

83024-0 EP

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I
NO. 60528-3-1

BELLEVUE SCHOOL DISTRICT,

Respondent,

v.

E.S.,

Appellant.

FILED
COURT OF APPEALS DIV. I
STATE OF WASHINGTON
2008 JUL 30 PM 3:46

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE JUDGE PATRICIA CLARK

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

BONNIE GLENN
Deputy Chief of Staff
Attorney for Respondent

LEAH TAGUBA
Deputy Prosecuting Attorney
Attorney for Respondent

King County Prosecuting Attorney
516 3rd Avenue W400
Seattle, WA 98104
(206) 296-9035

SHELBY SWANSON
Assistant General Counsel
Attorney for Respondent

Bellevue School District
12111 NE 1st St.
Bellevue, WA 98005
(425) 456-4086

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>FACTS</u>	1
C. <u>ARGUMENT</u>	7
1. THE COURT SHOULD DISMISS THIS APPEAL AS MOOT	7
2. TRUANCY LAW.....	7
3. THERE IS NO STATUTORY RIGHT TO COUNSEL UNDER RCW 28A.225.035(11).....	7
4. THERE IS NO CONSTITUTIONAL RIGHT TO COUNSEL AT THE INITIAL TRUANCY HEARING	8
a. <u>In Re Perkins</u> Is Still Controlling Law And The Court Should Not Reconsider Its Ruling That There Is No Right To Counsel At Initial Truancy Hearings.....	8
i. <u>Perkins</u> is readily distinguishable from <u>Shelton</u> and <u>Ziegenfuss</u> , and is therefore still controlling	9
b. The Appellant Does Not Have A Right To Appointed Counsel Under <u>Mathews</u> v. <u>Eldridge</u> Analysis.....	16
i. The private interest of education is not divested, but is reinforced through the truancy process	17

ii.	There are procedural safeguards in place to protect the child from an erroneous deprivation of private interests	18
iii.	Governmental burden outweighs the need for appointed counsel at initial truancy hearing	20
5.	THE COURT SHOULD NOT CONSIDER THE USE OF THE FLESCH-KINCAID ASSESSMENT TEST	21
6.	THE ORIGINAL TRUANCY PETITION AND FINDING MET THE REQUIREMENTS OF THE LAW.....	22
a.	The District Adequately Informed E.S.'s Mother Of E.S.'s Unexcused Absences	22
b.	The District Met Its Obligation Under RCW 28A.225.020(1) To Take Steps To Eliminate E.S.'s Absences	23
c.	The Court Should Not Consider The Issue Of "Waiver" As It Was Not Properly Preserved In The Lower Court.....	25
D.	<u>CONCLUSION</u>	27

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Alabama v. Shelton,
535 U.S. 654 (2002) 6, 10, 12, 13, 14, 16

Argersinger v. Hamlin,
407 U.S. 25 (1972) 10, 12

Gagnon v. Scarpelli,
411 U.S. 778 (1973) 14, 21

Gideon v. Wainwright,
372 U.S. 335 (1963) 10

Johnson v. Zerbst,
304 U.S. 458 (1938) 10

Mathews v. Eldridge,
424 U.S. 319 (1976) 16

Scott v. Illinois,
440 U.S. 357 (1979) 13

Washington State:

Housing Auth. of King County v. Saylor,
87 Wn.2d 732 (1976) 11

In re Dependency of Grove,
127 Wn.2d 221 (1995) 11

In re Marriage of King,
62 Wn.2d 378 (2007) 11, 14, 15

In re Perkins,
93 Wn. App. 590 (1990) 5-10, 12, 15-17

<u>In re Welfare of Luscier,</u> 84 Wn.2d 135 (1974).....	11
<u>In re Welfare of Myrick,</u> 85 Wn.2d 252 (1975).....	11
<u>State ex rel. Richey v. Superior Court of State,</u> 59 Wn.2d 872 (1962).....	11
<u>State v. M.B.,</u> 101 Wn. App. 425, 3 P.3d 780 (2000).....	9
<u>State v. Santos,</u> 104 Wn.2d 142 (1985).....	11
<u>State v. Ziegenfuss,</u> 118 Wn. App. 110 (2003)	10, 12, 14, 16
<u>Tetro v. Tetro,</u> 86 Wn.2d 252 (1975).....	10, 11, 15, 16
<u>Wolf v. Department of Motor Vehicles,</u> 27 Wn. App. 214 (1980)	11

Statutes

Washington State:

RCW 7.21.030.....	13
RCW 13.32A	13
RCW 28A.225	1, 7
RCW 28A.225.020	2, 3, 18, 22, 23
RCW 28A.225.035	8, 9
RCW 28A.225.090	3, 4, 13

Rules and Regulations

Washington State:

RAP 2.5..... 8, 21, 25

A. ISSUES PRESENTED

1. Does E.S. have a Constitutional right to counsel at the initial truancy hearing?
2. Has the Bellevue School District met the statutory requirements under RCW 28A.225?

B. FACTS

On October 18, 2005, Ms. Diane Tuttle, Assistant Principal of Highland Middle School, in the Bellevue School District, met with E.S. and E.S.'s mother to discuss E.S.'s excessive unexcused absences, the consequences of missing school, and the truancy process. CP 1-12. On October 21, 2005, Ms. Tuttle sent a letter notifying E.S.'s mother of E.S.'s first unexcused absence. CP 123.

On January 4, 2006, and January 6, 2006, E.S.'s school counselor, Mr. Dan Irvine, spoke with E.S.'s mother, who stated that E.S. was refusing to come to school. The school called E.S.'s mother again on January 11th, 17th, and 18th, 2006, to determine why E.S. was not at school. On January 19, 2006, E.S.'s mother called the school, stating that E.S. would return to school on Monday, January 23, 2006; however, E.S. did not return to school on the 23rd. E.S.'s mother called the school on January 23rd, 24th,

and 25th, 2006, and agreed to meet with Mr. Irvine on January 26, 2006, but she later canceled the meeting. E.S.'s mother then called on January 31st, February 1st, 2nd, and 3rd, 2006, stating that her daughter was still refusing to go to school. CP 2-3.

On February 6, 2006, E.S., E.S.'s mother, Ms. Tuttle, Mr. Irvine, and Mr. Glenn Hasslinger, Bellevue School District Truancy Representative, met to discuss E.S.'s absences. At that meeting an At-Risk Youth petition was discussed, which E.S.'s mother subsequently filed. E.S.'s mother reported on February 7th, 8th, 9th, 10th, 13th, 14th, 15th, and 16th that E.S. was refusing to go to school. On February 14, 2006, Ms. Judy Jindra, E.S.'s therapist, reported that she went to E.S.'s home to pick her up and bring her to school, but E.S. had left the home ten minutes before Ms. Jindra arrived. CP 2-3.

The school also sent letters to E.S.'s mother on January 13, 2006 (CP 125), January 31, 2006 (CP 127), February 3, 2006 (CP 129), and February 13, 2006 (CP 131), regarding E.S.'s additional unexcused absences as required by RCW 28A.225.020.

On March 4, 2006, the Bellevue School District filed a truancy petition with the court. CP 110-121. The Bellevue School District reported to the court that the school offered E.S. tutoring.

CP 174. The Bellevue School District offers after-school student tutorial for 30 minutes a day, four days a week per RCW 28A.225.020. In addition, English as a Second Language (ESL) services continued to be provided to E.S. CP 228-32. The School District asked the court to bypass the Truancy Workshop provided by the King County Superior Court because of the length of time E.S. had been out of school, a total of 73 absences as of March 3rd, 2006. RP 3/6/2006 at 2, CP 133.

A hearing was held on March 6, 2006, in conjunction with E.S.'s At-Risk Youth hearing previously scheduled for that day. CP 3. At the hearing on March 6, 2006, the presiding commissioner, the Honorable Nancy Bradburn-Johnson, found E.S. to have violated RCW 28A.225.090 and ordered E.S. to attend school on a regular basis in the Bellevue School District. CP 16-17. After the petition was filed, the District continued to work with the family as follows: continuing to call and speak with the parent; changing schools twice (once to a traditional school, then to an alternative school); meeting with the principal of the alternative school to discuss entry and reentry in order to create an appropriate schedule; reducing her schedule; offering the student summer school classes during the 2006 and 2007 summers and waiving the

summer school fees; and offering the student and placing her in independent contract classes. CP 212, 225-27.

On October 26, 2006, the Bellevue School District filed a Motion to Show Cause pursuant to RCW 28A.225.090. A Show Cause Contempt hearing was scheduled for November 22, 2006 and the Appellant was appointed counsel. On that date, the Appellant appeared with her attorney. The court found her in contempt, and sanctioned her with two days of work crew which could be purged if she completed a five-page paper on what she can do starting fresh at school and how she can be successful. CP 45-59. On January 31, 2007, a review hearing was held and the Appellant appeared with her attorney. The court found that she had not purged her contempt, and ordered her to enroll at Robinswood and have no further absences. CP 50-52. The next court date occurred on February 21, 2007, where the Appellant and her attorney, Sharon Vanardo-Rhodes, were present. The court found that she had not purged her contempt. The court instructed her to attend school with no further absences and collect her missing homework, or she would be placed on Electric Home Monitoring (EHM). It was further ordered that only the school could excuse her absence. CP 53-55. A contempt review hearing was held on

March 7, 2007, the court directed Appellant to attend school, request referral for mental health counseling, which she agreed to, and the case was continued until the 21st. On that day, the court informed the Appellant in the presence of her attorney that failure to go to school would result in EHM. CP 58-60.

The next contempt review hearing was on April 4, 2007; the Appellant contested the contempt and filed a Motion for Reconsideration through her attorney. The motion was later withdrawn, and the hearing reset for April 25, 2007. CP 71-76. That hearing was continued to determine the progress of the Appellant's therapist's recommendation for her transition back to school. CP 209-11. Two other continuances were granted, and the review set for June 26, 2007. The Appellant filed a motion to set aside the truancy finding and preclude detention or EHM on May 31, 2007. CP 87-88. Commissioner Barbara Canada-Thurston found on June 26, 2007 that under Perkins, there was no exceptional circumstance requiring counsel be appointed, and that there was no basis for the preliminary order of truancy to be vacated. The contempt review was rescheduled for October 16, 2007. CP 186-88. On July 3, the Appellant filed a motion to revise. CP 189-90.

Superior Court Judge Patricia H. Clark addressed these same issues on a Motion to Revise the Commissioner's Ruling, where the Commissioner denied the respondent's motion to vacate the finding of truancy. Judge Clark ruled that Perkins is controlling. CP 198-200. The court went on to say that any limitations that were imposed on the Appellant did not rise to the level of "an interest in keeping a roof over one's head, nor do they rise to the level of creation or termination of a parent-child relationship," that would require appointment of counsel. Id.

The court ruled that the Appellant's Shelton analysis was "simply misplaced." Id. Because the preliminary hearing is informal, where the school district is usually not represented by an attorney, and there are rarely any witnesses presented, no direct or cross examination, and no evidentiary objections made, the circumstances surrounding Shelton are readily distinguished. Id. Counsel is only appointed when a child is faced with the possibility of losing her liberty at the contempt stage. Judge Clark ruled that a truancy preliminary hearing is not a hearing in which procedural fairness demands an attorney. CP 198-200.

C. ARGUMENT

1. THE COURT SHOULD DISMISS THIS APPEAL AS MOOT

The Appellant has not suffered any loss of liberty; no relief can be awarded and therefore the Appellant's claims are moot. Although the Court in In re Perkins, chose to analyze the issue of whether there is Constitutional right to counsel at the initial truancy hearing because there were no existing opinions on the subject, it ultimately could not grant relief to the moving party due to mootness (as is the case here). In re Perkins, 93 Wn. App. 590 (1990). This Court should not revisit these issues given the holdings in Perkins and should dismiss the Appellant's claim as moot.

2. TRUANCY LAW

The law that governs truancy is the Compulsory School Attendance and Admissions code under RCW 28A.225. There is no provision in RCW 28A.225 which provides the right to counsel.

3. THERE IS NO STATUTORY RIGHT TO COUNSEL UNDER RCW 28A.225.035(11)

E.S. argues that the trial court should have exercised its discretion under RCW 28A.225.035(11) to appoint her an attorney

at the preliminary hearing. Br. of Appellant at 3. However, even if the court had the statutory authority to provide E.S. a lawyer, she did not ask for one. Therefore, this claim was not preserved for review under RAP 2.5(a).

4. THERE IS NO CONSTITUTIONAL RIGHT TO COUNSEL AT THE INITIAL TRUANCY HEARING.

Appellant asks this Court to find a Constitutional right to counsel at initial truancy hearings, but this Court has already rejected his arguments in the In re Perkins case. Since that opinion, nothing has changed.

a. In Re Perkins Is Still Controlling Law And The Court Should Not Reconsider Its Ruling That There Is No Right To Counsel At Initial Truancy Hearings

This Court has already rejected Appellant's argument that she has a right to counsel at the initial truancy hearing. In re Perkins, 93 Wn. App. 590 (1990). In Perkins, the middle school of Jennifer and Jaime Perkins filed a truancy petition against both girls after they were absent almost every day. Id. at 592. After an initial truancy hearing, the court ordered the girls to attend school. When they did not attend, the school filed a contempt motion, and they

were appointed counsel. Id. During the seven review hearings spanning five months, the Perkins girls served a few days each in detention and in the PASS program. Id.

On appeal, the girls claimed that they were entitled to appointed counsel, and that RCW 28A.225.035(6) is unconstitutional as a violation of due process. Id. at 594. This Court rejected those arguments "[b]ecause an initial truancy hearing is civil in nature, and because no significant liberty interest is at stake, litigants are not entitled to appointed counsel at an initial truancy hearing." Id. There has been no material change in the initial truancy procedure in this case, so Perkins is controlling, and the Appellant is not entitled to appointed counsel at the initial truancy hearing.¹

- i. Perkins is readily distinguishable from Shelton and Ziegenfuss, and is therefore still controlling

Appellant suggests that this Court overturn Perkins in light of three cases: Alabama v. Shelton, 535 U.S. 654 (2002); State v. Ziegenfuss, 118 Wn. App. 110 (2003); and Tetro v. Tetro, 86 Wn.2d

¹ See State v. M.B., 101 Wn. App. 425, 3 P.3d 780 (2000) (Sanctions are remedial, not punitive). This case further supports the view that truancy petitions are civil not criminal.

252 (1975). This argument should be rejected; each case is distinguishable from the facts and the law at issue here.

The first distinction that should be made is that Shelton and Ziegenfuss are criminal cases, whereas this is a civil case. The right to state-appointed counsel is firmly established for criminal prosecutions. Gideon v. Wainwright, 372 U.S. 335 (1963) (Sixth Amendment right for federal court proceedings); Johnson v. Zerbst, 304 U.S. 458 (1938) (Fourth Amendment right to counsel in state criminal prosecutions); Argersinger v. Hamlin, 407 U.S. 25 (1972) (indigent defendant must be offered counsel in any misdemeanor or case "that leads to imprisonment").

But in civil matters, the necessity for state-appointed counsel depends on "whether the individual will be deprived of a fundamental liberty interest," or when "procedural fairness demands it." Perkins, at 594; Id. at 595 (citing Tetro v. Tetro, 86 Wn. 2d at 253). No such fundamental interest exists at the initial truancy hearing, and therefore there is no right to counsel.

The courts have consistently rejected the contention that liberty interests in certain civil matters trigger the appointment of counsel. Wolf v. Department of Motor Vehicles, 27 Wn. App. 214, 220 (1980) (no right to counsel at license revocation proceedings);

Tetro, at 255 (no right to counsel in child support proceedings); Housing Auth. Of King County v. Saylor, 87 Wn. 2d 732, 742 (1976) (no right to appointed counsel in unlawful detainer actions); In re Marriage of King, 162 Wn.2d 378, 390 (2007) (no right to counsel in dissolution proceedings); In re Dependency of Grove, 127 Wn.2d 221, 238 (1995) (no right to appointed counsel where only financial interests are at stake).

In contrast, civil cases, where the court has required appointment of counsel include child dependency or parental termination cases, paternity proceedings, and civil commitment hearings. In re Welfare of Myrick, 85 Wn.2d 252, 255 (1975); In re Welfare of Lusier, 84 Wn.2d 135, 139 (1974); State v. Santos, 104 Wn.2d 142, 147-48 (1985); State ex rel. Richey v. Superior Court of State, 59 Wn.2d 872 (1962). The reasoning behind these decisions has been and should continue to be inapplicable in cases of truancy. Truancy hearings are civil in nature and do not involve a fundamental liberty interest. Perkins, at 594-96. The initial truancy hearing does not involve a deprivation of fundamental liberty interests rising to the level of terminating rights over children or being removed from the community, but rather it involves ordering a child to "attend the child's current school or other public school,

attend a private school, be referred to a community truancy board, or submit to drug and/or alcohol testing." Perkins, at 595. This court should not overturn Perkins, as no fundamental liberties are at stake in the initial stage of a truancy petition.

Secondly, the rationale behind the decisions made in Shelton and Ziegenfuss are inapposite. In Shelton, the U.S. Supreme Court held that Alabama could not impose a suspended sentence for a misdemeanor criminal conviction when the defendant was not represented by a lawyer at trial and the conviction was not subject to collateral attack at a hearing on whether to impose the sentence. Shelton, at 667. Under U.S. Supreme Court precedents, the right to counsel in a misdemeanor prosecution extends to any case "that actually leads to imprisonment." Shelton, at 661 (quoting Argersinger, 407 U.S. at 33). The analysis of what "actually leads to imprisonment" does not turn on whether the criminal statute authorized a jail sentence, but rather whether a jail sentence was actually ordered. Id. at 661 (citing Scott v. Illinois, 440 U.S. 357, 373 (1979)). A suspended sentence, if imposed, does not punish the violation of a probation condition; rather, it "is a prison term imposed for the offense of conviction." Id. at 662. If a student is initially found to be truant, the

judge does not order detention time and suspend it on condition the student goes to school, but rather, only orders the student to go to school.

Although RCW 28A.225.090(2), (4) authorizes a sanction of up to seven days of secure detention, this is only applicable in the contempt phase of the truancy process, not at the initial hearing. See RCW 7.21.030(2)(e); RCW 13.32A. Any sanction imposed by the court would be contingent on a subsequent finding that the condition(s) have not been followed. Thus, the sanction for contempt would be more like the scenario involving punishing a violation of a probation condition in a criminal case, rather than a sentence imposed for a criminal conviction. The finding of truancy does not "actually lead to imprisonment" if read under the reasoning set forth in Shelton. Therefore, the Appellant's argument that the finding of truancy *could* lead to incarceration misinterprets and erroneously extends the rationale in Shelton.

The Appellant relies on dictum in Ziegenfuss to support their argument that the right to counsel should be determined on a case-by-case basis. Ziegenfuss, at 116 (citing Gagnon v. Scarpelli, 411 U.S. 778 (1973)). The issue in Ziegenfuss was whether a criminal defendant in a cocaine possession case who was subject

to a penalty hearing for failing to pay a \$500 Victim Penalty Assessment was denied due process because Ziegenfuss had not yet been subject to the hearing. Ziegenfuss, at 112-13. Even under the Scarpelli case, “a per se rule in favor of a right to counsel at a probation revocation hearing is not justifiable.” Scarpelli, 411 U.S. 778, 789 (1973). In some cases “fundamental fairness” would call for a lawyer. Id. at 790. However, due process is “not so rigid as to require that the significant interests in informality, flexibility, and economy must always be sacrifices.” Id. at 788. This is such a case. An initial finding of truancy, which requires a child to attend school, does not rise to the level justifying appointed counsel. Furthermore, In re Marriage of King rejects a case-by-case analysis of the right to counsel in dissolution proceedings as “unwieldy, time-consuming, and costly.” In re Marriage of King, 162 Wn.2d 378, 390 fn. 11 (2007). Perkins remains good law.

Thirdly, the Appellant relies on the Tetro case, which is a civil contempt case where the respondents failed to pay child support. Both men were summoned to show cause hearings, and Tetro received a 30-day jail sentence. In both cases, the trial court denied Tetro and Scollard the right to counsel, ruling that publicly-provided lawyers were not a statutory or constitutional right. Tetro

at 253 (1975). The court held that when deciding whether the right to counsel attaches at a *contempt* hearing, the distinction between civil and criminal contempt does not matter. Id. at 255. The Court of Appeals found that counsel is necessary in contempt hearings, but what is most revealing and applicable in this case is that the court states that the "mere possibility that an order in a hearing may later serve as the predicate for a contempt adjudication is not enough to entitle an indigent party therein to free legal assistance." Id. at 255, n. 1.

Lastly, the Appellant concedes that there is no liberty interest at stake at the time of the initial hearing, which supports the Respondent's assertion that there is no change in the process that would give rise to this Court reconsidering Perkins. The Appellant asserts that "[r]eading Perkins in light of Shelton, Tetro, and Ziegenfuss, it is clear that the youth's liberty interest is at stake **after** the initial finding of truancy and that counsel is required" because it can lead to incarceration in a later proceeding. Br. of Appellant at 21 (emphasis added). The Appellant's own brief concedes that the youth's liberty interest is at stake, not at the time of the initial hearing, but after. Under Shelton, a finding of truancy does not actually lead to incarceration. Under Ziegenfuss, there is

no fundamental right that should require appointed counsel to be fair. And under Tetro, the finding of truancy as a predicate for a subsequent contempt adjudication is not enough to entitle appointment of counsel. Therefore, the court need not reconsider the Perkins decision, which already holds that counsel is not required. The trial court's decision should be affirmed.

b. The Appellant Does Not Have A Right To Appointed Counsel Under Mathews v. Eldridge Analysis

There is no Due Process violation in this case even when analyzed under Mathews v. Eldridge. Mathews v. Eldridge, 424 U.S. 319 (1976). The Appellant is not entitled to counsel under the factors articulated under Mathews: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used plus the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Id. at 335.

- i. The private interest of education is not divested, but is reinforced through the truancy process

Education is a very important private interest to each citizen, however, a finding of truancy does not negatively impact that interest in any way. To the contrary, if a finding of truancy is made, the child is required to "attend the child's current school or other public school, attend a private school, be referred to a community truancy board, or submit to drug and/or alcohol testing." Perkins, at 595. This finding is designed to keep children in school and give them the supervision to obtain that important interest, not to deprive them of that interest.

- ii. There are procedural safeguards in place to protect the child from an erroneous deprivation of private interests

There is no substantial risk of erroneous deprivation of one's education because there are steps that the school district must take prior to a petition even being filed. The school district is required to notify the parent of any unexcused absence, schedule a conference with student and/or parent to discuss the truancy process, and make efforts to reduce the unexcused absences as outlined by the statute. RCW 28A.225.020(c). By the time the child gets to the petition phase, there has been intervention done by the school where issues such as mental health and special needs can be discovered and explored. Should those issues arise, the school district would not have a good faith belief that the child was willfully being truant and therefore would not file the petition.

The initial hearing process is very informal, which supports the reasoning behind the presumption that there is no right to counsel at that stage. The school district is not represented by an attorney, but usually a school district employee. There is no formal direct or cross-examination, but rather the court just asking the parties to state their position, or give their version of the story. The

rules of evidence are generally relaxed as neither party are licensed attorneys and are not familiar with such rules. In this case, according to the verbatim record of proceedings, this process was utilized here. RP, 3/6/06 at 2-7. Therefore, procedural due process is not violated and the process has enough safeguards to protect the Appellant from erroneous deprivation of any interest.

The Appellant's argument that if a truancy finding is entered without counsel that subsequent absences could conceivably require the child to go to court and miss more school is without merit. Br. of Appellant at 34. If the student were to go to school then a subsequent hearing would not be necessary as the child would be in compliance with the court's order to go to school, and the petition dismissed. Even if the finding of truancy is erroneous, the effect is minimal given the court orders the child to go to school, in essence to obey the law.

Furthermore, the Appellant's argument that if an attorney is not appointed until the contempt stage that it may delay the student's access to resources is also without merit. Br. of Appellant at 35. Her example is that if the petition marked "provided tutoring" but learns that tutoring was not actually provided, the attorney can advocate for the provision of those services. Id. However, a child

must be in attendance at school to access those services. The school district can only offer these services, but it is up to the child to take advantage of them, and no attorney, whether at the initial stage or at the contempt stage, will be able to change that fact. Lastly, should a child be sanctioned to seven days of detention, which is a rarity, to argue that the child would be deprived of her education fails because the child's continuing absences are the basis for the contempt sanction.

- iii. Governmental burden outweighs the need for appointed counsel at initial truancy hearing

The financial and administrative burdens requiring appointed counsel would be extreme. The school is the initiator of a truancy petition, not the State. There is no formal paperwork that is reviewed by the Prosecutor's Office in the filing of a truancy petition. The King County Prosecuting Attorney's Office does not play a role in determining whether a petition should be filed. When a petition is filed and brought before the court for an initial hearing, the school district sends a school representative, who is not an attorney, to conduct an informal hearing. Therefore, taxpayers should not bear the financial burden for appointed counsel until the

child's liberty is at stake when they are entitled to counsel. Though the initial hearing is important, as this is the point where the court makes a finding of truancy and takes jurisdiction, "due process is not so rigid as to require that the significant interest in informality, flexibility and economy must always be sacrificed." Scarpelli, 411 U.S. 778, 93 (1973). Such is the case here, the initial finding, which does not carry any threat to one's liberty and is handled informally by a school district representative, and should not require taxpayers to shoulder the cost of appointing counsel.

5. THE COURT SHOULD NOT CONSIDER THE USE OF THE FLESCH-KINCAID ASSESSMENT TEST

E.S. argues that the court's vocabulary is higher than her level of understanding requiring appointment of counsel. The Appellant never made this fact-based, statutory argument in the trial court. She has failed to preserve these arguments; this Court should not review them under RAP 2.5(a). Even if the Court will consider these arguments, the Appellant does not disclose her methodology in how they determined her ability level. The Flesch-Kincaid test they are seeking to introduce is a reading assessment, not a verbal assessment, which would be more relevant since the

hearing requires verbal, not reading skills. Furthermore, there is no analysis as to how this reading assessment correlates to verbal skills. Lastly, we don't know the level of Appellant's skills. Therefore, it would be impossible for this court to decide this claim without a factual basis, and should not be considered, nor have these arguments been preserved.

6. THE ORIGINAL TRUANCY PETITION AND FINDING MET THE REQUIREMENTS OF THE LAW

a. The District Adequately Informed E.S.'s Mother Of E.S.'s Unexcused Absences

RCW 28A.225.020(1) requires that school districts provide notice in writing or by telephone to parents and guardians when their students have failed to attend school after one unexcused absence.... The assistant principal of Odle Middle School met with Ms. S. and E.S. to discuss E.S.'s excessive absences and the consequences of missing school. After E.S. had one unexcused absence, the school sent a letter home to Ms. S. in English because there was no indication that Ms. S. did not comprehend what was being discussed and there was no indication that Ms. S. needed an interpreter or to have any documents translated. The representatives of the school continued to meet with Ms. S. and to

speak with her on the telephone. CP 1-12. There is no requirement in the statute that notice be provided in a language other than English, and there was no evidence to suggest that Ms. S. needed an interpreter or a translation of documents. Nevertheless, had the District had information that there was a need for an interpreter or for document translation that could have been accomplished, but all information available to the District based on interactions with the parent and student was that English was used and understood. Therefore, the appellant's claim is without merit.

b. The District Met Its Obligation Under RCW 28A.225.020(1) To Take Steps To Eliminate E.S.'s Absences

RCW 28A.225.020(1) states:

(1) If a child required to attend school under RCW 28A.225.010 fails to attend school without valid justification, the public school in which the child is enrolled shall:

(a) Inform the child's custodial parent, parents, or guardian by a notice in writing or by telephone whenever the child has failed to attend school after one unexcused absence within any month during the current school year. School officials shall inform the parent of the potential consequences of additional unexcused absences;

(b) Schedule a conference or conferences with the custodial parent, parents, or guardian and child at a time reasonably convenient for all persons included for the purpose of analyzing the causes of the child's absences after two unexcused absences within any month during the current school year. If a regularly scheduled parent-teacher conference day is to take place within thirty days of the second unexcused absence, then the school district may schedule this conference on that day.

The Bellevue School District met its statutory obligation by: setting up a conference with the assistant principal and the family to discuss why the student was missing school, to help address attendance, to explain what was required, and to point out that there were consequences for not attending school (CP1-14); sending a letter to Ms. S. regarding the student's excessive absences that had caused the school concern and the letter included consequences of truancy (CP 117); offering tutoring to the student to assist her; continuing to offer the student ESL to monitor her progress²; calling the family's home and speaking with the mother; providing information about the At-Risk Youth (ARY) Petition; providing written notice to the family when the District was

² E.S. tested at the most proficient level of ESL. Monitoring is offered to some ESL students to review their progress, but is not required, and some students are exited from ESL without ever receiving monitoring services.

going to file the truancy petition; and, finally, filing the petition. CP 1-14, 117.

After the petition was filed, the District continued to work with the family as follows: continuing to call and speak with the parent; changing schools twice (once to a traditional school, then to an alternative school); meeting with the principal of the alternative school to discuss entry and reentry in order to create an appropriate schedule; reducing her schedule; offering the student summer school classes during the 2006 and 2007 summers and waiving the summer school fees; and offering the student and placing her in independent contract classes. CP 212, 225-27, RP 3/6/2006 at 5-6.

Appellant's allegations that the District did not meet its statutory obligations are baseless.

c. The Court Should Not Consider The Issue Of "Waiver" As It Was Not Properly Preserved In The Lower Court

The Appellant argues that there was not knowing or intelligent waiver of a hearing. This argument should not be considered by this court as it has not been properly preserved in accordance with RAP 2.5(a).

Even if the court considers this issue, there was no indication that Ms. S. or E.S. did not understand what they were agreeing to or that they did not understand the possible consequences. The commissioner asked both mother and Appellant if they agreed that an order should be in place, to which they verbally stated "yes." Furthermore, the commissioner explained the consequences and possible sanctions to both Ms. S. and E.S. RP 3/6/2006 at 3-4. There was also a Bosnian interpreter at the March 6th hearing who interpreted for the family, (RP 3/6/2006 at 1) although the District did not believe that such services were needed for the District's telephone calls and letters to Ms. S. or meetings with Ms. S. Ms. S. was frustrated by E.S.'s truancy and her heart was heavy that her daughter didn't go to school. RP 6/26/2007 at 17. The allegations that the family did not understand what they were agreeing to or the consequences of such agreement are without merit.

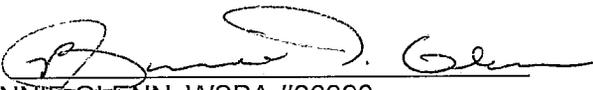
D. CONCLUSION

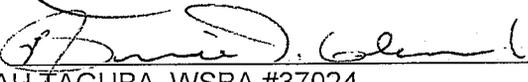
For the foregoing reasons, this court should reject the Appellant's arguments and affirm the ruling of the trial court.

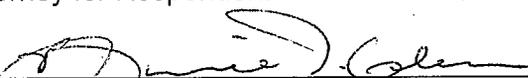
DATED this 30th day of July, 2008.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
BONNIE GLENN, WSBA #26090
Deputy Chief of Staff
Attorney for Respondent

By:  (FOR LEAH TAGUBA)
LEAH TAGUBA, WSBA #37024
Deputy Prosecuting Attorney
Attorney for Respondent

By:  (FOR SHELBY SWANSON)
SHELBY SWANSON, WSBA #27785
Bellevue School District
Assistant General Counsel
Attorney for Respondent

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 JUL 30 PM 3:47

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

BELLEVUE SCHOOL DISTRICT,

Respondent,

vs.

E.S.,

Appellant.

No. 60528-3-I

CERTIFICATE OF MAILING

Wynne Brame, Paralegal, King County Prosecutor's Office, certifies that on July 30, 2008 she served Robert Boruchowitz, Attorney for Appellant, with a copy of Brief of Respondent by depositing the same in the mails of the United States addressed to:

Robert C. Boruchowitz
Ronald A Peterson Law Clinic
1112 E. Columbia
Seattle, WA 98122.

Under penalty of perjury under the laws of the State of Washington, I certify that the foregoing is true and correct. Signed and dated by me on July 30, 2008

