No. 83024-0

SUPREME COURT OF THE STATE OF WASHINGTON

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
09 DEC 18 AM 10: 30
BY RONALD R. CARPENTER
CLERK

BELLEVUE SCHOOL DISTRICT,

Petitioner,

v.

E.S.,

Respondent.

SUPPLEMENTAL BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

Sarah A. Dunne, WSBA #34869
Nancy L. Talner, WSBA #11196
M. Rose Spidell, WSBA #36038
ACLU of Washington Foundation
705 2nd Ave, Suite 300
Seattle, WA 98104
(206) 624-2184

Alyse D. Bertenthal 80508
KEKER & VAN NEST, LLP
710 Sansome Street
San Francisco, CA 94111-1704
(415) 391-5400

Attorneys for *Amicus Curiae*
American Civil Liberties Union of Washington

FILED
SUPREME COURT
STATE OF WASHINGTON
2009 DEC 28 P 3:22
BY RONALD R. CARPENTER
CLERK

ORIGINAL

FILED AS
ATTACHMENT TO EMAIL

Table of Contents

I. IDENTITY AND INTEREST OF AMICUS 1

II. FAMILIARITY WITH THE ISSUES 1

III. ISSUE ADDRESSED BY AMICUS 1

IV. STATEMENT OF THE CASE 2

V. SUMMARY OF THE ARGUMENT 4

VI. ARGUMENT 5

A. AN INDEPENDENT ANALYSIS UNDER THE STATE CONSTITUTION IS REQUIRED 5

B. THE INITIAL TRUANCY HEARING IMPLICATES FUNDAMENTAL RIGHTS TO EDUCATION, PRIVACY AND LIBERTY, AND WITHOUT COUNSEL THE RISK OF ERROR IS GREAT, JUSTIFYING THE CHILD'S RIGHT TO COUNSEL 11

1. Right to an Education 11

2. Privacy 15

3. Liberty 16

4. Risk of Error 19

VII. CONCLUSION 20

Table of Authorities

Washington State Cases

Bellevue School District v. E.S.,
148 Wn.App. 205, 199 P.3d 1010 (2009), *review granted*, 166 Wn.2d 1011, 210 P.3d 1018 (2009) ..... passim

DeYoung v. Providence Med. Ctr.,
136 Wn.2d 136, 146, 960 P.2d 919 (1998) 14

In re J.L.,
140 Wn.App. 438, 166 P.3d 776 (2007) 21

In re Parentage of L.B.,
155 Wn.2d 679, 712, 122 P.3d 161 (2005) 12

In re Welfare of Luscier,
84 Wn.2d 135, 137-39, 524 P.2d 906 (1974) 7

In re Welfare of Myricks,
85 Wn.2d 252, 533 P.2d 841 (1975) 11

Seattle Sch. Dist. v. State,
90 Wn.2d 476, 513, 585 P.2d 71, 92 (1978) 16

State v. Bartholomew,
101 Wn.2d 631, 639-40, 683 P.2d 1079 (1984) 7

State v. Gunwall,
106 Wn.2d 54, 720 P.2d 808 (1986) 14

State v. Morse,
156 Wn.2d 1, 10, 123 P.3d 832 (2005) 19

State v. Santos,
104 Wn.2d 142, 147-48, 702 P.2d 1179 (1985) 10

State v. Winterstein,
___ Wn.2d ___, ___ P.3d ___ , 2009 WL 4350257 (slip opinion issued 12/3/09) 20

York v. Wahkiakum School District,

163 Wn.2d 297, 308, 178 P.3d 995, 1002 (2008) 20

Other Jurisdictions

Alabama v. Shelton,
535 U.S. 654, 663, 122 S.Ct. 1764, 152 L.Ed.2d 888 (2002) 22

Bd. of Educ. v. Rowley,
458 U.S. 176, 208, 73 L.Ed.2d 690, 102 S. Ct. 3034 (1982) 17

Fair Cadillac-Oldsmobile Isuzu Partnership v. Bailey,
229 Conn. 312, 317, 640 A.2d 101 (1994)..... 8

In re Gault,
387 U.S. 1, 26, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) 26

Kenny A. v. Perdue,
356 F.Supp.2d 1353, 1360 (N.D. Ga. 2005) 12

Lassiter v. Department of Social Services,
452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981) 10, 13

Mathews v. Eldridge,
424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) 8

People ex rel. Juhan v. District Court for Jefferson County,
165 Colo. 253, 260-61, 439 P.2d 741 (1968)..... 9

Rothgery v. Gillespie County, Tex.,
___ U.S. ___, 128 S.Ct. 2578, 171 L.Ed.2d 366 (2008) 22

San Antonio Independent School Dist. v. Rodriguez,
411 U.S. 1, 35, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973) 15

V.F. v. State,
666 P.2d 42 (Alaska 1983)..... 10

Van Harken v. City of Chicago,
305 Ill.App.3d 972, 982-83, 713 N.E.2d 754 (Ill.App. 1999)..... 9

Constitutional Provisions and Statutes

RCW 13.32A.160..... 14, 17

RCW 13.32A.192 ..... 14, 17

RCW 13.32A.250 24

RCW 28A.225.010 ..... 2, 3, 13

RCW 28A.225.020 ..... 2, 17

RCW 28A.225.030 ..... 3, 18

RCW 28A.225.031 ..... 3, 21

RCW 28A.225.035 ..... 3, 26

RCW 28A.225.090 ..... passim

RCW 4.08.050 14

Washington Constitution Article I, § 3 6

Washington Constitution Article I, § 7 19

Washington Constitution Article IX, § 1 4

OtherAuthorities

"Washington's Truancy laws in the Juvenile Courts: Wide Variation in Implementation and Costs," by Washington State Institute for Public Policy (October 2009), http://www.wsipp.wa.gov/rptfiles/09-10-2201.pdf 24

Utter and Spitzer, The Washington State Constitution – A Reference Guide at 4 (2002) 8, 16

I. IDENTITY AND INTEREST OF AMICUS

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonpartisan, and nonprofit organization with more than 20,000 members that is dedicated to preserving and defending civil liberties, including the right to counsel and the due process rights of juveniles. It has participated as amicus in several cases involving the civil liberties of juveniles,[1] including participating as amicus in this case in the Court of Appeals. *Bellevue School District v. E.S.,* 148 Wn.App. 205, 199 P.3d 1010 (2009), *review granted*, 166 Wn.2d 1011, 210 P.3d 1018 (2009).

II. FAMILIARITY WITH THE ISSUES

Amicus is familiar with the briefing and arguments presented by the parties and other amici and will not unduly repeat them. Amicus submits this supplemental brief for consideration in addition to the points raised in the amicus brief filed in the Court of Appeals.

III. ISSUE ADDRESSED BY AMICUS

Does the state constitution's due process clause support a right to counsel for children facing truancy court proceedings?

---

[1] *State v. CPC Fairfax Hospital*, 129 Wn.2d 439, 918 P.2d 497 (1996 (holding it is unlawful to deny a minor committed to mental hospital immediate access to counsel and subsequent access to her medical records); *Tunstall v. Bergeson*, 141 Wn.2d 201, 5 P.3d 691 (2000) (holding that State Constitution imposes duty on the state to provide an education for children up to the age of 18).

IV. STATEMENT OF THE CASE

Across Washington, thousands of children —some as young as age eight— are haled into court, expected to respond entirely on their own to allegations made by their school district about their failure to attend school. The Washington Legislature passed the state's truancy statute in 1995 as part of the "Becca Bill." The statute mandates that children attend school and that school officials act to curb truancy by children aged eight and above. RCW 28A.225.010 et seq. If actions taken by a school are not successful in substantially reducing the child's absences and a child accrues seven unexcused absences in one month, or ten unexcused absences during the school year, a school must file a petition seeking court intervention. RCW 28A.225.020 et seq.

Once a petition is filed by the school district, if the court finds by a preponderance that actions taken by the school were not successful in substantially reducing absences and "[c]ourt intervention and supervision are necessary to assist the school district or parent to reduce the child's absences from school," the juvenile court has authority to assert jurisdiction over the child and impose a broad range of mandated conditions. RCW 28A.225.030, .031, .035, .090. When a truancy petition is granted, court supervision over the child continues at least until the end of the school year in which it is entered, and may be extended for a period

of time "most likely [to] cause the juvenile to return to and remain in school while the juvenile is subject to this chapter." RCW 28A.225.035(12). A child called into court for alleged truancy in middle or junior high school may face as many as six or more years of court supervision.[2] As long as that order remains in effect, the court may order the child to transfer to a different school, require her to submit to drug and alcohol testing, or refer her to a community truancy board. RCW 28A.225.090; RCW 28A.225.031. If a child subsequently misses even one class period without excuse, the court may hold her in contempt, imposing severe penalties, including incarceration for up to seven days per violation, work crew, house arrest, community service and other sanctions. RCW 28A.225.090.

The record in this case shows a 13 year old girl, in most contexts legally unable to act for herself due to her age, was named as the responding party in a truancy petition, requiring her to defend herself against the school district's adult representative in a court hearing involving words she probably did not understand. *Bellevue School District v. E.S., supra*, 148 Wn.App. at 209, 217; Supp. Br. of Respondent E.S. at 1. Only after the court had accepted a waiver of her rights did anyone ask why she had been missing school, and then the question came from the

[2] Children are subject to the truancy chapter until age 18. RCW 28A.225.010.

Court Commissioner in the courtroom. Br. of Appellant E.S. at 11-12.

V. SUMMARY OF THE ARGUMENT

Amicus recognizes that the State has a legitimate interest in enforcing its compulsory school attendance laws; the state constitution deems education to be the "paramount duty" of the State. Wash. Const. Art. IX, § 1. But in carrying out enforcement of the truancy laws, the government must comply with due process. When this state chose to address truancy with a court proceeding where children face the judge and the government's adversarial representative wholly alone, and if unsuccessful in defending against the government's allegations are subjected to a lengthy period of court supervision and significant court-mandated conditions, it violated the constitutional guarantee of due process. Numerous interests long recognized as more protected under the state constitution compel the conclusion that the state due process clause requires that a child be afforded a right to counsel in truancy court proceedings.

Leaving children to navigate truancy proceedings alone does not serve the child's fundamental interests or those of the State and it poses an enormous risk of error. Why then should children be expected to represent themselves in truancy court without an attorney? Without counsel, there is no-one who can have a confidential discussion with the child about the

causes of the truancy. The court is charged with being the neutral decision-maker in the case and cannot replace counsel's function. The court's ability to first determine whether court supervision over a child's life is "necessary" depends on counsel's investigation of the factual basis for the petition and testing of the school's allegations regarding its efforts to identify and remedy causes of truancy. The court also cannot substitute for counsel's function in advising and counseling the child about his legal rights and the consequences of potential court intervention. Contrary to the prosecutor's arguments in this appeal, counsel for the child performs functions essential to the fairness and effectiveness of the court proceeding. See, *Bellevue School District v. E.S.*, 148 Wn.App. at 214. This Court should affirm the Court of Appeals and thereby protect children's due process rights while rejecting a system that is neither fair nor effective in promoting the state's interests.

VI. ARGUMENT

A. AN INDEPENDENT ANALYSIS UNDER THE STATE CONSTITUTION IS REQUIRED

Article I, section 3 of the Washington Constitution provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law." Although the wording is the same as the federal constitution's due process clause, this Court has held that the state

constitution is more protective of an individual's due process rights and that the United States Supreme Court's interpretation of the Fourteenth Amendment does not control its interpretation of Article I, section 3. *See State v. Bartholomew*, 101 Wn.2d 631, 639-40, 683 P.2d 1079 (1984) (recognizing in interpreting the state constitution's due process clause that "The federal constitution only provides minimum protection of individual rights. Accordingly, it is well established that decisions from the federal courts "do not limit the right of state courts to accord ... greater rights,'" and citing numerous authorities in support of that proposition); *In re Welfare of Luscier*, 84 Wn.2d 135, 137-39, 524 P.2d 906 (1974) (considering prior state cases that recognize the strength of the interest involved, in concluding that the state constitution's due process clause requires appointment of counsel for parents facing termination of parental rights by the State). "An independent interpretation and application of the Washington Constitution is not just legitimate, historically mandated, and logically essential; it is, in the words of the Washington Supreme Court, a 'duty' that all state courts owe to the people of Washington. [citation omitted.]" Utter and Spitzer, The Washington State Constitution – A Reference Guide at 4 (2002)

The fact that Washington courts have repeatedly used the federal

Mathews test[3] to analyze due process issues does not mean that the state constitution's due process clause compels the same result as might flow from less protective federal due process law. As one court explained:

> 'Just as it is wrong to assume that state constitutions are mere mirror images of the Federal Constitution, so it is wrong to assume that independent state constitutions share no principles with their federal counterpart.' ... [I]t is clear that our adoption, for purposes of state constitutional analysis, of an analytical framework used under the federal constitution does not preclude us from concluding that a statute that would be valid under the federal constitution is nevertheless invalid under our state constitution. (citations omitted)

Fair Cadillac-Oldsmobile Isuzu Partnership v. Bailey, 229 Conn. 312, 317, 640 A.2d 101 (1994).

Washington is not alone in interpreting its due process clause differently than the federal due process clause. *Van Harken v. City of Chicago*, 305 Ill.App.3d 972, 982-83, 713 N.E.2d 754 (Ill.App. 1999) (stating that due process under the state constitution is a matter of "fundamental fairness" of the proceeding, contrasting federal cases which look at the economic efficiency of a requested procedure); *People ex rel. Juhan v. District Court for Jefferson County*, 165 Colo. 253, 260-61, 439 P.2d 741 (1968) (requiring a different rule than the federal constitutional minimum regarding the burden of proof in an insanity case, based on the state constitution's due process clause, and noting that the Legislature

[3] *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

lacks the power to require a procedure which violates the state due process clause); *V.F. v. State*, 666 P.2d 42 (Alaska 1983) (parent's right to counsel in proceedings to terminate parental rights, based on state constitution's due process clause which is worded the same as the federal constitution).

Applying a state constitutional analysis here is consistent with ample Washington precedent. As the Court of Appeals recognized, Washington has a long history of providing representation for children in civil legal proceedings. *Bellevue School District v. E.S.*, 148 Wn.App at 212, citing *State v. Santos*, 104 Wn.2d 142, 147-48, 702 P.2d 1179 (1985) (child has a fundamental interest in knowing its parentage and is thus entitled to representation by guardian ad litem in paternity proceedings). In *Santos*, this Court ruled that the child support statute which eliminated the need for representation of a child by a guardian in paternity proceedings was an unconstitutional deprivation of the child's due process rights. The Court there, 104 Wn,2d at 148, noted the need for "active representation of all of the child's interests," and the State's inability to provide such representation. Furthermore, the *Santos* Court, 104 Wn.2d at 147 aptly recognized that:

> A child must not be a party in name only. It is fundamental that parties whose interests are at stake must have an opportunity to be heard 'at a meaningful time and in a meaningful manner.' [citation omitted.] Because a child cannot represent his or her own interests, RCW 26.26.090 requires that a child be represented by a guardian

> or a guardian ad litem, [citation omitted], who in fact protects the child's interests. [citation omitted.]

It is also well established in Washington that the right to counsel in civil cases is not limited to cases involving an immediate deprivation of physical liberty. *In re Welfare of Myricks*, 85 Wn.2d 252, 533 P.2d 841 (1975) (recognizing right to counsel for parents in cases involving short-term deprivation of parental rights); *In re Luscier*, *supra* (right to counsel in cases involving permanent deprivation of parental rights). The arguments in the prosecutor's supplemental brief, on behalf of petitioner Bellevue School District, apply an incorrect legal standard and should be rejected.

The due process clause of at least one other state constitution has been interpreted as requiring a right to counsel for children in dependency cases. *Kenny A. v. Perdue*, 356 F.Supp.2d 1353, 1360 (N.D. Ga. 2005). This Court resoundingly supported the *Kenny A.* ruling and the appointment of counsel for children in a wide variety of family law matters in *In re Parentage of L.B.*, 155 Wn.2d 679, 712, 122 P.3d 161 (2005) (albeit in dicta). The *L.B.* Court correctly recognized that children have a particular need for counsel, unlike other adult parties, because "not only are they often the most vulnerable, but also [are] powerless and voiceless." *Id.* Based on this ample precedent, and because the issue here

involves the quintessential state interests of education and children, this Court need not adhere to the minimal requirements of federal law; a more protective state procedure is appropriate. *Cf., Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981) (adult facing termination of parental rights due to long prison term did not necessarily have right to appointed counsel under federal due process clause).

In attempting to explain why children have a lesser right to counsel than adults in civil cases brought against them by the government, the prosecutor overlooks the fact that rules governing the legal rights of children are a matter of state law. In particular, state law mandates that children attend school, a requirement not imposed on adults. RCW 28A.225.010 (cited in *Bellevue v. ES., supra*, 148 Wn.App. at 207, fn.1). The law treats children differently than adults in almost every context. As this Court recognized in a medical malpractice case, "Minors are not similarly situated to adults because they are unable to pursue an action on their own until adulthood, RCW 4.08.050, and they generally lack the experience, judgment, knowledge and resources to effectively assert their rights." *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 146, 960 P.2d 919 (1998). See also, RCW 13.32A.192(1)(c) (counsel for at-risk youth); RCW 13.32A.160(1)(c) (counsel for child in need of services). The

balance of power in a truancy court proceeding – a child with little or no legal knowledge facing such powerful authorities as the judge and the school district - clearly weighs in favor of a right to counsel.

The *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986) factors further help show why this Court should conclude the state constitutional guarantee of due process includes a child's right to counsel in truancy court proceedings, even if the United States Constitution does not compel that result. *Id.* at 58. As discussed above, factor four – pre-existing state law – strongly favors a right to counsel in this context. Factor six - the local or state nature of the issue – also strongly favors more protection than the federal constitution, since issues such as the right to education, the right to privacy and the legal capacities of children are involved, as explained below.

B. THE INITIAL TRUANCY HEARING IMPLICATES FUNDAMENTAL RIGHTS TO EDUCATION, PRIVACY AND LIBERTY, AND WITHOUT COUNSEL THE RISK OF ERROR IS GREAT, JUSTIFYING THE CHILD'S RIGHT TO COUNSEL

A due process right to counsel is particularly justified in this case because of the confluence of multiple constitutional interests protected more strongly by the state constitution than the federal constitution.

1. Right to an Education

While federal courts do not recognize a "right to an education"

under the federal constitution,[4] a child's right to an education is guaranteed by our state constitution. Wash. Const. Art. IX, § 1, expressly recognizes that the State has a "paramount duty . . . to make ample provision for the education of all children residing within its borders[.]" One commentator has noted that "No other state has placed the common school on so high a pedestal ...." Utter and Spitzer, *supra*, at 153 (quoting from one of the participants in the 1889 Washington Constitutional Convention.) In interpreting Article IX, the Washington Supreme Court has recognized that "all children residing within the State's borders have a '*right*' to be amply provided with an education." *Seattle Sch. Dist. v. State*, 90 Wn.2d 476, 513, 585 P.2d 71, 92 (1978) (emphasis in original).

Consistent with education being a state law concern, and one protected more strongly by the Washington Constitution than in other states, there is no federal truancy law, and each state has crafted its own approach to truancy. *See*, Supp. Br. of Petitioner School District at 21 (noting the great diversity among state responses to truancy). *See also Bd. of Educ. v. Rowley*, 458 U.S. 176, 208, 73 L.Ed.2d 690, 102 S. Ct. 3034 (1982) (acknowledging the "primacy of the States in the field of education"). An examination of other state's truancy laws supports a right

[4] *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 35, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973).

to counsel for children in truancy court proceedings under the Becca Bill. *See*, Brief of Amicus Juvenile Law Center being filed in this case, explaining that the majority of states which deal with alleged truant children in juvenile court provide a right to counsel for those children. The lack of counsel for the child in truancy court cases also contrasts to the fact that counsel is provided in Washington for other status offense proceedings. *See* RCW 13.32A.192(1)(c) (counsel for at-risk youth); RCW 13.32A.160(1)(c) (counsel for child in need of services).

Children charged with truancy face deprivation of their right to an education in several ways. The truancy statute is intended to draw attention to a child who is missing school so that the causes for the absences can be determined and remedied. The statute implicitly recognizes that those causes will vary from child to child, but may include problems at home or at school. RCW 28A.225.020(1)(b) and (c) (directing schools to meet with students and their parents to "analyz[e] the causes of the child's absences" and directing schools to take steps to eliminate or reduce absences, including, e.g., "adjusting the child's school program or school or course assignment, providing more individualized or remedial instruction . . . or assisting the parent or child to obtain supplementary services."). Without counsel, most children are incapable of knowing about or asserting their rights under the truancy statute or their rights to

various educational services guaranteed by other laws, such as special education connected to a disability, or literacy or English language support. Without counsel for the child, the court has no way of knowing whether the truancy is connected to a lack of educational services. In such cases, a court order directing a child to attend school without addressing the lack of services will almost certainly be ineffective in resolving the attendance problem. In at least two cases known to amicus, it was not revealed to the court that the alleged truant child had significant disabilities until counsel for the child became involved with the case.[5] Without counsel, the court has no means to ensure accountability on the part of the school to fulfill its duty to identify causes and take steps to reduce the absences prior to seeking court intervention. RCW 28A.225.030(1). Moreover, truancy court proceedings threaten the child's right to an education because the court may disrupt a child's schooling by ordering that the child be transferred to a new educational institution, such as an alternative school. RCW 28A.225.090(1).

Contrary to the prosecutor's argument in this case (Supp. Br. of Petitioner School District at 18-19), truancy court proceedings are easily distinguishable from school discipline proceedings where deprivation of the constitutional right to an education is also at stake. School discipline

[5] *See Snohomish County* No. 00-7-02872-1 and *King County* No. 07-7-01125-9.

hearings are not court proceedings and do not form the basis for incarceration based on contempt. The prosecutor's discussion of school discipline cases utterly fails to demonstrate that forcing children to defend themselves in court alone in truancy cases complies with due process.

2. **Privacy**

The Washington State Constitution also clearly protects a child's right to privacy more strongly than the federal constitution. Wash. Const. article I, § 7 expressly ensures a right to privacy, stating that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." It is well-established that article I, § 7 provides greater protection of privacy rights than the federal constitution. *State v. Morse*, 156 Wn.2d 1, 10, 123 P.3d 832 (2005); *State v. Winterstein*, ___ Wn.2d ___, ___ P.3d ___, 2009 WL 4350257 at *6 (slip opinion issued 12/3/09). Specifically addressing the privacy rights of students, the Washington Supreme Court in *York v. Wahkiakum School District*, 163 Wn.2d 297, 308, 178 P.3d 995, 1002 (2008), held that article I, § 7 protects a student's "genuine and fundamental privacy interest in controlling his or her own bodily functions," striking down a school district's drug testing policy. Contrary to the prosecutor's assertions here (Supp. Br. of Petitioner School District at 17), the Court unanimously ruled the student drug testing policy violated the state constitution, confirming the strength of

Washington's protection of privacy in contrast to the federal constitution. Under *York*, a court's ability to order that a child submit to drug and alcohol testing at an initial truancy proceeding (RCW 28A.225.031 and .090(1)(e)) represents a clear threat of intrusion to her constitutionally protected privacy. The degree to which Washington protects the privacy rights of youth, beyond the requirements of the federal constitution, demonstrates that the individual interests at stake in truancy proceedings weigh in favor of a right to counsel under a state constitutional due process analysis.

3. **Liberty**

As noted above, this Court has already interpreted the liberty interests that give rise to a right to counsel in civil cases more broadly than the federal courts interpreting the federal constitution. Not only has Washington accepted for years that there is a liberty interest giving rise to a due process right to counsel in cases where the State seeks to impair parental rights, but it has recognized that the threat of incarceration for contempt increases the weight of the individual interest at stake. *In re J.L.*, 140 Wn.App. 438, 166 P.3d 776 (2007) (even suspended detention time poses a threat to liberty interest that must be considered in due process analysis, in case involving contempt in truancy case).

The United States Supreme Court recognized in *Alabama v.*

Shelton, 535 U.S. 654, 663, 122 S.Ct. 1764, 152 L.Ed.2d 888 (2002) that the right to appointed counsel (in criminal cases) does not attach to "only those proceedings 'resulting in immediate actual imprisonment' ...." In *Shelton*, the Court held that counsel was required at the fact-finding hearing at which guilt was initially determined. Subsequently, in *Rothgery v. Gillespie County, Tex.*, ___ U.S. ___, 128 S.Ct. 2578, 171 L.Ed.2d 366 (2008), the Court held that the right to counsel attaches at any "critical stage" of the proceedings. *Id.* at 2590-91. *Rothgery* made clear that the "critical stage" requiring counsel includes a first appearance before a judicial officer which initiates adversary proceedings.

Though not a criminal proceeding, E.S.'s appearance before a judge in the initial truancy fact-finding hearing bears striking parallels to the "critical stage" in *Shelton* and *Rothgery* which triggered the accused's right to representation. The initial hearing is the child's only opportunity to contest the allegations that the child is "truant;" it is the time when the school district must prove that in spite of the school's efforts to notify the parent of unexcused absences, analyze the causes of those absences and take steps to eliminate them, the child persists in her truant behavior. By the contempt stage, the truancy allegations are taken as proven, demonstrating why counsel is needed <u>before</u> that stage. Much like an order imposing a suspended sentence in a criminal proceeding, most truancy

orders tell the child: obey the law from here forward, or you will face court sanctions, including the possibility of incarceration. The Becca Bill intends that the court's order, prior to the contempt stage, will have a coercive effect on the child and thereby "assist" the school in improving the child's attendance. The court's order forms the basis for subjecting the child to detention for contempt. RCW 28A.225.090(2). If the child is found in contempt, she may be jailed for up to seven days. RCW 13.32A.250(3). In E.S.'s case, the court was presented with a sworn declaration executed by the representative of the School District which charged her with unexcused absences, and the court order provided that "[f]ailure to obey this Court order will subject the parties to sanction which may include monetary fines, community service, or detention." Op. Br. of Appellant E.S. at 36-37 citing RP(3/6/06) 2. Studies of Washington's truancy system demonstrate that for many children, the imposition of this order alone is ineffective in eliminating or reducing a child's absences; a large number of children end up, like E.S., being subjected to contempt proceedings shortly after the initial truancy order is entered, and many of those spend time incarcerated for contempt. See "Washington's Truancy laws in the Juvenile Courts: Wide Variation in Implementation and Costs," by Washington State Institute for Public Policy (October 2009), http://www.wsipp.wa.gov/rptfiles/09-10-2201.pdf

(noting that 33% of youth with a truancy petition also had a contempt motion filed); *Bellevue School District v. E.S.*, *supra*, 148 Wn.App. at 210.

Given the need for a testing of the facts at the initial truancy fact-finding hearing and the consequences of the court's findings at that hearing, the initial truancy hearing is equal to the hearing in a criminal proceeding at which guilt is determined and a court imposes a suspended sentence of incarceration. Based on the deprivation of liberty that was at stake for E.S. at the truancy fact-finding hearing, due process required representation by counsel at that proceeding.

4. **Risk of Error**

It should be obvious that children have a greater need for counsel than adults. Moreover, there are numerous significant functions an attorney performs for a child in truancy cases, to decrease the risk of error at the proceeding and make it more effective. In addition to identifying the causes of truancy and steps the school could take to remedy it, an attorney can present evidence on behalf of the child at the initial truancy hearing as allowed by statute. *See* RCW 28A.225.035(7)(a)(ii). And the attorney can build a record and bring an appeal should the court render an erroneous decision at the initial hearing. In all of these ways, the attorney can reduce the risk of arbitrary decisions about the child. In so doing, he not will only ensure a better substantive outcome for the child, but will also contribute

to her sense that the process is fair and legitimate. *See*, *In re Gault*, 387 U.S. 1, 26, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) (noting that providing due process including attorney representation promotes compliance with the court's orders since the process is perceived as fair.)

Moreover, appointing counsel for children in truancy court proceedings may actually result in a cost savings. Petitions will be filed and court time utilized only for those cases that meet the legal requirements of the Becca Bill. Agreed orders may be used as much or more, but they will be knowing, voluntary and intelligent agreements instead of ones that exploit a child's lack of understanding and are ripe for challenges when counsel is later obtained.

VII. CONCLUSION

For the foregoing reasons, this Court should interpret the State Constitution's due process clause to require that children in truancy proceedings have a right to counsel.

Dated: December 17, 2009 Respectfully submitted,

American Civil Liberties Union of Washington Foundation

By: Nancy L. Talner

Alyse D. Bertenthal
KEKER & VAN NEST, LLP

Sarah A. Dunne, WSBA No. 34869
Nanacy L. Talner, WSBA No. 11196
M. Rose Spidell, WSBA No. 36038

Counsel for Amicus
American Civil Liberties Union of Washington