

IN THE SUPREME COURT OF WASHINGTON

No. 83024-0

Court of Appeals No. 60528-3-1

Bellevue School District,
Petitioner

v.

E.S.

Respondent

Supplemental Respondent's Brief

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I. Introduction

To require a 13 year old child to represent herself in a truancy court proceeding brought by the government violates both state and federal constitutional principles of fundamental fairness. The Court of Appeals correctly emphasized the difficulties facing a child in court without counsel.

A courtroom is an intimidating place, even in less formal juvenile proceedings. Confronted and opposed not only by her school district but in many cases her own parent, a child is unlikely to be a good advocate for herself, regardless of formality. Children cannot be expected to understand words like "contempt" or "sanctions." (Below, the court made no inquiry as to whether E.S. understood those ideas.) Further, crowded calendars leave the court little time for exploring the circumstances of each. The hearing in this matter lasted only a few minutes, and the child said very little beyond acknowledging that sometimes she did not go to school because of stomachaches.

Bellevue Sch. Dist. v. E.S., 148 Wn. App. 205, at 217-218

(2009), footnote omitted.

In this case, E.S. faced a school district representative and a judicial officer asking her questions, and was forced to operate in a courtroom environment in which even the language used was beyond her ability to comprehend. The adversarial nature of the proceeding even isolated her from her mother, who was treated by

the court as a separate party. The court did not conduct a colloquy to make sure that the child understood the nature of the proceeding or possible defenses the child might have.

The purpose of a truancy fact-finding hearing is not simply to determine whether a child is going to school. The child has possible defenses, including whether the petition is sufficient and whether the school district has met its obligations under the statute.

As the Court of Appeals pointed out,

The steps to address the child's absences from school are a necessary predicate to the truancy petition. The District's failure to take such action is thus a defense to the petition (although the child will not likely know this).

Bellevue v. E.S., 148 Wn. App. 205, 277, (footnote omitted).

The parent faces possible fines and the child faces possible incarceration if she does not comply with whatever order the court makes. The court can order the child to submit to drug and alcohol testing. RCW 28 A. 225.090 (1)(e). The court also can order the child to change schools. RCW 28 A. 225.090 (1)(b),(c).

In this case, the challenges E.S. faced were made more difficult because her mother did not speak English well and required an interpreter. E.S. basically was alone and legally unprotected in court, something that is not tolerated in any other

kind of proceeding. She was not able to understand fully either the nature of the proceedings or how to defend herself.

The United States Supreme Court addressed the problems of children facing court proceedings against them when it made clear that there is a right to counsel in juvenile delinquency cases:

The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child 'requires the guiding hand of counsel at every step in the proceedings against him.
In re Gault, 387 US 1, 37 (1967).

The Court of Appeals was correct when it wrote: "A proceeding to declare a child truant affects the child's rights to liberty, privacy, and education. Due process requires that the child be afforded counsel." E.S., at 207. This Court should uphold the Court of Appeals decision.

II. Argument

A. The Court of Appeals Correctly Applied The Mathews Test

In civil cases affecting liberty and property rights, the U.S. Supreme Court has established a test for determining whether the right to counsel applies. Mathews v .Eldridge, 424 U.S. 319(1976).

In Mathews, the Court wrote that determining the specific requirements of due process requires considering three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Mathews v. Eldridge, 424 U.S. 319, 335.

The Court was concerned about fairness, reliability, and risk of error in the challenged proceeding. 434 U.S. at 344. The Court reaffirmed its earlier holding that it is necessary that “the procedures be tailored, in light of the decision to be made, to ‘the capacities and circumstances of those who are to be heard,’... to insure that they are given a meaningful opportunity to present their case.” 424 U.S. 319, 349, (citation and footnote omitted.)

It is clear that the proceeding in this case did not provide a meaningful opportunity to E.S. to present her case. There was no one to help her, there was no full explanation that she could understand about what was involved, particularly what legal obligations the school had to meet, and there was simply no time.

One of the factors considered by the Mathews Court in assessing the impact of official action on private interests was the

length of time that erroneous deprivation of benefits could last. 424 U.S. 319, 341. It is worth noting that a truancy judge can, after the first hearing, in which allegations of the petition are established by a preponderance of the evidence, assume jurisdiction to intervene for “the period of time determined by the court”, at least until the end of the school year. RCW 28A.225.035(12). This indefinite jurisdiction could allow a court to keep jurisdiction over a child like E.S. from the age of 13 until she turned 18.

The Court of Appeals was correct in determining that the interests at stake in a truancy proceeding—liberty, privacy, and education—are significant, that the risk of error is significant, that the assistance of counsel is valuable, and that the only countervailing government interest, cost, is uncertain and does not have controlling weight. E.S., at 219.

In the sections below, the Respondent will address factors that support the Court of Appeals’ application of the Mathews Test.

B. This Court’s Holding in Myricks Supports the Decision

This Court has held that there is a right to counsel in cases involving the power of the state and the deprivation of fundamental rights. In re Welfare of Myricks, 85 Wn. 2d 252, 254 (1975).

Myricks held that a parent in a temporary deprivation proceeding

who faces the superior power of the state in a dependency case has a right to counsel. Emphasizing the impacts of the overwhelming resources of the state against an individual, the Court stated:

In dependency and child neglect proceedings -- even if only preliminary to later and more final pronouncements -- the indigent parent has to face the superior power of State resources. The full panoply of the traditional weapons of the State are trained on the defendant-parent, who often lacks formal education, and with difficulty must present his or her version of disputed facts; match wits with social workers, counselors, psychologists, and physicians and often an adverse attorney; cross-examine witnesses (often expert) under rules of evidence and procedure of which he or she usually knows nothing; deal with documentary evidence he or she may not understand, and all to be done in the strange and awesome setting of the juvenile court.

In re Welfare of Myricks, 85 Wn.2d 252, 254 (1975).

This description of the awesome challenges facing an adult in court applies with even more vigor to a 13 year old child going to court without counsel. In this case, the child's situation was aggravated because her mother had limited English proficiency.

Moreover, in Myricks, the fact that the hearing at issue involved temporary deprivation, not a permanent one for which the Court already had held there is a right to counsel, In re Welfare of

Luscier, 84 Wn.2d 135 (1974), was not a reason to deny counsel.¹

Myricks, 85 Wn.2d 252, 255.

The Court wrote: “The boy was made a ward of the court pending further proceedings, which could result in the child being permanently taken from the parent.” Myricks, 85 Wn.2d 252, 255. Similarly, E.S. was found truant pending further proceedings, which could affect her fundamental rights to education and privacy and could result in her being incarcerated.

C. Prosecutors Are Directly Involved in Truancy Cases

One of the key factors this Court has considered in assessing the right to counsel in civil cases is whether the government is a party. That was a major factor in Myricks and in Luscier.² This Court wrote:

In a deprivation hearing, a parent without the assistance of counsel does not confront pro se a similarly situated party litigant, but the highly skilled representatives of the State. Not surprisingly, it has been statistically established, in one jurisdiction, that the presence of legal counsel in child deprivation hearings results in a significantly lower percentage of court findings against the parents.

¹ This Court found in Luscier that counsel is required in deprivation proceedings under both the state and federal constitutional due process provisions.

² “The cases establishing a right to counsel mention and rely on the fact that the full resources of the State are brought to bear in termination and dependency proceedings.” In re Marriage of King, 162 Wn.2d 378, 386 (2007), finding that the absence of state involvement weighed against a right to counsel in a private dissolution proceeding.

Luscier, 84 Wn.2d 135, 138.

The Court described the “cruel inequity” of this, and quoted with approval a Columbia Law Review article:

Since there is no evidence indicating that the average respondent who can retain counsel is better or less neglectful than one who cannot, the conclusion seems inescapable that a significant number of cases against unrepresented parents result in findings of neglect solely because of the absence of counsel. In other words, assuming a basic faith in the adversary system as a method of bringing the truth to light, a significant number of neglect findings (followed in many cases by a taking of the child from his parents) against unrepresented indigents are probably erroneous. It would be hard to think of a system of law which works more to the oppression of the poor than the denial of appointed counsel to indigents in neglect proceedings.

Luscier, 84 Wn.2d 135, 138, (citation omitted).

The Court concluded, “Thus, it is readily apparent that the lack of counsel, in itself, may lead improperly and unnecessarily to deprivation of one's children.” 84 Wn.2d 135, 138

Similarly in truancy cases, the lack of counsel may lead to improper and unnecessary truancy findings. The plaintiff is the government, a school district represented by the prosecutor or by a district employee. In this case, the district has been represented throughout the appeal by the Prosecutor, whose office “is deeply committed to enforcing our state’s truancy laws.” See, King

County Prosecutor web site, available at <http://www.kingcounty.gov/Prosecutor/truancy.aspx>, checked October 4, 2009.

The Pierce County Prosecutor files more than 1000 truancy cases each year.³

In 2004, the Washington State Center for Court Research found that in eight courts, or 26 per cent of those responding, prosecutors filed and presented truancy petitions in court. See, “Truancy Case Processing Practices”, pp.1, 9, available at <http://www.courts.wa.gov/newsinfo/content/pdf/TruancyReport.pdf>. (hereinafter Truancy Case Processing). In another six courts, prosecutors appear in court after school officials prepare and file petitions or the prosecutor’s office files contempt motions. Id., at 9, 18.

The 2004 study found that “Probation officers are involved in truancy hearings in 60 percent of the responding courts even though truancy is not a criminal offense and does not involve probation.” Id., at 9.

³See, Pierce County Prosecutor web page, available at <http://www.co.pierce.wa.us/pc/abtus/ourorg/pa/juvenile.htm>, checked October 4, 2009.

It is clear that the government is heavily involved in truancy prosecutions. As a matter of fairness, as outlined in Myricks, a child needs a lawyer to defend against the state.

D. Lawyers Are Needed To Guard Against Unreliability in Truancy Proceedings

The Court of Appeals pointed out that the few minutes per case available to a high volume court, coupled with the possibly embarrassing underlying causes of truancy, make it unlikely that a child by herself can be effective in court. E.S., at 218.

A problem contributing to unreliability in truancy proceedings is the inability of schools to maintain personal contact with students and families. A recent WSIPP study reported that most of the informants in their study

... noted that many parents are unaware of their child's school struggles and uninformed about the options available to them because schools do not maintain continued contact with parents, engage them in their child's education, and provide the tools for them to intervene. For instance, some informants mentioned that state-mandated phone calls notifying parents of their child's unexcused absence are conducted via automated calling mechanisms. In such cases, there is no personal contact with the parent; therefore, the opportunity to recruit parents into problem-solving early on is overlooked.

TRUANCY AND DROPOUT PROGRAMS: INTERVENTIONS BY WASHINGTON'S SCHOOL DISTRICTS AND COMMUNITY COLLABORATIONS, June 2009, p. 8, available at <http://www.wsipp.wa.gov/rptfiles/09-06-2202.pdf>.

Furthermore, school districts do not always provide sufficient information in their petitions. “Schools in three juvenile court district (9 percent) do not provide information on their intervention efforts as a part of the truancy petition, even though this is required by the statute.” See, Truancy Case Processing, p.2. The report noted, “Although the statute requires schools to meet all their intervention obligations before filing, two courts accept petitions even if none of the school interventions have been made.” Id., at 14.

The report added:

...a number of courts also qualified their answer by indicating that while the schools make attempts to contact parents and to schedule conferences, those efforts are often unsuccessful. Several courts did not know whether schools were making the required interventions, because schools in their juvenile court district do not provide the information on truancy petitions.

Id., at 25.

The need for counsel is reinforced because there is such variability in how school districts implement the law.

Standards for filing a contempt motion are so remarkably varied among juvenile court districts that in one county a contempt motion could be filed if a student skips a single class period while in another county a contempt motion would only be filed after a student continues to be truant for several months.

Id., at 19.⁴

E. Counsel Is Needed Because Judges Cannot Do Their Own Investigations Into the Complex Causes of Truancy

Judges cannot conduct their own investigations in truancy cases, and certainly the commissioner in E.S.' case did not. As outlined in E.S.' earlier briefing and in the amicus briefing in the Court of Appeals, counsel can in fact reduce the risk of errors by the school districts. For example, the trial court dismissed a truancy petition once it knew that the special education staff had recommended against filing a truancy petition against the child.

See, Amicus Curiae Brief by TeamChild, p.13, fn. 19.

As then ABA President Karen Mathis wrote:

Lawyers have a unique vantage point as we intersect with the most at-risk youth, and we can help shape law to better assist children. Lawyers can help connect the dots between the people that need to be involved in the lives of our youth as well as the programs that serve them in dealing with the complex problems they face.

⁴ Courts' willingness to impose sanctions not authorized by law suggests another reason for counsel. The 2004 study reported:

Survey responses from some courts suggest that court practices with regard to sanctions and purge conditions may depart from what is specifically authorized by statute. For example, one court reports that the court orders 30 days detention for each finding of contempt. At least one court requires completion of detention time on the third finding of contempt without a purge condition.

Truancy Case Processing, at 20. Recent case law may have altered these practices.

“Truant Children Need Early Assistance, Help From Us All”, at <http://www.abanet.org/media/releases/oped090106.html>.

Ms. Mathis pointed out that issues “such as abuse and neglect, homelessness and disability” can “lead a child to begin skipping school.” *Id.*,⁵ One article noted, “...absentee students frequently come from families with single mothers and perceive less parental acceptance but more family conflicts.” See, Steinhausen, Muller, and Metzke, “Frequency, stability and differentiation of self-reported school fear and truancy in a community sample”, *Child and Adolescent Psychiatry and Mental Health* 2008, 2:17, footnotes omitted, available at <http://www.capmh.com/content/2/1/17>.

The Washington State Institute for Public Policy has recognized that a combination of factors affect truancy: (1) student characteristics, including neurological factors and inability to make

⁵ Other research supports the former ABA President’s statement. Truancy is associated with psychopathology, as well as adverse experiences at home and school. Abstract, School refusal and psychiatric disorders: a community study, *J Am Acad Child Adolesc Psychiatry*. 2003 Jul;42(7):797, available at <http://www.ncbi.nlm.nih.gov/pubmed/12819439?dopt=Abstract&holding=f1000,f1000m,isrcn>. A recent article observed: “Adolescents who engage in status offense behaviors often come from broken homes, have suffered childhood trauma, and have unmet mental health and/or education needs.” Arthur and Waugh, “Status Offenses and the Juvenile Justice and Delinquency Prevention Act: The Exception that Swallowed The Rule”, 7 *SJSJ* 555 (2009).

friends, (2) family characteristics, including parents with poor parenting skills and health problems, and (3) school characteristics, including lack of personalized attention to students. See, “TRUANCY: Preliminary Findings On Washington’s 1995 Law”, available at <http://www.wsipp.wa.gov/rptfiles/truancy.pdf>.⁶

A child needs counsel to be able to investigate and present these issues to the court, and possibly to persuade the school district to take a course other than going to court.

F. This Court Has Recognized That Children Cannot Effectively Represent Themselves

This Court has strongly urged trial courts to consider appointing counsel to help children in court proceedings. In In re Parentage of L.B., 155 Wn.2d 679, 712 (2005), this Court reserved the question raised by amicus in that case of whether the state or federal constitution requires appointment of counsel for children in a parentage case. No party had raised the issue. The Court wrote:

⁶ In a 1998 study, WSIPP found that Both school and court staff believe that an important prevention tool for improving attendance was to help students with serious social and health issues receive the assistance they needed. However, this intervention was often lacking; schools and courts did not always possess the resources to provide the necessary personal attention. “**Truant Students** Evaluating the Impact of the ‘Becca Bill’ Truancy Petition Requirements”, available at http://www.wsipp.wa.gov/rptfiles/truanteval_1.pdf.

...we strongly urge trial courts in this and similar cases to consider the interests of children in dependency, parentage, visitation, custody, and support proceedings, and whether appointing counsel, in addition to and separate from the appointment of a GAL, to act on their behalf and represent their interests would be appropriate and in the interests of justice.... When adjudicating the "best interests of the child," we must in fact remain centrally focused on those whose interests with which we are concerned, recognizing that not only are they often the most vulnerable, but also powerless and voiceless.

155 Wn.2d 679, 712. (Internal citations omitted.)

Children in truancy proceedings also are powerless and can be voiceless. This Court's concern in L.B. that lawyers are needed to protect the child's interests and the reliability and fairness of proceedings involving children is equally applicable to a truancy prosecution.

The L.B. Court noted the holding in Kenny A. ex rel. Winn v. Perdue, 356 F. Supp. 2d 1353, 1359-61 (N.D. Ga. 2005), that children have a fundamental liberty interest in deprivation proceedings and due process requires appointment of independent counsel to represent a child's interests. L.B., 155 Wn.2d 679, 712.⁷

The Kenny A. court used the Mathews test and found a right to counsel for foster children in deprivation and termination

⁷ As outlined in E.S.' earlier briefing, other states provide counsel to children facing possible incarceration as a result of truancy. For example, in Arizona, a juvenile charged with truancy has the right to an attorney in incorrigibility proceedings under A.R.S. § 8-221(A).

of parental rights cases under the Georgia Constitution's due process clause. 356 F. Supp. 2d 1353, 1360.⁸ That clause reads as follows: "No person shall be deprived of life, liberty, or property except by due process of law." Ga. Const. Art. I, § I, Para. I⁹

The Kenny A. case involved a claim that the inadequate number of child advocate attorney positions funded by the County Defendants resulted in extremely high caseloads for the attorneys, making effective representation of the class of plaintiff foster children structurally impossible. The court denied summary judgment motions by the defendants. The court found that judges "do not adequately mitigate the risk of" errors by the state department of family and children services. 356 F. Supp. 2d 1353, 1355, 1361

Judges, unlike child advocate attorneys, cannot conduct their own investigations and are entirely dependent on others to provide them information about the child's circumstances.The Court concludes that only the appointment of counsel can effectively mitigate the risk of significant errors in deprivation and TPR proceedings.

⁸ The Indian Child Welfare Act provides for counsel. "The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child." 25 USCS § 1912 ICWA

⁹ The Washington Constitution Art. I, § 3 provides: "No person shall be deprived of life, liberty, or property, without due process of law." The U.S. Constitution provides in part: "nor shall any State deprive any person of life, liberty, or property, without due process of law." USCS Const. Amend. 14, § 1.

Kenny A. v. Perdue, 356 F. Supp. 2d 1353, 1361.¹⁰

G. Tetro is Not Inconsistent with E.S.

It is worth examining this Court's discussion and holding in Tetro v. Tetro, 86 Wn.2d 252 (1975), cited by the district for a footnote in the case to support its argument that counsel need only be provided when the threat of incarceration is immediate. In finding that there is a right to counsel for indigent persons charged with contempt for noncompliance with a child support order, the court wrote:

Defendants were complained against by the county prosecutor, required to appear and defend against charges of past illegal conduct, and, most importantly, faced with the possibility of imprisonment if their defenses were not successful.

Id., at 254.

All of these factors are true in a truancy proceeding. The footnote favored by the District states that counsel need not be provided for defendants "in child support suits which may subsequently result in orders the violation of which would be contemptuous." Tetro, 86 Wn.2d 252, 255 ; fn. 1. The Tetro

¹⁰ The parties reached a mediated settlement with regard to multiple federal and state law claims against Georgia's foster care system, and then there was litigation concerning attorney fees. The U.S. Supreme Court has granted certiorari. Kenny A. v. Perdue, 532 F.3d 1209 (11th Cir. Ga. 2008), certiorari granted by, in part Perdue v. Kenny A., 2009 U.S. LEXIS 2664 (Apr. 6, 2009)

decision was issued before Mathews and the Court did not engage in the analysis that is now required. More importantly, as the Court of Appeals recognized, Tetro involved adults, not children, who the state has recognized are incompetent to proceed alone in a legal matter. “A child is neither independent nor capable, in fact or in law.” E.S., at 214.

There is nothing inconsistent between Tetro and E.S. The Court wrote in Tetro that counsel is “constitutionally required only when procedural fairness demands it.” 86 Wn.2d 252, 254. As the Court of Appeals has made clear, procedural fairness demands that a child of 13 facing a government prosecution that threatens her rights to liberty, privacy, and education, needs counsel.

H. Truancy Petitions Can Result in Arrest At School

The primary liberty interest, to be free from incarceration, is engaged in truancy cases both because the petition can lead to juvenile detention following a contempt finding and because children can be arrested and detained based on a warrant for failure to appear for a truancy hearing.¹¹ Only 55 per cent of responding

¹¹ The Court of Appeals noted, “At the point of contempt proceedings, no challenge to the original truancy finding is available.” E.S., at 213.

courts in 2004 required personal service before issuing a warrant or default finding. *Truancy Case Processing*, at 11.

The Legislature recently reaffirmed that children can be arrested for failing to comply with a truancy court order, but modified the statute to limit arrests of children in school so that they cannot be arrested in a location where other students are present during school hours. SSB 5881 (2009).

I. Truancy Petitions Can Result in Invasion of Bodily Privacy

The Court of Appeals pointed out that the truancy court can order drug and alcohol testing of a child. “The child’s bodily integrity is thus jeopardized where such an order may be entered without competent challenge.” E.S., 148 Wn. App. 205, 216.

This concern is real. The 2004 study by the Center for Court Research reported: “RCW 28A.225.090 authorizes courts to order a truant student to submit to testing for drug and alcohol use. Twenty-nine of the 32 responding courts are exercising this authority.” *Truancy Case Processing*, at 23.

The E.S. Court’s concern was that the state constitutional right to privacy could be invaded without anyone to stand up for the child’s right. The Washington Constitution provides: “No person shall be disturbed in his private affairs, or his home invaded,

without authority of law.” Wash. Const. Art. I, § 7. While the Court of Appeals did not specifically reference that provision, it cited York v. Wahkiakum Sch. Dist. No. 200, 163 Wn.2d 297, 299 (2008), which held random urinalysis drug testing unreasonable based on Art. 1 & 7. E.S., 148 Wn. App. 205, 216, fn 45.

J. The Right to Education is Affected by a Truancy Order

Similarly, the Court of Appeals found that the child’s right to education is engaged in a truancy proceeding in which the court can order the child to change schools. RCW 28A.225.090(1)(b); E.S., at 216. Washington Constitution Article 9, Section 1, provides: “It is the paramount duty of the state to make ample provision for the education of all children residing within its borders....” This Court has held that all children residing in Washington have a right to education that is of paramount stature. Seattle Sch. Dist. v. State, 90 Wn.2d 476, 512 (1978).

The Court of Appeals properly was concerned about an uninformed judicial decision to change a child’s school after a rushed hearing without counsel.

Transferring a child to a different school is a major step. A misguided decision could disrupt the child’s education by introducing or exacerbating stigma, uncertainty, and instability, or by placing the child where needed services are not in fact available.

E.S., at 216.

Counsel can provide the court with information about the child's school history, special education needs, transportation issues, and other issues that would inform a decision about transferring a child to a different school.

Article 9, § 1 signifies that the private interest in education at stake in truancy proceedings is a *paramount* interest, unlikely to be outweighed by administrative costs.

K. The Washington Constitution Provides A Separate Basis for the Due Process Protections Recognized by the Court of Appeals

The Court of Appeals held: "A proceeding to declare a child truant affects the child's rights to liberty, privacy, and education. Due process requires that the child be afforded counsel." E.S., at 207. The Court did not specify whether it was relying on the state or federal Constitution, or both. The Court did rely on the test articulated in Mathews, *supra*, in which the Court addressed the implications of the Fifth Amendment.

As E.S. has demonstrated in her earlier briefs, the Court's analysis is mandated by cases reviewing the U.S. Constitution's Due Process Clause. In addition, the Washington Constitution provides an independent basis for the holding. Article 1 § 3, and

the Fifth and Fourteenth Amendments to the U.S. Constitution have similar language that no person shall be deprived of life, liberty, or property, without due process of law. The Washington Constitution's special protection for education adds extra support to the decision below.

Should this Court question this interpretation of the federal constitution, it can determine that the state constitution provides greater protection. State v. Gunwall, 106 Wn. 2d 54, 61-62, (1986).¹²

Although this Court has found that Washington's due process clause is generally coextensive with the Fourteenth Amendment, see, e.g., State v. Manussier, 129 Wn.2d 652, 679-80 (1996), on at least two occasions Washington's due process clause has been extended past federal limits, see State v. Bartholomew, 101 Wn.2d 631, 640 (1984) (regardless of federal requirements, the Rules of Evidence are required in capital sentencing

¹² The factors are (1) text of the state constitution, (2) differences in parallel constitutional provisions, (3) state constitutional and common law history, (4) preexisting state law, (5) structural differences between state and federal constitutions, and (6) whether the matter is of particular state or local concern. State v. Gunwall, 106 Wn.2d 54, 58, 720 P.2d 808 (1986). Counsel does not suggest that this analysis is necessary because the federal protection requires the Court of Appeals decision.

proceedings under Article 1, § 3);¹³ State v. Davis, 38 Wn.App. 600, 605 (1984) (unlike federal due process clause, Article 1, § 3 prohibits use of post-arrest silence for impeachment purposes).

And “when the court rejects an expansion of rights under a particular state constitutional provision in one context, it does not necessarily foreclose such an interpretation in another context.” State v. Russell, 125 Wn.2d 24, 58 (1994).

“Even where parallel provisions ... do not have meaningful differences, other relevant provisions of the state constitution may require that the state constitution be interpreted differently.”

Gunwall, 106 Wn.2d at 61. Under the Federal Constitution, education is not given explicit protection. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35, 93 S.Ct. 1278 (1973). Washington’s Constitution is different, as outlined above.

Article 9, § 1 thus provides an independent right to education that invokes due process protections, and also heavily informs any balancing of interests in due process analysis.

The legal and social issues raised by truancy proceedings are particularly local. The treatment of juveniles “is a subject of

¹³ *appeal after remand*, 104 Wash.2d 844, 710 P.2d 196 (1985), *judgment rev'd on alternate grounds sub nom.* Wood v. Bartholomew, 516 U.S. 1, (1995),

local concern and thus may be more appropriately addressed by resorting to the state constitution.” State v. Smith, 117 Wn.2d 263, 286-87, (1991) (Utter, J. concurring).

Education is also a state issue. “It is well established that education is a traditional concern of the States,” U.S. v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J. concurring).

The Gunwall factors are “nonexclusive.” In fact, this Court explicitly refused to abandon Bartholomew because it was decided prior to Gunwall and had not engaged in a Gunwall analysis. State v. Clark, 143 Wn.2d 731, 778, 24 P.3d 1006 (2001). This Court reiterated the rationale underlying Bartholomew, namely, that “a proceeding in which evidence is allowed which lacks reliability” would be “particularly offensive to the concept of fairness.” Id., at 779. By the same token, regardless of the particular Gunwall factors, should this Court find the federal due process clause not to require counsel herein, an independent interpretation of Washington’s due process clause would be necessary to avoid the fundamentally unfair circumstance of children being represented in truancy proceedings without counsel.

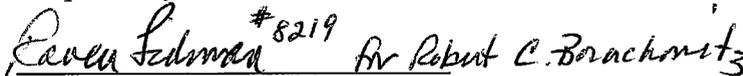
The Gunwall factors “parallel interpretive inquiries made when determining whether the state constitution ultimately

provides greater protection,” and the determination involves, among other things, the “relationship to other constitutional provisions” and “other historical context.” Madison v. State, 161 Wn.2d 85, 94 (2007) (internal quotations omitted).

III. Conclusion

Truancy proceedings are instituted by the state against children as “a necessary and direct predicate to a later finding of contempt and imposition of a detention sanction.” E.S., 148 Wn.App. at 213. They also engage the rights to education and privacy. The importance of accuracy and fairness, and the recognized inability of children to advocate for themselves in a court, require counsel for children in truancy proceedings. This Court should uphold the Court of Appeals decision.

Respectfully submitted,

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