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CRIMINAL DIVISION
KING COUNTY PROSECUTORS OFFICE
No. 605283

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

E.S., Appellant
vs.
Bellevue School District, Respondent

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COURT OF APPEALS
STATE OF WASHINGTON
2008 AUG 15 11 51 AM
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AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT

Brent Pattison
WSBA No. 29695
Chori Folkman
WSBA No. 38591
TeamChild
1225 S. Weller, Suite 420
Seattle, WA 98144
206.322.2444

Attorneys for Amici Curiae, TeamChild and Committee for Indigent
Representation and Civil Legal Equality (CIRCLE)

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I. SUMMARY OF THE ARGUMENT

Due process requires appointment of counsel in truancy proceedings. Amici agree with the Appellant E.S. and the ACLU that the time has come to reconsider *Truancy of Perkins*,¹ and assert that the court misapprehended the significant interests and rights at stake in truancy proceedings. Children without counsel in truancy proceedings are left without a meaningful voice in court proceedings where complicated social and educational issues are implicated, important state and federal rights are at stake, and, from the point of view of a child, the process is daunting and confusing. Without counsel from the start of the truancy process, children lack the advice and advocacy they need to understand and assert their statutory rights, to ensure schools do the required pre-truancy filing interventions, and to articulate their needs to accomplish the purposes of the truancy process – a positive educational outcome.

II. IDENTITY AND INTEREST OF AMICI

The identity and interest of Amici in the current matter is set forth in Amici's Motion for Leave to File Amici Curiae Brief.

III. STATEMENT OF THE CASE

Amici adopt Appellant's statement of the case.

¹ 93 Wn. App. 590, 969 P.2d 1101 (1999).

IV. ARGUMENT

A. CHILDREN ARE ENTITLED TO ATTORNEYS IN TRUANCY FACT-FINDINGS BECAUSE A CHILD'S CONSTITUTIONAL RIGHT TO EDUCATION IS AT STAKE

Children have a fundamental constitutional right to education in Washington. *See* Const. art IX, §1; *Seattle School Dist. v. State*, 90 Wn.2d 476, 500-502, 585 P.2d 71 (1978). Students are entitled to procedural due process when state action restricts a student's educational services.² *See Goss v. Lopez*, 419 U.S. 565, 581, 95 S. Ct. 729 (1975). To determine what kind of process is due, courts employ the *Mathews* Test. Under *Mathews v. Eldridge*, courts must balance the private interest at stake, and the risk of erroneous deprivation of that interest, against the burden of providing a particular procedural safeguard.³ *See Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893 (1976).

The Respondent, echoing *Truancy of Perkins*, argues in this case that a child's right to education is not at risk in truancy proceedings because the worst that can happen to the child is an order by the court to attend school. Br. of Respondent, p. 17. Amici contend that this position

² Students are entitled to due process not only when they are denied educational services, like the short term suspensions in *Goss*, but also when state action has a negative impact on their education, like in disciplinary transfer to an alternative school. *See Everett v. Marcuse*, 426 F. Supp. 397, 400 (E.D. Pa. 1977).

³ Amici agree with the ACLU's formulation of the *Mathews* analysis, and will limit our brief to a discussion of the practical educational services at stake in a truancy matter, as well as how the lack of counsel impacts access to justice in truancy cases.

reflects a fundamental misunderstanding of what is actually at stake in a truancy hearing for children. Without counsel, children in truancy proceedings may be wrongly found to be truant and unable to access the required services they need to reengage with school. Erroneous findings of truancy can aggravate the harm by improperly reducing the District's statutory obligation to intervene to help the child, thus depriving the child of her fundamental right to education.

1. Effective Truancy Intervention Requires Addressing the Complicated, Underlying Reasons for a Child's Nonattendance

In order to understand what is at stake in a truancy hearing, it is first helpful to consider the numerous reasons children stop attending school. Domestic violence, poverty, substance abuse, and mental health issues are all correlates of truancy, but school climate issues, teacher attitudes, and other factors related to the way schools provide educational services are also important factors.⁴ A recent evaluation of a truancy reduction program in Seattle noted that for many students and parents, the main problem is that "school isn't working for them" and that "kids feel marginalized."⁵ According to the evaluation, simply telling the kids to

⁴ See Myriam Baker et al., *Truancy Reduction: Keeping Kids in School*, OJJDP Bulletin, September 2001, available at <http://www.ncjrs.gov/pdffiles1/ojjdp/188947.pdf>.

⁵ See *The Story Behind the Numbers: A Qualitative Evaluation of the Seattle WA Truancy Reduction Demonstration Program*, National Center for School Engagement (2007), available at

“buck up and go back to class” is not a solution when kids need more help to reengage with school.⁶

2. Schools Have an Obligation to Intervene Prior to Filing a Truancy Petition

Washington’s truancy statute recognizes the importance of helping children reengage with school by requiring districts to meet with students and parents, analyze the causes of the nonattendance, and then take steps to eliminate or reduce the child’s absences *prior* to filing a truancy petition. *See* RCW § 28A.225.020. The statute recommends a significant number of specific interventions, including:

adjusting the child’s school program or school or course assignment, providing more individualized or remedial instruction, providing appropriate vocational courses or work experience, referring the child to a community truancy board, if available, requiring the child to attend an alternative school or program, or assisting the parent or child to obtain supplementary services that might eliminate or ameliorate the cause or causes for the absence from school.

RCW § 28A.225.020(1)(c).

These statutory requirements reflect both a clear preference and a mandate for school-based interventions to address truancy prior to court

<http://www.schoolengagement.org/TruancyPreventionRegistry/Admin/Resources/Resources/TheStoryBehindtheNumbersAQualitativeStudyoftheSeattleWATruancyReductionDemonstrationProgram.pdf>

⁶ *See id.*

involvement.⁷ A civil action filed against the child is intended to be a last resort and the failure of a district to engage in specific interventions is a defense to a truancy petition.

3. Appointment of Counsel is Necessary to Enforce the Fundamental Right to Meaningful Education Services

Without counsel for the child, fulfillment of a district's obligation to analyze the reasons for the truancy and try specific interventions prior to filing a truancy petition is much less likely to happen. One explanation for this is that districts, and even courts, misunderstand the obligation to provide interventions prior to filing a truancy petition. In TeamChild's experience advocating for children across the state, many districts take the position that they must file a petition upon a certain number of missed school days, even if no meaningful interventions have been tried first. Or, districts argue, the required letters and meetings with the family constitute the interventions, in spite of clear statutory language to the contrary.⁸ In addition, districts often complain that there is too little funding to do all of

⁷ Research on truancy prevention across the country supports the idea that intervention programs are more effective than court supervision. *See e.g.* Joyce Epstein and Steve Shelden, *Present and Accounted For: Improving Student Attendance through Family and Community Involvement*, Journal of Educational Research (2002).

⁸ Under Washington law, the obligation to have meetings with the family and send letters notifying parents of absences is separate from a district's obligation to take steps to eliminate or reduce the truant behavior. *Compare* RCW § 28A.225.020(1)(a-b) *with id.* at (c).

the important work they are required to do.⁹ It is far easier to file a petition for court supervision than spend the time and resources necessary to address the problem through school-based interventions.

Furthermore, children and parents are generally unaware of the requirement to do pre-filing interventions. School notices, like the notices sent to E.S. in this case, do not mention it. C.P. 9-12. They often merely state that districts are required to file a petition after a certain number of missed days. Courts are not able to enforce the requirement because many children, like E.S., waive their right to a hearing on the truancy and sign agreed orders. Even if judges meet the children in court and make an inquiry of district officials, they rarely have the opportunity to fully investigate whether appropriate interventions were tried.¹⁰ Even if they do make appropriate inquiry of district officials, the student (or their parent) is generally unskilled at presenting contravening evidence or impeaching testimony that might be offered by a district official.

Moreover, children are the best resource for finding out what is underlying truant behavior, but when proceeding *pro se*, a child may be

⁹ See Judy Bushnell, *Washington's Funding for Basic Education is Anything but Ample*, SEATTLE TIMES, March 25, 2007.

¹⁰ As one court has noted in the context of finding a constitutional right to counsel in dependency cases, "Judges, unlike child advocate attorneys, cannot conduct their own investigations, and are entirely dependent on others to provide them with information about the child's circumstances." *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp.2d 1353, 1361 (N.D. Ga. 2005).

understandably reticent to talk about the reasons for nonattendance.

Explaining one's learning problems, fears about school, or substance abuse issues to a judge in court is a tall order. Children are likely to be much more willing to open up about the reasons for their truancy problems with a confidential advocate than with a judge in open court where parents are also often present as named parties.

Lastly, the failure to complete pre-filing interventions can be compounded by the challenge of forcing districts to do interventions after the finding of truancy. There is less legal support for requiring the district to do interventions after truancy is established.¹¹ Once court supervision is in place, the focus shifts to the simple question of whether or not the student is complying with the judge's order to attend school.

For all of these reasons, the right to meaningful interventions to help the child reengage with school is an unfulfilled right for unrepresented children. As a result, the most effective ways to help the child reengage with school may be permanently lost, along with the opportunity for that child to succeed educationally to the significant social and economic detriment to the child and to the community as a whole.

¹¹ Compare RCW § 28A.225.020 with RCW § 28A.225.090.

4. The District's Failure to Provide Meaningful Interventions for E.S. Underscores the Need for Counsel

E.S.'s case is an excellent example of why children need lawyers in order to fulfill the state's promise of a meaningful education and the truancy statute's promise of interventions. As E.S.'s opening brief points out, the original petition the District filed was insufficient because it did not indicate meaningful steps taken to eliminate or reduce E.S.'s absences. *See* Brief of Appellant, pp. 44-46. The form petition used by the District includes 23 potential interventions, but only one of them was checked by District officials (C.P. 2), and even that alleged intervention is disputed. *See* Brief of Appellant, pp. 44-45. The petition even asked for permission to bypass a key intervention- the community truancy board. C.P. 13.¹²

While the District had a few meetings with the family about E.S.'s nonattendance, E.S.'s brief is correct that the meetings were held without an interpreter, and all of the letters sent to the family about the truancy process were in English, in spite of the family's recognized need for an interpreter in court. Although the truancy statute does not explicitly require that communication with the family be in the language of the

¹² The District may argue that ESL services were an intervention, but these services were actually part of the status quo when E.S. started having attendance problems. The only pre-filing intervention mentioned by the court below is a single attempt by a counselor to pick the student up for school, but there is no indication that lack of transportation was the reason E.S. was not attending. *See* C.P. 2-3.

home, other related state and federal laws do. *See* RCW § 28A.180.010 *et seq* (Transitional Bilingual Instruction Act); RCW § 49.60.215 (Washington Law against Discrimination); and 42 U.S.C. § 2000d (Title VI of the Civil Rights Act of 1964).

There is little doubt that if E.S. had been provided with counsel at the initial truancy hearing, she could and would have challenged the District's failure to provide meaningful interventions and notice with regard to the truancy action. The court quite likely would have dismissed the petition and the District would have been required to try a full range of interventions prior to taking legal action against E.S. With effective pre-filing intervention, the lengthy litigation that has followed the agreed order would likely have been avoided.

B. CHILDREN NEED COUNSEL IN TRUANCY PROCEEDINGS IN ORDER TO HAVE MEANINGFUL ACCESS TO JUSTICE

Without access to counsel, children have little chance of defending themselves in a truancy action. The risk of an incorrect decision where the child has no counsel is high for several reasons, including the complex web of legal issues implicated, the high rate of disability among children with truancy issues, and the lack of safeguards in truancy proceedings. The need for counsel is underscored by the fact that counsel is required in similar civil actions involving children.

1. Truancy Fact-Findings Involve a Complex Web of Legal Rights and Responsibilities

It is unrealistic to expect children without counsel to understand the complex web of legal rights and responsibilities implicated by truancy. Children between the ages of eight and eighteen are required to attend school in Washington. *See* R.C.W. § 28A.225.010. There are, however, multiple exceptions to this rule,¹³ as well as important pre-filing requirements like the interventions addressed above. Without a lawyer, it is left to the child alone to figure out whether any exceptions apply to her obligation to attend school, as well as whether or not the district took the legally required steps to eliminate or reduce her absences.

In addition to Washington's truancy statute, other state and federal laws are implicated in truancy matters. One correlate of truancy is homelessness,¹⁴ and the McKinney-Vento Homeless Assistance Act requires districts to provide a wide range of rights and protections for children who need help attending school during periods of housing instability. *See* 42 U.S.C. § 11431 *et seq.* Also, a large proportion of

¹³ Exceptions to the mandatory attendance rule include children who are being homeschooled, children unable to attend school for serious health issues, children attending approved education centers, and children who are 16 years old and lawfully employed. *See* RCW § 28A.225.010(1)(a-e).

¹⁴ *See* Lynda Richardson, *Walls of Shame Keep Homeless from School*, NEW YORK TIMES, Jan. 2, 1992.

children in truancy proceedings have disabilities.¹⁵ Under state and federal special education laws, districts must provide special education students with a broad range of services and support to help them be successful in school. *See* 20 U.S.C. § 1400 *et seq.* In addition, all one has to do is visit a local truancy court calendar and it will become clear that many of the students involved in truancy proceedings speak English as a second language. The Transitional Bilingual Instruction Act requires districts to provide bilingual services to children and families. *See* RCW § 28A.180.010 *et seq.* Knowledge of these laws, among others, is important in truancy proceedings, but it is highly unlikely *pro se* children will know the extent of their rights in these areas.

2. Children Involved in Truancy Proceedings Often Have Disabilities

It is especially problematic for children to be denied counsel at an initial fact-finding hearing when a large proportion of children involved in the truancy system have disabilities. A recent evaluation of a Tacoma

¹⁵ More than one third of the children in a Tacoma truancy program were eligible for special education. *See Reengaging Youth in School: Evaluation of the Truancy Reduction Demonstration Project*, National Center for School Engagement, Aug. 10, 2006, p. 80, available at: <http://www.schoolengagement.org/TruancyPreventionRegistry/Admin/Resources/71.pdf>.

truancy program found that more than one-third of children involved with the program have disabilities entitling them to special education services.¹⁶

It is unrealistic to expect that any child is prepared to face legal action like a truancy fact-finding on their own,¹⁷ but it is even more troubling to consider the challenge a child with a disability faces when appearing *pro se*.¹⁸ Students with special education needs often have very low reading skills, communication disorders, or even significant cognitive delays. Asking children with these kinds of vulnerabilities to proceed without counsel in any kind of civil proceeding is unfair, especially a proceeding that is only one step away from potential detention.

The high rate of disability among children with attendance problems is also an important reason for appointed counsel because special education legal rights can make the issue of appropriate educational programming even more complex. The Individuals with

¹⁶ *See id.* One quarter of children in the Seattle truancy reduction program were eligible for special education. *See id.* It seems reasonable to assume that the number is even higher when one considers students with disabilities who have not yet been identified as eligible for special education, as well as students who have disabilities but do not qualify for special education.

¹⁷ One reason for this is the basic difference between children and adults related to maturity and brain development. *See Roper v. Simmons*, 543 U.S. 551, 569-71, 125 S. Ct. 1183, 1195-96 (2005).

¹⁸ Given the problems facing *pro se* litigants with disabilities, some commentators have argued that the Americans with Disabilities Act may require appointed counsel as a reasonable accommodation. *See* Lisa Brodoff, Susan McClellan, and Elizabeth Anderson, *The ADA: One Avenue to Appointed Counsel Before a Full Civil Gideon*, 2 Seattle J. for Soc. Just. 609 (2004). Washington Courts already recognize that appointment of counsel may be an “accommodation” necessary to help a person with a disability have access to the courts. *See* WA. Ct. Gen. R. 33.

Disabilities Education Improvement Act (IDEIA) is a federal law requiring districts to provide specially designed, individualized instruction to students with disabilities. 20 U.S.C. § 1400 *et seq.* In TeamChild’s experience advocating for children, districts sometimes file truancy petitions regarding children with special education needs without considering whether changes in special education programming might address the nonattendance.¹⁹ Or, sometimes a judge orders an alternative school placement for a child with a disability, running afoul of the IDEIA’s mandate that special education teams make placement decisions. *See* 20 U.S.C. § 1414(d). Without counsel, there is no way for children and parents to protect these special education rights in a truancy proceeding.

3. The Complexity of the Issues in Truancy Proceedings is in Sharp Contrast to the Minimal Level of Due Process Afforded to Children

The District and the court below characterize truancy proceedings as simple and routine. But for children and their parents the process is confusing and daunting, and the “routine” nature of the hearings works against the best interests of the child.

¹⁹ For example, in a recent case, TeamChild worked with a public defender to get a truancy matter dismissed after finding a school record indicating that the student’s special education team believed his attendance problems were related to his disability, and that special education interventions should be tried first. The district filed a petition anyway, and it was not until counsel was appointed and discovered the recommendation that the case was dismissed.

Consider what it would be like to be summoned to Juvenile Court for a truancy hearing. Children and parents usually find out about the hearing after a call from a district official and a written notice sent to their home. The notices sent by districts typically threaten the possibility of detention if the child is found to be truant and the child fails to follow the court's order to attend school. The notice may state that a warrant may be issued for the child's arrest, or a default order entered against her, if she does not go to court. Notices also likely raise the specter of incarceration or fines for the child's parents. In most jurisdictions, very little information about the hearing process, or the child's rights, is included in the notice. It is likely that a summons to truancy court is the first time the child has ever been involved with court.²⁰

What happens at an initial truancy hearing in Washington varies greatly by jurisdiction. In some jurisdictions, children and their parents are summoned to a hearing, but actually attend a lecture by a probation officer about the importance of school. At the end of the meeting, both the child and parent(s) are asked to sign an agreed order to attend school and avoid discipline problems. There may be no representatives from the school district at these meetings, and no one is available to give the family

²⁰ Truancy can be a predictor of future juvenile offending. *See* Myriam Baker et al., *supra* note 4.

individualized advice about whether to sign the agreed order. If they refuse to sign the order, a more formal hearing is set.

If the summons results in an actual court appearance, the child and parents are likely one of many families on a busy truancy calendar. In some courts, the judge will give a general lecture to the families about how the process works, but children receive no individual advice. Instead, the child and parent are usually approached by a district representative who offers them a choice: sign an agreed court order waiving the child's right to a hearing and promising to go to school, or wait for the opportunity to face the judge.²¹ If the student picks the first option, the family can go home right away, usually without any further process. If the child wants a hearing, the child has to remain at court and go through the intimidating process of appearing before a judge on her own. Not surprisingly, agreed orders are signed frequently.²² While procedures vary, the one common feature is that the child is never given the chance to discuss the allegations with anyone who has the role of helping her determine whether there is a sufficient basis for the petition, or whether there are other ways to address the nonattendance.

²¹ In one jurisdiction, TeamChild has reviewed cases where school officials ask the child to sign an agreed order of truancy at the school, without parents or guardian present.

²² Based on our review of Superior Court statistics, it does not appear data is kept on the number of agreed orders. Anecdotally, agreed orders appear to be quite common.

Because parents are often parties to the proceedings as well, relying on parents to be advocates for children in this context is not a realistic alternative to appointed counsel. Often, parents have their own incentives to pressure the child to sign an agreed order, e.g., so that the parent does not have to wait at court for a hearing and miss work; or fear that the court will blame the parent for the child's truancy; or the parent will blame the child for the truant behavior in order to avoid potential contempt allegations against the parent.

If the child requests an actual hearing to challenge the allegations, she is forced to proceed without any legal assistance. The parent and child may not know anything about what kind of evidence is admissible, how to offer evidence, or what the legal standards are for a finding of truancy. The court below discounted the complexity of these hearings, asserting there are rarely ever any witnesses or cross-examination. The District argues that the rules of evidence are "relaxed."²³ Br. of Respondent, 19. This, however, is more a reflection of the absence of counsel for the child than evidence of the absence of the need for witnesses and cross-examination. The lack of procedural rigor in the hearings is a direct result of the fact that children and parents are generally not represented, and the "relaxed" nature of the hearing actually operates against the child and

²³ The Rules of Evidence apply fully in truancy proceedings. See ER 1101.

parent, preventing them from the opportunity to present valid defenses to the petition or to explain the problems underlying the non-attendance. Even if the district is not represented, truancy hearings are routine for district officials, and so families are at a huge disadvantage.

TeamChild hears from families frequently about the confusing, and sometimes coercive, nature of the truancy process. For example, families in one jurisdiction reported that the truancy officers will sometimes seek out children at home to obtain signatures on an agreed order, along with a police escort. Another child complained of being suspended when he refused to sign the agreed order without first having the opportunity to talk with a lawyer about it. In another case, a youth was placed in an alternative school pursuant to a truancy court order. The alternative school did not have the bilingual services he needed, but no one checked into that prior to his placement there. For reasons like these, children need counsel in order to protect them from harms that flow from the lack of procedural safeguards in the truancy process.

Finally, it is worth noting that justifications for lack of counsel by the District and court below echo rationalizations rejected by the U.S. Supreme Court in *In Re Gault*. 37 U.S. 1, 18-19; 87 S. Ct. 1428, 1438-39 (1968). In *Gault*, the court granted children the right to counsel in juvenile offender matters, and explained:

Failure to observe the fundamental requirements of due process has resulted in instances which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfit prescriptions of remedies. Due Process is the primary and indispensable foundation of individual freedom. It is the basic and essential term of the social compact which defines the rights of the individual and delimits the powers which the state may exercise.

See id. at 20, 1439.

While Amici recognize that *Gault* was a criminal case with a risk of detention, children in truancy proceedings are only one short step away from detention. Moreover, the *Gault* Court clearly rejected the idea that children need not have lawyers because hearings are simple or routine, or because the process purports to operate in the best interests of the child.

4. Children in Other, Similar Civil Proceedings Have Lawyers Appointed From the Beginning of the Case

Children in other civil proceedings similar to truancy hearings are appointed counsel from the outset. A child in an At-Risk Youth (ARY) proceeding has a right to appointed counsel. *See* RCW § 13.32A.192(1)(c). Similarly, a child who is the subject of a Child in Need of Services (CHINS) petition also has a right to appointed counsel at all hearings. *See* § 13.32A.160(1)(c). Children also have a right to appointed counsel at all stages of an Involuntary Treatment Act proceeding. *See* RCW § 71.05.300(2). In the dependency context children have a right to request counsel from age twelve, and have a federal legal right to be

represented by a Guardian Ad Litem in those proceedings. *See* RCW § 13.34.100(6); 42 U.S.C. § 5106a(b)(2)(A)(xiii).²⁴ The underlying rationale for these statutory rights is that children ought to have a voice in these important proceedings - even in the context of ARY and CHINS cases where the risk of detention is nearly identical. As Justice Bridge explained in the context of urging courts to appoint counsel for children in a variety of kinds of cases, “[w]hen 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.” *In Re Parentage of L.B.*, 155 Wn.2d 679, 712, n. 29, 122 P.3d 161 (2005).

V. CONCLUSION

Appointing counsel for children in initial truancy proceedings is an important matter of due process: it is the best way to protect children’s rights to the most effective solutions to truancy, especially school based interventions; and it leads to more correct results. Appointment of counsel also lends legitimacy to the court process. As one commentator noted:

Appointing counsel allows the vulnerable to present their best arguments to decision makers whose authority is backed by the coercive power of the state. It reduces the risk of an arbitrary decision. Appointment of counsel increases the likelihood of an

²⁴ The only federal court to consider whether counsel for children in dependency matters is constitutionally required answered the question in the affirmative. *See Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp.2d 1353 (N.D. Ga. 2005).

outcome consistent with the child's expressed preferences by partially redressing the imbalance of power between children and the adults who make decisions about them. Appointing counsel thus simultaneously enhances the likelihood of a just decision and the integrity of the justice system.

Catherine Ross, *From Vulnerability to Voice: Appointing*

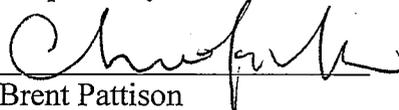
Counsel for Children in Civil Litigation, 64 FORDHAM L. REV.

1571 (1996).

Amici respectfully urge the court to reconsider *Truancy of Perkins*, and find that counsel is required by due process in any truancy hearing.

DATED this 15th day of August, 2008

Respectfully Submitted



Brent Pattison

WSBA No. 29695

Chori Folkman

WSBA No. 38591

Attorneys for Amici TeamChild and the
Committee for Indigent Representation and
Civil Legal Equality