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SUPREME COURT OF THE STATE OF WASHINGTON

BELLEVUE SCHOOL DISTRICT,

Petitioner,

v.

E.S.,

Respondent.

RESPONSE TO SELECTED ARGUMENTS OF AMICI

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A. ISSUE

Is counsel constitutionally required at the initial proceeding in a truancy action?

B. FACTS

No additional facts are relevant to this response.

C. SELECTED REPOSSES TO AMICI

For the most part, the points made in the amicus briefs have been covered by the District's supplemental brief. This brief is intended to succinctly respond to a few points or new analysis not already addressed by the District.

It should be noted at the outset that many of the points made by amici are uncontroversial. For example, the District agrees that truants are sometimes burdened by a variety of cognitive, medical, and sociological challenges, and that resolution of these underlying problems is difficult, and is often linked to reducing truancy. However, the broadest questions facing legislators over how to best solve those complex problems and to reduce truancy, are not facing this Court. Rather, the narrow question facing this Court is whether the constitution demands a certain approach.

1. FOREIGN STATUTES

The primary thrust of the Juvenile Law Center (JLC) brief is a lengthy examination of state statutes that provide counsel for truants. It is notable that JLC has not cited to a single state or federal court that requires counsel as a *constitutional* mandate at a point in proceedings before liberty is at risk. Thus, JLC's survey of statutes is of marginal relevance to the core constitutional question presented in this case. JLC cites a single Kentucky case that found a due process right to present closing argument in a truancy action where the truant was represented by counsel, T.D. v. Com., 165 S.W.3d 480, 483 (Ky.App.,2005), but the case does not hold that due process requires a lawyer, and Kentucky does not statutorily mandate a counsel. This lone case proves the novelty of the argument E.S. advances.¹

Even if statutory rights are examined, however, it is apparent that the majority of states do not have a truancy scheme like Washington's, where a petition may be filed without placing the juvenile at risk of detention.

¹ The JLC also mischaracterizes the District's position at one point. Br. of Amicus JLC at 12 (purporting to refute "the school district's claim that the protection of counsel at an initial hearing . . . is without precedent."). The District has never claimed that no state provides counsel to a truant, by statute, at an initial hearing. The District has claimed, however, that no state has found a *constitutional* right to counsel at a point before liberty is threatened.

JLC asserts, however, that "The Majority Of States Provide Counsel to Children Subject to Truancy Proceedings In Juvenile Court," suggesting that Washington is out-of-step with national norms. Br. of Amicus JLC at 3 (Heading A.1).² But, this assertion, and JLC's statutory survey, are misleading because -- regardless of what other states call truants, i.e., a "child in need of services," "status offender," "delinquent," or "dependent youth" -- many of these states appear to share the common feature that, under the legal systems for adjudicating a juvenile's "status" or "delinquency" or "dependency," the juveniles' liberty can immediately be at stake at the outset of the proceeding by entry of a dispositional order that, for example, removes the child from the home. *See* Br. of Amicus JLC at 3-9.

JLC's failure to control for the "liberty" variant dooms its survey. In essence, this section of their brief compares apples to oranges, and is not helpful in answering the question presented in this case.

Washington's truancy law is critically different in design and impact than are the laws of many of these states. Truants in Washington are not adjudicated as "delinquents," "dependents," or "children in need of

² JLC also asserts that "thirty-three states provide the right to counsel at all stages of truancy proceedings." Br. of Amicus JLC at 3. Only thirty state citations are included after that claim. *Id.* at 3-4. It is unclear whether this is a simple counting error or a failure to cite three states that should have been cited.

services," and no dispositional order is entered upon filing, so their liberty is not in jeopardy immediately upon filing a petition. Rather, Washington has a stand-alone truancy law and, under that law, liberty is imperiled *only* at the point that a court is considering contempt sanctions.

JLC's more salient comparisons come later in its brief when it discusses three states with statutory schemes admittedly more similar to Washington's scheme than the "majority" of states discussed early in the brief. *See* Br. of Amicus JLC at 9-14 (discussing Illinois, West Virginia, and Arkansas). JLC's separate analysis of these three states is tacit recognition of the fact that the "majority" of states analyzed on pages 3-9 are different from Washington. In any event, three states out of fifty states is a minority, not a majority, of states. And, the truancy laws in even these three states is somewhat different than Washington's truancy laws.

JLC appears to be correct that Illinois's truancy law is similar to Washington's in that liberty is not immediately imperiled when a petition is filed, but Illinois provides counsel for truants because they are considered a "minor in need of services" and *all* such minors are provided counsel. Br. of Amicus JLC at 10. In Washington, not all "children in need of services" (CHINS) are appointed counsel. RCW 13.32A.170. Thus, Illinois has simply made different policy choices than Washington on these matters.

West Virginia provides counsel early in truancy actions, but there are a number of differences in policy and procedure under West Virginia's truancy laws that might explain the difference. For instance, West Virginia grants juveniles the right to demand a jury trial on a truancy petition. See W. Va. Code Ann. § 49-5-9(5) (2009). And, the Petitioner (the government) *must* be represented by a prosecutor in status offense proceedings. See W. Va. Code Ann. § 49-5-12. It makes sense that counsel would be authorized for a juvenile where she can request a jury trial and where she *must* face off against a prosecuting attorney. Moreover, there is some ambiguity in the West Virginia statute regarding whether appointment of counsel is mandatory upon initiation of the proceedings. W. Va. Code Ann. § 49-5-7(a)(2) ("Upon the filing of the petition, the court shall set a time and place for a preliminary hearing as provided in section nine of this article and *may* appoint counsel" -- italics added).

Arkansas' law is also somewhat ambiguous. Compare Ark. Code Ann. 9-27-316 (a) - (c) (2009) (referring to a general right to counsel in juvenile proceedings) with Ark. Code Ann. 9-27-316 (d) ("In a proceeding in which the judge determines that there is a reasonable likelihood that the proceeding *may result in the juvenile's commitment to an institution in which the freedom of the juvenile would be curtailed* and counsel has not

been retained for the juvenile, the court shall appoint counsel for the juvenile" -- italics added). In any event, even assuming that Arkansas provides counsel at every hearing, the fact that Arkansas and two other states have taken a different approach than Washington does not suggest that the constitution requires that approach.

Finally, JLC's survey is deficient because it includes in its "majority," states that require appointment of a guardian ad litem, instead of a lawyer advocate. Br. of Amicus JLC at 3. As argued earlier by the District, the roles of guardians and advocate lawyers are different. Supp. Br. of Pet. at 22-24. Indiscriminately including both types of representation in the survey unfairly skews the results in favor of right to counsel argument.

For these reasons, JLC's survey of state statutes does not answer the question whether the due process requires counsel at an initial truancy proceeding, where liberty is not at stake.

2. RIGHT TO EDUCATION

A major focus of several of the briefs is the claim that counsel is necessary to secure E.S.'s right to education. The irony of this argument is that the very right to education that E.S. invokes is the same right to education that the legislature seeks to protect by establishing mandatory attendance and truancy laws. In effect, E.S. and amici are claiming that

E.S. needs a lawyer to protect her interests as she repeatedly, for over one year, attempts to thwart the state's efforts to secure that same interest. This is a much different -- and a much less threatening -- claim than is presented in most due process challenges. In most cases, a State actor is trying to limit or extinguish a right, and the question presented is what level of process is needed before the right is taken away.³ In this case, both parties appear to advocate for the *same* right -- a right to education -- but they differ on how best to effectuate that right. Under these circumstances, the "rights" portion of the Mathews v. Eldridge balancing test is far less compelling than it would be in most due process challenges because a right to education is not being taken away or limited, at all. The choice between whether counsel is necessary to advance children's educational interests, or whether some other strategy is superior, is a classic legislative choice, rather than a constitutional one.

3. AMICI'S ANECDOTES SHOULD BE STRICKEN OR DISREGARDED.

Amici relate anecdotes purporting to show abuses in truancy proceedings, and then recount how lawyers helped to curb these abuses.

³ The key right to counsel cases are illustrative. In Lassiter v. Department of Social Services of Durham County, N. C., 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981), and in In re Luscier, 84 Wn.2d 135, 524 P.2d 906 (1974), the State was trying to extinguish a parent's right to custody of her child. In Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), the government sought to deny disability benefits.

Br. of Amicus JLC at 17; Br. of Amicus TeamChild, et al. at 17. This case is an appeal, and the rules of appellate procedure apply to amici as well as to parties. To the extent that amici's anecdotes are unsupported by the record, they should be disregarded. RAP 9.1; 10.4(f). Moreover, amici's anecdotes do not cite to any particular court case by number, case citation, or jurisdiction. Thus, even if their stories were to be considered, they cannot be verified, analyzed or tested. And, even if particular cases were cited, this Court may not take judicial notice of files from some other Washington case, let alone from proceedings in some far-flung county or state. In essence, amici are simply testifying in their briefs.

Rather than rely on the anecdote-based picture painted by amici, the District respectfully asks this Court to focus on the record in this case, and on the studies commissioned by the Washington Legislature. See WSIPP Project Summary, available at <http://www.wsipp.wa.gov/current.asp?projid=100>.⁴ Those studies illustrate that E.S.'s case is really not typical at all. The vast majority of truancy actions in Washington are resolved by agreement, not litigation. Statewide, contempt motions are

⁴ For more background information on Washington's truancy programs, see Mary K. Yu, et al., The Becca Bill: The Rest of the Story, Washington State Bar Association, available at <http://wsba.org/media/-publications/barnews/archives/1999/jun-99-becca.htm>; S. Aos, et al., Keeping Kids in School: The Impact of the Truancy Provisions in Washington's 1995 "Becca Bill", Washington State Institute for Public Policy, Document No. 02-10-2201 (October, 2002), available at, <http://www.wsipp.wa.gov/rptfiles/-BeccaTruancy.pdf>.

filed in only 18 percent of cases where a truancy petition has been filed, and in "over half the school districts, contempt petitions are filed on fewer than 10 percent of youth." Tali Klima *et al.*, Washington's Truancy Laws: School District Implementation and Costs, Washington State Institute for Public Policy, Document No. 09-02-2201 (Feb. 2009), *available at* <http://www.wsipp.wa.gov/rptfiles/09-02-2201.pdf>. Cases are managed using a variety of contempt sanctions, and the counties differ greatly in the manner and frequency of their use of sanctions. Marna Miller, *et al.*, Washington's Truancy Laws in the Juvenile Courts: Wide Variation in Implementation and Costs, at 15, Washington State Institute for Public Policy, Document No. 09-10-2201 (Oct. 2009), *available at* <http://www.wsipp.wa.gov/rptfiles/09-10-2201.pdf>. This variation is likely due to differing expectations in distinct communities, and by different levels of community services (counseling, health services, tutoring) being funded in different communities. Some counties and districts have implemented partnerships for truancy reduction and dropout prevention, or use community truancy boards as an alternative to court intervention. Id. at 8-11. This diversity of community responses suggests a need for legislative and executive flexibility in responding to these complex issues. In such an environment, expansion of a constitutional doctrine beyond the limits of existing precedent is unwarranted, and could hamstring

legislative responses and actually harm efforts to address truancy in Washington.

D. CONCLUSION

For these reasons, the Bellevue School District respectfully asks this Court to reject the arguments of amici, and to hold that due process does not require that a lawyer be appointed for every juvenile who appears at an initial hearing under Washington's truancy statutes.

DATED this 8th day of January, 2010.

Respectfully submitted,

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Today I sent by electronic mail to counsel for E.S. and amici, a copy of the PETITIONER'S RESPONSE TO SELECTED ARGUMENTS OF AMICI, in Bellevue School District v. E.S., Cause No. 83024-0-1, in the Supreme Court of the State of Washington.

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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