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SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE TERMINATION OF

M.S.R. (D.O.B. 10/10/00) and T.S.R. (D.O.B. 10/10/00)

D.S.H.S., STATE OF WASHINGTON

Respondent,

v.

NYAKAT LUAK,

Appellant

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**AMICI CURIAE BRIEF OF COLUMBIA LEGAL SERVICES AND
THE CENTER FOR CHILDREN AND YOUTH JUSTICE**

IN SUPPORT OF APPELLANT

COLUMBIA LEGAL SERVICES

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ORIGINAL

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I. INTRODUCTION

This Court has unanimously found that, separate from their procedural due process rights, “foster children possess substantive due process rights that the State, in its exercise of executive authority, is bound to respect.” *Braam v. State*, 150 Wn.2d 689, 698, 81 P.3d 851 (2003). This Court further explained that “[t]o be reasonably safe, the State, as custodian and caretaker of foster children must provide conditions free of unreasonable risk of danger, harm, or pain, and must include adequate services to meet the basic needs of the child.” *Id.* at 700.¹ Despite making this powerful pronouncement, this Court upheld the dismissal of the children’s claims under federal and state statutes, finding that, although the statutes were created for the “especial benefit of foster children,” that “parties believing themselves aggrieved by DSHS’s failure to abide by these statutes, including a foster child through an attorney or guardian ad litem, will have an opportunity to raise the issue *in the context of a dependency action.*” *Id.* at 712 (emphasis added).

¹ Children’s rights to safety include “interests in accurate medical and mental health evaluations, appropriate education plans, caseworkers who are adequately trained and supervised, placements well matched to the child’s needs, caregivers with relevant information and adequate skills to address the child’s needs, and appropriate support services in placement to avoid disruptions and multiple moves.” Erik Pitchal, *Children’s Constitutional Right to Counsel in Dependency Cases*, 15 Temp. Pol. & Civ. Rts. L. Rev. 663, 680-82 (2006).

The experience of *amici*, who have significant expertise advocating for statewide improvements to our foster care system, indicate that such an opportunity is illusory, given that most children have no trained legal advocate to raise legal issues in termination of parental rights proceedings (TPRs) or in the underlying dependency proceedings that necessarily lead to the TPR. The viewpoint of *amici* is buttressed by the facts of this case and those of *In Re the Termination of D.R. and A.R.*, as well as from years of data reported through the *Braam* Settlement Agreement and from numerous task forces. Most children in our state, including M.S.R. and T.S.R., lack the opportunity to protect the numerous legal rights conferred by state and federal constitutional and statutory law because they do not have an attorney present prior to, during, and after a TPR. In no other context—and certainly not one where so many legal rights have been given to an individual in an involuntary legal proceeding—has our judicial system expected a lay advocate like a Court Appointed Special Advocate (CASA) or non-attorney Guardian ad Litem (GAL) to defend those rights. Nor can that be tolerated here.

II. IDENTITIES AND INTERESTS OF AMICI

The identities and interests of *amici* in the current matter are set forth in *amici's* Motion for Leave to File *Amici Curiae* Brief.

III. STATEMENT OF THE CASE

Amici adopt the Mother's statement of the case.

IV. ARGUMENT

A. Children's Rights are Not Revoked Upon the Filing of a TPR Petition

Each and every child involved in a TPR is in the temporary custody of the State which has the authority and duty to manage almost all aspects of their lives. While in the State's care, dependent children not only have substantive due process rights but other state and federal constitutional rights. These rights are at stake in every TPR, given that courts must determine whether termination is in a child's best interest.

The State's attempt to limit the reach of *Braam* to dependency proceedings, as well as its argument that dependencies and TPRs are largely unrelated, flies in the face of its own pronouncements as well as common sense. Supp. Resp't Br. at 14 ("*Braam* has nothing to do with the termination of parental rights, and a dependant [sic] child may be in the foster care system regardless of whether parental rights are terminated.").²

The rights described by this Court in *Braam* extend to "foster children"—a

² Dependencies and TPRs are generally considered closely linked proceedings. The Legislature named RCW Chapter 13.34 "The Juvenile Court Act – Dependency and Termination of Parent-Child Relationship." In 2001, the Legislature created a multidisciplinary Dependency and Termination Equal Justice Committee to examine problem areas in dependency and TPR cases, and the Administrative Office of the Courts issues an annual report called the "Timeliness of Dependency Case Processing Annual Report" in which it covers trends in dependency *and* TPR filings. *See* <http://www.courts.wa.gov/wsccl/docs/Timeliness%20of%20Dependency%20Case%20Processing%20Annual%20Report%202010.pdf>.

term which encompasses each and every child during the time they are placed out-of-home under RCW Chapter 13.34, including during a TPR. This Court did not find that the State can deny children of their constitutional rights simply by filing a TPR petition—such an outcome would result in an absurd vesting of power in the State.

Additionally, the State undercut this argument in *In Re the Termination of D.R. and A.R.*, Supreme Court No. 84132-2, in which this Court also considered children’s constitutional right to counsel in TPRs. In *D.R. and A.R.*, the State conceded on appeal that the failure to provide counsel to both children was in error. The State argued that, without counsel to raise *legal issues that arose in the dependency proceeding*, “the child’s legal position was not advocated [in the TPR].” App. A at 2-3. The State noted that it was not solely the “legal impact” of termination that required counsel for the children *in the TPR*, but also “the legal issues related to [A.R.’s] in-patient mental health treatment and designation and treatment as a sexually aggressive youth,” which, for A.R., occurred without the protection of an attorney *during the dependency*. *Id.* at 3. The State noted that “A.R. was not able to adequately present a legal argument to the court opposing termination because he did not have counsel.” *Id.* The State added that D.R.’s “significant legal concerns were not represented,” and that the CASA “did not profess that she had the ability

to advocate for the child's legal position or explain to the court the legal ramifications of the order the child opposed.” *Id.* at 2.

Here, the State contends that some, but not all, children have a due process right to counsel. Supp. Resp. Br. at 9 (“Thus, due process requires a trial court determine in each case whether counsel should be appointed.”).³ This argument cannot hold up in light of the fact that all children in TPRs face the possibility of a significant impact on their constitutional and statutory rights for many years. A TPR order commits a child fully to the State’s care from the termination until the child is adopted or ages out of the system. As such, it extends the impact of the TPR into the future—for possibly 21 years⁴—an impact which cannot be deemed *de minimis* and which has been called “the family law equivalent of the death penalty in a criminal case.” *In the Interest of F.M.*, 163 P.3d 844, 851 (Wyo. 2007). A TPR order can affect children’s myriad legal rights, including ordering or failing to order services and connections with relatives or providing or failing to provide for protections from harm.

³ *But see King v. King*, 162 Wn.2d 378, 390 n.8, 174 P.3d 659 (2007) (rejecting a case by case approach to appointment of counsel in dissolution proceedings because it would be costly, time-consuming, and might require appointment of counsel in order to analyze and present the case for appointment).

⁴ RCW 74.13.031 allows youth to continue receiving foster care services and remain dependent until they are 21 if they are completing high school or an equivalency program. Paradoxically, a criminal defendant charged with second degree murder faces less than 21 years in custody. Washington State Sentencing Guidelines Commission, *Statistical Summary of Adult Felony Sentencing Guidelines Fiscal Year 2010*, 1, 9 (2011). It would be unimaginable to have that person’s legal rights defended by a volunteer lay person.

Attorneys for children can ensure that TPR orders force the State to meet the needs of children, whose constitutional rights it is “bound to respect.” *Braam*, 150 Wn.2d at 698.

B. The Numerous Rights of Children at Stake in TPRs Must Be Protected by Attorneys

1. Dependent Children Have Numerous Rights Conferred By State and Federal Law

Children in TPRs face complex legal issues relating to the protection of their constitutional and statutory rights.⁵ The state statutory rights flow from the declaration in RCW 13.34.020, which precedes the Juvenile Court Act, and emphasizes a child rights to “basic nurture, health, and safety,” including “the right to a safe, stable, and permanent home and a speedy resolution of any proceeding under this chapter.” These rights are a “paramount concern” and “the rights and safety of the child should prevail” over the rights of parents. *Id.* All of these rights also bear on whether termination is in the child’s best interest. RCW 13.34.190(b).

Familial Connections. Children have substantial rights regarding connections with family members. For a child, termination can sever not only relationships with a parent, but also with siblings, grandparents, aunts, uncles, and other extended family. RCW 13.34.130(1)(b)(iii) gives

⁵ See App. B, which provides an overview of the rights and entitlements of foster children and a summary of the state’s obligations under the *Braam* Settlement Agreement.

foster children the right to the consideration of a placement with a sibling or half-sibling. However, the most recent *Braam* Monitoring Report indicates that more than one-third of children (35.5%) are separated from at least one out-of-home sibling and 18.8% of children are not placed with *any* of their out-of-home siblings. *Braam* Report, at 68-71.⁶ For those siblings placed apart, even though Department of Social and Health Services (DSHS) policy requires two or more monthly sibling visits or contacts, almost half (48.8%) of foster children do not have the required level of contact with their sibling. *Id.* at 72-73. Throughout and beyond the TPR process an attorney may seek to ensure that a child maintains relationships with siblings, either by advocating (in or out of court) for a result that mandates placement with other dependent siblings or ensuring that the TPR order mandates regular visits or contacts between siblings in different placements. Once the parents' rights have been terminated, only the child's attorney can enforce such an order given that the parents' attorneys are no longer involved in the ongoing dependency proceeding.⁷

Under state law, children that are removed from their homes also have a right to preferential placement with a relative in order to maintain

⁶ *Braam* Oversight Panel, *Braam Settlement Monitoring Report #10* (2011), available at <http://www.braampanel.org/MonRptMar11.pdf>. This report tracks the State's compliance with the *Braam* Settlement Agreement.

⁷ In fact, a child's attorney may be the only person able to enforce sibling visitation even prior to and during the TPR proceeding—parents' attorneys may not know whether sibling visits are taking place if the children are living in out-of-home care.

family relationships. RCW 13.34.130; RCW 74.15.020(2)(a). Attorneys may protect children's familial connections by advocating for placement with relatives during or after the termination trial.

Safe and Appropriate Placements. Children are entitled to safe and appropriate placements when they are removed from their home. RCW 13.34.138; RCW 13.34.145. However, just over half (53.6%) of children saw their caseworker each and every month for a private and individual face-to-face health and safety visit over the course of a year. *Supra* note 6, at 63-64. Furthermore, 9.7% of allegations of abuse and neglect against foster homes did not receive timely and thorough investigations by the State. *Supra* note 6, at 66-67.

Caseworkers cannot make informed decisions about children's placements if they do not visit children each and every month—a child's attorney can ensure the court is aware of DSHS's failure to provide monthly health and safety visits, which can impact the court's decision about the child's placement. An attorney can also inform the court during a TPR if the relationship between the child and caseworker is underdeveloped in a manner that would affect the evidentiary value of the caseworker's testimony. An attorney can also ensure that all referrals alleging abuse and neglect will receive timely and thorough investigation.

Safe and appropriate placements are especially important for youth with special needs, but the State routinely fails to ensure these children are in appropriate placements—29.5% of youth identified as sexually aggressive and 42.5% of children identified as physically assaultive or aggressive are placed with caregivers who have *not* received specialized training or who have a plan to address safety and supervision issues. *Supra* note 6, at 59-60. Meanwhile, 13.7% of medically fragile children are not connected to ongoing and appropriate medical care or placed with caregivers who have specialized skills or who receive consultation and ongoing training regarding their caretaking responsibilities for the medical condition. *Supra* note 6, at 61-62. An attorney can ensure that a child with special needs is matched with a safe and appropriate placement and that the caregiver has adequate training and skills to care for the child.

A child is also entitled to the fewest possible placements. RCW 74.13.290. However, 11.3% of children experience three or more placements within two years of entering care. *Supra* note 6, at 25-26. It is undisputed that some children, especially those who are legally free, experience dozens of placements. The filing of a TPR petition does not equate to automatic adoption or permanency. An attorney at termination can ensure that the TPR order requires permanency for a child shortly after the termination or at least minimizes the number of placements the child

will have to endure. The attorney can also advocate for permanency during the trial by bringing up factors that affect the child's ability to stay in one placement, for example, by clarifying that the State failed to provide services to the child that led to the continued disruption in placement.⁸

Timely Placements and Adoption. Children are entitled to placements that are "orderly and timely" and that are the least restrictive. 42 U.S.C. § 675. Children are also entitled to timely and permanent adoptions. 42 U.S.C. § 5111. Additionally, children age 14 or older may refuse consent to adoption. RCW 26.33.160. An attorney can ensure that the TPR is brought in a timely manner, that the outcome of the TPR will not equate to the child being in foster care for an unnecessarily long time, and that the proposed placement is the least restrictive option that will encourage permanence.⁹ An attorney can inform the court of the child's perspective on adoption and can counsel an adolescent client on the legal consequences of refusing or consenting to adoption. A child's perspective on adoption (and willingness to consent) is directly relevant to the TPR as

⁸ Given that children are entitled to practice their own religion, WAC 388-148-0430(3), attorneys can also ensure that respect of and connection to the child's religion is addressed in the termination order and in subsequent placements.

⁹ Andrew Zinn & Jack Slowriver, *Expediting Permanency: Legal Representation for Foster Children in Palm Beach County (2008)*, available at <http://www.chapinhall.org/research/report/expediting-permanency> (Finding that children with counsel experienced exits to permanent homes about 1.5 times more frequently than children without counsel. Children with counsel also moved from case plan approval to permanency at approximately twice the rate of those without representation.).

one of the considerations in the proceeding is whether continuation of the parent's legal relationship impedes the child's prospects for adoption.

RCW 13.34.180(1)(f).

Health and Safety. Foster children have the right to basic nurturing, including a safe, stable, and permanent home. RCW 13.34.020; *Braam*, 150 Wn.2d at 700. Additionally, children have the right to receive adequate food and clothing (WAC 388-148-0470(2)(b)), and medical and dental care (WAC 388-148-0470(2)(e)). Children also have the right not to be deprived of sleep (WAC 388-148-0470(2)(a)), subjected to cruel or humiliating discipline practices (WAC 388-148-0470(1)), forced to take medication other than that prescribed by a physician (WAC 388-148-0470(4) and (5)), and committed to an inpatient mental health facility without the approval of the legal guardian or supervising court (RCW 13.34.320).¹⁰ Unfortunately, many foster children in Washington, a population with significant health and mental health needs, do not receive adequate services. For example, 29% of children in out-of-home care do not have their health and educational plans developed within 60 days of placement, 41% of foster children do not have their health and education plans updated every six months, and 45.2% of foster children were not

¹⁰ In *D.R. and A.R.*, the State admitted that A.R.'s commitment to a long term inpatient hospital was one of the legal issues which required the protection of an attorney. App. A, at 3.

screened for mental health and substance abuse needs every 12 months.

Supra note 6, at 36-39, 42-43.

Attorneys can protect children's rights by ensuring that any proposed placement is safe and that their clients will have access to basic medical care. An attorney can also ensure that the termination order mandates periodic health screenings and any associated services. After TPR and until adoption, an attorney can continue to advocate for the protection of the child's health and safety. A TPR order makes the State the controller of a child's medical care—the parent no longer has any consent power, right to notice or records, and thus, only a child's attorney can ensure that the State does not violate a child's rights pertaining to medical or mental health treatment or improper placement.

Notification of Rights. Children are entitled to be informed of their rights during hearings, including their right to a speedy resolution of proceedings. RCW 26.44.105; RCW 26.44.053; RCW 13.34.020.

Adolescents 12-years-old or older are entitled to notice of any hearing associated with dependency/TPR proceedings. RCW 13.34.070; RCW 13.34.138; RCW 13.34.145. However, without an attorney to explain the notice or prepare the child for a hearing, such notice is meaningless—an unrepresented child will have difficulty engaging in or understanding the

purpose of the hearing.¹¹ An attorney can also ensure that the proceeding will be resolved as quickly as possible.

Privacy and Confidentiality. Children are entitled to make and receive private letters and phone calls unless the court has mandated otherwise (WAC 388-148-0422(1)). Children are entitled to keep their abuse and neglect records confidential. RCW 13.50.100. Attorneys can ensure that clients know with whom and in what manner they can communicate. An attorney can ensure that the child's records are kept confidential and that the record on appeal does not include information that would clearly identify the child.¹²

Education. Article 9, Section 1 of the Washington State Constitution declares that all children have the right to an education. The Washington Legislature sought to further protect the educational entitlements of foster children by mandating that children have the right to remain in the same school during the dependency and termination process whenever practical. RCW 74.13.550; RCW 13.34.130(4); RCW 13.34.136(2)(b)(v). Currently, more than half (52.3%) of youth in out-of-

¹¹ A Washington State pilot project which encouraged dependent youth to appear in court, found that: "In jurisdictions where a lawyer is provided for older youth, judges are uniformly convinced of the benefits of the practice, both to the youth and the court." Janet McLane, *Dependent Youth Interviews Pilot Program*, Olympia: Washington State Center for Court Research, at 18 (2010).

¹² As is common practice, the CASA in this case has not appeared in the appeal, leaving nobody to convey the children's best or stated interests to this Court.

home placements do not graduate from high school on time with a regular or adult Individualized Education Program diploma. *Supra* note 6, at 76-77. Attorneys can advocate during the dependency and TPR process for the educational rights of their clients, including the right to remain enrolled in the same school when moved from a placement. An attorney for a child with special education needs can ensure that the TPR order sets forth a surrogate parent as the child's parent will no longer have control over the child's educational decisions. *See* 20 U.S.C. § 1415.¹³

2. Only Attorneys Can Adequately Protect the Legal Rights Conferred Upon Children

As explained above, *amici's* efforts to reform the child welfare system have helped to uncover numerous areas where, despite rights enumerated in state or federal law, protection or implementation of those rights is lagging. The failure to appoint legal counsel to dependent children is a significant contributor as to why this occurs.¹⁴

¹³ *Amici's* experience is that most children who do not have attorneys during a successful TPR are left without a surrogate parent, and thus have no legal decision-maker in their special education proceedings.

¹⁴ When the State fails in its duty to protect these rights and interests, foster children suffer devastating developmental, educational, and other outcomes. *See* Joseph Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 *Am. Econ. Rev.* 1583, Abstract (2007) (citations omitted), also available at http://www.mit.edu/~jjdoyle/doyle_fosterlt_march07_aer.pdf, at 1 (Children in foster care are “far more likely than other children to commit crimes, drop out of school, join welfare, experience substance abuse problems, or enter the homeless population.”).

Children’s attorneys can protect their clients’ rights through legal mechanisms that are available to every other party in the TPR and dependency process. A child’s attorney can file pretrial motions, conduct discovery, put on and cross-examine witnesses, challenge the State’s experts, object to the introduction of prejudicial or inadmissible evidence, contest the filing of the TPR petition based on the State’s failure to make reasonable efforts or otherwise challenge the State to meet its burden. An attorney can develop a case theory and strategy, bolstered by the facts and the law, tailored to the child’s interests. An attorney can ensure the child’s interests are reflected in depositions, negotiations, pretrial conferences, or all hearings in which the child’s interests are at issue. An attorney can also request the child’s *in camera* testimony or a scheduling order that ensures the child’s meaningful presence during such hearings or trial.

Unlike children’s attorneys, non-attorney GALs and volunteer CASAs are unable to fulfill the requirement set forth by this Court in *Braam* to “raise the issue in the context of dependency actions.” 150 Wn.2d at 712.¹⁵ Though helpful in providing the juvenile court with information about the child’s life, GALs/CASAs are not trained to, nor is

¹⁵ DSHS has acknowledged that CASAs are not an adequate substitute for an attorney. *See Supp. Br. of Appellant*, at 12, n. 14. In addition, in 2010, the Washington Legislature amended RCW 13.34.100(6). As part of the legislation’s findings, the Legislature noted that “[a]ttorneys...have different skills and obligations than guardians ad litem and court-appointed special advocates, especially informing a confidential and privileged relationship with a child ...” 2010 Wash. Legis. Serv. Ch. 180 § 1(2).

it their role to, protect children's legal rights.¹⁶ GALs/CASAs are not required to know child welfare (or any) substantive law or any legal procedure. In contrast, under the Rules of Professional Conduct (RPC), attorneys are required to know the relevant laws and to advocate for their clients' interests. RPC 1.1 (Competency), RPC 1.3 (Diligence). Additionally, GALs/CASAs work for the court, not the child, and their primary function is to investigate, collect information about the child, and report this to the court.¹⁷ They are essentially witnesses, as opposed to attorneys who are ethically bound to assist a child in "[coping] with problems of law, make skilled inquiry into the facts, or insist upon regularity of the proceeding."¹⁸ GALs/CASAs are not required to ardently *advocate* for a child's position, counsel the child, negotiate on the child's behalf, or evaluate the child's legal options.¹⁹ Nor do GALs/CASAs owe

¹⁶ *Veazey v. Veazey*, 560 P.2d 382, 391 (Alaska 1977) ("[GAL] services are valuable supplements to, but not a substitute for, an independent advocate for the child") (citation omitted), *superseded by statute*, Alaska Stat. § 09.65.130, *as recognized in Deivert v. Oseira*, 628 P.2d 575, 579 n.3 (Alaska 1981).

¹⁷ RCW 13.34.105(1) requires a GAL/CASA to "investigate, collect relevant information about the child's situation, and report to the court factual information regarding the best interests of the child," as well as "meet with, interview, or observe the child, depending on the child's age and developmental status, and report to the court any views or positions expressed by the child on issues pending before the court." GALs/CASAs are also required to "monitor all court orders for compliance and to bring to the court's attention any change in circumstances that may require a modification of the court's order."

¹⁸ LaShanda Taylor, *A Lawyer for Every Child: Client-Directed Representation in Dependency Cases*, 47 Fam. Ct. Rev. 605, 614 (2009).

¹⁹ *See In re Frazer*, 721 A.2d 920, 923-24 (Del. 1998) (suggesting that the child's constitutional rights were violated in a TPR where child was denied an attorney to advocate for her stated interests and appointed a CASA instead).

the child a duty of confidentiality or privilege. Without a legally-trained eye, the GAL/CASA is likely to miss potentially vital legal issues.²⁰ Lacking this essential information could lead to an erroneous decision that could have “a traumatic, irreversible, and life-long effect on the child.”²¹

Simply put, non-attorney GALs/CASAs cannot adequately protect the complicated legal interests of children in TPRs, as these individuals “do not provide legal representation to a child.” *Kenny A. ex rel v. Perdue*, 356 F. Supp. 2d 1353, 1361 (N.D. GA 2005).²²

C. The Complete Lack of Standards for Appointing Counsel to Children Has Resulted in Broad Denials of Justice

As explained above in Section B, dependent children possess significant rights that are codified by state and federal law. Because this Court found in *Braam* that enforcement of these rights may only occur “in the context of dependency actions,” 150 Wn.2d at 712, children across Washington must have an equal opportunity to protect those rights.

²⁰ See RPC Preamble § 2. In *D.R. and A.R.*, the State agreed that the CASA did not understand “the legal impact termination would have on the [children].” App. A, at 2.

²¹ *Supra* note 18, at 609.

²² While the GAL is required to report an adolescent’s wishes regarding his/her desire to receive legal representation and make a recommendation about whether appointment of counsel is in the child’s best interests (RCW 13.34.100(6)), lay GALs/CASAs are not equipped to make a determination about whether a child needs a lawyer to protect his/her legal rights. The GAL may be predisposed to argue against counsel, given that counsel may advocate for a different viewpoint than the GAL. In addition, the court has to rely on information received from the parties and cannot make an independent investigation into a child’s need for legal counsel. This essentially puts an opposing party in charge of deciding whether a child should get counsel, which is constitutionally untenable.

Dependent children are provided counsel on a completely discretionary and arbitrary basis under state law. Currently, appointment of counsel depends on either (1) a child over 12 requesting legal counsel or (2) the GAL or court determining legal counsel is necessary. RCW 13.34.100(6)(f). Even if the child and the GAL advocate for the appointment of counsel, the court still has discretion to deny the request. *Id.* (“...the court *may* appoint an attorney to represent the child’s position.” (emphasis added)).

The statute fails to provide *any* criteria or guidance to the courts if and when the issue arises, resulting in substantial differences in appointment practices. A 2008 study found that even within individual counties “there is little consistency in perceptions relating to the practice of appointment of counsel.” Washington State Office of Civil Legal Aid (OCLA), *Practices Relating to the Appointment of Counsel for Adolescents in Juvenile Court Dependency Proceedings in Washington State*, 7 (2008). Very few counties use a uniform standard for appointing counsel—the report noted that “there is no discernable basis for decision-making in this area either statewide or in the counties.” *Id.* at 8-9. The considerable variation in appointment practices between judges subjects a child’s legal future to the biases of individual jurists rather than constitutionally sufficient criteria or standards.

The discretionary approach to the appointment of counsel created by RCW 13.34.100 has led to significant geographical variations—a child in one jurisdiction may be denied counsel, when in another jurisdiction the same child may be appointed a lawyer as a matter of course. For example, the OCLA study found that adolescents above age 12 (in King County) or children above age 8 (Benton-Franklin Counties) are almost always appointed counsel in dependency and TPR proceedings. *Id.* at 6. In many other counties, however, adolescents are appointed counsel in less than one-third of the cases. *Id.* at 6 (the report did not analyze how often children younger than 12 were appointed counsel). As one judge interviewed for the study put it, “[t]here seem to be two models for adolescent representation: ‘almost always’ and ‘almost never.’” *Id.* at 5. Thus, the appointment of legal counsel depends largely on where the child lives, not on the child’s need for legal representation.

As illustrated by the State’s concession on appeal in *D.R. and A.R.* that the trial court erred in denying counsel to those two children, the current approach to the appointment of counsel is highly problematic and results in the arbitrary denial of justice. The flawed legislative framework has created a system where county citizenship is the primary determinant of whether a child will receive legal representation. Despite the urging of *amici*, the Legislature has not, since the adoption of the Juvenile Court Act

Appendix A:

Motion To Reverse and
Remand

*In re Dependency of
D.R. and A.R.*

Court of Appeals
No. 27394-6-III consolidated
with No. 27395-4-III
(July 1, 2009)

COLUMBIA LEGAL
SERVICES

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SEATTLE OFFICE

NO. 27394-6-III

COURT OF APPEALS FOR DIVISION III
STATE OF WASHINGTON

In re Dependency of
D.R. and A.R.

MOTION TO REVERSE AND
REMAND CASE TO
SUPERIOR COURT

I. IDENTITY OF MOVING PARTY

Respondent Department of Social and Health Services asks for the relief designated in Part II.

II. STATEMENT OF RELIEF SOUGHT

The Department concedes that the trial court abused its discretion, based on the facts of this case, in failing or refusing to appoint counsel for A.R., a sexually aggressive youth, and for D.R., a child who was 12 years old and who requested counsel. The Department submits that this constitutes reversible error and, therefore, asks this Court to reverse and remand the case for new trial.

III. GROUNDS FOR RELIEF SOUGHT

The Department has reviewed the briefing of A.R. and now agrees with the mother and children that the trial court abused its discretion in denying legal counsel for A.R. and D.R.; that this error may well have

affected the outcome of the case; and, that on remand, counsel should be appointed to represent the legal interests of each child.

RCW 13.34.100(6) provides:

If the child requests legal counsel and is age twelve or older, or if the guardian ad litem or the court determines that the child needs to be independently represented by counsel, the court may appoint an attorney to represent the child's position.

The decision to appoint counsel for a child is within the sound discretion of the trial court. A trial court abuses its discretion when its decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Mayer v. Sto Indus. Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

During trial, D.R. turned 12 years old. She requested counsel, expressing that she disagreed with the termination action. Although her stability and emotional and social interests were represented by a guardian ad litem (hereinafter "GAL"), her significant legal concerns were not represented. The trial court relied solely on the GAL's and therapist's conclusion that the child did not need "legal" representation. Neither the GAL nor the therapist presented any evidence that they understood the legal impact termination would have on the child. The GAL did not profess that she had the ability to advocate for the child's legal position or explain to the court the legal ramifications of the order the child opposed. The result was

that the child's legal position was not advocated. In denying the motion to appoint counsel for D.R., the trial court abused its discretion.

A.R. also had significant legal issues that were separate from the "best interest" issues involved in his case. The legal issues related to his in-patient mental health treatment and designation and treatment as a sexually aggressive youth, as well as the legal impact of termination of his mother's rights. Like D.R., A.R. was not able to adequately present a legal argument to the court opposing termination because he did not have counsel. Based on the facts of this case, the trial court erred in failing to appoint counsel for A.R.

Moreover, the Department agrees that the error was not harmless. "A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the outcome of the case." State v. Smith, 131 Wn.2d 258, 263-64, 930 P.2d 917 (1997) (citation omitted) (quoting State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977)); see also Dennis J. Sweeney, An Analysis of Harmless Error in Washington: A Principled Process, 31 Gonz. L. Rev. 277 (1995-1996).

While it is not clear that the result would have been different had the children's legal positions been represented through their own counsel, the lack of counsel may have affected the outcome of the case.

Furthermore, under the termination and dependency statutes, children have the right to a speedy resolution of these types of proceedings. RCW 13.34.020; *In re Dependency of T.R.*, 108 Wn. App. 149, 154, 29 P.3d 1275 (2001). Because the Department concedes the court abused its discretion under the specific facts of this case by failing to appoint counsel to represent the legal interests of D.R and A.R., the best way to ensure a speedy resolution is to reverse and remand for further proceedings.

Accordingly, the Department asks the Court to accept its concession of error, reverse the termination order as it relates to appellant and remand for further proceedings, at which counsel should be appointed to represent D.R. and A.R. *Torp's Estate v. Town of Wilson Creek*, 138 Wash. 695, 697-698, 245 P. 32 (1926) (an appellate courts will usually "direct a reversal on a confession of error by a respondent without an inquiry into the merits of the controversy").

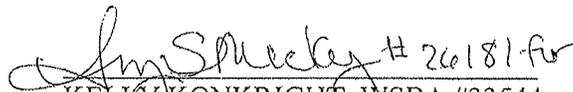
IV. CONCLUSION

The Department therefore requests that the Court reverse the Stevens County Superior Court order terminating the mother's parental rights to

A.R. and D.R. and remand the case back to the trial court for further proceedings at which the children are represented by legal counsel.

DATED the 1st day of July, 2009.

Respectfully submitted


KELLY KONKRIGHT, WSBA #33544
Assistant Attorney General

Appendix B:

The Rights of Children in Termination and Dependency Proceedings

Appendix B: The Rights of Children in Termination and Dependency Proceedings

Category	State and Federal Statutory Rights and Entitlements	The State's Obligation under the Braam Settlement Plan	The State's Noncompliance with the Braam Settlement Plan
<p><i>Foster Care Youth Services</i></p>	<p>WAC 388-148-0422(1): Children have the right to make and receive private letters and phone calls unless the court mandates otherwise.</p> <p>WAC 388-148-0470(3): Children have the right to contact the assigned social worker, legal representative or other individuals identified in the case plan and people providing therapeutic care as part of the case plan.</p>	<p>80% of children must not experience a change in school placement when they enter out-of-home care or change placement during the school year.</p> <p>70% of youth in out-of-home placement in grade 9 who remained in placement continuously through grade 12 must graduate from high school on time with a regular or adult (IEP) diploma.</p>	

	<p>WAC 388-148-0430(3): Children have the right to practice their own religion.</p> <p>RCW 26.44.105: Children over 12 are entitled to be notified of their legal rights by a CPS worker.</p>	<p>A multi-disciplinary staffing meeting must be held six months prior to a youth's exit from foster care to address issues related to transition to independence.</p>	
<p><i>Dependency/TPR Proceedings</i></p>	<p>RCW 13.34.070: A child age 12 and older is entitled to notice of any hearing associated with dependency and termination proceedings.</p> <p>RCW 13.34.145: A dependent child is entitled to a permanency hearing no later than 12 months from the beginning of the placement and every 12 months thereafter.</p> <p>RCW 13.34.136: Whenever a child is ordered removed from the home, the child is entitled to a permanency plan within 60 days from the time the supervising agency assumes responsibility for providing services or at the time of a hearing under 13.34.130, whichever occurs first.</p>		

	<p>RCW 13.34.138: A dependent child is entitled to a status hearing every six months from the beginning of the placement.</p> <p>RCW 13.50.100: A child has the right to keep his or her child abuse and neglect records confidential.</p> <p>RCW 13.34.100: A child has the right to a guardian ad litem until the court discharges the appointment or no longer has jurisdiction.</p> <p>RCW 13.34.100: Children 12 and older have the right to request an attorney during either a dependency or termination proceedings.</p> <p>RCW 13.34.136: A child engaged in a dependency or termination proceeding is entitled to a case plan that includes the goal of achieving permanence for the child.</p>		
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	<p>RCW 13.34.120: A child engaged in a dependency or termination proceeding is entitled to a social study report.</p> <p>RCW 13.34.020: Children have a right to a speedy resolution of any dependency proceeding.</p> <p>Adoption and Safe Families Act of 1997 (amending 42 U.S.C.A. § 675(1)): Children are entitled to “[a] plan for assuring that the child receives safe and proper care and that services are provided to the parents, child, and foster parents in order to improve the conditions in the parents’ home, facilitate return of the child to his own safe home or the permanent placement of the child, and address the needs of the child while in foster care, including a discussion of the appropriateness of the services that have been provided to the child under the plan.”</p> <p>42 U.S.C.A. § 5106a: A child is entitled to representation by a</p>		
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	<p>GAL in every case involving abuse or neglect (if the state pursues federal funding).</p>			
<p><i>Foster Care Placement</i></p>	<p>RCW 13.34.145: During a permanency planning hearing, a child is entitled to a court finding that the placement is safe and appropriate.</p> <p>RCW 43.43.837(3): A child is entitled to a foster parent that has undergone a fingerprint-based background check through the Washington State Patrol Identification and Criminal History Section and the FBI.</p> <p>RCW 26.33.160: A child who is age 14 or older has the right to refuse consent to adoption.</p> <p>RCW 74.13.260: Foster children are entitled to on-site monitoring of foster homes to assure quality care.</p> <p>RCW 74.13.290: A child is entitled to the fewest possible placements. Placement with a relative is the</p>	<p>The average monthly ratio of licensed foster care beds to children in licensed foster care must be at least 2.0.</p> <p>90% of children must experience two or fewer placements during an out-of-home episode of care.</p> <p>90% of social workers must have caseloads at or below the Council on Accreditation standards (8 child cases per caseworker for children with special needs, 18 child cases per caseworker for all other children).</p> <p>Children must not be placed in institutions not designed for placement of foster children, such as adult mental hospitals or detoxification facilities, where children and adults are commingled.</p> <p>Children must not stay overnight at DSHS offices or in</p>	<p><u>Placement Stability, Goal 1, Outcome 2 – Two or fewer placements:</u> 11.3% of children experience more than two placements during their out-of-home episode of care.</p> <p><u>Unsafe and Inappropriate Placements, Goal 1, Outcome 3—Safeguards for sexually aggressive youth:</u> 29.5% of youth identified as sexually aggressive are placed with caregivers who have not received specialized training or who have a plan to address safety and supervision issues.</p> <p><u>Unsafe and Inappropriate Placements, Goal 1, Outcome 4—Safeguards for physically assaultive/physically aggressive youth (PAAY):</u> 42.5% of children identified as physically assaultive or physically aggressive (PAAY) are placed with caregivers who have not received specialized</p>	

	<p>preferred option.</p> <p>RCW 74.13.330: A child is entitled to a foster parent that provides protection, care, supervision, and a nurturing environment.</p> <p>42 U.S.C. § 675: Foster children are entitled to “orderly and timely” placements. Foster children are also entitled to the least restrictive placement.</p> <p>42 U.S.C. § 5105: Children are entitled to abuse and neglect investigations that are appropriate, effective, and culturally sensitive.</p> <p>42 U.S.C. § 14601(b): Children have a right to be placed in a home with guardians who have been thoroughly checked for criminal history.</p>	<p>apartments or hotels.</p> <p>95% of children identified as sexually aggressive (SAY) pursuant to the statutory definition must be placed with caregivers who have received specialized training and have a plan developed to address safety and supervision issues.</p> <p>95% of children identified as physically assaultive or physically aggressive (PAY) pursuant to the statutory definition must be placed with caregivers who have received specialized training and have a plan developed to address safety and supervision issues.</p> <p>95% of medically fragile children must be connected to ongoing and appropriate medical care or placed with caregivers who have specialized skills or who receive consultation and ongoing training regarding their caretaking responsibilities for the medical condition.</p>	<p>training or do not have a plan to address safety and supervision issues.</p> <p><u>Unsafe and Inappropriate Placements, Goal 1, Outcome 5</u>—<u>Medically fragile youth</u>: 13.7% of medically fragile children are not connected to ongoing and appropriate medical care or placed with caregivers who have specialized skills or who receive consultation and ongoing training regarding their caretaking responsibilities for the medical condition.</p> <p><u>Unsafe and Inappropriate Placements, Goal 1, Outcome 6</u>—<u>Monthly visits</u>: 37-51% of children do not receive private and individual face-to-face health and safety visits from an assigned caseworker at least once every calendar month.</p> <p><u>Unsafe and Inappropriate Placements, Goal 2, Outcome 2</u>—<u>DLR/CPS (investigations of abuse and neglect referrals for children in out-of-home care)</u>: 9.7% of children in out-of-</p>
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<p><i>Foster Parent Role and Training</i></p>	<p>RCW 74.13.250: Children are entitled to foster parents that have undergone pre-service training.</p>	<p>90% of licensed caregivers must report adequate training for their roles and responsibilities.</p> <p>90% of licensed caregivers must report adequate support for their roles and responsibilities.</p> <p>90% of licensed caregivers must report adequate provision of information about the needs of children placed with them.</p> <p>The Department shall offer and provide accessible pre-service and in-service training to all caregivers sufficient to meet the caregiving needs of children in placement.</p>	<p>home care with referrals of abuse and neglect did not receive thorough investigation by the Division of Licensing Resources pursuant to CA (Children's Administration) policy and timeline and with required documentation.</p> <p><u>Foster Parent Training and Information, Goal 1, Outcome 1—Foster parent training:</u> 14.8% of licensed caregivers reported inadequate training for their roles and responsibilities.</p> <p><u>Foster Parent Training and Information, Goal 1, Outcome 2—Foster parent support:</u> 23.4% of licensed caregivers reported inadequate support for their roles and responsibilities.</p> <p><u>Foster Parent Training and Information, Goal 1, Outcome 3—Foster parent information:</u> 18.2% of licensed caregivers reported inadequate provision of information about the needs of children placed with them.</p> <p><u>Unsafe and Inappropriate Placements, Goal 1, Outcome 3—Safeguards for sexually</u></p>
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<p>aggressive youth: 29.5% of youth identified as sexually aggressive are placed with caregivers who have not received specialized training or do not have a plan to address safety and supervision issues.</p>			
<p><u>Mental Health, Goal 2, Outcome 1 – Health and education plans in the ISSP within 60 days of placement:</u> 29% of children in out-of-home care do not have health and education plans in their ISSPs within 60 days of placement.</p>	<p>90% of children must be screened by an appropriate health professional for immediate and urgent physical and mental health needs, including assessment for infectious and communicable diseases, within 72 hours of entering out-of-home care.</p>	<p>RCW 13.34.020: When the rights of basic nurture, physical and mental health, and safety of the child and the legal rights of the parents are in conflict, the rights and safety of the child should prevail. The right of a child to basic nurturing includes the right to a safe, stable, and permanent home and a speedy resolution of any dependency or termination proceeding.</p>	<p>Health and Safety</p>
<p><u>Mental Health, Goal 2, Outcome 2 – Health and education plans in the ISSP updated every 6 months:</u> 41% of children in out-of-home care do not have health and education plans in their ISSPs updated every 6 months.</p>	<p>90% of children in out-of-home care for 30 days or longer must have undergone Child Health and Education Track (CHET) screens within 30 days of entering care.</p>	<p>WAC 388-148-0420: Children have the right to be protected from all forms of child abuse and neglect.</p>	
<p><u>Mental Health, Goal 1, Outcome 1 – Initial health screening:</u> The data is not available regarding the number of children that are not screened by an appropriate health</p>	<p>90% of children must have a shared planning meeting (SPM) focusing on the CHET screening results within 60 days of entry into care.</p>	<p>RCW 13.34.060(1): Children have the right not to be held in detention solely because they are a foster youth.</p>	

	<p>RCW 13.34.060: Children have the right to a hearing in court within 72 hours (excluding Saturdays, Sundays and holidays) of being taken by CPS or the police.</p> <p>RCW 13.34.060: Children have the right not to be held in shelter care longer than 72 hours unless a court order has been entered for shelter care.</p> <p>WAC 388-148-0470(2)(b): Children have the right to receive adequate food, clothing and shelter.</p> <p>WAC 388-148-0470(2)(e): Children have the right to receive adequate medical and dental care.</p> <p>WAC 388-148-0470(4) and (5): Children have the right to be free of the administration of medication other than that prescribed by a physician or psychiatrist.</p> <p>WAC 388-148-0470(2)(a): Children have the right not to</p>	<p>be referred to the Infant Toddler early Intervention Program (ITEIP) within 2 workdays of identification of concerns about developmental delays from their CHET screens.</p> <p>90% of children in out-of-home care must have health and education plans in their ISSPs within 60 days of placement.</p> <p>90% of children in out-of-home care must have health and education plans in their ISSPs updated every 6 months.</p> <p>90% of children in out-of-home care must receive a comprehensive mental health assessment within 30 days of a request for an assessment.</p> <p>90% of children in out-of-home care will be screened for mental health and substance abuse needs every 12 months.</p> <p>95% of eligible children must receive services from a qualified mental health and/or substance abuse provider</p>	<p>professional for immediate and urgent physical and mental health needs, including assessment for infections and communicable diseases within 72 hours of entering out-of-home care.</p> <p><u>Mental Health, Goal 1, Outcome 2 – CHET within 30 days of placement:</u> 22% of children do not have the Child Health and Education Track (CHET) screen within 30 days of entering out-of-home care.</p> <p><u>Mental Health, Goal 1, Outcome 3 – Shared planning meeting focused on the CHET:</u> 48.1% of children do not have a shared planning meeting (SPM) focusing on the CHET screening results within 60 days of entering into out-of-home care.</p> <p><u>Mental Health, Goal 1, Outcome 4 – Referral to Early Support for Infant and Toddlers Program:</u> 14% of children age 3 and under in out-of-home care are</p>
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	<p>be deprived of sleep.</p> <p>WAC 388-148-0470(2)(d): Children have the right to take care of their own hygiene and toilet needs.</p> <p>WAC 388-148-0470(1): Children have the right to be free of cruel, unusual, frightening, unsafe or humiliating discipline practices.</p> <p>RCW 13.34.320: Children have the right not to be placed in an inpatient mental health facility without their parents' or legal guardian's approval or the permission of the court.</p> <p>WAC 388-148-0465(4): Children have the right to receive fair, reasonable, consistent discipline related to their behavior.</p> <p>CAPTA reauthorization act of 2010 (amending 42 U.S.C. § 5101): children have the right to <i>not</i> be abused or neglected.</p>	<p>within 30 days of the completion of an assessment.</p> <p>90% of children must have a shared planning meeting with DCFs to develop an appropriate alternative services plan when a child is found ineligible for or denied mental health treatment or substance abuse assessments or treatment services.</p> <p>85% of children must receive behavioral health treatment services from the same individual provider for each episode of mental health treatment and/or substance use treatment, except where necessary to maintain or improve the quality of care for the child.</p> <p>95% of children must receive a private and individual face-to-face health and safety visit from an assigned caseworker at least once every calendar month, with no visit being more than 40 days after the previous visit.</p>	<p>not referred to the Early Support for Infant and Toddlers Program within 2 workdays of identification of concerns about developmental delays from their CHET screens.</p>
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	<p>Adoption and Promotion Act of 2003 (modifying 42 U.S.C. § 637(b)): “consideration of children’s safety is paramount in child welfare decisions.”</p> <p>42 U.S.C.A. § 1396, 1397: Foster children are entitled to healthcare.</p>	<p>Children must not be victims of a founded report of child abuse or neglect by a foster parent of facility staff member.</p> <p>All referrals alleging child abuse and neglect of children in out-of-home care will receive thorough investigation by the Division of Licensing Resources (DLR).</p>	
<p>Relative Care Preference</p>	<p>RCW 13.34.130: A child removed from the home has a right to preferential placement with a relative.</p>		
<p>Sibling Relationships</p>	<p>RCW 13.34.130(3)(a): Children are entitled to have the court consider whether it is in the child’s best interest to be placed with, have contact with, or have visits with siblings.</p> <p>RCW 13.34.130(3)(a)(ii): Children have the right not to have parental visitation time reduced in order to provide sibling visitation.</p> <p>RCW 13.34.136: A child engaged in a dependency or termination</p>	<p>75% of children in out-of-home care must be placed with all siblings who are also in out-of-home care whenever possible.</p> <p>90% of children in out-of-home care must be placed with at least one sibling who is also in out-of-home care whenever possible.</p> <p>90% of children placed apart from their siblings must have two or more monthly visits or contacts with some or all of their siblings, unless it is</p>	<p><u>Sibling Separation, Goal 1, Outcome 1 – Placement with all siblings:</u> 35.5% of children in out-of-home care are not placed with all siblings who are also in out-of-home care.</p> <p><u>Sibling Separation, Goal 1, Outcome 2 – Placement with some siblings:</u> 18.8% of children in out-of-home care are not placed with at least one sibling who is also in out-of-home care.</p>

	<p>proceeding is entitled to a case plan that identifies the steps the agency plans to take to promote existing sibling relationships and/or facilitate placement together or contact in accordance with the best interests of the child.</p>	<p>contrary to the child's health, safety or welfare or would hinder reunification efforts.</p>	<p><u>Sibling separation, Goal 2, Outcome 1 – Sibling visits and contacts:</u> 48.4% of children placed apart from their siblings do not have two or more monthly visits or contacts with some or all of their siblings.</p>
<p><i>Independent Living</i></p>	<p>42 U.S.C. § 675: Children have a right to assistance in transitioning to adulthood.</p> <p>Promoting Safe and Stable Families Amendments of 2001 (P.L 107-133): Foster youth have a right to assistance in transitioning to independent living.</p>		<p><u>Services to Adolescents, Goal 2, Outcome 3—exit staffing for youth exiting to independence:</u> 73% of youth in foster care did not receive a multi-disciplinary staffing meeting six months prior to the youth's exit from foster care to address issues related to transition to independence.</p>
<p><i>Runaways</i></p>			<p><u>Services to Adolescents, Goal 3, Outcome 1—Runaways (frequency):</u> 2.7% of children ran from out-of-home care placements.</p> <p><u>Services to Adolescents, Goal 3, Outcome 2—Runaways (median number of days on runaway status):</u> Regional median numbers of days that children were on runaway status ranged from 8</p>

<p><i>Educational Attainment/ Continuity</i></p>	<p>RCW 74.13.550: Foster children have the right to remain enrolled in the schools they were attending at the time they entered foster care whenever practical and in the best interest of the child.</p> <p>RCW 13.34.130(4): Children have the right to remain in the same school that they attended prior to being removed from the home if it is practical and in their best interest.</p> <p>WAC 388-148-0510(1): Children must be provided with assistance to attend school.</p> <p>Washington State Constitution, Article 9, Sections 1 and 2: Children have the right to an education in Washington State.</p> <p>RCW 13.34.136(2)(b)(v): Children have the right to remain in the same school, if possible, when they move from one placement to another.</p>	<p>to 33 days.</p>	<p><u>Services to Adolescents. Goal 2. Outcome 2—HS graduation:</u> 52.3% of youth in out-of-home placements continuously from grade 9 through grade 12 do not graduate from high school on time with a regular or adult (IEP) diploma.</p>
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	<p>20 U.S.C. § 1411: Children with disabilities have a right to special education.</p> <p>Americans with Disabilities Act of 1990: Children with disabilities have a right to appropriate accommodations in school.</p> <p>Education of the Handicapped Amendments of 1986 (20 U.S.C. § 1470): Children with disabilities are entitled to information about their rights, responsibilities, and protections. Children also have a right to caregivers who have been adequately informed about these issues.</p>		
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