

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE
No: 605283

E.S.,
Appellant

vs.

Bellevue School District,
Respondent

Appellant's Opening Brief

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I. Introduction

E.S. was 13 years old when she was found to be truant after a hearing with no lawyer and no guardian ad litem, based on a truancy petition and supporting documents that her mother, who did not speak English well, could not read. Her mother was with her, but needed an interpreter to communicate with the court. The Court obtained from them a waiver of a hearing, heard no sworn testimony and received no physical evidence to support the truancy petition.

At no time did the Court conduct a colloquy designed to determine whether in fact E.S understood the nature of the proceeding, her rights, or the details of the agreement she was making.

The notice to the child's mother of the petition was not sufficient because it was not in a language she could read fluently. The assertions in the petition did not fully meet the standard of school intervention contemplated by the truancy statute. The Court never made a finding that "Court intervention and supervision are necessary to assist the school district or parent to reduce the child's absences from school," as required by the statute, RCW 28A.225.035.

The court did not meet fully its obligations under the statute to consider evidence or to advise the parent and child of their right to present

evidence at the hearing or of their rights available under RCW 13.32A, as expressly required by RCW 28A.225.035¹.

The hearing occupies slightly more than six pages of transcript, one of which contains greetings and the oath of the interpreter. The Commissioner told E and her mother that the matter was “set today for a preliminary hearing” and the school representative said, “I believe it will be an agreed matter, Your Honor.” Verbatim Record of Proceedings (“VRP”), 3/6/2006 at 1-2. The Court accepted the child's and her mother's agreement that there should be a court order, without either fully explaining what the order could mean or what defenses E might have had in the hearing. There was no lawyer available to advise E nor did the Court offer the services of a lawyer.

Based on the initial truancy finding obtained without evidence, counsel, or a contested hearing, the school district brought a petition that led to the court finding E in contempt. The court later denied a CR 60 motion to set aside the original finding.

¹ When a juvenile court hearing is held, the court shall:

....

(b) Notify the parent and the child of their rights to present evidence at the hearing; and

(c) Notify the parent and the child of the options and rights available under chapter 13.32A RCW [the Family Reconciliation Act].

Truancy proceedings can lead to a variety of sanctions on the child, including incarceration. The appellate courts recently have addressed a number of “status offense” cases in which judges have incarcerated children up to 60 days because of failure to comply with court orders. *See, e.g., In re Dependency of A.K.*, 162 Wn.2d 632 (2007). To require a 13-year-old child to represent herself in an adversarial court proceeding in which she is the respondent is a denial of fundamental fairness and is inconsistent with state law regarding children as parties. At the very least, there should be a case-by-case determination by the Court in truancy cases to find whether the child understands the proceedings and can represent herself effectively. E was not able either to understand fully the nature of the proceedings or how to defend herself. The court’s failure to vacate the order establishing the truancy finding against her should be reversed.

II. Assignments of Error

1. The Superior Court erred when it found that there was no due process right to counsel at an initial truancy hearing for a 13-year-old child when the hearing engaged the fundamental right to education and the truancy finding could lead to incarceration in a later proceeding.
2. The Superior Court erred and violated due process protections when it failed to conduct a case specific assessment of the need to

appoint counsel at an initial truancy hearing for a 13 year old sixth grade student, who had no effective assistance either by counsel or through her limited English proficient parent, in a proceeding which affected her fundamental right to education and led to a finding that could result in incarceration.

3. The Superior Court erred and did not meet statutory requirements when it failed to exercise discretion to appoint counsel at an initial truancy hearing for a 13 year old sixth grade student, who had no effective assistance either by counsel or through her limited English proficient parent, in a proceeding which affected her fundamental right to education and led to a finding that could result in incarceration.

4. The Superior Court erred and violated due process protections when it did not properly inform the child's mother or the child of their rights.

5. The Superior Court erred in denying E.S.'s Cr 60 Motion to Set Aside the Truancy Finding because there was an irregularity in obtaining the order (CR 60 (b)(1) and because there were erroneous proceedings against a minor (CR 60(b)(2) and error in judgment shown by a minor, (CR 60 (b)(10), when the School District's truancy petition did not set out the steps taken to reduce

the child's absences as required by statute or give adequate notice to the mother and the Court did not provide counsel at the initial truancy hearing under the specific circumstances of this case.

6. The Superior Court erred when it found that the truancy petition met the statutory requirements even though the district did not provide written notice in the mother's primary language, did not provide tutoring to the child or take steps to assist the parent or child to obtain supplementary services that might eliminate or ameliorate the cause or causes for the absence from school.

Issues Pertaining to Assignment of Error 1

Whether the Superior Court erred when it found that there was no due process right to counsel at an initial truancy hearing for a 13-year-old child, when (1) under Washington law, a child is presumed incapable of representing herself, and (2) the hearing engaged the fundamental right to an education and (3) the truancy finding could lead to incarceration in a later proceeding.

Issues Pertaining to Assignment of Error 2

Whether the Superior Court erred and violated due process protections when it failed to conduct a case specific assessment of the need to appoint counsel at an initial truancy hearing when (1) the child was only 13 years old and had completed the sixth grade,

and (2) the child's mother did not speak English well, and (3) the child's mother had been notified only in English of her daughter's absences, and (4) the fundamental right to education was implicated and (5) the truancy finding could lead to incarceration.

Issues Pertaining to Assignment of Error 3

Whether the Superior Court erred when it failed to exercise discretion to require counsel as contemplated by RCW 28A.225.035(11) when the language of the truancy statute implies that the Court should use discretion to determine whether to require counsel.

Issues Pertaining to Assignment of Error 4

Whether the Superior Court erred when it did not properly inform E.S. or her mother of their rights, when 1) the Commissioner failed to conduct a colloquy on E's understanding of her right to a hearing and (2) the Commissioner failed adequately and thoroughly to inform E and her mother that they were agreeing that the school had met its statutory requirements to reduce E's absences, and (3) the Commissioner failed to explain the possible repercussions of agreeing to a court order to attend school, and (4) the Commissioner failed to determine whether E understood the risk and consequences.

Issues Pertaining to Assignment of Error 5

Whether the Superior Court erred when it denied E's Cr 60 Motion to Set Aside the Truancy Finding when (1) E., a minor, made an error in judgment by "agreeing" to the Order; (2) there was an irregularity in the District's truancy petition because the district did not meet the statutory requirements in taking steps to reduce E's absences, and (3) there were erroneous proceedings against a minor because the Court did not provide E with an attorney at her initial truancy proceeding, although E was 13-years-old and her mother was unable to assist her.

Issues Pertaining to Assignment of Error 6

Whether the Superior Court erred when it found that the District's truancy petition met the statutory requirements in taking steps to reduce E's absences when (1) the District communicated with the mother not in her primary language but only in English; (2) the school did not provide tutoring to the child, and (3) the school did not take steps, other than to refer her to counseling, to assist E or her mother in obtaining supplementary services that might have eliminated or ameliorated the causes for E's absence from school.

III. Statement of the Case

On March 1, 2006, Vice Principal Diane Tuttle filed a truancy petition against E.S. and her mother. Clerk's Papers ("CP") 1. The school noted the need for interpreter services in Bosnian (the mother's primary language is Serbo-Croatian Bosnian). E was 13 years old. CP 1. The school indicated that it had met its obligations under RCW 28A.225.020 to inform the child's custodial parent of unexcused absences, schedule a conference with the custodial parent regarding unexcused absences, and to take steps to eliminate or reduce the child's absences. The school specified that it had met with E and her mother on two occasions. There is no indication that an interpreter was present at either meeting. CP 3.

The school attached to the petition copies of five letters, in English, sent to Mrs. S. concerning her child's absences to the Court. CP 2 at 4-7. In the letter sent on January 31, 2006, the Vice Principal stated specifically to Mrs. S., "Your *understanding*, assistance, response and cooperation in this important matter are greatly appreciated." CP 2 at 4 [Emphasis added]. The district recounted several telephone conversations, apparently all without an interpreter. CP 1. On February 14, 2006, therapist Judy Jindra went to E's apartment to pick her up, and E ran out of her apartment ten minutes before the therapist arrived and hid in the apartment building. CP1.

The district claimed that it had taken additional action to eliminate the child's absences as required under RCW 28A.225.020 (1)(c). CP 1. The only action that the school claimed it had done to "eliminate or reduce the student's absences" was "provided tutoring." CP 1. However, the school provided no evidence of the tutoring, and in fact no tutoring was ever provided. (See fn. 7, *infra* at p.44.)

The district had taken no other actions listed under RCW 28A.225.020 (c) to help eliminate the child's absences, which include adjusting the child's school program or school or course assignment, providing more individualized or remedial instruction, providing appropriate vocational courses or work experience, requiring the child to attend an alternative school or program, or, other than meetings with a counselor, assisting the parent or child to obtain supplementary services that might eliminate or ameliorate the cause or causes for the absence from school. CP 1.

The district also asserted that it was requesting to bypass the Attendance Workshop Programming provided by King County Court because E had not been in school for an extended period of time. CP 4. On the Truancy Transmittal Cover Sheet, the district represented that the "School District feels that due to exceptional circumstances, referral to truancy class or CTB will prove inadequate to ensure attendance"; the

“exceptional circumstance” appeared to be an extended period of absences. CP 3.

On March 6, 2006, E.S. and her mother appeared in court. The Court did not conduct a colloquy to determine whether the child understood the nature of the proceedings or possible defenses, or that she was able to communicate effectively and to represent herself. The Court did not address the facts alleged in the petition and the circumstances of the child, nor did it address how its order would “most likely cause the juvenile to return to and remain in school....” *See* RCW § 28A.225.035.

At the hearing, the Commissioner first asked Glenn Hasslinger, the District Representative, if it was an agreed matter, and Mr. Hasslinger indicated that he believed that it was. VRP 3/6/2006 at 2. The Court had the following exchange with the 13-year-old respondent and her mother:

THE COURT: You were both entitled to have a hearing this morning if you do not agree that there should be a court order that requires E. to go to school. And a hearing means that I would swear both of you under oath and hear from both of you why you did or did not think the order should be put in place. I would also swear Mr. Hasslinger in under oath and listen to what he wanted to say in response. Then I would decide based on the law and the facts whether there was a basis to enter the order. So, do you agree that there should be a court order in place?

MRS. S.: Yeah.

THE COURT: And how about you, E.?

E.S.: Yeah -- yes, Your Honor.

VRP 3/6/2006 at 2-3. The Court then told the child and her mother that

the order would be in place for a year and that if E did not go to school,

...the School District can bring a motion for contempt. At the contempt hearing if the Court finds that you have not been going to school and you do not have a valid reason, then the Court can enter sanctions against you.

VRP 3/6/2006 at 3. At this point, the hearing had lasted a little over four minutes. Initial Truancy Hearing, *Bellevue Sch. Dist. v. E.S.* (March 3, 2006) (recording on file with counsel). The Commissioner did not explain that agreeing to a court order was not necessary, what the consequences of contempt could be, or that in agreeing to the order E.S. and her mother were conceding that E.S. was truant and that the school district had done everything it was statutorily required to do. VRP 3/6/2006 at 2-3. It was not until *after* E.S. and her mother had agreed that there should be a court order for E.S. to attend school, and the Court had assumed jurisdiction for one year, that the Court explained possible consequences for being found in contempt of the order. VRP 3/6/2006 at 3.

The Commissioner moved directly from speaking about sanctions to asking about E's stomach pains, without a colloquy to determine that E understood what sanctions she might face:

THE COURT: This order will be in place for one year. And it does mean that if you do not go to school, that the School District can bring a motion for contempt. At the contempt hearing if the Court finds that you have not been going to school and you do not have a valid reason, then the Court can enter sanctions against you. Those sanctions

usually start out as either evaluations, community service, book reports. But if the truancy continued, we would be looking at house arrest, work crew, and possibly detention...And I noticed in here that you were complaining about stomach pain?

E.S.: Yes.

THE COURT: And is that the reason why you're not going to school?

E.S.: Well, some of the time. Uhm, some of the time, Your Honor, it hurts really bad that I can't go to school, so that's why I actually refused to go to school because it hurts really bad. And some of the time, Your Honor, I just -- I get so used to staying home that I just wanted to stay.

VRP 3/6/2006 at 2-4.

The entire hearing lasted slightly over 10 minutes, with approximately half of the time devoted to interpretation. Initial Truancy Hearing, (March 3, 2006) (recording on file with counsel). No counsel was provided, and E's signature does not appear on the order. CP 7.

The court entered an order, finding that the student had failed to attend school as required by the statute and that the school had taken steps to eliminate or reduce the child's absences. VRP 3/6/2006 at 7.

On May 31, 2007, the respondent's counsel filed a Motion to Set Aside the Truancy Finding. CP 47. The motion was denied on June 26, 2007. CP 55. The Commissioner said that she had looked at the initial hearing and found that the statute's requirements had been met. VRP 6/26/2007 at 27. The respondent's counsel filed a Motion for Revision. CP 56. The Superior Court denied the motion on July 27, 2007. CP 59.

IV. Summary of Argument

E.S. was 13 years old and under Washington law, is presumed incapable of understanding legal issues or representing herself. She did not have a lawyer or guardian ad litem at her hearing. Her mother, who did not speak English well, could not act to help her. The truancy hearing statute implies that the Court should use its discretion whether to require counsel. The trial court did not exercise any discretion to appoint either a lawyer or a guardian for the child.

Analogy to United States Supreme Court criminal case law makes clear that unless counsel is provided at the first hearing, incarceration may not be imposed at a contempt proceeding. Recent Washington case law on the right to counsel in civil cases also suggests a distinction from prior case law denying the right to counsel in truancy preliminary hearings.

The original petition for truancy was deficient, there was inadequate notice to the parent, the procedure followed by the school district did not comply fully with the statute, and no counsel was provided at the original finding of truancy. RCW 28A.225.020(1)(c) provides:

These steps shall include, where appropriate, 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. If the child's parent does not attend the scheduled conference, the conference may be conducted with the student and school official. However, the parent shall be notified of the steps to be taken to eliminate or reduce the child's absence.

The order finding truancy and the resulting contempt findings resulted from irregularity in obtaining a judgment or order, specifically, the court's failure to provide counsel for a child facing the possibility of incarceration resulting from a truancy finding, which was an abuse of discretion. E should also be relieved from the effect of the order because the order flowed from erroneous proceedings against and an error in judgment shown by a minor, that is, proceeding without requesting counsel in the original proceeding.

Failure to provide counsel and to require proper notice or a sufficient petition resulted in a denial of due process and the order should be set aside.

V. Argument

A. THE COURT ERRED IN FINDING THAT THERE IS NO RIGHT TO COUNSEL IN AN INITIAL TRUANCY HEARING.

The Court should recognize a right to counsel in a preliminary truancy hearing because statutes require that children who are parties should have help in court hearings, because due process requires it, and because the initial finding can lead to incarceration in a later proceeding. There is no question that there is a right to counsel in truancy contempt proceedings. "When an adjudication may result in incarceration, the accused has the right to counsel under the state and federal constitutions. This right applies equally in contempt proceedings." *State ex rel. Schmitz v. Knight*, 2007

Wash. App. LEXIS 3293 (2007), footnote omitted. This right should apply to the hearings that can lead to contempt proceedings. Because the holding of *Truancy of Perkins*, 93 Wn. App. 590 (1999) is inconsistent with this fundamental principle and current law, it should be reconsidered.

1. The Truancy Hearing Statute Implies That the Court Should Make an Individual Assessment of the Need for Counsel for the Child

The truancy hearing statute implies that a court should exercise discretion in deciding whether to proceed without counsel in an initial truancy proceeding, and the trial court in this case abused its discretion in not doing so. RCW 28A.225.035 (11) provides:

The court *may permit* the first hearing to be held without requiring that either party be represented by legal counsel, and to be held without a guardian ad litem for the child under RCW 4.08.050. At the request of the school district, the court shall permit a school district representative who is not an attorney to represent the school district at any future hearings.
[Emphasis added.]

This provision does not prohibit provision of counsel, but implies that it is a matter for the court's discretion, as the court *may* permit the hearing to be held without counsel or without a guardian ad litem.² The statute can

² Division Two of the Court of Appeals recently briefly discussed the linking of “may” with the exercise of discretion. In *In re Marriage of Eklund*, 2008 Wash. App. LEXIS 391 (2008), the Court distinguished between statutorily mandated actions and discretionary ones by the trial court in a parenting plan contempt proceeding. The court wrote, “At its discretion,” the trial court may also order the parent to be imprisoned, citing RCW 26.09.160(2)(b).

be read to require an affirmative determination that neither counsel nor a guardian is required. In this case no such finding was made. The statute does not permit an automatic waiver of these protections.

The Washington Supreme Court, in discussing the role of guardians, noted that children “are unable to pursue an action on their own until adulthood, RCW 4.08.050, and they generally lack the experience, judgment, knowledge and resources to effectively assert their rights.” *De Young v. Providence Med. Ctr.*, 136 Wn. 2d 136,146 (1998).

Discussing the application of RCW 4.08.050 to a case involving children defendants in a civil suit, the court of appeals wrote:

...the rule is that a minor must be represented by a guardian ad litem, or the judgment against him may be voidable at his option. Whether the minor will be allowed to avoid the judgment or whether the judgment is allowed to stand depends upon whether the court finds that his interests were protected to the same extent as if a guardian ad litem had been appointed at the time the action was instituted.

Newell v. Ayers, 23 Wn. App. 767, 772 (1979), citations omitted, review denied, *Newell v. Ayers*, 92 Wn.2d 1036, (1979).

In a case cited by the *Newell* court, the court, discussing the need for children to have guardians in an estate case, wrote: “It is a cardinal principle in the administration of justice, that no man can be condemned or divested of his right, until he has had the opportunity of being heard.” *Mezere v. Flory*, 26 Wn.2d 274, 278 (1946). As the children did not have a

guardian, they had not been heard.

In a truancy case, a child needs a lawyer, not a guardian. “The participation of counsel on behalf of all parties subject to juvenile and family court proceedings is essential to the administration of justice and to the fair and accurate resolution of issues at all stages of those proceedings.” The Institute of Judicial Administration-American Bar Association Juvenile Justice Standards, Standards Relating to Counsel for Private Parties 1.1 (1996). “However engaged, the lawyer’s principal duty is the representation of the client’s legitimate interests....” *Id.*, 3.1(a). And, “In general, determination of the client’s interests in the proceedings, and hence the plea to be entered, is ultimately the responsibility of the client after full consultation with the attorney.” *Id.*, 3.1 (b)(i).

In effect, E.S. had no representation and could not be expected to represent herself. At a minimum, as there was no attorney or guardian ad litem, the judgment of truancy should be voidable on the child’s motion.

The Washington Supreme Court has reached a similar conclusion in a civil commitment case under the statutory scheme that existed prior to the implementation of RCW 71.05. The Court reversed a commitment of a 12-year-old child because he had no representation at the commitment hearing and thereby was denied due process. *State ex rel. Richey v. Superior Court of State*, 59 Wn.2d 872, 878 (1962).

Because the child was only twelve years of age, and could not have known of his right to request an attorney to represent him, “it was the duty of the guardian to make the request for him.” *Richey*, 59 Wn.2d 872, 878.

It was an abuse of discretion for the trial court to fail to consider the ability of a 13-year-old child to understand what was happening and to determine whether the child needed counsel.

2. As a Matter of Due Process, The Court Should Require a Case by Case Assessment of the Need for Counsel for the Child.

Both the United States and Washington Constitutions require that liberty and property not be taken without due process. Article 1, Section 3 of the state constitution provides: “No person shall be deprived of life, liberty, or property, without due process of law.” The Fifth Amendment to the U.S. Constitution provides in part: “...nor shall any person ... be deprived of life, liberty, or property, without due process of law....”

This Court should find that because of her age, her level of education, and the restricted ability of her mother to assist her in the hearing, due process required that the trial court should have provided counsel for E.S.

This Court has held that there is a case by case right to counsel in Department of Corrections administrative hearings for people accused of not complying with their sentencing order. *State v. Ziegenfuss*, 118 Wn. App. 110, 116 (2003), *review denied*, 151 Wn.2d 1016 (2004). This

holding logically supports a similar right for children in truancy hearings.

The appellant recognizes that the state Supreme Court has rejected a case-by-case analysis of the right to counsel in dissolution proceedings as “unwieldy, time-consuming, and costly.” *In re Marriage of King*, 162 Wn.2d 378, 390, fn. 11 (2007). Such a process would be less unwieldy in a truancy case, and the court, because of the age of the children and the policy factors underlying court protections afforded children, could establish a presumption of appointment of counsel. This presumption would be consistent with the guardian ad litem statute discussed above. Because the truancy finding can lead to incarceration, it also is consistent with the concept articulated by the Court. “Outside of cases involving a risk to a fundamental liberty interest, there is a presumption of a right to counsel only where physical liberty is at stake.” *King*, 162 Wn.2d 378, 392, fn. 13, quoting *In re Grove*, 127 Wn.2d 221, 237 (1995).

The reasoning in the United States Supreme Court decision in *Alabama v. Shelton*, 535 U.S. 654 (2002), holding that a person cannot be incarcerated on a probation revocation if he did not have or validly waive counsel at the hearing that put him on probation, supports the proposition that a truant cannot be sanctioned in a contempt hearing if she did not have counsel at the hearing that found her to be truant.

a. The Trial Court Erred When It Failed to Consider *Truancy of*

Perkins in Light of Alabama v. Shelton and Ziegenfuss.

The trial court relied on *Truancy of Perkins*, 93 Wn. App. 590, 596 (1999), *rev. denied*, 138 Wn.2d 1003; 984 P.2d 1033 (1999), to find that there is no right to counsel in truancy preliminary proceedings. CP 59. In *Perkins*, the Court held that two sisters were not entitled to an attorney at their initial truancy hearing because there was no risk that they would be detained immediately following that preliminary hearing. *Id.* at 595-96 . The court found that at the initial hearing, “appellants were potentially subject to an order requiring them to attend school, change schools, or appear before a community truancy board”, and that these results were not significant enough to warrant counsel. *Perkins*, 93 Wn. App. 590, 596. The court addressed *In re Welfare of Myricks*, 85 Wn. 2d 252, 255, 533 P.2d 841 (1975), discussed in *King, supra*, and described its holding as follows: “parent entitled to appointed counsel in a dependency proceeding that only temporarily removes a child from the parent but has a substantial likelihood of eventually leading to termination of parental rights”. *Truancy of Perkins*, 93 Wn. App. 590, 595. The court rejected the application of *Myricks*, finding the issues in truancy preliminary hearings to be less important. It did not consider that a truancy preliminary hearing has a substantial likelihood of leading to a contempt proceeding, at which the right to counsel is established.

The commissioner in E's case did not address the argument that *Perkins* should be read in light of *Alabama v. Shelton*, supra, *Tetro v. Tetro*, 86 Wn.2d 252, 253 (1975), and *State v. Ziegenfuss*, supra, and the court on revision did not reconcile the cases.³ The judge on revision erroneously found *Shelton* to be inapplicable, repeating the prosecutor's assertion about the informality of the proceeding, that there is "no formal direct or cross examination". CP 59. This is at odds with the statute and with the statement of the commissioner that E.S. could have had a hearing with sworn testimony by witnesses. VRP 3/6/06 at 2-3.

Reading *Perkins* in light of *Shelton*, *Tetro*, and *Ziegenfuss*, it is clear that the youth's liberty interest is at stake after the initial finding of truancy and that counsel is required. The *Perkins* court did not have the benefit of the *Shelton* and *Ziegenfuss* cases.

In *Tetro*, the Court stated that when a proceeding is civil in form but criminal in nature, representation is required as part of due process.

Absent special statutory guarantees, the appointment of counsel is constitutionally required only *when procedural fairness demands it*. In proceedings civil in form but criminal in nature - - such as juvenile delinquency or mental commitment hearings - - representation is clearly part of due process. *In re Gault*, 387 U.S. 1, 18 L. Ed. 2d 527, 87 S. Ct. 1428 (1967); *Heryford v. Parker*, 396 F.2d 393 (10th Cir. 1968); *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972). But in cases where the

³ The Commissioner indicated that she did not realize that the Appellant's brief had addressed *Perkins*. VRP 6/26/2007 at 28.

individual's right to remain unconditionally at liberty is not at issue -- such as child neglect or parole revocation hearings -- *the right to counsel turns on the particular nature of the proceedings and questions involved*. Compare *In re Myricks*, 85 Wn.2d 252, 533 P.2d 841 (1975) and *In re Luscier*, 84 Wn.2d 135, 524 P.2d 906 (1974) with *Gagnon v. Scarpelli*, 411 U.S. 778, 36 L. Ed. 2d 656, 93 S. Ct. 1756 (1973).

86 Wn.2d at 253-254 [emphasis added]. *King, supra*, does not deviate from this analysis.

The Appellant recognizes that the Court of Appeals, pre-*Shelton*, found that “[t]he liberty interest at stake in initial truancy petition hearings does not require the due process of appointed counsel.” *Perkins*, 93 Wn. App. at 596. Counsel asks the Court to reconsider the analysis both in light of recent cases and in consideration of the nature of the proceedings and the questions involved.

In *Shelton*, the United States Supreme Court held that “a finding by the Court that may end up in the actual deprivation of a person’s liberty may not be imposed unless the defendant was accorded the opportunity to be represented by counsel at that initial hearing.” 535 U.S. at 658. Under the analysis of *Shelton*, a finding of truancy that may end up in incarceration based on contempt may not be imposed unless the child is accorded the opportunity to be represented by counsel at the initial hearing. The holding in *Shelton* invalidates the holdings of *Perkins* and

Tetro, insofar as they would deny the right to counsel in some civil proceedings that can lead to contempt.

b. Due Process Requires the Appointment of Counsel for Youth in Initial Truancy Hearings.

Even if this Court disagrees with the analysis under *Shelton*, the language in *Tetro* about “procedural fairness” and “the particular nature of the proceedings and questions involved” supports providing the right to counsel for a child in E’s situation. In effect, the Court was outlining a “case by case” analysis. The Court of Appeals noted a similar approach in reviewing the constitutionality of imposing legal financial obligations when the review of failure to pay those obligations would occur in an administrative hearing, not a court. The court wrote that in those hearings, “[t]he right to counsel, however, is determined on a case-by-case basis.” *State v. Ziegenfuss*, 118 Wn. App. 110, 116.

In a concurring opinion in a case that denied appointed counsel for a family of a deceased person in an inquest proceeding, Judge Ellington wrote, in language that is resonant for this case:

I agree with appellants that the right to access to the courts is fundamental to our system of justice. Indeed, it is the right "conservative of all other rights." *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 148, 28 S. Ct. 34, 52 L. Ed. 143, 6 Ohio L. Rep. 498 (1907). I also agree with appellants that meaningful access requires representation. Where rights and responsibilities are adjudicated in the absence of representation, the results are often

unjust. If representation is absent because of a litigant's poverty, then likely so is justice, and for the same reason.

Miranda v. Sims, 98 Wn. App. 898, 991 P.2d 681, 687 (2000), Ellington, J., concurring, review denied, *Miranda v. Sims*, 141 Wn.2d 1003 (2000) .

The state Supreme Court, in a case relied on in *King, supra*, provided a right to counsel in temporary deprivation proceedings "where permanent deprivation may likely follow the dependency and child neglect proceeding" *In re Welfare of Myricks*, 85 Wn.2d 252, 253 (1975). The Court wrote:

The essence of due process is the right to be heard. The hearing required by due process must be both "meaningful," *Armstrong v. Manzo*, 380 U.S. 545, 552, 14 L. Ed. 2d 62, 85 S. Ct. 1187 (1965), and "appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 94 L. Ed. 865, 70 S. Ct. 652 (1950). In dependency and child neglect proceedings -- even if only preliminary to later and more final pronouncements -- the indigent parent has to face the superior power of State resources. The full panoply of the traditional weapons of the State are trained on the defendant-parent, who often lacks formal education, and with difficulty must present his or her version of disputed facts; match wits with social workers, counselors, psychologists, and physicians and often an adverse attorney; cross-examine witnesses (often expert) under rules of evidence and procedure of which he or she usually knows nothing; deal with documentary evidence he or she may not understand, and all to be done in the strange and awesome setting of the juvenile court. ...

The fact that the instant case involves a nonpermanent *deprivation* of the child does not justify denying counsel. The boy was made a ward of the court pending further proceedings, which could result in the child being permanently taken from the parent.

In re Welfare of Myricks, 85 Wn.2d 252, 254-255 (Emphasis Added).

In *Myricks*, the appellant was served with a petition alleging his son was a dependent and neglected child, and the court held a temporary detention hearing to determine whether the child would continue residing with the appellant or be placed in detention. Similarly, in truancy cases, the Court should accord a right to counsel in the initial hearings because the children are facing representatives of the state, and have to cross-examine witnesses and deal with documents they do not understand in a court setting that can be intimidating.

At a minimum, the Court at the preliminary hearing should have reviewed the 13-year-old appellant's ability to understand the proceedings against her, the possible consequences, and possible defenses she might have to the petition. The Court then should have made a determination of the need to appoint counsel. Because the appellant's mother required an interpreter, the Court should have been even more careful, and in no way should have expected that the parent could have explained the legal proceedings to the child, or even that the child's English was strong enough to understand legal words such as "contempt" or "sanctions" or "detention", which has a different meaning in school settings.

The State argued that a truancy proceeding is unlike a criminal trial because in a criminal trial the prosecutor is present and witnesses can be called, and therefore counsel is not required. CP 52 at 13. The argument

overlooks the fact that witnesses can be called in a truancy case. It misses the point in *Myricks*, that a judicial proceeding is complicated when a government representative brings a case against a child and asks her to stipulate to facts that can lead to a finding that can lead to incarceration. Had E asked for a hearing, the school would have had to present evidence and she would have been entitled to contest it, either with documents or testimony. To expect a child to do that is unreasonable.

The relevant questions are whether the issues are complex, whether they can lead to incarceration, and whether a child can be expected on her own to understand possible defenses, the law involved, and the legal documents she is presented, and to advocate effectively for herself. Court proceedings, at least as conducted in this case, are not designed for children to be effective participants. E was not able to understand the law, possible defenses, or to advocate effectively for herself.

3. The State's Initiation of the Proceedings and the Appellant's Liberty Interest in a Truancy Proceeding Require Appointment of Counsel.

The appellant understands that in *King, supra*, the Court decided that an indigent parent involved in a dissolution and parenting plan proceeding does not have a right to free, appointed counsel. The Supreme Court upheld the trial court's denial of counsel because the State was not a party to the proceedings and did not instigate the proceedings,

and because the fundamental liberty interest at stake in the issue of a shared parenting plan in dissolution proceedings does not rise to the level of that in state-initiated dependency or termination proceedings. These factors are dramatically different than those in E's case.

Citing *Myricks* and *Luscier*, the *King* court distinguished the circumstances in a dissolution from dependency and termination proceedings. *King*, 162 Wn.2d 378, 383. See *In re Welfare of Luscier*, 84 Wn.2d 135, 524 P.2d 906 (1974). The Supreme Court stated that “[i]n *Myricks*, as in *Luscier*, we... noted the fact that the indigent parent faced the superior power of state resources in the proceedings.” *Id.* at 385. The Court wrote, “The dissolution proceeding is a private civil dispute initiated by private parties to resolve their legal rights vis-à-vis each other and their children.” *King*, 162 Wn.2d 378, 385. The Court emphasized that “The proceeding is not instituted by the State.” *Id.* at 386.

Truancy proceedings, on the other hand, are initiated by the public school district, which is an arm of government. See *Kuehn v. Renton Sch. Dist. No. 403*, 103 Wn.2d 594 (1985) (holding parent chaperones of school district to be state actors when searching students’ luggage), and *McLeod v. Grant County Sch. Dist.*, 42 Wn.2d 316, 319-320 (1953)(school district’s duty is to enforce against the pupils state rules and regulations.)

In truancy actions, it is not only the State against a private individual,

but it is also a young individual, in this case, a 13-year-old child without the effective guidance of an adult.⁴

The Supreme Court pointed out that it has the authority in a dissolution case to appoint an “attorney to represent the children's interests at public expense when the parties are indigent,” under RCW 26.09.110. *In re Marriage of King*, 162 Wn.2d 378, 387.⁵ The reasoning that underlies that statutory authority is equally applicable here—a child needs a lawyer to protect her interests in a complicated civil case.

⁴ Truancy hearings are the only type of proceeding, civil or criminal, in which a juvenile respondent is not provided counsel. In dependency, RCW 13.34.100 (6) (counsel for child 12 or older), at risk youth, RCW 13.32A.192 (1) (c), children in need of services, RCW 13.32A.160 (1) (c), and criminal, *In re Gault*, 387 U.S. 1 (1967), counsel is provided even at the first hearing. The Court’s language in *Gault* is helpful to understand the importance of counsel in the truancy context: “The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child ‘requires the guiding hand of counsel at every step in the proceedings against him.’” 387 US 1, 81, 37.

⁵ RCW § 26.09.110. Minor or dependent child – Court appointed attorney to represent – Payment of costs, fees, and disbursements , provides:

The court may appoint an attorney to represent the interests of a minor or dependent child with respect to provision for the parenting plan in an action for dissolution of marriage, legal separation, or declaration concerning the validity of a marriage. The court shall enter an order for costs, fees, and disbursements in favor of the child's attorney. The order shall be made against either or both parents, except that, if both parties are indigent, the costs, fees, and disbursements shall be borne by the county.

The *King* Court noted, "Under *Myricks*, whether counsel must be appointed depends on the nature of the rights in question and the relative powers of the antagonists." *King*, 162 Wn.2d 378, 394. Clearly here, E.S. was at risk of losing her liberty, and the power of the school district, with a representative to argue its interests, was far greater than that of a 13-year-old child whose mother did not speak English well.

4. E.S.'s Interest in Having Counsel at the Initial Truancy Hearing Outweigh Any Burdens to the Government Under the *Mathews v. Eldridge* Factors.

The Court in *King* ruled that given the reduced infringement on fundamental liberty interests involved in a private custody/dissolution case, the federal due process balancing test articulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976) applies to determine whether the civil litigant in that case has a right to appointed counsel. *King*, 162 Wn.2d at 667.

The *Mathews* court held that an evidentiary hearing was not required prior to the termination of disability benefits. But it affirmed that

The essence of due process is the requirement that "a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.".... All that is necessary is that the procedures be tailored, in light of the decision to be made, to "the capacities and circumstances of those who are to be heard,"... to insure that they are given a meaningful opportunity to present their case.

Mathews v. Eldridge, 424 U.S. 319, 348-349. [citations omitted.]

If the Court were to find there is no liberty issue at a truancy preliminary hearing, a child would still be entitled to the assistance of counsel under the *Mathews* balancing test. Under *Mathews*, the factors to consider are

[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

King, 162 Wn.2d 378 at 395, quoting *Mathews*, 424 U.S. at 335.

In a truancy proceeding, the child's private interest will be affected by the official action of the filing of the truancy petition, and the finding of truancy. Additionally, if a child does not have counsel, but is instead representing herself, then the risk of an erroneous deprivation of her fundamental liberty interest is much greater. The U.S. Supreme Court made clear that "Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision." *Mathews v. Eldridge*, 424 U.S. 319, 348. The cost to the Government in appointing counsel in initial truancy proceedings is subject to speculation. Appointing counsel in initial truancy proceedings could actually decrease overall costs to the Government because it would increase court efficiency in truancy cases.

If counsel were available at first hearings, they might be able in many cases to work with the school to find alternatives to court proceedings, and in other cases to demonstrate that the petition should be dismissed.

a.. Children Have a Strong Private Interest in Obtaining a Meaningful Education.

Children have an interest in obtaining an education that is meaningful to them, and structured in a way that meets their individual needs. They have a right to attend school, and can only be removed by statutorily approved procedures. *See, e.g., Goss v. Lopez*, 419 U.S. 565, 579 (1975), holding that students facing suspension of less than ten days “and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing.”

In language applicable to a truancy hearing, the Court wrote: “Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him,” the minimal requirements of the Clause must be satisfied. [citations omitted.] *Goss*, 419 U.S. 565, 574 .

The *Goss* court pointed out that any disciplinary process can be inaccurate and result in mistakes and unfair decisions. Just as school representatives rely on school officials for their information,

Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the

controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process.

Goss v. Lopez, 419 U.S. 565, 579-580.

While the Court did not require counsel, it suggested that in some situations the disciplinarian would permit counsel to be obtained and that unusual situations or longer suspensions would require greater protections.

Under the Washington Constitution, “[i]t is the paramount duty of the state to make ample provision for the education of all children residing within its borders.” Const. art. IX § 1. The Washington Supreme Court has held that the State’s duty to provide education is “superior in rank, above all others, chief, preeminent, supreme, and in fact dominant.” *Seattle Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 511 (1978). The Court has explained what the State’s duty entails:

[T]he State's constitutional duty goes beyond mere reading, writing, and arithmetic. It also embraces broad educational opportunities needed in the contemporary setting to equip our children for their role as citizens and as potential competitors in today's market as well as in the marketplace of ideas. Education plays a critical role in a free society. It must prepare our children to participate intelligently and effectively in our open political system to ensure that system's survival. ...

Seattle Sch. Dist. No. 1, 90 Wn.2d at 517-18. A child has a right to be educated in a way that will equip her for her role as a citizen and for future employment opportunities. When the district does not address her needs—

specifically, medical and emotional needs that affect her ability to learn—the district has failed to meet its duty to provide her with the education that she is entitled to, and her right to a meaningful education is at risk.

b. Denying Children the Assistance of Counsel at their Initial Truancy Hearing Creates a Substantial Risk for the Erroneous Deprivation of a Meaningful Education.

The lack of counsel at an initial truancy proceeding creates a substantial risk for children being erroneously deprived of their interest in obtaining a meaningful education that is effective for them individually, and of identifying issues that might be contributing to their absences from school. At an initial truancy proceeding in King County, the school district's truancy representative is the adversarial party to the youth. Although not a lawyer, the representative is in court frequently.

The procedure used in this case, with the school representative arranging an "agreed order" before the hearing, creates a substantial risk for children to be erroneously deprived of their interest in obtaining a meaningful education for several reasons. First, it is unreasonable to expect a child to represent herself against a more experienced district representative, and possibly in an adversarial position against her own mother. It is unlikely that a child will know how to cross-examine the school representative and her own parent, let alone know how to apply the rules of evidence. The chances of the child knowing what information is

relevant (e.g., physical or mental health problems), and knowing how to bring that information before the court (e.g., through doctor's notes or testimony from an expert), are slim. If a student is not able effectively to communicate her needs, then the chances are high that the Court will find an order to attend school is necessary without a thorough inquiry into why the child is missing school.

Second, if a truancy order is entered, then every time a child has an unexcused absence, the school can require the child to go to court. When the child is in court, she is missing school and the lessons being taught at that time, and is falling behind on in-class and assigned schoolwork.

Third, if an attorney is not appointed until the contempt proceeding, this might delay the student's access to resources that could help ameliorate or eliminate unexcused absences. For example, if an attorney looks at the petition and sees that it was marked "provided tutoring," but learns that tutoring was not actually provided, the attorney can advocate for the provision of those services.

Finally, if the child is found in contempt, the child can be incarcerated for up to seven days, days on which the child will not be able to go to school, and the child will fall further behind her regular school work.

c. Children's Interests in Obtaining a Meaningful Education Outweighs Governmental Costs of Providing Counsel in Initial Truancy Hearings.

Finally, in addition to protecting the private interest of children, appointing counsel in initial truancy proceedings would be beneficial by increasing court efficiency and accountability for the school districts, and decreasing overall court costs. First, appointing attorneys in initial proceedings would assist the Court in helping the youth understand the right to a contested hearing. Having counsel discuss the options with the child would lessen the risk that the child would not fully understand her rights, and would lessen the possibility of an attorney later needing additional court time and resources to move for the petition to be dismissed. It would also help to maintain the dignity of the court, and help children feel they were being treated fairly during the court proceedings.

Second, appointing attorneys in initial truancy proceedings would prevent procedurally defective cases from moving forward and wasting court time. For example, if the school district had not met its statutory duty to take steps to relieve the child's absences—or if those "steps" were insufficient, such as sending a non-English speaking parent notifications of absences only in English—an attorney would be able to recognize this at the initial hearing and could move for a dismissal of the petition.

Under current practice, such a dismissal cannot occur until at least the second court hearing.

Although the Court in *Goss* noted that requiring an attorney at every suspension hearing might be burdensome, it also stated that children needed an opportunity to give their version of events, to avoid an erroneous deprivation of their rights. 419 U.S. at 583. For children to be able effectively to “give their version of events,” they need counsel.

Under the *Mathews v. Eldridge* factors, the balance is in favor of children receiving appointed counsel at the initial truancy hearing.

5. E.S. needed an attorney because the Court’s vocabulary was at a much higher level than the last grade she had completed.

The language used by the Court in the first hearing was beyond E’s ability to understand. There is no indication that E understood the implications of the hearing or was aware of any valid defenses or mitigating circumstances for her absences, nor even any indication that she understood what a truancy petition was or why she was in court that day.

The Court stated the following regarding the order it issued as a result of the “agreement”:

THE COURT: This order will be in place for one year. And it does mean that if you do not go to school, that the School District can bring a motion for contempt. At the contempt hearing if the Court finds that you have not been going to school and you do not have a valid reason, then the Court can enter sanctions against you. Those sanctions

usually start out as either evaluations, community service, book reports. But if the truancy continued, we would be looking at house arrest, work crew, and possibly detention.

VRP 3/6/2006 at 2.

This statement is beyond the understanding of a child with a sixth grade education. Applying the Flesch-Kincaid grade level assessment test to this statement yields an eighth grade reading level.⁶

E.S.'s answers to the Court's questions illustrate her limited vocabulary. When E.S. was asked if she missed school because of her stomach hurting, her response was:

Well, some of the time. Uhm, some of the time, Your Honor, it hurts really bad that I can't go to school, so that's why I actually refused to go to school because it hurts really bad. And some of the time, Your Honor, I just -- I get so used to staying home that I just wanted to stay.

VRP 3/6/2006 at 4.

According to the Flesch-Kincaid reading grade level assessment, this response is just above a sixth grade level (6.2).

a. The Complexity of the Court's Statements Was Beyond E's Sixth Grade Understanding.

⁶ The Flesch-Kincaid system estimates the needed grade level for comprehension with a formula that combines sentence length with the average number of syllables per word. It is considered the most reliable estimate of required reading comprehension with a high level of consistency across writing samples. As a result, it has been adopted by the Department of Defense and has been used in competency research. Richard Rogers, et al. *An Analysis of Miranda Warnings and Waivers: Comprehension and Coverage*. 31 Law and Human Behavior, 177, 192, 182 (2007).

The Court made two statements to E.S. and her mother during the March 6, 2006, hearing. The first addresses E's right to a hearing:

THE COURT: You were both entitled to have a hearing this morning if you do not agree that there should be a court order that requires E.S. to go to school. And a hearing means that I would swear both of you under oath and hear from both of you why you did or did not think the order should be put in place. I would also swear Mr. Hasslinger in under oath and listen to what he wanted to say in response. Then I would decide based on the law and the facts whether there was a basis to enter the order.

So, do you agree that there should be a court order in place?

VRP 3/6/2006 at 2-3.

According to the Flesch-Kincaid reading grade level assessment test, the statement above made by the Court is at an eighth grade reading level. To expect a child who has only completed the sixth grade to be able to understand a statement that is at an eighth grade-reading level is unreasonable. As discussed *infra*, having an attorney present at the initial truancy hearing would help ensure that a child understands the court process, that her rights are protected, and that a valid petition is presented.

The second statement that the Court made registers as a 12th grade reading level on the test:

THE COURT ...Those sanctions usually start out as either evaluations, community service, book reports. But if the truancy continued, we would be looking at house arrest, work crew, and possibly detention...And I noticed in here that you were complaining about stomach pain?

E.S.: Yes.

THE COURT: And is that the reason why you're not going to school?

E.S.: Well, some of the time.

VRP 3/6/2006 at 3-4.

E.S. only responds “Yes,” to the fact that her stomach hurts her.

Because of E’s age, education, and socio-economic status her ability to comprehend the court’s language was limited. In *Readability of Miranda Warnings and Waivers: Implications for Evaluating Miranda Comprehension*, the authors address the issue of juveniles’ ability to comprehend and knowingly, intelligently, and voluntarily waive their *Miranda* rights. Rachel Kahn, et al, 30 *Law and Psychology Review*, 120, 135, 131 (2006). The article discusses Thomas Grisso’s finding that age, analyzed with academic achievement, is a predictor of a child’s ability to understand *Miranda* rights. *Id.* It suggests that socioeconomic status and academic achievement may play a large role in comprehension of *Miranda* warnings as middle class students and higher academic status students performed significantly better on several of the measures. *Id.* Grisso conducted empirical research showing that the comprehension level of *Miranda* warnings was impaired at age twelve or below and was variable between the ages of thirteen and fifteen. Grisso found that one-half of the sixteen-year-olds tested had impaired comprehension levels.

E.S. was 13 years old at the time of her initial hearing, and had completed the sixth grade. When she answered “Yes”, she likely did not comprehend what she was agreeing to do, nor did she knowingly, intelligently and voluntarily waive her right to a hearing.

b. At Initial Truancy Hearings, Attorneys Are Able to Accomplish Legal Tasks That Children Cannot.

Going to court is not something for a sixth grade child to handle alone. For such a child to be treated fairly, an attorney must be present.

Below are two examples of hypothetical cases that demonstrate both the problems of not having an attorney at the first hearing and the positive impact of attorneys in resolving truancy cases.

Example 1: A child with a history of emotional problems had more than five unexcused absences from school. A truancy petition was filed. The mother tried to contest it, but could not successfully present evidence or cross examine the school representative, and the child was found truant. The child continued to miss school because of emotional issues, and continued to see doctors. Before the contempt hearing, an attorney was appointed and gathered medical documentation, and explained this information to the school district representative, who dismissed the case, finding that the child’s absences were excused.

At the initial hearing an attorney would have been able to explain to the school district and to the court that the child's absences should be excused. This would have saved court time and resources.

Example 2: A child had a number of unexcused absences from school. The primary language of the family was Spanish. The parents and student went to the initial truancy hearing but no hearing was held; the family spoke to the school official in the hallway (with an interpreter) and signed the order. The family thought the school official was a judge. The child continued to miss school. Before the contempt hearing, an attorney was appointed and, through an interpreter, was able to explain to the parents the court process, the possible consequences, and the importance of addressing the truancy issue. The child raised the language barriers that he faced at school. The attorney met with the school counselor to assess what resources the school was providing for the student and to explore increasing Spanish-language assistance. The child, parents, and school were able to address the language issue and the petition was dismissed. Since then, the child has attended school.

B. THE ORIGINAL TRUANCY PETITION AND FINDING WERE INSUFFICIENT.

The Court's ruling should be set aside because the judge's ruling was based upon insufficient facts.

1. The School District Did Not Adequately Inform E.S.'s Mother, a non-fluent English speaker, of Her Child's Unexcused Absences.

The initial truancy petition should be set aside because the school district did not adequately inform the parent, whose primary language is not English, of E.S.'s unexcused absences.

According to the Washington Constitution, it is the State's duty to educate children, and every child has a right to be educated. Const. art. IX, § 1. Providing notice to a parent or guardian concerning a child's unexcused absences is an important step in ensuring that every child is going to school every day. *See* RCW 28A.225.020(1).

There is no provision in the statutes or current case law specific to notification of truant acts to those with limited English proficiency. However, the school district has a legal obligation to provide translations and interpreters in many situations. *See* The U.S. Department of Justice Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 F.R. 41455-41472 (June 18, 2002).

The nature and importance of school attendance, and the obligation of the school district to notify a parent in their primary language when a child is not attending school, is addressed in part in the Washington Administrative Code. Generally, schools must "adequately notify parents,

regardless of their national origin, *of school activities which are called to the attention of other parents*. In order to be adequate, *such notice may have to be provided in a language other than English.*” WAC 162-28-040(5) (Emphasis added). Requirements that a parent be notified in their primary language also apply to school suspension. WAC 392-400-245(3); *see also* WAC 392-400-260(3) and 392-400-275(3)

The importance of clear communication on the truancy matter is seen in the district’s own words in a letter sent to Mrs. S. on January 31, 2006, which states: “Your understanding, assistance, response and cooperation in this important matter are greatly appreciated.” CP 1.

Because the school did not provide adequate notice to E.S.’s mother that her child was not attending school, E.S. was deprived of her full opportunity to receive help in pursuing an education, and of help for her mother to assist the school in ensuring that her child was in school. In addition to the loss of education, the consequences of a truancy finding can include loss of liberty. VRP 3/6/2006 at 3. Because the notice was inadequate, the petition should have been set aside.

This Court recently found that notice to a non-English speaker in an administrative proceeding complied with due process when the notice was sent to the party’s English-speaking attorney and the party used an interpreter in the hearing and had knowledge of the appeal process in

which the party was engaged. *Kustura v. Dep't. of Labor & Indus.*, 2008 Wn. App. LEXIS 128, 25-26 (2008).

Unlike the plaintiffs in *Kustura*, E. did not have counsel at her initial proceeding, and her mother did not have an interpreter when she was communicating with the school. Just as the plaintiffs in *Kustura* needed counsel and interpreters to communicate the content of the appeal notices, E also needed counsel to communicate to her what rights and risks were involved at the initial truancy hearing. Unlike the plaintiffs in *Kustura*, E. was denied due process.

2. The School District did not meet its obligation under RCW 28A.225.020(1) to take steps to eliminate the child's absences.

The district did not meet its statutory obligation under RCW 28A.225.020 to “take steps to eliminate or reduce the child’s absences.” There was no verification of the district’s claim that it provided tutoring services, and the representative testified that no tutoring was ever provided. VRP 6/26/07 at 13.⁷ There was no evidence presented to the Court that the district had adjusted the child's school program or

⁷ This citation is to counsel's argument referring to the testimony of the school representative, which has not been transcribed. Counsel represents in good faith that the testimony was as represented by counsel in oral argument. The prosecutor did assert in its brief that the district provided tutoring, but provided no citation of authority for this assertion. CP 52 at 5.

school or course assignments, provided more individualized or remedial instruction, provided appropriate vocational courses or work experience, required the child to attend an alternative school or program, or, other than offering counseling, assisted the parent or child to obtain supplementary services that might eliminate or ameliorate the cause or causes for the absence from school, as statutorily required by RCW 28A.225.020(1)(c). CP 1.

The district bypassed the attendance workshop because of an “exceptional circumstance.” CP 4.⁸ The circumstance the district cited was that E had been out of a school for an extended period of time, and “referral to Truancy Class or CTB will prove to be inadequate to ensure attendance.” CP 4. The district chose not to make an attendance

⁸ A report, “Truancy Case Management Handbook: Advice from the Field” published by the National Center for School Engagement, describes King County’s truancy workshops as follows:

The pre-court attendance workshops have provided truant youth the opportunity to develop behavior contracts with their parents in a supportive, non-judgmental environment. These contracts are monitored by the school district for thirty days to assess compliance and level of behavior change. In the event of non-compliance, school districts can refer youth to community truancy boards (if available) or request a preliminary hearing for these youth to obtain a court order compelling them to go to school.

Online; available at <http://www.schoolengagement.org/TruancypreventionRegistry/Admin/Resources/Resources/TruancyCaseManagementHandbookAdvicefromtheField.pdf>, last visited 2/10/2008.

workshop available because the child *had missed too much school already*. This does not make sense. A workshop designed to address attendance is only effective for children who *are not* attending school.

3. The “Waiver” of a Hearing Was Not Knowing or Intelligent and There is no Verbal or Written Indication on the “Agreed” Order on Truancy that E. or her Mother Understood What They Were Agreeing to or the Possible Consequences.

There is no written or verbal indication within the hearing or on the “agreed” order that E.S or her mother understood to what they were agreeing and the possible consequences. The Commissioner *first* received agreement from E.S and her mother on the issue of truancy, *then* explained the possible consequences for being found in contempt of the order:

THE COURT: ...So, do you agree that there should be a court order in place?

MRS. S.: Yeah.

THE COURT: And how about you, E.?

E.S.: Yeah yes, Your Honor.

THE COURT: This order will be in place for one year. And it does mean that if you do not go to school, that the School District can bring a motion for contempt. At the contempt hearing if the Court finds that you have not been going to school and you do not have a valid reason, then the Court can enter sanctions against you.

VRP 3/6/2006 at 3.

Even after the Commissioner explained the possible consequences of agreeing to Truancy, there is no verbal indication that E.S. or her

mother understood the consequences of agreeing to this order. The court had the following exchange with E.S.:

THE COURT ... Those sanctions usually start out as either evaluations, community service, book reports. But if the truancy continued, we would be looking at house arrest, work crew, and possibly detention... And I noticed in here that you were complaining about stomach pain?

E.S.: Yes.

THE COURT: And is that the reason why you're not going to school?

E.S.: Well, some of the time.

VRP 3/6/2006 at 3-4.

E.S. only responds "Yes," to the fact that her stomach hurts her, and that is why she cannot go to school sometimes. There is no colloquy to ensure that the 13-year-old child understands that she may lose her liberty if she does not follow the Commissioner's order. The words the court used, such as *contempt*, *valid*, and *sanctions*, are not ones that a 13-year-old child who has missed school would be expected to comprehend. Furthermore, at no time did the Commissioner adequately explain to E that agreeing to the court entering an order was not necessary, what contempt was, or that in agreeing to the order E and her mother were conceding that E was truant and that the district had done everything it was statutorily required to do. *See* VRP 3/6/2006 at 3-4.

A one word verbal answer does not indicate a defendant's thorough understanding of an important right. In the criminal case *State*

v. Chavis, 31 Wn. App. 784, 794 (1982), the Court held that single answer responses by a defendant to questions by the trial court did not support a finding that the defendant fully understood the dangers and disadvantages of self-representation, and therefore the waiver was ineffective. Similarly, E made only simple statements in response to questions about her understanding of the right to a hearing.

E.S.'s statement, "Yeah yes, Your Honor", VRP 3/6/2006 at 3, is not sufficient for a valid waiver.

State v. Chavis involves an adult waiving a right to counsel in a criminal trial. 31 Wn. App. at 786. As a result of E's hearing she could face sanctions similar to an adult in a criminal trial, including community service or confinement. The Court has the duty to ensure that a 13-year-old *child* is not proceeding in ignorance in a way that would cause harm to herself or to her family. There was no colloquy to ensure that E understood that she might lose her liberty if she did not follow the court order. VRP 3/6/2006 at 3-4.

The United States Supreme Court has held that in order for a waiver of an individual's right to be valid, the waiver must be knowing, voluntary and intelligent. *Johnson v. Zerbst*, 304 U.S. 458 (1938). "[C]ourts indulge every reasonable presumption against waiver" of fundamental constitutional rights." 304 U.S. at 464. A waiver is "an intentional

relinquishment or abandonment of a known right or privilege.” *Id.* A determination of the validity of a waiver should be based on “the particular facts and circumstances surrounding that case, including the background, experience, and conduct” of the one whose waiver is being questioned. *Id.*

Although E’s case does not involve the Sixth Amendment right to counsel in a criminal proceeding, the analysis in *Zerbst* is appropriate. The Commissioner did not ask E or her mother if they understood what the purpose of having a hearing would be, or what the possible outcomes of a hearing could be, including winning the hearing and having the truancy case dismissed. VRP 3/6/2006 at 3.

Although a right to a truancy hearing is not constitutional, it is a statutory right and due process requires a hearing. The Washington Supreme Court held that a hearing must be provided to persons whose licenses have been ordered suspended and that failure to do so violates due process. *City of Redmond v. Moore*, 151 Wn.2d 664 (2004). Without a hearing, there were inadequate “procedural safeguards to ensure against the erroneous deprivation of a driver’s interest in the continued use and possession of his or her driver’s license.” *Id.* at 677.

VI. CONCLUSION

The truancy petition was insufficient because it did not provide the child's mother with adequate notice of the allegations of her child's unexcused absences because none of the school's interactions with the mother were in her native language. The petition was also insufficient because in it the district alleged that it had taken sufficient steps to reduce the child's absences, which it did not actually do.

The Court should reverse and set aside the trial court finding because the Superior Court erred when it found there was no right to counsel at an initial truancy hearing for a 13-year old child whose mother did not speak English fluently. The Commissioner's advice to the child and her mother and the "waiver" of a hearing and agreement that occurred were inadequate and underscore the need for counsel. The proceeding was initiated by a state actor with dramatically greater power than the child. Fundamental liberty interests are at stake, and the analysis of *Myricks* requires appointment of counsel in truancy proceedings.

Respectfully submitted,



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