NO. 60528-3-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

BELLEVUE SCHOOL DISTRICT,

Respondent,

v.

E.S.,

Appellant.

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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TABLE OF CONTENTS

TABLE OF CONTENTS
(cont'd)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(cont'd)

Constitutional Provisions

Statutes

Other Authorities

I. IDENTITY AND INTEREST OF AMICUS

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonpartisan, and nonprofit organization with more than 20.000 members that is dedicated to the preservation and defense of civil liberties, including the right to counsel and the due process rights of juveniles. It has participated as amicus in several cases involving the civil liberties of juveniles. These include *State v. CPC Fairfax Hospital*, 129 Wn.2d 439, 918 P.2d 497 (1996) (parents' authority to commit a juvenile to a mental hospital) and *Tunstall v. Bergeson*, 141 Wn.2d 201, 5 P.3d 691 (2000) (incarcerated juveniles' right to education).

II. FAMILIARITY WITH THE ISSUES

Amicus has reviewed the briefing submitted by the parties to this Court and the proceedings below. Amicus is familiar with the arguments presented by the parties and other amici and will not unduly repeat them.

III. ISSUES ADDRESSED BY AMICUS

Because the court in an initial truancy proceeding makes decisions jeopardizing a child's fundamental, constitutionally-protected interests in education, physical liberty and privacy, does due process require a child have a right to appointed counsel in such a proceeding? Do the government's interests in realizing the goals of the truancy statute and in

avoiding erroneous deprivations of children's rights, further support a right to appointed counsel in initial truancy proceedings?

IV. STATEMENT OF THE CASE

The record in this case illustrates why denying children appointed counsel in initial truancy proceedings jeopardizes not only their education, privacy, and physical liberty interests, but also the State's interests in avoiding erroneous deprivation of rights and in realizing the goal of its truancy statute—quick and effective response to risk factors that cause children not to attend school. Appellant E.S. (respondent below) was only thirteen years old when she was summoned to the King County Superior Court to defend herself against truancy charges brought by the Bellevue School District. CP 1. She was not represented by counsel or any other advocate. Although E.S.'s mother accompanied her daughter, she required a Bosnian interpreter to understand the proceeding. CP 4. At the start of the proceeding, the school district's representative advised the court that E.S.'s case was "an agreed upon matter," and both E.S. and her mother were allowed to state whether they "agree[d] that there should be a [truancy] order in place." RP(3/6/06) 2-3. Only *after* E.S. had responded "yeah—yes, your honor"—in the court's view, thereby waiving all of her rights to challenge the school district's charges—did the court explain that the truancy order would remain in effect for one year, and its

consequences. *Id.* These consequences included that if E.S. did not go to school, she faced "sanctions" ranging from "evaluations, community service, [and] book reports" to "house arrest, work crew, and possibly detention." RP(3/6/06) 3. Further, only *after* the court had accepted E.S.'s waiver of her rights and imposed the truancy order did it perfunctorily ask her why she had repeatedly missed school and whether the absences were related to the recurrent stomach aches she had complained of to school officials. RP(3/6/06) 3-4. The entire truancy proceeding lasted just over ten minutes, with a substantial portion of that time devoted to translation. Op. Br. of Appellant, p. 4.

Not until a little over a year later, when E.S. again came before the court for contempt of the truancy order—now represented by counsel—did it come out that she might be suffering trauma as a result of having lived in war-torn Bosnia and that the school district had not exhausted other alternatives prior to seeking the truancy order. Op. Br. of Appellant, p. 12; Resp. Br., p. 5; RP(7/26/07) 1-5. Moreover, to the extent that the school district had attempted to involve E.S.'s mother in improving her daughter's school attendance, all of its communications had been in English despite the fact that she did not speak the language. Op. Br. of Appellant, p. 8. Had E.S. had access to counsel so that these facts would have come to light at the initial truancy hearing, all of those involved—E.S., her mother, the school district, and the court—might have

been spared the cost and burden of a second proceeding. More importantly, a more effective alternative form of intervention might have enabled E.S. to realize the benefits of school attendance *and* to avoid the stigma of a truancy order.

V. SUMMARY OF ARGUMENT

Across Washington, thousands of children—some as young as age eight—stand unrepresented and alone against their school district, a judge, and, in many cases, their parents, to address allegations that they have violated the State's truancy statute and should be subjected to numerous court-ordered obligations for an extended period of time, with a threat of detention should they violate the court's order. Children like E.S. are required to navigate initial truancy proceedings by themselves, despite these proceedings' complexity and the fact that they may result in deprivation of a child's fundamental interests in education, physical liberty, and privacy.

The failure to ensure that children in initial truancy proceedings like E.S. have the counsel they need to protect their legal rights and to bring essential information to the court's attention, jeopardizes these children's fundamental interests. Moreover, this failure undermines the primary goal of Washington's truancy statute: to promote early and effective responses to truancy so as to protect children and their communities against associated risks, including "running away, substance

abuse, serious acting out problems, mental health needs, and other behaviors that endanger themselves or others." RCW 13.32A.010. In E.S.'s case, the Superior Court, in denying her motions to set aside and to revise, improperly brushed aside these concerns in violation of the due process balancing test articulated by the United States Supreme Court in *Mathews v. Eldridge*. For the reasons set forth below, in the appellant's briefs, and in the brief of other amici, this Court should rule that a child facing an initial truancy proceeding has a right to appointed counsel.

VI. ARGUMENT

A. Under the Washington and federal constitutions, children have a due process right to appointed counsel at initial truancy proceedings.

In determining whether due process has been satisfied, Washington courts use the balancing test that the United States Supreme Court articulated in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Courts must weigh three factors: "the private interests affected by the proceeding; the risk of error created by the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and the countervailing governmental interest supporting use of the challenged procedure." *In re Interest of M.B.*, 101 Wn. App. 425, 471, 3 P.3d 780, 804 (2000).

Here, each of the *Mathews* factors supports providing children facing initial truancy proceedings with counsel. First, initial truancy

proceedings are adversarial and may result in court orders depriving children of their fundamental interests in education, privacy, and physical liberty. Second, because of their immaturity, lack of legal knowledge, and lesser access to resources, children are generally unable to effectively protect these interests without assistance of counsel. Third, the State's interest in responding early and effectively to child truancy is not advanced when, due to children's lack of representation, important information never reaches the court and a serious risk of error arises.

1. Initial truancy proceedings jeopardize children's fundamental interests in education, physical liberty and privacy.

Under the *Mathews* analysis, a court first must consider all of the private interests at stake in a proceeding. Although *Mathews* due process analysis often focuses on "liberty" interests, Washington courts have refused to hold that due process requires appointment of counsel only where *physical liberty* is at stake. As the Washington Supreme Court explained in *In re Welfare of Luscier*, the same due process principles that "require[] the appointment of counsel if there is the possibility of even a 1-day jail sentence, must also extend to a proceeding" that threatens other significant interests not involving physical liberty. 84 Wn.2d 135, 138-39, 524 P.2d 906, 909 (1974). Moreover, while in some instances one important interest standing alone may be sufficient to trigger a due process right to counsel, in others, "several interests" may combine to demand

such procedural protection. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 24-25, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981) (emphasis added). Washington's truancy order procedure implicates three fundamental interests of the children involved—those pertaining to education, to physical liberty, and to privacy. Taken together, these interests weigh in favor of providing children in initial truancy proceedings a right to appointed counsel under the *Mathews* test.

a. Education

The United States Supreme Court has recognized that education is an important interest; education is necessary for "any child [to] reasonably be expected to succeed in life." *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 493, 74 S.Ct. 686, 98 L.Ed.2d 873(1954). The Court has held that State action that potentially interferes with a child's education, such as suspension from school, requires due process protections. *Goss v. Lopez*, 419 U.S. 565, 574, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975).

The Washington State Constitution, art. IX, § 1, goes further, expressly recognizing that the State has a "paramount duty . . . to make ample provision for the education of all children residing within its borders[.]" Based on this text, the Washington Supreme Court has recognized that "all children residing within the State's borders have a '*right*' to be amply provided with an education." *Seattle Sch. Dist. v. State*, 90 Wn.2d 476, 513, 585 P.2d 71, 92 (1978) (emphasis in original).

Children charged with truancy face deprivation of their right to an education because the court may disrupt their schooling by ordering that they be transferred to a new educational institution, such as an alternative school. RCW 28A.225.090. Some research suggests that placing at-risk students in separate schools may compromise rather than enhance their educational experience. *See, e.g.*, Regina M. Foley & Lan-Sze Pang, *Alternative Education Programs: Program and Student Characteristics*, High School Journal (Feb./Mar. 2006): 18. And if forced to switch schools, a child may lose access to services she needs to gain an education, such as language services, if her native language is not English, or special services to accommodate a disability. Moreover, transferring a child to a different school may exacerbate the very instability that empirical studies suggest is a primary "correlate" of truancy.[1] *See, e.g.*, Myriam L. Baker et al., Office of Juvenile Justice and Delinquency Prevention, *Truancy Reduction: Keeping Students in School*, Juvenile Justice Bulletin (Sept. 2001): 2, 9. Thus, a school transfer by a court pursuant to a truancy order may jeopardize a child's fundamental right to an education.

b. Physical Liberty

The threat to children's physical liberty interests in initial truancy

[1] Transfer may also obscure the fact that in some cases the child's truancy may be caused by a school failing in its duty to provide certain educational services.

proceedings also weighs in favor of more stringent procedural safeguards than those that are now provided. The United States Supreme Court, in *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967), held that due process is triggered by any proceeding that "may result in commitment to an institution in which the juvenile's freedom is curtailed." *Id.* at 41. The Court explained that whether a proceeding is styled as "civil" or "criminal" is irrelevant to the procedural safeguards required. *Id.* at 50. Rather, it is the nature of the interest, and of the threat posed to it, that matter. Washington courts have acknowledged that the "liberty interest" at stake when a child faces the possibility of detention for contempt of a truancy order is "substantial." *M.B.*, 101 Wn. App. at 471, 3 P.3d at 805.

Here, the trial court, citing *In re Truancy of Perkins*, 93 Wn. App. 590, 969 P.2d 1101 (1999), ruled that a child is not entitled to appointment of counsel until a contempt motion has been filed, even though the threat of detention was already apparent at the initial truancy proceeding. But *Perkins* was decided three years before *Alabama v. Shelton*, 535 U.S. 654, 663, 122 S.Ct. 1764, 152 L.Ed.2d 888 (2002), in which the United States Supreme Court explicitly rejected the argument that "only those proceedings 'resulting in immediate actual imprisonment' trigger the right to state-appointed counsel." While *Shelton* was a criminal case, due process principles first elaborated in criminal cases have consistently been applied in civil cases where significant interests—here, children's interests

in physical liberty—are at stake. *See, e.g.*, *Gault*, 387 U.S. at 50; *Lassiter*, 452 U.S. at 25-26; *Luscier*, 84 Wn.2d at 139, 524 P.2d at 908.

The Court in *Shelton* held that an Alabama man who received a suspended sentence and probation for a misdemeanor had a right to appointed counsel at his initial hearing, even though "incarceration was not immediate or inevitable." 535 U.S. at 659. In so holding, the Court stressed that Shelton's liberty interests were not implicated only at the time of a subsequent probation revocation hearing, when the possibility of incarceration became imminent. It explained, "The sole issue at the [second] hearing—apart from determinations about the necessity of confinement—[wa]s whether the defendant breached the terms of probation." *Id.* at 666. Shelton had no opportunity at the probation revocation hearing to challenge the merits of the underlying order that had been entered when he lacked the benefit of counsel. Accordingly, for constitutional purposes, the probation revocation hearing could not be "wall[ed] off" from the procedures that preceded it. *Id.* at 667.

Under Washington's truancy statute, a truancy order entered at an initial truancy proceeding forms the basis for any subsequent detention of a child for contempt. Moreover, assuming "jurisdiction is proper," such an underlying truancy order, even if "wrongly entered," may be immune from collateral attack at a contempt hearing. *See Mead Sch. Dist. No. 354 v. Mead Ed. Ass'n*, 85 Wn.2d 278, 280, 534 P.2d 561, 563-64 (1975). As

in *Shelton*, the sole issue at a truancy contempt hearing—apart from what sanction is appropriate—is whether the child violated the truancy order. This means that even if a child is appointed counsel at the contempt stage she may be unable to adequately protect her physical liberty interests because she has already waived her strongest defenses at the initial truancy proceeding. Given these facts, the Court's reasoning in *Shelton* applies to the due process analysis involved here. A child's interest in physical liberty is implicated in the initial truancy proceeding and not merely after she has been adjudged truant and hauled back to court for contempt. The threat of deprivation of this interest existing at the initial truancy proceeding weighs in favor of giving children a right to counsel at that stage, when the government is seeking a court order that carries with it significant consequences for the child's rights and physical liberty.

c. Privacy

Similarly, the drug and alcohol testing that a court may order at an initial truancy proceeding threatens a child's fundamental right to privacy. *See* RCW 28A.225.090(1)(e).

The Washington State Constitution, art. I, § 7 expressly ensures a right to privacy, stating that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." This year, the Washington Supreme Court, in *York v. Wahkiakum School District*, 163 Wn.2d 297, 308, 178 P.3d 995, 1002 (2008), held that article I, section 7

protects a student's "genuine and fundamental privacy interest in controlling his or her own bodily functions," striking down a school district's drug testing policy. Under *York*, a court's ability to order that a child submit to drug and alcohol testing at an initial truancy proceeding represents a clear threat of intrusion upon her constitutionally protected right to privacy. The serious risk of such intrusion supports her right to counsel under the *Mathews* test.

2. Children in initial truancy proceedings require access to counsel to effectively protect their education, privacy, and physical liberty interests

As is apparent from Washington's truancy statute, initial truancy proceedings are adversarial in nature. RCW 28A.225.030 et seq. Unless a child waives her rights, she is expected to argue her case against the school district's adult representative. Yet without counsel, children facing initial truancy proceedings often "lack the experience, judgment, knowledge and resources to effectively assert their rights." *DeYoung v. Providence Med. Ctr.*, 136 Wn. 2d 136, 146, 960 P.2d 919, 924 (1998). While parents may attend truancy hearings with their children, they may also lack the legal sophistication to understand the proceedings or appreciate their seriousness. Further, parents may be unable to view internal family dynamics with sufficient objectivity to assess why a child is missing school and whether a court order or other alternatives would be the best response. A guardian ad litem is not appointed for children facing

initial truancy proceedings. And a judge's role is not to advocate for the child or ensure that children effectively present their cases.

The failure to provide children in initial truancy proceedings with assistance of counsel creates an anomalous situation where children must defend themselves against the power of the State. This situation results in a significant and avoidable risk of erroneous deprivation of children's rights to education, privacy, and physical liberty. Without counsel, a child like E.S. may not fully comprehend what a truancy order is, let alone that she faces a loss of physical liberty if found in contempt of it. She likely will have no way of knowing about the legal defects that may exist in a school district's petition for a truancy order or about the alternatives to such an order. A child may not understand the steps a school district is required to take before filing a truancy petition or the services to which she may be legally entitled.[2] Accordingly, with a simple "yeah—yes, your honor" like that uttered by E.S. here, a child in an initial truancy proceeding may watch her education, privacy, and physical liberty interests disappear. Without so much as a colloquy, she may be

[2] In at least two recent truancy cases known to amicus, representation by an attorney resulted in the child's significant disabilities being brought to the court's attention; in one case, this led to appointment of counsel under GR 33, and in the other the truancy order was vacated because counsel discovered special education staff at the school had recommended not filing. See Snohomish County No. 00-7-02872-1 and King County No. 07-7-01125-9.

reassigned to a new school that may not be able to "amply provide" her with an education, compelled to turn over her bodily fluids, or exposed to detention should she miss even one period of school.

In contrast, an attorney can protect the interests of a child in an initial truancy proceeding in a number of ways. First, the attorney can help to discover the reasons for the child's truancy. Prior to the hearing, the attorney can collect medical and school records, as well as other data, and use them to identify potential defenses to the truancy petition and to evaluate the child's need for services, such as health care, language assistance, and special education. Such pre-hearing preparation would ensure that courts and school districts understand children's needs and effectively address the root causes of the truancy.

Second, the attorney can explain the proceeding to the child and her parents. He can remind her that she has the right to challenge the petition and also counsel her about the risks and benefits of doing so. If the child wishes to enter into an agreement with the school district, the attorney can advise her of her obligations under that agreement and of the consequences of breaching it.

Third, the attorney can ensure that the child and her parents receive adequate procedural protections leading up to, during, and after the initial truancy proceeding. The attorney can see that the child and her parents are provided with required interpretation services and accommodations for

physical and mental disabilities. He can evaluate—in a way that the child and her parents cannot—whether in its petition the school district has satisfied its evidentiary burden as set forth in the truancy statute. He can also present evidence on behalf of the child at the initial truancy hearing as allowed by statute. *See* RCW 28A.225.035(8)(b). And the attorney can build a record and bring an appeal should the court render an erroneous decision at the initial hearing.

In all of these ways, the attorney can reduce the risk of arbitrary decisions about the child. In so doing, he not will only ensure a better substantive outcome for the child, but will also contribute to her sense that the process is fair and legitimate. As a result, the child may be more willing to work with school officials and the court and have greater respect for the State's truancy regime. As the Supreme Court concluded in *Gault*, "'[u]nless appropriate due process of law is followed, even the juvenile who has violated the law may not feel that he is being fairly treated and may therefore resist the rehabilitative efforts of court personnel.'" *Gault*, 387 U.S. at 26.

Because assistance of counsel provides an effective safeguard against erroneous deprivation of children's rights to education, privacy, and physical liberty, the second *Mathews* factor also weighs in favor of providing such assistance.

3. Providing children in initial truancy proceedings with appointed counsel advances the State's interests in enforcing its truancy statute.

Providing counsel to children at initial truancy proceedings will help the State avoid erroneous deprivations of rights and also advance the primary goal of the Washington Legislature in passing the State's truancy law: earlier and more effective intervention to address truancy and associated risk factors. For this reason, the costs associated with appointing counsel in initial truancy proceedings may well be offset by decreased incidence of contempt proceedings and fewer repeat truancy petitions.

As this Court noted in *In re Interest of J.L.*, the "problem of at-risk youth and school attendance" presents "a major and complex dilemma." *In re Interest of J.L.*, 140 Wn. App. 438, 440, 166 P.3d 776, 777 (2007). That case involved a sixteen-year-old girl who had been adjudged truant, then incarcerated three times for contempt. *Id.* It revealed what the limited research on Washington's truancy procedures suggests is an all-too-familiar scenario: For the relatively small number of truants who end up in initial truancy proceedings, the courtroom often becomes a revolving door. One study found that 32% of students charged with truancy in one school year were subjects of another petition the following school year; even more continued to have attendance problems. Mason Burely & Edie Harding, *Evaluating the "Becca Bill" Truancy Petition Requirements: A*

Case Study in Ten Washington State School Districts 6 (Jan. 1998), http://www.wsipp.wa.gov/rptfiles/truanteval_s.pdf.

E.S.'s case demonstrates why the current truancy regime, by failing to provide counsel for children, fails to serve their needs. A one-sided and perfunctory truancy procedure is not calculated to identify and target the reasons why the most at-risk children do not attend school. Rather E.S.'s case epitomizes how leaving children to navigate initial truancy proceedings alone jeopardizes not only their own education, privacy, and physical liberty interests, but also the State's interest in early and effective intervention in truancy. Accordingly, the State's primary interest, effectuating the goals of the truancy statute, weighs in favor of affording children assistance of counsel when court intervention is alleged to be necessary to address their truancy.

B. *Perkins* does not resolve the questions before this Court.

The trial court's reliance on *Perkins*, *supra*, was misplaced for two reasons. First, the court in *Perkins* simply did not consider, let alone decide, the major questions raised here. Second, intervening authority has undermined the reasoning of *Perkins*.

The court in *Perkins* rested its holding on two assumptions: first, that "an initial truancy hearing is civil in nature"; and second, that "no significant liberty interest is at stake." 93 Wn. App. at 592, 969 P.2d at 1103. As already argued above, the fact that a proceeding is styled as civil

does not in itself resolve the *Mathews* analysis where important interests are at stake. So *Perkins* ultimately stands or falls on the court's second assumption that initial truancy proceedings implicate no significant interests.

Because the court in *Perkins* simply did not consider the possibility that children's education and privacy interests might trigger due-process requirements under the *Mathews* test, it provides no answer to important questions in this case. The question whether a child's interest in education is deserving of due process protection was not addressed by the court in *Perkins*. Moreover, because amendments to Washington's truancy statute allowing courts to order drug and alcohol testing had not taken effect when the appellants in *Perkins* faced truancy proceedings, *id.* at 595 n.2, 1104 n.2, children's privacy interests were not examined. *Cf. York*, 163 Wn.2d at 308. Furthermore the court below erred in failing to consider intervening precedent, in particular *Shelton*. As explained above. the United States Supreme Court, in *Shelton*, decided three years after *Perkins*, rejected the argument that individuals are entitled to assistance of counsel only when immediate and inevitable detention is threatened. Accordingly, *Perkins* cannot be taken as dispositive of the questions raised here.

VII. CONCLUSION

For the foregoing reasons, the Court should hold that children

have a right to appointed counsel in initial truancy proceedings.

Dated: August 18, 2008.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION

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

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