No. 83024-0

CHAMBERS, J. (dissenting) — E.S. was brought before the bench without an attorney at her side. The commissioner found her to be a truant and entered an order that if violated could lead to sanctions, including house arrest, work crew, and detention. This was the critical hearing for E.S. Schools are required "where appropriate" to try to reduce absences by providing tutoring, family services, alternative schooling, or adjusting course loads. RCW 28A.225.020(1)(c). After a hearing finding truancy, the focus of the proceeding shifts to the student's compliance with the court order. It is thus the initial hearing where protecting the child's interest is most important. Because I would conclude that the Washington Constitution's due process clause, Const. art. I, § 3, when read in conjunction with the paramount duty clause, Const. art. IX, § 1, guarantees the right of counsel at an initial truancy hearing, I respectfully dissent.

ANALYSIS

First, I disagree with the majority that the *Gunwall*[1] factors do not support an independent analysis of our state due process clause in the context of representation in an initial truancy hearing. Majority at 19. Whether article I, section 3 of the state constitution provides greater protection than the Fourteenth Amendment depends on the specific context of each case. *Compare State v.*

[1] *State v. Gunwall,* 106 Wn.2d 54, 720 P.2d 808 (1986).

Bartholomew, 101 Wn.2d 631, 639, 683 P.2d 1079 (1984) (state due process clause provides greater protection than the Fourteenth Amendment regarding the use of evidence in capital cases), *with State v. Ortiz*, 119 Wn.2d 294, 304-05, 831 P.2d 1060 (1992) (state due process clause does not provide greater protection than the Fourteenth Amendment regarding the State's duty to preserve potentially exculpatory evidence). Thus, depending on context, Washington's due process clause may provide greater protection than its federal counterpart. "[I]n interpreting the due process clause of the state constitution, we have repeatedly noted that the Supreme Court's interpretation of the Fourteenth Amendment does not control our interpretation of the state constitution's due process clause." *Bartholomew*, 101 Wn.2d at 639 (citing *Olympic Forest Prods., Inc. v. Chaussee Corp.*, 82 Wn.2d 418, 511 P.2d 1002 (1973); *Petstel, Inc. v. County of King*, 77 Wn.2d 144, 459 P.2d 937 (1969)).

An independent due process analysis is particularly appropriate when analyzing cases affecting a child's right to education. Washington's constitution places a unique emphasis on the right to education. Article IX, section 1 states that "[i]t is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex." Under our constitution, "all children residing within the State's borders have a 'right' to be amply provided with an education." *Seattle Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 513, 585 P.2d 71 (1978). Because the duty is "paramount," the corresponding "right" has equal stature. *Id.* at 512. The fact that our state constitution has made education the "paramount duty" of the State

places Washington "in a perhaps unique position among its peers." Robert F. Utter & Hugh D. Spitzer, The Washington State Constitution – A Reference Guide 153 (2002). "No other state has placed the common school on so high a pedestal." Theodore L. Stiles, *The Constitution of the State and Its Effects Upon Public Interests*, 4 Wash. Hist. Q. 281, 284 (1913). In contrast, there is no corresponding duty to provide or receive education under the federal constitution. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973). The State's "duty goes beyond teaching reading, writing, and arithmetic; it extends to preparing all resident children to participate intelligently and effectively in society." Utter & Spitzer, *supra,* at 154.

The paramount duty of the State to provide ample education to all children is of particular local interest and concern. When alleged violations of due process implicate a Washington citizen's unique right to education, an independent state constitutional analysis of the due process claim is warranted. The question of whether the state constitution's due process clause requires that juveniles be appointed counsel at the initial truancy hearing is adequately briefed and is of substantial public interest, and the majority should have reached the issue.[2]

Nevertheless, the balancing test adopted by the United States Supreme Court

[2] The majority's assertion that appointment of counsel in a truancy proceeding is not a matter of particular state or local concern is based in part on the Bellevue School District's (District) argument that appointing counsel would "'stand the [education] provision on its head.'" Majority at 19 (quoting Pet'r's Suppl. Br. on Constitutional Claim at 6). But the argument misapprehends the role of counsel in this context. As explained further below, the purpose of counsel here is not to aid the child in "refus[ing] to take advantage" of constitutional benefits, but to ensure that the state exercises its authority in a manner most consistent with the child's constitutional interest in education. *Id*.

in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), offers a valuable tool when determining what is required under article I, section 3 as well as the Fourteenth Amendment to the United States Constitution. Both parties briefed the *Mathews* factors extensively, and the Court of Appeals opinion below and this court's majority opinion both engage in a *Mathews* analysis. Inasmuch as the due process clause of the Fourteenth Amendment provides a floor under which the State may not fall below, a *Mathews* analysis does provide a useful baseline for determining whether due process requires appointed counsel for children at initial truancy hearings.

"'[D]ue process is flexible and calls for such procedural protections as the particular situation demands.'" *Mathews*, 424 U.S. at 334 (alteration in original) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)). In each situation, courts must analyze and balance the affected interests of the parties. Courts first examine (1) the private interests affected by the proceeding, (2) the risk of error caused by the procedures used, and (3) the probable value, if any, of additional procedural safeguards. *Id.* at 335. These factors must then be weighed against the countervailing governmental interest supporting the use of the challenged procedure. *Id.* The goal in performing this test is to determine whether the procedures currently used are fundamentally fair and, if not, what additional safeguards must be implemented.

A. Interests Involved

The majority analyzes liberty, privacy, and education as the three interests potentially at stake in an initial truancy hearing. I address each of the majority's arguments in turn.

Physical Liberty

The majority is correct that in criminal cases, there is generally a presumption that indigent defendants have a right to appointed counsel only when, if they lose, they may be deprived of physical liberty. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 26-27, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981) (holding that due process does not require appointment of counsel in *every* parental termination proceeding). However, this presumption may be overcome where other fundamental liberty interests are at stake. *In re Dependency of Grove*, 127 Wn.2d 221, 237, 897 P.2d 1252 (1995); *accord In re Marriage of King*, 162 Wn.2d 378, 394, 174 P.3d 659 (2007).

The majority points out that E.S. was not at risk of immediate incarceration at the initial hearing. Majority at 9-10. Had she complied with the court order and returned to school, contempt charges would never have been filed. *Id.* at 10. When contempt charges were eventually brought, E.S. was appointed counsel. *Id.* A party who disregards any court order stemming from any proceeding may later face contempt sanctions. RCW 2.28.020. The majority cites *Tetro* for the proposition that the "mere possibility that an order in a hearing may later serve as the predicate for a contempt adjudication is not enough to entitle an indigent party therein to free legal assistance." *Tetro v. Tetro*, 86 Wn.2d 252, 255 n.1, 544 P.2d 17 (1975). The majority is correct that the possibility of future contempt sanctions alone does not

necessarily create a right to appointed counsel. *See id.* But the inquiry should not end there.

We have previously held that under the due process clause of the Fourteenth Amendment and article I, section 3 of our state constitution, parents have a right to counsel in permanent child deprivation hearings. *In re Welfare of Luscier*, 84 Wn.2d 135, 138, 524 P.2d 906 (1974). In *Luscier*, we discussed the importance of the familial relationship and the rights of parents to raise their children. *Id.* at 137. We noted that the right to counsel in the civil context does not turn on whether the proceeding may result in imprisonment but whether the individual may be deprived of liberty. *Id*. A year later we extended *Luscier* and held parents have a right to counsel at dependency and child neglect proceedings even where the parent is not at risk for *permanent* deprivation of his child. *In re Welfare of Myricks*, 85 Wn.2d 252, 253, 533 P.2d 841 (1975). We concluded that the "right to one's child is too basic to expose to the State's forces without the benefit of an advocate." *Id.* at 254. As our decisions in *Luscier* and *Myricks* indicate, other significant interests coupled with the other *Mathews* factors may still tip the scales in favor of litigants seeking appointed counsel.

Privacy

E.S. argues that a child's privacy interest is implicated because the court can order drug and alcohol testing at the initial hearing. *See* RCW 28A.225.090(1)(e). The majority counters that privacy is not implicated because the statute limits the court's authority to order testing only when "appropriate." The majority seems to think this is sufficient to ensure that a child's privacy rights are not violated, and

does its best to downplay the potential privacy intrusion by noting that school children generally have a lower expectation of privacy in Washington. Majority at 10-11. But this court has recently held that the testing of a child's bodily fluids does implicate the reasonable expectation of privacy. *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 307, 178 P.3d 995 (2008). Moreover, as the majority admits, testing must be based on individualized suspicion. *Id.* at 308. Authority to test where "appropriate" does not necessarily comport with the requirement of individualized suspicion, and at any rate a fundamental privacy right to be free from such searches should be infringed upon only after careful review and under limited circumstances. The risk that a court may order such an intrusion at an initial hearing weighs in favor of appointing a lawyer who can understand the issues involved and argue to protect the rights of her client.

The majority also relies on the fact that the juvenile court in this case did not actually order E.S. to be tested. Majority at 11. Such reliance is puzzling given the majority's admission that this case is moot, and the only reason for deciding it is that "the right to counsel at an initial truancy hearing is an issue of significant public interest affecting many parties and will likely be raised in the future." Majority at 1 n.1. Basing its decision on the unique facts of a moot case is a strange way for the majority to go about providing guidance on an issue that will affect many parties in the future. The fact that this judge in this case did not order testing of this child is not a proper basis for determining the broader issue.

Education

Finally, E.S. argues that a child's right to education is implicated at initial truancy hearings because the court may order a truant child to change schools, attend private school, or enter into alternative education programs, any or all of which could have a disruptive impact on the child's education. "[E]ducation is perhaps the most important function of state and local governments." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493, 74 S. Ct. 686, 98 L. Ed. 873 (1954). The children of our state have a constitutional right to an education. *Seattle Sch. Dist. No. 1,* 90 Wn.2d at 512; Const. art. IX, § 1. That right is paramount. Our state constitution's emphasis on the importance of education, and its recognition of broad constitutional protections of individual rights generally, demonstrates that the procedures necessary to protect the rights of children in E.S.'s position must be more demanding than they are in other contexts. In addition to the rights of liberty and privacy, the state constitution confers a right to education that may be infringed upon only in very limited circumstances.

While the measures in RCW 28A.225.090 are aimed at protecting the child's right to education, the amount of authority the court assumes when making these determinations has a significant effect on the child's continued education. A misguided decision on which steps to take may easily have unintended adverse consequences on the child's education. The truancy statute gives the court authority to assume continuing jurisdiction over the child and to make significant choices regarding where and how education will be provided. This authority to affect the child's fundamental right to education should be exercised only after careful

consideration, with an understanding of all the factors involved. As the Court of Appeals noted, such decisions must not be made without challenge or intelligent debate. *Bellevue Sch. Dist. v. E.S.*, 148 Wn. App. 205, 216, 199 P.3d 1010 (2009).

The majority argues, as in its *Gunwall* analysis described above, that it would stand the state constitution's education provision "'on its head'" to hold that an attorney must be appointed for an initial truancy hearing. Majority at 12 (quoting Pet'r's Suppl. Br. on Constitutional Claim at 6). But the majority misperceives the role of counsel at the truancy hearing. Counsel is not there to ensure that the child's refusal to attend school is protected. Rather, an attorney serves to protect the child's right to education by providing meaningful advocacy and ensuring that the State and the school district have met their obligations under the statute. The paramount right to education must be meaningfully protected. A child who does not understand her rights, or the consequences of the proceedings against her, cannot meaningfully protect them on her own.

B. Risk of Erroneous Deprivation and Probable Value of Additional Safeguards

E.S. argues that children facing initial truancy hearings do not have the knowledge or sophistication to adequately protect their rights and that a lawyer is necessary for them to meaningfully be heard. We have recognized that children are often vulnerable, powerless, and voiceless. *In re Parentage of L.B.*, 155 Wn.2d 679, 712 n.29, 122 P.3d 161 (2005). Minors "generally 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 (1998). In other

contexts, this State has recognized the limited ability of children to act and reason to the same degree as adults. *See* ch. 26.28 RCW (establishing age of majority at 18 when persons may independently enter into contracts, vote, or sue in court to the same extent as adults, etc.). A child does not enjoy the full panoply of rights that adults have under the law precisely because, unlike adults, they are generally less capable of fully understanding the consequences of their actions. *See* RCW 9A.04.050 (children between ages 8 and 12 presumed incapable of committing a crime). The risk that children will be placed at a disadvantage in legal proceedings is as real in the truancy context as it is in many other civil contexts in which they are provided counsel. *See* RCW 13.34.100(6) (counsel appointed for children in dependency cases); RCW 13.32A.192(1)(c) (counsel must be appointed for children in at-risk youth petitions); RCW 13.32A.160(1)(c) (counsel must be appointed for children in need of services). Without the benefit of legal counsel, a child's ability to assert her rights is severely limited and the risk of error is high.

The majority says that "issues that are before the court at the initial hearing on a truancy petition are uncomplicated and straightforward." Majority at 13. To prove its point, the majority turns once again to the facts of the case, observing that "the record shows that E.S. was able to explain to the juvenile court why she missed school." *Id*. But the reasons behind a child's continued absences from school are *often* complicated. It is unlikely that children will be able to understand the school's statutory duties to provide services, or be able to explain the complex social, economic, or family issues that may be underlying factors in the absences. In the formal setting of a courtroom, children might well find these issues complicated and

have difficulty understanding and protecting their rights without the assistance of counsel. A lawyer can ensure that services are properly provided and help the court help the child reengage in school. Further, even assuming that E.S.'s explanation was as cogent and accurate as the majority asserts, the reliance yet again on specific facts of a moot case is entirely misplaced. Many children will not be in a position to explain themselves as well as E.S., and the fact that this particular child was able to explain her particular situation in this particular case is simply not a valid basis for a blanket denial of counsel to all children in all initial truancy hearings.

In addition, while the majority is correct that children must be appointed counsel when the school district has actually filed for contempt, the ability of a lawyer to effectively argue for their client at this point is severely limited. Once an initial decision to place a child under the jurisdiction of the court has been made, that decision cannot be collaterally attacked at a contempt hearing. *See In re J.R.H.*, 83 Wn. App. 613, 616, 922 P.2d 206 (1996) (court order cannot be collaterally attacked in contempt proceedings as contempt judgment will stand even if order violated was erroneous or later ruled invalid). In other words, counsel cannot argue that the underlying order giving rise to sanctions against the child should not have been entered in the first place.

Although certain conditions must be met before a school district may file a petition for truancy, without appointed counsel children will be less able to ensure that the school district met its burden. A school district must not only prove that the child has been absent the requisite number of days before filing a petition, it must also prove by a preponderance of the evidence that the steps taken by the school

district to address the absences have been unsuccessful, and that court intervention and supervision are necessary to assist the parents and the school district to reduce or eliminate the child's absences. RCW 28A.225.035(1)(a)-(c). In this case, counsel for E.S. could have argued at the initial hearing that the Bellevue School District (District) had not taken adequate steps to assist E.S. in returning to school. E.S. contends that the District should have communicated with her mother, Velma Serdar, in her native language rather than in English. She also argues that the District should have met with E.S. and Ms. Serdar on more than one occasion, and that E.S. should have been referred to a community truancy board or truancy workshop program before a court order was put in place.[3] While the District may have been able to meet its burden even if adequately challenged, the nature of the rights involved and the risk of erroneous deprivation demand that children facing these proceedings have an effective advocate on their side. As the Court of Appeals stated:

> The statute requires that before the court's intervention may be invoked, there will be a meaningful exploration of, and attempt to address, the causes of child's truancy. Nothing in the present procedure ensures this will happen. The risk of error is therefore high.

E.S., 148 Wn. App. at 219. I agree.

C. State Interests

The majority identifies as a countervailing state interest only the increased

[3] The District sought a request to bypass these programs when filing the petition, stating that "[s]tudent has been out of school for an extended period of time" as the reason for the request. Clerk's Papers at 15.

financial costs of providing counsel, arguing somewhat less than forcefully that it is "reasonable . . . to conclude that costs would rise . . . if an attorney had to be appointed." Majority at 14. I agree that such a conclusion is not beyond the bounds of reason. However, as E.S. points out, the increased cost of providing counsel at initial truancy hearings may be offset by a small reduction in contempt proceedings. Moreover, according to the Juvenile Law Center, of the 39 states that have made truancy a status offense, only 9 do not provide counsel at all stages of the proceedings. Thus, it seems, a majority of other states do not find providing counsel in this context overly burdensome. While costs may or may not rise if we require counsel earlier in truancy proceedings, financial costs alone do not control whether due process requires additional procedural safeguards. *Mathews*, 424 U.S. at 348. In this case, the majority's unsupported speculation about rising costs does not outweigh the value of providing children with counsel at the earliest stage of truancy proceedings.

On balance, due process requires that children at initial truancy hearings be provided counsel in order to protect their liberty, privacy, and educational rights. Unlike adults, children cannot be expected to fully understand their rights or be expected to adequately represent themselves in court against the superior resources of the State. Without representation, erroneous deprivation of those rights is a significant risk. An attorney can ensure that a child's interests are represented, that the school district meets its burden, and, perhaps most importantly, that an effective solution can be reached that results in the best educational outcome for the child. Where the consequences of a judge's decision have such an important and lasting

effect on their fundamental constitutional rights, children must be afforded counsel.

CONCLUSION

I would hold that article I, section 3 of our state constitution guarantees the right of counsel to children at initial truancy hearings held in court that subject the child to the authority of the court and create the potential for later contempt sanctions. Because the majority holds otherwise, I respectfully dissent.

AUTHOR:

Justice Tom Chambers

____

WE CONCUR:

Richard B. Sanders, Justice Pro Tem

____

____

____

____