

**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

BELLEVUE SCHOOL DISTRICT,	)	
	)	No. 83024-0
Petitioner,	)	
	)	
v.	)	En Banc
	)	
E.S.,	)	
	)	
Respondent.	)	
	)	Filed June 9, 2011

ALEXANDER, J.—We are asked to decide whether the due process clause of the Fourteenth Amendment to the United States Constitution or the due process clause set forth in article I, section 3 of the Washington Constitution requires appointment of counsel to represent a child at an initial truancy hearing. The Court of Appeals, Division One held that due process protections compel appointment of counsel at that stage of a truancy proceeding. We hold that the Court of Appeals erred in making that determination and, therefore, reverse its decision.<sup>1</sup>

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<sup>1</sup>This case appears to be moot, as counsel for E.S. informed us during oral argument that the truancy petition against E.S. has been dismissed. Wash. Supreme Court oral argument, *Bellevue Sch. Dist. v. E.S.*, No. 83024-0 (Jan. 19, 2010), at 27 min., 18 sec., *audio recording by TVW*, Washington State's Public Affairs Network, *available at* <http://www.tvw.org>. However, the question of whether or not a child has 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. Because we decide cases of substantial public interest likely to recur even though the issues may be moot, we

During the 2005-06 and 2006-07 school years, E.S. was enrolled as a student at Highland Middle School in the Bellevue School District (the District). E.S. was 13 years old during the 2005-06 school year. According to the District, E.S. was absent from school on 73 of the first 100 days of that school year. Many of the absences, it concluded, were unexcused. In response to E.S.'s absences, the District sent letters and made numerous phone calls to the child's mother, Velmanija Serdar, informing her of the absences. All communication between the school and Serdar prior to the truancy hearing was in the English language even though Serdar is a native Bosnian speaker and her facility with English is somewhat limited. Early in January 2006, a meeting took place between E.S., Serdar, and the assistant principal of Highland Middle School, Diane Tuttle. The purpose of that meeting was to discuss a plan to reengage E.S. with school with the objective of ensuring the child's attendance on a regular basis. At the meeting, E.S. and Serdar were informed by Tuttle that any further absences by E.S. for medical reasons needed to be verified by a doctor's note and that Washington law required the school district to file a truancy petition in juvenile court if her unexcused absences continued. Despite these warnings, E.S. continued to miss school.

On March 1, 2006, the District filed a truancy petition in the King County Juvenile Court pursuant to the provisions of RCW 28A.225.035. In it they sought an order requiring E.S. to attend school. A hearing on the petition was held before a King

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reach the issues presented. *See Dunner v. McLaughlin*, 100 Wn.2d 832, 838, 676 P.2d 444 (1984).

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County Juvenile Court commissioner on March 6, 2006. The hearing was attended by E.S., Serdar, and the District's representative, Glenn Hasslinger. E.S. and her mother were not represented by counsel at this hearing, and they did not request that counsel be appointed for either of them. Serdar was, however, provided with a Bosnian interpreter to assist her in communicating with the court.

During the hearing, E.S. explained to the court commissioner that one of the reasons she missed so much school was that she had been experiencing stomach pain. She went on to state, however, that many of her absences were attributable to the fact that she did not want to go to school. The court commissioner informed E.S. that absences for any medical issue required a doctor's note. The commissioner also indicated that she expected E.S. to be in class every day for the rest of the school year. E.S. said that she understood what she was being told and agreed with the requirement that she attend school. The commissioner also explained to E.S. and Serdar that if E.S. did not go to school, the District can bring a motion for contempt. At the contempt hearing if the [c]ourt finds that you have not been going to school and you do not have a valid reason, then the [c]ourt can enter sanctions against you. Those sanctions usually start out as . . . evaluations, community service, [or] book reports. But if the truancy continued, we would be looking at house arrest, work crew, and possibly detention.

Verbatim Report of Proceedings at 3. The juvenile court commissioner then

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determined that E.S. was truant and ordered her to attend school on a regular basis. A review hearing was scheduled for March 27, 2006.

E.S. continued to miss school. Consequently, on March 15, 2006, prior to the previously scheduled review hearing, the District initiated contempt proceedings against E.S and scheduled a show cause hearing for March 27, 2006. At the conclusion of the March 27 hearing, at which E.S. was represented by appointed counsel, the juvenile court commissioner held E.S. in contempt and ordered her to complete 10 hours of volunteer work. The court commissioner did indicate, however, that if E.S. complied with all orders in effect, the contempt would be purged. E.S. failed to attend school or perform the volunteer work. At a review hearing on May 8, 2006, at which E.S. was again represented by counsel, E.S. was found by the juvenile court to have failed to purge the contempt. She was then ordered to obey all orders then in effect and complete an additional 10 hours of volunteer work.

E.S.'s failure to attend school and complete volunteer work continued. At a review hearing on June 14, 2006, where E.S. was again represented by counsel, E.S. was again found by the juvenile court to be in contempt. On this occasion, the court ordered her to write a two-page paper explaining the value of education and setting forth her plan for how she could become a successful student. It also ordered E.S. to spend six days in detention at home with an electronic monitor. Over the course of the summer of 2006 and during the 2006-07 school year, the juvenile court conducted additional contempt hearings. E.S. was represented by counsel at each of these

hearings. At these hearings the court determined that E.S. was either in contempt or had failed to purge the contempt. The court entered various orders at each hearing, including requirements that E.S. write a five-page paper, participate in the enrollment process at an alternative school and attend that school and obtain therapy. Following a hearing on March 21, 2007, the juvenile court entered what turned out to be its last order in this matter, determining that E.S. had not purged the contempt.

On May 22, 2007, E.S.'s counsel filed a motion to set aside the truancy finding, arguing that the juvenile court should have appointed counsel for E.S. at the initial truancy hearing and that because of its failure to do so, the truancy finding should be vacated. At the hearing on that motion, counsel for E.S. argued that, notwithstanding the fact that the March 6, 2006, finding of truancy was made pursuant to an agreement, at 13 years of age E.S. could not have fully understood the legal issues involved in her case. E.S.'s counsel also contended that the District failed to take the statutorily required steps to help E.S. reengage in school before filing the truancy petition and that an attorney could have presented this argument to the court at the initial hearing. The juvenile court denied the motion to set aside the finding of truancy and continued the contempt hearing, originally scheduled for April 4, 2007, to the beginning of the new school year.

E.S. asked the King County Superior Court to modify the juvenile court commissioner's decision denying her motion to set aside the truancy finding. The superior court affirmed the commissioner's decision. E.S. then appealed to the Court of

Appeals. That court vacated the finding of truancy and held that “[a] child’s interests in her liberty, privacy, and right to education are in jeopardy at an initial truancy hearing” and that due process requires the provision of counsel for all children appearing at an initial truancy hearing. *Bellevue Sch. Dist. v. E.S.*, 148 Wn. App. 205, 220, 199 P.3d 1010 (2009). The District, through the office of the King County Prosecuting Attorney, then filed a petition in this court seeking review of the Court of Appeals’ decision. We granted review. *Bellevue Sch. Dist. v. E.S.*, 166 Wn.2d 1011, 210 P.3d 1018 (2009).

II

We are asked to decide whether the due process clause of the Fourteenth Amendment to the United States Constitution or article I, section 3 of the Washington Constitution requires that counsel be appointed to represent a child at an initial truancy hearing. We review constitutional issues de novo. *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 503, 198 P.3d 1021 (2009).

III

As noted above, the Court of Appeals concluded that a child who is not represented by counsel at an initial truancy hearing is denied due process of law. Because E.S. was not represented at that hearing, the Court of Appeals vacated the truancy finding. See *Bellevue*, 148 Wn. App. at 220. The Court of Appeals reached its conclusion after applying the balancing test set forth by the United States Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). That test is to be applied by a court in determining the extent to which procedural due

process considerations impose constraints on governmental decisions that deprive individuals of “liberty” or “property” interests within the meaning of the due process clause of the Fourteenth Amendment to the United States Constitution. *Id.* at 332-35. After applying the test, the Court of Appeals determined that the risk of erroneous deprivation of E.S.’s interests in her physical liberty, privacy, and education outweighed any countervailing government interest.

The District contends that the Court of Appeals erred in determining that E.S.’s due process rights were violated, asserting that E.S.’s physical liberty interest was not at stake at the initial truancy hearing and that courts have never required appointment of counsel to protect a child’s privacy and education interests. E.S. responded in a supplemental brief to this court that even if the Fourteenth Amendment does not compel appointment of counsel for a child in an initial truancy hearing, article I, section 3 of the Washington Constitution, which, according to E.S., offers broader due process protections than its federal counterpart, does compel appointment of counsel.<sup>2</sup> To this contention, the District argues that the factors set forth in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), do not support an independent analysis of this state’s due process clause.

Significantly, RCW 28A.225.035(10)<sup>3</sup> provides as follows: “The court may permit

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<sup>2</sup>The Juvenile Law Center, et al., American Civil Liberties Union of Washington, and Team Child, et al., each filed amicus curiae briefs in support of E.S.’s position.

<sup>3</sup>In 2009, the legislature recodified former RCW 28A.225.035(11) (2001) to RCW 28A.225.035(10). For our purposes, and since these subsections are identical, we will refer to subsection (10).

the first [truancy] hearing to be held without requiring that either party be represented by legal counsel.” Therefore, in order for us to reach a conclusion that E.S.’s right to due process under the Fourteenth Amendment and/or article I, section 3 of the state constitution has been violated by the juvenile court’s decision to not provide her with counsel at the initial truancy hearing, we would have to hold that RCW 28A.225.035(10) is unconstitutional. This statute, like most statutes,<sup>4</sup> is presumed to be constitutional, and the burden of overcoming that presumption resides with the challenger. *Fed. Way Sch. Dist. No. 210 v. State*, 167 Wn.2d 514, 523-24, 219 P.3d 941 (2009).

*Fourteenth Amendment to the United States Constitution*

The Fourteenth Amendment essentially provides that a state may not deprive persons of “life, liberty, or property” without providing them with “due process of law.” U.S. Const. amend. XIV, § 1. “The due process clause of the Fourteenth Amendment confers both procedural and substantive protections.” *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 216, 143 P.3d 571 (2006) (citing *Albright v. Oliver*, 510 U.S. 266, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994)). At issue here is E.S.’s claim that she was denied procedural due process. “When a state seeks to deprive a person of a protected interest, procedural due process requires that an individual receive notice of the deprivation and an opportunity to be heard to guard against erroneous deprivation.” *Id.*

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<sup>4</sup>In the free speech context, “the State usually ‘bears the burden of justifying a restriction on speech.’” *Voters Educ. Comm. v. Pub. Disclosure Comm’n*, 161 Wn.2d 470, 482, 166 P.3d 1174 (2007) (quoting *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 114, 937 P.2d 154, 943 P.2d 1358 (1997)).



(citing *Mathews*, 424 U.S. 334). “The opportunity to be heard must be ““at a meaningful time and in a meaningful manner,”” appropriate to the case.” *Id.* (quoting *Mathews*, 424 U.S. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965))). ““[D]ue process,” unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.” *Mathews*, 424 U.S. at 334 (alteration in original) (quoting *Cafeteria & Rest. Workers Union Local 473 v. McElroy*, 367 U.S. 886, 895, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961)). “[D]ue process is flexible and calls for such procedural protections as the particular situation demands.” *Id.* (alteration in original) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)). Under the *Mathews* balancing test, cited above, a court must consider three factors in identifying the due process that a person is entitled to receive in a particular circumstance: (1) “the private interest that will be affected by the official action”; (2) “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 (3) “the [g]overnment’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Id.* at 335.

E.S. contends that three of her private interests are at stake in this case, including physical liberty, bodily privacy, and education. With respect to the first of these interests, E.S. asserts that her physical liberty was threatened because the juvenile court’s truancy order was a necessary and direct predicate to its later finding of

contempt and imposition of a detention sanction consisting of home monitoring. E.S. contends in that regard that she was not afforded due process because at the point of contempt proceedings, no challenge to the original truancy finding is available. The District responds that due process concerns do not arise if, as here, deprivation of a child's physical liberty is merely potential or hypothetical. In support of its argument, the District points to the United States Supreme Court's decision that "an indigent's right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation" and, accordingly, the "mere threat" of punishment is insufficient to require appointment of counsel. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 25, 26, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981) (quoting *Scott v. Illinois*, 440 U.S. 367, 373, 99 S. Ct. 1158, 59 L. Ed. 2d 383 (1979)). While it is true that the initial hearing with which we are here concerned must precede a contempt hearing, 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); see also *In re Truancy of Perkins*, 93 Wn. App. 590, 969 P.2d 1101 (concluding that children are not entitled to appointed counsel at the initial truancy hearing), *review denied*, 138 Wn.2d 1003, 984 P.2d 1033 (1999). In our view, it is significant that contempt sanctions could not have been imposed against E.S. at the initial truancy hearing since a petition for contempt had not yet been filed. Indeed, as we have observed above, when the contempt petition was filed and there was a possibility that

the juvenile court could deprive E.S. of her physical liberty, E.S. was provided with counsel. In sum, the truancy order that was issued at the initial hearing did not deprive E.S. of her physical liberty.

The second private interest that E.S. identifies is bodily privacy. E.S.'s counsel argues that E.S.'s private interest in her bodily privacy would be at stake if the court, under RCW 28A.225.035 and RCW 28A.225.090, required E.S. to submit to testing for the use of controlled substances or alcohol. Under RCW 28A.225.090(1)(e), a court has authority to order a child to submit to testing for the use of controlled substances or alcohol only if it makes "a determination that such testing is appropriate to the circumstances and behavior of the child and will facilitate the child's compliance with the mandatory attendance law." We have recognized that, as a general proposition, school children "have a lower expectation of privacy" and that drug testing of students based on individualized suspicion, rather than suspicionless random testing, is permissible under our state constitution. *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 308, 178 P.3d 995 (2008).<sup>5</sup> Because there was no basis for individualized

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<sup>5</sup>We also noted that the United States Supreme Court has recognized a lower expectation of privacy for students and has "applied a standard of reasonable suspicion to determine the legality of a school administrator's search of a student, and [has] held that a school search 'will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.'" *Safford Unified Sch. Dist. No. 1 v. Redding*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 2633, 2639, 174 L. Ed. 2d 354 (2009) (citations omitted) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 342, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985)). Here, it is important to point out that if testing were ordered, that decision would be made by the juvenile court, which is in the best position to determine whether testing "reasonably related to the objectives of the search and [is] not excessively intrusive in light of the age and sex of the student and the nature of the

suspicion of drug or alcohol use by E.S., the juvenile court properly did not order such testing. If there had been such a showing, the testing may well have been appropriate because we have recognized a lower expectation of privacy for students in Washington State, notwithstanding the fact that E.S. was then unrepresented. The fact is, however, that the juvenile court did not order testing, so there was no basis to intrude on E.S.'s bodily privacy at the initial truancy hearing.

The third private interest that E.S. denotes is her right to an education under article IX, section 1 of our state constitution.<sup>6</sup> Citing the Court of Appeals' reasoning, E.S. claims that a misguided decision made during an initial truancy hearing "could disrupt the child's education by introducing or exacerbating stigma, uncertainty, and instability." Suppl. Resp't's Br. at 20 (citing *Bellevue*, 148 Wn. App. at 216). We thoroughly disagree with this contention, and note that the overriding purpose of the compulsory school attendance and admission statute, chapter 28A.225 RCW, is to *protect*, rather than interfere with, the child's right to an education. Clearly, a child must attend school in order to receive the benefits that flow from the right to an education. It cannot be said that, by holding an initial truancy hearing to determine why E.S. refused to attend school and to establish a plan for her to begin attending school regularly, the juvenile court subtracted in any way from the State's "paramount duty . . . to make

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infraction," rather than by school administrators. See RCW 28A.225.090(1)(e).

<sup>6</sup>"It is the paramount duty of the state to make ample provision for the education of all children residing within its borders . . . ." Wash. Const. art. IX, § 1.

ample provision” for E.S.’s education.<sup>7</sup> Wash. Const. art. IX, § 1. Thus, we agree with the District’s argument that the holding advanced by E.S. and adopted by the Court of Appeals would stand the aforementioned provision “on its head.” Pet’r’s Suppl. Br. on State Constitutional Claim at 6. For the reasons explained above, we conclude that E.S. failed to show any private interest that was affected by the initial truancy hearing.

In regard to the second *Mathews* factor, the risk of erroneous deprivation, E.S. asks us to conclude that counsel should be appointed for a child facing an initial truancy hearing because the child, without benefit of counsel, is in danger of being disadvantaged in truancy proceedings. This would, she asserts, include the initial hearing, because of the child’s limited ability to act and reason like an adult. We readily agree the child should be afforded appointed counsel at a contempt proceeding. That, though, is not an issue since a child is entitled to counsel at that stage. Indeed, as we have noted, E.S. had the benefit of counsel at her first and all subsequent contempt hearings. Furthermore, the initial hearing did not adversely affect any of E.S.’s private interests. While it may have been comforting to E.S. and her mother to have been accompanied by legal counsel at the initial hearing, the issues that are before the court at the initial hearing on a truancy petition are uncomplicated and straightforward. Indeed, the record shows that E.S. was able to explain to the juvenile

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<sup>7</sup>Pursuant to the provisions of RCW 28A.225.020(1)(c), a school district is authorized to “[t]ake steps to eliminate or reduce the child’s absences,” including “adjusting the child’s school program or school or course assignment” and “requiring the child to attend an alternative school or program.” These steps would be taken, in most instances, at a time when the child is unrepresented by legal counsel.

court why she missed school. Faced with E.S.'s statements, the juvenile court judge told her that she needs to see the school nurse if she feels ill and that she could not skip more school days if she wanted to go on to the eighth grade. E.S. indicated that she understood what the judge was telling her and that she did not have additional problems at school that prevented her from attending regularly. By enacting RCW 28A.225.035, the legislature determined that appointed counsel is not required at initial truancy hearings, and we fail to see what would be gained if additional or substitute procedural safeguards were required at that stage.<sup>8</sup>

The third *Mathews* factor, governmental interests, is only briefly mentioned by E.S.'s counsel, who addresses only the countervailing government interest of cost and states that cost "is uncertain and does not have controlling weight." Suppl. Resp't's Br. at 5. We believe that it is reasonable to conclude that costs would rise and additional administrative resources would be expended if an attorney had to be appointed whenever counsel is sought by a child at an initial truancy hearing. Therefore, the third

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<sup>8</sup>In dissent, Justice Chambers contends that 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." Dissent at 10 (citing RCW 13.34.100(6); RCW 13.32A.192(1)(c); RCW 13.32A.160(1)(c)). We note that RCW 13.34.100(6) merely grants a trial court the discretion to appoint counsel in a dependency action. Thus, it cannot be said that it provides children with any greater right to counsel than does RCW 28A.225.035, the statute at issue here. The other statutes, RCW 13.32A.160(1)(c) and RCW 13.32A.192(1)(c), provide for appointment of counsel for "[a]t-risk youth," defined as a juvenile who is absent from home without consent, who is beyond the control of her parents, or who has criminal charges pending relating to a substance abuse problem. RCW 13.32A.030(3). Our role is not to second-guess the legislature's decision to codify the right of an "at-risk youth" to have the benefit of appointed counsel while declining to provide the same right to a child at an initial truancy hearing.

*Mathews* factor does not weigh in favor of requiring counsel.

In sum, the *Mathews* analysis does not support the conclusion that counsel must be appointed at an initial truancy hearing. The fact is that the initial hearing at which E.S. was not represented by counsel had little or no adverse effect on her private interests and it presented little risk of an erroneous deprivation of any of the child's rights, including her right to an education. We, therefore, conclude that E.S. failed to meet her burden of proving that RCW 28A.225.035(10) is unconstitutional. While it is certainly within the province of the legislature to require the provision of counsel at an initial truancy hearing, that is a policy decision for the legislature and we will not intrude, under the guise of a constitutional directive, on what is clearly the legislature's prerogative.

*Article I, Section 3 of the Washington Constitution*

Article I, section 3 of the Washington Constitution provides that “[n]o person shall be deprived of life, liberty, or property, without due process of law.” E.S. contends that the state due process clause is more protective than its federal counterpart and asserts that, in the context of this case, the state constitutional provision requires appointment of counsel to represent a child in an initial truancy hearing. In the *Gunwall* case, we set forth the following nonexclusive factors to be considered when determining whether a provision of the state constitution should be interpreted independently of its corresponding federal constitutional provision: “(1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state

law; (5) structural differences; and (6) matters of particular state or local concern.” *Gunwall*, 106 Wn.2d at 58. E.S. cites two cases, one decided pre-*Gunwall* and the other decided post-*Gunwall*, in an effort to support her position that the question of whether article I, section 3 provides greater protection than the Fourteenth Amendment depends on the specific context of each case. Resp’t’s Suppl. Br. on State Constitutional Issue at 4 (*comparing State v. Bartholomew*, 101 Wn.2d 631, 639, 683 P.2d 1079 (1984) (stating “in 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”), *with State v. Ortiz*, 119 Wn.2d 294, 304-05, 831 P.2d 1060 (1992) (holding the state due process clause does not provide greater protection than the Fourteenth Amendment regarding the State’s duty to preserve potentially exculpatory evidence)). The District responded by pointing out that in *In re Marriage of King*, 162 Wn.2d 378, 391-95, 174 P.3d 659 (2007), we declined to independently analyze the State’s due process clause and that we should decline to do so here as well. Pet’r’s Suppl. Br. on State Constitutional Claim at 2. We, however, limited our holding in *King* to the context of that case, which pertained to whether due process compelled appointment of counsel at public expense in a dissolution proceeding. Our analysis in *King*, therefore, supports E.S.’s contention that context matters when we are determining whether to independently analyze the state due process clause. Because we have never addressed whether state and federal due process requirements are



coextensive in the context of an initial truancy hearing, we analyze the relevant *Gunwall* factors below.

In her supplemental brief, E.S. only addresses the fourth, fifth, and sixth *Gunwall* factors, apparently conceding that the first, second, and third factors do not support an independent analysis of the state due process clause. See Resp't's Suppl. Br. on State Constitutional Issue at 7-8. Under the fourth factor, preexisting state law, E.S. contends that we should independently analyze the state constitutional provision because "Washington has been protective of the right to counsel." *Id.* at 8. In support of this contention, E.S. cites RCW 71.34.720, the statute for involuntary commitment of minors, which states, "In no event may the minor be denied the opportunity to consult an attorney." Resp't's Suppl. Br. on State Constitutional Issue at 8 (quoting RCW 71.34.720(4)). That statute, however, is inapposite to our consideration of whether the state due process clause should be analyzed independently of the federal due process clause in the context of an initial truancy proceeding. Pointing to one statute that sets forth an inviolable right to counsel in a context entirely outside the scope of truancy is not instructive. Moreover, the fact that the statute explicitly provides the right to counsel cuts against E.S.'s argument because it shows that the legislature is capable of requiring counsel in circumstances where it deems counsel necessary. The legislature did not choose to require counsel in the context of an initial truancy hearing. In fact, it explicitly granted discretion to the trial courts to decide whether or not counsel should be present at the initial truancy hearing. See RCW 28A.225.035(10) ("The

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court may permit the first hearing to be held without requiring that either party be represented by legal counsel.”).

Also regarding the fourth factor, E.S. relies on *In re Welfare of Luscier*, 84 Wn.2d 135, 524 P.2d 906 (1974), for the notion that “the right to one’s children is a ‘liberty’ interest protected by the due process clauses of the federal and state constitutions.” Resp’t’s Suppl. Br. on State Constitutional Issue at 8. There, we concluded that the Fourteenth Amendment to the United States Constitution and article I, section 3 of our state constitution both guarantee an indigent parent’s right to counsel in a termination proceeding. The federal constitutional underpinnings of *Luscier* were, however, abrogated by the United States Supreme Court in *Lassiter*, 452 U.S. 18, the Court holding that there is a “presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty.” *Lassiter*, 452 U.S. at 26-27. It remains undetermined whether the *Lassiter* decision by the United States Supreme Court has eroded the constitutional underpinnings of this court’s decision in *Luscier*. We say this because in *Luscier* we noted that Washington courts have been “no less zealous” than federal courts in protecting familial relationships and did not separately analyze the state and federal constitutional provisions at issue. *Luscier*, 84 Wn.2d at 137. But even assuming that our decision in *Luscier* continues to have viability under article I, section 3, see *In re Dependency of Grove*, 127 Wn.2d 221, 897 P.2d 1252 (1995) (citing *Luscier* with approval), our narrow holding in *Luscier* that “appointment of counsel is constitutionally required in permanent

deprivation proceedings” is significantly distinguishable from this case. *Luscier*, 84 Wn.2d at 139. We cannot say that the fourth *Gunwall* factor supports an independent analysis of our state constitution in the context of this case.

The fifth *Gunwall* factor requires us to analyze structural differences between the state and federal constitutions. *Gunwall*, 106 Wn.2d 54. E.S. correctly asserts that our court has “consistently concluded that [the fifth] factor supports an independent analysis.” *King*, 162 Wn.2d at 393. “Our consideration of this factor is always the same; that is that the United States Constitution is a *grant* of limited power to the federal government, while the state constitution imposes *limitations* on the otherwise plenary power of the state.” *State v. Foster*, 135 Wn.2d 441, 458-59, 957 P.2d 712 (1998) (citing *State v. Russell*, 125 Wn.2d 24, 61, 882 P.2d 747 (1994); *Gunwall*, 106 Wn.2d at 66). Thus, the fifth *Gunwall* factor supports an independent analysis of the state constitution.

Under the sixth factor, we are to consider whether the matter is of particular state or local concern. *Gunwall*, 106 Wn.2d 54. E.S. contends that this factor favors independent analysis because “truancy proceedings concern local issues and national uniformity is not required.” Resp’t’s Suppl. Br. on State Constitutional Issue at 7. In support of this contention, E.S. cites to article IX, section 1 of the Washington Constitution, which provides that it 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.” Wash. Const. art. IX, § 1. It is

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true that we have previously indicated that “[n]o other state has placed the common school on so high a pedestal.” *Seattle Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 511, 585 P.2d 71 (1978) (quoting Theodore L. Stiles, *The Constitution of the State and its Effects Upon Public Interests*, 4 Wash. Hist. Q. 281, 284 (1913)). As we have noted above, the District points out that article IX, section 1 is a constitutional mandate to fund education and it would “stand the provision on its head to hold that a lawyer is constitutionally required to represent a juvenile who refuses to take advantage of the constitutional benefits that Art. 9, § 1 confers.” Pet’r’s Suppl. Br. on State Constitutional Claim at 6. We find ourselves in agreement with the District because the overriding purpose of the compulsory school attendance and admission statute, chapter 28A.225 RCW, is to *protect* the child’s right to an education. There is absolutely nothing in that chapter that inhibits that right or diminishes the State’s “paramount duty . . . to make ample provision” for E.S.’s education. Wash. Const. art. IX, § 1. Indeed, as we have indicated above, that chapter of the RCW sets forth provisions intended to ensure that parents and students are aware of and abide by the compulsory education requirements enacted by the legislature. See RCW 28A.225.005-.020. In our view, the sixth *Gunwall* factor does not support an independent analysis of the state constitution in the context of appointing counsel to represent a child in an initial truancy hearing.

In short, we cannot say that the *Gunwall* factors support an independent analysis of the due process provision of our state constitution in this context.

IV

For reasons set forth above, we hold that the Fourteenth Amendment to the United States Constitution does not require that appointed counsel represent a child in an initial truancy hearing. We conclude, additionally, that in this context the *Gunwall* factors do not support an independent inquiry under article I, section 3 of the Washington Constitution. The Court of Appeals is reversed.

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AUTHOR:

Justice Gerry L. Alexander

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WE CONCUR:

Justice Mary E. Fairhurst

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Justice Charles W. Johnson

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Justice James M. Johnson

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Justice Debra L. Stephens

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Justice Susan Owens

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