

Supreme Court No. 83024-0

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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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BELLEVUE SCHOOL DISTRICT,

Petitioner

v.

E.S.,

Respondent.

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**MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF**

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Juvenile Law Center (“JLC”) respectfully moves, pursuant to RAP 10.1(c) and 10.6, to file a brief as *Amicus Curiae* regarding the prevalence of representation by counsel in truancy proceedings nationwide. In support of this motion, Juvenile Law Center offers the following information:

**I. Identity And Interest Of *Amicus***

Juvenile Law Center is the oldest multi-issue public interest law firm for children in the United States, founded in 1975 to advance the rights and well being of children in jeopardy. JLC pays particular attention to the needs of children who come within the purview of public agencies – for example, abused or neglected children placed in foster homes, delinquent youth sent to residential treatment facilities or adult prisons, or children in placement with specialized services needs. JLC works to ensure children are treated fairly by systems that are supposed to help them, and that children receive the treatment and services that these systems are supposed to provide. JLC also works to ensure that children's rights to due process are protected at all stages of juvenile court proceedings, from arrest through disposition, from post-disposition through appeal, and that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights.

**II. Familiarity With The Issues**

Juvenile Law Center has obtained copies of, and is familiar with, the briefing submitted by the parties to this Court and the proceedings below. JLC is familiar with the arguments presented by the parties and other *amici* and will not unduly repeat them.

### **III. Issues To Be Addressed By *Amicus***

Is there a consensus among the states regarding the necessity of representation by counsel to protect the interests of children in truancy proceedings? Are there other states that structure their truancy proceedings as Washington does, with no immediate threat of out-of-home placement at the initial fact-finding hearing, and ensure counsel for children at this early stage?

### **IV. Why *Amicus* Briefing Will Assist The Court**

In the proceedings below, the parties asserted conflicting arguments regarding whether the provision of counsel to children in truancy proceedings is a novel or unique practice. E.S. presented some examples of states that do ensure counsel at truancy proceedings. (Resp't Answer to Pet. 17-20.) The school district claimed that there is "no consensus among the states on the scope or timing of a right to counsel for truants." (Sup. Br. Pet'r 21-22.) Juvenile Law Center presents a national perspective on the right to counsel, allowing the court to view its decision regarding Washington's truancy proceedings within a context of the rights

guaranteed to alleged truant children in other states. The additional argument provided by Juvenile Law Center *amicus* briefing will help the court make a fully informed decision. RAP 10.6(a).

**V. Conclusion**

For the foregoing reasons, Juvenile Law Center respectfully requests that the Court grant leave to file the attached *amicus* brief.

Respectfully submitted this 18th day of December, 2009.

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**BRIEF OF JUVENILE LAW CENTER, ET AL., AS *AMICUS*  
*CURIAE* ON BEHALF OF RESPONDENT**

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## **I. Summary Of The Argument**

The causes and contributing factors of truancy are diverse and complicated. Even where truancy is not addressed within the delinquency system, truant children often suffer the collateral consequences of adjudication through criminal contempt proceedings. Collateral consequences of a juvenile adjudication dramatically disadvantage a child's future employment, housing, higher education, and subsequent judicial matters.

States across the country recognize that a truancy fact-finding hearing in which the school district is represented by a prosecutor or school representative is too great a challenge for any child to adequately represent herself and her interests. Acknowledging the complexity of the issue and the serious consequences that attach, the majority of states provide children the right to counsel in juvenile court truancy proceedings. Of the thirty-nine states that address truancy as a status offense – as Washington does – only nine fail to ensure youth counsel at all stages of the proceedings. The right to counsel for children in initial truancy hearings found necessary by the Court of Appeals below is consistent with the prevailing trend of states nationwide to guard the rights of children by ensuring them adequate legal representation in juvenile court proceedings.

## **II. Identity And Interest Of *Amici*<sup>1</sup>**

Juvenile Law Center (“JLC”) is the oldest multi-issue public interest law firm for children in the United States, founded in 1975 to advance the rights and well being of children in jeopardy. JLC pays particular attention to the needs of children who come within the purview of public agencies – for example, abused or neglected children placed in foster homes, delinquent youth sent to residential treatment facilities or adult prisons, or children in placement with specialized services needs. JLC works to ensure children are treated fairly by systems that are supposed to help them, and that children receive the treatment and services that these systems are supposed to provide. JLC also works to ensure that children's rights to due process are protected at all stages of juvenile court proceedings, from arrest through disposition, from post-disposition through appeal, and that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights.

## **III. Statement Of The Case**

*Amici* adopt Respondent E.S.’s statement of the case.

## **IV. Argument**

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<sup>1</sup> A complete list of *amici* appears at Appendix A.

**A. The Prevailing Trend Among The States Is To Secure Counsel For Children In Truancy Cases**

**1. The Majority Of States Provide Counsel To Children Subject To Truancy Proceedings In Juvenile Court**

As E.S. has argued, the right to counsel for children in truancy proceedings is neither novel nor unique idea. (Resp. Answer at 17.) The Petitioner School District has incorrectly claimed that there is “no consensus among the states on the scope or timing of a right to counsel for truants.” (Sup. Br. Pet’r 21-22.) In fact, a clear majority of states that address truancy within the juvenile court’s jurisdiction provide children with the right to counsel for truancy proceedings.<sup>2</sup> Of the forty-five states that address truancy within juvenile court jurisdiction, thirty-three states provide the right to counsel at all stages of truancy proceedings. *See* Ariz. Rev. Stat. Ann. § 8-221(A)(2009); *Lana A. v. Woodburn*, 116 P.3d 1222, 1225-26 (Ariz. Ct. App. 2005); Ark. Code Ann. § 9-27-316 (2009); Cal. Welf. & Inst. Code § 634 (2009); D.C. Code § 16-2304(a) (2009); Ga. Code Ann. § 15-11-6 (2009); Haw. Rev. Stat. § 571-87 (2009); Idaho Code Ann. § 20-514 (2009) (right to counsel in status proceedings); Idaho Code Ann. § 16-1614 (court shall appoint GAL and may appoint separate counsel for child in dependency proceeding); 705 Ill. Comp. Stat. § 405/1-

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<sup>2</sup> Washington is excluded from this survey of states’ truancy proceedings. The District of Columbia is hereafter referred to as a state for ease of reference.

5 (2009); Ind. Code Ann. § 31-32-2-2 (2009) (right to be represented by counsel); Ind. Code Ann. § 31-32-4-2 (unrepresented child appointed counsel at first of detention hearing or initial hearing); Iowa Code § 232.89 (2009); Kan. Stat. Ann. § 38-2205 (2009) (court shall appoint GAL for child on filing of petition for CINC); Ky. Rev. Stat. Ann. § 610.060 (2009); Md. Code Ann. Cts. & Jud. Proc. § 3-813 (2009); Mass. Gen. Laws. Ch. 119 § 39F (2009); Miss. Unif. Rule Youth Ct. Proc. 24 (2009); Mont. Code Ann. § 41-5-1413 (2009); Neb. Rev. Stat. § 43-272 (2009); Nev. Rev. Stat. § 62D.030 (2009); N.H. Rev. Stat. Ann. § 169-D:12 (2009); N.M. Stat. § 32A-3B-8 (2009) (court shall appoint GAL if under age 14, and appoint counsel if over age 14); N.Y. Fam. Ct. Act § 741(2009); Ohio Rev. Code Ann. § 2151.352 (2009); N.D. Cent. Code § 27-20-26 (2009); Okla. Stat. tit. 10A, § 2-2-301 (2009); 42 Pa. Cons. Stat. § 6337 (2009); R.I. Gen. Laws § 14-1-58 (2009); R.I. Gen. Laws § 14-1-31 (2009); S.C. R. Fam. Ct. 36 (2009); S.D. Codified Laws § 26-7A-31 (2009) (court shall appoint attorney if child can't afford); Utah Code Ann. § 78A-6-1111 (2009); Vt. Stat. Ann. tit. 33, § 5112 (2009); Va. Code Ann. § 16.1-266 (2009); W.Va. Code § 49-5-9 (2009); Wyo. Stat. Ann. § 14-6-422 (2009) (court shall appoint counsel on request in CHINS proceeding after verifying indigence).

States that use the courts to hold children responsible<sup>3</sup> for their failure to attend school define truancy as either a delinquent act, one of several criteria for a dependency adjudication, or as a status offense. Three states define truancy as a ‘delinquent act,’<sup>4</sup> and four states include truancy in a definition of ‘neglect’ that triggers dependency proceedings.<sup>5</sup> All but one of these states provide counsel to children for truancy proceedings.

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<sup>3</sup> It should be noted that a number of states that deal with truancy in the court system place the burden on a child’s parent or custodial guardian to ensure the child complies with the attendance requirements. Thus, at least four states enforce their compulsory attendance laws solely through prosecution of the child’s parent or guardian. *See* Alaska Stat. § 14.30.010(2009); Mich. Comp. Laws § 380.1561(2009); Mo. Rev. Stat. § 167.091 (2009); Or. Rev. Stat. § 339.080 (2009); Or. Rev. Stat. § 339.090 (2009). Slightly more than half the states (26) allow for prosecution of the parent, usually through a misdemeanor charge, concurrent with a petition against the child under the Juvenile Act. *See e.g.*, Ala. Code § 16-28-12; Ark. Code Ann. § 6-18-222(a)(5)(A); Del. Code. Ann. tit. 14, § 2702; Fla. Stat. Ann. § 1003.27; Haw. Rev. Stat. § 302A-1135; Idaho Code Ann. § 33-207; 105 Ill. Comp. Stat. 5/26-10; Ind. Code Ann. §§ 20-33-2-27, 20-33-2-44; Ky. Rev. Stat. Ann. §§ 159.990, 159.180; La. Rev. Stat. § 17:221; Md. Code Ann. Educ. § 7-301; Minn. Stat. § 120A.34; Miss. Code Ann. § 97-5-39(1)(a); N.M. Stat. Ann. § 22-12-7(E); N.C. Gen. Stat. § 115C-380; Ohio Rev. Code Ann. § 2151.23; Okla. Stat. tit. 70 § 10-105(D); 24 Pa. Cons. Stat. § 13-1333; S.C. Code Ann. § 59-65-20; S.D. Codified Laws §§ 13-27-11, 13-27-20; Tenn. Code. Ann. § 49-6-3009; Tex. Educ. Code Ann. § 25.094 (2009); Utah Code Ann. § 53A-11-101.5; Va. Code Ann. § 22.1-263; W.Va. Code § 18-8-2; Wis. Stat. Ann. § 118.15(5).

<sup>4</sup> *See* Ind. Code Ann. § 31-37-2-3 (child commits delinquent act if violates compulsory school attendance); N.J. Stat. Ann. § 18A:38-29 (2009) (including truancy in definition of delinquent); Ohio Rev. Code Ann. § 3321.38 (court can adjudicate child as unruly or delinquent for habitual or chronic truancy). Of these states that provide for truancy as a delinquent act, only New Jersey does not provide counsel at an initial hearing. *See State v. G.J.*, 260 A2d 513 (N.J. Super. 1969)(finding no right to counsel at initial/informal hearing that may result in probation violation and detention later). Indiana and Ohio provide counsel to indigent youth at all stages of their delinquency proceedings. *See* Ind. Code Ann. §§ 31-32-4-2, 31-32-2-2; Ohio Rev. Code Ann. § 2151.352.

<sup>5</sup> These states provide counsel for children alleged truant within their dependency system. *See* Idaho Code Ann. §§ 16-1602 (including truancy within definition of neglected child), 16-1614 (court shall appoint GAL for child in neglect proceedings); Miss. Unif. Rule Youth Ct. Proc. 33 (truant child may be alleged CINS or neglected child), 24 (indigent child appointed counsel); 42 Pa. Cons. Stat. §§ 6302 (truant child alleged dependent), 6337 (court provides counsel if unable to employ); Utah Code Ann. §§ 78A-6-105(25)(2009)(including truancy in definition of neglect), 78A-6-1111(counsel appointed



The vast majority of states that address truancy within their juvenile court system treat truancy as a status offense; of forty-five states that use juvenile court jurisdiction, thirty-nine address truancy as a status offense. These states use various terms to characterize status offenders: “Children in Need of Services,” “Children in Need of Supervision,” “Children in Need of Assistance,” “Youth in Need of Intervention,” “Family in Need of Services,” “incorrigible youth,” “unruly youth,” “wayward youth” or simply “status offenses” (“status” or “CHINS”).<sup>6</sup> The states that treat truancy offenses as status offenses, as Washington does, are most instructive in an evaluation of Washington’s truancy proceedings.

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if indigent). Several states provide more than one avenue to enforce compulsory school attendance laws, and those duplicate methods are contained within this survey. For example, Ohio provides that a child can be adjudicated as unruly *or* delinquent for being habitually or chronically truant. Ohio Rev. Code Ann. § 2151.35(A)(1). Ohio is therefore counted here within both the ‘delinquency’ and ‘status/CHINS’ systems, because the juvenile court has discretion for both avenues.

<sup>6</sup> For states that classify truant youth as a variation of “children in need of services” see e.g., Ala. Code § 12-15-102; Ark. Code Ann. § 9-27-303(24); Conn. Gen. Stat. § 46b-120(8)(D); D.C. Code § 16-2301(8)(A)(i); Fla. Stat. Ann. § 984.151; 705 Ill. Comp. Stat. 405/3-33.5; Iowa Code § 299.8; Kan. Stat. Ann. § 38-2202; La. Child. Code Ann. art 730; Md. Code Ann. Cts & Jud. Proc. § 3-8A-01; Mass. Gen. Laws ch. 119 § 21; Minn. Stat. § 260C.007; Miss. Unif. Rule Youth Ct. Proc. 33; Mont. Code Ann. § 41-5-103; Nev. Rev. Stat. § 62B.320; N.H. Rev. Stat. Ann. § 169-D:2; N.M. Stat. § 32A-3B-1; N.Y. Fam. Ct. Act § 712; Okla. Stat. tit. 10A, § 2-1-103; S.D. Codified Laws § 26-8B-2; Tex. Fam. Code Ann. § 51.03; Vt. Stat. Ann. tit. 33, § 5102; Va. Code Ann. 22.1-267; Wis. Stat. Ann. § 938.13; Wyo. Stat. Ann. § 14-6-402. For states that classify truant youth as “incorrigible,” “unruly,” “wayward,” or “undisciplined youth” see Ariz. Rev. Stat. § 15-803; Ga. Code Ann. § 15-11-2; N.C. Gen. Stat. § 115C-380; N.D. Cent. Code § 27-20-02; Ohio Rev. Code Ann. § 3321.38; R.I. Gen. Laws § 14-1-3; Tenn. Code Ann. § 37-1-102. For states that label truancy a “status offense” see Cal. Welf. & Inst. Code § 601; Haw. Rev. Stat. Ann. § 571-11(2); Idaho Code Ann. § 20-516; Ky. Rev. Stat. Ann. §§ 610.010, 630.020; Neb. Rev. Stat. § 43-245; S.C. Code Ann. § 63-19-20; W.V. Code Ann. § 49-1-4.

The prevailing trend of providing counsel in juvenile court proceedings for truancy holds true for those states addressing truancy as a status offense/CHINS case. Of the thirty-nine states that address truancy as a status/CHINS offense, only nine do not provide counsel at all stages.<sup>7</sup> Wisconsin is representative of the minority – the court has *discretion* to appoint counsel in a “youth in need of intervention” case but a child *must* be represented by counsel before she can be placed outside the home. *See* Wis. Stat. Ann. § 938.23(1m)(b). Ensuring counsel for children in all stages of truancy proceedings is by far the more common practice among states that use status/CHINS classification for truancy, representing thirty of the thirty-nine states that treat truancy as a status offense.<sup>8</sup>

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<sup>7</sup> *See* Ala. Code § 12-15-202 (juvenile has right to appointed attorney in any proceeding where there is a possibility of placement in an institution); Conn. Gen. Stat. §§ 46b-149(h) (child entitled to representation in a hearing to commit the child to custody of the Commissioner of Children and Families), 46b-149f (child entitled to representation by counsel in adjudication alleging child violated court order); Fla. Stat. Ann. § 984.17 (when CINS petition is filed, court may appoint guardian ad litem for child); *In the Interest of C.O’C*, 769 So.2d 583 (La. Ct. App. 2000)(holding there is no right to court appointed counsel at state expense in FINS cases unless the child is continued in custody); Minn. Stat. § 260C.163 subd.3 (right to appointed counsel in truancy CINS proceedings before any out of home placement can be ordered); N.C. Gen. Stat. § 7B-2000 (right to appointed counsel only if alleged delinquent or contempt proceedings); *In re Walker*, 191 S.E. 2d 702 (N.C. 1972) (holding “undisciplined child” is not critical stage that triggers right to attorney); Tenn. Code Ann. § 37-1-126 (child alleged unruly is entitled to representation at all stages that place child in jeopardy of being removed from home); Tex. Fam. Code Ann. § 51.10 (child entitled to attorney where may be ordered confined); *In the matter of B.A.M.*, 980 S.W. 2d 788 (Tex. App. 1998)(finding no right to counsel in justice court because the court has no power to order confinement for failure or contempt); Wis. Stat. Ann. §§ 938.23(counsel may be appointed at discretion of the court), 938.23(1m)(b)(if child is not represented by counsel, court can’t place out of home).

<sup>8</sup> *See* Ark. Code Ann. § 9-27-316 (2009); Ariz. Rev. Stat. Ann. § 8-221(A)(2009); *Lana A.*, 116 P.3d at 1225-26 (Ariz. Ct. App.); Cal. Welf. & Inst. Code § 634 (2009); D.C.

Washington’s practice of holding an initial fact-finding hearing without counsel for the child diverges from the dominant practice nationwide of providing counsel for *all* stages of truancy proceedings within status/CHINS jurisdiction. In Montana for example, a habitual truant may be alleged a “youth in need of intervention.” Mont. Code Ann. 41-5-103. “*In all proceedings following the filing of a petition alleging that a youth is a . . . youth in need of intervention,*” if counsel is “not retained or if it appears that counsel will not be retained for the youth, the court *shall* order the office of the state public defender” to assign counsel for the youth. Mont. Code Ann. § 41-5-1413 (emphasis added). In “child in need of services” cases in New Hampshire, the “court *shall* appoint counsel for the child at the time of the initial appearance.” N.H. Rev. Stat. § 169-D:12 (emphasis added).

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Code § 16-2304(a) (2009); Ga. Code Ann. § 15-11-6; Haw. Rev. Stat. § 571-87 (2009); Idaho Code Ann. § 20-514 (right to counsel in status proceedings); Idaho Code Ann. § 16-1614 (court shall appoint GAL and may appoint separate counsel for child in dependency proceeding); 705 Ill. Comp. Stat. § 405/1-5; Iowa Code § 232.89; Kan. Stat. Ann. § 38-2205 (court shall appoint GAL for child on filing of petition for CINC); Ky. Rev. Stat. Ann. § 610.060; Md. Code Ann. Cts. & Jud. Proc. § 3-813; Mass. Gen. Laws. Ch. 119 § 39F; Miss. Unif. Rule Youth Ct. Proc. 24; Mont. Code Ann. § 41-5-1413; Neb. Rev. Stat. § 43-272; N.H. Rev. Stat. Ann. § 169-D:12; N.M. Stat. § 32A-3B-8 (court shall appoint GAL if under age 14, and appoint counsel if over age 14); N.Y. Fam. Ct. Act § 741; Nev. Rev. Stat. § 62D.030; N.D. Cent. Code § 27-20-26; Ohio Rev. Code Ann. § 2151.352; Okla. Stat. tit. 10A, § 2-2-301; R.I. Gen. Laws §§ 14-1-58, 14-1-31; S.C. R. Fam. Ct. 36; S.D. Codified Laws § 26-7A-31 (court shall appoint attorney if child can’t afford); Vt. Stat. Ann. tit. 33, § 5112; Va. Code Ann. § 16.1-266; W.Va. Code § 49-5-9; Wyo. Stat. Ann. § 14-6-422 (court shall appoint counsel on request in CHINS proceeding after verifying indigence).

In neighboring Idaho, truancy is a status offense under the Juvenile Corrections Act, Idaho Code § 20-516, and the court must “as *early as possible* in the proceedings, and in any event before the hearing of the petition on the merits” notify the juvenile of the right to appointed counsel if she is unable to pay. Idaho Code § 20-514 (emphasis added). Children in New York are also provided counsel at the first court appearance. New York characterizes a child who fails to attend school as required to be a “person in need of supervision” (“PINS”). N.Y. Fam. Ct. Act § 712. Children’s rights are protected by an appointed attorney at the *initial* PINS appearance or the commencement of *any* hearing. N.Y. Fam. Ct. Act § 741. In California, in a case in which a minor is alleged to be a “ward of the court” for truancy, Cal. Welf. & Inst. Code § 601 (2009), the court *shall* appoint counsel for the minor if he appears at the hearing without counsel, whether he is unable to afford counsel or not. Cal. Welf. & Inst. Code § 634 (2009).

## **2. Other States With Truancy Systems Similar to Washington’s Provide Counsel**

The school district argues that youth are not entitled to representation in Washington’s system, “where a child *might* become subject to a *future* contempt order and deprivation of liberty,” as distinguished from those states in which the child is entitled to counsel

because the “child is subject to immediate disposition” such that their liberty is at stake in the initial hearing. (Sup. Br. Pet’r 21 (emphasis in the original).) Washington’s Court of Appeals is not alone in providing counsel in these circumstances however – at least three other states provide counsel for children at an initial truancy hearing wherein the child’s only exposure to detention is through a potential future order.

Illinois’s truancy proceedings appear quite similar to those in Washington, with the distinction that Illinois provides children with counsel to protect against a future possibility of detention. Illinois statutory law provides that a school must offer supportive services and resources to the student to address truancy before a petition to the juvenile court can be filed. 105 Ill. Comp. Stat. § 5/26-12. Once a school certifies that appropriate services have been offered without success, the school can file a petition. 705 Ill. Comp. Stat. § 405/3-33.5. A truant minor may be adjudicated a “minor in need of supervision” (“MINS”) and eligible for dispositional orders including community service, counseling, fines, and suspension of driver’s license. *Id.* There is no potential for immediate detention as a child adjudicated MINS – the sole exposure to detention is through contempt proceedings. *See id.* (orders enforced through contempt proceedings in MINS cases). Nevertheless, and in contrast to Washington’s denial of counsel, in Illinois “no hearing on any petition or

motion filed under [the Illinois Juvenile Act] may be commenced unless the minor who is the subject of the proceeding is represented by counsel.” 705 Ill. Comp. Stat. § 405/1-5.

A juvenile adjudicated habitually truant is a status offender in West Virginia. W.Va. Code Ann. § 49-1-4. Following the filing of a petition, the court holds a preliminary hearing and the youth is afforded the right to appointed counsel at this early stage. W. Va. Code Ann. § 49-5-9 (2009). If the court determines at the preliminary hearing that there is probable cause to believe the juvenile is a status offender, the case proceeds to adjudication. *Id.* If the child is adjudicated a status offender, the court must impose a statutory “mandatory initial disposition” that consists of referring the youth to the department of health and human resources for services. W. Va. Code Ann. § 49-5-11. After the department provides services which can include psychiatric or other medical care, legal, educational or other social services, the department may petition the court for an order enforcing compliance or placing the juvenile out of the home. *Id.*

In Arkansas, a juvenile has the right to counsel in truancy proceedings though there is no risk of immediate detention. A “family in need of services” (“FINS”) petition is filed against a juvenile alleged to be “habitually and without justification absent from school.” Ark. Code Ann.

§ 9-27-303. A FINS juvenile must be advised at the first court appearance that “counsel shall be appointed to represent the juvenile at all appearances” if counsel is not retained, or it does not appear that counsel will be retained. Ark. Code Ann. § 9-27-316 (2009). Potential FINS dispositions include ordering family services (crisis counseling, transportation, family therapy, psychiatric evaluations, counseling or treatment) that are intended to “prevent a juvenile from being removed from a parent.” *See* Ark. Code Ann. § 9-27-332 (court may order FINS youth to receive family services to rehabilitate juvenile and family); Ark. Code Ann. § 9-27-303(25) (list of “family services” provided in order to prevent removal). Absent circumstances that warrant the emergency removal of a juvenile to protect his safety, a court may not remove a FINS juvenile from parental custody without first ordering family services to prevent removal and finding it in the best interest of the juvenile. *See* Ark. Code Ann. § 9-27-332. These examples of early provision of counsel where there is no immediate potential for custodial disposition flatly contradict the school district’s claim that the protection of counsel at an initial hearing, found necessary by the court below, is without precedent.

The school district further argued that there are no other states where representation by counsel in truancy proceedings is constitutionally compelled. (Sup. Br. Pet’r 20.) To the best of *Amici*’s knowledge, no other

court has ruled on the precise constitutional question at issue here – the right to counsel at an initial hearing with no immediate disposition to detention available. However, states have recognized other due process rights of children in truancy proceedings. For example, Kentucky acknowledges a child’s due process right to full representation by counsel, specifically the right to make a closing argument, in truancy proceedings. In *T.D.*, the Kentucky Court of Appeals cited *In re Gault*, 387 U.S. 1, 49 (1967), as “reflect[ing] that where the fault of the child is at issue and penalties, including loss of liberty, may attach, criminal protections provided by the constitution apply.” *T.D. v. Commonwealth*, 165 S.W.3d 480, 483 (Ky. Ct App. 2005). The alleged truant child in *T.D.* was represented by an attorney, but the court refused to allow the attorney to give a closing argument. *Id.* The Court of Appeals found that “a proceeding against a child for the status offense of habitual truancy . . . relates to the fault of the child and can result in severe consequences to that child. . . . [including] probation and detention for failure to meet the attendance terms.” As a result, the court held that due process required the court to permit defense counsel to give a closing argument in truancy hearings. *Id.* Truancy proceedings in Washington also relate to the fault of the child and carry severe consequences; therefore the due process clause is clearly implicated and counsel for the child must be provided.



**B. The Complex Sociological Causes of Truancy, As Well as the Potential Collateral Consequences of an Adjudication, Require Representation by Counsel in Truancy Proceedings**

E.S. would have benefited significantly from the “guiding hand” of counsel at her initial truancy proceeding. *See In re Gault*, 387 U.S. 1, 36 (1967). Like the majority of truant youth, E.S.’s noncompliance with school attendance requirements and court orders was merely a symptom of compound familial, cultural, and systemic problems. (*See Br. of Amicus ACLU at 3.*) Appearing *pro se*, E.S. lacked the legal expertise necessary to establish a record evidencing the complex circumstances contributing to her truancy, and to prove that the school district did not satisfy its statutory requirement of providing intervention services.

Advocates, school districts, and legislatures across the country increasingly appreciate the complex web of factors and causes of truancy. Washington’s statutory scheme itself recognizes the problem but fails to ensure its abolition. By requiring the school district to supply resources and services before the district can file a truancy petition, *see Wash. Rev. Code Ann. § 28A.225.020*, Washington acknowledges the importance of investigating the issues that prompt truancy. But in denying children their right to counsel, the state falls short of allowing minors the tools necessary to address the real problem and be involved in a solution.

Significant numbers of truant youth face serious and chronic problems in their lives that challenge their ability to regularly attend school. Data from youth served by Truancy Reduction Demonstration Programs funded by the Office of Juvenile Justice and Delinquency Prevention highlight the depth of challenges truant youth face. Eighty-seven percent qualified for free or reduced lunch, nineteen percent had individual education plans to address special education needs, fifteen percent had school discipline problems, thirteen percent had prior juvenile justice involvement, thirty-six percent lived in single parent homes, and twenty percent lived in a home with no working adults. *See* Krystina A. Finlay, National Center for School Engagement, *Re-Engaging Youth in School: Evaluation of the Truancy Reduction Demonstration Project at 2-4*, Aug. 10, 2006, *available at* [www.schoolengagement.org](http://www.schoolengagement.org).

Research shows that contributing factors threaten children from all fronts – family and community, school, and personal. Family and community factors include homelessness, poverty, single-parent families, large family size, family violence, parental abuse of alcohol or drugs, abuse or neglect, and a lack of modeling the importance of education. *See e.g.*, Joanna Zorn Heilbrunn, National Center for School Engagement, *Pieces of the Truancy Jigsaw: A Literature Review at 4* (Jan. 2007), *available at* [www.schoolengagement.org](http://www.schoolengagement.org); Loring P. Jones, et al., *School*

*Attendance Demonstration Project: An evaluation of a program to motivate public assistance teams to attend and complete school in an urban school district*, 12(2) *Research on Social Work and Practice* 222-37 (2002). School factors include poor relations with teachers, inappropriate academic placement, ineffective and inconsistently applied attendance policies, and an unsafe environment. See Heilbrunn, *Pieces of the Truancy Jigsaw*, at 4; Jones, *School Attendance Demonstration Project*, at 222-37. Personal factors include special education needs, mental health needs, alcohol or drug abuse, gang involvement, and feelings of academic incompetence. See e.g., Heilbrunn, *Pieces of the Truancy Jigsaw*, at 4-5; Jane Corville-Smith, et al., *Distinguishing absentee students from regular attenders: The combined influence of personal, family, and school factors*, 27 *J. Youth and Adolescence* 629 (1998).

Children struggling with any combination of these challenging circumstances cannot be expected to understand, let alone articulate to strangers in a courtroom, how they are consciously or unconsciously influenced to skip school because of such difficult life situations. Beyond articulation of why they miss school, children cannot be expected to know their legal rights nor the legal procedures that control in a courtroom. As one public defender from Kentucky explained, “the obvious problem with lack of counsel from the outset is that there are defenses that can be raised,

including motions to dismiss, that no child will be aware of and she is admitting guilt with no clue as to the consequences.”<sup>9</sup>

Another defender from Kentucky explained the indispensable value of having an attorney to probe the school district’s claim that the statutorily required services were provided.

“In one county in particular, there was a worker with the school system that was not doing the home visits or review that is mandated via statute so we were able to get the cases dismissed and keep children out of possible contempt proceedings which could have landed them in the same holding facilities that house our kids adjudicated of murder.... Also, we have had many children who were missing school due to learning disabilities that the school did not wish to investigate long enough to discover. Some other reasons have had to do with parents preventing the child from going to school that was only discovered through investigation through our office.

An attorney from Alabama who represents children in truancy proceedings also reported a “great need for counsel in truancy proceedings [because] quite often the child only misses school with the parent’s knowledge and permission. Having an attorney pressing that point . . . is no doubt the main reason that prosecutions of children have decreased dramatically and the typical treatment of truancy cases is now non-adjudicatory deferred dispositions.” A child is not likely to have the confidence to challenge the prosecutor or school representative in court, and it is implausible to expect

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<sup>9</sup> Comments from public defenders appearing in this brief represent a sampling of comments received by *amici* from public defenders across the country about their impressions of the need for counsel in truancy proceedings. Comments were prompted by an email listserv managed by National Juvenile Defenders Association.

a child to be aware of the school's statutory requirements, let alone determine whether the school has met that standard. Counsel is necessary at the initial hearing for these tasks.

Although many states address truancy as a status offense rather than directly within their delinquency code, truant children often suffer the collateral consequences of an adjudication of delinquency through criminal contempt proceedings. As was the case for E.S., a court order to attend school does not often by itself address the complex causes for a child's truancy, so the truancy pattern is likely to continue and the child may be then prosecuted for contempt of a court order – which the child had no legal assistance in challenging in the first instance. Washington provides a child the right to counsel at contempt proceedings; however as the Court of Appeals emphasized in this case below, at that point it is too late to challenge the finding of truancy. *Bellevue School District v. E.S.*, 199 P.3d 1010, 1014 (Wash. Ct. App. 2009). If adjudged in contempt of court, the child is subject to detention. Wash. Rev. Code Ann. § 28A.225.090(2). Collateral consequences of a juvenile adjudication hinder a juvenile's ability to productively reintegrate into society, impeding an individual's future housing, education, employment, and subsequent judicial matters. *See Juvenile Delinquency Records Handbook and Expungement Guide* (Juvenile Court Judges' Commission 2008), available

at [www.jcjc.state.pa.us](http://www.jcjc.state.pa.us); *Juvenile Records Expungement: A Guide for Defense Attorneys in Pennsylvania* (Juvenile Law Center 2007), available at [www.jlc.org](http://www.jlc.org). A juvenile charged with truancy needs counsel at the initial hearing to advise about the direct and indirect sanctions that may have drastic consequences on their future career and educational opportunities.

## **V. Conclusion**

For the foregoing reasons, *Amici Curiae*, Juvenile Law Center, *et al.*, respectfully request that this Court uphold the decision of the Court of Appeals finding that due process demands a child be represented by counsel in the initial truancy hearing.

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Date: December 18, 2009

**APPENDIX A**  
**Complete List and Statements of Interest of *Amici Curiae***

**Juvenile Law Center (JLC)** is the oldest multi-issue public interest law firm for children in the United States, founded in 1975 to advance the rights and well being of children in jeopardy. JLC pays particular attention to the needs of children who come within the purview of public agencies – for example, abused or neglected children placed in foster homes, delinquent youth sent to residential treatment facilities or adult prisons, or children in placement with specialized services needs. JLC works to ensure children are treated fairly by systems that are supposed to help them, and that children receive the treatment and services that these systems are supposed to provide. JLC also works to ensure that children's rights to due process are protected at all stages of juvenile court proceedings, from arrest through disposition, from post-disposition through appeal, and that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights.

**The Barton Child Law & Policy Clinic** is a program of Emory Law School dedicated to ensuring safety, well-being and permanency for abused and court-involved children in Georgia. These outcomes are best achieved when systems only intervene in families when absolutely necessary, treat children and families fairly, provide the services and protections they are charged to provide, and are accountable to the public and the children they serve. The mission of the clinic is to promote and protect the well-being of neglected, abused and court-involved children in the state of Georgia, to inspire excellence among the adults responsible for protecting and nurturing these children, and to prepare child advocacy professionals.

The Barton Clinic was founded in March 2000. The Barton Clinic has been involved in representation of juveniles in delinquency cases since the summer of 2001. Initially, such representation occurred in collaboration with the Southern Juvenile Defender Center, which was housed in the Barton Clinic until 2005. The Barton Clinic currently houses the Barton Juvenile Defender Clinic (JDC), which was founded in 2006.

The JDC provides a clinical experience for third year law students in the juvenile court arena. The focus of the clinical experience is to provide quality representation to children by ensuring fairness and due process in their court proceedings and by ensuring courts make decisions



informed by the child's educational, mental health and family systems objectives. As part of their clinical experience, student attorneys represent child clients in juvenile court and provide legal advocacy in the areas of school discipline, special education, mental health and public benefits, when such advocacy is derivative of a client's juvenile court case. Students also engage in research and participate in the development of public policy related to juvenile justice issues. Legal services provided by the Barton Clinic are provided at no cost to our clients.

**Tamar Birkhead** is an assistant professor of law at the **University of North Carolina at Chapel Hill** where she teaches in the **Juvenile Justice Clinic**. Her research interests focus on issues related to juvenile justice policy and reform, criminal law and procedure, and indigent criminal defense; one of her recent articles argued that when courts and legislatures determine whether juveniles should be granted certain procedural rights, including the right to trial by jury, empirical research related to adolescents and conceptions of procedural justice should inform the decision. Professor Birkhead has testified before the N.C. Governor's Crime Commission on the history of the movement to raise the age of juvenile court jurisdiction, and recently she was appointed Co-Facilitator of the Legal Issues Working Group of the Youth Accountability Planning Task Force, established by the North Carolina General Assembly to develop an implementation plan to raise the age from 16 to 18. Prior to joining the UNC School of Law faculty in 2004, Birkhead practiced for ten years as a public defender in the Massachusetts trial and appellate courts and in federal district court in Boston. Licensed to practice in North Carolina, New York and Massachusetts, Birkhead received her B.A. degree in English literature with honors from Yale University and her J.D. with honors from Harvard Law School, where she served as Recent Developments Editor of the Harvard Women's Law Journal.

The **Children & Youth Law Clinic (CYLC)** is an in-house legal clinic, staffed by faculty and students at the **University of Miami School of Law**, which advocates for the rights of children in abuse and neglect, delinquency and other legal proceedings. Founded in 1995, the CYLC has appeared as amicus curiae in numerous federal and state court cases implicating significant due process and therapeutic interests of children in state custody. The CYLC has pioneered the use of "therapeutic jurisprudence" in its advocacy for children in school discipline, dependency, mental health, delinquency, and other court proceedings.

Therapeutic jurisprudence is a field of social inquiry with a law reform agenda, which studies the ways in which legal rules, procedures, and the roles of legal actors produce therapeutic or anti-therapeutic consequences for those affected by the legal process. The CYLC works to ensure that children are treated with dignity and respect by public education, child welfare and juvenile justice systems charged with their schooling, protection and treatment. We believe that public policy should further the therapeutic interests of children, minimize anti-therapeutic consequences of the legal process, assure their fair and dignified treatment, and promote the rehabilitative purposes of the juvenile justice system.

**Barbara Fedders** is a clinical assistant professor at the University of North Carolina School of Law. Prior to joining the UNC faculty in January 2008, Professor Fedders was a clinical instructor at the Harvard Law School Criminal Justice Institute for four years. Prior to that, she worked for the Massachusetts Committee for Public Counsel Services as a Soros Justice Fellow and staff attorney. She began her career in clinical work at the Juvenile Rights Advocacy Project at Boston College Law School. As a law student, Professor Fedders was a Root-Tilden-Snow scholar and co-founded the NYU Prisoners' Rights and Education Project. She is a member of the advisory boards of the Prison Policy Initiative and the Equity Project.

**Barry Feld** is Centennial Professor of Law, University of Minnesota Law School. He received his B.A. from the University of Pennsylvania; his J.D. from University of Minnesota Law School; and his Ph.D. in sociology from Harvard University. He has written eight books and about seventy law review and criminology articles and book chapters on juvenile justice with a special emphasis on serious young offenders, procedural justice in juvenile court, adolescents' competence to exercise and waive *Miranda* rights and counsel, youth sentencing policy, and race. One of his earliest books, *Neutralizing Inmate Violence: Juvenile Offenders in Institutions* (Ballinger 1976), studied ten different juvenile correctional programs and the impact of institutional security practices on social control. His most recent books include: *Bad Kids: Race and the Transformation of the Juvenile Court* (Oxford 1999), which received the Outstanding Book Award from the Academy of Criminal Justice Sciences and the Michael Hindelang Outstanding Book Award from the American Society of Criminology; *Cases and Materials on Juvenile Justice Administration* (West 2000; 2<sup>nd</sup> Ed. 2005); and *Juvenile Justice Administration in a Nutshell* (West 2002). Feld has testified before state

legislatures and the U. S. Senate, spoken on various aspects of juvenile justice administration to legal, judicial, and academic audiences in the United States and internationally. He worked as a prosecutor in the Hennepin County (Minneapolis) Attorney's Office and served on the Minnesota Juvenile Justice Task Force (1992 -1994), whose recommendations the 1994 legislature enacted in its revisions of the Minnesota juvenile code. Between 1994 and 1997, Feld served as Co-Reporter of the Minnesota Supreme Court's Juvenile Court Rules of Procedure Advisory Committee.

**The Education Law Center - PA** is a public-interest organization dedicated to ensuring that children have access to quality public schools. Founded in 1975, ELC-PA focuses primarily on the needs of poor children, children in foster care and children who are homeless, children with disabilities, English language learners, and others who are at a disadvantage in the public education system. ELC-PA works primarily within Pennsylvania but is also involved in national activities, including work on federal policy and legislation, *amicus* participation in important litigation, and collaboration with parent and student groups engaged in school improvement efforts. ELC-PA has extensive experience advising and representing children and families in truancy and related proceedings. ELC-PA seeks to participate in this case in order to share its views concerning the interests at stake in truancy proceedings, and the legal framework within which those interests are properly analyzed.

**Martin Guggenheim** is the Fiorello La Guardia Professor of Clinical Law at N.Y.U. Law School, where he has taught since 1973. He served as Director of Clinical and Advocacy Programs from 1988 to 2002 and also was the Executive Director of Washington Square Legal Services, Inc. from 1987 to 2000. He has been an active litigator in the area of children and the law and has argued leading cases on juvenile delinquency and termination of parental rights in the Supreme Court of the United States. He is also a well-known scholar whose books include "What's Wrong with Children's Rights" published by Harvard University Press in 2005 and "Trial Manual for Defense Attorneys in Juvenile Court," published by ALI-ABA in 2007 which was co-authored with Randy Hertz and Anthony G. Amsterdam. He has won numerous national awards including in 2006 the Livingston Hall Award given by the American Bar Association for his contributions to juvenile justice.

The **National Juvenile Defender Center** was created to ensure excellence in juvenile defense and promote justice for all children. The National Juvenile Defender Center responds to the critical need to build the capacity of the juvenile defense bar in order to improve access to counsel and quality of representation for children in the justice system. The National Juvenile Defender Center gives juvenile defense attorneys a more permanent capacity to address important practice and policy issues, improve advocacy skills, build partnerships, exchange information, and participate in the national debate over juvenile justice.

The National Center provides support to public defenders, appointed counsel, child advocates, law school clinical programs and non-profit law centers to ensure quality representation and justice for youth in urban, suburban, rural and tribal areas. It also offers a wide range of integrated services to juvenile defenders and advocates, including training, technical assistance, advocacy, networking, collaboration, capacity building and coordination.

## CERTIFICATE OF SERVICE

I, Kristina A. Moon, Esq., certify and declare that on December 18, 2009, a copy of the foregoing Motion for Leave to File *Amicus Curiae* Brief and *Amicus Curiae* Brief was served electronically to:

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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.

Dated: December 18, 2009

/s/ Kristina A. Moon  
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