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INTRODUCTION

State agencies initiate dependency proceedings when a child is alleged, often due to parental neglect or abuse, to be a dependent of the state.[1] The state must intervene "[w]hen parents do not comply with [Child Protective Services] requirements, or when the state believes the child is at too great a risk to remain at home even if parents were to comply with services."[2] Dependency proceedings usually take place in juvenile courts and involve the local state agency, the parents, and the child.[3] After the government files a petition alleging circumstances of neglect or abuse, "[t]he court issues temporary orders regarding custody, parental and sibling visits, and services intended to rehabilitate the parents and address the children's medical, educational, and emotional needs."[4] Then, the court conducts a hearing to assess the state's factual allegations.[5] "Depending on the parent's compliance with the service plan written by the agency and ordered by the court," the child may return home.[6] However, in some cases the state will also initiate

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1. Erik S. Pitchal, *Where Are All the Children? Increasing Youth Participation in Dependency Proceedings*, 12 U.C. DAVIS J. JUV. L. & POL'Y 233, 237 (2008); *see also* WASH. REV. CODE § 13.34.030(6)(c) (2021) (noting that in Washington State, a child may also be found dependent if he or she "[h]as no parent, guardian, or custodian capable of adequately caring for the child, such that the child is in circumstances which constitute a danger of substantial damage to the child's psychological or physical development").

2. Pitchal, *supra* note 1, at 237.

3. *Id.*

4. *Id.* at 238.

5. *Id.*

6. *Id.*

termination proceedings "to permanently terminate the parent's parental rights . . . and enable the child to be adopted by a new family."[7]

In Washington State, the statutes, case law, court rules, and local practices that govern dependency proceedings do not protect all participants equally—the state and parents are guaranteed the right to an attorney,[8] but not all children are statutorily guaranteed that right.[9] This essay provides a general and brief overview of dependency proceedings[10] and emphasizes the disparity in the right of representation afforded to parents and children appearing in these proceedings. In addition, this paper details a study that observed dependency proceedings across Washington State.[11] The study investigated whether trial courts discretionarily appointed counsel to children on a case-by-case basis pursuant to guidance to do so by the Washington State Supreme Court.[12] It found that, even though trial judges possessed such discretionary power, it was rarely used, and most children were not represented by attorneys.[13] Further, researchers observed that the vast majority of children who *were* represented by attorneys were guaranteed that right under existing Washington State statutes or afforded it through local county practices.[14]

In 2021, the Washington State legislature passed House Bill 1219,[15] which expands and statutorily guarantees attorney representation to children in dependency proceedings who are eight years old or older.[16] This new statute does not grant attorney representation to all children, like statutes in other states already provide for, but it paves a path in that direction.

I. THE DIFFERENCES IN METHODS OF APPOINTMENT AND ADVOCACY STRATEGIES OF CHILD REPRESENTATIVES

Federal and state law allow for children to receive different types of representation in dependency proceedings, which affects the quality of

7. *Id.*
8. *See infra* Part II.
9. *See infra* section III.A.
10. *See infra* Part I.
11. *See infra* Part IV.
12. *Id.*
13. *See infra* section IV.B.
14. *See infra* section IV.B.2.
15. H.B. 1219, 67th Leg., Reg. Sess. (Wash. 2021).
16. *Id.*

advocacy that children receive in court. For example, federal law incentivizes states to provide representation to children in dependency proceedings—though not necessarily by an attorney. In 1974, Congress enacted the Child Abuse Prevention and Treatment Act (CAPTA),[17] which grants federal funds to states to provide protective services to children who are abused and neglected.[18] Under CAPTA, for a state to receive funding, the state must appoint a guardian ad litem (GAL) in dependency proceedings "in *every* case involving a victim of child abuse or neglect."[19] CAPTA's requirements "*may* be [satisfied by] an attorney," but states do not have to appoint attorneys to children to receive federal funding.[20]

In setting this minimum standard, federal law allows for disparate types of representation: GALs and attorneys do not advocate for children's interests in the same way and are not bound by the same principles and practices. GALs advocate for what they believe is "in the child's best interests, which may or may not align with the child's preferences."[21] In contrast, attorneys promote and advocate for the child's stated interests.[22] An attorney relays pertinent information from the child to the court and advocates for their client's position.[23] Furthermore, attorneys "have a duty of confidentiality to their child clients"[24] and can inform the child of their legal rights and responsibilities.[25] Ultimately, because attorneys have a more active relationship with children whom they represent, they provide the children with a voice in court.[26] Moreover, children who are represented by attorneys are more likely to be adopted or reunited with their parents[27] and benefit psychologically because they are more invested in the outcome after being heard by the court. [28]

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17. Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified as amended at 42 U.S.C. §§ 5101–5116).

18. 42 U.S.C. § 5106a(a).

19. *Id.* § 5106a(b)(2)(B)(xiii) (emphasis added).

20. *Id.* (emphasis added).

21. Alicia LeVezu, *Alone and Ignored: Children Without Advocacy in Child Abuse and Neglect Courts*, 14 STAN. J. C.R. & C.L. 125, 155 (2018).

22. *Id.*

23. LaShanda Taylor, *A Lawyer for* Every *Child: Client-Directed Representation in Dependency Cases*, 47 FAM. CT. REV. 605, 614 (2009).

24. LeVezu, *supra* note 21, at 155.

25. Taylor, *supra* note 23, at 614–15.

26. *Id.* at 620.

27. *Id.* at 615–16.

28. Shireen Y. Husain, Note, *A Voice for the Voiceless: A Child's Right to Legal Representation in Dependency Proceedings*, 79 GEO. WASH. L. REV. 232, 254 (2010).

Further, attorneys can mitigate the "high risk that children will be placed in foster care unnecessarily or will remain in the system longer than required to ensure their safety."[29] A child's liberty interests are often at stake in dependency proceedings.[30] Courts may opt to remove the child from their home, and the state often controls where the child will subsequently live.[31] When intervening in a child's living situation, the state has substantial interests in ensuring the child's safety from endangerment, maintaining family integrity, and reaching an equitable resolution.[32] However, in satisfying these interests, the state may ultimately have to place the child in multiple homes, in a group home, or in an institutional setting such as a mental health facility.[33] Children have countervailing "interests in their own safety, health, and well-being."[34] Attorneys would most adequately protect these interests because they have more active representative relationships with the children whom they represent in dependency proceedings.[35]

Although attorney representation benefits the child and streamlines the dependency court system, some have concerns about increasing the number of attorneys who work on dependency cases. Some worry about the increased cost.[36] However, "the cost of providing an attorney would be offset by the positive impact of effective court advocacy on behalf of the child, mainly increased permanency."[37] Further, increased rates of permanency, for example through adoption, reduce governmental costs associated with the child welfare system.[38] Others are concerned about the increased workloads that attorneys would face and the number of attorneys that would need to be properly trained in this field.[39] But this apprehension is misplaced. CAPTA already requires GALs to receive proper training "including training in early childhood, child, and adolescent development."[40] In enacting this provision, Congress may

29. Taylor, *supra* note 23, at 608.

30. *Id.* at 607.

31. Pitchal, *supra* note 1, at 247.

32. Taylor, *supra* note 23, at 608.

33. Pitchal, *supra* note 1, at 247.

34. Taylor, *supra* note 23, at 607.

35. *See id.*

36. Husain, *supra* note 28, at 256.

37. Taylor, *supra* note 23, at 616.

38. *Id.* It is also important to note that when a child is reunified with their parents, compared to when a child is adopted, the cost savings to the state are even greater because parents do not receive additional governmental support. *See id*. at 616 n.121.

39. Husain, *supra* note 28, at 257–58.

40. 42 U.S.C. § 5106a(b)(2)(B)(xiii).

have believed that states have a financial duty to provide adequate training to everyone who represents children in dependency proceedings. Moreover, for attorneys to provide the best representation possible, they must receive proper training, learn appropriate interviewing and counseling techniques, understand childhood development, and manage their caseloads.[41] Those who argue that these standards are too onerous ignore the vital, obligatory nature of this training and the realities of the dependency court system.

Each state has a statute that addresses when courts must, if at all, appoint counsel to children in dependency proceedings. As of 2019, thirty states and Washington, D.C., had implemented statutes requiring courts to appoint attorneys for all youth.[42] Fourteen other states afforded children a qualified right to counsel.[43] These states provided children "a lawyer under certain conditions, such as when parental rights have been terminated or when the juvenile is over a certain age."[44] The remaining six states permitted the court to appoint counsel, but their statutes did not require it.[45] Washington State falls in the middle. It provides a qualified right and mandates that courts appoint counsel in three circumstances: six months after parental rights have been terminated,[46] when the child petitions for reinstatement of parental rights,[47] and when the child is in extended foster care services.[48]

II. A PARENT'S STATUTORY RIGHT TO COUNSEL IS UNIVERSAL IN WASHINGTON STATE

In dependency proceedings, a parent's right to counsel stands in stark contrast to a child's right. Federal law does not establish such rights for parents—the United States Supreme Court allowed states to decide the degree to which public policy required that parents have a right to counsel.[49] Under that authority, most states, including Washington State and Washington, D.C., grant parents a universal right to counsel in

41. Taylor, *supra* note 23, at 620–21.

42. Kevin Lapp, *A Child Litigant's Right to Counsel*, 52 LOY. L.A. L. REV. 463, 484 (2019).

43. *Id.*

44. *Id.* at 484–85.

45. *Id.* at 485.

46. WASH. REV. CODE § 13.34.212(1)(a) (2021) (amending *id.* § 13.34.100(6)(a) (2019)). In other words, when the child is legally free. *See id.*

47. *Id.* § 13.34.215(3) (2018).

48. *Id.* § 13.34.267(6)(a) (2021).

49. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 33–34 (1981).

dependency and termination proceedings.[50]

In *Lassiter v. Department of Social Services*,[51] the United States Supreme Court addressed whether the Due Process Clause of the U.S. Constitution "require[d] the appointment of counsel when a State [sought] to terminate [the] parental status" of a defendant who was indigent.[52] To do so, the Court weighed three factors from *Mathews v. Eldridge*[53]: "the private interests at stake, the government's interest, and the risk that the procedures used [would] lead to erroneous decisions."[54] It considered these factors in light of "the presumption that there is no right to appointed counsel in the absence of at least a potential deprivation of physical liberty."[55] The Court reasoned that the Constitution did not "require[] the appointment of counsel in every parental termination proceeding."[56] Instead, the Court held that state trial courts should decide "whether due process calls for the appointment of counsel for [parents who are indigent] in termination proceedings."[57] The Court did, however, suggest that public policy "may require that higher standards be adopted than those minimally tolerable under the Constitution."[58]

At the time of *Lassiter*, most states already afforded parents a right to counsel, and more have granted parents that right since. Indeed, the *Lassiter* Court noted in its opinion that thirty-three states and Washington, D.C., already statutorily granted parents the right to counsel in termination proceedings, and some states even did so in dependency proceedings.[59] Now, forty-five states and Washington, D.C., grant parents a categorical right to counsel in termination proceedings, and five states permit courts to discretionarily appoint counsel.[60] In dependency proceedings, thirty-eight states and Washington, D.C., grant parents a categorical right to counsel, six states provide parents with a qualified right, and six states permit courts to discretionarily appoint

50. *Status Map*, NAT'L COAL. FOR CIV. RIGHT TO COUNS. (2021), http://civilrighttocounsel.org/map [https://perma.cc/MY6P-A2JH].

51. 452 U.S. 18 (1981).

52. *Id.* at 31.

53. 424 U.S. 319 (1976).

54. *Lassiter*, 452 U.S. at 27 (citing *Mathews*, 424 U.S. at 335).

55. *Id.* at 31.

56. *Id.*

57. *Id.* at 32.

58. *Id.* at 33.

59. *Id.* at 34.

60. *Status Map*, *supra* note 50.

counsel.[61]

In Washington State, parents have a statutory right to counsel during "all stages of a proceeding in which a child is alleged to be dependent . . . and if [deemed] indigent, to have counsel appointed for" them.[62] In *In re Dependency of M.S.R.*,[63] the Washington State Supreme Court reiterated that it has long recognized "that parents subject to dependency and termination proceedings have a fundamental liberty interest in the right to parent their children and a constitutional right to counsel when the State seeks to terminate that right."[64] Thus, parents in Washington State have the universal right to be represented by an attorney in both dependency and termination proceedings.

III. A CHILD'S RIGHT TO COUNSEL IN WASHINGTON STATE IS LIMITED

A. A Child's Right to Counsel as Prescribed by Statutes and Local Practices

Unlike parents, Washington State does not statutorily guarantee to children the right to counsel in dependency proceedings. Instead, a child is statutorily guaranteed representation by a GAL.[65] The court "shall" appoint a GAL for a child "unless [it] for good cause finds the appointment unnecessary."[66] The use of the word "shall" indicates that, at a minimum, the court must appoint a child a GAL when it declares that the child is dependent. However, section 13.34.100(1) of the Revised Code of Washington also empowers courts to decline to appoint a GAL if they find a legally substantial reason to warrant the appointment of a GAL unnecessary.[67] Alternatively, the appointment of a GAL "*may* be deemed satisfied if the child is represented by an independent attorney in the proceedings."[68] A child may also be represented by both a GAL and an attorney.

Because at minimum Washington State guarantees representation by a

61. *Id.*
62. WASH. REV. CODE § 13.34.090(2) (2021).
63. 174 Wash. 2d 1, 271 P.3d 234 (2012).
64. *Id.* at 13, 271 P.3d at 241.
65. WASH. REV. CODE § 13.34.100(1) (2021).
66. *Id.*
67. *Id.*
68. *Id.* (emphasis added).

GAL,[69] most children in Washington State dependency proceedings will be represented by someone advocating for what they believe is in the child's best interests.[70] Thus, these children are not granted a universal right to be represented by an attorney, who would advocate for the child's stated interests.[71] However, the GAL has a duty "[t]o inform the child, if the child is twelve years old or older, of his or her right to request counsel and to ask the child whether he or she wishes to have counsel, pursuant to [section 13.34.212(2)(c) of the Revised Code of Washington]."[72] In addition, the legislature imposes the same duty upon the Department of Children, Youth, and Families.[73] The notification and inquiry must then occur at least annually while the GAL represents the child.[74] The Department and GAL must note in the child's service and safety plan or report to the court "that the child was notified of the right to request an attorney and indicate the child's position regarding appointment of an attorney."[75]

Washington State requires that courts appoint counsel to children in dependency proceedings in certain, limited circumstances. A child must be appointed an attorney "in a dependency proceeding six months after [the court has granted] a petition to terminate the parent and child relationship . . . and when there is no remaining parent with parental rights."[76] If a child is seeking to petition the court to reinstate previously terminated parental rights, then the court must also appoint counsel.[77] Lastly, if the youth is between the ages of eighteen and twenty-one and is eligible for and wishes to remain in extended foster care, then the court must appoint counsel.[78] However, if a child is under the age of eighteen and their case does not involve termination of parental rights, the state does not statutorily guarantee them counsel.

Outside of these limited circumstances, there are instances where judges have the discretion to appoint counsel for children. For example,

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69. *Id.*

70. LeVezu, *supra* note 21, at 155.

71. *Id.* at 157.

72. WASH. REV. CODE § 13.34.105(1)(g) (2013).

73. *In re* Dependency of M.S.R., 174 Wash. 2d 1, 12, 271 P.3d 234, 240 (2012) (explaining that "[i]n 2010, the legislature specifically required that children 12 years and older be informed of the right to request counsel and be asked every year whether they wish to exercise that right"); WASH. REV. CODE § 13.34.212(2)(c) (2021) (amending *id.* § 13.34.100(7)(c) (2019)).

74. WASH. REV. CODE § 13.34.212(2)(d) (2021) (amending *id.* § 13.34.100(7)(d) (2019)).

75. *Id.* § 13.34.212(2)(f).

76. *Id.* § 13.34.212(1)(a).

77. *Id.* § 13.34.215(3) (2018).

78. *Id.* § 13.34.267(6)(a) (2021).

a court "*may* appoint an attorney to represent the child's position in any dependency action on its own initiative, or upon the request of a parent, the child, a guardian ad litem, a caregiver, or the department."[79] This statute authorizes, but does not require, courts to use discretion. Further, the statute allows parties in the proceeding or other interested individuals, such as caregivers, to request counsel for the child. However, the legislature did not delineate the factors courts should consider in their discretion.

Juvenile courts may further protect a child's right to counsel in dependency proceedings. Juvenile courts across Washington State "shall provide a lawyer at public expense in a dependency or termination proceeding . . . [u]pon request of a party or on the court's own initiative . . . for a juvenile who has no guardian ad litem and who is financially unable to obtain a lawyer without causing substantial hardship" to the juvenile or their family.[80] If the child has already been appointed a GAL, "the court may, but need not, appoint a lawyer for the juvenile."[81] Thus, in dependency proceedings in Washington State, a child must be represented by either a GAL or an attorney or both.

In addition to statewide requirements, some counties in Washington State employ local rules and non-binding practices that automatically appoint counsel for children once they turn twelve. For example, the Spokane County Juvenile Court Rules provide that "[a] child over the age of [twelve] may request the appointment of an attorney by informing the Guardian ad Litem or by written request to Juvenile Court staff," who shall then "apply to the Court for an Order Assigning Lawyer for the child."[82] In contrast, while Thurston County has Juvenile Court Rules relating to dependency, there is no rule mandating that counsel be appointed for children twelve years of age and up.[83] Despite this, local practices suggest that Thurston County routinely appoints counsel for children once they become twelve years old; Spokane County also

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79. *Id.* § 13.34.212(2)(a) (amending *id.* § 13.34.100(7)(a) (2019)) (emphasis added); *see also id.* § 13.34.212(2)(b)(i)(A) (allowing "[t]he child's caregiver, or any individual, [to] refer the child to an attorney for the purposes of filing a motion to request appointment of an attorney at public expense" if the child does not already have an attorney, either through court appointment or by privately retaining one).

80. WASH. JUV. CT. R. 9.2(c)(1) (2012). Unlike the Revised Code of Washington, this Rule requires the court to appoint counsel when the child does not have a GAL.

81. *Id.*

82. SPOKANE CNTY. SUP. CT. LOC. JUV. CT. R. 3.4(e)(2) (2019). This provision aligns with section 13.34.212(2)(c) of the Revised Code of Washington, but it places the burden on the child to request counsel.

83. *See* THURSTON CNTY. SUP. CT. LOC. CT. R. (2019).

follows a similar practice.[84] Further, in contrast to Spokane and Thurston Counties, Skagit County does not automatically appoint counsel for children once they turn twelve, and Skagit County Juvenile Court Rules do not mention dependency proceedings.[85]

B. Case Law Concerning a Child's Right to Counsel

In separate cases under the United States and Washington State Constitutions, the Washington State Supreme Court found that, unlike parents, children do not have a categorical right to counsel. First, in *In re Dependency of M.S.R.*, the Court held that a child does not have a categorical right to counsel under the U.S. Constitution in termination proceedings.[86] In *M.S.R.*, the trial court terminated a mother's parental rights over her twin boys.[87] The mother argued that the trial court erred by not appointing counsel to represent her children.[88] The Washington State Supreme Court acknowledged that state law and court rules provided trial courts with "the discretion to decide whether to appoint counsel to children who are the subjects of dependency or termination proceedings."[89] The Court found *Lassiter*'s "discussion of the rights of parents facing the termination of the parent child relationship . . . instructive in analyzing the rights of a child facing the termination of the very same relationship."[90] Thus, the Court used the *Mathews* factors to guide its analysis of a child's federal due process right to counsel in termination proceedings.[91]

Using the *Mathews* factors, the Court compared the private interests at issue in dependency proceedings. The Court noted that a child's physical liberty interest is often at stake, especially because placement in a foster home "may result in multiple changes of homes, schools, and friends over which the child has no control," and these changes can cause significant harm to the child.[92] The Court found that this liberty

84. *Cf.* LeVezu, *supra* note 21, at 139 n.80 (explaining how "Snohomish and King Counties have an unwritten policy of automatically appointing an attorney for youth on their 12th birthday"). It appears that Spokane and Thurston Counties have a similar, unwritten policy.

85. *See* SKAGIT CNTY. JUV. CT. R. (2020).

86. 174 Wash. 2d 1, 20–22, 271 P.3d 234, 244–45 (2012).

87. *Id.* at 8, 271 P.3d at 239.

88. *Id.* at 5, 271 P.3d at 237.

89. *Id.* at 11–12, 271 P.3d at 240.

90. *Id.* at 15, 271 P.3d at 242.

91. *Id.* at 14–15, 271 P.3d at 241–42.

92. *See id.* at 16, 271 P.3d at 243.

interest "is very different from, but at least as great as, the parent's."[93] The Court surmised that, unlike a parent, a child "may face the daunting challenge of having his or her person put in the custody of the State as a foster child, powerless and voiceless, to be forced to move from one foster home to another."[94] As to the government's interest, the Court found that the state generally has a strong and compelling interest in providing for the welfare of children and reaching a fair and just resolution.[95] Lastly, the Court punted on the issue of the risk of erroneous deprivation, acknowledging that "whether an additional lawyer in the proceedings would reduce the likelihood of an erroneous decision is subject to debate and has not been established here."[96]

Ultimately, the Court held "that children have at least the same due process right to counsel as do [parents who are indigent] subject to dependency proceedings as recognized by the United States Supreme Court in *Lassiter*."[97] The Court acknowledged that "there are many circumstances when counsel for a child would be extremely valuable" because counsel communicates confidentially with the child and represents their expressed desires.[98] However, this case involved the termination of parental rights.[99] Even though the Court held that "the due process right of children who are subjects of *dependency* or termination proceedings to counsel is not universal,"[100] it qualified that "[n]othing in this opinion should be read to foreclose argument that a different analysis would be appropriate during the dependecy [sic] stages."[101]

Six years later in *In re Dependency of E.H.*,[102] the Washington State Supreme Court revisited the issue under the Washington State Constitution in an appeal from a dependency proceeding. Specifically, the Court again held that state due process does not require courts to universally appoint counsel for children in dependency proceedings.[103] In *E.H.*, a six-year-old child appeared with a court-appointed special advocate (CASA), who acted as a GAL and asked the trial court to

93. *See id.* at 17–18, 271 P.3d at 243.
94. *See id.* at 16, 271 P.3d at 242.
95. *See id.* at 18, 271 P.3d at 243.
96. *Id.* at 19, 271 P.3d at 244.
97. *Id.* at 20, 271 P.3d at 245.
98. *Id.* at 19, 271 P.3d at 244.
99. *Id.* at 5, 271 P.3d at 237.
100. *Id.* at 22, 271 P.3d at 245 (emphasis added).
101. *Id.* at 22 n.13, 271 P.3d at 245.
102. 191 Wash. 2d 872, 427 P.3d 587 (2018).
103. *See id.* at 878, 427 P.3d at 589.

terminate the mother's parental rights.[104] During a review hearing, the trial court denied the mother's motion to appoint counsel for her child.[105] Upon reviewing the denial under the *Mathews* balancing test, the Washington State Supreme Court held that the denial was not an error.[106]

The Court inquired whether Washington State's Due Process Clause authorized section 13.34.100(7)(a) of the Revised Code of Washington, which grants children a discretionary right to counsel.[107] First, the Court had to determine "whether a provision of the state constitution should be interpreted independently of its corresponding federal constitutional provision."[108] To do so, the Court, using the analytical framework from *State v. Gunwall*,[109] weighed "(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."[110] The Court concluded that "the *Gunwall* factors support utilizing federal guidance."[111] Thus, the Court analyzed the constitutionality of section 13.34.100(7)(a) under a *Mathews* balancing test[112] and conducted a very similar analysis to that presented in *In re Dependency of M.S.R.*

Altogether, the Court ruled that the record did not support appointment of counsel for E.H.[113] Under the first prong of the *Mathews* test, the Court did not find that E.H. had a significant private interest at stake.[114] Although the Court recognized E.H.'s interest in visiting her siblings to be a liberty interest, the trial court did not decide E.H.'s placement and the state did not move to terminate her mother's parental rights.[115] The Court considered E.H.'s interest in sibling visitation to be "of a comparatively lesser constitutional magnitude than an interest in physical autonomy or medical or educational decisions."[116] Under the

104. *Id.* at 880, 427 P.3d at 590.

105. *Id.* at 880–81, 427 P.3d at 590.

106. *Id.* at 895–96, 427 P.3d at 597–98.

107. *Id.* at 883, 427 P.3d at 591.

108. *Id.* at 885, 427 P.3d at 592.

109. 106 Wash. 2d 54, 720 P.2d 808 (1986).

110. *E.H.*, 191 Wash. 2d at 885, 427 P.3d at 592 (quoting *Gunwall*, 106 Wash. 2d at 58, 720 P.2d at 811).

111. *Id.* at 887, 427 P.3d at 593.

112. *Id.* at 891, 427 P.3d at 595.

113. *Id.* at 898, 427 P.3d at 599.

114. *Id.* at 895, 427 P.3d at 597.

115. *Id.*

116. *Id.*

second prong of the *Mathews* test, the Court determined that the risk of erroneous deprivation was low because E.H. and E.H.'s CASA already agreed about visitation.[117] The Court acknowledged that attorney representation may decrease the lifespan of dependency proceedings and may increase a child's comfort levels in a courtroom.[118] However, the Court noted that procedural due process is focused on protecting against erroneous state actions[119] and that appointment of counsel may be proper in certain situations.[120] For example, this is so when the child disputes the facts of the dependency or when the child's stated interests do not accord with the GAL's beliefs about the child's best interest.[121] On the facts of the case, the Court ultimately concluded that the risk of erroneous deprivation was low because "it [was] unclear what additional decisional accuracy an attorney for E.H. would have provided the trial court in making its decision regarding visitation."[122] Under the third prong of the *Mathews* test, the Court emphasized "the government's interest against adopting a categorical requirement of representation" because the state argued that such a program would be expensive and impractical.[123] Here, the Court recognized the state's interest in "reaching [a] permanent and safe placement for E.H." and concluded that "that interest was not frustrated by the appointment of counsel for E.H."[124] Thus, the Court affirmed the trial court's denial.[125]

Although the Washington State Supreme Court held that the Washington State Constitution did not guarantee children a universal right to counsel in dependency proceedings, the Court provided trial courts with guidance to consider this issue on their own. The Court outlined a non-exhaustive list of factors for trial courts to consider:

> the age of the child, whether the child is in legal or physical custody of the State, whether the child's stated interests are aligned with the GAL's assessment of the child's best interest (if a GAL has been appointed) or with another represented party's desires, whether the child disputes the facts that form a basis for the dependency determination, whether the child presents a

117. *Id.* at 895–96, 427 P.3d at 597.
118. *Id.* at 893, 427 P.3d at 596.
119. *Id.*
120. *Id.* at 889–90, 427 P.3d at 594.
121. *Id.*
122. *Id.* at 895–96, 427 P.3d at 597.
123. *Id.* at 893, 427 P.3d at 596.
124. *Id.* at 896, 427 P.3d at 597.
125. *Id.* at 896, 427 P.3d at 598.

> complex argument against the State's proposed action, and the issues that are actually disputed or to be addressed in the hearing.[126]

The Court urged trial courts "to *sua sponte* raise the issue of representation for children *at the earliest practicable time* in the proceedings"[127] and "without a presumption against appointment of counsel."[128]

In re Dependency of A.E.T.H.[129] is one example of a court successfully using *E.H.* to guide its analysis. In that case, Division One of the Washington Court of Appeals balanced the *Mathews* factors and directed a trial court on remand to appoint an attorney to represent a child in a dependency proceeding.[130] The child was represented by a voluntary guardian ad litem (VGAL).[131] The court found that because the child's parents might have lost their parental rights, the child risked losing those relationships with her biological and foster parents and other familial relationships.[132] The court also concluded that the risk of erroneous deprivation was high because there was misconduct in the VGAL program and on the part of the VGALs in this case[133] and because an attorney would more effectively protect the child's legal interests.[134] Further, because the child was six years old at the time of appeal, the court acknowledged that she might "be able to communicate her interests to an attorney in a way that was not possible during the first trial when she was only two years old."[135] Finally, even though the state

126. *Id.* at 894, 427 P.3d at 597.

127. *Id.* at 890, 427 P.3d at 595 (emphasis added).

128. *Id.* at 898, 427 P.3d at 598.

129. 9 Wash. App. 2d 502, 446 P.3d 667 (2019).

130. *See id.* at 507, 446 P.3d at 671.

131. *Id.* at 508, 446 P.3d at 671.

132. *Id.* at 527, 446 P.3d at 680.

133. *See id.* at 508–16, 446 P.3d at 671–75. The child's first VGAL committed numerous breaches of confidentiality because she believed the child should stay with the foster parents. *Id.* at 508, 446 P.3d at 671. After the first VGAL passed away, the court appointed a replacement VGAL, who remained largely uninvolved in this case. *Id.* at 508–09, 446 P.3d at 671. At the termination trial, the court found the VGAL to be dishonest and uninformed. *Id.* at 509, 446 P.3d at 672. Both VGALs had facilitated a breach of confidentiality by illegally sending the biological parents' criminal records to the foster parent's adoption agency. *Id.* The child's biological parents moved to remove the VGAL. *Id.* at 510, 446 P.3d at 672. The VGAL eventually withdrew from the case. *Id.* at 511, 446 P.3d at 673. Further, during later evidentiary hearings, the court discovered that the VGALs destroyed information and ruled that they used abusive litigation tactics. *Id.* at 512, 446 P.3d at 673.

134. *Id.* at 527, 446 P.3d at 681.

135. *Id.*

had an interest in reducing the costs of their proceedings, "the costs and procedural burden of appointing an attorney to represent [the child did] not outweigh [the child's] interests."[136] Ultimately, the court deemed it necessary to appoint an attorney for this child to provide guidance that was "long overdue in a case that ha[d] languished for years in the superior court."[137]

On April 30, 2020, the Washington State Supreme Court issued an order in response to the COVID-19 global pandemic that added to the guidance that the Court enunciated in *E.H.*[138] This directive ordered juvenile courts to consider the decision's framework and "undertake an individualized determination at as early a time as is practicable whether appointment of an attorney" is necessary.[139]

IV. THE 2020 COURT OBSERVATION STUDY: JUDICIAL DISCRETION IS RARELY UTILIZED

To this point, this Essay has discussed the power courts have to appoint counsel in dependency proceedings; now, it investigates whether that power is used. First, this section briefly explains foundational research on dependency proceedings that occurred before the Washington State Supreme Court decided *In re Dependency of E.H.* Further, this section discusses a subsequent study that primarily observed the effects of *In re Dependency of E.H.* This study suggests that although trial courts have discretion from both statutes and case law to appoint attorneys for children in dependency proceedings, trial judges rarely utilize this discretion.

A. Past Research Shows that Most Children Were Not Represented by Attorneys in Dependency Proceedings

One study on children's representation, conducted by Alicia LeVezu and supported by the Children and Youth Advocacy Clinic at the University of Washington (UW) School of Law, aimed "to capture data about what was actually happening each day in local dependency courts by observing a wide array of dependency hearings and tracking what

136. *Id.* at 527–28, 446 P.3d at 681.

137. *Id.* at 528, 446 P.3d at 681.

138. Extended and Revised Order Re: Dependency and Termination Cases, In the Matter of Statewide Response by Wash. State Cts. to the COVID-19 Pub. Health Emergency, No. 25700-B-622 (Wash. Apr. 30, 2020).

139. *Id.* at 2.

occurred" (the 2018 study).[140] LeVezu published this study in June 2018—four months before *In re Dependency of E.H.* Thus, at that time the Washington State Supreme Court had not instructed trial courts to raise sua sponte the issue of appointing children counsel, but the courts were still statutorily bound to use their discretion when considering whether to appoint counsel.

The researchers observed 596 hearings involving 872 children across King, Pierce, and Snohomish Counties.[141] In all, 22% of children had attorneys present, and 23% of children were not represented by an advocate.[142] For cases in which the children did not have an advocate present, parties to the proceedings for eight children mentioned appointing them counsel during hearings, and courts subsequently appointed attorneys to two children.[143] Overall, most children were not represented by attorneys, and many were not represented at all. This study shows that, despite a statutory duty to do so, courts rarely considered whether to appoint children counsel.

B. The 2020 Study Shows that Judges Rarely Use Their Discretion to Appoint Counsel to Children in Dependency Proceedings

In late 2020, two students and a professor from the UW School of Law conducted another court observation study to better understand whether juvenile trial courts were using their discretion to appoint counsel for children on a case-by-case basis (the 2020 study).[144] The researchers sought to identify cases in which attorneys appeared in dependency proceedings and determine whether courts had appointed them via statutes, case law, or local practice. Further, the researchers sought to witness a discretionary appointment of counsel during their observations in part because researchers observed few appointments in the 2018 study.

The 2020 study hoped to expand on Alicia LeVezu's data. In particular, the 2020 study evaluated how statutes, case law—especially *In re Dependency of E.H.*—and local practices impacted courts'

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140. LeVezu, *supra* note 21, at 137–38.

141. *Id.* at 140. Because of confidentiality concerns it was impossible for the researchers to discern if they observed 872 unique children or if some children were observed during multiple hearings. *Id.* at 140 n.85.

142. *Id.* at 143.

143. *Id.* at 145.

144. Lisa Kelly, Ashleen O'Brien & Marisa Forthun's Observations of Dependency Hearings, in Skagit, Spokane, & Thurston Counties, WA (Nov. 10, 2020 to Dec. 29, 2020) (on file with author) [hereinafter Observation Data].

tendencies to appoint counsel for youth in dependency proceedings. The researchers observed 169 hearings involving 244 children over seven weeks in Skagit, Spokane, and Thurston Counties. Because of the COVID-19 global pandemic, all hearings were observed over the video conferencing service Zoom. This allowed the researchers to observe hearings in counties on the western and eastern sides of Washington State.

The researchers collected data on multiple variables in each hearing. Specifically, the researchers recorded (1) the type of hearing; (2) the age of the child, if determinable; (3) whether the child was present for the hearing; (4) whether the child was legally free under section 13.34.100(6)(a) of the Revised Code of Washington;[145] (5) what type of advocate was present on behalf of the child, if any; and (6) whether the court or any party raised the issue of appointment of counsel and if the court analyzed the *Mathews* factors.

i. Researchers Observed a Variety of Dependency Hearings with Different Types of Advocates Present

This section synthesizes the data collected in the 2020 study, including the number of hearings, number of children, and type of advocate present in Skagit, Spokane, and Thurston Counties. The number of hearings in each county seen in Table 1 is relatively proportionate to the size of that county's population.[146] As of July 1, 2019, Skagit County had the smallest population with 129,205 people,[147] Thurston County had the next largest population with 290,536 people,[148]

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145. At the time of the 2020 study, RCW 13.34.100(6)(a) provided, in part, that "[t]he court must appoint an attorney for a child when there is no remaining parent with parental rights for six months or longer prior to July 1, 2014, if the child is not already represented." WASH. REV. CODE § 13.34.100(6)(a) (2019). In 2021, this section was removed from RCW 13.34.100 and added to a new statute, RCW 13.34.212. H.B. 1219, 67th Leg., Reg. Sess. (Wash. 2021). The relevant language has been updated to state that "[t]he court shall appoint an attorney for a child in a dependency proceeding six months after granting a petition to terminate the parent and child relationship pursuant to RCW 13.34.180 and when there is no remaining parent with parental rights." WASH. REV. CODE § 13.34.212(1)(a) (2021).

146. Skagit County also had the lowest number of hearings because observations in Skagit County did not begin until shortly after observations in Spokane and Thurston Counties began.

147. *QuickFacts: Skagit County, Washington; United States*, U.S. CENSUS BUREAU (July 1, 2019), https://www.census.gov/quickfacts/fact/table/skagitcountywashington,US/PST045219 [https://perma.cc/2962-3FDY].

148. *QuickFacts: Thurston County, Washington; United States*, U.S. CENSUS BUREAU (July 1, 2019), https://www.census.gov/quickfacts/fact/table/thurstoncountywashington,US/PST045219 [https://perma.cc/RC7M-Z76Z].

and Spokane County had the largest population with 522,798 people.[149] The number of hearings is unequal because of the researchers' availabilities and the disproportionate frequency of dependency hearings in the three counties.

Table 1: Number of Hearings and Children by County

	Hearings	Children
Skagit	26	30
Spokane	75	124
Thurston	68	90
TOTAL	**169**	**244**

The researchers observed a wide variety of hearings to see whether children were represented by or appointed counsel at different rates in the timeline of dependency proceedings.[150] The most commonly observed hearing types were review hearings (42%), motion hearings (18%), and permanency planning hearings (14%).[151]

Table 2 presents the type of advocate present on behalf of the child in dependency proceedings per county. Even though Washington State mandates that courts appoint a GAL to every child in dependency proceedings unless they find good cause,[152] over 12% of the children observed did not have any type of advocate present.[153]

Table 2: Type of Advocate Present by County

	Only an Attorney	Only a GAL	Both an Attorney and a GAL	No Advocate
Skagit	2	25	1	2
Spokane	27	85	1	11
Thurston	15	49	9	17
TOTAL	**44**	**159**	**11**	**30**

149. *QuickFacts: Spokane County, Washington; United States*, U.S. CENSUS BUREAU (July 1, 2019), https://www.census.gov/quickfacts/fact/table/spokanecountywashington,US/PST045219 [https://perma.cc/H97N-NRQ2].

150. Family law matters, hearings that involved the Special Immigrant Juvenile Status (SIJS) process, and trials were excluded from observation. Trials, which would often span multiple days, were excluded due to the researchers' more limited time commitments.

151. Observation Data, *supra* note 144.

152. WASH. REV. CODE § 13.34.100(1) (2021).

153. *See* Table 2; Observation Data, *supra* note 144.

ii. The Findings Demonstrate that Most Children Remained Unrepresented by an Attorney

The 2020 study took place after *In re Dependency of E.H.*, in which the Washington State Supreme Court urged trial courts to raise sua sponte whether children need to be represented in dependency proceedings;[154] thus, one would expect a higher percentage of children to appear with counsel. However, comparison of the data between the 2018 study and the 2020 study shows that the Court's direction did not have a significant effect on the rates of represented children. In the 2018 study, 22% of children appeared with counsel,[155] and there was no change observed in the 2020 study.[156] Additionally, in the 2018 study, 23% of children appeared without an advocate,[157] and 12% of children appeared without one in the 2020 study.[158]

Other findings from the 2020 study were consistent with those from 2018—children who were represented by counsel were more likely to appear in court,[159] suggesting that they felt more invested in the outcome of the proceedings. Thirty-five percent of children who were represented by attorneys appeared in court, compared to the 5% of children who were not represented by attorneys but still appeared in court.[160] Further, represented children who appeared in court outnumbered those who were not represented by an attorney. Twenty-nine children appeared in court in Spokane and Thurston Counties.[161] Of those, fourteen of them were represented by an attorney, five of them were represented by both an attorney and a GAL, and eight of them were represented by a GAL.[162] Thus, almost 66% of children who appeared in court were accompanied by an attorney.[163]

In most cases where attorneys represented children, they were likely appointed via the existing Washington State statutory scheme or the relevant county's local practices—particularly those of Spokane and

154. *In re* Dependency of E.H., 191 Wash. 2d 872, 890, 427 P.3d 587, 595 (2018).

155. LeVezu, *supra* note 21, at 144.

156. *See* Observation Data, *supra* note 144.

157. LeVezu, *supra* note 21, at 144.

158. *See* Table 2; Observation Data, *supra* note 144.

159. LeVezu, *supra* note 21, at 150.

160. Observation Data, *supra* note 144.

161. *Id.* Zero children appeared in court in Skagit County.

162. *Id.* The remaining two children who appeared did not have an advocate present because either appointed counsel failed to appear, or the attorney's paralegal appeared instead.

163. *Id.*

Thurston Counties. Both counties regularly appoint counsel to children over the age of twelve. In Spokane County, of the twenty-eight children represented by attorneys, twenty-five of them were twelve years of age or older.[164] In other words, 89% of children received counsel likely because of local practices and statutory mandates.[165] In Thurston County, of the twenty-four children represented by attorneys, eighteen of them were twelve years of age or older.[166] This suggests that 75% of attorneys were likely appointed through local practices and statutory mandates.[167] In Skagit County, three out of thirty children were represented by an attorney.[168] A court in the county determined that one child was legally free, which statutorily guaranteed them counsel.[169] Thus, almost all children who were represented by counsel likely had counsel because of statutes or county practices.

A few cases suggest that courts might have exercised their discretionary powers to appoint counsel to children. However, even in these cases, the researchers could not ascertain how these children acquired counsel. In Thurston County, one child was eleven years old,[170] which suggests that a court may have exercised its discretion to appoint this child an attorney. However, the controlling reason for this appointment is unknown. Two children in Skagit County were siblings under the age of twelve, and it was unclear why they had an attorney present.[171] Thus, because no statute mandated that they be represented, this could have resulted from a prior discretionary appointment.

Overall, in the hearings involving the 189 children who were not represented by an attorney, researchers did not observe a single request made and approved for discretionary appointment of counsel. In a Thurston County hearing, one party requested counsel for a two-year-old child. The Assistant Attorney General who represented the state objected, claiming that a two-year-old child could not state her interests. The judge did not address the request further, rule on the matter, or appoint an attorney. In a Skagit County hearing, one researcher observed

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. After recent legislative changes, the relevant section of law is now found in RCW 13.34.212(1)(a). WASH. REV. CODE § 13.34.212(1)(a) (2021) (amending *id.* § 13.34.100(6)(a) (2019)).

170. Observation Data, *supra* note 144.

171. *Id.*

a judge grant a GAL's request to appoint a child counsel. The child had recently turned twelve years old and gave a noncommittal answer when informed of his right to request counsel. This was the only appointment of counsel observed in 169 hearings, and it was the result of the statutory mandate that GALs inform children of their right to request counsel after turning twelve rather than judicial discretion.[172]

iii. Analysis of Hearings Demonstrates that Unrepresented Children Could Have Benefitted from Counsel

Anecdotal examples from observed hearings demonstrate that numerous children who did not have counsel might have benefitted from a judicially-appointed attorney. These examples are drawn from firsthand observations of dependency proceedings.

Two Skagit County review hearings show that children with significant liberty interests at stake could have benefitted from an attorney's direction. In one hearing, key issues could not be resolved, and the child could not return home for forty-one months. The child's mother was homeless, and the social worker reported concerns that the child's father could not read the child's cues or respond quickly to emergencies. While the Department of Children, Youth, and Families asked the court to place the child with a guardian or terminate parental rights, the father wanted the court to return his daughter to his care. The child was represented by a GAL, but an attorney might have helped communicate the child's ultimate wishes and resolve the case more quickly. In a different hearing, the court considered changing a child's permanency plan. The child was not represented by an advocate, which is not in compliance with state law, unless the court previously found good cause to not appoint a GAL.[173] A change in the plan would affect the child's physical liberty, but the child did not have an advocate present to voice their interests. While *In re Dependency of E.H.* concerned sibling visitation,[174] these hearings determined where the child would ultimately be placed. The Washington State Supreme Court recognized sibling visitation as a liberty interest, but this interest was "of a comparatively lesser constitutional magnitude than an interest in physical autonomy."[175] Here, the children's interests to find permanent

172. WASH. REV. CODE § 13.34.212(2)(c) (2021).

173. *Id.* § 13.34.100(1) (mandating appointment of a GAL for a child in dependency proceedings).

174. *In re* Dependency of E.H., 191 Wash. 2d 872, 895, 427 P.3d 587, 597 (2018).

175. *Id.*

homes were strong because the former hearing concerned the termination of parental rights and the latter was missing an advocate. These strong interests likely outweighed the state's interests to reduce costs in both cases.[176] Thus, courts performing a *Mathews* analysis should have appointed attorneys for these children.

Similarly, a child in a Spokane County review hearing did not have an advocate and would have benefitted from being represented. The child did not have a GAL because all present parties acknowledged that the court would likely terminate parental rights. However, the court did not have "good cause"[177] to refrain from appointing a GAL for the child. In *In re Dependency of A.E.T.H.*, the child was at risk of losing her parents and other familial relationships.[178] The court noted that children have "the right to basic nurturing, including a stable, safe, and permanent home"[179] and appointed the child an attorney after weighing each of the *Mathews* factors.[180] In the Spokane County hearing, the child was at risk of losing these relationships as well and likely would have benefitted from an attorney, who could have protected her private liberty interests in the hearing.

Another review hearing in Spokane County also illustrates how attorneys can be beneficial in hearings involving siblings, especially when they might be separated in different placements. A court had placed three children in foster care: two children remained together, but the court had placed the third in a separate foster home. None of the children were placed with relatives, and the record did not explain why. This situation is typically undesirable because youth in foster care have well-established rights to be placed with siblings and "to live with adult relatives as opposed to strangers."[181] An attorney could have ensured these rights were met in this case.

A different permanency planning hearing in Spokane County demonstrates how an attorney could safeguard against unnecessary or numerous placement changes. At the outset, two children, ages six and seven, lived with their grandmother. Unlike *In re Dependency of E.H.*, which dealt with sibling visitation rights,[182] this court addressed the siblings' placement. Placement changes can cause significant harm to a

176. *See id.* at 893, 427 P.3d at 596.

177. WASH. REV. CODE § 13.34.100(1).

178. *In re* Dependency of A.E.T.H., 9 Wash. App. 2d 502, 527, 446 P.3d 667, 680 (2019).

179. *Id.* (citing *In re* Dependency of M.S.R., 174 Wash. 2d 1, 17, 271 P.3d 234, 243 (2012)).

180. *Id.*

181. Pitchal, *supra* note 1, at 255.

182. *In re* Dependency of E.H., 191 Wash. 2d 872, 895, 427 P.3d 587, 597 (2018).

child because they have to rebuild relationships and relocate schools.[183] There is also a risk that the first placement does not work out, and children could ultimately face a series of placement changes during their childhood.[184] Here, such a risk existed because the court was considering returning the six-year-old child to foster care because of his behavioral issues. Furthermore, this child was the same age as the child in *In re Dependency of A.E.T.H.*, who was appointed an attorney because she might "be able to communicate her interests to an attorney in a way that was not possible" when dependency began.[185] Comparably, the six-year-old child in Spokane likely deserved an attorney to whom he could have communicated his interests. The attorney would have advocated for the child's wishes, whether that was to stay with his grandmother or remain with his sibling.

Lastly, two hearings in Thurston County highlight the difference that an attorney can make at the shelter care stage in a dependency proceeding.[186] In one hearing, the child was a teenager in foster care. The teenager was represented by an attorney and appeared for his hearing. His attorney articulated that he wished to be placed with his sister and maintain communication with his father. By contrast, during a different hearing, a mother agreed with the judge to place her two unrepresented children into foster care. The mother did not feel like her home was safe for her and her children, and she identified some possible placement options, though they were outside Washington State. The judge granted the mother visitation rights, but there remained unresolved issues concerning the children's eligibility under the Indian Child Welfare Act (ICWA).[187] An attorney could have helped resolve the lingering ICWA issues and explored other placement options, particularly those suggested by the mother. An attorney could have also advocated for the children's stated interests, as was successfully demonstrated in the first shelter care hearing.

183. *M.S.R.*, 174 Wash. 2d at 16, 271 P.3d at 243.

184. Pitchal, *supra* note 1, at 247.

185. *A.E.T.H.*, 9 Wash. App. 2d at 527, 446 P.3d at 681.

186. *See* WASH. REV. CODE § 13.34.065(1)(a) (2021) ("When a child is taken into custody, the court shall hold a shelter care hearing within 72 hours . . . to determine whether the child can be immediately and safely returned home while the adjudication of the dependency is pending.").

187. 25 U.S.C. §§ 1901–1963; *id.* § 1903(4).

V. WASHINGTON HOUSE BILL 1219 EXPANDS CHILDREN'S REPRESENTATION

In 2021, the Washington State legislature passed House Bill 1219, which concerned the appointment of counsel for youth in dependency court proceedings.[188] Through this bill, the legislature sought to expand legal services afforded to youth in dependency proceedings.[189] The bill will implement a phase-in schedule for court appointment of attorneys developed by the statewide children's legal representation program.[190] This program exists within the Office of Civil Legal Aid (OCLA).[191]

The bill expands section 13.34.090 of the Revised Code of Washington by acknowledging that children have a right to counsel in dependency proceedings. Previously, section 13.34.090 only recognized that "the child's parent, guardian, or legal custodian has the right to be represented by counsel, and if [deemed] indigent, to have counsel appointed for him or her by the court."[192] The legislature amended section 13.34.090 to include that: "[a]t all stages of a proceeding in which a child is alleged to be dependent, the child has the right to be represented by counsel. Counsel shall be provided at public expense subject to the phase-in schedule as provided in section 6 of this act."[193] Pursuant to section 6, the legislature will appropriate money for legal services, and the statewide children's legal representation program will then contract with attorneys and agencies to implement the services.[194] Overall, this new addition to section 13.34.090 is a step in the right direction towards expanding children's access to counsel in dependency proceedings.

Further, section 6 statutorily guarantees counsel to children at younger ages.[195] It retains a child's statutory right to counsel six months after parental rights have been terminated.[196] In addition, pursuant to the phase-in schedule, it requires that courts appoint counsel for children under eight years old "for the dependency and termination action upon

188. H.B. 1219, 67th Leg., Reg. Sess. (Wash. 2021).

189. *Id.* at 11.

190. *Id.*

191. *Id.* at 8.

192. WASH. REV. CODE § 13.34.090(2) (2018).

193. H.B. 1219, 67th Leg., Reg. Sess. § 2 (Wash. 2021).

194. *Id.* at 12.

195. *Id.* at 8–12.

196. *Id.* at 8. This right was previously codified in section 13.34.100(6)(a) of the 2019 version of the Revised Code of Washington.

the filing of a termination petition."[197] Courts also retain the ability to appoint counsel for children under eight years old "on [their] own initiative, or upon the request of a parent, the child, a guardian ad litem, a caregiver, or the department, prior to the filing of a termination petition."[198] For children between the ages of eight and seventeen, "appointment must be made upon the filing of a new dependency petition at or before the commencement of the shelter care hearing."[199]

Despite its benefits, section 6 does not universally guarantee counsel to all children in dependency proceedings. First, this section's unqualified guarantee of counsel omits all children under the age of eight. These young children are guaranteed the right to counsel if the state seeks termination of parental rights, but they are not guaranteed the right to counsel in dependency proceedings. In limiting the guarantee for children under eight, the legislature likely believed that stakes are higher in termination proceedings; however, the stakes in dependency proceedings are often just as high because dependency proceedings discuss placement, sibling visitation, and school changes. Thus, the legislature could go further to guarantee the right to counsel for all children in dependency proceedings regardless of age. This is not unprecedented—Washington State could follow the lead of states like Louisiana and mandate that courts appoint counsel for every child and for the entire duration of the legal proceedings.[200]

Second, the phase-in schedule implements section 6's guarantees on a county-by-county basis over six years.[201] Counties are prioritized in the schedule if there is "[n]o current practice of appointment of attorneys for children in dependency cases" or where there is "[s]ignificant prevalence of racial disproportionality or disparities in the number of dependent children compared to the general population."[202] Because the phase-in schedule will require multiple years to implement, some children may not reap the bill's benefits until later in their dependency proceedings. Nonetheless, the phase-in schedule and section 6's new guarantees will provide more children in Washington State the benefit of legal representation during their dependency proceedings.

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197. *Id.* at 10.

198. *Id.*

199. *Id.* at 11.

200. Christin Lanham, *Statistically Speaking: How Can Illinois Improve Its Statutory Requirements for Representation of Children in Dependency Proceedings?*, 30 CHILD. LEGAL RTS. J. 106, 106 (2010).

201. H.B. 1219, 67th Leg., Reg. Sess. (Wash. 2021).

202. WASH. REV. CODE § 6(3)(c)(i)(A)–(B) (2021).

The legislature is also adding a new section to ensure that researchers assess the impacts of legal representation on case outcomes.[203] This research is critical to document positive changes that legal representation will have on children in dependency proceedings and to ensure that funds are being distributed appropriately. While the new section does not specify that researchers are to observe judicial outcomes, it would be beneficial for independent legal researchers to conduct research, observe, and ensure that these new laws and procedures are being properly followed in court, like the 2020 study aimed to do.

CONCLUSION

Although juvenile court judges have the authority to appoint counsel for children in dependency proceedings, they rarely do so. Washington State statutes and case law direct trial courts to consider appointing counsel for children who are unrepresented. Even in hearings where courts consider changes in a child's placement, separation of children from siblings, or termination of parental rights, children may not have an attorney or a GAL. While the existing Washington State statutory scheme provides judges with discretion to appoint counsel in these situations, the mechanism is futile if it is rarely used. And indeed, it is—the court observation study in 2020 found that the majority of children were represented by an attorney because statutes or local county practices guaranteed them that right. Thus, the most effective way to provide greater protection to a child's right to counsel is to statutorily mandate that right.

House Bill 1219 will pave the way for children to access legal representation more readily in Washington State dependency proceedings. While this new law statutorily mandates a right to counsel in certain cases, other states do more. The passage of this new legislation should address some of the disparities, inequalities, and injustices seen in the observation study across Skagit, Spokane, and Thurston Counties. Legal research in the future will hopefully document how greater legal representation provides greater protection to children and leads to more permanent outcomes.

203. *Id.*