

**STATE OF RHODE ISLAND
COUNCIL ON ELEMENTARY AND SECONDARY EDUCATION**

**LP, SR, and AR,
on behalf of their children, NC, JP, and JR,
and on behalf of a class of similarly
situated children in the Providence School District;**

Petitioners/Appellants

v.

PROVIDENCE SCHOOL DISTRICT,

Respondent.

**MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PETITIONERS'/ APPELLANTS' APPEAL TO THE
COUNCIL ON ELEMENTARY AND SECONDARY EDUCATION**

STATEMENT OF THE CASE

Petitioners are parents of students with disabilities who are English Language Learners. They brought this case, among other reasons, to challenge the Providence School District's Consultation Model¹ of English Language Learner Support as contrary to the state law and regulations because it does not provide the direct instruction time to students by a certified / endorsed EL Teacher, in amounts consistent with minimum EL teacher time requirements, as outlined in the State Regulations. They brought this case as an administrative class action, seeking class-wide relief for EL students of the Providence school district.

¹ While Providence's challenged model of service delivery has been variously called a "Collaboration" model or a "Collaboration/Consultation" model, it is not consistent with the "Collaboration" model outlined in the State Regulations. It is also distinct from a separate "Collaboration" model that Providence has, on information and belief, developed since the advent of this litigation. Therefore, to avoid confusion, it is referred to herein as "Consultation" model.

The parties have stipulated that the Petitioners' children are or have recently been enrolled in the Providence School District. The regulations, quoted in the Argument section, speak for themselves.

The parties resolved numerous issues via two consent decrees² and then cross-moved for summary judgment, as there is no dispute regarding the relevant facts. (Record: First and Second Stipulations of Fact). Significantly, it is undisputed that Providence's Consultation Model provides direct EL teacher instruction only to students in the lowest levels of English language proficiency (below 2.9 WIDA scores) and only if they are in general education, and only for 30-60 minutes per day. (Record: Second Stipulation of Fact, Exhibit 2, bullets1). In their cross-motion for summary judgment, Petitioners noted that this model is inconsistent with State Regulations which require that EL instruction be provided by EL teachers consistent with amount of time specified in Regulation.

After the cross-motions for summary judgment were submitted, Petitioners moved to Reopen the Hearing to address the newly signed Settlement Agreement between the United States Department of Justice and Providence regarding the Providence ELL program. (Record: Letter of August 2018). Among other things, the Department of Justice stated that the Consultation Model at issue here was "educationally unsound." Providence objected and moved to recuse the Hearing Officer. The Hearing Officer denied both motions, and, with regard to the motion to reopen, stated that he "fail[ed] to see how a settlement agreement with the federal government is relevant to claims in this forum based on state law." (Record: Hearing Officer's Ruling, September 21, 2018).

² Resolved issues include: not conditioning EL services on waiver of special education services (or vice versa), and many specific issues related to notices, notice translation and progress monitoring of ELs.

On March 8, 2019, the Commissioner issued the hearing decision in this case, (Record: Commissioner's Ruling), finding that the Consultation Model for EL services does not violate the pertinent state regulations. He also found that Providence was in violation of §L-4-13 of the Regulations by failing to provide reports of student progress in the EL program in English and in the home/native language of the student. Petitioners timely appealed the decision regarding the validity of the Consultation Model. Providence did not appeal the decision on the student progress reports.

QUESTIONS RAISED

1. Does the Providence School District's Consultation Model for ELL (English Language Learner) services violate the Rhode Island Regulations Governing the Education of English Language Learners (Rhode Island Regulations) insofar as it does not mandate ELL instruction by a certified or endorsed ELL teacher as defined in L-4-2(11) and as further required by L-4-5 (10) and L-4-2(16)-(22)?
2. Does the Providence School District Consultation Model for ELL services violate the Rhode Island Regulations Governing the Education of English Language Learners insofar as it does not comply with the minimum hours of direct ELL instruction by an ELL teacher as required by L-4-7?
3. Does the Providence School District Consultation Model for ELL services violate the Rhode Island Regulations Governing the Education of English Language Learners insofar

as it does not comply with any of the models of instruction set out in L-4-2(16)-(22), or a research-based model drawing on components of those models?

ARGUMENT

I. The Hearing Officer Erred in Refusing to Consider the Department of Justice's Decision That Providence's Consultation Model Is Invalid under Federal Law Because, as Rhode Island Regulations Implement Federal Law and May Not Legally Fall Short of, or Contradict, Federal Requirements, That DOJ Interpretation Directly Affects the Validity of Providence's Consultation Model Pursuant to Rhode Island State Regulations

During the pendency of this case, the U.S. Department of Justice (DOJ) conducted its own parallel and broader investigation of the Providence School Department's programs and services for English Language Learners. In August of 2018, the DOJ reached a Settlement Agreement Between the United States and Providence Public Schools, (hereinafter, DOJ Settlement), with regard to its investigation. (Record: Exhibit to Letter from Veronika Kot of August 28, 2018). The Settlement summarizes multiple violations of law which the DOJ found to exist in Providence's programs for English Language Learners.³ Most pertinent to this appeal, the DOJ found that Providence "*used an educationally unsound EL Program called the Consultation Model.*"⁴ Because of this, per the Settlement Agreement, the Providence School District agreed to no longer use this Consultation Model and, as a result, the Consultation Model is conspicuously absent from the rest of the Settlement. In addition, the DOJ Settlement finds that Providence is in violation of federal law by inadequately staffing its programs with ESL

³ The Settlement, p. 1, references a March 2018 Findings Letter for more in-depth coverage and description of these violations.

⁴ See DOJ Settlement, p. 1 (emphasis added). The Settlement has been made public and is available on the DOJ website. It is also part of the Record as an exhibit to the August 18, 2018 letter from Petitioners' Counsel.

teachers, and specifically requires that English as a Second Language (ESL) “is taught by a teacher with an ESL endorsement or ESL certificate from RIDE.”⁵

Given the direct relevance of these federal legal determinations to the pending cross motions for summary judgment, Appellants brought this Settlement Agreement to the attention of the Hearing Officer.⁶ Providence objected,⁷ and the Hearing Officer responded that he would not consider the DOJ Settlement in his decision and that he had deliberately avoided information regarding that Settlement. Specifically, the Hearing officer opined that “I fail to see how a settlement agreement with the federal government is relevant to claims in this forum based on state law.”⁸

As a matter of both law and fact, however, the DOJ Settlement is highly relevant to interpreting Rhode Island State Regulations Governing the Education of English Language Learners, for the simple reason that those regulations are, by their own terms, designed to implement federal law. Therefore, a federal agency interpretation of the federal law requirements is highly relevant to what state regulations must, at a minimum, require as well. *See* L-4-1.

It is well settled that state statutes and regulations implementing federal laws may exceed but may not fall short of federal legal requirements. If they fall short or are inconsistent with those federal laws, they are invalid. Thus the Rhode Island Regulations must, *at a minimum*, conform to the requirements of federal law regarding the rights of English Language Learners. The DOJ Settlement Agreement finds that the Providence Consultation Model is invalid as it falls short of such minimum federal law requirements. Therefore, the Hearing Officer’s refusal to consider this

⁵ See DOJ Settlement, p. 2.

⁶ Record: Letter from Attorney Veronika Kot dated August 28, 2018.

⁷ Record: Providence School District’s Objection and Motion to Recuse, dated August 28, 2018.

⁸ Record: Hearing Officer Pontarelli’s Ruling on Motion to Recuse and Motion for Hearing dated September 21, 2018.

federal finding, and his resulting contrary finding that the Consultation Model *is* valid and consistent with Rhode Island Regulations, is incorrect. **The DOJ Settlement also finds that ESL qualifies as ESL only if it is taught by an ESL endorsed or ESL certified teacher.**

Therefore, the Hearing Officer's decision that ESL can qualify as ESL under the state regulations, if taught by any teacher who is consulting with an ESL teacher, is incorrect; otherwise the Rhode Island State Regulations are invalid as inconsistent with federal law.

An interpretation which would invalidate the Rhode Island State Regulations Governing the Education of English Language Learners should be avoided, particularly given that the Regulations themselves explicitly indicate that they exist *precisely in order* to implement federal requirements:

L-4-1. Authority, scope and purpose. – These regulations implement R.I.G.L. 16-54-1, et. seq. and are intended to support compliance with Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) and the Equal Education Opportunities Act of 1974. See: 20 U.S.C 1703(f).

The Hearing Officer's refusal to consider the federal floor of requirements, as articulated in the DOJ Settlement, results in an erroneous interpretation of what is permitted by State Regulations. In essence, the Hearing Officer allowed, under state law, what had just been prohibited under the federal laws which the state law purports to implement. This is an interpretation which directly contradicts the stated purpose of the Rhode Island regulations themselves, i.e., at minimum, compliance with and implementation of federal law in this area. For that reason alone, the Commissioner's Decision should be reversed.

II. The Commissioner's Decision Contradicts the Plain Language of the Rhode Island Regulations Governing the Education of English Language Learners

The starting point of any interpretation of statute and regulation is necessarily the plain language of that statute or regulation. *See Reynolds v. Jamestown*, 45 A.3d 537, 541 (R.I. 2012);

Papazian v. Emerzian, 35 A. 2d 9 (R.I. 1943). In the present case, the plain language of Rhode Island State Regulations makes clear that the Commissioner’s interpretation is erroneous.

A. The Plain Language of the Rhode Island Regulations Requires That Specialized Language Instruction for English Language Learners Be Provided by ELL Teachers

The Rhode Island Regulations state that:

ELL programs *shall*: ... (10) Ensure that *specialized language instruction* for English Language Learners is provided by *appropriately certified and endorsed teachers* who are highly qualified and who are provided with regular, sustained, high-quality, job-embedded professional development. L-4-5(10) (emphasis added).

The plain language of the regulation thus requires that ELL instruction (specialized language instruction) be provided by teachers who meet three criteria:

- 1) They have appropriate certification and endorsement,
- 2) They are highly qualified (i.e. have content area certification, e.g. math, history), and,
- 3) They are provided with regular, sustained, high-quality, job-embedded professional development.

Thus, the Commissioner’s finding that ELL instruction need not be provided by an ELL teacher because “there is no such express categorical requirement in the Regulations” (Summary Judgment Decision at 7), contradicts the plain language of L-4-5(10). That regulation does, in fact, require that ELL instruction be provided by teachers with “appropriate certification and endorsement.” The specific terms employed by L-4-5(10), referring to “specialized language instruction for English Language Learners,” and requiring not just “certified,” but “*appropriately*” certified “*and endorsed*” teachers to deliver it, cannot be ignored. It is a basic tenet of statutory /regulatory construction that one must give effect to *each* word or phrase in the statute or regulation. *Power Test Realty Co. v. Coit*, 134 A.3d 1213, 1220 (R.I. 2016). The Commissioner’s interpretation, in contrast, writes out of existence the words “appropriately

certified and endorsed” for purposes of “specialized language instruction.” General and special education teachers are not “appropriately certified” for specialized language instruction of ELLs, let alone “endorsed” for anything. If *any* general or special education teacher could provide ELL instruction to students, as Providence alleges and as the Commissioner finds, these words would be rendered superfluous. Indeed, if such were the intent of this regulation, it would merely state that ELL programs shall: “ensure that language instruction for ELLs is provided by certified teachers.” Clearly and on its face, it does not do so.

The requirement that ELL services be provided by an ELL teacher must also be read in context and in harmony⁹ with the definition of an ELL teacher according to these same regulations:

ELL TEACHER -- an elementary or secondary teacher who holds (1) a Rhode Island certificate for the level and subject in which he or she teaches, and a Rhode Island endorsement as an ESL teacher or Bilingual teacher or Content Area Teacher of ELLs or (2) the Rhode Island ESL certificate. L-4-2(11)

Thus, in addition to a regular or special education teaching certificate, an ELL teacher in Rhode Island must also have specialized and extensive ELL training as demonstrated through specific endorsement / certification: she must have an *endorsement* as an ELL, Bilingual or Content Area Teacher of ELLs, or the RI ESL *certificate*. Without such endorsement / certification, a general education or special education teacher does not qualify as an ELL teacher and lacks “appropriate certification and endorsement” to provide the specialized language instruction needed by ELs.

⁹ See *Power Test, supra*, at 1221 (“It is a well-settled principle of statutory interpretation that an isolated part of a particular statute cannot be viewed in a vacuum; rather, each word and phrase must be considered in the context of the entire statutory provision”), citing *In re Rhode Island Commission for Human Rights*, 472 A2d. 1211, 1212 (R.I. 1984).

This plain language interpretation of Rhode Island regulations is, of course, further supported by the DOJ Settlement, discussed above, which finds that the Providence School District “failed to adequately implement several of its EL programs, including by not providing sufficient ESL... and failed to staff its EL programs with enough qualified teachers.” (DOJ Settlement at 1). The Settlement goes on to state:

English as a Second Language or ESL is direct, explicit instruction about the English language that provides a systematic and developmentally appropriate approach to teaching the language. ESL instruction addresses the listening, speaking, reading, and writing standards in the World-Class Design and Assessment (“WIDA”) English Language Development Standards adopted by the Rhode Island Department of Education (“RIDE”). *ESL is taught by a teacher with an ESL endorsement or ESL certificate from RIDE.* (DOJ Settlement at 2, emphasis added.)

As part of the remedies for Providence’s failure to deploy ESL teachers to teach ESL, the DOJ Settlement requires that “All ESL instruction will be provided by an ESL-Certified teacher or one who is ‘on track’ to complete the certification.” (DOJ Settlement at 8). The Settlement further phases in specific and increasing requirements for the minimum amounts of time of ESL taught by an ESL teacher that ELs at different levels of English language proficiency must receive, and makes clear that “ESL is a core subject for ELs and [the District] will provide ESL *in addition* to other core subjects...” (DOJ settlement at 5, emphasis added).

As noted earlier, given that the DOJ found the Providence School District in noncompliance with federal law for failure to provide adequate ESL services by a certified /endorsed ESL teacher, and ordered Providence to do so, the Rhode Island State Regulations which explicitly state that they implement federal law requirements must do no less. The Commissioner’s contrary interpretation, which validates a Consultation Model that the DOJ recently found invalid, is error of law.

B. Because the Plain Language of the State Regulations Requires That ESL Instruction Be Provided in Specific Amounts Depending on the English

Language Proficiency Level of the Student, the Commissioner Erred in Determining that General or Special Educator Teacher Time May Substitute for Such Instruction

Rhode Island's ELL Regulations not only carefully define "ELL Teacher (L-4-2(11))" and require that specialized language instruction for ELLs be provided by such teachers (L-4-5(10)), they also specify the amount of ESL instructional time *each* student must receive:

Time requirements. –ENTERING AND BEGINNING-LEVEL ENGLISH LANGUAGE LEARNERS must receive a minimum of 3 periods (or the equivalent) of ESL instruction a day. DEVELOPING ENGLISH LANGUAGE LEARNERS must receive a minimum of 2 periods (or the equivalent) of ESL instruction a day. EXPANDING AND BRIDGING ENGLISH LANGUAGE LEARNERS must receive a minimum of 1 period (or the equivalent) of ESL instruction a day.... L-4-7.

Thus, the state regulations require specific amounts of ESL instruction time, and the amount of time is determined by the student's scores on WIDA language testing, and it ranges from a *minimum* of one to three periods of ESL instruction a day, depending on the result of the tests. Notably, and on its face, this regulation contains no exceptions for any model of EL service provision.

It is undisputed that the Providence Consultation model does not provide ESL instruction by an ESL teacher in the amounts specified by regulation. In fact, that Consultation model requires ESL direct instruction by an ESL teacher only for the lowest scoring ELL students (i.e. Entering or Beginning, WIDA literacy score up to 2.9), and only if they are in "general education" (Record: Parties' Second Stipulation and its Exhibit 2, bullet one), and even then, only in the amount of 30-60 minutes per day even though the regulation requires at least three periods of ESL instruction for such students. Furthermore, the Consultation Model requires no ESL instruction by an ESL teacher for Developing, Expanding and Bridging students in general education, and no ESL instruction by an ESL teacher for special education students not in

general education at any WIDA level. (Record: Parties' Second Stipulation and its Exhibit 2, bullets one and six).

Neither Providence nor the Commissioner, in his Decision, dispute that ESL teachers were not delivering ESL instruction in amounts consistent with the above regulation to students in the Consultation Mode, before that model was invalidated and shut down pursuant to the DOJ Settlement. They assert, however, that because general and special education teachers in this model consult with ESL teachers, all of the general and special education teachers' time with students "becomes" or "substitutes" for ESL instruction time. (Record: Commissioner's Decision at 8). Further, the Commissioner asserts that the Consultation Mode provides "language accommodations and instructional approaches . . . throughout the school day." *Id.* But language accommodations and instructional approaches by general and special educators with no training in providing ESL services and mere minutes of consultation with an ESL teacher once every two months are not the same as ESL instruction designed to enable students to "attain proficiency in speaking, listening to, reading, and writing English at a level sufficient to enable them to succeed in the school's general academic program," as required by § L4-5(2). And, in fact, the Commissioner's decision says nothing about whether these approaches actually assist the students in any way in attaining proficiency in English. (Record: Commissioner's Decision, at 8). As noted above, the Commissioner's interpretation clashes both with the regulations' plain language regarding what constitutes ESL instruction and who may deliver it, and the DOJ's interpretation of the underlying federal law.

The Consultation Model's barebones requirement that an otherwise untrained special or general education teacher "consult" with an ELL teacher once *every eight weeks* for an unspecified amount of time, conceivably only three minutes (Record: Parties' Second Stip. Par

6), cannot convert a general or special education teacher into an “appropriately certified and endorsed teacher” for purposes of “specialized language instruction.”¹⁰ It is small wonder, therefore, that the DOJ has found the entire Consultation model invalid and that Providence has agreed not to continue implementing it as a condition of the DOJ Settlement Agreement.

Because Providence’s Consultation model does not provide the requisite amounts of ESL teacher instruction to EL students served by the model, it violates the Rhode Island Regulations, and the Commissioner’s findings to the contrary are error of law.¹¹

C. Providence’s Consultation Model Is Not Consistent with the Approved Models of Instruction in the Regulations, nor with any Research-Based Model Drawing on Components of Those Models

While at the beginning of this litigation the Providence School District attempted to argue that its Consultation Model was consistent with the “Collaborative” Model described and permitted under the Rhode Island Regulations, it has since acknowledged that this is not correct.¹² Instead, Providence now argues that its model draws on various “components from these models,” as permitted by L-4-10.¹³

¹⁰ ELL certification requirements in Rhode Island are rigorous and extensive requiring compliance with the TESOL standards, available at: <https://www.tesol.org/advance-the-field/standards/tesol-caep-standards-for-p-12-teacher-education-programs>. It is difficult to imagine that a quick chat once every two months between an ELL teacher and a general education teacher can bring that general education teacher to a level where she can fulfill the duties of an ELL teacher.

¹¹ Of course, the DOJ Settlement does not address minimum time requirements *under State Regulations* because it addresses only minimum federal law requirements which are under its jurisdiction.

¹² The Collaborative ESL model in the regulations is defined as: “a method of instruction that provides English Language Learners *with ESL instruction taught by a certified and/or endorsed ESL teacher* and content instruction provided through the school’s general-education program. The certified and/or endorsed ESL teacher works in close collaboration with the general-education teacher in delivering content instruction for ELLs.” L-4-2(18) (emphasis added). Providence’s Consultation Model is of course completely inconsistent with this Model as no direct ESL teaching time is provided to most students.

¹³ L-4-10 provides: “**Program models & components.** – Districts may choose one or more of the following models, or components from these models, as defined in these regulations in section L-4-2...” It then simply *lists* the six models from the definitions section (L-4-2(16-22)).

While L-4-10 *does* permit a school district to draw on “components” of the various listed models to deliver ELL instruction, none of the listed models contain components that would support or justify Providence’s Consultation Model. Notably, one relevant component of each model listed in the Rhode Island Regulations is the required staffing and training for that model. Every single model upon which Respondent could possibly draw for teacher qualification/certification “components” requires *specific* certification / endorsement / preparation. (See L-4-2(16-22)) Yet, Providence’s Consultation Model, far from drawing a staffing component from one of these models, instead allows general or special educators with *no* specialized or mandated endorsement or certification, or even mandated training in language instruction for ELs, to provide EL instruction.

While the Commissioner’s Decision relies heavily on the “Sheltered Content Instruction Model,” described in L-4-2(21), as providing a “component of a model” that Providence may draw upon in order to avoid providing ESL instruction through an endorsed / certified ESL teacher, (Decision at 7) that interpretation is incorrect for several reasons. First, the Sheltered Instruction Model, by its own terms, requires that all teachers participating in this model, even general content (core course) instructors, must “participate in specialized training in ESL methods and techniques,” (L-4-2(21), a requirement notably absent from the Providence Consultation Model. Second, nothing in the regulatory description of the Sheltered Content Model exempts it from the general regulatory plain language requirement, applicable to all models, that specialized language instruction be delivered by an *appropriately* certified/endorsed teacher, as discussed above.¹⁴

¹⁴ To the contrary, it mandates that teachers “meet *appropriate* state-certification requirements” (emphasis added.)

Third, if there were any doubts as to what the plain language of the Sheltered Content Model requires, the DOJ Settlement would put them to rest by indicating the floor of such requirements under federal law, and therefore, the appropriate interpretation of state regulations that purport to implement such federal requirements. First, the DOJ Settlement describes the Providence version of the Sheltered Content Instruction Model as a way of delivering core content (math, English, science and social studies) “by integrating English language and literacy development into content area instruction.” (DOJ Settlement at 3). Then it states that “The District agrees that ESL is a core subject for ELs and will provide ESL *in addition to other core subjects...*” (DOJ Settlement at 5, emphasis added). As noted earlier, the Settlement also requires that such ESL instruction (in contrast to other core classes) be provided by ESL teachers (DOJ Settlement at 2). Finally, it requires specialized training for classroom teachers delivering other core content classes to ELs in a variety of available models, including Sheltered Instruction (DOJ Settlement at 6). Thus, there can be little doubt that federal requirements support a model where ESL instruction is delivered by an ESL teacher *in addition* to core class instruction being provided by general education teachers with training on how to make their core subjects accessible to ELs. The latter does not substitute for, but rather complements ESL instruction by ESL teachers as a separate and additional core requirement. If such is the floor of what federal law requires, surely the Rhode Island Regulations require no less, and the Commissioner’s interpretation to the contrary is in error. Simply put, the Sheltered Content model is not meant to substitute for ESL teacher taught direct instruction but instead to supplement such ESL teaching with additional training for general educators in other core areas, so they can make those subjects more accessible. It reflects the recognition that services for ELs must include *both* access to core

content curriculum (i.e. math, history, science content) *and* the learning of the English language itself.

Most importantly, of course, *any* model used, but especially one drawn from components of other models rather than already pre-approved and vetted models, must not only draw on components of other models, but must also do so in a way that meets other federal and state *adequacy requirements*. It cannot be a slapped together, piecemeal assortment of random “components.” To the contrary, as stated in the introductory sections of the Rhode Island Regulations themselves, “English Language Learner programs must be grounded on *scientifically based research* on teaching English Language Learners. 20 U.S.C. 6826.”¹⁵ In addition, all such programs must be “(1) based on sound educational theory; (2) appropriately supported, with adequate and effective staff and resources, so that the program may reasonably be expected to be successful; and (3) periodically evaluated and, if necessary, revised.” L-4-1 (4). In other words, any and every model must not only pay lip service to a few random components of approved models, it must also assemble such components into a meaningful whole and show that it has the scientific research basis, sound educational theory and capacity to make it likely to work. It must then be tested to show that in fact it is working.

Thus, the Commissioner erred in stating that the Consultation model passes muster, as drawn from components of other models, because it “is built upon a framework of close collaboration between ELL and non-ELL teachers who provide scaffolded and differentiated instruction in English throughout a comprehensive system of core academic coursework.” (Record: Commissioner’s Decision at 8). First, it’s rather a stretch to impute “close collaboration

¹⁵ Short Explanation of Why These Regulatory Changes are Necessary (preamble to state regulations)(emphasis added).

between ELL and non-ELL teachers” to a model which permits that “close collaboration” to be limited to a five-minute chat once every two months, as the Providence Consultation model does. Second, the Commissioner’s conclusion in no way addresses the required components of adequacy of ESL teacher staffing and resources, the efficacy of the model, its research basis, or whether or not it has ever been evaluated. L-4-1 (4).

Providence has provided absolutely no evidence of a research basis or sound educational theory, and no evaluations of efficacy or adequacy of staffing. Indeed, in a Consultation Model premised on zero mandated training for general education teachers providing specialized ESL instruction, no minimum time for consultation between ESL and other teachers, and requiring consultation only once every eight weeks, it would be hard to demonstrate compliance with any such criteria. It is not surprising, therefore, that the DOJ Settlement finds, immediately and on the first page, that Providence “used an educationally unsound EL program called the Consultation Model” (Record: DOJ Settlement Agreement at 1), and that that Model is eliminated from further use or mention throughout the rest of the Agreement. Although the Commissioner quotes the regulation requiring that programs for English Language Learners must be “based on sound educational theory,” in setting out the governing regulations, (Record: Commissioner’s Decision at 5), nowhere in his Decision does he say anything about whether the Consultation Model is actually “based on sound educational theory.” As Providence offered no evidence of any sound educational theory supporting the Consultation Model, it is no wonder the Commissioner’s Decision is silent on this matter.

Indeed, if the four words “components from these models,” found in L-4-10, and permitting a District to design its own model, were a “safe harbor” permitting Respondents to ignore and avoid any and all other requirements set out in regulations (such as ESL teacher

qualifications or amounts of time provided by ESL teachers to ELs or the adequacy of the research basis and sound educational theory for the model) rather than implementing approved instruction models or their actual components in a research-based configuration, the entire regulatory framework would be rendered null and void, and its requirements simply advisory. Such a watered-down interpretation of State Regulations would jeopardize state compliance with its federal obligations and cannot therefore be a reasonable interpretation of regulatory intent.¹⁶ The Rhode Island regulations fulfill federal obligations *precisely* by requiring instruction by ELL teachers in specific amounts and through vetted, research-based program models.¹⁷

D. The Commissioner’s Interpretation of the Consultation Model as Valid and Consistent with State Regulations Would Permit Overt Discrimination against Children with Disabilities in Violation of State and Federal Law and Therefore Cannot be a Correct Interpretation of State Regulations

As noted above, the Consultation Model, as described by Providence, overtly permits discrimination against children with disabilities by denying them the ESL services provided to students without disabilities. According to that Consultation Model, children with disabilities who are not in general education settings, (e.g. those in a self-contained setting) receive absolutely no direct ESL services from an ESL teacher, regardless of whether they know any English at all. In contrast, general education children within the two lowest levels of English Language Proficiency (below WIDA level 2.9), do receive at least some direct ESL teacher

¹⁶ See e.g. L-4-1(4) citing federally required components of state ELL programming: A stated purpose of the regulations is to ensure “that programs for English Language Learners are (1) based on sound educational theory; (2) appropriately supported, with adequate and effective staff and resources, so that the program may reasonably be expected to be successful; and (3) periodically evaluated and, if necessary, revised.”

¹⁷ In 2016, proposed amendments to the state EL regulations put forth drastic reductions in the direct teaching time by ESL teachers (down to one period a day for beginning and emerging students [below WIDA Level 2.9] and elimination of direct ELL teacher time requirements for other students.) That proposal was withdrawn due to unanimous disapproval expressed through public comment. However, the very fact that such a regulation was proposed is further evidence that the **current** regulations require something else entirely, i.e., **direct** instruction time by ESL certified teachers in amounts specified as described above.

instruction each day (although not enough to comply with Rhode Island regulations). (Record: Second Stipulation, par. 3 and its Exhibit 2)

Despite acknowledging this fact (Record: Commissioner's Decision at 1), the Commissioner does not address this glaring discrepancy, which runs afoul of the Rhode Island State Regulations' own requirements that "ELL programs shall...Ensure equitable access to all services, and materials that are provided to all other students." L-4-5 (7). See also L-4-6(4). Such inequitable treatment of ELs who are special education students (in essence forcing such students to choose between access to certified ESL teachers that general education students enjoy to at least some extent, and access to the specialized placements they need due to disabilities) is a glaring violation of not only state regulations but also Section 504 of the Rehabilitation Act, the Americans with Disabilities Act, and the Individuals with Disabilities Education Act (IDEA), and the implementing regulations. That such a result is in effect endorsed by the Commissioner's Decision is further evidence that that interpretation cannot stand, lest it invalidate the Rhode Island Regulations as a whole.¹⁸

CONCLUSION

For the reasons stated above, the Commissioner's Decision should be reversed insofar as it held that Providence's Consultation Model for ELL services does not violate Rhode Island Regulations Governing the Education of English Language Learners. Judgment should be entered that Providence's Consultation Model for ELL services violates Rhode Island Regulations Governing the Education of English Language Learners, and Providence should be

¹⁸ Notably the DOJ Settlement concludes that Providence "did not provide ELs equal opportunities to participate in specialized programs" (DOJ Settlement at 1) and orders, as a remedy, that "All provisions of this Agreement apply equally to ELs with disabilities." (DOJ Settlement at 13). It further sets out additional remedies meant to ensure full and equal access to EL services and special education services by students who require both.

ordered to develop a plan for compensatory education for ELs in Providence, in consultation with Appellants.



4/10/19

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CERTIFICATION

I, the undersigned, hereby certify that copies of the above document were sent via email to: Charles Ruggerio, Esq., at charles.ruggerio@ppsd.org, and to Andrew Henneous, Esq. at ahenneous@hellawri.com, and Cecilia Pelke, Esq., at Cecilia.Pelkey@ride.ri.gov on this the 10th day of April, 2019.

