

**STATE OF RHODE ISLAND
PROVIDENCE, SC.**

SUPERIOR COURT

**L DOE, S DOE, and A DOE,
on behalf of their children, X DOE, Y DOE, and Z DOE,
and on behalf of similarly
situated children in the Providence School District;**

Plaintiffs,

v.

**RHODE ISLAND BOARD OF EDUCATION,
COUNCIL ON ELEMENTARY AND SECONDARY
EDUCATION and AMY BERETTA, COLLEEN A.
CALLAHAN, BARBARA COTTAM, KAREN DAVIS,
GARA BROOKE FIELD, JO EVA GAINES,
MARTA V. MARTINEZ, DANIEL P. MCCONAGHY,
LAWRENCE PURTILL, in their official capacities as
members of the RHODE ISLAND BOARD OF
EDUCATION, COUNCIL ON ELEMENTARY
AND SECONDARY EDUCATION**

P.C. No.

Defendants.

COMPLAINT

1. Plaintiffs, L DOE, S DOE, and A DOE and their minor children, X Doe, Y Doe, and Z Doe, are or have recently been residents of Providence, Rhode Island.
2. Defendant, Rhode Island Board of Education, Council on Elementary and Secondary Education (“Council”),¹ is a state agency subject to Rhode Island General Laws §42-35-15 and §16-39-4.

¹ The Council on Elementary and Secondary Education is the “arm” of the Rhode Island Board of Education that is charged with matters relating to education through the twelfth grade. The Council on Postsecondary Education is the Board’s “arm” charged with oversight of postsecondary matters.

3. Defendants Amy Beretta, Colleen A. Callahan, Barbara Cottam, Karen Davis, Gara Brooke Field, Jo Eva Gaines, Marta V. Martinez, Daniel P. McConaghy, and Lawrence Purtill are members of the Council and are sued in their official capacities.
4. Judicial review is authorized pursuant to R.I.G.L. §42-35-15.
5. The Providence School Department is the Local Educational Agency (LEA) within which X DOE, Y DOE and Z DOE attend or have attended school.
6. Plaintiffs, L DOE, S DOE and J DOE, on behalf of their minor children and similarly situated children, appeal the March 3, 2020 final decision of the Council (“the Council’s Decision”), which affirms the March 8, 2019 decision of the Commissioner of Elementary and Secondary Education (“the Commissioner”). The Council’s Decision is attached hereto as Exhibit A and the Commissioner’s decision is attached as Exhibit B.
7. The Council’s Decision affirms the Commissioner’s decision, which concluded that the Providence school district’s “Consultation Model” of service delivery to English Language Learners (ELs) does not violate the Rhode Island Regulations Governing the Education of English Learners (RI EL Regs) [200-RICR-20-30-3 *et seq.*].
8. The Council’s Decision is contrary to the plain language of the RI EL Regs.
9. The Council’s Decision contradicts a determination by the U.S. Department of Justice (DOJ) that Providence’s Consultation Model is “not based on sound educational theory,” and is therefore contrary to, and violative of, federal laws (which the RI regulations purport to implement), and that Providence is not permitted to continue implementing that Model, at least for the duration of the Settlement and oversight by the DOJ.
10. Y DOE was a ninth-grade student at the Providence Career and Tech Academy as of September 2015. Previously, he attended Del Sesto Middle School through June 2015. He is

also a student with disabilities who received services through an Individual Education Plan (IEP).

11. Y DOE's mother, S DOE, who is Spanish speaking, discovered in the fall of 2015 that her son was not receiving EL services during the 2015-2016 school year, and that he also had not received them in the prior (2014-2015) school year. She learned these facts only after her attorney obtained school records and raised the matter during an IEP meeting in October of 2015. S DOE was told that Y DOE's EL services were now on a "consult-only" model. When questioned, however, none of the District staff could identify or recall even one time that consultation time by an EL certified teacher had been provided to Y DOE's general or special education teachers. Student records produced in response to a formal request evidenced no actual EL services of any type having been provided during the years in question under Providence's Consultation Model.
12. In January of 2016, Z DOE was a second-grade student at the Robert Bailey School in Providence. He had an IEP because he has both learning disabilities and challenging behaviors.
13. Z DOE's mother, A DOE, who speaks only Spanish, was never informed about the availability of EL services. Student records produced in response to a formal student records request by her attorney revealed that Z DOE did not receive any EL services during the 2013-2014, 2014-2015 and 2015-2016 school years. In response to multiple requests for EL records, the District, in February of 2016, produced one "Consultation Log" that indicated that the EL teacher and the general teacher would test Z DOE through a Phonics Screen. Per available student records, this was the full extent of EL "services" provided to Z DOE during three academic years under the Providence Consultation Model.

14. In 2016 X DOE was an eleventh-grade student with learning disabilities attending Mount Pleasant High School. She had previously attended Central High School.
15. At an IEP meeting at Mount Pleasant High School in January of 2016, L DOE, mother of X DOE, was informed orally that X DOE would not receive any direct instruction by an EL teacher. Instead, she would receive “consult-only” instruction, which meant that an EL teacher would consult with her other teachers for an unspecified amount of time. Student records produced by the District did not include *any* evidence of EL services actually being provided to X DOE under this Consultation Model during 2015 or 2016.
16. On April 12, 2016, Plaintiffs in this case brought a Complaint to the Rhode Island Department of Education (RIDE) Commissioner’s Hearing Office on behalf of their own children and similarly situated children, alleging multiple violations of both federal and state law and regulations governing the education of English Learners (ELs). The Complaint included an allegation that the Providence Consultation Model of service delivery, which provided little to no actual EL instruction, violated both state and federal law.
17. Through negotiated settlement and two Consent Judgments, several of the legal violations alleged in the 2016 complaint were resolved.²
18. The Parties agreed to address the primary remaining issue, the legality of the Consultation Model, through Cross Motions for Summary Judgment, having stipulated to the pertinent facts, including the actual requirements of the Providence Consultation Model.
19. As stipulated by the Parties, Providence’s Consultation Model of Service delivery required no actual direct instruction by an EL or bilingual certified or endorsed teacher for most EL

² The Consent Judgments addressed, among other things, Providence’s failure to provide notices to parents of ELs in their native language and its practice of requiring “waivers” of EL services for special education students when it was inconvenient to provide both services at once. Providence agreed to cease requiring such “waivers” and to provide notice in the parent’s native language.

students. Instead, the EL certified teacher was only required to “consult” with the other teacher(s) once every 8 weeks for no specified amount of time – which could therefore be as little as one minute. Only the ELs in the lowest level of English Language Proficiency (essentially those speaking no English at all) received any direct instruction (30 minutes daily) from a certified endorsed teacher and, even then, only if the student was in a general education class. Students in special education classes, in contrast to non-disabled peers, received no direct instruction at all from a certified teacher, even if they were in that lowest level of English Language Proficiency.

20. Both parties briefed all legal issues raised in Summary Judgment. Petitioners argued that Providence’s *de minimis* Consultation Model directly violates the language of the RI EL Regs by failing to ensure that certified/endorsed teachers provide specialized EL instruction to ELs in amounts required by law, and by failing to ensure that an appropriate model of instruction is utilized, as specified in the regulations as a whole.³ All briefing was submitted by February of 2017.

21. Meanwhile, the U.S. Department of Justice (DOJ) conducted its own independent investigation of Providence’s EL Programs and made extensive findings of noncompliance with federal law. Subsequent to those formal findings, in August of 2018, DOJ reached a final Settlement Agreement with Providence. That Settlement Agreement specifically noted DOJ’s extensive Findings of noncompliance with federal law. This Settlement Agreement was and remains posted on the DOJ website and was publicized in the media. Relevant to

³ See 200-RICR -20-30- 3.2A4d (defining ELL teacher as one with specialized certification); 3.5 A10 (requiring “that specialized language instruction for English Language Learners is provided by appropriately certified and endorsed teachers. . . .”); 3.7 (requiring specific amounts of ESL instruction daily for ELs, ranging from 1-3 hours, depending on their levels of English proficiency); 3.1(4) (requiring that “Programs for English Language Learners are: (a) Based on sound educational theory; (b) Appropriately supported, with adequate and effective staff and resources, so that the program may reasonably be expected to be successful; and (c) periodically evaluated and, if necessary revised.”); and 3.10 and 3.2A5 (listing the various Programs of instruction).

this case and directly pertinent to the cross motions for summary judgment pending at that time, the very first page of the Settlement indicated that, contrary to federal law, “Providence used an educationally unsound EL Program called the Consultation Model,” and Providence agreed to cease using that Model at once. The Settlement Agreement also required that EL certified teachers provide EL instruction.

22. In order to expedite final resolution of the long-pending cross motions for summary judgment, Petitioners brought this Settlement to the attention of RIDE’s Commissioner’s Hearing Office. Counsel for Providence objected and demanded that the Hearing Officer recuse himself because he was “tainted” by exposure to this very public Settlement. Instead, on March 8, 2019, the Commissioner finally issued a decision on the Cross-Motions for Summary Judgment. The Decision determined to ignore both the DOJ Settlement Agreement and the specific Findings that were referenced in that Settlement Agreement. It found that Providence’s Consultation Model of service delivery, which the DOJ had just opined was contrary to federal law, was permissible under RI EL Regs, even though the regulations by their own language are designed to implement federal law.⁴

23. On March 18, 2019, Petitioners appealed to the Council on Elementary and Secondary Education.

24. On January 28, 2020, the Council⁵ verbally affirmed the Commissioner’s decision. It amended the decision with a single-sentence directive to the Commissioner to begin the process of reviewing the RI EL Regs, including the Consultation Model (which, notably, is

⁴ 200-RICR-20-30-3.1A. The Decision also found that Providence had violated the RI EL Regs by failing to provide reports of student progress in the ELL program, separate and apart from general education progress monitoring. Neither party has appealed this portion of the Decision.

⁵ In issuing its ruling, the Council accepted a recommendation of the Council’s Appeals Committee to affirm the Commissioner’s decision. The Appeals Committee’s recommendation is attached as Exhibit C.

not included in the regulations). On March 4, 2020, the Council emailed written notice of its decision to plaintiffs. This appeal follows.

25. The Council's Decision, like the Commissioner's decision on which it relies, is based on multiple errors of law and fact. It permits the continued use of the Providence Consultation Model of Service Delivery to ELs, despite its incompatibility with the plain language of the RI EL Regs, with federal law as interpreted by the Department of Justice, and with the requirements of nondiscrimination against children with disabilities who are also ELs, as contained in the RI EL Regs themselves and in both state and federal law. Specifically:
- a. It ignores the plain language of the RI EL Regulations, including but not limited to language requiring that specialized language instruction to ELs be provided by appropriately certified and endorsed teachers, in specific amounts based on the student's level of proficiency.⁶ Instead, it permits any teacher, with no specialized training or endorsement, to deliver such services, based solely on a meeting once every eight weeks with an EL certified teacher, and for as little as one minute.
 - b. It misstates undisputed facts in the record by asserting that no evidence is presented that the Consultation Model permits discrimination against children with special needs when, in fact, the Stipulated Facts in the record that underlie the Cross Motions for Summary Judgment acknowledge different treatment and fewer services for children with special needs pursuant to this Model.
 - c. It legitimates continued utilization of the Consultation Model under state regulations despite the DOJ's pronouncement that that Model violates federal law in multiple ways

⁶ 200 RICR-20-30-3.5A10 and 3.7.

and despite the RI EL Regs' own statement that their purpose is to implement those very federal laws.⁷

- d. It fails to construe the RI EL Regs as a coherent whole, including the requirements (which mirror requirements in federal law) that every model of service delivery be based on sound educational theory, research-proven, adequately staffed and capacitated so that it can be expected to work, and periodically tested in order to ensure that it is in fact effective. Instead, it authorizes continued use of a Consultation Model which meets none of these requirements and which has already been discredited and prohibited by a federal agency, the DOJ.

26. The decision of the Council on Elementary and Secondary Education in this case is thus:

- A. In violation of constitutional or statutory and regulatory provisions;
- B. In excess of statutory authority;
- C. Made upon unlawful procedure;
- D. Affected by other error of law;
- E. Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; and/or
- F. Patently arbitrary, discriminatory or unfair and not substantially justified.

WHEREFORE, Plaintiff asks this Honorable Court to:

- 1. Assume jurisdiction of this case;
- 2. Reverse and vacate the Council's decision;
- 3. Remand to the Commissioner for any remaining issues in the case not raised or resolved by this appeal;

⁷ 200-RICR-20-30-3.1A

4. Grant such other relief as the Court deems just, including an award of fees and costs under R.I.G.L. 42-92-1 *et seq.*, according to proof, per stipulation or briefing by the parties.

Plaintiffs
By their attorneys,

_____/s/_____
Veronika Kot #6653
Rhode Island Legal Services
56 Pine Street
Providence, RI 02903
Tel: (401) 274-2652 x 164
Fax: (401) 633-9199
vkot@rils.org

_____/s/_____
Ellen Saideman #6532
ACLU of RI Cooperating Attorney
7 Henry Drive
Barrington, RI 02806
401.258.7276
Fax 401.709.0213
esaideman@yahoo.com