

**STATE OF RHODE ISLAND
DEPARTMENT OF EDUCATION**

---- ----, ---- ----, and ---- ----,
**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,

v.

PROVIDENCE SCHOOL DISTRICT,

Respondent.

**COMPLAINT RE: PROVIDENCE SCHOOL DISTRICT’S FAILURE TO PROVIDE
NC, JP, JR, and a CLASS OF SIMILARLY SITUATED CHILDREN AND YOUTH,
WITH ENGLISH LANGAUGE LEARNER (ELL) SERVICES
CONSISTENT WITH STATE AND FEDERAL LAW**

Petitioners, on behalf of their own children, NC, JP, and JR, English Language Learners (ELLs), and a class of similarly situated children in the Providence School District (i.e., ELLs who have been, are or will be enrolled in the Providence School District and who are not being provided or have not been provided ELL services consistent with state and federal law) seek to enforce the provisions of Rhode Island Regulations Governing the Education of English Language Learners (L-4-1 *et seq.*) and R.I.G.L. 16-54-2, as well as Federal Laws governing the education of English Language Learners. This Commissioner’s Hearing Office has jurisdiction over such claims pursuant to R.I.G.L. 16-39.¹

Factual Allegations

1. Respondent, Providence School District, is an LEA organized under the laws of Rhode Island.
2. All named Petitioners and their children reside in Providence (or have resided in Providence until recently) and their children are enrolled (or have been recently enrolled) in the Providence School District.²

¹ L-4-23 “Parents have the right to appeal any ELL decision affecting their child through the appeals process established by R.I.G.L. 16-39-1 and R.I.G.L. 16-39-2...”

² The children of named petitioners are minors except NC who is 18. NC has given her mother educational power of attorney for her so that her mother can participate in educational decisions, including the decision to initiate this litigation. (Ex. 1)

3. The children of all named Petitioners qualify as English Language Learners (ELLs). All Petitioner families speak Spanish at home. (Ex. 2A, 2B, 3A, 3B, 4A, 4B)
4. The children of named Petitioners are also students with disabilities and receive special education pursuant to the IDEA. Their grade placement ranges from second grade (JR) to high school (NC and JP). (Ex. 5,6,7)
5. **The children of Petitioners have not been provided ELL services to which they are entitled pursuant to state law, state regulation and federal laws. Their children have been deprived of instruction by a certified ELL teacher as required per state regulation.**
6. NC is an eleventh grade student with learning disabilities who attends Mount Pleasant High School. She previously attended Central High School from September to December of 2015. She presently reads at approximately a second grade level.
7. At an IEP meeting at Mount Pleasant High School in January of 2016, Ms. ----, mother of NC, was informed orally that NC would not receive any direct instruction by an ELL teacher. Instead, she would receive “consult-only.” She was told that under “consult-only,” an ELL teacher would consult to her other teachers for an unspecified amount of time every two weeks. (Ex. 2A) At the same meeting Ms. ----, who speaks Spanish, was provided a form *in English* that confirms that NC is to receive ELL services through bi-weekly consultation with her teachers for an unspecified amount of time. (Ex. 2C). The ELL teacher/consultant did not attend the IEP meeting. Subsequent notes provided by the School District in response to requests for additional information indicate that some consultation for an unspecified amount of time is to be provided to NC. (Ex. 2D). Ms. --- does not know whether NC received *any* ELL services at all between September and December of 2015, while at Central High School, because she received no notices regarding what ELL services would be provided and the student record produced by the District does not include *any* evidence of ELL services. (Ex. 2A).
8. JP was a ninth grade student at the Providence Career and Tech as of September 2015. Previously, he attended Del Sesto Middle School through June 2015. He is also a student with disabilities who receives services through an IEP. He currently reads at a second or third grade level.
9. Ms. ---- discovered in the fall of 2015 that her son, JP, was not receiving ELL services during the 2015-2016 school year, at the Providence Career and Tech Academy, and that he also had not received them in the prior (2014-2015) school year, while still at Del Sesto Middle School. Ms. ---- had received no notice of this, and she learned these facts only after her attorney obtained school records. The matter of ELL services was raised during an IEP meeting in October of 2015. During that meeting, Ms. ---- was told that JP’s ELL services were now on a “consult-only” model. (Ex. 3A). When questioned, however, none of the District staff could identify or recall even one time that consultation time had actually been provided to JP’s teachers. (Ex. 3A). Student records produced in response to a formal request evidence no ELL services of any type having been provided during the years in question. (Ex. 3B).³
10. JR is a second grade student at the Robert Bailey School in Providence. He has an IEP because he has both learning disabilities and challenging behaviors.

³ JP and his family moved out of the Providence School District as of mid to late January of 2016. Their claim, therefore, is limited to compensatory rather than ongoing services.

11. Ms. ---- is not certain whether her son, JR, has ever received ELL services through the Providence School District. She learned for the first time in early 2016, after school records for her son were requested and received, that in 2013 she had signed a form in English allegedly “waiving” ELL services. (Ex. 4C). The reason written in for the “waiver” is “Student Placed by Special Ed Dept.” (Ex. 4C). Ms. ----, who speaks only Spanish, never understood the form, nor was she ever informed about the availability of ELL services. (Ex-4A) Student records produced in response to formal request confirm that JR did not received any ELL services during the 2013-2014, the 2014-2015 and the 2015-2016 school years (he is listed as “eligible but not enrolled” in ELL) and that the last time he was monitored for language proficiency was in March of 2013. (Ex. 4B). In apparent response to multiple requests for ELL records, the District, in February of 2016, indicated in a “Consultation Log” that “ELL Services Provided” are as follows: “discussed how best ELL teacher could support Justin and teacher. Decided to test him on academics in ELA.” (Ex. 4D). The memo goes on to note that the evaluation referred to is a Phonics Screen. This appears to be the extent of “ELL services” to date provided to JR in the past three academic years.
12. At least some of the children of named Petitioners, after being “waived” or “exited” from ELL services, **have not been subsequently monitored for progress as required by law.** (See, e.g. Ex. 4B).
13. **Petitioner families have not been provided with notice and appeal rights in their native language, as related to ELL services, as required by law.** Failure to provide notice includes but is not limited to notice regarding placement, placement changes, services provided, waivers of ELL services, and progress monitoring.
14. Ms. ---- has not received notices detailing hours of ELL services for NC or progress associated with such services. (Ex. 2A). The only form ever provided was during an IEP meeting in January, 2016, it was in English, it provided no appeal rights and did not indicate any minimum amount of services. (Ex.2C).⁴
15. Ms. ---- never received any notices related to ELL services. (Ex. 3A) Student records obtained for JP indicate no ELL services were provided in 2014-2015 and during the first half of the 2015-2016 school year (at which point the family moved from the school district).
16. Ms. ---- never received any notices related to ELL rights or services or monitoring. (Ex. 4A) A form in the student records obtained from the district documents the illegal “waiver” of such services. It is in English, it was not understood by the Spanish-speaking signatory, a copy was not provided to her, and it lists an impermissible reason (special education) for “waiver,” thereby violating JR’s rights to participate simultaneously in all services to which JR is entitled.

Group / Class Allegations

17. Petitioners bring this claim on behalf of their own children and all similarly situated children in the Providence School District.

⁴ The school record includes one form in Spanish signed by Ms. ---- (Ex. 2B) indicating her daughter’s *initial* eligibility for ESL services based on her test scores. However, neither that form nor any subsequent information in student records provides any information about the nature or amount of services actually provided, progress based on such services or appeal rights.

18. “Similarly situated children” are those children: who have been, are or will be enrolled in the Providence School District; who qualify for ELL services; and who are not being provided or have not been provided ELL services consistent with state and federal law, [either 1) because they have been *officially but illegally* exited from such services or 2) because they have been *de facto* exited from such services by not being provided *any* services or by not being provided services consistent with state regulation and the requirements of federal laws.] Petitioners’ situations are not isolated instances or omissions but part of a widespread practice/policy affecting many students and many schools.⁵

19. The violations alleged are precisely the kind that are capable of repetition but evading review. Despite prior instances of individual complaints to the District in this area, resolved through individual settlement agreements for individual students, the District has not changed its illegal policies and practices.

20. As the single state agency charged with oversight of LEAs, the Rhode Island Department of Education should exercise its oversight authority to put an immediate end to widespread and continuing violations of law pertaining to all ELLs in Providence.⁶

Legal Violations

1. **Failure to provide ELL/ESL instruction consistent with one of the approved models of instruction enumerated in L-4-2 (16)–(22).**
2. **Failure to provide ESL instruction consistent with one of the models of instruction listed (and approved by RIDE) in Providence’s Plan for providing ELL instruction.** (Ex. 8)⁷
3. **Failure to provide *direct* ELL instruction by a certified ELL teacher as defined in L-4-2 (11) and as further required in L-4-5 (10).**⁸
4. **Failure to provide the minimum hours of ELL instruction required in state regulations** (see L-4-7). Such *minimum* hours of *direct* instruction, (ranging from one to three periods per day depending on the student’s WIDA/ACCESS testing levels) are required under *all* approved models of ESL instruction in the regulations, *without exception*.⁹

⁵ Schools where failure to provide ELL services consistent with state regulations have been discovered and documented include: Bailey Elementary School, Roger Williams Middle School, Del Sesto Middle School, Providence Career and Tech Academy, Pleasant View High School and possibly Central High School.

⁶ RIDE is required to monitor LEA compliance with state and federal laws and regulations relating to ELLs. *See e.g.* L-4-28. *See also* EEOA at 20 U.S.C. 1720(a) holding state educational agencies (through oversight obligations) co-equally responsible with school districts, for enforcement of student rights with regard to overcoming language barriers.

⁷ Respondent’s “Consultation Model” is also inconsistent with its own English Language Learner Handbook, available on-line.

⁸ L-4-2 (11): “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-4-5 (10): “ELL Programs shall...Ensure that specialized language instruction for English Language Learner is provided by appropriately certified and endorsed teachers....”

⁹ No approved “Consult-only” model exists. The Providence School District now appears to hold that its “consult” model falls under the “Collaborative” model. However, *See Regulations: “Collaborative ESL Instruction – 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.**”* L-4-2 (18) (emphasis added). Thus, even the Collaborative model the District now claims to be following, specifically

5. **Failure to consistently provide parents or guardians with notice** regarding the child’s ELL placement and programming, progress monitoring, appeal rights, waivers, and other rights relating to ELL education, **in their native language**, pursuant to L-4-6 (b)(8)-(9), L-4-13, L-4-14, L-4-15, L-4-16, L-4-22 (f), and L-4-23.
6. **Failure to consistently monitor the progress of exited students.** L-4-6 (b)(9); L-4-14. L-4-17.
7. **Failure to “[u]se research based instructional practices recognized as sound by experts** in the education of English Language Learners ...” L-4-5(5).
8. **Failure to “respect the right of an English Language Learner to participate in other programs and services** for which he or she is eligible or entitled to (e.g. special education...) so as to ensure that the student’s educational needs are met on a basis equal to that provided to other students.” L-4-6(4). Waiving children out of ELL instruction because of special education placement (and especially doing so in English only without actual parent knowledge and consent) is expressly impermissible. Access to one federally guaranteed right may not be made contingent on waiver of another. “School districts must provide ELL students with disabilities with *both* the language assistance and disability-related services to which they are entitled under Federal Law.” Dear Colleague Letter, January 7, 2015, U.S. Department of Justice, U.S. Department of Education, at 24 (emphasis added).¹⁰
9. **Failure to ensure that ELLs have access to a public education equal to the education afforded to all other students**, by ensuring that ELL programs are 1) based on **sound educational theory**; 2) **appropriately supported**, with adequate and effective staff and resources so that they may reasonably be expected to be successful and 3) **periodically evaluated** and if necessary revised for efficacy. *Castaneda v. Pickard*, 648 F. 2d 989 (5th Cir.1981).¹¹ There is no evidence that the Providence “Consult-Only” model is research-based, adequately staffed with trained teachers and therefore likely to work, or that its effectiveness has been or is being evaluated. On the contrary, it appears that in many instances (see, e.g. Declaration of ----) the “Consult-only” approach in fact results in no services at all being provided, not even consultation, let alone the direct services required by regulations. .
10. **Violation of Section 504 of the Rehabilitation Act of 1973:** To the extent children with special needs are either being forced to “waive” in writing (albeit frequently without actual parent understanding or consent), or are *de facto* deprived of ELL services because of logistical difficulties associated with providing *both* special education and ELL services, this constitutes discrimination based on disability pursuant to the Act, as students with disabilities are treated differently than nondisabled ELLs.

requires ESL instruction (not merely consulting) by an ELL/ESL certified teacher in addition to content instruction in general education.

¹⁰ DOJ and OCR’s Letter specifically refers to the common policy in school districts “of allowing students to receive either ELL services or special education services but not both....These policies are impermissible under the IDEA and Federal civil right laws...” and remain a focus of both DOJ and OCR compliance monitoring. Letter at 25.

¹¹ See *Lau v. Nichols*, 414 U.S. 563 (1974) (Districts have an affirmative obligation to ensure equal access to educational opportunities for limited English students); see also Fourteenth Amendment to the U.S. Constitution; Title VI of the Civil Rights Act of 1964 (Prohibiting discrimination based on national origin); Equal Educational Opportunities Act (EEOA), 20 USC 1703 et seq. (the right to equal educational opportunities requires affirmative action to overcome students’ language barriers); NCLB act of 2001 and its successor ESSA Act of 2015 (providing funding for ELL programs and requiring accountability for outcomes in exchange).

Relief Requested

Wherefore, Petitioners request that this Commissioner's Hearing Office Order the Providence School District:

1. To immediately begin serving named Petitioners, as well as all ELLs enrolled in the Providence School District, in a manner consistent with one or more of the ELL program models listed in state regulation (L-4-2);
2. To ensure that these services are provided through direct instruction by ELL- certified providers as required by regulation (L-4-2(11), L-4-5 (10)), and consistent with at least the minimum hours required by regulation (L-4-7);
3. To provide compensatory services to the children of named Petitioners, consistent with the minimum time requirements of L-4-7, in an amount and manner established after consultation with Petitioners' counsel, and by submitting said compensatory agreements to RIDE within two weeks of this Order; if no agreement is reached the parties will seek the intervention of the Hearing Officer to determine compensatory services;
4. As promptly as feasible but no later than one month from this Order, to begin using notices in the native language of parents to comply with all notification requirements pursuant to regulations (including placement and programming, progress monitoring, appeal rights, waivers, and other rights relating to ELL education, consistent with L-4-6 (b)(8)-(9), L-4-13, L-4-14, L-4-15, L-4-16, L-4-22 (f), and L-4-23). Providence will submit all such proposed forms to RIDE for approval, and Petitioners' counsel will have opportunity to comment on them;
5. To make all reasonable efforts to identify and notify the families of students who have been deprived of ELL services regarding their right to receive compensatory services, and to provide such services forthwith. The plan for identification, notification and compensation of all students will be developed with the oversight of the Hearing Officer and participation of Petitioners and their counsel, and will be monitored to completion by RIDE;
6. To immediately halt all waivers of ELL services for special education students until adequate training and processes are established for 1) staff education, 2) parent notice of rights and 3) and a clear process and policy emphasizing the illegality of conditioning, coercing or otherwise promoting such waivers except *at the request of and with the full and informed consent of parents in their native language*;
7. To undertake an urgent staff training with RIDE or RIDE-approved providers from outside the District regarding state and federal requirements concerning ELLs. At a minimum, all ELL teachers, principals, special education supervisors and parent involvement coordinators or liaisons should participate. Continued periodic updates of training as well as training of new staff should be scheduled annually. The first such training should occur no later than June of 2016;
8. To publicize the terms of this settlement pursuant to a RIDE-approved plan through the media and through community organizations so that families can independently learn and avail themselves of these rights.

Petitioners,
By and Through Their
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CERTIFICATION

I, the undersigned, hereby certify that copies of the above document were mailed to: Superintendent Christopher Maher, Providence School District, 797 Westminster St., Providence, RI 02903; Jeffrey Dana, Esq., Providence City Solicitor, Joseph A. Doorley, Jr. Municipal Building, 444 Westminster Street Suite 220; and to Andrew Henneous, Esq. Brennan, Recupero, Cascionne, Scungio & McAllister, LLP, Attorneys at Law, 362 Broadway, Providence, RI 02909, postage prepaid, regular mail, on this the _____ day of April, 2016.
