Case Number: PC-2020-02619
Filed in Providence/Bristol County Superior Court
Submitted: 3/29/2021 11:54 AM
Envelope: 3027342
Reviewer: Zoila C.

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

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, **P.C. No. 2020-02619**
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

Defendants.

_____/

PLAINTIFFS' MEMORANDUM OF LAW

Introduction

Plaintiffs are parents of Providence students who are English Language Learners (ELs). They brought this case on behalf of their children who were experiencing severe academic failure because they were receiving little to no specialized language instruction for children with limited English proficiency. Under both federal and state law, English Learners (ELs) are entitled to specialized language instruction in order to learn English and receive full access to the content of all the classes available to other students. Plaintiffs' children received neither benefit.

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Instead, the Providence School District claimed they were receiving services through a "Consultation Model" of service delivery in which the certified EL teacher consults with a general or special educator once every eight weeks for no minimum amount of time and, in most cases, delivers no direct instruction herself, and never even meets or observes the student. This Consultation Model provides almost nothing in the way of EL services to most students.

The practical result of this almost nothing model was disastrous for students. One student was in eleventh grade and was reading at a second-grade level. Nonetheless, her parents were told she would no longer receive any direct EL instruction. Another student was in ninth grade and had a second to third grade reading level. His parents discovered accidentally that, despite being eligible, he was not receiving *any* EL instruction. The District insisted that he was receiving "consultation only" services, but it could not show documentation of even a single instance of an EL teacher providing actual consultation to his general or special education teachers during a two-year period, let alone any evidence of actual direct instruction by an EL certified teacher. A third student was "waived" out of receiving any EL services because the parents were required to sign a waiver form in English which they did not understand. (Transmission of Record, Petitioners' Complaint, #36).[1]

Petitioners challenged the Providence School District's Consultation Model[2] of English Language Learner Service delivery as contrary to the state law and regulations, and to the federal laws and regulations which those state laws and regulations are explicitly designed to implement. The state Regulations Governing the Education of English Language Learners (hereinafter,

[1] Hereinafter all citation to "Record" are designated simply by "#". Several of the most frequently cited items are attached hereto for ease of reference.

[2] 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 and is also distinct from a separate "Collaboration" model that Providence has developed since the advent of this litigation. Therefore, to avoid confusion, the model of service delivery challenged in this litigation is referred throughout as the "Consultation" model.

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"State Regulations") mandate that EL instruction be provided by EL-certified teachers, for specific amounts of time, and pursuant to research-based approaches that are tested for effectiveness. The Consultation Model fails to conform to any of these requirements. It also permits discrimination against children with significant disabilities by providing them with *even less* assistance than the almost nothing it provides to children without disabilities.

Ignoring the plain language of the State Regulations, and the federal mandates which underly them, the Rhode Island Department of Education (RIDE) concluded that Providence's Consultation Model of Service Delivery is consistent with State Regulations. RIDE's conclusion contradicted findings by the Department of Justice, which in an intervening investigation, had found that very Consultation Model to be illegal under federal law.[3] By adopting RIDE's interpretation, the Council on Elementary and Secondary Education found permissible, under state law, what federal authorities had just found illegal under the very federal laws that the State Regulations explicitly claim to implement.

If allowed to stand, the Council's interpretation of the regulations invites savings-motivated violations of the rights of English Learners throughout the state, at the very time that recent studies and reports highlight the disastrous academic underperformance of English Learners in Rhode Island as a result of long-running underfunding and failure to enforce legal protections.[4] These inequities and failures have only been exacerbated by the pandemic.

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[3] A copy of the Department of Justice's findings is attached as Exhibit A and is also available at https://www.bostonglobe.com/metro/rhode-island/2019/09/16/justice-department-letter-describes-how-providence-set-english-learning-students-fail/kiXZEbcB2va9eHGxb2OlvI/story.html The court is requested to take judicial notice of these findings pursuant to Rule 201 of the Rhode Island Rules of Evidence.

[4] Pursuant to Rule 201 of the Rhode Island Rules of Evidence, this Court is requested to take judicial notice of the June 2019 Johns Hopkins review of the Providence Schools, https://jscholarship.library.jhu.edu/bitstream/handle/1774.2/62961/ppsd-revised-final.pdf?sequence=1&isAllowed=y which indicates appalling lack of progress and achievement in the Providence School District and lists the underfunding and failure of English Language Learner service delivery as an important contributor to such negative outcomes. Indeed, the Report specifically mentions the findings of the U.S. Department of Justice that PPSD has provided inadequate services to ELL students –and the new commitment to hire more teachers who are ELL

Rhode Island's Regulations are sound. They should be interpreted to mean exactly what they say, and to say exactly what they mean, namely: compliance with federally mandated legal supports for English Learners through a robust system of intensive services, delivered by highly specialized and certified EL teachers, pursuant to research-vetted models of service delivery which explicitly prohibit discrimination.

Only these regulations, vigorously enforced, offer both current and ongoing protection to these vulnerable students. The Council's abdication of its responsibility to protect this class of learners by permitting an "anything goes" interpretation of what the State Regulations allow, one that could render these regulations invalid under federal law, must be rejected. The urgency to do so has never been greater.

Facts and Travel of Case

The administrative class Complaint in this case was filed on April 12, 2016 with the Commissioner's Hearing Office of the Rhode Island Department of Elementary and Secondary Education (RIDE). It sought relief for all English Learner (EL)[5] students in the Providence school district. *Inter alia*, the Complaint challenged Providence's Consultation Model of service delivery to English Learners as not consistent with State Regulations because it fails to provide students with direct instruction by a certified / endorsed EL Teacher in amounts specified by regulation. In addition, the Complaint challenged the validity of the Providence Consultation Model as not consistent with any of the specifically authorized, research proven models of

certified. *Id.* at 76. It also notes that the Providence Superintendent pointed out the "completely inadequate" historic level of funding support for this population. *Id.* Notably, while Providence is temporarily under federal supervision pursuant to a Settlement Agreement with the Department of Justice, and therefore not permitted to use the Consultation Model *at this time*, that oversight is by its own terms time limited and does not apply to any other school district.

[5] "EL" and "ELL" are used in the alternative herein to denote "English Learner" as both have been historically used in Rhode Island.

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service delivery in the Regulations, *or* with any alternative approaches for service delivery permitted by those Regulations.

The parties resolved several additional legal violations raised in the Complaint via two consent decrees.[6] These issues are not a part of this appeal.

The parties then agreed that remaining legal issues, namely those related to the validity of the Consultation Model itself, presented questions of law and could therefore be resolved by Summary Judgment. The Parties jointly prepared the First Stipulation of Facts and presented Motions for Summary Judgment, with briefing, to the Hearing Officer. (#35,34,32, First Stipulation, First Cross Motions for Summary Judgment). After the Hearing Officer requested additional clarification of facts and arguments, the parties agreed to and signed the Second Joint Stipulation of Facts and presented their Second Cross Motions for Summary Judgment to the Hearing Officer (#30, 28, 27, 26.)

While the Parties' Cross Motions for Summary Judgment were pending for more than a year, the United States Department of Justice (DOJ) was conducting its own separate investigation of the Providence School District's *entire* system of service delivery of specialized instruction for English Learners, (not limited to the Consultation Model). On March 8, 2018, the DOJ issued a letter of findings that explicitly found that the District's Consultation Model is "not educationally sound" because it "fails to provide EL students any direct EL services from an instructor qualified to provide those services and is devoid of any curriculum that is distinct from the regular education curriculum." Exhibit A at 5.

[6] S*ee* Consent Judgment Aug. 12, 2016 (#33) and Consent Judgment Sept. 15, 2017 (#19). In these agreements, among other things, Providence agreed not to condition EL services on waiver of special education services (or vice versa), to provide parents with adequate notices related to EL services in their own language; to conduct progress monitoring of ELs, and to report such progress to parents or guardians, as required by law.

On August 8, 2018, the DOJ reached a Settlement Agreement with the Providence School District concerning a broad range of deficiencies in Providence's EL system of service delivery. That public Settlement Agreement noted that the DOJ had previously made an explicit finding that the Consultation Model at issue in this case is "educationally unsound," and therefore impermissible under federal law. The Settlement included an agreement by the Providence District not to continue using it. (#18, at p. 1, Petitioner's Letter and attached Settlement Agreement, attached hereto for ease of reference).

Considering this finding critically relevant to this litigation, Plaintiffs brought it to the attention of the RIDE hearing officer and moved to reopen the hearing for a consideration of the impact of the newly signed Settlement Agreement on the case at hand. (#18, Letter of August 2018 and Settlement Agreement attached thereto). Providence objected and moved to recuse the Hearing Officer, alleging that the Hearing Officer's independence had somehow been tainted by exposure to this very public Settlement Agreement. (#17, 16) The Hearing Officer denied both motions.[7]

On March 8, 2019, the Commissioner issued a Decision in this case on the Parties' Cross Motions for Summary Judgment (#15, Commissioner's Ruling,), finding that Providence *was* in violation 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. However, the Commissioner concluded that the Providence Consultation Model for EL services itself does not violate the State Regulations, even though the DOJ had found that it was contrary to the very federal laws that the state regulations purport to implement.

[7] Regarding the motion to reopen to consider the effect of the Settlement on the instant case, the hearing officer 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." (Hearing Officer's Ruling, September 21, 2018, #15).

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Petitioners appealed the Decision regarding the validity of the Consultation Model to the Council on Elementary and Secondary Education (#12). Providence did not appeal the decision on the student progress reports, and, therefore, that ruling is not at issue now.

On March 3, 2020, the Council on Elementary and Secondary Education upheld the Decision of the Commissioner. (#1), while voicing significant concern about such an outcome, and urging RIDE to consider revising the State Regulations. To date no steps have been taken to do so.

This Appeal follows.

Jurisdiction

The Superior Court has jurisdiction over this appeal pursuant to the Administrative Procedures Act (APA), Chapter 35 of title 42 of the General Laws. The Board of Education / Council on Elementary and Secondary Education is a state agency "authorized by law to make rules or determine contested cases" and therefore subject to APA appeal to this Court. RIGL 42-35-1.1.[8]

Standard of Review

This Court's review of an agency decision is controlled by RIGL 42-35-15(g) which provides:

> The court shall not substitute its judgment for that of the agency as to the weight of the evidence *on questions of fact*. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if the substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

[8] The statute exempts certain *specifically* listed agencies and boards from appeal to this Court pursuant to the APA. RIGL 42-35-18(b). While the Board of Education/Council on Elementary and Secondary Education was once exempted, as of 2012 the exemption was removed from the statute.

(1) In violation of constitutional or statutory provisions;
(2) In excess of statutory authority;
(3) Made upon unlawful procedure;
(4) Affected by other error of law;
(5) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
(6) Arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

RIGL 42-35-15(g) (emphasis added).

Questions of law, however, are not binding upon the court and are reviewed de novo. Bunch v. Board of Review, R.I. Dep't of Employment & Training, 690 A. 2d 335, 337 (R.I. 1997); Narragansett Wire Co. v. Norberg, 118 R.I. 596, 607, 376 A. 2d 1,6 (1977).

In the instant case, where cross motions for summary judgment are at issue, by definition, the material facts are not in dispute and the matter turns on questions of law. *De novo* review is therefore warranted.

The Stipulated Facts

The actual parameters of the challenged Providence "Consultation Model" of service delivery to English Learners in Providence are summarized in the Parties' Second Joint Stipulation of Facts and Exhibits to it. (#30, Attached hereto for ease of reference). These facts, acknowledged by both parties, constitute the factual underpinnings upon which the legality of the Consultation Model must be judged. The minimal services *required* by the Consultation Model are limited to the following:

- The EL endorsed/certified teacher must "Provide direct instruction, 30-60 minutes daily, of English Language Development (ELD) to all WIDA Literacy Proficiency levels 1.0-2.9 students [i.e., the lowest level of English language

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proficiency] who are in *general education*." (#30, Stipulation Par. 3, quoting its Exhibit 2, "Responsibilities of the Collaborative Teacher", emphasis added).

- "If an ELL student is in levels 2.9 and above, the Collaborative /Consultation model does not require any direct instruction time to the student by the Collaborative [i.e., EL-certified] teacher." (#30, Stipulation, Par. 4, citing its Exhibit 2).
- No direct instruction by an ELL teacher is required for students who are not "in general education" (#30, Exhibit 2 of Stipulation, bullets 1 and 6), (in other words, for special education students in separate settings.) This is true regardless of the proficiency level of the special education student, including students who speak no English at all (i.e., are below Level 2.9) and would receive at least some direct EL instruction if they did not have disabilities which require their placement in a separate setting.
- All the other functions of the Collaborative (EL certified) Teacher are indirect and centered on consultation-only to non-EL certified teachers of ELs. (Exhibit 2 to Stipulation).
- EL certified teachers are "required to fill out a Consultation Log… every time they consult with the teacher of a student they are servicing. '[C]onsultation must take place at a minimum of every 8 weeks. No minimum time per student for the consultation is specified." (#30, Stipulation, Par. 6 citing its Exhibit 2).

Argument

I. **The Consultation Model Discriminates against Children with Disabilities in Violation of the State Regulations and Federal Laws, and, for this Reason Alone,**

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the Council's Decision that the Consultation Model is Consistent with the Regulations Is Wrong and Must Be Reversed

The Consultation Model permits discrimination against children with disabilities by denying them even the limited and inadequate ESL services it provides to similarly situated students without disabilities. As described in the Parties' Second Joint Stipulation of Facts, according to the Providence Consultation Model, children with disabilities who are not in general education settings, (for example, those who, due to the severity of their disabilities, are placed in separate settings, often called "self-contained"), receive *no* direct EL instruction from an EL teacher, regardless of whether they know *any* English at all. In contrast, children in general education[9] within the two lowest levels of English Language Proficiency (below level 2.9 on annual ACCESS testing of English proficiency), *do* receive at least 30-60 minutes of direct instruction from a certified/ endorsed ESL teacher each day. (#30, Second Stipulation, par. 3 citing its Exhibit 2)

In its decision, the Council recognizes that "*General education* students with proficiency levels between 1.0 and 2.9 received between 30 and 60 minutes of direct instruction daily from an ELL endorsed or certified teacher." (#1, p. 3, emphasis added). It then omits the obvious implications for special education students, who, if placed in a non-general education setting, receive no such services even if they are in the lowest level of English proficiency. Instead, the Council erroneously concludes that no evidence of discrimination is in the record (#1, p.5), despite the fact that several items in the record document this discrimination. *See, e.g.,* #30, Stipulation and its Exhibit 2. The *Commissioner's Decision* specifically acknowledged this disparate treatment. ("Students not in general education or exceeding the 2.9 literacy score need

[9] This includes special education children who are placed in general education settings, i.e., receive most of their education in a general education classroom.

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not be provided with any direct instruction by an ELL teacher under the Providence model.)"[10] *See also* #13 at 3. Yet, the Commissioner erred in failing to find that this disparate treatment violated Rhode Island and federal laws barring discrimination against students with disabilities.

Discrimination against children with severe disabilities, including those who are not placed in general education classrooms, is prohibited by the Rhode Island State Regulations' own requirements that "ELL programs shall…[e]nsure equitable access to all services, and materials that are provided to all other students." (L-4-5 (7), 200 RICR-20-30-3.5A (7))[11]. *See also* (L-4-6(4), 200 RICR-20-30-3.6B4: "The placement decision shall 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, including but not limited to special education…. so as to ensure that the student's education needs are met on a basis equal to that provided to other students.") Any EL model of service delivery which forces an English Learner to forego direct instruction by an EL certified teacher in exchange for a separate special education placement needed due to the child's particular disability, constitutes denial of access to services.

Inequitable treatment of ELs, who are also special education students in separate special education settings, is a violation of not only State Regulations -- which explicitly call for equitable access to all services -- but also Section 504 of the Rehabilitation Act, the Americans with Disabilities Act (ADA), the Individuals with Disabilities Education Act (IDEA), and the implementing regulations for these statutes. All of these prohibit discrimination based on disability. The Rhode Island Supreme Court has also made clear that an agency's decision is

[10] The RIDE Commissioner's Decision did not, in its conclusions, address this claim of discrimination at all, despite acknowledging the existence of the disparity earlier in the Decision. The Council Decision ratifies this omission.
[11] After the commencement of this litigation, all of Rhode Island's Regulations were consolidated and renumbered, with the Rhode Island Code of Regulations (RICR) replacing prior designations. For ease of cross-reference with earlier briefing in this case, both citations are included throughout this Memorandum.

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reversible if it is discriminatory. *Altman v. School Committee of Town of Scituate,* 113 R.I. 399, 347 A.2d 37, 40 (R.I. 1975)**.**

The Consultation Model deprives special education students in separate settings of any direct instruction by an EL teacher, while providing at least some such instruction to similarly situated non-disabled students. It is, therefore, discriminatory on its face. For this reason alone, both the Commissioner's Decision and the Council's Decision upholding it must be reversed.

II. The Council's Decision Is Contrary to the Plain Language of the Rhode Island Regulations Governing the Education of English Language Learners and Must be Reversed

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*, 69 R.I. 443, 35 A. 2d 9 (1943). In the present case, the plain language of Rhode Island State Regulations makes clear that the Council's interpretation of these regulations is erroneous.

Rhode Island's Regulations Governing the Education of Language Learners are designed to fulfill the obligation to provide access to an education to English Learners (ELs) in conformity with state and federal statutory requirements. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, prohibits discrimination based on race and national origin. In the educational context, it requires school districts to provide equal educational opportunity for national origin minority students who have a limited proficiency in English. The Equal Education Opportunities Act of 1974, EEOA, 20 U.S.C. § 1703(f), elaborated on these obligations by requiring states to ensure all students have the right to an equal education by taking appropriate actions to affirmatively overcome language barriers that impede equal participation by all students in instructional programs.

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The RI Regulations cite to and implement these mandates by creating a clear set of inter-related requirements, each described in greater detail in the sections which follow, and which together work to ensure the quality and actual efficacy of programming for English Learners as required by federal law:

- First, the State Regulations define an EL teacher, mandating specific certification / endorsement requirements *in addition to* regular or special educator certification (L-4-2(11); 200 RICHR-20-30-3.2A.4d;
- Next, they mandate that EL services in all programs be delivered by such teachers (L-4-5(10); 200 RICHR-20-30-3.5A10);
- Third, they specify the minimum amount of time that such direct services must be provided, with the amount varying based on the student's proficiency levels (L-4-7);200 RICHR-20-30-3.7);
- Fourth, to ensure quality, the regulations set out six different models of services from which districts can choose, (L-4-10; 200 RICHR-20-30-3.2A5);
- Fifth, the regulations mandate that service *delivery pursuant to each and every model* employed use "research-based instructional practices recognized as sound by experts in the education of English Language Learners" (L-4-5(5); 200 RICHR-20-30-3.5A.5; and
- Finally, the State Regulations state that their purpose and goal is to "[e]nsure that English Language Learners have access to a free, appropriate, public education equal to the education provided to all other students. This goal is to be reached by ensuring that programs for English Language Learners are (1) based on sound education theory; (2) appropriately supported, with adequate and effective staff

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> 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); 200 RICHR-20-30-3.1A.4).

A plain language interpretation of the RI EL Regulations requires that they be interpreted as a *coherent whole*, working together to accomplish all of the articulated objectives. "It is a well-settled principle of statutory interpretation that an isolated part of a particular statue cannot be viewed in a vacuum; rather, each word and phrase must be considered in the context of the entire statutory provision." *See Power Test Realty Co. v. Coit*, 134 A.3d 1213, 1221 (R.I. 2016), *citing In re Rhode Island Comm'n for Human Rights*, 472 A2d. 1211, 1212 (R.I. 1984).

The Council's interpretation of the State Regulations, in contrast, discards this internally coherent framework and allows a Consultation Model that conforms to none of these requirements. It gives the green light to the almost nothing EL services model that provides no services by an EL certified teacher, that discards the intensity of regulation-required services and that does not even mention a sound educational theory, a research basis or evaluations demonstrating efficacy. Such an interpretation cannot stand.

A. The Plain Language of the Rhode Island Regulations Defines EL Teachers as Certified and Endorsed for Specialized Language Instruction and Requires That Specialized Language Instruction for English Language Learners Be Delivered by Such Teachers

The Rhode Island Regulation define EL teacher as follows:

> "ELL teacher" means 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); 200 RICHR-20-30-3.2A.4d.

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*

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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*.

Having just defined who qualifies as an ELL teacher, the Rhode Island Regulations at L-4-5(10); 200 RICHR-20-30-3.5A10 go on to 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. (emphasis added).

The plain language of this regulation thus requires that EL 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 demonstrated content area mastery / certification, e.g., math, history), and,

3) They are provided with regular, sustained, high-quality, job-embedded professional development.

Thus, the Council's finding that EL instruction need not be provided by an EL teacher is simply wrong. It contradicts the plain language of regulation referring to "*specialized language instruction* for English Language Learners," and requiring not just "certified," but "*appropriately*" certified **"***and endorsed*" teachers to deliver it.

It is a basic tenet of statutory and regulatory construction that one must give effect to *each* word or phrase in the statute or regulation. *Power Test,* 134 A.3d at 1220. The Council's interpretation, in contrast, *writes out of existence the words "appropriately certified and endorsed" for purposes of delivering "specialized language instruction.***"** Indeed, general and

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special education teachers are not "appropriately certified" for specialized language instruction of ELs, let alone "endorsed" for anything.[12] If *any* general or special education teacher could provide "Specialized language instruction" to EL students, as the Council found, these words would be rendered superfluous. The regulation would merely state that "ELL programs shall ensure that language instruction for ELLs is provided by certified teachers." It obviously does not do so.

In addition, the interpretation espoused by the former Council would render the second prong of the regulation, which requires these teachers to be "highly qualified," entirely redundant. "Highly qualified" requirements already encompass certification as a general education teacher.[13] If, "appropriately certified and endorsed" for purposes of "specialized language instruction" (in the first prong of the regulation) could be misconstrued to simply mean "certified," as the Council suggests, the entire second prong of the regulation would be rendered duplicative, because every "certified teacher" must already be "highly qualified" for particular content areas. An EL certified teacher, in contrast, may not be, unless she also meets the qualifications for teaching a particular subject / grade level. The Council's construction,

[12] *See, e.g.*, Educator Quality and Certification Regulations, 200-RICR-20-20-1 *et seq*. setting out clear and distinct endorsement and certification requirements for teachers of ELs as compared with general or special education teachers.

[13] *See, e.g.* Highly Qualified Teachers in Rhode Island Public Schools and Districts – FAQs https://www.ride.ri.gov/Portals/0/Uploads/Documents/Teachers-and-Administrators-Excellent-Educators/Educator-Certification/Cert-main-page/HQ_FAQs.pdf (explaining that all core content teachers in RI must demonstrate that they are certified teachers, that they hold a bachelor degree and that they demonstrate content mastery of the subjects they teach.) In 2016, responding to changes in federal law, RIDE eliminated the separate "highly qualified" designation, subsuming it instead in detailed certification requirements including content mastery for the subjects taught. The most recent iteration of these requirements can be found in Educator Quality and Certification Regulations, 200-RICR-20-21-1 *et seq.* A quick perusal of these regulations indicates very specific requirements for certification for the teaching of particular content at particular grade levels by all certified teachers.

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therefore, is "in violation of basic tenets of statutory/regulatory interpretation that each word and phrase be given its full effect." *See Power Test, supra.*

The requirement that ELL services be provided by an "appropriately certified and endorsed" teacher must also be read in context and in harmony with the detailed definitions of an ELL teacher just preceding this requirement in the State Regulations. "It is a well-settled principle of statutory interpretation that an isolated part of a particular statue cannot be viewed in a vacuum; rather, each word and phrase must be considered in the context of the entire statutory provision." *See Power Test,* 134 A.3d at 1221 *citing In re Rhode Island Commission for Human Rights*, 472 A2d. 1211, 1212 (R.I. 1984).

The Council's contrary interpretation, which would permit *any* general or special education teacher to become magically qualified to provide specialized language instruction to ELs by virtue of as little as a one-minute consultation by the water-cooler with an EL teacher once every eight weeks, about a student the EL teacher has never even met, has absolutely no support in the plain language of the regulations.

B. Because the State Regulations Require that EL Certified Teachers Provide Instruction to ELs for Specific Amounts of Time Depending on the Student's Language Proficiency, the Council's Contrary Determination Contradicts the Plain Language of the State Regulations

The Rhode Island ELL Regulations specify the amounts of direct EL instructional time *each* student must receive, depending on the student's level of English language proficiency:

> **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

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> minimum of 1 period (or the equivalent) of ESL instruction a day…. L-4-7; 200 RICHR-20-30-3.7.[14]

Thus, the state regulations require specific amounts of EL instruction time, ranging from a *minimum* of one to three periods of EL instruction a day, depending on the student's proficiency level on the ACCESS tests. Notably, and on its face, this regulation applies to *all models* of EL service delivery and contains *no exceptions for any model of EL service provision*.

It is undisputed that the Providence Consultation model does not provide EL instruction by an EL certified teacher or by a teacher endorsed as an ESL, Bilingual or Content Area Teacher of ELLs in the amounts specified by these regulations. In fact, that Consultation model requires ESL direct instruction by an EL teacher only for the lowest scoring EL students (i.e., Entering or Beginning, ACCESS literacy score up to 2.9), and only if they are in "general education." (# 30: Parties' Second Joint Stipulation and its Exhibit 2, bullet one). Even then, the Consultation Model only requires 30-60 minutes of EL teacher instruction per day, even though the State Regulation requires at least three periods of EL instruction per day for such least-proficient 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* level of proficiency. (#30: Parties' Second Stipulation and its Exhibit 2, bullets one and six).

Throughout this litigation, Providence never disputed that EL teachers were not delivering EL instruction in amounts consistent with the above regulation to students in the Consultation Model. Instead, Providence asserted that because general and special education

[14] These levels correspond to certain scores on WIDA-ACCESS testing which measures EL language proficiency. 200 RICR-20-30-3.4

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teachers in this "Consultation Model" consult with ESL teachers, all of the general and special education teachers' time with students is somehow transformed into and "counts as" EL instruction time. The Council adopted this interpretation, which clashes with the plain language of the regulations regarding both *what* constitutes EL instruction and *who* may deliver it. (#1, Council Decision,)

Indeed, it defies credulity that the Providence 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 one minute* (#30, par 6), could convert a general or special education teacher into an "appropriately certified and endorsed teacher" for purposes of "specialized language instruction," (L-4-5(10); 200RICR-20-30-3.5A10) and thereby override detailed EL teacher certification requirements and direct instruction time by such teachers, as contained in regulation.

EL certification and endorsement requirements in Rhode Island are distinct from those for regular and special educators, and they are rigorous and extensive, requiring compliance with the Teaching English as a Second Language (TESOL) standards, with specific academic coursework, practicum requirements and specialized testing. These regulatory certification requirements ensure that teachers of specialized language instruction to EL students are knowledgeable and effective in achieving the challenging goals of EL instruction, i.e. simultaneously teaching students to learn to speak, read, write and understand English and mastery of the content of the general curriculum. [15] By requiring that such knowledgeable and

[15] See TESOL standards, available at: https://www.tesol.org/advance-the-field/standards/tesol-caep-standards-for-p-12-teacher-education-programs. *See also*, Rhode Island Educator quality and Certification Regulations, 200-RICR-20-20-1.9. A quick chat once every two months between an ELL teacher and a general education teacher – all that is required by Providence's "Consultation Model" -- cannot bring that general education teacher even close to a competence level where she can fulfill the duties of an ELL teacher, as anticipated by EL teacher certification regulations.

prepared teachers deliver that specialized language instruction to ELs, the Rhode Island Regulations Governing the Education of English Language Learners ensure the rigor and quality –and therefore effectiveness -- of such instruction.

By writing out of existence that assurance, thereby inviting untrained general or special educators to provide "specialized language instruction" they have not been prepared to provide, the Decision of the Council effectively demolishes the entire state regulatory scheme intended to ensure the quality of EL services. In fact, it opens a loophole that swallows that entire quality assurance scheme of Rhode Island's regulations, one based on objective standards of EL teacher certification/endorsement and EL teacher delivery of EL services in quantifiable amounts. It invites the very abuses that Providence's Consultation Model represents, i.e., an "on paper only" model of service delivery that delivered no actual competent services, achieved no discernible student success, and contributed to Providence's dismal student achievement record, which led to a State takeover of the District.[16]

Because Providence's Consultation model does not provide the requisite amounts of EL instruction by certified and endorsed EL teachers to EL students, it violates the Rhode Island Regulations. The Council's Decision to the contrary is contrary to the plain language of the regulation and cannot stand.

C. Providence's Consultation Model Is Not Consistent with the Approved Models of Instruction in the State Regulations, *nor with Any Educationally Sound, Research-Based Model Drawing on Components of Such Models*

The Rhode Island State Regulations indicate that an

[16] This Court is again urged to take judicial notice of the June 2019 Johns Hopkins review of Providence Schools. https://jscholarship.library.jhu.edu/bitstream/handle/1774.2/62961/ppsd-revised-final.pdf?sequence=1&isAllowed=y

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> LEA [Local Education Agency, i.e. school district] may choose one (1) or more of the following models, or components from these models, as defined in § 3.2 of this Part, to provide the most appropriate program for *each* English Language Learner… [lists methods of instruction described in 3.2A.5]

L-4-10;200-RICR-20-30-3.10A (emphasis added)

Because the language of this regulation is focused on individualizing programming for "each English Language Learner" to achieve programming most appropriate to that student, its primary intent appears to be to allow students to participate in more than one type of EL programming, out of the list of approved models, if that is best for the individual. Providence's Consultation Model does not fit into any of the listed and research proven methods of service delivery. The inquiry should end here.

The Council's Decision, however, has magnified the term "components of these models" out of context to permit a District to create its own model of service delivery. Even if this were to be the meaning of the regulation, nothing in this section or in any other part of the regulations implies that such a new model, even if permitted, is in any way exempt from all of the other regulatory requirements, including that it be a research-based and educationally sound model, tested for efficacy, with instruction provided by EL certified teachers.

Indeed, all models described in the regulations are subject to EL teacher certification / endorsement requirements spelled out earlier in the regulations, none is excepted from said requirements, and some add additional criteria necessitated by the particular model (e.g., bilingualism and specialized certification for bilingual programs.) (See L-4-2(16-22); 200-RICR-20-30.3.2A.5) Yet, Providence's Consultation Model, instead allows general or special educators with *no* specialized or mandated endorsement or certification, or even mandated minimum floor of training in language instruction for ELs, to provide EL instruction.

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The Council's Decision errs in relying heavily on the "Sheltered Content Instruction Model," which it erroneously interprets as an example where EL teachers are not required for the delivery of EL services. First, nothing in the regulatory description of the Sheltered Content Model exempts it from the general regulatory plain language requirement discussed above and applicable to all models, that *specialized language instruction be delivered by an appropriately certified/endorsed teacher, i.e., an EL certified teacher***.**[17]

Second, the Sheltered Instruction Model, by its own terms, requires that all teachers participating in this model, including both general content (core course) and EL instructors, must "participate in specialized training in ESL methods and techniques," (L-4-2(21; 200-RICR-20-30.2A.5e). In contrast, the Providence Consultation Model does not require a general education or special education teacher providing EL services in the Consultation Model to have had *any* specialized training in EL methods and techniques. A one-minute consult every two months is hardly "specialized training in ESL methods and techniques." Indeed, if there were any doubt about what the Sheltered Content Instruction Model actually requires, and whether its staffing requirements include EL certified teachers, the DOJ's Settlement Agreement, discussed in Section IIIC below, makes absolutely clear that the Sheltered model also requires EL-certified teachers to provide the EL component of instruction.

Finally, *any* model used, but especially one drawn from components of other models rather than already pre-approved and research vetted models, must not only draw on components of other models, but must also do so in a way that meets all other federal and state *adequacy requirements*. It cannot be a slapped together, piecemeal assortment of terms randomly pulled from descriptions of other models.

[17] To the contrary, it mandates that teachers "meet *appropriate* state-certification requirements" (emphasis added.)

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To the contrary, as stated in 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."[18] 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) 200-RICR-20-30.1A4. In other words, any and every model of service delivery, including those drawn from "components" of other models – even if such are actually permitted-- must also assemble such components into a meaningful whole and show that that whole 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.

The Record is wholly devoid of any evidence of 1) a research basis or sound educational theory underlying the Providence Consultation Model, 2) evaluations of efficacy or 3) evidence of the adequacy of staffing. To the contrary, the Model has already been found to be "educationally unsound" by the DOJ, the federal agency responsible for enforcing the Equal Education Opportunity Act upon which State Regulations are based.

Thus, the Council's conclusion that the Consultation model does not violate State Regulations because it is drawn from components of other models, contradicts the plain language of State Regulation which indicates that the necessary characteristics of *any* model of service delivery pursuant to both state regulation, and the federal laws they are intended to implement, must include sound educational basis and proven efficacy.

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

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Indeed, if the four words "components from these models," found in the Regulations, were a "safe harbor" permitting a district to do anything or nothing at all, and to ignore and avoid all other requirements set out in painstaking detail in the Regulations (including EL teacher certification / endorsement, amounts of time provided by EL teachers to ELs, or the adequacy of the research basis and sound educational theory underlying the model), the entire regulatory framework would be rendered null and void, and its objective, internally coherent requirements, merely advisory and easily avoided.

By ratifying the almost nothing Consultation Model as consistent with the State Regulations, the Council's interpretation of these Regulations, if allowed to stand, would water down their meaning to a point that State compliance with its floor of federal obligations would be jeopardized. It cannot therefore be a reasonable interpretation of regulatory intent. The Rhode Island regulations fulfill federal obligations *precisely* by requiring instruction by EL teachers in specific amounts and through vetted, research-based program models.[19]

III. The DOJ's Finding that the Consultation Model is "Educationally Unsound" and Therefore Violates Federal Law, Bolsters the Plain Language Interpretation of the State Regulations and Provides Additional Support for Reversal of the Council's Decision

Where, as here, the plain language of the regulations is clear, this Court need look no further to reverse the plainly erroneous interpretation of state regulation put forth by the Council.

[19] 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.

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However, should this Court require any further reinforcement in reaching its decision, the DOJ's specific findings regarding the Consultation Model, bolster the plain language interpretation set forth above.

A. **If the Consultation Model Is "Educationally Unsound" under Federal Law, It Must Be Educationally Unsound under State Regulation, Which by Their Own Language Exist to Implement These Federal Laws**

The Rhode Island Regulations indicate from the outset: "These regulations implement R.I. Gen. Laws § 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))." *See* 200-RICR-20-30-3.

The DOJ's explicit finding that the Consultation Model is "educationally unsound" pursuant to federal law it is charged with enforcing, logically leads to a similar finding under State Regulations, which by their own language are designed to implement these same federal laws. Indeed, as discussed above, Providence's failure to articulate any educational theory, research basis or proof of actual efficacy for its Consultation Model renders it equally "unsound" under both federal and state law requirements.

B. **The DOJ Specifically Found That under Federal Law Providence Is Required to Ensure that EL Certified and Endorsed Teachers Provide EL Instruction; State Regulations Can Require No Less**

The plain language interpretation of Rhode Island regulations requiring that EL certified and endorsed teachers be the ones who provide actual direct EL instruction is further supported by the DOJ's Findings which state: "teachers should at a minimum meet the state requirements for teaching ELs, though they may need even more training to become qualified to deliver EL services… (citations omitted). Even Rhode Island's regulations require ESL instruction to be taught by ESL-certified or bilingual-certified teachers." Exhibit A, at 10. In fact, the Settlement

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Agreement *defines the very nature of EL instruction as instruction delivered by EL certified and endorsed teachers*:

> **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.***

(# 18, DOJ Settlement at 2, emphasis added.)

Given that the DOJ found the Providence School District in noncompliance with federal law for failure to provide ESL services directly taught by certified /endorsed ESL teachers,[20] the Rhode Island State Regulations (which explicitly state that they implement federal law) must surely do no less. The plain language interpretation of State Regulations discussed above is thus further bolstered by the DOJ's conclusion.

C. The DOJ's Finding that Federal Law Requires that EL Certified Personnel Provide EL Instruction in *All* Models of Service Delivery Bolsters the Plain Language Interpretation that State Regulations, and *All* Models Permitted Pursuant to Them, Require No Less

As noted above, the Council's Decision seized upon an erroneous interpretation of the Sheltered Content Instruction Model of Service Delivery in the State Regulations, as an example of a program where EL teachers are not required to deliver EL instruction and used this misinterpretation to justify a similar outcome in Providence's Consultation Model. As discussed above, the plain language of the State Regulations does not support such an interpretation

[20] 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). It 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). Providence is required to implement a remedial hiring policy intended to ensure an adequate supply of EL teachers to provide EL instruction. (DOJ settlement at 7-9).

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regarding *any* model of instruction permitted by the Regulations. However, should this Court harbor any doubt in this regard, the Department of Justice's interpretation of what the law requires bolsters that plain language interpretation.

The DOJ found that Providence "failed to adequately implement several of its EL programs, including by not providing sufficient ESL" (#18, Settlement at 1), and, that the ESL portion of instruction (in contrast to other core content classes) must be provided by ESL teachers (#18, Settlement at 2, 5 and 20). Even more specifically, as remedies, the DOJ ordered that:

> By the start of the 2019-20 School Year, the District will ensure that the ESL components of its EL programs are taught by ESL-Certified Teachers, and that core content teachers of ELS in its Sheltered ESL, ESL Push-In, ESL Newcomer and Collaborative ESL programs are adequately trained to provide the Sheltered Content Instruction required by Paragraph 13.[21]

(#18, Settlement at 8, par. 20.)[22]

Thus, the ESL components of specialized language instruction models (including Sheltered Instruction) must be delivered by an ESL teacher, *in addition* to core class instruction provided by general education teachers with specific training on how to make their core subjects (e.g., math, science) accessible to ELs. The latter does not substitute for, but rather complements ESL instruction by ESL teachers as a separate and additional core requirement.[23]

If such is the floor of what federal law requires for EL services deliver, the Rhode Island Regulations require no less, regardless of the model. The Council's interpretation to the contrary is simply wrong. The DOJ's interpretation that Providence must utilize EL instruction by EL

[21] Par. 13 of the Settlement specifies the nature of the training that regular education content teachers must receive to deliver such content instruction to ELs.
[22] *See also* Exhibit A, Findings at 9, noting that according to the District's own guidance document, "ELs in the Sheltered ESL program should be placed in ESL classes with an ESL-certified teacher."
[23] "The District agrees that ESL is a core subject for ELs and will provide ESL *in addition to other core subjects*…" (#18, Settlement at 5, emphasis added).

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certified / endorsed teachers in *all* service delivery models, to comply with federal law, bolsters the plain language interpretation that the State Regulations require a similar outcome.

IV. The Council's Erroneous Decision Remains a Live Controversy with Practical Effects on English Learners, Requiring a Ruling from this Court

In its affirmative defenses, the Council now contends that the issues brought forth in this appeal are moot because the state regulations on which this appeal is based are in the process of being revised and because Providence has voluntarily suspended its use of the Consultation Model for the time being. (Answer at 6 and 7). Their arguments are incorrect for several reasons.

A case is moot only "if there is no continuing stake in the controversy, or if the court's judgment would fail to have any practical effect on the controversy." *Boyer v. Bedrosian*, 57 A.3d 259, 277 (R.I. 2012). As the Rhode Island Supreme Court has held, judicial review remains appropriate in "those cases that present a ripe case or controversy." *Lynch v. R.I. Dep't of Envt'l Management*, 994 A.2d 64, 71 (R.I. 2010), quoting *City of Cranston v. R.I. Laborers' Dist. Council, Local 1033*, 960 A.2d 529, 533 (R.I. 2008).[24]

The Plaintiff class of EL students in this case not only sought injunctive and declaratory relief but also compensatory services for their deprivation of specialized language assistance pursuant to State Regulations. (#36). Because the Council's erroneous decision that the State

[24] In *Lynch*, the Supreme Court held that a license had not become moot and its initial validity may still be challenged even though new licenses had subsequently been granted, because the initial license validity continued to have real world impacts on subsequent licenses. *Lynch*, at 71-72. The Court has only found mootness when the challenged action has been eliminated root and branch. Thus, in *Boyer*, the Supreme Court held that the Family Court's new Administrative Order mooted claims regarding the Truancy Court's procedures in effect prior to the issuance of the Administrative Order, and the Plaintiffs' concerns were fully addressed by the new policy. In addition, the Plaintiffs' claims *in Boyer* were limited to claims for injunctive and declaratory relief, and so they were susceptible of being mooted by a new policy. *Boyer*, 57 A.3d *at* 264, 274-80. Here, in contrast, there is no new policy *and* compensatory clams remain very much alive.

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Regulations permit these deprivations, still stands, English Learners' requests for compensatory remedies have not been met and the Plaintiffs very much have "a continuing stake in the controversy." Therefore, a declaratory judgment from this Court regarding what the State Regulations require would have a very "practical effect" on Plaintiffs, and this appeal presents a ripe and justiciable controversy. *See, e.g.*, *Me. Sch. Admin. Dist. No. 35 v. R.*, 321 F.3d 9, 18 (1st Cir. 2003) (noting that "[t]he presence of an actionable claim for compensatory education will insulate an IDEA class against a mootness challenge even after the child's eligibility for special education ends"). The DOJ Letter of Findings noted that there were 372 EL students in the Consultation Model. Exhibit A at 5-6. Plaintiffs and the other students enrolled in the Consultation model have claims for compensatory services that have not been addressed to date.

Because of the compensatory claims in this case, even if the State Regulations *had been* replaced by a different set of regulations, this case would still present a live controversy. Notably, however, the State Regulations which Plaintiffs seek to enforce in their correct interpretation have *not* been revised and Defendants have not asserted that they have taken any action to revise the State Regulations. There is nothing in the public record to indicate that Defendants have taken any of the steps required by the Administrative Procedure Act to initiate a revision of the regulations. While over a year ago, in its Decision, the Council urged that consideration be given to revising the State Regulations, no such revision has occurred. No proposed revised regulations have been made public or put forth for public comment, let alone finalized. Unless the current regulations have been repealed, the exact regulations that the Council interpreted to permit Providence's Consultation Model remain the only state regulations in effect, and their correct interpretation remains critically important to all English Language Learners. If the Council's erroneous interpretation is allowed to stand, these regulations will

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offer absolutely no protection to English Language Learners. If the almost nothing Consultation Model is legal under state regulation, then almost anything is. The DOJ does not police every school district in RI, nor is that its role. That is the role of RIDE and the Council. Because the erroneous interpretation of *existing* state regulation by the Council in the decision below continues to affect the interpretation of these regulations, to the detriment of all ELs, it remains critically important that this Court correct that erroneous interpretation.

Nor is the interpretation of state regulations at issue in this case mooted by the fact that the Providence District has temporarily suspended use of the Consultation Model at this time under pressure from the Department of Justice. It is well settled that voluntary cessation is insufficient to establish mootness. *See Bucci v. Lehman Brothers Bank, FSB*, 68 A.3d 1069, 1080 (R.I. 2013). In *Bucci*, the Rhode Island Supreme Court held that a party's amendment of its internal rules was "merely a voluntary cessation" of the challenged activity and that, therefore, it did not moot the claim. *Id*. at 1080-81.

Further, the DOJ Settlement Agreement is, on its face, time limited. Once the Department of Justice terminates its oversight, it is the State regulations, and RIDE enforcement of those regulations, which will govern the conduct both of Providence and all other districts. If the Council's erroneous interpretation of State Regulation is not corrected, nothing prevents a repetition of the Consultation Model under a different name. Brought as a class-wide administrative complaint, this litigation anticipates, and its class members deserve, a class wide and permanent resolution regarding the meaning of the State Regulations designed to protect them. The present situation is the very definition of "capable of repetition and evading review," which is an exception to mootness and requires judicial resolution. *Boyer*, 57 A.3d at 53.

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Indeed, Defendants' arguments of mootness based on Providence's temporary suspension of the use of the Consultation Model are inconsistent with their own prior position. After all, both the RIDE Commissioner of Education and the Council on Elementary and Secondary Education ruled – albeit erroneously -- on the legal questions presented, instead of dismissing them as moot due to the existence of a time-limited Settlement Agreement between Providence and the Department of Justice. The circumstances have not changed.

Far from being moot, the Council's interpretation of the Regulations Governing English Language Learners is being closely watched and could prove determinative to the quality and intensity of specialized language instruction offered throughout Rhode Island. The correct interpretation of State Regulation and the State Agency's obligation to enforce them is long overdue, and the children whose educational outcomes depend on it continue to need the protection of this Court.

CONCLUSION AND REMEDIES SOUGHT

For all the reasons stated above, the Council's and Commissioner's Decisions should be reversed insofar as they held that Providence's Consultation Model for ELL services does not violate Rhode Island Regulations Governing the Education of English Language Learners as alleged. Judgment should be entered that Providence's Consultation Model for ELL services violates Rhode Island Regulations Governing the Education of English Language Learners, Providence should be enjoined from using it, and RIDE and Providence should be ordered to develop a plan for compensatory education for ELs in Providence, in consultation with Appellants. Appellants also seek 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.

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CERTIFICATION

I hereby certify that on this 29th day of March, 2021, a true copy of the foregoing was filed and served via the Court's electronic file and serve system on all counsel of record.

/s/ Veronika Kot