STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: June 14, 2022)

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	:	
V.	:	**C.A. No. PC-2020-2619**
RHODE ISLAND BOARD OF EDUCATION, COUNCIL ON ELEMENTARY AND SECONDARY EDUCATION, AMY BERETTA, COLLEEN A. CALLAHAN, BARBARA COTTAM, KAREN DAVIS, GARA BROOKE FIELD, JO EVA GAINES, MARTA V. MARTINEZ, DANIEL P. MCCONAGHY, and LAWRENCE PURTILL, in their official capacities as members of the RHODE ISLAND BOARD OF EDUCATION, COUNCIL ON ELEMENTARY AND SECONDARY EDUCATION, and PROVIDENCE SCHOOL DISTRICT	:	

DECISION

VOGEL, J. L. Doe, S. Doe, and A. Doe, on behalf of their children, X. Doe, Y. Doe, and Z. Doe, (collectively, Petitioners) bring this appeal from a March 3, 2020 Decision by the Rhode Island Council on Elementary and Secondary Education (Council) affirming a March 8, 2019 Ruling on the parties' Cross-Motions for Summary Judgment.[1] In that Ruling, the Hearing Officer found that the Providence School District's (the District) Collaboration/Consultation Model for the

[1] The names of Petitioners and their children are withheld to protect their identities.

provision of English Language Learner (ELL) services does not violate the Rhode Island Regulations Governing the Education of English Language Learners (State Regulations).[2] This Court exercises jurisdiction over this matter pursuant to G.L. 1956 §§ 42-35-15 and 16-39-4. For the reasons set forth below, this Court reverses the Hearing Officer's Ruling and remands the matter for further proceedings consistent with this Decision.

I

Facts and Travel

During the time period at issue in this appeal, Petitioners and their children resided in Providence, and the children were enrolled in schools within the District. (R., Ex. 35 (Joint Stips. Fact), ¶¶ 2-3.) All three children qualified as ELLs and spoke Spanish at home. *Id.* ¶¶ 3-4. As students with disabilities, the children also received special education services under the federal Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, *et seq*. *Id*. ¶ 5.

With respect to the individual children, as of July 2016, X. Doe was an eleventh-grade student with learning disabilities who "scored 324 SS on her most recent STAR reading assessment . . . placing her at the 1st percentile when compared with typical peers." *Id.* ¶ 6

Y. Doe was a ninth-grade student with learning disabilities who scored 284 on the STAR reading assessment. *Id.* ¶ 8. School records described Y. Doe's "Model of Services" as "sheltered content instruction" for the 2013-2014 school year, and as "Collaborative ESL and sheltered content" for the 2015-2016 school year. *Id.* ¶ 9. However, the school records further revealed that Y. Doe did not receive any hours of ELL services and did not have an ELL teacher of record during those same two school years. *Id.*

[2] The Hearing Officer also found the District in violation of certain reporting requirements. The District did not appeal those findings, which are not at issue here.

Z. Doe was a second-grade student whose mother signed a waiver of ELL services on March 13, 2013. *Id*. ¶¶ 10-11.[3] The stated reason for the "waiver" was "Student Placed by Special Ed Dept." *Id*. ¶ 11. School records listed Z. Doe as "eligible but not enrolled" in ELL and indicated that Z. Doe did not receive ELL services during the 2013-2014, 2014-2015, and 2015-2016 school years. *Id.*

On April 12, 2016, Petitioners filed a Complaint (Agency Complaint) against the District "on behalf of their own children, [X. Doe, Y. Doe, and Z. Doe], and [on behalf] of a class of similarly situated children in the Providence School District." (R., Ex. 38 (Agency Compl.), at 1.)[4] Through the Agency Complaint, Petitioners alleged that the District was not providing ELL services consistent with state and federal law and sought to enforce the pertinent provisions of those laws and the State Regulations. *Id.* The Petitioners brought other claims in the Agency Complaint that later settled by way of a Consent Judgment and that are not pertinent to this appeal. *See* Record, Ex. 35 (August 2016 Consent Judgment).

On July 20, 2016, the parties entered into a Joint Stipulation of Facts and filed Cross-Motions for Summary Judgment. *See* Parties' Joint Stips. Fact; R., Ex. 34 (Providence School District Mot. Summ. J.); R., Ex. 33 (Pet'rs' Cross Mot. Summ. J.). Thereafter, on December 15, 2016, the parties entered into a Second Joint Stipulation of Facts and filed new Cross-Motions for Summary Judgment. *See* R., Ex. 32 (Second Joint Stips. Fact); R., Ex. 27 (Providence School District's Second/Cross Mot. Summ. J.); R., Ex. 30 at 15-30 (Pet'rs' Mem. Law. Supp. Second Mot. Summ. J.); R., Ex. 26 (Pet'rs' Reply Mem. Law Supp. Second Mot. Summ. J.). Through the

[3] Petitioners' allegations concerning waiver and notice violations were resolved through Consent Judgments with the District and are not at issue here.

[4] Petitioners' Agency Complaint against the District used a different system to identify Petitioners' children. For consistency and ease of reading, the Court will refer to Petitioners' children as X. Doe, Y. Doe, and Z. Doe.

Second Joint Stipulation of Facts, the parties agreed upon a description of the Collaboration/Consultation Model as follows:

> "1. The Providence School District's Collaboration/Consultation Model of service delivery to English Language Learners (ELLs) (hereinafter Collaboration/Consultation Model) is described in *Providence Schools English Language Learner Handbook: A Resource for Providence Educators* . . . under subtitle *Collaborative ESL* . . . .
> "2. The Providence School District's Responsibilities of the ELL Collaborative Teacher . . . describes the expectations for an ELL certified teacher working within the Collaboration/Consultation Model.
> "3. The Collaboration/Consultation Model requires that the ELL endorsed or certified teacher, known as the Collaborative Teacher, Provide direct instruction, 30-60 minutes daily, of English Language Development (ELD) to all WIDA[5] Literacy Proficiency levels 1.0-2.9[6] students who are in regular education.
> "4. If an ELL student is in levels 2.9 and above, the Collaboration/Consultation Model does not require any direct instruction time to the student by the Collaborative Teacher . . . .
> "5. The Collaboration/Consultation Model further requires that the Collaborative Teacher consult and collaborate with the non-ELL teachers (i.e. general and/or special education teachers) of ELLs . . . .
> "6. Collaborative teachers are required to fill out a Consultation Log . . . every time they consult with the teacher of a student they are servicing. [C]onsultations must take place at a minimum of every 8 weeks. . . . No minimum time per student for the consultation is specified." (Second Joint Stips. Fact 1-2) (internal citations and quotation marks omitted; footnotes not present in original).

[5] The acronym WIDA refers to the "'World Class Instructional Design and Assessment Consortium' or 'WIDA consortium[,]' . . . a consortium of states, including Rhode Island, that has developed English language proficiency standards and English language proficiency tests." 200 RICR 20-30-3.2(A)(2)(d). The State Regulations officially adopt WIDA's 2007 "English Language Proficiency Standards" (ELPs) as Rhode Island's ELL proficiency standards. 200 RICR 20-30-3.1(A)(2).

[6] These numerical metrics correspond to the six levels of English proficiency recognized by the State Regulations: a number from 1.0 to 1.9 denotes "Entering," the lowest level of English proficiency, and a number from 2.0 to 2.9 denotes "Emerging," the second lowest level of English proficiency. (Parties' Second Joint Stips. Fact, Ex. 3.)

The District's "English Language Learner Handbook: A Resource for Providence Educators" (Handbook) states:

> "Within the Collaborative ESL model is housed Consultation. Much like Collaboration, Consultation requires ongoing communication and collaboration amongst ELL and non-ELL certified colleagues. Consultation may be used as a stand-alone service for ELLs or in conjunction with Collaboration." Second Joint Stips. Fact Ex. 1 (Handbook) at 2.

The Handbook further explains:

> "In the Consultative model, the ELL certified case manager meets with the general or special educator(s) working with the student to determine what the student's areas of strength and areas of needs are as it relates to academic language development. In addition, a schedule for ongoing consultation is proposed. This initial meeting is memorialized on an *ELL Collaboration/Consultation Log* and is submitted to the Director of ELL or his/her designee for approval. Once the plan is approved, consultation services begin as scheduled in the proposal. From there the ELL certified case manager meets, as agreed upon, with the general and/or regular educator(s) and provides written recommendations to his/her colleagues regarding the specific language development accommodations and modifications that should be provided in order to ensure that the student has meaningful access to the instruction. The ELL certified case manager will provide job-embedded coaching support, as needed, to the general or special educator(s) involved in order to ensure that they understand how and when the accommodations/modifications should be provided. Each consultation between the ELL certified case manager and the general and/or special educator is documented on an *ELL Collaboration/Consultation Log*. Once the log is completed and signed, a copy is placed in the student's record while the original is submitted to the Office of ELLs. During each consultation, the student's data (formative, diagnostic and/or summative) will be reviewed and changes to the modifications/accommodations will be made to best meet the language development needs of the students." *Id.*

Before resolution of the parties' Cross-Motions for Summary Judgment, the United States Department of Justice (DOJ) concluded its separate investigation of the District's ELL services program. *See* Pls.' Mem. Law, Ex. A (March 8, 2018 DOJ Letter). The DOJ found that the

District's Collaboration/Consultation Model "fail[ed] to provide EL[L] students any direct EL[L] services from an instructor qualified to provide those services and is devoid of any curriculum that is distinct from the regular education curriculum." *Id.* at 4-5. On August 9, 2018, the DOJ and the District entered into a settlement agreement regarding the DOJ's investigation. *See* R., Ex. 18, at Ex. A (DOJ Settlement).

On August 28, 2018, counsel for Petitioners brought the DOJ Settlement to the Hearing Officer's attention and stated that the DOJ Settlement resolved all disputed issues of federal law. (R., Ex. 18 (August 28, 2018 Kot Letter)). Specifically, counsel for Petitioners argued that the DOJ Settlement should be binding on issues of federal law, stating:

> "State laws and regulations in the area of language access may go above and beyond minimums required by federal law, but may not fall short of such requirements. Thus any pronouncements and agreements in the DOJ Settlement with regard to the *minimum requirements of federal law* would be binding on interpretations of minimum criteria for rights and services required by state law as well, unless the state law or regulation were to be found invalid (as contrary to and falling short of federal requirements)." *Id.* at 1-2.

The District objected to any reopening of the record to allow the Hearing Officer to consider the DOJ Settlement and, believing that the DOJ Settlement would prejudice the Hearing Officer, moved for him to recuse himself from the matter. (R., Ex. 17.) Counsel for Petitioners objected to the Motion to Recuse and filed a "Motion to Reopen the Hearing for the Sole Purpose of Providing the Opportunity for the Providence District's Superintendent to Authenticate or Repudiate the DOJ Settlement Agreement on the Record." (R., Ex. 16.) On September 21, 2018, the Hearing Officer denied both motions, ruling that the DOJ Settlement was not relevant to Petitioners' claims based on state law and that he had avoided learning any information regarding the DOJ Settlement. (R., Ex. 15.)

On March 8, 2019, the Hearing Officer issued his Ruling on the parties' Cross-Motions for Summary Judgment. (R., Ex. 13 (Ruling Mots. Summ. J.)) After noting that "the parties agreed to defer the issue of whether the Commissioner of Education has jurisdiction to entertain a request for class-wide relief[,] the Hearing Officer found that "[v]iewed in their entirety, the ELL Regulations do not support Petitioners' claim that all ELL instruction must be delivered by an 'ELL teacher'" and that "Petitioners have failed to establish that the Collaboration/Consultation Model does not comply with the minimum hours of ELL instruction required by [the State Regulations.]"[7] *Id.* at 1 n.1, 7-8. The Hearing Officer also found that the State Regulations' minimum time requirements for periods of ELL instruction may be satisfied by non-ELL general and/or special education teachers who meet and consult with ELL-endorsed or certified teachers on how to provide ELL instruction. *Id.* at 7-8. Additionally, the Hearing Officer found "sufficient evidence" that the Collaboration/Consultation Model contains components from the "approved models" listed in the State Regulations. *Id* at 8. Accordingly, the Hearing Officer granted the District's Cross Motion for Summary Judgment with respect to the issue of whether the Collaboration/Consultation Model for ELL services violated the State Regulations. *Id.* at 9.

Petitioners filed a timely appeal of the Hearing Officer's Ruling to the Council, asserting that the Ruling contradicted the plain language of the State Regulations and that the Hearing Officer erred by failing to reopen the record and consider the DOJ Settlement as evidence that the Collaboration/Consultation Model violates federal law and therefore also violates the State Regulations as a matter of law. *See* R., Ex. 10 (Mem. P. &. A. Supp. Pet'rs' Appeal to Council),

[7] The Hearing Officer's Ruling cited to the version of the State Regulations that predated the consolidation and reformatting of state administrative rules into the uniform Rhode Island Code of Regulations. *See, e.g.*, Ruling Mots. Summ. J. 7. For ease of reference, this Court exclusively will cite to the State Regulations as they are currently codified in the Rhode Island Code of Regulations; substantively, both versions of the State Regulations are identical.

at 4-17; R., Ex. 12. Petitioners also argued that the Hearing Officer's Ruling had sanctioned overt discrimination against children with disabilities in violation of state and federal law and therefore could not be a correct interpretation of the State Regulations. (Mem. P. &. A. Supp. Pet'rs' Appeal to Council 17-18.) Petitioners asked the Council to reverse the Ruling and order the District to develop a plan for compensatory education for ELLs. *Id.* at 18-19.

In its subsequent decision, the Council upheld the Hearing Officer's "determination that not all ELL instruction must be done directly by an ELL Teacher under the Regulations." (R., Ex. 1 (Council Decision), at 5.) In view of this finding, the Council also found that special education students did not receive less ELL instruction than general education students under the Collaboration/Consultation Model and that Petitioners had therefore failed to demonstrate discrimination under State Regulations, the Americans with Disabilities Act (ADA), and the IDEA. *Id.* The Council also found the Collaboration/Consultation Model permissible because the State Regulations allow the use of components from approved models. *Id.* at 6. Finally, the Council found no error in the Hearing Officer's refusal to reopen proceedings and consider the DOJ Settlement because, the Council stated, the DOJ Settlement "had no bearing on [Petitioners'] allegation of a violation of the Regulations." *Id.* The Council also stated that its decision was

> "limited to the grounds presented in this matter, whether the Regulations require every minute of ELL instruction be performed by a teacher with an ELL endorsement, and whether the Providence model developed from the different components of the methods of instruction listed violates the Regulations. Nothing in this decision should be construed to limit the Commissioner, or the Council on appeal, from finding that a school district's ELL program violates specific provisions of the Regulations on a case-by-case basis, including, but not limited to, the requirement that '[s]chool districts shall employ a sufficient number of ELL teachers to ensure that ELL students receive the instruction and support required by the regulations . . . .'" *Id.* at 7.

Having found no error "that rises to the level for the Council to reverse" the Hearing Officer's Ruling "and remand for a calculation of damages[,]" the Council affirmed the Ruling "with one modification directing the Commissioner of Elementary and Secondary Education to begin the process of revising the current Regulations Governing the Education of English Language Learners, including, but not limited to, addressing the Consultation Model." *Id.* at 7-8. Petitioners timely appealed the Council Decision to this Court.[8] *See* Compl.

II

Standard of Review

This Court has jurisdiction to review agency decisions pursuant to chapter 35 of title 42, the Administrative Procedures Act (APA). *See McAninch v. State of Rhode Island Department of Labor & Training*, 64 A.3d 84, 87 (R.I. 2013). Section 42-35-15(g) of the APA governs this Court's review and provides in pertinent part that:

> "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 substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> "(1) In violation of constitutional or statutory provisions;
>
> "(2) In excess of the statutory authority of the agency;
>
> "(3) Made upon unlawful procedure;
>
> "(4) Affected by other error of law;

[8] Petitioners brought this appeal against the Council and its individual members in their official capacities but did not name the District as a defendant. *See* Compl. ¶¶ 2-3. The District brought this omission to the Court's attention on February 1, 2022. *See* Order, Feb. 10, 2022 (Vogel, J.). Thereafter, the Petitioners amended their Complaint, adding the District as a party Defendant. (Amended Compl., April 4, 2022.) After first moving to dismiss the appeal for failure to name an indispensable party, the District withdrew the motion, and the Court established a briefing schedule to enable the District to respond to the Amended Complaint. *See* Order, May 4, 2022 (Vogel, J.). The District filed its response brief on May 5, 2022. *See* Providence School Department's Mem. Law Supp. Opp'n Plaintiffs' Appeal (District's Mem. 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 abuse of discretion or clearly unwarranted exercise of discretion." Section 42-35-15(g).

"'Although this Court affords the factual findings of an administrative agency great deference, questions of law—including statutory interpretation—are reviewed *de novo*.'" *McAninch*, 64 A.3d at 86 (quoting *Heritage Healthcare Services, Inc. v. Marques*, 14 A.3d 932, 936 (R.I. 2011)). "'The construction of a regulation is a question of law to be determined by the court[,]'" and the "'principles or rules of statutory construction apply to administrative regulations.'" *Murphy v. Zoning Board of Review of Town of South Kingstown*, 959 A.2d 535, 541 (R.I. 2008) (quoting 2 Am. Jur. 2d *Administrative Law* § 245 at 221 (2004)).

"[W]hen 'the provisions of a statute are unclear or subject to more than one reasonable interpretation, the construction given by the agency charged with its enforcement is entitled to weight and deference as long as that construction is not clearly erroneous or unauthorized[.]'" *Labor Ready Northeast, Inc. v. McConaghy*, 849 A.2d 340, 345 (R.I. 2004) (quoting *In re Lallo*, 768 A.2d 921, 926 (R.I. 2001)). When the language of a statute or regulation is "'clear and unambiguous,'" there is no room for such deference and the Court must "'give the words of the enactment their plain and ordinary meaning.'" *Generation Realty, LLC v. Catanzaro*, 21 A.3d 253, 259 (R.I. 2011) (quoting *Kulawas v. Rhode Island Hospital*, 994 A.2d 649, 652 (R.I. 2010)). "The plain meaning approach, however, 'is not the equivalent of myopic literalism,' and 'it is entirely proper for [the Court] to look to the sense and meaning fairly deducible from the context.'" *Id.* (quoting *In re Brown*, 903 A.2d 147, 150 (R.I. 2006)). The Court must "'consider the entire statute as a whole; individual sections must be considered in the context of the entire statutory scheme, not as if each section were independent of all other sections.'" *Id.* (quoting *Sorenson v. Colibri*

Corp., 650 A.2d 125, 128 (R.I. 1994)). "[U]nder no circumstances" may the Court "'construe a statute to reach an absurd result.'" *Id.* (quoting *Kaya v. Partington*, 681 A.2d 256, 261 (R.I. 1996)).

III

Analysis

A

Motion to Add to the Record

On June 22, 2021, while this appeal was pending in the Superior Court, the Council filed a Motion to Add two documents to the Record on appeal: 1. A letter dated March 30, 2020 from the Commissioner of the Rhode Island Department of Elementary and Secondary Education to the Superintendent of the Providence Public School Department, confirming that "**utilization of mere consultation is not an acceptable substitute for implementing all aspects of the Collaboration Model**"; and 2. A memorandum dated April 14, 2020 from the Deputy Commissioner of the Rhode Island Department of Elementary and Secondary Education to "Superintendents and School Leaders" throughout Rhode Island, reminding all schools and districts that use of the "Consultation only approach . . . is not allowed in our state." Defs.' Mot. Add to R. 1; *id.* Ex. 1, at 2; *id.* Ex. 2. According to the Council, these documents demonstrate that Petitioners' appeal is now moot because the challenged model of ELL education is no longer in use. (Defs.' Mot. Add to R. 1.) Petitioners objected to the motion to expand the record and argued that the Council's proposed exhibits are insufficient to establish mootness. (Pls.' Mem. Law Resp. Defs.' Opp'n Appeal 8.)

After consideration thereof, the Court denies Defendants' Motion to Add to the Record. As the Court will discuss in more detail below, consideration of the proposed exhibits would not alter the Court's determination of any issue in this case, including mootness.

B

Mootness

The Council maintains that Petitioners' appeal is moot because the District has not employed the Collaboration/Consultation Model since at least 2018 and states it no longer intends to use that model going forward. (Def. Council on Elementary and Secondary Education, et al.'s Mem. Law Supp. Opp'n Plaintiff's Appeal of Council's Decision Dated March 3, 2020 (Council's Mem. Law) 6-10.) The Council notes that the Hearing Officer's ruling did not address Petitioners' requests for compensatory education and disputes any contention that such remedy is appropriate. The Council further argues that any decision by this Court addressing that issue would merely be an advisory opinion without practical effect. *Id.* at 9-10. Relying on the DOJ Settlement and the March 30, 2020 letter from the Commissioner to the District's Superintendent regarding the cessation of the "consultation only model," the District also argues that this appeal is moot because the challenged Collaboration/Consultation Model is no longer in use.[9] Providence School Department's Mem. Law Supp. Opp'n Plaintiffs' Appeal (District's Mem. Law) 5; *see id.* Ex. 1. In response to Petitioners' contention that the matter escapes mootness because it is of extreme importance and is capable of repetition yet evading review, the District points to its efforts to comply with the DOJ Settlement as evidence that the District will not use the challenged model in the future. (District's Mem. Law 7.)

Petitioners note that their original Agency Complaint sought compensatory services for the deprivation of ELL instruction pursuant to the State Regulations; however, because the Hearing Officer ruled that the District had not violated the State Regulations, those compensatory claims

[9] Neither the DOJ Settlement nor the March 30, 2020 letter are part of the record before this Court on appeal, and the Court declines to expand the record because consideration of those documents would not change the outcome of this case. *See* R., Ex. 15 (declining to consider DOJ Settlement).

were never addressed. (Pls.' Mem. Law 28-29; Pls.' Mem. Law Resp. Defs.' Opp'n Appeal 4-6.) Asserting that X. Doe, Y. Doe, and Z. Doe were harmed by the District's use of the Collaboration/Consultation Model and have not yet been made whole, Petitioners argue that their outstanding claims for compensatory education are dispositive of the mootness issue. (Pls.' Reply Providence School Department's Mem. Law 4-5.) Petitioners also note that—despite the Council's direction to the Commissioner of Education to begin revising the State Regulations—the same State Regulations at issue in the Ruling are still in effect; Petitioners also assert that the voluntary cessation of a challenged practice is not sufficient to demonstrate mootness. (Pls.' Mem. Law 29-31; Pls.' Mem. Law Resp. Defs.' Opp'n Appeal 8-11.)

"'[A] case is moot if it raised a justiciable controversy at the time the complaint was filed, but events occurring after the filing have deprived the litigant of an ongoing stake in the controversy.'" *Blais v. Rhode Island Airport Corporation*, 212 A.3d 604, 612 (R.I. 2019) (quoting *City of Cranston v. Rhode Island Laborers' District Council, Local 1033*, 960 A.2d 529, 533 (R.I. 2008)). "In other words, '[a] case is moot 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.'" *Id.* (quoting *Boyer v. Bedrosian*, 57 A.3d 259, 272 (R.I. 2012)). As a result, even when prospective claims for injunctive relief are moot, compensatory claims seeking redress for prior injuries "can keep the controversy breathing." *Seibert v. Clark*, 619 A.2d 1108, 1111 (R.I. 1993) (citations omitted).

In their original Agency Complaint, Petitioners requested "compensatory services" for their children "consistent with the minimum time requirements of [200 RICR 20-30-3.7], in an amount and manner" to be determined. Agency Complaint 6, ¶ 3; *cf. Maine School Administrative District No. 35 v. Mr. R.*, 321 F.3d 9, 11, 17-18 (1st Cir. 2003) (acknowledging that under the federal "Individuals with Disabilities Education Act (IDEA)," which "obligates school districts to

furnish a free appropriate public education (FAPE) to children with disabilities[,]" a child who is "eligible for special education services under the IDEA may be entitled to further services, in compensation for past deprivations, even after his or her eligibility has expired"). However, the question of which compensatory services would be appropriate was reserved until after the Hearing Officer issued a ruling on the parties' Motions for Summary Judgment. *See* Providence School District's Second/Cross Mot. Summ. J. 3 n.1; Pet'rs' Mem. Law Supp. Second Mot. Summ. J. 2 n.1 ("The claims for compensatory education have been reserved pending the outcome of this motion."). As Petitioners note, the Hearing Officer's subsequent ruling in the District's favor means that these compensatory claims will not be heard unless and until this Court reverses that ruling on appeal and remands this case back to the agency for further proceedings.

As a result—and even if the Court were to accept for purposes of argument that the alleged violations will not recur—this Court's "opinion on the merits of this appeal would indeed have a 'practical effect on the controversy' currently on review and, therefore, the case before [the Court] at present is not moot." *Blais*, 212 A.3d at 613 (quoting *Boyer*, 57 A.3d at 272). Although the Council disputes that compensatory services are appropriate for Petitioners' children, as long as "the possibility of some remedy for a proven past violation is real and not remote[,]" Petitioners' "cases remain live and justiciable[.]" *Decker v. Northwest Environmental Defense Center*, 568 U.S. 597, 610 (2013) (citation omitted); *cf. Doe ex rel. His Parents & Natural Guardians v. East Greenwich School Department*, 899 A.2d 1258, 1268 n.10 (R.I. 2006) (stating that, "[s]ince applicable law requires that a plaintiff claiming money damages still must exhaust the administrative process even if the administrative agency cannot award those money damages," the Court "need not reach the precise legal question of whether Rhode Island's administrative agency,

the department of education, has the authority to grant money damages"). For these reasons, the Court declines to dismiss the appeal as moot.

C

Class Action

Having determined that the appeal is not moot, the Court proceeds to the District's contention that the action may not be maintained as a class action. The Complaint filed by Petitioners purports to bring the action "on behalf of their own children, [X. Doe, Y. Doe, and Z. Doe], and a class of similarly situated children in the Providence School District[.]" (Agency Compl. 1.) The District asserts that a class action is not appropriate because the matter never was certified as a class action and because the APA does not provide this Court with jurisdiction to determine or certify a class in the first instance. District's Mem. Law 10-11; *see* Def. Council's Mem. 18-20.

Rule 23 of the Superior Court Rules of Civil Procedure provides in pertinent part: "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits." Super. R. Civ. P. 23(c)(1). Our Supreme Court has declared that

> "Before certifying a group of plaintiffs as a class, a hearing must be held and four showings must be made by the party seeking class certification:
>
> "'(1) there are a sufficient number of class members to make joinder impracticable,
>
> "(2) there are common legal or factual issues which can be efficiently adjudicated by the court on a classwide basis,
>
> "(3) the claims of the chosen representative are typical of those of the members of the class, and
>
> "(4) the chosen representative and attorney will vigorously and adequately represent the interests of all class members.'" *Cohen*

> *v. Harrington*, 722 A.2d 1191, 1196 (R.I. 1999) (quoting *Cabana v. Littler*, 612 A.2d 678, 685 (R.I. 1992)).

In the instant matter, when ruling on the parties' Cross-Motions for Summary Judgment, the Hearing Officer noted that "the parties agreed to defer the issue of whether the Commissioner of Education has jurisdiction to entertain a request for class-wide relief." Ruling Mots. Summ. J. 1 n.1. Petitioners have not requested a hearing seeking to have this Court certify any such class on appeal; consequently, it is not necessary for this Court to consider whether class certification would be appropriate or permissible with respect to this agency appeal. *See* Pls.' Reply to Providence School Department's Mem. Law 5 ("Plaintiffs have never sought, nor do they now seek, a class certification or specific compensatory rights adjudication from this Court.").

D

Compliance with State Regulations

Next, Petitioners argue that the Council erred in upholding the Hearing Officer's Ruling that the District's Collaboration/Consultation Model does not violate the State Regulations. (Compl. ¶ 25.) Specifically, Petitioners argue that the Collaboration/Consultation Model violates the plain language of the State Regulations requiring that the District provide specialized language instruction in specific amounts by appropriately certified and endorsed teachers. *Id.*; *see* Pls.' Mem. Law 12-20; Pls.' Mem. Law Resp. Defs.' Opp'n Appeal 15-17, 18-22; Pls.' Reply to Providence School Department's Mem. Law 8-10. Petitioners also argue that the Hearing Officer failed to construe the State Regulations as a coherent whole and ignored the provisions stating that every model of service delivery must be based on sound educational theory, appropriately supported with adequate and effective staff and resources, and periodically evaluated and revised as necessary. Compl. ¶ 25; *see* Pls.' Mem. Law 20-24; Pls.' Mem. Law Resp. Defs.' Opp'n Appeal 17, 23-24. Noting that the Collaboration/Consultation Model mandates that students at the lowest

levels of English proficiency receive direct instruction from a certified teacher if the students are in general education settings, but not if they are in special education settings, the Petitioners also argue that the Collaboration/Consultation Model discriminates against children with disabilities in violation of the State Regulations. Compl. ¶ 25; *see* Pls.' Mem. Law 9-12; Pls.' Mem. Law Resp. Defs.' Opp'n Appeal 13-15; Pls.' Reply Providence School Department's Mem. Law 11-12.

In response, the Council argues that this Court should defer to the Board of Education's interpretation of the State Regulations. (Def. Council's Mem. 10.) Substantively, the Council argues that the Collaboration/Consultation Model is valid because it contains components of the six educational models listed in the State Regulations, which allow school districts to choose and employ individual components of those models. *Id.* at 13. The Council also argues that the text of the six approved models indicate that Providence is not required to ensure that all ELL instruction is provided by an "ELL teacher" as that term is defined by the State Regulations. *Id.* at 13-15. Acknowledging that the State Regulations entitle ELLs to receive certain minimum periods of "ESL instruction" per day, the Council asserts that the Collaboration/Consultation Model satisfies those "time requirements" because ELLs receive multiple periods of ESL instruction through the mechanism of classroom teachers who regularly consult with ESL or Bilingual certified "case managers[.]" *Id.* at 15-16. The District raises substantially the same arguments. *See* District's Mem. Law 7-10.

The parties agree that the primary substantive issue before this Court is whether the Collaboration/Consultation Model complies with the State Regulations. *See* Pls.' Mem. Law 3-4; Def. Council's Mem. 2. The stated purposes of the State Regulations are to "implement R.I. Gen. Laws § 16-54-1, *et seq.*" and "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))."[10] 200 RICR 20-30-3.1(A). General Laws 1956 § 16-54-1 mandates that "limited English proficient students . . . shall be provided with appropriate programs and services which will make their educational opportunities equal to their English dominant peers." Section 16-54-1. "Programs or services developed by local schools must, at the very least, provide for the attainment of English language proficiency and academic achievement." *Id.* The Equal Education Opportunities Act of 1974 (EEOA) provides that:

> "No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by . . . (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." 20 U.S.C. § 1703.

"More particularly," the State Regulations implement § 16-54-1 and ensure compliance with federal law by requiring that ELLs "have access to a free, appropriate, public education equal to the education provided to all other students." 200 RICR 20-30-3.1(A)(4).

> "This goal is to be reached by ensuring 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." 200 RICR 20-30-3.1(A)(4).

Through these three requirements, the State Regulations directly track the leading analysis of the EEOA in *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981). In *Castaneda*, the Fifth Circuit

[10] The Petitioners do not challenge the State Regulations themselves, which they view as inherently "sound" and consistent with federal law. *See* Pls.' Mem. Law 4. For this reason, the Court's analysis will focus on the Collaboration/Consultation Model's compliance with the State Regulations, rather than on the model's compliance with the various federal statutes which the State Regulations implement and with which they themselves must comply. *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963) ("The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field[.]").

recognized that Congress's use of the term "appropriate action" in 20 U.S.C. § 1703(f) affords schools a "substantial amount of latitude in choosing the programs and techniques they [will] use to meet their obligations under the EEOA." *Castaneda*, 648 F.2d at 1009. Nevertheless, "Congress also must have intended to [ensure] that schools [make] a genuine and good faith effort, consistent with local circumstances and resources, to remedy the language deficiencies of their students[.]" *Id.*

Accordingly, the Fifth Circuit set out a three-pronged test that has been widely adopted by courts tasked with assessing the "appropriateness of a particular school system's language remediation program[.]" *Id.*; *see also Issa v. School District of Lancaster*, 847 F.3d 121, 134 (3d Cir. 2017) ("Courts have consistently followed *Castaneda*'s approach to apply § 1703(f)'s third element, requiring 'appropriate action.'"). First, the record before the court must support a conclusion that the program is based on sound educational theory or principles. *Castaneda*, 648 F.2d at 1009. The court may not weigh the merits of competing theories, "only to ascertain that a school system is [pursuing] a program informed by an educational theory recognized as sound by some experts in the field or, at least, deemed a legitimate experimental strategy." *Id.* Second, the court must determine whether the school system has employed "programs and practices" that are "reasonably calculated to implement" the chosen theory in an effective fashion. *Id.* at 1010. Even if a school system has adopted a sound theory, it has not acted appropriately under § 1703(f) if it "fails to follow through with practices, resources and personnel necessary to transform the theory into reality." *Id.* Third, a plan which fails to appreciably overcome students' language barriers "after being employed for a period of time sufficient to give the plan a legitimate trial" can no longer be considered appropriate action under § 1703(f). *Id.* Accordingly, school systems must monitor the effectiveness of their language remediation programs and make adjustments as needed.

The *Castaneda* test is conjunctive and language remediation programs must fulfill all three prongs to pass muster. *See Issa*, 847 F.3d at 134 n.7.

By incorporating the *Castaneda* test at 200 RICR 20-30-3.1(A)(4), the State Regulations support compliance with federal law by ensuring that ELL programs which comply with the State Regulations also comply with the leading interpretation of 20 U.S.C. § 1703(f). *See* 200 RICR 20-30-3.1(A); *see also* 200 RICR 20-30-3.5(A) ("ELL programs shall: . . . [u]se research-based instructional practices recognized as sound by experts in the education of English Language Learners . . . . [and] [i]nclude sufficient personnel and resources to effectively implement the program."). Simultaneously, 200 RICR 20-30-3.1(A)(4) helps implement the state law requirement that ELLs receive "appropriate programs and services which will make their educational opportunities equal to their English dominant peers." Section 16-54-1. In conjunction with the other standards and requirements set forth in the State Regulations, this codified version of *Castaneda* sets limits on school districts' "latitude in choosing the programs and techniques they [will] use to meet their obligations" to provide ELL services. *Castaneda*, 648 F.2d at 1009.

The State Regulations also require school districts—or "[l]ocal education agenc[ies]" (LEAs)—to take the salient characteristics of individual ELLs into account when providing services. 200 RICR 20-30-3.2(A)(3). The State Regulations recognize six levels of English proficiency, ranging from "Entering," "Beginning," and "Developing" to "Expanding," "Bridging," and "Reaching." 200 RICR 20-30-3.4(A). As part of an ELL's "Initial Assessment for Program Placement," the State Regulations prescribe the use of the "WIDA-ACCESS Placement Test or screener." *Id.* Before a student is placed in an ELL program, the LEA must review "all the student's identification and assessment data[,]" including:

> "1. the student's English-proficiency level;

> "2. the student's literacy level in her or his native language or languages;
> "3. number of years the student has attended school;
> "4. continuity of the student's schooling;
> "5. student retention-information; and
> "6. information on whether the student is receiving special education, whether the student may be in need of special education, or whether the student has a disability that affects his or her academic performance or limits his or her access to school facilities." 200 RICR 20-30-3.6(A).

The placement decision must take into account the right of an ELL "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 educational needs are met on a basis equal to that provided to other students." 200 RICR 20-30-3.6(B)(4). Students' English-proficiency levels are also relevant to the "Time Requirements" set out in the State Regulations, which prescribe a "minimum of three (3) periods (or the equivalent) of ESL instruction" per day for Entering and Beginning level ELLs, a "minimum of two (2) periods (or the equivalent) of ESL instruction" per day for Developing level ELLs, and a "minimum of one (1) period (or the equivalent) of ESL instruction" per day for Expanding and Bridging level ELLs. 200 RICR 20-30-3.7.

Much like the State Regulations, federal cases applying 20 U.S.C. § 1703(f) also indicate that when examining whether a school district has taken "appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs[,]" a court should consider the relevant characteristics of the ELLs affected by the district's program. 20 U.S.C. § 1703(f); *see ERI Max Entertainment, Inc. v. Streisand*, 690 A.2d 1351, 1353 n.1 (R.I. 1997) (citation omitted) (stating that "federal cases interpreting parallel federal provisions are appropriately consulted in interpreting state . . . laws" expressly intended to harmonize with parallel federal law). In *Issa*, cited *supra*, the named plaintiffs were school-age refugees who fell

"within a subgroup of ELLs called SLIFE—students with limited or interrupted formal education[,]" further defined by the court as "English language learners who are two or more years behind their appropriate grade level, possess limited or no literacy in any language, have limited or interrupted formal educational backgrounds, and have endured stressful experiences causing acculturation challenges." *Issa*, 847 F.3d at 125. The *Issa* plaintiffs challenged the defendant school district's decision to place them in an "alternative education program" that used an "accelerated curriculum" designed to allow students "to earn a high school diploma in roughly half (but sometimes less than half) the time of a traditional four-year high school[.]" *Id.* at 127. Aside from "one 80-minute ESL course per day[,]" the plaintiffs took "all their content courses—science, math, social studies—with [the school's] general population" and were not "sheltered from each other by their English proficiency or from native English speakers[.]" *Id.* at 128.

In upholding the district court's decision to grant the plaintiffs' motion for injunctive relief, the Third Circuit's application of the first *Castaneda* prong focused on whether there was theoretical support for the idea that the challenged program was appropriate for SLIFE like plaintiffs, not on whether there was evidence that such a program might be appropriate for ELLs with different characteristics. *See id.* at 135-36 (referencing the testimony of plaintiffs' expert witness that the use of an "accelerated, non-sheltered program for ELLs is unsound for SLIFE" and noting that "no evidence was adduced that accelerated, unsheltered instruction is accepted as sound educational theory for SLIFE"). As a result, the testimony of the defendant's "'ESL Coordinator . . . that the structured immersion technique is a sound theory generally for overcoming language barriers'" did not address the facts that the challenged "model of accelerated learning present[ed] different language barriers than a traditional education program, and [was] particularly imposing for students who [could not] yet understand the language in which the

courses [were] taught." *Id.* at 136 (internal quotation marks and emphasis omitted) (quoting *Issa v. School District of Lancaster*, No. 16-3881, 2016 WL 4493202, at *6 (E.D. Pa. Aug. 26, 2016)).

Substantively, the State Regulations set out six approved "Methods of Instruction and Assessment" (the Approved Models), which include "Collaborative ESL instruction[,]" "English as a second language[,]" and "Sheltered content instruction[.]" 200 RICR 20-30-3.2(A)(5); *cf.* 200 RICR 20-30-3.10. For example, "'Collaborative ESL instruction' means 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." 200 RICR 20-30-3.2(A)(5)(b). The language of 200 RICR 20-30-3.10—titled "Program Models & Components"—states that "LEAs may choose one (1) or more" of the six Approved Models, "or components from [those] models, . . . *to provide the most appropriate program for each English Language Learner*[.]" 200 RICR 20-30-3.10(A) (emphasis added). In other words, the flexibility granted under this provision must be employed in service of LEAs' obligation to ensure that ELLs "have access to a free, appropriate, public education equal to the education provided to all other students." 200 RICR 20-30-3.1(A)(4). This flexibility also helps LEAs comply with their obligation to consider students' specific characteristics, including their level of English proficiency and their entitlement to special education services, when providing ELL services. *See* 200 RICR 20-30-3.6(A).

However, a fair reading of 200 RICR 20-30-3.10—and of the State Regulations as a whole—makes clear that this flexibility cannot rescue programs that otherwise fail to comply with 200 RICR 20-30-3.1(A)(4), 200 RICR 20-30-3.6(A), or any of the other substantive provisions of the State Regulations. *Cf. Castaneda*, 648 F.2d at 1009 (interpreting "appropriate action" requirement of 20 U.S.C. § 1703(f) as "intended to [ensure] that schools [make] a genuine and

good faith effort, consistent with local circumstances and resources, to remedy the language deficiencies of their students" while also giving schools a "substantial amount of latitude in choosing the programs and techniques they [will] use to meet their obligations"). Otherwise—to give just one example—a program that is not "[a]ppropriately supported, with adequate and effective staff and resources, so that the program may reasonably be expected to be successful[,]" would nonetheless be permissible simply because the individual components the program fails to properly implement can be traced back to one or more of the Approved Models. 200 RICR 20-30-3.1(A)(4). This approach to the State Regulations would produce "an absurd result [and] defeat [their] obvious purpose[s]" of implementing § 16-54-1 and supporting compliance with 20 U.S.C. § 1703.[11] *Craig v. Pare*, 497 A.2d 316, 319 n.4 (R.I. 1985) (citations omitted); *see Martone v.*

[11] In their Reply Memorandum of Law in Support of their Second Motion for Summary Judgment, Petitioners raised essentially this same argument:

> "Any model which 'draws on components of other models' must still comply with the rest of the regulations[.] . . . Nothing in the language of [the provision] that permits use of 'components of models'—or any other section of the regulations—even remotely suggests that a District choosing such an option gets a 'free pass' to ignore the rest of the regulations. . . . There is good reason why no such loophole exists. Permitting Respondent's interpretation of the regulations would render the regulations grossly inadequate to implement federal requirements. As noted at the outset of this Memorandum, both the state's ELL regulations and the federal laws they implement require that the ELL programming authorized by states and offered by Districts be grounded in scientifically based research. There is no scientifically based research on teaching English Language Learners which would support the efficacy of Respondent Providence School District's Consultation Model." Pet'rs' Reply Mem. Law Supp. Second Mot. Summ. J. 12-13; *see id.* at 3 (footnote omitted) ("The stated purpose of the regulations is to ensure compliance with both state and federal law with regard to the rights of ELLs, including Title VI and the EEOA. In *Castaneda v. Pickard*, 648 F.3d 989 (5th Cir. 1981), the court indicated that a three-part test is required to determine such compliance. The court's first task is . . . 'to ascertain that a school system is pursuing a program informed by an educational theory recognized as sound by

Johnston School Committee, 824 A.2d 426, 432 (R.I. 2003) (quoting *Brennan v. Kirby*, 529 A.2d 633, 637 (R.I. 1987)) ("'[W]hen apparently inconsistent statutory provisions are questioned, every attempt should be made to construe and apply them so as to avoid the inconsistency[.]'").

Consequently, the Court agrees with Petitioners that the Council erred when it upheld the Hearing Officer's Ruling that the Collaboration/Consultation Model does not violate the State Regulations. In reviewing the District's use of components from the Approved Models, the Hearing Officer failed to consider whether the resulting Collaboration/Consultation Model complied with the plain language of 200 RICR 20-30-3.1(A)(4). The Hearing Officer also failed to properly consider how the Collaboration/Consultation Model applies to those ELLs who—like X. Doe, Y. Doe, and Z. Doe—are entitled to receive special education services.

The Hearing Officer's Ruling does quote the provisions of 200 RICR 20-30-3.1(A)(4), then codified in the State Regulations as § L-4-1; however, the subsequent analysis does not address the Collaboration/Consultation Model's compliance with those provisions, whether as part of the

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> some experts in the field or, at least, deemed a legitimate experimental strategy.'").

As a result, even in the context of the "three specific issues raised by [Petitioners] in their summary judgment motion[,]" Petitioners' argument that the Collaboration/Consultation Model violated the State Regulations' codification of the *Castaneda* test was still before the Hearing Officer in connection with Petitioners' claim that the Collaboration/Consultation Model was not "an acceptable program model under [200 RICR 20-30-3.10]." (Def. Council's Mem. 12.) Just as importantly, regardless of precisely how the Petitioners formulated their arguments, the Hearing Officer was required to construe the State Regulations as a coherent whole and not "'as if each section were independent of all other sections.'" *Generation Realty, LLC v. Catanzaro*, 21 A.3d 253, 259 (R.I. 2011) (quoting *Sorenson v. Colibri Corp.*, 650 A.2d 125, 128 (R.I. 1994)). This Court is also empowered to address any such legal errors on appeal. *See* § 42-35-15(g) (stating that "[t]he court . . . may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are[,]" *inter alia*, "[i]n violation of constitutional or statutory provisions" or "[a]ffected by other error of law"); *cf. Verizon New England Inc. v. Rhode Island Public Utilities Commission*, 822 A.2d 187, 191 (R.I. 2003) (citations omitted) (stating, in review of Public Utilities Commission's order, that "questions of preemption by federal law are dispositive questions of law and, thus, cannot be waived").

"Program Models and Components" analysis or otherwise. (Ruling Mots. Summ. J. 5-9.) Instead, the entirety of the Commissioner's "Program Models and Components" analysis reads as follows:

> "We also find sufficient evidence to show that the Providence model contains components from the approved models listed in [200 RICR 20-30-3.10]. The model is built upon a framework of close collaboration between ELL and non-ELL teachers who provide scaffolded and differentiated instruction[12] in English throughout a comprehensive system of core academic coursework. The elements of this framework can be found in the models described in [200 RICR 20-30-3.10]." *Id.* at 8.

Once again, a finding that individual components can be traced back to Approved Models does not establish that the Collaboration/Consultation Model itself complies with the requirements set forth at 200 RICR 20-30-3.1(A)(4). And as Petitioners point out, ensuring that a program is "[b]ased on sound educational theory" and "[a]ppropriately supported" is particularly important when the program departs from the terms of the Approved Models endorsed by the State Regulations. 200 RICR 20-30-3.1(A)(4); *see* Pls.' Mem. Law 22.

Similarly, although the Ruling acknowledges that Petitioners' children "have individualized education programs ("IEPs") and receive special education services[,]" those characteristics appeared to play no role at all in the ensuing analysis. Ruling Mots. Summ. J. 1; *see* 200 RICR 20-30-3.6(B) (mandating that an ELL's instructional placement take into account the ELL's right "to participate in other programs and services for which he or she is eligible or entitled

[12] While the term "scaffolded and differentiated instruction" is used in the State Regulations to describe the instruction provided through the "Sheltered content instruction" Approved Model, it does not appear at any point in the Collaboration/Consultation Model. 200 RICR 20-30-3.2(A)(5)(c). Given the Hearing Officer's cursory reference to this term, it is unclear on what basis he concluded that the Collaboration/Consultation Model provides "scaffolded and differentiated instruction" as that term is used in the context of the "Sheltered content instruction" Approved Model, which also contains the substantive requirements of "a comprehensive set of grade-level core academic courses aligned with the WIDA [English language proficiency] standards and Rhode Island's [Common Core State Standards (July, 2010)]" through teachers who "participate in specialized training in ESL methods and techniques." Ruling Mots. Summ. J. 6-7 & n.4; *cf.* 200 RICR 20-30-3.2(A)(5)(c).

to including but not limited to special education, . . . so as to ensure that the student's educational needs are met on a basis equal to that provided to other students"). For example, in concluding that the State Regulations do not require "that all ELL instruction must be delivered by an 'ELL teacher' as that term is defined in [200 RICR 20-30-3.2(A)(4)(d),]" the Hearing Officer pointed out that the "Sheltered Content Instruction" model does not explicitly contemplate the use of "ELL teachers" and stated that "[t]he needs of the ELLs for whom [the 'Sheltered Content Instruction'] model is appropriate do not require the services of a teacher holding the type of certification referenced in [200 RICR 20-30-3.2(A)(4)(d)]." (Ruling Mots. Summ. J. 7.) But the Hearing Officer failed to address whether Petitioners' children were "ELLs for whom [the 'Sheltered Content Instruction'] model is appropriate[,]" or whether they instead "require[d] the services of a[n] [ELL] teacher" as defined by the State Regulations. *Id.* Without these determinations, there was no basis on which the Hearing Officer could conclude that the District had used "components from" the Approved Models "to provide *the most appropriate* program for" Petitioners' children. 200 RICR 20-30-3.10(A) (emphasis added).

By themselves, these omissions constitute error. *See Kyros v. Rhode Island Department of Health*, 253 A.3d 879, 887 (R.I. 2021) (citations omitted) ("[T]he Board is required to 'prepare written findings of fact and law' to support its conclusions and decision. If the Board fails to adequately do so, then the Superior Court may, pursuant to § 42-35-15(g), find the decision erroneous and unsupported by evidence, or arbitrary or capricious."). Our Supreme Court has also '"acknowledge[d] that there are instances in which a remand to an administrative agency may not be the most appropriate remedy[,] including those cases in which a remand would not further the interests of justice . . . [or] provide decisive new information.'" *Id.* (quoting *Champlin's Realty Associates v. Tikoian*, 989 A.2d 427, 449 (R.I. 2010)) (internal quotation marks omitted).

The question of whether the Collaboration/Consultation Model violates the State Regulations presents such an instance: the Hearing Officer's Ruling addressed that legal question on the basis of the parties' Cross-Motions for Summary Judgment and Joint Stipulations of Fact, and Petitioners' claims for compensatory education were deferred pending a decision on those Motions. *See* Providence School District's Second/Cross Mot. Summ. J. 3 n.1; Pet'rs' Mem. Law Supp. Second Mot. Summ. J. 2 n.1. The Court is also mindful of the facts that this case implicates the substantial rights of ELLs with learning disabilities to receive "a free, appropriate, public education equal to the education provided to all other students" and that more than two years elapsed between the parties' submission of their Second Motions for Summary Judgment and the Hearing Officer's Ruling on those Motions. 200 RICR 20-30-3.1(A)(4); *see* Providence School District's Second/Cross Mot. Summ. J. (January 31, 2017); Pet'rs' Reply Mem. Law Supp. Second Mot. Summ. J. and Opp'n Resp't's Second/Cross-Mot. Summ. J. (February 7, 2017); Ruling Mots. Summ. J. (March 8, 2019); *cf. East Greenwich School Department*, 899 A.2d at 1263-65, 1270 (expressing "grave[ ] concern[ ]" with Department of Education's delay in affording plaintiff with Asperger's Syndrome an individualized education program pursuant to the Individuals with Disabilities Education Act). This Court will therefore perform a *de novo* legal analysis of whether the Collaboration/Consultation Model, as applied to Petitioners, violates the State Regulations.[13]

[13] The State Regulations make clear that the placement of any ELL in any ELL instructional program can only occur after a detailed examination of that individual ELL's characteristics to ensure that the ELL's "instructional placement . . . address[es] his or her academic needs." 200 RICR 20-30-3.6(B); *see* 200 RICR 20-30-3.6(A) (mandating a review of "all the student's identification and assessment data[,]" including but not limited to "information on whether the student is receiving" or "may be in need of special education"). As a result, and to avoid "entertain[ing] an abstract question or render[ing] an advisory opinion," the Court's analysis and findings will be limited to those issues necessary to properly address the facet of the Collaboration/Consultation Model that the District used to provide ELL instruction to students who, like Petitioners, were also entitled to receive special education. *H.V. Collins Co. v. Williams*, 990 A.2d 845, 847 (R.I. 2010) (citing *Sullivan v. Chafee*, 703 A.2d 748, 751 (R.I. 1997)).

The Collaboration/Consultation Model is set out in the *Providence Schools English Language Learner Handbook: A Resource for Providence Educators* (Handbook) under the heading of "Collaborative ESL." Parties' Second Joint Stips. Fact ¶ 1; *id.* at Ex. 1 (Handbook), 2. The Collaboration/Consultation Model requires that an ELL endorsed or certified teacher, "known as the Collaborative Teacher," provide thirty to sixty minutes of daily direct instruction to ELLs with "WIDA Literacy Proficiency levels [of] 1.0-2.9 . . . who are in regular education." (Parties' Second Joint Stips. Fact ¶ 3.) In addition, the Collaborative teacher "works with one or more content teachers to collaboratively plan instruction using effective ESL strategies in the content classes." (Handbook 2.) However, for ELL students with English proficiency levels of "2.9 and above," no direct instruction from an ELL endorsed or certified teacher is required. (Parties' Second Joint Stips. Fact ¶ 4.) Most pertinently for Petitioners, there is also no requirement that students in special education classrooms receive any direct instruction from an ELL endorsed or certified teacher. *See* Handbook 2; *see also* Providence School District Mot. Summ. J. Ex. A (Aff. Soledad Barreto), ¶ 5 & n.1.

Instead, the Handbook provides that Consultation, as "a stand-alone service[,]" (Stand-Alone Consultation) may function as the sole means by which students in special education receive ELL instruction. (Handbook 2.) "In the Consultative model, [an] ELL certified case manager meets with the general or special educator(s) working with the student to determine what the student's areas of strength and areas of need are as it relates to academic language development." *Id.* The case manager then "provides written recommendations" to the student's teachers "regarding the specific language development accommodations and modifications that should be provided in order to ensure that the student has meaningful access to the instruction." *Id.* "The ELL certified case manager [also] provide[s] job-embedded coaching support, as needed, to the

general or special educator(s) involved in order to ensure that they understand how and when the accommodations/modifications should be provided." *Id.* The case manager's "consultations" with special educators must occur "at a minimum of every 8 weeks." Parties' Second Joint Stips. Ex. 2. No minimum amount of time per covered student is specified for these consultations, at which each "student's data (formative, diagnostic and/or summative) will be reviewed and changes to the modifications/accommodations will be made to best meet the language development needs of the students." (Parties' Second Joint Stips. Fact ¶ 6; Handbook 2.)

Consequently, the Collaboration/Consultation Model contains no requirement that ELLs who receive special education services (also known as Dually Identified students), such as Petitioners' children, receive any direct instruction from an ESL endorsed or certified teacher, regardless of their level of English proficiency. (Handbook 2; Aff. Soledad Barreto ¶ 5 & n.1.) There is also no requirement that the classroom teachers responsible for implementing the case manager's "written recommendations"—and thus for providing the only ELL instruction that Dually Identified students receive—possess any endorsement, certification, or formal training as an "ELL teacher" as defined by the State Regulations. Handbook 2; *see* 200 RICR 20-30-3.2(A)(4)(d) (defining "ELL teacher" as holding either a "Rhode Island endorsement as an ESL teacher or Bilingual teacher or Content Area teacher of ELLs; or . . . the Rhode Island ESL certificate"). Instead, through the Stand-Alone Consultation approach "housed" within the Collaboration/Consultation Model, classroom teachers must successfully integrate each Dually Identified student's "specific language development accommodations and modifications" into their existing curricula with only the aid of the "job-embedded coaching support" provided "as needed" by a case manager—which may consist of a series of "ongoing consultation[s]" that occur as sporadically as once every eight weeks. (Handbook 2; Parties' Second Joint Stips. Fact Ex. 2.)

In addition, to satisfy the State Regulations, classroom teachers must complete this task at a level of skill and intensity sufficient to transform general or special education into the functional "equivalent" of one to three periods of "ESL instruction" per day. 200 RICR 20-30-3.7; *see* 200 RICR 20-30-3.7(D) (explaining that required periods of "ELL instruction must: 1. Develop the [ELL]'s ability to understand, speak, read, and write academic English, 2. Be aligned with WIDA standards, and 3. Incorporate content knowledge and concepts aligned to Common Core State Standards (July, 2010)"); *cf.* Ruling Mots. Summ. J. 8 ("The language development recommendations of the Collaborative Teacher are applied schedule-wide, not just during the specially-assigned one, two or three ELL instructional periods set forth in [the State Regulations]."). Outside of the eight-week consultation requirement, the Handbook makes no provision for an ELL teacher to monitor the Dually Identified students' instruction and ensure that the daily quota is met. (Handbook 2; Parties' Second Joint Stips. Fact Ex. 2.) Moreover, for Dually Identified students at the two lowest levels of English proficiency, the Stand-Alone Consultation approach allows the daily quota of three periods of ESL instruction to be satisfied without the benefit of the thirty to sixty minutes of direct instruction afforded ELLs "in a regular education classroom" at the same levels of English proficiency. Parties' Second Joint Stips. Fact Ex. 2; *see* 200 RICR 20-30-3.7(E) ("The ELL instructional period shall have the same length as the school's general content-area periods.").

"'*On its face, this practice appears to be counterintuitive*[,]'" and that impression is only reinforced by a comparison with the Approved Models in the State Regulations. *Issa*, 847 F.3d at 136 (quoting *Issa*, 2016 WL 4493202, at *3). For example, under the "Collaborative ESL instruction" model, ELLs receive "ESL instruction taught by a certified and/or endorsed ESL teacher *and* content instruction provided through the school's general-education program." 200

RICR 20-30-3.2(5)(b) (emphasis added). As part of this joint approach, the "certified and/or endorsed ESL teacher works in close collaboration with the general-education teachers in delivering content instruction for ELLs." *Id.* In contrast to Stand-Alone Consultation, in which the case managers do not directly interact with the ELLs under their care, this "close collaboration" thus takes place between teachers who each provide direct instruction to the ELL on a concurrent and ongoing basis, enabling the ELL teacher to ground any collaborative recommendations on first-hand knowledge of the student's needs rather than on indirect feedback. *Id.* Additionally, because direct ESL instruction is provided by a certified teacher, non-ESL-certified teachers working in the approved model need not bear the full burden of complying with the time requirements of 200 RICR 20-30-3.7. Similarly, while "Sheltered content instruction" provides for the integration of ELL instruction into "grade-level core academic courses" that makes the "content comprehensible to [ELLs] through scaffolded and differentiated instruction in English[,]" that instruction must be provided by teachers who "participate in specialized training in ESL methods and techniques[,]" a requirement that is absent from the Stand-Alone Consultation Model. 200 RICR 20-30-3.2(5)(e).

To qualify as a legitimate use of selected components from the Approved Models, the Stand-Alone Consultation approach must fairly constitute "the most appropriate program" for Dually Identified ELLs such as Petitioners. 200 RICR 20-30-3.10. As previously discussed, this requirement also necessarily implicates the State Regulation's mandate that ELLs have access to a "free, appropriate, public education equal to the education provided to all other students." 200 RICR 20-30-3.1(A)(4); *see Castaneda*, 648 F.2d at 1009 (interpreting "appropriate action" requirement of 20 U.S.C. § 1703(f)). On the first prong of the *Castaneda* test as codified at 200 RICR 20-30-3.1(A)(4), and assuming that the Approved Models in the State Regulations are

themselves based on sound educational theory, the Stand-Alone Consultation approach deviates from those models by eschewing both the direct ESL instruction required by the "Collaborative ESL instruction" model and the "specialized training in ESL methods and techniques" required by the "Sheltered content instruction" model. 200 RICR 20-30-3.2(5)(b), (e). Troublingly, these downward departures from the Approved Models occur in a program designed for Dually Identified students, and the additional challenges these students face are highly relevant to whether the Stand-Alone Consultation approach is theoretically sound. *See Issa*, 847 F.3d at 135-36 ("[N]o evidence was adduced that accelerated, unsheltered instruction is accepted as sound educational theory for [students with limited or interrupted formal education.]").

The sole reference to the sound educational theory requirement in the Collaboration/Consultation Model—and in the parties' joint stipulations of fact as a whole—is the Handbook's assertion that "[t]he instructional program and strategies in the classroom are based on sound research regarding second language acquisition." (Handbook 3.) The record before the Court also contains the Affidavit of Soledad Barreto (Barreto),[14] Director of English Language Learners for the District, who states that Stand-Alone Consultation—which she refers to as the "Consultation Model"—"encourages ELL certified teachers to collaborate and consult with general and special educators" and "allows for the educators working with ELLs to implement language development strategies discussed during the consultation throughout [the] entire school

[14] Petitioners dispute the contents of the Affidavit and argue that the Stand-Alone Consultation model must be evaluated based on its description in the Second Joint Stipulation of Facts. (Pls.' Mem. Law Resp. Defs.' Opp'n Appeal 17.) Before the Hearing Officer, the Petitioners similarly objected to the District's attempt to introduce the Affidavit outside the parties' Joint Stipulations of Fact and asked that all arguments based on the Affidavit be stricken from consideration. *See* Pet'rs' Reply Mem. Law Supp. Second Mot. Summ. J. and Opp'n Resp't's Second/Cross-Mot. Summ. J. 1-2. It is unclear if the Hearing Officer considered the Affidavit, as it was not referenced in the Ruling. *See* Ruling Mots. Summ. J. Ultimately, even if the Affidavit is considered, nothing in the Affidavit changes this Court's conclusions.

day rather than during a finite amount of time during the school day." Aff. Soledad Barreto ¶ 7. Barreto goes on to aver that the "Consultation Model is appropriate for ELL students because it provides, through close collaboration, a holistic approach to a student's English language development while still participating in the most appropriate educational setting to meet the child's individual academic and learning needs." *Id.* ¶ 9.

In addressing the theoretical basis for the use of Stand-Alone Consultation to provide services to Dually Identified students, Barreto asserts that

> "[t]he development of the model[] followed research performed by myself, in consultation with members of my staff, over the course of several months. During this time we examined a variety of research based instructional strategies that educators might be coached to utilize during instruction. In addition, I considered federal guidance and I reviewed *Essential Actions: A Handbook for Implementing WIDA's Framework for English Language Development Standards* produced by the WIDA consortium, specifically Actions 14 & 15 in order to incorporate aspects of co-planning and consultation with an ELL teacher into the model." *Id.* ¶ 11.

The only resource specifically identified in the Affidavit is the *Essential Actions* text, a WIDA publication designed to serve as a "Companion to the 2012 Amplification of the [English Language Development] Standards" by setting out "15 Essential Actions . . . [as] a starting point for rich conversations among professionals working with ELLs." (Pet'rs' Mem. Law Supp. Cross-Mot. Summ. J. Opp'n Resp't's Mot. Summ. J. Ex. 5, 1-2.) Among those fifteen "Essential Actions" are "Action 14[:] Coordinate and collaborate in planning for language and content teaching and learning[,]" and "Action 15[:] Share responsibility so that all teachers are language teachers and support one another within communities of practice." *Id.* at 3.

The Court has no doubt that the "aspects of co-planning and consultation" contemplated by these two "Essential Actions" are important parts of successful ELL programs. Aff. Soledad Barreto ¶ 11. But references to collaboration and shared responsibility as general concepts—like

references to unidentified "research based instructional strategies"—do not provide theoretical support for the basic idea underpinning the Stand-Alone Consultation approach: namely, that an LEA can provide effective instruction to Dually Identified students, at all levels of English proficiency, *solely* through the mechanism of non-ESL-certified classroom teachers who periodically consult with ESL-certified case managers. *Id.* Although "close collaboration" between "certified and/or endorsed ESL teacher[s]" and "general-education teachers" plays a key role in the "Collaborative ESL instruction" Approved Model, so too does direct "ESL instruction taught by a certified and/or endorsed ESL teacher[.]" 200 RICR 20-30-3.2(5)(b). It also bears repeating that an LEA's authority under the State Regulations to utilize selected "components" of the Approved Models is circumscribed by the requirement that the resulting program be "the most appropriate" one "for each Language Learner[,]" and nothing in the Affidavit's description of the development of the Stand-Alone Consultation model speaks to research or theory on the specific needs of Dually Identified students. 200 RICR 20-30-3.10(A); *cf. Issa*, 847 F.3d at 136 (quoting *Issa*, 2016 WL 4493202, at *6) (upholding trial court's finding that "'ESL Coordinator['s]'" testimony "'that the 'structured immersion' technique is a sound theory generally for overcoming language barriers'" did not establish that the technique's use in an "'accelerated, credit-recovery program'" was appropriate for students with limited or interrupted formal education).

The Court can only conclude that the Collaboration/Consultation Model, as applied to Petitioners' children through the Stand-Alone Consultation approach, is inadequate to the legally mandated task of "[e]nsur[ing] that English Language Learners have access to a free, appropriate, public education equal to the education provided to all other students." 200 RICR 20-30-3.1(A)(4). There is essentially no evidence in the record of any "sound educational theory" behind the idea that Stand-Alone Consultation could render direct instruction from certified teachers unnecessary

for Dually Identified ELLs, and any potential argument to that effect is undercut by the fact that the Collaboration/Consultation Model mandates periods of direct instruction for ELLs at the lowest levels of English proficiency in general-education classes.[15] 200 RICR 20-30-3.1(A)(4)(a). It is true that a "court's responsibility, insofar as educational theory is concerned, is only to ascertain that a school system is [pursuing] a program informed by an educational theory recognized as sound by some experts in the field or, at least, deemed a legitimate experimental strategy." *Castaneda*, 648 F.2d at 1009. Nevertheless, even this deferential standard of review requires more than buzzwords or conclusory reassurances. *See id.* ("[T]he court must examine carefully the evidence the record contains concerning the soundness of the educational theory or principles upon which the challenged program is based."); *cf. Clift v. Vose Hardware, Inc.*, 848 A.2d 1130, 1133 (R.I. 2004) (upholding motion justice's finding that affidavit, which "merely contained conclusory assertions and suppositions . . . rather than setting forth specific facts[,]" was insufficient to withstand motion for summary judgment).

Even if the Court were to assume for the sake of argument that the use of Stand-Alone Consultation as a language remediation program for Dually Identified ELLs rests on a sound theoretical basis, it is also apparent that the program was not "[a]ppropriately supported, with adequate and effective staff and resources, so that the program may reasonably be expected to be successful[.]" 200 RICR 20-30-3.1(A)(4)(b); *see Castaneda*, 648 F.2d at 1010 ("The court's second inquiry would be whether the programs and practices actually used by a school system are

[15] This discrepancy also implicates the provision of the State Regulations mandating that the placement of an ELL in a particular instructional program must respect the ELL's right "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 educational needs are met on a basis equal to that provided to other students." 200 RICR 20-30-3.6(B)(4).

reasonably calculated to implement effectively the educational theory adopted by the school.").[16] As previously stated, unlike teachers in the "Sheltered content instruction" Approved Model, general and special educators in the Stand-Alone Consultation model need not "participate in specialized training in ESL methods and techniques." 200 RICR 20-30-3.2(5)(e)(3). And unlike the "Collaborative ESL instruction" Approved Model, that sort of specialized training is crucial to the success of the Stand-Alone Consultation model, as general and special educators are expected to provide Dually Identified students with the only ELL instruction those students receive. *See* 200 RICR 20-30-3.2(5)(b).

"As in any educational program, qualified teachers are a critical component of the success of a language remediation program." *Castaneda*, 648 F.2d at 1013. By no means does the Court intend to disparage the qualifications of the District's Stand-Alone Consultation teachers as general and special educators; nevertheless, the Court must recognize that ELL instruction implicates its own unique set of skills. *See id.* at 1012 (noting that "any school district that chooses to fulfill its obligations under [20 U.S.C. §] 1703 by means of a bilingual education program has undertaken a responsibility to provide teachers who are able competently to teach in such a program" and that the record showed that "some of the district's English speaking teachers were inadequately prepared to teach in a bilingual classroom" despite their completion of a "100 hour continuing education course given to teachers already employed in [the district] in order to prepare

[16] It is not clear on the record before the Court whether the Stand-Alone Consultation approach was "employed for a period of time sufficient to give the plan a legitimate trial" and enable an analysis on the third *Castaneda* prong, which requires "results indicating that the language barriers confronting students are actually being overcome[.]" *Castaneda*, 648 F.2d at 1010; *see* 200 RICR 20-30-3.1(A)(4)(c) (requiring that ELL programs be "[p]eriodically evaluated and, if necessary, revised"). In any event, the plain language of the State Regulations indicates that "[a]ll three prongs must be met[.]" *Issa v. School District of Lancaster*, 847 F.3d 121, 134 n.7 (3d Cir. 2017) (citing *Castaneda*, 648 F.2d at 1009-10); *see* 200 RICR 20-30-3.1(A).

them to teach bilingual classes"). A language remediation program cannot reasonably be expected to be successful if it relies on general and special educators obtaining those skills through periodic consultations of unspecified length with ESL-certified case managers.

The Court therefore finds that the District violated the clear and unambiguous language of the State Regulations through its use of the Stand-Alone Consultation model to provide ELL services to Dually Identified students such as Petitioners. Specifically, and despite the State Regulations' provision that any choice of components from the Approved Models be used "to provide the most appropriate program for each" ELL, the District failed to "respect the right[s]" of ELLs to receive special education "so as to ensure that the student[s'] educational needs are met on a basis equal to that provided to other students" and failed to "ensur[e] that programs for English Language Learners are . . . [b]ased on sound educational theory [and] . . . [a]ppropriately supported, with adequate and effective staff and resources, so that the program may reasonably be expected to be successful[.]" 200 RICR 20-30-3.1(A)(4), 3.6(B)(4), 3.10. Having so found, the Court also concludes that the services that the District provided to Petitioners' children under the Stand-Alone Consultation model were insufficient to satisfy the "Time Requirements" of 200 RICR 20-30-3.7, as the Court can conceive of no rational means by which an instructional program that otherwise fails to comply with the substantive requirements of the State Regulations could still be considered "ESL instruction" for purposes of the "Time Requirements" provision. 200 RICR 20-30-3.7.

E

Compensatory Services

As previously discussed, Petitioners' claims for compensatory services have not yet been addressed at the agency level. Accordingly, and as that determination will necessarily involve the

consideration of facts not currently in the record, the issue of compensatory services for Petitioners' children initially must be determined by the Board of Education on remand. *See Champlin's Realty Associates*, 989 A.2d at 448-49 (quoting *Lemoine v. Department of Mental Health, Retardation and Hospitals*, 113 R.I. 285, 290, 320 A.2d 611, 614 (1974)) (characterizing "the authority of the Superior Court to remand for further proceedings under § 42–35–15(g) as 'a broad grant of power . . . to remand, in a proper case, to correct deficiencies in the record and thus afford the litigants a meaningful review'"); *East Greenwich School Department*, 899 A.2d at 1270-71 (directing department of education to afford plaintiff a hearing to "determine, among other corollary issues, what [program] should have been implemented in the past, and should be implemented for the future, so that plaintiff may receive a free, appropriate public education pursuant to the IDEA"); *see also Mr. R.*, 321 F.3d at 20 (remanding compensatory education issue to district court and stating that "[i]f the district court does not believe that the record is sufficient to permit it to make the highly nuanced judgments necessary to resolve the claim for compensatory education, it may remand the matter for further administrative adjudication").

IV

Conclusion

For the foregoing reasons, the Hearing Officer's Ruling and the Council's Decision upholding the Hearing Officer's Ruling are hereby reversed, and this case is remanded to the Board of Education for further proceedings on the issues of compensatory services for Petitioners' children and the potential certification of a class of similarly situated students.

Counsel shall prepare the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**L. Doe, et al. v. Rhode Island Board of Education, et al.**
CASE NO:	**PC-2020-2619**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**June 14, 2022**
JUSTICE/MAGISTRATE:	**Vogel, J.**
ATTORNEYS:	
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For Defendant:	**Paul V. Sullivan, Esq.**
For Interested Party:	**Andrew Henneous, Esq.**