No. _____

In The
Supreme Court of the United States

RITA C. SIMPSON-VLACH, ET AL.,
Petitioners,

v.

MICHIGAN DEPARTMENT OF EDUCATION, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

APPENDIX

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Case No. 22-1724
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RITA C. SIMPSON-VLACH and ALAN SIMPSON-VLACH on behalf of A.S. and M.S.; KATHY BISHOP and CHRISTOPHER PLACE on behalf of C.P. and H.P.,

Plaintiffs-Appellants,

v.

MICHIGAN DEPARTMENT OF EDUCATION; ANN ARBOR PUBLIC SCHOOLS; WASHTENAW INTERMEDIATE SCHOOL DISTRICT; DR. JEANICE KERR SWIFT; DR. MARIANNE FIDISHIN; SCOTT A. MENZEL; NAOMI NORMAN; MICHAEL F. RICE,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

OPINION

Before: COLE, GIBBONS, and READLER, Circuit Judges.

COLE, Circuit Judge. Rita Simpson-Vlach, Alan Simpson-Vlach, Kathy Bishop, and Christopher Place (collectively, "plaintiffs") are parents of children A.S., M.S., C.P., and H.P, all of whom

qualify as students with disabilities under the Individuals with Disabilities Education Act ("IDEA"). Plaintiffs allege that the defendants, local and state education agencies and individuals employed by them, violated the IDEA, the Americans with Disabilities Act ("ADA"), and several related state laws when schools switched to remote instruction in March 2020 due to the COVID-19 pandemic. Plaintiffs also allege that the individual defendants violated the Racketeer Influenced and Corrupt Organizations Act ("RICO") due to their allegedly false assurances made to ensure receipt of IDEA funds that were then misspent. Because plaintiffs have failed to allege necessary elements of constitutional standing that would permit the requested relief, we affirm.[1]

I. BACKGROUND

In March 2020, Ann Arbor Public Schools closed their doors and transitioned students to remote learning due to COVID-19. At the time of this transition, Ann Arbor Public Schools students A.S., M.S., C.P., and H.P. each had an individualized education program ("IEP") that outlined the student-specific goals and services necessary to ensure that each student received a free appropriate public

[1] The Supreme Court recently issued its decision in *Luna Perez v. Sturgis Public Schools*, 143 S. Ct. 859, 865 (2023). The Court explained that the IDEA's exhaustion requirement did not bar Perez's suit seeking compensatory damages under the ADA. *Id.* We decide the present case on standing principles, not exhaustion requirements, and the plaintiffs did not request compensatory damages under the ADA in their complaint. Therefore, *Luna Perez*'s holding does not impact our decision in this matter.

education ("FAPE") as mandated by the IDEA. *See* 20 U.S.C. §§ 1400(d), 1401(14). Notably, none of the students' IEPs in place at the time of the transition to remote learning specified whether the required services needed to be provided in-person. As with all other students in the district, A.S., M.S., and C.P. received remote instruction through May 2021, when schools re-opened for hybrid learning. H.P. participated in remote learning until January 2021 when her mother placed her in a private school. The 2021–2022 school year proceeded primarily in-person, though Ann Arbor Public Schools delayed the return to in-person learning after winter break for one week in January 2022. Since then, there has been no indication that another temporary or extended closure or period of remote instruction has occurred or will occur.

In June 2021, plaintiffs filed a putative class action complaint against the Michigan Department of Education ("MDE"), Washtenaw Intermediate School District ("WISD"), Ann Arbor Public Schools ("AAPS"), AAPS's superintendent Dr. Jeanice Swift, AAPS's Executive Director of Student Intervention and Support Services Dr. Marianne Fidishin, WISD's former interim superintendent Scott Menzel, WISD's current interim superintendent Naomi Norman, and MDE's state superintendent Dr. Michael F. Rice. AAPS, Swift, and Fidishin are collectively referred to as the "AAPS defendants"; WISD, Menzel, and Norman are collectively referred to as the "WISD defendants"; and the MDE and Rice are collectively referred to as the "MDE defendants."

Plaintiffs claim that the transition to remote learning in March 2020 effected a change in placement for students with IEPs, therefore

triggering several of the IDEA's procedural protections. From this premise, plaintiffs' original complaint asserted eight separate claims. The remaining claims[2] on appeal include:

- Count 1: MDE, WISD, and AAPS engaged in systemic violations of the IDEA when they transitioned to remote learning in March 2020 by failing to (1) provide parents with prior written notice of the change in educational placement, (2) provide parents with meaningful participation in decisions regarding changes to their child's IEP, (3) reconvene IEP meetings prior to or shortly following the change in placement, and (4) ensure that students with IEPs could access a FAPE on the same level as their peers without disabilities.

- Count 2: AAPS (and possibly WISD) violated the Michigan Administrative Rules for Special Education ("MARSE").[3]

- Count 4: AAPS and MDE violated Title II of the ADA.

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[2] Plaintiffs' initial complaint also included Count 3: violation of Section 504 of the Rehabilitation Act, Count 6: violation of plaintiffs' Fourteenth Amendment Equal Protection rights under § 1983, and Count 8: conspiracy to violate RICO. Plaintiffs voluntarily dismissed Counts 3, 6, and 8 as to all defendants and Counts 2 and 5 as to the state defendants only.

[3] In the complaint, this count alleges that "defendants" generally failed to comply with MARSE, and later identifies AAPS and MDE specifically. As noted, Plaintiffs dismissed Count 2 against the state defendants, but made no mention of WISD.

• Count 5: AAPS violated the Michigan Persons with Disabilities Civil Rights Act.

• Count 7: Swift, Fidishin, Menzel, Norman, and Rice violated RICO.

Plaintiffs assert that they meet the requirements for a declaratory and injunctive relief class under Federal Rules of Civil Procedure 23(a) and (b)(2). But while the plaintiffs sought preliminary class certification in their motion for a preliminary injunction that was then held in abeyance, no separate motion for class certification has been filed. So no class was ever certified.

Plaintiffs request various forms of relief, including that the court (1) assert jurisdiction; (2) certify a class action; (3) issue several declaratory judgments, including one indicating that the "class members' pendency placement is in-person instruction and services"; and (4) appoint two Special Monitors: (i) one to "oversee the completion of Independent Education Evaluations" for all class members and to "make expert recommendations to the Court regarding compensatory education or pendency payments for the class members to address any regressions and/or loss of competencies[,]" and (ii) another to "oversee the completion of an independent audit of defendants' expenditures of their IDEA Part B Funds from March of 2020 to the present" and ensure that any improperly spent funds "are reimbursed to a monitored account to be spent only upon review and approval by the RICO Special Monitor." (Compl., R. 1, PageID 41–43.)

While the federal litigation was pending, plaintiffs "filed four due process complaints with the State of Michigan Office of Administrative Hearings and Rules against . . . AAPS," one for each student named in the complaint. (Joint Update on Admin. Proceedings, R. 54, PageID 1427.) These administrative due process complaints similarly asserted that the transition to remote learning in March 2020 led to procedural violations of the IDEA and caused harm to students. In November 2021, plaintiffs reached settlement agreements in the administrative proceedings that acknowledged "(1) that the dispute[s] which gave rise to the Due Process Complaint[s] ha[ve] been resolved; and (2) that the Due Process Complaint[s] should be dismissed with prejudice." (Settlement Agreements, R. 54-2, PageID 1435, 1441, 1447, 1452.) Regarding additional claims, all settlement agreements state that they do not:

> [S]et forth any understanding or settlement of any of the Student's allegations regarding procedural and systemic violations under IDEA, discrimination under the Americans with Disabilities Act, the Michigan Persons with Disabilities Civil Rights Act, Section 504 of the Rehabilitation Act, or 42 U.S.C. § 1983, or violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO").

(*Id.* at 1436, 1442, 1448, 1453.) Plaintiffs' attorneys acknowledged that these agreements "achieved a full and complete settlement of all the IDEA issues, [and] all of the FAPE" issues faced by the named plaintiffs but argued that the putative class

members were owed the same relief. (Hr'g Tr., R. 62, PageID 1777–78, 1800–01, 1804, 1818.)

The AAPS, WISD and MDE defendants each filed separate motions to dismiss the complaint. In response to AAPS's temporary delay in returning to in-person instruction in January 2022, plaintiffs filed a motion for a temporary restraining order. The district court held a hearing on these motions, during which the district court expressed concern about plaintiffs' Article III standing and about several elements of the RICO claims, including whether the alleged injury was one to business or property or was too derivative to permit plaintiffs to pursue their RICO claim. Following the hearing, the district court requested supplemental briefing on standing and mootness.

The district court then dismissed the case without prejudice, determining that plaintiffs failed to allege harm sufficient to warrant prospective relief for Counts 1, 2, 4, and 5 and failed to allege causation and redressability with respect to the RICO claim. Plaintiffs appeal.

II. ANALYSIS

A. Standing

We review issues of standing de novo. *Cleveland Branch, N.A.A.C.P. v. City of Parma*, 263 F.3d 513, 523 (6th Cir. 2001). "To establish Article III standing, a plaintiff must show (1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'likel[ihood]' that the injury 'will be redressed by a favorable decision.'" *Susan B. Anthony List v.*

Driehaus, 573 U.S. 149, 157–58 (2014) (alteration in original) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). Like any other essential element of a claim, standing must be pleaded with particularity and conclusory allegations will not suffice. *Binno v. Am. Bar Ass'n*, 826 F.3d 338, 344 (6th Cir. 2016).

1. Counts 1, 2, 4, and 5

The district court determined that the plaintiffs lacked standing with respect to Counts 1, 2, 4, and 5 because they failed to allege an injury that permitted their requested relief. An alleged injury must be concrete, particularized, actual and imminent; it can be neither conjectural nor hypothetical. *Gerber v. Herskovitz*, 14 F.4th 500, 505–06 (6th Cir. 2021) (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016)). To be sufficiently particularized, "an injury 'must affect the plaintiff in a personal and individual way,' not in a general manner that affects the entire citizenry." *Id.* at 506 (internal citations omitted) (quoting *Lujan*, 504 U.S. at 560 n.1). But the injury need not have occurred in the past: "The threat of future harm can satisfy this requirement as long as there is a 'substantial risk' that the harm will occur." *Kanuszewski v. Mich. Dep't of Health & Hum. Servs.*, 927 F.3d 396, 405 (6th Cir. 2019) (quoting *Clapper v. Amnesty Int'l*, 568 U.S. 398, 414 n.5 (2013)); *see also Susan B. Anthony List*, 573 U.S. at 158 (explaining that a future injury must be "certainly impending" or present a "substantial risk" of occurrence (quoting *Clapper*, 568 U.S. at 414 n.5)). Under certain circumstances, an allegation of past injury accompanied by "continuing, present adverse effects"

may also permit a plaintiff to seek declaratory or injunctive relief. *Sullivan v. Benningfield*, 920 F.3d 401, 408 (6th Cir. 2019) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495–96 (1974)).

Importantly, plaintiffs must establish standing for each form of relief they seek, and the type of harm alleged impacts the available relief. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021); *Kanuszewski*, 927 F.3d at 406. While allegations of past injury permit a plaintiff to seek compensatory relief, allegations of ongoing or future harm permit a plaintiff to seek declaratory or injunctive relief. *Kanuszewski*, 927 F.3d at 406; *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 106 (1983).

Here, the complaint repeatedly requests declaratory and injunctive relief. Thus, plaintiffs must plead either a future injury that is "certainly impending" or presents a "substantial risk" of occurrence," *Susan B. Anthony List*, 573 U.S. at 158, or a past injury that presents "continuing, present adverse effects," *Sullivan*, 920 F.3d at 408 (quoting *O'Shea*, 414 U.S. at 495–96).

Beginning with the latter, plaintiffs fail to allege in Counts 1, 2, 4, or 5 continuing harm stemming from the switch to remote instruction in March 2020. Counts 1 and 2 allege that plaintiffs suffered "regressions in skills and loss of competencies regarding the goals and objectives outlined in their IEPs." (Compl., R. 1, PageID 22, ¶¶ 152, 156.) But the complaint does not indicate that these injuries are ongoing. Counts 4 and 5 allege more generally that plaintiffs experienced "harm as set forth above." (*Id.* at PageID 27, ¶¶ 184, 190.) Assuming these statements also refer to regressions in skills and loss

of competencies, there is similarly no mention of ongoing impact. Therefore, plaintiffs cannot pursue declaratory or injunctive relief on these grounds.

Plaintiffs also argue that they have sufficiently pleaded risk of future harm because future school closures are likely based on the "continuing uncertainty of COVID-19 and the ever-present possibility of new variants." (Appellant Br. 7.) But an examination of two seminal Supreme Court cases explains why this allegation is too general to establish that the threatened injury is "certainly impending" rather than merely possible. *Clapper*, 568 U.S. at 409.

First, in *Lyons*, the Supreme Court concluded that Lyons did not show a sufficiently substantial risk of future harm by relying on past experience. 461 U.S. at 105–07. The Court explained that Lyons's fear of being subjected to unconstitutional practices by police officers in the future was too conjectural to establish standing to seek injunctive relief, as Lyons's claim turned on whether he would *again* be stopped for violating a traffic law *and* subject to the same use of force. *Id.* Plaintiffs' claims of future harm in the present case fare no better than Lyons's did. Here, the risk of future harm turns on a hypothetical sequence of events: that students would *again* switch to an extended period of remote instruction, that this switch would constitute a change in placement under their IEP, that the school would fail to follow the IDEA's procedural protections, and that these violations would cause harm in a similar manner. The likelihood of such a sequence of events is no more concrete than the likelihood of the events the Court deemed too speculative in *Lyons*.

Second, in *Clapper*, the Supreme Court determined that the plaintiffs' alleged future injuries were too "highly attenuated" to be "certainly impending." 568 U.S. at 410–11 (outlining the five-step sequence of events necessary to cause an actionable injury). The sequence outlined in the preceding paragraph regarding these plaintiffs' alleged injuries is comparably attenuated. Even if the plaintiffs could establish that the ever-present, ever-changing COVID-19 circumstances create a likelihood of future school closures, they fail to allege that these future transitions to remote instruction would lead to the same alleged procedural violations of the IDEA or the same regressions in skills and competencies allegedly caused by the change to remote instruction in March 2020. Plaintiffs' case is difficult to distinguish from *Lyons* and *Clapper*, so they too have not claimed an injury permitting injunctive or declaratory relief.

Plaintiffs then attempt to side-step the future injury requirement by claiming that their request for a "declaratory judgment that the class members' pendency placement is in-person" is not contingent upon a future school closure because all students must have a current placement. (Compl., R. 1, PageID 41.) This argument stems from an IDEA provision, sometimes referred to as the "stay-put" provision, guaranteeing that, "during the pendency of any proceedings conducted pursuant to this section," students "shall remain in the then-current educational placement of the child." 20 U.S.C. § 1415(j); *see Honig v. Doe*, 484 U.S. 305, 308 (1988) (discussing what is now § 1415(j)). In *Honig*, the Supreme Court acknowledged that the stay-put provision is triggered when a "change in placement"

exceeds ten days. 484 U.S. at 325 n.8. *Honig* did not expressly define a "change in placement," but rather accepted the Department of Education's interpretation that a school's decision to suspend a student for more than ten days qualified as one. *Id.* Reading the statute and *Honig* together, students are to remain in their current educational placement during the pendency of litigation under the IDEA and may invoke the stay-put provision when there is a change in placement that will last more than ten days.

The problem here is that plaintiffs are not asking the court to *invoke* the stay-put provision based on the current litigation or a possible change in placement that will last longer than ten days. Rather, they ask the court to *define* the students' current placement so that students are guaranteed in-person instruction "[i]f and when the stay-put provision is triggered." (Appellant Br. 16.) Plaintiffs acknowledge as much when they describe the requested relief as a way to "establish their educational placement." (*Id.*) But a court does not define a student's educational placement when it issues a stay-put order. Instead, a "student's current pendency placement is the educational placement in the student's last agreed-upon IEP." (*Id.*) *See also* 20 U.S.C. § 1415(j); *N.W. ex rel. J.W. v. Boone Cnty. Bd. of Educ.*, 763 F.3d 611, 617–18 (6th Cir. 2014) (interpreting "placement" in light of the Department of Education's definition found at 34 C.F.R. § 300.116). Here, the plaintiffs ask the court to determine in the first instance which, if any, students' IEPs *require* in-person services, a decision a court is not in the position to make. *Cf.* 34 C.F.R § 300.116 (explaining that a child's placement is

determined by "a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options"). So, plaintiffs' argument that this form of declaratory relief is not contingent upon future closures is neither persuasive nor sufficient to establish standing to proceed.

Further, it is not clear that the initial March 2020 closure would have implicated the stay-put provision. Other courts have determined that changes that affect students with disabilities and students without disabilities alike do not amount to a change in placement and do not activate the stay-put provision. *See N.D. v. Haw. Dep't of Educ.*, 600 F.3d 1104, 1116–17 (9th Cir. 2010) ("To allow the stay-put provisions to apply [to a change that affected all students] would be essentially to give the parents of [children with disabilities] veto power over a state's decisions regarding the management of its schools."). So, even were a future closure likely, it is not clear that the closure would be considered a change of placement under the IDEA.

Additionally, plaintiffs argue that they also seek compensatory relief in the form of the appointment of a Special Monitor to make recommendations regarding compensatory education or pendency payments for putative class members based on regressions in skills resulting from the switch to remote learning in March 2020.[4] Plaintiffs argue

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[4] An award of compensatory education is an equitable form of relief available under the IDEA. *See* 20 U.S.C. § 1415(i)(2)(C)(iii); *see also Bd. of Educ. of Fayette Cnty. v. L.M.*, 478 F.3d 307, 315–18 (6th Cir. 2007). We read pendency payments to relate to the provision of the IDEA that authorizes reimbursement for costs associated with a unilateral private-

that such "compensatory relief" depends on their reportedly successfully alleged past injury.

But the named plaintiffs already received relief—compensatory and otherwise—through their administrative settlement agreements. Plaintiffs attempt to distinguish between the systemic violations pleaded in the putative class action and the individual violations pursued through the administrative remedy, highlighting that the settlement agreements specifically explained that they did "not set forth any understanding or settlement of any of the Student's allegations regarding procedural and systemic violations." (Reply Br. 4 (quoting Settlement Agreements, R. 54-2, PageID 1436).) But plaintiffs fail to explain how their requested relief differs from what they already received, or, proceeding on the assumption that this is a putative class action, how the case can proceed based on a hypothetical class of which the named representatives are no longer a part and about which the district court has made no findings as to class certification.

"A potential class representative must demonstrate individual standing vis-[à]-vis the defendant; he cannot acquire such standing merely by virtue of bringing a class action." *Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410, 423 (6th Cir.

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school placement of a child who was denied a FAPE. *See* 20 U.S.C. § 1412(a)(10)(C); *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239–40 (2009). Both of these forms of relief are distinct from compensatory damages that might be available under the ADA, which were not sought in this matter. *Cf. Luna Perez*, 143 S. Ct. at 865–66 (declining to address whether the compensatory damages sought by Perez were available under the ADA and clarifying only that the exhaustion requirement found in 20 U.S.C. § 1415(*l*) did not bar the claim).

1998). Moreover, when plaintiffs "receive relief before certification," as they have here, "the action, would, under the ordinary rule, become moot absent an exception." *Wilson v. Gordon*, 822 F.3d 934, 944 (6th Cir. 2016) (citing *Brunet v. City of Columbus*, 1 F.3d 390, 399 (6th Cir. 1993)); *see also United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1538 (2018) ("Normally a class action would be moot if no named class representative with an unexpired claim remained at the time of class certification." (citing *Gerstein v. Pugh*, 420 U.S. 103, 110–11(1975))). The named plaintiffs have already been compensated for the past injury claimed here, the district court has made no determinations as to class certification,5 and plaintiffs fail to explain how any of the possible exceptions might apply that would permit a class action to proceed when the named plaintiffs have already received the requested relief. *Cf. Bd. of Sch. Comm'rs of City of Indianapolis v. Jacobs*, 420 U.S. 128, 129 (1975) (determining that an action improperly certified under Rule 23(a) was moot when the named plaintiffs no longer attended the defendant school and therefore no longer had a live case or controversy); *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 537 (1978) ("Although not raised by the parties, [the mootness] issue implicates our jurisdiction."). We are not persuaded that plaintiffs can proceed under this theory because, even though they alleged a past injury, their claim is moot given that the named plaintiffs already received relief and no class has been certified. *Cf. Fox v. Saginaw Cnty.*, --- F.4th ---, Nos. 22-1265/1272, 2023 WL 3143922, at *8-9 (6th Cir. Apr. 28, 2023).

Therefore, we affirm the district court's dismissal of Counts 1, 2, 4, and 5.

2. Count 7: RICO

As to the RICO claim, the district court determined that, while the plaintiffs alleged an ongoing injury, they failed to show causation or redressability. To establish causation, the injury must be "fairly traceable to the challenged action of defendant" rather than the result of "the independent action of some third party not before the court." *Kanuszewski*, 927 F.3d at 412 n. 6 (cleaned up and citation omitted).

Here, plaintiffs bring the RICO claim against the individually named defendants Rice, Swift, Fidishin, Norman, and Menzel, based on their assurances to WISD, the MDE, and the U.S. Department of Education that the districts and state had the required IDEA policies and procedures in place and that they "used interstate wires to defraud plaintiffs of their rights under IDEA." (Compl., R. 1, PageID 32–35.) Plaintiffs further argue that Rice, after making these assurances to the Department of Education, collected IDEA funds via wire fraud and distributed the funds to WISD, who then distributed them to AAPS. AAPS then purportedly used these funds "for unlawful purposes, including but not limited to purchasing personal protective equipment for all staff and students." (*Id.* at 38.) Finally, plaintiffs purport that MDE, WISD, and AAPS did not follow the IDEA's procedures when the schools transitioned to remote learning and as a result, plaintiffs "have been and are continuing to be deprived of their rights under IDEA" and

experienced "significant regressions in skills and loss of competencies." (*Id.* at 38–39, 40.)

Plaintiffs must demonstrate that the defendants' challenged conduct (false assurances via wire fraud) is fairly traceable to the alleged injury (violation of procedural rights under the IDEA and regression in skills and competencies). But as the district court pointed out, the complaint faults the *individuals* for the false assurances, but faults *AAPS*, *WISD*, and *MDE* for the procedural violations of the IDEA and any regressions in skills and loss of competencies. (Op. & Order, R. 73, PageID 1970–71.) Plaintiffs do not contend that the individual defendants themselves took part in actions that caused the alleged injuries to plaintiffs, and so they cannot trace the defendants' challenged conduct to the alleged injury as is required to establish causation. While it is true that the claim is brought against the individuals in their official capacities, the complaint fails to explain how the defendants' roles are tied to or how the defendants are responsible for decisions related to the alleged procedural violations under the IDEA.

Even assuming causation, plaintiffs cannot show that their injury is redressable by the relief sought. To satisfy standing's redressability element, it "must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (quotation marks and citation omitted). Plaintiffs request appointment of a Special Monitor to (1) "oversee the completion of an independent audit of defendants' expenditures of their IDEA Part B Funds from March 2020 to the present," (2) oversee expenditures of IDEA Part B funds for 2021–2022 school year to ensure they were

spent appropriately, and (3) ensure any funds spent on items other than instruction and/or services for students with disabilities are reimbursed to a monitored account and spent only with approval of the Special Monitor. (Compl., R. 1, PageID 42.)

But it is "merely speculative" that this requested relief will address the plaintiffs' purported injuries. Plaintiffs do not show how reimbursement of any misspent funds to a monitored account will make it likely that students will catch up on lost skills, be made whole for alleged IDEA procedural violations, or avoid these types of injuries in the future.

Further, even if the plaintiffs could establish constitutional standing, RICO demands that plaintiffs establish a direct injury from the predicate acts, rather than a derivative injury. *See Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 612 (6th Cir. 2004) (citing *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 267–68 (1992)). In *Anza v. Ideal Steel Supply Corp.*, the Supreme Court determined that the plaintiff could not bring a RICO claim against a competitor on the theory that the competitor was "defrauding the New York tax authority and using the proceeds from the fraud to offer lower prices designed to attract more customers," therefore harming plaintiff's business. 547 U.S. 451, 457–58 (2006). The Court explained that the "direct victim of this conduct was the State of New York," not the plaintiff, and that the harm to the plaintiff's business (allegedly caused by lower prices by the competitor) was "entirely distinct from the alleged RICO violation (defrauding the State)." *Id.* at 458. The Court went on to reason that the defendant "could have lowered its prices for any number of reasons unconnected to the asserted pattern of

fraud." *Id.* Similarly, the Court explained that the plaintiff's "lost sales could have resulted from factors other than petitioners' alleged acts of fraud." *Id.* at 459.

The same is true here. The allegedly false assurances were made to the Department of Education, not to the plaintiffs, meaning that the federal government was the direct victim, whereas the plaintiffs suffered only passed-on injuries. Moreover, defendants could have violated the procedural guarantees of the IDEA for many reasons that do not stem from the false assurances, and the plaintiffs' regression in skills could have resulted from "factors other than [defendants'] alleged acts of fraud." *Id.*

Moreover, while not binding on our court, we also note that several district courts have rejected substantially similar RICO claims. *See J.T. v. de Blasio*, 500 F. Supp. 3d 137, 165–72 (S.D.N.Y. 2020) (dismissing a RICO claim that "fail[ed] in every particular" and "reek[ed] of bad faith and contrivance"), *aff'd in part, dismissed in part sub nom. K.M. v. Adams*, No. 20-4128, 2022 WL 4352040 (2d Cir. Aug. 31, 2022), *petition for cert. docketed*, No. 22-840 (March 3, 2023); *Bills v. Va. Dep't of Educ.*, 605 F. Supp. 3d 744, 757 (W.D. Va. 2022), *appeal docketed*, No. 22-1709 (4th Cir. July 6, 2022); *Carmona v. N.J. Dep't of Educ.*, No. 21-18746, 2022 WL 3646629, at *7–9 (D.N.J. Aug. 23, 2022) (dismissing RICO claims that only pleaded an indirect harm and failed to "plead the existence of an enterprise" or requisite predicate acts with any degree of particularity), *appeal docketed*, No. 22-2874 (3d Cir. Oct. 12, 2022); *Roe v. Baker*, No. 21-11751, 2022 WL 3916035, at *6 (D. Mass. Aug. 31,

2022) (dismissing RICO claims where plaintiffs failed to meet the "bare minimum" requirements for "the litigation equivalent of a thermonuclear device" (quoting *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991)), *appeal docketed*, No. 22-1740 (1st Cir. Oct. 6, 2022).

Because plaintiffs fail to plead the necessary elements to establish standing, we affirm the district court's dismissal of the RICO claim.

B. Mootness

Setting standing aside, the case is also moot with respect to requests for prospective relief. Students have returned to in-person learning, and the chances of another extended closure remain low. *See Resurrection Sch. v. Hertel*, 35 F.4th 524, 530 (6th Cir. 2022) (en banc) (finding a preliminary injunction to be moot because "[w]e are unlikely to see this mandate in a similar form again"). Even though the district court dismissed due to lack of standing, we may affirm based on any ground in the record. *Dixon v. Clem*, 492 F.3d 665, 673 (6th Cir. 2007) (citation omitted).

Mootness derives from Article III's case-or-controversy requirement and mandates "that there be a live case or controversy at the time that a federal court decides the case." *Sullivan*, 920 F.3d at 407, 410 (quoting *Burke v. Barnes*, 479 U.S. 361, 363 (1987)). When assessing whether a case as a whole is moot, we consider "whether there is 'a fair prospect that the [challenged] conduct will recur in the foreseeable future.'" *Resurrection Sch.*, 35 F.4th at 530 (alteration in original) (quoting *Ohio v. U.S.*

Evn't Prot. Agency, 969 F.3d 306, 310 (6th Cir. 2020)).

In *Resurrection School*, we determined that a challenge to a COVID-19-related state-wide mask mandate was moot. *Id.* Specifically, we concluded that it was unlikely that a new mask mandate would be reimposed given "the changed circumstances since the State first imposed its mask mandate," including case numbers, vaccination rates, and treatment options. *Id.* at 529–30; *see also Saint Michael Acad. v. Hertel*, No. 22-1054, 2022 WL 14707052 at *2 (6th Cir. Oct. 26, 2022) (holding that challenges to an expired school shut-down order did not fall within the "capable of repetition, yet evading review" exception to the mootness doctrine because there was "no reasonable expectation or demonstrated probability that the State will reimpose a school shutdown order"). Here, it is just as unlikely that another school closure—particularly one substantially similar to that which began in March 2020—is going to occur, let alone lead to the same alleged IDEA violations. The fact that AAPS closed its schools briefly in January 2022 does not change this outcome. A week-long delay before returning to in-person instruction is different in kind from the unprecedented closures that began in March 2020.

Interestingly, plaintiffs point to this week-long delay as evidence of the likelihood of future harm, but, at another point in their brief, they claim that the lack of additional school closures "is not probative of whether the harm is likely to recur." (Reply Br. 5.) It is difficult to see how more than eighteen months of largely uninterrupted in-person learning is not probative of whether another closure

is likely to recur, while one six-day delay in January 2022 is sufficient to establish a "substantial risk" of future harm. So even if the plaintiffs alleged an injury permitting declaratory or injunctive relief, the case is now moot given that a similar school closure is not reasonably likely to recur.

III. CONCLUSION

For the foregoing reasons, we affirm.

FILED: July 22, 2022

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 21-cv-11532

Judith E. Levy
United States District Judge

Mag. Judge Anthony P. Patti

Rita C. Simpson-Vlach, et al.,
Plaintiffs,

v.

Michigan Department of Education, et al.,
Defendants.

OPINION AND ORDER DISMISSING THIS CASE WITHOUT PREJUDICE FOR LACK OF SUBJECT MATTER JURISDICTION AND DENYING AS MOOT DEFENDANTS' MOTIONS TO DISMISS [20, 34, 38] AND PLAINTIFFS' MOTION FOR AN AUTOMATIC AND PRELIMINARY INJUNCTION [42]

Before the Court are three motions to dismiss filed by the Defendants in this case. (ECF Nos. 20, 34, 38.) The Defendants include a state educational agency, local educational agencies ("LEA"), and individuals affiliated with these agencies who are

being sued in their official capacities. The Plaintiffs are parents of children with disabilities, who bring this action "individually and on behalf of their . . . children." (ECF No. 1, PageID.1.) The Defendants' motions are fully briefed. On January 27, 2022, the Court held a hearing by video conference and heard oral argument.

For the reasons set forth below, the Court finds that the Plaintiffs fail to establish that they have Article III standing as to the remaining counts in this case: Counts 1, 2, 4, 5, and 7. The Plaintiffs' allegations are insufficient to demonstrate that they have standing to pursue the relief they seek in Counts 1, 2, 4, and 5, and to pursue their claim in Count 7. Because the Plaintiffs do not show that they have standing to proceed, the case is DISMISSED WITHOUT PREJUDICE for lack of subject matter jurisdiction. Accordingly, the Defendants' motions to dismiss (ECF Nos. 20, 34, 38) are DENIED AS MOOT. The Plaintiffs' motion for an automatic and preliminary injunction (ECF No. 42)— which was "held in abeyance pending disposition of [the] Defendants' motions to dismiss" (ECF No. 43, PageID.1013)—is also DENIED AS MOOT.

I. Background

A. The Complaint Filed on June 30, 2021

On June 30, 2021, the complaint in this case was filed by Plaintiffs Rita C. Simpson-Vlach, Alan Simpson-Vlach, Kathy Bishop, and Christopher Place. (ECF No. 1.) Plaintiffs are parents and residents of Ann Arbor, Michigan, who bring this

putative statewide class action on behalf of themselves and their children with disabilities: A.S., M.S., C.P., and H.P.[1] (*See id.* at PageID.1, 3–5.)

Defendants are the Michigan Department of Education ("MDE"), the Ann Arbor Public Schools ("AAPS" or "District"), the Washtenaw Intermediate School District ("WISD"), Jeanice Swift (the Superintendent of the AAPS), Marianne Fidishin (the Executive Director of Student Intervention and Support Services for the AAPS), Scott Menzel (the former Interim Superintendent of the WISD), Naomi Norman (the current Interim Superintendent of the WISD), and Michael F. Rice (the State Superintendent for the MDE). (See id. at PageID.1, 5.) Defendants divide themselves into three groups: (1) the State Defendants, which consist of the MDE and Rice; (2) the AAPS Defendants, which consist of the AAPS, Swift, and Fidishin; and (3) the WISD Defendants, which consist of the WISD, Menzel, and Norman. Each group of Defendants filed a motion to dismiss.

In their complaint, Plaintiffs allege that Defendants violated their rights when the AAPS closed in March 2020[2] due to the COVID-19 public

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[1] Rita and Alan Simpson-Vlach are the parents and natural guardians of A.S. and M.S. (*See* ECF No. 1, PageID.3.) Kathy Bishop and Christopher Place are the parents and natural guardians of C.P. and H.P. (*See id.* at PageID.4.)

[2] During the hearing on January 27, 2022, Plaintiffs' counsel stated that the AAPS "made the decision to close the Ann Arbor Public Schools . . . based on the orders by the governor of Michigan" involving "[t]he closure of all non essential industries." (ECF No. 62, PageID.1809–1810.) Plaintiffs' counsel stated that the governor "gave the first executive order"

health crisis and improperly switched from providing in-person instruction and services to providing virtual instruction and services. Plaintiffs allege violations of various state and federal laws, including the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, *et seq*.

Plaintiffs state that under the IDEA, the student Plaintiffs are "children with disabilities"[3] who "are entitled to receive a free and appropriate public education ('FAPE') and related services from the MDE, the WISD and AAPS."[4] (ECF No. 1, PageID.4.)

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on "March 10," which was to take effect on "March 13." *(Id*. at PageID.1810.)

[3] Plaintiffs indicate that "in March of 2020 when AAPS ceased in-person instruction and services due to the COVID-19 pandemic," A.S. was twelve years old,M.S. was nine years old, C.P. was ten years old, and H.P. was seven years old. (ECF No. 1, PageID.3–4.)

[4] In the complaint, Plaintiffs include the following information regarding the student Plaintiffs' eligibility "for special education *from AAPS*" (ECF No. 1, PageID.8, 10–11, 13 (emphasis added)):

* "A.S. is eligible for special education from AAPS due to a specific learning disability. . . . A.S. struggles with focus, generally, and math calculations, specifically, and requires a high degree of individualized attention and instruction." (*Id.* at PageID.8.)

* "M.S. is eligible for special education from AAPS due to a health impairment arising from her medical diagnosis of attention deficit hyperactivity disorder ('ADHD') and her 'limited alertness to education.' . . . M.S. struggles with focus, generally, and reading, specifically . . . ." (*Id.* at Page ID.10.)

* "C.P. is eligible for special education from AAPS due to a health impairment resulting in limited alertness to education. .

Each student Plaintiff has an Individualized Education Plan ("IEP"), which is the "primary mechanism" for ensuring that students with disabilities receive a FAPE.5 (*Id.* at PageID.[5]; *see id.* at PageID.8, 10, 12, 14.) The student Plaintiffs' IEPs from 2019 or 2020 "state[ ] that 'the primary mode of service is directly working with the student'" but "do[ ] not state whether this mode will be in-person or virtual."[6] (*Id.* at PageID.8, 10, 12, 14.)

. . C.P. struggles with reading, writing, perception, fine motor and gross motor skills, mobility, visual motor integration, receptive and expressive speech, and anxiety." (*Id.* at Page ID.11– 12.)

***** "H.P. is eligible for special education from AAPS due to a health impairment arising from her medical diagnosis of [ADHD] and 'limited alertness to education.' . . . H.P. struggles with inattention, hyperactivity, impulsivity, learning and executive functioning problems, reading, writing, math, visual motor integration, social-emotional/behavioral skills, and sensory processing." (*Id.* at Page ID.13.)

[5] Plaintiffs indicate in the complaint that

[a]n IEP is a written statement, prepared for every child with a disability, that sets forth the special education and related services, supplementary aids and services, and program modifications or supports to be provided to the child, or on behalf of the child, to enable that child to achieve a comprehensive set of annual goals and shortterm objectives. (ECF No. 1, Page ID.5.)

[6] The complaint provides the following details regarding each student Plaintiff's IEP and the services necessary to receive a FAPE:

***** "According to A.S.'s October 28, 2019 IEP, A.S. received between fifty-three minutes and an hour and six minutes of resource room instruction per week. . . . A.S. requires direct

With respect to the four student Plaintiffs, the complaint alleges:

> 61. On March 16, 2020, AAPS ceased all in-person education due to the COVID-19 pandemic.
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> 62. As a result of the March 16, 2020 closure of AAPS schools, AAPS altered A.S.'s[, M.S.'s,

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resource room services to accommodate his disabilities so he can receive a FAPE." (ECF No. 1, Page ID.8.)

* "According to M.S.'s February 12, 2020[ ] IEP, M.S. received twenty-thirty minutes of social work services three or four times a month, and one and a half to two and a half hours of resource room instruction for reading a week. . . . M.S. requires direct resource room services and direct social work services to accommodate her disability so she can receive a FAPE." (*Id.* at Page ID.10.)

* "According to C.P.'s April 4, 2019 IEP, C.P. received three to four thirtyminute direct teacher consultant sessions a week, three thirty-minute direct occupational therapy sessions a month, three thirty-minute direct speech and language therapy sessions a month, and three thirty-minute direct social work sessions a month. . . . C.P.'s April 4, 2019 IEP requires direct teacher consultant services, occupational therapy, speech and language therapy, and social work services to accommodate his disability so he can receive a FAPE." (*Id.* at Page ID.12.)

* "According to H.P.'s December 9, 2020 IEP, H.P. received three to four twenty-five-to-thirty-minute sessions of occupational therapy a month, three to four twenty-five-to-thirty-minute sessions of social work services a month, and seven and a half hours of resource room instruction per week. . . . H.P.'s December 9, 2020 IEP requires direct occupational therapy, direct social work services and direct resource room instruction to accommodate her disability so she can receive a FAPE." (*Id.* at Page ID.13–14.)

C.P.'s, and H.P.'s] IEP[s] for the 2019-2020 school year to complete virtual instruction and services without any prior written notice and/or the proper participation of parents.

63. The alterations and concomitant placement of A.S.[, M.S., C.P., and H.P.] at home receiving virtual instruction and services was procedurally defective because AAPS:

> a. Altered A.S.'s[, M.S.'s, C.P.'s, and H.P.'s] IEP[s] to complete virtual instruction without prior written notice or any written notice;
>
> b. Altered A.S.'s[, M.S.'s, C.P.'s, and H.P.'s] IEP[s] without the meaningful participation of [their] parents;
>
> c. Failed to reconvene an IEP meeting at a time that was mutually agreeable with parents prior to, or even soon after, changing A.S.'s[, M.S.'s, C.P.'s, and H.P.'s] placement from in-person instruction and services to home placement with virtual instruction and services;
>
> d. Failed to ensure that A.S.[, M.S., C.P., and H.P.] could access a free and appropriate public education on the same level as [their] non-disabled peers.

64. During the 2019-2020 school year, from March 16, 2020 through June 12, 2020, A.S.

> [, M.S., C.P., and H.P.] attended school at home with virtual instruction and services.
>
> 65. During the 2020-2021 school year, A.S.[, M.S., and C.P.] attended school at home with virtual instruction [and/or services] until May of 2021 when AAPS offered a hybrid option.
>
> * * *
>
> 107. During the 2020-2021 school year, H.P. attended school at home receiving virtual instruction and services until January of 2021 when her mother placed her in a private school.

(*Id.* at PageID.8–9, 15; *see id*. at PageID.10–14.)

In other words, Plaintiffs allege that the AAPS unilaterally changed the location and mechanism of the delivery of instruction and related services from at school/in person to at home/virtual during the 2019–2020 and 2020–2021 school years. Plaintiffs believe this change altered the student Plaintiffs' IEPs and educational placements and affected the student Plaintiffs' access to a FAPE.

Plaintiffs' complaint contains eight counts.[7] In Count 1, Plaintiffs allege that the WISD, AAPS, and MDE committed four "systemic violations" of the IDEA. (*Id.* at PageID.19–22.) In Count 2, Plaintiffs

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[7] The complaint also contains "Class Action Allegations." (ECF No. 1, Page ID.15.) Plaintiffs indicate that they "bring this action on behalf of themselves and all other similarly situated school aged children with disabilities covered by IDEA in Michigan and their parents, for the purpose of asserting the claims alleged in this complaint on a common basis." (*Id.*) Plaintiffs have not filed a motion for class certification, and this case has not been certified as a class action.

allege that "Defendants" violated Rules 300.324 and 300.518 of the Michigan Administrative Rules for Special Education ("MARSE"). (*Id.* at PageID.22–23.) In Count 3, Plaintiffs allege that the AAPS (and possibly the MDE) violated § 504 of the Rehabilitation Act. (See *id.* at PageID.23–25.) In Count 4, Plaintiffs allege that the AAPS (and possibly the MDE) violated Title II of the Americans with Disabilities Act ("ADA"). (*See id*. at PageID.25–27.) In Count 5, Plaintiffs allege that the AAPS (and possibly the MDE) violated the Michigan Persons with Disabilities Civil Rights Act ("PWDCRA"). (*See id.* at PageID.27.) In Count 6, Plaintiffs assert a claim under 42 U.S.C. § 1983 against "Defendants," alleging a Fourteenth Amendment equal protection violation. (*Id*. at PageID.28–29.) In Count 7, Plaintiffs allege that the individual Defendants (Swift, Fidishin, Menzel, Norman, and Rice) violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"). (*See id.* at PageID.29–40.) In Count 8, Plaintiffs assert a RICO conspiracy claim against the individual Defendants. (*See id*. at PageID.40–41.) Plaintiffs allege that Defendants' actions caused them to suffer "damages, including regressions in skills and loss of competencies regarding the goals and objectives outlined in their IEPs." (*Id.* at PageID.22; *see id*. at PageID.29, 40.)

Plaintiffs seek declaratory and injunctive relief. (*See id.* at PageID.2, 5, 41–43.) Plaintiffs also seek fees, costs, and expenses (including attorney fees). (*See id*. at PageID.42.) In the complaint's "Prayer for Relief," Plaintiffs ask that the Court:

1. Assert jurisdiction over this matter;

2. Certify this action as a class action pursuant to Fed. R. Civ. P. 23(a) and (b)(2)[;]

3. Issue a declaratory judgment that the class members' pendency placement is in-person instruction and services;

4. Issue a declaratory judgment that AAPS and other similarly situated LEAs' unilateral change of placement of plaintiffs from in-person instruction and services to virtual instruction and services violated the procedural safeguards of IDEA and discriminated against plaintiffs under IDEA, MARSE, § 504, the ADA, the [PWDCRA] and § 1983;

5. Issue a declaratory judgment that the MDE failed to monitor and provide proper oversight and resources to AAPS and other similarly situated LEAs during the COVID-19 pandemic as required under IDEA and MARSE;

6. Order the MDE, WISD, AAPS and other similarly situated LEAs to comply with the procedural safeguards guaranteed by IDEA for the 2021-2022 school year for the class members unless the U.S. DOE [Department of Education] issues IDEA waivers;

7. Assign a Special Monitor to: a) oversee the completion of Independent Education Evaluations ("IEE") for all the class members to determine regressions and loss of competencies due to the unilateral changes to their IEPs and placements, and reconvene IEP Team meetings

within thirty days of the completion of the IEEs; b) make expert recommendations to the Court regarding compensatory education or pendency payments for the class members to address any regressions and/or loss of competencies; c) ensure the expert recommendations are included in writing in the class members' IEP documents;

8. Require the MDE and its LEAs to comply with IDEA, MARSE, the ADA, § 504, the [PWDCRA] and § 1983 in the event of any future school closures for which the U.S. DOE does not issue IDEA waivers;

9. Assign a RICO Special Monitor to: a) oversee the completion of an independent audit of defendants' expenditures of their IDEA Part B Funds from March of 2020 to the present; b) oversee the defendants' expenditures of their IDEA Part B Funds for the 2021-2022 school year to ensure defendants spend IDEA Part B Funds for instruction and/or services for students with disabilities under IDEA; c) ensure any IDEA Part B Funds that defendants spent on items other than instruction and/or services for students with disabilities under IDEA from March of 2020 through the present are reimbursed to a monitored account to be spent only upon review and approval by the RICO Special Monitor;

10. Declare plaintiffs to be the "substantially prevailing party" (for purposes of IDEA's fee shifting provision);

> 11. Grant leave to plaintiffs to submit a statutory fee application;
>
> 12. Direct defendants to pay for the costs and expenses for maintaining this action, including reasonable attorneys' fees pursuant to 20 U.S.C. § 1415(i)(3)(B);
>
> 13. Award attorneys' fees pursuant to the Rehabilitation Act, the Americans with Disabilities Act, 42 U.S.C. § 1988 and the Michigan Persons with Disabilities Civil Rights Act;
>
> 14. Retain jurisdiction over this action until such time as this Court is satisfied that the systemic violations of the laws and regulations complained of herein have been rectified; and
>
> 15. Grant such other or further relief that the Court may deem just and proper.

(*Id*. at PageID.41–43.)

During the January 27, 2022 hearing, Plaintiffs' counsel informed the Court that Plaintiffs are no longer pursuing Count 8. (*See* ECF No. 62, PageID.1831.) Following the hearing, the Court ordered Plaintiffs to indicate to the Court which counts remain in the case, given "Plaintiffs' counsel's acknowledgement at the oral argument that certain claims cannot be maintained in the Sixth Circuit, as well as counsel's indication that the Release and Settlement Agreements [discussed below] fully redress Plaintiffs' injuries." (ECF No. 64, PageID.1857; *see* ECF No. 69, PageID.1873 & n.1

(stating that Plaintiffs' counsel indicated during the January 27, 2022 hearing "that the Release and Settlement Agreements fully redress Plaintiffs' injuries" and quoting relevant portions of the hearing transcript).) In a document filed on February 17, 2022, Plaintiffs provided the following information regarding the status of each count:

1. Count I: The IDEA cause of action remains as to the systemic violations for named Plaintiffs and both the systemic and FAPE violations for putative class members. Plaintiffs continue to seek prospective, injunctive relief to prevent further systemic violations as set forth in Plaintiffs' Complaint.

2. Count II: Plaintiffs voluntarily dismiss the MARSE Cause of Action in Count II as to State Defendants only.

3. Count III: Plaintiffs voluntarily dismiss the Section 504 claim in Count III as to all Defendants.

4. Count IV: The cause of action under the ADA remains as to the disparate impact of the COVID school closings.

5. Count V: Plaintiffs voluntarily dismiss the PWDCRA claim under Count V as to State Defendants only.

6. Count VI: Plaintiffs voluntarily dismiss the Section 1983 claim in Count VI as to all Defendants.

7. Count VII: Plaintiffs continue to seek prospective, injunctive relief for RICO violations outlined in Count VII.

8. Count VIII: Plaintiffs voluntarily dismiss Count VIII as to all Defendants.

(ECF No. 68, PageID.1868–1869 (emphasis in original).) Thus, the remaining counts in this case are Counts 1, 2, 4, 5, and 7 (but the claims in Counts 2 and 5 are no longer asserted against the State Defendants).

In addition to asking Plaintiffs to clarify which claims they continue to pursue, the Court gave Plaintiffs an opportunity—both during the hearing and after it had concluded—to address issues regarding the justiciability of this case under Article III. Plaintiffs had a chance to make arguments related to Article III justiciability orally (during the hearing) (*see* ECF No. 62, PageID.1800–1801, 1829–1830) as well as in writing (in a supplemental brief). (*See* ECF Nos. 69, 72.)

B. Administrative Proceedings

The complaint states that the parent Plaintiffs "filed . . . administrative due process complaint[s] against defendants but did not exhaust their administrative due process remedies under 20 U.S.C. § 1415(i)(2), on behalf of A.S.[, M.S., C.P., and H.P.], because their claims fall within the exceptions specified by law." (ECF No. 1, PageID.9, 11, 13, 15.)

Regarding the administrative due process complaints, the State Defendants indicate that Plaintiffs initially failed to comply with the

requirement in MARSE Rule 340.1724f that a due process complaint (at the administrative level) be served on both the MDE and the school district because Plaintiffs served four letters that they "intended to be treated as due process complaints" on only the AAPS. (ECF No. 34, PageID.511.) The MDE received Plaintiffs' four proposed due process complaints on August 6, 2021. (*See id.*)

On January 11, 2022, the parties filed a joint update in this case regarding the outcome of the administrative proceedings. (ECF No. 54.) The parties indicate in their filing that

> [o]n August 9, 2021, Plaintiffs filed four due process complaints with the State of Michigan Office of Administrative Hearings and Rules against the Ann Arbor Public Schools ("AAPS"): *In the Matter of R.S.V*[.] *obo M.S.V. v. Ann Arbor Public Schools*, Docket No. 21-017885; *In the Matter of R.S.V. obo A.S.V. v. Ann Arbor Public Schools*, Docket No. 21-017893; *In the Matter of K.B. obo H.P. v. Ann Arbor Public Schools*, Docket No. 21-017895; and *In the Matter of K.B. obo C.P. v. Ann Arbor Public Schools*, Docket No. 21-017897. In November 2021, Plaintiffs and AAPS entered into Release and Settlement Agreements in each of these matters. . . . Pursuant to these Release and Settlement Agreements, Administrative Law Judge Michael J. St. John entered Orders of Dismissal dismissing each matter with prejudice in November 2021.

(*Id.* at PageID.1427–1428.) Plaintiffs note in the parties' filing that each Release and Settlement Agreement contains the following language:

> This Agreement does not set forth any understanding or settlement of any of the Student's allegations regarding procedural and systemic violations under IDEA, discrimination under the Americans with Disabilities Act, the Michigan Persons With Disabilities Civil Rights Act, Section 504 of the Rehabilitation Act or 42 U.S.C. [§] 1983, or violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO").[8]

(*Id.* at PageID.1428.)

Copies of the four Release and Settlement Agreements and the four Orders of Dismissal are attached to the parties' filing as exhibits. (ECF Nos. 54-2, 54-3.) All four Agreements state: "[T]he Parents and the District voluntarily enter into this Agreement to resolve the disputes alleged in the Due Process Complaint regarding the Student's right to a FAPE under IDEA." (ECF No. 54-2, PageID.1433, 1439, 1446, 1451.) Three of the Agreements address the provision of compensatory services.[9] (*See id.* at

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[8] This language does not mention Plaintiffs' MARSE claim, which they assert in Count 2 of the complaint against "Defendants." (ECF No. 1, PageID.22.)

[9] Regarding the provision of compensatory services, the three Agreements provide that (1) the AAPS will evaluate the student to determine whether they need compensatory services to "address possible educational deficits sustained by the Student as a result of the District's transition to virtual instruction on and after March 2020," (2) the AAPS will

PageID.1434, 1440, 1446–1447.) Out of these three Agreements, two of them also provide that the AAPS will pay a certain sum[10] to the parents "as unrestricted funds for the benefit of the Student" and "to compensate Parents for out-of-pocket costs they have incurred for the Student's tutoring during the period when the Student was participating in virtual instruction." (*Id.* at PageID.1434, 1440.) The fourth Agreement—which does not address compensatory services—provides that the AAPS will pay $3,500 to the parents "as unrestricted funds for the benefit of the Student" and "to compensate Parents for tuition expenses incurred by the Parents as a result of the Student's enrollment in private school."[11] (*Id.* at PageID.1452.)

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convene an IEP to provide the results of its evaluation and will offer compensatory services if they are found to be necessary, (3) parents who disagree with the AAPS's evaluation may request an Independent Educational Evaluation ("IEE") at the AAPS's expense, (4) the AAPS will grant any request for an IEE and will reimburse parents for up to $3,000 for the IEE, (5) an IEP will be convened "as soon as possible after the IEE is concluded," and (6) parents reserve the right to file a new due process complaint if the IEE recommends compensatory services but that recommendation is not implemented by the IEP team that meets after the IEE is completed. (ECF No. 54-2, PageID.1434, 1440, 1446–1447.)

[10] One Agreement provides that the AAPS will pay $500 to the parents. (*See* ECF No. 54-2, PageID.1434.) The second Agreement provides that the AAPS will pay $1,000 to the parents. (*See id.* at PageID.1440.)

[11] During the hearing on January 27, 2022, Plaintiffs' counsel agreed with counsel for the AAPS Defendants that the "four plaintiffs have gotten compensatory services" and monetary compensation as part of the settlement of the administrative proceedings. (ECF No. 62, PageID.1797; *see id.* at PageID.1801,

In his November 2021 orders dismissing with prejudice the four administrative matters identified above, Administrative Law Judge St. John notes that the parties "requested that the hearing in . . . [each] matter be dismissed." (ECF No. 54-3, PageID.1457, 1459, 1461, 1463.) The order issued in each matter states that because of the dismissal with prejudice, "we have removed this case from our formal hearing docket, cancelled the prehearing . . . and the hearing . . . and are closing our file in this matter." (*Id.*)

II. Legal Standard

"Under Article III of the Federal Constitution, [federal courts] can only decide 'Cases' or 'Controversies.'" *Thompson v. DeWine*, 7 F.4th 521, 523 (6th Cir. 2021) (alteration added) (quoting U.S. Const. art. III, § 2). "Courts have explained the 'case or controversy' requirement through a series of 'justiciability doctrines,' including, 'perhaps the most important,' that a litigant must have 'standing' to invoke the jurisdiction of the federal courts." *Parsons v. U.S. Dep't of Just.*, 801 F.3d 701, 710 (6th Cir. 2015) (quoting *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 279 (6th Cir. 1997)). "Standing 'goes to [a c]ourt's subject matter jurisdiction.'" *Marks v. Schafer & Weiner, PLLC*, No. 20-11059, 2022 WL 866836, at *5 (E.D. Mich. Mar. 23, 2022) (alteration

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1815, 1818, 1830.) Plaintiffs' counsel indicated that "[t]he FAPE for the named clients is resolved now for the closures that occurred prior to this year." (*Id.* at PageID.1815; *see id.* at PageID.1817–1818, 1830.) Plaintiffs' counsel also indicated that there have been no "compliance problems" with the Release and Settlement Agreements. (*See id.* at PageID.1778.)

in original) (quoting *Loren v. Blue Cross & Blue Shield of Mich.*, 505 F.3d 598, 607 (6th Cir. 2007)). "If a plaintiff cannot establish constitutional standing, his or her claim must be dismissed for lack of subject matter jurisdiction." *Id.* (citing *Loren*, 505 F.3d at 607); *see Glennborough Homeowners Ass'n v. U.S. Postal Serv.*, 21 F.4th 410, 414 (6th Cir. 2021) (stating that "whether a party lacks 'Article III standing is jurisdictional and not subject to waiver'" (quoting *LPP Mortg., Ltd. v. Brinley*, 547 F.3d 643, 647 (6th Cir. 2008))).

The Sixth Circuit states that

> [t]o establish standing, [the plaintiff] must meet three requirements: (1) "injury in fact—a harm that is both [(a)] concrete [and particularized,] and [(b)] actual or imminent, not conjectural or hypothetical," (2) causation—a "fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant," and (3)"redressability—a substantial likelihood that the requestedrelief will remedy the alleged injury in fact."

Babcock v. Michigan, 812 F.3d 531, 539 (6th Cir. 2016) (alterations added) (quoting *Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 771 (2000)); *Buchholz v. Meyer Njus Tanick, PA*, 946 F.3d 855, 861 (6th Cir. 2020); *see Sullivan v. Benningfield*, 920 F.3d 401, 407–08 (6th Cir. 2019) ("'In the context of claims for injunctive or declaratory relief,' the threatened injury in fact must be 'concrete and particularized,' as well as 'actual and imminent, not conjectural or hypothetical[.]'" (alteration in original) (quoting *Sumpter v. Wayne*

Cty., 868 F.3d 473, 491 (6th Cir. 2017))). "Each requirement is 'an indispensable part of the plaintiff's case' and 'must be supported in the same way as any other matter on which the plaintiff bears the burden of proof.'" *Midwest Media Prop., L.L.C. v. Symmes Twp., Ohio*, 503 F.3d 456, 461 (6th Cir. 2007) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). "Whether a plaintiff has standing to sue is 'determined as of the time the complaint is filed.'" *Sullivan*, 920 F.3d at 407 (quoting *Cleveland Branch, N.A.A.C.P. v. City of Parma*, 263 F.3d 513, 524 (6th Cir. 2001)).

Regarding the first standing requirement of an injury in fact, "[a] concrete injury is . . . 'real and not abstract,'" *Buchholz*, 946 F.3d 861 (citing *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016)), and "must actually exist." *Spokeo, Inc.*, 578 U.S. at 340 (internal citation omitted). "To qualify as particularized, an injury 'must affect the plaintiff in a personal and individual way,' *Lujan*, 504 U.S. at 560 n.1, . . . not in a general manner that affects the entire citizenry, *Lance v. Coffman*, 549 U.S. 437, 439 . . . (2007)."[12] *Gerber v. Herskovitz*, 14 F.4th 500, 506

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[12] That Plaintiffs bring this case as a putative class action does not excuse them from the requirement to allege a particularized injury for purposes of Article III standing. "A potential class representative must demonstrate individual standing." *Thompson v. Love's Travel Stops & Country Stores, Inc.*, 748 F. App'x 6, 10 (6th Cir. 2018) (quoting *Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410, 423 (6th Cir. 1998)). And "'named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'" *In re Packaged Ice Antitrust Litig.*, 779 F. Supp. 2d 642, 657 (E.D. Mich. 2011) (quoting *Lewis v. Casey*, 518 U.S. 343, 347 (1996)).

(6th Cir. 2021), *cert. denied sub nom. Brysk v. Herskovitz*, 142 S. Ct. 1369 (2022), and *cert. denied*, No. 21-1263, 2022 WL 1528419 (U.S. May 16, 2022). "Standing can exist even if the alleged injury 'may be difficult to prove or measure.'" *Gamboa v. Ford Motor Co.*, 381 F. Supp. 3d 853, 886 (E.D. Mich. 2019) (quoting *Spokeo, Inc.*, 578 U.S. at 341–42).

"The threat of future harm can satisfy th[e injury-in-fact] requirement as long as there is a 'substantial risk' that the harm will occur," but "'[a]llegations of *possible* future injury' are not sufficient." *Kanuszewski v. Mich. Dep't of Health & Hum. Servs.*, 927 F.3d 396, 405 (6th Cir. 2019) (second alteration in original) (emphasis in original) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 414 n.5 (2013)). "[A] yet-to-happen 'injury must be *certainly impending* to constitute injury in fact[.]'" *Ass'n of Am. Physicians & Surgeons v. U.S. Food & Drug Admin.*, 13 F.4th 531, 545 (6th Cir. 2021) (emphasis in original) (quoting *Clapper*, 568 U.S. at 409). "The Supreme Court has noted that 'a highly attenuated chain of possibilities [ ] does not satisfy the requirement that threatened injury must be certainly impending.'" *Kanuszewski*, 927 F.3d at 405–06 (alteration in original) (quoting *Clapper*, 568 U.S. at 410).

The type of harm alleged—(1) past harm or (2) ongoing or future harm—"affects the type of relief available," so "[t]he distinction between [these] harms is significant." *Id.* at 406. The Sixth Circuit instructs that

> [p]ast harm allows a plaintiff to seek damages, but it does not entitle a plaintiff to seek injunctive or declaratory relief. This is because

> the fact that a harm occurred in the past "does nothing to establish a real and immediate threat that" it will occur in the future, as is required for injunctive relief. *City of Los Angeles v. Lyons*, 461 U.S. 95, 106, 103 S. Ct. 1660, 75 L.Ed.2d 675 (1983). Obtaining standing for declaratory relief has the same requirements as obtaining standing for injunctive relief. *National Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 279 (6th Cir. 1997) ("When seeking declaratory and injunctive relief, a plaintiff must show actual present harm or a significant possibility of future harm in order to demonstrate the need for pre-enforcement review.").

Id.; *see Ass'n of Am. Physicians & Surgeons*, 13 F.4th at 540 (stating that "a completed injury may give a plaintiff the right to seek damages, [but] it does not alone give the plaintiff the right to seek an injunction" (citing *Lyons*, 461 U.S. at 109)); *Sullivan*, 920 F.3d at 408 ("'Past exposure to illegal conduct' is insufficient to demonstrate an injury in fact that warrants declaratory or injunctive relief unless the past injury is accompanied by 'continuing, present adverse effects.'" (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495–96 (1974); *Grendell v. Ohio Sup. Ct.*, 252 F.3d 828, 832 (6th Cir. 2001))).

As for the second requirement of standing, "[c]ausation exists if the injury is one 'that fairly can be traced to the challenged action of the defendant.'" *Gamboa*, 381 F. Supp. 3d at 886 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41 (1976)). Causation in this context is "'not focused on whether the defendant "caused" the plaintiff's injury in the liability sense; the plaintiff need only allege "injury

that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.'" *Id.* (quoting *Wuliger v. Mfrs. Life Ins. Co.*, 567 F.3d 787, 796 (6th Cir. 2009)).

To meet the third requirement of standing involving redressability, "it must be *likely*, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Amiri v. Nielsen*, 328 F. Supp. 3d 761, 767 (E.D. Mich. 2018) (emphasis in original) (quoting *Lujan*, 504 U.S. at 561). "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court." *Glennborough Homeowners Ass'n*, 21 F.4th at 417 (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998)). "[A] 'remedy must be "limited to the inadequacy that produced [a plaintiff's] injury in fact."'" *Ass'n of Am. Physicians & Surgeons*, 13 F.4th at 540 (second alteration in original) (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018)). To demonstrate redressability for purposes of Article III standing,

> [t]he plaintiff must show that each requested remedy will redress some portion of the plaintiff's injury. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352–53, 126 S. Ct. 1854, 164 L.Ed.2d 589 (2006). Conversely, the plaintiff cannot seek a remedy that has no ameliorative effects on that injury. *See California*, 141 S. Ct. at 2116. While, for example, a completed injury may give a plaintiff the right to seek damages, it does not alone give the plaintiff the right to seek an injunction. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 109, 103 S. Ct. 1660, 75 L.Ed.2d 675

> (1983). Likewise, a plaintiff cannot "combin[e] a request for injunctive relief for which he *has* standing with a request for injunctive relief for which he *lacks* standing." *Salazar v. Buono*, 559 U.S. 700, 731, 130 S. Ct. 1803, 176 L.Ed.2d 634 (2010) (Scalia, J., concurring in the judgment); *see Lewis*, 518 U.S. at 357, 116 S. Ct. 2174.

Id. (second alteration in original) (emphasis in original).

"The plaintiff carries the burden of establishing th[e] three elements" of standing, *Buchholz*, 946 F.3d at 861, as "the part[y] invoking federal jurisdiction." *Kanuszewski*, 927 F.3d at 405 (citing *Shearson v. Holder*, 725 F.3d 588, 592 (6th Cir. 2013)). Regarding this burden, the Sixth Circuit states:

> A plaintiff must demonstrate standing for each claim she seeks to press and for each form of relief she seeks. *Id.* at 2208. At the pleading stage, that burden requires a "plaintiff[ ] to clearly allege facts that demonstrate each element of standing." *Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 386 (6th Cir. 2020) (citing *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, 136 S. Ct. 1540, 194 L.Ed.2d 635 (2016)); *see also Ward v. Nat'l Patient Acct. Servs. Sols., Inc.*, 9 F.4th 357, 363 (6th Cir. 2021) (requiring the plaintiff to "clearly assert in his complaint" the harm he suffered from an underlying legal violation). This standard aligns with the one governing motions to dismiss under Federal Rule of Civil Procedure 12(b)(6), meaning the [plaintiff] cannot rely on general or

> conclusory allegations in support of its standing, but instead must assert a plausible claim for why it has standing to pursue its . . . claim. *Ass'n of Am. Physicians & Surgeons v. FDA*, 13 F.4th 531, 544 (6th Cir. 2021).

Glennborough Homeowners Ass'n, 21 F.4th at 414 (first alteration in original); *see Binno v. Am. Bar Ass'n*, 826 F.3d 338, 344 (6th Cir. 2016) ("Conclusory allegations do not satisfy the requirements of Article III." (citing *Warth v. Seldin*, 422 U.S. 490, 508 (1975))).

III. Analysis

In their motion to dismiss, the AAPS Defendants argue that student Plaintiff H.P. lacks standing to bring any claims because H.P.'s parents switched her from a public school to a private school in January 2021. For the reasons set forth below, the Court finds that Plaintiffs fail to show that they have Article III standing with respect to all of their remaining claims (not just the ones asserted by H.P.). Plaintiffs' allegations are insufficient to establish standing as to the relief they seek in Counts 1, 2, 4, and 5, and as to their RICO claim in Count 7.

A. The Parties' Arguments Regarding Article III Standing

The AAPS Defendants argue that H.P.'s claims should be dismissed because H.P. does not have standing to bring a claim for compensatory services given that she is "no longer enrolled in the District."

(ECF No. 34, PageID.523; *see id.* at PageID.524.) The AAPS Defendants indicate that since January 2021, H.P. has been "attend[ing] the Daycroft Montessori School, a private program located within the Dexter Community School District." (*Id.* at PageID.509, 523 (citing ECF No. 36, PageID.598, Fidishin Decl., ¶ 28).) The AAPS Defendants state that "students who have been voluntarily placed in a private program do not have an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school." (*Id.* at PageID.523 (citing 34 C.F.R. § 300.137).) The AAPS Defendants also state that "[a] student with a disability parentally placed in a non-public school is not entitled to FAPE, ESY [Extended School Year[13]] services or compensatory education services." (*Id.* (citing ECF No. 36, PageID.598, Fidishin Decl., ¶ 30).) The AAPS Defendants note that H.P. "has not been re-enrolled in the District." (*Id.* at PageID.524 (citing ECF No. 36, PageID.599, Fidishin Decl., ¶ 32).)

In their response to the AAPS Defendants' motion to dismiss, Plaintiffs argue that "H.P. has standing to pursue compensatory services for the AAPS[ ] Defendants['] violation of IDEA procedural safeguards." (ECF No. 46, PageID.1146.) Plaintiffs reference a United States Supreme Court case called *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 367 (1985), and a Second Circuit case called *Ventura de Paulino v.*

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[13] According to the AAPS Defendants, Extended School Year "is a service offered to students who may regress in their educational skills without additional education during the summer." (ECF No. 34, PageID.502; *see* ECF No. 36, PageID.594–595.)

N.Y.C. Dep't of Educ., 959 F.3d 519, 531 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 1075 (2021), *reh'g denied*, 141 S. Ct. 1530 (2021). (*See* ECF No. 46, PageID.1146.) But Plaintiffs do not explain how these cases apply. (*See id.*)

From what the Court can tell from its own review of the cases, neither case cited by Plaintiffs addresses the issue of standing. In *Sch. Comm. of Town of Burlington, Mass.*, the Supreme Court considered the retroactive reimbursement to parents for private school tuition and related expenses when a court determines that the parents' private school placement was proper and "that an IEP calling for placement in a public school was inappropriate." 471 U.S. at 370. In *Ventura de Paulino*, the Second Circuit considered (1) "whether under the 'stay-put' provision of the IDEA parents [of a child enrolled in a private school] who unilaterally enroll their child in a new private school and challenge the child's IEP are entitled to public funding for the new school during the pendency of the IEP dispute" if "the educational program being offered at the new school is substantially similar to the program that was last agreed upon by the parents and the school district and was offered at the previous school"; and (2) "whether the fact that the school district has authority to decide how the child's agreed-upon educational program is to be provided during the pendency of an IEP dispute means that the parents also have such authority." 959 F.3d at 524–25.

In their reply, the AAPS Defendants argue that because Plaintiffs' counsel "concede that HP is no longer enrolled in the District," counsel "are forced to pivot and state that they are now seeking the previously unpled remedy of reimbursement for

private school tuition for this student." (ECF No. 49, PageID.1230 (citing ECF No. 46, PageID.1146).) The AAPS Defendants indicate that Plaintiffs filed an amended due process complaint (at the administrative level) on September 21, 2021 that "sought tuition reimbursement rather than the remedies set forth in HP's original due process complaint."[14] (*Id.* at PageID.1231 n.7 (citing ECF No. 50, PageID.1236, Fidishin Supplemental Decl., ¶ 9; ECF No. 50-8).) The AAPS Defendants state that "[n]o leave to amend has been sought here." (*Id.*) The AAPS Defendants are correct that Plaintiffs have not requested permission to amend the complaint in this case to seek tuition reimbursement.

B. Plaintiffs' Standing Under Article III

In their filings, Plaintiffs and the AAPS Defendants do not address the requirements for standing under Article III. "Because standing doctrine comes from Article III's case-or-controversy requirement, it is jurisdictional and must be addressed as a threshold matter." *Kanuszewski*, 927 F.3d at 405 (citing *Nikolao v. Lyon*, 875 F.3d 310, 315 (6th Cir. 2017)). In light of this guidance from the Sixth Circuit, the Court considers whether Plaintiffs—not just student Plaintiff H.P.—have

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[14] One of the Release and Settlement Agreements discussed above provides that the AAPS will pay the parents of a student $3,500 "to compensate Parents for tuition expenses incurred by the Parents as a result of the Student's enrollment in private school." (ECF No. 54-2, PageID.1452.) During the January 27, 2022 hearing, Plaintiffs' counsel agreed that H.P.'s parents received "some tuition reimbursement" through the settlement at the administrative level. (ECF No. 62, PageID.1830.)

standing to pursue their remaining claims and the relief they seek as to each claim.

As noted, Plaintiffs in this case seek declaratory and injunctive relief. (*See* ECF No. 1, PageID.2, 5, 41–43.) Plaintiffs state in their complaint filed on June 30, 2021 that they "were denied their rights under [certain state and federal laws] for the 2019-2020 and 2020-2021 school years by defendants" and that they "seek declaratory and injunctive relief to enjoin defendants from violating their procedural and substantive rights under [these laws]." (*Id.* at PageID.2.) The Court now considers whether each of Plaintiffs' claims independently meets the requirements of standing and "whether the alleged harm [in each claim] affords Plaintiffs standing to seek injunctive and declaratory relief[.]" *Kanuszewski*, 927 F.3d at 406.

i. Count 1: Systemic Violations of the Individuals with Disabilities Education Act ("IDEA")

In Count 1, Plaintiffs allege that the WISD, AAPS, and MDE committed "systemic violations" of the IDEA. (ECF No. 1, PageID.19–22.) The alleged systemic violations involve (1) the WISD's and AAPS's failure to give Plaintiffs prior written notice of school closures and alterations of the student Plaintiffs' IEPs and school placements, (2) the WISD's and AAPS's failure to maintain the student Plaintiffs' pendency placements and to ensure that "the parents of each child with a disability" were part of any IEP team that made decisions on educational placement in March 2020, (3) the AAPS's failure to "reconvene IEP Team Meetings to

change [the student P]laintiffs' IEP[s] to provide for complete virtual instruction and services," and (4) "Defendants[']"[15] failure to ensure that "children with disabilities had appropriate access to the same educational opportunities as their nondisabled peers." (*Id.* at PageID.20–22.) Plaintiffs also allege that the MDE "failed to appropriately monitor and conduct oversight of its LEAs, including the WISD and AAPS, to ensure they complied with IDEA's procedural safeguards upon the March 2020 closing of its schools." (*Id.* at PageID.20–21.)

Plaintiffs state in Count 1 that "Defendants' actions have caused plaintiffs' damages, including regressions in skills and loss of competencies regarding the goals and objectives outlined in their IEPs." (*Id.* at PageID.22.) Plaintiffs state that they seek relief under the IDEA that includes "injunctive relief declaring that the class members' pendency placement is in-person instruction and requiring the MDE and its LEAs to comply with IDEA in the event of any future school closures for which the U.S. DOE does not issue IDEA waivers." (*Id.* at PageID.21.)

Plaintiffs have alleged an injury in fact in Count 1 because they allege that they were deprived of their rights under the IDEA and suffered "regressions in skills and loss of competencies regarding the goals and objectives outlined in their IEPs." (*Id.* at PageID.22.) But Plaintiffs lack standing to pursue a claim for declaratory or injunctive relief in Count 1 because they do not allege ongoing or future harm. There is no indication

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[15] Defendants" appears to refer to the WISD, AAPS, and MDE because those Defendants are mentioned in the paragraph immediately preceding the one quoted above. (*See* ECF No. 1, PageID.21–22, ¶¶ 150–151.)

in Plaintiffs' complaint that the alleged IDEA violations or the regressions in skills and loss of competencies are an actual or continuing harm, and Plaintiffs do not allege that they face a "substantial risk" of future harm. *Kanuszewski*, 927 F.3d at 405 Plaintiffs state that they seek relief "in the event of any future school closures" (ECF No. 1, PageID.21); however, Plaintiffs do not allege that future school closures are a real or immediate threat.

Instead of relating to actual or future harm, Plaintiffs' allegations relate to past violations and injuries from the two school years that preceded the filing of their complaint. Plaintiffs' allegations involve the AAPS's closure in March 2020 and the "alteration of [the student P]laintiffs' IEPs and school placements from in-person instruction and services to virtual instruction or [sic] services," among other challenged acts (or failures to act) related to the March 2020 closure. (*Id.* at PageID.20; *see id.* at PageID.21–22.) Moreover, Plaintiffs do not allege that the student Plaintiffs were receiving solely virtual instruction and services when the complaint was filed on June 30, 2021. Instead, Plaintiffs indicate in the complaint that A.S., M.S., and C.P. received virtual instruction and/or services at home *until May 2021*, when the AAPS offered a hybrid option (*see id.* at PageID.9, 11, 13), and that H.P. received virtual instruction and services at home "*until January of 2021* when her mother placed her in a private school." (*Id.* at PageID.15 (emphasis added).) Because Plaintiffs allege past harm in Count 1, they do not have standing to pursue declaratory or injunctive relief with respect to their IDEA claim in this count.

ii. Count 2: Rules 300.324 and 300.518 of the Michigan Administrative Rules for Special Education ("MARSE")

In Count 2, titled "Violation of MARSE § 300.324," Plaintiffs allege that "defendants[16] failed to provide plaintiffs procedural safeguards upon the termination of in-person instruction in March of 2020." (*Id.* at PageID.22.) Plaintiffs allege that "Defendants" violated "§ 300.518 of MARSE"[17] by

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[16] Plaintiffs voluntarily dismissed their MARSE claim in Count 2 as to the State Defendants. (*See* ECF No. 68, PageID.1868.) As for the AAPS, the Release and Settlement Agreements between Plaintiffs and the AAPS do not indicate that the Agreements have no impact on Plaintiffs' MARSE claim (*see* ECF No. 54), so it is unclear whether Plaintiffs continue to assert this claim against the AAPS.

[17] The Court notes that Plaintiffs fail to reference an existing MARSE Rule in the complaint. The MARSE's first rule is "MARSE R 340.1701 Assurance of compliance." *Michigan Administrative Rules for Special Education (MARSE) With Related IDEA Federal Regulations*, Michigan Department of Education Office of Special Education (July 19, 2022), https://www.michigan.gov/documents/mde/MARSE_Supplemented_with_IDEA_Reg s_379598_7.pdf; *see Perez, Next Friend of Perez v. Sturgis Pub. Schs.*, No. 1:18-cv- 1134, 2019 WL 8105854, at *2 (W.D. Mich. June 20, 2019) (citing the MARSE as "MARSE Rules 340.1701, [ ]*et seq.*"), *report and recommendation adopted sub nom. Perez, next friend of Perez v. Sturgis Pub. Schs.*, No. 1:18-cv-1134, 2019 WL 6907138 (W.D. Mich. Dec. 19, 2019), *aff'd sub nom. Perez v. Sturgis Pub. Schs.*, 3 F.4th 236 (6th Cir. 2021). Therefore, it appears that the portions of the MARSE that Plaintiffs cite—Rules 300.324 and 300.518—do not exist.

In their response to the WISD Defendants' motion to dismiss, Plaintiffs do not contest that their references to the MARSE are incorrect. (*See* ECF No. 44, PageID.1023 n.1.) Plaintiffs state in footnote 1 of their response that the

"fail[ing] to comply with the procedural requirements for prior written notice, educational placements, pendency placements, IEP Team Meetings and equal access to instruction and services for plaintiffs." (*Id.*) Plaintiffs state that "Defendants' actions caused plaintiffs' damages, including regressions in skills and loss of competencies regarding the goals and objectives

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> WISD points out that Plaintiffs mistakenly cited MARSE 300.324 and 300.518 in its heading for Count Two of their Complaint. Plaintiffs will file an Amended Complaint to correct the heading and any other incorrect citations to MARSE after the hearing on all defendants' motions to dismiss if granted leave to do so by Judge Levy.

(*Id.*) During the hearing on January 27, 2022, Plaintiffs' counsel indicated that Count 2 involves "MARSE Rule 340.1701, MARSE Rule 340.1701 A, B, C." (ECF No. 62, PageID.1825.) But as of the date of this opinion and order, Plaintiffs have not sought leave to amend the complaint to correct their references to the MARSE in Count 2.

Despite this defect in Plaintiffs' complaint, the Court conducts a standing analysis as to Plaintiffs' MARSE claim in Count 2 as if Plaintiffs had referenced an actual MARSE rule because the "standing analysis does not consider the merits of Plaintiffs' claims." *Kanuszewski v. Mich. Dep't of Health & Hum. Servs.*, 927 F.3d 396, 407 (6th Cir. 2019); *see Warth v. Seldin*, 422 U.S. 490, 500 (1975) (stating that "standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal" (citing *Flast v. Cohen*, 392 U.S. 83, 99 (1968))); *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 800 (2015) ("[O]ne must not 'confus[e] weakness on the merits with absence of Article III standing.'" (second alteration in original) (quoting *Davis v. United States*, 564 U.S. 229, 249 n.10 (2011); citing *Warth*, 422 U.S. at 500)). Even if Plaintiffs had referenced existing portions of the MARSE, their allegations in Count 2 do not give them standing to seek declaratory or injunctive relief as to their MARSE claim, as discussed above.

outlined in their IEPs." (*Id.*) Plaintiffs indicate in Count 2 that they seek various forms of declaratory and injunctive relief.[18] (*See id.* at PageID.22–23.) Plaintiffs do not have standing to pursue declaratory or injunctive relief with respect to their MARSE claim in Count 2. Plaintiffs have alleged an injury:

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[18] Plaintiffs' request for relief in Count 2 is as follows:

> All class members seek injunctive relief requesting that the Court: 1) Issue a declaratory judgment that the class members' pendency placement is in-person instruction and services; 2) Issue a declaratory judgment that AAPS and other similarly situated LEAs' unilateral change of placement of plaintiffs from in-person instruction and services to virtual instruction and services violated the procedural safeguards of MARSE; 3) Issue a declaratory judgment that the MDE failed to monitor and provide proper oversight and resources to AAPS and other similarly situated LEAs during the COVID-19 pandemic as required under IDEA and MARSE; 4) Order the MDE and AAPS and other similarly situated LEAs to comply with the procedural safeguards guaranteed by MARSE for the 2021-2022 school year for the class members unless the U.S. DOE issues IDEA waivers; 5) Assign a Special Monitor to: a) oversee the completion of Independent Education Evaluations ("IEE") for all the class members to determine regressions and loss of competencies due to the unilateral changes to their IEPs and placements, and reconvene IEP Team meetings within thirty days of the completion of the IEEs; b) make expert recommendations to the Court regarding compensatory education or pendency payments for the class members to address any regressions and/or loss of competencies; c) ensure the expert recommendations are included in writing in the class members' IEP documents; and 6) Require the MDE and AAPS and other similarly situated LEAs to comply with MARSE in the event of any future school closures for which the U.S. DOE does not issue IDEA waivers.

(ECF No. 1, PageID.22–23.)

violations of their rights under the MARSE, *see supra* note 17, and regressions in skills and loss of competencies regarding the goals and objectives in their IEPs. "However, [Plaintiffs] cannot seek prospective relief because they do not allege a real or immediate threat that [Defendants] will repeat the alleged violation." *Kanuszewski*, 927 F.3d at 408. Plaintiffs also cannot seek prospective relief because they do not allege an ongoing or continuing harm. Because the injury alleged in Count 2 took place in the past (i.e., "upon the termination of inperson instruction in March of 2020" (ECF No. 1, PageID.22)), Plaintiffs do not have standing to seek declaratory or injunctive relief as to their MARSE claim in Count 2.

iii. Count 4: Title II of the Americans with Disabilities Act ("ADA")

In Count 4, Plaintiffs allege that the AAPS (and possibly the MDE) violated Title II of the ADA. Plaintiffs state that "[t]he MDE and its LEAs are public entities forbidden to discriminate based on disability." (*Id.* at PageID.26 (citing 42 U.S.C. § 12132).) Plaintiffs state that the AAPS's

> closure of in-person instruction in March of 2020 discriminated against plaintiffs as persons with disabilities, who necessitate in-person services including occupational therapy, speech therapy, social work services and resource room services, by denying them equal access and otherwise limiting their access to education, programs, and services as compared to their non-disabled peers. 34 C.F.R. §§ 104.4(a), 104.4(b)(ii) and (iv).

(*Id.* at PageID.26–27.) The last sentence in Count 4 states that "[a]s a proximate cause of these violations of Title II of the Americans with Disabilities Act, plaintiffs have suffered harm as set forth above."[19] (*Id.* at PageID.27.) Plaintiffs allege in Count 6 (their now-voluntarilydismissed equal protection claim brought under § 1983) that "Defendants' closure of schools in March of 2020 resulted in a disparate impact on plaintiffs due to their disabilities in violation of the ADA." (*Id.* at PageID.29.)

Plaintiffs do not specify an injury in Count 4. Nor do they specify the relief they seek in this count. To the extent Plaintiffs' allegation of "harm as set forth above" intends to reference their prior allegation that Plaintiffs suffered "regressions in skills and loss of competencies regarding the goals and objectives outlined in their IEPs" (*id.* at PageID.22), this allegation of harm does not give Plaintiffs standing to pursue declaratory or injunctive relief for their ADA claim in Count 4 for the reasons discussed above. To the extent Plaintiffs' reference to "harm as set forth above" intends to

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[19] Plaintiffs' general allegation in Count 4 that they suffered "harm as set forth above" lacks the specificity required for Plaintiffs to show that the first requirement of standing—injury in fact—is met. *See Glennborough Homeowners Ass'n v. U.S. Postal Serv.*, 21 F.4th 410, 414 (6th Cir. 2021); *Binno v. Am. Bar Ass'n*, 826 F.3d 338, 344 (6th Cir. 2016); *Warth v. Seldin*, 422 U.S. 490, 508 (1975). This allegation of "harm as set forth above" appears in Count 5 as well. (*See* ECF No. 1, PageID.27.) Even if the Court considers the possible harms "set forth above" that Plaintiffs may be referring to in Counts 4 and 5 and finds that Plaintiffs have alleged an injury in fact, Plaintiffs lack standing to seek declaratory and injunctive relief as to their claims in Counts 4 and 5, as discussed above.

reference Plaintiffs' allegations of discrimination or disparate impact[20] resulting from a violation of the ADA, those allegations do not give Plaintiffs standing to pursue declaratory or injunctive relief as to their claim in Count 4 either because the allegations of discrimination and disparate impact relate to the AAPS's closure in March 2020, which took place over two years ago. Plaintiffs make no allegation of ongoing or future harm in Count 4, so they lack standing to pursue declaratory or injunctive relief as to their ADA claim in that count.

iv. Count 5: Michigan Persons with Disabilities Civil Rights Act ("PWDCRA")

In Count 5, Plaintiffs allege that the AAPS (and possibly the MDE) violated the PWDCRA. Plaintiffs state that under the PWDCRA, "the MDE and its LEAs" are "educational institutions" that are prohibited from discriminating against people with disabilities. (*Id.* at PageID.27 (internal citation omitted).) Plaintiffs state that the AAPS's

> closure of in-person instruction in March of 2020 discriminated against plaintiffs as persons with disabilities, who necessitate in-person services including occupational therapy, speech therapy, social work services and resource room services,

[20] In Count 4, Plaintiffs allege that they "suffered harm as set forth *above*." (ECF No. 1, PageID.27 (emphasis added).) Plaintiffs' allegation regarding disparate impact appears in a *later* portion of the complaint and in a *subsequent* count. (*See id.* at PageID.29.) Even if the Court considers disparate impact as an alleged harm in Count 4, Plaintiffs lack standing to pursue declaratory or injunctive relief for their ADA claim in that count, as set forth above.

> by denying them equal access and otherwise limiting their access to education, programs and services as compared to their non-disabled peers. M.C.L. § 37.1402.

(*Id.*) Plaintiffs state that "[a]s a proximate cause of these violations of the Michigan Persons with Disabilities Act [sic], plaintiffs have suffered harm as set forth above." (*Id.*) *See supra* note 19.

In Count 5, Plaintiffs do not clearly allege an injury or the relief they seek as to their PWDCRA claim. Plaintiffs' injury in Count 5 is potentially them suffering unlawful discrimination under the PWDCRA, as well as the regressions in skills and loss of competencies alleged in their previous counts. These injuries (assuming Plaintiffs intended to allege them) do not give Plaintiffs standing to seek the declaratory and injunctive relief they request in the complaint. Plaintiffs state that the PWDCRA violation took place in March 2020, and the regressions in skills and loss of competencies from the prior two school years are not alleged to be an actual or future harm. Therefore, Plaintiffs do not have standing to pursue declaratory or injunctive relief as to their PWDCRA claim in Count 5.

v. Count 7: Racketeer Influenced and Corrupt Organizations Act ("RICO")

In Count 7, Plaintiffs allege a RICO violation. Plaintiffs indicate in the complaint that Count 7 is "[a]gainst [the] Individual Defendants." (ECF No. 1, PageID.29.) Plaintiffs state that their RICO claim

> arises from a scheme by individual defendants Swift, Fidishin, Menzel, Norman and Rice, in their official capacities, to fraudulently use their enterprises—AAPS, WISD and MDE respectively—to defraud plaintiffs, the beneficiaries of IDEA Part B [funds], of millions of dollars by making false assurances that the MDE and its LEAs complied with IDEA during the COVID-19 pandemic.

(*Id.* at PageID.29, 31; *see id.* at PageID.30.) Beneath a heading titled "The Racketeering Violation," Plaintiffs allege that

> [f]rom March of 2020 through the present, each individual RICO defendant knowingly and intentionally engaged in an ongoing pattern of racketeering activity under 18 U.S.C. § 1962(c) by committing the predicate acts of wire fraud and mail fraud . . . . The fraudulent schemes involved using the interstate wires to defraud plaintiffs, the beneficiaries of IDEA Part B Funds, of their procedural and substantive rights.

(*Id.* at PageID.32.) The "interstate wires" consist of "electronic messages and the collection of federal funds through the interstate banking system, all in furtherance of the scheme to defraud, and in violation of 18 U.S.C. § 1343." (*Id.* at PageID.33–35, 38.)

Regarding the "false assurances" referenced above, Plaintiffs allege that Swift, Fidishin, Menzel, Norman, and Rice made assurances in 2019 and/or 2020 to the WISD, MDE, or U.S. DOE indicating

that (1) the AAPS, WISD, or MDE had "policies and procedures in place as required by Part B of the [IDEA]," and (2) "[c]hildren with disabilities and their parents are afforded the procedural safeguards required by 34 CFR §§ 300.400 through 300.536 and in accordance with 20 U.S.C. § 1412(a)(6); 34 CFR[ ]§ 300.121."[21] (*Id.* at PageID.32–37.) Plaintiffs further allege that in 2019 and 2020, Rice "assured the U.S. DOE, via mail fraud through interstate commerce,"

> that [t]he Chief Executive Officer of a State or designee of the officer shall ensure that an interagency agreement or other mechanism for interagency coordination is in effect between each public agency described in subparagraph (b) of 34 CFR § 300.154 and the State education agency, in order to ensure that the services described in paragraph (b)(1)(i) that are needed to ensure a free appropriate public education are provided, include the provision of such services during the *pendency* of any dispute under § 300.154(a)(3).

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[21] Plaintiffs allege that Swift and Fidishin (from the AAPS) made these assurances to the WISD (*see* ECF No. 1, PageID.32–33), that Menzel and Norman (from the WISD) made these assurances to the MDE (*see id.* at PageID.34), and that Rice (from the MDE) made these assurances to the U.S. DOE. (*See id.* at PageID.35–37.) Plaintiffs do not specify how Swift, Fidishin, Menzel, and Norman communicated the assurances, but Plaintiffs state that the "interstate wires" used by these Defendants include "electronic messages." (*Id.* at PageID.32–35.) Plaintiffs allege that Rice made the assurances "via mail fraud through interstate commerce." (*Id.* at PageID.35–37.)

(*Id.* at PageID.36–37 (emphasis in original) (internal citation and quotation marks omitted).)

Plaintiffs state that the individual Defendants' assurances were false because "[c]ontrary to the[ir] . . . assurances, the MDE, the WISD and AAPS did not":[22] (1) "give plaintiffs prior written notice of its closure of schools and alteration of plaintiffs' IEPs and school placements from in-person instruction and services to virtual instruction or [sic] services during the COVID-19 pandemic," (2) "ensure that the parents of each child with a disability were included as members of any IEP Team that made decisions on the educational placement of their children during the COVID-19 pandemic," (3) "maintain plaintiffs' pendency placement through in-person instruction during the COVID-19 pandemic," and (4) "reconvene IEP Team Meetings to change plaintiffs' IEPs to provide for complete virtual instruction and services during the COVID-19 pandemic." (*Id.* at PageID.38–39.)

Plaintiffs allege that the MDE collected IDEA Part B funds from the U.S. DOE "via wire fraud through interstate commerce." (*Id.* at PageID.36–37.) Plaintiffs allege that Rice "collected" "interstate wires" (i.e., "electronic messages" and "federal funds through the interstate banking system") in 2019 and 2020 and that he continues to collect them "to further his objective to obtain federal funds under the false pretense that plaintiffs' procedural and substantive rights under IDEA were protected by the MDE." (*Id.* at PageID.38.) Plaintiffs allege that

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[22] The Court notes that the allegations that follow relate to the failure of the MDE, WISD, and AAPS to do certain things; Plaintiffs do not mention the individual Defendants in making these allegations.

IDEA Part B funds traveled "via wire fraud through interstate commerce" from the U.S. DOE to the MDE, "by wire" from the MDE to the WISD, and "by wire" from the WISD to the AAPS. (*Id.* at PageID.36–38.) Plaintiffs allege that the AAPS then used the IDEA Part B funds "for unlawful purposes, including but not limited to purchasing personal protective equipment for all staff and students." (*Id.* at PageID.38.)

As noted, Plaintiffs state that "[f]rom March of 2020 through the present, each individual RICO defendant knowingly and intentionally engaged in an *ongoing* pattern of racketeering activity under 18 U.S.C. § 1962(c) by committing the predicate acts of wire fraud and mail fraud[.]" (*Id.* at PageID.32 (emphasis added); *see id.* at PageID.33 (stating that Swift "used the interstate wires in the years 2019 and 2020, *and is continuing to use them*, to further her objective to obtain federal funds under the false pretense that plaintiffs' procedural and substantive rights under IDEA were protected by AAPS during its closure" (emphasis added)); *see id.* at PageID.33–34 (stating that Fidishin "used the interstate wires in 2020, *and is continuing to use them*, to further her objective to obtain federal funds under the false pretense that plaintiffs' procedural and substantive rights under IDEA were protected by AAPS during its closure" (emphasis added)); *see id.* at PageID.35 (stating that Norman used "interstate wires in 2020, *and is continuing to use them*, to further her objective to obtain federal funds under the false pretense that plaintiffs' procedural and substantive rights under IDEA were protected by the WISD during the closure of AAPS" (emphasis added)); *see id.* at PageID.38 (stating that Rice "collected"

interstate wires "in the years 2019, 2020 and [they] are *continuing to be collected*, to further his objective to obtain federal funds under the false pretense that plaintiffs' procedural and substantive rights under IDEA were protected by the MDE" (emphasis added)).) Plaintiffs state that "[t]here is a *threat of continued activity*" because (1) "each individual defendant has repeatedly engaged in the illegal and illicit activities," (2) "[e]ngaging in the pattern of racketeering activity" presented in the complaint "is the regular way the individual defendants conduct the affairs of their respective associated association in fact enterprises," and (3) "each enterprise has been in existence for many years, and the seeking of federal funding by these individual defendants on behalf of their associated association in fact enterprises *will continue indefinitely*," so "each individual defendant, through the operation of his or her associated association in fact enterprise, *remain*[*s*] *a threat to others*." (*Id.* at PageID.39 (emphasis added).)

Plaintiffs state that the individual Defendants' conduct deprived— and continues to deprive— Plaintiffs of their procedural and substantive rights under the IDEA. (*See id.* at PageID.32, 40.) Specifically, Plaintiffs state that "[a]s a direct and proximate result of the individual defendants' predicate acts [(i.e., wire fraud and mail fraud)] in furtherance of violating 18 U.S.C. § 1962(a), plaintiffs have been and are continuing to be deprived of their rights under IDEA, as set forth more fully above."[23] (*Id.* at PageID.40; *see id.* at

[23] Plaintiffs do not specify which portion of the complaint the language "as set forth more fully above" refers to. The language may be referring to the MDE's, WISD's, and AAPS's alleged

PageID.32.) Plaintiffs also state that the individual Defendants' acts caused Plaintiffs to "suffer[ ] harm including significant regressions in skills and loss of competencies." (*Id.* at PageID.40.) Plaintiffs do not specify the relief they seek in Count 7. Plaintiffs' request in the complaint's "Prayer for Relief" that the Court "[a]ssign a RICO Special Monitor" to carry out certain tasks (*id.* at PageID.42) is possibly part or all of the relief sought to remedy the harms alleged in Count 7.

Plaintiffs do not demonstrate that they have Article III standing to bring their RICO claim in Count 7 because they do not allege facts that establish all three requirements of standing: injury in fact, causation, and redressability.

Plaintiffs allege an injury in fact, but their allegations are insufficient to show causation and redressability. Plaintiffs allege an injury in fact in Count 7 because they allege that they have been deprived of their rights under the IDEA, *see supra* note 23, and suffered regressions in skills and loss of competencies (presumably related to the goals and objectives in their IEPs). Plaintiffs allege an existing harm, as well as a "substantial risk" of future harm, *Kanuszewski*, 927 F.3d at 405, 409–10, because they state that the racketeering activity is "ongoing" and "will continue indefinitely." (ECF No. 1, PageID.32–35, 39.) Further, Plaintiffs allege that because of the

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failure to do certain things discussed in Count 7 and/or to the alleged systemic violations of the IDEA that appear in Count 1. Even if the Court applies one or both of these possible interpretations to its analysis and finds that Plaintiffs' allegations in Count 7 sufficiently demonstrate an injury in fact, Plaintiffs' allegations do not give them standing to pursue their claim in Count 7, as discussed above.

individual Defendants' predicate acts, "plaintiffs have been and are continuing to be deprived of their rights under IDEA." (*Id.* at PageID.40.) Therefore, Plaintiffs allege an injury in fact, and the first requirement of standing is met.

However, Plaintiffs do not demonstrate that the second and third requirements of standing—causation and redressability—are satisfied. To satisfy the causation requirement, Plaintiffs must show that their injuries are "fairly traceable" to the challenged acts of the individual Defendants, who are the Defendants named in Count 7. *Buchholz*, 946 F.3d at 861. The Sixth Circuit instructs that

> [t]he standard for establishing traceability for standing purposes is *less demanding* than the standard for proving tort causation. *Pub. Interest Research Grp. of N.J., Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 72 (3d Cir. 1990). At the pleading stage, the plaintiff's burden of "alleging that their injury is 'fairly traceable'" to the defendant's challenged conduct is "relatively modest[.]" *Bennett v. Spear*, 520 U.S. 154, 171, 117 S. Ct. 1154, 137 L.Ed.2d 281 (1997). Thus, harms that flow "indirectly from the action in question can be said to be 'fairly traceable' to that action for standing purposes." *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1273 (11th Cir. 2003).

Id. at 866 (emphasis in original).

Here, Plaintiffs do not establish a fairly traceable connection between their alleged injuries (i.e., deprivation of their procedural and substantive rights under the IDEA as well as regressions in

skills and loss of competencies) and the challenged acts of the individual Defendants (i.e., making "false assurances" in electronic messages or by mail and/or collecting IDEA Part B funds through the interstate banking system). Plaintiffs state that the individual Defendants' assurances were false *because* the MDE, WISD, and AAPS failed to (1) provide prior written notice to Plaintiffs, (2) ensure that the parents of children with disabilities were included in IEP teams making decisions on educational placement, (3) maintain the student Plaintiffs' pendency placements, and (4) reconvene IEP team meetings to modify the student Plaintiffs' IEPs. But Plaintiffs do not allege that the individual Defendants' assurances or Rice's collection of IDEA Part B funds affected Plaintiffs' rights under the IDEA or their "skills" and "competencies." (ECF No. 1, PageID.40.)

Plaintiffs allege that they were defrauded of millions of dollars as IDEA Part B funds beneficiaries. (*See id.* at PageID.29–31.) But in their complaint, Plaintiffs do not allege facts indicating that the individual Defendants deprived Plaintiffs of IDEA Part B funds or of their rights under the IDEA. To the extent the IDEA gives Plaintiffs a right to IDEA Part B funds, Plaintiffs state that the AAPS—but not the individual Defendants—used IDEA Part B funds "for unlawful purposes," such as to buy personal protective equipment for staff and students. (*Id.* at PageID.38.) And Plaintiffs allege that the MDE, WISD, and AAPS—but not the individual Defendants—failed to provide prior written notice and to take certain steps related to IEPs and educational placement following school closures, as noted above. Thus, Plaintiffs do not include factual allegations in the complaint that

indicate that the individual Defendants had any involvement in the spending of IDEA Part B funds or in the alleged deprivation of Plaintiffs' rights under the IDEA.

Because Plaintiffs do not establish a direct or indirect connection between their injuries and the individual Defendants' predicate acts, Plaintiffs do not show that their injuries "flow" from the individual Defendants' challenged conduct. *Buchholz*, 946 F.3d at 861. Therefore, Plaintiffs have not met their burden of showing that the causation requirement for standing is met.

Even if Plaintiffs had established causation, they would still lack Article III standing to bring their RICO claim in Count 7 because they do not satisfy the redressability requirement. To satisfy the redressability requirement, Plaintiffs must show that it is likely, and not merely speculative, that their injuries will be redressed by a favorable decision. *See Doe v. DeWine*, 910 F.3d 842, 850 (6th Cir. 2018). As noted, Plaintiffs do not specify the relief they seek as to their RICO claim in Count 7. To the extent Plaintiffs' request for the assignment of a "RICO Special Monitor" relates to Count 7 (ECF No. 1, PageID.42), Plaintiffs do not demonstrate how this form of relief would redress *Plaintiffs'* injuries. Plaintiffs indicate that they want the RICO Special Monitor to (1) oversee an independent audit of Defendants' spending of IDEA Part B funds from March 2020 "to the present," (2) oversee Defendants' spending of IDEA Part B funds for the 2021–2022 school year "to ensure defendants spend IDEA Part B Funds for instruction and/or services for students with disabilities under IDEA," and (3) "ensure any IDEA Part B Funds that defendants spent on items

other than instruction and/or services for students with disabilities under IDEA from March of 2020 through the present are reimbursed to a monitored account to be spent only upon review and approval by the RICO Special Monitor." (*Id.*) Plaintiffs do not show how this request for relief—which seeks to ensure funding "for instruction and/or services *for students with disabilities* under IDEA" (*id.* (emphasis added))—will redress any portion of Plaintiffs' injuries.

In addition to not demonstrating that the assignment of a RICO Special Monitor will redress their injuries, Plaintiffs do not show that granting this relief will target the individual Defendants' alleged predicate acts (i.e., wire fraud and mail fraud) that allegedly caused Plaintiffs' injuries in Count 7. (*See id.* at PageID.40.) "Article III requires the remedy to be 'limited' to the plaintiff's injury." *Ass'n of Am. Physicians & Surgeons*, 13 F.4th at 540 (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996)). And the "'remedy must be "limited to the inadequacy that produced [a plaintiff's] injury in fact."'" *Id.* (alteration in original) (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018)). Here, Plaintiffs want the RICO Special Monitor to oversee the spending of IDEA Part B funds by "Defendants"—not just the individual Defendants named in Count 7. Yet the complaint does not allege that the individual Defendants were involved in the spending of IDEA Part B funds, as noted above. Therefore, instead of targeting the individual Defendants' challenged acts of wire fraud and mail fraud, the request for a RICO Special Monitor relates to all "Defendants'" spending of IDEA Part B funds. Such a request for relief is not limited to Plaintiffs' injuries alleged in Count 7 or

the individual Defendants' acts that are alleged to be the cause of these injuries.

Moreover, to the extent Plaintiffs seek any other remedy that appears in the complaint (other than, or in addition to, the assignment of a RICO Special Monitor), the remaining requests for relief that are listed in the complaint's "Prayer for Relief" (ECF No. 1, PageID.41–42) would not be granted by the Court if it were to issue a favorable decision on Plaintiffs' RICO claim. These requests are for declaratory and injunctive relief, and they involve the AAPS, WISD, and MDE, which are not Defendants named in Count 7. "An injury is redressable if a judicial decree can provide 'prospective relief' that will 'remove the harm.'" *DeWine*, 910 F.3d at 850 (quoting *Warth*, 422 U.S. at 505). The Sixth Circuit indicates that

> "[r]edress is sought *through* the court, but *from* the defendant. . . . The real value of the judicial pronouncement—what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion—is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff*."

Id. (emphasis in original) (quoting *Hewitt v. Helms*, 482 U.S. 755, 761 (1987)). In other words, a favorable decision on Plaintiffs' RICO claim in Count 7 would entitle Plaintiffs to relief that "affects the behavior of" the individual Defendants toward them. *Id.* Plaintiffs do not seek relief in the complaint that would alter the behavior of these Defendants and redress Plaintiffs' injuries that are alleged in Count 7. Because Plaintiffs do not show that their injuries in Count 7 are redressable by a favorable decision

that will "remove the harm," *id.*, Plaintiffs do not satisfy the third requirement for standing as to their RICO claim. Accordingly, Plaintiffs fail to properly allege Article III standing with respect to their RICO claim in Count 7.

C. Dismissal Without Prejudice for Lack of Subject Matter Jurisdiction

Given that Plaintiffs do not establish that they have standing as to the remaining counts in this case (Counts 1, 2, 4, 5, and 7), the Court dismisses this case without prejudice for lack of subject matter jurisdiction. The dismissal is without prejudice because "Article III standing is jurisdictional, and a federal court lacking subject-matter jurisdiction is powerless to render a judgment on the merits."[24]

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[24] Court dismisses this case without prejudice for lack of subject matter jurisdiction; however, the Court seriously considered a dismissal with prejudice given that Plaintiffs' claims are highly unlikely to survive Defendants' challenges to them based on other grounds. In their motions to dismiss, Defendants make various arguments for dismissal that include arguments related to mootness, Eleventh Amendment sovereign immunity, the failure to exhaust administrative remedies, and the failure to state a claim. The Court is doubtful that Plaintiffs can overcome these hurdles and come out with a viable case.

As for Plaintiffs' RICO claim in Count 7, the Court reminds Plaintiffs' counsel of Judge Colleen McMahon's admonition regarding the RICO claim asserted by the plaintiffs in *J.T. v. de Blasio*, 500 F. Supp. 3d 137 (S.D.N.Y. 2020), a case in which attorneys from Plaintiffs' counsel's office represented the plaintiffs. In *J.T.*, Judge McMahon stated:

> Frankly, the RICO allegations here asserted reek of bad faith and contrivance. Plaintiffs have baldly asserted that every school district in the country, in trying to respond to

Thompson v. Love's Travel Stops & Country Stores, Inc., 748 F. App'x 6, 11 (6th Cir. 2018) (internal citations omitted) ("[O]ur court has stated on several occasions that dismissal for lack of subject matter jurisdiction should normally be without prejudice." (collecting cases)); *see Marks*, 2022 WL 866836, at *6 (dismissing a case "without prejudice for lack of subject matter jurisdiction" because a plaintiff did not "sufficiently allege[ ] Article III standing").

IV. Conclusion

For the reasons set forth above, this case is DISMISSED WITHOUT PREJUDICE for lack of subject matter jurisdiction. Defendants' motions to dismiss (ECF Nos. 20, 34, 38) and Plaintiffs' motion for an automatic and preliminary injunction (ECF No. 42) are DENIED AS MOOT.

IT IS SO ORDERED.

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an unprecedented nationwide health crisis, has perpetrated a fraud on the federal government. They have not the slightest basis for so asserting. Their use of the phrase "on information and belief" does not save this patently defective pleading. *See First Asset Capital Mgmt.*, 385 F.3d at 179 ("Although it is true that matters peculiarly within a defendant's knowledge may be pled 'on information and belief,' this does not mean that those matters may be pled lacking any detail at all.") (internal citation and quotation marks omitted). This effort to inject racketeering into what is simply an IDEA lawsuit is bad faith pleading writ large.

J.T., 500 F. Supp. 3d at 172. Judge McMahon's findings regarding the plaintiffs' RICO allegations in *J.T.* may very well apply to Plaintiffs' RICO allegations in Count 7 of the complaint filed in this case.

Dated: July 22, 2022
Ann Arbor, Michigan

s/Judith E. Levy
JUDITH E. LEVY
United States District Judge

FILED: June 12, 2023

No. 22-1724

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RITA C. SIMPSON-VLACH AND ALAN SIMPSON-VLACH ON BEHALF OF A.S. AND M.S.; KATHY BISHOP AND CHRISTOPHER PLACE ON BEHALF OF C.P. AND H.P.,

Plaintiffs-Appellants,

v.

MICHIGAN DEPARTMENT OF EDUCATION; ANN ARBOR PUBLIC SCHOOLS; WASHTENAW INTERMEDIATE SCHOOL DISTRICT; DR. JEANICE KERR SWIFT; DR. MARIANNE FIDISHIN; SCOTT A. MENZEL; NAOMI NORMAN; MICHAEL F. RICE,

Defendants-Appellees.

ORDER

BEFORE: COLE, GIBBONS, and READLER, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt, Clerk

*Judge Davis recused herself from participation in this ruling.