No. _____

In The
Supreme Court of the United States

JENNICA CARMONA, ET AL,

Petitioners,

v.

NEW JERSEY
DEPARTMENT OF EDUCATION, ET AL.,

Respondents.

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

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-2874

JENNICA CARMONA, Individually, and as Parent and Natural Guardian of B.A.; KERRY GALLAGHER, Individually, and as Parent and Natural Guardian of K.G.; ANGELLE KURSAR, Individually, and as Parent and Natural Guardian of D.K.; JAMES NAZZARO, Individually, and as Parent and Natural Guardian of J.N.; LISA MATTESSICH**, Individually, and as Parent and Natural Guardian of M.M.; NICOLE TIERNEY, Individually, and as Parent and Natural Guardian of K.D.; DORENE CAMP*, Individually, and as Parent and Natural Guardian of S.C., C.C. and T.C.; LISA DRISCOLL, Individually, and as Parent and Natural Guardian of M.D.; DIANA LOGRASSO, Individually, and as Parent and Natural Guardian of K.I.; KELLY OSTERMAN, Individually, and as Parent and Natural Guardian of J.L.; TINA DELORENZO, Individually, and as Parent and Natural Guardian of N.D.; MUNIRA EDMONDS, Individually, and as Parent and Natural Guardian of A.K. and all other similarly situated; GABRIELLE KINDER, Individually, and as Parent and Natural Guardian of A.M.,

Appellants

v.

NEW JERSEY DEPARTMENT OF EDUCATION; AUDUBON PUBLIC SCHOOL DISTRICT; CAMDEN CITY SCHOOL DISTRICT; CAMDEN COUNTY SCHOOL DISTRICT; CAPE MAY COUNTY PUBLIC SCHOOL DISTRICT; ESSEX COUNTY PUBLIC SCHOOL DISTRICT; GLOUCESTER COUNTY PUBLIC SCHOOL DISTRICT; LOWER CAPE MAY REGIONAL SCHOOL DISTRICT; MANASQUAN PUBLIC SCHOOL DISTRICT; MATAWAN ABERDEEN REGIONAL SCHOOL DISTRICT; MIDDLE TOWNSHIP PUBLIC SCHOOL DISTRICT; MIDDLETOWN TOWNSHIP PUBLIC SCHOOL DISTRICT; MONMOUTH COUNTY PUBLIC SCHOOL DISTRICT; MORRIS COUNTY PUBLIC SCHOOL DISTRICT; OCEAN COUNTY PUBLIC SCHOOL DISTRICT; ROXBURY TOWNSHIP PUBLIC SCHOOL DISTRICT; RUMSON-FAIR HAVEN REGIONAL HIGH SCHOOLS; TOMS RIVER REGIONAL SCHOOL DISTRICT; WASHINGTON TOWNSHIP SCHOOL DISTRICT; WEST ORANGE PUBLIC SCHOOLS; COMMISSIONER ANGELICA ALLEN-MCMILLAN, In her official capacity; AVE ALTERSITZ, In her official capacity; DR. J. SCOTT CASCONE, In his official capacity; JOSEPH CASTELLUCCI, In his official capacity; ANDREW DAVIS, In his official capacity; DR. JUDITH DESTEFANO-ANEN, In her official capacity; THOMAS GIALANELLA, In his official capacity; DEBRA GULICK, In her official capacity; ROGER JINKS, in his official capacity; DR. FRANK KASYAN, in his official capacity; JOSEPH MAJKA, In his official capacity; KATRINA MCCOMBS, In her official capacity; JEFFREY MOHRE, In his

official capacity; CHARLES MULLER, in his official capacity; DR. LOVELL PUGH-BASSETT, in her official capacity; LORETTA RADULIC, in her official capacity; DR. LESTER RICHENS, in his official capacity; DAVID SALVO, in his official capacity; MARY ELLEN WALKER, in her official capacity; JOSEPH S. ZARRA, in his official capacity

(*Dismissed pursuant to Court Order dated 12/20/2022)
(**Dismissed pursuant to Court Order dated 9/6/2023)

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 2-21-cv-18746)
U.S. District Judge: Honorable John M. Vazquez

Submitted under Third Circuit L.A.R. 34.1(a)
July 13, 2023

Before: SHWARTZ, RESTREPO, and CHUNG,
Circuit Judges.
(Filed: September 8, 2023)

OPINION*

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*This disposition is not an opinion of the full Court and, pursuant to 3d Cir. I.O.P. 5.7, does not constitute binding precedent.

CHUNG, Circuit Judge.

Plaintiff-Appellants are parents of children with disabilities in New Jersey who sued Defendant-Appellees—the New Jersey Department of Education ("NJDOE"), the NJDOE Commissioner, their children's school districts, and superintendents of those districts (collectively, the "Educators")—in a putative class action challenging the suspension of in-person education and services during the COVID-19 pandemic under, inter alia, the Individuals with Disabilities Education Act ("IDEA") and the Racketeer Influenced and Corrupt Organizations Act ("RICO"). The District Court dismissed all claims because the IDEA and IDEA-related claims (Counts One through Eight) were unexhausted, and the RICO allegations (Count Nine) did not establish standing and were otherwise inadequate. We will affirm the District Court's order dismissing the Plaintiff-Appellants' Amended Complaint for failure to exhaust Counts One through Eight and for lack of standing to bring Count Nine.

I. BACKGROUND[1]

In March 2020, all New Jersey schools were closed by gubernatorial executive order due to the COVID-19 pandemic. A973–74. Schools continued to educate students "through appropriate home instruction," id., and remained closed for the rest of the 2019–20 school year. They gradually reopened over the 2020–21 school year, starting with a hybrid of distance and in-person learning and transitioning

[1] Because we write for the parties, we recite only facts pertinent to our decision.

to full-time in-person instruction. Exec. Order No. 175 (Aug. 13, 2020); A1023, Exec. Order No. 214 (Jan. 11, 2021); A979. During this time, the United States Department of Education ("USDOE") provided guidance on how schools might fulfill their obligations to students with disabilities and informed schools that "ensuring compliance with the [IDEA], Section 504 of the Rehabilitation Act …, and Title II of the Americans with Disabilities Act should not prevent any school from offering educational programs through distance instruction." A955.

In October 2021, the Plaintiff-Appellants (hereinafter, the "Parents") challenged the switch to distance learning in the 2019–20 and 2020–21 school years for their children with disabilities by filing suit against the Educators in the District Court.[2] The Parents filed suit for themselves and on behalf of a putative class of "all other similarly situated school-aged children with disabilities covered by IDEA in New Jersey and their parents." A257.[3]

The Parents amended their complaint and articulated eight causes of action based in federal

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[2] Some Appellees (the NJDOE, Angelica Allen-McMillan, Ave Altersitz, Judith DeStefano-Anen, Roger Jinks, Charles Muller, Lovell Pugh-Bassett, Lester W. Richens, and Joseph S. Zarra) did not file a brief on appeal, and they have explained their lack of participation in this appeal by letter to the Court indicating they were not properly served before the District Court. Letter, Carmona et al. v. New Jersey Dep't of Educ. et al., No. 22-2874 (3d Cir. Dec. 1, 2022), ECF No. 26.

[3] They also moved for a preliminary injunction declaring "in-person instruction and services" to be the class's "status quo pendency placement" and enjoining the Educators from "unilaterally changing [their] placement," for more than ten days at a time, among other things. A56–57. The District Court denied the Parents' motion for a preliminary injunction.

and state law all related to alleged deprivations of adequate education in violation of the IDEA. In support of these claims, the Parents generally alleged that their children's Individualized Education Plans ("IEP") had been unilaterally altered by the shift to distance learning and deprived them of the right to a free and appropriate public education ("FAPE") under the IDEA. The Parents contended this was a change of educational placement requiring prior written notice. See 20 U.S.C. § 1415(b)(3). At the time their suit was filed, the Parents had "initiated, but … not exhausted, their administrative remedies." A203.

Count Nine of the Amended Complaint, civil RICO, alleged that individual Educator defendants had engaged in a scheme wherein they falsely represented their IDEA compliance during the pandemic to continue to obtain federal IDEA funding. A275, 277–306. The false statements allegedly caused the federal government to wrongfully remit IDEA Part B funds to the NJDOE and defendant school districts.[4] This, in turn, allegedly deprived Plaintiffs of the benefit of Part B funds apparently because said funds were diverted from benefiting students with disabilities and used for other purposes such as the purchase of personal protective equipment. A304.

The Educators moved to dismiss the Amended Complaint and the District Court granted their motion. The District Court concluded that, in Counts One through Eight, the Parents were required to exhaust administrative remedies because they sought "relief available under the IDEA." A13. The

[4] Part B funds are the federal monies promised to States that ensure students receive a FAPE. 20 U.S.C. § 1412.

District Court further concluded that the Parents had not exhausted their remedies, nor shown an exception applied. These counts were thus dismissed for want of subject matter jurisdiction. The District Court also dismissed the Parents' RICO count because, among other infirmities, the Parents "allege[d] only indirect harm flowing from the allegedly fraudulent scheme" and therefore lacked standing. A15. The Parents chose to stand on their Amended Complaint rather than amending it again. The District Court then issued its final order and the Parents timely appealed.[5]

II. DISCUSSION[6]

Our review of the District Court's dismissal for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) is de novo,

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[5] Dorene Camp, individually and as Parent and Natural Guardian of S.C./C.C./T.C., was withdrawn from this matter by this Court's Order on December 20, 2022. ORDER, Carmona et al. v. New Jersey Dep't of Educ. et al., No. 22-2874 (3d Cir. Dec. 20, 2022), ECF No. 31. Lisa Mattessich, individually, and as Parent and Natural Guardian of M.M., sought to voluntarily withdraw from this matter on February 17, 2023, and the Court granted her withdrawal on September 6, 2023. ORDER, Carmona et al. v. New Jersey Dep't of Educ. et al., No. 22-2874 (3d Cir. Sept. 6, 2023), ECF No. 97.

[6] We have appellate jurisdiction to review the District Court's dismissal for lack of subject matter jurisdiction pursuant to 28 U.S.C. § 1291. Batchelor v. Rose Tree Media Sch. Dist., 759 F.3d 266, 271 (3d Cir. 2014). The District Court had jurisdiction over the Parents' RICO claims pursuant to 28 U.S.C. § 1331, and Section 1291 provides our appellate jurisdiction. Maio v. Aetna, Inc., 221 F.3d 472, 481 (3d Cir. 2000).

as is our review of dismissal for failure to state a claim pursuant to Rule 12(b)(6). In re Horizon Healthcare Servs. Inc. Data Breach Litig., 846 F.3d 625, 632 (3d Cir. 2017); Phillips v. Cnty. of Allegheny, 515 F.3d 224, 230 (3d Cir. 2008). The District Court determined, and the parties do not dispute, that the Educators' subject matter jurisdiction challenge to the first eight counts was a facial attack. A5. A facial attack "challenges subject matter jurisdiction without disputing the facts alleged in the complaint, and it requires the Court to 'consider the allegations of the complaint as true.'" Davis v. Wells Fargo, 824 F.3d 333, 346 (3d Cir. 2016) (quoting Petruska v. Gannon Univ., 462 F.3d 294, 302 n.3 (3d Cir. 2006)). In reviewing the dismissal of the RICO count for failure to state a claim, we likewise "accept [the Parents'] well-pleaded factual allegations as true and draw all reasonable inferences from those allegations in [their] favor." In re Horizon, 846 F.3d at 633.

A. IDEA and IDEA-Related Claims (Counts One – Eight)

Under the IDEA, every State that receives federal funds for "educating children with disabilities" must "provide a … FAPE … to all eligible children." Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 580 U.S. 386, 390 (2017) (citations omitted); Batchelor v. Rose Tree Media Sch. Dist., 759 F.3d 266, 271 (3d Cir. 2014). Parents who believe their child has been denied a FAPE may request a due process hearing to remedy the alleged denial. Mary T. v. Sch. Dist. of Phila., 575 F.3d 235, 240 (3d Cir. 2009); 20 U.S.C. §

1415(b)(6)(A). While a party may dispute the results of the due process hearing by filing a federal lawsuit, that party must "complet[e] the IDEA's administrative process, i.e., exhaust[]" administrative remedies before any such lawsuit is filed. Batchelor, 759 F.3d at 272; D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 558 (3d Cir. 2010); 20 U.S.C. § 1415(i)(2). The exhaustion requirement applies to lawsuits brought under the "Constitution, the [ADA], [Section 504], or other Federal laws protecting the rights of children with disabilities" when the remedy requested is one the IDEA makes available. 20 U.S.C. § 1415(*l*); Luna Perez v. Sturgis Pub. Sch., 143 S. Ct. 859, 864 (2023).[7]

The District Court determined the Parents were required to exhaust the claims in Counts One through Eight because they sought to redress the Educators' alleged failure to provide a FAPE with

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[7] In Perez, the Supreme Court held that exhaustion is not required when a plaintiff seeks "a form of relief … [the] IDEA does not provide." 143 S. Ct. at 864. Courts have determined that IDEA's remedies include "prospective injunctive relief" and "retroactive reimbursement." Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 370 (1985). Relief that is unavailable under the IDEA includes "compensatory and punitive damages." Chambers ex rel. Chambers v. Sch. Dist. of Phila. Bd of Educ., 587 F.3d 176, 186 (3d Cir. 2009) (explaining the IDEA is not meant to compensate for "pain and suffering where a FAPE is not provided."). When asked to address Perez, the Parents asserted that Perez is inapplicable to their case. Parents' Supp. Br. at 7. Our own review of the Amended Complaint confirms that the Parents did not seek compensatory damages; rather, the Parents only requested remedies provided by the IDEA. A307–08. While the Parents made cursory references to damages, we find these cursory references insufficient to constitute a claim for damages. See Phillips, 515 F.3d at 232–33 (rejecting "blanket assertion[s] of … entitlement to relief").

remedies available under the IDEA. The Parents had not completed due process hearings challenging changes to their children's IEPs, however, so the District Court dismissed Counts One through Eight for failure to exhaust. The Parents vigorously argue they did exhaust or, alternatively, that an exhaustion exception applied.

1. The District Court Correctly Concluded that to Exhaust the Parents Failed Administrative Remedies

The Parents contend that they satisfied the exhaustion requirement because, as set forth in the Amended Complaint, they "were in the process of exhausting their administrative remedies."[8] Parents' Opening Br. at 17.

We reject the Parents' contention that initiating the required due process hearing proceedings satisfies the IDEA's administrative exhaustion requirement. To satisfy this requirement, before filing their suit, plaintiffs must have the "findings and decision" from a due process hearing in hand. 20 U.S.C. § 1415(i)(2)(A). Merely beginning that process is not enough. Batchelor, 759 F.3d at 272; see Woodford v. Ngo, 548 U.S. 81, 90 (2006) (exhaustion "means using all steps that the agency holds out" (citation omitted)); see also Komninos ex rel Komninos v. Upper Saddle River Bd. of Educ., 13

[8] In the Amended Complaint, the Parents each alleged that they had initiated individual administrative cases. A223–56. On appeal, the Parents describe the updated status of those cases: some had settled, others had completed administrative proceedings, and one appellant's case was yet unresolved. Parents' Opening Br. at 15–17.

F.3d 775, 777–79, 781 (3d Cir. 1994). Accordingly, the Parents' argument that they could have shown exhaustion if only the District Court had called for oral argument (i.e., if only the District Court had delayed litigation until exhaustion was complete) is inapposite. See also 20 U.S.C. § 1415(*l*) (exhaustion precedes "filing of a civil action"). We thus affirm the District Court's determination that the Parents failed to exhaust their claims seeking IDEA relief.

2. The District Court Correctly Concluded That No Exceptions Excuse the Parents' Failure to Exhaust

The Parents have alternatively argued the systemic exception to exhaustion applies to their claim and that IDEA's "stay put" provision also excuses their failure to exhaust.

a. The Systemic Exception Does Not Apply

Before the District Court, the Parents asserted that, because their suit is a putative class action and they have sought relief from alleged systemic violations of the IDEA, the "systemic exception" should have applied. A9–11.[9] The systemic exception applies when claims challenge "those procedural violations that 'effectively deprive[] plaintiffs of an

[9] On appeal, the Parents have not fully developed a systemic exception to exhaustion argument, but we address the systemic exception herein out of an abundance of caution where the Parents' exception-to-exhaustion argument is interspersed with references to the Educators' alleged systemic failures with respect to providing FAPEs to the Parents' children and similarly situated children in New Jersey.

administrative forum.'" T.R. v. Sch. Dist. of Phila., 4 F.4th 179, 192 (3d Cir. 2021) (alteration in original) (quoting Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1305 (9th Cir. 1992)). Class action, i.e., the "volume of complaints," may be relevant to determining when plaintiffs' claims cannot "be[] remedied by administrative bodies." Id. at 192–93 (citing J.S. v. Attica Cent. Sch., 386 F.3d 107, 113–14 (2d Cir. 2004)). But generally, the systemic exception is for matters challenging "the framework and procedures for assessing and placing students in appropriate educational programs," which are matters wherein "an administrative record would not have been of substantial benefit to the district court." J.S., 386 F.3d at 114.

The District Court was correct not to apply the systemic exception here where the Parents alleged IDEA violations that did not "undermine access to the administrative hearing process itself." T.R., 4 F.4th at 193 (systemic exception did not apply where parent plaintiffs "dispute[d] the adequacy of the quantity, quality, and consistency" of interpretation/translation services but did not allege that "access to the administrative hearing process" had been compromised by such failures). These alleged violations included, among others: unilateral IEP changes from in-person learning to distance learning; failure to maintain in-person services for disabled students; and failure to involve the Parents in decisions about placement. A262–65. While a high volume of complaints could arise from these alleged violations, they did not involve a deprivation of process that calls for the application of the systemic exception. As explicitly set forth in the Amended Complaint, the Parents availed themselves of

(though without completing) the administrative process and they did not allege their access thereto was hindered.

b. The "Stay Put" Not Provision Does Excuse the Failure to Exhaust

When an IEP changes a student's educational placement, such as when an IEP calls for a student to move from one school to another, parents often bring IDEA administrative actions. The purpose of the "stay put" provision, 20 U.S.C. § 1415(j), is to guarantee "a student's right to a stable learning environment" while parents go through the administrative process. Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195, 199 (2d Cir. 2002). In stay-put proceedings under Section 1415(j), courts settle disputes about which academic setting should be considered a student's "current" educational placement. This finding determines where the student will "stay put" and be educated while administrative hearings (and eventual judicial review) proceed. M.R. v. Ridley Sch. Dist., 744 F.3d 112, 118 (3d Cir. 2014) (quoting Drinker ex rel. Drinker v. Colonial Sch. Dist., 78 F.3d 859, 867 (3d Cir. 1996)). Exhaustion is not required for stay-put challenges because "[t]he administrative process is 'inadequate' to remedy violations of § 1415(j)." Murphy, 297 F.3d at 199.

In their Amended Complaint (as opposed to their motion for a preliminary injunction, which was denied), the Parents did not raise a stay-put claim; nonetheless, they have sought to rely on the stay-put exception and have argued that, in complying with New Jersey's restriction against in-person schooling,

the Educators changed their children's current educational placements without the notice required by the IDEA. Parents' Opening Br. at 23–25; 33–37. The District Court rejected this argument because, even if a unilateral placement change could excuse a failure to exhaust, the Parents had not adequately alleged a change in placement. We agree.

In deciding what constitutes a change of placement, courts often draw a line between changes that specifically affect children with disabilities and changes motivated by budgetary or administrative concerns that affect a general student population; the former will often be found to effect a change in placement, but not the latter. D.M. v. New Jersey Dep't of Educ., 801 F.3d 205, 217 (3d Cir. 2015); N.D. ex rel. Parents Acting as Guardians Ad Litem v. Hawaii Dep't of Educ., 600 F.3d 1104, 1108 (9th Cir. 2010) (system-wide, financially motivated closure of schools on Fridays was "not [a] change[] in educational placement"); id. at 1116–17 (noting that holding otherwise would give "parents of disabled children veto power" over states' management of schools).[10]

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[10] The Ninth Circuit gave one example of a change of placement that, out of context, would seem to support the Parents' argument. Explaining a change in educational programming as a change in placement, the Ninth Circuit gave the example of moving "from one type of program—i.e., regular class—to another type—i.e., home instruction." Id. at 1116. But critically, that example was followed by guidance that these decisions were to be "made in light of Congress's intent to prevent the singling out of disabled children and to 'mainstream' them with non-disabled children." Id. Thus, the Ninth Circuit's example does not indicate a change of placement occurs when an entire school system moves to home instruction for reasons totally unrelated to any student's disability .

Here, there was no change in placement where New Jersey's school closure was "a system-[w]ide administrative decision of general applicability – an order shutting schools to all students (abled and disabled) … during an unprecedented and life-threatening health crisis." J.T. v. de Blasio, 500 F. Supp. 3d 137, 188 (S.D.N.Y. 2020).

Citing Honig v. Doe and NYS Association for Retarded Child., Inc. v. Carey, the Parents counter by arguing that the IDEA is meant to prevent schools from excluding disabled students even where a school invokes what might otherwise be a compelling reason, e.g., safety concerns. Parents' Opening Br. at 31, 34. Analogizing to such cases, the Parents argue that the IDEA did not permit schools to halt in-person instruction for disabled children despite the risks posed by COVID-19. Parents' Opening Br. at 34.

We are unpersuaded. Honig and Carey involved children with disabilities who faced the targeted exclusion that the IDEA does not tolerate. Honig v. Doe, 484 U.S. 305, 308 (1988) ("stay-put provision" did not permit exceptions for dangerousness where individual children were suspended for behaviors related to their disabilities); NYS Association for Retarded Child., Inc. v. Carey, 466 F. Supp. 479, 481 (E.D.N.Y. 1978) (finding an IDEA (formerly, the Education for All Handicapped Children Act) violation where disabled pupils afflicted with hepatitis B, but not similarly-situated non-disabled pupils, were excluded from schools). In this case, the transition to distance learning applied to all students regardless of disability. Thus, even if a unilateral change in placement could excuse a

failure to exhaust, the Parents have not shown there was a change in placement here.

For the reasons set forth above, we will affirm the District Court's dismissal of the first eight counts of the Parents' Amended Complaint.[11]

B. The RICO Count

The Parents also challenge the District Court's dismissal of Count Nine, which alleged that the individual Educators violated RICO (18 U.S.C. §§ 1961–1968). Specifically, the Parents alleged the Educators were involved "in a scheme to deprive Plaintiffs of IDEA Part B funds by making false representations to the USDOE about their compliance with the IDEA during the COVID-19 pandemic." A13. The District Court determined that these allegations failed because, among other things, the Parents lacked standing as "the alleged fraud was perpetrated on the United States government, not [the Parents]." A15–17.[12] We agree with the District Court's decision regarding the Parents' lack

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[11] As discussed supra, Section II.A. and footnote 7, although Counts Two through Eight were not IDEA claims, they are also subject to the exhaustion requirement because the Parents sought IDEA remedies and these claims concerned the denial of a FAPE; accordingly, they must be dismissed for the reasons set forth herein. 20 U.S.C. § 1415(*l*); Perez, 143 S. Ct. at 864–65; T.R., 4 F.4th at 195.

[12] The District Court also questioned whether RICO establishes a private right of equitable relief, though it ultimately assumed as much for purposes of evaluating the Parents' RICO claim. Neither the Supreme Court nor this Court has decided that question. RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 354 n.13 (2016). We need not address this question to resolve the Parents' appeal.

of standing and will affirm on that basis. Accordingly, we need not reach the other reasons cited by the District Court.

RICO prohibits a person, who is part of an enterprise that affects interstate commerce, from participating in the enterprise's affairs through a pattern of racketeering activity. Genty v. Resol. Tr. Corp., 937 F.2d 899, 906 (3d Cir. 1991) (citing 18 U.S.C. § 1962(c)). Such activity includes the commission of mail fraud and wire fraud. Care One Mgmt. LLC v. United Healthcare Workers E., 43 F.4th 126, 135 (3d Cir. 2022). RICO has both criminal and civil provisions and civil RICO suits may be "brought by any person injured 'in his business or property' by a RICO violation." Genty, 937 F.2d at 906 (quoting 18 U.S.C. § 1964(c)). To establish standing, a plaintiff must demonstrate that the alleged RICO violation is both a but for and proximate cause of her injury. Anderson v. Ayling, 396 F.3d 265, 269 (3d Cir. 2005). RICO does not permit suit where "the violation is … too remote from the injury." Allegheny Gen. Hosp. v. Philip Morris, Inc., 228 F.3d 429, 443 (3d Cir. 2000); see also St. Luke's Health Network, Inc. v. Lancaster Gen. Hosp., 967 F.3d 295, 300 (3d Cir. 2020) ("[P]roximate causation is employed in civil RICO … to stymie a flood of litigation, reserving recovery for those who have been directly affected by a defendant's wrongdoing.").

The Parents failed to plausibly allege injuries proximately caused by the purported RICO violations. In their Amended Complaint, the Parents alleged the individual Educators falsely assured the USDOE and NJDOE that the entity defendants (NJDOE and school districts) had IDEA-compliant

policies and procedures in place from January to July 2019 and January to July 2020. The Parents alleged that these misrepresentations caused Part B funds to be unlawfully remitted in violation of the mail and wire fraud statutes. The Parents further alleged that they—as the intended beneficiaries of Part B funds—were resultantly defrauded of hundreds of millions of dollars in funding and suffered other harm "including significant regressions in skills and loss of competencies." A275, 306–07.

We agree with the District Court that these injuries are too remote to establish the Parents' standing. To the extent the purported misrepresentations caused the fraudulent remittance of Part B funds, the direct victim of said fraud would be the United States government. J.T., 500 F. Supp. 3d at 166. The Parents' attempt to cast themselves as indirect victims is insufficient to establish standing, as the government would have the better claim for relief. St. Luke's, 967 F.3d at 301 ("[A] more direct victim … may also break the chain of causation."); Simpson-Vlach v. Mich. Dep't of Educ., No. 22-1724, 2023 WL 3347497, at *7 (6th Cir. May 10, 2023) (explaining in a similar case that plaintiffs' injuries were "passed-on" where the "false assurances were made to the [USDOE] … meaning that the federal government was the direct victim"). The Parents' alleged injuries from harms like skills regression are too remote and indirect to confer standing as the Parents failed to allege any connection between the claimed misrepresentations and these harms. Accordingly, we agree with the District Court that the Parents failed to establish

standing to pursue Count Nine, for violations of RICO.[13]

III. CONCLUSION

For the foregoing reasons, we will affirm the District Court's order entered September 12, 2022, dismissing the Parents' Amended Complaint for lack of subject matter jurisdiction and failure to state a claim.

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[13] Even if the Parents had shown standing, we would affirm the District Court's dismissal based on the Parents' failure to plausibly allege predicate acts. The Parents alleged violations of "federal mail and wire fraud statutes, 18 U.S.C. § 1341 and 18 U.S.C. § 1343." A278–79. Allegations of mail or wire fraud as the bases for a RICO violation must be "pled with specificity." Lum v. Bank of Am., 361 F.3d 217, 223 (3d Cir. 2004), abrogated in part on other grounds by Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007). The Parents' allegations fail for at least two reasons. First, the Parents' claim that the Educators made misrepresentations in 2019, before the pandemic began in 2020. But the Amended Complaint does not allege that the Educators sought or received IDEA Part B funds in 2019 with any idea that they would close schools due to a pandemic. See J.T., 500 F. Supp. 3d at 170. Second, the Parents' allegations that the Educators misrepresented IDEA compliance in 2020 are not only vague but also untenable in light of the fact that the Educators relied on USDOE's own guidance that a FAPE could be provided through distance learning. See Roe v. Baker, 624 F. Supp. 3d 52, 62 (D. Mass. 2022), aff'd, Roe v. Healey, — F.4th —, 2023 WL 5199870 (1st Cir. Aug. 14, 2023).

FILED September 8, 2023

UNITED STATES COURT OF APPEALS
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Appellants

v.

NEW JERSEY DEPARTMENT OF EDUCATION; AUDUBON PUBLIC SCHOOL DISTRICT; CAMDEN CITY SCHOOL DISTRICT; CAMDEN COUNTY SCHOOL DISTRICT; CAPE MAY COUNTY PUBLIC SCHOOL DISTRICT; ESSEX COUNTY PUBLIC SCHOOL DISTRICT; GLOUCESTER COUNTY PUBLIC SCHOOL DISTRICT; LOWER CAPE MAY REGIONAL SCHOOL DISTRICT; MANASQUAN PUBLIC SCHOOL DISTRICT; MATAWAN ABERDEEN REGIONAL SCHOOL DISTRICT; MIDDLE TOWNSHIP PUBLIC SCHOOL DISTRICT; MIDDLETOWN TOWNSHIP PUBLIC SCHOOL DISTRICT; MONMOUTH COUNTY PUBLIC SCHOOL DISTRICT; MORRIS COUNTY PUBLIC SCHOOL DISTRICT; OCEAN COUNTY PUBLIC SCHOOL DISTRICT; ROXBURY TOWNSHIP PUBLIC SCHOOL DISTRICT; RUMSON-FAIR HAVEN REGIONAL HIGH SCHOOLS; TOMS RIVER REGIONAL SCHOOL DISTRICT; WASHINGTON TOWNSHIP SCHOOL DISTRICT; WEST ORANGE PUBLIC SCHOOLS; COMMISSIONER ANGELICA ALLEN-MCMILLAN, In her official capacity; AVE ALTERSITZ, In her official capacity; DR. J. SCOTT CASCONE, In his official capacity; JOSEPH CASTELLUCCI, In his official capacity; ANDREW DAVIS, In his official capacity; DR. JUDITH DESTEFANO-ANEN, In her official capacity; THOMAS GIALANELLA, In his official capacity; DEBRA GULICK, In her official capacity; ROGER JINKS, in his official capacity; DR. FRANK KASYAN, in his official capacity; JOSEPH MAJKA, In his official capacity; KATRINA MCCOMBS, In her official capacity; JEFFREY MOHRE, In his

official capacity; CHARLES MULLER, in his official capacity; DR. LOVELL PUGH-BASSETT, in her official capacity; LORETTA RADULIC, in her official capacity; DR. LESTER RICHENS, in his official capacity; DAVID SALVO, in his official capacity; MARY ELLEN WALKER, in her official capacity; JOSEPH S. ZARRA, in his official capacity

(*Dismissed pursuant to Court Order dated 12/20/2022)
(**Dismissed pursuant to Court Order dated 9/6/2023)

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 2-21-cv-18746)
U.S. District Judge: Honorable John M. Vazquez

Submitted under Third Circuit L.A.R. 34.1(a)
July 13, 2023

Before: SHWARTZ, RESTREPO, and CHUNG,
Circuit Judges.

JUDGMENT

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the United States District Court for the District of New Jersey and was submitted on July 13, 2023, pursuant to Third Circuit L.A.R. 34.1(a).

On consideration whereof, it is now hereby ADJUDGED and ORDERED that judgment of the District Court entered September 12, 2022, is hereby AFFIRMED. Costs will be taxed to Appellants. All of the above in accordance with the opinion of this Court.

ATTEST:
s/Patricia S. Dodszuweit
Clerk

DATE: September 8, 2023

FILED August 23, 2022

Not for Publication

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 21-18746

JENNICA CARMONA, *et al.*,
Plaintiffs,
v.

NEW JERSEY DEPARTMENT OF EDUCATION, *et al.*,
Defendants.

OPINION

John Michael Vazquez, U.S.D.J.

Plaintiffs, parents of fifteen special needs children, initiated this putative class action against the New Jersey Department of Education ("NJDOE"), multiple public-school districts throughout New Jersey (the "School District Defendants"), and the New Jersey Commissioner of Education as well as the Superintendents of the school districts (the "Individual Defendants"). D.E. 1. Plaintiffs assert claims under the Individuals with Disabilities Education Act ("IDEA"), Section 504 of the Rehabilitation Act, the Americans with Disabilities Act ("ADA"), Section 1983, the New Jersey Administrative Code ("NJAC"), the New

Jersey Special Education Statute ("NJSA"), the New Jersey Civil Rights Act ("NJCRA"), the New Jersey Law Against Discrimination ("NJLAD," and together with the NJAC, NJSA, and NJCRA, the "New Jersey Statutes"), and the Racketeer Influenced and Corrupt Organizations Act ("RICO"). *Id*. Presently before the Court are Defendants' motions to dismiss the Amended Complaint ("AC"). D.E. 41, 54, 65, 87, 91, 92, 93, 118.[1] Additionally, the Court addresses the motion for sanctions filed by four Defendants. D.E. 120. The Court reviewed all the submissions in support and in opposition[2] and considered the

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[1] Plaintiffs filed the AC, D.E. 100, on February 5, 2022, indicating that they simply corrected a technical deficiency in the Complaint. Because there are no substantive changes to the AC, the Court will treat Defendants' current motions to dismiss as responsive to the AC.

[2] The moving briefs of West Orange Board of Education, Middletown Board of Education, Mary Ellen Walker, and Dr. J. Scott Cascone ("West Orange"), D.E. 41-4; Audubon Public School District and Dr. Andrew P. Davis ("Audubon"), D.E. 54-1; Lower Cape May Regional School District and Joseph Castellucci ("Lower Cape May"), D.E. 65-1; Toms River Regional Schools Board of Education and Thomas Gialanella ("Toms River"), D.E. 87-1; Middle Township School District and Dr. David Salvo ("Middle Township"), D.E. 91-1; Manasquan Board of Education and Dr. Frank Kasyan ("Manasquan"), D.E. 92-3; Rumson-Fair Haven Regional High School District, Camden City School District, Washington Township School District, and Matawan- Aberdeen Regional School District ("Rumson-Fair Haven"), D.E. 93-1; Roxbury Township Board of Education and Loretta Radulic ("Roxbury"), D.E. 118-1; Plaintiff's brief in opposition ("Opp."), D.E. 99; Audubon's reply, D.E. 108; West Orange's reply, D.E. 109; Middle Township's reply, D.E. 110; and Rumson-Fair Haven's reply, D.E. 111. The Court also reviewed the brief filed by Audubon, Lower Cape May, Dr. Andrew P. Davis, and Joseph Castellucci in support of their motion for sanctions, D.E. 120-1; Plaintiffs' brief in

motions without oral argument pursuant to Federal Rule of Civil Procedure 78(b) and Local Civil Rule 78.1(b). For the reasons discussed below, Defendants' motions to dismiss are **GRANTED** and the motion for sanctions is **DENIED.**

I. BACKGROUND[3]

The relevant facts of this case were outlined in detail in the Court's May 24, 2022 Opinion and Order denying Plaintiffs' motion for a preliminary injunction, D.E. 125, which is incorporated herein. As a result, the Court provides a brief summary of the relevant facts and procedural history.

Plaintiffs brought suit individually and on-behalf of fifteen school-aged children, who are students in different school districts throughout New Jersey. All have special needs and, all but one, B.A., had an Individualized Education Plan ("IEP") for the 2019-20 and/or the 2020-21 school years. *See, e.g.*, AC ¶¶ 237-42; 254-58. An IEP is the "primary mechanism" to ensure that every disabled child receives a free appropriate public education ("FAPE"), as required by the IDEA. *Id.* ¶ 184; *see also* 20 U.S.C. § 1400, *et seq*. An IEP is a written document that sets forth the special education and related services that must be provided to the child, to enable a FAPE. AC ¶ 185. Through their IEPs, all the named children in this

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opposition, D.E. 121; and the above-listed Defendants' reply, D.E. 123.

[3] The factual background is taken from the AC, D.E. 100. When reviewing a motion to dismiss, the Court accepts as true all well-pleaded facts in the complaint. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009).

matter, except B.A., received some type of specialized support or modifications at school during the 2019-20 and 2020-21 school years.[4] *See, e.g.*, *id.* ¶¶ 240, 256.

On March 16, 2020, in the face of the COVID-19 pandemic, all public and private preschools, elementary schools, and secondary schools in New Jersey were ordered to close indefinitely. *Id.* ¶ 190, *see also* D.E. 1-15 at 5. As a result, all New Jersey schools that had not already done so, including some of the School District Defendants, ceased in-person learning and began virtual instruction.[5] *See, e.g.*, AC ¶¶ 244-45. Plaintiffs received virtual instruction and services for the remainder of the 2019-20 school year. Virtual instruction continued until various points in the 2020-21 school year, when the School District Defendants began providing hybrid learning or in-person instruction. *See, e.g.*, *id.* at ¶¶ 249, 294.

On October 18, 2021, Plaintiffs commenced the present action seeking injunctive and declaratory relief. D.E. 1. On February 5, 2022, Plaintiffs filed the AC, which contains nine counts. D.E. 100. Count One alleges violations of the IDEA, AC ¶¶ 504-521; Count Two violations of the Rehabilitation Act, *id.* ¶¶ 522-537; and Count Three violations of the ADA, *id.* ¶¶ 538-550. Counts Four and Five assert Section

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[4] B.A. did not have an IEP for the 2019-20 or 2020-21 school years. An IEP was created for B.A. in September 2021 for the 2021-22 school year. AC ¶¶ 227-228. Plaintiffs allege that B.A. was denied a FAPE during the 2019-20 and 2020-21 school years through the school district's failure to provide B.A. with an IEP or other appropriate services.

[5] It appears that many of the School District Defendants stopped in-person instruction on March 13, 2020, before the Executive Order. *See, e.g.*, AC ¶¶ 274, 290, 426, 448.

1983 claims for deprivation of Plaintiffs' equal protection and substantive due process rights under the Fourteenth Amendment. *Id.* ¶¶ 551-568. Count Six alleges violations of the NJAC and NJSA, *id.* ¶¶ 569-573; Count Seven violations of the NJCRA, *id.* ¶¶ 574-578; and Count Eight violations of the NJLAD, *id.* ¶¶ 579-584. Finally, Count Nine alleges RICO violations against the individual Defendants. *Id.* ¶¶ 585-766. The Court previously denied Plaintiffs' motion for a preliminary injunction, finding that Plaintiffs failed to establish a reasonable probability of success on the merits on their RICO claims and that Plaintiffs were not entitled to an automatic injunction under the stay put provision of the IDEA. D.E. 125. The Court now turns to Defendants' motions to dismiss.

II. STANDARD OF REVIEW

A. Rule 12(b)(1)

Defendants argue that certain claims in the AC should be dismissed for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). To decide a Rule 12(b)(1) motion, a court must first determine whether the party presents a facial or factual attack against a complaint. A facial attack contests "subject matter jurisdiction without disputing the facts alleged in the complaint, and it requires the court to 'consider the allegations of the complaint as true.'" *Davis v. Wells Fargo*, 824 F.3d 333, 346 (3d Cir. 2016) (quoting *Petruska v. Gannon Univ.*, 462 F.3d 294, 302 n.3 (3d Cir. 2006)). A factual attack challenges "the factual allegations underlying the complaint's

assertion of jurisdiction, either through the filing of an answer or 'otherwise presenting competing facts.'" *Id.* at 346 (quoting *Constitution Party v. Aichele*, 757 F.3d 347, 358 (3d Cir. 2014)). Defendants do not challenge the factual allegations underlying Plaintiffs' assertion of jurisdiction. Accordingly, the Court treats Defendants' argument as a facial challenge and considers the allegations of the AC as true.

B. Rule 12(b)(6)

Defendants also move to dismiss under Federal Rule of Civil Procedure 12(b)(6), pursuant to which a count may be dismissed for "failure to state a claim upon which relief can be granted[.]" To withstand a motion to dismiss under Rule 12(b)(6), a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A complaint is plausible on its face when there is enough factual content "that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Although the plausibility standard "does not impose a probability requirement, it does require a pleading to show more than a sheer possibility that a defendant has acted unlawfully." *Connelly v. Lane Const. Corp.*, 809 F.3d 780, 786 (3d Cir. 2016) (internal quotation marks and citations omitted). As a result, a plaintiff must "allege sufficient facts to raise a reasonable expectation that discovery will uncover proof of [his] claims." *Id.* at 789.

In evaluating the sufficiency of a complaint, a district court must accept all well-pled factual

allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Phillips v. County of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008). A court, however, is "not compelled to accept unwarranted inferences, unsupported conclusions or legal conclusions disguised as factual allegations." *Baraka v. McGreevey*, 481 F.3d 187, 211 (3d Cir. 2007). If, after viewing the allegations in the complaint most favorable to the plaintiff, it appears that no relief could be granted under any set of facts consistent with the allegations, a court may dismiss the complaint for failure to state a claim. *DeFazio v. Leading Edge Recovery Sols.*, Civ. No. 10- 2945, 2010 WL 5146765, at *1 (D.N.J. Dec. 13, 2010).

III. STATUTORY FRAMEWORK

The IDEA, 20 U.S.C. § 1401 *et seq.*, is designed "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living[.]" 20 U.S.C. § 1400(d)(1)(A). The IDEA requires states that receive federal education funding to provide every disabled child with a free appropriate public education ("FAPE"). *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 993 (2017) (citing 20 U.S.C. § 1400, *et seq.*). A FAPE "consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction." *Ridley Sch. Dist. v.*

M.R., 680 F.3d 260, 268–69 (3d Cir. 2012) (internal quotation marks omitted).

The IDEA provides mechanisms for an aggrieved party to submit a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6)(A). Initially, a party may bring a complaint to challenge the adequacy of an IEP through "an administrative 'impartial due process hearing.'" *Ridley Sch. Dist.*, 680 F.3d at 269 (quoting 20 U.S.C. § 1415(f)). "In New Jersey, this process entails filing a complaint and request for a due process hearing with the New Jersey Department of Education ("NJDOE")." *Estate of S.B. ex rel. Bacon v. Trenton Bd. of Educ.*, No. 17-7158, 2018 WL 3158820, at *2 (D.N.J. June 28, 2018) (quoting N.J.A.C. 6A:14-2.7(c)). A party aggrieved by the outcome of the due process hearing "shall have the right to bring a civil action with respect to the complaint presented . . . in a district court of the United States, without regard to the amount in controversy." 20 U.S.C § 1415(i)(2)(A). The IDEA's detailed statutory regime makes it "clear ... that Congress intended plaintiffs to complete the administrative process before resorting to federal court." *Komninos v. Upper Saddle River Bd. of Educ.*, 13 F.3d 775, 778 (3d Cir. 1994).

IV. ANALYSIS

A. Exhaustion of Administrative Remedies

Defendants argue that the Court lacks subject matter jurisdiction over Plaintiffs' claims relating to the denial of FAPEs because Plaintiffs have not exhausted their administrative remedies under the IDEA. "Generally, a plaintiff who seeks relief available under the IDEA must exhaust his administrative remedies before filing a lawsuit[.]" *M.M. v. Paterson Bd. of Educ.*, 736 F. App'x 317, 319 (3d Cir. 2018) (internal quotation omitted). "There are four exceptions to the exhaustion requirement: (1) exhaustion would be futile or inadequate; (2) the issue presented is purely a legal question; (3) the administrative agency cannot grant relief; and (4) exhaustion would cause severe or irreparable harm." *Id.* at 319-20 (internal quotation omitted). "The party seeking to be excused from exhaustion bears the burden of establishing an exception." *Id.* (citing *Honig v. Doe*, 484 U.S. 305, 327 (1988)). Where no exception applies, "failure to exhaust will deprive a federal court of subject matter jurisdiction." *T.R. v. Sch. Dist. of Philadelphia*, 4 F.4th 179, 185 (3d Cir. 2021).

Here, Plaintiffs admit that they have not exhausted their administrative remedies. AC ¶ 15. However, they argue that they need not exhaust their administrative remedies because they were not given full notice of their procedural rights under the IDEA. Opp. at 6. Specifically, Plaintiffs contend, they were not given full notice of their procedural rights "before or after" Defendants unilaterally

changed the educational placement of the student Plaintiffs by closing schools and requiring students and staff to remain home. *Id.* at 7-9.

As an initial matter, Plaintiffs fail to cite to any binding authority in support of their position. Beyond this shortcoming, Plaintiffs have not plausibly plead that they were deprived of proper notice. The IDEA requires that prior written notice be provided to parents whenever a special education student's educational placement is changed. *See* 20 U.S.C. § 1415(b)(3). However, Plaintiffs have not adequately plead that the change from in-person to remote instruction resulting from the COVID-19 pandemic constituted a change in educational placement. In arriving at this conclusion, the Court finds the analysis in *J.T. v. de Blasio*, 500 F. Supp. 3d 137 (S.D.N.Y. 2020) instructive. There, a group of parents represented by the same attorneys as in the present action brought a nationwide class action asserting claims similar to those asserted here. Among other things, the plaintiffs alleged that when schools throughout the country were shut down due to the pandemic, the change to remote learning automatically altered the educational placement of every special needs student in the United States such that they were denied a FAPE. *See id.* at 147-48. The court found that none of the student plaintiffs had established that his or her educational placement had been changed for three reasons, two of which are relevant here. *Id.* at 186-88. First, the USDOE, the agency charged with administering the IDEA, issued guidance indicating that the provision of remote services does not work a change in placement, which the *J.T.* court refused to "second guess." *Id.* at 187-88. Second, the plaintiffs were

challenging an administrative decision of general applicability that applied equally to abled and disabled students, and "[s]uch an order does not work a change in pendency." *Id.* at 188.

Plaintiffs do not attempt to distinguish *J.T.* in arguing that Defendants unilaterally altered the student Plaintiffs' educational placements, and the Court finds the reasoning or *J.T.* persuasive. Here, as in *J.T.*, the change from in-person to virtual instruction applied to abled and disabled students alike. While the Third Circuit has not spoken to this precise issue, it has noted that a change in educational placement "should be given an expansive reading, at least where changes affecting *only an individual child's* program are at issue." *D.M. v. New Jersey Dep't of Educ.*, 801 F.3d 205, 215 (3d Cir. 2015) (emphasis added). Accordingly, the Court is not persuaded that an order of general applicability (such as the one at issue here) can work a change in educational placement. *See N.D. v. Hawaii Dep't of Educ.*, 600 F.3d 1104, 1108 (9th Cir. 2010) (ruling that Hawaii's system-wide decision to shut down all public schools, thus depriving able and disabled students of seventeen days of instruction, did not constitute a change in the disabled children's educational placement). Additionally, the USDOE's explicit guidance that providing remote instruction did not constitute a change in educational placement applies equally to the parties in the present action and, in the Court's view, deserves equal deference. Thus, even assuming that lack of proper notice would excuse Plaintiffs from exhausting their administrative remedies, such an exception would not apply here. *See Woodruff v. Hamilton Twp. Pub. Sch.*, Civ No. 06-3815, 2008 WL 11449201, at *8

(D.N.J. Apr. 8, 2008) (holding that "baldly stating…that [the plaintiffs] did not receive proper notice under the IDEA is insufficient to avoid the administrative process" where the plaintiffs failed to articulate how the notice requirement was violated or how the administrative process would not be able to provide them with a remedy to the alleged notice failure).

Plaintiffs also contend that they are excused from the exhaustion requirements because they "seek relief from Defendants' systemic violations of the IDEA on behalf of a large class, which the administrative due process system cannot provide." *Id.* at 10. Exhaustion of administrative remedies "is not required where plaintiffs allege systemic legal deficiencies and, correspondingly, request system-wide relief that cannot be provided (or even addressed) through the administrative process." *T.R.*, 4 F.4th at 185. This exception "flows implicitly from, or is in fact subsumed by, the futility and no-administrative-relief exceptions." *Id.* (internal quotation omitted). To satisfy the systemic exception, a plaintiff must challenge policies that are "truly systemic…in the sense that the IDEA's basic goals are threatened on a system-wide basis." *Id.* at 192. For instance, claims that challenge policies concerning the administrative dispute resolution mechanism itself often meet the systemic exception. *Id.* Notably, "the fact that a complaint is structured as a class action seeking injunctive relief, without more, does not excuse exhaustion." *Id.*

Here, Plaintiffs' claims of "systemic violations" of the IDEA consist of the following:

> (1) The School District Defendants did not give Plaintiffs prior written notice of school closures and the change from in-person instruction to virtual instruction (AC ¶ 506);
>
> (2) The School District Defendants did not maintain the student Plaintiffs' pendency placement through in-person instruction (*id*. ¶ 513);
>
> (3) The School District Defendants did not reconvene IEP meetings to change the student Plaintiffs' IEPs to provide for completely virtual instruction (*id.* ¶ 517);
>
> (4) Defendants failed to ensure that children with disabilities had appropriate access to the same educational opportunities as their non-disabled peers (*id.* ¶ 520); and
>
> (5) The NJDOE failed to appropriately monitor the School District Defendants to ensure that they complied with the IDEA's procedural safeguards upon the closing of schools in March 2020 (*id.* ¶¶ 507, 514, 518).

These issues implicate individualized inquiries regarding the notice each School District Defendant provided, each student Plaintiff's particular IEP, and how each student Plaintiff's access to educational opportunities compared to that of their non-disabled peers in the same school district. They do not implicate "policies which undermine access to the administrative hearing process itself." *T.R.*, 4 F.4th at 193; *see also id.* at 192 (discussing cases in which

the court recognized the systemic exception because the plaintiffs' problems "could not have been remedied by administrative bodies" and noting that this exception "is largely limited to those procedural violations that effectively deprive plaintiffs of an administrative forum") (internal quotation and alteration omitted). Plaintiffs' argument that their claims "are not premised on the individual needs of particular students" but rather "challenge [ ] the very framework and processes that Defendants have undertaken for every disabled child in their state," Opp. at 10, is simply incompatible with the claims set forth in the AC. Nor is the Court persuaded by Plaintiffs' argument that the relief they seek "on behalf of a large class," cannot be provided by the administrative due process system. *See T.R.*, 4 F.4th at 194 (rejecting the plaintiffs' argument that exhaustion was futile because the administrative process could not result in the desired relief of wholesale, systemic changes to the school district's challenged services and noting that if the "truism" that "administrative hearings cannot order class-wide relief [ ] were sufficient to satisfy the systemic exception, the IDEA's exhaustion requirement would be meaningless every time Rule 23 relief was invoked"). Thus, Plaintiffs fail to allege adequately that the systemic exception to exhaustion applies. As a result, the Court dismisses Plaintiffs' IDEA claims for lack of subject matter jurisdiction.

Plaintiffs' claims brought under Section 504 of the Rehabilitation Act, the ADA, Section 1983, and the New Jersey Statutes fare no better. The IDEA's exhaustion requirement extends beyond claims brought under the IDEA; it applies to any claims that seek relief also available under the IDEA. *T.R.*,

4 F.4th at 185. This statutory provision "bars plaintiffs from circumventing [the] IDEA's exhaustion requirement by taking claims that could have been brought under [the] IDEA and repackaging them as claims under some other statute—*e.g.*, section 1983, section 504 of the Rehabilitation Act, or the ADA." *Batchelor v. Rose Tree Media Sch. Dist.*, 759 F.3d 266, 272 (3d Cir. 2014) (first alteration in original) (internal quotation omitted); *see also Hornstine v. Twp. of Moorestown*, 263 F. Supp. 2d 887, 901-02 (D.N.J. 2003) ("[I]n cases in which it appears that a plaintiff has cloaked an IDEA claim as an ADA, Rehabilitation Act, or Section 1983 action in an effort to avoid application of the IDEA's distinct exhaustion requirement, courts will require that plaintiff to exhaust the state administrative remedies mandated for IDEA claims."). To determine whether a non-IDEA claim seeks relief that is also available under the IDEA, "a court should look to the substance, or gravamen of the plaintiff's complaint." *T.R.*, 4 F.4th at 185 (quoting *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 752 (2017)). Specifically, the analysis of whether the claim concerns the denial of a FAPE should be guided by two inquiries: (1) "could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was *not* a school—say, a public theater or library"; and (2) "could an *adult* at the school—say, an employee or visitor—have pressed essentially the same grievance"? *Id.* (emphasis in original) (quoting *Fry*, 137 S. Ct. at 756). If the answer to those questions is no, then the claim "probably does concern a FAPE, even if it does not explicitly say so." *Fry*, 137 S. Ct. at 756.

In light of the analytical framework, it is clear that the claims stated in Counts Two through Eight of the AC seek relief also available under the IDEA. The claims all arise out of the cessation of in-person instruction and services in March 2020, which allegedly resulted in Plaintiffs suffering discrimination and deprivation of their equal protection rights, substantive due process rights, and procedural safeguards. *See* AC ¶¶ 535-536 (Section 504 of the Rehabilitation Act); *id.* ¶ 549 (the ADA); *id.* ¶¶ 554-556 (Section 1983 claims for right to equal protection under the Fourteenth Amendment), *id.* ¶¶ 564-567 (Section 1983 claims for substantive due process rights under the Fourteenth Amendment); *id.* ¶¶ 570-571 (NJAC and NJSA), *id.* ¶ 577 (NJCRA); *id.* ¶ 583 (NJLAD). "Because these factual allegations are intertwined with [Plaintiffs'] complaints about the school[s'] failure to accommodate [their] educational needs…and because such allegations could not be brought by a nonstudent or outside the school setting," these claims seek relief available under the IDEA and are thus subject to exhaustion. *Wellman v. Butler Area Sch. Dist.*, 877 F.3d 125, 134 (3d Cir. 2017) (concluding that the gravamen of the plaintiff's complaint is the denial of a FAPE and affirming that the plaintiff's claims brought under the ADA, the Rehabilitation Act, and Section 1983 were subject to exhaustion). As Plaintiffs have not exhausted their administrative remedies or shown that any exception to the exhaustion requirement applies, their claims are not properly before the Court. *See Batchelor*, 759 F.3d at 281 (affirming dismissal of complaint for lack of subject matter jurisdiction because the appellants did not exhaust the IDEA's

administrative process and failed to demonstrate that an exception applies). Therefore, Counts One through Eight are dismissed for lack of subject matter jurisdiction.[6]

B. RICO Claims

Plaintiffs also allege that Defendants violated RICO by way of their involvement in a scheme to deprive Plaintiffs of IDEA Part B funds by making false representations to the USDOE about their compliance with the IDEA during the COVID-19 pandemic.[7] *Id.* ¶¶ 586, 610. "The civil RICO statute allows '[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter [to] sue therefor in any appropriate United States district court.'" *Anderson v. Ayling*, 396 F.3d 265, 268-69 (3d Cir. 2005) (quoting 18 U.S.C. § 1964(c)). To bring a federal civil RICO claim under 18 U.S.C. § 1962, a plaintiff must allege: "(1) the conducting of, (2) an enterprise, (3) through a pattern, (4) of racketeering activity." *Gunter v. Ridgewood Energy Corp.*, 32 F. Supp. 2d 166, 173 (D.N.J. 1998). To establish a pattern of racketeering activity, a plaintiff must allege "at least two predicate acts of racketeering that occurred within

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[6] Defendants also raise supplemental jurisdiction and abstention arguments. Because the Court dismisses Plaintiffs' claims on other grounds, it does not reach those issues.

[7] Through the IDEA, states are entitled to federal education funding if they have policies and procedures in place to ensure that their students receive a FAPE. 20 U.S.C. § 1412. This funding is referred to as Part B funding. In New Jersey, the NJDOE receives the Part B money then distributes it to local school districts. 20 U.S.C. § 1413.

ten years of each other." *Slimm v. Bank of Am. Corp.*, No. 12-5846, 2013 WL 1867035, at *20 (D.N.J. May 2, 2013). Racketeering activity is defined in Section 1961(1)(B) as "any act which is indictable under" a number of enumerated federal laws; these federal offenses are called "predicate acts." *See* 18 U.S.C. § 1341; 18 U.S.C. § 1962(1)(B).

As an initial matter, as the Court noted in its Opinion and Order denying Plaintiffs' preliminary injunction motion, multiple district courts within the Third Circuit "have affirmatively held that RICO does not establish a private right of equitable relief." *Minnesota ex rel. Ellison v. Sanofi-Aventis U.S. LLC*, No. 18-14999, 2020 WL 2394155, at *12 (D.N.J. Mar. 31, 2020); *see also MSP Recovery Claims, Series LLC v. Abbott Labs.*, No. 19-21607, 2021 WL 2177548, at *9 (D.N.J. May 28, 2021) ("declin[ing] to stray from the reasoned decisions from this District" concluding that "private parties cannot obtain equitable relief under RICO"); *Johnston Dev. Grp., Inc. v. Carpenters Local No. 1578*, 728 F. Supp. 1142, 1146 (D.N.J. 1990) (explaining that RICO "makes no provision for private equitable relief"). Plaintiffs' reliance on Second Circuit decisions for the proposition that RICO does provide a private right of action for injunctive relief is insufficient to overcome the weight of authority in this district. No court in this district has adopted the Second Circuit's reasoning and conclusion. *See MSP Recovery Claims*, 2021 WL 2177548, at *9 ("Plaintiffs point to no case in this District that has adopted the reasoning of the Second and Seventh Circuits.").

1. Standing

Even assuming *arguendo* that RICO provides a private right of action for equitable relief, Plaintiffs' RICO claims fail for numerous additional reasons. First, Plaintiffs lack standing to sue under the RICO statute. RICO grants standing to sue to "[a]ny person injured in his business or property by reason of a violation of section 1962." 18 U.S.C. § 1964(c) (1988). "A plaintiff lacks standing to sue under RICO where…he suffers injury that is only indirectly related to a defendant's alleged misconduct." *McCullough v. Zimmer, Inc.*, 382 F. App'x 225, 231 n.7 (3d Cir. 2010).

Here, Plaintiffs allege only indirect harm flowing from the allegedly fraudulent scheme. Plaintiffs claim that Defendants submitted false information to the USDOE, resulting in the receipt of IDEA Part B funds. *See*, *e.g.*, AC ¶¶ 586-588. Thus, the alleged fraud was perpetrated on the United States government, not Plaintiffs. Addressing similar claims, the *J.T.* court found that the plaintiffs lacked standing to assert a RICO claim because the alleged fraud—submitting false claims to the federal government to obtain federal funding for educating disabled children—was perpetrated on the United States rather than on the plaintiffs. 500 F. Supp. 3d at 166. Likewise, Plaintiffs here lack standing to bring their RICO claims because they allege injuries "derivative of harm suffered by a more immediate victim of the RICO activity." *Gratz v. Ruggiero*, 822 F. App'x 78, 82 n.3 (3d Cir. 2020) (internal quotation omitted); *see also In re Avandia Mktg., Sales Pracs. & Prod. Liab. Litig.*, 804 F.3d 633, 642 (3d Cir. 2015) ("[A] plaintiff who complained of harm flowing

merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover.").

2. Existence of an Enterprise

Plaintiffs also fail to plausibly plead the existence of an enterprise. The RICO statute defines the term "enterprise as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). "[A] RICO claim must plead facts plausibly implying the existence of an enterprise with the [following structural attributes]: a shared 'purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose.'" *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 369-70 (3d Cir. 2010) (quoting *Boyle v. United States*, 556 U.S. 938, 946 (2009)).

The AC fails to allege these structural attributes. Instead, Plaintiffs merely recite the elements of an enterprise, claiming that the NJDOE and each of the School District Defendants are "individual enterprises," each of which "is an association in fact consisting of individuals who function together as a continuing unit with consensual decision-making authority," and has "longevity sufficient to permit their respective individual RICO Defendants to pursue the enterprise's purpose." AC ¶¶ 593-594; 602. These conclusory allegations are insufficient. Far from alleging relationships among those associated with each enterprise, Plaintiffs identify only a single member of each: the Individual

Defendant serving as the alleged enterprise's Superintendent. *See*, *e.g.*, AC ¶¶ 595, 596, 599. Nor does the AC contain any allegations supporting an inference that the members of each enterprise—again, unidentified save for the Superintendent of each named school district—shared a common purpose.

Indeed, in response to Defendants' arguments, Plaintiffs assert the following in conclusory fashion without any citations to the AC:

> As outlined in the Complaint, Plaintiffs have plead sufficient facts on the fact [sic] of their complaint to identify the enterprise or group consisting of governmental agencies, including the New Jersey Commissioner of Education, the State Education Agency, and the Defendant school districts and their superintendents who were responsible for setting and managing state funding and state policy, as well as oversight and enforcement of the policies which violated the IDEA and deprived Plaintiffs of a FAPE.

Opp. at 12. In short, Plaintiffs have not adequately plead the existence of an enterprise, but rather, "at best, the conclusory naming of a string of entities coupled with legal conclusions." *J.T.*, 500 F. Supp. 3d at 167-68 (internal quotation omitted). The *J.T.* court found that the plaintiffs failed to allege the existence of an enterprise because they failed to allege any facts supporting an inference that the members of the alleged enterprise "have any sort of relationship that forms a coherent entity," that "they bonded together with the singular purpose of

depriving disabled students of the benefit of in-person education during the pandemic," or that "they acted together as a unit to achieve that purpose". *Id.*

3. Predicate Acts

Plaintiffs further fail to plausibly allege predicate acts of racketeering activity. Under the RICO statute, racketeering activity includes mail fraud under 18 U.S.C. § 1341 and wire fraud under 18 U.S.C. § 1343. *See* 18 U.S.C. § 1961(1). The elements of mail and wire fraud include: "(1) a scheme to defraud, (2) the use of the mails or wires for the purpose of executing the scheme, and (3) fraudulent intent." *In re Valent Pharms. Int'l, Inc.*, Civ. No. 16-3087, 2020 WL 9809347, at *22 (D.N.J. Aug. 24, 2020) (citing 18 U.S.C. §§ 1341, 1343; *United States v. Hedaithy*, 392 F.3d 580, 590 (3d Cir. 2001)). Further, "[w]here acts of mail and wire fraud constitute the alleged predicate racketeering acts, those acts are subject to the heightened pleading requirement of Rule 9(b)." *Warden v. McLelland*, 288 F.3d 105, 114 (3d Cir. 2002). This means that a complaint bringing RICO mail and wire fraud claims must "identify the purpose of the mailing within the defendant's fraudulent scheme and specify the fraudulent statement, the time, place, and speaker and content of the alleged misrepresentation." *Bonavitacola Elec. Contractor, Inc. v. Boro Devs., Inc.*, 87 F. App'x 227, 231 (3d Cir. 2003). The heightened Rule 9(b) pleading requirement is "particularly important in civil RICO pleadings in which the predicate racketeering acts are critical to the sufficiency of the RICO claim." *Balthazar v. Atl. City Med. Ctr.*, 279 F. Supp. 2d 574, 591 (D.N.J.

2003) (internal quotation omitted), *aff'd*, 137 F. App'x 482 (3d Cir. 2005).

Plaintiffs claim that Defendants engaged in mail and wire fraud by "using interstate wires to defraud Plaintiffs, the beneficiaries of IDEA Part B Funds." AC ¶¶ 609-610. Plaintiffs fall far short of satisfying the heightened pleading requirements of Rule 9(b). First, the predicate acts are pleaded on information and belief. *See*, *generally*, *id.* ¶¶ 611-752. "As a general matter, such allegations are insufficient for purposes of Rule 9(b)." *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295, 314 (D.N.J. 2005) (dismissing mail and wire fraud RICO claims pleaded on information and belief because "a conclusory declaration to this effect…does not satisfy Rule 9(b)"), *aff'd*, 691 F.3d 527 (3d Cir. 2012). Plaintiffs fail to even address this argument in their opposition brief, much less explain why such allegations pleaded on information and belief are sufficient.

Even without this deficiency, Plaintiffs' predicate act claims are insufficiently pled. The AC provides only conclusory allegations that each Individual Defendant used interstate wires to defraud Plaintiffs "[i]n furtherance of his [of her] scheme to defraud, and with the purpose of executing his [or her] scheme to defraud." *Id.* ¶¶ 615, 622, 631, 638, 645, 652, 659, 666, 673, 680, 687, 694701, 708, 715, 722, 729, 736, 750. These threadbare recitals are insufficient. Indeed, as the *J.T.* court noted, it is "utter[ly] implausib[le]" that, starting in *2019*,[8]

[8] Plaintiffs allege that the RICO Defendants knowingly and intentionally committed mail and wire fraud from March 2020 through the present, AC ¶ 609, but go on to allege that the Individual Defendants made allegedly fraudulent

Defendants sought and accepted federal funds for special education while being aware that the COVID-19 pandemic would disrupt in-person instruction in *March 2020* for a protracted period. 500 F. Supp. 3d at 170. Ultimately, Plaintiffs fall far short of satisfying their "obligation to provide allegations indicating why the charges are not baseless." *Zavala*, 393 F. Supp. 2d at 314.

In sum, not only do Plaintiffs lack standing to bring their RICO claims, but they additionally fail to plausibly allege the required elements of a RICO violation.9 Accordingly, Count Nine is dismissed.

C. Motion for Sanctions

Defendants Audubon, Lower Cape May, Dr. Andrew P. Davis, and Joseph Castellucci move for sanctions. D.E. 120. Before addressing the merits of a Rule 11 motion for sanctions, a court must ensure that the party seeking sanctions complied with the "safe harbor" provision of the rule. Rule 11 sanctions are only permissible after the party against whom sanctions are sought has notice of the alleged violation "and a reasonable opportunity to respond." Fed. R. Civ. P. 11(c)(1). To that end, a motion for sanctions can only be filed 21 days after the party seeking sanctions serves the motion on the party against whom sanctions are sought. Fed. R. Civ. P. 11(c)(2). *See Petit-Clair v. New Jersey*, No. 14-7082, 2016 WL 1568282, at *1 (D.N.J. Apr. 18, 2016). If a party fails to comply with the safe harbor provision, the motion for sanctions must be denied. *Scott v. Bd. of Educ. of City of E. Orange*, No. 01-4171, 2006 WL 3675278, at *18 (D.N.J. Dec. 12, 2006). Here, the

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representations beginning in 2019, *see*, *generally*, *id.* ¶¶ 611-752.

relevant Defendants complied with the safe harbor provision. *See* D.E. 120-1 at 3; 120-3.

Rule 11(b) imposes on any party who presents "a pleading, motion, or other paper . . . an affirmative duty to conduct a reasonable inquiry into the facts and the law before filing, and that the applicable standard is one of reasonableness under the circumstances." *Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc.,* 498 U.S. 533, 551 (1991). "[R]easonableness [under the circumstances is] defined as an objective knowledge or belief at the time of the filing of a challenged paper that the claim was well-grounded in law and fact." *Ford Motor Co. v. Summit Motor Prods., Inc.,* 930 F.2d 277, 289 (3d Cir. 1991) (citations and internal quotations omitted). Thus, attorneys are required to conduct a "normally competent level of legal research to support the[ir] presentation." *Simmerman v. Corino*, 27 F.3d 58, 62 (3d Cir. 1994). However, "Rule 11 is intended to impose sanctions 'only in the exceptional circumstance, where a claim or motion is patently unmeritorious or frivolous.'" *Ballard v. AT&T Mobility, Inc.*, No. 15-8808, 2018 WL 3377713, at *4 (D.N.J. July 11, 2018) (quoting *Doering v. Union Cnty. Bd. of Chosen Freeholders*, 857 F.2d 191, 194 (3d Cir. 1988)).

If Rule 11(b) is violated, Rule 11(c) permits the Court to impose sanctions, including reasonable attorneys' fees, expenses, or nonmonetary directives. Fed. R. Civ. P. 11(c). Any sanction, however, "must be limited to what suffices to deter repetition of the [sanctionable] conduct[.]" Fed. R. Civ. P. 11(c)(4). "Generally, sanctions are prescribed only in the exceptional circumstance where a claim or motion is patently unmeritorious or frivolous." *Ford Motor Co.,* 930 F.2d at 289 (internal citations and quotations omitted). Additionally, "the imposition of sanctions

for a Rule 11 violation is discretionary rather than mandatory." *Grider v. Keystone Health Plan Cent., Inc.*, 580 F.3d 119, 146 n.28 (3d Cir. 2009) (citation omitted). In deciding a Rule 11 motion, "[a]ny doubt . . . should be resolved in favor of the party charged with the violation." *Sanders v. Hale Fire Pump Co.*, No. 87-2468, 1988 WL 58966, at *1 (E.D. Pa. June 1, 1988) (citing *Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535, 544 (3d Cir. 1985)).

Here, the Court declines to impose sanctions. However, the Court cautions Plaintiffs to ensure that any future claims have both factual and legal support (or present a nonfrivolous argument for extending, modifying, or reversing existing law or establishing new law). Should Plaintiffs fail to heed the Court's warning, and should the Court be presented with a motion for sanctions in the face of similar circumstances in the future, the Court will impose sanctions if appropriate and require Plaintiffs to pay opposing counsels' fees and costs.

V. CONCLUSION

For the reasons set forth above, Defendants' motions to dismiss are **GRANTED** and the motion for sanctions is **DENIED**. The dismissal is without prejudice and Plaintiff shall have thirty (30) days to file an amended complaint that cures the deficiencies noted herein. If Plaintiff does not file an amended complaint within that time, this matter will be closed for lack of subject matter jurisdiction. An appropriate Order accompanies this Opinion.

Dated: August 23, 2022

/s/ John Michael Vazquez, U.S.D.J.

FILED: October 10, 2023

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-2874

JENNICA CARMONA, Individually, and as Parent and Natural Guardian of B.A.; KERRY GALLAGHER, Individually, and as Parent and Natural Guardian of K.G.; ANGELLE KURSAR, Individually, and as Parent and Natural Guardian of D.K.; JAMES NAZZARO, Individually, and as Parent and Natural Guardian of J.N.; LISA MATTESSICH**, Individually, and as Parent and Natural Guardian of M.M.; NICOLE TIERNEY, Individually, and as Parent and Natural Guardian of K.D.; DORENE CAMP*, Individually, and as Parent and Natural Guardian of S.C., C.C. and T.C.; LISA DRISCOLL, Individually, and as Parent and Natural Guardian of M.D.; DIANA LOGRASSO, Individually, and as Parent and Natural Guardian of K.I.; KELLY OSTERMAN, Individually, and as Parent and Natural Guardian of J.L.; TINA DELORENZO, Individually, and as Parent and Natural Guardian of N.D.; MUNIRA EDMONDS, Individually, and as Parent and Natural Guardian of A.K. and all other similarly situated; GABRIELLE KINDER, Individually, and as Parent and Natural Guardian of A.M.,

Appellants

v.

NEW JERSEY DEPARTMENT OF EDUCATION; AUDUBON PUBLIC SCHOOL DISTRICT; CAMDEN CITY SCHOOL DISTRICT; CAMDEN COUNTY SCHOOL DISTRICT; CAPE MAY COUNTY PUBLIC SCHOOL DISTRICT; ESSEX COUNTY PUBLIC SCHOOL DISTRICT; GLOUCESTER COUNTY PUBLIC SCHOOL DISTRICT; LOWER CAPE MAY REGIONAL SCHOOL DISTRICT; MANASQUAN PUBLIC SCHOOL DISTRICT; MATAWAN ABERDEEN REGIONAL SCHOOL DISTRICT; MIDDLE TOWNSHIP PUBLIC SCHOOL DISTRICT; MIDDLETOWN TOWNSHIP PUBLIC SCHOOL DISTRICT; MONMOUTH COUNTY PUBLIC SCHOOL DISTRICT; MORRIS COUNTY PUBLIC SCHOOL DISTRICT; OCEAN COUNTY PUBLIC SCHOOL DISTRICT; ROXBURY TOWNSHIP PUBLIC SCHOOL DISTRICT; RUMSON-FAIR HAVEN REGIONAL HIGH SCHOOLS; TOMS RIVER REGIONAL SCHOOL DISTRICT; WASHINGTON TOWNSHIP SCHOOL DISTRICT; WEST ORANGE PUBLIC SCHOOLS; COMMISSIONER ANGELICA ALLEN-MCMILLAN, In her official capacity; AVE ALTERSITZ, In her official capacity; DR. J. SCOTT CASCONE, In his official capacity; JOSEPH CASTELLUCCI, In his official capacity; ANDREW DAVIS, In his official capacity; DR. JUDITH DESTEFANO-ANEN, In her official capacity; THOMAS GIALANELLA, In his official capacity; DEBRA GULICK, In her official capacity; ROGER JINKS, in his official capacity; DR. FRANK KASYAN, in his official capacity; JOSEPH MAJKA, In his official capacity; KATRINA MCCOMBS, In her official capacity; JEFFREY MOHRE, In his

official capacity; CHARLES MULLER, in his official capacity; DR. LOVELL PUGH-BASSETT, in her official capacity; LORETTA RADULIC, in her official capacity; DR. LESTER RICHENS, in his official capacity; DAVID SALVO, in his official capacity; MARY ELLEN WALKER, in her official capacity; JOSEPH S. ZARRA, in his official capacity

(*Dismissed pursuant to Court Order dated 12/20/2022)
(**Dismissed pursuant to Court Order dated 9/6/2023)

(D.C. No. 2-21-cv-18746)

SUR PETITION FOR REHEARING

Present: CHAGARES, *Chief Judge*, JORDAN, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, CHUNG, *Circuit Judges*

The petition for rehearing filed by **Appellant** in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Cindy K. Chung
Circuit Judge

Dated: October 10, 2023
Sb/cc: All Counsel of Record