IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

KRISTINA BORISHKEVICH, et al.,	)	
	)	
Plaintiffs,	)	
v.	)	Case No. 20-03240-CV-S-BP
	)	
SPRINGFIELD PUBLIC SCHOOLS BOARD OF EDUCATION, et al.,	)	
	)	
Defendants.	)	

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Pending is Defendants' Motion for Summary Judgment. (Doc. 38.) For the following reasons, the motion is **GRANTED**.

I. BACKGROUND

The parties agree on most of the relevant facts, and with respect to many of the remaining facts, Plaintiffs have not identified evidence in the record that creates a factual dispute. Therefore, the Court will cite to the Record only when a fact is in dispute, and will state the facts in the light most favorable to Plaintiffs.

Plaintiffs are children who are enrolled in the Springfield Public School District and their parents. None of the children Plaintiffs are racial or ethnic minorities, but some have disabilities and, consequently, individualized education programs ("IEPs"). Defendants are the Springfield Public School District ("SPS") and the members of its Board of Education (the "Board").

In late 2019, a new strain of coronavirus, "COVID-19," emerged. COVID-19 quickly spread throughout the world in early 2020, prompting responses from government entities at all levels. For instance, the United States Secretary of Health and Human Services declared COVID-19 a public health emergency on January 31; the World Health Organization began referring to

COVID-19 as a "pandemic" on March 11; the State of Missouri declared a state of emergency on March 13; and the City of Springfield declared a local state of emergency on March 16. In light of these developments, the Director of the Missouri Department of Health and Senior Services issued an order on April 27, 2020, barring all public schools from convening in person for the remainder of the 2019–20 school year.

On March 24, 2020, the Board passed a resolution to expedite the process of adapting SPS to the COVID-19 pandemic. Among other changes, the resolution noted that "[s]ome emergency decisions may need to be made quickly, without the benefit of Board [] deliberation and the typical decision-making process," and conferred on the SPS Superintendent the authority to "do what is necessary for the good of the community based on information at the time, within the limits of the law." (Doc. 39-7, p. 1 (the resolution).)

Members of the Board later convened to formulate a plan (which came to be known as the "Re-Entry Plan") for the SPS 2020–21 school year. In doing so, they consulted with various stakeholders, including SPS teachers, principals, administrators, and staff, as well as parents of students attending SPS schools. (Doc. 39-47, ¶ 11–12 (Declaration of Dr. John Jungmann, SPS Superintendent).) They also relied on documents issued by the Missouri Department of Elementary and Secondary Education, which set out recommendations for implementing alternative methods of instruction to in-person schooling. To process this information, members of the Board divided into working groups to draft proposals for various aspects of the Re-Entry Plan.

Plaintiffs contend that the process for formulating the Re-Entry Plan was opaque, but the evidence shows otherwise. For example, in June 2020, SPS distributed a survey to parents and staff regarding their preferences for resuming schooling, and received feedback from almost

10,000 parents and over 1,000 teachers. (Doc. 39-47, ¶ 15.) The Board also conducted many meetings, which were available to the public through video conference, regarding the planning process. (*See, e.g.*, Doc. 39-8 (minutes for a March 24, 2020 Board meeting).)

Based on the feedback and information it reviewed, the Board published the Re-Entry Plan on July 23, 2020. (*See* Doc. 39-1 (the Re-Entry Plan).) The Re-Entry Plan offered parents two choices for their children: the "in-person learning option," which allowed students to attend in-person classes two days per week and virtual classes three days per week, and the "virtual learning option," which allowed students to attend virtual classes every day. (Doc. 39-1, p. 4.) Additionally, the Re-Entry Plan contained provisions to address students with special needs. Specifically, the Plan required SPS case managers to contact the parents of students with IEPs near the beginning of the school year to develop an approach for addressing the students' needs. (*Id.* at p. 9.)

On July 31, 2020, Plaintiffs brought this case in state court, which Defendants subsequently removed on August 6. Plaintiffs sought a temporary restraining order to block the implementation of the plan, but the Court denied that request on August 21. (Doc. 13.) Thus, the Re-Entry plan was in effect for the 2020–21 school year.

During that time, the Board periodically reviewed and updated the plan to reflect changing conditions, new information on the COVID-19 pandemic and other school districts' responses to it, and public opinion. Among other sources of information, the Board reviewed the practices implemented by other comparable school districts and tracked the number of COVID-19 cases in the region per age group. Near the beginning of November, Defendants allowed all students in the eighth grade and below who had chosen the "in-person option" to attend classes in-person four days per week. On February 1, 2021, Defendants allowed students who had chosen the "in-person

option" at all grade levels to attend classes in-person four days per week. Finally, on March 22, 2021, Defendants allowed students who had chosen the "in-person option" to attend classes in-person five days per week, effectively returning to a pre-pandemic schedule.

Plaintiffs' Amended Complaint, which is the operative pleading, asserts the following Counts against Defendants under 42 U.S.C. § 1983:[1]

- Count I: Violation of the Equal Protection Clause of the United States Constitution
- Count II: Violation of Procedural and Substantive Due Process under the United States Constitution
- Count III: Violation of Title VI of the Civil Rights Act of 1964
- Count IV: Violation of the Individuals with Disabilities Education Act and the Rehabilitation Act
- Count V: Violation of the Americans with Disabilities Act
- Count VI: Violation of MO. REV. STAT. § 160.051.1
- Count VII: Violation of the Equal Protection Clause of the Missouri Constitution
- Count VIII: Violation of the Due Process Clause of the Missouri Constitution

(Doc. 23, ¶¶ 30–31.) Plaintiffs seek temporary and permanent injunctive relief, a declaration that the Re-Entry Plan violates both the United States and Missouri Constitutions, attorneys' fees, and actual, consequential, punitive, and special damages.[2] (Doc. 23, p. 13.) Now, Defendants have moved for summary judgment on all of these claims. (Doc. 38.) Defendants also seek an order requiring Plaintiffs' to pay their attorneys' fees and costs. (Doc. 44, p. 31.) Plaintiffs oppose Defendants' motion. (Doc. 40.) In their opposition, they indicate that they do not oppose summary judgment on their Title VI claim; as a result, summary judgment is **GRANTED** for Defendants on Count III. The Court resolves the remaining issues below.

[1] Neither party separates the Counts in this manner; the Amended Complaint purports to assert two counts, of which Count I is "temporary and permanent injunctions," and Count II is "declaratory judgment." (Doc. 23, pp. 9–13.) These are forms of relief, however, not legal theories giving rise to separate causes of action. For clarity and completeness, the Court assumes that each separate legal theory Plaintiffs list in their Complaint, (*see id.* at ¶¶ 30–31), is a separate Count, and organizes its discussion accordingly.

[2] Because Plaintiffs request monetary damages, the case is not moot, even though SPS has returned to in-person classes five days per week.

II. DISCUSSION

"Summary judgment should be granted when—viewing the facts most favorably to the nonmoving party and giving that party the benefit of all reasonable inferences—the record shows that there is no genuine issue of material fact." *Schilf v. Eli Lilly & Co*., 687 F.3d 947, 948 (8th Cir. 2012) (citing FED. R. CIV. P. 56(c)). "A fact is material if it might affect the outcome of the suit," and a genuine dispute exists when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Dick v. Dickinson State Univ.*, 826 F.3d 1054, 1061 (8th Cir. 2016) (cleaned up; citations omitted). "The party opposing summary judgment cannot rest solely on . . . [m]ere allegations, unsupported by specific facts or evidence beyond the nonmoving party's own conclusions," *Morgan v. A.G. Edwards & Sons*, Inc., 486 F.3d 1034, 1039 (8th Cir. 2007), but must instead point to evidence in the record demonstrating the existence of a factual dispute. FED. R. CIV. P. 56(c)(1); *Conseco Life Ins. Co. v. Williams*, 620 F.3d 902, 909–10 (8th Cir. 2010).[3]

With these principles in mind, the Court turns to Plaintiffs' claims, which fall into three basic groups. The first group, Counts I and II, are brought under 42 U.S.C. § 1983, and assert that Defendants violated the United States Constitution. The second group, which includes only Count IV now that Plaintiffs have conceded Count III, assert that Defendants violated a federal statute. The third group, Counts V, VI, and VII, assert violations of Missouri law. Because each group requires somewhat different legal analysis, the Court addresses each group in turn.

[3] Because Defendants' motion requests summary judgment, the Court rejects their arguments that Plaintiffs have failed to meet various pleading requirements under 42 U.S.C. § 1983 and FED. R. CIV. P. 8(a)(2). (*See* Doc. 39, pp. 32–34.) On a motion for summary judgment, the Court reviews the record as a whole, not the adequacy of the pleadings. Moreover, Defendants' concerns with the adequacy of Plaintiffs' pleadings are moot in light of the Court's rejection of Plaintiffs' claims on the merits, as set out below.

1. Alleged Violations of the United States Constitution

Counts I and II assert that Defendants violated Plaintiffs' rights under the Equal Protection and Due Process Clauses, respectively, of the United States Constitution. When considering a constitutional challenge to state action taken in response to a public health crisis, the Court applies the two-part framework set forth in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). *See, e.g.*, *In re Rutledge*, 956 F.3d 1018, 1028 (8th Cir. 2020).[4] In *Jacobson*, the Supreme Court held that "when faced with a public health crisis, a state may implement measures that infringe on constitutional rights, subject to certain limitations." *Id.*; *see also Jacobson*, 197 U.S. at 26–27. The Court explained that "the liberty secured by the Constitution of the United States . . . does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint." *Jacobson*, 197 U.S. at 27. Instead, "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id.* Thus, while constitutional rights do not "disappear" during a public health crisis, "the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand." *Id.* at 29; *see also Rutledge*, 956 F.3d at 1027.

[4] Plaintiffs suggest that the COVID-19 pandemic is not a "public health crisis" because "[m]ore people died in the previous years of the flu in Greene County than did of Covid-19." (Doc. 40, p. 3.) To the extent Plaintiffs deny the applicability of the *Jacobson* framework with these remarks, the Court disagrees. First, the Eighth Circuit has acknowledged that the COVID-19 pandemic is an "unprecedented health crisis" that warrants applying the *Jacobson* framework. *Rutledge*, 956 F.3d at 1023. Second, Plaintiffs do not substantiate their assertions about the lethality of COVID-19 aside from a reference to something called the "New York Times Covid-19 Google Dashboard," which is not competent evidence. Third, more recent information shows that COVID-19 is significantly deadlier and easier to spread than the flu. *See* "Coronavirus vs. Flu: Similarities and Differences," *The Mayo Clinic*, April 20, 2021, https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/coronavirus-vs-flu/art-20490339. Finally, to whatever extent the effects of COVID-19 were minimized, it was undoubtedly due to measures taken to limit its spread—like the Re-Entry Plan.

Importantly, the Supreme Court concluded that judicial review of legislative action under such circumstances is only appropriate (1) "if a statute purporting to have been enacted to protect public health . . . has no real or substantial relation to those objects," or (2) the statute is "beyond all question, a plain, palpable invasion of rights secured by the fundamental law[.]" *Jacobson*, 197 U.S. at 31; *see also Rutledge*, 956 F.3d at 1028. Thus, Counts I and II can only survive summary judgment if the Re-Entry Plan has "no real or substantive relation to" the COVID-19 pandemic or is "beyond all question, a plain and palpable invasion" of Plaintiffs' rights.

As to the first prong of the *Jacobson* test, when deciding whether the Plan has a "real or substantive relation to" the COVID-19 pandemic, the Court must "take care not to usurp the functions of another branch of government, such as by second-guessing the state's policy choices in crafting emergency public health measures." *Rutledge*, 956 F.3d at 1028 (cleaned up). Defendants contend—and Plaintiffs do not meaningfully dispute—that the Re-Entry Plan has a "real or substantial relation" to preventing COVID-19. (Doc. 39, pp. 35–36.) The Plan was created to "allow for appropriate social distancing." (*See* Doc. 39-1, p. 4.) By reducing the number of students and teachers present at SPS, the Plan sought to slow the rate of infection and prevent exposure to the virus. (*Id.* at p. 12.) Dr. Clay Goddard, director of the Springfield-Greene County Health Department, endorsed the Re-Entry Plan as a "best practice" "based on evidence." (Doc. 39-40, p. 2.) And the Centers for Disease Control and Prevention has indicated that there is substantial scientific support for a policy that promotes social distancing and limits the number of people congregating indoors. *See, e.g.*, *How to Protect Yourself & Others*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html (last accessed Aug. 20, 2020). Thus, the Court finds that the Plan has a "real or substantive relation to" the COVID-19 pandemic.

The next question is whether the Re-Entry Plan "beyond all question" constituted "a plain and palpable invasion" of Plaintiffs' constitutional rights. Plaintiffs assert that the Plan violated their rights under the Due Process and Equal Protection clauses of the United States Constitution. The Court addresses each of these theories in turn.

a. Due Process

Plaintiffs contend that the Re-Entry Plan violated both their procedural and substantive due process rights. The Court first addresses Plaintiffs' procedural due process claims. To establish a procedural due process violation, Plaintiffs must establish that their "protected liberty or property interest is at stake" and that Defendants deprived them that interest "without due process of law." *Schmidt v. Des Moines Pub. Sch.*, 655 F.3d 811, 817 (8th Cir. 2011) (citations omitted). "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Id.* at 817–18 (cleaned up).

Initially, Plaintiffs have not identified a "liberty" or "property" interest that the Re-Entry Plan violated. Parents have a constitutionally-recognized interest in controlling their children's education, but this interest "is neither absolute nor unqualified"; "parents simply do not have a constitutional right to control each and every aspect of their children's education and oust the state's authority over that subject." *Stevenson v. Blytheville Sch. Dist. #5*, 800 F.3d 955, 966 (8th Cir. 2015) (citations omitted). While parents have the constitutional right to remove their children from the public education system by sending them to private school or educating them at home, when parents choose to send their children to public school—as Plaintiffs have done—they do not have a constitutional interest in micromanaging the education their children receive in public schools or otherwise "pre-empt[ing] the educational process." *Id*. (citations omitted) (holding that parents have no recognized interest in determining which public school in the district their children

attend). Put differently, a parent's interest "is the right to participate in the entire educational process and not the right to participate in each individual component of that process." *Id*. at 968 (citation omitted). The absence of any interest protected by the Due Process Clause is a sufficient reason, in and of itself, for granting summary judgment to Defendants.[5]

The Court also finds that the Re-Entry Plan did not violate any rights Plaintiffs may have had in the Board's decision-making process (assuming that the Constitution establishes such rights). The Court finds that the Board exceeded any procedural requirement imposed by the Due Process Clause. The Board convened repeatedly before and during the 2020–21 school year in open meetings that were available to the public; sought input several times from parents and other stakeholders; and consulted best practices from the scientific literature and other school districts on how best to educate Springfield children safely and effectively. Plaintiffs suggest that the Board should have been the final authority on the Re-Entry Plan, and that Defendants should have released a final draft of the plan to the public before implementing it. (Doc. 40, p. 7.) But Plaintiffs do not explain how any of this interfered with their procedural due process rights, nor do they cite any legal authority indicating that the Board's procedures were invalid. "Procedural due process mandates a meaningful opportunity to be heard, not a guarantee of a favorable outcome." *Pietsch v. Ward Cty*., 446 F. Supp. 3d 513, 538 (D. N.D. 2020). Plaintiffs had ample opportunity to express their views on how to run a school district during a pandemic—they could have participated in the Board meetings, for example, or responded to the surveys. The fact that Defendants settled on a plan which Plaintiffs dislike did not deprive Plaintiffs of procedural due process. For this

[5] The Plaintiffs who are students in SPS have a property interest in receiving a free public education under MO. REV. STAT. § 160.051.1. *See State ex rel. Yarber v. McHenry*, 915 S.W.2d 325, 329 (Mo. 1995) (en banc). However, as discussed below in Section 3.a, the Re-Entry Plan did not "deprive" any children of this right, because they continued to receive a free public education—albeit a partially virtual one—under the Plan.

independent reason, the Court finds that Plaintiffs have failed to establish a genuine dispute of material fact on whether their procedural due process rights were violated. Thus, summary judgment is **GRANTED** as to Count I.

The Court now turns to Plaintiffs' substantive due process claim. To establish a substantive due process violation, Plaintiffs must demonstrate "*both* that the official's conduct was conscience-shocking, *and* that the official violated one or more fundamental rights that are deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Schmidt*, 655 F.3d at 816 (emphasis in original) (*citing Norris v. Engles*, 494 F.3d 634, 638 (8th Cir. 2007)).

In their opposition to summary judgment, Plaintiffs suggest that Defendants violated their "fundamental rights" in a "conscience-shocking" way by not presenting the Re-Entry Plan to the public for approval, or to the Board for a final vote. (Doc. 40, p. 8.) Plaintiffs cite no authority indicating that the ability to review school board decisions, or to live in a public school district where the superintendent lacks independent decision-making authority, is a "fundamental right," and the Court has not found any such authority in its own research. Indeed, as discussed above, parents do not have a constitutional right to manage every aspect of their children's experiences in the public education system. Moreover, for an infringement of a right to "shock the conscience," it must amount to "arbitrary government action and egregious misconduct." *Schmidt*, 655 F.3d at 817. Plaintiffs present no evidence that Defendants acted "arbitrarily," and all of the evidence in the record suggests the opposite: that Defendants took great care to consult stakeholders, scientific literature, and best practices to formulate a plan that balances parents' natural desire to secure a good education for their children with the need to protect the public from a deadly pandemic.

Therefore, the Court finds no genuine dispute of material fact as to Plaintiffs' substantive due process claim, and **GRANTS** summary judgment as to Count II.

b. Equal Protection

Plaintiffs also claim that the Re-Entry Plan violates their rights to equal protection. The Fourteenth Amendment states that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. In essence, the Equal Protection Clause "requires that the government treat all similarly situated people alike." *Barstad v. Murray Cty.*, 420 F.3d 880, 884 (8th Cir. 2005) (*citing City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985)). "The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest," also known as rational basis review. *City of Cleburne*, 473 U.S. at 440. This general rule "gives way, however, when a statute classifies by race, alienage, or national origin." *Id*. Laws discriminating based on those qualities will be sustained "only if they are suitably tailored to serve a compelling state interest." *Id.* In addition, laws which differentiate between people on the basis of gender are unconstitutional unless they are "substantially related to a sufficiently important governmental interest." *See City of Cleburne*, 473 U.S. at 440–41.

Plaintiffs do not contend that Defendants discriminated against them on the basis of their race, alienage, national origin, or gender. Instead, they contend that "[t]he students in the SPS Re-Entry plan are in virtual classrooms part-time and have been receiving a separate and unequal education as stated in *Brown vs. Board of Education*." (Doc. 40, p. 9.) But in order to prove that they received "unequal" treatment, Plaintiffs must identify a comparator who was "identical or directly comparable to the [Plaintiffs] in all material respects," yet was "treated more favorably." *Robbins v. Becker*, 794 F.3d 988, 996 (8th Cir. 2015) (citation omitted). The only comparators

Plaintiffs identify are students in "regional and area surrounding school districts surrounding [sic] Springfield," who, Plaintiffs assert, had the option to attend school in-person full time. (Doc. 40, p. 9.) But these students are obviously not "identical or directly comparable" to Plaintiffs because they live in different school districts. The Equal Protection Clause is implicated when the government treats two similarly-situated people differently, but the Re-Entry Plan offered the same options to *all* students within the SPS. Thus, Plaintiffs have not shown that the Re-Entry plan discriminates against anyone at all.

Moreover, as Defendants point out, even if the Re-Entry plan did discriminate, it easily passes rational basis scrutiny—preventing the spread of COVID-19 is certainly a legitimate government interest, and as discussed above, limiting in-person contact and enforcing social distancing are rationally related to that interest. Thus, Plaintiffs have not shown a genuine dispute of material fact on their equal protection claim, and so summary judgment is **GRANTED** as to Count III.

2. Alleged Violations of Federal Statutes

Plaintiffs also contend that the Re-Entry Plan violated their rights under the Individuals with Disabilities Education Act, the Americans with Disabilities Act, and the Rehabilitation Act. All three of these statutes offer overlapping protections for individuals with disabilities.

a. Individuals with Disabilities Education Act and Rehabilitation Act

The Individuals with Disabilities Education Act ("IDEA") entitles students to a free appropriate public education. *See Lathrop R-II Sch. Dist. v. Gray*, 611 F.3d 419, 424 (8th Cir. 2010); *see also* 20 U.S.C. § 1400 *et seq*. The IDEA requires that Plaintiffs exhaust their administrative remedies before filing a claim in federal court. *See* 20 U.S.C. § 1415(i)(2) (stating exhaustion requirement for IDEA).

The Rehabilitation Act "provides that '[n]o otherwise qualified individual with a disability . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.'" *B.M. ex rel. Miller v. S. Callaway R-II Sch. Dist.*, 732 F.3d 882, 887 (8th Cir. 2013) (quoting 29 U.S.C. § 794(a)). The IDEA exhaustion requirement also applies to claims brought under the Rehabilitation Act "to the extent those claims seek relief that is also available under the IDEA." *M.Y. v. Special Sch. Dist. No. 1*, 544 F.3d 885, 888 (8th Cir. 2008). Thus, "when evaluating whether a non-IDEA claim should be dismissed for failure to exhaust administrative remedies, a court should look at the complaint's prayer for relief and determine whether the plaintiff's claim relates to the IEP . . . or is wholly unrelated to that process." *R.N. ex rel. Nevill v. Cape Girardeau 63 Sch. Dist.*, 858 F. Supp. 2d 1025, 1029 (E.D. Mo. 2012) (cleaned up) (*citing Fasnacht v. Missouri State Board of Education*, 2009 WL 2568051, at *5 (E.D. Mo. Aug. 18, 2009)).

Defendants contend that Plaintiffs did not exhaust their administrative remedies before filing suit. (Doc. 39, p. 43.) Plaintiffs concede in their opposition that they did not file an administrative complaint under the IDEA, excusing this lapse by stating that "it is not clear whether [Plaintiffs] would have been able to [file an IDEA complaint] when the school was closed in the Spring of 2020." (Doc. 40, p. 10.) But Plaintiffs provide no evidence that they would not have been able to file an IDEA complaint, and a plaintiff may exhaust her IDEA administrative remedy by filing a complaint with the *state* department of education, rather than the local school district, so the closure of SPS in spring 2020 is irrelevant to the exhaustion issue. *See* 34 C.F.R. § 303.433. Moreover, a parent's uncertainty about whether she can file a complaint does not excuse her from the IDEA exhaustion requirement. *See Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648,

656 (8th Cir. 1999) (explaining the circumstances in which administrative exhaustion is excused). Thus, the Court finds that Plaintiffs did not exhaust their IDEA administrative remedy, and did not have a viable excuse for their failure to do so.

The Court also finds that Plaintiffs' Rehabilitation Act claim is not "wholly unrelated" to the IEP process; both claims stem from Plaintiffs' belief that "Plaintiffs are denied equal access to an education for their children with disabilities." (Doc. 40, p. 10.)[6] Thus, the IDEA's exhaustion requirement applies equally to Plaintiffs' IDEA claim and their Rehabilitation Act claim—and, as just discussed, Plaintiffs did not exhaust their IDEA remedy. Because Plaintiffs admit that they did not exhaust their administrative remedy, as required by the IDEA and the Rehabilitation Act, they cannot proceed on the theory that Defendants violated these statutes, and Count IV is **DISMISSED WITHOUT PREJUDICE**.

b. Americans with Disabilities Act

Title II of the Americans with Disabilities Act ("ADA") "prohibits public entities, including public schools, from excluding qualified individuals with disabilities from participation in or benefits from that entity's services, programs, or activities." *B.M. ex rel. Miller*, 732 F.3d at 887; *see also* 42 U.S.C. § 12132. The Eighth Circuit has held that "where alleged ADA and § 504 violations are based on education services for disabled children, the plaintiff must prove that school officials acted in bad faith or with gross misjudgment." *Id.* (quotations omitted) (*citing Birmingham v. Omaha Sch. Dist.*, 220 F.3d 850, 856 (8th Cir. 2000)). To establish bad faith or gross misjudgment, "a plaintiff must show that the defendant's conduct 'departed substantially from accepted professional judgment, practice or standards so as to demonstrate that the persons

[6] In fact, Plaintiffs do not mention the Rehabilitation Act at all in their opposition to Defendants' summary judgment motion.

responsible actually did not base the decision on such a judgment.'" *Id.* (cleaned up) (*quoting M.Y. ex rel. J.Y. v. Special Sch. Dist. No. 1*, 544 F.3d 885, 888 (8th Cir. 2008)). This showing requires "something more" than "mere non-compliance with applicable federal statutes." *Id.* (*citing Monahan v. Nebraska*, 687 F.2d 1164, 1170–71 (8th Cir. 1982)).

In their opposition to Defendants' summary judgment motion, Plaintiffs contend that "[h]aving the Plaintiff children with disabilities out of the classroom for three days of virtual learning denied them the right to have equal access to an education. These children with IEPs should have been given an option for 5 day in person learning." (Doc. 40, p. 10.) Plaintiffs do not explain how any of the children with disabilities were treated "unequally"; like all students in the SPS, they had the option to attend classes in-person part-time, or only attend classes virtually. In fact, the Re-Entry Plan appears to incorporate provisions to ensure that children with IEPs received the individualized attention they needed by requiring SPS case managers to contact the parents of students with IEPs to develop a plan for addressing the students' needs. (Doc. 39-1, p. 9.) Plaintiffs have not presented any evidence that Defendants acted with "bad faith or gross misjudgment," or "departed substantially from accepted professional standards" in formulating or applying the Re-Entry Plan. [7] As a result, the Court **GRANTS** summary judgment for Defendants on Count V.[8]

[7] Defendants argue that Plaintiffs' claim under the ADA also requires exhaustion. However, the Eighth Circuit has held that "while a complainant may avail himself of the administrative grievance procedures outlined" in Title II, "administrative exhaustion is unnecessary and [the claimant] may file suit in federal court at any time." *Randolph v. Rodgers*, 253 F.3d 342, 348 (8th Cir. 2001) (*citing* 28 C.F.R. § 35.172(b) (2000)).

[8] This is an independent reason for dismissing Plaintiffs' Rehabilitation Act claim. *See B.M. ex rel. Miller*, 732 F.3d at 887 ("[T]he enforcement, remedies, and rights are the same under both Title II of the ADA and § 504 of the Rehabilitation Act.") (*citing Birmingham v. Omaha Sch. Dist.*, 220 F.3d 850, 856 (8th Cir.2000)).

3. Alleged Violations of Missouri Law

Plaintiffs contend that Defendants violated three provisions of Missouri law: MO. REV. STAT. § 160.051.1, the equal protection clause of the Missouri Constitution, and the due process clause of the Missouri Constitution. Before addressing the substance of these claims, Defendants argue that 42 U.S.C. § 1983 does not authorize Plaintiffs to sue for violations of state law. (Doc. 39, p. 44.) While this is true, the Court may exercise supplemental jurisdiction over any state-law claims "that are so related to the claims [] within [the Court's] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). Here, Plaintiffs' state law claims arise from the same "common nucleus of operative fact" as their § 1983 claims—namely, the implementation and enforcement of the Re-Entry Plan—and thus form part of the same "case or controversy." *Myers v. Richland County*, 429 F.3d 740, 746 (8th Cir. 2005) (citation omitted).

However, the Court "may decline to exercise supplemental jurisdiction over a claim" if it "has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c). "The factors a court should consider in determining whether to exercise jurisdiction over pendent state law claims are judicial economy, convenience, fairness, and comity." *Wilson v. Miller*, 821 F.3d 963, 970 (8th Cir. 2016). Although this "balance of factors . . . will [usually] point toward declining to exercise jurisdiction over the remaining state-law claims" when "all federal-law claims are eliminated before trial," *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988), here, the Court finds that the factors favor ruling on Defendants' summary judgment motion with respect to Plaintiffs' state law claims. Discovery in this case is fully completed. The school year is over, and SPS has returned to full-time in-person classes. Plaintiffs' state-law claims are closely related in substance to their federal claims, and do not present any novel issues of Missouri law.

All of these facts suggest that "judicial economy, convenience, fairness, and comity" would best be served by fully resolving the issues in this case. Therefore, the Court turns to address Plaintiffs' statutory and constitutional claims under Missouri law in turn.

a. MO. REV. STAT. § 160.051.1

MO. REV. STAT. § 160.051.1 provides that "[a] system of free public schools is established throughout the state for the gratuitous instruction of persons between the ages of five and twenty-one years." The Missouri Supreme Court has held that this statutory section vests students with an individual property right in receiving a free public education. *State ex rel. Yarber v. McHenry*, 915 S.W.2d 325, 929 (Mo. 1995) (en banc). Plaintiffs assert that "[t]he virtual classroom is not a sufficient classroom and is depriving the Plaintiff children of a right to a free education for those three days they had to attend virtually." (Doc. 40, p. 11.) But nothing in § 160.151.1 provides that a public school must provide a free education in the manner that the students or their parents desire; it simply provides that the school must provide a free education, and cannot deprive a student of the right to access that education without due process. *Yarber*, 915 S.W.2d at 329. While the Re-Entry Plan was in effect, SPS continued to provide a free education to all SPS students—including Plaintiffs—albeit a partially virtual one. Because the Record lacks any evidence that Plaintiffs were deprived of their right to a free public education, summary judgment is **GRANTED** as to Count VI.

b. The Equal Protection and Due Process Clauses of the Missouri Constitution

Plaintiffs asserted in their Amended Complaint that the Re-Entry Plan violated their rights under two clauses of the Missouri Constitution: Article I, § 2, which provides that "all persons are created equal and are entitled to equal rights and opportunity under the law," and Article

I, § 10, which provides that "no person shall be deprived of life, liberty or property without due process of law."

Plaintiffs do not mention these claims in their opposition to Defendants' summary judgment motion, indicating that they have abandoned the claims—which alone entitles Defendants to summary judgment. (*See generally* Doc. 40, p. 9.) Moreover, Plaintiffs do not suggest that the due process and equal protection clauses in the Missouri Constitution are different than their federal counterparts, and the Missouri Supreme Court has indicated that they are generally coextensive. *See, e.g., Glossip v. Mo. DOT & Highway Patrol Emples. Ret. Sys.,* 411 S.W.3d 796, 805 (Mo. 2013) (en banc) ("[T] he Missouri Constitution's equal protection clause is coextensive with the Fourteenth Amendment . . . ."); *Jamison v. Dep't of Soc. Servs., Div. of Family Servs*., 218 S.W.3d 399, 405 n.7 (Mo. 2007) (en banc) ("[T]his Court has treated the state and federal due process clauses as equivalent."). Thus, for the same reasons the Court granted summary judgment on Plaintiffs' federal equal protection and due process claims, Defendant is entitled to summary judgment on their state claims.[9] Therefore, summary judgment is **GRANTED** with respects to Counts VII and VIII.

4. Attorneys' Fees and Costs

In addition to summary judgment, Defendants request that the Court require Plaintiffs to pay their attorneys' fees and costs. (Doc. 44, p. 31.) As to attorneys' fees, 42 U.S.C. §1988(a)

[9] Defendant does not argue—and the Court declines to independently conclude—that Plaintiff would not be able to recover any monetary damages from these alleged violations of the Missouri Constitution, even though there are some cases that appear to support that position. *See, e.g., Collins-Camden P'ship, L.P. v. County of Jefferson,* 425 S.W.3d 210, 214 (Mo. Ct. App. 2014); *Moody v. Hicks*, 956 S.W.2d 398, 402 (Mo. Ct. App. 1997). If Plaintiffs could not collect monetary damages on their claims under the Missouri Constitution, then they would likely be moot, because Plaintiffs' requested declaratory and injunctive relief would merely mandate what has already occurred, namely, the return of SPS to full-time in-person classes. *See, e.g., Ayyoubi v. Holder*, 712 F.3d 387, 391 (8th Cir. 2013) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013)) ("A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.").

provides that, in actions brought under 42 U.S.C. § 1983 (as this case was), "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. . . ." But "[a]prevailing defendant may recover an attorney's fee only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant." *Hensley v. Eckerhart*, 461 U.S. 424, 429 n.2 (1983). Defendants do not adequately explain how Plaintiffs meet this high standard, and, after independently evaluating the claims in this case, the Court finds that the case does not meet the standard for a defendant to recover attorneys' fees.

As for costs, the "prevailing party is presumptively entitled to recover all of its costs." *Thompson v. Wal-Mart Stores, Inc.*, 472 F.3d 515, 517 (8th Cir. 2006) (quoting *In re Derailment Cases*, 417 F.3d 840, 844 (8th Cir. 2005)). However, because 28 U.S.C. § 1920 says that a court "may tax . . . costs," a court also has discretion to deny the prevailing party its costs. *See Hibbs v. K-Mart Corp.*, 870 F.2d 435, 443 (8th Cir. 1989) (citing *Crawford Fitting Co. v. J.T. Gibbons, Inc.,* 482 U.S. 437 (1987)). A denial of costs need not require a finding of misconduct by the prevailing party, *see Greaser v. State, Dep't of Corr.*, 145 F.3d 979, 985 (8th Cir. 1998), but the Court must specify its reasons for denying the prevailing party's request for costs. *Thompson*, 472 F.3d at 517.

Plaintiffs suggest that the Court should exercise its discretion to deny Defendants costs because "this request, if granted, would be against public policy," in that "Plaintiffs are parents and children of the SPS school system who genuinely care about their children's education." (Doc. 40, p. 12.) It is unclear whether Plaintiffs offer this argument with regard to only Defendants' request for attorneys' fees, or with regard to both of Defendants' requests for payment. Regardless, the Court disagrees. Most litigants probably genuinely care about the subject matter of the litigation; that alone does not excuse them from complying with the rules of litigation. Therefore,

Defendants' request for attorneys' fees is denied; the Court will consider Defendants' request for costs when they file a Bill of Costs as required by Federal Rule of Civil Procedure 54.

III. CONCLUSION

For the foregoing reasons, summary judgment is **GRANTED** as to all claims except those arising under the IDEA and Rehabilitation Act, which are **DISMISSED WITHOUT PREJUDICE**.

IT IS SO ORDERED.

/s/ Beth Phillips
BETH PHILLIPS, CHIEF JUDGE
UNITED STATES DISTRICT COURT

Date: May 27, 2021