Methods of Deletion:

Testing Displacement, State Accountability Design, and the Civil Rights of Students in Segregated Classrooms

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Working draft, June 2026 (v0.3)

Abstract

In many self-contained special education classrooms, the delivered curriculum consists of two subjects. Reading and mathematics are taught; science, history, civics, and the rest of social studies are not offered at all. This Article argues that the deletion is the predictable product of state accountability design under the Every Student Succeeds Act, which counts performance in two subjects and thereby instructs every rational administrator which subjects may vanish, and that the deletion is actionable under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act as a method of administration that subjects students with disabilities to discrimination in access to the state's general curriculum. The Article constructs the claim against its hardest authorities. It pleads the state's own conduct, the design and operation of the accountability system, rather than any supervisory or funding theory, satisfying the control principle of *Bacon v. City of Richmond* and the Sixth Circuit's recent boundary in *Y.A. v. Hamtramck Public Schools*. It answers the bad faith or gross misjudgment overlay by showing that a master schedule that omits subjects categorically embodies no educational judgment to which deference could attach. It answers *Wal-Mart v. Dukes* by locating the common contention upstream of individualization: no IEP team can individualize access to a subject that does not exist in the building, so the uniform absence of the offering is the classwide injury and the restoration of the offering is the single injunction. The claim concedes placement entirely. It asks only that the subjects be taught in the rooms that exist.

Keywords: ADA Title II; Section 504; methods of administration; ESSA accountability; special education; curriculum; *Wal-Mart v. Dukes*; IDEA exhaustion; *Ex parte Young*; Rule 23(b)(2).

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Contents

I. Introduction

Walk the corridor of an ordinary public school and read the master schedule posted outside each room. In the general education rooms the day rotates through reading, mathematics, science, social studies, and the rest of the familiar catalogue. In the self-contained special education room down the same corridor, the schedule in a growing number of buildings contains two subjects. Reading and mathematics fill the instructional day. Science does not appear. History does not appear. Civics does not appear. The absence is not a week's anomaly or a staffing gap; it is the permanent architecture of the program. The students inside the room are enrolled in the same school, governed by the same state standards, and counted in the same federal programs as the students across the hall, and they will graduate, if they graduate, never having been offered the subjects through which a person learns what a government is, what a law is, and what rights attach to being governed.

This Article makes three claims about that schedule. First, the schedule is designed. It is the predictable output of a federal and state accountability architecture that tests and counts performance in a small set of subjects and attaches consequences to the counted scores, thereby teaching every rational administrator that the uncounted subjects are free to disappear, and teaching them most insistently in the programs whose institutional standing depends most heavily on the counted scores, which are the segregated special education programs.[1] Second, the schedule is discriminatory in the precise sense the disability statutes use: it is a method of administering a public program that has the effect of denying qualified students with disabilities meaningful access to a benefit the state extends to everyone else, the state's own published general curriculum.[2] Third, the schedule is litigable, and litigable as a class, because the injury is uniform in a way that almost nothing else in special education is: the deletion of a subject from

1. See infra Part II.

2. See infra Part IV; 28 C.F.R. § 35.130(b)(3); 34 C.F.R. § 104.4(b)(4).

a building operates identically on every child in the room, before and beneath any individualized determination about any particular child.[3]

The Article is deliberately narrow about what it does not claim. It does not argue that segregated settings are unlawful, presumptively suspect, or due for dissolution. A substantial population of students requires intensive, specialized settings, and this Article's claim is fully compatible with the continued existence of every such setting. The claim concedes placement and attacks curriculum. Where students sit is one variable; what is taught where they sit is another; and the central analytic move of this Article is to hold those variables apart after four decades of advocacy and doctrine that have fused them.[4] The remedy sought is correspondingly modest and correspondingly administrable: an injunction obligating the responsible public entities to schedule and deliver the deleted subjects in the rooms that already exist, in forms the state's own alternate academic achievement standards already describe.

The Article proceeds in nine further Parts. Part II describes the accountability architecture and the displacement mechanism it predictably produces. Part III maps the three axes along which disability education litigation has run, placement, services, and curriculum content, and shows that the third axis is unoccupied. Part IV states the claim: the statutory benefit, the regulatory theory, and the meaningful access standard of *Alexander v. Choate*. Part V identifies the right defendant and the pleading discipline imposed by *Bacon v. City of Richmond* and *Y.A. v. Hamtramck Public Schools*: the complaint must target the state's own conduct, never its supervision or funding of someone else's. Part VI confronts the bad faith or gross misjudgment overlay that has dispatched many education-context discrimination claims, and explains why a categorical deletion embodied in a master schedule sits outside the deference that overlay encodes. Part VII answers *Wal-Mart v. Dukes*, distinguishes the failed certification in *S.S. v. City of Springfield*, and follows the successful certification architecture of *Ball v. Kasich*. Part VIII

3. See infra Part VII.
4. See infra Part III.

addresses IDEA exhaustion after *Fry* and *Perez*. Part IX addresses sovereign immunity. Part X specifies the remedy and its administration. Part XI concludes.

II. The Architecture of Displacement

A. What the Statute Counts

The Every Student Succeeds Act requires each state, as a condition of Title I funds, to administer annual academic assessments in mathematics and in reading or language arts in each of grades three through eight and once in high school, and assessments in science once within each of three grade spans.[5] The statute then requires each state to build an accountability system that annually meaningfully differentiates all public schools, and it specifies the indicators on which the differentiation runs. Academic achievement, as measured by proficiency on the annual assessments, is a required indicator; the statute's achievement indicator is built on the reading and mathematics assessments.[6] Schools identified through the system face escalating intervention, and the identification categories, comprehensive support and targeted support, are functions of the counted indicators.[7]

The same statute elsewhere declares a far broader curricular ambition. It defines a "well-rounded education" as courses, activities, and programming in subjects including English, reading or language arts, writing, science, technology, engineering, mathematics, foreign languages, civics and government, economics, arts, history, geography, and others, with the purpose of providing all students access to an enriched curriculum and educational experience.[8] It funds that ambition by name: the Student Support and Academic Enrichment grant program lists first among its statutory purposes providing all students with access to a well-rounded

5. 20 U.S.C. § 6311(b)(2)(B)(v).
6. 20 U.S.C. § 6311(c)(4)(B).
7. 20 U.S.C. § 6311(c)(4)(C)–(D), (d).
8. 20 U.S.C. § 7801(52).

education.[9] The statute, in other words, names the full catalogue as the entitlement of all students and then constructs a consequence engine that runs on two subjects.

B. What the Incentive Does

The behavioral consequence of counting some subjects and not others is one of the most replicated findings in the accountability literature. A metasynthesis of forty-nine qualitative studies found the primary effect of high stakes testing to be the narrowing of curricular content to tested subjects.[10] National survey research documented the marginalization of elementary social studies specifically under testing and standardization pressure.[11] In the most cited national district survey of the No Child Left Behind era, sixty-two percent of districts reported increasing elementary instructional time in English language arts or mathematics, and forty-four percent reported cutting elementary time in science, social studies, art and music, physical education, lunch, or recess to fund the increase.[12]

The incentive does not fall evenly. It concentrates where the counted scores are lowest and the institutional consequences of low scores are most direct. A self-contained program is, institutionally, a concentration of the students least likely to produce proficient scores on the counted assessments, and the program's standing within its building and district is tied to those scores. Every hour of science in such a room is an hour not spent remediating the two subjects on which the program will be judged. The rational administrative response is the two-subject schedule, and the response requires no animus, no policy memorandum, and no decision that any identifiable official ever has to defend in those terms. The deletion is nobody's stated choice. It is the design operating.

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9. 20 U.S.C. § 7111.

10. Wayne Au, *High-Stakes Testing and Curricular Control: A Qualitative Metasynthesis*, 36 EDUC. RESEARCHER 258 (2007).

11. Paul G. Fitchett & Tina L. Heafner, *A National Perspective on the Effects of High-Stakes Testing and Standardization on Elementary Social Studies Marginalization*, 38 THEORY & RSCH. SOC. EDUC. 114 (2010).

12. Jennifer McMurrer, CTR. ON EDUC. POL'Y, *NCLB Year 5: Choices, Changes, and Challenges: Curriculum and Instruction in the NCLB Era* (rev. Dec. 2007).

C. The Concentration in Segregated Settings

Federal data supply the population. Seven and a half million children and youth ages three through twenty-one were served under the Individuals with Disabilities Education Act in school year 2022–23, fifteen percent of public school enrollment.[13] Thirteen percent of those students, roughly one million children, spend less than forty percent of the school day in general classes, and the figure rises steeply within the disability categories most associated with self-contained placement: only twenty-one percent of students with intellectual disabilities and sixteen percent of students with multiple disabilities spend most of the day in general classes.[14] For the student who spends the bulk of the day outside general classes, the general education science block across the hall is not his science block. If his room's schedule omits the subject, the subject is omitted from his education. The federal monitoring apparatus has itself recorded the danger in adjacent terms: the National Center on Educational Outcomes warns that the instruction of students assessed on the alternate assessment track may be reduced in depth, breadth, or complexity,[15] and its analyses find that states placing higher percentages of students in more restrictive environments also assess higher percentages of students on that track.[16]

D. The Proof Problem Is a Records Request

Because the deletion lives in master schedules and instructional minute allocations, it is provable through public records. A schedule is not a judgment; it is a document. A multidistrict public records sweep of self-contained program schedules can establish, district by district and statewide, whether the two-subject pattern exists, how uniform it is, and how long it has persisted. Uniformity across districts that share nothing except the state's accountability design is itself

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13. NAT'L CTR. FOR EDUC. STAT., *Students with Disabilities* (Fast Facts), https://nces.ed.gov/fastfacts/display.asp?id=64.

14. NAT'L CTR. FOR EDUC. STAT., *Students With Disabilities* (Condition of Education indicator), https://nces.ed.gov/programs/coe/indicator/cgg/students-with-disabilities.

15. ANDREW R. HINKLE ET AL., NAT'L CTR. ON EDUC. OUTCOMES, *State Approaches to Monitoring AA-AAAS Participation Decisions* (NCEO Report 432, 2022).

16. SHERYL S. LAZARUS & MARIANNA K. QUANBECK, NAT'L CTR. ON EDUC. OUTCOMES, *The Relationship Between Student Placement and AA-AAAS Participation Rates* (NCEO Report 439, 2023).

evidence that the design is the common cause, a point whose litigation significance emerges in Parts V and VII.

III. Three Axes, One Unoccupied

Disability education litigation has organized itself along two axes for half a century, and the claim this Article constructs runs along a third.

A. The Placement Axis

The first axis asks where the student sits. Its statutory home is the least restrictive environment mandate, its constitutional ancestry runs through the desegregation cases, and its modern engine is the integration mandate of Title II as construed in *Olmstead v. L.C.*[17] Placement litigation contests the lawfulness of segregated settings themselves or of particular assignments to them. Whatever its merits, the placement axis cannot reach the injury described in Part II, because its remedy moves students between rooms and obligates no one to teach anything in either room. A student transferred from a two-subject self-contained room to a general classroom without the supports that made the self-contained setting necessary has not had his curriculum restored; he has had his supports removed. The pattern was criticized in the special education literature of the 1980s and 1990s as dumping, in warnings that integration driven by cost reduction would strip identifiable resources from identifiable students,[18] in the field's own account of the inclusion movement's radicalization,[19] and in case research on the meaning and practice of inclusion as implemented.[20] This Article takes no side in the placement debate and needs none. Its claim

17. 527 U.S. 581 (1999).

18. James M. Kauffman, Michael M. Gerber & Melvyn I. Semmel, *Arguable Assumptions Underlying the Regular Education Initiative*, 21 J. LEARNING DISABILITIES 6 (1988); James M. Kauffman, *The Regular Education Initiative as Reagan-Bush Education Policy: A Trickle-Down Theory of Education of the Hard-to-Teach*, 23 J. SPECIAL EDUC. 256 (1989).

19. Douglas Fuchs & Lynn S. Fuchs, *Inclusive Schools Movement and the Radicalization of Special Education Reform*, 60 EXCEPTIONAL CHILD. 294 (1994).

20. Janice M. Baker & Naomi Zigmond, *The Meaning and Practice of Inclusion for Students with Learning Disabilities*, 29 J. SPECIAL EDUC. 163 (1995).

is available to a plaintiff who believes, as many families of high support students do, that the segregated setting is exactly where their child belongs.

B. The Services Axis

The second axis asks what individualized services the student receives, and it is the axis on which nearly all special education litigation actually runs: the adequacy of a particular child's individualized education program under the IDEA's guarantee of a free appropriate public education. The services axis is individualized by design. Its unit of analysis is one child, its forum of first resort is an administrative due process hearing about that child, and its remedial currency is the revision of that child's program. Displacement facts surface inside services litigation, where a student's schedule of remediation crowds out access to electives and core academic classes, but they surface as inputs to an individual appropriateness determination, not as the object of challenge. The services axis cannot reach a buildingwide deletion for a structural reason developed in Part VII: an individualized process cannot supply a subject that does not exist in the building for any team to individualize.

C. The Curriculum Content Axis

The third axis asks what subjects exist in the room at all, holding placement constant and holding the individualized service mix constant. On this axis, the comparator is exact and local: the general education students in the same building receive instruction in the full published catalogue; the students in the self-contained room receive two subjects. The axis is, so far as a systematic search of the case law discloses, unoccupied as a theory of liability. Exit examination litigation came nearest, attacking the diploma consequences of tests covering material that students with disabilities had not been taught, but it attacked the test, accepted the instructional record as given, and sought relief against the consequence rather than the deletion.[21] The remainder of this Article builds the claim that occupies the third axis.

21. See, e.g., *Debra P. v. Turlington*, 644 F.2d 397 (5th Cir. 1981) (conditioning the diploma sanction on proof of the test's curricular validity while declining to "dictate what subjects are to be taught or in what manner"); *Rene v. Reed*, 751 N.E.2d 736 (Ind. Ct. App. 2001); *Chapman v. Cal. Dep't of Educ.*, 229 F. Supp. 2d 981 (N.D. Cal. 2002).

IV. The Claim

A. Elements and Statutory Text

Title II of the ADA provides that no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.[22] Section 504 of the Rehabilitation Act runs the parallel prohibition against programs and activities receiving federal financial assistance.[23] The Fourth Circuit has stated the Title II elements in the form this Article will use throughout: a plaintiff must show either that he was excluded from participation in, or denied the benefits of, a program or service offered by a public entity, or subjected to discrimination by that entity.[24] Every element will matter, and the phrase offered by a public entity will matter most, because Part V shows that the entity whose offering is at issue is the state.

B. The Benefit: The State's General Curriculum

The benefit denied is not an abstraction and not an artifact of litigation framing. It is an object the state itself has defined, published, and obligated itself to. Three independent bodies of law identify it.

First, the state's own content standards. Every state publishes academic content standards across the catalogue of subjects, and the federal statute conditions Title I funds on challenging standards in at least mathematics, reading or language arts, and science.[25] The catalogue the state publishes is the catalogue the state offers.

Second, the IDEA's own architecture presupposes the benefit. The statute requires every individualized education program to state how the child's disability affects involvement and

22. 42 U.S.C. § 12132.

23. 29 U.S.C. § 794(a).

24. *Bacon v. City of Richmond*, 475 F.3d 633 (4th Cir. 2007) (quoting *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 499 (4th Cir. 2005)).

25. 20 U.S.C. § 6311(b)(1).

progress in the general education curriculum and to set goals designed to enable the child to be involved in and make progress in the general education curriculum.[26] The Supreme Court built *Endrew F.* on that architecture: an IEP must be appropriately ambitious in light of the child's circumstances, and every child should have the chance to meet challenging objectives.[27] A statutory scheme that obligates a team to plan the child's progress through the general curriculum identifies access to that curriculum as the benefit the scheme administers.

Third, and most efficiently, the alternate achievement standards. For students with the most significant cognitive disabilities, federal law permits alternate academic achievement standards only if they are aligned with the state's academic content standards and promote access to the general curriculum.[28] Every state maintains an alternate assessment aligned to such standards in reading, mathematics, and science, and some states additionally maintain one in social studies.[29] A state that writes, adopts, and publishes a standard describing what a student with the most significant cognitive disabilities should know in science has committed itself, in an official instrument, to two propositions: that science is part of the offering, and that science is teachable to this population. The publication is a feasibility concession of the most formal kind, executed by the defendant, in advance of litigation, against itself.

C. The Theory: Methods of Administration

The regulatory theory is as old as the implementing regulations and as underused as the axis it fits. The Title II regulations prohibit a public entity from utilizing criteria or methods of administration that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability, or that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities.[30] The Department of Education's Section 504 regulations,

26. 20 U.S.C. § 1414(d)(1)(A)(i)(I), (II).
27. *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386 (2017).
28. 20 U.S.C. § 6311(b)(1)(E); 34 C.F.R. § 200.1(d).
29. NAT'L CTR. ON EDUC. OUTCOMES, *Alternate Assessments: AA-AAAS*, https://nceo.info/Assessments/aa-aas.
30. 28 C.F.R. § 35.130(b)(3).

which govern every state educational agency and school district receiving federal education funds, carry the same prohibition in nearly the same words.[31]

An accountability system is a method of administering the state's education program. It is the instrument by which the state allocates attention, consequence, and institutional survival across its schools. The claim is that the particular method the state chose, counting two subjects and attaching the consequences to the counted scores, has the effect, in the segregated settings where the incentive concentrates, of deleting the uncounted subjects from the delivered program and thereby denying the students in those settings the benefit the state offers everyone else. The theory requires no allegation that any official intended the deletion. The regulation is written in the language of effects, and the Supreme Court's construction of Section 504 in *Alexander v. Choate* frames the inquiry: the Court assumed that the statute reaches at least some conduct with an unjustifiable disparate impact, rejected the notion that every disparate impact showing states a claim, and located the guarantee in meaningful access to the benefit the grantee offers.[32] The opinion then added the sentence this claim lives on: the benefit itself cannot be defined in a way that effectively denies otherwise qualified individuals the meaningful access to which they are entitled.[33] Meaningful access to a curriculum is not satisfied by physical presence in a building where the curriculum is taught to others. A student for whom the subject does not exist on any schedule he can attend has no access to it at all, meaningful or otherwise.

Choate is also the source of the state's best answer, and the answer fails on the state's own documents. *Choate* permits a grantee to define the package of benefits it offers; Tennessee could define its Medicaid benefit as fourteen days of inpatient coverage, and Section 504 did not require enlarging the package to meet greater needs. The analogous move here is to define the benefit delivered in self-contained programs as whatever each child's IEP happens to provide, and to recast this claim as a demand for a bigger package. The move fails because the state has already defined the package, in public, in instruments of its own making: content standards across

31. 34 C.F.R. § 104.4(b)(4).

32. 469 U.S. 287, 299–301 (1985).

33. Id. at 301.

the catalogue extended to all students, an IEP architecture statutorily aimed at involvement and progress in the general education curriculum, and alternate achievement standards in the deleted subjects for this exact population. The claim does not ask for more than the defined benefit; it asks for the defined benefit. The plaintiff in *Choate* wanted the package enlarged. The plaintiff here wants the package delivered.

D. What the Claim Is Not

Three disclaimers police the claim's borders. The claim is not an adequacy challenge: it does not ask a court to evaluate the quality of any instruction, only the existence of the offering. The claim is not a funding challenge: it does not ask a court to order any appropriation, a framing whose procedural significance appears in Part IX. And the claim is not an integration challenge: it accepts every placement as it finds it. The borders are not modesty for its own sake. Each one detaches the claim from a body of doctrine that would otherwise consume it, as Parts V through IX show.

V. The Right Defendant: Pleading the State's Own Conduct

A. The Control Principle

The instinct to sue the state for what happens in local classrooms collides with a firm line of authority, and the claim must be built to honor that line rather than to test it. In *Bacon v. City of Richmond*, plaintiffs obtained an order requiring the city to fund accessibility retrofits for schools the school board operated; the Fourth Circuit reversed, holding that Title II does not contemplate funding liability for an independent public entity that neither controls the challenged services nor discriminated against plaintiffs because of disability.[34] Title II, the court explained, speaks not of ownership but of accessibility to services, programs, or activities, and where an entity does not exercise control over the challenged services, the statute does not reach it.[35] Behind

34. *Bacon*, 475 F.3d 633.
35. Id.

the statutory point stands a remedial one the court drew from *Milliken v. Bradley*: court-ordered decrees exceed appropriate limits when they are imposed upon governmental units that were neither involved in nor affected by the violation.[36]

The Sixth Circuit recently policed the same boundary in the special education context. In *Y.A. v. Hamtramck Public Schools*, the court rejected Title II liability of state defendants premised on their funding and general supervisory relationship to a district's violations, while expressly preserving liability where the state has used its regulatory power, and expressly not deciding the availability of a methods of administration theory.[37] Read together, *Bacon* and *Hamtramck* prescribe the pleading discipline this Article adopts as a rule: never plead that the state is liable because it funds, oversees, or failed to correct the district. Plead the state's own conduct.

B. The Accountability System Is the State's Own Conduct

The discipline costs this claim nothing, because the conduct at the root of the deletion is the state's own. The state designs the assessment system, selects which subjects are tested, constructs the accountability indicators, sets the weights, identifies the schools, and administers the consequences. None of that is supervision of somebody else's program; it is the state operating an instrument the federal statute requires the state itself to build and run.[38] The accountability system is a service, program, or activity of the state in the most literal sense, and the methods of administration regulation speaks to exactly this layer: the criteria and methods by which the entity administers what it offers. The district's master schedule is the downstream artifact; the state's design is the upstream method. The complaint targets the method.

Two corollaries follow. First, the state's general supervisory responsibility under the IDEA[39] is pleaded, if at all, only as evidence of knowledge, never as a source of liability; it shows the state knew where its incentive landed, not that the state must answer for the

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36. *Milliken v. Bradley*, 433 U.S. 267, 282 (1977), quoted in *Bacon*, 475 F.3d 633.
37. *Y.A. v. Hamtramck Pub. Schs.*, 137 F.4th 862 (6th Cir. 2025).
38. 20 U.S.C. § 6311(c)(1) (requiring each state to establish the accountability system).
39. 20 U.S.C. § 1412(a)(11).

district. Second, districts remain proper co-defendants for their own conduct, the adoption and maintenance of the two-subject schedule, under the same methods of administration theory at the local layer; the local schedule is the district's method of administering its instructional program. The two layers are independent, each entity answering for its own method, which is precisely the structure *Bacon* demands and *Milliken* permits a decree to reach. The regulation anticipates the layered structure expressly: its third clause prohibits methods of administration that perpetuate the discrimination of another public entity where both are agencies of the same State,[40] which describes a state accountability design and the district schedules it produces with uncomfortable precision.

C. Uniformity as Causation Evidence

The records sweep described in Part II.D does double work here. If the two-subject pattern recurs across districts that vary in size, wealth, demographics, and leadership, and that share only the state's accountability design, the design is the parsimonious common cause. Causation in an effects-based regulatory claim does not require tracing a memorandum; it requires showing that the challenged method produces the discriminatory effect. Cross-district uniformity is what that showing looks like in documents.

VI. The Bad Faith Overlay and Why It Does Not Reach a Schedule

A. The Overlay

Education is the one domain where courts have grafted an extra mental state element onto the disability statutes. Beginning with *Monahan v. Nebraska*, many courts have held that, where a Section 504 or Title II claim contests the educational programming of a child with a disability, the plaintiff must show something more than a statutory violation: bad faith or gross misjudgment by the educators.[41] The Sixth Circuit has signaled agreement that, to

40. 28 C.F.R. § 35.130(b)(3)(iii).

41. *Monahan v. Nebraska*, 687 F.2d 1164, 1170 (8th Cir. 1982).

prove discrimination in the education context, something more than a failure to provide a free appropriate public education must be shown.[42] The overlay has real teeth in systemic litigation: in the long-running challenge to Ohio's special education system, the district court allowed the IDEA claims to proceed while dismissing the Section 504 and ADA claims precisely because the complaint did not allege bad faith or gross misjudgment.[43]

Any honest construction of the present claim must treat the overlay as the principal doctrinal obstacle and answer it on its own terms. Four answers follow, in descending order of ambition; the claim needs only one of them to hold.

B. The Overlay Protects Judgments, and a Deletion Is Not One

The overlay's rationale is deference. Courts adopted the bad faith or gross misjudgment standard to keep federal discrimination law from becoming an appellate forum for the ordinary exercise of professional educational judgment: the evaluation calls, placement calls, and methodology calls that the IDEA channels through its own individualized process. The rationale identifies the standard's domain, and the domain has a boundary. Deference to judgment presupposes a judgment. A master schedule that contains two subjects for an entire program, year over year, is not an exercise of judgment about any child; no educator weighed any student's needs and concluded that science should not exist for him, because the question was never put to anyone in those terms. The deletion is an administrative artifact of an incentive structure, generated upstream of every professional whose judgment the overlay protects. Where there is no educational judgment in the causal chain, there is nothing for the deference rationale to attach to, and the overlay does not govern. The claim does not second-guess educators; it challenges a condition that was never theirs to decide.

42. *N.L. ex rel. Mrs. C. v. Knox Cnty. Schs.*, 315 F.3d 688 (6th Cir. 2003).

43. *Doe v. State of Ohio*, No. 2:91-cv-00464, 2004 WL 7347115 (S.D. Ohio July 9, 2004).

C. Injunctive Relief Does Not Require Intent

The overlay's modern descendants live in the law of damages. Compensatory damages under Title II and Section 504 require a showing of intentional discrimination, which most circuits measure by deliberate indifference. The claim constructed here seeks prospective injunctive relief, and the effects-based regulatory prohibitions, methods of administration and the *Choate* meaningful access standard, supply a complete injunctive theory without any mental state showing.[44] A court applying the overlay to bar even injunctive relief against a categorical deletion would be extending a deference doctrine beyond every rationale ever offered for it.

D. If Intent Is Required, the Record Supplies It

Even within the overlay, the claim has a path, because the gross misjudgment standard is an objective one and the state's own documents construct the showing. The state publishes alternate academic achievement standards declaring the deleted subjects teachable to the affected population; the state designs the accountability instrument that predictably ensures the subjects' nondelivery to that population; and the federal monitoring center the state participates in has warned in terms that instruction on the alternate track may be reduced in depth, breadth, or complexity.[45] An entity that formally documents both the feasibility of a benefit and the mechanism of its denial, and then maintains the mechanism, is not making a defensible professional judgment; it is persisting in a known contradiction. If gross misjudgment means anything short of malice, a known contradiction maintained against one's own published standards is it.

E. The Comparator Seals the Framing

Finally, the overlay's home territory is the FAPE-adjacent claim, the claim that is really an appropriateness dispute wearing a discrimination label. This claim is structurally incapable of

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44. See *Alexander v. Choate*, 469 U.S. 287, 299–301 (1985); 28 C.F.R. § 35.130(b)(3); 34 C.F.R. § 104.4(b)(4).
45. See supra Part II.C.

that description, because its comparator is not a hypothetical better program for the plaintiff; it is the actual program delivered to nondisabled students in the same building. Across the hall, the subjects exist. In the room, they do not. A claim whose entire content is that comparison is a discrimination claim in the statute's own grammar, exclusion from a benefit offered to others, and no court has ever suggested that the overlay converts the statutes' core guarantee into a bad faith tort.

VII. The IEP Inversion and the Class

A. The Individualization Defense

The defense every complaint on this axis will meet is individualization: every child is different, every program is set by an IEP team, and therefore nothing about these students' education can be common, neither the injury nor the remedy. The defense has a distinguished record. It is the reasoning on which class certification failed in *S.S. v. City of Springfield*, where a proposed class of students with mental health disabilities placed in a segregated public day school sought school based behavior services: the court held that the requested services were described in extraordinarily broad terms, would need to be implemented through the same individualized process the IDEA already requires, and would have to be harmonized, student by student, with each child's IEP, defeating commonality.[46] The First Circuit affirmed, and in affirming stated the rule that decides this Article's claim the other way: in special education class actions, plaintiffs satisfy commonality by identifying a uniformly applied, official policy, or an unofficial yet well-defined practice, that drives the alleged violation, and the certified classes the court offered as examples were challenges to exactly such policies, whose harm was that the policy precluded, across the board, the individualized determinations the statute promises.[47] *Springfield* failed that

46. *S.S. ex rel. S.Y. v. City of Springfield*, 318 F.R.D. 210 (D. Mass. 2016), aff'd sub nom. *Parent/Professional Advocacy League v. City of Springfield*, 934 F.3d 13 (1st Cir. 2019).

47. *Parent/Pro. Advocacy League*, 934 F.3d 13.

test because its plaintiffs identified no such policy. The two-subject master schedule is such a policy in documentary form.

B. The Inversion

The defense fails against this claim, and it fails because of the IDEA, not despite it. The statute's individualization machinery is a machine for tailoring a child's path through an offering. The IEP team selects from what exists: it can adjust dosage, modify content, set alternate goals against alternate standards, and calibrate every variable of delivery. The one thing the team cannot do is conjure a subject into a building whose master schedule does not contain it. Individualization presupposes an inventory. Where the inventory has been stripped to two subjects, every IEP in the room is being written against the same truncated menu, and the truncation is logically prior to, and untouched by, every individualized determination the defense invokes. The defense therefore inverts: the more seriously one takes the statutory premise that every child is different, the more indefensible a uniform two-subject schedule becomes, because a uniform deletion is the negation of individualization, applied identically to every child regardless of what any team might have chosen for him.

C. The Dukes Showing

Wal-Mart v. Dukes requires that class members have suffered the same injury and that their claims depend on a common contention capable of classwide resolution, such that determination of its truth or falsity will resolve an issue central to the validity of each claim in one stroke.[48] The common contention here is a sentence: the program's master schedule omits the subjects, and the omission is the product of the challenged method of administration. The contention is true or false on documents, identically for every member, and its truth resolves the central liability issue for the room at once. Contrast the failed contention in *Springfield*, which was about the adequacy and implementation of services whose content varied with each child. The distinction is the axis distinction of Part III in procedural dress: services claims are individualized because services are

48. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349–50 (2011).

individualized; existence claims are common because existence is binary and buildingwide. It is also precisely the showing the First Circuit's affirmance prescribed: a uniformly applied policy that drives the violation, provable from the schedule itself.

D. Cohesion and the Definition: Following Ball

Rule 23(b)(2) adds a cohesion requirement: the defendant must have acted on grounds generally applicable to the class so that a single injunction is appropriate for the class as a whole, which the Sixth Circuit has explained permits only classes with homogeneous interests.[49] *Ball* is the instructive modern application. A proposed class challenging Ohio's administration of services for people with developmental disabilities initially foundered on heterogeneity, because the class swept in members who might prefer institutional care and could be harmed by a remedy diverting resources toward community services; the court cured the defect by redefining the class around the homogeneous interest, certifying a class of those who, after counseling, express interest in community based services.[50]

The lesson is that (b)(2) cohesion is an engineering problem solved at the definition stage, and this claim's remedy makes the engineering trivial. An injunction that restores subjects to a schedule moves no student, closes no program, diverts no member's preferred service, and forecloses no team's individualized choice; it enlarges the choice set for every IEP team in the room and contracts nothing. There is no *Ball* style faction whose preferred state of affairs the remedy threatens, because no family's preferred state of affairs is that the option not exist. Should a court nonetheless demand belt and suspenders, the definition can mirror *Ball*'s cure directly: all students with disabilities placed in self-contained programs whose delivered schedule omits one or more subjects of the state's general curriculum. Membership is determined by documents, the injury is the omission itself, and the single injunction, schedule and deliver the subjects, answers

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49. *Ball v. Kasich*, 307 F. Supp. 3d 701 (S.D. Ohio 2018) (quoting *Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 645–46 (6th Cir. 2006)).

50. Id.

every member identically while leaving every individualized determination exactly where the IDEA puts it.

VIII. Exhaustion

The IDEA requires exhaustion of its administrative procedures before a suit under other federal laws seeking relief that is also available under the IDEA.[51] *Fry v. Napoleon Community Schools* directs courts to the gravamen of the complaint: exhaustion is required only when the suit seeks relief for the denial of a free appropriate public education.[52] *Perez v. Sturgis Public Schools* narrowed the provision further: it governs only suits seeking relief the IDEA can supply.[53]

The gravamen here is not FAPE. The complaint does not allege that any child's individualized program is inappropriate for that child; it alleges that the state administers its education program by a method that strips a benefit from a class, measured against the program delivered to nondisabled students in the same buildings. *Fry*'s own diagnostic questions confirm the framing: the same claim could be pressed against a public library that deleted its civics shelf for patrons with disabilities, and an adult visitor to the school could press an access claim of the same shape, because the theory sounds in discriminatory administration of a public benefit, not in the adequacy of special education.[54]

The contrary authority must be faced squarely, because it arises from this claim's nearest neighbor. In affirming *Springfield*, the First Circuit held that ADA claims whose underlying grievance concerned the adequacy of special education services and placements were FAPE claims in substance, and required exhaustion.[55] The holding marks the line rather than crossing it: the grievance there was the quality and setting of individualized programming, the heartland

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51. 20 U.S.C. § 1415(l).

52. 580 U.S. 154 (2017).

53. 598 U.S. 142 (2023).

54. *Fry*, 580 U.S. 154 (offering as clues whether essentially the same claim lies against a public facility that is not a school, such as a public theater or library, and whether an adult at the school, such as an employee or visitor, could press essentially the same grievance).

55. *Parent/Pro. Advocacy League*, 934 F.3d 13.

of FAPE; the grievance here is a categorical deletion measured against the program delivered to nondisabled students in the same buildings, a comparison no due process hearing is built to adjudicate. Behind the gravamen analysis stand two further answers. The first is *Perez*'s textual route: the exhaustion provision applies only to suits seeking relief that is also available under the IDEA,[56] and the relief sought here, a structural injunction against the state's method of administration, is relief no IDEA hearing officer can grant. The administrative process, as the court overseeing the Ohio systemic litigation put it, is limited to review of decisions concerning the identification, evaluation, or educational placement of a particular child, and nowhere allows a hearing officer or the state board to decide the broader issues a systemic challenge presents; administrative remedies are generally inadequate where structural, systemic reforms are sought.[57] The second is candor about what remains open: *Perez* expressly reserved whether the provision admits a judge-made futility exception, so this Article stakes the exhaustion answer on gravamen and on the statutory text, and treats the systemic futility line as confirmation from the courts that have administered challenges of this shape rather than as a doctrine the claim depends on.

IX. Sovereign Immunity

The immunity analysis is short because the claim was framed for it. Three independent doors are open.

First, *Ex parte Young*. The complaint names the responsible state officials in their official capacities and seeks prospective injunctive relief compelling compliance with federal law. The Eleventh Amendment does not bar such relief even if compliance requires the expenditure of state funds; an ancillary effect on the state treasury is a permissible and often inevitable consequence of the doctrine.[58] The remedy's framing in Part X, an obligation to schedule and deliver, never an order to appropriate, keeps the claim squarely inside the doctrine.

56. *Perez*, 598 U.S. 142; 20 U.S.C. § 1415(l).

57. *Doe v. State of Ohio*, No. 2:91-cv-00464, 2004 WL 7347115 (S.D. Ohio July 9, 2004) (quoting its July 5, 1995 order and citing *Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1309 (9th Cir. 1992)).

58. *Ex parte Young*, 209 U.S. 123 (1908); *Edelman v. Jordan*, 415 U.S. 651, 668 (1974). The Ohio systemic court applied exactly this structure to claims against the state's special education system, noting that plaintiffs did not ask

Second, the Section 504 waiver. A state that accepts federal financial assistance waives its immunity from Section 504 suits by statute,[59] and every state educational agency in the country accepts federal education funds.

Third, Title II abrogation. *United States v. Georgia* holds abrogation valid insofar as the challenged conduct actually violates the Fourteenth Amendment, and *Tennessee v. Lane* sustains abrogation as prophylactic legislation where Title II enforces access to a constitutionally significant sphere.[60] The Article does not need the third door and does not lean on it; *Ex parte Young* and the 504 waiver carry the injunctive claim without constitutional litigation.

X. The Remedy and Its Administration

A. The Injunction

The injunction has one operative sentence: the defendant entities shall schedule and deliver instruction in the deleted subjects, aligned to the state's content standards and, where applicable, its alternate academic achievement standards, to the students in the affected programs, in the settings where those students are currently placed. Everything administrable about the remedy follows from what it does not order. It does not order any placement changed, so it generates no individualized placement disputes. It does not order any service level, methodology, or staffing model, so it does not put the court in the business the *Springfield* court refused. It does not order an appropriation, so it stays within *Ex parte Young* and outside the political thicket. Compliance is measured the way the violation was proved: on the master schedule and the instructional minutes, documents the defendants already produce in the ordinary course.

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the court to order increased funding. *Doe v. State of Ohio*, No. 2:91-cv-00464, 2004 WL 7347115 (S.D. Ohio July 9, 2004).

59. 42 U.S.C. § 2000d-7(a)(1).

60. *United States v. Georgia*, 546 U.S. 151 (2006); *Tennessee v. Lane*, 541 U.S. 509 (2004).

B. Milliken Symmetry

The remedy runs against the authors of the method. The state amends the design whose incentives produced the deletion, or at minimum is enjoined from administering its accountability instrument in a manner that penalizes the restoration of the uncounted subjects in the affected programs; the districts amend the schedules that embody it. Each decree reaches an entity for its own conduct, which is the symmetry *Milliken* requires and *Bacon* enforces.[61]

C. Feasibility Is Conceded

The remedial objection that the affected population cannot be taught the subjects is foreclosed by the defendant's own instruments: the alternate academic achievement standards described in Part IV.B exist because the state has formally determined what students with the most significant cognitive disabilities should know and be able to do in these subjects. The objection that delivery is impracticable contends with a public record of accessible, engagement engineered delivery methods at consumer prices, a record developed at length in the companion literature and available to any court through ordinary evidence. The remedy asks the defendants to do something they have already certified, in published official instruments, can be done.

XI. Conclusion

The two-subject schedule survives because each body of law that might have noticed it was aimed at a different axis. Placement law asks where the child sits and would move him without restoring anything. Services law asks whether his individualized program is appropriate and cannot see a deletion that precedes every individualized choice. The accountability statute that caused the deletion contains its own confession, a definition of well-rounded education it extends to all students, and the disability statutes contain the instrument built for exactly this shape of harm: the prohibition on methods of administration that strip a public benefit from the people the statutes protect. The claim assembled here asks very little of doctrine. It asks courts to enforce an

61. *Milliken*, 433 U.S. at 282; *Bacon*, 475 F.3d 633.

effects-based regulation according to its terms, against the entity whose own design produced the effect, on behalf of a class whose injury is identical because it was administered identically, with a remedy that changes a schedule. What it asks of the legal imagination is only the recognition that a subject's absence from a child's education is not a fact of nature. Somebody designed it. The design has an author, the author is a public entity, and the statutes have always reached what public entities do by design.