What Filled the Period:

Uncompensated Student Labor in Segregated Instructional Programs

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Abstract

The accountability indicator that drives school ratings under the Every Student Succeeds Act is built on annual mathematics and reading assessments, and in segregated special education programs the unmeasured subjects give up their place in the schedule first. That much is documented. This Article addresses the question the deletion literature leaves open, which is what occupies the time after the subject is gone. In school-based enterprise programs of a common design, the vacated period is filled with uncompensated student labor that generates revenue for the district: coffee service and school stores staffed by students who receive no wage, no credential, and no arm's-length employer.

The Article argues that this substitution is independently actionable on three grounds the existing literature has not connected. First, labor performed inside the recipient's own building, for the recipient's own staff, fails the Department of Labor's community-based vocational program criteria on their face, and the school-as-host structure removes the arm's-length party the criteria presuppose. Second, the practice is a method of administration having the effect of discrimination under 28 C.F.R. 35.130(b)(3) and 34 C.F.R. 104.4(b)(4), effect standards carrying no intent element. Third, where the revenue funds a service the recipient is obligated to provide, the arrangement is a surcharge on a group of individuals with disabilities under 28 C.F.R. 35.130(f), paid in labor rather than in currency; the Ninth Circuit's holding that a surcharge is facial discrimination and the Office for Civil Rights' instruction that disability-specific athletic programs be supported equally carry the claim.

The Article develops two terms. Curricular substitution names the displacement of instruction by institutionally profitable activity, distinguishing it from deletion, which describes only an absence. Surcharge in kind names the transfer that results when a protected class discharges in labor a cost the covered entity owes in money. It answers the elective-choice defense as a formation failure rather than a defective assent, and it closes by locating the ceiling question in 34 C.F.R. 104.37(b), which forbids counseling students with disabilities toward more restrictive career objectives than nondisabled students of similar interests and abilities, and which the promulgating agency's own analysis never discussed.

Keywords: special education law; disability discrimination; method of administration; surcharge prohibition; work-based learning; transition services; curricular substitution; surcharge in kind; intellectual and developmental disabilities; school-based enterprise; subminimum wage; vocational rehabilitation.

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I. Introduction: The Period Was Not Empty

The literature on curricular narrowing in special education describes a disappearance. Science, history, civics, and the arts leave the schedules of segregated instructional programs, and they leave first, because the accountability indicator that drives school ratings is built on annual mathematics and reading assessments and a master schedule built to serve the measured subjects has to take the time from somewhere.[1] The account is well developed and it is correct as far as it goes.[2] What it does not ask is what happens to the hour.

The hour is reassigned; nothing in a master schedule goes empty.[3] And when the reassignment is examined in the programs where the deletion is most complete, a pattern appears that the deletion frame cannot describe, because the frame is built to notice absences and this is not an absence. The period is full. It is full of work.

In school-based enterprise programs of a common design, students in segregated placements spend scheduled instructional periods operating coffee carts, school stores, and similar in-building operations.[4] The programs are described in the vocabulary of independence:

1. Under the Every Student Succeeds Act, the academic achievement indicator is measured by proficiency on the annual assessments in mathematics and reading or language arts, which must be administered in each of grades three through eight and once in high school. 20 U.S.C. § 6311(c)(4)(B)(i), (b)(2)(B)(v)(I) (2026). Science assessments are required only once in each of three grade spans and do not feed that indicator. *Id.* § 6311(b)(2)(B)(v)(II). History and civics are not assessed under the Act at all.

2. The consequences of test-linked accountability for students with disabilities have been studied since the No Child Left Behind era. *See* Jim Ysseldyke et al., *What We Know and Need to Know About the Consequences of High-Stakes Testing for Students with Disabilities*, 71 EXCEPTIONAL CHILDREN 75 (2004) (reviewing the evidence base and identifying curricular effects as an open question); Sandra L. Christenson, Dawn Marie Decker & Heidi L. Triezenberg, *Consequences of High-Stakes Assessment for Students With and Without Disabilities*, 21 EDUC. POL'Y 662 (2007) (documenting differential consequences by disability status); Brittany Aronson, Kristin M. Murphy & Andrew Saultz, *Under Pressure in Atlanta: School Accountability and Special Education Practices During the Cheating Scandal*, 118 TCHRS. COLL. REC. 1 (2016) (tracing accountability pressure into special education placement and instructional practice); Brandi Hinnant-Crawford, *Legislating Instruction in Urban Schools: Unintended Consequences of Accountability Policy on Teacher-Reported Classroom Instruction*, 58 URB. EDUC. 3 (2019) (measuring instructional narrowing under accountability regimes).

3. The point is structural rather than empirical. A master schedule allocates every instructional minute to something; the question a deletion claim leaves open is what the something is. *See infra* Part II.A.

4. The transition literature treats school-based enterprises as an established instructional form. *See, e.g.*, C. J. Fields & MaryAnn Demchak, *Integrated Visual Supports in a School-Based Microenterprise for Students With Intellectual Disabilities*, 42 CAREER DEV. & TRANSITION FOR EXCEPTIONAL INDIVIDUALS 128, 128 (2018) (describing school-based microenterprises as "an effective approach to developing transferable vocational skills in students with intellectual and developmental disabilities"); Jennifer Cease-Cook, Catherine Fowler & David W. Test,

life skills, job readiness, community participation, employability. The students receive no wage. They receive, in most programs, no course credit that counts toward a diploma. The proceeds go to the district.

This Article takes that last fact seriously, because it is the fact that distinguishes the arrangement from every defensible version of vocational instruction. A student can be taught to make coffee, take an order, handle currency, and follow a multi-step routine without any money changing hands. The competencies are the same in a simulation. The revenue adds a beneficiary, and the beneficiary is the entity that also writes the schedule, certifies the instruction, and determines whether the student graduates.[5]

The Department of Labor has addressed the general problem, though not this application of it. Its criteria for non-paid work-based learning by students with disabilities require, among other conditions, that the placement be at a community-based worksite, that the activity appear in the student's individualized education program, that participation be documented as voluntary and without expectation of remuneration, and that the activity produce no immediate advantage to the host business.[6] A cart operated inside the recipient's own building, serving the recipient's own employees, satisfies none of the first three and inverts the fourth. The framework presumes an outside business hosting the student while the school supervises. Where the school is both host and supervisor, there is no arm's-length party to absorb the no-advantage test, because the entity capturing the proceeds is the entity certifying the education.

Strategies for Creating Work-Based Learning Experiences in Schools for Secondary Students With Disabilities, 47 TEACHING EXCEPTIONAL CHILDREN 352 (2015) (cataloguing in-school work-based learning designs, of which the school store and the service cart are the recurring examples); Magen Rooney-Kron & Stacy K. Dymond, *Teacher Perceptions of Barriers to Providing Work-Based Learning Experiences*, 44 CAREER DEV. & TRANSITION FOR EXCEPTIONAL INDIVIDUALS 229 (2021) (surveying 256 high school special education teachers on school and community work-based learning). None of these treatments asks who captures the proceeds.

5. The three roles are not separable in the public school setting, and their concentration in one entity is what distinguishes this case from the intern and trainee cases, where the educational institution and the host are different parties. *See infra* Part III.C.

6. U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK ch. 64c08 (community-based vocational programs for students with disabilities) [hereinafter FOH 64c08]. The criteria are reproduced for Illinois districts in Ill. Ctr. for Transition & Work, *The Fair Labor Standards Act and Non-Paid Work-Based Learning Experiences* (contract with Ill. State Bd. of Educ.), https://ictw.illinois.edu/docs/librariesprovider25/briefs/wble/fair-labor-standards-act-and-non-paid-work-based-learning-experiences.pd (last visited Sept. 1, 2026) [hereinafter ICTW Brief].

Federal law also supplies the wage-law answer to the characterization the programs invite. A school district is a public agency, and the regulation governing volunteers for public agencies is explicit that individuals are volunteers only where their services are offered freely and without pressure or coercion, direct or implied.[7] A scheduled period during compulsory attendance is not freely offered. Whatever else the arrangement is, it is not volunteering, and the regulation resolves the question in a sentence.

The discrimination analysis is where the argument does its work, and it turns on two provisions that have been underused in this setting. Both the Title II regulation and the Department of Education's Section 504 regulation prohibit methods of administration that have the effect of subjecting individuals with disabilities to discrimination.[8] These are effect standards. Purpose appears in each provision as an alternative and never as a requirement, which means the recurring defense that no one intended a discriminatory result does not reach the claim.[9]

The second provision is the one this Article treats as its principal contribution. A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures required to provide nondiscriminatory treatment.[10] The provision has been construed almost exclusively against monetary charges for parking placards, auxiliary aids, and program access.[11] It has not, so far as this Article has

7. 29 C.F.R. § 553.101(c) (2026).

8. 28 C.F.R. § 35.130(b)(3)(i) (2026); 34 C.F.R. § 104.4(b)(4)(i) (2026). Courts treat the provision as a distinct cause of action. *See* Price v. Shibinette, 2021 DNH 179, at *22 (D.N.H. 2021) (collecting cases, including Kenneth R. *ex rel.* Tri-Cnty. CAP, Inc./GS v. Hassan, 293 F.R.D. 254, 259–60 (D.N.H. 2013), and noting that "[c]ourts have recognized methods of administration claims as distinct causes of action").

9. The Supreme Court has now foreclosed the heightened-intent variant of that defense in the education setting specifically. A. J. T. v. Osseo Area Schs., No. 24-249 (U.S. June 12, 2025) (holding that "[s]choolchildren bringing ADA and Rehabilitation Act claims related to their education are not required to make a heightened showing of 'bad faith or gross misjudgment' but instead are subject to the same standards that apply in other disability discrimination contexts"). *See infra* Part IV.A.

10. 28 C.F.R. § 35.130(f) (2026).

11. *See* Dare v. Cal. Dep't of Motor Vehicles, 191 F.3d 1167, 1171 (9th Cir. 1999) (fee for disability parking placard); Klingler v. Dir., Dep't of Revenue, 433 F.3d 1078 (8th Cir. 2006) (same); Duprey v. Conn. Dep't of Motor Vehicles, 28 F. Supp. 2d 702 (D. Conn. 1998) (same); Thrope v. Ohio, 19 F. Supp. 2d 816 (S.D. Ohio 1998) (same). *But see* Brown v. N.C. Div. of Motor Vehicles, 166 F.3d 698 (4th Cir. 1999) (holding the regulation beyond Congress's Section 5 power for purposes of abrogating state sovereign immunity); Neinast v. Texas, 217 F.3d 275 (5th Cir. 2000), *reh'g en banc denied* (July 27, 2000) (same), both discussed *infra* Part V.B.

found, been applied to a case in which the covered entity extracts the cost in labor rather than in money from the same protected class that bears it. The gap is a doctrinal space the facts have now entered, and it gives no reason to doubt the application.

The surcharge framing acquires particular force in the common configuration where the proceeds fund an activity for students with disabilities themselves. Recipients must provide nonacademic and extracurricular services, and the regulation naming those services lists both club athletics and the employment of students by the recipient in the same subsection.[12] A recipient that sponsors club athletics must afford students with disabilities an equal opportunity for participation.[13] Where a club draws members from both the general education population and the segregated program, and only the segregated members discharge the cost of participation in labor performed during instructional time, the differential sits inside a single activity with the comparator on the same roster.

Finally, the transition-services framework supplies the forward-looking objection. Transition services must sit within a results-oriented process aimed at post-school activities including integrated employment.[14] Postsecondary goals must rest on age-appropriate transition assessments rather than on program design.[15] And a recipient must ensure that students with disabilities are not counseled toward more restrictive career objectives than nondisabled students with similar interests and abilities.[16] That last provision, promulgated in 1977, recodified in 1980, and almost never litigated, states the ceiling problem in regulatory language. The objection

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12. 34 C.F.R. § 104.37(a)(2) (2026) (listing "physical recreational athletics," "special interest groups or clubs sponsored by the recipients," and "employment of students, including both employment by the recipient and assistance in making available outside employment").

13. 34 C.F.R. § 104.37(c)(1) (2026).

14. 34 C.F.R. § 300.43(a)(1) (2026).

15. 34 C.F.R. § 300.320(b)(1) (2026).

16. 34 C.F.R. § 104.37(b) (2026). The provision was promulgated by the Department of Health, Education, and Welfare as part of the original Section 504 regulation at 45 C.F.R. part 84, Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 42 Fed. Reg. 22676 (May 4, 1977), and recodified as 34 C.F.R. part 104 when the Department of Education assumed the regulation, 45 Fed. Reg. 30936 (May 9, 1980). *See* 34 C.F.R. pt. 104 (2026) (source note: "45 FR 30936, May 9, 1980, unless otherwise noted"); 34 C.F.R. pt. 104, app. A (2026) (analysis of final regulation). *See infra* Part VII.C for the absence of any agency commentary on the provision.

is that the objective was set below what an unmeasured capacity would support, and that no instrument was ever administered that could have shown otherwise. Whether the student was taught something useful is a separate question.

The Article proceeds in seven further Parts. Part II develops curricular substitution as a distinct phenomenon and explains why the revenue capture, rather than the task, is the analytically decisive fact. Part III runs the labor characterization. Part IV states the method-of-administration claim and analyzes both configurations of the proceeds: where they fund general education and where they fund the segregated program itself. Part V develops the surcharge in kind and answers the Fourth and Fifth Circuits. Part VI addresses consent, and argues that an elective menu constructed so that every option is the same kind of activity produces a formation failure rather than a defective assent. Part VII takes up transition adequacy in a state that is eliminating subminimum-wage segregated employment by statute. Part VIII addresses forum and remedy.

II. Curricular Substitution

A. Deletion and Substitution Are Different Claims

Deletion is a claim about an absence. It says that a subject the general education curriculum contains does not appear in the schedule of the segregated program, and it proves itself by comparison: here is the general education course catalog, here is the segregated program's, and the difference is the deletion. It is a strong claim and it is enough, on its own, to state a Section 504 comparability violation, because the regulation defines a free appropriate public education as services designed to meet the needs of students with disabilities as adequately as the needs of nondisabled students are met.[17]

But deletion has a structural weakness as an account of what happened, and it is the weakness that this Article is built to correct. Deletion is compatible with innocent explanations.

17. 34 C.F.R. § 104.33(b)(1) (2026). The general education curriculum is defined in the IDEA regulations as "the same curriculum as for nondisabled children." 34 C.F.R. § 300.320(a)(1)(i) (2026).

The subject may be gone because the program has too few staff, or because the students were assessed as unable to access it, or because the district reallocated time to the measured subjects under accountability pressure and never got around to restoring the rest. Each of those explanations is a defense, and each of them puts the district's conduct in the register of scarcity: we did not have enough, so something had to go.[18]

Substitution forecloses the scarcity register. If the period is occupied by an activity that produces revenue for the district, the period was not scarce. It was allocated. The district had the hour, chose what to put in it, and chose something that pays. It is a claim about what was preferred rather than what is missing, and it is the harder claim to make because it requires evidence of the substitute rather than evidence of the gap.

The two claims are not in tension.[19] Substitution presupposes deletion, because the period had to be vacated before it could be filled. But they are pleaded differently, proved differently, and answer different defenses. A district can answer deletion with scarcity. It cannot answer substitution with scarcity, because the substitute is the proof that the hour existed.

B. The School-Based Enterprise as an Institutional Form

The school-based enterprise is a recognized instructional form with a professional literature, a set of implementation guides, and a place in the transition-services vocabulary.[20] Career and technical education programs have run student stores, print shops, and restaurants for decades, and the model is not confined to special education.[21] What distinguishes the special education

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18. The scarcity account is the one the accountability literature itself offers, which is why deletion claims tend to be answered rather than denied. *See* Hinnant-Crawford, *supra* note 2 (documenting teacher-reported narrowing as a response to accountability pressure rather than as a curricular judgment); Aronson, Murphy & Saultz, *supra* note 2 (same, in the special education setting).

19. They are, however, differently evidenced. Deletion is proved by the two catalogs. Substitution is proved by the master schedule, the enterprise's records, and the district's accounts, all of which are public records in most states. *See infra* Part V.D (on the fund-destination question and its documentary sources).

20. *See* sources cited *supra* note 4.

21. The school-based enterprise appears in the general CTE literature as a credit-bearing elective with a business curriculum attached, which is the form the comparison in Part IV.B relies on. The special education literature describes the same form without the credit. *Compare* Cease-Cook, Fowler & Test, *supra* note 4 (school-based enterprise as one of several in-school work-based learning designs for students with disabilities), *with* Carter,

application is three features that recur in programs of the design the transition literature describes and that the general CTE model does not share.[22]

First, the students are not in the enterprise by course selection from a general catalog. They are in it because their placement is the segregated program and the enterprise is what the segregated program does during that period. Second, the enterprise generates no credential. A general education student in a school store course receives a business elective credit that appears on a transcript. The segregated program's enterprise typically produces no credit, or produces credit that counts only toward a certificate of completion rather than a diploma.[23] Third, and decisively, the customers are not the public. They are the building's own staff, and the transaction is a donation rather than a price, which means the enterprise is not exposed to the market discipline that would make it a business and is instead exposed to the institutional discipline that makes it a service.[24]

The transition literature has noticed a related asymmetry without drawing the legal conclusion. Carter, Trainor, and Çakıroğlu, surveying thirty-four high schools, found that although school representatives identified an array of career development opportunities, participation by youth with disabilities in those experiences was fairly limited.[25] The pattern

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Trainor & Çakıroğlu, *supra* note 25 (documenting limited participation by students with disabilities in the career development opportunities available to their peers).

22. The features are drawn from the program descriptions in Fields & Demchak, Cease-Cook, Fowler & Test, and Rooney-Kron & Dymond, *supra* note 4, read against the general CTE school-based enterprise, which is credit-bearing and open to enrollment by course selection. This Article does not claim to have surveyed programs; it claims that the design the literature describes has the three features named, and that the features carry the legal consequences that follow.

23. The credential question is not incidental to the labor analysis. Whether an arrangement is tied to the participant's formal education program by integrated coursework or the receipt of academic credit is one of the factors the Second Circuit identified as bearing on whether the participant is a trainee or an employee. *See infra* note 42 and accompanying text. An enterprise that carries no diploma credit fails that factor by definition.

24. The Department of Labor's community-based worksite criterion is built on the premise that the placement is at a business serving the public. *See* FOH 64c08, *supra* note 6 (criterion two). The transition literature's own descriptions of work-based learning likewise assume a community employer. *See* Cease-Cook, Fowler & Test, *supra* note 4; Rooney-Kron & Dymond, *supra* note 4 (reporting teacher-identified barriers to arranging community placements). A building-internal enterprise is the arrangement that results when the community placement is not arranged.

25. Erik W. Carter, Audrey A. Trainor & Orhan Çakıroğlu, *Availability of and Access to Career Development Activities for Transition-Age Youth With Disabilities*, 33 CAREER DEV. FOR EXCEPTIONAL INDIVIDUALS 13, 13 (2009).

is that the opportunities available to nondisabled students are not the opportunities to which students with disabilities are routed. The school-based enterprise is where they are routed instead.

C. Why Revenue Capture Is the Decisive Fact

Every defensible version of the argument for vocational instruction survives the removal of the money. A student can learn to make coffee without selling it. A student can learn to take an order, make change, and follow a routine in a simulation that never leaves the classroom. The transition literature's own descriptions of school-based enterprises emphasize the skills and say nothing about the receipts.[26]

There is a second feature of the transaction that the money reveals, and it concerns the customers rather than the district. A dollar handed to a student for a cup of coffee inside a school building is not a price. Nobody is buying coffee at market from a high school cart. The teacher is donating a dollar to a disabled student and receiving a coffee, and the enterprise's revenue model is the sympathy the transaction trades on. That is not incidental to the analysis. The disability rights literature has long identified the discourse of charity and pity as the frame the rights movement set out to displace, and as the frame that, when it persists, undermines the statute's equality premise.[27] An enterprise whose revenue depends on the customer's awareness that the server is disabled has adopted the charity model as its business model, and has done so inside an institution that is legally obligated to treat the server as an equal.

So the money is doing something other than teaching. What it is doing is creating a beneficiary. Once the district books the proceeds, the district has an interest in the activity continuing, an interest in the activity expanding, and an interest in the students remaining in it. None of those interests is pedagogical. All of them are the interests of an employer.[28]

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26. *See* Fields & Demchak, *supra* note 4, at 128 (framing the enterprise as a vehicle for "functional digital literacy" and "autonomy").

27. Samuel R. Bagenstos, *Disability Rights and the Discourse of Justice*, 73 SMU L. REV. F. 26, 26 (2020) (arguing that the ADA's enactment "relied implicitly on a discourse of charity and pity" and that the limits of that discourse explain the statute's backlash); *see also* SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT (2009) (tracing the movement's rejection of the charity model).

28. This is the point at which the Department of Labor's framework and the discrimination analysis converge. The Department disqualifies a placement that produces immediate advantage to the host because advantage creates an

This matters for the labor analysis because the Department of Labor's own criteria make immediate advantage to the host a disqualifying factor for non-paid placement.[29] It matters for the discrimination analysis because the beneficiary is the comparator's own institution: the district that funds general education programs from its budget is the district that funds this one from the students. And it matters for the consent analysis because a party with a financial interest in the student's continued participation is not a neutral party in determining whether the participation is voluntary.

III. The Labor Characterization

The programs describe their participants as volunteers, trainees, or students receiving instruction.[30] Each characterization has a legal test attached to it, and this Part runs all three. The conclusion is narrower than a wage claim. The characterizations the programs rely on are unavailable on their own terms, which matters independently of whether a wage claim would succeed, because the discrimination analysis in Parts IV and V does not require one.

A. Public Agencies and the Volunteer Definition

A school district is a public agency, and the Fair Labor Standards Act regulations governing volunteers for public agencies define the term narrowly. Individuals are volunteers only where their services are offered freely and without pressure or coercion, direct or implied, from an employer.[31] The regulation is not ambiguous about implied pressure. It names it.[32]

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incentive to retain the participant. *See* FOH 64c08, *supra* note 6 (criterion five); *Portland Terminal*, 330 U.S. at 152–53. The discrimination analysis asks who bears the cost of that retention. *See infra* Part V.

29. FOH 64c08, *supra* note 6 (criterion five); ICTW Brief, *supra* note 6, at 2.

30. *See* Fields & Demchak, *supra* note 4, at 128 ("functional digital literacy," "autonomy"); Riesen, Trainor & Traxler, *supra* Part III.B ("internships"); FOH 64c08, *supra* note 6 ("vocational exploration," "assessment," "training"). Each label maps to a legal category with its own test.

31. 29 C.F.R. § 553.101(c) (2026).

32. The volunteer provision was added to the Act in 1985 to permit individuals to volunteer for public agencies without triggering the minimum wage, and the implementing regulation's coercion limit is the boundary Congress drew around that permission. *See* 29 U.S.C. § 203(e)(4)(A) (2026) (excluding from the definition of employee an individual who volunteers to perform services for a public agency if "the individual receives no compensation" and "such services are not the same type of services which the individual is employed to perform for such public

A scheduled period during compulsory school attendance cannot satisfy that definition. The student did not offer the service. The schedule assigned it. Attendance during the period is mandatory, the period appears on a transcript, and the alternative to participation is an unexcused absence. Whatever the students are, they are not volunteers under the only regulation that defines the term for public agencies.[33]

The programs' response, when they give one, is that the students chose the activity from an elective menu. That response is the subject of Part VI, which argues that a menu constructed so that every option is the same kind of activity does not produce a choice at all. For present purposes it is enough to note that the volunteer regulation does not ask whether the individual selected among options. It asks whether the service was offered freely and without implied pressure, and a menu is a form of pressure when it has been constructed to have only one kind of exit.

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agency"); 29 C.F.R. § 553.101(a) (2026) (defining a volunteer as one who performs service "for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation").

33. The argument is not a Thirteenth Amendment argument, and the distinction matters. Courts have rejected involuntary-servitude challenges to mandatory student service requirements, and one has rejected an FLSA claim on the same facts. *See* Herndon *ex rel.* Herndon v. Chapel Hill-Carrboro City Bd. of Educ., 899 F. Supp. 1443, 1448–49 (M.D.N.C. 1995) (upholding a fifty-hour community service graduation requirement against Thirteenth Amendment challenge); Bobilin v. Bd. of Educ., 403 F. Supp. 1095 (D. Haw. 1975) (holding that required student cafeteria duty is neither involuntary servitude nor FLSA employment, and deferring to the state's assertion of educational value where plaintiffs had not shown it "inarguably frivolous"). *Bobilin* is the closer authority and it must be stated at full strength: the court assumed the school derived economic benefit from the students' work and held the benefit legally irrelevant to employee status. *Id.* Every feature that carried those programs is absent here. *Herndon* involved fifty hours over four years, service to any of a multitude of outside organizations, graduation credit, and a requirement applied to every student; the court expressly did not address whether the school received proceeds from the students' service. 899 F. Supp. at 1449. *Bobilin* involved at most one day per month, averaging sixty to ninety minutes, imposed on every student in grades four through twelve, in service of a cafeteria the school was obligated to operate regardless; the court described the imposition as minimal. 403 F. Supp. 1095. The school-based enterprise involves more than a hundred hours per year, service to the school itself for revenue the school would not otherwise have, no credit, and a requirement applied only to the segregated program. More fundamentally, *Bobilin* was decided in 1975, before the Section 504 regulations, the ADA, *Glatt*, and *A. J. T.*, and it applied no disability-discrimination analysis because none was before it. Its deference to an assertion of educational value is the same deference the post-*Glatt* scholarship identifies as the mechanism by which the employer's advantage drops out of the analysis. *See* Murphy & Singh, *supra* note 43. That deference answers a claim that the labor is worthless. It does not answer the claim this Article makes, which is that the labor is assigned to one program and not to others, and that the program is defined by disability. That question was not before the *Bobilin* court and its framework has nothing to say about it. The volunteer regulation, not the Thirteenth Amendment, is the relevant labor instrument, and it asks only whether the service was offered freely.

B. The Department of Labor Criteria for Non-Paid Work-Based Learning

The Department of Labor has published criteria under which students with disabilities may participate in non-paid work-based learning without becoming employees.[34] The criteria were developed for community-based vocational programs and they carry seven conditions.[35] Four are directly relevant.

Criterion two requires that the placement be at a community-based worksite under the general supervision of public school personnel.[36] A cart inside the recipient's own building, serving the recipient's own staff, is not a community-based worksite under any reading of the term. The community is outside the building. The worksite is inside it.

Criterion three requires that the student's individualized education program list the needed transition services established for the exploration, assessment, or training component.[37] Where the activity does not appear in the IEP, the criterion fails on its face, and the failure has independent significance under the IDEA, because a service delivered during instructional time without appearing in the IEP is a service delivered without the procedural protections the statute attaches to every change in a child's program.[38]

Criterion four requires that enrollment be voluntary, documented as such, with no expectation of remuneration.[39] The documentation requirement is not incidental. It converts

34. FOH 64c08, *supra* note 6.

35. The special education practitioner literature treats FLSA compliance as a live design constraint on transition internships, not an afterthought. *See* Tim Riesen, Audrey A. Trainor & Rachel E. Traxler, *Understanding Internships for Transition-Age Students With Disabilities*, 54 TEACHING EXCEPTIONAL CHILDREN 286 (2021) (walking educators through the unpaid and paid internship structures that satisfy the Act, and noting that internships "often involve complicated and sometimes ambiguous labor laws"). The practitioner guidance assumes a community host. It does not contemplate the school as the host, which is the case this Article addresses.

36. *Id.*; ICTW Brief, *supra* note 6, at 1.

37. *Id.*

38. *See* 34 C.F.R. § 300.503(a) (2026) (requiring prior written notice whenever the agency proposes or refuses to initiate or change the provision of a free appropriate public education). The IEP must itself state the special education, related services, and supplementary aids to be provided. 34 C.F.R. § 300.320(a)(4) (2026). An enterprise that occupies a period of the school day and appears nowhere in that statement is, on the regulation's own terms, not part of the child's program.

39. FOH 64c08, *supra* note 6; ICTW Brief, *supra* note 6, at 1.

voluntariness from a characterization into a record, and where no record exists, the criterion is unmet.

Criterion five bars activities that result in an immediate advantage to the business, and lists as an indicator that participants are performing services that, although not ordinarily performed by employees, clearly are of benefit to the business.[40] That indicator describes the coffee cart exactly. No employee of the district is employed to bring staff coffee. The service benefits the district anyway, and the district books the proceeds.

C. The Missing Arm's-Length Host

The Department of Labor's framework was designed for a three-party structure: a student, a school that supervises, and a business that hosts. The no-immediate-advantage criterion makes sense in that structure because it polices the host's incentive. The host business must not profit from the placement, and if it does, the placement is not training.

The school-based enterprise collapses the three parties into two. The school is both the supervisor and the host. There is no arm's-length business whose advantage can be measured against the student's, because the entity capturing the proceeds is the entity certifying the education. The framework's central test therefore has nothing to test against. The criteria were not written to reach this structure, and the missing test should be read as an argument against the arrangement rather than as an argument that the criteria do not apply.

The Supreme Court's foundational trainee decision turned on the same fact the Department's criterion five isolates. In *Walling v. Portland Terminal Co.*, railroad brakeman trainees were not employees because, accepting the unchallenged findings that the railroads receive no immediate advantage from any work done by the trainees, their work served only their own interest.[41] The Court's reasoning depended on the absence of advantage to the host; where the host captures the proceeds of the work, the predicate on which *Portland Terminal* rested is missing. The Second Circuit's primary beneficiary test, now the dominant framework for unpaid

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40. FOH 64c08, *supra* note 6; ICTW Brief, *supra* note 6, at 2.

41. Walling v. Portland Terminal Co., 330 U.S. 148, 152–53 (1947).

trainees, asks whether the intern or the employer is the primary beneficiary of the relationship, and weighs among other factors the extent to which the arrangement is tied to a formal education program by integrated coursework or the receipt of academic credit, and the extent to which the work complements, rather than displaces, the work of paid employees while providing significant educational benefits.[42] A school-based enterprise that carries no diploma credit and occupies a period that would otherwise be instruction fails both of those factors on their face.[43]

The Seventh Circuit's treatment of student workers under the FLSA confirms that the inquiry is fact-specific and turns on the economic reality of the relationship.[44] In *Hollins*, cosmetology students were not employees during supervised salon work because they paid tuition for the practical training, the training was required for state licensure, and the incidental tasks

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42. Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 536–37 (2d Cir. 2015). The court was explicit that immediate advantage to the employer is "relevant but not sufficient" to establish employment, and that the inquiry is "highly context-specific." *Id.* at 538–39. That qualification is accepted here. The argument is not that revenue capture alone makes the students employees; it is that revenue capture removes the predicate on which every trainee exception rests, and that the remaining factors, no academic credit and displacement of instruction rather than complement to it, point the same direction. The court also noted it was not addressing training programs in the public or non-profit sector. *Id.* at 536 n.2. This Article does not rely on *Glatt* for a holding about public schools; it relies on the structure of the test.

43. The scholarship on *Glatt* has documented the pattern this Article relies on from the other direction. The leading labor scholars read the primary beneficiary test as having eroded the statute's protection precisely because courts weigh the existence of some educational component so heavily that the employer's benefit drops out of the analysis. *See* James J. Brudney, *Square Pegs and Round Holes: Shrinking Protections for Unpaid Interns Under the Fair Labor Standards Act*, in A RESEARCH AGENDA FOR THE LAW OF UNPAID WORK (Amir Paz-Fuchs et al. eds., 2021), https://doi.org/10.2139/ssrn.3434653 (tracing the erosion from *Portland Terminal*'s no-advantage predicate to the multi-factor balancing that replaced it); David C. Yamada, *Mass Exploitation Hidden in Plain Sight: Unpaid Internships and the Culture of Uncompensated Work*, https://doi.org/10.2139/ssrn.2905779 (2017); William Murphy & Sejal Singh, *What's Up With Glatt?!: The FLSA's Primary Beneficiary Standard in Hindsight*, 23 J. MGMT. POL'Y & PRAC. (2022) (surveying post-*Glatt* decisions and finding "a disproportionate emphasis on the existence of some inherent educational component"). That critique is the reason this Article does not rest on the labor characterization. Where the test has been read to let an educational label absorb the employer's advantage, the discrimination analysis, which asks a different question, is the instrument that survives.

44. Hollins v. Regency Corp., 867 F.3d 830 (7th Cir. 2017) (examining "the economic reality of the working relationship" and cautioning that "[t]hese cases normally turn on the facts of the particular relationship and program"). *See also* Berger v. Nat'l Collegiate Athletic Ass'n, 843 F.3d 285 (7th Cir. 2016) (holding that Department of Labor Field Operations Handbook provisions on student status "are not dispositive, but they certainly are persuasive," and that student athletes are not employees because "the tradition of amateurism defines the economic reality of the relationship"). Judge Hamilton's concurrence in *Berger* is instructive on the role of revenue: he was "less confident" that the reasoning extended to revenue sports, because there "economic reality and the tradition of amateurism may not point in the same direction." *Id.* (Hamilton, J., concurring). The observation transfers. Where an educational activity generates institutional revenue, the economic reality inquiry does not resolve in the institution's favor merely because the activity carries an educational label.

were part of the tested curriculum.[45] Every one of those factors is absent from the school-based enterprise. The students pay no tuition. No licensing body requires the activity. No accrediting standard tests it. *Hollins* is the closest Seventh Circuit authority, and its distinguishing features run toward employee status here.

D. The Hour Presumptions and What They Imply About a Daily Period

Criterion six sets presumptive annual limits per job: five hours for vocational exploration, ninety for vocational assessment, and 120 for vocational training.[46] The limits are presumptions rather than absolute caps, but they carry the Department's judgment about how much unpaid time an educational purpose can justify.

Illinois requires 176 days of actual pupil attendance in a school year.[47] Assume a class period of forty-five to fifty minutes, which is the range the district's own nine-period schedule implies.[48] A daily period across that year accumulates between 132 and 147 hours. That figure exceeds the presumptive limit for vocational training, the most generous category available, and exceeds the limit for vocational exploration by a factor of more than twenty-five. Even a period scheduled three days per week clears the exploration limit by a factor of fifteen and approaches the assessment limit.

The arithmetic is not the argument.[49] The argument is what the arithmetic reveals about the category. Exploration, assessment, and training, in the Department's sense, are measured in

45. *Hollins*, 867 F.3d at 830 (holding that "the fact that students pay not just for the classroom time but also for the practical-training time is fundamentally inconsistent with the notion that during their time on the Performance Floor the students were employees").

46. FOH 64c08, *supra* note 6; ICTW Brief, *supra* note 6, at 2.

47. 105 ILCS 5/10-19 (2026) (requiring "a minimum term of at least 185 days to insure 176 days of actual pupil attendance"). The figure varies by state; the arithmetic that follows uses Illinois because the district in which this pattern was observed is there, and the conclusion does not depend on the precise number.

48. The assumption is stated so that it can be checked. A district's master schedule is a public record, and the period length and the enterprise's frequency are the two inputs the calculation needs. Where a district's periods are shorter or the enterprise runs fewer days, the totals scale down; the exploration limit is exceeded at any frequency above one period per month.

49. The Department's limits are stated as presumptions that may be rebutted by documentation of an individualized educational rationale. FOH 64c08, *supra* note 6; ICTW Brief, *supra* note 6, at 2. That is a further reason the IEP criterion matters: the documentation that could rebut the presumption is the documentation criterion three requires, and where it does not exist the presumption stands.

hours. An activity that runs daily for a school year is a job with a schedule, and the Department's own presumptions say so.

IV. Method of Administration

A. The Effect Standard and the Absent Intent Element

The Title II regulation provides that a public entity may not utilize criteria or methods of administration that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability.[50] The Department of Education's Section 504 regulation is identical in substance.[51] In both, the operative word is effect.[52] Purpose appears in the adjacent subsection as an alternative ground, never as a required element.[53]

The Supreme Court's treatment of Section 504 has never required intent. In *Alexander v. Choate*, the Court rejected the boundless notion that all disparate-impact showings constitute prima facie cases, but assumed without deciding that Section 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped, and held that the statute requires meaningful access to the benefit the grantee offers.[54] The benefit itself cannot be defined in a way that effectively denies otherwise qualified individuals the meaningful access to which they are entitled.[55]

Whatever residual uncertainty *Choate* left about the reach of effect-based claims, the education setting is now the clearest case rather than the hardest. In *A. J. T. v. Osseo Area*

50. 28 C.F.R. § 35.130(b)(3)(i) (2026).

51. 34 C.F.R. § 104.4(b)(4)(i) (2026).

52. The two provisions are textually parallel because Congress directed that the Title II regulation be consistent with the Section 504 coordination regulations at 28 C.F.R. part 41. 42 U.S.C. § 12134(b) (2026) (requiring that regulations under subsection (a) "be consistent with this chapter and with the coordination regulations under part 41 of title 28"). The Department of Justice's commentary confirms that § 35.130(b)(3) "is taken from the section 504 coordination regulation." 28 C.F.R. pt. 35, app. B, § 35.130 (2026).

53. 28 C.F.R. § 35.130(b)(3)(ii) (2026) ("purpose or effect"); 34 C.F.R. § 104.4(b)(4)(ii) (2026) (same).

54. Alexander v. Choate, 469 U.S. 287, 299, 301 (1985). The Court's reasoning rested in part on the recognition that much of the conduct Congress sought to reach "would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent." *Id.* at 296–97 (as quoted in A. J. T. v. Osseo Area Schs., No. 24-249 (U.S. June 12, 2025) (Sotomayor, J., concurring)).

55. *Choate*, 469 U.S. at 301.

Schools, the Court unanimously rejected the rule, followed in several circuits for decades, that students bringing ADA and Rehabilitation Act claims related to their education had to show bad faith or gross misjudgment.[56] Students are subject to the same standards that apply in other disability discrimination contexts, and the IDEA does not restrict the rights and remedies the ADA and Section 504 independently confer.[57] The defense that the district meant well is not a defense to a methods-of-administration claim, and after *A. J. T.* it is not a defense to any education-context disability claim either.[58]

B. The Comparator, and Why It Is Easier Here Than Usual

The characteristic difficulty of disability discrimination claims is the comparator. Because individuals with disabilities are frequently not similarly situated to individuals without them, a defendant can often argue that the differential treatment reflects a difference in need rather than a difference in disability.[59] That difficulty is what makes the meaningful-access inquiry necessary, and it is what makes most effect-based claims contested.[60]

The school-based enterprise does not present that difficulty, because the comparator is the schedule, and a schedule has no needs. The question is whether any general education student in the same building is scheduled into a period of uncompensated revenue-generating labor as part of the school day. None is. Whether disabled students need different instruction is a separate question, and the claim does not ask it. General education students who work in a school store

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56. A. J. T. v. Osseo Area Schs., No. 24-249 (U.S. June 12, 2025). The Court reasoned that "[n]othing in the text of Title II of the ADA or Section 504 of the Rehabilitation Act suggests that such claims should be subject to a distinct, more demanding analysis," and that the heightened rule was "irreconcilable with the unambiguous directive" of 20 U.S.C. § 1415(l).

57. *Id.*; 20 U.S.C. § 1415(l) (2026).

58. The Court left open whether deliberate indifference is the correct standard for compensatory damages, which most circuits require. *A. J. T.*, No. 24-249 (noting that "[t]o obtain compensatory damages, courts generally require a showing of intentional discrimination, which most circuits find satisfied by 'deliberate indifference'"). That question does not affect the claim for injunctive relief, which is the primary remedy this Article contemplates. *See infra* Part VIII.

59. *Choate*, 469 U.S. at 298 (observing that "the handicapped typically are not similarly situated to the nonhandicapped").

60. *See Choate*, 469 U.S. at 299 (declining to hold that "all disparate-impact showings constitute prima facie cases under § 504"); *id.* at 301 (framing the inquiry as whether the challenged measure denies "meaningful access to the benefit that the grantee offers").

do so for a business elective credit that appears on a transcript and counts toward a diploma. The segregated program's students do the same work for no credit, no wage, and no transcript entry that a college or employer will recognize.[61]

The method of administration is the scheduling practice. It applies to one program and not to the others. The program it applies to is defined by disability.[62] That is the claim, and it requires no showing about the students' capacities, because it is a claim about what the district did with their time.

C. Two Configurations of the Proceeds

The proceeds of the enterprise go somewhere, and where they go determines which provision does the work. There are two configurations. Both are actionable. They are actionable on different theories, and an article that addressed only one would be describing a subset of the practice.

1. Configuration one: proceeds fund general education

In the first configuration, the money leaves the segregated program. It funds a general education athletic program, a schoolwide activity fund, or a building account from which the segregated program draws nothing. The students who generated the proceeds are, by the very placement decision that put them in the enterprise, excluded from the activities the proceeds fund.

This is a direct transfer from the protected class to the unprotected class, and the regulation that reaches it is the one prohibiting a covered entity from otherwise limiting a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or

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61. The credential asymmetry is independently a Section 504 problem under the provision barring the recipient from affording an opportunity to benefit that is not equal to that afforded others. 34 C.F.R. § 104.4(b)(1)(ii) (2026); 28 C.F.R. § 35.130(b)(1)(ii) (2026). It is also the factor that most sharply distinguishes the school-based enterprise from the cosmetology and internship cases, where the credential was the point. *See Hollins*, 867 F.3d 830; *Glatt*, 811 F.3d at 536–37.

62. The Title II regulation separately provides that a public entity may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different, despite the existence of permissibly separate or different programs. 28 C.F.R. § 35.130(b)(2) (2026). A general education business elective is a service that is not separate or different. A segregated program whose members are scheduled into the enterprise rather than the elective has denied them that opportunity by schedule.

opportunity enjoyed by others receiving the aid, benefit, or service.[63] Uncompensated labor by the excluded class, funding a privilege enjoyed by the included class, is a limitation on enjoyment by construction.

The district's answer to this configuration is the schoolwide-benefit defense: the enterprise is a charitable activity for the whole school, and the fact that its proceeds fund athletics is no different from a bake sale. The defense is self-defeating on the facts that define the configuration. Calling the benefit schoolwide requires the benefit to be schoolwide, and the segregated placement is precisely what makes it not. If the uniforms are worn by students the segregated program's members are not permitted to be among during the school day, the district's own placement decision supplies the proof that the laborers are excluded from what they funded. The district cannot use segregation as the educational rationale for the placement and then claim that the benefit crosses the line its own segregation drew.[64]

2. Configuration two: proceeds fund the segregated program or a disability-related activity

In the second configuration, the money stays close to home. It funds uniforms for a special education athletic club, supplies for the segregated classroom, or transportation for a community outing the segregated program takes. The students who generated the proceeds are among those who benefit from them.

The district's answer to this configuration is that the students are funding their own activities, and that there is nothing discriminatory about a program paying its own way. That answer misses the comparator. General education students' athletic programs, supplies, and

63. 34 C.F.R. § 104.4(b)(1)(vii) (2026); 28 C.F.R. § 35.130(b)(1)(vii) (2026).

64. The Department of Justice's 1991 commentary on the Title II regulation states the principle: "Even when separate programs are permitted, individuals with disabilities cannot be denied the opportunity to participate in programs that are not separate or different. This is an important and overarching principle of the Americans with Disabilities Act. Separate, special, or different programs that are designed to provide a benefit to persons with disabilities cannot be used to restrict the participation of persons with disabilities in general, integrated activities." 28 C.F.R. pt. 35, app. B, § 35.130 (2026) (guidance on the 1991 regulation, redesignated from Appendix A in 2010). The same passage states that "in most instances, separate programs for individuals with disabilities will not be permitted." *Id.* The commentary was relied on for the same proposition in Lane v. Kitzhaber, 841 F. Supp. 2d 1199 (D. Or. 2012). A segregated program that funds an activity from which the program's members are excluded has used the separate program to restrict general participation twice: once by the placement and once by the transfer.

field trips are funded from the district's budget. The segregated program's are funded by the segregated program's students, in labor, during instructional time. Both groups benefit. The differential is in who pays: the district pays for one group's benefits, and the other group pays for its own.

That differential is the surcharge in kind, and it is the subject of Part V. For present purposes the point is narrower: configuration two does not escape the methods-of-administration claim by keeping the money inside the program. It converts the claim from a transfer theory into a differential-funding theory, and the differential-funding theory is the cleaner of the two, because the comparator is documentary. The district's budget shows what it pays for. The enterprise's ledger shows what the students pay for. The difference between them is the claim.[65]

V. The Surcharge in Kind

A. The Provision and the Two-Part Test

The Title II regulation provides that a public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.[66] The Ninth Circuit, upholding the regulation against a validity challenge, articulated the inquiry in two steps. First, is the measure for which the entity levies the charge required to provide nondiscriminatory treatment. If not, the inquiry ends. Second, is the charge a surcharge, meaning a charge that nondisabled people would not incur for an equivalent service.[67] The court

65. The differential-funding theory does not require that the segregated program's activities be identical to general education's. It requires only that the district fund comparable activities by different mechanisms and that the mechanism applied to the segregated program impose a cost the other does not. That is the structure of the surcharge inquiry in *Dare*, 191 F.3d at 1171, and it is the reason Part V follows directly from this Part.

66. 28 C.F.R. § 35.130(f) (2026).

67. Dare v. Cal. Dep't of Motor Vehicles, 191 F.3d 1167, 1171 (9th Cir. 1999) ("First, as a threshold matter, we consider whether the measure for which California levies the fee is 'required to provide that individual or group nondiscriminatory treatment' as mandated by the ADA. . . . Second, we evaluate whether the fee for the measure is a surcharge; in other words, we consider whether it constitutes a charge that nondisabled people would not incur.").

held the regulation not arbitrary, capricious, or contrary to the statute, reasoning that if public entities place a surcharge on measures that help disabled people achieve parity, disabled people are paying fees others do not and so are not being treated equally.[68] The Eighth Circuit followed *Dare*, and read the regulation to prohibit public entities from singling out the disabled to pay the cost of any ADA compliance efforts.[69]

The Ninth Circuit added a point that bears on the standard of proof. Because surcharges against disabled people constitute facial discrimination, the court held, the meaningful access test of *Alexander v. Choate* does not apply; a surcharge is a per se violation of the statute's prohibition on being subjected to discrimination, and it is never reached as a facially neutral measure tested for its effect on access.[70] That matters here because it means the surcharge claim, unlike the methods-of-administration claim in Part IV, does not depend on the effect-versus-intent analysis at all. A cost placed on the protected group and not on others is discrimination on its face.

Applied to the school-based enterprise in configuration two, both steps resolve against the district. The first step asks whether the funded measure is required. A recipient that operates or sponsors club athletics must provide qualified students with disabilities an equal opportunity

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68. *Dare*, 191 F.3d at 1173–74 (holding that "[f]orbidding such additional charges is a solution aimed at preventing this type of discrimination" and that the regulation's rationale "dovetails neatly with the purposes of Title II").

69. Klingler v. Dir., Dep't of Revenue, 433 F.3d 1078 (8th Cir. 2006). The court's construction of the word required matters here: a program is required, as that word is used by the regulation, if in fact it discharges an obligation imposed by the ADA, however the entity chooses to meet that obligation. *Id.* ("However Missouri chooses to meet this obligation, it must comply with § 35.130(f)."). A district that discharges its equal-opportunity obligation for club athletics through a particular uniform program has made that program required within the meaning of the regulation. *Klingler* carries a caution flag in citator treatment; the flag attaches to the opinion's Eleventh Amendment damages holding, which rested on then-existing circuit precedent, and does not touch the surcharge holding relied on here. District courts reached the same result before either circuit ruled. Duprey v. Conn. Dep't of Motor Vehicles, 28 F. Supp. 2d 702, 708 (D. Conn. 1998) ("If the DMV wants to pass on the costs of providing placards, rather than absorbing the costs itself, it must pass the cost on to all parkers, and not just those disabled individuals protected by the ADA."); Thrope v. Ohio, 19 F. Supp. 2d 816, 825 (S.D. Ohio 1998) (cited with approval in *Dare*, 191 F.3d at 1173).

70. *Dare*, 191 F.3d at 1171 ("Because surcharges against disabled people constitute facial discrimination, the meaningful access test formulated by the Supreme Court in *Alexander v. Choate* . . . does not apply."). The court distinguished facially neutral laws, which are evaluated under *Choate*, from facially discriminatory ones, which present per se violations of 42 U.S.C. § 12132. *Id.* (citing Bay Area Addiction Rsch. & Treatment, Inc. v. City of Antioch, 179 F.3d 725, 733–35 (9th Cir. 1999)).

for participation,[71] and must provide nonacademic and extracurricular services in such manner as is necessary to afford handicapped students an equal opportunity for participation.[72] Where the general education club's uniforms are funded from the budget, equal opportunity for the segregated program's members to participate requires that theirs be funded the same way. The measure is required. The second step asks whether the charge is one nondisabled people would not incur. General education students on the same roster do not work a class period to fund their uniforms. The charge is a surcharge.

B. The Fourth and Fifth Circuits, and Why They Do Not Reach a School District

The adverse authority must be stated at full strength, and there are two circuits. In *Brown v. North Carolina Division of Motor Vehicles*, the Fourth Circuit held that 28 C.F.R. § 35.130(f), which prohibits a state from charging even a modest fee to recover the costs of its efforts to aid the handicapped, lies beyond the remedial scope of the Section 5 power, and that the effort to abrogate state sovereign immunity through it must fail.[73] The court characterized the regulation as definitional rather than remedial, an attempt to create a positive entitlement to a free handicapped parking space, which it described as a function of the state police power that nothing in the Constitution requires.[74] The Fifth Circuit followed a year later, holding that the regulation exceeds the scope of Congress's power to abrogate the states' immunity under Section 5, and describing the bar on cost-sharing as a highly intrusive limit on the core state power to choose

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71. 34 C.F.R. § 104.37(c)(1) (2026).

72. 34 C.F.R. § 104.37(a)(1) (2026). Courts apply the provision to district-sponsored extracurricular activities. *See* S.K. *ex rel.* K.K. v. N. Allegheny Sch. Dist., 146 F. Supp. 3d 700 (W.D. Pa. 2015) (applying § 104.37(a) to district-provided transportation as a nonacademic service subject to the equal-opportunity requirement).

73. Brown v. N.C. Div. of Motor Vehicles, 166 F.3d 698 (4th Cir. 1999) (holding that the regulation "is not a constitutionally valid exercise of power, and the effort to abrogate must fail").

74. *Id.* ("By imposing a ban on all surcharges, the regulations are definitional in an even more fundamental way. They attempt to create a positive entitlement to a free handicapped parking space.").

revenue sources.[75] Both decisions carry caution flags in citator treatment, and *Brown* drew a dissent.[76]

Three features confine both decisions, and the first is dispositive for the claim this Article states.

Brown and *Neinast* are sovereign immunity holdings. Both courts examined the regulation only to determine whether it could abrogate the Eleventh Amendment immunity of a state agency, and it framed the question as whether Congress, acting through the Department of Justice, had validly exercised its Section 5 power to subject a state to suit in federal court.[77] A local school district is not the state for Eleventh Amendment purposes. The Supreme Court settled that in *Mt. Healthy City School District Board of Education v. Doyle*, holding that a local school board is more like a county or city than it is like an arm of the State, and that the Eleventh Amendment bar does not extend to counties and similar municipal corporations.[78] The Seventh Circuit has applied *Mt. Healthy* to hold specifically that an Illinois local school district is not an arm of the state and hence may be sued in federal court for damages or other retroactive relief for violations of federal law.[79] A claim under § 35.130(f) against a school district therefore

75. Neinast v. Texas, 217 F.3d 275 (5th Cir. 2000), *reh'g en banc denied* (July 27, 2000) ("We hold that 28 C.F.R. § 35.130(f) exceeds the scope of Congress's power to abrogate the states' immunity under § 5 of the Fourteenth Amendment."). Like *Brown*, *Neinast* carries a caution flag reflecting the Supreme Court's later Section 5 decisions, and like *Brown* its holding is confined to abrogation.

76. *Brown*, 166 F.3d 698 (Murnaghan, J., dissenting). The caution flags on both *Brown* and *Neinast* reflect the Supreme Court's subsequent Section 5 decisions, discussed below.

77. *Id.* ("In determining whether Eleventh Amendment immunity is abrogated in a case involving a regulation, we first ask whether Congress intended to abrogate immunity. Then, in determining whether it was acting pursuant to a valid exercise of power, we examine the legality of the specific statute and regulation whose asserted violation by state government gave rise to the claim for relief in federal court.").

78. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977). The Seventh Circuit applies *Mt. Healthy* to Illinois school districts. *See* Gary A. v. New Trier High Sch. Dist. No. 203, 796 F.2d 940 (7th Cir. 1986) (finding "no significant difference between the Ohio school board" in *Mt. Healthy* and an Illinois district); DuPage Reg'l Office of Educ. v. U.S. Dep't of Educ., 58 F.4th 326 (7th Cir. 2023) (applying the *Mt. Healthy* arm-of-the-state inquiry).

79. *Gary A.*, 796 F.2d 940 ("A local school district ordinarily is not a 'State' and hence may be sued in federal court for damages or other retroactive relief for violations of federal law or the constitution."). *Gary A.* carries a caution flag; the flag attaches to its holding that the Education for All Handicapped Children Act did not abrogate state immunity, which Congress superseded by statute, and does not touch the school-district holding relied on here. *See* 20 U.S.C. § 1403 (2026).

never reaches the question *Brown* and *Neinast* decided. There is no immunity to abrogate, so the regulation's capacity to abrogate is irrelevant, and the holdings about that capacity do not apply.

Both decisions predate the Supreme Court's modern Section 5 jurisprudence on Title II. *Tennessee v. Lane* and *United States v. Georgia* both sustained Title II abrogation, the first as applied to a class of cases and the second as applied to conduct that independently violates the Constitution.[80] *Lane* rejected the premise on which both circuits proceeded, holding that nothing in the Court's case law requires Title II, with its wide variety of applications, to be considered as an undifferentiated whole, and sustaining abrogation as applied to a class of cases.[81] *Georgia* then held that Title II validly abrogates immunity insofar as it creates a cause of action for conduct that actually violates the Fourteenth Amendment, and directed a claim-by-claim inquiry.[82] The categorical approach *Brown* and *Neinast* took is no longer the approach, and neither decision's reasoning has been extended by any court to a claim against a non-immune entity.

On the merits, the Fourth and Fifth Circuits are outliers. The Ninth and Eighth Circuits, and every district court to consider the question in a non-immunity posture, have upheld and applied the regulation.[83] A claim in the Seventh Circuit, where no decision addresses the regulation's validity, writes on a slate that *Dare* and *Klingler* have already marked.

C. Whether a Surcharge Can Be Paid in Labor

The construction history of § 35.130(f) is a history of fees. The reported decisions construing the provision involve money: a parking placard fee, a charge for an auxiliary aid, a cost passed through for a modification.[84] No court has been asked whether the regulation reaches a cost

80. *See* sources cited *supra* note 73.

81. Tennessee v. Lane, 541 U.S. 509, 530–31, 533–34 (2004).

82. United States v. Georgia, 546 U.S. 151, 159 (2006).

83. *See* sources cited *supra* notes 11 and 67.

84. *See* sources cited *supra* note 11. A search of the reported decisions citing § 35.130(f) for any case involving a non-monetary cost returned nothing. The claim in the text is that no such decision was found, not that none could exist; the point is that the question is open.

extracted in labor rather than in currency. The question is therefore open, and this section argues that the answer is yes.

Begin with the regulation's text. It prohibits placing a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures required to provide nondiscriminatory treatment.[85] The operative phrase is to cover the costs. The regulation is concerned with who bears the cost of a required measure, and its command is that the cost may not be placed on the protected group. It does not specify the form in which the cost is borne, and there is no reason in the text to read a currency requirement into it.

The district court in *Duprey*, construing the term before either circuit ruled, defined surcharge by its ordinary meaning as a charge in excess of the usual or normal amount, an additional tax, cost, or impost, and noted that in many instances the surcharge element will be pro forma if the case involves a fee that was placed only on disabled persons in addition to a fee that is paid by disabled and non-disabled persons alike.[86] A cost is a cost whether it is discharged by paying money or by performing labor whose proceeds pay it. The student who works a class period to fund a uniform has borne the uniform's cost as surely as the student who wrote a check, and has borne it in a form that is harder to refuse.

Dare's second step confirms the reading. The court asked whether the fee constitutes a charge that nondisabled people would not incur for an equivalent service, and illustrated the point by observing that a state can charge a fee for disabled license plates so long as it charges the same fee for nondisabled license plates.[87] The inquiry is comparative. It asks whether the protected group bears something the comparison group does not. Labor performed by one group and not the other satisfies that inquiry as directly as money paid by one group and not the other. The form of the burden does not change the answer to the question the regulation asks.

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85. 28 C.F.R. § 35.130(f) (2026).

86. Duprey v. Conn. Dep't of Motor Vehicles, 28 F. Supp. 2d 702 (D. Conn. 1998) (quoting the dictionary definition of surcharge as "a charge in excess of the usual or normal amount: an additional tax, cost, or impost").

87. *Dare*, 191 F.3d at 1171.

Finally, the regulation's purpose, as the Ninth Circuit stated it, is to address the improper approach to funding services for the disabled, while leaving states broad flexibility to administer and fund their programs otherwise.[88] The improper approach is funding the protected group's services from the protected group. The earliest district court to apply the provision put the rationale in a sentence: the regulation prevents disabled persons from being denied access to mandated benefits because they lack funds, and spreads the cost to all taxpayers.[89] Cost-spreading is the regulation's mechanism. A district that funds the segregated program's activities from the segregated program's labor has concentrated the cost on the protected group instead of spreading it, which is the precise allocation the regulation forbids. That the funding mechanism is a coffee cart rather than a fee schedule makes the approach less visible, and no less improper.

D. The Obligation Question: What the Proceeds Fund

The surcharge claim's hinge is *Dare*'s first step. The regulation reaches only costs of measures required to provide nondiscriminatory treatment.[90] If the proceeds fund something the district is not obligated to provide, the surcharge inquiry ends, and the claim falls back to the methods-of-administration theory in Part IV.

That makes the destination of the money the single most important fact in any application of this Article's argument, and it is a fact that is almost always documentable. Public school districts account for student activity funds under state law, and the accounts are public records.[91] The question to put to the district is which fund receives the proceeds, who authorizes

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88. *Id.* at 1174.

89. *Thrope*, 19 F. Supp. 2d at 816 (describing the regulation's purpose as preventing denial of "ADA-mandated benefits because they lack funds" and spreading costs "to all taxpayers"). The court also rejected the argument that a no-cost alternative available only to vehicle owners cured the surcharge, observing that "[t]he ADA protects people, not cars." *Id.* The observation transfers: a district that offers a no-cost path to the activity for students who happen not to be in the segregated program has not cured the surcharge on those who are.

90. *Id.* at 1171.

91. In Illinois, student activity funds are governed by 105 ILCS 5/10-20.19 (2026), and the records are subject to the Freedom of Information Act, 5 ILCS 140 (2026).

expenditure from it, and what the expenditures purchased. Whether the enterprise is educational is a different question, and it is the one the district will prefer to answer.

Where the answer is an activity the district sponsors for students with disabilities and funds for nondisabled students from its budget, the obligation is established by § 104.37(a)(1) and (c)(1) and the surcharge claim is complete.[92] Where the answer is an activity the district does not sponsor and does not fund for anyone, the obligation is absent and the claim does not lie. The regulation requires that whatever a district pays for, it pay for on the same terms regardless of disability, and it requires nothing more.

The Office for Civil Rights has said as much in the specific context of disability-related athletic programs. Its 2013 guidance on extracurricular athletics instructs that where a district creates athletic opportunities for students with disabilities that are separate or different from those offered to other students, those opportunities should be supported equally, as with a school district's other athletic activities, and it names allied or unified sports teams on which students with disabilities participate with students without disabilities as one of the forms such opportunities take.[93] The promulgating agency said the same thing in 1977. Its analysis of the final regulation explains that because nonacademic and extracurricular services are part of a recipient's education program, they must be provided in the most integrated setting appropriate, and that separate athletics are permitted only if qualified handicapped students are also allowed the opportunity to compete for regular teams or participate in regular activities.[94] The integration

92. *See supra* notes 12 and 13 and accompanying text.

93. U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter: Students with Disabilities in Extracurricular Athletics 12 (Jan. 25, 2013), https://www.ed.gov/sites/ed/files/about/offices/list/ocr/letters/colleague-201301-504.pdf (last visited Sept. 2, 2026) [hereinafter OCR Athletics Letter] ("These athletic opportunities provided by school districts should be supported equally, as with a school district's other athletic activities."). The letter was issued at the recommendation of the Government Accountability Office and describes itself as clarifying existing obligations under 34 C.F.R. § 104.37(a) and (c) rather than creating new ones. *Id.* at 1, 11 nn.19–21. The letter also states that the provision of unnecessarily separate or different services is discriminatory. *Id.* at 11 (citing 34 C.F.R. pt. 104, app. A).

94. 34 C.F.R. pt. 104, app. A, ¶ 26 (2026) (analysis of final regulation, Section 104.37, originally published with the HEW regulation at 42 Fed. Reg. 22676 (May 4, 1977), *see supra* note 16). The paragraph offers, as its illustration of integration, that "a student in a wheelchair can participate in regular archery course, as can a deaf student in a wrestling course." *Id.* The list of nonacademic services in § 104.37(a)(2), which includes employment of students by the recipient, is subject to the same integration instruction.

instruction reaches the enterprise as well as the club, because employment of students by the recipient is on the same list of nonacademic services the paragraph governs. A unified team funded by the labor of its disabled members is not supported equally with the district's other athletic activities. It is supported differently, by a mechanism the district applies to no other team, and the enforcing agency's own guidance supplies the standard against which the difference is measured.

E. The Integrated Club: The Comparator on the Same Roster

The strongest application of the surcharge in kind arises in a configuration the Office for Civil Rights has recognized by name and that has not, to this Article's knowledge, been analyzed under the surcharge provision.[95] The proceeds fund a club that draws members from both the general education population and the segregated program. The club is integrated. Its uniforms are the same. Its roster includes students with and without disabilities, playing together.

That configuration is the most integrated setting the regulation could ask for, and it is exactly what the integration mandate contemplates.[96] It is also the configuration in which the surcharge is most visible, because the comparator is on the same team. The general education member signed up for the club, received a uniform, and returned to seventh-period chemistry. The segregated program's member signed up for the same club, received the same uniform, and spent ninth period serving coffee to fund it.

Nothing in the general education member's day resembles that. The uniform was a benefit of membership. For the segregated program's member, the uniform was a benefit of membership and the price of it, and the price was paid in instructional time. The regulation's second step asks

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95. OCR Athletics Letter, *supra* note 93, at 12 (identifying "allied or unified sports teams" on which "students with disabilities participate with students without disabilities" as one of the forms disability-related athletic opportunities take).

96. The promulgating agencies said so in 1977 and 1991 respectively. *See* 34 C.F.R. pt. 104, app. A, ¶ 26 (2026) (nonacademic services to be provided "in the most integrated setting appropriate"); 28 C.F.R. pt. 35, app. B, § 35.130 (2026) ("promoting integration of individuals with disabilities into the mainstream of society is an important objective of the ADA"). The Office for Civil Rights named unified teams specifically. OCR Athletics Letter, *supra* note 93, at 12. The regulation itself requires services in "the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d) (2026).

whether the charge is one nondisabled people would not incur. Two students on the same roster, in the same uniform, one of whom worked for it during class and one of whom did not, is that question answered.

VI. Consent and the Constructed Menu

A. Elective Framing as a Consent Artifact

Where the enterprise is scheduled as an elective, the district acquires a consent story. The student chose it. The choice was documented. The student is, in the district's account, glad to be there. That story is the district's strongest answer to everything in Parts III through V, because it converts the labor from something imposed into something selected, and it converts the surcharge from something placed on the student into something the student agreed to bear.

The story fails at a point earlier than the district expects.[97] It fails because nothing was formed to which the student could assent, a defect that comes before any question about the quality of the assent.

B. Formation Failure

Consent presupposes an alternative. To consent to an activity is to prefer it over some other thing that was available. Where every option on the menu is the same kind of activity, selecting among the options is assent to a variant, and it says nothing about the kind. The student who chooses the coffee cart over the laundry service has expressed a preference between two forms of uncompensated service labor. The student has not expressed a preference for uncompensated service labor over instruction, because instruction was not on the menu.

This Article takes as a premise a distinction familiar from contract: where a governing framework conditions authorization on an informed choice, and the structure of the transaction

97. The unpaid-work literature sorts arrangements along two axes: the purpose of participation and the level of participatory discretion. Deanna Grant-Smith & Paula McDonald, *Ubiquitous yet Ambiguous: An Integrative Review of Unpaid Work*, 20 INT'L J. MGMT. REVS. 559 (2017) (proposing a four-form matrix on those dimensions). The elective framing is an attempt to move the school-based enterprise along the discretion axis by relabeling it. The analysis in this Part is an argument that the relabeling changes the name and not the position.

makes the information unavailable or the choice illusory, the resulting authorization is a formation failure rather than a defective consent.[98] The difference matters because a defective consent is voidable and can be cured by better disclosure or a cooling-off period, while a formation failure is not a consent at all and cannot be cured by process. The remedy for a menu that contains only one kind of thing is a different menu; a better selection procedure changes nothing.

The point has been made at the level of Olmstead doctrine as well. Choice, in the integration mandate's sense, is not satisfied by the individual's assent to the placement offered; it requires that an integrated alternative be available to be chosen, and a regime that offers only segregated options and then records the individual's acceptance has simulated choice.[99]

The transition literature reaches the same conclusion from the other direction. Informed choice is a recognized requirement in the movement toward competitive integrated employment, and the literature is explicit that the requirement is meaningless where the choice set has been constructed to exclude the integrated option.[100] The Department of Justice's own commentary on the integration mandate, as construed in *Lane v. Kitzhaber*, states that participation in separate

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98. The distinction between a bargain that was never formed and one that was formed defectively is basic to contract doctrine; the former is void and the latter voidable. *See* RESTATEMENT (SECOND) OF CONTRACTS § 163 (Am. L. Inst. 1981) (where a misrepresentation as to the character or essential terms of a proposed contract induces conduct that appears to be a manifestation of assent, "his conduct is not effective as a manifestation of assent"), *as applied in* Resolution Tr. Corp. v. Townsend Assocs. Ltd. P'ship, 840 F. Supp. 1127 (E.D. Mich. 1993) ("Put simply, no contract is formed under these circumstances because the terms of the contract were never assented to by one of the parties."), *and* Colo. Plasterers' Pension Fund v. Plasterers' Unlimited, Inc., 655 F. Supp. 1184 (D. Colo. 1987) ("the contract in question is not merely voidable, it is void ab initio"); RESTATEMENT (SECOND) OF CONTRACTS § 7 (Am. L. Inst. 1981) (defining a voidable contract as one in which a party has the power, by a manifestation of election, either to avoid the legal relations created by the contract or to ratify it), *as applied in* Bertram v. Beneficial Consumer Disc. Co., 286 F. Supp. 2d 453, 458 (M.D. Pa. 2003). The analogy is not offered as a claim that the student's schedule is a contract. It is offered because the structure of the defect is the same: a choice among options that are all one kind is not a choice about the kind, and process cannot cure what was never formed.

99. *See* Samuel R. Bagenstos, *Taking Choice Seriously in Olmstead Jurisprudence*, 40 J. LEGAL MED. 5 (2020) (examining the role of individual choice in integration-mandate litigation and the conditions under which a stated preference for a segregated setting can be given weight); Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 CARDOZO L. REV. 1 (2012) (tracing the tension between integration presumptions and guardian-asserted preferences for institutional placement). The Cardozo pagination is cited from the author's SSRN posting, https://doi.org/10.2139/ssrn.2005301, and is confirmed on the proof pass.

100. Ruby Moore & Mark J. Friedman, *The Role of Informed Choice in Advancing Competitive Integrated Employment*, 46 J. VOCATIONAL REHAB. 245 (2017) (tracing the informed-choice requirement through deinstitutionalization litigation and current federal policy and arguing that choice without an integrated option is not informed choice).

programs must be a choice, not a requirement, and that separate, special, or different programs that are designed to provide a benefit to persons with disabilities cannot be used to restrict the participation of persons with disabilities in general, integrated activities.[101] A menu that offers only separate programs has restricted participation in general, integrated activities by construction, and the student's selection from that menu cannot be the choice the commentary requires.

The regulatory structure makes the same point in a single provision. Nothing in the Title II regulation requires an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit which such individual chooses not to accept.[102] The right to decline is meaningless where every alternative is the same thing declined.

C. Assent Produced by the Deprivation of Ordinary Access

There is a second limb to the consent analysis, and it is the one the programs rely on most heavily because it is the one that sounds most like the student's own voice. The student is excited. The student likes the coffee cart. The student wants to be there.

The observation is accurate and it proves nothing about the activity. A student who spends the school day in a segregated placement, among the same small group, in the same room, is a student for whom any activity that involves leaving the room and interacting with adults across the building is an improvement in the day. The enthusiasm is real, and its object is the access.[103] A student glad to be out of the room and around people will say yes to whatever puts him there, and willingness produced by the deprivation of ordinary social access is not a preference about the task that provides it.

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101. Lane v. Kitzhaber, 841 F. Supp. 2d 1199 (D. Or. 2012) (quoting the 1991 Department of Justice commentary, now 28 C.F.R. pt. 35, app. B, and holding that participation in sheltered workshops "must be a choice, not a requirement").

102. 28 C.F.R. § 35.130(e)(1) (2026).

103. The observation is consistent with the finding that adults with intellectual and developmental disabilities in competitive integrated employment report better psychological and social outcomes than those in segregated settings, an effect the literature attributes in part to the social integration the setting provides rather than to the work itself. *See* Taylor, Avellone & Brooke, *supra* note 111. A student's positive response to a segregated activity that happens to involve leaving the room is evidence of the value of leaving the room.

This is the reason student preference, which the IDEA regulations make a required input to transition planning,[104] cannot be satisfied by the student's reaction to the activity once assigned. The regulation requires that the plan be based on preferences, which means the preferences come first and the plan follows. A plan that assigns the activity and then reports the student's enthusiasm as evidence of preference has reversed the order the regulation prescribes, and has treated the student's response to segregation as if it were the student's choice about employment.

The self-determination literature has documented the gap between the practices recommended for developing student choice and the practices in use.[105] Where the practices are not used, the student's stated preference at the point of assignment is the product of the assignment, and of no process designed to elicit it.

VII. Transition Adequacy and the Vanishing Destination

A. Integrated Employment as the Regulatory Destination

The IDEA regulations define transition services as a coordinated set of activities designed within a results-oriented process that is focused on improving the academic and functional achievement of the child to facilitate movement from school to post-school activities, and the enumerated post-school activities include integrated employment, including supported employment.[106] The word integrated is in the regulation, placed there by the agency and by no one's advocacy, and it is the destination the regulation names.[107]

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104. 34 C.F.R. § 300.43(a)(2) (2026) (requiring that transition services be "based on the individual child's needs, taking into account the child's strengths, preferences, and interests").

105. Dalun Zhang, Antonis Katsiyannis & Jiabei Zhang, *Teacher and Parent Practice on Fostering Self-Determination of High School Students with Mild Disabilities*, 25 CAREER DEV. FOR EXCEPTIONAL INDIVIDUALS 157 (2002) (finding that fewer than half of surveyed parents frequently engaged in recommended self-determination practices).

106. 34 C.F.R. § 300.43(a)(1) (2026).

107. The Workforce Innovation and Opportunity Act reinforced the destination in 2014 by making competitive integrated employment the primary goal of vocational rehabilitation services and by creating pre-employment transition services for students with disabilities. *See* Joshua P. Taylor & Holly Whittenburg, *The Promise and the Challenge of Pre-Employment Transition Services: The Workforce Innovation and Opportunity Act After*

The IEP must include appropriate measurable postsecondary goals based upon age-appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills, together with the transition services needed to reach them.[108] The goals rest on assessments, which means they cannot rest on what the segregated program historically offers or on what the enterprise happens to need.

A ninth-period enterprise that trains students to serve coffee to building staff for donations is not a transition service oriented toward integrated employment, because the job it trains for does not exist in the integrated labor market. A barista is paid, works for a business, and serves the public. The enterprise's participants are unpaid, work for the school, and serve the school's employees. The skills overlap. The destination does not.[109]

B. The Statutory Elimination of Subminimum-Wage Segregated Work

The destination the enterprise does resemble is the sheltered workshop, and the sheltered workshop is being legislated out of existence. The federal framework for subminimum wage under section 14(c) of the FLSA has been the subject of sustained empirical critique,[110] and the systematic review evidence favors competitive integrated employment over segregated employment on economic, psychological, and physical health outcomes.[111]

Ten Years, 60 J. VOCATIONAL REHAB. 157 (2024) (assessing implementation a decade on); Jeanne A. Novak, *Raising Expectations for U.S. Youth with Disabilities: Federal Disability Policy Advances Integrated Employment*, 5 CTR. FOR EDUC. POL'Y STUD. J. 91 (2015) (tracing the federal policy shift toward integrated employment for transition-age youth).

108. 34 C.F.R. § 300.320(b)(1)–(2) (2026).

109. The distinction between skill acquisition and destination is the one the Department of Justice drew in the Rhode Island matter. *See infra* note 113. It is also the distinction the transition-assessment requirement is built to enforce: the postsecondary goal names a destination, and the services are measured against it. 34 C.F.R. § 300.320(b)(1)–(2) (2026).

110. *See* Lauren Avellone, Joshua P. Taylor & Paul Wehman, *State-Level Analysis of Subminimum Wage Use for Individuals With Disabilities in the United States: Implications for Policy and Practice*, 48 RSCH. & PRAC. FOR PERSONS WITH SEVERE DISABILITIES 127 (2023) (analyzing state-by-state 14(c) certificate use); Carli Friedman & Mary C. Rizzolo, *Fair-Wages for People With Disabilities: Barriers and Facilitators*, 31 J. DISABILITY POL'Y STUD. 152 (2020) (identifying correlates of fair-wage employment from Personal Outcome Measures data).

111. Joshua P. Taylor, Lauren Avellone & Paul Wehman, *The Efficacy of Competitive Integrated Employment Versus Segregated Employment for Persons with Disabilities: A Systematic Review*, 58 J. VOCATIONAL REHAB. 63 (2022); Joshua P. Taylor, Lauren Avellone & Valerie Brooke, *The Impact of Competitive Integrated Employment on Economic, Psychological, and Physical Health Outcomes for Individuals with Intellectual and Developmental Disabilities*, 35 J. APPLIED RSCH. INTELL. DISABILITIES 448 (2022) (systematic review).

Illinois has acted on that evidence. The Dignity in Pay Act eliminates subminimum wage employment in the state by December 31, 2029, amending the Illinois Minimum Wage Law and the Department of Human Services Act and establishing a transition program for affected workers and providers.[112] The Act imposes no duty on school districts and creates no cause of action against one. Its role here is evidentiary. A student who exits high school inside the phase-out window is being trained, by a ninth-period enterprise, for an arrangement the state has determined will not exist when the student arrives.

The Department of Justice has already found a school-based version of that destination to violate Title II. In 2013 the Civil Rights Division concluded that the Harold A. Birch Vocational Program, a sheltered workshop operated inside a Providence, Rhode Island public high school, placed students with intellectual and developmental disabilities at serious risk of unnecessary segregation in adult sheltered workshops and day programs, in violation of the ADA's integration mandate as construed in *Olmstead*.[113] The Department and the Department of Labor's Wage and Hour Division conducted the investigation jointly, and the resulting decree required the state and city to transition the students into integrated employment services. The analytic move was to ask what the in-school program prepared its participants for, and to treat the answer as the measure of the program.

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112. Dignity in Pay Act, H.B. 793, 103d Gen. Assemb. (Ill. 2025) (signed Jan. 21, 2025) (amending 820 ILCS 105 and 20 ILCS 1305). The engrossed bill is published by the Illinois Council on Developmental Disabilities at https://icdd.illinois.gov/content/dam/soi/en/web/icdd/documents/dignity-in-pay/dignity-in-pay-act-engrossed-bill.pdf (last visited Sept. 2, 2026). The Act's transition grant program is directed toward "supported employment, customized employment, entrepreneurship, and community-based day programs." *See* Ill. Council on Developmental Disabilities, *Transition Fund Grant*, https://icdd.illinois.gov/dignity-in-pay-act/transition-fund-grant.html (last visited Sept. 1, 2026).

113. Letter from Thomas E. Perez, Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to the State of Rhode Island and the City of Providence (June 7, 2013) (findings letter), and Interim Settlement Agreement, United States v. Rhode Island & City of Providence (D.R.I. June 13, 2013), both available at https://www.justice.gov/crt/case/united-states-v-state-rhode-island-and-city-providence (last visited Sept. 2, 2026); Consent Decree, United States v. Rhode Island, No. 1:14-cv-00175 (D.R.I. Apr. 8, 2014). The Birch program involved subcontracted piecework for private companies at wages between fifty cents and two dollars an hour, and functioned as a pipeline into an adult workshop where participants had remained for decades. The school-based enterprise this Article addresses is at the mild end of that spectrum, and the comparison is offered for the analytic question, not the facts: the Department asked what post-school setting the in-school program prepared its participants for, and found the answer dispositive.

That is the transition adequacy claim. It does not depend on the enterprise being unlawful. It depends on the enterprise being oriented toward a destination the regulation does not name and the state has abolished. A transition service that facilitates movement toward segregated unpaid work is not a transition service within a results-oriented process focused on integrated employment, and the district's own state has supplied the finding that the destination is closing.

C. The Ceiling That Was Never Measured

The final provision has been in the Section 504 regulation since 1977 and has almost never been litigated. A recipient that provides vocational counseling, guidance, or placement services to its students shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interests and abilities.[114]

The absence is documented rather than asserted. The agency's own analysis of the final regulation, which walks through Subpart D section by section, contains no discussion of paragraph (b) at all; its treatment of § 104.37 addresses only the equal-opportunity requirement of paragraph (a) and the athletics rule of paragraph (c).[115] The provision states the ceiling problem in regulatory language. The objection to the school-based enterprise as a transition service is that the objective was set at coffee service without any instrument having been administered that could show whether the student's capacity supports something more, and that nondisabled students with similar interests are counseled toward objectives set by assessment rather than by placement. Whether coffee service is a good skill is beside the point.

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114. 34 C.F.R. § 104.37(b) (2026). The provision appears in reported decisions almost exclusively as quoted regulatory text rather than as an applied standard. *See, e.g.*, Hartline v. Nat'l Univ., No. 2:14-cv-00635 (E.D. Cal. Aug. 18, 2016) (quoting the provision without applying it).

115. *See* 34 C.F.R. pt. 104, app. A, ¶ 26 (2026). The postsecondary analogue at § 104.47(b) receives one sentence of gloss, that the requirement "does not preclude a recipient from providing factual information about licensing and certification requirements that may present obstacles to handicapped persons." 34 C.F.R. § 104.47(b) (2026). No such qualification appears in § 104.37(b), and no court has supplied one.

The provision's requirement is comparative and it is about counseling, which means it is about the objective the district steers toward rather than the outcome the student achieves.[116] A district that assigns a segregated program's students to an enterprise because the enterprise is what the program does, without a transition assessment supporting an employment goal that the enterprise serves, has counseled those students toward a more restrictive objective than it counsels students of similar interests whose objectives are set by their own assessments. The provision reaches that steering directly, and it has been waiting since 1977 for a fact pattern to reach it.

VIII. Forum, Remedy, and the Limits of the Individualized Process

The claims this Article states divide by forum. The IDEA claims, that the enterprise is not in the IEP, that it displaces required instruction, that the transition plan rests on no assessment and aims at a vanishing destination, run through the individualized process: the IEP team, prior written notice, the state complaint, and due process.[117] Those claims are individual by nature and are pleaded for a named student.[118]

The discrimination claims are not. A method of administration that assigns uncompensated revenue-generating labor to a segregated program is a practice rather than a placement, and no IEP team can cure it, because the IEP team's jurisdiction is the child and the practice is the program. That is why the individualized process is the wrong instrument for the systemic claim by construction, and why the systemic claim belongs in the forums that reach

116. The comparative structure, "than are nonhandicapped students with similar interests and abilities," is the same structure as the FAPE comparability standard in § 104.33(b)(1), and it should be read the same way: the recipient's obligation is measured against what it does for the comparison group, not against an absolute floor. *See supra* note 17. The self-determination literature documents that the practices that would supply the comparison, assessment of the student's own interests and abilities, are frequently not used. *See* Zhang, Katsiyannis & Zhang, *supra* Part VI.C.

117. *See* 34 C.F.R. §§ 300.151–.153 (state complaint procedures), 300.507–.516 (due process procedures) (2026).

118. The IDEA's exhaustion requirement applies to claims seeking relief that is also available under the IDEA, but not to claims seeking relief the IDEA cannot provide. *See* 20 U.S.C. § 1415(l) (2026); *A. J. T.*, No. 24-249 (describing § 1415(l) as preserving the independent rights and remedies of the ADA and Section 504). A claim that a district-wide scheduling practice discriminates on the basis of disability seeks relief no IEP team can grant, and is not an IDEA claim in disguise.

practices: the Office for Civil Rights, the state education agency's program-level complaint process, and, where the facts support class treatment, a federal action for injunctive relief under Title II and Section 504 pleaded as a method of administration.[119] The state education agency's complaint process is likewise built for it. In Illinois, a parent, individual, or organization may file a written complaint alleging that a district has violated the rights of one or more children with disabilities, the agency must issue a written decision within sixty days addressing each allegation, and it may order any actions necessary to bring the district into compliance.[120] The federal action, where brought, is a Rule 23(b)(2) case: the party opposing the class has acted on grounds that apply generally to the class, so that final injunctive relief is appropriate respecting the class as a whole.[121]

The remedy that fits the practice is a schedule.[122] The relief that corrects curricular substitution is an order that the period be returned to instruction, that any enterprise activity be conducted outside instructional time or for transcript credit on the same terms as the general education equivalent, and that the proceeds of any enterprise be applied on the same terms the district applies to the proceeds of every other student activity. Where the surcharge claim lies, the relief includes restoration: the district funds the disability-related activity from the budget it uses for everyone else, and the students stop paying for it in class.

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119. The Office for Civil Rights complaint procedure is built for the systemic claim. The Section 504 regulation incorporates the Title VI procedures, 34 C.F.R. § 104.61 (2026), and those procedures provide that any person who believes himself or any specific class of individuals to be subjected to discrimination may file a written complaint, 34 C.F.R. § 100.7(b) (2026). The complaint must be filed within 180 days of the alleged discrimination unless extended. *Id.* A scheduling practice is a continuing act, and each school day on which the practice operates is a new day of discrimination for limitations purposes. The class-of-individuals language means the complaint need not be pleaded for a named student at all.

120. 23 Ill. Admin. Code § 226.570(a), (c)(6)–(7) (2026) (implementing 34 C.F.R. §§ 300.151–.153). The one-year limitation in § 226.570(b) runs from the violation, and a continuing scheduling practice is a continuing violation. An organization may file, which means the systemic complaint does not require a parent as complainant.

121. FED. R. CIV. P. 23(b)(2). The integration-mandate cases have proceeded on exactly that footing. *See* Lane v. Kitzhaber, 283 F.R.D. 587 (D. Or. 2012) (certifying a (b)(2) class of individuals in sheltered workshops); Kenneth R. *ex rel.* Tri-Cnty. CAP, Inc./GS v. Hassan, 293 F.R.D. 254 (D.N.H. 2013) (same, methods-of-administration claim). A scheduling practice applied to every member of a segregated program is a ground that applies generally to the class by definition.

122. This is also why the FLSA analysis in Part III, even where it succeeds, produces the wrong remedy standing alone. Back wages compensate the labor and leave the schedule intact. The discrimination remedy addresses the schedule. The two are not exclusive, and the Rhode Island matter was conducted jointly by the Departments of Justice and Labor for that reason. *See supra* note 113.

The remedy the individualized process cannot reach is the one the practice most needs: the finding that a program that does not exist cannot be created by an IEP team, and that a district which has filled the vacated hour with something that pays has answered the question of why the hour was vacant.

IX. Conclusion

The deletion literature described an absence and asked why the subjects were gone. This Article has asked what took their place, and the answer is work. Uncompensated, uncredentialed, revenue-generating work, performed inside the building for the building's own staff, by students whose placement put them there and whose schedule kept them there. The work is not volunteering, because the regulation defining that term for public agencies excludes services rendered under implied pressure.[123] It is not training, because the Department of Labor's criteria presuppose an arm's-length host that the arrangement collapses.[124] It is a method of administration with a discriminatory effect, because it applies to the segregated program and to no other,[125] and it is a surcharge in kind wherever the proceeds fund something the district owes.[126]

The two terms this Article has introduced are meant to survive it. Curricular substitution names what the deletion frame could not see: the period was full, and what filled it was preferred.[127] The surcharge in kind names the mechanism by which a protected class discharges in labor a cost the covered entity owes in money, and it locates that mechanism in a regulation that has been waiting for it since 1991.[128]

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123. *See supra* Part III.A.

124. *See supra* Parts III.B–C.

125. *See supra* Part IV.

126. *See supra* Part V.

127. *See supra* Part II.

128. *See supra* Part V.C; 28 C.F.R. § 35.130(f) (2026); Nondiscrimination on the Basis of Disability in State and Local Government Services, 56 Fed. Reg. 35694 (July 26, 1991) (final rule). The section-by-section analysis relied on in Parts IV and VI begins at 56 Fed. Reg. 35696 and is reproduced at 28 C.F.R. pt. 35, app. B (2026).

The regulation that has been waiting longest is the last one. Since 1977, recipients have been forbidden to counsel students with disabilities toward more restrictive career objectives than students of similar interests and abilities.[129] The agency that wrote it never explained it, and the courts have quoted it without applying it.[130] No one has asked what that provision means for a student assigned to a coffee cart because the coffee cart is what the program does. This Article has asked. The answer is that the objective was set by placement rather than by assessment,[131] that the ceiling was never measured, and that the provision reaches the steering directly.[132]

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129. 34 C.F.R. § 104.37(b) (2026); *see supra* note 16.

130. *See supra* Part VII.C.

131. *See supra* Part VII.A; 34 C.F.R. § 300.320(b)(1) (2026).

132. The elective-choice defense does not rescue the objective, because a choice among options of one kind is not a choice about the kind. *See supra* Part VI.B.

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