
YALE LAW & POLICY REVIEW

The Remediless Reading Right

Shana Hurley *

Lawmakers nationwide are trying to improve reading by embracing a scientific consensus regarding literacy acquisition and enacting robust regulatory regimes touching every part of the learning process. For most actors, “Right to Read” laws establish clear accountability rules and noncompliance remedies. However, students who are not provided with statutory reading entitlements have inconsistent or nonexistent remedies against their schools. As a result, states do not hold accountable educators using debunked instructional methods and schools failing to provide necessary interventions. And courts abstain from enforcing their entitlements based on anachronistic research and policy. This Note introduces the new literacy science and laws, arguing descriptively that Right to Read regimes are enforceable under an implied right of action or a statutory negligence claim. Nevertheless, it recommends that lawmakers enact a public enforcement scheme that would better serve the students most in need of support.

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INTRODUCTION

The story of reading instruction in America is a tragedy. Ninety-three million Americans have reading skills inadequate for tasks beyond a basic level.¹ Adults with limited literacy are more likely to earn less, be unemployed, and live in poverty;² have difficulty caring for their children

1. MARK SEIDENBERG, *LANGUAGE AT THE SPEED OF SIGHT 7* (2017).

2. *Employment Rates and Mean Monthly Earnings of 25- to 65-Year-Olds, by Literacy Proficiency Level, Numeracy Proficiency Level, and Country or Other Education System: 2012*, NAT'L CTR. FOR EDUC. STATS., <https://nces.ed.gov/>

and for themselves, with more health problems and greater entanglement with the criminal justice system;³ and have a harder time participating in our democracy.

This tragedy is avoidable. After centuries of “Reading Wars,”⁴ there is a first-time consensus concerning “how and when to begin and what to emphasize” for beginning readers.⁵ In the last three decades, scientists have rigorously analyzed the competing approaches to reading acquisition, sound-based (“phonics”) and image-based (“whole word instruction”). Scientists have found that *almost all students* can learn to read⁶ provided students are deliberately, systematically, and explicitly taught to identify letters’ corresponding speech sounds; blend those sounds into words; and recognize those words in their knowledge base.⁷

Even though reading scientists have learned how to prevent children from experiencing a lifetime of functional illiteracy, their findings are not making their way into classrooms. Over the past three decades, students’ average reading scores have barely budged.⁸ Instead, the opposite of the

programs/digest/d18/tables/dt18_604.30.asp [https://perma.cc/B768-RYN6].

3. Estimates suggest that 60-80% of citizens who are incarcerated are illiterate. KC Moody et al., *Prevalence of Dyslexia Among Texas Prison Inmates*, 96 TEX. MED. 69, 69 (2000); Tony Fabelo, James Austin & Angela Gunter, *The Impact of Ignoring Dyslexia and Reading Disabilities in the Criminal Justice System: What We Know and Need to Know*, DYSLEXIA RSCH. FED’N OF TEX. (2004). Regarding health, see Erin N. Marcus, *The Silent Epidemic—The Health Effects of Illiteracy*, 355 NEW ENGLAND J. MED. 339 (2006) (telling the story of a patient unable to read his medications and therefore comply with his prescriptions).
4. JEANNE CHALL, *LEARNING TO READ: THE GREAT DEBATE* 3 (1967).
5. James Kim, *Research and the Reading Wars*, in *WHEN RESEARCH MATTERS: HOW SCHOLARSHIP INFLUENCES EDUCATION POLICY* 89, 90-91 (Frederick M. Hess ed., 2008); see *infra* Section I.A.
6. Louisa C. Moats, *Teaching Reading Is Rocket Science, 2020: What Expert Teachers of Reading Should Know and Be Able to Do*, AM. FED’N TCHRS. 5 (2020), <https://www.aft.org/sites/default/files/moats.pdf> [https://perma.cc/46RQ-82HK] (“The knowledge exists to teach all but a handful of severely disabled children to read well.”).
7. See *infra* Part I.
8. Nat’l Ctr. for Educ. Stats., *NAEP Report Card: 2019 NAEP Reading Assessment*, U.S. DEP’T EDUC., <https://www.nationsreportcard.gov/highlights/reading/2019> [https://perma.cc/PTU4-B28M] [hereinafter *NAEP*] (showing an average of 217 in 1992 to 220 in 2019).

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scientific consensus is “deeply embedded” in American classrooms.⁹ Discredited instructional methods, based on debunked theories, dominate educators’ mindsets, practices, and materials. As a result, roughly two-thirds of all fourth-graders do not read proficiently.¹⁰ Most never catch up.¹¹

To improve literacy, scientists will have to break through a learned and politicized bias against phonics. Thus far, however, the law has failed to create the institutions needed to transmit the scientific knowledge and ensure its implementation. The challenge for public policy is to convey scientific insights so that teachers can best instruct children and are accountable for providing scientifically aligned high-quality instruction.

After federally led failure, state legislators nationwide are enacting robust regulatory regimes touching every part of the process by which students are taught to read.¹² Scores of new so-called “Right to Read” laws¹³ embed the “science of reading” in educator preparation programs, new educator certification requirements, in-service training for teachers, curriculum procurement protocols, and student intervention and retention policies.¹⁴ But the most important constituents—students—have the most tenuous claim to these reforms. If a student’s teacher is unaware of the reading science, the student cannot mandate that her school give her a teacher who is. If she falls behind, she can ask for more support but generally cannot enforce its delivery. At the same time, if she is unable to read at grade level in third grade, her school more often than not can hold her back without her input.

Policymakers and courts can and should help struggling readers get the instruction and support services they need. For example, when students with disabilities receive insufficient support, federal law provides a robust

9. SEIDENBERG, *supra* note 1, at 124.

10. NAEP, *supra* note 8.

11. Donald Hernandez, *Double Jeopardy: How Third-Grade Reading Skills and Poverty Influence High School Graduation*, ANNIE E. CASEY FOUND. (2011), <https://assets.aecf.org/m/resourcedoc/AECF-DoubleJeopardy-2012-Full.pdf> [<https://perma.cc/3BES-P3JE>].

12. In the past three years alone, eleven states have enacted such reading laws. Catherine Gewertz, *States to Schools: Teach Reading the Right Way*, EDUC. WEEK (Feb. 20, 2020), <https://www.edweek.org/teaching-learning/states-to-schools-teach-reading-the-right-way/2020/02> [<https://perma.cc/J7TX-LHRH>].

13. ARK. CODE § 6-17-429(a) (2021) (“This section shall be known and may be cited as the ‘Right to Read Act.’”); R.I. GEN. LAWS § 16-11.4-6 (2020) (same).

14. *See infra* Section II.B.

public and private enforcement regime, with extensive administrative oversight and private rights of action.¹⁵ But struggling readers who have not been identified for special education (“general education” students) are not entitled to that legal hook. Students in schools failing to provide reading supports must look to state law or the common law. And schools are neither publicly nor privately accountable to individual students’ reading needs.

Although only one state law explicitly disclaims a cause of action,¹⁶ an almost-unyielding line of precedent indicates that courts will not hear claims arising under Right to Read laws.¹⁷ Historically, efforts to vindicate better instruction in court may justifiably have been bogged down by indeterminacies of education theory and law. Since the 1970s, courts have supported rejecting certain education claims on the basis that no law can be enforceable and no workable standard of care established when the “science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught,” and because education laws are not “designed to protect against the risk of a particular kind of injury.”¹⁸ But science and statute have evolved, and the 1970s-era reasoning is patently inconsistent with today’s scientific and legal frameworks. But legislative abdication and judicial abstention based on outdated and inaccurate considerations mean Right to Read laws nevertheless provide no rights.

Despite the attention commanded in education circles by the science of reading, this Note is the first work of legal scholarship to address it. Prior scholarship has considered the potential for and contours of theoretical federal and actual state constitutional education rights.¹⁹ A substantially smaller set of legal scholarship has evaluated claims to education rights arising under the common law,²⁰ with a particularly compelling recent

15. Individuals with Disabilities Education Act, 20 U.S.C. § 1400 (2018).

16. OHIO REV. CODE § 3313.608(G) (2019) (“This section does not create a new cause of action or a substantive legal right for any person.”).

17. Johnny Parker, *Educational Malpractice: A Tort is Born*, 39 CLEV. ST. L. REV. 301, 302 (1991).

18. *Peter W. v. S.F. Sch. Dist.*, 131 Cal. Rptr. 854, 860-62 (Ct. App. 1976).

19. *E.g.*, KIMBERLY JENKINS ROBINSON, *THE FEDERAL RIGHT TO EDUCATION* (2019); Jeffrey S. Sutton, *San Antonio Independent School District v. Rodriguez and Its Aftermath*, 94 VA. L. REV. 1963 (2008).

20. Stephen D. Sugarman, *Accountability Through the Courts*, 82 SCH. REV. 233 (1974) (describing potential arguments); John Elson, *A Common Law Remedy for the Educational Harms Caused by Incompetent or Careless Teaching*, 73 NW. U. L. REV. 641 (1978); Gershon Ratner, *A New Legal Duty for Urban Public*

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treatment by Ethan Hutt and Aaron Tang illustrating how improved education research and data collection could support claims for negligent instruction.²¹ Earlier evaluations of science-based education statutes by Eloise Pasachoff (generally) and Kamina Aliya Pinder (for reading laws) have focused on federal rather than state law.²² This is the first work of legal scholarship to document proliferating state science of reading laws, and the first to frame such laws as a comprehensive reading regulatory regime. To that end, this Note singularly unites the emerging education research consensus together with state education policies to argue that higher-quality instruction and reading supports are statutory rights enforceable by an implied right of action.²³

Part I explains how the Reading Wars continue to rage in American classrooms, even though science should have settled them. It describes what researchers know we should be doing—introducing the well-developed conception of how students learn to read, the positive effects of science-based instruction, and the harms caused by poor teaching—and how educators are not doing it. Next, it describes a pervasive but little-

Schools: Effective Education in Basic Skills, 63 TEX. L. REV. 777, 800-09 (1985); Parker, *supra* note 17 (courts should recognize); Frank D. Aquila, *Educational Malpractice: A Tort En Ventre*, 39 CLEV. ST. L. REV. 323 (1991) (courts should not).

21. Ethan Hutt & Aaron Tang, *The New Educational Malpractice Litigation*, 99 VA. L. REV. 419 (2013); *see also* Todd A. DeMitchell et al., *Teacher Effectiveness and Value-Added Modeling: Building a Pathway to Educational Malpractice?*, 2012 BYU EDUC. & L.J. 257 (2012); Melanie Natasha Henry, Comment, *No Child Left Behind? Educational Malpractice Litigation for the 21st Century*, 92 CALIF. L. REV. 1117 (2004); Todd A. DeMitchell & Terri A. DeMitchell, *Statutes and Standards: Has the Door to Educational Malpractice Been Opened?*, 2003 BYU EDUC. & L.J. 485 (2003).
22. Eloise Pasachoff, *Two Cheers for Evidence: Law, Research, and Values in Education Policymaking and Beyond*, 117 COLUM. L. REV. 1933 (2017) (regarding the Every Student Succeeds Act); Kamina Aliya Pinder, *Using Federal Law to Prescribe Pedagogy: Lessons Learned from the Scientifically-Based Research Requirements of No Child Left Behind*, 6 GEO. J.L. & PUB. POL'Y 47, 82 (2008) (regarding the Reading First Act).
23. Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NORTE DAME L. REV. 1413 (2011) (focused on federal law); Sonja Ralston Elder, Note, *Enforcing Public Educational Rights Via a Private Right of Action*, 1 DUKE F. L. & SOC. CHANGE 137 (2009) (same).

examined effort at the state level to effectuate the science of reading.²⁴ Part II illustrates that the failure is, in part, a problem of law. It looks to the dearth of enforcement tools in state statutes and the judge-made doctrine of educational abstention interfering with students' rights, identifies the policy rationales courts have consistently invoked to reject certain education claims, contextualizes their reasoning in the education research and policy of its era, and explains how such reasoning is no longer defensible in light of scientific and statutory evolution. For struggling readers, Part II argues, the new scientific and legal frameworks support judicial intervention where legislatures abdicate responsibility. Specifically, students can state viable claims for common-law statutory enforcement and negligence. Part III argues normatively that students would be better served if legislators would create a public enforcement scheme to supplement or even supplant a common-law private right of action.

I. SCIENTIFIC AND STATUTORY DEVELOPMENTS

A. *The Science of Reading*

1. The Reading Wars and the Science of Reading

For as long as Americans have had public education, there have been Reading Wars. Sound-based phonics reigned in authoritarian and religious colonial schoolhouses,²⁵ ascribing a conservative valence to the belief that students must be taught to read. From the 1800s onwards, Progressive Horace Mann and liberal philosopher John Dewey embraced the opposing view, that learning to read was a natural outcome of students' self-

24. Radio journalist Emily Hanford is credited with bringing attention to the "science of reading." Emily Hanford, *Hard Words: Why Aren't Kids Being Taught to Read?*, AM. PUB. MEDIA (Sept. 10, 2018), <https://www.apmreports.org/episode/2018/09/10/hard-words-why-american-kids-arent-being-taught-to-read> [<https://perma.cc/74BQ-4EZ3>].

25. Noah Webster's leading *American Spelling Book*, comprised largely of short Bible passages, intended to democratize and harmonize communication in the new nation through a standardized spelling scheme based in synthetic phonics. For example, Webster invoked a phonetic approach to substitute "center" for the British centre." See generally E. JENNIFER MONAGHAN, *LEARNING TO READ AND WRITE IN COLONIAL AMERICA* 81-111 (2005).

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teaching.²⁶ Mann and Dewey ascribed a progressive valence to the image-based whole word instruction theory, later widely embraced in politically sympathetic schools of education.²⁷

In the past three decades, however, science has challenged the “personal experience, folk wisdom, and ideology” informing reading instruction.²⁸ Cognitive scientists using tools like fMRI scans, eye-tracking technology, and computer modeling illustrate that reading relies on two interdependent skills.²⁹ First, readers use letters’ correspondences to speech sounds to chunk and blend until expressing meaningful words.³⁰ That emerging readers must understand relationships between sound and print is “as close to conclusive as research on complex human behavior can get.”³¹ Second, readers imbue the verbalized word with its meaning, generally by matching it with an extant concept in their oral vocabulary. (One scientist has thus characterized reading comprehension as a

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26. Kim, *supra* note 5, at 89. Mann evocatively described letters as “skeleton-shaped, bloodless, ghostly apparitions,” firing some of the earliest shots in the Reading Wars. *Id.* Dewey later wrote, “I believe that the image is the great instrument of instruction. What a child gets out of any subject presented to him is simply the images which he himself forms with regard to it.” JOHN DEWEY, *MY PEDAGOGIC CREED* 14 (1897).
 27. DAVID LABAREE, *THE TROUBLE WITH ED SCHOOLS* 130 (2004) (“[P]rogressivism became the dominant view in schools of education”).
 28. Pamela Barnhouse Walters & Annette Lareau, *Introduction to EDUCATION RESEARCH ON TRIAL* 1, 1 (Pamela B. Walters, Annette Lareau & Sheri Ranis eds., 2009).
 29. Wesley A. Hoover & Philip B. Gough, *The Simple View of Reading*, 2 *READING & WRITING: AN INTERDISCIPLINARY J.* 127, 127–160 (1990); Philip B. Gough & William E. Tunmer, *Decoding, Reading and Reading Disability*, 7 *READING & SPECIAL EDUC.* 6, 6–10 (1986). Gough, Hoover, and Tunmer’s findings have been repeatedly validated. See Wesley A. Hoover & William E. Tunmer, *The Simple View of Reading: Three Assessments of Its Adequacy*, 39 *REMEDIATION & SPECIAL EDUC.* 304, 304–12 (2018) (reviewing three contemporary validation studies).
 30. This skill is known as “decoding” or “word recognition.” Gough & Tunmer, *supra* note 29, at 6. In reading science literature, these “phoneme-grapheme” correspondences are used to recognize “morphemes,” or meaningful words. That letters are chunked into speech sounds (graphemes), “sounded out” into meaningful chunks (phonemes), and converted into spoken words is known as “phonics.”
 31. SEIDENBERG, *supra* note 1, at 214.

“knowledge test[] in disguise.”)³² As children learn, they continuously catalogue recognized sound-spelling correspondences—and the words they form—in long-term memory, for easy access.³³ Thereafter, emerging readers fluently read the catalogued words without overtaxing their brains’ limited supply of working memory.

Children who master early reading skills are primed for a lifetime of success. For one, skilled word recognizers more readily identify meaning and are not bogged down by sounding words out.³⁴ At the same time, readers with robust background knowledge more readily recognize the words they encounter, and they glean and store more information in their

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32. This skill is known as “language recognition” or “comprehension.” Gough & Tunmer, *supra* note 29, at 6. The most consistent predictor of reading comprehension is salient substantive knowledge. DANIEL WILLINGHAM, *THE READING MIND: A COGNITIVE APPROACH TO UNDERSTANDING HOW THE MIND READS* 127 (2017) (“knowledge test[]”); *see also* E.D. HIRSCH, JR., *THE KNOWLEDGE DEFICIT: CLOSING THE SHOCKING GAP FOR AMERICAN CHILDREN* (2006) (arguing that American students struggle with literacy because they lack exposure to content). This is because brains operate like filing cabinets. Students already familiar with certain content are able to match the informational text with other relevant information accumulated and stored in long-term memory. Students unfamiliar with such content instead have to remember all of the information and try to piece it together. *See* NATALIE WEXLER, *THE KNOWLEDGE GAP* 54-55 (2019); Alan G. Kamhi, *Knowledge Deficits: The True Crisis in Education*, 12 *ASHA LEADER* 28, 28-29 (2007). In the famous “baseball study,” reading scientists asked two groups of students—one with strong decoding skills, the other with weak decoding skills—to demonstrate comprehension of a highly detailed and vocabulary-laden narrative about a baseball game. Their comparative lack of foundational reading skills notwithstanding, the baseball enthusiasts knocked it out of the park. Donna R. Recht & Lauren Leslie, *Effect of Prior Knowledge on Good and Poor Readers’ Memory of Text*, 80 *J. EDUC. PSYCH.* 16, 16-20 (1988).
33. This is known as “orthographic processing.” *See* Anne E. Cunningham & Keith E. Stanovich, *What Reading Does for the Mind*, 1 *J. DIRECT INSTRUCTION* 137 (2001); David L. Share, *Phonological Recoding and Orthographic Learning: A Direct Test of the Self-Teaching Hypothesis*, 72 *J. EXPERIMENTAL CHILD PSYCH.* 95 (1999); Keith Stanovich, *Matthew Effects in Reading: Some Consequences of the Individual Differences in Acquisition of Literacy*, 21 *READING RSCH. Q.* 360 (1986) [hereinafter Stanovich, *Matthew Effects*].
34. Among early readers, ease of word identification accounts for as much as 80% of variation in reading success. Frank R. Vellutino et al., *Components of Reading Ability: Multivariate Evidence for a Convergent Skills Model of Reading Development*, 11 *SCI. STUD. READING* 3, 23 (2007).

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long-term memory from the words they labored to decode or (after repeated encounters) identified on sight.³⁵ The interdependence of word-identification and comprehension has lifelong flywheel effects; good readers benefit exponentially by reading more and learning more from what they read every year, while poor readers fall further and further behind.³⁶

Scientists have settled the core argument of the Reading Wars: unlike speaking, reading is *not* an innate skill. For most children, literacy skills must be taught.³⁷ Although research regarding literacy instruction is less robust than research regarding literacy acquisition, it still provides essential insights into how educators can best develop literacy. The most prominent voice regarding instruction, the congressionally-convened National Reading Panel (“the Panel”), recommended that students be deliberately, systematically, and explicitly taught to identify letters’ corresponding speech sounds.³⁸ In addition, the Panel recommended that systematic phonics instruction be “integrated” to create a reading program “balanced” with the content knowledge essential for the vocabulary development and reading fluency necessary for comprehension.³⁹

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35. See, e.g., Tanya Kaefer et al., *Pre-Existing Background Knowledge Influences Socioeconomic Differences in Preschoolers’ Word Learning and Comprehension*, 36 *READING PSYCH.* 203, 203-31 (2015) (attributing socioeconomic achievement gaps to content-knowledge gaps); Danielle S. McNamara & Walter Kintsch, *Learning from Texts: Effects of Prior Knowledge and Text Coherence*, 22 *DISCOURSE PROCESS* 247, 248 (1996) (“[T]he bulk of the literature indicates that the more a reader knows about the domain of a text, the more likely the reader will comprehend and learn from the text.”).
 36. Cunningham & Stanovich, *supra* note 33; Stanovich, *Matthew Effects*, *supra* note 33.
 37. Anne Castles, Kathleen Rastle & Kate Nation, *Ending the Reading Wars: Reading Acquisition from Novice to Expert*, 19 *PSYCH. SCI. PUB. INT.* 5 (2018).
 38. NAT’L READING PANEL, *TEACHING CHILDREN TO READ: AN EVIDENCE BASED ASSESSMENT OF THE SCIENTIFIC RESEARCH LITERATURE ON READING AND ITS IMPLICATIONS FOR READING INSTRUCTION 1-1* (2000), <https://www.nichd.nih.gov/sites/default/files/publications/pubs/nrp/documents/report.pdf> [https://perma.cc/C8W8-UH23]. The National Reading Panel consisted of “leading scientists in reading research, representatives of colleges of education, reading teachers, educational administrators, and parents.” *Id.* (quoting Successful Reading Research and Instruction Act, H.R. 2192, 105th Congr. (1997-98); see also Keith Rayner, *How Psychological Science Informs the Teaching of Reading*, 2 *PSYCH. SCI. PUB. INT.* 31 (2001) (reviewing the research).
 39. NAT’L READING PANEL, *supra* note 38, at 2-137.

Despite the Panel's call for balance two decades ago, teaching practices in American classrooms remain deeply askew. Educators too often minimize phonics and instead use discredited techniques, known as cuing, based in whole word instruction. Cuing strategies—including guessing a word based on a picture book's illustrations—pull students' eyes off of the text itself, burdening working memory by encouraging students to guess at words' meanings.⁴⁰ Nevertheless, cuing techniques are pervasive. Indeed, three-fourths of reading teachers self-report using cuing in their classrooms⁴¹ and forty-three percent report having instructional materials employing cuing.⁴²

2. Instructional and Intervention Failures

At the risk of oversimplifying, illiteracy persists because of failures of core instruction and inadequate subsequent intervention.

The popular educational model Response to Intervention provides a useful framework.⁴³ Response to Intervention conceives of instruction taxonomized in three tiers. In the first, all students in a classroom receive "core" instruction standardized for what students in that grade level are expected to learn. The model posits that 80 to 85% of the class should

40. See *infra* notes 203-205 and accompanying text. For a vivid demonstration of this, listen to Emily Hanford's podcast series. See Hanford, *supra* note 24.

41. Linda Loewus, *Data: How Reading Is Really Being Taught*, 39 EDUC. WEEK 3 (Dec. 4, 2019) (describing the results of a survey of 670 K-2 and special education teachers and 530 education professors who teach reading courses).

42. The dominant program in the survey was Fountas and Pinnell's Guided Reading and Leveled Literacy Intervention (LLI). EDWEEK RESEARCH CENTER, EARLY READING INSTRUCTION: RESULTS OF A NATIONAL SURVEY 4 (2020), <https://epe.brightspotcdn.com/32/4f/f63866df760fb20af52754fd07ff/ed-week-reading-instruction-survey-report-final-1-24-20.pdf> [<https://perma.cc/4A5H-QBJB>]. At present, no state aggregates information about the curriculum adopted by all of its school districts. See Ulrich Boser et al., *The Hidden Value of Curriculum Reform* 5, CTR. FOR AM. PROGRESS (Oct. 2015), <https://www.americanprogress.org/issues/education-k-12/reports/2015/10/14/122810/the-hidden-value-of-curriculum-reform> [<https://perma.cc/2WPS-A5U9>].

43. RTI Action Network, *What is RTI?*, NAT'L CTR. FOR LEARNING DISABILITIES, <http://www.rtinetwork.org/learn/what/whatisrti> [<https://perma.cc/A2QF-MXTL>] (describing response to intervention).

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succeed based on core instruction.⁴⁴ In the second, up to the roughly 20% of students struggling in Tier 1 receive small-group instruction and feedback. In the third, a few students with particularly acute challenges like cognitive disabilities receive individualized attention in a smaller small group or one-on-one. But the persistence and pervasiveness of illiteracy indicates that students are not getting the high-quality Tier 1 instruction they need to succeed and that they are not getting the tailored Tier 2 and 3 supports required to get back on track.

Despite its intuitive appeal, a key study has found that Response to Intervention had negative or no effects on student performance.⁴⁵ The tiered model likely is not practicable given the current scope of reading failure. Whereas the model presumes no more than 15 to 20% of students will need additional instruction, 66% of students nationwide read below grade-level and need more support.⁴⁶ Among low-income, Black, Hispanic, and Native American fourth-graders, roughly 80% are not proficient.⁴⁷

Improving core instruction and ensuring its alignment with the science of reading is the most important lever of change. As is almost axiomatic in education, the most important in-school factor for a student's academic achievement is the quality of her teacher.⁴⁸ With regard to early literacy,

44. This should be tailored for the context, such that groups of higher-need students receive more intensive core instruction.

45. Rekha Balu et al., Nat'l Ctr. for Educ. Evaluation & Regional Assistance, *Evaluation of Response to Intervention Practices for Elementary School Reading*, U.S. DEP'T OF EDUC. INST. OF EDUC. SCI. ES-13 (Nov. 2015), <https://ies.ed.gov/ncee/pubs/20164000/pdf/20164000.pdf> [<https://perma.cc/J2GD-ZWZY>] (assessing outcomes and implementation in 146 elementary schools). RTI's architects challenged the study, alleging inter alia that the participating schools had failed to faithfully implement their model. Douglas Fuchs & Lynn S. Fuchs, *Critique of the National Evaluation of Response to Intervention: A Case for Simpler Frameworks*, 83 *EXCEPTIONAL CHILDREN* 255 (2017).

46. *NAEP*, *supra* note 8.

47. *Id.* (finding that 21% of fourth-graders eligible for free and reduced-price lunch (a proxy for poverty), 18% of Black fourth-graders, 23% of Hispanic fourth-graders, and 19% of Native American fourth-graders were proficient in reading on the 2019 NAEP).

48. Research has repeatedly established the lifelong effects of highly effective and ineffective instruction. See, e.g., Raj Chetty et al., *Measuring the Impacts of Teachers II: Teacher Value-Added and Student Outcomes in Adulthood*, 104 *AM. ECON. REV.* 2633 (2014) (finding that substituting an average for a very

educators' "knowledge of and ability to apply concepts of phonology and orthography" account for "significant variance" in their students' reading achievement.⁴⁹ Improving core instruction is especially important for low-income students and students of color, who are substantially less likely to have effective and experienced teachers.⁵⁰ Although the science of reading has been known for decades, it is not core to many teachers' practice.

Enhancing educators' knowledge and improving instruction is difficult for both school systems and individual educators alike. In schools, classrooms are often islands unto themselves. After an educator graduates from a pre-service teacher preparation program, in-service supervision is paltry. "[S]chool administrator[s] cannot watch teachers teach (except through classroom visits that momentarily may change the teacher's behavior) and cannot tell how much students have learned (except by standardized tests that do not clearly differentiate between what the teacher has imparted and what the student has acquired independently)."⁵¹ Despite high-profile efforts to reform supervision through teacher evaluation,⁵² much supervision remains perfunctory. And, although teacher coaching is effective, it is financially and logistically costly and is therefore

ineffective teacher would increase students' lifetime earnings by approximately \$250,000 per classroom).

49. Louisa C. Moats & Barbara R. Foorman, *Measuring Teachers' Content Knowledge of Language and Reading*, 53 ANNALS OF DYSLEXIA 23, 28 (2003); Candace Bos et al., *Perceptions and Knowledge of Preservice and Inservice Educators About Early Reading Instruction*, 51 ANNALS OF DYSLEXIA 97, 97-120 (2001); Deborah McCutchen et al., *Beginning Literacy: Links Among Teacher Knowledge, Teacher Practice, and Student Learning*, 35 J. LEARNING DISABILITIES 69, 69-86 (2002).
50. See, e.g., Charles Clotfelter et al., *High-Poverty Schools and the Distribution of Teachers and Principals*, 85 N.C. L. REV. 1345 (2007).
51. JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 168 (1991); see also MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES 3 (2010) ("[T]he individual decisions of these workers become, or add up to, agency policy.").
52. E.g., *IMPACT: The DCPS Evaluation and Feedback System for School-Based Personnel*, D.C. PUB. SCHS., <https://dcps.dc.gov/page/impact-dcps-evaluation-and-feedback-system-school-based-personnel> [https://perma.cc/9XRL-QMFA].

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relatively rare.⁵³ Lacking support from above, many educators are effectively on their own.

At the same time, education research has a hard time reaching educators, a “last mile” problem.⁵⁴ Teachers generally must keep themselves abreast of developments in their field, even though little formal infrastructure exists to disseminate research to them.⁵⁵ Unlike how professionals such as doctors and lawyers receive practicable information from the American Medical and Bar Associations, no professional organization analogously translates research for educators. Teachers’ unions sometimes step into that void—particularly at the national level—but such a task is secondary to their mission to bargain and advocate for members.⁵⁶ Peer-led professional development is considered a promising avenue to close the gap, but educators’ opportunities for professional

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53. Matthew Kraft et al., *The Effect of Teacher Coaching on Instruction and Achievement: A Meta-Analysis of the Causal Evidence*, 88 REV. EDUC. RSCH. 547, 588 (2018) (regarding efficacy).
 54. Mark Schneider, *How to Make Education Research Relevant to Teachers*, INST. EDUC. SCI., <https://ies.ed.gov/director/remarks/11-14-2018.asp> [<https://perma.cc/8EUV-N3C5>].
 55. A former senior federal official once suggested that Congress should “create for reading (and perhaps other subjects where scientific research can be done) the equivalent of a[] [Food & Drug Administration] for education to ensure that states and school districts only spend their [grant] funds on interventions that have been conclusively shown to work.” Pinder, *supra* note 22 (citing G. Reid Lyon, Editorial, *How to Improve Reading First*, THOMAS B. FORDHAM FOUND.: EDUC. GADFLY (Apr. 19, 2007), <https://fordhaminstitute.org/national/commentary/how-improve-reading-first> [<https://perma.cc/65BD-RLVA>]). The closest analogue, the U.S. Department of Education’s What Works Clearinghouse, is not commensurate to the need. It aggregates, lightly evaluates, and summarizes education research but lacks features to interpret and deliver information to practitioners.
 56. *But see* Daniel Willingham & Andrew Rotherham, *Education’s Research Problem*, 77 EDUC. LEADERSHIP 70, (2020), <http://www1.ascd.org/publications/educational-leadership/may20/vol77/num08/Education's-Research-Problem.aspx> [<https://perma.cc/7454-93ZN>] (disagreeing and arguing that “[t]he American Federation of Teachers and the National Education Association could provide a valuable service to members by offering systematic, scientifically literate reviews of prominent research findings, and of findings that should be prominent”).

collaboration are rare⁵⁷ and the efficacy of peer-led training is predicated on knowledgeable peer participants.⁵⁸

Unfortunately, the burden of self-informing is particularly inappropriate for the education profession. Educators are busy planning for and executing instruction, giving and grading assessments, and occupying numerous academic and non-academic service roles without which their schools could not function. Instruction is also cognitively demanding; during active engagement with students, educators make a decision at least every other minute, totaling roughly 195 decisions in a 6.5-hour school day.⁵⁹ In addition, the gendered labor force and low pay for the level of education required⁶⁰ result in many educators serving as the primary caretaker in their households while working second jobs.⁶¹

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57. One study found educators spend less than five percent of time on the clock collaborating with peers. Christopher Jay McCarthy, *Teacher Stress: Balancing Demands and Resources*, PHI DELTA KAPPAN (Oct. 28, 2019), <https://kappanonline.org/teacher-stress-balancing-demands-resources-mccarthy> [<https://perma.cc/7U2P-MLA4>] (citing to that study).
58. Vicki Vescio et al., *A Review of Research on the Impact of Professional Learning Communities on Teaching Practice and Student Learning*, 24 *TEACHING & TEACHER EDUC.* 80, 80 (2008) (finding positive effects of “well-developed” professional learning communities).
59. Hilda Borko, Carol Livingston & Richard Shavelson, *Teachers’ Thinking About Instruction*, 11 *REMEDIATION & SPECIAL EDUC.* 40, 43 (1990) (reviewing research finding that educators make 0.5-0.7 decisions per minute).
60. Teachers earn 22% less than they would earn if working in another profession. Eric A. Hanushek, *The Unavoidable: Tomorrow’s Teacher Compensation*, HOOVER INST. (2020), <http://hanushek.stanford.edu/sites/default/files/publications/Hanushek%202020%20HESI%20teacher%20compensation.pdf> [<https://perma.cc/6FLK-KNZN>]; see also Emily Forrest Cataldi et al., *2008–09 Baccalaureate and Beyond Longitudinal Study*, U.S. DEP’T OF EDUC. NAT’L CTR. FOR EDUC. STATS. (2011) (finding that college graduates in business earned 20% more, nurses earned 34% more, and engineers earned 57% more than college graduates working as teachers).
61. Nearly 20% of teachers work second jobs and they are about 30% more likely to take a second job than non-teachers. Madeline Will, *To Make Ends Meet, 1 in 5 Teachers Have Second Jobs*, *EDUC. WEEK* (June 19, 2018) (citing to research from the National Center for Education Statistics and the Bureau of Labor Statistics), <https://www.edweek.org/ew/articles/2018/06/19/to-make-ends-meet-1-in-5.html> [<https://perma.cc/CYN3-T95L>].

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In sum, a stubborn and difficult-to-rectify knowledge gap regarding the science of reading afflicts the education profession—and has a profound impact on students.

The second critical issue is that students are not getting the interventions necessary to close gaps arising from Tier 1 instruction. Research indicates that students who are off track in reading by third grade are on track to dropout,⁶² but that path does not have to be destiny. Rather, sufficient intervention could put students back on grade-level.⁶³ But the current need for and access to reading intervention is highly inequitable. Non-low-income and white students are significantly more likely to be proficient readers and attend segregated public schools in which a greater share of students are also proficient readers.⁶⁴ As a result, in their schools, a more practicable share of students require additional interventions. In contrast, low-income students and students of color attend schools in which the scope of interventions needed is disproportionate to the resources available. In addition, non-low-income and white students are more often identified as having learning disabilities affecting reading than low-income students and students of color. As a result, they more often receive special education services tailored to their reading needs.⁶⁵ Furthermore, non-low-income and white students' higher family income suggests that they are better able to access private tutoring or private schooling if their needs are not met by public schools.

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62. Leila Fiester, *EARLY WARNING! Why Reading by the End of Third Grade Matters*, ANNIE E. CASEY FOUND. 9 (2010), https://assets.aecf.org/m/resourcedoc/AECF-Early_Warning_Full_Report-2010.pdf [<https://perma.cc/4N2P-P8VN>] (“make-or-break”).
 63. See, e.g., Russell Gersten et al., Nat’l Ctr. for Educ. Evaluation & Regional Assistance, Inst. of Educ. Sci., *Assisting Students Struggling with Reading: Response to Intervention and Multi-Tier Intervention in the Primary Grades*, U.S. DEP’T EDUC. (2009), <http://ies.ed.gov/ncee/wwc/PracticeGuide.aspx?sid=3> [<https://perma.cc/U32F-Z8KA>].
 64. *NAEP*, *supra* note 8 (showing that 51% of students not eligible for free or reduced-price lunch and 45% of white students are proficient readers).
 65. Non-low-income and white students are overidentified for having specific learning disabilities, a federal classification describing learning disabilities including but not limited to dyslexia. 20 U.S.C. § 1401(30)(B) (2018). Regarding racial disability identifications, see Paul L. Morgan et al., *Replicated Evidence of Racial and Ethnic Disparities in Disability Identification in U.S. Schools*, 46 EDUC. RESEARCHER 305, 310 (2017).

Inadequate instruction and intervention have given rise to a broad-based illiteracy crisis, especially acute in low-income communities and communities of color, with lifelong consequences.

B. *State Right to Read Acts*

Law could address this illiteracy crisis by creating an enforceable right to effective reading instruction and interventions, but it has not. At the federal level, Congress has failed to legislate, and federal courts have declined to establish a federal right to an education. State legislatures and high courts have taken steps to address the problem, but they have still failed to provide students with the quality of instruction and instructional support necessary to guarantee functional literacy. This Section reviews the policy landscape.

1. Federal Rights to Read

Congress has effectively gotten out of the business of legislating reading. After convening the National Reading Panel, Congress and the U.S. Education Department promoted and tried to codify its recommendations. After relatively more tepid efforts,⁶⁶ Congress enacted the assertive Reading First amendment to the Elementary and Secondary Education Act to provide assistance to state and local education agencies to promote reading instruction “based on scientifically based reading research.”⁶⁷ But Reading First was hampered by scandals: allegations of inappropriately

66. The Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999 amended the Elementary and Secondary Education Act by enacting the Reading Excellence Act (REA), which for the first time defined reading using the National Reading Panel’s Big Five and required federal grantees to employ “scientifically based reading research.” Pub. L. No. 105-277, § 2251, 112 Stat. 2681, 392-93. Congress stepped in again with the No Child Left Behind Act of 2002 (NCLB) that, like its predecessor, defined “reading” like the National Reading Panel. NCLB was even more prescriptive, with robust accountability measures based on student achievement outcomes. No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 1208, 115 Stat. 1425, 1549.

67. It designated \$6 billion in federal grants to support identification of students with reading deficiencies, facilitate adoption of science-based reading curriculum, support teacher professional development, provide interventions for struggling readers, and conduct statewide reading assessments for accountability purposes. 20 U.S.C. § 6368 (2018). *See generally* Pinder, *supra* note 22 (a favorable history of Reading First).

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commandeering local curricula, improperly promoting certain publishing products, and conflicts of interest.⁶⁸ By 2008, Congress had washed its hands of Reading First by eliminating the program,⁶⁹ rolling back literacy funds,⁷⁰ substituting the National Reading Panel's definition of literacy for a more permissive alternative,⁷¹ and devolving authority back to states.⁷²

Federal courts have also failed to step up to the plate. Many legal advocates and scholars seek to address the crisis of illiteracy by establishing a federal right to education. Last summer, a three-judge panel of the Sixth Circuit made national headlines when, in a first for a federal appeals court, it held that the Fourteenth Amendment provides a fundamental right to a "basic minimum education," specifically one that "plausibly provides access to literacy."⁷³ But the hope inspired by the groundbreaking decision proved elusive. The Sixth Circuit agreed to rehear the case en banc and vacated the panel's decision.⁷⁴ Soon after, the litigants settled with the state and school district, ending the legal effort to establish a federal education right.⁷⁵ Another group is pursuing an at-bat in the First Circuit, seeking a right to civics education rather than the trial court's plaudit (in dicta) that basic civic participation would be "inaccessible without a basic level of literacy."⁷⁶ One

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68. OFF. OF THE INSPECTOR GEN., U.S. DEP'T EDUC., *THE READING FIRST PROGRAM'S GRANT APPLICATION PROCESS* (2006).
 69. Kathleen Kennedy Manzo & Alyson Klein, "*Reading First*" Funds Headed for Extinction, *EDUC. WEEK* (July 15, 2008), <https://www.edweek.org/teaching-learning/reading-first-funds-headed-for-extinction/2008/07> [<https://perma.cc/TJV2-45BE>].
 70. Every Student Succeeds Act of 2015, 20 U.S.C. § 6641 (2018).
 71. *Id.* § 6641(b) ("Comprehensive literacy instruction").
 72. 20 U.S.C. § 6642(f) (2018) (describing the state application process).
 73. *Gary B. v. Whitmer*, 957 F.3d 616, 653 (6th Cir. 2020), *reh'g en banc granted, opinion vacated*, 958 F.3d 1216 (6th Cir. 2020) (mem.).
 74. *Gary B.*, 958 F.3d at 1216.
 75. Press Release, Governor Gretchen Whitmer, Governor Whitmer and Plaintiffs Announce Settlement in Landmark Gary B. Literacy Case (May 14, 2020), https://www.michigan.gov/whitmer/0,9309,7-387-90499_90640-529231--,00.html [<https://perma.cc/DCY6-KFGV>].
 76. *A.C. v. Raimondo*, 494 F. Supp. 3d 170, 191 (D.R.I. 2020), *appealed sub nom.* *A.C. v. McKee*, No. 20-2082 (1st Cir. 2020) (internal citation omitted) (pursuing a federal constitutional right to civics education).

scholar has likened the pursuit of a federal constitutional right to education as a “holy grail.”⁷⁷

However, many students already have those rights—rights arising under state constitutions and statutes—but for state legislatures and courts refusing to enforce them.

2. State Constitutional Rights to Read

Nearly all state constitutions assert a positive right to education.⁷⁸ Several state constitutions even prescribe a minimum (if nebulous) level of educational quality or funding efficiency,⁷⁹ which litigants have asked courts to enforce against their state’s executive and legislative branches.⁸⁰

The first two waves of education-rights litigation focused on engendering horizontal equity in school finance, initially at the federal level and then at the state level.⁸¹ Distinguishably, the third wave of school finance litigation invited state high courts to scrutinize whether state legislatures had satisfied students’ constitutional entitlement to a certain

77. See, e.g., Joshua E. Weishart, *The Compromised Right to an Education?*, 71 STAN. L. REV. ONLINE 123, 123 (2018), <https://www.stanfordlawreview.org/online/the-compromised-right-to-education> [<https://perma.cc/92CY-AWTP>] (analogizing “Indiana Jones’s quest to discover the holy grail” to education law scholar Derek Black’s “quest to discover another elusive grail,” a federal constitutional right to education, and citing to prior efforts by Erwin Chemerinsky and Cass Sunstein).

78. EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES* 71 tbl.5.1 (2013)

79. E.g., ARK. CONST. art. 14, § 1 (2021) (the state must maintain “a general, suitable and efficient system of free public schools”); COLO. CONST. art. IX, § 2 (LexisNexis, Lexis+ through the 2020 regular and first extraordinary legislative sessions) (the legislature shall provide “a thorough and uniform system of free public schools”); FLA. CONST. art. IX, § 1(a) (2021) (the state shall provide “a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education”).

80. *Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206, 225 n.24 (Conn. 2010) (reviewing cases and observing that “the vast majority of jurisdictions ‘overwhelmingly’ have concluded that claims that their legislatures have not fulfilled their constitutional responsibilities under their education clauses are justiciable”).

81. See William S. Koski, *Of Fuzzy Standards and Institutional Constraints: A Reexamination of the Jurisprudential History of Educational Finance Reform Litigation*, 43 SANTA CLARA L. REV. 1185, 1264 (2003) (identifying and critiquing the wave metaphor).

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quality of education or educational outputs. The most prominent example of “adequacy” analysis is *Rose v. Council for Better Education*, in which the Kentucky Supreme Court established that the state’s system of schools must endow students with “sufficient oral and written communication skills” to “function in a complex and rapidly changing civilization.”⁸² The *Rose* court’s lofty language belied that it remanded defining and achieving adequacy to the state legislature. At least eighteen other state high courts have similarly kicked the can to the legislative branch.⁸³

Indeed, state supreme courts appear to be increasingly wary of education adequacy litigation.⁸⁴ Courts in California, Colorado, Connecticut, Indiana, Missouri, and Texas have recently declined to intervene in the legislature’s management of schools, in some cases even overturning lower court decisions finding systems unconstitutional.⁸⁵

As courts of last resort close their doors on constitutional litigants by explicitly or implicitly deferring to legislatures to set educational standards and carry them out, they leave students with little choice but to hope to vindicate more narrowly framed rights. Professor Koski describes these as “next generation” education-rights claims and argues they are more “judicially attractive” because they rest on particularized harms; are easier to define and prove, thus less likely to pull courts into the political thicket due to vague standards; and offer better-defined and more manageable remedies.⁸⁶

One area with well-defined standards and easy-to-define harms and remedies is reading regulation.⁸⁷

82. *Rose v. Council for Better Educ. Inc.*, 790 S.W.2d 186, 212 (Ky. 1989).

83. Koski, *supra* note 81, at 1241.

84. William S. Koski, *Beyond Dollars? The Promises and Pitfalls of the Next Generation of Educational Rights Litigation*, 117 COLUM. L. REV. 1897, 1907 (2017).

85. *Id.* at 1907-1915 (describing cases including but not limited to *Lobato v. State*, 304 P.3d 1132, 1141 (Colo. 2013); *Morath v. Tex. Taxpayer & Student Fairness Coal.*, 490 S.W.3d 826, 833 (Tex. 2016)).

86. Koski, *supra* note 84, at 1916.

87. In one promising example, the California Superior Court recently authorized a settlement between student litigants and, inter alia, the State Board of Education in which the state agency recognized that literacy is a right arising under the state constitution and agreed to fund a three-year, \$50 million block grant to foster it. Martha M. McCarthy, *Is There A Federal Right to A Minimum Education?*, 2020 BYU EDUC. & L.J. 2, 11 (2020) (describing *Ella T. v. California*, No. BC685730 (Cal. Super Ct. July 18, 2018)).

3. State Statutory Rights to Read

Even as Congress rejected the National Reading Panel's definition of reading as well as its own efforts at reading reform and courts deferred to state legislatures to enforce educational rights, a confluence of incentives motivated state legislatures to tackle early literacy. An influential report from the Annie E. Casey Foundation gained traction among governors who were concerned yet optimistic about the high return-on-investment of intervention, spurring widespread third-grade retention laws.⁸⁸ To support early readers, states got hands-on and directed teacher preparation programs to instruct in the National Reading Panel's Big Five: phonemic awareness, phonics, fluency, vocabulary, and comprehension.⁸⁹ At the same time, parents (primarily of children with dyslexia) became a powerful lobby in statehouses.⁹⁰ Reading reforms subsequently gained steam, becoming increasingly prescriptive.⁹¹

a. A Prevention Regime Directed at Teachers

The first goal of Right to Read regimes is prevention. They prioritize ensuring that novice teachers enter the profession with knowledge of the reading science, facilitate opportunities for practicing educators to learn the research and evidence-based practices, and develop a technical assistance architecture.

To change literacy instruction, Right to Read laws ensure that entering and practicing teachers are knowledgeable about the science of reading.

88. Hernandez, *supra* note 11. For an indication of the report's lasting influence, see Lyndsey Layton, *More States Requiring Third-Graders to Pass Reading Test to Advance*, WASH. POST (March 10, 2013), https://www.washingtonpost.com/local/education/more-states-requiring-third-graders-to-pass-reading-test-to-advance/2013/03/10/edcafb5e-76ec-11e2-aa12-e6cf1d31106b_story.html [<https://perma.cc/TH6J-ZLDM>]; Alexandra Starr, *States Are Ratcheting Up Reading Expectations For 3rd-Graders*, NPR (July 13, 2019), <https://wamu.org/story/19/07/13/states-are-ratcheting-up-reading-expectations-for-3rd-graders> [<https://perma.cc/FX9Y-XW2P>].

89. NAT'L READING PANEL, *supra* note 38.

90. *E.g.*, Lisa Stark, *Battle Over Reading: Parents of Children with Dyslexia Wage Curriculum War*, EDUC. WEEK (May 1, 2019), <https://www.edweek.org/leadership/battle-over-reading-parents-of-children-with-dyslexia-wage-curriculum-war/2019/05> [<https://perma.cc/463K-FMVS>].

91. Gewertz, *supra* note 12.

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They start where teachers do, pre-service training. Educator preparation programs have historically fallen short, providing just two or three classes in reading instruction with no guarantee of teaching the science.⁹² Right to Read laws in thirty-two states now require elementary teacher preparation programs to address evidence-based reading, the “science of reading,” or best practices identified by the National Reading Panel in their standards for teacher preparation programs.⁹³ Because educator preparation programs must be approved by state education authorities to operate, noncompliance carries an existential threat of program shutdown.⁹⁴

States also ensure new teachers’ knowledge through licensure. Twenty-seven states require teacher candidates to demonstrate knowledge of evidence- or science-based literacy instruction through skill-isolating assessments.⁹⁵ Without a license, a prospective educator is not eligible for a certified teaching position, most of the jobs in the field.

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92. Although a respected study found steady improvements in the extent of adequate instruction in all five literacy components recommended by the National Reading Panel, seventy-five percent of programs still cover only four or fewer components and coverage varies among program types. Graham Drake & Kate Walsh, *2020 Teacher Prep Review: Program Performance in Early Reading Instruction*, NAT’L COUNCIL ON TEACHER QUALITY 7 (Jan. 2020), https://www.nctq.org/dmsView/NCTQ_2020_Teacher_Prep_Review_Program_Performance_in_Early_Reading_Instruction [<https://perma.cc/E6GZ-GNCR>] (noting a 16% rise from 2013 to 2020). For a comparison of program types, see *id.* at 6, 9, 13.
93. Nineteen states do not. State Teacher Policy Database, *Teaching Reading National Results*, NAT’L COUNCIL ON TEACHER QUALITY (2021), <https://www.nctq.org/yearbook/national/Teaching-Reading-90> [<https://perma.cc/92XJ-5CM3>]. Some states prescribe the number of hours of such instruction required for graduation. See, e.g., ARIZ. REV. STAT. § 15-501.01(C)(3)(a) (2021) (referencing the Big Five); MO. REV. STAT. § 170.014 (2016) (requiring the Big Five and “explicit systematic phonics”); W. VA. CODE R. § 126-114-6 (2021) (nine credit hours of reading instruction on phonemic awareness, phonics, fluency, vocabulary, and comprehension).
94. E.g., DEL. CODE tit. 14, § 122(b)(22) (2021) (“[N]o individual, public or private educational association, corporation or institution, including any institution of post-secondary education, shall offer a course, or courses, for the training of school teachers to be licensed in this State without first having procured the assent of the Department for the offering of such courses.”).
95. Seventeen states require a teacher licensure examination but do not assess knowledge of all of the Big Five. *Teaching Reading: Elementary Teacher Preparation Policy*, NAT’L COUNCIL ON TEACHER QUALITY,

Accountability for practicing educators is emerging. Some states require current educators to take the new entry-level instructional assessment or otherwise demonstrate proficiency in the science of reading,⁹⁶ though most seek to remedy ineffective practice through in-service training or coaching.⁹⁷ Although often an unfunded mandate, some legislatures have used carrots (grants) or sticks (predicating access to per-pupil funds on such professional development) to effectuate compliance.⁹⁸

In addition, Right to Read laws seek to remedy the scarcity of science-based curricula⁹⁹ by increasingly asserting state control over instructional materials.¹⁰⁰ Nineteen states employ formal curriculum adoption

<https://www.nctq.org/yearbook/national/Teaching-Reading-90>
[<https://perma.cc/8ZN7-ZCF9>].

96. *E.g.*, 16 R.I. GEN. LAWS § 11-4-6 (2021) (requiring professional development in science-based reading instruction and places local education agencies on probationary status for noncompliance).
97. Tennessee will fund two weeks of no-cost and paid professional development in evidence-based reading instruction for K-3 teachers. *Early Literacy Supports FAQ and Update*, TENN. DEP'T EDUC. (Feb. 2020), https://www.tn.gov/content/dam/tn/education/textbook/Early%20Literacy%20Supports%20Update%2022-23_.pdf [<https://perma.cc/FB7L-BFDZ>]; *see also* TEX. EDUC. CODE ANN § 28.0062 (2021) (mandating that all K-3 educators must attend a “teacher literacy achievement academy”).
98. *See, e.g.*, Authorization of the Early Literacy Support Block Grant Program Grant, S.B. 98, § 113, 2019-2020 Reg. Sess. (2020) (appropriating \$50 million for a California grant program; carrot); COLO. REV. STAT. § 22-7-1210 (2021) (requiring recipients of per-pupil intervention funds or early-literacy grants ensure that K-3 educators get evidence-based reading instruction training; stick).
99. Mark LaVenia, *The State of the Instructional Materials Market: 2019 Report*, EDREPORTS ii-iii (2020), <https://www.edreports.org/resources/article/2019-state-of-the-market-report> [<https://perma.cc/WHF9-KRHP>]. Although newer materials tend to be better aligned to the science of reading, nearly 10% of reading classrooms utilize materials published before 2012. *Id.* at iii.
100. *E.g.* ALA. CODE § 16-6G-5 (2021) (“[E]ach local education agency shall offer a comprehensive core reading program to all students *based on the science of reading* which develops foundational reading skills.”) (emphasis added); COLO. REV. STAT. § 22-7-1208 (2021) (“[T]he core and supplemental reading curriculum must be designed around teaching the foundational reading skills of phonemic awareness, phonics, vocabulary development, reading fluency including oral skills, and reading comprehension.”) (employing the National Reading Panel’s Big Five).

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processes; of those, nine require or nearly require local procurement of state-specified materials.¹⁰¹ Another ten recommend materials to adopt.¹⁰² And many professionalize a process ordinarily relegated to amateur members of local boards of education by designating responsibility to the state education agency, a state panel of experts, or explicitly giving the local education agency the task of identifying science-based curriculum.¹⁰³

Taken together, these statutes establish robust regimes regulating teacher preparation, licensure, and professional development, as well as what gets taught in classrooms. They lay a stake in the ground that there is a right way—and wrong ways—to teach reading.

b. An Identification, Intervention, and Retention Regime Directed at Students

Next, Right to Read laws establish explicit intervention regimes to support struggling readers. Knowing that the roots of lifelong illiteracy take hold early,¹⁰⁴ legislators applied public health principles and implemented a universal diagnostic and early intervention strategy. Thirty-eight states require universal student assessments designed to identify reading difficulties.¹⁰⁵ Twelve states specify such assessments should identify

101. Boser, *supra* note 42, at 29-31 (providing a state-by-state table).

102. *Id.*

103. *Compare, e.g.,* ALA. CODE § 16-6G-5 (2021) (“The State Superintendent of Education shall provide a list of vetted and approved comprehensive reading and intervention programs with the advice of the task force established under subsection (a) of Section 16-6G-3.” (emphasis added)), *with* ARIZ. REV. STAT. § 15-704(D) (2021) (“Each school district . . . shall conduct a curriculum evaluation and adopt an evidence-based reading curriculum that includes the essential components of reading instruction.” (emphasis added)).

104. Stephanie Rose & Karen Schimke, *Third Grade Literacy Policies: Identification, Intervention, Retention*, EDUC. COMM’N STATES (2012), <https://files.eric.ed.gov/fulltext/ED535949.pdf> [<https://perma.cc/K6J5-XQQQ>].

105. ALA. CODE § 16-6G-3 (2021); ARIZ. REV. STAT. § 15-704 (2021); ARK. CODE § 6-15-2907 (2021); CAL. EDUC. CODE § 60640 (2021); COLO. REV. STAT. § 22-7-1205 (2021); CONN. GEN. STAT. § 10-14t (2021); DEL. CODE ANN. 14 § 151 (2021); D.C. CODE § 38-755.03 (2021); FLA. STAT. § 1008.25 (2021); GA. COMP. R. & REGS. 160-3-1-.07 (2021); 511 IND. ADMIN. CODE 6.2-3.1-3 (2021); IOWA CODE § 279.68 (2021); KAN. STAT. § 72-3567 (2021); KY. REV. STAT. § 158.791 (2021); LA. ADMIN. CODE 28 pt. CXV, § 2307 (2021); ME. REV. STAT. 20-A § 6209 (2021); MD. CODE EDUC. § 4-136 (2021); MICH. COMP. LAWS § 380.1280f (2021); MINN.

students' reading problems,¹⁰⁶ eleven command that such assessments inform instruction,¹⁰⁷ and twenty-one require that assessment outcomes be used to target interventions.¹⁰⁸ In short, the assessments are meant to tell educators what to prioritize for individual students.

Based on that data, Right to Read laws identify interventions to help struggling readers get on track. Twenty states provide for additional instruction,¹⁰⁹ eighteen require extended learning time opportunities like

STAT. § 120B.12 (2021); MISS. CODE ANN. § 37-23-16 (2021); MO. REV. STAT. § 167.645 (2021); NEV. REV. STAT. § 388.157 (2021); N.M. STAT. § 22-13-1.3 (2021); N.Y. COMP. CODES R. & REGS. 8, § 117.3 (2021); N.C. GEN. STAT. § 115C-83.6 (2021); OHIO REV. CODE ANN. § 3301.079-0710 (2021); OKLA. STAT. tit. 70 § 1210.508C (2021); OR. REV. STAT. § 329.834 (2021); 22 PA. CODE § 4.52; 16 R.I. GEN. LAWS § 97.1-1 (2021); S.C. CODE § 59-18-310 (2021); TEX. EDUC. CODE § 28.006 (2021); UTAH CODE ANN. § 53E-4-307 (2021); VA. CODE § 22.1-253.13:1 (2021); WASH. REV. CODE § 28A.300.310 (2021); W. VA. CODE R. § 126-14-4 (2021); WIS. STAT. § 118.016 (2021); WYO. STAT. ANN. § 21-3-401 (2021).

106. The following states specify identification: Florida, Louisiana, Maine, Michigan, Mississippi, North Carolina, Oklahoma, Pennsylvania, Texas, Utah, Virginia, and Wyoming. *See supra* note 105. These provisions arise from widespread adoption of the response-to-intervention model, which has been shown to be an effective counter to ineffective early reading instruction. *See generally* Frank Vellutino et al., *Using Response to Kindergarten and First Grade Intervention to Identify Children At-Risk for Long-Term Reading Difficulties*, 21 *READING & WRITING* 437 (2008) (efficacy).
107. The following states specify informing instruction: Arizona, Connecticut, Iowa, Kansas, Louisiana, Michigan, Minnesota, Missouri, Oregon, South Carolina, and Wisconsin. *See supra* note 105.
108. The following states specify intervention: Alabama, Colorado, Florida, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Missouri, Nevada, Oklahoma, Oregon, Pennsylvania, South Carolina, Utah, Virginia, Wisconsin, and Wyoming. *See supra* note 105.
109. ALA. CODE § 16-6G-5(b) (2021); ARIZ. REV. STAT. § 15-704 (2021); ARK. CODE §§ 6-15-2004 (2021), 6-16-704 (2021); CAL. EDUC. CODE § 48070.5 (2021); COLO. REV. STAT. §§ 22-7-1205, 22-7-1206 (2021); CONN. GEN. STAT. §§ 10-265g, 10-14u, 10-14v (2021); 14 DEL. CODE § 153 (2021); FLA. STAT. § 1008.25 (2021); IDAHO CODE § 33-1616 (2021); 105 ILL. COMP. STAT. 5/10-20.9a (2021); MD. CODE ANN., EDUC. § 7-202 (2021); MICH. COMP. LAWS § 380.1280f(3)(a) (2021); MINN. STAT. § 120B.12 (2021); MISS. CODE ANN. § 37-177-1(2) (2021); NEB. REV. STAT. § 79-2606 (2021); N.C. GEN. STAT. §§ 115C-83.3, 115C-83.8 (2021); 70 OKLA. STAT. § 1210.508C (2021); 16 R.I. GEN. LAWS § 16-67-2 (2021); S.C. CODE §§ 59-155-150, 59-155-160 (2021).

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summer school,¹¹⁰ and ten legislate tutoring.¹¹¹ These regimes are intended to be very narrowly tailored to the student and their reading needs. To that end, fifteen states embrace a highly individualized framework modeled after special education for struggling general education readers, requiring individualized instruction or an individual reading plan.¹¹²

More controversially, students may be entitled to an additional year of schooling. Over half of states require or permit students not reading proficiently in third grade to be held back.¹¹³ Under these laws, students retained in third grade are entitled to a more ambitious set of interventions, including intensive literacy instruction. Commonly, eligible students are entitled to a more effective or better-trained teacher.¹¹⁴

110. ALA. CODE § 16-6G-5(b) (2021); ARIZ. REV. STAT. § 15-701(c) (2021); ARK. CODE § 6-15-2004 (2021); CAL. EDUC. CODE § 48070.5 (2021); 14 DEL. CODE § 153 (2021); 511 IND. ADMIN. CODE § 6.2-3.1-5 (2021); MINN. STAT. § 120B.12 (2021); MISS. CODE ANN. § 37-177-1(2) (2021); MO. STAT. § 167.268 (2021); N.M. STAT. § 22-2C-6 (2021); N.C. GEN. STAT. §§ 115C-83.3, 115C-83.8 (2021); OHIO REV. CODE §§ 3313.608(3)(a), 3301-13-01 (2021); 70 OKLA. STAT. § 1210.508C (2021); S.C. CODE §§ 59-155-150 (2021); UTAH CODE § 53E-4-307 (2021); VA. CODE § 22.1-253.13:1 (2021); W. VA. CODE R. § 126-30-3 (2021).

111. Connecticut, Delaware, Illinois, Indiana, Mississippi, New Mexico, Ohio, Oklahoma, Utah, and Virginia.

112. ALA. CODE § 16-6G-5(b) (2021); COLO. REV. STAT. § 22-7-1205 (2021); CONN. GEN. STAT. § 10-265g (2021) (for students in “priority school districts”) (2021); 14 DEL. CODE § 153 (2021); MICH. COMP. LAWS § 380.1280f(2)(b) (2021); MO. STAT. § 167.268 (2021); NEB. REV. STAT. § 79-2606 (2021); N.C. GEN. STAT. §§ 115C-83.3, 115C-83.6 (2021); OHIO REV. CODE §§ 3313.608(3)(a), 3301-13-01 (2021); 70 OKLA. STAT. § 1210.508C (2021); S.C. CODE § 59-155-150 (2021); UTAH CODE § 53E-4-307 (2021); WIS. STAT. § 121.02 (2021); WYO. STAT. § 21-3-401.

113. Seventeen states and the District of Columbia require grade retention for nonproficient third graders, with good cause exemptions; an additional ten permit retention but do not require it. *50-State Comparison: State K-3*, EDUC. COMM’N OF THE STATES, <https://www.ecs.org/kindergarten-policies> [<https://perma.cc/TDP7-LMAQ>].

114. ALA. CODE § 16-6G-5(g) (2021) (“[A]n effective or highly effective teacher of reading”); ARIZ. REV. STAT. § 15-701(2)(c)(i) (2021) (evidence-based instruction “by a different teacher” evaluated within top two performance bands); 511 IND. ADMIN. CODE § 6.2-3.1-5 (2021) (an effective teacher as measured by student performance results); MICH. COMP. LAWS § 380.1280f(7)(a)(i) (2021); MISS. CODE § 37-177-13 (2021) (retained students entitled to “a high-performing teacher, as determined by student

Retention is generally disfavored among education researchers for its negative outcomes,¹¹⁵ though studies evaluating retention policies targeting younger students demonstrate more positive effects.¹¹⁶ Accordingly, the retention policy begs the question of whether it is a punishment or a remedy—and the answer depends on whether retained students receive the supports they need to improve. But what if local education agencies do not deliver scientifically aligned instruction and/or the reading interventions to which the students are entitled by law? Unlike the accountability built in for educator-preparation programs and individual educators, statutes are generally silent besides setting limits on the number of times a student may be retained.

C. Comparative Enforcement

The lack of redress available to general education students arising from Right to Read Laws becomes evident when contemplating an alternative enforcement scheme also designed to assist students needing more support: the federal Individuals with Disabilities Education Act (IDEA).¹¹⁷

The IDEA serves the roughly fourteen percent of students identified as having an eligible disability for which they need special education and

performance data, particularly related to student growth in reading, above-satisfactory performance appraisals, and/or specific training”); OHIO REV. CODE § 3313.608(H)(1) (2021).

115. Xia and Kirby’s examination of 91 studies of academic and nonacademic outcomes found that retained students do not sustain academic benefits but are more likely have worse outcomes, with higher rates of disconnection and drop out. Nailing Xia & Sheila Nataraj Kirby, *Retaining Students in Grade A Literature Review of the Effects of Retention on Students’ Academic and Nonacademic Outcomes*, RAND CORP. (2009), https://www.rand.org/content/dam/rand/pubs/technical_reports/2009/RAND_TR678.pdf [<https://perma.cc/EEQ5-U67E>].
116. An evaluation of Florida’s third-grade retention policy found it increased high school grade point average, resulted in students requiring fewer remedial courses, and did not appear to affect high school dropout rates (without improving them, either). Guido Schwerdt, Martin R. West & Marcus A. Winters, *The Effects of Test-Based Retention on Student Outcomes Over Time: Regression Discontinuity Evidence from Florida*, 152 J. PUB. ECON. 154 (2017).
117. Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1482 (2018).

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related services.¹¹⁸ Students with disabilities are entitled to a “free appropriate public education,” defined in an individualized education program co-created annually by parents and school stakeholders.¹¹⁹ This individualized plan is both privately and publicly enforceable.

Privately, a free appropriate public education is individually enforceable. Students with disabilities are entitled to due process before impartial hearing officers and are guaranteed protections such as the rights to be represented by counsel, present evidence, and compel and cross-examine witnesses.¹²⁰ They may also request mediation with the school district or file a complaint with the state education agency, which must investigate and resolve it.¹²¹ If students with disabilities remain unsatisfied after exhausting administrative procedures, the IDEA provides an explicit private right of action enforceable in federal court.¹²²

Publicly, the federal Office of Special Education Programs at the U.S. Department of Education regulates and monitors state and local education agencies, provides technical assistance, and enforces compliance—including by withdrawing federal funds.¹²³

In contrast, Right to Read laws do not provide a comprehensive private or public enforcement regime. As a result, general education students must rely on the inconsistent and inadequate set of available tools to enforce their statutory entitlements. No source has comprehensively compiled local or state administrative educational complaint procedures, but the inherent variation and discretion are evident in a hypothetical complaint process.

Privately, accessing a remedy requires luck. A student’s recourse may depend on a sympathetic teacher, responsive principal, open-minded school district, or helpful state agency or legislature.

As a first step, the student’s guardians might informally advocate that an individual teacher change practices or that the principal change the student’s class assignment. But an informal complaint is not binding, so the student and guardian would be at the mercy of the teacher or building administrator’s discretion to respond favorably.

118. Nat’l Ctr. for Educ. Stats., *Fast Facts: Students with Disabilities*, U.S. DEP’T EDUC., <https://nces.ed.gov/fastfacts/display.asp?id=64> [<https://perma.cc/LCN%-CM3U>] (fourteen percent); 20 U.S.C. § 1401 (2018).

119. 20 U.S.C. § 1412, 1414.

120. *Id.* § 1415.

121. 34 C.F.R. §§ 300.151-.153 (2021).

122. 20 U.S.C. § 1415(i)(2) (2018); 34 C.F.R. § 300.516(a) (2021).

123. 20 U.S.C. §§ 1406, 1416 (2018).

If unsatisfied with the classroom or building level response, a guardian could file a complaint using procedures outlined by the local education agency—if available. Many school districts, however, neither recognize a student’s classroom assignment nor the content of instruction as grounds for a grievance. For example, the largest school district in the nation—the New York City Department of Education—identifies seven categories of complaints arising from district regulations and twelve categories of appeals.¹²⁴ Not one offers a student ineligible for a formal plan arising under Section 504 of the federal Rehabilitation Act a basis to challenge the reading curriculum or insufficient reading interventions.

If unsatisfied with the local education agency’s response, the guardian could seek a remedy from the state education agency. But not all states have a generalized complaint procedure capable of addressing individual reading concerns. For example, the state of New York does not have one. And although federal law requires complaint procedures for covered federally funded programs, Congress’s retreat from reading policy diminishes the utility of federal law for literacy-related goals.¹²⁵

New York’s neighbor Connecticut illustrates the variation in policy. Connecticut General Statutes section 10-4b provides a procedure by which “[a]ny resident of a local or regional school district, or parent or guardian of a student enrolled in the public schools . . . unable to resolve a complaint with the board of education” has the option of filing a formal complaint with the state education agency by which to “allege the failure or inability of the board of education of such local or regional school district to implement the educational interests of the state.”¹²⁶ The state board of education will evaluate the complaint and may initiate an investigation, for which it has subpoena power.¹²⁷ If the state finds that the school district failed to comply with the state’s educational interests, it must require the district to “engage in a remedial process” to “develop and implement a plan of action through

124. *Parent Complaints and Appeals*, N.Y.C. DEP’T EDUC., <https://www.schools.nyc.gov/school-life/school-environment/get-help/parent-complaints-and-appeals> [<https://perma.cc/G9U4-Q72E>].

125. 20 U.S.C. § 7844 (2018) (requiring “the adoption of written procedures for the receipt and resolution of complaints alleging violations of law in the administration of [Every Student Succeeds Act] programs”); *New York State ESSA-Funded Programs Complaint Procedures*, N.Y. STATE EDUC. DEP’T, <http://www.nysed.gov/essa/new-york-state-essa-funded-programs-complaint-procedures> [<https://perma.cc/JWH3-EHX6>].

126. CONN. GEN. STAT. § 10-4b (2021).

127. *Id.*

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which compliance may be attained.”¹²⁸ If the state determines that the local board is “responsible” for the failure, it may order the district “to take reasonable steps to comply.”¹²⁹ The state may even enforce the remedial plan against the district in court.¹³⁰

If a Connecticut parent is unhappy with the state agency’s conduct, however, there is no private right of action to appeal an unsatisfactory outcome. Unlike the express private right of action under the IDEA, Connecticut courts have repeatedly held that allowing students and their guardians to bring private causes of action for alleged violations of state education statutes would be “inconsistent with the legislative purpose of § 10-4b.”¹³¹

Public enforcement is also highly variable. State accountability systems have not necessarily recognized student outcomes in grades K-3 because federally mandated testing has historically begun measuring student performance in third grade. For example, the federal Every Student Succeeds Act mandates that states test students in grades 3-8 in reading and/or language arts annually; measure school performance based on academic and non-academic factors, which don’t have to include measures for grades K-3; and use the performance outcomes to identify the bottom 5% of schools for “comprehensive support and improvement.”¹³² Accordingly, states are not required by federal law to set clear goals around early literacy, or include early learning among accountability and school improvement measures. One analysis of state plans submitted to the U.S. Department of Education identified sixteen states excluding early learning measures among their school quality indicators.¹³³

128. *Id.*

129. *Id.*

130. *Id.*

131. *Price v. Wilton Pub. Sch. Dist.*, No. CIV.3:97CV02218AVC, 1998 WL 2027632, at *6 (D. Conn. Sept. 23, 1998); *Doe v. Westport Bd. of Educ.*, No. CV185035923S, 2019 WL 2245957, at *19 (Conn. Sup. Ct. March 28, 2019) (citing to *Price v. Wilton*).

132. 20 U.S.C. § 6311(a)(2) (2018) (testing); *id.* § 6311(c) (accountability system); *id.* § 6311(c)(4)(d) (“comprehensive support and improvement”).

133. *Policy Brief: The State of Early Learning in ESSA: Plans and Opportunities for Implementation*, CTR. ON ENHANCING EARLY LEARNING OUTCOMES & COUNCIL OF CHIEF STATE SCH. OFFICERS (2017), https://www.ccsso.org/sites/default/files/2018-01/ESSA%20Early%20Learning%20Policy%20Brief-ver3_0.pdf [<https://perma.cc/E6FQ-AWBU>].

The result is that states are missing the mark. Even those demonstrating interest in evaluating specific literacy regimes and interventions seem to seek information for its own sake rather than accountability.¹³⁴ State agency reporting requirements in Right to Read laws are spotty at best, with few states gathering and publishing data about the elements captured in reading plans such as students' diagnosed reading deficiencies, the instructional services and interventions and services provided, and the instructional programming the teacher will use.¹³⁵ Without such data, state agencies cannot properly assess reading needs, audit plans to address them, collaborate with outside experts to accelerate research on instruction necessary to meet students' needs, or align resources.

In short, Right to Read laws do not provide students a channel to challenge the failure of state-mandated reading services. In such absence, lawyers representing students, parents, and advocates might consider using litigation as a strategy for furthering instructional and curricular reform.¹³⁶ Although that approach is widespread, it has failed to achieve its goals because courts have "overwhelmingly resisted" lawsuits with such aims.¹³⁷

II. THE RIGHT TO READ WARRANTS A REMEDY

A. *The Educational Abstention Doctrine*

Litigants attempting to use common-law tools to improve instruction fare poorly. Professionals in fields requiring comparable levels of education and discretion as educators—*e.g.*, accountants, architects, and lawyers—are liable in tort for malpractice. By contrast, educators are not. In some jurisdictions, the judicial educational abstention is capacious enough to deny almost any claim against an educational entity, including standard common-law claims like breach of contract or negligence liability for

134. COLO. REV. STAT. § 22-7-1209 (2021) (mandating hiring an independent evaluator); *id.* § 22-7-1211 (2021) (declining to extend the state literacy grant if the evaluator finds the grant ineffective).

135. *E.g.*, COLO. REV. STAT. § 22-7-1213 (2021) (requiring reporting the prevalence of reading deficiencies, annual literacy growth and student retention rates, and individual students with reading deficiencies).

136. Sugarman, *supra* note 20, at 235.

137. Johnny Parker, *Educational Malpractice: A Tort is Born*, 39 CLEV. ST. L. REV. 301, 302 (1991); *see also* Kimberly A. Wilkins, *Educational Malpractice: A Cause of Action in Need of a Call for Action*, 22 VAL. U. L. REV. 427, 431 n.31 (1988) (listing cases).

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personal injuries.¹³⁸ Litigants have fared equally poorly attempting to privately enforce education statutes, with courts holding, for example, that there is no private right of action to enforce provisions of the No Child Left Behind Act entitling students to supplemental services or school transfer.¹³⁹

This Section spotlights two types of such claims through case studies: first, two 1970s attempts by illiterate high school graduates to recover for liability in tort, and second, a recent attempt by young Michiganders to assert a private right of action to vindicate a statutory reading intervention scheme, defeated by 1970s-era reasoning. These bookends illustrate an aversion to education claims sufficiently consistent to constitute the educational abstention doctrine.

1. Educational Malpractice

The theory of educational malpractice dates to a 1972 article arguing that parents and taxpayers could raise consumer claims against education officials for failing to endow students with basic skills.¹⁴⁰ Since then, scholars and advocates have repeatedly tried to make such claims stick.¹⁴¹ They have near-uniformly failed. In roughly eighty claims for negligent instruction spanning forty years, plaintiffs prevailed only once.¹⁴² This

138. *E.g.*, *Harris v. Dutchess County Bd. of Co-Op Educ. Svcs.*, 25 N.Y.S.3d 527, 536 (Sup. Ct. 2015) (rejecting a breach of contract claim because, in New York, courts are “loathe to allow any claim that is based on negligent acts by school officials and educators, whether or not the allegations invoke the State’s public policy by calling for evaluation of educational policy or judgment”).

139. *E.g.*, *Newark Parents Ass’n v. Newark Pub. Sch.*, 547 F.3d 199 (3d Cir. 2008).

140. Sugarman, *supra* note 20, at 233 (citing Gary Saretsky & James Mecklenburger, *See You In Court?*, SATURDAY REV., Oct. 14, 1972, at 50).

141. *See, e.g.*, Sugarman, *supra* note 20, at 233 (describing potential arguments); John Elson, *A Common Law Remedy for the Educational Harms Caused by Incompetent or Careless Teaching*, 73 NW. U. L. REV. 641 (1978); Robert H. Jerry, II, *Recovery in Tort for Educational Malpractice: Problems of Theory and Policy*, 29 U. KAN. L. REV. 195 (1981); Parker, *supra* note 137; Frank D. Aquila, *Educational Malpractice: A Tort En Ventre*, 39 CLEV. ST. L. REV. 323 (1991). More recently, scholars and advocates have looked to standardized tests and their intersection with educational standards and teacher evaluations to argue that courts have the professional capabilities and long-term student data necessary to establish a standard of care and causation. *See supra* note 21.

142. Mark Dynarski, *Can Schools Commit Malpractice? It Depends.*, BROOKINGS (Jul. 26, 2018), <https://www.brookings.edu/research/can-schools-commit->

Section considers two types of these claims: common law and statutory negligence.

a. Common Law Instructional Negligence

To successfully make a claim for negligence, a plaintiff must prove that the defendant owed them a duty to satisfy a standard of care and, in breaching that duty, caused them harm. An educational-negligence claim posits that a school district owes its students a duty to provide a basic education and, by failing to exercise the degree of professional skill required of an ordinarily prudent educator, harms the student's learning and life prospects. Educational negligence is not legally cognizable, nulled by two 1970s cases now invoked as a "talisman to ward off a storm of calamities" that judges suggest would "inevitably descend upon the U.S. judicial system" on account of recognizing educational malpractice.¹⁴³

No Duty. The foundational case in "ed mal," *Peter W. v. San Francisco Unified School District*, concerned an eighteen-year-old high school graduate reading at a fifth-grade level despite attending school regularly and receiving average grades.¹⁴⁴ After graduating and receiving tutoring that noticeably improved his reading, Peter W. sued the school district for "negligently fail[ing] to use reasonable care" in its duty to provide "adequate instruction" in "basic academic skills."¹⁴⁵ Because he was only eligible only for employment not requiring basic literacy, he alleged the harm of lost earning potential.¹⁴⁶

malpractice-it-depends [<https://perma.cc/PQ59-3KH7>] (describing schools as "nearly immune" to malpractice claims). *But see* B.M. by Burger v. State, 200 Mont. 58, 649 P.2d 425 (1982) (relying on a unique provision of the Montana constitution to find educational malpractice where a student was wrongly identified for special education and educated in a more restrictive environment).

143. Patricia Abbott, Note, *Sain v. Cedar Rapids Community School District: Providing Special Protection for Student-Athletes?*, 2002 BYU EDUC. & L.J. 291, 294 (2002) (referring to *Peter W. v. S.F. Unified Sch. Dist.*, 131 Cal. Rptr. 854 (Ct. App. 1976)).

144. *Peter W.*, 131 Cal. Rptr. at 862-63.

145. *Id.* at 856.

146. *Id.* ("requir[ing] little or no ability to read or write").

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The California Court of Appeals framed the issue thusly: Would public policy allow recognition of educators' duty to teach students basic skills?¹⁴⁷ It answered no, citing four policy reasons:

First, the court concluded that education was too "fraught with different and conflicting theories" regarding "how or what a child should be taught" for a "readily acceptable standard of care."¹⁴⁸ If experts could not agree on the best method of teaching, such decision-making was surely outside judicial competence.

Second, the court held that difficulties establishing causation counseled against establishing a legal duty of care.¹⁴⁹ "Substantial professional authority" indicated that literacy was influenced by subjective factors beyond the "formal teaching process and . . . control of its ministers."¹⁵⁰ Physical, neurological, emotional, cultural, and environmental factors "negate[d] an actionable duty of care" by muddying the waters too much for proximate causation.¹⁵¹ To support this argument, the court cited to three diverging books written by education researchers.¹⁵²

Third, without elaboration, the court declined to find "inability to read and write" a cognizable injury.¹⁵³

Fourth, the court predicted that recognizing a negligence cause of action would open the floodgates to "countless" claims against schools, "already beset by social and financial problems," which would require courts to inappropriately oversee schools and school boards.¹⁵⁴

No Causation. Shortly after *Peter W.*, the New York case *Donohue v. Copiague Union Free School District* became the first to formally use the term

147. *Id.* at 859 ("[J]udicial recognition of such duty in the defendant, with the consequence of his liability in negligence for its breach, is initially to be dictated or precluded by considerations of public policy.").

148. *Id.* at 860-61.

149. *Id.* at 861 (finding that there was "no reasonable 'degree of certainty that . . . plaintiff suffered injury' within the meaning of the law of negligence, and no such perceptible 'connection between the defendant's conduct and the injury suffered,' as alleged, which would establish a causal link between them within the meaning." (quoting *Rowland v. Christian*, 69 Cal. 2d 108, 113 (1968))).

150. *Id.* at 861.

151. *Id.* (internal quotations omitted).

152. *Id.* at 861 n.4.

153. *Id.* at 861.

154. *Id.*

“educational malpractice.”¹⁵⁵ Like Peter W., plaintiff Donohue lacked the ability to comprehend anything in writing—not even a job application.¹⁵⁶ Like Peter W., Donohue alleged that the district had improperly permitted him to advance grade levels without proper assessment.¹⁵⁷ And like in *Peter W.*, the trial court was persuaded that there was no common-law duty of care.¹⁵⁸ On appeal, the Appellate Division and Court of Appeals affirmed.¹⁵⁹ Because language from both *Donohue* appellate opinions appear in subsequent educational malpractice decisions, both are included here.

First, the Appellate Division rejected the argument that the district owed students a duty of care. Establishing such a duty would require courts to “test the efficacy of educational programs and pedagogical methods” and “call upon jurors to decide whether [students] should have been taught one subject instead of another, or whether one teaching method was more appropriate than another, or whether certain tests should have been administered or test results interpreted in one way rather than another, and so on, ad infinitum.”¹⁶⁰ It was “simply . . . not within the judicial function” for a court to “evaluate conflicting theories” about “how best to educate.”¹⁶¹

The Appellate Division also found it “practical[ly] impossibl[e]” to demonstrate that breach of some ostensible standard of care caused students’ illiteracy.¹⁶² Student engagement, intelligence, and other “factors which are not subject to control by a system of public education” rendered it “virtually impossible to calculate to what extent, if any” the school’s conduct proximately caused the student’s reading deficits.¹⁶³

On appeal, the Court of Appeals expressed more sympathy to Donohue’s plight, noting that it was not far-fetched that educators, “if viewed as

155. *Donohue v. Copiague Union Free Sch. Dist. (Donohue III)*, 391 N.E.2d 1352, 1353 (N.Y. 1979).

156. *Id.*

157. *Id.*

158. *Donohue v. Copiague Union Free Sch. Dist. (Donohue I)*, 408 N.Y.S.2d 584, 585 (Sup. Ct. 1977).

159. *Donohue v. Copiague Union Free Sch. Dist. (Donohue II)*, 407 N.Y.S.2d 874, 881 (App. Div. 1978); *Donohue III*, 391 N.E.2d at 1355.

160. *Donohue II*, 407 N.Y.S.2d at 879.

161. *Id.*

162. *Id.* at 881 (“[F]ailure to learn does not bespeak a failure to teach.”).

163. *Id.*

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professionals,” owed a duty to students.¹⁶⁴ In addition, the court seemed to acknowledge injury, stating “who can in good faith deny that a student who upon graduation from high school cannot comprehend simple English—a deficiency allegedly attributable to the negligence of his educators—has not in some fashion been ‘injured.’”¹⁶⁵ Nevertheless, it rejected Donohue’s claim on the basis of policy. Specifically, in an oft-repeated phrase, the Court of Appeals reasoned that a claim for educational malpractice would “require the courts not merely to make judgments as to the validity of broad educational policies” but also to “sit in review of the day-to-day implementation of these policies.”¹⁶⁶ Such hands-on judging would threaten separation of powers between the courts, the legislature, and the executive branch and tread upon education duties conferred by the state constitution to courts’ coequal branches.¹⁶⁷

b. Statutory Negligence

In addition to common-law negligence, the plaintiffs in *Peter W.* and *Donohue* raised statutory-negligence claims. The doctrine of statutory negligence generally holds that a defendant’s negligent conduct violates not only the common-law duty of care but also a specific statute informing the duty and breach elements of the negligence claim.¹⁶⁸ Specifically, the statute must prescribe or proscribe certain conduct, the injured party must be within the class of people the statute was designed to protect, and the injury must be the type of harm the statute was designed to prevent. An educational statutory-negligence claim posits that a school district acted negligently by not complying with a law specifically designed to protect students from certain educational failures. In *Peter W.* and *Donohue*, the court rejected both that the education laws had been designed to protect against certain harms and that they had been designed for a particular class of persons.

Not Designed to Protect. After the *Peter W.* court rejected the common-law negligence claim, it turned to statutory negligence. Peter alleged that five state laws could establish a statutory standard of care and that the

164. *Donohue III*, 391 N.E.2d. at 1353.

165. *Id.* at 1354.

166. *Id.*

167. *Id.*

168. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 14 (AM. L. INST. 2010).

district proximately caused his reading injuries by failing to comply with them.¹⁶⁹ The court rejected the argument. The laws, it reasoned, were not “designed to protect against the risk of a particular kind of injury.”¹⁷⁰ Rather, they merely sought to “attain[] . . . optimum educational results.”¹⁷¹ Thus, they could not establish liability.¹⁷²

Not Designed for a Particular Class of Persons. In *Donohue*, the Appellate Division held that the state constitution’s education provision was not meant to “protect against the ‘injury’ of ignorance” but rather “to confer the benefits of a free education upon what would otherwise be an uneducated public.”¹⁷³ Because the *Peter W.* nor *Donohue* courts recognized neither common law nor statutory negligence, neither *Peter W.* nor *Donohue* had valid causes of action or redress.

The *Peter W.* and *Donohue* decisions persist, ready to strike the next litigant bringing an ill-fated educational malpractice lawsuit.¹⁷⁴ At this moment, the cases have re-emerged as courts hear from higher education student plaintiffs pursuing consumer claims related to remote instruction during the COVID-19 pandemic.¹⁷⁵ While these two foundational cases arguably were reasoned correctly at the time and perhaps are still appropriate for certain types of common-law education claims, their reasoning now indefensibly serves as an obstacle to students attempting to access services mandated by Right to Read laws.

2. Private Rights of Action

Where a statute creates a right but does not expressly authorize private parties to bring suit to enforce it, a court may find that the party has an implied right to do so. In the 2014 case *L.M. v. State of Michigan*, a Michigan

169. *Peter W.*, 131 Cal. Rptr. at 862 (highlighting duties to “not [] graduate students from high school without demonstration of proficiency in basic skills,” “to inspect and evaluate the district’s educational program,” and “to design the course of instruction offered in the public schools to meet the needs of the pupils for which the course of study is prescribed.”).

170. *Id.*

171. *Id.*

172. *Id.*

173. *Donohue II*, 407 N.Y.S.2d at 880.

174. *E.g.*, *Hunter v. Bd. of Educ.*, 439 A.2d 582, 583 (1982).

175. *E.g.*, *Lindner v. Occidental College*, No. CV 20-8481-JFW(RAOX), 2020 WL 7350212, at *7 (C.D. Cal. Nov. 11, 2020).

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intermediate appellate court considered whether students could sue to remedy a deficit of reading intervention in violation of a statutory literacy regime.¹⁷⁶

On its face, the law stated that general-education students who failed to demonstrate proficiency on the fourth or seventh grade reading tests “shall be provided special assistance” in order to attain grade-level proficiency within a calendar year.¹⁷⁷ The statute provided neither an enforcement scheme nor an explicit private right of action. A group of students brought suit, alleging that “inadequate and deficient instruction” resulted in their lack of foundational literacy skills.¹⁷⁸ They sought damages and a mandamus to order the school district to provide the reading intervention services in the statute.¹⁷⁹ Although the court found that the reading law imposed a “statutory duty” to provide “‘special assistance’ in specifically defined or restricted circumstances,” the court declined to find the duty redressable.¹⁸⁰

The court first rejected the damages remedy because the law did not expressly require a private right of action against the government. Next, it rejected the mandamus as too “undefined” and “subjective” to be enforceable.¹⁸¹ Concluding that it would be “difficult, if not impossible” for the court to remedy reading wrongs, the opinion echoed the language of *Peter W. and Donohue* by reasoning that such difficulties were too complex—“comprised of deficiencies in the manner and type of academic instruction received, but also impacted by a variety of social and economic

176. *L.M. v. State of Michigan*, 862 N.W.2d 246 (Mich. Ct. App. 2014), *appeal denied sub. nom.*, *SS v. State, State Bd. of Educ., Dept. of Educ.*, 869 N.W.2d 273 (Mich. 2015) (mem.).

177. “Excluding special education pupils, pupils having a learning disability, and pupils with extenuating circumstances as determined by school officials, a pupil who does not score satisfactorily on the fourth or seventh grade Michigan educational assessment program reading test shall be provided special assistance reasonably expected to enable the pupil to bring his or her reading skills to grade level within 12 months.” MICH. COMP. LAWS § 380.1278(8) (2021).

178. *L.M.*, 862 N.W.2d at 250-51.

179. *Id.* at 255-56.

180. *Id.* at 256.

181. *Id.* at 257 (“While a defined goal is therefore provided, the actual method to be used is undefined and quite subjective, with the selected programs and instruction varying considerably based on the individual needs of the pupils and their respective academic grade and proficiency levels.”).

forces unique to the circumstances of each student”—to be justiciable.¹⁸² Although the majority cited no authority for this proposition, a concurring judge marshaled a leading Michigan educational malpractice decision—one which gave lengthy treatment to *Peter W.*—to argue that courts uniformly hold that “judges are not equipped to decide matters of educational policy.”¹⁸³ Although the dissenting judge impassionedly characterized *L.M.* as “no different than many other[]” cases warranting “imperfect” legal remedies and accused the majority of “abandon[ing]” an “essential judicial role[]” by declining to enforce the law,¹⁸⁴ the majority nevertheless rejected the suit as nonjusticiable due to concerns about the separation of powers and judicial competence.¹⁸⁵

The Michigan Supreme Court, “not persuaded that the questions presented should be reviewed by this Court,” endorsed the majority view and declined review.¹⁸⁶

Rejecting the *L.M.* litigants’ right of action was not a *fait accompli*. Although federal courts have retreated from finding implied causes of action,¹⁸⁷ many states—including Michigan—have maintained the more permissive *Cort v. Ash* test.¹⁸⁸ Rather than the unequivocal indications of legislative intent required by federal courts, many state courts merely

182. *Id.*

183. *Id.* at 259 (Murray, J. concurring) (citing *Page v. Klein Tools, Inc.*, 610 N.W.2d 900, 905 (Mich. 2000)) (calling *Peter W.* “the seminal case” and “agree[ing] with and adopt[ing] as our own the reasoning employed by those courts that have declined to recognize a cause of action for educational malpractice . . .”).

184. *Id.* at 262-64 (Shapiro, J. dissenting) (“While the judiciary is not suited to selecting and executing educational policy, it is suited to determining whether defendants are complying with their constitutional and statutory duties and ordering them to take timely action to do so.”).

185. *Id.* at 257 (“We conclude that the specific dispute at issue in this case . . . would necessitate undue intrusion upon the other branches of government and would require us to move beyond our area of judicial expertise.”).

186. *SS v. State, State Bd. of Educ., Dept. of Educ.*, 869 N.W.2d 273 (Mich. 2015) (mem.) (denying review).

187. *See, e.g., Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979) (holding that there is no private right of action unless there is affirmative evidence of Congress’s intent to do so); *see also Alexander v. Sandoval*, 532 U.S. 275 (2001).

188. *Cort v. Ash*, 422 U.S. 66 (1975); *Gardner v. Knights of Columbus*, 414 N.W.2d 706, (Mich. 1987).

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require that a plaintiff be a member of the “class for whose especial benefit the statute was enacted,” evidence of legislative intent, and that the remedy be consistent with the “underlying purposes of the legislative scheme.”¹⁸⁹ The illiterate children were not ejected from the courthouse because they asked for a private right of action; rather, they were ejected because they asked the court to enforce an *education law*.

3. Policy Arguments, Then and Now

The *L.M.* court drew from educational negligence in its reasoning regarding a private right of action, and negligence liability is “initially to be dictated or precluded by considerations of public policy.”¹⁹⁰ In *L.M.* and others, policy considerations are the beginning and end. This Section examines these policy rationales in context, using representative justifications from the Maryland high court decision *Hunter v. Montgomery County Board of Education*.¹⁹¹

The first justification for not recognizing an educational malpractice cause of action is the lack of a satisfactory standard of care; specifically, that the duty is too contested and ill-defined to form a basis for liability. When *Peter W.* was decided, the “science of pedagogy” was indeed “fraught with different and conflicting theories of how or what a child should be taught.”¹⁹² The earlier-mentioned Reading Wars were especially pitched at the time of *Peter W.* and *Donohue*. Rudy Flesch’s 1955 book, later cited by the court in *Peter W.*, excoriated American reading instruction and reigned at the top of the bestsellers lists.¹⁹³ Soon after, Congress commissioned a sociologist to produce the first comprehensive study of educational

189. *Cort*, 422 U.S. at 78; *Gardner*, 414 N.W.2d at 303 n.6 (noting the omitted fourth *Cort* factor is whether “the cause of action [is] one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law”).

190. *Peter W. v. S.F. Unified Sch. Dist.*, 131 Cal. Rptr. 854, 859 (Ct. App. 1976).

191. 439 A.2d 582 (1982).

192. *Peter W.*, 131 Cal. Rptr. at 854, 860; see Carl F. Kaestle, *The Awful Reputation of Education Research*, 22 EDUC. RSCH. 23 (1993) (outlining a critical oral history of federal education research).

193. WEXLER, *supra* note 32, at 66 (citing RUDOLF FLESCH, *WHY JONNY CAN’T READ* (1955)). Flesch described tutoring a neighbor’s functionally illiterate son and concluding that “Johnny’s only problem was that he was unfortunately exposed to an ordinary American school.” FLESCH, *supra*, at 2; see *Peter W.*, 131 Cal. Rptr. at 861 n.4 (citing FLESCH).

disparities in the United States. The blockbuster 1966 “Coleman Report” revealed widespread educational failure among low-income children.¹⁹⁴ In 1967, building on Flesch’s success and the profound impact of the Coleman Report, Harvard professor Jeanne Chall published a breakthrough meta-analysis of literacy, demonstrating that reading was a scientific process and that systematic phonics instruction made for better readers.¹⁹⁵ Chall’s study instigated hotly-contested debates regarding how to best teach reading.

Despite this contest, the science of reading ameliorates the historical challenge of using education research for remedies. Education research has historically been limited and contested,¹⁹⁶ educators work in complex settings in which producing and applying high-quality research is difficult,¹⁹⁷ and Americans are “deeply divided about the underlying purpose of education.”¹⁹⁸ But no education goal is more agreed-upon than the minimum of functional literacy. And the research undergirding the science of reading is so robust that it is finally settling the Reading Wars. Former phonics skeptics, such as colleges of education¹⁹⁹ and teachers’ unions,²⁰⁰ are now embracing phonics. The consensus still has some

194. Heather C. Hill, *50 Years Ago, One Report Introduced Americans to the Black-White Achievement Gap. Here’s What We’ve Learned Since.*, CHALKBEAT (Jul. 13, 2016) (citing JAMES COLEMAN, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966)), <https://www.chalkbeat.org/2016/7/13/21103280/50-years-ago-one-report-introduced-americans-to-the-black-white-achievement-gap-here-s-what-we-ve-le> [<https://perma.cc/6SRT-PQ4U>].

195. CHALL, *supra* note 4; Kim, *supra* note 5, at 91 (citing Coleman and Chall).

196. Pasachoff, *supra* note 22, at 1937 (“caution[ing] against the fetishization of evidence”).

197. Of course, some uncertainty always remains even in the realm of hard science. See Willingham & Rotherham, *supra* note 56.

198. Pasachoff, *supra* note 22, at 1966.

199. Educator preparation programs have steadily increased aligned instruction in all of the Big Five components; one study noted a sixteen-percent rise from 2013 to 2020. Graham Drake & Kate Walsh, *2020 Teacher Prep Review: Program Performance in Early Reading Instruction*, NAT’L COUNCIL ON TEACHER QUALITY (Jan. 2020), https://www.nctq.org/dmsView/NCTQ_2020_Teacher-Prep_Review_Program_Performance_in_Early_Reading_Instruction [<https://perma.cc/S58M-Z6HU>].

200. Moats, *supra* note 6, at 3 (introduction by Randi Weingarten, President, American Federation of Teachers, endorsing such strategies so long as they are neither scripted nor “teacher-proof”). Less formally, a growing teacher

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dissenters,²⁰¹ the science is still subject to research-to-practice gaps,²⁰² and the research has moved and complexified faster than reading policy. But it is a new dawn compared to the *Peter W.* and *Donohue* era. As applied to the science of reading, the first rationale no longer holds true.

The second rationale was the uncertainties and indeterminacies of causation. Again, at the time *Peter W.* and *Donohue* were decided, this was likely a defensible argument. Prominent reading theorist Ken Goodman rejected Chall's notion that reading was a "precise process,"²⁰³ with a Goodman ally arguing that children "should not be taught at all."²⁰⁴ To Goodman, reading was just a "psycholinguistic guessing game" in which teachers played a minimal role.²⁰⁵ In the 1970s, Goodman's views prevailed. Contemporary understandings presumed reading came naturally and educators didn't have much influence.²⁰⁶ Now scientists know that Goodman was grievously wrong.

member organization called The Reading League had trained thousands of educators on the science of reading annually and facilitates local discussions. Maria Murray, *The Reading League Prioritizing Educator Knowledge through Grassroots Activism*, AM. EDUCATOR (2020), <https://www.aft.org/ae/summer2020/murray> [<https://perma.cc/3Z45-MBZQ>] (describing the founding of a nonprofit organization with the mission of increasing "awareness, understanding, and use of evidence-aligned reading instruction").

201. *E.g.*, Diane Ravitch, *Why I Object to the Term "Science of Reading,"* DIANE RAVITCH'S BLOG (Nov. 25, 2020), <https://dianeravitch.net/2020/11/25/why-i-object-to-the-term-science-of-reading> [<https://perma.cc/PS63-5JRF>] ("[T]eaching reading is not science. Good reading teachers use their knowledge, judgment, skill, and experience. They are not scientists. They are reading teachers."); Gewertz, *supra* note 12.
202. Mark Seidenberg, *Lost in Translation? Challenges in Connecting Reading Science and Educational Practice*, 55 READING RSCH. Q. S119, S121-22 (2020) ("We know more about the science of reading than about the science of teaching based on the science of reading.").
203. Kenneth S. Goodman, *Reading: A Psycholinguistic Guessing Game*, 6 LITERACY RSCH. & INSTRUCTION 126, 126 (1967).
204. FRANK SMITH, INSULT TO INTELLIGENCE: THE BUREAUCRATIC INVASION OF OUR CLASSROOMS 211 (1986); Kim, *supra* note 5, at 94 (summarizing this history).
205. Goodman, *supra* note 203, at 127. Goodman believed readers improved by gradually selecting the fewest, most productive letter, language, or context cues necessary to correctly identify the word. *Id.*
206. Kim, *supra* note 5, at 91.

In addition, schools now have much better tools to assess instructional efficacy and therefore causation. Even where observers cannot observe inputs, they may measure outputs and draw reasonable conclusions.²⁰⁷ Many states require year-over-year reading assessments, generating longitudinal growth data. “Value added teaching” studies establish strong causal links between teaching and students’ outcomes.²⁰⁸ Reading research unequivocally emphasizes the importance of quality instruction. That students are low-income, have experienced trauma, or come from households in which a language other than English is spoken should not be sufficient to bar legal entitlements.

The third justification arose from fears of imposing an “extreme burden” on public schools’ “already strained resources,”²⁰⁹ reflecting practical considerations and separation of powers concerns. But the third factor should carry less force now than it did then, because the school finance landscape is appreciably different today.²¹⁰

For one, both *Peter W.* and *Donohue* were decided before the federal Education for All Handicapped Children Act (1975) and the IDEA (1990) made vastly more federal funding (now nearly \$14 billion) available for state and local education agencies to spend on students with disabilities.²¹¹ Even though Congress does not fully fund the costs states and school districts incur for special education services, which would be a significant

207. Hutt & Tang, *supra* note 21 (regarding teacher evaluation and value-added measures).

208. *E.g.*, Raj Chetty et al., *Measuring the Impacts of Teachers II: Teacher Value-Added and Student Outcomes in Adulthood*, 104 AM. EC. REV. 2633 (2014); Eric Hanushek, Nat’l Ctr. for Analysts of Longitudinal Data, Educ. Research (Calder), *The Economic Value of Higher Teacher Quality* 3 (Dec. 2010) (“First, teachers are very important; no other measured aspect of schools is nearly as important in determining student achievement.”). For proposals suggesting that value-added teaching could serve as a basis for educational malpractice liability, see Hutt & Tang, *supra* note 141; and DeMitchell et al., *supra* note 21.

209. *Hunter v. Bd. of Educ.*, 439 A.2d 582, 584 (1982).

210. To be clear, adequate and equitable funding continues to be a challenge in many school districts. *Closing America’s Education Funding Gaps*, CENTURY FOUND. (July 22, 2020), <https://tcf.org/content/report/closing-americas-education-funding> [<https://perma.cc/AAR4-R23B>].

211. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773; Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, § 901, 104 Stat. 1103, 1142.

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step towards freeing state and local funds for general education students,²¹² the IDEA still revolutionized the resources for meeting students' complex and sometimes costly needs.

Furthermore, although *Peter W.* decided in the immediate aftermath of a heated fight between litigants and the legislature over inadequate implementation of the landmark California school finance decision *Serrano v. Priest*, many education malpractice decisions predate state school funding adequacy litigation and subsequent reforms.²¹³ Many states have subsequently adopted cost sharing formulas that more equitably—though insufficiently—redistribute school funding.²¹⁴

In addition, this rationale likely overstates the fiscal consequences of enforcing statutory reading regimes. Although some transition costs may be necessary, many costs associated with improving reading instruction remain roughly constant when effective options are substituted for ineffective ones. For example, schools need a number of certified teachers proportionate to student enrollment, and they may bear no additional cost for hiring a correctly trained educator or assigning struggling students to one with better instructional skills. Schools need curricula, so there isn't necessarily an additional cost for procuring materials informed by the reading science.²¹⁵ (This is especially so when the return on investment for good curriculum is forty times more cost-effective than reducing class size.²¹⁶) Though interventions such as reading coaches or extended learning time are not free, they may be supported by federal or state grants.

212. Evie Blad, *Why the Feds Still Fall Short on Special Education Funding*, EDUC. WEEK (Jan. 10, 2020), <https://www.edweek.org/teaching-learning/why-the-feds-still-fall-short-on-special-education-funding/2020/01> [<https://perma.cc/H7JA-3MQC>]; see also James Ryan, *Poverty as Disability*, 101 GEO. L.J. 1455, 1462 (2013) (describing that states and localities cover more than 80% of special education costs, with the federal government covering 20% less than promised).

213. *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976).

214. See generally Sutton, *supra* note 19.

215. An ambitious study found that, although 45% of English Language Arts materials available for purchase were properly aligned with standards, only 16% of materials used in reading classrooms are grade-level aligned. LaVenita, *supra* note 99.

216. Douglas N. Harris, *Toward Policy-Relevant Benchmarks for Interpreting Effect Sizes: Combining Effects with Costs*, 1 EDUC. EVALUATION & POL'Y ANALYSIS 3, 31 (2009).

Furthermore, it's not clear in this case that the finances should concern judges. Where state legislatures have made their intent so clear, with such detailed and prescriptive regimes, it would not violate separation of powers to enforce duly enacted laws. Indeed, it may undermine separation of powers not to. In state courts, decisions are "made very much in the close shadow of political choice."²¹⁷ By passing comprehensive reading regimes, legislators expressed a policy preference that courts—as a coequal branch—should respect. If legislative officials dislike the consequences of judicial enforcement, they may amend the statute to render it unenforceable.

The fourth reason for not recognizing a cause of action for educational malpractice is concern about the separation of powers and judicial competence. Namely, judges have agonized that recognizing educational malpractice would interfere with the legislature and executive's responsibilities over schools. But, as Professor Justin Driver has masterfully demonstrated, schools are significant theaters of law such that "modern judges should not automatically retreat to prefabricated claims of nonengagement."²¹⁸ Court rulings affecting public schools have become "commonplace,"²¹⁹ with courts from the United States Supreme Court on down regularly intervening in schools' day-to-day functions. For example, just one year before *Peter W.* was decided, the Supreme Court enduringly impacted school discipline by holding that minimal due process procedures were required before suspending or expelling a student.²²⁰

Furthermore, many of the kinds of education claims courts routinely hear are similar to those proposed by the litigants in *L.M.* IDEA lawsuits ask courts to weigh in on whether students' individualized education plans and their implementation satisfy the legal standard for the IDEA's "free appropriate public education." A robust body of caselaw has explicated the vague standard, with the Supreme Court most recently holding that an individualized education program must be "reasonably calculated to enable a child to make progress appropriate in light of the child's

217. Daniel B. Rodriguez, *The Political Question Doctrine in State Constitutional Law*, 43 RUTGERS L.J. 573, 576 (2013).

218. JUSTIN DRIVER, *THE SCHOOLHOUSE GATE* 19 (2018).

219. R. Shep Melnick, *Taking Remedies Seriously: Can Courts Control Public Schools?*, in *FROM SCHOOLHOUSE TO COURTHOUSE* 17 (Frederick Hess & Martin West eds., 2009).

220. *Goss v. Lopez*, 419 U.S. 565 (1975).

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circumstances.”²²¹ Indeed, since the Supreme Court penned the *Endrew* standard, it has appeared in 208 opinions. Moreover, judicially-enforced remedies in IDEA cases often mirror those in Right to Read laws: tutoring, summer school, or an additional year of instruction.²²² Thus, arguments that courts are not competent to assess essentially identical facts under Right to Read laws stretch credulity. Special education caselaw offers informative precedents weighing similar facts and equities.

The IDEA arises under federal law, so these kinds of previously nonjusticiable claims might be new to state courts. But state courts are especially well-positioned to fashion manageable standards. As Professor Hershkoff has observed, state courts are generalists in law and equity, with vast experience shaping normative frameworks in public and private law.²²³ They handle complex medical malpractice matters and apply legal constructs as complicated as the loss-of-a-chance doctrine, suggesting that they are sufficiently competent to evaluate whether a school system has satisfied students’ statutory rights. State jurisprudence can be distinguished from its federal counterpart in part because “decisions . . . are made very much in the close shadow of political choice.”²²⁴ Federal courts cannot commandeer by mandating equitable relief where doing so would require that states take on budgetary burdens; on the other hand, state courts violate no such anticommandeering doctrine by doing so.²²⁵

State court judges need not be bound by considerations designed for another context. One of the most consequential rationales for federal constitutional separation of powers—specifically, restraining unelected judges from exercising authority over democratically elected officials—is less applicable in state courts. Unlike appointed Article III judges with lifelong tenure, many state judges are elected, are subject to ratification

221. *Endrew F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988, 999-1001 (2017).

222. *E.g.*, *Morales v. Newport-Mesa Unified Sch. Dist.*, 768 Fed. Appx. 717, 719 (9th Cir. 2019) (affirming student’s award of forty hours of tutoring, a vocational assessment, and an assistive technology assessment).

223. Helen Hershkoff, *Positive Rights and State Constitutions*, 112 HARV. L. REV. 1131, 1181 (1999) (“In just the last fifty years, state courts have revolutionized legal rules affecting family relations, products liability, and tort immunities.”).

224. Rodriguez, *supra* note 217, at 576.

225. Helen Hershkoff & Stephen Loffredo, *State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis*, 115 PENN. ST. L. REV. 923, 980 (2011) (“Federalism concerns are heightened when . . . a federal court decree has the effect of dictating state or local budget priorities.”).

elections, and/or are term-limited.²²⁶ In addition, such concerns carry less force where a court's decisions bind a narrow geography and are more easily subject to revision via statute or ballot proposition than federal law.

The final justification given for denying relief to those alleging educational malpractice was fear of opening the floodgates to litigation. As is addressed in Section II.C, it is unlikely that suing to enforce a statutory scheme that lacks a damages remedy and a fee-shifting provision will incentivize much litigation at all.

In sum, the policy arguments may have made sense in the 1970s. At a minimum, they are not dispositive today. Setting aside these well-intentioned but ill-informed arguments, the next Section considers doctrine.

B. The Right to Read is Facially Vindicable

This Section argues that the *L.M.* plaintiffs and similarly situated students in states with Right to Read laws should be able to state a claim arising under common law for undelivered reading interventions. This section uses the Mississippi literacy scheme as a case study, as the state has become a "national leader" in the science of reading and has inspired others to borrow from its playbook.²²⁷ The Section argues that the Mississippi regime doctrinally supports two causes of action under Mississippi law: an implied private right of action to enforce the statute and a common-law claim of negligent instruction.

Although this section uses the Mississippi statute and case law, much of this analysis is transferrable. The legal elements necessary to find an implied right of action or to prove a negligence claim are the same or similar to those in other jurisdictions. And the contours of the Mississippi literacy

226. Helen Hershkoff, *State Courts and the 'Passive Virtues': Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1898-1905 (2001) (critiquing federalist reasoning in state courts).

227. Gewertz, *supra* note 12; Emily Hanford, Opinion, *There Is a Right Way to Teach Reading, and Mississippi Knows It*, N.Y. TIMES (Dec. 5, 2019), <https://www.nytimes.com/2019/12/05/opinion/mississippi-schools-naep.html> [<https://perma.cc/78RP-TA2B>]. Mississippi garnered national attention after it shed the state's near-worst-in-the-nation status in third grade reading proficiency, jumping from the bottom (49/50) in 2013 to the middle (29/50) of the pack in 2019. *Id.* An Urban Institute report adjusting National Assessment of Educational Progress scores for student demographics ranks the poorest state in the nation second overall on fourth grade reading. *America's Gradebook*, URBAN INST., <https://apps.urban.org/features/naep> [<https://perma.cc/FPL8-RSKH>].

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laws are similar to others, particularly because legislators often build legal frameworks informed by other states' and model legislation.²²⁸

Before proceeding, an important clarification: under these theories, students would bring suit against school districts. Although the statutes provide elaborate guidance about educators' knowledge and practices, local education agencies retain authority over teachers. Thus, teachers' employers—not teachers—would be accountable.²²⁹

1. An Implied Private Right of Action

Right to Read laws support an implied private right of action to engender compliance with promised reading interventions. Under Mississippi law, the “focal point” and “essential predicate” for inferring an implied cause of action is legislative intent.²³⁰ Courts look to statutory text, structure, historical background, and “purposes and objects”²³¹ as well as indications of “inten[t] to benefit” a particular group.²³² As applied, the Mississippi intervention and retention scheme, the Literacy-Based Promotion Act (LBPA),²³³ supports a private right of action to rectify a school's failure to provide interventions.

First, the purpose of the statute supports a cause of action. The LBPA begins with a clear purpose statement: “to improve . . . reading skills” such that “every student completing the Third Grade is able to read at or above grade level.”²³⁴ To accomplish that goal, the express legislative intent is to ensure students' academic advancement is “determined, in part,

228. *E.g., Comprehensive K-3 Reading Policy: Model Legislation*, FOUND. EXCELLENCE IN EDUC. (2018), https://www.excelined.org/wp-content/uploads/2017/11/ExcelinEdPolicyToolkit_K-3Reading_ModelLegislation_2017-1.pdf [<https://perma.cc/MXP5-4DQW>].

229. *See, e.g., Evans-Marshall v. Bd. of Educ.*, 624 F.3d 332, 351 (6th Cir. 2010) (“Even to the extent academic freedom, as a constitutional rule, could somehow apply to primary and secondary schools, that does not insulate a teacher's curricular and pedagogical choices from the school board's oversight.”).

230. *Doe v. State ex rel. Miss. Dep't of Corr.*, 859 So. 2d 350, 356 (Miss. 2003).

231. *Davis v. AG*, 935 So.2d 856, 868 (Miss. 2006) (Graves, J., dissenting).

232. *Doe*, 859 So. 2d at 356.

233. MISS. CODE ANN. § 37-177-1 (2021).

234. *Id.*

upon . . . proficiency in reading” and that local education agencies “facilitate this proficiency.”²³⁵

Second, the text supports a cause of action. Permissive language is dispositive evidence of the legislature’s intent to deny a remedy.²³⁶ By extension, mandatory language is at least persuasive that the legislature intended a right. The LBPA states that students exhibiting substantial reading deficiencies in grades kindergarten through three “*must* be given intensive reading instruction and intervention immediately” after identification.²³⁷ It does not suggest interventions—it requires them, and it lays them out in substantial detail.

Thus, third, the statute’s structure lends support by prescribing the interventions. It dictates how school officials should define a “substantial deficiency” and identify a student with one: all students in grades K-3 must be assessed within the first thirty days of the school year, plus the middle and end of the year, using a state-selected screening tool.²³⁸ Proficiency scores are set by a statutorily created entity, the Mississippi Reading Panel.²³⁹ Moreover, the law defines the “intensive reading instruction and intervention[s]” that must be identified, provided, and documented to “ameliorate” a student’s “specific deficiency.”²⁴⁰ Specifically, eligible students must receive a seven-part Individual Reading Plan,²⁴¹ with

235. *Id.*

236. *Taylor v. Delta Reg’l Med. Ctr.*, 186 So. 3d 384, 392 (Miss. Ct. App. 2016) (finding no remedy for noncompliance with regulations stating a medical specialist “*should*” be available (emphasis original)).

237. MISS. CODE ANN. § 37-177-1(2) (2021).

238. MISS. CODE ANN. § 37-23-16 (2021) (requiring an SEA-selected screening tool).

239. MISS. CODE ANN. § 37-177-5 (2021) (describing the Reading Panel). The Panel consists of “the State Superintendent of Education, or his/her designee, who will chair the committee; the Chair of the House Education Committee, or his designee; the Chairman of the Senate Education Committee, or his designee; one (1) member appointed by the Governor; and two (2) additional members appointed by the State Superintendent of Education.” *Id.*

240. MISS. CODE ANN. § 37-177-1 (2021).

241. The plan enumerates (1) the diagnosed deficiency; (2) growth goals; (3) progress monitoring tools; (4) the type of additional services and interventions to be provided; (5) the “research-based reading instructional programming”—defined as “phonemic awareness, phonics, fluency, vocabulary and comprehension”—which the teacher will use; (6) parental support strategies; and (7) “additional services” identified by the teacher. *Id.*

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requirements analogous to a court-enforceable individualized education program pursuant to the IDEA.

Lastly, the retention scheme is crystal clear about the group intended to benefit: the statute dictates that students with reading struggles cannot be promoted to fourth grade until reading at grade level, unless one of a limited number of statutory good cause exemptions applies.²⁴² Plainly, then, this statute is intended to benefit students in grades kindergarten through three who are not newcomer English Language Learners, students with disabilities, students demonstrating proficiency on an approved alternative assessment, or certain students who have already been retained.²⁴³

For students retained in third grade, the enumerated interventions are even more prescriptive and lend further support for an implied cause of action. Those students are eligible for a minimum of ninety minutes of reading instruction and supports, including but not limited to small group intervention, reduced teacher-student ratios, tutoring in “scientifically research-based reading,” optional transition classes, and extended learning time.²⁴⁴ Although the law does not establish thresholds for the entitled small groups or reduced student/teacher ratios, such determination requires little more than common sense. The other interventions are defined textually or intertextually. Tutoring must be in addition to regular classroom instruction. Transition classes are defined in regulatory guidance.²⁴⁵ Extended learning time programs, including summer reading

242. MISS. CODE ANN. § 37-177-13 (2021). As a result of this restrictive regime, Mississippi has the highest retention rate in the nation. Jennifer Palmer, *Oklahoma Nearly Tops Nation in Holding Back Early-Grade Students*, OKLA. WATCH (Dec. 14, 2018), <https://oklahomawatch.org/2018/12/14/oklahoma-nearly-tops-nation-in-holding-back-early-grade-students> [https://perma.cc/EQ6F-7V75] (analyzing self-reported federal Civil Rights Data Collection data and citing to Mississippi as the highest). A conservative education think tank suggests this is “a significant factor” in Mississippi’s improvement on the NAEP. Todd Collins, *Mississippi Rising? A Partial Explanation for Its NAEP Improvement Is That It Holds Students Back*, THOMAS B. FORDHAM INST.: FLYPAPER (Dec. 4, 2019), <https://fordhaminstitute.org/national/commentary/mississippi-rising-partial-explanation-its-naep-improvement-it-holds-students> [https://perma.cc/3JFS-7WRZ].

243. MISS. CODE ANN. § 37-177-13 (2021).

244. *Id.*

245. Transitional classes mandate ninety minutes of scientifically research-based reading instruction by a high performing teacher, delivered in a small-group, data-driven classroom setting featuring grade-level content. MISS. DEP’T EDUC.,

camps, are state-run.²⁴⁶ And such students are entitled to a “high-performing teacher,” defined by statute.²⁴⁷

Finally, the historical background supports a cause of action. In testimony introducing the legislation, the bill’s sponsor stated that the “intent of this bill [was that] all third graders exiting third grade [are] able to read on at least a basic level.”²⁴⁸ The committee chair emphasized early intervention, citing to research that “whether [a student is] proficient or non-proficient in third grade is a very good early indicator of where [the student] will end up going through school.”²⁴⁹

Taken together, the evidence supports that Mississippi legislators intended to ensure that struggling readers received the supports they needed to enter fourth grade reading at grade level, seamlessly making the transition from “learning to read” to “reading to learn.” Even if the legislature did not expressly provide a cause of action, the evidence supports one.

2. A Common Law Tort of Negligent Instruction

Nevertheless, if a court were to find that the Literacy-Based Promotion Act does not create a private right of action, student litigants could bring a claim for negligent instruction under the common law. To “inform [the standard of care] inquiry,” the court could rely on the literacy laws.²⁵⁰

Mississippi has had well-defined professional standards for literacy instruction since 2006, when it first passed legislation requiring teacher

GUIDELINES FOR STUDENTS IDENTIFIED WITH A READING DEFICIENCY AND/OR FOR STUDENTS NOT PROMOTED, https://www.mdek12.org/sites/default/files/documents/OAE/Literacy/ResourcesForAdmin/guidelines-for-transition-and-intensive-acceleration-classes_20170406162650_536208.pdf [<https://perma.cc/V3L6-99BR>] [hereinafter MISS. DEP’T EDUC., GUIDELINES].

246. Press Release, Miss. Dep’t Educ., *Mississippi Schools Receive \$3 Million to Support Summer Reading Camps* (June 13, 2019), https://www.mdek12.org/news/2019/6/13/Mississippi-Schools-Receive-3-Million-to-Support-Summer-Reading-Camps_20190613 [<https://perma.cc/FEQ9-ZJYH>].

247. MISS. CODE ANN. § 37-177-13 (2021).

248. *Legislative History Project, SB2347*, MISS. COLL. L., https://law-db.mc.edu/legislature/bill_details.php?id=1576&session=2013 [<https://perma.cc/L85F-HGWW>] (testimony of Senator Angela Burks Hill, first video, at 00:02:30).

249. *Id.* (testimony of Senator Gray Tollison, first video, at 00:01:46).

250. *Taylor v. Delta Reg’l Med. Ctr.*, 186 So. 3d 384, 391 (Miss. Ct. App. 2016).

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preparation programs to train educators on the National Reading Panel's Big Five.²⁵¹ Incoming Mississippi teachers must pass a rigorous reading instruction assessment.²⁵² The state also has a detailed statutory scheme outlining interventions due to a struggling reader. The breach inquiry, then, could contemplate whether the educator provided the services as outlined in the reading laws and as instructed in teacher preparation programs and tested on the professional entrance exam.

To evaluate causation, courts could be informed by the same assessments and standards Mississippi employs to identify a high-performing teacher, as required for retained third graders: "student performance data, particularly related to student growth in reading, above-satisfactory performance appraisals, and/or specific training" in the science of reading.²⁵³ If those standards prove too amorphous, courts could rely on the same resource they do in other technical fields: expert witnesses.

To define the harm, courts need not look to the lifelong parade of horribles illiteracy engenders: school dropout, reduced and inferior employment prospects, increased child welfare and justice systems involvement, and challenges participating in society.²⁵⁴ More narrowly, non-proficient readers must be retained by law.²⁵⁵ As a result, the student loses their cohort of friends and one may assume that the student's future graduation date is delayed by one year. For the purposes of injunctive remedies rather than detailed considerations of damages, the psychological loss associated with having to make new friends and the prospective denial of a year of full-time workforce participation and accompanying earnings should be sufficient. Without due interventions, retention and compulsory attendance risks emotional harm and lost income for no good reason.

In conclusion, once the outdated and inaccurate reading science and law is no longer an obstacle, it is clear that Rights to Read laws—specifically, here, the Mississippi regime—support judicial intervention.

251. See generally *2014-15 Study of Mississippi Teacher Preparation for Early Literacy Instruction*, BARKSDALE READING INST. 5 (Dec. 2015), <https://msreads.org/files/2016/03/31-Mar-2016-Release-STATEWIDE-REPORT-of-TEACHER-PREP.pdf> [<https://perma.cc/4BHA-KM87>].

252. State Superintendent Carey M. Wright, *Guidelines for Mississippi Educator Licensure K-12*, MISS. DEP'T EDUC. (2020), <https://www.sos.ms.gov/adminsearch/ACCode/00000398c.pdf> [<https://perma.cc/4452-WBYR>] (Foundations of Reading test).

253. MISS. CODE ANN. § 37-177-13 (2021).

254. See *supra* notes 2-3 and accompanying text.

255. MISS. CODE ANN. § 37-177-13 (2021).

III. A SUPERIOR PUBLIC ENFORCEMENT SCHEME

A. *The Strengths and Weaknesses of Private Enforcement*

The preceding Section considered whether Right to Read regimes are enforceable as a descriptive matter, rather than as a normative one. Although the legal arguments used to maintain educational abstention are dated on the facts and law, practical considerations weigh against exclusively vindicating a right to read through private enforcement. This Section debates the merits and demerits of private enforcement, ultimately recommending hybrid enforcement.

1. Strengths

First, private enforcement and judicial review appears to be superior to the patchwork or non-existent remedies available to general education students. For individualized needs arising from a student's specific deficiencies, private enforcement may be the "most effective means" to enforce individual rights.²⁵⁶ At a minimum, private enforcement is cost-efficient because it capitalizes parents' private interest in acting to improve their child's reading instruction. Some estimates suggest that as many as one-third of struggling readers are from college-educated families;²⁵⁷ accordingly, many may have resources for private enforcement.

Second, one of the primary benefits of this approach is that the right of action may offer so few incentives that only activist litigants bring suit in the first place. If litigants bear the costs, common sense suggests that the benefits should outweigh the costs. Remedies like small group instruction or the better teacher across the hall are likely insufficient. With the incentives under Right to Read laws, complaints are more likely to be strategic and systemic—like the *L.M.* complaint brought by the ACLU of Michigan and pro bono counsel—rather than individually brought by private litigants.²⁵⁸ In other words, there is reason to believe a legal hook

256. Kimberly Jenkins Robinson, *Designing the Legal Architecture to Protect Education as a Civil Right*, 96 IND. L.J. 51, 99 (2020).

257. Hanford, *supra* note 24.

258. *See, e.g.*, Monica Costello, Note, *Systemic Compliance Complaints: Making IDEA's Enforcement Provisions a Reality*, 41 U. MICH. J.L. REFORM 507, 513-18 (2008) (discussing the benefits of systemic complaints under IDEA state complaint procedures).

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will not lead to a flood of litigation nor exclusively benefit better-resourced families.

Third, even where self-funded private litigants bring suit, there may be positive spillover effects for other students. Some research has indicated that private enforcement under the IDEA has engendered positive externalities for other students as school officials improve practices at the systemic rather than individual level.²⁵⁹ Arguably, all students could benefit from wealthy parents motivated to enforce Right to Read laws on their own dime. Professor Pasachoff is skeptical of the spillover argument regarding the IDEA, but Professor Jenkins Robinson cites to school desegregation claims arising under Title IV as a good example of private enforcement lifting all boats.²⁶⁰

2. Weaknesses

There is no doubt that litigation alone will not be a silver bullet.

First, litigation may be ill-suited for the needs of struggling readers because it is slow. Kids develop quickly, and poor reading has snowball effects. Although the prevalence and success of IDEA lawsuits indicates that legal claims may be resolved in a sufficiently timely fashion to help schoolchildren, the length of litigation counsels in favor of including a public enforcement remedy.

Second, the likelihood of private enforcement by activist litigants risks a Serving Two Masters problem, by which public interest attorneys taking the cases are more focused on structurally changing school district services than their specific clients' needs.²⁶¹ Structural change takes time, perhaps

259. Pasachoff, *supra* note 23, at 1441.

260. Robinson, *supra* note 256, at 91-94.

261. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 516 (1976). In Bell's own words, the article considers that:

"Our clients' aims for better schooling for their children no longer meshed with integrationist ideals. Arguing that civil rights lawyers were misguided in requiring racial balance of each school's student population as the measure of compliance and the guarantee of effective schooling, I urged that educational equality rather than integrated idealism was the appropriate goal. In short, while the rhetoric of integration promised much, court orders to ensure that

more time than an emerging reader has before academic or workforce demands outpace her skills.

Third, private enforcement generally disproportionately disserves low-income students. Evaluating the private right of action provision in the IDEA, Professor Pasachoff persuasively critiques that private enforcement “runs counter” to the statute’s goal of improving education for poor children by leading to “information asymmetries, negative externalities, and high transaction costs.”²⁶² Although Right to Read Acts have somewhat different considerations, Pasachoff’s concerns are salient. Under the IDEA, wealthier parents are more aware of and better able to bargain for the services they want through the individualized education program process as “consideration” for abstaining from suing.²⁶³ Right to Read laws require even less process than the IDEA—merely that parents receive notice of their child’s reading achievement (at worst) or Individual Reading Plans (at best). As a result, only the most informed parents will know for what and how to advocate through informal channels and credibly threaten a lawsuit. Thus, private enforcement risks that social capital and whisper networks are necessary, not just beneficial, and concentrate benefits among wealthier students.

Moreover, litigation-based enforcement will require self-funded legal representation, if prospective litigants can find it. IDEA claimants, lacking statutory damages, already struggle to find legal counsel.²⁶⁴ Worse, unlike the IDEA, Right to Read laws rely on a common-law private right of action which lacks fee-shifting provisions that in principle help level the playing field.²⁶⁵ It is even more likely that wealthy families will be disproportionately able—likely the *only ones* able, if lacking pro bono representation—to bring suit under Right to Read laws.²⁶⁶ If the outcome of wealthy litigants’ suits are private and highly individualized remedies, such lawsuits may not engender positive externalities.²⁶⁷

black youngsters received the education they needed to progress would have achieved more.”

DERRICK BELL, *SILENT COVENANTS 4* (2004).

262. Pasachoff, *supra* note 23, at 1440.

263. *Id.* at 1436-37.

264. *Id.* at 1446-49 (describing limits on IDEA fee recovery); *id.* at 1461 (describing why merely reforming the fee shifting provision would be insufficient).

265. *See* 20 U.S.C. § 1415 (2018) (lacking a fee-shifting provision).

266. Pasachoff, *supra* note 23, at 1441.

267. *Id.* at 1440-43.

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However, Right to Read laws and the IDEA are distinguishable in important ways. Frankly, the consequences are less extreme. IDEA private enforcement leads to wealthy families taking more than their fair share from a limited pool of resources, at a cost of diminishing services made available to low-income students. But the IDEA covers really expensive costs, including tuition or tuition reimbursement for outplacement at therapeutic nonpublic boarding schools that can cost more than \$100,000 annually for just one student.²⁶⁸ Enforcing general education service provision—except, perhaps, relatively inexpensive after-school tutoring—is absolutely (not just relatively) affordable.

At a minimum, private enforcement should not be the only remedy for the Right to Read. So, why establish that courts *could* provide it? First, a hybrid model would best maintain the universalism of the statutory scheme (in contrast to, for example, means-tested enforcement supports) and prevent leveling down benefits for wealthier students. Second, without a funding carrot, making legislators enforce an unenforceable law—one that may entail a fiscal note for teacher coaching or additional interventions—may be impossible without a stick like the threat of private litigation. School administrators are litigation-adverse and will want to preempt such lawsuits.²⁶⁹ When statutes provide a public remedy, courts usually decline to find a private one.²⁷⁰ Thus, school administrators and state legislators can likely avoid litigation by enacting public enforcement. The next Section outlines the elements of a public enforcement scheme.

268. An analysis of 2007 data by the Massachusetts Department of Elementary and Secondary Education identified that 1,380 students were “outplaced” at private residential schools at an average cost of \$105,206 per student. Off. of Strategic Planning, Rsch. & Evaluation, *Education Research Brief: Special Education Placements and Costs in Massachusetts*, MASS. DEP’T OF ELEMENTARY & SECONDARY EDUC. (Mar. 2009), <https://archives.lib.state.ma.us/bitstream/handle/2452/107683/ocn725901472.pdf?sequence=1&isAllowed=y> [<https://perma.cc/7HCL-TX4Y>].

269. Frederick Hess & Lance D. Fusarelli, *School Superintendents and the Law: Cages of Their Own Design?*, in FROM SCHOOLHOUSE TO COURTHOUSE 49-72; Derek Black, *The Uncertain Future of School Desegregation*, 57 CATH. U. L. REV. 947, 980 (2008) (“[R]isk-averse schools are sure to follow by staying well within any conceivable constraints.”).

270. *E.g.*, *Wisniewski v. Rodale, Inc.*, 510 F.3d 294, 297 (3d Cir. 2007).

B. A Superior Statutory Scheme

An effective enforcement scheme would capitalize on natural incentives for individual students' advocates while maximizing positive externalities for all, especially for students most at risk for being underserved by private enforcement. In addition, a public enforcement regime would preventatively seek to improve instructors' knowledge and mindsets, closing gaps between research and practice. To that end, an effective public enforcement system would promote state and local education agency partnerships, reap the benefits of parent participation, effectuate a public complaint system and affirmative monitoring, and collect and disseminate longitudinal data.

Agency-expert partnerships. Legislators should continue to close gaps between research and practice. Through Right to Read laws, many states have sought to ameliorate the "last mile" problem by establishing partnerships between state education agencies and reading science experts. These partnerships can provide state and local education officials access to the most up-to-date information about reading development. But they do not do enough to get the information ever-closer to classrooms—and thus to students. Such partnerships should design effective professional development and curriculum evaluation standards, and hire staff dedicated to ensuring educators are trained and supported to deliver science-based instruction.²⁷¹ School districts need to open their central offices and classrooms to experts, provide teachers with expert coaching, and create a valuable feedback loop using data.

Parent participation. The statutes should be reformed to give parents the option of being included in the process of identifying reading interventions. Parents are students' first reading teachers and first advocates. Thus, statutory enforcement should capitalize on guardians' interest in ensuring their child's success. Currently, only two states require parents' input in selecting interventions.²⁷² Most merely require notice, if at all.²⁷³ A process that less formal and demanding than developing an

271. *E.g.*, Authorization of the Early Literacy Support Block Grant Program Grant, S.B. 98, § 113, 2019-2020 Reg. Sess. (2020) (\$50 million California appropriation).

272. CAL. EDUC. CODE § 48070.5 (2021); DEL. CODE ANN. tit. 14, § 153 (2021).

273. *For Those States with Third-Grade Retention Policies, is Parental Engagement Required?*, EDUC. COMM'N OF THE STATES, <https://internal-search.ecs.org/comparisons/state-k-3-policies-20> [<https://perma.cc/WT8N-XNPU>].

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individualized education program—such as a simple parent-teacher conference, so long as the teacher’s word is binding—would be sufficient.

Inviting parents into the process raises equity concerns. The risk of capture by wealthy and in-the-know parents gives pause, but such parents likely possess the social capital to advocate informally anyway. In addition, if the policy gives parents an option to participate, it will not impose opportunity costs disproportionately borne by low-income parents like lost wages to attend required meetings.

State complaint system. Right to read laws should establish a state complaint procedure modeled after the IDEA, which would allow anyone (including nonparents) to challenge service provision in violation of the Right to Read law.²⁷⁴ The state educational agency would then be required to determine whether an investigation is necessary and accordingly investigate and bring the complaint to resolution. Existing state agency special education infrastructure could address Right to Read complaints.

Moreover, resolving complaints should entail a de-identified written decision, made public, that makes public key information like the student’s reading deficiency and designated corrective action.²⁷⁵ School officials and students’ advocates would benefit from the knowledge of how other districts or schools address reading difficulties. For maximum dissemination, information about Right to Read complaints and their resolution should be presented in a database-like fashion and reported to the legislature as well as the agency/expert partnership.

Audits. The state agency or its partners should affirmatively audit select local education agencies, and individual educators’ practices therein, to ensure that promised interventions are occurring. The audits need not be fussy and could be conducted during routine site checks of grant recipients, such as literacy or school improvement grants. Because such grants disproportionately benefit lower-income school districts, their public enforcement may help offset the potential benefits to wealthier students and families of litigation.

Conditional grants. Many states have made additional funding for literacy instruction available through Right to Read laws. As in Colorado, as a condition for receiving such grants, districts should be required to provide and document in-service training to current teachers. In addition, they should be made to agree to make a random sample of Individual Reading Plans available for adequacy and equity review by the expert panel.

274. *E.g.*, 34 C.F.R. §§ 300.151-.153 (2021).

275. 34 C.F.R. § 300.151(b) (2021).

Data collection and sharing. State education agencies should collect and disaggregate detailed data on the basis of race, ethnicity, and socioeconomic status regarding reading diagnostics and interventions. Gathering and making public data about the elements captured in reading plans—students’ diagnosed reading deficiencies, the instructional services and interventions and services provided, and the instructional programming the teacher will use—could have the added benefit of allowing school officials and researchers to monitor practices and link interventions to outcomes.

By making this information available by school and district, ideally in an accessible format, the state education agency can empower advocates for children and mitigate some of the information asymmetries that disproportionately benefit wealthier students. The federal government (and its deeper pockets) should facilitate development of such data repositories through designated funding for state literacy programs.

The state’s expert partners should review the data, the individualized plans, and state complaints to inform their efforts to promoting adequate and equitable reading instruction and district compliance. Expert review would create a virtuous cycle that helps close the research-to-practice gap.

Finally, for state education agencies and partners to effectively longitudinally monitor and evaluate the natural experiment prompted by Right to Read reforms, reading regulation must facilitate access to data systems for longitudinal study. State proscriptions on data linkages or incompatible data sharing platforms frustrate such evaluations and must be remedied.²⁷⁶

CONCLUSION

Centuries of Reading Wars are ending. Amid this détente, states have adopted robust regimes ensuring that students receive the science-based instruction they need to compete in an interdependent, knowledge-based economy. But states have failed to give children a way to enforce their statutory rights. And courts have relied on anachronistic policy arguments to deny students their day in court. When those dated policy considerations are removed, the law facially supports such private rights of action. But all students—especially low-income ones—would benefit from the addition of public enforcement.

276. Christopher S. Elmendorf & Darien Shanske, *Solving ‘Problems No One Has Solved’: Courts, Causal Inference, and the Right to Education*, 2018 U. ILL. L. REV. 693, 715-20 (2018).

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This Note reserves for another day many interesting questions associated with the science of reading and Right to Read laws. One obvious extension of the grade-limited statutory schemes is their failure to meet the needs of struggling readers beyond grades K-3. Might older students be able to pursue a common-law tort remedy for failure to instruct in accordance with the prevailing standard of care exercised by a reasonably prudent reading teacher? Both the science and the law of reading comprehension are less well-defined than regarding early reading skills, suggesting a trickier legal argument and better-justified policy defenses.

Another obvious problem is the Note's failure to address the unfulfilled needs of students in jurisdictions without Right to Read laws or those with more skeletal regulatory regimes. One education scholar has suggested that the reading science supports claims of inadequate instruction in violation of state constitutional rights to an adequate education.²⁷⁷ However, courts evaluating education adequacy have focused on financial rather than instructional inputs. The adequacy proposal merits additional scholarly treatment, but it likely has a challenging road ahead.

Finally, this Note fails to address common-law claims that might more directly address the conduct of educators who are willfully non-compliant with reading regulations. The ideologies animating the Reading Wars linger. Amongst themselves, educators have used the term "educational malpractice" to describe their colleagues' instructional decisions based on ideology rather than science.²⁷⁸ Could courts be the next fora for that characterization?

277. Michael J. Petrilli, *Put "Whole Language" on Trial*, 20 EDUC. NEXT (Nov. 20, 2019), <https://www.educationnext.org/put-whole-language-on-trial-case-against-reading-instruction-illiteracy> [<https://perma.cc/Y6XP-CBB3>].

278. *E.g.*, @BamasonMason, TWITTER (Aug. 9, 2019, 7:14 AM), <https://twitter.com/BamasonMason/status/1159785015754014720?s=20> [<https://perma.cc/K98Y-V3PF>] ("I keep saying to my teachers if you aren't teaching kids with the science of reading and you know better it is educational malpractice.").