

**A BETTER SOLUTION THAN
MISSISSIPPI’S THIRD GRADE RETENTION
POLICY TO ADDRESS STUDENTS
STRUGGLING TO READ: THE FIRST
GRADE SWINGING DOOR**

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INTRODUCTION

On April 17, 2013, Mississippi joined the ranks of states with an official student retention program. Governor Phil Bryant signed into law “Education Reform Bills.”¹ Among these bills is Senate Bill 2347 which has been unofficially labeled the “Third Grade Gate.” Reportedly, this bill “will improve literacy achievement by ending social promotion of third grade students who are not reading on grade level.”²

In 1996, Chicago took a similar step with the implementation of its retention policy, ending the social promotion in third, sixth, and eighth grade for students who failed to achieve a minimum test score in the spring.³ Chicago’s policy faced much criticism, and many studies were released illustrating the ineffectiveness of the policy;⁴ nevertheless, fourteen states plus the District of Columbia have implemented a similar policy as of 2012.⁵ On the

¹ *Governor Bryant Signs Education Reform Bills into Law*, GOVERNOR PHIL BRYANT (Apr. 17, 2013), <http://www.governorbryant.com/governor-bryant-signs-education-reform-bills-into-law/>. These four bills were a part of his “Education Works” initiative. Senate Bill 2658 creates 200 college scholarships for students who wish to become teachers in the Mississippi public schools for five years, and it “requires districts with graduation rates of less than [eighty] percent to submit a restructuring plan . . .” Senate Bill 2188 raises the bar for acceptance into Mississippi universities to teach. House Bill 369 increases the possibilities for public charter schools in the lowest graded school districts. Senate Bill 2347 is the topic of this Comment.

² *Id.*

³ Donald R. Moore, *Chicago’s Grade Retention Program Fails to Help Retained Students*, DESIGNS FOR CHANGE 2 (Apr. 2000), available at <http://www.designsforchange.org/pdfs/Rejoindr2.pdf>. Moore’s report on the Chicago retention policy gives credit to educators for focusing on the lowest achieving students, but it stresses the importance of forming alternatives because the policy is not working as well as it could or should. *Id.*

⁴ See *infra* Part I.A. This section addresses the many negative reports on the retention policy. Specifically, it addresses the earlier criticism that a retention policy drives up later dropout rates. However, more recent studies conclude that a retention policy is neither helpful nor hurtful. See *infra* Part II.A.

⁵ See *infra* note 19 and accompanying text. See also Jay P. Greene & Marcus A. Winters, *Getting Ahead By Staying Behind: An Evaluation of Florida’s Program to End Social Promotion*, 6 EDUC. NEXT, No. 2, 65-66 (Spring 2006), available at http://educationnext.org/files/ednext20062_65.pdf. This study finds that the retention policy helps students in Florida raise retained students reading and math scores. See *id.* at 68. However, unlike the Chicago studies, this study only takes into account the

other hand, in 2002, Newark instituted the “Promotion with Intervention” program.⁶ This policy does the opposite, promoting students who are not academically on par with their peers.⁷

These policies and bills are aimed at helping the students most in need learn how to read. This is a noble effort, but in many respects, it has been in vain. Retaining students who are not reading on grade level assumes that students will succeed after repeating the same information for another year. Although conflicting studies have arisen as to whether retention affects later dropout rates, they conclude that retention is not the best solution for a struggling child.⁸ Likewise, promoting students who are unprepared will cause students to only fall further behind.

The best solution is earlier assessment and innovative intervention. This Comment proposes that children should be tested at the end of first grade, and if they are not on grade level for reading at that time, they should be placed in a reading intervention summer program and subsequently, in second grade, a similar program during and after class hours. This solution

results after one year. *Id.* at 69. The Chicago studies concluded that after two years the improvement made by repeating a year had worn away. *Id.*; see also *supra* note 3 and accompanying text. Greene and Winters’s study on Florida retention also differs from Chicago in that it allows a child to be held back as many times as needed. Greene & Winters, *supra* at 69. Greene and Winter also state that their study only categorizes limited benefits of the retention policy and no costs of it. *Id.*

⁶ Molly Moynihan, *Changing A Failing Promotional Standard: A Close Look at the Newark Public Schools District’s Hidden Social Promotion Policy*, 33 SETON HALL LEGIS. J. 609, 611 (2009).

⁷ *Id.*

⁸ See Shane R. Jimerson, et al., *Exploring the Association Between Grade Retention and Dropout: A Longitudinal Study Examining Socio-Emotional, Behavioral, and Achievement Characteristics of Retained Students*, 7 CALIF. ASS’N SCH. PSYCHOL. 51, 59 (2002). This study concludes that grade retention is not the answer to helping struggling students but rather the “implement[ation of] prevention and intervention programs that have been empirically demonstrated to meet the needs of these students in facilitating both positive academic success and socio-emotional adjustment.” *Id.* at 59. The study goes beyond looking at the facts of grade retention and dropout rates and looks at other factors and characteristics of the students who are retained and then dropout. *Id.* at 51. See also *White Paper: Grade Retention and Social Promotion*, NAT’L ASS’N SCH. PSYCHOL. 3 [hereinafter *White Paper*], available at http://www.nasponline.org/about_nasp/positionpapers/whitepaper_graderetentionandsozialpromotion.pdf (stating that “[n]either repeating a grade nor merely moving on to the next grade provides students with the supports they need to improve academic and social skills”).

seeks to address the problem at a younger age while not putting a “gate” in front of a child’s education.

This Comment will explore the policies of grade retention and social promotion and how the new Mississippi legislation fits into this jurisprudence. Part I will look at the Chicago policy, other state policies similar to the Chicago policy, the Newark policy, and the Mississippi legislation as compared to the legislation of other states. Part II will look at the statistics involved in grade retention and the dropout rate, potential reasons why children struggle with reading, and repercussions of a drastic retention policy on minorities. Part III will put forth a new solution for Mississippi that addresses the problems of unprepared and illiterate children. Finally, Part IV will compare the accountability between the Third Grade Gate and the solution this Comment puts forth while also considering counter-arguments.

I. BACKGROUND

A. *Chicago and Its Progeny: Ending Social Promotion*

Grade retention is based on the premise that if a child did not learn the material the first time, she should repeat it. Although this may be a helpful solution for some students, it affects thousands of children and generally the effects have been found to be more negative than positive.⁹

Chicago was one of the first places to institute a retention program—even before the No Child Left Behind Act was passed in 2001.¹⁰ Chicago implemented the retention policy for third grade, sixth grade, and eighth grade.¹¹ The policy was based on the test scores of students taken at the end of the school year, and retained students were tested again in January. However, after a few years, the retained students were no longer tested in January. The Chicago retention policy was the center of many studies and much criticism. The Consortium on Chicago School Research released a number of papers on different aspects of the retention

⁹ See *infra* Part II.A. This section specifically talks about the different studies and criticisms of a retention policy.

¹⁰ Chicago implemented the retention policy in 1996. See Moore *supra* note 3, at 2.

¹¹ *Id.*

program.¹² These studies took an in-depth look at the retention policy, and although they put forth some reservations, they generally concluded that it was a positive system. However, the studies did find a few less positive results. (1) The retention policy placed too much emphasis on one test.¹³ (2) The policy led to students being retained in grades without a retention policy because they may not be ready for the test.¹⁴ (3) Finally, the lowest performing students still struggled even after retention.¹⁵

Other studies have concluded that the retention policy raised the dropout rate and that retained students do not perform any better their second time around in the same grade.¹⁶ Parents United for Responsible Education claim that the policy is “injurious and discriminatory” to their children because it affects minorities the most.¹⁷ Parents United for Responsible Education

¹² See generally Melissa Roderick et al., *Ending Social Promotion: Passing, Retention, and Achievement Trends Among Promoted And Retained Students 1995-2000*, U. CHI. CONSORTIUM ON CHI. SCH. RES. (Sept. 2000), available at <http://ccsr.uchicago.edu/publications/update-ending-social-promotion-passing-retention-and-achievement-trends-among-promoted> (finding that more recent studies of the Chicago retention policy sixth graders show some improvement when not promoted in six grade, but this is not the case for third graders); Melissa Roderick et al., *Ending Social Promotion: Results from Summer Bridge*, U. CHI. CONSORTIUM ON CHI. SCH. RES. (Feb. 2003), available at <http://ccsr.uchicago.edu/publications/ending-social-promotion-results-summer-bridge> [hereinafter Roderick, *Results from Summer Bridge*]; Robin Tepper Jacob et al., *Ending Social Promotion: The Response of Teachers and Students*, U. CHI. CONSORTIUM ON CHI. SCH. RES. (Feb. 2004), available at <http://ccsr.uchicago.edu/publications/ending-social-promotion-response-teachers-and-students> (looking at changing dynamics between the teachers and the students due to the retention policy); Jenny Nagaoka & Melissa Roderick, *Ending Social Promotion: The Effects of Retention*, U. CHI. CONSORTIUM ON CHI. SCH. RES. (Mar. 2004), available at <http://ccsr.uchicago.edu/publications/ending-social-promotion-effects-retention> (finding that retention did not raise the test scores of third graders). These reports are part of a series of reports that were released on different aspects of the Chicago retention policy in an effort to categorize its benefits and costs.

¹³ Jacob et al., *supra* note 12, at 20.

¹⁴ Roderick, *Passing, Retention, and Achievement*, *supra* note 12, at 7.

¹⁵ Jacob et al., *supra* note 12, at 20-21.

¹⁶ Moore, *supra* note 3, at 3. See also Part II.A. for more in depth discussion on these criticisms.

¹⁷ Pepe Lozano, *Parents: Retaining Chicago Students is a Flunking System*, PEOPLE'S WORD (Dec. 10, 2010), <http://www.peoplesworld.org/parents-retaining-chicago-students-is-a-flunking-system/>. Parents United for Responsible Education is a Chicago based, non-profit membership organization that acts as a “resource for public school parents, providing information, support, training and advocacy.” *Id.* In 2010, the group filed a discrimination case against the United States Education Department for

also illustrate that the education of a child was traditionally the choice of the parent. The parent's choice included: how to educate the child and where to educate the child. Although these rights still exist in the private sector of education, they are not an option for lower income people who send their children to public schools. Under Chicago's new approach, testing scores now determine when a child is retained or promoted, effectively taking that decision away from the parents of children in the lower socio-economic income bracket.¹⁸

Even with these criticisms, many states and school districts have followed in this retention scheme. As of 2012, fourteen states plus the District of Columbia, but not including Mississippi, had a mandatory retention policy for children who did not score high enough on the standardized test for reading.¹⁹ With the institution of retention policies, the goals of the states, like Mississippi, are to improve reading proficiency in kindergarten through third grade.²⁰ However, the question remains whether a retention policy accomplishes this goal.

“unfairly flunking minority students” under the Chicago retention policy. *Id.* Studies showed that ninety-seven percent of students held back were minority students. *Results from Summer Bridge, supra* note 12, at 2.

¹⁸ See *infra* Part II.C.

¹⁹ Stephanie Rose, *Third Grade Reading Policies*, EDUC. COMM'N STATES 3 (Aug. 2012), available at <http://www.ecs.org/clearinghouse/01/03/47/10347.pdf>. This report provides a thorough list of the states with legislation affecting third grade reading intervention techniques and details the different interventions used by states. See generally *id.* The states requiring retention as of 2012 are: Arizona, Arkansas, California, Connecticut, Delaware, District of Columbia, Florida, Georgia, Iowa, Maryland, Missouri, North Carolina, Ohio, Oklahoma, and Tennessee. *Id.*

²⁰ See *id.* For a more specific example, compare the Florida retention policy goals to the Mississippi retention policy. Compare FLA. STAT. § 1008.31. (laying out the legislative intent, the mission, the goals and the measures being used to implement their new education acts which were first enacted in 2002), with MISS. CODE ANN. § 37-177-1 (1) (stating that “the purpose [of the retention policy] is to improve the reading skills of Kindergarten and First through Third Grade students enrolled in the public schools so that every student completing the Third Grade is able to read at or above grade level”). See also *infra* Part I(D)(2).

B. The More Than Retention Programs

1. Chicago Programs

Chicago also provided a “Summer Bridge” program and an afterschool “Lighthouse” program.²¹ These programs, along with the retention program, were aimed at ensuring the success of the retained students or students at risk for retention. Each summer, over 22,000 students participated in the Summer Bridge program, and the results were rather positive.²² Although it was not a substitute for school year instruction,²³ the children were positive about their experiences and their test scores were higher by the end of the summer.²⁴ Teachers who knew their students prior to the summer program and individualized the curriculum produced the best results.²⁵

The Lighthouse program was aimed at helping students after school to make the requisite test scores during the school year.²⁶ It started small and quickly grew to a sixteen million dollar program helping 81,000 students.²⁷ Schools were left to design their own afterschool programs, and many teachers taught the same basics as the day’s instructions.²⁸ This gave students a second chance to

²¹ Roderick, *Results from Summer Bridge*, *supra* note 12, at 2, 109; *see also* Jacob et al., *supra* note 12, at 2-3. The Summer Bridge was a summer program implemented with the Chicago retention policy. Roderick, *Results from Summer Bridge*, *supra* note 12, at 2. The goal of the program was to provide third-graders, sixth-graders, and eighth graders extra help to reach the test scores they needed. *Id.* at 109. The program included six weeks of class for three hours a day—eighth graders had class for seven weeks for four hours a day. *Id.* at 2. At the completion of the program, around eighty percent of the students were re-tested to see if they had improved above the required test score, and the reports showed that students had “substantial test-score gains.” *Id.* at 109. The Lighthouse Program was a similar program, but it targeted after school instruction during the school year, as opposed to a summer program. Jacob et al., *supra* note 12, at 2-3. The program slowly grew during the first years of the Chicago retention policy. *Id.*

²² *See* Roderick, *Results from Summer Bridge*, *supra* note 12, at 2, 109; Jacob, *Response of Teachers and Students*, *supra* note 12, at 2; *supra* note 20.

²³ Jacob et al., *supra* note 12, at 2-3.

²⁴ *See* Roderick, *Results from Summer Bridge*, *supra* note 12, at 110.

²⁵ *Id.* at 111.

²⁶ Jacob et al., *supra* note 12, at 2-3; *see also supra* note 20.

²⁷ Jacob et al., *supra* note 12, at 2-3.

²⁸ *Id.* at 3. The program was not mandatory but helpful for students who opted into it because it provided a smaller classroom size providing for a more individualized experience from the teacher. *Id.*

learn things they may have missed during the school day. In 2001, the program was renamed: “After School Counts,” and it began to look more toward external agencies for instructional support.²⁹

Although these programs were helpful, they were expensive, and they lacked the accountability needed to produce consistent results. However, the students that showed the greatest improvement were the ones that benefited from individualized and customized teaching.³⁰

2. Programs in Other States

Other states with a retention policy have followed Chicago’s lead and implemented similar intervention programs along with their retention policy.³¹ These programs are required in some states and recommended in other states.³² The programs include: (1) additional instruction during school hours, (2) additional instruction outside of regular school hours, (3) summer school like in Chicago, (4) “academic improvement plans” for children struggling with reading, (5) parental involvement in selecting the best “intervention strategy” or plan for their child, (6) parental involvement in the home, (7) individual or small group tutoring, (8) specialized lessons based on a child’s needs, (9) lessons on the computer or the internet, (10) contribution of a “reading specialist,” and (11) assurance that the child receives a different teacher once the child is retained.³³

These programs make the retention policies more effective. However, nearly all of these policies can be implemented prior to resorting to retention to ensure the child does not fall behind.³⁴

²⁹ *Id.*

³⁰ *See supra* notes 24, 25, & 27 and accompanying text.

³¹ *See supra* note 19 and accompanying text.

³² *See* Rose, *supra* note 19, at 2 (listing more specifically which programs are required in each state and which programs are recommended in each state).

³³ *Id.* For a general list of which programs in the Mississippi Literacy-Based Promotion Act are included, which programs are recommended, and which programs are required, see generally *infra* Part I.D.

³⁴ STEPHANIE ROSE & KAREN SCHIMKE, EDUCATION COMMISSION OF THE STATES, THIRD GRADE LITERACY POLICIES: IDENTIFICATION, INTERVENTION, RETENTION 11 (2012), available at <http://ecs.org/clearinghouse/01/01/54/10154.pdf>.

C. Newark and Social Promotion

Newark, New Jersey implemented the “Promotion with Implementation” program. This program promoted students regardless of whether they were prepared for the next grade or not. Similar to the retention policy, critics argue this is not the best policy to adopt. “First, promoting students who have not met specific academic requirements ‘neither increases student achievement nor properly prepares students for college and future employment.’”³⁵ Having high school graduates who cannot properly read or write fuel this criticism.³⁶

Critics also argue that social promotion, like grade retention, pressures teachers and principals.³⁷ This pressure can have a positive effect, providing a means for schools to provide more effective teaching methods, or it can have a negative effect, encouraging schools to promote students that would have been held back without the promotion program. Unlike with grade retention, teachers and principals are pressured to promote the child regardless of the child’s level at the end of the year, instead of pressuring them to retain the student.³⁸

Promoting a student who is not prepared also may give the child the idea that their success does not matter because they will go on to the next grade regardless.³⁹ Considering how certain policies affect a child’s mental well-being can have great effect on how the child views himself and his ability to succeed in the world. Illustrating to a child that their success does not matter can create low expectations for children and lead to dropping out.⁴⁰ Therefore, even with grade promotion, dropout rates are still a concern demonstrating that although forced grade promotion and

³⁵ Molly Moynihan, *Changing A Failing Promotional Standard: A Close Look at the Newark Public Schools District’s Hidden Social Promotion Policy*, 33 SETON HALL LEGIS. J. 609, 615 (2009) (quoting U.S. Dep’t of Educ., *Taking Responsibility for Ending Social Promotion: A Guide for Educators and State and Local Leaders* 4 (1999), <http://www2.ed.gov/PDFDocs/socialprom.pdf>). Moynihan argues that Newark’s social promotion policy violates the “promotion with intervention” policy of the Education Clause because social promotion does not allow “thorough and efficient” education. *Id.* at 613.

³⁶ *Id.* at 615.

³⁷ *Id.* at 616.

³⁸ *Id.*

³⁹ *Id.* at 615.

⁴⁰ *Id.*

forced grade retention are opposite approaches, neither solves the problem.

D. The Mississippi Gate

1. The Literacy-Based Promotion Act

The Mississippi Gate Legislation is formally named: Senate Bill 2347 the “Literacy-Based Promotion Act, established in public schools to achieve grade-level reading by end of 3rd Grade.”⁴¹ This Bill was signed by Governor Bryant at the same time as three other literacy and education based bills.⁴²

The Literacy-Based Promotion Act lists a number of general goals. The goals include: (1) improvement of the reading level of kindergarten through third grade students “so that every student completing the third grade is able to read at or above grade level;”⁴³ (2) institution of “intensive reading instruction and intervention” between grades one and three;⁴⁴ (3) prohibition of promotion of students not reading on grade level;⁴⁵ (4) the establishment of the “Mississippi Reading Panel” for the creation of reading assessments;⁴⁶ (5) prohibition of promotion based solely on age; (6) allowance of “[g]ood cause exemptions;”⁴⁷ (7)

⁴¹ S.B. 2347, 128 Legis. Sess. (Miss. 2013). The Bill is codified in section 37-177-1 of the Mississippi Code.

⁴² See *supra* note 1 and accompanying text.

⁴³ § 37-177-1.

⁴⁴ *Id.*

⁴⁵ *Id.* § 37-177-3(d).

⁴⁶ *Id.* § 37-177-5. “Mississippi Reading Panel” is made up of the Superintendent of Education or a designee therefrom, House and Senate Education Committee Chair or designee therefrom, an appointee by the Governor, and two additional appointees from the Superintendent of Education. *Id.* The three main roles of this panel are: (1) suggest appropriate comparable alternate assessments, (2) establish the score needed for promotion, and (3) establish a make-up test day for those students absent. *Id.*

⁴⁷ *Id.* § 37-177-11. “Good cause exemptions” include:

- (a) Limited English proficient students who have had less than two (2) years of instruction in an English Language Learner program;
- (b) Students with disabilities whose individual education plan (IEP) indicates that participation in the statewide accountability assessment program is not appropriate, as authorized under state law;
- (c) Students with a disability who participate in the state annual accountability assessment and who have an IEP or a Section 504 plan that reflects that the individual student has received intensive remediation in reading for more than two (2) years but still demonstrates a deficiency in reading and previously was retained in Kindergarten or First,

specification of actions school districts must take including sending annual reports to parents on their child's performance and publication in the local newspaper the overall student achievement levels for the year;⁴⁸ and (8) the allowance of the State Board of Education to adopt policies to implement the retention policy.⁴⁹

The retention policy states that students that are identified as having reading problems in kindergarten, first, second, or third grade "must be provided intensive interventions in reading."⁵⁰ These intensive intervention programs include "effective instructional strategies, and appropriate teaching methodologies."⁵¹ For retained students, the policy provides for "intensive instructional services, progress monitoring measures, and supports to remediate the identified areas of reading deficiency" through a minimum of a ninety minute scientifically-based reading program based on "phonics, fluency, vocabulary, and comprehension."⁵² The policy also puts forth a number of strategies for school districts to use to accomplish these goals. It lists small groups, smaller teacher/student ratios, tutoring based on "scientifically . . . based reading services," transition classes,

Second or Third Grade; (d) Students who demonstrate an acceptable level of reading proficiency on an alternative standardized assessment approved by the State Board of Education; and (e) Students who have received intensive intervention in reading for two (2) or more years but still demonstrate a deficiency in reading and who previously were retained in Kindergarten or First, Second or Third Grade for a total of two (2) years and have not met exceptional education criteria. A student who is promoted to Fourth Grade with a good cause exemption shall be provided intensive reading instruction and intervention informed by specialized diagnostic information and delivered through specific reading strategies to meet the needs of each student so promoted. The school district shall assist schools and teachers in implementing reading strategies that research has shown to be successful in improving reading among students with persistent reading difficulties.

Id.

⁴⁸ *Id.* §§ 37-177-3, 37-177-17.

⁴⁹ *Id.* § 37-177-19.

⁵⁰ *Id.* § 37-177-1(4). *See also id.* § 37-177-13. The retention policy also provides that students who are not promoted at the end of the third grade should receive "intensive instructional services," "monitoring," and "supports." *Id.*; *see also supra* note 47 and accompanying text.

⁵¹ *Id.* § 37-177-1(4).

⁵² *Id.* § 37-177-13(a).

longer school day, week, or year, and summer reading camps.⁵³ Retained students will also participate in a “Read at Home” plan with their parents and receive the benefit of being taught by a “high-performing teacher.”⁵⁴

The retention policy provides for the creation of vague “intensive interventions”⁵⁵ for children that are struggling with reading before third grade. However, after retention, it provides for the creation of more concrete and specific services leaving many of the particular decisions up to each individual school district.⁵⁶

2. Retention in Mississippi versus Retention in Florida

Studies have concluded that retention is not the most effective strategy for ensuring that children learn to read.⁵⁷ Studies have also concluded that third grade may be too late—meaning the child is too old—to effectively teach a child how to read.⁵⁸ Although retention may not be the best solution, different retention policies have proven to be more or less successful. The more successful retention policies have implemented *mandatory* intervention programs alongside their retention policies.⁵⁹

Parts of the Mississippi retention policy or Third Grade Gate are taken verbatim from the Florida retention policy implemented in 2002.⁶⁰ Florida implemented a retention policy for third graders who failed to receive a score of at least two on the Florida Comprehensive Achievement Test.⁶¹ The goal of the Florida retention policy is similar to the Mississippi retention policy. The Florida retention policy focuses on “reading, writing, science, and

⁵³ *Id.*

⁵⁴ *Id.* § 37-177-13(c)-(d).

⁵⁵ *Id.* § 37-177-1(4) and *supra* notes 45-46 and accompanying text.

⁵⁶ *See supra* notes 47-49 and accompanying text.

⁵⁷ *See also* ROSE & SCHIMKE *supra* note 34, at 11. This report explains the differences in the Florida and New York retention policy, makes recommendations for legislatures, and ultimately concludes that early intervention is needed but that retention may not be the best option. *Id.*; *see also infra* Part II.A.

⁵⁸ *See infra* notes 80-81, 104 and accompanying text.

⁵⁹ *See supra* Part I.B.(providing a comprehensive list of all the intervention programs different states have implemented).

⁶⁰ *Compare* FLA. STAT. § 1008.25(7) with MISS. CODE ANN. § 37-177-13.

⁶¹ ROSE & SCHIMKE, *supra* note 34, at 6. The law was passed as S.B. 20E, but it was codified in section 1008.25 of the Florida Statutes.

mathematics;⁶² whereas, the Mississippi policy focuses solely on reading.⁶³ Both policies seek to improve student's ability in school through instructional interventions, even if that calls for retention. However, the two policies do have notable differences.

The Florida retention policy calls for “[e]ach district school board [to] establish a comprehensive plan for [each] student[’s] progression;”⁶⁴ while, the Mississippi policy does not provide for an individualized reading strategy. The Florida retention policy also requires students to take established assessments between kindergarten and second grade, and the students who do not score a three on the tests are given “progress monitoring plan[s]” to help further evaluate their progress.⁶⁵ The Mississippi policy turns the assessment requirement into a recommendation for assessments to be given, and, although like the Florida policy it calls for immediate “intervention” when a reading deficiency is identified, it does not provide any formal method for identifying a reading deficiency.⁶⁶ The Mississippi policy also fails to list specific intervention methods for children before third grade;⁶⁷ whereas, the Florida policy lists the creation of an “individual education plan” or “progress monitoring for all students” or “[a]n individualized progress monitoring plan.”⁶⁸ These small differences make the Florida policy more specific than the Mississippi policy.

Both retention policies provide for informing the parents of their child's “reading deficiency” and exemptions for children who can show “good cause.”⁶⁹ The good cause exemptions are basically the same with one notable difference: Florida provides for students to be promoted based on their “student portfolio.”⁷⁰ A student portfolio shows that the student is performing at the same grade level needed to be promoted with the annual assessment.

⁶² FLA. STAT. § 1008.25(1).

⁶³ MISS. CODE ANN. § 37-177-1(1).

⁶⁴ FLA. STAT. § 1008.25(2).

⁶⁵ *Id.* § 1008.25(4).

⁶⁶ MISS. CODE ANN. § 37-177-1(3).

⁶⁷ *Id.* § 37-177-1(4) (stating that children identified with a deficiency should be “provided [with] intensive interventions”).

⁶⁸ FLA. STAT. § 1008.25(4).

⁶⁹ *Id.* §§ 1008.25(5)(c), 1008.25(6); MISS. CODE ANN. §§ 37-177-11, 37-177-13.

⁷⁰ FLA. STAT. § 1008.25(6)(b)4.

This provision allows students who do not test well but know how to read to still have the opportunity to be promoted. Mississippi does not have a similar provision.

Both policies call for the reporting⁷¹ of retention and also provide similar intervention strategies for retained third graders, including a “high performing teacher.”⁷² However, Florida requires students to participate in “summer reading camp[s];”⁷³ whereas, although the Mississippi policy lists the same “intensive instructional services,” summer reading camps are not mandatory but only recommended.⁷⁴ Also, this past year, Florida amended its policy deleting the requirement to provide students with a “Read at Home” plan.⁷⁵ A “Read at Home” plan remains in the Mississippi policy.⁷⁶

Both policies call for the creation of acceleration classes for retained students;⁷⁷ however, the Mississippi policy is not quite as specific. The Florida policy lists what the class should accomplish, while the Mississippi policy does not list the goals of the class.⁷⁸ The Mississippi policy, also, only makes the class available for students who were retained before third grade and are retained again in third grade.⁷⁹

The Mississippi policy, unlike the Florida policy, calls for the establishment of a “Mississippi Reading Panel” for the recommendation of “appropriate equitable alternative standardized assessments.”⁸⁰ The Florida policy does not call for the creation of a reading panel or anything similar to a reading panel, but it does specifically identify the different assessments required by students as listed under section 1008.22 of the Florida Statutes Annotated.⁸¹

The Mississippi retention policy and the Florida retention policy have many significant similarities; however, their

⁷¹ Compare FLA. STAT. § 1008.25(5)(c) with MISS. CODE ANN. § 37-177-13.

⁷² Compare FLA. STAT. § 1008.25(7)(b)(4) with MISS. CODE ANN. § 37-177-13(c).

⁷³ FLA. STAT. § 1008.25(7).

⁷⁴ MISS. CODE ANN. § 37-177-13.

⁷⁵ FLA. STAT. § 1008.25(7).

⁷⁶ MISS. CODE ANN. § 37-177-13(d).

⁷⁷ Compare FLA. STAT. §§ 1008.25(7), 1008.25(5) with MISS. CODE ANN. § 37-177-15.

⁷⁸ *Id.*

⁷⁹ MISS. CODE ANN. § 37-177-15.

⁸⁰ *Id.* § 37-177-5.

⁸¹ FLA. STAT. §§ 1008.25(4), 1008.25(6).

differences illustrate the specificity of the Florida policy because it requires certain intervention methods and assessment methods. Although it is possible that the Mississippi policy will become more specific with time, as the policy stands now, it lacks enforceability and therefore lacks the ability to fully succeed. Policies that are more specific and have more requirements, not recommendations, are the more successful policies.⁸² Moreover, Mississippi should quickly take note of the recent changes in the Florida policy because these changes show which provisions did not work. Although retention fails to take into account the whole child⁸³ or address the actual root problem, a retention policy need not create more problems of enforcement because it lacks specificity or clarity.

II. A DIFFERENT WAY OF LOOKING AT ILLITERACY

A. Retention versus Dropout

Statutory retention for a school district or state has been the topic of many studies over the past twenty years. These studies have inconsistent findings. They range from finding retention raises later dropout rates⁸⁴ to finding the effects of retention are “less negative.”⁸⁵

⁸² *White Paper, supra* note 8, at 3 (citing Heather A. Powell, *Third Grade Retention and Florida's Pupil Progression Plan: Individual and School Characteristics Associated with Long-Term Outcomes in Reading Performance* (June 1, 2007), available at <http://scholarcommons.usf.edu/cgi/viewcontent.cgi?article=3325&context=etd> (Doctoral dissertation, University of South Florida) (stating the problem with many retention programs is the absence of “systems to monitor implementation of these regulations”).

⁸³ *See supra* Part II.B. (explaining the importance of considering the whole child in writing legislation that affects the child).

⁸⁴ Shane R. Jimerson, *Winning the Battle and Losing the War: Examining the Relation Between Grade Retention and Dropping Out of High School*, 39 *PSYCHOLOGY IN THE SCHOOLS* 441, 441-57 (2002), available at <http://www.seg.guanajuato.gob.mx/Ceducativa/CartillaB/6antologia/antecedentes/pdf/35-%20WINNING%20THE%20BATTLE%20AND%20LOSING%20THE%20WAR%20EXAMINING%20THE%20RELATION%20BETWEEN%20GRADE%20RETENTION%20AND%20DROPPING%20OUT%20OF%20HIGH%20SCHOOL.pdf> (finding that retention was a predictor for students eventually dropping out of school based on seventeen studies).

⁸⁵ *White Paper, supra* note 8 at 2, 3 (citing Guanglei Hong & Bing Yu, *Effects of Kindergarten Retention on Children's Social-Emotional Development*, 44 *DEVELOPMENTAL PSYCHOL.* 407 (2008); Jan N Hughes et al., *An Investigation of the Relationship Between Retention in First Grade and Performance on High Stakes Test in*

On the other side of the spectrum, more recent studies have taken into account other factors that may lead to dropout rates aside from retention. Among these factors is the “pre-retention difference between students selected for retention intervention and promoted peers.”⁸⁶ These studies concluded “less negative” effects of retention, but the effects of retention are also not per se positive.⁸⁷

One study found that “[r]etained students often show a sharp improvement, relative to promoted peers, in meeting grade level standards during the repeat year, when retained students are exposed to a familiar curriculum; however, this improvement often disappears [two] to [three] years subsequent to retention.”⁸⁸ Other studies have found a faster increase in math and reading in the long term when comparing “aged-based scores” of retained children to non-retained as paralleled to comparing “grade standard scores” of retained and non-retained children.⁸⁹ These conflicting, semi-positive conclusions are weak at best and fail to really consider much about the long-term effects of retention and dropout.

The longitudinal study performed by Shane R. Jimerson and his colleagues at the University of California concluded that many factors play into student retention and subsequent dropout.⁹⁰ The

3rd Grade, 32 EDUC. EVALUATION AND POL'Y ANALYSIS 166; Wei Wu, et al., *Effect of Retention in First Grade on Children's Achievement Trajectories Over Four Years*, 100 J. EDUC. PSYCHOL. 727 (2008)). The later studies have taken into account pre-existing differences between students who are retained and students who are promoted. *White Paper*, *supra* note 8 at 1. Considering pre-existing conditions provides another factor weighing into post retention problems such as dropping out. *Id.*

⁸⁶ *White Paper*, *supra* note 8 at 2 (citing Chiharu S. Allen, et. al., *Quality of Research Design Moderates Effects of Grade Retention on Achievement: A Meta-analytic, Multi-level Analysis*, 31 EDUC. EVALUATION POL'Y ANALYSIS 480 (2009)); *see also supra* note 84 and accompanying text. Researchers reached this conclusion after conducting twenty-two different studies over a span of seventeen years. *White Paper*, *supra* note 8 at 2.

⁸⁷ *White Paper*, *supra* note 8 at 2.

⁸⁸ *White Paper*, *supra* note 8 at 2 (citing KARL L. ALEXANDER ET AL., *On the Success of Failure: A Reassessment of the Effects of Retention in the Primary Grades* (2003); Wei Wu, et al., *Effect of Retention in First Grade on Children's Achievement Trajectories Over Four Years*, 100 J. EDUC. PSYCHOL. 727 (2008)).

⁸⁹ *Id.* at 2-3. “Age-based scores” are based on the age of the child; versus, “grade standard scores” are based on the grade of the child. *Id.*

⁹⁰ *See Jimerson et al., supra* note 8. In considering the many factors playing into a child's eventual dropout after being retained, Jimerson and his colleagues did not rule out

study found that socio-emotional problems, behavior problems, low academic achievement, the mother's education level, and the value placed on education all affect dropout rates.⁹¹ This study shows that retention plays into dropout rates, but the relationship may not be a simple, direct one. Although these studies differ in their immediate conclusion on the effects of dropout and retention, their end conclusion remains the same: retention policies are not the answer.⁹²

B. *Psyche of a Child*

When considering a better solution, aside from retention or promotion policies, the answer needs to consider the whole child, like the Harlem Children's Zone.⁹³ Children targeted by this legislation are generally low-income African American or Hispanic children.⁹⁴ In an article entitled *Racial Disparities in Educational*

retention playing into a child dropping out of school. *See id.* This differs from other studies that concluded a child's pre-existing problems could possibly rule out retention as being the cause of a child dropping out. *See supra* notes 85-86 and accompanying text.

⁹¹ *See* Jimerson, et al., *supra* note 8, at 53, 55-56.

⁹² *White Paper*, *supra* note 8, at 5.

⁹³ Although legislation may not be able to consider the whole child to the extent that the Harlem Children's Zone does, the Harlem Children's Zone, founded by Geoffrey Canada, provides a model of a program that considers the whole child. *See* HARLEM CHILDREN'S ZONE, <http://hcz.org/index.php> (last visited Mar. 3, 2014). *The New York Times* has described the Harlem Children's Zone as a program that "combines educational, social and medical services. It starts at birth and follows children to college. It meshes those services into an interlocking web, and then it drops that web over an entire neighborhood." Paul Tough, *The Harlem Project*, N.Y. TIMES, June 20, 2004, available at <http://www.nytimes.com/2004/06/20/magazine/the-harlem-project.html?pagewanted=all&src=pm>. The whole child is considered in this project because "[i]t operates on the principle that each child will do better if all the children around him are doing better." *Id.*

⁹⁴ Lawyers' Committee for Civil Rights Under Law, *Racial Disparities in Educational Opportunities in the United States*, 6 SEATTLE J. FOR SOC. JUST. 591, 600-01 (2008), available at http://www.law.seattleu.edu/Documents/sjsj/2008spring/Brittain%20v.7.3_FINAL.pdf (explaining that nationwide lower-income students score lower on tests than do higher-income students, meaning that lower-income students are most affected by a retention policy). The article explains that in recent years, schools and school districts have become more segregated, and school districts with more lower-income children have less money and therefore fewer resources. *Id.* These problems affect the lower test scores of minority students and expansion of what has been called the "achievement gap." *Id.*, *see also* Lozano, *supra* note 17 (stating that minority children are the most affected by retention policies); *White Paper*, *supra* note

Opportunities in the United States, the Lawyers' Committee for Civil Rights Under Law stated, "Government reports and other entities in the United States use the term 'achievement gap' to describe a nationwide phenomenon where lower-income Black and Latino students as a group perform worse academically and score lower on standardized tests than their peers."⁹⁵ One of the reasons for this 'achievement gap' is the lack of resources available to minority students.⁹⁶

1. The Priorities of Poverty

Many of these children live in one parent households⁹⁷ in lower socio-economic neighborhoods where illicit underground economies are often present⁹⁸ and crime is prevalent. Studies have shown that children born in one parent households are more likely to face "cognitive, emotional, and behavioral problems,"⁹⁹ and

8 at 1 (stating that the "the highest retention rates are found among poor, minority, and inner-city youth.").

⁹⁵ Lawyers' Committee for Civil Rights, *supra* note 94 at 600.

⁹⁶ *Id.* at 600-01.

⁹⁷ See generally Jennifer L. Romich et al., *When Working Harder Does Not Pay: Low-Income Working Families, Tax Liabilities, and Benefit Reductions*, FAMILIES IN SOCIETY: THE JOURNAL OF CONTEMPORARY SOCIAL SERVICES, 419-20 (2007), available at <http://faculty.washington.edu/romich/homepage/RomichSimmelinkHolt2007.pdf> (showing the struggle of two single parent households through case studies). See also *supra* notes 66, 67, 69 and accompanying text.

⁹⁸ See SUDHIR ALLADI VENKATESH, OFF THE BOOKS: THE UNDERGROUND ECONOMY OF THE URBAN POOR 8-14 (First Harv. Univ. Press paperback ed. 2008) (outlining how and where an underground economy functions as an economy based on the sale of drugs).

⁹⁹ Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social, and Emotional Well-Being of the Next Generation*, 15 FUTURE CHILD. 75, 78 (2005), available at http://futureofchildren.org/futureofchildren/publications/docs/15_02_05.pdf. Cognitive, emotional, and behavioral problems can also be seen in children of divorced parents. *Id.* at 77. Studies have found that children with divorced parents and children who were born with unmarried parents generally have comparable problems. *Id.* at 78. For instance, thirty-one percent of children with divorced parents dropped out of high school as did thirty-seven percent of children born with unmarried parents. *Id.* Also, both kinds of family life make a child more prone to thinking his marriage will end in divorce, not setting goals for "occupational attainment," and depression. *Id.* These problems also occur if a parent lives with someone he or she is not married to because the fear of the relationship ending wears on a child. *Id.* at 78-79.

studies have also shown that these children face more learning problems.¹⁰⁰

The number one concern of a child should be learning, but the number one concern of these children may be caring for a younger sibling, eating,¹⁰¹ or family issues.¹⁰² Moreover, learning to read may be harder for a minority student who does not speak much English at home or that is an immigrant; and therefore, even though the Mississippi legislation provides a “good cause exemption” for children who are “[l]imited English proficient students,”¹⁰³ the new Mississippi legislation will still affect them.

¹⁰⁰ See Suet-ling Pong et al., *Family Policies and Children's School Achievement in Single- Versus Two-Parent Families*, 65 J. OF MARRIAGE & FAM. 681, 690, 692 (2003), available at <http://www.eui.eu/Personal/Dronkers/articles/Journalmarriagefamily2003.pdf>. This article stated that single parent households significantly affect specifically math and science scores in the United States and most other modernized countries. *Id.* at 690. However, the gap in test scores in the United States and New Zealand is greater than other countries. *Id.* at 692. One factor contributing to this gap is the fewer resources in a single-parent household. *Id.* See also Jung-Sook Lee & Natasha K. Bowen, *Parent Involvement, Culture Capital, and the Achievement Gap Among Elementary School Children*, 43 AM. EDUC. RES. J. 193, 194 (2006), <http://www.sagepub.com/kgrantstudy/articles/14/Lee.pdf>. This article states that parent involvement with a child's school and home life can “mediate the effects of poverty, parents' educational attainment, and race/ethnicity on [the] achievement [gap].” *Id.* See also Dalun Zhang et al., *The Impact of Basic-Level Parent Engagements on Student Achievement: Patterns Associated with Race/Ethnicity and Socioeconomic Status*, 22 J. OF DISABILITY POL'Y STUD. 28, 28 (2011), <http://numerous.files.wordpress.com/2012/04/56-the-impact-of-basic-level-parent-engagements-on-student-achievement.pdf> (finding that improving student achievement on tests and in the class room is linked to parent involvement in the child's education).

¹⁰¹ According to the World Hunger Education Service, “In 2010, 17.2 million households, 14.5 percent of households (approximately one in seven), were food insecure, the highest number ever recorded in the United States.” *Hunger in America: 2013 United States Hunger and Poverty Facts*, HUNGER NOTES, (last visited Mar. 3, 2014), http://www.worldhunger.org/articles/Learn/us_hunger_facts.htm.

¹⁰² See *supra* notes 99-100 and accompanying text. Studies have shown parental involvement in a child's education has been a factor that can help mitigate the problems with achievement and behavior faced by children in single family homes or lower income homes. Lee & Bowan, *supra* note 100, at 194. See also Romich, *supra* note 97 (highlighting the many obstacles faced by families with low-income); Jason DeParle, *Better Work Than Welfare. But What if There's Neither*, N.Y. TIMES, (Dec. 18, 1994), available at <http://www.nytimes.com/1994/12/18/magazine/better-work-than-welfare-but-what-if-there-s-neither.html> (exploring the timeless struggle of welfare versus a minimum wage job).

¹⁰³ MISS. CODE ANN. § 37-177-11(a). To qualify for this exemption a child must “have had less than two (2) years of instruction in an English Language Learner program.” *Id.* Studies have shown that “students from ethnically/linguistically diverse

If the number one concern of children is not learning and the resources are lacking—resources that will help close the achievement gap—the best solution is one that addresses both of these problems. Retaining a student will not improve the learning environment or the resources available. Addressing the symptom does not solve the problem.

Studies have concluded that if students think testing goals are unattainable they will “becom[e] more, not less, disengaged.”¹⁰⁴ A child must feel like he is important, that his success matters to his parents, his teachers, and his school. Simply requiring a child to repeat a grade may not be what is best for his learning needs. Children need to feel important and cared for in order to succeed in the short term; and in the long term, providing more individualized attention for children who are struggling may be all they need in order to succeed. Moreover, children learn in different ways and at different rates; therefore, if they are struggling, more individualized programs may address this problem.¹⁰⁵ A blanket retention policy does not allow room to consider what is individually best for each child.

2. Early Identification and Intervention, Earlier than Third Grade

Recent studies have also concluded that earlier identification and intervention of a reading problem helps to ensure that a child rises to the correct grade level of reading.¹⁰⁶ Therefore, a third

backgrounds were most likely not to make adequate yearly progress.” See Zhang *supra* note 100, at 28.

¹⁰⁴ See Jacob et al., *supra* note 12, at 3-4.

¹⁰⁵ See Margaret Semrud-Clikeman, *Research in Brain Function and Learning*, AM. PSYCHOL. ASS'N, (last visited Mar. 3, 2014), <http://www.apa.org/education/k12/brain-function.aspx?item=2> (explaining that each person’s brain does not mature at the same rate; therefore, children need instruction that is appropriate for their individual maturity level). This article provides scientific reasoning behind why children benefit from individualized academic lessons and programs. *Id.* See also Rose *supra* note 19, at 2 (listing the different intervention strategies used by states along with retention including individualized assessment plans and individualized instruction); *supra* note 33 and accompanying text.

¹⁰⁶ *Closing the Gap for Reading Success in the Early Years*, NEMOURS, 2 (June 2013), <http://www.nemours.org/content/dam/nemours/wwwv2/filebox/service/health/brightstart/about/earlyliteracybrief.pdf> [hereinafter *Closing the Gap*]. This article makes recommendations for Congress and the US Department of Education to help children learn how to read. *Id.* at 2-3. It focuses on considering a child’s development

grade retention policy is too late to ensure that a child reaches the correct reading level.¹⁰⁷ As the longitudinal study concluded, “prevention and intervention programs” help a child reach the reading level.¹⁰⁸ Early prevention and intervention programs look more to the root of the problem, instead of addressing the symptoms. Catching a child before she fails illustrates a prevention program. Providing a way for that child to learn in a better, more individualized environment illustrates an intervention program.

The Mississippi Literacy-Based Promotion Act states that *with retention* the child will receive the benefit of small groups, smaller teacher-student ratios, tutoring based on “scientifically research-based reading services,” transition classes, longer school day, week, or year, and summer reading camps.¹⁰⁹ Before retention, the retention policy calls for “intensive intervention,” but this vague assertion does not carry much with it. Since the more specific reading intervention programs come into play after

and reading between the ages of zero to five. *Id.* The article explains that teaching children to learn and figuring out which children are struggling at a younger age will better ensure their ability to learn to read as they get older. *Id.* at 4. It states:

Reading programs become more costly and less effective as children move to each successive grade; catch-up growth in schools is very expensive and historically not successful. In fact, if a child is not reading on grade level by the end of first grade, he or she has only about a 10 percent chance of reading on grade level at the end of fourth grade.

Id.

¹⁰⁷ See *id.*

¹⁰⁸ See Jimerson, *supra* note 8, at 59 and accompanying text. As of 2012, fifteen states have implemented intervention programs without implementing an intervention program. Rose, *supra* note 19, at 2-3. Some states had mandatory intervention programs and others had recommended intervention programs. *Id.* See also *supra* notes 31-33 and accompanying text (list of interventions). Of the fourteen states plus the District of Columbia that have a mandatory retention policy, all fourteen states plus the District of Columbia have some sort of intervention programs that are either recommended or required along with the retention policy. Rose, *supra* note 19, at 2, 7. With the exception of Delaware, Maryland, Missouri, Tennessee, and West Virginia, the states implementing intervention programs offer interventions—either required or recommended—for grades kindergarten thru third, not just third grade. *Id.* at 7-8. However, although these interventions exist, the question remains whether they are being properly implemented and are effective. See *White Paper*, *supra* note 8, at 3-4 (stating that “effective intervention strategies that provide educational opportunities and assistance to promote the social and cognitive development of students” is needed).

¹⁰⁹ See MISS. CODE ANN. § 37-177-13(a) (entitled “Actions required of school districts for grade 3 students not promoted to grade 4”).

the child has been retained, the retention policy does not prevent a child from failing. A proactive program would put reading aids in place long before retention was even considered.

C. Marginalization of the Lower-Socio-Economic Child

The ability to read opens up many doors in our society. The United States Constitution does not mention the right to an education; yet, the institution of the public school system and compulsory school attendance laws¹¹⁰ make education available and required for all children. During the twentieth century, equality in schools became one of the goals of the education system. In 1955, the Supreme Court held in *Brown v. Board of Education of Topeka, Kansas* that segregated schooling was unconstitutional and not equal for children.¹¹¹ Yet, even with the push for equal schooling, many lower-income students live in poorer school districts and face many more reading problems than their counter-parts from higher-income families in wealthier school districts. The Third Grade Gate has an admirable goal: to minimize or even eliminate reading problems in Mississippi. However, to accomplish this goal, the gate marginalizes poor and minority students in two ways.

First, retention policies affect minority students more than other students.¹¹² Even with all of the conflicting research on dropout rates and retention, nearly every study concluded that retention policies are not the best mode of teaching a child to read.¹¹³ The retention policy makes one very important assumption: because a child could not learn to read the first time, repeating the grade with more instruction will change this outcome. It provides for many programs, but it does not begin to consider looking at the *reason* why the child is struggling as stated in the above section: *Psyche of a Child*.

¹¹⁰ MISS. CODE ANN. § 37-13-91 (stating the requirement of compulsory school attendance for all children in Mississippi).

¹¹¹ 349 U.S. 294 (1955).

¹¹² See Lawyers' Committee on Civil Rights, *supra* note 94, at 600-01, *see also supra* notes 93-95 and accompanying text. In Chicago, Parents United for Responsible Education claim that the retention policy affects minorities the most. Lozano, *supra* note 17.

¹¹³ See *supra* notes 92, 105-06 and accompanying text.

Second, as mentioned above as a criticism of the Chicago retention policy in Section I.A: *Chicago and Its Progeny*,¹¹⁴ parents of retained students lose the right to make choices about their child's education. Parents United for Responsible Education illustrates an attempt from minority parents to have a voice in their child's education.¹¹⁵ The loss of rights is nothing new for minority parents or parents of the lower socio-economic class. Depending on the government for education, welfare, and housing also comes with the loss of decisions because the government makes many decisions for those living in poverty. The Third Grade Gate is only one example of this paternalism.

Until the implementation of gates through test taking and children's test scores, parents were able to make or participate in the decision of whether to retain or promote their child. The retention policy, based almost solely on test scores, takes away any deference of parents, and it takes away any opportunity for a parent or teacher to individually tailor a solution for each child.¹¹⁶ Although the retention policy states that parents must be informed of their child's progress or retention, the parent does not have the ability to make any decisions about their child's progress or retention.¹¹⁷ Therefore, this legislation in effect further marginalizes the lower-socio-economic class.

III. AN ALTERNATIVE APPROACH TO SOLVING ILLITERACY – THE SWINGING DOOR

A. *Why Third Grade?*

Why does the testing address third graders? Third grade is the first grade with standardized testing in Mississippi to follow

¹¹⁴ See *supra* notes 17-18 and accompanying text.

¹¹⁵ See Lozano, *supra* note 17.

¹¹⁶ The Mississippi retention policy does not provide for the creation of any sort of formal individual education plan or evaluation plan that is individually tailored for the child. See Rose, *supra* note 19, at 7-8 (detailing which states provide for an individual "academic improvement program" for children who are struggling).

¹¹⁷ MISS. CODE ANN. § 37-177-13(b) (stating only that parents of retained students will be notified "that the student has not met the proficiency level required for promotion and the reasons the student is not eligible for a good cause exemption").

the requirement of the No Child Left Behind Act of 2001.¹¹⁸ Therefore, the simplest grade to implement a gate is third grade. However, children learn at different paces and in different ways. Instituting a “one size fits all” gate at third grade, serves to trap kids who need more innovative and individualized ways to learn,¹¹⁹ and it waits too late to really successfully address the illiteracy problem.¹²⁰

B. The Legislative Gap

Legislation is normally black and white: if the child does not pass the test, unless she falls into an exemption, she will be retained.¹²¹ However, the law in practice is gray. The goal of the Third Grade Gate is to “improve the reading skills of Kindergarten and First through Third Grade students”¹²² The law looks for a solution that is easily enforceable and works in the short term. The law fails to consider long-term goals outside of retention in third grade and before third grade, such as: high school graduation, higher education, and learning vocational skills. The inability to read causes a burden on society. Considering the importance of literacy over what is easily enforceable or what temporarily patches the problem of illiteracy is imperative. Therefore, enforcement of intervention programs is also imperative. The *White Paper* published by the National Association of Psychologists points out that states have “requir[ed] additional accelerated instruction to students at-risk for retention

¹¹⁸ *Mississippi Curriculum Test, Second Edition (MCT2)*, MISS. DEPARTMENT OF EDUC., <http://www.mde.k12.ms.us/student-assessment/student-assessment-mct2> (last visited Mar. 3, 2014).

¹¹⁹ See Margaret Semrud-Clikerman, *Research in Brain Function and Learning*, AM. PSYCHOL. ASS'N, <http://www.apa.org/education/k12/brain-function.aspx?item=2> (last visited Mar. 3, 2014) (outlining “the importance of matching instruction to a child’s maturity level”).

¹²⁰ See *Closing the Gap*, *supra* note 81 (explaining the importance of early identification of reading problems in children and early intervention).

¹²¹ 2013 Mississippi Senate Bill No. 2347, Mississippi One Hundred Twenty-Eighth Legislative Session (stating that a goal of the Literacy-Based Promotion Act is to provide “reading instruction and intervention to students exhibiting a substantial deficiency in reading in kindergarten and grades [one] through [three]; to prohibit the promotion of students whose reading deficiency is not remedied before the end of third grade. . . .”). The Bill is codified in section 37-177-1 of the Mississippi Code.

¹²² MISS. CODE ANN. § 37-177-1(1).

and to students who are retained in grade” but that “systems to monitor implementation of these regulations are virtually nonexistent.”¹²³

The Mississippi legislation falls into this hole or gap. The legislation appropriated nine and a half million dollars for the Third Grade Gate for grades kindergarten through third.¹²⁴ According to the Mississippi Department of Education, the appropriation should go to: training for teachers and faculty, employing and training literacy coaches, employing a literacy director, employing a literacy assistant director, and directing assessments related to retention policy’s requirements.¹²⁵ Literacy coaches provide support and help teachers become better at teaching students to read.¹²⁶ Whereas, the retention policy states that un-promoted third graders will be provided with “a high-performing teacher”¹²⁷ and the following:

[I]ntensive instructional services, progress monitoring measures, and supports to remediate the identified areas of reading deficiency, including a minimum of ninety (90) minutes during regular school hours of daily, scientifically research-based reading instruction that includes phonemic awareness, phonics, fluency, vocabulary and comprehension, and other strategies prescribed by the school district, which may include, but are not limited to: (i) Small group instruction; (ii) Reduced teacher-student ratios; (iii) Tutoring in scientifically research-based reading services in addition to

¹²³ *White Paper, supra* note 8, at 3 (citing Heather A. Powell, *Third Grade Retention and Florida’s Pupil Progression Plan: Individual and School Characteristics Associated with Long-Term Outcomes in Reading Performance* (June 1, 2007) (Doctoral dissertation, University of South Florida) available at <http://scholarcommons.usf.edu/cgi/viewcontent.cgi?article=3325&context=etd>.

¹²⁴ Meeting of Mississippi Department of Education, *Special Education Leadership Institute: Literacy-Based Promotion Act Update*, MISS. DEPARTMENT OF EDUC. (Sept. 26, 2013), available at <http://www.mde.k12.ms.us/docs/sped-powerpoints-page/3rd-Grade-Reading-Gate.pdf?sfvrsn=2>. The Chicago summer program had a budget of sixteen million in the 1990s and early 2000s. *See supra* note 27 and accompanying text.

¹²⁵ Meeting of Mississippi Department of Education, *supra* note 124.

¹²⁶ *Id.*

¹²⁷ MISS. CODE ANN. §§ 37-177-13(a), 37-177-13(c). The retention policy defines a high performing teacher as a teacher who shows high performance in “student performance data, particularly related to student growth in reading, above-satisfactory performance appraisals, and/or specific training relevant to implementation of this chapter.” *Id.* § 37-177-13(c).

the regular school day; (iv) The option of transition classes; (v) Extended school day, week or year; and (vi) Summer reading camps.¹²⁸

The retention policy focuses on intervention directly geared toward the child, but as per the Mississippi Department of Education goals, the school districts will be using the funds to focus on literacy coaches who train teachers presumably to become “high-performing teacher[s].”¹²⁹ Focusing most efforts on literacy coaches, turns the student centered approach of the retention policy into more of a teacher centered approach.¹³⁰ The retention policy allows for this disparity, stating that the Department of Education may adopt “policies, rules and regulations as may be necessary” to ensure the enforcement of the retention policy.¹³¹ However, the Department of Education’s policies do not ensure the enforcement of the *whole* retention policy.

If implemented, the programs listed on the retention policy mirror the Lighthouse and Summer Bridge programs used by Chicago, but, like Chicago, the Mississippi retention policy lacks the requirement of enforcement. The only semblance of enforcement comes in the form of reporting. The retention policy states that school districts must publish “in a newspaper having a general circulation within the school district” their “accountability results” for the past year and also report them to the State Board of Education.¹³² But these requirements, butted against the broad language of the retention policy, do not lead to much enforcement. For instance, the retention policy’s vague assertion that between the grades of one and three, children facing reading problems should benefit from “effective instructional strategies, and appropriate teaching methodologies”¹³³ does not provide any accountability for enforcement.

¹²⁸ *Id.* § 37-177-13(a).

¹²⁹ *Id.* § 37-177-13(c).

¹³⁰ The retention policy states that it includes: “[C]omponents necessary to provide for teacher training, instructional materials, remedial education training and administration of an intensive literacy curriculum [which all] shall be subject to legislative appropriation.” *Id.* § 37-177-21. Therefore, teacher training is an important aspect of the retention policy, but it is not the *only* aspect of the retention policy. *Id.*

¹³¹ *Id.* § 37-177-19(1).

¹³² *Id.* § 37-177-17(1).

¹³³ *Id.* § 37-177-1(4).

The vagueness of the retention policy allows for differentiation in interpretation between the school districts and therefore a disparate effect on the progress of students across the state. In theory, the legislation is a great promise to help struggling students to succeed. It should provide retained students with “reduced teacher-student ratios” and “reading services” to allow for a more individualized learning environment.¹³⁴ But, in practice, students will be retained and not receive the help they need to not only succeed in third grade the second time around, but to also succeed through high school.

C. The First Grade Swinging Door

By third grade, a student struggling to read has been struggling to read for almost three years before she is retained. The gap between the time when children start to learn to read in kindergarten and when children are tested to see if they can read on grade level in third grade is huge. Research shows that “if a child is not reading on grade level by the end of first grade, he or she has only about a [ten] percent chance of reading on grade level at the end of fourth grade.”¹³⁵

Under the First Grade Swinging Door solution, children should be tested by the end of first grade to see if they have already fallen behind. If they have fallen behind grade level, those children should attend a reading intensive summer program.¹³⁶ After a summer of personalized, intensive reading, the student should then be re-tested. If the student is still struggling, the student should then be placed in a special reading class for second grade. This special reading class should not be considered special education but a class for an individualized reading environment. This individualized reading environment will better address the

¹³⁴ *Id.* § 37-177-13(a).

¹³⁵ *Closing the Gap*, *supra* note 106, at 2.

¹³⁶ Of the fourteen states plus the District of Columbia that have instituted mandatory retention policies, six states have implemented a mandatory summer school or summer reading program, and five states have implemented a similar recommended program. Rose, *supra* note 19, at 3, 7-8. Chicago also started a “Summer Bridge” program for its retained students. See Roderick, *Results from Summer Bridge*, *supra* note 12.

needs of struggling children.¹³⁷ The child will be tested again half way through the school year in order to more individualize the program for the spring and then tested once more at the end of the school year. If the child is still struggling, then either retention could be considered or another round through the summer program. The Swinging Door is flexible depending on what parents and teachers deem is best for the child.

The Swinging Door provides for testing the students many times. This periodic testing may not be the most ideal method, but it is necessary to ensure accountability and enforcement in the school districts, making sure that the school districts are taking the requisite steps to help each child. The testing also allows for more ways to individualize each child's instruction based on her reading weaknesses. The Swinging Door will not create the side effects of increasing dropout rates associated with grade retention¹³⁸ or the distrust in the education system with social promotion.¹³⁹

As part of the Swinging Door legislation, school districts must not only inform parents about the progress of their children but must also educate parents on ways to read with their child and when their child should be reading on their own. Many parents do not know what is normal and abnormal for their child.¹⁴⁰ Lastly, the legislation will also provide funding for

¹³⁷ Individualized academic programs better address the needs of a child at his or her stage of development. See Semrud-Clikeman, *supra* note 105 (explaining that each child's brain does not mature at the same rate; therefore, children need instruction that is appropriate for their individual maturity level).

¹³⁸ See *supra* Part II.A.

¹³⁹ See *supra* Part I.C.

¹⁴⁰ The Harlem Children's Zone provides a wide range of services to children in Harlem. See *supra* note 93 and accompanying text. The success of Geoffrey Canada's programs is partly due to the fact that he does not assume parents know to enroll their children in his programs, and he does not assume parents know what is normal or abnormal for their children. Paul Tough, *The Harlem Project*, N.Y. TIMES, June 20, 2004, http://www.nytimes.com/2004/06/20/magazine/the-harlem-project.html?page_wanted=all&src=pm. He, instead, teaches parents what their children need and are capable of achieving. See *id.* (stating that "[if governments] fix the schools without fixing the families and the community, and children will fail."). He recruits children for each program he starts by going door to door and sometimes even offering prizes and groceries to parents who sign up their children for his programs. *Id.* The Harlem Children's Zone works to provide educational, safe and enjoyable activities for children, much like many wealthier neighborhoods have.

continuing research on childhood illiteracy and the best ways to solve the problem. Continued research is needed to ensure that the legislation grows and is changing with the new physiological developments.¹⁴¹

D. Support for the Swinging Door

The First Grade Swinging Door is not without support based on studies performed on other retention policies. The Summer Bridge Program, like the other summer school programs in other states with retention programs,¹⁴² helped students because of the better quality of interactions between teachers and students.¹⁴³ Although the Third Grade Gate states that school districts *may* implement “[s]ummer reading camps” for retained students, these camps are neither mandatory nor clear—the retention policy does not provide any guidelines or aid in forming the summer reading program.¹⁴⁴ The Chicago program was a success because of the smaller more individualized environment between the teachers and students; the Third Grade Gate does nothing to ensure these same successful criteria.¹⁴⁵

¹⁴¹ The current Mississippi retention policy mentions “research” in three places, but it is vague. It states under the “Good Cause Exemptions” that students who have been retained twice and have received interventions but are still struggling to read shall be promoted. MISS. CODE ANN. § 37-177-11(1)(e). When the student are promoted, they should receive “specialized diagnostic information,” and “[t]he school district shall assist schools and teachers in implementing reading strategies that research has shown to be successful in improving reading among students with persistent reading difficulties.” *Id.* The retention policy also states that children who are retained in third grade should receive the benefit of “scientifically research-based reading instruction” and “other strategies prescribed by the school district, which *may* include . . . [t]utoring in scientifically research-based reading services.” *Id.* § 37-177-13(a) (emphasis added). Ideally, legislation that is centered on education, on teaching children to read—a field that is constantly changing as scientific discovery and understanding of the human mind constantly changes—should put great emphasis on providing students with the newest scientific findings in education.

¹⁴² The Summer Bridge Program was instituted by Chicago along with its retention policy. See Roderick, *Results from Summer Bridge*, *supra* note 12; see also *supra* note 107 and accompanying text (explaining the different states that implemented a summer school program).

¹⁴³ See Roderick, *Results from Summer Bridge*, *supra* note 12, at 2-4.

¹⁴⁴ MISS. CODE ANN. § 37-177-13(a)(vi).

¹⁴⁵ See Roderick, *Results from Summer Bridge*, *supra* note 12, at 2-4.

Critics have repeatedly concluded that retention, alone, is not enough to improve literacy in the lowest scoring students.¹⁴⁶ Critics have also stated that forcing teachers to attain the goal of raising a child's reading level two to four years in one school year was very stressful.¹⁴⁷ The *White Paper* sets forth four recommendations in lieu of retention policies and social promotion:

- Multitiered problem-solving models to provide early and intensive evidence-based instruction and intervention to meet the needs of all students across academic, behavioral, and social-emotional domains
- Equitable opportunities to learn for students from diverse backgrounds
- Universal screening for academic, behavioral, and social-emotional difficulties
- Frequent progress monitoring and evaluation of interventions.¹⁴⁸

The Swinging Door looks more to the whole child, including aspects such as: ensuring parents are taught about their child's success and providing an individualized learning plan for each child. The Swinging Door, therefore, works from both ends of the spectrum, from family life to school life, much like the Harlem Children's Zone.¹⁴⁹ Finally, the longitudinal study concluded that

¹⁴⁶ See generally *supra* note 12 and accompanying text (outlining the problems and shortfalls of the Chicago retention policy). See also *White Paper*, *supra* note 8, at 3-4 (stating that "effective intervention strategies that provide educational opportunities and assistance to promote the social and cognitive development of students" is needed).

¹⁴⁷ See Roderick, *Results from Summer Bridge*, *supra* note 12, at 16-18.

¹⁴⁸ *White Paper*, *supra* note 8, at 5.

¹⁴⁹ *The New York Times* summed up Geoffrey Canada's work on improving the whole child by illustrating the importance of considering the different aspects of a child's life:

[Canada] agrees that the economy is stacked against poor people no matter how hard they work, but he also thinks that poor parents aren't doing a good enough job of rearing their children. . . . Fix the schools without fixing the families and the community, and children will fail; but they will also fail if you improve the surrounding community without fixing the schools.

Paul Tough, *The Harlem Project*, N.Y. TIMES, June 20, 2004, <http://www.nytimes.com/2004/06/20/magazine/theharlemproject.html?pagewanted=all&src=pm>.

retention was not the solution, but a better solution is “prevention and intervention,”¹⁵⁰ which is essentially the same recommendation set forth by the *White Paper* and consequently this Comment.¹⁵¹

IV. IMPLEMENTATION OF THE SWINGING DOOR

A. A Closer Look at the Swinging Door: Accountability and Research

One of the problems with the Third Grade Gate is accountability of teachers, schools, and school districts. After a child is retained in third grade, the retention policy provides for a number of non-mandatory intervention techniques including small groups and an extended school year.¹⁵² However, before retention,

¹⁵⁰ This Comment recommends that Mississippi work to prevent illiteracy by implementing mandatory screening procedures and consequent intervention at the younger age of first grade, as opposed to third grade. Recent scientific research concludes that earlier intervention is imperative to ensuring that children successfully learn how to read. See *Closing the Gap*, *supra* note 106. The current retention policy does not do anything to help prevent illiteracy; it does not provide mandatory or concrete help for children struggling to read before third grade. MISS. CODE ANN. § 37-177-1. The retention policy provides that children in kindergarten through third grade who are identified with a problem based on a “reading screener” or a “locally determined assessment[]” should:

[B]e provided intensive interventions in reading to ameliorate the student’s specific reading deficiency, as identified by a valid and reliable diagnostic assessment. The intensive intervention *must* include effective instructional strategies, and appropriate teaching methodologies necessary to assist the student in becoming a successful reader, able to read at or above grade level, and ready for promotion to the next grade. A Kindergarten, First, Second or Third Grade student identified with a reading deficiency or not promoted *may* be placed in a transition class.

Id. (emphasis added). The retention policy states that “intensive intervention” must be provided, but it fails to adequately and clearly describe what these intensive interventions are. *Id.* Moreover, the process in which the children struggling to read is also unclear. *Id.* “[R]eading screeners” and “locally determined assessments” are not mandatory at this time, according to the language of MISS. CODE ANN. § 37-177-1.

¹⁵¹ See Jimerson, *supra* note 8, and accompanying text.

¹⁵² MISS. CODE ANN. § 37-177-13. This section is entitled “Services for retained third grade students,” and it lists the following interventions that are not mandatory but may be “prescribed by the school district”: (i) Small group instruction; (ii) Reduced teacher—student ratios; (iii) Tutoring in scientifically research-based reading services in addition to the regular school day; (iv) The option of transition classes; (v) Extended school day, week or year; and (vi) Summer reading camps.” *Id.* § 37-177-13(a). The

the policy simply calls for teachers and administrators to identify children struggling with reading and provide “intensive interventions in reading” including “effective instructional strategies, and appropriate teaching methodologies.”¹⁵³ These vague conditions act more as suggestions than requirements.

Children in first and second grade should benefit from the small groups and intensive reading intervention programs that school districts have the ability to implement for retained third graders. By implementing the First Grade Swinging Door, safeguards would be in place from first grade through second grade to ensure that these younger children benefit from reading intervention techniques.

The First Grade Swinging Door differs from the current Third Grade Gate in that it is not a one-time test leading to retention. Children are tested at the end of first grade ensuring that every child struggling with reading is identified. Those children are then put through a mandatory summer intensive reading program, and then they are re-tested. If they are still struggling, they are then placed in a second grade intensive reading program where they are tested yet again in the middle of the year and at the end of the year. These steps, with periodic assessment and specific intervention programs, allow for the program to mold and change with each child’s needs, thus ensuring less children fall through the cracks.

According to an early literacy study, children should be on reading level by the end of first grade in order to ensure their success and ability to stay on their reading level through elementary school.¹⁵⁴ The study lists a number of ways to ensure early reading, including: small groups, strict monitoring and accountability, developmentally appropriate programming, training and professional development for families and educators,

retention policy only lists one mandatory intervention: “a minimum of ninety (90) minutes during regular school hours of daily, scientifically research-based reading instruction that includes phonemic awareness, phonics, fluency, vocabulary and comprehension.” *Id.*

¹⁵³ MISS. CODE ANN. § 37-177-1. *See also supra* note 119 and accompanying text (outlining the vague and unforceful nature of these provisions in the retention policy).

¹⁵⁴ *Closing the Gap*, *supra* note 106 at 2.

and priority grant funding to ensure research on literacy and the effects of the school environment on children.¹⁵⁵

The best way to overcome illiteracy is to continuously be able to change policies based on new knowledge about what causes illiteracy and how to solve it. To fully address the root of the problem and not just the symptoms, research along with strict accountability is needed.

B. Counter-arguments

Critics may argue that the Third Grade Gate is more drastic of a change than the proposed First Grade Swinging Door; therefore, the Third Grade Gate will force school districts to make more changes than a program that is not based on retention. Change is great, if it is the right change. Forcing the school districts to retain third graders not reading on grade level and then recommend the implementation of certain programs¹⁵⁶ to potentially help them read on grade level is a large amount of change. However, they are not the right changes. The right changes are earlier identification of reading problems and implementation of mandatory reading techniques—like the interventions the retention policy lists for retained third graders. This alternative solution makes just as much change as the current Third Grade Gate, but it tackles the problem of illiteracy at a younger age by providing hands on, individualized aid. It does not just address the symptoms.

Critics may also argue that the First Grade Swinging Door will not motivate parents, administrators, and teachers to work harder because there is no real deterrent like retention. For teachers and administrators, the numerous tests that the children will take between the end of first grade and second grade ensure accountability and hard work from their side of the equation. The Swinging Door is not a blanket retention policy, but it leaves open the ability to retain a second grader who has not been able to reach grade level reading even with the intervention methods. Therefore, in the end, the same outcome may happen. However, the non-blanket approach ensures that each child is considered on

¹⁵⁵ *Id.* at 3.

¹⁵⁶ *See supra* note 121 and accompanying text.

her own individual needs. When considering the motivation of parents, they may be more motivated because the legislature has not taken away their ability to have a say in their child's education. If anything, a parent's aid and insight into the reasons their child is struggling with reading may be helpful.

CONCLUSION

The question the legislature should be asking is: why are children not learning to read. Instead, the legislature is trying to fix the symptom: the inability to read. The current Third Grade Gate is a retention policy that may discourage students who are daunted by learning to read and may raise eventual dropout rates. The current Third Grade Gate also marginalizes minority students, assumes that a one size fits all policy will work for all students, and waits until third grade to make substantial steps to address the illiteracy problem.

To actually work toward a solution, not just a temporary fix for the symptoms, the best solution is early intervention and intensive, individualized reading programs. The First Grade Swinging Door provides for these solutions while also ensuring accountability and continued research.

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