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# KNOWLEDGE IS POWER: REFORM OF FOR-PROFIT EDUCATIONAL INSTITUTIONS ON AN INDIVIDUAL AND INSTITUTIONAL LEVEL

## ABSTRACT

*For-profit colleges and universities are taking an ever-increasing share of the educational market. The industry has, however, received negative attention in the media for low quality education and deceptive business practices, leaving students with few prospects and large student loan bills. These practices are pervasive despite regulation and disproportionately affect low-income and minority students.*

*The for-profit model is not inherently corrupt, but the fact that for-profit schools are regulated and treated in court like non-profit schools creates a set of incentives for bad business practices. The profit motive pushes for-profit schools to work around regulations, take advantage of federal financial aid and accreditation procedures, and spend millions of dollars on advertising and legal battles. It is also nearly impossible to bring lawsuits against schools under traditional state causes of action.*

*Reform of the industry is needed. At its best, for-profit education can help many and provide needed educational opportunities. Reform requires changes on both the individual and institutional level, meaning both changes to the overarching system and providing pathways for students to recover their losses. This Note suggests three strong roads to reform, including creating a federal cause of action under the Higher Education Act or other laws, regulation tailored to for-profit schools, and recognition of the need for self-policing.*

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## I. INTRODUCTION

For-profit colleges, also known as “proprietary schools,” “trade schools,” or “career colleges,” are postsecondary educational institutions that educate students while turning a profit.<sup>1</sup> At their best, for-profit educational institutions provide low-cost, accessible, and flexible training programs to largely nontraditional students.<sup>2</sup> The schools’ success has allowed them to expand outside their traditional niche of adult-only vocational training to provide greater access to bachelor’s and professional degrees.<sup>3</sup> The brand of educational opportunity offered by for-profit

1. Cheryl L. Auster, *Promising a Better Future but Delivering Debt: Understanding the Financial and Social Impact of For-Profit Colleges and the New Program Integrity Rules*, 13 SCHOLAR 631, 637 (2011); see also *About APSCU*, ASS’N OF PRIVATE SECTOR CS. & U., [http://www.career.org/iMISPublic/AM/Template.cfm?Section=About\\_CCA](http://www.career.org/iMISPublic/AM/Template.cfm?Section=About_CCA) (last visited Aug. 30, 2012) (The Association of Private Sector Colleges and Universities (ASPCU) provides voluntary membership association benefits to private schools with “career-specific educational programs.”).

2. See Joe Nocera, *Why We Need For-Profit Colleges*, N.Y. TIMES, Sept. 18, 2011, at MM64, available at [http://www.nytimes.com/2011/09/18/magazine/why-we-need-for-profit-colleges.html?\\_r=1+pagewanted=all](http://www.nytimes.com/2011/09/18/magazine/why-we-need-for-profit-colleges.html?_r=1+pagewanted=all).

3. See SUSAN AUD ET AL., NAT’L CTR. FOR EDUC. STATISTICS, THE

institutions could be an important part of the solution to rebound the middle and working classes, particularly when unemployment rates currently hover between 10 and 15% for those without any postsecondary education or training.<sup>4</sup>

Undeniably, however, allegations of financial aid fraud, gross misrepresentations to students, and deceptive business practices have marred the for-profit education industry in recent decades.<sup>5</sup> The promise of a for-profit education may instead be a liability as too many students are left with few or no job prospects and high student loan debt.<sup>6</sup> The problem lies within the fundamental difference between for-profit and traditional nonprofit colleges and universities; the former's primary goal is to make money.<sup>7</sup> While for-profit institutions have fought vigorously for equal footing to "signal to [non-traditional] students that for-profit institutions represent an equally valid option,"<sup>8</sup> they are nonetheless business entities allowed to operate freely in a system designed for nonprofit educators, which incentivizes less-than-honest practices to increase revenue.<sup>9</sup> This

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CONDITION OF EDUCATION 2011, at 118 (2011).

4. See BUREAU OF LABOR STATISTICS, THE EMPLOYMENT SITUATION—SEPTEMBER 2011, at Summary tbl.A (2011).

5. See generally S. REP. NO. 102-58 (1991) (detailing the "fraud, waste and abuse" of federal financial aid "particularly as it relates to proprietary schools" throughout the 1980s and 1990s); see also Auster, *supra* note 1, at 641–43, 645–47 (explaining instances of abuse toward minorities and those with low income by for-profit schools in recent years).

6. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-600, PROPRIETARY SCHOOLS: STRONGER DEPARTMENT OF EDUCATION OVERSIGHT NEEDED TO HELP ENSURE ONLY ELIGIBLE STUDENTS RECEIVE FEDERAL STUDENT AID 15 fig.5 (2009) (exhibiting significantly higher student loan default rates by students who attended for-profit schools).

7. See Amanda Harmon Cooley & Aaron Cooley, *From Diploma Mills to For-Profit Colleges and Universities: Business Opportunities, Regulatory Challenges, and Consumer Responsibility in Higher Education*, 18 S. CAL. INTERDISC. L.J. 505, 519 (2009).

8. Melanie Hirsch, *What's in a Name? The Definition of an Institution of Higher Education and Its Effect on For-Profit Postsecondary Schools*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 817, 825 (2006) (alteration in original) (quoting *The College Access & Opportunity Act: Are Students at Proprietary Institutions Treated Equitably Under Current Law?: Hearing on H.R. 4283 Before the H. Comm. on Educ. & the Workforce*, 108th Cong. 2 (2004)) (internal quotation marks omitted) (detailing the fight for a single definition of "educational institution," inclusive of for-profit colleges, in the 2006 amendments to the Higher Education Act (HEA)).

9. See, e.g., *Alsides v. Brown Inst., Ltd.*, 592 N.W.2d 468, 473 (Minn. Ct. App. 1999).

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Note argues that the for-profit educational sector is beneficial and can provide benefits to its ever-increasing share of the educational market, but reform is needed to prevent further exploitation of both the institutional system and individual students.

Part II of this Note examines the modern for-profit educational industry in detail: its share of the market, recent enrollment figures, business structure, and profit margin. This part explains that the potential to earn profits has too often affected their operation, resulting in: (1) schools staying one step ahead of the fairly open-ended accreditation and financial aid qualification process, and (2) abuses of particularly vulnerable individuals in the recruitment, enrollment, and quality of education provided. Furthermore, this part demonstrates that while the problems may be abundant, for-profit educational institutions may be “too big to fail” and can provide benefits, so that pointed reform is needed rather than an outright rejection of the for-profit model.

Because these concerns are not new, Part III of this Note details what has been done historically to combat the institutional and individual abuses committed by for-profit schools. This part explains the federal government’s attempt, through federal financial aid regulation, to demand accountability and impose penalties on the industry, with an explanation of the key provisions of the recently enacted Program Integrity. Part III also explains the use, and ultimate failure, of individuals who invoke traditional state tort and contract causes of action such as educational malpractice, fraudulent misrepresentation, and negligent misrepresentation for individual recovery.

Part IV proposes and explores new solutions and the potential of each for success. Through the evidence provided in prior sections, this final part argues that there is no one-size-fits-all road to reform. There must first be a nonjudgmental acknowledgement of the differences between for-profit and nonprofit educational institutions, so that each can be regulated effectively. Second, there must be more than one solution to bring pressure on both the institutional and individual levels because the for-profit industry has proven adept at maneuvering around single obstacles which threaten its profitability. Thus, this final part argues traditional federal and state regulatory efforts are currently incomplete due to partisan gridlock and a lack of funding, and necessary reforms must include: (1) a departure from current state and federal regulatory schemes, (2) private causes of action for individuals under federal statute, and (3) a dramatic shift towards self-accountability and self-policing.

## II. THE FOR-PROFIT SCHOOL STRUCTURE, INFLUENCE, AND NECESSITY

### A. For-Profit Schools' Emergent Position in Postsecondary Education

Even detractors of the for-profit education sector cannot deny its ever-increasing popularity and success. Total enrollment skyrocketed 225% from 1998 to 2008,<sup>10</sup> and nearly 2.2 million of the 21 million students enrolling in postsecondary education in the fall of 2009 were entering for-profit institutions.<sup>11</sup> For-profits are also capturing a greater percentage of degrees awarded annually, and not wholly in their traditional realm of trade certification or associate's degrees.<sup>12</sup> In seizing "large gains" in the 2008–2009 academic year, 5% of all bachelor's degrees, 1% of first-professional degrees, and 2,600 doctoral degrees were awarded by private for-profit institutions.<sup>13</sup> In the last ten years, for-profits have staked out an impressive share of the education market and show no signs of relinquishing their investment,<sup>14</sup> particularly in the receipt of federal financial aid.<sup>15</sup> Although commanding about 10% of the college student body, for-profit schools are paid more than 23% of all federal Title IV financial aid.<sup>16</sup>

For such a large share of the market, the actual choices between

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10. *Monsters in the Making? Washington Grapples with a Booming Education Industry*, ECONOMIST, July 22, 2010, at 1, available at <http://www.economist.com/node/16643333>.

11. LAURA G. KNAPP ET AL., NAT'L CTR. FOR EDUC. STATISTICS, ENROLLMENT IN POSTSECONDARY INSTITUTIONS, FALL 2009; GRADUATION RATES, 2003 & 2006 COHORTS; AND FINANCIAL STATISTICS, FISCAL YEAR 2009, at 7 tbl.1 (2011).

12. See AUD ET AL., *supra* note 3, at 118. In the 2008–2009 academic year, the number of associate's degrees conferred by private for-profit institutions more than doubled from the 1998–1999 academic year, rising from 64,000 to 144,300. *Id.* The total percentage of associate's degrees awarded by for-profit institutions increased from 11% to 18%. *Id.* Private nonprofit schools not only lost a percentage share of the number of associate's degrees conferred, but actually declined in the total number of degrees granted in the ten-year period, falling from 47,600 to 46,900. *Id.*

13. See *id.*

14. See generally *id.*

15. Auster, *supra* note 1, at 634–35 (citing TOM HARKIN, CHAIRMAN ON HEALTH, EDUC., LABOR AND PENSIONS, 111TH CONG., EMERGING RISK?: AN OVERVIEW OF GROWTH, SPENDING, STUDENT DEBT AND UNANSWERED QUESTIONS IN FOR-PROFIT HIGHER EDUCATION: HEARING BEFORE THE S. COMM. ON HEALTH, EDUC., LABOR AND PENSIONS 4 (Comm. Print 2010), available at <http://harkin.senate.gov/documents/pdf/4c23515814dca.pdf>).

16. *Id.*

for-profit institutions are few. While hundreds of existing trade names and subsidiary organizations make the market appear diverse,<sup>17</sup> about three-fourths of the current for-profit industry is dominated by five major corporations.<sup>18</sup> Some of the largest and best-known names—ITT Technical Institute, DeVry University, Sanford Brown, Kaplan University, and the University of Phoenix—are all “part of, or the parent of, publically traded corporations.”<sup>19</sup>

The business for these corporations is also lucrative; the industry’s largest for-profit institution, the University of Phoenix, provided 95% of its parent company’s \$3.1 billion revenue in 2008.<sup>20</sup> The profitability of these institutions is due in part to their practices in (1) media and advertising,<sup>21</sup> and (2) manipulation of the accreditation system.<sup>22</sup>

### 1. *The Power of Advertising*

One of the greatest tools utilized by for-profit colleges in growing their market share is advertising.<sup>23</sup> For-profit schools vastly outspend traditional universities<sup>24</sup> with highly visible Internet pop-ups, television

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17. See Educ. Mgmt. Corp., Annual Report (Form 10-K) (Sept. 29, 2003). Education Management Corporation (EMC), one of the three largest for-profit providers of secondary education, is a prime example of the diversity of names and educational institutions existing under one large corporate entity. See *id.* at 1–2. In 2003, EMC operated The Art Institutes, Argosy University, Western State University College of Law, Argosy Professional Services, South University, Dubrueille International Culinary & Hotel Institute of Canada, the Bradley Academy for the Visual Arts, as well as “18 education institutions in eight states primarily in the Midwest” by acquiring another corporate entity. *Id.*

18. See Hirsch, *supra* note 8, at 822 (stating that the Apollo Group, Education Management Corporation, Corinthian Colleges, Career Education Corporation, and ITT Educational Services “make up about seventy-four percent of the business”).

19. Auster, *supra* note 1, at 639 (footnote omitted).

20. Marissa Miley, *A Lot of Branding But Not Much Understanding*, ADVERTISING AGE (Sept. 7, 2009), <http://adage.com/article/news/university-phoenix-spends-100-million-annually-advertising/138849/>.

21. *Id.*

22. See Daniel Golden, *Your Taxes Support For-Profits as They Buy Colleges*, BLOOMBERG.COM (Mar. 4, 2010), [http://www.bloomberg.com/apps/news?pid=email\\_en&sid=a8jjBVDqwzS0](http://www.bloomberg.com/apps/news?pid=email_en&sid=a8jjBVDqwzS0) (stating that for-profit colleges are aiming at accreditation loopholes).

23. Miley, *supra* note 20.

24. *Id.* (stating that the nationwide for-profit University of Phoenix alone spends \$100 million annually on advertising).

commercials, billboards, and bus side and subway signs.<sup>25</sup>

Schools employ catchy, optimistic slogans, such as ITT Technical Institute's use of "Education for the Future"<sup>26</sup> and Vatterott Educational Centers, Inc.'s use of "Career Skills for a Better Life,"<sup>27</sup> to promote an easy route to an improved life. However, these well-funded advertising campaigns can also easily cross the line into oversimplified and even tasteless attempts to grab the attention of potential students. For instance, one 2011 advertisement run by the Education Connection, self-described as "a free service that matches students with accredited online and campus-based schools," drew the ire of then-Senate Assistant Majority Leader Dick Durbin as part of his larger campaign against "predatory practices" of for-profit colleges.<sup>28</sup> The advertisement featured an attractive young woman lying on a bed in a "very small" tank top and shorts telling potential students she "love[d] learning new things in [her] pajamas."<sup>29</sup> Senator Durbin singled out the inappropriateness of advertising for higher education through use of sexual imagery and promises that students need not even "get out of bed to go to college."<sup>30</sup>

## 2. Accreditation Manipulation

Another great tool of the for-profit education industry is their command of the accreditation process.<sup>31</sup> The process by which postsecondary institutions are accredited is complicated and lightly regulated, and for-profit colleges are adept at capitalizing on confusion over the different accreditation standards and inability to transfer credits between nationally and regionally accredited schools.<sup>32</sup>

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25. See Karen W. Arenson, *Speedy Growth in Career Schools Raises Questions*, N.Y. TIMES, July 12, 2005, at A1, <http://www.nytimes.com/2005/07/12/education/12colleges.html?pagewanted=print>.

26. ITT TECH. INST., 2012–2013 CATALOG, i (2012), available at <http://www.itt-tech.edu/campus/download/094.pdf>.

27. VATTEROTT EDUC. CTRS., INC., [http://www.vatterott.edu/site\\_map.asp](http://www.vatterott.edu/site_map.asp) (last visited Aug. 30, 2012).

28. *Education Connection's Controversial Ad Gets Criticized*, HUFF POST COLL. (July 23, 2011), [http://www.huffingtonpost.com/2011/05/23/education-connection-ad\\_n\\_865447.html](http://www.huffingtonpost.com/2011/05/23/education-connection-ad_n_865447.html) (quoting Senate Assistant Majority Leader Dick Durbin) (internal quotation marks omitted).

29. *Id.* (internal quotation marks omitted).

30. *Id.* (internal quotation marks omitted).

31. See Golden, *supra* note 22.

32. See Mary Beth Marklein, *For-Profit Colleges Under Fire over Value, Accreditation*, U.S.A. TODAY (Sept. 29, 2010), <http://www.usatoday.com/news>

Although the process of accreditation is intended to ensure quality education, accreditation is nothing more than “the status of *public recognition* that *an accrediting agency* grants to an educational institution or program that meets the agency’s standards and requirements.”<sup>33</sup> The government itself does not accredit anything; the work of accreditation is provided by accrediting agencies, defined as “a legal entity, or that part of a legal entity, that conducts accrediting activities through voluntary, non-Federal peer review and makes decisions concerning the accreditation or preaccreditation status of institutions, programs, or both.”<sup>34</sup> The members of accrediting agencies and their governing boards are largely made up of volunteers from peer institutions, and the accrediting process is “grounded in peer review.”<sup>35</sup>

Although the Department of Education (DOE) maintains no actual control over accrediting agencies, the DOE is required by statute to publish a list of accrediting agencies determined by the Secretary of Education to be “reliable authority as to the quality of education or training offered.”<sup>36</sup> While receiving accreditation is not required for the operation of an institution of postsecondary education, acquiring accreditation with a recognized agency is a key contingency for receipt of federal financial aid,<sup>37</sup> which logically incentivizes all schools to become accredited.

The difficulty facing many students is that even all federally recognized accreditation is not created equal. There are two basic types of

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/education/2010-09-29-1Aforprofit29\_CV\_N.htm (citing Kevin Kinser, an education professor at the State University of New York at Albany, regarding for-profits and the accreditation process).

33. 34 C.F.R. § 602.3 (2010) (emphasis added).

34. *Id.*; see also William A. Kaplin & J. Philip Hunter, Comment, *The Legal Status of the Educational Accrediting Agency: Problems in Judicial Supervision and Governmental Regulation*, 52 CORNELL L. REV. 104, 105 (1966) (finding that unlike other countries with ministries of education or other vested authority, the U.S. system lacks a “single, authoritative body to establish uniform, national standards”).

35. Judith Areen, *Accreditation Reconsidered*, 96 IOWA L. REV. 1471, 1480–81 (2011).

36. 20 U.S.C. § 1099b(a) (2006).

37. See *id.* § 1099b(a)(2)(C). The application requirements and procedures for recognition on the Secretary’s list are found at 34 C.F.R. §§ 602.11–.50 (2010). It is of note that accrediting agencies are not prohibited from operating without federal recognition. See 34 C.F.R. § 602.10 (2010). In fact, they are required by the regulations to demonstrate upon application “that it has granted accreditation or preaccreditation covering the range of the specific degrees, certificates, institutions, and programs for which it seeks” to govern. *Id.* § 602.12.



accreditation—“institutional,” meaning an entire institution is accredited, and “programmatic,” meaning certain programs, departments, or schools within an institution receive accreditation.<sup>38</sup> Moreover, regional accreditation from the one of six recognized regional accrediting agencies “is considered the most rigorous and most prestigious,”<sup>39</sup> with the majority of nonprofit institutions enjoying this accreditation.<sup>40</sup> The majority of for-profit institutions receive accreditation from national agencies, which are considered less rigorous and may significantly restrict the transferability of their credits between institutions.<sup>41</sup>

These distinctions are not lost on the for-profit colleges. Many are becoming eligible for regional accreditation by offering added degree programs, and when regional accreditation is obtained, they tend to highly “promote that about themselves.”<sup>42</sup> Some for-profit colleges are even purchasing struggling nonprofit and religious schools to capture their “gold standard” accreditations status and reap the benefits in revenue.<sup>43</sup> In June 2011, ITT Technical Institute Educational Services, Inc. purchased the debt-ridden Daniel Webster College in Nashua, New Hampshire for \$20.8 million.<sup>44</sup> This, in turn, will provide ITT with “an academic credential that may generate a taxpayer-funded bonanza worth as much as \$1 billion” by increasing federal financial aid and enrollment.<sup>45</sup>

#### B. Profit Motive: Continuing Harm Towards the System and Individual

Central to the debate concerning the role and reform of for-profit colleges is their purported, but statistically supported, abuse of students and the federal financial aid system.<sup>46</sup> As suggested in the previous

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38. *Accreditation in the U.S.*, U.S. DEP’T OF EDUC., (last updated Aug. 23, 2012), [http://www2.ed.gov/admins/finaid/accred/accreditation\\_pg2.html](http://www2.ed.gov/admins/finaid/accred/accreditation_pg2.html).

39. *See* Marklein, *supra* note 32.

40. *See* Edward G. Simpson, Jr., *Accreditation Issues Related to Adult Degree Education Programs*, 103 NEW DIRECTIONS FOR ADULT & CONTINUING EDUC. 81, 82–83 (2004) (noting that the institutional profile of regional accreditation indicated that 97.4% of regionally accredited institutions are degree-granting and nonprofit while 79% of nationally accredited schools are for-profits).

41. *See id.* at 81–82.

42. *See id.* at 82–83.

43. *See* Golden, *supra* note 22.

44. *See id.*

45. *See id.*

46. *See* 136 CONG. REC. S4097 (daily ed. Apr. 5, 1990) (detailing the executive report summary entered into the Cong. Record by Sen. Sam Nunn, which recognizes the widespread abuse in for-profit vocational schools).

description of their advertising techniques,<sup>47</sup> for-profit colleges too often display a no-holds-barred approach due to “the fact that proprietary schools’ profitability depends almost solely on enrollment (with little regard to students’ subsequent employability).”<sup>48</sup> Although much can be said for the extensively documented history of problems with for-profits,<sup>49</sup> the most important concern in seeking reform is what for-profits are getting away with under current regulations.

1. *Misrepresentations to Increase Profit Margins*

In August 2010, the federal Government Accountability Office (GAO) released a report (GAO Report) regarding the “fraudulent, deceptive, or otherwise questionable sales and marketing practices” engaged in by for-profit colleges, particularly in the procurement of financial aid.<sup>50</sup> The GAO sent undercover investigators to meet with recruitment officers at a “nonrepresentative selection of [fifteen] for-profit colleges” across the country, with the schools selected to give a broad array of educational services, size, and structure.<sup>51</sup> After reviewing Federal Trade Commission Act (FTCA) and Higher Education Act (HEA) statutes and regulations regarding permitted and prohibited recruitment and marketing practices, the undercover agents met with for-profit representatives using fictitious identities.<sup>52</sup>

The results of the investigation demonstrate both the pervasiveness of

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47. See *supra* Part II.A.1.

48. Patrick F. Linehan, *Dreams Protected: A New Approach to Policing Proprietary Schools’ Misrepresentations*, 89 GEO. L.J. 753, 760 (2001); see also S. REP. NO. 102-58, *supra* note 5, at 6 (following amendments to the Higher Education Act (HEA) in the 1970s and 1980s that increased the ability of students to receive financial aid, the volume of students loans “skyrocketed,” with Subcommittee testimony indicating “that education became ‘big business’ in the proprietary school sector”).

49. See S. REP. NO. 102-58, *supra* note 5, at 2–5. The Senate Report detailed the “fraud, waste, and abuse” rampant in the implementation of the Government Student Loan Program throughout the 1980s, “particularly as it relates to proprietary schools.” *Id.*

50. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-948T, FOR-PROFIT COLLEGES: UNDERCOVER TESTING FINDS COLLEGES ENCOURAGED FRAUD AND ENGAGED IN DECEPTIVE AND QUESTIONABLE MARKETING PRACTICES 1–2 (2010).

51. See *id.* at 2. Schools were selected by the GAO based on a wide array of factors, including whether the institution received 89% or more of funding from Title IV financial aid and whether they were located within a state ranked in the top ten for receipt of such funds. *Id.* The schools ultimately selected were located in Arizona, California, Florida, Illinois, Pennsylvania, Texas, and the District of Columbia. *Id.*

52. *Id.* at 1–3.

the problem and the willingness (and skillfulness) of for-profit college recruiters to break regulatory and statutory requirements to increase profits:<sup>53</sup>

- Four of the fifteen schools' representatives encouraged the undercover students to "falsify their FAFSA in order to qualify for financial aid," including telling a student at a Texas school not to report savings or to falsely report nonexistent dependents.<sup>54</sup>
- All the schools' representatives provided "deceptive or otherwise questionable statement[s] . . . includ[ing] information about the college's accreditation, graduation rates and its student's prospective employment and salary qualifications, duration and cost of the program, or financial aid."<sup>55</sup> This statistic includes two institutions that informed students of "guaranteed or virtually guaranteed employment upon" graduation.<sup>56</sup>
- Six of the schools engaged in "hard-sell" techniques, such as allowing assistance and coaching through the entrance exam, telling a student an enrollment agreement was not legally binding, or becoming argumentative with hesitant students.<sup>57</sup>

Thus, the GAO Report confirms the profit motive—a majority of deceptive practices were aimed at enrolling students and receiving their federal financial aid, with significantly less regard for their actual financial and academic situation.<sup>58</sup>

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53. See, e.g., Auster, *supra* note 1, at 640. For-profit schools earn revenue by "continually grow[ing] the student body," and are not subject to the enrollment caps constraining nonprofit schools. *Id.* This ability to enroll high numbers with less competition and low completion rates arguably drives for-profit schools to add students irresponsibly without the ability to provide each a quality education. See *id.*

54. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-948T, *supra* note 50, at 7; see also 34 C.F.R. § 668.71 (2010).

55. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-948T, *supra* note 50, at 9. Misinformation regarding the already complex accreditation system was particularly troubling—one Florida representative falsely told undercover investigators "the same organization that accredits Harvard and the University of Florida" accredited their institution and noted that "[a]ll schools are the same." *Id.* (internal quotation marks omitted); see also *supra* Part II.A.2 (describing education accreditation).

56. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-948T, *supra* note 50, at 10; see also 34 C.F.R. § 668.74 (2010) (noting that misrepresentation regarding the employability of graduates is prohibited under the HEA).

57. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-948T, *supra* note 50, at 12.

58. See *id.* at 9–12.

Also contributing to these financial woes are the unexpectedly high rates of tuition. Despite the common perception, and even frequent sales pitch<sup>59</sup> that for-profit schools provide education at more affordable rates than traditional nonprofits, the GAO discovered “that tuition in 14 out of 15 cases, regardless of degree, was *more* expensive at the for-profit college than at the closest public colleges.”<sup>60</sup>

## 2. *Vulnerable Populations of Students*

Perhaps the most pressing concern for reform is that the individuals enrolling in for-profit educational institutions are in a particularly vulnerable segment of the population. Low-income and minority students are highly overrepresented in for-profit colleges’ student bodies,<sup>61</sup> which may not be entirely coincidental. Although it is a good thing that for-profit institutions provide flexible options for those “not . . . comfortable in a traditional academic setting,” some researchers suggest for-profit schools may shorten program times and target low-income individuals partly for increased enrollment numbers and because of guaranteed payment through federal financial aid.<sup>62</sup>

The abundance of federal funding has also recently led the for-profit colleges to target a new group: military veterans and overseas soldiers.<sup>63</sup> With the abundance of funding from the GI Bill, “there are reports of for-profit colleges aggressively targeting military servicemembers and veterans with expensive ad campaigns and hundreds of recruiters.”<sup>64</sup> “One prominent for-profit college has 452 recruiters focusing on recruiting

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59. *See id.* at 11 (finding recruiters routinely provided tuition estimation figures using methods that misrepresented the total tuition costs, such as providing estimated costs based on a nine-month rather than twelve-month year).

60. *Id.* at 16 (emphasis added).

61. NAT’L CTR. FOR EDUC. STATISTICS, PROFILE OF UNDERGRADUATE STUDENTS: 2007–08, at tbl.3.2, tbl.3.5-A (2010). The statistical analysis indicates that in public colleges and universities, regardless of degree program or duration, the number of white students was around 55 to 60% of the student body, with no one ethnic minority making up more than 10 to 20%. *See id.* at tbl.3.2. Conversely, minority students made up more than 50% of the student bodies in all for-profit programs. *See id.* In income distribution, the percentage of students with an independent income of less than \$19,000 was more than double in for-profit programs than in nonprofit programs. *See id.* at tbl.3.5-A.

62. Auster, *supra* note 1, at 643–44.

63. 157 CONG. REC. S1615 (daily ed. Mar. 15, 2011) (statement of Sen. Dick Durbin).

64. *Id.*

veterans out of the military.”<sup>65</sup> For-profit schools are also charging veterans exorbitant amounts of tuition for limited returns, with the knowledge they will be guaranteed payment by the federal government.<sup>66</sup> Senator Durbin in a recent Senate floor debate noted:

In the first year of the post-9/11 GI bill implementation, the Veterans’ Administration spent \$697 million on students attending public schools and \$640 million on students attending for-profit schools—almost the same. But we educated far more students for our money in public schools—203,000 students at public schools compared to 76,000 at for-profit schools, which charge two or three times as much for tuition and obviously educate one-half to one-third of what the public schools educated.<sup>67</sup>

By focusing on these populations of students and using the afore-described recruitment tactics,<sup>68</sup> it is students who suffer the most significant harm from the profit motive. While enrolling mass numbers of ill-prepared and misinformed students in violation of federal regulations does not necessarily cause immediate financial problems for for-profits, it causes significant hardship to the student and American taxpayer.<sup>69</sup>

For students, withdrawal and drop-out rates at for-profit colleges are monumental. In the Senate HELP Committee’s recent requests for information from thirty for-profit companies, they reported “2,500 students were enrolled as associate’s degree students in 2008-2009.”<sup>70</sup> “By September 2010, 57.6 percent of those students had withdrawn from the school.”<sup>71</sup> These students are left with significant financial burdens and no degrees. Consequently, default percentages for student loans are significantly higher for the students of for-profit colleges.<sup>72</sup> In October

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65. *Id.*; see also U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-256, VA EDUCATION BENEFITS: ACTIONS TAKEN, BUT OUTREACH AND OVERSIGHT COULD BE IMPROVED 33–40 (2011) (documenting the deficiencies in the Veterans Administration’s oversight and compliance surveys for the education programs enrolled in under GI Bill funding).

66. See 157 CONG. REC. S1615, *supra* note 63, at 1615.

67. *Id.*

68. See *supra* Part II.B.1.

69. Auster, *supra* note 1, at 666.

70. 157 CONG. REC. S1615, *supra* note 63, at 1616 (statement of Sen. Dick Durbin).

71. *Id.*

72. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-600, *supra* note 6, at 15 fig.5. Specifically, the default rates for both two-year and four-year institutions are

2010, the average debt nationally for those graduating from for-profit educational institutions was at \$33,000—those at public universities averaged \$20,000.<sup>73</sup> Some academic researchers indicate default rates are linked to the characteristics of typical for-profit college students—namely those with “low family income,” those in families “who lack higher education,” those at a higher age, those with more personal and familial financial obligations, and increased amounts of loan debt.<sup>74</sup> Although all of these are traits more frequently found in for-profit college students,<sup>75</sup> evidence such as that found in the GAO Report indicates correlations between characteristics in for-profit students and default rates are not necessarily causative; deceptive recruitment and fraudulent financial aid may instead be the common denominator.<sup>76</sup> As a result, too many students are left without degrees, without jobs, and with ruined credit.<sup>77</sup>

### III. HISTORICAL ATTEMPTS AT REGULATION AND REMEDIES: RECOGNITION OF PROBLEMS AND LACK OF SUCCESS

Currently, for-profit and nonprofit colleges are largely the same under the law. Under federal statute, while an “institution of higher education”<sup>78</sup> is any public or nonprofit institution “legally authorized within such State to provide a program of education beyond secondary education,”<sup>79</sup> the definition of “institution of higher education” specifically includes “proprietary institution[s] of higher education” and “postsecondary vocational institution[s]” for purposes of federal student aid.<sup>80</sup>

This latter definition allows for-profit schools to access federal

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higher for for-profit students than their nonprofit counterparts, and percentages are higher at the two-year, three-year, and four-year default periods. *See id.* at 15–18. Only in programs that are less than two years are nonprofit and for-profit schools comparable. *See id.* at 18 fig.8.

73. 157 CONG. REC. S8398, S8399 (daily ed. Dec. 7, 2011) (statement of Sen. Dick Durbin).

74. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-600, *supra* note 6, at 19–21.

75. *Id.*

76. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-948T, *supra* note 50, at 7–9.

77. Linehan, *supra* note 48, at 761 (finding direct harms from loss of education services and indirect harms such as loss of “creditworthiness”).

78. 20 U.S.C. § 1001(a) (2006).

79. *Id.* § 1001(a)(2).

80. *Id.* § 1002.

student aid funding no differently than any other educational institution, and thus equalize the way courts view them under the law.<sup>81</sup> In state law claims concerning educational institutions, for-profit colleges are also generally defined without hesitation as “educational institutions,” subject to the same statutory and common law provisions as public universities, private universities, and community colleges.<sup>82</sup> Because this understanding of the law has shaped many of the past administrative and judicial attempts to regulate the industry, there has been little success at reform or providing needed relief to wronged students.<sup>83</sup>

*A. Legislative and Regulatory Remedies: A Focus on Program Integrity*

Federal legislative and regulatory remedies for the abuses of for-profit colleges are practically limited to federal financial aid provisions of the Higher Education Act of 1965,<sup>84</sup> in which “Uncle Sam wield[s] a heavy hand in regulating access to such funds.”<sup>85</sup> For-profit schools are not otherwise dealt with through federal regulation. With nearly 94% of full-time students at for-profit schools<sup>86</sup> receiving a total of \$4 billion in federal grants and \$20 billion in DOE loans,<sup>87</sup> however, federal financial aid regulation is a key political tool in incentivizing—and punishing—for-profit schools. Stated most simply, the regulatory scheme scattered throughout 20

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81. See *id.*; Hirsch, *supra* note 8, at 825–26 (explaining the debate over inclusion of a single definition for institutions of higher education). Proponents of the single definition found it necessary to show that students at for-profit educational institutions were not “second-class citizens,” while opponents feared it would eliminate important distinctions between the two types of institutions. Hirsch, *supra* note 8, at 825–26 (quoting David Moore, an executive at Corinthian Colleges, Inc.) (internal quotation marks omitted).

82. See, e.g., *Jamieson v. Vatterott Educ. Ctr.*, 259 F.R.D. 520, 538 (D. Kan. 2009) (applying “education malpractice” and common education public policy arguments to for-profit schools indistinct from other types of education).

83. See *supra* Parts II.A–B; *infra* Part IV.A.

84. See 20 U.S.C. §§ 1001–1161aa-1 (2006) (providing authorization for both benefits to students of postsecondary educational institutions, and the promulgation of rules regarding such programs); 34 C.F.R. pt. 668 (2010) (providing the requirements for institutions receiving Title IV student financial aid).

85. *Career Coll. Ass’n v. Duncan*, 796 F. Supp. 2d 108, 113 (D.D.C. 2011) *aff’d in part, rev’d in part sub nom.* *Ass’n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427 (D.C. Cir. 2012).

86. *Id.* at 114. In comparison, 56.6% of full-time students at public institutions, and 70% at private, nonprofit institutions received federal aid. *Id.*

87. Tamar Lewin, *Senator to Review Accreditation of For-Profit Colleges*, N.Y. TIMES, Aug. 5, 2010, at A15, available at [http://www.nytimes.com/2010/08/05/education/05hearing.html?\\_r=1](http://www.nytimes.com/2010/08/05/education/05hearing.html?_r=1).

U.S.C. Chapter 28 and Part 668 of the Code of Federal Regulations operates by: (1) penalizing schools for the misuse of funds through fines or restrictions on receiving program funds;<sup>88</sup> or (2) requiring the schools to maintain certain practices to receive funding.<sup>89</sup>

The DOE imposed new restrictions under this scheme in 2010 with the dissemination and enactment of Program Integrity regulations and its regulations pursuant to the HEA of 1965.<sup>90</sup> Although broadly applicable to all “for-profit, nonprofit and public institutions,” the Program Integrity regulations were prompted by the “rapid growth of enrollment, debt load, and default rates at for-profit institutions.”<sup>91</sup> The final regulations, enacted on July 1, 2011,<sup>92</sup> came after eighteen months of extensive negotiation with the higher education industry.<sup>93</sup>

Notable among the comprehensive regulations is the popularly titled “gainful employment” provision codified at 34 C.F.R. § 668.6.<sup>94</sup> It was enacted to provide a meaningful definition to the requirement under federal statute<sup>95</sup> that for-profit “proprietary” institutions offer programs designed to “provide training for gainful employment in a recognized

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88. See, e.g., 34 C.F.R. § 668.82 (2010) (establishing the “standard of conduct” for institutions receiving financial aid). Subsection 668.82(b)(1) establishes that the educational institution receiving Title IV funds is a fiduciary “subject to the highest standard of care and diligence in administering the programs and in accounting to the Secretary for the funds received under those programs.” *Id.* § 668.82(b)(1). A failure to act as such or to account for program funds allows the initiation of a proceeding that could result in “a fine on the institution, or the limitation, suspension, or termination of the institution’s participation in that (loan or grant) program.” *Id.* § 668.82(c)(1).

89. See, e.g., 20 U.S.C. § 1099b(a) (2006) (stating that accreditation is required for Title IV funding).

90. See *Department of Education Establishes New Student Aid Rules to Protect Borrowers and Taxpayers*, U.S. DEP’T OF EDUC. (Oct. 28, 2010), [hereinafter *Department of Education*] <http://www.ed.gov/news/press-releases/department-education-establishes-new-student-aid-rules-protect-borrowers-and-tax> (explaining DOE’s motive for proposing the new regulations).

91. *Id.*

92. *Id.*

93. See *id.*; 34 C.F.R. pt. 668 (2010).

94. 34 C.F.R. § 668.6; see also David Moltz, *Ganging Up on ‘Gainful Employment,’* INSIDE HIGHER ED (Mar. 18, 2011), [http://www.insidehighered.com/news/2011/03/18/legislators\\_criticize\\_gainful\\_employment\\_rules](http://www.insidehighered.com/news/2011/03/18/legislators_criticize_gainful_employment_rules) (describing the bipartisan effort to repeal “gainful employment” after “fierce lobbying” against the controversial regulation).

95. 20 U.S.C. §§ 1001(b), 1002 (2006).



occupation.”<sup>96</sup> To meet eligibility, institutions must report information on individual student program enrollment, program completion rates, amounts of private loans taken out by students, amounts owed to the institution at the completion of the program, and whether students “matriculated to a higher credentialed program” at the institution or transferred elsewhere.<sup>97</sup>

In perhaps the most significant change, “gainful employment” also requires prospective students to receive pertinent employment information from the school in promotional materials and on the school’s website.<sup>98</sup> This information includes “occupations . . . that the program prepares students to enter,” on-time graduation rates, tuition and fee rates for students finishing the program “within normal time,” post-graduation placement rates, and “median loan debt” for students completing the program broken down by loan or grant.<sup>99</sup> In another “definitional” reform, the Program Integrity regulations also provide a standard measurement for a “[c]redit hour,”<sup>100</sup> which is the “metric used by the Department [of Education] to measure the eligibility for federal funding.”<sup>101</sup> The prior ambiguity of what constituted a “credit hour” reportedly led some institutions to award excessive credit to students in order to receive additional federal aid, which warranted the new provision.<sup>102</sup>

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96. DEANNE LOONIN, NAT’L CONSUMER LAW CTR., STUDENT LOAN LAW § 12.3.3.3 (4th ed. 2010).

97. 34 C.F.R. § 668.6(a) (2012). The regulation also includes an accelerated schedule for the information to be provided starting from the 2006–07 school year through the present. *Id.* § 668.6(a)(2)(i).

98. *Id.* § 668(b).

99. *Id.*

100. *See id.* § 600.2. Under this provision, a “[c]redit hour” is defined as:

(1) One hour of classroom or direct faculty instruction and a minimum of two hours of out of class student work each week for approximately fifteen weeks for one semester or trimester hour of credit, or ten to twelve weeks for one quarter hour of credit, or the equivalent amount of work over a different amount of time; or

(2) At least an equivalent amount of work as required in paragraph (1) of this definition for other academic activities as established by the institution including laboratory work, internships, practica, studio work, and other academic work leading to the award of credit hours.

*Id.*

101. *Department of Education, supra* note 90.

102. *Id.*

A substantial portion of Program Integrity also targets deceptive recruitment and marketing practices.<sup>103</sup> The regulations (1) eliminate any remaining safe harbor provisions for “incentive compensation” to school employees engaging in prospective student recruitment, admission, or enrollment;<sup>104</sup> (2) clarify which activities constitute “substantial misrepresentation” and increase penalties for schools and school officials engaging in such conduct;<sup>105</sup> and (3) require institutions to obtain state authorization in the state or states in which they operate.<sup>106</sup> Although Program Integrity is lauded by the Secretary of Education, Arne Duncan, as essential to “ensure that students are getting . . . solid preparation for a good job,”<sup>107</sup> the Program Integrity regulations have already suffered much controversy and repeal in their short lifespan.<sup>108</sup>

### B. *Limited Success with State Causes of Action*

Even if federal regulations are somewhat successful with industry-wide reforms, students and prospective students who are victims of dishonest or ill-equipped educational programs are often left with few options to recover personal losses. In particular, there exist no universal or specially adapted causes of action under state or federal law,<sup>109</sup> requiring students to fit their cases into traditional tort and contract theories of liability.<sup>110</sup> Also, with most students attending for-profit schools living in financially precarious or vulnerable situations to begin with, the prospect of

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103. *See id.*

104. *See* Program Integrity Issues, 75 Fed. Reg. 209, at 66872 (proposed Oct. 29, 2010) (to be codified at 34 C.F.R. § 668.14(b)).

105. *See* 34 C.F.R. § 668.71 (2010). This provision allows the Secretary to “(1) [r]evoke the eligible institution’s program participation agreement; (2) [i]mpose limitations on the institution’s participation in the title IV, HEA programs; (3) [d]eny participation applications made on behalf of the institution; or (4) [i]nitiate a proceeding against the eligible institution” for engaging in “substantial misrepresentation.” *Id.*

106. *See id.* § 600.9. This provision requires state review, complaint processes, state law, and state approval for the operation of institutions. *See id.* In a far-reaching measure, the provision also requires correspondence and distance programs to obtain state authorization in any state they may offer programs. *See id.*

107. *Department of Education, supra* note 90.

108. *See* Moltz, *supra* note 94 (explaining bipartisan efforts to repeal and defund “gainful employment”).

109. Linehan, *supra* note 48, at 764.

110. *See id.*; *see, e.g.,* Jamieson v. Vatterott Educ. Ctr., 259 F.R.D. 520 (D. Kan. 2009) (class action by students of for-profit school couched in traditional tort and contract theories).

bringing a hit-or-miss lawsuit is often daunting.<sup>111</sup> The subsections below discuss the various state action options and levels of success.

### 1. *Educational Malpractice*

Theoretically, an education malpractice tort claim can be levied by a student directly towards an educational institution,<sup>112</sup> and “centers on complaints about the reasonableness of the conduct engaged in by educational institutions in providing their basic functions of teaching, supervising, placing, and testing students in relationship to the level of academic performance and competency of the student.”<sup>113</sup> Such claims arise when “the student alleges that the school negligently failed to provide him with adequate skills . . . or the school negligently supervised his training[.]”<sup>114</sup> which, as argued by author John G. Culhane, is a tort that makes a lot of sense in a costly, malfunctioning educational system.<sup>115</sup>

However, in the last twenty years, education malpractice, also called the academic abstention doctrine,<sup>116</sup> has more often been raised as an affirmative defense,<sup>117</sup> due to the educational malpractice tort’s repeated rejection in state and federal courts.<sup>118</sup> Although accountability seems necessary in the expensive postsecondary educational system, courts increasingly avoid awarding recovery against educational institutions for

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111. See Linehan, *supra* note 48, at 763–64.

112. Moss Rehab. v. White, 692 A.2d 902, 905 (Del. 1997).

113. See, e.g., Sain II v. Cedar Rapids Cmty. Sch. Dist., 626 N.W.2d 115, 121 (Iowa 2001).

114. Glorvigen v. Cirrus Design Corp., 796 N.W.2d 541, 553 (Minn. Ct. App. 2011) (quoting Dallas Airmotive, Inc. v. FlightSafety Int’l, Inc., 277 S.W.3d 696, 699 (Mo. Ct. App. 2008)) (internal quotation marks omitted).

115. John G. Culhane, *Reinvigorating Educational Malpractice Claims: A Representational Focus*, 67 WASH. L. REV. 349, 413–14 (1992).

116. See Linehan, *supra* note 48, at 764.

117. See, e.g., Jamieson v. Vatterott Educ. Ctr., 259 F.R.D. 520, 535 (D. Kan. 2009).

118. See, e.g., Ross v. Creighton Univ., 957 F.2d 410, 414 n.2 (7th Cir. 1992) (recognizing that Alabama, Alaska, California, Florida, Idaho, Iowa, Kentucky, Maryland, New Jersey, New York, and Wisconsin reject education malpractice claims); *McFadyen v. Duke Univ.*, 786 F. Supp. 2d 887, 997 (M.D.N.C. 2011) (recognizing the universal rejection of education malpractice claims). While courts often state education malpractice is “almost universally” rejected or the “weight of authority” is against education malpractice claims, there is not one instance in modern case law in which such a claim is recognized or has resulted in recovery for a Plaintiff solely on the basis of educational malpractice. See *McFadyen*, 786 F. Supp. 2d at 997–98.

public policy reasons.<sup>119</sup> These reasons include:

the absence of an adequate standard of care, uncertainty in determining damages, the burden placed on schools by the potential flood of litigation that would probably result, the deference given to the educational system to carry out its internal operations, and the general reluctance of courts to interfere in an area regulated by legislative standards.<sup>120</sup>

Although many educational malpractice claims are grounded in traditional tort principles such as negligence and misrepresentation, and courts have even admitted that a good case could be alleged in an educational setting—such as a plaintiff who is graduated without basic literacy—educational malpractice is rejected with “impressive uniformity.”<sup>121</sup> Courts similarly reject claims if they merely implicate these public policy grounds or require “an inquiry into the nuances of educational processes and theories.”<sup>122</sup> Although scholars do at times argue for a renewed application of this tort,<sup>123</sup> and at least one court has appeared to toy with the idea of allowing such claims against more business-like for-profit schools,<sup>124</sup> the fact that state and federal courts have constantly, and even blindly, rejected this doctrine makes its inapplicability conclusive.

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119. See, e.g., *Alsides v. Brown Inst., Ltd.*, 592 N.W.2d 468, 472 (Minn. Ct. App. 1999) (finding that the “majority of courts” reject claims regarding the quality of education because of public policy concerns).

120. E.g., *Sain II v. Cedar Rapids Cmty. Sch. Dist.*, 626 N.W.2d 115, 121 (Iowa 2001) (citing *Moore v. Vanderloo*, 386 N.W.2d 108, 114–15 (Iowa 1986)).

121. *Culhane*, *supra* note 115, at 350–52.

122. *Ross*, 957 F.2d at 417; see also *Jamieson*, 473 F. Supp. 2d at 1159 (noting that characterizing a “cause[] of action as something other than educational malpractice does not ensure its survival”).

123. See, e.g., *Culhane*, *supra* note 113, at 354 (arguing that “a wastebasket” approach to education malpractice claims is unjust).

124. See *Makaeff v. Trump Univ., LLC*, No. 10-CV-940-IEG (WVG), 2010 WL 3988684 (S.D. Cal. Oct. 12, 2010). The court in *Makaeff* refused to dismiss claims against the for-profit Trump University on educational malpractice grounds by first suggesting it was not convinced Trump University was “an educational institution to which this doctrine applies.” *Id.* at \*2. The court then determined promises made by the school that the course would last for one year, when it was in fact three days, did not properly implicate the “pedagogical methods or the quality of the school’s classes, instructors, curriculum, textbooks, or learning aids” so that educational malpractice doctrines were relevant. *Id.* (citations omitted) (internal quotation marks omitted).

## 2. *Fraud, Misrepresentation, Negligence, and Breach of Contract Claims*

Without a specialized tort in the education context, student-plaintiffs have increasingly levied claims under the traditional state causes of action of fraud, misrepresentation, negligent misrepresentation, and breach of contract.<sup>125</sup> Although plaintiffs are required to prove prima facie elements of the cause of action in that jurisdiction to be successful, the facts that give rise to breach of contract or misrepresentation claims hinge largely on whether “*specifically promised educational services*” are provided.<sup>126</sup> To be successful, promises typically must be memorialized in writing, advertising, or enrollment agreements.<sup>127</sup> For instance, cognizable claims have been recognized where an educational institution offers a particular program, course selection, or accreditation and fails to provide it as promised—such as a medical school that failed to provide a gynecological rotation as indicated in their catalogue,<sup>128</sup> or a school not accredited or certified to provide a paralegal studies degree as advertised.<sup>129</sup> The United States District Court of Kansas in *Jamieson v. Vatterott Education Center* recognized that a claim was potentially actionable when an enrollment agreement promised a sixty-week course of study to result in seventy-two quarter-credit hours, and no instructor was provided for part of the course.<sup>130</sup>

Although authors such as Patrick Linehan correctly argue breach of contract claims are preferable to torts because courts are more receptive to them, they are less likely to succumb to education malpractice defenses,

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125. *E.g.*, *Alsides v. Brown Inst., Ltd.*, 592 N.W.2d 468, 473 (Minn. Ct. App. 1999) (providing an example in which junior college students brought claims of fraud, misrepresentation, and breach of contract against school for journeyman’s program); *see* Linehan, *supra* note 48, at 764–74.

126. *Alsides*, 592 N.W.2d at 472.

127. *See, e.g.*, *CenCor, Inc., v. Tolman*, 868 P.2d 396, 398–99 (Colo. 1994). In *CenCor*, the Colorado Supreme Court appeared poised to provide a more liberal interpretation of traditional claims when denying the adult education vocational school summary judgment, stating that the facts generally “obligated [CenCor] . . . to provide modern equipment in good working condition, qualified instructors, and computer training for all students.” *Id.* at 400. However, the court also made it clear such facts must be grounded in enrollment agreements and other identifiable, specific sources, not mere general expectations regarding the quality of educational services. *See id.* at 399–400.

128. *Ryan v. Univ. of N.C. Hosps.*, 494 S.E.2d 789, 791 (N.C. Ct. App. 1998).

129. *Malone v. Acad. of Court Reporting*, 582 N.E.2d 54, 56–59 (Ohio Ct. App. 1990).

130. *See Jamieson v. Vatterott Educ. Ctr.*, 259 F.R.D. 520, 542 (D. Kan. 2009).

and torts include more burdensome “intent” elements,<sup>131</sup> neither type of claim is sufficient to provide relief. Specifically, it is apparent that the need to find “‘specifically promised’ educational services”<sup>132</sup> in any type of claim significantly constrains courts, as does avoidance of educational malpractice. Savvy school representatives and recruiters are also able to quickly adapt their methods to avoid liability.<sup>133</sup>

For instance, although the plaintiffs won a small success in *Jamieson* when enrollment agreement credit hours were not provided, the court found allegations of poor course instruction, incompetent and unqualified teachers, courses being stopped before the scheduled end of classes, and course meeting times consisting of nothing more than completing assignments were not facts supporting a breach of contract.<sup>134</sup> Additionally, when a student alleged the school wrongly represented a course of study to be sufficient to pass a journeyman’s exam, the court found the claim was “more analogous to an attack on the general quality of Vatterott’s educational services than a failure to provide some objective, specifically provided service.”<sup>135</sup> The court also rejected a claim that the school fraudulently represented providing “entry-level” and “current programs,” because inquiring into such would improperly require an assessment of educational standards and the quality of instruction provided by Vatterott.<sup>136</sup> Notably, the court in a previous hearing recognized the inherent difficulty for plaintiffs in proving misrepresentations in statements made at various times, to various students, by various school employees—often verbally.<sup>137</sup>

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131. Linehan, *supra* note 48, at 773. Linehan also argued breach of contract claims ease the burden on the plaintiff by precluding a showing of fraudulent intent. *See id.* (citing *CenCor, Inc.*, 868 P.2d at 397).

132. *See id.* (quoting *CenCor, Inc.*, 868 P.2d at 400). Linehan also argued even more liberal courts are restricted to findings under the specific elements of tort and breach of contract claims. *See id.*

133. *See* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-948T, *supra* note 50, at 9–13 (finding that deceptive practices plague for-profit recruitment in less detectable ways); Linehan, *supra* note 48, at 758 (“School representatives usually are sophisticated enough to construct representations that are not factually inaccurate or promissory *per se* but achieve the same degree of persuasiveness. Because such persuasive representations are unlikely to be characterized as false, they are not likely to be grounds for proprietary school liability.”).

134. *Jamieson*, 259 F.R.D. at 540–41.

135. *Id.* at 539.

136. *See id.* at 535–36.

137. *Jamieson v. Vatterott Educ. Ctr.*, 473 F. Supp. 2d 1153, 1156–58 (D. Kan. 2007).

In 2009, the United States District Court for the Eastern District of Missouri in *Blake v. Career Education Corp.* took a more expansive approach.<sup>138</sup> The court found that claims the school falsely misrepresented that (1) courses “provided a sufficient foundation for law school,” (2) credits could be transferred to “most” major universities in the state, (3) tuition costs would be fixed, (4) books could only be purchased from the school, (5) students would participate in “hands-on” training, (6) students had to enroll quickly to avoid classes filling, and (7) students could expect to find jobs one month after graduation and expect to receive \$40,000–\$47,000 salary were all claims in which “the trier of fact would not need to inquire into the nuances of educational processes and theories.”<sup>139</sup> However, the liberal approach of *Blake* has not yet proven to be revolutionary.<sup>140</sup> Other courts have not followed its expansive view of claims against for-profit educational institutions.<sup>141</sup>

### 3. State Consumer Protection Acts

In some jurisdictions, traditional state causes of action are coupled with claims under state consumer protection statutes against for-profit schools.<sup>142</sup> This remedy proves unsatisfactory for student plaintiffs because of the great variance of consumer protection statutes, the statutes’ applicability to for-profit schools, and the ability of consumers to bring actions under the statute.<sup>143</sup> As such, the particulars of each state’s consumer protection statute and its applicability to for-profit schools’ practices are outside the scope of this Note.

No matter how many state consumer protection statutes generally follow the schemes of the “Uniform Deceptive Trade Practices Act (UDTPA), the Uniform Consumer Sales Practices Act (UCSPA), the Federal Trade Commission Act (FTCA), or the Uniform Consumer Credit Code (UCCC),” the statutes nonetheless “differ . . . from state to state” and do not provide consistent relief for student plaintiffs.<sup>144</sup> For instance,

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138. *Blake v. Career Educ. Corp.*, No. 4:08CV00821 ERW, 2009 U.S. Dist. LEXIS 72167 (E.D. Mo. Aug. 17, 2009).

139. *Id.* at \*6–13 (footnotes omitted).

140. *See id.* at \*6–7.

141. *See id.* at \*4–7.

142. *See, e.g., Alsides v. Brown Inst., Ltd.*, 592 N.W.2d 468, 473–74 (Minn. Ct. App. 1999) (providing an example of how plaintiffs brought traditional tort and breach of contract claims, as well as a claim under the Minnesota Consumer Fraud Act).

143. *See Linehan, supra* note 48, at 775–78.

144. *Id.* at 775–76.

under Iowa law, private causes of action are wholly not recognized under the consumer fraud provisions, providing no option for student plaintiffs.<sup>145</sup> Additionally, because those affected by for-profit education tend to possess “less political clout,”<sup>146</sup> lobbying “for more protective state and local legislation”<sup>147</sup> in the consumer protection arena is not likely to create uniform, effective relief.<sup>148</sup>

#### IV. NEW SOLUTIONS AND REFORM AT AN INSTITUTIONAL AND INDIVIDUAL LEVEL

As *New York Times* journalist Joe Nocera noted, “[C]apitalists will always behave more or less like greyhounds chasing a mechanical rabbit, motivated by whatever incentives are put in front of them.”<sup>149</sup> Although they have fought for equal standing under the law,<sup>150</sup> the reality is that for-profit schools are profit generating business entities.<sup>151</sup> Their motives are different than nonprofit educational institutions, yet they are operating in the same system and regulated in a one-size-fits-all fashion.<sup>152</sup> Many for-profits have in turn discovered that the biggest and best way to make money is to take advantage of the accreditation, recruitment, financial aid, and regulatory systems governing them.<sup>153</sup> Until there is a change in the mechanical rabbits, there will likely not be a change in the tendency to put money above students and quality of education.

Elimination of for-profit education altogether is not an option.<sup>154</sup>

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145. See *Molo Oil Co. v. River City Ford Truck Sales, Inc.*, 578 N.W.2d 222, 227–28 (Iowa 1998) (citing Iowa Code § 714.16(2)(a)).

146. Linehan, *supra* note 48, at 763.

147. *Id.* (footnote omitted).

148. *Id.* at 775.

149. Nocera, *supra* note 2.

150. See Hirsch, *supra* note 8, at 825–26 (citing *H.R. 4283, The College Access & Opportunity Act: Are Students at Proprietary Institutions Treated Equitably Under Current Law? Hearing Before H. Comm. on Educ. & the Workforce*, 108th Cong. 2 (2004)) (describing the for-profit education industry’s fight to be equally defined as an educational institution under federal financial aid law).

151. See Cooley & Cooley, *supra* note 7, at 518–21 (examining the motives behind diploma mills and proprietary schools).

152. See *supra* Part III.

153. See *supra* Part III.

154. See Nocera, *supra* note 2 (stating that “[t]here is nothing inherently wrong with the idea of for-profit education,” and for-profit schools remain a positive option for nontraditional students and working class); *supra* Part II.A (detailing the ever-growing percentage of students attending and receiving degrees from for-profit



Neither is treating for-profit education like an inherently harmful or destructive industry.<sup>155</sup> For-profit schools are highly successful, and when operated in line with their mission, they help “nontraditional students successfully complete college programs with workplace skills that enable them to get good jobs in a tough economy.”<sup>156</sup> Instead, a multifaceted approach to reform is necessary on both an institutional and individual level, with a primary focus on the realities of the industry *separate* from its nonprofit counterpart. Also, it is essential not only to contemplate *one* key solution, but *several* that will provide the necessary pressure at all levels to result in actual reform. As such, this final part discusses potential new solutions under this approach and the obstacles and potential viability of each.<sup>157</sup>

*A. New Regulations and Increased Oversight: One Step Forward Equals Two Steps Back*

Currently, only one group of individuals aggressively targeted by for-profit schools—military members and veterans<sup>158</sup>—are benefitting from demands for increased accountability at an institutional level.<sup>159</sup> Following

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educational institutions).

155. See Nocera, *supra* note 2 (criticizing the detractors who advocate for the elimination of for-profit schools or do not recognize the potential good in their mission of providing nontraditional, and largely vocational, education to different classes).

156. *Id.* (quoting Jeffrey Leeds, an investor in Education Management) (internal quotation marks omitted). Education Management “is the country’s second-largest [for-profit educational company], with more than 150,000 students attending classes on more than 100 campuses.” *Id.*

157. As described in Part II of this Note, for-profit educational institutions are increasingly adept at manipulating the nation’s private accreditation program through school acquisition and lack of information flow. See *supra* Part II. After careful examination, these problems appear to result from weaknesses inherent in the accreditation system, which is not unique to the operation of for-profit schools. See Kaplin & Hunter, *supra* note 34, at 104–08 (describing the history of the American self-autonomous accreditation system). Consequently, potential solutions specific to the national postsecondary education accreditation system are outside the scope of this Note and will not be discussed in the final Part.

158. 157 CONG. REC. S1615, *supra* at note 63 (statement of Sen. Dick Durbin) (2011); see also U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-256, *supra* note 64, at 33–40 (documenting the deficiencies in the Veterans Administration’s oversight and compliance surveys for the education programs enrolled in under GI Bill funding).

159. Julia Edwards, *Pentagon Targets Substandard For-Profit Schools*, GOV’T EXECUTIVE (Mar. 3, 2011), available at <http://www.govexec.com/dailyfed/0311/030311-for-profit-schools-pentagon.htm>; see also U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-256, *supra* note 64.

a GAO report detailing the deficient oversight of GI Bill funding and under-qualified for-profit educational institutions reaping millions of dollars in federal tax money, the Pentagon ended its contract with a DOE-approved accrediting agency in attempt to find another agency that will “hold for-profit schools accountable” when serving military students.<sup>160</sup> Unfortunately, this remains the exception to the rule, and most students are currently without an option for accountability on an institutional level. Regulation by state and federal agencies is a frequently proposed solution to this problem.<sup>161</sup>

Due to for-profit institutions’ dependence on federal financial aid,<sup>162</sup> there exists an argument that the DOE and its promulgated regulations are the proper vehicles to police for-profits at the federal level.<sup>163</sup> The DOE certainly possesses a “wealth of information and expertise” on for-profit schools and serves a “gatekeeper function” to protect financial aid funding.<sup>164</sup> Additionally, the recent passage of the Program Integrity regulations under the HEA<sup>165</sup> demonstrated both an awareness of problems in the industry and a concerted regulatory effort to curb such problems.<sup>166</sup> At the state level, independent monitoring agencies with the power to investigate and penalize “unscrupulous” school practices could put increased pressure on institutions.<sup>167</sup>

However, a significant argument against reliance on federal (and state) regulation is the political influence asserted by vocational and

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160. See Edwards, *supra* note 159; see also U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-256, *supra* note 64.

161. See Linehan, *supra* note 48, at 781 (demanding better federal regulatory oversight); Cooley & Cooley, *supra* note 7, at 525 (stating that increased state-level oversight is a necessary component of reform).

162. See Auster, *supra* note 1, at 634–35 (citing TOM HARKIN, CHAIRMAN ON HEALTH, EDUC., LABOR AND PENSIONS, 111TH CONG., EMERGING RISK?: AN OVERVIEW OF GROWTH, SPENDING, STUDENT DEBT AND UNANSWERED QUESTIONS IN FOR-PROFIT HIGHER EDUCATION: HEARING BEFORE THE S. COMM. ON HEALTH, EDUC., LABOR AND PENSIONS 4 (Comm. Print 2010), available at <http://harkin.senate.gov/documents/pdf/4c23515814dca.pdf>).

163. See Linehan, *supra* note 48, at 781–82.

164. See *id.* at 781–83.

165. See *supra* Part III.A (describing the recently enacted Program Integrity regulations).

166. Department of Education, *supra* note 90.

167. See Cooley & Cooley, *supra* note 7, at 524–25 (pointing out initiatives at the state level in Oregon and California aimed at regulating for-profit schools and “diploma mills”).

for-profit schools on the regulatory process.<sup>168</sup> Unlike nonprofits, for-profit schools actively engage in lobbying of federal officials, forming industry Political Action Committees which contribute directly to campaigns.<sup>169</sup> In 2005, the for-profit education industry contributed more than \$1 million to the campaigns of those politicians serving on the House Education Committee before consideration of the 2006 amendments to the HEA.<sup>170</sup> At the state level, in 2008, Governor Arnold Schwarzenegger vetoed a California state reform law meant to create a new, specialized agency to “renew oversight of California’s 1,700 for-profit and vocational schools,” largely due to pressure from wealthy for-profits.<sup>171</sup>

Under fire from the for-profit education industry, the recently enacted Program Integrity amendments are already undergoing a spate of judicial and political challenges. Shortly after enactment, the Career College Association, doing business as the Association for Private Sector Colleges and Universities (APSCU),<sup>172</sup> challenged the new regulations under the Administrative Procedure Act in the United States District Court for the District of Columbia.<sup>173</sup> APSCU challenged three parts of the new regulations: (1) the elimination of safe harbor provisions for incentive compensation, (2) the higher penalties for substantial misrepresentation, and (3) the state authorization requirements.<sup>174</sup> The court denied summary judgment to APSCU on the incentive compensation and substantial misrepresentation provisions, finding the Secretary of Education “articulated a rational connection between the facts before him and the choices he made”<sup>175</sup> and noted the regulations were not contrary to the

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168. See Hirsch, *supra* note 8, at 830–31.

169. *Id.*

170. *Id.*

171. See Cooley & Cooley, *supra* note 7, at 525 (footnote omitted) (internal quotation marks omitted).

172. See ASS’N OF PRIVATE SECTOR CS. AND U., *supra* note 1. The ASPCU describes their organization as “a voluntary membership organization of accredited, private, postsecondary schools, institutes, colleges and universities that provide career-specific educational programs. APSCU has over 1,800 members that educate and support almost two million students each year for employment in over 200 occupational fields.” *Id.*

173. See Career Coll. Ass’n v. Duncan, 796 F. Supp. 2d 108, 113 (D.D.C. 2011) *aff’d in part, rev’d in part sub nom.* Ass’n of Private Sector Coll. & Univs. v. Duncan, 681 F.3d 427 (D.C. Cir. 2012).

174. See 34 C.F.R. § 668.14 (2010) (setting forth incentive compensation regulations); *id.* § 668.71 (setting forth substantial misrepresentation regulations); *id.* § 600.9 (providing State Authorization requirements); see also *supra* Part III.A.

175. *Duncan*, 796 F. Supp. 2d at 123.

provisions of the HEA.<sup>176</sup> The state authorization regulation, which required schools to gain authorization to operate in any state in which there was a physical campus *and* where any student participating in a distance or online program was physically located,<sup>177</sup> was found by the court to vary too greatly from the proposed regulation that merely required “institutions to have approval from the States where they operate to provide postsecondary educational programs.”<sup>178</sup> Because APSCU was not provided an additional opportunity to comment on section 600.9(c) after the language requiring authorization in students’ locations was added, and the court found this change substantial enough to require comment, section 600.9(c) was vacated.<sup>179</sup>

On appeal to the United States Court of Appeals for the District of Columbia Circuit, the court took a more critical approach than the lower court.<sup>180</sup> With regards to the incentive compensation regulations, the court determined the new regulations eliminating safe harbors for incentive compensation were not contrary to the HEA,<sup>181</sup> but found two aspects of the compensation regulations to be arbitrary and capricious.<sup>182</sup> First, the court found “the elimination of the safe harbor for compensation based upon students successfully completing their educational programs, or one academic year of their educational programs,” was not sufficiently explained by the Department of Education to justify this safe harbor elimination.<sup>183</sup> Second, the court responded to critics who found the safe harbor regulations might disproportionally affect the recruitment of minority students through diversity programs or particularized recruiters, and “similarly remand[ed] to the Department for further consideration” of these two provisions.<sup>184</sup> Regarding the substantial misrepresentation provisions, the court held sections 668.71(a)(1), 668.71(a)(2), and 668.71(b) exceeded the authority granted by the HEA and denied procedural rights

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176. *See id.* at 123–32.

177. *Id.*

178. *See id.* at 134 (quoting Proposed Rule at 34812) (internal quotation marks omitted).

179. *See id.* at 135.

180. *Ass’n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 435 (D.C. Cir. 2012).

181. *Id.* at 442–47.

182. *Id.* at 448–49.

183. *Id.* at 448 (quoting 34 C.F.R. § 668.14(b)(22)(ii)(E) (2010) (internal quotation marks omitted)).

184. *Id.* at 448–49.

to institutions.<sup>185</sup> The court remanded this part of the case to allow the Department of Education to revise these regulations.<sup>186</sup> Finally, the court affirmed the lower court's finding that the "State Authorization" provision regarding distance education under 34 C.F.R. § 600.9 be vacated as a violation of the Administrative Procedures Act,<sup>187</sup> which rounded out an opinion largely disfavoring the Program Integrity regulations. Prior to this decision, the for-profit industry's challenges to HEA regulations were not typically successful.<sup>188</sup>

Legislative attempts to repeal or amend the new regulations are also receiving bipartisan support.<sup>189</sup> On July 23, 2011, H.R. 2117, the Protecting Academic Freedom in Higher Education Act (PAFHEA), was introduced and considered in the House Committee on Education and the Workforce.<sup>190</sup> This bill is meant "to prohibit the Department of Education from overreaching into academic affairs and program eligibility under title IV of the [HEA]."<sup>191</sup> PAFHEA (1) repeals all State Authorization regulations promulgated through title 34 of the C.F.R.,<sup>192</sup> (2) repeals the definition of "credit hour,"<sup>193</sup> and (3) prohibits the Secretary of Education from further promulgating any rules or regulations defining a "credit hour" under the HEA.<sup>194</sup> PAFHEA received a favorable recommendation in the Committee to be heard by the House as a whole, and in February 2012, it passed the House and was awaiting a vote in the Senate.<sup>195</sup> In the larger scheme of regulation, the repeal of these state authorization provisions requiring distance and online programs be "subject to State jurisdiction as

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185. *Id.* at 450–52 (citing 34 C.F.R. §§ 668.71(a)–(b) (2011)).

186. *Id.* at 452.

187. *Id.* at 462–63.

188. *See, e.g.,* Ponce Paramedical Coll., Inc. v. U.S. Dep't of Educ., 858 F. Supp. 303, 316 (D.P.R. 1994); Career Coll. Ass'n v. Riley, No. 94-1214, 1994 WL 396294 (D.D.C. July 19, 1994) *aff'd*, 70 F.3d 637 (D.C. Cir. 1995).

189. *See* H.R. REP. NO. 112-133, at 9–10 (2011) (reporting hearings that took place regarding "harmful and burdensome" regulations on for-profit institutions).

190. *Id.*

191. *See* H.R. REP. NO. 112-177, at 1 (2011). The PAFHEA was introduced on June 3, 2011, by Rep. Virginia Foxx (R-NC) and Rep. John Kline (R-MN). *Id.* at 3.

192. *See id.* at 2. This amendment specifically repeals sections 600.4(a)(3), 600.5(a)(4), 600.6(a)(3), 600.9 and 668.43(b) (2010). *Id.*

193. *See id.* This amendment specifically repeals section 600.2 (2010). *Id.*

194. *See id.*

195. *See* H.R. 2117: *Protecting Academic Freedom in Higher Education Act*, GOVTRAK.US, <http://www.govtrack.us/congress/bills/112/hr2117> (last visited Nov. 11, 2012).

determined by the State, [means] the institution [no longer] must meet any State requirements for it to be legally offering postsecondary distance or correspondence education in that State.”<sup>196</sup> It also eliminates a potential federally-mandated avenue to increased state-level regulation and accountability.

Rather than direct appeal or amendment, the “fierce[] lobb[ying]” of for-profit colleges is also resulting in the constructive end to Program Integrity regulations through lack of funding.<sup>197</sup> Specifically, an approved amendment to the Full-Year Continuing Appropriations Act of 2011 effectively blocked the DOE from using funds to carry out the controversial gainful employment regulations.<sup>198</sup> It is yet unclear if this funding may be reinstated, or if this method may be applied to effectively eliminate more Program Integrity provisions. However, it is worth closely watching the Program Integrity amendments for further challenges or appeals.

While these political influences stall state and federal regulatory efforts, state regulatory agencies also remain crippled by traditional, pragmatic restraints. State regulatory agencies are typically over-staffed and under-budgeted, which means “monitoring of vocational school activities may take a low priority.”<sup>199</sup> Low resources and inadequate investigations are also insufficient when dealing with sophisticated multistate corporate entities.<sup>200</sup> Moreover, states vary widely on whether they regulate for-profit institutions through “general consumer affairs” or specialized agencies.<sup>201</sup> Students, unaware of the existence or

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196. Career Coll. Ass’n v. Duncan, 796 F. Supp. 2d 108, 133 (D.D.C. 2011) *aff’d in part, rev’d in part sub nom.* Ass’n of Private Sector Colls. & Univs. v. Duncan, 681 F.3d 427 (D.C. Cir. 2012) (quoting 34 C.F.R. § 600.9(c) (2010)); *see also supra* Part IV.A.

197. Moltz, *supra* note 94.

198. *See id.*; *see also supra* Part III.A. (detailing the purpose and language of the gainful employment regulations under the HEA). The amendment to block gainful employment funding was introduced by Rep. John Kline (R-MN) and received bipartisan support with 231 of House Republicans and 58 of House Democrats voting in favor of the amendment. *See Final Vote Results for Roll Call 92*, U.S. HOUSE OF REPRESENTATIVES, <http://clerk.house.gov/evs/2011/roll092.xml> (last visited Aug. 30, 2012) (reporting the final roll call vote for Amendment No. 214 to H.R. 1 taken on Feb. 18, 2011).

199. Alan A. Alop, *Representing Victims of Vocational School Fraud*, 1 LOY. CONSUMER L. REV. 33, 33 (1989).

200. *See id.*

201. *See* Linehan, *supra* note 48, at 778–79.

differentiation between state regulatory bodies, are also not likely to file formal complaints.<sup>202</sup>

Thus, although it remains crucial that federal and state level entities continue to oversee for-profit educational institutions, it is evident authors Amanda Harmon Cooley and Aaron Cooley are correct that “for each step forward . . . made in the regulation of these fraudulent enterprises, it seems there is [always] a commensurate step backward.”<sup>203</sup> To the extent any state and federal regulation will play a future role, it is critical that federal and state governments confront the unique objectives of for-profit educational institutions and regulate specifically to the profit motive.

An effective example of this is the “90/10 rule,” which applies *only* to for-profit educational institutions and “requires each . . . school to limit the percentage of revenues it receives from Department of Education federal financial assistance . . . to no more than 90%.”<sup>204</sup> Because this provision applies only to for-profit institutions, it allows government officials to highlight the specific issues—here, the documented problems with high financial aid reliance, poor passage rates, and high student loans defaults in for-profit institutions<sup>205</sup>—in order to garner more support for the increased regulations. Specifically targeted reform should also be more palatable to lawmakers who opposed Program Integrity provisions, as a major reason they cited in proposing repeals was increased “red tape” and regulation of *all* educational institutions.<sup>206</sup>

It is clear a new regulatory scheme for for-profit educational institutions, independent of the current one that includes all educational institutions, would be the best option due to the distinct challenges presented by the profit motive.<sup>207</sup> Requiring for-profits institutions to share in the loss and defaults of student loans, for instance, would strike to the heart of the matter and create a great incentive to provide quality education with the ability to repay. However, the frequent and successful legislative and judicial challenges to federal regulations indicate this is,

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202. Alop, *supra* note 199.

203. Cooley & Cooley, *supra* note 7, at 525.

204. LOONIN, *supra* note 96, § 1.7.2.2 (citing 20 U.S.C. § 1094 (2008)).

205. *Id.* (citing U.S. GEN. ACCOUNTING OFFICE, PROPRIETARY SCHOOLS: POORER STUDENT OUTCOMES AT SCHOOLS THAT RELY MORE ON FEDERAL STUDENT AID, Report No. GAO/HEHS-97-103 (June 1997)).

206. H.R. REP. NO. 112-177, *supra* note 191, at 5–6.

207. *See id.* at 6–7 (stating that a lack of profit may drive these schools out of business); *see also* Auster, *supra* note 1, at 634.

practically speaking, not realistic.<sup>208</sup> The Program Integrity repeals and challenges<sup>209</sup> make it evident that regulatory reforms will be at minimum costly and incremental. Thus, reliance should not be placed on state and federal regulation alone and greater strides must be made in other areas of reform.

*B. Private Causes of Action and Administrative Reparation Under Federal Statute: HEA and FTCA*

Another problem with relying solely on increased regulation is the individual is left out of the equation.<sup>210</sup> Until now, reforms of the for-profit education industry have been focused entirely on regulatory oversight. The individual is often the most injured, left with little or no educational enhancements, large tuition bills, and no remedy.<sup>211</sup> Thus, a vital component of any move towards reform must be a route to direct compensation.

1. *The Higher Education Act*

Because state causes of action are unproductive and inconsistent,<sup>212</sup> authors such as Patrick Linehan appropriately suggest that the creation of a private cause of action on the federal level under the HEA would create deterrence of negative practices and provide direct recovery to wronged individuals.<sup>213</sup> While the HEA has provided for “civil penalties for institutions engaging in fraudulent misrepresentation” since 1986, a private cause of action for these violations is, perhaps nonsensically, absent.<sup>214</sup>

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208. See *supra* Part IV.A (discussing in detail the political strength of the for-profit education industry and challenges to the recently enacted Program Integrity amendments to the HEA).

209. See *supra* Part IV.A.

210. See Linehan, *supra* note 48, at 789–90 (stating that federal private causes of action could provide compensation for injured students otherwise unable to recover).

211. See Auster, *supra* note 1, at 634–36 (noting that the most vulnerable demographics of the population that are often targeted and exploited by for-profit institutions, with little ability to seek redress).

212. See *supra* Part III.B.

213. Linehan, *supra* note 48, at 790.

214. See Auster, *supra* note 1, at 649 (footnote omitted); see also 34 C.F.R. § 668.86 (2010) (allowing the Secretary to “limit or terminate an institution’s participation in a Title IV, HEA program or the eligibility of a third-party servicer to contract with any institution” if it violates any statutory or regulatory provision or engages in substantial misrepresentation).



However, Linehan also argues that a citizen's private right to bring suit is most effectively coupled with a right to bring suit by the DOE, to both provide recovery and help shoulder the cost of litigation for financially stricken plaintiffs.<sup>215</sup> While assistance for needy plaintiffs is an important consideration in the creation of a federal cause of action, this would likely be more effectively done by means other than providing standing to the DOE.<sup>216</sup> As conceded by Linehan, the DOE already has "wide discretion in selecting which administrative actions to bring and in imposing penalties,"<sup>217</sup> and due to a lack of manpower, technology, and ability to conduct thorough investigations, the DOE "has in practice, fallen short of fulfilling its responsibilities."<sup>218</sup> Even if the ability to bring causes of action for individual plaintiffs provides some funding offset,<sup>219</sup> it is difficult to imagine empowering the DOE to sue would greatly advance the interests of individual plaintiffs.

Instead, incorporating incentives such as attorneys' fees awards for successful suits or supplementing the administrative reparation procedure under the HEA may more effectively assist plaintiffs to bring personal suits or class actions. In a well-known example of the former, a potential award of attorneys' fees for prevailing plaintiffs was embedded in the federal cause of action for violations of civil rights, codified at 42 U.S.C. § 1988.<sup>220</sup> Congress recognized such legislation was crucial for the "vindication of individuals' rights in a society where access to justice so often requires the services of a lawyer."<sup>221</sup> Although contrary to the traditional "American Rule" against the awarding of fees in litigation, the use of such fee-shifting statutes has increased across federal and state legislation to create strong incentives to bring lawsuits for disadvantaged plaintiffs with smaller potential awards.<sup>222</sup> Because one of the greatest struggles for plaintiffs in actions against for-profit educational institutions is the lack of resources to employ an attorney and bring suit (especially with the current low

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215. See Linehan, *supra* note 48, at 790.

216. See *id.* (advocating for a right to sue for the DOE under the HEA).

217. *Id.* at 790.

218. *Id.* at 788.

219. See *id.* at 790.

220. See *Hensley v. Eckerhart*, 461 U.S. 424, 441–42 (1983) (Brennan, J., concurring in part and dissenting in part) (citing 42 U.S.C. § 1988).

221. See *id.* at 442.

222. Michael Kao, *Calculating Lawyers' Fees: Theory and Reality*, 51 UCLA L. REV. 825, 826–27 (2004) (stating that "fee-shifting statutes have riddled the rule with exceptions in various categories of cases," yet provide a number of benefits).

likelihood of success),<sup>223</sup> fee-shifting may be proper under the HEA.

Similarly, an administrative reparation procedure, mirrored after the federal Commodities Futures Trading Commission (CFTC),<sup>224</sup> could provide significant bite to the HEA regulatory scheme, while increasing system efficiency and individual access. The CFTC imparts exclusive jurisdiction on an administrative commission to adjudicate cases and grant damage awards to any person applying within the statute of limitations for “any violation of any provision . . . , or any rule, regulation, or order issued pursuant to the [Commodity Exchange Act].”<sup>225</sup> Without resorting to the courts, a person can then obtain an award for damages, which can “run, be served, and be returnable anywhere in the United States,” along with no liability for costs or payment for attorneys’ fees.<sup>226</sup> This solution would result in a greater system overhaul due to the likely need to form an independent commission or agency to enforce the provisions of the HEA and its promulgated rules;<sup>227</sup> however, an administrative reparation procedure could allow a person alleging a violation to apply directly for damages in a more streamlined administrative procedure.<sup>228</sup>

One potential downside to a reparation procedure is that the Supreme Court found the use of such a procedure would waive the right of the applicant to a trial on the matter.<sup>229</sup> However, other courts have noted the creation of such an administrative procedure would not preclude the continued jurisdiction of federal courts over private claims arising out of the regulated conduct—particularly if Congress expressly retains private causes of action under the statute.<sup>230</sup> Thus, the additional creation of an

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223. See *supra* Part III.B (explaining the obstacles individual plaintiffs face in state causes of action).

224. See 7 U.S.C. § 18 (2006).

225. *Id.* § 18(a)(1).

226. *Id.* § 18(d)(1)–(2).

227. See *id.* § 2 (establishing the CFTC as an independent agency with the power to administer and enforce the provisions of the Commodity Exchange Act).

228. See *id.* § 18(d)(1)–(2).

229. *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 849 (1986) (finding that a party who proceeded with a CFTC administrative claim effectively waived his ability to pursue the same claim in state or federal court).

230. See *Meyer v. Thomas & McKinnon Auchincloss Kohlmeyer, Inc.*, 686 F.2d 818, 819 (9th Cir. 1982). Some debate has occurred within the courts regarding the retention of private causes of action under the Commodities Exchange Act. See *Am. Agric. Movement, Inc. v. Bd. of Trade of City of Chi.*, 977 F.2d 1147, 1152–53 (7th Cir. 1992) (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 379 (1982)). In *Curran*, the Court found a private cause of action under the CEA was

optional administrative remedy accompanying a private cause of action could provide an additional expedited remedy for individuals.

## 2. *The Federal Trade Commission Act*

Additionally, other federal acts may provide applicable sources for private causes of action outside the HEA. The Federal Trade Commission Act (FTCA) makes it unlawful to engage in “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.”<sup>231</sup> There is not currently a private cause of action cognizable under the FTCA;<sup>232</sup> however, a private cause of action for students who are victims of the deceptive trade practices<sup>233</sup> of for-profit educational institutions in recruitment and enrollment is arguably warranted, particularly considering the high degree of personal harm.<sup>234</sup>

In support of this proposition and the link between for-profit practices and the FTCA, it has been noted the FTCA was considered in formulating and interpreting the DOE Program Integrity regulations aimed at for-profit schools.<sup>235</sup> Namely, while defending the 2011 amendments before the United States District Court for the District of Columbia, the Secretary of Education presented case law interpreting the FTCA—specifically 15 U.S.C. § 45(a)(1), which makes it unlawful to engage in “unfair or deceptive acts or practices”<sup>236</sup>—to aid in interpreting the

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intended by Congress and the addition of the reparations procedure was to “supplement rather than supplant the implied judicial remedy.” *Curran*, 456 U.S. at 384. The court in *Am. Agric. Movement*, in contrast, found subsequent amendments to the CEA closed the possibility of some implied causes of action outside the exclusive jurisdiction of the CFTC. *See Am. Agric. Movement*, 977 F.2d at 1153; *see also* *Khalid Bin Alwaleed Found. v. E.F. Hutton & Co.*, 709 F. Supp. 815, 818 (N.D. Ill. 1989) (“A review of the language of the statute that authorized these regulations, its focus and legislative history, indicates that Congress did not intend that the rules promulgated by the CFTC should give rise to a private cause of action.”).

231. 15 U.S.C. § 45(a)(1) (2006).

232. *N. Am. Broad., LLC v. United States*, 306 F. App’x 371, 374 (9th Cir. 2008).

233. 15 U.S.C. § 45(a)(1).

234. *See Auster, supra* note 1, at 633–34.

235. *Career Coll. Ass’n v. Duncan*, 796 F. Supp. 2d 108, 127–28 (D.D.C. 2011), *aff’d in part, rev’d in part sub nom. Ass’n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427 (D.C. Cir. 2012).

236. 15 U.S.C. § 45(a)(1).

regulations dealing with for-profits.<sup>237</sup> The court in that case ultimately rejected the analogy.<sup>238</sup> However, it is clear the practices engaged in by for-profit educational institutions are closely related to those prohibited by the FTCA, and those drafting the HEA regulations consider for-profit institutions to be entities capable of unfair and deceptive practice regulated under the FTCA.<sup>239</sup> Thus, to the extent for-profit educational entities must be continuously treated under the law as the profit-seeking business institutions they are,<sup>240</sup> a private cause of action under the FTCA arguably may provide an additional deterrent for bad business practices.

### *C. Self-Policing: An Indispensable Consideration*

Finally, it is the profit motive itself that may provide the final source of meaningful reform. Some for-profit educational institutions have operated with questionable and fraudulent business practices for decades,<sup>241</sup> with repeated unsuccessful governmental efforts to curtail the practices.<sup>242</sup> The news media is beginning to step into the picture, though, and is reporting on the “boiler-room style sales culture”<sup>243</sup> of for-profit schools and sympathetic stories of individuals such as Chelsi Miller—a 26-year-old, self-proclaimed “naïve single mother” who was left with \$30,000 in student loan debt after the for-profit Evergreen College misinformed her that her credits would transfer to a four year university program.<sup>244</sup> The negative attention may be the push the industry needs.

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237. *Duncan*, 796 F. Supp. 2d at 127–28.

238. *Id.*

239. *See id.* (rejecting the Secretary’s argument that “misrepresentation” under the HEA should be interpreted under case law authority which interprets “misrepresentation” and “deceptive practices” under the FTCA).

240. *See* Nocera, *supra* note 2 (arguing that the for-profit institutions are not inherently negative but are a business dominated by their need to earn money).

241. *See* S. REP. NO. 102-58, *supra* note 5, at 5 (detailing the “fraud, waste and abuse” of federal financial aid “particularly as it relates to proprietary schools” throughout the 1980s and 1990s).

242. *See supra* Part IV.A (explaining the failure of regulatory oversight on both the federal and state level, despite recognition of the problem and repeated efforts at reform).

243. *See* Nocera, *supra* note 2 (quoting a Department of Justice allegation against the culture at Education Management, the nation’s second-largest for-profit education company) (internal quotation marks omitted).

244. Marklein, *supra* note 32 (quoting Chelsi Miller) (internal quotation marks omitted).

In fact, although government reported enrollment figures<sup>245</sup> and net profits<sup>246</sup> remain strong for many for-profit schools, recent market indicators are demonstrating that pervasive negative publicity may be starting to have an effect.<sup>247</sup> Stock prices of major for-profits such as Strayer Education, DeVry Inc., ITT Educational Services, and Apollo Group plunged in early 2011 after Strayer reported significant declines in enrollment.<sup>248</sup> Scrutiny by the government and issues regarding student loan repayment rates were cited as factors in the industry's slump.<sup>249</sup> As noted by Kevin Kinser, an associate professor at the State University of Albany at New York who studies the for-profit education industry, for-profit schools now "have a huge bulls-eye on them."<sup>250</sup>

There is no doubt the elimination of deceptive, or borderline-deceptive, practices will result in some lost profits;<sup>251</sup> however, it is adopting legitimate practices now that will result in the most promising and lasting success.<sup>252</sup> The University of Phoenix, the nation's single largest for-profit college,<sup>253</sup> may be one of the first to realize this, and—in addition to

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245. See AUDET AL., *supra* note 3, at 118.

246. See Jahna Berry, *University of Phoenix Enrollment Drops 42%*, THE ARIZ. REPUBLIC (Jan. 11, 2011), <http://www.azcentral.com/arizonarepublic/business/articles/2011/01/10/20110110university-of-phoenix-enrollment-drops.html>. Apollo Group, the company that owns the University of Phoenix, reported "net revenue of \$1.33 billion on the three-month period that ended Dec. 30, [2011], up 5.4 percent, from \$1.27 billion during the quarter a year earlier." *Id.*

247. See *id.*; *University of Phoenix Enrollment Plunges 42%*, HUFF POST COLL. (Jan. 12, 2011), [http://www.huffingtonpost.com/2011/01/12/university-of-phoenix-enr\\_n\\_807934.html](http://www.huffingtonpost.com/2011/01/12/university-of-phoenix-enr_n_807934.html).

248. *Enrollment Drops Hammers For-Profit Education Sector*, FORBES.COM (Jan. 10, 2011), <http://www.forbes.com/2011/01/10/forprofit-education-stocks-plunge-on-news-of-decline-in-student-enrollment-marketnewsvideo.html>.

249. See *id.*

250. Alan Scher Zagier, *University of Phoenix, Other For-Profit Colleges Respond to Scrutiny*, MISSOURIAN (Aug. 6, 2011) (internal quotation marks omitted), <http://www.columbiamissourian.com/stories/2011/08/06/university-phoenix-other-profit-colleges-respond-scrutiny/>.

251. See Berry, *supra* note 246. Berry cites a chief reason for the University of Phoenix's 42% drop in enrollment in the last three months of 2010 to be the company's struggle to adjust to new Program Integrity regulations prohibiting incentive compensation for recruitment counselors, although such influence was downplayed by company executives. See *id.*

252. Zagier, *supra* note 250.

253. THOMAS D. SNYDER & SALLY A. DILLOW, DIGEST OF EDUCATION STATISTICS 2010, NAT'L CTR. FOR EDUC. STATISTICS 282 (2010), available at <http://nces.ed.gov/pubs2011/2011015.pdf>.

complying with new federal regulations—is currently self-imposing its own remedies.<sup>254</sup> The self-imposed remedies at the University of Phoenix include: (1) running a social network to better link students to graduates for career networking, (2) adding new alumni associations and mentorship programs, (3) hosting a free orientation program to reduce the number of drop-outs, and (4) reducing the use of outside sales companies to produce leads and recruit students.<sup>255</sup> The results of these changes have been dramatic,<sup>256</sup> with enrollment dropping 42% and resulting in an overall 3.8% decrease from the previous year's total enrollment figure.<sup>257</sup> Although critics are split on whether the declines result from bad publicity or the self-imposed reforms,<sup>258</sup> Mark Brenner, vice-president of external affairs for the University of Phoenix, stated that the company anticipates further decline but “ha[s] made a conscious decision to make sure the students coming through the door are more likely to be successful.”<sup>259</sup> Other industry leaders such as Kaplan University, which enrolls the second-largest number of students in the nation,<sup>260</sup> are also anticipated to explore self-imposed reforms.<sup>261</sup>

Thus, if for-profit educational institutions desire to retain their presence and market share in light of the scrutiny, they must give “active participation in the process [and] . . . redouble their efforts to avoid future impropriety.”<sup>262</sup> It is an opportunity for for-profit educational institutions operating within lawful constraints to “assert themselves as business models for the industry” and usher in a legitimate industry.<sup>263</sup> Similarly, attorneys representing for-profit educational institutions are perhaps most

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254. Zagier, *supra* note 250.

255. *Id.*

256. *Id.*

257. Berry, *supra* note 246.

258. Compare *id.* (citing federal regulations and new self-imposed changes for decreasing enrollment), with *University of Phoenix Enrollment Plunges 42%*, *supra* note 245 (noting the increase in government scrutiny and publicized “student loan default rates, nefarious recruiting practices and low graduation rates” as a chief cause).

259. Zagier, *supra* note 250 (quoting Mark Brenner) (internal quotation marks omitted). This change is also reflected in the Apollo Group’s 2011 Annual Report, which states reforms “over time” are expected to result in returns, with the highest immediate priority being to “deliver quality educational experience[s] to . . . students.” Apollo Group, Inc., Annual Report (Form 10-K) (Oct. 20, 2011).

260. SNYDER & DILLON, *supra* note 253, at 282.

261. Zagier, *supra* note 250.

262. Cooley & Cooley, *supra* note 7, at 526.

263. *Id.*

zealously and meaningfully representing for-profit schools as clients by encouraging this type of self-reform, because for-profit schools playing by the rules stand to benefit most in the long-term.<sup>264</sup> In turn, it is also essential for those institutions providing quality education within the bounds of state and federal regulation to actively combat the negative image to garner good reputations and future financial success.

#### V. CONCLUSION

Although the tide of public sentiment and regulatory efforts are slowly turning against the powerful for-profit educational industry known by their hundreds of trade names—University of Phoenix, DeVry, Vatterott, Strayer, ITT—immediate and comprehensive reform is still needed. For-profit educational institutions are not inherently harmful and in fact may provide great educational support to a demographic in need, however, incentives are improperly placed, which encourage and allow fraudulent practices. Federal and state regulatory efforts have proven unsuccessful and, most importantly, individuals have little ability to recover in state courts.

It is necessary as a society and legal community to re-think our approach to for-profits. Treating these schools like all other educational institutions is ultimately a disservice, and without a complete reorganization of the regulatory scheme, incremental regulatory efforts will not be the solution. The greatest need is a federal private cause of action to help those harmed, which may help spur the industry to self-institute reform. It is clear changes at both the individual and institutional level are needed to protect vulnerable people and the industry from itself, and more than one solution is needed for success.

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264. *Id.*

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