

SOMETHING CORPORATE:  
THE CASE FOR TREATING PROPRIETARY  
EDUCATION INSTITUTIONS LIKE  
CORPORATIONS

CHRISTOPHER J. RYAN, JR. \*

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\* C.J. Ryan received an A.B. from Dartmouth College, an M.Ed. from the University of Notre Dame, and a J.D. from the University of Kentucky College of Law, where he served as Notes Editor on Volume 101 of the KENTUCKY LAW JOURNAL. In July 2012, Kentucky Governor Steven L. Beshear appointed C.J. to serve a one-year term on the Kentucky Council on Postsecondary Education, the Commonwealth’s higher education policy and regulation board, where he advocated for, and helped implement, the lowest annual state-wide tuition increase in decades. This article was presented in part as a Concurrent Session on November 8, 2012 at the Education Law Association’s Annual Conference in Hilton Head, SC, under the title: *How to Succeed in the Proprietary Education Business without Really Disclosing Anything: The Case for Fiduciary Duties and Disclosure*. C.J. would like to thank Professor Scott R. Bauries, of the University of Kentucky College of Law, and Professor John H. Robinson, of the Notre Dame Law School, and the editors of the JOURNAL OF COLLEGE AND UNIVERSITY LAW for their contributions to this article. C.J. would also like to thank the faculty and administration, especially Assistant Dean Daniel P. Murphy, of the University of Kentucky College of Law for their financial support, which made C.J.’s research and presentation at the ELA Conference possible.

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## INTRODUCTION

### A. Cautionary Proprietary Education “Folktale” from the Bluegrass State

Among the most important purposes of the folktale is that it serves as a vehicle for identifying society’s strengths and shortcomings. Folktales make sense of an often chaotic world. The damsel-in-distress who is tricked into the clutches of the villain serves both as a cautionary tale and emphasizes the importance of right behavior.<sup>1</sup> With that in mind, here is a brief tale.

Picture the archetypal female student featured in any admission pamphlet, blithely procrastinating on a class assignment by enjoying a sunny afternoon on the college green. This carefree scholar, in her idyllic collegiate setting, is not “Jane.” Jane is more like Cinderella (pre-fairy-godmother); she comes from a lower socioeconomic and educational background and always aspired to be a paralegal.<sup>2</sup> Initially attracted by a low-cost paralegal degree program and the promise of assistance in her post-graduation job search, Jane decided to enroll at Daymar College’s Louisville campus because—she claims—one of Daymar’s employees promised her that the academic credits she earned at Daymar would transfer to

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1. BRUNO BETTELHEIM, *THE USES OF ENCHANTMENT: THE MEANING AND IMPORTANCE OF FAIRY TALES* 9 (1976).

2. Anna Prendergrast, *Thirty-nine Louisville Students Join Daymar College Lawsuit*, WHAS11 (Feb. 23, 2011, 11:34 PM), <http://www.WHAS11.com/community/116784023.html>. In the interest of brevity and uniformity in conveying this cautionary tale, the student’s real name and demographic information have been intentionally removed by the author.

other schools.<sup>3</sup>

We know how this story ends; in a post-Madoff world, we are conditioned to be cautious—if not disbelieving—of promises that seem too good to be true. But Jane took Daymar's promise on faith. After receiving her paralegal degree, she found herself saddled with over thirty thousand dollars of debt and no job prospects.<sup>4</sup> Worse yet, Jane discovered the grim reality that her Daymar College credits were essentially worth nothing.<sup>5</sup> Not only was her degree from Daymar College an insufficient credential in the paralegal job market, but the promise on which she relied in choosing Daymar College—the value in the transferability of her credits—proved to be illusory. No other four-year school in Kentucky would accept the course credits from Daymar College for transfer into one of its four-year degree programs.<sup>6</sup>

Sadly, Jane's experience was not unique. Other Daymar students have alleged that Daymar and its representatives misled them about critical information regarding financial aid and textbooks. For example, students alleged that Daymar forced them to purchase textbooks and supplies from only Daymar's bookstore at substantially higher rates than other vendors.<sup>7</sup> Like Jane, a number of students have alleged that Daymar employed many unfair and deceptive practices in recruiting and enrolling students:

[E]nrolling and retaining students with false assurances that their credits will transfer to public or traditional schools, when, in fact, the credits do not transfer in most circumstances; offering programs that do not meet the career educational standards of Daymar College's own institutional accreditation organization; recruiting and enrolling students who incur substantial debt to attend Daymar College, but do not meet Daymar College's own admission standards and so are unable to complete the program and/or obtain a job in their field.<sup>8</sup>

Further, students allege that Daymar representatives made oral statements to students that their Daymar credits would transfer to other colleges and universities, made inaccurate written statements about the transferability of Daymar credits, and did not inform prospective students that their Daymar credits were unlikely to transfer.<sup>9</sup> For these reasons, the Attorney

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3. *Id.* It is important to note that the statements made by Jane explaining why she enrolled at Daymar College are gleaned from court documents and news articles. *Id.* See also *infra* note 7.

4. Prendergrast, *supra* note 2.

5. *Id.*

6. *Id.*

7. Complaint at 4, Commonwealth v. Daymar Learning, Inc., No. 11-CI-01016 (Daviness Cir. Ct., Div. I, July 27, 2011).

8. *Id.*

9. *Id.* at 6.

General of the Commonwealth of Kentucky filed a civil complaint against the institution in the Daviess County Circuit Court in July 2011.<sup>10</sup>

If true, such practices undoubtedly disenfranchise students, like Jane, who were recruited under a false pretense to attend a for-profit institution. Significantly, the complaint against Daymar also alleges that Daymar misreported the cost of its degree programs and did not disclose adequate information to prospective students about costs and financial aid options for attending Daymar.<sup>11</sup> Furthermore, if the complaint's allegations are true, Daymar and its representatives took "the financial aid monies owing and belonging to students and us[ed] these monies for [Daymar College's] use and benefit by denying students access to their funds for any purpose other than purchasing textbooks, supplies and services from Daymar College."<sup>12</sup> Deceptive practices like those alleged in the complaint not only serve to further elevate the unequal informational position of the proprietary institution over the student, but also unfairly foist insurmountable student loan debt upon those students. This unconscionable scenario, if true, requires those victims be permitted a viable means of redress against such transgressions.<sup>13</sup>

Yet, the idea that America needs proprietary schools has become some

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10. *Id.* at 1. Later, Daymar moved to remove the case to federal district court and to have the action against it dismissed, alleging "conflict preemption" and a failure to satisfy the pleading requirements. The U.S. District Court for the Western District of Kentucky denied the motion and remanded the case, upon the plaintiff's motion, to the Daviess County Circuit Court. *See Kentucky ex rel. Conway v. Daymar Learning, Inc.*, CA No. 4:11CV-00103-JHM, 2012 WL 1014989, at \*1-7 (W.D. Ky. Mar. 22, 2012). At the time of this writing, this case has not reached resolution.

11. *Kentucky ex rel. Conway*, 2012 WL 1014989 at \*5.

12. *Id.* at \*7.

13. With the passage of a bill by the Kentucky General Assembly in 2009, that body backed innovative education reform to promote student, institution, and career readiness. *See Act of Mar 25, 2009, ch. 101, 2009 Ky. Acts 1114* (codified at KY. REV. STAT. ANN. § 158.6453). At a time, such as now, when Kentucky ranks among the bottom forty states in its unemployment rate—just over nine percent—it is imperative that the state legislature honor its promise to protect students in the Commonwealth from being recruited under false pretenses; depleted of much needed financial aid; and, if he or she is lucky enough to be considered for a job in an oversupplied occupation, sent out into the workforce without the competitive advantage of an education calculated to effectuate the student's career success. *See Unemployment Rates for States*, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/web/laus/laumstrk.htm> (last modified Jan. 28, 2014); *Economy at a Glance: Kentucky*, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/eag/eag.ky.htm> (last updated Feb. 20, 2014); RICHARD L. HEMBRA, U.S. GOV'T. ACCOUNTABILITY OFFICE, GAO-97-104, PROPRIETARY SCHOOLS: MILLIONS SPENT TO TRAIN STUDENTS FOR OVERSUPPLIED OCCUPATIONS (1997), available at <http://www.gao.gov/assets/230/224276.pdf>. Kentucky's unemployment rate is higher than the national average by more than half a point. *See Chris Ott, Kentucky Unemployment Rate Drops to 9.1%*, LOUISVILLE COURIER-JOURNAL (Jan. 20, 2012) available at <http://www.courier-journal.com/article/B2/20120119/BUSINESS/301190042/kentucky%20unemployment%20rate>.

thing of a truism, as these schools do play a key role in the world of higher education,<sup>14</sup> offering services to an important and unique student demographic that, like Jane, is largely female, financially independent, and over the age of twenty-five.<sup>15</sup> Additionally, students attending proprietary schools are more likely to be veterans, to have family incomes near or below the poverty level, and to have a parent without at least an associate's degree than a student at non-proprietary postsecondary institutions.<sup>16</sup> Furthermore, though they serve a disproportionately large number of economically disadvantaged students<sup>17</sup> and veterans,<sup>18</sup> the necessity for (and suc-

14. Goldie Blumenstyk, *Nonprofit Colleges Compete on For-Profits' Turf*, CHRON. HIGHER EDUC. (Jun. 1621, 2013), <http://chronicle.com/article/For-Profit-Colleges-Consider/139851/>. This idea has been voiced not only by members of the proprietary education sector, but also by public higher education figures such as Mitchell E. Daniels, Jr., President of Purdue University, and Freeman A. Hrabowski III, President of University of Maryland-Baltimore County. *Id.*

15. Kelly Field, *Demographics Do Not Explain For-Profit Colleges' Shortcomings on Student-Success Measures GAO Says*, CHRON. HIGHER EDUC. (Dec. 7, 2011), <http://chronicle.com/article/Demographics-Do-Not-Explain/130040/>.

16. *Id.* See also GEORGE A. SCOTT, U.S. GOV'T. ACCOUNTABILITY OFFICE, GAO-12-143, POSTSECONDARY EDUCATION: STUDENT OUTCOMES VARY AT FOR-PROFIT, NONPROFIT, AND PUBLIC SCHOOLS (2011), available at <http://www.gao.gov/assets/590/586738.pdf>; Paul Fain & Scott Jaschik, *Obama on For-Profits*, INSIDE HIGHER ED (Aug. 26, 2013), <http://www.insidehighered.com/news/2013/08/26/obama-speaks-directly-profit-higher-education-noting-concerns-sector>.

[I]n a question-and-answer session at the State University of New York at Binghamton, a doctoral student . . . asked the president about the sector and for-profit colleges that the student called 'predatory.' The president responded with some language that didn't go over well with officials in for-profit higher education. He agreed that some for-profit colleges are taking advantage of students (and in particular veterans) . . . .

*Id.*

17. GEORGE A. SCOTT, 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 (2009), available at <http://www.gao.gov/new.items/d09600.pdf>. The article states:

Academic researchers have found that higher default rates at proprietary schools are linked to the characteristics of the students who attend these schools. Specifically, students who come from low income backgrounds and from families who lack higher education are more likely to default on their loans, and data show that students from proprietary schools are more likely to come from low income families and have parents who do not hold a college degree.

*Id.* See also Neil S. Seftor & Sarah E. Turner, *Back to School: Federal Student Aid Policy and Adult College Enrollment*, 37 J. HUMAN RES. 336 (2002); Richard N. Apling, *Proprietary Schools and Their Students*, 64 J. HIGHER EDUC. 379 (1993).

18. Aaron Smith, *For-Profit Schools Cash in on the GI Bill*, CNNMONEY (June 26, 2012, 10:46 AM), <http://money.cnn.com/2012/06/26/news/economy/veterans-schools/index.htm>.

The Department of Veterans Affairs bankrolls four years of higher education for veterans who have served since September 11, 2001. The VA paid out

cess of) proprietary schools is undercut by the lack of proprietary school graduates trained to work in the highly skilled fields that the market most demands, like engineering and the biosciences.<sup>19</sup> But unscrupulous proprietary schools, and the inability of the proprietary education industry to self-regulate, seem to altogether impair the demand and respect for such schools.<sup>20</sup> Jane's story is a cautionary tale, which presents an opportunity to emphasize the need for, and indeed to demand, ethical behavior from these institutions in the form of fair dealing and greater transparency.

### B. Proprietary Education: A Current Snapshot

As recently as the year 2000, most litigation involving proprietary education institutions concerned inflated or false representations made by proprietary school representatives; today, however, the frequency of these suits is dwindling.<sup>21</sup> While it may be alarming that Jane's tale takes place in the

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\$4.4 billion for tuition and fees in the two academic years spanning 2009 to 2011. For-profit private schools raked in 37% of those funds, but educated just 25% of veterans, according to the U.S. Senate's Health, Education, Labor and Pensions (HELP) committee.

*Id.*

19. See Blumenstyk, *supra* note 14.

'They don't have a heavy presence in STEM,' said Brian K. Fitzgerald, chief executive of the Business-Higher Education Forum . . . Georgetown University's Anthony Carnevale, a labor economist who studies the connections between academic credentials and job markets, says the growth of online education in the nonprofit sectors and the rise of MOOCs and other alternative forms of higher education change the equation regarding the 'need' for for-profit colleges. Without them, he said, 'the loss wouldn't be monumental' to the economy, but the nation would 'lose a substantial set of earnings opportunities for people' being trained for jobs in medical technology, culinary arts, and high-tech mechanical fields. 'They're good at HVAC,' said Mr. Carnevale . . . 'The question is whether the earnings are worth the price.'

*Id.*

20. Frank Donoghue, *Who Goes to For-Profit Colleges?*, CHRON. HIGHER EDUC. (June 27, 2011), <http://chronicle.com/blogs/innovations/who-goes-to-for-profit-colleges/29725>.

For-profit colleges and universities educate [twelve percent] of the postsecondary population, but have huge attrition rates and [account for] half of the federal loan defaults, measured in dollars. That ratio suggests that the for-profits are only interested in enrolling students—any students—but don't particularly care if those students graduate, get well-paying jobs and are thus able to pay back their student loans.

*Id.*

21. See Patrick F. Linehan, Note, *Dreams Protected: A New Approach to Policing Proprietary Schools' Misrepresentations*, 89 GEO. L.J. 753, 754 (2001) (citing U.S. GOV'T. ACCOUNTABILITY OFFICE, T-HEHS-96-158, HIGHER EDUC.: ENSURING QUALITY EDUC. FROM PROPRIETARY EDUC. INSTS. (1996), available at <http://www.gao.gov/assets/110/106522.pdf> (statement of Cornelia M. Blanchette before the Subcommittee on Human Resources and Intergovernmental Relations)).

modern era, it is perhaps not so surprising that change takes a touch longer than usual to reach Kentucky.<sup>22</sup> At first blush, it reflects positively on the proprietary education industry that fraudulent misrepresentation suits are down, perhaps a sign that the schools are reining in their extravagant promises to students, or that students are becoming savvy to the traditional deceptive recruitment practices. Unfortunately, reality is less rosy. If anything, Jane's cautionary tale, and other true stories like it, has led to an unintended consequence. Learning to couch misrepresentations as legally permissible puffery, some proprietary education institutions have merely evolved and now employ more erudite methods of trickery. State governments, however, have yet to take notice of the fact that a growing number of proprietary schools have developed new practices of profit generation, often at the expense of students.

With substantial sums of money at stake, federal financial aid has become the new fiscal focus of many proprietary schools. In 2012, Senator Tom Harkin issued the final report of his two-year investigation of the proprietary education industry.<sup>23</sup> The report reveals that taxpayers spent \$32 billion in 2011 on postsecondary proprietary education institutions in the form of federal financial aid; but most students at for-profit colleges left without earning degrees or certificates.<sup>24</sup> Worse, half of those students left those schools within four months of enrolling for classes.<sup>25</sup> Yet, despite this unsettling statistic, an even more distressing facet of the federal financial aid system—the zero-sum game—has been brought to the fore by the practices of a few unprincipled proprietary schools.<sup>26</sup> If a student withdraws from a proprietary school in the middle of the semester: (1) the student forfeits his or her financial aid award for the semester and may be responsible for imminent repayment of the award; (2) a non-proprietary school, already wearing a tighter belt amidst deep cuts to its operating budget, loses out on the financial aid award that the student brought to the proprietary school; and (3) the proprietary school keeps most, if not all, of the federal financial aid award without having educate the very student who brought his or her federal financial aid money to the school in the first place.<sup>27</sup>

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22. The great 19th century humorist Mark Twain is credited as the originator of this quip about the Bluegrass State: "I want to be in Kentucky when the end of the world comes, because it's always 20 years behind." Rebecca Kaplan, *Immersed in the Bluegrass State*, LANGUAGE MAG., [http://languagemagazine.com/?page\\_id=4415](http://languagemagazine.com/?page_id=4415) (last visited Feb. 24, 2014).

23. Tamar Lewin, *Senate Committee Report on For-Profit Colleges Condemns Costs and Practices*, N.Y. TIMES, July 29, 2012, at A12.

24. *Id.*

25. *Id.*

26. *Id.*

27. Paul Fain, *Results Are In*, INSIDE HIGHER ED (July 30, 2012), <http://www.insidehighered.com/news/2012/07/30/harkin-releases-critical-report-profits> (noting a troubling sixty-four percent dropout rate in associate degree programs).

The Harkin Report's startling findings demand attention. That "education is perhaps the most important function of state and local governments"<sup>28</sup> is as true today as it was in 1954 when the Supreme Court proclaimed it. This article's goal is to argue that postsecondary education, particularly proprietary postsecondary education, has become a product-driven industry in the modern era, and as such, the law should apply the same accountability standards to proprietary schools that it applies to other proprietary entities. Because states are best positioned to regulate the institutions within their own borders, they should seize the opportunity to regulate the proprietary education industry by requiring more robust disclosure about its operations. As the cases regarding the deceptive trade practices of proprietary education institutions continue to funnel through the American court system, the argument for legislation requiring proprietary education institutions to disclose vital investment information to potential consumers should be given due concern.

In Part I, this article examines (1) the history of proprietary colleges and universities, distinguishing them from traditional postsecondary colleges and universities; (2) the modern reality of the educational marketplace; and (3) the organizational structure of proprietary schools. Given this context, the article posits that the regulation of the proprietary education industry is more akin to regulating a traditional corporation than regulating a traditional postsecondary school. Next, Part II introduces the academic abstention doctrine that has long been a fixture in the courts and scrutinizes the historical causes of action against proprietary schools, arguing that they are inadequate in the modern era. Part III considers the role that deceptive trade practices, such as inadequate disclosure, have in relation to the current student loan default rate crisis and contends that the states are better positioned to regulate proprietary schools' harmful trade practices than the federal government. In Part IV, this article turns to the modern evolution of fiduciary duties and the corporate elements of proprietary schools, asserting that general fiduciary duties, existing between proprietary education institutions and their students, should supplant the academic abstention doctrine. Finally, Part V makes a realistic recommendation for the regulation of proprietary educational institutions as for-profit enterprises, distinguishing proprietary schools from other educational institutions with which the law has mistakenly associated them.

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28. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). By acknowledging the priority of education as a function of state and local government, the Supreme Court implicitly deferred to the states and municipalities with regard to education. More recently, consumer protection laws have become an avenue by which states shoulder the burden of protecting the uneducated. *Id.*



## I. THE HISTORICAL RISE OF PROPRIETARY EDUCATION INSTITUTIONS

Although the proprietary education model is often regarded as a modern invention, the history of proprietary schools in this country is quite established, predating even the signing of the Declaration of Independence.<sup>29</sup> As alternatives to apprenticeships and the colleges of the day, proprietary schools served important purposes during the Colonial period and early years of the nation.<sup>30</sup> Eventually, these schools began to teach career training in addition to basic literacy; since the late nineteenth century, proprietary education institutions have existed to keep up with the market's demand for vocationally educated and trained members of the workforce.<sup>31</sup> Historically, these institutions existed for the purpose of offering a career path for students who either did not fit into, or were neglected by, the traditional postsecondary education model.<sup>32</sup> In the second half of the twentieth century, however, the proprietary education industry took up a different mantle with a more profit-centered focus. The industry saw exponential growth after the Higher Education Amendments<sup>33</sup> were enacted in 1972, which granted proprietary schools eligibility to participate in Title IV programs and thereby provided these schools federally-backed student financial aid packages.<sup>34</sup>

In the late 1990's, some five thousand proprietary education institutions served over one million students, with over two-thirds of those students receiving Title IV federal student aid; at the same time, proprietary education institutions comprised fifty percent of all postsecondary institutions and served slightly greater than half of all non-baccalaureate students attending postsecondary schools.<sup>35</sup> Even since then, proprietary education has seen

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29. Aaron N. Taylor, "Your Results May Vary": *Protecting Students and Taxpayers Through Tighter Regulation of Proprietary School Representations*, 62 ADMIN. L. REV. 729, 752-53 (citing LISA K. FOSTER, CAL. STATE LIBRARY, CRB 04-010, FOR-PROFIT POSTSECONDARY EDUCATIONAL INSTITUTIONS: OVERVIEW OF ACCREDITATION AND STATE AND FEDERAL OVERSIGHT 13 (2004)).

30. *Id.*

31. See Melvin L. Barlow, *200 Years of Vocational Education*, 51 AM. VOCATIONAL J. 1 (1976) (detailing the origins, early history, and the evolution of proprietary and vocational schools in the United States). See also RICHARD S. RUCH, HIGHER ED, INC.: THE RISE OF THE FOR-PROFIT UNIVERSITY 52 (2001) (chronicling how student interest prompted early proprietary schools to expand their curricula to include courses that taught "skills that were in high demand by employers").

32. Michael J. Seiden, *For-Profit Colleges Deserve Some Respect*, CHRON. HIGHER EDUC. (June 29, 2009), <http://chronicle.com/article/article-content/46985/>.

33. Pub. L. No. 92-318, 86 Stat. 235 (1972) (codified as amended at 20 U.S.C. § 1001 (2012)).

34. See Linehan, *supra* note 21, at 755-56 (discussing the proprietary education industry's regulatory framework and participation in Title IV programs as well as the importance of the Higher Education Amendments).

35. See SCOTT, *supra* note 16, at 5. See also NAT'L ASS'N FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., FINDINGS FROM VOCATIONAL EDUCATION IN THE UNITED STATES:

marked growth. The percentage of federal financial aid payouts to postsecondary schools doubled in the years between 2000 and 2010.<sup>36</sup> In 2010, over ninety-five percent of students enrolled in proprietary schools received some type of federal student aid.<sup>37</sup> In the same year, proprietary schools educated only ten percent of all postsecondary students, but proprietary schools received over twenty-three percent of all Title IV federal loans and grants.<sup>38</sup> To emphasize, proprietary schools now eat nearly a quarter of the overall Title IV federal loan and grant pie. This figure is illustrative of the floodgates that opened with a trickle just over forty years ago in 1972.

In certain respects, proprietary education institutions have not changed since their early history, as they continue to target minorities traditionally underrepresented at postsecondary institutions,<sup>39</sup> but with significant sums of federal financial funds at stake, the tactics for, and the urgency of, recruiting these students has changed.<sup>40</sup> This adaptation is either the underlying cause or the direct result of a sea change in postsecondary education: the paradigm shift from higher education as an intangible benefit—a way of thinking—to a commodity.

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THE EARLY 1990s, at 18 tbl.1 (1996), available at <http://nces.ed.gov/pubs97/97391.pdf>).

36. S. HEALTH, EDUC., LABOR & PENSIONS COMM., 111TH CONG., EMERGING RISK?: AN OVERVIEW OF GROWTH, SPENDING, STUDENT DEBT AND UNANSWERED QUESTIONS IN FOR-PROFIT HIGHER EDUCATION 3 (2010) [hereinafter “Harkin”], available at <http://harkin.senate.gov/documents/pdf/4c23515814dca.pdf> (2010) (statement of Tom Harkin, Chairman of the Health, Education, Labor and Pensions Committee, United States Senate).

37. SANDRA STAKLIS, NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., WEB TABLES—PROFILE OF UNDERGRADUATE STUDENTS: 2007–08, at 109 (2010), available at <http://nces.ed.gov/pubs2010/2010205.pdf>.

38. Cheryl L. Auster, *Promising a Better Future But Delivering Debt: Understanding the Financial and Social Impact of For-Profit Colleges and the Effect of the New Program Integrity Rules*, 13 SCHOLAR 631, 634–35 (2011) (citing Harkin, *supra* note 36, at 4).

39. Welford W. Wilms, *Proprietary Schools: Strangers in Their Own Strange Land*, 19 CHANGE 10 (1987) (identifying that part of proprietary schools’ appeal is that schools provide hope for students who have experienced educational failure in a more conventional setting). See also Cathy Lesser Mansfield, *The Federal Trade Commission Holder Rule and Its Applicability to Student Loans—Reallocating the Risk of Proprietary School Failure*, 26 WAKE FOREST L. REV. 635, 636–47 (1991) (noting that proprietary education institutions “aggressively recruit economically deprived or homeless individuals, often from welfare lines and laundromats”); *Frontline: College Inc.* (WGBH Educational Foundation television broadcast May 4, 2010), available at <http://www.pbs.org/wgbh/pages/frontline/collegeinc/etc/script.html> (transcript and video).

40. Proprietary education institutions often place their schools in locations convenient to students’ homes or workplaces and accessible by regular public transportation routes, while developing advertising campaigns and messages to appeal directly to these students’ desires. See *Frontline: College Inc.*, *supra* note 39.

### A. Commoditizing Higher Education

Postsecondary education in the United States is the unique product of a *laissez-faire* system. This backdrop precipitated an immense entrepreneurial expansion of higher education, and in turn, it yielded a wide array of postsecondary institution models.<sup>41</sup> Unlike the European college and university models, the American postsecondary system developed and continues to thrive with comparatively little direct influence or interference from the federal government,<sup>42</sup> placing it among the most market-oriented systems of higher education in the world.<sup>43</sup> This status is the result of historical insulation from market pressures that are pervasive in and germane to the private sector, because higher education has long held public favor.<sup>44</sup>

Yet, for the last century, the postsecondary education landscape bears increasing similarity to a marketplace, where students<sup>45</sup> and institutions play roles ranging from consumer to entrepreneur to corporation. Aaron Taylor has argued that:

Like capitalism in general, academic capitalism is about competition—competition for funding, students, and—for some schools—prestige. The primary competitors are institutions, which are embodied by the actors who operate therein: faculty, students, and administrators. Networks are central to viability within the academic capitalist system. As such, institutional actors seek to link institutions (and themselves) to the modern,

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41. CHRISTOPHER J. LUCAS, *AMERICAN HIGHER EDUCATION: A HISTORY* 116–19 (2006) (noting the proliferation of American colleges and universities in the nineteenth century).

42. See Martin Trow, *Federalism in American Higher Education*, in *HIGHER LEARNING IN AMERICA: 1980–2000*, at 39 (Arthur Levine ed., 1993) (discussing the minimal direct influence of the federal government on the United States' postsecondary education system). *But see* Lawrence E. Gladieux & Jacqueline E. King, *The Federal Government and Higher Education*, in *AMERICAN HIGHER EDUCATION IN THE TWENTY-FIRST CENTURY: SOCIAL, POLITICAL, AND ECONOMIC CHALLENGES* 151 (Philip G. Altbach et al. eds., 2d ed. 2005) (arguing that the historical influence of the federal government on the United States' postsecondary education system has been pervasive).

43. See Taylor, *supra* note 29, at 742 (citing David D. Dill, *Allowing the Market to Rule: The Case of the United States*, 57 *HIGHER EDUC. Q.* 136, 137 (2003) (discussing the increased “marketization” of higher education and its impact on the public interest)). See also DAVID L. KIRP, *SHAKESPEARE, EINSTEIN, AND THE BOTTOM LINE: THE MARKETING OF HIGHER EDUCATION* 2 (2003) (“For better or worse—for better and worse, really—American higher education is being transformed by both the power and the ethic of the marketplace.”).

44. See Taylor, *supra* note 29, at 743.

45. See SHEILA SLAUGHTER & GARY RHOADES, *ACADEMIC CAPITALISM AND THE NEW ECONOMY: MARKETS, STATE, AND HIGHER EDUCATION* 12 (2004) (“[R]aising tuition . . . has heightened students’ and parents’ consumer consciousness about what they expect in terms of their educational experience. . . . These changed expectations reshape student identity from that of learner to that of consumer.”).

knowledge-based economy. These links most often take the form of ‘new circuits of knowledge’—partnerships with the private sector, investments in marketing, product development and student services, and an expanded managerial core to handle these new demands. Fundamentally, the goal of institutions competing in this environment is to generate income, particularly from ‘alternative revenue streams,’ with the assumption that robust, diversified funding will lead to greater prestige, better students, and increased viability.<sup>46</sup>

Regardless of the dangers associated with higher education mimicking the marketplace, the shift to a knowledge-based economy is undeniable. This economy is based on the theory that “knowledge is a commodity that when exploited can reap tangible benefits [for] the possessor.”<sup>47</sup> Because postsecondary education institutions are considered “a major source of alienable knowledge,” these institutions are at the very center of a knowledge-based economy.<sup>48</sup> Learning for the sake of learning, however, is the first thing to fall by the wayside in a knowledge-based economy, quickly ceding to the contemporary reality that education is increasingly regarded as a private pursuit, not a public good.<sup>49</sup> This paradigm shift does not sit well with members of the professoriate who increasingly complain about the consumer mentality of their students.<sup>50</sup> However, postsecondary education institutions have long benefitted from the fact that they know more about prospective students than these students know about the institu-

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46. See Taylor, *supra* note 29, at 743–44 (citations omitted).

47. *Id.* at 744 (citing SLAUGHTER & RHOADES, *supra* note 45, at 15 (“[K]nowledge is a raw material to be converted to products, processes, or service.”)). See also *Andre v. Pace Univ.*, 618 N.Y.S.2d 975, 979 (N.Y. City Ct. 1994), *rev’d*, 655 N.Y.S.2d 777 (N.Y. App. Term 1996) (“Colleges and Universities are in the business of marketing and delivering educational services and degrees to the general public.”).

48. See Taylor, *supra* note 29, at 744 (citing SLAUGHTER & RHOADES, *supra* note 45, at 15) (internal quotation marks omitted).

49. SLAUGHTER & RHOADES, *supra* note 45, at 42–43 (citation omitted) (“By the 1980s and 1990s, higher education was construed less as a necessary public or social good and more as an individual or private good, justifying ‘user pays’ policies.”). See also Vikki Conwell, *For-Profit Schools Under Pressure to Prove Investment in Education Pays Off*, DIVERSE ISSUES IN HIGHER EDUC. (Aug. 25, 2013), <http://diverseeducation.com/article/55498/#>.

As college tuition costs rise, more students, parents and taxpayers are asking institutions to show a return on the financial investment. . . . ‘Institutions need to be nervous because more and more people want to know about the economic value of the education,’ said Anthony P. Carnevale, director and Research Professor of the Georgetown University Center on Education and the Workforce.

*Id.*

50. Jeffery Selingo, *Colleges Must Prepare for a Buyers Market*, CHRON. HIGHER EDUC. (Apr. 12, 2013), <https://chronicle.com/article/Colleges-Must-Prepare-for-a/138383/>.

tions.<sup>51</sup> Even though the classroom may be an improper forum for a student's consumer mentality, the modern academic marketplace requires that a student be a savvy consumer of postsecondary education in choosing the institution that the student "calculate[s] [is] likely to bring a return on educational investment."<sup>52</sup>

### B. The Structural Advantage of Proprietary Education Institutions

No two proprietary schools are organized exactly alike. That said, many proprietary schools have a structural framework in which a chief administrator, usually the director of the corporation which owns the school, is aided by a small administrative staff.<sup>53</sup> The "responsibility for admissions, financial aid, recruitment and instructional program [is] usually delegated to others."<sup>54</sup> In essence, these institutions exhibit classic corporate organization, where the plenary power of running a corporation resides with the director who oversees the officers' work as agents of the corporation.<sup>55</sup> Despite the even greater variety of governance models at traditional postsecondary schools, the proprietary institution model, with its power centralized in one person or only a few people, stands in stark contrast to the institutional or system-wide governing board typical of most traditional postsecondary schools. These models are, quite simply, diametrically opposed.

Traditional, non-proprietary, postsecondary schools rely on alumni and private donations, grants, tuition payments, and (in the case of state schools) state appropriations to do the heavy lifting for the school's operational budget. In contrast, proprietary schools rely almost entirely on enrollment as a means of boosting profit. Because Title IV financial aid is moveable, students can choose to take their federal financial aid grants and loans to any educational institution contemplated by the Higher Education Amendments—including proprietary schools. Enrollment is a crucial com

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51. See *id.* See also James M. Lang, *Is College Worth It?*, NOTRE DAME MAG. 22–27 (2013), <http://magazine.nd.edu/archives/2013/summer-2013/>.

52. See Taylor, *supra* note 29, at 745 (citing SLAUGHTER & RHOADES, *supra* note 45, at 1–2) (discussing how students "increasingly choose majors linked to the new economy, such as business, communications, [and] media arts"). See also Lang, *supra* note 51.

53. Of the four in-state, for-profit colleges licensed to operate in the Commonwealth of Kentucky by the Council on Postsecondary Education, two entities carry assumed names, and are entities related to only two institutions, comprised of two officers, and three director-officers, respectively. See KY. SECRETARY OF ST. ONLINE SERVICES, <http://app.sos.ky.gov/ftsearch/> (search "Daymar Learning, Inc." and "The Sullivan University System, Inc.") (last visited Feb. 24, 2014).

54. Linehan, *supra* note 21, at 756. See also Wilms, *supra* note 39, at 14–15.

55. See generally ROBERT W. HAMILTON ET AL., CASES AND MATERIALS ON CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES 11 (11th ed. 2010).

ponent of the financial health at a proprietary school because of the federal funding that is guaranteed to the school by a Title IV qualifying student's enrollment. In fact, some of the largest proprietary education institutions in the country, such as the University of Phoenix and Kaplan University, derive ninety percent of their revenue from federal financial aid funding.<sup>56</sup> As a result, historically, several proprietary schools conditioned recruiters' and admission counselors' salaries on the actual tuition paid by students personally persuaded to enroll by the recruiter or counselor.<sup>57</sup> Not only can such practices provide an incentive for recruiters and admission counselors to mislead prospective students (because the federal financial aid funding stays with the proprietary school even if the student bringing the funding to the school drops out), but the proprietary school also has a disincentive to expend resources on enrolled students.<sup>58</sup>

In theory, the current trend of rising tuition costs at non-proprietary post-secondary institutions<sup>59</sup> should carve out a growing enrollment base for the

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56. Daniel Luzer, *The Financial Future of For-Profit Colleges*, WASH. MONTHLY (June 25, 2012, 6:46 PM), [http://www.washingtonmonthly.com/college\\_guide/blog/the\\_financial\\_future\\_of\\_forpro.php](http://www.washingtonmonthly.com/college_guide/blog/the_financial_future_of_forpro.php). See also Daniel Luzer, *Cracking Down on Military Money and For-Profit Colleges*, WASH. MONTHLY (Feb. 21, 2012), [http://www.washingtonmonthly.com/college\\_guide/blog/cracking\\_down\\_on\\_military\\_mone.php](http://www.washingtonmonthly.com/college_guide/blog/cracking_down_on_military_mone.php).

Under current rules, for-profit colleges are not allowed to derive more than [ninety] percent of their revenues from federal financial aid. But veterans' benefits and payments from the military's tuition assistance program don't count as federal financial aid. Because of this, many critics argue that for-profit schools are deliberately enrolling unprepared soldiers and veterans into their programs. Enrolling soldiers and veterans not only allows for-profits to avoid sanctions for making too much money off traditional financial aid, it also enables them to enroll more traditional students. . . . Since 2008, for-profit colleges have seen a [six hundred] percent increase in income derived from military education programs.

*Id.*

57. Linehan *supra* note 21, at 756 (citing S. Rep. No. 102-58, at 7 (1991) (discussing instances wherein schools' sales representative earned incentive awards for enrolling the highest number of students for a given period, wherein receptionists with the highest number of student phone contacts were given time off, and wherein loan counselors received cash, color televisions, and other awards for the highest number of applications processed). See also *Moy v. Terranova*, No. 87-CV1578-SJ, 1999 WL 118773, at \*1 (E.D.N.Y. Mar. 2, 1999) (noting an allegation that defendant proprietary school sent a salesman into poor neighborhoods to recruit students on a commission basis). For a chronicling of proprietary schools that continued this practice as recently as 2009, see Barry Yeoman, *The High Price of For-Profit Colleges*, AM. ASS'N. OF UNIV. PROFESSORS (2011), <http://www.aaup.org/article/high-price-profit-colleges#.UjZpxY2IK4>. See also Sharona Coutts, *Recruiter's Experience at One For-Profit University Suggests Reform Efforts Will Face Hurdles*, PROPUBLICA (Feb. 14, 2011, 1:30 PM), <http://www.propublica.org/article/recruiters-experience-at-one-for-profit-university-suggests-reform-efforts->.

58. See Linehan, *supra* note 21, at 756–60.

59. Allie Bidwell, *The Rise in Tuition is Slowing, But College Still Costs More*,

proprietary institutions, which can raise tuition without fear of displacement in the market, so long as their tuition rate remains below that of traditional postsecondary schools. In practice, however, most proprietary schools charge much higher tuition than comparable programs at community colleges and flagship public universities.<sup>60</sup> In fact, Senator Harkin's 2012 congressional investigation found that proprietary associate degree and certificate programs averaged nearly four times the cost of comparable degree programs at community colleges.<sup>61</sup> Similarly, bachelor's degree programs offered by proprietary schools cost twenty percent more on average than the cost of analogous programs at flagship public universities, even though the credits earned at proprietary schools are almost always non-transferrable.<sup>62</sup> A study issued by the National Bureau of Economic Research in 2012 demonstrated that:

Many for-profit institutions that are not Title IV eligible offer certificate (non-degree) programs that are similar, if not identical, to those given by institutions that are Title IV eligible. We find that the Title IV institutions charge tuition that is about [seventy-

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USNEWS (Oct. 24, 2013), <http://www.usnews.com/news/articles/2013/10/24/the-rise-in-tuition-is-slowing-but-college-still-costs-more>.

60. See Harkin, *supra* note 36, at 8–9. “In many cases . . . [comparable] public and nonprofit options are far less expensive than the for-profits are.” Blumenstyk, *supra* note 14. The reason for the rising cost of tuition, which has recently out-paced inflation in most areas, is a multifaceted inquiry. See Derek Thompson, *Why Are Colleges Getting So Expensive?*, ATLANTIC (Dec. 4, 2013, 10:44 AM), <http://www.theatlantic.com/video/archive/2013/12/why-are-colleges-getting-so-expensive/282027/> (stating, simply, that “[d]ifferent schools are getting [more] expensive for different reasons”); Peter High, *Education Technology Is in Its Infancy But It Is Growing up Fast*, FORBES (Dec. 9, 2013, 8:03 AM), <http://www.forbes.com/sites/peterhigh/2013/12/09/education-technology-is-in-its-infancy-but-it-is-growing-fast/> (purporting that the “fundamentals” of the education industry “have not dramatically changed in hundreds of years, and yet its costs have risen at a rate three times as fast as the consumer-price index”). In Kentucky, for instance, public postsecondary education tuition and fees have risen 177% in 12 years, but according to Republican state senator Chris McDaniel, the increase in cost was not accompanied by a corresponding increase in the quality of education. Nick Storm, *Ky. College Tuition and Fees Rise 177% in 12 Years, But Senator Says Academic Results Haven't Kept Up*, CN2 (Dec. 11, 2013, 6:46 PM), <http://mycn2.com/politics/higher-education-tuition-and-fees-increase-177-percent-over-12-years-but-academic-results-haven-t-improved-with-rates>. On the national level, members on the other side of the aisle are, at the time of the publication of this article, introducing legislation to slow the untenable inflation of college tuition costs; this is, perhaps, because they are not-so-far-removed from postsecondary study that senators Chris Murphy (D-CT) and Brian Schatz (D-HI)—the United States Senate's two youngest members—are still paying off their student loans. Dave Collins, *Two Youngest US Senators Seek to Lower College Costs*, BOSTON GLOBE (Dec. 8, 2013), <http://www.boston.com/news/education/2013/12/08/youngest-senators-seek-lower-college-costs/rdSyvIMWpVfPVJAsOzydIK/story.html> (referencing the tripling of college tuition costs over the last thirty years).

61. Lewin, *supra* note 23.

62. *Id.*

eight] percent higher than that charged by comparable institutions whose students cannot apply for federal financial aid. The dollar value of the premium is about equal to the amount of grant aid and loan subsidy received by students in eligible institutions.<sup>63</sup>

According to one of the authors of the study by the National Bureau of Economic Research, “the difference in price between financial-aid eligible institutions and others ‘seems to match, pretty well, the size of a Pell Grant.’”<sup>64</sup> However, in spite of the inordinate cost and objectionable student outcomes at many proprietary schools, the enrollment at proprietary schools continues to grow, especially with its key demographic—the economically disadvantaged.<sup>65</sup> When these students and their futures can be reduced to figures for profit margins, they inevitably lose. In the competitive, commoditized, high-stakes marketplace of higher education, proprietary schools have the upper hand because they are organized like corporations with a clear informational advantage over student consumers.

The very characteristic that makes a proprietary school proprietary—a corporate structure that exists to maximize profits for its shareholders—

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63. Stephanie Riegg Cellini & Claudia Goldin, *Does Federal Student Aid Raise Tuition? New Evidence on For-Profit Colleges*, NAT'L BUREAU ECON. RESEARCH, <http://nber.org/papers/w17827> (last revised Apr. 10, 2013). Put most simply, Title IV eligible schools are those that may receive federal student financial aid—such as Pell Grants and Stafford Loans—under Title IV of the Higher Education Act of 1965. These schools are accredited to award degrees and certificates in two and four-year programs of study. Schools awarding credentials that require less than two years of postsecondary study are not eligible for Title IV funds. See David J. Deming, Claudia Goldin & Lawrence F. Katz, *The For-Profit Postsecondary School Sector: Nimble Critters or Agile Predators?* (2011) (unpublished manuscript), available at [http://www.frbatlanta.org/documents/news/conferences/11employment\\_education\\_demming.pdf](http://www.frbatlanta.org/documents/news/conferences/11employment_education_demming.pdf) (presented at the Federal Reserve Bank of Atlanta's second annual conference September 29, 2011). In practice, the eligibility of a proprietary school to receive Title IV funds is more complex—and currently tied to the 90/10 Rule, which mandates that a proprietary school's revenue from federal financial aid not exceed ninety percent. Goldie Blumenstyk, *For-Profit Colleges Show Increasing Dependence on Federal Student Aid*, CHRON. HIGHER EDUC. (Feb. 15, 2011), <http://chronicle.com/article/For-Profit-Colleges-Show/126394/>.

The 90/10 rule applies only to for-profit colleges. And only federal student-aid money, commonly referred to as Title IV funds . . . is counted toward the [ninety] percent limit. Other sources of federal aid, such as money from the GI Bill or military tuition reimbursements that many students use to pay for college, are not treated as part of the Title IV side of the calculation.

*Id.*

64. Daniel Luzer, *Why Are Many For-Profit Schools So Costly?*, WASH. MONTHLY (Feb. 15, 2012, 4:01 PM), [http://www.washingtonmonthly.com/college\\_guide/blog/why\\_are\\_many\\_forprofit\\_schools.php](http://www.washingtonmonthly.com/college_guide/blog/why_are_many_forprofit_schools.php).

65. See Donoghue, *supra* note 20. “From ‘2000 to 2008, the percentage of low-income students enrolling in for-profits increased from [thirteen] percent to [nineteen] percent, while the percentage enrolling in public four-year institutions declined from [twenty] percent to [fifteen] percent.’” *Id.* (citations omitted).



necessarily distinguishes it from other postsecondary education institutions and is the fundamental difference between the purposes of the corporate and nonprofit models. For example, the annual convention of the Association of Private Sector Colleges, a voluntary membership organization for proprietary schools, is typically “swarming with private-equity investors, business brokers, and bankers, looking for growing colleges to buy or sell.”<sup>66</sup> This example starkly contrasts with the environment of non-proprietary education, illustrating the disparity in function and governance between proprietary and non-proprietary schools, and underscoring the fact that—particularly with regard to predatory proprietary schools—the wolf in sheep’s clothing should not be treated the same as the sheep.

Without a doubt, corporate entities have a genuine business interest in fair dealing while delivering good products to customers. However, principally, the purpose of any corporation is to maximize profits for its shareholders.<sup>67</sup> Given this fiduciary duty to its shareholders, a proprietary college or university is practically compelled to extract as much money as it can from its students. With the collection of student tuition fees, a proprietary school has made its money whether its students continue to show up for class or not.<sup>68</sup> Because the organizational structure of proprietary education institutions incentivizes withholding vital information from the consumer in the academic marketplace, as a matter of fact, proprietary schools maintain a competitive advantage over the consumer and even over their non-proprietary peers. It is time to call a spade a spade. The appropriate regulation of the proprietary education industry should not resemble the *laissez-faire* relationship between the government and non-proprietary colleges or universities; instead, proprietary colleges and universities should be regulated like the for-profit, corporate entities that they are.

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66. Blumenstyk, *supra* note 14.

67. Felix Salmon, *For-Profits vs. Not-for-Profits*, REUTERS (Jan. 16, 2012), <http://blogs.reuters.com/felix-salmon/2012/01/16/for-profits-vs-not-for-profits/>.

68. *Id.*

[T]here are two main ways in which [proprietary schools] could . . . compete on price with traditional colleges. The first is to take advantage of their high drop-out rates, and use the drop-outs’ tuition fees to effectively cross-subsidize the minority of students who actually finish the course. After all, if half your students have stopped showing up for class, they’re not going to cost you much money. The average student will still suffer, of course, but at least those who finish the course might benefit. The other way that for-profit colleges can end up cheaper than their traditional competitors is by concentrating on costs: rather than paying enormous sums for prestigious professors and research institutes, they concentrate with a laser focus on their core business of teaching undergrads. After all, their concentration on profits means that they’re likely to be more efficient than flabby old traditional not-for-profits.

*Id.*

## II. A PRIMER TO THE ACADEMIC ABSTENTION DOCTRINE

To date, most claims against educational institutions have arisen from tort actions, specifically: (1) fraudulent representation, (2) negligent representation, and (3) educational malpractice.<sup>69</sup> Generally, courts will bar attempts to repackage tort claims, such as educational malpractice claims, as contract claims. This is because courts are understandably nervous about the idea of classifying the student-institution relationship as a contractual one.<sup>70</sup> This idea, which has come to be known as the academic abstention doctrine,<sup>71</sup> is also borne from policy concerns associated with utilizing a court to determine the quality of a student's education and the sufficiency of a school's ability to provide the student with an education meeting this standard for quality.<sup>72</sup> Thus, invoking academic abstention, many courts have declined to evaluate either the quality of an education or the sufficiency of its delivery altogether<sup>73</sup>—even in cases sounding in tort.<sup>74</sup> However,

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69. See Linehan, *supra* note 21, at 764 (citing Carol Crocca, Annotation, *Liability of Private Vocational or Trade School for Fraud or Misrepresentations Including Student to Enroll or Pay Fees*, 85 A.L.R. 4th 1079 (1991)) (discussing the liability of proprietary vocational schools for fraudulent inducement of student enrollment). See also Kevin P. McJessy, Comment, *Contract Law: The Proper Framework for Litigating Educational Liability Claims*, 89 N.W. U. L. REV. 1768, 1774–83 (1995) (describing possible theories applicable to educational liability claims).

70. See *Ross v. Creighton Univ.*, 957 F.2d 410 (7th Cir. 1992).

71. See Taylor, *supra* note 29, at 763 (defining the doctrine as the tenet that the “professional judgment of educators should be protected from the unqualified assessment of judges or other fact finders”).

72. See *Wickstrom v. N. Idaho Coll.*, 725 P.2d 155, 157–58 n. 1 (Idaho 1986); *Hunter v. Bd. of Educ.*, 439 A.2d 582, 586 n.5 (Md. 1982); *Torres v. Little Flower Children's Servs.*, 474 N.E.2d 223, 227 (N.Y. 1984).

73. *Paladino v. Adelphi Univ.*, 454 N.Y.S.2d 868, 872 (1982).

Where the essence of the complaint is that the school breached its agreement by failing to provide an effective education, the court is again asked to evaluate the course of instruction . . . [and] is similarly called upon to review the soundness of the method of teaching that has been adopted by an educational institution.

*Id.*

74. For example, courts in at least eleven states have considered and rejected claims for educational malpractice: Alabama, Alaska, California, Florida, Idaho, Iowa, Kentucky, Maryland, New Jersey, New York, and Wisconsin. See, e.g., *Jackson v. Drake Univ.*, 778 F. Supp. 1490 (S.D. Iowa 1991); *Blane v. Alabama Commercial Coll., Inc.*, 585 So. 2d 866 (Ala. 1991); *D.S.W. v. Fairbanks N. Star Borough Sch. Dist.*, 628 P.2d 554 (Alaska 1981); *Smith v. Alameda Cnty. Soc. Servs. Agency*, 153 Cal. Rptr. 712 (Cal. Ct. App. 1979); *Peter W. v. S. F. Unified Sch. Dist.*, 131 Cal. Rptr. 3d 834 (Cal. Ct. App. 1976); *Tubell v. Dade Cnty. Pub. Sch.*, 419 So. 2d 388 (Fla. Dist. Ct. App. 1982); *Wickstrom*, 725 P.2d 155; *Moore v. Vanderloo*, 386 N.W.2d 108 (Iowa 1986); *Rich v. Ky Cnty. Day, Inc.*, 793 S.W.2d 832 (Ky. Ct. App. 1990); *Hunter*, 439 A.2d 582; *Swidryk v. Saint Michael's Med. Ctr.*, 493 A.2d 641 (N.J. Super. Ct. Law Div. 1985); *Donohue v. Copiague Union Free Sch. Dist.*, 391 N.E.2d 1352 (N.Y. 1979); *Hoffman v. Bd. of Educ.*, 400 N.E.2d 317 (N.Y. 1979); *Helm v. Prof'l Children's Sch.*, 431 N.Y.S.2d 246 (N.Y. App. Term 1980); *Wilson v. Cont'l Ins. Co.*, 274

the widespread acceptance of the academic abstention doctrine, while defensible, is not without consequences.

A. The Inadequacy of Historical Causes of Action by Students  
Against Proprietary Education Institutions

Of all the claims brought against proprietary colleges and universities, educational malpractice has proven to be a virtually fruitless cause of action. Historically, fraudulent misrepresentation is the tried and true cause of action against proprietary institutions. Still, few courts have dealt with fraudulent misrepresentation cases against proprietary colleges and universities on the merits, let alone cases involving proprietary institutions. In *Paladino v. Adelphi University*, however, a New York state appellate court considered a fraudulent misrepresentation claim against a school.<sup>75</sup> In *Paladino*, the defendant was an elementary and secondary school, named the Waldorf School, and not a postsecondary school, as the named defendant—Adelphi University—suggests.<sup>76</sup> Although the plaintiff contended that the Waldorf School misrepresented the quality of the instruction that it offered, the court was highly deferential to the institution and wary to tread on educators' discretion.<sup>77</sup> Significantly, the court explained that when a student's expected educational results are not achieved, it is the charge of the educational community, not the judiciary, to create a solution.<sup>78</sup>

This decision, defensible under the doctrine of judicial restraint, is illustrative of the academic abstention doctrine and reveals the underlying problem with relying on the judiciary to resolve issues created by the deceptive trade practices of unscrupulous proprietary institutions. The *Paladino* decision is not anomalous; it is the rule rather than the exception. The judiciary does not believe itself to be the proper forum to resolve disputes where the legislature has not explicitly charged the judiciary with deciding causes of action, standards, and methods to regulate the industry. The Iowa Supreme Court articulated the clearest justification of this position in *Moore v. Vanderloo*, resting its holding on the following rationale:

1. There is no satisfactory standard of care by which to measure an educator's conduct.
2. The cause of the student's failure to learn is inherently uncertain, as is the nature of damages.
3. Permitting such claims would flood the courts with litigation

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N.W.2d 679 (Wis. 1979). See also Joel E. Smith, Annotation, *Tort Liability of Public Schools and Institutions of Higher Learning for Educational Malpractice*, 1 A.L.R. 4th 1139 (1980).

75. See *Paladino*, 454 N.Y.S.2d 868.

76. *Id.*

77. *Id.* at 872.

78. *Id.* at 873.

and would thus place a substantial burden on educational institutions.

4. The Courts are not equipped to oversee the day-to-day operation of educational institutions.<sup>79</sup>

Furthermore, apologists of the academic abstention doctrine argue that to put the question to the fact finder would present similar issues and lead to even more vague and uncertain judicial precedent.<sup>80</sup>

As discussed above, contract claims fare even worse and provide less guidance than fraud claims in that they are seldom addressed on the merits. Some promises, made by an institution and its representatives, can be binding,<sup>81</sup> and certain institutional promises must be kept to avoid contractual breach.<sup>82</sup> However, to the extent that a court has considered a contract claim against an institution, the court's determination typically rests on a fact-intensive inquiry—a slight deviation from the academic abstention doctrine. In *Ross v. Creighton*, the United States Court of Appeals for the Seventh Circuit held that if the court were required to make determinations of educational processes and theories, then the contractual claim would fail; but if the court could objectively conclude that the institution failed on its promises, then the claim could proceed.<sup>83</sup> While this decision recognizes a student's viable contract cause of action against the institution, it does so in the narrowest of circumstances and still greatly disfavors the plaintiff.

For instance, a successful fraudulent or negligent misrepresentation claim hinges on the plaintiff's ability to prove the defendant institution's *scienter*—intent or knowledge of wrongdoing.<sup>84</sup> A standard element of a

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79. WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* 104–05 (4th ed. 2007) (citing *Moore v. Vanderloo*, 386 N.W.2d 108, 114–15 (Iowa 1986)).

80. See Linehan, *supra* note 21, at 764; McJesty, *supra* note 69, at 1774–80.

81. See *CenCor Inc. v. Tomlan*, 868 P.2d 396, 399 (Colo. 1994).

82. See *Ross v. Creighton Univ.*, 957 F.2d 410, 417 (7th Cir. 1992).

83. *Id.*

84. In fact, the full elements of the claim require that: (1) the defendant made a false misrepresentation; (2) the defendant acted with intent to deceive; (3) the misrepresentation was directed at a particular person; (4) the misrepresentation was material; and (5) the plaintiff's action in reliance upon the misrepresentation resulted in the plaintiff's injury. See W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 107 (5th ed. 1984). See also Linehan, *supra* note 21, at 765 n.76 (“Most states apply the traditional common law elements of fraudulent misrepresentation, though with subtle variations.”) See, e.g., *Draughon's Bus. Coll. v. Battles*, 68 So. 2d 58, 61 (Ala. Ct. App. 1953) (holding that for a false promise by a school to constitute actionable fraud, the promise must be made with the intent to deceive, no intention to fulfill the promise at the time the promise is made, and injury resulting therefrom); *Delta Sch. of Commerce, Inc. v. Wood*, 766 S.W.2d 424, 426 (Ark. 1989) (noting that the essential elements of an actionable fraud are false, material representation; *scienter*; an intention that the plaintiff should act on such representation; justifiable reliance by the plaintiff on the representation; and damage resulting therefrom); *Lidecker v. Kendall Coll.*,

*prima facie* case of fraud, this knowledge is proved when the plaintiff demonstrates that the defendant “kn[ew] or believe[d] the matter [wa]s not as he represent[ed] it to be.”<sup>85</sup> As is often the case, direct evidence of the defendant’s knowledge of wrongdoing is rarely available to the plaintiff, but the plaintiff must prove this element in order for the plaintiff’s claim to survive. As if that burden of proof was not difficult enough to satisfy, a plaintiff bringing a fraudulent misrepresentation claim may recover for pecuniary loss only if three requirements are met: (1) the plaintiff relies on the misrepresentation,<sup>86</sup> (2) the reliance upon the misrepresentation is justifiable,<sup>87</sup> and (3) this reliance is not deemed justifiable unless the matter misrepresented is material to case.<sup>88</sup> Thus, the knowledge requirement, coupled with the reliance and proximate cause elements of this claim, impose a high burden on the plaintiff, which severely limits the plaintiff’s chances of success with this claim.

Similarly, even though the judicial tenet of academic abstention is a wise position for the judiciary to take, it offers no viable remedies for plaintiffs in tort or contract, thereby achieving no justice for victims of misrepresentations made by proprietary education institutions. A “new” cause of action must be made available to those who have been injured by dishonest proprietary colleges and universities—at the least to place these plaintiffs on equal footing with defendants. As postsecondary education increasingly resembles a product-driven industry, the accountability standards that the law applies to for-profit ventures to protect consumers should also apply in the same fashion, and with the same force, to proprietary education institutions.

### III. THE IMPORTANCE OF DISCLOSURE

The insistence on transparency in our society may seem to be a recent phenomenon, but in reality it has been a legislative goal since as early as 1938, when the passage of the Federal Food, Drug, and Cosmetic Act<sup>89</sup> gave consumers the benefit of seeing what they were actually ingesting through modern food label requirements. President John F. Kennedy took this principle a step further with his Consumer Bill of Rights speech to Congress in 1962. Most notably, President Kennedy championed the right of the consumer to be informed, including the consumer’s right “to be pro

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550 N.E.2d 1121, 1124 (Ill. App. Ct. 1990) (holding that the elements of common law fraud include a false statement or omission of material fact, which is made by defendant with the intent to deceive and induce the plaintiff to act, and justifiable reliance by the plaintiff on the “false statement or omission, and an actual injury to [the] plaintiff as a result of the misstatement or omission”).

85. RESTATEMENT (SECOND) OF TORTS § 526(a) (1977).

86. *Id.* at § 537(a).

87. *Id.* at § 537(b).

88. *Id.* at § 538.

89. *See generally* 21 U.S.C. § 301–99 (2012).

tected against fraudulent, deceitful, or grossly misleading information, advertising, labeling, or other practices, and to be given the facts he [or she] needs to make an informed choice.”<sup>90</sup>

To be sure, there are drawbacks associated with too much disclosure, which can result in decreased consumer attention to the disclosed information.<sup>91</sup> Additionally, more disclosure does not always alert consumers to fraudulent or unethical behaviors, as was exposed during the housing market collapse.<sup>92</sup> However, in the educational setting, disclosing vital information about an institution aids students in deciding which school to attend and may even improve student matriculation.<sup>93</sup> A randomized, controlled study tested whether sending high-achieving (test scores in the top ten percent), low-income (family income in the lowest quarter) students more information changed their enrollment patterns.<sup>94</sup> The results of the study, which gathered information on nearly forty thousand students from this specific demographic, demonstrate that for these students more information about a college choice and cost positively affected the application their behavior and drastically improved their likelihood of admission.<sup>95</sup> Furthermore, the students who received more information submitted more applications, were more likely than other students in a control group to apply to “peer” colleges—schools where other students had similar levels of preparation—and were accepted by more colleges, including nearly a seventy-eight percent likelihood of being accepted by a “peer” college over the con-

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90. President John F. Kennedy, Special Message to the Congress on Protecting the Consumer Interest (Mar. 15, 1962), available at <http://www.presidency.ucsb.edu/ws/?pid=9108>.

91. See, e.g., Bikram Ghosh & Michael R. Galbreth, *The Impact of Consumer Attentiveness and Search Costs on Firm Quality Disclosure: A Competitive Analysis*, 59 MGMT. SCI. 2604 (2013).

92. See U.S. DEPT. OF THE TREASURY, REFORMING AMERICA’S HOUSING MARKET: A REPORT TO CONGRESS (2011), available at <http://www.treasury.gov/initiatives/documents/reforming%20america's%20housing%20finance%20market.pdf>.

93. Beckie Supiano, *A Low-Cost Way to Expand the Horizons of High-Achieving, Low-Income Students*, CHRON. HIGHER EDUC. (Mar. 29, 2013), <http://chronicle.com/article/A-Low-Cost-Way-to-Expand-the/138227/>. The view that more information aids students and their families in making the decisions about post-secondary education may have even become commonplace. See Michael Garanzini, *The Devil Is in the Performance-Based Details*, CHRON. HIGHER EDUC. (Oct. 7, 2013), <http://chronicle.com/article/The-Devils-in-the/142153/> (“Everyone agrees that students and parents should have more information about the institutions they are considering, that college needs to be more affordable, and that degree completion has real value in the marketplace.”).

94. See Supiano, *supra* note 93.

95. Caroline Hoxby & Sarah Turner, *Expanding College Opportunities for High-Achieving Low Income Students* (Stanford Inst. for Econ. Policy Research, Discussion Paper No. 12-014), available at <http://siepr.stanford.edu/?q=/system/files/shared/pubs/papers/12-014paper.pdf>.

trol group.<sup>96</sup> Because the institution a student selects to attend for his or her postsecondary instruction is universally regarded as an important decision, it is essential that students have more information available to them to facilitate this process.<sup>97</sup>

#### A. The Insufficiency of Current Measures to Regulate Proprietary Education Institutions

Under the oversight of Title IV mechanisms, the present model for the regulation of all postsecondary institutions—proprietary and non-proprietary—is often referred to as “the triad,” consisting of the Department of Education, state regulatory bodies, and accreditation agencies.<sup>98</sup> Each body has a principal function in this relationship: (1) the Department of Education authenticates institutional eligibility for Title IV funding<sup>99</sup> and certifies accreditation agencies;<sup>100</sup> (2) state entities regulate postsecondary institutions through a variety of means, including regulatory boards and consumer protection laws;<sup>101</sup> and (3) accreditation agencies verify that postsecondary institutions have met a minimum standard of quality to receive certification to operate within a state or territory.<sup>102</sup> For every postsecondary institution, the triad’s blessing is essential to the school’s operation, because Title IV funding is available only to postsecondary institutions accredited by an agency certified by the Department of Education.<sup>103</sup> With regard to proprietary schools, however, the sanctions and fines that the triad, through the Department of Education, can impose on these institutions does little to deter unscrupulous business practices, and none provides a forum for a private right of action for a student who claims to have been harmed by a proprietary college or university.<sup>104</sup> Furthermore,

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96. *See id.* *See also* Supiano, *supra* note 93.

97. *See* Supiano, *supra* note 93. “‘This is a huge decision for students, choosing which college [to attend],’ Ms. Hoxby said. ‘The goal is not to sway high-achieving, low-income students to go to a particular kind of college,’ she said. It’s to make sure they are as well informed as their more privileged peers.” *Id.*

98. *See* Taylor, *supra* note 29, at 768.

99. U.S. GOV’T. ACCOUNTABILITY OFFICE, T-HEHS-96-158, HIGHER EDUCATION: ENSURING QUALITY EDUCATION FROM PROPRIETARY INSTITUTIONS (1996), *available at* <http://www.gao.gov/assets/110/106522.pdf> (statement of Cornelia M. Blanchette before the Subcommittee on Human Resources and Intergovernmental Relations, United States House of Representatives).

100. *Id.* at 4–5.

101. *Id.* at 5.

102. *Id.* at 5–6.

103. *See* Taylor, *supra* note 29, at 768.

104. *See, e.g., Enforcement of Federal Anti-Fraud Laws in For-Profit Education: Hearing Before the H. Comm. on Education and the Workforce, 109th Cong. 9* (2005) (statement of Rep. Maxine Waters, Member, H. Comm. on Educ. and the Workforce) (“[T]he school doing the defrauding may be allowed to pay a few cents on the dollar to settle claims with the Department, or placed on reimbursement status so that they have

accrediting agencies have a disincentive to revoke an institution's accreditation because their "income-stream is directly determined by the number of schools they accredit."<sup>105</sup>

To be sure, the Department of Education's regulatory failures are more complex than can be dealt with in this article, but bear discussion. In 2010, the Department valiantly attempted to modernize the triad model with the promulgation of its Program Integrity Rules,<sup>106</sup> as the result of an extensive review of the industry by the Senate Committee on Health, Education, Labor and Pensions, as well as the Government Accountability Office.<sup>107</sup> These rules recognize frauds perpetuated by any postsecondary institution in four areas: (1) marketing practices, (2) value of a degree, (3) financial aid practices, and (4) compensation of employees based on enrollment.<sup>108</sup> Similarly, in June of 2013, the Department of Education announced that it would again propose revised Gainful Employment Rules,<sup>109</sup> which would allow the triad to close down programs that fail to measure up as good financial value for students.<sup>110</sup>

Adding on existing disclosure requirements,<sup>111</sup> the Program Integrity Rules do a number of things right. For example, the rules strengthen existing regulations governing misrepresentation in advertising materials by broadening the definition of misrepresentation to include both direct and

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to wait 45 days for payment of financial aid."'). The Department's promulgation of the Program Integrity Rules clearly intends to hit a moving target, but inevitably misses the mark.

105. See *id.* at 32.

106. See 34 C.F.R. §§. 668.11–668.28 (2013).

107. See Harkin *supra* note 36, at 8–9.

108. See Press Release, U.S. Dep't of Educ., Obama Administration Proposes Student Aid Rules to Protect Borrowers and Taxpayers; Key Elements of Gainful Employment on a Separate Track (June 16, 2010), available at <http://www.ed.gov/news/press-releases/obama-administration-proposes-student-aid-rules-protect-borrowers-and-taxpayers->.

109. The Gainful Employment Rules, which are in the process of being revised at the time of publication of this article, are detailed in the next section of the article. See *infra* notes 116, 126, and 135.

110. This announcement came after the proffered Gainful Employment regulations were struck down by the United States District Court for the District of Columbia in March 2013. See *Ass'n of Private Coll. & Univ. v. Duncan*, 870 F. Supp. 2d 133 (D.D.C. 2013). See also Allie Bidwell, *Judge Refuses to Restore Vacated Provisions of 'Gainful Employment' Rule*, CHRON. HIGHER EDUC. (Mar. 20, 2013), <http://chronicle.com/article/Judge-Refuses-to-Restore/138029/>; Blumenstyk, *supra* note 14.

111. See Hazel Glenn Beh, *Student Versus University: The University's Implied Obligations of Good Faith and Fair Dealing*, 59 MD. L. REV. 183, 194 (2000) ("Congress imposes numerous disclosure requirements on postsecondary schools receiving federal funds, including the requirement to provide all students with general descriptive information and information regarding the nature of the program, its costs and its financial aid terms, crime data, and student-athlete consumer information.") (citations omitted).



indirect statements of an “erroneous, false, or misleading nature.”<sup>112</sup> Effectively, these new rules hold eligible institutions “liable not only to a prospective student hearing an advertisement *but also* to a prospective student who did not hear the advertisement directly from the institution, but instead learned about the false advertisement from a secondary source.”<sup>113</sup> The new rules also attempt to compel bolder disclosure requirements.<sup>114</sup> Previous regulations established rules against a limited set of misrepresentation types: false representation of accreditation status, a student’s ability to qualify for professional licensure, a student’s ability to transfer credits, and a school’s overstatement of employment opportunities after graduation.<sup>115</sup>

The new regulations, however, fall short in many regards; for instance, they merely utilize more specific language to require schools to make various disclosures regarding accreditation and only when asked.<sup>116</sup> Additionally, the New York County Supreme Court recently examined the rules, holding that their interpretation by a non-government agency, *i.e.* “a national bar association akin to a private self-regulatory organization, receiving a delegation of authority” from the Department of Education, does not make the interpreting party an “official department, division, commission or agency of the United States.”<sup>117</sup> With this decision, the court underscores

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112. See Auster, *supra* note 38, at 650.

113. *Id.*

114. See 34 C.F.R. § 668.41 (2013).

115. See Auster, *supra* note 38, at 651.

116. See Program Integrity Issues, 75 Fed. Reg. 34,806, 34,835 (June 18, 2010). See also Auster, *supra* note 38, at 652 (“The rules expand the current provision covering disclosure of examination requirements for receiving a local, state, or federal license, mandates disclosure of whether the course work completed at the school qualifies a student to meet employment requirements, and clarifies conditions under which credits from another institution will be accepted.”) (citations omitted). *But see* Nat’l Ass’n of Coll. & Univ. Attorneys, Subpart Q – Gainful Employment (GE) Programs (Discussion Draft 2013), available at [http://www.nacua.org/documents/GainfulEmploymentRule\\_DraftLanugage.pdf](http://www.nacua.org/documents/GainfulEmploymentRule_DraftLanugage.pdf) (including a metric considering loan-default, and measuring the repayment rates of a postsecondary education program’s entire “portfolio” of loans, particularly for those programs that experience high dropout rates). Both proponents and critics of the new draft believe that the proposed language is more rigorous with regard to closing loopholes and is more expansive in its scope of application—applying to over 11,000 proprietary education schools, vocational schools, and community colleges, more than double those covered by the standards from two years ago—than the prior draft. See Paul Fain, *Further on Gainful Employment*, INSIDE HIGHER ED (Nov. 12, 2013), <http://www.insidehighered.com/news/2013/11/12/feds-release-tighter-proposed-language-gainful-employment-rules#ixzz2kSwwgk7g>. While this Article primarily contemplates considerations such as student loan default under the Gainful Employment Rules in the context of proprietary education, it must be said that even community colleges are on notice to pare down the number of graduating students who default on their loans. See, e.g., Mike James, *ACTC Worries about Student Loan Default Rate*, THE INDEP. (Dec. 8, 2013), <http://www.dailyindependent.com/local/x853089297/ACTC-worried-about-student-default-rate>.

117. Gomez-Jimenez v. N.Y. Law Sch., 943 N.Y.S.2d 834, 841–42 (N.Y. Sup. Ct.

the disconnect between the Department of Education and the accrediting bodies it certifies.

Moreover, these new regulations lack the teeth to root out the most concerning deceptive trade practices of some proprietary education institutions—financial aid manipulation and the misrepresentation of the valuation of a degree. Even though the Department of Education identified these areas as requiring the highest level of transparency,<sup>118</sup> and thus attempted to develop mandatory reporting and disclosure guidelines for all proprietary education institutions,<sup>119</sup> the disclosure and reporting requirements are treated more like guidelines than law under the new rules. Ensuring that all information is disseminated uniformly is a vital step toward allowing prospective students to make important comparisons of their choices in post-secondary education as well as toward avoiding manipulation of the facts by all unscrupulous postsecondary institutions.

Although the guidelines established by the Program Integrity Rules attempt to standardize the means by which schools report graduation rates, placement rates, program costs, average student debt, and occupation profiles, allowing students to compare costs and programs across various schools, the rules provide no meaningful guidance on how the standardization of disclosure and reporting is to be accomplished.<sup>120</sup> Furthermore, the new rules have been in effect since July of 2011, but as of August of 2013, the Department of Education has yet to release a standardized form that streamlines the disclosure and reporting process.<sup>121</sup> Additionally, the Department of Education has explicitly stated that under the rule, schools have flexibility in how they choose to report data, but that they must report to the Department of Education as to how they intend to make the calculation.<sup>122</sup>

While this approach takes into account “the concerns made during the comment period and will allow schools to utilize an approach already ap-

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(2012).

118. See 34 C.F.R. § 668.72 (2013). See also 34 C.F.R. § 668.74 (2013).

119. 34 C.F.R. § 668.6 (2013).

120. See *id.* See also Auster, *supra* note 38, at 653 n.153 (“The DOE’s discussion clarifies that the disclosure requirement applies to all schools offering programs for gainful employment, therefore all schools that qualify for Title IV funding under §§ 102(b)-(c), 101(b)(1) of the Higher Education Act. . . . These sections define schools eligible for Title IV funds, which includes proprietary schools.”); Program Integrity Issues, 75 Fed. Reg. 66,832, 66,948–49 (proposed Oct. 29, 2010) (requiring occupation profiles to be linked to the website O\*Net, established by the Department of Labor, and to provide information about particular jobs, the training required, and the expected salaries).

121. Program Integrity Issues, 75 Fed. Reg. 66,832, 66,833, 66,836 (Oct. 29, 2010). Not surprisingly, the Department employs non-enforcing and circular language under the rule; until the Department of Education develops a form, schools must comply with the regulations as they are written.

122. *Id.* at 66,836.

proved by states or accrediting bodies,”<sup>123</sup> it suggests that the standardization of disclosure and reporting is of nominal importance to the Department of Education.<sup>124</sup> This lack of follow-through highlights the triad regulatory model’s shortcomings. The triad should cede to a model that includes non-partisan governmental accreditation entities, which lack pecuniary interest in the accreditation of any postsecondary institution and are equipped to enforce penalties on schools that do not follow the Department of Education’s rules, such as the Program Integrity Rules. This new model should also prioritize standardizing the disclosure and reporting process in a way that the triad has failed to do.

#### B. The Role of Proprietary Education Institutions in the Student Loan Default Crisis

Even after the Department of Education passed its Program Integrity Rules in 2010, the student loan defaults have continued to balloon.<sup>125</sup> This fact, taken together with the proprietary education industry’s disproportionate share of federal aid dollars, underscores the need for greater scrutiny.<sup>126</sup> The proprietary education industry’s reliance upon Title IV funding may be caused by the substantially higher percentage of students at proprietary colleges and universities that take out loans to finance their education than do their peers at traditional postsecondary institutions.<sup>127</sup> Because of this in-

123. Auster, *supra* note 38, at 656 n.156.

124. The Department’s deference to already-extant reporting mechanisms is, by its nature, not made in the interest of uniformity. *See id.* *See also* Blumenstyk, *supra* note 14; Bidwell, *supra* note 110. *But see* Beh, *supra* note 111, at 193–95.

125. *See* Andy Thomason, *Student-Loan Default Rates Continue Steady Climb*, CHRON. HIGHER EDUC. (Oct. 1, 2013), <http://chronicle.com/article/Student-Loan-Default-Rates/142009/>; Bill Hardekopf, *More Than Half of Student Loans Are Now in Deferral or Delinquent*, FORBES (Feb. 1, 2013, 10:36 AM), <http://www.forbes.com/sites/moneybuilder/2013/02/01/alarming-number-of-student-loans-are-delinquent/>. *See also* Jane Glickman, *Student Loan Default Rates Increase*, U.S. DEPT. OF EDUC. (Sept. 13, 2010), <http://www.ed.gov/news/press-releases/student-loan-default-rates-increase-0>. For an implicit discussion of why student loan default rates have increased, see Eric A. Hanushek, *Expenditures, Efficiency, and Equity in Education: The Federal Government’s Role*, 79 AMER. ECON. REV. 46 (1989).

126. Program Integrity: Gainful Employment, 75 Fed. Reg. 43,616, 43,618 (proposed July 26, 2010) (indicating that in 2009, the five largest for-profit institutions derived seventy-seven percent of their revenue from federal student aid programs). *See also* Nicholas R. Johnson, *Phoenix Rising: Default Rates at Proprietary Institutions of Higher Education and What Can Be Done to Reduce Them*, 40 J.L. & EDUC. 225, 269 (2011) (“In for-profit education, every segment of the institution is incentivized to enroll as many students as possible—recruiters are paid on volume, instructors are compensated based on completions, and executives and shareholders are paid based on growth.”).

127. Allison Sherry, *Pass or Fail? For-Profit Colleges Make the Grade In Reaching At-Risk Students, But Questions Arise Over Student Loan Defaults and Job Prospects*, THE DENVER POST, Jan. 17, 2010, at A1 (proposing that ninety-four percent of

creased borrowing, students who graduate from proprietary colleges and universities have substantially more debt than graduates of traditional post-secondary institutions.<sup>128</sup> Proprietary institutions, however, have no skin in the game, because they do not bear the risk of loss if their students default on their loans.<sup>129</sup> If the government cannot ultimately collect on Title IV loans, the government is forced to absorb the cost. For instance, the Federal Family Education Loan Program holds the government responsible for ninety-seven percent of the cost of loans in default,<sup>130</sup> and the Direct Loan program requires that the government pay the full cost of unpaid principal and accrued interest on defaulted loans.<sup>131</sup> Ultimately, taxpayers are stuck with the bill if the government cannot recover on defaulted student loans.<sup>132</sup>

Of the \$16 billion in federal loans lent to students at proprietary schools in 2007, over forty percent of these student loans are or will be in default—equating to well over \$6 billion.<sup>133</sup> The cost of the proprietary education industry's use of Title IV funds exceeds the cost of defaulted loans paid with taxpayer dollars. Perhaps more alarming still is the fact that this data is six years old, before the wheels fell off the student loan cart. One possible reason for the rise in student loan defaults is that the entire proprietary education industry has failed to ensure its students' preparation for gainful employment.<sup>134</sup> For instance, the persistent oversupply of labor saturates the workforce with the same skill-sets and perpetuates the student loan default rates as well as unemployment rates. To paraphrase Judge Richard Posner, if an optimal ratio of loan debt to income actually exists, as the government

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those enrolled at proprietary schools take out federal loans to pay for tuition, as compared with only one third of students at traditional public colleges).

128. Johnson, *supra* note 126, at 232. See also Daniel Luzer, *How are the For-Profits Doing?*, WASH. MONTHLY (July 30, 2012, 6:23 PM), [http://www.washingtonmonthly.com/college\\_guide/blog/how\\_are\\_the\\_forprofits\\_doing.php](http://www.washingtonmonthly.com/college_guide/blog/how_are_the_forprofits_doing.php) (“Ninety-six percent of for-profit students take out student loans, according to the most recent U.S. Department of Education data. In comparison, [thirteen percent] of students at community colleges, [forty-eight percent] at [four]-year public, and [fifty-seven percent] at [four]-year private non-profit colleges borrow money to pay for school.”).

129. See S. HEALTH, EDUC., LABOR & PENSIONS COMM., 111TH CONG., SUBPRIME GOES TO COLLEGE 1 (testimony of Steven Eisman, Portfolio Manager, FrontPoint Financial Services Fund), available at <http://help.senate.gov/imo/media/doc/Eisman.pdf>. It has been suggested that non-proprietary schools do not typically engage in the same fraudulent behavior as their proprietary peers, despite not having much to lose when their students default on loans, because of their historically greater reliance on public goodwill. See *id.* See also Blumenstyk, *supra* note 14; Cellini & Goldin, *supra* note 63.

130. *Cohort Default Rates*, FINAID.COM, <http://www.finaid.org/loans/cohortdefaultrates.phtml> (last updated Dec. 21, 2010). See also SCOTT, *supra* note 16.

131. See SCOTT, *supra* note 17.

132. See Sherry, *supra* note 127, at 1. See also Johnson, *supra* note 126, at 236.

133. Sharona Coutts, *Setting the Record Straight On Our Student Default Rate Story*, PROPUBLICA (Dec. 24, 2009 2:40 PM), <http://www.propublica.org/article/setting-the-record-straight-on-our-student-default-rate-story-1224..>

134. Johnson, *supra* note 126, at 267.

says that there is, then why don't at least some proprietary schools work to achieve this level without government intervention?<sup>135</sup>

The Gainful Employment Rules are an integral part of the Program Integrity Rules. In order to continue to receive federal funding, under the Gainful Employment Rules, a postsecondary institution is required to meet three requirements: (1) ensure that at least thirty-five percent of former students are paying down their loans, (2) make certain that former students do not pay more than thirty percent of their discretionary income on loan payments, (3) make sure that former students do not spend more than twelve percent of their total income on loan payments.<sup>136</sup> In July 2011, several companies that own proprietary institutions sued to prevent the Department of Education from issuing the rules.<sup>137</sup> In a favorable outcome for the proprietary education industry, the United States District Court for the District of Columbia held that the debt measures comprising the Gainful Employment Rules “lack[ed] a reasoned basis” and were “arbitrary and capricious.”<sup>138</sup> While a strong argument can be made that the thirty-five percent rule is arbitrary, it is incontrovertible that the Department of Education has the authority to regulate the proprietary education industry in order to prevent fraud, but has failed to meaningfully do so.

In *Association of Private Colleges and Universities v. Duncan*, the court held that the Department fell short in justifying one prong of the three-prong test used to evaluate job-focused higher education programs:

Under the rules, programs are evaluated on three measures: a debt-to-earning ratio (that is, how big [a student's] loans are compared to how much money [that student is] making), a debt-to-discretionary-earnings ratio, and a loan repayment rate. The first two measures were valid . . . because the department had presented research backing up the specific thresholds they chose. The [thirty-five] percent repayment-rate threshold, by contrast, was essentially chosen as a number that would land on some . . . middle ground between identifying too many and too few programs. This is arbitrary . . . and since the three measures work together in determining eligibility for financial aid, the whole regulatory apparatus is suspended.<sup>139</sup>

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135. Richard Posner, *The Controversy Over For-Profit Colleges*, BECKER-POSNER BLOG (June 20, 2010), <http://www.becker-posner-blog.com/2010/06/the-controversy-over-forprofit-collegesposner.html>.

136. Luzer, *supra* note 128.

137. See Complaint, *Ass'n of Private Coll. & Univ. v. Duncan* (D.D.C. 2012) (No. 11-1314), 2011 WL 2898945. See also *Ass'n of Private Coll. & Univ. v. Duncan*, 870 F. Supp. 2d 133 (D.D.C. 2012).

138. *Duncan*, 870 F. Supp. 2d at 137.

139. Kevin Carey, *Let's Put "Gainful Employment" Ruling in Perspective*, CHRON. HIGHER EDUC. (July 2, 2012), <http://chronicle.com/blogs/brainstorm/lets-put-gainful->

Whether or not this number is arbitrary, it tends to favor the proprietary education industry. Because the plaintiffs succeeded in their quest for an injunction, the Department of Education will not be able to implement penalties under the Gainful Employment Rules, leaving dishonest proprietary colleges and universities free to continue to take advantage of federal student aid without regard to the debt levels and repayment rates of their former students.<sup>140</sup> In light of the court's decision in *Duncan*, it is vital that new regulations and remedies emerge to prevent a dire situation from worsening.<sup>141</sup>

#### IV. THE CASE FOR ADOPTING A FIDUCIARY DUTY MODEL IN THE RELATIONSHIP BETWEEN PROPRIETARY EDUCATION INSTITUTIONS AND THEIR STUDENTS

Postsecondary institutions have all but abandoned the *in loco parentis* doctrine—the idea that, by placing the school in the position of parents, the school may exert untrammelled authority over the student—that predominated postsecondary education before 1972.<sup>142</sup> Increasingly, postsecondary institutions, especially proprietary education institutions, treat students more like the adults and consumers they are.<sup>143</sup> Yet, the judiciary has been reluctant to withdraw the protection it has long afforded all postsecondary institutions, not just proprietary schools, against holding these schools to the same standards of care that are applied to business or other non-educational organizations. At the same time, proprietary education institu

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employment-ruling-in-perspective/49203.

140. Daniel Luzer, *Arbitrary Research Standards for For-Profit Colleges*, WASH. MONTHLY (July 2, 2012, 5:19 PM), [http://www.washingtonmonthly.com/college\\_guide/blog/arbitrary\\_research\\_standards\\_f.php](http://www.washingtonmonthly.com/college_guide/blog/arbitrary_research_standards_f.php).

141. At the time of publication of this article, the White House released information on its plan to make college more affordable. Press release, Office of the Press Sec'y, The White House, Fact Sheet on the President's Plan to Make College More Affordable: A Better Bargain for the Middle Class (Aug. 22, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/08/22/fact-sheet-president-s-plan-make-college-more-affordable-better-bargain->. It is unclear how these ratings would be implemented. See Scott Jaschik, *Obama's Ratings for Higher Ed*, INSIDE HIGHER ED (Aug. 22, 2013, 3:44 AM), <http://www.insidehighered.com/news/2013/08/22/president-obama-proposes-link-student-aid-new-ratings-colleges>. However, one thing is certain: the like-treatment of proprietary institutions and non-proprietary institutions ignores the fundamental differences between the two, which can only perpetuate the problem contemplated by this article.

142. See KAPLIN & LEE, *supra* note 79, at 16. See also Theodore C. Stamatakos, *The Doctrine of In Loco Parentis, Tort Liability, and the Student-College Relationship*, 65 IND. L.J. 471 (1990); Perry A. Zirkel & Henry F. Reichner, *Is the In Loco Parentis Doctrine Dead?*, 15 J.L. & EDUC. 271 (1986).

143. See Kerry B. Melear, *From In Loco Parentis to Consumerism: A Legal Analysis of the Contractual Relationship Between Institution and Student*, 40 NASPA J. 124 (2003); Susan L. Pollet, *Is In Loco Parentis at the College Level a Dead Doctrine?*, 4 N.Y. L.J. 228 (2002).

tions, as corporate entities, must maximize profits for their shareholders; this distinguishes the corporate education model and nonprofit education model and underscores the need to treat each model separately under the law.

It is also clear that the traditional causes of action that students bring against proprietary educational institutions are inadequate to provide an effective and equitable remedy to student victims of deceptive trade practices. Because the postsecondary institutions themselves have abandoned the *in loco parentis* approach, it is time for the judiciary to respond—by protecting students against injury at the hands of dishonest colleges and universities—especially in the context of the student-proprietary-education-institution relationship.

The most sensible remedy is to apply a limited fiduciary duty to proprietary education institutions.<sup>144</sup> In *Schneider v. Plymouth State College*, which involved a public, non-proprietary institution, the New Hampshire Supreme Court recognized a limited fiduciary duty, noting that such duty “may exist under a variety of circumstances, and does exist in cases where there has been a special confidence reposed in one who, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing the confidence.”<sup>145</sup> The court clarified that the fiduciary relationship existing between a postsecondary institution and its students did not rest on the doctrine of *in loco parentis*, which the court reserved for the relationship between primary and secondary schools and their students.<sup>146</sup> Rather, the court distinguished the relationship between a postsecondary institution and its students as a unique “professional relationship of trust and deference, rarely seen outside the academic community.”<sup>147</sup>

Even though the “confidence” standard applied by the New Hampshire Supreme Court is mostly clear and provides a level playing field for both plaintiff and defendant to dispute the existence of a fiduciary relationship, this standard has not yet gained traction in other courts. This may be, in part, because the New Hampshire Supreme Court essentially carved out a limited fiduciary duty for application in the postsecondary education context. Instead of typical fiduciary duty labels—such as duties of obedience, loyalty, care, and disclosure—the court recognizes a general fiduciary duty that implies good faith, fair dealing, and transparency.<sup>148</sup>

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144. Most notably, fiduciary duties include good faith and fair dealing between the relevant parties. See generally RESTATEMENT (THIRD) OF AGENCY §§ 8.01–8.12 (2005).

145. *Schneider v. Plymouth State Coll.* 744 A.2d 101, 105 (N.H. 1999) (quoting *Lash v. Cheshire Cnty. Sav. Bank*, 474 A.2d 980 (N.H. 1984) (quotation marks and formatting omitted)).

146. *Id.* at 106.

147. *Id.*

148. *Id.* While the court also addressed the plaintiff’s Title IX claims, the court’s

Critics argue that creating a fiduciary duty, which proprietary institutions would owe their students in addition to the duties that proprietary institutions already owe their investors, creates conflicting duties for the institution.<sup>149</sup> However, applying the New Hampshire Supreme Court's general duty to the proprietary education context would avoid conflicts that might arise among the duties that proprietary institutions owe their students, their shareholders, and the public. This is because good faith, fair dealing, and transparency—essential to good business practices and to the general duty to students and the public—are important intangibles which an investor must consider before he lends his funds to an enterprise. While this is precisely the kind of fiduciary duty that should apply to proprietary postsecondary education institutions, the fact that other courts have not done so seems to stem from the judiciary's continued reluctance to compare traditional postsecondary institutions to business organizations.<sup>150</sup>

Outside of the traditional business organizational setting, however, there may be no better place for the application of a fiduciary duty than in the proprietary education context. In the first place, proprietary education institutions are most often organized with the Secretary of State's office as a corporation, as Part I of this article describes. By definition, these institutions exist to make profits. In the case of the publicly traded, proprietary education institutions—of which, as of 2013, there are fourteen nationwide<sup>151</sup>—there are additional pressures to increase shareholder value and maintain high stock prices.<sup>152</sup> These ever-present market pressures can lead to bad behavior from proprietary institutions against consumers who lack adequate protection.

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holding as to the existence of the fiduciary duty clearly stands on its own.

[O]ur conclusion that a fiduciary relationship existed between the defendants and the plaintiff does not rest on the *in loco parentis* doctrine. . . . '[A] fiduciary relationship exists whenever special confidence has been placed in another,' and . . . '[a] breach of a fiduciary relationship results whenever influence has been acquired and abused or confidence has been reposed and betrayed.' These concepts are not beyond the ability of the average layperson to understand.

See *id.* at 105–07 (citing *State v. Hungerford*, 697 A.2d 916, 921 (N.H. 1997)).

149. See *Salmon*, *supra* note 67.

150. See generally *Valente v. Univ. of Dayton*, 438 F. App'x 381 (6th Cir. 2011) (holding that a law school did not breach a contract with a student in connection with a disciplinary proceeding).

151. See *Harkin*, *supra* note 36, at 4. See also *Auster* *supra* note 38.

The actual revenue percentage reported to the DOE is 81.3%, reflecting the ability of schools to exclude increased distributions of Stafford Loans from revenue calculations. Congress' initial requirement that a school must have at least fifteen percent of its revenue from sources other than Title IV funds was reduced to ten percent in 1998, creating what is called the 90/10 rule.

*Id.* at 638 n.37 (citations omitted).

152. *RUCH*, *supra* note 31, at 3.



In addition, there is an increasing tendency to find the existence of a fiduciary relationship in diverse but seemingly quotidian contexts:

[Fiduciary relationships] include the relationship between an employer and employee, brothers and sisters, husband and wife, persons engaged to be married, children and parents, attorney and client, officers of the corporation and stockholders, joint purchasers, joint owners selling jointly owned property, partners, joint venturers, physician and patient, priest and parishioner, rabbi and congregation, principal and agent, and trustee and *cestui que* trust. . . . At least two courts have even found that close friends stand in such a relationship of trust and confidence as to require full disclosure of material facts.<sup>153</sup>

Our society places a high value on good faith and transparency. For example, under Section 13(a) of the Securities Exchange Act of 1934, a registered corporation under the Commission Rule is required to file an annual report of its financial condition as “necessary or appropriate in the public interest [or] for the protection of investors.”<sup>154</sup> Of course the analog here is that the securities investor is to the corporation what the student-consumer is to the proprietary school, but this analogy is not as far afield as it may initially seem. In *SEC v. W.J. Howey Co.*, the Supreme Court of the United States provided a three-pronged definition of a security: (1) “an investment of money,” (2) “in a common enterprise,” (3) “with profits to come . . . from the efforts of others.”<sup>155</sup> Given that the second prong of this test—common enterprise—is understood to mean “one in which the fortunes of the investor are interwoven with and dependent upon the efforts and success of those seeking the investment or of third parties,”<sup>156</sup> it is not unreasonable to conclude that student-consumers, bringing their large sums of grant and loan money to a proprietary institution, deserve the same treatment as a potential shareholder. Their future is as tied-up with the success of the proprietary institution and the valuation of its degree as a purchaser of securities is with the valuation of its company shares. That said, the burden may be too great to impose typical registration requirements for the sale of securities on proprietary education institutions.

This article does not claim that proprietary colleges and universities should be subject to the same stringent security registration requirements as corporations; however, as Part II of this article described, a proprietary ed-

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153. See Nicola W. Palmieri, *Good Faith Disclosures Required During Precontractual Negotiations*, 24 SETON HALL L. REV. 70, 127–28 (1993) (citations omitted) (discussing the ethical role standards play in the marketplace).

154. 17 C.F.R. § 240.13a-1 (2013); Securities Exchange Act of 1934, §13, 48 Stat. 881, 894–95; 15 U.S.C. § 78l(b) (2012).

155. *SEC v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946).

156. *SEC v. Glenn W. Turner Enter., Inc.*, 474 F.2d 476, 482 (9th Cir. 1973).

ucation institution is organized around a corporate model, beholden to its shareholders, and not accountable to its students. If requiring a corporation to issue a prospectus to potential shareholders has become so uncontroversial as to be commonplace, then imposing fiduciary duties of disclosure, good faith, and fair dealing on corporate educational providers should be considered. For the law to begin to reflect the reality of the educational marketplace, a general fiduciary duty should apply to proprietary institutions.

## V. A RECOMMENDATION

Writing proprietary education institutions out of Title IV eligibility would be a simple fix to the problems endemic to the industry, but it would throw the baby out with the bathwater. Proprietary colleges and universities do serve an important role in postsecondary education—though this is increasingly less the case as non-proprietary colleges and universities move into direct competition with them at significantly lower prices to students.<sup>157</sup> However, the bad deeds of too many proprietary institutions have proven costly to American taxpayers,<sup>158</sup> demanding more effective regulation of the proprietary education industry. This article merely recommends a state-based action plan which ensures that the student-consumer is fully informed before deciding to attend a proprietary educational institution and that remedies exist for student-consumer victims of proprietary educational institutions' deceptive trade practices. Below are three simple, transparent, best-practices for achieving this important policy goal.

### A. Expand "The Triad"

To ensure that consumers have the information they need to make informed decisions before enrolling in proprietary education institutions, and viable venues to pursue remedies against institutions that engage in deceptive trade practices, the regulatory triad must be expanded. It is not enough that only the Department of Education, state regulatory bodies, and accrediting agencies govern the relationship between proprietary education insti-

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157. See Blumenstyk, *supra* note 14.

158. S. HEALTH, EDUC., LABOR & PENSIONS COMM., 112TH CONG., FOR PROFIT HIGHER EDUCATION: THE FAILURE TO SAFEGUARD THE FEDERAL INVESTMENT AND ENSURE STUDENT SUCCESS MAJORITY COMMITTEE STAFF REPORT AND ACCOMPANYING MINORITY COMMITTEE STAFF VIEWS (2012), available at <http://www.help.senate.gov/hearings/hearing/?id=cdd6e130-5056-9502-5dd2-e4d005721cb2>. See, e.g., Peter Fenn, *For-Profit Colleges Use Taxpayer Dollars to Rip Off Students*, U.S. NEWS (July 31, 2012), <http://www.usnews.com/opinion/blogs/PeterFenn/2012/07/31/for-profit-college-s-use-taxpayer-dollars-to-rip-off-students>; Eric Flack, *For-Profit Colleges Waste Billions in Taxpayer Money*, W.A.V.E. NEWS (Aug. 28, 2013, 2:17 PM), <http://www.wave3.com/story/23279771/for-profit-colleges-accused-of-wasting-billions-in-taxpayer-money>.

tutions and their students.<sup>159</sup> This conversation excludes two vital pieces; the triad must welcome state legislatures and the judiciary to the table. For example, given the debt that the federal government assumes in defaulted student loans,<sup>160</sup> it would be wise to use cooperative federalism—reserving money that would be spent by the federal government solely to shoulder the burden of regulating and cleaning up after proprietary schools, and offering it as a reward to state legislatures who enter the realm of proprietary education regulation more boldly. This would get the states on board with useful regulatory measures. The existing Program Integrity Rules cannot accomplish this task, as evidenced by the recent outcome of litigation challenging the rules.<sup>161</sup> But these rules should be a floor, not a ceiling. The states should enter the fray at this critical juncture. If the states do not have accreditation entities, they need to create such entities to ensure that compliance with the Department of Education’s requirements for Title IV funding and other accreditation standards is regulated in a fair and disinterested manner. Furthermore, involving the judiciary by creating private causes of action that are more favorable to plaintiffs could deter the scrutiny-attracting, unscrupulous behavior of some proprietary institutions and encourage best practices to bring the schools that have strayed from their educational mission back into the fold.

#### B. Enact Narrowly Tailored Disclosure Legislation at the State Level

State legislatures across this country have enacted consumer protection legislation.<sup>162</sup> Now, they must enact substantive disclosure legislation that can be reasonably calculated to provide consumers with the information necessary to make informed decisions about attending proprietary institutions. At a minimum, this legislation should require the standardized publication of—or other means of conveying—key information: (1) annual student attrition, (2) annual student retention, (3) annual student persistence, (4) annual student degree and certificate completion rates, (5) transferability options for credits earned, (6) average student debt at the time of degree or certificate completion, and (7) average rate of employment in the field of training, tracking three months, six months, nine months, and one year from the date of degree or certificate completion. In order for this information disclosure to achieve the desired effect, information should be communicated in simple, clear terms. Ideally, these figures should convey

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159. See Taylor, *supra* note 29, at 768.

160. See S. HEALTH, EDUC., LABOR & PENSIONS COMM., *supra* note 129; SCOTT, *supra* note 17.

161. See *Ass’n of Private Coll. and Univ. v. Duncan*, 870 F. Supp. 2d 133 (D.D.C. 2012).

162. See, e.g., IND. CODE § 24-5-0.5-1 (2013); KY. REV. STAT. ANN. § 367.120 (2013); N.Y. GEN. BUS. LAW § 349 (2013); S.C. CODE ANN. § 37-1-101 (2013); TEX. BUS. & COM. CODE ANN. § 17.12 (2013); W. VA. CODE R. § 46A-6-101 (2013).

each item using a school-wide average and detail each item by individual programs of study. Given the expenditures of proprietary institutions on promotional and advertising materials,<sup>163</sup> it is not unreasonable to require this information to be provided to the consumer on each advertisement.

As the Department of Education has been unable to articulate a uniform method of doing so,<sup>164</sup> this article recommends that states develop standardized reporting methods requiring: (1) the disclosure be filed with the state accreditation board annually by June 30; (2) the state accreditation board compile the disclosure filings of all proprietary institution licensed to operate inside the state for the current school year; (3) the disclosure filings be arranged by the state accreditation board in a manner that allows the consumer to clearly compare and contrast the proprietary education institutions; (4) the compilation of disclosure filings be placed in a visible and centralized location on the state accreditation board's website, as well as on the website of all accredited proprietary institutions within the state, annually by July 31; (5) all proprietary education institutions include a state-agency-approved summary of the complete compilation of disclosure filings with any mailed, in person communication of, or printed promotional or advertising materials; and (6) an employee or agent of the proprietary education institution engaged in admissions, financial aid, recruitment, instruction or any related activity to explain the institution's disclosure filing to any and all current and prospective students in clear and non-confusing terms. That said, communicating all of the information required by the recommended legislation in non-print promotional or advertising materials places a high burden on the proprietary education institution. In the case of video or digital media promotions or advertising, this article recommends a simple solution: that the advertisement clearly articulate where the viewer may find important data about the advertising institution (*e.g.* annual student attrition rates, annual student degree and certificate completion rates, average student debt at the time of degree and certificate completion, and

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163. Between 2007 and 2012, ten of the largest virtual proprietary K-12 schools have spent an estimated \$94.4 million on advertisements. Greg Toppo, *Online Schools Spend Millions to Attract Students*, USA TODAY (Nov. 28, 2012), <http://www.usatoday.com/story/news/nation/2012/11/28/online-schools-ads-public-1732193/>. Google's largest advertiser—at more than \$400,000.00 in daily advertisements—is the University of Phoenix. Kaplan, Devry and ITT also rank among the twenty-five biggest advertisers on Google. A. Ananthalakshmi, *For-Profit Colleges Spend Big on Marketing While Slashing Other Costs*, REUTERS (Nov. 28, 2012), <http://www.reuters.com/article/2012/11/28/net-us-forprofitcolleges-analysisidUSBRE8AR0FJ20121128>. These numbers do not include the nearly \$40 million proprietary colleges spent on lobbying from 2007 to 2012. See Tyler Kingkade, *For-Profit Colleges Spending Millions on Lobbying, Nearly \$40 Million Since 2007*, HUFFINGTON POST (Aug. 30, 2012, 9:19 AM), [http://www.huffingtonpost.com/2012/08/30/for-profit-colleges-lobbying\\_n\\_1842507.html](http://www.huffingtonpost.com/2012/08/30/for-profit-colleges-lobbying_n_1842507.html).

164. See 34 C.F.R. §§ 668.6, 668.41 (2013). See also Auster, *supra* note 38, at 652–53.

average rate of employment within six months of the date of degree or certificate completion according to the same standards as listed above), such as by directing the viewer to the state accreditation agency's website.

Because the current disclosure requirements lack depth and uniformity,<sup>165</sup> this solution goes a step further while serving important governmental interests that will withstand judicial scrutiny: (1) disclosure serves an informational interest, (2) it reduces the appearance of corruption, and (3) it helps detect violations of law. Although mandatory disclosure legislation may not eradicate problems like the rising student loan default rate, it should give student-consumers—who, without this information, withdraw from school without receiving a degree or default on their loans<sup>166</sup>—the information they need to make informed decisions in the educational marketplace.

### C. Adopt a Cause of Action with a Chance of Success for Students

The judiciary has heretofore relied on the academic abstention doctrine to stay out of the affairs of educational institutions.<sup>167</sup> The courts should acknowledge that, because the postsecondary education model has changed, it is necessary to vest proprietary schools with a fiduciary duty to their student-consumer. As the New Hampshire Supreme Court articulated,<sup>168</sup> this may be accomplished through the recognition of a limited fiduciary duty of good faith, fair dealing, and transparency to all current and potential students. Recognizing a general fiduciary duty serves four central purposes: (1) it places the judiciary back in step with modern reality of postsecondary education; (2) it abrogates the disfavored, paternalistic *in loco parentis* doctrine by treating student-consumers as adults capable of making informed decisions; (3) it places proprietary education institutions on clear notice of their duties to student-consumers; and (4) in the event that an institution breaches a fiduciary duty, it allows the plaintiff a more reasonable standard for bringing a claim against the institution in breach of its duty. Finally, recognizing the fiduciary duty acknowledges a special relationship where one has long existed unnoticed.

These recommendations are designed to encourage the right behavior of proprietary colleges and universities, in the form of relatively non-invasive regulation, and to enable student-consumers to make informed choices and have a fair shake at legal recourse if their choice was the result of fraud or deceit by a proprietary institution.

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165. See Program Integrity Issues, 75 Fed. Reg. 34,806, 34,835 (June 18, 2010); Program Integrity Issues, 75 Fed. Reg. 66,832, 66,833, 66,836 (Oct. 29, 2010). See also Auster, *supra* note 38, at 652–53.

166. See Hoxby & Turner, *supra* note 95.

167. See KAPLIN & LEE, *supra* note 79, at 104–05.

168. Schneider v. Plymouth State Coll. 744 A.2d 101 (N.H. 1999).

## CONCLUSION

While many states still do not allow a plaintiff's tort or contract claims against a proprietary education institution to succeed, nearly every state provides some sort of avenue for fraud victims to seek legal redress and imposes fiduciary duties on many forms of business organizations.<sup>169</sup> Because the states are in the best position to regulate the institutions within their own borders, they should seize the opportunity to regulate an unbridled industry, before the damage—such as the historically high loan default rate—worsens.<sup>170</sup> While only ten percent of all students enrolled in post-secondary institutions attend proprietary colleges and universities, the student loan default rate among these students accounts for over forty percent of all federal student loans in default.<sup>171</sup> It is even more important that post-secondary education returns to an economy of reciprocal benefit and is not used as a means of fleecing consumers. As Justice Brandeis once said, “sunlight is said to be the best of disinfectants;”<sup>172</sup> it is time that the proprietary education industry is held to the same standards of accountability to which every other for-profit industry is held.

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169. See generally Prentiss Cox, *Goliath Has the Slingshot: Public Benefit and Private Enforcement of Minnesota Consumer Protection Laws*, 33 WM. MITCHELL L. REV. 163 (2006).

170. Right or wrong, students attending proprietary schools assume more debt than their peers at traditional postsecondary schools. See Harkin, *supra* note 36, at 8–9. Therefore, it is imperative to find solutions to this problem sooner, not later.

171. See Harkin, *supra* note 36, at 11. See also Auster, *supra* note 38, at 667 n.244.

The GAO reports that eighteen percent of for-profit graduates default on their Title IV loans. This figure only includes students who actually complete a degree. The default rate of students attending non-profit schools is almost a quarter of this default rate.

*Id.* (citations omitted).

172. Walter J. Enright, *What Publicity Can Do*, 58 HARPER'S WEEKLY 10 (1913), available at <http://www.law.louisville.edu/library/collections/brandeis/node/196> (quoting Justice Brandeis).