BLACK LETTER LAW AND THE FOR-PROFIT COLLEGE

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There is no single resource available to consumers of for-profit education or to owners and administrators of for-profit colleges and universities that aggregates consumer protection law. The purpose of this study is to examine the laws that regulate the operation of for-profit institutions, the marketing and advertising of for-profit institutions, the gainful employment regulations, and how the courts have interpreted laws (constitutional, statutory, and regulatory) in each of these three areas. Utilizing legal research methodology, the study revealed that for-profit institutions are treated differently in the legislation at both the state and federal level. Furthermore, by reviewing each state and federal law, its application, and its treatment by the courts, the research uncovered the weaknesses of a decentralized system of regulation and demonstrated a need for strong centralized federal oversight to protect educational businesses and their consumers.
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CHAPTER I
INTRODUCTION

In the United States, regulation of education is decentralized.\(^1\) At the highest level, two types of higher education systems exist in the United States, nonprofit institutions and for-profit institutions. This study of the legal framework of institutional operation focuses on the latter to determine if the current decentralized system of regulation, law, and policy provides adequate protections for students attending for-profit institutions.

The History of For-Profit Colleges

Throughout history, education has been a saleable commodity.\(^2\) At the turn of the twentieth century, industrial growth and new technologies such as the typewriter and stenographic machine led to the opening of many schools to teach these skills. For-profit colleges began to dwindle in the U.S. with release of the Flexner report of 1910, which criticized teaching and education in the country’s medical schools.\(^3\) At the time of the report, most medical schools were small proprietary institutions run by doctors for-profit.\(^4\) There was also a political shift in attitudes toward public vocational education during the same timeframe.\(^5\)

In 1965, Congress in order to support students entering postsecondary education developed two federal loan insurance programs, the Higher Education Act of 1965 and the National Vocational Student Loan Insurance Act.\(^6\) The Higher Education Act limited its eligibility to students attending nonprofit colleges either seeking an academic degree or for a program more than one year in length that led to gainful employment in a recognized occupation but did not terminate in an academic degree. Nursing programs were specifically
listed as eligible for funding. At the time of the inception of the Act, this was limited to institutions that: admitted students only after proof of completion of a secondary education; that were legally authorized in the state to do business; are public or nonprofit; and are accredited by a regional or national accrediting body recognized by the United States Department of Education. The National Vocational Student Loan Insurance Act, in contrast, extended benefits to for-profit institutions but required that students seek a program that provided postsecondary technical or vocational education that prepared students for useful employment.

The number of for-profit colleges continued to decline until 1972. In 1972, a substantial overhaul of the Higher Education Act was passed by Congress. One of the major changes in the Act was the merging of the National Vocational Student Loan Insurance Act and the Higher Education Act. Under the Higher Education Act, eligible students became those attending institutions of higher education, and the National Vocational Student Loan Insurance Act was changed to cover students attending vocational schools. The change in the Act created a bifurcated system. While students attending nonprofit and public institutions could receive federal financial aid for any program that resulted in an academic degree, for-profit institutions were limited to programs that provided for gainful employment in a recognized occupation, regardless of whether the program resulted in an academic degree.

Since the reauthorization in 1972, there has been an explosive growth in for-profit colleges. In 2009, for-profit colleges claimed 9% of the share of students, which equates to 1.5 million learners in the nontraditional market. Enrollment was expected to increase at a
compound annualized growth rate of 2.7% in the twenty-five to thirty-four age ranges, the area of enrollment that for-profit institutions focus. With the projected growth, for-profit institutions were expected to hold 14% of a much larger market share within ten years (see Figure 1).\textsuperscript{14} Recent trends however, have shown a decrease in enrollment at for-profit colleges rather than the explosive growth seen over the past ten years.\textsuperscript{15} Annual growth has continued to slow in the online market from a growth rate of 20% year over year in 2009 to 4% in 2014.\textsuperscript{16} Since 2005, the number of online providers has doubled. In addition to for-profit institutions like the University of Phoenix and Grand Canyon University, public institutions like Arizona State University and private institutions like Liberty University and

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\caption{Projected Growth Rate and Potential Market Share over Ten Years}
\end{figure}
Southern New Hampshire University have entered the online delivery market with 60% of all institutions now offering online programs.\textsuperscript{17} While overall enrollment in the for-profit sector has continued to decline, not all for-profit institutions have been affected. Grand Canyon University reported a 14% growth in the last quarter of 2013 by attracting both traditional age campus based students and the adult online market.\textsuperscript{18}

For-profit education is well established among educational provider types.\textsuperscript{19} It has been an important part of the history of western postsecondary education and is likely to continue to serve expanding markets in the near future.\textsuperscript{20}

**Statement of the Problem**

There is no single source that clearly defines the consumer protections in place for consumers of for-profit postsecondary education. Consumers are often unaware of the legal authority permitting an institution to offer a degree and the limitations placed on recruitment and marketing initiatives as was the case with Evans v. Corinthian colleges when after having been called seven to eight times per day by a recruiter from Corinthian Colleges, Ms. Evans was unable to produce a log of all telephone calls and her case was subsequently thrown out.\textsuperscript{21} As well, it is unclear to consumers what the achievement of the degree will do for them as was the case with the State of Colorado v. Argosy where students were led to believe that a doctoral program offered through Argosy would prepare them for licensure in the state when in fact it did not.\textsuperscript{22} Finally, there is no collection of relevant case law that would support an understanding of the legal relationship between the for-profit college or university and the student, which is the first step in identifying what laws and protections apply. Also confusing to consumers is who has the legal authority to award a degree.\textsuperscript{23}
Authority to Award a Degree

It is unclear to the consumer under what authority institutions are permitted to award degrees. The federal government does not hold sole authority over education in the United States. The word education appears nowhere in the Constitution. The authority to award a degree comes from several different sources. In the past, the federal government has chartered and supported several postsecondary institutions. These include the military institutions such as the National Defense University. Another military institution is Uniformed Services University of the Health Sciences. A third military institution is Community College of the Air Force. All of these operate under the power of Congressional act. Haskell Indian Nations University is operated by the Department of the Interior, which is a federal agency. The authority to operate institutions within the District of Columbia also falls under the authority of the federal government. The federal government has enacted bills of incorporation, as in the case of the Catholic University of America, where the federal government confirmed and expanded the institution’s 1887 charter. The federal government also provides support to Gallaudet College, which serves the deaf population, and Howard University which serves African-American students because of national interest. Colleges such as the College of the Menominee Nation, Leech Lake Tribal College, and United Tribes Technical College were given the authority to operate by tribal governments. Beyond federal and tribal authority to approve institutions to award degrees, rules and regulations vary drastically from state to state. In some states, local authorities and municipalities are given the authority to establish and control community colleges, whereas in other states, that power is reserved for the state.
The structure for the regulation of education varies from state to state as well. Statewide structures for higher education also differ from public to private. Public institutions such as The Ohio State University, Washington State Community College, and the State University System of New York receive their authority to award degrees from the state. Private liberal arts colleges such as Grinnell College and Kenyon College receive their permission to operate from the state. Columbia, William and Mary, and other institutions founded prior to the Revolutionary War received permission to operate and award degrees by royal charter, and later sought permission from the state or colony to continue to operate. Most states have a state board or state officer responsible for higher education within the state. Some states have multiple boards that deal with different sectors of education within the state.

Many states have organizations that regulate for-profit schools. Regulations that can be imposed include licensing, mandatory inspections, and mandatory bonding that protects the student in the event that the college fails. Most states have some regulatory scheme for proprietary institutions that either falls under a consumer protection board or under a board that specifically regulates the for-profit industry.

For-profit education in the state may be under a different set of regulations than nonprofit higher education. Until 1950, only seventeen states had any laws that allowed for the licensing, registration, or approval of for-profit colleges. Throughout the 1960s and 1970s, more laws were drafted to regulate the for-profit colleges. By the 1980’s, forty-three states and the District of Columbia had bodies that saw to the oversight of for-profit colleges, but only thirty-eight had requirements above simple registration or reporting of
accreditation. One area of consumer protection that needs further clarity is how far an institution can go in recruiting new students.

**Limitations on Advertising and Recruitment**

It is unclear to the consumer what limitations are placed upon for-profit institutions in advertising and recruitment. The Federal Trade Commission is one organization that protects consumers against deceptive advertising practices, along with a host of laws that vary from state to state. In an effort to ensure that the $4 billion in Pell grants and the $20 billion in federal loans that students who attend for-profit colleges are receiving are not being obtained through fraudulent or coercive practices on the part of the institution, the Department of Education asked the Government Accountability Office, hereinafter GAO, to investigate. In 2010, the GAO performed undercover testing of fifteen for-profit colleges in six states and Washington, D.C. The undercover tests revealed that for-profit representatives encouraged students to falsify their federal application for student aid by increasing the number of dependents a student had in one instance, and by not reporting $250,000 in savings in another. In some instances, students were pressured to sign a contract before meeting with a financial aid representative.

Representatives also falsified potential earning outcomes to students. In one instance, a student studying to be a barber was told that he could earn over three times more than the average barber makes. Undercover agents were misled about the total cost of tuition and were lied to about accreditation. A representative from one for-profit institution told a student that the program was accredited by the same accrediting body as Harvard University and the University of Florida. Not only was the institution not accredited by a
regional accrediting association, the University of Florida and Harvard University are accredited by two different regional accrediting bodies, the Higher Learning Commission and the New England Association of Schools and Colleges, making the claim false in several different ways.

The Senate Committee also investigated telephone-marketing techniques where aggressive calling strategies were utilized to recruit students. It is unclear how telecommunication law may play a factor in these aggressive marketing techniques. For example, a nonprofit organization may contact individuals without an existing business relationship, even if their name is on the federal Do Not Call registry. The same is not true regarding for-profit organizations.

Cases such as this have resulted in heightened scrutiny of for-profit colleges. The Senate Committee on Health, Education, Labor, and Pensions in 2012 produced a report entitled, *For-Profit Colleges: The Failure to Safeguard the Federal Investment and Insure Student Success*, after two years of investigation that further exposed issues with the for-profit industry.

All fifty states have consumer protection laws that protect consumer transactions in the marketplace. These laws are known as Unfair and Deceptive Acts and Practices (UDAP) statutes. UDAP statutes range in levels of protection for consumers across the fifty states. There is an 11-part test to determine common law fraud. According to Justice Harry Blackmun, who articulated the test in the case: (1) There has to be a claim, (2) That claim has to be untrue, (3) It has to be about a current or past fact, (4) It has to be material, (5) It has to be susceptible of the knowledge, (6) The presenter must know the claim is false, (7) The person representing the claim intends for the person to act on, (8) The person is induced
into acting, (9) The person making the decision relies on the claim, (10) By acting on the claim the person suffers damages, and (11) The damages can be attributed to the false claim.\textsuperscript{49}

Since 1938, the Federal Trade Commission Act has prohibited unfair or deceptive practices in the marketplace, but states did not have agencies in place to enforce the Act.\textsuperscript{50} In the 1970s and 1980s, states began to pass UDAP statutes that provided consumer protections.\textsuperscript{51} Prior to that time, fine print in a contract would often immunize a seller, or the consumer would need to fall back on common law fraud.\textsuperscript{52} Common law fraud requires a much higher burden of proof on the part of the consumer, including knowing what the seller was thinking at the time.\textsuperscript{53} These statutes provide for greater protection than their common law and federal counterpart but do not offer equal or easily understandable protection to the consumer across the fifty states. Utility companies have immunity from UDAP laws in sixteen states and insurance companies have immunity in twenty-four states.\textsuperscript{54} Attorneys’ fees cannot be recovered in Arizona, Delaware, Mississippi, South Dakota, and Wyoming, causing undue burden on the plaintiff.\textsuperscript{55} In Florida and Oregon, even if the lawsuit is filed in good faith, the consumer can be forced to pay the businesses’ attorneys’ fees if deceptive practices are found.\textsuperscript{56} These are the same consumer protection laws that would protect consumers of for-profit education.\textsuperscript{57}

**Value of a Degree**

It is unclear to the consumer what obtaining the degree will do for them. In the case of Townsend v. Gray, the court ruled that simply because three men started a college and awarded a medical degree, did not mean that they had the legal authority to do so.\textsuperscript{58} “In
practical affairs, [a degree] introduces its possessor to the confidence and patronage of the general public. Its legal character gives it a moral and material credit in the estimation of the world, and makes it thereby a valuable property right of great pecuniary value. Furthermore, the state did not have the legal obligation to recognize that degree and award licensure to practice in the state. The lesson here is one of recognition. The value of a degree is inherent to the recognition that others give it.

The Higher Education Act defines proprietary and vocational schools as equivalents and defines them differently from nonprofit public and private schools. In a separate section of the Act, vocational and proprietary schools are defined as schools that provide training in an occupation recognized by the DOE for gainful employment, whereas nonprofit public and private schools are defined as schools that are accredited by a nationally recognized accrediting agency and provide credit towards a two-year or four-year degree. Private schools are defined differently in that programs are not required to train students for gainful employment in a recognized occupation. Under the Higher Education Act, for-profit colleges are to provide eligible program training for gainful employment, but the Act does not define gainful employment. In a 1965 Senate report attached to H.R. 7743, which gave trade and vocational schools access to federal loan dollars, Congress argued that the nature of these institutions is different because the students who enter these trade programs already know what they want to do, while that may not be the case at a typical nonprofit institution.
**Relationship Between the Student and the University**

It is unclear to the consumer what remedies are available when the laws that govern the relationship between the student and the for-profit university are violated. The available legal remedies have changed over time. According to Kaplan and Lee, the university was thought of by the courts and legislators as an institution which could regulate itself based upon history, tradition, and consensus and it operated best when operated autonomously.\(^6^5\) The training of lawyers and judges was not even a part of the postsecondary American education system until the twentieth century as training was conducted by apprenticeship.\(^6^6\) The courts have reluctantly become involved in matters concerning universities.\(^6^7\) When they do, they only rule on academic matters if other issues were involved. The courts will not make a decision on a purely academic matter such as how well a student performed on a test or an assignment. They will interfere when academic decisions conflict with existing state or federal law.\(^6^8\)

**Due process.** Due process is the common law concept and constitutional guarantee that the state cannot deprive an individual of his or her legal rights.\(^6^9\) Constitutional due process does not apply to private institutions, but is the basis for the first remedies awarded by the judiciary to a student against a university.\(^7^0\) The first remedy awarded to a student by the judiciary for a university violation was a *writ of mandamus*.\(^7^1\)

Fowler and Harker both commented on the use of writ of mandamus in higher education.\(^7^2\) In 1887 in the case Commonwealth *ex rel.* Hill v. McCauley, the court was asked for a writ of mandamus to mandate that a student be allowed to return to college after being dismissed for “riotous conduct.”\(^7^3\) Historically speaking, a writ is simply an order from the
king to his subject. It was not judicial in nature, but simply an order from the king. Over time, the writ became a remedy used by the king’s court to compel a lower court to take action. Today, it is used when there is an issue between two parties, where one party seeks a civil resolution to protect a right. In making a ruling on Commonwealth ex rel. Hill v. McCauley the court cited King v. University of Cambridge. When determining what common law is, English court decisions rendered before the Revolutionary War are generally considered conclusive. In King, the court issued a writ of mandamus ordering the college to restore the graduate’s degree after it was suspended for not paying a debt to a faculty member. The court came to that conclusion because the degree was suspended without providing the opportunity for the defendant to defend himself. The court came to the conclusion by arguing that even God gave Adam a chance to defend himself by asking if he ate from the tree of knowledge. A similar decision was reached in Commonwealth ex rel. Hill v. McCauley, when students holding peaceful demonstrations against racial segregation were dismissed from school without a hearing or due process. The use of writ of mandamus provided the remedy for not giving due process in higher education.

Beh clarified the courts’ requirements for due process using the cases University of Missouri v. Horowitz, University of Michigan v. Ewing, and Regents of the University of California v. Bakke. In University of Missouri v. Horowitz, the Court ruled procedural due process is required for decisions involving student conduct. The Supreme Court provided guidance on academic misconduct in University of Michigan v. Ewing, stating that on purely academic decisions, due process is not required unless the decisions are substantially different than what would be commonplace.
Corporation. Students attending private colleges cannot seek remedies through due process unless by the steps previously laid out. However, students attending private schools could seek relief of a writ of mandamus under the common law of a corporation. In its simplest terms, a corporation is a legal entity of many people which may act as an individual.

In Hill v. McCauley, a student filed suit after being dismissed. The judge stated that the same rules apply as when a corporation wants to remove one of its members. In the Hill ruling, part of the rationale for government interference was that universities served a public function and were chartered by the state.

The board of trustees has the ability to enact rules to govern the college, but these rules cannot supersede state law. Because the procedure of the institution was to dismiss without a hearing, the court had jurisdiction over the university because the university attempted to make rules that were in conflict with state law. The court further applied corporation doctrine in the 1904 case of Baltimore University v. Colton. In this case, a student was dismissed from a private law school during his final year of attendance without notice and without a chance to defend himself. The student was dismissed after a faculty member retired, and the new faculty member did not know the student or believe that the student had attended enough lectures to take the final exam and graduate. The student offered to pay any money that he may have owed, but the refusal was outright. The student applied for a writ of mandamus through the courts. The judge ruled that even though the school was private, regardless of its for-profit or not-for-profit status, the institution must follow the rules of a corporation and not dismiss without a hearing when there are no monetary issues involved.
In loco parentis. From 1681 to 1961, the judiciary continued to defer to educational institutions the rights to handle their own affairs. One way in which this was done was by advancing another English common law principle, the principle of in loco parentis or in place of the parents. By upholding the principle of in loco parentis, the judiciary gave institutions almost unlimited ability to make any rules that concerned the mental, physical, or moral health of the student. The courts would not interfere under this principle unless the rules were unlawful or against public policy. The principle of in loco parentis originally applied to both public and private entities and gave universities authority over students’ lives.

The legal principle of in loco parentis was used to determine the case of Gott v. Berea College. In this case, several students were expelled from college for eating at a restaurant across the street from campus that was on the college’s list of banned eating establishments. A tavern owner brought suit against the college for prohibiting students from eating in its establishment. The college contended that it was responsible for the health and wellbeing of its students. In practice, all eating establishments that were not owned by the college were banned from student use. The court ruled that the college stood in loco parentis when it came to the physical or mental wellbeing of its students. Additionally, the court stated that it did not have the authority to interfere with the rules governing an institution, regardless of whether they were good rules or not, unless those rules violated public policy or law.

Beh and Fowler reported that in the 1961 case of Dixon v. Alabama State Board of Education, the court stopped applying the legal principle of in loco parentis. In the case,
several students were expelled from Alabama State College for their participation in a sit-in protest.\textsuperscript{98} The students were expelled without notice or an opportunity for a hearing.\textsuperscript{99} The judge upheld the constitutional right of due process, but did not go to the extremes that were expressed in Hill v. McCauley.\textsuperscript{100} The judge ruled that the institution needed to provide notice to the students of the charges that they faced and what the repercussions would be if they were found guilty.\textsuperscript{101} The judge also indicated that an oral or written presentation of any eyewitnesses should be provided to the student, but the student is not required to be directly confronted by the institution.\textsuperscript{102} Interestingly, the court limited its decision to public universities, but based its decision on Hill v. McCauley, which was in fact a private institution.\textsuperscript{103}

**Contract Law**

The idea of a contractual relationship between the student and the university has been recognized by the court for some time.\textsuperscript{104} However, originally contract law was construed heavily in the institution’s favor with almost unlimited power to dictate the contract terms.\textsuperscript{105} A contract, in its simplest form, is a promise of an exchange of goods or services between two individuals which is legally binding.\textsuperscript{106}

**Elements.** The basic elements of a contract are a valid offer, acceptance, and consideration.\textsuperscript{107} An offer is the set of terms and conditions communicated to another party with the intent of entering into a legally binding promise to do or not do something.\textsuperscript{108} Acceptance is the communication that that the offer was accepted. An offer can be revoked at any time before acceptance.\textsuperscript{109} When a party accepts, the acceptance must be absolute based upon the offered terms or the process starts over with a new offer.\textsuperscript{110} Consideration is
the promised action of the contract offer based upon the fulfillment of the terms and conditions of the contract by the offeree. Generally speaking it is payment of some kind, but it might also be a number of other things. According to Howell, it may be the “forbearance or creation, modification, or destruction of a legal relationship, or it may be a return promise.”

Validity. The contract is generally considered a valid legal contract if the basic elements of a contract exist, if the people entering the contract were legally able to do so, and if the contract was for a legal purpose. Contracts cannot be considered valid if the legally binding process is to do something illegal. In order to enter into a legal contract, you must be of legal age, not have a severe mental illness, not be coerced by fraud, not be under the influence of drugs or alcohol which would result in impairment, and have the legal authority within an organization to contract with another individual or corporation. When a contract is entered into by somebody who does not have the authority within an organization to enter into a contract, it is considered ultra vires and is unenforceable.

Contract theory. Fowler states that contract theory has continued to remain the theory that courts apply to the student’s relationship to private universities. In 1901, Koblit v. Western Reserve University, used the terms of a contract with a student to submit to all reasonable discipline at the school. The 1928 Anthony v. Syracuse University, the court reinforced the contractual relationship. In 1962 Carr v. St. John’s University, the contractual relationship was again reinforced. In the 1928 case, Anthony v. Syracuse University, a contractual relationship between the student and the university was identified. The contract however was so heavily construed in favor of the university that it
was almost useless in providing any protection to the student, allowing the university to
dismiss a student because they were not what the institution defined as a typical Syracuse
girl. In the 1964 case, Militana v. University of Miami, the judge’s ruling included a
definition of the relationship between a student and a private university. The ruling stated
that these colleges are operated as private businesses and as such, they can set rules and
regulations for the college. The terms and conditions are those that were published by the
college at the time of enrollment. Because they have characteristics that relate to a contract,
both parties are able to seek remediation in the courts. In the case of Militana v. University
of Miami, the writ of mandamus was overruled on appeal because the student was dismissed
purely for academic reasons and the university followed its own rules in doing so.

Anjum stated that suits brought forth against colleges and universities have been
more successful under contract law. Misrepresentation can be held against universities and
colleges in court. An example of this is can be found in Behrend v. State, where the Ohio
University School of Architecture closed after losing its accreditation status, leaving students
stranded. Without being accredited, their students were unable to get licensed and the
university did not disclose its loss of accreditation to its students.

The courts have established precedent; similar claims have been brought against
nonprofit institutions. Catalogs, advertisements, and internal regulations have been used
and endorsed by the courts in defining the contract between the institution and the
student. In the case of Dodge v. Trustees of Randolph Macon Women’s College several
students brought suit after the college started to admit men. The court recognized the
organization must have the ability to change and that students cannot expect the catalog to constitute a definitive promise to remain the same.\textsuperscript{131}

According to Beh, contract duration has been difficult for the courts to determine. The courts have determined it in one of three ways. Some courts have determined that the contact renews each semester and each time the student pays tuition, others have determined that the institution is excused from meeting the agreement of the contract only when it has become impossible for it to do so, and still others have determined that the institution is excused when operating under good faith.\textsuperscript{132} Because educational institutions hold so much of power in the contractual arrangement with the student, the courts have encouraged very clear publications, limited promises made to students, and increased use of disclaimers.\textsuperscript{133}

Anjem and Beh reported that courts have dealt with this contractual relationship in a variety of ways.\textsuperscript{134} In some instances with public institutions, courts have either limited or refused to see a contractual relationship between the student and the institution.\textsuperscript{135} In Tran v. State System of Higher Education, the court found the handbook was not a contract, and in Yarcheski v. University of Medicine and Dentistry of New Jersey, the court ruled a syllabus was not a contract.\textsuperscript{136}

According to Anjum, other courts have enforced the idea of contract law, as in Zumbrun v. University of Southern California.\textsuperscript{137} The court ruled that the institution breached its contract with the student when the professor left half way through the semester to protest the federal government’s policies toward Cambodia and assigned all the students in the course a B.\textsuperscript{138} Another breach of contract case occurred in the case of Cencor, Inc. v. Tolman, when a dental school failed to offer free repeat courses to its students as
promised.\textsuperscript{139} The court ruled that an instructor assigning a B unilaterally to the class was not a claim of educational malpractice because the college failed to provide a promised service.\textsuperscript{140}

According to Beh, the clearest approach that courts have used is recognizing that a contract exists, but allowing the contract to change as long as it is done in good faith on the part of the institution.\textsuperscript{141} In Raethz v. Aurora, the court ruled that as long as the university was not acting capriciously, no breach of contract would exist.\textsuperscript{142} Under the standard of good faith, students would rely upon the promised program or something similar without excessive catalog disclaimers stripping students of contractual rights.\textsuperscript{143}

**Breach of contract.** A breach of contract occurs in at least one of two different ways including an actual breach and an anticipatory breach.\textsuperscript{144} In an actual breach, one party refuses to uphold its portion of the contract.\textsuperscript{145} In an anticipatory breach, one party announces that it will not be fulfilling the terms of the contract prior to the contract due date.\textsuperscript{146} In an anticipatory breach the offended party has the right to damages, but must attempt to mitigate the losses suffered by the failure to fulfill the contract.\textsuperscript{147} That means that the offended party cannot allow the situation to get worse and sue for additional damages.\textsuperscript{148}

**Termination of contract.** There are three different conditions that can terminate a contract when breached regardless if that breach was anticipatory or actual.\textsuperscript{149} Those conditions are renunciation, breach of condition, and fundamental breach.\textsuperscript{150} A contract is considered terminated under renunciation when it is clear either by action or by words that one party no longer intends to fulfill their side of the contract.\textsuperscript{151} Breach of condition occurs when one party breaks a condition listed in the contact.\textsuperscript{152} Finally, a fundamental breach occurs when one party does not perform their duty under the contract.\textsuperscript{153}
Remedies. There are at least five remedies for breach of contract. Those include money damages, restitution, rescission, reformation, and specific performance.\textsuperscript{154} Damages equal to the value of the completed contract or the cost to hire someone else to complete the contract can be awarded.\textsuperscript{155} Restitution as a remedy makes the party whole by compensating the victim for loss of profits or earnings caused by the breach of contract.\textsuperscript{156} Rescission occurs when both parties enter into a contract by fraud or mistake and the courts rewrite the terms of the contract to reflect the parties’ actual agreement.\textsuperscript{157} Two other types of remedies are specific performance and injunction.\textsuperscript{158} A specific performance is an order by the court requiring a party to complete a portion of the contract when monetary compensation cannot be determined.\textsuperscript{159}

According to Beh, along with pleading under statutory law, breach of contract students can also plead under common law for negligence, fraud, or fraudulent misrepresentation.\textsuperscript{160} \textbf{Fraudulent misrepresentation} is attractive because \textbf{punitive damages} can be attached.\textsuperscript{161} However, these cases are difficult to prove and rarely won.\textsuperscript{162} Consumer fraud statutes are being legislated nationally against both nonprofit and for-profit institutions with mixed results as the courts attempt to balance institutional autonomy with consumer rights.\textsuperscript{163}

\textbf{Consumer fraud statutes.} Under consumer fraud statutes, damages to make whole are more readily available, and the burden of proof is generally less than a common law tort.\textsuperscript{164} Educational institutions have other deterrents placed upon them to ensure they are not defrauding students. Institutions can lose the ability to receive Title IV funding and be
fined $25,000 for each violation. For-profit institutions face an additional penalty through the Federal Trade Commission Act where deceptive acts also carry a $25,000 fine per act.\textsuperscript{165}

For-profit education has helped to move postsecondary education from a privilege that a select few would ever achieve, to a service based industry based upon consumer demand.\textsuperscript{166} Because the shift has happen radically, the laws and courts have yet to catch up with the cultural shift in how postsecondary education is being consumed.\textsuperscript{167}

**The For-Profits**

The relationship between the university and the student has changed over time. State and federal governments have increased access by supporting the cost of higher education through grants and loans made directly to students. However, as the demand for postsecondary education has increased, so has the number of educational providers.\textsuperscript{168} For-profit education stands alone in that its intentions are far from altruistic.\textsuperscript{169} Yet these same institutions would presumably be given great deference from the courts making judgment against academic matters as are public and nonprofit institutions, through the legal concept of stare decisis.\textsuperscript{170} The motivation to give graduates an education that provides them with minimum competencies and maximum return on investment is greatly enhanced in the for-profit sector.\textsuperscript{171}

There are no parts of the Higher Education Act that specifically regulate the marketing and advertising by colleges, the Act does regulate the marketing and advertising of student loans.\textsuperscript{172} There are, however, Department of Education (DOE) regulations that hold the for-profit college or university responsible if it misrepresents the programs, cost of attendance, or employment prospects upon program completion.\textsuperscript{173} Amendments to the
Higher Education Act in 1986 hold the institutions liable for civil penalties if they misrepresent themselves, but do not provide for a private right of action.\textsuperscript{174} A misrepresented student may opt to file a claim with the DOE, may opt to file suit under state consumer protection laws, may opt to do neither or just the former.\textsuperscript{175}

Auster states that the FTC regulates for-profit colleges and gives guidelines to consumers. Regulations set forth what constitutes deceptive advertising, promotional advertising, sales, and marketing. According to the DOE, \textbf{substantial misrepresentation} is “any misrepresentation on which a person to whom it was made could reasonably be expected to rely, or has reasonably relied, to that person’s detriment.”\textsuperscript{176} DOE regulations also prohibit misrepresenting the degree being offered.\textsuperscript{177} This could mean misrepresenting accreditation status, misrepresenting transferability of credits, or overstating the employability of graduates.\textsuperscript{178} Financial issues are also regulated by the DOE and include understating of the cost to attend and exaggerating the availability and level of financial aid.\textsuperscript{179} Compensation which incentivizes enrollment of a student is also banned by the DOE.\textsuperscript{180} From 2002 to 2011, twelve safe harbor provisions were enacted which allowed recruiters to earn compensation under certain circumstances.\textsuperscript{181} In 2011, these regulations were rewritten. Now, in order to determine if the incentive is banned the DOE developed a two-part test: (1) Is the payment made for services rendered? (2) Is the payment based on a student enrolling or receiving financial aid?\textsuperscript{182}

Auster also reported that \textbf{qui tam} lawsuits brought by employees of for-profit colleges and universities under the False Claims Act have been an area of litigation.\textsuperscript{183} A qui tam lawsuit is one brought against an organization on behalf of the government by a
whistleblower who has information that an organization is defrauding the government. The reaction of the various courts has been mixed.\textsuperscript{184}

The Fifth Circuit Court used a two-part test to see if any claim was available under the False Claims Act.\textsuperscript{185} In the case United States ex rel. Graves v. ITT Educational Services, Inc. In order for a student to file a claim, the school had to make a false statement regarding compliance with statutes or regulations, and the school had to falsely and knowingly certify that it were in compliance with state regulation prior to the student receiving payment.\textsuperscript{186} The court dismissed the lawsuit stating that there was no fraud for payment under Title IV.\textsuperscript{187} The plaintiffs had argued that a program participation agreement form (PPA), which all for-profit colleges and universities are required to sign, certified that they were in compliance with the DOE.\textsuperscript{188} The Fifth Circuit disagreed, arguing that the PPA does not require schools to certify that they are in compliance with state regulations.\textsuperscript{189}

In United States v. University of Phoenix, the courts identified four factors to determine if a lawsuit could move forward based on a PPA violation: A violation occurs when a false statement is made to the prospective student, when the fraud is made knowingly, when the fraud is material, and when the statement caused the government to disperse money.\textsuperscript{190} The courts interpreted the PPA as a prerequisite for federal funding.\textsuperscript{191}

As the aforementioned supports, there is no clear resource for consumers of for-profit education that supports the selection of a legal institution, or supports that students understand their rights when participating within a related program. The outcome of ongoing litigation will continue to redefine and reshape the relationship between student and the for-profit college. It is necessary to aggregate that information so that future consumers
are able to make decisions that are in their best interests prior to attending and while participating in for-profit higher education.

**Purpose of the Study**

This study will identify, aggregate, and synthesize the consumer protection law surrounding for-profit colleges in order to determine if the current decentralized system of regulation, law, and policy provides adequate protections for students attending for-profit institutions.

**Significance**

This study would fill an existing void in the literature. While there are government reports and newspaper articles, there is little available in terms of peer reviewed literature on the subject. This study would aggregate information making it accessible to consumers and legislators looking to improve the regulatory environment. Furthermore, this study would open paths for further academic investigation and inquiry.

**Research Questions**

(1) What federal and state laws regulate the operation of for-profit postsecondary institutions?

(2) What federal and state laws regulate marketing and advertising at for-profit postsecondary institutions?

(3) What federal laws regulate the gainful employment for students attending for-profit postsecondary institutions?

(4) How have the courts interpreted and applied the laws (constitutional, statutory, and regulatory) identified in questions 1-3 above.
Glossary

**Appropriate Academic Adjustment** – Aids or services as well as modifications to academic requirements that ensure an equal educational opportunity

**Consumer** – Purchaser of a good or service

**Doctrine of precedence** – See stare decisis

**Established business relationship** – A relationship where the consumer has purchased a good or service or requested information about a good or service, which expires after a period of time, varying from state to state

**False advertisement** – An advertisement that is materially misleading

**Fraudulent Misrepresentation** – Representation with the intent to deceive

**Long arm statutes** - Laws that allow states to exercise jurisdiction over a resident of another state, assuming that individual has made a minimal number of contacts within the state

**Mandatory authority** – A ruling from a higher court within your jurisdiction that decides a matter of law

**National Do Not Call List** – A registry established by the federal government where consumers can place their telephone number on a list requesting not to be called by telemarketers

**Persuasive authority** – A ruling from another court outside one’s jurisdiction, or from a lower court that decides a matter of law

**Punitive damages** – Damages awarded as a punishment
**Sheppardizing** – Looking at a case to see how the courts have treated the case and to see if the legal principles used in the case are still good law, or if they have been overturned by a higher court

**Stare decisis** – Latin for “stand by the decided matter,” meaning a judge is held to rulings of previous judges within their district, or from a higher court, if the case facts are substantially similar

**Reasonable Accommodation** – A modification or adjustment to a task, environment, or the way things are usually done that enables student with disabilities to have an equal opportunity to participate in an academic program

**State Do Not Call List** – A registry established by the state government, typically the state’s consumer protection office, where consumers can place their telephone number on a list requesting not to be called by telemarketers

**Substantial misrepresentation** – Any misrepresentation that a person could reasonably be expected to rely on to that person’s detriment

**Qualifying Disability** – A physical or mental impairment that substantially limits one or more major life activities of an individual, having a record of such an impairment, or being regarded as having such an impairment

**Qui tam suit** – A lawsuit usually brought by a whistleblower who is entitled to a portion of the compensation recovered by the government

**Ultra vires contract** – A contract where the person entering the contract did not have the legal authority to do so

**Writ of certiorari** – A filing asking for a court to review a case
Delimitations

For the purposes of this study, only for-profit institutions that award degrees to students in the United States will be studied. Of all for-profit institutions, only those that offer at least an associate degree will be considered. If an institution offers only certificates and short training modules, that institution will be outside the scope of this analysis. Moreover, the only areas of study will be governance and operations, marketing and advertising, gainful employment, and student disability. Tribal authorities that pre-exist the federal union and have sovereign control over the affairs of American Indians on Indian land will not be included in this study.

Limitations

Legal research is a process of identifying analogous relationships and drawing conclusions from those relationships. As such, it is not a statement of fact. The universe of case law is constantly changing. As cases are heard, more rise up through the system to take their place. At the time of this writing, the best possible cases and statements of law were used to draw conclusions, but the law can and does change.

Remaining Chapters

Chapter two will seek to address the literature surrounding the topic of consumer protections as they relate to students attending for-profit colleges and universities. Chapter three will address the research methods used in obtaining that information. The following chapters will address each research question in turn. Chapter four will address state authorization. Chapter five will address the laws regulating marketing practices in for-profit higher education. Chapter six will address gainful employment rules and regulations and how
they affect the for-profit college and university. Chapter seven will address how courts have interpreted the laws addressed in chapters four, five, and six. Chapter eight will provide a summary and conclusion informing the thesis that the disjointed nature of state law, and the lack of strong federal oversight have created unequal protections for consumers of for-profit education and as such centralized federal oversight is needed.
CHAPTER II

LITERATURE REVIEW

Introduction

Higher education in America has changed drastically from its church-based roots. For-profit education has increased its share of the overall educational marketplace in the United States. For-profit colleges are also known as proprietary colleges. In order to contextualize the literature surrounding for-profit education, this review of literature will be organized into four sections. The first section will focus on institutional demographics including the number of for-profit institutions, ownership of for-profit institutions, size of for-profit institutions, longitudinal data regarding growth, and the future of for-profit institutions. The second section will focus on the literature surrounding the activities of for-profit institutions prior to enrollment including fraudulent degrees, aggressive marketing, government intervention, consumer fraud state statutes, state regulatory bodies, and financial aid and other resources. The third section will focus on the literature surrounding matriculated students or students who have been through the admission process and their experiences including school closings, the quality of staff, instructors, administrators, and the cost of attendance to society. The fourth section will seek to review the literature surrounding deceptive degree earning potential, default rates on student loans, student satisfaction, retention rates and graduation rates, job placement rates, and income level.

Institutional Demographics

For-profit institutions have been an understudied part of the overall higher education system in the United States. In a decentralized system of education and in a federalist society,
regulations change from that govern the legal relationship between the for-profit college and its students, the state, and the federal government, as well as to understand their size and scope of operation.\textsuperscript{194} Simply counting the number of for-profit colleges has been a struggle for many researchers.\textsuperscript{195} As a decentralized system, each state has different rules on establishing a business and different methods on how those businesses are tracked.\textsuperscript{196} Furthermore, not all institutions are accredited, and there is no national database that for-profit institutions are required to register. Single institutions offering their product across state lines also complicate the ability to track these institutional types.\textsuperscript{197} Ownership affects the institutional mission and management, as well as size.\textsuperscript{198} Institutional growth and regulation all play important roles in the overall picture of the for-profit college.\textsuperscript{199}

**The Number of For-Profit Institutions**

It is difficult to determine the total number of for-profit college providers in the U.S., as there does not seem to be a consistent way to identify them. Many corporations are publicly traded and own and operate several colleges under different names. For example, DeVry, Inc. operates as Keller Graduate School, Chamberlain College of Nursing, DeVry University, and Carrington College.\textsuperscript{200} According to Breneman et al. in data retrieved from the 2002 census of institutions from the National Center for Education Statistics, there were 2,382 for-profit institutions.\textsuperscript{201} Of the 2,382 institutions, only 297 offered a bachelor’s degree and 494 offered associate degrees.\textsuperscript{202} At that time the majority, 55.3\% offered programs requiring less than two years and award certificates rather than traditional degrees.\textsuperscript{203} Bennett et al. reported that in 2008 over 6,700 higher education institutions were in operation. Of those, 2,900 were for-profit. Although for-profit colleges have proliferated, they tend to be
smaller than their nonprofit counterparts, accounting only for 9.2% of the market (i.e.,
students) but having 40% of the total number of colleges. Estimates from 2012 show that
there were 2,940 for-profit institutions eligible for Title IV funding, but there were a total of
7,550 for-profit postsecondary institutions if those that were not eligible were included in the
overall count.

In 2010, the largest fifteen for-profit institutions enrolled 59.5% of the 9.2% market
share. These included Apollo Group, Education Management Corporation, Career
Education Corporation, Corinthian Colleges, DeVry, Kaplan Education, ITT Educational
Services, Strayer Education, Laureate, Bridgepoint Education, Capella Education, Lincoln
Educational Services, Grand Canyon Education, American Public Education, and the
Universal Technical Institute. As of 2010, the Apollo Group was by far the largest
accounting for 395,361 students, or 21.2% of total for-profit student enrollment.

One segment of for-profit colleges is regionally accredited colleges. According to
Kinser, there is little agreement on the number of regionally accredited for-profit colleges.
In several different studies, different tallies were reached for the same year. One study
suggested there were 69 in 1999, and another reported that there were 63. A third study in
1991 reported that approximately 200 schools were regionally accredited. According to
Kinser, even the Integrated Postsecondary Education Data System (IPEDS), a data set
maintained by the federal government, returns different results when accessed through the
Peer Analysis System, College Opportunities On-Line and Dataset Cutting Tool. Kinser
identified a total of 241 institutions. It is clear from the data that colleges such as the
University of Phoenix (Apollo Group) and DeVry are the exception in terms of scale and
size of enrollment rather than the rule. The contrast becomes even starker when looking at how for-profit institutions are owned.

**Ownership of For-Profit Institutions**

According to Kinser, ownership is one important variable in the classification of a for-profit institution and helps to explain how the college will be managed. Because the ownership defines the institutional goals, institutions with shareholders have the responsibility to return value to shareholders. In contrast, a family-owned institution’s goals would reflect the owners’ will. Researchers have determined that for-profit institutions can be owned in a variety of ways, from a single owner to complex corporate structures. Although large, well-known institutions are often used as the model for for-profit higher education, they are not the majority. There are national chains like ITT Technical Institute, the University of Phoenix, and DeVry University, but there are also small family-owned institutions. The three ways that private colleges are owned: publically traded companies whose stock are available for purchase in an open market; a closely-held corporation; and private equity companies under private ownership. Fewer than half of all for-profit higher education companies are publically traded. Stockholders demand growth in their investment. Publically traded institutions are bigger on average than privately held for-profit institutions. Furthermore, publically traded organizations are more likely to be regionally accredited with 25% of all publically traded companies holding regional accreditation, while only 5% of institution that are not publically traded colleges are regionally accredited. A closely held corporation is owned by a small group of people who usually manage and operate the business. In this corporation, stock is not available for public
sale. According to Kinser, most for-profit higher education colleges and schools are small privately held equity companies and family owned businesses.

Size of For-Profit Institutions

For-profit institutions can also be categorized by size. According to Kinser, in 2006 the University of Phoenix was by far the largest for-profit institution, with 170 campuses and an enrollment of 230,000. That same year DeVry University enrolled only 55,000. Of all the for-profit institutions, only fifteen had an enrollment greater than 5,000. Moreover, in 2006 no other for-profit institution operated as many campuses as did the University of Phoenix. According to Kinser, only six institutions operated more than twenty campuses. They were ITT Technical Institute, who had eighty-seven campuses, DeVry University with seventy-eight campuses, Strayer University with thirty-nine, The Art Institutes with thirty-three, Brown Mackie College with twenty-one, and Remington College with twenty-one. The number of campus operated reflects the business model of the institution, the market demand for the product, and the academic credentials being offered. Many institutions have seen large growth in the online sector, not reflective of the number of campuses they own, while other for-profit institutions may require a physical campus presence based upon academic offerings. Licensure programs, such as nursing, require a physical presence in the state.

According to the United States Senate Committee on Health, Education, Labor, and Pensions, the size of for-profit schools can vary drastically. To give an example of each institutional ownership model and corresponding enrollments, in the fall of 2010, Apollo Group enrolled 470,800 students, operating the University of Phoenix and Western
International University, while during that same time period Grand Canyon Education, Inc. which operates Grand Canyon University and has one campus, enrolled only 42,300 students. Both of these were publically traded companies. Chancellor University LLC, which operates one campus in Seven Hills, a suburb of Cleveland, Ohio, is a private equity company and only enrolled 739 students during that same period. Rasmussen Colleges, Inc. enrolled 17,000 students on twenty-two campuses and is also a private equity company. Herzing, Inc, a closely held corporation enrolled 13,000 students in the fall of 2010, while Med-Com Career Training enrolled 2,700 students during the same period. Publically traded companies on average enroll much larger numbers of students than private equity companies or closely held corporations.

Longitudinal Data Regarding Growth

According to Breneman, Pusser, and Turner, degrees granted may be an excellent way to look at the growth of the for-profit sector. In 1970, there were 786,478 bachelor’s degrees awarded of which 641 were from for-profit institutions, 266,238 were awarded from private nonprofit, and 519,599 were awarded from public nonprofit. Private for-profit institutions made up only .01% of the share of degrees awarded. In 2002, there were 1,291,900 bachelor’s degrees awarded. For-profit colleges awarded 26,398, while 424,322 were awarded from private nonprofit, and 841,180 were awarded by public. The growth of awarded degrees was 30% from 1970 to 2002, but for-profit institutions only grew their programs at 10%. Also growing is the graduate degree market. In 1970, there were 2,008,345 master’s degrees awarded across institution types. Of those, eleven were awarded by a for-profit institution. In 2002, those numbers drastically changed with 482,118 total master’s
degrees awarded, 14,264 coming from for-profit colleges. That’s an annual growth rate of over 4000% and 3% percent of all graduate degrees awarded. 225

Until 1971, Armstrong College and Madison Junior College were the only for-profit institutions to award bachelor’s degrees, and Armstrong was the only for-profit institution to award a master’s degree. In 1982, more than 300,000 master’s degrees were awarded by public and private nonprofit institutions, while for-profit institutions awarded only 400. 226 Today 80% of all for-profit bachelor’s degrees awarded are by Strayer, DeVry, and the University of Phoenix. From 1982 until 2002, over 2,700,000 master’s degrees were awarded by for-profit institutions. 227 The University of Phoenix and Keller School of Management have awarded 80% or more of those degrees since the 1980’s. 228

The Future of For-Profit Higher Education

According to Zemani-Gallaher, private for-profit higher education continues to move towards a corporate structure. 229 For example, the Washington Post Company, which owns Kaplan University, purchased a career college chain with 13,500 students. The ten colleges were purchased from Quest Education Corporation in 2000 for $165 million and have regionally accredited certificate and bachelor’s programs. 230 The Wyandotte Tribe of Oklahoma has also bought six proprietary college businesses to raise money. 231 The owner of Harcourt Brace, a textbook publisher, and Bergdorf Goodman, a retailer, are planning to open a for-profit college that would offer undergraduate and graduate degrees. 232 Argosy was originally known for auto mechanics training. 233 Argosy now offers doctoral degrees in psychology and is now the largest provider of for-profit doctoral education. 234 In 2008, a private investor offered to buy the online degree programs from Rio Salado College, a public
community college in Arizona for $400 million. This raised questions as to whether a state could sell a public college effectively making it private. The idea was quickly quashed by the Maricopa Community College District, which oversees Rio Salado College, stating that while he was flattered at the amount, the college was not for sale. Each of these examples shows the move towards the corporatization of higher education.

**Summary of the Problem**

For-profit colleges do not fit cleanly into a box. They vary in size and scope and in the audiences they serve. Furthermore, institutions seeking to meet the requirements of the Higher Education Act and become recognized so that their students are eligible to receive aid, offer academic credentials that prepare students for gainful employment in a recognized occupation. They are owned in a variety of ways and like the rest of the educational marketplace in America they are not easily defined. They have been growing rapidly although recent data suggests that there may be a decline in the rate of growth. There also seems to be a general move towards the corporatization of for-profit colleges although the vast majority of for-profit colleges remain closed corporations.

**Literature Following the Student Path: Prior to Enrollment**

In the United States, academic credentialing is the system by which we determine if individuals have obtained a minimum set of competencies in a given field. Although the minimum level of competency changes from college to college, accrediting bodies at both the collegiate and programmatic level provide a check on the system. There are two types of accreditation at the collegiate level (regional and national) and these accreditations are the basis on which the DOE determines the ability for a student to receive federal financial aid.
There are six regional and over thirty national accrediting bodies recognized by the DOE in the U.S.\textsuperscript{238} Regional and national accrediting bodies have similar characteristics. These include the voluntary peer review of the programs offered and how content is delivered (i.e., on-ground, online, blended). Additionally both types are nonprofit organizations.

Accrediting bodies are not subdivisions of the federal government.\textsuperscript{239} Regional accrediting bodies historically accredited institutions within their geographic region. Today this is not always the case.\textsuperscript{240} Institutions may seek regional accreditation from a regional accrediting agency outside of their geographic location.\textsuperscript{241} Regional accrediting bodies were established by traditional colleges and universities.\textsuperscript{242} These accrediting bodies were grouped by the region in which the institutions that founded them were located. National accrediting bodies were formed by institutions with similar thematic offerings regardless of region.\textsuperscript{243} State and federal agencies also provide regulations that ensure the safety of the public.

As with collegiate accreditation, programmatic accreditation is voluntary. Unlike regional accreditation, programmatic accreditation is not tied to federal aid. However, institutional accreditors may require programmatic approval of specific degree programs in order to become eligible for institutional accreditation.\textsuperscript{244} Not all programs offered at colleges and universities have programmatic accreditation, and not all programs have a programmatic accreditor. Some programs have multiple bodies that provide programmatic accreditation. Some states require programmatic accreditation for licensure programs while others do not.
Fraudulent Degrees

Rosie Kolitwenzew was a nine-year-old who died after her mother stopped giving her intravenous injections of insulin upon the medical advice of Lawrence Perry.245 According to Perry, Rosie was not a diabetic, but had a virus that could be healed by cleansing the toxins from her body.246 Eventually convicted of manslaughter and practicing medicine without a license, Perry’s credentials included a Doctor of Medicine degree from British West Indies Medical School, a diploma mill.247 A diploma mill is defined as an organization that creates fraudulent academic credentials and sells them to the public. The British West Indies Medical School was created, owned, and operated by Gregory Caplinger.248

Gregory Caplinger was convicted of money laundering and fraud, a judgment which was upheld in the United States Court of Appeals for posing as a doctor and selling a fake cancer cure. Caplinger held degrees from the Metropolitan Collegiate Institute in Great Britain and a Doctor of Science degree from Sussex College of Technology.249 Government witnesses testified that the Sussex College of Technology was run by one man out of a private house. Degrees at any level from this institution could be obtained by mail with no course of study.250 A degree from the Metropolitan Collegiate Institute could be obtained for $100 with no course of study.251

In the 1980’s the U.S. Federal Government, through the FBI, pursued fake universities through an investigation called DipScam.252 Although the committee members were outraged at the egregiousness of some of these diploma mills, there was no comprehensive legislation that came out of the investigation.253 In 2002, the General
Accountability Office (GAO) of the United States issued a report on fraudulent degrees. After issuing the report, Congress asked the accounting office to do a separate investigation to see if any federal money was spent in the purchasing of fraudulent degrees.

In the GAO’s investigation, the Internet was searched for nontraditional colleges that provided degrees for a relatively low cost. These institutions award credit based upon life experiences, and offered no traditional in-class instruction. In addition to having a federal agent pose as a student and contact these institutions to see if federal money could be used towards purchasing a degree, the GAO requested records of all individuals who had used federal dollars to attend these institutions. Three of the four schools responded with the requested records, which showed that eight different federal agencies reported having a total of twenty-eight high-ranking employees with fraudulent degrees. One of these employees was a senior level official in the department of Homeland Security who had received a series of degrees from Hamilton University, an unaccredited university that awarded credit hours based upon life experiences. The GAO included in its report that the students who participated in the scheme produced fraudulent degrees for advancement in the federal government and disregarded the purpose of higher education as an understanding of a body of knowledge.

One recent case of major diploma fraud was that of Saint Regis University, which began as a small operation in 1999 with revenues starting at $5,000. By 2005, institutional revenue had grown to $1.65 million. In 2005 alone, the institution created more than 10,000 diplomas distributed in 165 countries. While Dixie and Steven Randock and their associates were eventually prosecuted for fraud, had they moved the business as they were
intending to Liberia, India, Italy, or Russia, they may have diminished their presence in the U.S. enough to escape prosecution. Today, both the Council for Higher Education Accreditation, a nongovernmental association and the U.S. Department of Education maintain a website which helps the public to recognize diploma or degree mills.

Marketing and Admission Practices

In an effort to ensure that the $4 billion in Pell grants and the $20 billion in federal loans that students who attend for-profit colleges are receiving are not being obtained through fraudulent or coercive practices on the part of the institution. On June 21st, 2010 five members of the House Committee on Education and Labor, asked the GAO to investigate. In 2010, the GAO performed undercover testing of fifteen for-profit colleges in six states and Washington, D.C. The undercover tests revealed that for-profit representatives encouraged students to falsify their federal application for student aid by increasing the number of dependents a student had in one instance, and by not reporting $250,000 in savings in another. In some instances students were pressured to sign a contract before meeting with a financial aid representative. Representatives falsified potential earning outcomes, telling one student that he could earn upwards of $150,000 per year as a barber, when the Bureau of Labor Statistics report the average salary for a barber at $43,000 per year.

The investigation also covered aggressive marketing by telephone. Four fictitious prospective students registered with websites that were designed to link the student with for-profit colleges. Within five minutes of entering the students’ information, they started to
receive phone calls. One fictitious student received 150 phone calls within one month, at all hours of the day and as late as 11:00 p.m.  

Of the fifteen schools that the GAO investigated, all of them, whether big or small, privately held or publically traded, made deceptive statements to students. Graduation rates were hidden, what a student could do with a degree was falsified, and students were told not to worry about the future loan payments because their income would be more than sufficient or that they would not need to repay the loan. Students were told contracts were not legally binding when they were, and aggressive techniques were used to get a student to sign for admission prior to seeing a financial aid representative. In one instance, the undercover agent insisted on seeing a financial counselor, but instead of bringing a counselor back, the employer brought back his supervisor who tore up the student’s application because the student was not passionate enough about his career to enroll without seeing a financial counselor.

One tool used to combat aggressive recruiting tactics is the False Claims Act. This Act was used against two universities, Chapman University and the University of Phoenix. The False Claims Act may be enacted by a whistleblower, or someone who reports illegal or dishonest activities, when the Higher Education Act, which prohibits paying recruiters based upon the number of students recruited, is violated. Both institutions violated this policy resulting in settlements against their institutions. The False Claims Act requires triple repayment of the full amount of money at stake, and the whistleblower that files the claim is entitled to 15% of the recovered damages. In the 2009 settlement, the University of Phoenix
paid a $78.5 million settlement that included $11 million in attorneys’ fees and costs. The whistleblower in the case received $19 million.\textsuperscript{279}

These cases have caused more scrutiny of and government intervention into for-profit higher education.\textsuperscript{280} In 2012, the Senate Committee on Health, Education, Labor, and Pensions produced a report entitled, \textit{For-Profit Colleges: The Failure to Safeguard the Federal Investment and Insure Student Success} after two years of investigation which further exposed issues with the for-profit industry.\textsuperscript{281} The companies included in the report spent a large portion of overall revenue on recruiting students, 22.7\% or $4.3 billion.\textsuperscript{282} The same colleges under investigation also employed 35,202 recruiters, while only employing 3,512 career counselors and 12,452 support staff.\textsuperscript{283} According to Lewin, in the not so distant past, recruiters were paid based upon the number of students they recruited, regardless of the quality of the students.\textsuperscript{284}

For-profit institutions spend tremendous amounts of money in comparison to nonprofit institutions on advertising on Internet traditional and nontraditional media outlets.\textsuperscript{285} According to Linehan, for-profit colleges tend to have aggressive marketing techniques such as immediate and aggressive calling plans and outreach.\textsuperscript{286}

As might be expected, for-profit colleges follow a strict business model and in the process spend the majority of their budget on advertising.\textsuperscript{287} Although such advertising may have achieved its primary goal of increasing enrollment, it at times misrepresented the educational product. The Harkin report, which examined thirty for-profit colleges, showed that 22.4\% of all revenue of for-profit institutions went to marketing, while 19.4\% went to profits, 17.7\% went to instruction, and the remainder went to other overhead. For-profit
institutions had a total of 32,496 recruiters and only 3,512 career services staff. If the primary goal of for-profit colleges is career training the lack of career services staff in comparison to recruiters provides insight into institutional priorities.

**Government Intervention**

Federal intervention into for-profit colleges has generally been limited to fraudulent degrees purchased with federal money, fraudulent practices in receiving and distributing federal financial aid, and requirements to report through the Integrated Postsecondary Education Data System (hereinafter IPEDS). Unlike traditional nonprofit colleges, for-profit colleges are subject to regulations from Federal Trade Commission (hereinafter FTC) and the United States Securities and Exchange Commission (hereinafter SEC). Additionally for-profit colleges are subject to additional requirements that their nonprofit brethren do not need to meet under the Higher Education Act of 1965.

At the state level, regulations vary widely. Arizona and Iowa are two good examples to illustrate the difference in regulation at the state level. In Arizona, the State Board for Private Postsecondary Education has regulatory powers over private for-profit institutions. Under Arizona law, the Board has the power to license private school operations in the state, insures that the institutions maintain appropriate faculty, and have the financial and managerial capacity to operate an institution. Moreover, the Board regulates which institutions, with the exclusion of state or community colleges, are able to grant a degree at any level.

In Iowa, the College Student Aid Commission regulates the operation of for-profit colleges. Any school that conducts a program that leads to a postsecondary credential and
has a presence in the state is required to register with the Commission. Registration requires accreditation by an organization recognized by the U.S. Department of Education. Information such as degrees offered, instructional method, and how the school will preserve student records is required for registration. If the private college or university is accredited by the Higher Learning Commission of the North Central Association of Colleges and Secondary Schools, it is not required to register with the Iowa College Student Aid Commission regardless of its tax status. Institutions offering postsecondary education in the state must show that they are financially stable. Furthermore, the institution must show that it has a fair tuition reimbursement program for students who withdraw from a program longer than four months. Iowa’s regulations provide further protections to students by requiring a tuition reimbursement policy and by requiring the same regulation for for-profit and nonprofit institutions.

**Review of Consumer Fraud State Statutes**

Most states use the Uniform Deceptive Trade Practices Act, the Uniform Consumer Sales Practices Act, the Federal Trade Commission Act, or the Uniform Consumer Credit Code as schemata for state law to address consumer fraud. According to Linehan, while specific statutes are different across states they share the common theme in that violation of the law requires advertising a good or service that does not exist. Through either judicial interpretation or direct statutory language, many states allow for civil prosecution and permit plaintiffs to recover either damages or a fixed penalty. Several states also have consumer protection laws that specifically address for-profit colleges.
Linehan notes that consumer protection laws may not be adequate to protect students because most states require the plaintiff to show actual or real damages and in most instances, attorneys’ fees are not recoverable. Without the prospect of recovering attorneys’ fees and only the possibility of collecting a contingency fee if they win, these types of cases are not appealing to attorneys. Especially since recoverable damages are generally low, the amount attorneys could recover would not make it worth their while. Additionally, some states limit the total damages available by placing a consumer fraud cap on the amount that can be awarded.

State Regulatory Bodies

According to Linehan, many states have organizations that regulate for-profit schools. Some states regulate for-profit schools through licensing to operate in the state, some have mandatory inspections, and others have mandatory bonding which protects the student in the event that the college fails. Most states have some regulatory scheme for proprietary institutions that either falls under a consumer protection board or under a board that specifically regulates the for-profit industry.

According to Kinser, regulation of for-profit education is primarily each state’s responsibility, and federal government and nongovernment accrediting bodies also play a significant role. For-profit education in the state may be under a different set of regulations than nonprofit higher education. Until 1950, only seventeen states had laws that allowed for the licensing, registration, or approval of for-profit colleges. Throughout the 1960s and 1970s, more and more laws were drafted to regulate for-profit colleges, but most were concerned with consumer protection rather than quality. By the 1980’s, forty-three
states and the District of Columbia had bodies that saw to the oversight of for-profit colleges, but only thirty-eight had requirements above simple registration or reporting of accreditation. Kinser, for example, suggested that unaccredited institutions in Alabama, California, Hawaii, Idaho, Mississippi, Montana, and Wyoming should be viewed as suspicious because those states have the weakest regulations.

Financial Aid and Other Resources

According to Turner, since 1972 when the term postsecondary education rather than higher education was used by Congress with the intent of broadening the options for students beyond the traditional university experience, students attending proprietary schools have been eligible to receive federal support in the form of student loans and Pell grants. The ability for a student to become eligible for financial aid rests on the accreditation status of the school they wish to attend. The language of the Pell grant was widened to include career and vocational schools that were accredited by an agency recognized by the U.S. Department of Education. By the virtue of becoming accredited, an institution is able to receive Title IV funding or financial aid through its students. Students attending for-profit colleges are 98% more likely to apply for financial aid than those students in traditional colleges. Students at for-profit colleges are 72% more likely to receive Pell grants, and 91% more likely to receive Stafford loans than students at public or private nonprofit institutions.

Among Pell recipients in for-profit colleges, most are enrolled in short duration, less than two-year programs, but Pell recipients are more concentrated in those colleges that offer bachelor’s degrees. Among public institutions, however, Pell recipients are more likely to be in community colleges. For-profit institutions share access to federal loans and
Pell grants with public and nonprofit institutions.\textsuperscript{322} Although enrollment at for-profits is 3% of all enrollments, for-profit college students have a disproportionately high share of student aid dollars at 13.6% of all Pell recipients and 11.8% of subsidized Stafford Loan receipts.\textsuperscript{323} While 55% of Pell recipients at private nonprofit institutions are classified as dependents, only 25% at for-profit institutions are financially dependent on their parents.\textsuperscript{324}

Students are more likely to borrow, and borrow in larger amounts at for-profit colleges.\textsuperscript{325} According to Blumenstyk, federal financial aid makes up a huge percentage of revenue of for-profit institutions.\textsuperscript{326} Among for-profit publicly traded companies, ratios of revenue coming from Title IV changed from institution to institution. Of the overall revenue, 82% came from Title IV funding at Corinthian Colleges, 69% at Education Management Colleges, and 67% at ITT Technical Institute. Institutions that offered graduate degrees had a smaller percentage because graduate degrees do not qualify for need-based aid.\textsuperscript{327} According to Lewin, the amount of financial aid a for-profit college receives is significant and quickly growing. In the 2000-2001 academic aid year, students at the University of Phoenix received $24 million in Pell grants, while in the 2010-2011 academic aid year, they received $1.2 million.\textsuperscript{328}

In the five years between 1992 and 1997, 800 for-profit institutions were stripped of federal loan eligibility, often due to fraud.\textsuperscript{329} The fraud fell into one of five categories including (1) misrepresentation of the amount of time it takes to complete a degree, (2) course content or equipment, (3) accreditation status, (4) the ability to acquire licensure, or (5) employment prospects after graduation.\textsuperscript{330} In 2001, Linehan reported that of the 6,000 schools eligible for federal financial aid, one-third were for-profit.\textsuperscript{331} Although only one third
were for-profit, the same schools accounted for three-fourths of the Department of Education’s investigations into fraud and abuse. 332

**Summary of Prior to Enrollment**

Bad actors in the system have caused a patchwork of regulations to spring up across local, state, and federal authorities. 333 These regulations protect two distinct groups including the consumers of education and society who place value upon the academic credentials earned. 334 The nature of the current regulatory structure of for-profit higher education is that it is so diffuse across agencies, and unenforced that it is ineffective at protecting consumers. 335

**Literature Following the Student Path: Matriculated Students**

The literature surrounding the student experience while enrolled at a for-profit institution is relatively sparse. These institutions grew by providing a good or service that traditional colleges and universities were unwilling or unable to deliver. 336 While some institutions used aggressive and unwarranted marketing techniques, others provided for flexible scheduling and removed institutional barriers facing adult students. 337 Some examples of institutional barriers include the financial aid office only being open Monday through Friday from nine to five, textbooks for classes only available for purchase at the bookstore, and required fieldtrips and events that occur during normal business hours. 338 Additionally some for-profit colleges provided for a learning environment with students who were similar in age and experience to themselves in order to attract more adult students. Regulations and laws, however, are not put into place to address good actors. 339
**School Closings**

Schools closing due to financial instability have also affected consumers of for-profit education. Jennifer Keop and Cari Whitney were left weeks away from graduation with over $12,000 in debt when the for-profit college they were attending, Alpine College, suddenly closed its doors. When students arrived for Monday morning classes, they found a note on the door notifying them that the school had closed. According to Stacey Breugeman, the former Director of Admissions, the faculty had no warning that the school would be closing. Breugeman explained that the school could no longer afford to stay open.

**Quality of Staff, Instructors, and Administrators**

According to Carol Floyd, the Education Commission of the States in 2001 organized for-profit colleges and their faculty into three separate categories: Internet systems, super systems, and enterprise systems. In 2001, there were relatively few institutions that were totally virtual, Internet systems. These institutions have no campus or facilities and these institutions tend to have no full-time faculty. In a Super System, faculty are more likely to have master’s and doctoral degrees. Enterprise institutions, which are largely locally or family owned, have an informal structure and operating style. The faculty tend to be full-time faculty without graduate degrees.

According to Kinser, teaching is the central role of faculty in a for-profit college. Student failure is faculty failure in these organizations. There is no tenure in these organizations, and faculty members are considered at will employees. They are not afforded the same lifetime teaching contract available at most nonprofit institutions.
Faculty members often have extensive advising responsibilities, heavy supervision, and little authority to alter the curriculum. This may be due to the necessity to keep a consistent curriculum that can be taught by many part-time faculty and assessed across the program. Kinser also reported that there is concern that these workers are not protected because of their part-time contingent status, that institutions are unclear in their commitment to academic freedom, and that faculty have little participation in governance.

**Cost of Attendance to Society**

Society shares some of the burden of cost in postsecondary education. It shares in this burden through taxpayer support of federal and state aid and through defaults on federally subsidized student loans, appropriations, and contracts. In addition, there is out of pocket expense to the educational consumer. According to Cellini, the total cost to students and taxpayers attending two-year for-profit institutions is between $52,000 and $65,000 per year with the taxpayer share equal to $7,600 per year. The same student attending a community college would pay less overall, with a total yearly cost of $32,200, but with a taxpayer share of $11,400 per year. Society pays much more for education in the for-profit sector. The individual taxpayer pays less, but in combination with the student paid fees, the overall cost is greater to attend a for-profit college.

**Summary of Matriculated Students**

Enrollment at for-profit institutions is expensive, but the curriculum is likely to be specialized and focused to a relevant career outcome. Coursework taken at these or any institution has no guarantee of transferability. Institutions accepting transfer credit hours have the sole ability to determine if credit earned at a different institution will transfer and
apply towards an academic program. There is a broad range of transfer policies. Credits earned at a regionally accredited institution, regardless of tax status, may transfer easily while credits earned at a nationally accredited institution may not as easily transfer, especially if the institution accepting the credit hours is regionally accredited. The regulatory framework insuring that these institutions are able to continue to function without closing their doors is sometimes lacking, leaving students without an alternative for transfer and student debt which cannot be discharged.

**Literature Following the Student Path: Termination of Enrollment**

Students’ futures can be, and have been, put in jeopardy when for-profit colleges are deceptive or are unable to fulfill their financial obligations and close.\textsuperscript{358} Institutional admission representatives have given incorrect information about potential job prospects and income once earning a degree, as in the case of Westwood College.\textsuperscript{359} Westwood College students were told that they had the potential to earn salaries either impossible with the degree they are pursuing, or exceptionally high for the median level of income for a person working in that field.\textsuperscript{360}

**Deceptive Degree Earning Potential**

When Becky Loring was interviewed by an admissions representative, she waivered at choosing the school and its $45,000 program, but was convinced to attend after the admissions representative reminded her that this was necessary or she would never get what she wanted (i.e., a career as a graphic designer).\textsuperscript{361} The admissions representative informed Becky that she would make at least $70,000 per year with a visual communications degree from Westwood College. Westwood College is a for-profit college with campuses in
California, Colorado, Georgia, Illinois, and Virginia, as well as offering degrees completely online. The college offers thirty-five degree programs at the diploma, associate’s, and bachelor’s levels.

Once admitted, the school refused to accept transfer credits from a different online college that she had attended, contrary to what the admissions representative had told her. After she was unable to pay for school and living expenses, Becky continued to take out more loans with the help of Westwood. By 2009 when she graduated, she was $100,000 dollars in debt. When she was unable to get a job after graduation, Becky thought about returning to school, but when she went to look at state universities, she was told that while Westwood was accredited by the Accrediting Council for Independent Colleges and Schools, it was not accredited by an agency that the state schools recognized.

When Becky saw a news report on TV about the problems at Westwood College, she contacted the law firm of James, Hoyer, Smiljanich, and Yanchunis and became one of the 1,200 students in a class action lawsuit against the school. The class action lawsuit was denied by the United States District Court for the District of Colorado because the enrollment documents included an arbitration clause. The parties were ordered to arbitrate, but the results of the arbitration are not available to the public. Another class action lawsuit was filed in Texas against Westwood, but was dismissed because class representation was inadequate. To be certified as a class representative, the same injury must have befallen all members and all members should have the same interest. Westwood College settled a federal government lawsuit for $7 million when the government
charged it with misrepresentation. The lawsuit was settled in May of 2009 and covered the periods of enrollment from 2002 to 2005.\textsuperscript{373}

California Culinary Academy, which is one of the sixteen Le Cordon Bleu Cooking Schools owned by Career Education Corporation, has a $40 million settlement pending in the state court after a class action lawsuit.\textsuperscript{374} This was on the grounds that the school misrepresented its 98\% placement rate, exaggerated its prestige, and implied that it was selective when it was not.\textsuperscript{375} The settlement would entitle students to rebates of up to $20,000 for students who attended the college between 2003 and 2008.\textsuperscript{376} An associate’s degree in culinary arts at the California Culinary Academy has a sticker price of $43,000, which does not include books or supplies.\textsuperscript{377} Matt Foist was a forty-six year-old software engineer who believed he was tricked into taking out $45,000 dollars in loans for the education necessary to become a chef in San Francisco, but in reality was to make considerably less money than he was promised with his education.\textsuperscript{378}

**Default Rates on Student Loans**

According to Deming et al. for-profit college students default on student loans at a higher rate than their traditional counterparts, with the rate rising dramatically from 2006 to 2011.\textsuperscript{379} Cohort default rate is a measure of student borrowers who either leave a program, graduate, or drop out and enter student loan repayment.\textsuperscript{380} If an institution exceeds 40\% student default rate in any one year, or 25\% in any two, an institution can lose Title IV student funding. In 2008, the cohort default rate was 11.6\% at for-profit institutions compared to 6\% at publics and 4\% at private nonprofits.\textsuperscript{381} In 2012, the federal government moved to a three-year measure of the cohort default rate rather than a two-year measure.\textsuperscript{382}
If the same 2008 data were used over a three-year period rather than a two-year period, the default rate at for-profits would be 24.9% compared to 10.8% at publics and 7.6% at private nonprofits.\textsuperscript{383}

In one analysis of default rates by Deming et al., regression analysis was used to compare default rates while adjusting for individual student characteristics and institutional types.\textsuperscript{384} The study controlled for demographics including fraction’s part-time, twenty-five years and older, female African-American, and Hispanic.\textsuperscript{385} Financial aid controls included the number of Pell recipients, number of students receiving subsidized and unsubsidized federal loans, the total yearly disbursement amounts for each, and the total loans and Pell Grants per enrollee.\textsuperscript{386} Degree types and offerings include indicators for distance education, remedial course offerings, job placement assistance, part-time employment services for enrolled students, highest degree offered, and open admission policy.\textsuperscript{387} Four-year publics and nonprofits were 8.7% lower and community colleges were 5.7% lower in default rates than for-profits. This was true among all types of nonprofits including independents, chains at both the regional and national level, and online.\textsuperscript{388} Of all the for-profit institutions, national chains and online institutions have the highest default rate.\textsuperscript{389}

**Student Satisfaction**

Using the Beginning Postsecondary Students Dataset for students entering the 2003-2004 school year, Deming et al. identified several factors related to student satisfaction in postsecondary education.\textsuperscript{390} Students attending for-profit, public, and nonprofit private colleges self-reported satisfaction with their course of study, but when comparing satisfaction levels across the three institutional types, students attending for-profit colleges
and universities were significantly less satisfied than students attending either public or private nonprofit institutions. Furthermore, students attending for-profit colleges and universities were significantly more likely to state that their student loans were a worthwhile investment. Although students had slightly less satisfaction with their jobs and lower income levels than students who graduated with degrees from public or nonprofit private institutions, neither rose to the level of statistical significance. Consistent with Deming et al., in a study by the Washington State Workforce Training and Education Coordinating Board, reported that nine months after graduation for-profit students were “mostly satisfied” with their education. In both studies students reported satisfaction with their education, but were not as satisfied as students attending other institutional types.

Retention Rates and Graduation Rates

From fall 2005 to fall 2006, across all institutional types, 69% of full-time students who started in fall 2005 returned in fall 2006. For part-time students over that same time period 53% returned. Across institutional types figures for retention vary. Public four-year institutions retained 72%, private nonprofit four-year institutions retained 73%, and private four-year for-profit retained 56% of full-time students. For students attending part-time, public four-year institutions retained 50%, private nonprofit institutions retained 56%, and private for-profit institutions retained 43% (see Figure 2). At public two-year institutions, 57% were retained, at private nonprofit 68% were retained, and private for-profit institutions 72% of full-time students were retained (see Figure 3). For part-time students, public two-year institutions were able to retain 45%, while private nonprofits retained 56%, and private
Figure 2. Two-Year Institutional Retention

Figure 3. Certificate Project Retention
for-profits retained 60%. At the certificate level, 75% are retained year over year across all institutional types of full-time students and 71% of part-time students (see Figure 4).\textsuperscript{401}

Fifty-three percent of all students entering a for-profit four-year college received some type of academic credential (19% certificate, 15% associate’s, and 20% bachelor’s).\textsuperscript{402} Seventy-three percent of all students entering a private nonprofit four-year college received some type of academic credential (2% certificate, 3% associate’s, and 69% bachelor’s).\textsuperscript{403} Sixty percent of all students attending a four-year public achieved some type of academic credential (3% certificate, 4% associate’s, and 53% bachelor’s).\textsuperscript{404}

Fifty-five percent of all students entering a for-profit two-year college received some type of academic credential (29% certificate, 25% associate’s, and 2% bachelor’s).\textsuperscript{405} Fifty-eight percent of all students entering a private nonprofit two-year college received some type of academic credential (20% certificate, 27% associate’s, and 12% bachelor’s).\textsuperscript{406} Thirty-six

\begin{figure}[h]
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\caption{Academic Credential Achievement}
\end{figure}
percent of all students attending a two-year public achieved some type of academic credential (10% certificate, 16% associate’s, and 10% bachelor’s).  

Sixty-four percent of all students entering a for-profit less than two-year college received some type of academic credential (63% certificate, 1% associate’s, and 0% bachelor’s). There were no students entering a private nonprofit less than two-year college. Fifty-six percent of all students attending a less than two-year public achieved some type of academic credential (54% certificate, 3% associate’s, and 0% bachelor’s).

Consistent with the above data, the Education Trust reports that completion rates for students who start at for-profit colleges as first-time students are only 22% after six years, unlike at public universities which have a completion rate of 55% and private nonprofit colleges which have a 65% completion rate. However, the story is quite different at the two-year level where 60% of students complete within three years at for-profits while only 22 percent complete at public community colleges. Clearly this data includes less than two-year colleges awarding certificates. It is also possible that the data are skewed because only first-time students are counted in the data.

Job Placement Rates & Income Level

The personal economic benefits of obtaining a degree from a for-profit institution are not very well understood. According to Deming et al., for-profit college students are more likely to be not working and not attending college six years after starting. However, Persell and Wenglinsky’s evidence shows that for-profit schools may have a positive influence on future employment. This included two studies, one in 1977 and one in 1986
that showed that those for-profit schools with large job placement programs helped more students to find jobs.⁴¹⁵

For-profit students no longer enrolled in 2009 had income earnings 8% to 9% lower than if they had gone to another type of institution.⁴¹⁶ On average, students graduating with an associate’s degree from a for-profit college earned $8,154 less annually than those graduating from a community college and $5,152 less annually than those graduating from a public vocational college.⁴¹⁷ Another issue is the relatively small data set that could lead to limited generalizability. Data were collected from the National Longitudinal Study of 1972.⁴¹⁸ While for-profit graduates were likely to earn less than if they had graduated from another institutional type, they were still more likely to earn more than those who had no postsecondary education. Lyke et al. compared proprietary students hourly and monthly earnings based on High School and Beyond national longitudinal survey of high school graduates in the class of 1980.⁴¹⁹ Of the 9,373 students who responded, 948 students attended for-profit colleges in the five years and six months after graduation.⁴²⁰ The study showed that students who attended a for-profit college earned more than those who did not attend college, whether male or female.⁴²¹

**Summary of Termination of Enrollment**

After graduating from a for-profit institution, some have found that they were unable to earn what they were promised when they graduated. Although students were generally satisfied with their education while taking classes, this was not the case after graduation when student loans came due. This was not the case for traditional nonprofit students. Graduation rates were typically lower for for-profit colleges and universities at the
baccalaureate level, but higher at the associate and certificate level. Although the graduation rates were lower, the students served in these schools typically have a lower entering GPA and other life challenges associated with attending college. Across all institutional types, students who earned a degree earned more than those who did not. However, all studies of economic impact of degrees included certificate studies such as truck driving and cosmetology that could skew the data.

Summary

There is no clear model or type of for-profit college. Who they serve, how large they are, what degrees they award, how they are owned, and what body if any accredits them varies from institution to institution. The one item that links these institutions together is their desire to return a profit to stakeholders rather than reinvest in the system.

There has not been a consistent and clear regulation of for-profit colleges and universities. This has created a series of disparate regulations at the local, state, and federal levels from multiple agencies. The regulations are unclear, and it is also unclear at times who has the authority to regulate these institutions. These regulations are intended to protect not only the consumer of the product, but also society who has attached value to academic credentials.

Attending for-profit institutions is expensive is more expensive on average then attending a nonprofit institution. The curriculum is highly specialized and career facing. Transferability of coursework continues to be an issue. Moreover, students are less likely to graduate from for-profit institutions at the baccalaureate or associate’s level and if they do are likely to earn less than had they graduated from a private nonprofit or a public
institution. In summary, further inquiry is needed to aggregate and summarize information for consumers of for-profit education and for educational policy makers.
CHAPTER III
METHODS

Introduction

The intent of this study is to identify what legal protections are afforded to students attending for-profit colleges and universities that offer at least an associate’s degree. The three areas to be reviewed include governance and operation, marketing and advertising, gainful employment. The study necessitates using legal research methodology to develop an understanding of current laws and judicial interpretations. Legal research methodology, and specifically doctrinal legal research, is an analysis of legal rules. In a vacuum, these legal rules cannot provide an accurate statement of law. It is only through their application to a situation that statements of law can be made. Legal doctrines can help to identify how a rule applies within a given context. They can also help to clarify ambiguities, and describe their relationship to other rules. According to Chynoweth, doctrinal research is “concerned with the discovery and development of legal doctrine for publication in textbooks or journal articles and its research questions take the form of asking ‘What is the law?’ in particular contexts.”

The development of law is often reactive. Law is developed to meet a societal need or concern. Although federal or state legislatures may develop laws, courts may overturn or interpret them differently than expected based upon previous rulings and constitutional interpretation. Agencies too, both at the state and federal level, could promulgate volumes of rules that can change or be overturned. Because of this, all types of law will be given equal consideration in the discovery process in this study and all types of laws will be reviewed.
The application of law often requires legal researchers to refer to the most basic principles of how our government was established.\textsuperscript{430} Conflicting law in a decentralized system forces the researcher to refer to foundational documents and elementary principles such as the division of power between the three branches of government and the supremacy of the Constitution.\textsuperscript{431} While many may know these basic principles, the courts are often called upon to interpret the limits of federal, state, and local authority.\textsuperscript{432} Furthermore, as law is created, the primary question each legal researcher must ask is under what authority has the Constitution, statute, or regulation been established. An outline of the principles by which we govern ourselves is provided to establish a baseline of understanding.

The United States is a federalist government where power is divided between federal, state, and local governments.\textsuperscript{433} The Supremacy Clause of the United States Constitution mandates that federal law is superior to state law. However, the Tenth Amendment to the Constitution states, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”\textsuperscript{434} There are some areas of the law where the state retains law-making powers, other areas where the federal government retains the power, and some areas of law where it is not clear which level of government has authority or if it is shared.\textsuperscript{435}

The American system of law can be broken into two distinct parts, that which is legislated and that which is based upon case law rather than by a legislative process.\textsuperscript{436} The American legal tradition is based upon the English common law system.\textsuperscript{437} Common law requires that the judge refer to previous similar cases and apply the same legal principles as the previous judge in ruling on a case if the ruling has mandatory authority.\textsuperscript{438} Generally
speaking, a court ruling has **mandatory authority** if it comes from a higher court in the court hierarchy within the same jurisdiction.\(^4\) Rulings outside the jurisdiction of the court, but from a higher court in the court hierarchy have **persuasive authority**, and the court is not bound by the decision, but may be influenced by it.\(^4\) In contrast to common law, statutory law is law that is created by a legislative body to address a governmental or societal need.

**Primary and Secondary Sources of Law**

Primary sources of law include common law, case law, federal, and state legislated law, law created by agencies with the designated power to do so, and proclamations of the president. They are positive statements of the law itself. They represent a vast puzzle of legal information that must be investigated to determine the answer to a legal question.

Secondary sources also play in important part in legal research. Secondary sources are persuasive authority and can be used to sway a judicial opinion.\(^4\) Sources that provide commentary on law, organize the law, or summarize the law are all secondary sources.\(^4\) Hornbooks, law reviews, legal dictionaries, and legal newspapers are all examples of secondary sources.

Hornbooks are created and used to investigate a major area of the law, such as torts. They present the law in a straightforward manner and lay out cases that apply. They are not kept up to date. A hornbook will generally include an index of cases as well as a table of statutes. A nutshell is an even more simplified tool that is easily readable and does not back up its statements with citations as in a hornbook. It is not scholarly by nature.\(^4\) Legal dictionaries, outlines like those published for state bar preparation, and legal encyclopedias
are all secondary sources of information that can aid the legal researcher in finding and understanding a case and the primary source of law. Law reviews are the dominant form of publication for legal scholars and law professors. There are two types of law reviews, including those that bear the name of the school, such as the *Harvard Law Review*, and those that have subject specialty. Law reviews carry more or less persuasive authority based upon the author and publisher. An article published in the *Harvard Law Review* by a famous legal scholar or Supreme Court justice would carry much more weight than a publication in a regional review from a law professor at a small regional law school.

Law review articles can be found in a number of ways. Topical searches are a very effective tool through not only online resources, but also print publications such as the H.W. Wilson Company’s publication *Legal Periodicals and Books*, which dates back to 1908. Looseleaf services are also effective tools. Looseleaf services provide updates on a specific area of the law and pages are inserted into a looseleaf binder, hence the term. These publishers assemble teams of experts who focus on a particular area of law. Legal newspapers and journals provide a source for news stories concerning legal issues and practice.

Generally, secondary sources are used to develop context and lead the researcher to primary sources. Examples of primary sources of law include a judge interpreting and applying common law, or a legislative body enacting a new law or empowering a person or administrative agency to do so. Examples of secondary sources include scholars and journalists discussing cases in newspaper articles and journals, and textbooks are written about the application and researching of law and the legal system.
Within primary sources, there is a hierarchy as well. Actual statements of law that are not rebuttable in court are called positive law. Within a judge’s opinion or written decision, there may only be a few statements that are actual statements of the law or positive law. For example, in the case of Plessy v. Ferguson, there was a seven-to-one decision issued by the Supreme Court that upheld the constitutionality of state laws that allowed for racial segregation in private businesses so long as the facilities were equal. The majority opinion was written by Justice Henry Billings Brown and was six pages long, yet the only statement of law was in two sentences: “We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the coloured race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the coloured race chooses to put that construction upon it.” This statement of positive law upheld the precedence of separate but equal as the law of the land from 1896 to 1954 when it was overturned by Brown v. Board of Education. Statutory law is created through legislation and session law is the positive form of that law. Session law is one step in the documentation and publication of new laws. Any other republication or interpretation is referred to as prima facie law.

Legal research requires an understanding of the legal system and its history. This includes common law and its development, the publishing of court decisions in the United States, state and federal courts, and legislation which results in constitutional, statutory, and administrative law. The development, history, and purpose of all of these branches of law is necessary to investigate the pattern of legal research most often used to solve a legal problem.
Common Law

Common law evolved from the tradition of three twelfth and thirteenth century English courts including the Court of the Exchequer, the King’s Bench, and the Court of Common Pleas. These courts assumed jurisdiction over courts such as the Forest Court or Admiral’s Courts which only ruled over specific geographical areas or subject matters. The ancient law that the courts enforced was based upon societal customs such as the protection of persons and property. A common law court relies on previous actual disputes in order to rule upon a case and is obliged to adhere to the decisions of previously decided cases where the facts in the current case are substantially the same. When a statute governs the dispute between two parties, a judge in a common law system may only interpret the statute to see how the law applies. This system of adhering to precedence is known as stare decisis, which is Latin for “stand by the decided matter.” Common law is very flexible because it can cope with societal changes, new discoveries, and inventions. When a case presents itself that is not clearly rooted in judicial precedent, called a case of first impression, judges will look outside their jurisdiction and use judicial experience to draw upon past experiences for analogies to render a verdict.

Under this system all citizens are subject to the same set of laws and the power of the government is limited by those laws. A judge may review new legislation to determine its constitutionality, but not write the laws. In a common law system, the facts of a case are presented to either the judge or jury through oral arguments and presentation of evidence. Once the judge or jury makes a decision based upon evaluation of the evidence and application of the appropriate law to the facts, a judge provides a ruling in favor of one of
the two disputed parties.\textsuperscript{468} If either party wishes to appeal the decision to a higher court it may.\textsuperscript{469} The court to which the party may appeal in a common law system is the appellate court. Yet appellate courts may only review findings of law (i.e., was the law correctly interpreted by the lower court?).\textsuperscript{470} This system, with the relative certainty of stare decisis and the flexibility for cases of first impression, allows for a stable legal government.\textsuperscript{471}

Although American legal tradition has its roots in English common law, it is not bound by it.\textsuperscript{472} Common law is flexible by its very nature; thus, the system changed to meet the societal concerns of a new America, freed from British rule.\textsuperscript{473} In this way, judges were able to alter the law by establishing judicial precedent.\textsuperscript{474} Many, however, argued for the need of a code of laws that was concise and dealt with civil and criminal matters and created by disinterested legislators.\textsuperscript{475} Arguing against a fixed code of laws were those who felt that the common law system, which had been developed over centuries of rulings and judicial wisdom, was more than sufficient.\textsuperscript{476} Reformers who were pushing for a set of codified laws believed that judges were legislating by interpreting common law haphazardly and without restraint.\textsuperscript{477} In the English tradition, a very small amount of legislation was passed, and then only to fill in the missing spots in common law.\textsuperscript{478}

**The Courts**

The tradition of common law requires that researchers review court cases to effectively discern the current, best interpretation of the law.\textsuperscript{479} As cases work their way through the legal process, researchers must be aware of the order of importance of the cases they are reading. In the American legal system, whether at the state or federal level, a higher court can overrule, modify, or limit a lower court’s decision.\textsuperscript{480}
At both the state and federal level, there is court hierarchy. The decisions about the role of the judiciary were discussed at great length prior to the drafting of the Constitution.\textsuperscript{481}

There is a trial court, which may decide issues of fact and issues of law. In addition to a trial court there is an appellate court, or a court of appeals. Appeals courts only decide issues of law. Generally speaking several judges write legal briefs, only sometimes questioning lawyers.\textsuperscript{482} At an appellate court, the judge(s) read legal briefs prepared by attorneys from both parties. The attorneys write the briefs enabling the appellate judges to align their judges decision with relevant precedent. Often the lawyers will make oral arguments in front of the judges as well. At this level, courts have several options including affirming or denying the trial court or writing a judicial opinion.\textsuperscript{483} Among the appeals courts is a court of last resort. This court is often called the Supreme Court, but has some variation across states. The court of last resort often has discretionary jurisdiction.\textsuperscript{484} There can be specific legislation that requires the court to take a case, but generally the courts have discretion in deciding which cases they will hear. The court is asked to take the case to decide on one or more issues of law ruled on by the appellate court. These are argued orally by specialist lawyers. As a general rule, courts of last resort are made of three, five, seven, or nine justices. After oral arguments, those judges can affirm or deny a lower court’s decision, or they can write an opinion.\textsuperscript{485}

In the American legal tradition, one judge writes the opinion for the court. When multiple judges are included, there can be disagreements among them. When this happens, there are multiple different outcomes. There will always be an opinion of the court, but in this instance it is called a \textbf{majority opinion}. If a judge agrees with the majority opinion, but
does so for a different reason, the judge may write his or her own opinion called a **concurring opinion.** If a judge disagrees with the majority of the justices, he or she also has the ability to write a **dissenting opinion.** In a judicial opinion, the judge articulates a decision in the strongest possible terms; it is not intended to be balanced. Because of the **doctrine of precedence,** the case becomes legal authority.

It is possible for the precedent to change over time. This happened with what is commonly known as “the flag salute cases.” In 1940 in the case of *Minersville School District v. Gobitis,* the United States Supreme Court upheld a lower court’s decision forcing public school children to salute the American flag. The children were Jehovah’s Witnesses, and that religion prohibits acts such as saluting a flag, which could be construed as worshiping a graven image. The school district successfully argued to the court that it was part of the civic education of the child. The ruling was widely criticized by the public and by legal scholars and led to several incidents of persecution against Jehovah’s Witnesses. Just three years later, in the case of *West Virginia State Board of Education v. Barnette,* the court had an opportunity to revisit its decision. In this case, the State Board of Education required local school districts to make a flag salute ceremony part of the regularly scheduled school day. Children that did not participate were to be expelled. When several Jehovah Witness children were expelled, suit was filed. In breaking with judicial authority, the federal court ruled in favor of the children. The school board appealed directly to the Supreme Court, and the Supreme Court upheld the lower court’s decision. In the intervening three years, the members of the court had changed, as had public sentiment, and the court broke with the tradition of stare decisis overturning its previous decision.
Two systems developed that allow the researcher to determine if the judgment made in the case is still valid. Sheppard’s Citations was originally published in 1873 as a court reporter insert and then in book form. KeyCite was originally published in 1997 and is only published online. The two systems are owned by West Publishing and LexisNexis. Sheppard’s Citations became so important that it has become a verb and today the term shepardizing is used to describe finding out if the case you are reviewing is still good law. Above and beyond whether a case has been overturned or upheld is discovering how the courts have treated the case. If other courts have cited the case favorably, its opinion can be stronger; if it was criticized, it can grow weaker. Both KeyCite and Shepard’s indicate how subsequent courts have treated the precedent established in the case. Both publications review all published cases back to the 1700’s. It can take twenty-four to forty-eight hours to have a case go through the shepardizing process once the publishers receive it.

Legislation

Researching legislation is an important component to understanding what the law is. Legislation can include constitutions, statutes, and treaties, as well as municipal charters and ordinances, interstate compacts, and reorganization plans. Statutes, whether at the federal or state level, follow the same pattern. Sometimes legislators purposefully use vague wording when crafting the laws to allow court interpretation. The last step in the publication of law is when the entire U.S. code is republished with every decision that has interpreted that section, as well as a truncated legislative history, in the annotated code. In addition, rules and regulations that are written by administrative agencies are included.
Constitutional Law

Constitutions are the documents that establish the fundamental rules by which a government functions. They can change with the time through judicial interpretation and amendment, and they establish the fundamental rights and legal system of a political entity and its citizens. Constitutions can be brief documents or much longer.505

Federal

The United States Constitution establishes its own supremacy by saying that it is the supreme law of the land. Because of frequent judicial interpretation, only a small part of constitutional law relates to the actual provision in the Constitution.506 Relationships between state and federal constitutions are often argued in court requiring the researcher to understand relevant case law. Most constitutional research problems require additional aids beyond the text itself. Annotated texts, such as United States Code Annotated (hereinafter USCA), United States Code Service (hereinafter USCS), and the Library of Congress Edition at the federal level can be used.507 Secondary sources such as scholarly legal review articles, legal encyclopedias, and legal histories can also be helpful.508 Notes by James Madison and other delegates to the drafting and ratification of the Constitution of the United States, which was drafted in 1787 in Philadelphia and ratified by the states between 1787 and 1790, can provide background of the Constitution. There were no official records of the proceedings. Federal amendments are rarely made. The first ten were passed in 1791, and are known as the Bill of Rights. Since that time the Constitution of the United States has been amended twenty-six times.509
State

Each of the fifty states has a constitution. Each state’s statutory code includes the state’s current constitution along with any other previous constitutions. There are annotated codes of the states’ constitutions which include references to historical background, attorney general opinions, legislative history, and relevant cases. There are also searchable databases by WestLaw and Lexis, and additional private publishers online and in print. Historical research is important with state constitutions as many states change their constitution or have had many constitutions since their inception. For example, Alabama has had 400 amendments to its constitution since 1901, Louisiana has had eleven constitutions, and nineteen states such as Massachusetts, New Hampshire, and Vermont, operate under original constitution dating from the eighteenth century.

Statutes

Slip or Chartered Law

Once a bill has passed the legislature and been signed into law it is referred to as a chartered law. Chartered law typically includes the text of the law, the chapter or law number, a legislative digest summarizing the law, and the names of the legislators who passed the law. Chartered law is published out of context and separate from other laws. These are often published on the legislative website before being published in print, and some states such as California only publish these electronically.

Session Law

Session laws are permanent publications of the slip laws, which are the first level of federal publication. They are enacted by the legislature during a legislative session and
published in chronological order. The federal government and all fifty states publish session laws after a legislative session. Session law in most states is referred to as positive law, meaning that the law in the session law is always valid. In the instance of a discrepancy between the code and the session law, the session law is assumed correct. All other law is prima facia law, meaning that it provides evidence, but is not fact as the session law. Session law has indices that cover the modifications in the law for a given year, but do not go beyond that. Session law volumes are impractical for research because of the length of time it takes them to be published and because they are only indexed for the year’s changes.

**Codes**

Codes and statutory compilations are publications of statutes in a given jurisdiction ordered by subject. Codes preserve the original session law, but group them under broad subject categories. In this format, laws that are repealed are deleted and minor adjustments are made to text to fit them into a compilation. There is no universal subject arrangement, and often new laws are simply dropped into a code. There are limited statutory notes, and these are not adequate for most statutory research.

**Annotated Codes**

Annotated codes are reproductions of the original code, but after each section relevant judicial decisions and administrative decisions are listed. These publications also include attorney general opinions, legislative history, law reviews, and administrative code sections. Commercial annotated codes are updated frequently, online immediately, and published through pocket parts in bound volumes. These are also indexed by words and
phrases, and according to Berring and Edinger, they are an excellent place to start searching for a relevant case.\textsuperscript{520}

**Federal.** At the federal level the first type of legal publication is referred to as a **slip law.** It is published separately in a pamphlet form with no internal indexing. Slip laws can include a brief summary of the law’s legislative history following the text of the law. Slip laws, once published, are the authoritative text until Statutes at Large are published, at which point the Statutes become the authority. There are two commercial services that publish these slip laws.\textsuperscript{521} They include United States Code Congressional and Administrative News (hereinafter USCCAN), which is published by Thompson-West, and Advance pamphlets to the USCS, published by LexisNexis.\textsuperscript{522} Both texts indicate where the law will appear when published in the official United States Statutes at Large and are only meant to be temporary.\textsuperscript{523}

**The United States Statutes at Large.** The United States Statutes at Large (hereinafter Statutes at Large) is the official and permanent record. Reorganization plans, presidential proclamations, private and public laws, and concurrent resolutions are all published in chronological order within the Statutes at Large. Through 1951, treaties and international agreements were published within the Statutes at Large. After that point they were published in a separate series labeled, U.S. Treaties and Other International Agreements. In both volumes, indexes by subject and names are included, but each index only includes the changes in that volume and are therefore inadequate for research.\textsuperscript{524}

Because statutory research requires an understanding of judicial history, legislative history, and multiple forms of publication, a heavily annotated version that can direct the
researcher to primary sources are necessary.\textsuperscript{525} For the purposes of this study Lexis was identified as the primary tool for access to the law.

**State Publications**

State publications generally emulate federal publications and patterns of operation. Each state is different and its rules vary widely. The regulations at the state level affect the citizens of that state every bit as much as their federal counterparts. Part of the process of conducting state administrative legal work is finding which publications exist that allow you to research the agencies’ rules, regulations, and rulings.\textsuperscript{526}

**Summary**

Legal research involves a pattern of practice to fully understand the nature of the problem. Defining a research question, narrowing that question or questions as much as possible, and defining the context of the question and where it sits in the literature is the first step. Defining the forum for the use of the information can also be helpful as the research for a scholarly publication would be by nature very different from that of a practicing attorney. Defining the research resources and making sure of the currency of the information being reviewed is imperative to the legal researcher. All research tools provide references to a larger research database that can be useful in understanding the scope and history of the legal problem. Consulting the most recent publications in the area under review is necessary to ensure that as the law changes, the legal researcher has the most current information available. It is important to understand that legal research is a means to an end, and is used to define real world legal problems and provide answers to those problems.\textsuperscript{527}
Legal research methodology is used not only to solve a problem, but to understand the law. As more students attend for-profit colleges and universities, it becomes imperative that students know what protections they are entitled to under the law. The questions that guide this study can only be answered through legal research.
CHAPTER IV
STATE AUTHORIZATION

Intent

The next four chapters present the results of the legal analysis, organized by the
study research questions. The intent of this chapter is to answer the first research question.
Specifically, what federal and state laws regulate the operation of for-profit postsecondary
institutions? The results of the research in this chapter and in chapters five, six, and seven
will be used to inform the thesis that the disjointed nature of state law, and the lack of strong
federal oversight have created unequal protections for consumers of for-profit education and
as such centralized federal oversight is needed.

Introduction

There is no current federal regulation requiring institutions to obtain authorization in
the states that they operate in order to be eligible for Title IV funding. Individual states are
responsible for identifying what requirements, if any, an institution must meet to operate in
the state.

Laws requiring authorization vary dramatically from state to state. All fifty states and
the District of Colombia have an entity tasked with the regulation of private postsecondary
education. Regulatory requirements, fees, exemptions, and definitions vary. Some states
have established statutes that regulate the authorization process, while others have deferred
the responsibilities to state agencies to develop rules surrounding the authorization process.

In many states, authorization is required if an institution establishes a physical
presence in the state. Each state has its own definition of physical presence. In some states
such as California, Hawaii, and Oregon, having a phone number within the state establishes physical presence. In other states, such as New Hampshire, Ohio, and Tennessee, advertising to residents of the state constitutes physical presence. In Rhode Island, having any paid employee, including an adjunct instructor, would establish physical presence in the state. In contrast, Pennsylvania and Utah require authorization, even if there is no physical presence within the state.

Regulations vary dramatically from state to state. Florida, for example, dictates clock hour requirements, naming conventions of degree programs; while states like New York and Minnesota regulate the terms college and university while using different definitions to describe the two entities in each state. Most states provide exemptions from authorization for religiously affiliated institutions offering programs leading to vocation within the faith. However, other states, such as Oklahoma and Nebraska, require authorization if the religious training results in a degree. Each state establishes its own rules, requirements, and definitions, making the understanding of the legal requirements necessary to offer a degree program within a state and across state lines a cumbersome and confusing task.

The laws identified in this chapter regulate the operation of the for-profit industry. Essentially, each state has its own criteria and laws that govern the operation of for-profit education. The laws in each state also define regulations for those providers that are out of state, but wish to deliver their education electronically to residents of their state.

An examination of these laws shows the gaps in operational oversight from one state to another. In Alabama, all institutions are required to apply for approval to offer
educational programming through one of the states three approval agencies; however in Alaska, nonprofit institutions offering credit towards an associate’s, bachelor’s, or master’s degree are exempt from regulation, as are institutions authorized in another state that are regionally accredited. In Hawaii, a school that is not accredited can receive authorization to operate; while in every other state, accreditation of some form is required. In Florida, institutions operated by the federal government are exempt from state regulatory oversight, as are institutions that only offer religiously affiliated degrees. In Idaho, flight schools are exempted from state regulatory authorization. In New Hampshire, institutions founded prior to 1775 are exempt from state regulation, while in New Mexico institutions run by the Pueblo Tribe are exempt. In North Dakota, institutions operating on a military base prior to 1972 are exempt from authorization, while those established after that date are required to be authorized by the state regulatory bureau. In many of the states, such as California, Georgia, New Mexico, and Oregon, new state institutions are exempt from seeking authorization to operate within the state. The regulatory framework is such that an online nonaccredited institution operating in Hawaii may deliver fully online programs to the residents of Georgia, yet a college in Georgia could not be authorized to operate within the state without accreditation.

For the practitioner of education law, there are currently no resources that consolidate this information into a single document and show the primary sources of law from which these requirements are established. In this chapter, I will provide an overview of
the legal requirements for a for-profit institution to offer programs within a state and across state lines. Additionally, I will consolidate these laws into a table showing the state, state authorization body, the law or rule establishing the body and giving it oversight over regulation, exemptions to the law, the law or rule establishing the exemptions, physical presence definition when one exists, and the law or rule establishing the physical presence definition.

**State-by-State Analysis**

State requirements vary dramatically. Following is an analysis of the laws by state. Because education is generally a power reserved for the state and each state in the union so different, the collection requirements varies not only in content, but also in the type of law enacted to establish a regulatory agency. Some agencies are established by state constitutional charter or by state statute, while others are enacted by executive order of the governor. For a visual comparison, consult Appendix B.

**Alabama**

Alabama has three distinct entities that handle the authorization of private higher education. The Alabama Commission on Higher Education has regulatory authority over all postsecondary institutions in the state. The Alabama Department of Postsecondary Education has authority for all private postsecondary institutions in the state. The Alabama Secretary of State has regulatory authority for all new businesses in the state. Therefore, all new postsecondary institutions wishing to offer instruction to Alabama
residents, virtual or face-to-face, must also secure permission to operate within the state from the Secretary of State. Approval from all three bodies is necessary for any private institution wishing to deliver postsecondary academic instruction leading towards a degree within the state. Moreover, institutions wishing to offer nursing within the state must seek approval from a separate nursing board.

**Alaska**

The Alaska Commission on Postsecondary Education governs all postsecondary institutions in the state, other than the State University System, which is governed by the Board of Regents. Institutions operating in Alaska that are not part of the university system must be authorized to operate in the state. The law does provide for exemptions such as: institutions which are nonprofit offering credit towards an associate’s, bachelor’s, or master’s degree within the state; a program which does not offer educational credentials; and an institution which is authorized to operate within another state and has regional or national accreditation. Exemption from authorization requires application, approval, and renewal.  

**Arizona**

Private postsecondary education in Arizona is regulated by the Arizona State Board for Private Postsecondary Education. The board has regulatory authority over any private institution that has a physical presence in the state. An institution is considered to have a physical presence within the state if it has an address with an Arizona zip code, maintains a telephone number with an Arizona area code, or has an Internet URL or uses an ISP based
In Arizona, institutions wishing to operate a fully online program are exempt from authorization in the state.

Arkansas

In Arkansas, the Arkansas Higher Education Coordinating Board is responsible for the authorization of both public and private colleges in the state. Schools must be accredited by an entity recognized by the United States Department of Education, be recognized by the Council for Higher Education Accreditation or be an applicant for accreditation in order to receive approval to operate in the state. There is no exemption for online degree programs. Schools exempt from registration include those regulated by the Cosmetology Technical Advisory Committee or those authorized by the Arkansas State Board of Private Career Education, which would include programs such as real estate licensure and flight school.

California

California private postsecondary education is regulated by The California Bureau for Private Postsecondary Education and is housed within the state’s Department of Consumer Affairs. Private institutions wishing to offer postsecondary education must receive approval from the bureau to operate within the state. The California Private Postsecondary Education Act lists several exemptions to oversight including: institutions that offer programs fully online, as long as the institutions do not have a physical presence within the state; institutions that only offer religious training or test preparation; and institutions that
are governed by the federal government or the state of California. A full list of exemptions can be found at Cal. Edu. Code § 94874.

**Colorado**

In Colorado, the Commission on Higher Education is a division of the Department of Higher Education. It is the responsibility of the Department of Higher Education to implement the policies of the Commission on Higher Education. The Commission on Higher Education is responsible for oversight of private in or out-of-state institutions that have a physical presence within the state. Colorado has two bodies which assist in the regulation of postsecondary institutions within the state. The Division of Private Occupational Schools regulates institutions where the majority of enrollments come from students seeking credentials at the associate’s degree or lower. The Degree Authorization Act places the Colorado Department of Higher Education as the body that regulates institutions that offer credentials at the baccalaureate or graduate level. Fully online programs are not required to obtain authorization unless they meet one of the state’s physical presence triggers. These triggers include establishing a phone number within the state, requiring students to meet at a physical location within the state, and providing office space for staff. Institutions may be required to seek separate programmatic approval in certain fields such as allied health and nursing. Unlike in many states, religious institutions are required to seek authorization if they collect tuition.
Connecticut

Connecticut postsecondary private and out-of-state education is regulated by the Office of Higher Education. In Connecticut, institutions must be accredited by the state in order to award a degree. In Connecticut, individual programs and the institution as a whole must be approved by the state. Some programs, such as teacher education, nursing, and counseling, require separate programmatic approval by a separate state agency. Out-of-state institutions, which have a physical presence in the state, must be accredited by a regionally accredited institution. Fully online programs are not required to be authorized by the state in order to offer programming.

Delaware

The Delaware Department of Education is the regulating body for any institution wishing to offer postsecondary education for credit. Programmatic approval by state licensing boards, such as the Board of Nursing or the Professional Society for Engineers, is required for certain degree programs before a degree can be awarded. Out-of-state institutions must apply one year in advance of offering any courses in the state. Purely online institutions are not required to seek authorization to operate within the state.

District of Columbia

The Education Licensure Commission regulates postsecondary education in the District of Columbia. Educational institutions which are incorporated outside of the District of Columbia and do not have a physical presence within the state are not under the
regulatory authority of the Education Licensure Commission. Institutions that have their charter to operate from Congress, and nonprofit institutions which do not offer courses for credit or degree programs, are also exempt. Some programs, such as nursing, require separate approval from a professional board.

**Florida**

In Florida, the Commission for Independent Education in the Florida Department of Education regulates all out-of-state institutions that have a physical presence in the state of Florida. This includes out-of-state public institutions. State institutions and institutions operated by the federal government are exempt from licensure requirements as are religious institutions which award only religiously affiliated degrees. A full list of exempted institutional types can be found at 1005.6 of Florida’s Administrative Code. The Commission also operates and assesses fees for a student protection fund that covers the cost to complete student training should a licensed school close. The Commission regulates both institutions and programs.

**Georgia**

The Nonpublic Postsecondary Education Commission in Georgia regulates, approves, and licenses all private and out-of-state public institutions that have a physical presence in the state of Georgia. The Commission approves both institutions and programs in Georgia. However, many programs require additional approval from other regulatory boards, such as nursing, allied health programs, cosmetology, and education, among
others. There are many institutions that are exempt from regulation by the Commission including certain religious institutions, state institutions funded by the Georgia Board of Regents, and the Georgia Technical College and University Systems. In some circumstances, a proprietary school can also be exempted from oversight if it is accredited by the Southern Association of Colleges and Schools and it provides a $200,000 surety bond, offers both associate and baccalaureate degrees, and contributes to the state’s tuition guarantee trust fund program.

Hawaii

There are four bodies that regulate Higher Education in the state of Hawaii. The Office of Consumer Protection is responsible for the enforcement of the state law that regulates unaccredited postsecondary institutions in the state. The Department of Commerce regulates private postsecondary education through the Hawaii Postsecondary Authorization Program. In July of 2013, this new board was developed to meet the requirements of the Higher Education Act. The Department of Education regulates trade or vocational education below the university or college degree granting level. The Hawaii Board of Regents regulates the state university system. Fully online programs that have no physical presence in the state are exempt from authorization, as are courses that do not lead to a degree and religious degrees and certificates.
Idaho

The Idaho State Board of Education is the only regulatory body over higher education in the state of Idaho. Postsecondary institutions are defined as those that offer a course of instruction leading to a degree; proprietary schools are those institutions that offer a course of study leading to less than a degree. Institutions are only required to seek approval to operate if they have a physical face-to-face presence in the state. Institutions may be required to seek additional programmatic approval in licensure areas such as nursing and education in order to offer programming in the state. Institutions must be accredited by an accrediting body recognized by the United States Department of Education and the Counsel for Higher Education Accreditation in order to offer programming that terminates with a degree in the state of Idaho. Fully online institutions with no physical presence in the state are not required to seek approval from the board to operate. There are many exemptions to the requirement to register including flight schools and religious institutions offering religious degrees. A full list of exempt institutions can be found at Idaho Code Ann. 33-2403(4).

Illinois

The Illinois Board of Higher Education regulates all vocational schools, private business schools, independent schools, out-of-state schools, and public schools. In Illinois, institutions with limited physical presence in the state are not required to seek authorization from the Illinois Board of Higher Education in order to operate. Limited physical
presence is defined in several ways. Schools are required to provide evidence that the school is approved to operate in another state. Moreover, schools must have accreditation by an institution recognized by the United States Department of Education or the Counsel On Higher Education Authorization, provide proof that less than 10% of the coursework is offered in the state or that the coursework is fully online and asynchronous, and evidence that core academic services such as advising and registration are not happening within the state. Both programs and the institution require authorization, although some degree programs may require additional programmatic approval from separate state boards such as counseling psychology, social work, and education. Some institutions are exempt from regulation by the Board, including programs that offer religious training, but no academic credentials.

Indiana

Indiana has four separate bodies that regulate degree authorization in the state. The Indiana General Assembly regulates all private, regionally accredited, nonprofit institutions operating in the state through legislation by offering automatic authorization to operate based upon accreditation status. The Indiana Commission for Higher Education is the state agency that regulates all public in state, public out-of-state, private nonprofit, and regionally accredited degree-granting institutions. The Board for Proprietary Education regulates all nonregionally accredited private nonprofit postsecondary education and private for-profit out-of-state degree granting institutions regardless of accreditation status.
Indiana Department of Workforce Development, Office for Career and Technical Schools regulates noncredit and nondegree granting proprietary postsecondary education. No institution may do business in the state if it is not recognized by an accrediting body that is recognized by the United States Department of Education, unless it is offering a program for religious study. Both programs and institutions must seek authorization in the state, and some programs require a separate programmatic board’s approval. This is the case in fields such as nursing, education, social work, and many others. All in-state and out-of-state institutions must be authorized in order to operate within the state. However, physical presence could trigger automatic authorization by the state legislature, or application to operate through the Commission for Higher Education. Physical presence is triggered when an institution requires that 25% or more of an institution’s coursework requires face-to-face instruction on site in Indiana.

**Iowa**

The Iowa Student Aid Commission regulates postsecondary education in Iowa. Institutions that offer programs for licensure must seek approval from the Iowa Board of Education before offering programs in the state and seek approval from the appropriate program board. The Iowa Student Aid Commission also enforces sections of the consumer protection code for the state of Iowa that deal with withdraw and refund policies and financial responsibilities of an institution. Iowa Code § 714.18 requires that a for-profit institution be financially stable in order to offer a degree program in the state.
714.19 provides an exception to the need to prove financial stability including institutions that are authorized by Iowa, by another state, or by a foreign country to offer a degree; public schools; and schools of nursing accredited by a board of nursing, by an equivalent board in a different state, or by a foreign country. Iowa Code § 714.23 sets out the requirements for a refund policy in the state.

**Kansas**

In Kansas, the Board of Regents authorizes all postsecondary institutions in the state and their programs, excluding institutions on Tribal Land and Federal Bases. Also excluded from review by the Board of Regents are institutions regulated by the Kansas Board of Cosmetology and the Kansas Board of Barbering. Some programs may require approval by more than one agency. Accreditation that is recognized by the United States Department of Education is required for all programs offered within the state of Kansas that result in a degree. Certificate programs are not required to be accredited. In addition to the Board of Regents approval, programs in nursing, education, social work, counseling psychology, and other allied health programs must have separate approvals from the appropriate board. There are many exceptions to the requirement to be authorized by the Board of Regents including institutions supported by state or local taxation, institutions approved under a previous law, and the Kansas City College and Bible School, Inc. A full list of exceptions can be found at Kan. Stat. Ann. § 74-32,164. There is no set formula to determine if a fully online institution is required to seek approval from the Kansas Board of...
Regents.\textsuperscript{620} The Board of Regents uses long arm jurisdiction to determine whether an institution needs to be approved by the Kansas Board of Regents.\textsuperscript{621} Long arm statutes are laws that allow states to exercise jurisdiction over a resident of another state, assuming that individual has made a minimal number of contacts within the state.\textsuperscript{622}

**Kentucky**

The Kentucky Commission on Proprietary Education regulates private, for-profit postsecondary educational institutions regardless of the instructional method (i.e., online, correspondence, or face-to-face).\textsuperscript{623} The Commission on Proprietary Education does not regulate institutions that offer a four year baccalaureate degree program.\textsuperscript{624} Also excluded from Commission regulation are programs approved by the Kentucky Board of Barbering, the Kentucky Board of Hairdressers and Cosmetologists, the State Board of Embalmers and Funeral Directors, and institutions regulated by the Kentucky Council on Postsecondary Education.\textsuperscript{625} The Kentucky Council on Higher Education is the regulatory body for all private, nonprofit institutions that award a degree at any level, and proprietary institutions and programs that offer degrees at the baccalaureate level or higher.\textsuperscript{626} Institutions that offer degrees fully online to the residents of Kentucky are not required to apply for authorization to operate, unless the institution has any physical presence in the state.\textsuperscript{627} This includes institutions that have a physical address in the state or programs that require internships in the state.\textsuperscript{628} A full list of physical presence triggers can be found in Kentucky’s Administrative Regulations.\textsuperscript{629} State schools, such as the University of Kentucky, are
authorized to operate directly within the legislation and do not require separate authorization to operate.\textsuperscript{630}

\textbf{Louisiana}

The Louisiana Board of Regents is responsible for licensing all out-of-state, private, and vocational postsecondary institutions.\textsuperscript{631} Degree granting institutions must be accredited by an accrediting agency recognized by the United States Department of Education in order to offer programming in the state.\textsuperscript{632} Certain programs, such as teacher education and nursing, require additional programmatic accreditation.\textsuperscript{633} Religious institutions that offer degrees that are religious in both title and content are exempt from licensure. Institutions that offer distance education programs with no physical presence in the state, such as internships, face-to-face instruction, and clinicals, are not required to be licensed.\textsuperscript{634}

\textbf{Maine}

Regulation of postsecondary institutions in the state of Maine is conducted by the Maine Department of Education, Office of Higher Education.\textsuperscript{635} Public, in-state institutions are regulated by one of three boards: the Maine System Board of Trustees, the Maine Maritime Academy Board of Trustees, or the Maine Community College System Board of Trustees. Institutions wishing to offer postsecondary instruction in the state must be accredited by an accrediting agency recognized by the United States Department of Education in order to be authorized to operate in the state.\textsuperscript{636} In Maine, programs are authorized rather than institutions.\textsuperscript{637} Every program must be authorized in order to be
delivered in Maine. In order for the program to be authorized, some programs must be approved by other state agencies such as nursing and teacher education. Religious degree programs offered by institutions that are owned by a church or religious organization and are intended to pursue a vocation or position of leadership within a faith are exempt, as are programs on Federal Reservations over which the federal government has authority. Fully online degree programs and correspondence programs are not required to be authorized in order to operate.

Maryland

The Maryland Higher Education Commission sets the minimum requirements for degrees offered by postsecondary institutions. Each program offered in the state of Maryland must be approved by the Higher Education Commission in order for the institution to operate in the state. In order for an institution to become approved, it must be accredited by an accrediting agency recognized by the United States Department of Education. Postsecondary religious institutions that offer only sectarian vocational degree programs are not required to seek approval from the Commission. Fully online degree programs offered to the residents of Maryland by out-of-state institutions, must seek approval from the Commission within three months of the first Maryland resident enrolled in order to continue operating in the state. In order to be granted approval, out-of-state institutions must be accredited by an accrediting body recognized by the United States Department of Education.
Massachusetts

The Massachusetts Board of Higher Education is responsible for the oversight and authorization of all out-of-state institutions wishing to offer education to the residents of the Commonwealth of Massachusetts. Additional approval is required for programs such as nursing and education. Institutions must be accredited by an accrediting agencies recognized by the United States Department of Education in order to operate. Programmatic accreditation may be required as well. Fully online institutions and programs incorporated outside of the state of Massachusetts are not required to seek approval from the Massachusetts Board of Higher Education, unless they have a physical presence in the state. In addition to having a physical location in the state, requirements for internships, teaching experiences, or practicums may also trip the physical presence rule. In addition, for-profit institutions must establish a board of trustees within the state of at least three members, with one third of the board consisting of a member of the community that has no affiliation with the institution. For-profit colleges and universities are also required to submit an annual report that evaluates faculty, students, and programs being offered. The report should include information on student completion, employment of graduates, and number of student transfers. Institutions are also required to report on their operating costs and revenue to demonstrate financial health.
Michigan

The Department of Licensing and Regulatory Affairs has regulatory authority over for-profit colleges in Michigan. This authority is derived from a broader authority to regulate corporations within the state. Unincorporated colleges are also under the purview of the Department of Licensing and Regulatory Affairs, but the authority is from a different legislative act. While the legislation directs regulatory authority to the Department of Energy, Labor, and Economic Growth, Governor Rick Snyder changed the name of the department by executive order 2011-4. All degree-granting institutions in the state are required to be authorized by an accrediting body recognized by the United Stated Department of Education. Institutions offering fully online degree programs are not required to seek authorization in the state. However, if there is a physical presence in the state, the institution is required to seek a certificate of compliance. Religious institutions are exempt from registration if the only training is for vocation within the church. Michigan strictly regulates the terms college, university, and community college and certain criteria must be met in order to use the terms. Additionally, Michigan has minimum credit hour requirements in order to award the associate’s, bachelor’s, master’s, and doctoral degree programs.

Minnesota

In Minnesota, all institutions, whether physically located in the state or not, offering courses leading to a degree are required to register with the state. Institutions must have
their name and degrees approved before offering courses of instruction within the state.\textsuperscript{663} Minnesota defines the terms college and university.\textsuperscript{664} An institution that does not offer at least one graduate degree may not use the term university.\textsuperscript{665} Accreditation by an institution recognized by an accrediting body recognized by the United States Department of Education is required for any school to receive registration within the state.\textsuperscript{666} Religious institutions that offer a degree leading to service within the church and clearly religious in nature are exempt from registration.\textsuperscript{667} Extensive documentation is required for registration including, but not limited to, constitution, incorporation documents, bylaws, mission and goals of the institution, fiscal balance sheet from the previous year including any independent auditor’s statements, admission policies, and any policies on granting credit for prior experience.\textsuperscript{668} The Minnesota Office of Higher Education is the agency tasked with the regulation of all colleges and universities offering education that leads to an academic credential available to the residents of Minnesota.\textsuperscript{669}

**Mississippi**

The Mississippi Commission on College Accreditation is the agency tasked with the regulation of nonpublic colleges and universities in the state.\textsuperscript{670} Fully online programs that do not have a physical presence in the state are not required to seek approval to operate from the Commission.\textsuperscript{671} The Commission regulates both programs and institutions.\textsuperscript{672} Separate approval from other agencies is required in licensure areas.\textsuperscript{673} The Mississippi Commission on College Accreditation regulates all degree-granting programs except for occupational
associate degrees.\textsuperscript{674} An occupational associate degree is defined by the state as an associate’s degree where 60\% of the courses are occupational or technical in nature.\textsuperscript{675} The Commission on Proprietary Schools and Registration also has regulatory authority over for-profit, occupational, and technical schools, and all occupational associate degree programs with the exception of practical nursing programs that are authorized by the Mississippi Commission on College Accreditation.\textsuperscript{676} The Commission on Proprietary Schools is a division of the Mississippi Community College Board.\textsuperscript{677} The Commission on Proprietary Schools sets the minimum qualifications for instructors and will review and evaluate instructors.\textsuperscript{678} **Missouri**

The Missouri Department of Higher Education regulates all private, proprietary, and nonpublic higher education in the state, if not specifically exempted through legislation.\textsuperscript{679} Out-of-state proprietary schools must adhere to a special set of additional regulations including, but not limited to, proof of qualified faculty, a curriculum that can be demonstrated to meet the published outcomes of the degree or certificate, adequate facilities, and financial stability.\textsuperscript{680} There are many exemptions to oversight by the Missouri Department of Higher Education including public institutions, approved private institutions, religious institutions, and institutions that closed membership and whose purpose is to provide education in trades or professional education among others.\textsuperscript{681} An approved private institution is one that is nonprofit, under the control of an independent board, offers programs longer than six months which terminate in a degree, meets the standards for
accreditation by a body recognized by the United States Department of Education, does not discriminate in hiring practices, and allows faculty to pick their own textbooks.\textsuperscript{682}

Qualifications for exempt religious institutions include accreditation by the Association of Theological Schools, the American Association of Bible Colleges, or a regional accrediting association or institutions that offer programs that only terminate in theological, biblical, or divinity degrees.\textsuperscript{683}

**Montana**

In Montana, the Board of Regents is the only body that regulates and approves all education that leads to an academic credential.\textsuperscript{684} The only way to become authorized in the state of Montana is to be accredited by one of the six regional accrediting bodies, be accredited by an institution recognized by the United States Department of Education, or be accredited by a body recognized by the Council on Higher Education Accreditation.\textsuperscript{685}

Religious institutions that award only religious degrees are exempt from authorization.\textsuperscript{686} Additionally, institutions must receive approval to operate a business from the Montana Secretary of State, who determines for-profit and nonprofit status.\textsuperscript{687} Nursing programs must seek separate approval to place a student in a clinical setting within the state.\textsuperscript{688}

**Nebraska**

There are two agencies that regulate postsecondary education in the state of Nebraska. Nebraska’s Coordinating Commission for Postsecondary Education has regulatory authority for all programs except for private institutions that award degrees at or
below the associate’s level and are occupational. Private institutions that award occupational degrees at the associate’s level and below are regulated by the Nebraska Department of Education, Private Postsecondary Career Schools. Institutions that offer fully online degree programs without any physical presence in the state are exempt from state authorization. Physical presence triggers include having a physical location in the state, requiring students to meet face-to-face for instruction in the state, and requiring an internship or clinical in the state. For nonoccupational degree programs, accreditation by an accrediting body recognized by the United States Department of Education is required. Reauthorization is required if the curriculum for the degree program is changed. There is no exemption for religious organizations in the state of Nebraska. If they offer courses for credit, leading to a degree, authorization is required. Additional programmatic approval may be needed in licensure programs from other state agencies in areas such as nursing, education, massage, cosmetology, and truck driving.

Nevada

Regulatory authority over public and private postsecondary institutions is held by the Nevada Commission on Postsecondary Education. Accreditation by an accrediting body recognized by the United States Department of Education may be accepted as meeting the requirements for approval to operate. Unaccredited institutions may be given approval to operate after review by a panel of evaluators. Additional approval may be required from other state agencies in licensure areas in order to operate in the state. Examples include
education, nursing, cosmetology, massage therapy, and pharmacy.\textsuperscript{700} Fully online institutions with no physical presence in the state are not required to be authorized in the state of Nevada.\textsuperscript{701} Programs that offer face-to-face instruction, require internships or clinicals in the state, or have administrative offices would be required to seek authorization to operate.\textsuperscript{702} In order to submit application to operate in the state, postsecondary institutions must submit a certified public account reviewed or audited financial statement, college catalog, and curricula.\textsuperscript{703} Religious institutions that offer their programs to the public must seek approval to operate in the state.\textsuperscript{704}

**New Hampshire**

The New Hampshire Department of Education, Division of Higher Education, Higher Education Commission is the body tasked with the regulation of postsecondary education in the state.\textsuperscript{705} Excluded from authorization are in state public universities and colleges founded before 1775.\textsuperscript{706} Accreditation by an accrediting body recognized by the United States Department of Education or the Counsel for Higher Education Accreditation is required within eight years of approval to operate in the state.\textsuperscript{707} Institutions that are fully online and have no physical presence in the state are not required to seek permission to operate.\textsuperscript{708} Physical presence triggers include a New Hampshire telephone number, a post office address within the state, and any face-to-face instruction, advising, or mentoring in the state.\textsuperscript{709} Additional approval from licensure areas may be required to receive authorization to operate.\textsuperscript{710}
New Jersey

In 2011, the governor of the state of New Jersey abolished the New Jersey Commission on Higher Education and transferred all of the powers to the Secretary of Higher Education by executive order.\textsuperscript{711} As part of the order, any existing regulations, rules, and contracts that make reference to the Commission on Higher Education will be taken to mean the Secretary of Higher Education.\textsuperscript{712} No one in the state of New Jersey can issue a degree or proficiency in a course of study, or do business towards that end, without obtaining a license from the Secretary of Higher Education.\textsuperscript{713} Accreditation by an accrediting body recognized by the United States Department of Education may be used as partial fulfillment of the requirements for authorization.\textsuperscript{714} However, unaccredited institutions may seek and receive authorization to operate.\textsuperscript{715} Unaccredited institutions that are authorized to operate in the state must seek institutional accreditation after the first three years.\textsuperscript{716} Institutions must show that they are financially able to carry out their mission by showing a plan for future revenue and expenses and financial records audited annually by a certified public accountant.\textsuperscript{717} Institutions must show that they have the appropriate faculty for the disciplines being taught.\textsuperscript{718} Institutions must also show that they have appropriate library resources.\textsuperscript{719} New Jersey regulates to the level of determining time on task per credit hour and length of a degree program at the associate’s, bachelor’s, master’s, and doctoral level.\textsuperscript{720} New Jersey regulates the terms junior college, college, and university with defined requirements for usage of each term.\textsuperscript{721} For-profit institutions must follow an additional set
of state regulations that define minimum library size, faculty teaching loads, and governing board requirements. Institutions with no physical presence in the state are not required to seek authorization.

**New Mexico**

The New Mexico Higher Education Department is the agency tasked with the regulation of all private, postsecondary institutions operating in New Mexico. Career schools and nonaccredited institutions must be authorized by the department in order to operate. Regionally accredited institutions are exempt from authorization but must register with the Department. Examples of institutions exempt from oversight are those supported by New Mexico State Taxation, by the Pueblo Tribe of New Mexico, and institutions wishing to provide training for religious vocational service. The terms college and university are regulated by the Higher Education Department. In order to use the term university, postsecondary institutions must offer graduate programs. Institutions are required to prove financial stability in order to receive authorization to operate. Institutions must show that they have faculty qualified to offer the programs. Out-of-state institutions that offer programs fully online are required to register with the Department of Higher Education if they actively recruit students in New Mexico.

**New York**

All institutions offering postsecondary education in the state that lead to an academic degree are considered to be part of the University of the State of New York. The
University of the State of New York is governed by the Board of Regents.\textsuperscript{733} The Board of Regents determines educational policies of the state and carries into effect any law created by the legislature regarding education. The Board of Regents is prohibited through legislation to modify any degree in religious instruction in the state.\textsuperscript{734} The terms college and university are strictly regulated by the state of New York.\textsuperscript{735} The only institutions allowed to use the term university are the State University of New York, the City University of New York, and their subdivisions.\textsuperscript{736} Institutions may use the term college if it is part of their incorporated name and they meet the appropriate criteria.\textsuperscript{737} The state of New York uses a physical presence rule to determine if out-of-state institutions are required to seek state authorization in order to operate.\textsuperscript{738} Physical presence triggers include face-to-face instruction in the state, clinical internships, and a representative in state that supports academics.\textsuperscript{739} The Office of College and University Evaluation administers the Regent’s responsibility to regulate public, independent, and for-profit institutions in the state of New York.\textsuperscript{740}

**North Carolina**

The University of North Carolina Board of Governors regulates postsecondary education in the state for all nonpublic or out-of-state degree granting institutions. The Board of Governors has delegated the application and operating process to the University of North Carolina General Administration. Both institutions and programs must receive approval from the board.\textsuperscript{741} Accreditation is not a requirement for authorization within the state. Areas of education that result in an additional license generally require approval from a
separate board. Examples include nursing, education, massage therapy, and cosmetology.\textsuperscript{742} Institutions which offer instruction only on military posts or which held approval to operate in the state prior to 1972 do not need to seek additional authorization to operate.\textsuperscript{743} Religious institutions that offer religious degrees preparing for vocations within a religious denomination are also exempt from authorization.\textsuperscript{744} Physical presence is required for authorization. Physical presence triggers include face-to-face instruction in the state, property or facilities within the state, or third party agreements with organizations that transmit, present, or disseminate information on behalf of the institution. Institutions offering fully online degree programs are not required to seek authorization. Field experiences, clinical practicums, and student teaching all trigger state physical presence.\textsuperscript{745}

**North Dakota**

In North Dakota, the agency responsible for the state authorization of out-of-state private and for-profit institutions is the North Dakota State Board of Higher Education.\textsuperscript{746} In August 2013, legislation was enacted that changed regulatory oversight from the North Dakota Department of Career and Technical Education to the State Board.\textsuperscript{747} State authorization is not required for: business or trade institutions; nonprofit or charitable organizations offering training not leading to a degree; out-of-state or in state public institutions; private four year institutions established prior to 1972 in the state as long as they maintain regional or national accreditation; schools of nursing which are authorized under a different body; Native American colleges; postsecondary institutions not operating in the
state; institutions whose only physical presence is students in internships, practicums, and student teaching; and postsecondary career institutions authorized by a separate agency. A regional or national accrediting body must accredit all postsecondary institutions seeking authorization in the state. New institutions seeking authorization to operate in the state must first seek provisional accreditation. It is specifically prohibited to create, use, or issue a false academic credential, purport that an academic credential is completed when it is not, or operate a diploma mill.

Ohio

Two bodies are responsible for the authorization of for-profit institutions in the state of Ohio. The Ohio Board of Career and Technical Education regulates all for-profit institutions. In addition, the Chancellor of the Ohio Board of Regents also regulates all for-profit institutions which offer programs at the baccalaureate level or higher and for-profit institutions which offer associate degrees and want to participate in the Ohio Instructional Grant Program. Religious institutions that offer biblical training and vocational training, and do not offer associate’s, bachelor’s, master’s, or doctoral degree programs, are exempt from registration. Institutions offering fully online programs are exempt from state authorization unless they have a physical presence in the state. Physical presence triggers include a physical location, an internship that will be completed in the state, or if the institution solicits Ohio residents.
Oklahoma

The Oklahoma State Regents for Higher Education is the agency charged with the regulation and licensing of all degree granting institutions in the state. The Oklahoma Board of Private Schools and the Oklahoma Department of Career and Technology Education regulate private and public, nondegree granting postsecondary institutions. Out-of-state institutions with a physical presence in the state of Oklahoma must also be authorized by the Oklahoma State Regents for Higher Education. In order to operate in the state, institutions must be accredited by a regional accrediting agency, a national accrediting agency authorized by the U.S. Department of Education for Title IV, or receive accreditation status with the Oklahoma State Regents for Higher Education. The Regents authorize both the college and individual programs with licensing agencies offering final approval, such as education and nursing. There are no exemptions for religious institutions if they use the words such as degree, associate, baccalaureate, and doctorate. Fully online programs are not required to seek authorization. However, internships, externships, and clinical for convening any students for instruction in the state of Oklahoma will constitute physical presence. All private institutions operating within the state must be registered as a corporation within the state.

Oregon

No institution in the state of Oregon may award a degree or offer classes of instruction that purport to lead to a degree without first getting approval from the Higher
Education Coordinating Commission. The intent of the authorization is to protect the citizens of Oregon from fraudulent degree programs and protect the integrity of a degree as a public credential. Nonprofit institutions are exempt from authorization. There are also exemptions for institutions only offering religious degree programs, schools that have conferred degrees under the same ownership for five years, or those accredited by a regional accrediting body. The Office of Degree Authorization is empowered by the Higher Education Coordinating Commission to authorize out-of-state degree programs. Oregon does have a physical presence rule. The need for authorization is triggered with advertising, establishing a phone number or physical location in the state, employing any person to assist a school, including recruiters and faculty, among other triggers.

Pennsylvania

The Pennsylvania State Board of Education is the regulatory board responsible for postsecondary education. The Counsel on Higher Education has the responsibility to develop standards for the approval of colleges awarding degrees and certificates. The Division of Higher and Career Education, Pennsylvania Department of Higher Education, Postsecondary and Adult Education regulates the approval process. Out-of-state institutions must be authorized to operate in the state if they are performing any educational activity for academic credit or continuing education. Only institutions that offer 50% or more of their academic programs face-to-face can be authorized to operate in Pennsylvania.
Fully online institutions are prohibited from authorization by law. The use of the words college, seminary, or university are prohibited without a separate certificate of authority.

**Rhode Island**

Rhode Island is statutorily prohibited from authorizing for-profit institutions to operate within the state. However, fully online programs do not need to be authorized to offer education to Rhode Island citizens unless they establish a physical presence. A physical presence is defined as having any paid employee within the state. This includes adjunct faculty, recruiters, and internship supervisors.

**South Carolina**

The South Carolina Commission on Higher Education is the agency tasked with the regulation of all in state and out-of-state postsecondary institutions not exempted by statute. Institutions established in the state of South Carolina must receive a license from the state in order to operate. The words college and university have restricted use in the state of South Carolina. Only institutions that offer degrees at the associate’s degree level or higher may use the term college. Using the term university requires approval from the Commission on Higher Education or the approval to use that term in the institution’s own state. There are exemptions to registration for religious schools which serve and train students for a vocation within the church. Fully online institutions or programs are not required to be licensed as they do not have an actual presence in the state.
South Dakota

In South Dakota, the Secretary of State’s office is responsible for authorization to offer postsecondary education.\textsuperscript{787} Authorization is continuous once a school has received initial authorization as long as it maintains accreditation.\textsuperscript{788} Institutions that are established by the federal government, established by a tribal government on tribal lands, or owned by a religious organization and offer only degrees or certificates that prepare for service within the religion are exempt from authorization.\textsuperscript{789} Fully online programs offered by out-of-state institutions are also exempt from registration.\textsuperscript{790}

Tennessee

Tennessee’s Higher Education Commission, Division of Postsecondary School Authorization has the authority to approve all postsecondary institutions with a physical presence in the state, unless exempted by law. Accreditation is not required for institutions to be approved.\textsuperscript{791} Certain programs such as allied health, nursing, and education require separate programmatic approval. There are a host of exemptions including schools that have been accredited by a regional accrediting association for more than ten years, nonprofit institutions that have had their primary campus in the state for more than ten years, and institutions that operate solely as barber or cosmetology schools.\textsuperscript{792} Distance education providers must seek approval to operate in the state if they establish a physical presence. This can include an instructional site in the state, instruction originating from within the
state, a business, recruiter, or agent soliciting enrollment in the state, or advertisements that specifically target Tennessee residents.\textsuperscript{793}

**Texas**

The Texas Higher Education Coordinating Board is the agency responsible for approving all private and out-of-state public institutions offering academic credits and degree programs within the state.\textsuperscript{794} Postsecondary institutions that offer distance education whose primary campus is in another state must be legally authorized to offer education in their home state, must be accredited by a regional or national accrediting agency recognized by the United States Department of Education, and must offer only postsecondary or distance education courses in Texas.\textsuperscript{795} Accreditation is required for institutions seeking authorization within the state. In addition, certain programs in law, allied health, and education require separate approvals from the appropriate state agency such as the State Bar of Texas, the Texas Board of Nursing, and the Texas Education Agency.\textsuperscript{796} Physical presence for online programs is triggered through a physical location, internships or practicums, and recruiting students outside of typical education fairs.\textsuperscript{797} Religious institutions offering only religious degree programs or credentials are exempt from registration.\textsuperscript{798}

**Utah**

The Utah Division of Consumer Protection is the agency tasked with the regulation of for-profit colleges and universities in the state.\textsuperscript{799} In Utah, an institution which is accredited by a regional or national accrediting body recognized by the United States
Department of Education is exempt from state authorization. Additionally, all institutions owned and operated by a recognized religious organization are also exempt. The Division is limited only to authorization to operate and may not regulate individual courses or day to day operations of schools. Fully online institutions, whether inside or outside of the state of Utah, must register with the division and demonstrate that the institution’s education objectives can be met through distance or correspondence education. Additionally, the institution must show proof that there is adequate interaction between faculty and students through the submission of graded work.

Vermont

In Vermont, the Vermont State Board of Education, which sits underneath the Vermont Agency of Education, has regulatory power over authorization to operate in the state. Any school accredited by a body recognized by the United States Department of Education is exempted from authorization. Institutions that are not accredited and wish to offer postsecondary education or a degree must be authorized. Any institution outside the state of Vermont that intends to offer programs to the citizens of the state, must secure accreditation from a regional or national accrediting body recognized by the United States Department of Education. Institutions that offer sole distance education, nondegree-granting institutions, and religious institutions whose credit does not result in the conferral of a degree are exempt from registration.
Virginia

The State Council of Higher Education for Virginia is the coordinating body for postsecondary education in the state of Virginia.\textsuperscript{807} Institutions that are fully accredited by an accrediting body recognized by the United States Department of Education, have maintained the same campus ownership for ten years, or were formed by the Commonwealth of Virginia are exempt from authorization and are not required to seek additional approval to operate within the state.\textsuperscript{808} The Private and Out-of-State Postsecondary Education Division is the unit of the state council that regulates private, not-for-profit and for-profit institutions that award academic credit and all out-of-state institutions that operate in Virginia. Authorization to operate is only required of institutions that have an actual physical presence in the state of Virginia.\textsuperscript{809} At a minimum, the Division must ensure that institutions meet minimum academic and career technical standards.\textsuperscript{810} Any out-of-state institution wishing to offer distance education to the citizens of Virginia does not need to seek approval to operate, unless it establishes a physical presence or actual campus location for instruction within the state.\textsuperscript{811}

Washington

The Washington Student Achievement Counsel has regulatory oversight for all institutions offering courses for academic credit or courses that lead to a degree. Degree granting institutions in the state of Washington are required to obtain authorization in order to operate.\textsuperscript{812} Exempted institutions include public universities, institutions that have
operated in the state for more than fifteen years and have been accredited by an accrediting agency recognized by the Department of Education, and institutions whose sole objective is religious training. Institutions operating with a physical presence in Washington must be accredited by an agency recommended by the Department of Education, or be actively seeking authorization and granted a waiver to operate while doing so.

**West Virginia**

The West Virginia Counsel for Community and Technical College Education has regulatory power over for-profit institutions offering academic degrees at the associate’s degree level. The West Virginia Higher Education Policy Commission has regulatory power over all for-profit institutions offering academic degrees at the bachelor’s degree or higher level. Institutions offering fully online associate’s degree programs or bachelor’s degree programs to the residents of the state are not required to seek authorization to operate. Institutions that establish a physical presence by having an instructional site in the state, an agent recruiting residents, or clinical or internship experiences are required to seek authorization to operate and must be accredited by a regional or national accrediting association.

**Wisconsin**

The Wisconsin Education Approval Board is the regulatory agency responsible for authorization of for-profit educational institutions in the state of Wisconsin. This board is an independent board made up of appointees of the governor of the state of Wisconsin.
Physical presence is not a determining factor in authorization. All for-profit institutions must be authorized to operate within the state. The sole exception to authorization is religious institutions offering degrees that prepare students for service within the religious order.\footnote{818}

**Wyoming**

Wyoming Department of Education regulates all for-profit institutions, degree granting institutions located in the state, or institutions offering distance education to the residents of the state. All institutions must be licensed or registered prior to offering education to the residents of Wyoming.\footnote{819} All institutions must be accredited by an accrediting agency recognized by the United States Department of Education.\footnote{820} Institutions may be given candidacy status for up to five years if they are in the process of seeking accreditation.\footnote{821} Institutions that offer programs that are religious in nature and limited to the beliefs of the church are exempted from registration.\footnote{822}

**Summary**

This chapter addressed the first research question, what federal and state laws regulate the operation of for-profit postsecondary institutions? As such, each state law was reviewed and a summary was provided. The results of this chapter indicated that requirements for authorization and operation vary widely from state to state. The disjointed nature of state authorization law has created unequal protections for consumers.
Obtaining state authorization is a cumbersome and expensive process. Exemptions, definitions, laws, and rules vary substantially from state to state (see Appendix B). There may be new hope for institutions wishing to legally operate distance education programs across many states through state reciprocity agreements. One such agreement, the National Council for State Authorization Reciprocity Agreement (hereinafter SARA), is a voluntary agreement between member states and institutions allowing for authorization to operate if you are a member state and member institution.\textsuperscript{823} There are currently eighteen member states of SARA.\textsuperscript{824} However, SARA is not a solution for all for-profit institutions as accreditation by an accrediting body recognized by the United States Department of Education is required for participation.\textsuperscript{825}
CHAPTER V

CONSUMER PROTECTIONS

Intent

Chapter five addresses the second research question posed in this study. Specifically, what federal and state laws regulate marketing and advertising at for-profit postsecondary institutions? As this chapter will show, state laws concerning consumer protection vary widely from state to state. Therefore, consumers of for-profit education do not have equal protection under the law from either consumer protection bodies or telemarketing law.

Introduction

For-profit colleges have come under scrutiny for their aggressive recruitment techniques. These aggressive techniques may be unsavory to the average American, but that does not necessarily mean that they are illegal. The federal government and all fifty states have laws that regulate unfair and deceptive acts in marketing. Generally speaking, stating that a good or service has an affiliation that it does not have, misrepresenting the quality of a good or service, or intentionally misleading a consumer as to the approval or affiliation of a good or service are illegal at the federal level and across all fifty states.

Many for-profit colleges use the telephone as their primary recruiting tool. The federal government and the states all have laws that regulate telemarketing in the state. In many instances, these laws pertain to unsolicited outreach. There are, some states that define the length of time a prospective student may be called based upon the time from original inquiry or based upon the time from the last instance the individual purchased a good or service. This is also known as an established business relationship.
The laws identified in this chapter regulate the consumer protections and marketing and advertising for consumers of for-profit education. For the practitioner of education law, it outlines the federal and state protections afforded students seeking a for-profit education. This includes state and federal business code laws, telemarketing laws, and advertising laws. Each law was identified at the federal level and state-by-state.

In most states, the attorney general regulates the Unfair and Deceptive Acts and Practices (Hereinafter UDAP) statues in the state. However in California, it may be a district attorney, a county counsel, a city attorney, or city with a full-time prosecutor who enforces the law depending upon where the offense occurred. In Kentucky, it is the Department of Law’s responsibility to enforce the UDAP statutes, while in New Hampshire; it will be one of three agencies, The Office of the Attorney General, The Department of Justice, or The Consumer Protection and Antitrust Bureau. Texas has an entire division of the attorney general’s office that is responsible for UDAP statues. In Alabama, it is the Public Services Commission while in Massachusetts it is the Public Services Commission. In Oregon, it is the Department of Justice that regulates telemarketing activities, while in Tennessee it is the Tennessee Regulatory Authority. Not only are the agencies different from state to state, but the statutory requirements are different as well. In Arizona, telemarkers are forbidden to call anyone on the National Do Not Call list, while in California businesses must have had an established business relationship in the past eighteen months in order to dial an individual’s number. In Delaware, a phone number cannot be called for ten years once the caller asks to be removed from the caller’s list, while in the District of Columbia causing a telephone to ring more than fifteen times is prohibited by
In Hawaii, causing a phone to ring more than ten times, or using profane language is against the law. In New Hampshire, blocking the caller ID violates the law. In Rhode Island, telemarketers may only call between the hours of 9:00 a.m. and 6:00 p.m. on Saturday and not allowed to call at all Sunday.

**Federal Law**

Under the law, the Federal Trade Commission (Hereinafter FTC), which was established in 1914, has the regulatory authority to ensure advertisements are not false, misleading, or deceptive. False advertisement is defined as an advertisement that is materially misleading. When taking into account what is misleading, the government will consider representations or suggestions made about the product through mediums such as written statements, spoken word, or design of the advertisement that fail to reveal material facts about the product or consequences that may result from use of the product. The FTC has the power to promulgate rules and general statements of policy that define specific acts of unfair or deceptive marketing that effect commerce. Under the law, penalties for false advertising can include terminating or changing contracts, refunding money, and payment for damages.

There are important rules that effect for-profit colleges and universities. Telemarketing activities must be conducted between 8:00 a.m. and 9:00 p.m. Calls may not contain profane or abusive language, calls may not be made frequently with the intent to harass, calls may not be abandoned, defined as no live person available to speak to the person being called within two seconds of the phone being answered, more than 3% of the time, no person may misrepresent the product or service, and the organization must
maintain a list of people who wish to be added to a Do Not Call list. Furthermore, calls may only be made in response to an established business relationship. Telemarketing calls may only be made within three months of an inquiry or application and within eighteen months of the purchase of a good or service. Calls that are purely informational are not regulated.

State Law

Every state in the union and the District of Columbia has separate statutes dealing with unfair and deceptive acts. This set of legislation is known as Unfair and Deceptive Acts and Practices Statutes (UDAP). These laws deal with a wide range of issues including lending, advertising, and sales agents (see Appendix B).

Alabama

The Alabama Office of the Attorney General is responsible for any litigation involving the interests of the state. Unfair and deceptive acts in the state include, but are not limited to, causing confusion about the certification of a product, representing that the goods are of a certain quality when they are of another, and engaging in any false, deceptive, or uncontainable act while in the act of selling a product. The Alabama Telecommunications Act established rules for engaging in the sale of a good or service over the phone. The Alabama Public Services Commission oversees regulation of the Telecommunications Act. Violation of the law results in a $2,000 penalty. Consumers may sue for actual damages.
Alaska

The Alaska Office of the Attorney General is responsible for consumer protection within the state of Alaska and is responsible to bring civil action or refer criminal action to the appropriate legal authority. Unfair and deceptive acts are regulated under the Alaska Consumer Protection Act and include causing confusion over the source, approval, or sponsorship of a good or service, representing that goods are of a certain quality when they are of another, and representing that an agreement confers rights that it does not. The Alaska Telephonic Communications Act regulates the sales of goods or services to the residents of the state and requires registration. Telemarketers must register with the state. The Act specifically requires a written contract for purchases and requires that the caller within the first fifteen seconds of the call give the name, number, and organization that they are calling from and make mention that it is a sales call. The attorney general may file suit.

Arizona

The Arizona Office of the Attorney General is responsible for consumer protection within the state of Alaska. Deceptive and fraudulent advertising in the state includes any false, deceptive, or misleading advertisements when representing a good or service. The Arizona Telephone Solicitations Statute requires registration of all telemarketers and prohibits calling anyone on the National Do Not Call list. Penalty for breaking the law is $1,000 per violation.
Arkansas

The Arkansas Attorney General’s office is a constitutionally created position whose powers and duties are described by statutory law and includes consumer protection in the state. In Arkansas, unfair and deceptive trade practices are illegal, including but not limited to, knowingly making false representations about the product, good, or service, engaging in any false or unconscionable act in business or trade, and displaying or causing to be displayed a false number on a residents caller ID. Arkansas does not have a separate telemarketing law and only requires that telemarketers seeking donations for a charitable organization be registered. The attorney general may bring suit if the law is violated.

California

There is not one state agency in California with the responsibility of enforcing California’s Consumer Protection Statutes. Instead, multiple agencies, including the attorney general, county counsel, and city prosecutors, may all bring suit. California uses the term unfair competition to describe any act that is an unfair or fraudulent business act or any act in advertising that is untrue, misleading, unfair, or deceptive. Telemarketing rules are separate within California’s Business and Professional code. The law specifically prohibits calling anyone on the National Do Not Call list and calling outside of the federally imposed time frame of 8:00 a.m. to 9:00 p.m. The telemarketer must have an established business relationship and call within eighteen months of that relationship or have obtained written approval to call. Penalties include $11,000 per violation and consumers have a private right of action to bring suit.
Colorado

The Colorado Attorney General was established by the state constitution and is obligated to fulfill duties specifically assigned under state law. The attorney general, along with district attorneys, is responsible for the enforcement of consumer protection in the state. Deceptive trade practices in the state include, but are not limited to, falsely representing a good or service, using deceptive wording in the geographic origins of a product, and failing to disclose material information regarding a good. Telemarketing in the state is regulated and requires registration, but generally requires that no unfair or deceptive practices are used when making a sales call. Penalties for breaking the law are $2,000 per violation.

Connecticut

Deceptive acts and practices are illegal using a very broad definition in the Connecticut state statutes. The Commissioner of Consumer Protection is responsible for enforcing unfair or deceptive trade practices in the state. The state telemarketing laws generally place restrictions upon unsolicited telephone calls where no previous business relationship or request for information occurred. For example, a business may not simply dial numbers at random or sequentially in an attempt to sell a good or service. Consumers have a private right of action for actual damages when the law is violated.

Delaware

Unfair and deceptive acts in trade and commerce are prohibited by statute in Delaware and include listing a local number if it is routinely forwarded to another location, concealing, suppressing, or omitting a material fact about a product, and misrepresentation
of the seller’s location.\textsuperscript{890} The state attorney general is responsible for investigation and enforcement of the statute, but there is no specific fine for violation.\textsuperscript{891} The Delaware Telemarketing Fraud Act specifically requires the registration of telemarketers and makes it illegal to call anyone for ten years after they have asked not to be called.\textsuperscript{892} Registration is required of all telemarketers in the state.\textsuperscript{893}

**District of Columbia**

Deceptive and unfair practices in the District of Columbia include, but are not limited to, representing that a product has a sponsorship or approval that it does not, representing that a good or service is of a standard or quality that it is not, and using ambiguity or innuendo about a material fact with the intent to deceive.\textsuperscript{894} The Consumer Protection Agency has the power by statute to enforce state regulations surrounding unfair or deceptive acts in trade.\textsuperscript{895} Telemarketing in the state is regulated and infractions include causing a telephone to ring more than fifteen times, calling a consumer outside of 8:00 a.m. to 9:00 p.m., and calling a consumer after being asked not to be called.\textsuperscript{896}

**Florida**

The Florida Unfair Practices and Deceptive Trades Act prohibits unconscionable, deceptive, or unfair acts in trade or commerce in the state of Florida.\textsuperscript{897} The code is enforceable by the state attorney if the practice occurs in one judicial circuit, by the department of legal affairs if it crosses circuits, or by the department of legal affairs if the state attorney fails to act after ninety days of having received official written notice of a violation.\textsuperscript{898} The Florida Telemarketing Act specifically exempts nonprofit education from law requirements.\textsuperscript{899} Telemarketers are prohibited from making phone calls outside of the
hours of 8:00 a.m. to 9:00 p.m. Additionally, they cannot prevent the transmission of their caller ID or submit a false caller ID. All agents must be licensed in the state to do business.  

Violation of the law results in a $10,000 per violation penalty.  

**Georgia**

The Georgia Uniform Deceptive Trade Practices Act specifically prohibits causing confusion as to the certification, approval, or sponsorship of a good or service, misleading consumers to the quality or grade of a good or service when they are of another, or making false or misleading statements about a good or service. The attorney general is responsible for the enforcement of these laws. Law prohibits abusive, deceptive, or fraudulent telemarketing and the Secretary of State has the power to create rules for the telemarketing industry. The telemarketing industry is prohibited from making a series of calls that the average consumer would find coercive or abusive. Furthermore, the Telemarketing Communications Act of 1998 makes illegal causing a number to ring with the intent to annoy or harass a person, use profane language, or call outside of the calling restricted hours of 8:00 a.m. to 9:00 p.m. The law specifically excludes customer initiated calls. Breaking the law results in a $2,000 penalty per violation.  

**Hawaii**

Law in the state of Hawaii prohibits unfair or deceptive acts in trade or commerce. The attorney general and the Office of Consumer Protection are responsible for the enforcement of the law. Causing confusion with the certification or affiliation of a good or service, representing that a good or service has the approval or sponsorship of another organization when it does not, and representing that a good is of a certain quality when it is
of another are all prohibited by law. Telemarketers are also prohibited from making any statement that causes consumers to believe that they are approved or registered by the state, making any false statement about the quality of a good or service, or calling anyone intentionally on the Federal Do Not Call list. Threatening, the use of profane language, causing a telephone to ring more than ten times, or engaging in a pattern of calling that the reasonable consumer would find abusive or annoying are also prohibited by statute. There are no specific fines for violation of the laws in Hawaii.

Idaho

In Idaho, passing off goods or services as those of another, representing that goods or services are of a certain quality when they are of another, causing confusion as to the sponsorship or approval of goods, and engaging in any unconscionable act or practice in the selling of a good or service is illegal. The attorney general is responsible for the enforcement of these laws. The Idaho Telephone Solicitations Act establishes a separate State Do Not Call List and makes it illegal to use any device which blocks the transmission of a caller ID, to intimidate or torment the reasonable consumer with telemarketing calls, and requires registration of telemarketers in the state. Telemarketers are also prohibited from calling any Idahoans on the Federal or State Do Not Call list. Violation of the law results in a fine of $500 for the first violation, $2,500 for the second violation, and $5,000 for the third and all following violations.

Illinois

In addition to the Uniform Deceptive Trade Practices Act, Illinois adopted the Consumer Fraud and Deceptive Business Practices Act that prohibits deception, fraud,
misrepresentation, or concealment of material fact with the intent to mislead a consumer. The attorney general, any state attorney, or any municipality with a population over 1,000,000 may enforce this Act. The Telephone Solicitations Act prohibits calling outside of the times of 8:00 a.m. and 9:00 p.m., blocking a caller ID transmission or transmitting a false caller ID, and calling consumers that have asked to be placed on the Federal Do Not Call list. Consumer initiated calls are exempt from this Act. Violation of the law results in a $1,000 penalty for the first violation and a $2,500 penalty for any violation after the first.

**Indiana**

Indiana regulates deceptive consumer sales by prohibiting unfair, abusive, or deceptive acts in the selling process. This includes misrepresenting the standard or quality of a good or service, misrepresenting that a product has approval or sponsorship when it does not, stating that a product can be delivered within a specified period of time when the seller knows that it cannot, and listing a fictitious or assumed business name. The state attorney general is responsible for the enforcement of this Act. The state attorney general is also responsible for unfair or deceptive practices in telemarketing. Telephone solicitations are generally regulated by the state and require that telemarketers and their agents register with the state. Specifically excluded from the state telemarketing laws are consumer-initiated transactions. Violation of the law results in a $10,000 penalty for the first violation and a $25,000 penalty for any violation after the first.

**Iowa**

In Iowa, unfair practice, false pretense, promise, or misrepresentation, and deception in the selling of a product to a consumer are broadly prohibited. The attorney general is
responsible for the enforcement of this law. There is no separate law that regulates telemarketing in the state of Iowa. Sales are broadly regulated under the same deceptive practices act as any other type of sales. As such, the attorney general is still the person responsible for enforcement. There is no set penalty for violation of the law.

**Kansas**

In Kansas, deceptive acts and practices are illegal and include stating that goods and services have sponsorship or approval when they do not, representing that the goods are of a standard or quality which they are not, misrepresentation of material facts about a good or service, and misrepresentation about the use of a product when it has not been proven. Unconscionable acts such as a consumer being unable to receive material benefit from the transaction or the seller making a misleading statement of opinion that the consumer relied on to the consumer’s detriment are also prohibited by law. The attorney general is responsible for enforcement of the laws regulating unconscionable and deceptive acts. The Kansas No Call Act requires that telemarketers remove the number of any person who requests that their name and number be added to the Do Not Call list for the state of Kansas. The attorney general is responsible for the enforcement of this Act. In Kansas, consumers have a private right of action for actual damages. Penalties also include a $10,000 fine for violation of the law and a $20,000 fine if that violation was willful.

**Kentucky**

In Kentucky, unfair, unconscionable, false, and deceptive acts in trade or commerce are broadly prohibited. Kentucky regulates the use of automated calling equipment, requiring that no calls are made outside of the restricted calling hours of 8:00 a.m. and 9:00
p.m., that within twenty-five seconds of the call being made a person is available to answer the call on behalf of the person or organization making the call, and that the automated equipment does not call nursing homes, police stations, fire protection agencies, hospitals, or numbers that are removed from the telephone directory at the consumer’s request.\textsuperscript{942} The law does not prohibit the use in the event of a consumer initiated request.\textsuperscript{943} The Department of Law is responsible for the enforcement of these laws.\textsuperscript{944} In Kentucky, violation of the law is a class D felony and a $2,000 per violation fine. That increases to $10,000 per violation if the victim is over sixty.\textsuperscript{945}

\textbf{Louisiana}

Louisiana has a broad statute that makes any unfair methods of competition and deceptive acts or practices while conducting any trade or commerce unlawful.\textsuperscript{946} The law gives the authority to the attorney general to make any rules or regulations surrounding the enforcement or interpretation of this law.\textsuperscript{947} Louisiana prohibits calling during a state of emergency declared by the governor and requires that telemarketers remove numbers on the Federal Do Not Call list.\textsuperscript{948} The Louisiana Public Services Commission is responsible for the enforcement of the state’s telemarketing laws.\textsuperscript{949} Violation of the law results in a $1,500 penalty per violation if the victim is less than sixty, a $3,000 per violation penalty if the victim is older than sixty, and a $10,000 violation if the telemarketer was not registered or if they failed to screen the calls against the Federal Do Not Call List.\textsuperscript{950}

\textbf{Maine}

Maine broadly prohibits unfair or deceptive acts in trade or commerce and gives the attorney general the power to promulgate rules and interpretations of the law.\textsuperscript{951}
Telemarketers are required to remove names located on the State or Federal Do Not Call list. Furthermore, telemarketers may not call outside of the restricted calling hours of 8:00 a.m. and 9:00 p.m. and they may not block the transmission of a caller ID. Regulation of telemarketers is the responsibility of the state’s Consumer Protection Division. Specifically excluded from the law are consumer-initiated requests. Violation of the law results in a $10,000 penalty for the first violation and a $25,000 violation for each subsequent violation.

**Maryland**

Maryland law makes it unlawful to have used any deceptive acts or practices in trade or commerce including, but not limited to, in the sale of goods or services, the offer of sale of goods or services, the offer of sale of course credit for educational purposes, and the extension and collection of consumer credit. Falsely representing a product to mislead a consumer, representing that a good has a sponsorship or approval when it does not, and representing that a good is of a particular quality or grade when it is not are all forms of deceptive practices under Maryland law. The Maryland attorney general is responsible for consumer protection in the state including the violation of any telemarketing laws. The Maryland Telephone Solicitations Act is the telemarketing law for the state of Maryland, although other protections appear in different subsections of the law. Generally speaking, telemarketers must not be deceptive in their practices, must provide a written contract of the sale of goods or services when a sale is made over the phone, and must comply with all federal telemarketing laws. Consumer initiated inquiries are exempt from this regulation. Maryland has no specific penalties for violation of the law.
Massachusetts

In Massachusetts, unfair or deceptive acts in trade or commerce are broadly prohibited. The attorney general has the power to interpret this law and make rules to enforce it, but the interpretation of the law must be guided by the federal courts and the Federal Trade Commission. The attorney general is responsible for the enforcement of this law. Telephone solicitation is regulated in the state of Massachusetts. Under Massachusetts's law, a telemarketer may not make an unsolicited phone call outside of the hours of 8:00 a.m. and 8:00 p.m. and must not make calls to any individual whose name appears on the Federal or State Do Not Call list. Furthermore, telemarketers may not block caller IDs or intentionally misrepresent a caller ID number. The Office of Consumer Affairs and Business Regulation has the power to promulgate rules and regulations as necessary for the enforcement of these laws. The attorney general is ultimately responsible to enforce the law. Customer initiated inquiries are exempt from this Act. Violation of the law results in a penalty of $5,000 and consumers have a private right of action to sue for damages.

Michigan

Michigan law makes illegal unfair, unconscionable, or deceptive practices in the sale or trade of goods or services. This includes, but is not limited to, causing confusion as to the sponsorship, approval, or certification of a good or service, representing that a good or service is of a certain quality or has benefits when it does not, and taking advantage of a consumer’s disability, illiteracy, or inability to understand in the sale of a good or service. The attorney general is responsible for the enforcement of these laws. The Michigan
Home Solicitations Act regulates telemarketing in the state of Michigan. Under the Act, a telemarketer may not block a caller ID and may not call Michigan residents on the Federal Do Not Call list. This excludes consumer initiated inquiries. The Public Services Commission is responsible for the enforcement of this Act. Consumers have the right to sue for actual damages or the state can fine the telemarketer $250 per violation, whichever is greater.

**Minnesota**

The attorney general is responsible for the enforcement of laws regulating unlawful practices in business and trade in Minnesota. False statements in advertising are strictly prohibited. In Minnesota, the law prohibits any fraud, false pretense, misleading statement, or deceptive practice in the sale of a good or service. Minnesota law regulates the use of automatic dialing and calling devices when there is not an established business relationship or customer initiated inquiry. Broadcast messaging in the state is prohibited unless a live caller, who obtains consent before playing the message, precedes the message. Minnesota regulates calling hours for telemarketers limiting the calling period to between 9:00 a.m. and 9:00 p.m. Violation of the law results in a $1,000 per violation penalty.

**Mississippi**

The Office of Consumer Protection, which is housed in the Office of the Attorney General is responsible for the enforcement of unfair and deceptive trade practices within the state. Specifically prohibited acts include, but are not limited to, misrepresentation of the approval or sponsorship of a product, representing that a product has benefits which it does not have, and representing that goods are of a certain quality when they are not.
Mississippi regulates telemarketing through the Public Services Commission. The Mississippi Telephonic Sales Act requires telemarketers to purchase and maintain the States No Call list.\textsuperscript{983} This creation of the list was also established as part of the Act, giving Mississippi residents the opportunity to place their name on both a Federal and a State Do Not Call list.\textsuperscript{984} Unsolicited telephone calls may only be made between 8:00 a.m. and 8:00 p.m., Monday through Saturday. Law prohibits calling on Sunday.\textsuperscript{985} Violation of the law results in a $5,000 per violation penalty.\textsuperscript{986}

**Missouri**

Missouri regulates unfair and deceptive practices in trade and commerce including any deception or fraud about a product and any misrepresentation about a good or service. The prosecuting attorney and circuit attorneys in their respective jurisdictions, and the attorney general throughout the state, are all responsible for the enforcement of the law.\textsuperscript{987} Nonconsumer initiated telemarketing is regulated by the state.\textsuperscript{988} Calls may only be made between 8:00 a.m. and 9:00 p.m. Also exempt from the law are phone calls where the sale of the good or service is not completed over the phone.\textsuperscript{989} Violation of the law results in a penalty of $5,000 per violation.\textsuperscript{990}

**Montana**

Montana broadly regulates unfair and deceptive practices in trade and commerce.\textsuperscript{991} Authority is given to the Department of Justice to promulgate rules, but the rules must be consistent with the interpretations of the Federal Trade Commission.\textsuperscript{992} The Department of Justice is responsible for the enforcement of the law.\textsuperscript{993} The Montana Telemarketing Registration and Fraud Prevention Act regulates unsolicited telemarking laws in the state.\textsuperscript{994}
The Department of Justice regulates telemarketing in Montana and all telemarketers must register with the department. Any calls initiated by the consumer are exempted. Abusive acts and practices including using obscene or threatening language, calling a residence outside of the restricted calling hours of 8:00 a.m. and 9:00 p.m., intentionally blocking caller IDs, and calling a person who has asked not to be called are all prohibited by law. Private right of action for actual damages or $5,000 penalty for each violation, whichever is greater for violation of the law.

**Nebraska**

Unfair methods of competition and unfair or deceptive acts in trade or commerce are illegal under Nebraska's Consumer Protection Act. The state attorney general is responsible for the enforcement of this law. The Automatic Dialing-Announcing Services Act regulates telemarketing in the state. The Public Services Commission regulates the provisions of this law. Cell phones are prohibited from being called in the state of Nebraska. Consumers with an established business relationship are exempted from the provisions of this Act.

**Nevada**

Deceptive and unfair practices in commerce are illegal in the state of Nevada. Knowingly making a false representation about a product or stating that a product has an association, approval, or authorization when it does not are considered deceptive. The attorney general, the Director of Business and Industry, and the Commissioner of Consumer Affairs all have responsibility for the enforcement of unfair and deceptive acts in trade and commerce. Telemarketing is limited to the hours of 8:00 a.m. and 9:00 p.m. Obscene
language, calling which a reasonable consumer would perceive as harassing or abusive, and blocking a caller ID transmission are all considered unfair and deceptive acts under the provisions of Nevada Law. A fine of $2,500 per violation of the law is leveraged in Nevada.

New Hampshire

New Hampshire law prohibits unfair and deceptive practices in trade or commerce. This includes, but is not limited to, causing confusion over the source or sponsorship of a good or services, leading a consumer to believe that a product has an approval, sponsorship, or certification when it does not, and representing that goods are of a quality that they are not. The Department of Justice and the Consumer Protection and Antitrust Bureau conduct enforcement and administration of these regulations. The attorney general brings action when needed. Registration is required for telemarketers in the state of New Hampshire. Telemarketers may not block the transmission of their caller ID. Telemarketers are prohibited from making any calls to consumers on the Federal Do Not Call list. In New Hampshire a fine of $5,000 is assigned for every violation of the law. Additionally, consumers have a private right of action and can sue for actual damages or $1,000, whichever is greater.

New Jersey

New Jersey broadly prohibits unfair and deceptive practices in marketing and advertising. This includes any false representation, unconscionable act, misrepresentation, concealment, suppression, or omission about the facts of a good or service. The attorney general is responsible for the enforcement of this law. Telemarketers in the state of New
Jersey are required to register with the state. The Division of Consumer Affairs in the Department of Law and Public Safety is responsible to maintain a State Do Not Call list. Telemarketers are prohibited from calling anyone on the Federal or State Do Not Call list. Law prohibits the blocking of caller ID and calling outside the prescribed hours of 8:00 a.m. and 9:00 p.m. Additionally, telemarketers must maintain a list of anyone who asks to no longer be called. Violation of the law in New Jersey results in a $10,000 fine for the first violation and a $20,000 fine for each subsequent violation.

New Mexico

New Mexico prohibits unfair, deceptive, and unconscionable acts in the sale of goods or services. This includes representing that goods are of a certain quality when they are not, stating that a good or service has a sponsorship or approval when it does not, representing that goods or services are of a certain quality when they are not, and causing confusion as to the approval, affiliation, or certification of a good or service. Unconscionable acts include selling a good or service to someone without the mental capacity to understand the good or service they are purchasing. The attorney general is responsible for the enforcement of these laws. Telemarketing in the state of New Mexico is regulated. Calls may only be made between 9:00 a.m. and 9:00 p.m. Telemarketers are prohibited from calling anyone on the Federal Do Not Call list. This law does not apply to consumers with an established business relationship. The attorney general is responsible for enforcement of the laws. Violation results in a $5,000 per violation fine. Additionally consumers have a private right of action and can sue for actual damages or $100 whichever is greater.
**New York**

Fraudulent acts are broadly prohibited under New York state law. These acts are defined as any scheme to defraud, any misrepresentation or suppression, and any false promise or unconscionable contract provision. Under the law, it must be persistent and repeating, meaning that the fraud happened more than once, and affected more than three individuals. The attorney general is responsible for the enforcement of these laws. Telemarketing is regulated in the state of New York. Telemarketers are prohibited from calling outside of the hours of 8:00 a.m. and 9:00 p.m. Specifically prohibited are the use of obscene or offensive language, any conduct which a reasonable person would find abusive or harassing, calling individuals who have stated that they do not wish to be called, or the use of any deceptive or misleading language. The secretary of state is responsible for the registration of all telemarketers in the state. Each violation of the law results in a $11,000 penalty.

**North Carolina**

Deceptive or unfair acts affecting commerce in the state of North Carolina are broadly prohibited. The attorney general is responsible for the enforcement of these laws. The Telephone Solicitations Act regulates telemarketing in the state of North Carolina. Telemarketers must ensure that unsolicited phone calls are not made to numbers on the Federal Do Not Call list. This law does not apply to an existing business relationship. Telemarketers may call anyone who inquired about a good or service for three months from the date of original inquiry. Telemarketers may call anyone who purchased a good or service from them for eighteen months after the purchase of a good or service.
The attorney general is responsible for the enforcement of these laws. Violation of the law results in a $500 penalty for the first violation, a $1,000 penalty for the second violation, and a $5,000 penalty for each violation over the third. Consumers also have a private right of action and may sue for actual damages.

**North Dakota**

Deceptive acts and practices including misrepresentation, false promises, or misrepresentation when a consumer relies on that information for the purchase of a good or service are illegal in the state of North Dakota. The state attorney general is responsible for the enforcement of this law. Telephone solicitations are regulated in the state of North Dakota. Telemarketers may not broadcast a prerecorded message unless prior consent is received. Telemarketers may not call outside of the restricted calling periods of 8:00 a.m. and 9:00 p.m. Telemarketers may not block their caller ID. Calling to numbers on the Federal Do Not Call list is prohibited. The attorney general is responsible for the enforcement of these laws. Customers with an established business relationship are exempt from this Act. In North Dakota, consumers have a private right of action and can sue for actual damages or $2,000, whichever is greater.

**Ohio**

Unfair and deceptive acts and practices are prohibited in Ohio. This includes, but is not limited to, representing that a good or service is of a certain quality when it is not and representing that a good or service has sponsorship, affiliation, or approval that it does not. Unconscionable acts are also prohibited under state law. These include taking advantage of a person’s inability to understand, due to mental infirmity, in the sale of a good
or service and entering into a transaction when there is no benefit to the consumer. The attorney general is responsible for the enforcement of these laws. Telemarketing is regulated in Ohio. False or misleading information given to the consumer in an attempt to receive payment and the blocking of a caller’s ID are prohibited. The attorney general is responsible for the enforcement of these laws and for creating any necessary administrative rules.

Oklahoma

The Oklahoma Consumer Protection Act regulates unfair and deceptive acts and practices in the state. These include, but are not limited to, stating that a good or product is of one brand when it is of another, stating that the good or service has the approval of an organization when it does not, and stating that the good or service is of a certain quality when it is of another. Under the same consumer protection act, use of an automatic dialing device is prohibited between the hours of 9:00 a.m. and 9:00 p.m. They can only be used in response to an inquiry or after the purchase of a good or service. The calling of randomly generated numbers is prohibited. The attorney general or district attorney can enforce the provisions of this Act. There are no specific fines for violation of the law in Oklahoma.

Oregon

Unfair and deceptive acts in trade and business are illegal under Oregon law. These include misrepresenting the quality of a good or service, stating that a good or service has the approval, sponsorship, or affiliation with a person or organization when they do not, and causing confusion as to the sponsorship, approval, or affiliation. Enforcement of these
laws is by the attorney general or the district attorney where the violation occurred. Telemarketing in the state of Oregon is regulated by the Department of Justice and registration is required. Telemarketers are prohibited from calling numbers on the Federal or State Do Not Call list. Blocking of caller ID is prohibited. This law also regulates those who have inquired about a good or service or that have an established business relationship. There are no specific fines for violation of the law in Oregon.

**Pennsylvania**

The Unfair Trade Practices and Consumer Protections Law is the law in Pennsylvania that regulates deceptive and fraudulent acts in commerce and trade. Under the law, it is illegal to cause confusion or misunderstanding as to the approval or sponsorship of a good or service, represent that a good or service has characteristics or qualities that it does not, and engage in any fraudulent or deceptive act that would create confusion or misunderstanding. The attorney general is responsible for the enforcement of this Act and may adopt rules that have the force of law. The Telemarketing Registration Act regulates telemarketing in the state of Pennsylvania. Under this law, educational institutions are excluded from registration, unless a professional solicitor is used. Outbound calling is restricted to the hours between 8:00 a.m. and 9:00 p.m., telemarketers may not block their caller ID, and telemarketers are prohibited from calling numbers on the Federal or State Do Not Call list. The Bureau of Consumer Protection is responsible for the enforcement of these laws. Violation of the law results in a penalty of $1,000 per violation if the victim is less than 60 and a $3,000 per violation if the victim is less than 60.
Rhode Island

Unfair or deceptive practices in the state of Rhode Island include causing confusion about the source, approval, or certification of a good or service and causing confusion about the affiliation, connection, or association. By law, unfair or deceptive acts and practices are illegal. The attorney general is responsible for the enforcement of this Act. The Telephone Solicitations Act governs telemarketing in Rhode Island. Registration is required for anyone wishing to telemarket to the residents of the state. Telemarketers must maintain a list of individuals who have asked not to be called. Telemarketing is not allowed on Sunday, calls may only be made on Saturday between the hours of 10:00 a.m. and 5:00 p.m., and during the week between the hours of 9:00 a.m. and 6:00 p.m. Calling on a state or federal holiday is also prohibited. There are no specific fines for violation of the laws in Rhode Island.

South Carolina

The South Carolina Unfair Trade Practices regulates unfair or deceptive advertisement in the selling of a good or service. Any unfair or deceptive acts and practices in trade or commerce are illegal in the state. The state attorney general is responsible for the enforcement of this Act. Unsolicited telephone calls are regulated in the state, as are voice broadcast messaging. The Department of Consumer Affairs is responsible for enforcement of the law. Telemarketers must maintain a list of individuals who ask to be removed from lists for future calling. Voice broadcasting may only be used in response to an established business relationship.
South Dakota

Unfair or deceptive acts in commerce are broadly prohibited in the state. The attorney general is responsible for the enforcement of these laws. Telemarketers must maintain a do not call list for customers who wish not to be called and must not call numbers on the Federal or State Do Not Call list. Telemarketers may only call between the hours of 9:00 a.m. and 9:00 p.m. Monday through Saturday. Sunday calling is prohibited. A fine of up to $5,000 may be assigned for each violation.

Tennessee

Unfair or deceptive acts in commerce are prohibited in Tennessee and include, but are not limited to, causing confusion as to the certification, affiliation, or connection with another, causing confusion as to the sponsorship or certification of a good or service, and using illustrations or statements that create the false impression of the quality of a good or service. The Division of Consumer Affairs in the Department of Commerce and Insurance is responsible for the enforcement of this law. The Consumer Telemarketing Protection Act of 1990 regulates telemarketing in the state. Distribution of prerecorded audio messages is prohibited by the state, unless there is an established business relationship. These calls are limited to the hours of 8:00 a.m. and 9:00 p.m. No calls may be made to consumers on the Federal Do Not Call list. Telemarketers are required to obtain a permit prior to calling. Violation of the law results in a $2,000 per violation penalty.

Texas

The Deceptive Trade Practices, Consumer Protection Act makes unfair and deceptive acts and practices in advertising and in the sale of goods or services. Specifically
prohibited, but not limited to, is misrepresentation about the quality of a good or service, stating that a good or service has the approval, sponsorship, or affiliation of an organization when it does not, and representing that a good or service is of a certain quality when it is not.\textsuperscript{1100} The Consumer Protection Division in the Office of the Attorney General is responsible for the enforcement of the law under this Act.\textsuperscript{1101} The Texas Telemarketing Discloser and Privacy Act regulates telemarketing in the state.\textsuperscript{1102} Specifically exempt are consumers with an existing business relationship or consumers who call or inquire about a product or service based on advertisements they have seen.\textsuperscript{1103} Texas maintains a separate Do Not Call list which includes state citizens who have asked to be put on the Federal Do Not Call list, as well as those who have asked to be put on the state’s list.\textsuperscript{1104} Telemarketers may not block their caller ID from being broadcast.\textsuperscript{1105} Both the attorney general and the Public Utilities Services Commission are responsible for the enforcement of these laws.\textsuperscript{1106} Penalties for violation of the laws include a $1,000 penalty for each violation or a $5,000 for each violation if it was willful.\textsuperscript{1107}

\textbf{Utah}

The Utah Consumer Sales Practices Act regulates sale and commerce in the state.\textsuperscript{1108} The Division of Consumer Protection is responsible for the enforcement of this law.\textsuperscript{1109} Specifically, prohibitions under the law include stating that a good or service is of a certain quality when it is of another, stating that a good or service has the approval or certification of an organization when it does not, stating that a good or service is of less cost than a similar good or service when it is not, soliciting or entering into an agreement with someone who does not have the mental capacity to enter into an agreement or benefit from the good
There are two laws that govern telemarketing in the state of Utah. The Telephone and Facsimile Solicitation Act prohibits actions include calling outside of the prescribed hours of 8:00 a.m. and 9:00 p.m., calling on a Sunday or a holiday, and blocking a caller ID transmission. The Division of Consumer Protection is responsible for the enforcement of this Act. The Telephone Fraud Prevention Act requires that telemarketers register with the state and pay a surety bond in order to telemarket within the state. In Utah, violation of the law results in a $2,500 penalty for each violation. Consumers have a private right of action and may sue for actual damages and legal fees or $500, whichever is greater.

**Vermont**

Vermont broadly prohibits unfair or deceptive acts in trade or practice. The attorney general is responsible for the enforcement of this law and the attorney general will be guided by the rulings of the Federal Trade Commission when determining an unfair act or practice. The telemarketing laws in the state of Vermont apply only to unsolicited phone calls and not to phone calls made to parties where an established business relationship existed or in response to an inquiry about a good or service. Telemarketers may not call anyone on the Federal Do-Not-Call list. Telemarketers making unsolicited phone calls must register with the Secretary of State. Enforcement is by private cause of action. Anyone may bring suit to the state supreme court for violation of telemarketing law. Violation of the law results in a $500 penalty for the first violation and a $1,000 penalty for each subsequent violation. Furthermore, if criminal charges are filed it can result in ten
months in prison and a $10,000 fine. Consumers also have a private right of action and can sue for actual damages.\textsuperscript{1122}

**Virginia**

The Virginia Consumer Protection Act prohibits misrepresentation including, but not limited to, the source, sponsorship or approval of a good or service, the association of affiliation of a good or service, and representing that a good or service is of a particular brand or quality when it is not.\textsuperscript{1123} The attorney general is responsible for the enforcement of these laws.\textsuperscript{1124} The Virginia Telephone Privacy Prevention Act is the law that regulates unsolicited calling in the state. Calling outside of the restricted calling time of 8:00 a.m. and 9:00 p.m. is prohibited.\textsuperscript{1125} Telemarketers may not continue to call consumers who state that they no longer wish to revive phone calls.\textsuperscript{1126} The Commissioner of the Department of Agriculture and Consumer Services and the attorney general are responsible for the enforcement of this Act.\textsuperscript{1127} Violation of the law results in a fine of $500 per violation or a $1,500 fine per violation if it was done willfully.\textsuperscript{1128}

**Washington**

Unfair and deceptive acts and practices in the sale of goods or services are broadly prohibited in the state of Washington.\textsuperscript{1129} The attorney general is responsible for the enforcement of consumer protections in the Washington Revised Code.\textsuperscript{1130} Washington regulates commercial telephone solicitation and defines that as an unsolicited call in the sale of a good or service.\textsuperscript{1131} Calling outside of the prescribed times of 8:00 a.m. and 9:00 p.m. is prohibited, as is calling with the intent to harass or intimidate.\textsuperscript{1132} Registration is required with the Department of Licensing, which may revoke licensure for violation of the law.\textsuperscript{1133}
The use of an automatic dialing devise for commercial telephone solicitation where an automatically broadcast message is played, rather than a live person, is prohibited in the state.\textsuperscript{1134} Penalties for violation include a $2,000 fine per violation and a private right of action for consumers to sue for actual damages.\textsuperscript{1135}

**West Virginia**

In West Virginia, unfair and deceptive acts and practices include, but are not limited to, causing confusion as to the source, sponsorship, or approval of a good or service, representing that a product or service has an approval, sponsorship, status, or affiliation when it does not, and representing that goods or services are of a certain quality when they are not.\textsuperscript{1136} Unfair and deceptive acts and practices are prohibited under West Virginia law.\textsuperscript{1137} The attorney general is responsible for the enforcement of this law and may make rules and regulations that help to interpret and define this part of the law. When this is done, the attorney general is required to interpret and make rules in alignment with the Federal Trade Commission.\textsuperscript{1138}

Telemarketing in West Virginia is regulated by the West Virginia Telemarketing Act.\textsuperscript{1139} Telemarketing is broadly defined in the state and includes both solicited and unsolicited inquires where the intent was to drive the lead to a telemarketer.\textsuperscript{1140} Registration in the state is required for all telemarketers with the Secretary of the Department of Tax and Revenue.\textsuperscript{1141} Abusive telemarketing is illegal in the state and includes threatening or intimidating a caller, using profane language, harassing a caller, calling a person who has asked not to be called, calling outside of the prescribed calling hours of 8:00 a.m. and 8:00
p.m., or use of any techniques that would be considered abusive to the reasonable consumer.\textsuperscript{1142} The attorney general is responsible for the enforcement of this Act.\textsuperscript{1143}

\textbf{Wisconsin}

Unfair trade practices are broadly prohibited in the state.\textsuperscript{1144} The Department of Justice and the Department of Commerce are responsible for the enforcement of the law.\textsuperscript{1145} The Department of Agriculture, Trade, and Consumer Protection is responsible for the regulation and registration of telemarketers in the state.\textsuperscript{1146} Telemarketing is defined as an unsolicited call or text to a consumer with the attempt to sell a good or service.\textsuperscript{1147} Unsolicited, prerecorded messages, making phone calls to numbers on the Federal and State Do Not Call list, or making any phone calls to a consumer who has asked not to be called are prohibited by law.\textsuperscript{1148} Each violation of the law results in a $100 penalty.\textsuperscript{1149}

\textbf{Wyoming}

Unfair and deceptive acts and practices are regulated under the Wyoming Consumer Protection Act.\textsuperscript{1150} Under the Act, representing that a good or product has a sponsorship, approval, or affiliation that it does not and stating that a good or product is of a certain quality when it is not are both forms of unfair and deceptive acts and practices.\textsuperscript{1151} Telephone solicitations are also regulated under the Wyoming Consumer Protection Act. These include unsolicited phone calls and do not include phone calls in response to an inquiry or to a person with an established business relationship. Blocking caller ID or calling outside the business hours establish by the FTC are prohibited.\textsuperscript{1152} Violation of the law results in a $500 penalty for the first violation, a $2,500 penalty for the second violation, and a $5,000 penalty for each subsequent violation.\textsuperscript{1153}
Summary

A patchwork of regulations protects consumers across the United States (see Appendix B). Consumers have different protections and levels of protections based upon their geographic location. A review of the federal and state laws shows that consumers are not protected equally across all fifty states. Telemarketing law varies from state to state making it confusing for both the business and the consumer to understand the law. Unfair and deceptive acts and practices seem to be fairly consistent across the states, but the bodies that enforce those laws are different and each state law is subject to the state’s court for interpretation.

In order to comply across the states, for-profit education providers should consider following a few simple rules: (1) Make sure every advertisement is a true reflection of the goods and services being offered. (2) Only advertise programs that currently exist. (3) Call only those prospective students that have inquired about your program in the last 18 months. (4) Call only Monday through Saturday from 9:00 a.m. to 8:00 p.m. in the state’s time zone. (5) Call no more than once per day. (6) Only a live operator should place the call. By following these rules a for-profit institution can ensure they are in compliance with the law across all fifty states.

This chapter demonstrated the variability in state marketing and telecommunication. It supported the thesis specifically showing the difference in laws from state to state. The differing regulations make it is impossible for consumers to have equal treatment under the law.
CHAPTER VI
GAINFUL EMPLOYMENT

Intent

This chapter examines the federal laws that regulate the gainful employment of students attending for-profit postsecondary institutions in order to address the study’s third research question. Through the Higher Education Act, Congress required for-profit colleges to guarantee that the programs that they offered would lead to the gainful employment of their students. This chapter will demonstrate that this statutory requirement was not enforced by the DOE because in its fifty-year history, the term gainful employment was never defined by Congress. The Department of Education, recently defined the term provide for some additional oversight. Even with this additional regulation in place, this chapter demonstrates the limited nature of the federal government’s oversight.

Introduction

The Higher Education Act was passed by Congress and signed into law by President Lyndon B. Johnston in 1965. The stated purpose of the law was to strengthen the resources of colleges and universities and provide financial assistance for students in post-secondary and higher education programs. Among the provisions of the Act were the establishment of federally backed loans made payable to the student and the inclusion of federal grants that were paid directly to the institution.

The term gainful employment was first introduced by Congress in the Higher Education Act of 1965. In short, Congress wanted to ensure that students eligible for Title IV funding were using those federal dollars at institutions that provided for gainful
employment in a recognized field.\textsuperscript{1158} However, Congress failed to define in the Act the terms “gainful employment” or “recognized occupation.”\textsuperscript{1159} The terms were left undefined for many years. The controversy surrounding gainful employment has been the Department of Education’s attempt to define those terms in order to implement the Act. Chapter six is focused on the Higher Education Act as it relates specifically to gainful employment regulations as defined by the DOE. The chapter examined how Title IV funding is used as the tool for implanting regulation at the federal level. The chapter also identified the limitations of federal regulation. Gainful employment is an undefined term in the Higher Education Act. While not defined in the first thirty plus years of the law’s existence, increasing social concern over the quality of education and the use of federal funds in for-profit education led the DOE to attempt to define the term and by doing so regulate the for-profit industry. The metrics used to define gainful employment were struck down by the courts. This was because of lack of adequate time for the industry to comment and the DOE to respond under the Administrative Services Act. New regulations were proposed and became effective July 1, 2015. For the practitioner of education law, the current regulations are provided in addition to flow charts that help to explain the implementation and reporting requirements mandated by the law.

History

In 1965, Congress in order to support students entering postsecondary education developed two federal loan insurance programs, the Higher Education Act of 1965 and the National Vocational Student Loan Insurance Act.\textsuperscript{1160} The Higher Education Act limited its eligibility to students attending nonprofit colleges either seeking an academic degree or for a
program more than one year in length that led to gainful employment in a recognized occupation but did not terminate in an academic degree. Nursing programs were specifically listed as eligible for funding. At the time of the inception of the Act, this was limited to institutions that: admitted students only after proof of completion of a secondary education; that were legally authorized in the state to do business; are public or nonprofit; and are accredited by a regional or national accrediting body recognized by the United States Department of Education. The National Vocational Student Loan Insurance Act, in contrast, extended benefits to for-profit institutions but required that students seek a program that provided postsecondary technical or vocational education that prepared students for useful employment.

In 1972, a substantial overhaul of the Higher Education Act was passed by Congress. One of the major changes in the Act was the merging of the National Vocational Student Loan Insurance Act and the Higher Education Act. Under the Higher Education Act, eligible students became those attending institutions of higher education, and the National Vocational Student Loan Insurance Act was changed to cover students attending vocational schools. This change in the Act created a bifurcated system. While students attending nonprofit and public institutions could receive federal financial aid for any program that resulted in an academic degree, for-profit institutions were limited to programs that provided for gainful employment in a recognized occupation, regardless of whether the program resulted in an academic degree.

Gainful employment in a recognized occupation was not defined in the reauthorization of 1972, or in subsequent authorizations of the Act. The Higher
Education Act of 1965 was reauthorized in 1972, 1976, 1980, 1986, 1992, 1998, and 2008. The law is set to expire every five years and requires congressional approval for every authorization. While Congress has made many changes and amendments to the law over the years, the language surrounded the inclusion of for-profit colleges and universities remained stable until 1992 when the term vocational school was replaced with proprietary institution of higher education, meaning any for-profit institution or postsecondary vocational institution. Both institutional types were required to prepare students for gainful employment in a recognized occupation.

After a forty-five day public comment period, the Department of Education proposed final rules on November 1, 2010 to become effective July 1, 2011, which would define gainful employment and recognized occupation. These rules were proposed over fifty years after the original language in the passage of the Higher Education Act of 1965, and its amended language that included proprietary institutions in 1972.

**Gainful Employment**

For public and nonprofit institutions, a gainful employment program is one that is less than one year in length and does not result in the awarding of an academic degree, such as an associate’s degree. Virtually all programs at for-profit institutions are gainful employment programs, with two exceptions. Institutions that offer a bachelor’s degree in liberal arts that has been continuously provided by the institution since January 1st, 2009, are not required to include that program in gainful employment data. Institutions that offer a preparatory course of study for a program leading to an associates or bachelor’s degree that
is not offered by that institution or another proprietary college are not required to submit gainful employment data for that program (see Figure 5).\textsuperscript{1171}

In addition to defining gainful employment, the Department of Education needed to define recognized occupation. Four possibilities were identified as sources that could be used to define gainful employment after program completion.\textsuperscript{1172} The Department of Education defines a recognized occupation as one that correlates to a standard occupational classification as defined by the Office of Budget Management, an Occupational Information Network Code as defined by the Department of Labor, or an occupation identified by the Secretary of Education in consultation with the Secretary of Labor.\textsuperscript{1173}

**Authority to Make Regulations**

There are four sources that give the Department of Education authority to make regulations. (1) The General Education Provisions Act gives the Secretary of Education the power to make, rescind, amend, promulgate, and issue regulations, rules, and operations of programs administered by the Department of Education.\textsuperscript{1174} In this case, Title IV funding is administered by the Department, and since indirect recipients (i.e., postsecondary institutions) of Title IV funding must demonstrate that they are training students for gainful employment in a recognized occupation, the department is forced to define gainful employment and recognized occupation if Congress does not do so in order to implement the regulation.\textsuperscript{1175} (2) The Department of Education Organization Act authorizes the secretary to prescribe rules and regulations as necessary to appropriately administer the functions of the secretary or department.\textsuperscript{1176} (3) In order to appropriately administer Title IV funds, the Department must define gainful employment and recognized occupation, if
Figure 5. Title IV Eligibility
Congress does not. According to the language of the Act, in order to be eligible for Title IV funding, nonprofit programs which do not result in an academic credential and all for-profit programs must demonstrate that they train students for gainful employment in a recognized occupation. (4) In the case APSCU v. Duncan, the court specifically considered the Department’s authority to define what it means to prepare students for gainful employment and requires students to report and disclose information about their gainful employment programs.

**Implementation of Regulations**

In 2010, the United States Department of Education released rules that defined gainful employment. It would be measured through a combination of student loan default rates and debt to income ratios, and the college or university would certify that each of its programs met the state and federal licensure requirements for that program, as well as any required accreditation. Under the rules, institutions demonstrate gainful employment in one of three ways: (1) have no more than a 35% default rate, defined as 65% of all students reducing their debt by at least $1 over three years; (2) show that students paying back student loans at a rate that is not beyond 30% of discretionary spending; (3) or 12% of total earnings. Under this framework, institutions failing to meet the guidelines three times in four years become ineligible for Title IV funding.

In 2010, a federal judge ruled, in response to a lawsuit filed by the Association of Private Sector Colleges and Employees, the trade group for for-profit colleges and universities, that the Department of Education had failed to justify the reason why a minimum of a 35% default rate on student loans qualified as measure for gainful
employment. Because this measure was considered arbitrary, and because this default rate was intertwined with so many other parts of the regulations, the rules were struck down and sent back to the Department of Education for review.

**Current regulations.** The United States Department of Education released new regulations regarding gainful employment after a lengthy rules making process and dropped the federal loan default rate as a measure of gainful employment. The new regulations are similar to the previous version struck down by the courts, but now require a two-part test to ensure that graduates are being prepared for gainful employment, essentially dropping the 35% default rate as a measure of gainful employment and moving forward with all other regulations. The Notice of Proposed Rule Making for this most recent set of regulations was posted on March 24, 2014.

Gainful employment is determined using a debt to income ratio. In order for a program to meet the definition of gainful employment, graduates of its programs have a repayment rate that is less than or equal to 20% of their discretionary income, or an annual earnings rate which is less than or equal to 8%. If the student cohort discretionary income rate is greater than 30%, or if the annual earning rate is zero or less, or if the discretionary income rate is greater than 12% and the annual earning rate is zero or less, then the program is considered failing. A program with a discretionary income rate greater than 20% but greater than or equal to 30%, or the annual earning rate is greater then 8% but less then or equal to 12%, is considered in the zone. Programs with a combination of zone and failing for four years become ineligible for Title IV funding. Programs that fail two out of three years become ineligible for funding (see Figure 6).
Summary

Final gainful employment regulations went into effect July 1, 2015 (see Appendix D). The rules and regulations are already under challenge. In November 2014, the Association of Private Sector Colleges and Universities (hereinafter APSCU) again filed suit in federal court arguing that the new rules are arbitrary. The federal government stands by the regulations citing the need for regulations that protect students and taxpayers and bring transparency to vocational programs.

Based upon this researcher’s review or prior history involving the rules and regulations surrounding Title IV funding, the amount of Title IV dollars available to students, and the percentage of those dollars that fund the for-profit college model, it is likely that the for-profit sector will continue to challenge any regulations put forth by the Department of Education. Based upon the public pressure being placed on for-profit institutions, it seems unlikely that the Department of Education will back down from the proposed rules unless Congressional action is taken. Given that it has been over fifty years since the original inception of the Act, it seems unlikely that Congress will be willing to intervene.

Because all federal oversight is tied through the Higher Education Act to Title IV funding, any institution that does not receive Title IV funding is not required to follow the auspices of the Act. Furthermore, the Higher Education Act does not specifically regulate marketing or advertising of programs or services, although limitations are placed on the marketing and advertisement of student loans. Given the weakness of the federal government’s ability to provide oversight and consumer protection to the consumer through
both the FTC and the Higher Education Act, it is clear that a stronger centralized body of oversight with the ability to regulate state authorization, consumer protections as they relate to marketing and telecommunications law, and the employment of graduates from for-profit institutions is necessary.
What is my program's annual loan repayment?

Associate, undergraduate certificate, post-baccalaureate certificate

Bachelor’s degree

Master’s, graduate certificate

Master’s, professional, or doctoral degree

Calculated undergraduate interest rate = average federal unsubsidized interest rate over 3 year cohort period

Calculated graduate interest rate = average federal unsubsidized graduate interest rate over 3 year cohort period

Calculated graduate interest rate = average federal unsubsidized graduate interest rate over 6 year cohort period

Median cohort loan debt over a 3 year period amortized over a 10 year period using calculated undergraduate interest rates

Median cohort loan debt over a 6 year period amortized over a 10 year period using calculated undergraduate interest rates

Median cohort loan debt over a 6 year period amortized over a 20 year period using calculated graduate interest rates

Median cohort loan debt over a 6 year period amortized over a 20 year period using calculated graduate interest rates

Discretionary income rate = annual loan payment/the higher, mean or median, of annual earning – (1.5 * annual poverty guideline)

Annual earning rate = annual loan payment/the higher, mean or median, of annual earning – (1.5 * annual poverty guideline)

Passing = discretionary income > 30% or annual earning rate ≤ 8%

Zone = discretionary income > 20% but ≤ 30% or annual earning rate > 8% but ≤ 12%

Fail = discretionary income > 30% or annual earning rate > 12%

Pass = 2 out of 3 years

Zone = combo of fail and zone 3 out of 4 years

Fail = 1 out of 3 years

2 out of 3 years

Fail

1 out of 3 years

Pass

Zone

Figure 6. Gainful Employment Framework
CHAPTER VII

INTERPRETATION BY THE COURTS

Intent

The intent of this chapter is to answer the fourth and final research question posed as part of this study: How have the courts interpreted the statutes and regulations identified in chapters four, five, and six? While reading of black letter law is important to understand laws as they were written, it is imperative to see how these laws were put into effect by the courts. Oftentimes laws are left open for judicial interpretation, and past precedent can affect enforcement of the law. This chapter will show that there is, in fact, limited federal oversight and dramatic differences in the laws being reviewed by the state courts.

Introduction

In a review of court cases surrounding for-profit colleges, lawsuits have been filed under two broad areas: (1) The ability of the federal government to regulate activities under the Higher Education Act, specifically by denying an institution’s ability to receive Title IV funding (2) Consumer protection statutes at the state or federal level. According to the National Consumer Law Center, over the past ten years five federal agencies have initiated investigations against accredited for-profit schools. Based upon their research of media reports, school announcements, and other publically available resources, there are sixty-one active investigations and lawsuits. The 2012 U.S. Senate Committee on Health, Education, Labor, and Pensions issued a report highlighting abuses in for-profit institutions that resulted in a wave of lawsuits against the for-profit education sector. In 2014, the Consumer Protections Bureau filed a lawsuit in federal court against ITT Technical Institute
alleging that students were mislead in future job prospects, pressured into loans that were predatory in nature, misleading students as to the transferability of credits, and pushing students into private loans they were likely to default.\textsuperscript{1199}

**Title IV Funding**

In order for an institution to accept Title IV funding, a postsecondary institution must qualify as an institution of higher education and be legally authorized in the state it is located to offer higher education.\textsuperscript{1200} Furthermore, the institution must enter into a program participation agreement with the secretary of education. Finally the school must not misrepresent its programs, services, or employability of its graduates.\textsuperscript{1201}

In 2009, the Department engaged in a rulemaking process to provide further clarification to the regulations.\textsuperscript{1202} The regulations provide three areas of clarification: when an institution may operate within a given state; the proper use of the compensation model; and issues related to misrepresentation.\textsuperscript{1203} While before, authorization in the institution’s home state was enough to meet the statutory requirement, the Department would now require that institutions become authorized in every state in which they do business.\textsuperscript{1204} This would include any online degree programs offered through the institution to residents of another state.\textsuperscript{1205} Additionally, the Department further clarified the compensation model for incentive payments. The compensation model clarification provided that recruiters could receive pay raises based upon retention but not admission.\textsuperscript{1206} Finally the Department clarified its stance on misrepresentation.\textsuperscript{1207} According to DOE any statement that has the likelihood of deceiving or has the intent to confuse would be considered misrepresentation.\textsuperscript{1208}
In Career College Association v. Duncan, the APSCU filed suit challenging all new regulations under the Administrative Procedures Act. Upon summary judgment the court upheld the incentive compensation rules requiring the department to better explain its decision to use graduation dates as a reason to change its compensation regulations and to respond to comments about how these new regulations might affect diversity outreach. The court upheld the regulations in part and vacated in part. The DOE was required to add additional protections for certified schools and to revise the rules covering misrepresentation. According to the court, the Higher Education Act does not exclude true statements that have a tendency to confuse as part of the definition of misrepresentation. Finally, the court upheld the validity of the State Authorizations Rule, but vacated the rule based upon the fact that the creation of the rule violated the Administrative Procedures Act.

Upon appeal of the administrative ruling in the case of APCSU v. Duncan, the U.S. District Court required the department to provide clarification of its incentive rule and graduation rates stating that the payment of recruiters based upon the graduation rate of their students was consistent with the Higher Education Act. Additionally, the court overturned the rule that confusing statements were intentional misrepresentations. Finally while the court upheld the validly of the State Authorization Rule, the court vacated the rule because it violated the Administrative Procedures Act. This was because the Department did not give institutions adequate time during the rulemaking process for dissenters to review and provide commentary.
Compliance with State Laws for Title IV Funding

There are no federal laws that require institutions that have distance education programs to be authorized in the state that where their consumers live. However, individual states have laws that require institutional authorization for out-of-state providers. There are no current or past court records of violation of these laws. This may be due to the fact that violation generally results in a cease and desist letter to the offending organization with instructions to stop violating the law.

Sistema Universitario v. Riley, is a case about the ability of the Department of Education, through the Secretary, to withhold funds. Sistema Universitario is a private university system that operates three educational institutions in Puerto Rico. The Secretary of Education determined that the university system did not meet the eligibility requirements for all of its programs under Title IV of the Higher Education Act.

The system expanded to over sixty campuses through a community based extension program, Programa de Servicios Especiales, but did not receive authorization from the Department of Education (hereinafter DOE) to operate in all of its campus locations. The university did not notify the Secretary of these delivery sites, nor did they obtain approval from the secretary to expand to the sites as is required by Title IV implementation regulations.

Upon an audit from the DOE, the Secretary found that the institution was not in compliance with Title IV funding rules because it was operating in locations it was not authorized under the program participation agreement. The institution was held liable for $1,712,540 in student loan funds distributed while the institution was operating without
authorization. Sistema filed suit claiming that it was not required to notify the Secretary. The court granted summary judgment to the Secretary. Upon appeal, the ruling was upheld in that it was the sole discretion of the Secretary of Education to determine if an institution had obtained legal authorization and met the criteria for distribution of Title IV funding.1217

In the case San Juan City College v. United States, the DOE incorrectly assumed that the institution had closed permanently and withheld federal funding. San Juan City College was a Puerto Rican Private College that operated from 1977 until 1996. In 1994 the institution entered into a program participation agreement with the Department of Education giving its students access to Title IV funding. Funds from Title IV funding became the major portion of the institution’s budget and it became reliant on them for survival. In February 1995, the Puerto Rican tax office made a visit to the school to conduct an inventory related to tax debt. The tax officials closed the school for two weeks and classes resumed immediately following. The semester was extended to make up all missed classes.

On February 14th, 1995 DOE officials sent a certified letter stating that it had been advised that the institution was closed and it was no longer eligible for Title IV funding. This assumption was incorrect and the institution made multiple attempts to inform the DOE that this was not the case. The institution brought suit against the federal government for loss of income during the period when federal funds were withheld. However, under the contract with the federal government the school was only entitled to equitable relief and no additional funding regardless of the economic impact that resulted from the DOE’s error. Because the institution made whole the individuals who should have received funding during
the erroneous period, the school was entitled to no further monetary damages and the suit was dismissed.\textsuperscript{1218}

In the case of Lee v. Corinthian Colleges, the plaintiffs alleged that the defendant made false statements to the federal government regarding its recruiting practices.\textsuperscript{1219} The plaintiffs claimed that Corinthian violated the Higher Education Act by increasing the salary of admissions counselors based on student enrollment and established quotas of new students that admissions counselors had to meet to remain employed. Recruiters who exceeded their quotas received a 2.5% to 10% increase in their base salaries every six months.\textsuperscript{1220}

The plaintiffs alleged that Corinthians practices violated the incentive compensation ban in the Higher Education Act. The United States Court of Appeals for the Ninth Circuit found that U.S. Department of Education allows for increases to base pay twice per year based upon performance. As such, there was no violation in reporting to the federal government was found and the case was dismissed.\textsuperscript{1221}

Sobek v. Education Management was a whistleblower or qui tam lawsuit. Jason Sobek, a former employee of Education Management Corporation (hereinafter EDMC), filed a lawsuit against his employer on behalf of the government alleging that Education Management committed fraud against the federal government.

Sobek was an Associate Director of Admissions from June 2008 to November 2010 for Education Management Corporation.\textsuperscript{1222} Sobek in a six count second amendment lawsuit argued that over a nine-year period, EDMC and its affiliate colleges lied to students regarding their accreditation status and employment outcomes.\textsuperscript{1223} The plaintiff argued that
EDMC falsified information to the federal government including: the accreditation of its nursing programs; job placement statistics; the cost of its educational programs; the satisfactory academic progress of its students; violation of the incentive compensation ban; and failure to report students that should have been dropped from school rolls.

On October 22nd, 2012, Magistrate Judge Cynthia Eddy recommended that the cost of educational program, violation of the incentive compensation ban, and failure to report students dropped from school roles be dismissed. Both parties agreed that violation of the incentive compensation ban should be dropped from the suit and Sobek conceded to the magistrate on the cost of educational programs and the reporting of students who should have been dropped from school rolls. At odds between the parties were the claims that EDMC falsified to the federal government the accreditation of its nursing programs, its job placement statistics, and the satisfactory academic progress of its students in violation of the False Claims Act. In order to file a False Claims Act the defendant must be presented with a false or fraudulent claim against the United States; The claim was presented to an agency or a contractor of the United States; The defendant knew that the claim was false or fraudulent. In order to support a claim under the False Acts Claim, the fraud must be specific and state the circumstances constituting fraud, while intent knowledge or other conditions may be alleged. Additionally the regulations must require an objective standard and be specific. Since EDMC signed a program participation agreement, the court held that the regulations were specific and that the plaintiff had alleged claims of fraud with enough specificity that the suit could move forward. The case will now move to the discovery phase.
In the case of Thompson v. Art Institute International Minnesota owners of for-profit colleges, the plaintiff failed to support his claim that his degree was useless and that his admissions counselors committed fraud by promising him that his credits would transfer. The plaintiff alleged that after receiving his associate’s degree from the Art Institute of Chicago, he enrolled in an Art Institute in Minnesota. The plaintiff argued that he was promised that the credits he earned would transfer to a Bachelor of Arts in Film. After some time he returned to Denver where he could receive a degree in film, where he took several quarters of credit hours. After a continuation of coursework at multiple campuses of the Art Institute the plaintiff’s Stafford loans ran out and he was left with over $100,000 in debt. After having reviewed the claim against the defendant, the court determined that the plaintiff never identified what federal law had been violated and the judge dismissed the claim for lack of jurisdiction.

Consumer Protection Violations

Violations of consumer protections that reach the courts are more common then those violations that effect Title IV funding. Each state has consumer protection and business laws, but the requirements of these laws vary from state to state. Violation of these laws can result in individual, class action, or lawsuits from the state government on behalf of a group of citizens.

Individual Action

Individual actions occur when an individual files suit against an organization. This has occurred in a variety of circumstances, but most often occurs when individuals feel that they were promised something that was not delivered as part of their transaction with the
institution. If many people file individual suits around a theme, the defendant can request that these lawsuits be grouped together into a class action lawsuit.

**Arbitration.** The Federal Arbitration Act applies to all contracts involving interstate commerce and sets forth the principle that arbitration is a matter of contract. Furthermore, it sets the policy that any doubts about an issue being resolved by arbitration should be resolved in favor of arbitration.\(^{1228}\) When arbitration is part of the enrollment agreement, the courts have generally upheld that arbitration must be completed prior to any further hearing by the courts.

In the case of Mueller v. Career Education Corporation, the plaintiff claimed fraudulent misrepresentation in recruitment.\(^{1229}\) Stephanie Mueller enrolled in a Sanford Brown College in Fenton Missouri with the goal of becoming a respiratory therapist. As part of the enrollment agreement that the plaintiff signed, the refund policy, the policy regarding transfer of credits, and the total cost of tuition and fees ($29,185) were conspicuously listed. In this case, the plaintiff argued that there were misrepresentations by Sanford Brown College including, Fraudulent Misrepresentation, Fraud by Concealment or Omission, and Violation of Missouri Merchandising Practices Act. The document and enrollment form that she signed required arbitration prior to any court hearing. The court granted judgment for the defendant and dismissed the case pending arbitration.\(^{1230}\)

In the class action lawsuit Deck v. Miami Jacobs Business College Company, the plaintiffs claimed misrepresentation on enrollment material and breach of contract.\(^{1231}\) Specifically, the plaintiff claimed that the paid tuition, incurred debt, and lost wages. The plaintiff sought a jury trial under breach of contract, violation of federal statutes (e.g. the
False Claims Act), violation of Ohio Statutes including the Ohio Pattern of Corrupt Activity Act, and Ohio Deceptive Trade Practices, and common law torts including fraud, negligence, civil conspiracy, public policy, equitable claims, including estoppel, and unjust enrichment. Arbitration was ordered.

In the case of Rosendahl v. Bridgment Education, a student claimed violation of False Advertising Act, negligent misrepresentations, and fraud. Scott Rosendahl enrolled at Ashford University and completed five courses in his bachelors degree program by 2009. Rosendahl alleged that when he spoke to an enrollment counselor about the program, the counselor told him that Ashford’s bachelors program was one of the cheapest in the country.

Veronica Clark enrolled in a doctor of psychology program at the University of the Rockies. Clark alleged that the enrollment counselor told her that completing the program would qualify her for licensure as a clinical psychologist for the U.S. Military and that the total cost of the program would be $53,000. Both of these statements were false. Clark and Rosendahl both signed an enrollment agreement with their respective schools that required arbitration as the sole remedy for complaints. The plaintiffs argued in part that the arbitration agreement was procedurally and substantively unconscionable and that by litigating the case the schools waived their right to arbitration. The courts disagreed, argued that the contract (enrollment agreement) was valid. The defendant was granted arbitration.1232

In Chisholm v. Career Education Corporation, the plaintiff, Patricia Chisholm applied and was admitted to Sanford Brown College, LLC’s Paralegal program. As part of
the enrollment agreement that Chisholm signed, an arbitration clause that indicated any dispute resolution relating to the student recruitment, enrollment, attendance, career or education would be resolved by binding arbitration. Chisholm filed suit, claiming fraud by concealment or omission, fraudulent misrepresentation, and violation of the Merchandising Practices Act. Because the claims against the plaintiff arose directly from the student enrollment and recruitment to Sanford Brown, LLC, and the defendant waived her right to file suit pending arbitration by signing an enrollment agreement, arbitration was ordered by the court.1233

Another case involving arbitration was Hubbard v. Career Education Corporation. Misha Hubbard enrolled in Sanford Brown College in the Health Information Technology Program. Hubbard upon enrollment in the institution signed an enrollment agreement that require that any dispute arising from recruitment, attendance, education, or career services would be settled through the grievance procedure in the catalog, and if not resolved by arbitration. Hubbard filed suit alleging common law fraud and violation of the Missouri Merchandising Act. All of the claims arose from her recruitment enrollment and attendance. Hubbard also claimed that the enrollment agreement was unconscionable. The court determined that any unconscionability claims should be resolved by the arbitrator. Given the nature of the plaintiff’s claims, the court ordered arbitration.1234

In Reed v. Florida Metro University, Jeffery Reed enrolled in Florida Metro Universities Online program in paralegal studies with the intention of starting law school after completing. He received assurance that law schools and employers would accept his degree. After area law schools and the local police department refused to recognize his
degree, he brought suit against the institution for $51,000, the cost of his education. The contract that he signed upon enrollment forced arbitration and the court refused to hear the complaint until after arbitration was complete. Upon completion of arbitration, the arbitrator awarded the plaintiff damages. When the plaintiff sought to confirm the award in district court, the school argued that the arbitrator exceeded his powers by ordering the parties into class arbitration. The district court ruled in favor of the plaintiff and ordered the school to pay damages. Upon appeal, to the 5th circuit court, the court determined that the arbitrator overstepped his authority and as such vacated the award and ordered new arbitration.1235

**Loss of income.** In Johnson v. Walden University, a graduate claimed fraudulent and negligent misrepresentation, violation of the Connecticut Unfair Trade Practices Act, and breach of implied contract. Johnson was a United States Marine stationed in Okinawa, Japan. Johnson’s career goal was to become a practicing psychologist. Johnson applied, and was admitted into Walden’s Professional Psychology Program. Johnson was admitted to a specialization in the Professional Psychology Program (i.e., Sports Psychology) that was specifically listed as a program that did not prepare students for licensure unlike the Clinical Counseling and School Counseling specializations. Johnson’s faculty mentor indicated to him that the Sports Counseling Specialization would prepare him for licensure. When the Sports Psychology program was discontinued, Johnson switched to Health Psychology at the recommendation of his faculty mentor, still assuming it would result in licensure. Upon his completion of the program, and retirement from the military, Johnson sought licensure in the state of Connecticut, but was denied because the doctorate he had earned was not an
approved licensure program. The defendant filed for summary judgment as the statute of limitations of three years had passed. The court denied summary judgment since it had been less than three years from the completion of the program. After Johnson provided expert testimony regarding the loss of income that arose from Johnson’s lack of ability to be a practicing psychologist, Walden moved to strike loss of income from any possible award because there was not enough reliable data to support the loss of income claim by the defendant. That motion was granted by the courts.

In contrast in the case Rude v. NUCO Education Corporation, two nursing students brought suit based upon the institution misrepresenting the accreditation of their nursing programs. The students had enrolled at Fortis College in Ohio, a subsidiary of the National Institutes of Technology. Two months later, two additional students filed suit. The case was consolidated. Students testified that they were told the program was accredited when it was not, substantially limiting their employment outcomes. Each student signed an enrollment agreement, agreeing to pay $25,000 for a course of study leading to an occupational associates degree in registered nursing and agreeing to arbitration if disputes were to arise. The court found that the contract was presented on a take it or leave it basis, because there were more applicants than seats available in the program. Because this placed the school in a superior bargaining position over the students, the contract was determined to be unconscionable and the defendant’s request for arbitration was denied.

Telecommunications. The courts have generally upheld the need for proof that the institution used aggressive telecommunications techniques (e.g., calling and texting to an
An extreme amount. This can be either through documentation of calling or through charges on a phone plan.

In Evans v. Everest College, the plaintiff complained that officials at Everest College, in an attempt to secure enrollment at their institution, called her cell phone seven to eight times per day for over a month. This occurred even after she specifically asked that the institution not call her anymore. Furthermore, when she picked up the phone, she would be greeted by silence, with instructions to wait for the next available representative. Ms. Evans filed suit citing the Telephone Consumer Protection Act. In order to support a claim under this Act, the plaintiff must provide material evidence to support that the defendant is liable for misconduct. The Telephone Consumer Protection Act specifically prohibits the use of any automatic dialing system or artificial voice or recording from dialing a number assigned to a cellular telephone number without prior consent unless it is for an emergency purpose. Everest College argued that because the plaintiff was unable to produce at minimum a list of times and dates when she was called, the case must be dismissed. The court agreed.

In contrast, Patton v. Corinthian Colleges, Patton claimed that Corinthian Colleges made ongoing calls using an automatic dialer and a prerecorded voice in addition to sending text messages to her cell phone. Each attempt by the college resulted in a charge on the plaintiff’s bill. The plaintiff argued that she never gave permission for the institution to call or text her cell phone. Corinthian filed for dismissal of the case as the plaintiff was unable to provide a list of dates and times of the phone calls. Because of the charges to her cell phone record and the texts on the plaintiff’s phone, the court agreed that there was
sufficient evidence for the suit to move forward, regardless of not having a list of all phone calls made, because the plaintiff was able to provide material evidence through cellular telephone bill.\textsuperscript{1244}

**State authorization to offer a degree.** In Shelton College v. State Board of Education, Shelton College questioned the state’s authority to regulate institutional degree conferral in the state.\textsuperscript{1245} The crux of Shelton’s argument was that the legislator violated the first amendment, freedom of speech. The court rejected Shelton’s claim, stating in part that neither the course of training or nor what was being taught was not in question. The matter in question was whether the state had the power to require authorization of degree granting programs. The court determined that the regulation of higher education is the sole authority of the state and that there were no conditional violations against freedom of speech or religious freedom in doing so.\textsuperscript{1246} The court affirmed that the institution could not offer credits toward completion of a degree without obtaining the proper license from the state.\textsuperscript{1247}

**Government Action**

In many instances, the state attorney general has brought suit against organizations on behalf of the states citizens for violations of various state laws. These lawsuits often result in both civil penalties and damages to the plaintiffs. Additionally, these lawsuits have resulted in the cancelation of private loans.

**State filings.** In a suit filed by the Attorney General Edmond Brown, California v. Corinthian Colleges, California alleged that Corinthian Colleges (doing business as Bryman College and Everest College) and Titan Schools (doing business as the National Institute of Technology), violated multiple sections of the Business and Professions Code, the Education
Among other complaints, California alleged that these schools misrepresented employment outcomes, did not provide adequate disclosure statements, misled students about degree completion and starting salaries, and claimed California Department of Education authorization when that authorization did not exist. Furthermore, the defendants' records show a low program completion rate and a majority of program completers do not obtain successful employment within six months after graduation. Corinthians' employment outcomes were inflated and listed places of employment that did not exist. The defendants used misleading statements to entice student enrollment and required that recruiters meet quotas in violation of California’s Business and Professions Code. On July 31, 2007, the state attorney general announced that Corinthian Colleges, Inc., and Titan Schools, Inc. would pay $6.5 million consisting of $5.8 million in restitution, $1.5 million for debt cancellation, $4.3 million in refunds to former students, and $700,000 in civil penalties and costs.

In a suit filed by Kamala D. Harris, California vs. Corinthian Colleges et al., the state made multiple complaints including lying about placement rates, advertising programs that were not offered, using military seals in advertising, and inserting unlawful clauses in the enrollment agreement. On June 19, 2014, Corinthian Colleges filed a letter with the Securities and Exchange Commission to notify them of their intent to close many of their campuses. Also in June, the Office of Federal Financial Aid placed Corinthian Colleges on an increased level of financial oversight. In July, Corinthian Colleges announced that it would be winding down operations as part of an oversight agreement with the DOE. On November 20th, the DOE announced its support of an agreement between ECMC Group
and Corinthian Colleges. ECMC would create a new nonprofit entity Zenith Education Group, that will take over the Corinthian Colleges and ensure that the 40,000 Corinthian students could continue their education.

The State of Colorado filed suit in Colorado v. Alta Colleges, against Alta Colleges doing business in the state as Westwood Colleges. The state accused the college of inflating employment outcomes, overstating starting salary, indicating that credits will transfer to another institution, and utilizing data in advertising that was out of date. On March 14, 2012, Colorado and Alta Colleges reached a settlement agreement. Westwood College agreed to pay $4.5 million. $2.5 million was to reduce the debt of those who borrowed dollars through the institutions private student loan system and $2 million was to the state for restitution fees, attorneys’ fees, and civil penalties.

In a complaint against Argosy University, Colorado v. Education Management Corporation, the state accused the institution of knowingly making false representation as to the approval and certification of goods and services; knowingly making false representations as to its affiliation, connection, or association with certification by another; representing that its goods or services are of a particular quality or standard when it is known that they are of another; and failing to disclose material information with the intent to enter into a transaction.

The complaint arose because the university started a doctoral program, Educational Doctorate in Counseling Practice (Ed.D. CP) and misled students as to the programs accreditation and their ability to obtain licensure at the completion of the program. In a settlement with the state, Argosy agreed to pay $2,870,047 to cover the complete cost of
tuition, books, and fees in addition to a portion of any federal loans for all students enrolled in the Ed.D. CP program. Additionally the institution was required to pay the state $500,000 to reimburse the state for reasonable costs and attorneys’ fees.

In State of New York v. Education Management Corporation, the defendant operated several institutions including Sanford Brown, American Intercontinental University, and Colorado Technical University. In addition to incorrectly reporting placement rates of its graduates by counting graduates engaged in one day of employment at a health fair, the colleges operated several programs that were not accredited by the accrediting body necessary for its graduates to achieve licensure and therefore employment in the field. In addition to a $1,000,000 civil penalty, the consent judgment outlined the calculation of placement rates, the requirement to adequately disclose programmatic accreditation, and transferability of credit.

Summary

The federalist system of rule breaks down with cross-border commerce. What is a violation of law in one state may not be in another. Individual state action requires institutions to comply within the state border, but the same institution operating in a different state is not required to comply. Although there are consumer protection laws in all fifty states, individual state action is required to insure compliance across all states. Federal court interpretation is limited to the interpretation of the Higher Education Act and ultimately Title IV funding. Review of the current case law provides clarification in three ways. The Department of Education has the ability to define undefined terms in the Higher Education Act when necessary to provide taxpayer protection in the distribution of federal
funds, but must provide adequate time for commentary when releasing new rules. The DOE cannot be held liable for loss of revenue and enrollment even when it erroneously cuts Title IV funding to an institution and restores it at a later date. State consumer protections only really protect the consumers of the state filing the claim. Out-of-state consumers have no protection unless their state files a claim.
CHAPTER VIII

DISCUSSION

Intent

The purpose of this study was to examine the laws governing for-profit institutions in state authorization, marketing and advertising, and gainful employment. Toward that end, four research questions were addressed using legal research methodology. Chapters four through seven presented the results of the study. Chapter eight summarizes and synthesizes these results, concluding that the disjointed nature of state law, and the lack of strong federal oversight have created unequal protections for consumers of for-profit education and as such centralized federal oversight is needed. Furthermore, this chapter will provide a guide to the practitioner to operate under the conditions, as they exist.

Introduction

Chapter one focused on the history of for-profit institutions and their relationship in the broader United States’ educational system context. For-profit educational institutions face an additional hurdle because their product is both a public and a private good. For-profit institutions have the ability to confer academic credentials, but are faced by a unique relationship when their customer is also a student. Chapter two reviewed existing literature surrounding for-profit institutions and their place in our society, leading to the present study’s research questions. Chapter three provided a research model by which the four guiding questions and the answers to those questions will be used to support the thesis of this dissertation. The four questions identified were: (1) What are the federal and state laws that regulate the operation of for-profit colleges and universities? (2) What are the federal and state laws that regulate consumer protections and marketing? (3) What are the federal
regulations that regulate gainful employment? (4) And how have the courts interpreted the laws in questions one through three?

**Summary of Study Findings**

A thorough review of state-by-state law showed that states use different criteria to authorize institutions to offer education within their boundaries. Nonetheless, many states will accept the authorization of another state for the purposes of distance education. In the most extreme cases, such as in Hawaii, accreditation is not required for operation or delivery of education for academic credentials (see Appendix A). On the other end of the spectrum is Arkansas, which requires that all institutions, regardless of tax status, that deliver education to its residents be accredited and approved through the Arkansas Higher Education Coordinating Board. Prior to the cross-border commoditization of higher education, states were able to maintain regulations to protect their own residents. Changes in technology in education delivery have made many of these regulations difficult to fully enforce. For example, an unaccredited institution in Hawaii that is authorized to operate within that state can receive authorization to deliver distance education in Alaska even though that state’s requirement for authorization for institutions residing within the state includes accreditation (see Appendix A).

State consumer protection law provides different levels of protection to students depending on the state in which they reside. Differing consumer protection laws make it difficult for for-profit institutions to operate and remain in compliance with state law across state borders. Furthermore, it is difficult for consumers to understand which protections are afforded to them. Consumer protections vary widely from state to state, as does telemarketing law while federal laws narrowly focus on areas such as fraud and deception.
Congress has always differentiated for-profit institutions and nonprofit institutions in that for-profit institutions were always required by law to offer programs that resulted in gainful employment of their graduates. However, gainful employment was not defined by Congress but was left to the DOE to define. It was not until fifty years after the original Act that gainful employment regulations went into effect. The intent of defining gainful employment was to protect Title IV funds and ensure that students pursuing an education at a for-profit institution are able to use the education attained to find employment.

The first set of regulations proposed by the DOE was struck down by the courts as being overly broad in how they defined the metrics for gainfully employed. Furthermore the DOE had not followed the Administrative Procedures Act giving adequate time for the public to review and the DOE to respond to concerns over the new regulations. After refining gainful employment, and another lengthier rules-making process, new regulations went into effect July 2015.

The courts have played a unique role in the application and interpretation of state and federal laws as they pertain to colleges and universities, especially when those colleges and universities are also for-profit institutions. The power of the courts is to establish precedence for how a law will be interpreted in the future, or to define a legal principle when none exists. Understanding the nature of an enrollment agreement, or a college catalog as a contract between the student and the institution was established through court precedent. The ruling in the case of Townsend v. Gray have provided persuasive authority to other courts to authorize a degree program when this was never defined in black letter law by Congress or the Constitution. Because of this established case precedent, both students and owners and operators of for-profit institutions can understand not only the law as it as
written, but how the courts are likely to interpret a law when a suit is brought by the
government, the state, or an individual.

**Implications**

Students attending for-profit colleges and universities are not adequately protected,
most especially when education is offered virtually across state lines. Both consumers of for-
profit education and owner/administrators are harmed through the current fragmented
regulatory system. For-profit institutions are left with a patchwork of regulations that vary
from state to state, making it difficult for institutions to deliver an education across state
lines while remaining in compliance with the laws in all fifty state laws. Consumers may not
be aware of the quality or approval process their institution went through to deliver
education to them when consumed across state lines.

**Future Policy Suggestions**

Create one federal body responsible for oversight and consumer protections of
students attending all educational institutions. This body would regulate marketing, truth in
advertising, and direct marketing/telemarketing. Require that all states participating in Title
IV funding follow the same minimum requirements for degree authorization. Institutions
meeting this standard would be eligible to offer education throughout the United States.
State requirements vary so much from state to state, as does the cost of achieving and
maintaining authorization, that it is prohibitive of the best institutions to offer their
education to consumers across state lines.

**Practitioner’s Guide**

The intent of this guide is to provide a reference for a for-profit college owner and
administrator to seek the lowest cost, and highest return on investment startup location and
program while remaining compliant with state and federal law and providing protections to
the institution to avoid costly litigation. In contrast, a guide to the consumer is provided for
consumers to choose a for-profit college in a location, delivery format, and program that
provides the highest level of consumer protection.

**For-Profit College Owners and Administrators**

The first step a for-profit college owner or administrator might make in developing a
starting a college is to determine the location that the business is established. Several things
should be taken into consideration. A for-profit college owner/administrator should be
concerned with what location has the least onerous requirements to establish a business
leading to the awarding of academic credentials and what program to offer. Additionally, the
owner/administrator might consider, what delivery format has the potential to reach the
largest recruitment pool, and requires no programmatic accreditation as an additional cost.

An owner/administrator may use Appendix A to determine what authorizations and
exemptions are available in each state and refer directly to the law to determine next steps.
The least onerous requirements to offer a program that awards academic credentials exist in
the state of Hawaii. Hawaii allows for unaccredited programs to be authorized by the state
Office of Consumer Protection. This office does not certify the value of the curriculum; it
only requires that institutions be registered in order to become authorized. While
accreditation may eventually be sought by the institution as to access Title IV funding,
initially forgoing access to Title IV funding provides the least restrictions to the institution in
terms of operation. Not all for-profit colleges and universities are accredited. Title IV
funding can represent a substantial portion of the overall budget of for-profit colleges with
access to it. However, there are colleges without access that remain profitable in terms of
Institutions such as Dorcas University, an unaccredited university with authorization to operate in Hawaii, have remained open and operating without institutional accreditation. Furthermore, all of the recruitment risk is placed upon the OPM provider resulting in no upfront cost to the institution to recruit students to its program.

In terms of delivery, a virtual college with only a small physical location offering training completely online would provide the most cost effective solution. In order to facilitate a quick program startup, the administrator might engage an Online Program Management (OPM) provider. According to Eduventures, an OPM provider assumes responsibility for marketing and lead generation, student services, enrollment management, and course development and delivery. As part of this package of services, a provider can purchase a curriculum already approved by a regional accrediting body and deliver that curriculum under the institution’s name. On average these agreements require a 60/40 revenue split, with the OPM provider having the larger share.

According to Eduventures, the program with the highest demand and largest enrollments of students studying online is a bachelor’s degree in business management, with an estimated 455,670 students studying this program online in 2012. In the same year the next highest enrolling online program was the bachelor’s in criminal justice with 130,699 students enrolled in online programs.

The institution may choose to hire one full-time Ph.D. prepared business faculty member to oversee and approve the curriculum and manage any adjunct faculty. Since the institution has state authorization to operate in its home state, it would be eligible to apply for authorization to deliver a distance education program to residents of the following states: Alaska, Arizona, California, Colorado, Delaware, District of Columbia, Hawaii, Idaho,
Kentucky, Louisiana, Maine, Michigan, Mississippi, Nebraska, Nevada, New Hampshire,
New Jersey, New York, North Carolina, Ohio, Oklahoma, Rhode Island, South Carolina,
South Dakota, Tennessee, Texas, Vermont, Virginia, and West Virginia. This is true even if
these states require accreditation to authorize schools in their state (see Appendix A).

An owner/administrator might then refer to Appendix B and chapter seven,
treatment by the courts, to determine how to remain compliant with federal and state laws
while recruiting and enrolling students. From chapter seven, as summary of relevant case
law, an owner administrator would likely come to the conclusion that including a strongly
worded clear enrollment agreement with a conspicuous statement of program costs and an
arbitration clause will allow the institution to save on litigation if a student were eventually to
file suit. This should include an appeals process as identified in the catalog prior to any
arbitration.

Finally, an owner/administrator might refer to Appendix A to ensure that the OPM
provider is following applicable state guidelines in marketing to ensure that in-state
authorization is not triggered, requiring additional fees and oversight. The
owner/administrator could use Appendix B to ensure that the recruitment activities, calling
patterns, and compensation of the OPM recruiters does not violate state law.

**For-Profit College Consumer/Student**

A consumer of for-profit education might use the information provided in this
dissertation much differently than the institution’s owner/administrator. Research by
Eduventures suggests that adult students seek a program first, and a school second. As
such, the consumer might choose to seek a program that has high employment outcomes,
has programmatic accreditation, has regional accreditation, is offered in an on-ground
format, and exists in a location where the highest consumer protections are afforded to students.

One such program is an associate’s degree in nursing that leads to Registered Nurse licensure in the state. According to the Bureau of Labor Statistics Occupational Outlook Handbook, the median annual salary for a registered nurse was $65,470 per year, with an associate’s degree generally required as the minimum level of entry into the occupation and a 19% growth rate in 2012.\textsuperscript{1266}

The consumer/student might then use Appendix A to find which location might provide for the most oversight. One such state might be Arkansas, which requires all institutions, regardless of delivery format, to be authorized by the Higher Education Coordinating Board.\textsuperscript{1267} The consumer then might seek information about program costs from several providers and choose a vendor who adhered to the protections against aggressive marketing and recruitment afforded in Appendix B. Finally the consumer might refer to chapter seven and review relevant case law to ensure that any agreement accurately described the goods and services being provided, the cost of the program, and any arbitration requirements in the event that the institution did not provide the goods and services as promised.

Conclusion

The laws that protect students attending for-profit institutions are a collection of federal and state legislative statutes and rules. The federal government utilizes accrediting agencies to limit access to Title IV funds. Without a unified system of oversight, students attending and businesses operating for-profit institutions are without equal justice under the law.
It is in our national and economic interest to regulate higher education in the United States. The federalist system delegates all powers not specifically held by the federal government to the states. Nowhere in the Constitution is there mention of education at the primary, secondary, or postsecondary level. Each state has the power to determine its own credentialing system and criteria for the awarding of an academic credential. The conferral of a degree is integrated with state law as a minimal level of understanding to perform the functions inherent to the credential (e.g. The degree of M.D. or Medical Doctor assumes a minimal competency in the medical care of humans). To insure a minimum standard of quality, states have turned to national, regional, and programmatic accreditation. This does not mean that it is not possible for the federal government to regulate for-profit colleges and universities. The federal government can provide additional regulations and oversight of marketing law and telecommunications law by tying those requirements to Title IV funding. While education is specifically a state’s right, the federal government has used federal funding to provide for additional regulations on institutions. Such is the case with the Individuals with Disabilities Education Act (hereinafter IDEA). IDEA is a federal law that provides a host of regulations to protect students in the primary and secondary school system by mandating that schools that wish to access federal funds must comply with its regulations. Federal funding represents only 8.5% of the primary and secondary school system budget. To date there is no state in the union that does not accept federal funding for public schools, and therefore all public state institutions and any other recipients of federal aid have had to comply with the law. A similar format could be used to regulate for-profit institutions. The Senate HELP committee determined that of the top 15 publically
traded for-profit institutions, 86% of their total budget on average was from federal sources such as veteran’s benefits and Title IV student loans and grants.\textsuperscript{1270}

Some of this has already been done through the DOE’s rules and regulations. Specifically, the rules and regulations prohibit for-profit institution recruiters from achieving a monetary compensation from their employer based on a number of students that they enroll. Similar rules and regulations could be created by the DOE or inserted directly into the Act by Congress in order to provide further protections to for-profit education consumers, specifically in the areas of marketing, advertising, and telecommunications law.

The federal government currently has the power to enforce statutes or create more restrictive statutes in the areas of fraud.

There are no similar independent national or regional voluntary bodies that govern the institution’s relationship with the student, truth in advertising, cross-border commerce, or business and ethics of an organization. The massification of higher education and the relatively new ability to deliver content instantly and across state and federal lines has led to inadequate market regulation. This inadequate market regulation of education has led to fraudulent degrees, unethical or false statements in the sale of a good or service, and aggressive marketing techniques that prey upon those who are least able.

If we as a citizenry continue to believe that higher education is both a private and a public good, we must ensure that the quality of the education that the masses are receiving is at a level consistent with our purposes for funding it. We currently rely on federal and state oversight to protect the consumer. The federal government relies on accreditation as a minimum criterion for participation in Title IV funding in order to protect taxpayer dollars.
State consumer protection bodies and federal government agencies such as the FTC and the DOE provide another level of protection. These bodies are responsible for regulating marketing, truth in advertising, and direct marketing to home or cellular phones (Appendix B). In addition, accountability measures are enforced through the various state and federal agencies that authorize an institution to award a degree (see Appendix A). The courts provide for the ultimate protection of consumers by allowing their grievances to be heard and to be made whole in instances of deception.

This dissertation used legal research methodology to uncover the protections afforded by the United States legal system for those students attending for-profit institutions. Statutorily, for-profit institutions are treated differently, regardless if the legislative forum is at the federal or state level. By revealing each state and federal law, its application, and its treatment by the courts, the weaknesses inherent in a decentralized regulatory system are revealed. The research reviewed in this dissertation revealed the disjointed nature of state law, which, along with the lack of strong federal oversight, has created unequal protections for consumers of for-profit education. A strong centralized system is needed to protect educational businesses and their consumers, the students.
APPENDICES
APPENDIX A

STATE AUTHORIZATION
### Appendix A

**STATE AUTHORIZATION**

Table 1  
*State Authorization*

<table>
<thead>
<tr>
<th>State</th>
<th>Agency</th>
<th>Law Authorizing Agency</th>
<th>Exemptions</th>
<th>Law Authorizing Exemptions</th>
<th>Physical Presence triggers</th>
<th>Law Establishing Physical Presence Triggers</th>
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<td>Alabama</td>
<td>Alabama Commission on Higher Education</td>
<td>Ala. Admin Code r. § 16-5-8</td>
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<td>Secretary of State</td>
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<td>Alaska</td>
<td>Alaska Commission on Postsecondary Education</td>
<td>Alaska Stat. § 14.42.010</td>
<td>1. Nonprofit offering credit towards associate’s, bachelor’s, or master’s degree within the state</td>
<td>Alaska Stat. § 14.48.030</td>
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<td>3. Internet URL or ISP based in Arizona</td>
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<td>California</td>
<td>The California Bureau for Private Postsecondary Education</td>
<td>Cal. Edu. Code § 94876</td>
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<td>California</td>
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<td>Cal. Edu. Code § 94874</td>
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<td>2. Religious training</td>
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<td>3. Test preparation</td>
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<td>4. Institutions governed by federal government or the state of California</td>
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<td>The Division of Private Occupational Schools</td>
<td>Col. Rev. Stat § 12-59-104</td>
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<td>The Office of Higher Education</td>
<td>Conn. Gen. Stat. § 10a-31-1</td>
<td>1. Out-of-state, regionally accredited institutions with a physical presence and which are approved in their home state</td>
<td>Conn. Gen. Stat. § 10a-34-24a</td>
<td>2. Requiring students to meet at a physical location in the state</td>
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<td>2. Fully online programs authorized in another state with regional accreditation</td>
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<td>District of Columbia</td>
<td>The Education Licensure Commission</td>
<td>DC Code § 38-1303</td>
<td>1. Institutions operated by the federal government</td>
<td>DC Code § 38-1310</td>
<td>2. Institutions authorized by another state</td>
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<td>Commission</td>
<td>Statute</td>
<td>1. Institutions operated by the federal government</td>
<td>2. Institutions operated by the state</td>
<td>3. Institutions that offer only religiously affiliated degrees</td>
<td>2. Certain religious institutions</td>
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<td>Nonpublic Postsecondary Education Commission</td>
<td>Ga. Code. Ann. § 20-3-250.5</td>
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<td>2. Fully online programs that do not trigger physical presence</td>
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<td>Department of Commerce</td>
<td>Haw. Rev. Stat. § 305J</td>
<td>3. Nondegree granting institutions licensed by any entity of the state</td>
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<td>Department of Education</td>
<td>Haw. Rev. Stat. § 302A-424</td>
<td>4. Schools that only offer religious degrees or certificates</td>
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<td>Hawaii Board of Regents</td>
<td>Haw. Rev. Stat. § 304A-123</td>
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</table>

3. Proprietary schools accredited by the Southern Association of Colleges and schools with a $200,000 surety bond and contributions to the state's tuition guarantee trust fund


Hawaii Board of Regents

Haw. Rev. Stat. § 304A-123

4. Schools that only offer religious degrees or certificates


1. Having a physical location in the state for instruction


2. Establishing an administrative office in the state


3. Maintaining a phone number in the state
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<tr>
<th>State</th>
<th>Regulatory Authority</th>
<th>Statute/Code</th>
<th>Requirements</th>
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<td>3. Religious degrees</td>
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<td>Illinois</td>
<td>The Illinois Board of Higher Education</td>
<td>Ill. Admin. Code. tit. 23. pt, 1030.10</td>
<td>1. Religious training but no academic credentials</td>
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<td>Ill. Admin. Code. tit. 23. pt, 1030.20</td>
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<td>1. Approved to operate in another state</td>
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<td>Ill. Admin. Code. tit. 23. pt, 1030.10</td>
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<td>2. Less than ten percent of coursework is offered in the state</td>
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<td>3. Coursework fully online and asynchronous</td>
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<td>1. 25% or more of coursework is offered face to face</td>
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<td>The Iowa Student Aid Commission</td>
<td>Iowa. Code. § 261B.3</td>
<td>1. Proof of financial stability</td>
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<td>5. Native American Colleges</td>
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Institutions whose only physical presence is internship, practicum, or student teaching

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<th>Ohio</th>
<th>The Ohio Board of Career and Technical Education</th>
<th>Ohio Rev. Code § 3330.06</th>
<th>1. Nonprofit institutions</th>
<th>1. Physical location in the state</th>
<th>Academic Program Approval, available at <a href="https://www.ohiohiogered.org/academic-program-approval">https://www.ohiohiogered.org/academic-program-approval</a></th>
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<td>Tex. Admin. Code tit. 3 § 61.222</td>
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4. Fully online programs

Tenn. Comp. R. & Regs. 1540-01-02-.004(1)

4. Advertisements that specifically target Tennessee residents

Tex. Admin. Code tit. 7 § .3(29)

1. Fully online programs

Tex. Admin. Code tit. 3 § 61.0512

1. Physical location in the state

Tex. Admin. Code tit. 3 § 61.222

2. Religious institutions offering vocational training

Tex. Admin. Code tit. 19 § 7.9

2. Internships

3. Internships

4. Recruiting students outside of typical education fairs

No exemptions


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<th>Washington</th>
<th>Washington Student Achievement Counsel</th>
<th>Wash. Rev. Code § 250-61-010</th>
<th>1. Public universities</th>
<th>Wash. Rev. Code § 250-61-060</th>
<th>2. Institutions which have operated in the state for more than 15 years and are accredited by a body recognized by the United States Department of Higher Education</th>
<th>3. Religious institutions offering vocational training in the faith</th>
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<td>W. Va. Code § 18B-4-7</td>
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APPENDIX B

MARKETING LAW
## Appendix B

### Marketing Law

**Table 2**

**Marketing Law**

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## Appendix C

### Gainful Employment Framework

Table 3

*Gainful Employment Framework*

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<th>Gainful Employment Framework</th>
<th>Calculations</th>
<th>Regulations</th>
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<td>Discretionary Income Rate</td>
<td>Annual loan payment/(the higher mean or median of annual earning - (1.5 * poverty guideline))</td>
<td>34 CFR 668.404</td>
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<td>Annual Earning Rate</td>
<td>Annual loan payment/mean or median of annual income</td>
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<td>Loan Debt</td>
<td>Title IV loans borrowed during cohort period + private education loans + outstanding monies owed to the institution upon completion of the gainful employment program - debt incurred at another institution</td>
<td>34 CFR 668.404</td>
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<td>Annual Loan Payment (Associate, Undergraduate Certificate, Post Baccalaureate Certificate)</td>
<td>Median cohort loan debt over 3 year period/ amortized over 10 years using calculated undergraduate interest rate</td>
<td>34 CFR 668.404</td>
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<td>Annual Loan Payment (Master's, Graduate Certificate)</td>
<td>Median cohort loan debt over 3 year period/ amortized over 10 years using calculated graduate interest rate</td>
<td>34 CFR 668.404</td>
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<td>Annual Loan Payment (Bachelor's)</td>
<td>Median cohort loan debt over 6 year period/ amortized over 15 years using calculated undergraduate interest rate</td>
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<td><strong>Annual Loan Payment</strong> (Master’s, Professional Degree, Doctoral Degree)</td>
<td>Median cohort loan debt over 6 year period/ amortized over 20 years using calculated graduate interest rate</td>
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<tr>
<td><strong>Calculated Undergraduate Interest Rate</strong></td>
<td>Average of federal direct undergraduate unsubsidized interest rate over a 3 or 6 year period</td>
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<td><strong>Calculated Graduate Interest Rate</strong></td>
<td>Average of federal direct graduate unsubsidized interest rate over a 3 or 6 year period</td>
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<td><strong>Median Cohort Loan Debt</strong></td>
<td>Median of loan debt incurred by total number of students in the gainful employment program</td>
<td>34 CFR 668.404</td>
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<td><strong>Passing Gainful Employment Program</strong></td>
<td>Discretionary income &gt; 30% or annual earning rate ≤ 8%</td>
<td>34 CFR 668.403</td>
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<td><strong>Zone Gainful Employment Program</strong></td>
<td>Discretionary income &gt; 20% but ≤ 30%, or annual earning rate is &gt; 8% but ≤ 12%</td>
<td>34 CFR 668.403</td>
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<td><strong>Failing Gainful Employment Program</strong></td>
<td>Discretionary income &lt; 30%, annual earning rate ≤ 0, annual earnings rate is &gt; 12% or the mean or median of annual income = 0</td>
<td>34 CFR 668.403</td>
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<td>Eligible for Title IV Funding</td>
<td>Passing; failing once in a 3 year period; or a combination of zone and failing for 3 years</td>
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<td>Ineligible for Title IV Funding</td>
<td>Failing 2 out of 3 years, or a combination of zone and failing for 4 years</td>
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