

2018

HIGHER EDUCATION LAW—THE NEGATIVE EFFECTS OF STUDENT LOANS: A PLEA FOR IMPACTED STUDENTS

Kelly A. Bednarz

Follow this and additional works at: <http://digitalcommons.law.wne.edu/lawreview>

Recommended Citation

Kelly A. Bednarz, *HIGHER EDUCATION LAW—THE NEGATIVE EFFECTS OF STUDENT LOANS: A PLEA FOR IMPACTED STUDENTS*, 40 W. New Eng. L. Rev. 121 (2018), <http://digitalcommons.law.wne.edu/lawreview/vol40/iss1/6>

This Note is brought to you for free and open access by the Law Review & Student Publications at Digital Commons @ Western New England University School of Law. It has been accepted for inclusion in Western New England Law Review by an authorized editor of Digital Commons @ Western New England University School of Law. For more information, please contact pnewcombe@law.wne.edu.

HIGHER EDUCATION LAW—THE NEGATIVE EFFECTS OF STUDENT LOANS: A PLEA FOR IMPACTED STUDENTS

*Kelly A. Bednarz**

Throughout the United States, college enrollment has overwhelmingly increased, reaching its peak in 2010 with approximately twenty million students. Due to the expanded accessibility to attend college through the Department of Education's higher education programs, the ability to attend college is no longer solely for the elite. This rapid growth, however, has created additional challenges. Despite the evolving higher education demand, government regulations and oversight have mostly remained stagnant. Colleges began to capitalize and take advantage of this market, prompting the rise of for-profit colleges. In 2012, about 12 percent of students attended for-profit colleges, as opposed to the 0.2 percent of students about twenty years prior.

Although not all for-profit colleges misuse the system, many colleges have been criticized in recent years for predatory and illegal recruiting tactics. The Department of Education is aware of these problems, but continually enables this conduct through lack of oversight and mismanaged federal funds. The students enrolled in these for-profit colleges have little to no recourse within the court system or otherwise after acquiring burdensome debt based on deceptive tactics and unrealistic promises.

This Note will argue that students who are negatively impacted by the predatory tactics of for-profit colleges should have a remedy under the theory of estoppel against the government. Although there is a heightened "affirmative misconduct" standard for this claim, the system will likely go unchanged without a direct effect on the government, given its own interest and benefits based on the current structure of the system.

INTRODUCTION

The United States higher education system is facing a financial crisis.¹ As of 2018, forty-four million people owe approximately \$1.5

* Candidate for J.D., Western New England University School of Law, 2018. A special thank you to Professor René Reich-Graefe, Alison Wynn, Esq., and the Western New England

trillion in student loan debt,² and the federal government, as the primary lender of student loans, maintains approximately ninety percent of that debt.³ By means of the Department of Education (DOE), the federal government has “relinquished direct control of the student loan program, opening its bank to corporations concerned with profits, not diplomas.”⁴ This incentive for profits is a reality, as the DOE has calculated that the federal government can earn up to twenty percent profit on each loan.⁵

Massachusetts Senator Elizabeth Warren continues to voice her concern about this for-profit phenomenon, stressing that the DOE continues to fail students by allowing for-profit colleges to drain federal funds despite years of criticism over their suspicious practices.⁶ There is also a concern that this financial crisis will “exacerbate income inequality for decades to come.”⁷

The current financial aid system is unsustainable and widely recognized as failing students.⁸ Economists suggest that the financial aid system is ineffective because “colleges and universities will react to the incentives [government] policies create and not passively accept their consequences.”⁹ These policies allow higher education institutions to “increase[] their prices and general spending *because they [can] get*

Law Review staff for the invaluable feedback throughout this Note-writing process. To my parents, Edward and Lori Bednarz, my sister, Katie, and future husband, Timmy Clark, thank you for your endless love and support.

1. See Donna Rosato, *Is Student Debt the Next Financial Crisis?*, CONSUMER REPORTS (June 30, 2016), <http://www.consumerreports.org/student-loan-debt-crisis/is-student-debt-the-next-financial-crisis/> [https://perma.cc/PQN8-TCJ4].

2. *A Look at the Shocking Student Loan Debt Statistics for 2018*, STUDENT LOAN HERO (Jan. 24, 2018), <https://studentloanhero.com/student-loan-debt-statistics/> [https://perma.cc/7G58-Y9MG].

3. James B. Steele & Lance Williams, *Who Got Rich Off the Student Debt Crisis*, CTR. FOR INVESTIGATIVE REPORTING (June 28, 2016), <https://www.revealnews.org/article/who-got-rich-off-the-student-debt-crisis/> [https://perma.cc/WLS3-DJ9K].

4. *Id.*

5. *Id.*

6. Tracy Jan, *Warren Calls for More Oversight of For-Profit Colleges*, BOS. GLOBE (June 10, 2015), <https://www.bostonglobe.com/news/politics/2015/06/10/elizabeth-warren-chastising-department-education-over-for-profit-college-rules/PfnlX3iW9RXDZ9DVBblj5O/story.html>.

7. Steele & Williams, *supra* note 3.

8. Andrew Gillen, *Financial Aid in Theory and Practice*, in *DOING MORE WITH LESS: MAKING COLLEGES WORK BETTER* 15, 15 (Joshua C. Hall ed., 2010).

9. *Id.* (quoting MICHAEL S. MCPHERSON & MORTON OWEN SCHAPIRO, *THE STUDENT AID GAME: MEETING NEED AND REWARDING TALENT IN AMERICAN HIGHER EDUCATION* 139 (1998)).

*away with it*¹⁰ In 1987, William Bennett, then-Secretary of Education, acknowledged that increases in financial aid “enabled colleges and universities blithely to raise their tuitions, confident that Federal loan subsidies would help cushion the increase.”¹¹ This theory is known as the “Bennett Hypothesis,”¹² and has proven true since the cost of tuition at higher education institutions has increased at a rate “four-and-a-half times faster than inflation” over three decades.¹³ Nearly thirty years later, Arne Duncan, Secretary of Education during the Obama administration, admits the same issues exist today.¹⁴ Duncan blames the challenges of reform for this perpetuation of the financial aid crisis, which he says cannot “become a discussion-ending excuse for inaction or for defending the status quo.”¹⁵ Despite widespread criticism from the government, admitting change is imperative, there continues to be no major progress toward a solution for this acknowledged system failure.¹⁶

As evidence of this failing financial aid system, a number of for-profit colleges have recently been shut down, leaving thousands of students with massive amounts of debt and no college degree.¹⁷ One of the most well-known for-profit colleges, ITT Technical Institute (ITT Tech), abruptly closed over one hundred of its campuses when their federal financial aid eligibility was revoked.¹⁸ “Roughly 80 percent of ITT’s revenues [came] from government-backed student loans.”¹⁹

10. *Id.* at 23 (quoting RUPERT WILKINSON, AIDING STUDENTS, BUYING STUDENTS 147 (2005)).

11. *Id.* at 29 (quoting William J. Bennett, *Our Greedy Colleges*, N.Y. TIMES (Feb. 18, 1987)).

12. *Id.*

13. VICKIE CHOITZ & PATRICK REIMHERR, CTR. FOR POSTSECONDARY & ECON. SUCCESS, MIND THE GAP: HIGH UNMET FINANCIAL NEED THREATENS PERSISTENCE AND COMPLETION FOR LOW-INCOME COMMUNITY COLLEGE STUDENTS 1 (Apr. 2013), <http://files.eric.ed.gov/fulltext/ED544243.pdf> [<https://perma.cc/5V85-7NJB>].

14. Arne Duncan, U.S. Sec’y of Educ., Making the Financial Aid System Sustainable, Remarks at the 2013 FSA Training Conference for Financial Aid Professionals (Dec. 4, 2013), <http://www.ed.gov/news/speeches/making-financial-aid-system-sustainable> [<https://perma.cc/TJ62-JSGF>].

15. *Id.*

16. Kevin Carey, *Fixing Financial Aid*, CHRON. HIGHER EDUC. (Mar. 4, 2013), <http://www.chronicle.com/article/Fixing-Financial-Aid/137593> [<https://perma.cc/CK9G-JQ8S>].

17. Kathryn Vasel & Katie Lobosco, *For-Profit College ITT Shuts Down: Tens of Thousands of Students in the Lurch*, CNN MONEY (Sept. 9, 2016, 11:21 AM), <http://money.cnn.com/2016/09/06/pf/college/itt-shuts-down/> [<https://perma.cc/E8KW-M8EQ>].

18. *Id.*

19. Richard Morgan, *For-Profit College Shuts Down, Shafting 40,000 Students*, N.Y. POST (Sept. 6, 2016, 12:05 PM), <http://nypost.com/2016/09/06/for-profit-college-itt-is->

Consequently, the 35,000 students enrolled at ITT Tech during the shutdown will be unable to finish their degrees because, as the school advertises, “[i]t is unlikely that any credits earned at an ITT Technical Institute will be transferable to or accepted by any institution other than an ITT Technical Institute.”²⁰ This institution has been the subject of investigation by the federal government for years, but no adequate transition program is in place for these aggrieved students.²¹ The DOE indicated that students enrolled at the time of closing *may* have their federal loans canceled, but this approach does not apply to all students that are in need of a remedy.²²

Since the recent closings of failed for-profit colleges,²³ there have been approximately 26,000 claims received by the DOE for loan forgiveness, but only about fourteen percent have been approved.²⁴ The DOE’s loan forgiveness program is supposed to provide relief for “[a]nyone who can prove a school used illegal or deceptive tactics in violation of state law to persuade them to borrow money for college.”²⁵ However, this process is “difficult to navigate,” and cases are rarely successful.²⁶

Students significantly impacted by the negative effects of the financial aid system have little recourse within the court system,²⁷ and

closing-after-federal-loan-crackdown/ [https://perma.cc/QV7A-QZGC].

20. *2016-2017 Catalog*, ITT TECH. INST. 48 (2016) (emphasis omitted), <http://itt-tech.info/wp-content/uploads/2016/09/061.pdf> [https://perma.cc/XEL3-Q7MK]; see also Erin Gallagher, *ITT Tech Students Await Answers on Their Futures*, CHICAGO TRIBUNE (Sept. 30, 2016, 7:25 AM), <http://www.chicagotribune.com/suburbs/daily-southtown/news/ct-sta-itt-students-register-st-0930-20160930-story.html> [https://perma.cc/3GG5-SWS6?type=image] (explaining that ITT Tech credits are unlikely to transfer because the curriculum does not meet the standard of accredited colleges).

21. Vasel & Lobosco, *supra* note 17.

22. *Id.*

23. In 2016, ITT Technical Institute and Corinthian College closed after the DOE revoked financial aid due to deceptive tactics. *Id.*

24. Danielle Douglas-Gabriel, *ITT Tech Students Refuse to Repay Loans in Protest Over Government Policy*, WASH. POST (Sept. 14, 2016), https://www.washingtonpost.com/news/grade-point/wp/2016/09/14/itt-tech-students-refuse-to-repay-loans-in-protest-over-government-policy/?utm_term=.60546a662c87 [hereinafter Douglas-Gabriel, *ITT Tech Students*].

25. *Id.*

26. *Id.*

27. The Higher Education Act prohibits injunctive relief for a plaintiff, which includes a plaintiff’s claim to prevent the government from collecting on a student loan. *Kemper v. U.S. Dep’t of Educ.*, No. 17-683 (TNM), 2018 WL 300370, at *2 (D.D.C. Jan. 4, 2018). There is also no explicit cause of action for a plaintiff under the Higher Education Act and case precedent does not allow for an implied cause of action. *Id.*

find themselves buried in debt that cannot be discharged in bankruptcy.²⁸ Since there is currently no developed legal remedy for the injustice that these students experience, students should have an equitable remedy against the DOE under the theory of estoppel. Although there are obstacles to prove the claim, there will be no change in the system until it begins to directly impact the federal government, which is only possible if it is the one being sued.

This Note argues that students negatively impacted by the DOE's policies that enable predatory, for-profit practices should be able to estop the government from collecting on burdensome student loan debt. Part I of this Note will explain the DOE's authority and its disbursement of federal funds, as well as the original purpose of the Higher Education Act. Part II of this Note will discuss the relationship between the DOE and for-profit colleges, specifically regarding accrediting agencies. Part III of this Note will address the predatory practices of colleges, particularly in the for-profit sector, and the DOE's awareness of this harmful conduct with no action. Part IV of this Note will identify the legal elements required to bring a claim of estoppel against the government. Finally, Part V of this Note argues that negatively impacted students should meet the difficult standard of establishing an estoppel claim against the government due to the government's contribution towards the problem, while also recognizing public policy concerns.

I. HIGHER EDUCATION SYSTEM

A. *The Department of Education*

The DOE is a federal agency that oversees and improves the United States educational system.²⁹ Congress established the DOE³⁰ to accomplish four main purposes: (1) establish policies for administering, distributing, and monitoring federal financial aid for higher education; (2) collect and analyze data for reporting to Congress, educators, and the general public; (3) bring major issues and problems to national attention; and (4) enforce federal statutes regarding discrimination to ensure equal

28. Steele & Williams, *supra* note 3 (“Student loans are virtually the only consumer debt that cannot be discharged in bankruptcy except in the rarest of cases.”).

29. *The Federal Role in Education*, U.S. DEP'T OF EDUC., <https://www2.ed.gov/about/overview/fed/role.html> [<https://perma.cc/39T3-QKFU>] [hereinafter *The Federal Role in Education*].

30. 20 U.S.C. § 3411 (1979).

access to education.³¹

1. Higher Education Act of 1965

The DOE regulates the United States higher education system, which provides financial assistance³² to approximately thirteen million students—awarding approximately \$120 billion per year in various types of federal financial aid.³³ This authority is granted by the Higher Education Act of 1965, which was enacted, in part, to remove financial barriers for eligible college students.³⁴ Title IV of the Higher Education Act, which provides financial assistance to students,³⁵ “represented the first generally available aid program for postsecondary students.”³⁶ Federally funded student loans were originally designed to allow any student from any background to attend college; however, the DOE’s management of the financial aid system is no longer serving that intended purpose.³⁷

2. Types of Higher Education Institutions

There are different types of higher education institutions, which include public colleges, nonprofit colleges, and for-profit colleges.³⁸ Public colleges are primarily funded by state governments and are typically in the form of state and community colleges.³⁹ Nonprofit colleges are by their nature not-for-profit, meaning that they are not in

31. *An Overview of the U.S. Department of Education*, U.S. DEP’T OF EDUC., https://www2.ed.gov/about/overview/focus/what_pg2.html#howdoes [<https://perma.cc/RF3Z-VLYZ>].

32. *The Federal Role in Education*, *supra* note 29.

33. *Types of Aid*, FED. STUDENT AID, DEP’T OF EDUC., <https://studentaid.ed.gov/sa/types#federal-aid> [<https://perma.cc/ZVH3-HZQR>] [hereinafter *Types of Aid*].

34. ANGELICA CERVANTES ET AL., OPENING THE DOORS TO HIGHER EDUCATION: PERSPECTIVES ON THE HIGHER EDUCATION ACT 40 YEARS LATER, TG RESEARCH & ANALYTICAL SERVS. 1 (2005), <http://files.eric.ed.gov/fulltext/ED542500.pdf> [<https://perma.cc/7DG6-5LAJ>].

35. 20 U.S.C. § 1070. (2009).

36. CERVANTES ET AL., *supra* note 34, at 20.

37. See LINDSEY BURKE & STUART BUTLER, HERITAGE FOUND., ACCREDITATION: REMOVING THE BARRIER TO HIGHER EDUCATION REFORM (Sept. 21, 2012), <http://www.heritage.org/research/reports/2012/09/accreditation-removing-the-barrier-to-higher-education-reform> [<https://perma.cc/2PDX-28F4>].

38. *College Terminology Decoded: For-Profit, Nonprofit, Private and Public Universities*, MY COLL. GUIDE, <http://mycollegeguide.org/blog/2013/12/college-terminology-decoded-forprofit-nonprofit-private-public-universities/> [<https://perma.cc/3RCE-VLXB>].

39. M. Douglas, *Public and Private: What’s the Difference?*, INSIDE HIGHER ED (Mar. 6, 2006), <https://www.insidehighered.com/views/2006/03/06/lombardi> [<https://perma.cc/KPY5-AWFP>].

the business of making money, and are accountable “to a financially disinterested board.”⁴⁰

Contrastingly, for-profit colleges are in the business to make money and must answer to their owners or shareholders.⁴¹ The primary motivation for the owners is to profit off of the college’s operations, similar to running a business.⁴² The main difference between for-profit and nonprofit colleges is the “non-distribution constraint,” which provides a limitation on a nonprofit college’s ability to spend profits.⁴³ For-profit colleges are not restricted with regard to spending the revenue and may distribute them to the shareholders.⁴⁴ This structure results in for-profit colleges “sacrific[ing] long-term success for short-term gains,” creating a flawed academic system.⁴⁵

3. Federal Financial Aid System Disbursement of Funds

There are a series of procedures required by the government before any loans or grants are awarded to assist with the cost of college.⁴⁶ First, a student must submit a Free Application for Student Financial Aid (FASFA) to determine their economic need.⁴⁷ This provides the government with an understanding of the student’s and parents’ economic assets and income.⁴⁸ The government then calculates the data to determine the amount a student could pay toward their college education, referred to as the Expected Family Contribution (EFC).⁴⁹ Next, each college or university individually calculates its cost of

40. Robert Shireman, *The Important Difference Between For-Profit and Nonprofit Colleges*, HUFFINGTON POST (Sept. 16, 2014, 2:43 PM), http://www.huffingtonpost.com/shireman/the-important-difference-_b_5595903.html [<https://perma.cc/D2HZ-8SHV>].

41. *Id.*

42. *Id.*

43. *Id.* (emphasis omitted); see also FOR-PROFIT UNIVERSITIES: THE SHIFTING LANDSCAPE OF MARKETIZED HIGHER EDUCATION 16–17 (Tressie McMillan Cottom & William A. Darity, Jr. eds., 2017) (discussing the non-distribution constraint limitation as requiring a nonprofit college to reinvest profits into the institution and removing its ability to distribute excess profits to administrators).

44. Shireman, *supra* note 40.

45. *Id.* (quoting financial aid expert Mark Kantrowitz). Although “[n]onprofit and public colleges obviously can be quite aggressive in seeking money, sometimes creating surpluses that look an awful lot like profit,” that issue is outside of the scope of this Note. *Id.*

46. *How Does Financial Aid Work?*, PRINCETON REV., <https://www.princetonreview.com/college-advice/financial-aid-scholarship/financial-aid> [<https://perma.cc/MEA8-NB2F>].

47. *Id.*

48. *Id.*

49. *Id.*

attendance, which is the total estimated amount of tuition, fees, books, travel, and other related expenses.⁵⁰ The individual school then determines how much financial aid a student will receive by subtracting the student's EFC, as determined by the FASFA, from the cost of attendance.⁵¹ However, this system can be flawed because many students cannot realistically afford the calculated EFC amount.⁵²

4. Types of Federal Financial Aid

Federal financial aid offers three types of assistance for students: grants, loans, and work-study.⁵³ Most commonly, the government provides a variety of student loans that are available based upon a student's calculated financial need.⁵⁴ The William D. Ford Federal Direct Loan Program is the largest program offered to students.⁵⁵ Under this program, there are different options for borrowing, such as direct subsidized loans, unsubsidized loans, PLUS loans, and consolidated loans.⁵⁶ Direct subsidized loans are for undergraduate students, and the interest on these loans does not accumulate while students are enrolled at least part time and up to six months after graduation or withdrawal.⁵⁷ On the other hand, direct unsubsidized loans accumulate interest while the student is attending college, but do not require any payments on the loan if the student is enrolled in school at least part time.⁵⁸ PLUS loans are

50. *Id.*

51. *Id.*

52. The EFC calculates how much a student can contribute toward the cost of enrollment in order to determine the amount of financial aid eligibility. BRIDGET TERRY LONG, NAT'L CTR. FOR POSTSECONDARY RES., WHAT IS KNOWN ABOUT THE IMPACT OF FINANCIAL AID?: IMPLICATIONS FOR POLICY, 6 (Apr. 2008), <https://files.eric.ed.gov/fulltext/ED501555.pdf> [<https://perma.cc/KS99-D89G>]. Any amount that the financial aid does not cover is considered unmet need. *See id.* In the 2003–04 academic year, after eligible grants and loans were applied to a student's account, a dependent student had \$5911 in unmet need, and an independent student had \$4503 in unmet need. *Id.* at 8. “Without sufficient financial aid, students increasingly turn to loans and credit cards. They also work significant hours, and this has been shown to impact academic performance and reduce the chances that a student will persist to college graduation.” *Id.* at 35.

53. The government provides grants to students, which are funds that the student does not need to repay, as well as work-study programs, which subsidize student income for certain qualified jobs. *Types of Aid, supra* note 33.

54. *Id.*

55. *Types of Aid: Loans*, FED. STUDENT AID, DEP'T OF EDUC., <https://studentaid.ed.gov/sa/types/loans> [<https://perma.cc/7EWP-NW67>].

56. Depending on the loan option that is received, students may not be required to have a cosigner or credit check in order to be awarded the loan. *Id.*

57. *Id.*

58. *Id.*

for graduate level students, or parents of dependent students, to assist with the cost of attendance.⁵⁹ These “loans are provided to students regardless of their creditworthiness and with no security.”⁶⁰ Finally, consolidated loans allow students to combine eligible loans for repayment to one loan servicer.⁶¹

These federal loans cannot be discharged in bankruptcy proceedings, so it is unavoidable debt for the student once incurred and a guaranteed payment to the government.⁶² If a student does not repay their federal loans—resulting in default—the federal government can “penalize[] individual defaulters by garnishing their wages or restricting access to future public subsidies.”⁶³ The government also has the authority to seize a student’s tax refund, impose additional collection costs, bring a lawsuit against the student, and/or restrict future financial aid or other federally funded benefits, such as social security.⁶⁴

B. *Accreditation of Higher Education Institutions*

For an institution to receive financial aid, the DOE first requires it to receive accreditation by a “nationally recognized” accreditor, which is a private educational association approved by the DOE.⁶⁵ Many accrediting agencies exist, and they normally focus on a particular educational area, such as healthcare or legal.⁶⁶ An accrediting agency becomes “nationally recognized” when the Secretary of Education determines that the accreditor is a “reliable authorit[y] as to the quality

59. *Id.*

60. Susan Dynarski, *An Economist’s Perspective on Student Loans in the United States 10* (Sept. 2014) (unpublished manuscript) (Brookings Institution ES Working Paper Series), https://www.brookings.edu/wp-content/uploads/2016/06/economist_perspective_student_loans_dynarski.pdf [<https://perma.cc/Y2F7-EYC9>].

61. *How to Repay Your Loans*, FED. STUDENT AID, DEP’T OF EDUC., <https://studentaid.ed.gov/sa/repay-loans> [<https://perma.cc/8TMG-3YVK>].

62. There are certain circumstances under which the federal loans may be discharged, but they are rare, and mostly limited to discharge upon death or permanent disability. Steele & Williams, *supra* note 3.

63. Nicholas W. Hillman, *College on Credit: A Multilevel Analysis of Student Loan Default*, 37 REV. HIGHER EDUC. 169, 178 (2014).

64. *Id.* at 170.

65. *Accreditation in the United States*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/admins/finaid/accred/accreditation.html#Overview> [<https://perma.cc/CZ36-AZR3>] [hereinafter *Accreditation*].

66. *See Nationally Recognized Accrediting Agencies*, U.S. DEP’T OF EDUC. (Feb. 1, 2018), https://www2.ed.gov/admins/finaid/accred/accreditation_pg5.html#NationallyRecognized [<https://perma.cc/ZMH7-WK9W>].

of education or training provided by institutions of higher education.”⁶⁷ To meet this standard, the accrediting agency seeking recognition must address the quality of the institution or program by setting achievement standards regarding numerous factors, such as fiscal and administrative capacity and job placement.⁶⁸

C. *The Predatory Nature of For-Profit Colleges*

For-profit colleges have been scrutinized for their predatory enrollment practices in recent years.⁶⁹ By continually authorizing federal student aid, the DOE is funding these practices as well as the profits they accrue and distribute to their investor-owners.⁷⁰ The investor-owners of these colleges are profiting at the expense of the students.⁷¹

In 2015, in response to the Corinthian Colleges closing, the DOE claimed to recognize the abusive college tactics seen frequently in the for-profit college sector, and, supposedly, heightened investigations, improved enforcement, and increased regulations as a result.⁷² Although the DOE announced these intentions with regard to the oversight of predatory conduct, their lack of action says otherwise.⁷³ When questioned about the disbursement of funds to subpar for-profit colleges, the DOE indicated that they cannot withhold federal aid from colleges based only on accusations; however, many of these for-profit colleges have a proven use of illegal practices and somehow still maintain eligibility to receive DOE funds.⁷⁴

One such college is Education Management Corporation (EMC),

67. *Id.*

68. 34 C.F.R. § 602.16 (2016). These factors also include state licensing examinations, course completion, curricula, student support services, recruiting and admissions practices, and student complaints. *Id.*

69. Patricia Cohen, *For-Profit Colleges Accused of Fraud Still Receive U.S. Funds*, N.Y. TIMES (Oct. 12, 2015), <https://www.nytimes.com/2015/10/13/business/for-profit-colleges-accused-of-fraud-still-receive-us-funds.html>.

70. *Id.*

71. Richard North Patterson, *Too Many For-Profit Colleges Defraud Students and Taxpayers Alike*, BOS. GLOBE (June 5, 2017), <http://www.bostonglobe.com/opinion/2017/06/05/too-many-for-profit-colleges-defraud-students-and-taxpayers-alike/6jKnrUaLp9Ue1SPcgU4nUL/story.html>.

72. Press Release, U.S. Dep’t of Educ., Fact Sheet: Protecting Students from Abusive Career Colleges (June 8, 2015), <https://www.ed.gov/news/press-releases/fact-sheet-protecting-students-abusive-career-colleges> [<https://perma.cc/BJL6-E6SB>].

73. Cohen, *supra* note 69.

74. Cohen, *supra* note 69.

which operates about 110 for-profit colleges around the United States, specializing in specific trades, such as cooking and the arts.⁷⁵ This institution has been investigated or sued in at least twelve states for its predatory behavior and allegedly illegal practices.⁷⁶ In 2014, a class action lawsuit was also filed for the “deceptive enrollment practices and manipulated federal student loan and grant programs.”⁷⁷ Despite these investigations and lawsuits against EMC, the DOE awarded approximately \$1.25 billion in federal loans to students enrolled in EMC-operated colleges the following academic year.⁷⁸

For-profit colleges have mastered the art of “exploiting loopholes, sidestepping rules or taking advantage of yearslong [sic] appeals processes” to continue obtaining federal aid from the DOE.⁷⁹ They are successful in maintaining financial aid eligibility because they can “pool graduation, financial, enrollment, staffing[,] and other statistics to mask weak performers.”⁸⁰ In 2014, colleges that exceeded the acceptable standard for the allowed student loan default rate still received about \$116 million in federal aid from the DOE.⁸¹ At Everest University, an operating for-profit college, only twenty-two percent of the students “paid ‘at least \$1 towards the principle balance of their federal [student] loans within [three] years of leaving school.’”⁸² This problem has become so widespread that thirty-seven state Attorney Generals have teamed up to prosecute for-profit colleges.⁸³ These prosecutors are investigating 152 colleges that collectively received about \$8.1 billion in federal aid from the DOE in 2015.⁸⁴

Consider Alta Colleges, which are a group of for-profit colleges owned by a private equity firm operating in several states.⁸⁵ According to the complaint filed by the Illinois Attorney General’s Office, a three-year degree in law enforcement at Alta Colleges costs approximately

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. C. Tyler Flores, *Unprecedented Uncertainty: The Corinthian Colleges Debacle, the Department of Education’s Response, and the Bankruptcy Practitioner’s Dilemma*, 39 AM. J. TRIAL ADVOC. 651, 662 (2016) (quoting *College Scorecard*, U.S. DEP’T OF EDUC.).

83. Cohen, *supra* note 69.

84. *Id.*

85. *Id.*

\$75,000.⁸⁶ However, less than four percent of graduated students are actually employed in this area.⁸⁷ Many of the students with a degree from Alta Colleges are employed in retail, security, or other similar jobs that typically require only a high school diploma.⁸⁸ Additionally, many of these lawsuits have settled, which can be for amounts ranging from about \$1.5 million to \$95.5 million.⁸⁹ Frighteningly, such settlements are paid with the funds derived from the DOE through the federal financial aid program because an “overwhelming bulk of revenue” at for-profit colleges is derived from federal aid.⁹⁰ Massachusetts Attorney General Maura Healy stated that these colleges exist solely because of taxpayers, and the DOE has the authority to “cut off funds” based on the Attorney General’s findings.⁹¹ The idea of taxpayers funding for-profit predatory practices is continually criticized, but lawmakers and agency officials have resisted the much-needed change.⁹²

With regard to this predatory conduct, Corinthian Colleges, prior to their closing, used recruiting tactics that targeted impoverished prospective students in order to make a profit.⁹³ For example, the college administration recruited homeless and unemployed students, promised them strong future careers, and pushed them into thousands of dollars in student loans they knew the students could not afford.⁹⁴

Corinthian Colleges explicitly defined their target prospective students to include those with “low self-esteem,” and who are “isolated”

86. Plaintiff’s Second Amended Complaint for Injunctive and Other Relief at 2, *Illinois v. Alta Colls. Inc.*, No. 14-cv-03786, 2014 U.S. Dist. LEXIS 123053 (N.D. Ill. 2014), <http://www.cfpbmonitor.com/wp-content/uploads/sites/5/2014/11/IL-AG-second-amended-complaint.pdf> [<https://perma.cc/G6MP-WM74>].

87. *Id.*

88. Cohen, *supra* note 69.

89. *Id.*; *For-Profit College Company to Pay \$95.5 Million to Settle Claims of Illegal Recruiting, Consumer Fraud and Other Violations*, U.S. DEP’T OF JUST. (Nov. 16, 2015), <https://www.justice.gov/opa/pr/profit-college-company-pay-955-million-settle-claims-illegal-recruiting-consumer-fraud-and> [<https://perma.cc/L9EX-4Q22>].

90. *See* Cohen, *supra* note 69.

91. *Id.*

92. JOHN AUBREY DOUGLASS, CTR. FOR STUDIES IN HIGHER EDUC., MONEY, POLITICS AND THE RISE OF FOR-PROFIT HIGHER EDUCATION IN THE US: A STORY OF SUPPLY, DEMAND AND THE BRAZILIAN EFFECT 8 (2012), <https://cshe.berkeley.edu/sites/default/files/publications/rops.jad.forprofitsus.2.15.2012.pdf> [<https://perma.cc/XC3S-N9JX>].

93. *See* Annie Waldman, *How a For-Profit College Targeted the Homeless and Kids with Low Self-Esteem*, PROPUBLICA (Mar. 18, 2016), <https://www.propublica.org/article/how-a-for-profit-college-targeted-homeless-and-kids-with-low-self-esteem> [<https://perma.cc/UT4S-M7LR>].

94. *Id.*

with “few people in their lives that care about them.”⁹⁵ The colleges advertised “high demand” programs that were never actually offered at any of their campuses in order to appear more often on web searches and attract more prospective students.⁹⁶ Moreover, Corinthian Colleges encouraged students to borrow private funds from a financially tied bank without disclosing this connection.⁹⁷ These for-profit colleges are manipulating and taking advantage of students in order to increase profits.⁹⁸ Since for-profit colleges are focused on profits and the bottom line, their business model encourages admission of vulnerable students who are eligible for the maximum allotment of federal aid.⁹⁹ This profit-motivated business model ultimately cultivates these predatory practices.¹⁰⁰

D. *Government Reports Indicate the Higher Education System Has Needed Reform for Years*

Government committees, such as the United States Accountability Office (GAO) and the Health, Education, Labor and Pensions (HELP) Committee, have been assigned to investigate and propose changes to the for-profit college concern.¹⁰¹

1. United States Government Accountability Office

The GAO is an agency that works for Congress with the purpose of “investigat[ing] how the federal government spends taxpayer dollars.”¹⁰² The GAO advises Congress and other governmental agencies in order “to make government more efficient, effective, ethical, equitable[,] and

95. *Id.*

96. *Id.*

97. *Id.*

98. *See generally* Sarah Ann Schade, *Reining in the Predatory Nature of For-Profit Colleges*, 56 ARIZ. L. REV. 317 (2014) (discussing the business model of for-profit colleges).

99. *Id.* at 322.

100. *See generally id.*

101. *See* GEORGE A. SCOTT, U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-600, PROPRIETARY SCHOOLS: STRONGER DEPARTMENT OF EDUCATION OVERSIGHT NEEDED TO HELP ENSURE ONLY ELIGIBLE STUDENTS RECEIVE FEDERAL STUDENT AID (2009), <http://www.gao.gov/new.items/d09600.pdf> [<https://perma.cc/W56M-B6HR>]; RICHARD HILLMAN, U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-150, FOR-PROFIT SCHOOLS: EXPERIENCE OF UNDERCOVER STUDENTS ENROLLED IN ONLINE CLASSES AT SELECTED COLLEGES (2011), <https://www.gao.gov/assets/590/586456.pdf> [<https://perma.cc/5DEX-8HHL>].

102. *About GAO*, U.S. GOV'T ACCOUNTABILITY OFF., <https://www.gao.gov/about/index.html> [<https://perma.cc/26QB-5HQT>].

responsive.”¹⁰³

In August 2009, the GAO recommended stronger oversight of for-profit colleges to ensure that only eligible students receive financial aid.¹⁰⁴ While the government’s policies require certain standards before a student receives financial aid, the lack of oversight allows colleges, particularly for-profit colleges, to abuse federal funding.¹⁰⁵ From 2001 to 2009, federal student aid at for-profit colleges increased by 164%.¹⁰⁶ Yet, in 2004, the default rate for students attending for-profit colleges was nearly double the rate of nonprofit and public colleges.¹⁰⁷ The investigation of for-profit colleges found that many were violating rules for admissions testing to ensure more students were eligible for enrollment.¹⁰⁸ For example, some test administrators provided students with the answers to the admissions tests, and others changed students’ answers after submission.¹⁰⁹

The investigation also discovered that for-profit colleges were referring students to “diploma mills” in order to meet the high school diploma requirement before enrolling.¹¹⁰ These diploma mills allowed students without a high school diploma to pay for an invalid diploma that required little academic effort “in order to obtain access to federal student loans.”¹¹¹ Despite evidence of these practices, the DOE has yet to “establish[] clearly written policies to help ensure high school diploma requirements are met” before disbursing federal funds.¹¹²

In October of 2011, the GAO conducted an investigation of for-profit colleges by enrolling undercover students in online classes at different colleges to determine any activity that was not compliant with federal regulations.¹¹³ The GAO initiated the investigation due to changes in the scale and scope of for-profit colleges—specifically, their consumption of \$32 billion in government grants and loans in the 2009–10 school year.¹¹⁴ The GAO reported the results of the investigation to

103. *Id.*

104. SCOTT, *supra* note 101, at 28–30.

105. *Id.* at 28–29.

106. *Id.* at 1.

107. *Id.* at 13.

108. *Id.* at 22.

109. *Id.*

110. *Id.* at 26.

111. *Id.*

112. *Id.*

113. *See* HILLMAN, *supra* note 101.

114. *Id.* at 1.

Congress, and found that among the fifteen for-profit colleges involved in the report, seven acted in a manner inconsistent with policies or federal regulations.¹¹⁵ This continued concern about for-profit colleges with no action by the DOE confirms that students need a legal remedy to protect against being taken advantage of by private for-profit colleges with the assistance and financing of the federal government.¹¹⁶

In 2012, the GAO once again investigated the deceptive practices of for-profit colleges and found that the abusive admissions-testing practices continued since the 2009 investigation.¹¹⁷ The 2012 investigation suggested stronger oversight of such practices, but there continues to be no responsive changes, and the DOE has failed to ensure compliance with federal regulations.¹¹⁸

2. HELP Committee Report

The HELP Committee proposes legislation related to issues concerning health, education, labor, and pensions.¹¹⁹ The Senate HELP Committee Chairman conducted an “oversight investigation focusing exclusively on the for-profit sector of higher education” between June 2010 and July 2012.¹²⁰ The findings of the investigation showed that academic quality at for-profit colleges is significantly less than the nonprofit and public equivalents due to the business model of for-profit colleges.¹²¹ This disparity is attributed to “[t]he self-reporting and peer-review nature of the accreditation process [that] exposes it to manipulation by companies that are more concerned with their bottom line than with academic quality and improvement.”¹²² This relationship between for-profit colleges and accreditors, which is designed by the DOE, adds to the flawed outcomes in the higher education system.¹²³

The investigation also revealed that for-profit colleges were using

115. *Id.* at 7.

116. *See supra* Subpart I.C.

117. U.S. SENATE COMM. ON HEALTH, EDUC., LABOR & PENSIONS, FOR PROFIT HIGHER EDUCATION: THE FAILURE TO SAFEGUARD THE FEDERAL INVESTMENT AND ENSURE STUDENT SUCCESS 53–54 (July 30, 2012), http://www.help.senate.gov/imo/media/for_profit_report/PartI-PartIII-SelectedAppendixes.pdf [<https://perma.cc/2UK7-K3KK>] [hereinafter THE FAILURE TO SAFEGUARD].

118. *Id.*

119. *About*, U.S. SENATE COMM. ON HEALTH, EDUC., LABOR & PENSIONS, <http://www.help.senate.gov/about> [<https://perma.cc/KF4K-TN39>].

120. THE FAILURE TO SAFEGUARD, *supra* note 117, at Abstract.

121. *Id.* at 18.

122. *Id.* at 8, 123.

123. *Id.* at 18.

questionable tactics to evade requirements imposed specifically on them to address the increasing predatory practices concerns, thereby making attempts by the DOE to regulate for-profit colleges ineffective.¹²⁴ There were three proposed recommendations that came from the investigation: (1) accuracy in reporting student results to enhance transparency; (2) more effective oversight of federal financial aid; and (3) “meaningful protections for students.”¹²⁵ Interestingly, both ITT Tech and Corinthian Colleges were examined by the 2010 investigation, but the DOE did not revoke their financial aid until 2016.¹²⁶ Despite more than five years of concern, the DOE did not prepare any remedy or transition for all the affected students after the colleges were shutdown.¹²⁷

II. LACK OF REMEDIES FOR NEGATIVELY IMPACTED STUDENTS

Students wronged by the current financial aid system have few remedies within the DOE for discharging student loans, and those that are available are very narrow in scope.¹²⁸ Students have challenged the validity of their loans under the DOE loan discharge programs¹²⁹ and an implied cause of action,¹³⁰ but are largely unsuccessful under both theories.

124. THE FAILURE TO SAFEGUARD, *supra* note 117, at 8. There are currently two regulations specifically directed at for-profit colleges: the 90/10 rule and percentage of default regulations. *Id.* The 90/10 rule requires that a for-profit college derive a minimum of 10% of its revenue from funds other than federal student aid, but 90% of its revenue may be from federal loans and grants. *Id.* at 8–9. This rule has been scrutinized because Veterans Affairs benefits can be counted in the 10% of outside funding, so “servicemembers [are seen] as nothing more than ‘dollar signs in uniform.’” *Id.* There is also a regulation that revokes financial aid after a certain percentage of their students are in default. *Id.* at 9–10.

125. *Id.* at 10–11.

126. *Id.* at 20–21; Vasel & Lobosco, *supra* note 17.

127. See THE FAILURE TO SAFEGUARD, *supra* note 117, at 168–69; Vasel & Lobosco, *supra* note 17.

128. *Forgiveness, Cancellation, and Discharge*, FED. STUDENT AID, U.S. DEP’T OF EDUC., <https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation#when> [<https://perma.cc/H5K8-V3KW>] [hereinafter *Forgiveness, Cancellation, and Discharge*].

129. See generally *id.* (discussing the limited means in which a student may discharge a student loan).

130. See *L’ggrke v. Benkula*, 966 F.2d 1346, 1348 (10th Cir. 1992); *Moy v. Adelphi Inst.*, 866 F. Supp. 696, 705 (E.D.N.Y. 1994); *Williams v. Nat’l Sch. of Health Tech., Inc.*, 836 F. Supp. 273, 278–79 (E.D. Pa. 1993), *aff’d*, 37 F.3d 1491 (3d Cir. 1994); *Hudson v. Acad. of Court Reporting, Inc.*, 746 F. Supp. 718, 719–20 (S.D. Ohio 1990).

A. *Department of Education Programs Designed—but Failing—to Help Students*

There are a variety of loan repayment and discharge programs for students, but most of these programs do not help the students that need loan forgiveness the most—those that attended predatory, poor-quality institutions.¹³¹ Absent death or total and permanent disability, there are only two programs that *may* apply to students who attended one of the predatory, for-profit institutions; but these options hardly provide an adequate financial remedy.¹³²

1. Closed School Discharge

Students may discharge their loans under the Closed School Discharge Program when their school is shut down because the government rescinded the school's financial aid eligibility.¹³³ However, there are three exceptions to meeting the criteria: (1) the student withdraws from the institution “more than 120 days before the school closes”; (2) the student transfers credits to another institution to complete a comparable degree; or (3) “any other comparable means.”¹³⁴ Therefore, any student that meets the criteria for one of the three exceptions will not be eligible for relief from their student loan debt, even though the DOE revoked financial aid from their institution.¹³⁵ Additionally, the DOE is responsible for interpreting the criteria, which is conveniently broad.¹³⁶

Although this program appears to provide a remedy for students attending failing for-profit colleges, it still falls short of protecting many

131. The DOE provides loan forgiveness to graduates that are employed as teachers at low-income elementary or secondary schools and employees in other particular public-service jobs. *Forgiveness, Cancellation, and Discharge*, *supra* note 128. Additionally, there are loan discharge options for students when loans were incorrectly retained because the college did not refund per federal regulations or were falsely certified, i.e., identity theft or college officials improperly disbursing loans. *Id.* However, these programs fail to specifically assist the category of vulnerable students discussed in this Note. *Id.*

132. Douglas-Gabriel, *ITT Tech Students*, *supra* note 24.

133. *Closed School Discharge*, U.S. DEP'T OF EDUC., <https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/closed-school> [<https://perma.cc/4XQD-NQHJ>]. A student may be eligible for 100% student loan discharge if the student is enrolled at the institution at the time of closure, or the school closes within 120 days of the student's withdrawal. *Id.*

134. *Id.*

135. *Closed School Discharge*, *supra* note 133.

136. *Id.*; see LOAN DISCHARGE APPLICATION: SCHOOL CLOSURE, U.S. DEP'T OF EDUC., <https://studentaid.ed.gov/sa/sites/default/files/closed-school-loan-discharge-form.pdf> [<https://perma.cc/HE9S-LYXZ>].

similarly situated students.¹³⁷ For example, a student withdrawing from the school just one semester before its closing, which is ordinarily more than 120 days, is excluded from the program based on the 120-day exception.¹³⁸

The DOE is fully aware of these deceptive institutions, but takes no action until years after the recognized concern.¹³⁹ That same agency then decides that only those students attending in the last four months have been negatively impacted enough to allow eligibility for loan discharge.¹⁴⁰ Not only is this an arbitrary line, but the DOE also has the control and authority to protect students before their situation becomes a lost cause; however, the DOE has consistently and repeatedly failed to take preventative action.¹⁴¹

2. Borrower Defense Discharge

Alternatively, students may submit a claim to discharge their student loans under the DOE's Borrower Defense Discharge program.¹⁴² This program discharges student loans when a college commits fraud, misrepresents services, or violates other state laws that relate to the educational services provided regardless of whether the school is closed or active.¹⁴³ When a student submits a claim, the DOE places their loans into forbearance, so the student is not required to make payments while the claim is investigated.¹⁴⁴ However, interest on those loans will continue to accrue.¹⁴⁵

Although this program seems to provide relief to students negatively impacted by the current financial aid system, there are still concerns that

137. See Douglas-Gabriel, *ITT Tech Students*, *supra* note 24.

138. *Id.*

139. See *supra* Subpart I.C.

140. See *Closed School Discharge*, *supra* note 133.

141. See generally Press Release, U.S. Dep't of Educ., U.S. Department of Education Announces Final Regulations to Protect Students and Taxpayers from Predatory Institutions (Oct. 28, 2016), <http://www.ed.gov/news/press-releases/us-department-education-announces-final-regulations-protect-students-and-taxpayers-predatory-institutions> [<https://perma.cc/324D-KVRV>] (announcing the need to protect students from predatory practices in 2016, which is years after the government was made aware of such conduct).

142. See generally *Borrower Defense to Repayment*, U.S. DEP'T OF EDUC., <https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/borrower-defense> [<https://perma.cc/V5WA-SCDH>].

143. *Id.*

144. *Id.*

145. *Id.*

this solution is not enough.¹⁴⁶ For example, the program's success "hinges on the discretion of the department," which continuously prevents student relief by failing to approve students' claims for discharge.¹⁴⁷ The DOE is criticized for "view[ing] itself as a debt collection agency first and a protector of students second."¹⁴⁸ Since the DOE is concerned with revenue from the interest of the student loans, it is unlikely that the DOE would have either the incentive or the determination to internally develop a dependable and effective solution for the negatively impacted students.¹⁴⁹ Additionally, this limited relief for a fraction of the impacted students could itself be revoked as presidential administrations change.¹⁵⁰

As long as the current financial aid structure remains the same, students who are negatively impacted by the system need a dependable resolution with disinterested and neutral decision-makers.¹⁵¹ The DOE uses the accreditors and the accreditation process as a shield to protect against liability¹⁵²—despite awareness of the illegal and deceptive practices at for-profit colleges—and then provides relief to only a fraction of the negatively impacted students. The remaining students that have fallen victim to this predatory conduct need an external, neutrally, and evenly administered means of establishing and enforcing a legal claim against the federal government, who repeatedly disburses funds enabling such conduct.

B. *Causes of Action Under the Higher Education Act Similarly Fail*

Although there is no explicit cause of action under the Higher

146. See generally Matthew A. McGuire, *Subprime Education: For-Profit Colleges and the Problem with Title IV Federal Student Aid*, 62 DUKE L.J. 119, 141 (2012) (discussing the negative outcomes with regard to for-profit colleges and the inadequacies of the current governmental financial aid structure).

147. Danielle Douglas-Gabriel, *Obama Administration Issues Rules to Overhaul Student Debt Forgiveness*, WASH. POST, June 13, 2016), https://www.washingtonpost.com/news/grade-point/wp/2016/06/13/obama-administration-issues-rules-to-overhaul-student-debt-forgiveness/?utm_term=.cac79941d0f5 [hereinafter Douglas-Gabriel, *Obama Administration*].

148. *Id.* (internal quotation omitted).

149. See *id.*

150. Political administrations on both sides of the aisle—by means of their appointees to the DOE—use their authority to interpret the broad legislation of Congress to further their political interests. Jillian Berman, *A Glimpse at How Much Power Trump's Cabinet Appointees Will Have*, MARKETWATCH (Dec. 19, 2016), <http://www.marketwatch.com/story/a-glimpse-at-how-much-power-trumps-cabinet-appointees-will-have-2016-12-19>.

151. See Douglas-Gabriel, *Obama Administration*, *supra* note 147.

152. Peter H. Schuck, *Tort Liability to Those Injured by Negligent Accreditation Decisions*, 57 LAW & CONTEMP. PROBS. 185, 186 (1994).

Education Act, students alleging fraud by their institutions rely on a claim of an implied right of action for the disbursement of loans despite their institution's misconduct.¹⁵³ However, student claims are generally not successful because courts have declined to consider students the primary beneficiary of student loans, as required under this cause of action.¹⁵⁴

In *Cort v. Ash*, the Supreme Court held that an implied right of action may exist if: (1) the plaintiff belongs to the class that the statute was intended to benefit; (2) there is an explicit or implicit indication of legislative intent to provide or deny this remedy; (3) the remedy is consistent with the underlying purposes of the legislative scheme; and (4) the cause of action is not in an area that typically concerns the states, which would make it inappropriate to infer a cause of action under federal law.¹⁵⁵ It is important to note that under this analysis, the second and third elements are given more weight to infer an implied cause of action.¹⁵⁶ The Supreme Court later clarifies this standard, holding that although the factors are relevant, “[t]he central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action.”¹⁵⁷

Although the current analysis for an implied cause of action as applied to the Higher Education Act is inconsistent, most courts conclude students cannot meet the standard set by *Ash*.¹⁵⁸ Courts have held that a student seeking an implied cause of action easily satisfies the first element because students are the intended beneficiaries of the student loan program as outlined in the Higher Education Act.¹⁵⁹ Other courts find that the government and lending institution—rather than the

153. See *Williams v. Nat'l Sch. of Health Tech., Inc.*, 836 F. Supp. 273, 278 (E.D. Pa. 1993), *aff'd*, 37 F.3d 1491 (3d Cir. 1994).

154. *Hudson v. Acad. of Court Reporting, Inc.*, 746 F. Supp. 718, 719–20 (S.D. Ohio 1990) (holding that the Higher Education Act was intended to protect against the use of funds for non-education purposes, so the student is not the intended beneficiary); *L'ggrke v. Benkula*, 966 F.2d 1346, 1348 (10th Cir. 1992) (holding no private cause of action under the Higher Education Act may exist when the statute delegates the authority to the Secretary of Education); *Moy v. Adelphi Inst., Inc.*, 866 F. Supp. 696, 705 (E.D.N.Y. 1994) (holding there was no “congressional intent” to create a private cause of action); *Williams*, 836 F. Supp. at 279 (“[W]here a statute provides an administrative enforcement mechanism, it is presumed that Congress did not mean to create a private right of action.”).

155. *Cort v. Ash*, 422 U.S. 66, 78 (1975).

156. *Hudson*, 746 F. Supp. at 719–20.

157. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575 (1979).

158. *L'ggrke*, 966 F.2d at 1348; *Moy*, 866 F. Supp. at 705; *Williams*, 836 F. Supp. at 278–79; *Hudson*, 746 F. Supp. at 719–20.

159. *Williams*, 836 F. Supp. at 279.

students—are the intended beneficiaries of the program because the act prevents the misapplication of federal funds “toward purposes not intended and unrelated to education.”¹⁶⁰

There are also cases that decline to extend students an implied cause of action because Congress cannot intend a private cause of action where a remedy already exists under an administrative enforcement mechanism.¹⁶¹ Since Congress’ intent is to delegate the authority of loan discharge to the DOE, it has the sole authority to design a remedy if desired, meaning a remedy cannot also exist as an implied cause of action.¹⁶² The Higher Education Act “expressly provides remedies to rectify the very issues raised by [students].”¹⁶³ Therefore, no implied cause of action exists.¹⁶⁴ However, as explained previously, the DOE refuses to provide an adequate remedy for students because it is profit motivated and does not want to provide mechanisms for successful discharge of student loans.¹⁶⁵ Therefore, an implied cause of action is not a successful remedy for impacted students.

There has been one case in which the court found an implied cause of action under the Higher Education Act.¹⁶⁶ In *De Jesus Chavez v. LTV Aerospace Corp.*, the District Court of Texas allowed an implied cause of action for a student, recognizing that “[s]tudent borrowers were a primary concern of the Higher Education Act of 1965,”¹⁶⁷ and “[t]he entire program is based on the needs of . . . student borrower[s] and exists for [their] benefit.”¹⁶⁸ However, other courts have taken issue with this interpretation, claiming it is “excessively broad.”¹⁶⁹

Courts are also hesitant to find an implied cause of action because “implied right of action cases ‘reflect a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes.’”¹⁷⁰ This means that the court

160. *Hudson*, 746 F. Supp. at 721; *see also* *Phillips v. Pa. Higher Educ. Assistance Agency*, 497 F. Supp. 712, 723 (W.D. Pa. 1980), *rev'd*, 657 F.2d 554 (3d Cir. 1981).

161. *L'ggrke*, 966 F.2d at 1348; *Williams*, 836 F. Supp. at 279–80.

162. *L'ggrke*, 966 F.2d at 1348; *Williams*, 836 F. Supp. at 279–80.

163. *Moy*, 866 F. Supp. at 705.

164. *Id.*

165. *See* Douglas-Gabriel, *ITT Tech Students*, *supra* note 24.

166. *De Jesus Chavez v. LTV Aerospace Corp.*, 412 F. Supp. 4, 6–7 (N.D. Tex. 1976).

167. *Id.* at 6.

168. *Id.*

169. *Moy*, 866 F. Supp. at 704; *Hudson v. Acad. of Court Reporting, Inc.*, 746 F. Supp. 718, 720 (S.D. Ohio 1990).

170. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 300 (2002) (Stevens, J., dissenting) (quoting *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 508 n.9 (1990)).

system does not want to substitute its judgment for Congress to provide a remedy for a negatively impacted student.¹⁷¹ Therefore, a student negatively impacted by the structure of the higher education system is not likely to find a remedy within the court under an implied cause of action.

III. FEDERAL ESTOPPEL CLAIM

In general, estoppel is a legal doctrine “invoked to avoid injustice in particular cases.”¹⁷² Estoppel against the government is an area of the law that lacks guidance for interpretation and analysis.¹⁷³ The theory of equitable estoppel against the government has been used to prohibit the government’s recovery of damages under its own legal theory, and also to prevent the government from undermining a plaintiff’s cause of action.¹⁷⁴ In a case where a plaintiff brings suit against the government, estoppel serves “as a shield against a government claim that would have defeated recovery.”¹⁷⁵

It is very difficult to bring an estoppel claim against the government.¹⁷⁶ However, a student buried in debt from institutions with predatory practices does not have many options under the current financial aid structure.¹⁷⁷ The confusion in estoppel law serves as an opportunity for a student to find relief because the body of law is in need of reform and students are still in need of an adequate remedy.¹⁷⁸

A. *Estoppel Standard*

It is well established that “the Government may not be estopped on the same terms as any other litigant.”¹⁷⁹ However, the Supreme Court recognizes that there may be occasions where the “public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings

171. *Id.*

172. *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 59 (1984).

173. *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 422 (1990).

174. *Jablon v. United States*, 657 F.2d 1064, 1068 (9th Cir. 1981).

175. *Id.* at 1069.

176. *Office of Pers. Mgmt.*, 496 U.S. at 422.

177. *See supra* Part II.

178. *See* Andrew P. Kelly, *Share the Risk on Student Loans*, AEI (Sept. 7, 2016), <https://www.aei.org/publication/share-the-risk-on-student-loans/> [https://perma.cc/G4BJ-KV58].

179. *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 60 (1984).

with their Government.”¹⁸⁰

In order to prevail, the party bringing the claim must first satisfy the traditional elements of estoppel,¹⁸¹ which include (1) “a material misrepresentation by a party who had reason to know of its falsity”; (2) reasonable reliance on the misrepresentation; and (3) the party seeking estoppel is disadvantaged due to that misrepresentation.¹⁸² In addition to these basic elements, government liability also considers “affirmative misconduct” on the part of the governmental body the claim is being brought against.¹⁸³ All governmental agencies may be subject to an estoppel claim.¹⁸⁴ However, the government will not be responsible for the statements of its agents.¹⁸⁵

Despite recognizing that an estoppel claim against the government may exist under strict circumstances, the Supreme Court has never found a case that has satisfied the narrow standard of “affirmative misconduct.”¹⁸⁶ However, the Court refused to adopt a bright line rule of no estoppel against the government, which seemingly encourages lower courts to allow such claims to be successful in particular circumstances.¹⁸⁷ The government may be estopped when its “wrongful conduct threatens to work a serious injustice and if the public’s interest would not be unduly damaged by the imposition of estoppel.”¹⁸⁸ However, without proper guidance from the Supreme Court in defining the “affirmative misconduct” standard, lower courts will continue to be split on the issue.¹⁸⁹

180. *Id.* at 60–61.

181. *Id.* at 61.

182. *Falcone v. Pierce*, 864 F.2d 226, 228 (1st Cir. 1988).

183. *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 421 (1990).

184. *Tarco, Inc. v. Conifer Metro. Dist.*, 316 P.3d 82, 90 (Colo. App. 2013) (holding equitable estoppel may be applied to governmental agencies, as the purpose is to “prevent manifest injustice.”). However, other jurisdictions have declined to allow an estoppel claim against a government agency. *McBride v. N.Y. City Hous. Auth.*, 31 N.Y.S.3d 506, 506 (N.Y. App. Div. 2016).

185. *Office of Pers. Mgmt.*, 496 U.S. at 419–20.

186. *Heckler*, 467 U.S. at 67.

187. *Office of Pers. Mgmt.*, 496 U.S. at 423.

188. *United States v. Lazy FC Ranch*, 481 F.2d 985, 989 (9th Cir. 1973); *see also United States v. Boccanfuso*, 882 F.2d 666, 680 (2d Cir. 1989); *Squillacote v. United States*, 747 F.2d 432, 438 (7th Cir. 1984). Although *Squillacote* was not strictly an estoppel case, the court held the government could be estopped when it “unconscionably delayed” the discovery of a jurisdictional defect and used deceptive legal tactics. *Id.*

189. *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting).

B. *Distinguishing Between Proprietary and Sovereign Activities*

A court may also consider the difference between governmental actions in a proprietary and sovereign capacity.¹⁹⁰ The government acts in a sovereign capacity “by merely performing its ‘governmental’ functions.”¹⁹¹ When the government acts in a proprietary capacity by “launching a profitmaking enterprise, ‘a State leaves the sphere that is exclusively its own’” “and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation.”¹⁹² “The touchstone of whether the government is acting in its proprietary capacity or sovereign capacity is whether the government is entering into ordinary contractual relations with its citizens or whether it is seeking to enforce a public right or interest.”¹⁹³ Some jurisdictions require that the government act in a proprietary capacity in order to have a claim of estoppel.¹⁹⁴ Other courts, although reluctant, still recognize liability if the government is acting in its sovereign capacity.¹⁹⁵ In *Hicks v. Califano*, the Fifth Circuit Court of Appeals found that the government was acting in a sovereign capacity when insuring student loans because the loans are for the public interest based on the legislative history of the 1965 Higher Education Act.¹⁹⁶ The Rhode Island Supreme Court oppositely held that an agency’s “essential function was to collect the principal and interest on outstanding student loans and to maintain records on all transactions,” which was proprietary in nature.¹⁹⁷

Other jurisdictions have noted that interpreting whether the government is acting in a sovereign or proprietary capacity is “impossible,” and must be determined by looking at the surrounding circumstances.¹⁹⁸ “The purpose and character of the undertaking, and the method of its operation determine whether it is public or private.”¹⁹⁹

190. *Edelman v. Jordan*, 415 U.S. 651, 695 (1974) (Marshall, J., dissenting).

191. *Id.*

192. *Id.* (quoting *Parden v. Terminal Ry. Ala. State Docks Dep’t*, 377 U.S. 184, 196 (1964)); *Parden v. Terminal Ry. Ala. State Docks Dep’t*, 377 U.S. 184, 196 (1964).

193. *Hicks v. Califano*, 450 F. Supp. 278, 283 (N.D. Ga. 1977) (quoting *Moody Nursing Home, Inc. v. Matthews*, No. C75-72 (N.D. Ga. 1977), *aff’d sub nom. Hicks v. Harris*, 606 F.2d 65 (5th Cir. 1979)).

194. *United States v. Vonderau*, 837 F.2d 1540, 1541 (11th Cir. 1988).

195. *United States v. Lazy FC Ranch*, 481 F.2d 985, 989 (9th Cir. 1973).

196. *Califano*, 450 F. Supp. at 283–84.

197. *Rhode Island Student Loan Auth. v. NELS, Inc.*, 550 A.2d 624, 627 (R.I. 1988).

198. *Williams v. Town of Morristown*, 222 S.W.2d 607, 610 (Tenn. Ct. App. 1949), *decree modified*, 222 S.W.2d 615 (Tenn. 1949).

199. *Id.*

Alternatively, other courts have found that the sovereign-proprietary distinction is not helpful in determining whether the government should be estopped.²⁰⁰ This is because the purpose of estoppel is to prevent injustice, so a claim should not hinge on the type of activity in which the government engaged.²⁰¹ It has also been noted that “the distinction is not sufficiently calibrated to implement that concern in every situation.”²⁰² However, this distinction between the sovereign and proprietary capacity suggests a public policy concern of hindering the government with meritless estoppel claims.²⁰³

C. *Material Misrepresentation*

To bring a successful estoppel claim against the government, the claimant must prove the traditional elements of estoppel, so there must first be a material misrepresentation.²⁰⁴ A material misrepresentation sufficient for an estoppel claim can be established if “the governmental official or agency made misrepresentations, whether by misleading statements, conduct, or silence, that induced the party to act.”²⁰⁵ Additionally, misrepresentations may be made to third parties, as defined under the Restatement (Second) of Torts:

The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct in the transaction or type of transaction involved.²⁰⁶

A representation is not limited to words, but also includes acts or “[c]onduct calculated to convey a misleading impression.”²⁰⁷ This prong of the test may be satisfied with “a false representation or concealment of a material fact.”²⁰⁸

200. *Mesaba Aviation Div. of Halvorson of Duluth, Inc. v. Itasca Cty.*, 258 N.W.2d 877, 880 (Minn. 1977).

201. *Id.*

202. *Id.*

203. *Id.*

204. *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 61 (1984).

205. *State v. Brown*, 95 A.3d 82, 87 (Me. 2014).

206. RESTATEMENT (SECOND) OF TORTS § 533 (AM. LAW INST. 1977).

207. *Flagship Resort Dev. Corp. v. Interval Int’l, Inc.*, 28 So. 3d 915, 923 (Fla. Dist. Ct. App. 2010) (quoting *Francoeur v. Pipers, Inc.*, 560 So. 2d 244, 245 (Fla. Dist. Ct. App. 1990)).

208. *In re Rowland*, 275 B.R. 209, 217 (Bankr. E.D. Pa. 2002).

D. *Reliance*

Next, in order to establish an estoppel claim, the claimant must prove that there was reasonable reliance on the material misrepresentation.²⁰⁹ To prove justifiable reliance, courts consider the totality of the circumstances, looking at the relationship of the parties, as well as the intelligence, age, and knowledge of the parties.²¹⁰ In order to show reliance, “[t]he party asserting estoppel must show that it ‘would not have so acted but for the conduct or representations of the other party and that [it] had no knowledge or convenient means of ascertaining the true facts which would have prompted [it] to react otherwise.’”²¹¹ A party that asserts estoppel can prove reliance on the misrepresentation based on either their inaction or action.²¹²

E. *Adverse Impact*

The final traditional element of an estoppel claim requires the claimant to demonstrate that relying on the misrepresentation caused them to suffer an adverse impact.²¹³ An adverse impact means the student was disadvantaged based on the misrepresentation.²¹⁴ In order to establish this requirement, the adverse impact must outweigh the unfairness that would otherwise occur to the party asserting estoppel.²¹⁵

F. *Affirmative Misconduct*

In addition to the three elements of a traditional estoppel claim, affirmative misconduct is considered in a claim of estoppel against the government.²¹⁶ Although there is a lack of guidance from the Supreme Court regarding estoppel of the government, generally courts have concluded that this component “requires an affirmative act to misrepresent or mislead.”²¹⁷ Therefore, a mere act of negligence is not

209. *Heckler*, 467 U.S. at 61.

210. *Finomore v. Epstein*, 481 N.E.2d 1193, 1196 (Ohio Ct. App. 1984); *Hanson v. Acceptance Fin. Co.*, 270 S.W.2d 143, 149 (Mo. Ct. App. 1954); *Thomas v. Am. Workmen*, 14 S.E.2d 886, 888 (S.C. 1941).

211. *Loyola Univ. v. Humana Ins. Co.*, 996 F.2d 895, 902 (7th Cir. 1993) (quoting *De Graw v. State Sec. Ins. Co.*, 351 N.E.2d 302, 309 (Ill. App. Ct. 1976)).

212. *Pagan v. Integrity Sol. Servs., Inc.*, 42 F. Supp. 3d 932, 934 (E.D. Wis. 2014).

213. *Heckler*, 467 U.S. at 61.

214. *Falcone v. Pierce*, 864 F.2d 226, 228 (1st Cir. 1988).

215. *Schafer v. City of Los Angeles*, 188 Cal. Rptr. 3d 655, 658 (Cal. Ct. App 2015).

216. *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 421 (1990).

217. *LaBonte v. United States*, 233 F.3d 1049, 1053 (7th Cir. 2000) (quoting *Gibson v. West*, 201 F.3d 990, 994 (7th Cir. 2000)).

enough to prove affirmative misconduct.²¹⁸ One measure to determine affirmative misconduct includes “‘ongoing active misrepresentations’ or a ‘pervasive pattern of false promises’ as opposed to ‘an isolated act of providing misinformation.’”²¹⁹ A misstatement alone does not establish affirmative misconduct by the government;²²⁰ courts will look at the totality of the circumstances to determine a claim of estoppel.²²¹ It is also more likely to find affirmative misconduct when the misrepresentations are written rather than oral.²²²

IV. NEGATIVELY IMPACTED STUDENTS MANIPULATED BY FOR-PROFIT COLLEGES SHOULD HAVE A SUCCESSFUL CLAIM OF ESTOPPEL AGAINST THE GOVERNMENT

Students should be able to estop the government from collecting their student loans in situations where they attended a for-profit, predatory college known to use illegal tactics and the government continued to authorize the disbursement of its federal funds.²²³ Estoppel is the appropriate remedy because there are currently no other viable protections for these students against this predatory conduct that is enabled and tolerated by the DOE.²²⁴ The federal government will continue to financially benefit from the interest accrued from the outstanding debt, and for-profit colleges will remain financially dependent on the revenue from the DOE through the financial aid programs, so there is no motivation to change or revise the system from within.²²⁵ Therefore, to create accountability for the financial aid scheme that cultivates these actions, students should have a claim of estoppel against the government as a remedy.

218. *Id.*

219. *Purcell v. United States*, 1 F.3d 932, 940 (9th Cir. 1993) (quoting *S & M Inv. Co. v. Tahoe Reg'l Planning Agency*, 911 F.2d 324, 329 (9th Cir. 1990)).

220. *Rider v. United States Postal Serv.*, 862 F.2d 239, 241–42 (9th Cir. 1988)

221. *State v. Brown*, 95 A.3d 82, 88 (Me. 2014).

222. *See Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 65 (1984) (“Written advice, like a written judicial opinion, requires its author to reflect about the nature of the advice that is given to the citizen, and subjects that advice to the possibility of review, criticism, and reexamination.”).

223. *See supra* Subpart I.C.

224. *See supra* Part II.

225. *See supra* Subpart I.C.

A. *The Modern Day Higher Education Structure is Proprietary—
Rather Than Sovereign—in Nature*

Indeed, the government student loan program began as a means to encourage students to pursue an otherwise nearly impossible opportunity to attend college, but the current profit model of the system is proprietary in nature.²²⁶ In the 2013 fiscal year, student loans accrued more profits than all but the two highest earning companies in the world.²²⁷ Despite claiming to have student interests at the core of its mission, the government refuses to allow students to refinance the interest rates of loans that are “almost twice the rate of an average 30-year mortgage—and, more to the point . . . three times what it costs the federal government to borrow.”²²⁸ This shift in the system from student interests toward a profit-based model creates a proprietary activity of the government.²²⁹

B. *The DOE Materially Misrepresents the Quality of For-Profit
Colleges*

In the case of the higher education system, the DOE has misrepresented institutions’ overall quality by means of misleading statements, conduct, and silence.²³⁰ The DOE states misleading information by not only providing—but also encouraging—students to review their published information “when selecting postsecondary institutions,” in order to protect against enrolling in a “diploma mill.”²³¹ The DOE further publishes a “positive list” of colleges and universities that the Secretary of Education recognizes as accredited for the benefit

226. Vasel & Lobosco, *supra* note 17.

227. David Jesse, *Government Books \$41.3 Billion in Student Loan Profits*, USA TODAY (Nov. 25, 2013), <http://www.usatoday.com/story/news/nation/2013/11/25/federal-student-loan-profit/3696009/> [<https://perma.cc/RT7C-G7HM>]. This amount is based on the accounting principles set forth in the Federal Credit Reform Act of 1990, which some argue does not appropriately take into account the complex factors of student loans. However, this was a legitimate method of determining the amount profited by measuring “the cash outflow as the disbursement of the principal loan amount and the inflowing money as the payments of interest and principal, minus amounts not paid, plus any fees the government receives from the borrower.” *Id.*

228. Dan Kadlec, *Why Can’t People with Student Loans Refinance at Better Rates?*, TIME (Feb. 20, 2013), <http://business.time.com/2013/02/20/why-cant-people-with-student-loans-refinance-at-better-rates/> [<https://perma.cc/QV8Q-X4NQ>].

229. Vasel & Lobosco, *supra* note 17.

230. *See supra* Subpart III.A.

231. *Diploma Mills and Accreditation*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/students/prep/college/diplomamills/index.html> [<https://perma.cc/7EVX-68MV>].

of prospective students' decision-making, which endorses and directs students to the deceptive for-profit colleges.²³²

In terms of conduct, the DOE sets minimum requirements for accreditation procedures, which allows for-profit colleges to obtain accreditation and financial aid eligibility notwithstanding the predatory conduct.²³³ The DOE also asserts that accredited institutions "are reviewed on a routine basis to ensure students receive a quality education and get what they pay for."²³⁴ According to the DOE, "[a]ccreditation's quality assurance function is one of the three main elements of oversight governing the Higher Education Act's . . . federal student aid programs."²³⁵ Despite awareness of particular institutions' involvement with illegal and deceptive practices, the DOE continues to allow accreditors to approve of these colleges.²³⁶ This in turn causes students to feel confident in attending these institutions and taking on massive amounts of student loans²³⁷—while unaware of the high risk of failure.²³⁸ Additionally, the DOE also fails to increase eligibility standards or revoke financial aid for colleges they have investigated and proven to be below acceptable quality levels.²³⁹

Despite its inaction, the DOE has the authority to increase the standards by which colleges are evaluated through the accreditation process.²⁴⁰ However, in the rare instance where the DOE takes action toward subpar colleges by revoking financial aid, there is no transition process in place to assist the students that were enrolled at the institutions to gain any benefit from their education.²⁴¹ Without an adequate transition in place, a student is left without any remedy after

232. *See id.*; *Office of Postsecondary Education—Information for Students*, U.S. DEP'T OF EDUC., <http://www2.ed.gov/students/prep/college/index.html> [<https://perma.cc/38Q6-S6LK>].

233. *See supra* Subpart I.B.

234. *Diploma Mills and Accreditation—Accreditation*, U.S. DEP'T OF EDUC., <https://www2.ed.gov/students/prep/college/diplomamills/accreditation.html#accredited> [<https://perma.cc/R84Q-PBUT>].

235. *Accreditation*, *supra* note 65.

236. *See supra* Subpart I.D.

237. FOR-PROFIT COLLEGES AND UNIVERSITIES: THEIR MARKETS, REGULATIONS, PERFORMANCE, AND PLACE IN HIGHER EDUCATION 110 (Guilbert C. Hentschke et al. eds., 2010).

238. *See supra* Subpart I.D.

239. *See supra* Subpart I.D.

240. 34 C.F.R. § 602.16 (2010).

241. *See Vasel & Lobosco*, *supra* note 17.

accepting thousands of dollars of debt.²⁴² By not making any changes to their current system, the DOE is effectively encouraging colleges to disregard standards and regulations to satisfy pressures from shareholders to make a profit.²⁴³

Lastly, the DOE is silent about these risks, and does not adequately warn students of the predatory tendencies of for-profit colleges.²⁴⁴ The government recently attempted to provide students with relevant information regarding colleges with the “College Scorecard” Program.²⁴⁵ However, critics of this new program find the data too broad to be meaningful,²⁴⁶ as it fails to provide pertinent information.²⁴⁷ For example, colleges that have certificate programs and also receive financial aid are not included in the “College Scorecard” database.²⁴⁸

While it is difficult to prove that the DOE is the body making material misrepresentations directly to students, persuasive arguments exist regardless.²⁴⁹ The government delegates college accreditation to independent agencies, so it is removed from the direct process of evaluating the colleges.²⁵⁰ However, through the accreditation process, the DOE allows colleges to represent that they are guaranteed by the agency.²⁵¹ Regardless of this separation, the DOE should not be able to shield itself against liability by using separate accrediting agencies to approve these colleges—a process over which the DOE has direct control—and later assert that it cannot be held responsible for negatively

242. *Id.*

243. *See generally* Schade, *supra* note 98.

244. *See generally* THE FAILURE TO SAFEGUARD, *supra* note 117.

245. COLLEGE SCORECARD, <https://collegescorecard.ed.gov> [<https://perma.cc/WY4T-4NDN>]. The College Scorecard Program is intended to “provide[] students and families the critical information they need to make smart decisions about where to enroll for higher education.” Press Release, U.S. Dep’t of Educ., Education Department Releases College Scorecard to Help Students Choose Best College for Them (Feb. 13, 2013), <https://www.ed.gov/news/press-releases/education-department-releases-college-scorecard-help-students-choose-best-college-them> [<https://perma.cc/BH3Q-9GX4>].

246. J. Randall O’Brien, *President Obama’s New College Scorecard Receives an ‘F,’* HUFFINGTON POST (Sept. 15, 2016), http://www.huffingtonpost.com/j-randall-obrien/president-obamas-new-coll_b_8137234.html [<https://perma.cc/4WNU-4H44>].

247. Tyler Kingkade, *The Education Department Isn’t Warning Students About Beauty Schools*, HUFFINGTON POST (Sept. 25, 2015), http://www.huffingtonpost.com/entry/college-scorecard-beauty-schools_us_56041272e4b00310edfa3f1c [<https://perma.cc/5DH8-2Y6T>].

248. *Id.*

249. *See supra* Subpart III.C.

250. *See supra* Subpart I.B.

251. *See supra* Subpart I.B.

impacted students.²⁵² This is especially concerning given that these colleges may advertise their supposed high quality and accreditation by the DOE throughout their admissions process.²⁵³

Students also develop a contractual relationship directly with the DOE when they agree to federal student loans.²⁵⁴ The DOE alone provides funding for federal loans to students with the “private sector now participat[ing] in the [federal loan] program only as ‘servicers’ for the Department of Education, collecting payments, keeping records[,] and communicating with borrowers.”²⁵⁵ Since the DOE decided to control the student loan program—eliminating the participation of third parties—students enter into a contractual obligation with the government when borrowing federal student loans.²⁵⁶

Ultimately, DOE’s actions and policies enable subpar colleges to continue deceptive advertisement due to the lack of consequences.²⁵⁷ This reality creates severe financial situations for students, and the accumulative effect makes it difficult for the government to provide financial assistance.²⁵⁸

C. *Students Rely on the DOE’s Misrepresentations*

Since the DOE has the authority to make representations about the quality of education at a specific college, and does in fact make such representations, a student’s reliance is more than reasonable.²⁵⁹ To attend a college or university and receive financial aid, the only educational requirement is a high school diploma or General Education Degree equivalent.²⁶⁰ In some cases, a student is not even required to have a high school diploma or equivalent in order to attend a higher

252. See Schuck, *supra* note 152, at 186.

253. Stephen Koff, *With Taxpayer Money, For-Profit Colleges Spend Massively on Marketing; Sherrod Brown Wants to Ban the Practice*, CLEVELAND (June 16, 2015), http://www.cleveland.com/open/index.ssf/2015/06/with_taxpayer_money_for-profit_colleges_spend_massively_on_marketing_sherrod_brown_wants_to_ban_the_practice.html [<https://perma.cc/DZ9X-8LFC>].

254. See generally *supra* Section I.A.4.

255. Dynarski, *supra* note 60, at 9.

256. *Id.*

257. Koff, *supra* note 253.

258. Gillen, *supra* note 8.

259. Reliance is considered unreasonable if the government actor does not have the authority to make a representation. *Kucera v. Bradbury*, 97 P.3d 1191, 1203–04 (Or. 2004).

260. *Basic Eligibility Criteria*, U.S. DEP’T OF EDUC., <https://studentaid.ed.gov/sa/eligibility/basic-criteria> [<https://perma.cc/T5YH-M3WL>].

education institution and receive financial aid.²⁶¹ For-profit institutions also target students based on “class, race, gender, inequality, insecurity, and shame.”²⁶² Specifically, reports have indicated that admissions counselors are trained to target prospective students with low income and lack of family support.²⁶³ The federal government is aware of these predatory tactics and enables the colleges to continue enrolling students in this manner by authorizing disbursements of federal funds.²⁶⁴ These funds are the essential source of revenue for these for-profit colleges and the only means of affordability for these students to attend the institution.²⁶⁵

For a claim of estoppel, students must demonstrate that, but for the government’s representations, the student would not have attended that particular school.²⁶⁶ The government is guaranteeing a school’s quality through the accreditation process.²⁶⁷ Once a school becomes accredited, the enrolled students are eligible to receive federal financial aid funds to attend that institution.²⁶⁸ In the 2014–15 academic year, eighty-nine percent of students at four-year, for-profit institutions received some type of federal financial aid.²⁶⁹ If students did not receive these federal funds, then many, if not all, of those students would be unable to attend the institution due to the high cost of tuition.²⁷⁰

Students are likely to rely on the DOE’s expertise, and expect they only provide financial aid to those colleges that meet acceptable standards.²⁷¹ Since the government is essentially investing in the

261. Karen W. Arenson, *Can’t Complete High School? Go Right to College*, N.Y. TIMES (May 30, 2006), <http://www.nytimes.com/2006/05/30/education/30dropouts.html>.

262. Astra Taylor & Hannah Appel, *Subprime Students: How For-Profit Universities Make a Killing by Exploiting College Dreams*, MOTHER JONES (Sept. 23, 2014, 10:19 PM), <http://www.motherjones.com/politics/2014/09/for-profit-university-subprime-student-poor-minority> [<https://perma.cc/3XKH-Q2FN>].

263. *See supra* Subpart I.C.

264. *See supra* Subpart I.D.

265. *See supra* Subpart I.D.

266. *See supra* Subpart III.D.

267. *See supra* Subpart I.B.

268. *See supra* Subpart I.B.

269. *Fast Facts*, NAT’L CTR. FOR EDUC. STATS., <https://nces.ed.gov/fastfacts/display.asp?id=31> [<https://perma.cc/TWY4-SGE5>].

270. *See id.*

271. *Cf. Addington v. C.I.R.*, 205 F.3d 54, 58 (2d Cir. 2000) (finding that reliance on advice of a professional with knowledge within the industry is not unreasonable). Although students are not given a report from the DOE at the time of enrollment in a particular school, the student loan is an all-or-nothing system. *See supra* Subpart I.B. A school is either accredited and has the ability to receive financial aid or they are not and receive no federal

student's ability to repay the loan, that student is relying on the notion that the government is confident that the school will provide for gainful employment.²⁷²

In the case with students and the DOE, the accreditors evaluate colleges based on the government's standards and certify the institution for its quality.²⁷³ Once that institution is accredited, it has the ability to communicate that certification to students and award financial aid.²⁷⁴ In ITT Tech's academic catalog published for the 2016–17 school year,²⁷⁵ the financial assistance portion of the catalog indicates that it "is designated as an eligible institution by the U.S. [DOE] for participation in . . . federal student financial aid programs."²⁷⁶ It would be reasonable for the government to expect that the for-profit institution will represent their quality based on that accreditation and federal aid eligibility.²⁷⁷

D. *Students are Adversely Impacted by the DOE's Policies and Actions*

Assuming students could prove that they justifiably relied on misrepresentations by the DOE, this reliance adversely impacts students because they receive a degree leading to underemployment, where students agree to thousands of dollars in debt that will take a lifetime to repay.²⁷⁸ Even worse, some students do not have the means to finish their program in order to earn a degree, and these credits are unlikely to be transferred to another institution.²⁷⁹ The accreditation of failing colleges causes students to begin their education at a school where the financial aid eligibility is ultimately revoked, and they are then left with

funds under Title IV. *See supra* Subpart I.B. A high-quality institution is not entitled to any more funds from the government than a school that has poor quality. Carey, *supra* note 16. Therefore, by the student receiving federal student loans from the institution, they are effectively confirming the legitimacy of the enrolled program. Students may assume based on the DOE's expertise and knowledge of the industry that it only provides funds to schools meeting particular standards, so no further report would be necessary.

272. *See* Michael Stratford, *Pointing a Finger at For-Profits*, INSIDE HIGHER ED (Sept. 11, 2015), <https://www.insidehighered.com/news/2015/09/11/study-finds-profit-colleges-drove-spike-student-loan-defaults> [<https://perma.cc/3WYU-25L3>].

273. *See supra* Subpart I.B.

274. *See supra* Subpart I.B.

275. This catalog was published for the academic year in which the institution was shut down by the government due to illegal practices. Vasel & Lobosco, *supra* note 17.

276. *Norwood, MA: 2016–2017 Catalog*, ITT TECH. INST. 50 (2016), <http://itt-tech.info/wp-content/uploads/2016/09/052.pdf> [<https://perma.cc/4SS4-CF2D>].

277. *See supra* Subpart I.B.

278. *See supra* Subpart I.C.

279. Vasel & Lobosco, *supra* note 17.

massive debt and no degree.²⁸⁰

E. *The DOE's Actions Amount to Affirmative Misconduct*

Concerns about the higher education system have been ongoing for years.²⁸¹ In 1987, the Bennett Hypothesis recognized that the government policies and subsidies enable colleges to raise tuition at a faster rate than inflation, which ultimately increases a student's overall debt.²⁸² In terms of the DOE's affirmative action, it continues to allow accreditors to certify institutions that they know are a risk to students and the economy, and authorize the disbursement of federal funds where the government later profits.²⁸³

It is worth noting that when the two largest for-profit institutions shut down, there were thousands of students negatively impacted by this system.²⁸⁴ Additionally, there are many economists and other financial professionals that have found parallels between the housing market crash of 2008 and the student loan crisis, but the government continuously accredits and disburses loans to risky, deceptive colleges, despite awareness of the concern.²⁸⁵

The government built a market which "is artificially altered to a level that would never be created by a rational free market system."²⁸⁶ The DOE is loaning federal funds to students against their own interests, in situations in which no reasonable investor would finance.²⁸⁷ If there is no change in the financial aid system to address these concerns, when the financial bubble bursts, the negative impact on the economy will far exceed the housing collapse of 2008.²⁸⁸ At least in the case of the housing market, the home was an asset which could be sold to recoup losses and homeowners could declare bankruptcy.²⁸⁹ Students cannot

280. *Id.*

281. *Id.*

282. Gillen, *supra* note 8.

283. *See supra* Subpart I.D.

284. *See supra* Subpart I.C.

285. *See generally* April A. Wimberg, *Comparing the Education Bubble to the Housing Bubble: Will Universities Be Too Big to Fail?*, 51 U. LOUISVILLE L. REV. 177 (2012).

286. *Id.* at 192.

287. Anthony Davies & James R. Harrigan, *Why the Education Bubble Will Be Worse Than the Housing Bubble*, U.S. NEWS: ECON. INTELLIGENCE (July 12, 2012), <http://www.usnews.com/opinion/blogs/economic-intelligence/2012/06/12/the-government-shouldnt-subsidize-higher-education> [<https://perma.cc/4AFQ-R8FT>].

288. *Id.*

289. *Id.*

sell back their college degrees to offset their debt.²⁹⁰ The government is aware of these concerns and still decides to allow risky, for-profit universities to be accredited and federally funded.²⁹¹

Arguably, the DOE's inaction to find a solution would not rise to the level of affirmative misconduct. However, when the government takes years to act against colleges they know are inadequate and involved in illegal tactics, it makes an affirmative choice to continue to federally fund the institutions through financial aid.²⁹² This funding accounts for an overwhelming majority of for-profit colleges' revenue, giving the DOE direct control over the sustainability of these colleges and their deceptive, predatory, and manipulative practices.²⁹³ The DOE has the knowledge and authority needed to improve the accreditation and loan disbursement process,²⁹⁴ but have made no effective changes.²⁹⁵

F. *Public Policy Against Estoppel*

Although students are mistreated by predatory, for-profit colleges, and have no other viable remedy for relief, there are public policy concerns against bringing a successful governmental estoppel claim even in such an unsettling situation as the student loan crisis.

1. Separation of Powers

One hesitation to find estoppel against the government is the separation of powers doctrine. "While the courts have the power to require the other branches of government to conform to their respective regulations and statutes, our tripartite system of government does not provide the judiciary with the power to rewrite those regulations and statutes."²⁹⁶ The DOE is granted the authority to monitor and regulate the higher education system.²⁹⁷ Therefore, courts are inclined to side-step a student remedy when the DOE forms inadequate policies, as it feels that it is the role of Congress to change the authority granted upon the agency.²⁹⁸

290. *Id.*

291. *See supra* Subpart I.D.

292. *See supra* Subpart I.D.

293. Cohen, *supra* note 69.

294. 34 C.F.R. § 602.16 (2010).

295. Carey, *supra* note 16.

296. *United States v. Wellons*, 598 F. Supp. 282, 289 (E.D.N.C. 1984).

297. *See supra* Section I.A.1.

298. *See supra* Section I.A.1.

However, despite this concern, the separation of powers doctrine does not prohibit an estoppel claim against the government, but rather requires a compelling argument.²⁹⁹ It may be inferred that the affirmative misconduct consideration for governmental estoppel claims establishes the courts' involvement.³⁰⁰ Therefore, since the DOE's conduct is so egregious, courts should estop the government despite the policy concern regarding separation of powers.

2. Protecting the Government

In an attempt to protect the government, courts also require a serious injustice that will not unduly burden the public.³⁰¹ In the higher education crisis, the DOE's conduct is unconscionable considering the enormous number of students that are negatively impacted by the policies.³⁰² Due to the number of those affected, discharging so many students' loans could likely harm the public.³⁰³ However, many of the students are already not repaying their loans because their education did not provide them with gainful employment, so the government loses this funding anyway.³⁰⁴ There are also governmental resources needed to collect on defaulted loans.³⁰⁵ The type of remedy provided to a student also affects the amount of harm imposed on the public. A court could determine that discharging a loan would be excessive, but forgiving the interest accrual would allow the student to repay the government without the government profiting from the deceitful school.³⁰⁶

CONCLUSION

Currently, there is no ideal solution for a student that is buried in debt by a for-profit institution's illegal operation, of which the DOE is fully aware. The DOE's options for loan discharge are limited and

299. *State v. Lee*, 584 N.W.2d 11, 14 (Minn. Ct. App. 1998).

300. *See supra* Subpart III.F.

301. *Yerger v. Robertson*, 981 F.2d 460, 466 (9th Cir. 1992).

302. *See supra* Subpart I.C.

303. Gillen, *supra* note 8.

304. Of the ITT Technical Institute students that started repayment of student loans in 2009, fifty-one percent defaulted after five years. Stratford, *supra* note 272.

305. Jesse, *supra* note 227.

306. To learn more about the benefits of interest free loans, see Kim Clark, *Pros and Cons of Interest-Free Student Loans*, U.S. NEWS (Sept. 7, 2010), <http://www.usnews.com/education/best-colleges/paying-for-college/student-loan/articles/2010/09/07/pros-and-cons-of-interest-free-student-loans> [<https://perma.cc/T7LX-9NRB>].

discretionary,³⁰⁷ and any implied cause of action under the Higher Education Act is typically unsuccessful.³⁰⁸ The government's policies are encouraging the rapid increase of for-profit colleges that are accountable to shareholders' wallets over student academic interests.³⁰⁹

A claim of estoppel against the government provides an appropriate remedy for these vulnerable students based on the confusion and inconsistent areas in the law. Furthermore, it leaves open an opportunity to correct the injustice to the students, who otherwise have no options but to remain in debt to government.

Courts enabling student claims of estoppel is a crucial spark needed to ignite change—putting student interests first and profits second—throughout the higher education program. Certainly, the current structure of the higher education financial aid system—leaving students buried in enormous amounts of debt from deceptive colleges—cannot be what President Lyndon Johnson had in mind when he signed the Higher Education Act of 1965.

307. *See supra* Subpart II.A.

308. *See supra* Subpart II.B.

309. *See supra* Section I.A.2.