

# WHAT'S IN A NAME? THE DEFINITION OF AN INSTITUTION OF HIGHER EDUCATION AND ITS EFFECT ON FOR-PROFIT POSTSECONDARY SCHOOLS

*Melanie Hirsch\**

## INTRODUCTION

In January 2006, after observing explosive growth and increasing reports of problems in the state's for-profit career schools and colleges, the New York Board of Regents imposed a moratorium on the opening of new for-profit post-secondary schools, also called proprietary schools. The Regents noted a flow of public money to proprietary schools and found themselves facing the "recurring question" of "whether some schools are enrolling students who have little hope of graduating simply to capture the financial aid."<sup>1</sup> But just as New York and other states are moving to tighten the regulation of proprietary schools, the federal government may be moving in the other direction. The federal Higher Education Act of 1965 (HEA),<sup>2</sup> which addresses a wide array of topics related to higher education, including the eligibility requirements for institutions to receive federally guaranteed student loans, is due for reauthorization by September 30, 2006.<sup>3</sup> While it is unclear at this time precisely what form the reauthorized HEA will take, its current iterations suggest that change is forthcoming and that proprietary schools will ultimately benefit financially from little-noted changes to the definition of an institution of higher

---

\* Candidate for J.D., 2007, New York University School of Law; B.A., Swarthmore College, 2002. Many thanks to Mary Jayne Fay, for opening my eyes to the issues presented by for-profit providers of higher education and for her tireless work to improve proprietary schools, to Vanessa Briceño and James Temple for their insightful editorial assistance, and to my parents for their constant encouragement.

1. Karen W. Arenson, *Regents Impose Limits on Colleges That Seek Profit*, N.Y. TIMES, Jan. 21, 2006, at A1.

2. Pub. L. No. 89-329, 79 Stat. 1219 (codified as amended in scattered sections of 20 U.S.C.).

3. Second Higher Education Extension Act of 2006, Pub. L. No. 109-238, 120 Stat. 507.

education, perhaps to the detriment of both the schools' students and taxpayers, and in conflict with the purpose of the HEA.

In this Recent Development, I will examine the impact of the reauthorization of the federal HEA on proprietary schools. First, I will discuss issues and concerns raised by these schools, particularly their eligibility for federal student loan funds. Second, I will review both the current version of the HEA and the proposed revisions, and attempt to explain how the new rules would affect the for-profit education sector.

## I.

### BACKGROUND: PROPRIETARY SCHOOLS AND THE PROBLEMS THEY PRESENT

#### A. *Proprietary Schools and the Higher Education Act*

Proprietary schools, also known as career colleges, are private, for-profit, postsecondary institutions primarily offering vocational training.<sup>4</sup> Such schools are estimated to graduate approximately half of the technically trained workers who enter the U.S. workforce.<sup>5</sup> Proprietary schools also serve many nontraditional students, including those who have not done well in their prior schooling or who come from disadvantaged backgrounds.<sup>6</sup> In September 2003, six percent of the approximately 15.2 million students enrolled in postsecondary institutions were attending private, for-profit institutions, and such institutions accounted for thirty-eight percent of the 6,900 schools

---

4. U.S. GEN. ACCOUNTING OFFICE, PROPRIETARY SCHOOLS: POORER STUDENT OUTCOMES AT SCHOOLS THAT RELY MORE ON FEDERAL STUDENT AID 1 (1997) [hereinafter GAO, PROPRIETARY SCHOOLS]; Career College Association, What Is a Career College?, [http://www.career.org/Content/NavigationMenu/About\\_CCA/What\\_is\\_a\\_career\\_college\\_/What\\_Is\\_a\\_Career\\_College\\_.htm](http://www.career.org/Content/NavigationMenu/About_CCA/What_is_a_career_college_/What_Is_a_Career_College_.htm) (last visited Apr. 8, 2006). According to the Career College Association, “[a]ccounting, allied medical, automotive technology, business administration, commercial art, criminal justice and law enforcement administration, culinary and hospitality management, emergency medical technology, energy management, information technology, interior design, legal administration, mechanical engineering, radio and television broadcasting, and visual and performing arts are among the 200 occupational fields for which career colleges provide programs.” Individual states may have different definitions of proprietary schools, sometimes including non-profit institutions and excluding schools that grant degrees as opposed to certificates. See, e.g., Mass. Dep’t of Educ., About Proprietary Schools, <http://www.doe.mass.edu/ops/about.html> (last visited Apr. 10, 2006). For the definition of a proprietary school under the Higher Education Act, see *infra* notes 52–61 and accompanying text.

5. Career College Association, What Is a Career College?, *supra* note 4.

6. Patrick F. Linehan, Note, *Dreams Protected: A New Approach to Policing Proprietary Schools’ Misrepresentations*, 89 GEO. L.J. 753, 756 (2001).

receiving federal student aid.<sup>7</sup> The for-profit sector is said to play a unique role in the American educational field:

[C]omplex and converging forces, including demographic trends, shifts in the job market, technological developments, and demands on higher education from ongoing reforms and innovations have contributed to the growth of the proprietary sector and have created a phenomenal demand for higher education providers that the traditional sector cannot meet alone.<sup>8</sup>

The fortunes of proprietary schools have been closely tied to the availability of federal aid for their students. The federal law governing this funding is the HEA,<sup>9</sup> which was enacted “to strengthen the educational resources of our colleges and universities and to provide financial assistance for students in postsecondary and higher education.”<sup>10</sup> One way it achieves this goal is through Title IV, which provides federally guaranteed loans to students attending institutions of higher education. In 1972, Congress amended the HEA to permit proprietary schools to participate in programs under Title IV of the HEA, thus allowing them to offer federally backed student loans.<sup>11</sup>

Since the late 1980s, the U.S. Department of Education’s (DOE) Office of the Inspector General, Congress, and the General Accounting Office (GAO) have all conducted investigations into proprietary schools, leading them to conclude that “extensive fraud and abuse exist in student aid programs.”<sup>12</sup> The problems they discovered included “deceptive recruitment practices, false claims and representations to prospective students, falsification of admission and financial aid records, disbursement of aid to ineligible students, and non-existent or

---

7. U.S. GEN. ACCOUNTING OFFICE, *TRANSFER STUDENTS: POSTSECONDARY INSTITUTIONS COULD PROMOTE MORE CONSISTENT CONSIDERATION OF COURSEWORK BY NOT BASING DETERMINATIONS ON ACCREDITATION* 7 (2005) [hereinafter GAO, *TRANSFER STUDENTS*]. The apparent discrepancy between the relatively small percentage of students who attend for-profit schools and the relatively large number of for-profit schools that receive federal student aid can be explained by the fact that for-profit schools tend to be smaller than nonprofit or public institutions. See Linehan, *supra* note 6, at 755–56.

8. H.R. REP. NO. 109-231, at 160 (2005).

9. Pub. L. No. 89-329, 79 Stat. 1219 (1965).

10. *Id.*

11. Pub. L. No. 92-318, 86 Stat. 235 (1972) (codified as amended at 20 U.S.C. § 1001 (2000)); Linehan, *supra* note 6, at 755; see also Anya Kamenetz, *The Profit Chase*, SLATE, Nov. 16, 2005, <http://www.slate.com/id/2130516/>.

12. U.S. GEN. ACCOUNTING OFFICE, *HIGHER EDUCATION: ENSURING QUALITY EDUCATION FROM PROPRIETARY INSTITUTIONS* 1 (1996) [hereinafter GAO, *HIGHER EDUCATION*].

inadequate teaching infrastructure.”<sup>13</sup> Such abuses were “fueled by a federal loan system that created a con artist’s perfect dream. Schools were able to pressure vulnerable and low-income consumers into signing documents obligating them to thousands of dollars.”<sup>14</sup>

In 1992, in response to these concerns, Congress revised the HEA to include a rule requiring that proprietary schools derive at least fifteen percent of their revenues from non-federal sources<sup>15</sup> and a provision limiting the percentage of courses offered entirely through distance education.<sup>16</sup> In 1996, a GAO investigation into the efficacy of these safeguards found “mixed results”: fewer proprietary schools were receiving accreditation, proprietary schools’ share of Title IV funding had declined, and proprietary school students’ loan default rates had fallen, but concerns about program quality remained.<sup>17</sup>

Despite the 1992 amendments, recent reports suggest that the earlier problems are resurfacing, due in part to the continued availability of student loan funds. For-profit career school companies frequently note their reliance on federal student aid in their annual reports and other information they provide to investors.<sup>18</sup> One for-profit education company was described as being “built to swallow Title IV funds in the way a whale gathers up plankton.”<sup>19</sup> For fiscal year 2004, all

---

13. DEANNE LOONIN & JULIA DEVANTHÉRY, NAT’L CONSUMER LAW CTR., MAKING THE NUMBERS COUNT: WHY PROPRIETARY SCHOOL PERFORMANCE DATA DOESN’T ADD UP AND WHAT CAN BE DONE ABOUT IT 10 (2005), <http://www.nclc.org/news/ProprietarySchoolsReport.pdf>. The National Consumer Law Center (NCLC) report has been sharply criticized by the Career College Association. Press Release, Career College Association, Flawed NCLC Report Paints Inaccurate Picture—Why the NCLC Report Simply Doesn’t Add Up (June 30, 2005), [http://www.career.org/Template.cfm?Section=Press\\_Releases1&CONTENTID=3348&TEMPLATE=/ContentManagement/ContentDisplay.cfm](http://www.career.org/Template.cfm?Section=Press_Releases1&CONTENTID=3348&TEMPLATE=/ContentManagement/ContentDisplay.cfm) [hereinafter Career College Association, Flawed Report]; Career College Association, Understanding the Facts and the Numbers: Why the NCLC Report Simply Doesn’t Add Up, [http://www.career.org/Template.cfm?Section=Press\\_Releases1&CONTENTID=3372&TEMPLATE=/ContentManagement/ContentDisplay.cfm](http://www.career.org/Template.cfm?Section=Press_Releases1&CONTENTID=3372&TEMPLATE=/ContentManagement/ContentDisplay.cfm) (last visited Mar. 31, 2006) [hereinafter Career College Association, Understanding the Facts].

14. LOONIN & DEVANTHÉRY, *supra* note 13, at 10.

15. Higher Education Amendments of 1992, Pub. L. No. 102-325, § 481(b)(3), 106 Stat. 448, 611; GAO, HIGHER EDUCATION, *supra* note 12, at 2; *see infra* notes 63–75 and accompanying text.

16. Pub. L. No. 102-325, § 481(a)(3), 106 Stat. at 610; *see infra* notes 77–89 and accompanying text.

17. GAO, HIGHER EDUCATION, *supra* note 12, at 2.

18. LOONIN & DEVANTHÉRY, *supra* note 13, at 7.

19. Daniel Kruger, *Blackboard Jungle*, FORBES MAGAZINE, Dec. 13, 2004, at 118, 120.

federal student loan aid came to nearly \$69 billion,<sup>20</sup> and by one estimate, \$4.3 billion of that money went to proprietary schools.<sup>21</sup> Among all undergraduates enrolled in private, for-profit schools, eighty-nine percent received some type of financial aid in 2003–04, with about seventy-three percent taking out an average loan of \$6,800.<sup>22</sup>

### B. Contemporary Concerns About Proprietary Schools

According to the Inspector General of the DOE, seventy-four percent of institutional fraud cases over the past six years have involved proprietary schools.<sup>23</sup> Critics of proprietary schools today cite a litany of abuses, including “admitting unqualified students, inflating graduation and job-placement rates, lying about accreditation, [and] paying bonuses to employees for signing up new pupils.”<sup>24</sup> In order to raise their numbers, recruiters admit students who have not graduated from high school or earned a general equivalency diploma, count students who never show up or drop out before the first week, sign up friends, family, or themselves, and mislead students about classes, programs, and the nature of the institution.<sup>25</sup> One former professor at a proprietary school commented that “if you can breathe and walk, you can get into the school.”<sup>26</sup> These recruiting practices may be driven by the fact that many schools make the salaries of recruiters and admissions counselors dependent on the tuition paid by students whom they convince to enroll.<sup>27</sup> Experiences like these have led current and former proprietary school students to bring class action lawsuits alleging unfair business practices, including misrepresentations

---

20. See JAMES R. STEDMAN, CONGRESSIONAL RESEARCH SERVICE, *THE HIGHER EDUCATION ACT: REAUTHORIZATION STATUS AND ISSUES* 3 (2004) [hereinafter CRS Report].

21. Kamenetz, *supra* note 11.

22. NATIONAL CENTER FOR EDUCATION STATISTICS, *2003–04 NATIONAL POST-SECONDARY STUDENT AID STUDY, UNDERGRADUATE FINANCIAL AID ESTIMATES FOR 2003–04 BY TYPE OF INSTITUTION* 8 (2005), <http://nces.ed.gov/pubs2005/2005163.pdf>.

23. *Federal Student Loan Programs: Are They Meeting the Needs of Students and Schools?: Hearing Before the H. Comm. on Gov't Reform*, 109th Cong. at 41 (2005) (statement of John P. Higgins, Jr., Inspector General, U.S. Dep't of Educ.) [hereinafter Higgins Testimony].

24. Samuel G. Freedman, *Tucked in Katrina Relief, a Boon for Online Colleges*, N.Y. TIMES, Oct. 12, 2005, at B8.

25. Stephen Burd, *Promises and Profits*, CHRON. OF HIGHER EDUC., Jan. 13, 2006, at A21 [hereinafter Burd, *Promises and Profits*].

26. *Id.*

27. Linehan, *supra* note 6, at 756.

to students regarding accreditation and transferability of credits to other institutions.<sup>28</sup>

There are also major questions concerning the quality of education at for-profit institutions and whether it actually prepares students for the job market. Under the HEA, a proprietary school's receipt of federal financial assistance is supposed to be contingent upon provision of an "eligible program of training to prepare students for gainful employment in a recognized occupation."<sup>29</sup> If students do not receive the training that they sought, they will not only be unable to advance in the job market, but will also be saddled with the loans they took out to pay for training—a result which essentially defeats the purpose of offering the loans in the first place. Furthermore, a student who takes out loans will almost always have to repay them, "regardless of the quality of the education, generally regardless of whether she was able to complete the course, and regardless of whether she finds employment."<sup>30</sup>

One difference between today's for-profit education sector and that of the 1980s and 1990s that could potentially lead to increased abuses is the rise of large, publicly traded corporations. The eight largest corporations currently have a combined market value of \$26 billion, as compared to a sector previously "known for mom-and-pop trade schools."<sup>31</sup> These companies had the highest-earning stocks of any industry between 2000 and 2003, rising 460 percent during that period compared to a twenty-four percent loss for the Standard & Poor's 500-stock index.<sup>32</sup> Five corporations—the Apollo Group, Education Management Corporation, Corinthian Colleges, Career Education Corporation, and ITT Educational Services—make up about seventy-four percent of the business.<sup>33</sup>

In order to keep stock prices up and promote investment, these companies must continually expand, even if their growth works to the

---

28. See, e.g., *Corinthian Colleges, Inc. v. Price*, No. G034327, 2005 WL 1199069, at \*1, (Cal. Ct. App. May 20, 2005) (discussing class action lawsuit filed by former and current students of career schools which alleges that schools "engage in unfair business practices by misrepresenting to students the [s]chools' accreditation and the transferability of credits earned at the [s]chools to other higher education institutions"); see also Carolyn Kleiner Butler, *Commercial Schools Lobby for Relaxation of Rules*, N.Y. TIMES, July 27, 2005, at B7; Burd, *Promises and Profits*, *supra* note 25.

29. 20 U.S.C. § 1002(b)(1)(A) (2000).

30. LOONIN & DEVANTHÉRY, *supra* note 13, at 6.

31. Burd, *Promises and Profits*, *supra* note 25, at A22.

32. Eryn Brown, *Can For-Profit Schools Pass an Ethics Test?*, N.Y. TIMES, Dec. 12, 2004, at BU5; Kamenetz, *supra* note 11.

33. LOONIN & DEVANTHÉRY, *supra* note 13, at 11–12.

detriment of the schools and their students.<sup>34</sup> The DOE's Inspector General has recognized that rapid growth is a risk factor for abuse when federal financial aid is on the table.<sup>35</sup> The Department of Justice (DOJ) and the Securities and Exchange Commission are currently investigating the Career Education Corporation which, with nearly 100,000 students at eighty-two campuses, is one of the largest providers of private, for-profit education.<sup>36</sup> Stockholders have also filed complaints.<sup>37</sup> In response to these investigations and lawsuits, the Career College Association noted that DOJ investigations of career schools have not necessarily found improper activity and that several lawsuits have been dismissed.<sup>38</sup>

The for-profit career school industry maintains that not only proprietary institutions but all sectors of higher education sometimes engage in fraud and abuse.<sup>39</sup> School administrators argue that their schools provide education equal to, if not superior to, non-profit and public schools, and that the legal distinction between the institutions is arbitrary.<sup>40</sup> The industry's position, as stated by U.S. Rep. John Boehner, former chairman of the House Committee on Education and the Workforce and now House majority leader, is that proprietary schools and their students are treated like second-class citizens under current law.<sup>41</sup> Even opponents of proprietary school growth note that the private sector offers some advantages over more traditional post-secondary education; most notably, proprietary schools have been at the forefront of educational innovations like flexible course scheduling, offering more convenient locations for working adults, and accelerated programs.<sup>42</sup> Students who do not believe they can fit in at traditional

---

34. See Kamenetz, *supra* note 11 (calling proprietary school corporations "Wall Street darlings").

35. Higgins Testimony, *supra* note 23.

36. See Butler, *supra* note 28.

37. See Taubenfeld v. Career Educ. Corp., No. 03-C-8884, 2005 WL 350339 (N.D. Ill. Feb. 11, 2005) (granting defendants' motion to dismiss without prejudice to plaintiff's filing amended complaint); see also Burd, *Promises and Profits*, *supra* note 25.

38. Career College Association, Flawed Report, *supra* note 13.

39. Career College Association, Understanding the Facts, *supra* note 13.

40. Stephen Burd, *For-Profit Colleges Want a Little Respect*, CHRON. OF HIGHER EDUC., Sept. 5, 2003, at A23 [hereinafter Burd, *Respect*].

41. H.R. 4283, *The College Access & Opportunity Act: Are Students at Proprietary Institutions Treated Equitably Under Current Law?: Hearing Before the H. Comm. on Educ. & the Workforce*, 108th Cong. 2 (2004) [hereinafter H.R. 4283 Hearing] (opening statement of Rep. John Boehner, Chairman, House Comm. on Educ. and the Workforce).

42. H.R. 4283 Hearing, *supra* note 41, at 24 (testimony of Barnak Nassirian, Associate Executive Director, American Association of Collegiate Registrars & Admissions Officers).

institutions will sometimes be more comfortable at for-profit institutions, which they may see as being more attentive to their needs.<sup>43</sup> Data also suggest that for-profit schools play a key role in providing educational services for minority groups: one-fifth of African-American and Hispanic students earning associates degrees do so at for-profit institutions.<sup>44</sup>

## II.

### THE REAUTHORIZATION OF THE HIGHER EDUCATION ACT

The HEA is a comprehensive piece of legislation, the primary objective of which is to increase access to postsecondary education.<sup>45</sup> The Act was due to expire on December 31, 2005, but Congress has approved an extension until September 30, 2006.<sup>46</sup> The Deficit Reduction Act of 2005,<sup>47</sup> while including provisions that affect the federal student loan program,<sup>48</sup> did not reauthorize the HEA in its entirety. The stand-alone HEA reauthorization bills in the Senate (S. 1614, The Higher Education Amendments of 2005) and the House (H.R. 609, The College Access and Opportunity Act of 2006) therefore remain relevant. The House passed H.R. 609 on March 30, 2006,<sup>49</sup> but as of this writing the Senate has yet to vote on its bill.

The section of the HEA that most directly concerns proprietary schools is Title IV, which covers student financial aid. This analysis will consider three main areas of contention in the HEA amendments, all of which affect institutions' eligibility to receive Title IV funds as "institutions of higher education": (1) the "single" or "double" definition of an institution of higher education; (2) the "90/10 rule" on institutional revenues; and (3) the "50-percent rule" or "50/50 rule" concerning distance education. Changes to any of these areas—two of

---

43. Michelle Howard-Vital, *The Appeal of For-Profit Institutions*, CHANGE, Jan./Feb. 2006, at 68, 71.

44. Career College Association, Understanding the Facts, *supra* note 13.

45. CRS Report, *supra* note 20, at 5.

46. Second Higher Education Extension Act of 2006, Pub. L. No. 109-238, 120 Stat. 507. The reauthorization process has proved to be unusually complex due to the simultaneous challenges of "pulling together a \$34.7 billion budget savings package and confronting the fallout from Hurricane Katrina," both of which have affected congressional decisions regarding higher education. Kate Barrett, *CQ BillAnalysis: S. 1614—Higher Education Amendments Act of 2005*, CONG. QUARTERLY, Feb. 13, 2006; Jonathan M. Katz & Kate Barrett, *CQ BillAnalysis: H.R. 609—College Access Opportunity Act of 2005*, CONG. QUARTERLY, Feb. 10, 2006.

47. Pub. L. No. 109-171, 120 Stat. 4 (2006).

48. Pub. L. No. 109-171, § 8001, 120 Stat. 4, 155 (codified in scattered sections of 20 U.S.C.).

49. 152 Cong. Rec. H1363 (daily ed. Mar. 30, 2006).



which were enacted in 1992 in response to abuses by for-profit schools, and all of which have been deemed “key student aid safeguards”<sup>50</sup>—would result in more federally guaranteed student loans being made available to proprietary schools, and therefore present a risk of increased abuses and greater harm to students.<sup>51</sup> The 90/10 rule and the 50-percent rule are part of the HEA’s definition of an institution of higher education, but for the purposes of this analysis, they will be considered individually. After addressing each of these provisions, I will consider some of the political underpinnings of legislative action concerning proprietary schools.

A. *The “Single Definition” of an Institution of Higher Education*

The HEA currently contains two separate definitions of an institution of higher education (IHE)—a general definition of IHE concerning eligibility for a variety of federal funds under 20 U.S.C. § 1001, and one specific to Title IV eligibility for proprietary schools under § 1002. Proprietary school advocates, in seeking a single definition that would give them access to additional sources of federal funds under Titles III and V of the HEA, maintain that the dual definition is inequitable to for-profit career schools and fails to recognize their importance in the current economy. Such advocates further maintain that a single definition “would send an important signal to [non-traditional] students that for-profit institutions represent an equally valid option. . . . It would say to these students that, if they choose to seek the education, training, and skills that they need . . . they will not be regarded under federal law as second class citizens.”<sup>52</sup> Opponents of the single definition, however, argue that the single definition “would erase the difference between universities and dog-

---

50. H.R. REP. NO. 109-231, at 609 (2005) (minority report).

51. *Supra* notes 15–16 and accompanying text; Am. Counsel on Educ., Problematic Provisions in the House Higher Education Act Reauthorization Bill (HR 609), June 24, 2005, <http://www.acenet.edu/AM/Template.cfm?Section=Home&CONTENTID=10761&TEMPLATE=/CM/ContentDisplay.cfm> (“The House bill allows a large number of institutions that are not now eligible for federal student aid to participate in the programs. By doing so, the House proposes to undo provisions put in place in the early 1990s to stem the increase in student loan defaults. Many associations believe that this step will lead to a reemergence of the default problems that plagued federal student loans at that time and may, therefore, compromise these programs.”).

52. H.R. 4283 Hearing, *supra* note 41, at 43 (testimony of David Moore, Chairman & CEO, Corinthian Colleges, Inc.).

grooming schools.”<sup>53</sup> A single definition of an IHE has been called “the most contentious change” in H.R. 609.<sup>54</sup>

The original intention of a single definition was to make federal funds, including those available under Titles III and V, available to all IHEs.<sup>55</sup> An amendment to H.R. 609, however, maintains the ineligibility of for-profit schools for Title III grants, awarded mainly to community colleges, and Title V grants, awarded to institutions that serve significant numbers of minority students.<sup>56</sup> Another amendment also makes clear that other federal funds available to IHEs through the current statutory reference to § 1001 will not be automatically available to for-profit institutions unless the laws granting those funds are expressly amended to give access to proprietary schools.<sup>57</sup> These changes answer many of the concerns of opponents to the single definition,<sup>58</sup> while still allowing for-profit institutions to compete for federal teaching training grants and state need- and merit-based grants.<sup>59</sup> The single definition in H.R. 609 thus achieves an important symbolic goal of equality and clarifies for-profit schools’ eligibility for Title IV funds, but does not necessarily open the door to vastly increased federal funding.<sup>60</sup> In the current version of the Senate bill, the dual definition remains intact.<sup>61</sup>

### B. *The 90/10 Rule Regarding Institutions’ Sources of Revenue*

The second issue, the provision commonly known as the “90/10 rule,” comes from 20 U.S.C. § 1002.<sup>62</sup> In order to qualify as an IHE for the purpose of receiving federal student aid, a school must derive at least ten percent of its revenues from “sources that are not derived

---

53. Barmak Nassirian, *Why an Awful Reauthorization Bill Is Likely to Pass With a Large Majority, and What You Could Do About It*, Mar. 28, 2006, [http://www.aacrao.org/transcript/index.cfm?fuseaction=show\\_view&doc\\_id=3113](http://www.aacrao.org/transcript/index.cfm?fuseaction=show_view&doc_id=3113) (last visited Apr. 8, 2006).

54. *Inside Higher Education*, House Dives in to the Higher Ed Act, <http://www.insidehighered.com/news/2005/07/14/hea> (last visited Apr. 10, 2006).

55. H.R. 4283 Hearing, *supra* note 41 (testimony of David Moore, Chairman & CEO, Corinthian Colleges, Inc.).

56. H.R. REP. NO. 109-231, at 159–60 (2005); H.R. 609, 109th Cong. § 123 (2006).

57. *Id.*

58. See H.R. 4283 Hearing, *supra* note 41, at 17–18 (testimony of Dr. Alice Letteny, Dir., Univ. of N.M.—Valencia).

59. Stephen Burd, *Huge Education Bill Moves Closer to Passage in U.S. House*, CHRON. OF HIGHER EDUC., July 29, 2005, at A23 [hereinafter Burd, *Huge Education Bill*].

60. See *id.*; H.R. REP. NO. 109-231, at 130 (2005).

61. S. 1614, 109th Cong. §102 (2005).

62. 20 U.S.C. § 1002 (2000).

from funds provided under subchapter IV.”<sup>63</sup> The rationale for this provision is that it requires schools to prove that their training is valuable, on the theory that “if the training is worthwhile . . . a for-profit college should be able to derive at least 10 percent of its revenue from students willing to spend their own money on it.”<sup>64</sup> The ratio, which was added to the HEA in 1992, was originally 85/15 and was intended as a response to problems in the proprietary sector of the sort discussed in Part I.<sup>65</sup> In its investigation of proprietary schools and federal loan funds under the 85/15 rule, the GAO found that schools that relied more heavily on Title IV funds tended to have poorer student outcomes.<sup>66</sup> Nevertheless, in 1998, Congress amended the HEA to require that schools derive only ten percent of their revenues from non-federal sources.<sup>67</sup>

Those in favor of removing the rule argue that, even in its weakened form, it hinders educational access: “statistics show proprietary schools tend to serve larger populations of needy, high-risk, minority, and non-traditional students [who are] the students most in need of federal assistance,” which they cannot get if the school serves too many needy students.<sup>68</sup> The rule thus “creates an incentive for proprietary schools to raise tuition or move away from urban areas where students are more likely to depend on federal aid.”<sup>69</sup> Others argue, however, that “the 90/10 rule was put into effect to ensure that federal student aid was not the sole funding stream for these schools. . . . There is no evidence to believe that this protection is no longer neces-

---

63. § 1002(b)(1)(F).

64. Stephen Burd, *Lawmakers are Urged to ‘Go Slowly’ on Loosening Rules for For-Profit Colleges*, CHRON. OF HIGHER EDUC., Mar. 11, 2005, at A24 [hereinafter Burd, *Lawmakers*].

65. GAO, PROPRIETARY SCHOOLS, *supra* note 4, at 1. The general concept of an 85/15 rule to ensure educational quality originated in Congress’ desire to help veterans. After the extension of the GI bill following the Korean War, Congress was concerned that the education benefits could “end up funding courses of little value that flourished only to capture veterans’ education benefits.” H.R. 4283 Hearing, *supra* note 41, at 26 (testimony of Barmak Nassirian, Assoc. Executive Dir., Am. Ass’n of Collegiate Registrars & Admissions Officers). The notion of such a rule was upheld by the Supreme Court as a “rational assumption that if ‘the free market mechanism [were allowed] to operate,’ it would ‘weed out those institutions [which] could survive only by the heavy influx of Federal payments.’” *Cleland v. Nat’l Coll. of Bus.*, 435 U.S. 213, 219 (1978) (per curiam) (quotations omitted).

66. GAO, PROPRIETARY SCHOOLS, *supra* note 4, at 3.

67. Higher Education Amendments of 1998, Pub. L. No. 105-244, § 101(b)(1)(F), 112 Stat. 1581, 1588 (1998).

68. H.R. 4283 Hearing, *supra* note 41, at 3 (opening statement of Rep. John Boehner, Chairman, House Comm. on Educ. and the Workforce).

69. *Id.*

sary.”<sup>70</sup> Of all of the HEA provisions concerning proprietary schools, the deputy inspector general of the DOE stated that his most serious reservations are about eliminating the 90/10 rule.<sup>71</sup>

Both the Senate and the House versions of the bill would remove the 90/10 rule as part of the definition of an institution of higher education, enabling schools to take in a larger portion of their revenues via federal funds. H.R. 609 achieves this result through its conflation of the two definitions of an IHE currently found under 20 U.S.C. §§ 1001 and 1002,<sup>72</sup> while S. 1614 simply strikes from 20 U.S.C. § 1001(b)(1) the provision containing the rule.<sup>73</sup> The rule is not entirely destroyed, however. Both bills, while eliminating the rule from the definition of an IHE, relocate it, with potentially laxer enforcement mechanisms, to the provision on program participation agreements under 20 U.S.C. § 1094(a), where it is applicable to non-profit and public schools as well.<sup>74</sup> The rationale for this move is that “if the rule does act to promote institutional integrity and educational quality, it should apply more broadly.”<sup>75</sup>

### C. *The 50-Percent Rule for Distance Education*

Under the 1992 amendment to the HEA, now codified as 20 U.S.C. § 1002(a)(3), institutions are not considered to meet the definition of an IHE for the purposes of receiving aid if, under the “50-percent rule,” they offer more than half their coursework by correspondence.<sup>76</sup> This rule has been on the table for some time, and those in favor of repealing it point to dramatic changes in technology and the demographics of postsecondary students.<sup>77</sup> The definition of “cor-

---

70. Letter from Diane Shust, Dir. of Gov't Relations, and Randall Moody, Manager of Fed. Policy and Politics, Nat'l Educ. Ass'n, to the H. Comm. on Educ. & the Workforce (July 19, 2005), available at <http://www.nea.org/lac/letters/705Hhea2.html>.

71. See Burd, *Lawmakers*, *supra* note 64.

72. H.R. 609, 109th Cong. § 490(b) (2006).

73. S. 1614, 109th Cong. § 491 (2005).

74. H.R. 609, 109th Cong. § 490(b) (2006); S. 1614, 109th Cong. § 491 (2005); ADAM STOLL, CONG. RESEARCH SERV., THE HIGHER EDUCATION ACT: REAUTHORIZATION STATUS AND ISSUES 6 (2005), available at [http://wwwa.house.gov/cas/crs\\_reports/higher.education.pdf](http://wwwa.house.gov/cas/crs_reports/higher.education.pdf); Stephen Burd, *House Subcommittee Approves Bill to Extend Higher Education Act*, CHRON. OF HIGHER EDUC., July 22, 2005, at A16.

75. H.R. REP. NO. 109-231, at 211 (2005).

76. 20 U.S.C. § 1002(a)(3) (2000).

77. U.S. DEP'T OF EDUC., THIRD REPORT TO CONGRESS ON THE DISTANCE EDUCATION DEMONSTRATION PROGRAM 21 (2005), <http://www.ed.gov/programs/disted/DEDP-thirdreport.pdf> (“The advent of distance learning has forever changed this critical segment of our educational system . . . [Yet] several of the rules that were intended to protect Federal funds have instead protected brick-and-mortar institutions,

respondence” in the HEA did not exclude telecommunications;<sup>78</sup> in 1992, however, no one could have foreseen the rise of the Internet and Internet-based distance education.<sup>79</sup> For many, the repeal of the 50-percent rule is simply an idea whose time has come. It would also “be of enormous value to the commercial education industry.”<sup>80</sup>

Unlike most of the Republican-sponsored HEA provisions affecting the for-profit educational sector, proposals eliminating the 50-percent rule have had relatively bipartisan support. A bipartisan commission in 2000 produced a report on web-based education that encouraged the federal government to review or possibly revise the 50-percent rule to remove barriers to students enrolling in distance education courses.<sup>81</sup> A possible repeal of the 50-percent rule is also supported by the results of the DOE’s Distance Education Demonstration Program, which began following the 1998 amendments to the HEA.<sup>82</sup> The program was intended to test the quality and viability of distance education courses, provide increased student access to higher education, determine the most effective means for delivering quality distance education, and establish the appropriate regulatory and statutory requirements and level of Title IV student aid.<sup>83</sup> In its 2005 report to Congress on the Distance Education Demonstration Program, the DOE concluded that distance education does increase access to education, particularly for older and minority students, and that “the potential risk to Title IV student financial aid programs has more to do with the integrity of the institution than with the way in which the education is offered.”<sup>84</sup>

Nevertheless, the idea of repealing the 50-percent rule has not been without controversy, and its measure of bipartisan support has not prevented the debate from breaking down along party lines.<sup>85</sup>

---

by limiting Title IV eligibility to institutions that offer primarily on-site courses, and delayed appropriate expansion of this alternative mode of delivery.”); H.R. 4283 Hearing, *supra* note 41, at 3 (opening statement of Rep. John Boehner, Chairman, House Comm. on Educ. and the Workforce).

78. § 1002(a)(3)

79. H.R. REP. NO. 109-231, at 207 (2005).

80. Sam Dillon, *Online Colleges Receive a Boost From Congress*, N.Y. TIMES, Mar. 1, 2006, at A1.

81. WEB-BASED EDUC. COMM’N, THE POWER OF THE INTERNET FOR LEARNING, MOVING FROM PROMISE TO PRACTICE 14 (2000), <http://www.ed.gov/offices/AC/WBEC/FinalReport/WBECReport.pdf>.

82. See Higher Education Amendments of 1998, Pub. L. No. 105-244, § 488, 112 Stat. 1581, 1746 (1998).

83. U.S. DEP’T OF EDUC., *supra* note 77, at ii.

84. *Id.*

85. See Dan Carnevale, *Rule Change May Spark Online Boom for Colleges*, CHRON. OF HIGHER EDUC., Feb. 3, 2006, at A1.

Meanwhile, traditional colleges have fought repeal of the rule—pointing, as an example, to cases like the Masters Institute, which experienced substantial new online enrollment after it first gained access to federal money but then collapsed in 2001 after coming under investigation for fraud.<sup>86</sup>

The 50-percent rule has, however, already been repealed. In February 2006, its repeal was codified in the Deficit Reduction Act of 2005.<sup>87</sup> Subtitle A of Title VIII of the Act, also known as the Higher Education Reconciliation Act of 2005, includes a section that modifies 20 U.S.C. § 1002(a)(3) to insert the phrase “excluding courses offered by telecommunications.”<sup>88</sup> “Telecommunications” is in turn defined in 20 U.S.C. § 1091(l)(4) as “the use of television, audio, or computer transmission, including open broadcast, closed circuit, cable, microwave, or satellite, audio conferencing, computer conferencing, or video cassettes or discs.” While a “correspondence course” might once have meant a course delivered by means of a written instruction booklet, it is safe to assume that most correspondence courses today would be delivered using the means now described as exempt “telecommunications,” thus rendering the 50-percent rule effectively moot.<sup>89</sup>

#### *D. Politics and Lobbying Regarding Proprietary Schools*

The for-profit education industry, well aware of the impact HEA reauthorization can have on its finances, has been lobbying heavily in favor of the changes discussed above.<sup>90</sup> As one congressperson noted in the press, in the past ten years, “the power of this interest group has spiked as much as any you’ll find.”<sup>91</sup> Unlike most traditional universities, for-profit institutions have formed political action committees to channel campaign donations.<sup>92</sup> In the past two years, proprietary schools and lending institutions that benefit from federally guaranteed student loans gave more than a million dollars in campaign contribu-

---

86. Dillon, *supra* note 80.

87. Pub. L. No. 109-171, § 1932, 120 Stat. 4 (2006). The cost of the repeal is estimated at \$697 million over ten years. U.S. DEP’T OF EDUC., *supra* note 77, at iii.

88. Pub. L. No. 109-171, § 8002, 120 Stat. 4 (2006).

89. The change made to the 50-percent rule is commonly referred to as a “repeal.” See H.R. REP. NO. 109-231, at 145 (2005). Nevertheless, the rule does remain intact for programs that fit the more traditional, non-telecommunications notion of correspondence schools.

90. Butler, *supra* note 28.

91. Dillon, *supra* note 80 (quoting Rep. Michael Castle).

92. *Id.*

tions to members of the House Education Committee.<sup>93</sup> Of that amount, approximately half went to Rep. Boehner and Rep. Howard “Buck” McKeon.<sup>94</sup> Boehner’s successful bid to become majority leader was financed in large part by for-profit schools and private student lenders,<sup>95</sup> and McKeon is the new chair of the committee.<sup>96</sup> As noted above, some provisions, like the repeal of the 50-percent rule, have bipartisan support.<sup>97</sup> Nevertheless, H.R. 609 passed in the House substantially along party lines,<sup>98</sup> with widespread Democratic discontent about the bill as a whole.<sup>99</sup>

### CONCLUSION

The HEA is currently due to be reauthorized by September 30, 2006. Despite the career school industry’s complaints that the current version of the HEA, by relegating proprietary schools to “second-class” status, hurts the neediest students, both the Senate’s and the House’s proposed amendments to the definition of an IHE would be likely to ultimately harm those very students, depriving them of the skills they need to advance in the workforce while saddling them with additional debt. If this happens, it would hardly be consistent with the purpose of the federal student loan program—namely, to achieve greater educational access for all. The current version of the HEA, with an intact dual definition of an IHE and 90/10 rule, may at least prevent these problems from growing worse and avoid forcing taxpayers to further subsidize poor education.

In the midst of the heated debate on the reauthorization of the HEA, issues other than those relating to for-profit education have generated the most discussion and assumed the highest priority. The issues discussed in this analysis, while less noticed, go directly to the integrity of the federal student aid program. H.R. 609 includes a pro-

---

93. *60 Minutes* (CBS television broadcast Aug. 14, 2005) (transcript on file with the NYU Journal of Legislation and Public Policy).

94. Butler, *supra* note 28.

95. Thomas B. Edsall, *Controversial Industries Have Backed Boehner*, WASH. POST, Jan. 29, 2006, at A05.

96. Press Release, H. Comm. on Educ. & the Workforce, McKeon Elected Education & the Workforce Chair, Pledges to Address “New Realities” Agenda (Feb. 16, 2006), <http://edworkforce.house.gov/press/press109/second/02feb/mckeon021606.htm>.

97. See *supra* notes 81–84 and accompanying text; see also Freedman, *supra* note 24 (noting Democratic Senator Edward Kennedy’s support for lifting 50-percent restriction for colleges that pass threshold as result of enrolling students from region hit by Hurricane Katrina).

98. 152 Cong. Rec. H1363 (daily ed. Mar. 30, 2006).

99. Feller, *supra* note 49.

vision requiring the Secretary of Education to commission a “nonpartisan, comprehensive study on the prevention of fraud and abuse in Title IV student financial aid programs,” which will include an analysis of the efficacy of the new HEA’s fraud protection provisions, enforcement, and potential improvements.<sup>100</sup> The Secretary’s report to Congress on the study must “include clear and specific recommendations for legislative and regulatory actions that are likely to significantly reduce the fraud and abuse in Title IV student financial aid programs.”<sup>101</sup> Such a report may serve as a safeguard for ensuring that harms to students resulting from student loan abuse will be short-lived, if Congress works quickly to amend the provisions that reportedly result in the most harm. While one certainly hopes that the new provisions will not result in more widespread fraud and that Congress will be responsive to the Secretary’s report, the information available to Congress at the time that it drafted its current measures should have been adequate to encourage active efforts to reduce fraud.

---

100. H.R. 609, 109th Cong. § 496 (2006).

101. *Id.*