

## Higher Education's Gainful Employment and 90/10 Rules: Unintended "Scarlet Letters" for Minority, Low-Income, and Other At-Risk Students

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### INTRODUCTION

Proprietary institutions of higher education,<sup>1</sup> sometimes called "career colleges" since they focus on degrees that are more vocationally oriented postgraduation, provide a pathway to a postsecondary credential for approximately 3.2 million students across the country.<sup>2</sup> Due to access to capital and scalable infrastructures, which allow proprietary institutions to respond quickly to market needs, their enrollments have grown significantly faster than their public and nonprofit counterparts over the past decade.<sup>3</sup> Proprietary institutions serve significantly more students who are at high risk of failing to complete their education,<sup>4</sup> with a substantial portion being low-income and minority students.<sup>5</sup> It is

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<sup>1</sup> A "proprietary institution of higher education" is defined as an institution that, among other things, is not "a public or other nonprofit institution." 20 USC §§ 1001(a)(4), 1002(b)(1)(C). Proprietary institutions are also referred to as "private for-profit" institutions.

<sup>2</sup> Mary Gotschall and Bob Cohen, *Data Reveal Dramatic Increases in Private Sector College and University Awards; Demand for Higher Level Degrees* (Association of Private Sector Colleges and Universities Nov 8, 2010), online at [http://www.career.org/iMISPublic/AM/Template.cfm?Section=Press\\_Releases1&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=21646](http://www.career.org/iMISPublic/AM/Template.cfm?Section=Press_Releases1&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=21646) (visited Oct 19, 2011).

<sup>3</sup> Daniel L. Bennett, Adam R. Lucchesi, and Richard K. Vedder, *For-Profit Higher Education: Growth, Innovation and Regulation* 10 (Center for College Affordability and Productivity July 2010), online at [http://www.centerforcollegeaffordability.org/uploads/ForProfit\\_HigherEd.pdf](http://www.centerforcollegeaffordability.org/uploads/ForProfit_HigherEd.pdf) (visited Oct 16, 2011).

<sup>4</sup> Watson Scott Swail, *Graduating At-Risk Students: A Cross-Sector Analysis* 15 figure 4 (Imagine America Foundation 2009), online at <http://www.educationalpolicy.org/pdf/GraduatingAtRiskStudents.pdf> (visited Oct 19, 2011).

<sup>5</sup> Laura J. Horn and C. Dennis Carroll, *Nontraditional Undergraduates: Trends in Enrollment from 1986 to 1992 and Persistence and Attainment Among 1989-90 Beginning Postsecondary Students* 10 (National Center for Education Statistics Nov 1996), online at <http://nces.ed.gov/pubs/97578.pdf> (visited Oct 19, 2011).

also beyond debate that these students, regardless of type of institution attended, graduate at lower rates, borrow at higher rates, and are more likely to default on their student loans than more affluent students.<sup>6</sup>

The question, then, is how to provide meaningful access to at-risk students who want to pursue higher education. Because student need is the primary determinant of the amount of federal aid and debt awarded, and because such aid follows the student (and not the institution),<sup>7</sup> there has been significant growth in federal aid that has gone to proprietary institutions in recent years. Ironically, in a classic example of the law of unintended consequences, existing legislative and regulatory policies directed at proprietary institutions, while pursued ostensibly in response to allegedly disproportionately higher numbers of student borrowers and defaulters at proprietary institutions,<sup>8</sup> have unwittingly restricted minority and at-risk students' access to higher education.

Two rules in particular—the US Department of Education's (ED) new “gainful employment” (GE) rule<sup>9</sup> and the “90/10” rule<sup>10</sup>—through complex regulatory metrics with contradictory implications, penalize proprietary institutions that serve high minority populations and discourage them from providing the type of access that federal student funding initiatives were intended to enable. If, as the data and analysis suggest, it is the type of student enrolled, as opposed to the quality of the program offered or the institution offering it, that is the primary cause of low graduation rates, excessive debt, and student defaults, then it is pointless to shift these students from proprietary institutions to nonprofit and public colleges. Both rules should be eliminated in favor of policies that apply to all types of institutions, that are designed to ensure student access and success, that require transparency and comparability, that consider institutional mission where appropriate, that measure student outcomes normalized against populations served, and that treat at-risk students equitably no matter what institution they choose to attend.

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<sup>6</sup> See Mark Kantrowitz, *Borrowing in Excess of Institutional Charges 2* (FinAid Apr 28, 2011), online at <http://www.finaid.org/educators/20110428debtbeyondtuition.pdf> (visited Oct 16, 2011).

<sup>7</sup> Department of Education, *Federal Pell Grant Program*, online at <http://www2.ed.gov/programs/fpg/index.html> (visited Oct 19, 2011).

<sup>8</sup> See, for example, *Emerging Risk? An Overview of the Federal Investment in For-Profit Education*, Hearing before the Senate Committee on Health, Education, Labor, and Pensions, 111th Cong., 2d Sess 2 (2010).

<sup>9</sup> See 20 USC § 1002(b)(1)(A).

<sup>10</sup> See 20 USC § 1094(a)(24).

## I. TITLE IV OF THE HIGHER EDUCATION ACT OF 1965

The Higher Education Act of 1965<sup>11</sup> (HEA) was enacted as part of President Johnson's "Great Society" social program to augment the educational resources of American colleges and universities to provide financial assistance and higher education opportunities for low- and moderate-income families.<sup>12</sup> Most federal student-aid programs, and programs that provide services and support to less advantaged students, are authorized under Title IV of the HEA.<sup>13</sup> Students may use their Title IV aid at any of approximately 5,400 eligible public, nonprofit, or proprietary institutions.<sup>14</sup> Significantly, student eligibility for Title IV aid is mainly a function of financial need and is not based on the student's success.<sup>15</sup> ED delivered approximately \$134 billion in Title IV student aid to over fourteen million postsecondary students and their families during the 2009–10 award year.<sup>16</sup>

Title IV aid comes in two primary forms: grants based on need that *do not* have to be repaid and loans that *do* have to be repaid. The largest grant program is the Pell Grant Program, which provides need-based grants to low-income students "to promote access to postsecondary education."<sup>17</sup> The Pell Grant Program is carefully targeted based on financial need, with the amount of individual grants varying according to the financial circumstances of the students and their families. For the 2009–10 award year, "ED disbursed approximately \$29 billion in Pell Grants that averaged

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<sup>11</sup> Pub L No 89-329, 79 Stat 1219, codified at 20 USC § 1001 et seq.

<sup>12</sup> See Angelica Cervantes, et al, *Opening the Doors to Higher Education: Perspectives on the Higher Education Act 40 Years Later* 17 (TG Research and Analytical Services Nov 2005), online at [http://www.tgslc.org/pdf/HEA\\_History.pdf](http://www.tgslc.org/pdf/HEA_History.pdf) (visited Oct 19, 2011). See also President Lyndon B. Johnson, *Remarks at Southwest Texas State College upon Signing the Higher Education Act of 1965*, 1965 Pub Papers 1102, 1102.

<sup>13</sup> See 20 USC § 1070 et seq. See also 20 USC § 1070(a) (explaining that the purposes of Title IV programs include providing higher education funding to students with financial need and funding programs and projects that identify and encourage qualified youths with financial or cultural need to prepare for and obtain a postsecondary education).

<sup>14</sup> Department of Education, *Federal Pell Grant Program* (cited in note 7).

<sup>15</sup> The focus on student need is underscored by the fact that grants and loans provided under Title IV are entitlements. See, for example, 20 USC § 1070(a)(1) (Pell Grants); 20 USC § 1078-8(b) (Stafford Loans).

<sup>16</sup> Department of Education, *FY 2010 Annual Report for Federal Student Aid* 6 (2010), online at <http://www2.ed.gov/about/reports/annual/2010report/fsa-report.pdf> (visited Oct 20, 2011).

<sup>17</sup> Department of Education, *Federal Pell Grant Program* (cited in note 7).

approximately \$3,591 to approximately eight million students.”<sup>18</sup> Pell funding over the years has not kept pace with demand.<sup>19</sup>

The largest loan program is the William D. Ford Federal Direct Loan Program (Direct Loan Program), under which ED makes low-interest loans directly to students and parents for use at participating schools.<sup>20</sup> The Direct Loan Program offers several types of loans: subsidized and unsubsidized Stafford loans for students, PLUS loans for parents and graduate or professional students, and consolidation loans for students and parents.<sup>21</sup> In 2010, ED made \$80.6 billion in loans to 8.3 million recipients.<sup>22</sup> The outstanding balance of loans under all Title IV programs was \$605.6 billion as of fiscal year 2009.<sup>23</sup>

## II. ROLE OF PROPRIETARY INSTITUTIONS IN EDUCATING STUDENTS

### A. Growth in Proprietary Colleges

The case for a more productive US system of higher education has been succinctly stated:

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<sup>18</sup> Department of Education, *FY 2010 Annual Report* at 8 (cited in note 16).

<sup>19</sup> An estimated nine million students were eligible to receive Pell grants in the 2010–11 school year, resulting in an \$11 billion shortfall that was covered by the Budget Control Act of 2011, Pub L No 112-25, 125 Stat 240, codified at 20 USC § 1070a(b)(7). See Department of Education, *Student Financial Assistance: Fiscal Year 2012 Budget Request* P-9, P-16, online at <http://www2.ed.gov/about/overview/budget/budget12/justifications/p-sfa.pdf> (visited Oct 20, 2011).

<sup>20</sup> See Department of Education, *Direct Loans: The William D. Ford Federal Direct Loan Program*, online at <http://www2.ed.gov/offices/OSFAP/DirectLoan/index.html> (visited Oct 20, 2011). Until July 1, 2010, a parallel loan program through private lenders existed under the Federal Family Education Loan (FFEL) Program. See Department of Education, *Update on Student Loan Programs*, online at <http://studentaid.ed.gov/PORTALSWebApp/students/english/studentloansupdate.jsp> (visited Oct 20, 2011) (explaining that the loans would no longer be made under the FFEL Program beginning July 1, 2010). FFEL loans, also referred to as “Guaranteed Student Loans” because they were insured by a guaranty agency and reinsured by the federal government, were discontinued by the Health Care and Education Reconciliation Act of 2010 § 2201, Pub L No 111-152, 124 Stat 1029, 1074.

<sup>21</sup> See Department of Education, *Direct Stafford Loans*, online at <http://studentaid.ed.gov/PORTALSWebApp/students/english/studentloans.jsp> (visited Oct 20, 2011). Direct PLUS loans have a higher interest rate than Stafford loans, and accrue interest from the date of disbursal. See Department of Education, *Direct PLUS Loans for Parents*, online at <http://studentaid.ed.gov/PORTALSWebApp/students/english/parentloans.jsp> (visited Oct 20, 2011); Department of Education, *Direct PLUS Loans for Graduate and Professional Degree Students*, online at <http://studentaid.ed.gov/PORTALSWebApp/students/english/PlusLoansGradProfstudents.jsp> (visited Oct 20, 2011). A consolidated loan allows borrowers to combine different federal loans into one loan thereby only owing a single monthly payment. See Department of Education, *Loan Consolidation*, online at <http://studentaid.ed.gov/PORTALSWebApp/students/english/consolidation.jsp> (visited Oct 20, 2011).

<sup>22</sup> Department of Education, *FY 2010 Annual Report* at 9 (cited in note 16).

<sup>23</sup> See Mark Kantrowitz, *Student Loans* (FinAid 2011), online at <http://www.finaid.org/loans/> (visited Oct 15, 2011).

Substantial increases in those segments of America's young population with the lowest level of education, combined with the coming retirement of the baby boomers—the most highly educated generation in U.S. history—are projected to lead to a drop in the average level of education of the U.S. workforce over the next two decades . . . . The projected decline in educational levels coincides with the growth of a knowledge-based economy that requires most workers to have higher levels of education. At the same time, the expansion of a global economy allows industry increased flexibility in hiring workers overseas. As other developed nations continue to improve the education of their workforces, the United States and its workers will increasingly find themselves at a competitive disadvantage.<sup>24</sup>

In recognition of this bleak reality, President Obama, in his first formal address to Congress in February 2009, pledged to “provide the support necessary for all young Americans to complete college and meet a new goal. By 2020, America will once again have the highest proportion of college graduates in the world.”<sup>25</sup> The United States was ranked tenth in the proportion of college graduates per capita at the time of President Obama's pledge<sup>26</sup> and has dropped to sixteenth since that time.<sup>27</sup>

Proprietary institutions play an essential role in achieving the goal of a more educated US populace. ED Secretary Arne Duncan has recognized that the President's 2020 goal, which will require approximately eight million graduates over the next decade,<sup>28</sup> “cannot be achieved without a healthy and productive for-profit sector of higher education.”<sup>29</sup>

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<sup>24</sup> National Center for Public Policy and Higher Education, *Policy Alert: Income of U.S. Workforce Projected to Decline If Education Doesn't Improve*, 1 (Nov 2005), online at [http://www.highereducation.org/reports/pa\\_decline/pa\\_decline.pdf](http://www.highereducation.org/reports/pa_decline/pa_decline.pdf) (visited Oct 20, 2011).

<sup>25</sup> President Barack H. Obama, *Address before a Joint Session of the Congress*, 2009 Pub Papers 145, 150.

<sup>26</sup> Centre for Educational Research and Innovation, *Highlights from Education at a Glance 2008* 13 figure 1.2 (Organisation for Economic Co-operation and Development 2008), online at [http://www.oecd-ilibrary.org/education/highlights-from-education-at-a-glance-2008\\_9789264040625-en](http://www.oecd-ilibrary.org/education/highlights-from-education-at-a-glance-2008_9789264040625-en) (visited Oct 20, 2011).

<sup>27</sup> Organisation for Economic Co-operation and Development, *Education at a Glance 2011: Highlights* 13 figure 1.2 (2011), online at [http://www.oecd-ilibrary.org/education/education-at-a-glance-2011\\_eag\\_highlights-2011-en](http://www.oecd-ilibrary.org/education/education-at-a-glance-2011_eag_highlights-2011-en) (visited on Oct 20, 2011).

<sup>28</sup> Patrick J. Kelly, *Closing the College Attainment Gap between the U.S. and Most Educated Countries, and the Contributions to be Made by the States 2–4* (National Center for Higher Education Management Systems Apr 2010), online at <http://www.nchems.org/pubs/docs/Closing%20the%20U%20S%20%20Degree%20Gap%20NCHEMS%20Final.pdf> (visited Oct 20, 2011).

<sup>29</sup> Program Integrity: Gainful Employment—New Programs, 75 Fed Reg 66665, 66671 (2009) (amending 34 CFR §§ 600.10, 600.20).

Proprietary colleges remain integral to delivering the college graduates needed to meet the President's 2020 goal. At a time when other sectors of higher education are struggling to address our nation's critical skilled-workforce shortage due to severe cuts in state funding and shrinking endowments, proprietary colleges are expanding capacity, investing in infrastructure, and experiencing significant growth. Presently, there are about 3.2 million students attending proprietary colleges.<sup>30</sup> The growth of proprietary institutions has significantly outpaced the growth of traditional institutions, having grown at an average annualized rate of 8.4 percent from 1986 to 2008, while public and nonprofit institutions grew at 1.6 percent and 1.4 percent per year, respectively, for the same twenty-two-year period.<sup>31</sup>

Significantly, this growth in enrollments has also translated into rapid growth in the number of graduates from proprietary institutions. According to ED's *Conditions of Education 2011* report, during the ten-year period ending with academic year 2008–09:

- Two-year associate degrees conferred by proprietary colleges more than doubled (up 125 percent) compared to an increase of 33 percent for public institutions and a decline of 1 percent for nonprofit institutions;
- Four-year bachelor's degrees awarded by proprietary colleges grew 418 percent compared to 29 percent for public and 26 percent for nonprofit institutions;
- Master's degrees awarded by proprietary colleges grew 580 percent compared to 29 percent for public and 48 percent for nonprofit institutions; and
- Total number of associate, bachelor's, and master's degrees conferred by proprietary colleges per year grew from about 90,000 in 1998–99 (4 percent of all such degrees conferred) to

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<sup>30</sup> See Gotschall and Cohen, *Data Reveal Dramatic Increases* (cited in note 2); Michelle Camacho Liu, *Do For-Profit Schools Pass the Test? The Growing Popularity and Criticism of These Universities Have Caught Lawmakers' Attention*, State Legislatures 15 (June 2011), online at <http://www.ncsl.org/LinkClick.asp?fileticket=r1oYCxoCKzE%3d&tabid=23005> (visited Oct 19, 2011). For the raw data supporting these sources, see National Center for Education Statistics, Department of Education, *12-Month Unduplicated Headcount: 2004–05* (2005), online at <http://nces.ed.gov/ipeds/datacenter/DataFiles.aspx> (visited Oct 20, 2011); National Center for Education Statistics, Department of Education, *12-Month Unduplicated Headcount: 2009–10* (2010), online at <http://nces.ed.gov/ipeds/datacenter/DataFiles.aspx> (visited Oct 20, 2011).

<sup>31</sup> Bennett, Lucchesi, and Vedder, *For-Profit Higher Education* at 10 (cited in note 3).

over 290,000 (almost 10 percent of all such degrees conferred) by 2008–09.<sup>32</sup>

Proprietary schools are also a cost-effective way to meet the growing demand for higher education. A recent study concludes that proprietary institutions train and graduate students more effectively and at a lower cost to taxpayers than nonprofit and public institutions.<sup>33</sup> The study demonstrates that the total cost per enrollee for programs leading to associate degrees is over \$4,000 higher at public institutions than at proprietary institutions, once all sources of support (including taxpayer subsidies and endowments) for these institutions and offsetting tax payments made by proprietary institutions are considered.<sup>34</sup> From a per-graduate perspective, an associate degree from a two-year public institution costs almost \$35,000 more per graduate than a comparable degree from a proprietary institution.<sup>35</sup> Because of proprietary institutions' cost-efficiencies and better graduation rates for at-risk students, the study estimates that the President's goal of delivering five million associate and certificate degrees by 2020 would yield \$33 billion in savings to taxpayers if proprietary institutions were used along with community colleges.<sup>36</sup> A similar analysis compared net-taxpayer costs per student at two- and four-year institutions combined, factoring in the cost of defaults on student loans, and found the annual cost to be \$4,519 per student at proprietary schools, \$11,340 at public institutions, and \$7,051 at nonprofit institutions.<sup>37</sup>

#### B. Proprietary Colleges Serve an Underserved At-Risk Population

Most students attending proprietary institutions are from groups that have been underserved by nonprofit and public colleges and universities. More than half of the students who enroll in proprietary colleges are older than twenty-five, compared to less than 40 percent

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<sup>32</sup> Department of Education, *The Condition of Education 2011* § 5 at 119 table 42-1 (National Center for Education Statistics 2011), online at [http://nces.ed.gov/pubs2011/2011033\\_6.pdf](http://nces.ed.gov/pubs2011/2011033_6.pdf) (visited Oct 21, 2011).

<sup>33</sup> See Robert J. Shapiro and Nam D. Pham, *Taxpayers' Costs to Support Higher Education: A Comparison of Public, Private Not-for-Profit, and Private For-Profit Institutions* 7–8 (Sonecon 2010), online at [http://www.sonecon.com/docs/studies/Report\\_on\\_Taxpayer\\_Costs\\_for\\_Higher\\_Education-Shapiro-Pham\\_Sept\\_2010.pdf](http://www.sonecon.com/docs/studies/Report_on_Taxpayer_Costs_for_Higher_Education-Shapiro-Pham_Sept_2010.pdf) (visited Oct 21, 2011).

<sup>34</sup> See id at 58.

<sup>35</sup> See id at 57.

<sup>36</sup> See id at 54–59.

<sup>37</sup> See Gregory W. Cappelli, *Higher Education at a Crossroads* 20–21 & exhibit 14 (Apollo Group Aug 2010), online at [http://www.apollogrp.edu/Investor/Reports/Higher\\_Education\\_at\\_a\\_Crossroads\\_FINALv2%5B1%5D.pdf](http://www.apollogrp.edu/Investor/Reports/Higher_Education_at_a_Crossroads_FINALv2%5B1%5D.pdf) (visited Oct 21, 2011).

of students enrolled in public and nonprofit institutions.<sup>38</sup> Approximately 60 percent are women, and 50 percent are minorities.<sup>39</sup> Almost one-third of proprietary students are single parents.<sup>40</sup>

Minority enrollments in proprietary institutions have grown dramatically faster than in public and nonprofit institutions. The number of African American students at two- and four-year proprietary undergraduate programs has grown 146 percent from 2004 to 2009, compared to 21 percent at public schools and 11 percent at nonprofit schools.<sup>41</sup> Providing access to minority students is critical to meeting President Obama's 2020 goal, as the educational gap between white and minority students continues to grow.<sup>42</sup> As reported by the Education Trust, "The gaps that separate Latino and African-American students from their white peers actually are wider [as of December, 2009] than in 1975, and the gap between low-income and high-income students has *doubled*. These degree-attainment gaps are the result of gaps in both enrollment and graduation rates."<sup>43</sup>

Students at proprietary institutions also tend to have lower incomes, and 76 percent are completing their education without parental financial support.<sup>44</sup> For example, 51 percent of students at proprietary institutions are financially independent and have annual incomes under \$20,000, compared to 39 percent at public institutions

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<sup>38</sup> Government Accountability Office, *Proprietary Schools: Stronger Department of Education Oversight Needed to Help Ensure Only Eligible Students Receive Federal Student Aid* 7 & table 1 (Aug 2009), online at <http://www.gao.gov/new.items/d09600.pdf> (visited Oct 21, 2011).

<sup>39</sup> *Id.* at 7 table 1, 8 figure 2 (comparing the gender and racial breakdowns of students at public, nonprofit, and proprietary schools).

<sup>40</sup> National Center for Education Statistics, *Computation by DAS-T Online Version 5.0: Single Parents*, online at <http://nces.ed.gov/dasolv2/tables/displayTable.asp?sessionID=4F7852DE-2527-4285-9DF6-0FCCC2026B08&sequenceID=1&returncode=SUCCESS> (visited Oct 21, 2011) (providing, for public, private not-for-profit, and private for-profit institutions, the percentage of students who are single parents).

<sup>41</sup> Compare Laura G. Knapp, Janice E. Kelly-Reid, and Roy W. Whitmore, *Enrollment in Postsecondary Institutions, Fall 2004; Graduation Rates, 1998 & 2001 Cohorts; and Financial Statistics, Fiscal Year 2004* 4-5 table 1 (National Center for Education Statistics Feb 2006), online at <http://nces.ed.gov/pubs2006/2006155.pdf> (visited Oct 21, 2011), with Laura G. Knapp, Janice E. Kelly-Reid, and Scott A. Ginder, *Enrollment in Postsecondary Institutions, Fall 2009; Graduation Rates 2003 & 2006 Cohorts; and Financial Statistics, Fiscal Year 2009: First Look* 7-8 table 1 (National Center for Education Statistics Feb 2011), online at <http://nces.ed.gov/pubs2011/2011230.pdf> (visited Oct 21, 2011).

<sup>42</sup> Jennifer Engle and Mary Lynch, *Charting a Necessary Path: The Baseline Report of the Access to Success Initiative 2* (Education Trust Dec 2009), online at [http://www.edtrust.org/sites/edtrust.org/files/publications/files/A2S\\_BaselineReport\\_0.pdf](http://www.edtrust.org/sites/edtrust.org/files/publications/files/A2S_BaselineReport_0.pdf) (visited Oct 21, 2011).

<sup>43</sup> *Id.*

<sup>44</sup> Cappelli, *Higher Education at a Crossroads* at 15 & exhibit 9 (cited in note 37).

and 36 percent at nonprofit institutions.<sup>45</sup> A student's receipt of Pell Grants is often used as a proxy for low-income status because, while it has its limitations, it is the only comparative income measure available across all types of institutions. For comparison purposes, 63.1 percent of students at proprietary colleges received a Pell Grant, compared with 26.3 percent at nonprofit colleges and 23.0 percent at public colleges.<sup>46</sup>

Students at proprietary institutions also tend to have a number of risk factors not shared by their traditional-school peers that increase their chance of not completing their education. Seven risk factors have been consistently used in ED databases as characteristics of "nontraditional" or "at-risk" students: delayed enrollment in postsecondary education, part-time attendance, financial independence from parents, full-time employment while enrolled, dependents other than a spouse, single parenthood, and lack of a standard high school diploma.<sup>47</sup> Students with these risk factors are more likely to be women or to belong to a racial-ethnic minority group.<sup>48</sup> The likelihood of students persisting or graduating decreases substantially as the number of risk factors increases.<sup>49</sup> As depicted in the chart below, over half the students in two- and four-year programs at proprietary institutions have at least three risk factors and are considered to be "high risk," compared to significantly smaller portions of students enrolled at traditional colleges.

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<sup>45</sup> Association of Private Sector Colleges and Universities, *Cohort Default Rates in Contest: Key Factors Driving the Difference in Student Defaults in Institutions of Higher Education; A White Paper* 4 (Feb 14, 2011), online at <http://www.apscu.org/iMISPublic/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=22702> (visited Oct 21, 2011).

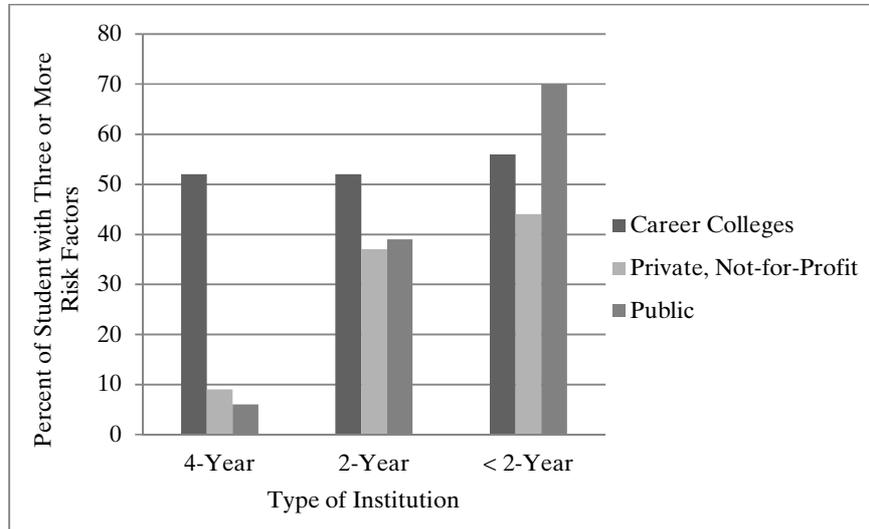
<sup>46</sup> Kantrowitz, *Borrowing in Excess of Institutional Charges* at 10 (cited in note 6).

<sup>47</sup> Horn and Carroll, *Nontraditional Undergraduates* at 26 table 11 (cited in note 5). Approximately 73 percent of US students are classified as nontraditional students by ED. Susan Choy, *Nontraditional Undergraduates* 1 (National Center for Education Statistics 2002).

<sup>48</sup> Horn and Carroll, *Nontraditional Undergraduates* at 10 (cited in note 5).

<sup>49</sup> George D. Kuh, et al, *What Matters to Student Success: A Review of the Literature* 27 (National Postsecondary Education Cooperative July 2006), online at [http://nces.ed.gov/npec/pdf/kuh\\_team\\_report.pdf](http://nces.ed.gov/npec/pdf/kuh_team_report.pdf) (visited Oct 21, 2011).

FIGURE 1. PROPRIETARY INSTITUTIONS SERVE MORE STUDENTS WHO HAVE A HIGHER RISK OF NOT COMPLETING PROGRAMS



Source: Swail, *Graduating At-Risk Students* at 15 figure 4 (cited in note 4).

Finally, students who attend proprietary institutions are more likely to overborrow when attending college. A recent analysis of undergraduate students across all of higher education found that students attending proprietary institutions were more than twice as likely to borrow “excessively” (more than \$2,500 annually in excess of institutional charges) as students attending public and nonprofit colleges.<sup>50</sup> Not surprisingly, this ratio was found to correlate to the number of Pell Grant–eligible students that proprietary institutions enroll.<sup>51</sup> This overborrowing likely makes it more difficult for low-income students to repay their debt after graduation.

Unfortunately, proprietary institutions (or any institutions for that matter) have little ability to control a student’s debt. Under current law, institutions are required to inform students of the maximum amount of federal loans available.<sup>52</sup> Institutions set the “cost of attendance,” which includes direct educational expenses such as tuition, fees, books, and supplies, as well as indirect living expenses such as transportation, room and board, and dependent child care costs for independent students with dependents.<sup>53</sup> Students are able to borrow up to the maximum loan limits for their cost of

<sup>50</sup> See Kantrowitz, *Borrowing in Excess of Institutional Charges* at 1–2 (cited in note 6).

<sup>51</sup> See *id.* at 2–3.

<sup>52</sup> See 34 CFR § 674.16(a)(1)(iv).

<sup>53</sup> See 20 USC § 1087ll.

attendance less the student's estimated financial assistance for that period (including grants and scholarships).<sup>54</sup> While the HEA permits college financial aid administrators to selectively limit student borrowing in a nondiscriminatory manner, the opportunities for institutions to limit excessive student debt in the aggregate is restricted by current law and regulatory guidance: that is, institutions must let students borrow as much as they can qualify for regardless of their actual need or ability to repay.<sup>55</sup>

### C. Strong Correlation between Student Demographics and Outcomes

Interpretations of available data reveal a strong correlation between the percentage of at-risk students that an institution enrolls and the outcomes of the students attending the institution. With respect to student cohort default rates,<sup>56</sup> for instance, the US Government Accountability Office in a 2009 report found that

higher default rates at proprietary schools are linked to the characteristics of the students who attend these schools. Specifically, students who come from low income backgrounds and from families who lack higher education are more likely to default on their loans, and data show that students from proprietary schools are more likely to come from low income families and have parents who do not hold a college degree.<sup>57</sup>

Other recent studies have found similar correlations between student demographics and graduation rates and default rates.<sup>58</sup>

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<sup>54</sup> See 34 CFR § 682.603(e).

<sup>55</sup> See Department of Education, *3 2010–2011 Federal Student Aid Handbook* ch 6 at 3-100, 3-144 (Feb 2011), online at <http://www.ifap.ed.gov/fsahandbook/attachments/1011FSAHbkVol3Ch6.pdf> (visited Oct 21, 2011).

<sup>56</sup> A “cohort default rate” measures the percentage of a school's borrowers who enter repayment in one fiscal year and default before the end of the next fiscal year. See Department of Education, *Official Cohort Default Rates for Schools*, online at <http://www2.ed.gov/offices/OSFAP/defaultmanagement/cdr.html> (visited Oct 21, 2011).

<sup>57</sup> Government Accountability Office, *Proprietary Schools* at Introduction (cited in note 38).

<sup>58</sup> See, for example, Engle and Lynch, *Charting a Necessary Path* at 2 & figure 1, 3 & figure 2 (cited in note 42) (finding that low-income and minority students enroll in and graduate from four-year programs at disproportionately lower rates); Don Hossler, et al, *What Matters in Student Loan Default: A Review of the Literature* 3 (Project on Academic Success, Indiana University 2008), online at <http://pas.indiana.edu/pdf/DefaultFull.pdf> (visited Oct 21, 2011) (finding that cohort default rates tend to be higher at proprietary institutions because students who attend those institutions “tend to borrow more, to come from lower income families, and to belong to a racial or ethnic minority group—characteristics that are all associated with increased likelihood of default”).

The following charts illustrate the nearly linear relationship between the percentage of Pell-eligible students an institution enrolls and the institution's graduation rates and cohort default rates.

**FIGURE 2. GRADUATION RATES (2009) FOR ALL FOUR-YEAR DEGREE GRANTING INSTITUTIONS WITH VARYING PERCENTAGES OF STUDENT POPULATION RECEIVING PELL GRANTS**

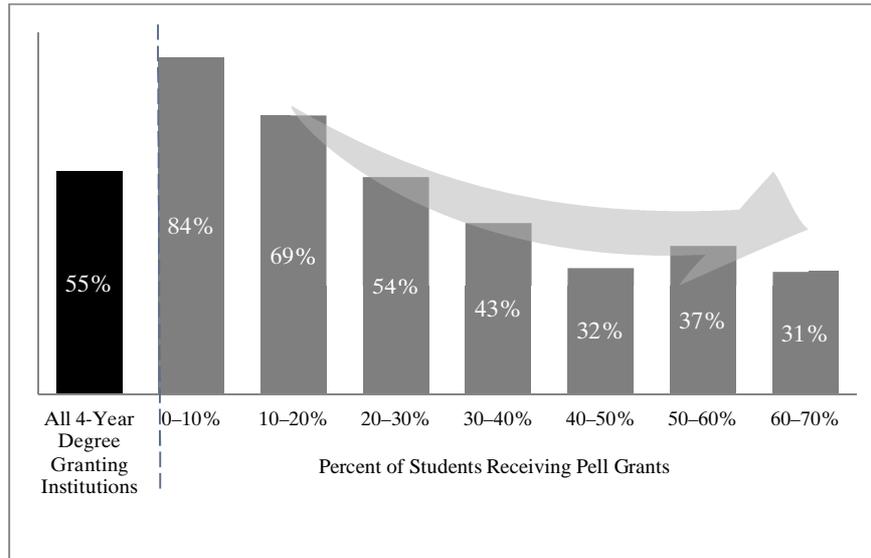
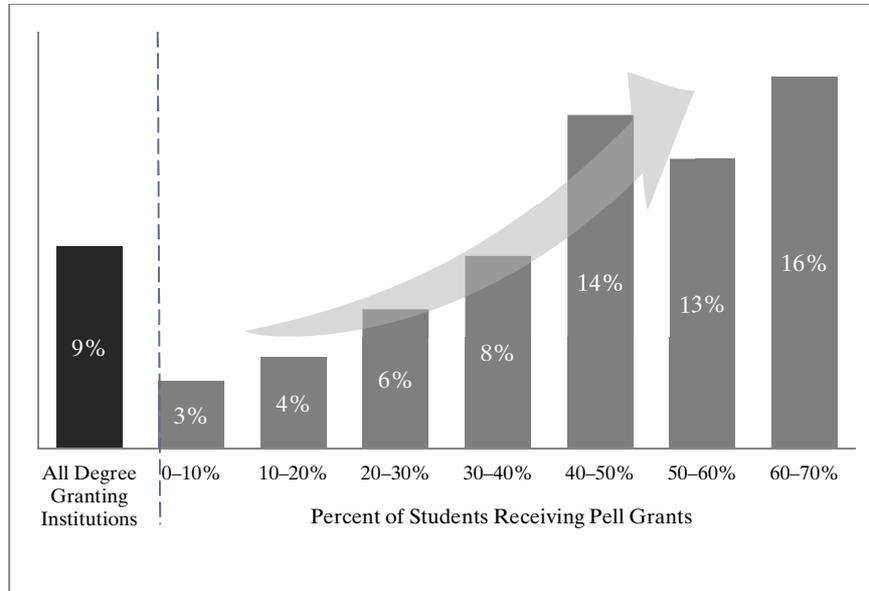


FIGURE 3. COHORT DEFAULT RATES (2009 TWO-YEAR) FOR ALL DEGREE GRANTING INSTITUTIONS WITH VARYING PERCENTAGE OF STUDENT POPULATION RECEIVING PELL GRANTS



#### D. Proprietary School Success in Outcomes for At-Risk Students

Despite their level of high-risk enrollees, proprietary institutions generally provide an educational experience that meets the needs of their students. This is likely the result of a focus on providing students with clear pathways to degrees, customized and flexible scheduling, information systems that track progress, a commitment to advisement, and active job-placement counseling.<sup>59</sup>

Proprietary schools are more successful than their two- and four-year public and nonprofit counterparts at graduating at-risk students. At first blush, published graduation rates of proprietary institutions lag public and nonprofit four-year institutions (35 percent, 54 percent, and 65 percent, respectively) and are comparable to two-year nonprofit institutions (60 percent versus 55 percent, respectively).<sup>60</sup>

<sup>59</sup> See David Wakelyn, *Increasing College Success: A Road Map for Governors* 1 (National Governors Association, Center for Best Practices, Dec 9, 2009), online at <http://www.nga.org/files/live/sites/NGA/files/pdf/0912INCREASINGCOLLEGESUCCESS.PDF> (visited Oct 21, 2011) (pointing out these factors to explain why two-year proprietary schools have much higher graduation rates than two-year public colleges even though they enroll similar students).

<sup>60</sup> Imagine America Foundation, *Fact Book 2011: A Profile of Career Colleges and Universities* 25 figure FF (2011).

Published graduation rates of two-year proprietary institutions are almost triple that for public two-year institutions (primarily community colleges)—the sector most comparable demographically (60 percent versus 22 percent, respectively).<sup>61</sup>

However, when graduation rates are more closely examined based on the types of students that an institution enrolls,<sup>62</sup> propriety colleges do much better than their traditional counterparts. The findings in one study can be summarized as follows:

- *Institutions predominantly serving low-income populations (at least 60 percent Pell-eligible students):* Four-year proprietary colleges graduated 55 percent of their students, as compared to 31 percent and 39 percent, respectively, at comparable public and nonprofit institutions. Two-year proprietary colleges graduated 56 percent of their students, as compared to 24 percent and 45 percent, respectively, at comparable public and nonprofit institutions.
- *Institutions predominantly serving minorities (less than 25 percent white students):* Four-year proprietary colleges graduated 47 percent of their students, as compared to 33 percent and 40 percent at comparable public and nonprofit institutions. Two-year proprietary colleges graduated 56 percent of their students, as compared to 16 percent and 44 percent, respectively, at comparable public and nonprofit institutions.<sup>63</sup>

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<sup>61</sup> Id.

<sup>62</sup> There is currently “a highly incomplete understanding of graduation rates” due to the lack of a meaningful standard definition. Kara M. Cheseby, *Class Conflict: Gainful Employment Proposal Penalizes At-Risk Student Populations and Hurts the Economy* 8–10 (Competitive Enterprise Institute Mar 2011), online at <http://cei.org/sites/default/files/Kara%20Cheseby%20-%20Class%20Conflict%20Gainful%20Employment%20Proposal.pdf> (visited Oct 21, 2011) (“What is the realistic graduation rate, especially given differences in programmatic concentrations and student demographics between post-secondary sectors?”).

<sup>63</sup> See Swail, *Graduating At-Risk Students* at 22–26 & figures 13, 15 (cited in note 4). See also, Robert Lytle, *Private Sector Post-secondary Schools—Do They Deliver Value to Students and Society?* 2–3 & exhibit 1 (Parthenon Group Mar 2010), online at <http://www.parthenon.com/GetFile.aspx?u=%2fLists%2fThoughtLeadership%2fAttachments%2f17%2fParthenon%2520Perspectives%2520-%2520Private%2520Post%2520Secondary%2520Schools%2520Value%2520Proposition%2520-%2520White%2520Paper.pdf> (visited Oct 22, 2011) (using ED data for two-year and less institutions, found students at proprietary colleges graduate at rates roughly 20 percent higher than public schools even though they attract more “high risk” students).

### III. REGULATORY ROADBLOCKS TO COLLEGE ACCESS FOR LOW-INCOME AND MINORITY STUDENTS

#### A. The Gainful Employment Rule Improperly Singles Out Low-Income and Minority Students Attending Proprietary Colleges

In June 2011, ED issued its controversial “gainful employment” rule,<sup>64</sup> which applies to most programs at proprietary institutions and only nondegree programs at public and nonprofit institutions.<sup>65</sup> Under the GE rule, the words “gainful employment”—which sat dormant in the HEA for forty-six years<sup>66</sup>—were now embroidered with minimum debt-to-income standards and loan repayment rates that programs must meet in order to retain eligibility for student assistance under Title IV.<sup>67</sup> Under the complex rule (which is more than 5,500 words long and takes 157 pages to explain),<sup>68</sup> each program an institution offers must meet at least one of three metrics to remain eligible for Title IV funding: (1) a 12 percent debt-service-to-total-earning ratio applied to graduates of a program; (2) a 30 percent debt-service-to-discretionary-income ratio applied to graduates of a program; or (3) a 35 percent loan-repayment-rate test for any person who attended a program.<sup>69</sup> A program that fails all

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<sup>64</sup> ED received more than ninety-thousand comments to the GE rule during the public comment period, more than twice its previous record. Goldie Blumenstyk, *Education Dept. to Delay Issuing “Gainful Employment” Rules Opposed by For-Profit Colleges*, Chron Higher Educ (Sept 24, 2010), online at <http://chronicle.com/article/Education-Dept-to-Delay/124617/> (visited Oct 21, 2011). Opposition to the GE rule was bipartisan. A House amendment to the fiscal year 2011 continuing resolution that would have prohibited using federal funds to implement the GE rule passed 289–136 and garnered 58 Democrat votes, including those of former Speaker Nancy Pelosi and one-third of the Democrats of the Tri-Caucus. See HR 1, 112th Cong, 1st Sess (Feb 11, 2011), in 157 Cong Rec 789 (Feb 14, 2011); HR 1, 112th Cong 1st Sess (Feb 11, 2011), in 157 Cong Rec 1234 (Feb 18, 2011). The main trade group representing proprietary institutions also has filed suit to invalidate the GE rule on the grounds it exceeds the regulatory authority granted by Congress under the HEA, conflicts with congressional intent, was developed through a flawed process, and was implemented without adequately exploring the impact on minorities, women, and jobs. See Complaint, *Career College Association v Duncan*, Case No 1:11-cv-01314, \*2–5 (DDC filed July 20, 2011), online at [http://www.nacua.org/documents/APSCU\\_v\\_Duncan\\_ComplaintPrayerDeclaratoryInjunctiveRelief.pdf](http://www.nacua.org/documents/APSCU_v_Duncan_ComplaintPrayerDeclaratoryInjunctiveRelief.pdf) (visited Oct 21 2011).

<sup>65</sup> Programs at proprietary institutions may participate in Title IV assistance programs only if they prepare students for “gainful employment in a recognized occupation” or provide a program at a regionally accredited institution that leads to a baccalaureate degree in liberal arts or that has been in existence since January 1, 2009. 20 USC § 1002(b)(1)(A).

<sup>66</sup> See Jennifer Gonzalez, *Federal Proposal Could Jeopardize For-Profit Programs, Especially Bachelor’s Degrees*, Chron Higher Educ (May 17, 2010), online at <http://chronicle.com/article/Federal-Proposal-on-Student/65604/> (visited Oct 21, 2011).

<sup>67</sup> Department of Education, Program Integrity: Gainful Employment—Debt Measures, 76 Fed Reg 34386, 34386–90 (2011) (amending 34 CFR § 668 effective July 1, 2012).

<sup>68</sup> Id at 34386–34539.

<sup>69</sup> See 34 CFR § 668.7.

three tests in three out of four years is ineligible for further Title IV funding,<sup>70</sup> a result that, in most instances, would lead to closure of the program.

ED's stated purpose for enacting the GE rule was to address programs offered by proprietary institutions that leave students with "unaffordable debts and poor employment prospects."<sup>71</sup> However, analyses by nationally recognized financial aid expert Mark Kantrowitz of data released by ED during the GE rulemaking process support the conclusion that it is the type of student enrolled—more so than the quality of the program offered or the institution offering it—that is the primary cause of excessive debt and student defaults. Kantrowitz found "an almost linear relationship between the percentage [of] Pell Grant recipients and the average loan repayment rates," concluding that colleges that enroll primarily at-risk students who qualify for Pell Grants are "extremely unlikely" to have passing loan repayment rates under the original draft rule.<sup>72</sup>

In litigation filed by the Association of Private Sector Colleges and Universities (APSCU) against ED to invalidate the GE rule, ED Assistant Secretary Eduardo M. Ochoa admits that ED erred in calculating the effects of race on repayment rates in the final GE regulation. Ochoa states that ED mistakenly used a variable called "percent minority," which, while intended to measure the percentage of an institution's student body made up of minorities, did not include African American students in the data set. This resulted in ED significantly understating the relationship between race and repayment rates, such that, while ED originally estimated that race explained only 1 percent of the overall variance in repayment rates, it actually explained 20 percent of the variance.<sup>73</sup> While ED claims the GE rule would not have been different had it known of the mistake before it issued the rule, APSCU has asserted that ED's error goes to the heart of the concerns raised in public comments filed during the rulemaking process that the regulation

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<sup>70</sup> 34 CFR § 668.7(i). Programs failing to meet one or more of these tests are also subject to certain disclosure requirements and warnings to students. 34 CFR § 668.7(j).

<sup>71</sup> 76 Fed Reg at 34386 (cited in note 67).

<sup>72</sup> Mark Kantrowitz, *The Impact of Loan Repayment Rates on Pell Grant Recipients* 2–3 (FinAid Sept 1, 2010), online at <http://www.finaid.org/educators/20100901gainfulemploymentimpactonpell.pdf> (visited Oct 21, 2011). But see 76 Fed Reg at 34460–65 (cited in note 67) (noting that nine sector-wise multiple regression models exploring the relationship between repayment rates and student- and institution-level factors ran from being wholly nonpredictive to explaining more than half of the potential variance in repayment rates).

<sup>73</sup> See Declaration of Eduardo Ochoa, *Association of Private Sector Colleges and Universities v Duncan*, No 1:11-cv-01314, \*2–3 (DDC filed Dec 13, 2011).

disproportionally impacted minority students and by itself requires that the GE regulation be vacated.<sup>74</sup>

Because the GE rule does not adjust for these demographic correlations, it creates the perverse incentive for proprietary institutions to avoid enrolling low-income and minority students altogether. The GE rule also incorrectly focuses on the financial success of students as the main criterion for eligibility when the core metric of the Title IV program, as clearly stated in the statute and legislative history, is financial need. By predetermining program choices for students primarily based on their ability to pay for their schooling without borrowing, the GE rule will almost certainly have a disproportionate impact on low-income, minority, and other underserved students. Instead of helping disadvantaged students achieve their highest potential, the GE rule will reduce access to education for disadvantaged students based on the very factors that caused them to be disadvantaged in the first place.

#### B. The 90/10 Rule Creates Structural Incentives for Tuition Inflation and Barriers to Access for Low-Income and Minority Students

The 90/10 rule applies only to proprietary institutions and requires that at least 10 percent of an institution's revenues for tuition, fees, and other institutional charges be received from sources other than federal Title IV student aid.<sup>75</sup> The rule was enacted to stem fraudulent and abusive practices that had been identified at proprietary institutions. An oft-stated rationale for the rule is that a proprietary institution providing a high-quality education should be able to derive a specific percentage of its revenue from non-Title IV programs.<sup>76</sup> Stated slightly differently, students would be willing to pay at least 10 percent out of their own pockets toward their education if it were worthwhile.<sup>77</sup>

While the 90/10 formula may seem fairly straightforward, the underlying details of the regulation are numerous, subjective, and

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<sup>74</sup> See Memorandum of Law in Opposition to Defendant's Cross-Motion for Summary Judgment and Reply Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment, *Association of Private Sector Colleges and Universities v Duncan*, No 1:11-cv-01314, \*2-5 (DDC filed Jan 12, 2012).

<sup>75</sup> 20 USC § 1094(a)(24).

<sup>76</sup> Rebecca R. Skinner, *Institutional Eligibility and the Higher Education Act: Legislative History of the 90/10 Rule and Its Current Status* 3 (Congressional Research Service Jan 19, 2005), online at <http://www.policyarchive.org/handle/10207/bitstreams/1904.pdf> (visited Oct 16, 2011). There is no known research that establishes a relationship between the amount of institutional charges a student pays and quality.

<sup>77</sup> See *id.* at Summary.

extremely burdensome to implement.<sup>78</sup> Further, the rule generally presumes that Title IV funds received by an institution are applied to institutional charges first (90 percent element).<sup>79</sup> Institutions whose students overborrow are at a disadvantage because the Title IV aid these students receive often covers most, if not all, of the institutional charges, leaving little or no balance owed against which to apply non-Title IV (10 percent element) funds. For example, if institutional charges are \$7,500 and a student has \$2,500 in cash and receives \$7,500 in Title IV aid, the revenue presumption deems the \$7,500 in institutional charges to be fully paid by Title IV aid, resulting in a 90/10 ratio of 100 percent.

The 90/10 rule is fundamentally in conflict with the goal of educating low-income students. The rule presupposes financial resources that are not available to low-income students. This lack of personal financial resources devolves into the 10 percent element being sourced according to the rule from private student loans, military student aid, and employer tuition assistance.<sup>80</sup> Because proprietary institutions have no authority to limit student use of Title IV federal student aid, their main tool for 90/10 compliance is increasing institutional charges beyond the maximum amount of federal aid to force students to fill the “gap” thus created with non-Title IV funds.<sup>81</sup> The GE rule further complicates matters because a main tool for compliance with the debt restrictions of that rule is tuition reductions that will hurt their 90/10 scores, thus putting the requirements of the GE and 90/10 rules in conflict with each other and institutions in a catch-22.<sup>82</sup>

House Speaker John Boehner (who was then chairman of the House Committee on Education and the Workforce) recognized the fundamental problems with the 90/10 rule in 2004:

[T]he 90/10 Rule . . . was put into place as part of the larger effort to reduce fraud and abuse that plagued the proprietary sector in the 1970s and 1980s. While I don’t disagree that this rule was well intentioned years ago, today it seems not only

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<sup>78</sup> See Advisory Committee on Student Financial Assistance, *Preliminary List of Burdensome Regulations* \*1 (May 2011), online at <http://www2.ed.gov/about/bdscomm/list/acsf/acsfa/prelimlistofburdenregsmay11.pdf> (visited Oct 22, 2011).

<sup>79</sup> See 20 USC § 1094(a)(24), (d)(1).

<sup>80</sup> See Kantrowitz, *Borrowing in Excess of Institutional Charges* at 1 & nn 1–2 (cited in note 6).

<sup>81</sup> See *id.*

<sup>82</sup> See Mark Kantrowitz, *What Is Gainful Employment? What Is Affordable Debt?* 22 (FinAid Mar 11, 2010), online at [http://www.finaid.org/educators/20100301gainful\\_employment.pdf](http://www.finaid.org/educators/20100301gainful_employment.pdf) (visited Oct 22, 2011).

unnecessary and ineffective, but also potentially harmful to students.

The rule requires proprietary institutions to show at least 10 percent of funds are derived from sources outside of Title IV student aid funding. While this may not seem like too much to ask, looking closely at this rule shows just how burdensome it may be.

Statistics show proprietary schools tend to serve larger populations of needy, high-risk minority and nontraditional students. In other words, the students most in need of federal assistance.

Yet when a proprietary schools serves a large share of needy students, many of whom rely on federal aid, the school's compliance with the 90/10 Rule is put in jeopardy. . . . Worse still, this rule 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>83</sup>

In recent years, 90/10 rates at proprietary institutions have been increasing based on a host of factors that are outside their control. These changes include rapid and substantial increases in available federal Title IV aid,<sup>84</sup> the collapse of the private credit markets and the associated end of private student lending for all but the best credit risks,<sup>85</sup> and a deteriorating economy with considerable job

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<sup>83</sup> *The College Access & Opportunity Act: Are Students at Proprietary Institutes Treated Equitably under Current Law?*, Hearing on HR 4283 before the Committee on Education and the Workforce, 108th Cong, 2d Sess 2–3 (2004) (statement of Rep John Boehner), online at <http://www.gpo.gov/fdsys/pkg/CHRG-108hhr94285/pdf/CHRG-108hhr94285.pdf> (visited Oct 21, 2011).

<sup>84</sup> The increase in the Title IV growth rate has been significantly impacted by (1) a 13 percent annual increase in the maximum Pell Grant amount effective July 1, 2009, see Mark Kantrowitz, *Pell Grant Historical Figures* (FinAid 2011), online at <http://www.finaid.org/educators/pellgrant.phtml> (visited Oct 21, 2011); (2) the introduction of year-round Pell Grants, see 34 CFR § 690.67(a); (3) Pell Grant formula changes for undergraduate students, see Jason Delisle, *The Real Cause of Pell Grant Cost Increases* (New America Foundation Mar 8, 2011), online at [http://higheredwatch.newamerica.net/blogposts/2011/the\\_real\\_cause\\_of\\_pell\\_grant\\_cost\\_increases-46147](http://higheredwatch.newamerica.net/blogposts/2011/the_real_cause_of_pell_grant_cost_increases-46147) (visited Oct 22, 2011); (4) a \$2,000-per-academic-year increase in the unsubsidized Stafford loan limits effective July 1, 2008, see Continued Access to Student Loans Act of 2008, Pub L 110-227, 122 Stat 740, codified at 20 USC § 1078-8(d)(3)(A) (adding an additional \$2,000 to the amount of aid per year a student may borrow); (5) an increase of 20 percent per academic year in Stafford loan limits for graduate students, see Mark Kantrowitz, *Historical Loan Limits* (FinAid 2011), online at <http://www.finaid.org/loans/historicallimits.phtml> (visited Oct 22, 2011); and (6) the introduction of Grad PLUS loans, see Mark Kantrowitz, *Private Student Loans* (FinAid 2011), online at <http://www.finaid.org/loans/privatestudentloans.phtml> (visited Oct 22, 2011).

<sup>85</sup> See Mark Kantrowitz, *Impact of the Credit Crisis on Student Loans* (FinAid 2008), online at <http://www.education.com/reference/article/impact-credit-crisis-student-loans/>

losses. The result is that substantially more students are eligible for Pell Grants;<sup>86</sup> substantially more students have an “expected family contribution” of \$0, which makes them “fully” Pell eligible;<sup>87</sup> students have cut back on their credit hour load, meaning that federal Title IV aid covers most, if not all, of their tuition instead of a portion of it;<sup>88</sup> and fewer students are able to make even small cash payments towards their education.<sup>89</sup> Exacerbating the situation are widespread reductions in grant aid in a number of states,<sup>90</sup> which worsens the 90/10 ratio because state grants generally count toward the 10 percent and are presumed to be applied first to tuition and fees.<sup>91</sup> Not surprisingly, institutions enrolling greater numbers of low-income students tend to have higher 90/10 scores.<sup>92</sup>

The GE rule and the 90/10 rule do not measure educational quality. Instead, their standards are based on financial metrics that are highly influenced by student need. As outlined previously, the purpose of the HEA is to help disadvantaged students achieve their highest potential. The GE and 90/10 rules do just the opposite—limiting access to education for disadvantaged students based on the very factors that caused them to be disadvantaged.

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(visited Oct 16, 2011) (“Three-quarters of the lenders offering private student loans, representing about a third of the private student loan volume, have suspended their private student loan programs. The remaining lenders are still liquidity constrained, and have reacted by tightening their credit underwriting standards and increasing interest rates.”); Mark Kantrowitz, *Impact of the Subprime Mortgage Credit Crisis on Student Loan Costs and Availability* (FinAid 2008), online at <http://www.finaid.org/loans/credicrisis.phtml> (visited Oct 22, 2011).

<sup>86</sup> Shannon M. Mahan, *Federal Pell Grant Program of the Higher Education Act: Background, Recent Changes, and Current Legislative Issues* at Summary, 4 (Congressional Research Service May 12, 2011), online at <http://www.nasfaa.org/EntrancePDF.aspx?id=5410> (visited Oct 22, 2011).

<sup>87</sup> *Id.* at 14 & nn 25–27.

<sup>88</sup> See *id.* at 3 & nn 13–14, 4.

<sup>89</sup> See *id.* at 15 & table 3.

<sup>90</sup> See, for example, Annamaria Andriotis, *Last-Minute Tuition Hikes Hit Students: Almost 20 States Have Cut Funding for Colleges, Raising Costs for Students—Starting Now*, Smart Money (July 11, 2011), online at <http://www.smartmoney.com/plan/careers/lastminute-tuition-hikes-hit-college-students-1310165302807/> (visited Oct 22, 2011); Nicholas Johnson, Phil Oliff, and Erica Williams, *An Update on State Budget Cuts: At Least 46 States Have Imposed Cuts That Hurt Vulnerable Residents and the Economy* 5 (Center on Budget and Policy Priorities Feb 9, 2011), online at <http://www.cbpp.org/files/3-13-08sfp.pdf> (visited Oct 21, 2011); Kelly Heyboer, *Neediest Students Getting Pinched: Tuition Aid Grant Funds Spread Thin as More Are Eligible*, NJ Star-Ledger 1 (Aug 30, 2010); Janet Okoben, *State Budget Cuts Slice Up College Grant*, Cleveland Plain Dealer B2 (July 29, 2009).

<sup>91</sup> 34 CFR § 668.28(a)(4)(i).

<sup>92</sup> Government Accountability Office, *For-Profit Schools: Large Schools and Schools That Specialize in Healthcare Are More Likely to Rely Heavily on Federal Student Aid* 20 (Oct 2010), online at <http://www.gao.gov/new.items/d114.pdf> (visited Oct 22, 2011).

The GE rule (for the most part) and the 90/10 rule do not apply to public and nonprofit colleges. At-risk students, however, will tend to have lower graduation rates, higher debt, and higher defaults regardless of which college they attend. Denying these students access to proprietary institutions will not solve their problem; it will only serve to exacerbate it and significantly reduce their chances of obtaining a degree. As demonstrated previously, public and nonprofit institutions are less successful in graduating at-risk students. Combined with the limited capacity at traditional colleges,<sup>93</sup> the GE and 90/10 rules will serve only to further disadvantage the disadvantaged, in stark conflict with the HEA's statutory purpose to provide aid to students in need who otherwise may not be able to attend college.

Both rules should be eliminated in favor of policies that apply equally across all of higher education and that are designed to provide equal access and measures of success for at-risk students.

#### IV. AN ACROSS-THE-BOARD APPROACH TO THE AT-RISK STUDENT DILEMMA

Given the widening degree attainment gap for blacks and Hispanics, our country must implement policies to increase access to higher education for minorities and other at-risk students. Policy makers should be mindful that while continuous improvement in student outcomes must always be the goal, at-risk students simply will not always use Title IV funds as efficiently as their peers. Kantrowitz observed the public policy conflicts that this creates as follows:

There is a fundamental conflict between public policy goals of safeguarding taxpayer dollars (e.g., minimizing student loan defaults) and increasing the number of low income, first generation and nontraditional students who graduate from college. Students from at-risk populations are more likely to default on their education loans because they are less likely to graduate and because jobs are less available in their home towns. Basing for-profit institutional eligibility for Title IV funds solely on purely financial metrics might be painting the institutions with a very broad brush, effectively throwing the baby out with the bathwater. Instead, there needs to be a more

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<sup>93</sup> See, for example, Josh Keller, *Cal State May Cut Enrollment by 40,000, Chancellor Says*, Chron Higher Educ (June 5, 2009), online at <http://chronicle.com/article/Cal-State-May-Cut-Enrollmen/47297/> (visited Oct 22, 2011) (reporting that Cal State probably will be cutting enrollment by forty thousand in response to state appropriations cuts).

direct measurement of differences in institutional quality, to permit the separation of the wheat from the chaff.<sup>94</sup>

When “bad actors” in higher education break the rules—regardless of their form of ownership or tax structure—they should be punished. Conversely, proprietary institutions should not be unfairly singled out merely because they are the schools of choice for minorities and other at-risk students. Ensuring that students have access to a quality education and are not saddled with excessive debt is a worthy goal that can be accomplished without harming students who need assistance or high-quality institutions that provide such access.

The divide on the best ways to address competing public policy goals of providing educational opportunities to at-risk students and safeguarding taxpayer money has fallen along the traditional lines of conservative and progressive policy makers, which has been described in the recent public debate regarding proprietary schools:

In a sense, this war [“between for-profit institutions of higher education and U.S. government forces determined to control them”] is symptomatic of the great divide in the U.S. society between conservative and progressive thought. Conservatives are willing to give people a chance to succeed, though they seem less sympathetic to the plight of those who fail. In the language of this war, they support for-profits and their mission of providing a chance of success for lower-income, less-prepared students. However, they lack suggestions for how to address the debt load borne by those who do not succeed.

However, progressives trust government and nonprofit entities much more than private for-profits of any kind—including and especially higher-education institutions. In the language of this war, they desire to protect low-performing students from for-profit predators at any and all costs. But they lack perspectives on enabling students to make their own choices about where and whether to pursue college education.<sup>95</sup>

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<sup>94</sup> Email from Mark Kantrowitz, Publisher of FinAid.org, to Anthony Guida (Dec 22, 2009) (on file with author).

<sup>95</sup> Tim Gramling, *All-Out War: A Case Study in Media Coverage of For-Profit Higher Education* 8 (SAGE Open June 29, 2011), online at <http://sgo.sagepub.com/content/early/2011/07/08/2158244011414732.full.pdf> (visited on Oct 21, 2011). See also Andrew P. Kelly, *Private Enterprise in American Education: More Than Meets the Eye; The Politics of For-Profits in Education* 2 (American Enterprise Institute July 2011), online at <http://www.aei.org/docLib/Private-Enterprise-No-2.pdf> (visited Oct 22, 2011).

In building a bridge across the chasm that currently exists between conservative and progressive policy makers, a good place to start is separating the “symptoms” from the “causes.” Different demographic groups often have different academic needs that must be considered. Though many students attending proprietary schools are similar to those attending traditional schools, proprietary schools educate a significant proportion of minority, low-income, and other at-risk students. Most of these students will necessarily borrow more and perform differently than dependent students from financially stable backgrounds who are academically well-prepared, attend highly selective universities, and obtain a college degree within prescribed timeframes. Policies that ignore these differences will fail to meet the needs of at-risk students.

A framework for addressing the at-risk student dilemma was outlined in 2006 by the Commission on the Future of Higher Education appointed by then-ED Secretary Margaret Spellings.<sup>96</sup> The purpose of this Commission (also known as the “Spellings Commission”) was “to consider how best to improve [the US] system of higher education to ensure that our [country’s] graduates are well prepared to meet our future workforce needs and are able to participate fully in the changing economy.”<sup>97</sup> The Spellings Commission’s final report offered six broad recommendations:<sup>98</sup>

1. Expand access to and success in higher education “by improving student preparation and persistence, addressing nonacademic barriers and providing significant increases in aid to low-income students.”
2. Restructure the entire student financial aid system and put in place new incentives to better measure and manage costs and institutional productivity.
3. Change higher education from a system based primarily on reputation to one based on performance by creating “a robust culture of accountability and transparency” aided by new systems of data measurement with comparable information that take into consideration different types of students served, including “nontraditional” students.

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<sup>96</sup> Department of Education, *A Test of Leadership: Charting the Future of U.S. Higher Education; A Report of the Commission Appointed by Secretary of Education Margaret Spellings* 1–7 (Sept 2006), online at <http://www2.ed.gov/about/bdscomm/list/hiedfuture/reports/final-report.pdf> (visited Oct 16, 2011).

<sup>97</sup> *Id.* at 33–34.

<sup>98</sup> The following list is drawn from the Spellings Commission’s findings. See *id.* at 17–27.

4. Encourage colleges and universities to embrace “a culture of continuous innovation and quality improvement.”
5. Develop a strategy for lifelong learning to help all Americans understand the importance of a college education to their future.
6. Target federal investments to areas critical to America’s global competitiveness, such as math, science, and foreign languages. Policies must also encourage and channel students from diverse racial and ethnic populations into key strategic areas.

While the Spellings Commission achieved only marginal improvements to access, affordability, and accountability in the five years since it issued its report, its third recommendation has moved to the forefront the uncomfortable discussion that our country’s system of higher education is ill-equipped to address: the large number of “nontraditional” students in need of higher education.<sup>99</sup>

Measures to ensure both access *and* success of at-risk students are best approached separately from the indebtedness issue. As the Education Trust in its “Access to Success Initiative” espouses, a “simultaneous focus on both access and success” is required if we are to achieve substantial increases in the number of low-income and minority students graduating college, because neither course alone will produce more graduates.<sup>100</sup>

Current policies like the GE and 90/10 rules, while well-intentioned, actually diminish access for at-risk students. They must be discontinued in favor of a focus on assuring accountability for positive student outcomes through measures such as graduation rates, job placement rates, lifetime earnings, and licensure and certification examination success. Policy makers must also develop alternative progress measures for “nontraditional” students who, due to personal circumstances, do not progress in the same linear fashion as traditional students, such as success in remedial programs and first-year college courses, credit accumulation, retention rates,

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<sup>99</sup> See Kelly Field, *Spellings Panel Spurred Progress in Some Key Areas but Failed to Remake American Higher Education: 5 Years after Release of Report on the Future of Colleges, Experts Note Improvements in Access and Accountability*, Chron Higher Educ (Sept 18, 2011), online at [http://chronicle.com/article/5-Years-Later-the-Impact-of/129053/?sid=at&utm\\_source=at&utm\\_medium=en](http://chronicle.com/article/5-Years-Later-the-Impact-of/129053/?sid=at&utm_source=at&utm_medium=en) (visited Oct 21, 2011). See also Robert Zemsky, *The Unwitting Damage Done by the Spellings Commission*, Chron Higher Educ (Sept 18, 2011), online at [http://chronicle.com/article/The-Unwitting-Damage-Done-by/129051/?sid=at&utm\\_source=at&utm\\_medium=en](http://chronicle.com/article/The-Unwitting-Damage-Done-by/129051/?sid=at&utm_source=at&utm_medium=en) (visited Oct 21, 2011). Determining the proper roles and relationships between the federal government and accreditation within the system of higher education is beyond the scope of this Article.

<sup>100</sup> Engle and Lynch, *Charting a Necessary Path* at 5 (cited in note 42).

and time and credit to degrees.<sup>101</sup> This is in addition to the current extensive qualitative factors that are already built into the HEA that all Title IV participating institutions must meet.<sup>102</sup>

Student outcome measurements must take into consideration the demographics and risk profile of the student population so that they are actually measuring the added value provided by the education and are not merely reflective of an institution's selectivity in enrollment. In addition, ED must begin to collect and report data for nontraditional students, such as part-time students, transfer students, low-income students, or remedial students.<sup>103</sup> Research institutes such as the Lumina Foundation,<sup>104</sup> Complete College America,<sup>105</sup> and the Education Trust<sup>106</sup> have espoused such approaches in which "robust, honest data" inform policy makers where institutions stand and how they are improving, which is critical to raising US degree attainment rates.<sup>107</sup>

Analogous legislative approaches that seek to measure success differently depending upon the types of students served have been discussed for a number of years, employing the two handles of punishment and reward. Congressman Rob Andrews recently reintroduced his "Education Quality Index," applicable to all

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<sup>101</sup> See *Essential Steps for States: Uniformly Measure Progress and Success* 2–3 (Complete College America 2010), online at [http://www.completecollege.org/docs/CCA%20Essential%20Steps%20Common%20Measures%20of%20Progress\(1\).pdf](http://www.completecollege.org/docs/CCA%20Essential%20Steps%20Common%20Measures%20of%20Progress(1).pdf) (visited Oct 21, 2011). See also Jeffrey Brainard and Andrea Fuller, *Graduation Rates Fall at One-Third of 4-Year Colleges*, Chron Higher Educ (Dec 5, 2010), online at <http://chronicle.com/article/Graduation-Rates-Fall-at/125614/> (visited Oct 21, 2011) (explaining that ED's current definition of graduation rates fails to count students who take longer to complete their degrees, count part-time students, count students who transfer in and graduate, or count students who transfer to another college and earn their degree there).

<sup>102</sup> For example, to be eligible for Title IV aid, proprietary institutions must admit only students who have graduated from a secondary school (or the equivalent), must be authorized as a matter of state law to provide a program of education in the state where they are located, must be accredited by a nationally recognized accrediting agency, must have been in existence for at least two years, must be determined to be administratively capable and financially responsible by the secretary, and must comply with numerous other requirements ranging from health and safety issues, to restrictions on incentive compensation, to specifically enumerated program requirements. See 20 USC §§ 1001(a)(1)–(2), 1002(b)(1), 1088(b), 1094(a).

<sup>103</sup> See *Uniformly Measure Progress and Success* at 1–2 (cited in note 101).

<sup>104</sup> See *Student Success* (Lumina Foundation 2011), online at [http://www.luminafoundation.org/our\\_work/student\\_success/](http://www.luminafoundation.org/our_work/student_success/) (visited Oct 16, 2011) (noting that "[t]he majority of publicly reported data about college-going and completion rates omit large numbers of [nontraditional] students").

<sup>105</sup> *Uniformly Measure Progress and Success* at 1 (cited in note 101).

<sup>106</sup> Kati Haycock, Mary Lynch, and Jennifer Engle, *Opportunity Adrift: Our Flagship Universities Are Straying from Their Public Mission* 10 (Education Trust Jan 2010), online at [http://www.completionmatters.org/sites/default/files/Opportunity%20Adrift\\_0.pdf](http://www.completionmatters.org/sites/default/files/Opportunity%20Adrift_0.pdf) (visited Oct 22, 2011) (suggesting a "New Measurement of Success: Pell Graduation Rates").

<sup>107</sup> *Student Success* (cited in note 104).

institutions of higher education, “that will consider various outcomes including graduation, job placement, student loan repayments, and pass rates on various credentialing examinations—to make judgments on an institution’s value proposition.”<sup>108</sup> Andrews originally proposed this index in the Educational Quality Act of 1994.<sup>109</sup> His recent iteration will apply by program and “will also take into account the type of student being educated, understanding that students with various ‘risk factors,’ such as the first to attend college or being a working parent, present additional challenges to institutions that accept them.”<sup>110</sup> His revised metric considers an institution’s effort to educate those most in need by applying a multiplier to the index score based upon the percentage of Pell-eligible students the institution enrolls.<sup>111</sup> Programs failing to meet the threshold would be given a timeframe to improve their performance before losing Title IV eligibility.<sup>112</sup>

The House, in July of 2009, took the “rewards” approach in proposing two programs in the Student Aid and Fiscal Responsibility Act of 2009<sup>113</sup> (SAFRA). A new grant program entitled “Grants to Eligible Entities for Community College Reform” sought to provide \$630 million annually to support innovative programs that lead to completion of degrees or industry-recognized credentials, with priorities given to institutions that serve nontraditional students.<sup>114</sup> Institutions were required to develop and meet “quantifiable benchmarks,” approved by the secretary of education that closed gaps in enrollment and completion rates for groups underrepresented in higher education. The bill referenced educational and employment benchmarks such as student persistence, credits earned, successful completions of developmental courses, transfer of credits between institutions, transfers to four-year institutions, and job placements.<sup>115</sup> That bill also included reforms to the Perkins Loan Program that would have allowed institutions to selectively increase loan limits based on student need and would have allocated a portion of the funding (\$1.5 billion) based on the institution’s share of Pell Grant–

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<sup>108</sup> See Letter from Congressman Robert E. Andrews to ED Secretary Arne Duncan 2 (Aug 5, 2010), online at <http://www.ed-success.org/pdf/ANDREWS%20GE%20LETTER.pdf> (visited Oct 21, 2011) (“Letter from Congressman Andrews”).

<sup>109</sup> Educational Quality Index Act of 1994, HR 4384, 103d Cong, 2d Sess, in 140 Cong Rec 9979 (May 11, 1994).

<sup>110</sup> Letter from Congressman Andrews at 2 (cited in note 108).

<sup>111</sup> *Id.* at 3.

<sup>112</sup> *Id.*

<sup>113</sup> HR 3221, 111th Cong, 1st Sess (Sept 16, 2009), in 155 Cong Rec 9604 (July 15, 2009).

<sup>114</sup> SAFRA § 501, 155 Cong Rec at 9621 (cited in note 113).

<sup>115</sup> SAFRA § 503(g), 155 Cong Rec at 9622 (cited in note 113).

receiving students that graduated with a degree.<sup>116</sup> Neither the community college nor the Perkins reforms were included in the final law.<sup>117</sup>

Policy makers also must address the overborrowing issues facing minority and low-income students regardless of the ownership structure of the college they choose to attend. Ensuring that students receive a quality education and are not saddled with excessive debt can be accomplished without harming either the high-quality institutions that build capacity or create innovation in higher education and the students they serve.

The first step is to require that all institutions disclose to students information sufficient for them to make informed decisions regarding the debt to be incurred relative to the program in which they enroll and the outcomes that can be expected, with students, and not the government, making the final decision. New gainful employment disclosure rules published by ED already require that institutions subject to the GE rule provide transparent information, such as the average total debt incurred by students enrolled in a program, placement rates (where available), the total cost of attendance, “on time” graduation rates, and a link to a database that will provide detailed employment information for graduates from the program that includes median salary data based on the Bureau of Labor Statistics.<sup>118</sup> At a minimum, the impact of these new disclosures on student borrowing should be examined before the draconian and untested gainful employment rule is fully implemented.<sup>119</sup> And while further refinements of the choice architecture of these disclosures may be warranted to encourage students to make better choices, students ultimately should remain free to make those decisions.<sup>120</sup>

Second, and as a corollary backstop to robust disclosure, institutions must be given the authority to prevent overborrowing. While the GE, 90/10, and cohort default rules hold proprietary institutions accountable for the debt that their students incur, current

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<sup>116</sup> SAFRA § 224, 155 Cong Rec at 9612–13 (cited in note 113).

<sup>117</sup> See Health Care and Education Reconciliation Act of 2010, 124 Stat 1029 (adopting other portions of SAFRA without the mentioned community college or Perkins reforms).

<sup>118</sup> 34 CFR § 668.6(b).

<sup>119</sup> As of the date of this article, ED has yet to run actual data through the GE rule to determine its impact on students and the programs they attend, including how many at-risk students will be displaced from their program of choice, how many of those students have other realistic educational choices, and whether the negative effects on at-risk students are in fact justified in light of other regulatory alternatives that are available.

<sup>120</sup> See, for example, Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* 11–13 (Yale 2008) (describing ways that consumer information and choices can be arranged to allow consumers to make better decisions—but remain free to make those decisions).

laws and regulations permit students to borrow up to the maximum loan limits based on very little demonstration of actual need and no demonstration of an ability to repay the loans. As previously discussed, institutions can do nothing to prevent excessive borrowing. Existing laws must be changed to give institutions across all of higher education the authority to limit the amount a student may borrow under Title IV to actual educational expenses (that is, tuition, fees, supplies, and room and board). Students should be required to actively budget and demonstrate the need for any funds over these charges up to the maximum loan amount for which the student is eligible.

#### CONCLUSION

Title IV of the 1965 Higher Education Act was designed to put a college degree within reach of individuals who otherwise could not afford to go to college. Proprietary institutions that provide quality higher-education opportunities to millions of students who are underserved by “traditional” higher education play a critical role in this effort. However, policy reforms addressing academic quality and student overborrowing for “nontraditional,” or “at-risk,” students must apply equally to all of our country’s colleges and universities—public, nonprofit, and proprietary alike—and must uniformly address the critical issues of accessibility, affordability, transparency, and accountability. At the same time, they must allow our country’s educational institutions to quickly respond to a rapidly changing world. An across-the-board approach is the only way to level the playing field for millions of minority and other at-risk students, and to change the “minority” or “at-risk” label on millions of students in this country from a scarlet letter to a ticket of opportunity for a better life. The economic future of our country depends on it.