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## Education Fraud at the Margins: Using the Federal False Claims Act to Curb Enrollment Abuses in Online, For-Profit K-12 Schools

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## NOTE

### EDUCATION FRAUD AT THE MARGINS: USING THE FEDERAL FALSE CLAIMS ACT TO CURB ENROLLMENT ABUSES IN ONLINE, FOR-PROFIT K–12 SCHOOLS

*Erin R. Chapman\**

*America’s online schools have some things to account for. In recent years, an increase in the number of for-profit K–12 schools has coincided with the rise of online education. Meanwhile, funding models that award money for each additional student incentivize for-profit schools to overenroll students in online programs that were once reserved for specialized subsets of students. Although, to date, reported incidents of enrollment fraud have been rare, there are many reasons to think that the problem has gone largely undetected. As education reformers on both sides of the political spectrum continue to push privatization and charter schools, figuring out how to avoid waste and minimize fraud will only become more important. This Note argues that the federal False Claims Act (FCA) is the best short-term option for curbing this kind of enrollment-reporting abuse. By drawing an analogy to health-care fraud, this Note makes the case that prosecutors and individuals can and should use expanded theories of false claiming to hold accountable online charter schools that exaggerate their enrollment.*

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#### INTRODUCTION

In online charter schools across the country, enrollment numbers are not adding up. The situation looks something like this: A well-established education management organization (EMO) partners with a state or local school district to open a new online charter school. The school aggressively recruits students away from traditional, brick-and-mortar schools by highlighting the flexibility online learning provides. Students and families who are dissatisfied with their current schools sign up. These students include a few high achievers and athletes but are mostly students who were overlooked by or pushed out of traditional schools—among them, students with behavior records and students on the verge of dropping out.

School starts and classes begin. Most students log in and complete all their classes, but some do not. Others log in only occasionally. On the one day a year that the state requires the school report its enrollment, the new school reports that all the students it recruited are enrolled in its program, including the ones who have only completed a couple of class sessions. Based on the numbers the school reported, it receives state and federal funding proportional to the number of qualifying students on the rolls.

A little while later, some of the students who struggled in their physical school find themselves struggling with their new online school as well—a few of them even stop logging in all together. Without daily attendance or teachers to note the absence, the students fall increasingly behind. And without a system in place to track enrollment, the online charter does nothing either to get the students to log back in or to adjust its reported enrollment numbers.

That means that a portion of the school’s students have stopped receiving any educational benefits from the school. But, because the state funding associated with that student was already disbursed, the online provider continues to be able to use—and profit from—the funds the state allocated for the students’ education.

This scenario has played out in varying degrees in schools across the country. School district officials in Stockton, California, for example, closed Renew Virtual Academy in May 2015 after they received information that the school was overreporting the number of students enrolled in the school by “roughly double.”<sup>1</sup> Two years earlier, a whistleblower at a Pennsylvania school alleged that an online charter kept one special education student enrolled in order to continue receiving state special education funds, despite the fact that the student missed 140 consecutive days of school.<sup>2</sup> Another whistleblower in Ohio revealed that an online charter school kept 400 truant students enrolled.<sup>3</sup> The recent growth in online schools<sup>4</sup> combined with current count practices and funding levels make such schools particularly susceptible to abuse. Despite these concerns, regulators are not currently using any consistent strategy to deal with enrollment fraud in K–12 online charter schools.<sup>5</sup>

This Note explores options to regulate enrollment fraud at online charter schools to ensure that public money spent on online education supports students and not for-profit providers. This Note begins by providing context on online charter school enrollment and funding. Part I describes the unique potential for enrollment fraud in online charter schools and why such fraud is a problem that deserves the attention of plaintiffs and prosecutors. Part II surveys the federal False Claims Act (FCA) and chronicles the emergence of expanded theories of FCA liability in the health-care context

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1. Elizabeth Roberts, *Charter School Dissolves Amid Charges of Nepotism, Fiscal Mismanagement, Enrollment Fraud*, RECORD (May 2, 2015, 6:07 PM), <http://www.recordnet.com/article/20150502/NEWS/150509921> [<https://perma.cc/5EKF-RW7D>].

2. Benjamin Herold, *Ex-Workers Claim Cyber-Charter Operator Manipulated Enrollment Figures*, PHILA. PUB. SCH. NOTEBOOK (Jan. 22, 2013, 9:15 AM), <http://thenotebook.org/blog/135532/ex-workers-claim-operator-cyber-charters-played-games-enrollment-figures> [<https://perma.cc/Z234-C3TV>].

3. *Online Charter School Accused of Padding Rolls for School Funding*, COLUMBUS DISPATCH (May 5, 2015, 12:01 AM), <http://www.dispatch.com/content/stories/local/2015/05/05/e-school-attendance-allegations.html> [<https://perma.cc/DAN5-2Z2E>]. Those allegations were initially dismissed by the then CEO of School Choice in Ohio who later resigned after evidence surfaced that he had deliberately ignored failing data from several of the state’s online charter schools, organizations run by campaign donors to his political party. Doug Livingston, *Investigation of Ohio Department of Education and Charter-School Oversight Requested by Tom Sawyer, Teresa Fedor*, AKRON BEACON J. (Aug. 27, 2015, 11:00 AM), <http://www.ohio.com/news/break-news/investigation-of-ohio-department-of-education-and-charter-school-oversight-requested-by-tom-sawyer-teresa-fedor-1.619449> [<https://perma.cc/B4CH-RS27>]. Ohio state senators called for the reopening of the investigation into the Ohio Virtual Academy’s enrollment abuses after it became clear that the CEO of School Choice was “in-bed with the industry during the time of the supposed review.” *Id.*

4. See *infra* notes 17–20 and accompanying text.

5. See ROSA PAZHOUH ET AL., CTR. ON REINVENTING PUB. EDUC., *THE POLICY FRAMEWORK FOR ONLINE CHARTER SCHOOLS 4–13* (2015), [https://www.crpe.org/sites/default/files/crpe-policy-framework-online-charter-schools-final\\_0.pdf](https://www.crpe.org/sites/default/files/crpe-policy-framework-online-charter-schools-final_0.pdf) [<https://perma.cc/UZ5J-XVLK>] (cataloguing the disparate ways states regulate online charter schools).

that have made the statute a more potent waste-fighting tool. Part III analyzes the only FCA case to date brought against an online charter for enrollment issues and suggests that courts are open to hearing similar cases. Additionally, Part III argues that plaintiffs and prosecutors could use the expanded theories of false claiming pioneered in health-care cases to curb enrollment abuse. After considering and rejecting available alternatives, this Note concludes that FCA suits represent the best short-term approach to regulating online charter schools and their for-profit providers.

#### I. K–12 ONLINE CHARTER SCHOOLS AND THE POTENTIAL FOR ENROLLMENT ABUSES

Because online charter schools are a relatively recent innovation, this Part begins by providing some background on how they operate and why their funding structure makes them particularly vulnerable to abuse. After that, it explains why the K–12 education context makes it particularly important that enrollment fraud at online schools be stopped as soon as possible.

Online charter schools allow K–12 students enrolled in public school districts to take classes online.<sup>6</sup> As public charter schools, these schools receive funding from local, state, and federal governments<sup>7</sup> but operate under a “charter,” or contract, from an authorizing board, which allows the schools to exist for a specified amount of time provided they meet certain predetermined benchmarks.<sup>8</sup> Even though their futures are inherently uncertain, charter schools offer founders and school districts an attractive tradeoff: the school district does not have to commit to funding the school indefinitely in exchange for providing the school leaders more control over the direction of the school.<sup>9</sup> Since charters do not have to comply with all of the regulations that plague traditional public schools, they theoretically have more opportunities to innovate.<sup>10</sup>

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6. See, e.g., *Cyber Charter Schools*, REACH FOUND., <http://www.paschoolchoice.org/school-choice/cyber-charter-schools/> [<https://perma.cc/N34L-T8K2>]. For clarity, this Note uses the phrase “online charter schools” to refer to schools that deliver instruction to students remotely using computers. Other authors talk about “cyber” or “virtual” schools. When I say “online” schools, I mean to include these other schools as well.

7. See U.S. DEP’T OF EDUC., 10 FACTS ABOUT K-12 EDUCATION FUNDING 2, 7 (2005) [hereinafter U.S. DEP’T OF EDUC., 10 FACTS], <https://www2.ed.gov/about/overview/fed/10facts/10facts.pdf> [<https://perma.cc/B4X8-QMS3>].

8. See, e.g., Paul Kim et al., *Public Online Charter School Students: Choices, Perceptions, and Traits*, 49 AM. EDUC. RES. J. 521, 524 (2012).

9. See Michael Mintrom & Sandra Vergari, *Charter Schools as a State Policy Innovation: Assessing Recent Developments*, 29 ST. & LOC. GOV’T REV. 43, 44–45 (1997) (discussing how charter schools, as autonomous and independent bodies, have more latitude for innovation than traditional public schools).

10. See *id.*

Generally, schools are funded on a per-pupil basis according to a funding formula set by the state or local government.<sup>11</sup> That means that each additional student who enrolls increases the school's revenue and, depending on the formula used, certain groups of students—often low-income and special education students—bring more revenue for the school.<sup>12</sup> Although schools are funded in the United States primarily on a local basis, K–12 schools also receive funding from the federal government, generally in the form of money for special education or Title I funds.<sup>13</sup>

Online charters allow their students to access the curriculum over the internet, sometimes through synchronous instruction—instruction happening in real time—and other times through prerecorded lessons.<sup>14</sup> Occasionally, students complete lessons at a school building, but most often they do so in their own homes, interacting with instructors only online or over the phone. Much of the draw of online learning is flexibility.<sup>15</sup> This flexibility makes online learning a natural fit for certain categories of students: elite

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11. See EDUC. LAW CTR., FUNDING, FORMULAS, AND FAIRNESS 5–6 (2013), [http://www.elc-pa.org/wp-content/uploads/2013/02/ELC\\_schoolfundingreport.2013.pdf](http://www.elc-pa.org/wp-content/uploads/2013/02/ELC_schoolfundingreport.2013.pdf) [https://perma.cc/2LP3-YCPL] (summarizing different factors states use in their enrollment formulas). State funding ranges between about \$6,500 to \$19,800 per pupil. See Emma Brown, *The States that Spend the Most (and the Least) on Education*, in *One Map*, WASH. POST (June 2, 2015), [https://www.washingtonpost.com/news/local/wp/2015/06/02/the-states-that-spend-the-most-and-the-least-on-education-in-one-map/?utm\\_term=.24f671f8e83c](https://www.washingtonpost.com/news/local/wp/2015/06/02/the-states-that-spend-the-most-and-the-least-on-education-in-one-map/?utm_term=.24f671f8e83c) [https://perma.cc/DP5A-X8EQ]. About 10 percent of a school district's funding comes from federal, as opposed to state or local, funds. See *How Much Money Does Our School District Receive from Federal, State, and Local Sources?*, DATA FIRST, <http://www.data-first.org/data/how-much-money-does-our-school-district-receive-from-federal-state-and-local-sources/> [https://perma.cc/24T2-PGXD]. For example, in 2012 the New York City School District received \$23,517,452 total in funding, \$2,237,047 of which came from the federal government. STEPHEN Q. CORNMAN, NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., NCES 2014-303, REVENUES AND EXPENDITURES FOR PUBLIC ELEMENTARY AND SECONDARY SCHOOL DISTRICTS: SCHOOL YEAR 2011–12 (FISCAL YEAR 2012), at 7 tbl.3 (2015), <https://nces.ed.gov/pubs2014/2014303.pdf> [https://perma.cc/AV8R-6ECH].

12. See, e.g., *Understanding State School Funding*, PROGRESS EDUC. REFORM (Educ. Comm'n of the States, Denver, Colo.), June 2012, at 1, 5, <http://www.ecs.org/clearinghouse/01/02/86/10286.pdf> [https://perma.cc/D5TZ-22UV]. Compare MARIA MILLARD & STEPHANIE ARAGON, EDUC. COMM'N OF THE STATES, STATE FUNDING FOR STUDENTS WITH DISABILITIES 2 (2015), <http://www.ecs.org/clearinghouse/01/19/47/11947.pdf> [https://perma.cc/HT5Q-U2FM] (“Thirty three states and the District of Columbia provide money for students with disabilities through their primary funding formula. Adjustments for students with disabilities are multiplied by the base funding amount—an amount deemed sufficient for general education students to meet state standards.”), with 50-State Comparison, EDUC. COMM'N STATES, <http://ecs.force.com/mbdata/mbfundall?rep=SBFAF> [https://perma.cc/LQ26-EMD7] (listing state funding formulas, including formulas that include multipliers or weights that result in additional funding for students with disabilities).

13. See U.S. DEP'T OF EDUC., 10 FACTS, *supra* note 7, at 4. Title I of the Elementary and Secondary Education Act provides additional funds to schools that enroll high numbers of low-income students. *Improving Basic Programs Operated by Local Educational Agencies (Title I, Part A)*, U.S. DEP'T EDUC., <https://www2.ed.gov/programs/titleiparta/index.html?exp=0> [https://perma.cc/SJE3-SZU9].

14. See Kim, *supra* note 8, at 524–30.

15. See *id.*

athletes with demanding training schedules, rural students seeking a wider variety of courses, and high achievers wanting access to more rigorous material.<sup>16</sup>

Since 2000, the number of online schools operating in the United States has ballooned.<sup>17</sup> These schools now enroll many different kinds of students.<sup>18</sup> Today, it is much more common for online schools to target struggling students on the verge of dropping out<sup>19</sup>—a demographic that research shows is often not at all well served by the self-driven model of online learning.<sup>20</sup>

Beyond serving a more diverse pool of students, online schools now also serve many more students. In fact, in 2011, nine for-profit companies ran online K–12 schools that collectively enrolled almost 200,000 full-time students.<sup>21</sup> One study estimated that there were 311 full-time virtual schools enrolling students during the 2011–2012 school year.<sup>22</sup> To date, thirty states and the District of Columbia permit full-time virtual schools to enroll and educate students.<sup>23</sup>

Online charter schools cost significantly less to run than their brick-and-mortar counterparts because they generally do not incur the costs associated with a physical building, and one instructor can deliver a lesson to a virtually unlimited number of students.<sup>24</sup> Even so, most states currently fund online charter schools at the same level as traditional public schools.<sup>25</sup> While the start-up costs associated with investing in online technology are significant,<sup>26</sup> online schools, once established, are able to make more money for each additional student that they enroll with very few marginal costs.<sup>27</sup> This potential profit margin makes the schools attractive to educational management organizations, or EMOs, that have already invested in the technology

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16. See, e.g., Stephanie Saul, *Profits and Questions at Online Charter Schools*, N.Y. TIMES (Dec. 12, 2011), <http://www.nytimes.com/2011/12/13/education/online-schools-score-better-on-wall-street-than-in-classrooms.html?mcubz=1> [<https://perma.cc/7GAL-YBHM>].

17. See *id.*

18. See *id.*

19. See *id.*

20. See *id.*

21. *Id.* (“In all, for-profit educational management companies run 79 online schools around the country.”).

22. Gary Miron et al., *Full-Time Virtual Schools: Enrollment, Student Characteristics, and Performance*, in VIRTUAL SCHOOLS IN THE U.S. 2013: POLITICS, PERFORMANCE, POLICY AND RESEARCH EVIDENCE 22, 24 (Alex Molnar ed., 2013), <http://nepc.colorado.edu/files/nepc-virtual-2013.pdf> [<https://perma.cc/B4Z5-3L2L>].

23. *Id.*

24. See Saul, *supra* note 16.

25. *Id.*

26. EDUC. TECH. COOP., S. REG’L EDUC. BD., COST GUIDELINES FOR STATE VIRTUAL SCHOOLS: DEVELOPMENT, IMPLEMENTATION AND SUSTAINABILITY 4 (2006), [http://publications.sreb.org/2006/06T03\\_Virtual\\_School\\_Costs.pdf](http://publications.sreb.org/2006/06T03_Virtual_School_Costs.pdf) [<https://perma.cc/HJ84-EXTN>] (“Although the first several years require greater funding, economies of scale should benefit states in funding state virtual schools over time.”).

27. *Id.*

necessary to deliver the curriculum.<sup>28</sup> As a result, online charter schools, particularly ones run by EMOs, have an incentive to recruit additional students aggressively, often without considering whether those students are well suited for online learning—which requires much more self-motivation and parental involvement than traditional classroom learning.<sup>29</sup>

Given these factors, it is unsurprising that, as enrollment at online charter schools has increased, incidents of enrollment abuses have also grown.<sup>30</sup> The most egregious example of this growing fraud involved Renew Virtual Academy in California.<sup>31</sup> There, auditors determined that the school had overreported its enrollment by almost double.<sup>32</sup> Although incidents this extreme are rare, it highlights how the growth of online charter schools offers opportunities for enterprising CEOs and EMOs to exploit taxpayers. Because for-profit online providers have incentives to enroll more students to receive more profits, this problem will only get worse as more providers enter the market.<sup>33</sup>

This potential for abuse would be troubling in any public-sector program. But the fact that it exists in K–12 education makes it even more concerning, because paying for K–12 education services that are not actually delivered is bad for taxpayers, students, and society. Of course, when the state and federal governments pay out tax dollars to schools for students who rarely log in, the government wastes money. And since here the wasted funds translate into revenue for the for-profit providers, the waste is even more troubling.<sup>34</sup> Not to mention that when students do not log in to complete their lessons, they do not make progress toward meeting the baseline expectations for their grade level,<sup>35</sup> do not learn the required material, and

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28. EMOs are companies that administer the online curriculum on behalf of the district. See GARY MIRON & CHARISSE GULSINO, NAT'L EDUC. POLICY CTR., PROFILES OF FOR-PROFIT AND NONPROFIT EDUCATION MANAGEMENT OPERATIONS: FOURTEENTH EDITION (2011–2012), at 2 (2013). During the 2011–2012 school year, more than 800 public schools that together enrolled more than 460,000 students were run by for-profit EMOs. *Id.* at iii–iv. Of those schools managed by for-profit EMOs, 10.8 percent of them were online schools. *Id.* at iii.

29. See Saul, *supra* note 16.

30. See, e.g., *supra* notes 1–5 and accompanying text.

31. See Roberts, *supra* note 1.

32. *Id.* In addition to the enrollment violations, the CEO hired relatives, sometimes without disclosing their relationship. *Id.* The CEO even hired her son—whose resume listed experience as a manager at a bar, a Chili's restaurant, and a Sprint store—as deputy executive director, paid him \$96,000 a year, and allowed him to telecommute two weeks per month from his home in Colorado. Bank statements showed that grant funds given to the school were spent on airplane tickets, hotels, and restaurants. *Id.*

33. See Saul, *supra* note 16.

34. See *id.*

35. Online charter school students do not make nearly the same amount of progress as their counterparts in brick-and-mortar schools. See Miron et al., *supra* note 22, at 31 (“In the 2010–2011 school year, there was a 28 percentage point difference between full-time virtual schools meeting [adequate yearly progress] and traditional brick-and-mortar district and charter schools that did: 23.6% compared with 52% respectively.”). Of course, adequate yearly progress is not a perfect measure of academic performance, but it still highlights a concerning difference between online schools and their brick-and-mortar counterparts.

are consequently more likely to drop out.<sup>36</sup> Even for those students who beat the odds and graduate, their schools are sending them out into the world without the skills necessary to be productive citizens.<sup>37</sup> This is especially problematic given that online charter schools often serve vulnerable students,<sup>38</sup> including students who have been expelled or pushed out of traditional schools because of poor behavior.<sup>39</sup>

Failing to adequately educate online-school students hurts not only the students themselves but also their communities and society at large. Students who graduate unprepared for college or careers weaken the workforce, which hurts the economy.<sup>40</sup> And if you take seriously the idea that in a democracy mandatory public education exists in part to produce an educated electorate,<sup>41</sup> online charter schools are bad for democracy, too. All of which is to say that it is important—both for individual students and families, as well as for communities and society at large—that regulators find a way to stop online charter schools from overenrolling and then undereducating

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36. See, e.g., DONALD J. HERNANDEZ, *DOUBLE JEOPARDY: HOW THIRD-GRADE READING SKILLS AND POVERTY INFLUENCE HIGH SCHOOL GRADUATION* 4 (2012), <https://www.aecf.org/m/resourcedoc/AECF-DoubleJeopardy-2012-Full.pdf> [<https://perma.cc/MX3M-78HE>] (discussing how students who fall behind grade level in reading are more likely not to graduate from high school).

37. Cf. Catherine Gewertz, *Only 8 Percent of Students Complete College- and Career-Ready Curriculum*, *EDUC. WEEK: HIGH SCH. & BEYOND* (Apr. 5, 2016, 6:48 AM), [http://blogs.edweek.org/edweek/high\\_school\\_and\\_beyond/2016/04/only\\_8\\_percent\\_of\\_students\\_complete\\_college\\_or\\_career\\_ready\\_curriculum.html](http://blogs.edweek.org/edweek/high_school_and_beyond/2016/04/only_8_percent_of_students_complete_college_or_career_ready_curriculum.html) [<https://perma.cc/EV98-EBDW>] (“Only 8 percent of U.S. high school graduates complete a curriculum that prepares them well for college and the workplace. Even fewer complete those course sequences with grades that would suggest they mastered the content.”).

38. See Saul, *supra* note 16. Although online schools in general serve fewer economically disadvantaged students than brick-and-mortar schools, some online schools target low-income communities because in many states those students bring with them larger subsidies from state governments. See *id.*

39. See, e.g., *STEP UP PROGRAM*, <http://backontrack.education/step-up-program/> [<https://perma.cc/AUN8-DKA4>] (“Step Up will also enroll . . . students expelled from other schools . . .”).

40. Kelsey Sheehy, *High School Students Not Prepared for College, Career*, *U.S. NEWS* (Aug. 22, 2012, 8:00 AM), <https://www.usnews.com/education/blogs/high-school-notes/2012/08/22/high-school-students-not-prepared-for-college-career> [<https://perma.cc/BU2W-JG6L>]; cf. Douglas N. Harris et al., *Education and the Economy Revisited: How Schools Matter*, 79 *PEABODY J. EDUC.* 36, 39 (2004) (discussing how education impacts worker productivity).

41. See Mary Marcy, *Democracy, Leadership, and the Role of Liberal Education*, *LIBERAL EDUC.*, Winter 2002, at 6, 8 (“The importance of education is implicit in the history of democracy itself. Some of the earliest philosophers, Plato and Aristotle among them, shared a concern (born of elitism as much as intellect) about rule by those deemed less qualified to make decisions—the mob, the unpropertied, the poor. Over time, these concerns were muted by an understanding of the larger conditions necessary for a just democracy, including . . . the overarching need for an educated citizenry. For if such decisions as affairs of state are to be left directly to citizens or their elected representatives, the need for citizens to be educated assumes profound importance. Education in this vision of democracy calls on the classical notion of an informed citizenry—individuals who are able to think, reason, analyze, and reflect with discrimination and care.”).

these marginal students.<sup>42</sup> To date, though, no consistent strategy has been employed.

## II. EXPANDED NOTIONS OF WHAT CONSTITUTES A “FALSE CLAIM” UNDER THE FCA HAVE HELPED CURB OTHER KINDS OF WASTE

Outside the K–12 enrollment context, the federal government is quite good at smoking out fraud. This Part examines the FCA and how litigators in other contexts have used it to stop the misuse of federal funds. After giving an overview of the FCA, this Part discusses the recent expansion of what counts as a legally false claim under the FCA, particularly in health-care cases. It does this to illustrate the potential the FCA has to provide a solution to the growing enrollment-fraud problem.

### A. *The FCA Allows Prosecutors and Plaintiffs to Hold Accountable People Who Make “False Claims” for Federal Funds*

The FCA subjects government contractors who fraudulently receive federal funds to civil liability.<sup>43</sup> Federal prosecutors rely on the provision to curb the abuse of federal funds in programs ranging from Medicaid to disaster assistance.<sup>44</sup> In 2016, the Department of Justice recovered \$4.7 billion dollars from settlements and judgments brought under the Act.<sup>45</sup>

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42. I mean “marginal students” in the economics sense. I’m assuming that there is a group of students who would always opt to take their classes online irrespective of whether a school aggressively recruits them or not; there is another group of students who would not consider online learning if they weren’t recruited by an online school, but are nevertheless well suited to it, or at least not any less well suited to it than they are to learning in a traditional classroom. The students I’m concerned about here are the students at the margins: the students who are poorly suited to online learning, but nevertheless enroll in an online program because they were aggressively recruited by an online school.

43. See 31 U.S.C. § 3729(a) (2012). Originally enacted during the Civil War, the Act served as the first widespread check on military contractors who defrauded the Union army. See Christopher L. Martin, Jr., Comment, *Reining in Lincoln’s Law: A Call to Limit the Implied Certification Theory of Liability Under the False Claims Act*, 101 CALIF. L. REV. 227, 236 (2013). As the federal bureaucracy grew in the twentieth century, the scope and impact of the FCA grew as well. See *id.* at 229.

44. See Press Release, U.S. Dep’t of Justice, Justice Department Recovers Over \$4.7 Billion from False Claims Act Cases in Fiscal Year 2016 (Dec. 14, 2016), <https://www.justice.gov/opa/pr/justice-department-recovers-over-47-billion-false-claims-act-cases-fiscal-year-2016> [<https://perma.cc/PEJ3-NW4B>] (“The False Claims Act is the government’s primary civil remedy to redress false claims for government funds and property under government programs and contracts relating to such varied areas as health care, defense and national security, food safety and inspection, federally insured loans and mortgages, highway funds, small business contracts, agricultural subsidies, disaster assistance, and import tariffs.”).

45. *Id.* In 2016, 702 qui tam suits were filed, averaging out to 13.5 new cases filed each week. *Id.*

Through a qui tam, or citizen-suit, provision,<sup>46</sup> the Act empowers whistleblowers to bring actions on behalf of the government.<sup>47</sup> The Act incentivizes this kind of whistleblowing by (1) shielding whistleblowers from retaliatory employment actions and (2) allowing successful plaintiffs to receive between 15 and 30 percent of the proceeds of the action or settlement.<sup>48</sup> Owing in part to these provisions, roughly 88 percent of FCA claims are brought as qui tam suits.<sup>49</sup>

Qui tam plaintiffs must satisfy several requirements to make out a successful claim for FCA liability. The plaintiff must prove that the defendant (1) “present[ed], or cause[ed] to be presented, a false or fraudulent claim for payment or approval” and (2) did so “knowingly.”<sup>50</sup> Under the Act a “claim” includes “any request or demand, whether under a contract or otherwise, for money or property.”<sup>51</sup> In addition, to be successfully sued under the act, the defendant must be a “person.”<sup>52</sup> Even though no definition of “person” is provided in the text of the statute,<sup>53</sup> the Supreme Court has found that corporations and municipalities are covered persons, but state governments are not.<sup>54</sup> To prevent overzealous claiming, the Act also requires that the plaintiff be the “original source” of the information on which the action is based.<sup>55</sup> FCA actions are fundamentally fraud actions, so FCA plaintiffs must meet the higher pleading standard of the Federal Rule of Civil Procedure 9(b) to survive a motion to dismiss.<sup>56</sup> All things considered, though,

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46. Qui tam provisions allow individual plaintiffs in civil suits to sue both on their own behalf and on behalf of the government to enforce the provisions of a statute. See Evan Caminker, Comment, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 341 (1989).

47. See 31 U.S.C. § 3730(b).

48. See *id.* § 3730(d), (h).

49. See CIVIL DIV., U.S. DEP’T OF JUSTICE, FRAUD STATISTICS—OVERVIEW (2013), [http://www.justice.gov/sites/default/files/civil/legacy/2013/12/26/C-FRAUDS\\_FCA\\_Statistics.pdf](http://www.justice.gov/sites/default/files/civil/legacy/2013/12/26/C-FRAUDS_FCA_Statistics.pdf) [<https://perma.cc/F7XS-88SA>].

50. 31 U.S.C. § 3729(a). Per the terms of the act, a defendant acts “knowingly” when they have “actual knowledge,” “ac[t] in deliberate ignorance of the truth or falsity of the information,” or “reckless[ly] disregard the truth or falsity of the information.” *Id.* § 3729(b)(1).

51. *Id.* § 3729(b)(2).

52. *Id.* § 3729.

53. See *id.*

54. Randy J. Sutton, Annotation, *Construction and Application of False Claims Act—Supreme Court Cases*, 37 A.L.R. FED. 2D 543, §§ 10–11 (2009); see also *Cook County v. United States ex rel. Chandler*, 538 U.S. 119 (2003); *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000).

55. 31 U.S.C. § 3730(e)(4)(A).

56. Martin Merritt & Rachel V. Rose, *Pleading “Healthcare Fraud and Abuse” Under the False Claims Act: Surviving Rule 9(b) and Rule 12(b) (6) Motions to Dismiss*, FED. LAW., May 2013, at 62, 64 (“It is well established that the heightened pleading requirements of Rule 9(b) applies to claims brought under the FCA.”); see also FED. R. CIV. P. 9(b). To satisfy Rule 9(b), the plaintiff must “include plausible factual allegations as to each link of the 31 U.S.C. § 3729 chain.” Merritt & Rose, *supra*, at 66. Generally, this means that plaintiffs are required to show either “presentment” or the “materiality” of specific statements as well as evidence that the pleader has direct knowledge that the claims were presented. *Id.*

the FCA is a powerful tool that plaintiffs and prosecutors can use to prevent public funds from being wasted.

B. *Notions of What Is an Actionable “False Claim” Under the FCA Have Recently Expanded*

Recently, courts have shown a willingness to hear FCA suits brought on increasingly expansive theories of liability. This trend has the potential to make the FCA an even more powerful tool for fighting fraud. In particular, courts are broadening conceptions of what counts as a “false claim” under the FCA. In the health-care context, specifically, courts have allowed plaintiffs to proceed to trial on theories of false claiming that put pressure on traditional understandings of what constitutes fraud. This Section discusses three theories of what counts as a legally false claim: false certification, implied certification, and worthless services. Whereas under traditional theories of fraud, a defendant would be held liable only if she made deliberate misrepresentations in the claim she submitted, these theories make it so providers can be held liable for something closer to negligence. These theories of liability, this Note argues, offer a solution to the enrollment-abuse problem.

1. The False Certification Theory

The typical argument that a defendant is liable under a false certification theory of FCA liability goes like this: The provider submitted a “false claim” when its representative signed a form before the funds were disbursed. That form indicated that by signing, the provider agreed to comply with all federal regulations. That claim was legally false, the argument goes, if the provider knew it was in violation of federal regulations at the time of signing.<sup>57</sup> This kind of claim is factually false and the rationale for imposing this kind of liability is straightforward: the government only disbursed the money because the organization certified that they would comply with the relevant federal regulations. In other words, the organization lied when it took federal funds while simultaneously—and knowingly—breaking federal regulations.

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57. Keith D. Barber et al., *Prolific Plaintiffs or Rabid Relators? Recent Developments in False Claims Act Litigation*, 1 IND. HEALTH L. REV. 131, 137 (2004). Occasionally, courts will apply a limited version of this theory, “finding it applicable only ‘when certification is a prerequisite to obtaining a government benefit.’” *Id.* (quoting *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266 (9th Cir. 1996)). For example, in *United States ex rel. Hopper v. Anton*, the Ninth Circuit concluded that under the FCA “the false certification of compliance . . . creates liability when certification is a prerequisite to obtaining a government benefit.” 91 F.3d 1261, 1266 (9th Cir. 1996); see also *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 902 (5th Cir. 1997) (“[W]here the government has conditioned payment of a claim upon a claimant’s certification of compliance with, for example, a statute or regulation, a claimant submits a false or fraudulent claim when he or she falsely certifies compliance with that statute or regulation.”).

Plaintiffs have had success bringing these suits against for-profit colleges and universities.<sup>58</sup> Given the widespread use of federal Pell Grants and federally subsidized loans that colleges and universities distribute, institutions of higher education regularly submit claims for public funds. The amount of public money channeled into higher education combined with the growing criticism of for-profit colleges and universities makes it unsurprising that qui tam plaintiffs have attempted to use the FCA to regulate for-profit schools.<sup>59</sup>

In most of these cases, the plaintiff was previously employed at a for-profit college or university as an “admissions consultant.”<sup>60</sup> Consultants are often the ones to bring FCA actions because Title IV of the Higher Education Act bans universities that receive federal funding from financially rewarding recruiters for enrolling students.<sup>61</sup> Generally, the plaintiffs allege that, notwithstanding the ban, they were paid bonuses for enrolling students and then falsely certified compliance with federal regulations before receiving federal funds.<sup>62</sup> For-profits are often the target of these kinds of suits because, given their profit motive, they are seen as more likely to enroll additional students without concern for whether enrolling is in the students’ best interest.<sup>63</sup>

## 2. The Implied Certification Theory

After plaintiffs had success bringing false certification actions, other plaintiffs attempted to expand liability by bringing actions under an *implied* certification theory.<sup>64</sup> In these cases, a provider that submits a claim but

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58. See, e.g., *United States ex rel. Brooks v. Stevens-Henager Coll., Inc.*, No. 1:13-cv-00009-BLW, 2015 WL 758988, at \*2 (D. Idaho Feb. 23, 2015) (“In many lawsuits against for-profit colleges, plaintiffs will proceed under a ‘false-certification’ theory.”).

59. See, e.g., *United States ex rel. Powell v. Am. InterContinental Univ., Inc.*, 756 F. Supp. 2d 1374 (N.D. Ga. 2010) (allowing an FCA class action claim to proceed to discovery that was brought by relators who alleged that that several for-profit colleges and universities had made false statements in their program-participation agreements that were submitted to the Department of Education as a prerequisite to receiving federal student-loan funding).

60. *Brooks*, 2015 WL 758988, at \*2.

61. 20 U.S.C. § 1094(a)(20) (2012) (“The institution will not provide any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting . . .”). This “incentive-compensation ban” exists to lessen the temptation that schools would otherwise have to enroll marginal students who would bring with them federal funding, even though those students are not likely to graduate. See *Brooks*, 2015 WL 758988, at \*2.

62. See *Brooks*, 2015 WL 758988, at \*2.

63. See *id.*

64. See Barber et al., *supra* note 57, at 137; see, e.g., *Universal Health Servs., Inc. v. United States*, 136 S. Ct. 1989, 1995 (2016) (“We first hold that, at least in certain circumstances, the implied false certification theory can be a basis for liability.”); *United States ex rel. Augustine v. Century Health Servs., Inc.*, 289 F.3d 409, 416 (6th Cir. 2002) (stating that FCA claims brought under an implied certification theory can proceed as long as “the contractor knew, or recklessly disregarded a risk, that its implied certification of compliance was false” (quoting *Shaw v. AAA Eng’g & Drafting, Inc.*, 213 F.3d 519, 533 (10th Cir. 2000))); *Mikes v. Straus*, 274

does not actually sign a form certifying compliance could still violate the FCA.<sup>65</sup> In other words, the provider could be liable even though it did not submit a factually false claim. Instead, the theory goes, submitting the claim implies that the provider affirmed that it was in compliance with the regulations, since violating those regulations would have made it ineligible to receive the funding.<sup>66</sup> Put another way, the fact that the provider submitted any claim at all when it *knew or should have known* that it was ineligible to receive funds because of a violation is what makes the claim legally “false.”

For example, the Sixth Circuit found a holding company for home health-care agencies liable under the FCA for implicitly certifying compliance.<sup>67</sup> The holding company submitted a claim for reimbursements for payments made to its employee-benefits plan, even though those benefits were paid back to the provider the next day.<sup>68</sup> The court concluded that the provider’s signed statement accompanying its cost reports, which said that the reports were “true, correct, and complete” to the best of the signer’s knowledge, was enough for the provider to be liable under the FCA.<sup>69</sup> The court concluded that the company was liable even though the provider did not explicitly state that, when it signed the statement, it would not transfer the specific funds.<sup>70</sup> This theory has allowed plaintiffs to recover despite the fact that it stretches the traditional understanding of what counts as a false claim, but it has not been as successful as often as the false certification theory.<sup>71</sup> The Supreme Court recently endorsed this approach in *Universal Health Services, Inc. v. United States*,<sup>72</sup> so it is likely that more plaintiffs will rely on this theory going forward.

### 3. The Worthless Services Theory

The worthless services theory is a new theory of recovery that puts even more pressure on what it means to submit a false claim. Under this understanding of false claiming, defendants can be liable when the health-care

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F.3d 687, 700 (2d Cir. 2001) (“[W]e think a medical provider should be found to have implicitly certified compliance with a particular rule as a condition of reimbursement in limited circumstances.”); *Shaw v. AAA Eng’g & Drafting, Inc.*, 213 F.3d 519, 531 (10th Cir. 2000) (“[T]he language and structure of the FCA itself supports the conclusion that, under 31 U.S.C. § 3729(a)(1), a false implied certification may constitute a ‘false or fraudulent claim.’”); *Ab-Tech Constr., Inc. v. United States*, 31 Fed. Cl. 429, 434 (1994) (finding the defendant liable under an implied certification theory).

65. Barber et al., *supra* note 57, at 137.

66. *See id.*

67. *Augustine*, 289 F.3d at 416.

68. *Id.* at 412, 416.

69. *Id.* at 414–15.

70. *Id.* at 415–16.

71. Barber et al., *supra* note 57, at 137. (“The implied false certification theory has not been as well received as the false certification theory, and several federal circuit courts have declined the opportunity to accept it.”).

72. 136 S. Ct. 1989 (2016).

services that they provided was so subpar as to be completely worthless.<sup>73</sup> In these cases, by claiming reimbursement for providing valueless care, the provider effectively forces the government to pay for nothing—making it so the provider submits a legally false claim when it asks the government to reimburse it for services that have no value.<sup>74</sup>

In *United States ex rel. Lee v. SmithKline Beecham, Inc.*, the Ninth Circuit said that it was possible for plaintiffs to state a claim for worthless services fraud.<sup>75</sup> There, a laboratory billed Medicare for tests it had completed using control samples that it knew fell outside of the acceptable standard of error.<sup>76</sup> Likewise, defendants in a Virginia FCA case settled after the plaintiffs alleged worthless services fraud where the defendant nursing home had claimed Medicare benefits while neglecting patients.<sup>77</sup>

Even though the worthless services theory of liability puts pressure on the traditional understanding of fraud, it covers a category of deceptive practices that feel fraudulent. If a provider's services are so bad that they in effect have no value, the provider might as well be selling snake oil.

### III. THE EXPANDED THEORIES OF FALSE CLAIMING SHOULD BE APPLIED IN THE ENROLLMENT CONTEXT

The health-care fraud cases offer a template for what expanded notions of false claiming and FCA liability could look like in the K–12 enrollment context. Assuming that courts will allow FCA suits against charter schools to proceed to the merits<sup>78</sup>—and there are good reasons to think that they

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73. Isaac D. Buck, *Caring Too Much: Misapplying the False Claims Act to Target Overtreatment*, 74 OHIO ST. L.J. 463, 487–88 (2013); see, e.g., *United States ex rel. Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1053 (9th Cir. 2001) (“In an appropriate case, knowingly billing for worthless services or recklessly doing so with deliberate ignorance may be actionable under § 3729, regardless of any false certification conduct.”); *Mikes v. Straus*, 274 F.3d 687, 703 (2d Cir. 2001) (“We agree that a worthless services claim is a distinct claim under the Act. It is effectively derivative of an allegation that a claim is factually false because it seeks reimbursement for a service not provided.”).

74. Buck, *supra* note 73, at 487–88. This theory emerged after the U.S. Attorney's Office for the Eastern District of Pennsylvania successfully prosecuted a long-term care facility after one of its patients was sent to the emergency room and found to be suffering from “26 ulcers, a gangrenous leg and a series of other serious complications.” *Id.* (quoting Devin S. Schindler, *Pay for Performance, Quality of Care and the Revitalization of the False Claims Act*, 19 HEALTH MATRIX 387, 396–97 (2009)).

75. 245 F.3d at 1053.

76. *Id.* at 1050.

77. Compare David R. Hoffman, *The Role of the Federal Government in Ensuring Quality of Care in Long-Term Care Facilities*, 6 ANNALS HEALTH L. 147, 148 (1997), with Michael J. Davidson, *Governmental Responses to Elder Abuse and Neglect in Nursing Homes: The Criminal Justice System and the Civil False Claims Act*, 12 ELDER L.J. 327, 344 (2004), for a discussion of *United States v. GMS Management-Tucker, Inc.*, a case that settled after federal prosecutors brought a suit against a Virginia nursing home that claimed Medicaid benefits while failing to provide adequate care, including allowing one patient to develop twenty-six bedsores, one of which was as large as a grapefruit.

78. See *infra* note 84.

will<sup>79</sup>—the health-care cases suggest a theory of false claiming that plaintiffs and prosecutors should attempt to use to hold accountable charter schools that exaggerate their enrollments.

This Part starts by analyzing the only case to date that has been brought in federal court against an online charter school for its alleged enrollment abuses. Next, it evaluates the potential for future plaintiffs to make out the case that online charter schools submit legally false claims when they exaggerate their enrollments. It ends by arguing that bringing these kinds of cases is the best short-term approach to stopping enrollment fraud.

#### A. Minnesota Transitions: *Submitting Exaggerated Enrollment Data Could Constitute a “False Claim”*

In 2014, a federal district court indicated for the first time that an FCA claim against an online charter school that either (at best) lazily tracks or (at worst) inflates its enrollment data might be able to succeed.<sup>80</sup> That case, *United States v. Minnesota Transitions Charter School*,<sup>81</sup> gives us a glimpse into how the expanded notions of false claiming pioneered in the health-care and higher education cases could apply in FCA cases about exaggerated enrollment numbers.

In *Minnesota Transitions*, a former administrator for the special education program at an online high school brought an FCA action against the school alleging that the school knowingly submitted false enrollment data to the state in order to receive additional funds.<sup>82</sup> The court considered three challenges to the plaintiff’s FCA action,<sup>83</sup> but this Note will only discuss one of them at length here<sup>84</sup>: Does submitting exaggerated enrollment numbers to the federal government amount to a “false claim” for FCA purposes?

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79. See *infra* note 84.

80. See *United States v. Minn. Transitions Charter Sch.*, 50 F. Supp. 3d 1106, 1108 (D. Minn. 2014).

81. *Id.*

82. *Id.* at 1108–09.

83. *Id.* at 1108.

84. The other two challenges concerned whether charter schools can be sued under the FCA. *Id.* The defendant online charter school argued that it could not be sued because (1) online charter schools are shielded from suit by Eleventh Amendment sovereign immunity and (2) online schools are not “persons” within the meaning of the FCA. *Id.* at 1111. The court found for the plaintiffs on both questions, concluding that the charter school could be sued under the FCA. *Id.* at 1113, 1120, 1122. To come to that conclusion, the court asked whether online charter schools are the kind of entity that would normally receive sovereign immunity. See *id.* at 1114. The court’s answer ultimately turned on its determination that online charter schools are more like local governments (which *can* be sued under the FCA) than they are like wings of the state governments (which *cannot* be sued under the FCA). See *id.* at 1114–20.

Another note could be written on whether future courts will consider charter schools to be entitled to sovereign immunity—and by extension—whether charter schools are appropriate defendants under the FCA. To give an overview, courts are currently split over whether charter schools are effective enough wings of the state to be entitled to sovereign immunity: Like the district court in Minnesota, the Supreme Court of California has concluded that

Specifically, the court considered whether submitting enrollment numbers constituted a “false . . . claim for payment or approval” under the FCA.<sup>85</sup> The court held that, because the complaint did not “adequately allege how [d]efendants’ actions amounted to a false claim for payments or benefits,” the plaintiffs failed to state a claim on which relief could be granted.<sup>86</sup> The court left open the possibility, however, that if the plaintiffs had clearly explained how “the relevant funding mechanisms operate and how the allegedly falsified documents and other reports related to those funding mechanisms,” the plaintiffs could have succeeded at alleging that the “[d]efendants’ actions amounted to a false claim for payments or benefits.”<sup>87</sup>

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certain charter schools operated by independent managers are not entitled to sovereign immunity. See *Wells v. One2One Learning Found.*, 141 P.3d 225, 229 (Cal. 2006). Meanwhile, courts in Pennsylvania, Texas, and Colorado have concluded that charter schools *are* entitled to immunity. See Preston C. Green, III et al., *The Legal Status of Charter Schools in State Statutory Law*, 10 U. MASS. L. REV. 240, 245 (2015); see also *Capacity Builders, Inc. v. Richard Milburn Acad./Texas, Inc.*, No. 1:15-CV-1097-RP, 2016 WL 8223266, at \*5 (W.D. Tex. Apr. 8, 2016) (“Texas charter schools are entitled to immunity . . .”); *King v. United States*, 53 F. Supp. 2d 1056, 1079 (D. Colo. 1999); *Warner ex rel. Warner v. Lawrence*, 900 A.2d 980, 988 (Pa. Commw. Ct. 2006). Even so, *Minnesota Transitions* is the only case to date to discuss the arm of the state analysis in the FCA context. See *Minn. Transitions*, 50 F. Supp. 3d at 1119–20. Thus, it is possible that even courts in states that have found that charter schools to be wings of the state for certain purposes could still find them to be independent enough to be sued under the FCA.

Moreover, there are good reasons to think future courts will follow *Minnesota Transitions* and hold that online charter schools in other states are likewise appropriate FCA defendants. For one thing, the defining feature of charter schools is their independence from state education bureaucracies. See *supra* notes 8–9 and accompanying text. Indeed, charter schools were initially sold as a grand bargain: they offer school founders less money in exchange for more control. See, e.g., *supra* note 9 and accompanying text. Since charters do not have to comply with all the regulations that plague traditional public schools, the argument goes, charter schools have more latitude to innovate. See *supra* note 9 and accompanying text. Critics of education privatization continue to condemn charter schools while supporters laud them as business-like innovation hubs. Compare Diann Woodard, *The Corporate Takeover of Public Education*, HUFFINGTON POST (June 6, 2013, 2:34 PM), [http://www.huffingtonpost.com/diann-woodard/the-corporate-takeover\\_b\\_3397091.html](http://www.huffingtonpost.com/diann-woodard/the-corporate-takeover_b_3397091.html) [<https://perma.cc/P25B-88VZ>] (“Unless this drive to privatize our public schools is arrested, there is little doubt that the largest eight foundations . . . will succeed in what amounts to a corporate takeover of our public schools . . .”), with Presidential Proclamation No. 8815, 77 Fed. Reg. 27555, 27555 (May 7, 2012) (“[C]harter schools serve as incubators of innovation in neighborhoods across our country.”). It seems reasonable that future courts will conclude that charter schools simply cannot have it both ways: they cannot separate themselves from the burdens of being a state-run agency and reap the benefits of independence, only to claim that the protections of the state when they get sued. Thus, it is not unreasonable to expect that some courts will find that online charter schools can be sued under the FCA both because (1) sovereign immunity does not apply to them and (2) they are “persons” for FCA purposes. For these reasons, this Note assumes that at least some future courts will find that online charter schools are proper FCA defendants and proceed to evaluate FCA claims on the merits.

85. 31 U.S.C. § 3729(a)(1)(A) (2012); see *Minn. Transitions*, 50 F. Supp. 3d at 1122. Note that the claim is that the defendant defrauded the federal government because its submission of enrollment numbers triggered a disbursement of federal education funds.

86. *Minn. Transitions*, 50 F. Supp. 3d at 1122.

87. *Id.*

In doing so, the court in *Minnesota Transitions* left a key question unanswered: How exactly could future plaintiffs make the case that falsifying enrollment numbers is in fact a “false claim” under the FCA? Although no court has, to date, taken up that question, the health-care fraud cases suggest possible answers.

B. *Under the Expanded Theories, Exaggerating Enrollment Should Be Considered a “False Claim”*

After *Minnesota Transitions*, there are reasons to be optimistic that future courts will allow plaintiffs to make out a case that a provider has submitted a legally false claim.<sup>88</sup> In making that case, prosecutors and *qui tam* plaintiffs can and should use the expanded theories of false claiming pioneered in the healthcare context.

Plaintiffs could argue, for example, that online charter schools are liable for exaggerating enrollment numbers under an implied certification<sup>89</sup> or worthless services<sup>90</sup> theory of FCA liability. Prosecutors or plaintiffs proceeding on an implied certification theory against an online charter could argue that submitting enrollment numbers at all—when school leaders know that they correspond directly to a pay out from the government—implies that the school certifies its compliance with the relevant regulations. In this context, the relevant regulations could include keeping accurate attendance and providing special education services to all students.<sup>91</sup> Thus, online charters who do not keep close track of log-ins and attendance data could be liable if a court finds that school officials implicitly certified that they would keep their data current when they made the claim for public funds.

Alternatively, online charter schools could be liable under a “worthless services” theory of fraud. The theory would be that keeping students enrolled who never log in—while school officials fail to make reasonable efforts to monitor students’ log-ins but nevertheless continue to use the federal money allocated for educating those students—forces the government to in effect pay for “worthless services.” The idea is that claiming federal funds without simultaneously ensuring that students are even logging on provides worthless services to students in the same way that providing

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88. See *supra* note 84 and accompanying text.

89. See *supra* Section II.B.2.

90. See *supra* Section II.B.3.

91. See, e.g., Clare McCann, *IDEA Funding*, EdCENTRAL: EDCYCLOPEDIA, [http://www.edcentral.org/edcyclopedia/individuals-with-disabilities-education-act-funding-distribution/\[https://perma.cc/YJ2U-AL4U\]](http://www.edcentral.org/edcyclopedia/individuals-with-disabilities-education-act-funding-distribution/[https://perma.cc/YJ2U-AL4U]) (discussing the requirement to provide services to students with special needs); see also OFFICE OF ELEMENTARY & SECONDARY EDUC., U.S. DEP’T OF EDUC., NON-REGULATORY GUIDANCE: LOCAL EDUCATIONAL AGENCY IDENTIFICATION AND SELECTION OF SCHOOL ATTENDANCE AREAS AND SCHOOL AND ALLOCATION OF TITLE I FUNDS TO THOSE AREAS AND SCHOOLS (2003), <https://www2.ed.gov/programs/titleiparta/wdag.doc> [https://perma.cc/N4KV-N3W6] (discussing the requirements for schools to receive Title I funds).

abysmal care to patients does.<sup>92</sup> In other words, if a for-profit provider receives federal money for delivering instruction to students, at bare minimum, they must have a system in place to make sure that students are logging in to receive that instruction. Otherwise, they are no better than a school whose teachers lecture to empty classrooms.<sup>93</sup>

Not all the theories of liability, however, will translate seamlessly to the enrollment-fraud context. For example, online charter schools likely cannot be held liable under the FCA for submitting false claims under a certification theory. Unlike for-profit colleges and universities, which must certify compliance whenever they submit claims for federal loan money,<sup>94</sup> K–12 schools do not explicitly certify compliance before they receive federal funds for the qualifying students who they enroll.<sup>95</sup> Consequently, claims brought on a false certification theory of FCA liability will likely fail. Even so, the potential for liability under the implied certification and worthless services theories of liability still make the FCA an attractive option.

C. *Treating Exaggerated Enrollments as False Claims Is the Best Short-Term Way to Deter Enrollment Abuses*

Using the FCA is not only a viable option for regulating online charters, but bringing FCA suits against online charter schools that engage in abusive enrollment practices is a better strategy than the alternatives in the short-term. Indeed, it is the fastest and most effective way to address this problem because it does not require legislative or regulatory action.

The major alternatives to bringing FCA actions are (1) state or federal laws that directly regulate how online school enrollment is counted and monitored, (2) regulation by the Department of Education, and (3) regulation by the Federal Trade Commission.

Unlike these other alternatives, the FCA allows plaintiffs and prosecutors to take immediate action. Since legislation and administrative actions take time—often months and years—one of the major benefits of FCA actions is that individuals and prosecutors could start bringing these suits tomorrow without any other government action.<sup>96</sup>

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92. See *supra* note 77 and accompanying text. Implicit in my argument is the idea that if students are never logging on to complete their lessons, they are not receiving the instruction that the government paid the school to deliver to them.

93. Schools could thus avoid FCA liability for enrollment fraud by implementing systems to track how long and how often students are logging in. If the school finds that a student is not logging in, they could avoid liability by taking reasonable steps to get the student to log in and complete lessons. Alternatively, they could promptly notify the government that the student has stopped attending.

94. See *supra* notes 58–63 and accompanying text.

95. Cf. McCann, *supra* note 91 (explaining how federal special education funds are distributed to avoid the overidentification of students with special needs). In fact, federal special education funds are distributed in block grants to states based on the population of school-aged children specifically to avoid incentivizing schools to overidentify students with special needs. *Id.*

96. See Martin, *supra* note 43, at 236.

Critics may argue that, even if it means a delay, legislators—not private citizens playing attorneys general—should decide how and whether to regulate enrollment abuses. These skeptics will insist that charter schools and their for-profit providers are running imperfect schools and businesses, not defrauding the government.<sup>97</sup> Yet, at its core, fraud is knowingly or recklessly misrepresenting the nature of the service provided to receive federal funds. And that is exactly the sort of behavior that these schools are engaging in.

More importantly, allowing bad businesses to fail is simply not an option when it comes to student achievement. With rare exceptions, students only get one chance at each course.<sup>98</sup> This is particularly true of students in online schools, who are often on the brink of dropping out and who may have exhausted all their other educational options.<sup>99</sup> Waiting for legislators to pass new laws will leave many students floundering in subpar schools for the foreseeable future.<sup>100</sup> Since an alternative strategy exists, this kind of delay is unacceptable.

In addition, bringing FCA actions now does not foreclose employing these other regulatory options later. Until new rules can be passed to regulate online charter school enrollment, FCA suits can serve as a needed stop-gap. Even once new laws and regulations are passed, FCA suits can continue to work in conjunction with these other regulatory measures. And since qui tam suits do not strain prosecutors' resources, there is no reason to worry that these suits will divert resources from other efforts at regulation.<sup>101</sup> Critics will argue that these suits will strain judicial, if not prosecutorial, resources. But fraud's higher pleading standard makes it more difficult for shoddy claims to make it to discovery, which allows courts to screen out nonmeritorious claims early enough in the process to avoid wasting judicial time.<sup>102</sup>

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97. Cf. Victor E. Schwartz & Phil Goldberg, *Carrots and Sticks: Placing Rewards as Well as Punishment in Regulatory and Tort Law*, 51 HARV. J. ON LEGIS. 315, 339 (2014) ("Profit motivated over-punishment is not the purpose of the FCA."); Ryan Winkler, Note, *The Civil False Claims Act and Its Unreasonably Broad Scope of Liability: The Need for Real "Clarifications" Following the Fraud Enforcement and Recovery Act of 2009*, 60 CLEV. ST. L. REV. 533, 547 (2012) ("[I]t appears that merely negligent defendants are now subject to liability under the amended FCA.").

98. Cf. CTR. FOR RESEARCH ON EDUC. OUTCOMES, STANFORD UNIV., ONLINE CHARTER SCHOOL STUDY 23 (2015), <https://credo.stanford.edu/pdfs/Online%20Charter%20Study%20Final.pdf> [<https://perma.cc/74M4-N5SA>] (finding that students in online charter schools lagged behind their peers in traditional schools in terms of academic achievement). In one Stanford University study, researchers found that students in online charter schools made academic gains in math that translated to the gains that the researchers would have expected to see if they had spent 180 fewer days—or an entire academic year—learning than their peers in a brick-and-mortar classroom. *Id.* Likewise, online charter school students' reading gains put them 72 school days behind their peers in traditional schools. *Id.*

99. See Miron et al., *supra* note 22, at 30 (noting that some online schools cater to students who are already on the brink of dropping out).

100. See Saul, *supra* note 16.

101. See *supra* notes 46–47 and accompanying text.

102. See *supra* note 56 and accompanying text.

Exposing online charter schools to FCA liability might also lead those within the education community to push harder for needed enrollment reforms. If these suits are successful, they could draw attention to the problem and inspire legislators and administrative agencies to take notice.<sup>103</sup> That means that even if these suits are unpopular, they could still hasten attempts to regulate online schools in other ways. Thus, bringing FCA actions would serve to catalyze, not stymie, other regulatory actions.

Nevertheless, critics will argue that it is not the school's fault alone if students do not log in to complete their classes.<sup>104</sup> And even if we assume that schools shoulder the brunt of the responsibility for monitoring students, failing to ensure that students are engaging with the curriculum is not the same thing as committing fraud—it's more like the school whose teachers continue to teach while students snooze in the back of the classroom.<sup>105</sup>

These same critics will say that brick-and-mortar schools are not liable for fraud when they collect funds for chronically truant students.<sup>106</sup> The difference between the online schools and traditional ones, however, is that brick-and-mortar schools are required to take attendance every day, often every period, so state and local governments have a way to hold those schools accountable if their students chronically do not attend.<sup>107</sup> Additionally, it is much harder for traditional brick-and-mortar schools to anticipate that any individual student will not come to school. Since traditional schools generally do not actively recruit students to come to their schools, they are

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103. A similar thing happened in the context of for-profit colleges and universities. See Doug Lederman, *For-Profits and the False Claims Act*, INSIDE HIGHER ED (Aug. 15, 2011), [https://www.insidehighered.com/news/2011/08/15/new\\_round\\_of\\_false\\_claims\\_act\\_worries\\_for\\_profit\\_colleges](https://www.insidehighered.com/news/2011/08/15/new_round_of_false_claims_act_worries_for_profit_colleges) [<https://perma.cc/8JN6-ZL64>]; see also Gayland O. Hethcoat II, *For-Profits Under Fire: The False Claims Act as a Regulatory Check on the For-Profit Education Sector*, 24 LOY. CONSUMER L. REV. 1 (2011).

104. Cf. Marc Sternberg & Marc Holley, *We Must Rethink Online Learning*, WALTON FAM. FOUND. (Jan. 27, 2016), <http://blog.waltonfamilyfoundation.org/2016/january/we-must-rethink-online-learning> [<https://perma.cc/P43L-KK6Y>] (“Virtual schools must help students learn without requiring parents to be constantly present and monitoring progress. Parents, of course, must be involved in their children’s education, but schools can’t abdicate their responsibility in this equation.”).

105. As one critic of a proposed Ohio law that would have implemented stricter attendance requirements for online schools argued traditional, brick-and-mortar schools can’t ensure that students are always engaged either. See Jim Siegel, *Ex-Worker at Ohio Online School Tells Legislators of Attendance Problems*, COLUMBUS DISPATCH (May 8, 2016, 12:01 AM), <http://www.dispatch.com/content/stories/local/2016/05/08/debate-over-eschool-attendance-bill-continues.html> [<https://perma.cc/RTG3-CD8P>]. As he put it, “So you can’t daydream in class now and let your mind wander?” *Id.*

106. Cf. *id.* (quoting a skeptical legislator who thought that lack of engagement is not the same thing as fraud).

107. See, e.g., Jim Siegel, *Ohio Legislature Might Delve into E-School Attendance*, COLUMBUS DISPATCH (Sept. 19, 2016, 12:01 AM), <http://www.dispatch.com/content/stories/local/2016/09/19/ohio-legislature-might-delve-into-e-school-attendance.html> [<https://perma.cc/WQP2-J6E4>] (noting that students at online schools can log in for just a minute each day to qualify for full funding while a student at a traditional schools who showed up for one minute each day would trigger the truancy system).

not selling them on a new model. Because their model is the default, they do not have to assess whether any additional student would be a good fit for their school—they do not have any choice but to serve students regardless of fit.

Online charter schools, on the other hand, seek out their students and persuade parents that the model will work well for their children. As a result, online charter schools are in a better position to decide whether any individual student is likely to succeed or fail at their school. In addition, because particular types of students historically do poorly in an online learning environment,<sup>108</sup> online schools ought to have a sense of which students will not do well before they enroll them in the first place.

The business model of online charter schools is built around enrolling as many students as possible, including marginal students that they have reason to believe will never log in.<sup>109</sup> Because online charter schools, unlike traditional schools, have incentives to enroll struggling students, regulators should think differently about the responsibility online schools have to monitor enrollment.<sup>110</sup> Moreover, as one supporter of online charter schools put it, online charter schools are still schools first and foremost, so they “can’t abdicate their responsibility in this equation.”<sup>111</sup>

Qui tam suits also work well in the enrollment-fraud context because damages are easy to calculate. There is a direct correspondence between each student that a school enrolls and the amount of federal money that school receives.<sup>112</sup>

The FCA is also a remedy that can theoretically work in any state across the country.<sup>113</sup> Even though K–12 education is largely regulated at the local level, the fact that a school receives some federal money makes the FCA

108. See Saul, *supra* note 16 (commenting that online schooling “requires strong parental commitment and self-motivated students”).

109. See *id.* (reporting that former officials of one online provider “say problems begin with intense recruitment efforts that fail to filter out students who are not suited for the program”).

110. Of course, the whole point of monitoring student enrollment is to ensure that students are actually going to school—even when going to school just means logging into their online program. And we care about whether students are going to school because we think if they are not going to school they are not learning. Ideally, schools should not just make sure that their online students are logging in, they should make sure that their students are learning as well. A discussion of what responsibility schools have to monitor not just log-ins, but academic progress is beyond the scope of this Note. But expecting online providers to at the very least ensure online students are logging in and showing up is an important first step toward making sure that online students are receiving the education that they deserve and that the state paid for.

111. Sternberg & Holley, *supra* note 104 (explaining the authors’—high-profile funders of online charter schools—changed position on accountability for online charter schools).

112. See *supra* Part I for a discussion of school funding and enrollment.

113. Note, though, that some states have found in other contexts that charter schools are entitled to sovereign immunity, which might make it more difficult for those courts to recognize charter schools as appropriate defendants under the FCA. See *supra* note 84.

applicable.<sup>114</sup> As a result, schools anywhere could be the subject of an FCA suit regardless of what local or state laws say.

The FCA also has structures built into it that guard against too much liability.<sup>115</sup> Some educators will worry that using expanded theories of FCA liability to target online charters will subject schools and educators to too much civil liability. But once again, the high pleading standard that fraud plaintiffs face guards against this.<sup>116</sup> The heightened pleading standard combined with the FCA's own high requirements for pleading make it unlikely that courts will actually hear a case unless there is a significant chance that fraud occurred.<sup>117</sup> And the fact that unsuccessful plaintiffs have to pay for their own fees means that plaintiffs with marginal claims already have strong incentives not to bring them.<sup>118</sup> For all of these reasons, the FCA is not only a viable but also a valuable tool available to plaintiffs and prosecutors to regulate fraudulent enrollment practices employed by online charter schools.

#### CONCLUSION

Unless we act now, as online charter schools grow in popularity, instances of enrollment fraud will grow as well. In the short-term, the FCA and the expanded theories of liability pioneered in the health-care cases represent the best option for regulating online charter schools that exaggerate enrollment and misuse public funds. Unlike the alternatives, FCA actions have the potential to stem the growth of abuse and hold schools and their for-profit providers liable for overenrolling and undereducating students. Going forward, prosecutors and qui tam plaintiffs should use the FCA to sue online charter schools that inflate or fail to reasonably monitor their enrollment data. In doing so, they will be able to better ensure that tax money is spent where it ought to be spent—on students.

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114. See 31 U.S.C. § 3729 (2012). “Many, if not most,” public schools receive some federal funds, generally in the form of special education money. See McCann *supra* note 91.

115. See 31 U.S.C. § 3730(e)(4)(A).

116. See *supra* note 56 and accompanying text.

117. See *supra* note 56 and accompanying text.

118. See 31 U.S.C. § 3730(d).