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## News

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### For-Profit Colleges Open Another Front

January 24, 2011

WASHINGTON -- For months, leaders of for-profit colleges have promised to pull out all the stops to fight the Obama administration's plan to impose tough new rules on the sector. Advocacy groups have undertaken expensive and highly visible marketing campaigns aimed at undercutting the government's strategy with politicians and the public, and the colleges' lobbying has in turn prompted federal lawmakers -- especially given the heavy Republican gains in the newly convened Congress -- [to promise legislative intervention](#) to prevent a forthcoming set of rules on "gainful employment" from taking effect.

On Friday, the colleges formally unveiled the third part of their strategy: asking the courts to block several of the administration's regulations. The Association of Private Sector Colleges and Universities (formally the Career College Association) [filed a lawsuit in federal court](#), asking a judge to invalidate three of [the dozen-plus new rules](#) that the Education Department [issued in October](#) to ensure the integrity of federal financial aid programs. The three disputed rules relate to state authorization of colleges, incentive compensation for recruiters, and misrepresentation of colleges' programs and results.

The lawsuit, which the group's president, Harris N. Miller, said it had chosen to file only after "our good faith efforts to work with the Department of Education to craft clear, workable rules through the negotiated rulemaking process and the public comment period failed," asks the court to temporarily bar the agency from enforcing three regulations that it says "go far beyond lawful regulatory efforts."

The for-profit colleges (and their defenders in Congress) have also vowed to take legal action if, as promised, the department issues regulations in the coming weeks aimed at requiring vocationally oriented colleges to prove that they prepare students for "gainful employment." Miller said APSCU could not hold off on filing a broader lawsuit until those new rules come out because its member institutions are having to deal right now with vexing issues raised by the October regulations, which take effect in July.

#### On Their Own

The three rules challenged by the career college group have also generated their share of concern among some nonprofit college officials, since they apply broadly to all institutions whose students receive federal financial aid.

Miller said that his group had reached out to the American Council on Education to see if the main association of traditional college presidents wanted to join the lawsuit, but that ACE officials had demurred. Terry W. Hartle, the council's senior vice president for government and public affairs, confirmed late Sunday that the groups had discussed the lawsuit, but said that while ACE shared some of APSCU's concerns about state authorization and misrepresentation, its members "don't have the same high level of concern about incentive compensation" that for-profit institutions do. "We decided not to join," Hartle said.

The career college group's lawsuit faces an uphill climb. Several legal experts said, and Miller acknowledged, that federal courts give executive branch agencies broad deference to issue and carry out regulations, and historically show "a definite bias in favor of the agency," as Miller put it, when affected parties challenge executive branch regulatory efforts.

Agencies can be vulnerable when their processes for drafting the rules fall short or when they overreach and exceed the bounds of the underlying law, and the career college lawsuit challenges both the Education Department's process for issuing the rules (which it

describes as "rushed, unfair and structured from the beginning to implement a desired result") and the ultimate rules, which it says "are well beyond the Department's regulatory authority under the Higher Education Act and, in some cases, the Constitution."

Lawsuits against the Education Department's higher education policies are uncommon, but an advocacy group for men's sports sued in 2007 to challenge the agency's rules on sex discrimination in college athletics, and some college and accrediting officials **quietly contemplated a challenge** (similar to APSCU's) to the Bush administration's aggressive attempts to issue regulations governing student learning outcomes in 2007.

Ultimately, they did not have to go that route, as Congress stepped in to **effectively block** then-Education Secretary Margaret Spellings from issuing rules.

The lawsuit filed by the career college group could complicate its own efforts to get Congress to rein in the Education Department's rule making, as lawmakers are sometimes reluctant to get involved in disputes that are caught up in the courts.

— **Doug Lederman**