

[ORAL ARGUMENT SCHEDULED FOR JANUARY 22, 2016]

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UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5190

Association Of Private Sector Colleges And Universities,

*Plaintiff-Appellant,*

v.

Arne Duncan, In His Official Capacity As Secretary  
Of The Department Of Education; United States Department Of Education;  
And United States Of America

*Defendants-Appellees.*

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On Appeal From The United States District Court  
For The District Of Columbia  
(No. 1:14-cv-01870-JDB)

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**BRIEF *AMICUS CURIAE* OF ROCKY VISTA UNIVERSITY  
IN SUPPORT OF APPELLANT AND IN SUPPORT OF  
REVERSAL OF THE DECISION ON REVIEW**

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**CERTIFICATE AS TO PARTIES, RULINGS,  
AND RELATED CASES**

Pursuant to Circuit Rule 28(a)(1), *Amicus Curiae* Rocky Vista University respectfully submits the following certificate as to parties, rulings, and related cases:

**(A) Parties, Intervenors, and *Amici***

The parties to appeal are the Appellant-Plaintiff, Association Of Private Sector Colleges And Universities (“APSCU”), and the Appellees-Defendants, Arne Duncan, In His Official Capacity As Secretary Of The Department Of Education; United States Department Of Education; and United States Of America.

The Chamber of Commerce of the United States participated in the district court as an *amicus* in support of Appellant.

RVU is an *amicus curiae* in support of Appellant. RVU operates a for-profit college of osteopathic medicine on its campus, which is located near Denver, Colorado.

The following entities participated in the district court as amici in support of the defendants: Air Force Sergeants Association; American Federation of Teachers, AFL-CIO; Center for Public Interest Law; Center for Responsible Lending; Children’s Advocacy Institute; Consumer Action; Consumer Federation of California; Demos; The Institute for College Access

& Success; League of United Latin American Citizens; Military Officers Association of America; Mississippi Center for Justice; National Council of La Raza; New Economy Project; Public Advocates Inc.; Public Citizen, Inc.; Public Counsel; Public Good Law Center; Public Law Center; Service Employees International Union; United States Student Association; University of San Diego School of Law Veterans Legal Clinic; Veterans Education Success; Veterans' Student Loan Relief Fund; VetJobs; Vietnam Veterans of America; Woodstock Institute; and Young Invincibles.

Public Citizen, Inc. and Young Invincibles have filed a notice of intent to participate as amici in this Court in support of defendants-appellees.

There are currently no other *amici* and no intervenors.

**(B) Rulings Under Review**

APSCU seeks review of the Order entered on June 23, 2015, by the United States District Court for the District of Columbia (Bates, J.) (District Court Docket Entry (“D.E.”) 32), denying plaintiff’s motion for summary judgment and granting defendants’ motion for summary judgment. The district court also issued a Memorandum Opinion accompanying its Order on June 23, 2015 (D.E.31), F. Supp. 3d \_\_\_, 2015 WL 3866659 (D.D.C. June 23, 2015).

**(C) Related Cases**

The same agency action was challenged in the Southern District of New York by the Association of Private Colleges. Association of Private Colleges v. Duncan, 14-cv-08838 (S.D.N.Y.). The district court in the Association of Private Case entered judgment for the defendants on May 28, 2015. No notice of appeal was filed.

Counsel is not aware of any other related cases.

**Rule 26.1 Corporate Disclosure Statement**

Rocky Vista University has no parent company, nor does any publicly-held company hold any ownership interest in the entity.

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REVERSAL OF THE DECISION ON REVIEW**

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**IDENTITY AND INTEREST OF *AMICUS CURIAE* AND SOURCE  
OF AUTHORITY TO FILE**

Pursuant to Rule 29(a), Rocky Vista University (“RVU”) files this  
brief *amicus curiae* in support of Appellant (Association Of Private Sector



Colleges And Universities and in support of reversal of the district court's Decision on Review. All Parties have consented to this filing.<sup>1</sup>

In the district court's Decision on Review, the court referred to a "Colorado medical school" and how the GE rule might affect it. *Ass'n of Private Sector Colleges & Universities v. Duncan*, 2015 U.S. Dist. LEXIS 81031 (D.D.C. June 23, 2015) \*44. RVU is the school the District Court was referring to. The purpose of this *amicus* brief is to help educate the Court on how schools like RVU will be harmed by the arbitrary and capricious manner in which the GE rule would separate the important work of the schools from Title IV funding for their student bodies.

*Amicus Curiae* RVU operates a for-profit college of osteopathic medicine on its campus, which is located near Denver, Colorado. As a proprietary institution of higher education,<sup>2</sup> many of whose students benefit from Title IV loans, it is an "eligible institution"<sup>3</sup> subject to the U.S. Department of Education's Gainful Employment ("GE") rule.<sup>4</sup> RVU is a unique type of professional program that prepares students for gainful employment in a recognized occupation, but it does so in an important way:

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<sup>1</sup> No party's counsel authored this brief in whole or in part, and no party submitting the brief. No person other than RVU contributed money that was intended to fund preparing or submitting the brief.

<sup>2</sup> 34 C.F.R. § 600.5.

<sup>3</sup> 34 C.F.R. § 600.2.

<sup>4</sup> 34 C.F.R. §§ 668.401 *et seq.*

by addressing a critical need in the United States – the education of medical students who have both the skills to serve as primary care physicians and the desire to do so in rural and underserved urban communities. It also prepares students to be doctors in the military or the Public Health Service. But doctors in these fields often do not earn as large a salary, especially those just starting out, as those salaries associated with other specialties performed in urban areas. The GE rule has an arbitrary and capricious cutoff mathematical formula for Title IV funding that fails to account for these facts.

## I. BACKGROUND

The Department of Education based its decision to issue the GE rule out of a concern “that a number of [gainful employment] programs: (1) do not train students in the skills they need to obtain and maintain jobs in the occupation for which the program purports to train students, (2) provide training for an occupation for which low wages do not justify program costs, and (3) are experiencing a high number of withdrawals or ‘churn’ because relatively large numbers of students enroll but few, or none, complete the program, which can often lead to default.”<sup>5</sup>

RVU’s osteopathic medicine program exhibits none of these traits. RVU is an excellent example of a school that is doing what it is supposed to do to contribute to the common good of the country and *prepare its students for gainful employment in a recognized occupation*. It provides an excellent medical education to its students and has a 100 percent placement rate for medical residency programs.

*A. RVU provides students with the skills they will need to enter the medical profession.*

RVU’s mission is to provide quality healthcare education while inspiring students to serve with compassion, integrity, and excellence, with

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<sup>5</sup> 79 Fed. Reg. 16426 (March 25, 2014) (preamble to proposed rule).

the vision of achieving new heights in medical education. RVU's specific mission is to graduate a particular type of doctor – a primary care physician – to serve rural and underserved urban communities. Sixty-one percent of the first graduating class (2012) to complete their residency program (in June 2015) practice medicine in rural and underserved urban communities. Established in 2006, RVU enrolled its first class in 2008. It is the nation's first private, for-profit health sciences university to offer a professional medical degree since 1910.

RVU educates more doctors for the military than any other civilian medical school. With over 18 percent of its student body being on the Military Health Profession Scholarship Program and the Veteran's Administration Scholarship program, RVU boasts among the highest percentage of medical students on military scholarship of any civilian medical school. RVU also prepares doctors who enter the Public Health Service.

RVU operates as an independent, privately funded organization with a volunteer Board of Trustees that is responsible for governance and oversight of the school's operations, administration, education, and policy. It selected Colorado as its home due to the large number of counties designated as medically underserved areas, with only one other medical school to serve the

state. RVU chose osteopathic medicine as its first medical-degree program (the College of Osteopathic Medicine) because osteopathic medicine emphasizes primary care and takes a mind-body-spirit approach to medicine, with the potential to add additional programs.

Osteopathic physicians are distinguished by an emphasis on primary care and their tradition of caring for patients in rural and underserved urban areas. They view the human body as an interdependent unit, rather than an assortment of separate parts and systems. All medical and surgical specialties are represented within the osteopathic medical profession.

*However, the education of primary care physicians, and the commitment to serve rural and underserved urban populations, including minorities, is a prime characteristic of RVU and the osteopathic medical profession.*

RVU has specialized tracks in Global, Rural/Wilderness, and Military Medicine for its students who have an interest in serving rural and underserved urban populations nationally and internationally as well as those who will serve our country in the armed forces.

In the 2014-2015 academic year, colleges of osteopathic medicine nationwide educated over 24,600 future physicians – more than 20 percent of U.S. medical students. RVU's College of Osteopathic Medicine currently receives nearly 6,000 applications for 160 seats. Current enrollment is 632

students over four years of medical school, taught by approximately 40 full time faculty members.

RVU has a campus of more than 20 acres in Parker (Douglas County), Colorado, in a suburb south of Denver, and it has a 145,000 square foot, technologically advanced building. The building has auditoriums, laboratories, and study/learning areas that have been professionally engineered to develop a positive learning environment. This includes a standardized patient laboratory that has been designed and equipped to replicate the testing facilities of the National Board of Osteopathic Medical Examiners, as well as of the United States Medical Licensing Examination. RVU takes pride in its experienced and talented administration, faculty, and staff, as well as its exceptional student body. A strong sense of community is evident at RVU. While the University does not rely on state funding, it contributes significantly to the economic development of the town of Parker and the State of Colorado, with an estimated annual economic impact of more than \$75 million.

Future plans include the development of 50,000 square feet of additional facilities and up to 150,000 square feet of facilities to be used as learning space. The Parker Campus is scheduled to be increased to 40 acres with the development of additional health care colleges at the University.

The University employs more than 100 physicians, professors, researchers and ancillary staff.

*B. RVU's program costs are justified by the quality of medical students it graduates and how they will address the need for qualified primary care physicians in rural and underserved urban areas.*

For the last three years, RVU was ranked as the “10<sup>th</sup> Least Expensive Private Medical School in the Nation,” according to *US News*

& *World Report*.<sup>6</sup> It was ranked as the top innovator in medicine for 2014 by *5280 Magazine*,<sup>7</sup> and is designated as a Military Friendly<sup>®</sup> School.<sup>8</sup>

RVU developed a special Military Track for its military students. And 12 percent of the RVU class that matriculated in Fall 2015 were classified as under-represented ethnic groups.

#### *Accreditation*

There are currently 31 accredited colleges of osteopathic medicine in the United States. These colleges deliver instruction at 44 teaching locations in 29 states. Six of the colleges are publicly controlled, 25 are private institutions. RVU also has regional accreditation from the Higher Learning

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<sup>6</sup> U.S. News and World Report: *10 Most Affordable Private Medical Schools*. Smith-Barrow, Delece, March 17, 2015.

<sup>7</sup> 5280 [The Denver Magazine]: Big Ideas Feature: Medicine; Rocky Vista University: Prepping Surgeons Sooner; Cordell, Kasey, November 2014.

<sup>8</sup> Victory Media; Military Friendly Schools.

Commission, a commission of the North Central Association of Colleges and Schools. The College of Osteopathic Medicine is accredited by the Commission on Osteopathic College Accreditation of the American Osteopathic Association. The Surgical Simulation Center is accredited by the American College of Surgeons. RVU is the first and only osteopathic medical school in the nation to have this specialized accreditation from the American College of Surgeons.

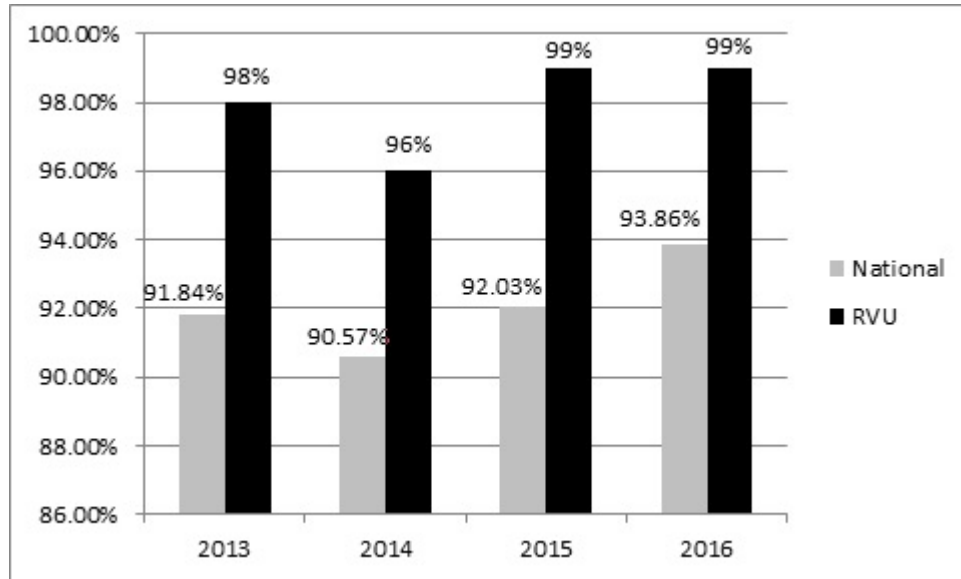
*Residency placement rate*

In each of the four classes that have graduated, RVU has successfully placed *100 percent* of its students in highly competitive residency programs around the country.

*Medical boards pass rate*

RVU's College of Osteopathic Medicine Board Scores are ranked at the top of all osteopathic medical schools, as shown in the following table:





***Board Scores: Percentage of First Time Pass Rate - RVU vs. National***

More than half of the graduates of RVU's first four classes plan to enter a primary care field.

***Reasonable tuition***

RVU's tuition is competitive with that of other medical schools, as demonstrated by a comparison of annual tuition between the RVU College of Osteopathic Medicine and the University of Colorado School of Medicine ("USCM") for school year 2014-2015:

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**UCSM:**

In-state tuition = \$35,663 (*not* including fees, which can add another \$5,000 to \$10,000 per year, per student)

Non-resident tuition = \$83,290

**RVU:**

Tuition for all students = \$48,738

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In comparison, the average tuition for all osteopathic colleges during the 2014-2015 school year was \$44,890.

*C. RVU's withdrawal rate is very low.*

RVU's withdrawal rate for each class based on year of graduation is as follows:

<u>Year of Graduation</u>	<u>Withdrawal Rate</u>
Class of 2012	4.4%
Class of 2013	6.5%
Class of 2014	3.1%
Class of 2015	3.2%
Class of 2016	4.4%
Class of 2017	3.8%
Class of 2018	1.9%

***II. Argument – The GE rule is arbitrary and capricious when applied to a professional school like RVU***

The District Court recognized the fact that the GE rule applies mathematical rules in a way that could harm a program like RVU. In the

motions hearing before the District Court, the Court expressed concern to the Government's attorney about the possible negative impact the GE rule could have on a school like RVU.

[The Court:] [C]ertainly it isn't the goal of the Department . . . to take medical schools that are expensive to run, that charge high tuition and for which students often are going into substantial debt, but where that medical school is putting doctors out into lower-paying positions, into public health service, into the military, into rural communities, I mean, that's something that we want to encourage.

Does it concern you as a representative of the . . . Department of Education, if these regulatory tests are going to put that school in the zone and therefore eventually perhaps close it?

[Government attorney:] It certainly is concerning, . . . if there is a well-functioning school that is serving its students and providing the type of preparation that Congress has required, if there's a school meeting that profile that can be rendered ineligible, *then certainly that's not a desired outcome.* (Emphasis added.)

[The Court:] But if that hypothetical comes true for one or more institutions, is there anything the Department of Education can do about it? Or if this regulatory structure goes into effect, is that institution just out of luck and therefore we're going to lose it?

[The Government attorney:] I would say that the institution is given an opportunity to challenge the debt figures that the Department puts together, and if the Department has miscalculated the debt, then that's something that the institution can bring to the Department's attention.

District Court Docket Entry ECN 30 at 46-47.

In other words, if a school like RVU were to lose Title IV funding, it could challenge the numbers the Department of Education used in its mathematical calculations, but if the numbers were confirmed to be

accurate, the GE rule provides no procedure for the Department to waive the regulatory requirements; there would be no escape valve for a school that happens to fall into the regulatory web because, by their nature, the use of mathematical formulas does not take into account the uniqueness of a school such as RVU, which prepares students for gainful employment in a recognized occupation. Notwithstanding the Department's "concern," the fact that a school like RVU would be affected in this manner means the GE rules are arbitrary and capricious. Moreover, RVU has met its obligation for "gainful employment in a recognized occupation" by preparing its medical students to be competitive and competent for selection in a national residency program. The salaries earned after a medical school graduate completes a residency are out of the control of the medical school. Therefore, to hold RVU to an additional metric of gainful employment under the GE rule would disparately impact a highly successful postsecondary institution – one that is achieving outcomes envied by almost all not-for-profit institutions.

Because of the medical specialty many of its students enter (primary care in rural and underserved urban areas), RVU likely would be disproportionately affected and could get ensnared in the mathematical formulas in the GE rule and lose its eligibility for the Title IV loan program.

Many of RVU's graduates choose to take positions as doctors in rural and underserved urban communities, which pay less than doctors who serve in high-priced specialties in urban areas. The mathematical formulas are arbitrary in that respect because they do not take into account these factors plus other variables that could affect individuals at the time the compensation determination of the cohort is made, such as deciding to work less than full time following completion of a residency program or electing to do a fellowship for an additional specialty.

To remedy this likely result, RVU would have to change its admissions policies to admit more students who are either wealthy enough that they will not need to take out as many student loans, or who intend to go into medical career fields where they are likely to earn more income, such as neurosurgery, orthopedic medicine, or anesthesiology. RVU's student body would likely become less diverse, and its mission would have to change so that fewer students go into the primary care field to serve rural and underserved urban communities.

This would require significant changes in RVU's mission and long-term plan. RVU would need to start making these determinations now; it cannot wait two to three years to assess its status under the GE rule and, if needed, change its direction. No school can plan like that. Nor it is practical

for students who are entering a medical program to plan how to finance their education if the rules of the road will change midway through their education. RVU and its students need to know now the school's status regarding the GE rule.

The rule forces a school to admit students not based on their interest in serving the medical needs of rural and underserved urban communities, but based on their financial wherewithal or their intention to go into higher paying medical specialties.

These arguments were made in the rulemaking, but the Department of Education turned its back on them; it did not attempt to address these concerns. In sum, the GE rule is arbitrary and capricious because its mathematical formulas are not able to address schools like RVU who prepare students for gainful employment in a recognized occupation (medical doctors). Additionally, for a medical school, "gainful employment" reasonably should focus on a medical student being selected for a residency program and not on salary earnings after residency. Finally, the data demonstrate that medical students repay their student loans and do not contribute to the concerns underpinning the GE rule.

## Conclusion

RVU's program is exactly what Congress intended: the school educates and prepares future doctors for gainful employment in a recognized occupation. But as we have demonstrated, the GE Rule would harm RVU's capacity to do what Congress wants schools like it to do. Consequently, it is arbitrary and capricious and needs to be revoked.

Dated: October 6, 2015

Respectfully submitted,

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**Fed. R. App. P. 32(a)(7)(C) Certificate of Compliance**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 2,747 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word with 13 characters per inch (14-point) Times New Roman style.

Dated: October 6, 2015

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 6<sup>th</sup> day of October, 2015, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the CM/ECF system. Service was accomplished by the CM/ECF system on the following counsel for Appellant and the counsel for Appellees, who are registered CM ECF users:

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