

1 BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
2 MARCIA BERMAN
Assistant Director, Federal Programs Branch
3 KATHRYN L. WYER (DC Bar #90023642)
U.S. Department of Justice, Civil Division
4 1100 L Street, N.W., Room 12014
5 Tel. (202) 616-8475
kathryn.wyer@usdoj.gov
6 *Attorneys for Defendants*

7 **IN THE UNITED STATES DISTRICT COURT**
8 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
9 **SAN JOSE DIVISION**

10 ISAI BALTEZAR & JULIE CHO,
11 Plaintiffs,
12 v.
13 MIGUEL CARDONA, in his official
14 capacity as Secretary of Education, *et al.*,
15 Defendants.
16

Case No. 5:20-cv-455-EJD

**DEFENDANTS’ NOTICE OF MOTION,
MOTION TO DISMISS, AND
MEMORANDUM IN SUPPORT**

Date:
Time:
Place: Courtroom 4, 5th Floor
Judge: Hon. Edward J. Davila

17 **NOTICE OF MOTION AND MOTION TO DISMISS**

18 PLEASE TAKE NOTICE that on _____¹, at _____, Defendants Miguel Cardona, in
19 his official capacity as Secretary of Education, and the Department of Education (“Department”),
20 by and through undersigned counsel, will, and hereby do, respectfully move the Court to dismiss
21 this case as moot because the final rule at issue, 84 Fed. Reg. 31392 (July 1, 2019) (the “2019
22 _____
23

24 ¹ Counsel for Defendants was advised by the Courtroom Deputy that, because the case is
25 presently held in abeyance, the Court would not set a hearing date at this time. As indicated
26 below and in the parties’ Joint Status Report, filed concurrently herewith, Defendants believe the
27 Court may dismiss this case as moot *sua sponte* without further briefing or a hearing. The parties
28 are scheduled to appear at a status conference on June 18, 2024.

1 Rule”), has been superseded by new Department regulations, which went into effect July 1,
2 2024, *see* 88 Fed. Reg. 70004 (Oct. 10, 2023). This motion is made pursuant to Fed. R. Civ. P.
3 12(h)(3) and Local Rules 7-1 and 7-2 before the Honorable Edward J. Davila, San Jose
4 Courthouse, Courtroom 4.

5 MEMORANDUM OF POINTS AND AUTHORITIES

6 INTRODUCTION

7 This case has remained dormant for nearly three years while the Department of Education
8 went through a new rulemaking process and promulgated new regulations that supersede the
9 2019 rule that Plaintiffs challenge in this case. On October 10, 2023, the Department issued its
10 new Financial Value Transparency (“FVT”) and Gainful Employment (“GE”) rules (collectively,
11 the “2023 Rule”), and the 2023 Rule went into effect on July 1, 2024. *See* 88 Fed. Reg. 70004
12 (Oct. 10, 2023). The 2023 Rule sets forth a new financial value transparency framework
13 applicable to all schools that participate in the Department’s student financial assistance
14 programs under Title IV of the Higher Education Act of 1965, as amended, including educational
15 programs that prepare students for gainful employment (“GE programs”). The 2023 Rule also
16 sets forth a new accountability framework specific to GE programs. The 2023 Rule thus
17 supersedes the prior 2019 rule, which had rescinded the previous transparency and accountability
18 frameworks for GE programs, and moots Plaintiffs’ challenge, which sought to set aside the
19 2019 rule. The organizational plaintiff, the American Federation of Teachers, anticipated this
20 outcome long ago and already dismissed its claims. Although the two individual Plaintiffs seek
21 to hold this case in abeyance indefinitely, no case or controversy remains for the Court to
22 adjudicate. This case has reached its inevitable conclusion and should finally be dismissed.²
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24
25 ² Defendants file this Motion to ensure dismissal of this case is squarely before the Court.
26 However, the Court need not delay its dismissal. Rather, “[t]he Court has ‘an independent duty to
27 consider *sua sponte* whether a case is moot.’” *Perez v. Arviza*, No. 1:23-CV-01341-SAB-HC,
28 2024 WL 2393143, at *1 (E.D. Cal. May 23, 2024) (quoting *Demery v. Arpaio*, 378 F.3d 1020,

STATEMENT OF THE ISSUES

Whether the Court should dismiss the remaining claim(s) in this case because the Department's 2023 Rule supersedes the rule Plaintiffs' challenge and renders this case moot.

BACKGROUND

This case was filed in January 2020 to challenge the 2019 Rule, which rescinded prior Department regulations that set forth transparency and accountability frameworks to govern certain programs that are statutorily defined as leading to "gainful employment" ("GE") and that wished to participate in the Department's student aid programs under Title IV of the Higher Education Act of 1965 ("HEA"). In an order largely granting Defendants' motion to dismiss, this Court recognized that Plaintiffs' substantive claims were not redressable at the time the case was filed, depriving Plaintiffs of standing. *See* Order of Sept. 3, 2020 [ECF 33], at 17, 20 & n.5; *cf.* Order of Sept. 29, 2021 [ECF 44]. In October 2021, the Department moved to remand the case in light of anticipated rulemaking proceedings on the subject of gainful employment that could ultimately yield new regulations that would supersede the 2019 Rule under challenge. *See* Mot. to Remand [ECF 48]. Although the Court did not remand the case, it granted the Department's alternative request that the case be held in abeyance while the Department's rulemaking process was underway. Order of May 10, 2022 [ECF 73], at 10; *see also* Order of June 27, 2023 [ECF 81] (denying plaintiffs' motion to lift abeyance while rulemaking process continued).

1025 (9th Cir. 2004)); *cf.* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."); *Bernhardt v. Cnty. of Los Angeles*, 279 F.3d 862, 871 (9th Cir. 2002) ("[W]e must raise issues concerning our subject matter jurisdiction *sua sponte*. This includes mootness." (citation omitted)); *Sannon v. United States*, 631 F.2d 1247, 1250 (5th Cir. 1980) ("Striking at the very heart of federal subject matter jurisdiction, a mootness issue quite clearly can be raised *sua sponte* if not addressed by the parties." (footnote omitted)).

1 The Department issued final regulations on October 10, 2023, on the subject of Financial
2 Value Transparency and Gainful Employment. *See* 88 Fed. Reg. 70004 (Oct. 10, 2023).
3 Defendants argued at that time that this case should be dismissed due to mootness. *See* Jt. Status
4 Rpt. [ECF 84], at 5-10. However, Plaintiffs opposed dismissal, primarily on the ground that the
5 2023 Rule would not take effect until July 1, 2024. *See id.* at 2-5. The Court continued to hold
6 the case in abeyance and ordered a further status report be submitted on July 11, 2024, and set a
7 status conference for July 18, 2024. Minute Entry of Feb. 8, 2024 [ECF 85].

8 After the 2023 Rule was issued, two cases were filed in the Northern District of Texas, by
9 entities that are not parties to this case, challenging the 2023 Rule’s validity. *See AACS v. U.S.*
10 *Dep’t of Educ.*, No. 4:23-cv-1267-O (N.D. Tex. filed Dec. 22, 2023); *Ogle School Mgmt., LLC v.*
11 *U.S. Dep’t of Educ.*, No. 4:24-cv-259-O (N.D. Tex. filed Mar. 20, 2024). The plaintiffs in *Ogle*
12 *School* sought to enjoin the 2023 Rule before it took effect, but the court denied their motion,
13 holding they had failed to show a substantial likelihood of success on the merits. Order of June
14 20, 2024, *Ogle School* [ECF 31], at 7, 11. The court then consolidated *AACS* and *Ogle School*.
15 *See* Order of July 2, 2024, *Ogle School* [ECF 33]. The current summary judgment briefing
16 schedule in *AACS* contemplates that briefing will continue through November 2024. *See* Order of
17 Apr. 1, 2024, *AACS* [ECF 15].

18 As of July 1, 2024, the 2023 Rule is in effect.

19 ARGUMENT

20 This case should be dismissed as moot. Article III of the Constitution “requires that ‘an
21 actual controversy . . . exist not only at the time the complaint is filed, but through all stages of
22 the litigation.’” *N.D. v. Reykdal*, 102 F.4th 982, 989 (9th Cir. 2024) (quoting *Kingdomware*
23 *Techs., Inc. v. United States*, 579 U.S. 162, 169 (2016)). “If there is no longer a possibility that [a
24 litigant] can obtain relief for his claim, that claim is moot and must be dismissed for lack of
25 jurisdiction.” *Id.* (internal quotation omitted). Courts readily recognize that “when subsequent
26 legislation or rulemaking supersedes challenged regulations or rules, the challenge is moot.”
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1 *Twitter, Inc. v. Lynch*, 139 F. Supp. 3d 1075, 1081 (N.D. Cal. 2015); *see also California v. Azar*,
2 911 F.3d 558, 569 (9th Cir. 2018) (“If the final rules become effective as planned . . ., there will
3 be no justiciable controversy regarding the procedural defects of [interim final rules] that no
4 longer exist.”); *Bullfrog Films, Inc. v. Wick*, 959 F.2d 778, 780–81 (9th Cir. 1992) (dismissing
5 appeal as moot where challenged regulations were superseded by statute); *Ozinga v. Price*, 855
6 F.3d 730, 734 (7th Cir. 2017) (“When a plaintiff’s complaint is focused on a particular statute,
7 regulation, or rule and seeks only prospective relief, the case becomes moot when the
8 government repeals, revises, or replaces the challenged law and thereby removes the
9 complained-of defect.”); *The Gulf of Me. Fishermen’s All. v. Daley*, 292 F.3d 84, 88 (1st Cir.
10 2002) (“[P]romulgation of new regulations and amendment of old regulations are among such
11 intervening events as can moot a challenge to the regulation in its original form”); *NRDC v. U.S.*
12 *Nuclear Regulatory Comm’n*, 680 F.2d 810, 813–14 & n. 8 (D.C. Cir. 1982) (dismissing APA
13 procedural challenge to interim rule because promulgation of superseding final rule mooted the
14 claim); *Sannon v. United States*, 631 F.2d 1247, 1250–51 (5th Cir. 1980) (“That newly
15 promulgated regulations immediately applicable to litigants in a given case can have the effect of
16 mooting what once was a viable case is without doubt.”); *Cal. Avocado Comm’n. v. Johanns*,
17 No. CVF016578, 2005 WL 1344203, at *2 (E.D. Cal. May 18, 2005) (dismissing challenge to
18 rule as moot because, under the APA, “an amended rule as promulgated is final and supersedes
19 the earlier rule,” so the challenged rule “ceased having legal effect” when the new rule became
20 effective, and “the Court cannot grant relief from an inoperative rule”).

21
22 Over two and a half years ago, Defendants asked the Court to remand this case because
23 the Department intended to pursue new rulemaking “that would propose replacing the 2019
24 Rule” that Plaintiffs have challenged in this case “with further regulation on gainful
25 employment” that would “moot the remaining claim presented in this litigation.” Def. Mot. to
26 Remand [ECF 49], at 1-2. The Court held that it would instead hold this case in abeyance. Order
27 of May 10, 2022. The Court recognized that “both Plaintiffs and the Department largely appear
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1 to be striving towards a common purpose—the creation of an effective gainful employment
2 regulatory framework—and the Parties only differ as to *when* such a framework should be
3 implemented.” *Id.* at 9. The Court further recognized that abeyance was appropriate because “all
4 further litigation in this case would be haunted by the specter of mootness should the Department
5 reach a final GE rule at any point.” *Id.* at 10. The Court noted Plaintiffs’ concession that vacatur
6 would “largely become irrelevant” once the Department published new final regulations. *Id.* at 9.

7 The Court later rejected Plaintiffs’ request to lift the abeyance while the Department’s
8 rulemaking process was still underway, again recognizing that Plaintiffs “appear to be
9 advocates” of the Department’s proposed new rule. Order of June 27, 2023, at 1-2. After the
10 Department issued the final 2023 Rule, on October 10, 2023, Plaintiffs opposed dismissal
11 because the 2023 Rule had not yet taken effect but recognized that “the Department’s mootness
12 position may become correct at some point in time.” Jt. Status Rpt. [ECF 84] at 2.

13 Now that the July 1, 2024 effective date has passed, and the 2023 Rule is indisputably in
14 effect, Plaintiffs continue to oppose dismissal, but their position lacks merit. To the contrary, the
15 principles and authorities cited above require dismissal because the Court no longer has subject
16 matter jurisdiction. Indeed, the plaintiffs in another case raising a similar challenge to the 2019
17 Rule voluntarily dismissed their claims months ago, after the 2023 Rule was published in the
18 Federal Register. *See* Pls. Notice of Voluntary Dismissal [ECF 62], *Pennsylvania v. DeVos*, No.
19 1:20-cv-1719 (D.D.C. filed Dec. 15, 2023).

20 The Court already recognized that a new rulemaking process would redress Plaintiffs’
21 procedural claim in Count 11, which Defendants understand to be the only remaining claim.
22 Order of Sept. 29, 2021 [ECF 44], at 7 n.3 (noting that new rulemaking would redress Count 11
23 by “allow[ing] the public an opportunity to comment on the sources upon [which] the
24 [Department] relies and Defendants the opportunity [to] consider amending the GE Rule to use a
25 different source of annual earnings data”). The notice and comment period for the 2023 Rule was
26 completed while this case was in abeyance, and there is no further relief that Plaintiffs can
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28

1 obtain. The same is true for any substantive challenge to the 2019 Rule.³ Indeed, setting aside the
2 2019 Rule—the relief identified in the Administrative Procedure Act (“APA”), 5 U.S.C. § 706—
3 is not an available remedy when the 2019 Rule has already been superseded by the 2023 Rule.

4 Plaintiffs have suggested that their claims are not moot because certain aspects of the
5 2023 Rule, like building a new Department website that will provide certain information, will
6 take time to complete and because the Department has extended an initial reporting deadline. *See*
7 *Jt. Status Rpt.* (July 11, 2024), at 3-4; ECF 84, at 3. As Defendants noted in the most recent
8 status report, the Department determined that an extension of the deadline Plaintiffs identified
9 would not delay other steps in its timeline for implementing the 2023 Rule. *See* July 11, 2024 *Jt.*
10 *Status Rpt.* at 8. In any event, the fact that certain steps under the 2023 Rule will take time does
11 not mean that any part of the 2019 Rule remains in effect or is subject to challenge. The 2023
12 Rule is fully in effect now, the Department is moving forward with its implementation, and the
13 2019 Rule that Plaintiffs challenged is thus entirely superseded. *See* 88 Fed. Reg. 70004 (“These
14 regulations are effective July 1, 2024.”).⁴ Regardless of the Department’s timeline for
15 undertaking certain steps identified in the 2023 Rule, Plaintiffs’ challenge to a rule that no longer
16 exists will afford them no meaningful relief. Nor does Plaintiffs’ moot challenge to the
17 superseded 2019 Rule afford them or this Court oversight over the Department’s implementation
18 of the 2023 Rule. Plaintiffs have not challenged the 2023 Rule in this case.
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22 ³ As set forth in prior filings, Defendants understand only Count 11 to remain pending in this
23 case. Plaintiffs have insisted that Counts 1-3 remain at issue, but they rely on a stilted reading of
24 the Court’s prior decisions and ignore that the Court’s reasoning in dismissing other substantive
25 challenges would require dismissal of Counts 1-3 as well. In any event, this case is now moot in
26 its entirety.

27 ⁴ The specific regulations promulgated by the 2023 Rule are also identified as “effective July 1,
28 2024.” *See, e.g.*, 34 C.F.R. § 668.43.

1 Nor can Plaintiffs avoid mootness by further speculation about how the 2023 Rule will
2 fare in litigation filed by other parties and pending in other courts. The court where challenges to
3 the 2023 Rule are currently pending recently denied a motion for preliminary injunction that
4 sought to prevent the 2023 Rule from taking effect. Order of June 20, 2024, *Ogle School* [ECF
5 31], at 7, 11. The 2023 Rule thus took effect on July 1, 2024, as scheduled. And as Defendants
6 previously pointed out, not only are the ultimate dispositions of other cases unknown, “but the
7 judicial reasoning that might prevail” in those cases, “and the extent to which such reasoning
8 might affect either the 2019 Rule or its predecessor, the 2014 Rule, is also unknown.” ECF 84, at
9 10. The Court lacks subject matter jurisdiction now, and it cannot delay dismissal based on mere
10 speculation about other cases’ future dispositions, which may take months or years to become
11 final. *See Ass’n of Am. Physicians & Surgeons v. Sebelius*, 746 F.3d 468, 472–73 (D.C. Cir.
12 2014) (rejecting “the idea that a claim can be saved from mootness by the court’s blithely
13 hypothesizing that a whole other set of rules, not at issue in the present case, . . . , may be
14 invalid”); *New York v. Raimondo*, No. 1:19-CV-09380, 2021 WL 1339397, at *2 (S.D.N.Y. Apr.
15 9, 2021) (holding “[t]he possibility that the challenged rules could become operative again,”
16 should a new rule be vacated in litigation, insufficient to keep a controversy live).

17
18 This Court should not continue to hold this case in abeyance indefinitely when the 2019
19 Rule that Plaintiffs challenge has been superseded, and the Court no longer has subject matter
20 jurisdiction. The proper course of action at this stage is therefore to dismiss this case.

21 CONCLUSION

22 For the foregoing reasons, this case should be dismissed as moot.

23 DATED: July 11, 2024

Respectfully submitted,

24 BRIAN M. BOYNTON

Principal Deputy Assistant Attorney General

25 MARCIA BERMAN

Assistant Director, Federal Programs Branch

26
27 /s/ Kathryn L. Wyer

28 KATHRYN L. WYER (DC Bar #90023642)

U.S. Department of Justice, Civil Division
1100 L Street, N.W., Room 12014
Tel. (202) 616-8475
kathryn.wyer@usdoj.gov
Attorneys for Defendants

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