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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

**JOINT STATUS REPORT**

Hon. Edward J. Davila

17 Pursuant to the Court’s minute entry of February 8, 2024, the parties submit this joint  
18 status report. This case, filed in January 2020, challenges a final rule issued by the U.S.  
19 Department of Education (“Department”) in 2019 (“2019 Rule”), which rescinded a prior  
20 Department rule, issued in 2014 (“2014 Rule”), that set forth disclosure and eligibility  
21 requirements for certain programs that are statutorily defined as leading to “gainful employment”  
22 (“GE”) and that wished to participate in the Department’s student aid programs under Title IV of  
23 the Higher Education Act of 1965 (“HEA”). After certain of the plaintiffs’ claims were  
24 dismissed, *see* Orders of Sept. 3, 2020 [ECF 33] & Sept. 29, 2021 [ECF 44], the Court held the  
25 case in abeyance while the Department engaged in new rulemaking proceedings. Order of May  
26 10, 2022 [ECF 73], at 10; *see also* Order of June 27, 2023 [ECF 81] (denying plaintiffs’ motion  
27 to lift abeyance while rulemaking process continued).  
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1 The Department issued new Financial Value Transparency (“FVT”) and Gainful  
2 Employment (“GE”) rules (collectively, the “2023 Rule”) on October 10, 2023. *See* 88 Fed. Reg.  
3 70004 (Oct. 10, 2023). The parties submitted joint status reports on October 20, 2023 [ECF 82]  
4 and January 25, 2024 [ECF 84], notifying the Court of the 2023 Rule and stating the parties’  
5 different positions on whether or how to proceed. The Court held a status conference on  
6 February 8, 2024, and then issued a Minute Entry, indicating that the case would continue to be  
7 held in abeyance and ordering the parties to file a further status report on July 11, 2024. [ECF  
8 85.].

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

19 The parties have conferred and disagree regarding whether and how this case should  
20 proceed. The parties set forth their respective positions below.

21 **Plaintiffs’ Position:**

22 Plaintiffs object to the Department’s use of a Joint Status Report to brief a complicated  
23 mootness issue. Plaintiffs will respond to any motions that Defendants choose to file, consistent  
24 with the Local Rules and any orders from this Court.<sup>1</sup>  
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27 <sup>1</sup> Defendants’ suggestion that Plaintiffs refused to agree to a briefing schedule, *see infra* n.9, is  
28 misleading. At Plaintiffs’ invitation, on July 9 Defendants proposed a briefing schedule

1 Plaintiffs respectfully request that the parties proceed to summary judgment briefing.  
2 Alternatively, Plaintiffs request that the Court continue to hold the matter in abeyance until there is  
3 greater certainty about the implementation and legality of the 2023 Rule.

4 From the perspective of Plaintiffs and countless students, the 2023 Rule has only nominally  
5 taken effect; nothing changed on July 1, 2024. As the Department explained in *Ogle*: “the earliest  
6 any GE program might lose Title IV eligibility under the GE Rule is 2026. In addition, beginning  
7 on July 1, 2026, a GE program must warn students and prospective students of its potential loss of  
8 eligibility if it has already failed one of the metrics during the previous two award years.”<sup>2</sup> Put  
9 otherwise, although implementation wheels may have started to spin, students will not benefit for at  
10 least two years. Moreover, the July 2026 effectiveness is already threatened by the Department’s  
11 delay of a key institutional reporting deadline,<sup>3</sup> with colleges calling for further implementation  
12 delays.<sup>4</sup> The Department has refused to commit that it will not announce additional delays.<sup>5</sup>  
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15 regarding its forthcoming motion to dismiss. Without any justification, that proposal afforded  
16 Plaintiffs two days to respond to Defendants’ motion.

17 <sup>2</sup> Defs.’ Mem. in Opp. To Pls.’ Mot. for Prelim. Inj. at 12, *Ogle Sch. Mgmt. v. U.S. Dep’t of Educ.*,  
18 No. 4:24-cv-00259-O (N.D. Tex. May 3, 2024), Dkt. 25. (“*Ogle Br.*”)

19 <sup>3</sup> See March 29, 2024 Letter from the U.S. Dep’t of Educ., Office of Fed. Student Aid, GE-24-04  
20 (available at <https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2024-03-29/regulatory-requirements-financial-value-transparency-and-gainful-employment-updated-may-28-2024>).  
21  
22

23 <sup>4</sup> See Am. Council on Educ., Ltr. on Fin. Value Trans. and Gainful Empl. Reporting Req. (April 22,  
24 2024), <https://www.acenet.edu/Documents/Letter-ED-FVT-GE-042224.pdf>; Nat’l Ass’n of Student  
25 Fin. Aid Adm’rs., Ltr. to Congress re: Extension of Reporting Deadline for Gainful Empl. and Fin.  
26 Value Trans. Reg. (June 10, 2024),  
27 [https://www.nasfaa.org/uploads/documents/Letter\\_to\\_Congress\\_Requesting\\_Extending\\_Reporting\\_Deadline\\_for\\_GE\\_FVT.pdf](https://www.nasfaa.org/uploads/documents/Letter_to_Congress_Requesting_Extending_Reporting_Deadline_for_GE_FVT.pdf).  
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1 The delayed effectiveness also has a legal effect. With respect to mootness, it cannot be the  
2 case that the government can moot litigation by superseding a challenged regulation with one that  
3 nominally takes “effect” on one date, without having a practical benefit for years down the road.  
4 That is exactly what is happening here: as the Department noted in *Ogle*, during the next two years,  
5 24% of students enrolled in GE programs will be enrolled in failing programs.<sup>6</sup>

6 Finally, as explained in the January 25, 2024 Joint Status Report [ECF 84], the ongoing  
7 litigation and potential that the 2023 Rule may be vacated entirely, creates a risk that—should this  
8 case be dismissed as moot—Plaintiffs’ injuries will continue unremedied and without recourse, and,  
9 to quote the Department, the “resulting harm to students and taxpayers” would be “immense.”<sup>7</sup>

10 For the reasons stated herein, as well as those stated in ECF 84, Plaintiffs suggest that  
11 continuing the abeyance would balance equities, require limited judicial resources, and not  
12 prejudice Defendants.

13 **Defendants’ Position:**

14 Most of Plaintiffs’ claims were dismissed over two and a half years ago, and the  
15 remaining claim(s) have been held in abeyance since that time while the Department conducted  
16 rulemaking proceedings and ultimately issued the 2023 Rule.<sup>8</sup> Although the Court hesitated in  
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19 <sup>5</sup> On July 2, 2024, Counsel for Plaintiffs asked Counsel for Defendants via email whether the  
20 “Department [is] willing to commit, and represent publicly, that it will not be further delaying  
21 implementation of the new rule.” In response, Defendants’ counsel stated: “The new rule is in effect  
22 and the 2019 rule has been superseded, so Defendants’ position is that this case is moot, and the  
23 court has no role in monitoring implementation of the new rule.”

24 <sup>6</sup> *Ogle Br.*, *supra* n.2, at 12.

25 <sup>7</sup> Decl. of James Kvaal at ¶ 17 in *Ogle Sch. Mgmt. v. U.S. Dep’t of Educ.*, No. 4:24-cv-00259-O  
26 (N.D. Tex. May 3, 2024), Dkt. 25-1.

27 <sup>8</sup> As set forth in prior filings, Defendants understand only Count 11, a procedural challenge to the  
28 notice and comment process that led to the 2019 Rule, to remain pending in this case. Plaintiffs

1 the last status conference to dismiss the case before the 2023 Rule went into effect, the 2023  
2 Rule took effect on July 1, 2024. *See* 88 Fed. Reg. 70004 (“These regulations are effective July  
3 1, 2024.”). This case therefore should be dismissed as moot.

4 As an initial matter, although Defendants have, concurrently with this status report, filed  
5 a Motion to Dismiss on grounds of mootness, Defendants set forth their position in full here. The  
6 issues presented here are not “complicated,” as Plaintiffs claim. Indeed, the parties previously set  
7 forth their positions on mootness in detail in their prior joint status report (“JSR”) of January 25,  
8 2024 [ECF 84], which Plaintiffs reference above. This Court thus need not order further briefing  
9 and a future hearing to resolve Defendants’ Motion but instead may determine the case is moot  
10 and dismiss it now based on the arguments already before the Court.<sup>9</sup> Mootness implicates the  
11 Court’s subject matter jurisdiction. Article III of the Constitution “requires that ‘an actual  
12 controversy . . . exist not only at the time the complaint is filed, but through all stages of the  
13 litigation.’” *N.D. v. Reykdal*, 102 F.4th 982, 989 (9th Cir. 2024) (quoting *Kingdomware Techs.,*  
14 *Inc. v. United States*, 579 U.S. 162, 169 (2016)). “If there is no longer a possibility that [a  
15 litigant] can obtain relief for his claim, that claim is moot and must be dismissed for lack of  
16 jurisdiction.” *Id.* (internal quotation omitted). The Court thus “has ‘an independent duty to  
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19 have insisted that Counts 1-3 remain at issue, but they rely on a stilted reading of the Court’s prior  
20 decisions and ignore that the Court’s reasoning in dismissing other substantive challenges would  
21 require dismissal of Counts 1-3 as well. In any event, this case is now moot in its entirety.

22 <sup>9</sup>Counsel for Defendants proposed to counsel for Plaintiffs that the parties agree to expedited  
23 briefing on Defendants’ motion so that it would be fully briefed prior to the status conference  
24 scheduled for July 18, 2024, but Plaintiffs did not agree. The arguments set forth here largely repeat  
25 the same arguments the parties made in their January 25, 2024 JSR. *See* ECF 84. As was the case  
26 then, an extended briefing period is unnecessary to fully present the parties’ arguments regarding  
27 mootness. Defendants therefore request that the Court consider the issue at the July 18, 2024 status  
28 conference.

1 consider *sua sponte* whether a case is moot.” *Perez v. Arviza*, No. 1:23-CV-01341-SAB-HC,  
2 2024 WL 2393143, at \*1 (E.D. Cal. May 23, 2024) (quoting *Demery v. Arpaio*, 378 F.3d 1020,  
3 1025 (9th Cir. 2004)); *cf. Bernhardt v. Cnty. of Los Angeles*, 279 F.3d 862, 871 (9th Cir. 2002)  
4 (“[W]e must raise issues concerning our subject matter jurisdiction *sua sponte*. This includes  
5 mootness.” (citation omitted)); *Sannon v. United States*, 631 F.2d 1247, 1250 (5th Cir. 1980)  
6 (“Striking at the very heart of federal subject matter jurisdiction, a mootness issue quite clearly  
7 can be raised *sua sponte* if not addressed by the parties.” (footnote omitted)).

8  
9 Now that the 2023 Rule has taken effect, it is indisputable that this case is moot and must  
10 be dismissed. Courts readily recognize that “when subsequent legislation or rulemaking  
11 supersedes challenged regulations or rules, the challenge is moot.” *Twitter, Inc. v. Lynch*, 139 F.  
12 Supp. 3d 1075, 1081 (N.D. Cal. 2015); *see also California v. Azar*, 911 F.3d 558, 569 (9th Cir.  
13 2018) (“If the final rules become effective as planned . . ., there will be no justiciable controversy  
14 regarding the procedural defects of [interim final rules] that no longer exist.”); *Bullfrog Films,*  
15 *Inc. v. Wick*, 959 F.2d 778, 780–81 (9th Cir. 1992) (dismissing appeal as moot where challenged  
16 regulations were superseded by statute); *Ozinga v. Price*, 855 F.3d 730, 734 (7th Cir. 2017)  
17 (“When a plaintiff’s complaint is focused on a particular statute, regulation, or rule and seeks  
18 only prospective relief, the case becomes moot when the government repeals, revises, or replaces  
19 the challenged law and thereby removes the complained-of defect.”); *The Gulf of Me.*  
20 *Fishermen’s All. v. Daley*, 292 F.3d 84, 88 (1st Cir. 2002) (“[P]romulgation of new regulations  
21 and amendment of old regulations are among such intervening events as can moot a challenge to  
22 the regulation in its original form”); *NRDC v. U.S. Nuclear Regulatory Comm’n*, 680 F.2d 810,  
23 813–14 & n. 8 (D.C. Cir. 1982) (dismissing APA procedural challenge to interim rule because  
24 promulgation of superseding final rule mooted the claim); *Sannon v. United States*, 631 F.2d  
25 1247, 1250–51 (5th Cir. 1980) (“That newly promulgated regulations immediately applicable to  
26 litigants in a given case can have the effect of mooting what once was a viable case is without  
27 doubt.”); *Cal. Avocado Comm’n. v. Johanns*, No. CVF016578, 2005 WL 1344203, at \*2 (E.D.  
28 Cal. May 18, 2005) (dismissing challenge to rule as moot because, under the APA, “an amended

1 rule as promulgated is final and supersedes the earlier rule,” so the challenged rule “ceased  
2 having legal effect” when the new rule became effective, and “the Court cannot grant relief from  
3 an inoperative rule”).

4         The 2023 Rule’s July 1, 2024 effective date marks the culmination of the process that  
5 began in October 2021, when Defendants asked the Court to remand this case because the  
6 Department intended to pursue new rulemaking “that would propose replacing the 2019 Rule”  
7 that Plaintiffs have challenged in this case “with further regulation on gainful employment” that  
8 would “moot the remaining claim presented in this litigation.” Def. Mot. to Remand [ECF 48], at  
9 1-2. The Court held that it would instead hold this case in abeyance. Order of May 10, 2022. The  
10 Court recognized that “both Plaintiffs and the Department largely appear to be striving towards a  
11 common purpose—the creation of an effective gainful employment regulatory framework—and  
12 the Parties only differ as to *when* such a framework should be implemented.” *Id.* at 9. The Court  
13 further recognized that abeyance was appropriate because “all further litigation in this case  
14 would be haunted by the specter of mootness should the Department reach a final GE rule at any  
15 point.” *Id.* at 10. The Court noted Plaintiffs’ concession that vacatur would “largely become  
16 irrelevant” once the Department published new final regulations. *Id.* at 9.

17         The Court later rejected Plaintiffs’ request to lift the abeyance while the Department’s  
18 rulemaking process was still underway, again recognizing that Plaintiffs “appear to be  
19 advocates” of the Department’s proposed new rule. Order of June 27, 2023, at 1-2. After the  
20 Department issued the final 2023 Rule, on October 10, 2023, Plaintiffs opposed dismissal  
21 because the 2023 Rule had not yet taken effect but recognized that “the Department’s mootness  
22 position may become correct at some point in time.” Jt. Status Rpt. [ECF 84] at 2. Now that the  
23 July 1, 2024 effective date has passed, and the 2023 Rule is indisputably in effect, Plaintiffs  
24 continue to oppose dismissal, but their position lacks merit. To the contrary, the principles and  
25 authorities cited above require dismissal because the Court no longer has subject matter  
26 jurisdiction. Indeed, the plaintiffs in another case raising a similar challenge to the 2019 Rule  
27 voluntarily dismissed their claims months ago, after the 2023 Rule was published in the Federal  
28

1 Register. *See* Pls. Notice of Voluntary Dismissal [ECF 62], *Pennsylvania v. DeVos*, No. 1:20-cv-  
2 1719 (D.D.C. filed Dec. 15, 2023).

3 Although any challenge that Plaintiff might raise to the 2019 Rule is now moot, the Court  
4 already recognized this to be so with respect to Plaintiffs' procedural claim in Count 11, which  
5 Defendants understand to be the only remaining claim. The Court previously noted that the  
6 Department's rulemaking process for a new rule would redress Count 11 by "allow[ing] the  
7 public an opportunity to comment on the sources upon [which] the [Department] relies and  
8 Defendants the opportunity [to] consider amending the GE Rule to use a different source of  
9 annual earnings data." Order of Sept. 29, 2021 [ECF 44], at 7 n.3. The notice and comment  
10 period for the 2023 Rule was completed while this case was in abeyance, and there is no further  
11 relief that Plaintiffs can obtain.

12 Plaintiffs contend that their claims are not moot because certain aspects of the 2023 Rule,  
13 like building a new Department website that will provide certain information, will take time to  
14 complete and because the Department has extended an initial reporting deadline. The  
15 Department "made the determination that it could extend this deadline without impacting other  
16 steps in its timeline for implementing the FVT Rule." Kvaal Decl. ¶ 4. In any event, the fact that  
17 certain steps under the 2023 Rule will take time does not mean that any part of the 2019 Rule  
18 remains in effect or is subject to challenge. The 2023 Rule is fully in effect now, the Department  
19 is moving forward with its implementation, and the 2019 Rule that Plaintiffs challenged is  
20 entirely superseded. *See* 88 Fed. Reg. 70004 ("These regulations are effective July 1, 2024").<sup>10</sup>  
21 Regardless of the Department's timeline for undertaking certain steps identified in the 2023  
22 Rule, Plaintiffs' challenge to a rule that no longer exists will afford them no meaningful relief.  
23 Nor does Plaintiffs' moot challenge to the superseded 2019 Rule afford them or this Court  
24  
25  
26

27  
28 <sup>10</sup> The specific regulations promulgated by the 2023 Rule are also identified as "effective July 1,  
2024." *See, e.g.*, 34 C.F.R. § 668.43.



1 oversight over the Department’s implementation of the 2023 Rule. Plaintiffs have not challenged  
2 the 2023 Rule in this case.

3 Nor can Plaintiffs avoid mootness by further speculation about how the 2023 Rule will  
4 fare in litigation filed by other parties and pending in other courts. The court where challenges to  
5 the 2023 Rule are currently pending recently denied a motion for preliminary injunction that  
6 sought to prevent the 2023 Rule from taking effect. Order of June 20, 2024, *Ogle School* [ECF  
7 31], at 7, 11. The 2023 Rule thus took effect on July 1, 2024, as scheduled. And as Defendants  
8 previously pointed out, not only are the ultimate dispositions of other cases unknown, “but the  
9 judicial reasoning that might prevail” in those cases, “and the extent to which such reasoning  
10 might affect either the 2019 Rule or its predecessor, the 2014 Rule, is also unknown.” ECF 84, at  
11 10. The Court lacks subject matter jurisdiction now, and it cannot delay dismissal based on mere  
12 speculation about other cases’ future dispositions, which may take months or years to become  
13 final. *See Ass’n of Am. Physicians & Surgeons v. Sebelius*, 746 F.3d 468, 472–73 (D.C. Cir.  
14 2014) (rejecting “the idea that a claim can be saved from mootness by the court’s blithely  
15 hypothesizing that a whole other set of rules, not at issue in the present case, . . . , may be  
16 invalid”); *New York v. Raimondo*, No. 1:19-CV-09380, 2021 WL 1339397, at \*2 (S.D.N.Y. Apr.  
17 9, 2021) (holding “[t]he possibility that the challenged rules could become operative again,”  
18 should a new rule be vacated in litigation, insufficient to keep a controversy live).

19  
20 This Court should not continue to hold this case in abeyance indefinitely when the 2019  
21 Rule that Plaintiffs challenge has been superseded, and the Court no longer has subject matter  
22 jurisdiction. The proper course of action at this stage is therefore to dismiss this case.  
23

24 DATED: July 11, 2024

Respectfully submitted,

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