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IN THE UNITED STATES DISTRICT COURT, DISTRICT OF UTAH
CENTRAL DIVISION

CENTER FOR EXCELLENCE IN HIGHER EDUCATION,	Case No. 2:16-CV00911-CW
Plaintiff,	**DEFENDANTS' SUPPLEMENTAL MEMORANDUM CONCERNING ISSUANCE OF FINAL DECISION**
vs.	
BETSY DeVOS,[1] *et al.*,	Honorable Clark Waddoups
Defendants.	

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[1] Pursuant to Rule 25(d), Federal Rules of Civil Procedure, Secretary DeVos is automatically substituted as party for her predecessor in office.

Introduction

The complaint in this case says that plaintiff is challenging an August 11, 2016, Decision of the Department of Education. Complaint ¶ 93, 160. Prior to filing the complaint, plaintiff had also sought reconsideration of the agency's decision. *Id*. ¶ 113. Defendants' motion to dismiss argues that, because plaintiff had filed a timely request for agency reconsideration, there was no final agency action that could be subject to judicial review. The Court has scheduled argument on that motion for April 6.

On December 22, 2016, the Department of Education denied plaintiff's request for reconsideration. On February 7, 2017, defendants noted that they had "been anticipating that plaintiff may seek to challenge that final agency decision." ECF # 30. But, since plaintiff had not yet done so, defendants advised the Court that a final decision had been issued. *Id*. On March 16, the Court asked the parties to address in supplemental briefs the effect of the issuance of a final decision on the relief sought by the motion to dismiss. ECF #31.

Argument

The agency's initial decision in August was not a final agency action subject to judicial review when the motion to dismiss was filed and it is not final agency action subject to judicial review now. In that sense, the motion to dismiss the only challenge plaintiff has filed to date – to the never final and now superseded initial agency decision – is not moot: that challenge should indeed be dismissed.

To be sure, now that a final agency decision has been issued, plaintiff *could*, if it chooses to do so, file a challenge to the final agency action. But the mere issuance of a final decision does

not *automatically* transform a challenge to the initial agency decision into a challenge to the final agency decision. *Clifton Power Corp. v. F.E.R.C.*, 294 F.3d 108 (D.C. Cir. 2002), illustrates the point. There, as here, a party asked an agency to reconsider an action and sought judicial review – in that case via a petition for review in a court of appeals – before the agency acted on reconsideration. 294 F.3d at 110. There, as here, the request for agency reconsideration was denied after the request for judicial review was filed. *Id.* The court held that the petition seeking review of the initial agency action did not operate as a challenge to the later final agency decision. *Id*. at 110-11. *See also Council Tree Investors v. FCC*, 739 F.3d 544, 548 (10th Cir. 2014) (noting similar decision by Third Circuit).

Not treating a challenge to a non-final agency decision as automatically ripening into a challenge to a final decision once agency reconsideration is denied is not empty formalism. It serves important interests in judicial economy in part because the party that had sought judicial review of the non-final decision may choose not to seek judicial review, or at least not immediate judicial review, of the final agency decision even when the result is the same as the prior, non-final, agency decision.

For one thing, perhaps the party is persuaded by the more complete analysis of the final agency decision that the agency is right after all. Perhaps uncommon where the decision is against the party's interest, but also not unheard of. Two other potential factors are suggested by the circumstances here. First, the litigant may have a changed appreciation of the extent or immediacy of the adverse consequences of a decision; a for-profit college is in some respects subject to different standards than a non-profit one, but perhaps plaintiff now anticipates that it

can participate under the for-profit standards after all. Second, the plaintiff in this case argued that the agency was "[m]otivated by an obvious political agenda," Pls.' MTD Opp. at 2, and might therefore anticipate that the new administration will take a different view of the matter.[2] Even if no one of these factors is by itself decisive, the factors may combine. If the final decision does not entirely persuade plaintiff, but plaintiff perceives it as a stronger opinion that will be more difficult to overturn; if the feared consequences are not absent altogether, but are less severe or less immediate than previously thought; and if hope that a new administration will take a different view remains alive even if certainty is dead, the combination of such partial-strength considerations might be enough to persuade a plaintiff to defer filing a challenge to the final agency action even where it had previously challenged the initial decision.

In any event, whatever the reason might be, plaintiff has not yet filed a challenge to the final agency action. If plaintiff does choose to challenge the final agency action, the challenge could be accomplished by filing a new civil action or, perhaps, by filing a supplemental complaint in this action.[3] If plaintiff does file a new civil action (or, if permissible, a supplement to

[2] Defendants and this brief express no view on that likelihood. The point is merely that if plaintiff took its own rhetoric seriously, *plaintiff* may be anticipating that the subsequent change of administration will have an effect.

[3] Cases like *Clifton Power* that involve petitions for review of agency action in a court of appeals hold that a petition filed to challenge an agency decision that is not yet final is not only premature but "incurably" premature, 294 F.3d at 111, which means that review to challenge a later final decision can only be accomplished with a new petition for review not by amendment to the original petition for review. This brief takes no position on whether the different procedural mechanism of district-court judicial review, through a civil action, permits a "cure" of prematurity through a supplemental complaint. *Cf. XP Vehicles, Inc. v. Dep't of Energy*, 118 F. Supp. 3d 38, 62-63 (D.D.C. 2015) (not reaching question given court's conclusion that agency reconsideration had been completed before the initial complaint was filed).

this civil action) challenging the final agency decision, defendants will address that filing and challenge as provided in Local Rule 7-4.

Although the motion to dismiss is not moot, in the event that plaintiff does file a proper challenge to the final agency action, that challenge should supersede both the motion and the original complaint it seeks to dismiss. If plaintiff proceeds by filing a new civil action, this action could be voluntarily dismissed; if plaintiff proceeds by filing a supplemental complaint (and that method of proceeding is held proper), the supplemental complaint will become the operative pleading in this civil action. For these reasons, although the motion to dismiss is not moot, it may not be an appropriate use of judicial resources for the Court to hold a hearing on the motion unless and until plaintiff clarifies its intent regarding a possible challenge to the final agency decision.

Conclusion

For the reasons stated above the pending motion to dismiss is not moot; however, the Court may wish to defer action on that motion pending plaintiff's statement of its intentions with respect to challenging the final agency decision.

Respectfully submitted,

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