[ORAL ARGUMENT NOT SCHEDULED]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-1062

ERIC FLORES,

Petitioner

v.

UNITED STATES DEPARTMENT OF EDUCATION, *et al.*,

Respondents

ON PETITION FOR REVIEW FROM THE UNITED STATES DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS, DALLAS OFFICE

THE UNITED STATES DEPARTMENT OF EDUCATION'S MOTION TO DISMISS THE PETITION FOR REVIEW FOR LACK OF SUBJECT MATTER JURISDICTION AND RESPONSE TO PETITIONER'S MOTION FOR LEAVE TO FILE AN OVERSIZED PETITION FOR REVIEW

Petitioner Eric Flores, proceeding *pro se*, has petitioned this Court for review of a Findings Letter dated November 13, 2012, issued by the United States Department of Education's (Department) Office of Civil Rights (OCR). The Findings Letter determined that Flores's complaint, filed pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* (Title VI), was not supported by

sufficient evidence. See Findings Letter (Attachment B). Flores subsequently filed a motion for leave to file an oversized petition for review, to which this Court ordered the Department to respond by April 8, 2013. Pursuant to Federal Rule of Appellate Procedure 27 and Circuit Rule 27(g), the Department respectfully moves this Court to dismiss Flores's petition for review for lack of jurisdiction, because he does not have the right to seek review of the Findings Letter in this Court. This Court should also deny Flores's motion to file an oversized petition for review as moot.

BACKGROUND

On May 17, 2012, OCR's Dallas Office received Eric Flores's administrative complaint against the University of Texas El-Paso (UTEP). Flores alleged that UTEP discriminated and retaliated against him based upon his Mexican-American national origin in violation of Title VI and its implementing regulation, 34 C.F.R. Part 100, which prohibit discrimination by recipients of federal financial assistance on the basis of race, color, or national origin.[1] On November 13, 2012, OCR completed its investigation of Flores's complaint and

[1] The relevant Title VI regulation prohibits recipients of federal financial assistance from engaging in intimidating or retaliatory acts against any person for the purpose of interfering with any right or privilege secured under the regulation, or because the person has made a complaint or participated in any manner in an investigation or proceeding brought pursuant to the regulation. See 34 C.F.R. 100.7(e).

issued a Findings Letter determining that "there is insufficient evidence to support a conclusion of noncompliance [with Title VI] with regard to the issue raised in this complaint." Findings Letter 2. The Findings Letter advised Flores of his opportunity to take a written appeal of OCR's findings to the Deputy Assistant Secretary for Enforcement within 60 days. Findings Letter 9-10.

On December 17, 2012, Flores appealed OCR's Findings Letter to the Deputy Assistant Secretary for Enforcement. Pet. for Rev. 19. On February 6, 2013, before receiving a decision on his appeal (see Pet. for Rev. 19), [2] Flores petitioned the Fifth Circuit for review of the Findings Letter. See *Flores* v. *United States Dep't of Educ.*, No. 13-60078 (5th Cir.). On March 5, 2013, Flores filed a second petition for review in the same case that elaborated upon his factual allegations and legal arguments. Both petitions asked the Fifth Circuit to compel the Department of Education to issue sanctions against UTEP for noncompliance with Title VI and its implementing regulations, and to instruct the Department to admonish a Department attorney for allegedly attempting to protect UTEP employees from lawful sanctions for noncompliance with Title VI.

[2] Flores's appeal was routed to OCR's Dallas Office, which is in the process of drafting a decision.

Flores subsequently filed a petition for writ of mandamus in the Fourth Circuit [3] and the petition for review in this Court raising the same factual allegations and legal arguments, and requesting the same relief, as the two petitions for review he filed in the Fifth Circuit.

DISCUSSION

This Court should dismiss the petition for review for lack of jurisdiction. Petitioner has cited no authority that authorizes direct appellate review of a funding agency's finding of insufficient evidence that a recipient of its financial assistance discriminated or retaliated against an individual in violation of Title VI. As we demonstrate below, no such authority exists.

1. "Federal courts are courts of limited subject-matter jurisdiction. A federal court created by Congress pursuant to Article III of the Constitution has the power to decide only those cases over which Congress grants jurisdiction." *Al-Zahrani* v. *Rodriguez*, 669 F.3d 315, 317 (D.C. Cir. 2012) (citing *Micei Int'l* v. *Department of Commerce*, 613 F.3d 1147, 1151 (D.C. Cir. 2010)). The party claiming federal subject matter jurisdiction has the burden of proving it exists. *Khadr* v. *United States*, 529 F.3d 1112, 1115 (D.C. Cir. 2008). "'[O]nly when a direct-review statute specifically gives the court of appeals subject-matter jurisdiction to directly review agency action' may a party seek initial review in an

[3] See *In re: Eric Flores*, No. 13-1331 (4th Cir.) (filed Mar. 7, 2013).

appellate court." *Micei Int'l*, 613 F.3d at 1151 (quoting *Watts* v. *SEC*, 482 F.3d 501, 505 (D.C. Cir. 2007)).

2. Flores asserts that Rule 15 of the Federal Rules of Appellate Procedure provides this Court with subject matter jurisdiction over his petition for review. Pet. for Rev. 8. It is well-settled, however, that Rule 15 does not confer jurisdiction upon the courts of appeals, but rather prescribes the procedures to be followed by courts of appeals in cases in which they are authorized by statute to review final agency decisions. See *Office of Governor, Territory of Guam* v. *Department of Health & Human Servs., Admin. on Dev. Disability*, 997 F.2d 1290, 1292 (9th Cir. 1993); *Dillard* v. *United States Dep't of Hous. & Urban Dev.*, 548 F.2d 1142, 1143 (4th Cir. 1977) (per curiam); *Noland* v. *United States Civil Serv. Comm'n*, 544 F.2d 333, 334 (8th Cir. 1976) (per curiam). Flores's reliance on Rule 15 is therefore misplaced.

3. Nor does Title VI afford this Court jurisdiction to review the Findings Letter. Direct appellate review under Title VI is limited to those final agency orders "terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 2000d-1 of this title." 42 U.S.C. 2000d-2. By limiting direct appellate review in this fashion, Congress demonstrated an intent not to allow direct appellate review in circumstances such as this, in which individuals have filed administrative

complaints with OCR alleging prohibited discrimination or retaliation and are disappointed with the disposition of their complaints.

This does not mean, however, that such individuals have no opportunity for judicial resolution for their claims of prohibited discrimination or retaliation by recipients of federal financial assistance. It is settled that these persons have an implied private right of action under Title VI against recipients of federal financial assistance who engage in such prohibited conduct. *Alexander* v. *Sandoval*, 532 U.S. 275, 279 (2001) ("Private individuals may sue to enforce [Title VI] and obtain both injunctive relief and damages."); *Cannon* v. *University of Chi.*, 441 U.S. 677, 703 (1979) (same). Because aggrieved individuals may bring civil actions under Title VI against recipients of federal financial assistance who engage in prohibited discrimination or retaliation, Congress reasonably limited direct appellate review under Title VI to those final agency decisions "terminating or refusing to grant or to continue financial assistance." 42 U.S.C. 2000d-2. Accordingly, Title VI does not provide this Court jurisdiction to review the Findings Letter.

4. Flores also does not have a right to appellate review of the Findings Letter pursuant to the Administrative Procedure Act (APA). The APA provides for judicial review of "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704. The

APA, however, makes unreviewable "agency action [that] is committed to agency discretion by law." 5 U.S.C. 701(a)(2).

a. At the outset, we note that the Findings Letter is "agency action * * * committed to agency discretion by law," and thus unreviewable under the APA. 5 U.S.C. 701(a)(2). In *Heckler* v. *Chaney*, 470 U.S. 821 (1985), the Supreme Court explained that "an agency's decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2)," unless the "substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Id.* at 832-833. In other words, judicial "review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Id.* at 830.

Nowhere in Title VI or its implementing regulations are there any substantive guidelines for the Department to follow in investigating and resolving individual discrimination complaints, or for a court to judge such actions. See 34 C.F.R. Part 100. Accordingly, OCR's determination that Flores failed to present sufficient evidence that UTEP had discriminated and retaliated against him in violation of Title VI is a discretionary agency action for which the APA does not allow judicial review. See *Marlow* v. *United States Dep't of Educ.*, 820 F.2d 581, 582-583 (2d Cir. 1987) (per curiam) (no APA jurisdiction where anti-discrimination statute "provides no express guidelines for [determining liability

and] neither the statute nor the regulations impose significant substantive limitations on the Department's investigation and resolution of individual complaints of discrimination"), cert. denied, 484 U.S. 1044 (1988); cf. *Madison-Hughes* v. *Shalala*, 80 F.3d 1121, 1124-1125 (6th Cir. 1996) (no jurisdiction under the APA for suit claiming that HHS failed to collect specified racial data, where Title VI regulations indicated collection of such data was discretionary, not mandatory).

b. Even if the Findings Letter were not considered a discretionary agency action, this Court would nonetheless lack jurisdiction to consider Flores's petition for review. The APA provides for judicial review of "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704.

As indicated above, Title VI does not provide for direct appellate review of rulings like the Findings Letter at issue here, and we are aware of no other statute that does. Thus, appellate review of the Findings Letter is not "made reviewable by statute."

Nor is the Findings Letter "final agency action for which there is no other adequate remedy in a court." First, the Findings Letter is not "final agency action" within the meaning of the APA. Title VI's implementing regulations define this term for purposes of the APA to require a decision by a hearing examiner. See 34

C.F.R. 101.104, 101.106. The Title VI regulations further limit the opportunity for a hearing to review decisions terminating or refusing to grant or to continue federal financial assistance. See 34 C.F.R. 100.8(c), 100.9. Thus, under these Title VI regulations, only those decisions concerning the termination of, or refusal to grant or continue, federal financial assistance may constitute "final agency action" that would be subject to direct review by this Court under the APA.[4]

Moreover, the Findings Letter is not an agency action "for which there is no other adequate remedy in a court." As indicated (p. 6, *supra*), *Cannon* established the "other adequate remedy" of a civil action against the discriminating funding recipient. 441 U.S. at 703; see also *Garcia* v. *Vilsack*, 563 F.3d 519, 523 (D.C. Cir. 2009) ("Relief * * * will be deemed adequate 'where there is a private cause of action against a third party otherwise subject to agency regulation.'") (quoting *El Rio Santa Cruz Neighborhood Health Ctr.* v. *United States Dep't of Health & Human Servs.*, 396 F.3d 1265, 1271 (D.C. Cir. 2005)), cert. denied, 130 S. Ct. 1138 (2010). Indeed, in a decision authored by then-Circuit Judge Ruth Bader Ginsburg, the D.C. Circuit concluded that "*Cannon* suggests that Congress considered private suits to end discrimination not merely adequate but *in fact the*

[4] Because the Department is charged with enforcing Title VI, its interpretation of the statute is entitled to *Chevron* deference. *Monteiro* v. *Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1033 (9th Cir. 1998); *Peters* v. *Jenney*, 327 F.3d 307, 315-316 (4th Cir. 2003).

proper means for individuals to enforce Title VI." *Women's Equity Action League* v. *Cavazos*, 906 F.2d 742, 751 (D.C. Cir. 1990) (emphasis added). See also *Jersey Heights Neighborhood Ass'n* v. *Glendening*, 174 F.3d 180, 191-192 (4th Cir. 1999) (same). Accordingly, Flores was entitled to file a Title VI suit in district court against UTEP, but may not seek review under the APA in this Court of the Findings Letter's determination of insufficient evidence to support his Title VI claim.

CONCLUSION

For the foregoing reasons, this Court should dismiss the petition for review for lack of jurisdiction. This Court should also dismiss as moot Flores's pending motions, including his motion for leave to file an oversized petition for review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2013, I electronically filed the foregoing THE UNITED STATES DEPARTMENT OF EDUCATION'S MOTION TO DISMISS THE PETITION FOR REVIEW FOR LACK OF SUBJECT MATTER JURISDICTION AND RESPONSE TO PETITIONER'S MOTION FOR LEAVE TO FILE AN OVERSIZED PETITION FOR REVIEW with the Clerk of the Court using the appellate CM/ECF system.

I further certify that, within two business days of April 8, 2013, I will cause to be hand-delivered four paper copies of the foregoing motion to the United States Court of Appeals for the District of Columbia.

I further certify that petitioner listed below will be served via e-mail and U.S. Mail postage prepaid at the following address:

Eric Flores
8401 Boeing Drive
El Paso, TX 79910

s/ Dennis J. Dimsey
DENNIS J. DIMSEY
Deputy Chief

Attachment A: Certificate of Parties, Rulings, and Related Cases

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The United States Department of Education, as respondent, certifies that:

1. Parties

This is a petition for review of a Findings Letter of the United States Department of Education, Office for Civil Rights. The *pro se* petitioner is Eric Flores. The respondents are the United States Department of Education and the United States Department of Justice. There are no intervenors or *amici*.

2. Rulings Under Review

Petitioner seeks review of the November 13, 2012, Findings Letter of the United States Department of Education, Office for Civil Rights, determining that his Title VI complaint was not supported by sufficient evidence. There were no prior proceedings in district court.

3. Related Cases

To the best of our knowledge, this case was not previously before this Court or any other court. We are aware of two pending petitions for review of the Findings Letter in the Fifth Circuit, *Flores* v. *United States Department of Education*, No. 13-60078 (5th Cir.), and a pending petition for writ of mandamus in the Fourth Circuit, *In re: Eric Flores*, No. 13-1331 (4th Cir.).

s/ Dennis J. Dimsey
DENNIS J. DIMSEY
Deputy Chief

Attachment B: Findings Letter

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

1999 BRYAN STREET, SUITE 1620
DALLAS, TEXAS 75201-6831

REGION VI
ARKANSAS
LOUISIANA
MISSISSIPPI
TEXAS

NOV 13 2012

Ref: 06122112

Mr. Eric Flores
11669 Gwen Evans Lane
El Paso, Texas 79936

Dear Mr. Flores:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), Dallas Office, has completed its investigation of the above-referenced complaint, received on May 17, 2012, filed against the University of Texas-El Paso (UTEP or university), El Paso, Texas. You alleged that UTEP retaliated against you. Specifically, you alleged that on February 7, 2012, you filed a grade grievance with the Chairman of the Student Welfare Grievance Committee and alleged that your University 1301 professor graded one of your quizzes incorrectly because of your "Mexican American national origin," and you eventually notified the UTEP president of your grievance. You were subsequently retaliated against in the following ways:

a. On March 30, 2012, which was two days after you notified the UTEP president of the February 7th grade grievance, the Associate Dean of Students/Director of Judicial Affairs (DJA) filed disciplinary charges against you (i.e., conduct that endangered the health or safety of members of the university; falsifying university documents; and harassment of any university community member);

b. On March 30, 2012, UTEP issued a trespass warrant against you and you were suspended for two weeks;

c. After learning about your March 30th disciplinary charges, your University 1301 professor told the disciplinary hearing officer (DHO) that your personality was "explosive and disruptive";

d. After you filed the grade grievance, your University 1301 professor continued to grade your assignments incorrectly;

e. On April 10, 2012, the DHO upheld the disciplinary charges and suspended you for the summer semester; and

f. On May 16, 2012, the UTEP president upheld the decision of the DHO.

This agency is responsible for determining whether entities that receive or benefit from Federal financial assistance from the Department or an agency that has delegated investigative authority to this Department are in compliance with enforcing Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d, and its implementing regulation at 34 C.F.R. Part 100 (2012), which prohibit discrimination on the basis of race, color or national origin.

With respect to allegations of retaliation, the Title VI regulation at 34 C.F.R. § 100.7(e) prohibits recipients of federal financial assistance from engaging in intimidating or retaliatory acts against any person for the purpose of interfering with any right or privilege secured under the regulation or because the person has made a complaint or participated in any manner in an investigation or proceeding brought pursuant to the regulation.

UTEP is a recipient of Federal financial assistance from the Department. Therefore, OCR has jurisdictional authority to process this complaint for resolution under Title VI.

In reaching a determination in this case, OCR conducted interviews with and obtained written statements from you and several UTEP officials. OCR also reviewed information and documentation provided by you and UTEP. Based on a review of this information, OCR has determined that there is insufficient evidence to support a conclusion of noncompliance with regard to the issue raised in this complaint. The basis for this determination is set forth below.

Issue: Whether UTEP retaliated against you for filing a February 7, 2012 grade grievance alleging discrimination based on race and national origin, by taking the following actions in violation of 34, C.F.R. § 100.7(e): (a) filed disciplinary charges against you; (b) issued a trespass warrant and suspended you for two weeks; (c) your University 1301 professor informed the DHO that your personality was "explosive and disruptive"; (d) your University 1301 professor continued to grade your assignments incorrectly; (e): the DHO upheld the charges against you and did not allow you to enroll for the summer 2012 semester; and (f) the UTEP president upheld the DHO's decision.

In your original complaint, you alleged that you had been retaliated against by employees at UTEP. During the June 19, 2012 teleconference with OCR, you explained that you believed you were retaliated against for filing a grade grievance on February 7, 2012, regarding a grade you received from your University 1301 professor. You explained that other students answered a question on a quiz exactly as you had, but their answers were accepted and yours was not. In your July 2, 2012 response to OCR's 20-day letter, you further explained that your February 7th grade grievance alleged that your University 1301 professor discriminated against you based on your "Mexican-American national origin" by grading your quizzes incorrectly. You said that you spoke with the following individuals about your grievance: the Director of the Entering Studies Program, who is also the University 1301 professor's supervisor (Director); the Associate Provost for Undergraduate Studies; the Associate Vice President for Student Life (Associate VP); the DJA; and the Associate Provost. Finally, you said that you were then retaliated against as described above.

In order for an allegation of retaliation to be sustained, OCR must determine that:

1. The complainant was engaged in a protected activity;
2. The recipient had knowledge of the complainant's protected activity;
3. The recipient took an adverse action contemporaneously with or subsequent to the protected activity; and
4. There was a causal connection between the protected activity and the adverse action.

If any one of the foregoing cannot be established, retaliation cannot be established. If, however, all of the above are established, OCR inquires as to whether the recipient can identify a legitimate, nondiscriminatory reason for its actions. OCR determines whether any reason presented by the recipient is merely a pretext for discrimination in the form of retaliation.

A "protected activity" is one in which a person either opposes any practice made unlawful by the statutes enforced by OCR or a person makes a charge, testifies, assists or participates in an investigation, proceeding or hearing or otherwise asserted rights protected by the laws enforced by OCR.

If OCR determines that you engaged in a protected activity, it will then determine whether you were subjected to an adverse action. To be an "adverse action," the recipient's action must significantly disadvantage the complainant as a student or employee, or his or her ability to gain the benefits of the program. In the alternative, even if the challenged action did not objectively or substantially restrict an individual's employment or educational opportunities, the action could be considered to be retaliatory if the challenged action reasonably acted as a deterrent to further protected activity, or if the individual was, because of the challenged action, precluded from pursuing his/her discrimination claims. In making this determination, OCR considers whether the alleged adverse action caused lasting and tangible harm, or had a deterrent effect. Merely unpleasant or transient incidents usually are not considered adverse.

Also, for the actions that were determined to be "adverse", OCR considered whether there was a causal connection between the protected activity and the adverse action. This element addresses whether the recipient took the adverse action because of the protected activity. This determination, like others in the retaliation analysis, is made on a case-by-case basis, and must consider all the facts in the given case. A causal connection is inferred in most OCR cases when the adverse action occurs in a close proximity in time with the protected activity. Generally, the more time in between the protected activity and the adverse action, the weaker the presumption of a causal connection.

Finally, and as mentioned above, if all of the above elements are established, then OCR considers whether the recipient had a legitimate, nondiscriminatory reason for its action, or whether the reason is a pretext for discrimination.

OCR reviewed a copy of your the February 7, 2012 grade grievance. The grievance form indicates that you were appealing a grade you received on a pop quiz in University 1301 on that same date. The grievance form allows the student to identify the following broad bases for the incorrect grade: malice, bias, arbitrariness, caprice and impermissible discrimination. You placed a check mark in the box next to each of these bases. You then summarized your complaint, and explained that one of your answers on the quiz was counted wrong while other students answered exactly as you had but received full credit. Although you used the terms "impermissible discrimination" and "prejudice", you never indicated that you believed the grade was based on your race or national origin.

UTEP also submitted a large amount of data for OCR's review, including an audio recording of your April 5, 2012 disciplinary hearing; email communications between you and various UTEP officials; and certain assignments completed by you in University 1301 during the spring 2012

semester. To determine whether you engaged in a protected activity, OCR analyzed the communications between you and UTEP according to two categories: all communications from February 1, 2012 (the date of your first meeting with the Director regarding your grades in University 1301) to April 5, 2012 (the date of your disciplinary hearing); and all communications on and subsequent to April 5th. Some of the more notable communications are as follows:

- Email correspondence: In various emails to UTEP officials you indicated that you were retaliated against for "invoking a constitutional right" by seeking the UTEP president's "level of attention" regarding a professor's "academic dishonesty." While the language differed throughout the emails submitted before the April 5th disciplinary hearing, they contain nothing that indicates that you were making a complaint of race or national origin discrimination.
- Classroom assignments: UTEP submitted two essays completed by you for University 1301, which were dated March 20, 2012. In an essay entitled "What's Your Problem?," you explained that a person of "white American national origin" was using "advanced technology" to cause an instructor to grade your assignments incorrectly. In the other essay, entitled "So what do you want, anyway?," you repeatedly explain that you plan to obtain a law degree to learn how to "adequately complain" in federal court "against an organized group of executive employees of the federal government that are persons of white American national origin, that have tortured to death more than four members of a protected class of Mexican American citizens." In this same essay, under the section "Short-Term Goal," you said that your short term goal was to notify various named UTEP officials about the person of "white "American national origin" who had taken control of a professor's mind to influence her to give you bad grades.

OCR also obtained written statements from all UTEP officials mentioned by you as persons who had knowledge about your allegation of discrimination on the basis of national origin, including your University 1301 professor, the Director (and professor's supervisor), and the Chairman of the Student Welfare Grievance Committee (the person to whom the February 7th grade grievance was submitted). Each individual stated that you did not indicate to them that you were making a complaint based on race, color or national origin. Rather, the officials explained that you indicated that the grievance was based on the professor's "academic dishonesty" and the fact that the professor was connected to the federal government. Specifically, the DJA indicated that, during your first meeting with him, you explained the professor's connection to the federal government and how she was using grade numbers that correlated with the case numbers of lawsuits you had filed. The DJA said that you described the professor as being of "white American national origin"; however, he said that he simply felt the term was a descriptor, and had no indication that you were making a race or national origin based complaint. Further, the Director said that, at the end of a February 1, 2012 meeting, you began talking about the atrocities committed during the Holocaust (the grade grievance was based on an assignment related to this event). She said that, while wrapping up this discussion, you noted that there were also people in the United States who mistreat and "torment" Hispanic people; however, she did not take your parting remark as a complaint of race or national origin discrimination.

On October 18 and 26, 2012, OCR requested that you provide further information in support of your alleged protected activities. In your responses, you provided the following examples that you believed proved that you engaged in a protected activity:

- In the February 7, 2012 grade grievance, and in other communications with the professor and other UTEP officials, you explained that the professor graded your answer on a quiz differently than that of other students, and since the professor is white and you are Mexican, you established "grounds for racial profiling."
- You informed the following people of your complaint of race or national origin discrimination: the Chairman of the Student Welfare Grievance Committee; the Director; the Associate Provost; the Associate VP; the DJA, and the UTEP president.
- You complained that a "professor of white American national origin . . . was intentionally and knowingly" grading your assignments differently from other students in the class, and that she did so to intimidate you to such an extent that you would "discontinue seeking criminal prosecution in the federal court system against" the professor's relatives that murdered your brother.

A finding that a recipient has violated one of the laws that OCR enforces must be supported by a preponderance of the evidence (i.e., sufficient evidence to prove that it is more likely than not that unlawful discrimination occurred). When there is a significant conflict in the evidence and OCR is unable to resolve that conflict, for example, due to the lack of corroborating witness statements or additional evidence, OCR generally must conclude that there is insufficient evidence to establish a violation of the law.

As mentioned above, you engaged in numerous written communications (i.e., February 7th grade grievance, emails) with UTEP from around February 1st until the time of your April 5th disciplinary hearing. Some of the written communications use the phrase "impermissible discrimination," or the words "prejudice" and "retaliation". Also, you appear to describe possible acts of race or national origin discrimination in some of your classroom assignments. However, neither the February 7th grade grievance nor your email communications prior to the April 5th hearing give any indication that you made a complaint of race, color or national origin discrimination to UTEP, and your assignments were not submitted through any type of grievance process, nor was there any indication that they were to be taken as actual grievances. You also said that you verbally informed several UTEP officials of your complaint of race or national origin discrimination, but each of those individuals indicated that no such complaint was made to them. OCR's review of in-person communications found that you made references to the tormenting of Hispanic individuals, and often referenced people's race, but these statements were either made in reference to classroom topics or while simply describing the University 1301 professor. The in-person communications were not accompanied by language that would indicate that you were making a complaint of race or national origin discrimination with respect to the February 7th grade grievance or within any other context.

OCR policy states that opposition that comprises broad or ambiguous complaints of unfair treatment would be considered a protected activity if the protest reasonably would be interpreted as opposition to discrimination. OCR has determined it would not have been reasonable to interpret any of your communications, prior to April 5th, as complaints of race or national origin discrimination.

However, the evidence indicates that you did engage in a protected activity on or about April 5, 2012. You submitted a document entitled "Notice of Appeal" to UTEP that references Title VI's

prohibition of discrimination on the bases of race, color and national origin, and explains your belief that the DJA retaliated against you by charging you with the university rule violations, which were officially brought on March 30, 2012. You informed OCR that this document was submitted on the day of the April 5th hearing (you later said it was submitted "around the time" of the hearing). UTEP was unsure when the document was submitted, but speculated that it was submitted around April 12, 2012. UTEP was unable to provide more specific information regarding the date this document was filed. Thus, OCR will assume the document was submitted on April 5th, 2012, as you have indicated. Also, since UTEP actually submitted the document to OCR, it is clear that they had knowledge of the complaint and its contents.

The date given for the alleged adverse actions in issues 1(a) and 1(b) (March 30, 2012) pre-dates your April 5th protected activity. Furthermore, with regard to allegation 1(d) (i.e., that the professor continued to grade your assignments incorrectly after you filed the grade grievance), you have provided information about two quizzes: the February 7th quiz for which the grievance was filed, and a March 6, 2012 quiz. Despite OCR's requests for specific dates on which assignments were graded incorrectly, you have provided no information about incorrectly graded quizzes, tests or assignments on or after April 5, 2012. Therefore, the evidence is insufficient to conclude that the alleged adverse actions in issues 1(a), (b) and (d) were taken contemporaneously with or subsequent to April 5, 2012. Therefore, retaliation cannot be established with regard to these issues, and each of them will be closed as of the date of this letter.

You have alleged three adverse actions that occurred contemporaneously with or subsequent to April 5, 2012. The discussion of each is below.

Issue 1(c):
You alleged that when your University 1301 professor learned of the disciplinary charges against you, the professor told the DHO that your personality was "explosive and disruptive." You explained that the professor made these remarks in retaliation for your complaint of national origin discrimination.

During an October 23, 2012 teleconference with OCR, your professor admitted making the alleged statement. She said that she first made the statement when the DJA called her sometime after the February 7th grade grievance was filed and asked about your behavior.[1] She also made the statement at the disciplinary hearing. The professor said that she made the statement because it was an accurate description of your conduct at the beginning of the semester. During the April 5th disciplinary hearing and during a teleconference with OCR, the professor provided the following examples of your behavior: you would yell out at the professor during class (e.g., "hey", "hey, that is not fair," etc.); while a film was being shown in class, you reached across the professor's legs and vomited into a waste can; you would "curse" outside of class because of your grades; and you often confronted the professor after class in an "abrasive, hostile manner." The professor explained that, during some of the after-class confrontations, you would approach her in a "hostile" and "abrasive" manner and demand to know who was influencing her to grade your

[1] The Director previously explained that the Associate Dean, College of Liberal Arts contacted her on February 9, 2012 and shared a conversation she had with you on the same date. The Associate Dean informed her that you were connecting the University 1301 professor to people who were "tormenting" your family. The Director said that, since this information concerned her, she shared the information with the DJA.

assignments incorrectly. The professor indicated that she first made the statement to the DJA because you displayed such behavior, and not because you had filed a grade grievance.

OCR asked you to explain your understanding of the professor's reason for making the above-referenced statement. You reiterated that during the April 5th hearing your student witnesses testified to your "scholarly" and "professional" attitude, and explained that this proved that the professor's allegations of hostile behavior before and after class were simply an attempt to cover up the fact that she graded your assignment incorrectly.

OCR's review of the audio recording of the disciplinary hearing confirmed the fact that the student witnesses testified that you displayed good classroom behavior, and that they did not witness the behavior alleged by the professor; however, neither of the witnesses testified about after-class discussions between you and the professor. Furthermore, during the hearing, the professor voluntarily explained that, although she felt your behavior was disruptive and explosive during the first part of the semester, she felt that your behavior had improved after your first meeting with the DJA, which took place on February 13, 2012.

The professor's description of your behavior eventually led to a charge of endangering the health or safety of members of the university. Thus, it was an adverse action that significantly affected you as a student. However, the professor provided a legitimate, nondiscriminatory reason (i.e., she made the statement because she was asked about it and felt it was true). Further, with regard to pretext, OCR received conflicting information that could not be resolved. Therefore, with regard to issue 1(c), OCR has determined that the evidence is insufficient to conclude that UTEP retaliated against you, and OCR will take no further action with regard to this issue.

Issue 1(e):

You also alleged that you were retaliated against on April 10, 2012, when the DHO upheld the disciplinary charges and suspended you for the summer semester. In a document submitted to OCR on June 28, 2012, you further explained that the DHO held that you must obtain psychological counseling and provide written documentation of such to the DJA. You felt that the DHO did not have sufficient information to make such a ruling. You also explained that the DHO upheld the charges alleging that you exhibited "violent, hostile and disruptive behavior while in class and on campus, which presented a threat and danger" to the university, despite the fact that several witnesses testified that you exhibited "professional, attentive and scholarly" behavior. You said that these actions were retaliatory because of the following: during the hearing, students and professors testified that you exhibited professional and scholarly behavior; the DHO knew that the University 1301 professor was related to the individual that murdered your brother, but still said the allegation was "unfounded"; the DHO said you did not understand the term "academic dishonesty"; and the DHO determined that you used campus email and voice mail in a harassing manner, even though you attended a workshop at which students were encouraged to use these systems to overcome any barrier.

The DJA originally charged you with the following university rule violations: (1) conduct that endangers the health and safety of members of the university; (2) falsifying University documents; and (3) harassment of any university community member. As a result of these charges, the DJA placed you under an interim suspension, and UTEP issued a trespass warning. The DJA recommended that you be expelled from UTEP.

You appealed the DJA's decision, which resulted in the April 5th disciplinary hearing. The DHO's written ruling is dated April 10, 2012, and was submitted to OCR. The document indicates that the DHO did "not find the evidence . . . compelling enough to support the allegation that (you) endangered the physical health and safety of members of the University." However, he acknowledged that your behavior "clearly did create concern and discomfort."

The DHO did uphold the DJA's charges of falsifying a university document and harassing employees. With regard to the charge of falsifying a university document, such acts are prohibited by UTEP Student Conduct and Discipline Policy 1.3.6.f. The rule states that "falsifying" includes the omission of requested information. You were specifically charged with omitting information from question 14 of your application for admission, which asks the student to provide the names of prior institutions attended. The DHO explained that, during the hearing, testimony from El Paso Community College (EPCC) officials indicated that you were enrolled at EPCC in 1999 and 2007, and still had a disciplinary hold on your records from that institution; however, you failed to provide this information in question 14. The DHO explained that, per university rules, you were guilty of the charge.

With regard to harassment of any university community member, such acts are prohibited by UTEP Student Code of Discipline Policy 1.3.6.q. The DHO went on to note that the Texas Penal Code defines one form of harassment as sending "repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another." In a written statement, dated November 5, 2012, the DHO informed OCR that he found that you had violated this policy because, despite being warned not to send repetitive emails to UTEP officials, you continued to do so. Also, he said that, following the April 5th hearing, you sent him 12 emails and left 4 voice messages.

Although the DHO upheld two of the charges, he did not accept the DJA's recommendation of expulsion from UTEP. Rather, he reinstated you for the remainder of the spring semester, and suspended you for the summer 2012 semester only. He held that you could re-enroll for the spring semester if certain conditions were met, which included obtaining counseling and providing UTEP documentation of such.

Your specific allegation (i.e., the DHO upheld the disciplinary charges brought by the DJA) is not entirely correct, because the DHO did not uphold all three charges brought by the DJA, nor did he accept the recommendation of expulsion. However, the DHO's eventual disciplinary decision significantly affected you as a student at UTEP. Also, the DHO's decision was made contemporaneously with your April 5th protected activity, so a causal connection is inferred. However, the DHO provided legitimate, nondiscriminatory reasons for his actions (i.e., you were technically in violation of the rules he was charged with violating).

You did not submit any information that indicates that the DHO's reasons were a pretext for discrimination, nor has OCR obtained information that betrays a retaliatory motive. The DHO informed OCR that, over the past two years, he had not served as DHO for cases that involved harassment or falsifying university documents. However, he provided examples of four cases on which he served that involved the charge of endangering the health or safety of university employees. The punishments ranged from suspension for a semester to expulsion. Thus, OCR has determined that the evidence is insufficient to indicate that UTEP's proffered reason is a pretext

for discrimination. Therefore, OCR has determined that the evidence is insufficient to conclude that UTEP retaliated against you in this instance, and OCR will take no further action with regard to this issue.

Issue 1(f):
You also alleged that you were retaliated against when the UTEP president upheld the findings of the DHO. In its data response, UTEP denied retaliating against you, and indicated that the May 16, 2012 decision to uphold the DHO's decision was simply based on a review of the decision and your appeal of the decision. Specifically, UTEP maintained in its data response that "[t]here have been other instances in student conduct disciplinary appeals where the President, and/or the President's designee, has upheld the decision of the hearing officer, has overturned the decision of the hearing officer and instances where the hearing officer has been asked to re-open the hearing to consider additional evidence by the parties (student and/or University)."

On October 26, 2012, OCR notified you of UTEP's response and requested further information. In your response, you indicated that you believed the act was retaliatory because the UTEP president and the "disciplinary officers," were all of "white American national origin," and they upheld each other's decisions to discriminate against a student of "Mexican American national origin." You also said that you told the UTEP president that certain faculty members wanted to retaliate against you for bringing your grade grievance to her, but she acted as though you had not warned her.

The DHO's decision included a suspension for the summer 2012 semester and mandatory counseling. Therefore, OCR has determined that the action of upholding this decision significantly disadvantaged you as a student and interfered with your ability to gain the benefits of UTEP's education program. Further, the adverse action occurred just over a month after your protected activity, so a causal connection is inferred. However, in its data response, UTEP denied retaliating against you, and indicated that the decision to uphold the DHO's decision was simply based on a review of the decision and the complainant's appeal of the decision. In response to UTEP's reason, you submitted information to OCR that had already been dismissed during the evaluation of this complaint under section 108(c) of OCR's *Case Processing Manual,* and simply said that you had "warned" the UTEP president that you were being retaliated against. OCR has obtained no other evidence to indicate that UTEP's reason is a pretext for discrimination. Therefore, OCR has determined that the evidence is insufficient to conclude that UTEP's legitimate nondiscriminatory reason is simply a pretext for discrimination, and retaliation cannot be established. Thus, the evidence is insufficient to conclude that retaliation occurred with regard to this issue.

Based on the above information and documentation, OCR has determined that there is insufficient evidence to support a conclusion of noncompliance with Title VI as it pertains to the issues investigated.

If you have questions about OCR's determination in your case or wish to discuss it further, please contact Brandon Carey, Attorney, at 214/661-9683, or me at 214/661-9600. If following this conversation, you still have concerns, you may send a written appeal to the Deputy Assistant Secretary for Enforcement within 60 days of the date of this letter of findings. The appeal process provides an opportunity for you to bring information to OCR's attention that would change OCR's decision. Please note that while you are encouraged to do so, having a discussion with Ms. Martin

or me about the OCR determination is not a prerequisite to filing an appeal with the Deputy Assistant Secretary for Enforcement and it does not stop the running of the 60-day timeline.

In filing your written appeal, you must explain why you believe the factual information was incomplete, the analysis of the facts was incorrect, and/or the appropriate legal standard was not applied, *and* how this would change OCR's determination in the case. Failure to do so may result in the denial of the appeal. You may send your appeal by electronic mail to OCRAppeals@ed.gov, or regular mail to the following address:

Office of the Deputy Assistant Secretary for Enforcement
Office for Civil Rights
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202-1100

A written response to an appeal will be issued as promptly as possible. The decision of the Deputy Assistant Secretary for Enforcement constitutes the agency's final decision with respect to your case.

This letter is a letter of findings issued by OCR to address an individual OCR case. Letters of findings contain fact-specific investigative findings and dispositions of individual cases. Letters of finding are not formal statements of OCR policy and they should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

Under OCR procedures we are obligated to advise the complainant and the institution against which a complaint is filed that intimidation or retaliation against a complainant is prohibited by the regulations enforced by this agency. Specifically, the regulations enforced by OCR, directly or by reference, state that no recipient or other person shall intimidate, threaten, coerce or discriminate against any individual for the purpose of interfering with any right or privilege secured by the regulations enforced by OCR or because an individual has made a complaint, testified, assisted or participated in any manner in an investigation, proceeding or hearing held in connection with a complaint.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personally identifiable information, which, if released, could reasonably be, expected to constitute an unwarranted invasion of personal privacy.

If you have any questions or concerns regarding this letter, please call me at (214) 661-9600 or Mr. Carey at the number listed above.

Sincerely,

Adriane P. Martin
Team Leader
Dallas Office