

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-60585

ERIC FLORES,

Petitioner

v.

UNITED STATES DEPARTMENT OF EDUCATION,

Respondent

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,
MOTION TO DEFER FILING OF THE ADMINISTRATIVE RECORD, AND
MOTION TO DISMISS PETITIONER'S PENDING MOTION AS MOOT

Petitioner Eric Flores, proceeding pro se, has petitioned this Court for review of a discretionary decision of the United States Department of Education's (Department) Office of Civil Rights (OCR). According to Flores, OCR's August 20, 2015, letter to him dismissed and closed his complaint, which he filed pursuant to Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. 2000d *et seq.* Title VI prohibits discrimination on the basis of race, color, or national origin in

programs and activities receiving federal financial assistance.¹ Flores also filed a motion to proceed in forma pauperis.

Pursuant to Federal Rule of Appellate Procedure 27, the Department respectfully moves this Court to dismiss Flores's petition for review for lack of jurisdiction, because there is no statutory right to seek review of OCR's alleged August 20 dismissal of his complaint in this Court. We also respectfully request this Court to defer the filing of the administrative record pending its resolution of our motion to dismiss the petition, and to dismiss as moot Flores's pending motion to proceed in forma pauperis. See p. 10, *infra*.

BACKGROUND

1. Flores alleges in his petition for review that he filed an administrative complaint against the University of Texas at El Paso (UTEP) and Austin Community College (Austin). In this complaint, Flores alleges, he claimed that

¹ OCR has no record of issuing a dismissal letter to Flores on August 20, 2015, and Flores failed to attach a copy of this letter to his petition for review, as Fifth Circuit Rule 15.1(b) requires. Accordingly, the motion to dismiss labels OCR's dismissal of Flores's complaint as "alleged," and relies on Flores's petition in describing the content of the dismissal and substance of his supposed complaint. In any event, even if Flores had provided a copy of the dismissal letter, this Court lacks jurisdiction to review the Department's entirely discretionary decision to dismiss his complaint.

UTEP and Austin discriminated and retaliated against him in violation of Title VI.² Pet. for Rev. 12, 14-16, 31-32, 46-48, 74-79. According to Flores, on August 20, 2015, OCR's Office of Deputy Assistant Secretary for Enforcement dismissed his discrimination complaint. Pet. for Rev. 12. As stated before (see note 1, *supra*), OCR has no record of sending a dismissal letter to petitioner.

On August 24, 2015, Flores petitioned this Court for review of OCR's alleged dismissal of his complaint. The petition asks this Court to compel the Department to (1) sanction UTEP and Austin for noncompliance with Title VI and its implementing regulations; and (2) reinstate Flores as a student at UTEP and Austin. Pet. for Rev. 80-82.

2. Prior to filing this petition for review, Flores has five times petitioned this Court for review of OCR's adverse decisions on similar complaints he filed with OCR alleging discrimination and/or retaliation in violation of Title VI (Case Nos. 06142285, 06122188, and 06122112).³ In all five cases, this Court granted the Department's motions to dismiss Flores's petitions for lack of jurisdiction, holding

² Flores alleges in his petition for review that UTEP and Austin officials discriminated and retaliated against him because of his criminal convictions. Pet. for Rev. 46-48. Discrimination and retaliation based on a criminal background, of course, is not actionable under Title VI.

³ Flores's two most recent petitions for review in this Court, filed in Nos. 15-60456 and 15-60220, also failed to include a copy of the OCR dismissal letter for which he sought review.

that neither the Administrative Procedure Act (APA) nor any other statute authorizes direct appellate review of a funding agency's discretionary decision not to take enforcement action on an individual's discrimination complaint.⁴ See Per Curiam Orders in *Flores v. United States Dep't of Educ.*, No. 15-60456 (Aug. 11, 2015); *Flores v. United States Dep't of Educ.*, No. 15-60220 (May 27, 2015); *Flores v. United States Dep't of Educ.*, No. 14-60390 (July 30, 2014) (dismissing Case No. 06142285); *Flores v. United States Dep't of Educ.*, No. 13-60303 (July 19, 2013) (dismissing Case No. 06122188); *Flores v. United States Dep't of Educ.*, No. 13-60078 (May 3, 2013) (dismissing Case No. 06122112).

DISCUSSION

This Court should dismiss the petition for review for lack of jurisdiction, as it has his other similar petitions. As with the previous petitions for review Flores filed in this Court in Appeals Nos. 15-60456, 15-60220, 14-60390, 13-60303, and 13-60078, he has cited no authority that provides for direct appellate review of an

⁴ Flores has filed numerous other petitions for review from adverse OCR decisions, none of which has been found to be meritorious. See Order, *Flores v. United States Dep't of Educ.*, No. 14-1582 (4th Cir.) (Aug. 21, 2014); Opinion, *In re: Eric Flores*, 519 F. App'x 150 (4th Cir. 2013) (No. 13-1331); Per Curiam Order, *Flores v. United States Dep't of Educ.*, No. 14-1128 (D.C. Cir.) (Dec. 3, 2014); Per Curiam Order, *Flores v. United States Dep't of Educ.*, No. 13-1062 (D.C. Cir.) (Dec. 11, 2013); Per Curiam Order, *Flores v. United States Dep't of Educ.*, No. 13-1161 (D.C. Cir.) (Oct. 15, 2013).

agency's discretionary decision not to take enforcement action on an individual's discrimination complaint. As we demonstrate below, no such authority exists.

1. "Federal courts are courts of limited jurisdiction" and "have no jurisdiction absent jurisdiction conferred by statute." *Peoples Nat'l Bank v. Office of the Comptroller of the Currency of the U.S.*, 362 F.3d 333, 336 (5th Cir. 2004). "The party claiming federal subject matter jurisdiction has the burden of proving it exists." *Ibid.* "[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 appellate court." *Micei Int'l v. Department of Commerce*, 613 F.3d 1147, 1151 (D.C. Cir. 2010) (quoting *Watts v. Securities & Exch. Comm'n*, 482 F.3d 501, 505 (D.C. Cir. 2007)) (alteration in original).

2. Flores asserts that Federal Rule of Appellate Procedure 15 provides this Court with subject matter jurisdiction over his petition for review. Pet. for Rev. 16-20. It is well-settled, however, that Rule 15 does not confer *jurisdiction* upon the courts of appeals, but rather only prescribes the procedures courts of appeals are to follow in cases in which they are authorized by statute to review final agency decisions. See *Office of the 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. Flores is also incorrect in asserting that the APA affords this Court jurisdiction to address OCR's alleged dismissal of his complaint. Pet. for Rev. 23-25. 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. See also *Peoples Nat'l Bank*, 362 F.3d at 336. The APA, however, makes unreviewable an "agency action [that] is committed to agency discretion by law." 5 U.S.C. 701(a)(2).

a. OCR's alleged dismissal of Flores's complaint 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 "[a]n agency's decision not to take enforcement action is 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 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 use to address such actions. See 34 C.F.R. Pt. 100. OCR's alleged dismissal of Flores's complaint is a discretionary agency action for which the APA does not provide 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 Section 504 of the Rehabilitation Act "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, and 484 U.S. 1045 (1988); see also *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 OCR's alleged dismissal of Flores's complaint was 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.

Title VI does not afford this Court jurisdiction to review OCR's alleged dismissal of Flores's complaint. 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 and are disappointed with the agency’s disposition of their complaints. Accordingly, judicial review of OCR’s alleged action is not “made reviewable by statute.” 5 U.S.C. 704.

Nor is OCR’s alleged dismissal of Flores’s complaint “final agency action for which there is no other adequate remedy in a court.” 5 U.S.C. 704. First, OCR’s alleged dismissal of the complaint is not a “final agency action” within the meaning of the APA. Title VI’s implementing regulations define the term “final agency action” for purposes of the APA to require a decision by an administrative judge on a Department’s decision to cut off federal funds. See 34 C.F.R. 101.104, 101.106. Title VI regulations limit the opportunity for a hearing to review an agency decision 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 constitutes “final agency action” that would, by statute, be subject to direct review by this Court under the APA.⁵

Moreover, OCR’s alleged dismissal of Flores’s complaint is not an agency action “for which there is no other adequate remedy in a court.” 5 U.S.C. 704. To the contrary, it is settled that individuals have an implied private right of action under Title VI against recipients of federal financial assistance who engage in prohibited discrimination. *Alexander v. Sandoval*, 532 U.S. 275, 279 (2001) (“[P]rivate 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). 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 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). Accordingly, Flores is entitled to file a suit in district court against UTEP and Austin asserting Title VI and Title IX allegations, but may not seek review under the APA in this Court of OCR’s alleged dismissal of his complaint.

⁵ 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).

4. This Court has ordered the Department to file the administrative record on or before October 5, 2015. In the event that the Department's motion to dismiss is granted by this Court, this proceeding will be dismissed and there will be no need for the agency to prepare and file an administrative record. To avoid the expenditure of time and resources on a task that may well prove to be unnecessary, the Department respectfully requests this Court to defer the filing of the administrative record until after it rules on the Department's motion to dismiss this petition. Should the Department's motion to dismiss be denied, we respectfully request that the administrative record be due 40 days from the date of the denial of the motion.

5. Flores has filed a motion to proceed in forma pauperis. See p. 2, *supra*. Because this Court lacks jurisdiction to consider the petition for review, it should dismiss this motion as moot.

6. Undersigned counsel contacted the pro se petitioner via e-mail on September 22, 2015, to ask whether he intends to oppose this motion. As of the date of the filing of this motion, petitioner has not yet responded.

7. As noted above (see p. 4 & n.4, *supra*), Flores has made ten previous attempts in three different federal courts of appeals to seek judicial review of OCR decisions rejecting similar complaints of discrimination and/or retaliation by an educational institution in violation of Title VI. Each attempt was summarily

dismissed. In *Flores v. United States Att’y Gen.*, 434 F. App’x 387, 388 (5th Cir. 2011) (No. 11-50008) (per curiam), this Court warned Flores that “the filing of further frivolous appeals will result in sanctions” that “may include dismissal, monetary sanctions, and restrictions on his ability to file pleadings in this court and any court subject to this court’s jurisdiction.” Given Flores’s repeated frivolous filings, and this Court’s warning in Appeal No. 11-50008, this Court may wish to consider imposing appropriate sanctions in this case.

CONCLUSION

For the foregoing reasons, this Court should dismiss the petition for review for lack of jurisdiction and dismiss Flores pending motion to proceed in forma pauperis as moot. This Court should also defer the filing of the administrative record until after it rules upon the motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2015, 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, MOTION TO DEFER FILING OF THE ADMINISTRATIVE RECORD, AND MOTION TO DISMISS PETITIONER'S PENDING MOTION AS MOOT with the Clerk of the Court using the appellate CM/ECF system.

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

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