



## Foundation for Individual Rights in Education

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March 30, 2004

Ted Mitchell, President  
Occidental College  
Office of the President  
1600 Campus Road  
Los Angeles, CA 90041

### URGENT

*Sent By U.S. Mail and Facsimile (323-259-2907)*

Dear President Mitchell,

As you can see from our Directors and Board of Advisors, the Foundation for Individual Rights in Education (FIRE) unites leaders in the fields of civil rights and civil liberties, scholars, journalists, and public intellectuals across the political and ideological spectrum on behalf of liberty, legal equality, freedom of religion, academic freedom, and—in the case of Jason Antebi—freedom of speech and expression on America's college campuses. Our web page, [www.thefire.org](http://www.thefire.org), will give you a greater sense of our identity and activities.

FIRE is gravely concerned by the threat to free speech posed by the punishment of and continuing proceedings against Jason Antebi, a senior at Occidental College who is only weeks away from graduation. Simply because a radio program he hosted offended certain students, Mr. Antebi has been charged with sexual harassment, removed from his position at KOXY, Occidental's college radio station, and may now face removal from his position as vice president of policy for Occidental's student government, the Associated Students of Occidental College (ASOC). Occidental's administration must surely realize that if everything that anyone considered rude or offensive could be banned, we would all be reduced to silence. Nevertheless, Occidental College has aggressively pursued these punishments against Antebi based on his speech alone.

This is our understanding of the facts, based on numerous official documents, university minutes, and reports from students. We ask you to correct any misunderstanding of the facts, if any exists. Jason Antebi has been the co-host of a popular campus radio show called *Rant and Rave* for three years. *Rant and Rave*, like many college radio shows, relies on what some describe as a "shock jock" brand of bawdy and provocative humor, satire, and parody. The program mocks everything from the student government to popular social causes. On

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Friday, March 12, 2004, Mr. Antebi was informed that a sexual harassment complaint was filed against him by several fellow students. Soon after, on March 16, Dean of Students Frank Alaya e-mailed Mr. Antebi to tell him that the administration had banned him from KOXY radio. By March 25, three sexual harassment claims had been filed against Antebi due to the content of his radio show.

Two of the complaints against Antebi were filed by rivals from the ASOC who believed that he had mocked them on the air. These two complainants, who had unsuccessfully attempted to have Mr. Antebi impeached from the ASOC on unrelated grounds earlier in the school year, alleged that the rude and insulting words Antebi used in his radio show and in the advertisements for his show constituted “hostile environment” harassment. Among the aspects of Mr. Antebi’s shows that the students complained about were Mr. Antebi’s insults of his own mother, his apparent mockery of some members of student government, statements that one complainant called “‘ad hominem’ satires,” and “disrespect and slander” against “women, diversity, and Occidental College.” The complainants even went so far as to report other ASOC senators who called in to “support” Antebi and “his comments.” The complainants clearly believed they had a right to punish Mr. Antebi due to the “offensive” and “demeaning” content of his radio program.

Occidental College’s moral obligation to guarantee its students’ free speech rights and to protect its students from censors is clear; its legal obligation to uphold First Amendment standards for speech under California Education Code Section 94367 (the “Leonard Law”) is indisputable. While removing a student from his position in the student media is highly suspect from a legal standpoint, Mr. Antebi is currently primarily concerned with avoiding any further punishment based on his viewpoint and expression.

The fact is that despite the stunning breadth of the three complaints against Mr. Antebi, none of them state a single claim that would transform Mr. Antebi’s speech from fully protected provocative speech to unprotected harassment. Fortunately for our society, the protection of the First Amendment does not end the moment satire stings local officials. Yet FIRE has often witnessed wanton and terrible misinterpretation of sexual harassment law in order to punish speech that some students find “offensive,” but which is clearly protected under the First Amendment.

In fact, over the past few years the misinterpretation of federal sexual harassment law by colleges and universities bent on chilling protected speech had become so rampant that on July 28, 2003, Assistant Secretary Gerald A. Reynolds of the U.S. Department of Education’s Office for Civil Rights (OCR) issued an open letter to all college and university presidents in the United States that clarified the relationship between harassment law, federal regulations, and the First Amendment (the letter is attached). Secretary Reynolds stated:

[I]n addressing harassment allegations, OCR has recognized **that the offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment** under the statutes enforced by OCR... Some colleges and universities have interpreted OCR’s prohibition of “harassment” as encompassing all offensive speech regarding sex, disability, race or other classifications. Harassment, however, to be prohibited by the statutes within OCR’s jurisdiction, must include

something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive. [Emphasis added.]

The OCR letter also explains that in order to qualify as sexual harassment under the law, the pattern of harassment “must be sufficiently serious (*i.e.*, severe, persistent or pervasive) as to limit or deny a student's ability to participate in or benefit from an educational program.” Indeed, Mr. Antebi’s radio show comes nowhere near the realm of sexual harassment, because in order for the complainants even to experience the allegedly harassing speech they would have to actively tune in to the show. By way of comparison, it is only common sense that someone who knowingly attends an R-rated film and finds the content objectionable does not have the right to have the film’s producers punished for “harassment.” Laws against harassment simply do not protect anyone who actively seeks to experience the allegedly “harassing” behavior.

While their charges of harassment have no basis in law or fact, the complainants are not without recourse. They are free to expose speech they see as offensive to the community, as they have done here. They are also free to bring their opinion of Mr. Antebi’s character to the student government, as they have done, and they are free to protest his views and expression in the student media and a variety of forums. What they are not free to do is to utilize the official power of Occidental College, a college bound by the standards of the First Amendment, to punish speech that offends them.

To be clear, highly offensive material, including profanity, is fully protected under the First Amendment. We strongly encourage you to read the landmark U.S. Supreme Court cases *Cohen v. California*, 403 U.S. 15 (1971), and *Hustler Magazine, Inc. et al. v. Jerry Falwell*, 485 U.S. 46 (1988). In *Cohen v. California*, the Court ruled that a Vietnam War protester's jacket bearing the words “Fuck the Draft” was constitutionally protected expression even when worn in a courthouse. Similarly, in *Hustler Magazine v. Falwell*, the Court ruled that the First Amendment protects even extraordinarily offensive satire and parody—in that case, a cartoon suggesting that the Reverend Jerry Falwell lost his virginity in a drunken encounter with his mother in an outhouse. Taken together, these cases decisively and clearly protect offensive material, farce, profanity, and exaggeration, and, in fact, even recognize that the “right to offend” serves a vital societal function.

A detailed examination of Occidental’s policies may reveal why its students have come to believe that they have a right to censor offensive words. Despite several “savings clauses” supporting free speech, Occidental’s policies attempt to make several forms of clearly protected speech punishable under college rules, including listing “Comments, questions, or statements of a sexual nature,” “jokes relating to gender or sexual orientation,” and “suggestive...letters” as examples of sexual harassment. Occidental College has done its students, particularly those who filed the complaints, a great disservice by incorrectly teaching them that such a wide range of sexual discourse could be forbidden on its campus.

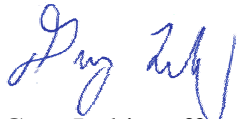
FIRE urgently requests that Occidental College end its proceedings against Jason Antebi and that no further action be taken against him on the basis of the content of his radio show. While your Sexual Harassment procedures list an *eventual* right to have a complaint dismissed “if the content that is the subject of the complaint is protected by the First Amendment of the United

States Constitution and Article 1, Section 2 of the California Constitution,” (stage seven of the formal complaint procedures) this procedural protection comes far too late in the disciplinary process. When expression, such as that of Mr. Antebi, is clearly protected, an institution bound by the standards of the First Amendment has no business investigating that expression in the first place.

Let me assure you that many individuals and organizations devoted to freedom and civil liberties are actively watching this attempt by Occidental College’s administration to roll back its students’ basic freedoms. FIRE is committed to using all of our media and other resources to support Mr. Antebi and, ultimately, to see this matter through to a just and moral conclusion. Furthermore, while FIRE is not a litigation organization, Occidental College should be aware that it is treading on legally untenable ground, and should carefully consider its actions in light of the many additional groups who have expressed support of Mr. Antebi’s legal rights. Please spare Occidental College the embarrassment of fighting against the principles enshrined in the Bill of Rights.

I look forward to your response.

Sincerely,



Greg Lukianoff  
Director of Legal and Public Advocacy

cc:

Frank Ayala, Jr., Dean of Students, Occidental College  
Kenyon Chan, Vice President for Academic Affairs/Dean of the College, Occidental College  
Sandra Cooper, General Counsel, Occidental College  
Maryanne Horowitz, Title IX Officer, Occidental College  
Eric Newhall, Associate Dean of the College, Occidental College  
Eric Frank, Associate Dean of the College, Occidental College  
Arthe Anthony, Associate Dean of the College, Occidental College  
Chris Craney, Associate Dean of the College, Occidental College  
Earic B. Peters, Assistant Dean of Students/Associate Director of Student Life, Occidental College  
Ross Papish, Associate Dean of Students/Director of Student Life, Occidental College  
Rameen Talesh, Associate Dean of Students/Director of Residence and Greek Life, Occidental College  
Jon Keates, Vice President for Institutional Advancement, Occidental College  
Harold Hewitt, Vice President for Administration and Finance, Occidental College  
Michael McDonald, Director of Special Initiatives, Occidental College  
Sara Dogan, National Campus Director, Students for Academic Freedom  
Mark Goodman, Executive Director, Student Press Law Center  
Manny Klausner, General Counsel, Individual Rights Foundation  
Peter Eliasberg, ACLU of Southern California  
Carol Sobel, Esq.  
Jason Antebi

Encl.



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

July 28, 2003

Dear Colleague:

I am writing to confirm the position of the Office for Civil Rights (OCR) of the U.S. Department of Education regarding a subject which is of central importance to our government, our heritage of freedom, and our way of life: the First Amendment of the U.S. Constitution.

OCR has received inquiries regarding whether OCR's regulations are intended to restrict speech activities that are protected under the First Amendment. I want to assure you in the clearest possible terms that OCR's regulations are not intended to restrict the exercise of any expressive activities protected under the U.S. Constitution. OCR has consistently maintained that the statutes that it enforces are intended to protect students from invidious discrimination, not to regulate the content of speech. Harassment of students, which can include verbal or physical conduct, can be a form of discrimination prohibited by the statutes enforced by OCR. Thus, for example, in addressing harassment allegations, OCR has recognized that the offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment under the statutes enforced by OCR. In order to establish a hostile environment, harassment must be sufficiently serious (*i.e.*, severe, persistent or pervasive) as to limit or deny a student's ability to participate in or benefit from an educational program. OCR has consistently maintained that schools in regulating the conduct of students and faculty to prevent or redress discrimination must formulate, interpret, and apply their rules in a manner that respects the legal rights of students and faculty, including those court precedents interpreting the concept of free speech. OCR's regulations and policies do not require or prescribe speech, conduct or harassment codes that impair the exercise of rights protected under the First Amendment.

As you know, OCR enforces several statutes that prohibit discrimination on the basis of sex, race or other prohibited classifications in federally funded educational programs and activities. These prohibitions include racial, disability and sexual harassment of students. Let me emphasize that OCR is committed to the full, fair and effective enforcement of these statutes consistent with the requirements of the First Amendment. Only by eliminating these forms of discrimination can we fully ensure that every student receives an equal opportunity to achieve academic excellence.

Some colleges and universities have interpreted OCR's prohibition of "harassment" as encompassing all offensive speech regarding sex, disability, race or other classifications. Harassment, however, to be prohibited by the statutes within OCR's jurisdiction, must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive. Under OCR's standard, the conduct must also be considered sufficiently serious to deny or limit a student's ability to participate in or benefit from the educational

program. Thus, OCR's standards require that the conduct be evaluated from the perspective of a reasonable person in the alleged victim's position, considering all the circumstances, including the alleged victim's age.

There has been some confusion arising from the fact that OCR's regulations are enforced against private institutions that receive federal-funds. Because the First Amendment normally does not bind private institutions, some have erroneously assumed that OCR's regulations apply to private federal-funds recipients without the constitutional limitations imposed on public institutions. OCR's regulations should not be interpreted in ways that would lead to the suppression of protected speech on public or private campuses. Any private post-secondary institution that chooses to limit free speech in ways that are more restrictive than at public educational institutions does so on its own accord and not based on requirements imposed by OCR.

In summary, OCR interprets its regulations consistent with the requirements of the First Amendment, and all actions taken by OCR must comport with First Amendment principles. No OCR regulation should be interpreted to impinge upon rights protected under the First Amendment to the U.S. Constitution or to require recipients to enact or enforce codes that punish the exercise of such rights. There is no conflict between the civil rights laws that this Office enforces and the civil liberties guaranteed by the First Amendment. With these principles in mind, we can, consistent with the requirements of the First Amendment, ensure a safe and nondiscriminatory environment for students that is conducive to learning and protects both the constitutional and civil rights of all students.

Sincerely,

A handwritten signature in black ink, appearing to read "Gerald A. Reynolds". The signature is stylized and cursive.

Gerald A. Reynolds  
Assistant Secretary  
Office for Civil Rights  
Department of Education