



FIRE

Foundation for Individual
Rights and Expression

July 6, 2022

Ruki Neuhold-Ravikumar
Office of the President
Kansas City Art Institute
4415 Warwick Blvd.
Kansas City, Missouri 64111

URGENT

Sent via U.S. Mail and Electronic Mail (president@kcai.edu)

Dear President Neuhold-Ravikumar:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech, expression, and conscience, and other individual rights on campus, is concerned by Kansas City Art Institute's expulsion of Ash Mikkelsen for sharing hentai¹—sexually explicit Japanese-style drawings—on their² personal pseudonymous Twitter account. While some may have found the images in bad taste or uncomfortable to view, KCAI's free expression promises preclude the school from punishing students for their artistic expression.

I. KCAI Expels Mikkelsen for Personal Twitter Account Featuring Hentai

The following is our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us. To these ends, please find enclosed an executed privacy waiver authorizing you to share information about this matter.

Ash Mikkelsen is an undergraduate student enrolled at KCAI who has paid their deposit to the school and registered for classes to start in the Fall semester. On June 15, 2022, Assistant Dean of Students Joe Timson sent Mikkelsen a letter stating that they would be investigated for contributing to a hostile learning environment and potential sexual harassment.³ Timson met with Mikkelsen later that day, and said the investigation was due to Mikkelsen's pseudonymous

¹ *Hentai*, OXFORD ENGLISH DICTIONARY, available at <https://www.lexico.com/en/definition/hentai> [<https://perma.cc/F3NB-6R8P>]. (Noun. "A genre of Japanese manga and anime characterized by overtly sexualized characters and sexually explicit images and plots").

² Mikkelsen uses they/them pronouns.

³ Letter from Joe Timson, Assistant Dean of Students, to Ash Mikkelsen (June 15, 2022) (on file with author).

personal Twitter account, @Contegoamour, where they often retweet hentai, which features artistic depictions of nudity and sex. The pseudonymous account clearly states that the content is fiction and is intended for those over 18 years old, with its Twitter bio stating: “Minors DNI!!! don’t like? BLOCK ME. NSFW! Problematic themes ahead. Fiction =/= reality. (23 years old)”⁴

On June 29, Mikkelsen met again with Timson. During this meeting, Timson told Mikkelsen they would be expelled for violating the Student Code of Conduct because of the “content and activity” of their Twitter account. Timson’s expulsion letter to Mikkelsen said that their social media content “has contributed to the development of a hostile environment and reflects potential Sexual Harassment.”⁵ The letter also says “the quantity of posts and their egregious nature reflect unacceptable behavior” and that the conversation Timson and Mikkelsen had on June 15 led Timson to believe that Mikkelsen feels “it is acceptable to glorify” the sexual acts displayed in the posts.⁶ KCAI gave Mikkelsen five business days, until July 6, to appeal the finding.

II. KCAI’s Free Expression Promises Prevent It from Punishing Students for Sharing Art on Social Media

While KCAI is a private institution not bound by the First Amendment to protect expressive rights, it has made clear promises that students enjoy these rights. Specifically, KCAI’s posting policy states that the school “supports the rights of the campus community to engage in free speech and open assembly.”⁷ Additionally, its assurance argument states:

KCAI is committed to freedom of expression and the pursuit of truth in teaching and learning, and this commitment is evident in the behaviors of faculty, staff and administration. We value intellectual and artistic curiosity together with critical and creative inquiry.⁸

Having made these strong commitments to protect student free expression, KCAI is morally and legally bound to uphold them.⁹

KCAI cannot avoid that commitment even insofar as its Code of Conduct says that “[i]n narrowly-defined circumstances,” it may “restrict expression, as for example, that violates the law, that falsely defames a specific individual, that constitutes a genuine threat or harassment,

⁴ Natsuo’s fat cock ring-COMMS OPEN (@Contegoamour), TWITTER, <https://twitter.com/Contegoamour> (last visited July 5, 2022).

⁵ Letter from Timson to Mikkelsen (June 29, 2022) (on file with author).

⁶ *Id.*

⁷ *Posting on Campus Policy*, KANSAS CITY ART INST. (Spring 2022), https://mykcai.kcai.edu/ICS/icsfs/22-23_FINAL_Posting_on_Campus_Policy.pdf?target=d3dde0f0-c0d9-4b2e-b6b4-72b21dbebc2a [<https://perma.cc/G9LV-ZRSW>].

⁸ *Assurance Argument*, KANSAS CITY ART INST. (Sept. 13, 2021), [https://mykcai.kcai.edu/ICS/icsfs/assurance_argument_\(5\)_1.pdf?target=64f7b028-5193-466d-8afe-c5bb30be0689](https://mykcai.kcai.edu/ICS/icsfs/assurance_argument_(5)_1.pdf?target=64f7b028-5193-466d-8afe-c5bb30be0689) [<https://perma.cc/343T-D22Z>].

⁹ *Corso v. Creighton Univ.*, 731 F.2d 529, 531 (8th Cir. 1984) (recognizing a contractual relationship between a university and students).

that unjustifiably invades privacy or confidentiality interests, or that interferes with the educational process central to the mission of KCAI.”¹⁰ Mikkelsen’s Twitter account does not violate any law, including laws related to obscenity. Nor do Mikkelsen’s posts meet any of KCAI’s other disciplinary standards that would remove it from the protection of KCAI’s free expression promises.

A. Mikkelsen’s Retweets Do Not Constitute Hostile Environment Harassment or Sexual Harassment

KCAI justified expelling Mikkelsen as punishment for non-Title IX hostile environment “sexual harassment,” which has no definition within the Student Code of Conduct. Given this lack of definition and KCAI’s free expression promises, students may reasonably expect the school to abide by the definition of student-on-student, or peer, harassment established by the U.S. Supreme Court.

In *Davis v. Monroe County Board of Education*, the Court held that student expression constitutes actionable harassment only where it is (1) unwelcome, (2) discriminatory on the basis of a protected status, and (3) “so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims’ educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities.”¹¹ By definition, this includes only extreme, and typically repetitive, behavior targeted at an individual—conduct so serious that it would prevent a reasonable person from receiving his or her education.

Prior federal guidance on addressing peer harassment, while simultaneously protecting free expression, is also informative. The Office for Civil Rights of the U.S. Department of Education has made clear that campus harassment “must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive.”¹²

KCAI’s obligations to address and remedy a hostile environment thus neither require nor permit the university to depart from its commitment to protect freedom of expression where speech does not meet the narrow legal standard for harassment. While some may have found Mikkelsen’s retweets on the @Contegoamour account to be subjectively offensive, that alone does not remove protection.

Mikkelsen’s retweets do not amount to conduct that “create[s] a hostile environment and/or substantially interfere[s] with access to a University program or activity,” and nor are they “severe” and “pervasive.” In retweeting these images, Mikkelsen did not tag any individuals or send any messages to anyone. In short, those who do not wish to encounter the posts can block Mikkelsen’s account—the modern equivalent of avoiding offensive speech “simply by averting

¹⁰ Student Code of Conduct, KANSAS CITY ART INST. (Sept. 2021), https://mykcai.kcai.edu/ICS/icsfs/20-21_Student_Code_of_Conduct.pdf?target=2283aeb9-edd0-4825-b90d-8d70d15eca4d [<https://perma.cc/5BJT-7ZBM>].

¹¹ 526 U.S. 629, 651 (1999).

¹² U.S. Dep’t of Educ., Dear Colleague Letter from Gerald A. Reynolds, Assistant Sec’y for Civil Rights (July 28, 2003), <https://www2.ed.gov/about/offices/list/ocr/firstamend.html>.

their eyes.”¹³ Additionally, no reasonable person would consider Mikkelsen’s retweets to be discriminatory on the basis of a protected class. The images—which consist of Japanese-style drawings of sex acts—do not reference a protected class nor do they discriminate against any individual.

This is particularly egregious given that KCAI argues Mikkelsen’s social media content “contributed to the development of a hostile environment”¹⁴ even though Mikkelsen and those in their academic class have not yet begun their classes or participated in a university program. And KCAI sanctioned Mikkelsen with the most serious punishment because the school believes Mikkelsen’s retweets “reflect[] *potential* Sexual Harassment.”¹⁵ The institution may not punish students for *potentially* violating university policy, and in this case cannot punish Mikkelsen because they did not violate policy at all.

B. Mikkelsen’s Posts Do Not Lose Protection Because They Are Subjectively Offensive

The principle of freedom of speech does not exist to protect only non-controversial expression. Rather, it exists precisely to protect speech that some or even most members of a community may find controversial or offensive.

The Supreme Court has made clear that sharing offensive ideas on campus is protected by the First Amendment.¹⁶ The freedom to offend some listeners is the same freedom to move others. As the Court observed in holding that burning the American flag was protected expression, the “bedrock principle underlying the First Amendment” is the notion that authorities “may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”¹⁷ In *Cohen v. California*, the Court aptly observed that although “the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive” expression, that people will encounter offensive expression is “in truth [a] necessary side effect[] of the broader enduring values which the process of open debate permits us to achieve.”¹⁸

While it’s clear that you and the individual who reported Mikkelsen’s account were offended by its content, that is not enough to strip away the free expression rights KCAI guarantees students.

¹³ *Cohen v. California*, 403 U.S. 15, 21 (1971) (anti-war jacket emblazoned with “Fuck the Draft” was protected expression).

¹⁴ Timson Letter, *supra* note 3.

¹⁵ *Id.* (emphasis added).

¹⁶ *See Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 670 (1973). FIRE understands that KCAI is a private institution and thus is not bound by the First Amendment to respect students’ expressive rights; however, First Amendment jurisprudence provides a helpful baseline to determine what “freedom of expression” institutions commit to protect through their free expression promises.

¹⁷ *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

¹⁸ 403 U.S. at 24–25 (1971) (holding that wearing a jacket reading “Fuck the Draft” was protected expression).

C. *KCAI's Mission Places Special Value on Artistic Expression*

Emphasizing that the value of any act of personal expression is subjective, the *Cohen* Court also famously said, “One man’s vulgarity is another’s lyric.”¹⁹ This principle takes on an added dimension at an institution like KCAI that educates students in art and design—areas of study that inherently involve creative expression. KCAI proudly states that it is a “makers’ school,” where “ambitious artists” come to “fashion[] an idea into matter.”²⁰ Undue restrictions on student expression—especially *artistic* expression—only stifle students’ creativity, an ironic result at an institution that advertises itself to “students who are passionate about the realization of their ideas.”²¹

Hentai is an artform dating back to the 18th century.²² Hentai is a genre of manga—Japanese style comic drawings—which includes images of sex. However, leading scholars in this field state that hentai is also about “persuasive . . . storytelling.”²³

Taste in art is, of course subjective. The history of art is in part a history of censorship of personal expression that some found beautiful and moving but many others found shocking and offensive, including depictions of sex or nudity that, for many artists and art admirers, express something meaningful about the human condition. Without robust freedom of artistic expression, those with the most delicate sensibilities are able to suppress creativity and innovation, preventing artists from “fashioning an idea into matter.” This is why expression with artistic value remains protected by the First Amendment from being considered legally obscene.²⁴

KCAI’s punishment of Mikkelsen for their retweets is particularly egregious considering that they did not create or share the art for a class assignment or project, but instead posted it on a personal social media account which was not shared with the university or any individuals within it. KCAI must understand that students will, on their own time, create and/or share art they find valuable. Given the institution’s promises of free expression and self-determination as a place where students can bring their artistic ideas to life, KCAI must not interfere with nor punish students for sharing art.

¹⁹ *Id.* at 25.

²⁰ *About KCAI*, KANSAS CITY ART INST., <https://kcai.edu/about> (last visited July 5, 2022).

²¹ *Id.*

²² Kimi Rito, *The History of Hentai Manga* 137 (2011).

²³ *Id.* at 12.

²⁴ KCAI did not allege in its investigatory or expulsion notices that the images Mikkelsen retweeted constitute obscenity. For content to constitute obscenity, it must meet the exacting three-prong *Miller* test, which requires that (1) it must, “taken as a whole, appeal to the prurient interest in sex;” (2) it must portray sexual conduct in a patently offensive way; and (3) when “taken as a whole,” it must “lack[] serious literary, artistic, political, or scientific value.” *Miller v. California*, 413 U.S. 15, 24 (1973). *See also Oklahoma ex rel. Macy v. Blockbuster Videos, Inc.*, 1998 U.S. Dist. LEXIS 22096 (holding that a film was a serious bona fide artistic work, and thus did not constitute obscenity).

III. KCAI Failed to Provide Mikkelsen Due Process Prior to Expulsion

KCAI also violated Mikkelsen’s due process rights by failing to provide them with the opportunity to properly contest the allegations before imposing the most severe sanction—expulsion. The opportunity to be heard is the most basic requirement of due process.²⁵

KCAI’s Title IX sexual harassment policy, which defines sexual harassment and sets out procedures for due process, would have required KCAI to give Mikkelsen an opportunity to contest the allegations against them *before* imposing punishment.²⁶ KCAI avoided this, however, by alleging Mikkelsen’s posts constitute sexual harassment that doesn’t fall under Title IX, but rather under the Code of Conduct more generally, despite the fact that there are no additional sexual harassment provisions in the code of conduct.

But KCAI fails to define sexual harassment in the Code of Conduct, leaving room for the institution to label any conduct punishable harassment. This violates the basic tenet of due process that rules clearly define proscribed conduct so as to avoid “arbitrary and discriminatory enforcement” and “give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.”²⁷ Vague policies—and the enforcement of nonexistent policies—chill expression, as students “steer far wider” of the prohibited zone “than if the boundaries of the forbidden areas were clearly marked.”²⁸

KCAI must immediately rectify the situation and provide Mikkelsen due process. If KCAI insists that there is actionable sexual harassment not governed by Title IX over which it has jurisdiction, it must also adequately define non-Title IX sexual harassment consistent with its broad commitment to free expression, which protects Mikkelsen’s retweeted art.

IV. Conclusion

As an institution that promises students expressive rights, KCAI may not punish students for sharing art others dislike. That some or all of Mikkelsen’s retweets might offend others—including administrators or students—is a wholly insufficient basis to infringe upon students’ expressive rights. That KCAI is an art school punishing a student for promoting artistic expression makes the infringement all the more egregious.

KCAI must rectify this misstep by rescinding its expulsion of Mikkelsen, clarifying its sexual harassment policies, and publicly reaffirming its commitment to student free expression.

²⁵ *Furey v. Temple Univ.*, 884 F.Supp.2d 223, 250 (E.D. Pa. 2012) (citing *Goss v. Lopez*, 419 U.S. 565, 581); see also *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629,635 (6th Cir. 2005).

²⁶ *Sexual Harassment*, KANSAS CITY ART INST., [https://mykcai.kcai.edu/ICS/icsfs/KCAI_Sexual_Harassment_Policy_\(Fall_2020\)_copy.pdf?target=404c4bd0-92c2-407c-bf8f-242f0f4335b5](https://mykcai.kcai.edu/ICS/icsfs/KCAI_Sexual_Harassment_Policy_(Fall_2020)_copy.pdf?target=404c4bd0-92c2-407c-bf8f-242f0f4335b5) [<https://perma.cc/44EF-JFQ7>].

²⁷ *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

²⁸ *Id.* at 109.

Given the urgent nature of this matter, we request receipt of a response to this letter no later than the close of business on Wednesday, July 13, 2022.

Sincerely,

A handwritten signature in black ink, appearing to read "Sabrina Conza".

Sabrina Conza
Program Officer, Campus Rights Advocacy

Cc: Joe Timson, Assistant Dean of Students
Gina Golba, Vice President & Dean of Student Affairs

Encl.

