



Foundation for Individual Rights in Education

210 West Washington Square, Suite 303 · Philadelphia, PA 19106

Tel: 215-717-3473 · Fax: 215-717-3440 · fire@thefire.org · www.thefire.org

Alan Charles Kors
CHAIRMAN

Harvey A. Silverglate
VICE CHAIRMAN

Erich Wasserman
EXECUTIVE DIRECTOR

Greg Lukianoff
DIRECTOR OF LEGAL AND
PUBLIC ADVOCACY

BOARD OF DIRECTORS

William J. Hume
Alan Charles Kors
Joseph M. Maline
Michael Meyers
Marlene Mieske
Daphne Patai
Virginia Postrel
Harvey A. Silverglate
Ed Snider
James E. Wiggins
Kenny J. Williams (d. 2003)

BOARD OF ADVISORS

David Brudnoy
Lloyd Buchanan
T. Kenneth Cribb, Jr.
Candace de Russy
William A. Dunn
Thor L. Halvorssen
Benjamin F. Hammond
Robert E. Hanrahan, Jr.
Nat Hentoff
Roy Innis
Wendy Kaminer
Woody Kaplan
Leonard Liggio
Herbert London
Peter L. Malkin
Milton Rosenberg
John R. Searle
Ricky Silberman
Christina Hoff Sommers

May 6, 2004

Sandra Cooper
General Counsel
Occidental College
1600 Campus Road
Los Angeles, California 90041-3314

Dear Attorney Cooper,

When I initially received your April 2, 2004, letter defending Occidental College's punishment of Jason Antebi, I was appreciative of the apparent time and effort you had put into answering our concerns. When the Foundation for Individual Rights in Education (FIRE) states in our letters, "We ask you to correct any misunderstanding of the facts, if any exists," we are quite sincere. In fact, many of FIRE's cases have been resolved by an effective answer on the part of a university administration. Upon further review of your letter and research of your facts, however, my opinion is quite different. Your explanation of the facts is often demonstrably false, you include unsupported allegations of wrongdoing, and you misinterpret case law, OCR regulations and ACLU policy to such a dramatic extent I can only conclude that such actions were willful.

I find no small irony in the fact that, at a time when the FCC and corporate radio seem bent on a campaign to ban "indecentcy" from broadcast, Occidental should become an unwitting partner in this latest wave of censorship. While Occidental may not understand why we must defend even the rights of the "shock jocks" of the world, we suspect that when the tide of censorship turns on expression dearer to Occidental's heart, you will understand the necessity of defending the speech of shock jocks like Antebi.

In your letter you wrote: "I assume that since your letter was copied to numerous individuals, you will assume responsibility for forwarding them" your April 2 letter. I am attaching both your letter of April 2 and my original letter. Due to the length of this letter I will not be sending it to a large number of those we listed on our initial correspondence, but I will be attaching additional individuals who expressed great interest in this case.

Update

It is essential to note that since sending our letter Occidental has taken some remarkable steps, including:

- 1) On March 30, 2004, Occidental President Ted Mitchell announced that he had decided to dissolve ASOC (Associated Students of Occidental College—the Occidental College student government). As justification for this dissolution, he described various “examples of abusive, intimidating, harassing behavior that have no place on our campus” that were “masquerading as open expression,” as well as “an unacceptable number of complaints and cross complaints involving ASOC officials.” Although President Mitchell did not cite Jason Antebi by name, almost all of the reasons Mitchell gave for closing down ASOC related to the college’s accusations against Antebi. The dissolution of the student government means that the college administration has taken over some \$441,000 in student fees¹ that would usually be administered by the students’ elected representatives.
- 2) In a report dated April 12, 2004, Occidental Title IX officer Maryanne Cline Horowitz ruled that Antebi’s broadcast did constitute sexual harassment against his audience. Horowitz’s ruling was in response to sexual harassment complaints from three students who were offended by the content of Antebi’s *Rant and Rave* radio show, and the ruling included findings based exclusively on Horowitz’s own reaction to the content of Antebi’s radio show.

Summary

Upon a careful factual review of the assertions made in your April 2 letter and in Horowitz’s report, and after examining literally hundreds of pages of documentation in this case, I conclude the following:

- 1) **The factual assertions made in your April 2 letter grossly and systemically misrepresent the facts of this case.**
- 2) **The sexual harassment claims against Antebi are baseless. Antebi’s speech was not in fact unprotected harassment, but rather fully protected speech under the First Amendment and California’s “Leonard Law,” which binds Occidental College.**
- 3) **Occidental’s legal errors and factual misrepresentations were so gross that they are either intentional or are part of an unlikely series of extraordinary errors that coincidentally supported the college’s claim that it has engaged in no wrongdoing in its behavior towards Antebi.**

¹ The source for this figure is Stuart Silverstein, “Occidental suspends student government; The college president says ugliness in campus politics got ‘out of hand.’” *The Los Angeles Times*, April 2, 2004, page B1.

- 4) **If (as appears likely) these false statements were intentional, then this series of factual misrepresentations, baseless accusations, and legal distortions were likely an attempt to deter groups like FIRE and the ACLU from aiding Antebi in this case.**
- 5) **Far from succeeding, this strategy has only made FIRE more committed to protecting the rights of students on Occidental's campus from these extraordinary abuses of power. These abuses are made all the more extraordinary by the fact that they have been aided and abetted by you, an attorney, constrained not only by the requirements of academic freedom but also by the ethical codes of our profession.**

**Factual and Legal Errors and Distortions In Your Letter
and in the Findings of Maryanne Horowitz**

After carefully examining the allegations in your reply letter, I cannot help but conclude that your account of the facts in Antebi's case is so highly selective and misleading as to create an almost entirely false picture of how the present situation unfolded. The greatest problem is that you recount numerous incidents and alleged incidents out of proper chronological order and in ways that imply chronological and causal relationships that not only do not actually exist but also that, in some cases, reverse the true relationships.

In the paragraphs that follow, I will try to put your allegations into the proper sequential and factual context, as well as to provide any necessary clarifications of your description of the events in question. With the chronology thus straightened out, I will then address the legal issues.

The "Leonard Law" and its Protection of Free Speech Rights at Private Colleges and Universities in California

As a preliminary matter, it is helpful to quote California Education Code 94367, the so-called Leonard Law, which imposes First Amendment and free-speech standards on Occidental College.

"California Education Code 94367. (a) No private postsecondary educational institution shall make or enforce any rule subjecting any student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article 1 of the California Constitution..."

Occidental's Leadership Retreat (August 2003)

The earliest distortion in your letter involves Jason Antebi's LiveJournal entry time-stamped 2003-08-15, 02:26:00 and titled "Retreat." (As you are no doubt aware, LiveJournal is a form of

“blog,” meaning a web site which consists of successive time-stamped entries written by the author. LiveJournal sites differ from other kinds of blogs in that they are “online diaries,” expressing immediate and often private feelings and thoughts for public or semi-public viewing.) On page 1 of your letter, you provided an excerpt from this entry to support your contention that Antebi is “attempting with both words and actions to silence students who disagree with his political philosophy.” On page 2 of your letter, you characterized this entry as deserving a formal disciplinary response because it “labeled [his political opponents] all as people who ‘should be murdered in their sleep by a santa suit wearing fat man.’” The paragraphs you quoted, along with the relevant context from the entry, are as follows:

Retreat

I hated the "leadership" retreat in palm springs. It was filled with loser kids who are all peppy about getting nothing done. they'll sit and cheer and clap and try to motivate each other. it was pathetic.

the facilitators preached socialism and told us that only white people an be racist. i didn't speak the entire three days i was there. well i did say "i wasn't listening" when the facilitator asked me a question.

it was such a fucking joke. oxy is such a fucking socialism peddling cunt. it's all about brainwashing students and anyone buys into the nonsense of only whites can be racist, should be murdered in their sleep by a santa suit wearing fat man.[...]

Both of your readings of the entry take individual sentences completely out of context. First, this entry was posted more than two weeks before the September 5 deadline for students to indicate their intention to run for ASOC offices, so it is not even clear that Antebi would have known who his political opponents would be when he wrote it. Second, the other parts of the entry make it clear that Antebi was merely using vivid language to complain about a leadership retreat he disliked, not attempting to “silence” his future opponents or incite the Santa-suit-wearing fat men of the world to carry out nocturnal political assassinations. One would think that the reference to these Santa-Assassins would signal to an honest investigator that this speech was not, in fact, a threat, but rather a hyperbolic expression of derision.

“Token Black Girls,” ASOC Firings, and a Nasty Break-Up (November-December 2003)

On November 4, Antebi’s KOXY show aired a short segment entitled “Token Black Girls.” In your letter you claim that Antebi created this segment in order to taunt or punish two students whom he had recently fired from the radio station. **That allegation is patently false.**

The promo for the episode, which was sent out to the campus multiple times in the Student Digest, described the “Token Black Girls” segment as follows: “Nena, Erika and Charm tell us what's hot on black girls, but not on white girls, and visa versa!” The three students named in the promo and who appeared in the segment were African-American friends of Antebi, and one of

them (Charmisha Baker) has informed FIRE via e-mail that she actually coined the phrase “Token Black Girls” with a satirical intent. In an April 18, 2004 e-mail she wrote:

We never attacked anyone specifically; the show discussed issues pertaining to race relations at Oxy. In fact it was myself who initially ‘coined’ the phrase Token Black Girls (I’m African American and the term was used as a joke). Jason only restated the phrase in the digest, in a jokingly and "as said by Charm" manner. The accusations surrounding "token black girl" should not be used as a technique to attack Antebi.

Nearly a month later, on December 3, the ASOC Senate voted to fire two African-American student workers—Adrian Carpenter and Sheena Johnson—over, respectively, management issues and misuse of ASOC funds.² Neither Carpenter nor Johnson was involved with or named in the November 3 show, although Antebi was the ASOC Vice President who led the committee that investigated where the funds had gone.³

Yet in an effort to prove that Antebi used his radio show to harass his political opponents, your letter posits a false connection between these two events—and does so *in reverse order!* You wrote, on page 2, “Students expressed their disagreement with his public ‘firing’ and humiliation of the African-American student workers. He then taunted the fired students in a campus wide advertisement for his radio show by characterizing them as ‘token black girls.’”

Again, the actual sequence of events was (1) the “Token Black Girls” segment aired on November 4, (2) the ASOC Senate voted to fire Carpenter and Johnson on December 3, and (3) some students subsequently disputed the Senate’s decision to fire them. It is both absurd and dishonest to claim that the November 4 broadcast was motivated by public reaction to the December 3 firing. Moreover, the promotional materials for the broadcast and the statements of the “Token Black Girl” guests themselves make clear that the segment title—“Token Black Girls”—was not aimed at Carpenter and Johnson.

Horowitz’s report repeats this distortion, blaming Jason for his use of the term “token black girls.” The report states, “That comment is sexist as well as racist— an epithet that implies an adult has a job, or for that matter a college admission that she does not merit.” This incorrectly characterizes the use of the term. While Antebi’s speech would still be protected if he had meant this speech in a more derisive way, the facts show the term was actually being used by African-

² One of the votes was later rescinded. The effect of this was that Johnson was briefly reinstated and then resigned. To be fully accurate, Carpenter was fired but Johnson resigned under pressure. For simplicity’s sake, however, I will simply refer to them as being “fired” in the remainder of this letter. This, after all, is the construction you adopt in your letter.

³ On page 2 of your letter, you described Antebi’s investigative role as being that he “used his position in student government to fire the students on college work study who disagreed with him.” This is another distortion. Antebi did not act alone; the Senate chose to appoint Antebi to lead the investigation, and subsequently voted to fire both Carpenter and Johnson. Both actions were undertaken by ASOC as a whole. Not only this, but Johnson’s December 4 resignation letter and Carpenter’s December 5 mass e-mail describing her firing both blame a *different* ASOC officer for spearheading the actions against them. To hold Antebi solely responsible for the investigation and the firing vote is unfair and contradicts the statements of the two students who were fired.

American students to mock tokenism. May we assume that Occidental's values do not preclude a student from mocking lingering racism, or is that, too, banned at Occidental?

To return to the actual chronology of events: On November 8, a student with whom Antebi was romantically involved broke up with him. Antebi then angrily posted the following entry in his LiveJournal, time-stamped 2003-11-09, 02:57:00:

A promise to those who have wronged me, who still read this because they r fucking pathetic flamers

What goes around, comes around. Don't you forget that you only get what you give. You know I'm talkign to you. I know you read this. I know your friends do too. Trust me when I say everything you have brought upon me will be delivered back to you with a vengeance never to be seen by anyone who knows me, and they could all attest to how fucking bad i get back at people who have wronged me. this will be worse.

i
promise
you.

And... the whole school knows about you.

Yet on page 1 of your letter, you describe this November 9 entry—which, again, occurred *before* the Senate voted to fire Carpenter and Johnson—as being a threat directed against the students who protested against the December 4 firing. On page 2 of your letter, you repeat this misrepresentation by describing the entry as a vow of “‘vengeance’ against the individuals he identified by name in his program.” In your letter you state, “There is no doubt as to the identity of the subject or his ire – he opined that he hated the elected representative of the College’s Womens’ Center.” **This is, again, demonstrably false.** We have even been contacted by the student who broke up with Antebi, who confirms that this LiveJournal entry was directed at the break-up, not at the student from the Women’s Center. Your characterization wrongly takes a 21-year-old’s words of anger at the person who just broke up with him, referring to events in their own relationship, and twists those phrases into a threat against completely different individuals, supposedly in retaliation for *events which had not even occurred at the time he posted this entry.*

The Program Director’s Resignation

On page 2 of your letter, you include among Antebi’s transgressions the following: He “demanded the resignation of the radio station program director who wanted to broadcast student government meetings.” This is another distortion.

The actual sequence of events was as follows: On February 9, KOXY program director Daniel Campagna submitted an e-mail to the Student Digest promoting KOXY’s live broadcast of

ASOC Senate meetings. In it, he denounced the ASOC Senate and stopped just short of calling them “fascists.” At the bottom of the e-mail, Campagna wrote, “KOXY: We get in trouble so you don’t have to.”

On February 10, Campagna’s e-mail was sent out to the entire campus as part of the Student Digest e-mail. After receiving the e-mail, several people, including Jason Antebi, complained to the station director about it. On February 12, Campagna resigned from his position at KOXY, stating, “It has become clear that the Station Director and I cannot trust each other and therefore can no longer work together. If I do not resign, Jennifer [the station director] will terminate me.” He lamented that “[his] presence has become incompatible with the new vision of KOXY,” and stated, “I take immense pride in what I have done for the station, the controversy and problems I have caused, and it has all made for Good College Radio. I will not apologize for any of this.”

While your letter correctly states that Antebi called for Campagna’s resignation, and also correctly states that Campagna was in favor of broadcasting student government meetings, you not only omit the fact that Antebi was not alone in calling for Campagna’s resignation, but you also omit the actual reason why Campagna resigned: there were serious conflicts between him and the station director over his refusal to apologize for sending an all-campus e-mail, under KOXY auspices, and that inflamed an already fractious relationship between the radio station and the student government. By failing to present all the relevant facts, your account has lied by omission, presenting a very misleading picture of the situation.

Problems Between Antebi and Student Government Advisor Ross Papish

On page 3, you write, “This sequence of events was punctuated by a plea for guidance from the Women’s Center students to the College’s Office of Student Affairs. When a College official attempted to mediate, Antebi responded by asking the official’s supervisor to remove him from interaction with the student government. When that was unsuccessful, Antebi filed a sexual harassment complaint against the official based on a humorous comment the official made, thereby making any further attempts to modify his behavior appear retaliatory. Then he contacted a donor to the College seeking to have the official’s job terminated.”

This account, like the others in your letter, provides a misleading impression of the timing and seeks to link unconnected events together.

Antebi and Ross Papish, the student government advisor,⁴ had a long history of strained relations. Antebi first brought this to the administration’s attention on August 10, 2003, when he wrote an e-mail to Dean Frank Ayala describing why he refused to have social contact with Papish. In that e-mail, Antebi wrote that about an hour after the funeral of Jake (a fellow Oxy student and close friend of Antebi’s who had committed suicide), Mr. Papish “was bragging about how ‘Jake looked up to me more than any other administrator’ just for the sake of saying it,” and then tried to talk about student government business—even after Antebi told Papish that

⁴ Although your letter does not name the “College official” against whom Antebi filed a sexual harassment complaint, I assume Ross Papish is the official to whom you are referring, since Papish is the only Oxy administrator against whom Antebi attempted to file a sexual harassment complaint (whether formal or informal).

he didn't feel like discussing it with him then. "Mr. Papish pretty much sealed the deal for me not wanting to ever be alone with him or deal with him again," wrote Antebi. "The only dealings I am mentally comfortable with are the ones that are necessary with eboard present, or with some email communications [...] I don't respect the attitude he gives me, nor do I respect the strategies he uses to get what he wants." Antebi continued, "He makes me uncomfortable. It's taken two years to get to this point. I've had problems with him the same way MANY others have. And I don't feel like he's being looked into the way he should be. [...] I hope you can help get it a bit more clear to him that I'm not doing things that make me uncomfortable, nor will I be harassed until I do it." Antebi followed this up with a meeting with Dean Ayala in which they discussed various comments Papish had made to Antebi and why Antebi found them offensive.

On September 30, Antebi wrote an e-mail to Richard Ledwin and Frank Ayala complaining that Papish was "offensive, intrusive, abusive and makes people very uncomfortable." Antebi continued, "He is not trustworthy and is very vindictive and I am willing to make a formal complaint along with many other students, if this is what we need to do to stop him from continuing to harass and annoy students."

On December 29, Antebi made an inquiry by e-mail to Maryanne Horowitz, the Title IX officer, describing the comments Papish made which made him feel uncomfortable. After she e-mailed him back and said that she would have to launch an investigation for any "incident involving a named administrator," Antebi described his situation as a hypothetical scenario and asked, "If this were to happen and a complaint was filed with you, is it something you would look into or is it the student being hypersensitive due to not having a positive relationship with this administrator?" As they continued to exchange e-mails over the next few days, Horowitz recommended that the hypothetical student file an "informal written complaint" with her: "If the sexual harassment has only been verbal (not something more not mentioned below), I'd advise the [student file an] informal written complaint." Such a complaint would, she wrote, allow her to "talk with the administrator, asking that he no longer have such personal conversations with the student." In a further exchange, she opined: "The negative aspects of the relationship seem to contain some Title IX elements but also some more general elements of campus civility. That hypothetical student could make a plea now to [Dean] Ayala concerning the negative repercussions of the complaint." Based on this exchange, Antebi filed an "informal written complaint" with Horowitz on January 2. Separately, he also complained to a college donor about the comments which Papish made regarding Antebi's recently deceased friend.

But what do Antebi's ongoing difficulties with Papish, and his January 2 informal written complaint about Papish, have to do with the undated "plea for guidance" on unstated topics that you say students from the Women's Center made to the Office of Student Affairs regarding Antebi?

Based on the records available to me, the only conflict that occurred prior to Antebi's complaint against Papish that involved Jason Antebi, and that could have led to a "plea for guidance" from Women's Center, is a controversial proposal which the ASOC Senate discussed in October 2003. That proposal was put forward on October 21 by the ASOC Policy Committee, which recommended that the Women's Center be consolidated into the "off-campus regulated constituency" for voting purposes. Students from the Women's Center objected to this proposal

because they believed it would make the Center have less representation on the Senate. During the discussion of the issue, Antebi permitted only senators to speak⁵—a decision which angered several non-senators who wished to deliver speeches against the proposal. I assume that Antebi's controversial decision on how to run the meeting is why, as you put it in your letter, some members of the Women's Center made "a plea for guidance" to the Office of Student Affairs regarding Antebi. In any case, ASOC chose not to put the proposal to a vote, so it never passed. Your objection to this process fits in well with Occidental's clear discomfort with the autonomy of the student government.

As with so many of the other things you try to link together in your letter, the two issues are unrelated. Antebi was upset enough with Papish to consider filing a formal complaint against him as early as September, and he eventually followed through on that by filing an informal written complaint against Papish in late December. This is a narrative that stands alone and has nothing to do with the Women's Center.

Your letter focuses on one issue with which the student government dealt (the October 21 proposal to consolidate the Women's Center into another unit) and tries to characterize Antebi's actual difficulties with Papish as being merely a strategic complaint to hobble Papish's mediation abilities. This is not accurate. Because of Papish's role as student government advisor, the two had numerous contacts (and presumably numerous arguments) dealing with a wide range of issues throughout that time. The dispute over the Women's Center proposal was only one of those, ***and it occurred a full two months before Antebi actually filed his complaint against Papish.*** The two events are, by any reasonable interpretation, unconnected. The only reason that it is so difficult to determine this lack of connection is that the maddening vagueness of the description you provide masks the true facts.

The Recall Petition

The following semester, several students (including some of the students who had been angered by Antebi's handling of the Women's Center consolidation proposal the previous semester) began to circulate a petition to recall Antebi from his ASOC Vice President position. You make two allegations regarding this petition, which I will deal with below.

From the descriptions that we have received, the recall petition process seems to have been extraordinarily nasty. We have received numerous e-mails from students describing how the recall petitioners made unfounded allegations against Antebi in order to get more signatures. Although most of these students wished to remain anonymous, three agreed to have their names published. Excerpts from those e-mails follow:

During the election, I was approached by a certain constituent asking what I believed about the recall attempt of Jason Antebi. I told her how i voted and why, and immediatly she expressed her

⁵ According to Antebi, this is how ASOC Senate meetings normally operated. Because Occidental removed almost all student government information from their web site after President Mitchell chose to dissolve ASOC, I am unable to determine whether or not ASOC ever adopted this as a written rule of procedure.

discontent with my actions. She had explained how those recalling Jason Antebi had told her he said racial slurs, sexually harrassed women, and most importantly made disparaging remarks on Jews. I told her he was a Jew, and to my knowledge I have never heard anything racist, sexist, or blantly offensive come out of his mouth. She didnt buy it, and listed the things he had done, which to my knowledge were completely false.

—James Luke Chalker, via e-mail

During the course of the recall, Jason was constantly protrayed unfairly by the petitioners. Many of my friends told me they signed the petition simply because the petitioners said Jason was a racist and sexually harrassed women. About 10 of my friends were misinformed in this manner.

—Gil Esquivel, via e-mail

Last week I was approached by a student I did not know who asked me to sign a petition to recall you [Jason] or remove you from office (whatever the correct way to phrase that is) During my brief encounter with this student I said no that I would not sign the form and I asked why they felt the need to remove you. They had a list of reasons the first being that you were not fair in senate meetings and other such related offenses. They also said that you were known to sexually harass people and that you had made racist remarks.

—Erin Christmas, via email

Also relevant is the following statement, which ASOC Senator Roy Nichols sent to the student newspaper in late January, in response to a reporter's questions about the petition:

The petition process is one of deception, deceit, and badgering. From what I have witnessed and heard the petitioners are purposely vague and forceful when people question their motives. The accusations grow at a preposterous rate each day as the petitioners become more desperate for petitions. The petition is wrongly tarnishing and questioning a hard working officer of senate.

I will address your two allegations against Antebi in turn.

On page 2 of your letter, you claim that Antebi “arranged to have a letter he prepared sent to the student newspaper under another student’s name, accusing his protagonists [sic] of lying to students in an attempted recall petition signed by 650 Occidental students (more than 2/3rds of those who had voted in the prior student government election).”

Antebi has told us that he was aware that the letter was being written and by whom it was sent, but he did not set up the arrangement and was not involved in writing the letter. If you have documentation that contradicts this, I would encourage you to produce it.

Moreover, the descriptions of the petition process above suggest that the letter, regardless of its origin, made well-founded accusations against the petitioners. Even if Antebi assisted in the writing of the letter, it is unreasonable to make Antebi's attempts at defending his reputation the basis for a formal disciplinary response, as you seem to suggest in your letter.

On page 2 of your letter, you also state that Antebi "used his position in student government to prevent the recall petition from being voted on by the student body." According to ASOC procedures (and the procedures endorsed by Dean Frank Ayala) the ASOC Senate must approve the petition as valid—meaning, among other things, that it accurately describes the facts supporting a recall—before it can be submitted to a vote of the student body. The "Typical Recall Procedures" that Dean Ayala and ASOC Advisor Joseph Martinez compiled and submitted to the Executive Board and Policy Committee during the recall petition process read:

‘Sustaining the validity of the reasons on the petition’ is defined as: Yes vote = I vote that the reasons stated on the presented petitions hold validity justifying the recall of the officer in question. No vote = I vote that the reasons stated on the presented petition do not hold validity justifying the recall of the officer in question.

On February 20, the Senate voted not to approve the petition as valid because most senators were not confident in the accuracy of the allegations. From my review of the minutes, everything appears to have been done according to the appropriate procedures, as decided upon by the Senate, under Dean Ayala's supervision. Antebi even took the voluntary step of removing himself from the room during the vote. Given these facts, I cannot determine how you concluded that Antebi "used his position" to prevent a vote from taking place, nor why you included this as one of the reasons for taking formal disciplinary action against Antebi. All that Antebi did was defend himself openly and tell Senators why he should not have been recalled. Is lobbying other senators an offense against Occidental's honor code?

Debate and dissension inside of ASOC and students' disagreements over the recall petition are at the heart of the current controversy, yet you have allowed the administration to be dragged into nasty partisan bickering. Rather than affirm the sometimes messy process of student government, you have taken sides and decided that instead of seeing the process through you would prefer to do away with student government altogether and proceed with politically inspired harassment complaints against one party in that conflict. And unfortunately, now that a student's basic rights are at stake, FIRE and other organizations are compelled to join this fight as well.

Harassment Complaints Against Antebi Regarding the March 11 KOXY broadcast

Your letter describes Antebi's March 11 KOXY broadcast in detail and suggests that it violated the federal Drug-Free Schools and Communities Act. It then alludes to the sexual harassment complaints that three students filed against Antebi after hearing the March 11 broadcast by embarking on an extended discussion of harassment, free speech, and hate speech. I will deal with the legal validity of what you say later; for now, I will focus on filling in the necessary background information that you left out of your letter.

As you know from your conversations with him, Antebi complained to various administrators multiple times about his door being vandalized by recall petition supporters, and also about **Female ASOC Complainant** and **Male ASOC Complainant**⁶ using the newspaper and the student digest to "spread lies about me." In February, he sought to file a harassment complaint with Dean Frank Ayala. You and Dean Ayala had meetings with Antebi to discuss his complaint, during which, according to Antebi's recollection, you told him that his complaints did not constitute harassment, that the college administrators were not his parents, and that he would have to fight his own battles with these students. Even if Antebi's recollection of the exact things said during the meeting is flawed, it is clear that there was no full-scale investigation of his claims. This is significant in light of the college's disciplinary response to his March 11 broadcast.

On March 11, Antebi and his co-host broadcast a show in which they promised to "get really trashed" and to "make fun of Dan and Vander Douche." During the show, both students pretended to take Vicodin (a prescription pain reliever)⁷ on the air, made insults to various people including Antebi's own mother, and detailed the adventures of a character named "Vander Douche" who was "half man, half vagina." The Vander Douche character was an obvious parody of **Male ASOC Complainant**, one of the senators who had unsuccessfully pushed for Antebi's recall and made various accusations against him in the school newspaper. Even if Antebi's remarks were not parody, they would be protected speech, but as parody they are part of a long tradition of parodic speech that has received extraordinarily strong protection by the U.S. Supreme Court. Indeed, in the case of *Hustler Magazine, Inc et al v. Jerry Falwell*, 485 U.S. 46 (1988), you will see that the Supreme Court justifies its protection of parody not *despite* its ability to wound its objects and targets, but precisely *because* of its power to do so. You are seeking to ban sharp parodic speech precisely because it contains the elements that, according to the Supreme Court, call for its heightened protection.

In your letter, you describe these admittedly sophomoric antics as possibly running afoul of the Drug-Free Schools and Communities Act and of contributing to the college's decision to take disciplinary action against him. Indeed, later that month, Antebi received notice that three sexual harassment complaints had been filed against him because of the March 11 show. All three complaints were filed by people who had unsuccessfully pushed for his recall the previous

⁶ All complainants' names have been changed to protect their identity from further unnecessary dissemination. FIRE's concern is with Occidental College's abuses of power. Students often try to abuse harassment and other regulations. FIRE does not become involved until college administrators give these abuses official sanction.

⁷ In your letter, you state that Vicodin is "otherwise known as OxyContin." That is not correct. OxyContin is a highly addictive Schedule II prescription drug (*i.e.* placed in the same closely regulated category as cocaine, PCP, and morphine). Vicodin is a Schedule III prescription drug and is more commonly prescribed by doctors.

month, and two of the complainants were the *very same* student government officers whom Antebi had accused of harassing *him* during the recall campaign.

The first complaint, by **Female Complainant**, was very short. It described how she was “horrified, hurt, terrified, offended, and left utterly speechless” by the way in which Antebi insulted his own mother, insulted the student newspaper editors, asked sexual questions of a Seven-Eleven employee, and mocked the upcoming Take Back the Night event. She listed no cause for her complaint other than having been offended.

The second complaint, by **Female ASOC Complainant**, was much longer and more detailed. In addition to describing and analyzing the elements of the show which had also offended **Female Complainant**, **Female ASOC Complainant**’s complaint noted the insulting nickname Antebi had allegedly created for her: “Sam the bearded feminist.” She concluded her complaint by making the remarkable argument that Antebi’s radio show should be considered *more* harassing than a personally harassing communication: “By disseminating his comments over the air and the internet, Antebi inevitably contributed to a hostile environment, not just for me and [**Male ASOC Complainant**] but for women at Occidental College and everywhere.”

In the third complaint, **Male ASOC Complainant** described the “Vander Douche” character on Antebi’s show and stated his claim for relief thusly: “For the last month, I have had to bear constant public sexual ridicule. All my friends have seen Jason Antebi’s statements in the Student Digest. Some heard his comments on the radio. I have to walk around campus every day wondering who is laughing at me for being the ‘Vander Douche,’ looking like a vagina, and spreading jokes of what I have up my ass.”

Antebi’s earlier complaint against **Female ASOC Complainant** and **Male ASOC Complainant** was properly dismissed as a matter for the free marketplace of ideas to resolve. By any reasonable and lawful definition of sexual harassment, the three students’ harassment complaints should have met the same fate. Yet the college decided to go ahead with a full-blown investigation against Antebi less than a month after it refused to do the same for Antebi’s complaints against the two ASOC members who complained. (Indeed, Horowitz’s findings, issued on April 12, 2004, reached the remarkable conclusion that the March 11 show was literally an “assault” on women that created a hostile environment for women and those who support them.)

There is a double standard at work here. Occidental’s recent production of the Vagina Monologues was permitted to use sexually explicit terms that many people would find offensive (for instance, “Cum to the Chapel to Pray” and “I would eat my pussy if only I could. Yum” were among the phrases that appeared in the advertisements for the Monologues at Oxy). The recall petitioners were allowed to call Jason Antebi, who is Jewish, a racist and an anti-Semite. And Antebi’s co-host was allowed to say many of the same offensive things as Antebi himself did. But when Antebi himself used sexually explicit humor on his radio show and used insulting nicknames for his political opponents, he suddenly became the subject of an aggressive sexual harassment investigation that forced him out of the KOXY radio station and made it extremely difficult for him to perform his duties in the ASOC Senate.

Claim that Antebi Excluded the Complainants after Harassment Claims Were Filed

On March 15, Title IX officer Maryanne Horowitz instructed Antebi to “refrain from all contact, physical and electronic, with [**Female ASOC Complainant**].” When he asked, “How is she supposed to come to Senate when I’m the one who runs the meetings? Or am I prohibited from going to Senate meetings now?” Horowitz made the eyebrow-raising suggestion that Antebi and the complainants “alternate attendance while the investigation proceeds.”

Given the extremes to which Horowitz was willing to take this “no contact” directive, it is not surprising that Antebi decided to obey Horowitz’s command by removing **Female ASOC Complainant** from the unofficial e-mail list which Antebi used to make announcements to other student government officers. He was, after all, told to cease *all* contact with her. When, on March 22, Horowitz then instructed him to include **Female ASOC Complainant** in “all notices you send to the Occidental College student body, to the Senate, to committees on which she serves,” Antebi decided to deal with the apparently contradictory instructions by deleting his e-mail list and not sending *any* such notices to *anyone*. He did, however, have difficulty deleting the list, so he e-mailed and later called the computer center (ITS) for assistance.⁸ During the time when it was being deleted, Antebi did not use the listserv.

On page 2 of your letter, you describe this process as follows: Antebi “unsubscribed those in student government who disagreed with him from the student government list serve, told College administrators that no such list existed, and then, within minutes, contacted the computer center asking frantically for help in eliminating the list serve from the College’s email system.”

Your description presents Antebi’s fully understandable attempt to comply with seemingly contradictory duties as a wanton and hostile act. Antebi removed **Female ASOC Complainant** (**Male ASOC Complainant** had not yet filed his complaint) from his e-mail list not because he disagreed with her, but because he was attempting to comply with the Title IX officer’s instruction that he “refrain from all contact, physical and electronic” with her. Upon receiving contradictory instructions, he then deleted the e-mail listserv entirely. If there had been fewer distortions of this nature I might be more inclined to believe you were simply unclear on your facts, but the sheer number of misrepresentations intended to bolster your position indicate to me that Occidental’s case against Jason Antebi is far weaker than you would have the public believe.

Other Accusations

On page 2 of your letter, you state that Antebi “opined that he hated the elected representative of the College’s Women’s Center, and labeled her by name, a ‘cunt.’” You also state that Antebi suggested his political opponents “should ‘be tarred and feathered’ on a campus web page.” I

⁸ I do not have access to ITS calling records, so I am unable to identify the exact intervals between Antebi’s various communications with ITS. Antebi tells me that it was about a week. This suggests that your characterization of Antebi’s call as being “frantic” is something of a stretch. That said, I would not be at all surprised if Antebi sounded agitated over the phone. I think it is safe to say that *most* people would feel agitated if they were subjected to the same Kafka-esque web of contradictory requirements which various administrators imposed on Antebi during the sexual harassment investigation.

am unable to find any documentation of either event. Nevertheless, as I will discuss later in my letter, both comments are protected speech.

On page 2 of your letter, you allege that Antebi “subscribed them [his political opponents] to ‘spam’ of all sorts, using campus computers.” Since you did not provide any documentation of this, and because the other assertions you have made which I have been able to fact-check turned out to be false or misleading, I am extremely skeptical of this assertion.⁹

On page 3 of your letter, you state: “The college is investigating the following:

- “Middle of the night sexual telephone calls placed to women who reside at the Campus Womens’ Center, who are also identified by Antebi in his various publications and radio broadcasts at ‘bitches’ ‘whores’ and ‘cunts’
- “Anonymous emails to members of the gay community at the College, alleging that these same women are ‘outing’ them
- “Defaced brochures in the student union advertising programs at the Womens’ Center with the words ‘cunt’ ‘bitch’ and ‘pussy.’
- “Two tires on a vehicle in the Womens’ Center parking lot were disabled, one by an apparent slashing, another by a screw that appeared to have been inserted.
- “Loud labeling by Antebi, of two of these same women as ‘bitches,’ as they crossed the campus to collect their mail.”

What I find significant about this list is that at the time of your letter Antebi had been formally charged with none of these offenses. It seems to have been just thrown in, as if it were okay to baselessly insinuate a student’s involvement in vandalism and other criminal acts. I suspect that the serious incidents among that list (the crank calls and tire slashings, for instance) will turn out to have no connection to Antebi whatsoever. Indeed, FIRE has an e-mail from one former Women’s Center resident and ASOC member, Queenie Chen, which states that in her experience (2001 to 2003), there have “always been crank calls made to our house.” FIRE also has an e-mail from student Ian McCurdy stating that he has seen “several people on different occasions” defacing Women’s Center brochures, but Antebi was never among them.

Like the rest of your letter, the inclusion of this laundry list appears to be part of an effort to create the illusion of a messy factual situation that would dissuade FIRE and other organizations from getting involved in his case.

Antebi’s Firing from the Student Radio Station

⁹ I should note that Maryanne Horowitz’s findings against Antebi in the sexual harassment complaints do include a more specific, apparently related allegation, that was not included in your letter: “The sending of spam on March 6, 2004 to [Male ASOC Complainant] from an ASOC computer, on which Antebi was the only one to log in before the spam and right after the spam.” Because that allegation first came to my attention during the writing of this letter, I was unable to investigate it further. However, spam—in the normal sense of bulk unsolicited commercial e-mail—is generally sent by either (a) e-mail servers controlled by the sellers themselves or their subcontractors or (b) computers which have been infected with viruses that turn them into e-mail relay servers without the knowledge of the user. So the new allegation is somewhat confusing unless the university is now accusing Antebi of *writing* spam or of knowingly allowing his computer to become infected with a spam-relaying virus.

In our letter we wrote, “While removing a student from his position in the student media is highly suspect from a legal standpoint, Antebi is currently primarily concerned with avoiding any further punishment based on his viewpoint and expression.” I believed this was clear enough indication that FIRE did not intend to pursue the firing of Antebi from his radio show. In your response you claimed, “The issue in this matter is not whether Occidental has infringed on Antebi’s free speech rights. It is whether the college is required to sponsor a forum to facilitate Antebi’s behavior, which includes hate speech as defined by both state and federal law, in his attempts to silence the speech of others.” Your characterization of the issue here is, like much of your letter, wrong. Occidental is going far beyond defending its choice not to sponsor a forum for Antebi; Occidental is attempting to punish him as a student for the content of a radio show, and has decided to dissolve the student government. If your statement had been true, and all that Occidental wanted to do was remove a host from his radio show, Antebi and FIRE would not be so concerned about this case.

While we are on the topic, however, it is important to note that Antebi was fired by the Dean of Students over the strong and principled objections of the student directorship of KOXY. I urge you to read the excerpts from the student director of KOXY Jennifer Clasen below. Her insightful objections apparently fell on deaf ears. The firing of Jason Antebi and the dissolution of the student government demonstrate a pattern of profound disrespect for student autonomy and decision-making at Occidental.

**From the Letter to Dean Ayala from Jennifer Clasen, 3/22/2004, Director of KOXY
Objecting to the Firing of Jason Antebi**

...Mr. Ayala, in all due respect, I wholeheartedly disagree with your decision to remove Antebi's show from the KOXY programming schedule...

Every week the newspaper publishes articles that cause backlash and at times, even outrage. However, it is understood that everyone is entitled to their opinion and that has to be respected. Additionally, if an individual is really dissatisfied with a perspective presented in the paper, they have the opportunity to publish their own opinion in various sections of the paper. The same opportunity is available at KOXY. If students disagree with the content of a show, they are more than welcome to come down to the station and present their own point of view. It is not appropriate, however, to shut down someone's program because a small minority of individuals are made uncomfortable. Again, this is a chance to create dialogue and debate. I assure you, that these issues will not die because Antebi's show is cancelled. On the contrary, they will begin to fester...

The beauty of radio is that when you don't like what you're listening to, you can turn the dial. For Antebi's show, people keep the dial on 104.7. We do not censor, and I'm not endorsing or enforcing your decision against Antebi because I feel something of a personal nature may be involved with this complaint that, for some reason, never went through KOXY.

Now that I have addressed many of the factual distortions in your letter, I will move on to identifying more of the legal errors presented in your letter.

The Sexual Harassment Claims

In our letter, we explained the sexual harassment claims against Antebi thusly:

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 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 Antebi’s shows that the students complained about were 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 Antebi due to the ‘offensive’ and ‘demeaning’ content of his radio program.

This characterization of the complaints remains accurate, and does not describe sexual harassment that a college may punish under the First Amendment or under the Leonard Law. If insulting or vulgar speech directed at someone on the basis of their politics could be banned, much of college—and, indeed, public—discourse could be easily silenced.

I will now go over some of the factors elucidated by case law to demonstrate why Antebi’s speech did not constitute sexual harassment.

1) The conduct was not “discriminatory”

As Justice Ginsberg wrote in her concurring opinion in *Harris v. Forklift Systems*, 510 U.S. 17 (1993), the “critical issue” in any sexual harassment case is “whether members of one sex are exposed to [treatment] to which members of the other sex are not exposed.” Unless behavior impacts the sexes differentially, it cannot be sexual harassment.

Jason Antebi’s show, like many college radio shows, was intentionally obnoxious—that was why it was named *Rant and Rave*. The targets of Antebi’s on-air mockery included whites, alcoholics, drug users, “straight-edges,” his cohost, his former cohost, Mormons, Christians, Jews, Jehovah’s Witnesses, doctors, lawyers, Democrats, Republicans, feminists, “hippies,” the Christian Right, Alan Colmes, Greta Van Susteren, Bill O’Reilly, Al Franken, campus safety officers, women, men, children, space aliens, Star Trek fans, Star Wars fans, Matrix fans, porn actors, people who don’t own Diesel shoes, people who wear socks with sandals, short people, tall people, fat people, skinny people, “web nerds,” TV characters, KOXY management, and even himself. Far from being targeted discrimination, the “rant” aspect of *Rant and Rave* was often quite indiscriminate. The very fact that the both men and women complained about Antebi’s show demonstrates that the offensiveness was more general. Antebi was, to borrow a hackneyed phrase, “an equal opportunity offender.”

I would like to quote again the July 28, 2003, letter from Assistant Secretary Gerald A. Reynolds of the U.S. Department of Education's Office for Civil Rights (OCR):

[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.]

Again, the complaints against Antebi state little more than that Antebi's speech was offensive to some members of the Occidental College community. When a radio host sets out to challenge a community's sense of politeness or decorum, he or she is engaging in protected speech. Institutions of power are not allowed to do an "end run" around such protections by reclassifying "offense" as "discrimination."

2) The discrimination must be "because of sex"

As should be common sense, sexual harassment cannot be said to have taken place if there was no discrimination on the basis of sex. Otherwise merely rude speech could be punished in almost every circumstance. Title IX's prohibition of "discrimination" "on the basis of sex" is interpreted as equivalent to Title VII's prohibition on "discriminat[ion] ... because of ... sex."

Horowitz's finding strains itself to the point of absurdity in order to turn Antebi's omnidirectional jokes into discrimination on the basis of sex:

a) "Vander Douche"

The complaints and Horowitz's finding make much of Antebi's reference to a figure named only as "Vander Douche." The complaint of **Male ASOC Complainant** is primarily focused on the use of this insulting nickname. FIRE has collected information that indicates that this unfortunate nickname for **Male ASOC Complainant** is actually quite common and that its use preceded Antebi's radio show. Unfortunate and derisive nicknames for students and campus student officials are nothing new, and many students have to put up with being labeled things far worse than "Vander Douche."

The nickname is clearly intended as a mockery of the student's name and a personal insult; however, Horowitz's report has concluded that this is both sexual and ethnic harassment:

Similarly, he applied hostile sexual and gender epithets and ancestry/country of origin to the Dutch name of [**Male ASOC Complainant...**], Mr, Antebi turns [**his last name**] into "Douche," an instrument designed for women to utilize for vaginal cleansing, and Antebi states 'And Vander Douche who looks like a

vagina.’ Thus, Antebi, an officer in the ASOC, distorted the imagined face of a fellow student, attributing to him a female body part in location suggestive of oral sex.

This, frankly, is one of the strangest paragraphs I have seen in my time as an attorney. The conclusion that this is “suggestive of oral sex” is extremely strained (not to mention bizarre), and at no point indicates that Antebi’s use of the student’s unfortunate nickname was on the basis of sex.

Antebi and this student are political rivals; indeed, **Male ASOC Complainant** was one of the students who attempted to have Antebi dismissed from student government. You may not like his nickname or the fact that Antebi is rude to this student, but his political and personal disagreements with him do not transform this into harassment “because of sex.” Fortunately, there is no equivalent form of punishable “offense on the basis of political and personal dislike.” If there were, all of Washington, D.C., could be arrested.

One of the Multiple Letters Indicating the Pervasiveness of the “Vander Douche” Nickname

My name is Jeremy Gruber and I am a freshman at Occidental College in Los Angeles, California. The reason for this e-mail is to explain occurrences on campus regarding the "nicknaming" of [**Male ASOC Complainant**] and the radio show hosted by Jason Antebi titled "Rant and Rave". It is to the best of my knowledge that [**Male ASOC Complainant**] 's campaign posters depicted his running for the position of Residence Hall Representative, posted mainly in Chilcott residence hall where he resides, had been written over in permanent marker with nicknames such as "Van Der Douche" and "Van Der Mooch". These "nicknames" were started by a college student with a magic marker, not a student with a radio show. It is also to the best of my knowledge that these nicknames were not created during Antebi's radio show but by a rebellious student who obviously felt [**Male ASOC Complainant's**] views were either corrupt or incorrect. Although the incident is unfortunate, it cannot be solely placed on the shoulders of Antebi.

Regards,

Jeremy Joseph Gruber, Occidental Class of '07

b) “The bearded feminist”

Horowitz’s reply states: “I concur that Antebi made hostile sexual and gender based characterizations of two of the complainants. He applied a satiric anti-feminist caricature for [**Female ASOC Complainant**], a Senate Representative of the Women's Center, with ‘Let's talk about the bearded feminist named Sam. You stupid bitch.’ Other evidence shows that Antebi uses the name ‘Sam’ to identify [**Female ASOC Complainant**].”

First, this finding admits that the school would have to appeal to other evidence in order to even prove who this nickname was directed against. Second, mocking someone as a “bearded feminist” does not indicate harassment because of sex; rather, it indicates harassment on the

basis of political difference. As for his use of the term ‘bitch,’ not only does case law firmly establish that the use of profanity cannot be banned under the guise of sexual harassment law, but a quick consult of popular culture (I recommend watching the very popular *Dave Chappell Show* in order to familiarize yourself with modern slang) will demonstrate that the word ‘bitch’ is increasingly used as a cross-gender insult. The First Amendment does not provide an exception for insulting nicknames or rude words. Indeed, as should by now be obvious, rudeness, especially to make a parodic or political point, is worthy of the *highest* constitutional protection. Neither the Supreme Court nor the First Amendment are in the least bit grudging or apologetic in conferring this protection.

3) Hostile Environment does not include exposure to expression actively sought out

We wrote in our original letter, “Indeed, 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.”

In order to be sexual harassment, the harassment must be “unwelcome.” While this does not mean that the allegedly harassed must actively protest every time they are exposed to the harassment, it does certainly eliminate from consideration of harassment speech that one must actively seek out. You will recall that in order to hear Antebi’s allegedly harassing speech, the complainants had to actually tune into and record *Rant and Rave*.

A few facts about KOXY student radio: According to Gil Esquivel, KOXY webmaster, there are two ways students may listen to KOXY radio. One is by broadcast signal; the signal is very weak and reception is poor even on campus. The other way is by streaming audio which students can access via the Internet. According to Esquivel, this system does not have the capacity to allow many more than 20 people to listen to the radio station at once. Esquivel reports and ASOC meeting notes confirm that KOXY’s programming is difficult to get and listenership is quite low.

Furthermore, students are aware of and warned of the content of KOXY programming. **For example, on Wednesday February 25, 2004, the advertisement for *Rant and Rave* concluded with this disclaimer: “Don't listen if you're easily offended.”** This makes the comparison to an R-rated movie even more apt. Surely, a student tuning into a heavily advertised show that he or she knows has offensive content and has been warned by the hosts themselves that the show may be offensive has no right to then press charges of sexual harassment against the host if the content is, in fact, offensive.

4) Additional restrictions on peer to peer harassment in the education context

Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999) is the only Supreme Court case to deal with peer-on-peer harassment in an educational setting. That case clearly established that

the analysis for deciding if a pattern of behavior is substantially ratcheted up from the standard that would establish harassment in the employer-employee or faculty-student context. The analysis prescribed by the Supreme Court requires the conduct in question be sufficiently “severe,” “pervasive,” *and* “objectionably offensive” to have a “systematic effect” that “effectively bars the victim’s access to an educational opportunity or benefit.” It also suggests that in evaluating these questions, the “constellation of surrounding circumstances, expectations, and relationships” must be considered.

With regards to severity, the behavior at issue in *Davis* was a quantum leap beyond the behavior implicated here. It involved repeated groping, fondling, and invasion of personal space to such an extent that the perpetrator was eventually charged with and pleaded guilty to sexual battery. The Court, in fact, specifically noted that in *Davis*, the “harassment was not only verbal; it included numerous acts of objectively offensive touching.”

Davis even states, “It is thus understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it. **Damages are not available for simple acts of teasing and name-calling among school children...**” [Emphasis added] Antebi’s occasional use of insulting nicknames on his radio show is clearly not the kind of expression the Supreme Court intended to proscribe in its opinion in *Davis*.

Furthermore, speech that must actively be sought out is certainly not “pervasive” by any definition of the word. Both of the complaints could have easily avoided the speech by not tuning into the college radio station to listen to *Rant and Rave*. Finally, the students who filed the complaints against Antebi provide no evidence that they have been effectively barred from their educations by Antebi’s radio show. In fact, from the aggressiveness of the two members of student government it appears that they were quite able to defend themselves in this case. The harassment claim against Antebi fails on virtually every factor established by *Davis*.

It is important to note that *Davis* took place in the context of a public grade school. Since the Supreme Court has found on numerous occasions that the protections of the First Amendment are far greater in college context and at their lowest ebb in the grade school context, it is hard to imagine the severity of behavior necessary to trigger a finding of actionable peer to peer harassment in the higher education context.

OCR and ACLU Language Do Not Support Harassment Finding

As a loyal member of—and former research assistant during law school for—the ACLU, I can say with great confidence that the ACLU would be horrified to see that its language is being used to justify punishing a college student for the content of his satirical radio show. (I should also note, parenthetically, that Harvey A. Silverglate, a co-founder and current vice-chairman of FIRE, has for many years been a member of the Board of Directors—and indeed is a past president—of the ACLU of Massachusetts. It is not Antebi’s behavior, but rather that of the college and its administrators, that is shocking to an ACLU activist.) Even the ACLU language you quoted (“For example, threatening, bias-inspired phone calls to a student’s dorm room, or white students shouting racist epithets at a woman of color as they follow her across campus –

these are clearly punishable acts”) indicates that the ACLU is talking about a directed pattern of behavior that invades a student’s personal realm at improper times, in inappropriate places, and/or in a directed and persistent manner. Both FIRE and the ACLU agree that these sorts of behaviors—most similar to stalking or common law harassment—are punishable. However, mere televised or broadcast insults do not rise to this level.

Also, as someone who has consulted with the Office of Civil Rights, I am exceedingly confident that the OCR would not deem Antebi’s behavior harassment. In fact, the very reason why the OCR issued its July 18, 2003, letter was to prevent the rampant and pervasive abuse of the legal concept of “harassment” to punish clearly protected speech.

The Speech in Question is, in fact, Clearly Protected Speech

Antebi’s performances on *Rant and Rave* are not merely outside of the legally punishable definition of harassment; they are also well *inside* the category of protected speech which Occidental is obliged to honor under the Leonard Law.

1) *Rant and Rave* was Parody and Satire

In her findings, Horowitz states, “The venom of the oral delivery eliminates the possibility of humorous interpretation. The show is ill prepared, with long pauses when making random telephone calls and ignorant buffoonery in attempting to speak Spanish. It has no redeeming aesthetic or literary merits; it aims to appeal through misogyny.”

Besides confusing the issue by introducing only part of the standard for obscenity (I hope it will suffice for me to assure you that Antebi’s speech is nowhere near the line where it could be banned as obscenity), this excerpt is remarkable because it indicates the administration’s apparent belief that if it finds something unfunny, it is therefore not protected satire or parody. The very fact that institutions of power so often do not “get the joke” is why satire and parody are so absolutely protected.

One of the problems with judicial considerations of humor is that when a joke is separated from context and placed in quotes it may suddenly look very grave indeed. One can imagine how certain quotes from Chris Rock or Lenny Bruce would look printed out of context in a legal opinion. Therefore, permit me to print, in full, one of Antebi’s ads for his show *Rant and Rave*.

-----Original Message-----

From: Jason Robert Antebi

Sent: Sun 11/9/2003 8:55 PM

To: oxy.students@oxy.edu

Cc:

Subject: The most Uncontroversial and Positive show on KOXY!!! You won't be offended, we promise.

The MOST UNCONTROVERSIAL SHOW OF THE YEAR!!!

If you are only going to listen to ONE KOXY show this year... tune into another show, but if you were to only listen to four or five shows, THIS is the one you shouldn't miss!

THE MOST POSITIVE SHOW OF THE YEAR! EVEN YOUR MOTHER COULD LISTEN!!!

Our show, heard every Tuesday night from 10pm-12am on KOXY 104.7 FM, has changed formats!! No more offensive and fun shows!!

On this week's show...

- What is YOUR favorite rainbow color?
- Name that New Testament verse!
- The virtues of building "bridges of communication" so that whites and non-whites can come together and create positive social change!
- Why puppies and kittens are soooo cute!!
- Why it's okay to be "different".
- Why it's wrong to make fun of people who are too sensitive for their own good.
- "Jew Talk" is replaced with "Mad About Jesus".
- Songs by the most positive musicians of our time, like John Denver and the Celine Dion.

Please join the bipolar Jason "Absolutely Affirmative" Antebi and the painfully shy Sam "Magnificently Positive" Mowe as we talk about loving life and living every day to its fullest (without the use of prescription drugs)!!

KOXY 104.7 fm.

Rant and Rave with Jason and Sam. Every Tuesday nights.

Sponsored by the OXY Libertarians.

It's a show even the ICC would approve of.*

*We make no claims as to what the ICC would approve of.

This ad contains virtually all of the elements that have gotten Antebi into his current predicament. He mocks sacred cows of the college, political correctness, prescription drug abuse (an issue currently haunting another, better known radio host), and hypersensitivity, but surely it is obvious in this ad that Antebi is engaging in parody and satire?

It is helpful to note that students do, for the most part, seem to "get the joke." According to Jennifer Clasen, Director of KOXY, "Antebi's show is one of the most popular programs at KOXY."

As we stated in our previous letter:

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.

We stand by this applicability of this analysis. Antebi's speech is clearly protected satire and parody.

2) Antebi's insults of his own mother and of "Take Back the Night"

In her complaint against Antebi, **Female ASOC Complainant** noted the fact that Antebi has mocked his own mother on the air and argued, as part of her sexual harassment claim, that this showed a lack of respect for women in general. In her findings, Horowitz transmogrifies Antebi's jokes about his own mother into negative "treatment of the category 'mother'" that constitutes "sexual harassment and gender harassment of his mother and friends' mothers." Both your letter and Horowitz's finding note that Antebi had also mocked the yearly "Take Back the Night Rally."

First of all, it is extremely odd that a university would think it has the right to interfere when a student mocks his own family. Unless his mother has written in to complain, this is not discrimination in any form, and remains a joke between Antebi and his family.

Again, I ask Occidental College to look into what it would doubtlessly find to be the less pleasant aspects of modern youthful communication. Often, the intention of those of the younger generation is to mock the values of the older one. Jokes mocking one's own mother and "mothers" in general have been a mainstay of sophomoric humor for at least the past few decades. (If you doubt the pervasiveness of tasteless jokes against mothers I recommend visiting any of the approximately 35,300 "Yo mama joke" websites listed on Google. I do not endorse or recommend the "humor" on any of these sites; I only list them to demonstrate that the category of "mother jokes" is so old and extensive that many of the current generation would not bat an eye at these jokes.)

As for Antebi's comments about "Take Back the Night," it should be clear by now that the intent of *Rant and Rave's* brand of humor is to shock, and to mock the values of the community. As numerous cases such as *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386 (4th Cir. 1993) establish, students have the right to mock even the most sacred values of the university they attend. In fact, given young people's tendency to rebel, such mockery is virtually guaranteed, no matter what those values may be. Furthermore, Antebi also claims that

in mocking “Take Back the Night” he was, in part, being “ironic.” He points out “most of my friends who listen know I was a member of a committee that helped plan the Take Back the Night meeting the year before as well as push for the school to adopt a better sexual assault policy, when I served as a senator.” This is confirmed in a letter to FIRE by Jeremy Glatstein, founder of Occidental’s *Sons and Brothers* club, describing Antebi as “an invaluable ally and friend” who fought “to institute a Zero-Tolerance policy for sexual assault both inside student government” and who led by example, “attend[ing] *Take Back the Night* as well as multiple events during *White Ribbon Week*.”

Regardless, whether Antebi’s remarks were merely intended to shock, mock his own loudness, or to simply be ironic, his speech was protected.

Judging from Occidental’s impression of a First Amendment of fairly limited scope, I think you would be surprised at the range of speech that the Supreme Court has deemed to be protected. In *Terminiello v. Chicago*, 337 U.S. 1 (1949), the Court reversed a disturbing-the-peace conviction of a notorious racist and anti-Semite. Justice Douglas wrote that speech is protected even when its purpose is to “induce a condition of unrest, create dissatisfaction with conditions as they are, or even stir people to anger.” In another important civil rights case, *Gooding v. Wilson*, 405 U.S. 518 (1972), the Court reversed the conviction of a citizen who called a police officer a “white son of a bitch” and added “I’ll kill you.” In *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667 (1973), the Court ordered the reinstatement of a journalism student who had distributed a cartoon depicting policemen raping the Statue of Liberty and the Goddess of Justice. **The Court held that “conventions of decency” did not dictate what speech was protected on a public college campus.**

3) Viewpoint discrimination

As noted above, Antebi himself attempted to file a harassment claim that was certainly no more frivolous than the three complaints listed above. However, while Antebi’s claim was summarily dismissed, the complaints against Antebi were not only allowed to proceed, but he has actually been found guilty by Horowitz’s report.

In your letter you state that the Supreme Court case of *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), is not applicable to this case, as if you were refuting a case I had mentioned (I did not, in fact, mention it). You go on to state “Indeed, FIRE has attempted to do exactly what Justice Scalia found unacceptable in *R.A.V. v. City of St. Paul*: ‘[L]icense one side of a debate to fight freestyle, while requiring the other to follow the Marquis of Queensbury Rules.’”

I am simply mystified as to what this means; it is a peculiar misapplication of Supreme Court language. I think you are suggesting that it is somehow inappropriate that Antebi is free to espouse whatever viewpoint he likes while the college is not free to punish him. I hope we have not reached the point where the distinction between speech and action is so badly muddled that one cannot distinguish between an “objectionable” opinion and an official sanction.

The above quote from *R.A.V.* means that under the First Amendment the state may punish certain categories of speech, but it **may not** decide to only punish certain kinds of speech within that

unprotected category on the basis of the speaker's viewpoint. While Antebi's speech is clearly protected speech, even if something were to transform it into unprotected harassment, Occidental would be barred from punishing Antebi due to its selective enforcement of the code on the basis of viewpoint.

The Drug-Free Schools and Communities Act

As stated above, you mention a show in which Antebi pretended to take prescription drugs while on the air. You imply that this is somehow punishable "given the requirements of the federal Drug-Free Schools and Communities Act and the concomitant College policy." Merely joking about taking a drug is protected speech. In fact, Antebi is even free to advocate and encourage the use of illegal drugs under the First Amendment.

If, however, you have proof that Antebi was, in fact, illegally abusing prescription drugs while on the air, I would be interested in seeing this evidence. I hope you will understand that, after the pattern of distorting facts that we have established above, I am skeptical of this assertion.

The laundry list of additional allegations implied against Antebi

1) The apparently baseless accusations of criminal wrongdoing

As noted above, your letter implies that—in addition to engaging in offensive speech—Antebi may be linked to telephone harassment, anonymous e-mail harassment, vandalism, slashing students' tires, and rudely shouting at fellow students from across the quad. From the documents I have seen since then, however, it appears that Occidental is no longer investigating Antebi for being involved in the phone calls and the tire slashing and is proceeding only with investigating the drug claims and the newly added allegation of "unauthorized access to college facilities."

Publicly accusing Antebi of such serious crimes, if you had no evidence, not only shows ruthlessness and bad faith, but is textbook defamation. Accusations and innuendo without evidence from people in positions of power constitute a terrible abuse of that power. Again, if you have any evidence that Antebi took any part in the crimes listed above, I ask you to produce that evidence. If you cannot, it will further confirm my belief that listing of these crimes was a corrupt attempt to dissuade organizations like FIRE and the ACLU, who may wish to defend Antebi's free speech rights, from coming to his aid.

2) Accusing Antebi of encouraging criminal wrongdoing by his speech

Horowitz's report states: "The power of Antebi's verbal assaults waged in this radio program and other publications, and directed at identifiable individuals, was evidenced in the actions that proceeded and followed them, I have been informed that the College is still investigating several incidents. Not all of them may be directly attributable to Antebi, but they echo his intimidating, threatening and demeaning tone."

The implication seems to be here that Antebi's speech made these crimes possible or more likely. This echoes the "bad tendency test" of the early twentieth century that allowed courts to punish any speech that they could conclude had a tendency to result in eventual bad behavior. (Please see David Rabban's excellent work, *Free Speech in its Forgotten Years*.) That test has long since been abandoned since it provided scant protection to free speech. Reviving such a standard not only violates our modern definition of free speech but brings us back to the parallels with the censorship of the Victorian era that Occidental seems to be so willingly cultivating.

As I suspect you already know, *Brandenburg v. Ohio*, 395 U.S. 444 (1969) limited restriction of speech to "advocacy [that] is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." That case involved a rally and speeches by members of the Ku Klux Klan, suggesting that violence against blacks and Jews might be appropriate to protect white Christian society. Even in this case the mere advocacy of violence was protected as long as the speaker took no steps to implement it. In the current case, the unverifiable assertion that Antebi's speech somehow convinced others to commit these various and sundry crimes is both morally and legally off-target. The law recognizes the basic moral principle that the responsibility for destroying property or terrorizing individuals rests with the perpetrator of those acts, not with every potential intellectual influence that may exist in the media.

Conclusion

The understanding—or lack thereof—that Occidental's administration has shown of fundamental precepts of constitutional law and academic freedom is shocking. To help remedy this, I am sending you under separate cover two copies of *The Shadow University: The Betrayal of Liberty on America's Campuses*, authored by FIRE's co-founders and current Board of Directors members Alan Charles Kors and Harvey A. Silverglate. One copy is for the use of you and your fellow administrators; the other copy is FIRE's gift to Occidental's library. I suggest that you read, in particular, the excellent chapters on free speech (chapter 2), academic freedom (chapter 3), and, in light of how you have tried to railroad Antebi, due process (chapter 11).

In your letter, you wrote, "It is ironic that an organization dedicated to freedom of speech and expression in colleges would choose to intervene in the Jason Antebi matter." Upon detailed examination of your claims I find much irony, but none of it has to do with FIRE's decision to defend the free speech rights of Antebi. FIRE exists to defend students' rights, and your college is engaging in a gross pattern of abuse of students' rights. It would only be ironic if we agreed with you.

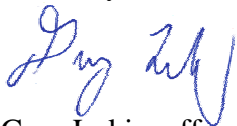
It is quite clear that Antebi is a very controversial character. He has loyal fans and ferocious critics. The university newspaper and the university's administration seem to hate him. Unfortunately, the university has demonstrated this through this extensive and outrageous attempt to silence Antebi and through its apparent ruthlessness in its attempts to punish him for constitutionally protected speech.

We urge you to undo your findings against of Antebi as soon as possible. Jason Antebi is scheduled to graduate from Occidental College next week. We request that he be allowed to graduate without incident or further attempts at punishment or deception by the college.

Finally, while FIRE does not litigate against universities (although we have a loyal and talented Legal Network composed of able lawyers who are quite willing to do so in the appropriate case), we do warn them when they are treading on legally untenable ground. Please consider this another such warning. We hope that this can be resolved through reasoned discussion before Antebi decides that he has no choice except to litigate. If he decides to litigate, you can rest assured that he will be well-supported in all relevant arenas of combat. This is not a battle that will proceed quietly.

I look forward to your response, but, more urgently, FIRE looks forward to your providing immediate relief to Antebi so that he is able to graduate on schedule.

Sincerely,



Greg Lukianoff
Director of Legal and Public Advocacy

cc:

Ted Mitchell, President, Occidental College
Frank Ayala, Jr., Dean of Students, Occidental College
Kenyon Chan, Vice President for Academic Affairs/Dean of the College, Occidental College
Maryanne Horowitz, Title IX Officer, Occidental College
Rameen Talesh, Associate Dean and Director of Residence Life, Occidental College
Larry Gordon, *The Los Angeles Times*
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
Eugene Volokh, UCLA School of Law
Carol Sobel, Esq.
Harvey A. Silverglate, Esq.
Jason Antebi

Encl.