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Via Facsimile

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Greg Lukianoff
Director of Legal and Public Advocacy
Foundation for Individual Rights in Education
210 West Washington square, Suite 303
Philadelphia, Pennsylvania 19106

Dear Mr. Lukianoff:

Thank you for the opportunity to correct "any misunderstandings of facts" contained in your letter dated March 30, 2004. It is ironic that an organization dedicated to freedom of speech and expression in colleges would choose to intervene in the Jason Antebi matter. The issue in this matter is not whether Occidental has infringed on Mr. Antebi's free speech rights. It is whether the College is required to sponsor a forum to facilitate Mr. Antebi's behavior, which includes hate speech as defined by both state and federal law, in his attempts to silence the speech of others.

The gravamen of the complaints the College has received concerning Mr. Antebi's behavior is that he is attempting with both words and actions to silence students who disagree with his political philosophy. Last August, he outlined his view of these classmates in his online diary:

"oxy is such a fucking socialism peddling cunt. Its 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."

By November, he was more explicit. Students expressed their disagreement with his public "firing" and humiliation of two 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." When some students (the same ones who ultimately filed complaints) protested, he vowed:

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

What does around, comes around. Don't you forget that you only get what you give. You know I'm talking 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."

There is no doubt as to the identity of the subject of his ire – he opined that he hated the elected representative of the College’s Womens’ Center, and labeled her by name, a “cunt.”

In this context, I would like to address your concerns.

Mr. Antebi began his radio program on KOXY, a College owned and operated station, by announcing that he was in pain, but was fortunate to have a bottle of prescription Vicodin, otherwise known as OxyContin. He announced he was taking it on the air, and periodically interrupted his program to shake the bottle and announce he was taking yet another pill. He repeatedly solicited his sophomore co-host to similarly indulge and ridiculed his reluctance to do so. He then commented on the pleasures of getting high on the air, instead of before going on the air, as was his usual habit. Indeed, his speech became slurred and the program regularly faltered as he attempted to remember what was next on the program.

Mr. Antebi then accused the editors and staff of the College newspaper of being “crack heads” and lamented that they were able to get better quality crack than he was.

This may have been humor. However, given the requirements of the federal Drug-Free Schools and Communities Act and the concomitant College policy, I did not find it amusing, nor, I suspect, would the numerous students at Occidental who receive federal financial aid, had they known the consequences of this type of college sponsored performance.

Only then, after ridiculing campus rape victims and offering to console them, did he spend ninety minutes focusing his attention on various other issues, starting by characterizing his mother as a “bitch” and a “whore,” and then applying the same and other sexually derogatory epithets to his political opponents on campus.

If this program were the only incident displaying Mr. Antebi’s attitude toward his political protagonists, it likely would not have resulted in formal complaints. However, by this point in the academic year, Mr. Antebi had:

- vowed “vengeance” against the individuals he identified by name in his program,
- suggested they should “be tarred and feathered” on a campus web page;
- used his position in student government to fire the students on college work study who disagreed with him;
- demanded the resignation of the radio station program director who wanted to broadcast student government meetings;
- labeled them all as people who “should be murdered in their sleep by a santa suit wearing fat man;”
- subscribed them to “spam” of all sorts, using campus computers;
- 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;
- arranged to have a letter he prepared sent to the student newspaper under another student’s name, accusing his protagonists 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); and

- used his position in student government to prevent the recall petition from being voted on by the student body.

There is more. 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, Mr. Antebi responded by asking the official's supervisor to remove him from interaction with the student government. When that was unsuccessful, Mr. Antebi filed a sexual harassment complaint against the official based on a humorous comment the official made, thereby making any further attempts modify his behavior appear retaliatory. Then he contacted a donor to the College seeking to have the official's job terminated.

That did not end the matter. The College is still investigating the following incidents:

- Middle of the night sexual telephone calls placed to women who reside at the Campus Womens' Center, who are also identified by Mr. Antebi in his various publications and radio broadcast 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 Mr. Antebi, of two of these same women as "bitches," as they crossed the campus to collect their mail.

We could likely have a spirited debate whether you believe Mr. Antebi's "humor" qualifies as protected speech or as unprotected hate speech under these circumstances. One thing is clear: The cases you have cited, without knowledge of the background, are not applicable. 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."

The ACLU's interpretation of hate speech coincides with that of the recent Office of Civil Rights, attached to your letter. When I teach constitutional law or give seminars on harassment, I regularly refer my students to the ACLU web page. It is a valiant attempt to fill the void left by Supreme Court cases, and help us decipher where the boundary is between unlawful harassment and free speech:

"The ACLU believes that hate speech stops being just speech and becomes conduct when it targets a particular individual, and when it forms a pattern of behavior that interferes

with a student's ability to exercise his or her right to participate fully in the life of the university.

The ACLU isn't opposed to regulations that penalize acts of violence, harassment or intimidation, and invasions of privacy. On the contrary, we believe that kind of conduct should be punished. Furthermore, the ACLU recognizes that the mere presence of speech as one element in an act of violence, harassment, intimidation or privacy invasion doesn't immunize that act from punishment. 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. "

<http://archive.aclu.org/library/pbp16.html>

Under the circumstances present here, no educational institution should, as you suggest, "end its proceedings against Mr. Antebi," nor would the ACLU or OCR so find.

But, frankly, these cases are moot vis-à-vis the radio program. The speech in issue on a campus radio station is institutional speech, and not individual speech.

"Although "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the school house gate, where that speech or expression begins to implicate the school as speaker, First Amendment rights have been limited.

...

[S]chools retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with the shared values of a civilized social order, or to associate the school with any position other than neutrality on matters of political controversy.

Downs v. Los Angeles Unified School Dist., 228 F.2nd 1003, 9th Cir. 2000, *cert. denied*, 121 S.Ct. 1653 (Holding specifically, that when a school is the speaker, its control of its own speech is not subject to the constraints of constitutional safeguards under the First Amendment, but instead is measured by practical considerations applicable to any individual's choice of how to convey oneself, which include, among other things, content, timing, and purpose.)

I apologize if this response sounds as though I am aggravated. Perhaps I am. I have spent many hours trying to explain to parents why their daughters seek counseling because they are unable to concentrate, sleep, or even walk across campus without fear, while the College conducts a federally mandated investigation. We have provided alternative email addresses so these students can use their computers without facing reams of unwanted email, and contacted the appropriate enforcement authorities to deal with the middle of the night telephone calls. We found the funds to provide extra security personnel for the Women's' Center. In the meantime, we will finish evaluating the complaints against Mr. Antebi, as we are required by law and our policy to do.

I will share your concerns with the College's sexual harassment policy with our faculty and Title IX officer. Our policy is used to primarily, in the words of our Title IX officer, to provide "educational moments." It was reviewed and approved by OCR during an audit some years ago.

No one at the College can recall an instance where it has been necessary to implement it in a punitive manner. However, there is similarly no recollection of incidents as threatening or disruptive as those in the instant case. Moreover, there is little doubt that the purpose of these activities were designed to silence political opponents..

Please address any future communications to me, and not to my clients. The media are already aware of this situation. Your media contacts should be directed to Jim Tranquada at the same address as mine. Occidental College is now and always has been a fierce protector of free speech. We categorically reject your assertion that our actions have been either immoral or legally untenable and we do not expect to be embarrassed by our handling of this matter.

I assume that since your letter was copied to numerous individuals, you will assume responsibility of forwarding to them this response.

Sincerely,

Andrea Cooper