SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. W. FRANC PERRY** **PART** **IAS MOTION 23EFM**

Justice

----------X

ADAM PARKER, MICHELLE PARKER, individually and on behalf of their minor child, D.P.,

Plaintiffs,

- v -

TRUSTEES OF THE SPENCE SCHOOL. INC., d/b/a THE SPENCE SCHOOL,

Defendant.

----------X

INDEX NO. 155427/2019

MOTION DATE 01/23/2020

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 20, 21, 22, 23, 24, 25, 26, 27, 28, 30

were read on this motion to/for DISMISS.

In this action, plaintiffs are seeking to recover damages individually and on behalf of their minor child, D.P., a former student at The Spence School, alleging claims for slander, libel, intentional infliction of emotional distress, negligent infliction of emotional distress, prima facie tort, on behalf of D.P., and breach of contract, on behalf of D.P. and themselves. The claims alleged in the complaint arise from an Instagram post by D.P. related to Halloween costume ideas the tenth grader and her friends were sharing in a text message conversation and the actions taken by the parents and the school in the aftermath.

In motion sequence number 004, defendant, Trustees of the Spence School, Inc., d/b/a The Spence School ("defendant" and/or "Spence"), seeks dismissal of the complaint with prejudice pursuant to CPLR 3211(a)(7) and seeks an order striking paragraphs 7-9, 60-71, 121-123, and 139- 145 of the complaint pursuant to CPLR 3024(b). Plaintiffs oppose the motion.

BACKGROUND/CONTENTIONS

The court is asked to determine whether plaintiffs have alleged causes of action on behalf of their daughter for defamation, intentional infliction of emotional distress, negligent infliction of emotional distress, prima facie tort, and breach of contract on behalf of themselves and their daughter. At the time that D.P. created the Instagram post that forms the basis of this lawsuit, she was 15 years old and had been a student at Spence since kindergarten; her sister had also attended Spence since kindergarten and at the time was a student in the Lower School.

Each year the parents signed an Enrollment Contract wherein the parents and student agreed to be bound by the rules and regulations set forth in the student and parent handbook, as well as all as all directives of School administrators, faculty and staff that govern enrollment at Spence. (NYSCEF Doc # 23, Ex. A). The Terms and Conditions of Enrollment for 2018-2019, also provide that the School reserves the right to discipline or suspend a student at any time if, in the judgement of the Head of School, the conduct of the student, in or out of school is not in keeping with the School's accepted standards. (Id.).

The 2018- 2019 Upper School Parent & Student Handbook defines Community Standards, in part, as follows:

> Understanding that good, strong community can never be accidental, The Spence School asks every member within its fold to meet the high standards necessary for effective citizenship and valued humanity. Beyond any calculus of rules, Spence strives as always and in all ways, to be a place of ethical stance and substance, a place in which students, parents, faculty and administration cultivate personal integrity in service to the collective values of respect and trust. This we believe for school and for life.
>
> This allegiance has at its core a partnership of engagement, education and responsibility, all held in balance for that significant relationship between life and learning. Recognizing that mistakes can sometimes be our most vibrant lessons, we also understand that clear and deliberate expectations go hand-in-hand with meaningful consequences.

(Id., Ex. B, p. 2).

The facts alleged in the complaint are largely undisputed. On October 29, 2018, D.P., a tenth grader at Spence was home studying and exchanging a series of text messages with her two camp friends, who were not students at Spence. The girls were sharing ideas for costumes they could dress up as together for a camp Halloween party later that week. (NYSCEF Doc #23, ¶¶ 4, 43-48). A review of the actual text messages, reproduced in the complaint, indicate that the girls exchanged several text messages listing categories of costume ideas which included dressing up as math functions, "Slaves, indigenous people, white settlers" and "Hitler, mussolini, stalin", among several other costume ideas. (NYSCEF Doc #23, ¶¶ 4, 43-49). D.P. responded that she did not want to dress up as anything school related. (Id., ¶ 4). D.P. then posted the text message conversation to her private Instagram account. (Id., ¶ 5).

The next day, two Spence students who follow D.P.'s Instagram confronted her and claimed they were offended by her post; D.P. took down the post and apologized to the two students. (Id., ¶6). According to the complaint, D.P. thought that was the end of the matter, however, it is alleged that after this exchange the students began to spread false information about the post to the Spence community. (Id.). On October 31, 2018, three Spence students, not including the two students D.P. had apologized to, told D.P.'s Faculty Advisor about the post, indicating that D.P. had joked about dressing up as "slaves and slaveholders, Jews and Hitler, and indigenous people"; it is alleged that none of the students had read or seen the post they had discussed with the Faculty Advisor. (Id., ¶11).

It is further alleged that without investigating or reading the actual post, later that afternoon, D.P.'s Faculty Advisor accompanied D.P. to the office of Spence's Director of Institutional Equity, who along with Spence's Head of Upper School, told D.P. that students

were offended by the post and wanted Spence to take action; D.P. was asked by the Head of Upper School if she had anything to say. It is alleged that "D.P. was crying hysterically and terrified. She had never been in trouble before and now three top Spence administrators had ambushed her and accused her of an act of racism and anti-Semitism. . .. At that time, D.P. did not agree with [the] understanding of the express wording of the Post, but she also did not think it prudent to argue with [the Head of Upper School], who was visibly upset and held a position of significant power and authority over her." (Id., ¶¶ 12, 74).

D.P. told the Head of Upper School that "she and her friends had listed many trios of things that they were learning about in school and that, upon getting a complaint about it, she had taken down the Post from Instagram. D.P. stated that she had not intended to offend anybody." (Id., ¶ 74). It is alleged that during this meeting, the Head of Upper School told D.P. that she needed to apologize to the student who was offended by the post, assuring D.P. that she was not in trouble. D.P.'s father joined the meeting in progress and spoke to the Head of Upper School, alleging that during this conversation she had confirmed that she had not read the post and neither had he, however he indicated that "this was the first time that D.P. had ever been in trouble" and that the Head of Upper School reconfirmed that D.P. was not in trouble and that "the Spence Administration just wanted D.P. to apologize to the student who said she was offended." (Id., ¶ 76).

The next morning, in the company of five Spence administrators, D.P. apologized to the student who had complained about the post; during this meeting the student acknowledging that she had not seen the post, explained to D.P. that she was offended by it because "it undermined the hardships of slavery, that it undermined oppression and that it undermined her reality as a black student", stating "that she 'didn't need or want to see the Post' because 'just hearing about

it was so hurtful and offensive' ." (Id., ¶¶12, 77, 78). It is alleged that after D.P.'s initial apology, the Director of Institutional Equity instructed D.P. to "racialize" her apology and D.P. complied. (Id., ¶¶ 13, 77-80).

Immediately thereafter, D.P., feeling "angry, flustered and frustrated" that she was forced to "racialize" her apology for a post that she believed when read in context was not offensive, asked to speak privately with her Faculty Advisor; she showed her the post and after she read it, D.P. alleges that she asked her Faculty Advisor to accompany her back to the office of the Director of Institutional Equity who was still with the Head of Upper School so that they could read the post and see that D.P. "had not done anything that was offensive." (Id., ¶¶ 14, 81-83). It is alleged that the Faculty Advisor admonished D.P. not to share the post with the other administrators, stating "that it would not help her cause" and that D.P. complied knowing that if she were to confront the other administrators and disagree with them, she would need someone to "go with her and support her". (Id.). According to the complaint, by compelling D.P., on November 1, to make a "racialized" apology to the offended student, Spence validated the false accusation of racism against D.P. (Id., ¶ 80).

Plaintiffs allege that Spence "has structured its curriculum and educational philosophy around the Pacific Educational Group's ("PEG") 'Courageous Conversations,' whereby every Spence faculty and staff member is required to take part in PEG's Courageous Conversations about Race and Beyond Diversity." (Id., ¶ 39). The complaint details Spence's diversity curriculum which begins in Grade 1, continues through Middle School and is pursued in Upper School through more intensive conversations about race and cultural identities, acknowledging staff development programs and curriculum designed to encourage a deeper understanding of issues of bias and multiculturalism in the classroom and to institutionally engage the community.

(Id., ¶¶ 38-42). Plaintiffs allege that while Spence's goals in promoting its diversity curriculum are laudable, implementation of these goals has been "problematic", and "has led its administrators to view speech and actions through a 'racialized' lens and created a call-out culture and victimhood mentality among many students." (Id., ¶ 42).

On November 2, 2018, the Spence administrators convened an assembly, led by the Head of Upper School and the Director of Institutional Equity for all tenth-grade students, which D.P. did not attend, to describe D.P.'s post "in detail" and to explain "what happened". (Id., ¶¶ 14, 85). The complaint refers to an audio clip recording from the November 2 assembly[1] which purports to indicate that Spence administrators told the assembled students that there had been an "incident" in which a student posted something on Instagram that is outside of the Spence community standards and had done something "destructive to the community". (Id., ¶ 86). Plaintiffs allege that the administrators then falsely told the assembled tenth graders and senior students that D.P.'s post paired "slave and slave owners "and "Jews and Hitler together to create oppressed-oppressor associations and suggested dressing up as those pairings for Halloween; the assembly closed with a student speaking about feeling unwelcomed at Spence. (Id., ¶ 87).

Plaintiffs allege that although Spence administrators did not use D.P.'s name during the November 2 assembly, everyone in attendance knew they were referring to D.P. and describing her conduct and her post; after the assembly, during a telephone call between D.P.'s parents, the Head of Upper School and the Director of Institutional Equity, it was confirmed that "probably many students in the class know who the student is" and "she made a very impactful and hurtful mistake." (Id., ¶ 88). On November 5, the Spence administrators met with D.P. and told her that she "needed to give restitution to the community" and the Head of Upper School imposed a "day

[1] The court has not listened to the audio recordings referenced throughout the complaint and notes that defendant contends that the recordings were made surreptitiously, without defendant's knowledge or consent.

of suspension" on D.P., despite the previous assurances that she was not in trouble and would not be disciplined for her post. (Id., ¶ 89). Plaintiffs allege that during this meeting the Head of Upper School reaffirmed "Spence's condemnation and false characterization" of the post and made clear that there was a need for "'restitution' (and resultant punishment)" arising from the "great negative impact" of the post and "a 'great, negative impact' that Spence itself created through its validation of the false rumors on November 1 and the defamation of D.P. during the tenth-grade assembly on November 2." (Id., ¶ 92).

Later that day, during a telephone call with D.P.'s parents, the Head of Upper School "stated that D.P. would be 'discipline[d]' for '[her] breach of community standards last week,' that she would have to 'serve a full day of in-home reflection'--which she previously described to D.P. as a 'day of suspension'--that '[a] letter documenting this breach will be placed in [D.P.'s] file,' and that 'any future breach would be reportable' to colleges. Although [the Head of Upper School] imposed this discipline, when asked 'Did you read, did you read the text? Have you read the text [of D.P.'s Post]?' [she] replied 'No I did not.'" (Id., ¶ 93).

The next day, the Parkers met with the three Spence administrators and showed them a copy of the actual post, which they all read. (Id., ¶ 95). Plaintiffs allege that "in an effort to shift the blame and defend Spence's indefensible actions, [the Head of Upper School] blamed D.P. and boldly claimed that D.P., when first summoned to [the Director of Institutional Equity's] office and confronted by [the three Spence administrators], had falsely described her own Post as stating that she and her friends planned to dress up as "slaves and slave owners" or "Jews and Hitler." (Id., ¶ 96). Plaintiffs allege that D.P. had not falsely described her post and that "when confronted by adults in positions of power . . .D.P. remained largely silent and did not argue with [the Head of Upper School] who was visibly upset with D.P. Moreover, D.P. showed

a copy of her Post to [her Faculty Advisor] who admonished D.P. not to show it to the other Spence administrators." (Id., ¶ 97). Plaintiffs then asked the Head of Upper School to reverse her decision to discipline D.P. Later that day, D.P. again met with the three Spence administrators who "reduced D.P.'s punishment from a full-day to a half-day of in-home reflection but maintained the unwarranted position that D.P. still needed to complete a half-day of in-home reflection to give "restitution" to the Spence community." (Id., ¶ 98).

Plaintiffs allege that during this meeting, the Director of Institutional Equity "engaged in further acts of harassment in a transparent effort to shift the blame away from herself and onto D.P. [The Director of Institutional Equity] confronted D.P. in a condescending and accusatory tone and asked 'why did you tell your parents something different than you told us?' D.P. felt intimidated and that she was being pegged as their scapegoat now that they knew they had mismanaged all the events relating to the Post. D.P. wanted to defend herself and tried to speak up about how the punishment was improper given that the Post was not racist, anti-Semitic or otherwise offensive. The administrators responded by telling D.P. that she still did not understand her 'words had impact,' and 'that as a white student [she] need[ed] to reflect on the community outrage that [her] Post has caused.'" (Id., ¶ 99).

On November 7, Spence administrators held a second assembly for the tenth grade to reiterate and continue the discussion they had at the November 2 assembly. Plaintiffs allege that the Spence administrators then explained to the tenth-grade students that they were "'going to work on a one day [racial] facilitation training in December' to 'come together and talk [] about triggers'" and emphasized the need for a "'racial reconciliation process to acknowledge pain and harm that has been done in the past.'" (Id., ¶¶ 102, 103). Plaintiffs allege that during this assembly, the Director of Institutional Equity "emphasized that the hurt D.P. supposedly inflicted

was so deep that the School planned to engage in its 'racial reconciliation process' all year long." (Id.). Plaintiffs allege that the Director of Institutional Equity falsely described D.P.'s post at the assembly and that it was understood by everyone in attendance that the Spence administrators were referring to D.P.'s post.

Thereafter, plaintiffs allege that the tenth-grade Dean, "using D.P. as an example, then told the audience that 'we have to unlearn bias that we were taught directly or indirectly ... at home'--thereby implicitly accusing [D.P.'s parents] of instilling bias and racism in D.P." (Id., ¶ 105). It is alleged that in addition to failing to "correct the record", affirmative statements were made by Spence administrators to further reinforce their false narrative of D.P. (Id., ¶ 105). Following the November 7 assembly, D.P.'s parents spoke to Spence's Head of School asking her to reverse the punishment that Spence had imposed, which she refused to do, and asking for a personal meeting which was scheduled for November 9, 2018, the day after D.P.'s half-day of "in home reflection." (Id., ¶¶ 108-110).

During the November 9 meeting, plaintiffs gave the Head of School a copy of D.P.'s post and asked her to read it along with them. Plaintiffs allege that after reading the post, Spence's Head of School was "visibly flustered" and then admitted that at the time Spence imposed its punishment on D.P., they did not have the post. (Id., ¶¶ 112, 113). Plaintiffs allege that the Head of School then attempted to defend Spence's actions but admitted that Spence had made "an enormous mistake" and then "candidly admitted that '[w]e didn't have the Post. We didn't ask for it. We didn't read it. The consequences of that have been significant.'" (Id., ¶ 115).

Plaintiffs allege that in the months following the November 9 meeting with the Head of School, they repeatedly contacted defendant and its administrators and asked them to correct and retract their "false and defamatory statements about D.P." to get Spence to mitigate the harm

caused to D.P. Plaintiffs allege that the Head of School had represented to them that she had begun and would continue to "slowly correct the misinformation" but that Spence did not do so and rather, continued to perpetuate the false narrative about D.P. (Id., ¶¶ 116-120).

After seven months and receiving hold notices stating litigation was imminent, plaintiffs allege that defendant sent a letter, on May 24, 2019, to all Spence Upper School families that "purported to address the truth about D.P.'s Post"; rather than correcting the record, plaintiffs allege that the letter "continued to repeat and reaffirm its false narrative about D.P.'s Post." (Id., ¶ 124; NYSCEF Doc # 26).

Plaintiffs signed an Enrollment Contract with Spence for the 2018-2019 school year for their daughters on February 16, 2018; Spence signed and accepted those contracts on February 26, 2018. (NYSCEF Doc # 23, Ex. A). Plaintiffs allege that the Enrollment Contracts set forth the rules, regulations, procedures, and standards that apply to and govern D.P.'s enrollment at Spence as well as rules, regulations, procedures, and standards that apply to and bind Spence and its administrators. Plaintiffs allege that the rules, policies and procedures set forth in the Upper School Student & Parent Handbook are incorporated into the Enrollment Contracts, and that Spence's community standards are defined in the Handbook. (NYSCEF Doc # 23, Ex. B).

Plaintiffs allege that Spence's Handbook requires Spence to follow specific rules and procedures when imposing discipline on students, including procedures to be followed by defendant when imposing a penalty of "home reflection" or suspension upon a student, which includes the requirement to form a Community Standards Committee to gather information and allow the accused student to "choose an adult member of the community to accompany them" in meetings with Spence administrators. (Id., ¶¶ 148-151; see also, Appendix C to Handbook). Plaintiffs allege that Spence breached its Enrollment Contract when it found that D.P. had

committed a "Major Infraction" and disciplined her without following the procedures required by the Handbook and incorporated into the Enrollment Contract. (Id., ¶¶ 152-160).

Plaintiffs allege that Spence failed to enforce its Harassment Policy and failed to protect D.P. from bullying and retaliation after plaintiffs reported that D.P. was being harassed. (Id., ¶¶ 161-164; ¶ 173). Plaintiffs further allege that Spence created a "toxic environment" for D.P. and her sister that made it impossible for them to continue to enroll at Spence. (Id., ¶ 183).

In Count One, plaintiffs allege that as a result of the false and defamatory statements made by Spence, D.P. has been exposed to public hatred, ridicule, and contempt, and has suffered severe mental, emotional, and psychological damage. Plaintiffs claim they are entitled to actual, punitive, and other damages in an amount to be determined at trial. (Id., ¶¶ 187-212).

In Count Two, plaintiffs allege that Spence breached its 2018-2019 Enrollment Contract by failing to enforce its Harassment Policy to prevent and alleviate harassment, bullying, and threatening behavior directed toward D.P., by failing to follow the required Disciplinary Protocols incorporated into the Enrollment Contract and imposing punishment on D.P. for a non-academic major infraction, and by arbitrarily and unfairly applying its community standards to D.P. (Id., ¶¶ 213-223).

In Count Three, plaintiffs allege that Spence and its administrators engaged in intentional, extreme, and outrageous conduct toward D.P., intending to cause severe emotional distress, alleging that Spence knew that its false accusations of racism, anti-Semitism, and bigotry were improper, but it did not care because it wanted to further its educational philosophy, regardless of the true facts of D.P.'s post. Plaintiffs seek punitive damages alleging such damages are necessary to deter Spence from engaging in this outrageous behavior toward other persons or students at Spence in the future. (Id., ¶¶ 223-238).

In Count Four, plaintiffs seek actual and punitive damages alleging negligent infliction of emotional distress on behalf of D.P., claiming that Spence should have known that its false accusations of racism, anti-Semitism, and bigotry, were completely improper and tortious, but that Spence did not care because it wanted to validate its educational philosophy, regardless of the true facts of D.P.'s post. (Id., ¶¶ 239-254).

In Count Five, plaintiffs allege prima facie tort on behalf of D.P., claiming that Spence intentionally inflicted harm on D.P. while she was in their custody and control and while they owed her a legal duty of care to refrain from harassing, bullying, threatening, retaliating against, or otherwise making D.P. feel unsafe at Spence, and to refrain from creating a hostile and unsafe environment at school, causing D.P. to suffer special damages. (Id., ¶¶ 240-266).

Defendant urges this court to dismiss the complaint in its entirety for failure to state a cause of action; it frames the issue before the court as "a simple dispute over a half-day that D.P. spent at home to consider how her words may have affected others and over discussions at two assemblies with about sixty school-aged children who already knew about D.P.'s post." (NYSCEF Doc # 21, p. 6).

Plaintiffs contend that this action involves much more than second-guessing a private school's judgment to impose a punishment upon D.P. and implore the court to deny defendant's motion and allow discovery to proceed as they have asserted valid claims resulting from "Spence's egregious actions in maliciously targeting, defaming, ostracizing, and harming a minor child entrusted to its care." (NYSCEF Doc # 25, p. 10).

Plaintiffs acknowledge that a private school has much latitude in making disciplinary decisions, however, they strenuously claim that the facts alleged and the legal principles they rely upon, demonstrate that here, Spence has committed torts against their minor child which it

was duty-bound to care for, and it has breached its contract with her parents. Embedded throughout plaintiffs' detailed complaint is the assertion that Spence cared more about its reputation than it cared about protecting D.P. from false allegations of racism and anti-Semitism. Plaintiffs allege that Spence's educational mission to promote diversity, inclusion and equity, led the administrators to "rush to judgment" as "Spence cared only about appearing to take swift and decisive action to quash a specter of racism -- even after knowing the incident was decidedly not what they originally understood it to be." (NYSCEF Doc # 23, ¶ 3).

At the core of plaintiffs' complaint is the central theme that Spence allowed the students who claimed to be offended by D.P.'s post to weaponize it, "knowing that at Spence, a claim of victimhood from a student of color is a form of power"; and they claim that these students "seized on D.P.'s Post, exaggerated its content, garnered the support of the student body and of the Spence administration so that the school would take swift action to demonize D.P., all while casting themselves both as victims and as heroes. Their plan worked." (Id., ¶ 10).

Plaintiffs maintain that the facts alleged support the claims asserted and demonstrate Spence's failure to follow its own mandatory procedures before disciplining D.P., in breach of its Enrollment Contract with plaintiffs; they aver that Spence's refusal to investigate plaintiffs' reports, because of the false narrative it peddled about D.P. publicly, resulted in her being repeatedly harassed and threatened in breach of Spence's written Harassment Policy. Plaintiffs insist that private schools are bound by the contracts that govern the relationship between the school and the families who enroll their children there and urge this court to hold Spence accountable for its alleged flagrant breaches of these duties that they claim have caused themselves and D.P. to suffer tremendous harm.

Defendant strenuously seeks dismissal of all claims contending that plaintiffs have failed to assert any valid cause of action. Defendant maintains that the detailed facts alleged in the complaint aptly demonstrate that plaintiffs are improperly asking the court to step into the role of head of school, to second-guess the reasoned approach taken by Spence in the aftermath of the controversy and stated complaints from students who had heard of or saw D.P.'s post before she removed it from her Instagram account.

STANDARD OF REVIEW/ANALYSIS

A motion to dismiss may be granted, pursuant to CPLR 3211(a)(7), if the pleading fails to state a cause of action. "So liberal is the standard under these provisions that the test is simply 'whether the proponent of the pleading has a cause of action, not even whether he has stated one'" (*Wiener v Lazard Freres & Co.*, 241 AD2d 114, 120, 672 N.Y.S.2d 8 [1st Dept 1998], citing *Leon v Martinez*, 84 NY2d 83, 87-88, 638 N.E.2d 511, 614 N.Y.S.2d 972 [1994] and *Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 372 N.E.2d 17, 401 N.Y.S.2d 182 [1977]); see also, (*D.K. Prop., Inc. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 168 AD3d 505, 506 [1st Dept 2019]). Whether the plaintiff will ultimately be successful in establishing those allegations "'is not part of the calculus'" (see, *J.P. Morgan Sec. Inc. v Vigilant Ins. Co.*, 21 NY3d 324, 334, 992 NE2d 1076, 970 NYS2d 733 [2013], quoting *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19, 832 NE2d 26, 799 NYS2d 170 [2005]).

Notwithstanding the liberal standards favoring a pleading subject to a motion to dismiss, for the following reasons, the court finds that plaintiffs' complaint must be dismissed in its entirety for failure to state a cause of action.

Count One of the complaint asserting defamation on behalf of D.P. consists of two claims, one for slander (i.e., oral defamation) based on statements allegedly made by Spence

administrators at the November 2 and November 7, 2018 tenth-grade assemblies, and one for libel (i.e., written defamation) based on the May 24, 2019 letter sent by defendant to Spence Upper School families. (NYSCEF Doc # 23, ¶ 189(a)-(g); and ¶ 189(h)). Plaintiffs maintain that Spence's false statements that D.P. committed a racist, anti-Semitic act and violated Spence's governing rules and community standards are slanderous per se because they falsely accuse D.P. of having engaged in racist and anti-Semitic conduct and that these statements have injured D.P. in her trade or profession as a Spence student.

Defendant maintains that plaintiffs have failed to allege "special damages", noting that being a "tenth grade student" is not a "trade, business or profession" for purposes of the pleading requirements necessary to assert a claim for slander per se. Additionally, because the allegedly defamatory statements made at the two assemblies are all expressions of opinion or substantially true, defendant contends that plaintiffs have failed to sufficiently plead defamation, noting that whether D.P.'s costume ideas were offensive may present a subjective matter for debate, the claims however, do not assert a cause of action. Additionally, defendant avers that plaintiffs' libel claim, premised on a letter Spence sent shortly after the Parkers sent forty litigation "hold notices" to Spence Upper School families, should be dismissed because the written statements on which they base this claim are not false.

To establish a claim for defamation, a plaintiff must plead "'a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se.'" (*Frechtman v Gutterman*, 115 AD3d 102, 104, 979 NYS2d 58 [1st Dept 2014] [internal citations omitted]). In determining the sufficiency of a defamation pleading, on a motion to dismiss, the court must consider "whether the contested statements are reasonably susceptible of a

defamatory connotation" (*Armstrong v Simon & Schuster*, 85 NY2d 373, 380, 649 NE2d 825, 625 NYS2d 477 [1995], citing *Weiner v Doubleday & Co*., 74 NY2d 586, 592, 549 NE2d 453, 550 NYS2d 251 [1989]).

For the challenged statements to be susceptible of a defamatory connotation, they must come within the well-established categories of actionable communications. Thus, a false statement "that tends to expose a person to public contempt, hatred, ridicule, aversion or disgrace constitutes defamation" (*Thomas H. v Paul B.*, 18 NY3d 580, 584, 965 NE2d 939, 942 NYS2d 437 [2012]). "Since falsity is a necessary element of a defamation cause of action and only 'facts' are capable of being proven false, '. . . only statements alleging facts can properly be the subject of a defamation action' " (*Gross v New York Times Co*., 82 NY2d 146, 152-153, 623 NE2d 1163, 603 NYS2d 813 [1993], citing, *600 W. 115th St. Corp. v Von Gutfeld*, 80 NY2d 130, 139, 603 NE2d 930, 589 NYS2d 825 [1992], and *Immuno AG. v Moor-Jankowski*, 77 NY2d 235, 254, 567 NE2d 1270, 566 NYS2d 906 [1991]; *Rosner v. Amazon.com*, 132 A.D.3d 835, 18 N.Y.S.3d 155, 157 [2d Dep't 2015] [internal quotations and citations omitted]).

Here, plaintiffs claim that defendant falsely portrayed the words in the post insinuating that it contained racist, anti-Semitic pairings of costume ideas that violated Spence's community standards and thus, defamed D.P. causing her to suffer damages.

Regrettably, accusing someone's words and actions as being "racist" and "anti-Semitic" has been the subject of much litigation and numerous court decisions which have long recognized that "there is no question but that the use of racial or religious slurs and derogatory characterizations about an entire ethnic, racial or religious group are bigoted and hurtful" (*Herlihy v Metropolitan Museum of Art*, 160 Misc 2d 279, 283, 608 N.Y.S.2d 770 [Sup Ct, NY Co, 1994], affd as mod 214 AD2d 250, 633 N.Y.S.2d 106 [1st Dept 1995]); however, such

accusations are only actionable if the statements can be subjected to the test of truth or falsity as opposed to nonactionable expressions of opinion. (*Covino v. Hagemann*, 165 Misc. 2d 465, 627 N.Y.S.2d 894 [Sup Ct. Rich. Co. 1995], citing *McManus v Doubleday & Co.*, 513 F Supp 1383, 1385). Pure opinion is not actionable because "expressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation." (*Davis v. Boeheim*, 24 N.Y.3d 262, 268, 998 N.Y.S.2d 131, 22 N.E.3d 999 [2014]; see also, *Mann v. Abel*, 10 N.Y.3d 271, 276, 885 N.E.2d 884, 856 N.Y.S.2d 31 [2008]). The issue of whether a statement constitutes fact or opinion "is a question of law" to be resolved by the court. (*Davis*, 24 N.Y.3d at 269; *Mann*, 10 N.Y.3d at 276).

The Court of Appeals has explained that "[d]istinguishing between opinion and fact has proved a difficult task, but this Court, in furtherance of that endeavor, has set out the following factors to be considered: (1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal... readers or listeners that what is being read or heard is likely to be opinion, not fact." (*Mann v. Abel*, 10 N.Y.3d at 276 [internal citations omitted]).

After careful review of the record the court finds that the claims alleged amount to nonactionable opinion, and as such, plaintiffs have failed to assert a claim for defamation arising from the school's actions taken in response to the aftermath that arose when D.P. posted her text messages to her Instagram account. Specifically, at the two assemblies, Spence administrators expressed the opinion that the words and phrases set forth in D.P.'s post, violated Spence's community standards and required prompt and decisive action from Spence's administrators.

Plaintiffs allege that on November 2, Spence administrators told the assembled students that there had been an "incident" in which a student posted something on Instagram that is outside of the Spence community standards and had done something "destructive to the community". (NYSCEF Doc # 23, ¶ 86). Plaintiffs allege that the administrators then falsely told the assembled tenth graders and senior students that D.P.'s post paired "slave and slave owners "and "Jews and Hitler" together to create oppressed-oppressor associations and suggested dressing up as those pairings for Halloween. (Id., ¶ 87).

Here, the "'court[] must consider the content of the communication as a whole, as well as its tone and apparent purpose' and in particular 'should look to the over-all context in which the assertions were made'" (*Mann v. Abel*, 10 N.Y.3d at 276 [internal citations omitted]). The challenged statements attributed to D.P., were made by Spence administrators to the assembled students to explain the importance of coming "'together and talk [] about triggers'" and emphasizing the need for a "'racial reconciliation process to acknowledge pain and harm that has been done in the past.'" (NYSCEF Doc # 23, ¶¶ 102, 103).

In the complaint, plaintiffs detail Spence's diversity curriculum, acknowledging staff development programs and curriculum designed to encourage a deeper understanding of issues of bias and multiculturalism in the classroom and to institutionally engage the community. (Id., ¶¶ 38-42). Plaintiffs do not allege that defendant read the actual post at the assembly, nor do they allege that Spence specifically referred to D.P. during the assembly. Rather, plaintiffs contend that Spence's diversity curriculum was "weaponized" by students to defame D.P. and that Spence's statements during the school assemblies are also slanderous per se because they falsely accuse D.P. of violating Spence's governing rules and standards, thereby assailing D.P. in her trade and profession as a student. Plaintiffs contend that they have sufficiently pled

defamation based on the statements made by Spence administrators at the assemblies, because they can prove that the actual Instagram post shows that D.P. never paired slaves with slave owners or Jews with Hitler. As such, plaintiffs maintain that the statements can be subjected to the test of truth or falsity and are not nonactionable opinion.

Applying the test set forth by the Court of Appeals in *Mann* to the facts of this case, the court finds that the context of the challenged statements, communicated during an assembly convened to respond to students who expressed offense at the idea of suggesting Halloween costumes as "slaves", "Hitler, mussollini, and stalin" would signal to the reasonable listener that Spence was expressing its opinion that such statements violated its community standards and identified a need to come together as a community to confront issues of oppression and acknowledge past pain and harm, not to convey negative facts about D.P. Accordingly, the court finds that plaintiffs have failed to assert a cause of action for defamation based on the statements made by Spence administrators at the student assemblies.

Similarly, plaintiffs have failed to assert a cause of action for libel based on the letter that Spence sent to Upper School families on May 24, 2019. As noted, "courts must consider the content of the communication as a whole, as well as its tone and apparent purpose" and in particular "should look to the over-all context in which the assertions were made and determine on that basis 'whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff'" (*Mann v. Abel*, 10 N.Y.3d at 276 [internal citations omitted]). Applying that test to the facts of this case, the court finds that plaintiffs have failed to assert a cause of action for libel based on the May 24, 2019 letter sent by Spence to Upper School families. Accordingly, Count One is dismissed.

Turning to Count Two, to state a claim for breach of contract in New York, one "must allege (1) the existence of an agreement, (2) performance of the agreement by one party, (3) breach by the other party, and (4) damages" (*Oppman v IRMC Holdings, Inc.*, 14 Misc. 3d 1219[A] [Sup Ct, NY County 2007], citing *Noise in the Attic Prods., Inc. v London Records*, 10 AD3d 303, 306 [1st Dept 2004] [citation omitted]). "The damages for which a party may recover for a breach of contract are such as ordinarily and naturally flow from the non-performance. They must be proximate and certain, or capable of certain ascertainment, and not remote, speculative or contingent" (*Fruition, Inc. v. Rhoda Lee, Inc.*, 1 AD3d 124, 125 [1st Dept 2003] [citation omitted]).

Plaintiffs allege that Spence breached D.P.'s enrollment contract in at least eight different ways, including, by failing to ensure that D.P. was and reasonably felt safe at Spence, by itself harassing and retaliating against D.P., and by arbitrarily and inconsistently applying its rules and community standards to D.P. but not to others. (Id. ¶ 221(a)-(h)). Plaintiffs acknowledge that private schools are afforded broad discretion in conducting their programs, including decisions involving the discipline of students, and allege that notwithstanding such broad discretion, Spence breached its enrollment contract with D.P. by failing to follow its own disciplinary procedures, when it disciplined D.P. for a Major Infraction, and by failing to investigate plaintiffs' reports that D.P. was being harassed. (NYSCEF Doc # 23, ¶¶ 152-53).

"Significantly, though, 'when a disciplinary dispute arises between the student and the institution, judicial review of the institution's actions is limited to whether the institution acted arbitrarily or whether it substantially complied with its own rules and regulations." (*Jones v. Trs. of Union Coll.*, 92 A.D.3d 997, 998-99, 937 N.Y.S.2d 475 [3d Dep't 2012] [student failed to state breach of contract claim as he did not identify specific internal rule, regulation or code college

violated in expelling him based on crime he allegedly committed]; *Gary v New York Univ.*, 48 AD3d 235, 850 N.Y.S.2d 433 [1st Dept 2008] [plaintiff did not demonstrate that defendant had failed to comply with policies and procedures in terminating her enrollment]; *Martin v Pratt Inst.*, 278 AD2d 390, 717 N.Y.S.2d 356 [2d Dept 2000], lv denied 96 NY2d 715, 754 N.E.2d 202, 729 N.Y.S.2d 442 [2001][dismissing breach of contract claim as provision in student bulletin permitted defendant to withhold plaintiff's diploma and transcript]).

Here, the court finds that plaintiffs have failed to identify any specific, concrete rule or contractual term that Spence failed to follow when it determined that D.P. should serve a half-day of in home reflection, and as such, the breach of contract claim is dismissed.

To state a cause of action for intentional infliction of emotional distress, plaintiff must plead four elements: "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress." (*Chanko v. American Broadcasting Cos. Inc.*, 27 N.Y.3d 46, 56 [2016], citing *Howell v New York Post Co.*, 81 N.Y.2d 115, 121 [1993])." To state such a claim, plaintiff must set forth facts from which the court or a jury could infer that defendant acted "solely for malevolent purposes," and must allege conduct that is "so extreme and atrocious" that it shocks the conscience. (*Fleischer v NYP Holdings, Inc.*, 104 AD3d 536, 538-39 [1st Dept 2013]).

Count Three is dismissed because plaintiffs have not alleged any conduct so outrageous in character and extreme in degree to go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized community; particularly here, where plaintiffs acknowledge that a private school is granted wide latitude in enforcing its rules and determining

whether a penalty should be imposed when those rules are violated. (*Id.*, see also *Wilson v DiCaprio*, 278 AD2d 25, 26 [1st Dept 2000]).

While the court is troubled by the allegations that D.P.'s Faculty Advisor instructed her not to share the actual post with the administrators who convened to address the complaints made by students who found the content of D.P.'s post offensive, and that the Head of School admitted that she and the other administrators had not read the post prior to imposing the penalty, such conduct is not actionable on this record. The detailed allegations set forth in the complaint, highlight the delicate balance that must be struck by adults who are responsible to monitor a teenager's use of social media to ensure an understanding that words shared on social media, not intended to offend can nonetheless be perceived as offensive and have other unforeseen consequences. This conduct, however, does not give rise to a cause of action for intentional infliction of emotional distress here, and Count Three is dismissed for failure to state a claim.

Similarly, Count Four, negligent infliction of emotional distress, is dismissed as it does not differ from the intentional emotional distress claim, and plaintiffs did not adequately allege extreme and outrageous conduct (see *Howell v New York Post Co.*, 81 NY2d 115, 121, 612 NE2d 699, 596 NYS2d 350 [1993]).

Count Five is also dismissed for failure to state a claim. To state a cause of action for prima facie tort, the plaintiff must allege "(1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful" (*Freihofer v Hearst Corp.*, 65 NY2d 135, 142-143, 480 NE2d 349, 490 NYS2d 735 [1985]). There can be no recovery under this theory "unless malevolence is the sole motive for defendant's otherwise lawful act or, in [other words], unless defendant acts from disinterested malevolence" (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314,

333, 451 NE2d 459, 464 NYS2d 712 [1983] [internal quotation marks omitted]). "[P]rima facie tort was designed to provide a remedy for intentional and malicious actions that cause harm and for which no traditional tort provides a remedy, and not to provide a catch-all alternative for every cause of action which cannot stand on its legs" (*Bassim v Hassett*, 184 AD2d 908, 910, 585 NYS2d 566 [3d Dept 1992] [internal quotation marks omitted]).

In the complaint, plaintiffs do not identify or itemize with any specificity the special damages they allegedly suffered that are encompassed within the prima facie tort claim (see *Phillips v New York Daily News*, 111 AD3d 420, 421, 974 NYS2d 384 [1st Dept 2013]). Moreover, the complaint does not allege that disinterested malevolence was the sole motivation for the conduct of which plaintiffs complain (see *AREP Fifty-Seventh, LLC v PMGP Assoc., L.P.*, 115 AD3d 402, 403, 981 NYS2d 406 [1st Dept 2014]). Rather, plaintiffs merely allege in exhaustive detail, their dissatisfaction with how Spence handled the complaints it received from members of its community, highlighting the fact that D.P. felt bullied and harassed by having her words taken out of context and for being punished and held accountable for something she did not intend to do. While it is understandable that the Parkers are seeking to protect their daughter, whom they believe was wrongly accused of committing acts that violated Spence's community standards, the facts alleged do not give rise to a cause of action for prima facie tort.

Failure to plead that the defendant's "sole motive" for committing the act alleged is "disinterested malevolence," mandates dismissal of the cause of action. (*Burns Jackson Miller Summit & Spitzer v Lindner*, supra at 333; *Brook v Peconic Bay Med. Ctr.*, 152 AD3d 436, 438, 59 N.Y.S.3d 310 [1st Dept. 2017]). Accordingly, the prima facie tort claim is dismissed for failure to state a claim.

Finally, defendant seeks to strike paragraphs 7-9, 60-71, 121-123, and 139- 145 of the complaint pursuant to CPLR 3024(b), contending that the allegations contained therein are scandalous and prejudicial and are unnecessarily inserted to produce harm to Spence and other Spence families. Defendant contends that the paragraphs sought to be stricken from the complaint are not relevant to the claims asserted by plaintiffs and are intended to embarrass and harass Spence, rather than state a legal claim. Plaintiffs argue that defendant has failed to demonstrate that the allegations are not relevant to each of plaintiffs' claims and requests for damages, and acknowledge that while the allegations are contemptable, they are not so scandalous and irrelevant that they should be stricken.

The facts detailed in the complaint underscore how the use of social media, especially by teenagers, make it too easy to post something without considering the potential consequences and make it just as easy to publicly criticize someone for perceived offensive behavior. "In reviewing a motion pursuant to CPLR 3024(b) the inquiry is whether the purportedly scandalous or prejudicial allegations are relevant to a cause of action." (*Soumayah v Minnelli*, 41 AD3d 390, 392, 839 N.Y.S.2d 79 [1st Dept 2007]); see also *New York City Health & Hosps. Corp. v St. Barnabas Community Health Plan*, 22 AD3d 391, 391, 802 N.Y.S.2d 363 [1st Dept 2005]).

Having determined that the complaint fails to state a cause of action, defendant's request to strike the allegations noted, is moot. Nonetheless, the court finds that defendant has met its burden to strike paragraphs 7-9, 60-71, 121-123, and 139- 145 of the complaint pursuant to CPLR 3024(b), because the material is not relevant to the plaintiffs' claims.

In rendering its decision, the court acknowledges the difficult social and emotional issues the parties have experienced in pursuing and defending this litigation. It is the court's sincere hope that the end of this lawsuit can be the starting point for restorative conversations with all

involved, especially the students, and in the spirit of Spence's community standards, that all parties can indeed recognize that mistakes can sometimes truly be our most vibrant lessons.

Accordingly, based on the foregoing, it is hereby,

ORDERED that defendant's motion to dismiss the complaint is granted and the complaint is dismissed in its entirety as against said defendant, without costs and disbursements to said defendant, and the Clerk is directed to enter judgment accordingly in favor of said defendant.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

10/23/2020							
DATE				W. FRANC PERRY, J.S.C.			
CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE