

CAUSE NO. 2019-58519

MICHAEL FEINBERG,

Plaintiff,

v.

KIPP, INC A/K/A KIPP HOUSTON,  
N/K/A KIPP TEXAS INC. AND  
KIPP FOUNDATION

Defendants.

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IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

11<sup>TH</sup> JUDICIAL DISTRICT

**DEFENDANTS' MOTION TO DISMISS  
PURSUANT TO THE TEXAS CITIZENS PARTICIPATION ACT**

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## **I. Introduction**

This is a defamation lawsuit in which Plaintiff Michael Feinberg alleges that the KIPP Defendants, acting through their respective Boards of Directors (the “KIPP Boards”), made false and defamatory statements relating to the circumstances surrounding his termination and intentionally inflicted emotional distress upon him. The KIPP Defendants terminated Plaintiff Feinberg’s employment based on the results of an independent investigation conducted by an outside law firm, WilmerHale, which reported that it had made the following assessments: 1) the allegation against Feinberg of sexual abuse by a then-minor student was credible; 2) at least one of the accusations against Feinberg of sexual harassment of an eighteen-year-old employee and recent KIPP graduate was credible; and 3) Feinberg accessed pornography multiple times on his KIPP-issued computer. As to the first incident, the investigators reported to the KIPP Boards that they found both Feinberg’s denials and the victim’s accusation to be credible, but on balance they found the victim to be more credible. As to the second incident, the investigators reported that they did not find Feinberg’s denials to be credible. And as to the third incident, Feinberg admitted that he had accessed the pornography in question but claimed it had only occurred during business travel.

The communications relating to these conclusions are what form the basis of Feinberg’s defamation claims. In conjunction with Feinberg’s termination, the KIPP Boards decided that issuing a written statement to the KIPP community was vital for three reasons: 1) to provide any other potential victims or complainants with information and a contact point if they wished to come forward, 2) to provide a transparent explanation for their decision to all relevant stakeholders, and 3) to confirm that the KIPP Boards had acted prudently to protect the children entrusted to their care, as well as all other KIPP stakeholders, by hiring an independent firm to conduct the investigation. The statement that the KIPP Defendants posted on the KIPP website went out of its

way to make clear—twice—that the truth of the underlying events could not conclusively be determined. The statement always referred to the accusations as “allegations,” never adopting or endorsing them as fact. In addition, the statement expressly specified that Feinberg categorically denied the allegations. It was also careful to state only what had been reported to the boards regarding the evidence and to make no pronouncements regarding Feinberg’s ultimate guilt or innocence. Instead, the statement concluded that “at a minimum, Mr. Feinberg put himself into situations where his conduct could be seriously misconstrued” — a conclusion with which Feinberg himself agreed. The statement also omitted other information against Feinberg, such as his accessing of pornography on his KIPP-issued computer.

These decisions were not undertaken lightly. Feinberg was one of KIPP’s original co-founders, the face of the organizations, a veritable celebrity in the charter-school and education-policy worlds, and a close, personal friend to many of the board members involved. This is precisely why the KIPP Boards engaged a third-party law firm with relevant expertise to conduct an independent investigation.

Feinberg has now sued both KIPP entities, asserting legal theories of defamation and intentional infliction of emotional distress, while asserting repeatedly that he was somehow denied “due process.” KIPP Texas Public Schools, as a charter school, is entitled to governmental immunity. Recognizing this, Feinberg subsequently amended his petition to drop any reference to KIPP Texas in his actual claims, while still lumping both entities together for purposes of all factual allegations. Feinberg’s claims are meritless and should be dismissed as a matter of law. As discussed in more detail below, KIPP’s public statement on his termination contains no false statements, either on its face or by implication. The statement expressly makes clear that KIPP reached no definitive conclusions regarding Feinberg’s guilt or innocence, instead stating only that

its investigations had determined there were credible accusations of misconduct. KIPP's statement therefore cannot constitute defamation as a matter of law. Feinberg cannot satisfy other elements of defamation either, particularly given his status as a public figure. The KIPP boards engaged in a careful investigation conducted by independent counsel and accurately reported their findings in the statement posted on the KIPP web site. That is not negligence, much less actual malice, as required for a defamation claim in these circumstances.

Feinberg's attempt to sue KIPP for statements made by the *New York Times* is also meritless, as KIPP was not the publisher of those statements. Moreover, Feinberg's conspiracy claim—now reduced to a conspiracy of one after his constructive dismissal of KIPP Texas—fails for all the above reasons. Similarly, Feinberg's intentional infliction of emotional distress claim cannot proceed because it is not based on facts independent of his defamation claim.

As to the due process assertion, Feinberg omits the fact that he was interviewed on two separate occasions and provided extensive opportunity to rebut the allegations against him. WilmerHale interviewed more than 15 different witnesses in addition to Feinberg, so his attempt to paint the investigation as somehow incomplete is also wrong. At-will employees are not legally entitled to any "due process" in their investigation or termination, but KIPP provided Feinberg (and the other witnesses) with a robust process anyway.

Given the constitutional interests at stake, KIPP is entitled to prompt dismissal of these meritless claims under the Texas Citizens Participation Act ("TCPA"). KIPP asks the Court to hold a hearing in accordance with the TCPA. KIPP further requests that the Court award KIPP its full attorneys' fees, dismiss Feinberg's claims with prejudice, and award all other relief that KIPP is entitled to under the statute.

## **II. Factual and Procedural Background**

### **A. Feinberg is a well-known public figure in the education and charter school worlds**

As Feinberg alleges, he and David Levin founded the KIPP organization in Houston in the mid-1990s. Pet. ¶ 8. KIPP (“Knowledge Is Power Program”) eventually grew to become one of the most successful charter school networks nationwide. Ex. 3 ¶ 2. At the time of Feinberg’s termination, KIPP Texas (which then existed as KIPP Houston) operated 28 schools in the Houston area with over 14,600 students. Ex. 3 ¶ 2. Nationwide, the KIPP network of schools encompassed 209 schools with approximately 88,000 students.

Feinberg’s prominence in the world of charter schools and education policy grew alongside KIPP. He served as the Superintendent of KIPP Houston for more than a decade. Ex. 3 ¶ 3. At the time of his termination, he was the Executive Vice-Chair of KIPP Houston Public Schools and Co-Founder and a Director of KIPP Foundation. Feinberg gave numerous interviews on national platforms, including with Oprah Winfrey and a dedicated segment on his career with *60 Minutes*. See Exs. 4-24. He developed extensive contacts with reporters and news media, especially within Houston and those specializing in educational issues.

Feinberg also received extensive public recognition for his work with KIPP and in the charter education world. His own petition trumpets these accolades and awards. In many ways, he made himself the face of the KIPP brand and organization. He was—at least within the KIPP world, the charter-school world, and the educational-policy world—a prominent public figure.

### **B. Allegations of misconduct lead Defendants to investigate Feinberg**

In April 2017, Feinberg was scheduled to give his customary speech to a group of graduating seniors. Ex. 3 ¶ 4. One of them objected, stating that he had “raped [her] cousin.” *Id.* This comment was quickly reported up the KIPP chain of command and resulted in Feinberg being

placed on administrative leave while an investigation was conducted. *Id.* In accordance with Texas law, KIPP also reported the accusation to Texas CPS, which declined to investigate (because the alleged victim was no longer a minor). *Id.*

The initial investigation was conducted by KIPP Houston's longtime outside counsel, Ellen Spalding. Ex. 3 ¶ 5. Ms. Spalding conducted several interviews, through which she learned that the cousin in question was a former KIPP student. *Id.* Ms. Spalding interviewed the former student and found her to be a credible witness. *Id.* The former student asserted that when she was twelve years old, Feinberg had taken her into his office on two occasions, under the guise of a "medical examination," and touched her inappropriately. *Id.* Ms. Spalding was unable to find any corroborating circumstantial evidence for this accusation, particularly given the passage of time; however, she did not interview any of the former student's friends or family members. *Id.* Despite concluding that the former student was credible, Ms. Spalding ultimately determined that the former student's allegations could not be confirmed or substantiated. *Id.* She reported this conclusion to KIPP leadership, and Feinberg was reinstated. *Id.*

Shortly thereafter, in an unrelated incident, a KIPP counselor in Houston was terminated for misconduct. Ex. 3 ¶ 6. In the comments section of a local news post on social media about the termination, Feinberg's accuser posted a comment: "smh [shaking my head], if only they knew there's more from the past." Ex. 3 ¶ 6 & Ex. 3A. Several current KIPP parents quickly responded, asking for more information. *Id.* When this comment was brought to the KIPP boards' attention, they decided that they needed to bring in a top, national firm with experience in sexual misconduct allegations and investigations—WilmerHale—to conduct a more in-depth investigation. Ex. 3 ¶¶ 7-8. WilmerHale was given full license to pursue any line of inquiry or evidence that it believed to be relevant, without restrictions. Ex. 2 ¶ 3; Ex. 3 ¶ 8. The boards' intent was to ensure that the

matter had been investigated to the best extent possible and to select a law firm for the job whose credentials and impartiality would not be subject to subsequent impeachment. Ex. 3 ¶ 7. Their expectation at the time was that the result would be a full exoneration of Feinberg. Ex. 3 ¶ 7.

WilmerHale interviewed over 15 witnesses over the course of four months. Ex. 2 ¶ 5. WilmerHale also examined the contents of Feinberg's KIPP-issued computer, including web history, and various relevant documents. Ex. 2 ¶ 5. In the course of the investigation, WilmerHale found additional evidence supporting the misconduct allegations against Feinberg. The following is a summary of WilmerHale's findings relevant to Feinberg's defamation claims.

First, WilmerHale interviewed the former student who accused Feinberg of sexually assaulting her while she was a minor. Ex. 2 ¶ 6. She provided a detailed account that was consistent with what she had told Ms. Spalding. *Id.* She was able to accurately describe the interior of Feinberg's office at the time, where she said the assault had occurred. *Id.* WilmerHale also interviewed two other witnesses—the former student's mother and one of her friends—both of whom confirmed that the former student had previously told them similar accounts of her assault by Feinberg. *Id.* In the mother's case this occurred right after the assault; in the friend's case, it was several years prior to WilmerHale's investigation. *Id.*

WilmerHale also investigated incidents of inappropriate sexual overtures Feinberg had allegedly made to more recent KIPP graduates. Ex. 2 ¶ 7. These teenagers had been offered internships or employment by the organization not long after graduating from KIPP schools. *Id.*

The first involved a young woman who had graduated from a KIPP school a short time earlier and, at Feinberg's invitation, had come to work for KIPP for a period of time due to a delay in her college enrollment. Ex. 2 ¶ 8. She had a longstanding, close relationship with Feinberg, whom she viewed as a father figure. *Id.* She told WilmerHale that, several months after she started

work, Feinberg invited her to a small room when school was not in session. *Id.* In that meeting he allegedly proposed a relationship in which she would have sex with him and, in exchange, he would take care of her financially, which he described as a “tradition in the North.” *Id.* According to her account, she told him she would think about it and fled the meeting. *Id.*

After the meeting, the young woman allegedly told her father what happened and the two of them purchased a recording device from RadioShack and used it on a follow-up call between her and Feinberg. Ex. 2 ¶ 9. Among other things, the recording—which WilmerHale reviewed as part of its investigation—captured Feinberg inviting her to meet him later that day to run an errand. *Id.* Feinberg further stated that he was home alone and suggested that they could head back to his place afterward. *Id.* The young woman asked Feinberg to confirm that “this is a tradition,” to which he said yes, they could talk more about it, but it was a “lifestyle” that others in his family had, although it is something that he did not think he would ever want to do. *Id.* The young woman responded that she thought the tradition was “bullshit” and that she did not want to do it. *Id.* Feinberg responded in turn “that’s totally fair” and that he “didn’t want to make her uncomfortable.” *Id.* The young woman also made a recording—which WilmerHale also reviewed—of a meeting with Feinberg and others at a restaurant at which Feinberg made certain admissions. *Id.*

The young woman in question reported these allegations to others within KIPP Houston and eventually hired a lawyer. Ex. 2 ¶ 10. She and KIPP Houston reached a settlement before a case was filed. *Id.*

In the course of investigating this allegation, WilmerHale learned of at another young woman who had come forward with a similar accusation around the same time as the first young woman. Ex. 2 ¶ 11. The second woman in question never pursued legal action or made any

demands on KIPP. However, Feinberg also paid her several thousand dollars. *Id.* She declined WilmerHale's requests to be interviewed. *Id.*

WilmerHale obtained additional information from other KIPP employees and representatives that was consistent with what it had learned from its interviews of the young woman who had reached a settlement. Ex. 2 ¶ 12.

During its investigation, WilmerHale interviewed Feinberg twice at length. Ex. 2 ¶ 13. Feinberg denied all of the accusations against him. *Id.* With regard to the initial sexual abuse accusation, Feinberg denied having ever done anything inappropriate and said he could not recall any events that could have been misconstrued. *Id.* With regard to the alleged sexual overture towards the more recent KIPP graduate, he claimed that the incident had been a "misunderstanding." *Id.* He admitted, however, having at least put himself into a situation that could be misconstrued. *Id.* He was also unable to explain various statements he made in the recorded conversations, despite being provided with the opportunity to do so. *Id.*

In addition to all of the above, WilmerHale also determined that Feinberg had accessed pornographic websites from his KIPP-issued computer on at least 30 occasions. Ex. 2 ¶ 14. He did not dispute that he had done so but said it had only occurred during business travel. *Id.* This was a direct violation of KIPP policy. *Id.*

Wilmer Hale made an oral presentation of its findings to each of the KIPP boards. Ex. 2 ¶ 15; Ex. 3 ¶ 9. Based on the above information, both boards determined that Feinberg needed to be terminated. Ex. 2 ¶ 16; Ex. 3 ¶ 10. Among the two boards, twenty-six members voted in favor of termination, and one abstained. Ex. 2 ¶ 16; Ex. 3 ¶ 10.

**C. Defendants terminate Feinberg and release a public statement explaining why**

In addition to terminating Feinberg, the KIPP boards released a succinct public statement explaining the reasoning and process behind that decision. The full statement was as follows:

Dear KIPP Team and Family,

We are writing to you with difficult news. Today, we are announcing the termination of our co-founder, Mike Feinberg, as a result of findings from an independent investigation into allegations of misconduct.

Although the incidents investigated allegedly occurred many years ago, and Mr. Feinberg categorically denies any wrongdoing, credible evidence was found of conduct that is incompatible with the mission and values of KIPP.

We recognize this news will come as a shock to many in the KIPP Team and Family as we struggle to reconcile Mr. Feinberg's 24 years of significant contributions with the findings of this investigation.

The investigation was triggered last spring by an allegation of sexual abuse of a student by Mr. Feinberg in the late 1990s. The alleged conduct had not previously been reported to KIPP or the authorities.

Following the protocols we have established, KIPP immediately contacted Texas Child Protective Services.

KIPP Houston Public Schools then began its own investigation, which was carried out by KIPP Houston's external counsel. After receiving initial findings in the fall, KIPP Houston and the KIPP Foundation jointly hired WilmerHale, a law firm with significant experience investigating allegations of sexual misconduct, to conduct a thorough independent investigation.

While neither investigation conclusively confirmed the initial allegation, which referenced events two decades ago, the investigators found the allegation to have credibility. Mr. Feinberg denies this allegation.

In the course of its work, WilmerHale presented evidence of sexual harassment by Mr. Feinberg involving an adult KIPP alumna who was employed by KIPP Houston in 2004, which led to a financial settlement at the time. A second credible harassment claim against Mr. Feinberg, involving another adult alumna employed by KIPP Houston from the same time period, could not be corroborated.

At KIPP, leadership integrity must be without compromise. Each of us is expected to put the safety, care and well-being of our students, alumni and staff above all else. In light of the nature of the allegations and the passage of time, critical facts about these events may never be conclusively determined. What is clear, however, is that, at a minimum, Mr. Feinberg put himself into situations where his conduct could be seriously misconstrued. We believe that Mr. Feinberg's actions were incompatible with the leadership qualities that are central to our mission.

As a result, the KIPP Foundation board and the KIPP Houston board have terminated Mr. Feinberg.

As we move forward from this decision, we want all members of our community to know that any incident of sexual misconduct, abuse or harassment is of grave concern to KIPP, and we offer unconditional support to anyone who comes forward. We encourage anyone who has experienced, or has knowledge of, any abuse or harassment to contact Bruce Berman or Danielle Conley, partners at WilmerHale. Any contact will be entirely confidential. Bruce can be reached at 202-663-6173 and Danielle can be reached at 202-663-6006. We are also thoroughly reviewing all of our organizational policies and practices to ensure that they protect every member of the KIPP community.

Every day, thousands of KIPPsters — families, students, alumni and staff — put their trust in KIPP to operate with the highest levels of responsibility, integrity and transparency. It is to this standard that we expect every member of our team to adhere and to which we hold ourselves accountable.

Ex. 40. The statement was signed by the Superintendent for KIPP Houston, Sehba Ali, and the CEO for KIPP Foundation, Richard Barth. *Id.*

The KIPP boards made this statement for several reasons. First, they sought to provide a resource and point of contact for any potential victim of sexual misconduct within KIPP, whether of Feinberg or anyone else. Ex. 3 ¶ 11. The statement contained contact information for both of the lead WilmerHale investigators, along with a promise to protect the confidentiality of anyone who came forward.<sup>1</sup> *Id.* Second, they wanted to provide a single, transparent explanation for their decision that could be provided to parents, teachers, alumni, donors, and media alike. *Id.* Third, as part of that explanation, the KIPP Boards wanted to confirm that they had done what any board—particularly one engaged in the care and education of children—should do as a matter of best practice when confronted with an allegation of sexual misconduct: hire a well-regarded independent firm to conduct the investigation. *Id.*

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<sup>1</sup> Several persons subsequently contacted WilmerHale and raised potentially problematic behavior by Feinberg, but all callers wished to remain anonymous and/or were unwilling to provide any detailed allegations against Feinberg at that time. Ex. 2 ¶ 17.

#### **D. Procedural history**

Shortly before the one-year anniversary of his termination, Feinberg first gave notice of this dispute to Defendants via a demand for retraction or correction pursuant to the Texas Defamation Mitigation Act. *See* Ex. 41 (2019.2.18 Letter re Michael Feinberg). In the demand letter, he asserted that KIPP's statement and the *Times* article "heavily imply" and "seriously suggest" that Feinberg was guilty of sexual misconduct with a minor. He thus demanded that both be corrected or withdrawn, without specifying any particular language or correction to be made. The parties subsequently entered into a series of tolling agreements to permit discussions. KIPP subsequently sent Feinberg a demand for evidence of falsity pursuant to CPRC § 73.056. Specifically, KIPP requested that Feinberg "provide all reasonably available information regarding the falsity of the alleged defamatory statements." Ex. 42 (2019.5.10 DMA Request for Evidence) (citing TEX. CIV. PRAC. & REM. CODE § 72.056(a)). Feinberg never responded to the request and never provided any such evidence of falsity.

Feinberg filed this case on August 21, 2019. In his initial petition he pleaded claims for defamation, tortious interference with contracts and prospective relations, intentional infliction of emotional distress, and conspiracy to defame, against both KIPP Texas and KIPP Foundation. Shortly thereafter, he filed a First Amended Petition, in which he dropped his claim for tortious interference but retained all other claims. On November 4, 2019, Feinberg filed his Second Amended Petition, which remains his live pleading in the case (defined herein as the "Petition"). In the Petition, he amended his claims to be solely against KIPP Foundation, apparently dropping all claims against KIPP Texas. His Petition continues, however, to include KIPP Texas for purposes of all of its factual allegations, without distinguishing between the two entities.

### III. Applicable Legal Standards

Feinberg filed this case on August 21, 2019, so this motion is governed by the version of the TCPA then in effect. The TCPA protects the freedom to speak, associate, and petition by giving defendants the ability to seek expedited dismissal of claims that implicate those rights. *In re Lipsky*, 460 S.W.3d 579, 684 (Tex. 2015). The TCPA applies to any lawsuit that is “based on, relates to, or is in response to” a defendant’s exercise of the rights of freedom of speech, petition, or association. TEX. CIV. PRAC. & REM. CODE § 27.003(a). The statute “shall be liberally construed to effectuate its purpose and intent fully.” *Id.* § 27.011.

The TCPA sets forth a three-stage inquiry. First, Defendants must satisfy the initial burden of demonstrating that the legal action at issue implicates one or more of their protected rights to speech, association, and petition. When that step is satisfied, the burden then shifts to Plaintiff, who must show by “clear and specific evidence” a prima facie case for each essential element of the claim in question.” TEX. CIV. PRAC. & REM. CODE § 27.005(c). Clear and specific evidence is “‘unambiguous,’ ‘sure,’ ‘explicit’ or ‘free from doubt.’” *In re Lipsky*, 460 S.W.3d at 590. A prima facie case is the “minimum quantum of evidence” that is “sufficient as a matter of law to establish a given fact if not rebutted or contradicted.” *Id.* “General allegations” and “mere notice pleading” are insufficient. *Id.* Failure to meet this burden results in dismissal with prejudice.

In the event that Plaintiff satisfies that burden as to a claim, Defendants then have the opportunity to prove any available affirmative defense. Per the statute, the court “shall” dismiss the action if Defendants establish the essential elements of a defense by a preponderance of the evidence. TEX. CIV. PRAC. & REM. CODE § 27.005(d).

#### **IV. Arguments and Authorities**

##### **A. Feinberg’s claims against KIPP are subject to the TCPA.**

“If a legal action is based on, relates to, or is in response to a party’s exercise of free speech . . . that party may file a motion to dismiss the legal action [under the TCPA].” TEX. CIV. PRAC. & REM. CODE § 27.003(a). The “‘exercise of the right of free speech’ means a communication made in connection with a matter of public concern.” *Id.* § 27.001(3). Here, Feinberg alleges that KIPP made statements about an investigation into allegations that he had engaged in sexual misconduct (and his subsequent termination), which he claims amount to defamation and intentional infliction of emotional distress. It is beyond dispute that these claims are based on, related to, and in response to KIPP’s communications involving a matter of public concern.

##### **1. Feinberg’s claims involve “communications” as defined by the TCPA.**

The TCPA provides a broad definition of “communications.” “Almost every imaginable form of communication, in any medium, is covered.” *Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 894 (Tex. 2018). The definition “includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.” TEX. CIV. PRAC. & REM. CODE § 27.001(1). Additionally, the communication need not be made to the public or in a public forum. Instead, the Legislature defined “communication” to “include both public and private communication.” *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015); *see also, e.g., Exxon Mobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 899 (Tex. 2017) (“[T]he plain language of the Act merely limits its scope to communications involving a public subject—not communications in public form.”).

Feinberg’s claims expressly target KIPP’s “communications.” With respect to KIPP’s purported wrongdoing, the Petition alleges:

- KIPP made statements about allegations of sexual harassment and sexual misconduct, and an investigation into those allegations, to the *New York Times*, *Washington Post*, *Houston Chronicle*, and other news sources. Pet. ¶¶ 13, 29, 31, 32, 37, 44.
- In a blog post, which was distributed to KIPP’s “team and family” via email, “KIPP wrote that the child abuse allegation was ‘credible’ and made other misstatements and omissions and told outright lies.” Pet. ¶¶ 13, 29, 32, 36, 43.
- During conference calls, KIPP shared information about the sexual misconduct allegations with donors and third-party educators. Pet. ¶ 24.
- “KIPP representatives ... assert[ed] to various people that WilmerHale concluded that [Feinberg] had sexually touched a child.” Pet. ¶ 35.
- Following Feinberg’s termination, KIPP representatives told staff members not to contact him and stated, in effect, that “if you knew what I know you would understand why we had to do this.” Pet ¶ 39.

Based on these allegations, Feinberg asserts three causes of action: (1) KIPP made defamatory statements; (2) the publication of these defamatory statements constituted intentional infliction of emotional distress; and (3) KIPP conspired to commit defamation. Pet. ¶¶ 47-60. Eliminating any doubt that these claims are based on KIPP’s communications, the Petition specifically alleges that Feinberg was injured “not from his employment termination, but by the false statements.” *Id.* ¶ 46.

## 2. Feinberg’s claims involve a matter of public concern.

The TCPA broadly defines a “matter of public concern” to include any “issue related to (A) health or safety, (B) environmental, economic, or community well-being, (C) the government, (D) a public official or public figure, or (E) a good, product, or service in the marketplace.” TEX. CIV. PRAC. & REM. CODE § 27.001(7); *see also, e.g., Shipp v. Malouf*, 439 S.W.3d 432, 438 (Tex. App. —Dallas 2014, pet. denied) (“A matter of public concern is defined broadly; therefore, the legislature expressed its intent that the statute, enacted to protect the right of free speech, be construed broadly.”). Communications relevant to any one of these subjects establishes a matter of public concern, and the communications at issue here—statements regarding an investigation

into allegations of sexual misconduct and harassment by a high-profile employee of a governmental entity like KIPP Texas—involve almost all of the subjects listed in the statute.

**a. Communications addressing a sexual misconduct and harassment investigation relate to health, safety, and community well-being.**

“The public has a strong interest in protecting children from abuse.” *Golden Spread Council, Inc. No. 562 of Boy Scouts of Am. v. Akins*, 926 S.W.2d 287, 292 (Tex. 1996). Consistent with this obvious principle, courts have repeatedly held that “communications or statements regarding the welfare of children are matters of public concern that involve the right to free speech under the TCPA.” *DeAngelis v. Protective Parents Coal.*, 556 S.W.3d 836, 852 (Tex. App.—Fort Worth 2018, no pet.) (collecting cases). More specifically, courts have found it “clear[]” that allegations of “sexual misconduct involving young vulnerable individuals are matters of public concern as they relate to health, safety, and community well-being, all included in the definition of ‘matters of public concern’ under the TCPA.” *Crews v. Galvan*, No. 13-19-00110-CV, 2019 WL 5076516, at \*5 (Tex. App.—Corpus Christi Oct. 10, 2019, no pet.) (statements alleging that a former youth pastor manipulated and seduced a teenager more than a decade earlier); *see also Campbell v. Clark*, 471 S.W.3d 615, 624 (Tex. App.—Dallas 2015, no pet.) (statements alleging that a county commissioner had helped his nephew avoid prosecution for child molestation).

Feinberg claims that he was injured by KIPP’s statements related to allegations of sexual misconduct against a KIPP student and sexual overtures toward a young adult alumna who was employed by KIPP. Pet. ¶¶ 31-40. The law is clear that these statements—like other allegations of misconduct against children—relate to the health and safety of young people in the community.

**b. KIPP’s communications related to a charter school, a governmental entity.**

Consistent with the TCPA’s mandate that the statute be “liberally construed,” TEX. CIV. PRAC. & REM. CODE § 27.011, courts have given broad meaning to the phrase “related to ... the government.” *Id.* § 27.001(7). Under this prong, matters of public concern include “the activities of government officials,” *Baumgart v. Archer*, 581 S.W.3d 819, 826 (Tex. App.—Houston [1st Dist.] 2019, no pet.); expenditures of public funds, *Schimmel v. McGregor*, 438 S.W.3d 847, 859 (Tex. App.—Houston [1st Dist.] 2014, pet. denied); people who believe that Texas is a sovereign nation, *Avery v. Baddour*, No. 04-16-00184-CV, 2016 WL 4208115, at \*3 (Tex. App.—San Antonio Aug. 10, 2016, pet. denied); concerns about the Vietnamese government, *Tu Nguyen v. Duy Tu Hoang*, 318 F. Supp. 3d 983, 1001 (S.D. Tex. 2018), *appeal dismissed* (5th Cir. Oct. 5, 2018); and allegations that a homeowners’ association violated the law in maintaining land that is open to the public, *Adams*, 547 S.W.3d at 896.

The statements challenged here fit squarely within this category. As an open-enrollment charter school network, KIPP Texas is “indisputably part of the Texas public-education system,” *Honors Acad., Inc. v. Texas Educ. Agency*, 555 S.W.3d 54, 62 (Tex. 2018), *reh’g denied* (Sept. 28, 2018) (quoting *LTTS Charter Sch., Inc. v. C2 Constr., Inc.*, 342 S.W.3d 73, 76 (Tex. 2011)), and is defined as “a governmental unit” by the Texas Education Code. TEX. EDUC. CODE § 12.1056(b); *see also Neighborhood Centers Inc. v. Walker*, 544 S.W.3d 744, 752 (Tex. 2018) (discussing 2015 amendments to the Texas Charter Schools Act, which “made an open-enrollment charter school a governmental unit”). KIPP’s status as a governmental entity is well-settled law. *See Springboards to Educ., Inc. v. Kipp Found.*, No. 3:16-CV-2436-G, 2017 WL 3917701, at \*3 (N.D. Tex. Sept. 7, 2017); *Rosenberg v. KIPP, Inc.*, 458 S.W.3d 171, 176 n.4 (Tex. App.—Houston [14th Dist.] 2015, pet. denied); *KIPP, Inc. v. Whitehead*, 446 S.W.3d 99, 105 (Tex. App.—Houston [14th Dist.] 2014,

pet. denied) (all holding that KIPP Texas, as a governmental entity, is entitled to governmental immunity).

Accordingly, statements related to KIPP are statements related to “the government” within the meaning of the TCPA. They are no different from statements about any other public school or governmental unit. In light of KIPP’s status as a governmental entity, allegations of misconduct by a KIPP employee—that occurred on KIPP property, affected KIPP students, and led to investigations that used KIPP funds—are a matter of public concern. Feinberg’s termination as the Executive Vice-Chair of KIPP Houston—and the reasons behind that termination—are similarly matters of public concern.

Recognizing that KIPP Texas is protected by governmental immunity, Feinberg now purports to sue only the KIPP Foundation, a nonprofit organization that, among other things, trains and develops educators, provides research and analysis, and raises funds for KIPP public charter schools. But the Petition makes no effort to distinguish between KIPP Texas and KIPP Foundation. To the contrary, the Petition states at the outset that “KIPP Foundation, together with KIPP, Inc. a/k/a KIPP Houston n/k/a KIPP Texas, Inc. (“KIPP Houston”) and other affiliated entities, are referred to collectively as ‘KIPP.’” Pet. ¶ 4. The Petition then alleges various written and oral statements made by “KIPP,” periodically emphasizing that both entities participated in the alleged wrongdoing. *See, e.g.*, Pet. ¶ 27 (alleging that the investigation “directed and controlled by the KIPP Foundation and KIPP Houston” was “unfair”); *id.* ¶ 28 (alleging that Feinberg was simultaneously asked to “resign his positions on the boards of the KIPP Foundation and KIPP Houston”). Isolating the KIPP Foundation is therefore impossible, as Feinberg alleges that the two entities acted together and that all statements related to KIPP’s charter school network. Feinberg’s claims thus relate to a matter of public concern under this prong as well.

**c. As a “celebrity educator,” Feinberg is a limited-purpose public figure.**

The TCPA does not define the term “public figure,” so courts look to the meaning that term has acquired in First Amendment cases. *Rauhauser v. McGibney*, 508 S.W.3d 377, 386 (Tex. App.—Fort Worth 2014). There are two types of public figures: “general-purpose public figures,” who “occupy positions of such persuasive power and influence that they are deemed public figures for all purposes,” and “limited-purpose public figures,” a person who “voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974); *Klentsman v. Brady*, 312 S.W.3d 886, 904 (Tex. App.—Houston [1st Dist.] 2009, no pet.). For example, courts have found that a university voice teacher was a limited-purpose public figure for purposes of a dispute related to that role, *Lane v. Phares*, 544 S.W.3d 881, 889-91 (Tex. App.—Fort Worth 2018, no pet.); a local restaurant owner was a limited-purpose public figure “with respect to his behavior in business and family matters,” *New Times, Inc. v. Wamstad*, 106 S.W.3d 916, 925 (Tex. App.—Dallas 2003, pet. denied); and the chair of a large hedge fund that invested primarily in energy companies could be a limited-purpose public figure in the context of “issues related to energy,” *Pickens v. Cordia*, 433 S.W.3d 179, 187 (Tex. App.—Dallas 2014, no pet.).

To determine whether a person is a limited-purpose public figure, Texas courts apply a three-part test: “(1) the controversy at issue must be public both in the sense that people are discussing it and in the sense that people other than the immediate participants in the controversy are likely to feel the impact of its resolution; (2) the plaintiff must have more than a trivial or tangential role in the controversy; and (3) the alleged defamation must be germane to the plaintiff’s participation in the controversy.” *Rauhauser*, 508 S.W.3d at 386 (citing *WFAA-TV v. McLemore*, 978 S.W.2d 568, 572 (Tex. 1998)).

All three elements are satisfied here: First, in his role as the co-founder and long-time senior executive of a large and well-respected charter school network, Feinberg has attracted national media attention, high-profile donations, and prestigious awards for more than two decades. He is therefore a limited-purpose public figure in his role as a KIPP leader and with respect to education more broadly. Second, Feinberg played an active and central role in drawing attention to KIPP and himself, both before and after his termination. Third, KIPP's statements at issue, which terminated Feinberg's employment and ended his association with the KIPP entities, are absolutely germane to Feinberg's role as a KIPP leader.

First, Feinberg is a limited public figure in his capacity as a "celebrity educator." Ex. 10 (Fordham Institute Bio). Since the 1990s, Feinberg's work co-founding and operating KIPP has been featured on television programs including Oprah,<sup>2</sup> 60 Minutes,<sup>3</sup> ABC World News Tonight, and CBS, and in print sources including the *New York Times*, *Washington Post*, *Houston Chronicle*, and *U.S. News & World Report*. See, e.g., Ex. 4 (Global Philanthropy Forum bio). Indeed, by 2009, Feinberg's work at KIPP had been covered and praised by "just about every news outlet in the country." Ex. 17 (10/10/2009 GOOD 100 article). KIPP's origin story and pedagogy have even been the subject of rival books: *Work Hard Be Nice*, a positive account by a *Washington Post* reporter (and a *New York Times* bestseller), and *Work Hard, Be Hard*, a critical take by a Professor of Educational Leadership at Cambridge College. Ex. 23 (2/29/2016 *Washington Post* article).<sup>4</sup> In addition, Feinberg received numerous honors and awards, including the Presidential Citizens Medal and an honorary degree from Yale. See, e.g., Ex. 8 (World Economic Forum bio); Ex. 10 (Fordham Institute profile); Ex. 14 (12/10/2008 *Houston Chronicle* article); Ex. 15 (Charles

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<sup>2</sup> See <https://www.youtube.com/watch?v=j6LkxMyPzmM>.

<sup>3</sup> See <https://vimeo.com/91447154>.

<sup>4</sup> See also <https://www.amazon.com/Work-Hard-Be-Nice-Promising/dp/1565125169>.

Bronfman Prize); Ex. 20 (Brock International Prize); Ex. 21 (Schwab Foundation Award). Even in his Petition, Feinberg holds himself out as the co-founder of an organization that “revolutionized public school education,” earning him “many awards and accolades” as well as “the respect of students, parents, teachers, community leaders, educational professionals, academics, and policy experts.” Pet. ¶¶ 8-9.

Feinberg cannot “have it both ways,” presenting one persona to advance his career and another to gain an advantage in litigation. *San Antonio Exp. News v. Dracos*, 922 S.W.2d 242, 255 (Tex. App.—San Antonio 1996, no writ) (“Dracos cannot hold himself out as a popular television personality and yet deny he is a public figure for purposes of the New York Times standard and the First Amendment.”); *see also, e.g., Lane*, 544 S.W.3d at 889 (“Lane simply cannot sing her national and international renown on her website and the UNT faculty page, stand by those statements in her affidavit, and then claim she has no public presence.”).

The court’s analysis in *Dracos* is particularly instructive here, holding the plaintiff in that case to be a public figure based on the fact that he had popular local news segments and had won several awards. *See* 922 S.W.2d at 255. Feinberg similarly won many awards and honors, especially within educational circles.

Feinberg’s career and work for KIPP therefore constitute a public controversy. The fact that they were not generally “controversial” in the colloquial sense is irrelevant—in this context, the “public controversy” element refers more generally to “something the public is talking about.” *See, e.g., McLemore*, 978 S.W.2d at 572 (examining “whether persons were actually discussing some specific question”). In any event, Feinberg’s work for KIPP certainly had its detractors and critics, especially among those opposed to charter schools. *See, e.g., Ex. 11* (3/21/2007 *New York Times* article); *Ex. 23* (2/29/2016 *Washington Post* article).

The media response to the sexual misconduct allegations and Feinberg’s termination both confirms that Feinberg is a limited-purpose public figure with respect to his role as a co-founder of KIPP and demonstrates that those allegations constitute a public controversy in their own right. According to Feinberg, KIPP’s “high-profile investigations” led to “total public vilification” and an “onslaught of media inquiries” Pet. ¶¶ 14, 20, 30. The issue has been covered in a variety of news sources—both local and national, education-specific and general-interest—including a lengthy piece in Section A of the *New York Times*. See, e.g., Exs. 25-28; see also *WFAA-TV, Inc.*, 978 S.W.2d at 572 (To determine whether a public controversy indeed existed, “the court can see if the press was covering the debate, reporting what people were saying and uncovering facts and theories to help the public formulate some judgment.”) (citation omitted).

Further, the impact of any public dispute related to Feinberg’s role as a co-founder of KIPP—including the controversy over the misconduct allegations—will be felt far beyond the direct participants. The impact extends at least to the broader KIPP “Team and Family,” a large community of KIPP students, parents, alumnae, donors, and employees. See *Lane*, 544 S.W.3d at 889 (“[T]he issue affected more than just . . . the immediate participants in the controversy, because it dealt with a professor’s fitness for, and performance of, her role as a teacher, which affects any potential or current UNT voice student.”). And as the Petition aptly notes, a sexual misconduct investigation involving a “prominent” educator “conducted during the height of the #MeToo movement” is nationally significant news. Pet. ¶ 42; see *Swate v. Schiffers*, 975 S.W.2d 70, 76 (Tex. App.—San Antonio 1998, pet. denied) (finding that plaintiff was a limited-purpose public figure where the “type of behavior described by the articles is certainly the type of information that interests the public”).

Second, Feinberg has played more than a trivial or tangential role in the controversy because he “actually sought publicity,” “had access to the media,” and “voluntarily engaged in activities that necessarily involved the risk of increased exposure and injury to reputation.” *WFAA-TV, Inc.*, 978 S.W.2d at 573 (citation and alterations omitted). Since the 1990s, Feinberg has made himself highly recognizable within education circles, giving speeches and extensive interviews addressing how he founded and built KIPP into a successful, nationwide organization. *See, e.g.*, Ex. 4 (Global Philanthropy Forum bio); Ex. 5 (Premiere Speakers Bureau bio); Ex. 9 (1/31/2006 *Washington Post* article); Ex. 16 (2009 District Management Group interview). Because Feinberg “chose[] a career that regularly involves media attention” and has promoted his credentials and successes, there is “no question” that Feinberg “invite[d] attention and comment.” *Lane*, 544 S.W.3d at 890.

Moreover, after his termination Feinberg embraced the “onslaught of media inquiries,” Pet. ¶ 30, and actively courted public attention in an apparent effort to clear his name. *See, e.g.*, Ex. 27 (8/22/2018 *Washington Post* article); Ex. 39 (LinkedIn Profile). Feinberg kicked off another round of media coverage when he publicly announced that he was starting a new organization, *see, e.g.*, Exs. 29, 38, and yet another when he filed this suit, holding a press conference to which he invited reporters from all over the country, *see, e.g.*, Exs. 31-36. By “purposely trying to influence the outcome” of the public controversy, Feinberg further satisfied this element of the limited-purpose public figure test. *Lane*, 544 S.W.3d at 890 (citation omitted); *see also, e.g., Vice v. Kasprzak*, 318 S.W.3d 1, 16 (Tex. App.—Houston [1st Dist.] 2009) (finding this prong satisfied where a local newspaper published a letter to the editor presenting the plaintiff’s side of a homeowners’ association controversy); *Wamstad*, 106 S.W.3d at 925 (same, where local restaurant owner “participated in the debate by using his media access to propound his point of view”); *Swate*, 975

S.W.2d at 76 (same, where physician “may not have voluntarily injected himself into controversy” but was “drawn into controversy” following allegations of “atrocious” abortion-related practices).

Third and finally, all of the allegedly defamatory statements concern Feinberg’s role as the co-founder of KIPP: those statements explained the termination of his employment and the end of his association with the KIPP entities. *See Lane*, 544 S.W.3d at 890 (finding this element satisfied where “the statements [plaintiff] sued [defendant] for making ... all concerned [plaintiff’s] role as a voice teacher”). Additionally, the allegations of sexual misconduct contradict Feinberg’s public portrayal of himself as a devoted educator. *See Trotter v. Jack Anderson Enterprises, Inc.*, 818 F.2d 431, 436 (5th Cir. 1987) (“In alleging that Trotter was responsible for the anti-union violence, Anderson was also describing Trotter’s role in the controversy.”); *Wamstad*, 106 S.W. 3d at 925 (allegations of domestic violence were relevant to “the family-man persona [plaintiff] persistently projected” in advertising for his restaurant). Thus, the alleged defamation was plainly germane to Feinberg’s role as a co-founder of KIPP and his self-promotion as an educator.

**B. Feinberg’s claims are meritless and he cannot meet his TCPA burden.**

**1. KIPP Texas is immune from Feinberg’s claims.**

As an initial matter, KIPP Texas has governmental immunity against all the claims pleaded by Feinberg. Feinberg eliminated KIPP Texas from his formal listing of claims in the Second Amended Petition, but retained KIPP Texas for purposes of the Petition’s undifferentiated factual allegations. *See* Pet. ¶ 4. KIPP Texas has not been formally dismissed from the case either. KIPP Texas is entitled to such dismissal—with prejudice—as it is immune from all conceivable claims by Feinberg based on the set of facts asserted. *See, e.g., Rosenberg v. KIPP, Inc.*, 458 S.W.3d at 176 n.4; *KIPP, Inc. v. Whitehead*, 446 S.W.3d at 105.

**2. Feinberg's defamation claim fails.**

Feinberg's lead remaining claim in this lawsuit is that KIPP Foundation defamed him in connection with his termination. KIPP Foundation is entitled to dismissal of that claim under the TCPA for multiple reasons.

**a. Feinberg cannot meet his burden to provide clear and specific evidence as to each element of his defamation claim.**

Under the TCPA, Feinberg must provide by clear and specific evidence a *prima facie* case for each essential element of the claim in question. For defamation, that means Feinberg must provide such evidence for each of the following elements:

1. KIPP Foundation published a statement of fact.
2. The statement referred to Feinberg.
3. The statement was defamatory.
4. The statement was false.
5. With regard to the truth of the statement, KIPP Foundation was either:
  - a. acting with actual malice, by clear and convincing evidence (if Feinberg qualifies as a public figure), or
  - b. negligent (if Feinberg is not a public figure).
6. Feinberg suffered injury as a result.

*See Dallas Morning News, Inc. v. Tatum*, 554 S.W.3d 614, 623 (Tex. 2018) (defining general elements); *Lipsky*, 460 S.W.3d at 593.

Feinberg cannot meet that burden as to any alleged defamatory statement by KIPP Foundation. When Defendants requested that Feinberg provide them with evidence of falsity under the Defamation Mitigation Act, he ignored the request and provided no such evidence at all. His Petition fails to make any specific allegations as to KIPP Foundation, instead using the vague term "KIPP"—which includes immune defendant KIPP Texas, as well as potentially other

unspecified “affiliated entities”—for purposes of virtually all fact allegations. Pet. ¶ 4. In short, Feinberg currently has not satisfied *any* elements of a defamation claim on the face of his Petition.

One element in particular is glaringly lacking: scienter. For the reasons addressed above, Feinberg is a public figure for purposes of this matter. As a consequence, Feinberg must establish that KIPP Foundation acted with actual malice toward him. *See, e.g., Lipsky*, 460 S.W.3d at 593; *Huckabee v. Time Warner Entm’t Co. L.P.*, 19 S.W.3d 413, 420 (Tex. 2000). This he cannot do. His Petition alleges no plausible basis for any finding of actual malice, or even negligence, against the Foundation. “‘Actual malice’ in this context means that the statement was made with knowledge of its falsity or with reckless disregard for its truth.” *Lipsky*, 460 S.W.3d at 593. “‘Reckless disregard’ is also a term of art, meaning that the publisher “entertained serious doubts as to the truth of his publication.” *Huckabee*, 19 S.W.3d at 420 (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)).

In an apparent attempt to gin up some semblance of malice, Feinberg points to the fact that the KIPP boards commissioned a second investigation after the first determined that the sexual abuse accusation could not be corroborated. Feinberg’s position is, effectively, that KIPP and its boards acted with malice, or at least negligence, simply by hiring an entirely independent and nationally renowned law firm to undertake an investigation. That is untenable. He offers vague and wholly unsubstantiated speculation that this was somehow motivated by two Foundation board members’ desire to remove him. *See* Pet. ¶¶ 14, 17. But as discussed above, the KIPP boards’ decision to launch the second investigation was undertaken for valid reasons. Indeed, in such circumstances, hiring an independent, highly qualified firm to investigate thoroughly is precisely the type of prudent decision that the law should encourage.

Moreover, the decision to undertake a second investigation has no bearing on the boards' scienter with respect to the *statement*, which is what matters for defamation purposes. See *Huckabee*, 19 S.W.3d at 420. KIPP's public statement accurately notes that the initial investigation had occurred. There is no defamation there. Moreover, the first investigation, like the second, had determined that the accuser's account was "credible," consistent with KIPP's public statement. Ex. 2 ¶ 15; Ex. 3 ¶ 5. The second investigation also found corroborating evidence via interviews with the former student's mother and friend, as well as confirming that her detailed account of the assault was consistent with her previous account and that her recollection of Feinberg's office at the time was consistent with Feinberg's description. Ex. 2 ¶ 6; Ex. 3 ¶ 9. Feinberg thus identifies no plausible basis, much less the unambiguous evidence required by the TCPA, to conclude that KIPP Foundation and its board acted with malice or negligence regarding KIPP's public statement.

**b. Feinberg's defamation theories suffer from several incurable defects.**

Feinberg has the right to submit additional evidence in support of his claims in response to this motion. But on its face, his Petition suffers from multiple fatal flaws. Feinberg alleges essentially three basic "theories" of defamation:

- 1) The *Times* article defamed him by referring to the sexual harassment allegation as being "uncovered" by KIPP in 2017;
- 2) KIPP's public statement defamed him by misleadingly implying that he was a child molester;
- 3) KIPP representatives made various unspecified verbal defamatory statements to donors and other third-party educators.

Each of these theories is addressed in turn below.

**i. KIPP Foundation is not liable for statements published by the *New York Times*.**

Throughout his Petition, Feinberg makes various references to statements by the *New York Times* in its article about his termination that he contends are false or misleading. Most notably, he takes issue with the article's statement that KIPP "uncovered" the 2004 sexual harassment allegations against him when conducting the 2017 investigation. See Pet. ¶ 37. That statement cannot support a defamation claim for a litany of reasons. As an initial matter, Feinberg offers no explanation as to how that statement is at all defamatory toward him or any plausible damages it caused. More fundamentally, KIPP Foundation was not the publisher of that statement and thus cannot be held liable for it. KIPP Foundation's statement uses different language, stating only that WilmerHale "presented evidence" regarding this allegation in the course of its work, which Feinberg does not dispute is true. Ex. 40 (KIPP Statement). As a practical matter, those allegations and that evidence *were* new to all of the board members and executives in question, as none of them had participated in those events in 2004, and to KIPP Foundation, which did not sign or participate in the 2004 accusation and settlement. This theory thus fails.

**ii. Feinberg's "defamation by implication" theory fails.**

Feinberg's other major defamation theory is that KIPP's public statement defamed him by implying to readers that he was, in fact, guilty of the sexual abuse accusation.<sup>5</sup> But a defamation-by-implication theory cannot succeed when the statement in question expressly *disavows* the implication in question.<sup>6</sup> That is precisely what KIPP's statement did here: on two separate

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<sup>5</sup> In particular, Feinberg appears to be relying on the "gist" form of defamation by implication as explained by the Texas Supreme Court in *Tatum*, 554 S.W.3d at 628-29.

<sup>6</sup> The Idaho Supreme Court recently rejected a similar set of defamation claims by an educator. In *Verity v. USA Today*, an Idaho teacher who had been forced to resign sued for defamation based on news coverage that described his "misdeeds," including an inappropriate relationship with an 18-year-old female student that occurred when plaintiff was a teacher in Oregon. 164 Idaho 832, 837 (2019). The court rejected three defamation-by-implication claims on the basis that the defendants' statements "specifically include[d] facts that negate the implications that [the plaintiff] conjures up." *Id.* at 848 (quoting *Tatum*, 554 S.W.3d at 635). As to the first alleged defamatory implication,

occasions, the statement makes clear that KIPP and KIPP’s investigation did not reach any final judgment or conclusions regarding Feinberg’s guilt or innocence with regard to the sexual abuse accusation. The mere fact that some readers nonetheless came away with the impression that he likely committed the alleged act of abuse is irrelevant. *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 118 (Tex. 2000) (“[A] true account which does not create a false impression by omitting material facts or suggestively juxtaposing them is not actionable, regardless of the conclusions that people may draw from it.”).<sup>7</sup> Defamation-by-implication of this sort requires that the statement *as a whole* provide a false or misleading impression of events. *See Tatum*, 554 S.W.3d at 628.

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that plaintiff “was a danger to female students,” the defendants “simply reported that a psychologist made the finding that he should not be alone with female students,” which created no such implication. *Id.* In any event, the defendants “were specific in stating that a psychologist recommended that [plaintiff] not be left alone with female students over the age of twelve, both for his protection and the potential students.” *Id.* As to the second alleged defamatory implication, that plaintiff “committed a crime by having sex with a minor,” the defendants “expressly stated that the female student was 18.” *Id.* Finally, as to the third alleged defamatory implication, that plaintiff “deceived Idaho officials by hiding his past,” defendants “unambiguously stated that [plaintiff] told his principal about his actions in Oregon.” *Id.*; *see also, e.g., Deripaska v. Associated Press*, 282 F. Supp. 3d 133, 148 (D.D.C. 2017), *appeal dismissed*, No. 17-7164, 2017 WL 6553388 (D.C. Cir. Dec. 8, 2017) (finding that an article could not be read to suggest that the plaintiff was “personally involved in the Trump campaign controversy or [was] accused of stealing Ukrainian assets” because it “specifically include[d] facts that negate [those] implications,” including that plaintiff was not mentioned during House intelligence committee hearings and that no criminal charges had been filed); *Wyoming Corp. Servs. v. CNBC, LLC*, 32 F. Supp. 3d 1177, 1188 (D. Wyo. 2014) (finding that an article did not suggest that plaintiff was “in the business of aiding and abetting illegal activities” where it expressly stated that he “fully complies with the law and doesn’t have any knowledge of how clients use the companies he registers”).

<sup>7</sup> As a limited-purpose public figure, Feinberg bears the burden of proving KIPP’s statement to be false. *See* Subsection IV(A)(iii), *supra*; *Hearst Corp. v. Skeen*, 159 S.W.3d 633, 636 & n.1 (Tex. 2005). Indeed, Feinberg bears that burden even if he is *not* a public figure, as KIPP’s statement indisputably was made regarding a matter of public concern. *See* Subsection IV(A)(ii), *supra*; *Brady v. Klentzman*, 515 S.W.3d 878, 883 (Tex. 2017). But regardless of where the burden falls, KIPP Foundation will prevail regarding the truth of its statement. A statement is true if it is either literally true or substantially true. *Tatum*, 554 S.W.3d 614. A statement is substantially true if it is “[no] more damaging to the plaintiff’s reputation than a truthful [statement] would have been.” *Id.*; *see also KBMT Operating Co., LLC v. Toledo*, 492 S.W.3d 713 (Tex. 2016) (holding that station’s report that plaintiff pediatrician had been disciplined for having engaged in sexual contact with a patient was substantially true even though report did not clarify that the patient was a 60-year-old that she was treating with testosterone).

Moreover, the underlying assessments of Feinberg or the alleged victim’s credibility are opinions incapable of a defamatory meaning. If a statement is not verifiable as false, it is not defamatory. *Tatum*, 554 S.W.3d at 624. Even when a statement is verifiable as false, it does not give rise to liability if the “entire context in which it was made” discloses that it is merely an opinion masquerading as a fact. *Tatum*, 554 S.W.3d at 624. Because the underlying credibility determinations are subjective opinions not susceptible of being proved objectively true or false and because the entire context of the statements made clear that Feinberg denied the allegations, Feinberg’s defamation claim fails as a matter of law.

Feinberg can only make his theory work by ignoring multiple express portions of KIPP Foundation's statement.

To shore up this theory, Feinberg contends that the statement should have at least included some reference to his own credibility in denying the allegations. That fails as a matter of law—KIPP Foundation was not obligated to include every detail or mitigating fact in its statement. *See, e.g., Green v. CBS Inc.*, 286 F.3d 281, 285 (5th Cir. 2002) (“Given that CBS accurately reported facts, albeit not all of the facts, whether or not the story painted Mitzi Green in an attractive light is irrelevant.”). Moreover, the statement already included the fact that “Feinberg categorically denies any wrongdoing” and later that he “denies the allegation” with regard to the sexual abuse claim. Ex. 40 (KIPP Statement). KIPP's statement did not get into any relative or comparative credibility weighing, which was entirely appropriate. Had the statement addressed that subject, the *full* report would have been that WilmerHale found Feinberg's accuser, on balance, to be more credible than him with respect to the sexual abuse allegation, and found his denial of the sexual harassment accusation to be not credible at all. *See* Ex. 2 ¶ 15; Ex. 3 ¶ 9. In other words, the full truth would have been worse for Feinberg, not better. That is not defamation.

But again, credibility comparisons were not the statement's ultimate purpose or message. Rather, as conveyed at the end of the statement: “What is clear, however, is that, at a minimum, Mr. Feinberg put himself into situations where his conduct could be seriously misconstrued.” That statement is true, as Feinberg himself admitted during the investigation. And that conclusion, in conjunction with the credible accusations against him (and the unmentioned pornography use) was the basis for the boards' decision.

Having failed these basic tests, there is no need to even reach the Texas Supreme Court's most recent holding on defamation-by-implication claimants' burden. But as the Court held in

*Tatum*: “a plaintiff who seeks to recover based on a defamatory implication—whether a gist or a discrete implication—must point to ‘additional, affirmative evidence’ within the publication itself that suggests the defendant ‘intends or endorses the defamatory inference.’” *Tatum*, 554 S.W.3d at 635. Feinberg offers no evidence satisfying that requirement either. This theory fails for that reason as well.

**iii. The Petition’s vague references to oral statements are insufficient.**

In addition to Defendants’ official statement and associated articles, Feinberg’s Petition also makes reference to various unspecified verbal statements allegedly made by KIPP representatives about him and his termination. Such vague references are insufficient. To satisfy the TCPA, Feinberg must at a minimum provide evidence regarding the who, when, where, and what was said in these statements. *See Lipsky*, 460 S.W.3d at 591. That is especially important now that Feinberg has apparently dropped all claims against KIPP Texas as well, because any statements made by its representatives cannot establish liability as to KIPP Foundation. In the event that Feinberg sets forth evidence that actually meets these requirements, KIPP Foundation will address such statements in reply. At present, he has none.

**iv. Feinberg cannot assert any claim for a deprivation of “due process.”**

Throughout his Petition, Feinberg accuses the KIPP Defendants of denying him “due process” in connection with the investigations. *See* Pet. ¶¶ 14, 20-21, 25, 27. That is factually inaccurate. *See, e.g.,* Ex. 2 ¶¶ 5, 13. The issue is also legally irrelevant. Under Texas law, at-will employees are not entitled to any form of due process in connection with an investigation or termination. *See, e.g., Texas Farm Bureau Mut. Ins. Companies v. Sears*, 84 S.W.3d 604, 609 (Tex. 2002) (“By definition, the employment-at-will doctrine does not require an employer to be reasonable, or even careful, in making its termination decisions.”); *see also Wal-Mart Stores, Inc.*

*v. Lane*, 31 S.W.3d 282, 294 (Tex. App.—Corpus Christi 2000, pet. denied) (same). To be sure, that does not give the KIPP Foundation free license to defame Feinberg. But for all the reasons set forth above, Feinberg’s defamation theories are meritless. His attempt to buttress those theories with “due process” accusations fails as well.

**3. Feinberg’s conspiracy to defame claim also fails.**

Feinberg’s conspiracy to defame claim is entirely premised upon his defamation claim. It therefore fails for all the reasons set forth above. In addition, Feinberg now alleges this claim as a conspiracy of one: KIPP Foundation is the sole named member of the conspiracy, alongside unspecified “other individuals and entities.” Pet. ¶ 58. He also provides no information regarding when or how the requisite “meeting of the minds” occurred with respect to this conspiracy. That is wholly inadequate. *See First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 222 (Tex. 2017) (discussing required conspiracy elements).

**4. Feinberg’s intentional infliction of emotional distress fails.**

KIPP Foundation is entitled to dismissal of Feinberg’s claim for intentional infliction of emotional distress (“IIED”) as a matter of law under the TCPA because the claim is not based on facts independent of his defamation claim. The law is clear that IIED is a “gap-filler tort, judicially created for the limited purpose of allowing recovery in those rare instances in which a defendant intentionally inflicts severe emotional distress in a manner so unusual that the victim has no other recognized theory of redress.” *Hoffman-La Roche Inc. v. Zeltwanger*, 144 S.W.3d 438, 447 (Tex. 2004). IIED “simply has no application where the actor intends to invade some other legally protected interest, even if emotional distress results.” *Id.* (quotations omitted). “Where the gravamen of a plaintiff’s complaint is really another tort, intentional infliction of emotional distress should not be available.” *Id.*; see BLACK’S LAW DICTIONARY 731 (8th ed. 2004) (defining “gravamen” as “[t]he substantial point or essence of a claim, grievance, or complaint”). “Even if

other remedies do not explicitly preempt the tort, their availability leaves no gap to fill.” *Creditwatch Inc. v. Jackson*, 157 S.W.3d 814 (Tex. 2005) (“As [plaintiff’s] complaints are covered by other statutory remedies, she cannot assert them as intentional infliction of emotional distress claims just because those avenues may now be barred”). “And a plaintiff cannot maintain his claim for intentional infliction of emotional distress regardless of whether he succeeds on, or even makes” the precluded claim. *Id*; *Zeltwanger*, 144 S.W.3d at 448; *see also Conley v. Driver*, 175 S.W.3d 882, 887 n.4 (Tex. App.—Texarkana 2005, pet. denied) (explaining that intentional infliction of emotional distress tort cannot be used as an alternative to some other, more conventional tort that fits the facts but might be subject to some structural impediment).

Here, Feinberg’s IIED claim is based solely on KIPP Foundation’s alleged defamatory statements. Specifically, Feinberg alleges in the Petition that his IIED claim is based on the following: “KIPP Foundation intentionally or recklessly published and allowed the publication of defamatory claims about Mike Feinberg. They thereby allowed false claims about Mike to be circulated among his colleagues, friends, and family.” Pet. ¶ 51. Because Feinberg did not even attempt to base his IIED claim on facts independent of his defamation claim, the IIED claim is not available to him as a matter of law. *See Oliphint v. Richards*, 167 S.W.3d 513, 517 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) (affirming summary judgment on IIED claim because the claim was not based on facts independent of the defamation claim); *see also Landing Community Improvement Ass’n, Inc. v. Young*, No. 01-15-00816-CV, 2018 WL 2305540 at \*13 (Tex. App.—Houston [1st Dist.] May 22, 2018) (finding that an IIED claim was not available because the gravamen of plaintiff’s complaint was really another tort); *Patel v. Hussain*, 485 S.W.3d at 177 (holding that the IIED claim was unavailable as a matter of law because “the gravamen of [plaintiff’s] complaint was fully encompassed by her invasion of privacy claim”); *Draker v.*

*Schreiber*, 271 S.W.3d 318 (Tex. 2008) (affirming dismissal of plaintiff's IIED claim where the court found that essence of plaintiff's complaint was defamation).

KIPP Foundation is also entitled to the dismissal of Feinberg's IIED claim under the TCPA because Feinberg cannot meet his burden to provide clear and specific evidence as to each element of his IIED claim. As noted above, under the TCPA, Feinberg must provide by clear and specific evidence a *prima facie* case for each essential element of the claim in question. For the IIED claim, that means that Feinberg must provide such evidence for each of the following elements:

1. KIPP Foundation acted intentionally or recklessly;
2. KIPP Foundation's conduct was extreme and outrageous;
3. KIPP Foundation's actions caused Feinberg emotional distress; and
4. The resulting distress was severe.

*Zeltwanger*, 144 S.W.3d at 445. Extreme and outrageous conduct is conduct “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” *Id.* Not only does Feinberg's Petition fail to articulate specific facts to support his IIED claim, there is simply no evidentiary support that will allow him to avoid dismissal of this claim under the TCPA standard.

#### **V. Discovery Is Automatically Stayed**

Pursuant to § 27.003(c) of the TCPA, all discovery in this matter is automatically stayed pending the resolution of this motion.

#### **VI. KIPP Texas and KIPP Foundation Are Entitled to Attorneys' Fees**

The TCPA provides for mandatory fee-shifting in Defendants' favor. Under the TCPA, “[i]f the court orders dismissal of a legal action under this chapter, the court shall award to the moving party the following: (1) court costs, reasonable attorneys' fees, and other expenses incurred in defending against the legal action as justice and equity may require; and (2) sanctions against

the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter.” TEX. CIV. PRAC. & REM. CODE § 27.009(a)(1)-(2). Should the Court dismiss any of Feinberg’s claims, Defendants will submit evidence of reasonable attorneys’ fees and expenses, together with a request for monetary sanctions as applicable.

## **VII. Conclusion and Prayer**

Feinberg asserts that he brought this lawsuit to “tell his side of the story” and redeem his reputation. Neither of those things required him to invoke formal legal process against KIPP: he was free to hold a press conference and tell his story as he saw fit at any time. By all accounts, he has already sought to do so in many private and semi-private conversations over the last year. KIPP even asked Feinberg to provide proof of falsity as a prelude to this suit under the Defamation Mitigation Act, yet he declined to do so. And he had every opportunity to tell his story to WilmerHale during the course of its investigation.

The KIPP Boards did everything a prudent board of directors should do when presented with this scenario. They hired a well-regarded, independent law firm to conduct an investigation. When that firm returned with findings that included at least two credible accusations of misconduct—only one of which, at best, Feinberg could credibly deny—plus admitted and repeated accessing of pornography on KIPP-issued computer, they terminated his employment. They provided a short statement explaining their decision, in which they made clear that they had reached no ultimate conclusions regarding his guilt or innocence. Instead, as highlighted in the statement, Feinberg had at a minimum put himself in situations where his conduct could be misconstrued. For educational institutions like KIPP, such evidence required termination, even of its own co-founder.

Feinberg's suit is meritless. For the reasons set forth above, his claims should be dismissed with prejudice under the TCPA. KIPP Defendants ask the Court to order such dismissal, as well as all other relief to which they are entitled under the statute.

Respectfully submitted,

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### CERTIFICATE OF CONFERENCE

I certify that the parties have had multiple discussions, including person-to-person discussions on June 27, 2019 and November 6, 2019, in which KIPP Defendants made clear their intent to move to dismiss under the TCPA. Feinberg in response stated his intent to proceed with his claims.

/s/ Brice A. Wilkinson  
Brice A. Wilkinson

### CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document has been served on all parties of record on this 17<sup>th</sup> day of November 2019 pursuant to Rule 21a.

/s/ Robin C. Gibbs  
Robin C. Gibbs

Unofficial Copy Office of Marilyn Burgess District Clerk