

IN THE SUPREME COURT OF PENNSYLVANIA

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No. \_\_\_\_\_ 2005

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IN RE: MILTON HERSHEY SCHOOL TRUST

THE HERSHEY TRUST COMPANY &  
THE MILTON HERSHEY SCHOOL

Petitioners

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Order entered on January 31, 2005, by the Commonwealth Court, Pennsylvania  
at No. 759 C.D. 2004, reversing the order of the Court of Common Pleas  
of Dauphin County, Orphans' Court Division, at No. 712, Year 1963,  
entered November 15, 2003

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PETITION FOR ALLOWANCE OF APPEAL  
OF APPELLEES THE HERSHEY TRUST COMPANY AND  
THE MILTON HERSHEY SCHOOL FROM THE ORDER OF JANUARY 31, 2005,  
OF THE COMMONWEALTH COURT OF PENNSYLVANIA,  
NO. 759 C.D. 2004

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## **I. INTRODUCTION**

In a 4-3 decision, the Commonwealth Court of Pennsylvania adopted a new rule of “special interest” standing for charitable trusts, reversed the decision of the orphans’ court denying standing to the Milton Hershey School Alumni Association (“Association”), granted standing to the Association, and remanded for a hearing on the Association’s petition that, *inter alia*, challenged an agreement between the Milton Hershey School and the Office of the Attorney General. The Commonwealth Court made no reference to the appropriate standard of review – whether the orphans’ court abused its discretion – nor did it limit in any way the scope of the standing it granted. For the reasons set out below, this Court should allow petitioners to appeal the Commonwealth Court’s decision.

## **II. THE OPINIONS BELOW**

The opinion of the Commonwealth Court of Pennsylvania that forms the basis for this petition was filed on January 31, 2005, and is not reported. The majority opinion by Judge Pellegrini, the dissenting opinion by Judge Colins, and the opinion issued by the orphans’ court are appended to this petition pursuant to Pa. R.A.P. 1115(a)(6).

## **III. TEXT OF THE ORDER IN QUESTION**

Petitioners the Hershey Trust Company (“Trust Company”) and the Milton Hershey School (“School”) request that this Court allow an appeal of the order entered in this matter on January 31, 2005, by the Commonwealth Court of Pennsylvania, which stated:

AND NOW, this 31<sup>st</sup> day of January, 2005, the order of the trial court in the above-captioned matter is reversed and the matter is remanded for hearing on the Association’s petition.

Jurisdiction relinquished.

#### **IV. QUESTIONS PRESENTED FOR REVIEW**

1. Did the Commonwealth Court err in promulgating a new rule of “special interest” standing to permit an alumni association to challenge the Attorney General’s regulation of a charitable trust?

Suggested Answer: Yes.

2. Did the Commonwealth Court depart from accepted judicial practice in not reviewing the orphans’ court decision for an abuse of discretion in denying standing to the Association?

Suggested Answer: Yes.

#### **V. STATEMENT OF THE CASE**

##### **A. Procedural History**

On September 4, 2003, the Association filed a petition in the Orphans’ Court Division of the Court of Common Pleas of Dauphin County (“orphans’ court”) at No. 712, Year 1963, seeking (1) that a citation be directed to the Office of the Attorney General (“OAG”), the School, and the Trust Company to show cause why the “July 2002 Reform Agreement” among the OAG, the School and the Trust Company should not be reinstated; (2) that the “child and young adult beneficiaries of the Milton Hershey School Trust, known and unknown, have appointed to represent their interests Dr. Rodney E. McLaughlin and John W. Schmehl, Esq.” as guardian *ad litem* and trustee *ad litem*; (3) that any modifications to the “July 2002 Reform Agreement” be agreed to by these representatives and approved by the orphans’ court; and

(4) that the orphans' court order the Trust to comply with its December 7, 1999, adjudication, "halting non-child use of certain land in violation of the said Adjudication." (R. 70a-71a).<sup>1</sup>

The OAG, the School, and the Trust Company, filed preliminary objections to the Association's petition, challenging its standing. (See R. 139a-154a, 155a-162a). Following briefing and argument, the orphans' court dismissed the Association's petition for lack of standing.

A majority of the Commonwealth Court decided that the Association "has standing to bring an action to rescind the [June] 2003 Agreement and reinstate the [July] 2002 Reform Agreement." *In re: Milton Hershey School Trust*, No. 759 C.D. 2004 (January 31, 2005) ("*Slip Op.*"), p. 11. Importantly, the majority below misunderstood or mischaracterized the relief sought by the Association as only

[a] challenge to the rescission of an agreement between the [OAG], the [School] and [Trust Company] that prohibited conflicts of interest and other actions by the trust managers that were deemed inimical to the interests of the orphan beneficiaries<sup>2</sup>. . . . (*Slip Op.*, p. 1);

and as

merely seek[ing] to determine whether the July 2002 Reform Agreement will better serve the charitable purpose of the Trust instead of the June 2003 Agreement struck by the OAG, the School, and the Trust . . . (*Slip Op.*, p. 28);

and as

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<sup>1</sup> Pursuant to Pa. R.A.P. 1112(b), one copy of the Reproduced Record and one copy of the Supplemental Reproduced Record are submitted with this petition. The Reproduced Record filed below by the Association omitted three exhibits (exhibits 6, 7, and 8) to the Affidavit of Robert D. Stets, which had been filed by the School and the Trust Company in support of their preliminary objections to the Association's petition. Consequently, the School and the Trust Company filed a Supplemental Reproduced Record including the entire Stets Affidavit and all exhibits attached thereto.

<sup>2</sup> "The deed of trust provides that the beneficiaries of the Trust are the orphan children attending the School." *Slip Op.*, p. 3 (emphasis added).

only seek[ing] the reasons why the July 2002 Reform Agreement was replaced by the June 2003 Agreement when the Reform Agreement was the result of an extensive investigation funded in part by the Association to aid the OAG, which concluded that potential conflicts of interests amongst trust managers and potential asset mismanagement interfered with the Trust's charitable mission . . . (*Slip Op.*, p. 29).

In fact, the relief sought by the Association, as outlined above, is much more extensive and includes a broad and detailed challenge to the administration of the School as well as the appointment of a guardian *ad litem* and a trustee *ad litem* who become, in effect, additional members of the boards of the School and the Trust Company, with pre-emptive powers.

**B. Factual Background**

Milton S. Hershey and Catherine Hershey founded the School by Deed of Trust in 1909 to provide a “permanent institution for the residence and accommodation of poor children.” (R. 176a-90a). The School is the beneficiary of the Trust. The Deed of Trust, which appoints the Trust Company as the Trustee of the School Trust, does not contemplate or mention the Association. (*Id.*)

As directed by the Deed of Trust, the members of the School's Board of Managers are also members of the Board of Directors of the Trust Company. The Deed of Trust endows the Board of Managers and the Trustee with decision-making responsibility for all aspects of running the School and for management and administration of Hershey trust assets. Together, they are charged with making all decisions about uses of trust funds, land development and sales, admissions, and education under the standards set forth in the Deed of Trust.

The Association was organized in 1930, twenty years after Mr. Hershey created the Trust for the establishment of the School. (R. 73a). As the orphans' court pointed out, until recently the stated purpose of the Association was

to continue the friendships formed in orphanhood at the Milton Hershey School and to foster fellowship among all who have left, to inspire and promote the welfare of each other by mutual concern and inquiry, and to reflect credit on the Milton Hershey School and Milton S. Hershey its founder.

*In re: Milton Hershey School*, No. 712 of 1963 (Dauph. County Ct. Common Pls., November 19, 2003), p. 4.<sup>3</sup> A short time ago, the Association changed its stated purpose to express a “dedication to the educational and other principals [sic] of Milton and Catherine Hershey’s Deed of Trust, with a commitment to the well-being of Milton Hershey School, its students and alumni.” *Id.*

The OAG is charged with enforcing the duties of charitable trustees and, as *parens patriae*, protecting the public. In the case of the School Trust, the OAG has taken an active role. *See, e.g., In re Milton Hershey School Trust*, 807 A.2d 324 (Pa. Cmwlth. Ct. 2002). In July, 2002, the OAG, the School, and the Trust Company as Trustee entered into an agreement concerning the administration of the Trust and the School, most of which was to become effective as of June 2003 or the beginning of the 2003-04 school year (“July 2002 Reform Agreement”). (R. 48a-55a). After that agreement was signed but before it was implemented, the composition of the Board of Managers and the senior administration of the School changed. In light of the commitment of the Board of Managers and senior administration to implementing certain changes that, in the view of the OAG, would better fulfill the Deed of Trust, the July 2002 Reform Agreement was revised to allow and require the Board of Managers and the Trustee to exercise their discretion in implementing the principles referred to in that agreement (“June 2003 Agreement”). (R. 31a-47a).

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<sup>3</sup> This opinion will be referred to and cited as “*Hershey November 2003 Opinion*.” Pursuant to Pa. R.A.P. 1115(a)(6), a copy of this opinion is appended to this petition.

In the view of the orphans' court, "the [June 2003] Agreement addresses generally most of the earlier included concerns advanced by the Association but eliminates the restriction on Trustee/Manager membership and does not bind the re-constituted Trustees/Managers to the exact text of the financial and academic criteria for admissions to the School set forth in the earlier Agreement." *Hershey November 2003 Opinion*, p. 6.

In the more than 250 paragraphs of its petition, the Association complains about virtually every decision, large and small, that the Trustee has made since Milton Hershey's death in 1945. (R. 128a, 134a). The Association's complaints fall into four general categories: (1) student admissions and academic requirements; (2) student living; (3) use of land; and (4) "conflicts of interest." The Association asserts that the July 2002 Reform Agreement addressed these issues and the June 2003 Agreement does not. As noted above, the orphans' court concluded that each of these categories is addressed by the June 2003 Agreement.

First, the June 2003 Agreement does not "[do] away with any efforts to impose strict income caps on candidates," nor does it go back on commitments to de-emphasize scholastic achievement as a condition of enrollment as the Association alleges in paragraph 177 of its petition. (R. 116a). To the contrary, the June 2003 Agreement requires the School to admit only children who are deemed poor within the meaning of the Deed of Trust and, among other things, as defined by the poverty guidelines published by the United States Department of Health & Human Services. (R. 35a).<sup>4</sup>

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<sup>4</sup> In fact, the Board has directed the School administration to implement a strict admission policy, committing at least half its places to those who come from families with household incomes of no more than 100 percent of the federal poverty guideline with the remainder drawn from families with household incomes of no more than 150 percent of the poverty guideline. (R. 362a-369a).

Second, the June 2003 Agreement specifically requires the School to provide students with a “year-round program.” *Id.* The June 2003 Agreement also requires the School to “continue its plans to increase student safety by, among other things, reducing the age difference between children in each home.” (R. 36a).<sup>5</sup>

Third, the June 2003 Agreement prohibits the Trustee from “sell[ing] any land, construct[ing] any building, or plac[ing] any restriction (including, but not limited to, leases or easements) on land which would interfere with the present or future use of that land for program purposes, without first notifying the [OAG].” (R. 34a). The June 2003 Agreement even requires the Trustee to notify the OAG of lease renewals for properties that were formerly used as School homes. (R. 34a-35a). The net effect of this paragraph of the June 2003 Agreement is exactly the same as the comparable paragraph in the July 2002 Reform Agreement.<sup>6</sup>

Fourth, the June 2003 Agreement addresses conflicts of interest and permits the Trustee to continue its role of monitoring its major investments, in part, by appointing representatives to the boards of Hershey Foods and Hershey Entertainment and Resorts Company. (R. 31a-34a).

In addition to covering all of the Association’s supposed areas of concern, the June 2003 Agreement states (and, in fact, mandates) all parties’ dedication to fulfilling the Deed of Trust. It also confirms and continues the OAG’s *parens patriae* role in the administration of the Trust by requiring the School to provide an annual report to the OAG describing the economic and academic characteristics of the children admitted to the School; year-round

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<sup>5</sup> The School is currently implementing a “24 hours a day, 7 days a week, 52 weeks a year” program and has taken steps to ensure student safety and developmentally appropriate living by working on a plan to reconfigure student homes into three residential neighborhoods based on age divisions. (R. 49b-56b).

<sup>6</sup> A comparison of School land in 1976 to 2003 demonstrates that the change in holdings in almost thirty years is minimal. (R. 338a-340a). The Trust currently has more land than it did ten years ago. (R. 338a).

programs in place or in development; programs and policies to increase child safety, including policies to reduce age differences in student homes; and any other matter that the OAG wishes to explore. The June 2003 Agreement gives the OAG the right, consistent with its *parens patriae* role, of direct access to any materials, information, and personnel that it may request as necessary to carry out its role. (R. 36a-37a).<sup>7</sup>

As the lower court noted, “[t]he time expended and obvious consideration by the Attorney General of the concerns of the [Association] reflected in the terms of both the rescinded and the new Agreements clearly belie any charge that the [OAG] has been inattentive or is likely to be inattentive to its duty regarding supervision of the Milton Hershey School Trust.” *Hershey November 2003 Opinion*, p. 8.

## **VI. STATEMENT OF REASONS RELIED ON FOR ALLOWANCE OF APPEAL**

In the words of President Judge Colins, the Commonwealth Court’s decision is “a quantum leap away from historical concepts of standing, based upon public policy considerations, and a judicially-created ‘special interest,’ [that] may only be undertaken by the Supreme Court of the Commonwealth.” *Slip Op.*, p. 34 (Colins, P.J., *dissenting*). The Commonwealth Court’s new rule for “special interest” standing presents a question of first impression, involving a matter of substantial public importance, that requires definitive resolution by this Court. Further, the Commonwealth Court’s failure to limit its review of the orphans’ court decision to an abuse of discretion standard is a departure from accepted judicial practice that must be corrected by this Court. These grounds for allowance of appeal are

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<sup>7</sup> That reporting and monitoring process is operating. In response to the School’s 2004 report, the OAG recently officially acknowledged that “we reviewed the said report and have noted the progress therein concerning the economic and academic characteristics of the children admitted to the school; the implementation of a year-round program; and the efforts underway to increase child safety by, *inter alia*, reducing the span of ages within each student home,” and observed that “we see nothing remiss in the information reported and look forward to next year’s report.”

consistent with the considerations enumerated in Pa. R.A.P. 1114 and this Court's Internal Operating Procedures, V, §A.

**A. The Commonwealth Court Erred in Adopting a New Rule of “Special Interest” Standing in Matters Involving Charitable Trusts.**

The Commonwealth Court majority expressly adopted a test for “special interest” standing that it derived from a law review article, Mary Grace Blasko, *et al.*, *Standing to Sue in the Charitable Sector*, 28 U.S.F. L. Rev. 37 (1993) (hereafter “Blasko”).<sup>8</sup> With a mere nod to this Court's decision in *Valley Forge Historical Society v. Washington Memorial Chapel*, 493 Pa. 491, 426 A.2d 1123 (1981), it applied Blasko's “multi-factor test to determine whether the Association has standing under the special interest doctrine.” *Slip Op.*, p. 27.

The “multi-factor test” articulated by Blasko and adopted by the Commonwealth Court, *slip op.*, pp. 24-27, includes these elements: “(1) the extraordinary nature of the acts complained of and the remedy sought; (2) the presence of fraud or misconduct on the part of the charity or its directors; (3) the attorney general's availability or effectiveness; (4) the nature of the benefited class and its relationship to the charity; and (5) subjective, case-specific circumstances.” *Id.*, p. 26. One may fairly conclude that, in the Commonwealth Court's application of its new “special interest” test to the Association's allegations, the fifth factor predominated. *Id.*, p. 28.

That the Commonwealth Court has formulated a new test for “special interest” standing is beyond dispute. In doing so, it did not demonstrate any inadequacy in the test that

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<sup>8</sup> Blasko is cited in only one other reported decision, *Robert Schalkenbach Found. v. Lincoln Found., Inc.*, 91 P.3d 1019 (Ariz. Ct. App. 2004). In that case the court held, first, that plaintiffs were precluded from relitigating standing, which had been denied in a prior, essentially identical, proceeding. *Id.*, 91 P.3d at 1023-24. The court then, in *dicta*, embraced a modified version of Blasko's “special interest” test because there was no “reported Arizona appellate decision explaining which private parties have common-law standing to enforce a charitable trust.” *Id.*, 91 P.3d at 1024. Ultimately, the court found that none of the “special interest” factors it delineated supported a finding that plaintiffs in that case had standing. *Id.*, 91 P.3d at 1026-28.

this Court described 50 years ago in *Wiegand v. Barnes Foundation*, 374 Pa. 149, 152, 97 A.2d 81, 82 (1953), except, implicitly, that the test did not yield the desired outcome. Indeed, in a footnote, the Commonwealth Court indicated that it did not apply “the general direct-immediate-substantial test” for standing announced by this Court in *Wiegand*. See, *Slip Op.*, p. 27 n. 26.

That this is a new test is also evident in the Commonwealth Court’s summary of the law of standing in actions challenging decisions affecting a charitable trust. *Slip Op.*, pp. 20-26. At the heart of this summary is the Commonwealth Court’s treatment of the OAG. The Commonwealth Court acknowledged the role of the Attorney General acting in its *parens patriae* capacity as “the watch dog that supervises the administration of charitable trusts to ensure that the object of the trust remains charitable and to ensure that the charitable purpose of the trust is carried out.” *Slip Op.*, p. 20. But, the Commonwealth Court then referenced authorities that have argued for “special interest” standing because the Attorney General is either absent, ineffective, or conflicted, relying particularly on *Blasko*. *Slip Op.*, pp. 22-23, and *id.*, p. 22 n. 22.

Whether “special interest” standing should be granted when the OAG is actively engaged in matters affecting a charitable trust is a question presented with particular sharpness in this case. Compare *Valley Forge*, 493 Pa. at 498, 426 A.2d at 1127 (the Attorney General advised that his office would not participate and this Court found that “[e]nforcement of the duty owed by the [trustee] . . . was therefore left to . . . someone having a special interest in the trust”). Unlike cases in which a court must decide whether to grant “special interest” standing in the absence of the Attorney General as *parens patriae*, in this case the Commonwealth Court has allowed the Association standing to challenge the actions of the OAG as *parens patriae*. For what is at issue in this litigation is not an action by the Trust, but an agreement by the OAG,

acting as *parens patriae*. Viewed in that light, the Commonwealth Court’s decision represents not only a new rule of standing, but an extraordinary departure from the law of Pennsylvania governing the supervision of charitable trusts.

**B. The Commonwealth Court Failed to Apply the Proper Standard of Review.**

The Commonwealth Court should have reviewed the orphans’ court decision for an abuse of discretion. That it did not was perhaps compelled by its adoption of a new test for “special interest” standing, a test the orphans’ court could not have applied because it had not been announced. If the Commonwealth Court had adhered to the abuse of discretion standard for review, it would have had to sustain the orphans’ court decision.

The Commonwealth Court itself summarized many of the pertinent facts as follows:

The Association is not a division of the School or of the Trust Company. It was not named in the deed of trust and is not an intended beneficiary of the Trust. As the deed states, “[a]ll children shall leave the institution and cease to be the recipients of its benefits upon the completion of the full course of secondary education being offered at the School.” (Reproduced Record at 25a). The Managers of the Trust may, in their discretion, contribute to the higher education of a graduate of the School, in which case graduates would continue to be beneficiaries of the Trust, but generally, once orphans graduate from the School, they are no longer Trust beneficiaries.

*Slip Op.*, p. 4. As President Judge Colins noted in his dissent, “this is where [the Commonwealth] Court’s inquiry must end.” *Id.*, p. 33.

Three additional sets of facts were important to the orphans’ court. The first of those is the active role taken by the OAG as *paren patriae*:

The offices of the Attorney General and the Charitable Trusts and Organizations Sections are located in Harrisburg just twelve miles from the Milton Hershey School. Within the past three years, the Attorney General has successfully litigated proposals by the

Trustees/Managers: a *cy pres* petition to direct trust funds to a use other than the School, and the effort to divest the Trust of the controlling interest in Hershey Foods Corporation. After the latter suit, the Attorney General was a significant factor in reconstituting the membership of the Trustees/Managers. The time expended and obvious consideration by the Attorney General of the concerns of the Association reflected in the terms of both the rescinded and the new Agreements clearly belie any charge that the office of the Attorney General has been inattentive or is likely to be inattentive to its duty regarding supervision of the Milton Hershey School Trust.

*Hershey November 2003 Opinion*, p. 8. The second is the potential for vexatious litigation by the Association:

The prayer for relief in the Petition is preposterous. It asks that we appoint nominees of the Association as guardian and trustee *ad litem* for the current and potential students of the School respectively whose consent will be required for any amendment to the re-instated Agreement and thereafter “otherwise to protect the interests of” their wards. In addition, the Petition asks that we direct that the Trustees/Managers shall take no further action *that in any way affects the future use of Trust lands for child purposes until a long term growth plan for the school has been developed with the participation of the aforementioned guardian and trustee ad litem*.

The Association would thus have us supplant the Office of the Attorney General in the exercise of its common law duty and to add two members never contemplated by Milton S. Hershey to the Trustees/Managers; not to mention creating a court-endorsed climate for potentially vexatious litigation.

*Id.*, p. 3 n. 2 (emphasis in original).<sup>9</sup>

The third, and perhaps most significant, is the immediate premise for the Association’s petition, the June 2003 Agreement’s replacing the July 2002 Reform Agreement:

The July [2002 Reform] Agreement does not, as its purpose, charge or admit any breach of trust or abuse of discretion by the

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<sup>9</sup> See *Schalkenbach, supra*, where the court denied “special interest” standing because, among other reasons, the remedies sought by plaintiffs, including removal and appointment of new directors, were “highly intrusive in the administration of the trust, . . .” 91 P.3d at 1028.

Trustees/Managers. The Association has not identified any of its members or any child now enrolled or having potential for enrollment in the School who has been harmed because of the abrogation of the July [2002 Reform] Agreement or by the terms of the 2003 Agreement. The Attorney General consented to the abrogation of the earlier Agreement and is a party to the new Agreement. To make a new Agreement was entirely within the discretionary powers of the Trustees/Manager. Considering the circumstances under which the current Trustees/Managers were constituted, that they might modify or suspend for later consideration positions taken by the prior membership on matters of School management and Trust administration should not have been unexpected.

A court will not interfere with the discretion of those managing a charity unless there has been such a substantial departure from the dominant purpose as amounts to a perversion of that purpose. Fisch, Freed, and Schacter, Charities and Charitable Foundations, § 476. The matter of the abrogation of the July [2002 Reform] Agreement is not of such substance. Moreover, the Attorney General exercising his duty of supervision over charities is a party to the new Agreement and we find no occasion or authority here for judicial interference with the performance of the duties of that office of the executive branch.

The Petition filed by the Association has 68 pages and contains 253 paragraphs. It is less a pleading than a diatribe deploring the manner in which former Trustees/Managers, exercising their discretion, have handled Trust real estate and School management. It impugns the integrity of the Attorney General and insultingly disparages the new Board. Its claims regarding the dire consequences that will follow from rescinding the July [2002 Reform] Agreement are conjectural and extravagant.

*Id.*, pp. 9-10.

These latter factors, well within the competence of the orphans' court to determine, and available to the Commonwealth Court in the record, were nowhere countered by the Commonwealth Court.

Had these facts been considered by the Commonwealth Court, as they should have been, it would have found that the orphans' court did not abuse its discretion.

## VII. CONCLUSION

The Commonwealth Court's decision involves a question not previously presented to this Court, that is of substantial public importance, and that requires prompt and definitive resolution by this Court. Moreover, the Commonwealth Court's decision shows a departure from accepted judicial practices. Because of these errors, and because resolution of these issues will contribute to the orderly administration of justice, the School and the Trust Company request that this Court allow an appeal of the Commonwealth Court's order.

Respectfully submitted,

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Dated: March 2, 2005

**PROOF OF SERVICE**

I hereby certify that I am this day serving the foregoing *Petition for Allowance of Appeal of Appellees The Hershey Trust Company and The Milton Hershey School From the Order of January 31, 2005, of the Commonwealth Court of Pennsylvania, No. 759 C.D. 2004*, on the persons and in the manner indicated below which service satisfied the requirements of Pa.R.A.P. 121:

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