

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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**No. 759 CD 2004**

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**IN RE: MILTON HERSHEY SCHOOL TRUST**

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**BRIEF FOR APPELLANT  
THE MILTON HERSHEY SCHOOL ALUMNI ASSOCIATION**

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**Appeal from the Order dated November 19, 2003 of the Court of Common Pleas of  
Dauphin County, Pennsylvania, Orphans' Court Division, No. 712, Year 1963**

**VICTOR P. STABILE, ESQUIRE  
DILWORTH PAXSON LLP  
112 Market Street, 8<sup>th</sup> Floor  
Harrisburg, PA 17101  
(717) 236-4812**

**JAMES F. MONTEITH, ESQUIRE  
JOHN W. SCHMEHL, ESQUIRE  
DILWORTH PAXSON LLP  
3200 Mellon Bank Center  
Philadelphia, PA 19103  
(215) 575-7000**

**F. FREDERIC FOUAD, ESQUIRE  
230 Park Avenue, Suite 625  
New York, NY 10169  
(212) 687-8534**

*Attorneys for Petitioner-Appellant  
The Milton Hershey School Alumni Association*

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**I. STATEMENT OF JURISDICTION**

This Court has jurisdiction pursuant to 42 Pa.C.S. §762(a)(5)(ii), providing exclusive jurisdiction of appeals from final orders of the courts of common pleas to the Commonwealth Court in actions “involving the corporate affairs of any corporation not-for-profit subject to Title 15 or the affairs of the members, security holders, directors, officers, or employees or agents thereof, as such.” The Milton Hershey School is a respondent in the above-entitled action, and is a nonprofit corporation subject to the Nonprofit Corporation Law of 1989, as reenacted and amended, 15 Pa.C.S. §§5101 et seq.

## II. STATEMENT OF SCOPE AND STANDARD OF REVIEW

On appeal from an order granting a preliminary objection in the nature of a demurrer, this Court's standard of review is to determine whether the common pleas court abused its discretion or committed an error of law. Factor v. Goode, 149 Pa. Cmwlth. 81, 612 A.2d 591 (1992), petition for allowance of appeal denied, 533 Pa. 654, 624 A.2d 112 (1993). Further, when the common pleas court sustains a demurrer, this Court is constrained to examine only well-pleaded facts in the complaint, because a demurrer admits those facts and any inferences reasonably deducible therefrom as true. Easton Area Jt. Sewer Auth. v. Bushkill-Lower Lehigh Jt. Sewer Auth., 71 Pa. Cmwlth. 553, 455 A.2d 286 (1983).

“In order to sustain the demurrer, it is essential that the plaintiff's complaint indicate on its face that his claim cannot be sustained . . . If there is any doubt, this should be resolved in favor of overruling the demurrer.” Gall v. Allegheny County Health Dept., 521 Pa. 68, 71-72, 555 A.2d 786, 788 (1989).

### **III. ORDER IN QUESTION**

After a hearing on respondents' Preliminary Objections to a Petition filed by the Milton Hershey School Alumni Association, the Honorable Warren G. Morgan, Senior Judge, of the Dauphin County Court of Common Pleas, Orphans' Court Division, issued the following Order in No. 712, Year of 1963:

“AND NOW, November 19, 2003, the Petition is DISMISSED.”

#### IV. STATEMENT OF THE QUESTIONS INVOLVED

1. Did the lower court err in dismissing for lack of standing on preliminary objections the appellant's petition challenging actions by the appellees that rescinded a charitable trust reform agreement intended to protect the trust's charitable intent, where all well-pled facts to be accepted as true demonstrated, *inter alia*, that:

- a. the appellant had a substantial, direct and immediate interest in the subject matter of the petition and a special interest in the trust;
- b. the appellant had suffered harm by the rescission; and
- c. the petition on its face alleged that the actions of the Trustee, the School, and the OAG in rescinding the agreement were all adverse to the trust's child beneficiaries?

2. Alternatively, even if the lower court did not err in denying the petitioner standing under the traditional test, did the court nonetheless err in dismissing the petition under the alternative standing test enunciated by the Pennsylvania Supreme Court in *Application of Biester*?

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

### **A. Form of Action and Procedural History**

On September 4, 2003, The Milton Hershey School Alumni Association (“MHSAA”) filed a Petition For Citation For Rule To Show Cause Why The Trust’s July 31, 2002 Agreement Should Not Be Reinstated, Except As Later Appropriately Modified, And to Appoint A Guardian And A Trustee Ad Litem For Known And Unknown Orphan Beneficiaries, And To Order The Trust To Comply With This Court’s December 7, 1999 Adjudication (the “Petition”). (R. 67)<sup>1</sup> The Petition requested that a citation be issued to the Office of Attorney General of Pennsylvania (the “OAG”), the Milton Hershey School (the “School” or “MHS”), and the Hershey Trust Company (the “Trustee”) (collectively “Respondents”), to show cause why a July 31, 2002 reform agreement (the “Reform Agreement”) should not be reinstated, except as later appropriately modified, and a June 27, 2003 agreement that rescinded the Reform Agreement (the “Abrogation Instrument”) should not be set aside. Both agreements pertain to the Milton Hershey School Trust (the “Trust”). The Trust is a charitable trust established by Milton S. Hershey and his wife Catherine S. Hershey for orphan child beneficiaries (the “Orphan Beneficiaries”). (R. 67, 71 (P. ¶5))

Respondents filed Preliminary Objections to the Petition on October 20, 2003 seeking dismissal of the Petition on the ground that MHSAA lacks standing to challenge rescission of the Reform Agreement. (R. 139, 155) The matter was briefed and oral argument was conducted on November 10, 2003. (R. 139, 155, 218) By an opinion and order dated November 19, 2003 (Attachment 1 hereto), the Dauphin County Court of Common Pleas, Orphans’ Court Division, granted Respondents’ Preliminary Objections and dismissed MHSAA’s Petition for lack of standing. (Ruling at 1.)

MHSAA filed a Notice of Appeal on December 17, 2003 in the Superior Court of Pennsylvania seeking review of the trial court’s order. Upon motion of the OAG, the appeal was transferred to the Commonwealth Court because the appeal concerns the affairs of a nonprofit corporation.

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<sup>1</sup> References to the record on appeal are identified by “R.,” followed by the page numbers. Where the Petition is cited in the Factual Background section, the paragraph number so cited is also noted, by “(P. ¶ \_\_).” References to the trial court Order and Opinion (Attachment 1 hereto) are identified by “Ruling at [page number].”

## **B. Prior Determination of Court of Common Pleas**

The trial court denied Petitioner-Appellant standing on the ground that MHSAA does not have a substantial and special interest in the Trust, that the actions complained of in the Petition did not cause direct harm to MHSAA's interests, that there is no class of Orphan Beneficiaries on behalf of whom MHSAA is entitled to present evidence and arguments, and that rescission of the Reform Agreement did not lead to any instance of harm to any party. (Ruling *et passim*.) The trial court reasoned that MHSAA's role in the Reform Agreement was merely advisory. (*Id.*) The court concluded it would not interfere with the discretion of those managing a charity unless there has been such a substantial departure from the trust's dominant purpose as to amount to a perversion of that purpose. (*Id.*)

The Opinion of the Common Pleas Court is unreported. (Attachment 1.) The determination to be reviewed is that of the Honorable Senior Judge Warren G. Morgan.

## **C. Factual Background**

1. **Milton & Catherine Hershey establish a child-saving charitable Trust.** In 1909, settlors Milton & Catherine Hershey (the "Settlors") established a charitable trust whose sole purpose is to provide residential care for dependent and at-risk children, or "orphan" children as the term was then used. (R. 75 (P. ¶19)) The Hersheys forbade the alienation of land assets from the Trust except where the proceeds of such were used to purchase equivalent amounts of land. (R. 75-76 (P. ¶19)) The Hersheys bequeathed virtually their entire fortune to saving orphan children in this manner, eventually contributing to the corpus of the Trust a total of approximately 12,000 acres of land. (R. 75-76 (P. ¶¶19, 21))

Under the terms of the Settlers' Deed of Trust, children brought within the Trust's care have financial and social need to a degree that they require substantially year-round residential care. (R. 76 (P. ¶20)) The pool of these extremely needy children is referred to herein as "Unknown Orphan Beneficiaries." Once enrolled, the children thereafter have all of their educational, physical, spiritual, and other needs met by the Trust, in a setting commonly referred to as a children's home. (R. 75-77 (P. ¶¶17-22)) The children taken into the care of the Trust are referred to herein as "Orphan Beneficiaries."

The Orphan Beneficiaries are cared for in the facilities of the School, which is funded by the Trust. (R. 74, 75 (P. ¶¶16-17)) The Hersheys mandated that Orphan Beneficiaries would be

nurtured in facilities that provided them with a homelike and healthy setting, in an ideal manner, in spite of associated costs and land requirements. (R. 75-77 (P. ¶¶18-22))

The Hersheys made clear that the only beneficiaries of their charity were orphan children and left no discretion as to the use of Trust income: the income is to be used *solely* to serve as many children as possible in the ideal manner prescribed by the Settlers. (R. 78 (P. ¶29)) The OAG, however, has at times asserted that the community and general public are the Trust's beneficiaries. (R. 81-82, 107-110 (P. ¶¶39, 141, 147, 151))

Children cared for by the Trust within the orphan parameters established by Settlers have a high degree of social and financial need, and would otherwise require residential care in other facilities, such as foster care. (R. 72 (P. ¶6)) Children in programs such as foster care have life outcomes dramatically inferior to the life outcomes of children cared for by the Trust. (R. 72-73 (P. ¶¶7, 8)) The circumstances faced by children consigned to inferior forms of care are often harrowing, and include increased risk of dying in childhood, not completing high school, teenage pregnancy, adult institutionalization, adult incarceration, and adult homelessness. (*Id.*) Children cared for by the Trust are rescued from inferior forms of residential childcare, and demonstrate intense attachment to the Trust, particularly later as adults. (R. 73, 79-80 (P. ¶¶9, 32))

Children brought within the care of the Trust establish familial bonds with each other, viewing the Trust as a home, and viewing other children at the Trust as a kind of surrogate family. (*Id.*) These bonds cross generational lines, and adults who had been within the care of the Trust as children have shown devotion and commitment to the welfare of children later entering the Trust's care. (R. 79-81 (P. ¶¶32, 35, 36)) (Ruling at 4-5 (“There is, indeed, a family like bond shared by the alumni, a relationship that Mr. Hershey approved of and fostered.”).) These adults are organized and act within MHSAA. MHSAA is comprised of all living alumni, with its leadership democratically chosen by alumni. (R. 10, 320 (P. ¶10))

2. **MHSAA was established at the direction of settlor Milton S. Hershey and has a special interest in the Trust.** Appellant-Petitioner MHSAA is a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code, and incorporated under the laws of Pennsylvania. (R. 73 (P. ¶10)) MHSAA was formed 74 years ago at the direction of Settlor Milton S. Hershey, and is comprised of past and present Orphan Beneficiaries. (*Id.*) MHSAA maintains offices on Trust property at the Homestead, Heritage Circle, Hershey, PA 17033. (*Id.*) One of MHSAA's functions is to directly serve Orphan Beneficiaries. (R. 73 (P. ¶11))

MHSAA's purposes also include "furthering bonds formed in orphanhood." (R. 79 (P. ¶32)) (Ruling at 4.)

The strong and family-like bonds between members of MHSAA (some of whom remain Orphan Beneficiaries after leaving MHS while they receive college tuition benefits) and current Orphan Beneficiaries still at MHS is a phenomenon unique to children's homes. (Id.)

From its office on Trust property, more than 50% of MHSAA's activities are devoted to student-related functions and to young graduate assistance programs, relying for this on MHSAA member volunteer services. (R. 80 (P. ¶33)) These MHSAA functions are particularly important to Orphan Beneficiaries, because of their special need for the stability, community, and continuity in care supplied by MHSAA through its programs. These programs include mentoring, job shadowing, transitioning, young graduate assistance, and graduate crisis services. (Id.)

MHSAA also expends tremendous efforts and resources lobbying the Trust and the OAG, seeking to protect the charitable intent of the Hersheys, pursuant to MHSAA's core mission of promoting the Hersheys' philanthropic child-saving mission. (R. 80 (P. ¶34)) This includes pressing for utilization of Trust resources in a manner that will serve as many children as possible, and in the prescribed model, as the Deed of Trust mandates. (Id.) This also includes preventing Trust resources from being diverted to non-child purposes, a role that has arisen in direct response to consistent diversion of assets by the Trust to non-child interests. (Id.) As alumni organized within MHSAA saw increasing diversion of assets to non-child purposes, they took preventive measures, relying as much as possible on the OAG for assistance. (Id.)

MHSAA is particularly well-suited to protecting the interests of the Trust's child beneficiaries due to the special knowledge of their conditions by MHSAA members, many of whom also experienced foster care, extreme poverty, homelessness, inferior orphanage care, or other of the harrowing conditions faced by Unknown Orphan Beneficiaries. (R. 80 (P. ¶35))

MHSAA's articles of incorporation state its purpose, in part, as follows:

the promoting in every proper way of the interests of Milton Hershey School, including [...] the establishment and maintenance of supplemental educational programs and activities for students [...] that encourage habits of thrift, industry, leadership, scholarly achievement, and other attributes of good citizenship; and to foster among its graduates an attachment to their Alma Mater.

Articles of Amendment filed with the Commonwealth of Pennsylvania, Department of State, on June 5, 1984 (No. 8440 964). (Ruling at 4; Attachment 4.)

3. **The children’s home mission has been diverted.** To understand the need for the relief requested by MHSAA, i.e., reinstatement of a 2002 Reform Agreement, it is necessary to understand the circumstances that led to this Agreement. At the time the action below was filed, Trust assets had grown to approximately \$5.5 billion.<sup>2</sup> (R. 101 (P. ¶115)) The Trust is thus the largest residential childcare charity in the world, dwarfing any comparable facility in asset size. (R. 94, 115 (P. ¶¶90, 155, 172))

While these assets were amassed, need for residential childcare resources also increased. (R. 72 (P. ¶6)) 1.3 million American children are homeless today, 540,000 American children are in foster care, and 5 million American children live in extreme poverty (defined as half the Federal poverty rate). (Id.) Within Pennsylvania alone, 180,000 children live in extreme poverty and 15,000 children are in foster care. (Id.)

The assets presently available to the Trust could serve up to 8,000 children. (R. 101 (P. ¶117)) Had the Trust prudently husbanded its resources over time, it could today have ended foster care as it is now known in Pennsylvania. (R. 101-102 (P. ¶118)) Though possessing these amounts of resources, the Trust today serves less than 1,300 children. (R. 101 (P. ¶115)) Childcare policy problems have also beset the Trust, as described below.

Children who might have been cared for by the Trust but instead receive state care require large amounts of Commonwealth resources, up to \$300 million annually, including at times large sums expended in adulthood due to the adult needs of these children. (R. 99-100 (P. ¶¶107, 108)) The potential benefit to Pennsylvania taxpayers from efficient utilization of the Trust to serve children who would otherwise require state care is extremely large. This is to a degree where efficient use of Trust assets might over time have already closed the state’s budget deficit. (Id.) However, Trust resources have not been used efficiently. (R. 91-95 (P. ¶¶79-94))

To illustrate, during the period 1970 to 2003, as Trust assets grew from approximately \$200 million to \$5.5 billion, and as American and Pennsylvania residential childcare needs dramatically grew, the number of children served by the Trust *shrank*, going from 1,600 children

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<sup>2</sup> MHSAA believes that these assets have since grown to approximately \$6.3 billion due to the increase in the HFC stock value. MHSAA will use the figure at the date of the filing of the Petition as the “current” value of the Trust, except where otherwise specified. Other figures and statistics, such as on the state of national and Pennsylvania residential childcare needs, are also as of the date of the filing of the Petition.

to 1,300 children.<sup>3</sup> (R. 101 (P. ¶115)) The amount of land being utilized to house these children also shrank, from 10,000 acres to approximately 2,000 acres. (Id.) During this time, under Deed modifications made after the Settlers' deaths and as interpreted by the Trustee, land assets were transferred to numerous non-child purposes and rezoned to prohibit residential childcare use. (R. 96 (P. ¶¶95-97))

During the same period, other entities owned or controlled by the Trust, such as the Hershey Entertainment & Resort Company ("HERCO"), or created from Trust assets, such as the Hershey Medical Center ("HMC"), enjoyed tremendous growth. (R. 89, 91-92 (P. ¶¶69-70, 81-82)) These other entities have had representation on the Trust Board of Directors and on the MHS Board of Managers.<sup>4</sup> (R. 89, 93-94 (P. ¶¶69, 87-88)) This Trust Board representation by these other entities was determined by the OAG and others to present conflicts of interest that caused a breakdown by the Trust in fulfilling its child-saving mission. (R. 100-101 (P. ¶¶127, 133)) These conflicts of interest include ones related to competition over scarce land resources. (R. 88 (P. ¶63))

For instance, the growth of HERCO in major tracts of Trust land intended by the Hersheys to house Orphan Beneficiaries led to the closing, selling, abandoning, or transferring to HERCO use of some 21 former MHS student homes in areas near HERCO facilities. (R. 88-87 (P. ¶¶66-67)) These student homes were in some of the Trust's most child-friendly areas, and were sufficient to house some 310 Orphan Beneficiaries. (Id.) HERCO thus benefited at the expense of the Trust's sole legal purpose, the residential care of orphan children. (Id.)

The OAG has consistently asserted that in exercising its *parens patriae* duty, it is not seeking to protect orphan children as Trust beneficiaries, but instead "the community and general public." (R. 98-99 (P. ¶¶102-105)) An example of this was the OAG's joining with the Trustee in successfully seeking removal of 500 acres of land and \$50 million in cash from the Trust's child-saving asset base to build HMC for Penn State University in 1963. (Id.) Another example

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<sup>3</sup> Pennsylvania's second largest residential childcare facility (Girard College) enrolls 600 children with only \$380 million of assets. (R. 101 (P. ¶116)) Without regard to economies of scale, MHS would serve 8,684 children if as efficient as Girard.

<sup>4</sup> The Trust Board of Directors has historically also served as the School Board of Managers, with entirely overlapping membership, and with the Managers chosen from among the Directors. This is also the case today except for one Director who is not a Manager, Mr. Rob Vowler, the President of the Hershey Trust Company. Except where the context requires otherwise, this Brief of Appellant refers to Trust "Directors" and School "Managers" interchangeably and to the Trust and MHS Boards as "the Trust Board." Because the Trust and School always act jointly, they are referred to together as the "Trust" in regard to their joint action.

of this was the OAG's joining with the Trustee in unsuccessfully seeking the removal of land from the Trust's child-saving asset base in 1999. (R. 98 (P. ¶103)) Consistent with this *parens patriae* duty interpretation, HERCO has been permitted to expand to the benefit of the community and the general public, while draining resources away from the Trust's Orphan Beneficiaries. (R. 96 (P. ¶¶95-96))

Commencing in approximately 1990, School enrollment policies were altered to disfavor children requiring year-round residential care. (R. 79 (P. ¶31)) Educational, housing, and other policies were also altered to reflect the differing needs of the enrolled children who increasingly did not require substantially year-round residential care. (*Id.*) Efforts to free up Trust land for non-child purposes led to relocation of Orphan Beneficiaries from the spacious lands provided them by Settlers into a crowded and smaller facility, in a fraction of available land holdings. (R. 79, 87-95 (P. ¶¶31, 60-76, 79-81))

This relocation was pursued even though it was economically irrational and ultimately created more crowded and less child-friendly facilities. (R. 91-92 (P. ¶79)) The relocation benefitted non-child business interests, including those with Trust Board representation. (R. 83-84 (P. ¶¶66-67)) Crowding and poor childcare policies reached a point in 2001 where a safety crisis led to a one-year moratorium on increased enrollment. (R. 104-105 (P. ¶¶126, 128)) This was after School-hired consultants documented 60 incidents of physical or sexual abuse over a two-year period. (*Id.*) Many of these incidents occurred in a residential setting called "multi-age housing," that was well understood by residential childcare experts to be dangerous because it mixed the youngest and most vulnerable children with older ones in group home settings. (R. 103, 133 (P. ¶¶123, 239)) Multi-age housing was continued even as evidence of harm mounted. (R. 103)

The long-standing failure of the Trust to serve children commensurate with asset growth, the move away from serving children who require substantially year-round residential care, the altering of School programs to disfavor children who require year-round residential care, the diversion of Trust land and cash assets to non-child uses, and the breakdown in safety at the School due to improper residential and related policies all represent clear departures from the charitable intent of Settlers as stated in their Deed of Trust. (R. 77-79 (P. ¶¶22-23, 26-31))

4. **MHSAA mobilizes to end deviation from charitable intent.** With the OAG silent as to what was happening at MHS, MHSAA began pressing the OAG about diversion from

the Settlers' charitable intent in the early 1990's. (R. 84 (P. ¶46)) One of the first triggering events was the attempt by the Trust to end entirely the vocational education program mandated by the Deed of Trust, without opposition from the OAG. This program is essential to the needs of many orphan children who may not necessarily be bound for college and who thus may need to learn a trade. (Id.) MHSAA expended large amounts of resources in this effort, eventually obtaining an agreement signed by the OAG and the Trust that compelled the Trust to preserve some form of vocational education at the School. (Id.)

Throughout the 1990's, MHSAA continued to labor to protect the Trust's child-saving charitable intent, in addition to fulfilling MHSAA's other duties, such as providing services to students and alumni. (R. 83-84 (P. ¶¶45-46))

When the Trust filed its 1999 "Petition for Cy Pres Award Of Portion Of Accumulated Income And Authorization For The Execution And Delivery Of Certain Easements Cy Pres" ("the CHILD Petition") to create a teaching institute and divert land to public use, MHSAA was the first to alert the OAG to the impropriety of the CHILD Petition.<sup>5</sup> (R. 81, 84 (P. ¶¶37, 46)) MHSAA again marshaled large amounts of resources to oppose that proposed departure from the Trust's charitable intent. (R. 81, 84 (P. ¶¶47-49)) In the CHILD Petition proceeding, the Trust sought to divert hundreds of millions of dollars, and more than 1,000 acres of land, to purposes other than directly serving Orphan Beneficiaries. (R. 81 (P. ¶37)) The substance of the CHILD Petition was ultimately rejected by the Orphans' Court. (R. 81 (P. ¶38))

MHSAA was granted *amicus curiae* status in the CHILD Petition proceeding. (R. 81 (P. ¶37)) MHSAA's efforts in that matter were pivotal to educating the Orphans' Court on certain land issues, besides helping to persuade the OAG to contest the Petition. (R. 81 (P. ¶38)) MHSAA's efforts ultimately contributed to the preservation of land for Child Beneficiaries as well as to the denial of the Trust's request to divert funds. (Id.) In the CHILD Petition proceeding, the OAG and MHSAA disagreed on one key matter: the OAG endorsed the Trustee's request to divert land to use by the general public, while MHSAA opposed this request. (R. 84 (P. ¶¶48, 49)) The Orphans' Court rejected the OAG/Trustee's joint position on this land issue, agreeing with MHSAA that the request violated the Trust's charitable intent. (Id.) Had MHSAA not made these arguments, the OAG/Trustee joint action on this would have been unopposed. (Id.)

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<sup>5</sup> CHILD is an acronym for the "Catherine Hershey Institute of Learning and Development."

In the wake of the CHILD Petition proceeding, MHSAA alerted the OAG to ongoing alleged improprieties in the Trust Directors' execution of their duties, and requested an investigation. (R. 100 (P. ¶112)) The alleged improprieties included Trust Board conflicts of interest, improper enrollment policies, improper and unsafe residential policies, failure to utilize Trust resources strictly to serve orphan children, failure to utilize Trust resources to serve as many children as possible, improper educational policies, and other Trust actions which, as a whole, MHSAA alleged to constitute a perversion of the Trust's charitable intent. (R. 100-101 (P. ¶¶113, 114))

The OAG resisted commencing an investigation into these allegations but relented after obtaining MHSAA's agreement to contribute more MHSAA resources to assist with the effort. (R. 102 (P. ¶119)) MHSAA contributed these resources pursuant to MHSAA's core mission, including its goal of protecting the Settlers' charitable intent. (R. 80-81 (P. ¶¶34-37)) (Ruling at 4.) In particular, it was imperative for MHSAA to assure that Orphan Beneficiaries would continue to fall within the orphan parameters established by the Hersheys, since MHSAA's membership is drawn entirely from the pool of children enrolled at the School.<sup>6</sup> (R. 73 (P. ¶10)) A change in enrollment policies to disfavor orphan children will over time entirely reconstitute MHSAA's membership, and render impossible the MHSAA mandate of maintaining "bonds formed in orphanhood" as well as the MHSAA mandate of protecting the Settlers' child-saving charitable intent. (Id.)

The OAG announced that it would commence an investigation on December 5, 2000.<sup>7</sup> (R. 102 (P. ¶119)) Pursuant to the OAG's condition for proceeding with the investigation, MHSAA expended vast resources in assisting the OAG in this, contributing attorney time, researcher time, and childcare expert time, as well as contributing large amounts of out of pocket costs. (R. 102 (P. ¶¶120, 121)) This constituted a tremendous resource drain on MHSAA. (R. 81, 102 (P. ¶¶34, 120)) The OAG thereupon conducted a lengthy and exhaustive investigation, deliberating carefully for twelve months before reaching its conclusions. (R. 104)

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<sup>6</sup> One exception to this exists: a handful of select MHS retirees have been designated by MHSAA as "Honorary Alumni," having been deemed "one of us" by the alumni themselves.

<sup>7</sup> This date is incorrectly noted in ¶119 of the Petition (R. 102) as "December 5, 2001," though the context makes clear that the correct date is December 5, 2000. The December 5, 2000 date is thus used in this Brief of Appellant.

The conclusions of the OAG's investigation were announced on December 5, 2001, bearing out virtually every one of MHSAA's contentions. (R. 104-106 (P. ¶¶127, 129, 133-137)) The OAG determined that the Trustee was diverting from the Trust's charitable intent, and called for "broad sweeping reforms." (R. 105 (P. ¶127)) The OAG made clear that conflicts of interest had burdened Trustee decisions. (R. 105-106 (P. ¶128)) The OAG emphasized that personnel changes would be inadequate to address the Trust's failures, and that the only means of obtaining lasting improvements would be through structural reforms. (R. 105 (P. ¶129)) The OAG deemed these structural reforms necessary to a degree where it indicated it would commence legal proceedings against the Trust if necessary to obtain the reforms. (R. 104 (P. ¶127)) The OAG's investigation thereupon shifted to resolution mode, as the details of reform were negotiated. (R. 104)

Broad structural reforms were eventually memorialized in the Reform Agreement at issue in this proceeding. (R. 105-106 (P. ¶¶130, 133)) By the time of the agreement's execution on or around July 31, 2002, MHSAA efforts in the matter constituted an investment of millions of dollars, without which the OAG conceded it could not have grasped many of the central issues. (R. 85-86, 102, 133 (P. ¶¶50-52, 120, 239)) At all times in this matter, MHSAA was acting to protect its own central purposes of preserving bonds formed in orphanhood and furthering the Hersheys' child-saving mission. (R. 79-80 (P. ¶32))

5. **The OAG orders structural reforms in the Reform Agreement whose provisions are tied directly to MHSAA initiatives.** MHSAA's efforts were directly tied to each of the Reform Agreement's provisions, touching virtually every area that MHSAA had identified as a concern, including enrollment policies, conflicts of interest, failure to utilize assets to serve more children, and dangerous residential and childcare policies. (R. 102, 105-106 (P. ¶¶120-121, 133-136))

Some of the most critical reforms were as follows:

(a) **End all conflicts of interest.** The Reform Agreement ended conflicts of interest deemed harmful to fulfilling the Trust's charitable intent. (R. 105-106 (P. ¶133)) This included prohibiting members of the Trust (and MHS) Board from serving on the boards of the two for-profit entities controlled by the Trust, i.e., Hershey Foods Corporation ("HFC") and HERCO. (Id.) This also included prohibiting the CEO's of these two companies from serving as directors of the Trust (and MHS) Board.

The Reform Agreement compelled the Trust to focus on its residential childcare mission by restricting the scope of Director duties to those centered on residential childcare and shedding all other competing or conflicting duties. (R. 105-106, 49-51 (P. ¶133)) Each Trust Director would be permitted only to serve the charity. (Id.) The conflict rules were so well-thought out that Trust Directors were prohibited from serving on related charitable boards, including HMC and its controlling entity Penn State University. (R. 50) Trust Directors were therefore removed from serving any entity that would have designs on Trust land or assets. (Id.) To stop back-scratching cronyism, the Reform Agreement also prevented more than one Director from serving on the same compensated outside board. (Id.)

(b) **Ensure admission of needy children.** The Reform Agreement sought to ensure minimum need levels of children served by imposing certain financial standards on enrolled children. (R. 106, 52-53 (P. ¶135)) These were necessary because of earlier amendments to the Deed of Trust that over time muddled the clearly-defined need standards created by Settlers. (R. 77 (P. ¶¶25-26)) The School had thus come to enroll children from circumstances where true social or financial need was lacking; and the School relied in this on the Deed amendments that had over time been enacted without due regard for this type of potential abuse. (R. 77-78 (P. ¶¶25-31)) To prevent further abuses and continued drift in admissions away from needy children, maximum household incomes were tied to percentages of the federal poverty level (with the majority of new admissions to be capped at 100% of such level). Further, household income was deemed to include income from all persons with a legal obligation to support the child as well as from a step-parent residing in the same household. (R. 52-53)

(c) **Mandatory foster care program.** The Reform Agreement sought to return MHS to the Settlers' children's home intentions by mandating a foster care pilot admission program in Dauphin, Lancaster, and Lebanon Counties, to seek out children at risk of foster care. (R. 53)

(d) **Land transfer and use restrictions.** The Reform Agreement imposed a strict 90-day advance notice obligation on the Trust to advise the OAG before any Trust land could be transferred or encumbered by a lease exceeding five years, an easement, or a right of way. (R. 51) As a further check on maintaining usable land for MHS student homes, the Reform Agreement also required this notice be given for any transfer of land by the Trust's controlled entities where that land was acquired from the Trust and had previously been used as a student home. (Id.) This was directed to those many student homes that had been converted to

commercial purposes, or ones that might be transferred to a controlled entity for disposition. (R. 89 (P. ¶67)) When reading these land restrictions in conjunction with the conflict-ending Reform Agreement provisions, the clear intended result is the return to use of Trust land for residential childcare purposes as competing interests were also removed from the Trust Board.

(e) **Academic standards.** The Reform Agreement sought to avoid disqualification of applicants for lack of “scholastic achievement potential” where the applicants had IQ’s of at least 80 and exceeded “borderline intellectual functioning,” including those performing two or more years below grade level. It also prevented expelling children for academic reasons unless assistance services were exhausted and used for at least one year. (R. 52) These standards sought to end the Trust’s continued drift towards enrolling the highest achieving children.

(f) **Status reports.** The School was required to personally meet with the OAG twice per year to provide a status report on its progress and to inform the OAG on major developments. (R. 55, 106 (P. ¶137)) This was important in that it also imposed a duty to monitor on the OAG. The Trust’s historic underperformance over decades demonstrated this to be prudent because Trust failures do not necessarily reveal themselves absent close scrutiny.

While the Reform Agreement could have done more to restructure the Trust so as to assure better fulfillment of the Settlers’ child-saving charitable intent, by any measure it was a landmark document. (R. 105 (P. ¶132)) After 57 years of charitable intent misdirection, the Reform Agreement represented a dramatic and long overdue step in the direction of restoring the Trust to the Hersheys’ child-saving mission. (R. 105-106 (P. ¶132))

6. **Political and community panic led to reform rescission.** Commencing around April 2002, the Trustee decided to solicit bids for the purchase of the Trust’s entire controlling interest in HFC. (R. 106 (P. ¶138)) This became publicly known on July 25, 2002. (*Id.*) In direct response to the public outcry over the matter, the OAG filed a proceeding seeking to enjoin the sale, specifically noting that it did so on behalf of the community of Derry Township and the general public (the “HFC Proceeding”). (R. 107 (P. ¶141)) There was no meaningful mention by the OAG of whether the proposed sale was in the interest of fulfilling the Trust’s child-saving mission. (R. 106-107 (P. ¶¶142-143))

The reaction of the Central Pennsylvania community to the proposed sale was visceral and angry, with a concomitant political result. (R. 106 (P. ¶139)) In addressing the matter, the OAG was highly influenced by the outcry of an inflamed public and the economic issues

affecting local jobs, though ignoring entirely the residential childcare issues. (R. 106-107 (P. ¶¶142-143))

The latter was reflected, for instance, in open court statements from the OAG in the Court of Common Pleas itself, to the effect that the OAG longed for a return to Trust policy such as had prevailed in 1963, i.e., the year that \$50 million in cash and 500 acres of land were diverted from residential childcare to build HMC. (R. 108 (P. ¶¶145-146)) The OAG thereby advanced the position of the community and general public as putative Trust beneficiaries, in derogation of the interests of the orphan children who are the Trust's sole actual beneficiaries.<sup>8</sup> (Id.)

When the Pennsylvania Legislature subsequently passed a statute that sought to elevate the community of Derry Township and the Pennsylvania general public to Trust beneficiary status as a matter of law -- by restricting the Trust's ability to sell HFC -- the OAG endorsed the legislation. (R. 109-110 (P. ¶151)) This was done without due consideration of its harm to the interests of orphan children, the only class with true beneficiary status within the Settlers' Deed of Trust. (R. 109-110 (P. ¶¶151-153))

The Trust eventually decided not to sell its controlling interest in HFC, at a meeting that took place in September 2002 in Valley Forge Pennsylvania. (R. 109 (P. ¶150)) The OAG thereafter took steps to cause the removal of every Trust Director who voted in favor of the sale at Valley Forge, ignoring entirely any child-centered reason that any Director may have had for voting for the sale, or the fact that such Directors had agreed to the Reform Agreement. (R. 112 (P. ¶162))

Ten Trust Directors were eventually removed in the fall 2002 Trust Board restructuring (the "Board Restructuring"), to be replaced by four new Directors. The new Directors were two local business attorneys, the CEO of HFC, and a retired local newspaper editor. (R. 38, 113 (P. ¶113)) The Board Restructuring was thus predicated in part on rescission of certain provisions of the Reform Agreement, though this matter was never examined in any public or judicial forum. (R. 113 (P. ¶113)) Without such rescission, the CEO of HFC, who was appointed as a Trust Director in the Board Restructuring, would have had to resign his appointment on the June 30,

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<sup>8</sup> MHSAA had sought leave to intervene in the HFC Proceeding to prevent the very harms to children's interests that later flowed from these OAG positions. MHSAA's intervention petition was never ruled on, being dismissed as moot once the underlying proceeding was itself dismissed, after the sale of HFC fell through.

2003 effective date of the Reform Agreement. (R. 50) It thus appears that the OAG was committed from an early point in the process to erasing those Trust reforms that were intended to assure that the Trust's controlled entities, HFC and HERCO, would not retain undue influence on future Trust decisions. (R. 113 (P. ¶167))

The OAG acted entirely in the interests of the community and general public in the Board Restructuring, and refused requests to name residential childcare experts to the Trust Board. (R. 112-113 (P. ¶¶163-165)) The Trust Board continues to lack any residential childcare expertise, which results in continued MHS program breakdown and further harm to children and to the Trust's child-saving mission. (Id.)

On June 27, 2003, just three days before the effective date of many reforms contained in the Reform Agreement, the press office of the OAG contacted MHSAA and announced the execution of an agreement purporting to amend the Reform Agreement (the "Abrogation Instrument"). (R. 114 (P. ¶171)) In fact, the Abrogation Instrument voided the Reform Agreement in its entirety, declaring that the parties agreed to "rescind in its entirety their July 31, 2002 agreement, which shall be void *ab initio*." (Id.) The Abrogation Instrument is a watered-down, shortened, and toothless version of the Reform Agreement, doing away with its most meaningful reforms. (R. 114-117 (P. ¶¶171-183)) The Abrogation Instrument also failed to improve the Reform Agreement where it could have, which is to say that reforms were shed with no commensurate child protections to temper reform loss. (R. 115 (P. ¶173)) Many of the changes helped the community and general public at the expense of children's interests. (Id.) None of the changes benefitted children. (Id.)

In comparison to the Reform Agreement, the Abrogation Instrument is facially adverse to the interests of orphan children and the Trust's mission, as is demonstrated by the following:

(a) **Conflicts of interest.** The Abrogation Instrument deleted the prohibition on interlocking boards contained in the Reform Agreement, among the agreement's most important provisions. (R. 115 (P. ¶173)) This reform was of such clear cut necessity that former United States Attorney General Richard A. Thornburgh had himself recommended it. (R. 115 (P. ¶174)) Rescinding this reform once again permitted the CEO's of the for-profit controlled entities (HFC and HERCO) to serve on the Trust Board, where their duties to their respective corporate employers as a matter of course interfere with the Trust's sole residential childcare mission. (R. 115-116 (P. ¶¶174-175)) The Abrogation Instrument also permits Trust Board members to sit on

boards of the controlled entities, collecting lucrative fees and dividing their loyalties, in a manner shown to have an unhealthy influence on the Trust's sole residential childcare charitable purpose. (Id.)

The Reform Agreement removed from the Trust (and MHS) Board the CEO's of the controlled companies to eliminate the undue influence on the Trust Board of local business interests, but did not restrict the School President from serving on the Trust (and MHS) Board. The Abrogation Instrument's sole substantive new provision stands this principle on its head: the Abrogation Instrument *prohibits* the MHS children's home President from serving on the Trust (and MHS) Board, but *permits* the CEO's of controlled companies HFC and HERCO to serve on the Board. Further, the Trust Directors receive no compensation in their capacity as Managers of the School, in contrast with what they receive if chosen to serve on the HERCO Board.<sup>9</sup> (R. 50, 32)

(b) **Income limitations and strict guidelines deleted.** The Abrogation Instrument deleted the hard income caps contained in the Reform Agreement. (R. 116 (P. ¶177)) It also eliminated the strict requirements on measuring a household's income. (Id.) This restores the Directors/Managers to the enrollment discretion that the OAG had determined was not sufficient to ensure the admission of needy children. (R. 116 (P. ¶178))

(c) **Foster care program deleted.** The Abrogation Instrument deleted the foster care pilot admission program contained in the Reform Agreement. (R. 116 (P. ¶180))

(d) **Land transfer and lease restrictions gutted.** The Abrogation Instrument gutted the notice provisions of the Reform Agreement by: (a) restricting dispositions to "sales" instead of "transfers" and thus allowing "no notice" friendly condemnations and other transfers that are not sales (R. 34-35); (b) limiting notice to land uses that "interfere with the present or future use of the land by MHS for program purposes," an easily justified exception that would stifle MHS expansion (Id.); (c) exempting property already being used for commercial purposes unless previously used as a student home (Id.); and (d) allowing land to be transferred to affiliates and then sold by the affiliate without notice. (Id.) This blueprint for permitted land transfers was contained in the same Abrogation Instrument that simultaneously restored to the Trust Board the very conflicts of interest that caused land competition problems in the first place.

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<sup>9</sup> The Managers receive fees as Directors of the Trustee.

(e) **Academic standards.** The Abrogation Instrument deleted the specific protections for those children of lesser scholastic achievement, including the mandatory one-year of assistance before a child could be expelled from the children's home. (R. 35)

(f) **Status reports.** The twice per year face-to-face meetings were replaced by once-per-year written reports. (R. 36)

Exhibit A attached hereto provides a summary of key Reform Agreement provisions, the problems they addressed, and how they fared in the Abrogation Instrument.

The OAG has stated that the personnel changes that occurred in the fall 2002 Trust Board restructuring obviated the need for structural reforms, although the OAG had earlier insisted that only structural reforms were adequate to end the 57 years of diversion from the Trust's charitable intent that have followed the death of Mr. Hershey. (R. 31, 105 (P. ¶129)) The trial court too emphasized personnel changes in dismissing the Petition on standing grounds. (Ruling at 1-2.)

7. **MHSAA's years of efforts get discarded to its detriment, to the detriment of the Trust's charitable intent, and to the detriment of orphan children.** For the 12 years preceding the Reform Agreement, MHSAA fought a grueling and fully-volunteer battle to protect the rights of Orphan Beneficiaries, when no one else would act. (R. 133 (P. ¶239)) MHSAA fought to protect vocational education, to preserve land, to see the neediest children enrolled, to protect children from multi-age housing and congregation, and to otherwise direct to orphan children all of the Hersheys' child-saving charity, while others openly sought to direct this charity to non-orphan uses, as has occurred for decades. (Id.) MHSAA contributed millions of dollars of time and expenses to this effort. (Id.)

MHSAA's efforts led to the protections for Orphan Beneficiaries as set forth in the Reform Agreement. This was all to protect the Settlers' child-saving charitable intent after years of its perversion. (Id.)

Rescission of the Reform Agreement renders MHSAA's time and expense wasted, and consigns MHSAA to future additional expense since it puts the Trust in a structural position worse than before. (R. 133 (P. ¶¶240-241)) This causes harm to the interests of MHSAA as set forth in its charter, because it erases the MHSAA-driven protections of Orphan Beneficiaries while reopening the door to further changes in the make-up of MHSAA's membership. (R. 73 (P. ¶12))

8. **MHSAA Petition and post-rescission developments.** When the OAG and Trustee rescinded the child-protecting Reform Agreement, MHSAA filed the Petition seeking judicial review of the matter. (R. 67, 134-135 (P. ¶¶245-247)) MHSAA's Petition requested a hearing where the OAG and Trustee would be required to demonstrate to a court that rescission of the Reform Agreement was proper and in the best interest of poor orphan children, despite the *prima facie* harms inherent in such rescission. (Id.)

MHSAA also sought the appointment of a guardian and trustee *ad litem*, to represent minor Orphan Beneficiaries and Unknown Orphan Beneficiaries in the event that any appropriate modification of the Reform Agreement were proposed, and in order to assure proper decisions during the time necessary for reforms to be implemented. (R. 135-136 (P. ¶¶248-249))

Since the rescission of the Reform Agreement and a Trust Board restructuring that (1) restored past conflicts of interests, and (2) perpetuated a Trust Board deficiency in residential childcare expertise, MHS children have continued to be harmed by policies detrimental to their needs. (R. 112-113, 124, 126 (P. ¶¶164, 209, 216))

Also since that time, infrastructure decisions have continued to fail to put the Trust's sole charitable intent, i.e., residential childcare, above all other competing considerations. (R. 118 (P. ¶186)) The latter has included: (1) the transfer of student homes Springdale and Union to the Derry Township Municipal Authority in a friendly condemnation (i.e., one proposed by the Trust Directors) (Id.); (2) the announcement of efforts to direct Trust land to a proposed Route 743 bypass (R. 118 (P. ¶187)); (3) the creation of a new HERCO winter attraction on Trust land historically devoted to MHS children's use (R. 118-119 (P. ¶188)); and (4) further crowding of children into already crowded facilities. (R. 128 (P. ¶222))

## **VI. SUMMARY OF ARGUMENT**

This appeal concerns rescission of a Reform Agreement that culminated a one-and-one-half year OAG investigation of improper Trust practices brought to the OAG's attention by MHSAA. The trial court ignored overwhelming evidence in the Petition that establishes: (i) MHSAA's "substantial, direct, and immediate" interest in the Reform Agreement that is the touchstone for standing in general; (ii) MHSAA's "special interest" in the Trust itself as required for charitable trust standing; and (iii) that the Reform Agreement's provisions were crafted to correct the Trust's long-term failure to fulfill its residential childcare mission.

The Reform Agreement was intended to correct structural flaws that caused decades of diversion from the Trust's sole charitable purpose, i.e., providing orphan children with residential care. Years of MHSAA efforts were the catalyst for the OAG investigation and the Reform Agreement, neither of which would have otherwise come about. Trust structural flaws have consigned untold numbers of children to inferior forms of residential childcare outside MHS, while favoring business, community, and general public interests.

The OAG conditioned investigation on MHSAA assistance. MHSAA's actions in this were part of a now 14-year costly effort to compel adherence to the Trust's charitable intent. The Reform Agreement, *inter alia*, (i) prohibited certain pernicious conflicts of interest; (ii) imposed strict notice provisions for nearly all land transactions; (iii) set hard guidelines on need levels of orphan beneficiaries; (iv) de-emphasized scholastic achievement in admissions; (v) imposed a pilot foster care admissions program; and (vi) compelled focus on the Trust's residential childcare mission.

When the OAG and Trustee reacted to political pressures by rescinding the Reform Agreement, MHSAA commenced this action seeking judicial review of their act. MHSAA seeks the narrow relief of reinstatement of the Reform Agreement. The trial court declined to review the rescission on grounds that MHSAA lacks standing to raise the matter at all. This was irrespective of well-pled facts that showed rescission to be harmful to the Trust's sole charitable purpose, and a legal standard that requires a court to grant standing unless there is no doubt that MHSAA's claim to standing cannot be sustained. Such doubts are abundant here.

Rescission of reforms is facially harmful to the Trust's charitable intent and to the interests of unrepresented children. Rescission elevates community and business interests above the interests of orphan children, in a panicked reaction to the near-sale of HFC. The OAG action

here creates an enforcement void because the Trust's child beneficiaries should not be faced with the compromise of their protections in the manner that occurred. Well-settled law grants standing to a party such as MHSAA in cases where the OAG cannot or will not act to protect charitable trust intent, as is the case here.

Rescission also harms MHSAA's interests directly because it renders years of MHSAA effort and cost wasted, and again puts in jeopardy MHSAA's own mission and constituency. Failure to reinstate the Reform Agreement will mean this opportunity to secure these reforms will be entirely lost for all time.

MHSAA fully satisfies every standing test articulated by our courts. In particular, MHSAA's: (i) vast effort to secure the Reform Agreement (including at the OAG's request); (ii) historic relation with the Trust; and (iii) unique purpose and constituency all factor together to establish a substantial, direct and immediate interest in the reinstatement of the Reform Agreement, and a special interest in the Trust itself, as necessary for standing.

MHSAA additionally satisfies the standing test for challenging governmental action articulated by the Pennsylvania Supreme Court in Application of Biester because: (i) rescission would otherwise go unchallenged; (ii) judicial relief is appropriate; (iii) other redress is not available; and (iv) MHSAA is in the best position to seek reinstatement.

The only question before the Court is whether the facts alleged in the Petition, taken as true, establish MHSAA's standing. These facts indubitably do so. The trial court's order denying standing should thus be reversed and the case remanded for a hearing on the merits. Anything else will allow child-protecting reforms and years of MHSAA effort to be discarded, after decades of charitable intent diversion, and without so much as passing judicial scrutiny.

In light of the enormous stakes at issue for innumerable desperate children, for the Commonwealth, and for MHSAA, the OAG and Trustee should be required to demonstrate to a court in the context of a bona fide hearing how the reform rescission will benefit orphan children and better fulfill the Settlers' child-saving mission. This *bare-minimum* obligation to appear and explain their action should be imposed on the OAG and Trustee before they are permitted to compromise the rights -- *for all time* -- of countless needy children who look to the OAG for protection of their rights. The harm to orphan children from rescission will never be known if MHSAA is not granted standing to challenge the joint actions here of the OAG/Trustee.

## VII. ARGUMENT FOR APPELLANT MHSAA

### A. **The Trial Court’s Improper Application of the Traditional “Substantial, Direct, and Immediate” and “Special Interest” Standing Requirements Constitutes Error As a Matter of Law and an Abuse of Discretion**

1. **MHSAA fully satisfies the threshold standing requirement of a “substantial, direct and immediate interest” in the subject matter of the litigation.** “The purpose of the requirement of standing is to protect against improper plaintiffs.” Application of Biester, 487 Pa. 438, 442, 409 A.2d 848 (1979). The United States Supreme Court in Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962), has stated that the essential inquiry in determining the standing of a litigant is:

Have the [litigants] alleged such a personal stake in the outcome of the controversy as to assure the concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult...questions.

Taking guidance from the federal interpretation of standing principles, our Supreme Court has outlined the standing criteria that must be considered in Wm. Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975). Standing requires a “substantial, direct and immediate” interest in the subject matter of the litigation. Id.

A “substantial” interest is an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law. A “direct” interest requires a showing that the matter complained of caused harm to the party’s interest. An “immediate” interest involves the nature of the causal connection between the action complained of and the injury to the party challenging it.

South Whitehall Twp. Police Service v. South Whitehall Twp., 521 Pa. 82, 86-87, 555 A.2d 793, 795 (1988) (citations omitted).

To be substantial, the “interest must have substance -- there must be some discernable adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law.” In re McGillick Foundation, 537 Pa. 194, 642 A.2d 467, 469 (1994) (diocese had standing to enforce trust even though not a named beneficiary). “[A] private party seeking to enforce a charitable trust must possess an interest in the litigation, which surpasses the common interest of the public in continuing to benefit from the trust.” In re McCune, 705 A.2d 861, 865 (Pa. Super. 1997), citing Wiegand v. Barnes Foundation, 374 Pa. 149, 153, 97 A.2d 81,

82 (1953) (Wiegand was a mere private citizen “whose interest is only that held in common with other members of the public”); In re Pasquay, 525 A.2d 13, 14 (Cmwlth.), order aff’d, 529 A.2d 1076 (Pa. 1987) (voting member of a political party has a substantial interest in assuring Election Code compliance of candidates in its party’s primary).

“[I]t is clear that some interests will suffice to confer standing even though they are neither pecuniary nor readily translatable into pecuniary terms.” Wm. Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 193, 346 A.2d 269, 281 (1975). The Pennsylvania Superior Court expounded upon this concept in In re McCune, 705 A.2d 861, 865 (Pa. Super. 1997), stating as follows:

Although standing does not require the presence of a direct economic interest, it does mandate that a party possess some sort of substantial interest, which has been adversely affected by the alleged misconduct. McGillick, [537 Pa. 194, 642 A.2d 46 (1994)]. In the absence of a beneficial interest, the [petitioner] must demonstrate the existence of some other interest, which would justify its standing to pursue this matter.

MHSAA fully satisfies all three prongs of the traditional standing test: MHSAA’s interests are different than those held in common with the general public; MHSAA has material and non-material interests that are adversely affected by the act complained of (reform rescission); and there is a direct causal link between the harms to MHSAA’s interests and the act complained of.

MHSAA’s founding mission statements indicated that 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.” (Ruling at p. 4.) The purpose of the Association now also states a “dedication to the educational and other principles 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., Attachment 4.) These statements reflect the truism that MHS alumni are overwhelmingly committed to the Settlor’s child-saving mission and act in this through MHSAA.

By virtue of its *raison d’être*, MHSAA faces an end to its very mission if the Trust’s orphan-serving mission is itself abandoned. The very constituency of MHSAA will be changed and its central purpose end if the children enrolled in MHS cease to be the orphans identified by

Settlers in their Deed of Trust as the Trust's beneficiaries, and identified in MHSAA's mission statement as the Association's core constituency once they become adults.<sup>10</sup> Such departure in this case would be as though a Yeshiva or a Catholic school were to cease enrolling Jewish or Catholic students: in each case, the respective alumni associations would cease to exist *qua* Jewish or Catholic associations.<sup>11</sup>

For MHSAA, the fabric of shared bonds is woven from the extreme deprivation of orphanhood, and alumni have been devastated to witness the jarring shift away from orphans in admissions. This is among the reasons that MHSAA fought so hard to obtain the Reform Agreement's enrollment provisions, for it affects the very character of MHSAA too. If the mission shift of the nineties does not get corrected through the assurances contained in the Reform Agreement, it would lead to MHSAA being no different from any "boarding school" alumni association, threatening its very special nature as one of our nation's few remaining children's home alumni associations.<sup>12</sup>

MHSAA has for similar reasons also been compelled to concern itself with assuring that MHS programs continue to meet the needs of orphans so that MHS would continue to admit and serve them. This included waging a costly and time-consuming battle in the early 1990's to preserve some degree of vocational education at MHS. (R. 84) It also includes monitoring MHS safety and working to stop such dangerous policies as multi-age housing, congregation, and mixing of children across all age lines in one centralized location. (R. 133) This is no small point, for the reality at MHS has been that radical program and infrastructure changes have created a climate that *fails* the neediest types of children whom the Hersheys intended to save.

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<sup>10</sup> When the trustee of the Girard Estate moved to expand the class of beneficiaries of Girard College from those with a deceased parent to those whose natural parent or parents are not furnishing them with proper care (essentially the same standard adopted by the Hershey Trust), Judge Klein of the Orphans' Court Division in Philadelphia referred to the expansion as now including "functional orphans." Girard Estate, 27 Fiduc. Rptr. 545 (Phila. 1977).

<sup>11</sup> Among other things, the Reform Agreement focused admissions on poverty levels and defined family income. These hard guidelines together with closer OAG monitoring should result in the admission of greater numbers of children who need substantially year-round care than if there were no such guidelines.

<sup>12</sup> See, e.g., Crenson, Matthew A., *Building the Invisible Orphanage: A Prehistory of the American Welfare System*, Harvard University Press, 1998, at p. 306 *et passim* ("The age of the orphanage ended in the same diffuse, disjointed way it had evolved"). Crenson explains in careful detail how children's homes became disfavored over time for reasons that included the land and monetary requirements of establishing quality and "homelike" settings such as is mandated by Settlers Milton & Catherine Hershey, as compared with crowded and "institutional" settings driven by desires to economize. The Trust is thus a rare, remarkable, remaining exception, and MHSAA too a remaining rarity among children's home alumni associations.

These children are then expelled, to be replaced by non-orphan children who adjust better to the altered programs and facilities. This in turn causes a shift in admissions that violates the Settlers' intent in ways far more insidious than with openly-stated policies that discriminate against orphans (e.g., foster care children) in admissions. This problem is exacerbated here because even good intentions among Directors/Managers cannot overcome the inexplicable lack of residential childcare expertise on the Trust/MHS Boards. If granted standing, MHSAA can demonstrate how the Reform Agreement affords the best opportunity for correcting these program breakdowns, just as the OAG once publicly represented.

MHSAA also brought to the forefront improper enrollment standards and inexplicably low enrollment numbers. (R. 85) All of these efforts by MHSAA require the expenditure of great amounts of resources. (R. 83)

MHSAA had proved so effective in analyzing the problems at MHS that a precondition of the OAG even agreeing to pursue the lengthy and complex investigation leading to the Reform Agreement was MHSAA committing additional resources to assist in this. (R. 102) MHSAA expended large amounts of uncompensated time and effort to help the OAG with its investigation, particularly to enable the OAG to better grasp the residential childcare issues at the core of the problem. This was so that the OAG could craft the mission-saving provisions of the Reform Agreement, intended to ensure the admission of needy children and more of them. (Id.)

Because of the importance of Trust reforms to MHSAA's core mission, MHSAA was the primary initiator and moving force behind the OAG's investigation and the OAG's primary assistant throughout the process. (Id.) MHSAA's role, however, was dismissed by the trial court as "advisory, nothing more" in denying MHSAA standing. (Ruling at 8.) The court's characterization is contradicted by the facts stated in the Petition and as such constitutes error. Given the well-pled facts in the record, there is no Pennsylvania case law that would allow a court to dismiss all of MHSAA's actions in this manner, ignoring how the Reform Agreement came about.

With the OAG rescission of the Reform Agreement, nearly 12 years of MHSAA's necessary vigilance was rendered meaningless and wasted. There is thus a clear link between harm to MHSAA and the act complained of. MHSAA's efforts came at great personal sacrifice by MHSAA members and caused a tremendous drain on MHSAA's resources, both financially and in volunteer efforts that could have otherwise been devoted solely to working hand-in-hand

with the Trust. MHSAA's investment was in thousands of hours of donated time, unreimbursed expenses, marshalling of attorney and expert services, and not merely in financial contributions. The fruit of all this labor and investment was the Reform Agreement. Without the Reform Agreement, the Trust remains saddled with the very governance structure that has led to the historic, sustained, and unacceptable failure to fulfill its child-saving mission as intended, its sole charitable purpose.

The rescission of the Reform Agreement also confronts MHSAA with a continued resource drain because structural flaws uncorrected now will lead to further demands on MHSAA. Without structural reforms, MHSAA will have to continue monitoring the Trust and pressing for fulfillment of the Trust's sole legal mandate, exclusive of the many competing goals that have frustrated this charitable intent. This will in turn detract from MHSAA's other core work of serving MHS children, MHS, and graduates.

Further, MHSAA relied on representations and commitments from the OAG in 2000 that it would pursue genuine structural reforms. (R. 102) MHSAA thus eschewed earlier legal measures, contributing its scarce resources to instead assist in the OAG's investigation. Had MHSAA simply brought an action years ago, it would likely have been less costly given the ultimate demands on MHSAA from years of painstaking work cooperating with the OAG.

While MHSAA trusted the OAG over these years to secure proper reforms, the Trust's mission continued to be diverted, assets were wasted, and many children were physically and psychologically harmed. (R. 103) During these years, the School did not grow, more children were needlessly turned away "for lack of resources," and MHSAA nonetheless refrained from immediate action that might have seemed disrespectful of the OAG's intentions. (R. 103-104)

After all this, the OAG should be estopped now from arguing that MHSAA is in any way just like anyone else in the general public in regard to this Trust, or lacking a "substantial, direct and immediate" interest in the Reform Agreement. The very suggestion is improper given what all parties to this proceeding know about MHSAA's role in obtaining the Reform Agreement.

The harms to MHSAA from rescission are therefore clear: MHSAA's very nature and mission are threatened; MHSAA's millions of dollars of material contributions are rendered worthless; MHSAA's efforts and hard-fought tangible achievements are voided; and future MHSAA resource drain is virtually assured since the Trust is now structurally worse off than before. Taking all well-pled facts as true, it is beyond cavil that MHSAA has met the

“substantial, direct and immediate” requirement: (1) MHSAA is affected by this as no other party, with interests surpassing any held in common with the general public (i.e., the “substantial” prong of the traditional standing test); (2) the very real harms to MHSAA are as described above (i.e., the “direct” prong of the traditional standing test); and (3) these harms are caused by the rescission of the Reform Agreement (i.e., the “immediate” prong of the traditional standing test).

MHSAA has an undeniable interest in seeing that these reforms are not senselessly discarded, without so much as a word of explanation before an appropriate tribunal as to why this should be allowed. MHSAA thus has the necessary connection to the subject of the Petition to justify allowing MHSAA an opportunity to defend reforms obtained primarily as a result of MHSAA efforts. It was error for the trial court to ignore these facts and to ignore the proper conclusion to be drawn from them, i.e., that MHSAA is indeed entitled to standing as concerns the Reform Agreement under the traditional standing test.

**2. MHSAA has the requisite “special interest” in the Trust for charitable trust standing in this matter.** Pennsylvania law limits standing in most cases involving charities to the OAG. While it is true that the OAG is charged with enforcing charitable trusts on behalf of the public, each member of which has some interest in seeing such trusts properly enforced, its right of enforcement is not exclusive. Wiegand v. Barnes Foundation, 374 Pa. 149, 153, 97 A.2d 81, 82-83 (1953). Among those who can also bring an action for the enforcement of a charitable trust are persons or organizations with a “special interest” in the trust. Id.

This principle has evolved over time and reflects certain practical realities concerning the administration of charitable trusts, including that in certain instances parties other than the OAG are better suited than the OAG to enforcing charitable intent. See e.g., Karst, “The Efficiency of the Charitable Trust Dollar: An Unfulfilled State Responsibility,” 73 Harv. L. Rev. 433, 448-449 (1960). The balance that is sought is one between preventing “strangers” to a trust from bringing vexatious or frivolous lawsuits on the one hand, and on the other hand filling an OAG charitable trust enforcement gap that may in certain circumstances arise. Id. This is not a novel or puzzling phenomenon, but a matter-of-course and well-settled recognition by the courts that an OAG’s actions too may at times fall short. On those occasions, courts will grant standing to a party with a “special interest” in a particular charitable trust as required by the interests of

justice. Id. As the New Jersey Superior Court recognized some time ago in Paterson v. Paterson Gen. Hosp., 235 A.2d 487, 495 (N.J. Super. 1967) and as remains true today:

While public supervision of the administration of charities remains inadequate, a liberal rule as to the standing of a plaintiff to complain about the administration of a charitable trust...seems decidedly in the public interest.

Valley Forge Historical Society v. Washington Memorial Chapel, 493 Pa. 491, 426 A.2d 1123, 1127 (1981), contains an extensive discussion of when someone has a “special interest” in a charitable trust under Pennsylvania law sufficient to allow standing. The Historical Society sought to restrain the trustees of a historical chapel from evicting the Society from its quarters in the chapel. The Society was found by the court to have a special interest in the Chapel trust and standing to petition for equitable relief, despite there being no mention of the Society in any governing documents of the Chapel. The court so held for the following reasons:

- (a) The relationship between the Society and Chapel had been a “close” and “cordial” one, both having occupied the same building;
- (b) The common founder of both organizations intended for both of them to “aid in the development of patriotism, one along the lines of religion, the other along those of education;”
- (c) The Society made several substantial monetary contributions to the benefit of the Chapel;
- (d) The Society, by its origins, its very real link to the Washington Memorial, and its professed purpose distinguished it from any other historical society; and
- (e) The rationale for barring a member of the general public from enforcing a duty owed by the charitable organization to protect the trustees from frequent suits based upon cursory investigation and brought by irresponsible parties was not applicable to the particular controversy. Id. at 1127-28.

All these indicia of “special interest” for purposes of standing find parallel in MHSAA’s relationship with the instant Trust. MHSAA has set forth in its Petition the “close and cordial” relationship it has enjoyed with MHS and its student body over the course of 74 years, performing numerous valuable services for the School and MHS children. (R. 79-81 (P. ¶¶32-36)) The Society and Chapel had occupied the same buildings since 1918 at the Washington Memorial, when both were founded by Dr. W. Herbert Burk. MHSAA too has always occupied

facilities on Trust property, and was founded at the direction of Settlor Milton S. Hershey. (R. 73) MHSAA's professed purposes are also aligned with the instant Trust's purpose. (Id.) The Society made contributions to the Chapel, MHSAA has also made contributions to the MHS Trust. (R. 80) The Society was not named as a beneficiary of the Chapel trust, as is the case with MHSAA and the instant Trust, though MHSAA members were all at some point beneficiaries of the Trust. (R. 73) By its origins, its very real link to the Trust, and its professed purpose, MHSAA is distinguished from the general public and from any other similar organization, just as was the case with the Society.

The Society was permitted to enforce "the duty owed by the Chapel, to use the property in question for 'religious and patriotic purposes.'" Id. at 1127. Enforcement of this duty was "left to ... someone having a special interest" because the OAG "would not" do it. Id. The two cases are similar in all key areas for purposes of establishing "special interest."

Montgomery County Orphans' Court Judge Ott recently summarized the "special interest" doctrine applicable to charitable trust standing law in Pennsylvania where standing beyond the OAG is concerned. In In re North Penn Hospital, 22 Fiduc. Rptr. 2d 102, 105 (Montgo. 2001), the court stated:

This court has permitted third parties to participate in proceedings involving charitable trusts and nonprofit corporations in a few, discrete instances. In the long-running Barnes Foundation litigation, the late Honorable Louis D. Stefan determined that the deMazia Trust, a charitable trust, had the requisite "special interest" to intervene, by virtue of its financial support of the Foundation. Judge Stefan also permitted students at the Barnes Foundation to intervene for the limited purposes of providing facts about the educational process and curriculum at the Foundation, which would be impacted by the proposals for which the Foundation was seeking court approval. In other courts, a "special interest" has been attributed to an organization that occupied and contributed renovation funds for a building owned by a charity in Valley Forge Historical Society v. Washington Memorial Chapel, 493 Pa. 491, 426 A.2d 1123 (1981); and to an organization given the right by the charitable trust to select scholarship recipients in McGillick Foundation, 537 Pa. 194, 642 A.2d 467 (1994) .

In these “third party standing” charitable trust cases, in addition to providing standing to related charities,<sup>13</sup> students,<sup>14</sup> and representatives of unrepresented charities in Pennsylvania,<sup>15</sup> the special interest necessary to support standing in a charitable context, applicable in most jurisdictions, has extended to: (i) alumni; (ii) a donor’s spouse as representative of his estate; (iii) a former trustee and descendant of the settlor; (iv) a preservation society; (v) incidental beneficiaries; (vi) township residents; and (vii) a local boy scout council.<sup>16</sup>

These cases, as discussed in more detail below, have varying fact patterns but all share a common unifying principle equally applicable here: third party standing is granted by courts as an aid to justice when the generally accepted criteria are met, because important judicial interests are thereby served. These third parties invariably have in common that they are the only one willing or able to act in a matter vital to a trust’s charitable intent, where an OAG will not or cannot act, or where the OAG improperly emphasizes the interests of the general public in derogation of the rights of the minority of the general public who are a Trust’s actual intended beneficiaries.

The basis for allowing third party standing to enforce charitable trusts when the Attorney General is too focused on broad public interest and inadequately focused on narrow charitable intent was discussed in Holt v. College of Osteopathic Physicians and Surgeons, 40 Cal. Rptr. 244, 394 P.2d 932 (Cal. 1964). The Attorney General moved to dismiss an action brought by minority trustees on the basis that the charitable trust’s challenged actions “would not be detrimental to the public interest.” Id. at 246, 934. The California Supreme Court responded that a charitable “trust is not fulfilled merely by applying the assets in the public interest,” and that “[t]he administration of charitable trusts stands only to benefit if in addition to the Attorney General other suitable means of enforcement are available.” Id. at 248, 936. Standing was

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<sup>13</sup> Valley Forge Historical Society v. Wash. Mem. Chapel, supra (same founder, similar purpose, close relationship).

<sup>14</sup> Noted in In re Barnes Foundation, 661 A.2d 889, 894-95 (Pa. Super. 1995).

<sup>15</sup> Shelly Will, 27 Fiduc. Rptr. 42 (Montgo.), aff’d sub nom. Estate of Shelly, 484 Pa. 322, 399 A.2d 98 (1979).

<sup>16</sup> Coffee v. William Marsh Rice University, 403 S.W. 2d 340 (Tex. 1966) (alumni (described as beneficiaries of the trust and donors) challenged *cy pres* application by college trustees where attorney general remained neutral because he wanted the warring factions to fully develop the case and carry the battle); Smithers v. St. Luke’s, infra (donor’s spouse); Trust of Hill, infra (former trustee); Kapiolani v. Park Preservation Soc’y, infra (preservation society); In re McGillick Foundation, supra (incidental beneficiary); Paterson v. Paterson Gen. Hosp., supra (local residents had “special interest” in local hospital sufficient for them to challenge relocation); San Diego County Council, Boy Scouts of America v. City of Escondido, infra (boy scout council could enforce charitable trust for local scouts).

granted “to bring to light conduct detrimental to a charitable trust so that remedial action may be taken.” *Id.* at 247, 935. MHSAA should similarly be granted standing here to likewise bring to light conduct detrimental to a charitable trust’s intent, so that the remedial action of reinstatement can at least be *considered*.

One commentator has suggested that the standard for finding a special interest in charitable matters and granting access to the courts could be articulated as whether the party “has a particularized and justified involvement in the accomplishment of the [Trust’s] charitable objectives.” Blasko, Crossley & Lloyd, “Standing to Sue In the Charitable Sector,” 28 U.S.F. L. Rev. 37, 62 (1993). With the requisite special interest in the instant charity’s philanthropic goals, and by virtue of its charter and all of its actions, MHSAA has just this “particularized and justified involvement in the accomplishment of the [Trust’s] charitable objectives,” especially as relates to the Reform Agreement. MHSAA is unique in that its interests are directly aligned with the narrow child-saving mission of the Trust, unlike a member of the general public, who may not mind if Trust assets are used for general public benefit completely unrelated to residential childcare, e.g., to build a medical school (R. 98-99), create a public greenway (R. 98), or create a Central Pennsylvania entertainment and resort industry (R. 96).

Turning to other courts that have addressed this issue, in New York State a deceased donor’s wife was recently granted standing to enforce the terms of a charitable gift to a hospital to establish an alcohol treatment center due to her special interest. Smithers v. St. Luke’s-Roosevelt Hospital Center, 281 A.D.2d 127, 723 N.Y.S.2d 426 (2001). The case has many similarities to the instant proceeding. The donor’s wife in Smithers had monitored the hospital’s use of the gift, and reported improprieties to the Attorney General, just as MHSAA did. The New York Attorney General investigated and entered into an agreement with the hospital, making certain promises on matters where the wife had identified insufficient enforcement of the gift -- just as did the Pennsylvania OAG here. When Mrs. Smithers’ vigilance disclosed a breach of the agreement, the Attorney General entered into a second agreement with the hospital, to resolve issues raised by her, and eventually sought dismissal of Mrs. Smithers’ suit for lack of standing -- just as with MHSAA.

The court rejected the New York Attorney General’s argument, and granted standing to Mrs. Smithers after observing, “[w]ithout the possibility of pecuniary gain for himself or herself, only a plaintiff with a genuine interest in enforcing the terms of a gift will trouble to investigate

and bring this type of action.” 281 A.D.2d at 138, 723 N.Y.S.2d at 434. MHSAA too has repeatedly demonstrated this “genuine interest” by investigating and acting for orphan children when no one else would do so, including when this has been politically unpopular, as now.

The court in Smithers noted that without her vigilance, the Attorney General would not have even taken the steps that he did, just as is the case with MHSAA’s vigilance here. On account of her many activities associated with the alcohol treatment center (fundraising, organization of events, etc.), Mrs. Smithers manifested a “special, personal interest in the enforcement of the Gift restrictions.”

According to the court, Mrs. Smithers and the Attorney General had “distinct but related interests,” that were best served by “co-existent standing.” 281 A.D.2d at 140, 723 N.Y.S.2d at 435-36. This rationale is also fully applicable to MHSAA standing in regard to the narrow question of enforcing the Reform Agreement: (i) no pecuniary gain; (ii) a genuine interest; (iii) vigilance that disclosed the problem; and (iv) involvement in the Trust’s activities. The OAG’s participation in this matter assures that it will have co-existent standing as well, if MHSAA is granted standing.

The many actions taken by MHSAA in support of the Trust’s mission provide a tangible demonstration of its special interest in the Trust. These actions are not taken by any member of the public, but only by an organized nonprofit entity deeply involved in the Trust, as the record before the trial court showed.

For example, no one from the public fought to preserve vocational education for MHS students, pursuant to the Deed of Trust (as MHSAA successfully did). (R. 84) No one from the public alerted the OAG of the impropriety of the 1999 CHILD *cy pres* petition filed by the Trust (as MHSAA did, to ultimate success). (R. 83-84) No one from the public administers a series of essential student-centered programs such as MHSAA’s mentoring, transitioning, job-shadowing, and other career-related MHS student programs. (R. 80) No one from the public has generated tens of thousands of volunteer hours and given them gladly to a Trust that otherwise pays top dollar for every service or good provided by virtually any other party from the public. (R. 80, 102). No one from the public has a 74-year purpose and mission to further the philanthropic residential childcare mission of Milton and Catherine Hershey, as does MHSAA.

The actions of MHSAA relied upon to support standing were taken “in order to promote its own substantive, religious or social goals,” and MHSAA “derive[s] a benefit or fulfill[s] a

programmatic function” from these actions. These were the critical criteria for “special interest” articulated in In re McCune, 705 A. 2d 861, 865 (Pa. Super. 1997) (standing was denied to members of a distribution committee of a charitable trust in an action for breach of duty by the trustees since their actions did not serve any of their own goals or serve any of their own program functions).

Third party standing cases thus speak for allowing third party “pinch-hitters” to step to the plate when the OAG will not. To be sure, scrutinizing care must occur to be sure that the pinch-hitter is rightly-motivated and knows how to bat, and is actually required to bat under the circumstances of the game for the good of the team -- and is not some mere fan who has wandered down from the stands seeking to interfere. Under virtually every applicable principle or test, MHSAA passes muster as a bona fide and able pinch-hitter, in a matter where the OAG has decided to go back into the dugout, even though the game is on the line and vital child-protecting structural reforms hang in the balance.

MHSAA is dutifully stepping to the plate to pick up where the OAG left off after public outcry at the proposed sale of HFC led the OAG to abandon Trust reforms. MHSAA’s interest is distinct from and far surpasses that of the ordinary public; and the Reform Agreement at issue in this proceeding owes its very existence to years of dedicated reform efforts by MHSAA.

In the instant case, the trial court concluded that MHSAA lacked a “special interest” in the Trust sufficient to justify its standing in this matter. This ignored the history of this Trust, the history of MHSAA, the constellation of relations among MHSAA, MHS, MHS students, and the Hersheys’ child-saving mission, and the entire 12-year struggle by MHSAA to obtain the Reform Agreement itself. The conclusion ignores facts contained in MHSAA’s Petition, is without any support in the record, and as such was error.

The well-pled facts alleged in the Petition are all taken as true for purposes of the standing analysis. Easton Area Jt. Sewer Auth. v. Bushkill-Lower Lehigh Jt. Sewer Auth., 71 Pa. Cmwlth. 553, 455 A.2d 286 (1983). These facts establish MHSAA’s “special interest” in this Trust. These facts also establish MHSAA’s “substantial, direct, and immediate” interest in enforcing the Reform Agreement, as described in Section 1 above. Accordingly, the Court need look no further than this to overturn the trial court’s dismissal of the Petition on standing grounds, under well-settled Pennsylvania law.

**3. The trial court erred in ignoring well-pled facts that demonstrate that “perversion” of charitable purpose had occurred, causing it to also err on the harm from reform rescission.** In ruling against MHSAA on the standing question, the trial court stated that it would not grant MHSAA standing to challenge the rescission of the Reform Agreement absent “perversion” of the dominant purpose of the Trust. (Ruling at 9.) The trial court thus treated the Reform Agreement as merely preventive, instead of as a necessary cure for what has been an ongoing perversion of charitable purpose. To conclude that the Reform Agreement was merely preventive, the trial court had to ignore entirely the underlying facts alleged in the Petition. These facts paint a somber picture of severe charitable intent misdirection, leading eventually to a curative Reform Agreement entered into by the Trust on pain of litigation.

The Reform Agreement resulted from the OAG’s own conclusion that there indeed had been a perversion of the Trust’s sole charitable purpose, whether or not the agreement explicitly stated so. This conclusion was a matter of course because for decades desperately needy children have been consigned to shabby and inferior forms of residential care outside MHS. This occurred while Trust assets were improperly directed to other non-child interests, and as the neediest children of all were increasingly turned away or expelled after inadequate programs failed them. The trial court’s own standard for involvement of “perversion” of charitable purpose was thus met. Ignoring the underlying facts that led to the Reform Agreement constituted error as a matter of law and ruling in disregard of them was an abuse of discretion.

The trial court’s unsupported determination that no perversion of charitable intent had occurred was compounded by its rejection *a priori* of MHSAA’s argument that rescission would leave past problems (structural and operational) uncorrected, and therefore would cause continued harm to the Trust’s childcare mission and to MHSAA’s interests. (“Unrealized fears do not meet the direct and immediate need for standing.” (Ruling at 8.)) An abundance of evidence showed that these fears were not “unrealized,” including a failure to utilize assets properly and a safety crisis so severe that it required a moratorium on increased enrollment. (R. 104-105 (P. ¶128)). Scores of children have been harmed due to the Trust’s failures, whether related to poor policies or grossly inefficient resource utilization.

There is no mistaking how serious the OAG viewed the deficiencies in the Trust governance structure, the child-centered purposes of the Reform Agreement imposed on the Trust, and the stakes involved, because we have the OAG’s own contemporaneous statements to

explain these matters. The OAG's Press Release (R. 267-268), issued on July 31, 2002 and still on its website at [www.attorneygeneral.gov/press/release.cfm](http://www.attorneygeneral.gov/press/release.cfm), made these observations regarding the Reform Agreement:

- (a) The agreement "will ensure that a greater number of needy children are served;"
- (b) The agreement "will resolve potential conflicts of interest;"<sup>17</sup>
- (c) The agreement "ensures that needy children will be offered admission;"
- (d) "We need to preserve Milton Hershey's vision of serving needy children while at the same time ensuring that Milton Hershey School and the boards that run and finance the School are operated in a financially sound manner;"
- (e) "This agreement is designed to focus the trust's mission on the many needy children struggling to make it;"<sup>18</sup> and
- (f) The OAG met with the School's Board of Managers for "the past year and a half," and "met with members of the school's Alumni Association to discuss their ideas on how to improve the management of the school."

This agreement was imposed on the Trust by the OAG after careful deliberation and investigation of long-standing charitable trust misdirection. The OAG concluded that the Trust's flawed pre-reform structures had led to a notorious underutilization of assets and that a greater number of children must be served. (R. 101) The facts were that while the Trust was awash in cash, land, buildings, and student homes, it managed nonetheless to *shrink* the number of children it cared for: assets grew from approximately \$200 million to \$5.5 billion during the past thirty years -- yet during the same period, enrollment *decreased* by 25%, going from 1,600 children to around 1,200 children. (*Id.*) It is no exaggeration to say that this represents the single most inefficient use of residential childcare resources in history -- a fact recognized by the OAG when it *insisted* on Trust structural reforms, and publicly pounded its chest to declare how committed it was to the Hersheys' residential childcare mission. (R. 101, 104)

The trial court improperly ignored the record and prejudged the matter when it concluded that there had been no perversion of charitable purpose here and that reform rescission did no

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<sup>17</sup> The Philadelphia Inquirer reported on September 2, 2002 that Chief Deputy Attorney General Mark Pacella of the Charitable Trusts and Organizations Section told the Trust Board that it was "hopelessly conflicted." 2002 WL 24706503.

<sup>18</sup> As the OAG recognized and as MHSAA will demonstrate at trial if permitted, among the most important child-protecting changes were ones that compelled the Directors to focus *solely* on the residential childcare mission.

violence to charitable purpose. The trial court could not properly analyze the standing question because it refused to accept the real harms that the Reform Agreement was meant to correct, and therefore saw no harm in its rescission. The court's ruling on standing was thus in error.

**4. Where reforms are represented by the OAG to be beneficial to Trust charitable purpose, rescission must be harmful and MHSAA should be granted standing to explain this whether or not rescission was popular or politically expedient.** When public outrage over the proposed sale of HFC politicized the matter, and placed Attorney General Fisher under intense pressure, he came to regret the reform efforts negotiated by his Charitable Trusts and Organizations Section. It appears that Attorney General Fisher was fearful that focusing too heavily on the childcare mission was partially to blame for the Trustee's HFC sale effort and so decided to rescind reforms for the good of the general public.

Just several months after the 2002 Reform Agreement was signed and publicly heralded, the OAG commenced these rescission efforts. The Abrogation Instrument executed in 2003 returned the Trust Directors to their earlier unfettered discretion, within the very Trust structures that had proved so unhealthy already, but made all the worse by now excluding the MHS President from serving on the Trust/MHS Boards. (R. 31-47)

More specifically, in addition to deleting specific financial, academic and social guidelines adopted to ensure admission of needy children, and killing the Reform Agreement's pilot foster care program, the rescission allows local commercial interests to be reinserted on the Trust and MHS Boards in a manner that perpetuates interference with the Trust's child-saving mission. (R. 31-32) Rescission also simplifies the Trust's ability to commercialize and dispose of Trust land.<sup>19</sup> (R. 34-35) The comprehensive notice provision of the Reform Agreement for land transfers, leases, and other such items was severely weakened by the Abrogation Instrument, even though the more extensive oversight had been shown essential by years of land diversion and the OAG's responsibility to prevent this. 15 Pa.C.S. §5547 ("Property committed to charitable purposes shall not . . . be diverted from the objects to which it was donated . . . unless and until the board of directors . . . obtains from the court an order under 20 Pa.C.S. Ch.

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<sup>19</sup> Students have been crowded into approximately 2,000 acres of land even though approximately 9,000 acres are available. Much of the land now contains abandoned student homes or former homes converted to commercial uses. Some of the land is leased as parking lots or for other commercial purposes, while having formerly been used by MHS students and which could be so used now. (R. 89, 92-93 (P. ¶¶67, 83-85)). It is a matter of course that droves of desperately needy children are being turned away who could be housed in these facilities if the Trust's Directors would implement strictly child-centered policies.

61 . . . specifying the disposition of the property”). Instead of preventing land diversion, the Abrogation Instrument provides a blueprint for it.

The rescission of the Reform Agreement is thus on its face not in the best interests of the Trust’s intended beneficiary class, orphan children. (R. 31-47) As a consequence, orphan children are in effect being punished because a decision by the Trustee alarmed the general public and brought pressure on the OAG, and only MHSAA has the special interest necessary to understand and prove it.<sup>20</sup>

As noted above, Exhibit A to this Brief summarizes six key Reform Agreement provisions and what became of them in the Abrogation Instrument. This chart illustrates in stark terms that reform rescission is facially adverse to children’s interests when considering the insidious and long-term structural harms that the Reform Agreement was to address.<sup>21</sup>

The only plausible explanation for why the reforms were rescinded is the overreaction by the OAG to the political fallout from the Trust’s near-sale of HFC. While this may have been good politics for the OAG as it sought to appease an inflamed public by reaffirming the improper dominant Trust position of local commercial interests, it was deleterious to the sole proper mission of the Trust: “to lodge, board and instruct, as many children as . . . the revenue . . . will provide for” in an “institution for the residence and accommodation of poor children.”<sup>22</sup> (R. 18, 22)

The Dauphin County Orphans Court itself articulated the Trust’s sole child-saving mission in a December 7, 1999 Adjudication: “Any reading of the Deed of Trust must convince one that the Hersheys had in mind that theirs would be a direct gift to the child with observable results.” In re Matter of the Estate of Milton S. Hershey, No. 712 of 1963, slip op. at 13 (Dauph.

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<sup>20</sup> For a discussion of how community pressure caused the OAG to contest the Trust’s sale of HFC, discard Trust Directors who favored the sale, replace them with local individuals, and reinstate interlocking directors, see Sidel, “The Struggle for Hershey: Community Accountability and the Law in Modern Philanthropy,” 65 U. Pitt L. Rev. 1, 24-31 (2003).

<sup>21</sup> The Reform Agreement contained eight single-spaced small type pages of substantive content. The Abrogation Instrument purports to contain seven pages, but is double spaced, with large type and wide margins, to the extent that it could have fit on two and one-half pages if in the same format as the Reform Agreement. The parties were obviously embarrassed by its brevity.

<sup>22</sup> Political influence on the OAG in regard to Hershey Trust matters has been recognized by observers. The desire to “gain some political capital with the Pennsylvania voters” has been cited as a reason why the OAG sought to block the sale of HFC by the School Trust in 2002. Komoroski, Note, “The Hershey Trust’s Quest to Diversify: Redefining the State Attorney General’s Role When Charitable Trusts Wish to Diversify,” 45 Wm. & Mary L. Rev. 1769, 1785 (March 2004).

December 7, 1999) (Morgan, J.). (Attachment 3.) “The vision of Milton and Catherine Hershey was to relieve poor children from all the conditions of poverty; to undertake their total care and upbringing,” and to create a “home.” (*Id.* at 4, 5.)

The OAG momentarily acted to assure fulfillment by the Trust of the Hersheys’ charitable child-saving intent when it obtained the Reform Agreement for the sole benefit of orphan children. Sadly, the Reform Agreement provisions intended to enforce this recognized child-saving mission were nearly all deleted as politics trumped mission-protecting reforms, by an OAG that turned its back on its duty to champion the interests of the narrow beneficiary class, i.e., orphan children.

The decision to rescind the Reform Agreement is flawed if in fact justified on the basis of favoring community or general public interests, as certainly seems to be the case here. This can only be demonstrated, however, if someone can appear and so argue. “The attorneys general and the courts should not broadly define the public that a charitable trust serves, but rather should define it narrowly in accordance with the trust’s stated purpose or the settlor’s intent.”<sup>23</sup> Justification for the rescission of reforms should be solely with respect to the Trust’s child-saving mission, but the rescission seems only to harm this mission, even if restricting the inquiry merely to the OAG’s own earlier statements on the matter.<sup>24</sup>

MHSAA’s action properly seeks an open court explanation from the OAG and the Trustee of how the rescission of reforms purports to benefit orphan children. The OAG, in particular, should explain how its guardianship responsibilities have been fulfilled in allowing the Directors/Managers to rescind an agreement previously executed for the benefit of Orphan Beneficiaries. The OAG should do this in the context of a meaningful adversary proceeding,

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<sup>23</sup> Komoroski, Note, *supra* at 1779.

<sup>24</sup> When the OAG came before this Court with its “serving the public interest rationale” for attempting to block the Trust’s sale of its HFC stock, without regard to the Trust’s stated purpose, the propriety of such an OAG position was deferred. This Court noted that the important underlying legal issue, whether the OAG had authority to prevent the sale of HFC “under the guise of protecting the public,” need not be the focus of its review, due to the narrow question on appeal, i.e., upholding a trial court’s temporary restraining order. *In re Milton Hershey School Trust*, 807 A.2d 324, 327 (Pa. Cmwlth. 2002). In a dissenting opinion, Judge Pellegrini would have reached the underlying issue even within that narrow context, and concluded that “for the Attorney General to properly exercise *parens patriae* powers, his concern must be on behalf of the public and tied to the express desires of the Trust settlor.” *Id.* at 338. The question deferred by this Court in the HFC Proceeding is now squarely before it, with strong judicial reasons to address it lest the OAG continue in its improper *parens patriae* duty interpretation. This subject is discussed in depth in Section 6 below.

with a bona fide advocate, i.e. MHSAA, on the other side presenting evidence and arguments as to why orphan-protecting reforms should be preserved rather than abandoned.

If a bona hearing is granted, MHSAA will establish that there is no credible child-serving explanation for the rescission of reforms, and will request that the Reform Agreement be reinstated, except as later modified with Orphans' Court supervision should any modification be appropriate.<sup>25</sup> Given the Trust's failure in fulfilling its residential childcare mission as mandated by the Deed of Trust, and the life-or-death consequences of this failure already for thousands of desperate children, "We changed our minds but are not required to tell a court why" is not an acceptable answer. This should not be the final court-approved public end to the Reform Agreement and Court sanction of this should not be granted absent proper scrutiny.

MHSAA has its own interests to protect, as described above in Section 1. MHSAA also has the interests of orphan children to protect and these children have been inadequately represented by the OAG in connection with the Reform Agreement's rescission. No child advocate would have rescinded these reforms but would instead have only sought to strengthen them, if anything. MHSAA can perform the child-advocate role free of the political influence or other competing community pressures that have burdened the OAG's actions.

While the trial court may ultimately rule against MHSAA on the Petition, it is beyond dispute that MHSAA has amply met the standing burden necessary to warrant at least an opportunity to be heard on why the child-protecting reforms obtained by MHSAA should not be matter-of-factly rescinded. See e.g. Paterson v. Paterson Gen. Hosp., 235 A.2d 487, 495 (N.J. Super. 1967), where the court explained that even though its "opinion upon the principal point involved in this case is contrary to the contentions and views urged by plaintiffs [local

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<sup>25</sup> MHSAA's Petition had proposed that if its primary relief were granted, i.e., reinstatement of a Reform Agreement rescinded by joint OAG/Trustee action, but with the possibility of some potentially appropriate amendment, a guardian and trustee *ad litem* should be appointed by the court. This guardian and trustee *ad litem* would then participate in any proposed amendment and supervise reform implementation, because the OAG and the Trustee are already on record as now opposing reform. The trial court described this proposed mechanism for handling potential amendment and reform supervision as "preposterous." Courts deem this mechanism standard, however, in charitable trust cases where joint OAG/trustee action is the problem, as is the case here. See, e.g., Shelly Will, 27 Fiduc. Rptr. 42 (Montgo.), aff'd sub nom. Estate of Shelly, 484 Pa. 322, 399 A.2d 98 (1979) (court appointed an attorney to serve as trustee *ad litem* to protect the interests of the unrepresented charity after the OAG failed to take action).

residents],...they had every right to bring the suit,” and compel performance of certain duties because they were “especially interested,” in this charitable matter.<sup>26</sup>

**5. Standing is essential where, as here, the OAG cannot or will not act to enforce charitable intent, leaving a void to be filled by a third party.** It is well-settled that standing is not exclusive to the OAG in charitable trust enforcement proceedings where the OAG cannot or will not act to protect the interests of a beneficiary class, and that in such cases third-party standing is especially important.<sup>27</sup> In these instances, it is essential that parties with the requisite special interest be granted standing. The Dauphin County Orphans’ Court itself referred to this principle in the context of the 1999 CHILD *cy pres* petition. (“We would note that, in the exercise of their discretion, courts have allowed standing to a party asserting that a proper claim of benefits has been denied where the Attorney General fails or refuses to participate.” In re Matter of the Estate of Milton S. Hershey, No. 712 of 1963, slip op. at 2 n.2 (Dauphin May 24, 1999 (Morgan, J.)) (Attachment 2.)

The Montgomery County Orphans’ Court also recited the “cannot or will not” standard in the Barnes Foundation litigation. “We could grant standing to the Students only if we first accepted as true their allegation that [the OAG] cannot or will not perform adequately in this regard. Because we have no basis for such a finding, we must entrust this task to the *parens patriae*.” Barnes Foundation, a Corporation (No. 11), 23 Fiduc. Rptr. 2d 127, 131 (Montgo. 2003). In the instant proceeding, there is an overwhelming basis for such a finding: the OAG one day declared reforms to be essential after an exhaustive investigation, but on another day decided to rescind them. This reversal on child-protecting reforms must be considered a “failure” adequate to meet the “cannot or will not” standard. Because the well-pled facts demonstrate here refusal or failure by an OAG to protect reforms, it is error as a matter of law and abuse of discretion for a court to ignore these facts in a denial of standing.

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<sup>26</sup> MHSAA faced a particularly difficult time in seeking to challenge here the very first major act of a Trust Board selected in part by the trial court. This may have colored the trial court’s view on the merits of the underlying Petition. For example, it was the trial court itself that had approved the HFC CEO’s return to the Trust Board, yet was now faced with an action challenging this return. The Trust’s Orphan Beneficiaries are entitled to have this Petition heard on its merits even if the trial court takes a dim view of the matter before it has heard the other side of the story.

<sup>27</sup> A recent law review article cited traditionally understaffed, underfunded Attorney General offices and their political nature (not wanting to investigate “respectable trustees and corporate officers”) as reasons for insufficient charitable enforcement. Blasko et al, “Standing to Sue in the Charitable Sector,” 28 U.S.F. L. Rev. 37, 48 (1993).

Especially as concerns the Reform Agreement, MHSAA's concerns *cannot* be pressed by the OAG because the OAG has itself taken the action complained of. The OAG has no interest in enforcing the Reform Agreement because the OAG rescinded it. See Barnes Foundation, a Corporation (No. 11), 23 Fiduc. Rptr. 2d 127, 132 (Montgo. 2003) (deMazia Trust denied standing only because its "concerns will be pressed by the Attorney General"). MHS and the Trust Company, much as with any party that has an opportunity to be out from under an agreement compelling its reform, will not contest the rescission of an agreement which it at one time had been compelled to accept, on pain of litigation by the OAG. (R. 104 (P. ¶127))

This concept has also been recognized by commentators. "The modern law of charity...somewhat begrudgingly acknowledges the need for default enforcers." Atkinson, "Who (Else) Should Enforce Duties of Charitable Fiduciaries?" 23 J. Corp. Law 665 (1998).<sup>28</sup> See also Shelly Will, 27 Fiduc. Rptr. 42 (Montgo.), aff'd sub nom. Estate of Shelly, 484 Pa. 322, 399 A.2d 98 (1979) (court appointed an attorney to serve as trustee *ad litem* to protect the interests of the unrepresented charity after the Attorney General failed to take action).

The OAG's charitable enforcement duty been described as serving "a void-filling function." Commonwealth of PA v. Brown, 260 F. Supp. 323 (E.D. PA 1966). The void is created by virtue of there normally being a "lack of beneficiaries [of charitable trusts] with interests definite enough to enable them to sue for themselves." Id.; Nevil Estate, 414 Pa. 122, 199 A.2d 419 (1964). The OAG has created a new void in this case, as described in MHSAA's Petition. The OAG did this by failing to perform as an advocate or guardian for the class of intended orphan beneficiaries of the Trust when the OAG abandoned the Reform Agreement's child-protecting measures. The OAG abandoned these measures without receiving any meaningful commitments in exchange, in a replacement agreement that was obviously for the benefit of local commercial interests.

As a result of OAG internal dynamics that pit politics against strict enforcement, the OAG decision-makers who ultimately scrapped the reforms may not even adequately appreciate

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<sup>28</sup> "It is this author's view that the overriding factor in almost every case in which standing has been granted to individuals has been lack of effective enforcement by the attorney general." Fremont-Smith, *Enforceability and Sanctions*, "Governance of Nonprofit Organizations: Standards and Enforcement," Ninth Annual Conf., N.Y.U. School of Law Program on Philanthropy and the Law (Oct. 1997 at 4) found at [www.law.nyu.edu/ncpl/library/publications.html](http://www.law.nyu.edu/ncpl/library/publications.html).

that the Reform Agreement stood to benefit innumerable Orphan Beneficiaries. See Holt v. College of Osteopathic Physicians and Surgeons, 40 Cal. Rptr. 244, 394 P.2d 932 (Cal. 1964) (OAG may not “be sufficiently familiar with situation to appreciate its impact”). It must be remembered that these reforms were achieved by the apolitical subordinates of the Charitable Trusts and Organizations Section, in response to years of Trustee mismanagement, but were then rescinded by Attorney General Fisher three days before they were to take effect. This apparent politicization of the OAG’s work cries out for an explanation that only MHSAA is willing to pursue, as the OAG subordinates whose work has now been discarded are not likely to raise the issue themselves.

The OAG’s abrupt reversal on reforms mandates that a third party with a special interest, such as MHSAA, be granted standing to make arguments not only for its own benefit, but also for the benefit of the inadequately represented narrow class of child beneficiaries. Trust of Hill, 509 N.W. 2d. 168, 172 (Ct. App. Minn. 1994) (“When the attorney general does not appear to represent the interest of [charitable] trust beneficiaries, other courts have granted standing to members of the public in order to protect the public interest.”) (Former trustee and descendant of settlor had “sufficient interest in the trust” to be granted standing in “the absence of a party to protect the public interest”); Kapiolani Park Preservation Soc’y v. Honolulu, 69 Haw. 569, 751 P.2d 1022 (1988) (same; court allowed society standing when attorney general failed to enforce charitable trust in order to avoid leaving public without any recourse in the courts).

The undeniable preference shown to commercial interests over the interests of the Trust’s childcare mission, and the absence of the OAG as a champion of orphan children, is most clearly revealed in the Abrogation Instrument’s one new substantive provision: this provision *bars* the MHS President from serving on the Trust (and MHS) Board, *while reinstating* the ability of the Presidents of the two controlled for-profit entities to serve on such Boards. (R. 31-32) This specific clause is breathtaking in what it reveals: the MHS children’s home President must now come to the MHS/Trust Boards hat-in-hand whenever children’s home needs require it, say for more land, student homes, or cash resources for more frontline childcare providers. However, the CEO’s of HERCO and HFC will participate in making decisions affecting their employers (HERCO and HFC) from within the very Trust Board that purportedly supervises/owns these entities. This will apply to all land needs, cash allocations, infrastructure decisions, and all other

matters -- and it follows decades of favoring these very outside interests, by the OAG's own admission.

This sobering fact dramatically illustrates what the OAG now views as the ideal Trust structure in the wake of the community/general public HFC job panic: the commercial interests will decide whether the school interests get properly run and funded! The commercial interests will set residential childcare policy! By itself, the OAG's reasons for making the MHS President *subservient* to the HERCO and HFC Presidents in the Abrogation Instrument demands meaningful judicial scrutiny, as it relegates the School to second class status. How could this possibly be in the interests of Orphan Beneficiaries?

This new paradigm is particularly unsettling because the OAG had earlier stated that the *reverse* policy (no commercial interests on the Trust Board, MHS President on) was necessary to focus the Trust's mission on serving needy children. This new policy thus appears even *more* harmful to the Trust's explicitly-stated residential childcare mission than the unhealthy pre-Reform Agreement policy of allowing all such executives, including the MHS President, to sit on the Trust Board.

This provision paints a stark picture of how matter-of-course it has become for the OAG to openly treat the Trust not solely as the child-saving charity that the Settlers explicitly established, but instead as the local economic engine that so many wish it to be -- one that created a medical school for Penn State, controls a global chocolate enterprise, and has quietly diverted cash and land over decades to develop a local entertainment and resort industry nowhere mentioned in the Settlers' Deed of Trust.

There has been a decades-long tug-of-war for the Trust's assets between child and non-child interests. This is despite the near universal recognition that "[a]lthough the public in general may benefit from any number of charitable purposes, charitable contributions must be used only for the purposes for which they were received in trust." Holt v. College of Osteopathic Physicians and Surgeons, 40 Cal. Rptr. 244, 247, 394 F.2d 932 (Cal. 1964). Children have lost this tug-of-war in the past, and they lost again with the rescission of the Reform Agreement.

The OAG reform rescission action is even more perplexing when considering its earlier refusal to assure the appointment of *even one* residential childcare expert to the reconstituted Trust/MHS Boards when it had the chance, in a period when manifest harm has befallen scores of MHS children due to the Board's lack of residential childcare expertise. In spite of the glaring

need for at least some residential childcare expertise on the reconstituted Board and the OAG's strong bargaining power for obtaining one, four local community representatives were appointed, including the CEO of HFC. The lack of concern for the Trust's residential childcare mission could not have been more blatant, until the rescission of the Reform Agreement six months later.

The trial court, however, ignored these facts and reached the opposite conclusion, "reject[ing] out of hand... the argument that [the Trust and OAG] have subordinated to other interests the interests of [Orphan Beneficiaries]." (Ruling at 2-3.) MHSAA respectfully submits that this determination by the trial court is contradicted by the very terms of the Abrogation Instrument. At the very least, the conclusion is without support in the record, taking as true the factual allegations in the Petition. Accordingly, this conclusion constitutes error. If granted standing, MHSAA will present evidence to explain why the OAG was right *the first time* when it concluded that for the good of orphan children, the CEO's of HERCO and HFC should *not* serve on the MHS/Trust Boards, and that the other reforms were equally essential.

When a third party such as MHSAA alerts a trial court to dramatic reversal of acts intended to enforce charitable intent, and this reversal is facially adverse to charitable intent though pursued jointly by the OAG and a trustee, a trial court should welcome the assistance of such a third party. Under these conditions, MHSAA is performing a valuable public service and should be granted standing to appear in court for the still legally-identified beneficiaries.

The void left by the OAG can hardly be filled by poor at-risk orphans or their financially desperate families hiring attorneys and instituting the complex litigation necessary to speak for themselves. MHSAA should thus be allowed to appear, to make arguments, and to present evidence on the Orphan Beneficiaries' behalf, and in MHSAA's own interests, so as to enforce a Reform Agreement intended to benefit orphan children because the OAG itself has decided that it *will not* do so.

**6. *Parens patriae* interpretation needs clarification for orphan children.** The *parens patriae* powers of the Attorney General have been described, in part, as "ancient powers of guardianship over persons under disability." In re Pruner's Estate, 390 Pa. 529, 136 A.2d 107, 109 (1957). In the instant proceeding, a chief problem relates to the OAG's anomalous interpretation of its *parens patriae* duty. This interpretation has at times permitted the OAG to maintain that it may elevate the interests of the local community and general public ahead of the Trust's child-saving mission when the OAG feels this appropriate. This stretches the *parens*

*patriae* concept to mean that the general public is, literally, a “beneficiary” of the Trust. This error in interpretation is the apparent OAG justification for favoring the general public’s commercial interests over the narrow child-saving mission of the Trust, and for rescinding child protections, as described above.

The ordinary understanding of *parens patriae* is that the OAG is designated, *on behalf of the public at large*, to assure that the Settlor’s intent is served and that those under a disability are protected. In the case of the MHS Trust, the OAG’s duty is to act as protector of orphan children yet the OAG consistently suggests otherwise. It is remarkable how commonplace misconstruction by the OAG of its *parens patriae* duty has become in regard to this Trust, and how often the OAG invokes it.

The OAG’s misinterpretation of this duty was first encountered in the OAG/Trustee joint 1963 action, where it was determined that removing \$50 million of cash and 500 acres of land from the Trust’s residential childcare asset base was acceptable because, *inter alia*, the putative beneficiary general public would be better served by a medical school than by the use of these resources for orphan children. More recently, this anomalous OAG *parens patriae* duty interpretation was invoked just days after announcement of the execution of the Reform Agreement, to prevent the Trustee from selling HFC to diversify its asset portfolio. (R. 108) Alarmed at the OAG’s position in the latter proceeding, MHSAA sought intervention to be sure that the OAG’s view would be tempered with the child-centered arguments that also needed to be made. (R. 109) In that proceeding, MHSAA made only child-centered arguments consistent with the Trust’s charitable intent, but sought to join the OAG in obtaining a hearing before completion of a sale. (Id.) The OAG made no such child-centered arguments.

On the contrary, the OAG went so far in the HFC Proceeding as to state that it had come to view the 1963 OAG/Trust joint conduct as constituting the ideal operating principle.<sup>29</sup> (R. 108) This highly questionable OAG *parens patriae* duty interpretation is dangerous to charitable intent. It serves to elevate the general public to a beneficiary status to which it is not entitled, while also rewriting a settlor’s charitable wishes. This concern is heightened here because the OAG and Trustee are acting jointly in seeking to rescind the Reform Agreement after the OAG took aggressive measures to assure that the Trustee would comply in this rescission.

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<sup>29</sup> (R. 108 (Pet. ¶¶105, 145-146)) (referring to the use of Trust monies to build HMC, the OAG stated “the Trust seems temporarily, we hope – to have forgotten this link”).

The OAG forced off the Trust Board in late 2002 *any* Trust Director who might have taken a different view, in particular by voting to sell HFC. (R. 111) The OAG replaced these Directors with prominent local citizens who appeared willing to provide what the OAG decision-makers had come to view as the proper degree of deference toward community interests. (R. 110-113) The restructuring gave virtually no consideration to the Trust's residential childcare purpose in spite of systemic problems plaguing MHS, a break-down in safety at the School, and years of harmful residential childcare policies. (Id.)

With the Trust board thus "reconstituted" and aligned with the OAG's new focus on the community's commercial interests, nothing stood in the way of reform rescission within the OAG or at the Trust. This left it up to MHSAA to alert the Orphans' Court to the damaging aspects of the rescission, just as MHSAA had on earlier occasions been left as the lone voice speaking on behalf of the Trust's narrow child-saving mission.

The sequence of events in late 2002 -- political panic over the proposed sale of HFC, the stampede in the State Legislature to alter charitable trust law solely to target this Trust (20 Pa. C.S. §7203(c)(6) and (d)), and the forcible removal in late 2002 of every Trustee who so much as appeared willing to put residential childcare above the putative beneficiary general public -- left MHSAA as the only party that did not lose sight of the Trust's sole childcare mission and the continuing need to protect it. (R. 106, 109-110, 112) Consequently, MHSAA sought judicial review of what appears to have been a rash rescission of the Reform Agreement.

The OAG pays scant attention to child-saving goals in the Abrogation Instrument, and has shown by the conduct described here that it now refuses to enforce the child-saving intent of the Trust to the extent it deemed this necessary in July 2002. MHSAA's fidelity to the Trust's children's home mission allows of no similar caprice, and no similar lack of will at the reform implementation stage.

The trial court looked to the OAG action in the CHILD Petition proceeding, the HFC Proceeding, and the Board Restructuring as evidence that the OAG is paying adequate attention to this Trust and thus rejected MHSAA's argument that an OAG inadequacy exists. (Ruling at 8.) The trial court ignored that mere OAG action is insufficient by itself to sustain the denial of standing. Where, as here, the nature of the OAG action is contrary to or not in furtherance of the Settlers' charitable intent, OAG action argues *for* the grant of third-party standing, rather than *against* it.

In each of the examples cited by the court, the OAG favored the general public over the interests of the narrow class of child beneficiaries. The OAG's actions must be judged in these cases from the perspective of Child Beneficiaries: (1) in the CHILD Petition proceeding, the OAG *joined* the Trustee in seeking to create a greenway for the general public from Trust land (opposed by MHSAA and ultimately rejected by the court too) (R. 84); (2) in the HFC Proceeding, the OAG openly argued for a putative general public beneficiary status nowhere identified in the Settlers' Deed of Trust, and went so far as to point to 1963 as an ideal arrangement (R. 108); and (3) in the Board Restructuring the OAG made clear: (a) its lack of concern at the residential childcare expertise deficiencies plaguing the Trust Board, and (b) its desire to assure protection of community, local business, and general public interests (R. 110-113).

In other words, the OAG may indeed be taking action in regard to the Trust, but other than in regard to the Reform Agreement, these actions were not taken solely to advance the interests of orphan children. Thus, rather than harming MHSAA's standing arguments, the actions pointed to by the trial court strengthen these arguments and help illustrate precisely why MHSAA should be granted standing in this case. The only instance where it was clear that the OAG was indeed acting solely on behalf of Orphan Beneficiaries was the Reform Agreement, and we can see what became of that.

Under such circumstances, who is willing now to come forward and defend politically unpopular reforms on behalf of at-risk children? No one -- unless MHSAA is granted standing to explain that a rescission that looks harmful to children's interests is in fact harmful to their interests. The inexplicable rescission of this highly-touted agreement due to political pressures should not be immunized from judicial scrutiny, whether or not the OAG wants that scrutiny. See Alco Gravure, Inc. v. Knapp, 479 N.E.2d 752 (N.Y. 1985) (the approval of the attorney general and a trial court judge of the transfer of assets by a nonprofit corporation to one with a similar, but not identical, purpose was inadequate to immunize it from scrutiny).

This would not be the first instance in recent years where the OAG could be criticized for "an abdication of that office's responsibility" in the oversight of charities. The OAG received a rebuke from Montgomery County Orphan Court Judge Ott in Barnes Foundation, A Corporation (No. 12), 24 Fiduc. Rptr. 2d 94, 107 (Montgo. 2004), for failing in his "absolute duty to probe, challenge and question every aspect of the [proposed move to Philadelphia] now under

consideration.” The OAG was criticized for supporting the Foundation’s proposed action before the hearing had even taken place, for merely sitting “as second chair to counsel for the Foundation, cheering on its witnesses and undermining the students’ attempts to establish their issues,” and for preventing “the court from seeing a balanced, objective presentation of the situation.”

The same can be said for the OAG’s conduct in endorsing the rescission of the Reform Agreement without *any* hearing, cheering on the Trust’s desire to throw out written reform commitments, and trying to stifle MHSAA’s effort to obtain court review of the action. In the Barnes case, the OAG believed that moving the Barnes Foundation would be good for the broad public interest and that the majority of the public would thereby be well served. Neither the minority of the public that is the narrow focus of most charities nor the intent of the settlor, however, have a voice in certain matters, except through another party with a special interest. This is why the students in Barnes were allowed to participate in the litigation on certain issues, and why MHSAA needs to be allowed to speak for a minority class of orphan children here.

One other similarity between Barnes and the instant case should be noted in support of a grant of standing. Both cases involve charitable trusts where a long-deceased settlor funded the trust, as opposed to ongoing fundraising. Where a charity, such as the United Way, relies on donations, asset misdirection and other abuses are checked by contributor vigilance. Where, as here and in Barnes, trustees are not beholden to contributors who will scrutinize trustee actions, the temptation to favor general public interest is greater for both trustees and the OAG -- with a commensurate increased need for courts to prevent this when alerted to it. While the Barnes students have consistently shown themselves savvy enough to seek to protect their rights, the same is impossible for Orphan Beneficiaries. Every fact in the instant case argues for allowing MHSAA to make the arguments that no one else is willing to make, least of all the OAG.

None of this is to say that the general public cannot benefit from the MHS Trust as properly administered. On the contrary, the Commonwealth has a major stake in the relief sought by MHSAA in this proceeding, because of its interest (both social and economic) in taking care of its neediest children. It is believed that efficient use of Trust resources could have closed budget deficits and reduced foster care to a minimum. No other state in the country is blessed with a \$5.5 billion resource dedicated to the care of children who will otherwise require

public care; and it is astonishing that reforms intended to ameliorate underutilization of this asset were rashly rescinded.

**7. MHSAA has the special interest necessary to represent the beneficiary class.** Cases have permitted “persons deemed to represent a class of actual or prospective beneficiaries to bring suit to enforce the charitable trust.”<sup>30</sup> Pennsylvania courts have also permitted a “possible beneficiary” of a charitable organization to have standing to challenge an adjudication “in order that the cases could be decided...on their merits.” McNeil’s Estate, 39 Pa. D.& C. 15, 16 (Phila. 1940). The “possible beneficiaries” of the Trust cannot have the subject at issue addressed and adjudicated except through MHSAA.

An “incidental beneficiary” of a charitable trust was granted standing to seek removal and surcharge of trustees in In re McGillick Foundation, 537 Pa. 194, 642 A.2d 467 (1994). The Roman Catholic Diocese, which “may incidentally benefit” from the performance of a portion of the trust, was determined to have “a special nonpecuniary interest which creates standing to enforce the charitable trust.” Id. at 198 and 469.

In San Diego County Council, Boy Scouts of America v. City of Escondido, 14 Cal. App. 3d 189, 92 Cal. Rptr. 186 (1971), the County Council was granted standing, “on behalf of boy scouts and girl scouts of the Escondido area,” to enforce a charitable trust with an unrelated third-party settlor. The trust real property was dedicated for the use of local boy scouts and girl scouts and their local organizations. The trustee conveyed the trust property to the City of Escondido to be used for park purposes and youth activities. The court observed that it could “think of no more responsive or responsible party” to represent the “beneficiaries of the trust” in this litigation. Id. at 196, 190. The County Council was charged under its articles of incorporation and bylaws with the duty to represent and protect scouts within its districts. Finally, in response to an argument that the Attorney General has the exclusive right to enforce charitable trusts, the court concluded:

the need of the boys and girls who were the original beneficiaries of the trust for representation is at least as great as that of the general public. We think that need can best be met by representation by those who are directly concerned with their interests and welfare. Id.

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<sup>30</sup> Bogert, *The Law of Trusts and Trustees*, §414 (Rev. 2d Ed. 1991); Township of Cinnaminson v. First Camden Nat. Bank & Trust Co., 238 A.2d 701 (N.J. Super 1968) (residents of township could sue to enforce a trust to establish a library).

MHSAA serves the very same purpose with respect to the child beneficiaries of the MHS Trust as did the San Diego County Council with respect to the scout beneficiaries of the Escondido Trust. MHSAA is directly concerned with the interests and welfare of orphan children, as has been fully explained above.

Whatever articulation of status is applicable, poor orphan children are certainly actual, possible, or incidental beneficiaries under Pennsylvania law. If the Court should still find that MHSAA is not entitled to standing in its own right, then poor orphan children are entitled to have standing in this matter, through MHSAA, to raise the substantive issues set forth in the Petition when, as here, the OAG has abandoned their interests.

In sum, the uncontroverted facts show that reform rescission was not intended to protect the Orphan Beneficiary class and cannot be defended from the perspective of children's interests. Instead, reform rescission advances the interests of the community of Derry Township, HERCO, and the general public in derogation of the rights of the Trust's narrow class of beneficiaries. Denial of standing under these circumstances constitutes error as a matter of law and an abuse of the trial court's discretion, because the plain facts of this case demonstrate that rescission is a facially indefensible act. MHSAA should be granted standing to prove it is substantively indefensible as well.

**8. MHSAA standing will not bring multiplicity of lawsuits.** The concerns expressed by Respondents-Appellees below regarding vexatious lawsuits if MHSAA is granted standing in this discrete matter are baseless. The Pennsylvania Supreme Court addressed this issue in Valley Forge Historical Society v. Washington Memorial Chapel, 493 Pa. 491, 626 A.2d 1123, 1127-28 (1981) as follows:

Moreover, the rationale for barring a member of the general public from enforcing a duty owed by a charitable organization is not applicable to the instant controversy. The purpose of this restrictive rule is to protect the trustees from frequent suits perhaps based on cursory investigation and brought by irresponsible parties. [citations omitted.] Such is not the case here.

Id. at 1127-28. Such is not the case with MHSAA either. MHSAA is a somber, responsible, and cautious organization that has painstakingly worked for years to obtain structural reforms from the OAG. This is the only independent action brought by MHSAA in its history, and is based not on "cursory investigation," but on one so thorough that MHSAA's expertise was relied on by

the OAG itself in the OAG's own investigation. Indeed, MHSAA's participation was a *condition* imposed by the OAG in agreeing to investigate these matters in the first place. (R. 102 (P. ¶119))

The Petition's primary prayer for relief also demonstrates that there is not even a hint of frivolity here: MHSAA merely seeks enforcement of the *OAG's own Reform Agreement*. This is one that the OAG publicly represented as essential to the Trust's child-saving charitable intent, but which was then rescinded after an inexplicable collapse by the OAG on the eve of the Reform Agreement's June 30, 2003 effective date. Such an action, brought by MHSAA, could not possibly trigger a need for protection from "suits ... brought by irresponsible parties." The instant action could only be questionable if the OAG is now maintaining that its once highly-touted Reform Agreement was nothing like it represented, and that the underlying investigation was just a waste of everyone's time.

The nature of the challenge presented by MHSAA is also not directed to the administration of any discreet day-to-day matter, nor to any other issue of the kind that is recurring and unworthy of the grant of standing sought here. Rather, the challenge in the instant proceeding is directed to the rescission of one historic, and much-needed reform agreement, where the effect of the agreement's rescission will be felt by *all* potential beneficiaries of the Trust, *in perpetuity*, and following decades of charitable intent misdirection.

The language of a District of Columbia court in Hooker v. The Edes Home, 579 A.2d 608, 616 (D.C. C.A. 1990) is particularly meaningful here:

It is not an exaggeration...to say that the Trustees, and *all present and future residents of the Edes Home*, stand at a *crossroads they are unlikely to face again*. [...] [T]he outcome of this action will determine whether the institution undergoes the fundamental change the Trustees propose. [When], as here, the Trustees decide upon a basic change affecting the interests of the entire class of intended beneficiaries--and one alleged to be inconsistent with the settlor's will--the value of denying representatives of the class access to judicial process to challenge that decision is greatly diminished. [...] Since the suit here is to vindicate a collective interest [...] affected by a proposed exercise of discretion that will change the nature of the institution--the prospect of recurrent vexatious litigation is minimal. [Emphasis added.]

The court further concluded that “the policy goals of the traditional rule limiting standing to enforce a charitable trust to a public officer would not be served by denying standing to [the claimant].” *Id.* at 613.

This Trust too is at a vital crossroads that it is unlikely to ever face again. Here, the question is whether the OAG will preserve meaningful, long-term, written commitments from the Trust designed to correct deviation from charitable intent. How this once-only question is answered will determine -- *for all time* -- whether the Hersheys’ child-saving mission will be better fulfilled by focusing the Trust/MHS Boards solely on this mission, or whether structures *already* shown unhealthy are perpetuated after a highly politicized set of events led to the rescission of reforms. This is underscored here by the fact that the OAG, the Trust and the School openly represented that the Trust reforms were essential on July 31, 2002, only to change their minds on June 27, 2003, *sans* explanation.<sup>31</sup>

When such single issue litigation implicates the interests “of the entire class of intended beneficiaries,...the value of denying [a party] access to judicial process to challenge [a] decision is greatly diminished.” *Hooker v. The Edes House*, *supra* at 617. By its very nature, this dispute over the survival of the Reform Agreement can be tried only once.

This does not mean, of course, that a party with a special interest in the Trust for purposes of this proceeding will be permitted to seek remedies with respect to every decision of the Trust, just as the Valley Forge Historical Society could not challenge every decision of the Washington Memorial Chapel. On the contrary, the party with a “special interest” must still establish that it has a “substantial, direct and immediate interest” in the *subject of the litigation*, in this case the Reform Agreement, and that this interest is not being protected by the OAG. All of this is clearly established by the facts set forth in the Petition. The OAG has abandoned the Reform Agreement -- it does not get much clearer than that.

**9. Summary of special interest factors that require standing.** In sum, the combination of the following factors requires the grant of standing to MHSAA in this

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<sup>31</sup> Importantly, reform rescission points here to internal splits within the OAG and Trust Board. The OAG subordinates who did the work in obtaining the Reform Agreement, such as the attorney identified in footnote 17, *supra*, appear to have had their work erased for political reasons by the more politically sensitive OAG senior decision-makers. The Trust Board too had reform supporters who were either removed in the fall 2002 Board Restructuring or otherwise quieted, and all without open court explanations.

extraordinarily important case as a matter of law under the charitable trust “special interest” requirement:

- (a) The limited remedy sought, i.e., reinstatement of the OAG’s own Reform Agreement;
- (b) The extraordinary impact that the Reform Agreement was intended to have on the neediest children of the Commonwealth and the nation;
- (c) The nonrecurring nature of the matter;
- (d) The obvious loss of child-protecting provisions caused by rescission of the Reform Agreement;
- (e) MHSAA’s mission, purpose, and relationship to the Trust;
- (f) The substantial uncompensated services performed by MHSAA for over a decade, including at the request of the OAG, in securing the reforms;
- (g) The harm to MHSAA in wasted efforts, continued required vigilance, and the changing nature of its membership;
- (h) The OAG’s inexplicable flip-flop on reforms that it touted just eleven months prior to their rescission; and
- (i) The powerlessness and voicelessness of needy children, whose interest is not being adequately represented -- no unconflicted child advocate would have rescinded these reforms.

**B. The Lower Court Erred As a Matter of Law in Not Addressing Alternative Taxpayer Standing Rule: The Five-Part Biester Test.**

This Commonwealth Court has held, following our Supreme Court, that a taxpayer, even where his or her interest may not be substantial, direct, or immediate, may have standing to challenge governmental action. Rizzo v. City of Philadelphia, 136 Pa. Cmwlth. 13, 582 A.2d 1128 (1990), *petition for allowance of appeal denied*, 527 Pa. 653, 593 A.2d 424 (1991); Sprague v. Casey, 520 Pa. 38, 550 A.2d 184 (1988) (“certain cases warrant the grant of standing to taxpayers where their interest arguably is not substantial, direct and immediate”). The exception has been applied in a variety of contexts “when the degree of causal connection is small but judicial review is necessary to protect against governmental action that would otherwise go unchallenged.” Sierra Club v. Hartman, 605 A.2d 309 (Pa. 1992) (dismissed on

standing because “the same issues are being addressed in [another case]” brought by the Department of Environmental Resources).

In Application of Biester, 487 Pa. 438, 409 A.2d 848 (1979), our Supreme Court stated that taxpayer standing is permissible where: (1) governmental action would otherwise go unchallenged; (2) those directly affected are beneficially affected; (3) judicial relief is appropriate; (4) redress through other channels is not available; and (5) no one else is better positioned to assert the claim. Consumer Party of Pennsylvania v. Com., 507 A.2d 323, 329 (Pa. Cmwlth. 1986) (summarizing Biester); Boady v. Philadelphia Mun. Authority, 699 A.2d 1358, 1361 (Pa. Cmwlth. 1997).

The policy for granting taxpayer standing is “to ensure judicial review which would otherwise not occur.” Application of Biester, 487 Pa. At 445, 409 A.2d at 852. The taxpayer in Biester was not granted standing to seek dismissal of an application by the Attorney General to impanel a multi-county investigating grand jury, in part because those adversely affected by the grand jury’s actions can be expected to challenge the Attorney General’s actions. Id.

This Commonwealth Court has limited the taxpayer standing test in Biester to the following circumstances:

[Taxpayer] standing may exist only when a taxpayer is challenging obligations placed on the general public or emoluments given through the exercise of governmental power imposed or given by general ordinances or statutes.

Drummond v. University of Pennsylvania, 651 A.2d 572, 577-78 (Pa. Cmwlth. 1994). This is not an articulation of a requirement imposed by the Pennsylvania Supreme Court, but there is no case in this Court where the five-part Biester test was satisfied while this additional requirement was not. See Consumer Party of Pennsylvania v. Com., 507 A.2d 323 (Pa. 1986) (applying Biester test without the Commonwealth Court’s limitation).

The Biester test can be applied when a taxpayer is “challenging the exercise of government power.” Boady v. Philadelphia Mun. Authority, 699 A.2d 1358, 1362 (Pa. Cmwlth. 1997). As then Justice Roberts pointed out in Faden v. Philadelphia Housing Authority, 424 Pa. 273, 278, 227 A.2d 619, 621-22 (1967):

[A]lthough many reasons have been advanced for granting standing to taxpayers, the fundamental reason is simply that otherwise a large body of government activity would be unchallenged in the courts.

In Sprague v. Casey, 520 Pa. 38, 46, 550 A.2d 184, 187 (1988), the Court found that an individual voter warranted standing because “this election would otherwise go unchallenged.” In short, there are certain instances where acts of government are such that justice mandates their scrutiny, to a degree where standing requirements are liberalized.

The test for taxpayer standing naturally contains many of the elements that courts have used to determine whether the complainant has a “special interest” sufficient for standing in charitable matters. The difference is that for taxpayer standing, there is less causal connection that needs to be demonstrated between the action and the harm to the litigant. Were this Court to deem MHSAA’s “special interest” inadequate, MHSAA submits that the Biester exception should nonetheless save the Reform Agreement from the unscrutinized demise to which it will be consigned absent a grant of standing to MHSAA.

**1. Without standing for MHSAA, questionable government action will otherwise go unchallenged.** A denial of standing here will mean that no party will make any argument to any court in support of any of the Reform Agreement’s provisions, and that this agreement’s long-sought structural reforms will thus be rescinded without a single word in their defense. This is whether or not the Reform Agreement is essential to fulfilling the Trust’s charitable intent, and whether or not our nation’s poorest children have lost the benefit of its carefully-structured protections, after decades of charitable intent diversion. (See Exhibit A.)

The only other person suited to assert the claim (the OAG) is the one whose conduct is in question. See also Upper Bucks Co. Vo-Tech School Ed. Ass’n v. Upper Bucks Vo-Tech Jt. Com., 474 A.2d 1120, 1122 (Pa. 1984) (Pennsylvania cases granting standing to those whose interest arguably does not meet the traditional test “are explained by the policy of ensuring judicial review which otherwise would not occur”). Because the only party willing and able to present a court with evidence and arguments in support of enforcing those reforms is Petitioner-Appellant MHSAA, the trial court’s order denying MHSAA standing should be reversed.

**2. Those directly affected are beneficially affected.** The OAG’s oversight responsibilities required under the Reform Agreement were substantially curtailed in the Abrogation Instrument, easing its administrative burden. There are now no hard guidelines to monitor, no face-to-face meetings, and fewer approval scenarios on land transfers. The rescission of the child protections was also politically popular. The Trust Board’s broad discretion that led to many of the problems addressed by the Reform Agreement is returned to

them. The rescission allows the Board Chairman to retain substantial fees as a director of HERCO.

**3. Judicial relief is appropriate to reinstate the Reform Agreement.** The function of equity is to take such action as the court in its discretion deems necessary to prevent the recurrence of improper conduct. Taking the facts alleged by MHSAA in its Petition as true, rescission without judicial review is improper. Judicial relief is appropriate to correct this so that essential reforms are reinstated.

The Orphans' Court can reinstate the Reform Agreement and oversee amendments, if necessary, under its authority over the administration and proper application of property by nonprofit corporations committed to charitable purposes. 20 Pa. C.S. §711(21); Rule of Judicial Administration No. 2156. The Orphans' Court also has broad plenary authority to enforce agreements made by a trustee for a charitable trust on behalf of minors under 20 Pa. C.S. §711(3).

**4. Redress through other channels is not available.** The MHSAA Petition seeks equitable relief. The Orphans' Court is the only available channel for such relief. The Orphans' Court decision, if allowed to stand, would mean that there is no party who could challenge the OAG action in rescinding the Reform Agreement, to the detriment of the intended beneficiary class.

**5. No one other than MHSAA is better positioned to assert the claim.** That no one is better positioned than MHSAA to assert the Petition's claims is demonstrated by the lower court opinion, where the Orphans' Court would conclude that *no one at all* has standing to bring the claim. It is also demonstrated by the practical realities of this matter. The beneficiary class of orphans cannot be expected to hire counsel; township residents have no special interest in the child-saving mission; and the OAG has taken a stand contrary to the one that needs to be asserted for justice to be served. MHSAA is clearly best positioned to assert unpopular claims on behalf of a powerless class of children.

### **VIII. CONCLUSION**

As demonstrated above, there has been a long-standing diversion of attention and resources from the Trust's sole charitable purpose. This undermines the child-saving legacy bequeathed by Settlers Milton and Catherine Hershey, even if it bestows bounty on the community and the general public. A landmark structural Reform Agreement was intended to

end this diversion, and was obtained after years of grueling MHSAA labor. MHSAA performed this labor due to its unique constituency and purposes, devoting itself to the Settlers' mission.

When political winds abruptly shifted, fainthearted OAG decision-makers regretted the reforms and decided to abandon them. The OAG did this with the agreement of a Trust Board hand-picked to facilitate rescission and apparently over the objections of apolitical OAG subordinates. This joint OAG/Trustee act leaves MHSAA as the lone voice willing to resist the rush to abandon child-protecting reforms. The joint OAG/Trustee act is so blatantly and facially improper that it should not be permitted without meaningful judicial scrutiny.

Taking all well-pled facts in the Petition as true, MHSAA has standing to seek review of the OAG/Trustee Reform Agreement rescission on either of the following grounds:

(a) MHSAA has a “substantial, direct, and immediate” interest in the Reform Agreement that surpasses the common interest of any member of the general public and a “special interest” in the Trust as related thereto; the grant of standing will not lead to a multiplicity of suits or vexatious litigation because this is a one-time “cross-roads” issue; and MHSAA is filling an enforcement void created by the OAG’s abrupt lack of will to implement long-overdue reforms.

(b) Whether or not MHSAA is entitled to standing under the traditional tests, MHSAA should be granted standing under the alternate Biester test. There is no other party with the will, volunteer resources, and unique relationship to the subject matter of this litigation to present this vital matter to the trial court. If MHSAA is not granted standing, there will be no judicial review whatsoever of the rescission of reforms deemed essential to the fulfillment of the Trust’s child-saving charitable intent. Were this to occur, an act that on its face appears to clearly violate the Trust’s charitable intent will be permitted absent any judicial scrutiny. Because only MHSAA is willing to come before a court and press the OAG and Trustee for an explanation, MHSAA should be granted standing to have the Petition heard.

Resolving “any doubt” in favor of allowing standing, which is the standard of review articulated by this Court, there is simply no logical way to conclude that MHSAA’s Petition indicates on its face that its claims cannot be sustained.

For all of these reasons, the trial court’s order sustaining the Preliminary Objections of Respondents-Appellees should be reversed, MHSAA should be granted standing, and the matter should be remanded for an appropriate hearing on the Petition’s merits.

Dated: August 24, 2004

Respectfully submitted,

**MILTON HERSHEY SCHOOL ALUMNI ASSOCIATION**

By: \_\_\_\_\_

VICTOR P. STABILE, ESQUIRE  
Attorney I.D. No. 37449  
Dilworth Paxson LLP  
112 Market Street, Suite 800  
Harrisburg, PA 17101  
Tel: 717-236-4812  
Fax: 717-236-7811

James F. Monteith, Esq.  
Attorney I.D. No. 13436  
John W. Schmehl, Esq.  
Attorney I.D. No. 27888  
Dilworth Paxson LLP  
1735 Market St., Ste. 3200  
Philadelphia, PA 19103  
Tel: 215-575-7000  
Fax: 215-575-7200

F. FREDERIC FOUAD, ESQUIRE  
230 Park Avenue, Suite 625  
New York, NY 10169  
Tel: 212-687-8534  
Fax: 212-687-8535

**Exhibit A – Summary of Reform Rescissions (R. 31-66)**

PRE-REFORM CONDITION	REFORM AGREEMENT	ABROGATION INSTRUMENT
<p><b><u>CONFLICTS</u></b> Trust/School Boards: (a) HERCO officers and directors allowed. (b) HFC officers and directors allowed. (c) Interlocking Boards with subsidiaries allowed. (d) MHS President allowed. <b>Problem:</b> Trust diverts assets from childcare to commercial purposes.</p>	<p>Trust/School Boards: (a) HERCO directors and directors/officers prohibited. (b) HFC directors and directors/officers prohibited. (c) Interlocking Boards ended. (d) MHS President allowed.</p>	<p>Trust/School Boards: (a) HERCO restrictions <i>deleted</i>. (b) HFC restrictions <i>deleted</i>. (c) Interlocking Boards <i>restored</i>. (d) MHS President <i>prohibited</i>.</p>
<p><b><u>NEED</u></b> (a) Neediest and most alone children not being served; no definition of “poor.” (b) All sources of family or household support not being considered. (c) Deed modifications misinterpreted. <b>Problem:</b> Discretion too broad.</p>	<p>(a) Mandates pilot foster care program in Dauphin, Lancaster, Lebanon Counties to enroll at-risk children. (b) Hard income caps tied to 100% of federal poverty level for majority of enrollees. (c) “Family Income” to include step-parent in same household and those with support obligation.</p>	<p>(a) Foster care program <i>deleted</i>. (b) Hard caps <i>deleted</i>. (c) Family income definition <i>deleted</i>.  <i>Unfettered discretion is restored.</i></p>
<p><b><u>NEED/ACADEMIC</u></b> Scholastic achievement emphasized in enrollment above need -- “hard luck” cases disfavored.</p>	<p>Requires low-achieving children to remain in admission pools under set criteria. Requires one-year of assistance before expulsion.</p>	<p><i>Provisions deleted – no enforceable criteria to protect these children.</i></p>
<p><b><u>LAND</u></b> (a) Land used for student homes shrinks dramatically. (b) Student homes abandoned, sold or converted to commercial use, and land used by related entities. (c) Development interests cause children’s home to be crowded into remaining land.</p>	<p>(a) Strict 90-day notice to OAG on all transfers, leases and dispositions by affiliates to protect land for school use. (b) Outside entities’ influence on decisions is eliminated, thus addressing root land-competition problem. (c) Mission focussed solely on children’s home thus addressing root land-competition problem.</p>	<p>(a) Notice provision severely <i>limited</i> to facilitate non-child use (e.g., applies only to a narrow class of “sales,” not other transfers). (b) Land competition <i>returned</i> to Board as conflicts are <i>restored</i>. (c) MHS President <i>excluded</i> from Board’s land decisions; commercial interests <i>back</i> in competition with children.</p>
<p><b><u>MONITORING</u></b> No monitoring of performance by OAG.</p>	<p>Twice-per-year meeting with OAG required.</p>	<p><i>No meetings; once per year written report to OAG.</i></p>
<p><b><u>FOCUS</u></b> Directors/Managers pay inadequate attention to residential childcare mission while focusing on land development, HERCO, and other outside interests.</p>	<p>End all competing duties/interests and focus all attention solely on residential childcare.</p>	<p><i>Reverts back to distractions of competing duties/interests, compounded by removal of MHS President from Board.</i></p>