

**BIAS, FLAW, & AVOIDANCE:**

**A RESPONSE TO THE K&L REPORT**

**MILTON HERSHEY SCHOOL ALUMNI ASSOCIATION**

**October 16, 2000**

# Bias, Flaw, & Avoidance: A Response to the K&L Report

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# Bias, Flaw, & Avoidance: A Response to the K&L Report

## Prefatory Statement

### *Why Is MHSAA Issuing This Response?<sup>1/</sup>*

Over the last two years, the Milton Hershey School Alumni Association ("MHSAA")<sup>2/</sup> has devoted itself to seeking an understanding of the history of the Milton Hershey School Trust (the "*Trust*"), the Deed of Trust (the "*Deed*"), and our own history. In this endeavor, MHSAA has utilized the expertise of the tradesmen and professionals who graduated from our school and who comprise our organization. While we are in a sense a ragtag army of volunteers, we count amongst our numbers seasoned attorneys, accountants, construction and real estate experts, educators, childcare experts, and members of many other professions. Through the unselfish efforts of countless of our members, particularly those who have unique knowledge related to the matters at issue, MHSAA has reviewed warehouses full of documents, combed the public records, interviewed hundreds of keywitnesses, unearthed long-forgotten and dusty files, traced witnesses across America, and otherwise undertaken an exhaustive review of all available evidence related to the matters at issue. MHSAA believes that no other comparable research project has ever been undertaken, not even by the Board of Managers of the Milton Hershey School, a Pennsylvania nonprofit corporation (the "*School*"), as Managers (the "*Board of Managers*," "*Board*" or "*Managers*") of the Trust.<sup>3/</sup>

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<sup>1</sup> *Bias, Flaw, & Avoidance: A Response to the K&L Report* (the "Response") is issued by the Milton Hershey School Alumni Association. The Response is the result of the collaborative efforts of business owner Joseph W. Berning '73, attorney F. Frederic Fouad '80, retired educator Girard P. Gaughan '50, attorney John F. Halbleib '71, attorney John F. Mardula '69, retired Colonel US Army Graham W. McIntyre '49, and educator D. Michael Weller '66. The Response was initially released on October 16, 2000 and subsequently edited to remove typographical errors. The Response can be found on the Alumni Association's website, [www.MHSAA.org](http://www.MHSAA.org). The K&L Report itself can be found on the official website of the Milton Hershey School, [www.mhs-pa.org](http://www.mhs-pa.org). Readers are invited to take a survey related to these matters by visiting [www.MHSAA.org](http://www.MHSAA.org).

<sup>2</sup> MHSAA is the alumni association of the Milton Hershey School, an orphanage in Hershey, Pennsylvania, founded in 1909 by the chocolate manufacturer, Milton S. Hershey. Having no children of his own, Mr. Hershey and his wife Catherine left substantially all of their fortune in a trust, to be used to save as many of America's orphans as the trust income would allow. That trust is now valued at over \$5 billion. Mr. Hershey established MHSAA shortly after the first boys were discharged from his orphanage, in order to, among other things, incorporate "his boys," as he called them, into the institutional mechanisms by which he sought to run the orphanage, as well as to preserve the childhood bonds established amongst the children raised at this home. In essence, Mr. Hershey created a kind of large, surrogate family for otherwise neglected or abandoned children, and took every administrative and legal step necessary to see that this school became a true family for these children. Over time, the Milton Hershey School has come to admit girls and minorities, changes which it is clear the far-sighted Mr. Hershey would himself have fully endorsed. However, certain other changes, described in this document, are of a highly questionable nature, and have resulted in MHSAA organizing an effort to protect the wishes of Mr. Hershey and the children's home that he built.

<sup>3</sup> Our research has demonstrated that over time the nomenclature used to describe various aspects of the Trust, the Managers and the school has changed. These changes (a) were initiated by the Board of Managers and the school's Administration some three or four decades ago, (b) hide or confuse the identity of the entity referenced, and (c) create a very different impression of the legal relationships amongst the Trust, the Managers and the school when contrasted with those which were intended by Mr. Hershey. For instance, when referring conceptually to the residential dependent and at-risk childcare program, school, or institution contemplated by the Deed, Mr. Hershey, the maker of the Deed and founder of our school, used the term "school," in lowercase. Moreover, Mr. Hershey chose the term "school" rather than "orphanage" because he required that the environment for his children, including nomenclature, be devoid of any notion of charity. Mr. Hershey said: "**These boys must grow up with a feeling that**

MHSAA has also applied the highest caliber of expertise -- primarily legal and childcare -- to distilling, analyzing, and otherwise making sense of the exhaustive collection of information which we have gathered, information which must be viewed in context to be understood. We are confident that MHSAA at present possesses the single most comprehensive repository of information and expertise on these issues anywhere in existence. Our efforts in this have been, as a matter of course, extraordinarily time-consuming and expensive, and have been paid for solely from our own pockets and from those of our *pro bono* attorneys.

Why did MHSAA undertake this extraordinary task, in the face of strong opposition from the parties who control so many of the key records, such as the Board of Managers?

Our exhaustive review began in connection with the 1999 CHILD *cy pres* petition of the Board of Managers, when MHSAA was invited to support the Board's request that the Orphans' Court grant the CHILD-related amendment to the Deed, which the Board had sought from the court at that time.<sup>4</sup> MHSAA asked a few questions of the school's Administration related to CHILD, and were essentially informed that the Board had made certain decisions that must stand. MHSAA was otherwise not provided with satisfactory answers. This attitude by the school's Administration followed more than a decade of confrontation between MHSAA on the one hand and the Board of Managers and the school Administration on the other. This period of confrontation often made it appear that the two sides were talking past each other, as though the two sides were working from a completely different set of factual premises, and as though we were each talking about a different Deed and a different Mr. Hershey. It was simply astounding to the antagonists how differently the two sides viewed these issues, and how much acrimony attended these disputes.

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**they have a real home.**" Thus, we preserve the use of Mr. Hershey's original term "school." However, one must remember that the Trust was -- as many have observed -- an orphanage with a school, through which Mr. Hershey provided a home for his school Family. When referring to the incorporated Board of Managers, which as a separate legal entity is charged with the responsibilities and duties of fiduciaries operating the orphanage that Mr. Hershey created -- an orphanage which included a school component -- Mr. Hershey referred to the Board of Managers as "managers" or the "Board," but never as the "School." It is only the current Board that refers to itself as the "School." As to the trust, it is a separate legal entity distinct from the Board of Managers, referred to by Mr. Hershey as the "Trust;" and it is the Trust which "holds assets" and "employs" the teachers and staff of the school. Where possible, Mr. Hershey's usages are preserved in this document, although recent convention is to refer to both the Trust and the Managers as the "School," in upper case. This convention has blurred the distinction between the two and contributed to the misapprehension that the Board -- a separate legal entity -- is the school. The corollary to this is the encouragement of the misapprehension that the Board of Managers -- in the clothing of "the School" -- has replaced the children and young adults as the beneficiaries of the Trust. The process by which this blurring/substitution has occurred, and its implications, are discussed in detail below. In sum, the blurring process constitutes an effort to turn Mr. Hershey's children's home for orphans into a boarding school for a less desperate class of children -- rather than permitting it to remain a home for full orphans, wards of the court, foster care children, and other dependent children.

<sup>4</sup> For those unfamiliar with this matter, in the spring of 1999, the Board filed a so-called *cy pres* petition before the Orphans' Court, in Dauphin County, Pennsylvania. The petition, in essence, asked the court for permission to use some \$30 to \$50 million of Trust assets to build an institute, to be called CHILD, and \$25 million a year thereafter for operation. The acronym "CHILD" stands for the "Catherine Hershey Institute for Learning and Development", which was a proposed facility for educating teachers. In order to obtain court approval, the Board had to assert a so-called "*pro tanto*" failure of the Trust purposes, that is, that the School was not able to fully utilize its vast resources in caring for dependent children, but instead should be permitted to use a portion of those resources in another area, namely, to build, and fund the operation of, CHILD.

Hence, when confronted by the unwillingness of the school Administration to provide acceptable explanations related to the CHILD *cy pres* petition, and seeking to replace the verbal sparring between the two sides concerning the Deed with an informed discussion premised on an articulated set of assumptions which flowed *directly* from the historic record itself, MHSAA set out to educate itself on all of these issues. This was particularly important given how critical an exhaustive study would be for both an informed decision on CHILD as well as for the establishment of common ground for the two sides to come together in the future. MHSAA thus undertook this exhaustive study.

*What our study unearthed was shocking even beyond the worst suspicions of the most avid critics of the Board.* MHSAA's study revealed that the Deed of Trust had been reconstructed by the Board over an extended period of time, along lines explicitly rejected by Mr. Hershey while he was alive. We also discovered that court petitions amending the deed had been filed in flagrant disregard of Pennsylvania law, without notice to the public or any public hearings, and which resulted in the illegal transfer of substantial assets to uses which the Trust's own counsel understood to be illegal under the terms of this Trust. Most disturbing, we discovered that Mr. Hershey would never have supported the Board's various actions, having expressly rejected each during the time that he was alive.<sup>5/</sup> Finally, we came to believe that had the court and the Attorneys General been adequately apprised of the long-term plans of the various Boards undertaking these actions, they would not have countenanced the changes obtained by these Boards, which changes are now of concern to MHSAA.

Based on what our studies revealed, MHSAA took the dramatic step of opposing in court -- for the first time in the school's 90-year history -- the position taken by the Board in the CHILD *cy pres* proceeding. For our membership, there is something so sacred about the orphans' Trust -- a Trust which for most of us saved our lives -- that we feel it disloyal to ever challenge its actions, even where we don't necessarily agree with these actions. In a sense, this is a variation of "my school, wrong or right." It was only the fact that we concluded, reluctantly, that the Board's positions were in direct violation of Mr. Hershey's express desires that permitted us to overcome our deep resistance to challenging the decisions of the Board. This same resistance continues to influence our actions, and is the primary reason why we have for so long resisted taking such steps such as issuing this Response.

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<sup>5</sup> In a 1933 memo from Mr. Paul Reed to Mr. Hershey, which, ironically, was submitted to the Orphans' Court by the Board in support of their CHILD petition, the roadmap for the changes to be sought by those surrounding Mr. Hershey became clear. Mr. Hershey lived for 12 more years after their ideas had been presented to him in this memo. Mr. Hershey's response was not only to reject the proposed changes, but also to take steps to make these kinds of changes impossible -- or so he thought. As the record shows, the very changes proposed by Mr. Reed and rejected by Mr. Hershey were undertaken by various Boards beginning almost immediately upon Mr. Hershey's death, without proper court approval. Mr. Reed's suggested changes -- explicitly rejected by Mr. Hershey -- include the following: (i) "More freedom of action with respect to detail should be left to the future Managers" so as to avoid the need for *cy pres* in the future; (ii) changing the school's age requirements; (iii) permitting Trust assets to be used for other philanthropic interests; (iv) permission for alternative uses of Trust assets at the Board's discretion, including permission to sell land without replacing the sold land with other land bought from the proceeds of the sale; (v) "Permission...to use excess funds -- beyond the needs of the School...for other philanthropic work;" (vi) insertion of a broad discretion clause in the Deed, permitting the Board to treat Mr. Hershey's explicit Deed instructions as mere "statements of wishes which may be changed" should the Board, on its own and without court approval, deem it fit; and (vii) permitting surviving relatives or guardians of students to contribute to the student's education, rather than relying solely on Trust assets.

Last Fall, MHSAA's positions in opposing the Board were fully vindicated by the Orphans' Court, when Judge Morgan dismissed the Board's petition and questioned the very premises by which the Board had earlier made changes to the Deed. Importantly, it was as a result of MHSAA's exhaustive efforts that the court had been apprised of the true facts of these matters, because the Attorney General's office did not have the resources to undertake this historical review absent the extraordinary efforts of MHSAA. In perhaps the greatest tribute to MHSAA's efforts, the Attorney General went from supporting the Board's position at the beginning of the proceedings, to later on rejecting it, based on what the Attorney General had learned in the interim from MHSAA's court filings. No more eloquent endorsement of the *bona fides* of our views could be found than this, and we were thus doubly hopeful that the Managers would likewise thereafter agree to treat our concerns seriously.

Significantly, upon learning last year that the Attorney General had been swayed by MHSAA to the degree that the Attorney General changed its position and so opposed the Board's petition, the school Administration immediately announced that it was freezing the amount of its funding of certain student-centered programs which MHSAA administers, such as a mentoring program wherein our graduates serve as mentors for students still at the school. The school Administration also informed MHSAA that it had decided not to hold Career Day for the high school students last year, stating that "it was sufficient to hold Career Day every other year."<sup>6</sup> For our graduates, Career Day provides an additional opportunity for interacting with our school's students, whom we view, literally, as our younger siblings. As anyone with children can understand, we were torn as an association about having taken public stands which jeopardized our ability to interact with our students -- as we continue to be. To not mince words, when confronted with the tactics of those who hold over our heads programs which the school's Administration can influence as a means of "bringing us into line," MHSAA, like any family, has grave concerns about whether to give in to the demands of these persons or instead stand on principle.

After the Orphans' Court rejected the CHILD *cy pres* petition, and after much negotiating, MHSAA and the Board eventually entered into an agreement pledging to try to work with each other in the future, on the basis of the Deed and Mr. Hershey's desires. This agreement is titled the *Relationship Agreement* ("*Relationship Agreement*"), legally binding on both parties and signed by Dr. William Lepley in his capacity as President of the Milton Hershey School.

Prior to entering into the Relationship Agreement, MHSAA presented the Board with a draft of a petition which MHSAA was contemplating submitting to the Orphans' Court. MHSAA's draft petition treated in general terms many of the issues with which MHSAA is concerned, and the Board expressed its desire to avoid legal proceedings related to these concerns. It was in this context that the Board retained Dick Thornburgh and Kirkpatrick & Lockhart LLP ("K&L") to provide an examination of the concerns raised by MHSAA. Although many of our members viewed this arrangement with K&L skeptically, we nonetheless agreed to cooperate fully with the investigation, devoting thousands of hours of our time, and providing massive amounts of documentary and other evidence in the process. Virtually alone among all involved in the investigation, MHSAA did all of this at its own expense. We did this because we believed that a fair review of the matter would demonstrate the clear intent of Milton Hershey in his Deed. We thus

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<sup>6</sup> Career Day is a day on which students get to meet persons in the various professions and ask them questions about those professions, as a means of helping the children decide what they want to do when they leave the school.

enthusiastically -- and in hindsight, naively -- lent our full support to the endeavor, instructing all of our members to cooperate as well. Relying on the assurances of the Managers that the investigation would be fair, we thus presented K&L with all manner of evidence and childcare expertise to demonstrate the validity of our concerns about the changes to, and unauthorized reconstruction of, the Deed. During this time frame, MHSAA sought to keep the results of its research private, and shied away from airing our differences with the Managers in the press. In the meantime, the Board continued to methodically pursue the very changes that MHSAA was seeking to have reviewed during the course of the K&L investigation, as though to make those changes irreversible.

Unfortunately, and as will be demonstrated below, the final report of K&L is a complete whitewash. It ignores facts and law which do not comport with its desired result, and goes so far as to gratuitously insult and demean members of MHSAA for having had the temerity to want to have Milton Hershey's wishes for disadvantaged children fulfilled in the manner stated in the Deed.

Notwithstanding the wholly erroneous nature of the K&L findings, the school's Administration lost no time in issuing self-serving press releases about the findings, and declaring their intention to rely on these findings in the future. In short, MHSAA was told in no uncertain terms that our requests, so far as the Board was concerned, were a thing of the past and had already received the attention that they warranted, in the K&L Report -- and this after months of work with K&L and the expenditure of vast amounts of time and resources on the process.

For MHSAA's part, we immediately set out to demonstrate that the K&L findings were indeed wholly flawed. True to form, and notwithstanding the terms of the Relationship Agreement, when Dr. Lepley learned that MHSAA would not be silent in the face of K&L's misstatements of fact and law, Dr. Lepley immediately again resorted to the tactic of warning MHSAA that the school Administration would examine our response in determining their ability to work with MHSAA. Thus, Dr. Lepley went so far as to write MHSAA a letter containing veiled threats related to his willingness to cooperate with us in the future should we in fact challenge the substance of the report in public, and should we not agree to issue a joint "public endorsement" of the Report's findings, in which we "agreed" that our concerns were a thing of the past.<sup>7</sup> Once again, our membership was torn between remaining silent so as to permit the continuation of policies which we feel violate Mr. Hershey's wishes, and speaking up and jeopardizing our ability to interact with the children of the school; that is, once again, MHSAA was confronted with the tactics of those who hold over our heads their control over our access to the school's children. After agonizing internally over the matter, MHSAA concluded that we have been left no choice but to take the matter public. This is particularly true given that the changes being implemented by the present Board --

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<sup>7</sup> MHSAA has, in accordance with the terms of the Relationship Agreement, put the Board and the school Administration on notice of their continuing violation of the Deed. Expecting that the Board and the school Administration would eventually bring their behavior and the operation of the Trust into compliance with the Deed as a result of the Thornburgh investigation -- that is, so as to comply with Mr. Hershey's intent -- MHSAA has determined that the K&L Report is a clear signal that the Board and the school Administration have no intention to in fact conform their operation of the Trust with Mr. Hershey's Deed. MHSAA has fulfilled its requirements under the Relationship Agreement by advising the school Administration of our position. After the distribution of this Response -- in a manner consistent with the Board's distribution of the K&L Report -- MHSAA expects that the Milton Hershey School will abide by its legal obligations under the Relationship Agreement, including the full discharge of its obligation to act in good faith, and not to jeopardize any of our jointly-operated programs for the school's children and young graduates.

changes odious to the interests of the school's children and repugnant to the wishes of Mr. Hershey -- *will soon be irreversible*. We thus produced this *Bias, Flaw, and Avoidance: A Response to the K & L Report* (the "*Response*"), in which is contained our rebuttal to K&L's findings. It is simply impossible for us to do otherwise, the record having been so distorted by the K&L Report, and the Board having made so clear that, at the end of the day, they still refuse to undertake the substantive examination of our concerns which we have sought for so many years. It is clear to us that our concerns about the unauthorized changes to, and reconstruction of the Deed, to the detriment of the disadvantaged children whom the Deed was designed to benefit, will only receive adequate attention after this matter has been made public, as we do here.

# Bias, Flaw, & Avoidance: A Response to the K&L Report

## I. Introduction

The September 1, 2000 *Independent Evaluation of Fiduciary Compliance, Findings and Conclusions of Special Counsel* (the "K&L Report" or the "Report") is tainted with conflict and substantively flawed. It ignores the direct responsibility of its primary author in contributing to the very circumstances at issue in the Report. Furthermore, by framing its inquiry as merely one of whether the Managers have met the minimum standards imposed on corporate directors under the "business judgment rule," the Report does nothing to resolve the key issues raised by MHSAA. Indeed, by its own terms, the Report is "not directed to the wisdom of the various discretionary decisions made by the Managers, nor is it focused on the Board's performance of management functions." What, then, was the point of the inquiry, one is led to ask.

Even under circumstances where every childcare expert in America would conclude that the Board is grossly mistaken in its decisions, these Managers are absolved by the Report, under the business judgment rule. Substantive inquiry into the decisions of the Board is thereby wholly avoided, including any inquiry into whether questionable past decisions should be reconsidered by a current Board of Managers fully apprised of the nature of these decisions and their tragic consequences for America's neediest children. While substantive inquiry is thus avoided, the Report nonetheless strives to present a contrary appearance, and in fact lends approval to decisions which are indefensible under the standards imposed by childcare experts, even if acceptable under the standards of the business judgment rule. Where the decisions at issue took place relatively earlier in time -- such as the misappropriation of orphan assets to build a medical school for Penn State University -- the report additionally declares the decisions non-actionable, due to the running of the statutes of limitations. As such, the Report glosses over the miscarriages of justice attendant to these decisions and the fact that these miscarriages can be ameliorated now.

Also ignored in the Report are the implications of the Board's recently-announced notion that the Board -- rather than the children and young adults to whom the Managers owe a fiduciary duty -- is the designated beneficiary of the Trust. As MHSAA will develop more fully below, the notion that the Board is the beneficiary of the Trust is a legal absurdity, and the changes implemented without court approval to achieve this absurdity have served as one of the primary causes of the school's decline in overall effectiveness as a care-providing institution.

For these reasons, and as further described below, the Report is but another expensive public relations purchase made by a Board who seek to avoid legitimate outside scrutiny of its practices. Accordingly, far from resolving the allegations directed at the Board, the Report only underscores them.

MHSAA, rather than applying the "Is-it-illegal?" standard encompassed within the business judgment rule, instead seeks application of a standard which asks, "**What is in the best interests of America's dependent and at-risk children, as Mr. & Mrs. Hershey intended?**" MHSAA respectfully suggests that the Board itself would be well-advised to seek to perform their duties under the latter standard as well, rather than merely seeking refuge in the safe harbor of the business judgment rule.

Finally, and using the misstatements in the K&L Report as a starting point, this Response also seeks to demonstrate the linkage between the Board's deviation from the requirements of the Deed and the direct, negative consequences of those decisions for the children whom Mr. & Mrs. Hershey sought to aid.

## **II. The Methodology of the Report**

### **A. Undisclosed Conflicts**

While the Report begins with the unsupported statement that its authors are "independent" and had not previously been "involved in any of the matters raising the issues to be reviewed," it inexplicably ignores the fact that Dick Thornburgh -- the Report's primary author -- himself served as Governor of Pennsylvania during periods critical to the events at issue in the Report. Dick Thornburgh surely understands -- and was told repeatedly during the drafting of the Report -- that the Commonwealth of Pennsylvania, through its successive Governors, including Mr. Thornburgh, have utterly failed in their public duty to see that the assets of the Trust were used judiciously to benefit the intended recipients of Mr. Hershey's fortune, the orphans of America. This is particularly so in light of the Report's insistence that only public authorities, rather than, for instance, MHSAA, have legal standing to seek enforcement of the Deed.

As is now well-known, historically it has been the Executive Branch of the Commonwealth who helped to carry out the most unconscionable actions of the Board, such as the misappropriation of orphan assets in 1963 to build Penn State a medical school.<sup>8/</sup> While these actions do not seem to trouble the Report's authors -- individuals who have never experienced foster care in America, warehouse orphanages, or abysmal group homes -- it might trouble them to know that for the millions of American orphans who did experience these things, the misuse of funds intended for their care to instead build Penn State a medical school most certainly is troubling; and the involvement of Pennsylvania authorities in the misuse of these assets is even more so. Thus, it is a flat-out misstatement for the Report's authors to claim no involvement in these issues -- as the "non-involvement" of Pennsylvania authorities, including past governors, is central to this matter. The Report thus by definition constitutes an act of self-assessment of one aspect of the gubernatorial tenure of the Report's primary author, albeit this fact is not disclosed.

Making matters worse, Dick Thornburgh -- although the Report makes no mention of it -- is far from a stranger to the school and the members of the Board whose actions are directly at issue. For example, Thornburgh held the inaugural ball in both of the years in which he was elected Governor of Pennsylvania at Founders Hall -- one of the very multimillion dollar construction projects undertaken by the Board, and which we criticize because it was constructed at a time when America's orphans were being savaged by the lack of resources directed to their care.<sup>9/</sup> The construction of Founders Hall also occurred at a time when

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<sup>8</sup> This misappropriation is treated more fully below, at pages 32-37, Section C.

<sup>9</sup> For a sense of just how lavish the construction of Founders Hall was, it is worth considering that when Founders Hall was built, it constituted the second largest un-suspended dome in the country, second only to the Nation's Capital Building. (This would still be true today but for the creation of sports domes throughout America.) Founders Hall was also built with specially imported Italian marble, and all manner of other expensive extras, including a sweeping rotunda unimaginable for any persons who think

the number of children who could be served by the school was increasing, including as a result of the opening of the school to new groups of children in poverty. However, the number of children being served by the school declined within a year of construction of Founders Hall, the precise opposite of what would have been expected given the resources of the school, the expansion of the groups of children qualified for admission, and the desperate needs of America's dependent children. Dick Thornburgh's use of Founders Hall flowed directly from his close friendship with Dr. J.O. Hershey (no relation to Milton Hershey), who is at the center of many of the most questionable acts at issue in the Report. J.O. Hershey, for his part, received two high-level gubernatorial appointments during Thornburgh's tenure as Governor -- one as Chairman of the Pennsylvania State Board of Education, and one as Vice President of the Pennsylvania Public Television Network.

The nature of the relationship between Thornburgh and J.O. Hershey -- and how it affected and affects Thornburgh's view of the school's children and graduates -- is also illustrated by the fact the school's junior high school children were ordered to Founders Hall for Thornburgh's inaugural parties, to serve as uncompensated waiters, including being required to serve Thornburgh and his guests alcoholic beverages. The latter was in violation of the otherwise strict prohibition against the presence of alcohol anywhere on the school's campus under any circumstances -- a rule so sacrosanct that even alumni banquets are alcohol-free, as are homecoming game tailgate parties. So well understood is this rule by the school's children that one boy called on to perform the task asked whether they might get in trouble for serving alcohol even under direct instructions. This boy was immediately dismissed and sent back to his student home for having dared to mention the subject. Because Thornburgh's parties were held on Saturday nights, other of the school's children were ordered to arrive early on Sunday morning to clean up the empty drink cups and other trash from the party, prior to the beginning of the school's weekly Sunday church service. That former Governor Thornburgh did not need to hire caterers or a clean-up crew -- relying instead on the child conscripts supplied by an accommodating J.O. Hershey -- speaks volumes about how Thornburgh views the school's children and its graduates.

In sum, a substantial bias is inherent in Dick Thornburgh's participation in the drafting of the Report, though nowhere is this mentioned. This bias and direct personal interest of the report's primary author is candidly revealed in his correspondence related to the investigation, wherein he grudgingly agreed to meet with graduates who had sought to provide input into the investigation, referring to such a meeting as "distasteful." This intemperate reference to graduates during the investigation was then coupled with numerous *ad hominem* attacks on MHSAA throughout the Report, as one would only expect from someone whose primary contact with the school's students related to having them serve him and his friends drinks and then clean up their trash after his parties had ended. Under these circumstances, some mention of the relationship of Dick Thornburgh to Dr. Hershey and the Board should have been forthcoming as a matter of course.

Finally, while K&L take pains to point out that they have never provided legal services to the Board or the Trust, they do not bother to disclose the amount of fees, if any, generated from their work for Hershey Foods, the Hershey Medical Center, or other Hershey Entities -- nor the fact that K&L can expect many

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of costs. The heating bill alone is astronomical, in a building which houses the most luxurious administrative offices of any orphanage -- or any school for that matter -- anywhere in the world. It is, in short, one of the most extravagant structures in Pennsylvania, and all built with assets intended by Mr. Hershey to be used for America's orphans.

more fees in the future from these entities as reward for their efforts in this matter. Moreover, inasmuch as the conduct of particular members of the Board and the existing composition of, and selection process for, the Board have all been questioned, it would also be relevant to know whether K&L have any relationship with particular members of the Board or any businesses that one or more of these members control. Likewise, no disclosure is made as to whether any of the Hershey Entities or individual Board members made contributions to the gubernatorial election campaigns of Mr. Thornburgh, although it is known that the architect of the 1963 Penn State giveaway of \$50,000,000.00, Gilbert Nurick, was a contributor to Thornburgh's campaigns.

For these reasons, the Report is tainted *ab initio* by the direct and indirect conflicts which burdened its authors and by their unexplained failure to even disclose the same at the outset.

## **B. The Fostering of the Appearance of Outside and General Inquiry**

While the Report by its own terms is no more than an inquiry into the corporate law question of whether the Managers have fulfilled their duties under the standards of the business judgment rule, it disingenuously strives to present the appearance of being more. Thus, K&L style themselves "Special Counsel," language similar to that contained in the Federal Independent Counsel Act, and thereby conjuring up images of zealous inquiry by disinterested third parties -- something completely lacking in this investigation. The use of the term "Special Counsel" also raises the inference that the Report's primary author is seeking to trade on his past service as Attorney General of the United States to lend a sense of governmental credibility to what is purely and simply a purchased opinion on a corporate law question. This, in turn, reveals what is elsewhere demonstrated throughout the Report, that is, that the Board is seeking to preempt what those devoted to the ideals of Mr. Hershey have long demanded: a legitimate independent inquiry, by a true Independent Counsel, appointed by the Governor or Attorney General of Pennsylvania, including childcare professionals in its composition, and not paid by or otherwise beholden to the Board. Furthermore, the K&L Report's analysis takes its starting point from the current Deed of Trust, a deed that has been deliberately and illegally modified over time, as further described below. K&L does this rather than questioning the propriety of the current Deed, as MHSAA continues to seek.

In addition to fostering the appearance of a quasi-governmental/Independent Counsel-type of inquiry, the Report's authors also foster the false impression that they have examined the childcare policies enacted by the Board, and that based thereon they have found in favor of the Board with regard to these policies -- and notwithstanding K&L's disclaimers when it comes to substantive questions. Even though the authors of the Report concede no expertise in issues of childcare -- and, where they did consult with childcare experts, obviously ignored the information supplied to them -- the authors nonetheless opine in shorthand on issues critical to the well-being of the school's children, issues such as "multi-age housing," the ending of the farm program, and the "centralization" of the campus. While these items are treated in more detail below, it is sufficient to point out here that the Report is dishonest in creating the appearance that these policy issues were examined by the authors when this was not the case, and by definition could not have been so. By fostering this false impression, the Report contributes to the tragic failure of the Board of Managers to correct policies which are not in the best interests of America's most vulnerable children.

### **C. Refusal to Acknowledge Independent Duty to Beneficiaries**

The authors of the Report, presumably paid from Trust assets, owed an independent duty to the child and young adult beneficiaries of the Trust. However, these authors strive in their Report to disclaim this duty, and instead pledge allegiance merely to the Board. Indeed, when asked about whom -- as a matter of legal ethics -- these attorneys viewed as their clients at the outset of the inquiry, the authors simply refused to answer the question. In the Report, they suggest that their sole duty is to the Board, which is true if the Report is intended only as an internal assessment of allegations of illegality directed at the Board -- but in which case there should have been no suggestion of it being more, and certainly none of the associated press releases. By sidestepping the legal question of who their clients are, K&L has sought to avoid the inquiry which is really at the heart of these matters, that is, *what is in the best interests of the children?*

If the child and young adult beneficiaries' interests were not paramount in K&L's analysis, than whose interests were? Obviously, the answer to this question is the Board.

### **D. The Irrelevance of the Business Judgment Rule to the Main Issues**

The business judgment rule is a standard applied to directors of a corporation when their actions are questioned by, among others, disgruntled shareholders. Courts devised the principle to permit limited inquiry on the legality of directors' actions. Importantly, the rule has never applied to the wisdom of those decisions, but merely to their legality. In other words, the decisions of directors can be woefully lacking; but so long as they fall within legally permissible bounds -- such as not being tainted by direct conflicts of interest -- those decisions will pass muster under the business judgment rule. K&L thus could not have selected a more lenient standard by which to judge the actions of the Board, as is demonstrated by their conclusions. Were this the only matter at issue, one is led to ask what the whole point of this extravagant, time-consuming, and costly exercise was in the first place. Put another way, the business judgment rule may not necessarily condemn such actions as shutting down Senior Hall, centralizing the campus, or ending the farm program.<sup>10</sup> From the outset, all parties knew this, as they knew that the Board has broad discretion in certain areas (though not in others). But since they decided to spend this money, the proper inquiry should have been and remains: What did Mr. Hershey state in his Deed? Was the Deed improperly amended? Were these amendments in keeping with Mr. Hershey's wishes? Why was the Deed amended? Were these amendments in the best interests of the dependent children whom Mr. Hershey sought to aid? Are the present changes being undertaken at the school in the best interests of the child and young adult beneficiaries whom Mr. Hershey sought to aid? Those seeking answers to these questions in the K&L Report will seek in vain. Instead, all we are told is that the Managers' actions are not illegal; and that where past actions may have been illegal, they are now non-actionable due to the running of the relevant statutes of limitations.

Furthermore, notably absent from K&L's soft-test analysis is any meaningful examination of decisions that, even under the business judgment rule, fail to withstand scrutiny. Primary among these is the hiring of a president using criteria which specifically eschewed any expertise in at-risk and dependent

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<sup>10</sup> These three matters are all addressed in more detail below.

childcare; that is, according to the CHILD *cy pres* proceeding testimony of William Alexander -- the construction magnate who has profited handsomely from the construction programs undertaken by the Board, even while serving as a member of that Board -- the current president, Dr. William Lepley, was selected because he was (1) an educator, (2) capable of difficult decisions, and (3) willing to stand by those decisions "regardless of the extent of criticism of those decisions."<sup>11/</sup> Translation? The Managers wanted an educator stubborn enough to push through controversial changes, while knowing little about at-risk or dependent children. Selection of the president of the most important orphanage in the world using these criteria cannot pass muster even under the lenient standards of the business judgment rule. Yet nowhere does the Report address this. Nor does one need to look much earlier than Dr. Lepley to find someone who was probably even less qualified to run an orphanage -- in the person of Rod Pera, an attorney whose troubled relations in Hershey are a matter of public knowledge.<sup>12/</sup> Again, the Report is silent on these issues. Need we add that Dr. Lepley -- chosen for his ability to ignore criticism "no matter how strong" -- was brought to the school just in time to commence the sweeping changes which MHSAA has pleaded are in violation of the Deed and contrary to the interests of the dependent children whom Mr. Hershey sought to aid?

As for individual decisions made by the Board and how they fare when closely scrutinized, these are treated below.

In sum, the application of the business judgment rule was a questionable and misleading approach to bring to this inquiry in the first place. This notwithstanding, certain decisions of the Board -- such as the hiring of a president who had virtually no credentials in the field of orphan care -- cannot withstand even the mild scrutiny of the business judgment rule, had K&L chosen to review those decisions closely rather than avoiding or glossing over them.

### **III. Flawed Analysis**

#### **A. The Report Is Written without Historical Context**

Because the Report merely applies the business judgment rule to the decisions of the Board, and because, under this standard, the Board's decisions are subjected to the lowest level of scrutiny, response to the substance of the Report affords it more dignity than it warrants. In essence, the Report sets up a straw man in the guise of "allegations of violation of the business judgment rule" and then knocks it down -- while presenting the appearance of doing more, as described above. However, certain glaring flaws in the Report demand rebuttal, even applying only the lenient standards of the business judgment rule. These flaws are addressed below, in a manner which also seeks to make clear precisely what MHSAA has been seeking from the Board of Managers and the relevant Pennsylvania authorities.

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<sup>11</sup> See, Transcript of Proceedings Before the Honorable Warren G. Morgan, June 3, 1999, p. 9.

<sup>12</sup> Pera was a member of McNeese, Wallace & Nurick, a law firm at the center of the most objectionable acts undertaken by the various Boards, as is further discussed below.

The most obvious flaw in the Report is its purposeful disregard of the nature of the school in historic context. This occurs both in macro, that is, the school in the history of orphan care in America generally, as well as in micro, that is, the unique features of the school, which the authors so utterly fail to grasp that not once in their entire Report do they even mention the "school Family," the phrase fondly used by Mr. Hershey himself. More than anything else, the latter failure demonstrates that the authors of the Report, after six months of inquiry, still just don't get it. It is little wonder that the Report is so condescending to MHSAA, and that the authors of the Report could barely conceal their contempt for the school's graduates during their inquiry and in their final product -- as though we were strangers to the school with too much time on our hands, rather than the adopted family of Mr. Hershey, who have made extraordinary sacrifices of time, money, and energy to fight to preserve his legacy and school Family, as well as to save the children's home in which we were raised.

## 1. Orphan Care In America

The Report completely ignores a central fact known to all who work with dependent and at-risk children and which informs any legitimate assessment of the actions of the Board: these children have been savaged for decades by a lack of resources devoted to their care. Thus, these children have been consigned to hideous institutions where they were warehoused in cramped quarters; they have been subjected to the nightmare of a foster care system whose chief feature appears to be sexual abuse of the children, and whose worthlessness is demonstrated by the fact that *25% of the homeless in America today were raised in foster care*; and they have been consigned to group homes where the only positive thing that could be said of them is that they were better than sleeping in the streets.

Each and every problem related to the care of dependent children in America can be traced directly to inadequate resources. That is, this most vulnerable group in America, a non-voting group, is always beggared when it comes to the distribution of government spending. By way of further illustration, it was only with the passage last year of the Adoption and Safe Families Act that *convicted felons were barred from serving as foster parents* -- perhaps the most eloquent testimony to what generations of America's dependent children have faced, as our nation scraped the bottom of the barrel for decades to find persons who would serve as foster parents. As one judge in family court put it -- at a conference on bringing back America's orphanages which was attended by the school's representatives -- "I'm not going to take a child from his home to be put in a foster home where he will be abused. If he is going to be abused, let him be abused by people who love him instead of being abused by strangers."<sup>13/</sup> Importantly, a little known fact (though well understood by experts in the field) is that the only reason that foster care is so prevalent today

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<sup>13</sup> Quoted by the Honorable Ella May Moriarty, in *Rethinking Orphanages for the 21st Century*, edited by Richard B. McKenzie, Sage Publications, 1999, p. 42. Nor does MHSAA imply here that all foster parents and all group homes are bad -- merely that, generally speaking, they have been a failure, as is demonstrated by the above-mentioned provision of the Adoption and Safe Families Act, numerous studies, and the first-hand accounts of the children themselves. See, e.g., Foster Care Youth United, the newsletter produced by some of America's foster children and their advocates.

is that it is *radically less costly* than quality residential care such as can be found at Boys Town or the Milton Hershey School -- a critical fact entirely overlooked by the K&L Report.<sup>14</sup>

Understanding this historic context is necessary to any legitimate assessment of the decisions of the Board, as it underscores just why, for instance, it was unconscionable to take \$50 million in assets intended for America's orphans -- an intention explicitly stated in Mr. Hershey's will -- and use this money instead to build a medical school for Penn State University. While the authors of the Report have chosen to ignore the fact, things such as this misappropriation had dire consequences for tens of thousands of would-be recipients of Mr. Hershey's largesse -- and MHSAA can take K&L's attorneys to homeless shelters in America and introduce them to thousands of individuals who would not be living in those conditions today had they had a Milton Hershey School to attend during the last three decades of the 20th Century. The latter has been amply demonstrated by the work of Andrew Cuomo, the U.S. Secretary of Housing and Urban Development, who surveyed America's homeless last year for the very first time, only to discover this startling fact about the composition of the homeless population in America. We daresay that the doctors trained at the medical school built with orphan assets would not have ended up in homeless shelters or in the streets had they been forced to attend one of the myriad other medical schools in the country instead of the Penn State medical school. Furthermore, the case studies of children in foster care during this period -- the sexual assaults on these children, their deaths due to savage beatings, and the complete failure of the various state agencies, including those of Pennsylvania, to adequately protect them -- is a matter of public record in light of the multiple statewide class action lawsuits brought against the various state foster care agencies throughout America.

While 500,000 children languish in foster care today, and while nearly one in five children in America live in poverty (as defined by the US Government, not using the Board's "new" formula, discussed below at pp. 52-54, Section M), the Milton Hershey School virtually alone among institutions devoted to orphan care possesses abundant resources to look after these children. Solely for this reason, each and every dollar that is spent by the Board is among the most precious of resources, and must be used judiciously, as the orphans' Trust is one of the few institutions in a position to properly see to the care of these children. By this standard, there can be no denying that such things as the construction of Founders Hall, the misappropriation of assets to build Penn State's medical school, the decision to shut Senior Hall, the destruction of perfectly adequate students homes, and the unconscionable decision to launch an unnecessary \$300 million construction program, are all outrageous and unacceptable -- and fail to meet approval even under the lenient standards of the business judgment rule.<sup>15</sup>

While the school cannot see to the needs of all of America's dependent children, the Managers are duty-bound -- and we, Mr. Hershey's adopted family, are likewise duty-bound -- to see that the Trust's resources are used in a manner which maximizes the number of children saved by Mr. Hershey. Understanding how scarce these resources are, and knowing the Trust to be a national treasure the assets of which must be guarded from dissipation, fraud, and misuse, the decisions of the Board fall abysmally short of what is to be expected of them. Furthermore, it is little wonder that these Managers have carefully

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<sup>14</sup> See, e.g., Crenson, Matthew A., *Building the Invisible Orphanage: A Prehistory of the American Welfare System*, Harvard University Press, 1998.

<sup>15</sup> All of these actions are treated in more detail below.

sought to keep out of their ranks or otherwise limit the influence of those who would oppose decisions which waste these assets -- including *bona fide* childcare experts, graduates, and former administrators whose wisdom would have put an end to such folly as the William Alexander construction frenzy. Likewise, it is also little wonder that the K&L Report excludes all historic context from its inquiry, lest it be forced to confront these issues.

## 2. The Unique Nature of The School

Although its lack of over-all historic context is disturbing enough, the Report also demonstrates an even more glaring lack of appreciation of the unique nature of the school. Nowhere is this more evident than in the manner in which MHSAA is treated by the authors of the Report, as though we were some sort of meddlesome interlopers, whining because of some sentimental and nostalgic attachment to old buildings and antiquated practices. K&L apparently does not understand what the school means for the children fortunate enough to land there, nor what Mr. Hershey intended when he created his institutional family. Perhaps the notion seems quaint to K&L, but we are a school Family; and we will continue to do all in our power to see that Mr. Hershey's legally binding intent is fulfilled, and that the Trust is used to benefit at-risk and dependent children, just as it benefitted us, and irrespective of how many reports the Board purchases to endorse their views of how to construe Mr. Hershey's wishes.

### B. K&L's Analysis of Trust History, Including the History of the Amendments to the Deed, Is Fundamentally Flawed

K&L's assumptions and analysis of Trust history are wholly flawed. Some of K&L's more glaring mistakes are discussed below.

#### 1. K&L's Position: Milton Hershey School, a Pennsylvania non-profit corporation, is the designated beneficiary of the Trust.

#### MHSAA's Response:

This is complete nonsense. The beneficiaries of the Trust are *the children*. Translated into plain English, the Report is saying: "The designated beneficiary of the Trust is the Board of Managers." This leads to the corollary that the Board owes a duty of loyalty and care to *the Board*. One need not hire expensive lawyers to observe that this makes no sense. This recently-invented notion is designed to provide the maximum amount of autonomy and unchecked discretion for the Board, and to take the focus away from the needs of the children. It is also similar to the argument asserted by the trustees in the infamous Hawaiian Bishop's Estate matter, an argument which ultimately resulted in the removal of all but one of the trustees in that matter, together with the filing of individual lawsuits against those removed.

The Board, which is charged with fiduciary duties under the Trust, *is* the Milton Hershey School, a Pennsylvania nonprofit corporation, the latter of which is "the School" referred to by K&L as the *designated beneficiary* of the Trust. Historically, the Trust was viewed as an orphanage that, in addition to other attributes, had a school. Thus, all assets were owned by, and all employees or agents were

employed by or agents of, the Milton Hershey School *Trust*, not by the Milton Hershey School. That is to say, the sole reason for the establishment of the Milton Hershey School -- a nonprofit Pennsylvania corporation -- as a legal entity was to incorporate the Managers. This was done in order to protect the Managers from personal liability should any of its members be negligent in carrying out their fiduciary duties under the Deed. Thus, when the statement is made that the Milton Hershey School or "the School" is the designated beneficiary of the Trust, this is the equivalent of a statement that the Board, itself, is the designated beneficiary of the Trust. Obviously, this makes no sense, because the logical consequence of it would be that the Board owes a duty to and only to itself, such as was disastrously asserted by the Bishop's Estates trustees.

Moreover, other than the Board and its lawyers, no one believes this to be true. Instead, every other interested person knows that the beneficiaries of the Trust are twofold: (a) the general public, whose interest are represented by the Attorney General (as with all charitable trusts); and (b) those individuals who have been accepted into the school and thereby become identified beneficiaries of the Trust, and whose specific legal rights the Attorney General recognizes.

The original Deed imposed on the Managers the legal burden to represent *the individual* identified beneficiaries, and to assume *parental obligations* to the children, through a mechanism then known as "indenturing."<sup>16</sup> Within eight years of Mr. Hershey's death, the Managers sought to get out from under these obligations, by simply ignoring -- without court approval -- the explicitly-stated requirement in the Deed that the Managers in fact assume parental obligations towards the children through "indenturing." Although we will deal with indenturing further below, it is sufficient to point out here that the various Boards of Managers have struggled -- of course, only after Mr. Hershey died -- to escape from under the burden of this solemn duty to the children which Mr. Hershey explicitly included in the Trust. It is precisely the struggle to escape from this duty that yields such preposterous conclusions as "The [Board] is the beneficiary of the Trust."

On the question of who the beneficiaries of the Trust actually are, here is what the Orphans' Court, the Attorney General, former members of the Board, and the present Board itself have said on the subject over time:

**Orphans' Court:** The Honorable Warren G. Morgan, in his December 7, 1999 opinion, stated: "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." This seems clear enough: the Deed contemplates a direct gift to each child. For the "School" (that is, the Board) to be the beneficiary, at a minimum the gift to the children would be indirect. Furthermore, on October 7, 1966 the Hershey Trust Company and the Board of Managers filed a formal petition with the Orphans' Court in which they asserted that, "The subject Trust is a charitable trust and **its beneficiaries by its terms are confined to poor orphan boys** who meet the qualifications of the Trust language." The characterization of the "beneficiaries" contained in this petition was accepted in its entirety by the Orphans' Court on December 22, 1966.

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<sup>16</sup> Indenturing is treated in more detail below. Generally speaking, indenturing was similar to adoption by the individual Managers of the admitted students, with two exceptions. First, there was no permanent termination of the biological parental relationships, with these relationships encouraged for any surviving parent or guardian of the children. Second, the child did not receive any general rights of inheritance from Mr. Hershey, but did inherit the specific benefits set forth in the Deed. Otherwise, the indenturing process was akin to adoption in that the individual Managers assumed the role of parent, which also contributed to the strong sense of school Family that the graduates possess.

**Attorney General:** The Attorney General, in a carefully negotiated, written agreement entered into with the Board and designated the "Memorandum of Understanding," makes explicit reference to "the beneficiaries of that Trust, namely the MHS students."

**Board of Managers and Trustee:** The Board concurred with the position of the Attorney General in the "Memorandum of Understanding" described above, by deliberately entering into that binding agreement. Moreover, in filings before the Orphans' Court -- filings that are also legally binding -- the Board has made reference to "the ultimate beneficiaries - needy children." *See, e.g.*, Reply Brief of Milton Hershey School and Hershey Trust Company to Brief of the Office of the Attorney General, October 21, 1999, p. 24. Finally, in the proceedings before the Orphans' Court over a 90-year period prior to 1999, the Board never claimed that the School was the designated beneficiary of the Trust. Furthermore, and as mentioned above, the Hershey Trust Company and the Board of Managers filed a formal petition with the Orphans' Court on October 7, 1966, in which they asserted that, "The Subject Trust is a charitable trust and **its beneficiaries by its terms are confined to poor orphan boys** who meet the qualifications of the Trust language."

**Former Members of the Board of Managers:** Joseph S. Gumpher, an alumnus of the school and a member of the Board for 28 years, made explicit mention of this subject in *Institutional Trust Service* (June 1950, p. 14), wherein Mr. Gumpher writes: "Beneficiaries. The indefinite beneficiaries of the trust are members of a class of dependent children... These, then, are the beneficiaries of the trust." Mr. Gumpher, as a former member of the Board and as a former President of the Trust Company, would have known who the beneficiaries of the Trust are.

**Mr. Milton S. Hershey:** It goes without saying that if anyone would know the identity of the intended beneficiaries of the Trust, it would be Mr. Hershey himself. Mr. Hershey was often quoted as follows: "Well, I have no heirs--that is, no children. **So I decided to make the orphan boys of the United States my heirs.**"

Thus, it is safe to say that the concept that the School (that is, the Board) is the designated beneficiary of the Trust is clearly wrong. This notwithstanding, the Board persists in its endeavor to insert itself as the designated beneficiary of the Trust. Nor is this a mere academic quibble on some obscure point of charitable trust law: The reason for this persistence by the Board is the Board's desire to limit its direct duties to disadvantaged children, and thereby to permit it to favor other outside interests which compete with the interests of the children, as described in more detail below.

2. **K&L's Position:** MHSAA sought to prove Mr. Hershey's intent by utilizing irrelevant archival material.

**MHSAA's Response:**

K&L seeks to ignore as irrelevant all that was submitted to them by MHSAA simply because the material related to time periods *after* the Deed was executed, though still during Mr. Hershey's lifetime. K&L's analysis is wholly flawed as to the law and intentionally misleading as to what it was told by MHSAA.

MHSAA provided K&L with a legal analysis of the exact language of the Deed itself, which analysis had been generated by Mayer, Brown & Platt, a global law firm with over 900 attorneys, and whose diversified practice includes a trust group developed, in part, by George Bogert. During his lifetime, Mr. Bogert became a leading authority on trusts, and his treatise on the subject is quoted twice by Judge Morgan in the Court's December 7, 1999 decision, rejecting the Board's CHILD *cy pres* petition. The analysis performed by MHSAA's counsel, as explained to K&L, turned *first* on an explanation of the simple, straightforward and plain meaning of the Deed as it relates to the topics under study by K&L.

Having established the Deed's plain meaning on these topics, MHSAA's counsel then went an extra step, by demonstrating that this analysis of the plain meaning of the Deed was wholly confirmed by various contemporaneous writings of Mr. Hershey, the Board, and the general public at all times prior to Mr. Hershey's death.

The submission of archival material thus was not, and K&L understood that it was not, a substitute for an analysis of the clear and plain meaning of the Deed. Rather, it was submitted to confirm that the plain meaning of the Deed was correct because this meaning is supported by everything that Mr. Hershey did for the rest of his life subsequent to execution of the Deed. After all, if Mr. Hershey's *own activities* in carrying out the Deed *during his lifetime* are not relevant to confirming the plain meaning of a deed which the Board might seek to interpret differently after Mr. Hershey's death, then what, we ask, *is* relevant? K&L instead looked at what the Managers *decided* Mr. Hershey meant *after* he died. MHSAA submits that nothing could be less relevant to the inquiry than what the various Boards of Managers did immediately after Mr. Hershey's death -- unless it is to prove precisely what Mr. Hershey *did not want*, as is evidenced by the fact that these things could not be accomplished during his lifetime.<sup>17</sup>

**3. K&L's Position:      The "vision" of Mr. Hershey is merely a target toward which the Board may aim and give deference, but it is not binding upon them.**

**MHSAA's Response:**

An artful technique deployed by the Board in the past and used to good effect by K&L is to refer to Mr. Hershey's intent -- as explicitly stated in the Deed (and as consistently followed by him during his lifetime) -- as his "vision." As stated above, Mr. Hershey himself expressly rejected Paul Reed's suggestion that "a clause be added to the Deed of Trust directing the Board of Managers to consider certain other parts as statements of wishes." Thus, the technique deployed by the Managers was precisely what Mr. Hershey rejected. This technique suggests to the reader that such "vision" is something less than Mr. Hershey's legally binding pronouncement, and is instead some malleable idea, which can be stretched or shrunk, depending on the whims of a particular Board (that is, as if the Deed were merely a statement of "wishes," in the words of Paul Reed). This manner of treating subject matter legally binding on a Board that is obligated to abide by Mr. Hershey's instructions provides a convenient means by which to suggest that the Board must be deferential to Mr. Hershey's intent, while not being wholly bound by it. In other words, the

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<sup>17</sup> See footnote 5 above.

Board wants its discretion to be unlimited, even by Mr. Hershey's explicitly-stated intentions. K&L endorses this substitution of "vision" for legally-binding "intent," which MHSAA submits is contrary to the law.<sup>18/</sup>

4. **K&L's Position:** **Mr. Hershey wanted the Hershey Interests represented on the Board because he sought to optimize a family of enterprises working together in harmony.**

**MHSAA's Response:**

A long-perpetuated myth (based upon a self-serving misstatement of the facts) has been that Mr. Hershey chose certain representatives of the various Hershey Entities to achieve a set of purposes still being achieved today. K&L says:

Although it has been said the Trust Company Directors were once representative of various community interests, after creation of the School Trust, Mr. Hershey appears to have favored representatives of HFC [Hershey Foods Corporation] and HERCO on the board of the Trust Company. Given Mr. Hershey's vision of a family of enterprises working together in harmony, it is not surprising that Controlled Company personnel served in overlapping capacities. The resulting relationships were not traditionally perceived to create invidious conflicts between the Managers' duties to the School and their duties to Controlled Companies that they also served.

Although this statement is accurate to the extent that Mr. Hershey did seek to optimize "a family of enterprises working together in harmony," K&L left out the most important ingredient: the purpose of this was not to harmonize their separate and distinct business goals and objectives in order merely to optimize such business goals and objectives collectively -- for that simple endeavor could have been (and today can be) achieved by merely forming a holding company. Rather, Mr. Hershey put those in charge of his businesses on the Board of Managers so as to make their pursuit of such separate, distinct, and often conflicting business objectives *servient* to the extraordinarily high fiduciary duties that the assumption of parental responsibilities towards the children imposed on each individual Manager, an assumption of parental duties that was effectuated through *indenturing* -- the process wherein the Managers assumed parental duties to each child admitted to the school under the terms of the Deed of Trust. So demanding was this personal burden towards the children (and obviously not what the individual Managers wanted), that within eight short years of Mr. Hershey's death, the Board of Managers quietly *discontinued* indenturing, without even seeking permission of the Court. What's more, they did not seek the Court's permission for

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<sup>18</sup> While violence to Mr. Hershey's legally-binding intent is consistently dressed by the Board in the clothes of their ostensibly acting pursuant to his "vision," there is a corresponding practice in the Board's use of Hershey family names for any project no matter how out of line with Mr. Hershey's instructions, as though to so use the Hershey family names would somehow excuse the attendant divergence from Deed requirements. Thus, Penn State's medical school is named, "The Milton S. Hershey Medical Center;" and the institute which the Board sought permission to build last year was to have been called the "Catherine Hershey Institute for Learning and Development."

this change in policy until 17 years later, even though the Board was before the same Court in 1963 and again in 1968.<sup>19</sup>

*Why then did the Board wait so long to request permission from the Orphans' Court to end indenturing?* Because: (1) the extraordinarily high standard of care which the Managers owed to each beneficiary required, among other things, that the Managers represent each child in the Orphans' Court should the children's rights be at issue; and (2) in 1970 (17 years later), the youngest beneficiary from 1953 -- the year in which the Board stopped indenturing without court approval -- had been 4 years old (a minor), but by 1970, *had turned 21 (and was therefore an adult)*.<sup>20</sup> Once the last of this group of beneficiaries had become adults, they were legally able to protect their own rights, and the Managers were no longer obligated to represent them in court, and therefore had no conflict in seeking the court's *ex post facto* legal ratification of the decision that had already been put into effect 17 years earlier.

If MHSAA's explanation is not accurate in this regard, than what, we ask, is the explanation for this 17-year gap? Sheer coincidence? As all persons dealing with minors and court proceedings are aware -- and as McNees, Wallace, & Nurick, the attorneys who have helped engineer all of these changes, cannot possibly have failed to know -- surrogate courts are punctilious in protecting the rights of minors when the legal interests of those minors are at issue. Failure, for instance, to obtain the approval of these courts for the settlement of a claim of a minor can result in an examination of the matter decades later, after the child has attained adulthood. In short, it is difficult to accept that this was pure coincidence. Of course, one way of determining the facts of this matter is to simply have the Board make available the evidence related to the decision, something which it has to date refused to do, in a manner which only underscores the suspicious nature of this 17-year gap. Nor can MHSAA emphasize enough how central this assumption-of-parental-obligations issue is to the needs of the orphans whom Mr. Hershey sought to save.

Most importantly, one of the primary reasons why the school has been less effective since these changes were made has been that, by eliminating the assumption of parental obligations to each child that had previously been achieved through "indenturing," the Board has obtained greater freedom to reject the neediest children (such as full orphans and wards of the court) as well as to send "problem" children back to their parents, guardians, or relatives as soon as the Managers decided that the children had become too difficult. This, then, made it no longer necessary to accept the harder cases (such as wards of the court) or to work to solve problems once the children had passed through the short waiting period during which their status was probationary, as had been the standard from 1909 through the 1950s, and as is the case with all biological families (absent the waiting period in the latter case, of course).

Instead of having this parent-like obligation to the children, and instead of accepting large numbers of children with literally no parent in their lives, the Managers now have an easier time just sending

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<sup>19</sup> K&L refer to "indenturing" as "an archaic practice of the 1950's." This canard is treated below at pp. 45-47, Section I.

<sup>20</sup> It is also telling that one of the Managers, who had been a director of MHSAA for nearly a decade during the 1960's, resigned as a director of MHSAA in 1970-- only to return as a director of MHSAA in 1971. Was this also part of a concerted plan to avoid duties such as he would have otherwise had to the alumni of the school had he remained a director in that year? Does this not also raise questions about the obligations of a fiduciary to disclose knowledge which he knows is material to the interests of those persons to whom he owes a duty?

problems back "home" and -- incredibly -- *today accept very few, if any, children who are wards of the court or otherwise completely lacking parental care.* The latter point demonstrates more than anything else what the various Boards have engineered over time: there are today very few, if any, orphans, wards of the court, abandoned children, or foster care children at the Milton Hershey School, as the Board moves away from being the home and family for these children that Mr. Hershey had created. This phenomenon is made worse by the assertion that *the Board* is the beneficiary of the Trust, because it contributes to the notion that ease of management is more desirable than reaching needy children. It also contributes to an increasing focus by the Board on the operation of the family of related businesses without being servient to a high personal fiduciary duty to each child, which when taken together accelerate the development of a "defined package" school for less needy children, where such less needy children at the school are free to make the best of it or leave.

Furthermore, by eliminating the high standard of care owed to each child and young adult beneficiary, an insurmountable conflict was created for the Managers in their effort to serve the Trust -- the Trust that was operating the school -- as well as to simultaneously serve the Hershey Entities. This is because the school or orphanage contemplated in the Deed by Mr. Hershey competes directly with the Hershey Entities, as a matter of course, for limited resources (e.g., land) and in regard to governance matters that affect the town directly (e.g., rules related to the children, such as their access to town, the type of child brought to the town, whether the child was encouraged to stay in the area after graduation, how quickly problem children were sent away, etc.). During the time that the Managers had an express fiduciary duty to each child beneficiary as a result of the assumption of parental obligations by the Managers through "indenturing," *each of the Managers could be relied upon to balance the interests of the Hershey Entities against the higher duty that they owed to each child,* in a way that would never permit the children's interests to become subservient to those of the Hershey Entities. This is much as the directors of a family trust who serve on the boards of a family's related businesses can be relied upon to see that the business interests that they serve never trump the family interests that they simultaneously also serve. **However, once the express fiduciary duty to each child was discontinued (through (i) the deliberate abandonment of Mr. Hershey's requirement that each individual Manager assume parental obligations to each child through "indenturing" and (ii) the substitution of the Board as the designated beneficiary of the Trust in replacement of the child and young adult beneficiaries), the mechanism for protecting the children's interests vanished, and the Managers then became free to (and did) place their other duties (such as to the Hershey Entities) first.**

It was by eliminating this high level of individual fiduciary duty that the Managers were able to create the illusion that *they* are the beneficiaries of the Trust, under the misleading title "the School." Furthermore, the pattern of their behavior over five decades -- the methodical and carefully orchestrated progression from Managers which put children first to a Board where the direct duties to the children were slowly eroded, and from an orphanage with a school to a Trust where the Board claims to be the beneficiary of the Trust -- would not have been acceptable to anyone, including former Attorneys General, had these persons been properly advised of what the actual long-term goals of the Board were. These long-term goals, conceived by some members of the Board before Mr. Hershey died and then steadily pursued even before Mr. Hershey's body had turned cold, have been implemented with a chilling degree of deliberation. The modifications of the Deed which have been granted by the Orphans' Court occurred because that court was never fully apprised of the full implications of the long term goals of past Boards. For this reason, each of the present Managers has a duty to return to the original construct of the Deed, as the changes to the Deed

were obtained only by willfully misleading the Orphans' Court and, at times, the various Attorneys General. No greater proof of this can be found than the current composition of the student body and the associated recent trends at the school -- which are leading the Trust farther and farther away from the orphanage and school Family which Mr. Hershey had created. Again, K&L provides absolutely no comment on these issues other than its baseless suggestion -- thoroughly refuted below -- that discontinuing indenturing was acceptable because it was "an archaic practice of the 1950's."

**5. K&L's Position: Moving real estate and other Trust resources among or between Hershey Foods, HERCO, Penn State University, Derry Township and others is acceptable.**

**MHSAA's Response:**

On a related topic, K&L blends a number of concepts without careful analysis, so as to lead one to believe that selling or otherwise transferring 1,796 acres of land to Hershey Foods, HERCO, Penn State University, Derry Township and others is acceptable.

In the first place, MHSAA's research of property and other records has led us to conclude that the 1,796 acres mentioned by K&L should in fact actually be 2,797 acres. Irrespective of whose number one uses, the transfer of all of this land is among the best evidence available to demonstrate that there is a gross conflict between the interests of orphans in America who should be served by the Trust and the interests of HERCO, Hershey Foods, the Hershey Medical Center, and the town of Hershey generally, the latter of whom over a period of decades following Mr. Hershey's death took control of the orphans' Trust, unlawfully modified the Deed, substituted themselves as the beneficiary of the Trust, and thereby inappropriately and immeasurably profited from the illegal allocation of resources to their benefit. What is completely and conveniently ignored by K&L is the fact that any allocation of Trust resources between these various competing entities while Mr. Hershey was alive was subject to the extraordinarily high fiduciary duty that was owed to each individual beneficiary as a result of indenturing, as described above. This was the tradeoff that Mr. Hershey established to make the allocation of resources possible -- and this is also why Mr. Hershey's construct was so brilliant. Even where resources were allocated amongst the various entities, those making the decisions were *not permitted* to let their obligations to the various businesses or to the community trump their extraordinarily high fiduciary duty to each child, who was recognized as a beneficiary of the Trust.

Unfortunately, the Managers dismantled Mr. Hershey's original construct during the 1950's, 1960's and early 1970's. After the original construct was dismantled, the Board preserved only those aspects of Mr. Hershey's original design as suited their own objectives, which then and now results in grave and insurmountable conflicts of interest, because these objectives are no longer subservient to a shared duty to the children. Put another way, once the Managers ceased assuming parental duties to the children through their stealthy discontinuance of indenturing, anyone with any business interests even remotely related to the town of Hershey should have been immediately removed from the Board, because these persons were obviously going to start engaging in acts which favored the non-child interests -- such as building the Penn State medical school and the numerous other acts described in this Response.

6. **K&L's Position:** **The Deed of Trust does not have a plain meaning consistent with MHSAA's understanding of that meaning and the related Board decisions fall within the "broad discretion" of the Board.**

**MHSAA's Response:**

Although the Deed is a complex document drafted in an old style, MHSAA's legal analysis has demonstrated that the Deed's plain meaning is clear. However, K&L dismisses any analysis that concludes that the Board does not have authority, or "discretion," where they seek it, relying on some vague notion of "broad discretion," which K&L apparently contends is not even servient to that which is explicitly stated in the Deed.

These were the same arguments presented by the Board in the 1999 *cy pres* proceedings, wherein the Board sought to justify limiting the size of the student body at the school as within their "broad" discretion. Judge Morgan summarily rejected these arguments, stating:

**Any discretion of the Board of Managers is servient to the dominant intent of the Hershey's to care for as many children at the School as the income will permit.**

Thus, as Judge Morgan observed, any provision in the Deed which constitutes a dominant intent would require that the Board's discretion be servient to it. In fact, the process of indenturing achieves just this result for each individual child, by making all of the discretion of each Manager *servient* to the best interests of each child or young adult beneficiary. Moreover, in a number of instances, such as those relating to scholar benefits before and after graduation, destruction of Trust property, centralization of the campus, sale of land, preservation of a rural campus, and others, MHSAA has demonstrated that the plain meaning of the Deed limits the Board's discretion -- or as Judge Morgan put it, makes it "servient" to specific requirements of the Deed. As MHSAA has shown, the Board has exceeded its authority in a number of areas through reliance on the vagaries of this "broad discretion."

7. **K&L's Position:** **There is nothing to be done regarding prior Deed amendments even if they were obtained under illegal circumstances and without adequate representation of interested parties.**

**MHSAA's Response:**

K&L ignores the legal history surrounding the various amendments to the Deed in 1963, 1968, 1970 and 1976. As described below, these amendments were obtained without providing the advance public notice and public hearing required by law.<sup>21</sup> As such, it is arguable that the defects in the relevant orders were jurisdictional, that is, that the Orphans' Court never had jurisdiction to grant the petitions. Thus, MHSAA believes that each of these orders is presently susceptible to collateral attack on jurisdictional grounds. If the Orphans' Court did not have jurisdiction over these particular proceedings, then the

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<sup>21</sup> See below at pp. 32-37, Section C.

decisions reached in 1963, 1968, 1970 and 1976 would be null and void. This proposition may be tested in Pennsylvania's courts in the future, particularly given the wholly unprecedented nature of what transpired in the past and the wholly novel appellate questions thereby raised.

Likewise, certain of the Deed amendments, such as the one which ended the practice of the Managers' assuming parental duties to children through "indenturing," were obtained in a calculating and deceptive manner, in essence pulling the wool over the eyes of the Attorney General's office and the Orphans' Court -- because the latter parties had no means of understanding such things as the 17-year gap which separated the Board's ending of the practice of "indenturing" from their finally coming before the Orphans' Court and asking for *ex post facto* approval of the same. In short, these changes constitute a kind of fraud on the court and on the public, and as such cannot be dismissed by mere reliance on the running of the statutes of limitations.

MHSAA thus believes that, besides the jurisdictional defects to past Deed-related orders, an argument exists that the statutes of limitations for challenging such orders were equitably "tolled" as a result of the fraud on the court and on the public. As K&L points out, the statute of limitations is five years from the date of entry of each of these orders. However, it is an open question as to when this five-year period begins to run. Thus, MHSAA and officials of the Commonwealth of Pennsylvania may still have time to challenge these prior decisions.

K&L also ignores the fact that Judge Morgan expressly called into question the propriety of the earlier amendments, refusing to accept the 1963 decision as binding precedent. K&L avoids all of these issues by simply declaring the amendments irreversible as a matter of law, relying almost exclusively on the Second Restated Deed to do so.

**Irrespective of the legal arguments described above, MHSAA believes that as a matter of fiduciary duty and ethics, where the current Managers have actual knowledge that prior amendments were not properly obtained, and that the effect of such amendments upon the Trust and upon the poor, dependent children who are to be served by the Trust, was not then, and is not now, in the best interests of those children or in keeping with the true purposes of the Trust, the Managers have a duty now to reverse these decisions -- because the rights of this class of child beneficiaries were radically altered in the absence of the due process and legal safeguards to which these children were entitled. After all, why would the current Managers' fiduciary duty not mandate that these former sins be redressed?**

With regard to the precedential weight of the string of Deed amendments that produced these changes, Judge Morgan's language is worth noting :

*As to the alleged pro tanto failure to the trust, we reject the Managers' suggestion that conclusions reflected in decrees of this Court in prior proceedings in which the expression "pro tanto failure" was asserted are binding upon us in this proceeding. The proceeding to which particular reference is made is that in 1963 wherein this Court authorized disbursement of \$50,000,000 from the accumulated income of the School Trust for a medical school for the Pennsylvania State University. That proceeding was not contested; the Attorney General joined in the petition. There was no public notice of the pendency of the*

*matter, no hearing was conducted, and no Opinion was filed to support the decree.*  
(Emphasis added.)

The questionable attributes of the 1963 proceeding enumerated by Judge Morgan are also attributes of each of the 1968, 1970 and 1976 proceedings. K&L, of course, completely overlooks this, because they obviously have no answer. (See below at pp. 32-37, Section C.)

The current Managers now have actual knowledge that the prior amendments were not properly obtained, and MHSAA believes that the current Managers also know that the effect of such amendments upon the school, the children, and the school's young graduates was not in the past and is not now in the best interests of the children or these young graduates. **It follows then that MHSAA and the public should be entitled to learn why the fiduciary duty of the current Managers would not mandate that these impermissible and ill-advised changes not be reversed today.** Is knowledge of these matters not sufficient to induce the current Managers to completely exhaust every avenue of investigation into the propriety of these previous amendments, and redress any wrongs that were effected thereby? Instead, however, the current Board simply hires "Special Counsel" to provide them with a means for avoiding this duty, through the safe harbor of the business judgment rule, and through such bromides as "the law encourages repose." So long as there is no repose for America's orphans, MHSAA will not afford repose to this Board or to Pennsylvania authorities.

The list of things which the present Board should reestablish in accordance with Mr. Hershey's original construct -- a construct intended to create, and preserve, our institutional school Family -- include the following:

- ! A return to the higher fiduciary duty owed to each child and young adult beneficiary through the assumption of parental obligations to each child, by means of some form of "indenturing";
- ! Strict prohibition of all conflicts of interest on the Board, so that the interests of the children -- and not of local businesses -- will be paramount;
- ! Preservation of a rural campus, making use of the 10,000 acres retained by the Trust, including its extraordinary reserve of natural and scenic treasures;
- ! Cessation of the senseless destruction of Trust assets (e.g., Senior Hall, historic and viable student homes, etc.);
- ! Recognition that the true beneficiaries of the Trust *are the children and young adults*, and **not** the Board itself;
- ! Recognition of the mandatory educational requirements set forth in the Deed, including a vocational program for needy children who are not college-bound, and suitable post-graduate assistance for young graduates;

- ! Return to admissions policies which favor the neediest of America's children, including foster children and wards of the court, in addition to the children of poor, single parents; and
- ! To avoid any more of the chicanery witnessed since Mr. Hershey's death, the Managers should be required by law to operate pursuant to public meetings and to provide full disclosure of all their activities (other than with respect to traditionally confidential matters), and not behind closed doors, as they continue to do.

**8. K&L's Position: The Report is the product of a thorough and independent investigation.**

**MHSAA's Response:**

The Report, the Board resolutions authorizing the Report, the announcement of the appointment of Thornburgh as Special Counsel, and the press releases issued with the Report, all lead one to believe in no uncertain terms that the Managers wanted a thorough investigation into all of the issues so as to resolve these matters once and for all. Likewise, the impression has been created that everyone within the Board's control or influence was to be fully cooperative, and that the investigation was to be independent.

However, what actually occurred is that Robert Stets, a former partner in McNees, Wallace & Nurick, and therefore one of the very individuals whose conduct is, directly and indirectly, under investigation, served as gatekeeper for much of the information flowing to K&L.<sup>22</sup> Bob Stets also severely limited MHSAA's access to archival material within the Board's control during the course of the investigation, asserting that he was completely unsuccessful in locating the records regarding MHSAA's first 17 years, which were ostensibly lost while within the sole custody and control of the Board in 1945 (the first 15 years of original records) and in 1947 (the next two years of original records).

Although the resolutions of the Board provided that "all directors, officers, employees, and agents of the School [are] to cooperate with the inquiry," the administrators of the school took no general steps to encourage anyone to voluntarily cooperate in the investigation. Those who did cooperate did so only because they took the risk to come forward on their own, or because MHSAA identified them as witnesses. However, whenever K&L was to interview an employee, Bob Stets would call the employee in advance and "tell them it was OK to participate in the investigation." This naturally had a chilling affect on their participation, because the nature of the information that they had to offer would make it easy to determine

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<sup>22</sup> Lest the point be overlooked, the fact that attorney Bob Stets was ever dispatched to the school from the law firm of McNees, Wallace & Nurick is by itself deeply troubling. McNees, Wallace & Nurick has played a central role in every single questionable act undertaken by the various Boards over time, commencing with the ending of indenturing (described above), and up to the present "centralization" scheme (described below). It appears that Stets has come to be employed by the school solely for the purpose of facilitating the reconstruction of the Trust away from what Milton Hershey wanted, with a full-time attorney apparently being required for the process -- and with that attorney being supplied from none other than McNees, Wallace & Nurick, whose street address is still listed as Stets' in his Martindale & Hubbel attorney directory listing. McNees, Wallace & Nurick's role in the removal of \$50,000,000.00 in funds from the orphans' Trust to build the Penn State medical school is discussed below, at pp. 32-37, Section C.

from whom the particular information came, especially when coupled with the fact that Bob Stets knew in advance that they actually did participate. Moreover, as best as MHSAA could tell, release of written material from the school's records to K&L was typically first reviewed by Bob Stets, and only made available once Stets gave his approval.

MHSAA recommended that the school Administration simply send written notice to all potential witnesses assuring all who participated that no retribution would occur. MHSAA also requested the removal of Bob Stets from his gate-keeping position regarding the review of our school's archives. The Managers did implement, through K&L, some assurances that participation in the investigation would not result in adverse employment consequences. However, no plan for communicating the Managers' instruction that all school employees, directors, officers and agents were to cooperate in the investigation was ever distributed. Likewise, the process of confirming who was participating did not change, and Bob Stets remained the gatekeeper.

Moreover, some former members of the Board elected not to participate in the investigation. At least one former member of the Board, who produced an oral history interview, required that it not be opened until after his death, and refused to let it be reviewed by K&L or MHSAA, notwithstanding assurances from MHSAA that private matters would be kept private.

In a related vein, MHSAA has learned that certain members of the Board or members of the school Administration have undertaken wholesale purging of select documents that ought to have properly been retained intact by the school, and were thus not available for inspection during the investigation. This occurred at least once in the early 1980's, and at least twice thereafter. The nature of the purging includes review and selective removal of certain archival records of the Trust as well as destruction of records related to the school's children. One goal of this purging appears to have been the reconstruction of the history of the real estate transactions that have steadily carved away the land holdings of the Trust, to the advantage of local interests. One aspect of the real estate changes is that, with respect to transactions occurring after the early 1980s (that is, after Rod Pera became a Manager and in charge of the real estate dealings of the orphans' Trust), ownership came to be documented and recorded so as to assert or imply that the "School" (that is, the Board) is the beneficiary of the Trust. For the first 70+ years of the Trust, ownership was documented and recorded in a manner which negated any construction of the Deed which suggested that the School (that is, the Board) was the beneficiary of the orphans' Trust. The purging of these documents and other records and the manipulation of real estate records appear to have paralleled the various Deed amendment actions undertaken by successive Boards, as though to be sure that anyone reviewing the matter later would only find in the record material which would support these amendments. These facts, together with the "disappearance" of the first 17 years of MHSAA records while in the custody and control of the Board, would at the very least raise questions about the propriety of what occurred. Yet nowhere is this matter treated by K&L. One can thus draw their own conclusions about the "thoroughness" of the investigation.

- 9. K&L's Position: The Report gave due consideration to the legal and factual information supplied by MHSAA.**

### MHSAA's Response:

In many cases where K&L states that it is responding to MHSAA, K&L leaves out key components of the analysis to which K&L evidently had no response. For instance, MHSAA's analysis of the mandate to provide post-secondary education to graduates has at least two key components which K&L completely ignored. MHSAA's position is not that Paragraph 21 of the Deed mandates this education, as is asserted by K&L. Rather, it is that Paragraph 16 mandates this education. MHSAA points out that, although the Deed clearly states when the Managers have discretion over matters expressly contemplated in the Deed, the determinative phrase of Paragraph 16 contains absolutely no language that suggests that the Managers have any discretion in the matter. The same paragraph provides that the level of such education must be determined solely on the basis of certain unique characteristics of each child.

Paragraph 16 of the Deed reads, in part, as follows:

They shall be instructed in  
*the several branches of a sound education,*  
*agriculture,*  
*horticulture,*  
*gardening,*  
such mechanical trades and handicrafts as the Managers may determine, and  
such natural and physical sciences and practical mathematics as in the opinion of the Managers it  
may be important for them to acquire, and  
**such other learning and science as the tastes, capacities, and adaptability of the several  
scholars may merit or warrant,**  
**to fit themselves for the trades they are to learn, and a useful occupation in life.**

As can be observed by comparing the highlighted text with the normal text, the discretion of the Managers applies *only* to mechanical trades, handicrafts, natural and physical sciences and practical mathematics, but not to any of the other categories. Moreover, there is an entire category of education with no age limit or Manager discretion associated with it -- which is "***such other learning and science as the tastes, capacities, and adaptability of the several scholars may merit or warrant.***" Without going into any more detail (and there is much more to MHSAA's analysis), one can easily observe that K&L completely glossed over this essential component of MHSAA's analysis, and ignored the plain language of the Deed to do so.

Moreover, the focus K&L has on Paragraph 21 is misplaced. Paragraph 21 merely grants the authority to spend the money. Again, although the Deed expressly states when the Managers have discretion over matters expressly contemplated in the Deed (thereby mandating the proper construction of provisions where "discretion" is not mentioned -- as not being subject to discretion), the relevant phrase in Paragraph 21 does *not* state that the Managers have any discretion in the matter. Only a lack of Trust income can serve to limit this authority. Here is the relevant text of Paragraph 21:

The Managers may **in their discretion** provide for such a system of premiums and rewards dependent upon good behavior, character, and proficiency, as shall enable those of the scholars entitled to its benefits to receive from the Managers, when they leave the School at the full expiration of their term, a sum of money not exceeding One Hundred Dollars to

any one scholar, which sum of money shall be paid by the Managers out of any of the moneys received by them as income of the School,

or

the Managers may, out of the income, if sufficient for the purpose, provide for or contribute toward the further education of the scholar at some other school, college, or university.

As is obvious from the text itself, the second clause does not contain the phrase **in their discretion.**" Moreover, the phrase "provide for or contribute toward" reflects the fact that there may not be enough income at any particular time. That is to say, the educational burden upon the Trust is set forth in Paragraph 16, and the Trust can not avoid these obligations unless it runs out of money -- much as one would expect for a man who wanted to treat his institutional family as one would treat their biological family. Thus, it appears that K&L has simply intentionally misstated MHSAA's position, there being no adequate response to it.

Furthermore, and as stated below, this question has been emphasized less by MHSAA due to the substantially increased college aid package announced by the Managers early this year, in the wake of the public attention drawn to the matter by MHSAA. MHSAA simply did not want to delay the implementation of this vastly better program, because our young graduates need the additional funding. However, and as K&L neglects to treat in their Report, the fact remains that generations of graduates in the 60's, 70's, 80's, and 90's were beggared in their efforts to attend college, often forgoing the opportunity, even while the local construction business was booming due to the lavish building projects undertaken.<sup>23/</sup> Similarly ignored by K&L is the failure of the Board even to this day to have created a meaningful post-graduate transition assistance program -- something equally important to providing financial aid for college, and evidencing just how uncaring these Boards have been towards the needs of, and the Trust's obligations to, our graduates over several decades.<sup>24/</sup>

**10. K&L's Position: MHSAA is not an affiliate of the Trust and K&L has reviewed the relevant information to make such determination.**

**MHSAA's Response:**

MHSAA believes that it is obligated and legally authorized to serve Mr. Hershey's intentions through, among other things, full use of MHSAA in the review, design, planning and management of the school and the orphanage -- as well as the school Family -- created and maintained by the Trust. This full

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<sup>23</sup> In the course of the 1999 CHILD *cy pres* proceedings, it was revealed how poor the results were for graduates while in college. Cy Pres Hearing Record, at Page 140. This material demonstrated an unwillingness of the Managers to take responsibility for the dropout rate and other related issues. The Managers' own testimony coupled with its own expert research suggests that the Managers had, over the years, adopted a philosophy of "do as little as possible for our graduates, because they are not our problem anymore." However, the Deed mandates that the Trust provide benefits to scholars after graduation.

<sup>24</sup> Again, in direct response to attention brought to this matter during the course of the CHILD *cy pres* proceeding, the Board announced the hiring in September of this year of a Director of Transitioning. That hiring is addressed below.

use of MHSAA contemplates various activities -- for example, MHSAA as an advisor to the Managers, and selection of MHSAA leaders to become members of the Board of Managers. MHSAA believes that the historic record and the relevant legal documents all support this position, that is, that Mr. Hershey created MHSAA as an affiliate, and an integral part, of the Trust. On the question of whether MHSAA is indeed an affiliate of the Trust, K&L leads the reader to believe that it has reviewed all relevant material. However, K&L neglects to mention that the first 17 years of the records of MHSAA "disappeared" while under the custody and control of the Board, at a time when the alumni were off protecting our country during World War II, and shortly after Mr. Hershey died.<sup>25/</sup> Taken together with all of the other supporting information which MHSAA provided to K&L, this should have been more than enough to merit the conclusion that either MHSAA is correct, or that much of the pertinent information was not available to reach a conclusive determination. What makes matters worse is that many other records that existed at the time of Mr. Hershey's death, and which were known to contain his personal thoughts on what he wanted in these matters, likewise "disappeared" while under the custody and control of the Board and during the same time frame. Demands for the original records of the first 17 years of MHSAA's existence have been made on the Board. Thus far, these demands have not been satisfied. Given all else that we have seen -- the unauthorized and deceptive way in which parental obligations to the children were discontinued, the illegal lack of public notice for court hearings, the illegal failure to hold open court hearings, the efforts to mislead successive Attorneys General, the misappropriation of \$50 million to build Penn State a medical school -- is it really credible that this information would not support MHSAA's position? And in any event, why is there no mention of it anywhere in the K&L Report?

Finally, K&L also ignored historic material showing at least two factions in Hershey which sought totally different objectives for the school during Mr. Hershey's lifetime. The faction that wanted to re-invent the orphans' Trust so as to do away with Mr. Hershey's carefully conceived construct (in which the interests of the town and Hershey Entities would be servient to the interests of the orphan children) in the early 1930s lost out during Mr. Hershey's lifetime, as Mr. Hershey expressly rejected their recommendations.<sup>26/</sup> However, the very changes enacted after Mr. Hershey's death were *the ones which he had himself rejected during his life*, demonstrating that no time was wasted after Mr. Hershey died to implement precisely the recommendations which Mr. Hershey had sought to make impossible. It is these changes -- which harmed children and benefitted local business interests -- which MHSAA has challenged. Nowhere does the K&L Report address this -- as it can not.

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<sup>25</sup> A total of 17 years of original MHSAA records disappeared while under the custody and control of the Board of Managers. The first 15 years of original MHSAA records disappeared in 1945 near the time of Mr. Hershey's death. Three years later, the original MHSAA records for 1946 and 1947 also disappeared. All of these original records relate to a time *when MHSAA was not separately incorporated, but rather was an unincorporated extension of the Trust*. That is to say that at that time, MHSAA was controlled *jointly* by the Managers and the alumni who had left the school with a good record. By virtue of the limits imposed by the Deed on the actions of the Managers as well as by the terms of the original Constitution of MHSAA, the actions of the Managers, which were transpiring during Mr. Hershey's lifetime, would have been illegal unless they were in fulfillment of the purposes of the Trust. Thus, MHSAA must have been a part of, and an extension of, the Trust as contemplated in the Deed and by Mr. Hershey. MHSAA is seeking to enforce and preserve this aspect of Mr. Hershey's original construct in addition to our other goals, for we feel it essential to the proper function of the Trust as contemplated by Mr. Hershey himself.

<sup>26</sup> See footnote 5 above.

- 11. K&L's Position: Since 1970, when the Deed of Trust was amended to permit the sale of land without replacement, the Trust has sold approximately 1,800 acres, most of it to HFC [Hershey Foods] (619 acres), HERCO (125), and the Medical Center (327). The Trust has also acquired 144 acres, and now holds a total of 9,203 acres of land. The disposition of Trust land has been consistent with the Managers' fiduciary duties.**

**MHSAA's Response:**

MHSAA disputes these figures, since 1,001 acres of the original 12,000 acres of land in the Trust are neither accounted for nor mentioned in K&L's Report. Furthermore, the figure of 327 acres for the Hershey Medical Center is flat-out incorrect. The entire Hershey Medical Center campus came from appropriated Trust farmland, a total of more than 633 acres (that is, 100 acres in the original land grant, plus 204 acres in 1969, 162 acres in 1980, and 167 acres in 1985). This adds up to 633 total acres -- which is double the figure mentioned in the Report. MHSAA also believes that the accuracy of the other figures cited in the Report is also suspect. *If* the figure provided to K&L identifying the Trust's "beneficial ownership" of 9,203 acres is correct, then the use of simple math would indicate that **2,797** acres have been "disposed of" either by means of sale, trade, or *gift* -- not the 1,800 acres that K&L would attempt to have us believe. MHSAA's figure is calculated from the original 12,000 acre land corpus in 1945, at the time of Mr. Hershey's death. The 12,000 acres land figure is fully documented in MHSAA's archival information. Additionally, in several instances, including Palmdale Park, Chocolatetown Square, and other parks and lands deeded to Derry Township and Derry Township School District over the last year, Trust land was "*gifted*" by the Managers to these entities.

The transfer of these nearly 3,000 acres -- *some 25% of the original 12,000 acres* -- demonstrates the hardship being worked upon the beneficiaries of the Trust through the dedication of land for uses that benefit entities controlled by individual Managers rather than benefitting the orphan children of America for whom the Trust was created. K&L ignores that this constitutes some of the very best evidence of the existence of insurmountable conflicts between the outside interests served by these individual Managers and their duties to the orphan beneficiaries of Mr. Hershey's Trust.<sup>27</sup>

Furthermore, Judge Morgan ruled in his decision of December 7, 1999 (at p. 16) that, "However worthy the motive of the Managers, the land is held under trust and their power to alienate such property is limited. The Managers have a broad discretion to sell the lands but it is well established that the power of sale conferred upon a trustee *does not authorize an alienation of any character other than a sale. The power to sell does not authorize a gift of the property.*" (Emphasis added.) Therefore, the Managers have clearly violated the Deed in regard to these land gifts, and their duties to the beneficiaries of the Trust -- needy children. All transactions pursuant to which land was gifted are of questionable legal validity and

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<sup>27</sup> The latest example of this was the announcement earlier this year of the intention to lease 41 acres of orphans' Trust land to construct athletic fields for the local town children, in a facility to be called "founders park." Ostensibly, the facility is also intended for the Trust's children to use. However, the latter children have *no need* for these new facilities, and only time will tell whether the Trust's children will actually use them, or whether this is but another act of using land intended for America's dependent children in a means which will instead benefit local interests.

must be reviewed by the current Managers for adequacy of consideration. Each such gift was without authority, and the party receiving such land paid no consideration. Where there is failure of adequate consideration, the Trust should reclaim this gifted land or be compensated for its full value.

K&L avoided these issues entirely.

**12. K&L's Position: The claim that the Managers favor local business and community interests over those of the School is unfounded.**

**MHSAA's Response:**

As is demonstrated throughout this Response, there can be no credible challenge to the proposition that the Managers have continuously favored local business interests over the interests of the child and young adult beneficiaries of the Trust – in terms of land use, allocation of assets, and rules and policies related to the children and young graduates. For example, one need merely observe K&L's own land chart to see who received the lion's share of the 2,797 acres which were removed from the Trust. Nor does the Report make any meaningful mention of business partners and vendor clients of certain Managers, who profit tremendously from doing business with the Trust. In short, this entire Response is submitted in opposition to K&L's wholly unsupported and conclusory statement on the matter – in particular, Sections C through N below (treating a broad range of subjects), footnote 27 above (treating founders park), and Section 4 at p. 19 above (treating the illegal manner in which the practice of assuming parental duties to the children was ended, and how this specifically freed the Managers to openly favor the town's interests over those of the school's children). K&L simply cannot credibly believe their statement on this matter to be true.

**C. Misappropriation of Orphan Assets**

As mentioned above, the use of \$50 million in 1963 to build a medical school for Penn State University, in derogation of the needs of millions of needy American children, and in flagrant contravention of the explicit intent of Mr. Hershey, was morally unconscionable. While the morals of the issue may be irrelevant to K&L, the grossly illegal nature of this misappropriation should not be beyond their grasp. The manner in which this misappropriation was achieved is as follows:

First, the idea of building a medical school for Penn State University was conceived by the primary actors, including Dr. J.O. Hershey (again, no relation whatsoever to Mr. Hershey, the settlor). It appears that it was Dr. Hershey himself -- then a mere Trust employee who had not yet attained the prominence which he would later attain in Pennsylvania, a prominence arguably obtained with the assets of the orphans' Trust -- and others on the Board who designed and implemented the idea, with the assistance of the law firm of McNeese, Wallace & Nurick.

Dr. Hershey had risen through the ranks of the school from the level of houseparent all the way up to the position of president. He then worked for, and was compensated by, the Hershey Trust Company and HERCO, while he was still serving as the president of the Milton Hershey School -- transforming him into

one of the town's leading figures due to the importance and prominence of these two companies. However, his elevation to the Board coupled with his role in serving these other two companies placed him in violation of a prohibition in the Deed and also created a conflict of interest when the prohibition was finessed. The original terms of the relevant provision of the Deed read:

No person employed by the school, in any capacity, in connection with which any compensation or expenses **are directly or indirectly paid**, shall at the same time serve as a member of the Managers of The Hershey Industrial School. [Emphasis added.]

How was this problem fixed? Dr. Hershey simply ceased receiving his salary from the school, relying instead solely on his outside income, yet remaining the president of the Milton Hershey School. In other words, the person sitting on the Board of Managers who would be acting on behalf of the Milton Hershey School and its children and representing their interests would no longer even receive a salary for that work, *but instead would only be compensated by entities other than the school*, whose interests naturally conflicted with those of the children.<sup>28/</sup>

The participants then needed to come up with a means for removing the funds from the orphans' Trust, together with the necessary land, which was also to come from the Trust. This, of course, was the work of lawyers, and McNeese, Wallace & Nurick was only too glad to supply the assistance. However, the participants were immediately stymied by the fact that Mr. Hershey's Deed was explicit in what you could and could not do with the money of the orphans' Trust. As the lead lawyer on the matter, Mr. Gilbert Nurick, later bragged for a Penn State alumni audience: "[Y]ou couldn't take money out of a trust [for] orphans, and use it to start a medical center. It was wholly inappropriate for the purpose..."<sup>29/</sup> The reason that you could not take the money, of course, was that it was intended to serve the most needy of all of America's children, her orphans. Thus, obtaining court approval for the removal of \$50 million from a trust intended to be used on these orphans should have been impossible. In fact, Nurick -- himself -- admits that the Board had received an opinion from its New York legal counsel that the removal of \$50 million from a trust intended to be used on orphans was not possible.<sup>30/</sup>

Undaunted, Mr. Nurick and the other participants conceived a ruse by which they determined they might be able to obtain the court's approval. As Mr. Nurick later described, the business of conceiving this idea was of such a nature that related meetings were not even held at the offices of McNeese, Wallace & Nurick, but were instead held in secret, at Mr. Nurick's home. Their plan called for "arguing" (and here, legalese and Latin come to their aid, as obfuscation tends to serve those whose actions are questionable) that

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<sup>28</sup> Ironically, the K&L Report praises Dr. Hershey roundly for his "instrumental" role in improving HERSHEY PARK, the amusement park that is HERCO's primary asset. This only strengthens MHSAA's claims that persons on the Board -- *and certainly the school President* -- ought to be running the school and concentrating on the needs of the children, and not spending their energies and the Trust's resources on the needs of HERCO.

<sup>29</sup> See, Oral History Interview with Gilbert Nurick, July 18, 1984, Harrisburg, PA, by Leon J. Stout, for the Penn State Room, Pennsylvania State University Libraries. No one reading this transcript in its entirety and understanding what these actions meant for America's orphans can avoid extreme revulsion at the manner in which Mr. Hershey's wishes were violated. See, also, *Hershey Community Archives, Oral History Program, Gilbert Nurick, Narrator*, July 6, 1989.

<sup>30</sup> *Id.*

a "cy pres" amendment should be granted, due to a "pro tanto failure" of the orphans' Trust's purpose. In other words, they intended to go before the court and argue that Mr. Hershey's intentions could no longer be fulfilled ("pro tanto failure") due to an inability of the Trust to serve enough orphan children; and that the court should therefore grant permission for an alternative use of funds, under the doctrine of "cy pres" ("as near as possible," in French, meaning as near as possible to the "failed" purpose which Mr. Hershey had originally intended).

That their arguments were balderdash is demonstrated by any reference to America's social statistics from that time forward. The number of American orphans -- abandoned children, abused children, neglected children, children in foster care, runaway children, children living in the streets -- was such that their needs could not have been met even if our beloved Mr. Hershey had left them a fortune ten times that contained in the Trust. Thus, the next problem which presented itself to Mr. Nurick, Dr. Hershey, and McNees, Wallace & Nurick was making sure that when they walked into court with their fanciful "argument," no one would be there to tell the judge, "Wait a minute Your Honor! Everything that they are saying is malarkey!"

How did the planners achieve this goal? *By simply by-passing the legal requirement that notice be given to the public of the intent to seek this court approval, and simultaneously by-passing the legal requirement of a public hearing on the issue.* As Mr. Nurick later described:

**[I]t became evident that we had to figure out a way to do it where there'd be no public notice and no public hearing because if you would let the public know that you had 50 million dollars available for charitable purposes, and the Orphans' Court was conducting a hearing to determine how it should go, well that would be a lifetime career for all the lawyers in Dauphin County.<sup>31/</sup>**

By-passing the requirements of public notice and a public hearing, in turn, required the enlistment of the aid of then Governor William W. Scranton, and his Attorney General, Walter Allessandroni. This is because the Orphans' Court could never have been convinced to grant the *cy pres* petition in the absence, at the very least, of joinder in the petition by the Attorney General's office -- the Attorney General being designated the "official protector" of the public's interests in all matters related to charitable trusts. What the planners of this act told Governor Scranton and Attorney General Allessandroni is unknown. Suffice it to say that it was convincing, as they managed to obtain full support from the Pennsylvania authorities -- not unpredictable given the tremendous boon to the Penn State University system and the local economy that was soon to be derived from the construction of the medical school.<sup>32/</sup> Meticulous planners that they were, the principal actors had already spoken with the presiding judge in the Orphans' Court, Judge Lee Swope, only to learn that he had concerns about granting their petition, but that these concerns would be alleviated if the Attorney General joined in the petition.<sup>33/</sup>

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<sup>31</sup> Id.

<sup>32</sup> The Penn State medical school went on to become the single largest employer in the town of Hershey, surpassing even Hershey Foods in this category, a fact which underscores the conflict inherent between the interests of the individual Managers and those unidentified beneficiaries nationwide who were denied a Milton Hershey School because money and other resources (land for example) intended for them went instead to build the Penn State medical school.

<sup>33</sup> Id.

Having thus concocted a far-fetched argument that the purposes of the orphans' Trust had "failed," (for a "lack of" suitable dependent children to be benefitted by the Trust), and having enlisted the aid of the sitting Governor of Pennsylvania and his Attorney General in their actions, the participants then moved swiftly to complete the deed and obtain approval of their request for an "as near as" (*cy pres*) amendment to the Deed: Thus, in a single day -- on August 23, 1963 -- the planners of this act filed their petition, obtained Judge Swope's approval, and then recorded the order before anyone even had a chance to realize what had happened -- almost certainly the only time in American legal history that \$50 million walked out of a charitable trust under such circumstances.<sup>34/</sup> What this illegal act has meant to generations of American orphans who did not have a Milton Hershey School to turn to for refuge can hardly be overestimated, as all evidence related to their care demonstrates. Even 37 years later, the smell of this transaction still lingers.

Yet K&L passes over these events with no mention whatsoever of even the mildest reproach. This effort to absolve the 1963 Board and McNees, Wallace & Nurick reveals in part why K&L have been so careful to distance themselves from any sense of obligation to the child and young adult beneficiaries of the Trust: by narrowly defining the clients of the attorney to consist *solely of the Board*, K&L -- as with the McNees firm -- seeks to absolve themselves of responsibility towards the ultimate beneficiaries of the Trust, as though Mr. Hershey had wanted to benefit the vendors who profit from the Trust even while sitting on the Board more than he wanted to benefit the children and young adults who are its stated beneficiaries. Not only is this morally indefensible, but it also ignores blackletter law on the duties of an attorney where the attorney knows that the actions of a director of a charitable trust are in conflict with the duties of that director to the trust's beneficiaries.

K&L also have the temerity to point to the *lack of opposition* to the misappropriation of the \$50 million in 1963 as evidence that this misappropriation was not the gross breach of trust that it in fact was. In this regard, K&L conveniently omit from their Report any mention of the fact -- as described above -- that the requirement of public notice and a public hearing were *ignored* by the Board and McNees, Wallace & Nurick, with the active assistance of the then Governor and Attorney General of Pennsylvania. K&L then adds in their Report, in case anyone has paid attention to this omission, that in all events no one exercised their right to challenge the diversion of assets within the statutorily prescribed five years, as though this makes the act any less unconscionable.

This, of course, should have led K&L to see the fallacy that runs throughout their entire Report: the persons publicly tasked with making such challenges -- the Governor and the Attorney General -- were working hand in glove with the Penn State graduates to take the money in question from America's orphans; the orphans in America were hardly in a position to protect their own interests; and MHSAA had not yet reached the level of sophistication necessary to act on the misappropriation at issue, due in part to the reduced focus on the Deed at that time and what appears to have been a concerted effort to see that as few

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<sup>34</sup> That Nurick himself apparently understood how similar their actions were to that of a cabal is shown by his own description of the aftermath of the events: "[T]his was the largest *cy pres* in history and particularly where it was for a collateral purpose. Since there was no appeal taken, since there was no opinion written, since it's not in any of the official reports, I don't know whether it has made an impact on the law of *cy pres* or not. Certainly anybody researching the question would never come upon it unless he knew about the situation." *Id.*

people as possible even read the Deed in its original form, with the public relying solely on the "translation" provided by the various Boards and the McNees, Wallace & Nurick law firm.<sup>35/</sup>

Most importantly, given that even the CHILD *cy pres* petition itself would not have been exposed as being improper in the absence of MHSAA's Herculean efforts in that matter, K&L must also realize the utter speciousness of their suggestion that the lack of *ex post facto* opposition to a court decision which was engineered with the active assistance of a governor and attorney general somehow serves to *endorse* those actions by the general public. Can we really expect that someone would have suddenly appeared on the spot prepared to spend the vast amounts of time and money which would have been necessary to undo an act undertaken with the full endorsement and encouragement of a sitting governor and attorney general, in the very state whose university system and economy were about to receive a windfall benefit from the illegal act? And can we also believe -- by the way -- that our Good Samaritan, who was going to miraculously do all this at his own expense, was also going to do so on behalf of a group of as yet unidentified orphans, who did not even know that Mr. Hershey had sought to help them through the use of his fortune? Only in the world of Dick Thornburgh and the K&L Report is this plausible.

K&L also ignore that each successive amendment to the Deed of Trust was also tainted by the same questionable lack of due process, including: (1) the role of McNees, Wallace & Nurick; (2) the lack of public notice; (3) the lack of a public hearing; (4) the same, one-day collapsing of all of the attendant legal steps, so that the petitions have all been submitted to the court, approved by the court, and the resulting orders thereafter filed with the court clerk on the same day, and all before anyone even realized what was occurring. This only came to a stop with last year's CHILD *cy pres* petition, when MHSAA -- for the first time in history -- asked the Orphans' Court to examine closely what the Board was seeking. Judge Morgan's eloquent rejection of the Board's petition in that proceeding will stand for all time as the first victory of America's orphans in defense of their own interests and in defense of the right of Mr. Hershey to have his legally binding instructions adhered to, and not replaced with the "vision" of the local businessmen and self-promoters who have insinuated themselves into the administration of the Trust.

If nothing else, what all of this teaches us is that the only party who has demonstrated pure selflessness in these matters to the degree necessary to present Pennsylvania courts with the real story on these issues is MHSAA, while the Pennsylvania authorities -- including past governor Thornburgh -- have demonstrated their complete failure in the matter. As far as MHSAA can tell, the most notable time that former Governor Thornburgh took an interest in the Milton Hershey School was as it related to scheduling his inaugural celebrations at Founders Hall, including having the school's children serve him and his guests alcoholic beverages, and then clean up their party trash prior to the children's Sunday morning worship service the next day. It does not appear that Thornburgh, while in office, had adequately considered the needs of the wretched, abandoned, and neglected children of America who should have been deriving the

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<sup>35</sup> To illustrate how successful the various Boards were at keeping the Deed from being the focus of attention, the first time that MHSAA or anyone else other than the Board and its lawyers even read the Deed occurred in the early 1990's. This happened when two graduates of the school from the class of 1942, both of whom had met Mr. Hershey and thus had a firsthand understanding of precisely how Mr. Hershey would have viewed the sweeping changes which were being undertaken at around that time, went to the courthouse and themselves pulled the original Deed from the files, made a thousand copies of it, and distributed it to other graduates and to the public at large, in a touching effort to expose the actions of the Board, and in the hopes of putting a stop to these actions. Prior to that moment, all that MHSAA and the public knew of the Deed was as the Board had informed them, which as can be seen, presented a grossly distorted view.

maximum benefits that Mr. Hershey had sought to provide them through the orphans' Trust -- a Trust which has instead been used to create the palatial buildings where people like Thornburgh can hold inaugural parties, even while American children sleep in homeless shelters or are otherwise left at the mercy of foster care.<sup>36/</sup>

#### **D. Abandonment of the Farm Program**

The Report strains to argue that the farm program is outdated now, since most graduates no longer enter the farm industry. Indeed, the Report dwells on statistics related to farming in America, and how our graduates over time have migrated away from dairy farming and into other industries, seemingly pleased to show us how antiquated we are for wanting our children to milk cows. Perhaps the authors of the Report didn't realize it, but those of us who showed up in their offices to explain our support of the farm program not only left our pitchforks and overalls at home, but in fact don't even engage in dairy farming today. We're actually doctors, teachers, auto mechanics, plumbers, scientists, attorneys, newscasters, and members of other professions. Our endorsement of the farm program is thus not premised on our belief that our children will someday strike it rich milking cows; rather, it is premised on our understanding that working on a farm *makes good citizens out of children*. That K&L fails to appreciate this underscores how lacking their analysis is. In fact, even among the first graduates of the school -- let alone subsequent graduates -- very few became farmers, which illustrates that in Mr. Hershey's time as in ours, the advantages of a farm education for developing sound human beings were well understood.<sup>37/</sup>

What K&L was told -- and what is perfectly understood in the field of dependent childcare -- is that the structure of a rural community, the discipline imposed by the routine of farms, and the self-reliance that is learned from mastering the requirements of working on a farm, encourages the best aspects of children, and takes even the hardest of inner city youths and converts them -- through their own work on a farm -- into promising young men and women. By equating farm life with vocational training -- as though MHSAA consisted of Luddites who think that "Green Acres is where we want to be!" -- the Report misses the entire point of why MHSAA believes that operational farms must be restored to the school. MHSAA desires to bring back the farm program not because we think that the future is in the dairy industry, but because we know that working on a farm is conducive to the wholesome and healthy development of our special class of children, instilling in them a highly desirable work ethic -- as has been successfully demonstrated by successive generations of Milton Hershey School graduates.

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<sup>36</sup> So that there is no misunderstanding, MHSAA is not suggesting that construction of the Penn State medical school was not a worthy undertaking nor that this medical facility has not served countless numbers of persons in the Central Pennsylvania area. Rather, MHSAA is stating its opinion, based on the relevant facts and laws as we understand them, that the use of orphans' Trust assets to construct the facility was achieved through illegal and impermissible means, in derogation of the needs of America's orphan children, and in disregard of the express wishes of Mr. Hershey.

<sup>37</sup> To further illustrate this point, an effort was made to convince Mr. Hershey to reject the farm program -- with its need for land spread out in a rural environment -- in favor of a less costly, centralized dormitory program. Mr. Hershey, whose frugality and thrift were legendary, rejected the latter out of hand, insisting that his boys be educated on farms spread out as much as possible. As a historic matter, it is precisely the large costs of running a quality residential school for orphans that has led to the near-disappearance of orphanages from the American scene and their replacement with inferior caretaker institutions, such as foster care. See, e.g., Crenson, Matthew A., *Building the Invisible Orphanage: A Prehistory of the American Welfare System*, Harvard University Press, 1998.

Indeed, the writers of this Response have been told repeatedly by workers in at-risk childcare how so many of the children in the system are not bad and don't need therapy or severe discipline, but instead simply "need to live on a farm somewhere and to get away from their impoverished, neglectful, or abusive families." In Hershey, this otherwise wholly unattainable environment existed for approximately six decades, producing decent, well-adjusted young men and women. The abandonment of this program cannot be justified by reference to the best interests of the children, nor is it endorsed by *bona fide* childcare specialists -- all of whom dream of a school with a farm component to send their worthiest cases. One asks, then, what evidence K&L had to support the suggestion that the abandonment of the farm programs was in the best interests of the children? Here again, the answer is no evidence whatsoever -- K&L simply ignores this aspect of the question.

K&L also chose to ignore the internal school memos from the time in question, which memos confirm and underscore the ill-advised nature of the abandonment of the farm program. To quote just one, "Looking back [...] in review, [...] I feel the lowest point of my career at Milton Hershey School was reached this month [...] when I walked out of a meeting conducted by the Trust Company, I believe I saw a group so bent on an agenda of destroying a part of the school that has meant so much to so many students in the past."<sup>38</sup> Could anyone put it better? What is K&L's response to this? K&L does not respond. In fact, the K&L Report fails to mention the retirement of the then President of the school, Mr. William Fisher, a graduate of the Milton Hershey School, who chose to have nothing to do with the further implementation of the sweeping changes then envisioned for the school by the Board, which sweeping changes included the abandonment of the farm program and centralization of the school campus.

What is most important about the Miller memorandum is that it shows how those working closest to the children -- and who had no outside interests in conflict with their desire to educate these children in the best manner possible -- were the ones who were mystified and shocked by the decision to end the farm program. Conversely, and as the Miller memorandum clearly reveals, it was the "Trust Company," that is, *the Managers who have outside interests which conflict with their duties to the children*, who thought nothing of ending the farm program, as they "were bent on an agenda of destroying a part of the school that has meant so much to so many students in the past." Incredibly, the only reason that MHSAA even obtained this memorandum is that the school was throwing it away, together with a collection of filing cabinets, which caused one graduate to recoil at the waste. This graduate thus asked to take the cabinets and use them himself, only to discover the Miller memo in one of the cabinets. If a fortuitous event such as this revealed a memorandum this strongly in opposition to the decision to end the farm program, then what would one expect to find were one to review all of the records related to this decision together with the records which have otherwise been destroyed in earlier revisionist raids on the archives of the orphans' Trust? We want these records made available for inspection by us and by the Pennsylvania authorities -- though we suspect that many of the most important ones have already found their way into the incinerator.

Likewise, when asked by MHSAA to share the childcare expertise that led to the decision to abandon the farms and centralize the campus (the latter of which is treated below), the Board could offer nothing in response -- just as K&L's Report offers nothing, other than their naked assertions that our children do not benefit from the unique and amazing opportunities formerly presented by growing up on farms. It is little

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<sup>38</sup> Memorandum of Norman L. Miller to Richard C. Hann, July 4, 1992, p. 3.

wonder that the Report is so attached to the forgiving standards permitted under business judgment rule -- a rule which looks not to the wisdom of the Board's decisions, but merely to whether the Board can be hauled into court and charged with illegality for these decisions.

### **E. Centralization of Campus**

Nowhere is the Report's avoidance of the core issues presently confronting all who seek to uphold Mr. Hershey's will more apparent than in the pages devoted to K&L's finessing of the question of land disposition and campus centralization. Through the use of vague generalities and unsupported references to a question-begging "need" for new facilities and a similar "need" to be within walking distance of school, the report then manages to muster the mere assertion that "the atmosphere and amenities [of the new school building] are closer to that of an elite private school in a spacious, suburban neighborhood than a warehouse orphanage in a congested urban setting." Some endorsement! It is not like a warehouse orphanage! \$5 billion in total assets, nearly 10,000 acres of rural land, and K&L think it sufficient that we have a building that is "not like a warehouse orphanage in a congested urban setting." We respectfully suggest to K&L that the bar is set just a bit higher when it comes to the needs of our children, the use of our resources, and the fulfillment of Mr. Hershey's legacy.

What K&L glosses over is that there is no such thing as a "normal school" system, and the Board, with its vast resources, should be operating the best school system possible, to serve as many needy children as possible, which includes integration of our children into the social, athletic, educational and other activities of the township children, rather than restricting them to the smallest possible quarters.

Although challenged to do so repeatedly, nowhere does the Report identify any bona fide child-oriented reason for concentrating our children into a centralized campus as opposed to the campus that Milton Hershey himself constructed. The best that they can do is to state that the decision "met the standards of the business judgment rule" -- K&L's preferred shibboleth when failing to find a substantive means for justifying a decision. We respectfully submit that the decision also met the standards of the local town-planning committee, where for years local residents have chafed at the amount of land -- to not mince words -- that has been used for those "outsider" children, other people's children, children who after all "ought to be happy for what they have."

What is even more revealing is the fact that town privilege -- the Friday night permission granted to the high school students to walk into town and interact with local residents, meet their girl/boyfriends, or just stop by the store for an ice cream cone or a piece of pizza -- has also been taken away from our children. No doubt reflecting a shift in the town's views over time, graduates from the 80's recall incidents where local merchants refused to serve them during town privilege, simply turning students away. Yet no one thought we would actually see a day when a school Administration so compliant to the town's attitudes would be found that they would agree to simply scrap town privilege in its entirety. This effort to segregate our children from the town that Mr. Hershey created as the community to which our children were to belong is impossible to justify. We challenge K&L to identify a single *bona fide* childcare expert who would endorse this appalling policy -- a policy which former school Administrators themselves condemn. Mr.

Hershey would himself no doubt be enraged by it, as are all graduates who learn of it and simply cannot believe it to be true.<sup>39/</sup>

To illustrate MHSAA's point on "campus centralization" in concrete terms, one must appreciate the quality of the homes that are being abandoned -- one by one -- in comparison with the ones being built now. The old homes are spread out over the countryside, each with its own unique features, while the mass of homes in the "centralized campus" are all of the same general design, piled one on another, in one dense concentration, and lacking the stunning visual beauty afforded by the Pennsylvania countryside.

To provide specific examples, in the past, generations of students have been able to live in student home Swatara, right by Swatara creek, where the children can go inner-tubing in the summer. Students residing in student homes Bonniemead and Fosterliegh could walk past the old farmhouse on the back road near these homes and explore the caves located there, usually bringing lunch and transistor radios with them. Students in student home Rosemont would walk to Senior Hall, passing through the Hershey Rose Gardens every morning to do so -- sometimes finishing chores early just to stroll through the gardens for an extra few minutes. The list goes on and on -- with the common factor for all these magnificent farm homes being *no common factor* -- but instead the wonderful variety of creeks, fields, woods, and other natural treasures that every child everywhere has always dreamed of being able to play in.

Those who understand these issues in substance rather than in the abstract also understand that it is ill-advised to seek to limit the children to the "centralized campus" and thereby deny them the richness encompassed within Mr. Hershey's legacy. MHSAA again suggests that the only people happy with this turn of events are local planners, who have long coveted the rich land assets heretofore enjoyed by Mr. Hershey's children. Anyone who doubts this should join MHSAA for a tour of the campus as it has existed for 90 years. This tour of the original campus designed by Mr. Hershey will take the better part of a full day. Then we'll give you a tour of the work-in-progress that is the "centralized campus," which the present school Administration is attempting to quietly and quickly make a permanent feature of the school. The latter "tour" will hardly take an hour or two, so small is the centralized campus into which the Board is seeking to place the children. After the tours, we'll ask you what you would want for your children if, heaven forbid, someday they needed to be placed in a children's home.

On a similar note -- and turning to the question of Senior Hall -- HERCO and other business interests have long coveted the select pieces of land necessary to undertake such activities as increasing the amount of land for Hershey Park or expanding the facilities of Hotel Hershey. Based on these kinds of local business-oriented reasons, the desire to close Senior Hall makes all the sense in the world. But when viewed solely from the interests of the children and optimal utilization of the Trust's assets for all needy children, the efforts to close Senior Hall are indefensible.

Again, K&L would like to have it believed that our opposition in this area is based on some sentimental attachment to an old building -- an attachment which we readily admit we have, there being no

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<sup>39</sup> Moreover, centralization of the campus also works undesirable results upon younger, more vulnerable children, who are collectively placed in close proximity to older children who may be prone to act out aggressively against them, rather than permitting the younger children to reside in their own geographically removed safe haven, as had occurred in the past. (*See* below at pp. 41-42, Section F.)

shame in this whatsoever. However, sentimental attachment is far from the primary reason for opposing the destruction of Senior Hall. Rather, the primary reason is that Senior Hall is a perfectly adequate, and indeed, a historically important facility, which should be preserved and utilized -- rather than being thrown away so that the local construction industry can continue to improve its financial statements.<sup>40/</sup>

Finally, ignored entirely by the Report is MHSAA's often expressed criticism that -- besides the desires for the local townspeople for access to Trust land -- it is the "construction multiplier" rather than the needs of children that drives the decisions of the Board. To explain, it is an economic axiom that money spent in the construction industry has a tertiary and expansive impact on any local economy. Thus, each time that the Board launches a new building program -- such as construction of the Penn State medical school in the 1960's, Founders Hall in the 1970's, and the centralized campus in the 1990's -- the benefit to all local businesses, in particular, the construction business, is immediate, dramatic, lucrative, and windfall. Conversely, from the perspective of helping America's orphans, a "shrink-multiplier" is in effect for each dollar spent on unnecessary construction; that is, given the paucity of resources in America directed to the needs of our most vulnerable children, each time that money is spent in a manner not optimally designed to maximize the positive impact of that money on the lives of America's neediest children, some child somewhere suffers. This link is real and has been completely ignored by the Board, as is the case with the K&L Report: we respectfully submit that it is unconscionable to talk about "excess capital" in the Trust when America's children are being savaged every day in foster care, inadequate group homes, and wholly inferior orphanages. We demand that the Managers hear the cries of these children.

## **F. Multi-Age Homes**

Of all the disturbing things contained in the K&L report, nothing can compare with K&L's effort to gloss over the question of multi-age homes with the mere chant of their favorite mantra, "business judgment rule."

Again, some background: when orphanages emerged in the 1800's, the first dramatic systemic improvement imposed by law was the separation of children from adults. The second was the separation of children by age, which occurred throughout the 1900's, albeit in some states the laws did not change, merely the accepted practices. The Milton Hershey School, for its part, completed the process of separating the older and younger children in 1966, based on hard experience and the advice of knowledgeable childcare experts. The reason that childcare experts recommended separating children by age was the constantly-observed empirical fact that unrelated dependent children, by their nature, are prone to act out aggressively on younger, more vulnerable children living in proximity. Put another way, an abandoned, neglected, or abused teenager carries deep scars and anger, and in spite of finding refuge in a school such as ours, remains highly likely to cause real harm to more vulnerable, that is, younger and smaller, children.

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<sup>40</sup> Another illustration of how the school's children are viewed when it comes to using facilities which were built for them relates to Hershey Stadium, the extraordinary facility situated just down the hill from Senior Hall, and which Mr. Hershey proudly built for his football players. The school's children are no longer permitted to use this stadium, but instead use a vastly inferior one built for them practically on top of the junior high school, resulting in a complex that many considered an eyesore from day one. While the school's football players cannot use the old stadium, other local high school football teams are permitted to use it -- with the Milton Hershey team only going there for *away* games against the other teams. One can only imagine what Mr. Hershey would do were he alive to see this.

This is such an axiom in the field of dependent childcare that most states prohibit, by law, the housing of dependent children in multi-age group homes.

At the Milton Hershey School, a president was hired who had scarcely a scintilla of experience in dealing with dependent or at-risk children -- according to the sworn CHILD *cy pres* testimony of Bill Alexander as well as the evidence presented in that proceeding by that president himself. Instead, this president was hired for reasons which included -- inexplicably-- an ability to stubbornly *ignore* criticism.<sup>41</sup> In other words, ignorance of at-risk childcare issues would be compounded by stubbornness. True to expectation, Dr. Lepley -- when informed point-blank of the dangers of multi-age housing which he was seeking to *re-introduce* at the school, and as was explicitly revealed to K&L by first-hand witnesses -- obstinately refused to listen to reason. Thus, Dr. Lepley forced on experienced administrators, houseparents, and other staff the superficially appealing but knowingly dangerous scheme of a return to multi-age homes.

As predicted, this resulted in an explosion of violent acts directed at the younger children, together with sexual assaults, including a group attack on one young child whose existing emotional state was such that the group attack may have left this child damaged for life.

In this context, for K&L to fail to utter even a single word of criticism of this reckless experiment is not only morally unconscionable, but it also lays to rest any notion that the Report is anything other than a wholesale whitewash, purchased from attorneys who will defend anything, no matter how indefensible. Needless to say, even under the business judgment rule, the hiring of Dr. Lepley and the subjection of our children to the known dangers of multi-age housing rises to the level of wholly impermissible. Perhaps K&L would feel differently if their youngest children had spent some time last year in those multi-age homes. Moreover, the centralization of the campus works similar undesirable results upon younger, more vulnerable children, who are collectively placed in close proximity to those who may be prone to act out aggressively against them, rather than residing in their own geographically removed division, as had occurred in the past. K&L also makes no mention whatsoever of this.

### **G. Blatant Discrimination Against Graduates in Hiring**

Graduates have long complained about blatant discrimination to which they have been subjected when seeking positions at the school or at the Hershey Entities. By insinuating that graduates seek positions in the Hershey Entities and the school because we need the jobs, K&L once again dodges the issue. After all, who can quibble with the suggestion that graduates should learn to stand on their own two feet?

K&L avoids the issue: our graduates have not sought positions at the school or in the Hershey Entities because we cannot find employment elsewhere, nor have we sought any preferential treatment when being evaluated for the positions sought. Rather, we have sought these positions out of a desire to serve as role models for our children, as well as to help the school to be the model institution that it should be and the Hershey Entities to be the successes that they should be. And far from wanting an inside track in employment matters, we merely seek equal footing and an end to the open and notorious discrimination

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<sup>41</sup> See, Transcript of Proceedings Before the Honorable Warren G. Morgan, June 3, 1999, p. 9, *et passim*.

practiced against us by persons who have proven their commitment to greatly reduce their fiduciary duty to children and to keeping us from positions of influence in regard to matters of the orphans' Trust and the school.

The orphans' Trust provides a school and a home for dependent and at-risk children -- orphans in the language of by-gone years. Is there something odd in its best graduates seeking to come back to help to shape it and preserve its traditions for the future? Should our children be denied principals, teachers, coaches, and counselors who also came from broken homes or who were also abandoned in childhood, but who nonetheless made something of themselves, thanks to the school? Wherever one looks, the idea that an institution for a specific class of people should be run by persons who come from that class is *unquestioned*. Thus, Jewish schools are headed by Jews -- not Muslims. Catholic schools are headed by Catholics -- not Jews. African American schools are headed by African Americans -- not Italians. *It is only in Hershey that this principle runs into opposition.*<sup>42/</sup>

Indeed, the latest example of this blatant discrimination relates to the recent hiring of a Director of Transitioning who -- as usual -- is not a graduate of the school. How could anyone anywhere be more capable of helping our young graduates with transitioning than one of our own graduates? How can anyone who has never experienced those first months and years away from the school really understand what it is that our children experience when they first leave -- when they spend holidays alone in dormitories, when they confront personal and medical crises without guidance or adequate parental assistance, when they for the first time have to negotiate life beyond the school?

The same discriminatory principles are in effect in all of the Hershey Entities, as can be demonstrated by numerous examples. Even where our best graduates apply for positions -- graduates whose credentials *dwarf* those of the other applicants -- these graduates' applications are rejected, for no reason other than the desire to prevent us from ever having the opportunity to attain to positions of influence within the Hershey Entities or elsewhere in town. MHSAA provided concrete examples of this phenomenon to K&L and can do so again for other interested parties. Suffice it to say that of the school's nearly 7,000 living graduates, MHSAA is not aware of any graduates who are currently employed in an executive management level in any of the Hershey Interests, Entities, or Controlled Companies. What kind of parent would say to their child upon graduation from high school "Do not come back to live or work in the town in which you were raised?" Is a policy to that effect consistent with the Managers' fiduciary duty to these children? Is this not tantamount to a second abandonment suffered by these children, in cases where the Board is accepting the truly desperate children whom Mr. Hershey sought to help? And doesn't this policy of wanting the children to go away after they graduate also result in but another reason for the Board to increasingly seek children who don't view the school as a home, but instead merely as a "boarding school," thus further departing from the desires of Mr. Hershey?

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<sup>42</sup> MHSAA would think that many are aware of what occurred at Gallaudet University, the nationally prominent university for hearing impaired persons. At Gallaudet, when a non-hearing impaired president was appointed by that University's board of managers, the students and alumni immediately engaged in massive agitation, successfully demanding the appointment of a qualified, hearing impaired president, and insisting that as a matter of principle one of their own should serve in the position of president. In the case of the Milton Hershey School, even after the fiasco of the Francis O'Conner/Rod Pera period, no school graduates *were even considered* for the position. Just what message this is sending to our present students and graduates one can only wonder. Suffice it to say that K&L has no response to this either.

MHSAA respectfully submits that our most able graduates ought to be on at least equal footing to serve our school and the Hershey Entities as are those who did not come from our backgrounds. We further submit, and as the historical record amply demonstrates, that Mr. Hershey wanted this for the graduates of his school, whom he viewed as his children, and whom he intended to constitute the school Family that we are. We also call on the Pennsylvania authorities to investigate this offensive pattern of insidious social discrimination against persons such as ourselves.

The K&L Report dodges these questions entirely, by insultingly suggesting that we seek some sort of preferential treatment in hiring. Furthermore, there can be no legitimate dispute that, from the outset, our awareness of the unique needs of our children positions us to be eminently more capable than non-graduates to serve the needs of our children -- including serving as their role models, teachers, and mentors. Only by the logic of the K&L Report is this proposition challenged, and then with the absurd and conclusory statement that: "The evidence suggests that School officials were properly concerned about the ability of the town of Hershey to absorb numerous graduates and about the corresponding potential for tension between the community of Hershey and the School arising from competition for jobs. [...] Contrary to the sentiments of some alumni critics, the Managers had and have no duty to ignore the potential impacts [sic] of their actions on the community in which the School exists and on the enterprises that have financially sustained its mission." In other words, K&L concedes the discriminatory policy in favor of a group which is not the beneficiary of the Trust and to which the Managers owe no duty and against those who are beneficiaries of the Trust and to whom the Managers do owe a fiduciary duty, then seeks to justify it by resort to the "higher needs" of the local townspeople -- never mind the needs of the school's children or the rights of graduates to make their homes near the place where we were raised. Unbelievable. But then again, this is from someone whose primary interaction with the school's children related to his use of their facilities for his parties -- a person who thinks that meeting with graduates of the school in the course of his investigation of their allegations is "distasteful."

Notwithstanding K&L's failed endeavor to justify this discrimination, no one can deny that the policy which K&L seeks to justify is nothing more than discrimination designed to favor or benefit the Managers and the town of Hershey. Perhaps it is now time for the Managers, the Hershey enterprises and the town of Hershey to stand on their own two feet -- and to stop relying on the orphans' Trust assets which have immeasurably enriched the town and its economy. All we're asking is that we be allowed to compete on a fair, nondiscriminatory basis.

#### **H. Judge Morgan's Opinion/Inappropriate Efforts to Influence Attorneys General and Orphans' Court**

The K&L Report also ignores -- predictably -- that the only judicial ruling ever to come from a contested proceeding regarding the Trust fully supports the positions of MHSAA, while making short shrift of the positions of the Board. Besides ignoring this, K&L also suggest that, under Judge Morgan's opinion, MHSAA lacks standing to challenge the Board's decisions in the future. This is incorrect: Judge Morgan never reached the standing question, because he rejected the Board's *cy pres* petition without needing to do so.

Pennsylvania law also supports MHSAA's claim of standing. *See, e.g., Valley Forge Historical Society v. Washington Memorial Chapel*, 493 Pa. 491 (1980) (An action for the enforcement of a charitable trust can be maintained by the Attorney General, a member of the charitable organization, *or someone having a special interest in the trust.*) (Emphasis added.) Significantly, in *Valley Forge Historical Society*, the Pennsylvania Supreme Court pointed out that the rationale for barring a member of the general public from enforcing a duty owed by a charitable organization is "to protect the trustees from frequent suits perhaps based on cursory investigation and brought by irresponsible parties." *Id.* If nothing else, the CHILD *cy pres* proceeding served to demonstrate beyond cavil that, in these matters, MHSAA more than any other party has performed the most thorough investigation and has shown the most responsibility. After all, both the Pennsylvania Attorney General and Judge Morgan agreed with MHSAA to the extent that they both rejected the arguments of the Board -- a board which went so far as to walk into Orphans' Court and declare the Trust "failed" for lack of suitable candidates for admission, in a nation teeming with dependent children, of all things. Needless to say, MHSAA may need to proceed at law in the future if it feels such necessary to enforcing the Deed, so this question may soon be before the courts again. Unfortunately for the Board, the legal proceedings related to CHILD have only strengthened MHSAA's claim to standing, by having provided an excellent forum for MHSAA to tangibly demonstrate how fully MHSAA meets the guidelines enunciated in *Valley Forge Historical Society*. MHSAA undoubtedly possesses the single most comprehensive grasp of all the relevant information and issues on these topics, while MHSAA's pre-existing and undeniable "special relationship" to the Trust is also beyond dispute.

Furthermore, while the references in the Report to the standing question would seem gratuitous, they illustrate another inappropriate aspect of the Report: it is clear that the Report is seeking to preempt future judicial and Attorney General action in regard to the Board's decisions, by repeatedly offering up legally erroneous conclusions on such matters as the question of standing, the wisdom of the Board, and the interests of the school's children -- and all backed by the considerable prestige associated with the Report's primary author as former Attorney General of the United States. Suffice it to say that MHSAA will leave the Attorney General of Pennsylvania and the Orphans' Court to draw their own conclusions from the manner in which the Report seeks to admonish them. For our part, we will continue to advocate the interests of our children and young graduates, as well as to serve as defenders of the intent of Mr. Hershey, as stated in the plain language of the Deed.

## **I. "Indenturing"<sup>43/</sup>**

Another area where K&L demonstrates its inability to comprehend the fundamental childcare issues underlying MHSAA's criticism of the Board relates to the question of "indenturing," a process wherein parental rights and obligations to a child would be surrendered to, and assumed by, each of the individual Managers, as a personal undertaking with respect to each individual child, and backed by the vast resources of the orphans' Trust as a caretaker institution. While K&L correctly states that indenturing entails the surrender of certain parental rights as a condition of admission to the school, and that MHSAA endorses a return to a higher fiduciary duty to each child as existed under indenturing, the K&L Report misunderstands the societal dynamics involved in the process, and ignores the important inverse of the

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<sup>43</sup> The unauthorized deviation from the Deed's requirement that the individual Managers assume parental responsibilities to the children through "indenturing" is treated above, at pp. 19-22, Section #4.

matter, that is, that the Managers today will rarely, if ever, accept children for admission if these children do not have a parent or legal guardian to sponsor them, including full orphans in the commonly understood meaning of the term, as well as children in foster care and wards of the court.

In response to MHSAA's request that the Deed's indenturing provisions be enforced, the K&L Report simply concludes, "The creative argument of the Alumni Association does not present a plausible legal analysis, and therefore, warrants no extended discussion." MHSAA's "creative legal argument" speaks for itself, and can be found above at pp. 19-22. What K&L's condescending statement also ignores -- perhaps because they still don't understand it -- is that what K&L view as an "archaic practice of the 1950's" (their phrase) is today more than ever alive and well and central to the weightiest issues confronting the field of dependent childcare in America.

As anyone who has troubled to read ASFA<sup>44</sup> knows -- a group which obviously does not include K&L -- the 500,000 children in foster care today are now subject to a strict, federally-imposed timetable, wherein all parental rights to the children at issue will be severed at the conclusion of 16 months in care. Thus, far from being an "archaic practice of the 1950's," indenturing in some form is among the chief trends today, and indeed is mandated by federal law (and the parallel state laws promulgated throughout the country in accordance with ASFA's requirements for federal funding). Furthermore, the strict time line imposed by ASFA, as *bona fide* experts tried to tell K&L, has created a crisis in the field of group homes, because by law the children now in care will need permanent placements after 16 months. While no one knows for certain what is going to happen to children who cannot be adopted, a sizable body of authority anticipates that many of these children will end up in group homes -- and it is obvious that the Milton Hershey School, more than any other institution, is the primary positive alternative to being sent to a group home for children who are not delinquent but who instead simply lack adequate parental care.

Compounding the problems which will accompany ASFA -- and also ignored by K&L -- is the impact of America's vastly expanded prison population on the number of children in care today, such that some *1.5 million children* today have an incarcerated parent. This trend too has resulted, tragically, in the severance of parental rights for untold numbers of American children, a trend which will only increase as the various states come into full compliance with ASFA.

Finally, on the basis of a pure childcare analysis, it is undisputed today that all trends in at-risk childcare point to the desire for permanency and long-term placement in some home setting, even where this requires the severance of parental rights. It is simply not disputed today that children are harmed from being bounced from one setting to another, and this is among the reasons for the increase in support among experts for a surrender of parental rights. Visionary that he was, Mr. Hershey understood this in 1909. He therefore achieved both stability for the children admitted into the care of the Managers and the orphans' Trust, and imposed on each of the individual Managers and on the orphans' Trust the sobering parental obligations to each child that are entailed in the process of indenturing.

The elimination of indenturing has also resulted in a much higher turnover rate in the student population at the school, due to the concomitant ease of removing a child from the care of the school after

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<sup>44</sup> "The Adoption and Safe Families Act."

admission.<sup>45/</sup> The elimination of indenturing also resulted in the Managers having a substantially lower fiduciary duty to each child, which gives rise to a different "philosophy." The original intent of Mr. Hershey was that each Manager would have a parental duty to each child and that the program for that child would revolve around the child's unique qualities. However, once the high fiduciary duty to each child inherent in indenturing was eliminated, the Managers shifted to a "here is what the school offers, take it or leave it" approach. These factors, over time, greatly accelerated the turnover rate in the student population.

Inasmuch as the children who stay are required to continuously make entirely new sets of friends, an untrusting and unstable environment arises due to this constant change -- a problem which now plagues the school. In fact, whereas the turnover rate in earlier years was modest, the removal of indenturing has given rise to the unbelievable fact that while the school has graduated approximately 7,000 students, *more than 10,000 additional students* have been admitted to the school, but left without graduating. Thus, 40% more students have left the school before graduating than have successfully graduated. That is, for every class of 100 graduates, 140 additional students will leave before graduation that year. This demonstrates how unstable the environment has become, an instability which derives primarily due to the ending of the higher standard of fiduciary duty contemplated by indenturing. For K&L to find the notion of indenturing to be "archaic" can only mean that they didn't bother to inquire what experts today agree, nor to attempt to grasp that the essence of this practice is not one of simply surrendering parental rights (where parents are even at issue in the lives of these dependent children). Rather, the essence of the practice is one of establishing the highest duty of care to the children, rather than permitting the Managers to have no direct duty to the children and thus be permitted to give priority to, among other things, (a) the financial interests of the other entities to which they also owe duties, and (b) to ease of management for a Board that doesn't want to take the hardest cases.

In the face of all this, K&L's report utterly fails to appreciate that MHSAA's positions are not only in full keeping with the terms of the Deed, but are also in full keeping with every trend in dependent childcare today. Perhaps if K&L had listened to experts in the field -- rather than a person whose chief qualification is obstinacy -- they too might have understood this. There can be no *bona fide* debate but that the school's intended students -- the neediest and saddest cases amongst America's children -- will be better served by a return to the higher standard of fiduciary duty contemplated by indenturing; and MHSAA thus will continue to seek a return to this higher fiduciary duty.

## **J. Post-Graduate Support**

As elsewhere, K&L erects here a straw man and then knocks it down -- as though college aid is the issue, and as though their lengthy and flawed exegesis on what the Deed says about this is even relevant now. Suffice it to say that the Board's present policies on college aid, hastily enacted last year as things began to look bleak during the proceedings related to CHILD, are in keeping with MHSAA's requests for increased college aid to our graduates, though not in full compliance with the mandates of the Deed.

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<sup>45</sup> This is made worse by the relatively recent institution of excessively frequent and long periods of "vacation" away from the school in environments which the Managers were required to determine were not healthy as a precondition to the child's initial admission to the school. These "vacations" in essence put the children right back where they came from for excessively lengthy periods.

However, the K&L Report fails to address the larger issue raised by MHSAA and others in a related area, that is, the failure, both historic and present, of the Managers to create a meaningful post-graduation support structure. To illustrate with but one example, while federal law requires that even foster care children be provided with health insurance until they are 21 years of age, the Managers have never bothered to consider this very important need of its graduates, preferring instead to simply treat them as strangers immediately upon graduation.

Nor is insurance the end of the matter. As K&L heard from graduates as well as from former administrators, it has been unconscionable for the Board to fail to create some kind of post-graduation support system beyond mere college aid, to assist our young graduates in transition, and to help them as they make their way in the world. Again, this is in keeping with the concept of an institutional school Family, something which K&L, like Dr. Lepley, apparently do not care to understand. Their failure to understand this only underscores why the single most important residential school for dependent children on earth should today be run by childcare experts and the very persons who grew up in that school, rather than by strangers to the field and persons whose chief merit is their ability to ignore the wisdom of the ages.

## **K. Academic Programs and Vocational Programs**

While K&L dwells on the supposed superiority of college prep programs to vocational ones, MHSAA is compelled to make clear one point that K&L continues to ignore. This is that our support of vocational programs -- a support that is sound for reasons well beyond tradition -- is not based on our belief that vocational programs are superior to college prep ones. Indeed, among the graduates, former administrators, and childcare experts arguing most strenuously for a full range of vocational programs (to complement, rather than replace, the academic ones) are college, law school, medical school, and graduate school degree holders.

What we keep insisting -- and what the K&L Report ignores -- is that the school's doors should be open to a full range of dependent children, including those who are not going to attend college. This is particularly so given that all evidence indicates that dependent and at-risk children have a higher proportion of learning challenges than do children in the general population -- something which we would have hoped the Board already knew, since a year ago they walked into Orphans' Court and offered to grace America with their expertise in the area, after having represented to the Court that there were no longer enough dependent children in America to otherwise adequately utilize the Trust's assets.<sup>46</sup> By building what is a virtual bias against dependent and at-risk children into the criteria for admission -- which naturally results when the Board limits the vocational opportunities -- the Board fails in that part of its mission which is to open its doors to all needy children. Happily, one simple solution is to use the Trust's tremendous land and financial resources to create a vocational program as well as a college prep one, and one can only wonder

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<sup>46</sup> Subtle observers might notice that the K&L Report refers to the Board's CHILD *cy pres* petition as having been concerned with educating "at-risk" children, while the petition itself made no such reference -- the phrase having only recently come into vogue at the school, *after it was used by MHSAA to critique the Board's policies.*

why this isn't happening already. Senior Hall would be a perfect candidate for one or the other of these schools.<sup>47/</sup>

## **L. Asset Churning**

Another criticism made by MHSAA -- and also ignored by K&L -- is what can broadly be described as a continuous pattern of "asset churning," wherein needless construction and related activities are undertaken, without adequate reference to economically rational principles of resource allocation. Rational economic principles would say, as described above, "Given the number of children in need and the fact that we'll never have enough money to care for all of them, are we nonetheless using our resources to maximum efficiency in everything we do?" For example, the money that went to build the Penn State medical school could have started ten Milton Hershey Schools in ten different states, and thereby saved thousands of American children from joining the armies of homeless in America. Given the vast number of medical schools in America and the dearth of quality residential schools for dependent children -- to say nothing of Mr. Hershey's legally-binding instructions -- a rational allocation of resources would have directed Mr. Hershey's funds towards orphan care in a residential setting in some form, and not to the creation of but another medical school.

To illustrate further, in 1979 the late Father Bruce Ritter described how he lacked even the money to buy the children at Covenant House underwear, while on a mission to the school to obtain assistance for these Covenant House children. While it is our understanding that the Board rejected Father Ritter's requests for assistance, what went unnoticed at the time is that our children did not reject these requests. Recognizing the links between themselves and the less fortunate children at Covenant House, our children raised a small sum of money, a mere several hundred dollars, to buy underwear for the children at Covenant House. In essence, our children were showing greater understanding of the needs of dependent children beyond the school and better principles of resource allocation than successive Boards of Managers -- who think nothing of lavish and unnecessary projects, all of which line the pockets of school vendors, but none of which can be justified when viewed from the perspective of rational resource utilization. Examples of needless expenditure provided elsewhere in this Response include the \$250 million campus "centralization" scheme, the misappropriation of \$50 million to construct the Penn State medical school, the construction of Founders Hall, and the recent plan to close Senior Hall (which MHSAA will continue to oppose). Other examples include the following:

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<sup>47</sup> To provide one example of the impact on the children of policies which make an obsession of academic ability and ignore the fact that many dependent children will simply not excel academically, MHSAA is aware of one instance in the last few years where a child was removed from the school because of learning challenges. While MHSAA is not aware of all of the details of the matter, our understanding is that the child, a little girl, had been at the school for several years, together with her siblings. Apparently, when it became clear that the child would need special education, she and her siblings -- the latter of whom we understand had no special learning needs -- were removed from the school. If this is in fact the case, it would represent the first time, to our knowledge, that a child was removed from the school Family after having been admitted and spent several years at the school solely for reasons of a learning disability. Prior to the unlawful elimination of indenturing, it would have been unthinkable to remove a child from the school for these reasons, because had the Managers assumed parental obligations towards her in accordance with Mr. Hershey's instructions, the Managers would have had to act in a manner that was in her best interest, as would naturally occur in a biological family. What's more, it has been suggested that part of the reason for the removal of this child -- and for other admission/retention decisions -- has been the preoccupation of the present school Administration with learning-related statistics and numerical scores on standardized tests.

1. **The Original Memorial Hall:** What was an excellent, well-planned, and soundly-constructed model school building with profound historical significance was razed to the ground, supposedly because it was structurally unsound and had drainage problems. A member of MHSAA with construction expertise retained video footage of the demolition of the building demonstrating that it was a structural "bombshelter." Likewise, the "drainage problems" were the direct result of a failure to keep the drainage grates clear of leaves and other debris, and could have been alleviated simply by keeping the grates clean through normal, prudent maintenance, rather than by tearing down the building. Moreover, the building had already been completely renovated and modernized in the early 1960's, and could have been upgraded again had there been a need to do so. Rather than destroying this building, there were innumerable alternative uses to which it could have been put. The decision to destroy the old Memorial Hall had no rational economic basis, even if the Board did not act "illegally" in making this decision under the business judgment rule.

2. **The Current Memorial Hall:** This building -- built to replace the old Memorial Hall -- did not last five years before half of it had to be torn down, expanded, and redesigned for additional children. As much as any other project, the current work on this building illustrates that if the Managers were frugal and judicious with their resources, this "reconstruction on top of needless destruction" would never have occurred.

3. **Green Acres/Farm Home #62:** This home was completely remodeled within the last two years, although the need for the work was itself questionable. Giving the Board the benefit of the doubt on the remodeling work, one would at least assume that the home would have thereafter been put to good, economical use well into the future. However, with no warning whatsoever, the home was razed to the ground, in June of this year -- remodeling and all. Again, while strictly speaking this may not have been "illegal" under the business judgment rule, it was senseless so far as any commonsensical use of Mr. Hershey's money is concerned, and underscores the problem of letting local vendors make decisions about how the Trust assets are to be used.

4. **Meadowbrook/Farm Home #27A:** Among the most disturbing images etched in the minds of all who value the ideals of Mr. Hershey was that of the rubble that was once Meadowbrook, and which appeared in the Hershey Chronicle on September 14, 2000. This proud farmstead dated back to the 18th century, and was opened by the school on March 15, 1929, as one of three original farm homes within the Dairy Farm Chore Program. It was completely remodeled on two occasions, in February 1964 and November 1988. It served as a student residence until the spring of 2000. Meadowbrook had five computers directly linked to Founders Hall for access to the Internet as well as four telephones -- two for students, one for houseparents, and a phone line for the tenant house. Prior to its demolition during the last week of August 2000, the structure was in compliance with all residential housing codes. Nonetheless, the Board also razed Meadowbrook to the ground, to "make room for the construction of four additional houses." This was notwithstanding that the home was perfectly adequate already, and notwithstanding further

some 3,200 other acres from which to choose a location for the same homes, even restricting the choice to areas within the "centralized campus."

Again, playing with "house money," the Board has never met a construction project that it didn't like. In the case of Meadowbrook, this is made all the more unconscionable by the historic significance of the building to Mr. Hershey's ideals and the hundreds of graduates who passed through the home. It's as if the Board were seeking to actively obliterate any collective memory that would tie the school which they envision with the home that Mr. Hershey created, and which we are endeavoring to preserve. MHSAA is also concerned with the fate of the remaining homes on campus built during the 18th and 19th centuries, which also have similar historic significance to the school and the community. Once again, it is only by resort to the business judgment rule that common sense is suspended and that historic treasures are rendered into rubble -- in a never-ending process that delights the local contractors.

5. **Inferior Construction, Change Orders, Poor Design:** The entire execution of the centralized campus scheme is rife with allegations of budget increases which are said to have been achieved through design "flaws" requiring "change orders," and all of which contributed to the bloated construction budget now so prevalent in this project. These allegations are based on conversations with the builders involved and with houseparents who have moved into the new homes, all of whom have provided specific examples. Given that the construction management contract went to a Board member, is it any wonder that efficiencies have not been achieved? Again, the safe harbor of the business judgment rule says that there's nothing "illegal" with this kind of resource allocation. While this project is alleged to be under budget, it should be noted that the initial estimated cost of the project was \$100 million, not the \$257 million and counting that we presently observe.

6. **Deliberate Designs for High Operational Costs and Poor Ergonomics:** Knowledgeable persons, both on and off campus, have commented that the design of the buildings of the centralized campus are of the "high maintenance" variety and otherwise inferior. The requirements to heat, cool, and ventilate these structures would be cost-prohibitive to the average school district, and therefore would not have been approved in the first place. Likewise, one need merely visit the campus to see design flaws, such as shuttle-busses transporting teachers and students from remote parking lots (So much for "walking to school!"), classrooms so poorly designed that they are virtually non-functional, lockers excluded from the initial designs of what is purportedly a school building, and vocational shops so inadequate that the instructors are pining for a return to the "old" Senior Hall. Again, MHSAA believes that this is an example of the poor resource utilization in effect due to the structurally flawed composition of the Board, when excess is encouraged, since any loss to America's dependent children is a gain to local business interests.

While each of the above examples taken alone might not cause undue concern, the truth is more disturbing when viewed over time, as it evidences a pattern of resource waste that can only be described as "asset churning." This is particularly the case given the dubious nature of the major construction decisions otherwise described herein -- Penn State's medical school, Founders Hall, and the centralized campus --

when viewed from the perspective of the dire needs of America's dependent children. K&L does not address this criticism, as it cannot.<sup>48/</sup>

### **M. Changing Demographics of the School**

Taking together all of the various acts of successive Boards, at the core of MHSAA's concerns is an effort by these Boards to slowly erode the role of the Trust as a caretaker institution for the specific group of children whom Mr. Hershey originally sought to aid -- poor, dependent and at-risk children -- in favor of a new role, as a kind of "prep school" for less affluent albeit not desperate children. While this has not been accomplished yet, it is slowly occurring, in such an insidious way that its prevention now will only be achieved with the direct intervention of such outside authorities as the Pennsylvania Governor and Attorney General.

To explain, beginning with the announcement in 1976 that the children of divorced parents would thereafter be considered "social orphans" and so meet an expanded criteria for admission to the school, there has been a steady expansion of the target class of child beneficiaries, in derogation of the needs of the most desperate of America's children. Thus, when the Board was commencing its planning of the campus "centralization" scheme and the end to vocational training in the early 1990's, the Board sent teams to observe the elite prep schools in the country, and then sought to model the school along those lines. This resulted in the introduction of a radically different view of the school, as merely the provider of an education to children somewhat better than the education available in their own neighborhoods, and with a corresponding drift away from the view of the school as a home for children who desperately need one.

Indicia of this shift include a radical decrease in the number of full orphans, wards of the court, and foster care children in the school today, with the trend accelerating every day, to a point where the trend will soon be irreversible. To illustrate this in concrete terms, the school today is apparently prevented by law from accepting even a single foster care child into its care, because the Board has not obtained the appropriate license to do so. Other indicia include rising income levels of the families of newly admitted students, such that last year, some 50% of these families were from *above* the poverty level, in a nation where some 30 million children live below the poverty level. This year, the Board simply declined to disclose these statistics in their annual report, even refusing written requests from graduates to provide the information -- a fact which underscores how deliberate and insidious this effort has been.

Glossing over this issue, K&L mentions that the Board -- again, in the absence of legal authority to do so -- decided last year that their new admissions criteria would simply *multiply the federal poverty rate by 150%*, and use that standard to determine what class of children should be admitted to the school. This is notwithstanding that there are some 500,000 children in foster care, and for which children the federal

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<sup>48</sup> In a related matter, CHILD is a perfect example of the waste of orphans' Trust assets by the Managers. The Managers expended time, money and other resources on the study, development and implementation of CHILD, including related legal, marketing, consulting, and other fees and expenses for several years. This was before the Managers had even asked the Orphans' Court whether this particular use was permissible. Had the Managers asked the Court first, this waste of millions of dollars of orphans' Trust assets would have been avoided, because when finally asked, the Orphans' Court concluded that CHILD was not permissible.

poverty guidelines are meaningless, because their income is zero. K&L does suggest, absurdly, that the "number of orphans in America has declined" since Mr. Hershey set out to save these children, as though to provide an endorsement of the Board's continued drift away from Mr. Hershey's wishes. In this, the K&L Report's authors are either engaging in intentional misstatement, or else they have genuinely never heard of AIDS -- a disease which by itself has created an explosion in America in the number of physically healthy orphans who need a home such as that provided by the school. Similarly, K&L must also be completely unaware of all of the other facts mentioned in this Response, such as the number of children who have lost parents for a multitude of socioeconomic reasons, including the drug epidemic, the explosion in the prison population, and the failure of the American economic boom to reach the lowest strata of society.

All of these trends in the *increase* of orphan children are compounded by a corresponding decrease in the number of quality orphanages remaining in existence today, the latter of which results solely from the fact that quality residential care for dependent children is just so expensive that most dependent children will never have the opportunity to receive this kind of care, but will instead be consigned to such inferior alternatives as foster care and group homes.<sup>49</sup> In short, K&L's unsupported statement notwithstanding, the number of children whom the school can serve today *under the criteria established by Mr. Hershey* is at an all-time high absent any expansion of the applicant pool. Furthermore, expansion of the applicant pool in the manner sought by the Board results in closing the school to the children at the bottom of the barrel, in favor of less difficult (and less needy) children at the top.<sup>50</sup>

The thread binding all of the Board's unacceptable actions is this steady and insidious shift in the type of child whom the Board would like to see served by the school. Thus: the campus centralization scheme (along the lines of a prep school and away from the model of a rural home for orphans); the destruction of the farm program (thereby removing a critical tool for educating dependent and at-risk children in the most wholesome and time-tested manner imaginable); de-emphasis of vocational education (thereby creating an admissions criteria which will automatically select away from dependent children, who statistically are more likely to be better served by vocational programs than by college prep programs); and the imposition, without so much as a peep in public or the approval of the Orphans' Court, of a new poverty criteria which is 150% that of the federal guideline (thereby assuring that increasing numbers of children can be brought to the Milton Hershey School who will not view it as a home but who will instead merely view it as a boarding school). Each and every one of these items, in turn, dovetails perfectly with the outside, conflicting interests of the members of the Board, because they permit the Board to continue to justify such things as taking land and assets from their intended use for orphans, and instead using these assets for the town's interests -- as can be seen from the numerous examples provided in this Response. This all can occur because in the new "prep school" model, centralization is permissible, there being no need to retain the aspects of the Trust that create a "home" for orphans spread out in a rural environment.

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<sup>49</sup> See, e.g., Crenson, Matthew A., *Building the Invisible Orphanage: A Prehistory of the American Welfare System*, Harvard University Press, 1998; see, also, *Rethinking Orphanages for the 21st Century*, edited by Richard B. McKenzie, Sage Publications, 1999.

<sup>50</sup> MHSAA is not suggesting that admitting children from homes with divorced parents is improper in cases where the children are not receiving adequate parental care.

In short, when viewed over time, it is very clear that the goal of the Board -- a Board whose make-up is tainted with insurmountable conflicts of interest -- is to move the school away from an expanded, rural home for the neediest of children, and towards something else, namely, a school that will permit them to use assets of the orphans' Trust for other purposes, restricting the children to the smallest possible grounds, and "sparing" the town the presence of the "outsider" children who might actually view the Milton Hershey School, and Hershey Pennsylvania, as a home -- and who might thus even dare to want to settle in Central Pennsylvania and raise families there. The centerpiece of this extraordinary but deliberate shift has been the illegal abandonment of indenturing, that is, the abandonment of the assumption of parental obligations by each individual Manager to the children admitted to the school -- an abandonment which was in contravention of Mr. Hershey's express instructions, and which was achieved in a wholly illegal manner. It is precisely this shift that has permitted the Board to begin to slowly start closing the school's doors to the neediest of America's children. This insidious shift is on its way to completion, and failure by those concerned with this trend to act **immediately** will result in the situation becoming irreversible, as there is simply no more time left to delay.

The CHILD *cy pres* proceeding was but an accelerant to this process, the progress of which was slowed by MHSAA and others. Naturally, the primary persons speaking out on this matter are members of MHSAA, since we know more than anyone how dire are the straits of the children who will be increasingly turned away by the Board under its changing admissions policies.<sup>51/</sup> Likewise, it is we first and foremost who insist on a return to a higher duty of care to the children such as existed through some process like indenturing, because we ourselves know -- when viewed in the full light of all relevant circumstances -- that the personal assumption of parental rights and obligations by each individual Manager to each child, backed by the vast resources of the orphans' Trust, is essential to providing these children with the stability of the true home that was promised to them by Mr. Hershey, but which is being denied to them by the Board today.

## N. An Increasingly Unhealthy Environment

Without providing any detailed analysis or supporting evidence, K&L broadly concludes, "The Managers have created a board that serves the needs of the School's students while at the same time being deferential to Mr. Hershey's vision," and that the Managers have "hired a competent executive staff." K&L further suggests, "The School's success with at-risk children is demonstrated by objective data and evaluations, and there is no doubt that the Managers have met their legal obligations under the Deed of Trust." These statements are belied by what even casual observers have noted.

As described above, according to the testimony of Bill Alexander in the CHILD *cy pres* proceeding, the current school President, Dr. William Lepley, was chosen *not* for any at-risk or dependent childcare expertise, but instead primarily on the basis of his ability to pursue controversial ends, "no matter how strongly criticized." These ends, as we have seen, include "campus centralization," ending of the farm program, the re-introduction of multi-age housing, and an acceleration in the closing of the school's doors

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<sup>51</sup> Of course, there are others who continue to speak out in favor of fulfilling Milton Hershey's dream, to whom we offer our sincerest gratitude, including other members of the school Family such as former houseparents, teachers, and staff, and members of the community.

to full orphans, wards of the court, and foster care children. As explained in detail throughout this Response, these changes, have not served the needs of the children, as K&L would suggest. Rather, these changes have suited the needs of the outside, conflicting interests represented by certain members of the Board, such as the needs of HERCO, Hershey Foods, the Hershey Medical Center, and the town of Hershey generally for additional land -- land which Mr. Hershey had dedicated to be used for America's orphan children.

As for the "objective data and evaluations" which, according to K&L, "support" their finding of satisfactory performance on the part of this Board and the executive staff whom the Board has hired, again, even a casual observer would conclude that the Report is mistaken.

Since Dr. Lepley came to the school with his staff -- many of whom were hand-selected by Dr. Lepley and brought with him from his home state of Iowa<sup>52</sup> -- and the expansion of the Board of Managers to 18 members, the following highly-publicized results have followed: (1) decreasing enrollment; (2) an increase in the number of students withdrawing; (3) a spate of violent assaults; (4) use and sale of narcotics on an unprecedented level; (5) an increase in rapes and sexual assaults; (6) failure of the school's Administration to report criminal acts to the authorities as required by law; (7) a high rate of turnover among the employees; (8) the creation of no less than three employee unions, after eighty or so years without even a single such union; (9) the implementation, followed by its failure, of the multi-age housing experiment with the school's children; (10) an environment manifestly lacking in structure, discipline and respect for authority; (11) a reduction in the school's overall educational standards; and (12) the graduation of young adults not yet prepared for the real world compounded by the absence of a fully developed and tested transition program -- and all of which K&L ignores so as to conclude "there is no doubt" that Dr. Lepley and the Managers are adequately fulfilling their duties. There most certainly are doubts, to say the least.

When the present school Administration does take action to address a problem at the school, such as drugs, they do so in a manner which only underscores how far removed they are from a meaningful understanding of at-risk and dependent childcare. For example, in the wake of several highly-publicized incidents related to the sale of narcotics at the school, Dr. Lepley announced a new "zero tolerance" policy related to drugs, with offenders who sell, deliver, or distribute drugs being immediately expelled. While this might be acceptable in an elite boarding school where the children can go home to mommy and daddy, for dependent and at-risk children, it is absurd -- as any childcare expert could have told Dr. Lepley. For with the kinds of children who are at the school, there often is no alternative. Thus, this "one strike and you're out" policy can, and has, resulted in permanent harm to the children, at a point in their lives *when we expect them to make mistakes*, as children everywhere do. The answer in instances where they do make mistakes, of course, is not to throw them out, but rather to work with them, as has occurred with generations

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<sup>52</sup> It appears from the *cypres* testimony that Dr. Lepley's knowledge of orphan care in America prior to his having been identified as a candidate for the position of President of the school was of a degree that *he had never even heard of the Milton Hershey School* before being approached about the job -- with his ultimate selection having turned on the qualifications described above. See, Transcript of Proceedings Before the Honorable Warren G. Morgan, June 3, 1999. This is highly significant, because it demonstrates a conscious effort on the part of the Board to break with the school's past traditions, including those as an orphanage, by finding someone for whom all of this was totally alien. Indeed, immediately prior to Dr. Lepley's arrival, six top administrators at the school were abruptly and inexplicably fired, leading to the surmise that the "deck was being cleared" for Dr. Lepley to arrive and impose the Board's new paradigm on the school -- as has in fact happened.

of children at the school -- usually, we might add, by making them do a few weeks of extra barn chores and taking away their Friday night town privilege, until they come to understand that impulse control might be in order the next time that someone comes up with the bright idea of smoking marijuana or introducing any drugs to the campus. It is astounding that this school Administration, so attached to slogans such as "zero tolerance," cannot appreciate this -- and it underscores how imprudent it was to have hired an educator who has so little understanding of these children, to say nothing of the greater imprudence of having abandoned the assumption of parental obligations to the children in the first place. After all, what parent would institute this kind of "one strike and you're out" policy within their own household?<sup>53/</sup>

Among objective data demonstrating the veritable poisoning of the school's atmosphere since the arrival of Dr. Lepley are those found in several surveys of employee attitudes conducted during the periods 1995 through 1998. These surveys -- performed by professionals who regularly undertake similar surveys for other organizations -- found an extraordinarily low level of morale at the school, as well as giving the school low marks in the areas of trust, openness, honesty, mutual respect, and teamwork. These results displeased the school Administration, which asked for the surveys to be redone, with similar, poor results. Notwithstanding the advice of the consultants who performed the surveys to make the results known to the school employees in an effort to constructively address the causes of the problems, the school Administration chose instead to simply ignore this advice and the findings which they had commissioned from orphans' Trust assets. This illustrates the type of environment to be found at the school today, one which is in steady overall decline, and with that decline being accelerated by such things as an unwillingness to accept advice that does not fit with the predispositions of the school Administration or the plans of the Board.

As for how the children have reacted to Dr. Lepley, one can ask them directly -- children having an extraordinary natural ability to discern the genuine from the feigned. For his part, Dr. Lepley's views on these children -- the dependent and at-risk children about whom he is learning on the job -- were demonstrated fully on September 30, 2000, during the alumni homecoming banquet, which Dr. Lepley hosted this year. At this banquet, with the school's children acting as servers -- in a manner painfully embarrassing to many graduates -- Dr. Lepley concluded the evening's "work" for the children by thanking them perfunctorily, and then telling them that they were "dismissed," while stating to the graduates that he hoped the children had been "suitably polite and respectful," or words to that effect, while the children themselves were still present in the dining hall to hear this.

This condescending attitude towards the children -- speaking in front of them as though they were mere servants, and imbibing in them a sense of servility rather than a sense of pride -- speaks volumes about how Dr. Lepley views the children and how he has discharged his duties. Any person who cares about and understands the needs of these children would have led a round of applause for them, would have at least supplied them with name tags indicating their anticipated graduation classes, would have made them to feel proud to be a part of the school Family -- to the extent that the children were going to even participate in

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<sup>53</sup> The "zero tolerance" policy may not actually be strictly enforced, but may have been merely a public relations effort by a school Administration trying to appease local authorities who had conducted a highly visible drug "raid" on the school. If this is the case, than one must ask what kind of school Administration creates strict rules which it doesn't intend to enforce but which are in fact merely public relations measures -- thereby also sending additional conflicting messages to children who already have enough problems.

this manner at all. This is certainly what beloved, genuinely child-oriented school Administrators in the past, such as George Copenhaver or Don Witman, would have done -- but not Dr. Lepley. What's more, Dr. Lepley's attitude mirrors perfectly the attitude of the primary author of the K&L Report, with his own experiences in having had the children serve as cocktail waiters and clean-up staff for his parties. Both of these individuals do not seem to have a notion of the children as human beings, but instead merely see them as objects which must be tolerated in some manner, in as small an environment as possible, and as guinea pigs for such "innovations" as multiage housing -- even while the resources of the Trust are being utilized in a manner which best serves local interests, usually justified by some vague reference to Mr. Hershey's "vision" (there being no authority for all of these "visionary" uses in the Deed).

The general attitude of this Administration is also captured by the fact that children at the school, as young as ten or so, can be seen today wearing t-shirts which declare, "MYPLAN" on their backs, together with a description of what the MYPLAN program envisions for the school, that is, "Imagine a school where children are..."<sup>54/</sup> One is simply astounded to see children at the school thus turned into billboards advertising another Lepley innovation that has been tried out and discarded, no doubt soon to be replaced by but another innovation, the latter of which will likely have our children wearing new slogan-bearing t-shirts. Truly, only in this school and only under this administration can one find this kind of behavior and this kind of attitude towards children -- yet nowhere in the K&L Report is this brought out. Do Dick Thornburgh and Dr. Lepley not understand that children are neither billboards nor waiters, but instead are *children*?

Can Managers who hire a president using the above-mentioned criteria and with the above-mentioned results really be said to be fulfilling their duties? Dr. Lepley's sole positive achievement during his tenure has been to discharge only one mandate of the Board, and that is to have stood tall in the face of strong criticism, in pursuit all of the changes described in this Response, to the great satisfaction of local interests, and to the grave harm of the school that Mr. Hershey founded. Looking at the matter from this perspective, K&L's conclusions on the discharge of the Managers' duties towards the children is completely lacking in any empirical support.

## **O. Wasteful Public Relations**

While the details of the Report can be criticized much further, MHSAA believes that the above is sufficient -- beyond a note in passing that the entire inquiry has obviously been nothing more than an expensive public relations ploy. By hiring Dick Thornburgh and ballyhooing the six months' "investigation," it is clear that the Board has sought to achieve again through public relations what they have failed to achieve through substance. Nowhere is this more evident than in the spate of press releases that all appeared immediately upon the Report's being issued -- as though the Board was more concerned with making sure that the public was informed of the existence of the findings than with the validity of those

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<sup>54</sup> MYPLAN is a "program" wherein the children each create four goals, towards which they are then to strive, with the "assistance of a devoted adult staff." The reality is that the program has collapsed under the complicated weight of its own bureaucratic implementation, including the sheer aggravation to houseparents who found monitoring alone to be so time-consuming as to make the whole exercise pointless. In short, it was but another failed experiment by the Lepley administration.

findings. Importantly, the public has been sorely misled by all of this public relations, as none of the press reports make it clear that, far from constituting formal findings of compliance with Mr. Hershey's intent, the Report merely argues that the managers today *are not acting illegally*, and that where past action *may have been illegal*, the statutes of limitations have already run -- a pathetically weak endorsement, and far less than has been bandied about by the Board. It is highly unlikely that anyone in the general public understood this from reading the press statements issued by the Board.<sup>55/</sup>

What's more, these press releases often dwell on the statements made by graduates who are members of the Board. It is troubling that the school Administration will always endeavor to find a graduate who agrees with their views and hold him up as representative of the alumni. With over 7000 alumni, we appreciate and respect that we will have many divergent views on issues. However, MHSAA speaks for the majority of our Association, and if the press, the public, or Pennsylvania authorities want to learn what we believe, they should contact MHSAA directly.

#### **IV. Conclusion**

MHSAA has observed for years the degeneration of the values of the school which Mr. Hershey founded and has reluctantly entered the fray in defense of those values. This process began in the early 90's, when relations between MHSAA and the Board deteriorated, because MHSAA openly opposed actions which we believed to be in violation of the Deed, and at a time when the Board was engaged in changes of school presidents and policies that made no sense whatsoever from the perspective of the interests of the school's children. Last year, when MHSAA was seeking to bridge the distance between itself and the Board through informed discussions of the Deed in historic context, the Board sought leave of the Orphans' Court to direct but another \$30 to \$50 million to a project premised on the absurd notion that there weren't enough dependent and at-risk children in America to adequately utilize the assets of the Trust.

MHSAA thus opposed this effort by the Board. In opposing this effort -- in the so-called *CHILD cy pres* petition -- MHSAA uncovered evidence of the most unconscionable acts imaginable, including flat-out misappropriation of orphan assets to build the Penn State medical school, in violation of Pennsylvania law, and in derogation of the needs of millions of American orphans. What's worse, MHSAA also uncovered a pattern of consistent abuse of discretion over time, which was coupled with a deliberate and insidious dismantling of the ideals of Mr. Hershey, through a steady duping of the local courts and the public. This process was at times abetted by the Pennsylvania authorities themselves, or countenanced by these authorities since they themselves appear to have been misled by the various Boards over time.

Early this year, MHSAA demanded that these issues be addressed, lest MHSAA be forced to seek relief from the Orphans' Court. These demands led to the appointment of Dick Thornburgh and K&L, to undertake what was represented would be an independent investigation. On the basis of this representation, MHSAA reined in its more outspoken members, tabled its plans for seeking relief directly from the court, and cooperated fully with the K&L investigation. MHSAA was confident that any independent review

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<sup>55</sup> The one laudable exception to mere repetition by most of the local newspapers of the press reports issued by the School was the September 21, 2000 Hershey Chronicle piece by Judy Etschmaier, in which the author made clear what the K&L Report was and was not, based on the writer's own analysis.

would demonstrate the merit of our contentions and thus aid in beginning to set aright the course of the school -- including rectifying past grossly illegal changes to the Deed.

While waiting for the K&L investigation to conclude, the Board accelerated its effort to transform the school -- destroying old farmhouses, directing more land to non-school uses, and quietly changing admissions criteria to permit ever-rising income levels among newly-admitted students, while increasingly closing the door to full orphans, wards of the court, and foster care children.

K&L released its report some six months after commencing its investigation, a report which turns out to be neither independent nor constructive. Rather, it is biased; it is flawed; and it avoids all of the critical issues -- and we believe that disinterested readers of the K&L Report and this Response will agree with us. While the Board has been delighted with the K&L Report's results, and has bandied these results in the press, MHSAA has been singularly disappointed, and immediately set itself to the challenging and time-consuming task of showing, item by item, the undeniable flaws in the Report.

While we would have preferred to keep this matter private, this was rendered impossible by the Board's resort to publicity and the associated gross distortion of the public record, together with the clear indication that so far as the Board is concerned, our questions have all been answered by the K&L Report. Happy with the record that it created through the hiring of Dick Thornburgh, and desirous that no one would upset that record, the Board then attempted to also squelch this Response, through the use of threats about their willingness to cooperate with us in the future should we in fact speak out publicly about the flaws in the Report -- that is, once again threatening to cut us off from our programs with the children of our school, and making these children pawns in the matter. These threats only underscored the need for us to tell our story publicly. They also underscored the utter failure of the present school Administration to understand our school Family, and how committed we are to preserving the ideals of Mr. Hershey. Indeed, we would be poor examples of the best that Mr. Hershey gave us were we to wilt before threats or otherwise not tell the truth as we now know it.

Thus, we have issued this Response -- and we call on all who read it to support us in our struggle to compel compliance with the Deed, and a return to a Milton Hershey School that puts America's dependent and at-risk children first. In particular, we call on the Pennsylvania Governor, the Attorney General, and the Dauphin County Orphans' Court to appreciate the entirety of the story we tell here, as it is only the entirety of the story which will do justice to our claims for enforcement of Mr. Hershey's will -- *as he wrote it*.

We also call on the Governor of Pennsylvania and the State Attorney General to immediately commence a full investigation of the allegations raised here, preceded by an order that the present Managers *take no more actions* which in any way alter the *status quo* at the Milton Hershey School, pending the results of a *bona fide* investigation. Action by the Pennsylvania authorities to correct the abuses described here will confirm their commitment to poor, dependent children, and will show by example that our society and its leaders will not tolerate the abuse of our legal system which we have described here and which has caused so much harm to the poor, dependent children whom Mr. Hershey sought to save.

Respectfully submitted,  
MILTON HERSHEY SCHOOL ALUMNI ASSOCIATION