

EXHIBIT B

Opinion of Gilbert Nurick, Counsel to the  
Board of Managers of Milton Hershey School,  
pursuant to which the racially restrictive  
admissions policy was terminated.

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May 13, 1968

Mr. James E. Bobb, Chairman  
Board of Managers  
Milton Hershey School  
Hershey, Pennsylvania 17033

Dr. John O. Hershey, President  
Milton Hershey School  
Hershey, Pennsylvania 17033

Mr. Arthur R. Whiteman, President  
Hershey Trust Company  
Nine West Chocolate Avenue  
Hershey, Pennsylvania 17033

Gentlemen:

We have your oral request for our opinion as to whether the limitation to "white orphans" in the Deed of Trust establishing the Hershey Industrial School (predecessor in name to Milton Hershey School) is legal under the present status of the law. We understand that your inquiry was predicated in part by the decision of the U. S. Court of Appeals for the Third Circuit filed on March 7, 1968 in the Girard College litigation (Docket No. 16,721) and by other significant developments in the legislative and case law. As we previously informed you, the Trustees of

Girard College have filed a petition for certiorari with the United States Supreme Court. (1331 October Term 1967.) We would not be surprised if the Supreme Court should deny certiorari very soon, and we are therefore submitting our opinion now so that the Board of Managers and the Trustee may give prompt consideration to this important and sensitive subject. If the Supreme Court should grant certiorari, we would recommend that your consideration of the matter be deferred until that Court files an opinion on the merits.

The Girard College decision of the Third Circuit was grounded upon the provisions of Section 1 of the Fourteenth Amendment to the United States Constitution which provides, *inter alia*, "\*\*\* nor shall any state \*\*\* deny to any person within its jurisdiction the equal protection of the laws". (Underscoring ours.) You will observe that this prohibition is upon the "state". In Girard College, the Court held, under the circumstances present in that case, that the exclusion of non-whites by the college trustees constituted state action and resulted in a violation of the equal protection clause of the Fourteenth Amendment.

There are some marked distinctions between the Girard will and the Milton S. Hershey Trust instrument. These have been

reviewed in our previous discussions regarding the earlier litigation involving Girard College. The Court of Appeals in its recent decision held that its conclusion is confined to "a will in which the testator has deliberately and specially involved the State in the designated use of his testamentary property". (Mr. Girard had provided for public administration by officials of the City of Philadelphia.) In the Milton S. Hershey Trust, provision is made for a private trustee and private managers to administer the trust. Despite this distinction, the basic legal question nevertheless is the same. Is there such involvement by the state as to bring the institution within the proscription of the Fourteenth Amendment?

In determining whether there is such state involvement, certain guidelines and precepts have been established by the United States Supreme Court. It has been held frequently that state action may be predicated on participation by any one of the three major branches of the state government. For example, as far back as 1880, the Court in Commonwealth of Va. v. Rivers, 100 U.S. 313, stated:

"It is doubtless true that a State may act through different agencies--either by its legislative, its executive, or its judicial authorities;

and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another."

In the Civil Rights Cases decided in 1883 (109 U.S. 3), the Supreme Court stated that the Fourteenth Amendment makes void "state action of every kind" which is inconsistent with the guarantees and extends to manifestations of "state authority in the shape of laws, customs, or judicial or executive proceedings". The Court, in Shelley v. Kramer (1948), 334 U.S. 1, reiterated this doctrine even more forcefully when it stated that:

"State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertion of State power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands."

Thus, the Courts have found state action in the conduct and activities of executive agencies of the state government (Snowden v. Hughes, (1944), 321 U.S. 1); state courts (Barrows v. Jackson, (1953), 346 U.S. 249); municipal corporations (Home T&T Co. v. Los Angeles, (1913), 227 U.S. 278); political parties empowered by state law to prescribe voting qualifications (Nixon v. Condon, (1932), 286 U.S. 73); state police (Bell v. State of Md.,

(1964) 378 U.S. 226); city officials (Lombard v. State of La., (1963) 373 U.S. 267); municipal golf course officials (Holmes v. city of Atlanta, (1956) 350 U.S. 879); a parking authority (Burton v. Wilmington Parking Authority, (1961) 365 U.S. 715); and the public school system (Brown v. Board of Education, (1954) 347 U.S. 483).

Within recent years, there has been a trend to expand the concept of "state action" to ever greater dimensions. For example, in Evans v. Newton, (1966) 382 U.S. 296, the Court stated that:

"Conduct that is formally 'private' may become so intertwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."

and in United States v. Guest, (1966) 383 U.S. 745, the Court stated that:

"\*\*\* the involvement of the state need [not] be either exclusive or direct. In a variety of situations the Court has found state action of a nature sufficient to create rights under the equal protection clause even though the participation of the state was peripheral, or its action was only one of several co-operative forces leading to the constitutional violation."

In Reitman v. Mulkey, (1967) 387 U.S. 369, the Court held that state action could be involved where the conduct of

the instrumentality of the state would "significantly encourage and involve the State in private discrimination". Thus, even meaningful encouragement by state agencies may be held to be proscribed state action.

In Sweet Briar Institute v. Button, decided within the past year, a Federal Court went so far as to enjoin the Attorney General of Virginia from enforcing a racial restriction contained in the will establishing and funding Sweet Briar College. (387 U.S. 423; decision on merits Civil No. 66-C-10-L Western Dist. Va.)

As stated by the Court in Evans v. Newton, supra:

"\*\*\* generalizations do not decide concrete cases. Only by sifting facts and weighing circumstances \*\*\* can we determine whether the reach of the Fourteenth Amendment extends to a particular case."

Guided by these precepts, we have reviewed and considered in great detail the facts and circumstances pertaining to the Milton Hershey School situation. The Deed of Trust establishing the Milton Hershey School (then called The Hershey Industrial School) was executed by Milton S. Hershey and his wife, Catherine S. Hershey, on November 15, 1909. It provided for the establishment of the school to be permanently located in Derry Township, Dauphin County, Pennsylvania. Paragraph 13 prescribed

that:

"The institution shall be organized as soon as practicable and when prepared to receive orphans, the managers shall from time to time receive and admit to the School as many poor, healthy, white, male orphans, of such ages between four and eight years, as may from time to time be determined by the Managers, as in the opinion of the Managers, the extent, capacity, and income of the School will provide for, and shall be adequate to maintain, and from time to time as there may be vacancies, or increased ability from income may warrant, others shall be admitted. The term orphan in this deed designates a child whose father is deceased."

Paragraph 28 provides that:

"If in the opinion of the Managers it may be advantageous and convenient that they should be incorporated, and as a corporation hold and exercise the trusts herein created and directed to be held and exercised by the Managers as individuals, the Managers shall have full power and authority at their option to apply for and obtain and take corporate powers and become a corporation under the laws of the State of Pennsylvania existing at the time of the application for such corporate powers \*\*\*."

Paragraph 28 set forth certain conditions which should be met in the event that a corporation would be formed. The charter must be in perpetuity, the institution shall be called "The Hershey Industrial School", and the Managers "shall be the sole incorporators and managers of said corporation". It provided:

\*\*\*\* that the said corporation, under and by virtue of the law or laws of the Commonwealth of Pennsylvania existing at the time of its creation, shall have full and complete legal authority to take and execute the trusts hereinabove created and intended to be exercised and held by the Managers as individuals, to exercise and enjoy as such corporation all the trusts herein created to be exercised and enjoyed by the said individual Managers, with all the powers and authorities, and under and subject to all the conditions, restrictions, and limitations as are herein given, granted, created, prescribed, and declared of and concerning the said trusts to be held and exercised by the said individual Managers \*\*\*."

It further prescribed that the corporation

"shall thenceforth hold and enjoy all the trusts hereinabove declared and created and intended to be held and exercised by the individual Managers aforesaid, and be and become the successors in the trust of the said Managers."

Additional procedural details are set forth with respect to notice of incorporation to be served on the Trustee and the relationship between the corporation and the Trustee.

Mr. Hershey was a sophisticated businessman and was undoubtedly quite knowledgeable in the advantages of corporate existence and the nuances of corporate operations. It is significant that in the Deed of Trust he specifically provided for the authority to incorporate the institution and for said corporation to enjoy all of the benefits of the laws of the Commonwealth of Pennsylvania relating to this status. This factor

assumes special importance since this power to incorporate was exercised on December 30, 1919, when an application for charter for "The Hershey Industrial School" was filed by the Managers and was approved by the Court of Common Pleas of Dauphin County, Pennsylvania as of that date. It is noteworthy that Mr. Hershey was one of the managers who participated in that proceeding. Thus, the School achieved corporate status and the material benefits therefrom through the application of state legislation and the action of state judiciary. We do not suggest that, under the present state of the law, this action alone was sufficient to activate the proscription of the Fourteenth Amendment, but it is a significant event which must be included in considering the total scope of state involvement and participation.

We note further that Articles of Amendment were filed by the corporation on two occasions to reflect certain modifications in eligibility requirements for admitttees and also to change the name. These modifications will be considered later, but at this point it should be observed that the Articles of Amendment filed on October 30, 1933, and December 24, 1951, again involved agencies of the state. Indeed, these amendments also received the prior approval of the Secretary of Welfare, a state official whose action further involved the state.

There have been several significant proceedings involving instrumentalities of the state in connection with substantial modifications of the terms of the trust. On or about October 27, 1933, the School filed a petition for modification of the trust in the Court of Common Pleas of Dauphin County (No. 1096 Equity Docket), requesting that the maximum age limit for eligibility for admission be extended from eight years to fourteen years and that the definition of an eligible orphan be enlarged to include boys whose mothers were deceased. In accordance with the laws of the Commonwealth of Pennsylvania, leave was granted by the Attorney General to file the petition, and he consented to "any decree the Court may make". Mr. Hershey, who was still living at that time, joined in the petition. On October 30, 1933, the Court granted the prayer of the petition and entered a decree as requested.

Again, on or about December 17, 1951, the School, with the leave of the Attorney General, filed another petition for modification of the trust, this time in the Orphans' Court of Dauphin County (Docket No. 824). This petition requested permission to change the name of the School from "The Hershey Industrial School" to "Milton Hershey School". On December 17, 1951, the Orphans' Court entered its decree authorizing the change of name.

Subsequently, Articles of Amendment to the Articles of Incorporation were filed in the Court of Common Pleas at Docket No. 816, September Term 1951, to conform the Articles to this modification. Here again, there was a heavy enmeshment of the state.

Thus, through state action, the benefits of corporate status were conferred; the eligible age for admission was extended; the definition of an orphan for purposes of admission was broadened; and the name of the institution was changed to eliminate the stigma which began to attach to the use of the word "Industrial" in the name of the institution. These were fundamental changes of primary importance to the trust and to the school and could not have been achieved without the substantial involvement of the state.

The action of the state did not cease at this point. In 1963, the Trustee and the Managers of the School decided to make a grant of \$50,000,000 from the accumulated income of the trust for the purpose of establishing a medical school in Derry Township. This praiseworthy, generous and public-spirited objective could not have been attained without the cooperation and action of state agencies. A review of the record (No. 712, Orphans' Court of Dauphin County, 1963) indicates that the Attorney General was consulted regarding the proposal, that he joined in

the prayer of the petition, that he attended and participated in the proceeding in which the petition was presented, and the President Judge granted the petition and signed the decree on August 23, 1963. This procedure was permeated with state action. It involved state laws applicable to cy pres and the requisite actions of the Attorney General and the Court.

In the same year, a petition was filed with the Orphans' Court for approval of a lease and an agreement relating to the operation of the Hershey Community Center structure, which is an asset of the trust. Here again, the petition was reviewed by the Attorney General, who consented to a decree as prayed for, and the President Judge of the Orphans' Court granted the petition. Through this state participation, another worthy objective of the Trustee and the Managers was effectuated for the benefit of the community.

After the status of the trust fund was disclosed in the cy pres proceeding, the Trustee deemed it appropriate--albeit not required--to file an accounting with the Orphans' Court of Dauphin County pursuant to provisions of applicable statutes and rules of the Pennsylvania Supreme Court and of the Orphans' Court of Dauphin County. Such action was highly desirable for the protection of the Trustee as well as from the standpoint of the

public. Since no accounting had previously been filed, a petition was presented to the Supreme Court of Pennsylvania seeking a waiver of item-by-item accounting for the first 50 years of the trust. The matter was reviewed with the Attorney General and the President Judge of the Orphans' Court, and both executed acknowledgments and statements indicating that they did not oppose the relief granted. On June 6, 1966, the petition was granted by the Pennsylvania Supreme Court (287 Misc. Docket Term 1966). This action by the agencies of the Commonwealth in permitting the Trustee to follow a simplified accounting procedure relieved the trust of a heavy financial burden and prevented an unwarranted dissipation of its funds. Subsequently, accounts were filed with the Orphans' Court of Dauphin County (for the period from November 15, 1909 to December 31, 1959, and from January 1, 1960 to December 31, 1965) with appropriate notice to the Attorney General, and following audit, the accounts were confirmed. (No. 712, Year of 1963.) Through confirmation of these accounts, the Trustee derived significant protection under the provisions of the applicable laws of Pennsylvania. Here again, this objective could not have been accomplished without the heavy interplay of state laws, state officials and state judiciary.

One other court proceeding involved a petition to the

Orphans' Court of Dauphin County (No. 712 Year of 1963) in which Hershey Trust Company as Trustee sought approval of the right to lease certain real estate to Acme Markets, Inc. for a period in excess of five years. A copy of the petition was presented to the Attorney General who, after his review, executed an acknowledgment and consent. On October 12, 1966, the President Judge of the Orphans' Court issued a decree authorizing the execution of the lease. This transaction of economic benefit to the trust was effected through the involvement of agencies of the state.

There is a galaxy of other factors which, though not as significant as those recited above (and which alone might not have comprised state action within the reach of the Fourteenth Amendment) nevertheless have forged even more deeply the imprimatur of the state on the Milton Hershey School trust.

The Department of Welfare has general powers of supervision over the institution, regularly inspects its facilities and establishes standards for its equipment, management and administration; the Department of Public Instruction prescribes certain courses to be offered to the students and assists in the development of particular courses and the employment of qualified professional personnel; the Department of Health establishes minimum health standards applicable to students, and regularly

inspects the School's food processing and sanitation facilities; the Department of Labor and Industry reviews and approves all building plans and inspects the buildings; the Department of Agriculture is involved in the School's production and marketing of farm products; the Department of Revenue has exempted the School from sales and use taxes; and the Legislature has provided statutory authorization for limited exemption from real estate taxes.

After "sifting facts and weighing circumstances" as directed by the United States Supreme Court, we come to the conclusion that there has been and is substantial and significant state participation in the administration of Milton Hershey School and that the exclusion of non-whites by the School constitutes a violation of the equal protection clause of the Fourteenth Amendment. Accordingly, non-white boys should be admitted on the basis of the same requirements and qualifications (other than color), and standards, specifications and procedures which are applicable to white boys.

If the Board of Managers should determine to admit non-white boys to comply with this opinion, we would recommend that such modification in your admission policy be made subject to the concurrence of the Attorney General of the Commonwealth of Pennsylvania, who is the exclusive representative of the public

in matters affecting charitable trusts. Since the Attorney General is also the chief law enforcement officer of the Commonwealth, it is doubly desirable to obtain his concurrence so that the Managers and the Trustee may be fully protected in taking this significant action.

Very truly yours,

McNEES, WALLACE & NURICK

By

*Gilbert Nurick*  
Gilbert Nurick

GN:M

EXHIBIT C

Opinion of William C. Sennett, Attorney-General of Pennsylvania, pursuant to which the racially restrictive admissions policy was terminated.

COMMONWEALTH OF PENNSYLVANIA  
OFFICE OF ATTORNEY GENERAL  
HARRISBURG, PA. 17120

WILLIAM C. SENNETT  
ATTORNEY GENERAL

June 4, 1968

James E. Bobb, Chairman  
Board of Managers  
Milton Hershey School  
Hershey, Pennsylvania

Dr. John O. Hershey  
President  
Milton Hershey School  
Hershey, Pennsylvania

Arthur R. Whiteman, President  
Hershey Trust Company  
Hershey, Pennsylvania

Gentlemen:

I am in receipt of your request for my concurrence in the decision of the Board of Managers of Milton Hershey School of May 22, 1968, modifying the admission policy of the School so as to admit non-white orphan boys. Your present admission policy is in compliance with the requirement of the Deed of Trust executed by Milton Hershey and his wife on November 15, 1909, which established the said School and provided, *inter alia*, that the institution shall be organized to receive poor, healthy, white, male orphans.

I understand that the proposed change of policy was adopted pursuant to the advice of your counsel that by reason of the recent Girard College decision (Commonwealth of Pennsylvania et al. v. Brown et al., No. 16721-U. S. Court of Appeals, Third Circuit, Certiorari denied by the U. S. Supreme Court May 20, 1968, No. 1331 October Term,

1967), and other significant decisions on the subject, the continuance of the exclusionary policy would constitute such a denial of equal protection of the laws as to violate the requirements of the Fourteenth Amendment of the United States Constitution.

This opinion of your counsel was based upon his conclusion that the Hershey School has been so involved with the Commonwealth of Pennsylvania that the continued exclusion of non-white orphans would constitute State action prohibited by the said equal protection clause.

The Trustee and Managers of the Milton Hershey School have had continuous contact with the Orphans' Court of Dauphin County and the Office of the Attorney General of Pennsylvania. For example, the institution was incorporated by the Court of Common Pleas of Dauphin County in 1919. Thereafter, amendments were filed in that Court on two occasions. In 1933, pursuant to leave of the Attorney General, the Court of Common Pleas of Dauphin County made a decree changing the maximum age limit of eligibility for admission from eight years to fourteen years and defining the term "orphans" as boys whose mothers were deceased. Again, in 1951, pursuant to leave of the Attorney General, petitions for modification of the Trust changing the name of the School to Milton Hershey School were approved by the Dauphin County Court.

In 1963, after consultation and with the joinder and participation of the Attorney General, a petition was presented to the Orphans' Court of Dauphin County authorizing the grant of \$50 million dollars from the accumulated income of the Trust for the establishment of a medical school in Derry Township. Later the same year, the Attorney General reviewed and consented to a petition to the Orphans' Court of Dauphin County asking for approval of a lease and agreement to the Hershey Community Center structure.

James E. Bobb, Chairman  
Dr. John O. Hershey  
Arthur R. Whiteman, President

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On June 6, 1966, the Supreme Court of Pennsylvania granted the petition of the Trustee with the Attorney General's joinder for the waiver of certain requirements of accounting for the first fifty years of the Trust. Subsequently, accounts were confirmed by the Orphans' Court of Dauphin County after notice to the Attorney General.

In addition to the foregoing, the laws of the Commonwealth subject the School to certain supervision and regulation by the Departments of Welfare, Public Instruction, Health, Labor and Industry and Agriculture. It also exempts the School from Sales, Use and Real Estate Taxes. These contacts with the State have significance only when considered in the context of the aforementioned history of Commonwealth activity.

The language of the Supreme Court of the United States in Evans v. Newton, 382 U. S. 296 (1966), is appropriate in evaluating the extent of State action involved in the above activities.

"Conduct that is formally 'private' may become so intertwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."

The nature of activities which constitute State action were defined in United States v. Guest, 383 U. S. 745 (1966), wherein the Court stated that:

"\* \* \* the involvement of the state need [not] be either exclusive or direct. In a variety of situations the Court has found state action of a nature sufficient to create rights under the

James E. Bobb, Chairman  
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equal protection clause even though the participation of the state was peripheral, or its action was only one of several co-operative forces leading to the constitutional violation."

The authority of the Courts to enforce restrictions similar to those under consideration has been denied by the Supreme Court of the United States. It has held that such Court enforcement would constitute State action supporting discrimination prohibited by the equal protection clause of the Fourteenth Amendment of the United States Constitution. It is our considered opinion that this determination is applicable in this matter. In coming to this conclusion, we are guided by the decision of the United States Supreme Court in Shelley v. Kraemer, 334 U. S. 1 (1948), where the State courts had enforced restrictive real estate agreements. Chief Justice Vinson held:

"We hold that in granting judicial enforcement of the restrictive agreements in these cases, the states have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand.

\* \* \* \* \*

"The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color."

James E. Bobb, Chairman  
Dr. John O. Hershey  
Arthur R. Whiteman, President

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In the recent case of Sweet Briar Institute v. Button, 12 Race Rel. L. Rep. 85 (W.D. Va., 1967), rev'd per curiam, 387 U. S. 423, decision on the merits, Civil No. 66-C-10-L (W.D. Va., filed July 14, 1967), the Trustee of the Institute sought to enjoin enforcement by the State Attorney General of a racial restriction contained in the will establishing and funding the college. In restraining the Attorney General from enforcing the restriction, the Court stated:

"The State cannot require compliance with the testamentary restriction because that would constitute State action barred by the Fourteenth Amendment. This was the express holding in the Girard Case."

See also the concurring opinion of Circuit Judge Kalodner in the Girard case wherein he stated:

"The Fourteenth Amendment is contravened under the Shelley doctrine, where there is 'active intervention of the state courts, supported by the full panoply of state power' in the furtherance of enforcement of restrictions denying citizens their civil rights because of their race, color, or creed."

After sifting all the facts and weighing circumstances, I come inevitably to the conclusion that there exists a significant and substantial State involvement in connection with the Milton Hershey School and the Trust under which it was established.

Accordingly, I concur in the action of your Board of Managers in modifying the admission policy so as to admit non-white orphan boys. Such applicants should be admitted on the

James E. Bobb, Chairman  
Dr. John O. Hershey  
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basis of the same requirements and qualifications (other than color), and standards, specifications and procedures which are applicable to white boys.

I commend your Board for its judicious decision which I am certain will meet with the approval of all fair-minded people. I confidently predict that the elimination of the color restriction will enable the School to continue its invaluable service to orphan boys, who obviously were so dear to the heart of its illustrious Founder, Milton S. Hershey.

Sincerely,

  
William C. Sennett  
Attorney General