

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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|---|---|----------------------|
| MOTHER SMITH, on behalf of herself and as Parent and Natural Guardian, on behalf of ABRAHAM SMITH, a Minor, | : | |
| Plaintiffs, | : | Case No. 11-7391-CDJ |
| v. | : | |
| MILTON HERSHEY SCHOOL, | : | |
| Defendant. | : | |
| | : | |

**PLAINTIFFS’ ANSWER WITH AFFIRMATIVE DEFENSES TO DEFENDANT’S
COUNTERCLAIM FOR DECLARATORY JUDGMENT**

Plaintiffs Mother Smith and Abraham Smith, by and through their undersigned counsel, file this Answer with Affirmative Defenses to Defendant Milton Hershey School’s (“MHS,” “Defendant,” or “the School”) Counterclaim for Declaratory Judgment (Dkt. No. 10) and state as follows:

ANSWER TO DEFENDANT’S BACKGROUND STATEMENT

A. To the extent this paragraph states a conclusion of law, no response is required. In all other respects, this paragraph is denied. It is specifically denied that MHS “considered all of the factors required by law” to conclude that Abraham posed a direct threat to the health and safety of others. It is specifically denied that Abraham poses a direct threat to the health and safety of others simply because he is HIV positive.

- B. Denied.
- C. Denied.
- D. Denied. By way of further response, the School did not take any steps to contact

Plaintiffs or discuss any issues with respect to Abraham's application for admission prior to sending its denial letter on June 30, 2011. The School's June 30, 2011 letter did not invite Plaintiffs to "identify any legal authority, or personal factors involving Abraham Smith" that might affect its determination. The School's June 30, 2011 letter simply stated that "[a]fter review of the information, it has been determined that [Abraham's] documented needs are beyond the scope of the Milton Hershey School programs. Specifically we are unable to meet his needs in our residential setting." A true and correct redacted copy of Defendant's June 30, 2011 letter is attached hereto as Exhibit A. On August 5, 2011, Plaintiffs' counsel contacted the School by letter, and requested that the School reconsider its decision. The August 5, 2011 letter stated "[i]t is our hope that these events were the result of an oversight or misunderstanding, and can be quickly resolved," and invited Defendant to contact Plaintiffs' counsel to discuss the matter further. The School's counsel at Saul Ewing contacted Plaintiffs' counsel on August 16, 2011, and stated that he would look into the matter. Abraham and Mother awaited anxiously for several months, in hopes that the School would reconsider its decision. Not until November 29, 2011 did the School's counsel first explicitly admit that it did not consider Abraham's application because of his HIV status. During that conversation, which occurred almost four months after Plaintiffs' counsel's letter seeking a prompt resolution, defense counsel reinforced its belief that the law permitted the school to exclude Abraham, and offered to explain the theory in greater detail at a later date. As more than a third of the school year had already passed, Plaintiffs did not believe that continued delay benefited Abraham's educational interests, and instead filed the instant Complaint.

E. Denied.

F. Denied. Plaintiffs lack sufficient knowledge or information to form a belief as to

the truth of the whether “the School was preparing to file a Declaratory Judgment action,” or its purpose in doing so, and therefore denies the same. By way of further response, shortly after the Complaint was filed, Plaintiffs obtained a copy of a draft pleading styled by Defendant as a declaratory judgment to be filed in the District Court for the Middle District of Pennsylvania, which Defendant had released to media outlets. The remainder of the allegation is denied. Plaintiffs specifically deny that Defendant’s declaratory judgment is properly asserted in either this Court or the Middle District. *See Hyatt Int’l Corp. v. Coco*, 302 F.3d 707, 712 (7th Cir. 2002) (holding that the Declaratory Judgment Act is not to be used as a “tactical device whereby a party who would be a defendant in a coercive action may choose to be a plaintiff by winning the proverbial race to the courthouse”) (internal citations omitted).

**PLAINTIFFS’ ANSWER TO DEFENDANT’S COUNTERCLAIM FOR
DECLARATORY JUDGMENT**

98. Plaintiffs incorporate by reference each of their allegations and responses to the proceeding paragraphs as fully as though set forth herein at length.

JURISDICTION

99. The allegation is a conclusion of law to which no response is required and the same is therefore denied. To the extent a response is required, Plaintiffs specifically deny that subject matter jurisdiction is proper under the Declaratory Judgment Act, 28 U.S.C. § 2201 or that Defendant has standing under Title III of the ADA , 42 U.S.C § 12181.

100. The allegation is a conclusion of law to which no response is required and the same is therefore denied.

101. The allegation is a conclusion of law to which no response is required and the same is therefore denied. To the extent a response is required, this allegation is denied.

102. The allegation is a conclusion of law to which no response is required and the same is therefore denied.

ADDITIONAL FACTS

103. Admitted in part, denied in part. It is specifically denied that the School's program is "unique" from any other public accommodation subject to the Americans with Disabilities Act. Otherwise admitted, based on information and belief.

104. Plaintiffs lack sufficient knowledge or information to form a belief as to the truth of the information contained in this paragraph, and therefore deny the same.

105. Plaintiffs lack sufficient knowledge or information to form a belief as to the truth of the information contained in this paragraph, and therefore deny the same.

106. Denied.

107. Plaintiffs lack sufficient knowledge or information to form a belief as to the truth of the information contained in this paragraph, and therefore deny the same.

108. Admitted in part, denied in part. It is admitted that Abraham Smith, by and through Mother Smith, applied for admission to the Milton Hershey School in February 2009, and was not admitted. It is further admitted that Abraham Smith's initial application was complete and did not contain medical information. Plaintiffs lack sufficient knowledge or information to form a belief as to the truth of the remainder of the information contained in this paragraph, and therefore deny the same.

109. Admitted in part, denied in part. It is admitted that Abraham Smith applied for admission to the Milton Hershey School in the Spring of 2011, and that Abraham meets the qualifications for admission to the School. Plaintiffs lack sufficient knowledge or information to

form a belief as to the truth of the remainder of the information contained in this paragraph, and therefore deny the same.

110. Admitted in part, denied in part. It is admitted that Mother Smith caused Abraham's medical records to be sent to the Milton Hershey School, and that those records contained information about Abraham's HIV status. It is further admitted that the Milton Hershey School sent Abraham a letter denying him admission to the School, and that, prior to that denial, Defendant did not conduct an on-campus interview, conduct any cognitive or behavioral tests, review additional information about Abraham's behavior, or conduct a medical examination. The remainder of this allegation is denied.

111. Admitted in part, denied in part. It is admitted that Defendant denied Abraham admission because of his HIV status. The remainder of this allegation is denied.

112. Admitted in part, denied in part. It is admitted that, in a letter dated August 5, 2011, Plaintiffs' counsel asked the School to reconsider its rejection of Abraham, and that, after almost four months had passed, the School continued to refuse Abraham admission because of his HIV status. The remainder of this allegation is denied.

113. Denied.

114. Denied.

115. Admitted in part, denied in part. It is admitted that HIV may be transmitted through specific activities of sexual conduct in which a protective barrier is not utilized. It is admitted that there is currently no "cure" for HIV, the virus that causes AIDS. The remainder of this allegation is denied.

116. The allegation is a conclusion of law to which no response is required and the same is therefore denied. It is specifically denied that the ADA's individualized assessment requirement does not require an assessment of the individual.

117. Denied as stated.

118. Plaintiffs lack sufficient knowledge or information to form a belief as to the truth of the information contained in this paragraph, and therefore deny the same.

119. Plaintiffs lack sufficient knowledge or information to form a belief as to the truth of the information contained in this paragraph, and therefore deny the same.

120. Denied.

121. Plaintiffs lack sufficient knowledge or information to form a belief as to the truth of the information contained in this paragraph, and therefore deny the same. To the extent Defendant alleges that fear of litigation is a defense to an ADA claim, that allegation is a conclusion of law, to which no responses is required, and the same is therefore denied. By way of further response, it is specifically denied that fear of litigation is a valid defense to a violation of an individual's civil rights.

BASIS FOR RELIEF

122. The allegation is a conclusion of law to which no response is required and the same is therefore denied.

123. The allegation is a conclusion of law to which no response is required and the same is therefore denied.

124. The allegation is a conclusion of law to which no response is required and the same is therefore denied. To the extent a response is required, Plaintiffs admit that they have filed the instant Complaint against Defendant for violation of the ADA and related state law, and

that Defendant admits that its reason for denying Abraham admission was due to his HIV status. Otherwise denied.

125. The allegation is a conclusion of law to which no response is required and the same is therefore denied. To the extent a response is required, this allegation is denied.

126. The allegation is a conclusion of law to which no response is required and the same is therefore denied. To the extent a response is required, this allegation is denied. By way of further response, Defendant has improperly framed the issue.

127. The allegation is a conclusion of law to which no response is required and the same is therefore denied.

WHEREFORE, Plaintiffs pray that Defendant's claim for Declaratory Judgment be dismissed in its entirety.

AFFIRMATIVE OR OTHER DEFENSES

128. Defendant's actions constitute a violation of Title III of the ADA and related state law.

129. Defendant lacks standing for the relief it seeks.

130. The Court does not have subject matter jurisdiction over Defendant's counterclaim.

131. Defendant's legal framing of the issue is incorrect.

132. Defendant's factual framing of the issue is incorrect.

133. Defendant has failed to identify a concrete set of undisputed facts from which the Court can make a declaration as to the parties' rights based on those facts.

134. Defendant's request for a declaratory judgment is mooted if the Court determines that Defendant failed to properly conduct an individualized assessment of Abraham's disability, as required by the ADA.

135. Defendant's counterclaim is barred by the doctrine of laches, because Defendant unreasonably delayed in seeking declaratory relief from the Court for more than seven months after it had already denied Abraham admission based on his HIV status in violation of the ADA, and such delay greatly prejudiced Abraham and Mother.

136. Defendant's counterclaim is barred by its unclean hands, as Defendant is not entitled to seek equitable relief from the Court for the purpose of retroactively affirming the discriminatory decision it made in violation of the law.

137. Defendant's counterclaim is improper because a declaratory judgment by a prospective or actual defendant in a tort action should not be entertained. *See Sun Oil Co. v. Transcontinental Gas Pipe Line Corp.*, 108 F. Supp. 280, 282-83 (E.D. Pa. 1952).

138. Defendant's counterclaim is duplicative because adjudication of Plaintiffs' claims will render the counterclaim moot. *See Aldens, Inc. v. Packel*, 524 F.2d 38, 51-52 (3d Cir. 1975) (citing 6 C. Wright & A. Miller, *Federal Practice & Procedure* § 1406 (1971)); *Principal Life Ins. Co. v. DeRose*, No. 1:08-cv-2294, 2009 WL 4061366, at *4 (M.D. Pa. Nov. 23, 2009) (dismissing a counterclaim for declaratory relief on the same issues presented in the plaintiff's claims because the counterclaim "serve[s] no purpose in this case, but its inclusion in the action needlessly creates the risk of procedural confusion"); *Principal Life Ins. v. Minder*, No. 08-5899, 2009 WL 1917096, at *2 (E.D. Pa. Jul. 1, 2009) (dismissing counterclaim that was a mirror image of plaintiff's claim for relief).

139. Judgment on Defendant's counterclaim would not be useful to the parties, because adjudication of Plaintiffs' pending Complaint will address all the issues raised by Defendant's counterclaim in terms of the rights and duties of the parties. Thus, Defendant's counterclaim for declaratory judgment would not alleviate a legal uncertainty.

140. Plaintiffs intend to rely on or assert such other defenses that may become available or apparent during the course of discovery in this case.

Dated: February 27, 2012

Respectfully submitted,

AIDS LAW PROJECT OF PENNSYLVANIA

/s/ Ronda B. Goldfein

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Attorney for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing PLAINTIFFS' ANSWER WITH AFFIRMATIVE DEFENSES TO DEFENDANT'S COUNTERCLAIM FOR DECLARATORY JUDGMENT was served upon counsel for Defendant via first class and electronic mail, and is available for viewing through the Court's ECF system this 27th day of February, 2012, addressed as follows:

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/s Ronda B. Goldfein
Ronda B. Goldfein

EXHIBIT A

MILTON
HERSHEY
SCHOOL

FOUNDED 1909

June 30, 2011

Dear [REDACTED]
[REDACTED]

We are in receipt of [REDACTED] application materials for Milton Hershey School. After carefully considering all of the information submitted, we regret to inform you that [REDACTED] application will not be considered for possible enrollment.

After review of the information, it has been determined that [REDACTED] documented needs are beyond the scope of the Milton Hershey School programs. Specifically we are unable to meet his needs in our residential setting.

We understand that this decision is disappointing news. On behalf of my staff, thank you for your cooperative efforts throughout the process. If you have any questions, please contact the Admissions Office at 1-800-322-3248 or 717-520-2100.

Sincerely,



Danny Warner
Director of Admission

DW/cb