

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

MILTON HERSHEY SCHOOL,

Petitioners,

vs.

JANE DOE and JOHN DOE,

Respondents.

No.: _____

COMPLAINT FOR DECLARATORY JUDGMENT

Milton Hershey School (“the School” or “Petitioner”), by counsel, files this action under the Declaratory Judgment Act, 28 U.S.C. § 2201 seeking a declaration that the School is not obligated under federal law to admit a minor child with a disability, John Doe, because he would pose a direct threat to the health and safety of others and his needs cannot be accommodated in this unique residential setting.

The School has carefully considered the relevant legal factors, and this has been a challenging decision. While the School is sympathetic to John Doe, the School is required to balance his rights and interests with its obligation to

provide for the health and safety of all of the 1,850 children in its care. Milton Hershey School is a unique, home-like environment, a residential school where children live on campus in homes with 10 to 12 other students, 24 hours a day, 7 days a week, throughout most of the year. In order to protect children in that unique environment, the School is not able to accommodate the needs of students with chronic communicable diseases. Because of the comprehensive nature of the care provided by the School, and its long experience serving children, the School knows that no child can be assumed to always make responsible decisions which protect the well being of others. The School believes that it has made the correct assessment of the risks of transmission of HIV in this setting, and has not violated the law because this student would pose a direct threat to the health and safety of other students. The School recognizes that this is a challenging and complex issue, and there is some uncertainty in how the ADA applies to unique setting. That is why the School is asking the Court for a declaration of its rights and obligations.

PARTIES

1. The School is a private co-educational school and home for pre-Kindergarten through 12th Grade students from families with identified economic and social needs. The School is located in Hershey, Dauphin County, Pennsylvania. Because the School is a privately-owned place of education, it is a “place of public accommodation” covered under ADA Title III.

2. Jane Doe¹ is an adult individual who currently resides in Pennsylvania. John Doe, a male, is the 13 year old minor child of Jane Doe, and lives with his mother. John Doe is HIV-positive and would likely be considered a person with a disability under the ADA, as amended. Jane and John Doe have been represented since at least August 2011 by the AIDS Law Project of Pennsylvania, a non-profit public interest law firm located in Philadelphia, Pennsylvania.

JURISDICTION AND VENUE

3. The Court has subject matter jurisdiction over this declaratory judgment action under the Declaratory Judgment Act, 28 U.S.C. §2201 (“DJA”), the Americans with Disabilities Act, 42 U.S.C. § 12181, *et seq.* (“ADA Title III”), and the Fair Housing Act of 1973, 42 U.S.C. § 3601, *et seq.* (“FHA”), pursuant to 28 U.S.C. §§ 1331 and 1343.

¹ The School has redacted the names of the Respondents to protect their confidentiality until they can make an appearance and the Court can determine how best to proceed. John Doe is a minor child, and his name is appropriate to redact under Local Rule 5.2(d)(2). Jane Doe may have privacy and other concerns she can raise because this case involves HIV. The School wishes to respect the privacy of both Jane and John Doe in the event that John Doe is subsequently admitted, and is concerned that even providing the initials of these Respondents Defendants might allow them to be identified. Therefore, the School has not included the initials of either Jane Doe or John Doe pending further direction of the Court. A reference list has been filed under seal pursuant to Local Rule 5.2(e)(2).

4. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(2), because a substantial part of the events or omissions giving rise to the dispute between the parties over the admission of John Doe to the School occurred in this judicial district, where the School is located.

5. An “actual controversy” exists regarding the School’s obligations under federal law to admit John Doe into its unique residential and school program.

6. The School asserts a legal relation, status, right, or privilege that is denied by Defendants—namely, that if John Doe is an otherwise qualified individual with a disability who is eligible for admission to the School, the School is not obligated to admit John Doe if he poses a “direct threat” to the health or safety of others that cannot be mitigated through reasonable modifications of policies, practices or procedures, or the provisions of auxiliary aids or services. *See* 28 C.F.R. §36.208. The School has made an individualized assessment as required by the ADA and its implementing regulations and determined that John Doe would pose a direct threat.

7. Jane and John Doe, through counsel, have rejected the School’s assessment of the potential risk to the health and safety of others, and have threatened to bring an action for injunctive and other relief under ADA Title III

and the FHA, as well as state tort law claims, seeking injunctive relief and compensatory damages.

8. Where federal jurisdiction would exist in a coercive action, *i.e.* a suit by Jane Doe and John Doe under the ADA or the FHA, the Court has subject matter jurisdiction to hear a claim for declaratory judgment by the entity threatened with suit. *Franchise Tax Board*, 463 U.S. 1, 19, 103 S.Ct. 2841 (1983); *Ameritech Benefit Plan Committee v. Communications Workers of America*, 220 F. 3d 814, 818 (7th Cir. 2000).

FACTS

9. The School was created pursuant to a Deed of Trust established by Milton and Catherine Hershey for the purpose of educating children from families of low income, limited resources and social need. In accordance with its governing Trust documents, the School provides a unique all-encompassing program for these children, including an education, housing in a family setting, food, clothing, medical, dental and psychological care, and recreational opportunities, with no financial obligation to the family. The School currently serves more than 1,800 students, with approximately 600 in the Middle Division (grades 5-8) and 900 in the Senior Division (grades 9-12).

10. The School receives many more applications than the spaces available. The admission requirements include, but are not limited to, coming

from a family of low income, limited resources and social need; having the ability to learn; being free of serious emotional and behavioral problems that might disrupt life in the classroom or the home; and being able to take part in the School's programs.

11. Once admitted, students generally enroll through high school graduation, provided that the child complies with all applicable policies and procedures. The School offers small class sizes and individualized attention in a highly structured environment. There are high expectations for performance and behavior, and significant supervision. Students and their parents must agree to abide by all rules, policies and procedures as a condition of admission and continued enrollment.

12. As a fundamental part of its program, the School operates as a residential setting for much of the calendar year. There are no Day students. All students live in family-style residences with 10 to 12 students of the same gender. Each home is overseen by Houseparents, a married couple who provide full-time supervision and care for the students. The Houseparents live in the student homes, often with their own children. The Houseparents are employees of the School, covered under a collective bargaining agreement.

13. The School is familiar with the requirements of ADA Title III and has been able to accommodate the needs of some students with disabilities. Some

students require psychological treatment and counseling, and some have learning disabilities. The School has also had students who were admitted with or later developed physical or medical conditions. A number of these students may meet the definition of persons with disabilities under the ADA.

14. Because of the nature of the School's programs and services, there are limits on the School's ability to accommodate all prospective or current students with disabilities. In accordance with its Deed of Trust, the School admits students who have the capacity to learn and become above average achievers; it is not designed specifically to provide intensive special education services. Similarly, the School's program is not designed for students with severe behavioral problems that would interfere with classroom and home life. Because of the nature of the home-like residential program, with 10 to 12 students in each home, the School is unable to accommodate students with active communicable diseases for more than a short duration.

15. The application process contains a number of steps. The initial stage includes an application and financial disclosures and obtaining school records and recommendations. During this process there is an initial review to see if the student meets the financial criteria and has the academic potential to learn. During this stage, or later in the process, medical issues may be identified that require further review.

16. John Doe is currently in 8th grade. John Doe first applied for admission in February 2009. His application was turned down several weeks later because there were limited spaces in limited grades. John Doe's initial application did not disclose any medical issues. John Doe applied for admission to the School a second time in February 2011. Based upon the information provided during the application process, the Admissions Committee determined that John Doe appeared to meet the initial minimal qualifications for admission to the School. This application did not disclose any medical issues.

17. During the application process, the School was provided medical records that revealed that John Doe is HIV-positive. The Admissions Committee referred this issue to a senior administrative team for review. As a result of the decisions made by the senior administrative team, the Admissions Committee never completed the rest of the admissions process. The steps that were not completed included, but are not limited to, an on-campus interview, various cognitive and behavioral tests, additional information on the child's behavior, a medical examination, and determination of whether there are available spaces.

18. In a letter dated June 30, 2011, the School advised Jane Doe that John Doe'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." The reason underlying this decision related to John Doe's HIV-positive status. The

primary reason was the risk he would pose to others in this residential setting. In addition, the School determined that in order to mitigate the risk to others and to accommodate his needs, the School would have to make modifications of its policies and procedures that would not be reasonable, would pose an undue burden, and/or would fundamentally alter the nature of the School's programs and services.

19. In a letter dated August 5, 2011, counsel for John Doe asked the School to reconsider its denial of admission.

20. In response to this request, the School undertook another review of its decision. At the conclusion of that review, the School again concluded that John Doe would pose a direct threat to the health and safety of others, and that accommodating his needs would require a fundamental alteration of its programs and services, or an undue burden.

21. One category of risks that would be posed by John Doe if he was admitted to the School is the risk to others from exposure to blood that is likely to occur in various settings, including a residential setting. The School acknowledges that the risk of transmission of HIV through this means is low, and can be minimized through the use of "universal precautions." The School has concluded that because of the unique 24/7 residential nature of its program and services, with multiple caregivers throughout the year, that a large number of staff had a need to

know of John Doe's status in order reduce the risk of injury from blood below that of a direct threat. On information and belief, John Doe and Jane Doe are not willing to consent to the School disclosing John Doe's condition to all those with a need to know. In addition, the School may need to make other modifications of its program and services to address the risk to students and others, such as training to students to avoid caring for each other in emergencies without following Universal Precautions, that might require a fundamental alteration of its programs. John Doe's particular medical needs may also require significant modifications of the School's services.

22. The other, more significant category of risks identified by the School is the risk of transmission of HIV to fellow students through sexual contact. In *Doe v. County of Centre, PA*, 242 F. 2d 437 (3rd Cir. 2001) the Third Circuit Court of Appeals, applying the Supreme Court's decision in *Bragdon v. Abbott*, 524 U.S. 624, 648-49 (1998), addressed the application of the direct threat standard to transmission of HIV through sexual transmission. The Court of Appeals held as a matter of law that (a) HIV has been proven to be transmitted through sexual intercourse (homosexual or heterosexual); (b) HIV is permanent, since there is no cure; and (c) the harm to third parties is life threatening. Thus in cases involving HIV, where there is a clear means of transmission such as sexual conduct, the only issue to be raised is the likelihood or probability of sexual conduct.

23. It is an unfortunate fact that throughout our society teenagers are increasingly sexually active at an ever earlier age, including Middle School. Even with pervasive media attention to teen sexual behavior and sex education, many teenagers are likely to engage in sexual behavior prior to high school graduation, often without the use of condoms.

24. Students at the School are subject to rules about dating and sexual behavior. The School encourages sexual abstinence, and provides its students with sex education and sound moral training. Appropriate counseling and health services are provided if students are found to have engaged in sexual activity. Violation of these rules can lead to expulsion.

25. Despite the School's policies and procedures against sexual behavior on campus, and its efforts at supervision, the School knows through anecdotal evidence, counseling, discipline and medical treatment of students that some of its students will, like their peers, become sexually active prior to graduation. Because of the School's unique residential co-ed setting, closely-knit community, and extended year, sexual activity is likely to occur on campus and while students are under the supervision of the School.

26. The School is sympathetic to John Doe's medical condition. The School has assumed, for purposes of its analysis, that John Doe is a responsible 13 year old boy. However, the School must balance his rights against its obligations

to the health and safety of other students. Based upon its experience, and considering all of the relevant factors required by law, the School believes that the risk of transmission of HIV to other students through consensual sexual conduct meets the standard of a direct threat to the health and safety of others that cannot be mitigated through reasonable modifications to its policies, procedures and practices. However, the School acknowledges that this is an evolving area of the law. This case poses questions that were left unanswered in the *Doe v. County of Centre* decision and an application to a unique residential private school setting. Therefore, the School is seeking a declaration of its rights and obligations under federal law.

27. While the School's primary concern is based upon the direct threat to the safety of other students through the transmission of HIV by sexual conduct, if such transmission were to occur there is a not insubstantial risk of liability in a subsequent tort claim by an infected student. At a minimum, the School would face the likelihood of litigation.

28. The School has communicated these concerns to John Doe and Jane Doe through their counsel, who has rejected these concerns. Defendants' Counsel has represented that they have filed a Complaint with the Pennsylvania Human Rights Commission, and intend to file or have filed a lawsuit in federal court that the School's denial of admission to John Doe is a violation of the ADA and FHA.

COUNT I

Declaratory Judgment that Milton Hershey School Has Not Violated ADA Title III by Failing to Admit Defendant John Doe

29. The School incorporates herein by reference Paragraphs 1-28.

30. This is an action for declaratory judgment pursuant to the DJA, 28 U.S.C. § 2201, for the purpose of resolving whether the School has or would violate ADA Title III by refusing to admit John Doe. Accordingly, the School seeks to obtain a declaration of its rights and obligations under that federal law.

31. The DJA permits a federal court to “declare the rights and other legal relations of any interested party seeking such declaration,” when there is a “case or controversy.” 28 U.S.C. § 2201. As the Court of Appeals for the Third Circuit (“Third Circuit”) has explained, “a ‘case of actual controversy’ means one of a justiciable nature.” *Abraham v. Del. Dept. of Corr.*, 331 F. App’x 929, 931 (3d Cir. 2009) (quoting *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 325 (1936)). The controversy must be “definite and concrete, touching the legal relations of parties having adverse legal interests.” *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937).

32. In *Surrick v. Killion*, 449 F.3d 520, 527 (3d Cir. 2006), the Third Circuit identified three factors for determining whether a declaratory judgment is appropriate: “(1) the parties must have adverse legal interests; (2) the facts must be sufficiently concrete to allow for a conclusive legal judgment, and (3) the judgment

must be useful to the parties.” (citing *Step-Saver Data Sys., Inc. Tech.*, 912 F.2d 643, 647 (3d Cir. 1990)). In this case, all three elements are met.

33. The parties clearly have an adverse legal interest. The School believes that it was justified in denying John Doe admission based upon the risk to the health and safety of its students and others and the inability of the School to meet John Doe’s needs in its setting without posing a direct threat to others, imposing an undue burden, or a fundamental alteration of its programs and services. Jane Doe and John Doe have rejected the School’s articulated defenses.

34. Second, the “facts are sufficiently concrete to allow for a conclusive legal judgment.” In this case, most of the facts are not in dispute, and the development of the record would be no more than in a coercive action brought by the Defendants against the School. The real issues are legal in nature: whether the School would violate the ADA by not admitting John Doe.

35. Third, a declaratory judgment will materially affect the actions of the parties, i.e. whether the School has a legal obligation to continue processing his application without consideration of John Doe’s HIV positive status.

36. For the reasons set forth above, the School asks that the Court declare that it would not violate ADA Title III by refusing to admit John Doe because (a) he would pose a direct threat to the health and safety of others, and (b) his needs

cannot be accommodated without imposing an undue burden or requiring a fundamental alteration of the programs and services of the School.

COUNT 2

Declaratory Judgment that Milton Hershey School Has Not Violated FHA by Failing to Admit Defendant John Doe

37. The School incorporates herein by reference Paragraphs 1-36.

38. On information and belief, the basis for Defendants' allegation that the School is violating the FHA is that the failure to admit John Doe constitutes discrimination in the rental of residential housing.

39. The School does not offer rental housing to the public, or to its students. Students who are admitted to the School receive housing free of charge. The School's academic programs are intertwined with its residential setting.

40. Because the School has legitimate, non-discriminatory reasons for not admitting John Doe, and this decision would not violate the ADA or any other law prohibiting discrimination in admission to its programs, the School has not violated the FHA.

41. Moreover, the housing provided to students while attending the School is not covered by the Fair Housing Act.

42. For the reasons set forth above, the School asks that the Court declare that it would not violate the FHA by failing to admit John Doe.

WHEREFORE, Plaintiff respectfully requests that the Court enter a Declaratory Judgment ordering, adjudging, and decreeing that:

A. The School would not be discriminating against John Doe on the basis of his disability, in violation of the ADA or the FHA, if the School denies him admission to its programs; and

B. That the School be granted such other and further relief as the Court deems appropriate.

Respectfully submitted,

SAUL EWING LLP

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2011, I electronically transmitted the attached document to the Clerk's Office using the ECF System for filing and mailed a copy of the attached document to:

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