

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

MOTHER SMITH, on behalf of herself and as
Parent and Natural Guardian, on behalf of
ABRAHAM SMITH, a Minor,

Plaintiffs,

vs.

MILTON HERSHEY SCHOOL,

Defendant.

Case No.: 11-7391 (CDJ)

**DEFENDANT'S MOTION TO TRANSFER VENUE TO THE
MIDDLE DISTRICT OF PENNSYLVANIA**

For the reasons set forth in the accompanying Memorandum of Law, defendant the Milton Hershey School respectfully moves this Court for an order transferring this civil action to the United States District Court for the Middle District of Pennsylvania.

Respectfully submitted,

SAUL EWING LLP

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Dated: January 27, 2012

**IN THE UNITED STATES DISTRICT COURT
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Parent and Natural Guardian, on behalf of
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**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S
MOTION TO TRANSFER VENUE
TO THE MIDDLE DISTRICT OF PENNSYLVANIA**

I. Introduction

This case involves the Milton Hershey School's decision to discontinue processing the Plaintiff Abraham Smith's application for enrollment after deciding, relatively early in the admissions process, that the School could not accommodate his needs in its residential setting. . . not to continue the enrollment process of a student. The Milton Hershey School is located in Hershey, Pennsylvania. Nearly everyone involved in the school's decision, or who has knowledge of facts relevant to this lawsuit, resides in and around Hershey, Pennsylvania – and each of those people plays a vital and daily role in the continued, uninterrupted operation of the School. In addition, the decision not to continue the enrollment process for this potential student was based in large part on the unique, residential and home-like setting of the Milton Hershey School – a setting so unique that a true understanding of it, and its significance in the decision made here, will require a site visit by the ultimate fact-finder.

The Eastern District's only connection with this action is that Plaintiffs reside here, and Abraham Smith's current doctors are here. There are no other material or substantive connections to the Eastern District. All operative facts occurred in, and all key witnesses reside in, the Middle District of Pennsylvania ("Middle District").¹ Accordingly, while venue may be proper in this District, it is not convenient or efficient.

Accordingly, The Milton Hershey School ("MHS" or "the School") moves to have this case transferred to the Middle District. This Memorandum of Law supports the School's Motion to Transfer under 28 U.S.C. §1404(a).

II. Factual Background

Plaintiffs seek damages from the School for alleged violations of Title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12181, *et seq.*, and state tort law, arising from the School's decision to discontinue the enrollment process for Abraham Smith. (Am. Compl. at ¶ 1). Abraham Smith is a 13 year-old boy currently in the 8th grade in a suburban Philadelphia school. (Am. Compl. at ¶ 23). Mr. Smith is HIV-positive. (Am. Compl. at ¶ 25).

MHS has served children in need since 1909. (Declaration of Peter Gurt, January 27, 2012 ("Gurt Declaration"), at ¶ 4). 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. (Id. at ¶ 5). 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

¹ Plaintiffs' Amended Complaint adds seven paragraphs, allegedly in support of the contention that venue is proper in the Eastern District. There is no dispute that venue may be proper in this District. Instead, this motion turns on whether this venue is convenient. MHS submits that it is not.

psychological care, and recreational opportunities, *with no financial obligation to the family*. (*Id.* at ¶ 6).

MHS currently educates and cares for more than 1,800 students. (*Id.* at ¶ 7). MHS does not have “day students.” (*Id.* at ¶ 8). No students live “off campus.” (*Id.*). All students live on campus in family-style residences with an average of 10 to 12 students of the same gender. (*Id.* at ¶ 9). Student homes are grouped by Division—Elementary (pre-K through grade 4); Middle (grades 5-8) and Senior (grades 9-11, with 12th graders living in a different apartment setting). Therefore, it is likely that students of different ages may live together. (*Id.* at ¶ 10).

Depending on the age of the students and the type of residence, two to four students share a bedroom and bathroom, just as they might in any family setting. (*Id.* at ¶ 11). Each home is overseen by Houseparents, a married couple employed by the School who are responsible to provide full-time supervision and care for the students. (*Id.* at ¶ 12). Houseparents give all of the care and meet all of the needs that would normally be expected of “real parents” in a family setting. (*Id.* ¶ 13). This group home, “family”-based residential structure is part of the fabric of the School, uniquely intertwined with the School’s stated mission. (*Id.* at ¶ 14).

In this instance, MHS received Mr. Smith’s application, and supporting information, over the course of March and April 2011. (Am. Compl. at ¶¶ 30-32). As with all applications, Mr. Smith’s application was initially processed by the School’s Admissions Department. (Gurt Declaration at ¶ 15). All Admissions personnel involved in processing Mr. Smith’s application reside in or near Hershey, Pennsylvania. (*Id.* at ¶ 16). In June 2011, MHS decided that the processing of Mr. Smith’s application would be discontinued on the basis that MHS is “unable to meet his needs in [MHS’s] residential setting. (Am. Compl. at ¶ 35). This was a collaborative decision involving key senior administrative personnel, with input from others, including

medical personnel (Gurt Declaration at ¶ 18). All of these people, and other staff with knowledge of relevant facts, reside in or near Hershey, Pennsylvania. (Id. at ¶ 19).

III. Argument

A. Legal Standards

28 U.S.C. § 1404(a) provides that:

For the convenience of parties and witnesses, in the interests of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Id. That section requires district courts to conduct an “individualized, case-by-case consideration of convenience and fairness” when deciding a motion to transfer. Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29 (1988).

District courts are vested with wide discretion in making a determination to transfer venue under § 1404(a). See Piper Aircraft v. Reyno, 454 U.S. 235, 253, 255-56 (1981); Lony v. E.I. DuPont de Nemours & Co., 886 F.2d 628, 631-32 (3d Cir.1989). A court “may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute,” Gulph Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947). Various factors contribute to the calculus of “whether the interests of justice would be better served by a transfer to a different forum.” Jumara v. State Farm Ins. Inc., 55 F.3d 873, 879 (3d Cir. 1995). “Convenience” (of parties and witnesses) is important, and so are “practical considerations that could make the trial easy, expeditious, or inexpensive...” Id. (internal citations omitted).

In this instance, Plaintiffs have selected the Eastern District as their desired forum. Although “a plaintiff’s choice of forum should rarely be disturbed,” Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 (1981), “a plaintiff’s choice [of forum] receives less weight where none of the operative facts occurred in the selected forum.” Fid. Leasing, Inc. v. Metavec Corp., No. Civ. A. 98-6035, 1999 WL 269933, at *2 (E.D. Pa., Apr. 29, 1999); see also Cameli v. WNEP–News

Station, 134 F. Supp 2d 403, 405–06 (E.D.Pa. 2001) (“The deference given to a plaintiff’s choice of forum is reduced when the operative facts that give rise to the action occur in another district”). Here, the claim did not arise in this District; all operative facts occurred in the Middle District.

This case presents a unique set of circumstances – things endemic to just what the School is “all about” – and it is those things, the things which make MHS unique, which the School believes militate in favor of a transfer. As the attached Gurt Declaration indicates, all of the potential fact witnesses in this case (other than the Plaintiffs), reside in the Middle District. (Gurt Declaration at ¶¶ 18-20). Many of these witnesses may be outside the Court’s subpoena power, a circumstance which at best creates discovery related issues and at worst could prejudice the Plaintiffs’ ability to prosecute their case. This is not, however, the driving factor supporting transfer.

B. Convenience

Here, “convenience” takes on a new dimension, because the School is not only a unique residential elementary and secondary learning institution – it is also a unique community. The School educates and cares for, and essentially parents, 1,850 students, all of whom live, generally in groups of 10 to 12, in group homes in which a married couple acts as “houseparents.” Throughout the day – every day, all day – each child is cared for just as a parent would care for his or her own child – the student’s every need is met, monitored, cultivated and attended to by someone associated with the School.

Why is this uniqueness important to the “convenience” aspect of a transfer of venue decision? There are two critical considerations involved in answering that question; the necessity of the fact-finder to experience the School environment and the critical need to avoid constant interruption to the school environment.

1. Site Visit

First, given the underlying rationale for the School's decision not to continue the enrollment process for Abraham Smith, it will be critically important to visit and spend time at the School, perhaps more than once, to view and understand on a first-hand basis just what its residential educational community is all about. See Christensen v. Hyatt Corp., No. 1:09-cv-70, 2009 WL 5195772, at *3 (D. Virgin Islands Dec. 21, 2009) (granting a motion for transfer and finding "a site visit or examination [of the situs of the underlying incident] may be helpful to a jury."); see also Grohoski v. Wyndham Int'l, Inc., No. Civ. A. 04-3949, 2005 WL 475175, at *1 (E. D. Pa. Mar. 1, 2005) (suggesting "essential evidence" militated transfer, including location, "layout of resort" and where accident occurred.)

Although some courts have deemed the "site visit" argument unpersuasive, it is submitted that those cases differ in one key respect – what needs to be seen there may be captured by picture or testimony. See, e.g., Boiardi Products Corp. v. Axam, Inc., No. 87-4010, 1989 WL 201020 (D.N.J. Mar. 23, 1989) (rejecting the premise that a site visit would be necessary to "physically observ[] an inoperable machine would be more convincing than the testimony of plaintiff's expert witness ... or that of the engineers involved in the project.") That is not the case here. In this action, what needs to be seen is how and where children live. What are the daily, moment-to-moment realities of this location that bear directly on how children interact with each other? This cannot be understood simply with pictures, a video, or descriptions via testimony. It must be seen to be understood.

In addition to the efficacy of a site visit in relation to understanding the unique residential setting of the School, given that the majority of people involved in this case do not live in the Eastern District, it will be more convenient for the parties, related persons, and the Court, and perhaps a jury, to make those visits from within the Middle District than from Philadelphia. The

School's decision not to continue the enrollment process for Abraham Smith was heavily influenced by the direct threat he would pose to students living in unique familial proximity to each other, students who cannot be supervised by an adult 24 hours per day. Why that direct threat is magnified in the School's setting can only be understood by seeing the setting itself. To understand the relevance, and significance, of this point and all things relating to it, it will be necessary for the jury and/or Court to actually visit the School to get a first-hand view of what the residential education setting actually entails. This will be more easily accomplished if the case is transferred to the Middle District, where the School is located.

2. The Prejudice to School Operations

Also very important, the School submits, is that many of the potential witnesses from the School – if not all of them – are central to the smooth, efficient, effective and persistently reliable operation of the School, and the fulfillment of its obligation to care for all 1,850 of its students, which is a daily proposition. In other words, it would be inconvenient to take these people away from the School for the kind of time that would be required to litigate this case in the Eastern District. Some of these witnesses are key administrative personnel. Some of them are medical personnel. Some witnesses may be houseparents, who cannot be taken away from the School's grounds for extended periods. Some of these witnesses may be witnesses that the Plaintiffs want, whether or not the School wants them, giving rise to the subpoena power issue addressed in the attached Gurt Declaration.

These people need to be at the School, or, as near the School as possible, essentially 24/7. This is virtually impossible when the School can be anywhere from 2 to any number of hours from the federal courthouse in Philadelphia, depending on traffic. By contrast, the School is 20 minutes from the federal courthouse in Harrisburg.

As a practical example, witnesses are likely to include MHS's medical and Admissions personnel. If such people are pulled away from the School for extended periods of time, it is possible that MHS would have to avoid all campus admissions interviews for the entire period of the trial. By way of further example, MHS has two primary physicians that share **daily** coverage and on-call duties for the School. If one or both of these personnel are pulled away from the School for extended periods of time, it could have dire consequences on the health and well-being of MHS's nearly 1,850 students.

Taking key personnel away from the School places an inconvenient burden on the School in terms of coordinating and scheduling to cover the extended absences of key personnel (at potentially unpredictable times) as this litigation progresses. There is no reason, on balance, to jeopardize the School's operations in this manner.

C. Key Witnesses Are in the Middle District

Accommodating the School's operational needs by transferring this case to the Middle District will not prejudice Plaintiffs, and may in fact make the prosecution of their case more efficient by insuring ready access to witnesses and the School itself as the litigation develops. The witnesses of interest to the Plaintiffs will include school administrators, teachers, coaches, houseparents, relief houseparents, counselors, and medical personnel, all of whom reside in the Middle District. In stark contrast, the only witnesses reasonably anticipated by the School to be involved for the Plaintiffs residing in the Eastern District are Abraham Smith, his mother, and his medical providers. Thus, because *nearly every* witness resides in the Middle District, transferring this case will help expedite this action, and be far less expensive. See Jumara, 55 F.3d at 779 (citation omitted).

D. The Operative Events Occurred in the Middle District

Plaintiffs would be hard-pressed to dispute the fact that *all* of the events giving rise to their claims occurred in the Middle District. This too is an important consideration - “whether the claim arose elsewhere [in a district other than originally filed] . . .” Jumara, 55 F.3d at 779 (citation omitted). *Everything* related to this action occurred in the Middle District. The decision to discontinue the enrollment process was made in Hershey. The application for enrollment, discontinuance and the letter sent by the School to convey its decision—all occurred in or stemmed from things done in the Middle District. In addition, the School has no offices, property, assets, or employees in the Eastern District. The *only* connection to the Eastern District is that Plaintiffs reside there. Every other fact, connection, or issue in this case relates to the Middle District.

E. Plaintiffs Will Not Be Inconvenienced by a Transfer

The inconvenience to everyone connected to this matter other than Plaintiffs is clear. Equally clear, the School submits, is that Plaintiffs will not be prejudiced by a transfer. As previously stated, the majority of witnesses reside in the Middle District. While Plaintiffs’ attorney will want to depose several of those witnesses, it is unlikely that Plaintiffs would actually *attend* most depositions. In other words, Plaintiffs will not have to travel back and forth—on a regular basis—from their home to the School. Consequently, a transfer will not result in a significant increase of costs to Plaintiffs. However, any travel of the School’s personnel disrupts the daily operation of the School particularly if the absence is extended.²

Based upon the allegations in the Amended Complaint, it does not appear that a transfer to the Middle District will interfere with or inconvenience Abraham Smith’s medical treatment.

² In this regard, the School is likely to suggest that it may be best if depositions occur at the School, so that key personnel can be where they need to be in the event of an emergency.

The Amended Complaint states that Abraham Smith “sees his doctor at the Children’s Hospital of Philadelphia (‘CHOP’) approximately three times per year.” (Am. Compl. at ¶ 25). Given this limited number of visits, as alleged by Plaintiffs, the School can and will take all efforts necessary to coordinate with Plaintiffs’ counsel to work around Plaintiff’s medical appointments. This is not easily accomplished in reverse. Pulling the School’s medical staff away from campus does more than inconvenience the well-being of students -- it puts those 1,850 students at a real risk.

F. Transfer is Practical, Especially Now

As the Third Circuit has made clear, the Court should consider the “practical considerations that could make the trial easy, expeditious, or inexpensive.” Jumara, 55 F.3d at 779 (citation omitted). Having the trial close to the School—rather than at least two hours away in Philadelphia—will make trial itself less expensive and burdensome. It would better accommodate and pose less of an inconvenience to the vast majority of people involved with the case. It will also be less disruptive to the School’s operation and caring for 1,850 students.

In addition, this request is being made at a *very early stage* in the proceedings. Only the Complaint (and very recently, on January 20, 2012, an Amended Complaint) has been filed. The Middle District will receive the case on an essentially clean slate, allowing that court to set a schedule and administer all of the other matters critical to its ultimate decision.

IV. CONCLUSION

For the foregoing reasons, The Milton Hershey School respectfully requests that the Court transfer this case from the Eastern District of Pennsylvania to the Middle District of Pennsylvania, pursuant to 28 U.S.C. § 1404(a).

Respectfully submitted,

SAUL EWING LLP

/s/ Michael Finio, Esquire

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Dated: January 27, 2012

Attorneys for Defendant Milton Hershey School

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DECLARATION OF PETER GURT
IN SUPPORT OF DEFENDANT'S MOTION TO TRANSFER VENUE

I, Peter Gurt hereby declare as follows:

- 1) I am employed as Senior Vice President and Chief Operating Officer by Defendant The Milton Hershey School ("the School" or "MHS").
- 2) As part of my job, I maintain access to certain of the School's personnel files and records and, in the regular course of my duties, have become thoroughly familiar with matters relating to the facts of this case. I am making this declaration based upon my own personal knowledge, and information obtained upon investigation in the ordinary course of my employment. If called to testify, I could and would competently testify to the following facts.
- 3) MHS is located at 801 Spartan Lane in Hershey, Pennsylvania, 17033.
- 4) MHS has served children in need since 1909.
- 5) 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.

6) 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.*

7) 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).

8) MHS does not have “day students.” No students live “off campus.”

9) *All* students live on campus in family-style residences with an average of 10 to 12 students of the same gender.

10) Student homes are grouped by Division—Elementary (pre-K through grade 4); Middle (grades 5-8) and Senior (grades 9-11, with 12th graders living in a different apartment setting). Therefore, it is likely that students of different ages may live together

11) Depending on the age group and the type of residence, two to four students share a bedroom and bathroom, just as they might in any family setting.

12) Each home is overseen by Houseparents, a married couple employed by the School who are responsible to provide full-time supervision and care for the students. Some Houseparents also have their own children living in the home.

13) Houseparents give all of the care and meet all of the needs that would normally be expected of “real parents” in a family setting.

14) This group home, “family”-based residential structure is part of the fabric of the School, uniquely intertwined with the School’s specific mission.

15) In this instance, Mr. Smith’s application was initially processed by the School’s Admissions Department.

in or near Hershey, Pennsylvania, including but not limited to the Senior Admissions Processor and Director of Admissions.

17) In June 2011, MHS decided that the processing of Mr. Smith's application would be discontinued on the basis that MHS is "unable to meet his needs in [MHS's] residential setting.

18) This was a collaborative decision by the school's senior administration officials, involving input from a number of administrative and medical personnel, all of whom reside in or near Hershey, Pennsylvania.

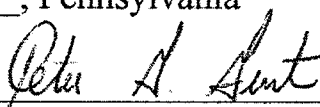
19) The majority of School employees live in and around Hershey, Pennsylvania, and near the School including a number of people with knowledge of relevant facts likely to be called as witnesses. This includes, but is not limited to, the Medical Pre-Enrollment Coordinator, the Executive Director of Student Support Services, the Director of Medical Services, the Lead Physician, the Executive Director of Enrollment Management and Family Relations, the Senior Vice President and Chief Operating Officer, and the President.

20) The School is located approximately 93 miles from the federal courthouse in Philadelphia, Pennsylvania.

21) There are also some School employees who beyond the Court's 100-mile subpoena power.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 27th day of January, 2012, at _____, Pennsylvania



Peter Gurt

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ORDER

AND NOW, this ____ day of _____, 2012, upon consideration of the Motion to Transfer Venue, filed by defendant The Milton Hershey School, IT IS HEREBY ORDERED THAT the motion is GRANTED, and the above-captioned action is TRANSFERRED to the United States District Court for the Middle District of Pennsylvania.

BY THE COURT:

Honorable C. Darnell Jones
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Motion to Transfer Venue and accompanying documents* has been electronically filed and is available to be viewed and downloaded from the Court's Electronic Case Filing system. I further certify that the following parties were served electronically:

Ronda B. Goldfein
AIDS Law Project of Pennsylvania
1211 Chestnut Street, Suite 600
Philadelphia, PA 19107

Attorney for Plaintiffs

Dated: January 27, 2012

/s/ Michael A. Finio, Esquire
Michael A. Finio