

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

C.N., L.B., and minor child B.K.L.N.;
J.A.R., E.G.M., and minor child J.G.;
M.N., P.M., and minor child H.M.N.;
M.C., G.S.C., and minor children
G.R.S.C. and N.B.T.; M.E.L., E.O.E.,
and minor child J.O.E.,

No. 268 MD 2020

Petitioners,

v.

Pennsylvania Department of Human
Services,

Respondent.

**REPLY TO RESPONDENT'S ANSWER TO
PETITIONERS' APPLICATION FOR SPECIAL RELIEF**

INTRODUCTION

Petitioners, families with young children detained at the Berks County Residential Center ("BCRC"), hereby file the instant Reply to the Answer filed by Respondent Department of Human Services ("Department") to Petitioners' Application for Special Relief. Peremptory judgement is warranted in this case because Petitioners have a clear right to mandamus and no genuine issues of material fact exist. Petitioners are in urgent danger as the COVID-19 pandemic continues to spread rapidly through Berks County.¹

¹ As of April 30, 2020, at 12:45 p.m., Berks County has a higher death toll (117 deaths) than even Allegheny County, the second-most populous county in the state (94 deaths). Pennsylvania

ARGUMENT

I. Petitioners have a clear right to a Writ of Mandamus because the Department’s exercise of discretion in failing to issue a removal order was arbitrary or based on an erroneous interpretation of law.

The Department is obligated to issue an emergency removal order based on the undisputed facts in the record. Its failure to do so amounts to an arbitrary exercise of discretion, or one that is based on a mistaken view of the law.

The Department claims that “[an immediate and serious danger to the life or health of the clients] ... do[es] not exist” at the BCRC. Answer at 5. To back up its claim, the Department points to a remote inspection conducted from March 31, 2020 to April 7, 2020. To quote the Department, “The inspection was conducted remotely because of the concern for the COVID-19 pandemic.” *Id.* If remote inspections are necessary because it is a risk to the health of inspectors to enter the facility, that should be a signal *that it is unsafe for families to be confined to the facility.*

The remote inspection was conducted via FaceTime. Diane Edwards, the facility’s Director, held a device as she was instructed to walk through the facility and provide a snapshot of a specific area at a given point in time. The Department stated that “the inspector did not find any evidence that BCRC residents could not

Department of Health, *COVID-19 Data for Pennsylvania* (Apr. 30, 2020), <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx>

practice social distancing” and stated, “During the walk-through, the inspector observed residents practicing social distancing.” *Id.* at 7. Even if Petitioners remained confined to their rooms, they would still be in danger of infection. *See* Petition, Exhibit B (Declaration of Dr. Jaimie Meyer) ¶ 10 (isolation is an ineffective way to prevent transmission of the virus to others, because air continues to flow outward from rooms to the rest of the facility, increasing risk of exposure to other families and staff). *Id.* Regardless, it is undisputed that Petitioners do regularly leave their rooms to eat in a shared cafeteria, use bathrooms and other common areas, and otherwise move throughout the facility – all activities which heighten the risk of transmission of the virus.

The inspector also “reviewed the procedures BCRC put in place to respond to COVID-19.” Answer at 6. These included suspending on-site job interviews, having staff serve residents from the salad bar, allowing staff to carry hand sanitizer, and questioning new arrivals (which have been suspended) on whether they were in close contact with anyone with COVID-19. *Id.*

Despite these procedures, current conditions at BCRC constitute a “serious danger to the life or health of the clients.” 55 Pa. Code § 20.37. “[Q]uestioning detainees, staff, vendors, or visitors upon entry whether they have been in contact with those with known COVID-19 positive disease is . . . ineffective for the same reason that they may have been in contact with someone asymptomatic and

therefore unaware of their infection.” Shapiro Decl. at ¶ 19. This makes it impossible for screening protocols to identify all those who are infected and contagious. *Id.* at ¶ 16.

Petitioners included numerous decisions from courts around the country who have ordered ICE detainees released because the measures taken by detention facilities, such as “screening on intake for risk factors, isolating detainees who report symptoms, . . . providing soap and hand sanitizer to inmates, and increasing the frequency of cleaning jail facilities,” are “patently insufficient to protect Petitioners.”²

BCRC is designed to be a congregate facility, with shared bathrooms, dining facilities, hallways, lounges, and recreational areas. As Dr. Shapiro states, “These congregate facilities are not designed in a way that permits appropriate preventative steps to avoid the spread of COVID-19.” *Id.* at ¶ 10. Social distancing is made even more difficult when, as here, young children are involved. Dr. Shapiro states: “It is imperative to understand that children’s developmental and

² *Basank v. Decker*, 2020 U.S. Dist. LEXIS 53191, 17-18 (S.D.N.Y. March 26, 2020); *see also United States v. Harris*, 2020 U.S. Dist. LEXIS 53632, 6 (D.D.C. March 27, 2020) (“Infections that are transmitted through droplets are particularly difficult to control in detention facilities, as 6-foot distancing and proper decontamination of surfaces is virtually impossible.”); *United States v. Fellela*, 2020 U.S. Dist. LEXIS 49198 (D. Conn. March 20, 2020); *United States v. Kennedy*, 2020 U.S. Dist. LEXIS 53359, 5 (E.D. Mich. March 27, 2020); and *United States v. Nkanga*, 2020 U.S. Dist. LEXIS 56188 (S.D.N.Y. March 31, 2020) (“Realistically, the best – perhaps the only – way to mitigate the damage and reduce the death toll is to decrease the jail and prison population by releasing as many people as possible.”).

cognitive limitations make consistent social distancing between different families and meticulous hand-washing impossible in congregate settings. Nor is it possible to prevent children from touching commonly used surfaces, from rubbing their eyes, nose, and mouth, from uncovered coughs or sneezes, or, for young children, from putting toys and other shared objects in their mouth.” *Id.* at ¶ 11.

Petitioners are still sharing meals and common areas. Petition, Exh. I (Cambria Supp. Decl.) at ¶¶ 24, 32. Petitioners are still required to clean not only their own rooms, but the communal bathrooms and children’s playroom as well. *Id.* at ¶ 28. Moreover, the detained families are still at risk because BCRC continues to host County, ICE, and medical staff, who come and go from the facility. *Id.* at ¶ 19. The Department provided no evidence to counter these statements; therefore, pursuant to Pa. R.Civ.P. 1029(b), it has admitted them.

As Petitioners noted, detaining children in an enclosed space without adequate social distancing and other necessary safety precautions during the COVID-19 pandemic meets the threshold at which immediate action is compulsory. If “bathroom tiles needing to be replaced, menus not posted, insufficient closet space, [or] inadequate record keeping with respect to the dispensing of medication” can constitute “gross incompetence, negligence, or misconduct,” then surely that standard is met when very young children are

knowingly placed in an environment where they are likely to be exposed to COVID-19.³

The Department's determination that the conditions at BCRC are not likely to constitute an immediate and serious danger to the life or health of Petitioners represents an arbitrary exercise of its discretion, or one based on a mistaken interpretation of the legal standard set forth in 55 Pa. Code § 20.37.⁴ The Department has ignored voluminous evidence presented by Petitioners and medical experts. The Department is obligated to issue an emergency removal order because the available evidence leaves no room for a contrary interpretation. Petitioners have a right to relief and the Department's exercise of discretion was arbitrary or based on an erroneous interpretation of law.

II. Peremptory Judgment should be granted because no genuine issues of material fact exist.

Peremptory judgment is appropriately entered only where there exists no genuine issue of material fact, and where the case is clear and free from doubt.

³ See *Colonial Manor Pers. Care Boarding Home v. Com., Dep't of Pub. Welfare*, 551 A.2d 347, 353 (Pa. Cmwlth. 1988), quoting *Pine Haven Residential Care Home v. Department of Public Welfare*, 512 A.2d 59, 61 (Pa. Cmwlth. 1986).

⁴ In its Answer, the Department mischaracterizes the standard for an ERO as follows: "if the Department finds that gross mismanagement of a facility places the residents in immediate and serious danger." Answer at 3. The standard is articulated more completely, but still incorrectly, by the Department later: "[T]he Department may issue an ERO only if the Department 'finds evidence of gross incompetence, negligence, misconduct in operating the facility or agency, or mistreatment or abuse of clients, likely to constitute an immediate and serious danger to the life or health of the clients.'" *Id.* at 5. To be clear, there is no "may" about it: the regulations say the Department *will* issue an ERO if it finds evidence of such. 55 Pa. Code § 20.37.

Shaler Area Sch. Dist. v. Salakas, 431 A.2d 165, 168 (Pa. 1981). Here, there are no genuine issues of material fact, and the case is clear. These facts are undisputed: The COVID-19 pandemic is sweeping Pennsylvania, and Berks County is a hotspot. Petitioners—children as young as one year old and their parents—remain detained in a congregate setting. BCRC’s response to the COVID-19 health crisis has demonstrated its incompetence, negligence, or misconduct in operating the facility. Petitioners presented affidavits from multiple medical experts attesting to such. The Department did not deny these assertions; therefore, they admitted them, making the facts undisputed. Pa. R.Civ.P. 1029(b).

Additional undisputed facts include:

1. Petitioners are still sharing meals and common areas. Petition, Exh. I (Cambria Supp. Decl.) at ¶¶ 24, 32.
2. Children have inherent limitations in effectively implementing social distancing or necessary hygienic precautions. Petition, Exh. J (Shapiro Decl.) ¶ 11.
3. Asking detainees whether they were in contact with someone with a laboratory-confirmed case of COVID-19, as the Department alleges that BCRC medical staff have done at the time of admission (Answer at 7), does not screen for contacts who were asymptomatic, were symptomatic but did not have a lab-confirmed test, or who had a lab-confirmed test unknown to the detainee being questioned.

4. BCRC is not conducting comprehensive, systematic testing of detainees or staff for COVID-19, instead relying on measures such as taking temperature of detainees upon admission to the facility and administering a brief oral survey of self-reported contacts and travel. Application Exh. I, ¶ 14; Answer at 7.

5. Staff who come and go could be bringing the virus into BCRC even if they are asymptomatic, and likewise, they could bring the virus out into the community.

The Department argues that the Court should deny peremptory judgment because “the parties dispute whether the Department has taken action and whether an ERO should issue pursuant to Section 20.37. Those disputes will directly affect the outcome of this case. Because those disputed facts will affect the outcome of the case, those disputed facts are material.” Answer at 9.

Petitioners do not dispute that the Department has taken action. The Department conducted a remote inspection (facilitated by BCRC’s Director) *because of the danger posed by COVID-19*, and made a decision not to issue an emergency removal order. That decision was arbitrary or based on an erroneous interpretation of law because the facts in the record support a finding that the standard for issuance of an emergency removal order has been met.

The dispute over whether an ERO should issue is a question not of fact, but of legal interpretation. BCRC’s failure to adequately protect Petitioners from infection by a contagious and deadly disease constitutes “an immediate and serious

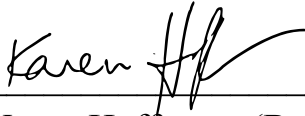
danger to their life or health.” The Department’s determination to the contrary amounts to an arbitrary exercise of discretion, or one based on an erroneous interpretation of the legal standard.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioners’ Application for Special Relief in the Nature of an Application for Peremptory Mandamus, and enter an Order compelling the Department to take immediate action to remove Petitioners from BCRC pursuant to 55 Pa. Code § 20.37.

Dated: April 30, 2020

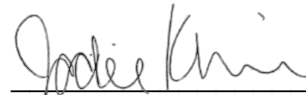
Respectfully submitted,



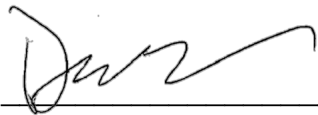
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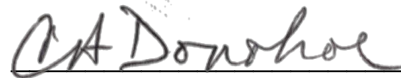


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