

**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 M.D. 2020
Petitioners	:	
v.	:	
	:	
Pennsylvania Department of Human	:	
Services,	:	
	:	
Respondent	:	

**ANSWER TO**  
**PETITIONERS' APPLICATION FOR SPECIAL RELIEF IN THE**  
**NATURE OF AN APPLICATION FOR**  
**PEREMPTORY JUDGMENT IN MANDAMUS**

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## INTRODUCTION

On April 23, 2020, Petitioners filed an application for Peremptory Judgment in Mandamus (“Application”). The Application was filed in conjunction with a Petition for Review seeking a Writ of Mandamus. Application, at ¶ 1.<sup>1</sup> In both pleadings, Petitioners ask this Court to direct the Department of Human Services (“Department”) to remove Petitioners from the Berks County Residential Center (“BCRC”).

BCRC is one of three immigration detention facilities in the United States that provides housing to undocumented immigrant families seeking asylum while the federal Immigration Customs Enforcement agency (“ICE”) seeks to enforce federal immigration laws. *D. G. A. v. Dep’t of Human Serv.*, 2020 WL 283885, \*1 (Pa. Cmwlth. January 21, 2020)(unreported)(which recounts BCRC’s licensing status as a child residential facility). The Department conducts monthly inspections of BCRC pending resolution of BCRC’s appeal of its status as a child residential facility.

Petitioners ask this Court to direct DHS to remove them from BCRC pursuant to 55 Pa. Code § 20.37. Application at ¶¶ 3 – 6. Section 20.37 authorizes

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<sup>1</sup> Petitioners incorporate by reference their Petition for Review into the Application for Peremptory Judgment. Application, at ¶ 1. In response, the Department incorporates into this Answer its Answer to the Petition for Review.

the Department to issue an Emergency Removal Order (“ERO”) if the Department finds that gross mismanagement of a facility places the residents in immediate and serious danger. 55 Pa. Code § 20.37.

Petitioners assert that the Department must remove the Petitioners because the “BCRC’s response to the COVID-19 health crisis has demonstrated its incompetence, negligence, or misconduct in operating the facility.” Application at ¶ 5. Petitioners additionally assert that the Department has failed or refused to act in violation of Pennsylvania law. *Id.* at ¶ 6.

This Court should deny Peremptory Judgment for two reasons. First, Petitioners have failed to show clearly on the existing record that this Court should issue a Writ of Mandamus for an ERO. To the contrary, as explained in more detail below, the Department has acted to address BCRC’s response to COVID-19, and the Department’s inspector found no evidence that would support an ERO. This Court should reject Petitioners’ attempt to improperly interfere with the Department’s discretion to determine whether facts exist for an ERO. Second, at a minimum, genuine issues of material fact exist. When genuine issues of material fact exist, Peremptory Judgment is precluded.<sup>2</sup>

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<sup>2</sup> Paragraphs 2 – 6 of the Application for Peremptory Judgment contain legal conclusions to which no response is required. To the extent a response is necessary, the Department denies those allegations as set forth in this Answer.

## ARGUMENT

Peremptory Judgment is governed by the same standard of review that governs summary judgment. *Dusman v. Bd. of Directors of Chambersburg Area Sch. Dist.*, 113 A.3d 362, 372 (Pa. Cmwlth. 2015). Consequently, “[P]eremptory [J]udgment is appropriately entered only where there exists no genuine issue of material fact, and where the case is clear and free from doubt.” *Id.* at 372 (quoting *Shaler Area Sch. Dist. v. Salakas*, 431 A.2d 165, 168 (Pa. 1981)).

The burden to prove those elements is on the moving party. *Aiken v. Radnor Twp. Bd. of Sup’rs*, 476 A.2d 1383, 1388–1389 ( Pa. Cmwlth. 1984); *Wolgemuth v. Kleinfelter*, 437 A.2d 1329, 1331 (Pa. Cmwlth. 1981). The record must be reviewed in the light most favorable to the non-moving party. *Aiken*, 476 A.2d at 1388-1389.

Viewing the record in the light most favorable to the Department, the Petitioners have not satisfied their burden of proof, and this Court should deny the Application.

**I. Petitioners do not have clear right to a Writ of Mandamus for a removal order because the Department acted to address the issue of BCRC’s response to COVID-19.**

Petitioners do not have a clear right to a Writ of Mandamus. Mandamus is an extraordinary remedy and requires a petitioner to show the following: (1) a

clear legal right in the petitioner, (2) a corresponding duty in the respondent, and (3) a lack of any other adequate and appropriate remedy at law. *See, e.g., Sinkiewicz v. Susquehanna Cty. Bd. of Comm'rs*, 131 A.3d 541, 546 (Pa. Cmwlth. 2015) (citing *Crozer Chester Med. Ctr. v. Dep't of Labor & Industry*, 22 A.3d 189, 193 (Pa. 2011)). The writ of mandamus is “rarely issued and never to interfere with a public official’s exercise of discretion.” *Sinkiewicz*, 131 A.3d at 546. Here, Petitioners have not established that they have a clear right to an ERO.

The Department’s regulations state that the 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.” 55 Pa. Code § 20.37. Such circumstances have not existed at the BCRC and do not exist now.

The Department recently conducted a remote inspection of BCRC, commencing on March 31 and concluding on April 7. *See* Declaration of Erin Roman, attached hereto as Exhibit A at ¶ 7. The inspection was conducted remotely because of the concern for the COVID-19 pandemic. *Id.* Prior to that time, the inspector conducted monthly on-site inspections for at least four years, since the Department revoked and non-renewed the facility’s license. *Id.*

The March-April remote inspection included: a) a telephone interview of the Director of BCRC; b) a visual walk-through of BCRC using the mobile application Facetime; and c) a desk review of documents that DHS requested from BCRC and the United States Immigration and Customs Enforcement agency (“ICE”). *Id.* at ¶¶ 8 - 11.

As part of the inspection, the inspector specifically reviewed the procedures BCRC put in place to respond to COVID-19. *Id.* at ¶¶ 15 and 16. BCRC’s procedures include the following:

- a. No new admissions since March 18;
- b. Suspend all social visits;
- c. Suspend all field trips;
- d. Suspend all volunteer services;
- e. Suspend all on-site professional interviews (job and background checks);
- f. Continue and enhance the already preventative cleaning of the facility;
- g. Staff serve from the resident salad bar; residents no longer serve themselves;
- h. Change the offering of certain food items at the kitchenettes to sealed food options;
- i. Allow staff to carry alcohol-based sanitizer on their person;
- j. Placed alcohol-based sanitizer around the building for use by residents and staff;

- k. Placed sanitizer wipes in the elevators for use by residents and staff; and
- l. For all medical transports, staff and residents wear gloves and masks into the medical facility. Only the resident who is receiving the medical procedure may go on the trip, except that one parent may accompany a child.

*Id.* at ¶ 15. Additionally, the medical staff amended the initial health and safety assessments for the doctor to ask the following questions:

- a. “Have you been in close contact with a person with laboratory confirmed 2019 novel coronavirus or their respiratory secretions in the past 14 days?”
- b. “Have you traveled from or through a geographic area(s) with widespread or sustained community transmission in the past 2 weeks?”

*Id.* at ¶ 16.

In addition to finding policies directly addressed to mitigating the spread of COVID-19, the inspector did not find any evidence that BCRC residents could not practice social distancing. *Id.* at ¶ 17. To the contrary, BCRC is a 96-bed facility, and every family has their own bedroom. *Id.* at ¶¶ 12 – 14. During the walk-through, the inspector observed residents practicing social distancing. *Id.* at ¶ 10.

As a result of the remote inspection, the inspector concluded that BCRC was in compliance with the Department’s licensing requirements under 55 Pa. Code Chapter 3800. *Id.* at ¶ 19. More important for purpose of addressing Petitioners’ allegations, she found no evidence of gross incompetence, negligence, or misconduct in the licensee’s operation of BCRC, or mistreatment or abuse of

residents, likely to constitute an immediate and serious danger to the life or health of the residents of BCRC. *Id.* at ¶ 18.

In addition to the Department's licensure inspection findings, Petitioners' own affidavits show that BCRC personnel took measures to mitigate the spread of COVID-19. For example, the affidavits of P.M. and G.S.C. state that BCRC provided different hand soaps and posted two different posters about hand-washing and social distancing. *See* Petitioners' Exhibits E & F to the Petition for Writ of Mandamus.

Finally, as noted above, BCRC instituted a ban on new admissions. Exhibit A at ¶ 15. At the same time, BCRC has released individuals, and the census has decreased from 13 adults and eight children on April 7 to ten adults and six children on April 27, 2008. *Id.* at ¶¶ 12 and 20. These numbers suggest there is no reason to believe that Petitioners cannot continue to distance themselves and to maintain their own rooms.

Given the findings of the remote inspection, the facts asserted in Petitioners' own affidavits, and the low census, Petitioners cannot demonstrate that they are entitled to an ERO because of COVID-19. Rather, the Department's findings establish the direct opposite conclusion – BCRC is not operating its facility in a manner that constitutes an immediate and serious danger to the life or health of its residents.

## **II. Peremptory Judgment should be denied because genuine issues of material fact exist.**

Even if the record does not reflect conclusively that this Court should deny Petitioner's demand for a Writ of Mandamus, then at the minimum, the Department has shown that genuine issues of material fact exist. Consequently, the Court should alternatively deny Peremptory Judgment for that reason.

This Court has stated that “[a] factual issue is considered ‘material’ for peremptory judgment purposes ‘if its resolution could affect the outcome of the case under the governing law.’” *Dusman*, 113 A.3d at 372 (quoting *Strine v. Commonwealth*, 894 A.2d 733, 738 (Pa. 2006)).

At the minimum, 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. Therefore, this Court should deny Peremptory Judgment.

## **CONCLUSION**

In conclusion, this Court should deny Peremptory Judgment because Petitioners have failed to prove that this Court must issue a Writ of Mandamus for an ERO. To the contrary, the record reflects that this Court should deny the Writ of Mandamus. The Department has acted to address BCRC's response to COVID-19, and the Department found no evidence that would support an ERO. Even if the

record does not reflect conclusively that this Court should deny a Writ of Mandamus, then at the minimum, the Department has shown that genuine issues of material fact exist. Consequently, the Court should deny Peremptory Judgment for that reason alone.

Respectfully submitted,

Date: April 28, 2020

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# **Exhibit A**

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 M.D. 2020  
: Petitioners, :  
v. :  
: :  
Pennsylvania Department of Human :  
Services, :  
: :  
Respondent. :

**DECLARATION OF ERIN ROMAN IN SUPPORT OF**  
**RESPONDENT’S RESPONSE TO**  
**PETITIONERS’ APPLICATION FOR SPECIAL RELIEF IN THE**  
**NATURE OF AN APPLICATION FOR**  
**PEREMPTORY JUDGMENT IN MANDAMUS**

I, Erin Roman, declare the following:

1. I am a Licensing Technician for the Northeast Region of the Department of Human Services (“DHS”), Office of Children, Youth and Families.
2. As a Licensing Technician, I am responsible to, among other things, inspect Child Residential and Day Treatment Facilities to determine whether those

facilities are in compliance with licensing requirements set forth at 55 Pa. Code Chapter 3800.

3. Berks County Residential Center (“BCRC”) currently operates under a license for Child Residential Facilities.

4. To successfully complete inspections of Child Residential and Day Treatment Facilities, I became familiar with the licensing requirements at 55 Pa. Code Chapter 3800 and with all interpretations of and policies applying those regulations.

5. I am also familiar with the general licensing regulations that apply to all type of entities licensed by DHS, which are set forth at 55 Pa. Code Chapter 20, and all interpretations of and policies applying those regulations.

6. In addition to determining whether a licensee is in compliance with the licensing requirements, I am also charged with determining whether there is evidence of gross incompetence, negligence, or misconduct in the licensee’s operation of the facility, or mistreatment or abuse of residents, likely to constitute an immediate and serious danger to the life or health of the clients, which would support an Emergency Removal Order under 55 Pa. Code § 20.37.

7. I conducted a remote inspection of BCRC commencing on March 31, 2020 and concluding on April 7, 2020. I conducted this inspection remotely out of

concern for the COVID-19 pandemic. Prior to this inspection, I personally conducted monthly onsite visits for almost four years.

8. The March/April remote inspection included: a) a telephone interview of the Director of BCRC, Diane Edwards; b) a visual walk-through of BCRC using the mobile application Facetime with Diane Edwards; and c) a desk review of documents requested by DHS from BCRC and the United States Immigration and Customs Enforcement agency (“ICE”).

9. The visual walk-through using Facetime included only open areas that I normally would inspect during an onsite inspection, including BCRC’s hallways, places of egress, playground, staff station, the living room/recreation area, and other common areas.

10. The visual walk-through did not include resident rooms or other private areas, to protect the privacy of the residents. However, I did observe residents during the walk-through, and those residents were practicing social distancing.

11. My document review included a review of the following: fire drill records; BCRC’s census report; BCRC’s admission and discharge log since my last inspection on February 25, 2020; the admission physical examination and the initial health and safety assessments of the eight children who remained at BCRC

on the date of my review; and BCRC's procedures responding to the 2019 Novel Coronavirus (COVID-19).

12. On April 7, 2020, BCRC housed 13 adults and eight children.
13. Every family has their own bedroom.
14. BCRC has the capacity to house 96 individuals.
15. BCRC's procedures in response to COVID-19 include the following:
  - a. No new admissions since March 18;
  - b. Suspend all social visits;
  - c. Suspend all field trips;
  - d. Suspend all volunteer services;
  - e. Suspend all on-site professional interviews (job and background checks);
  - f. Continue and enhance the already preventative cleaning of the facility;
  - g. Staff serve from the resident salad bar; residents no longer serve themselves;
  - h. Change the offering of certain food items at the kitchenettes to sealed food options;
  - i. Allow staff to carry alcohol-based sanitizer on their person;
  - j. Placed alcohol-based sanitizer around the building for use by residents and staff;
  - k. Placed sanitizer wipes in the elevators for use by residents and staff; and

1. For all medical transports, staff and residents wear gloves and masks into the medical facility. Only the resident who is receiving the medical procedure may go on the trip, except that one parent may accompany a child.
16. In addition to BCRC's COVID-19 procedures, the medical staff, who are part of the United States Public Health Services, amended the initial health and safety assessments for the doctor to ask the following questions:
  - a. "Have you been in close contact with a person with laboratory confirmed 2019 novel coronavirus or their respiratory secretions in the past 14 days?"
  - b. "Have you traveled from or through a geographic area(s) with widespread or sustained community transmission in the past 2 weeks?"
17. I did not find any evidence that residents could not practice social distancing.
18. I did not find any evidence of gross incompetence, negligence, or misconduct in the licensee's operation of BCRC, or mistreatment or abuse of residents, likely to constitute an immediate and serious danger to the life or health of the residents of BCRC.
19. Based on my remote inspection, I concluded that BCRC was in compliance with DHS's licensing requirements under 55 Pa. Code Chapter 3800.
20. As of today, BCRC houses ten adults and six children.
21. The statements made in this Declaration are true and correct to the best of my personal knowledge or information and belief.

22. I understand that statements made in this Declaration are made subject to the penalties of 18 Pa. C.S. § 4904, relating to unsworn falsification to authorities.

Declarant states nothing further.

*Erin Roman*

Erin Roman  
Licensing Technician  
Office of Children, Youth and Families  
Department of Human Services

Date: 4/28/2020

**CERTIFICATE OF SERVICE**

The undersigned certifies that I caused a copy of the foregoing to be served

upon the following as indicated:

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Date: April 28, 2020

/s/ Edward G. Cherry  
Edward G. Cherry

**CERTIFICATE OF COMPLIANCE**

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Date: April 28, 2020

/s/ Edward G. Cherry

Edward G. Cherry