IN THE COMMONWEALTH COURT OF PENNSYLVANIA

C.N., B.L., 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., Petitioners	:	
v.	:	No. 268 M.D. 2020 Heard: May 26, 2020
Pennsylvania Department of Human Services, Respondent	:	

BEFORE: HONORABLE MICHAEL H. WOJCIK, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE WOJCIK FILED: July 7, 2020

On April 23, 2020, C.N., B.L., 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.; and M.E.L., E.O.E. and minor child J.O.E. (collectively, Petitioners)[1] filed an Emergency Petition for Issuance of a Writ of

[1] On May 19, 2020, Petitioners filed a motion for protective order requesting that their testimony at trial be shielded from livestream to protect their identities – essentially, that the virtual courtroom be closed. They further requested that the Court only use their initials during the hearing, and that they be permitted to file their full names under seal. The Court granted this motion, which was unopposed by the Department of Human Services (Department). As such, Petitioners will be referred to throughout this opinion by their initials or as "Petitioners."

Mandamus (Petition) addressed to this Court's original jurisdiction.[2] Petitioners seek an order directing the Pennsylvania Department of Human Services (Department) to issue an emergency order removing them from the Berks County Residential Center (BCRC) to avoid potential infection during the COVID-19 pandemic.[3] The Court held a non-jury trial on May 26, 27, and 29, 2020, via WebEx. After review of the record and evidence in this matter, the Court enters a verdict in favor of the Department and against Petitioners.

Background

Petitioners are immigrant parents and their children who are detained at BCRC pending federal immigration proceedings. BCRC is a two-story, single building congregate care facility, meaning the individuals are housed together with communal sleeping quarters, bathrooms, dining facilities, and recreational areas. BCRC has an Intergovernmental Services Agreement with the federal Immigration and Customs Enforcement Agency (ICE) to provide this residential program. While

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[2] Petitioners initially filed an application for extraordinary relief in the Supreme Court of Pennsylvania, under the Court's King's Bench jurisdiction. *See C.N., et al. v. Pennsylvania Department of Human Services* (Pa., 76 MM 2020). On April 16, 2020, the Supreme Court issued an order, *per curiam*, denying Petitioners' application without prejudice to file an action in this Court or with the Department of Human Services (Department) itself. That order further directed that if an action was filed here, the Commonwealth Court "shall establish an expedited schedule for such matter and shall move expeditiously to resolve the matter so as to prevent further potential harm to Petitioners." (Supreme Ct. April 16, 2020 Order pp. 1-2.)

[3] Along with the Petition, Petitioners simultaneously filed an application for special relief in the nature of an application for peremptory judgment in mandamus. On May 6, 2020, the Court issued a memorandum and order denying Petitioners' application, noting peremptory judgment was not appropriate as there were genuine issues of material fact. *See Dusman v. Board of Directors of Chambersburg Area School District*, 113 A.3d 362 (Pa. Cmwlth. 2015).

the Petitioners and other BCRC residents are technically in federal custody, BCRC itself is licensed and overseen by the Department and subject to its regulations.

Of particular importance here, Department Regulation 20.37 titled "Emergency removal of residents" (the Regulation or Regulation 20.37), provides as follows:

> 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, the Department will take immediate action to remove the clients from the facility or agency. If physical obstruction is offered to prevent removal of the clients the Department will request law enforcement authorities to assist in the removal of the clients.

55 Pa. Code § 20.37. An order issued pursuant to this provision is referred to as an emergency removal order (ERO).

Petitioners assert that conditions at BCRC and the facility's response to the COVID-19 pandemic rise to the level of necessitating an ERO. Petitioners claim that COVID-19 presents a severe danger to public health, in particular to individuals detained in enclosed environments such as BCRC, and that the Department has not taken adequate action to protect them. They aver:

> Petitioners are at high risk of contracting COVID-19 while in custody. Social distancing is not possible in the enclosed conditions of the detention center; . . . ICE and BCRC personnel are not providing adequate safety precautions to prevent detainees from contracting and spreading COVID-19; and employees come and go from their home and their communities[.] The only viable way to protect the children and families at BCRC is for them to be removed from the center and released to their sponsors.

(Petition ¶ 2) (footnote omitted). With respect to children, Petitioners note that they play together, touch each other, share toys, put things in their mouths, and cannot be expected to observe the same rules and norms of social distancing that are expected of adults. Therefore, it is impossible for children in the BCRC's enclosed, communal environment to avoid potential contamination.

Moreover, Petitioners aver that numerous parents and children in the facility are sick with cold-like symptoms, such as coughs, congestion and fever, and that they have observed numerous staff members exhibiting similar symptoms. (Petition ¶ 25.) Yet when detainees request medicine for their children, it is allegedly not provided for days or weeks, if at all. Petitioners assert that BCRC lacks the medical infrastructure to address the spread of infectious disease and does not have a pediatrician on staff. They further claim that they have not been briefed by BCRC staff or ICE on COVID-19 or what precautions they should be taking to prevent the spread of the virus. Petitioners allege that BCRC has not provided adequate personal protective equipment (PPE); appropriately sized masks for children have not been provided; soap dispensers in the facility are broken; and BCRC is not properly sanitized as it relies on the detained civil population itself to clean the facility.

Petitioners note that the purpose of the Department's regulations is "to protect the health, safety and well-being of children receiving care in a child residential facility through the formulation, application and enforcement of minimum licensing requirements." 55 Pa. Code § 3801. They assert that the conditions at BCRC, as outlined above, constitute an immediate and serious danger to Petitioners' life or health, triggering the Department's duty to issue an ERO pursuant to Department Regulation 20.37, 55 Pa. Code § 20.37. Moreover, they assert that BCRC's response to the COVID-19 health crisis – in particular, its failure

to adequately protect Petitioners from infection by a highly contagious and deadly disease – has demonstrated its incompetence, negligence, or misconduct in operating the facility. Because the Department has failed to act on its own given these conditions, Petitioners claim they have no other adequate and appropriate remedy than to seek mandamus.

On April 28, 2020, the Department filed an answer with new matter denying the material allegations in the Petition. The Department averred that it recently conducted a remote inspection of BCRC during which the licensing technician, Erin Roman, found no evidence of gross incompetence, negligence, or misconduct in the operation of BCRC, or mistreatment or abuse of residents. In addition, the Department noted that BCRC had policies in place to respond to and mitigate the effects of COVID-19. As such, the Department concluded there are not circumstances that constitute an immediate and serious danger to the life or health of residents at BCRC; therefore, an ERO was not warranted.

Prior to the start of testimony, this Court heard oral argument on the Department's motion *in limine* seeking to exclude (1) all evidence prior to December 2019, as being outside the relevant timeframe of the allegations in the Petition and, therefore, irrelevant and not probative of Petitioners' claims; (2) the testimony of proposed witness Carol Anne Donohoe, Esquire, as Attorney Donohoe lacks personal knowledge as to the conditions at BCRC from December 2019 onward; (3) the testimony and declaration of proposed witness Bridget Cambria, Esquire, to the extent it relies on inadmissible hearsay; and (4) statements found in newspaper articles, learned treatises, or periodicals as inadmissible hearsay if introduced to establish the truth of the matters asserted. Following argument, the Court orally

denied Respondent's motion *in limine* in its entirety, and issued a formal order to this effect on June 15, 2020.

During trial, Petitioners called the following witnesses: (1) Petitioner B.L.; (2) Petitioner P.M.; (3) Alan Shapiro, M.D.;[4] (4) Attorney Cambria; and (5) Attorney Donohoe. The deposition testimony of Jeanne Parisi, Bureau Director for Human Services Licensing, was also entered into the record, in its entirety, upon stipulation of the parties. The Department called the following witnesses: (1) Erin Roman, a Licensing Technician with the Department; and (2) Diane Edwards, BCRC's Executive Director (Director Edwards).[5]

The Court admitted the following exhibits into evidence at trial without objection or upon stipulation of the parties:

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[4] In their pretrial statement, Petitioners indicated that they intended to call Dr. Shapiro as an expert witness. While they summarized Dr. Shapiro's potential testimony, Petitioners failed to specify in what areas they intended to qualify Dr. Shapiro as an expert. Moreover, at trial, Petitioners failed to offer Dr. Shapiro as an expert witness, in any area, and there was no stipulation between the parties as to his expert qualifications. *See* Notes of Testimony (N.T.) 156:13-16. Given these facts, the Court cannot consider Dr. Shapiro's expert opinions in this matter.

[5] On April 27, 2020, the County of Berks (County), which operates the BCRC, filed an application seeking leave to intervene in this matter. Following oral argument, the Court issued a Memorandum and Order on April 29, 2020, stating that the County's interests are currently aligned with, and adequately represented by the Department. Therefore, the County's application was denied without prejudice to request leave to intervene in the future if the licensing status of the BCRC changed, or for any other good cause shown. *See* Pa. R.C.P. No. 2329. On the second day of trial, May 27, 2020, the County filed a renewed application for leave to intervene citing concerns over Petitioners' line of questioning of the Department's witnesses, in particular regarding BCRC's licensing status and any potential violations. The Court orally denied the County's renewed application on the record immediately following argument, and issued an order to this effect on June 15, 2020. The Court did permit counsel for the County, Attorney Matthew Connell, to be present and raise objections during the testimony of Director Edwards, in particular to ward against any potential conflict of interest with counsel for the Department.

Exhibits

Petitioners' Exhibits:

P-1	Alan J. Shapiro, M.D. – Curriculum Vitae
P-2	May 21, 2020 deposition transcript of Jeanne Parisi
P-4	Declaration of Erin Roman dated April 28, 2020
P-5	Video file (5 seconds)
P-6	Video file (9 seconds)
P-8	May 21, 2020 deposition transcript of Erin Roman (page 42 only)
P-26	*O.M.G., et al. v. Wolf*, D.D.C., No. 1:20-cv-00786, Emergency Verified Petition for a Writ of Mandamus and Complaint for Declaratory and Injunctive Relief, filed March 21, 2020 (page 1 only)
P-29	*Flores, et al. v. Barr*, C.Dist. Cal., No. 2:85-cv-04544, April 24, 2020 Order re: Plaintiffs' Motion to Enforce
P-36	Petitioners' Interrogatory Number 18 and Department's Response thereto

Department's Exhibits:

R-1	April 7, 2020 email from Erin Roman to Louis Bisignani and Brian Hazlak
R-2	Email string ending with March 18, 2020 email from Diane Edwards to Brian Hazlak, Erin Roman and David Smith (1 page)

R-2-A	Email string ending with March 25, 2020 email from Diane Edwards to Brian Hazlak, Louis Bisignani and Erin Roman (4 pages)
R-3	Email string ending with March 25, 2020 email from Diane Edwards to Erin Roman, Brian Hazlak, Louis Bisignani, and David Smith (1 page)
R-4	Email string ending with March 26, 2020 email from Diane Edwards to Brian Hazlak, Louis Bisignani and Erin Roman (5 pages)
R-5	Email string ending with March 30, 2020 email from Diane Edwards to Erin Roman, Brian Hazlak, Louis Bisignani and David Smith (3 pages)
R-6	Email string ending with March 26, 2020 email from Louis Bisignani to Erin Roman, Brian Hazlak and Jacqulyn Maddon (3 pages)
R-7	Email dated March 30, 2020 from Diane Edwards to Erin Roman with attachments (fire drills) (4 pages)
R-8-A Parts 1 & 2, and R-8-B Parts 1 & 2	Email dated March 31, 2020 from Diane Edwards to Erin Roman and David Smith with attachments (juvenile resident admission files) (58 pages total)
R-9-A Parts 1, 2 & 3, and R-9-B Parts 1, 2 & 3	Email dated March 31, 2020 from Diane Edwards to Erin Roman and David Smith with attachments (additional juvenile resident admission files) (74 pages total)
R-10	Email string ending with March 31, 2020 email from Diane Edwards to Erin Roman

	(3 pages)
R-11	Juvenile Admission Report dated April 6, 2020 (4 pages)
R-12	Email string ending with April 6, 2020 email from Diane Edwards to Erin Roman and Brian Hazlak (3 pages)
R-13-A, and R-13-B Parts 1, 2 & 3	ICE medical records for BCRC child residents (101 pages total)
R-14	Email string ending with April 7, 2020 email from Illecia Benefield to Erin Roman (2 pages)
R-15	ICE COVID-19 Poster in various languages (4 pages)
R-17	Email dated April 14, 2020 from Diane Edwards to Brian Hazlak, Erin Roman, David Smith and Louis Bisignani (2 pages)
R-18	Email string ending with April 22, 2020 email from Diane Edwards to Erin Roman, Brian Hazlak and David Smith (4 pages)
R-19	Email dated May 5, 2020 from Diane Edwards to Erin Roman and Brandon Witmer with attachments (fire drills) (4 pages)
R-20	Juvenile Admission Report dated May 5, 2020 (4 pages)
R-21	Email dated May 5, 2020 from Diane Edwards to Erin Roman and David Smith (1 page)
R-22	Email string ending with May 6, 2020

	email from Diane Edwards to Erin Roman and David Smith (3 pages)
R-23	Erin Roman's inspection report from BCRC May Inspection (7 pages)
R-24	Erin Roman's hand written notes from BCRC May Inspection (2 pages)

The Court also admitted the following exhibits into evidence over objection:

Petitioners' Exhibits:

P-3	Email string between Petitioners' immigration counsel and the Department (15 pages)
P-24A, B & C, and P-25B	ICE medical records for BCRC child residents (127 pages total)

The Court makes the following findings of fact based on the evidence presented throughout the course of the proceedings.

Findings of Fact

1. Petitioner B.L., a 29-year-old man from Haiti, has been detained at BCRC with his wife, C.N., and their one-year-old son, B.K.L.N., since March 18, 2020. Notes of Testimony (N.T.) 27:24, 28:1-20, 29:13-19.

2. Petitioner P.M., a 37-year-old man from Haiti, has been detained at BCRC with his wife, M.N., and their two-year-old daughter, H.M.N., since March 18, 2020. N.T. 61:6-10, 63:20-25, 64:1-5.

3. Petitioners B.L. and P.M. both speak Haitian Creole, and both understand some Spanish. N.T. 31:13-25, 32:4-10, 68:14-22.

4. Translators and language services are available to BCRC so staff can communicate and discuss issues with residents. N.T. 490:13-15.

5. The federal government provides BCRC with at least two contracted language lines for translation services 24 hours a day, 7 days a week. N.T. 472:5-10.

6. BCRC employs one individual who can interpret Haitian French, one individual who can interpret Haitian Creole, at least three individuals whose native language is Spanish, and at least nine individuals who can speak conversational Spanish. N.T. 471:1-13. These BCRC staff members are on duty at a variety of shifts, dates, and times. N.T. 471:14-23.

7. BCRC's is a two-floor facility, N.T. 452:20, with approximately 58,000 square feet. N.T. 450:15-451:2.

8. BCRC can accommodate, and is licensed for 96 individuals. N.T. 452:10-12.

9. On the last day of trial, May 29, 2020, BCRC's total census was 13 individuals. N.T. 452:13-15.

10. BCRC's configuration is in the shape of a "V," with a communal recreational area in the center and two wings that veer off from the central area. N.T. 452:24-453:7.

11. Each wing in BCRC's second floor has 8 bedrooms, each of which is over 400 square feet. N.T. 453:1-3, 450:17-18. Each bedroom has a private bathroom with a toilet, sink, soap dispenser, and towel dispenser. N.T. 454:8-11.

12. As of May 29, 2020, each family unit at BCRC had its own bedroom. N.T. 453:8-13.

13. Each wing also has a shower room that consists of six shower stalls – one shower room is designated as a female shower room, the other as a male shower room. N.T. 454:8-14.

14. BCRC provides residents with toothpaste, a toothbrush, combs, shampoo, hand soap, feminine hygiene products, toilet paper, and towels. N.T. 456:8-14. BCRC also provides clean sheets for residents once a week. N.T. 456:14.

15. If a resident does not like the brand or type of hygiene product provided by BCRC, the resident can purchase something different at BCRC's commissary. N.T. 456:15-24.

16. BCRC's program areas where the resident can move about freely include the communal recreational areas, with televisions and kitchenettes; a chapel; a fitness room; a movie area; a classroom wing; an area for legal and social visits; and a dining room. N.T. 450:3-14, 460:20-462:3.

17. BCRC has three to four acres of outdoor space for residents to use for recreational purposes. N.T. 451:7-18, 452:2-17.

18. BCRC cleans for the prevention of all diseases. N.T. 461:13-462:5.

19. Beginning March 18, 2020, BCRC enhanced its preventive cleaning of the facility. Exhibits R-2, P-4 ¶ 15(d); N.T. 463:13-16.

20. BCRC's shelter care counselors conduct most of the cleaning in the facility, including the communal bathrooms, other communal areas, vehicles, outside areas, doorknobs, high-touch areas, telephones, computers, keyboards, and walls. N.T. 462:14-463:10.

21. BCRC's shelter care counselors are present on the program floors on all shifts, 24 hours a day, 7 days a week. N.T. 462:17-19.

22. BCRC staff perform two normal preventative cleanings per shift, six times per day, in addition to disinfecting common areas three or four additional times per day. Exhibit R-12 at 2.

23. Residents clean their own private bedrooms, bathrooms, and the shower areas, N.T. 464:4-15, and are responsible to disinfect all children's toys after each use. Exhibit R-23 at 2.

24. BCRC provides buckets, mops, and gloves to all staff and residents for cleaning. N.T. 467:4-15.

25. BCRC staff do hygiene checks to ensure that the areas the residents are responsible for cleaning are cleaned properly. N.T. 464:16-20. If BCRC determines that such an area is not cleaned properly, then BCRC will clean the area, ensuring the resident is present if the area is the resident's bedroom. N.T. 464:21-465:6.

26. For cleaning purposes, BCRC uses a disinfectant called Virex and Clorox Anywhere Spray. N.T. 466:16-25.

27. BCRC provides Purell wipes and 70 percent alcohol sanitizer for staff and residents. Exhibit R-23 at 2; N.T. 467:1-3.

28. BCRC has provided at least 11 wall-mounted and stand-alone hand sanitizer dispensers in the program areas for residents and staff. N.T. 473:14-21, 473:24-474:6.

29. BCRC has posted multilingual signs in the facility to encourage frequent handwashing. N.T. 475:24-476:3.

30. Before mealtimes, BCRC staff encourages residents to return to their rooms to wash their hands. N.T. 476:4-8.

31. BCRC has implemented social distancing requirements in the dining room, bedroom areas, and communal activity areas. N.T. 468:8-13.

32. BCRC has posted signage to remind residents about social distancing. Exhibits R-15, R-23 at 1; N.T. 469:14-15.

33. One family unit uses the communal showers at a time to maintain social distancing. N.T. 485:15-21.

34. Prior to the COVID-19 pandemic, residents all lined up in the dining room for meals. Residents now enter the dining room as a family unit, one at a time, after the previous family has been served. Exhibit R-23 at 3, 5; N.T. 488:19-489:2, 490:1-3.

35. BCRC has removed some tables from the dining room and assigned each family unit to a particular table. Exhibit R-23 at 5; N.T. 489:5-8, 23-25.

36. BCRC staff guide the families to their respective tables after they are served food. Exhibit R-23 at 5; N.T. 489:19-25.

37. If BCRC staff were to observe residents commingling during meals, then staff would remind the residents to maintain social distancing. N.T. 490:7-15.

38. BCRC has interpreters or language services available for when staff counsel and redirect residents to practice social distancing. N.T. 470:8-19.

39. If Director Edwards, her supervisors, or staff observed another BCRC staff member not practicing social distancing, then that staff member would be reminded of the CDC guidelines on social distancing. Exhibit R-23 at 1; N.T. 469:11-470:5, 472:15-18.

40. Beginning April 7, 2020, BCRC provided disposable masks for all residents. N.T. 477:20-21, 479:15-16. BCRC residents are given one reusable mask every week, N.T. 477:25-478:3, and they can request and be given new masks or gloves at any time. Exhibit R-23 at 2; N.T. 478:4-16, 479:20-23.

41. On April 8, 2020, BCRC received a donation of cloth washable, reusable masks, and every resident received one. N.T. 477:21-24.

42. BCRC staff are required to wear a face mask at all times within the facility. Exhibit R-23 at 2; N.T. 477:17-19.

43. Since April 7, 2020, BCRC has required staff to wear gloves at all times. N.T. 482:18-19.

44. BCRC has 12 glove stations with boxes of gloves throughout the facility, including the common areas. N.T. 484:12-485:6.

45. The Immigration Health Services Corps provides on-site general primary care to all residents at BCRC, including mental health, medical care, assessments, and wellness visits. N.T. 495:3-18, 21-22; 496:3-4.

46. The Immigration Health Services Corps has over 15 full-time medical staff, including a physician assistant, nurses, and psychologists. N.T. 496:7-13.

47. Sick calls are available twice a day for adult residents, and 24 hours a day, 7 days a week for child residents. Exhibit R-23 at 3.

48. If a resident were to require hospitalization, BCRC would take that resident to a hospital that has entered into a memorandum of understanding with BCRC to provide care to its residents. N.T. 496:6-497:11.

49. Petitioner B.K.L.N. fell and hit his head while at BCRC, and afterward was unable to sleep. B.L., B.K.L.N.'s father, does not believe his son

received appropriate treatment of diagnosis by the medical staff at BCRC. N.T. 40:16-25, 41:1-3.

50. Petitioner B.K.L.N. contracted a virus that lead to sores around his mouth and him not being able to eat. Petitioner B.K.L.N. also had a fever and congestion for three days, and was not tested for COVID-19. N.T. 37:17-25, 38:1-20.

51. Petitioner B.L., B.K.L.N.'s father, testified that his family is living in constant fear. N.T. 38:19-20.

52. Petitioner P.M.'s two-year-old daughter, Petitioner H.M.N., had a fever while detained at BCRC, and was not tested for COVID-19. N.T. 74:23-25, 75:1-25.

53. Director Edwards has been in her position at BCRC since 2013. N.T. 446:12-18.

54. Director Edwards oversees all program components of BCRC, including policies, procedures, regulations, and standards. N.T. 445:24-446:3.

55. To ensure the program runs properly, Director Edwards takes trips around BCRC to observe what is going on in the facility. N.T. 472:19-22.

56. Director Edwards educates herself on the guidance the Centers for Disease Control and Prevention (CDC) has issued regarding COVID-19, and continually checks the CDC's guidance to ensure BCRC is following the updated revisions. N.T. 457:3-13, 514:24-515:1.

57. BCRC has trained its staff as to the CDC's COVID-19 guidance and has provided staff with written materials, which the staff must sign-off as having received. N.T. 458:18-459:12, 515:2-15.

58. BCRC staff are to adhere to hand hygiene, respiratory hygiene, and cough etiquette as found in the CDC's infection control guidance. Exhibit R-23 at 2.

59. BCRC has posted signage with the CDC's COVID-19 guidance for residents to view and read. N.T. 486:13-17, 515:16-20. That signage is written in English, Spanish, French, and Creole. N.T. 515:21-516:5.

60. BCRC staff had meetings with each family unit to educate the residents about COVID-19. N.T. 488:4-11, 517:4-10. During those meetings, a translator or language service was available. N.T. 486:8-9, 488:12-18.

61. As of March 18, 2020, BCRC suspended: all new admissions to the facility, Exhibits R-2, P-4 ¶ 15(a), N.T. 494:1-3; all visits to the facility, Exhibits R-2, P-4 ¶ 15(b), R-23 at 2, N.T. 493:12-14; and all field trips, Exhibits R-2, P-4 ¶ 15(c).

62. BCRC has been screening staff for COVID-19 since the middle of March. N.T. 491:7-9, 17-18.

63. Before a staff member enters BCRC, he or she is asked screening questions recommended in the CDC's guidance. Exhibit R-23 at 2; N.T. 491:7-9. These questions cover symptoms of COVID-19 such as fever, chills, cold and cough, difficulty breathing, and loss of senses of taste and smell. N.T. 491:17-24.

64. BCRC revises its screening questions for staff any time the CDC's guidance changes. N.T. 491:9-10, 24.

65. If an individual staff member answers "yes" to any of the screening questions, then BCRC will not allow that individual into the program areas and will send the individual home. N.T. 491:11-13, 492:3-5.

66. If the individual staff member answers "no" to the screening questions, then the individual's temperature is taken. Exhibit R-23 at 2, N.T. 491:13-14, 492:6-8.

67. Pursuant to the CDC's guidance, if a staff member has a temperature of 100.4 degrees Fahrenheit or higher, then BCRC will not allow that individual into the program areas and will send the individual home. N.T. 492:6-21.

68. Every resident is medically screened upon admission to BCRC. N.T. 493:23-24.

69. Medical staff, who have access to program areas, look for symptoms of COVID-19 in BCRC residents. N.T. 494:11-18.

70. Medical staff take the temperatures of BCRC residents every day before lunch. Exhibit R-23 at 3; N.T. 494:19-21.

71. Medical staff only allow one family unit in the medical clinic at a time. Exhibit R-23 at 3.

72. If a resident presents with symptoms of COVID-19, BCRC will place the resident in quarantine in their bedroom. N.T. 497:23-498:1.

73. If a resident tests positive for COVID-19, BCRC will place the resident in medical isolation in a negative pressure room in the Medical Department. N.T. 497:20-22. The negative pressure room has its own air system. N.T. 498:2-7.

74. One staff person at BCRC presented with potential COVID-19-like symptoms, was tested for the virus, and the result was negative. Exhibits R-16, R-17; N.T. 498:16-23.

75. Two residents at BCRC – Petitioner J.O.E. and her father – have presented with potential COVID-19-like symptoms, were tested for the virus, and

both residents tested negative. Exhibits R-2, R-4, R-18; N.T. 498:24-499:4, 521:18-522:7.

76. If someone in BCRC were suspected of having COVID-19, BCRC would report this to the Department as a critical incident. N.T. 499:23.

77. The Department conducts monthly monitoring inspections of BCRC. N.T. 267:17-24.

78. Ms. Roman is the Department's Licensing Technician responsible for inspecting BCRC. N.T. 267:17-24. She has been conducting monthly inspections of BCRC for approximately four years. Exhibit P-4 ¶ 7.

79. As part of their work duties, the Department's Licensing Technicians are responsible for observing whether conditions exist at a facility that would warrant an ERO. N.T. 264:7-10.

80. An ERO is considered when a facility licensed by the Department presents imminent health and safety issues that can only be mitigated through the removal of the licensee's residents. Exhibit P-2 at 28:4-18.

81. If a Licensing Technician finds conditions that may warrant an ERO, the technician will remain at the facility, contact his or her supervisor, and discuss how to proceed. N.T. 264:21-25, 265:3-5.

82. The Department may respond to a licensing violation by requiring the facility to develop a plan of correction to bring it into compliance with the applicable regulations. Exhibit P-2 at 32:19-33:2; N.T. 266:12-23.

83. License revocation is a remedy the Department uses for more serious licensing violations. N.T. 266:24-267:4.

84. Ms. Roman conducted a remote inspection of BCRC from March 31, 2020 to April 7, 2020 (March/April Inspection). Exhibit R-3; N.T. 272:11-15, 284:1-8.

85. The March/April Inspection included a telephone interview with Director Edwards, a visual walk-through of BCRC using the mobile application FaceTime, and a desk review of documents Ms. Roman requested from BCRC and ICE. N.T. 291:6-13.

86. During the FaceTime tour of BCRC, Ms. Roman was able to observe hallways, sanitary conditions, common areas, staff stations, and exterior conditions of the building. N.T. 291:6-292:12.

87. Director Edwards complied with Ms. Roman's directives while conducting the FaceTime tour of BCRC. N.T. 292:18-21.

88. As part of the March/April Inspection, Ms. Roman inspected the following documents: fire drill records, Exhibit R-7, N.T. 297:24-298:13; child resident intake documents, Exhibits R-8-A, R-8-B, R-9-A, R-9-B, N.T. 303:20-304:23, 305:23-309:11; child resident admission reports, Exhibit R-11, N.T. 310:12-311:9, 311:24-312:1; records of initial physical examinations of child residents, child resident health and safety assessments, and child resident health and safety plans, Exhibits R-13-A, R-13-B, N.T. 313:12-318:1, 319:8-20, 320:6-13.

89. Ms. Roman's interview of Director Edwards included questions about BCRC's COVID-19 mitigation efforts and policies that were put in place to reduce the likelihood of introducing COVID-19 into the facility. N.T. 325:23-327:12.

90. Based on the March/April Inspection, Ms. Roman made the following conclusions:

(a) that BCRC had implemented adequate COVID-19 mitigation policies, N.T. 329:16-25;

(b) that BCRC residents could adequately social distance due to the number of residents and size of the facility, N.T. 330:4-25; and

(c) that there was no evidence to support an ERO, N.T. 332:2-7.

91. On April 7, 2020, Ms. Roman sent an email to her supervisors detailing the findings of her inspection. Exhibit R-1; N.T. 332:15-334:8.

92. Ms. Roman conducted a remote inspection of BCRC on May 6, 2020 (May Inspection). N.T. 272:8-10.

93. On May 6, 2020, BCRC's total resident census was 16 residents – 10 adults and 6 children. Exhibit R-23 at 1.

94. Ms. Roman created a written report of her findings from the May Inspection, including her interviews with BCRC staff, observations during the video review, and summaries of interviews she conducted with BCRC residents. Exhibit R-23; N.T. 347:2-356:6.

95. Ms. Roman again utilized the FaceTime application to conduct remote video observation of the conditions at BCRC for the May Inspection. Exhibit R-23 at 4-5; N.T. 350:10-22.

96. Because residents of BCRC complained after being filmed during the March/April Inspection, Ms. Roman instead utilized the FaceTime application to observe live video from BCRC's surveillance monitors during the May Inspection. Exhibit R-10; N.T. 293:10-17, 350:19-21.

97. Through the May FaceTime tour, Ms. Roman was able to see hand-sanitizer stations, signage relating to COVID-19, and residents washing their hands. Exhibit R-23 at 4-5.

98. As part of the May Inspection, Ms. Roman reviewed and considered the following documents: fire drill records, Exhibit R-19, N.T. 342:2-343:4; child resident admissions reports, Exhibit R-20, N.T. 343:5-344:4; the list of residents who were released since the March/April Inspection, Exhibit R-21, N.T. 344:4-23; and emails Director Edwards sent to her regarding a resident's concerns related to COVID-19 and BCRC's response to those concerns, Exhibit R-22, N.T. 344:24-346:25.

99. Ms. Roman conducted a video conference with Director Edwards as part of the May Inspection, which included the following subjects: BCRC's census; how many staff were working on each shift; whether anyone tested positive for COVID-19; the signs and symptoms that lead to the testing of a resident; whether the residents were compliant with social distancing; how staff communicate with residents; general precautions for COVID-19; screening of staff when they report to work; face masks and other PPE; the cleaning and sanitizing of the facility; visitation policies; and how BCRC was following the CDC's COVID-19 guidance. Exhibit R-23 at 1-2.

100. Ms. Roman conducted a telephone interview with BCRC's Medical Department as part of the May Inspection, which included the following subjects: the Medical Department's protocol for monitoring for COVID-19; sick calls; information on a resident child who was tested for COVID-19; whether the Medical Department observed social distancing; PPE; and the mental health of the residents. Exhibit R-23 at 3-4.

101. Medical staff reported to Ms. Roman that no resident has requested a sick call with signs or symptoms of COVID-19, and that no resident has

been afebrile since they started taking temperature checks on April 21, 2020. Exhibit R-23 at 3.

102. As part of the May Inspection, Ms. Roman conducted interviews with adult residents of BCRC, including the adult Petitioners. Exhibits R-23 at 5-7, R-24; N.T. 353:20-355:1.

103. During the May Inspection, Ms. Roman utilized either BCRC staff who speak the residents' native language or a language interpreter service to communicate with BCRC residents. N.T. 359:25-361:11.

104. Ms. Roman's resident interviews included 13 questions that specifically addressed the residents' concerns about COVID-19 and BCRC's mitigation efforts. Exhibit R-23 at 5-6.

105. Ms. Roman took handwritten notes of her questions and the responses she received during her resident interviews. Exhibit R-24; N.T. 356:7-358:3.

106. All residents reported to Ms. Roman that they are physically healthy and have been informed of COVID-19 through information from staff members, the news, posters on the walls of the facility, and speaking with other residents. Exhibit R-23 at 6.

107. As for measures to mitigate the spread of COVID-19, residents described washing hands, wearing a mask, social distancing, using hand sanitizer, wiping off surfaces and toys, and covering their faces when coughing or sneezing. Exhibit R-23 at 6.

108. In her May Inspection report, Ms. Roman noted that a few residents expressed feelings of stress and concern about their families' safety due to

COVID-19, particularly if BCRC staff were to become infected. Exhibit R-23 at 6; N.T. 380:4-7, 20-25, 381:1-3, 384:17-25, 385:1-25.

109. Residents reported that BCRC staff wear face masks and that every family has their own bedroom. Exhibit R-23 at 6.

110. Residents admitted to Ms. Roman that they do not wear their masks all of the time. Exhibits R-23 at 6, R-24 at 1; N.T. 379:19-22.

111. Residents stated that they practice social distancing and were able to describe what that term means. Exhibit R-23 at 6.

112. During the May Inspection, Ms. Roman saw residents closer than six feet apart and residents who were not wearing masks. N.T. 380:1-3, 384:34-35, 385:1-5.

113. Based on the May Inspection, Ms. Roman made the following conclusions:

(a) that BCRC was being proactive in implementing COVID-19 mitigation measures, N.T. 358:19-359:24;

(b) that BCRC residents were safe and understood COVID-19 safety protocols, *id.*;

(c) that BCRC residents were not in immediate danger or harm due to COVID-19, *id.*;

(d) that there was no evidence to suggest the health and safety of BCRC child residents was at risk, N.T. 361:12-362:7; and

(e) that there was no basis for an ERO. *Id.*

114. Ms. Roman sent her written monthly inspection report of BCRC to her supervisors. N.T. 355:20-356:6.

115. As of May 29, 2020, the Department had not issued an ERO against BCRC. N.T. 330:12-14.

Evidentiary Ruling

The Court SUSTAINS the Department's hearsay objections to the testimony of Attorneys Cambria and Donohoe regarding statements Petitioners made to them about their health and obtaining medical treatment while at BCRC. Petitioners maintain that the hearsay exception in Pennsylvania Rule of Evidence 803(4), Pa. R.E. 803(4), for statements made for medical diagnosis and treatment applies. However, the Court finds that Petitioners failed to establish that the statements Petitioners made to their immigration counsel, during the course of representation, were made for the purpose of receiving treatment, or that they were necessary and proper for diagnosis and treatment. *Commonwealth v. Smith*, 681 A.2d 1288, 1291 (Pa. 1996). Therefore, the Court holds that the exception in Pa. R.E. 803(4) does not apply here and the testimony is excluded as inadmissible hearsay.

Discussion

Mandamus is an extraordinary remedy that lies only to compel performance of a ministerial act or a mandatory duty by a government official. *Sanders v. Wetzel*, 223 A.3d 735, 739 (Pa. Cmwlth. 2019); *Sinkiewicz v. Susquehanna County Board of Commissioners*, 131 A.3d 541, 546 (Pa. Cmwlth. 2015). A petitioner seeking mandamus relief must establish that he or she (1) has a clear legal right, (2) the respondent has a corresponding legal duty, and (3) there is no other adequate remedy at law. *Sanders*, 233 A.3d at 739; *Sinkiewicz*, 131 A.3d

at 546. The purpose of a writ of mandamus is "to enforce rights that have been clearly established. Mandamus may not be used to establish legal rights or to compel performance of discretionary acts. . . ." *Sanders*, 233 A.3d at 739 (quoting *Tindell v. Department of Corrections*, 87 A.3d 1029, 1034 (Pa. Cmwlth. 2014)). *See also Mazin v. Bureau of Professional and Occupational Affairs*, 950 A.2d 382 (Pa. Cmwlth. 2008). Moreover, "[t]he petitioner's right to performance of a mandatory duty must be well-defined, clear and specific; where any doubt exists, mandamus relief will not lie." *Kegerise v. Delgrande*, 183 A.3d 997, 1004 (Pa. 2018) (citation omitted).

Here, Petitioners have failed to prove they have a clear legal right and the Department has a mandatory duty to issue an ERO. As for the second issue, Petitioners summarily argue that the Department's duty to issue an ERO under Regulation 20.37 is mandatory and leaves no room for discretion. Their argument centers on the fact that Regulation 20.37 contains the word "will" – that "the Department <u>will</u> take immediate action to remove the clients from the facility or agency." 55 Pa. Code § 20.37 (emphasis added). Petitioners maintain that use of this affirmative or conditional language constitutes a mandatory duty for the Department to issue an ERO.

However, Petitioners argument ignores the preceding language of Regulation 20.37 which states that an ERO is appropriate "[i]f 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.* Taken, as it must, in its entirety, the plain language of the Regulation necessarily vests within the Department the discretion to determine if evidence exists that meets the applicable

legal standards. More to the point, whether the conditions at BCRC meet the threshold for issuance of an ERO is a subjective determination within the Department's discretion and expertise. Mandamus is simply not the appropriate vehicle or remedy as the Department does not have a mandatory duty to issue an ERO.

Even if Regulation 20.37 could be said to impose a mandatory duty on the Department, the Court finds that Petitioners have not demonstrated a clear legal right to an ERO under the circumstances. Petitioners point to their subjective and unsupported allegations as the basis for claiming that the conditions at BCRC, and the facility's response to the COVID-19 pandemic, demonstrate gross incompetence, negligence, or misconduct likely to constitute an immediate and serious danger to their lives or health.

The uncontroverted evidence belies Petitioners' subjective fears and demonstrates that BCRC has taken steps to mitigate the risk of residents being exposed to or contracting COVID-19. Specifically, BCRC suspended admissions, visitation and field trips as of March 18, 2020. Staff has been trained regarding the CDC's COVID-19 guidance and are required to adhere to the CDC's infection control guidance pertaining to hand hygiene, respiratory hygiene, and cough etiquette. While Petitioners claim no one from BCRC ever spoke to them regarding COVID-19, Director Edwards credibly testified otherwise. She specifically stated that staff met with each family unit to educate residents about COVID-19, and that a translator or language service was available during those meetings.

Despite Petitioners' allegations to the contrary, BCRC has adequate space for social distancing as it is a 58,000 square foot facility with an additional outdoor recreation area of at least three acres. While BCRC can accommodate up

to 96 residents, it currently only houses 13 residents and each family has its own bedroom. Moreover, BCRC has instituted policies that stagger use of the communal showers and entry to the dining area to avoid families being in contact with one another. The ability to adequately social distance exists at BCRC, and it is incumbent on the residents to follow this practice.

As for cleaning and PPE, BCRC has significantly enhanced its preventive cleaning of the facility. It has also provided at least 11 hand sanitizer dispensers throughout the facility, for both residents and staff, and residents are encouraged to wash their hands. Staff are required to wear face masks and gloves at all times within the facility, and there are 12 glove stations located throughout BCRC, including in the common areas. While residents are typically only provided one disposable face mask per week, they can request and will be given a new disposable mask at any time, and they also have been given reusable masks. Again, while the record contains evidence that residents do not always practice social distancing measures or wear their masks, that is inherently by choice and not due to lack of ability.

With respect to medical care, there are over 15 full-time medical staff at BCRC and the facility has developed specific policies for placing a resident in quarantine if he or she presents symptoms of COVID-19. In addition, if a resident tests positive for the virus, he or she will be placed in medical isolation in a negative pressure room. Sick calls are available twice a day for adult residents, and are always available for child residents. The residents were given a medical examination and screened upon entry to BCRC, and medical staff takes the temperature of all residents every day prior to lunch. BCRC staff has also been screened daily since March 2020. Staff are not permitted to enter the facility if they have a fever of 100.4

or higher, or if they fail to appropriately answer any of the daily screening questions they are asked. No residents or staff have tested positive for COVID-19.

Petitioners B.L. and P.M. both testified regarding the concerns they have regarding being detained at BCRC during the COVID-19 pandemic. In particular, they expressed their fears about being in an enclosed environment, whether staff might bring the virus into the facility, and what type of care they may receive if they or their family members contract the virus. The Court does not doubt Petitioners' testimony or the fear they expressed for themselves and their families during this unprecedented time. However, these subjective concerns do not support the extraordinary remedy requested here, especially in light of the Department's ample evidence regarding BCRC's mitigation efforts. Given the facts of record, Petitioners simply have not demonstrated a clear right to an ERO.

In the alternative, Petitioners argue that if application of the ERO standard falls within the Department's discretion, the Department's failure to issue an ERO during the COVID-19 pandemic is arbitrary or based on a mistaken view of the law. Petitioners assert there is no written protocol for issuing an ERO other than Regulation 20.37 itself, and that the Department's decision not to issue an ERO here was made without sufficient information due to its deficient monitoring protocols of BCRC.

Petitioners are correct that mandamus can be appropriate, in certain circumstances, when a discretionary act is involved. "Where the action sought to be compelled is discretionary, mandamus will not lie to control that discretionary act, . . . but courts will review the exercise of the actor's discretion where it is arbitrary or fraudulently exercised or is based upon a mistaken view of the law." *Banfield v.*

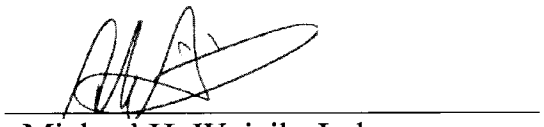
Cortes, 110 A.3d 155, 175 (Pa. 2015) (quoting *Pennsylvania State Association of County Commissioners v. Commonwealth*, 681 A.2d 699, 701-02 (Pa. 1996)).

This narrow application of mandamus is not appropriate in the present case. First, the Department has exercised its discretion and this is not an instance of an agency merely "sitting on its hands" so to speak. Ms. Roman credibly testified regarding her remote inspections of the facility since March of this year, which included interviews with Director Edwards, members of the Medical Department, and Petitioners themselves. She also reviewed extensive documentation and was able to see the facility through use of the FaceTime application. Based upon these inspections, Ms. Roman concluded that the BCRC residents, including Petitioners, were not in immediate danger or harm due to COVID-19, there was no evidence that their health and safety was at risk, and there was no evidence to support an ERO. Ms. Roman relayed her findings and conclusions to her supervisors, and the Department determined that an ERO was not warranted. This is not an instance where the Department has refused to exercise its discretion, and the law is well settled that mandamus is not to be used to control the Department's discretion. *See, e.g., Banfield*; *Sinkiewicz*.

Second, the Court notes the ample evidence provided by the Department demonstrating the mitigation efforts BCRC has implemented to prevent residents from being exposed to COVID-19, as well as the facility's ability to place residents in quarantine or even medical isolation in a negative pressure room if they were to test positive. Given the uncontradicted evidence of record, the Court finds that the Department's decision that an ERO was not warranted is reasonable, and that the Department did not act arbitrarily in exercising its discretion.

Conclusion

Petitioners have failed to prove they have a clear legal right and the Department has a mandatory duty to issue an ERO, two necessary elements for the issuance of a writ of mandamus. Moreover, the Court finds that the Department acted reasonably in determining that an ERO was not warranted under the circumstances. Accordingly, the Court finds in favor of the Department and against Petitioners.



Michael H. Wojcik, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

C.N., B.L., 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., Petitioners	:	
v.	:	No. 268 M.D. 2020
Pennsylvania Department of Human Services, Respondent	:	

ORDER

NOW, this 7th day of July, 2020, after a non-jury trial in the above-captioned matter, the Court enters a verdict in favor of the Respondent Pennsylvania Department of Human Services and against Petitioners.

Michael H. Wojcik, Judge

Certified from the Record

JUL -7 2020

And Order Exit