

IN THE SUPREME COURT OF PENNSYLVANIA

No. 46 MAP 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.; M.E.L., E.O.E., and minor child J.O.E.,

Appellants,

v.

PENNSYLVANIA DEPARTMENT OF HUMAN SERVICES,

Appellee.

BRIEF OF APPELLANTS

Appeal from the Orders of the Commonwealth Court of Pennsylvania
Entered on July 7, 2020, and July 22, 2020, at No. 268 M.D. 2020

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I. STATEMENT OF JURISDICTION

This is an appeal from final orders of the Commonwealth Court's original jurisdiction. The Supreme Court has exclusive jurisdiction pursuant to 42 Pa. C.S. §723(a).

II. ORDERS IN QUESTION

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.

/s/
Michael H. Wojcik, Judge

ORDER

AND NOW, this 22nd day of July, 2020, upon consideration, Petitioners' Motions For Post-Trial Relief Pursuant To Pa. R.C.P. No. 227.1, are hereby DENIED.

/s/
Michael H. Wojcik, Judge

III. STATEMENT OF SCOPE AND STANDARD OF REVIEW

Scope of review: In reviewing the denial of a mandamus, the Court's scope of review is to determine whether the trial court abused its discretion or committed an error of law. *Bd. of Directors of Palmyra Area School District v. Palmyra Area Education Ass'n*, 644 A.2d 267 (Pa. Cmwlth. 1994). As to errors of law, the Court's scope of review is plenary. *L. Makefield Twp. v. Lands of Chester*

Dalgewicz, 67 A.3d 772 (Pa. 2013). “[W]here the trial court leaves open the possibility that there were reasons to grant or deny a new trial other than those it expressly offered, or the trial court justifies its decision on the ‘interests of justice,’ an appellate court must apply a broad scope of review and affirm if it can glean any valid reason from the record.” *Harman ex rel. Harman v. Borah*, 756 A.2d 1116, 1123-24 (Pa. 2000) (citing *Morrison v. Commonwealth, Dep’t of Pub. Welfare, Office of Mental Health*, 646 A.2d 565, 570 (Pa. 1994)).

Standard of review: On questions of law, the Court exercises plenary review. *Allegheny County Sportsmen’s League v. Rendell*, 860 A.2d 10, 14 (Pa. 2004).

IV. STATEMENT OF QUESTIONS INVOLVED

1. Did the Commonwealth Court err in refusing to consider expert testimony from Dr. Alan Shapiro, when he was qualified as an expert according to Pa.R.E. 702?

2. Did the Commonwealth Court err in excluding testimony from Attorneys Bridget Cambria and Carol Anne Donohoe as hearsay, when their testimony fell under the hearsay exception in Pa.R.E. 803(4)?

3. Did the Commonwealth Court err in affording the Department unfettered discretion to disregard known facts and refuse to engage in adequate fact-finding, when 55 Pa. Code § 20.37 requires the Department to

perform the mandatory duty of issuing an emergency removal order (“ERO”) upon a given state of facts?

4. Did the Commonwealth Court err in concluding that the Department’s exercise of discretion was not arbitrary or based on a mistaken view of the law, when Petitioners have shown that their life or health is in immediate and serious danger due to the COVID-19 pandemic and that existing safety protocols at BCRC are insufficient to protect them from contracting COVID-19?

5. Did the Commonwealth Court err in concluding that minor Petitioners’ failure to adhere to social distancing and masking was due to choice and not lack of ability, when that finding is contravened by the record, including testimony from the Department’s witness?

6. Did the Commonwealth Court err in failing to grant a new trial based on improper exclusion of relevant material evidence, namely the testimony of Petitioners’ expert witness and Attorneys Cambria and Donohoe?

7. Did the Commonwealth Court err in failing to grant a new trial based on after-acquired evidence that BCRC has resumed detaining new families since the Court’s July 7, 2020 Order, a fact which impacts

Petitioners' ability to practice social distancing and which is highly relevant to the Court's analysis of whether Petitioners have a legal right to an ERO?

V. STATEMENT OF THE CASE

A. The Parties

Appellants 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"), are young children and their parents detained in the custody of Immigration and Customs Enforcement at the Berks County Residential Center ("BCRC") during the COVID-19 pandemic.

Appellee is the Pennsylvania Department of Human Services ("Respondent" or "Department").

B. Procedural History

On April 8, 2020, Petitioners filed an Application for Extraordinary Relief Under the Court's King's Bench Jurisdiction in this Honorable Court. *C.N. et al. v. Pa. Dep't of Human Services*, No. 76 MM 2020. In that matter, Petitioners requested that the Court direct the Department to issue an Emergency Removal Order ("ERO") pursuant to 55 Pa. Code § 20.37 due to the imminent risk to their life or health posed by the COVID-19 pandemic. On April 16, 2020, the Court denied the Application without prejudice, directing that if the action were filed in

Commonwealth Court, that court should establish an expedited schedule and “move expeditiously to resolve the matter so as to prevent further potential harm to Petitioners.” *Id.*, April 16, 2020 Order at 1-2.

On April 23, 2020, Petitioners filed an Emergency Petition for a Writ of Mandamus (“Petition”), requesting that the Commonwealth Court direct the Department to issue an ERO.¹ Testimony was taken at a non-jury trial on May 26, 27, and 29, 2020, via WebEx. After post-trial briefing, on July 7, 2020, the Court issued a Memorandum Opinion and Order entering a verdict in favor of the Department and against Petitioners. On July 17, 2020, Petitioners filed Motions for Post-Trial Relief, which were denied by the Court in its Order of July 22, 2020.

C. Prior Determinations

All prior determinations are listed above.

D. Judge Whose Determination Is To Be Reviewed

The July 7 Opinion and Order and July 22 Order were entered by Judge Michael H. Wojcik.

¹ The same date, Petitioners filed an Application for Special Relief in the Nature of an Application for Peremptory Judgment in Mandamus, to which the Department filed an Answer on April 28, 2020. On May 6, 2020, the Commonwealth Court denied the Application, finding genuine issues of material fact remained. CR-14.

E. Statement of Facts

1. Living in detention creates an exponential risk of COVID-19 infection beyond that experienced by the general public.

The COVID-19 global pandemic presents a severe danger to public health. There is no vaccine against COVID-19, and there is no known cure. Thus far, more than 33 million people worldwide have been diagnosed with COVID-19 and nearly a million have died.² In the United States, more than 7 million cases of infection have been confirmed and 205,024 people have died.³ In Pennsylvania alone, more than 150,000 cases have been confirmed and 8,107 people have died. Confirmed infections in Berks County have skyrocketed to 6,905, and 393 people have died.⁴

a. COVID-19 is highly contagious and can be fatal to children.

While older individuals face greater chances of serious illness or death from COVID-19, it is now known that young people are just as susceptible to contracting the virus and also face serious threats to life and health. Children infected with COVID-19 can contract Multisystem Inflammatory Syndrome, which can damage organ systems and require hospitalization in the Intensive Care Unit.⁵

² As of September 28, 2020. See Coronavirus COVID-19 Global Cases, Johns Hopkins University Coronavirus Resource Center, <https://coronavirus.jhu.edu/map.html>.

³ *Id.*

⁴ Pennsylvania Department of Health, *COVID-19 Data for Pennsylvania*, <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx>.

⁵ As of September 28, 2020, there were 49 confirmed cases of the syndrome in Pennsylvania and 22 potential cases under investigation. Pennsylvania Department of Health, *COVID-19 Data for Pennsylvania*, <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx>.

(R. 490a). COVID-19 may exacerbate a previous underlying disease. (R. 492a). In the absence of a cure for COVID-19, treatment involves fever control, rest, provision of fluids, respiratory support, dialysis, and in severe cases, intubation. (R. 499a-500a).

COVID-19 is extremely infectious. Coronavirus spreads through airborne transmission or droplets that fall to surfaces. The virus can be spread through sneezing, coughing, or even speaking. (R. 492a-93a). Approximately 60 percent of people infected with COVID-19 have either mild symptoms or no symptoms, making formal testing important for accurate detection. (R. 491a).

Petitioners face an elevated risk of contracting COVID-19 simply because they are detained. In the enclosed environment of a detention facility, both those incarcerated and those who watch over them are at risk for airborne infections. Because the virus is transmitted through droplets, through the air, and on surfaces, and because asymptomatic carriers can transmit the virus to others, even one infected person in a facility, whether a detainee or a staff member, can infect the majority of people in the facility. Alternative measures of detecting COVID-19, such as self-reporting of symptoms or temperature checks, are imperfect since a high percentage of infected people are asymptomatic. (R. 498a).

Social distancing rules and other measures to prevent exposure to and spread of COVID-19 by adults are necessarily not applicable to a facility in which

children are detained. The CDC guidelines for correctional facilities do not even address children. (R. 511a-12a). Children—especially very young children—cannot be expected to observe the same rules and norms of social distancing and standard hygienic practices that are expected of adults. (R. 500a, 511a). Young children don't wear masks, and adult-sized masks don't fit them. (R. 523a). Children not wearing masks is a risk factor for them and those around them, since children sneeze, cough, drool, and put things in their mouths. (R. 522a).

2. BCRC's COVID-19 protection measures have been grossly inadequate.

Congregate facilities, and particularly ICE detention centers like BCRC, are high-risk locations for the spread of COVID-19. (R. 503a-504a). Of ICE detainees who have been tested for COVID-19 nationally, more than 50 percent tested positive. (R. 543a). COVID-19 has been diagnosed in other ICE detention facilities in Pennsylvania: York County Prison and Pike County Correctional Facility. (R. 542a).

At BCRC, it is impossible to implement standard procedures like household self-quarantines or even basic social distancing. The BCRC Resident Handbook states that “you will be living in close proximity with other families” and “due to the communal nature of the Center . . . children from different families may room together, and non-related adults room together.” (R. 92a, 94a). The Handbook

further states, “Residents are expected to share common equipment such as telephones, televisions, tables, recreational games and other equipment.” (R. 92a).

BCRC staff eats at the same time as the families in the cafeteria, sometimes even at the same table. The tables are less than six feet apart. During fire drills, which happen twice a month, they are crowded together in the stairwells and have to touch each other. (R. 410a, 412a-414a, 447a-448a, 456a, 1454a-1456a, 1710a).

Eating in a congregate cafeteria setting presents a risk of transmission of COVID-19 because small children tend to move around the space and people must remove their masks to eat, potentially exposing them to the airborne virus. (R. 523a-24a). Child Petitioners play on the floor and touch the toys that have been on the ground and put them in their mouth. The BCRC staff hug and touch the children. (R. 420a, 458a-59a, 1722a, 1727a).

New families were being detained at BCRC up until at least March 18, 2020, well after the threat of COVID-19 was known. (R. 547a, 1436a). And new families have been brought into the facility since the day of the Commonwealth Court’s order, July 7, 2020. As of July 27, according to ICE, there were 21 detainees being held at BCRC. (R. 1226a).

Every day, the children and parents at BCRC are exposed to new potential virus vectors because BCRC staff, ICE staff, medical staff come and go as shifts change. Nearly 80 BCRC staff, ICE officers, and medical personnel come and go

from BCRC on a regular basis. (R. 935a-37a). ICE staff have contacts with those not only within BCRC but multiple detention centers. Yet only one staff member and two detainees have been tested for COVID-19. No ICE or medical personnel have been tested. (R. 875a-76a, 936a-37a, 1703a-1709a).

Instead of testing, BCRC relies on self-reporting questionnaires and temperature taking to determine whether staff are allowed to enter the facility, despite asymptomatic spreading of COVID-19. (R. 868a). Expert witness Dr. Alan Shapiro testified that self-reporting protocols to determine whether newly admitted families and facility staff have been exposed to COVID are ineffective given that a majority of infected people are asymptomatic or have only mild symptoms. (R. 514a). Taking temperatures before mealtime is an ineffective screening tool due to variability in different types of thermometers and the possibility of asymptomatic carriers. (R. 524a-25a).

Petitioners have not been adequately informed about the risks of COVID-19 and prevention measures in their native language. Petitioners B.L. and P.M. speak Haitian Creole. Their primary source of information about COVID-19 at BCRC has been TV reports in Spanish, a language of which they understand only a few words. (R. 407a, 443a, 446a). Because BCRC staff does not speak Creole, to communicate with them, Petitioners use hand gestures. (R. 408a-409a, 445a).

The only written material regarding COVID-19 mitigation provided to the families is in the form of signage. Some signs are only available in English. (R. 892a-93a, 1699a-1702a). The educational poster provided to Petitioners in Creole to inform them about COVID-19 was not effective or adequate. For instance, the poster had the words “social distancing” but did not explain what that meant. (R. 446a, 506a-508a, 1699a-1702a).

To buy food that their children can eat, some adult Petitioners participate in a coercive, putatively “voluntary” work program that pays a dollar a day. (R. 418a-19a). As part of this program, Petitioners must clean common areas including the showers, the activity room, the library, and the children’s playroom. (R. 421a-23a, 449a). Petitioners are not given protective gloves apart from when they are cleaning. B.L. was not told to wear gloves when cleaning to protect himself from COVID-19. (R. 424a-25a, 450).

There have been persistent shortfalls in providing adequate personal protective equipment to Petitioners at BCRC. When Petitioners arrived at BCRC they were not given any masks. After seeing on TV that masks should be worn to protect from coronavirus, Petitioners spoke to their lawyers. Petitioners were only provided paper masks on April 7, 2020, after Petitioners’ attorneys filed a federal complaint. They are given a new mask once a week. Petitioners are concerned because using a mask for an entire week could spread the virus. Young children

were given adult-sized masks. (R. 420a-21a, 442a-43a, 553a, 856a, 860a, 938a, 1402a).

Dr. Shapiro testified that the only way to protect Petitioners in this pandemic would be to release them from BCRC or to have an entirely closed facility, with no one coming in or going out: staff, medical personnel, or immigrant families. But there would be no way to provide needed services to children in such a scenario, and there is no way BCRC could function for its intended purpose. (R. 513a, 532a-33a).

Petitioners have family members ready to receive them upon release from BCRC, and families previously released from Berks have gone to live with family members in the United States. (R. 568a-69a, 576a-77a). Petitioners would feel safer with family because they would be able to implement protective measures and control with whom they and their children have contact. As long as they are detained in BCRC, they feel they cannot protect themselves. (R. 429a-30a, 457a-58a).

a. BCRC's deficient medical protocols and resources would likely result in serious injury or death to children who fell ill with COVID-19.

BCRC lacks adequate medical infrastructure to address the spread of infectious disease and to treat people most vulnerable to illness in detention. Children have unique medical needs that require specialized treatment. (R. 487a). Newly arrived immigrant children are particularly vulnerable to health problems

since they have often suffered trauma or abuse before arriving in the U.S. (R. 476a-77a). Most newly arrived immigrant children have not had ongoing medical services or “continuity of care” prior to arriving in the U.S. (R. 477a-78a).

Dr. Shapiro testified that based on his past observations of BCRC, the facility did not provide adequate behavioral and mental health services to detained children, nor did it provide adequate treatment to detained children experiencing medical problems. (R. 485a-86a). BCRC does not have a pediatrician on staff. *Id.*

Petitioners have expressed concern over medical treatment for their children. (R. 553a). Families expressed concerns about being placed in isolation, sore throats, children with mouth infections leading to open sores, and children with fevers. (R. 558a, 562a-63a). During the pandemic, requests for medical assistance made by Petitioners or their attorneys have gone unheard. (R. 558a-59a).

When one-year-old B.K.L.N. fell and hit his head, leaving him unable to sleep, medical staff gave him Tylenol and told his parents that the baby was merely having nightmares. (R. 417a-18a). However, B.K.L.N.’s father, B.L., testified that he has never known his child to have difficulty sleeping or experience nightmares. *Id.* B.L. testified that he did not believe his child had received adequate medical care. *Id.*

Petitioner P.M.’s two-year-old daughter, H.M.N., had a *fever for more than a week but was not tested for COVID-19*. P.M. does not believe that his family

would receive appropriate medical treatment at BCRC if they were to get sick with COVID-19. (R. 451a-54a, 1399a). B.K.L.N. contracted a virus that led to sores around his mouth and made it so that he could not eat. He also had fever and congestion lasting for three days. (R. 414a-15a, 418a). Despite having a fever, *B.K.L.N. was not tested for COVID-19*. At the time of the hearing, no Petitioners, besides Petitioner J.O.E. and her father, had been tested for COVID-19, although multiple Petitioners had suffered from fever. (R. 445a, 1281a, 1287a, 1303a, 1317a, 1328a, 1350a; 1387a, 1389a, 1391a).

Alarming, BCRC Director Diane Edwards did not know which Petitioners had been tested for COVID-19. She was not familiar with basic medical records used at BCRC to track and report medical issues among the minor Petitioners. Ms. Edwards claimed Petitioners' fevers were due to non-COVID-19 medical issues despite the fact that the children with fevers were not tested for COVID-19. (R. 896a-98a, 900a-901a, 916a, 927a, 929a-31a, 1115a, 1281a, 1287a, 1303a, 1317a, 1328a, 1350a; 1387a, 1389a, 1391a).

If a child at BCRC became ill with multisystem inflammatory syndrome, the illness would likely not be detected in time due to inconsistencies in health care at BCRC and lack of a pediatric specialist, resulting in the child becoming seriously ill before reaching the hospital system. (R. 529a-30a).

3. The Department's long-deficient oversight of BCRC has now reached a crisis point.

Despite these documented risks to the life or health of Petitioners, the Department has not improved or increased its inspections of BCRC. In fact, due to the virus, the Department has cut back on inspection protocols and is not even conducting on-site visits. Department Licensing Technician Erin Roman is responsible for conducting monthly inspections of BCRC. (R. 637a-38a, 644a). On March 26, 2020, Erin Roman refused to conduct her monthly inspection of BCRC, despite her responsibility and her supervisor's instructions to do so. She wrote in an email, "I will not make myself available to put myself, my family, or others in harm's way." (R. 745a-46a, 1442a). Ms. Roman's next two inspections of BCRC during the COVID-19 global pandemic were conducted remotely. (R. 649a, 740a-41a, 751a-52a, 1435a, 1722a).

The Department is mandated by regulation "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 § 3800, *et seq.*; R. 639a. BCRC operates under the 3800 regulations. (R. 645a). Concomitant with this mandate is the duty to conduct inspections. (R. 644a). Licensing technicians are required to be familiar with all the 3800 regulations and Chapter 20 of 55 Pa. Code regulations. (R. 640a).

a. *The Department has no written protocol for deciding whether to issue an Emergency Removal Order.*

When the Department finds evidence of “gross incompetence, negligence, [or] 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 *must* take immediate action to remove the clients from the facility. 55 Pa. Code § 20.37.

Apart from that regulation, the Department has no written protocol for determining when to issue an emergency removal (“ERO”). (R. 634a, 644a, 1264a-65a, 1447a). When questioned on how the decision was made to issue EROs in the past, Jeanne Parisi, the Department’s Bureau Director for Human Services Licensing, responded that a licensing inspector would alert their supervisor and their regional director to concerns and if the regional director agreed that the concerns were egregious enough, they would bring it to Ms. Parisi’s attention and she would bring it to the Deputy Secretary’s attention. (R. 627a-28a, 1258a-59a).

When asked how the decision to issue an ERO would be made, Ms. Parisi responded:

It would be based on what the level of egregiousness was and the ability to mitigate it. The emergency relocation is the very last step in our process and wouldn't be taken unless no other actions could be taken to ensure the health and safety of the residents. It's hard to forecast what that might be because people's lives don't fit neatly into boxes, but if it was felt that it was in the best interest and there was no way to mitigate on-site, then we would consider that.

(R. 628a-29a, 1264a-65a). Ms. Parisi confirmed that in her tenure at DHS, there have been no situations in which the possibility of issuing an ERO was contemplated at any monitored facility. (R. 1266a).

Moreover, the BCRC Director Diane Edwards stated under oath that even if an ERO were issued, *BCRC would continue to operate in violation of the 3800 regulations.* (R. 883a-84a).

b. The Department's oversight of BCRC during the COVID-19 pandemic has been negligent.

Although the Department's monthly inspections are supposed to be unannounced, the March/April remote inspection was coordinated with BCRC Director Diane Edwards. (R. 1452a-56a). The Department gave BCRC a week's notice to prepare and even had a "dry run" of the inspection on March 30, 2020. (R. 746a-47a, 749a, 1447a-50a). The inspection was conducted via the FaceTime app, with Ms. Roman looking at a cell phone while Ms. Edwards walked through sections of the facility. (R. 668a, 741a, 1435a, 1268a-69a). The wireless internet connection at BCRC was known to be unreliable and have connectivity issues; Erin Roman testified that the entire March/April virtual inspection lasted 10 minutes or less and that the connection repeatedly dropped, such that she was unable to observe the entire facility. (R. 667a, 741a-42a, 1447a).

As part of the March/April inspection, Director Edwards sent Ms. Roman video files purporting to show representative footage inside BCRC, lasting a total of 14 seconds. (R. 669a-70a, 708a, 742a, 744a-45a, CR-28 Exhibits P-5, P-6). Erin Roman testified that she was not able to see if the detained families were practicing social distancing in the video files. (R. 744a, CR-28 Exhibit P-6). The families detained at BCRC expressed discomfort at being filmed by Diane Edwards without their consent. (R. 668a, 741a, 1268a-69a, 1435a).

The May inspection was, again, conducted virtually via the FaceTime app with Diane Edwards holding her cell phone camera up to a series of surveillance monitors while Erin Roman observed on her phone. (R. 727a). Each surveillance monitor was only observed for a few minutes. (R. 728a). In her May 6 report describing the May inspection, Erin Roman described the families detained at BCRC as being “distant.” (R. 1725a-26a). However, at trial, Erin Roman testified that she saw detained people closer than six feet apart, and not wearing masks. (R. 752a, 756a-57a, 761a-62a, 1727a). Ms. Roman’s testimony demonstrated further inconsistencies with her May 6 report as she reported cafeteria tables being adequately spaced, yet at trial, she testified that she could not tell how far apart the tables were. (R. 754a-55a, 1728a).

Ms. Roman testified that, in general, it is difficult for detained children to understand and follow social distancing and proper hygiene protocols. (R. 776a).

Although the detained families expressed to Ms. Roman that they felt stressed and worried about their families' safety during the COVID-19 pandemic, especially regarding BCRC employees bringing the virus into the facility, she stated in her May 6 report that all detained families reported feeling safe. (R. 757a-58a, 761a-62a, 1727a). Despite having inspected BCRC for four years, Erin Roman was unaware of the existence of the voluntary work program, which includes cleaning of common areas; only learning of its existence during her virtual May 6 inspection in an interview with a parent. (R. 758a-60a, 1274a).

c. The Department has no access to the health records of children after their admission to BCRC, or any access to parents' records.

Department records do not count the number of adults detained at BCRC during an inspection period. (R. 720a). Erin Roman testified that, despite the risks presented by COVID-19, the Department has no access to the medical files of the parents detained at BCRC, or any information regarding the parents' well-being. (R. 775a). Erin Roman testified that the Department only inspects the children's intake records, but does not review any records of the children's health after admission despite the ongoing nature of the COVID-19 pandemic. (R. 774a).

Erin Roman testified that, between the monthly inspections, BCRC would communicate any "signs or symptoms of COVID-19 related issues," yet she also testified that she was unaware of children presenting with fever. (R. 649a-50a, 773a). The Department did not request any documents relating to detainees being

treated for fever as part of its inspections during COVID-19. (R. 773a).

Consequently, the Department was unaware of the fever suffered by two-year-old H.M.N. lasting more than a week. (R. 766a, 771a-72a). Jeanne Parisi, the Department's Bureau Director for Human Services Licensing, does not know the COVID-19 testing status for the 1200 centers she oversees, including BCRC. (R. 626a-27a, 1240a).

d. The Department's history of deficient oversight.

This is not the first time the Department has ignored its own regulations to the detriment of BCRC detainees. The Department revoked BCRC's license in 2016 because BCRC does not meet the definition of "child residential facility" by housing adults together with children, 55 Pa. Code § 3800.5, and BCRC's appeal is pending;⁶ yet despite revoking the license, the Department has made annual stipulations in Commonwealth Court to allow BCRC to continue to operate using an expired license. *See J.S.C. et al. v. Pa. Dept. of Human Svcs. et al.*, No. 678 MD 2019 (Pa. Cmwlth. 2019). BCRC operates in violation of 55 Pa. Code § 3800.271 by housing children in a secure facility who have not first been alleged or

⁶ *County of Berks v. Dallas*, No. 8 MD 2017 (Pa. Cmwlth. 2017). BCRC has also sued the Department because of its failure to grant its applications for subsequent one-year licenses. *County of Berks v. Miller*, No. 13 MD 2018 (Pa. Cmwlth. 2018). In 2018, detained families petitioned to intervene in the licensing matter before the Department's Bureau of Hearings and Appeals (BHA). That petition was granted on appeal to the Commonwealth Court and remanded to the BHA on January 21, 2020, where it remains pending. *See D.G.A. et al. v. Dept. of Human Svcs.*, No. 1059 CD 2018 (Pa. Cmwlth. 2018).

adjudicated delinquent. The Department has also allowed BCRC to continue to operate despite housing children under nine years of age in violation of 55 Pa. Code § 3800.283(7). Infants have been detained at BCRC; in 2019, a three-month-old infant was detained in unsanitary conditions for weeks. (R. 566-67, 1252a-55a).

The Department has a history of ignoring or downplaying medical complaints made by detained people and their attorneys at BCRC. (R. 606, 1258a-66a). Carol Anne Donohoe testified that complaints made to the Department about medical neglect of clients detained at BCRC were often met with no response. (R. 606). When the Department did respond to a complaint of medical neglect of detained clients, it was solely by way of communication with Executive Director Diane Edwards rather than with any detained clients. (R. 606a, 613a).

Complaints of medical neglect and inadequate care, made by detained people and their attorneys, were not reported as violations on the Department's website. (R. 607a). A sexual assault at BCRC, which was witnessed by a detained child, was not reported as a violation on the Department's website. (R. 615a). Attorney Carol Anne Donohoe testified that, in over four years representing hundreds of detained families at BCRC, she did not observe any change or improvement in the medical treatment of detained families, who were merely told to take Tylenol and drink water by BCRC staff. (R. 613a-14a). This lack of

response and oversight by the Department led BCRC medical staff and supervisors to discount and downplay the medical concerns of detained families. (R. 612a-13a). Despite this, the Department has refused to act.

Indeed, there have been no publicly reported inspections of BCRC by the Department since 2018.⁷ In 2019, Department licensing technician Erin Roman found and reported a violation of 55 Pa. Code § 3800.221 (housing adults and children together) during her annual inspection of BCRC. (R. 779a-80a). Rather than compel BCRC to correct the violation, the Department instead *never issued its 2019 report*. (R. 777a, 780a).

Even before the coronavirus pandemic, these conditions constituted “gross incompetence, negligence, [or] 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 client.” Yet the Department never mentioned any of the aforementioned harmful conditions in its reports. The Department turned a blind eye to gross incompetence, negligence, misconduct, and mistreatment of children at BCRC. This history of administrative neglect has set the stage for the current critical situation: Children are detained unprotected from infection by a highly contagious virus.

⁷ Pennsylvania Department of Human Services, *Inspection/Violation Reports for Berks County Residential Center*, <http://services.dpw.state.pa.us/dhs/ViolationReport.aspx?reportid=14386&fac=BERKS%20COUNTY%20RESIDENTIAL%20CENTER>.

F. Order To Be Reviewed

The text of the July 7, 2020 and July 22, 2020 Orders is printed above.

G. Statement of Place of Raising or Preservation of Issues

Petitioners raised the questions presented for review to this Court in their Emergency Petition for Writ of Mandamus; Pre-Trial Statement; Expert Statement; Exhibit P-1; Petitioners' Response to Respondent's Motion in Limine; Petitioners' Post-Hearing Brief; Petitioners' Reply to Respondent's Post-Hearing Brief; and during the three days of hearing.

VI. SUMMARY OF ARGUMENT

The Commonwealth Court erred in refusing to consider the testimony of Petitioners' expert witness and Attorneys Bridget Cambria and Carol Anne Donohoe, and then failing to grant a new trial based on that improper exclusion. The Commonwealth Court also erred in affording the Department unfettered discretion to disregard known facts and refuse to engage in adequate fact-finding, and in concluding that the Department's exercise of discretion was not arbitrary or based on a mistaken view of the law. The Commonwealth Court further erred in concluding that minor Petitioners' failure to adhere to social distancing and masking was due to choice and not lack of ability. Finally, the Commonwealth Court erred in failing to grant a new trial based on after-acquired evidence that BCRC has resumed detaining new families since the Court's July 7, 2020 Order.

The Commonwealth Court erred in affording the Department unfettered discretion to disregard known facts and refuse to engage in adequate fact-finding, when 55 Pa. Code § 20.37 requires the Department to perform the mandatory duty of issuing an emergency removal order (“ERO”) upon a given state of facts. At trial, Petitioners showed that they face an immediate and serious danger to their life or health. Petitioners’ expert witness, Dr. Alan Shapiro, testified that COVID-19 is highly contagious and can be fatal to children. He further testified that BCRC’s COVID-19 protection measures have been grossly inadequate. Dr. Shapiro and other witnesses testified that BCRC medical infrastructure is deficient, which would likely result in serious injury or death to children who fell ill with COVID-19. Because that evidence is determinative in whether the Department has a mandatory duty to issue an ERO, it was material and its exclusion was error.

The Commonwealth Court erred in concluding that the Department’s exercise of discretion was not arbitrary or based on a mistaken view of the law, when Petitioners have shown that their life or health is in immediate and serious danger due to the COVID-19 pandemic and that existing safety protocols at BCRC are insufficient to protect them from contracting COVID-19. The Department’s oversight of BCRC has been deficient, both before and during the pandemic. A history of unexamined complaints of medical neglect shows that the Department has not exercised necessary oversight of BCRC, even before the pandemic. No

protocol for issuing an ERO exists apart from a vague “egregiousness” standard. The Department has refused to even contemplate the possibility of an ERO during the pandemic. The Department does not monitor the children's health after their arrival at BCRC, and does not monitor the parents’ health at all. The Department’s exercise of discretion was therefore arbitrary or based on a mistaken view of the law.

Finally, the Commonwealth Court erred in failing to grant a new trial based on after-acquired evidence that BCRC has resumed detaining new families since the Court’s July 7, 2020 Order, a fact which impacts Petitioners’ ability to practice social distancing and which is highly relevant to the Court’s analysis of whether Petitioners have a legal right to an ERO.

VII. ARGUMENT

A. The Commonwealth Court erred in refusing to consider the testimony of Petitioners’ witnesses, and then in failing to grant a new trial based on that improper exclusion.

1. The Commonwealth Court erred in refusing to consider the testimony of expert witness Dr. Alan Shapiro, when he was qualified as an expert according to Pa.R.E. 702.

The Commonwealth Court’s failure to consider Dr. Shapiro’s expert testimony constitutes reversible error. To reverse an evidentiary ruling, including the exclusion of expert testimony, there must be an abuse of discretion or error of

law. *Freed v. Geisinger Medical Center*, 910 A.2d 68, 72 (Pa. Super. 2006).

Additionally, the ruling must be prejudicial to the complaining party. *Id.*

A party suffers prejudice when the trial court's error could have affected the verdict. *Wright v. Residence Inn by Marriott, Inc.*, 207 A.3d 970, 974 (Pa. Super. 2019) (finding plaintiff had suffered prejudice by trial court's exclusion of plaintiff's only medical expert).

The fundamental consideration in determining the admission of evidence is whether the evidence is relevant to the fact to be proved. Pa.R.E. 402. Evidence is considered relevant if it logically tends to establish a material fact in the case, tends to make the fact at issue more or less probable, or supports a reasonable inference or presumption regarding the existence of a material fact. Pa.R.E. 401. All relevant evidence is admissible, except as otherwise provided by law. Evidence that is not relevant is not admissible. Relevant evidence, however, may be excluded if its probative value is outweighed by the danger of unfair prejudice. Pa.R.E. 403. Consequently, if the testimony of the witness is relevant to the elements to be proven, then the testimonial evidence must be permitted, unless otherwise excluded.

In Pennsylvania, the standard for qualifying an expert witness is a liberal one. *Miller v. Brass Rail Tavern, Inc.*, 664 A.2d 525, 528 (Pa. 1995). The test for qualifying a witness as an expert is whether the witness has "any reasonable

pretension” to specialized knowledge on the subject under investigation. *Id.* If they do, they may testify and the weight the testimony is to be given is at the discretion of the trier of fact. *Id.*

Here, Dr. Shapiro’s testimony was relevant to the key issue in the case: whether there exists at BCRC an imminent risk to Petitioners’ life or health from COVID-19. Indeed, in its July 7, 2020 Opinion, the Commonwealth Court does not reason that Dr. Shapiro’s testimony was irrelevant. App. A at 6, fn. 4.

Instead, the Commonwealth Court stated that although Petitioners summarized Dr. Shapiro’s potential testimony, Petitioners “failed to specify in what areas they intended to qualify Dr. Shapiro as an expert” and that, 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” *Id.*

The Commonwealth Court’s conclusion that it cannot consider Dr. Shapiro’s testimony constitutes an abuse of discretion and an error of law. As the Court noted, Petitioners indicated they would call Dr. Shapiro as an expert witness, and summarized Dr. Shapiro’s potential testimony, indicating in what areas he would be offering expert testimony.⁸ Petitioners also provided Dr. Shapiro’s detailed, signed expert statement. (R. 300a).

⁸ R. 293a-294a (“The Petitioners expect to call the following witnesses at hearing: 1. Dr. Alan Shapiro. As an expert witness, Dr. Shapiro will testify that COVID-19 is highly contagious and widespread in the community. He will further testify that COVID-19 can be transmitted during its incubation period and shed in asymptomatic persons. He will also testify about new scientific

Petitioners included in their Pretrial Statement a declaration of Dr. Shapiro that outlined his education and experiences. (R. 301a-328a). Dr. Shapiro's declaration described his experience caring for individuals who have contracted COVID-19 and his experience visiting detained immigrant families and children. *Id.* In his declaration, Dr. Shapiro stated he had visited the BCRC and that he had authored the American Academy of Pediatrics' policy statement on the detention of immigrant children. *Id.* During trial, Petitioners questioned Dr. Shapiro extensively on his qualifications and offered his CV into evidence. (R. 466a-76a, 1229a-33a).

Moreover, no Pennsylvania rule of evidence requires formal tender of an expert witness, nor is there a requirement that the parties stipulate to an expert's qualifications.⁹ Pennsylvania Rule of Evidence 702 reads:

Testimony by expert witnesses. If scientific, technical or other specialized knowledge beyond that possessed by a layperson will assist the trier of fact

evidence pointing to risk to children, especially the very young. Dr. Shapiro will testify to Petitioners' inability to social distance, self-quarantine/isolate, and other impossibilities for properly dealing with COVID-19 at the BCRC. He will testify as to the inconsistent and inadequate healthcare in family detention centers including BCRC and the severely detrimental effects that he has observed detention to have on children and their parents. He will testify that the steps taken in response to COVID-19 at the BCRC thus far are wholly inadequate to protect the health of the Petitioners during this pandemic."); R. 397a-398a ("Our expert will testify that COVID-19 is a highly contagious and potentially life-threatening disease. He will testify to that in detail. And he will refer to the latest research and information that is showing that even previously healthy children are now falling ill from COVID associated syndrome. You know, it had previously been thought to be more of a disease affecting older people, but that is changing as the fuller specific picture emerges.").

⁹ For a survey of state and federal practice on this issue, see Cynthia Ford, *Tender is the Night: Should your expert be?*, 38 Mont. Law. 21 (2013), available at http://scholarship.law.umt.edu/faculty_barjournals/63.

to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise. Pa.R.E. 702.

Nothing in Pa.R.E. 702 deals with the process of entering the expert's testimony into evidence. There is no rule-based requirement to offer the witness prior to asking for his opinion. Also, notably, the Department did not object to Dr. Shapiro's qualifications or seek to exclude his testimony. They did not even cross-examine him.

Thus, because the qualification in Pennsylvania is a liberal one and Dr. Shapiro's education and experience treating immigrant children and families in detention centers was extensively described in Petitioners' Pretrial Statement as well as in testimony, Dr. Shapiro was qualified as an expert witness pursuant to Rule 702.

Dr. Shapiro was the only medical expert called as a witness -- by either party. Because Dr. Shapiro's testimony was excluded, Petitioners had no expert testimony regarding the risks of COVID-19 infection in detention, the inconsistent and inadequate medical healthcare in family detention centers, or the effectiveness of BCRC's purported mitigation measures. Dr. Shapiro testified that the threat to Petitioners from COVID-19 is immediate. He noted that children have unique medical needs requiring specialized treatment, especially since they get sick very quickly (R. 487), and testified that COVID-19 is an extremely contagious disease

that has rapidly spread to more than five million people worldwide. (R. 493a). He noted that one in 109 people in Berks County were infected with the virus, and that it would be impossible to keep BCRC staff from bringing it into the facility.¹⁰

In sum, Dr. Shapiro's testimony was crucial to Petitioners' argument in support of their right to an ERO. Because the Court excluded Dr. Shapiro's testimony, Petitioners were unable to prove they had a clear legal right and the Department had a mandatory duty to issue an ERO. Therefore, Petitioners were prejudiced by the court's exclusion of Dr. Shapiro's testimony, and the Commonwealth Court's failure to consider his expert testimony constitutes reversible error.

2. The Commonwealth Court erred in excluding testimony from Attorneys Bridget Cambria and Carol Anne Donohoe as hearsay, when their testimony fell under the hearsay exception in Pa.R.E. 803(4).

The Commonwealth Court's exclusion of testimony from Attorneys Bridget Cambria and Carol Anne Donohoe as hearsay constitute reversible error as they fall within the hearsay exception in Pa.R.E. 803(4). Hearsay statements that fall within the Pa.R.E. 803(4) exception are not limited to those made to medical

¹⁰ (R. 384a-90a). Dr. Shapiro also cited a recent CDC study on incarcerated populations and staff between April 22 and April 28, 2020. In that time, more than 5,000 incarcerated people became infected with COVID-19, and more than 2,700 staff members became infected. Of those, there were 88 deaths amongst the incarcerated and 15 deaths among the staff. (R. 503a-04a). That was over a six-day period, showing how quickly COVID can ravage a detained population, and going to the immediacy of the threat at BCRC.

personnel. *See Com. v. Belknap*, 105 A.3d 7, 12 (Pa. Super. 2014). The determinative issues for whether a hearsay statement falls within the Pa.R.E. 803(4) exception are whether: (1) the statement must be made for the purpose of receiving medical treatment; and (2) the statement must be necessary and proper for diagnosis and treatment. *Id.* at 11 citing *Com. v. Smith*, 959 A.2d 928, 976 (Pa. 2004).

The Court excluded “testimony of Attorneys Cambria and Donohoe regarding statements Petitioners made to them about their health and obtaining medical treatment while at BCRC,” finding that Petitioners failed to establish that the statements they made to Attorneys Cambria and Donohoe were for the purpose of seeking medical treatment. App. A at 25.

This exclusion constitutes error because the statements made by Petitioners and other detained families to Attorneys Cambria and Donohoe regarding their health fall under the hearsay exception under Pa.R.E. 803(4). *See Belknap*, 105 A.3d at 12 (“the medical treatment exception to the hearsay rule set forth in Rule 803(4) is not expressly limited to statements made to licensed medical professionals such as physicians or nurses.”)

As Petitioners stated during the hearing, the statements they made to Attorneys Cambria and Donohoe regarding their health were made because they felt that they were not receiving the medical treatment they needed at BCRC, and

their lawyer was the only person they thought could obtain such treatment for them. In *Belknap*, the hearsay statements were made to a police officer who declarants believed could get their friend the medical attention he needed. *Id.* at 10; (R. 554a-58a, 618a-21a). Here, the statements were made by detained people to their immigration attorneys, for the purposes of receiving urgently needed medical treatment. The statements were necessary for diagnosis and treatment due to BCRC's consistent refusal to pay attention to the clients' requests for treatment of various medical conditions.

Petitioners were prejudiced by the exclusion of the testimony of Attorneys Cambria and Donohoe. Donohoe testified that over four years of representing hundreds of detained families, BCRC's standard response to requests for medical assistance by detained parents, including serious issues, was to take Tylenol and drink water. She did not observe any change or improvement in medical treatment of detained families during those four years. (R. 613a-14a). Attorney Cambria testified, *inter alia*, that BCRC failed to provide adequate supplies for the care of a three-month old infant until she herself complained to the Department. (R. 566a-67a). The trial court's exclusion of this testimony constitutes a clear error of law and misreading of Pa.R.E. 803(4) and Pennsylvania case law. Furthermore, this error prejudiced Petitioners by keeping them from introducing evidence of the Department's failure to act on medical complaints at BCRC -- a pattern of

inadequate oversight that has continued during this pandemic, which is relevant to Petitioners' right to an ERO.

3. The Commonwealth Court erred in failing to grant a new trial based on the improper exclusion of the above material evidence.

“In general, questions concerning the admission and exclusion of evidence are within the sound discretion of the trial court and will not be reversed on appeal absent a finding of abuse of discretion.” *Carpenter v. Pleasant*, 759A.2d 411, 414 (Pa.Cmwlt. 2000), *appeal denied*, 782 A.2d 549 (Pa. 2001). “*The improper exclusion of relevant material evidence is, however, grounds for a new trial.*” *Id.* (emphasis added); *see also Kuisis v. Baldwin-Lima-Hamilton Corp.*, 319 A.2d 914, 924-925 (Pa. 1974) (remanding for new trial when lower court had erroneously excluded expert testimony on grounds he was not qualified).

Here, Petitioners moved for a new trial based on the improper exclusion of relevant material evidence, which the Court denied in its July 22, 2020 Order. R. 1202a-1223a; App. B.

As noted above, excluded testimony from Attorneys Cambria and Donohoe constituted material evidence that is relevant to the issue of BCRC's ability to provide medical care during a pandemic.

Moreover, the Court erred in entirely failing to consider Dr. Shapiro's expert opinions despite his qualification as an expert witness. Dr. Shapiro's medical

opinions should have been considered and given appropriate weight as opinions of a medical expert. As a pediatrician with experience treating COVID-19 and recently arrived children, Dr. Shapiro's testimony went to the heart of the principal factual question: Are BCRC's protective measures adequate to prevent Petitioners from exposure to COVID-19? By failing to consider Dr. Shapiro's testimony, the Court excluded perhaps the most relevant and material evidence in the proceeding. *Kuisis*, 319 A.2d at 924-925. This was an error warranting a new trial, and the Court's failure to grant one constituted further error.

B. The Commonwealth Court erred in affording the Department unfettered discretion to disregard known facts and refuse to engage in adequate fact-finding, and in concluding that the Department's exercise of discretion was not arbitrary or based on a mistaken view of the law.

1. The Commonwealth Court erred in affording the Department unfettered discretion to disregard known facts and refuse to engage in adequate fact-finding, when 55 Pa. Code § 20.37 requires the Department to perform the mandatory duty of issuing an emergency removal order upon a given state of facts.

The Commonwealth Court erred in affording the Department unfettered discretion to disregard known facts and refuse to engage in adequate fact-finding, when 55 Pa. Code § 20.37 requires the Department to perform the mandatory duty of issuing an emergency removal order ("ERO") upon a given state of facts. At trial, Petitioners showed that they face an immediate and serious danger to their life or health. Petitioners' expert witness, Dr. Alan Shapiro, testified that COVID-

19 is highly contagious and can be fatal to children. He further testified that BCRC's COVID-19 protection measures have been grossly inadequate. Dr. Shapiro and other witnesses testified that BCRC medical protocols and resources are deficient, which would likely result in serious injury or death to children who fell ill with COVID-19. Because that evidence is determinative in whether the Department has a mandatory duty to issue an ERO, it was material and its exclusion was error.

The Court erred in finding without qualification that “whether the conditions at BCRC meet the threshold for issuance of an ERO is a subjective determination within the Department’s discretion and expertise.” App. A at 27. The Court wrongly endorsed the Department’s assertion that its discretion over fact-finding is absolute, giving it sole authority to determine the truth or falsity of objective facts with no possibility of review by the courts.

The obligatory act for which a writ of mandamus is requested is a mandatory duty of the Department. Again, the conditional formulation of 55 Pa. Code § 20.37 is as follows: “[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, the Department *will* take immediate action to remove the clients from the facility.” 55 Pa. Code § 20.37 (emphasis added). In other words, if

the predicate evidence meets the threshold of being “likely to constitute an immediate and serious danger to the life or health” of Petitioners, then the Department is obligated to take action. If objective facts support a clear factual finding that the predicate condition is met, the obligation to issue the ERO is mandatory. The Department’s discretion does not extend to creating its own version of the facts to suit a predetermined decision.

The Department must be afforded some level of discretion to engage in fact-finding consistent with its obligations under state law. But that discretion does not extend to denying the truth of proven objective facts. The Department cannot turn a blind eye to evidence and information of which it has clear knowledge. The Department does not have the discretion to refuse to engage in fact-finding adequate to reach a decision whether the obligation to issue an ERO has been triggered.

In Pennsylvania, “[a] mandatory duty is ‘one which a public officer is required to perform upon a given state of facts and in a prescribed manner in obedience to the mandate of legal authority.’” *See Sanders v. Wetzel*, 223 A.3d 735, 739 (Pa. Cmwlth. 2019), *citing Filippi v. Kwitowski*, 880 A.2d 711, 713 (Pa. Cmwlth. 2005). Here, the Department is required to perform the mandatory duty of issuing an ERO “upon a given state of facts,” a condition which is satisfied here by

record evidence of conditions likely to constitute an immediate and serious danger to life or health of Petitioners.

2. The Commonwealth Court erred in concluding that the Department's exercise of discretion was not arbitrary or based on a mistaken view of the law, when Petitioners have shown that their life or health is in immediate and serious danger due to the COVID-19 pandemic and that existing safety protocols at BCRC are insufficient to protect them from contracting COVID-19.

The Commonwealth Court erred in concluding that the Department's exercise of discretion was not arbitrary or based on a mistaken view of the law, when Petitioners have shown that their life or health is in immediate and serious danger due to the COVID-19 pandemic and that existing safety protocols at BCRC are insufficient to protect them from contracting COVID-19. The Department's oversight of BCRC has been deficient, both before and during the pandemic. A history of unexamined complaints of medical neglect shows that the Department has not exercised necessary oversight of BCRC, even before the pandemic. No protocol for issuing an ERO exists apart from a vague "egregiousness" standard. The Department has refused to even contemplate the possibility of an ERO during the pandemic. The Department does not monitor the children's health after their arrival at BCRC, and does not monitor the parents' health at all. The Department's exercise of discretion was therefore arbitrary or based on a mistaken view of the law.

Assuming, *arguendo*, that application of the ERO standard falls within the Department's discretion, the Department's failure to issue an ERO during the pandemic was nevertheless arbitrary or based on a mistaken view of the law. The Court's conclusion that the Department's exercise of discretion was not arbitrary or based on a mistaken interpretation of the law was erroneous.

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*, 631 Pa. 229, 110 A.3d 155, 175 (2015); *Camiel v. Thornburgh*, 489 A.2d 1360, 1362 n.2 (Pa. 1985). One seminal text described the writ of mandamus as follows:

Where an official duty is to be performed by an officer upon the happening of a particular event, he can not arbitrarily or capriciously refuse to perform the duty after the happening of such event upon the ground that he is not satisfied that it has yet happened. And in such case he may be compelled to act by mandamus.¹¹

In *Stockton*, trustees said they could not deliver bonds until they had received a statement from a government body, the Common Council, that "the road has been constructed and the track laid in a manner and of a character acceptable to them, and that the same is properly stocked." The Council refused to make such a statement, arguing they had to exercise their judgment in deciding whether the road

¹¹ *Stockton R. Co. v. Stockton*, 51 Cal. 328, as cited in James Lambert High, *A Treatise on Extraordinary Legal Remedies* (Callaghan, 1884) at 43.

had been properly constructed and stocked; therefore, they argued, they could not be compelled by mandamus to perform an act on which they are entitled to exercise their judgment and discretion. The California Supreme Court dismissed their argument, writing, “On this theory the Common Council might forever defeat the delivery of the bonds, by declining to be satisfied, even though it appeared by the most convincing proofs that the road in every minute particular had been constructed and stocked in the manner and within the time prescribed by the statute.” *Stockton & Visalla Railroad Co. v. City of Stockton*, 51 Cal. 328, 338-39 (1876).

Similarly, here, the Department refused to issue an ERO, claiming it has to exercise its judgment in deciding whether an immediate threat to life or health exists for Petitioners. In this way, the Department might forever defeat the issuance of an ERO by declining to be satisfied by any amount of compelling evidence, even though Petitioners have provided convincing proof that their life or health is in immediate and serious danger due to the COVID-19 pandemic. The Court’s ratification of the Department’s position constituted error.

The Department decided that BCRC’s failure to protect Petitioners from COVID-19 does *not* constitute evidence of gross incompetence, negligence, or misconduct in operating the facility constituting an immediate and serious danger to Petitioners’ life or health. This is also based on a mistaken interpretation of the

law. COVID-19, which can result in potentially fatal multisystem inflammatory syndrome, manifestly constitutes a serious danger to the life or health of Petitioners. Existing safety protocols at BCRC have been shown to be insufficient to protect Petitioners from contracting COVID-19. Failure to implement adequate safety protocols constitutes gross incompetence, negligence, or misconduct in operating the facility. The Department has necessarily misapplied or misinterpreted the plain language of the regulation in finding that issuance of an ERO was not required under the circumstances. The Court’s finding otherwise constituted error.

C. The Commonwealth Court erred in concluding that minor Petitioners’ failure to adhere to social distancing and masking was due to choice and not lack of ability, when that finding is contravened by the record, including testimony from the Department’s witness.

The Commonwealth Court found that “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.” App. A at 28. The Commonwealth Court erred in finding that small children, including children one year of age, “do not practice social distancing measures or wear their masks . . . inherently by choice and not due to lack of ability.” *Id.* Evidence and testimony in the record, including testimony from the Department’s witness Erin Roman, contravenes the finding that very young children choose not to practice social distancing or wear a mask. (R. 500a, 511a, 776a).

D. The Commonwealth Court erred in failing to grant a new trial based on after-acquired evidence that BCRC has resumed detaining new families since the Court's July 7, 2020 Order, a fact which impacts Petitioners' ability to practice social distancing and which is highly relevant to the Court's analysis of whether Petitioners have a legal right to an ERO.

The Commonwealth Court erred in failing to grant a new trial based on after-acquired evidence that BCRC had resumed admitting new families after the trial. R. 1219a; App. A. The requirements that must be met for the grant of a new trial based on after-acquired evidence are as follows: 1) the evidence must have been discovered after the trial, 2) it must be such that it could not have been obtained at the trial by exercising due diligence, 3) it is relevant and noncumulative, 4) it is not merely for the purposes of impeachment, and 5) it must be likely to compel a different result. *Com., ex rel. Myers v. Stern*, 501 A.2d 1380 (Pa. 1985); *Gamma Swim Club, Inc. v. PennDOT*, 505 A.2d 342 (Pa. Cmwlth. 1986).

Here, the Commonwealth Court stated in its July 7, 2020 Opinion:

The uncontroverted evidence ... 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 ... 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.

Appendix A at 27-28.

As Petitioners noted in their Motion for Post-Trial Relief, this is no longer true. The same day the Decision was issued, ICE began bringing new families into BCRC. Petitioners stated in their Motion that upon information and belief, there were currently eight families in the facility, double the number at the time of trial.¹² It is impossible to say how many more will be added as admissions to BCRC are apparently no longer suspended. This significantly impacts Petitioners' ability to social distance within the confines of BCRC, particularly in common areas and at mealtimes.

This evidence meets the criteria for a new trial because it was discovered after the trial; it could not have been obtained at the trial by exercising due diligence, because it did not yet exist; it is relevant and noncumulative; it is not merely for the purposes of impeachment, and the fact that the population of BCRC has nearly doubled since the trial would likely compel a different result. There were 13 people detained at BCRC at the time of the Commonwealth Court's decision. App. A at 28. As of July 27, according to ICE, there were 21 detainees being held at BCRC. (R. 1226a). Importantly, this demonstrates that ICE and BCRC have no longer stopped detaining additional new families.

¹² Petitioners noted that the new families had been placed in quarantine, so their counsel had been unable to contact them directly and must rely on Petitioners' reports for information.

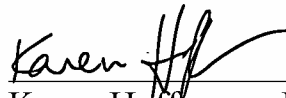
The fact that there is now no brake on the population held at BCRC greatly diminishes Petitioners' ability to social distance, a key factor in the Court's analysis of whether Petitioners have a legal right to an Emergency Removal Order. For that fact alone, the Commonwealth Court should have granted a new trial based on after-acquired evidence, and its failure to do so constituted error.

VIII. CONCLUSION

For the reasons stated above, Petitioners respectfully request that this Honorable Court reverse the decision of the Commonwealth Court.

Dated: September 28, 2020

Respectfully submitted,



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IX. CERTIFICATE OF COMPLIANCE

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

Furthermore, I certify that the Brief of Appellants complies with the length requirements of Pa.R.A.P. 2135. Excluding the parts of the Brief that are exempted by Pa.R.A.P. 2135(b), there are 10,069 words in the Brief, as counted through the use of Microsoft Word.

Date: September 28, 2020

/s/Karen Hoffmann
Karen Hoffmann, Esq.

APPENDIX A

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. :

Pennsylvania Department of :
Human Services, :
Respondent :

No. 268 M.D. 2020
Heard: May 26, 2020

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

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:

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	<i>O.M.G., et al. v. Wolf</i> , 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	<i>Flores, et al. v. Barr</i> , 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 Jacquelyn 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.” *Kezerise 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 will 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

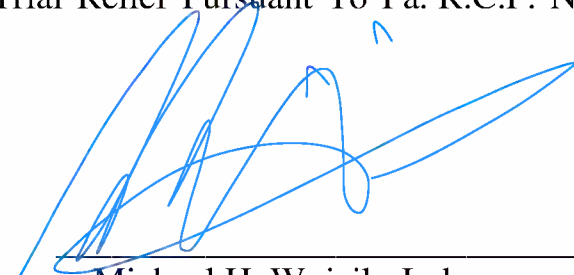
APPENDIX B

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

ORDER

AND NOW, this 22nd day of July, 2020, upon consideration, Petitioners' Motions For Post-Trial Relief Pursuant To Pa. R.C.P. No. 227.1, are hereby **DENIED**.



Michael H. Wojcik, Judge