

**COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF HUMAN SERVICES**

IN RE: BERKS COUNTY RESIDENTIAL)	
CENTER,)	
Petitioner,)	
v.)	
)	License No. 224580
COMMONWEALTH OF PENNSYLVANIA,)	
DEPARTMENT OF HUMAN SERVICES,)	
THEODORE DALLAS,)	
Respondent.)	

**PETITION TO INTERVENE ON BEHALF OF INDIVIDUALS DETAINED AT
BERKS COUNTY RESIDENTIAL CENTER
IN THE APPEAL OF THE DENIAL OF THE LICENSE**

Petitioner-Intervenors seek to intervene in this appeal pursuant to 1 Pa. Code § 35.28. They are detained families currently or recently incarcerated in the Berks County Residential Center, a detention center that continues to operate despite the state’s revocation and nonrenewal of its license. As parents and children currently or recently confined in the facility, Petitioner-Intervenors are not only directly affected by the outcome of this appeal but also seek to participate in this appeal in the interest of the public. While Petitioner-Intervenors agree with Pennsylvania Department of Human Services’ decision to not renew Petitioner’s license, they also argue that Petitioner’s operation of this facility violates additional child welfare regulations. For the reasons set forth below, Petitioner-Intervenors seek to intervene to obtain speedy resolution of this appeal, where the detention center’s continued operation is endangering the safety and well-being of families and children.

I. Facts & Procedural History

1. Petitioner-Intervenors are parents and children currently or recently incarcerated at the Berks County Residential Center (BCRC) in Leesport, Pennsylvania.

2. Petitioner-Intervenors in this case include:

- a. [REDACTED]. Ms. [REDACTED] was born on [REDACTED] and is a citizen of El Salvador. She was detained on Dec. 14, 2015 and held in the South County Residential Center in Dilley, Texas until she was transferred to the Berks County Residential Center on or about Jan. 8, 2016. To date, she continues to be detained in the Berks County Residential Center.
- b. [REDACTED], daughter of [REDACTED] [REDACTED]. [REDACTED] is ten-years-old. She was born on [REDACTED] and is a citizen of El Salvador. She was detained with her mother on Dec. 14, 2015 and held in the South County Residential Center in Dilley, Texas until she was transferred to the Berks County Residential Center on or about Jan. 8, 2016. She continues to be detained in the Berks County Residential Center.
- c. [REDACTED]. Ms. [REDACTED] was born on [REDACTED] and is a citizen of Honduras. She and her thirteen-year-old son were detained in the Berks County Residential Center from early April 2014 until May 15, 2015. Ms. [REDACTED]'s immigration case is currently pending. She remains at risk of being detained again in the future under the federal government's current detention policies.

3. Petitioner-Intervenors are currently or were recently in the custody of the federal Immigration and Customs Enforcement agency (ICE) and are asserting asylum defenses to deportation that are recognized under federal immigration law.

4. Petitioner and ICE have entered into a contract which provides that Petitioner will be responsible for the day to day operation of the detention center, BCRC, and that Petitioner must operate the facility in compliance with applicable laws. See, Intergovernmental Service Agreement for Housing Federal Detainees, United States Department of Homeland Security Bureau of Immigration & Customs Enforcement at Art. II, Sec. C (2003) attached hereto as Exhibit “A”.

5. BCRC detains children and adults together.

6. Detained families are not free to leave the detention center.

7. Detained families are prevented from leaving by a system of deadbolts or deadlocks. See, ICE Residential Standard Key and Lock Control at 4, attached hereto as Exhibit “B”.

8. Detained individuals who attempt to leave may be punished. Attempting to leave is considered a “major offense,” the most serious category of offenses, where it is listed alongside “arson,” “rape,” and “assault.” For committing this “major offense,” children over twelve years of age may “have their free movement privilege suspended for up to 14 days” and adults may be “restrict[ed] to housing area” for three full days. See, Berks Family Residential Center Resident Handbook at 28, attached hereto as Exhibit “C”; ICE Residential Standard on Use of Physical Force and Restraints at 1, attached hereto as Exhibit “D”.

9. Detained families are under 24-hour visual surveillance by guards. Throughout the night, the guards conduct flashlight checks that awake the parents and children. See Exh. C at 10; see also 55 Pa. Code § 3800.274(7).

10. Detained individuals have neither been charged with nor adjudicated of any violation of Pennsylvania law.

11. Nor has a Pennsylvania judge ordered the incarceration of the detained families.

12. Prior to February 22, 2016, the Pennsylvania Department of Human Services (PA DHS) licensed BCRC as a “Child Residential and Day Treatment Facilit[y]” to provide “community-based, dependent, and delinquent” “[r]esidential services.” See Exh. A attached to Pet’rs Pet. to Appeal the Dep’t of Human Servs. Non-renewal and Revocation of the Berks Cnty. Residential Facility’s 2016-2017 License and Denial of the Request to Increase Capacity (hereinafter “Pet’rs Pet. to Appeal”).

13. On March 9, 2015, Petitioner requested by email that PA DHS approve an increase in the licensed capacity of BCRC from 96 residents to 192 residents. See Pet’rs Pet. to Appeal at ¶ 13.

14. On October 22, 2015, PA DHS notified Petitioner that it would postpone acting on the request because Petitioner was not operating the detention center in accordance with its license since it was detaining children with adults and was only licensed by PA DHS to operate as a child residential facility. It provided Petitioner with the opportunity to come into compliance with the submission of its application for a renewed license. See Exh. C attached to Pet’rs Pet. to Appeal.

15. In a press release, PA DHS also recognized that BCRC is “secure facility for refugee children and their families.” See Press Release, Pa. Dep’t of Human Serv., Dep’t of Human Serv. Sec’y Issues Statement on Berks County Residential Center (Oct. 22, 2015).

16. Construing this as a denial of its request for increased capacity, Petitioner submitted an appeal to the Bureau of Hearings and Appeals (“BHA”).

17. On November 9, 2015, PA DHS mistakenly issued Petitioner a license to operate from 2016 through February 2017. See Exh. E attached to Pet’rs Pet. to Appeal.

18. On November 10, 2015, PA DHS informed Petitioner that its October 22, 2015 letter did not constitute a denial of the request for expansion. Rather, PA DHS stated that it was providing Petitioner with a period of time to come into compliance with its license. See Exh. F attached to Pet’rs Pet. to Appeal.

19. On November 17, 2015, PA DHS notified Petitioner that the November 9th license was issued in error and formally rescinded the license. It also notified Petitioner that its license renewal would turn on Petitioner’s decision to return to the only function for which it was licensed: operation as a child residential facility, *not* a detention center for adults. See Exh. G attached to Pet’rs Pet. to Appeal.

20. On November 23, 2015, Petitioner notified PA DHS that it would continue operating as a family detention center. See Exh. H attached to Pet’rs Pet. to Appeal.

21. On January 27, 2016, PA DHS notified Petitioner that it would not renew BCRC’s operating license when it expired on February 21, 2016 because BCRC operates in violation of

the terms of the license, which do not permit detaining children with adults. See Exh. H attached to Pet'rs Pet. to Appeal.

22. On February 8, 2016, Petitioner filed an appeal based on the nonrenewal of the license.

23. On February 21, 2016, Petitioner's current operating license expired.

24. Petitioner is now operating without any license.

II. Grounds of Proposed Intervention

25. There are two grounds upon which Petitioner-Intervenors seek to intervene: 1) they have "an interest which may be directly affected and which is not adequately represented by existing parties, and as to which Petitioner-Intervenors may be bound by the action of the agency in the proceeding" and 2) they have an "interest of such nature that participation of the petitioner may be in the public interest." See 1 Pa. Code § 35.29.

26. First, one would be hard pressed to imagine an interest that is more "directly affected" by a detention center's licensing nonrenewal than that of a parent and child physically confined to that facility.

27. The regulations governing eligibility to intervene provide several examples of "directly affected" interests: "consumers, customers or other patrons served by the applicant or respondent; holders of securities of the applicant or respondent; employe[e]s of the applicant or respondent; competitors of the applicant or respondent." See 1 Pa. Code § 35.28.

28. Surely, if an employee or mere "customer" of a facility has a "directly affected" interest, so would a detained individual involuntarily confined to a detention center.

29. Petitioner-Intervenors are not directly represented by either of the existing parties, and justice requires that they be heard at the BHA's hearing concerning the license of a detention center they are not free to leave.

30. While Petitioner-Intervenors agree with PA DHS's decision to not renew Petitioner's license, Petitioner-Intervenors' position differs from that of PA DHS. Although PA DHS is responsible for administering the licensing requirements of Pennsylvania law, PA DHS does not directly represent the interest of residents inside licensed facilities.

31. Petitioner-Intervenors also intend to assert that there are additional grounds upon which PA DHS could have properly decided to not renew or revoke Petitioner's license.

32. The interests of detained families are significantly more impacted by the resolution of the licensing issue than the administrative interests of PA DHS because the minimum standards imposed by the license and other state laws shape the daily, physical conditions under which residents live.

33. As Petitioner may not operate without a license, the outcome of this proceeding literally binds Petitioner-Intervenors: if Petitioner prevails, their physical confinement will continue.

34. Second, participation of Petitioner-Intervenors is in the public interest. The regulations governing child residential facilities, under which BCRC was formerly licensed, state that their very purpose "is to protect the health, safety and well-being of children receiving care in a child residential facility . . ." 55 Pa. Code § 3800.1.

35. The essential requirement in the regulations that facilities obtain a license also comports with the public purpose of protecting children by ensuring that minimum standards of care are met. See 55 Pa. Code § 3800.11.

36. Petitioner-Intervenors, including children inside a residential facility, present the specific interest the state’s regulatory scheme explicitly seeks to serve. See 55 Pa. Code § 3800.1 (“The purpose of this chapter is to protect . . . through the formulation, application and enforcement of minimum licensing requirements.”).

37. The state has thus recognized that there is a public benefit in requiring safe and healthful residential centers for children that meet minimum standards. Petitioner-Intervenors’ participation in this proceeding is necessary to effectuate that public interest scheme.

III. Position of Petitioner-Intervenors

38. Petitioner concedes that the BCRC has been licensed by PA Department of Human Services (“PA DHS”) under 55 Pa. Code § 3800 from 2001 to present.

39. The Pennsylvania Department of Human Services has asserted a specific, valid basis for the revocation of Petitioner’s license pursuant to 55 Pa. Code. § 20.71.

40. Pursuant to 55 Pa. Code § 20.71(a)(2), PA DHS may “deny, refuse to renew or revoke a certificate of compliance for . . . [n]oncompliance with [PA DHS’s] program licensure or approval requirements.”

41. At no time has Petitioner been compliant with PA DHS’s licensure regulations for Child Residential and Day Treatment Facilities, found at 55 Pa. Code § 3800, as it has improperly held children together with adults. The licensure regulations for Child Residential

and Day Treatment Facilities do not permit housing of adults with children. See 55 Pa. Code § 3800 et seq.

42. The PA DHS’s licensure regulations found at 55 Pa. Code § 3800 serve 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 § 3800.1 (emphasis added). These regulations apply to facilities that house children, as defined by the Juvenile Act. See 55 Pa. Code § 3800.2, § 3800.5. These regulations do not address the presence of people outside the Juvenile Act’s definition of “child” in any facility under the Chapter unless they are considered to be staff. 55 Pa. Code § 3800.2. Examples of facilities in which both adults and children are present or are provided care are exempt from the scope of the regulations. See 55 Pa. Code § 3800.3.

43. PA DHS correctly issued a nonrenewal and revocation of Petitioner’s license. Allowing Petitioner to continue operating the BCRC as a “Child Residential and Day Treatment Facility” improperly and unlawfully extends the scope of the licensure regulations to detention centers that govern adults without any direct regulatory authority.

44. Allowing Petitioners to unlawfully hold both children and adults in a detention center licensed and approved solely for the care of children endangers the safety and well-being of Petitioner-Intervenors by not adequately accounting for the practical and legal differences, and potential dangers, caused by having entire families residing in a detention center only licensed for the care of children, and for having children reside with nonrelative adults.

45. While PA DHS has failed to revoke or not renew Petitioner's license for a number of years, the recent decision by PA DHS to issue a nonrenewal and revocation of Petitioner's current certificate of compliance is within the Agency's discretion per 55 Pa. Code § 20.71 given Petitioner's violation of the licensure regulations, 55 Pa. Code § 3800, as well as ongoing and past abuses occurring at the BCRC against Petitioner-Intervenors.

46. PA DHS should not be estopped from revoking Petitioner's license, as the continued operation of the detention center is contrary to law. An improper issuance of a license will not create grounds to estop a revocation, if permitting the licensure would be a "violation of positive law." See Chester Extended Care Center v. DPW, 586 A.2d 379, 383 (Pa. 1991). Permitting Petitioner to continue operating would be in clear violation of law, as the regulations for Child Care and Day Treatment facilities only address the care and supervision of children in facilities granted licenses under the provisions of 55 Pa. Code § 3800. Estopping PA DHS's revocation of Petitioner's certificate of compliance after giving it sufficient time to come into compliance with its licensure regulations would permit Petitioner to violate 55 Pa. Code § 3800.

47. Additionally, even if Petitioner were to meet the requisite elements of estoppel, the license cannot be renewed if doing so would effectively create an amendment to an existing statute. Borkey v. Township of Centre, 847 A.2d 807, 813 (Pa. Commw. Ct. 2004). Even if the license was improperly issued, Pennsylvania Courts have held that it is impermissible to estop an action—even if the government was in error—if estopping the action would "override" the "enforcement of a statute." Finnegan v. Public School Employee's Retirement Board, 560 A.2d 848 (Pa. Commw. Ct. 1989).

48. Effectively, Petitioner is requesting an amendment to 55 Pa. Code § 3800 to permit the licensure of a detention center that does not comply with the existing regulatory framework by housing adult individuals, who fall outside the intended scope of the regulations. In effect, granting estoppel amends the Child Residential and Day Treatment facility licensure regulations to create both a new type of facility and a new “clientele” base.

49. Even if PA DHS has acquiesced in the licensure of the BCRC for fifteen years, the current license nonrenewal and revocation is proper and should be permitted given that Petitioner has and continues to operate the BCRC in violation of state law.

50. PA DHS’s nonrenewal and revocation of Petitioner’s license does not violate Petitioner’s due process rights, as due process simply requires that Petitioner was given notice of the charges against it and an opportunity to be heard. Dunn v. Com., Dept. of Transp., Bureau of Driver Licensing, 819 A.2d 189, 192 (Pa. Cmmw. Ct. 2003).

51. Petitioner was given ample notice of the revocation and a period of time in which to come into compliance with the licensure regulations, of which Petitioner declined to take advantage. Although a license is a property interest, in no way is Petitioner being unjustly deprived of this interest without the requisite process.

52. In addition to Petitioner’s violation of 55 Pa. Code § 3800 by detaining children with adults, there are separate and distinct legal grounds under which the detention center’s license can be revoked, which Petitioner-Intervenors seek to raise.

53. BCRC is a secure detention center. PA DHS issued a Press Release on October 22, 2015 in which it recognized that BCRC is a secure facility. Petitioner also operates BCRC as a

secure detention center where detained families are not free to leave; can be punished for leaving; are kept inside by a series of deadbolts or locks; and are subject to around-the-clock surveillance, including nighttime flashlight checks.

54. Pennsylvania law prohibits the detention of children under the age of nine in a secure facility. 55 Pa. Code § 3800.283(7). Petitioner has violated and continues to violate PA DHS's licensure regulations by unlawfully detaining children under the age of nine in the BCRC.

55. Moreover, Pennsylvania law states that children over the age of nine cannot be detained in a secure facility unless they are alleged or adjudicated delinquent and court-ordered to a secure facility. 55 Pa. Code § 3800.271. Petitioner has violated and continues to violate PA DHS's licensure regulations by unlawfully detaining children over age nine who are neither alleged nor adjudicated delinquent by a Pennsylvania court.

56. Further, PA DHS has the authority to revoke a certificate of compliance for mistreatment or abuse of clients being cared for in the detention center or for gross negligence or misconduct in operating the detention center. 55 Pa Code § 20.71(a)(5)-(6). Petitioner has operated the detention center with gross negligence and misconduct. In particular, detained families lack adequate access to medical and mental health care. The reported incidents include: a five-year-old child left to suffer without treatment for her diarrhea for three weeks after going to the facility's medical center and being given no treatment, a three-year-old child left to suffer with a fungus for four months without any treatment despite visiting a medical facility in BCRC, and young children experiencing hopelessness and depression that, as a result, has disrupted their sleeping and eating patterns. Petitioner has been alerted to these conditions via formal complaints

written by individuals detained in BCRC yet has ignored the conditions. See Human Rights First, Brief, Health Concerns at the Berks Family Detention Center (Feb. 2016) attached hereto as Exhibit “E”.

57. Detained families also have no access to Spanish-speaking mental health personnel in the medical department, despite the fact that the majority of individuals detained in the BCRC are Spanish-speaking. See Human Rights First, Family Detention in Berks Cnty., Pa. at 8 (Aug. 2015) attached hereto as Exhibit “F”.

58. In addition, Petitioner-Intervenors have included responses to the material allegations of fact or law asserted in the proceeding by Petitioner as required under 1 Pa. Code § 35.29. See, Exhibit “G”.

59. For the foregoing reasons, Petitioner-Intervenors argue that PA DHS properly refused to renew Petitioner’s license in accordance with Pennsylvania law.

IV. Relief Requested

Petitioner-Intervenors respectfully request to intervene in this appeal and to participate in any briefing and hearings related to this appeal.

Dated: March 11, 2016

Respectfully submitted,

Jennifer J. Lee
Co-Counsel for Petitioner-Intervenors
Sheller Center for Social Justice
Temple University Beasley School of Law
1719 N. Broad Street of Law
Philadelphia, PA 19122

Caitlin Barry
Co-Counsel for Petitioner-Intervenors
Director, Farmworker Legal Aid Clinic
Villanova University Charles Widger School of Law
299 N. Spring Mill Road
Villanova, PA 19085

Bridget Cambria
Co-Counsel for Petitioner-Intervenors
Cambria & Kline PC
123 N. 3rd Street
Reading, PA 19601

Carol Anne Donohoe
Co-Counsel for Petitioner-Intervenors
539 Court Street
Reading, PA 19601

Certificate of Service

I, Roshonda Scipio, hereby certify that on March 11, 2016, a copy of the foregoing document has been served by United Parcel Service (UPS), postage pre-paid to the following:

Human Services Licensing
Department of Human Services
Room 631, Health and Welfare Building
625 Forster Street
Harrisburg, PA 17120
Respondent

MacMain Law Group
101 Lindenwood Drive, Suite 160
Malvern, PA 19355
Counsel for Petitioner

Roshonda Scipio