

**COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF HUMAN SERVICES
BUREAU OF HEARINGS AND APPEALS**

**IN THE APPEAL OF: Berks County Residential Center
 BHA ID No. 9999
 BHA Docket No. 061-16-0003
 Child Residential and Day Treatment Facility**

**PETITION TO INTERVENE ON BEHALF OF INDIVIDUALS CURRENTLY AND
FORMERLY DETAINED AT
BERKS COUNTY RESIDENTIAL CENTER**

The individuals and organization enumerated in paragraph 2, *infra* (“Petitioner-Intervenors”), seek to intervene in the pending appeal pursuant to 1 Pa. Code § 35.28. They are, or represent, families currently or formerly detained in the Berks County Residential Center (“BCRC,” also “Appellant”), a detention center that continues to operate despite the state’s revocation and nonrenewal of its license. As parents and children currently or formerly confined in the facility and their attorneys, the individual 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 the decision of the Pennsylvania Department of Human Services (“Department”) to not renew Appellant’s license, they also argue that Appellant’s continued operation of this facility violates additional child welfare regulations that the Department did not address and that Petitioner-Intervenors’ interests are not being adequately represented by the Department.

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 formerly detained at BCRC in Leesport, Pennsylvania, and their *pro bono* legal representatives.
2. Petitioner-Intervenors in this case include:
 - a. Child D.G.A. was born on February 14, 2005 and is a citizen of Guatemala. He and his father are currently detained at BCRC and have been since February 24, 2018.
 - b. Child R.D.A.M. was born on August 12, 2000 and is a citizen of Honduras. She and her father are currently detained at BCRC and have been since April 2, 2018.
 - c. Ms. G.C.G. was born on September 9, 1986, and is a citizen of Honduras. She and her then-five-year-old daughter, born on September 1, 2010, were detained in BCRC from October 21, 2015, until January 18, 2017. While detained at BCRC, her daughter had undiagnosed shigellosis and continued to suffer from diarrhea throughout her detention.
 - d. Ms. R.N. was born on May 28, 1984, and is a citizen of Honduras. She and her fifteen-year-old son were detained in BCRC from early April 2014 until May 15, 2015. Ms. R.N.'s immigration case is currently pending review at the U.S. Court of Appeals for the Third Circuit. She remains at risk of being detained again under the federal government's current detention policies.
 - e. Aldea - The People's Justice Center ("Aldea") is a nonprofit 501(c)(3) organization based in Reading, Pennsylvania. Its volunteer attorneys and

advocates have represented more than 700 individuals previously detained at BCRC since 2015, as well as the approximately 35 currently detained families, in their asylum and immigration proceedings *pro bono*.

3. The individual Petitioner-Intervenors are currently or were formerly in the custody of the U.S. Immigration and Customs Enforcement (“ICE”) and are asserting asylum defenses to deportation that are recognized under federal immigration law.
4. Appellant and ICE have entered into a contract which provides that Appellant will be responsible for the day to day operation of the detention center, BCRC, and that Appellant must operate the facility in compliance with applicable laws. *See* Exh. A, Intergovernmental Service Agreement for Housing Federal Detainees, United States Department of Homeland Security Bureau of Immigration & Customs Enforcement at Art. II, Sec. C (2003).
5. BCRC detains children and adults together, including unrelated adults of the opposite sex.
6. Detained families are not free to leave the detention center. Detained families are prevented from leaving by a system of deadbolts or deadlocks. *See*, Exh. B, ICE Residential Standard Key and Lock Control at 4.
7. 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* Exh. C,

Berks Family Residential Center Resident Handbook at 28; Exh. D, ICE Residential Standard on Use of Physical Force and Restraints.

8. 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).
9. Detained individuals have neither been charged with nor adjudicated of any violation of Pennsylvania law.
10. Nor has a Pennsylvania judge ordered the incarceration of the detained families.
11. Prior to February 22, 2016, the Department licensed BCRC as a “Child Residential and Day Treatment Facilit[y]” to provide “community-based, dependent, and delinquent” “[r]esidential services.” *See* Appellant’s Exhibits A-1 to A-15.
12. On March 9, 2015, Appellant requested by email that the Department approve an increase in the licensed capacity of BCRC from 96 residents to 192 residents. *See* Petition to Appeal at ¶ 13.
13. On October 22, 2015, the Department notified Appellant that it would postpone acting on the request because Appellant was not operating the detention center in accordance with its license since it was detaining children with adults and was only licensed by the Department to operate as a child residential facility. The Department provided Appellant with the opportunity to come into compliance with the submission of its application for a renewed license. *See* Appellant’s Exh. A-34.
14. In a press release, the Department also recognized that BCRC is a “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).

15. Construing this as a denial of its request for increased capacity, Appellant submitted an appeal to the Bureau of Hearings and Appeals (“BHA”).
16. On November 9, 2015, the Department mistakenly, due to automatic online issuance, issued Appellant a license to operate from 2016 through February 2017. *See* Appellant’s Exh. A-35.
17. On November 10, 2015, the Department informed Appellant that its October 22, 2015, letter did not constitute a denial of the request for expansion. Rather, the Department stated that it was providing Appellant with a period to come into compliance with its license. *See* Appellant’s Exh. A-36.
18. On November 17, 2015, the Department notified Appellant that the November 9th license was issued in error and formally rescinded the license. It also notified Appellant that its license renewal would turn on Appellant’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* Department’s Exh. C-1, Letter of 11/10/2015.
19. On November 23, 2015, Appellant notified the Department that it would continue operating as a family detention center. *See* Appellant’s Exh. A-38.
20. On January 27, 2016, the Department notified Appellant 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* Appellant’s Exh. A-38.

21. On February 8, 2016, Appellant filed an appeal based on the nonrenewal of the license.
22. On February 21, 2016, Appellant's current operating license expired.
23. Appellant BCRC is now operating without any license.
24. On March 14, 2016, detained families currently or formerly incarcerated at BCRC, including Ms. R.N. ("Prior Petitioner-Intervenors"), filed a Petition to Intervene in the pending appeal ("2016 Petition to Intervene"). *See* Exh. E, 2016 Petition to Intervene.
25. On March 17, 2016, the BHA issued a Rule to Show Cause to the Department and Appellant directing them to respond to the 2016 Petition to Intervene.
26. On March 21, 2016, Appellant objected to Prior Petitioner-Intervenors' request to intervene.
27. On March 28, 2016, the Department filed a response indicating they had no objection to the request to intervene.
28. On April 5, 2016, the BHA denied the 2016 Petition to Intervene, finding that Prior Petitioner-Intervenors' interests were adequately represented by the Department and that the public's interest in ensuring the health, safety, and well-being of children detained at BCRC was best represented by the participation of the Department. *See* Exh. F, BHA Order of 4/5/2016.
29. On or about May 2, 2016, Prior Petitioner-Intervenors filed a Petition for Review of the Collateral Order of the BHA in the Commonwealth Court. Prior Petitioner-Intervenors withdrew that petition prior to its adjudication to facilitate the timely resolution of the pending appeal.

30. On November 7, 2016, an administrative hearing was held at the BHA field office in Reading, Pennsylvania.
31. On January 5, 2017, an amicus brief was filed jointly by counsel for the Villanova and Temple University Schools of Law.
32. Appellant and the Department filed their briefs in the principal matter on January 5, 2017. Both parties filed their reply briefs on January 20, 2017, and the hearing record was closed that day.
33. On January 6, 2017, the County of Berks filed a Complaint in Mandamus in the Commonwealth Court of Pennsylvania seeking to compel the Department to act on the County's application for a Certificate of Compliance for 2017-2018 to operate BCRC, as well as an Application for Preliminary Injunction that would prevent any action from the Department that would impact the then-current 2016-2017 Certificate of Compliance. On February 3, 2017, the parties to that action stipulated, and the court ordered, that the matter be stayed pending resolution of this appeal pending before the BHA. *See* Exh. G, Docket Sheet, *County of Berks v. Dallas*, 8 MD 2017, Pa. Commw. Ct. Pursuant to that stipulation, the Commonwealth Court ordered that BCRC be permitted to continue to operate pursuant to 55 Pa. Code § 3800 et. seq and the 2016-2017 Certificate of Compliance.
34. On April 20, 2017, the BHA sustained Appellant's appeal, holding that the Department was estopped from revoking BCRC's license and that the Department acted arbitrarily and capriciously, responding to outside pressures instead of regulatory violations. The BHA instructed the Department to rescind the notice of nonrenewal dated January 27,

2016. The BHA limited its ruling to rescission of the notice of nonrenewal, refraining from deciding how BCRC is to be licensed.

35. On January 11, 2018, the County of Berks filed a Complaint in Mandamus and Request for Special Relief in the Commonwealth Court of Pennsylvania to compel the Department to act on its pending request to renew the Certificate of Compliance for BCRC. *See* Exh. H, Docket Sheet, *County of Berks v. Miller*, 13 MD 2018, Pa. Commw. Ct. On January 19, 2018, the parties to that action filed a joint Application for Stay of the proceedings. On January 22, 2018, the Commonwealth Court granted the stay, ordering that BCRC be permitted to continue to operate pursuant to 55 Pa. Code §3800 et. seq. The Commonwealth Court noted that the “joint stay is intended to maintain the status quo and permit the BCRC to continue to operate pursuant to the 2016-2017 Certificate of Compliance” Exh. H at 4.
36. In or around May of 2017, the Department filed an application for reconsideration of the BHA’s decision sustaining the appeal. In or around May of 2017, application for reconsideration was granted. Then-Secretary Theodore Dallas designated Cathy Utz, Deputy Secretary of the Department, to rule on the application on behalf of the Department. On January 30, 2018, Deputy Secretary Utz issued an order setting aside the BHA’s decision of April 20, 2017, and remanding the appeal to the BHA (“Remand Order”). Deputy Secretary Utz found that the BHA’s findings of facts were inadequate, that the adjudication did not address the Department’s exhibits or take into consideration the post-hearing briefing, and that the BHA did not rule on the question of whether

BCRC is a type of facility that is required to be licensed by the Commonwealth. Remand Order at 1.

II. Grounds of Proposed Intervention

37. 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 § 35.28.
38. Traditional standing generally requires an “aggrieved” status, or a substantial and direct interest in the proceedings. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269 (1975). The Pennsylvania Supreme Court has stated that “standing will be found more readily where protection of the type of interest asserted is among the policies underlying the legal rule relied upon by the person claiming to be ‘aggrieved.’” *Id.* at 198, 346 A.2d at 284. Standing is conferred on persons who are “arguably within the zone of interests sought to be protected or regulated by the statute or constitutional guarantee in question.” *Id.* at 198, n23, 346 A.2d at 284 n23.
39. Eligibility to intervene under the General Rules of Administrative Practice and Procedure (GRAPP), 1 Pa.Code Part II, however, is a lower standard than traditional standing to intervene, requiring merely a “direct interest” (1 Pa.Code § 35.28(a)(2)) or an “interest of such nature that participation ... may be in the public interest.” 1 Pa.Code § 35.28(a)(3).
40. “The basic tenets of due process apply with equal force in administrative proceedings as they do in judicial proceedings. Moreover, it is fundamental that the key principles

underpinning due process include the requirements of notice and an opportunity to be heard.” *Pa. Bankers Ass’n v. Pa. Dept. of Banking*, 956 A.2d 956 (Pa. 2008) (internal citations omitted).

41. More generally, in *Application of El Rancho Grande*, 496 Pa. at 508, 437 A.2d at 1156, the Supreme Court of Pennsylvania referred to a statement of the United States Supreme Court in *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970), that where statutes are concerned “the trend is toward enlargement of the class of people who may protest administrative action.” In *MEC Pennsylvania Racing, Inc. v. Pennsylvania State Horse Racing Commission*, 827 A.2d 580 (Pa.Cmwlth. 2003), the applicable regulation permitted consideration of the best interests of horse racing generally, and the Horse Racing Commission concluded there that granting the application was in the best interest of racing. The Court stated that MEC had standing akin to that of the “local community” in *Cashdollar v. State Horse Racing Commission*, 143 Pa.Cmwlth. 650, 600 A.2d 646 (1991), which had standing to appeal where the statute required consideration of the public interest. The Court held that *when an agency was directed in its enabling statute to consider the effects of its decision on a particular class of individuals, then they might have standing to challenge a decision on the ground that the agency did not fulfill its statutory duty. Id. as quoted in Sheetz I*, 881 A.2d at 42-43 (footnotes omitted) (emphasis added).

A. Petitioner-Intervenors’ Direct Interest

42. Here, Petitioner-Intervenors have a directly affected interest in the outcome of this appeal under 1 Pa. Code § 35.28(a)(2). 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.

43. 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.
44. 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 and their legal representative.
45. All the adults and children detained at BCRC will be affected by the BHA’s decision about whether BCRC’s license was properly non-renewed. But the decision (and any ensuing appeal) will also affect children in Department-regulated facilities throughout the Commonwealth, as well as the Department’s ability to enforce statutes and regulations by revoking or not renewing licenses when facilities violate their provisions.
46. Furthermore, because the refugee families detained at BCRC are in the custody of ICE, the BHA proceedings will implicate the rights of children under a 1997 settlement decree that compels ICE to house detained minors in facilities that meet certain standards.¹
47. Finally, the determination of whether Pennsylvania law prohibits some or all the practices employed by BCRC will shape the future of family detention in the Commonwealth.

¹ See *Flores v. Lynch*, 828 F.3d. 898, 901-03 (9th Cir. July 6, 2016); see also *Twp. of Radnor*, 859 A.2d at 4 (allowing appeal from a denial of intervention where “the Proposed Intervenors ha[d] ... established certain rights under [a settlement] that [we]re allegedly threatened”).

48. Thus, the BHA decision will clearly “impact[] ... individuals other than those involved in this particular litigation.” *Ben v. Schwartz*, 729 A.2d 547, 552 (Pa. 1999).
49. Even if Petitioner-Intervenors are no longer in the Department’s custody after the time of filing, the public interest dictates that they should nevertheless be allowed to intervene in this litigation. In an analogous situation, the Court of Appeals for the Third Circuit has held that filing of a class certification motion preserves standing for the named plaintiff even if her individual claim is mooted by release from custody. *See, e.g., Gayle v. Warden Monmouth County Correctional Institution*, 838 F.3d 297, 305-06 (3d Cir. 2016). Similarly, the people most affected by the outcome of this appeal—children detained at BCRC or children at risk of detention at BCRC—would lose their opportunity to be heard if this Petition is not granted because these proceedings have already lasted longer than the period any child has been detained at BCRC. Furthermore, at least one of the Petitioner-Intervenors is at risk of being re-detained at BCRC, as are other similarly-situated families released from BCRC.
50. As legal representatives, Petitioner-Intervenor Aldea has a direct interest in the outcome of this litigation in that providing representation in a detained setting is infinitely more difficult than if the child and parent are not detained. Effective representation has been made ever more difficult due to increasingly restrictive policies instituted by Appellant that limit attorney access. Thus, a licensing regime that enables continued detention imposes burdens on Aldea in terms of added expenditures in time, personnel, and resources, all of which limit Aldea’s ability to represent more clients.

51. Petitioner-Intervenors are not “adequately 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.
52. While Petitioner-Intervenors do agree with the Department’s decision to not renew Appellant’s license, their direct interests are not directly represented by the Department.
53. Petitioner-Intervenors do not agree with the Department’s decision to wait months before taking the nonrenewal action, the Department’s decision not to seek immediate remedies to close BCRC or otherwise protect BCRC residents, or the Department’s decision not to address the other violations of law affecting residents at BCRC. Nor do they agree with the Department’s decision to provisionally license BCRC while this matter is on appeal.
See Ex. I, Provisional License.
54. The interests of detained families are significantly more impacted by the resolution of the licensing issue than the administrative interests of the Department because the minimum standards imposed by the license and other state laws shape the daily, physical conditions under which residents live.
55. Moreover, Petitioner-Intervenors assert numerous additional grounds for revocation of the license not alleged by the Department.
56. These disagreements could influence the Department to seek a different outcome in the BHA proceedings than would serve Petitioner-Intervenors’ interests.
57. For instance, to avoid protracted litigation, the Department might grant BCRC additional time to come into compliance, or allow it to continue operating under certain conditions,

as it has formally stipulated to for the past two years. *See* Exhibits G and H, Mandamus Docket Sheets.

58. Petitioner-Intervenors, however, seek to ensure that BCRC’s license is revoked—and its operations terminated—as soon as possible.

59. While analyzing intervention under the Federal Rules of Civil Procedure, the Third Circuit has instructed that a government agency may not be an adequate representative of an individual’s interest “when an agency’s views are necessarily colored by its view of the public welfare rather than the more parochial views of a proposed intervenor whose interest is personal to it.”²

60. Petitioner-Intervenors’ interest in these proceedings is simple: to ensure BCRC is closed so they may live in a safe and comfortable place with their families while awaiting their immigration decisions, rather than in captivity at BCRC (in which those who were previously released could be re-detained at any time).

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

62. Nor are Petitioner-Intervenor Aldea’s interests adequately represented by the Department.

² *Benjamin ex rel. Yock v. Dep’t of Pub. Welfare*, 701 F.3d 938, 958 (3d Cir. 2012). Thus, an applicant seeking to intervene “may demonstrate that its interests, though similar to those of an existing party, are nevertheless sufficiently different that the representative cannot give the applicant’s interests proper attention.” *Hoots v. Commonwealth of Pa.*, 672 F.2d 1133, 1135 (3d Cir. 1982). “Alternatively, the applicant may establish collusion between the representative and an opposing party, or an indication that the representative has not been diligent in prosecuting the litigation.” *Id.*

63. Importantly, the Department's decision not to renew BCRC's certificate of compliance came only after repeated requests from counsel for Petitioner-Intervenors and other BCRC residents to address violations of Pennsylvania law at BCRC. As explained in a Human Rights First report attached to the instant Petition:

Lawyers who represent children and their parents at the facility have written to the Pennsylvania authorities, arguing that the facility should not be licensed by the state as there are no dependent or delinquent children in custody. ... Attorneys have also argued that [BCRC] operates as a secure care facility, in violation of Pennsylvania law.³

64. The Department did not take any action until October 22, 2015, seven months after residents' requests alerted the Department to the situation at BCRC.

65. Further, since the license revocation, and while the Department has allowed the center to operate, additional violations have occurred. *See infra* ¶¶ 103-12. The Department has not adequately investigated formal complaints made with respect to these and other regulatory violations that have occurred at BCRC. The BHA can infer that the Department is not adequately representing the interests of Petitioner-Intervenors in these proceedings by its demonstrated failure to carry out its principal duty of enforcing existing regulations designed to protect Petitioner-Intervenors and similarly-situated children.

³ Ex. J, at 10-11 (endnotes omitted) (Human Rights First, *Family Detention in Berks County, Pennsylvania*, (Aug. 2015)). The report referenced a letter dated March 23, 2015, to Roseann Perry, Director of the Department's Bureau of Child and Family Services; letters dated April 24 and April 30, 2015, to Jay Bausch, Deputy Secretary for Administration of the Department of Public Welfare; and a letter dated July 28, 2015, to Doris M. Leisch, Chief Counsel for the Department. *Id.* at 10 & 23 n.27, 11 & 14 n.29.

66. What action the Department finally did take also shows a lack of urgency in attempting to address the violations of Pennsylvania law at BCRC through revocation and non-renewal of the certificate of compliance.
67. The Department's October 22, 2015, letter to BCRC instructed only that the facility resume operation as a child residential facility before its license expired months later. The Department took no further action until it notified BCRC of its non-renewal decision on January 27, 2016.
68. And despite its conclusion that BCRC's operation as a family detention center, rather than as a child residential facility, violates Pennsylvania law, the Department has not attempted to stop BCRC from continuing to operate by issuing a cease and desist letter, as it has in other cases where it has decided to revoke or non-renew a facility's license.⁴
69. Nor has the Department exercised its statutory authority to issue Emergency Removal Orders removing residents from BCRC.⁵
70. The Department's persistent failure to enforce the regulations in 55 Pa. Code § 3800 and its public statements that even the most egregious alleged violations have not been substantiated (*see, e.g.,* Exh. K, ReWire News, *ICE Held Teen Girl in Majority-Male*

⁴ *See, e.g., Aggie v. Pa. Dep't of Human Servs.*, Civ. No. 15-5456, 2015 WL 8007570, at *2 (E.D. Pa. Dec. 7, 2015) ("Plaintiff received a letter from DHS informing her that it was refusing to renew her certificate of compliance for failure to comply with DHS regulations, and gross incompetence, negligence, or misconduct in operating [a daycare facility]. As it is unlawful to operate a commercial day care center without a current certificate of compliance, DHS instructed Plaintiff to cease and desist all operation").

⁵ *See* 55 Pa. Code § 20.37; *Liberty Manor Pers. Care Home v. Dep't of Pub. Welfare*, No. 979 C.D. 2014, 2015 WL 5432471, at *9 (Pa. Commw. Ct. Apr. 17, 2015) (upholding issuance of Emergency Removal Order in connection with non-renewal of operating license); *Colonial Manor Pers. Care Boarding Home v. Dep't of Pub. Welfare*, 551 A.2d 347, 351 (Pa. Commw. Ct. 1988) (upholding issuance of Emergency Removal Order in connection with revocation of operating license).

Detention Center for More Than a Month (Apr. 3, 2018), at 6) despite ample evidence of regulatory violations, demonstrate that the Department is committed to the premise that violations have not occurred. Consequently, the Department failed to present in these proceedings any evidence of the health and safety violations referenced herein and widely reported in the press.

71. One such omission was the lack of any reference to the institutional sexual assault committed by one of the facility's "Shelter Care Counselors," which was witnessed by an 8-year-old child who walked into a communal bathroom during an incident of assault. *See* Exh. L, Redacted Criminal Complaint at 4 ("One female juvenile interviewed, Witness 2, reported that on August 10, 2014 she had entered the bathroom and states she found Sharkey and E.D. in a stall, together. During her interview Witness 2 stated that when she entered the bathroom stall area Sharkey had his hands on E.D. [sic] hips adjusting her shorts. She did not know if Sharkey was pulling down or pulling up E.D. [sic] shorts.").

72. Later, at the instruction of the BCRC psychologist Mike Mosko, the 8-year-old girl who witnessed the rape was asked to:

[D]raw what she could not verbally express. . . . She explained to me that she wanted to draw what she saw involving . . . Shelter Care Counselor Dan Sharkey and Resident E.D. [The girl] began by choosing green paper and stencilling the words Dan y [and] E.D. across the top of the paper. [The girl] stated that she wanted to draw Dan first. She drew Dan's body in gray. He is slightly bent over forward with a straight/serious look on his face. His one hand is shown holding a door shut. He is wearing a blue t-shirt and brown shorts. His eyes are looking to the right. [The girl] then drew E.D. standing to the right of Dan. She is standing straight but with her behind towards Dan. She wore her hair in a ponytail with long side bangs. Her facial expression is happy and smiling. E.D. is depicted wearing a pink t-shirt and gray Capri pants. E.D. [sic] hand is holding the other door shut in front of her. [The girl] drew a yellow arrow showing Dan's hand leading to E.D. [sic] hip area. [The girl] explained that his hand was gripping onto

her waist near her belt loop (the arrow shows approximately where his hand touched). [The girl] stated that this occurred on Sunday August 10, 2014 at approximately 1900 in the female A-Floor bathroom. [The girl] stated that when she saw Dan and E.D. in this position she became confused and left the bathroom immediately.

Exh. M, Affidavit of BCRC Shelter Care Counselor Brittany Rothermel (Aug. 18, 2014).

73. As evidence of substantive violations of 55 Pa. Code § 3800, et seq., would be material to any determination of whether the Department was within its rights to revoke and not renew the certificate of compliance for BCRC, the Department has failed to make the most compelling arguments why the certificate of compliance should be revoked. This has resulted in a conflict of interest between the Department and Petitioner-Intervenors for which intervention is the only remedy.

74. Petitioner-Intervenors allege that the deficiencies of the BHA's Order of April 20, 2017, outlined in the Remand Order resulted in part from the BHA's denial of the 2016 Petition to Intervene. The Department's failure to provide adequate evidence of systematic violations of 55 Pa. Code § 3800 at BCRC, along with its failure to adequately represent the interests of families detained at BCRC, contributed to the BHA's failure to develop the factual record and make clear findings as to whether BCRC "is a type of facility that is required to be licensed by the Commonwealth." *See* Remand Order at 1. The remedy upon remand is to allow Petitioner-Intervenors to participate in these proceedings.

B. Petitioner-Intervenors' Intervention is in the Public Interest

75. As noted *supra*, intervenors are eligible to intervene when they have an "interest of such nature that participation of the petitioner may be in the public interest." *See* 1 Pa. Code § 35.28.

76. The Supreme Court of Pennsylvania has found intervention pursuant to 1 Pa. Code § 35.28(a)(3) (the “public interest prong”) appropriate for members of the banking industry when credit unions filed notice with the Pennsylvania Department of Banking of their intention to convert to geography-based membership. *Pa. Bankers Ass’n*, 956 A.2d at 956.
77. Here, Petitioner-Intervenors’ participation is certainly 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.
78. 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.
79. Petitioner-Intervenors, including children inside a residential facility, represent 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.”).
80. 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.
81. The public interest in this case is not best represented by the participation of the Department. Although the Department is responsible for the licensure of child residential

facilities, it has failed to zealously advocate for the interests of the detained children and families.

82. While Petitioner-Intervenors do not deny that the Department represents aspects of the public interest, it is also an agency of the Commonwealth. Not all its goals, such as administrative aims of efficiency and compromise, will align with those of detained asylum-seeking families.
83. As pro bono legal counsel who have represented nearly all of the families detained at BCRC for over three years, Aldea - The People's Justice Center attorneys have daily interaction with the detained families, a vulnerable population of asylum seekers. As such, they have first-hand knowledge of the traumas these children and parents have experienced that might be exacerbated by the conditions of detention, as well as the legal standards that must be met by a family detention facility. *See* ¶ 46, *supra*. It is in the interest of the public, as well as the individual Petitioner-Intervenors, to ensure that these families have zealous legal representation untainted by potential conflicts of interest.
84. The BHA proceedings will affect those families most of all, and especially if appealed, the result will shape the future of family detention in Pennsylvania.
85. Giving those families and their representatives a voice in the proceedings alongside the Department, and allowing them to assist in developing the record of how BCRC's operation violates Pennsylvania law, would surely serve the public interest.

III. Position of Petitioner-Intervenors

86. BCRC has been licensed by the Department under 55 Pa. Code § 3800 from 2001 to present.

87. The Department has asserted a specific, valid basis for the revocation of Appellant's license pursuant to 55 Pa. Code. § 20.71.
88. Pursuant to 55 Pa. Code § 20.71(a)(2), the Department may “deny, refuse to renew or revoke a certificate of compliance for . . . [n]oncompliance with [the Department's] program licensure or approval requirements.”
89. At no time has Appellant been compliant with the Department'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.
90. The Department'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.
91. The Department correctly issued a non-renewal and revocation of Appellant's license. Allowing Appellant 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.

92. Allowing Appellant 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 non-relative adults.
93. While the Department has failed to revoke or not renew Appellant’s license for a number of years, the decision by the Department to issue a non-renewal and revocation of Appellant’s current certificate of compliance is within the Agency’s discretion under 55 Pa. Code § 20.71 given Appellant’s violation of the licensure regulations, 55 Pa. Code § 3800, as well as ongoing and past abuses occurring at the BCRC against individual Petitioner-Intervenors.
94. The Department should not be estopped from revoking Appellant’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 Appellant 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 the Department’s revocation of Appellant’s certificate of

compliance after giving it sufficient time to come into compliance with its licensure regulations would permit Appellant to violate 55 Pa. Code § 3800.

95. Additionally, even if Appellant 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).
96. Effectively, Appellant 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.
97. Even if the Department has acquiesced in the licensure of the BCRC for fifteen years, the current license non-renewal and revocation is proper and should be permitted given that Appellant has and continues to operate the BCRC in violation of state law.
98. The Department’s non-renewal and revocation of Appellant’s license does not violate Appellant’s due process rights, as due process simply requires that Appellant 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).

99. Appellant was given ample notice of the revocation and a period of time in which to come into compliance with the licensure regulations, of which Appellant declined to take advantage. To the extent a license is deemed property interest, in no way is Appellant being unjustly deprived of this interest without the requisite process.
100. In addition to Appellant'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 should be revoked, which Petitioner-Intervenors seek to raise.
101. BCRC is a secure detention center. The Department issued a Press Release on October 22, 2015 in which it recognized that BCRC is a secure facility. Appellant 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. *See* Exh. B, ICE Residential Standard Key and Lock Control at 4; *see also* Exh. N, Declaration of Walter A. ("Walter A. Decl.") ¶ 14 ("The doors here at Berks are sometimes locked and sometimes unlocked . . . Even if the doors are unlocked, we cannot just leave because there are always guards by the doors); Exh. O, Declaration of Allison M. ("Allison M. Decl.") ¶ 22 ("I know that we are in a facility that is locked. At certain parts of the day we are only permitted in certain areas and blocked from certain parts of the facility. There are key pads throughout the facility. . . . I see the staff use key cards to unlock internal doors which prevent us from passing.")
102. Pennsylvania law prohibits the detention of children under the age of nine in a secure facility. 55 Pa. Code § 3800.283(7). Appellant has violated and continues to violate the

Department's licensure regulations by unlawfully detaining children under the age of nine in the BCRC.

103. 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. Appellant has violated and continues to violate the Department's licensure regulations by unlawfully detaining children over age nine who are neither alleged nor adjudicated delinquent by a Pennsylvania court.

104. Further, the Department 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). Appellant has operated the detention center with gross negligence and misconduct.

105. Under 55 Pa. Code § 3800.148, BCRC is required to identify acute and chronic conditions of a child and arrange for appropriate medical treatment. There are numerous examples of detained children being denied "appropriate medical treatment," including the following:

- a. A child with urinary incontinence was told that her condition was due to "laziness." Upon her release it was discovered that she was in kidney failure. *See* Exh. P, Human Rights First, *Long-Term Detention of Mothers and Children in Pennsylvania* (Aug. 2016); Exh. Q, ICE Evaluation of Child With Enuresis (Jan. 8, 2016); Exh. R, Evaluation of Child With Enuresis by Licensed Clinical Social Worker (Apr. 4, 2016).

- b. The daughter of Petitioner-Intervenor Ms. G.C.G., a five-year-old child, was left to suffer without treatment for her diarrhea for three weeks after going to the facility's medical center and being given no treatment. *See* Exh. S, Human Rights First, *Health Concerns at the Berks Family Detention Center* (Feb. 2016); Exh. T, Email of Carol Anne Donohoe, "Child Diagnosed With Shigellosis" (Apr. 5, 2016).
- c. A three-year-old child who vomited blood was refused medical treatment for four days before she was taken to the hospital. *See* Exh. U, Ed Pilkington, *Child immigrant detainees: 'There's an overwhelming sadness among them'*, The Guardian (May 12, 2015).
- d. A six-year-old child with a severe dental condition was ignored until it required a trip to the hospital for infection. *See* Exh. P, Human Rights First, *Long-Term Detention of Mothers and Children in Pennsylvania* (Aug. 2016).
- e. A child who collapsed and appeared to stop breathing received no help from nearby staff. *Id.*
- f. A child suffered from a skin disease that caused painful scratching and bleeding all over his body, including his genitals, without appropriate treatment. *See* Exh. S, Human Rights First, *Health Concerns at the Berks Family Detention Center* (Feb. 2016).
- g. Children with high fevers were told to "drink more water," and were denied any fever reducer, such as acetaminophen. *See* Exh. V, Human Rights First, *Family Detention in Berks Cnty., Pa.* at 8 (Aug. 2015).

- h. A child exhibited fever and lack of appetite for several weeks, but was never tested for parasites or infection until her mother found a worm in her diaper. *See* Exh. W, Email of Carol Anne Donohoe, “Child Tested Late for Worms” (May 22, 2016).
 - i. A child exhibited vomiting, fever, and pain, but was refused medical treatment until a shift change occurred. He was diagnosed with an ear infection. *See* Exh. X, Email of Carol Anne Donohoe, “Child Treated Late for Ear Infection,” (Sept. 19, 2016).
 - j. At a time when the population was mixed mothers and fathers, an adult male detainee was noticeably masturbating beneath a towel with the door open, where children could witness him. *See* Exh. Y, Letter to Sec. Dallas (June 5, 2017) p. 1.
 - k. A 15-year-old girl was the only female in the facility, which is now predominantly male, for more than a month. She told a reporter, “The only privacy I have is when I shower. I don’t feel comfortable here.” Exh. K, Tina Vasquez, “ICE Held Teen Girl in Majority-Male Detention Center for More Than a Month,” *Rewire.News* (Apr. 3, 2018).
106. Under 55 Pa. Code § 3800.2, BCRC is required to provide “appropriate” mental health care to detained children. There are documented cases of young children experiencing hopelessness and depression that, as a result, has disrupted their sleeping and eating patterns. Parents have reported behavioral changes in children including lack of appetite, difficulty sleeping, increased crying, and feelings of desperation and distress. Children have mimicked suicide, saying they prefer to die than to continue life in

detention. Petitioner has been alerted to these conditions via formal complaints written by individuals detained in BCRC yet has ignored the conditions. *See* Exh. S, Human Rights First, *Health Concerns at the Berks Family Detention Center* (Feb. 2016); Exh. V, Human Rights First, *Family Detention in Berks Cnty., Pa.* at 8 (Aug. 2015); Exh. P, Human Rights First, *Long-Term Detention of Mothers and Children in Pennsylvania* (Aug. 2016).

107. Appropriate mental health care must be provided in a language that a child understands. Detained families also have no access to Spanish-speaking mental health personnel in the medical department, even though most individuals detained in the BCRC are Spanish-speaking. *See* Exh. V, Human Rights First, *Family Detention in Berks Cnty., Pa.* at 8 (Aug. 2015).
108. A child who witnessed the rape of a woman at the detention center received only one visit with a mental health professional. *See* Exh. P, Human Rights First, *Long-Term Detention of Mothers and Children in Pennsylvania* (Aug. 2016).
109. Under 55 Pa. Code § 3800.32, BCRC may not discriminate against detainees on account of “national origin.” Failing to provide language access violates this provision.
110. Under 55 Pa. Code §§ 3800.223; 3800.226, BCRC must “meet the needs of the child,” including through the creation of an Individualized Service Plan (ISP). The ISP must make findings regarding treatment goals for the child’s stay at the facility, an anticipated duration of stay, and a discharge plan. BCRC does not do so.
111. Under 55 Pa. Code § 3800.1, BCRC must “protect the health, safety and well-being of children receiving care.” It fails to do so, however, because it does not exclude adult

men from the living spaces of unrelated women and girls. *See* Exh. S, Human Rights First, *Health Concerns at the Berks Family Detention Center* (Feb. 2016). Young girls have been forced to shower with grown non-relative men, and to sleep in the same room as grown non-relative men. As noted above, women have witnessed men masturbating. *See* Exh. Z, Letter to Sec. Dallas, “Co-mingling,” (May 18, 2017); Exh. Y, Letter to Sec. Dallas, “Inappropriate Showering,” (June 5, 2017); Exh. AA, Report of Suspected Child Abuse (May 29, 2017).

112. BCRC further fails to “protect the health, safety, and well-being of children” through its ongoing practice of frequent nightly checks every 15 minutes, disturbing children’s sleep and causing nightmares. *See* Exh. P, Human Rights First, *Long-Term Detention of Mothers and Children in Pennsylvania* (Aug. 2016); Exh. BB, Declaration of Dr. Alan Shapiro (Apr. 16, 2017); Exh. CC, Declaration of John Doe 3 (Jan. 9, 2018); Exh. DD, Declaration of John Doe 1, ¶ 6 (Feb. 28, 2018) (“I’ve been sleeping maybe 2-3 hours a night for a month now. The staff come into our room every 20 minutes during the night with their lights and shine them in our faces. They bang the door open too. I can’t go back to sleep It’s extremely stressful.”). Interrupting a child’s sleep is contrary to all principles of health sleep hygiene. Exh. BB, Declaration of Dr. Alan Shapiro (Apr. 16, 2017). Sleep deprivation in children has deleterious behavioral, neurocognitive, and health consequences. *Id.* It is a risk factor for mood disorders and attention-related disorders. *Id.*

113. BCRC has further failed to “protect the health, safety and well-being of children receiving care,” by continuing to isolate a father and child due to a disproven suspicion

that they had tuberculosis. The child was traumatized by the isolative conditions, where he was kept away from other children and not permitted to play. Exh. EE, Email of Carol Anne Donohoe, “Inappropriate Isolation of Child” (Mar. 2, 2018); Exh. FF, Declaration of John Doe 2 (Feb. 28, 2018).

114. BCRC has also failed in this regard by keeping a distressed child with untrained workers, while her mother was taken to the hospital for multiple days. The child would not sleep or eat. *See* Exh. GG, Email of Carol Anne Donohoe, “Child Without Mother” (June 24, 2016).

115. Per the Remand Order, Petitioner-Intervenors request that the BHA reconvene the hearing to accept additional testimony and exhibits to clarify the concerns raised by Deputy Secretary Utz and to support new findings of fact.

116. Petitioner-Intervenors hereby respond to the material allegations of fact or law asserted in the proceeding by Appellant as required under 1 Pa. Code § 35.29, by incorporating by reference the Answer filed by Prior Petitioner-Intervenors. *See* Ex. HH, Answer in Response to Material Allegations of Fact or Law.

117. For the foregoing reasons, while Petitioner-Intervenors argue that the Department properly refused to renew Appellant’s license in accordance with Pennsylvania law, they also argue that Appellant’s continued operation of this facility violates additional child welfare regulations that the Department did not address and that Petitioner-Intervenors’ interests are not being adequately represented by the Department.

IV. Relief Requested

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

4/9/2018

Date

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**COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF HUMAN SERVICES
BUREAU OF HEARINGS AND APPEALS**

**IN THE APPEAL OF: Berks County Residential Center
 BHA ID No. 9999
 BHA Docket No. 061-16-0003
 Child Residential and Day Treatment Facility**

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Petition to Intervene upon all parties of record in this proceeding in accordance with the requirements of 1 Pa.Code true and correct copy of the documents to either the parties directly, or to their counsel of record at the addresses shown below by FedEx:

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