



**MEMO**

**To:** Stop Berks Coalition

**From:** John Farrell, Anthony Sierzega, and Mariya Tsalkovich

**Re:** Pennsylvania Emergency Removal Order Authority

**Date:** 11 December 2016

**Key Findings:**

- The Pennsylvania Department of Human Services (“PA DHS”) has the authority to regulate the Berks County Residential Center (“Berks”)
- Despite the fact that Berks holds federal detainees, Pennsylvania laws regarding the operation of child residential facilities still apply
- PA DHS will not violate federal law (in fact it will comply with federal law set out in *Flores* decision) if it chooses to issue an Emergency Removal Order or a Cease and Desist Order
- PA DHS can work with the federal government to provide ample notice so that U.S. Immigration and Customs Enforcement can address the situation of detainees prior to shutting the facility down

**I. Pennsylvania Has the Authority to Shut Down Berks**

A. Pennsylvania Law Applies to Berks County

Berks is licensed and controlled by Berks County, which is subject to regulation by the State. The Pennsylvania Department of Human Services (DHS) regulates the health and safety of facilities for adults and children. In particular, the law states that “[n]o person” may operate a facility “without having a license therefore issued by the department.”<sup>1</sup> The regulations governing child residential facilities applies to all “facilities and agencies subject to licensure or

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<sup>1</sup> 62 P.S. § 1002.

approval.”<sup>2</sup> These requirements apply to any entity, whether operated by a private company or by local government. There is no specific provision or exclusion for a facility like Berks. Pennsylvania, therefore, has the authority to regulate Berks County as the operator of a child residential facility.

#### B. Pennsylvania Law Applies Although Berks Houses Federal Detainees

Berks is not a federal facility; it is owned and operated by Berks County via a contract with the federal government.<sup>3</sup> While federal officials are immune from state regulation, contractors that are not part of the federal government can be subject to state regulation.<sup>4</sup> Courts have found that as long as regulation of the contractor is not a veiled means of directly controlling the federal government, such regulation is legitimate.<sup>5</sup> For instance, states may tax contractors who are working for the federal government so long as they are not federal government employees themselves.<sup>6</sup>

Here, Berks County is operating as a federal contractor. It has a contract with the federal government to house federal detainees but is not otherwise a department, agency, or instrumentality of the federal government. Pennsylvania laws governing childcare facilities, therefore, do apply to Berks as it cannot be shielded by its contract with the federal government.

#### C. Pennsylvania Can Shut Down Berks Without Violating Federal Law

The ERO process arguably does not interfere with federal law. As described in section 20.37 of the Pennsylvania Code, the process mandates that DHS remove residents from a facility where it 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.” Where these conditions are met, “the Department will take immediate action to remove the clients from the facility.”<sup>7</sup> The only effect of the ERO on the federal government would be that it would not be able to detain migrants at this particular facility. The shutting down of the facility would do nothing to change the federal government’s relationship with its detainees as they would remain in federal custody. Further, Pennsylvania could provide reasonable notice and time to the federal government to make the necessary arrangements to relocate these detainees so that the state would not have to physically remove detainees. There is nothing to suggest that an ERO would mean that the state was taking over the custody of federal detainees as the ERO focuses on simply the “remov[al]” of “clients from the facility.”

Moreover, there is no support that shutting down Berks would violate federal law. There no legal support that could be found, in court cases or statutes, that state law does not apply to contract facilities housing federal prisoners. The county’s contract with ICE also does not limit the state’s

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<sup>2</sup> 55 Pa. Code § 20.1.

<sup>3</sup> Dec. 15, 2008 Berks ICE Contract.

<sup>4</sup> *United States v. Pennsylvania Environmental Hearing Board*, 431 F. Supp. 747 (M.D. PA 1977).

<sup>5</sup> *Arizona Dept. of Revenue v. Blaze Construction Company*, 119 S. Ct. 957 (1999).

<sup>6</sup> *Id.*

<sup>7</sup> 55 Pa. Code § 20.37.

authority over the facility and compliance with state law. Shutting down Berks, therefore, contradicts no federal law and would be within the scope of Pennsylvania's authority.

Rather, the only federal law on point requires the federal government to comply with state law when using a facility like Berks.<sup>8</sup> A federal appeals court in the *Flores* case decided that the federal government can only detain minors with parents for more than five days in a secure facility, if it is licensed by the state.<sup>9</sup> Such facilities must comply with state licensing requirements. The Berks' license, however, is currently invalid because they improperly house children and adults together. Further, under Pennsylvania law, children under the age of 9 and those who have not been committed to a facility by state court order are not permitted to be detained in a secure facility. Berks is violating the requirements of *Flores* because it continues to detain children in a facility that cannot be licensed by Pennsylvania. The Advisory Committee on Family Residential Centers to the U.S. Department of Homeland Security released a report that recommended complying with this mandate. It described detention as unnecessary given the small risk detainees pose and the availability of alternatives.<sup>10</sup> If Pennsylvania were to issue an ERO to shut down the facility, it would, in fact, bring the federal government into compliance with state and federal law, rather than violating any federal law.

#### D. States Have the Right to Regulate their Own Internal Affairs

Pennsylvania has authority to regulate or shut down facilities within its boundaries including Berks, regardless of the federal detainees being held there. This concept is grounded in the Tenth Amendment of the United States Constitution, where state sovereignty gives states the right to regulate their own internal affairs so long as their regulation does not interfere for federal authority.<sup>11</sup> Berks is a county-operated facility in Pennsylvania that holds federal detainees.<sup>12</sup> The federal government may not compel a state to permit the detention of families, including children, in a local county facility that is contrary to the state's health and safety regulations.<sup>13</sup>

Even federal facilities can be reasonably regulated by the states as long as those regulations do not frustrate their inherent purpose.<sup>14</sup> States, for example, are able to regulate environmental

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<sup>8</sup> *Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016).

<sup>9</sup> *Id.*

<sup>10</sup> *Report of the DHS Advisory Committee on Family Residential Centers*, Department of Homeland Security (Sept. 16, 2016).

<sup>11</sup> U.S. Const. amend. X.

<sup>12</sup> Dec. 15, 2008 Berks ICE Contract, Attached as Exhibit A.

<sup>13</sup> Forcing Pennsylvania to open facilities within its borders, in violation of state law, is akin to commandeering state officials to implement federal programs. The Supreme Court has held that the federal government cannot do so because of state sovereignty. "Whatever the outer limits of that sovereignty may be, one thing is clear: Federal Government may not compel the States to enact or administer a federal regulatory program." *New York v. United States*, 112 S.Ct. 2408, 2435 (1992); see also *Printz v. United States*, 117 S. Ct. 2365 (1997).

<sup>14</sup> *First Nat. Bank in St. Louis v. State of Missouri at in. Barrett*, 44 S. Ct. 213 (1924). A general principle of constitutional law provides that states cannot regulate the federal government directly or indirectly, but they can enforce their own laws unless federal law explicitly overrides state law. When a federal bank began operating in locations that were not authorized by state law, the Supreme Court ruled it was acting illegally. The Court stated that the state regulations did not offend federal authority because there was no federal law that addressed the location of these banks.

concerns and zoning, which address the health and safety of a community.<sup>15</sup> Here too, Pennsylvania is trying to regulate health and safety concerns of child residential facilities. Berks, despite its federal contract, is a locally run facility that is subject to state law. The closure of the facility would not frustrate the inherent purpose of the federal government, which is addressing migrant families who have come to the U.S. seeking asylum. Rather, the federal government has many options available to addressing this population, including non-detention alternatives that it already applies to many families in the identical position to those that are detained at Berks.<sup>16</sup>

## II. Steps Pennsylvania Can Take To Shut Down Berks

### A. Emergency Removal Order

As stated above, the mechanism by which residents are removed from a facility is an ERO. PA DHS has acknowledged in court filings that it is required to remove residents where it finds that their health is in serious and immediate danger, stating that it is “required by 55 Pa. Code § 20.37 to immediately remove children from a facility” and that it “must take immediate action to remove children from a center if the gross negligence in operating the facility is likely to constitute an immediate and serious danger to the life or health of the [children].”<sup>17</sup>

In 2010, PA DHS issued an ERO when it found that the Walnut Grove Assembly of God child daycare center was not adequately caring for the children under its supervision.<sup>18</sup> The facility frequently left four toddlers unsupervised and allowed the children to walk “through an area with a number of hazards including a cement ditch, unkempt cement stairs, wood planks with rusty nails, gasoline canisters, and a parking lot/access road. In 2015, an ERO was issued for patients at Liberty Manor Personal Care Home after two staff members were arrested for stealing residents’ medication and the facility could not provide documentation that another qualified administrator was available to oversee the facility’s operation.”<sup>19</sup>

The conditions at Berks similarly constitute an immediate and serious danger to the detained children and their families. Berks has allowed chronic health problems to go untreated in the facility. Some examples include: (1) a six year old with a severe dental condition that has been ignored since September 2015 despite the child being sent to the emergency room from resulting complications;<sup>20</sup> (2) two children reporting feeling distressed by an incident in which a child collapsed and appeared to stop breathing, yet received no help from nearby staff;<sup>21</sup> and (3) a

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<sup>15</sup> *Id.*

<sup>16</sup> The U.S. government has arbitrarily detained some families while releasing other families with identical case statuses. American Immigration Counsel notes that “[s]ome [families] are released, while others face lengthy detention that makes it much harder to prepare their cases.” The Inter-American Commission on Human Rights has noted that the U.S. government’s decision of whether to detain families is seemingly based on whether bed space happens to be available for the family.

<sup>17</sup> Br. For Respondent Dep’t of Pub. Welfare, *Walnut Grove Assembly of God v. Dep’t of Pub. Welfare*, No. 919 CD 2010, 2010 WL 5604585 (Pa. Cmwlth. Oct. 27, 2010).

<sup>18</sup> *Walnut Grove Assembly of God v. Dep’t of Pub. Welfare*, No. 919 CD 2010, 2010 WL 5604585 (Pa. Cmwlth. Oct. 27, 2010).

<sup>19</sup> *Liberty Manor Pers. Care Home v. Dep’t of Pub. Welfare*, 979 C.D. 2014, 2015 WL 5432471, (Pa. Cmwlth. Ct. Apr. 17, 2015).

<sup>20</sup> Human Rights First, *Long-Term Detention of Mothers and Children in Pennsylvania* (Aug. 2016).

<sup>21</sup> Human Rights First, *Family Detention in Berks County, Pennsylvania* (Aug. 2015).

three-year-old child who vomited blood was refused medical care by Berks staff for four days before she was taken to a hospital.<sup>22</sup> Further, the mental health of the detained families is put in danger because its mental health care professionals do not speak Spanish.<sup>23</sup> These failures to provide adequate medical care demonstrate an immediate and serious danger to the health of the detainees. Therefore PA DHS is required to issue an ERO to immediately release the detained families, regardless of their status as federal detainees. Once the state removes the detainees it will be the responsibility of the federal government to decide where to relocate them. The state can certainly work with the federal government in advance to address how detainees can be transferred prior to the shutting down of the facility to avoid the complications that may arise out of removal of residents.

## B. Cease-and-Desist Order

On January 21, 2016, PA DHS issued notice that the licensing of Berks would not be renewed and was officially revoked. This decision is currently under appeal and a decision will likely be made within the next few months. If the appeal is unsuccessful, the decision to not renew the license will become the final agency determination. While Berks County may seek judicial review of this determination, there is no longer a valid license in place and they will have to file an application for a stay.<sup>24</sup>

PA DHS will then have the authority to issue a cease-and-desist order directing the center to stop operating. While there is no express statutory grant of authority to PA DHS to issue a cease-and-desist order in Article IX of the Human Services Code, PA DHS implicitly has the authority to take actions that promote their express mandates.<sup>25</sup> PA DHS is mandated to ensure the safety of all children in child care facilities and regulates such facilities by requiring that they are licensed. Without a license, PA DHS has the authority to order the facility to halt its operation. In October 2016, the Pennsylvania Commonwealth Court held that PA DHS had the authority to issue a cease-and-desist order to a church that was operating a preschool without a certificate of compliance.<sup>26</sup> This same supervisory authority exists over Berks, thus granting PA DHS the same power to issue a cease-and-desist order if Berks' license remains revoked.

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<sup>22</sup> Ed Pillington, *Child immigrant detainees: 'There's an overwhelming sadness among them'*, The Guardian (May 12, 2015), available at <https://www.theguardian.com/us-news/2015/may/12/immigration-detention-centers-children>.

<sup>23</sup> Human Rights First, *Family Detention in Berks County, Pennsylvania* (Aug. 2015).

<sup>24</sup> *Goslin v. State Bd. of Medicine*, 937 A.2d 531, 534 (Pa. Cmwlth Ct. 2007).

<sup>25</sup> *Our Lady of Victory Catholic Church v. Department of Human Services*, 2016 WL 6407287 (Pa. Cmwlth. Ct. 2016); 62 Pa. Stat. Ann. §§ 901, 902, 911(a), 911(c); 55 Pa. Code §§ 3270.3(c), 3270.11(a).

<sup>26</sup> *Our Lady of Victory Catholic Church v. Department of Human Services*, 2016 WL 6407287 (Pa. Cmwlth. Ct. 2016).