



July 31, 2015

The Barbara McDowell and Gerald S. Hartman Foundation Progress Report

The American Immigration Council (“Immigration Council”) is grateful to the Barbara McDowell and Gerald S. Hartman Foundation for your support of our work in *J.E.F.M. v. Lynch*, No. 2:14-cv-01026 (W.D. Wash.). The Immigration Council and our partners (the ACLU, the Northwest Immigrant Rights Project, Public Counsel, and K&L Gates) filed *J.E.F.M.* in July 2014 on behalf of children who are challenging the federal government’s failure to provide them with legal representation in immigration proceedings. Currently, the government forces thousands of immigrant children nationwide to appear in these proceedings without counsel. We argue that this practice violates the U.S. Constitution and the Immigration and Nationality Act’s requirement of a full and fair hearing before an immigration judge, and seek certification of a nationwide class of unrepresented children in immigration proceedings.

1) *Case developments over the last six months:* On April 13, the district court denied in part and granted in part the government’s motion to dismiss *J.E.F.M.* Reasoning that “the due process question plaintiffs have raised in this case is far too important to consign it, as defendants propose, to the perhaps perpetual loop of the administrative and judicial review process,” the judge refused to dismiss the serious constitutional claims raised in the lawsuit. However, the judge did dismiss the plaintiffs’ statutory claim on jurisdictional grounds and dismissed, without prejudice, the claims of three individual plaintiffs. The court also held that it lacked jurisdiction to grant class-wide injunctive relief, while class-wide declaratory relief remains available under the decision. Subsequently, the Immigration Council and its partners sought reconsideration of several elements of the decision, but the district court denied our motion.

The government proceeded to ask the district court to certify the 4/13/15 decision for immediate review by the Ninth Circuit Court of Appeals; the district court certified in a minute order issued on June 19. Then, both the government and the plaintiffs requested that the Ninth Circuit conduct interlocutory review of portions of the 4/13/15 decision. Currently, that petition and cross-petition to permit appeal are pending before the Ninth Circuit. *See J.E.F.M. v. Lynch*, No. 15-80113 (9th Cir. filed Jun. 29, 2015).

While seeking interlocutory review, the government requested a stay of proceedings before the district court. We vigorously opposed any stay, which would prevent plaintiffs from conducting discovery or seeking class certification while the government continues to force unrepresented children to proceed in immigration court. In its 6/19/15 order, the district court declined to stay proceedings, noting that it would “issue a separate order explaining its reasons for denying a stay.” The court has not yet issued this separate order. The government also requested a stay of district court proceedings from the Ninth Circuit, which we opposed. That request is pending before the Ninth Circuit.

Additionally, we again sought certification of a nationwide class after the district court issued its 4/13/15 decision. In its 6/19/15 order, the district court denied our motion without prejudice – and without explanation. The court stated that it would “further address plaintiffs’ motion for class certification in a subsequent order,” but, again, has not yet issued any subsequent order. (See Attachment C.) We filed a protective petition for permission to appeal the decision to the Ninth Circuit, so that we will have complied with even a restrictive interpretation of the petition filing deadline if we determine that appeal is necessary after receiving a substantive decision from the district court on class certification. *See J.E.F.M. v. Lynch*, No. 15-80116 (9th Cir. filed Jul. 6, 2015).

Also in the last six months, the parties exchanged initial disclosures and submitted a discovery plan to the district court. We have served several requests for admissions and/or production, to which the government did not respond. Instead, the government argues that discovery is limited to the records of proceedings in the immigration cases of named plaintiffs. Finally, the government has filed a second motion to dismiss, arguing that the claims of several named plaintiffs are now moot. We opposed, and this motion remains pending before the district court.

The government’s failure to recognize a right to legal representation for all children in immigration proceedings remains an urgent problem. According to the Transactional Records Access Clearinghouse, more than half of the 70,000 children with pending immigration court proceedings were unrepresented as of June 2015. The same data shows that the immigration courts have already ordered the removal of almost 2,000 unrepresented children whose cases began this fiscal year.

2) *Anticipated progress in the next six months:* In the coming weeks or months, we expect that the district court will issue one or more decisions addressing the government’s pending motions and providing the further explanation referenced in the court’s 6/19/15 order. The Immigration Council and our partners will respond to these anticipated rulings. It may be necessary, for example, either to go forward with an appeal of class certification issues before the Ninth Circuit or to seek class certification again before the district court.

Additionally, the Ninth Circuit may rule on the pending petition and cross-petition for interlocutory review of the district court’s 4/13/15 decision. If the court decides to conduct interlocutory review, we would brief the merits of the relevant jurisdictional issues for the Ninth Circuit. If the Ninth Circuit does not accept the appeal, we have requested that the district court set a trial date in May 2016 and deadlines for amending pleadings, completing discovery, and filing dispositive motions between early December 2015 and early February 2016. In either case, we do not anticipate a swift resolution to the case, and expect that discovery before the district court will continue at least for the next six months and that district court and/or appellate briefing will continue throughout 2016.

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