Barbara McDowell Foundation Receives 2019 Grantee Final Reports

- August 26, 2019

Each of the 2019 Barbara McDowell Foundation grantees has submitted their final grant reports as of August 1. While the term of the grants do not expire until September 30, the grants require any grantee wishing to apply for the coming year to submit their final report on August 1. Each of the 2019 grantees applied for a 2020 grant.

The 2019 Grantees:

- American Immigration Council
- Center for Gender and Refugee Studies
- National Center for Law and Economic Justice
- National Immigration Project of the National Lawyers Guild
- Prisoner's Legal Services of Massachusetts

Their final reports can be found in the following pages, below.

McDowell Foundation
Final Report
August 1, 2019

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1. Background on *Moreno v. Nielsen*

Moreno v. Nielsen, No. 1:18-cv-01135 (E.D.N.Y.), challenges a U.S. Citizenship and Immigration Services' (USCIS) policy that unlawfully blocks otherwise eligible noncitizens with Temporary Protected Status (TPS) from gaining lawful permanent (LPR) status. The case was filed on behalf of a putative class of TPS holders who, but for this policy, are eligible to become lawful permanent residents (LPR) through sponsorship by a qualifying U.S. citizen or lawful permanent resident family member or a U.S. employer.

TPS provides a temporary haven for noncitizens living in the United States when natural disasters or civil strife in their home countries render it unsafe for them to return. While holding TPS, a noncitizen is in a lawful, though non-permanent status, authorized to work, and protected from deportation. Most TPS holders have held this status for upwards of two decades and, consequently, have established deep roots in the United States. Because TPS is not a permanent status, many of these individuals take steps to gain LPR status (a "green card") through relationships they have established during their long years in the United States.

Hundreds, if not thousands, of TPS holders are blocked from becoming LPRs solely due to USCIS's unlawful policy, challenged in this lawsuit. The policy states that TPS holders who entered the United States without inspection cannot demonstrate that they were "inspected and admitted or paroled" into the United States, a requirement to adjust to LPR status. However, as the Sixth and Ninth Circuits have both held, the plain language of the TPS statute itself deems a grant of TPS to qualify as an inspection and admission for purposes of adjustment of status. The Eleventh Circuit has held the opposite. USCIS applies its policy everywhere except within the Sixth and Ninth Circuits. As a result, whether these TPS holders will be able to remain with family and community depends on the arbitrariness of where they reside. The Council's goal in filing this suit was to overturn the policy as applied in the jurisdiction of the nine courts of appeals that have not ruled on the issue.

2. Report on Case Developments During the Grant Year

As detailed in the semi-annual report submitted on March 29, 2019, Plaintiffs' motion for class certification and cross motion for summary judgment had been pending for a number of months at the start of the grant year. In an effort to move the case more quickly, we filed a motion for a preliminary injunction with supporting brief on November 16, 2018, and, after the

government's response, a reply brief. In January 2019, we filed a Motion for a Temporary Restraining Order or, in the Alternative, for Preliminary Injunction on behalf of lead Plaintiff, Amado Moreno, who was facing a lay-off from his job of 17 years. The court denied the request for a temporary restraining order on February 15 and asked for supplemental briefing on Mr. Moreno's standing to sue, which we submitted on February 22.

Since the interim report, we have been awaiting a decision on the pending motions for preliminary relief and/or full disposition of the case. On July 2, we submitted a letter brief to the court which notified the court of recent decision on the issue from the U.S. District Court for the District of Minnesota.

Revised Strategy for Reaching Our Goal

As noted above, our goal for this suit was to challenge the legality of USCIS' policy in the jurisdictions of the nine Courts of Appeals where it is applied. While we have waited for the court in *Moreno* to rule on our pending motions, TPS holders have filed individual lawsuits challenging the application of the policy in their own cases in, inter alia, Minnesota, Texas, and New Jersey. We have been advising the attorneys in these cases and following their progress. To date, all district courts have ruled in favor of the TPS holders, finding that their grant of TPS must be deemed an "admission" for purposes of eligibility for adjustment of status. The government has now appealed three of these individual cases to the Courts of Appeals for the Third, Fifth and Eighth Circuits. In August and September, we will submit amicus curiae briefs in support of the TPS holders in all three cases. We are hopeful that, if one or more of these circuit courts rules favorably, it will prompt a decision from the court in *Moreno*. Even without such a ruling in *Moreno,* however, favorable decisions by these Courts of Appeals will benefit thousands of TPS holders and significantly reduce the number of states within which USCIS can apply its detrimental policy.

Our focus for the remainder of the grant period and the months beyond that, then, will be twofold:

1) Continue litigating *Moreno*. If the court ultimately rules favorably, will we need to monitor USCIS' implementation of the decision. If the court denies our motion for summary judgment, we will file an immediate appeal. If the court denies either our motion for class certification or our motion for a preliminary injunction, we will consider filing an interlocutory appeal;
2) Continue supporting individual lawsuits throughout the country and filing amicus curiae briefs in all cases that are appealed to a Court of Appeals, while simultaneously waiting for a decision in *Moreno*. Either strategy, individually or in combination, will move us towards our end goal: striking down USCIS' unlawful policy as applied within the jurisdictions of nine Courts of Appeals.

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Final Report to the McDowell Foundation: August 1, 2019

Adjudication of Ms. A.B.'s claims for relief

Ms. A.B.'s case remains pending before the Board of Immigration Appeals (BIA or Board). Although we filed a notice of appeal to the Board in November 2018, we have yet to receive our briefing schedule. However, we have begun preparing our brief and lining up support from *amicus* parties. We recently confirmed *amicus* participation from the Harvard Immigration and Refugee Clinic, Tahirih Justice Center, a group of former immigration judges and BIA members, and a group of immigration law professors. We expect to soon confirm participation from the UN High Commissioner for Refugees (UNHCR) as well. While the Board has been slow to move on Ms. A.B.'s case, we anticipate that they will issue a briefing schedule within the next six months. Because we are preparing our briefing and coordinating *amicus* support well in advance, we expect that we will be able to move swiftly once the briefing schedule is issued.

In the meantime, we are continuing to pursue other avenues to reverse former Attorney General Jeff Sessions' erroneous ruling in Ms. A.B.'s case. In early 2019, we initiated representation in *O.L.B.D. v. Barr*, an asylum case involving a young Salvadoran woman that presents an opportunity to challenge *Matter of A-B-* in the First Circuit. We submitted briefing on behalf of our client Ms. B.D. in early March. Then in May, CGRS Co-Legal Director Eunice Lee appeared as *amicus* in another First Circuit case, *De Pena Paniagua v. Barr*. Last fall the BIA relied on *Matter of A-B-* to deny asylum to the petitioner in that case, Ms. De Pena, without conducting a meaningful examination of her claim. Sharing argument time with Ms. De Pena's attorney, Eunice called on the First Circuit to overturn *A-B-* and remand Ms. De Pena's case to the Board for proper individualized consideration. In August we plan to file another *amicus* brief in a similar case, *Fuentes Reyes v. Barr*, involving a domestic violence survivor from El Salvador.

FOIA lawsuit on behalf of Ms. A.B.

In March 2019, CGRS and pro bono counsel at Riley Safer Holmes & Cancila filed suit against the U.S. Department of Justice (DoJ), challenging the agency's failure to release information about former Attorney General Sessions' involvement in *Matter of A-B-*. The lawsuit was brought under the Freedom of Information Act (FOIA) and filed on behalf of Ms. A.B. Ms. A.B. had filed a FOIA request back in March 2018 seeking all records and communications pertaining to Sessions' decision to certify her case. After DoJ failed to respond to the FOIA request by the legal deadline, Ms. A.B. filed an administrative appeal asking for prompt production of records. To this day, however, DoJ has failed to disclose the requested information.

The goal of our current lawsuit is to compel DoJ to provide records that might shed light on the troubling procedural irregularities experienced by Ms. A.B., which implicate her due process rights to a fair and impartial agency proceeding. However, the government has failed to respond to the complaint in a timely manner. At the end of May, the government requested relief from a default judgment, which the D.C. District Court granted, and the case has since been reassigned to a new judge.

Additional FOIA request

CGRS filed an additional FOIA request in March, requesting a statistical dataset of all cases heard by Judge V. Stuart Couch related to applications for asylum, withholding of removal, and Convention Against Torture (CAT) relief since June of 2017. Judge Couch denied Ms. A.B. relief when her case first came before the Charlotte Immigration Court, and then again after Sessions sent her case back. Through this FOIA request we are seeking information that illuminates how asylum cases have been adjudicated at the Charlotte Immigration Court pre- and post-*Matter of A-B-*. We hope to learn whether Judge Couch has been analyzing claims on an individualized, case-by-case basis, as required under U.S. law. As mentioned in previous updates to the Foundation, after Sessions remanded Ms. A.B.'s case to the Charlotte Immigration Court we filed a motion to recuse Couch, alleging bias, which he unsurprisingly denied.

This request has been placed on a complex track, and we have not yet received the records we are seeking. In the meantime, we are collecting and analyzing the limited public data that does exist on asylum adjudication trends in Charlotte, and we are reaching out to local attorneys to request additional anecdotal data to supplement it. We expect that the data we obtain – through our FOIA request and these other efforts – will bolster our arguments that Judge Couch has not been appropriately analyzing claims on a case-by-case basis, and that he prejudged Ms. A.B.'s claims in violation of her due process rights.

The following attorneys may be contacted for further information:

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The Barbara McDowell and Gerald S. Hartman Foundation
National Center for Law and Economic Justice – Final Report
July 31, 2019

Overview

Since our inception, NCLEJ has been committed to advocacy on behalf of low-income individuals and families. That commitment, in addition to our successful work around the criminalization of poverty, and the disproportionate impact of such practices on communities of color, is what led us to file *Black Love Resists in the Rust v. City of Buffalo* last June. The Buffalo Police Department (BPD) had conducted thousands of "traffic safety" stops at checkpoints that were overwhelming placed in Black and Latinx neighborhoods. There people of color were being stopped, searched, ticketed, and even arrested and having their cars towed in violation of their constitutional rights. They were also being issued multiple tickets for offenses such as having tinted windows, as the City of Buffalo sought ways to generate an increase in revenue at their expense.

With the generous support of the Barbara McDowell and Gerald S. Hartman Foundation, NCLEJ has been hard at work to stop these practices. As the litigation proceeded, we have simultaneously been conducting outreach, engaging in intense discovery, and participating in the court's process to determine whether the case can be addressed through mediation.

Actvities

Outreach/Fact Gathering - NCLEJ planned and held numerous meetings with our plaintiffs and community members in Buffalo throughout the period. In the meetings, we informed community members about the case and listened to stories about their experiences with checkpoints, ticketing, and the BPD. In December 2018, we also coordinated an outreach training for plaintiffs where questionnaires, case fact sheets, and flyers we created were distributed to plaintiffs, law student volunteers, and other legal team members who would be canvassing and conducting outreach. Since that time, we have continued to coordinate and supervise canvassing and outreach efforts around the City of Buffalo.

We have conducted numerous interviews with people who have been through checkpoints or experienced the BPD's excessive ticketing practices. We have reviewed thousands of pages of material, data from multiple sources, and various reports.

Discovery - NCLEJ has submitted and requested various types of information to support our claims for relief on behalf our individual named plaintiffs as well as our claims about the BPD and

the City of Buffalo's policy and practice of discriminatory and excessive ticketing and revenue generating for the City. First, we prepared and submitted initial disclosures with information concerning evidence we plan to use to support our plaintiffs' claims. Then, we drafted and submitted requests for production and interrogatories asking the defendants to produce certain documents and reveal certain information to us.

However, although it has been several months, opposing counsel has yet to turn over much of the information that we have requested, and much of what he has produced has not been produced in the form we requested it in so that we can effectively analyze it. However, as the discovery process requires, we had lengthy negotiations in the hopes of assisting opposing counsel in producing the information that we need.

Defendant remained obdurate and by May 2019, the Court issued an order mandating compliance with discovery requirements. Defendant still has not complied and, as a consequence, at the end of July 2019 we filed a motion to compel full discovery production, including a range of electronic discovery as well as to locate and produce BPD Housing Unit, Traffic Unit, and Strike Force Monthly and Daily Reports – all of which detail police action in City of Buffalo.

Mediation - The local rules for the federal district court in which our case was filed require that we attempt to address our dispute through mediation. As a result, we selected a mediator for the case to assess whether we might be able to do so. In preparation for this, we coordinated phone calls with our plaintiffs where we discussed their goals for the case and ideas they might have about potential injunctive relief. We included these ideas in a letter to the mediator, which we sent to him in advance of our call to discuss the possibility of settlement. However, there has not been successful mediation to date.

Media Coverage - The case generated and continues to generate strong media coverage. For example, Marsha McLeod, a reporter for the *Investigative Post* has written two articles that were inspired by and explicitly mention our case about the BPD's discriminatory ticketing practices and the City of Buffalo's use of traffic tickets, including excessive surcharges, to generate revenue. The first article was published in February 2019 and the other was published in March 2019. See http://www.investigativepost.org/2019/02/27/city-hall-cashing-in-on-traffic-tickets/

Progress Anticipated Over the Next Six Months

A primary focus of the next six months will be on obtaining the discovery needed to move for class certification and prepare for trial. We also must obtain and review substantial electronic discovery from defendants concerning their policies and practices; obtaining this information will likely require some motion practice before the district court. After we obtain and analyze document discovery, we will begin taking depositions. If we can obtain all necessary discovery within the next six months, we will move for class certification. Finally, we will continue to engage with the City in settlement discussions as appropriate.

Conclusion

The assistance from the Barbara McDowell and Gerald S. Hartman Foundation supports our efforts to fight for fundamental civil right of low income communities of color. This assistance has been absolutely essential to our work, which has been and continues to be very resource intensive. We

could not be more grateful for the support – it is truly making a difference by shining a spotlight on egregious governmental misconduct, helping communities of color in Buffalo to be heard, and vindicating important rights.

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August 1, 2019

Jerry Hartman
President
Barbara McDowell Foundation

Re: Barbara McDowell and Gerald S. Hartman Foundation Final Report 2019

Dear Mr. Hartman:

The National Immigration Project of the National Lawyers Guild (NIPNLG) is grateful to the Barbara McDowell and Gerald S. Hartman Foundation for your support of our pending litigation in support of detained families' right to intervene in a dispute over the licensing of the Berks County Residential Center (BCRC) as a child residential facility.

Case Developments and Anticipated Progress

Since the case was first funded, NIPNLG, along with co-counsel, filed a Petition for Review on behalf of detainees at BCRC, including minors, appealing an order denying their Petition to Intervene in proceedings before the Bureau of Hearings and Appeals (BHA) of the Pennsylvania Department of Human Services (PADHS). The underlying BHA proceedings concern the revocation of BCRC's license as a child care facility by PADHS.

BCRC responded with an opposition brief on March 1, 2019. We filed a reply brief on March 15, 2019. On April 30, 2019, the court assigned an oral argument date set for November 12, 2019 in Philadelphia to address the merits. The next six months will be devoted to preparing for our tentative session in November as well strategizing next steps depending on the outcome.

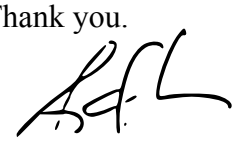
If the Commonwealth Court rules in our favor, we will be entitled to participate in the licensing dispute before the BHA. That work would entail presenting witnesses and evidence about regulatory violations at BCRC and requesting that the BHA finally revoke BCRC's child residential facility license. Even if the Commonwealth Court denies our petition, we simultaneously plan on pursuing alternative litigation options, including an affirmative civil rights lawsuit in Federal court challenging detention conditions and a state mandamus action to require the closure of BCRC as a child residential facility.

Attorney Contact Information

For additional information about this case, please contact Khaled Alrabe, Staff Attorney, khaled@nipnlg.org, 510.679.3994

As always, please also feel free to contact me if you would like to discuss the grant further.

Thank you.



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August 23, 2019

PLS Final Report
October 1, 2018 – July 31, 2019

On March 14, 2019, PLS filed a class action Complaint, entitled *Does I-X v. Commissioner of Correction, et al.,* Suffolk County Superior Court. No. 1984-00828 on behalf of men civilly committed to correctional facilities under Mass. Gen. Laws Chapter 123, Section 35, for treatment of alcohol or substance use disorders. Massachusetts is the only state to incarcerate people for medical treatment who have not been charged or convicted of a crime. The Complaint claims that:

(1) Incarcerating civilly-committed men but not women constitutes gender discrimination in violation of the 14th Amendment to the U.S. Constitution, the Massachusetts Declaration of Rights, and the Massachusetts Equal Rights Act. Under Section 35, men who need inpatient treatment for alcohol or substance use disorder go to prison, while women receive treatment in secure treatment facilities in the community.

(2) Civil commitment to a correctional institution for treatment of a medical condition constitutes unlawful disability discrimination in violation of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and Article 114 of the Massachusetts Declaration of Rights. By subjecting men to stigma and punishment instead of treatment, Section 35 perpetuates unwarranted negative stereotypes, and reinforces the perception that they are second-class citizens unworthy of bona-fide treatment.

(3) Civil commitment to a prison violates the substantive due process provisions of the Fourteenth Amendment to the United States Constitution, 42 U.S.C. § 1983, and Articles 1, 10, and 12 of the Massachusetts Declaration of Rights. Plaintiffs' unnecessary incarceration in a prison, rather than in an appropriate treatment facility, represents a substantial departure from accepted professional judgment, practice, and standards. Their confinement in a traumatic and counter-therapeutic environment sabotages the possibility of recovery and bears no reasonable relation to the purpose of Section 35.

The suit seeks a declaratory judgment that Plaintiffs' incarceration violates the constitutional and statutory provisions referred to above, and a permanent injunction prohibiting the civil commitments under Section 35 to a correctional facility.

The Defendants' filed an Answer on May, 1, 2019.

On July 2, 2019, the Court certified a class consisting of:

> *All men placed or housed in a DOC facility solely pursuant to G.L. c. 123, § 35 from July 2, 2019 through the date of the final judgment in the case, including the named plaintiffs*. (A copy of the decision is attached).

We are now continuing to engage in fact-finding, discovery, and consulting with experts. We are contemplating amending the Complaint to add plaintiffs confined in the recently opened Section 35 unit at the Hampden County House of Correction. There are also ongoing settlement discussions with the Defendants. We hope to file a motion for summary judgment by early 2020, if settlement discussions are not successful.

The filing of the Complaint triggered the Department of Correction to implement numerous reforms at the Massachusetts Alcohol and Substance Abuse Center (MASAC), the prison where Section 35 patients are incarcerated. These include: installing toilets in the solitary confinement cells, no longer requiring patients to wear prison uniforms or prison identification badges that identify them as inmates, removing the recording on the telephone calls saying that the call is from an "inmate at a correctional institution," transferring sentenced prisoners from the facility, and expanding treatment staff. While these changes are welcomed by patients, they do not alter the essential problem: putting men in prison who have not been charged or convicted of a crime. Accordingly, no settlement is possible unless the Defendants agree to stop confining Section 35 men in a correctional facility, and this will require the state to establish approximately 250 new treatment beds to replace the prison beds.

Simultaneously with the litigation, PLS has been working with the media, the Legislature, activists, and other policy makers to end civil commitment of men to a correctional facility for inpatient treatment of alcohol and substance use disorders. The Boston Globe, Boston National Public Radio affiliate WBUR, Filter Magazine and several other prominent outlets have run critical stories scrutinizing Section 35. During this time, PLS has worked to educate the members of the Legislature, the medical and legal communities, and the public about the harm of incarcerating Section 35 patients, including presenting testimony before the Legislature (See https://www.masslive.com/politics/2019/06/obamas-drug-czar-michael-botticelli-backs-bill-to-get-addiction-patients-out-of-jails.html) and working with the legislatively-established commission on Section 35, which, on June 27, 2019, recommended that all civil commitments to criminal justice facilities under Section 35 be abolished. (See

https://www.mass.gov/files/documents/2019/07/01/Section%2035%20Commission%20Report%207-1-2019.pdf). Two bills (S.1145 and H.1700) have also been filed in the current Legislative session that would end the practice of incarceration of civilly-committed men at MASAC or any other correctional facility, and they have widespread support.

We hope that by continuing to litigate the case vigorously, we will motivate the Legislature, the Defendants and other public officials to develop the systemic changes that are necessary to put an end to this longstanding unconscionable and discriminatory treatment of men with alcohol and substance use disorders.

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