



POSITION ON PROPOSED LEGISLATION

BILL:	House Bill 750, Office of the Public Defender, Right to Counsel in Immigration Proceedings Coordinator
POSITION:	SUPPORT
DATE:	March 1, 2021

The Office of the Public Defender is honored to be designated as the Coordinator of the Maryland Right to Counsel in Immigration Proceedings program established by House Bill 750, and strongly supports the bill. This program is urgently needed to protect vulnerable, indigent Maryland residents and their families. An estimated 600 Maryland children per year are at substantial risk of permanent separation from their parents because of ICE’s enforcement actions against their parents. Those parents are held in ICE custody in Maryland or other jails, with no viable opportunity to post a bond for their release. If their parent loses their immigration hearing -- a loss that is exponentially more likely without an attorney -- the parent will be deported from the United States. The U.S. Supreme Court has long-equated deportation with “banishment or exile.”¹

ICE may arrest and detain anyone who is not a U.S. citizen based on ICE’s belief that the person is deportable, including asylum applicants and long-time lawful permanent residents (“green card” holders).² ICE detainees -- including many asylum-seekers who have no criminal convictions -- are held in the same jails as those facing criminal trials or serving sentences, even though the ICE detainees may have had no contact with the criminal justice system.

¹ *Padilla v. Kentucky*, 130 S.Ct. 1473, 1484 (2010); *Delgado v. Carmichael*, 332 U.S. 388, 390-91 (1947).

² The immigration statute, 8 USC 1226(a) says that any noncitizen “may be arrested and detained pending a decision on whether the [noncitizen] is to be removed from the United States.” Further, subsection 8 USC 1226(c) says that ICE “shall” take into custody any noncitizen who was convicted of any of a very broad range of offenses, including simple possession of a small amount of marijuana. These provisions have been interpreted to mean that immigration judges do not have authority to set bonds for people held in this “mandatory detention.” *Demore v. Kim*, 538 U.S. 510 (2003).

Many ICE detainees had decades of productive work history and peaceful family life in Maryland, with extensive community contacts. No criminal conviction is required for ICE to deport an undocumented person. Having a U.S. citizen spouse or child does not by itself prevent deportation. When the parent is deported, this permanent exile often means the family bread-winner is permanently gone. A parent's deportation puts huge burdens on public support programs and in the worst situation, on the state's foster care system.

The notable increase of an individual person's likelihood of success in immigration court -- of not being separated from their home and family -- has been well-documented by researchers. For example, the Vera Institute of Justice reports that:

*It is nearly impossible to win deportation cases without the assistance of counsel. Only 5 percent of cases that won between 2007 and 2012 did so without an attorney; 95 percent of successful cases were represented.*³

Appointing a lawyer to ICE detainees through this program would serve only indigent Marylanders who are not otherwise represented by counsel. Of course detainees and their families would be free to retain private immigration attorneys. This program would not assist detainees who are able to hire private attorneys.

Unfortunately, however, few private attorneys are willing, capable, and financially able to represent clients who are in ICE custody. Immigration law is extremely complicated, often being equated to tax law. Deportation defense is a subspecialty requiring even more specialized expertise. Practitioners must have intricate knowledge of numerous bases for deportation, case law interpretations, asylum case law, and the details of other defenses to deportation. Few private attorneys find the field is practically or financially feasible, especially adding the extra burdens of working with clients who are in ICE custody.

To provide high-quality representation, the Office of the Public Defender, acting as Coordinator of this program, will assign indigent detainees' cases to Designated Organizations, whose staff have the expertise and the demonstrated capacity to provide high-quality legal representation to these vulnerable individuals.

³ Why Does Representation Matter? The Impact of Legal Representation in Immigration Court. <https://www.vera.org/downloads/publications/why-does-representation-matter.pdf>. See also Eagly and Shafer: https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf

Our office does not currently represent individuals in immigration proceedings. Under the obligations imposed by *Padilla v. Kentucky*, we do provide individualized advice to our immigrant clients of the immigration consequences of their criminal charges and convictions. That is where our service ends, however. Our former clients are left on their own in immigration court. ICE is represented in each case by an experienced attorney employed by the U.S. Department of Homeland Security. A few fortunate detainees are represented by the CAIR Coalition, under grants in similar programs from Prince George's County and Baltimore City,⁴ but the vast majority lack counsel in these quasi-criminal proceedings and remain in jail throughout their deportation hearings.

The Office of the Public Defender is the appropriate entity to be the Coordinator of this program, with the additional appropriations specified in this bill, beyond our current budget, to hire additional staff and necessary equipment and supplies. We have a client-focused infrastructure that is long-established and functioning throughout Maryland, including in every part of the state where ICE detains immigrants. Our staff work daily with clients in jails and prisons throughout the state. We already operate an extensive program for identifying which clients need to be represented by private attorneys because of conflicts, and for appointing cases to those private attorneys and paying them accordingly. We anticipate and are prepared to implement a similar referral process here if the Designated Organizations have conflicts or otherwise are unable to accept a particular detainee's case.

Similar programs operate successfully in other public defender offices throughout the United States, including in Atlanta; New York; Alameda County California, and San Francisco. Likewise, our Immigration Division will be able to provide valuable expertise and technical assistance to this effort. The Immigration Division is staffed by attorneys who have many years of deportation defense experience, and extensive contacts throughout the Maryland immigration legal community and beyond. Our Immigration Division already works collaboratively with CAIR Coalition, CASA, and other community groups to help our current clients, and those ties would be extended through this program.

For these reasons, the Maryland Office of the Public Defender strongly urges a favorable report on House Bill 750.

⁴ SB 317 anticipates respecting and coordinating with these pre-existing programs, and directing the relevant funding to those programs.