

Senator Jerry Moran, Chairman
Senator Jeanne Shaheen, Ranking Member
Senate Committee on Appropriations
Subcommittee on Commerce, Justice,
Science and Related Agencies
S-128 The Capitol
Washington, DC 20510

Congressman José Serrano, Chairman
Congressman Robert Aderholt, Ranking
Member
House Committee on Appropriations
Subcommittee on Commerce, Justice,
Science and Related Agencies
H-307 The Capitol
Washington, DC 20515

November 19, 2020

Re: Executive Office for Immigration Review Legal Access Programs

Dear Senator Moran, Senator Shaheen, Congressman Serrano, and Congressman Aderholt:

The United States immigration courts are in crisis, crippled by backlogs and operational challenges.¹ With no right to appointed counsel in the immigration court system, the majority of individuals represent themselves before the judge, opposite a federal prosecutor.² Immigration laws are complex and the court system is often opaque and confusing.³ **Legal access programs serve as a critical bulwark against deteriorating due process norms for those navigating the immigration court system. Today, a series of escalating actions by the Executive Office for Immigration Review are putting these programs' continued efficacy at risk.** We write to urge you to engage in heightened oversight of these programs to guarantee their protection.

The undersigned organizations sub-contract to provide legal services through the umbrella of the Legal Orientation Program (LOP), funded through dollars appropriated to the Executive Office for Immigration Review (EOIR) within the Department of Justice: the LOP for individuals in removal proceedings while in immigration custody; the Immigration Court Helpdesk (ICH) for non-detained individuals facing removal proceedings; and the LOP for Custodians (LOPC), an orientation program for the adult custodians of unaccompanied children in removal proceedings. Additionally, another program, the Board of Immigration Appeals (BIA) Pro Bono Project, is not funded by the U.S. government but is an EOIR legal access program that

¹ Kate Brumback, Deepti Hajela, and Amy Taxin, Associated Press, "AP visits immigration courts across US, finds nonstop chaos," Jan. 19, 2020, <https://apnews.com/article/7851364613cf0afb67cf7930949f7d3>; Marissa Esthimer, Migration Policy Institute, "Crisis in the Courts: Is the Backlogged U.S. Immigration Court System at Its Breaking Point?," Oct. 3, 2019, <https://www.migrationpolicy.org/article/backlogged-us-immigration-courts-breaking-point>.

² Ingrid Eagly and Steven Shafer, American Immigration Council, Access to Counsel in Immigration Court, Sept. 28, 2016, <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>.

³ Tal Kopan, San Francisco Chronicle, "Immigration courts in 'chaos,' with coronavirus effects to last years," May 18, 2020, <https://www.sfchronicle.com/politics/article/Immigration-courts-in-chaos-with-15276743.php>.

has also been severely impacted by administrative changes to the program.⁴ These programs have long enjoyed broad bipartisan support for their vital role in preserving basic due process rights for unrepresented immigrants facing removal proceedings while contributing to the efficient functioning of the courts.⁵

Despite the long-standing support and success achieved by these programs, they have been undermined by the current Administration. In 2018, we learned that then-Attorney General Jeff Sessions intended to terminate LOP.⁶ Through congressional intervention, the program was saved.⁷ In February 2019, the Fiscal Year 2019 Consolidated Appropriations Act required in statutory text the continuation of the services and activities provided by LOP.⁸ This language is continued in the Fiscal Year 2020 Consolidated Appropriations Act.⁹

Nonetheless, despite clear congressional intent and legal authority requiring the program's continuation, EOIR has taken a series of actions that threaten the integrity and sustainability of these critical programs. We present here five recent actions by EOIR that have come to our attention and demand scrutiny: 1) agency restructuring that appears designed to weaken the Office of Legal Access Programs; 2) stymieing of the Immigration Court Helpdesk

⁴ For more information about the BIA Pro Bono Project please see <https://www.justice.gov/eoir/bia-pro-bono-project>.

⁵ Evidence has shown the detained LOP program for detained adults to be remarkably successful by efficiency and due-process related measures. The Vera Institute of Justice's 2018 LOP case time analysis (released to the public through FOIA), found that not only are LOP cases more likely to complete sooner, but following release from custody, LOP participants had a lower chance of receiving orders of removal *in absentia* than their non-LOP counterparts. Vera Institute of Justice, LOP Case Time Analysis for Performance Indicators, September 14, 2018, <https://perma.cc/SH8S-KB8J>. A 2012 study conducted by the Department of Justice found that detained immigrants who received LOP completed their court proceedings more quickly and therefore remained detained for an average of six fewer days. U.S. Department of Justice, Cost Savings Analysis - the EOIR Legal Orientation Program, Apr. 4, 2012, https://www.justice.gov/sites/default/files/eoir/legacy/2013/03/14/LOP_Cost_Savings_Analysis_4-04-12.pdf. A previous study conducted in 2008 by the Vera Institute of Justice found an average reduction in case processing time of 13 days for LOP participants as well as significantly higher rates of court compliance rates for those released from detention who received LOP services. Vera Institute of Justice, Legal Orientation Program: Evaluation and Performance and Outcome, May 2008, <https://www.justice.gov/sites/default/files/eoir/legacy/2008/05/15/LOPEvaluation-final.pdf>. A preliminary review of the Immigration Court Helpdesk conducted in July 2017 by the Vera Institute of Justice, obtained by the National Immigrant Justice Center through a FOIA request, also found the program to significantly boost efficiency metrics and compliance rates, including quicker resolution of cases where Helpdesk support was provided. (FOIA results on file with NIJC.) See also a 2014 study conducted on the BIA Pro Bono Project which demonstrated the effectiveness of the program, available at https://www.justice.gov/sites/default/files/pages/attachments/2015/11/17/bia_pbp_eval_2012-1-13-14.pdf.

⁶ Maria Sacchetti, Washington Post, "Justice Dept. to halt legal-advice program for immigrants in detention," Apr. 4, 2018, https://www.washingtonpost.com/local/immigration/justice-dept-to-halt-legal-advice-program-for-immigrants-in-detention/2018/04/10/40b668aa-3cfc-11e8-974f-aacd97698cef_story.html.

⁷ National Immigrant Justice Center, Attorney General Sessions Reinstates Legal Information Programs for Immigrants, Apr. 25, 2018, <https://immigrantjustice.org/press-releases/attorney-general-sessions-reinstates-legal-information-programs-immigrants>.

⁸ Consolidated Appropriations Act, 2019, Public Law 116-6, 133 Stat. 13 at 102 (Feb. 15, 2019).

⁹ Consolidated Appropriations Act, 2020, Public Law 116-93, 133 Stat. 2317 at 2396 (Dec. 20, 2019).

program through “federalization”; 3) proposed rulemaking that undermines LOP’s viability; 4) changes to contractual provisions governing LOP that hamper non-profit functioning; and 5) continued limitations on the operations of the BIA Pro Bono program. Together, these changes subvert your subcommittee’s instructions to preserve the integrity of LOP programming and undermine due process rights and court efficiency.

1) Restructuring EOIR to Weaken the Office of Legal Access Programs

In August 2019, EOIR published an Interim Final Rule in the Federal Register, effectively immediately, that dramatically restructured the agency; this rule was published in final form this month with only minor edits despite 191 of 193 comments submitted expressing opposition to its contents.¹⁰ Primarily, the rule moved the EOIR Office of Policy—created by the Trump Administration in 2017—under the purview of EOIR’s Office of the Director, which the Rule imbued with significantly increased power including adjudication authority.¹¹ The National Association of Immigration Judges (the immigration judges’ union) publicly decried the Rule, noting its impact “removes any semblance of an independent, non-political court system which ensures due process rather than political expediency.”¹²

Many of the undersigned organizations formally registered our opposition to the Rule as well; we feared that the Rule was at least in part intended to empower the Office of Policy and EOIR Director to dismantle or weaken legal access programs. These fears have been borne out in recent weeks, as our organizations learned of major shifts in staffing and organization within the agency that we understand to be designed to weaken the Office of Legal Access Programs. We have yet to see public confirmation of these changes but fear they will portend major changes to the operation and oversight of the Legal Orientation Programs and the Recognition and Accreditation Program.

2) Stymieing and “Federalization” of the Immigration Court Helpdesk

In the Fiscal Year 2020 Appropriations Act, your subcommittee provided \$18 million for the services and activities provided by the Legal Orientation Program; the Joint Explanatory Report specified that \$3 million be used for the Immigration Court Helpdesk (ICH), a \$2 million

¹⁰ Organization of the Executive Office for Immigration Review, 84 Fed. Reg. 44537, August 26, 2019; published in final form at 85 Fed. Reg. 69645, Nov. 3, 2020, <https://www.federalregister.gov/documents/2020/11/03/2020-23210/organization-of-the-executive-office-for-immigration-review>.

¹¹ See Richard Gonzales, NPR, “DOJ Increases Power of Agency Running Immigration Court System,” Aug. 23, 2019, <https://www.npr.org/2019/08/23/753912351/doj-increases-power-of-agency-running-immigration-court-system>.

¹² National Association of Immigration Judges, Breaking: Statement by Immigration Judges Union on Major Change Announced to Immigration Courts, Aug. 2019, https://www.naij-usa.org/images/uploads/newsroom/NAIJ_Speaks_on_Major_Change_Announced_to_the_Immigration_Court_System.pdf.

increase from the previous year.¹³ As legal service providers we applauded this increase in funds, which we imagined would be used to grow the number of courts that host an Immigration Court Helpdesk from the existing five sites (Los Angeles, Miami, Chicago, New York City, and San Antonio). However, we are now *past* the end of the fiscal year and as far as we are aware neither the Vera Institute for Justice (the contractor on the Legal Orientation Program) nor any of the sub-contractors on the ICH program have received additional funds to expand.

Instead, it appears EOIR is misusing appropriated funds to move forward with plans to “federalize” the ICH program. It is our best understanding that this plan entails the following:

Hiring of 26 ICH specialists employed by EOIR: EOIR appears to be moving forward with a plan to assume operation of the ICH program within the Office of Policy, presumably with an eye toward phasing out entirely the use of non-profit legal service providers such as our organizations. On October 15, EOIR opened the hiring process for 26 “Immigration Helpdesk Specialist” positions.¹⁴ It is inexplicable to suggest that EOIR’s own employees could provide independent and confidential legal orientations to individuals seeking to present their case to an immigration judge *also employed by EOIR*. There is an inherent conflict in this sort of “federalization.”

Launch of the “Immigration Court Online Resource Tool” (ICOR): On October 1st, EOIR announced the launch of ICOR,¹⁵ an online application theoretically intended to assist unrepresented individuals in navigating the immigration court system. While some of the information centralized in the ICOR is certainly useful to unrepresented individuals, the heart of the online tool—the part of the ICOR application intended to assist individuals in identifying whether they are eligible for relief from removal—is likely to undermine, rather than support, the goals of the ICH program. Riddled with complex terms of art and critical omissions of several forms of relief from removal, this tool will, at best, be entirely unhelpful and, at worst, mislead immigrants as to their relief eligibility or ineligibility. Even if the tool were perfectly composed, an online app is no substitute for the assistance of an informed and compassionate *person* who is able to gauge and respond to an individual’s level of comprehension at every stage in the process, as has always been the case with the ICH program.

We are concerned that the federalization of the ICH program is simply an effort to eliminate independent non-profit contractors and sub-contractors and move the program fully

¹³ Joint Explanatory Report to the FY2020 Commerce, Justice, Science, and Related Agencies Appropriations Act, H.R. 1158, <https://appropriations.house.gov/sites/democrats.appropriations.house.gov/files/HR%201158%20-%20Division%20B%20-%20CJS%20SOM%20FY20.pdf>, at p. 32.

¹⁴ The job postings are online at <https://www.usajobs.gov/GetJob/ViewDetails/581632900>.

¹⁵ Executive Office for Immigration Review, EOIR Launches Resources to Increase Information and Representation, Oct. 1, 2020, <https://www.justice.gov/eoir/pr/eoir-launches-resources-increase-information-and-representation>.

within the control of EOIR's Office of Policy. This is a mistake. The goals of the ICH program simply cannot be met if it is administered by staff members of the very same agency adjudicating removal cases.

3) Proposed Rulemaking regarding Limited Representation Undermines Viability of LOP

On September 30, EOIR published a Notice of Proposed Rulemaking entitled, "Professional Conduct for Practitioners," that provides new rules and definitions for individuals providing limited representation and/or assisting individuals with filing applications and other materials before the immigration courts.¹⁶ While there are numerous changes proposed in the Rule that impact different stakeholders, we fear that a significant motivator behind the proposed changes and much of the rhetoric used throughout the Rule will further close the door to viable continued LOP services.¹⁷

Of greatest concern, the Proposed Rule dramatically expands the definition of "practice" as relevant to immigration, encompassing many actions that constitute core services within LOP components, and then goes on to provide that EOIR funds are not permitted to be used for such practice or preparation assistance.¹⁸ As providers we can attest that the LOP programs are essentially triage programs—attorneys and legal assistants and accredited representatives are trained to provide information and support for individuals facing life and death proceedings in a fast paced setting with far more individuals in need than the programs are funded to handle.¹⁹ Both the LOP and ICH programs are centered around the delivery of general and individual orientations, designed to empower individuals who often do not speak English as a first language to represent themselves before an immigration judge. Providing preparation assistance is a vital tool in the LOP and ICH providers' toolbox. Precluding the use of EOIR funding for this purpose essentially eviscerates EOIR's legal access programs, at least insofar as those programs are actually intended to *help* individuals understand their legal rights.

There are other problematic components to this Proposed Rule, including a tone of general hostility toward limited representation and additional bureaucratic hurdles for LOP and other legal service providers providing *pro se* support. In a footnote, for example, the Department "notes that it expects practitioners to engage only rarely in acts of preparation,

¹⁶ Professional Conduct for Practitioners - Rules and Procedures, and Representation and Appearances, 85 FR 61640, Sept. 30, 2020.

¹⁷ Numerous LOP providers submitted a joint comment opposing many of the Proposed Rule's provisions, available at <https://immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2020-11/Comments-for-EOIR-Limited-Rep-NPRM-LOP-providers-10-30-20-final-submitted-0.pdf>.

¹⁸ See *id.* at Section IV, introductory text.

¹⁹ For an example of the life and death stakes faced by those seeking relief in immigration court, see Kevin Sieff, Washington Post, "When death awaits deported asylum seekers," Dec. 26, 2018, <https://www.washingtonpost.com/graphics/2018/world/when-death-awaits-deported-asylum-seekers/>.

because of the inherent likelihood that a practitioner will exercise legal judgment or provide legal advice while performing otherwise ministerial tasks such as serving as a scribe in filling out a form.”²⁰ Such an approach to acts of legal orientation and preparation, as distinct from providing legal advice, are problematic coming from EOIR, an agency overseeing the cases of hundreds of thousands of individuals with backlogged proceedings and chaotic operating procedures.

4) Changes (and Proposed Changes) to Contracts Governing LOP Programs

Over the course of the Trump Administration, all three programs under the Legal Orientation Program umbrella have been shifted from a fixed price contract to time and materials. In practice, this means that the non-profit organizations providing LOP services receive varied payments depending on the number of hours dedicated to the program during that particular pay period. While this may sound reasonable in the abstract, it is potentially crippling in the context of the LOP programs. LOP providers are all non-profit organizations. LOP programs operate in immigration courts and immigration detention centers—spaces where the number of individuals in need of services and the circumstances under which services are provided are *constantly* in flux. In Immigration and Customs Enforcement detention centers, for example, the actual number of individuals detained can vary greatly from month to month, yet LOP providers must be able to maintain consistent staffing to meet the needs of those detained at each facility when it is at full capacity. If the facility sees a dip in population, the funds the organization will receive will decrease, yet the budget needs (salary and overhead costs for LOP staff) will remain constant.

Attempting to maintain consistent staffing when the funds incoming through the contract vary dramatically each month can be difficult if not impossible for non-profits. The flexibility in staffing this contracting model demands is simply unrealistic in the context of LOP, where service provision is highly specialized and hiring and properly training staff is time intensive. In addition to the unreasonable budget and staffing challenges time and material pricing causes LOP providers, the added administrative tasks of tracking contract hours by the type of work done is causing a significant strain on the efficiency of non-profit LOP staff and the programs.

In addition to these changes already in place in the contracts governing the LOP programs, EOIR proposed changes to the Statements of Work governing all three LOP programs with very little notice before the task orders had to be renewed. These changes included: provisions giving EOIR full access to the databases used by our organizations to log individual orientations (eliminating our ability to ensure LOP participants’ confidentiality); language discouraging LOP providers from making referrals to attorneys working at the same organization for direct representation; and dramatically limiting LOP providers’ discretion and flexibility in meeting the needs of individual LOP participants by restricting providers’ speech and

²⁰ See NPRM, *supra* n. 15, at FN 8.

unreasonably limiting the exercise of judgment. Any one of these changes would threaten the integrity of legal access programming and render critical services meaningless for the individuals they are meant to serve. Although most of those changes were not adopted at the time of the task order renewals because they conflicted with the Blanket Purchase Agreement underlying the work, we have learned that EOIR is now intending to modify the terms of the Blanket Purchase Agreement to ensure such changes are adopted.

5) Modifications to the BIA Pro Bono Project

Since 2001, the BIA Pro Bono Project has facilitated pro bono legal representation for indigent, detained individuals whose cases are before the Board of Immigration Appeals. The project is self-funded and coordinated by the Catholic Legal Immigration Network, Inc. (CLINIC), which works in partnership with EOIR to identify cases in need of representation. The BIA Pro Bono Project has long experienced bipartisan support within EOIR and has worked to leverage private resources to help streamline efficiency of the immigration court process. The majority of individuals represented through the BIA Pro Bono Project are asylum seekers. In October 2019, EOIR implemented changes to the project that severely restricted CLINIC's ability to screen cases for representation and to match respondents with pro bono counsel. Prior to these changes, in fiscal year 2019 the BIA Pro Bono Project placed 142 cases with pro bono counsel. As a result of EOIR's restrictions, in fiscal year 2020 that number dropped to 12.

Taken separately, each of the steps above might seem small in scope. Taken together, they represent an unprecedented assault on the ability of non-profit legal service providers to work in partnership with EOIR to provide basic due process protections for individuals attempting to navigate the immigration court system alone and, in many cases, from behind bars. EOIR has taken these steps away from public view, with our organizations—*the ones providing the services at issue*—largely unaware of changes directly impacting their work.

We urge you to take the following actions to assert your subcommittee's power of the purse with regard to EOIR's use of funds appropriated for LOP in a manner that appears at odds with the letter and spirit of the appropriations law.

Specifically, we urge you to:

- 1) Demand an accounting for all funds spent or obligated under the full \$18 million appropriated budget for LOP in the FY20 bill, especially given the static nature of the ICH program despite funded expansion funds;

- 2) Inquire as to the source of funds for the online ICOR system and the hiring of 26 federal employees to serve as ICH specialists, and if such funds are coming from funds appropriated for LOP require remedial action;
- 3) Ensure that EOIR ceases efforts to modify the terms of the Blanket Purchase Agreement or Statements of Work governing the LOP programs in any manner that undermines the ability of non-profit subcontractors to continue providing high quality and independent legal orientation services;
- 4) Ensure that EOIR reverts the LOP contracts (for all three programs) to fixed price;
- 5) Ensure that the NPRM entitled “Professional Conduct for Practitioners” is amended prior to finalization to remove the prohibition on use of funds for preparation, and otherwise to ensure the Rule in no way undermines or puts at risk the integrity of LOP programming; and
- 6) Ensure that EOIR staff consider options for protecting respondents’ privacy and encouraging access to counsel, such as having respondents sign a release form allowing BIA Pro Bono staff access to their file and improving electronic access to case files for respondents and BIA Pro Bono Staff.

Thank you for your steadfast support and commitment to legal access programming in the United States immigration court system. With any questions, please contact Heidi Altman at the National Immigrant Justice Center at 312-718-5021 or haltman@heartlandalliance.org.

Sincerely,

American Bar Association

American Gateways

Capital Area Immigrants’ Rights (CAIR) Coalition

Catholic Charities Archdiocese of Boston Refugee and Immigrant Services Division

Catholic Charities Archdiocese of Galveston- Houston, Cabrini Center

Catholic Charities Atlanta

Catholic Charities of the Archdiocese of Newark

Catholic Charities of the Archdiocese of Washington

Catholic Legal Services, Archdiocese of Miami

Diocesan Migrant & Refugee Services, Inc.

Esperanza Immigrant Rights Project

Florence Immigrant & Refugee Rights Project

Immigrant & Refugee Services, Catholic Charities Community Services, Archdiocese of New York

Immigration Center for Women and Children

Mid-South Immigration Advocates

National Immigrant Justice Center

Pennsylvania Immigration Resource Center (PIRC)

Rocky Mountain Immigrant Advocacy Network

U.S. Conference of Catholic Bishops, Migration and Refugee Services