

STATE OF NEW YORK

81--B

2021-2022 Regular Sessions

IN SENATE

(Prefiled)

January 6, 2021

Introduced by Sens. HOYLMAN, BAILEY, BIAGGI, BRISPORT, BROUK, CLEARE, COONEY, GIANARIS, HARCKHAM, JACKSON, KAPLAN, KAVANAGH, LIU, MAY, MYRIE, PARKER, PERSAUD, RAMOS, RIVERA, SALAZAR, SEPULVEDA, STAVISKY -- read twice and ordered printed, and when printed to be committed to the Committee on Finance -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- recommitted to the Committee on Finance in accordance with Senate Rule 6, sec. 8 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the executive law, in relation to establishing the right to legal counsel in immigration court proceedings and providing for the administration thereof

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. This act shall be known and may be cited as "the access to
2 representation act".

3 § 2. The executive law is amended by adding a new section 94-d to read
4 as follows:

5 § 94-d. Right to counsel in immigration court proceedings. 1. Defi-
6 nitions. As used in this section:

7 (a) "Administrator" means the director of the New York state office
8 for new Americans.

9 (b) "Covered individual" means any income-eligible individual in
10 detention in New York, transferred from detention in New York to immi-
11 gration detention in another state, or who is subject to removal or
12 inspection pursuant to 8 U.S.C. § 1229a or 8 U.S.C. § 1225 and their
13 implementing regulations, or subject to a final order of removal under 8
14 C.F.R. § 1241.1, regardless of age, in a covered proceeding who is:

15 (i) a New York state domiciliary who is a non-United States citizen;

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

LBD02529-04-2

1 (ii) a New York state domiciliary who is a United States citizen or
2 whose United States citizenship is in dispute; or

3 (iii) any individual whose proceedings have a significant nexus to New
4 York state such that they should be provided relief under this statute.
5 Significant nexus shall be established in the following circumstances:
6 if an individual is in detention or incarcerated in the state of New
7 York, if an individual is transferred by federal immigration authorities
8 from New York to immigration detention in another state, if an individ-
9 ual has an immigration case in a tribunal located in the state of New
10 York, if an individual is a New York domiciliary and detained by federal
11 immigration authorities anywhere in the United States, if an individual
12 had an immigration case located in a tribunal in New York before being
13 transferred by immigration authorities from detention in New Jersey to
14 immigration detention in another state or, as determined by the adminis-
15 trator or designee of the administrator.

16 (c) "Covered proceeding" means any proceeding in a covered venue in
17 which a covered individual is seeking an avenue of relief from removal
18 from the United States, or is challenging his or her arrest or detention
19 under the Immigration and Nationality Act ("INA"), as amended, and its
20 implementing regulations. A covered proceeding includes, if applicable,
21 a proceeding or hearing in immigration court; a proceeding before the
22 United States Citizenship and Immigration Services; a proceeding in a
23 tribunal located in New York for purposes of obtaining any order neces-
24 sary for or relevant to immigration relief; a habeas corpus or other
25 relevant petition to a federal district court challenging detention
26 under the INA; motions to reopen or reconsider under 8 U.S.C. § 1229(a);
27 a petition for review under 8 U.S.C. § 1252; a remand to a federal
28 district court from the United States Circuit Courts of Appeals for
29 fact-finding purposes; and any appeal related to any of the foregoing to
30 the Board of Immigration Appeals, the United States Circuit Courts of
31 Appeals, and/or the United States Supreme Court.

32 (d) "Covered venue" means: (i) an immigration court anywhere in the
33 United States where the case of a covered individual is located; (ii)
34 any tribunal located within New York state, including, but not limited
35 to, family courts and federal district courts; (iii) with respect to the
36 provision of legal services in the context of expedited removals, any
37 location within the borders of New York state where expedited removals
38 are processed; (iv) the Board of Immigration Appeals; (v) the United
39 States Circuit Courts of Appeals; (vi) the United States Supreme Court;
40 (vii) United States Citizenship and Immigration Services; and (viii) any
41 tribunal as determined by the administrator or a designee of the admin-
42 istrator on a case-by-case basis.

43 (e) "Domicile" means a principal location where a person, wherever
44 temporarily located, intends to reside.

45 (f) "Domiciliary" means a person that has established domicile with
46 respect to a particular jurisdiction.

47 (g) "Immigration court" means a tribunal of the Executive Office for
48 Immigration Review or a successor entity tasked with deciding the inad-
49 missibility or deportability of a noncitizen of the United States that
50 is presided over by an immigration judge as defined in 8 U.S.C. §
51 1101(b)(4).

52 (h) "Income-eligible individual" means an individual who is deemed
53 eligible for legal services in a covered proceeding based on pre-set
54 income-related criteria promulgated by the administrator, but in any
55 event must at a minimum include any individual whose annual gross house-
56 hold income is not in excess of two hundred percent of the federal

poverty guidelines as updated periodically in the Federal Register by the United States Department of Health and Human Services under the authority of 42 U.S.C. § 9902(2).

(i) "Legal services" means individualized legal assistance in a single consultation and/or ongoing legal representation, provided by a legal services provider to a covered individual, and all legal advice, advocacy, and assistance, including but not limited to social service assistance, associated with such service.

(j) "Legal services provider" means an individual, organization, or association that has the authority to provide legal services and is designated by the administrator to provide such services.

2. Right to counsel in immigration proceedings. (a) All covered individuals shall have the right to legal services as provided in this paragraph.

(i) Covered individuals facing a covered proceeding shall have the right to ongoing legal representation until termination is authorized pursuant to paragraphs (c) and (d) of this subdivision.

(ii) Covered individuals facing a covered proceeding in a covered venue other than an immigration court in New York or New Jersey shall have the right to a consultation provided by a legal services provider, and if found by the legal services provider to have a viable application for appeal, challenge to a court order, or other form of relief from removal from the United States, shall have the right to ongoing legal representation.

(b) The right to counsel established in paragraph (a) of this subdivision shall attach:

(i) In the case of proceedings for removal pursuant to 8 U.S.C. § 1229a, upon receipt of a Notice to Appear, as defined in 8 U.S.C. § 1229. The obligations of this section shall be satisfied if counsel is provided to a covered individual no later than their first appearance in a covered proceeding, or as soon thereafter as is practicable.

(ii) In the case of removal proceedings pursuant to 8 U.S.C. § 1225, upon the commencement of such proceedings, or as soon thereafter as is practicable.

(iii) In the case of a referral to an immigration judge for a hearing pursuant to 8 U.S.C. § 1231(b)(3) or 8 U.S.C. § 1158, upon receipt of a Notice of Referral to Immigration Judge, or as soon thereafter as is practicable.

(iv) In the case of a reinstatement of a final order of removal, upon such reinstatement, or as soon thereafter as is practicable.

(v) In all other cases, as soon as is practicable.

(c) Subject to the provisions of paragraph (d) of this subdivision, the right to counsel established in paragraph (a) of this subdivision shall terminate:

(i) upon the termination or dismissal of removal proceedings or any related appellate matter in respect of a covered individual by the immigration court or other competent tribunal or authority;

(ii) upon the issuance of a final order or judgment in respect to a covered individual's removal proceedings from which there remains no opportunity for appeal or other avenue for relief including, but not limited to, motions to reopen, motions to reconsider, and petitions for review; provided, however, that legal services providers shall not be required to pursue appeals or other avenues for relief that are speculative or frivolous;

1 (iii) if an individual covered by virtue of being a New York state
2 domiciliary ceases to be a New York state domiciliary and establishes
3 domicile in a jurisdiction outside of New York state;

4 (iv) if an individual covered by virtue of being transferred from New
5 York to immigration detention in another state is released from
6 detention and is not a New York state domiciliary;

7 (v) if it is discovered that the initial determination that an indi-
8 vidual was an income-eligible individual was erroneous at the time that
9 such determination was made, as soon as such discovery occurs; provided,
10 however, that such individual will continue to be provided with legal
11 services pursuant to this subdivision for a reasonable amount of time to
12 enable such person to obtain alternative counsel, so as not to mate-
13 rially prejudice such individual's chance of success in any covered
14 proceeding;

15 (vi) if a covered individual knowingly and voluntarily waives the
16 right to counsel; or

17 (vii) upon a determination by a legal services provider after the
18 consultation described in subparagraph (ii) of paragraph (a) of this
19 subdivision that a covered individual facing a covered proceeding in a
20 covered venue other than an immigration court has no viable application
21 for appeal, challenge to a court order, nor other form of relief from
22 removal from the United States.

23 (d) Notwithstanding the requirements of paragraph (c) of this subdivi-
24 sion, the rights established in paragraph (a) of this subdivision shall
25 not terminate if:

26 (i) an immigration judge declines to allow a legal services provider
27 to withdraw from representing a covered individual; or

28 (ii) a legal services provider is prohibited from ceasing to provide
29 legal services pursuant to the New York Rules of Professional Conduct or
30 the Executive Office for Immigration Review's Practice Manual.

31 3. Powers and duties of the administrator. The administrator is
32 charged with implementing the requirements of this section no later than
33 January first, two thousand thirty, and shall promulgate such rules,
34 policies, and procedures necessary and appropriate to accomplish such
35 implementation no later than January first, two thousand twenty-four.
36 Such rules, policies, and procedures shall include, but not be limited
37 to, the measures delineated in this subdivision, with annual benchmarks
38 to ensure full implementation by January first, two thousand thirty.
39 The administrator shall have the power and responsibility, independently
40 and/or through one or more designees, to:

41 (a) ensure that all covered individuals be advised of their right to
42 counsel and be offered legal services as provided in paragraph (a) of
43 subdivision two of this section;

44 (b) ensure independent, competent, high quality, and zealous represen-
45 tation of covered individuals receiving legal services provided pursuant
46 to this section;

47 (c) examine, evaluate, and monitor legal services provided pursuant to
48 this section;

49 (d) collect and receive information and data regarding the provision
50 of legal services not protected by attorney-client privilege, work prod-
51 uct privilege, or any other applicable privilege, or that can be
52 disclosed by legal services providers without violating the New York
53 Rules of Professional Conduct, including but not limited to:

54 (i) the types and combinations of such services being utilized across
55 the state;

1 (ii) the salaries and other compensation paid to individual adminis-
2 trators, attorneys, and staff in connection with the provision of such
3 services;

4 (iii) the caseloads of legal services providers providing legal
5 services in connection with the provision of such services;

6 (iv) the types, nature, and timing of dispositions of cases handled by
7 legal services providers providing legal services;

8 (v) the actual expenditures currently being made in connection with
9 the provision of legal services; and

10 (vi) the time, funds, and in-kind resources currently being spent on
11 providing such legal services and the amount being spent on ancillary
12 services such as support staff and expert witnesses;

13 (e) analyze and evaluate collected data, and undertake any necessary
14 research and studies, in order to consider and recommend measures to
15 enhance the provision of effective legal services and to ensure that
16 recipients of legal services are provided with quality representation
17 from fiscally responsible providers, which shall include but not be
18 limited to standards, criteria, and a process for qualifying and re-qua-
19 lifying legal services providers to provide legal services;

20 (f) establish measures of performance which programs shall regularly
21 report to the administrator to assist the administrator in monitoring
22 the quality of legal services;

23 (g) establish the standards and criteria used in programs to determine
24 whether individual legal services providers are qualified to provide
25 legal services;

26 (h) establish the criteria and procedures used to determine whether a
27 person is eligible to receive legal services, including requirements
28 related to income and domicile, and to track the number of persons
29 considered for and applicants denied such services, the reasons for the
30 denials, and the results of any review of such denials;

31 (i) establish standards and criteria for the provision of legal
32 services in cases involving a conflict of interest;

33 (j) develop recommendations to improve the delivery of legal services;

34 (k) target grants and establish strategic programs in support of inno-
35 vative and cost-effective solutions that enhance the provision of and
36 capacity for legal services, including, but not limited to, a capacity
37 building pipeline to bring new attorneys into the field and including
38 collaborative efforts serving multiple jurisdictions where covered indi-
39 viduals and covered proceedings are located;

40 (l) investigate and monitor any other matter relevant to the provision
41 of legal services which the administrator deems important;

42 (m) request and receive from any department, division, board, bureau,
43 commission, or other agency of the state or any political subdivision of
44 the state or any public authority such assistance, information, and data
45 as will enable the administrator to properly carry out its functions,
46 powers, and duties, subject to limitations on the disclosure of informa-
47 tion provided on a privileged basis to legal services providers, as well
48 as limitations on the disclosure of information by legal services
49 providers under the New York Rules of Professional Conduct;

50 (n) apply for and accept any grant or other source of funding for
51 purposes of carrying out the requirements of this section. Any sums so
52 received may be expended by the administrator to effectuate the fulfill-
53 ment of any such requirement, subject to any relevant requirements
54 related to the approval of expenditure of funds and audits of such
55 expenditures;

1 (o) develop, publish, and implement a written plan that establishes
2 numerical caseload/workload standards for all legal services providers,
3 with such plan to be completed and published within one hundred eighty
4 days after the enactment of this section, and to monitor and period-
5 ically report on the implementation of and compliance with the plan;

6 (p) develop and implement a written plan, and to monitor and period-
7 ically report on the implementation of and compliance with such plan, to
8 improve the quality of legal services provided to covered individuals,
9 and to ensure that legal services providers providing such represen-
10 tation receive effective supervision and training, have access to and
11 appropriately utilize interpreters and expert witnesses on behalf of
12 clients, communicate effectively with their clients, have the necessary
13 qualifications and experience;

14 (q) beginning in two thousand twenty-five, and by September fifteenth
15 of each year thereafter, submit a report to the governor, the speaker of
16 the assembly, and the temporary president of the senate, describing
17 compliance with the requirements of this section, including but not
18 limited to:

19 (i) the criteria used to determine whether an individual is eligible
20 for legal services;

21 (ii) the procedures used to determine whether an individual is eligi-
22 ble to receive legal services;

23 (iii) the number of individuals deemed eligible and ineligible for
24 legal services;

25 (iv) the number of cases started and completed and the outcomes of
26 those cases; and

27 (v) qualitative review of the legal services provided; and

28 (r) beginning in two thousand twenty-five, and by September fifteenth
29 of every second year thereafter, in consultation with the advisory
30 committee, submit a report to the governor, the speaker of the assembly,
31 the temporary president of the senate, and the director of the division
32 of the budget, presenting an analysis of qualitative and quantitative
33 data on immigration court cases and immigration enforcement activity and
34 recommendations for adjustments in funding to ensure compliance with
35 this section.

36 4. Funding. (a) The state shall establish a dedicated fund and shall
37 appropriate sufficient sums into such fund to fully carry out the
38 requirements of this section. Funds necessary to fully carry out the
39 requirements of this section shall be determined annually by December
40 first of each year by the secretary of state, in consultation with the
41 administrator and the director of the division of the budget upon review
42 of the report submitted by the administrator pursuant to paragraph (r)
43 of subdivision three of this section.

44 (b) The administrator will be charged with ensuring that appropriated
45 funds are timely distributed to legal services providers for the
46 provision of legal services.

47 (c) Notwithstanding the requirements of paragraphs (a) and (b) of this
48 subdivision, sums appropriated to carry out the requirements of this
49 section shall be used to supplement and not supplant any state, local,
50 or private funding that is, or is anticipated to be, expended for the
51 provision of legal services to covered individuals, and the state shall
52 not be required to appropriate any funds for legal services to the
53 extent that obligations associated with the provision of legal services
54 are otherwise fully satisfied by funds received from state, local, or
55 private sources, or by the United States government in satisfaction of
56 any legal obligation.

1 5. Advisory committee. (a) There shall be an advisory committee which
2 shall work, in collaboration with the administrator, to develop
3 programs, policies, training, and procedures necessary to effectuate the
4 requirements of this section. The administrator shall collaborate with
5 the advisory committee on matters including, but not limited to:

6 (i) the rates of compensation for legal services;

7 (ii) community engagement efforts;

8 (iii) the sufficiency of access to and the quality of legal services
9 provided to covered individuals in covered venues;

10 (iv) the sufficiency of space available for designated providers in
11 covered venues;

12 (v) ensuring individuals with limited English proficiency have access
13 to appropriate translation services; and

14 (vi) other efforts by other states to support individuals facing
15 deportation.

16 (b) The advisory committee shall be comprised of nine members. The
17 governor shall appoint five members offering services to individuals in
18 covered proceedings, representing the geographic regions where covered
19 individuals and covered venues are located. The governor's appointees
20 shall further consist of no more than one representative of the private
21 bar and four representatives of legal services providers and represen-
22 tatives of community-based organizations offering services to covered
23 individuals. The speaker of the assembly and temporary president of the
24 senate shall appoint two members each. The administrator shall serve ex
25 officio. The governor shall designate one member to serve as chair of
26 the advisory committee.

27 (c) Each member, other than the member serving in an ex officio capac-
28 ity, shall serve for a term of two years, with initial terms for each
29 committee seat commencing on January first, two thousand twenty-four and
30 expiring on December thirty-first, two thousand twenty-six. Initial
31 appointments under this subdivision must be made within twenty days of
32 the effective date of this section. Any vacancies shall be filled
33 promptly and in the same manner as the original appointment, and the
34 appointee filling such vacancy shall serve for the unexpired portion of
35 the term of the succeeded member. Any committee member may be reap-
36 pointed for additional terms. A member of the advisory committee shall
37 continue in such position upon the expiration of their term and until
38 such time as they are reappointed or their successor is appointed, as
39 the case may be.

40 (d) Members of the advisory committee shall serve without compen-
41 sation, but shall be allowed and reimbursed for their reasonable actual
42 and necessary expenses incurred in performance of their functions under
43 this section by the administrator.

44 (e) The advisory committee's initial meeting shall take place within
45 thirty days of the appointment of all required committee members under
46 paragraph (b) of this subdivision, or within sixty days of the effective
47 date of this section, whichever is sooner. The advisory committee shall
48 meet no less than four times per year. The advisory committee may estab-
49 lish its own procedures with respect to the conduct of its meetings and
50 its other affairs; provided, however, that the quorum and majority
51 provisions of section forty-one of the general construction law shall
52 govern all actions taken by the advisory committee.

53 (f) Membership on the advisory committee shall not constitute the
54 holding of an office. The advisory committee shall not have the power
55 to exercise any portion of the sovereign power of the state. No member
56 of the advisory committee shall be disqualified from holding any public

1 office or employment, nor shall he or she forfeit any such office or
2 employment, by reason of his or her appointment pursuant to this
3 section, notwithstanding the provisions of any other general, special,
4 or local law; ordinance; or city charter.

5 (g) Beginning in two thousand twenty-four, the advisory committee
6 shall produce a report concerning its duties pursuant to this section
7 and any related recommendations, and such report shall be included in
8 the report submitted by the administrator to the governor, the speaker
9 of the assembly, and the temporary president of the senate under para-
10 graph (q) of subdivision three of this section.

11 6. No private right of action. Nothing in this section or the adminis-
12 tration or application thereof shall be construed to create a private
13 right of action on the part of any person or entity against the state or
14 any agency, instrumentality, official, or employee thereof.

15 7. Miscellaneous provisions. (a) Any legal services performed by a
16 legal services provider pursuant to this section shall not supplant,
17 replace, or satisfy any obligations or responsibilities of such legal
18 services provider pursuant to any other program, agreement, or contract.

19 (b) The provisions of this section shall supersede conflicting state
20 or local laws, rules, policies, procedures, and practices, except to the
21 extent that the provisions of any such state or local law, rule, policy,
22 procedure, or practice may provide any additional or greater right or
23 protection. Nothing in this section shall be interpreted or applied so
24 as to create any power, duty, or obligation prohibited by federal law.

25 (c) If any provision of this section or any application thereof to any
26 person or circumstance is held invalid, such invalidity shall not affect
27 any provision or application of this section that can be given effect
28 without the invalid provision or application. To this end, the
29 provisions of this section are severable.

30 § 3. This act shall take effect immediately.