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:

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

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

§ 94-d. Right to counsel in immigration court proceedings. 1. Definitions. As used in this section:

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

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

(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.

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

(iii) any individual whose proceedings have a significant nexus to New York state such that they should be provided relief under this statute. Significant nexus shall be established in the following circumstances: if an individual is in detention or incarcerated in the state of New York, if an individual is transferred by federal immigration authorities from New York to immigration detention in another state, if an individual has an immigration case in a tribunal located in the state of New York, if an individual is a New York domiciliary and detained by federal immigration authorities anywhere in the United States, if an individual had an immigration case located in a tribunal in New York before being transferred by immigration authorities from detention in New Jersey to immigration detention in another state or, as determined by the administrator or designee of the administrator.

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

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

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

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

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

(h) "Income-eligible individual" means an individual who is deemed eligible for legal services in a covered proceeding based on pre-set income-related criteria promulgated by the administrator, but in any event must at a minimum include any individual whose annual gross household 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;

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

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

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

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

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

(d) Notwithstanding the requirements of paragraph (c) of this subdivision, the rights established in paragraph (a) of this subdivision shall not terminate if:

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

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

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

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

(b) ensure independent, competent, high quality, and zealous representation of covered individuals receiving legal services provided pursuant to this section;

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

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

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

(ii) the salaries and other compensation paid to individual administrators, attorneys, and staff in connection with the provision of such services;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(p) develop and implement a written plan, and to monitor and periodically report on the implementation of and compliance with such plan, to improve the quality of legal services provided to covered individuals, and to ensure that legal services providers providing such representation receive effective supervision and training, have access to and appropriately utilize interpreters and expert witnesses on behalf of clients, communicate effectively with their clients, have the necessary qualifications and experience;

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

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

(ii) the procedures used to determine whether an individual is eligible to receive legal services;

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

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

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

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

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

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

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

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

(i) the rates of compensation for legal services;

(ii) community engagement efforts;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 3. This act shall take effect immediately.