

# STATE OF NEW YORK

999--A

2023-2024 Regular Sessions

## IN SENATE

January 9, 2023

Introduced by Sens. HOYLMAN-SIGAL, BAILEY, BRESLIN, BRISPORT, BROUK, CLEARE, COMRIE, COONEY, FERNANDEZ, GIANARIS, GONZALEZ, GOUNARDES, HARCKHAM, JACKSON, KAVANAGH, LIU, MAY, MAYER, MYRIE, PARKER, PERSAUD, RAMOS, RIVERA, SALAZAR, SEPULVEDA, SERRANO, STAVISKY, THOMAS, WEBB -- 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

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;

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

18 (iii) any individual whose proceedings have a significant nexus to New  
19 York state such that they should be provided relief under this statute.

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

LBD01980-04-3

1 Significant nexus shall be established in the following circumstances:  
2 if an individual is in detention or incarcerated in the state of New  
3 York, if an individual is transferred by federal immigration authorities  
4 from New York to immigration detention in another state, if an individ-  
5 ual has an immigration case in a tribunal located in the state of New  
6 York, if an individual is a New York domiciliary and detained by federal  
7 immigration authorities anywhere in the United States, if an individual  
8 had an immigration case located in a tribunal in New York before being  
9 transferred by immigration authorities from detention in New Jersey to  
10 immigration detention in another state or, as determined by the adminis-  
11 trator or designee of the administrator.

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

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

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

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

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

48 (h) "Income-eligible individual" means an individual who is deemed  
49 eligible for legal services in a covered proceeding based on pre-set  
50 income-related criteria promulgated by the administrator, but in any  
51 event must at a minimum include any individual whose annual gross house-  
52 hold income is not in excess of two hundred percent of the federal  
53 poverty guidelines as updated periodically in the Federal Register by  
54 the United States Department of Health and Human Services under the  
55 authority of 42 U.S.C. § 9902(2).

1 (i) "Legal services" means individualized legal assistance in a single  
2 consultation and/or ongoing legal representation, provided by a legal  
3 services provider to a covered individual, and all legal advice, advoca-  
4 cy, and assistance, including but not limited to social service assist-  
5 ance, associated with such service.

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

9 2. Right to counsel in immigration proceedings. (a) All covered indi-  
10 viduals shall have the right to legal services as provided in this para-  
11 graph.

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

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

22 (b) The right to counsel established in paragraph (a) of this subdivi-  
23 sion shall attach:

24 (i) In the case of proceedings for removal pursuant to 8 U.S.C. §  
25 1229a, upon receipt of a Notice to Appear, as defined in 8 U.S.C. §  
26 1229. The obligations of this section shall be satisfied if counsel is  
27 provided to a covered individual no later than their first appearance in  
28 a covered proceeding, or as soon thereafter as is practicable.

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

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

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

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

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

42 (i) upon the termination or dismissal of removal proceedings or any  
43 related appellate matter in respect of a covered individual by the immi-  
44 gration court or other competent tribunal or authority;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

53 (i) the types and combinations of such services being utilized across  
54 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 twenty  
4 days after the effective date of this section, and to monitor and peri-  
5 odically 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 on September fifteenth, one year after the effective  
15 date of this section, and by September fifteenth of each year thereaft-  
16 er, submit a report to the governor, the speaker of the assembly, and  
17 the temporary president of the senate, describing compliance with the  
18 requirements of this section, including but not 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 on September fifteenth, one year after the effective  
29 date of this section, and by September fifteenth of every second year  
30 thereafter, in consultation with the advisory committee, submit a report  
31 to the governor, the speaker of the assembly, the temporary president of  
32 the senate, and the director of the division of the budget, presenting  
33 an analysis of qualitative and quantitative data on immigration court  
34 cases and immigration enforcement activity and recommendations for  
35 adjustments in funding to ensure compliance with 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 ninety days after the effective date of this  
30 section. Initial appointments under this subdivision must be made with-  
31 in sixty days of the effective date of this section. Any vacancies  
32 shall be filled promptly and in the same manner as the original appoint-  
33 ment, and the appointee filling such vacancy shall serve for the unex-  
34 pired portion of the term of the succeeded member. Any committee member  
35 may be reappointed for additional terms. A member of the advisory  
36 committee shall continue in such position upon the expiration of their  
37 term and until such time as they are reappointed or their successor is  
38 appointed, as the case may be.

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

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

52 (f) Membership on the advisory committee shall not constitute the  
53 holding of an office. The advisory committee shall not have the power  
54 to exercise any portion of the sovereign power of the state. No member  
55 of the advisory committee shall be disqualified from holding any public  
56 office or employment, nor shall he or she forfeit any such office or

1 employment, by reason of his or her appointment pursuant to this  
2 section, notwithstanding the provisions of any other general, special,  
3 or local law; ordinance; or city charter.

4 (g) Beginning on September fifteenth, one year after the effective  
5 date of this section, the advisory committee shall produce a report  
6 concerning its duties pursuant to this section and any related recommen-  
7 dations, and such report shall be included in the report submitted by  
8 the administrator to the governor, the speaker of the assembly, and the  
9 temporary president of the senate under paragraph (g) of subdivision  
10 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.