

STATE OF NEW YORK

170--A

2023-2024 Regular Sessions

IN ASSEMBLY

(Prefiled)

January 4, 2023

Introduced by M. of A. CRUZ, ROZIC, COLTON, CARROLL, REYES, DARLING, SIMON, KIM, EPSTEIN, L. ROSENTHAL, WEPRIN, HYNDMAN, RAMOS, TAYLOR, COOK, THIELE, DAVILA, JOYNER, FALL, WILLIAMS, SEAWRIGHT, BURGOS, DINOWITZ, CLARK, MITAYNES, MAMDANI, KELLES, JACKSON, GONZALEZ-ROJAS, BURDICK, OTIS, GALLAGHER, JACOBSON, DE LOS SANTOS, CUNNINGHAM, DICKENS, RIVERA, ARDILA, RAGA, SHRESTHA, HEVESI, FORREST, ANDERSON, BORES, AUBRY, SOLAGES, WALKER, ALVAREZ, SHIMSKY, JEAN-PIERRE, McDONALD, HUNTER, LEVENBERG, LEE, MEEKS, LAVINE, PAULIN, FAHY, GIBBS, SIMONE, O'DONNELL, TAPIA, BICHOTTE HERMELYN, SEPTIMO -- read once and referred to the Committee on Codes -- 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:

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

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

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

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

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

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

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

48 (g) "Immigration court" means a tribunal of the Executive Office for
49 Immigration Review or a successor entity tasked with deciding the inad-
50 missibility or deportability of a noncitizen of the United States that
51 is presided over by an immigration judge as defined in 8 U.S.C. §
52 1101(b)(4).

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

1 hold income is not in excess of two hundred percent of the federal
2 poverty guidelines as updated periodically in the Federal Register by
3 the United States Department of Health and Human Services under the
4 authority of 42 U.S.C. § 9902(2).

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

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

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

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

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

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

28 (i) In the case of proceedings for removal pursuant to 8 U.S.C. §
29 1229a, upon receipt of a Notice to Appear, as defined in 8 U.S.C. §
30 1229. The obligations of this section shall be satisfied if counsel is
31 provided to a covered individual no later than their first appearance in
32 a covered proceeding, or as soon thereafter as is practicable.

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

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

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

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

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

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

49 (ii) upon the issuance of a final order or judgment in respect to a
50 covered individual's removal proceedings from which there remains no
51 opportunity for appeal or other avenue for relief including, but not
52 limited to, motions to reopen, motions to reconsider, and petitions for
53 review; provided, however, that legal services providers shall not be
54 required to pursue appeals or other avenues for relief that are specula-
55 tive 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 of the sixth year following the effective date of this
34 section, and shall promulgate such rules, policies, and procedures
35 necessary and appropriate to accomplish such implementation no later
36 than January first of the first year following the effective date of
37 this section. Such rules, policies, and procedures shall include, but
38 not be limited to, the measures delineated in this subdivision, with
39 annual benchmarks to ensure full implementation by January first of the
40 sixth year following the effective date of this section. The adminis-
41 trator shall have the power and responsibility, independently and/or
42 through one or more designees, to:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 related to the approval of expenditure of funds and audits of such
2 expenditures;

3 (o) develop, publish, and implement a written plan that establishes
4 numerical caseload/workload standards for all legal services providers,
5 with such plan to be completed and published within one hundred twenty
6 days after the effective date of this section, and to monitor and peri-
7 odically report on the implementation of and compliance with the plan;

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

16 (q) beginning on September fifteenth, one year after the effective
17 date of this section, and by September fifteenth of each year thereaft-
18 er, submit a report to the governor, the speaker of the assembly, and
19 the temporary president of the senate, describing compliance with the
20 requirements of this section, including but not limited to:

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

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

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

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

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

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

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

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

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

1 private sources, or by the United States government in satisfaction of
2 any legal obligation.

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

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

9 (ii) community engagement efforts;

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

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

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

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

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

29 (c) Each member, other than the member serving in an ex officio capac-
30 ity, shall serve for a term of two years, with initial terms for each
31 committee seat commencing ninety days after the effective date of this
32 section. Initial appointments under this subdivision must be made with-
33 in sixty days of the effective date of this section. Any vacancies
34 shall be filled promptly and in the same manner as the original appoint-
35 ment, and the appointee filling such vacancy shall serve for the unex-
36 pired portion of the term of the succeeded member. Any committee member
37 may be reappointed for additional terms. A member of the advisory
38 committee shall continue in such position upon the expiration of their
39 term and until such time as they are reappointed or their successor is
40 appointed, as the case may be.

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

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

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

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

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

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

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

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

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

32 § 3. This act shall take effect immediately.