

# 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 (g) 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.