

# WEST VIRGINIA LEGISLATURE

## 2019 REGULAR SESSION

**Enrolled**  
**Committee Substitute**  
**for**  
**Senate Bill 408**

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

2019 MAR 22 P 3:33

FILED

SENATORS PALUMBO AND WOELFEL, *original sponsors*

[Passed March 4, 2019; in effect 90 days from  
passage]

SB 408

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1 AN ACT to amend and reenact §29-21-16 of the Code of West Virginia, 1931, as amended,  
2 relating to public defender services generally; clarifying the person to determine financial  
3 eligibility for public defender services; empowering court administrators in circuits which  
4 have one to make the eligibility determination; continuing the authority of public defender  
5 offices to make eligibility decisions in circuits with a public defender office but without a  
6 court administrator; and authorizing circuit courts to make eligibility decisions in circuits  
7 with neither a court administrator nor a public defender office.

*Be it enacted by the Legislature of West Virginia:*

**ARTICLE 21. PUBLIC DEFENDER SERVICES.**

**§29-21-16. Determination of maximum income levels; eligibility guidelines; use of form affidavit; inquiry by court; denial of services; repayment; limitation on remedies against affiant.**

1 (a) The agency shall establish and periodically review and update financial guidelines for  
2 determining eligibility for legal representation made available under the provisions of this article.  
3 The agency shall adopt a financial affidavit form for use by persons seeking legal representation  
4 made available under the provisions of this article.

5 (b) All persons seeking legal representation made available under the provisions of this  
6 article shall complete the agency's financial affidavit form, which shall be considered as an  
7 application for the provision of publicly funded legal representation.

8 (c) Any juvenile shall have the right to be effectively represented by counsel at all stages  
9 of proceedings brought under the provisions of §49-4-701 through §49-4-725 of this code. If the  
10 juvenile advises the court of his or her inability to pay for counsel, the court shall require the  
11 juvenile's parent or custodian to execute a financial affidavit. If the financial affidavit demonstrates  
12 that neither of the juvenile's parents, or, if applicable, the juvenile's custodian, has sufficient  
13 assets to pay for counsel, the court shall appoint counsel for the juvenile. If the financial affidavit  
14 demonstrates that either of the juvenile's parents, or, if applicable, the juvenile's custodian, does

15 have sufficient assets to pay for counsel, the court shall order the parent, or, if applicable, the  
16 custodian, to provide, by paying for, legal representation for the juvenile in the proceedings.

17           The court may disregard the assets of the juvenile's parents or custodian and appoint  
18 counsel for the juvenile, as provided in this section, if the court concludes, as a matter of law, that  
19 the juvenile and the parent or custodian have a conflict of interest that would adversely affect the  
20 juvenile's right to effective representation of counsel, or concludes, as a matter of law, that  
21 requiring the juvenile's parent or custodian to provide legal representation for the juvenile would  
22 otherwise jeopardize the best interests of the juvenile.

23           (d) In any circuit in which there exists a trial court administrator, the office of the  
24 administrator shall make determinations of indigency. In circuits in which a public defender office  
25 is in operation and a trial court administrator does not exist, all determinations of indigency shall  
26 be made by a public defender office employee designated by the executive director. In circuits in  
27 which no trial court administrator or public defender office is in operation, circuit judges shall make  
28 all determinations of eligibility. The determinations shall be made after a careful review of the  
29 financial affidavit submitted by the person seeking representation. The review of the affidavit shall  
30 be conducted in accord with the financial eligibility guidelines established by the agency pursuant  
31 to subsection (a) of this section. In addition to the financial eligibility guidelines, the person  
32 determining eligibility shall consider other relevant factors, including, but not limited to, those set  
33 forth in subdivisions (1) through (9), subsection (e) of this section. If there is substantial reason to  
34 doubt the accuracy of information in the financial affidavit, the person determining eligibility may  
35 make any inquiries necessary to determine whether the affiant has truthfully and completely  
36 disclosed the required financial information.

37           After reviewing all pertinent matters, the person determining eligibility may find the affiant  
38 eligible to have the total cost of legal representation provided by the state, or may find that the  
39 total cost of providing representation shall be apportioned between the state and the eligible  
40 person. A person whose annual income exceeds the maximum annual income level allowed for

41 eligibility may receive all or part of the necessary legal representation, or a person whose income  
42 falls below the maximum annual income level for eligibility may be denied all or part of the  
43 necessary legal representation if the person determining eligibility finds the person's particular  
44 circumstances require that eligibility be allowed or disallowed, as the case may be, on the basis  
45 of one or more of the nine factors set forth in subsection (e) of this section. If legal representation  
46 is made available to a person whose income exceeds the maximum annual income level for  
47 eligibility, or if legal representation is denied to a person whose income falls below the maximum  
48 annual income level for eligibility, the person determining eligibility shall make a written statement  
49 of the reasons for the action and shall specifically relate those reasons to one or more of the  
50 factors set forth in subsection (e) of this section.

51 (e) The following factors shall be considered in determining eligibility for legal  
52 representation made available under the provisions of this article:

53 (1) Current income prospects, taking into account seasonal variations in income;

54 (2) Liquid assets, assets which may provide collateral to obtain funds to employ private  
55 counsel, and other assets which may be liquidated to provide funds to employ private counsel;

56 (3) Fixed debts and obligations, including federal, state, and local taxes, and medical  
57 expenses;

58 (4) Child care, transportation, and other expenses necessary for employment;

59 (5) Age or physical infirmity of resident family members;

60 (6) Whether the person seeking publicly funded legal representation has made reasonable  
61 and diligent efforts to obtain private legal representation, and the results of those efforts;

62 (7) The cost of obtaining private legal representation with respect to the particular matter  
63 in which assistance is sought;

64 (8) Whether the person seeking publicly funded legal representation has posted a cash  
65 bond for bail or has obtained release on bond for bail through the services of a professional  
66 bondsman for compensation and the amount and source of the money provided for the bond;

67 (9) The consequences for the individual if legal assistance is denied.

68 (f) Legal representation requested by the affiant may not be denied, in whole or part,  
69 unless the affiant can obtain legal representation without undue financial hardship. A person  
70 determined to be ineligible by public defender personnel may have the initial determination  
71 reviewed by a local circuit judge who may amend, modify, or rewrite the initial determination. At  
72 any stage of the proceedings a circuit court may determine a prior finding of eligibility was incorrect  
73 or has become incorrect as the result of the affiant's changed financial circumstances, and may  
74 revoke any prior order providing legal representation. In that event, any attorney previously  
75 appointed shall be entitled to compensation under the provisions of law applicable to the  
76 appointment for services already rendered.

77 (g) In the circumstances and manner set forth below, circuit judges may order repayment  
78 to the state, through the office of the clerk of the circuit court having jurisdiction over the  
79 proceedings, of the costs of representation provided under this article:

80 (1) In every case in which services are provided to an indigent person and an adverse  
81 judgment has been rendered against such person, the court may require that person, and in  
82 juvenile cases, may require the juvenile's parents or custodian, to pay as costs the compensation  
83 of appointed counsel, the expenses of the defense, and any other fees and costs authorized by  
84 statute;

85 (2) The court shall not order a person to pay costs unless the person is able to pay without  
86 undue hardship. In determining the amount and method of repayment of costs, the court shall  
87 take account of the financial resources of the person, the person's ability to pay, and the nature  
88 of the burden that payment of costs will impose. The fact that the court initially determines, at the  
89 time of a case's conclusion, that it is not proper to order the repayment of costs does not preclude  
90 the court from subsequently ordering repayment if the person's financial circumstances change;

91 (3) When a person is ordered to repay costs, the court may order payment to be made  
92 immediately or within a specified period of time or in specified installments. If a person is

93 sentenced to a term of imprisonment, an order for repayment of costs is not enforceable during  
94 the period of imprisonment unless the court expressly finds, at the time of sentencing, that the  
95 person has sufficient assets to pay the amounts ordered to be paid or finds there is a reasonable  
96 likelihood the person will acquire the necessary assets in the foreseeable future;

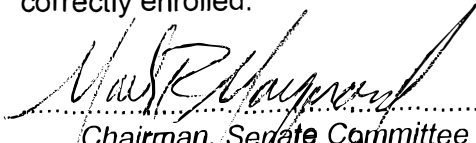
97 (4) A person who has been ordered to repay costs, and who is not in contumacious default  
98 in the payment thereof, may at any time petition the sentencing court for modification of the  
99 repayment order. If it appears to the satisfaction of the court that continued payment of the amount  
100 ordered will impose undue hardship on the person or the person's dependents, the court may  
101 modify the method or amount of payment;

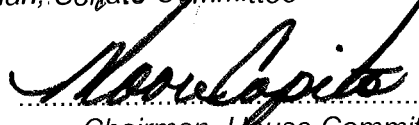
102 (5) When a person ordered to pay costs is also placed on probation or imposition or  
103 execution of sentence is suspended, the court may make the repayment of costs a condition of  
104 probation or suspension of sentence.

105 (h) Circuit clerks shall keep a record of repaid counsel fees and defense expenses  
106 collected pursuant to this section and shall, quarterly, pay the moneys to the State Auditor who  
107 shall deposit the funds in the General Revenue Fund of the state.

108 (i) The making of an affidavit subject to inquiry under this section does not in any event  
109 give rise to criminal remedies against the affiant nor occasion any civil action against the affiant  
110 except for the recovery of costs as in any other case where costs may be recovered and the  
111 recovery of the value of services, if any, provided pursuant to this article. A person who has made  
112 an affidavit knowing the contents of the affidavit to be false may be prosecuted for false swearing  
113 as provided by law.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

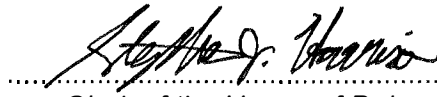
  
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Chairman, Senate Committee


  
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Chairman, House Committee

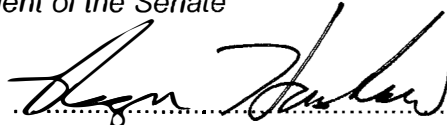
Originated in the Senate.

In effect 90 days from passage.

  
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Clerk of the Senate

  
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Clerk of the House of Delegates

  
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President of the Senate


  
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Speaker of the House of Delegates

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

2019 MAR 22 P 3:33

FILED

The within is approved this the 22<sup>nd</sup>  
Day of March..... 2019.

  
.....  
Governor



PRESENTED TO THE GOVERNOR

MAR 11 2019

Time 1:41 pm