

# **WEST VIRGINIA LEGISLATURE**

**2018 REGULAR SESSION**

**Committee Substitute**

**for**

**Senate Bill 467**

BY SENATOR TRUMP

[Originating in the Committee on the Judiciary;

Reported on February 14, 2018]



1 A BILL to amend and reenact §29-21-6 and §29-21-13a of the Code of West Virginia, 1931, as  
2 amended; and to amend said code by adding thereto a new section, designated §29-21-  
3 9a, all relating generally to Public Defender Services; transferring initial authority to review,  
4 approve, modify, or refuse panel attorney vouchers from circuit courts to Public Defender  
5 Services; providing for resubmission or reconsideration of vouchers previously modified  
6 or refused; establishing procedures for handling of modified or refused vouchers;  
7 maintaining final authority over payment of vouchers with circuit courts; authorizing the  
8 Executive Director of Public Defender Services, with approval of the Indigent Defense  
9 Commission, to contract for noncriminal legal services; providing for payment of contracts;  
10 authorizing agency to reduce or reject vouchers or requests for payment; requiring panel  
11 attorneys to maintain time-keeping records to enable the attorney to determine time  
12 expended on a daily basis; authorizing Governor by executive order to borrow funds from  
13 the Revenue Shortfall Reserve Fund to pay appointed counsel and establish repayment  
14 requirements; requiring Secretary of Administration's clarification that borrowing is  
15 necessary; expiring authorization to borrow on January 1, 2020; setting record-keeping  
16 standards; requiring prompt processing and payment of vouchers; revising the rates of  
17 compensation for various types of cases; and authorizing the executive director to  
18 promulgate emergency rules.

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

**ARTICLE 21. PUBLIC DEFENDER SERVICES.**

**§29-21-6. Powers, duties, and limitations.**

1 (a) Consistent with the provisions of this article, the agency is authorized to make grants  
2 to and contracts with public defender corporations and with individuals, partnerships, firms,  
3 corporations, and nonprofit organizations for the purpose of providing legal representation under  
4 this article and may make any other grants and contracts that are necessary to carry out the  
5 purposes and provisions of this article.

6 (b) The agency is authorized to accept, and employ or dispose of in furtherance of the  
7 purposes of this article, any money or property, real, personal, or mixed, tangible or intangible,  
8 received by gift, devise, bequest, or otherwise.

9 (c) The agency shall establish and the executive director or his or her designee shall  
10 operate a criminal law research center as provided in §29-21-7 of this code. This center shall  
11 undertake directly, or by grant or contract, to serve as a clearinghouse for information; to provide  
12 training and technical assistance related to the delivery of legal representation; and to engage in  
13 research, except that broad general, legal, or policy research unrelated to direct representation  
14 of eligible clients may not be undertaken.

15 (d) The agency shall establish and the executive director or his or her designee shall  
16 operate an accounting and auditing division to require and monitor the compliance with this article  
17 by public defender corporations and other persons or entities receiving funding or compensation  
18 from the agency. The accounting and auditing division shall review all plans and proposals for  
19 grants and contracts and shall make a recommendation of approval or disapproval to the  
20 executive director. The accounting and auditing division shall prepare, or cause to be prepared,  
21 reports concerning the evaluation, inspection, or monitoring of public defender corporations and  
22 other grantees, contractors, persons, or entities receiving financial assistance under this article  
23 and shall further carry out the agency's responsibilities for records and reports as set forth in §29-  
24 21-18 of this code. The accounting and auditing division shall require each public defender  
25 corporation to submit financial statements monthly and to report monthly on the billable and  
26 nonbillable time of its professional employees, including time used in administration of the  
27 respective offices, so as to compare the time to similar time expended in nonpublic law offices for  
28 similar activities. The accounting and auditing division shall provide to the executive director  
29 assistance in the fiscal administration of all of the agency's divisions. This assistance shall  
30 include, but not be limited to, budget preparation and statistical analysis.

31 (e) The agency shall establish and the executive director or his or her designee shall  
32 operate an appellate advocacy division for the purpose of prosecuting litigation on behalf of  
33 eligible clients in the Supreme Court of Appeals. The executive director or his or her designee  
34 shall be the director of the appellate advocacy division. The appellate advocacy division shall  
35 represent eligible clients upon appointment by the circuit courts or by the Supreme Court of  
36 Appeals. The division may, however, refuse the appointments due to a conflict of interest or if the  
37 executive director has determined the existing caseload cannot be increased without jeopardizing  
38 the appellate division's ability to provide effective representation. In order to effectively and  
39 efficiently use the resources of the appellate division, the executive director may restrict the  
40 provision of appellate representation to certain types of cases. The executive director may select  
41 and employ staff attorneys to perform the duties prescribed by this subsection. The appellate  
42 division shall maintain records of representation of eligible clients for record purposes only.

43 (f) If the executive director, with the approval of the Indigent Defense Commission and  
44 the Secretary of Administration, determines that the purposes of this article can be furthered and  
45 costs reduced by the execution of a contract with a provider of legal services in specialized areas  
46 of the law, other than criminal defense or the representation of respondent parents in abuse and  
47 neglect proceedings, to provide legal representation to eligible clients, the execution of the  
48 contract is authorized and is exempt from the provisions of, and procedures adopted pursuant to,  
49 §5A-3-1 et seq. of this code. The payment of the contract amount is authorized from the funds  
50 appropriated for the payment of appointed counsel fees.

51 (g) The agency may reduce or reject vouchers or requests for payment submitted pursuant  
52 to §29-21-13a of this code found not to be in compliance with the provisions of this article, subject  
53 to the limitations set forth herein.

54 (h) The executive director may promulgate emergency rules pursuant to the provisions of  
55 §29A-3-15 of this code to effectuate the provisions of this article as amended during the 2018  
56 regular session of the Legislature.

**§29-21-9a. Borrowing authority from Revenue Shortfall Reserve Fund to pay appointed counsel fees; repayment requirements.**

1           (a) Notwithstanding any provision of this code to the contrary, and subject to the provisions  
2 of this section, the Governor may, by executive order, after first notifying the presiding officers of  
3 both houses of the Legislature in writing, borrow funds from the Revenue Shortfall Reserve Fund  
4 created in §11B-2-20 of this code for deposit into the appropriate special revenue account  
5 established for the payment of appointed counsel fees. The amount of funds borrowed and  
6 outstanding under this section may not exceed \$20 million at any one time, or the amount the  
7 Governor determines is necessary to adequately fund payment of appointed counsel fees.

8           (b) Notwithstanding the provisions of §29-21-9a(a) of this code, the Governor may not  
9 borrow funds from the Revenue Shortfall Reserve Fund pursuant to this section unless the  
10 Secretary of Administration first certifies that borrowing is necessary to pay for appointed counsel  
11 fees and the Governor certifies that a supplemental budget appropriation sufficient to repay the  
12 funds borrowed will be submitted to the Legislature.

13           (c) Any funds borrowed pursuant to this section shall be used to pay for appointed counsel  
14 fees only.

15           (d) Any funds borrowed pursuant to this subsection shall be repaid during the fiscal year  
16 in which the funds are borrowed from a supplemental budget appropriation to Public Defender  
17 Services, without interest, and redeposited to the credit of the Revenue Shortfall Reserve Fund  
18 within 180 days of their withdrawal.

19           (e) No amounts may be borrowed pursuant to the provisions of this section after January  
20 1, 2020.

**§29-21-13a. Compensation and expenses for panel attorneys.**

1           (a) All panel attorneys shall maintain detailed and accurate records of the time expended  
2 and expenses incurred on behalf of eligible clients, and which records are to be maintained in a  
3 form that will enable the attorney to determine for any day the periods of time expended in tenths

4 of an hour on behalf of any eligible client and the total time expended in tenths of an hour on that  
5 day on behalf of all eligible clients: *Provided*, That in no event may panel attorneys be required  
6 to maintain or submit the actual start and finish times of work performed.

7 (b) Upon completion of each case, exclusive of appeal, panel attorneys shall submit to ~~the~~  
8 ~~appointing court~~ Public Defender Services a voucher for services. Public Defender Services shall  
9 electronically acknowledge the submission of a voucher. Claims for fees and expense  
10 reimbursements shall be submitted to ~~the appointing court~~ Public Defender Services on forms  
11 approved by the executive director. The executive director shall establish guidelines for the  
12 submission of vouchers and claims for fees and expense reimbursements under this section.  
13 Claims submitted more than 90 ~~calendar~~ business days after the last date of service shall be  
14 rejected unless, for good cause, the appointing court authorizes in writing an extension. *Provided*,  
15 ~~That claims where the last date of service occurred prior to July 1, 2008, shall be rejected unless~~  
16 ~~submitted prior to January 1, 2009.~~

17 (c) ~~The appointing court~~ Public Defender Services shall review the voucher to determine  
18 if the time and expense claims are reasonable, necessary, and valid. ~~and shall forward the~~  
19 ~~voucher to the agency with an order approving payment of the claimed amount or of a lesser sum~~  
20 ~~the court considers appropriate.~~ A voucher found to be correct shall be processed and payment  
21 promptly directed within 45 business days of submission of the voucher.

22 (d)(1) If Public Defender Services rejects a voucher, the attorney submitting the voucher  
23 shall be notified electronically of the rejection and detailed reasons for the rejection within 30  
24 business days of submission of the voucher. The attorney may resubmit the voucher  
25 accompanied by copies of his or her records supporting the voucher and certification from the  
26 appointing court that the services or expenses were performed or incurred, and were reasonable  
27 and necessary, within 15 business days of receipt of notification. The executive director shall  
28 make a final agency decision regarding the rejection of the voucher within 15 business days of  
29 receipt of the submitted records and certification. Under no circumstances may the executive  
30 director have the authority or require any panel attorney to submit privileged client information.

31 (2) If the final agency decision is to reject the voucher, Public Defender Services shall  
32 request review of the final agency decision by motion to the appointing court filed within 15  
33 business days of notice of the final agency decision. After a hearing providing the attorney and  
34 Public Defender Services an opportunity to be heard, the appointing court shall have final  
35 authority to resolve the issue of payment, and to order all remedies available under the West  
36 Virginia Rules of Civil Procedure.

37 (e) If Public Defender Services reduces the amount of compensation claimed or  
38 reimbursement requested, the attorney submitting the voucher shall be notified electronically of  
39 the reduction and detailed reasons for the reduction within 30 business days of the submission of  
40 the voucher. The attorney may:

41 (1) Agree with the reduction and certify his or her agreement electronically to Public  
42 Defender Services which shall then proceed to process payment; or

43 (2) Disagree with the reduction and request payment of the reduced amount while  
44 preserving the ability to contest the reduction.

45 (3) An attorney proceeding pursuant to this subsection shall inform Public Defender  
46 Services of his or her decision by electronic means within 15 business days of receipt of the notice  
47 of reduction. If there is no communication from the attorney within 15 business days of receipt of  
48 the notice of reduction, then the reduction is deemed to be accepted by the attorney.

49 (4) The attorney may submit records and certification from the appointing court that the  
50 services or expenses reflected in the amount reduced were performed or incurred and were  
51 reasonable and necessary. The executive director shall then make a final agency decision  
52 regarding the reduction within 15 business days of receipt of the submitted records and  
53 certification. Under no circumstances may the executive director have the authority to require  
54 any panel attorney to submit privileged client information.

55 (5) If the attorney disagrees with the final agency decision, and the attorney and the  
56 executive director cannot reach an agreement regarding the reduction within 15 business days of



57 the receipt of the notice of the final agency decision, Public Defender Services shall request  
58 review of the final agency decision by motion to the appointing court filed within 15 business days  
59 of notice of the final agency decision. After a hearing providing the attorney and Public Defender  
60 Services an opportunity to be heard, the appointing court shall have final authority to resolve the  
61 issue of payment, and to order all remedies available under the West Virginia Rules of Civil  
62 Procedure.

63 (6) If there is no communication from Public Defender Services within 30 business days  
64 of the submission of the voucher, the voucher is deemed to have been approved for payment  
65 without reduction.

66 (f) Notwithstanding any provisions of this code to the contrary, the executive director may  
67 employ in-house counsel to represent Public Defender Services in hearings held pursuant to this  
68 article.

69 (g) Except for the emergency rulemaking provision set forth in §29-21-6(h) of this code,  
70 the provisions of the amendments to this article enacted during the 2018 regular session of the  
71 Legislature shall be effective July 1, 2018.

72 ~~(b)~~ (h) Notwithstanding any other provision of this section to the contrary, Public Defender  
73 Services may pay by direct bill, prior to the completion of the case, litigation expenses incurred  
74 by attorneys appointed under this article.

75 ~~(e)~~ (i) Notwithstanding any other provision of this section to the contrary, a panel attorney  
76 may be compensated for services rendered and reimbursed for expenses incurred prior to the  
77 completion of the case where: (1) More than six months have expired since the commencement  
78 of the panel attorney's representation in the case; and (2) no prior payment of attorney fees has  
79 been made to the panel attorney by Public Defender Services during the case. The executive  
80 director, in his or her discretion, may authorize periodic payments where ongoing representation  
81 extends beyond six months in duration. The amounts of any fees or expenses paid to the panel  
82 attorney on an interim basis, when combined with any amounts paid to the panel attorney at the

83 conclusion of the case, shall not exceed the limitations on fees and expenses imposed by this  
84 section.

85 ~~(d)~~ (j) In each case in which a panel attorney provides legal representation under this  
86 article, and in each appeal after conviction in circuit court, the panel attorney shall be  
87 compensated at the following rates for actual and necessary time expended for services  
88 performed and expenses incurred subsequent to the effective date of this article:

89 ~~(1) For attorney's work performed out of court, compensation shall be at the rate of \$45~~  
90 ~~per hour. For paralegal's work performed out of court for the attorney, compensation shall be at~~  
91 ~~the rate of the paralegal's regular compensation on an hourly basis or, if salaried, at the hourly~~  
92 ~~rate of compensation which would produce the paralegal's current salary, but in no event shall~~  
93 ~~the compensation exceed \$20 per hour. Out of court work includes, but is not limited to, travel,~~  
94 ~~interviews of clients or witnesses, preparation of pleadings and prehearing or pretrial research~~

95 (1) Compensation is to be calculated using a rate of \$45 per hour, without regard to  
96 whether the work is performed in-court or out-of-court, for a panel attorney's work performed in  
97 an eligible proceeding for which the maximum period of incarceration upon conviction on the most  
98 serious offense is one year or less and in the following eligible proceedings: Juvenile proceedings  
99 in which the charges are solely status offenses; contempt of court proceedings; mental hygiene  
100 commitment proceedings; forfeiture proceedings brought pursuant to §61A-1-1 et seq. of this  
101 code; appeals from and post-conviction challenges to proceedings governed by this subdivision;  
102 and proceedings in municipal court when the accused is at risk of incarceration.

103 ~~(2) For attorney's work performed in court, compensation shall be at the rate of \$65 per~~  
104 ~~hour. No compensation for paralegal's work performed in court shall be allowed. In-court work~~  
105 ~~includes, but is not limited to, all time spent awaiting hearing or trial before a judge, magistrate,~~  
106 ~~special master or other judicial officer~~

107 (2) Compensation is to be calculated using a rate of \$50 per hour for work performed out-  
108 of-court and \$70 for work performed in-court in an eligible proceeding in which the most serious

109 charge is a felony and in the following eligible proceedings: Juvenile proceedings for which the  
110 charge would be a crime if committed by an adult; child abuse and neglect proceedings which  
111 may result in a termination of parental rights; extradition proceedings; proceedings to enhance  
112 sentences brought pursuant to §61-11-18 and §61-11-19 of this code; proceedings brought to  
113 obtain extraordinary remedies; and appeals from and post-conviction challenges to the final  
114 judgment in an eligible proceeding governed by this subdivision.

115 (A) In-court work includes, but is not limited to, all time spent awaiting hearing or trial  
116 before a judge, magistrate, special master, or other judicial officer.

117 (B) Out-of-court work includes, but is not limited to, travel, interviews of clients or  
118 witnesses, preparation of pleadings, and prehearing or pretrial research.

119 (3) Compensation for legal services performed for a panel attorney by a paralegal out-of-  
120 court is to be calculated using a rate of \$20 per hour and no compensation is to be paid for in-  
121 court services performed for a panel attorney by a paralegal.

122 ~~(3)~~ (4) The maximum amount of compensation for out-of-court and in-court work under  
123 this subsection is as follows: For proceedings of any kind involving felonies for which a penalty of  
124 life imprisonment may be imposed, the amount as the court may approve; for all other eligible  
125 proceedings, \$3,000 unless the court, for good cause shown, approves payment of a larger sum.

126 ~~(e)~~ (k) Actual and necessary expenses incurred in providing legal representation for  
127 proceedings of any kind involving felonies for which a penalty of life imprisonment may be  
128 imposed, including, but not limited to, expenses for travel, transcripts, salaried or contracted  
129 investigative services, and expert witnesses, shall be reimbursed in an amount as the court may  
130 approve. For all other eligible proceedings, actual and necessary expenses incurred in providing  
131 legal representation, including, but not limited to, expenses for travel, transcripts, salaried or  
132 contracted investigative services and expert witnesses, shall be reimbursed to a maximum of  
133 \$1,500 unless the court, for good cause shown, approves reimbursement of a larger sum.

134           (l) Expense vouchers shall specifically set forth the nature, amount, and purpose of  
135 expenses incurred and shall provide receipts, invoices, or other documentation required by the  
136 executive director and the State Auditor:

137           ~~(1)(A)~~ Reimbursement of expenses for production of transcripts of proceedings reported  
138 by a court reporter is limited to the cost per original page and per copy page as set forth in §51-  
139 7-4 of this code.

140           ~~(2)(B)(i)~~ There shall may be no reimbursement of expenses for or production of a transcript  
141 of a preliminary hearing before a magistrate or juvenile referee, or of a magistrate court trial,  
142 where ~~such~~ the hearing or trial has also been recorded electronically in accordance with the  
143 provisions of §50-5-8 of this code or court rule.

144           (3) ~~(ii)~~ Reimbursement of the expense of an appearance fee for a court reporter who  
145 reports a proceeding other than one described in ~~subparagraph (i) of this paragraph~~ §29-21-  
146 13a(l)(2) of this code is limited to \$25. Where a transcript of a proceeding is produced, there shall  
147 may be no reimbursement for the expense of any appearance fee.

148           ~~(4)~~ ~~(iii)~~ Except for the appearance fees provided in this ~~paragraph~~ subsection, there shall  
149 may be no reimbursement for hourly court reporters' fees or fees for other time expended by the  
150 court reporter, either at the proceeding or traveling to or from the proceeding.

151           (5) ~~(C)~~ Reimbursement of the cost of transcription of tapes electronically recorded during  
152 preliminary hearings or magistrate court trials is limited to \$1 per page.

153           (6) ~~(2)~~ Reimbursement for any travel expense incurred in an eligible proceeding is limited  
154 to the rates for the reimbursement of travel expenses established by rules promulgated by the  
155 Governor pursuant to the provisions of §12-8-11 of this code and administered by the Secretary  
156 of the Department of Administration pursuant to the provisions of §5A-3-48 of this code.

157           (7) ~~(3)~~ Reimbursement for investigative services is limited to a rate of \$30 per hour for  
158 work performed by an investigator.

159           (f) (m) For purposes of compensation under this section, an appeal from magistrate court  
160 to circuit court, an appeal from a final order of the circuit court, or a proceeding seeking an  
161 extraordinary remedy made to the Supreme Court of Appeals shall be considered a separate  
162 case.

163           (g) (n) Vouchers submitted under this section shall specifically set forth the nature of the  
164 service rendered, the stage of proceeding or type of hearing involved, the date and place the  
165 service was rendered, and the amount of time expended in each instance. All time claimed on the  
166 vouchers shall be itemized to the nearest tenth of an hour. If the charge against the eligible client  
167 for which services were rendered is one of several charges involving multiple warrants or  
168 indictments, the voucher shall indicate the fact and sufficiently identify the several charges so as  
169 to enable ~~the court~~ Public Defender Services to avoid a duplication of compensation for services  
170 rendered. The executive director shall refuse to requisition payment for any voucher which is not  
171 in conformity with the recordkeeping, compensation, or other provisions of this article or the  
172 voucher guidelines established issued pursuant to §29-21-13a(a) of this code and in such  
173 circumstance shall return the voucher to the court or to the service provider for further review or  
174 correction.

175           (h) (o) Vouchers submitted under this section ~~after July 1, 2008~~ shall be reimbursed within  
176 90 days of receipt. Reimbursements after 90 days shall bear interest from the ninety-first day at  
177 the legal rate in effect for the calendar year in which payment is due.

178           (i) (p) Vouchers submitted for fees and expenses involving child abuse and neglect cases  
179 shall be processed for payment before processing vouchers submitted for all other cases.