

# **WEST VIRGINIA LEGISLATURE**

**2019 REGULAR SESSION**

**Committee Substitute**

**for**

**Senate Bill 408**

SENATORS PALUMBO AND WOELFEL, *original sponsors*

[Originating in the Committee on the Judiciary;

Reported on February 6, 2019]



1 A BILL to amend and reenact §29-21-16 of the Code of West Virginia, 1931, as amended, relating  
2 to public defender services generally; clarifying the person to determine financial eligibility  
3 for public defender services; empowering court administrators in circuits which have one  
4 to make the eligibility determination; continuing the authority of public defender offices to  
5 make eligibility decisions in circuits with a public defender office but without a court  
6 administrator; and authorizing circuit courts to make eligibility decisions in circuits with  
7 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. In circuits in which a public defender office is in operation, all  
29 determinations of indigency shall be made by a public defender office employee designated by  
30 the executive director. The determinations shall be made after a careful review of the financial  
31 affidavit submitted by the person seeking representation. The review of the affidavit shall be  
32 conducted in accord with the financial eligibility guidelines established by the agency pursuant to  
33 subsection (a) of this section. In addition to the financial eligibility guidelines, the person  
34 determining eligibility shall consider other relevant factors, including, but not limited to, those set  
35 forth in subdivisions (1) through (9), subsection (e) of this section. If there is substantial reason to  
36 doubt the accuracy of information in the financial affidavit, the person determining eligibility may  
37 make any inquiries necessary to determine whether the affiant has truthfully and completely  
38 disclosed the required financial information.

39 After reviewing all pertinent matters, the person determining eligibility may find the affiant  
40 eligible to have the total cost of legal representation provided by the state, or may find that the

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

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

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

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

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

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

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

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

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

66 (8) Whether the person seeking publicly funded legal representation has posted a cash

67 bond for bail or has obtained release on bond for bail through the services of a professional  
68 bondsman for compensation and the amount and source of the money provided for the bond;

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

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

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

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

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

93           (3) When a person is ordered to repay costs, the court may order payment to be made  
94 immediately or within a specified period of time or in specified installments. If a person is  
95 sentenced to a term of imprisonment, an order for repayment of costs is not enforceable during  
96 the period of imprisonment unless the court expressly finds, at the time of sentencing, that the  
97 person has sufficient assets to pay the amounts ordered to be paid or finds there is a reasonable  
98 likelihood the person will acquire the necessary assets in the foreseeable future;

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

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

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

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