

SB 1009

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CLERK OF WEST VIRGINIA
SECRETARY OF STATE

ENROLLED

Senate Bill No. 1009

(BY SENATORS TOMBLIN (MR. PRESIDENT)
AND CARUTH, BY REQUEST OF THE EXECUTIVE)

[Passed June 2, 2009; in effect ninety days from passage.]

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(BY SENATORS TOMBLIN (MR. PRESIDENT) AND CARUTH,
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AN ACT to amend the Code of West Virginia, 1931, as amended, by adding thereto a new section, designated §11-21-12i; and to amend said code by adding thereto a new article, designated §44-16-1, §44-16-2, §44-16-3, §44-16-4, §44-16-5 and §44-16-6, all relating to the future support of children with autism; creating a personal income tax modification to adjusted gross income for parents and guardians contributing to a qualified trust fund; providing for limitations on amount of modification earned and taken; specifying modification carryforward and treatment of modification carryforward; specifying personal income tax treatment of deposits, earnings and withdrawals of trust funds; specifying effective date for tax modification; providing rule-making authority for use and administration of qualified trust funds and requirements for claiming the tax modification; specifying tax assessment for modification improperly taken; addressing statute of limitations;

defining terms; specifying criteria for creating a qualified trust for a child with autism; establishing eligibility criteria; providing for creation of trust accounts for a child with autism; creating the West Virginia Children with Autism Trust Board; requiring board certification of certain information; setting forth membership of the board; setting forth duties and responsibilities of the board; granting rule-making authority to the board; providing for reimbursement of board members' expenses; exempting identities of trust fund beneficiaries, account owners or donors from chapter twenty-nine-b of said code; and providing an effective date.

Be it enacted by the Legislature of West Virginia:

That the Code of West Virginia, 1931, as amended, be amended by adding thereto a new section, designated §11-21-12i; and to amend said code by adding thereto a new article, designated §44-16-1, §44-16-2, §44-16-3, §44-16-4, §44-16-5 and §44-16-6, all to read as follows:

CHAPTER 11. TAXATION.

ARTICLE 21. PERSONAL INCOME TAX.

§11-21-12i. Decreasing modification reducing federal adjusted gross income for qualifying contribution to a qualified trust maintained for the benefit of a child with autism; effective date.

1 (a) In addition to amounts authorized to be subtracted
2 from federal adjusted gross income pursuant to section
3 twelve of this article, a modification reducing federal
4 adjusted gross income is hereby authorized in the amount
5 of any qualifying contribution to a qualified trust main-
6 tained for the benefit of a child with autism by the parent
7 or guardian of a child with autism, up to a maximum of
8 \$1,000 per year for individual filers and persons who are
9 married but filing separately, and \$2,000 per year for
10 persons who are married and filing jointly, but only to the

11 extent the amount is not allowable as a deduction when
12 arriving at the taxpayer's federal adjusted gross income
13 for the taxable year in which the payment is made. This
14 modification is available regardless of the type of return
15 form filed. The taxpayer may elect to carry forward the
16 modification over a period not to exceed four tax years,
17 beginning in the tax year in which the payment was made:
18 *Provided*, That the amount of the decreasing modification,
19 in combination with all other decreasing modifications
20 authorized pursuant to this article, shall in no event
21 reduce taxable income below zero. Any unused decreasing
22 modification carryforward amount remaining after the
23 four-year carryforward period is forfeited. The accrued
24 deposits and earnings on the qualified trust account for a
25 child with autism and the subsequent withdrawal of funds
26 from that trust account, made in accordance with the
27 provisions of article sixteen, chapter forty-four of this
28 code, shall not be treated as taxable income to either the
29 trust or the beneficiary. The provisions of this section are
30 effective for taxable years beginning on and after January
31 1, 2011.

32 (b) The following definitions apply to this section:

33 (1) "Autism" means "autism" as that term is defined in
34 section one, article sixteen, chapter forty-four of this code.

35 (2) "Child with autism" means "child with autism" as
36 that term is defined in section one, article sixteen, chapter
37 forty-four of this code.

38 (3) "Guardian" means "guardian" as that term is defined
39 in section one, article sixteen, chapter forty-four of this
40 code.

41 (4) "Parent" means a "parent" as that term is defined in
42 section one, article sixteen, chapter forty-four of this code.

43 (5) "Qualified trust for a child with autism" means
44 "qualified trust for a child with autism" as that term is

45 defined in section one, article sixteen, chapter forty-four
46 of this code.

47 (c) If it appears upon audit or otherwise that any person
48 or entity has taken the decreasing modification allowed
49 under this section and was not entitled to take the de-
50 creasing modification, or has withdrawn funds from the
51 qualified trust for a child with autism in a way not
52 consistent with the requirements of article sixteen, chapter
53 forty-four of this code, then an assessment shall be made
54 and the income tax liability of the taxpayer shall be
55 recomputed disallowing the decreasing modification so
56 taken. Such assessment shall not be barred by any statute
57 of limitations otherwise applicable to the tax imposed
58 pursuant to this article. Amended returns shall be filed for
59 any tax year for which the decreasing modification was
60 improperly taken. Any additional taxes due under this
61 chapter shall be remitted with the amended return or
62 returns filed with the Tax Commissioner, along with
63 interest, as provided in section seventeen, article ten of
64 this chapter and such other penalties and additions to tax
65 as may be applicable pursuant to the provisions of article
66 ten of this chapter.

67 (d) Married parents who qualify for the modification
68 provided under this section and who file separate state tax
69 returns shall each receive the modification provided in this
70 section in an amount equal to the amount of contributions
71 made by the parents into the trusts, not to exceed \$1,000
72 each.

73 (e) Joint guardians who qualify for the modification
74 provided under this section and who file separate state tax
75 returns shall each receive the modification provided in this
76 section, in an amount equal to the amount of contributions
77 made by the guardians into the trust, not to exceed \$1,000
78 each.

79 (f) In the event the parents or guardians of a child with
80 autism, claiming the modification provided under this
81 section, become divorced or legally separated, each party
82 shall be allowed to claim the amount of unused
83 carryforward modification that remains available under
84 this section according to the terms of an agreed property
85 settlement approved by the divorce court which specifi-
86 cally addresses the unused carryforward modification. In
87 the event that no property settlement specifically address-
88 ing the unused carryforward modification exists relating
89 to the divorce or legal separation, then any unused
90 carryforward modification remaining at the time of the
91 divorce or legal separation is granted shall be evenly
92 divided between the parties.

93 (g) The Tax Commissioner may propose rules necessary
94 to carry out the provisions of this section and to provide
95 guidelines and requirements to ensure uniform adminis-
96 trative practices statewide to effect the intent of this
97 section, all in accordance with the provisions of article
98 three, chapter twenty-nine-a of this code.

CHAPTER 44. ADMINISTRATION OF ESTATES AND TRUSTS.

ARTICLE 16. TRUSTS FOR CHILDREN WITH AUTISM.

§44-16-1. Definitions.

1 For purposes of this article, the following terms have the
2 meanings ascribed to them, unless the context clearly
3 indicates otherwise:

4 (a) "Autism" means a complex developmental disability
5 and spectrum disorder, whose diagnosis must be clinically
6 confirmed by qualified physicians and psychiatrists after
7 extensive examination and testing, defined by a certain set
8 of behaviors and symptoms which affects a person's ability
9 to communicate and interact with others.

10 (b) "Board" means the West Virginia Children with
11 Autism Trust Board created in section three of this article.

12 (c) "Child with autism" means a child, under the age of
13 eighteen, who has been clinically diagnosed as having
14 autism to a degree to which it results in a moderate or
15 severe impairment in two or more areas of daily living, as
16 the terms "moderate impairment", "severe impairment"
17 and "daily living" are defined under Title II or Title XVI
18 of the Social Security Disability Act, or a child who has
19 been clinically diagnosed with autism and has been
20 determined to be disabled under either Title II or Title XVI
21 of the Social Security Disability Act for any reason.

22 (d) "Guardian" means a person lawfully invested with
23 the power and charged with the duty of taking care of
24 another person and managing the property and rights of
25 another person who for some peculiarity of status or defect
26 of age, understanding or self-control is considered incapa-
27 ble of administering his or her own affairs.

28 (e) "Parent" means a person who is another person's
29 natural or adoptive mother or father or who has been
30 granted parental rights by valid court order and whose
31 parental rights have not been terminated by a court of law.

32 (f) "Qualified trust for a child with autism" means a
33 trust account for a child with autism that: (1) Is estab-
34 lished at a national bank, a state bank of a state of the
35 United States or a trust company that at all times is no
36 less than adequately capitalized as determined by stan-
37 dards adopted by United States banking regulators and
38 that is either regulated by state banking laws of a state of
39 the United States or is a member of the Federal Reserve
40 System; and (2) has been approved by the West Virginia
41 Children with Autism Trust Board in accordance with this
42 article.

43 (g) "Qualified trustee" means any person authorized by
44 the laws of this state or of the United States to act as a
45 trustee who has been approved by the board to serve as the
46 trustee of a qualified trust for a child with autism.

47 (h) "Tax Commissioner" means the same as that term is
48 used in section one, article one, chapter eleven of this code.

§44-16-2. Creation of a qualified trust for a child with autism.

1 (a) Any parent or guardian of a child with autism may
2 establish a qualified trust for a child with autism. No
3 account shall qualify as a qualified trust for a child with
4 autism until it has been approved as such by the West
5 Virginia Children with Autism Trust Board established in
6 section three of this article. The board shall certify the
7 establishment of each qualified trust to the Tax Commis-
8 sioner.

9 (b) To qualify for the tax deduction established in
10 section twelve-i, article twenty-one, chapter eleven of this
11 code, the parent or guardian seeking the tax deduction
12 shall provide to the Tax Commissioner certification that
13 the qualified trust has been authorized by the board and
14 any other documentation required by the Tax Commis-
15 sioner.

16 (c) The following types of expenses incurred to support
17 the designated beneficiary after the named beneficiary has
18 reached the age of eighteen or after the death of the parent
19 or guardian who established the trust account shall be
20 allowable if made for the benefit of the beneficiary of the
21 trust.

22 (1) *Education.* – Expenses for education, including
23 tuition for preschool through post-secondary education,
24 books, supplies and educational materials related to such
25 education, tutors and special education services.

26 (2) *Housing*. – Expenses for housing maintained for the
27 beneficiary, separate and apart from the housing used by
28 the parent or guardian who established the trust account
29 while the parent or guardian is still alive, including rent,
30 mortgage payments, home improvements and modifica-
31 tions, maintenance and repairs, real property taxes and
32 utility charges.

33 (3) *Transportation*. – Expenses for transportation,
34 including the use of mass transit, the purchase or modifi-
35 cation of vehicles and moving expenses.

36 (4) *Employment support*. – Expenses related to obtaining
37 and maintaining employment, including job-related
38 training, assistive technology and personal assistance
39 supports.

40 (5) *Health, prevention and wellness*. – Expenses for the
41 health and wellness, including premiums for health
42 insurance, medical, vision and dental expenses, habilita-
43 tion and rehabilitation services, durable medical equip-
44 ment, therapy, respite care, long-term services and sup-
45 ports, and nutritional management.

46 (6) *Life necessities*. – Expenses for life necessities,
47 including clothing, activities which are religious, cultural
48 or recreational, supplies and equipment for personal care,
49 community-based supports, communication services and
50 devices, adaptive equipment, assistive technology, per-
51 sonal assistance supports, financial management and
52 administrative services, life and health insurance premi-
53 ums, expenses for oversight, monitoring or advocacy, and
54 funeral and burial expenses.

55 (7) *Assistive technology and personal support services*.
56 – Expenses for assistive technology and personal support
57 with respect to any item described in subparts (1) through
58 (6) above.

§44-16-3. West Virginia Children with Autism Trust Board; creation and composition of the trustee board; duties and responsibilities; reimbursement of expenses.

1 (a) The West Virginia Children with Autism Trust Board
2 is created to qualify and oversee trust accounts created
3 pursuant to this article and held by approved banks or
4 trust companies for administration by qualified trustees.

5 (b) The West Virginia Children with Autism Trust Board
6 shall consist of the following governmental officials: The
7 Tax Commissioner or his or her designee, who shall serve
8 as the chair, the Secretary of the Department of Health
9 and Human Resources as set forth in article one, chapter
10 five-f of this code, or his or her designee, and the Commis-
11 sioner of Banking as set forth in article one, chapter
12 thirty-one-a of this code, or his or her designee. The board
13 shall also consist of the following six public members who
14 shall be appointed by the Governor with advice and
15 consent of the Senate:

16 (1) An attorney at law, licensed to practice law in this
17 state pursuant to article two, chapter thirty of this code.
18 The attorney should have extensive knowledge and
19 experience in the creation, management and administra-
20 tion of trusts;

21 (2) A counselor licensed in this state pursuant to the
22 provisions of article thirty-one, chapter thirty of this code.
23 The counselor should have experience in the delivery of
24 vocational, rehabilitative or support services to persons
25 with disabilities;

26 (3) A physician or psychiatrist licensed in this state
27 pursuant to the provisions of article three, chapter thirty
28 of this code. Such physician or psychiatrist must have
29 extensive knowledge and experience in diagnosis and
30 treatment of persons with autism;

31 (4) One public member with a background in advocacy
32 on behalf of persons with disabilities; and

33 (5) Two citizen members.

34 (c) Each of the appointments shall be for a period of five
35 years and appointees are eligible for reappointment at the
36 expiration of their terms. Of the public members of the
37 board first appointed, one shall be appointed for a term
38 ending June 30, 2012, and a second for a four-year term.
39 The remainder shall be appointed for the full five-year
40 terms as provided in this section. In the event of a vacancy
41 among appointed members, the Governor shall appoint a
42 person representing the same interests to fill the unexpired
43 term.

44 (d) Members of the board may not be compensated in
45 their capacity as members, but shall be reimbursed for
46 reasonable expenses incurred in the performance of their
47 duties by the Department of Administration. Expense
48 payments are to be made at the same rate paid to state
49 employees.

50 (e) The board shall meet at least once per month to
51 review and recommend to the Tax Department approval of
52 proposed qualified trust funds or to conduct other business
53 as required by this article or section twelve-i, article
54 twenty-one, chapter eleven of this code. Board meetings
55 shall be held in person, by video conference or by
56 teleconference, or a combination thereof. Five members of
57 the board shall constitute a quorum.

58 (f) Notwithstanding the provision of section four, article
59 six, chapter six of this code, the Governor may remove any
60 board member for incompetence, misconduct, gross
61 immorality, misfeasance, malfeasance or nonfeasance in
62 office.

63 (g) The Department of Administration shall provide
64 support staff and office space for the board.

65 (h) Nothing in this section creates an obligation of State
66 General Revenue Funds: *Provided*, That funding for
67 expenses and offices of the West Virginia Children with
68 Autism Trust Board shall be paid, subject to appropria-
69 tion.

70 (i) The board may propose rules for legislative approval
71 and may adopt procedural and interpretive rules in
72 accordance with the provisions of article three, chapter
73 twenty-nine-a of this code to carry out the provisions of
74 this article.

§44-16-4. Reports and account.

1 In addition to any other requirements of this article, the
2 board shall:

3 (a) Receive annual summary information on the financial
4 condition of qualified trust funds and statements on the
5 qualified trust funds and savings plan accounts from
6 qualified trustees; and

7 (b) Prepare, or have prepared, by January 1, each year,
8 an annual report on the status of the program, including
9 a summary of the qualified trust funds, and provide a copy
10 of the report to the Joint Committee on Government and
11 Finance and the Legislative Oversight Commission on
12 Health and Human Resources Accountability.

§44-16-5. Confidentiality.

1 Any information that would tend to disclose the identity
2 of a beneficiary, account owner or donor is exempt from
3 the provisions of the Freedom of Information Act, located
4 in chapter twenty-nine-b of this code. Nothing in this
5 section prohibits disclosure or publication of information
6 in a statistical or other form which does not identify the

7 individuals involved or provide personal information.
8 Account owners are permitted access to their own personal
9 information.

§44-16-6. Effective date.

1 This article is effective for years beginning on or after
2 January 1, 2011.

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

[Handwritten Signature]

.....
Chairman Senate Committee

[Handwritten Signature]

.....
Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

[Handwritten Signature]

.....
Clerk of the Senate

[Handwritten Signature]
.....
Clerk of the House of Delegates

[Handwritten Signature]
.....
President of the Senate

[Handwritten Signature]
.....
Speaker House of Delegates

The within is approved this the 17th
Day of June, 2009.

[Handwritten Signature]
.....
Governor

PRESENTED TO THE
GOVERNOR

JUN 16 2009

Time 9:00 am