OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

Education, Public Institutions, and Local Government Committee

Chad A. Readler, Chair
Edward L. Gilbert, Vice-chair

Part I

November 10, 2016

Ohio Statehouse
Room 017

OCMC Education, Public Institutions, and Local Government Committee

Chair	Mr. Chad Readler
Vice-chair	Mr. Edward Gilbert
	Mr. Roger Beckett
	Ms. Paula Brooks
	Sen. Bill Coley
	Rep. Robert Cupp
	Rep. Mike Curtin
	Sen. Tom Sawyer
	Governor Bob Taft
	Ms. Petee Talley

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

EDUCATION, PUBLIC INSTITUTIONS, AND LOCAL GOVERNMENT COMMITTEE

THURSDAY, NOVEMBER 10, 2016
9:30 A.M.
OHIO STATEHOUSE ROOM 017

AGENDA

I. Call to Order

II. Roll Call

III. Approval of Minutes

- Meetings of September 8, 2016

  [Draft Minutes – attached]

IV. Presentations

- None Scheduled

V. Reports and Recommendations

- Article VI, Section 5 (Loans for Higher Education)
  - First Presentation
  - Public Comment
  - Committee Discussion
  - **Possible Action Item: Consideration and Adoption**

  [Report and Recommendation – attached]

- Article VI, Section 6 (Tuition Credits Program)
  - First Presentation
  - Public Comment
  - Committee Discussion
  - **Possible Action Item: Consideration and Adoption**

[Report and Recommendation – attached]

VI. Committee Discussion

- Article VII, Section 1 – Institutions for the Benefit of the Insane, Blind, and Deaf and Dumb

The chair will lead discussion to assess the sense of the committee on what position it wishes to take regarding a possible change to the Article VII provisions on the state supporting institutions for the benefit of the insane, blind, and deaf and dumb.

[Testimony of Michael Kirkman, Executive Director, Disability Rights Ohio, on Article VII, Section 1as presented at the September 8, 2016 meeting of the committee - attached]

[Memorandum by Shari L. O'Neill titled "Article VIII (Public Institutions) at the 1851 Constitutional Convention," dated August 23, 2016 - attached]

VII. Next Steps

- The chair will lead discussion regarding the next steps the committee wishes to take in preparation for upcoming meetings.

[Planning Worksheet – attached]

VIII. Old Business

IX. New Business

X. Public Comment

XI. Adjourn

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE
EDUCATION, PUBLIC INSTITUTIONS, AND LOCAL GOVERNMENT COMMITTEE

FOR THE MEETING HELD
THURSDAY, SEPTEMBER 8, 2016

Call to Order:

Chair Chad Readler called the meeting of the Education, Public Institutions, and Local Government Committee to order at 11:09 a.m.

Members Present:

A quorum was present with Chair Readler, Vice-chair Gilbert, and committee members Beckett, Coley, Cupp, Curtin, Sawyer, and Taft in attendance.

Approval of Minutes:

The minutes of the April 14, 2016 and June 9, 2016 meetings were approved.

Presentations:

Senator Bill Coley
Senate District 4
"Ohio: The State of Gaming"

Chair Readler recognized Senator Bill Coley, a member of the committee, who presented on the topic of casinos and other gambling operations in the state as provided by Article XV, Section 6.

Sen. Coley expressed that the language contained in Article XV, Section 6 does not belong in a constitution, and that, if it were legislation, it would not be considered to be well-written. He said, during the time the Commission has been reviewing the constitution, no witnesses have advocated putting language of this length, detail, and complexity in the constitution.

Sen. Coley emphasized he is not advocating eliminating casinos or gaming, noting that voters said they wanted to legalize gambling. Instead, he said, the problem is that the constitutional

provision indicates exactly where the gaming can occur, language that does not belong in a constitution.

Examining the history of the provision, Sen. Coley said Article XV, Section 6 had been promoted as a way to increase jobs and provide additional tax revenue for the state. He said the casino proponents had promised many more jobs and tax revenue dollars than have been realized. He said one example is that while employment during the construction phase inflated the number of jobs by ten thousand, those were temporary jobs that are gone now. Sen. Coley suggested Ohio officials were too trusting of the financial projections provided to them.

Sen. Coley said he has chaired the General Assembly's Permanent Joint Committee on Gaming and Wagering since its creation. He added that he is a member of the National Counsel of Legislators from Gaming States (NCLGS), and is currently serving as president. He said that his service in NCLGS has helped him understand the extent to which Ohio and other states have been taken advantage of by the gaming industry.

One example, he said, is that Ohio allowed casino operators to deduct from their revenue the amount that would be used for promotion. He said Ohio had been told that other states do not tax promotional activity. However, he said casinos engage in constant promotions in which they give away free play, and all of that promotional activity is untaxed.

Sen. Coley said, in reality, the average tax revenues have been 42 percent lower than originally presented. He said the state has given away over $400 million in tax revenue. He questioned how long Ohio will continue to give a constitutionally-protected monopoly to out-of-state interests that have shorted Ohio taxpayers out of hundreds of millions of dollars in tax revenues.

Chair Readler asked, if gaming is not going away, whether Sen. Coley is proposing simply to eliminate the section or whether he advocates replacing it with statutory law. Sen. Coley answered he would like to see the section rewritten in a way that guarantees that gaming will stay in Ohio, that allows local entities to have a say in whether expansion occurs, and that protects currently-existing revenues.

Chair Readler asked whether Sen. Coley had language to propose, and Sen. Coley said he does not have that yet. He said the first question is whether the committee agrees the provision needs to change.

Representative Mike Curtin asked whether Sen. Coley advocates removing the section from the constitution and putting the details in statute. Sen. Coley answered that is part of his proposal, but he also wonders why there is a constitutionally-protected monopoly when the casinos did not deliver what was promised. He explained that, in the casino world, investment opportunities are worldwide, so investment decisions are triggered by the total return on investment. So, he said, there is a solid business reason why casino proponents did what they did.

Thanking Sen. Coley for his testimony, Chair Readler said the committee would return to this issue at a future meeting.

Michael Kirkman
Executive Director
Disability Rights Ohio
"'Fostering' Institutions and People with Disabilities"

Chair Readler then recognized Michael Kirkman, who is executive director of Disability Rights Ohio, noting that Mr. Kirkman would be addressing the committee on the history of Article VII, Section 1, relating to "Institutions for the Insane, Blind, and Deaf and Dumb." [1]

Mr. Kirkman began by noting that the word "institution" is ambiguous because an institution can be a physical place or a service, among other things. He said the language of the section is not self-executing, requiring action by the General Assembly.

He continued that his research did not indicate that the state currently operates institutions for the blind and deaf. He said although there is a school for the blind and a school for the deaf, they are operated under the auspices of the Department of Education and do not appear to be connected to Article VII, Section 1.

Describing the history of the state's involvement in the care of the mentally disabled, Mr. Kirkman said the earliest attempts to provide care reflected a lack of understanding. He noted that, in the 1800s, reformers Benjamin Rush and Dorothea Dix led campaigns to provide more humane treatment to mentally ill persons. He said during that period, twenty states expanded the number of mental hospitals. He noted that, prior to the passage of Section 1 in 1851, Ohio had provided for the care and treatment of the insane, although most responsibility fell to charities, counties, and churches. After 1851, Mr. Kirkman commented that the state population grew, and there came a need for the state to sponsor asylums to provide more humane treatment to the mentally ill. He said there was no scientific evidence that Dix's asylum model actually had a therapeutic value, but many believed asylums helped.

Mr. Kirkman commented that, as time went on, these institutions changed for the worse. Further problems were related to the philosophy behind the Eugenics Movement in the early 20th century, which regarded "feeblemindedness" as being genetic, and which was viewed as justification for mandatory sterilization. Mr. Kirkman noted examples of persons or groups who were institutionalized or sterilized solely because of race or economic status rather than due to actual mental incapacity.

Mr. Kirkman remarked that, in the 1960s, attitudes changed, and the field of psychiatry adopted new views on treating and institutionalizing the mentally ill. He said during that period the mental hospital was replaced with community care and neighborhood clinics. In the 1980s, he said, law evolved to where the state is now required to provide training to people in commitment, and the mentally ill are afforded equal protection and due process rights under the Fourteenth Amendment.

[1] Article VII, Section 1 reads: "Institutions for the benefit of the insane, blind, and deaf and dumb, shall always be fostered and supported by the state; and be subject to such regulations as may be prescribed by the General Assembly."

He commented there has been a significant depopulation of state hospitals since the 1980s, with the unfortunate result that many mentally disabled persons became homeless or were imprisoned. He further noted that assistance to that population is now governed by the Americans with Disabilities Act (ADA), which focuses on services in the community rather than institutionalization.

He said Ohio currently has six psychiatric hospitals with a total of 1,067 beds. He said as many as 70 percent of this population has been committed as a result of a criminal proceeding.

Mr. Kirkman emphasized that the language used to describe those with psychiatric disabilities is a "major focus in the mental health world." He said the word "insane" is offensive and discriminatory, with the current trend in the Ohio Revised Code being to identify people first and the disability second.

Mr. Kirkman suggested that, because Ohio does not operate any institution for the "blind" or the "deaf and dumb," and because the trend is away from institutionalizing the mentally incapacitated, Article VII, Section 1 could be eliminated. As further support, he noted that funding state institutions takes away from community-based services. He said eliminating the section would not affect treatment of persons in the criminal justice system because treatment for those persons is required by the United States Constitution and derives from the inherent authority of the state to prescribe criminal laws.

Rep. Curtin asked whether advocates for the developmentally disabled would agree with Mr. Kirkman's recommendation that the section could be eliminated with no adverse effects. Mr. Kirkman said the provision does not deal with the system in place for the developmentally disabled, but rather only addressed the "insane, blind, deaf and dumb." However, he said many people would oppose removing the section because of the current climate, citing two bills in Congress relating to federal mental health law. He said one bill would push more toward hospitalization of patients, while the other would expand funding for current services. He said the debate in Congress has been polarized around how many beds are needed and whether the affected persons could be treated in the community. He said it looks like Congress may pass a bill after the recess. He noted that some could see removal of Article VII, Section 1 as an attempt to put the state out of the institution business, but he does not see it that way.

Committee member Ed Gilbert said he is concerned about removing the provision as opposed to correcting the language, because removal might suggest there would be no protection for mentally ill individuals. He said he would be interested in drafting language that would simply bring the section up to date. He noted a debate that occurred in the Bill of Rights and Voting Committee about the proper wording for persons who have mental health issues as described in Article V, Section 6. He suggested it would be possible to draft language that is more acceptable, so people would not take it the wrong way as they might do in the case of removal. He acknowledged "it would be heavy lift to do that." Mr. Gilbert also asked whether the phrase "deaf and dumb" is currently accepted.

Mr. Kirkman answered that the deaf community does not like the word "dumb," and that many do not consider themselves having a disability but rather that they simply have a different

language. He said the main point he would emphasize is that the deaf and blind are integrated into society now and are not institutionalized.

Seeking clarification, Chair Readler noted the word "dumb" is objectionable, and Mr. Kirkman agreed. Chair Readler also commented that the word "insane" is also not accepted, and Mr. Kirkman acknowledged the only context in which "insane" is still used is as a term of art in criminal law.

Chair Readler asked about the challenges of changing the language. Mr. Kirkman noted that whatever language is used today will have a different meaning in ten years. He said the better focus is on making the language consistent with federal law in terms of not segregating people.

Chair Readler asked about the legal force of the provision, noting it is not self-executing but must be supplemented by statute. Mr. Kirkman noted that an argument that the constitutional provision supports requiring the state to pay for institutionalization has been rejected in favor of the view that statutes control that question.

Representative Bob Cupp asked whether there is some other authorization in the Ohio constitution for use of public funds to assist those with disabilities. Mr. Kirkman said the power to do that existed before the 1851 constitution. He said the inherent authority to use public funds to assist the disabled lies with the general authority to provide for the general welfare of people in the state. But, he acknowledged, taking this language out could be viewed by some as eliminating a backstop.

Chair Readler asked if staff could provide insight on what the Constitutional Revision Commission recommended regarding Article VII, Section 1 in the 1970s. Senior Policy Advisor Steven H. Steinglass answered that this was one of the most contentious issues in the 1970s. He said at that time a majority of the commission voted to change the language to remove the offending words, but there were cases establishing a right to treatment. Thus, some 1970s Commission members wanted to put a right to treatment in the constitution, a proposal that achieved majority support but not the requisite two-thirds of the commission. He noted there is a minority report signed by nine or ten members of the 1970s Commission, saying the language should be strengthened consistent with the emerging right-to-treatment movement.

Mr. Steinglass continued that the General Assembly has plenary authority, and that a specific provision of the constitution is not needed to allow the General Assembly to enact law related to institutions for persons in need of care. He said the provision derives from the mid-19th century, when litigation was not viewed as an option. He said these mandates were addressed to the legislative branch, with no conception that the provision could be used as a basis for suing to protect an individual right.

Rep. Curtin added that the debate in the 1970s Commission was taking part in a supercharged climate, recalling that John Gilligan campaigned for governor by taking reporters to view these "medieval-type" institutions in order to emphasize a need to modernize. Rep. Curtin said there was no consensus as to how to replace those institutions, but now that is no longer a question and it is assumed those populations will be treated humanely.

Committee member Roger Beckett asked if the word "insane" is considered antiquated and offensive. Mr. Kirkman answered the word is not just antiquated but is not used clinically, and the mentally ill consider it to be stigmatizing.

Mr. Gilbert asked if Mr. Kirkman could recommend alternative language to the words "insane" and "dumb." Mr. Kirkman said the problem with terms like this is that there is always the risk that in five years the preferred usage will be completely different.

There being no further questions for Mr. Kirkman, Chair Readler thanked him for his presentation.

Report and Recommendation:

Article VI, Section 3 (Public School System, Boards of Education)

The committee then turned to a discussion of whether to hear a final presentation and then vote on a report and recommendation for Article VI, Section 3 (Public School System, Boards of Education).

Governor Bob Taft said he would like to defer concluding the committee's work on Article VI, Section 3 because he would like the committee to consider recommending elimination of the provision's distinction between rural and urban school districts. Referring specifically to language excepting city school districts from the requirement that the General Assembly determine by law the size and organization of district boards of education, Gov. Taft said the basis for that exception is unclear. He said this exception could impede the ability of the General Assembly to address educational challenges across the state.

Senator Tom Sawyer said he concurs with Gov. Taft's request to wait on issuing the report and recommendation, noting that the role of the General Assembly has changed in the last few decades in relation to public schools and the funding of nonpublic schools. He said it would be worthwhile to look at that issue. He said this section was written when Ohio, like other states, was expanding on its educational requirements, and, while the provision still may be sufficient, the current use of public funds for education may make it important to take a new look at the provision.

Mr. Gilbert commented that he heard from the head of the Youngstown NAACP, who would like the opportunity to present to the committee on the topic of Article VI, Section 3. Thus, he agrees with waiting to conclude the committee's review of the section.

Chair Readler indicated that, in light of the requests by Gov. Taft, Sen. Sawyer, and Mr. Gilbert, the committee would postpone concluding its work on Article VI, Section 3.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 12:30 p.m.

Approval:

The minutes of the September 8, 2016 meeting of the Education, Public Institutions, and Local Government Committee were approved at the November 10, 2016 meeting of the committee.

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Chad A. Readler, Chair

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Edward L. Gilbert, Vice-chair

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION OF THE
EDUCATION, PUBLIC INSTITUTIONS, AND LOCAL GOVERNMENT COMMITTEE

OHIO CONSTITUTION
ARTICLE VI, SECTION 5

LOANS FOR HIGHER EDUCATION

The Education, Public Institutions, and Local Government Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article VI, Section 5 of the Ohio Constitution concerning loans for higher education. It is issued pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

The committee recommends that no change be made to Article VI, Section 5 of the Ohio Constitution and that the provision be retained in its current form.

Background

Article VI, Section 5 reads as follows:

> To increase opportunities to the residents of this state for higher education, it is hereby determined to be in the public interest and a proper public purpose for the state to guarantee the repayment of loans made to residents of this state to assist them in meeting the expenses of attending an institution of higher education. Laws may be passed to carry into effect such purpose including the payment, when required, of any such guarantee from moneys available for such payment after first providing the moneys necessary to meet the requirements of any bonds or other obligations heretofore or hereafter authorized by any section of the Constitution. Such laws and guarantees shall not be subject to the limitations or requirements of Article VIII or of Section 11 of Article XII of the Constitution. Amended Substitute House Bill No.618 enacted by the General Assembly on July 11, 1961, and Amended Senate Bill No.284 enacted by the General Assembly on May 23, 1963, and all appropriations of moneys made for the purpose of such enactments, are hereby validated, ratified, confirmed, and approved in all

> respects, and they shall be in full force and effect from and after the effective date of this section, as laws of this state until amended or repealed by law.

Article VI of the Ohio Constitution concerns education, and Section 5 provides for a program to guarantee the repayment of student loans for state residents as a way of promoting the pursuit of higher education.

Adopted by voters upon being presented as Issue 1 on the May 1965 ballot, the provision expresses a public policy of increasing opportunities for state residents to pursue higher education by guaranteeing higher education loans and allowing laws to be passed to effectuate that purpose. The section also exempts state expenditures for student loan guarantees from the limitations on state spending contained in Article VIII (relating to state debt), and Article XII, Section 11 (preventing the state from issuing debt unless corresponding provision is made for levying and collecting taxes to pay the interest on the debt).

The provision was effectuated by statutes that first created the Ohio Student Loan Commission (OSLC), and, later, in 1993, by statutory revisions that created the Ohio Student Aid Commission (OSAC). The name change was prompted by the addition of state grant and scholarship programs to the administrative duties of OSLC, programs that previously had been under the auspices of the Ohio Board of Regents (now the Ohio Board of Higher Education).

As outlined in a 1993 Attorney General Opinion, the OSAC consisted of nine members appointed by the governor with the advice and consent of the Senate, with powers and duties that included the authority:

> " * * * [T]o guarantee the loan of money for educational purposes; to acquire property or money for its purposes by the acceptance of gifts, grants, bequests, devises, or loans; to contract with approved eligible educational institutions for the administration of any loan or loan plan guaranteed by the OSAC; to contract with "approved lenders," as defined in R.C. 3351.07(C), for the administration of a loan or loan plan guaranteed by the OSAC and "to establish the conditions for payment by the commission to the approved lender of the guarantee on any loan," R.C. 3351.07(A)(4); to sue and be sued; to collect loans guaranteed by the OSAC on which the commission has met its guarantee obligations; and to "[p]erform such other acts as may be necessary or appropriate to carry out effectively the objects and purposes of the commission," R.C. 3351.07(A)(10). Further, pursuant to R.C. 3351.13, the Ohio Student Aid Commission "is the state agency authorized to enter into contracts concerning the programs established" by those federal educational loan programs specified in that statute. The OSAC also has authority to "accept any contributions, grants, advances, or subsidies made to it from state or federal funds and shall use the funds to meet administrative expenses and provide a reserve fund to guarantee loans made pursuant to [R.C. 3351.05-.14]." R.C. 3351.13. [1]

In relation to its duties, the OSAC was empowered to collect loan insurance premiums, depositing them into a fund in the custody of the state treasurer to be used solely to guarantee

loans and to make payments into the OSAC operating fund. Such moneys were reserved solely to pay expenses of the OSAC. Asked whether language in Article VI, Section 5 indicating the state would guarantee the repayment of educational loans meant that the full faith and credit of the state had been pledged to cover that debt, the attorney general opined that the obligations incurred by OSAC are not backed by the full faith and credit of the state and, therefore, that the obligee would not have recourse to other funds of the state.

By 1995, the changing landscape of the student loan market rendered the utility of OSAC obsolete, partly due to the success of a federal direct-lending program, and partly because private companies were offering the same service.[2] Thus, OSAC commissioners voted to dissolve the agency at the conclusion of the biennial budget cycle in June 1997.[3] OSAC was eliminated by the 121st General Assembly with the passage of Am. Sub. H.B. 627, effective January 3, 1997, and any remaining functions and duties of OSAC were transferred to the Ohio Board of Regents. Finally, with the passage of H.B. 562 in the 122nd General Assembly, all references to the duties and authority of OSAC were eliminated from the Revised Code.[4]

Amendments, Proposed Amendments, and Other Review

Section 5 has not been amended or reviewed since its adoption in 1994.

Litigation Involving the Provision

Although the Ohio Supreme Court has not reviewed Section 5, a federal court case addressed whether federal law changes requiring states to return excess funds in their student loan guarantee accounts to the federal government violated the United States Constitution.

In *Ohio Student Loan Comm. v. Cavazos*, 709 F.Supp. 1411 (S.D. Ohio 1988), the court described the history of the hybrid federal-state arrangement regarding student loan guarantees:

> The Ohio Higher Education Assistance Commission ("OHEAC") was created by the Ohio General Assembly in 1961 and began operations in 1962. The OHEAC was originally funded solely with state appropriations and was designed to administer state programs to assist Ohio residents attending institutions of post-secondary education. In particular, the OHEAC guaranteed loans made by private lenders to certain eligible students.
>
> Three years later, the United States Congress created the Guaranteed Student Loan Program pursuant to the Higher Education Act of 1965, as amended, 20 U.S.C. 1071 et seq. The purpose of this program was to encourage states and nonprofit organizations and institutions to establish student loan guaranty programs, to provide a federal guaranty program for those students not having reasonable access to state or private guaranty programs, to subsidize interest payments on student loans, and to reinsure state and private guaranty programs. 20 U.S.C. 1071(a). In response to this federal program, the Ohio General Assembly created the OSLC, pursuant to Chapter 3351 of the Ohio Revised Code,

> as a successor to the OHEAC. The creation of such a commission was authorized by Article VI, Section 5 of the Constitution of the State of Ohio.
>
> The OSLC is a state agency created for the administration of Ohio's student loan guaranty program. The OSLC is authorized to enter into contracts and to sue and be sued in its own name. R.C. 3351.07. In addition, R.C. 3351.07(A)(2) expressly states "that no obligation of the commission shall be a debt of the state, and the commission shall have no power to make its debts payable out of moneys except those of the commission." The OSLC is also expressly authorized to accept federal funds and to enter into contracts pursuant to the Higher Education Act of 1965, as amended, 20 U.S.C. 1071 et seq. R.C. 3351.13.

As described in the facts of the case, OSLC's funding sources derived partially from federal government reimbursements for losses sustained due to student loan defaults, and federal payment of administrative cost allowances, but OSLC also received money from non-federal sources in the form of private lender fees, and interest and investment income from moneys held in a reserve fund. The program was subject to a federal-state reinsurance agreement providing that OSLC would administer the guaranteed student loan program in Ohio in exchange for which the secretary of the U.S. Department of Education would reinsure the state's guarantees.

In 1987, the relevant law was amended to limit the amount of state cash reserves, requiring any excess to be transferred to the secretary. A dispute arose when OSLC refused to transfer its excess reserves, which amounted to over $26 million, on the grounds that the transfer would violate the terms of the contractual agreement between the secretary and OSLC. In response, the secretary withheld the reinsurance funds, and OSLC sued, and won, in federal district court.

However, the United States Court of Appeals for the Sixth Circuit reversed, concluding the secretary was transferring the funds from a federal program with a state administrator, rather than appropriating funds from a state program, and that none of the facts supported a conclusion that the federal government had breached a contract, misappropriated funds, or violated due process or other constitutional rights. *Ohio Student Loan Comm. v. Cavazos*, 900 F.2d 894 (6th Cir. 1990).

Presentations and Resources Considered

Harmon Presentation

On June 9, 2016, David H. Harmon, former executive director of OSLC, presented to the committee. Mr. Harmon was employed with OSLC from 1977 to 1988, and was executive director from 1984-88. According to Mr. Harmon, Ohio was one of the earliest states to recognize a need for the support and encouragement of the provision of credit for the financing of higher education. He noted the General Assembly acted in July of 1961 to create the Ohio Higher Education Commission, whose purpose was to guarantee repayment of student loans made by banks, savings and loan companies, and credit unions. The Higher Education Commission collected an insurance premium on each loan as it was made, covering

administrative expenses and creating an insurance fund from which lender guaranty payments could be made.

Following the model established in Ohio and several other states, Mr. Harmon said the federal government moved in 1965 to create a federal program operating on the same principles. Mr. Harmon said the point of the constitutional section in 1965 was to allow OSLC to become the guaranteed agency under the federal loan program. He said the federal Guaranteed Student Loan Program was a part of the Higher Education Act of 1965. In response, in 1967, Ohio designated the Ohio Higher Education Commission as the state's guaranty agency, renaming it OSLC.

Mr. Harmon said the federal program provided for the "re-insurance" of all loans – meaning whenever the states paid off an insured loan, the federal government would reimburse the agency for each payment. He said OSLC continued collecting insurance premiums as loans were approved, providing the necessary revenue for agency operations.

During his time with the agency, Mr. Harmon said the annual loan volume grew from $21.1 million in 1970 to $120.3 million in 1978 – a 570 percent increase. He said the volume of loans guaranteed in 1979 was nearly double the 1978 loan volume. Mr. Harmon said OSLC began with only three employees in 1962, but grew to over 50 in 1970, and reached nearly 250 by the early 1990s.

Mr. Harmon said the 1980s saw the beginning of competition for loan volume, as several multi-state guaranty agencies began offering services to Ohio students, schools, and lenders. He said, although these competitors were non-profits, as required by federal law, increased loan volume brought increased revenue – thereby enhancing the ability of these agencies to offer enhanced support and automation.

Mr. Harmon said OSLC lacked the resources and spending authority to match these competitors on a feature-by-feature basis, but did respond to competitive developments. He said in 1992, the General Assembly authorized a move of the Ohio Instructional Grant Program from the Ohio Board of Regents to OSLC, resulting in the agency being renamed the Ohio Student Aid Commission (OSAC).

He noted that, despite the fact that the agency provided schools and students with enhanced service levels and streamlined processes, schools, lenders and student borrowers all found the competitive offerings from the out-of-state guarantors to be compelling, and the OSAC's market share, expressed as loan volume, plummeted.

Mr. Harmon said the creation of the Federal Direct Loan Program in the early 1990s resulted in a vote by the OSAC in 1995 to abolish the agency. He said, by that time, the OSAC's share of Ohio's loan volume had fallen to below 50 percent and revenues declined along with the loan volume. Thus, the OSAC ended its 36-year run at the end of the state's biennial budget cycle in 1997. As a result, the state's guaranty agency designation was awarded by the U.S. Department of Education to an out-of-state competitor, and the grant and scholarship programs were transferred to another state agency.

Asked whether there is any need to retain Article VI, Section 5, Mr. Harmon said, with the move to the federal direct loan program, no states have a guaranteed program any longer. Thus, he said, the section is no longer necessary. Mr. Harmon said unless new legislation is a precise mirror of previous legislation, it is unlikely that Section 5 could be repurposed for the new legislation. He said he is not sure a change in the constitution was ever necessary to allow OSLC, but any need for new law could be done by statute rather than by constitutional amendment.

Mr. Harmon was asked whether eliminating Section 5 could prevent the state from promulgating programs that would forgive loan indebtedness for graduates who accept certain types of employment, such as teaching or medical jobs in underserved communities. Mr. Harmon said those types of programs are unrelated to the constitutional provision, were never part of OSLC, and could be created legislatively.

Estep Presentation

Rae Ann Estep, currently deputy director of operations at the Office of Budget and Management (OBM), testified before the committee on June 9, 2016 to provide her perspective as a former executive director of OSAC from 1995-1997. Ms. Estep said the mission of the OSAC was to administer the federal-guaranteed student loan program, and to provide loan information to students and their families. She said the OSAC also administered a state grant and scholarship program. According to Ms. Estep, the OSAC consisted of nine persons serving three-year terms, with two members representing higher education institutions, one representing secondary schools, and the three remaining members representing approved lenders. Ms. Estep said, during her tenure, the OSAC staff consisted of an executive director and 225 employees.

Ms. Estep continued that, in the summer of 1995, the OSAC began proceedings to dissolve itself due to changes in financial aid policy on the federal and state levels in the 1990s. She said a primary factor was competition from private companies and the OSAC's subsequent declining market share of student loans. She noted that, in 1989, the OSAC guaranteed 99 percent of the state's higher education loans, but that number fell below 50 percent in 1995. She commented that the OSAC administered a federal program with federal money, and was in direct competition with private companies offering the same service. In addition, the OSAC faced the threat of federal funding cuts due to the federal government's rapidly-changing financial aid policy. According to Ms. Estep, when the new federal direct lending program was established, it took away the OSAC's market share, ultimately leading to the vote to dissolve the agency.

Ms. Estep concluded by saying because the OSAC was financed by the federal government, its closing did not have a direct cost-saving measure for Ohioans. She said the grant and scholarship program, which was the only part of the OSAC's operations financed by the state, was transferred to the Ohio Board of Regents. She said the OSAC's final closure occurred on June 30, 1997. Ms. Estep noted that her tenure at the agency was focused on closing the OSAC and assisting its employees in transitioning to new positions.

Discussion and Consideration

In considering whether to recommend a change to Article VI, Section 5, the committee acknowledged that, as matters currently stand, Article VI, Section 5 would appear to be non-functional because it is not necessary to facilitate activities of the Ohio Department of Higher Education in relation to student loans, grants, and scholarships, to accommodate the federal student loan program, or to support private lender activity related to student loans.

Nevertheless, the committee was concerned that future changes to the federal government's student loan programs and policies could result in Ohio and other states taking on additional responsibilities related to student loan guarantees. Further, although the committee was uncertain whether the provision is necessary to support programs that forgive student loan debt in order to foster the provision of needed services in underserved areas of the state, the committee was reluctant to recommend its elimination in case it could be implemented in that manner. The consensus of the committee was that, in any event, the section expresses an important state public policy of encouraging higher education and helping students afford it.

For these reasons, the committee determined Article VI, Section 5 may continue to play a useful role in encouraging the state's support of funding for higher education, and so concluded the provision should be retained.

Conclusion

The Education, Public Institutions, and Local Government Committee concludes that Article VI, Section 5 should be retained in its current form.

Date Issued

After formal consideration by the Education, Public Institutions, and Local Government Committee on November 10, 2016, the committee voted to issue this report and recommendation on _____.

Endnotes

[1] Ohio Atty. Gen. Opinion No. 93-058 (Dec. 20, 1993). Available at: http://www.ohioattorneygeneral.gov/getattachment/110d0ab1-1ac3-46c3-9d07-838260f371f2/1993-058.aspx (last visited June 3, 2016).

[2] Jeanne Ponessa, "Ohio Student-Aid Agency to Dissolve Itself," Education Week (Nov. 8, 1995) http://www.edweek.org/ew/articles/1995/11/08/10oh.h15.html (last visited June 3, 2016).

[3] *Id.*

[4] *See*, http://archives.legislature.state.oh.us/bills.cfm?ID=122_HB_562 (last visited June 3, 2016).

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION OF THE
EDUCATION, PUBLIC INSTITUTIONS, AND LOCAL GOVERNMENT COMMITTEE

OHIO CONSTITUTION
ARTICLE VI, SECTION 6

TUITION CREDITS PROGRAM

The Education, Public Institutions, and Local Government Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article VI, Section 6 of the Ohio Constitution concerning the tuition credits program. It is issued pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

The committee recommends that no change be made to Article VI, Section 6 of the Ohio Constitution and that the provision be retained in its current form.

Background

Article VI, Section 6 reads as follows:

> (A) To increase opportunities to the residents of this state for higher education, it is hereby determined to be in the public interest and a proper public purpose for the state to maintain a program for the sale of tuition credits such that the proceeds of such credits purchased for the benefit of a person then a resident of this state shall be guaranteed to cover a specified amount when applied to the cost of tuition at any state institution of higher education, and the same or a different amount when applied to the cost of tuition at any other institution of higher education, as may be provided by law.
>
> (B) The tuition credits program and the Ohio tuition trust fund previously created by law, which terms include any successor to that program or fund, shall be continued subject to the same laws, except as may hereafter be amended. To secure the guarantees required by division (A) of this section, the general assembly shall appropriate money sufficient to offset any deficiency that occurs in the Ohio tuition trust fund, at any time necessary to make payment of the full

> amount of any tuition payment or refund that would have been required by a tuition payment contract, except for the contract's limit of payment to money available in the trust fund. Notwithstanding Section 29 of Article II of this Constitution, or the limitation of a tuition payment contract executed before the effective date of this section, such appropriations may be made by a majority of the members elected to each house of the general assembly, and the full amount of any such enhanced tuition payment or refund may be disbursed to and accepted by the beneficiary or purchaser. To these ends there is hereby pledged the full faith and credit and taxing power of the state.
>
> All assets that are maintained in the Ohio tuition trust fund shall be used solely for the purposes of that fund. However, if the program is terminated or the fund is liquidated, the remaining assets after the obligations of the fund have been satisfied in accordance with law shall be transferred to the general revenue fund of the state.
>
> Laws shall be passed, which may precede and be made contingent upon the adoption of this amendment by the electors, to provide that future conduct of the tuition credits program shall be consistent with this amendment. Nothing in this amendment shall be construed to prohibit or restrict any amendments to the laws governing the tuition credits program or the Ohio tuition trust fund that are not inconsistent with this amendment.

Article VI of the Ohio Constitution concerns education, and Section 6 is designed to promote the pursuit of higher education by establishing in the constitution a government-sponsored program to encourage saving for post-secondary education.

Beginning in 1989, the General Assembly enacted Revised Code Chapter 3334, establishing a college savings program and creating the Ohio Tuition Trust Authority (OTTA), an office within the Ohio Board of Regents (now the Department of Higher Education). The OTTA was designed to operate as a qualified state tuition program within the meaning of section 529 of the federal Internal Revenue Code. *See,* R.C. 3334.02, 3334.03.

Additional statutes authorize the OTTA to develop a plan for the sale of tuition units through tuition payment contracts that specify the beneficiary of the tuition units, as well as creating a tuition trust fund that is to be expended to pay beneficiaries, or to pay higher education institutions on behalf of beneficiaries, for certain higher education-related expenses. R.C. 3334.09, 3334.11. Those expenses include tuition, room and board, and books, supplies, equipment, and other expenses that meet the definition of "qualified higher education expenses" under section 529 of the Internal Revenue Code. R.C. 3334.01(H) and (P).

Both Section 6 and the related Revised Code sections work in conjunction with the so-called "529 plans," named for the Internal Revenue Code section providing tax benefits for college savings plans. As described by an analyst for the Congressional Research Service:

> 529 plans, named for the section of the tax code which dictates their tax treatment, are tax advantaged investment trusts used to pay for higher-education expenses. The specific tax advantage of a 529 plan is that distributions (i.e., withdrawals) from this savings plan are tax-free if they are used to pay for qualified higher education expenses. If some or all of the distribution is used to pay for nonqualified expenses, then a portion of the distribution is taxable, and may also be subject to a 10 percent penalty tax.
>
> Generally, a contributor, often a parent, establishes an account in a 529 plan for a designated beneficiary, often their child. Upon establishment of a 529 account, an account owner, who maintains ownership and control of the account, must also be designated. In many cases the parent who establishes the account for their child also names [him or herself] as the account owner.
>
> According to federal law, payments to 529 accounts must be made in cash using after-tax dollars. Hence, contributions to 529 plans are not tax-deductible to the contributor. The contributor and designated beneficiary cannot direct the investments of the account, and the assets in the account cannot be used as a security for a loan. A contributor can establish multiple accounts in different states for the same beneficiary. Contributors are not limited to how much they can contribute based on their income. Similarly, beneficiaries are not limited to how much they can receive based on their income. However, each 529 plan has established an overall lifetime limit on the amount that can be contributed to an account, with contribution limits ranging from $250,000 to nearly $400,000 per beneficiary. [Citations omitted.][1]

Since their implementation in the early 1990s, 529 plans have grown to represent $253.2 billion in investments nationwide, with the average account size now hovering at $20,000.[2] Ohio plan data indicate that, as of December 2015, over a half million accounts are open, with over $9 billion in assets:[3]

Plan	Assets Under Management	Open Accounts
CollegeAdvantage 529 Savings Plan (guaranteed)[4]	$340,966,665	34,275
CollegeAdvantage 529 Savings Plan (direct)[5]	$4,318,805,309	266,370
CollegeAdvantage 529 (advisor)[6]	$4,631,704,946	339,962
Total	$9,291,476,920	640,607

Section 6 was successfully proposed to voters as Issue 3 on the November 1994 ballot. Its purpose, as described on the ballot, was to "increase opportunities to the residents of the State of Ohio for higher education and to encourage Ohio families to save ahead to better afford higher education." The proposed amendment was projected to:

1. Allow the state to maintain a program for the sale of tuition credits whereby the proceeds of such credits purchased for the benefit of state residents are guaranteed by the state to cover a specified amount when applied to the cost of tuition at any state institution of higher education and the same or a different amount when applied to the cost of tuition at any other higher education institution as may be provided by law.

2. * * * [R]equire that tuition credits paid from the tuition credits program and the Ohio tuition trust fund be supported by the full faith and credit of the state of Ohio and require the passage of laws for the conduct of the tuition credits program consistent with this amendment.

3. Require the General Assembly to appropriate money to offset any deficiency in the Ohio tuition trust fund to guarantee the payment of the full amount of any tuition payment or refund required by a tuition payment contract, and allow a majority of the members of each house of the General Assembly to appropriate funds for the payment of any tuition payment contract previously entered into.

4. Require that all Ohio tuition trust fund assets be used for the purpose of the fund, and if the fund is liquidated, require that any remaining assets be transferred to the general revenue fund of the state.[7]

Amendments, Proposed Amendments, and Other Review

Section 6 has not been amended or reviewed since its adoption in 1994.

Litigation Involving the Provision

There has been no litigation concerning Article VI, Section 6.

Presentations and Resources Considered

Gorrell Presentation

On April 14, 2016, Timothy Gorrell, executive director of the Ohio Tuition Trust Authority (OTTA), presented to the committee on Ohio's tuition savings program. Mr. Gorrell said his agency is part of the Department of Higher Education and is charged with responsibility for administering the tuition credits program set forth in Article VI, Section 6.

According to Mr. Gorrell, the OTTA originally was created in 1989 under R.C. Chapter 3334, with the purpose of helping families save for higher education expenses. He described that, in November 1994, Ohio voters approved State Issue 3, a constitutional amendment that provided the state's full faith and credit backing for the Ohio Prepaid Tuition Program (now known as the Guaranteed Savings Plan), and to clarify the federal tax treatment of that plan.

Mr. Gorrell said in 1996, section 529 was added to the Federal Internal Revenue Code to provide a federal tax-advantaged way to save for college education expenses. Then, in 2000, the Ohio General Assembly authorized Ohio to offer variable savings plans, as well as allowing a state tax benefit by which Ohio residents can deduct up to $2,000 a year, per beneficiary, from their Ohio taxable income.

In December 2003 the Guaranteed Savings Plan was closed to contributions and new enrollments in response to rapidly rising tuition costs and investment pressures due to the market environment, said Mr. Gorrell.[8] Then, in 2009, existing legislation was changed to place OTTA under the Department of Higher Education, with the role of OTTA's 11-member board being limited to a fiduciary duty over the investments in OTTA's college savings plans.

Mr. Gorrell described OTTA as a "non-General Revenue Fund, self-funded agency," with all of its operating expenses being funded through account fees paid by CollegeAdvantage Program account owners.

Mr. Gorrell said OTTA currently sponsors three plans under the CollegeAdvantage 529 College Savings Program: the CollegeAdvantage Direct 529 Savings Plan, the CollegeAdvantage Advisor 529 Savings Plan offered through BlackRock, and the CollegeAdvantage Guaranteed 529 Savings Plan, which is closed to new investments. He said funds invested in these plans may be used at any accredited college or university in the country, as well as at trade schools and for other education programs that are eligible to participate in federal financial aid programs. According to Mr. Gorrell, across the three plans, OTTA directly manages or oversees over 641,000 accounts and $9.4 billion in assets as of March 31, 2016.

Mr. Gorrell further explained that, in November 1994, by adopting Article VI, Section 6, Ohio voters approved providing the Guaranteed Savings Plan with the full faith and credit backing of the state, meaning that, if assets are not sufficient to cover Guaranteed Savings Plan liabilities, the Ohio General Assembly will appropriate money to offset the deficiency.

Mr. Gorrell also indicated that OTTA has the responsibility to generate investment returns on assets to match any growth in tuition obligations, noting that, currently, OTTA has sufficient assets on a cash basis to meet the payout obligations of the existing tuition units and credits held by account owners.

Mr. Gorrell said OTTA does not recommend any changes to Article VI, Section 6. He noted that a federal tax goal of the section was intended to address a period of unsettled case law that created uncertainty as to whether similar prepaid tuition programs were exempt from federal taxation. He said that uncertainty has been resolved by the codification of Internal Revenue Code section 529, rendering the constitutional provision unnecessary to clarify the federal tax treatment of such plans.

Discussion and Consideration

In considering whether to recommend a change to Article VI, Section 6, the committee was persuaded by Mr. Gorrell's testimony indicating that, while one goal of the provision was to

clarify federal tax treatment of the Guaranteed Savings Plan, a purpose that became obsolete with the federal enactment of Internal Revenue Code section 529, the constitutional provision's other purpose, to establish the full faith and credit backing of the state for the Guaranteed Savings Plan, remains viable. The committee agreed with Mr. Gorrell that, although no new Guaranteed Savings Plan account holders have been added since 2003, the fact that some accounts are still active may require the constitutional provision to be retained in its current form.

Thus, the committee was reluctant to alter or repeal Article VI, Section 6, although a future constitutional review panel may conclude there is no justification for retaining the section because all accounts have been paid out.

Conclusion

The Education, Public Institutions, and Local Government Committee concludes that Article VI, Section 6 should be retained in its current form.

Date Issued

After formal consideration by the Education, Public Institutions, and Local Government Committee on November 10, 2016, the committee voted to issue this report and recommendation on _____.

Endnotes

[1] Margot L. Crandall-Hollick, Tax-Preferred College Savings Plans: An Introduction to 529 Plans, (Washington, D.C.: Congressional Research Serv. 2015), http://fas.org/sgp/crs/misc/R42807.pdf (last visited June 14, 2016).

[2] "529 Plan Data," College Savings Plans Network, available at: http://www.collegesavings.org/529-plan-data/ (last visited June 15, 2016).

[3] 529 Plan Data, Reporting Date Dec. 31, 2015, College Savings Plans Network. Available at: http://www.collegesavings.org/wp-content/uploads/2015/09/Dec-2015.pdf (last visited June 15, 2016).

[4] A "guaranteed savings fund" is defined in the Ohio Administrative Code as: "those accounts in the Ohio college savings program, whether containing tuition credits and/or tuition units, which have the financial backing through the full faith and credit of the state of Ohio as more specifically set forth in Section 6 of Article VI, Ohio Constitution." Ohio Admin.Code 3334-1-01(G).

[5] A direct plan is defined as one in which the investor directly contracts with the company managing the plan. *See,* https://www.collegeadvantage.com/docs/default-source/stand-alone-documents/otta_decisiontree_02_cr(1).pdf?sfvrsn=4 (last visited June 24, 2016).

[6] An "advisor" plan is one in which the investor has purchased the plan through a financial advisor or broker-dealer who, in turn, facilitates the investment with the company managing the plan. *See, id.*

[7] Toledo *Blade*, Oct. 25, 1994, at p. 7, https://news.google.com/newspapers?id=qUYxAAAAIBAJ&sjid=fQMEAAAAIBAJ&pg=6086,7819623&hl=en (last visited June 14, 2016).

[8] According to the Legislative Service Commission, the suspension of the Guaranteed Savings Plan resulted from an actuarial deficit that was "initially caused largely by the combination of the downturn in the economy and the stock market, and the large increases in tuitions at Ohio's public colleges and universities after the removal of the tuition caps in FY 2002 and FY 2003." LSC Greenbook, Analysis of the Enacted Budget, Department of Higher Education (August 2015), p. 42. Available at: http://www.lsc.ohio.gov/fiscal/greenbooks131/bor.pdf (last visited June 24, 2016).

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Disability Rights OHIO

We have the legal right of way.

"Fostering" Institutions and People with Disabilities
Presentation to the Education, Public Institutions, and Local Government Committee of the Ohio Constitutional Modernization Commission

Michael Kirkman, J.D.
Executive Director
Disability Rights Ohio

I. Introduction

The Ohio Constitution, at section 1 of Article VII, states:

> Institutions for the benefit of the insane, blind, and deaf and dumb, shall always be fostered and supported by the state; and be subject to such regulations as may be prescribed by the general assembly.

This section has been interpreted many times, most significantly in the case of *State ex rel. Price v Huwe*,[1] where the Ohio Supreme Court specified that the language is not self-executing. Subsequent cases have also limited the reach of the language, for example not allowing a court to order payment for private institutional care when state care is not available or adequate,[2] or to provide payments for individuals for their benefit. Reduced to its basic level, as interpreted by the state's courts, the provision provides a basis for the state to create a system of state hospitals.

In reviewing this language and its place in a modern Ohio Constitution, it is important for the Committee to have some understanding of the history of institutions and the impact, often horrific and negative, of state institutions on the lives of those involuntarily detained in them. This paper is a high level overview of how institutions for people with disabilities have evolved in the United States and Ohio, and some of the impact institutions have had on the lives of citizens with disabilities.

II. Early history

The earliest attempts to "care for" people with disabilities reflected the lack of understanding of their conditions, and often led to their living in horrible conditions. In the late 18th Century:

> [T]he lunatics [sic] were kept in gloomy, foul smelling cells and were ruled over by 'keepers' who used their whips freely. Unruly patients, when not being beaten, were regularly 'chained to rings of iron, let into the floor or wall of the cell … restrained in hand-cuffs or ankle irons," and bundled into Madd-shirts that "left the patient an impotent bundle of wrath."[3]

Individuals such as Benjamin Rush of Pennsylvania and Dorthea Dix in Massachusetts led campaigns to provide more humane "treatment" to "lunatics" and "maniac" during the period from the 1770s to the 1850s. Dix in particular was able to convince state lawmakers to increase appropriations for care for those labeled as mentally ill. As a result of those efforts, twenty states expanded their mental hospitals, and the

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Disability Rights Ohio is the federally mandated system to protect and advocate the rights of people with disabilities in Ohio. See 42 U.S.C. § 15041, 42 U.S.C. § 10801, and R.C. § 5123.60

[1] 105 Ohio St. 304, 137 N.E. 167 (1922)

[2] *In re Hamil*, 69 Ohio St.2d 97, 431 N.E.2d 317 (1982)

[3] Whitaker, Mad in America at 4 (Perseus 2004), quoting Thomas Morton, *The History of the Pennsylvania Hospital* (Times Printing House 1895)

number of people who received care there grew from 2,561 in 1840 to approximately 74,000 in 1890.[4]

Ohio had a similar experience. The General Assembly had been providing for the care and treatment of the "insane" since the early 1800's,[5] although most of the cost and responsibility for care fell to families, the church, or counties. After the passage of the 1851 language, the number of institutions grew and the population grew from 3,300 in 1880 to 10,226 by 1900.[6]

The changes reflected not just a call for hospitals but also a change in how therapy for this group was provided, to one of "moral" or "humane" treatment that had prospered in England and in parts of the United States. Such treatment was premised on small, family like settings and recreational and education programs, however, and a combination of expansive growth, blending of populations, and political patronage resulted in a steady decline in treatment outcomes.[7]

III. Eugenics and Institutions in the 20th Century

By the early 20th Century, however, this attempt to humanize treatment for those in institutions turned ugly based on the faux science of Eugenics. Fueled by plant research conducted by Gregor Mendal, American psychologist Henry H. Goddard and others quickly declared that the same natural selection could be applied to the human animal. Goddard is particularly notorious for his 1912 story of the Kallikak family (a pseudonym), in which he concluded that feeble-mindedness could be transmitted genetically.[8]

While Goddard later expressed regret for the inaccuracies in his research (indeed, it has been completely debunked) and the abuses that followed, the idea had taken hold in the scientific and political communities of the time. Numerous states passed laws mandating compulsory sterilization of "feeble-minded" people. This resulted in hundreds if not thousands of people in institutions throughout the nation being sterilized, often without their knowledge and consent.

This issue also gained legal notoriety in the case of *Buck v Bell*,[9] in which the Supreme Court of the United States denied a constitutional challenge to Virginia's compulsory sterilization law. Justice Oliver Wendell Holmes is famously quoted:

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[4] *Ibid.* p. 34
[5] Eagle and Kirkman, Ohio Mental Health Law (2d Ed. Banks-Baldwin), Section 1.11 p 41, *Rone v Fireman*, 473 F. Supp. 92(N.D. Ohio 1979)
[6] *Ibid.*
[7] Whitaker, n. 3, p. 36
[8] The Kallikak Family: A Study in the Heredity of Feeble-Mindedness (McMillan 1912) The book was also translated into German in 1914 and 1932, Die Familie Kallikak. Earnest Kraepelin, a psychiatrist known for his attempts to create a nosology or classification structure for mental illness, and Earnst Rudin, who worked closely with the National Socialists beginning in 1933, were reportedly influenced by the work. See also Smith et al. *Who Was Deborah Kallikak?*, 50 Intellectual and Developmental Disabilities 169-178.
[9] 274 U.S. 200 (1927)

> [Carrie Bell] … is the daughter of a feeble-minded mother in the same institution, and the mother of an illegitimate feeble-minded child... Three generations of imbeciles are enough.[10]

Years later, anthropologist Steven Jay Gould would conduct an investigation into the circumstances surrounding that quote and conclud that neither Carrie Bell, her mother, nor her grandmother were imbeciles. Rather, Carrie's mother became pregnant while unwed in rural Virginia and was sent to the institution because she was pregnant.[11]

The *Buck* case also highlights a convergence of poverty, gender, and disability as hallmarks of the nation's institutional population in the early 20th Century. A similar convergence occurred largely but not exclusively in the American South with people of color.[12] These individuals involved were largely poor, many had no mental disability to speak of, but were sent to state institutions or schools because they were deaf, had other disabilities, such as epilepsy, or simply were unruly.

Ohio has its own legal chapter in this story. In *Wade v Bethesda Hospital*,[13] Judge Holland M. Gary sought immunity after being sued in federal court for ordering the sterilization of a minor who was alleged to be feeble-minded, relying on Ohio's statutes allowing the practice. Unfortunately for Judge Gary, the statues had been rescinded and the federal court denied immunity for his actions.

IV. "Almost a Revolution"[14]

Eugenics and other laws that segregated and discriminated against people with behavioral or intellectual disabilities, such as "Ugly Laws"[15] remained on the books in most states into the mid-20th Century. Other practices such as non-consensual lobotomy or electro-shock therapy (ECT) added to the list of "treatments" that were sometimes visited on individuals in the name of therapy, but ultimately proved abusive and unsupportable.

Two trends emerged in the 1960's that completely changed how institutions were viewed and used. Debate related to these trends continues in the current legal, medical, and political debate.

Psychiatry has long sought to shore up its credibility within the medical profession. The "Kraepelinian dichotomy" developed by Emil Kraepelin in early 20th

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[10] *Ibid. at* 207

[11] Gould, Carrie Buck's Daughter, 7 National History 14 (1984). See Lombardo, Three Generations, No Imbeciles: Eugenics, the Supreme Court and Buck v. Bell (Johns Hopkins 2002)

[12] Burch & Joyner, Unspeakable: The Story of Junius Wilson (North Carolina Press 2007)

[13] 337 F.Supp. 671 (1971) *aff'd on reconsideration* 356 F.Supp. 380 (S.D. 1973) Judge Gary had previously ordered other sterilizations in Muskingum County, including one involving a physically attractive feeble-minded young woman, *In re Simpson*, ___Ohio Misc.___, 180 N.E.2d 206 (Muskingum Co. P. Ct. 1962). Citing to *Buck*, the judge ordered the sterilization as incidental to his authority to institutionalize people, relying on the general equity powers of the court.

[14] Applebaum, Almost a Revolution: Mental Health Law and the Limits of Change

[15] Schwiek, The Ugly Laws: Disability in Public (New York University Press 2009) Columbus, Ohio, had one of the first such laws, passed as part of the vagrancy code in 1894.

century Germany was one such attempt at a psychiatric nosology. The American Psychiatric Association's Diagnostic and Statistical Manual (currently in version 5) sought to classify mental disease with the scientific precision that the International Statistical Classification of Diseases and Related Health Problems, or ICD, brought to physical disease. Most recently, the National Institute of Mental Health has created its own system, the Research Domain Criteria or RDoC, seeking to guide its funding towards research that will lead to new nosology based in biology.[16]

In the mid 1960's, advances in psychopharmacology allowed psychiatrists to prescribe neuroleptic or "anti-psychotic" drugs to tranquilize and mitigate the worst of many patient's symptoms. This meant that many individuals did not need to be segregated from society because of their symptoms.

Based in part on reports of the success of patients on neuroleptics, the Kennedy administration proposed a community mental health act in 1962. "The state hospital, relics from a shameful past, would be replaced by a matrix of community care, anchored in neighborhood clinics."[17] That system is still roughly in place, though it was never fully funded and funding, now a block grant, has lagged for many years.

The second trend was an onslaught of federal litigation attacking the use of state institutions on two fronts: first, unconstitutional conditions, including abuse, lack of hygiene, and lack of adequate treatment and training in the institutions; and a lack of due process, both procedural and substantive, in state laws providing for involuntary commitment. The former culminated in the U.S. Supreme Court case of *Youngberg v Romeo*,[18] which held that the 14th Amendment requires a state to provide adequate training to those who are held in state institutions to protect them from harm and address the reasons for confinement.

As to the second issue, starting with the Wisconsin case of *Lessard v Schmidt*,[19] people subject to involuntary commitment were guaranteed procedural due process rights including right to counsel in those hearings. Various other rulings established a higher evidentiary standard (clear and convincing),[20] and a requirement that the individual must present a danger of harm to self or others to justify involuntary confinement.[21] In Ohio

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[16] Director's Blog: Transforming Diagnosis, April 29 2013, www.nimh.nih.gov/about/director/2013/transforming-diagnosis.shtml

[17] Whitaker, note 1, p. 155-6

[18] 457 U.S. 307 (1982). In Ohio, the Northern District of Ohio required the state to improve conditions at the state psychiatric hospital in Lima, *Davis v Hubbard*, 506 F. Supp. 915 (N.D. Ohio 1980). Cases were filed in Ohio against Orient State School (*Barbara C. v. Moritz* No. C-2-77-887, Order and plan for relief October 19, 1981 (S.D. Ohio) and Apple Creek Developmental Center (*Sidles v. Delaney*No. C75-300A, Consent Judgment April 26, 1976, modified January 6, 1981(N.D. Ohio), resulting in rulings that provided comprehensive standards for the management of the institutions. A consent order also settled a case against the Central Ohio Psychiatric Hospital, *Doe v Hogan.*

[19] 349 F. Supp. 1078 (E.D. Wis. 1972)

[20] *Addington v Texas*, 441 U.S. 418 (1979)

[21] *O'Connor v Donaldson,* 422 U.S. 563 (1975)

these reforms followed from the case of *In re Fisher*,[22] and subsequently appeared in statute in the Mental Health Act of 1976.[23] Other cases clarified when medication could be administered without the consent of the individual, an area where "the controversy between a 'therapeutic' versus a 'rights' oriented approach to mental health policy" was particularly acrimonious.[24]

The combination of these two trends, combined with the always relentless pressure on state budgets and a lack of federal dollars for inpatient psychiatric treatment, resulted in significant depopulation of state hospitals. Without adequate funding in the community system, many individuals were unable to access treatment. Some became homeless or were imprisoned.

This situation and the different narratives describing it, remain with us today. One narrative describes the situation as a tragedy,[25] or even as "a psychiatric *Titanic.*"[26] At the same time, others recognize that the situation is less than black and white. "That deinstitutionalization has generally failed to deliver appropriate services to ex-mental patients or other persons in need of them is hardly debatable," writes Professor David Rothman, but "[t]he question is why the outcome . . . should have been so grim, and what should be done to remedy the situation."[27] And as noted by Professor Sam Bagenstos, the debate is not simply historical, as federal courts are actively involved in deciding cases under the Americans with Disabilities Act as interpreted by the U.S. Supreme Court in *Olmstead v L.C. ex rel. Zimring*[28] recognizing that unjustified institutionalization can violate the Americas with Disabilities Act.[29]

Perhaps the key difference, as pointed out by Professor Bagenstos, is that the litigation theories under the ADA are necessarily focused forward on the receipt of quality services in a home like environment. *Ball v Kasich*, filed earlier this year by Disability Rights Ohio,[30] challenges the undue segregation of people with intellectual and developmental disabilities in large state and private institutions (ICFs), but the relief requested in the case actually is focused on provision of residential and vocational services for class members in community based settings which already are in use in the state. Similar results have been achieved in other cases.[31]

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[22] 39 Ohio St.2d 71, 313 N.E.2d 851 (1974)
[23] 1976 H 244, eff. August 26, 1976. See generally, Eagle and Kirkman, Ohio Mental Health Law, Chapter 7(2d Edition, Banks-Baldwin 1990)
[24] Eagle and Kirkman, supra n. 5 p. 294. *Steele v Hamilton County Board*, 90 Ohio St.3d 176, 736 N,E,2d 10 (2000)
[25] Applebaum, *Crazy in the Streets*, Commentary, May 1987, at 34, 39
[26] E. Fuller Torrey, Out of the Shadows: Confronting America's Mental Illness Crisis 11 (1997)
[27] Rothman, The Rehabilitation of the Asylum, Am. Prospect, Sept. 21, 1991, http://prospect.org/article/rehabilitation-asylum
[28] 527 U.S. 581 (1999)
[29] Bagenstos, The Past and Future of Deinstitutionalization Litigation, 34 Cardoza L. Rev. 1 (2012)
[30] No. 2:16-cv-282, filed May 31, 2016
[31] See *Disabilities Advocates, Inc. v Paterson*, 598 F. Supp. 2d 289 (E.D.N.Y. 2009) vacated on other grounds, 675 F.3d 149 (2d Cir. 2012)

V. The Current Situation in Ohio

Against this back drop, Ohio continues to provide institutional care in state hospitals. There are six physical facilities (Athens, Heartland, Northern Ohio, Northcoast, Summit, and Twin Valley)[32] with 1,067, available beds. A portion of the facility at Twin Valley is the Moritz Forensic Center, a high security facility for individuals judged as particularly at a high risk of violence or flight. As of September 6, 2016, the total census is 1,040 patients.[33]

Significantly, of these patients, the state department estimates that 70% of admissions are "forensic" or committed as a result of a criminal court proceeding and found incompetent to stand trial or not guilty by reason of insanity. Although there is no clear data on this, it is generally assumed that the length of stay for forensic patients is longer due to stricter controls in the law and the involvement of the trial judge from the criminal case.[34] Length of stay for civil commitments average 10-12 days, with some variation between hospitals.[35]

Under the Mental Health Act of 1988, commitment to the hospital is generally initiated and is paid for by the local mental health and addiction board. These boards are considered the 'gatekeepers' of the beds.[36] Many boards operate short term "three day" emergency centers or small hospitals to control the flow into the more expensive state hospitals. Recent changes in the law favor court ordered outpatient treatment as an alternative to long term or repeated hospitalization.[37]

VI. The Growth of Self Advocacy and Concerns about Language

While some might consider it a minor point, language and particularly the labeling of people who have lived experienced with psychiatric disabilities has become a major focus in the mental health world. Those who have experienced involuntary commitment or forced treatment now regularly speak out against those practices, instead recognizing the need for community based services, peer supports, housing, and employment. The Substance Abuse Mental Health Services Administration (SAMHSA)[38] in the United States Department of Health and Human Services, which administers the mental health block grant to the states, has recognized the need to focus on recovery based services,[39] and this approach is incorporated into many of Ohio MHAS' programs.

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[32] A comprehensive description of the services provided by the Ohio Department of Mental Health and Addiction Services can be found at http://mha.ohio.gov, and the hospital system at http://mha.ohio.gov/Default.aspx?tabid=96.
[33] http://reports.mha.ohio.gov/pcs/dailycensus.pdf
[34] Eagle and Kirkman, supra note 5 at section 7.12, p. 236-8
[35] http://reports.mha.ohio.gov/pcs/losdischarged.pdf
[36] Rev. Code § 5122.10 et seq.
[37] See R.C. §§ 5122.01(B)(5), 5122.15 as amended by 130 SB 43 (2014)
[38] http://www.samhsa.gov/
[39] https://recoverymonth.gov/

VI. Conclusion

There are many reasons why the Committee may want to consider removal or modification of the language in Article V, section 1. The most apparent concern is the antiquated language, which not only is not descriptive of current clinical nomenclature or more acceptable 'people first' language, but is offensive and discriminatory. The trend in both the Revised Code and other regulatory matters is to identify people first, in other words the person first, the disability second. Advocates in this area go even farther, asking that the clinical labels not be applied to them at all.

Second, there is no real need for a separate provision of the Constitution to allow the General Assembly to perform this function, as evidenced by the provision for institutions prior to its enactment. In the politics of 1851, the height of progressive reform and the addition of therapeutic care as advocated by Dorthea Dix, such a provision certainly seemed enlightened. But the need for services, and the competition for funding, is for evidence based practices such as Assertive Community Treatment, which is proven to help individuals comply with treatment and avoid re-hospitalization. Providing funding for state institutions actually takes away from community based, integrated, and recovery based services that provide support to the many individuals who voluntarily seek treatment and contribute to society, as well as payment to private hospitals which are less costly. Provision for treatment of those in the criminal justice system is both constitutionally mandated, and inherent in the authority of the General Assembly and the State to fashion criminal laws. All of these points suggest that the section could be eliminated.

Education, Public Institutions, and Local Government Committee

Planning Worksheet
(Through October 2016 Meetings)

Article VI - Education

Sec. 1 – Funds for religious and educational purposes (1851, am. 1968)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved
Completed	**5.14.15**	**10.8.15**	**10.8.15**	**10.8.15**	**11.12.15**	**12.10.15**	**12.10.15**

Sec. 2 – School funds (1851)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved
Completed	**5.14.15**	**10.8.15**	**10.8.15**	**10.08.15**	**11.12.15**	**12.10.15**	**12.10.15**

Sec. 3 – Public school system, boards of education (1912)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved
Completed	**10.8.15**						

Sec. 4 – State board of education (1912, am. 1953)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 5 – Loans for higher education (1965)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 6 – Tuition credits program (1994)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Article VII - Public Institutions

Sec. 1 – Insane, blind, and deaf and dumb (1851)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 2 – Directors of penitentiary, trustees of benevolent and other state institutions; how appointed (1851)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 3 – Vacancies, in directorships of state institutions (1851)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Article X - County and Township Organization

Sec. 1 – Organization and government of counties; county home rule; submission (1933)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 2 – Township officers; election; power (1933)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 3 – County charters; approval by voters (1933, am. 1957)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 4 – County charter commission; election, etc. (1933, am. 1978)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Article XV - Miscellaneous

Sec. 1 – Seat of government (1851)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 3 – Receipts and expenditures; publication of state financial statements (1851)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 4 – Officers to be qualified electors (1851, am. 1913, 1953)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 6 – Lotteries, charitable bingo, casino gaming (1851, am. 1973, 1975, 1987, 2009, 2010)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 7 – Oath of officers (1851)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 10 – Civil service (1912)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 11 – Marriage (2004)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Article XVIII - Municipal Corporations

Sec. 1 – Classification of cities and villages (1912)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 2 – General laws for incorporation and government of municipalities; additional laws; referendum (1912)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 3 – Municipal powers of local self-government (1912)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 4 – Acquisition of public utility; contract for service; condemnation (1912)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 5 – Referendum on acquiring or operating municipal utility (1912)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 6 – Sale of surplus product of municipal utility (1912, am. 1959)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 7 – Home rule; municipal charter (1912)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 8 – Submission and adoption of proposed charter; referendum (1912)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 9 – Amendments to charter; referendum (1912, am. 1970)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 10 – Appropriation in excess of public use (1912)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 11 – Assessments for cost of appropriating property (1912)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 12 – Bonds for public utilities (1912)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 13 – Taxation, debts, reports, and accounts (1912)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 14 Municipal elections (1912)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

2016 Meeting Dates

December 8

2017 Meeting Dates

January 12

February 9

March 9

April 13

May 11

June 8

July 13

August 10

September 14

October 12

November 9

December 14