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.

/s/ Chad A. Readler
Chad A. Readler, Chair

/s/ Edward L. Gilbert
Edward L. Gilbert, Vice-chair