Testimony to Public Institutions and Local Government Committee of the Ohio Constitutional Modernization Commission

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Thank you for giving me the opportunity to testify before your Committee. The work you are doing is very important and I appreciate the seriousness with which you approach this topic.

Although I ordinarily do not like to brag about myself, I thought it might be helpful for me to suggest to you why I am qualified to assist you today. I am a Distinguished University Professor at the Ohio State University, the highest recognition given to faculty. I received this recognition, in part, because of my constitutional and statutory work in the disability rights field. I was honored to have the United States Supreme Court cite my work to help explain why the Americans with Disabilities Act is a constitutional exercise of Congress' Section Five authority under the Fourteenth Amendment.[1] Thus, you have asked me to testify in my primary area of expertise and I am honored to do so, although I should note that I am not an expert on the Ohio Constitution. My expertise lies in the areas of federal statutory and constitutional law.

You have asked me to comment on the following language in the Ohio Constitution:

> 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.

You have asked whether the language used in this provision needs to be updated to reflect a more modern and respectful way to describe people with disabilities and, equally importantly, whether it should be modified to be more consistent with federal constitutional and statutory law.

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[1] *See* Tennessee v. Lane, 541 U.S. 509, 526 n. 15 (2004).

I. Definition of Disability

The answer to your first question is relatively easy. The disability rights community prefers "person first" language so we might refer to a person who has a psychiatric impairment but we would not describe the person as "the insane." The thinking behind this word choice is that our disability status is only one aspect of our personhood. In addition, we no longer use words such as "insane" or "deaf or dumb." We might refer to individuals with psychiatric, speech, sensory, visual or intellectual impairments. As you probably know, the word "retarded" has been eliminated from most discourse and "deaf and dumb" is similarly disrespectful.

The overall purpose of the language in the Ohio Constitution seems to be to demarcate a subgroup of those with disabilities who might need state assistance. The federal government sometimes uses the terms "people with developmental disabilities" or "people with severe disabilities." The Centers for Disease Control and Prevention defines the term "developmental disabilities" as including "a group of conditions due to an impairment in physical, learning, language, or behavior areas. These conditions begin during the developmental period, may impact day-to-day functioning, and usually last throughout a person's lifetime."[2] With strong educational programs, some people with developmental disabilities are able to live in the community without assistance. The term developmental disability typically refers to people who are born with significant disabilities like Down Syndrome or autism. It does not usually refer to people who become disabled later in life through disease, an accident, or aging, and who might find themselves needing assistance to

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[2] *See* https://www.cdc.gov/ncbddd/developmentaldisabilities/facts.html.

live independently. If the purpose of the paragraph in the state Constitution is to specify who might need state assistance, the term "developmental disability" might be both underinclusive and overinclusive.

The federal government also uses a form to help people self-identify as having a targeted/severe disability and therefore be entitled to affirmative hiring rules. The definition of "targeted/severe disability" includes people who have total deafness in both ears, are blind, are missing extremities, have partial or complete paralysis, have epilepsy, have severe intellectual disability, have psychiatric disability, or have dwarfism.[3] As used by the federal government, not everyone in the definition of "severe" disability would need assistance. For example, the term can include people who use a wheelchair but have no intellectual impairments. It also might not include some people, like those with muscular dystrophy, who might need assistance in daily activities. If the purpose of this paragraph in the Constitution is to specify who might need state assistance, the term "severe disability" may also be underinclusive and overinclusive.

In sum, whatever terms you chose should be "people first" language and specify those subgroups of people with disabilities who you conclude need assistance. There is no term that accurately refers to that subcategory of individuals with disabilities. Thus, I would recommend a functional approach where you qualify the term "individual with a disability" to reference those who need assistance to live independently. I use that functional approach in my recommendations at the end of this testimony.

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[3] U.S. Office of Personnel Management, Form 256 (revised July 2010).

II. Institutional Care

The purpose of this section appears to be benign – to suggest what kind of responsibility the state wants to accept for the care of some people in an institutional setting who are in that setting because of their disability status. While states may have created many of the institutions for the "insane, blind, deaf or dumb" out of public-spirited purposes, the reality, unfortunately, was often quite horrific.[4] Those institutions were often nothing other than barbaric warehouses for people until they died with little respect for their basic humanity.

Judges ordered some of those institutions closed after hearing graphic descriptions of their conditions. For example, a grand jury was convened in Cleveland in 1944 to investigate the conditions at Cleveland State Hospital and reported that it was "shocked beyond words that a so-called civilized society would allow fellow human beings to be mistreated as they are at Cleveland State Hospital."[5] In 1971, an Alabama district court judge described the following conditions at a state mental institution, six months after defendants were ordered to make improvements:

> One of the four died after a garden hose had been inserted in his rectum for five minutes by a working patient who was cleaning him; one died when a fellow patient hosed him with scalding water; another died when soapy water was forced into his mouth; and a fourth died from a self-administered overdose of drugs which had been inadequately secured."[6]

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[4] *See* Ruth Colker, WHEN IS SEPARATE UNEQUAL?: A DISABILITY PERSPECTIVE (Cambridge University Press 2008).

[5] E. Fuller Torrey, OUT OF THE SHADOWS: CONFRONTING AMERICA'S MENTAL ILLNESS CRISIS 83 (1997).

[6] Wyatt v. Stickney, 334 F. Supp. 1341, 1343 (M.D. Ala. 1971).

This kind of testimony helped spur the deinstitutionalization movement. The concept that people with disabilities should be educated in and live in the most integrated setting possible (rather than a segregated, institutional setting) has received strong support from the United States Congress and the United States Supreme Court.

When the Education for All Handicapped Children Act was passed in 1975 (and continuing today as the Individuals with Disabilities Education Act ("IDEA")), Congress insisted that all children be educated in the most integrated setting possible. The IDEA provides that States must have in place procedures assuring that:

> to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.[7]

This language was taken from federal court decisions from the 1970s in which courts found that that inclusion principle is grounded in the Fourteenth Amendment's equal protection clause.[8] This federally-mandated inclusion principle was the *Brown v. Board of Education* for the disability-rights community. Integrated, rather than segregated, education was considered constitutionally required by both the courts and Congress.

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[7] 34 C.F.R. § 300.114(a)(2).

[8] *See Mills v. Board of Education,* 348 F. Supp. 866 (D.D.C. 1972), and *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania,* 343 F. Supp. 279 (E.D. Pa. 1972).

This integration principle then received further support from Congress when it enacted the Americans with Disabilities Act in 1990.[9] In 1999, in the *Olmstead* decision, the United States Supreme Court held that the "proscription of discrimination [under the ADA] may require placement of persons with mental disabilities in community settings rather than in institutions."[10] In support of that conclusion, the Court noted that: "Unjustified isolation … is properly regarded as discrimination based on disability."[11] It based that conclusion on two "evident judgments":

> First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life …. Second, confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.[12]

While the Supreme Court in *Olmstead* did not go so far as to require all state institutions to be closed, it created a presumption in favor of deinstitutionalization, holding that states:

> are required to provide community-based treatment for persons with mental disabilities when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.[13]

Because the *Olmstead* Court was interpreting Title II of the ADA, which, in turn, has been found to be a valid exercise of Congress' authority under Section 5 of

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[9] 42 U.S.C. § 12101 et seq.

[10] Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 587 (1999). I strongly urge the Committee to read the *Olmstead* decision.

[11] *Id.* at 597.

[12] *Id.* at 600-01.

[13] *Id.* at 607.

the Fourteenth Amendment,[14] one can understand the *Olmstead* Court to be reflecting on the meaning of the United States Constitution. In other words, the *Olmstead* holding can be grounded in a state's obligations under the equal protection clause of the Fourteenth Amendment.

Thus, one can readily see that the language currently used in the Ohio Constitution, which presumes that people will receive state-funded assistance or treatment in an institutional setting, conflicts with the evolution of statutory and constitutional law in the disability context. It is impermissible for the state to place an individual with disabilities in the most restrictive setting, i.e., institutional care, if a more integrated option, like community-based care, could be made available. A state cannot fund institutional care at the exclusion of community-based care.

III. Recommendations

In light of the above discussion, you could pursue two different options and abide by federal statutory and constitutional law.

First, you could repeal the provision under the theory that its emphasis on institutionalization and use of derogatory disability labels are antiquated and serve no contemporary purpose.

Second, you could update the provision to reflect a state's obligation to provide community-based service and support for people with disabilities who need assistance to live in the community, with institutional care being only a last resort. It could state:

> The state shall always foster and sustain service and supports for people with disabilities who need assistance to live independently;

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[14] *See* Tennessee v. Lane, 541 U.S. 509(2004).

these services and supports will, to the maximum extent possible, be provided in the community, rather than in institutions.

I hope you find these recommendations helpful. Thank you for your time. I am happy to answer any questions.