



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION

OHIO CONSTITUTION ARTICLE VI, SECTION 5

LOANS FOR HIGHER EDUCATION

The Ohio Constitutional Modernization Commission adopts this report and recommendation regarding Article VI, Section 5 of the Ohio Constitution concerning loans for higher education. It is issued pursuant to Rule 10.3 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

The Commission 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be in full force and effect from and after the effective date of this section, as laws of this state until amended or repealed by law.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 1965.

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 Education, Public Institutions, and Local Government 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 Education, Public Institutions, and Local Government 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.

Action by the Education, Public Institutions, and Local Government Committee

After formal consideration by the Education, Public Institutions, and Local Government Committee, the committee voted on November 10, 2016 to issue a report and recommendation recommending that Article VI, Section 5 be retained in its current form.

Presentation to the Commission

On December 15, 2016, on behalf of the Education, Public Institutions, and Local Government Committee, Commission Counsel Shari L. O'Neill appeared before the Commission to present the committee's report and recommendation, by which it recommended retention of Article VI, Section 5. Ms. O'Neill explained the history and purpose of the provision, indicating that the committee had determined that it would be appropriate to retain Article VI, Section 5 in its current form.

On March 9, 2017, Ms. O'Neill appeared before the Commission to provide a second presentation of the committee's report and recommendation. Ms. O'Neill indicated the report and recommendation expresses that the section articulates a policy encouraging financial support for state residents wishing to pursue higher education, declaring it to be in the public interest for the state to guarantee the repayment of student loans.

Ms. O'Neill continued that the report describes the history of the section, as well as indicating it has not been amended or reviewed since its adoption. She said the report indicates the section has not been subject to any Ohio Supreme Court decisions. Ms. O'Neill said the report describes that presentations by two former directors of the commissions that oversaw the state student loan

program would support the conclusion that the constitutional section is currently nonfunctional, however, the committee recommends the section be retained because it could be necessary in the future to accommodate changes to the federal student loan program, or to support programs that forgive student loan debt in order to foster the provision of needed services in underserved areas of the state. Thus, she said, the report documents the committee’s recommendation to retain the section in its present form.

Action by the Commission

At the Commission meeting held March 9, 2017, Commission member Ed Gilbert moved to adopt the report and recommendation for Article VI, Section 5, a motion that was seconded by Commission member Jo Ann Davidson.

A roll call vote was taken, and the motion passed unanimously, by a vote of 21 in favor, with none opposed, one abstention, and seven absent.

Conclusion

The Ohio Constitutional Modernization Commission concludes that Article VI, Section 5 should be retained in its current form.

Date Adopted

After formal consideration by the Ohio Constitutional Modernization Commission on December 15, 2016, and March 9, 2017, the Commission voted to adopt this report and recommendation on March 9, 2017.

/s/ Charleta B. Tavares
Senator Charleta B. Tavares, Co-chair

/s/ Jonathan Dever
Representative Jonathan Dever, Co-chair

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).