OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

Education, Public Institutions, and Local Government Committee

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

Part I

September 8, 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
	Mr. Larry Macon
	Sen. Tom Sawyer
	Governor Bob Taft
	Ms. Petee Talley

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

EDUCATION, PUBLIC INSTITUTIONS, AND LOCAL GOVERNMENT COMMITTEE

THURSDAY, SEPTEMBER 8, 2016
11:00 A.M.
OHIO STATEHOUSE ROOM 017

AGENDA

I. Call to Order

II. Roll Call

III. Approval of Minutes

- Meetings of April 14, 2016 and June 9, 2016

  [Draft Minutes – attached]

IV. Presentations

- "Article XV, Section 6 – Lotteries, Charitable Bingo, and Casino Gaming"

  Senator Bill Coley
  Ohio Senate, 4th District

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

  Michael Kirkman
  Executive Director
  Disability Rights Ohio

V. Reports and Recommendations

- Article VI, Section 3 (Public School System, Boards of Education)
  - Second Presentation
  - Public Comment
  - Committee Discussion
  - **Possible Action Item: Consideration and Adoption**

  [Report and Recommendation – attached]

  [Memorandum by Steven C. Hollon and Shari L. O'Neill titled "Summary of Youngstown City School Dist. Bd. of Edn. v. State of Ohio," dated August 16, 2016 – attached]

- Article VI, Section 5 (Loans for Higher Education)
  - First Presentation
  - Public Comment
  - Committee Discussion

  [Report and Recommendation – attached]

- Article VI, Section 6 (Tuition Credits Program)
  - First Presentation
  - Public Comment
  - Committee Discussion

  [Report and Recommendation – attached]

VI. Committee Discussion

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

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

  [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

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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

FOR THE MEETING HELD
THURSDAY, APRIL 14, 2016

Call to Order:

Chair Chad Readler called the meeting of the Education, Public Institutions, and Local Government Committee to order at 9:41 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 February 11, 2016 meeting of the committee were approved.

Presentation:

Article VI, Section 6 (Tuition Trust Authority)

Chair Readler began the meeting by noting the committee would be receiving a presentation on Article VI, Section 6 dealing with the Ohio Tuition Trust Authority.

Timothy Gorrell
Executive Director
Ohio Tuition Trust Authority

Chair Readler introduced Timothy Gorrell, executive director of the Ohio Tuition Trust Authority (OTTA), an agency within the Department of Higher Education charged with responsibility for administering the tuition credits program set forth in Article VI, Section 6.

Mr. Gorrell indicated the OTTA originally was created in 1989 under R.C. Chapter 3334, with the purpose of helping families save for higher education expenses. He continued 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.

According to Mr. Gorrell, 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. 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. 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 concluded that Ohio's CollegeAdvantage 529 College Savings Program, including the Guaranteed Savings Plan, helps Ohioans and others across the country save over time to help offset the future costs of higher education.

He said OTTA does not recommend any changes to the existing Article VI, Section 6 of the Ohio Constitution. Reiterating that the purposes of the constitutional amendment were (1) to clarify federal tax treatment of the Guaranteed Savings Plan, and (2) to provide the Guaranteed Savings Plan with the full faith and credit backing of the State of Ohio, he said the federal tax goal of the provision came from a period of unsettled case law that created uncertainty as to whether similar prepaid tuition programs were exempt from federal taxation. Because that uncertainty has since

been resolved by the codification of Internal Revenue Code Section 529, he said the constitutional provision is no longer necessary to clarify federal tax treatment of such plans. However, he said, with regard to the second purpose of establishing the full faith and credit backing of the Guaranteed Savings Plan, OTTA defers to experts in Ohio constitutional law as to whether the constitutional language is necessary to maintain that guarantee. He said OTTA believes its duty is to continue to service the existing Guaranteed Savings Plan account holders and to manage the investments in a way that minimizes risk to the state under the guarantee.

Chair Readler asked whether Article VI, Section 6(A) continues to have a purpose. Mr. Gorrell answered that his understanding is that when the plans began in the 1990s, these types of college savings plans were just starting up and many were guaranteed plans. He said at that time there were concerns about the status of the plans under federal tax law, and no federal guidelines. He said Ohio decided to address that concern, but after the constitutional amendment was adopted and the federal government caught up by codifying Section 529, Article VI, Section 6(A) was no longer necessary.

Chair Readler followed up, asking if Mr. Gorrell agreed that it is not necessary to remove Section 6(A). Mr. Gorrell said the Guaranteed Savings Plan has been closed since 2003, with each year having fewer account holders, so there will be a time in the future when the fund will not exist anymore. He concluded that the question of whether there needs to be a constitutional provision or not will be answered by the passage of time.

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

Article VI, Section 4 (State Board of Education)

Chair Readler then turned the committee's attention to its continuing consideration of Article VI, Section 4, relating to the state board of education and provision for the appointment of a state superintendent of public instruction.

Russell Harris
Ohio Education Association

Chair Readler recognized Russell Harris, education research development consultant for the Ohio Education Association (OEA), an organization that represents 122,000 educators across the state. Mr. Harris indicated that he was appearing to express the OEA's concerns relating to the suggestion that the state board of education be an all-appointed board.

Indicating the OEA has had a longstanding policy that supports an all-elected state board, Mr. Harris noted that state board members are among the few public officials who are considered to be "non-partisan." He said an all-appointed board would not be less political, and that, although there are some appointed board members in the current system, "having an all-appointed board would make it more vulnerable to the political whims of whoever is governor."

Mr. Harris said, in 1994, when the then-sitting board refused to appeal the state's loss in the *DeRolph* school funding case, the governor called for an all-appointed board. He said the General Assembly rejected this idea, but compromised by creating the current hybrid board

consisting of eight gubernatorial appointees and eleven elected representatives from districts that are each comprised of three state senate districts.

Mr. Harris continued that, while the current hybrid board has at times been subject to partisan politics, it also has agreed on important issues such as the need for stronger oversight and accountability for charter schools. He said having elected board members has made the overall board more responsive to the public's desire for reform. Nevertheless, he added there are still many instances where the votes of the board are "along party lines," with appointed members joining with members of their own party to form a working majority on most votes.

He said it is not clear just who the appointed or at-large members of the board represent. He said they may represent people in their home school district or county, or they may be carrying out the wishes of the governor who appointed them. In any event, he continued, they do not have to answer to the voters.

Mr. Harris concluded that, in order to best serve the needs of Ohio's students, the state board should be an independent voice for public education. He said an autonomous, all-elected board can better advocate for high-quality educational opportunities for all children, and for providing resources based on educational needs instead of political expedience.

Chair Readler thanked Mr. Harris for his remarks, asking Mr. Harris whether one of the speakers who had presented to the committee had proposed that the state board of education be all-appointed. Mr. Harris said the only speaker who had advocated for an all-appointed board was Tom Gunlock, current president of the State Board of Education. Chair Readler disagreed, saying his recollection was that Mr. Gunlock had suggested several possibilities for improvement, with one possibility being an all-appointed board.

Mr. Ed Gilbert asked whether Mr. Harris had suggestions regarding whether the superintendent should be elected or appointed. Mr. Harris said the OEA does not have an official position on that question, but has always operated under the model that the state board has one employee, who is the superintendent, and that the board has the ability to hire and fire the state superintendent. He noted there are only 13 states that have an elected superintendent, thus, in the majority of cases, the board has control over the state superintendent.

Chair Readler noted that in a majority of states the governor appoints the board members, unlike Ohio, adding that even though the state board is picking the superintendent, the governor is picking the board.

Representative Michael Curtin commented that all all-appointed boards are not created equal, suggesting that providing safeguards as to what sort of candidates would be forwarded to the governor for his consideration could help improve the composition of the board. He said, for example, there could be a nominating council to vet and forward names to the governor, and the council could be comprised of experienced stakeholders. He added that there could be criteria for who could be considered for a nomination. He said, for example, the candidate could be required to have served two terms on a local board of education before being considered, there could be a requirement for interviews by the council along with the council's approval by a supermajority vote (2/3 for example), followed by consent of the Senate by supermajority vote.

He asked Mr. Harris, if such a procedure were in place, whether the OEA would still oppose any type of appointment to the board.

Mr. Harris said Rep. Curtin's suggestion was an interesting prescription for the board's configuration, and would be better than the current structure. He said Rep. Curtin's plan would improve the appointment process, and that OEA would have to see the details. However, he said his organization would look at that plan much more favorably than it views the current system.

Senator Tom Sawyer asked whether Mr. Harris could describe how an all-elected board differs from a hybrid board in terms of problem-solving and decision-making. Mr. Harris said there are eleven races for the state board, noting that seven of the seats are up for a vote in November, and that for the last three election cycles there have been seven board member seats contested each time. He said there has been a great deal of campaigning for state board positions. Based on his experience attending all board meetings, he said he has noticed that elected members are aware of regional, parent, and local board concerns particularly relating to high-stakes testing. He said he has seen fair and well-intended resolutions go down, and said there would be a difference if it were an all-elected board. He emphasized the importance of removing topics from the governor's administration, citing this as a way of preventing recent scandals. He noted that when the General Education Development (GED) program was taken out of the Department of Education and given to a private firm, the price increased and there are many fewer GEDs being given now. He said board members are upset, and would like to work with the legislature to get it back into the hands of the department, but the elected members are sensitive to the preferences of the public while appointed members are not because they look to the administration's view. He said he thinks things would be different if there were an all-elected board, and the autonomy that goes with that.

Mr. Harris cited the current trend in which there is frequent turnover of the superintendent as one symptom of the problem, indicating that superintendents would not be forced out if there were an all-elected board. He said, however, that state board districts are unwieldy, with three senate districts together making one state board district. He said the current system results in a huge geographical area, with approximately 900,000 or more voters in each district.

Chair Readler asked whether Mr. Harris is proposing a board with 33 members, to which Mr. Harris said no, but that the districts are too big. He said the solution would be to follow the lines of Congressional districts.

Committee member Roger Beckett said currently the constitution is silent on the question of how the state board is selected; it is left to the legislature. He asked whether it is the association's position that the method of selecting the board should be taken out of statute and put in constitution. Mr. Harris said that would be OEA's first preference, and that OEA wants a constitutional amendment for all-elected board. Nevertheless, he said, OEA recognizes that statutes allow some flexibility because times change, technology changes, and the legislature needs to react. So, he said, the first preference would be for a constitutional amendment, and the second preference would be to leave Section 4 the way it is.

Senator Bill Coley said legislators generally care more about the opinions of the local boards in their home districts rather than those of the state board. He said he does not foresee a possibility

that the General Assembly would cede authority over education or educational funding to the state board. He asked whether, given that reality, a state board of education is necessary. He also wondered why it would not work to have a superintendent who is a member of the governor's cabinet.

Mr. Harris answered that the state needs a state board to implement legislation enacted at both state and federal levels, to set standards, and to define and coordinate rules. He said he agrees the legislature should not give up authority to provide funding and set direction, but implementing educational policy needs to be done by education professionals, not political professionals. He said that can be accomplished better with an all-elected state board.

Governor Bob Taft noted that, at the committee's last meeting, Senator Peggy Lehner had recommended that the superintendent be a member of the governor's cabinet appointed by the governor, but that the person would not change with every administration. He said the most interesting part of her testimony was her observation that the primary function of the board is to set a clear educational vision for the state, and to provide a long-term strategic plan or road map for everyone to follow. He said Sen. Lehner recommended that the board include key stakeholders selected on the basis of their expertise. He said he found that plan interesting, and suggested that the state board could include parents, or business leaders, for instance. Gov. Taft asked for Mr. Harris' reaction to Sen. Lehner's model.

Mr. Harris said he worked for the secretary of education in Pennsylvania for many years, and there that model worked very well, and under that model there was a lot of coordination with other members of governor's cabinet. He said, in a sense that plan moved things up a level to the cabinet level. He continued, if there were stronger, more representative, and experienced members of the board, they could lay out that vision, advocate programs and resources for children, and could deal with a secretary of education or other title who is in the governor's cabinet. But, he said, governors change and secretaries of education change. He asserted the reason for there being only a few superintendents over a span of 35 years was that the all-elected board was independent and autonomous and acted to maintain that continuity. He concluded, there are good attributes to both models, but there is a huge disruption to the educational improvement process when you change superintendents at the same time you change governors.

Gov. Taft noted he likes the concept of prescribing the nature of who is on board, requiring members who specifically represent the interests of teachers, school boards, and parents, for example, and selecting from a pool of candidates representing each seat.

Mr. Harris said that plan relates to the best aspects of Rep. Curtin's suggestion, and reduces the problem of board members having no background in educational policy. Mr. Harris said, if Ohio had a system with those requirements, it would be a better system than the current system.

Chair Readler commented on the need to take politics out of education. He asked how the system could be made less political. He said he is not sure the constitution should prescribe the selection of the members. He said the Pennsylvania model is very governor-dominated. He asked Mr. Harris whether, under the current constitutional language, change is being inhibited because the board is required to appoint the superintendent. He said the constitution has tied the hands of groups that want to resolve these issues.

Mr. Harris said the fact that the state superintendent is the single employee of the board has been a good model and has allowed for the independence and autonomy of the state board through the decades with the result that the board has had a nonpartisan history. He said he would be hesitant to take that authority away from the state board and give it to the governor unless things really changed and there were a system such as described by Rep. Curtin and Gov. Taft.

Chair Readler commented that he would like to make the process less political, but he is not sure how. Mr. Harris gave school funding as an example, saying he worked on seven school funding cases across the country and that, because of the money involved, they politicized education in an unnecessary way. He said 49 states have now had school funding litigation. He said the conversation about education becomes about budgets, budget residuals, and the politics of spending, and not about the needs of children, or the educational system. He remarked, "we need to get the conversation back to the educational needs of the students," adding the focus should be on the efficient administration of schools, and encouraging the best people to be teachers. He emphasized, "we need a strong, well-qualified board of education to take that on."

Mr. Gilbert said he has a concern about Mr. Harris' proposal to provide for an all-elected board in the constitution because the state's history of gerrymandering has made the African American community concerned about being pushed out of the educational process. He said he does not know the current makeup of the board, but is concerned that if it is all-elected it will exclude African Americans, who predominantly rely on the public school system.

Mr. Harris noted that Sen. Sawyer has worked on that problem. He said Ohio badly needs redistricting reform, with fair districts for both the General Assembly and Congress. He said, until that happens, Mr. Gilbert's concerns are valid because of the way the districts are drawn. Mr. Harris said he is optimistic and hopeful regarding redistricting reform. But, he said, in addition to the problems and solutions noted by Rep. Curtin and Gov. Taft, there should be diversity on the state board; thus, the criteria for choosing board members should include candidates who can serve minorities with expertise.

Mr. Gilbert asked about the current makeup of the board. Mr. Harris said there are many women members, and one Hispanic member, but no African American members of the board. He said all members realize diversity is a big problem.

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

Discussion:

Chair Readler then led the committee in its discussion of possible recommendations for Article VI, Section 4.

Mr. Beckett said consideration of Section 4 poses some complex questions. He said, in his view, there are parts of the section that bind the hands of the legislature, for example, there is no constitutional provision relating to the board of higher education or its chancellor, and therefore there is a forced separation between K-12 and higher education. He said, in recent years, states have begun to blend both of those educational systems, recognizing that some overlap is helpful.

As a way of assisting the committee in considering possible revisions to Section 4, Mr. Beckett proposed a revision that would broaden the General Assembly's ability to include higher education, giving the legislature more flexibility. He said his proposal also removes the constitutional requirement that there be a superintendent who is appointed by the state board. He said this does not mean there should not be a state board, but, rather, that the legislature should have the flexibility to best determine how appointments should made or how K-12 and higher education work together.

Mr. Beckett proposed the following language for Article VI, Section 4:

> To oversee education in this state, the General Assembly may provide for boards, departments, and directors that may be selected in such manner and for such terms as may be provided by law, and may prescribe by law their respective powers and duties.

Gov. Taft commended Mr. Beckett on his proposal, and said he thinks it is something the committee should seriously consider. He said, although the committee has not formally discussed this until now, it is clear that there are many views on the issue, noting his own views and those of Senator Peggy Lehner, who presented to the committee at its February 2016 meeting. He said, as compared with the local boards of education, he is not sure that the state board provides a significant measure of accountability given the size of the state board districts. Gov. Taft said the constitution has good language already that ought to be retained, for instance Article VI, Sections 2 and 3. He said language in those sections covers the educational needs of the state. He said his first inclination would be to totally remove Section 4, but that would be interpreted as a recommendation to eliminate the state board, which is not his intent.

Sen. Sawyer, expanding on Gov. Taft's comments, said the Ohio Constitution is modeled on the United States Constitution, which describes the functions the government is called to undertake and how Congress is to fulfill those responsibilities. He said this flexibility is expanded on in Mr. Beckett's proposal, which gives clarity, and reflects a goal of considering the changing nature of education in modern environment. He said he believes the proposal provides for the latitude the legislature needs, but should be combined with an electoral environment in which an elected board can provide the right circumstances for an appointed superintendent. He said while there are many formats by which that could be achieved, he would like to provide for the legislature to do that.

Mr. Gilbert said he appreciates what Mr. Beckett has proposed, but his concern is that the draft language does not require the General Assembly to do anything because it does not use the word "shall." He said that sends a bad signal to the public. He said the current language is a mandate, but under Mr. Beckett's proposal the legislature could decide to do nothing. He said a second problem is that the proposal ignores the problems that resulted in the *DeRolph* litigation, which is that poor districts were suffering because no one cared. He said there ought to be mandated language, and there must be some thought given to quality across-the-board for all school districts.

Rep. Curtin said he is concerned about the proposal, noting if this were the new Article VI, Section 4, it would wipe out the state board and the superintendent, replacing them with the great

unknown. He said, despite concerns, the existing section has served the state well. He said, "we have been trying to solve for partisanship, and increase the level of expertise of board members, but this exacerbates the problem because it gives the General Assembly the opportunity to do nothing and to leave it to the governor."

Chair Readler said he agrees the proposal has some unknown aspects, leaving details to be addressed at some point. He observed the majority of states create state boards by statute and have resolved problems by having some kind of role for the governor. He said Ohio is the only state that has a constitutional superintendent of public instruction. Chair Readler said Mr. Beckett's proposal would seem to take Ohio closer to other states, but that does not mean they are right and Ohio is wrong. Chair Readler asked Rep. Curtin if he has thoughts on how to ameliorate the concern about the unknown result of the proposed change.

Rep. Curtin said it is not possible to change Section 4 without a vote of the people, and, further, it would be necessary to have the support of stakeholders. He said the proposal, as drafted, "would invite warfare; we wouldn't get it out of the Commission." He remarked, "ideological warfare is at an all-time high, primarily because of gerrymandered districts."

Mr. Beckett said, as a public member, he does not have knowledge of legislative concerns but can appreciate them. Responding to Gov. Taft, Mr. Beckett said what his proposal does could be addressed under Article VI, Sections 2 and 3. He agreed that eliminating Section 4 would be a mistake, and said he is not suggesting that. He agreed the proposal could be revised to include mandatory language. Mr. Beckett said he shares Rep. Curtin's concern about how this might unfold, but noted it could be "the worst solution except for all the alternatives." He said it would be a mistake to be more specific in the constitution, a result that concerns him. He said he wants to give the legislature the ability to address issues more effectively, rather than to allow the legislature to avoid the issues.

Sen. Coley commented that the proposed draft is a good starting point. He observed that sometimes people take questions as advocacy, cautioning that no one is suggesting that the state board be abolished. He suggested including a trigger mechanism so that the change would not take effect until 2023. He said, at that point, concerns would be alleviated because districts would be redrawn.

Rep. Curtin emphasized the importance of placing education in the hands of professionals. He said he would worry about turning policy over to the General Assembly. He said some things are so important that politics should be limited, and that nothing is more worthy of that goal than K-12 education. He said this type of proposal runs counter to the shared goal of reducing partisanship in education, suggesting that "if we could have a proposal that captures our shared goal of lowering partisanship and increasing expertise than we are onto something."

Gov. Taft noted the role of the superintendent of public instruction in Ohio is for K-12, but that Florida has combined all educational sectors. He said, looking forward, the committee might want to preserve the option to have K-12 combined with higher education.

Mr. Gilbert agreed, saying "we need to look at expertise in the educational field." He added that Mr. Beckett has done "an excellent job raising our attention to these matters, but to move forward we should turn to counsel, absorb comments, and come up with some alternatives."

Sen. Sawyer commented that, as the committee progresses, it is important to remember the distinction between development of policy by the state board, and the administration of policy by the Department of Education. He said making sure the requirements of thoroughness and efficiency are carried out as a matter of policy should be done without regard to politics and partisanship. He continued, if there is a place where policy can be altered over time through elected board members, that is where democracy comes in. He concluded it is important to make sure the work of the Department of Education reflects the intended will of the elected board.

Gov. Taft asked whether staff could draft language that, without specifying who should be on the state board, would encourage the legislature to provide specifics that would secure greater expertise on the state board.

Rep. Curtin noted that many state boards reserve seats for people with expertise. But, he said, that is a matter for legislation, adding that, by statute, many boards are required to have certain members with expertise. He agreed that draft language would be useful.

Sen. Sawyer agreed with Rep. Curtin's comment, saying the boards are where the General Assembly puts expertise within the departments.

Chair Readler asked whether requiring expertise should be part of the constitution, noting he is a minimalist and is not sure whether that is a subject for legislation. He wondered if there could be a proposal that would satisfy everyone.

Mr. Beckett said if the committee agrees to something along these lines, the legislature is going to have to act. He suggested the committee consult with the legislature. He remarked, "we have to be able to go to the voters and say this is intended to fix that problem."

Rep. Curtin said, if the committee has staff follow up by providing draft language, there would be something for legislators to consider. He cautioned, however, that he does not want to propose something that would "create a firestorm in the educational community."

Chair Readler asked how the committee should proceed. Sen. Coley suggested draft language could be a staff project.

Sen. Sawyer said he would want to provide the least-prescriptive mandate, noting that, under the U.S. Constitution, when there is a function created, it requires Congress to take action.

Rep. Curtin suggested a draft include a trigger date that is out several years. He said this will reduce anxiety and give time to deliberate.

Gov. Taft suggested staff have one version of proposed language that deals with the composition of the board, including the proposals suggested by Sen. Lehner as expressed in her presentation to the committee. He added there should be a succinct statement of purpose, such as "there shall

be a state board of education with authority to prescribe a clear vision for education in this state." He said it would be useful to consider defining the role of the board in terms of long-term vision and planning in the state. He added he would encourage legislative members to convene with their respective caucuses to help refine language.

Rep. Curtin said if the committee has drafts of both statutory and constitutional language, the committee should allow the interested groups who have testified to offer more commentary on the direction of the committee, adding this would give the groups an opportunity to study the proposal.

Chair Readler emphasized the committee has been receptive to the public, and encouraged participation by interested groups.

New Business:

Chair Readler then asked if there was new business to come before the committee. Sen. Coley directed the committee's attention to Article XV, Section 6 (Lotteries, Charitable Bingo, Casino Gambling), noting that the proscriptive language used in that section does not belong in constitution. He said he would like a presentation on that issue, asking that the question be revisited because of the monopoly issue that voters passed in November 2015. He said he would like to look at that issue as a committee because it is an area ripe for consideration now that the anti-monopoly provision passed. He noted the General Assembly has allowed promotional gaming, which has cost schools, a result that was not the intention of the voters. He said the committee might find a presentation on that topic interesting.

Chair Readler said Article XV, Section 6 is on the committee's list, but maybe at the next meeting the committee can discuss when is the most appropriate time to bring that up.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 11:24 a.m.

Approval:

The minutes of the April 14, 2016 meeting of the Education, Public Institutions, and Local Government Committee were approved at the September 8, 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

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

FOR THE MEETING HELD
THURSDAY, JUNE 9, 2016

Call to Order:

Vice-chair Edward Gilbert called the meeting of the Education, Public Institutions, and Local Government Committee to order 9:40 a.m.

Members Present:

A quorum was not present with Vice-chair Gilbert, and committee members Brooks, Curtin, Sawyer, and Taft in attendance.

Approval of Minutes:

There being no quorum, the minutes of the April 14, 2016 meeting were not approved.

Presentation:

Article VI, Section 5 (Loans for Higher Education)

David H. Harmon
Former Executive Director
Ohio Student Loan Commission (1984-1988)

Vice-chair Gilbert announced the committee would be considering Article VI, Section 5, relating to loans for higher education. He introduced David H. Harmon, former executive director of the Ohio Student Loan Commission (OSLC), who provided information about his agency's role in facilitating college loans for Ohio students.

Indicating that he was employed with OSLC from 1977 to 1988, and was executive director from 1984-88, Mr. Harmon testified that 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. The state seeded the new organization with start-up funds that were later repaid in full.

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. 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 the Ohio Student Loan Commission.

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.

Mr. Harmon said the OSLC had a board of nine commissioners appointed by the governor and confirmed by the Ohio Senate. He said the commissioners met monthly to review agency operations and reported to the governor. Daily operations were under the control of an executive director who staffed and administered the agency. Mr. Harmon said he was the fifth executive director, serving in that capacity until 1988.

Mr. Harmon said the OSLC was a self-sustaining entity, but operated like other state agencies in that its budget was approved in the state's biennial budgeting process and the commission's employees were state employees.

Prior to joining the OSLC in 1977, Mr. Harmon said he had been associate director of education lending at the Ohio State University. He said he was asked to take over as executive director at the OSLC when the previous director retired in 1984. 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 the commission 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 the 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 the OSLC, resulting in the agency being renamed to 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. An additional factor was the creation of the Federal Direct Loan Program, created by President Bush as a pilot program in 1992. In 1993, President Clinton moved the Direct Loan Program from a pilot to fully operational status, anticipating that it would ultimately grow to replace the Guaranteed Student Loan Program.

Mr. Harmon said these changes caused the OSAC to vote 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. He said the OSAC ended its 36-year run at the end of the state's biennial budget cycle in 1997. He said 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. He noted that from the perspective of Ohio's students, schools, and lenders, it was a seamless transition.

Mr. Harmon added that the Guaranteed Student Loan Program and the Federal Direct Student Loan Program operated in parallel until 2010, when President Obama directed that all new loans be made through the Direct Loan Program. He said the switch to 100 percent Direct Lending was effective July 1, 2010 was enacted by the Health Care and Education Reconciliation Act of 2010 – the same legislation that created the Patient Protection and Affordable Care Act (PPACA), now known popularly as "Obamacare."

Mr. Harmon observed that this development ended a public/private partnership that helped students and families pay for higher education for 35 years. He said guaranty agencies, which once totaled 50, with an agency designated in each state, shrank to only six or seven, because guarantors either merged with other agencies, closed their doors, or struggled to repurpose themselves.

He said, as a result of this change, the Direct Loan Program has become the primary source of assistance to students to help pay for postsecondary education. He said it is estimated that over 60 percent of all college and university students have to borrow to pay their bills and the resulting levels of indebtedness have become a social issue. He remarked that, in Ohio, 69 percent of all college graduates have student loan debt, which averaged just over $29,000.

He said under the current system, all new federal loans are made directly by the federal government, but are disbursed, serviced, and collected by private contractors. While some private loan programs are offered by a variety of lending institutions, they represent a small fraction of the annual total of new loans being made.

Mr. Harmon then answered the committee's questions.

Committee member Paula Brooks asked Mr. Harmon to describe his current employment, and he said he coordinates services nationwide for nonprofit and for profit companies that deal in federally-backed direct loans for higher education. Ms. Brooks asked whether a system

involving private sector loans was adequate to meet the needs of students who need loans to be affordable.

Mr. Harmon said the cost of the student loan program is a factor, and with the private loan market there is a need for profit. He said government programs emphasize helping students. He said, in his view, a balance of programs is the best approach.

Governor Taft noted that Ohio created the program in 1961, but the effective date of the section is 1965, wondering how Section 5 came to be in the constitution. Mr. Harmon said the point of the constitutional section in 1965 was to allow the Ohio Student Loan Commission to become the guaranteed agency under the federal loan program. He said that change allowed the state to have the federal agency housed within state government.

Gov. Taft asked whether that section is now needed. Mr. Harmon answered that, 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.

Gov. Taft asked whether Mr. Harmon knew of any adverse consequences if the section were repealed. Mr. Harmon answered that under the current circumstances it is not needed.

Vice-chair Gilbert commented on Mr. Harmon's testimony indicating the federal direct student loan program had been part of the same legislation that produced Obamacare, asking whether a potential future repeal of Obamacare might impact the student loan program and revive a need for Ohio to have a constitutional section relating to student loans.

Mr. Harmon said although the legislation was passed under same the omnibus act, the two programs are separate. Thus, he said, if Obamacare were repealed it would not affect the federal direct loan program. He said, however, that he anticipates other changes in the future that may shift some of the burden back to the states.

Vice-chair Gilbert asked whether such a development would affect Article VI, Section 5.

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 the OSLC, but any need for new law could be done by statute rather than by constitutional amendment.

Rae Ann Estep
Former Executive Director
Ohio Student Aid Commission (1995-97)

Vice-chair Gilbert then recognized Rae Ann Estep, who is currently deputy director of operations at the Office of Budget and Management (OBM). She testified that she was appearing before the committee to offer information about her experience in her former position as executive director of the Ohio Student Aid Commission (OSAC) from 1995-1997. Ms. Estep said the mission of the OSAC was to guarantee the loans to persons or the parents of persons attending or planning

to attend eligible academic institutions. She said OSAC's primary duty 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. She said the OSAC also faced the threat of cuts in funding from the federal government 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.

Vice-chair Gilbert said a major complaint about student loans is the high interest rates that accompany them, asking whether a repeal of Section 5 would affect interest rates.

Ms. Estep deferred to Mr. Harmon to answer the question. Mr. Harmon answered that interest rates reflect the cost of borrowing at the federal level. He said the rates are variable, but the real problem for students is not the rates but rather the level of indebtedness. He said, generally, rates have been at a level reflecting where the market is over the years.

Ms. Brooks asked Mr. Harmon about a program in Maryland designed to keep graduates in the state by forgiving student loans if students pursue work in needed fields. She asked whether Mr. Harmon thought the committee should review that type of program and whether removing Section 5 might interfere with an effort to create such programs in Ohio.

Mr. Harmon said an aspect of student lending is the selective forgiveness or repayment in exchange for students entering fields that are being promoted. He said such a program could be handled separately from the current constitutional provision. He noted that type of program was never part of the OSLC. He said, if the state wanted to create such a program, it could do so legislatively.

Elaborating further on the topic, Mr. Harmon said there are a lot of those types of programs around the country; some are private sector, while others originate with the local government. He noted that when he was with the OSLC, Vinton County put together a local program to attract doctors to the community. He noted other programs that encourage teachers to take employment in low-income communities.

Vice-chair Gilbert asked whether eliminating Section 5 could prevent such programs, and Mr. Harmon answered that kind of program was never part of Section 5, and could be done by legislation.

Report and Recommendation:

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

Vice-chair Gilbert recognized Shari L. O'Neill, counsel to the Commission, for the purpose of giving a presentation of a report and recommendation for Article VI, Section 3 (Public School System, Boards of Education).

Ms. O'Neill noted that the provision bears some relevance to ongoing litigation in the case of *Youngstown City Sch. Dist. Bd. of Edn. v. State of Ohio*, 10th Dist. App. No. 15AP-941, currently pending in the Franklin County Court of Appeals. She said, as an update, oral argument was held in that case on April 14, 2016. She added that the docket reflects that one judge on the panel, Judge William Klatt, recused, and Judge Lisa Sadler replaced him on the panel by court order on April 18, 2016. She said no further developments on that case are recorded, and the decision of the court remains pending.

Ms. O'Neill described that Article VI, Section 3 authorizes the enactment of laws for the organization, administration and control of the state's public school system, reserving to city school districts the power by referendum to determine the number of members and the organization of their boards of education.

She indicated that the report and recommendation provides the history of the section, indicating it was adopted during the Progressive Era, and created, for the first time, a constitutional, statewide framework for school governance by mandating law that would organize, administer, and control a statewide public school system while allowing city school districts the power by referendum to organize their own school boards.

Ms. O'Neill described that the report and recommendation empowers the General Assembly to make laws governing the public school system and gives voters in some, but not all, school districts the power to determine by referendum the number of members and the organization of the district board of education. She said, under the provision, voter control of local school districts applies only to school districts "embraced wholly or in part within any city" and thus does not extend to "non-city" school districts. She further noted that the report and recommendation outlines activity of the 1970s Ohio Constitutional Revision Commission, which recommended no change to the section, as well as detailing presentations provided by several school board members who explained their roles to the committee. She said the report and

recommendation records the committee's conclusion that the current state of the law as it has developed around Article VI, Section 3 lends a meaning that could be lost if the section were changed. Thus, she said, the committee recommends Article VI, Section 3 be retained in its current form.

The committee briefly discussed the significance of having a second reading on Article VI, Section 3, wondering whether an additional reading, as well as discussion, was in order due to the lack of a quorum, and considering whether the *Youngstown City School District* case was an impediment to the committee moving forward on the report and recommendation. Steven C. Hollon, executive director, explained that the committee would be meeting again in September and could have an additional reading, with a potential vote, at that time.

Discussion:

The committee discussed what its next steps should be with regard to Article VI, Section 5. Gov. Taft suggested the Department of Higher Education might wish to opine on whether the section should be retained. Steven C. Hollon, executive director, said he had been in contact with counsel from the Department of Higher Education who had referred him to Ms. Estep, but that he would contact the department again to see if additional names could be provided.

Gov. Taft said the precise question is whether, if Section 5 were not in the constitution, the legislature could enact statutes related to or guaranteeing student loans in the future.

Ms. Brooks agreed, stating she would want to preserve authority for loan forgiveness programs, and if that authority derives from the constitutional provision it would be important to retain it.

Gov. Taft wondered if the attorney general could provide an opinion on that question.

Steven H. Steinglass, senior policy advisor, said, generally speaking, the General Assembly has broad plenary power to do what it wants in a range of areas. He added the precise question is whether, if the General Assembly acted, there would be other provisions of the constitution that might constrain it. He noted Section 5 has a "notwithstanding clause," indicating the drafters must have had some concerns that there were other constitutional provisions that might have inhibited the authority the General Assembly. He identified that as an area of research that could be pursued.

Mr. Steinglass further observed that in 1964-65 the Ohio Supreme Court threw out legislation that used state revenue bonds to fund economic development.[1] He said the following year Article VIII, Section 13 was approved, creating a constitutional basis for that kind of economic development. He hypothesized that the people who supported the student loan guarantees wanted to be careful and so went the amendment route and put in the "notwithstanding" language.

Senator Tom Sawyer asked Mr. Steinglass to look into that issue for the September meeting of the committee.

[1] *State ex rel. Saxbe v. Brand*, 176 Ohio St. 44, 197 N.E.2d 328 (1964).

Representative Mike Curtin asked whether the OCMC has the authority to request an attorney general opinion if it is considering eliminating a constitutional provision, noting that there is a concern about unintended consequences. Alternately he wondered whether the Legislative Service Commission could be consulted.

Mr. Hollon said staff would seek out all possibilities. He noted other committees have been addressing provisions which are obsolete. He said this section raises some interesting questions that would be explored.

Ms. Brooks said it would be important to get more data from an economic development viewpoint, suggesting maybe the section does not need to be eliminated but could be amended.

Mr. Hollon noted this is just the beginning of the committee's review of the section, and that further information, including other speakers, would be provided at a future meeting.

Vice-chair Gilbert noted the committee would not get to a discussion about Article VI, Section 6 (Tuition Trust Authority) due to a lack of a quorum, and said he expected that topic to come up at the next meeting.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 10:33 a.m.

Approval:

The minutes of June 9, 2016 meeting of the Education, Public Institutions, and Local Government Committee were approved at the September 8, 2016 meeting of the committee.

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Chad A. Readler, Chair

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Edward L. Gilbert, Vice-chair

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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

OHIO CONSTITUTION
ARTICLE VI, SECTION 3

PUBLIC SCHOOL SYSTEM, BOARDS OF EDUCATION

The Education, Public Institutions, and Local Government Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article VI, Section 3 of the Ohio Constitution concerning the public school system and boards of 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 3 of the Ohio Constitution and that the provision be retained in its current form.

Background

Article VI, Section 3 reads as follows:

> Provision shall be made by law for the organization, administration and control of the public school system of the state supported by public funds: provided, that each school district embraced wholly or in part within any city shall have the power by referendum vote to determine for itself the number of members and the organization of the district board of education, and provision shall be made by law for the exercise of this power by such school districts.

Article VI of the Ohio Constitution concerns education.

Article VI, Section 3 was one of the constitutional amendments adopted during the Progressive Era, a time of social and political change that reformed multiple institutions, including the public education system.[1] One of 42 amendments proposed by delegates to the 1912 Ohio Constitutional Convention, Article VI, Section 3 created, for the first time, a constitutional, statewide framework for school governance by mandating law that would organize, administer, and control a statewide public school system while allowing city school districts the power by

referendum to organize their own school boards. In a special election held September 3, 1912, Article VI, Section 3 was one of 34 successful proposals to come out of the convention, and was approved by a voting margin of 298,460 to 213,337.[2]

This section contains two discrete provisions. The first clause deals with state control of the public school system. The second clause gives the voters in city school districts power over the size and organization of local boards of education.

The first clause in the section provides for state supervision of the public schools by stating that "[p]rovision shall be made by law for the organization, administration and control of the public school system * * * ." The culmination of many years of work by supporters of state control of education, the provision also was intended to assure that the power of home rule would be extended to cities (in proposed Article XVIII) and would not be used to undercut state control of education.[3] Columbus delegate to the convention, George W. Knight, a professor from Ohio State University and a strong supporter of both the education provision and home rule, in arguing for Section 3, made clear his position that the state, not local government, should control education:

> [This provision] must be adopted in order to establish definitely that the state shall for all time, until the constitution is further amended, have complete control over the educational system, and that no city, village or part of territory of the state can withdraw itself, under the guise of a charter, from the public educational system of the state.[4]

At one point during the convention, an earlier version of this provision extended state control to the "public school and educational system of the state[,]" but the reference to "and educational" was dropped to assuage concerns that the provision could give the state too much control over higher education, which at the time consisted of Ohio University, Miami University, and Ohio State University.[5] In addition, the modification of "public school system of the state," with the addition of the phrase "supported by public funds," made clear that the provision did not extend state control to parochial schools.[6]

The work of the convention in centralizing control over education was summarized as follows:

> The delegates did not "contemplate taking out of the hands of the local authorities the control and administration of their local schools, but gave to the state beyond any question, the right to fix the standard and the right to organize an entire system, leaving to each local community the determination of the schools in the system." The vision was "one complete educational system for the schools and all educational institutions supported by public taxation."[7]

Seeking to emphasize state control over education, convention delegates adopted language that explicitly empowered the General Assembly to make laws governing the public school system. Delegates also sought to eliminate the possibility that cities acting under an expanded home rule power could interfere with the role of the state in controlling education.[8]

Section 3 also gives voters in some, but not all, school districts the power to determine by referendum the number of members and the organization of the district board of education. Voter control of local school districts, however, applies only to school districts "embraced wholly or in part within any city" and thus does not extend to "non-city" school districts. Although the section provides each city school district with the ability to set the number of board members, and to determine the board's organization, it has not been interpreted as giving the district power to appoint the actual members of the board. *See E. Liverpool Edn. Assn. v. E. Liverpool City School Dist. Bd. of Edn.*, 177 Ohio App.3d 87, 893 N.E.2d 916 (2008).

In an essay written for the Ohio Centennial Anniversary Celebration in Chillicothe on May 20-21, 1903, Lewis Bonebrake identified four categories of school districts: city, township, village, and special. He then described the proliferation of school districts in Ohio, observing that there were 2,437 different districts, of which 66 were city districts, 1,036 were village and special districts, and 1,035 were township districts. The boards of education in city districts ranged from three members in Wooster and Delaware, to 31 in Cincinnati. In some city districts, the boards were elected at large, in some by wards, and in some by both wards and at large. The boards in the township, village, and special districts ranged from three to six members.[9] As reported by the Ohio School Boards Association, Ohio currently has 613 traditional public school districts, 55 educational service centers, and 49 joint vocational school districts.[10]

Delegates to the 1912 Convention were concerned about the size of local school boards, and the inability or unwillingness of school boards to use their power under existing law to address issues concerning their size and their organization. For example, according to George W. Harris, a Cincinnati delegate to the convention, cities of over 50,000 had authority to change (*i.e.*, reduce) the size of school boards only if the local board agreed, but "[t]he larger boards *** refuse to vote themselves out of office * * * ."[11] Delegates addressed this issue by requiring that the number of members and the organization of the district board of education could be determined by the voters by referendum. Thus, voters were given an explicit constitutional role in the organization of school boards.

The power of local school districts to determine their size and organization did not, however, extend to all school districts. Earlier versions of the section applied the referendum requirement to all school districts, but some representatives of rural districts objected to the application of the provision to them.[12] To accommodate the rural districts, the second clause was phrased so as to apply only to those districts "embraced wholly or in part within any city." Thus, the voters in rural school districts that served villages and townships were not given a constitutionally-mandated role in the size and organization of their school boards.[13]

Amendments, Proposed Amendments, and Other Review

In 1977, the Ohio Constitutional Revision Commission (1970s Commission) recommended no change to Article VI.[14] Although the 1970s Commission generally reviewed the topic of "Educational Governance," the substance of the analysis related to Article VI, Section 4, dealing with the state board of education, rather than local boards of education. While the record of the 1970s Commission does not reveal a rationale for maintaining this section in its present form, the 1970s Commission did base at least part of its recommendation for no change on the view that

revision, if needed, could be accomplished through legislative measures rather than by constitutional amendment.[15]

Litigation Involving the Provision

Ohio courts have determined that Article VI, Section 3 allows the General Assembly to enact legislation authorizing county boards of education to arrange districts and change boundary lines as long as the county boards do not "act unreasonably or in bad faith in effecting the creation of a new district." *See Smith v. Bd. of Edn.*, 97 Ohio App. 507, 519-20, 127 N.E.2d 623, 630 (1954). Section 3 has been found to support legislation that would reorganize a school district by requiring an affirmative vote of 55 percent of the vote in the new district unless 75 percent of the voters in any district oppose the reorganization. *See State ex rel. Groh v. Bd. of Edn. of W. Clermont Local Sch. Dist.*, 169 Ohio St. 54, 54, 157 N.E.2d 325, 326 (1959) (syllabus at number 1). Section 3 also has been interpreted to allow the state to create charter schools as part of the state's program of education. *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, 111 Ohio St.3d 568, 581, 857 N.W.2d 1148, 1162 (2006) ("By choosing to create community schools as part of the state's program of education, but independent of school districts, the General Assembly has not intruded on the powers of city school boards.").

The power of the General Assembly over school districts was summarized by the Ohio Supreme Court in *State ex rel. Core v. Green*, 160 Ohio St. 175, 180, 115 N.E.2d 157, 160 (1953):

> [T]he General Assembly has the power to provide for the creation of school districts, for changes and modifications thereof, and for the methods by which changes and modifications may be accomplished, and, where it has provided methods by which changes in school districts may be made, no citizen has a vested or contractual right to the continuation of such methods, and if a particular method is abolished or changed by legislative enactment there can be no basis for a claim that a contractual or vested right is impaired.

Because Article VI, Section 3 does not address when voters may conduct referenda, some litigation has focused on the timing of the referenda guaranteed by the section. The issue of timing came up in 1914, after the General Assembly adopted the Jung Small School-Board Act (Jung Act). The Jung Act classified and organized city school districts and their respective school board members by using three general categories based on population, and by creating a schedule of activities that could delay for two years the referendum on the size and organization of school boards.

In *State ex rel. Ach v. Evans*, 90 Ohio St. 243, 107 N.E. 537 (1914), the Ohio Supreme Court rejected an argument that the time for a vote specified in the Jung Act was unconstitutional. In *Evans*, it was asserted the General Assembly had violated Article VI, Section 3 by permitting as long as a two-year delay before the required referendum vote. Resting on the premise that a statute cannot be held unconstitutional simply because it imposes an objectionable time frame, the court emphasized that the legislature is presumed to have acted in good faith, and that "[t]he mere suggestion by counsel that this necessarily carries a referendum election beyond the time of the first regular November election for members of the school board cannot be used as the basis

of a claim of unconstitutionality. Statutes cannot be held unconstitutional upon the ground that somebody disagrees with the Legislature as to the time at which an act should take effect." *Id.*, 90 Ohio St. at 247-48, 107 N.E. at 538.

The timing issue arose again in the 1990s in litigation challenging a state statute that organized the Cleveland Municipal School District Board of Education to give the mayor authority to appoint a nine-member board. Previously, the district was governed by a seven-member elected board, but a statute adopted in the wake of desegregation litigation provided for a referendum in the first even-numbered year occurring at least four years after the board appointed by the mayor assumed control of the district. The statute did not refer to the Cleveland district by name, but rather referred to districts under federal desegregation orders (which only included Cleveland).[16]

Challenged in both state and federal courts, the statute first was reviewed on the merits by the federal courts. Upholding the statute, the United States Court of Appeals for the Sixth Circuit in *Mixon v. State of Ohio*, 193 F.3d 389 (6th Cir. 1999), focused on the argument that there was a two-year time limit for holding a referendum. Relying on the 1914 Ohio Supreme Court decision in *Evans, supra*, the court held that "the referendum provision did not require that voters approve any legislative change to the organization of the boards of education in Ohio cities before the legislature can enact and implement such changes." *Id*. at 400-01.

In so ruling, the court interpreted *Evans* as follows:

> *Evans* held that the legislature may make such changes without voter pre-approval so long as it provides the voters with an opportunity at a later date to vote on the changes. *Id*. ("It is obvious that this provision of the Constitution does not require that, before any change shall be made in the old board, a referendum shall be provided determining what change shall be made."); *see also State ex rel. Core v. Green*, [*supra*] (holding that the legislature may change the organization and control of the public schools without holding an immediate public referendum). Absent a showing of bad faith on the part of the legislature, the court determined that the Jung Bill did not conflict with the referendum provision of the Ohio Constitution because the Jung Bill provided for a referendum within a reasonable time. *See Evans*, 107 N.E. at 538 ("Statutes cannot be held unconstitutional upon the ground that somebody disagrees with the Legislature as to the time at which an act should take effect. The Legislature is presumed to have acted in good faith, and there is nothing in the record to overcome that presumption."). *Evans* thus implied that the legislature could wait two years before submitting the school district changes to a referendum.

Mixon, supra, at 401.

Finally, the Sixth Circuit noted that Article XVIII, Section 5, another referendum provision that dated back to the 1912 Constitutional Convention, explicitly required a referendum before a challenged ordinance involving public utilities would take effect. The court then concluded as follows:

> Had the drafters of the Ohio Constitution wanted a similar express limitation in Article VI, Section 3, it is likely they would have included similar language in that provision. The fact that they did not evinces their intent that discretion regarding the timing of referenda under Article VI, Section 3, should rest with the legislature, which has determined that four years between referenda is acceptable."

Id.

Similar litigation took place in the Ohio courts, with the Court of Appeals for the Eighth District in *Malcolm-Smith v. Goff*, 8th Dist. Cuyahoga App. No.1999 WL 961495, 1999 Ohio App. LEXIS 4915 (Oct. 21, 1999), rejecting the conclusion and analysis in *Mixon* and instead holding that the four-year delay violated the Ohio Constitution. In so ruling, the court treated the two-year time limit in *Evans* as an outside limit for holding a referendum. The Ohio Supreme Court, however, reversed that decision on the basis of claim preclusion, and did not discuss the merits of the state constitutional issue. *See Malcolm-Smith v. Goff*, 90 Ohio St.3d 316, 738 N.E.2d 793 (2000).[17]

Neither the decision of the Sixth Circuit in *Mixon,* nor the reversed decision of the Eighth District Court of Appeals in *Malcolm-Smith,* is binding on Ohio courts; thus *Evans*, though more than a century old, remains the last word from the Ohio Supreme Court on the proper interpretation of the issue of the timing of the referendum under Article VI, Section 3.

Presentations and Resources Considered

Morales Presentation

On January 15, 2015, Stephanie Morales, a member of the Board of Education of the Cleveland Municipal School District, presented to the committee regarding her experiences as a school board member of a large urban school district. According to Ms. Morales, Cleveland's unique organizational structure, in which board members are appointed by the mayor rather than being elected, has worked well in Cleveland for 17 years because the local community is involved in determining the structure of the board of education. Ms. Morales stated that there is a synergy between the mayor, the superintendent, and the board, which works well. She commented, "Our governing structure creates that synergy. This is why we were able to pass the Cleveland plan. It was unprecedented, and all feel they have a vested interest in what is happening."

Baker Presentation

On May 14, 2015, Columbus Board of Education president, Gary Baker, II spoke to the committee on the importance of the local board of education for urban school districts. In his remarks, Mr. Baker provided demographic data demonstrating the diversity of his district's student population, the challenges this diversity brings, and the role the school board has in providing leadership. Mr. Baker noted that Columbus City Schools is the largest school district in the state of Ohio, encompassing approximately 127 square miles, and employing 8,000 staff members. Mr. Baker described the student population, consisting of about 51,000 children, as

being comprised of seven different ethnic groups and nationalities, with the first language for twelve percent of the student population being a language other than English. He said over 83 percent of the district's students are considered economically disadvantaged, while about 14 percent have a disability. Commenting on the transience of the population, Mr. Baker said only one fifth of the students are at the same school for an entire school year. Mr. Baker said the different languages, socio-economic concerns, disabilities, and the mobility of a significant portion of the schools' population, all create challenges the board has had to try to address in order to determine the best way to allocate and provide the resources needed for each child.

Opining on whether the constitutional language is adequately addressing the needs of schools, Mr. Baker said the current system has served well, and that school boards should be elected by those individuals who reside in the district. Mr. Baker added that those who are elected must share a passion for education, must want to improve teaching and learning, and to focus on student achievement. Mr. Baker said control of local districts should reside at the school board level, and that local power should be retained, indicating if people in a district want a hybrid board or one that is appointed, they should have that option. He said he believes the best school board is one that is elected by residents of the district, but flexibility can be important as well.

Germann Presentation

Eric Germann, board member for Lincolnview Local Schools in Van Wert County, presented to the committee on May 14, 2015 regarding the importance of the local board of education for small and rural school districts. He said the local board plays a vital role in shaping, adopting, and enforcing policy. According to Mr. Germann, in his rural district the board levies, collects, and operates on tax revenue, maintains a balanced budget, and engages the community in developing both budget and tax policies. The board also works with economic development groups and business developers to encourage economic development and growth of the wage and tax base. He added that the board also serves as an arbiter for student and employee discipline, and provides a forum for those who wish to petition the governing body for change.

Steele Presentation

On July 9, 2015, Sue Steele, board member of the Great Oaks Institute of Technology and Career Development (Great Oaks), presented on the value of joint vocational schools. Providing statistics for Great Oaks, Ms. Steele stated that Great Oaks educates approximately three thousand high school students per year, plus thousands of other students through adult education programs.

Ms. Steele explained some of the duties of her board, including hiring and budgeting, identifying possible ballot issues, determining policy, and setting and monitoring goals for the district. She further explained that recent statutory changes could result in future board members being appointed rather than elected, and that board members can be term-limited, both changes that could cause a loss of institutional knowledge. She further explained her concern that, if an appointed board member does not live in the district and is not involved in the community, he or she may not be as focused on seeing students succeed. She emphasized that elected board members are held accountable by the public, but an appointee is not.

Haberstroh Presentation

On July 9, 2015, Albert Haberstroh, board member of the Trumbull County Educational Service Center, presented on the value of educational service centers. As provided in Ohio Revised Code Chapter 3312, and according to the Ohio Educational Service Center Association, these centers support efforts to improve school effectiveness and student achievement by assisting districts and families in obtaining educational and other support services. Mr. Haberstroh said his board provides a variety of different types of assistance to the schools and students it serves. For example, board members assist families supporting students with developmental issues, help students locate resources to prepare for college, provide professional development services for teachers, accommodate transportation needs for special education students, and provide support services in a variety of other ways.

Mr. Haberstroh said he prefers an elected board because having to campaign helps ensure that only those with a strong interest will commit themselves to running. As an example, he noted that an elected board member he knows probably would not have been chosen under an appointive system, but she has been a great asset, providing exemplary, personal service to her constituents. He continued that elected board members belong to political organizations, are active in their communities, and donate to neighborhood organizations that are interested in education. Thus, he emphasized, they are vested in their communities and care about outcomes.

Conclusion

Upon review, the committee recognizes that the current state of the law as it has developed around Article VI, Section 3 lends a meaning that could be lost if the section were changed. In addition, the committee finds there is no consensus for changing the section, and no consensus that alternate language could improve it.

Thus, the Education, Public Institutions, and Local Government Committee concludes that Article VI, Section 3 should be retained in its current form.

Date Adopted

After formal consideration by the Education, Public Institutions, and Local Government Committee on October 8, 2015, and September 8, 2016, the committee voted to adopt this report and recommendation on _____.

Endnotes

[1] *See, e.g.,* Hoyt Landon Warner, *Progressivism in Ohio 1897-1917* (1964).

[2] Steven H. Steinglass & Gino J. Scarselli, *The Ohio State Constitution,* Appx. B (2nd prtg. 2011).

[3] *See generally* Molly O'Brien & Amanda Woodrum, *The Constitutional Common School*, 51 Cleve.St.L.Rev. 581, 634-36 (2004).

[4] *Proceedings and Debates of the Constitutional Convention of the State of Ohio*, Vol. 2, 1500 (1913) (hereafter, "*Debates*").

[5] *Id.* at 1915-16.

[6] *Id.* at 1916.

[7] O'Brien & Woodrum, *supra*, at 635 (quoting Delegate Knight) (footnotes omitted).

[8] *See Debates*, at 1929 (Delegate Knight: "Because the municipal home rule proposal which we have passed is so broad that there is a possibility that unless this is adopted the city of Columbus might have power to do a good deal more in the way of control of its educational system than is desirable [that] it should have. It would be inconsistent with the unified public school system of the state.")

[9] *See* Lewis Bonebrake, "The Public Schools of Ohio," in *Complete Proceedings, Ohio Centennial Anniversary Celebration at Chillicothe*, 389, 399-400 (E.O. Randall, ed., 1903).

[10] "Today in Ohio, there are 613 traditional public school districts, 55 educational services centers, and 49 joint vocational school districts providing educational services to students." Remarks to the Ohio Constitutional Modernization Commission by Richard C. Lewis, Executive Director, Ohio School Boards Association (Aug. 8, 2013), http://ocmc.ohio.gov/ocmc/committees/educ_pubinst_misc_localgovt;jsessionid=b957049e1ac01b4e1baacea4fc97 (last visited Oct. 5, 2015).

[11] *Debates*, *supra*, at 1500.

[12] "[It] seems that in some portions of the state * * * there is objection to its application to rural school districts." *See Debates* (Delegate Knight), *supra*, at 1915. Delegate Knight then stated that "[a]s a member of the Convention, I have no desire to force a referendum on any people who do not want it. The cities do want it, and I offer an amendment * * *." *Id*.

[13] *See generally Debates*, *supra*, at 1914-15.

[14] Ohio Constitutional Revision Commission (1970-77), Recommendations for Amendments to the Ohio Constitution, Final Report, Index to Proceedings and Research, 53 (June 30, 1977), http://www.lsc.ohio.gov/ocrc/final%20report%20index%20to%20proceedings%20and%20research.pdf (last visited Oct. 5, 2015).

[15] *Id.* at 61.

[16] *See* R.C. 3311.73.

[17] Held on November 5, 2002, the required referendum resulted in more than 70 percent of Cleveland voters supporting a plan that permitted the mayor to make appointments to the Cleveland Municipal School District. The Cleveland Teachers Union and the Cleveland branch of the NAACP supported mayoral control of the board of education. *See* Patrick O'Donnell, "Mayoral control of the Cleveland city schools has brought stability but other improvements hard to measure," Cleveland *Plain Dealer* (Aug. 20, 2011), http://blog.cleveland.com/metro/2011/08/mayoral_control_of_the_clevela.html (last visited Oct. 5, 2015).

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MEMORANDUM

TO: **Chair Chad Readler, Vice-chair Ed Gilbert, and Members of the Education, Public Institutions, and Local Government Committee**

FROM: **Steven C. Hollon, Executive Director, and Shari L. O'Neill, Counsel to the Commission**

DATE: **August 16, 2016**

RE: **Summary of *Youngstown City School Dist. Bd. of Edn. v. State of Ohio***

Within the last year, the Education, Public Institutions, and Local Government Committee has received presentations on and discussed Article VI, Section 3 of the Ohio Constitution. Article VI, Section 3 concerns the public school system of the state and district boards of education. It reads as follows:

> Provision shall be made by law for the organization, administration and control of the public school system of the state supported by public funds: provided, that each school district embraced wholly or in part within any city shall have the power by referendum vote to determine for itself the number of members and the organization of the district board of education, and provision shall be made by law for the exercise of this power by such school districts.

During the committee's discussions, a question arose whether the case of *Youngstown City School Dist. Bd. of Edn. et al. v. State of Ohio, et al.*, currently on appeal to the Ohio Tenth District Court of Appeals (Franklin App. No. 15AP-941) from a decision of the Franklin County Court of Common Pleas (Franklin CP No. 15CVH08-7311) might have a bearing on any recommendation the committee ultimately will make to the Commission regarding this constitutional provision.

The purpose of this memorandum is to provide a summary of the case and an update on its procedural posture in order to assist the committee in determining whether it might want to wait on a final determination of all legal issues in the matter before making a recommendation on

Article VI, Section 3, or whether the committee should issue a report and recommendation at this time regardless of how the courts might rule on the issues raised in the case at a future time.

Background

The plaintiffs in the case are the Youngstown City School District Board of Education; AFSCME Ohio Council 8; AFL-CIO; Youngstown Education Association; Ohio Education Association; and Jane Haggerty. The defendants are the State of Ohio; Richard A. Ross, State Superintendent of Public Instruction; and the Ohio Department of Education.

On August 21, 2015, plaintiffs filed a complaint for declaratory judgment and an application for a preliminary injunction in the Franklin County Court of Common Pleas, seeking to enjoin Superintendent Ross from establishing an academic distress commission for the Youngstown schools as permitted by legislation that had been passed by the Ohio General Assembly and signed into law. The legislation had been introduced as HB 70 in the 131st General Assembly and was later amended as Am. Sub. HB 70. It was signed by the governor on July 16, 2015, and scheduled to take effect October 15, 2015.

Court Action

The court held an evidentiary hearing on September 30, 2015 and issued a ruling on October 13, 2015 denying the application for preliminary injunction.

According to the court, the original bill introduced in the General Assembly was designed to allow for the creation of community learning centers to assist in the restructuring and support of failing and/or lower performing school districts. However, during legislative consideration, the bill was amended to provide for a process where the state superintendent could appoint a chief executive officer to manage a school district determined to be in academic distress as well as the power to appoint a new school board subject to a later referendum vote.

In its ruling, the court identified three bases for plaintiffs' case:

- The General Assembly violated the three-reading rule in Article II, Section 15(C) of the Ohio Constitution. Plaintiffs alleged that when HB 70 was amended, the bill was vitally altered, thereby triggering a constitutional requirement of three new readings, which did not occur;

- The provision in HB 70 granting a chief executive officer operational, managerial, and instructional control of a school district violates Article VI, Section 3 of the Ohio Constitution; and

- The chief executive officer provision violates the equal protection clauses of the United States and Ohio Constitutions, as well as Article V, Section 1 of the Ohio Constitution, because it denies the local electorate the right to vote.

The court addressed each of these arguments as follows:

- The court found that HB 70 was not vitally altered by the amendment, as the bill maintained a common purpose from its introduction through its enactment. The court stated that "Both versions of HB 70 were focused on restructuring and improving failing or lower performing school districts, and both versions of the bill primarily amended the same chapter of the Ohio Revised Code." The court reasoned that the change from using a community learning center model to using an expanded academic distress system with an appointed chief executive officer to manage the schools was not a vital alteration because the purpose of both versions was to assist and guide school restructuring and provide support for lower performing school districts. The court also found there was opportunity in the General Assembly to study and debate the amended bill.

- The court found that Article VI, Section 3 "merely provides the electorate the right to vote on the composition of its school boards, and does not provide any substantive rights as to the power and authority that those school boards will exercise." The court determined the bill did not alter the electorate's ability to elect school board members and only changes the powers conferred by statute on a district board that is consistently not meeting standards. As a result, the court concluded plaintiffs did not show a substantial likelihood of prevailing on the merits of their claim.

- The court found that the chief executive officer provision in HB 70 did not violate the equal protection clauses of the United States and Ohio Constitutions, or Article V, Section 1 of the Ohio Constitution. Following *Mixon v. Ohio*, 193 F.3d 389 (6th Cir. 1999) (if the challenged legislation does not infringe on the right to vote, it is examined under the rational basis standard, meaning that the state may treat classes of persons differently if the legislation rationally relates to a legitimate state purpose), the court determined that because a chief executive officer might possibly appoint a school board subject to a later referendum vote is "rationally related to the legitimate state purpose" of improving school quality, the plaintiffs' equal protection claim did not have a substantial likelihood of success on the merits.

In its ruling, the court rejected plaintiffs' claim that they would suffer irreparable injury without injunctive relief, finding persuasive defendants' evidence that the Youngstown City School District is "in dire need of help and change," and that the district had received poor performance ratings for the past decade.

The court also rejected plaintiffs' claim that an injunction would serve the public interest in ensuring the Ohio Constitution is followed by state legislators, the public interest in maintaining the right to vote for local school boards under Article VI, Section 3, and the public interest in protecting the voters' right to equal protection under law. Considering these interests in light of the public's interest in effective schools, the court concluded that Am. Sub. HB 70 served the more weighty interest of educating students.

Plaintiffs' appealed the decision to the court of appeals and oral argument was held April 14, 2016. A decision is pending.

Analysis

Two features of Section 3 relate to the issues raised in the Youngstown case. First, the section requires the enactment of laws to organize, administer, and control the public school system. Second, the section provides city school districts with the power to determine for themselves the number of members and the organization of the district board.

The section does not specify what the laws for organizing, administering, and controlling the schools should say or how those laws must operate. Nor does the section dictate how city school boards should be organized or how many members they should have. It also does not provide that *only* a local board may organize, administer, or control the local district.

Whether the legislation in question does or does not violate these two features may not be determined for some time. No matter how the court of appeals may rule, its decision may be appealed to the Ohio Supreme Court. If it is, a final determination may not be known for a number of months or even years, which may well extend beyond the end date for the work of the Commission.

As a result, the committee needs to consider whether it wishes to proceed with consideration of the section or whether it wishes to continue to wait on a resolution of the issues by the courts. In answering this question, the committee may wish to weigh whether any conceivable outcome in the Youngstown case would sway the committee from recommending that Article VI, Section 3 be retained in its present form.

Conclusion

Given the timelines involved in the case and the potential end date of the work of the Commission, the committee may wish to proceed with considering a report and recommendation retaining Article VI, Section 3 in its present form at this time, a recommendation that could be modified, if necessary, as events in the case proceed.

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

2016 Meeting Dates

October 13

November 10

December 8