OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

EDUCATION, PUBLIC INSTITUTIONS, AND LOCAL GOVERNMENT COMMITTEE

THURSDAY, MAY 14, 2015
9:30 A.M.
STATEHOUSE ROOM 017

AGENDA

I. Call to Order

II. Roll Call

III. Approval of Minutes

- Meeting of March 12, 2015

  [Draft Minutes – attached]

IV. Presentations

- "Article VI, Section 3 (Public School System, Board of Education)"

  Steven H. Steinglass
  Senior Policy Advisor

  [Memorandum by Steven H. Steinglass titled "Review of Article II, Section 3 (Public School System, Board of Education)" dated May 7, 2015 – attached]

- "Local Boards of Education"

  W. Shawna Gibbs
  Member, Board of Education
  Columbus City Schools
  Columbus, Ohio

  Eric Germann
  Member, Board of Education
  Lincolnview Local Schools
  Van Wert, Ohio

V. Reports and Recommendations

- Article VI, Section 1 (Funds for Religious and Educational Purposes)
  - First Presentation
  - Public Comment
  - Discussion

  [Report and Recommendation – attached]

- Article VI, Section 2 (School Funds)
  - First Presentation
  - Public Comment
  - Discussion

  [Report and Recommendation – attached]

VI. Committee Discussion

- Local Boards of Education

VII. Old Business

VIII. New Business

IX. Public Comment

X. Adjourn

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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

FOR THE MEETING HELD
THURSDAY, MARCH 12, 2015

Call to Order:

Chairman Chad Readler called the meeting of the Education, Public Institutions, and Local Government Committee to order at 9:30 a.m.

Members Present:

A quorum was present with committee members Readler, Gilbert, Coley, Cupp, Curtin, Macon, Sawyer, Taft, and Talley in attendance.

Approval of Minutes:

The minutes of the January 15, 2015 meeting of the committee were approved.

Presentations:

"Article VI, Section 2 (School Funds)"

Darold Johnson
Legislative Director
Ohio Federation of Teachers

The committee welcomed Darold Johnson, legislative director for the Ohio Federation of Teachers. Mr. Johnson provided written comments indicating the preference of his organization that the current language in Article VI, Section 2 of the Ohio Constitution, be retained. He said the Ohio Supreme Court in the *DeRolph* cases defined what thorough and efficient means, noting an article from Rutgers University outlining a similar experience in New Jersey.

Mr. Johnson entertained questions from the committee at the conclusion of his remarks.

Vice-Chair Edward Gilbert asked whether New Jersey had expanded "thorough and efficient" to define anything else or to include early childhood education. Mr. Johnson said that he was not

aware that had happened. He said that his group's parent organization, the American Federation of Teachers, does support early childhood education.

Committee member Dr. Larry Macon asked how much discussion has occurred in Mr. Johnson's organization regarding the "thorough and efficient" clause. Mr. Johnson said that there was a lot of discussion when they thought changes in the provision were being contemplated. He said the organization developed its rationale based upon those conversations.

Dr. Macon asked whether the organization had come up with any alternatives to "thorough and efficient," to which Mr. Johnson answered that because civil rights already exist in federal law, and in federal constitutional amendments, and because case law in this area is settled, the feeling is that the Ohio Constitution should only be changed in order to reflect changes that would be for the purpose of correcting problems for which there are no other options.

Dr. Macon wondered whether it would suffice for the committee to change the language to include "equitable" or "equal." Mr. Johnson said that "through and efficient" is better than "equitable" or "equal" because *DeRolph* has defined the phrase and is a benchmark. Removing "thorough and efficient" would cause a bigger loss than would be gained from including the word "equitable."

Committee Member Sen. Bill Coley asked whether keeping the current constitutional language would permit a system whereby people could select their own educational resources, in the same way the state allows welfare recipients to make their own nutritional selections. Mr. Johnson said that the constitution allows a lot of flexibility right now.

Chair Readler summed up some of the history of the section, indicating that "thorough and efficient" has been open to conflicting meanings and has been used by courts to impose their own views, which, in his opinion, upsets the balance of power. He also noted that the concerns in 1851, when this provision was adopted, were not the same as they are now. He asked why the American Federation of Teachers prefers court involvement.

Mr. Johnson answered that the three branches of government are equal and do have the ability to affect policy. He said sometimes the courts will move the boundaries beyond where people want them to go, but courts are consistent and willing to do the hard work to move past partisanship in many instances. He said that the four *DeRolph* decisions occurred because the legislature wasn't doing what the court had ordered it to do, and courts have a function of ensuring that schools are thorough and efficient.

Mr. Readler noted that the New Jersey litigation went on for 25 years, and the court there even ordered the legislature to raise taxes to fund public schools. Mr. Readler asked whether Mr. Johnson believes that was a good development. Mr. Johnson said that his comments are on the process. He said Ohio's justices are elected, and the public has a way to seek redress if it doesn't like a judicial decision.

Mr. Gilbert asked whether Mr. Johnson's view is that the clause should not be removed, and Mr. Johnson agreed this was what he is advocating. Mr. Gilbert commented that making a change to

"thorough and efficient" would involve more court activity and litigation, rather than less, so the better course would be to leave it alone because the meaning is settled at this point. Mr. Johnson agreed with Mr. Gilbert's assessment.

Committee member Rep. Mike Curtin said the U.S. Constitution and the state constitution are full of aspirational language, and that "thorough and efficient" is one example of this. He said there was a high level debate in 1851 before this language was adopted, and the drafters knew that every generation would work through what the expectations would be. Rep. Curtin said "thorough and efficient" is not an invitation for courts to meddle. The fact that Ohio had one episode of litigation [*DeRolph*] that lasted 10 years is not enough to say that the language is not acceptable. Like the concept of due process in the U.S. Constitution, "thorough and efficient" is a concept that evolves with the law. He said that the job of legislators is to reinterpret what expectations are and what means the state has to achieve them. He said no sum of money was set for a reason. Rep. Curtin said the committee should keep the language because it has served the state very well. He applauded *DeRolph* as having set the standard.

Mr. Johnson then concluded his remarks.

"Summary of Presentations on School Funds"

Steven H. Steinglass
Senior Policy Advisor

Steven H. Steinglass, Senior Policy Advisor, briefly summarized the prior presentations and discussion that occurred with regard to Article VI, Section 2 (School Funds). He indicated that the committee could take one of several options: repeal the section, keep it without change, or adopt one of the proposals that were presented. Additional questions include whether early childhood education should be included, and whether education should be defined as a fundamental right.

Mr. Steinglass said changing the language would result in litigation, which would result in a lot of effort and expense in order to re-define the new language. He said if there is a change, it could be given a later effective date so as to allow school districts to prepare. He also said "thorough and efficient" is an elastic clause that each generation can examine and define for itself.

Committee Discussion:

Chair Readler then invited the committee members to discuss their views on Article VI, Section 2, and wondered what the committee's consensus was about whether to change it.

Committee member Mr. Bob Taft said that *DeRolph* had an impact on his term as governor. He said they increased spending and improved facilities at that time, and other governors continued that work. Governor Kasich is now considering "thorough and efficient" and the *DeRolph* definitions as he works on his education budget. Mr. Taft said the language is hard to understand, but each new generation can read-in its own understanding of what it means. He said

it is hard to imagine changing it without there being a lot of resulting litigation. He said creating education as a "fundamental right" could crowd out other priorities of society, including healthcare, daycare, or other needs. He continued, saying the question of determining the quality of education has been a big debate over time, but it is best processed through the legislature rather than through the courts. He said the concept of "fundamental right" invites court involvement. Mr. Taft said "thorough and efficient" has taken on sacrosanct status, and his inclination is to leave it alone as it gets interpreted and reinterpreted through the generations.

Sen. Coley said that he seconds Mr. Taft's comments. He added that "we must be pragmatists," as our society has become more partisan and ideological. He said "thorough and efficient" has true meaning for most people, with certain gradations of interpretations, but that everyone collectively decided to bring schools up to a certain standard. Sen. Coley said that a compelling reason is needed to change along with consensus to change. He feels the committee does not have a compelling reason or consensus, so his vote is to leave the provision alone.

Vice-chair Gilbert said he agrees with the comments of Mr. Taft and Sen. Coley, particularly Sen. Taft, but his question for Mr. Steinglass is whether early childhood education must be in the constitution in order to be effectuated, rather, couldn't the legislature just handle that. Mr. Steinglass said that the constitution does not need a reference to early childhood education in order for the General Assembly to fund it, and that the same is true for higher education.

Vice-chair Gilbert asked Director Hollon what is the next course of action for the committee if it wants to vote on retaining Article VI, Section 2. Director Hollon said that once the committee decides on a course of action, the staff will draft a report and recommendation, and that, in this instance, the committee should decide whether it wants a report and recommendation on this section alone, on Section 1 and 2, or on the entire article.

Dr. Macon asked if there are problematic aspects of the various proposals.

Mr. Steinglass then described alternatives 1 and 2.

Dr. Macon said he agrees with his colleagues on maintaining the "thorough and efficient" clause, but he also would like to expand and clarify what that is. He wondered if Mr. Steinglass could help him understand, at a later time, what has been defined in the cases. Mr. Steinglass said he would talk to Professor Charlie Wilson and get some research on this for Dr. Macon.

Sen. Coley commented that it would be good to be able to allow a marketplace for educational alternatives under the Constitution.

Mr. Steinglass said that the phrase "common schools" is understood to mean "public schools," and that a 100 percent voucher system might be taking things too far under Article VI, Section 2. He said within a narrow area the state has some discretion, and how that is exercised is up to the General Assembly.

Sen. Coley said additional items might crowd out other items and interfere with having a balanced budget. He said there are already issues with limited resources. Sen. Coley concluded that he is in favor of leaving the provision as is.

Vice-chair Gilbert said that while he believes it would be good to have more language to explain the meaning of "thorough and efficient," the reality is the only ones who would win from trying to do this would be lawyers.

Vice-chair Gilbert then moved to retain Article VI, Section 1 and Section 2 as they are. Motion was seconded, and a roll call vote was taken.

The motion unanimously passed.

Director Hollon asked whether the committee wanted a report and recommendation on both sections together, and Chair Readler agreed that one report and recommendation for those two provisions would be acceptable.

Mr. Taft said he would like the committee to have a discussion about Article VI, Section 3, relating to boards of education, specifically whether there should be a change in the way individuals obtain seats on the boards. Director Hollon suggested that Sections 3 and 4 seem to go together and could form the basis of one report and recommendation.

Sen. Coley said he would like to review Sections 5 and 6, commenting that they are phrased more like legislation and they may need some revision.

Chair Readler said that after the committee concludes its review of Article VI, it might then review Article VII, Public Institutions.

Rep. Curtin said that he would like to add a topic if the committee agrees, and that is the earmarking of revenues for K-12 education. While he recognizes a provision regarding the net proceeds from the lottery is in the constitution, he wonders what other states do in regard to earmarking revenues for education. He said the highest constitutional obligation is education, and that he has introduced legislation on this topic.

Sen. Coley said the legislature has many priorities and all of them are important. He said casino revenues currently go to education.

Mr. Steinglass pointed out that Article XV, Section 6a, concerning the state lottery, has been assigned to this committee for review.

Vice-chair Gilbert said he would like further information from Mr. Steinglass about having education consist of "0 to 12" as opposed to "K to 12".

Mr. Steinglass pointed out that the earmarking provision only says "K to 12."

Adjournment:

With no further business to come before the committee, the meeting adjourned at 11:10 a.m.

Attachments:

- Notice
- Agenda
- Roll call sheet
- Prepared remarks of Darold Johnson

Approval:

The minutes of the March 12, 2015 meeting of the Education, Public Institutions, and Local Government Committee were approved at the May 14, 2015 meeting of the committee.

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

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

TO: **Chair Chad A. Readler, Vice Chair Edward L. Gilbert, and Members of the Education, Public Institutions, and Local Govt. Committee**

CC: **Steven C. Hollon, Executive Director**

FROM: **Steven H. Steinglass, Senior Policy Advisor**

RE: **Review of Article VI, Section 3 (Public School System, Boards of Education)**

DATE: **May 7, 2015**

This memorandum reviews Article VI, Section 3, which gives the General Assembly the power to organize, administer, and control the public school system, and also provides a role for the voters in Ohio's city school districts.

Introduction

Recommended by the Constitutional Convention of 1912, approved by the voters, and ever amended, Article VI, Section 3 requires the General Assembly to enact laws for "the organization, administration and control of the public school system of the state supported by public funds." It also gives voters in city school districts power over the size and organization of local boards of education. The full text of the section (with its two clauses separately identified) is as follows:

> [1] Provision shall be made by law for the organization, administration and control of the public school system of the state supported by public funds: [2] 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.

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.

State Control

The first clause in Section 3 centralizes state power over the public schools by providing that "[p]rovision shall be made by law for the organization, administration and control of the public school system * * * ." This provision was the culmination of many years of work by supporters of state control of education. *See generally* Molly O'Brien & Amanda Woodrum, The Constitutional Common School, 51 Cleve.St.L.Rev. 581, 634-36 (2004). It was also 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. 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.

2 Proceedings and Debates of the Constitutional Convention of the State of Ohio 1500 (1913) (hereafter "Debates").

At one point during the Constitutional Convention of 1912, an earlier version of this provision extended state control to "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). *See* Debates at 1915-1916. 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. *See* Debates at 1916.

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."

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

Though it is likely that the General Assembly already had the power to centralize state control over education, proponents of a strong role for the state in education wanted to remove any doubts by making this constitutional power explicit. More particularly, they wanted to remove

the possibility that cities acting under an expanded home rule power could interfere with the role of the state in controlling education. *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.").

Litigation

Under the first clause of Section 3, the General Assembly was permitted to adopt legislation to facilitate the consolidation of school districts by giving county boards of education broad power 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 Ed*., 97 Ohio App. 507, 519-20, 127 N.E.2d 623, 630 (1954), to reorganize a school district within a county by requiring an affirmative vote of 55% of the vote in the new district unless 75% of the voters in any district opposed the reorganization, s*ee State ex rel. Groh v. Bd. of Ed. of W. Clermont Local Sch. Dist.*, 169 Ohio St. 54, 54, 157 N.E.2d 325, 326 (1959) (syllabus at number 1), and to create charter schools as part of the state's program of education, *see State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Ed*., 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.

Thus, there is little doubt that under Article VI, Section 3 the state possesses broad power to organize, administer, and control public education in the state.

Size and Organization of Local School Boards

In addition to its assertion of state control over education, the second clause 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. The power extended to city school districts, however, grants each district the power to determine the number of members and organization of

the board, but not the actual members of the board. *See East Liverpool Ed. Assn. v. East Liverpool City School Dist. Bd. of Ed.*, 177 Ohio App3d 87, 893 N.E.2d 916 (2008).

In the early 20th century, there were a huge number of school districts in Ohio. For example, in an essay written for the Ohio Centennial Anniversary Celebration in Chillicothe on May 20-21, 1903, Lewis Bonebrake described the state's four categories of school districts: city, township, village, and special. He then observed that there were 2,437 different school 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 from both wards and at large. The boards in the township, village, and special districts ranged from three to six members. *See* Lewis Bonebrake, The Public Schools of Ohio, 389, 399-400, in Complete Proceedings, Ohio Centennial Anniversary Celebration (1903). "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 (August 8, 2013).

The second clause addresses the concern 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 Constitutional Convention of 1912, 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 * * * ." Debates at 1500.

The second clause addressed this issue by providing that the "number of members and the organization of the district board of education" could be determined by the voters by referendum. Thus, the voters were given an explicit constitutional role in the organization of school boards. Still, the constitutionally-guaranteed role of the district board of education was very narrow, going only to the size and organization of the board.

Exclusion of Rural School Districts from the Referenda Requirement

The power of local school districts to determine their size and organization did not, however, extend to all school districts. Earlier versions of the second clause applied the referendum requirement to all school districts, but some representatives of rural districts objected to the application of the provision to them. ("[It] seems that in some portions of the state * * * there is objection to its application to rural school districts."). *See* Debates (Delegate Knight) 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*. The second clause was then amended 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 role in the size and organization of their school boards. *See generally* Debates at 1914-1915.

The Right of Referendum and its Timing

For those school districts wholly or partly within cities, there is no doubt that Section 3 guarantees the school district the right to determine by referendum the size and organization of its board. This provision does not, however, address when such referenda shall be conducted.

The issue of the timing of the referendum came up in 1914 after the General Assembly adopted the Jung Small School-Board Act (hereafter "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 a challenge under Section 3 to the Jung Act. The act classified and organized city school districts and their respective school boards by using three general categories based on population. The central legal challenge in *Evans* was that the Jung Act impermissibly infringed on the referendum provision of the Ohio Constitution by permitting as long as a two-year delay before the required vote. But the Ohio Supreme Court rejected the challenge:

> Now, it has always been recognized as a proper exercise of legislative power for the Legislature to determine for itself when the act or part thereof shall go into effect. This the Legislature undertook to do by putting into the act the 'one hundred and twenty day' provision. The only limitation upon the Legislature in this behalf would be a constitutional limitation, and there is none suggested in this case. The 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. The Legislature is presumed to have acted in good faith, and there is nothing in the record to overcome that presumption.

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 the Cleveland 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). *See* R.C. 3311.73.

The statute requiring the appointment of the Cleveland school board was challenged in both state and federal courts, but the federal courts reached the merits of the claim first. In upholding the

state statute, the United States Court of Appeals for the Sixth Circuit in *Mixon v. State of Ohio*, 193 F.3d 389 (6th Cir. 1999), relying on the 1914 Ohio Supreme Court decision in *Evans*, rejected the argument that there was a two-year time limit for holding a referendum. 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*, 160 Ohio St. 175, 115 N.E.2d 157, 160 (1953) (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.

Id. 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, and 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), rejected the conclusion and analysis in *Mixon* and held that the

four-year delay violated the Ohio Constitution. In so ruling, the court treated the two-year time limit on *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).[1]

Implications for the Future: Elected or Appointed School Boards

Neither the decision of the Sixth Circuit in *Mixon,* nor the reversed decision of the Eighth District in *Malcolm-Smith*, is binding on the Ohio courts, and *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. Thus, it appears that, under current law, the General Assembly can provide for the appointment of local school board members as long as it subsequently permits the voters of the school district to decide by referendum if they agree with the loss of the power to elect school board members. The precise issue of the timing of the referendum, however, remains unclear.

[1] The required referendum was held on November 5, 2002, and more than 70 percent of Cleveland voters supported 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* Cleveland Plain Dealer, Mayoral control of the Cleveland city schools has brought stability but other improvements hard to measure (August 20, 2011). Available at http://blog.cleveland.com/metro/2011/08/mayoral_control_of_the_clevela.html (accessed May 7, 2015).

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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

OHIO CONSTITUTION
ARTICLE VI, SECTION 1

FUNDS FOR RELIGIOUS AND EDUCATIONAL PURPOSES

The Education, Public Institutions, and Local Government Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article VI, Section 1 of the Ohio Constitution concerning funds for religious and educational purposes. 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 1 of the Ohio Constitution and that the provision be retained in its current form.

Background

Article VI, Section 1 reads as follows:

> The principal of all funds, arising from the sale, or other disposition of lands, or other property, granted or entrusted to this state for educational and religious purposes, shall be used or disposed of in such manner as the General Assembly shall prescribe by law.

Article VI of the Ohio Constitution concerns education, and Section 1 deals more specifically with lands provided to the state for educational and religious purposes.

As originally adopted in the 1851 constitution, Article I, Section 1 provides:

> The principal of all funds arising from the sale or other disposition of lands or other property granted or entrusted to this state for educational or religious purposes, shall forever be preserved inviolate and undiminished; and the income arising therefrom shall be faithfully applied to the specific objects of the original grants or appropriations.

School Lands

School lands provided by the federal government to Ohio and other states played an important role in the development of public education in this country, and school lands supported education in virtually all the new states beginning with Ohio in 1803.[1]

The history of school lands dates to the days before statehood, when the Confederation Congress, through the Land Ordinance of 1785,[2] reserved in every township in the survey of the land tract in the eastern portion of the state (which was known as the Seven Ranges) a one-mile square section for the maintenance of public schools.[3] The Northwest Ordinance,[4] enacted in 1787 by the Confederation Congress and reaffirmed by the first United States Congress in 1789,[5] established a path to statehood for Ohio and the other states that were carved from the Northwest Territory. It also continued the commitment to public education by providing, in part, that "[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[6] The founders' emphasis on the value of education, and particularly on its relationship to religion and morality, is recognized as stemming from the view that the establishment of a new nation required "an educated, moral, sober citizenry in the new states that would have the stability and civil responsibility of a republican society."[7]

In the 1802 Enabling Act, Congress moved Ohio along the path to statehood by enacting legislation to "enable the people of the eastern division of the territory northwest of the river Ohio to form a constitution and State government and for the admission of such State into the Union * * *."[8] It also contains an unusual provision offering the new state one "section, number 16, in every township" or other equivalent lands.[9] The 1802 Constitutional Convention made a counteroffer[10] that, in turn, was accepted by the federal government. This resulted in Ohio ultimately gaining control of 704,204 acres (or 2.77 percent of its land area) of federally-donated land to support public schools.[11]

The importance of education to the new state was reflected in the 1802 constitution, which followed the Northwest Ordinance in providing, in Article VIII, Section 3, that "religion, morality and knowledge, being essentially necessary to good government and the happiness of mankind, schools and the means of instruction shall forever be encouraged by legislative provision, not inconsistent with the rights of conscience."

After statehood, the General Assembly leased much of this land, with some leases being as long as 99 years and renewable forever. In 1826, however, Congress permitted land sales with the consent of township residents.[12] And in 1827, the General Assembly adopted legislation providing that proceeds from the sale of school lands were to be deposited in the Common School Fund and earmarked for the benefit of schools within the townships.[13]

Because of concerns about the local stewardship of the school lands, the General Assembly in 1914 and 1917 transferred supervision of the school (and ministerial) lands to the Auditor of State. In 1985, the General Assembly transferred supervision to the Director of Administrative Services, and in 1988, the General Assembly transferred supervision of all remaining monies to

the Board of Education in each school district that had been allotted these lands, with title held in trust by the State of Ohio.[14]

Ministerial Lands

In addition to allocating land to support education, the federal government allocated land in Ohio to support religion by providing that section 29 of certain land purchases be used to support religion.[15] The granting of real property for religious purposes has been identified as a "holdover from English and other European traditions where one denomination constituted a state church and received its support and other perquisites from the state."[16] Ohio's "ministerial lands," which totaled 43,525 acres, represented only a small part of the total land originally granted to Ohio by Congress.[17]

The Confederation Congress (in the Ohio Company's First Purchase in 1787) and the United States Congress (in the Symmes Purchase in 1794) reserved section 29 for the purpose of religion in what are today Washington, Meigs, Gallia, Lawrence, and Athens counties (from the Ohio Company's First Purchase), and in Butler, Hamilton, and Warren Counties (from the Symmes Purchase). In addition, the Ohio Company on its own reserved section 29 from its Second Purchase in what are now Hocking and Vinton Counties. [18] " 'Ministerial land,' as these lands have since been termed, are found nowhere in the United States, except within these three parts of the state of Ohio."[19]

In 1833, Congress allowed the sale of lands that had been granted to the state for the support of churches and religious societies, with the proceeds to be placed in a trust fund and interest thereon paid to local schools and religious societies.[20]

The 1851 constitution addressed these issues by adopting a provision, Article VI, Section 1, which addressed both educational and ministerial lands and provided that the proceeds from the sale of lands granted for educational or religious purposes must be applied to the objects of the original grants.

Amendments, Proposed Amendments, and Other Review

By 1968, the practice of state payments to religious organizations was recognized as problematic under the Establishment Clause of the First Amendment to the United States Constitution, and Congress acted to limit the use of sale proceeds to educational purposes only, subject to the discretion of the General Assembly.[21] Ohio voters subsequently approved an amendment to Article VI, Section 1 that expressly allowed the General Assembly discretion to disperse money set aside in the trust fund.[22] Thus, Article VI, Section 1 was altered to provide that funds arising from these lands would not be restricted to school or religious purposes, but "shall be used or disposed of in such manner as the General Assembly shall prescribe by law." In the May 7, 1968, election, the voters approved an amendment proposed by the General Assembly to this section by a vote of 847,861 to 695,368, or 55 percent to 45 percent.[23]

In 1977, the Ohio Constitutional Revision Commission ("1970s Commission") recommended no change to this section.[24]

Litigation Involving the Provision

There has been no significant litigation involving Article VI, Section 1.

Presentations and Resources Considered

On November 13, 2014, the committee heard a presentation by former Ohio Supreme Court Justice Robert R. Cupp, who was at that time chief legal counsel for the Ohio Auditor of State.[25] Mr. Cupp explained that while some may consider Article VI, Section 1 as an obsolete provision, the section remains necessary as the state still possesses some "school lands" as referenced in the provision.

Mr. Cupp provided a brief history of the provision, indicating that these lands first had been managed and supervised by township trustees, then by the auditor of state, and later by the director of the Department of Administrative Services. However, in 1988, legislation went into effect that transferred supervision, management, and all remaining monies of school lands to the board of education in each school district that had been allotted these lands. He said it is unclear how much real estate of this nature remains under state title, but the most recent transfer by the state took place in 2009 to the Upper Scioto School District in Hardin County. He said the Hardin County property has a current market value of $2.5 million and is leased by the school district for farming. The school district derives $247,000.00 in annual revenue from this lease.

Conclusion

The Education, Public Institutions, and Local Government Committee concludes that Article VI, Section 1 should be retained in its current form.

Date Adopted

After formal consideration by the Education, Public Institutions, and Local Government Committee on May 14, 2015, and _____, 2015, the committee voted to adopt this report and recommendation on _____.

Endnotes

[1] *See generally* Jon A. Souder & Sally K. Fairfax, State Trust Lands: History, Management, and Sustainable Use (1996); Sean E. O'Day, School Trust Lands: The Land Manager's Dilemma Between Educational Funding and Environmental Conservation, A Hobson's Choice?, 8 N.Y.U. Envtl. L.J. 163 (1999). For a compendium of the various legislative enactments relating to the creation and preservation of Ohio school lands in the early 1800s, see A Compilation of Laws, Treaties, Resolutions, and Ordinances, of the General and State Governments, which Relate to Lands in the State of Ohio; including The Laws Adopted by the Governor and Judges; The Laws of the Territorial Legislature; and the Laws of this State, to the Years 1815-16. Published in Pursuance of Resolutions of the General Assembly, passed January 22, 1825. Columbus: Geo. Nashee, State Printer, 1825.

[2] General Land Ordinance of 1785, reprinted in 28 Journals of the Continental Congress 1774-1789, at 375.

[3] *See generally* Steven H. Steinglass & Gino J. Scarselli, The Ohio State Constitution (2nd prtg. 2011), p. 220.

[4] Journals of the Continental Congress, 1774-1789, ed. Worthington C. Ford et al. (Washington, D.C., 1904-37), 32:334; Ordinance of 1787: The Northwest Territorial Government, Act of July 13, 1787. Available at http://uscode.house.gov/browse/frontmatter/organiclaws&edition=prelim (Office of the Law Revision Counsel of the House of Representatives ed.) (Accessed May 6, 2015).
See also http://avalon.law.yale.edu/18th_century/nworder.asp (accessed April 27, 2015).

[5] Northwest Ordinance, Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51.

[6] Ordinance of 1787, *supra*, at Section 14 (Compact), Article III.

[7] Matthew J. Festa, Property and Republicanism in the Northwest Ordinance, 45 Ariz. St. L.J. 409, 460 (2013). *See also*, Alexandra Usher, "Public Schools in the Original Federal Land Grant Program" The Center on Education Policy; April 2011 p. 5. Available at http://www.eric.ed.gov/ERICWebPortal/search/detailmini.jsp?_nfpb=true&_&ERICExtSearch_SearchValue_0=ED518388&ERICExtSearch_SearchType_0=no&accno=ED518388 (Accessed April 27, 2015), citing Culp, P.W., Conradi, D.B., & Tuell, C.C. (2005). *Trust land in the American west: A legal overview and policy assessment.* Cambridge, MA: Lincoln Institute of Land Policy, pp. 4-8. Available at https://www.lincolninst.edu/subcenters/managing-state-trust-lands/publications/trustlands-report.pdf (accessed April 27, 2015).

[8] Ohio Enabling Act, ch. 40, § 7, 2 Stat. 173, 175 (1802). Available at http://www.ohiohistorycentral.org/w/Enabling_Act_of_1802?rec=1490 (accessed April 27, 2015) http://research.archives.gov/description/299949 (accessed April 27, 2015).

[9] *Id*. at Sec. 7.

[10] Propositions From the Ohio Constitutional Convention to the Congress of the United States, Relating to the Admission of Ohio, Ordinance and Resolution Passed in Convention, Nov. 29, 1802, as reprinted in Daniel J. Ryan, From Charter to Constitution, Ohio Archaeological and Historical Publications, Volume 5, Columbus: Ohio State Archaeological and Historical Society, 1897, p. 78 et seq.; and available at: http://publications.ohiohistory.org/ohj/browse/displaypages.php?display[]=0005&display[]=1&display[]=164 (Accessed May 5, 2015).

[11] George W. Knepper, *The Official Ohio Lands Book*. The Auditor of the State of Ohio. 2002, p. 57, *see, also*, Steinglass & Scarselli, *supra.*

[12] Knepper, *supra.*

[13] *Id*. at 58.

[14] *Id*. at 58-59.

[15] *See generally* William E. Peters, Ohio Lands and Their Subdivision, pp. 340-357 (2d. ed. 1918).

[16] Knepper, *supra*, at 59.

[17] *Id*. at 60.

[18] Peters, *supra*, at 362-364.

[19] *Id*. at 364.

[20] Steinglass & Scarselli, *supra.*

[21] *Id*. at 220-21, citing Public Law 90-304 (May 13, 1968).

[22] *Id*. at 221.

[23]Source: Secretary of State's website; May 7, 1968 Primary (Official Results); http://www.sos.state.oh.us/sos/elections/Research/electResultsMain/1960-1969Results/68priconst.aspx (accessed May 5, 2015).

[24] Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Final Report, June 30, 1977, p. 53.

[25] On November 4, 2014, Mr. Cupp was elected state representative for the Fourth District (Allen County) for a term beginning January 6, 2015. Upon being sworn as state representative, Rep. Cupp was selected to serve as a legislative member of the Ohio Constitutional Modernization Commission.

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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

OHIO CONSTITUTION
ARTICLE VI, SECTION 2

SCHOOL FUNDS

The Education, Public Institutions, and Local Government Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article VI, Section 2 of the Ohio Constitution concerning school funding. 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 2 of the Ohio Constitution and that the provision be retained in its current form.

Background

Article VI, Section 2 reads as follows:

> The General Assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state; but no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this State.

Article VI of the Ohio Constitution concerns education.

Section 2, adopted as part of the Ohio Constitution of 1851 and never amended, includes the first use of the phrase "thorough and efficient" in the constitution of any state.[1] The provision was influenced by an 1837 report about education in England and Europe commissioned by the Ohio legislature and prepared by Calvin Ellis Stowe, a professor of biblical literature at Lane Theological Seminary in Cincinnati.[2] Stowe, the husband of Harriet Beecher Stowe, was a strong supporter of universal public education, and urged Ohio to follow the Prussian example of state-supported education.[3] Stowe's report was republished by the legislatures of Michigan, Massachusetts, Pennsylvania, North Carolina, and Virginia.[4] In fact, some 22 states are

recognized as having constitutional provisions imposing educational standards similar or identical to Ohio's "thorough and efficient" clause.[5] Despite these similarities, the definition of "common schools," as well as what constitutes a "thorough and efficient" system for providing education, varies widely from state to state due to differences in history, demographics, geography, and other factors.[6]

Amendments, Proposed Amendments, and Other Review

In 1977, the Ohio Constitutional Revision Commission ("1970s Commission") recommended no change to this section, concluding that adding specific language that dealt with school finance would undermine the view that a constitution should only state general principles and guidelines.

The 1970s Commission succinctly summarized its position on retaining current language by stating:

> A system of school finance poses unique problems because so many factors are involved, many of which are legislative, economic and geographical considerations, and being subject to change, are not likely to be more adequately provided for in the [c]onstitution than by the language presently contained in that document.[7]

Litigation Involving the Provision

The most recent, and notable, litigation involving school funding is the *DeRolph* line of cases, [8] in which a coalition of individuals and five Ohio school districts sued the state in 1991, alleging that the state educational funding system violated the "thorough and efficient" clause found in Article VI, Section 2.[9] Specifically, the *DeRolph* plaintiffs argued that the school funding scheme in place at the time relied too heavily on local property taxes, resulting in disparities in the quality of educational facilities and resources in different communities across the state. Concluding that the school funding system was "wholly inadequate" to meet the constitutional mandate, the Ohio Supreme Court directed in 1997 that the General Assembly "create an entirely new school financing system" that was not overly dependent on local property taxes. *DeRolph v. State,* 78 Ohio St.3d 193, 239, 213, 1997-Ohio-84, 677 N.E.2d 733, 765, 747 (*DeRolph I*).[10]

The *DeRolph* litigation brought to light evidence that a lack of funding in many districts had resulted in deteriorating school facilities, outdated textbooks, insufficient school supplies, overcrowded classrooms, and other conditions that were seen to impede learning. In *DeRolph I,* a majority of the court concluded that "state funding of school districts cannot be considered adequate if the districts lack sufficient funds to provide their students a safe and healthy learning environment." *Id.,* 78 Ohio St.3d at 208, 677 N.E.2d at 744. The court ordered the General Assembly to "first determine the cost of a basic quality education in both primary and secondary schools in Ohio, and then ensure sufficient funds to provide each student with that education, realizing that local property taxes can no longer be the primary means of providing the finances for a thorough and efficient system of schools." *Id.,* 78 Ohio St.3d at 261-262, 677 N.E.2d at 780.

In 2000, after the state undertook measures to institute reforms, the case again came before the court on the same question of whether the constitutional requirement that the state provide a "thorough and efficient system of common schools" had been met. Noting the complexity of the state's educational system, a majority of the court observed that setting a per-pupil funding amount, or otherwise providing some specific funding scheme, would violate the separation of powers doctrine; thus, the court left the specific remedy to the General Assembly. *DeRolph v. State*, 89 Ohio St.3d 1, 6, 11-12, 2000-Ohio-437, 728 N.E.2d 993, 998, 1002-03 (*DeRolph II*). While recognizing that the General Assembly's creation of the Ohio School Facilities Commission, as well as its enactment of other remedial legislation, had constituted a "good faith attempt to comply with the constitutional requirements" and had improved conditions around the state, the court nevertheless concluded that the state defendants needed more time to institute reforms before the court could declare the state had met its obligation to provide a "thorough and efficient system of common schools."[11] *Id.*, 78 Ohio St.3d at 35-36, 728 N.E.2d at 1020.

In 2001, the court continued its review of the reforms adopted by the General Assembly, finding further measures were needed to conform with Article VI, Section 2. Specifically, the court ordered the state to modify its base cost formula, by which the state calculated the per-pupil cost of providing an adequate education; to accelerate the phase-in of a parity aid program that was designed to provide additional funding to poorer districts; and to consider alternative means of funding school buildings and facilities. *DeRolph v. State*, 93 Ohio St.3d 309, 324-25, 2001-Ohio-1343, 754 N.E.2d 1184, 1200-01 (*DeRolph III*).

In 2002, upon reconsideration of its decision in *DeRolph III*, a divided court agreed to vacate the judgment. However, despite this action, a majority of the court maintained that Ohio's school funding system continued to be unconstitutional because the General Assembly, despite enacting reforms, had not performed " 'a complete systematic overhaul' of the school-funding system." *DeRolph v. State*, 97 Ohio St.3d 434, 435, 2002-Ohio-6750, 780 N.E.2d 529, 530 (*DeRolph IV*), quoting from *DeRolph I*. Commenting during a presentation before the committee about the impact of *DeRolph*, Justice Paul E. Pfeifer indicated that the consensus of the court in *DeRolph IV* was to release jurisdiction because litigation was not proving to be the answer to the problem, and because, by that time, reforms had resulted in school facility improvement.[12]

In May 2003, the Ohio Supreme Court granted a peremptory writ of prohibition, preventing the trial court from exercising further jurisdiction over *DeRolph*. *State ex rel. State v. Lewis*, 99 Ohio St.3d 97, 2003-Ohio-2476, 789 N.E.2d 195. In so deciding, the court clarified that its mandate in *DeRolph IV* was not for the trial court to conduct further proceedings, and determined that allowing the trial court to take further action would be an improper attempt to require judicial approval for proposed remedies. *Id.*, 99 Ohio St.3d at 103, 789 N.E.2d at 202. Thus, the court ended further litigation in *DeRolph*. *Id.*, 99 Ohio St.3d at 104, 789 N.E.2d at 202.[13]

Although the *DeRolph* litigation ended without there being a judicial determination that the state had complied with the constitutional mandate, *DeRolph* did bring to light school funding insufficiencies, and resulted in the adoption of changes that were intended to improve school facilities and other educational resources.[14]

Presentations and Resources Considered

DeMaria Presentation

Paolo DeMaria of Education First presented to the committee on August 8, 2013. His presentation focused on the importance of education to the public good, the role of government, the elements of an excellent education, the governance of education at the state and local level, the variety of local educational structures, and funding. He also identified emerging issues, including: standards, assessments, educating all students, early childhood education, accountability, teacher/leader quality, technology, data, school operational improvement, competency-based education, finances, and the relationship between education policy and tax policy. Finally, he concluded with a brief review of state and local support for K-12 education, observing that more spending does not result in better student outcomes.

Lewis Presentation

Richard C. Lewis, Executive Director of the Ohio School Boards Association, also appeared before the committee on August 8, 2013, focusing on the constitutional structure of education in Ohio; the importance of local control; the importance of reliable and equitable funding; the spectrum of urban, suburban, and rural districts; the impact of privatization; the importance of balancing the traditional and the innovative; and accountability. He also provided the committee with some detailed materials on the elements of a model school funding formula.

Wilson Presentation

Charles Wilson, professor emeritus of the Ohio State University Moritz College of Law, provided a broad overview of Article VI at his November 14, 2013, presentation to the committee. Subsequently, he submitted two alternative proposals. Both alternatives retain the "thorough and efficient" language and expressly characterize education as a "fundamental right." One proposal requires the General Assembly to provide for and fund an "efficient, safe, secure, thorough, equitable, and high quality education." Another alternative requires the General Assembly to fund and provide a "uniformly high quality educational system designed to prepare Ohio's people to function effectively as citizens," as well as an early childhood educational system.

Phillis Presentation

William L. Phillis, Executive Director of the Ohio Coalition for Equity & Adequacy of School Funding, presented to the committee on December 12, 2013, and on March 13, 2014. Mr. Phillis provided the committee with information on public education, relevant methodologies for determining the cost of public education, and information on the impact of charter schools. He also provided drafts of specific amendments for the committee's consideration.

Mr. Phillis recommended that the "thorough and efficient" clause be maintained. He also provided the committee with the text of three proposed amendments to Article VI. Under his proposal, a new Section 2a would provide state officials with direction in determining what

constitutes a "thorough and efficient" education. Mr. Phillis proposed a second provision that would require the institution of early childhood educational programs to all children beginning at three years of age. Mr. Phillis' third proposed amendment concerns the state board of education and provides that "[s]tate board of education members shall be elected, one from each congressional district."

Pittner Presentation

Nicholas A. Pittner, the lead attorney in the *DeRolph* litigation, appeared with William L. Phillis on December 12, 2013, and summarized the history of the *DeRolph* cases. Mr. Pittner opined that Ohio's educational funding system remains inadequate because the current system is still over-reliant on local property taxes. According to Mr. Pittner, "Section 2, Article VI of the Ohio Constitution is clear and needs no revision. What is needed are specific standards by which compliance with the mandates of Section 2, Article VI can be measured and enforced." Mr. Pittner expressed his support for a proposed amendment, submitted by Mr. Phillis, that would provide additional constitutional direction.

Dyer Presentation

On June 12, 2014, Stephen Dyer, the Education Policy Fellow at Innovation, Ohio, presented to the committee on the financing of education in Ohio, specifically, his concerns about the level of state support and the disparity in the ability of districts to support education. With respect to the "thorough and efficient" requirement, he urged that if the requirement is to be replaced it should be replaced with language that is even stronger. He pointed to provisions in the Florida and Montana Constitutions, and he provided the committee with proposed changes to Article VI, Section 2 that included a requirement that Ohio residents receive a "world-class education," which the legislature would be responsible for funding.

Reedy Presentation

Maureen Reedy, co-founder of Ohio Friends of Public Education and a former grade school and special education teacher, presented to the committee on June 12, 2014. Her remarks emphasized the importance of public schools and expressed alarm at the possible removal of the "thorough and efficient" requirement from the constitution.

Alt Presentation

Robert Alt, President and CEO of the Buckeye Institute for Public Policy, appeared before the committee on September 11, 2014. In his comments, Mr. Alt gave an overview of the history of educational policy issues in Ohio, emphasizing that it is the role of the legislature, not the courts, to define the contours of education. Mr. Alt was critical of judicial intervention in education, and expressed concern that broad or generalized language in the constitution could invite improper judicial intervention. Criticizing some of the proposals being considered by the committee as being vague and too aspirational, Mr. Alt said he did not like the "thorough and efficient" phrase, but did not believe it should be repealed. Mr. Alt declined to suggest new

language because of his position that the General Assembly should have primary responsibility for education issues.

Pfeifer Presentation

Hon. Paul E. Pfeifer, Justice of the Ohio Supreme Court, presented to the committee on November 13, 2014. His talk focused upon the *DeRolph* decisions, specifically referencing his concurring opinions in two of the four *DeRolph* decisions. Justice Pfeifer, who is the only current justice to have participated in all four *DeRolph* decisions, provided background on the litigation. He expressed the view that not all decisions regarding education should be left to the legislature, but he observed that the court in *DeRolph* did not intend to tell the legislature what to do. Justice Pfeifer expressed the view that "thorough and efficient" served a worthy purpose, and he did not advocate removing it from the constitution. He did comment that he would not be opposed to more modern language to replace "thorough and efficient."

Morales Presentation

Stephanie Morales, a member of the Board of the Cleveland Municipal School District, a graduate of the Cleveland public schools, and the parent of three children currently in the Cleveland public schools, made a presentation on January 15, 2015. Ms. Morales described the challenges faced by the school district, the efforts made by the district to support its mission, and the importance of state funds to the district. She acknowledged the substantial support provided to the district through the Ohio Facilities Construction Commission. With respect to the "thorough and efficient" requirement, she urged the committee to not take any action that might be interpreted as weakening the state's duty to provide a quality education for all of Ohio's children.

Middleton Presentation

Dr. Renee A. Middleton, Dean of the Patton College of Education at Ohio University, appeared before the committee on January 15, 2015. Dr. Middleton stressed the history of public education in Ohio and its importance in ensuring an educated citizenry and in safeguarding democracy. She urged that public education be fair and equitable, she expressed support for maintaining judicial oversight, and she advised the committee not to turn its back on "thorough and efficient." She emphasized the importance of determining and funding a high-quality education without an overreliance on property taxes, as well as the importance of adequate funding to promote essential educational opportunities for all.

Johnson Presentation

On March 12, 2015, Darold Johnson, Director of Legislative and Political Action for the Ohio Federation of Teachers, appeared before the committee to express his organization's position that the current language in Article VI, Section 2, be retained. He said that the Ohio Supreme Court in the *DeRolph* cases defined "thorough and efficient," and that changing the provision would result in more litigation in order to provide clarity about whatever replacement language might signify. Mr. Johnson indicated that because civil rights already exist in federal law, and in

federal constitutional amendments, and because case law in this area is settled, the Ohio Constitution should only be changed in order to correct problems for which there are no other options. Mr. Johnson said that "through and efficient" is better than "equitable" or "equal" because *DeRolph* has defined the phrase and is a benchmark. He stressed that removing "thorough and efficient" would cause a bigger loss than would be gained from including the word "equitable."

Conclusion

The Education, Public Institutions, and Local Government Committee concludes that Article VI, Section 2 should be retained in its current form.

Date Adopted

After formal consideration by the Education, Public Institutions, and Local Government Committee on May 14, 2015, and _____, 2015, the committee voted to adopt this report and recommendation on _____.

Endnotes

[1] *See, e.g.*, Jeremy J. Neff, A Thorough and Efficient Definition of "Thorough and Efficient": The Starting Point for Meaningful School Funding Reform, 33:1 J. of Educ. Finance 69 (2007).

[2] C.E. Stowe, Report on Elementary Public Instruction in Europe, Made to the Thirty-Sixth General Assembly of the State of Ohio, December 19, 1837 (Columbus: Medary) 1837.

[3] A history of the concept and implementation of a "system of common schools" in Ohio may be found in Molly O'Brien & Amanda Woodrum, The Constitutional Common School, 51 Clev.St.L.Rev. 581 (2004).

[4] *See, e.g.*, Frank Forest Bunker, Reorganization of the Public School System, Department of the Interior, Bureau of Education Bulletin No. 8 (Washington: Government Printing Office) 1916, p. 24.

[5] William E. Thro, The Role of Language of the State Education Clauses in School Finance Litigation, 79 Educ. L. Rep. 19, note 10 at pp. 23-24, as cited in O'Brien & Woodrum, *supra*, at 584, note 14.

[6] Paul L. Tractenberg, Education, in G. Alan Tarr & Robert F. Williams, eds., *State Constitutions for the Twenty-First Century* 241, 242 (Albany: SUNY Press 2006).

[7] Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Final Report, June 30, 1977, pp. 65-66.

[8] *See DeRolph v. State*, 78 Ohio St.3d 193, 1997-Ohio-84, 677 N.E.2d 733 (*DeRolph I)*; *DeRolph v. State*, 89 Ohio St.3d 1, 2000-Ohio-437, 728 N.E.2d 993 *(DeRolph II)*; *DeRolph v. State*, 93 Ohio St.3d 309, 2001-Ohio-1343, 754 N.E.2d 1184 *(DeRolph III)*; and *DeRolph v. State*, 97 Ohio St.3d 434, 2002-Ohio-6750, 780 N.E.2d 529 *(DeRolph IV).*

[9] A comprehensive overview of the *DeRolph* litigation may be found in Larry J. Obhof, *DeRolph v. State* and Ohio's Long Road to an Adequate Education, 2005 B.Y.U. Educ. & L.J. 83 (2005).

[10] Summarizing the comments of delegates to the Constitutional Convention of 1850-51 in the fourth, and final, *DeRolph* decision, Justice Paul Pfeifer emphasized that the purpose of the provision is to express the state's commitment to education for all:

> "James Taylor, a delegate from Erie County, stated, 'I think it must be clear to every reflecting mind that the true policy of the statesman is to provide the means of education, and consequent moral improvement, to every child in the State, the offspring of the black man equally with that of the white man, the children of the poor equally with the rich.' [citation omitted.] Samuel Quigley, a delegate from Columbiana County, stated, 'The report directs the Legislature to make full and ample provision for securing a thorough and efficient system of common school education, free to all the children in the State. The language of this section is expressive of the liberality worthy a great State, and a great people. There is no stopping place here short of a common school education to all children in the State.' [citation omitted.] The delegates knew what they wanted, what the people wanted, and that it was necessary to use the Constitution to achieve what they wanted."

DeRolph IV, *supra*, 97 Ohio St.3d at 436, 2002-Ohio-6750, 780 N.E.2d at 531.

[12] Ohio Constitutional Modernization Commission, November 13, 2015, Meeting Minutes of the Education, Public Institutions, and Local Government Committee, available at http://ocmc.ohio.gov/ocmc/committees/educ_pubinst_misc_localgovt;jsessionid=b957049e1ac01b4e1baacea4fc97 (accessed April 30, 2015).

[13] In October 2003, the United States Supreme Court denied a petition for a writ of certiorari. *DeRolph v. Ohio*, 540 U.S. 966 (2003).

[14] *See* Obhof, *supra*, at 145-149.