



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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

FOR THE MEETING HELD
THURSDAY, NOVEMBER 10, 2016

Call to Order:

Chair Chad Readler called the meeting of the Education, Public Institutions, and Local Government Committee to order at 9:39 a.m.

Members Present:

A quorum was present with Chair Readler, Vice-chair Gilbert, and committee members Beckett, Cupp, Curtin, Sawyer, and Taft in attendance.

Approval of Minutes:

The minutes of the September 8, 2016 meeting were approved.

Reports and Recommendations:

Article VI, Section 5 (Loans for Higher Education)

Chair Readler recognized Shari O'Neill, counsel to the Commission, for purposes of a presentation on the report and recommendation for Article VI, Section 5. Ms. O'Neill indicated that the section expresses a policy encouraging financial support for state residents wishing to pursue higher education, specifically declaring it to be in the public interest for the state to guarantee the repayment of student loans, and authorizing laws to carry into effect such purpose.

Ms. O'Neill described that, as part of the article dedicated to education, Section 5 provides for a program to guarantee the repayment of student loans for state residents as a way of promoting the pursuit of higher education.

She said the provision was adopted by voters upon being presented as Issue 1 on the May 1965 ballot, and expresses a public policy of increasing opportunities for state residents to pursue higher education by guaranteeing higher education loans and allowing laws to be passed to

effectuate that purpose. The section also exempts state expenditures for student loan guarantees from the limitations on state spending contained in Article VIII (relating to state debt), and Article XII, Section 11 (preventing the state from issuing debt unless corresponding provision is made for levying and collecting taxes to pay the interest on the debt).

Ms. O'Neill said the provision was effectuated by statutes that first created the Ohio Student Loan Commission (OSLC), and, later, in 1993, by statutory revisions that created the Ohio Student Aid Commission (OSAC). According to the report and recommendation, the OSAC was empowered to collect loan insurance premiums, depositing them into a fund in the custody of the state treasurer to be used solely to guarantee loans and to make payments into the OSAC operating fund. The report and recommendation references an attorney general opinion indicating that the obligations incurred by OSAC are not backed by the full faith and credit of the state and, therefore, that the obligee would not have recourse to other funds of the state.

The report and recommendation elaborates that, by 1995, the changing landscape of the student loan market rendered the utility of OSAC obsolete, partly due to the success of a federal direct-lending program, and partly because private companies were offering the same service. Thus, by 1997, the OSAC was dissolved, with remaining functions and duties of OSAC being transferred to the Ohio Board of Regents.

Ms. O'Neill elaborated that the report and recommendation reviews presentations to the committee by David H. Harmon, executive director of OSLC from 1977 to 1988; and by Rae Ann Estep, executive director of the OSAC from 1995-1997. The report summarizes Mr. Harmon's presentation as giving a history of student loans in Ohio, describing how, in 1961, the General Assembly created 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 report and recommendation further summarizes Mr. Harmon's comment that, in 1965, the federal government created its student loan program, and that the purpose of Section 5 was to allow OSLC to become the guaranteed agency under the federal loan program. The report and recommendation describes Mr. Harmon's conclusion that, with the move to the federal direct loan program, Section 5 is no longer necessary.

With regard to Ms. Estep's presentation, the report and recommendation describes that she presided over an agency of 225 employees, but that her role was primarily to oversee the dissolution of the agency due to the changes in student loan governance and administration.

Ms. O'Neill said the report and recommendation indicates the committee's acknowledgement that, as matters currently stand, Article VI, Section 5 would appear to be non-functional because it is not necessary to facilitate activities of the Ohio Department of Higher Education in relation to student loans, grants, and scholarships, to accommodate the federal student loan program, or to support private lender activity related to student loans.

The report and recommendation notes that, despite this acknowledgement, the committee's concern that future changes to the federal government's student loan programs and policies could result in Ohio and other states taking on additional responsibilities related to student loan guarantees. The report and recommendation also notes that, although the committee was

uncertain whether the provision is necessary to support programs that forgive student loan debt in order to foster the provision of needed services in underserved areas of the state, the committee was reluctant to recommend its elimination in case it could be implemented in that manner.

Ms. O'Neill stated that the report and recommendation concludes that the consensus of the committee was that the section expresses an important state public policy of encouraging higher education and helping students afford it, and so should be retained in its present form.

Chair Readler thanked Ms. O'Neill for the presentation, and asked the members of the committee for their comments. There being none, he called for a motion to issue the report and recommendation, which was provided by Representative Bob Cupp. The motion was seconded by Vice-chair Ed Gilbert, and a roll call vote was taken. The motion to issue the report and recommendation for Article VI, Section 5 passed unanimously, by a vote of seven to zero.

Article VI, Section 6 (Tuition Credits Program)

Chair Readler then asked Ms. O'Neill for a presentation on Article VI, Section 6, which supports the creation of a program allowing families to purchase tuition credits as a way of encouraging saving for higher education costs.

Ms. O'Neill described that the report and recommendation indicates Section 6 is designed to promote the pursuit of higher education by establishing in the constitution a government-sponsored program to encourage saving for post-secondary education. She said the report and recommendation summarizes the history of the section as beginning in 1989, when the General Assembly enacted Revised Code Chapter 3334, establishing a college savings program and creating the Ohio Tuition Trust Authority (OTTA), an office within the Ohio Board of Regents (now the Department of Higher Education). The OTTA was designed to operate as a qualified state tuition program within the meaning of section 529 of the federal Internal Revenue Code. The report and recommendation further describes the statutory scheme by which tuition credits may be purchased and used.

Ms. O'Neill continued that the report and recommendation indicates Section 6 was proposed to voters as Issue 3 on the November 1994 ballot as a way to "increase opportunities to the residents of the State of Ohio for higher education and to encourage Ohio families to save ahead to better afford higher education."

She said the report and recommendation further describes a presentation to the committee by Timothy Gorrell, executive director of the Ohio Tuition Trust Authority (OTTA), who expressed that his agency is part of the Department of Higher Education and is charged with responsibility for administering the tuition credits program set forth in Article VI, Section 6. The report and recommendation presents Mr. Gorrell's view that, at the time of its adoption, the section addressed a period of unsettled case law that created uncertainty as to whether similar prepaid tuition programs were exempt from federal taxation, a status that has since been resolved by the codification of Internal Revenue Code section 529. However, the report and recommendation notes that Mr. Gorrell nevertheless opined that Section 6 should be retained because one purpose

of the provision, to establish the full faith and credit backing of the state for the Guaranteed Savings Plan, remains viable.

Ms. O'Neill said the report and recommendation summarizes the committee's conclusion that, although no new Guaranteed Savings Plan account holders have been added since 2003, the fact that some accounts are still active may require the constitutional provision to be retained in its current form. The report and recommendation notes that, although the committee was reluctant to alter or repeal Article VI, Section 6, a future constitutional review panel may conclude there is no justification for retaining the section because all accounts have been paid out.

Thus, the report and recommendation concludes that Article VI, Section 6 should be retained in its current form.

The presentation on Section 6 having concluded, Chair Readler asked committee members if they had any questions or comments. Rep. Cupp asked whether Mr. Gorrell had provided information on the obligation of the state to back tuition trust accounts, to which Ms. O'Neill replied he had not. There being no further discussion, Chair Readler then entertained a motion by Mr. Gilbert to issue the report and recommendation. The motion was seconded by Senator Tom Sawyer, and a roll call vote was taken. The motion passed unanimously by a vote of seven to zero.

Ms. O'Neill indicated that the two reports and recommendations would now be presented to the Coordinating Committee for approval before being forwarded to the full Commission for its consideration.

Discussion:

Article VII, Section 1 (Institutions for the Benefit of the Insane, Blind, and Deaf and Dumb)

Chair Readler then turned the committee's attention to Article VII, relating to Public Institutions. He indicated that Section 1 of that article raises two issues. First, he said, the language used to refer to the persons being aided by public institutions is outdated and could be viewed as offensive. He said a second issue is whether there is continuing relevance for the section.

Steven C. Hollon, executive director, pointed out a memorandum being provided to the committee that discusses Section 1 as well as Sections 2 and 3 of Article VII.

Chair Readler asked Mr. Gilbert for information about a similar discussion regarding outdated language that had occurred in the Bill of Rights and Voting Committee in relation to Article V, Section 6 (Mental Capacity to Vote).

Mr. Gilbert said that is still an unresolved issue, although there is consensus that the language, which refers to "idiots and insane persons," must be changed.

Mr. Hollon noted that the report and recommendation on that section was not adopted by the Commission, but it was not because of the substitute language the committee had proposed, which was to refer to the subject persons as those lacking the “mental capacity” to vote.

Chair Readler noted that reference was not an exact fit for the language in Article VII, Section 1.

Sen. Sawyer said some of the reference derives from clinical usage and some of it derives from law, asking whether that was the fundamental problem.

Mr. Gilbert said the Bill of Rights and Voting Committee struggled with several different replacements. He said one of the primary issues was whether the probate court should be involved in the determination of whether a person has the mental capacity to vote. In regard to the discussion about Article VII, Section 1, he asked what language could replace “insane, blind, deaf and dumb.” He said he is not sure the committee has had enough presentations on the question to be able to determine how to replace what all agree is outdated language.

Sen. Sawyer asked whether the committee could consult experts to see if there are separate bodies of nomenclature that might be better.

Chair Readler agreed with this proposal.

Committee member Roger Beckett asked whether there is a difference in the issue the committee is dealing with here as opposed to the voting issue. He said voting has to be resolved within the constitution because it is a right. He said, Article VII, Section 1 has more of a public policy purpose of encouraging the legislature to do something that perhaps, at the time, was not as common a thing. He said, by comparison, today the fact that institutions provide assistance and support for people with mental or physical disabilities is more understood and accepted, and less controversial.

Mr. Beckett continued, saying one option is to suggest the removal of the section. He said the General Assembly would still have the authority to continue anything it is currently doing. He said this is a more arcane topic for the constitution, adding “If we are going to try to describe in the constitution language about how modern medicine will keep up with these issues, it will be a continuing problem.” He said the only possible concern is to be sure the committee is not suggesting the state should somehow limit its existing programs.

Chair Readler said his sense from testimony is that this section has never been used as authority for enacting law on this topic.

Committee member Bob Taft endorsed Mr. Beckett’s comment, directing committee members to a memorandum provided by Michael Kirkman, executive director of Disability Rights Ohio at the last meeting. He said Mr. Kirkman recommended that the section be deleted because there is a strong preference for community-based treatment rather than institutional treatment.

Chair Readler noted that the committee agrees the language should go, but that rewriting the section is a challenge. He added that Sections 2 and 3 in Article VII would seem to be unnecessary.

Gov. Taft agreed, saying those two sections appear to be obsolete.

Rep. Cupp said the purpose of the sections appears to focus on who is to appoint the governance of these institutions, an issue that has been settled for a long time and is not relevant to any present procedure. He said these sections do not deal with an allocation of authority, nor with a limit on the powers of government, so they seem to be superfluous.

Mr. Gilbert said he thinks the conclusion of the Bill of Rights and Voting Committee report and recommendation on Article V, Section 6 was that the language was archaic. But, he said, he is nervous about removing Article VII, Section 1, not wanting to send a message that the state no longer fosters support for the disabled.

Chair Readler directed the committee to Mr. Kirkman's testimony, noting that under federal law there are some established constitutional rights that would impact the rights of someone in an institution.

Mr. Beckett said one of the key words that that make him less hesitant to remove the section is the word "institutions." He said the movement has been away from institutionalizing people and toward other types of programs and support. He said removing it does not mean the committee would be suggesting that support or services would be eliminated.

Representative Mike Curtin asked whether Mr. Kirkman is the only person the committee has heard from. He said he would be more comfortable if he were sure word has gone out within the disability and legal community to see if they are comfortable with removing the section.

Mr. Hollon suggested that he would contact Mr. Kirkman for names of persons who could provide additional perspective.

Rep. Cupp asked whether there might be someone associated with the Ohio State Bar Association who might identify a speaker.

Gov. Taft said Mr. Kirkman pointed out that these kinds of institutions existed before 1851, so presumably, the General Assembly has the authority to establish institutions if they see fit.

Steven H. Steinglass, senior policy advisor, noted the Ohio Constitution gives the legislature plenary power. He said this provision was a creature of its time when there was uncertainty, and was addressed to the legislature to require legislative action. He indicated the provision was considered for amendment by the Ohio Constitutional Revision Commission in the 1970s, but failed to get the requisite 2/3 vote. He indicated there was a nine-person minority report written, and, at a time when the rights of the handicapped were at the fore, there was pressure to create a constitutional right to treatment. He offered that staff would provide the committee with the 1970s Commission report.

Chair Readler said he can see the view that there is some broader right being discussed. He said his sense is there will not be broad majority support for that.

Peg Rosenfeld, elections specialist with the League of Women Voters of Ohio, who was seated in the audience, suggested a change in the wording that would say “provision” instead of “institutions.” Thus, she said, “Provision shall be made for people with mental or physical disabilities.” She said there may be a problem ordering the General Assembly to provide services.

Chair Readler said his general reaction is that would make this a broader basis for limitations on the legislature. But, said Ms. Rosenfeld, it gets away from the institutional requirement.

Mr. Gilbert said it is important not to remove a state obligation in favor of private sources, since, if those sources lose their funding, there would be nothing to take their place. He said he would support another presentation on that issue. He said simply taking Section 1 out sends a signal the committee may not want to send.

Chair Readler asked if the legislative members of the committee might serve on a related General Assembly committee and have some knowledge of this issue.

Sen. Sawyer said he served on a committee relating to implementing the Americans with Disabilities Act. He said the committee is in a simpler position here, to recognize need and then provide the constitutional underpinning that that would require. He cautioned that it is important not to try to legislate in the constitution by taking up language of this kind.

Gov. Taft said, reflecting on the history of the *DeRolph* litigation, he is leery of creating a constitutional right to help.¹ He said he trusts legislators to help the welfare of the public. Commenting on Sections 2 and 3, he said the state has departments to deal with these issues, suggesting that the committee should hear from those directors.

Chair Readler suggested that, at its next meeting in January, the committee can have two speakers on Section 1. He added he thinks the committee’s consensus is that Sections 2 and 3 are obsolete but wonders if the committee requires a speaker.

Mr. Hollon said he is not sure there would be a speaker on Sections 2 and 3, but that staff could provide a memorandum. Chair Readler agreed a short memo on that topic would be useful.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 10:27 a.m.

¹ 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*).

Approval:

The minutes of the November 10, 2016 meeting of the Education, Public Institutions, and Local Government Committee were approved at the January 12, 2017 meeting of the committee.

/s/ Chad A. Readler

Chad A. Readler, Chair

Edward L. Gilbert, Vice-chair