OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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

FOR THE MEETING HELD
THURSDAY, JANUARY 12, 2017

Call to Order:

Chair Chad Readler called the meeting of the Education, Public Institutions, and Local Government Committee to order at 9:42 a.m.

Members Present:

A quorum was present with Chair Readler and committee members Brooks, Coley, Cupp, Curtin, and Taft in attendance.

Approval of Minutes:

The minutes of the November 10, 2016 meeting were approved.

Presentations and Discussion:

"Disability Rights and the ADA"
Ruth Colker, Professor of Law
Moritz College of Law
The Ohio State University

In relation to the committee's review of Article VII, Section 1, which requires institutions for the "benefit of the insane, blind, and deaf and dumb" to always be fostered and supported by the state, Chair Readler introduced Professor Ruth Colker, who is Distinguished University Professor and Heck-Faust Memorial Chair in Constitutional Law at the Ohio State University's Moritz College of Law. Prof. Colker began her presentation by indicating her first recommendation would be to repeal Section 1 as unnecessary. Failing that, she said, her second recommendation would be to recommend new language that would meet the underlying purpose of the original section, but would be more respectful and consistent with other provisions. She said, in this regard, she would recommend changing the language to state:

> The state shall always foster and sustain services and supports for people with disabilities who need assistance to live independently; these services and supports will, to the maximum extent possible, be provided in the community, rather than in institutions.

Prof. Colker said, in formulating this language, she consulted with members of the disability rights community. She said the revision is more respectful, and offers a more functional definition of disability. She said another goal was to have the section be more consistent with modern notions under federal law and the United States Constitution.

Addressing the terms used in the current section to describe persons with disabilities, Prof. Colker said the disability rights community prefers "person first" language, thus persons with psychiatric impairment would not be described as "the insane." She said the thinking behind this word choice is that disability status is only one aspect of personhood. She added that descriptors such as "insane" or "deaf or dumb" are not used. Instead, such persons would be described as being individuals with psychiatric, speech, sensory, visual, or intellectual impairments. Describing definitions that have been used at the federal level, she said no one definition would serve the purpose, and that the federal government has chosen different functional definitions depending on the context.

Prof. Colker emphasized considering the kind of assistance the state is saying it wants to provide. Noting federal case precedent, she said the United States Supreme Court and Congress have adopted the concept that people with disabilities should be integrated into communities as much as possible. She cited an example as being that the Individuals with Disabilities Education Act (IDEA) provides that states must have procedures assuring, to the maximum extent appropriate, that children with disabilities are educated with children who are not disabled, and that special or separate placement occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary assistance cannot be achieved satisfactorily. She said this has been the preference since 1975, and suggests a default principle that persons with disabilities be placed in an integrated environment.

Noting Section 1's use of the word "institutions," Prof. Colker said this word choice suggests a preference for an institutional setting, a concept that is no longer the prevailing view. She said she tried to craft language that would indicate an understanding that, aspirationally, the state would try to place people in a community setting, rather than have the default be placing them in institutions.

She said this approach is also reflected in the Americans with Disabilities Act, which was passed in 1990. Citing the case of *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), she said the ADA is violated when people who are able to live in the community are placed in institutions because, as the U.S. Supreme Court concluded, unjustified isolation is discrimination based on disability. She noted that principle is stated in the Court's finding that there is a presumption of deinstitutionalization, and that states are required to provide community-based treatment for persons with mental disabilities when it is determined "that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities." *Olmstead* at 607.

Prof. Colker having concluded her remarks, Chair Readler opened the floor for questions.

Committee member Mike Curtin asked whether her suggested language could be interpreted as creating a fundamental right. He said a concern is whether it could permit a court to tell the General Assembly how much money needs to be allocated to meet this mandate.

Prof. Colker answered that would depend on what doctrine or rule of law applies. She said she relied on the language in the *Olmstead* decision indicating the resources of the state are a consideration. She said, as a result, her recommendation would be to describe the state's obligation as being "to the maximum extent possible." She said the definition of a fundamental right does not mean limitless support, but rather means a court would develop a pragmatic rule that is flexible. She said the phrase "fundamental right" is not a helpful term; rather, the more relevant question is what rule would apply. She said *Olmstead* does not stand for the notion of limitless support, but does mean there is an obligation. She said one goal in changing Section 1 would be to maintain the principle articulated in the current provision that the state should be doing something for people who cannot live without assistance.

Committee member Paula Brooks commented that the *Olmstead* case came up in her role as county commissioner, noting it is an issue whether the state has an obligation to provide an institution if a segment of the population requires it. She asked whether Prof. Colker's suggested language would impact the creation of a separate facility for those suffering from autism, for example. Prof. Colker said an alternate version of her recommended language could read "to the maximum extent appropriate," which would allow creation of separate facilities for autism if needed. She said "We would always hope the state would do what is appropriate. For some, an institutional setting is necessary and appropriate." She said her goal is to flip the default principle away from institutionalization, but not in a way that would harm anyone.

Representative Bob Cupp said the current language talks about "institutions for the benefit," commenting that Prof. Colker's language in one sense appears to be a limitation. Prof. Colker said the drafters of the current provision wrote it in the passive voice. She said placing the state at the beginning of the sentence, saying that "the state shall always foster and support institutions," does not change the underlying meaning of the sentence. Rep. Cupp said he is more concerned about the term "institution" as a limiting factor in the current language. He said there is some argument the obligation should be broader than that, but the follow up is how the courts would interpret it.

Prof. Colker said the problem with the current language is that it is unconstitutional and illegal under the ADA because it indicates the state only has an obligation to support people who are in an institutional setting. She said from a policy perspective that is wrong, and is also unconstitutional and illegal. She said it is not helpful to have something in the constitution directing the state to do something that is not constitutional.

Chair Readler said his sense is that the committee agrees the language in the current section is antiquated and offensive. He said his question is whether the phrase "people with disabilities" is broader than what is reflected in the current language. Prof. Colker said that language would be both broader and narrower, explaining that, for instance, there are many people with visual impairment in the community who would not be covered by her language because they do not need support. She said there will be people who have a certain kind of condition that makes it

difficult for them to live independently. She said her language would include people who are not covered in the current language.

Chair Readler ask if there is a "gold standard" definition of disability. Prof. Colker answered that the ADA says the term "disability" means a physical or mental impairment that interferes with one or more major life activity.

Chair Readler asked, if Ohio did not have Section 1, whether the standard would be found in state law. Prof. Colker said eliminating Section 1 would not have a significant impact because *Olmstead* already requires the state to provide for the disabled. She said a constitution is aspirational, and that keeping and refining the obligation set out in Section 1 would continue that aspirational goal using language that is respectful and modern. She said repeal of Section 1 might not make a difference to Ohioans, but as an aspirational statement it may matter.

Summing up Prof. Colker's presentation, Chair Readler acknowledged there is a tension between what is aspirational and what is a fundamental right. He said Prof. Colker's suggested language is very helpful.

Committee member Bob Taft asked about the phrase "assistance to live independently," wondering if placement in a small group home would be considered living independently. Prof. Colker said the phrase in the second part of her proposed language indicating the support would be provided to allow community living "to the maximum extent possible," recognizing that each individual might need a different level of assistance. Gov. Taft asked whether the proposed language, creating an obligation to sustain services and support, might create a problem if the state has a budget crisis and has to reduce the level of support. Prof. Colker answered that the current provision mandates state support, and that, as a state, it would be important to maintain that obligation.

Senator Bill Coley asked whether, if rewriting the language is not an option, Prof. Colker would recommend keeping the current provision or repealing it. Prof. Colker said her preference would be to delete it.

There being no further questions for Prof. Colker, Chair Readler thanked her for her presentation.

"Institutions for the Benefit of the Insane, Blind, and Deaf and Dumb"
Marjory Pizzuti, President and CEO of Goodwill Columbus
Ohio Association of Goodwill Industries

Chair Readler introduced Marjory Pizzuti, who is president and chief executive officer of Goodwill Columbus, which is a member of the Ohio Association of Goodwill Industries (OAGI). Ms. Pizzuti described OAGI as consisting of 16 autonomous Goodwill organizations that provide employment and family strengthening services to individuals with disabilities. She said her organization serves more than 77,000 individuals, with 85 percent of those persons having a disadvantaging condition such as long-term unemployment, incarceration, low educational attainment, and physical or intellectual disabilities. She said Goodwill chapters throughout Ohio are partners and providers of services through many state agencies, including Opportunities for Ohioans with Disabilities, and the Ohio Departments of Aging, Jobs and Family Services,

Developmental Disabilities, Rehabilitation and Corrections, and Mental Health and Addiction Services.

Describing the history of the international Goodwill movement, Ms. Pizzuti said Goodwill was founded in Boston in 1902 by a Methodist minister and early social innovator who collected used household goods and clothing in wealthier areas of the city, then trained and hired recently settled immigrants to repair the used goods before reselling them. She identified the Goodwill social enterprise philosophy as promoting "a hand up, not just a hand out," and that this model has created independence and economic self-sufficiency by providing appropriate training, skill building, and support. She said her organization seeks to provide support to individuals with disabilities, and to assure that all citizens can be full and active participants in the community.

Addressing current Section 1, Ms. Pizzuti said the commitment to community based integration may be fundamentally at odds with the intent of Section 1, which specifically references "institutions." She said she would be focusing on three issues raised by the current section: first, the implications of the wording used to describe the population that this section is referencing; second, the appropriateness of continuing to include that provision in Article VII, Section 1, given the historical focus on institutions serving those individuals; and, third, the fundamental question of whether any reference to a specific population should be included anywhere in the Ohio Constitution.

With regard to the terminology used to describe persons with disabilities, Ms. Pizzuti said the current section is not only offensive but inappropriate based on the current understanding of illness and disabilities. She said, while this language was relevant at the time of adoption, there is no place for this language in current or future revisions of the Ohio Constitution. However, she recognized that an attempt to revise the terminology is difficult and ultimately would not resolve the problem because society's perceptions and acceptance of individuals with disabilities continue to evolve, and contemplating any language that could endure the test of time would be futile.

Ms. Pizzuti continued that the movement toward community integration has been reflected in the downsizing of the state's institutional facilities, the increase in competitive integrated employment, and the transition into community-based settings. She said this is an intentional and widely-acknowledged paradigm shift for the full integration of individuals with physical and intellectual disabilities into communities.

Acknowledging the good intentions of the drafters of Section 1 to protect and serve individuals with disabilities, she said her organization, nevertheless, believes Article VII, Section 1 may not be the appropriate place in the Ohio Constitution to state this commitment, because the section refers to state institutions as the mechanism to support individuals with physical and intellectual disabilities. She identified numerous governmental agencies that provide community-based support.

Ms. Pizzuti said there is a more fundamental question of whether there is a rationale to have any reference in the Ohio Constitution to a need to foster and support individuals with disabilities, and, if so, where to place such a reference. She said it is possible such a "general welfare" statement could be incorporated in the Bill of Rights or the Preamble. She said Article VII, Section 1 provides an important voice for individuals with disabilities, although the notion of

institutionalization and the language used in Article VII, Section 1 is obsolete. She said her organization encourages the committee to work toward balancing the need to modernize the language with the need to reaffirm the spirit of the intent of the provision, which is to provide assistance that "fosters and supports" opportunities for individuals with disabilities.

Chair Readler thanked Ms. Pizzuti for her comments and invited committee members' questions.

Rep. Cupp asked whether Goodwill operates an intermediate care facility. Ms. Pizzuti said her chapter does operate such a facility. Rep. Cupp asked whether the facility receives state support and Ms. Pizzuti agreed it does. Rep. Cupp noted that the state is fostering and supporting private institutional facilities.

Mr. Curtin asked Ms. Pizzuti her opinion of a change that would indicate the state "shall always endeavor to foster," instead of just "foster," adding the phrase "to the extent possible" rather than "to the maximum extent possible." Ms. Pizzuti said she would take that suggestion back to her organization to see what they think.

Ms. Brooks said she agrees the provision is in the wrong section of the constitution. She asked Ms. Pizzuti to identify others in the disability community who might wish to provide input on changing the section. Ms. Pizzuti said county boards of developmental disability might be helpful, as well as other organizations. She offered to provide a list to the committee.

Ms. Brooks asked what would occur if there is a major change in the position of the federal government on the ADA, and Section 1 were eliminated. Ms. Pizzuti identified this as a "fairly dramatic" change, but that, from her own perspective, the state is on a philosophical pathway that helps persons with disabilities because it is the right thing to do, and she believes the state would continue on that pathway. However, she said Medicaid is the major funder of these types of activities, so a change in the federal position would be significant.

Rep. Cupp asked whether keeping the existing provision, but substituting the offending language would resolve the problem. Ms. Pizzuti said the question would be twofold. She said if, in fact, Article VII has the specific heading of "public institutions," and the section no longer requires institutions, the section may need to be in another article.

Chair Readler said it is good to raise the point of where the section belongs. He wondered if the disability community has proposed any constitutional language or attempted a change in the past. Speaking from the audience, Michael Kirkman, executive director of Disability Rights Ohio, said he is aware of no such effort.

There being no further questions, Chair Readler thanked Ms. Pizzuti for her remarks.

"Institutions for the Benefit of the Insane, Blind, and Deaf and Dumb"
Sue Hetrick, Executive Director
The Center for Disability Empowerment

Chair Readler recognized Sue Hetrick, executive director of the Center for Disability Empowerment, to provide her agency's perspective on potential changes to Section 1. Ms. Hetrick described that her agency operates a center for independent living, and that such

facilities have been around since the 1970s. She said the concept that persons with disabilities, with assistance, could be integrated into the community corresponded with the civil rights movement. She said her organization emphasizes consumer control, and that 51 percent of the board of directors is comprised of persons who are disabled. She said, unlike other organizations that only serve one type of population, her agency serves anyone with any disability. She said her agency also does not require a medical investigation prior to assisting someone who is disabled, meaning that persons who say they are disabled will be served without medical proof.

Focusing on Section 1's references to persons who are disabled, Ms. Hetrick said disability is regarded as a neutral difference, meaning that it results from the interaction of the individual with his or her environment, rather than from other causes. She said, despite the emphasis on integrating persons into the community, Ohio continues to have a culture of institutions, maintaining schools for the deaf and for the blind, as well as nursing facilities sometimes being mental health institutions. She said any congregate setting can be an institution. However, she said, under *Olmstead*, if the appropriate supports and services are in place segregation is not necessary.

Chair Readler asked committee members if they had questions for Ms. Hetrick.

Sen. Coley reiterated his previous question, asking whether, if the section is not revised, it should be removed or kept as is. Ms. Hetrick answered that, if the constitution is to provide sections protecting gender and religion, there should be a section acknowledging and protecting persons with disabilities. Thus, she said, if revision is not an option she would prefer that the section be left as is.

Asking about the state's maintenance of a special school for the blind, Rep. Cupp asked whether that is an appropriate institution. Ms. Hetrick said, from the perspective of the disability community she represents, families choose that as a placement because they feel there is no other choice. She said if there are appropriate services elsewhere then the preference would be not to have a separate segregated classroom.

Rep. Cupp asked whether integrating a blind student would imply that the student should have one-on-one assistance all day. Ms. Hetrick said her expertise is not in sensory disabilities so she is not clear what integration would require.

Chair Readler asked Ms. Hetrick's opinion of the proposed language provided by Prof. Colker. Ms. Hetrick said she had not had a chance to think about that, and would be sharing the proposed language with her colleagues to get input. Chair Readler commented the committee will meet in March, and welcomed Ms. Hetrick to submit more materials in preparation for that meeting.

Ms. Hetrick having concluded her remarks, Chair Readler thanked her for her presentation.

Chair Readler suggested the committee review the report on Section 1 by the Constitutional Revision Commission in the 1970s, as well as other related materials, to submit names of any speakers they would like to hear, and to come to the next meeting prepared to continue the discussion of what to recommend regarding Article VII.

Mr. Curtin said it would be useful to have proposed language, and wondered if there are enough votes to eliminate the section altogether. He encouraged Rep. Cupp to bring suggested language forward that would clarify that the state's obligation to provide assistance is not limitless. Mr. Curtin said having replacement language is preferable to getting rid of the section.

Adjournment:

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

Approval:

The minutes of the January 12, 2017 meeting of the Education, Public Institutions, and Local Government Committee were approved at the March 9, 2017 meeting of the committee.

/s/ Edward L. Gilbert
Edward L. Gilbert, Vice-chair