Testimony in Support of Budget Amendment SC-2167-2[1] as Amended as Sub. H.B. 110 L-134-0001-5 6/3/21

Bullet Points of the Memo:

SC-2167-2 does not re-designate the agency responsible for overseeing Ohio's P&A system and therefore, it would not violate federal law.

Nor does SC-2167-2 does require the General Assembly or the Governor to re-designate Ohio's P&A system. Instead, it requires only that the General Assembly establish a joint committee to recommend whether there should be a re-designation.

Our current P&A's interpretation that the Budget Amendment violates the Federal Statutes/Regulations is incorrect.

The State needs only to designate its Protection and advocacy system (P&A).

The P&A can still be re-designated under the existing legal process.

SC-2167-2 simply formalizes the State Legislatures inherent oversight powers to have hearings and make recommendations to the executive branch.

The current Ohio P&A "chilling effect" arguments are an unfounded distraction.

Moreover, our current P&A does not want you to grasp the real chilling effects its misguided efforts are currently having on the construction of new affordable housing for the disabled.

The current Ohio P&A's recent "undue burden" arguments are equally unsupported.

Our current P&A is arguing that it has no accountability to any authoritative entity.

Our current P&A is arguing that they have a Lifetime appointment for their non-profit law firm.

Our current P&A is arguing that they can encumber, cripple businesses or state agencies with significant cost structuring without any repercussions. Where else can Ohio citizens and businesses can express their concerns without suffering crippling legal fees or personal counter suits in Court?

Critics of our current P&A are afraid to make their criticism public due to fear of litigation from our current P&A.

[1] As most recently amended as Sub. H.B. 110 L-134-0001-5 **(Attached as Exhibit A)**

MORE DETAILED ARGUMENTS

SC-2167-2 does not re-designate the agency responsible for overseeing Ohio's P&A system and therefore, it would not violate federal law. **Instead, it requires only that the General Assembly establish a joint committee to recommend whether there should be a re-designation**. [2]

Summary of SC-2167-2

The provision in question (SC-2167-2) requires the Speaker of the House of Representatives and the President of the Senate to establish a joint committee every two years to examine the operation of the state's protection and advocacy system and client assistance program (P&A system) and recommending whether a new entity should be designated to serve in that capacity.

There are several requirements under federal law that must be satisfied before a state may redesignate the agency responsible for administering its P&A system. **However, SC-2167 does not re-designate the agency responsible for overseeing Ohio's P&A system and therefore, it would not violate federal law.**

Nor does SC-2167-2 does require the General Assembly or the Governor to re-designate Ohio's P&A system. **Instead, it requires only that the General Assembly establish a joint committee to recommend whether there should be a re-designation**. Because this section does not require a re-designation of Ohio's P&A system, the federal requirements regarding the procedure for re-designating a P&A system are not triggered.

Our current P&A's interpretation that the Budget Amendment violates the Federal Statutes/Regulations is incorrect:

a. SC-2167-2 does not violate the vast legislative-regulatory jungle. The State needs only to designate its Protection and advocacy system (P&A). [3] **It can take public board or private**

[2] See OHIO LEGISLATIVE SERVICE COMMISSION OPINION. (Attached as Exhibit B); Note: "As to the value of Legislative Service Commission analyses, we have observed: '* * * Although this court is not bound by such analyses, we may refer to them when we find them helpful and objective.'" State, Industrial Com. v. American Dynamic Agency, Inc., 70 Ohio St. 2d 41, 44 (Ohio 1982), quoting Meeks v. Papadopulus (1980), 62 Ohio St.2d 187, 191.

[3] SEC. 144. ADMINISTRATION. (a) GOVERNING BOARD.—In a State in which the system described in section 143 is organized as a private nonprofit entity with a mult-imember governing board, or a public system with a multimember governing board, such governing board shall be selected according to the policies and procedures of the system, except that— (1)(A) the governing board shall be composed of members who broadly represent or are knowledgeable about the needs of the individuals served by the system; (B) a majority of the members of the board shall be— (i) individuals with disabilities, including individuals with developmental disabilities, who are eligible for services, or have received or are receiving services through the system; or (ii) parents, family members, guardians, advocates, or authorized representatives of individuals referred to in clause (i); and (C) the board may

non-profit forms. [4]The P&A needs to meet certain requirements. SC-2167-2's opponents have misleadingly stated that our task is to prove an unassailable conclusion. We respond with a true simple negative: SC-2167-2 does not violate the vast legislative-regulatory jungle.

b. The P&A can still be re-designated under the existing legal process:

(4) the agency implementing the system shall not be re-designated unless—

(A) there is good cause for the re-designation; (B) the State has given the agency notice of the intention to make such re-designation, including notice regarding the good cause for such re designation, and given the agency an opportunity to respond to the assertion that good cause has been shown;

(C) the State has given timely notice and an opportunity for public comment in an accessible format to individuals with developmental disabilities or their representatives; and (D) the system has an opportunity to appeal the re-designation to the Secretary, on the basis that the re-designation was not for good cause. [5]

That's it. SC-2167-2 (Amendment to H.B. 110 FY 2022-2023 biennial budget bill) violates none of these steps.

It simply formalizes the State Legislatures inherent oversight powers to have hearings and make recommendations to the executive branch. [6]The executive branch still retains the power

include a representative of the State Council on Developmental Disabilities, the Centers in the State, and the self - advocacy organization described in section 124(c)(4)(A)(ii)(I); (2) not more than 1⁄3 of the members of the governing board may be appointed by the chief executive officer of the State involved, in the case of any State in which such officer has the authority to appoint members of the board; (3) the membership of the governing board shall be subject to term limits set by the system to ensure rotating membership; (4) any vacancy in the board shall be filled not later than 60 days after the date on which the vacancy occurs; and (5) in a State in which the system is organized as a public system without a multi-member governing or advisory board, the system shall establish an advisory council— (A) that shall advise the system on policies and priorities to be carried out in protecting and advocating the rights of individuals with developmental disabilities; and (B) on which a majority of the members shall be— (i) individuals with developmental disabilities who are eligible for services, or have received or are receiving services, through the system; or (ii) parents, family members, guardians, advocates, or authorized representatives of individuals referred to in clause (i).

[4] Indiana's Disability Rights is the service arm of the Indiana Protection and Advocacy Services (IPAS) Commission.

[5] Public Law 106–402 106th Congress SEC. 143. SYSTEM REQUIRED. (a) SYSTEM REQUIRED (4)

[6] The power of inquiry – with the power to enforce it – is an essential and appropriate auxiliary to the legislative function. Legislative bodies have the inherent power to conduct investigations in aid of prospective legislation and for the purpose of securing information needed for the proper discharge of their functions and powers. 72 Am. Jur. 2d States, Territories, and Dependencies § 51 (2012) (footnotes omitted). The power to investigate is an essential corollary of the power to legislate. The scope of this power of inquiry extends to every proper subject of legislative action. Commonwealth ex rel. Carcaci v. Brandamore, 327 A.2d 1, 3 (Pa. 1974) (citations omitted).

to conduct the same re-designation process it utilized to replace its original public board -the Legal Rights Service Commission- with the non-profit model of Disability Rights Ohio.

Also illuminating inherent Legislative oversight power over our current P&A: the redesignation process required Legislative approval. [7]

The current Ohio P&A "chilling effect" arguments are unfounded. SC-2167-2 is neither too broad nor too vague. The argument illustrates Justice Harlan's strong concerns about an "amorphous chilling-effect doctrine (that) would serve only to chill the interests sought to be maintained.." [5] And the arguments amount to "nothing more than unpersuasive empirical guesswork."[8] **Moreover, our current P&A does not want you to grasp the real chilling effects its misguided efforts are currently having on the construction of new affordable housing for the disabled.** Available housing for Ohio's disabled citizens is in crisis.[9] **Legislative oversight is required to ensure that Ohio's P&A do not prevent the creation of valid, creative approaches to help ameliorate this grave problem**. I am personally aware of two promising housing proposals that were scrapped due to (in part) a perceived threat of litigation from Ohio's P&A.

The current Ohio P&A's recent "undue burden" arguments are equally unsupported. The standard has been used in cases to uphold state regulations on abortion. Clearly the Ohio Legislature's exercise of its inherent oversight powers to make recommendations to the Governor and Joint Committee on Medicate concerning how it's Medicaid expenditures may be

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Now, an investigation into the management of the various institutions of the state and the departments of the state government is at all times a legitimate function of the legislature. Dickinson v. Johnson, 176 S.W. 116, 117 (Ark. 1915). See Arey, Frank at https://www.ncsl.org/documents/lsss/mon_arey_handout.pdf

[7] Sections 319.20 (primary) and 120.20 to 120.23; R.C. 5123.60, 5123.601 (new), and 5123.602 (new); conforming changes in R.C. 3721.16, 5111.709, 5119.221, 122.01, 5122.02, 5122.27, 5122.271, 5122.29, 5122.31, 5122.32. [5] Sanford ZWICKLER, Appellant, v. Aaron E. KOOTA, 389 U.S. 241 (1967) (Harlan-Concur)

[8] "Though chilling effects are widely cited and claimed systematic and reliable evidence is difficult to locate within and outside case law…. that problem with the application of the chilling effect concept is that 'both the detection of a problem and the imposition of a remedy involve intractable empirical difficulties' and unambiguously suggests that the US Supreme Court 'has founded the chilling effect on nothing more than unpersuasive empirical guesswork'. (Townend, Judith) (Routledge Companion to Media and Human Rights, p.10) found at http://sro.sussex.ac.uk/id/eprint/67678/1/Chapter%207%20Townend-chilling%20effects-accepted%20version-1-317.pdf

[9] "Ohio's aging and disabled population is rising, but housing options remain limited, putting them at unique risk for housing instability….The prevalence of disability in Ohio has been generally increasing since 2008 and has consistently been above the national average (15% in 2018)…Those with disabilities have a higher prevalence of housing problems than those without disabilities. About 54.9% of renters with a disability experience housing problems, compared with 44.5% of all renters." See https://ohiohome.org/hna-20/executivesummary-hna.aspx

limited rationally relates to a legitimate state purpose[10] And the Bill has been amended to ease any "burden" so that the current entity serving as the state's protection and advocacy system and client assistance is not required to appear before the committee**.** [11]

OTHER BULLET POINTS

Our current P&A is arguing that it has no accountability to any authoritative entity.

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REVISITING DISABILITY RIGHTS OHIO AUTHORIZATION AND CAUSE FOR OPTIONS

Since its inception, Disability Rights Ohio has earned criticism for its operations not recognizing inherent conflicts of interest in representing one group. The criticisms are aptly summed up by VOR, a national organization that advocates for high quality care and human rights for people with intellectual and developmental disabilities:

> ***DRO's claim that they speak for the 6,800 severely developmentally disabled Ohioans who reside in Intermediate Care Facilities (ICFs), and others who benefit from employment choices, is outlandish and wholly untrue****. Nor does DRO speak for the tens of thousands of parents, guardians, family members, and friends who know first-hand that an ICF and employment workshops give their loved ones a safe and nurturing home and*

[10] . "If the particular regulation does not 'unduly burden' the fundamental right, then our evaluation of that regulation is limited to our determination that the regulation rationally relates to a legitimate state purpose." Planned Parenthood v. Casey, 505 U.S. 833 (1992), citing Associate Justice Sandra Day O'Connor in her dissent in City of Akron v. Akron Center for Reproductive Health, 462 US 416 (1983.)

[11] See Exhibit A: "(2) In its sole discretion, the current entity serving as the state's protection and advocacy system and client assistance program may appear before, and offer testimony to, the joint committee." Sub. H.B. 110 L-134-0001-5.

productive days that will ensure their long-term happiness, and provide for their complex medical and physical needs. ***DRO's disregard for the unique desires and needs of people with severe intellectual and developmental disabilities (I/DD) denies these individuals of their personhood and strips them of their constitutional rights to life, liberty (i.e. choice), and the pursuit of happiness.*** *See "Disability Rights Ohio Does Not Speak for Everyone: Individuals with Intellectual and Developmental Disabilities are Entitled by Federal Law to Residential and Employment Choice." http://www.vor.net/images/NoDRO.pdf.*

Respectfully submitted,
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