

DISABILITY RIGHTS OHIO

Ohio Disability Rights Law and Policy Center, Inc.

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**Testimony of Michael Kirkman, Executive Director of DISABILITY RIGHTS OHIO
Before the House Finance and Appropriations, Health and Human Services Subcommittee**

Chairwoman Gonzales, Ranking Member Foley, and Members of the Subcommittee, my name is Michael Kirkman, Executive Director of the Ohio Disability Rights Law & Policy Center, Inc., or “Disability Rights Ohio.” As the federally mandated system to protect and advocate rights under the Developmental Disabilities Act and other federal laws, and also the Client Assistance Program under the Rehabilitation Act of 1973, our mission is to advocate for the human, civil and legal rights of people with disabilities in Ohio. Thank you for the opportunity to appear today to discuss the interests of our clients in the biennial budget bill, H.B. 59.

First, though, I want to provide a quick report on the transition we have undergone. As some of you may recall, under the provisions of H.B. 153 the Ohio Legal Rights Service was abolished on October 1, 2012, and the not for profit Disability Rights Ohio became the designated P&A and CAP on that date. I would like to thank the members of the Ohio General Assembly for their support of OLRs over the years, and I am pleased to report that with assistance from the Governor’s Office and OBM, the transition has gone well and according to plans. Most importantly, 42 (of 48) staff members transferred to the not for profit, including all of our advocates and lawyers, and there was no service disruption to the clients we represent and advocate on behalf of every day.

With respect to the current biennial budget proposal or H.B. 59, I plan to focus my testimony on a few priority items of importance to the clients of Disability Rights Ohio and many in the disability community in general.

Medicaid expansion

It is hard to overestimate the importance to our clients of Medicaid expansion. The executive budget proposal to expand Medicaid coverage to individuals below 138% of the federal poverty level and to simplify the eligibility determination process will result in greater access to health care for a population that has traditionally been underserved. In particular, however, I want to talk about the impact on services to people with psychiatric disabilities. Many Ohioans who currently attempt to access mental health services through county boards of mental health and addiction services but who are not Medicaid eligible are put on long wait lists. These individuals will become eligible for services under the expansion, thus insuring services, including routine health care, for many of those who are most in need. This will also allow counties to redirect those resources for other non-Medicaid supportive services, such as housing, peer supports, and employment assistance. The process of simplifying the determination process will shorten delays and help those who do not meet the formal disability requirements of the SSI program or are forced to wait great lengths before a determination is made on their application. Again, at a time when access to mental health services is a topic of national discussion, this proposal ensures access to care for those who currently must wait, and are sometimes homeless or in the criminal justice system.

As we understand it, the administration’s proposal would maintain current coverage criteria for people with disabilities who are receiving Medicaid through a home and community based services waiver or the Medicaid Buy In for Workers with a Disability program. At the same time, apparently reacting to the lifting of the maintenance of effort requirements of the Affordable Care Act, language at § 5163.06, line 85675, allows the Director of Medicaid on January 1, 2014, to make changes to several programs, including two that are critical for people with disabilities: Medicaid Buy-In for Workers with Disabilities and continuing Medicaid

eligibility for children with special needs who are adopted. It will be of great importance to our clients to continue these successful programs. The programs, respectively, allow people with disabilities to seek employment and become productive members of society, and facilitate adoptions of special needs children from foster care. Moreover, any change in eligibility must support the wide-ranging efforts of the Office of Health Transformation to increase Ohio's use of home and community based services instead of institutionalized services, to improve the quality of services that people receive in their homes, and to increase access to mental health services.

Finally, the expansion will result in billions of additional federal funds flowing into Ohio's healthcare systems, creating jobs and supporting the Ohio economy. This will in turn help support the Governor's Employment First initiative, which fosters competitive employment for people with disabilities.

Mental Health and Addiction Services

Recovery Requires a Community

Closely related to the expansion is the need for people with psychiatric disabilities to be supported through recovery. This need is answered by the initiative in H.B. 59 known as *Recovery Requires a Community*. This program represents a step in the right direction to resolve an issue of utmost importance to people with behavioral health needs throughout Ohio. Because Ohio's mental health system has been underfunded to a point of crisis, thousands (perhaps tens of thousands) of these individuals, most of whom are under age 60, languish in nursing facilities, separated from their families and friends and isolated from all aspects of community life, often in locked behavioral units.

For the past year Disability Rights has been in negotiation with officials from the Office of Health Transformation, Medicaid, Mental Health and Aging to determine if there was any answer to this problem short of federal litigation under Title II of the Americans with Disabilities Act and the *Olmstead v. L.C.* opinion from the U.S. Supreme Court, which held that undue segregation of an individual with a disability was a form of prohibited discrimination. The *Recovery* proposal directly addresses the needs identified in those discussions.

Expansion of home and community based services is a viable way in which to prevent individuals from unnecessary institutionalization and to provide the services and support they need in the community. At the same time, the state is able to achieve substantial cost savings. Indeed, the Governor's Office of Health Transformation has acknowledged that Ohio Medicaid presently spends \$102,500 on average per year for each of these nursing facility residents, but cost savings of \$35,250 could be realized for each individual who moves into the community.

Home and community based services are almost invariably preferred by people with disabilities as an alternative to institutional care. In fact, our clients with disabilities in nursing facilities tell us they feel as though they have been imprisoned simply because of their disability and describe life in the NF as miserable, hopeless, and dehumanizing. Our advocates have found that the quality of "care" that is provided is generally sub-standard. The residents are sequestered on locked units or otherwise restricted, and have no interaction with their communities.

The state of Ohio must administer its programs and activities to individuals with disabilities in the most integrated setting appropriate to each person's individual needs and abilities. The *Recovery Requires a Community* initiative, under which an estimated 1,200 individuals with behavioral health needs in nursing facilities will move into the community over

the biennium, is a significant step in this direction. The cost savings realized through less expensive home and community based services will follow each individual as he or she moves from the nursing facility and into the community. Local mental health boards and HOME Choice transition coordinators will work collaboratively to achieve a successful transition, and also a limited housing voucher program will be created to ensure affordable housing.

The expansion of the Medicaid program in Ohio, and the utilization of a 1915(i) Medicaid home and community-based services waiver for people with psychiatric disabilities (as H.B. 59 proposes), enable Ohio to begin to address a problem that has plagued this state for years. At a time when some are arguing to take away the rights of people with disabilities based on discriminatory stereotypes and fear, it is critical that the availability of quality, voluntary, and accessible mental health services be expanded.

Department of Developmental Disabilities

Employment First

The Employment First initiative has great potential to tap into an underutilized labor market with individuals who want to work and are eager to learn. The initiative ultimately focuses on changing the state's historical pattern of spending over 90% of funding for employment services for individuals with intellectual and developmental disabilities on segregated workshop. The presumption that all individuals can work is a critical first step to ensuring future change. There should be a timely and comprehensive implementation of this initiative.

Failure to serve individuals with intellectual and developmental disabilities in the community

Ohio must end its continued reliance on unnecessary and expensive institutional care for people with intellectual and developmental disabilities. As noted above, unnecessary institutionalization is a violation of the "integration mandate" of the Americans with Disabilities Act and is an unlawful form of disability discrimination. The state is obligated to manage its programs to serve people with disabilities in the most integrated setting appropriate to each person's individual needs and abilities. At the same time, home and community based services permit the State to comply with the law by supporting individuals with disabilities in a more cost effective manner. Every study to date demonstrates that community based care provides the greatest level of satisfaction for both people with disabilities and their families.

The state of Ohio has more individuals in large privately operated institutions than any other state, and it is eighth in the nation for serving individuals in state-operated institutions. The wait list for HCBS waivers fluctuates at approximately 30,000 people. Yet instead of addressing this problem head on and creating a plan for serving individuals with home and community based services, H.B. 59 proposes to incentivize institutions for (Intermediate Care Facilities for Individuals with Intellectual Disabilities or "ICFs/IID") and proposes to spend even more money on new ICFs/IID. The Department of Developmental Disabilities has publicly announced its intention to do a Request for Proposals for twenty ICFs/IID. In essence, the State plans to spend even more resources on more institutions, albeit slightly smaller in size.

An ICF/IID, whether 6 beds, 8 beds, or more than 16 beds, is not a home. The U.S. Department of Justice has over the last few years provided guidance and enforcement in this area. DOJ guidance, and their position taken in multiple court cases, requires that services be provided in scattered site housing. Congregate, institution-like settings, even if small and placed

“in the community” are not the most integrated setting. States whose plans favor such settings have been found to violate the integration mandate of the ADA by the Department of Justice and by federal courts. Over the past three years alone, the United States Department of Justice has issued letters of finding or intervened in litigation in seven states that were violating the ADA in their manner of providing services to individuals with disabilities.

Most on point, in the Commonwealth of Virginia, the DOJ specifically stated that “congregate, more institutional-like settings in the community, including ICF/DDs that serve between five and twelve individuals,” are not the most integrated settings appropriate to the needs of many individuals. DOJ, in a settlement approved by the federal district court, required significant change including a real plan that prioritizes home and community based services, moves individuals who are unnecessarily institutionalized out of institutions, and has capacity to meet the needs of individuals on waiting lists at a reasonable pace.

For the subcommittee’s review, I have included links to both the DOJ Letter of Findings: http://www.justice.gov/crt/about/spl/documents/cvtc_findlet_02-10-2011.pdf; and the Settlement reached by the Commonwealth of Virginia with the DOJ to address its violations of the integration mandate: http://www.ada.gov/olmstead/documents/virginia_final_settle.pdf

Instead of working on plans for new institutions, the state of Ohio can avoid protracted and expensive litigation by proposing a plan to serve institutionalized individuals in their homes and communities and to reduce the waiting list of almost 30,000 individuals seeking a Medicaid waiver for home and community based services.

Rehabilitation Services Commission (RSC) – proposed to be the Opportunities for Ohioans with Disabilities Agency (OOD)

Funding

First of all, let me say that Disability Rights Ohio and the clients it serves have long argued for full funding for vocational rehabilitation services in Ohio. For every \$1 of GRF, Ohio can pull down nearly \$4 of federal matching funds which can be put to use helping Ohioans with disabilities become employed. Once again, however, the proposed budget leaves federal money on the table. That being said, we support the proposed increase in GRF for this agency. All of that helps Ohio’s economy and tax revenue base.

Commission structure and independence

Disability Rights Ohio has heard real concerns that H.B. 59 would alter the Rehabilitation Services Commission governance structure and strip people with disabilities of a directing voice in violation of federal law. To receive federal funds, the Rehabilitation Act of 1973, as amended, 29 USC § 701, *et seq.*, and applicable regulations require each state to submit a plan to the Rehabilitation Services Administration (a division of the federal Department of Education) that meets the requirements of 29 USC § 721(a)(21), including a requirement of an independent commission that “is responsible under State law for operating, or overseeing the operation of, the vocational rehabilitation program in the State,” and is “consumer controlled,” or a state rehabilitation council with specific membership requirements. 29 U.S.C. § 725. To comply with this requirement, Ohio has historically had an independent commission with required seats for people with disabilities.

Starting in 2009, Ohio law has gradually changed to center more authority in the Governor and the administrator of the VR agency. That position is no longer filled by the

Commission but is now selected by the Governor. The changes proposed in H.B. 59 remove the last of the Commission's independent authority. Today, the Commission has the power to enact rules, certify for disbursement funds for vocational rehabilitation services, submit reports and a budget to the Governor, take action to guarantee rights and services to persons with disabilities, and enter into cooperative agreements with governmental and other entities. The proposed revisions would take these powers from the Commission and vest them in the OOD Executive Director (proposed § R.C. 3304.16). The Commission under the new OOD Agency will be left to conduct surveys with no actual authority over OODA. Not only would this proposal reduce a critical consumer engagement opportunity for Ohioans with disabilities, it is also contrary to federal law and thus jeopardizes federal funding.

Appeals

Based on our years of experience representing clients seeking vocational rehabilitation services, we have noted that individuals found ineligible for services often are not provided a formal notice of a decision. This is a barrier to obtaining appeal rights guaranteed by Ohio and federal law. RSC practice has been to assume that clients learn of actions or decisions when they are made or when there is any contact with the client, regardless of whether the client was actually in fact notified of the action. If there is a dispute as to when the individual learned of the action taken, RSC's practice is to summarily dismiss the appeal and leave the individual with no means of recourse. RSC denies without exception any appeal filed after that time.

While the budget proposal includes amendments to R.C. 3304.20, it offers nothing that would address the difficulties we have found that people with disabilities face when seeking to file an appeal with RSC. Without any formal written notice of a decision in their case, or even made aware of their hearing rights and timelines to appeal, individuals are denied an opportunity for a fair hearing as guaranteed by federal law.

Disability Rights Ohio would be glad to work with the committee and staff to craft language that would address this concern. Language can be provided to remove this barrier to services, and also to ensure that any notice of rights and responsibilities be in a format that the individual can understand – for example, Braille or electronic for someone who is blind and cannot read a print letter.

Authority of the Executive Director

Finally, the new section R.C. 3304.15 (formerly R.C. 3304.14) gives the Executive Director the authority to appoint, remove or discipline staff members without regard to sex, race, creed, color age or national origin. The criteria should include disability – its omission seems particularly unusual for the agency that assists people with disabilities in finding employment, and this is a good opportunity to modernize that language.

Thank you again for this opportunity to testify, and I would be glad to answer any questions.