



100 Pine Street • PO Box 1166 • Harrisburg, PA 17108-1166  
Tel: 717.232.8000 • Fax: 717.237.5300

Elizabeth A. Maguschak  
Direct Dial: 717.237.5406  
Direct Fax: 717.260.1766  
emaguschak@mwn.com

August 1, 2014

**VIA HAND DELIVERY AND ELECTRONIC MAIL**

Honorable L. Jill Hans  
Deputy Secretary for Postsecondary and Higher Education  
PENNSYLVANIA DEPARTMENT OF EDUCATION  
333 Market Street  
Harrisburg, PA 17126-0333

Re: Wilson College  
Application of Approval of Certificate of Authority to Amend Articles of Incorporation

Dear Deputy Secretary Hans:

I am writing on behalf of the Board of Trustees of Wilson College, to follow up on the June 16, 2014 informational hearing over which you presided. As you know, the subject was the May 2013 request of Wilson College for the approval by the Pennsylvania Department of Education's ("PDE" or "Department") of amendments to the College's Articles of Incorporation (a.k.a. Charter). In the informational hearing, you gave Wilson College and the Limited Participants the option of submitting additional comments to you in letter form.<sup>1</sup> The Board of Trustees is pleased to do so. In light of our submissions on March 17 and April 14, 2014, we will focus on issues that arose during the June 16 hearing, and we will refer to or summarize, rather than repeat at length, our previous points.

**Overview**

In light of the Limited Participants' objections and the questions of the Hearing Officer, two issues predominate here. The first issue – and, we believe, the most important one – is: (1) whether the proposed amendments to Wilson College's Articles of Incorporation satisfy the standards for approval listed in 24 Pa. CS §6504(c). The second issue has two parts: (2)(a) whether Wilson College was incorrect in reading its 1993 charter as allowing the College to begin its marketing, recruitment, and other steps in preparation for expanding coeducation to all of its programs, and (2)(b) even if the Secretary were to read Wilson's 1993 charter differently

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<sup>1</sup> Transcript of June 16, 2014 hearing ("Tr.") at 6.

than the College reads that 1993 charter, does this compel the Secretary to reject the 2013 amendments? The proper answers to those questions are as follows:

- (1) the 2013 amended Articles of Incorporation satisfy the standards in §6504(c) and thus should be approved;
- (2)(a) Wilson's 1993 Articles are sufficiently broad to authorize Wilson to do what it has done in 2013 and 2014; and
- (2)(b) even if the Department does not read the 1993 Articles as broadly as Wilson College does, this is not a cause to disapprove the 2013 Articles.

In summary: the 2013 amendments are substantively approvable, and the 2013 amendments should not be disapproved on account of how the College has operated under its 1993 Articles during the months while the matter has been pending in the Department.

### **The Role of the Department**

On May 17, 2013, the Wilson College Board of Trustees approved changes to its Charter. The next work day, the College sought PDE's approval. Pending that approval, the College's 1993 Charter is in effect. The role of the Department in the approval process is defined in a statute and a regulation. The statute is 24 Pa C.S. §6504(c), in which the General Assembly set forth the standards by which the Department of Education will approve (or disapprove) amendments to Articles of Incorporation. The factors relevant under that statute are whether the change:

conforms to law, including the regulations of the department ... and the standards and qualifications ... prescribed by the State board ... and will result in an institution which, under the then current provisions of this chapter and standards and qualifications ... of the State board ... would be eligible to receive a certificate authority as an institution.

The regulation is 22 Pa. Code §31.11, which made it the rule of the State Board of Education that the Department of Education will leave the governance of a private college to the private initiative of that college:

except that the administration of the institution shall be in accordance with applicable Board regulations in this subpart and standards which may from time to time be approved by the Board and established by the Department.

This is an important exception to private academic autonomy, but a limited one.

Both the statute and the regulation define the role of the Department as implementing formally enacted statutes, formally promulgated regulations, and formally established standards. Even if legally confining, this is nonetheless a big and substantive job. However, adding to that job by roaming beyond the statutes and regulations is neither necessary nor justified. This would be beyond the role of the Department in this regulatory process.

One of the Limited Participants said that "among the many different goals or purposes of the Department of Education ... [are] the diversity of institutions of higher education as well as helping and protecting the historic missions of institutions of higher education."<sup>2</sup> One of the major flaws of this argument – other than its inaccuracy – is that it confuses a goal, a purpose, and a power. Even if "protecting historic missions" were a Departmental goal, such a goal does not create an ability, much less an obligation, to disapprove amendments to a private institution's Articles of Incorporation. After all, the "goals" announced by the Limited Participants were not included by the General Assembly in 24 Pa. C.S. §6504(c). Nor has the State Board of Education included those "goals" in 22 Pa. Code §31.11. Certainly, the General Assembly and the State Board of Education could have included those factors as they described the role of PDE in the life of private colleges, but they did not.

The Limited Participant went on to assert that the Department has "an obligation and the authority to act to determine what's in the public interest and also what is consistent with the mission of a particular institution."<sup>3</sup> This is wrong for two reasons. One is that there is nothing in law or known policy that authorizes or obliges the Department to thwart the will of a private college's Board of Trustees by forcing the maintenance of an old mission. Public regulators can protect the public, but public regulators do not get to choose the mission of a private college if the college's chosen mission violates no law.

The second reason that the Participant's "authority" theory is wrong has to do with the idea that the Department has an obligation to determine the public interest. Various voices claim to articulate the public interest. If the Department wishes to impose a particular version of the public interest in which the Department believes, it cannot properly do so on an *ad hoc* basis which changes without notice from case to case. Rather, it can do so only after establishing its view of the public interest through formal rulemaking, and only if that rulemaking is done pursuant to a legislative power to formulate and announce the public interest. The Limited Participants do not get to decide what the public interest requires, and the Department has not undergone the rigor and public process of doing so through rulemaking.

In the absence of a change in statute or regulation (or even an announced policy) that altered the Department's job since 1970, we see no justification for applying the public interest one way in 1970 – when the Department approved the amendments to the College's Charter that specifically permitted the College to offer all of its educational programs to both women and men

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<sup>2</sup> Tr. at 127.

<sup>3</sup> Tr. at 127.

– and another way in 2014. The Limited Participants urge the Department to take on the job of policing an *ad hoc* version of the public interest, and to take on the role of maintaining cherished traditions. However, doing so would be inconsistent with both 24 Pa. C.S. §6504(c) and 22 Pa. Code §31.11.

Nothing enacted by the General Assembly or adopted by the State Board of Education has converted the Secretary's view of the public interest into a legal tool for controlling entities such as Wilson College. Like all Pennsylvanians, PDE officials are entitled to their view of what is in the public interest. This may guide their discretionary activities that are not confined by statute or regulation. However, this does not mean they are legally authorized to act as if their shifting view of the public interest is the law. On the contrary, we argue that it is up to the Wilson College Board of Trustees to determine how the College will further the public interest, so long as the College breaks no law. We think this is clear from the higher education regulation at 22 Pa. Code §31.11, which pertains to the governance of private institutions. With limited exception, the rule of §31.11 is that "The principle of local control and private initiative shall be supported [by the Department of Education] ...."

Finally, the Limited Participant expressed her belief that "you [in PDE] have the authority to deny an application for fundamental change if it does not advance the purposes of why a particular institution is chartered in the first place."<sup>4</sup> This has no basis in 24 Pa. C.S. §6503(d), 24 Pa. C.S. § 6503(d), nor in 22 Pa. Code §31.11. It has no other basis that we are aware of. We think the Limited Participants are wrong.

There are people whose job it is to consider history and tradition, and to weigh those factors alongside financial viability and other factors. Those people are the members of the College's Board of Trustees. It is they to whom these issues are entrusted in our system of private college governance.

### **Validity and Status of Previous Iterations**

The Wilson College Charter has been amended many times over the years. The iterations of 1970 and 1993 appear to be of particular interest, and you have enquired about their "validity." We see each of these as valid in their time, and of significant historical interest in providing context. As we have always acknowledged, the 1993 iteration is the one now in effect.

The 1970 iteration is significant for its explicit coeducational wording. It was approved by the Secretary.<sup>5</sup> Its approval by the Secretary and others helps answer the question of whether an explicit coeducational mission is permissible for Wilson College in light of its history. We assert that broad coeducational wording of that sort was approvable – and approved – in 1970,

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<sup>4</sup> Tr. at 128.

<sup>5</sup> See, Tr. at 102.

and it is approvable – and should be approved – now. If there is a difference between what the public interest would tolerate now and what it tolerated in 1970, we do not see it. The history of Wilson College and its mission cannot adequately be described without including the 1970 iteration of its Charter. It was the College's fundamental document for 23 years, and was succeeded by a 1993 iteration.

### **Terminology**

The Limited Participants describe the 2013 amendments to the Articles of Incorporation as "fundamental." We note, however, that *any* change in an Article of Incorporation is "fundamental." Section 6504 of 24 Pa. C.S. deals with changes to Articles of Incorporation; that section is entitled "Fundamental Changes." Moreover, section §6504(c) refers to "amendments of articles" as "fundamental changes." Thus, by definition, any change in a college's Articles of Incorporation – large or small, important or trivial – is a "fundamental" change. In this sense, even if in no other, the Limited Participants are right to call the 2013 amendments – like any amendment to any Article of Incorporation of any private college in Pennsylvania's Articles of Incorporation – "fundamental." Since any change in such Articles is, by definition, fundamental, the use of the term "fundamental" in this case is accurate but not meaningful.

There has also been some discussion of whether the 2013 amendments constitute a major corporate change. According to the definition in 22 Pa. Code §31.2, the answer is "no." Under that definition, a major corporate change is a change not in the operation of the college as an educational institution but a change in the corporation operating the postsecondary institution. The examples of major corporate changes in the regulatory definition (*e.g.* merger, change of sponsorship, dissolution) have nothing in common with the 2013 amendments. Thus, if there are requirements that relate to major corporate changes, they do not apply here.

### **Operations during the last year under the 1993 Articles.**

Much has been said about what the College has and has not done in the year or so since the College approved Amendments and submitted them for PDE approval. Most recently, it was the subject of hearing testimony including the College's recruitment of future athletic coaches and revisions to the "branding" that is part of the College's public communications.<sup>6</sup> Without reviewing all of that testimony and the surrounding arguments, we emphasize three points in order of ascending importance. First, we believe that it is not improper (and is in fact necessary) to take anticipatory steps for a change that would be implemented in earnest in 2014-15, fifteen months after the May 2013 request to the Secretary.

Second, and more important, the College has, throughout this period, understood its 1993 Charter to be broad and flexible enough to permit the actions that were taken after the May 2013 request to the Secretary. On advice of counsel dated November 28, 2012, the College believed

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<sup>6</sup> Tr. at 115 *et seq.*

(and believes) that the 1993 iteration did not need to be amended to accommodate a broadening of coeducational opportunities, but that the College ought to amend the 1993 document for clarity's sake.<sup>7</sup> Thus, at a minimum, the College did not act in disregard of, or a lack of respect for, the Department's approval process, but acted only after consulting with counsel. Counsel's conclusion (adopted by the College) is based on the broad purpose-statement in the 1993 Charter and the "including, without limitation" language in that Charter. The Limited Participants appear to believe not only that this is an incorrect understanding of the 1993 Charter but also it would lead to chaos in the administration of higher education in Pennsylvania.<sup>8</sup> This chaos has not materialized, and could not materialize in light of the Secretary's supervision of the creation of new degree programs and the like. Moreover, the Secretary of Education approved the 1993 Amendments that incorporate the "including, without limitation" language. The Secretary had an opportunity in 1993 to reject or resist the open-ended "including, without limitation" language. That open-ended language was, after all, obvious for all to see; but the Secretary approved the amendments with that language. With no complaint or limitation, the Secretary accepted the language notwithstanding its obvious breadth. We do not see how this obviously broad language could be acceptable to the Secretary in its inclusiveness in 1993 but unacceptable when read inclusively now.

Third, and most important, the Department should not be dissuaded from approving the 2013 Amendments on account of any conclusion about the College's actions between January 2013 and today on advice of counsel. Wilson College urges the Secretary to focus on the **substance** of the 2013 amendments, not on whether the College moved too quickly in rebranding its communications or taking other steps the College believes were authorized all along. As stated since 2012 and in the Informational Hearing, the College asserts that the changes to the Articles are not necessary (because the current, *i.e.*, 1993 Articles are broad and inclusive as is), but that the changes are highly desirable because as this proceeding demonstrates, the current Articles are not sufficiently clear and they allow for differing interpretations. Certainly, the promotion of clarity argues in favor of approval. No good comes from a lack of clarity when clarity is easily within reach. It is not in the interests of any student, male or female, for the College to simply revert to a status in which the 1993 iteration remains in effect and various interest groups argue about how to read them.

Ultimately, it is not crucial that the Department confirm the November 2012 advice of counsel. What is ultimately important is that the Department focus on the substantive approvability of the 2013 Amendments. We submit that it is the future of the College, not its interim activities in the recent past, on which the Secretary should ultimately focus.

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<sup>7</sup> The November 28, 2012 memorandum from attorney Elizabeth Maguschak to President Barbara Mistick was described in the June 16, 2014 hearing. Tr. at 37. Because it was described in the hearing but misidentified as being part of Limited Participants' Appendix D, the November 28, 2012 memorandum is now enclosed.

<sup>8</sup> Tr. at 104.

**Additional Points**

Without repeating each point, the College notes that it addressed a variety of issues in its March 17, 2014 and April 14, 2014 submissions, as follows:

Topic addressed by Wilson College	March 17 document (pages)	April 14 document (pages)
Role of the Department; legal standards	1-3	14-16
Previous and current charters	4-8; 19-20	
Role of the Orphan's Court; role of the Attorney General relating to donated funds	8-10; 18-22	
History of male students at Wilson College, the planning process, the <i>Commission on Shaping the Future of Wilson College</i> , and the larger <i>Wilson Today</i> planning context of which broader coeducation is one part	11-16	1-2; 12-14
Consideration and action by the Board of Trustees	16-18, 20-21	8-12; 15
Objections not focused on coeducation		3-6
Title IX		6-8

In addition, The Informational Hearing left us feeling a need to emphasize or clarify a few facts, as follows.

Wilson College has a longstanding and current presence of male students and female students *in the same classes*. There is nothing new about the fact that female and male students of the traditional college program and the adult education program have been in the same classes together and have been awarded the same degrees. There has never been, and there is not now, anything physically separate about the male population (which, as we testified, constitutes 12% of the current undergraduate student population). There are, in an administrative sense, two pathways to the same classroom. But that administrative distinction is invisible in the classroom. Wilson College classrooms are, and have been, integrated.

The Limited Participants were sometimes referred to as representing the College's alumnae. We acknowledge, of course, that each of the Limited Participants is an alumna. We concede also that there are others who agree with them. It would not, however, be accurate to conclude that they represent the majority of alumnae. In June 2013, the Alumnae Association considered a formal Resolution opposing the Trustees' earlier vote to extend the College's coeducational programming. The Alumnae Association defeated that Resolution; the vote was 86 for and 106 against. In June 2014, the Alumnae Association considered a formal Resolution calling upon the Trustees and staff to cease actions that were in supposed violation of the current Charter. That resolution was also defeated; this time the vote was 46 for, 91 against, and 1 abstention. Also in 2014, the "50<sup>th</sup> anniversary class" (that is, the graduating class of 1964) gave

the College the largest class gift in the College's history. Thus, while the Limited Participants are properly heard as a passionate minority, they are, nonetheless, a minority.

The Limited Participants' minority voice simply opposes the broadening of coeducation at Wilson College. As Ms. Van Ness testified about the Commission that developed ideas for the future of the College, "Early in the commission process, I became concerned about the possibility of change in the mission of the College."<sup>9</sup> In our view, the Department should take the Limited Participants' opposition to a broadened coeducational activities as *sincere*, but should take the dissenting views about fiscal issues and the Board of Trustees' deliberative process as *window-dressing*. The ultimate question remains whether having a private coeducational college located in Chambersburg, Pennsylvania in the 21<sup>st</sup> century violates section 6503 or 6504 of 24 Pa C.S.

Among the things that emerge from the Limited Participants' testimony are a series of questions:

- In light of the debate over whether enhancing the coeducational offerings of the College is fiscally advisable or a fiscal imperative, who is it in the Department of Education who is better equipped to answer this question than John Gibb (who testified on June 16, 2014 about his experience in the field of higher education finance and his conclusions<sup>10</sup>) and his fellow Trustees?
- In light of the suggestion that the College acted improperly in its use of donated funds, who is it in the Department of Education who has more information than, or a reason to come to a different conclusion than, the Pennsylvania Office of Attorney General?
- In light of the significant passage of time (now, a year and a quarter and running) since the May 20, 2013 request for Departmental approval of the May 17, 2013 amendments, should the Department punish the College and its fiscal health for its continued planning for re-branding the College and expanding its coeducational offerings at Wilson College to the residential undergraduate program?<sup>11</sup>

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<sup>9</sup> Tr. at 97.

<sup>10</sup> Tr. at 24 *et seq.* Mr. Gibb ran the division of Sallie Mae that financed colleges and universities nationwide. He is now with Jones, Lang, and LaSalle, where he advises colleges and universities on finance and real estate.

<sup>11</sup> The process established by the Department in this matter has been orderly but not speedy. See partial chronology in letter dated January 6, 2014 from Deputy Secretary L. Jill Hans to Elizabeth Maguschak. Most recently, the Department, without any request that it do so, replaced a process that would have closed the



- In light of the Secretary's approval of the "including, without limitation" language in 1993, how could the Secretary now doubt or criticize the breadth of this language in 2014?
- In light of the Secretary of Education's approval of the explicitly pro-coeducational language of Wilson College's 1970 Articles of Incorporation, and in the absence of relevant changes in law or formal policy since then, what is it that could compel, or even justify, a Secretarial disapproval of such language now, in 2014?

On behalf of the Board of Trustees, I close with one final note from history. There is poignancy, but also irony, in the fact that Limited Participant Van Ness concluded her testimony with a quote from Daniel Webster about a love for a small college<sup>12</sup>. We do not question the love that Ms. Van Ness has for her *alma mater*. If she is part of a loyal opposition, so be it. Still, there is rich irony in the fact that her position on the role of the State is the opposite of Daniel Webster's. Mr. Webster was counsel for Dartmouth College in the U.S. Supreme Court case of *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819). As college counsel, Mr. Webster argued against the attempt of the State of New Hampshire to override the judgment and decisions of the college's Board of Trustees. The Court rejected the over-reaching of the State. Yet, it is precisely this sort of overreaching – that is, having the State override the judgment and decision of Wilson College's Board of Trustees – that the Limited Participants seek today. Under the statutes and regulations of the Commonwealth of Pennsylvania and its Department of Education, the State's role is both important and limited. It can override a private college's Board of Trustees only in very circumscribed circumstances; this case does not present one of those circumstances.

Sincerely,

McNEES WALLACE & NURICK LLC

*Elizabeth A. Maguschak*

By

Elizabeth A. Maguschak

Enclosure

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record two weeks after the informational hearing with a process that closes the record six weeks after the informational hearing. Our point is not that this is improper; however, we assert that the Department ought not command a regulated entity to stand still indefinitely (or penalize a regulated entity for not standing still indefinitely) as the Department processes an issue.

<sup>12</sup> Tr. at 111.

## MEMORANDUM

TO: Barbara Mistick, President

FROM: Elizabeth A. Maguschak                      E-MAIL: emaguschak@mwn.com

RE: Articles of Incorporation

DATE: November 28, 2012

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Wilson College was originally chartered as a Women's College in 1869: Section 2 of the original Charter stated: "The object and purpose of said corporation are hereby declared to be to promote the education of young women in literature, science and the arts." While there had been numerous amendments to and iterations of the Charter/Articles of Incorporation over the ensuing 100 years, none addressed this "object and purpose".

In May 1970, however, the Articles were amended, specifically addressing this section 2 of the original Charter, amending it to read as follows: "The object and purpose of said corporation are hereby declared to be, to promote the education of both women and men in literature, science and the arts." Again, while the College maintains some later iterations of the Charter (not necessarily amendments), until 1993, none of them revised or amended this Section 2.

In 1993, the College amended and restated the Articles of Incorporation<sup>1</sup>, stating that the "restated Articles of Incorporation supersede the original Articles and all amendments thereto." The restated Articles provide at Section 3:

The corporation is incorporated exclusively for charitable, educational and scientific purposes within the meaning of Section 501 (c)(3) of the Internal Revenue Code, or the corresponding section of any future federal tax code (the "Code") including, without limitation, the following purposes:

- (a) In furtherance of its purpose set forth in the original charter, to operate a College for Women, which offers residential opportunity, and, in addition, to operate a co-educational College of Continuing Education; and
- (b) To offer its students studies in literature, science and the arts in a liberal arts program, including preparation for specific careers as well as preparation for graduate and professional school; and
- (c) To grant to students under its charge diplomas or honorary testimonials, in such form as it may designate, and also to grant and confer such honors, degrees and diplomas as are granted by any university or college in the United States.

(emphasis added).

The 1993 restated Articles of Incorporation, then, clearly provide that the College is incorporated for "charitable, educational and scientific purposes" and those purposes are "without limitation". While it goes on to describe three of the specific purposes sought to be addressed, including Section 3. (a) above, those specific purposes do not limit the more general "charitable, educational and scientific purpose".

Thus, the present (1993) Articles of Incorporation do not prohibit the College from operating a co-educational undergraduate program (and the 1970 Amendment, while superseded, would encourage it). That is, a revision to the present Articles would not be required to undertake this programmatic change. Indeed, there is nothing we can find that would compel Wilson to seek permission from another authority to admit men as undergraduates or to amend the articles to more clearly reflect the College's purposes.

Nevertheless, if the decision is made to admit men as undergraduates, we would recommend that the Board revise the Articles of Incorporation to more clearly and without any room for question, authorize the College to move forward as a co-educational institution.

The Charter itself does not state the vote required for a Charter revision. The Bylaws currently require a two-thirds vote of those present to amend the Bylaws. We recommend that that same requirement would be appropriate for amendment of the Articles of Incorporation.

If the decision is made to admit men as undergraduates, the Bylaws would also require revisions, at the least in the introductory section discussing "college dedicated to the education of women". The "Mission" as stated in the catalog (and presumably elsewhere) also needs to be addressed.

E.A.M.

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<sup>i</sup> Among the documents provided to us and that we located that were filed with the Department of State, we were unable to determine whether the 1993 Articles were approved by the PA Department of Education. For purposes of this memo, we assume that they were.