COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF EDUCATION	: APPLICATION OF WILSON COLLEGE : FOR APPROVAL OF CERTIFICATE OF : AUTHORITY TO AMEND ITS ARTICLES : OF INCORPORATION

WILSON COLLEGE'S RESPONSE TO THE TESTIMONY OF THE LIMITED PARTICIPANTS

Wilson College appreciates the opportunity to respond to the written testimony of the Limited Participants. In light of the narrow factors defining the Department's role under 24 Pa C.S. §6504(c), the College does not choose to respond to each and every topic raised by the Limited Participants. The College focuses on three areas of the Limited Participants' testimony: (I) the proposed revisions to the Charter (a/k/a Articles of Incorporation), (II) the role of Title IX in the College's decision-making, and (III) the College's process for developing the Charter revisions.

I. REVISIONS TO THE CHARTER

Contrary to the single-sex picture painted by the objectors, Wilson College is, and has long been, a College that educates male and female undergraduates together. The residential facilities at the College have been (and are) single-sex, but the classroom and other educational facilities have been and are coeducational. Wilson College first welcomed men on campus in 1944, after President Roosevelt signed the Servicemen's Readjustment Act into law. The College graduated 23 ex-servicemen at that time, many of whom take great pride in their Wilson diplomas. Similarly, the graduating class of 2013 (enrolled prior to the decision to admit men to the residential college in 2015) included males who received Bachelor's degrees. The participation of these males in the undergraduate program was distinguished from some other students'

participation at Wilson College only by the lack of residential status. The male and female students were not differentiated in terms of the classes they could attend or the purpose or credits involved in that attendance. As of 2013, for example, 12% of the students on campus were male (and none of the students residing in Wilson dorms were male). This, rather than the more amorphous statements about various traditions, is the factual background for assessing the changes that the Limited Participants want the Department of Education to disapprove. If there is a fundamental black-and-white change that is factually at issue here, it relates to housing services, not educational services.

This reality demonstrates one reason why the Limited Participants are incorrect in suggesting that the College has violated the law by taking steps that the Limited Participants characterize as being premature because the Department has not yet approved the Charter amendments. Another reason, perhaps more important to this proceeding, is that the preexisting Charter does not limit the activities of Wilson College to the support of its students—all of its students. As thoroughly discussed in the College's initial submission, the preexisting Charter is broadly written and does not prohibit Wilson College from taking steps to support the education of its male students, including the 12% of students who are male undergraduate nonresidential students, pursuant to the preexisting Charter. The College's activities in this regard are neither in violation of the law nor disrespectful of the Department's approval process.

A number of the Limited Participants, and particularly Paula S. Tishok, object to the revisions to the Charter in a number of respects. This is interesting in and of itself, given the fact that Ms. Tishok was a member of the *ad hoc* committee that reviewed and

revised counsel's recommended changes to the Charter; Ms. Tishok did not object to the Committee's final recommended revisions to the Charter as reported out to the full Board.

One section of the amended Charter to which the Limited Participants object is the revision of the language regarding the "mission" and areas of education of the College. In that regard, the language of the Charter was changed from offering its students "studies in literature, science, and the arts" to offering its students "studies in the arts, science, and religion." These revisions were suggested by the then-Secretary to the Board of Trustees of the College. She offered these revisions so that the language of the Charter echoed the Latin language in the College's seal, which is "ars, scientia, religio." When the Board discussed and voted on the revisions to the Charter at its May reading, no one saw anything controversial about this revision. It was not designed to change in any way the courses and studies being offered at Wilson.

Another Limited Participant, Melissa A. Behm, critiques proposed changes in the Articles not dealing with *single-sex vs. coeducational* opportunities. Her criticisms miss the mark, however, because they are based on the false notion that the Articles must repeat the requirements of various statutes. She refers to such repetition as being "in alignment with" current law. This is not the test under section 6504 of 24 Pa. C.S., because section 6504 does not require that the Articles repeat the statutes or regulations.

Similarly, Ms. Behm points out that the proposed Articles do not "acknowledge" that liabilities must be satisfied before asset distribution. (Behm, at 7.) However, the law does not require that such an "acknowledgement" appear in any college's Articles of

Incorporation. Here, and elsewhere, the Limited Participants invite the Department reach beyond the scope of its role under Section 6504. This invites the Department to delve into making decisions that are within the purview of the Board of Trustees so long as they do not violate any statute or other binding rule. For example, the Limited Participants "ask that" a particular phrase in the pre-existing Articles be "retained" because the revised version is based on a supposed mistranslation of Latin. This issue, whether substantively major or minor, is emblematic of the Objectors' mistaken belief that the Department's role is to serve as a general editor of the Articles even when the Articles are lawful.

Similarly, at least one Limited Participant would insist that certain topics – such as admissions standards -- be addressed in the Articles of Incorporation (Behm, 11-12.) even though the Department's regulations make clear that these topics can be addressed in college catalogues or other publications of the College.

The Limited Participants improperly suggest that the Department should treat editorial choices as if they were issues of legality under section 6504. For example, the Limited Participants treat it as legally significant that the Board of Trustees decided to remove from the Charter the requirement of "at least eight regular professors" and decided to change the language regarding the descriptor of the endowment. These changes, however, are not legally significant because: (1) the changes are not inconsistent with any law, (2) there is no law requiring that these topics be addressed in a Charter or Articles of Incorporation, and (3) these changes are consistent with Charter language approved by the Department in connection with other colleges.

The editorial changes in the Charter document are in no way intended as a statement by the College that it would not abide by appropriate requirements, but merely an attempt to streamline the Charter by removing topics that could permissibly be addressed elsewhere. These editorial changes were the product of a Committee that included members who are lawyers and that had access to counsel. (See Tishok attachments.) Of course, the College has every intention of abiding by all state and federal laws and regulations that govern its existence and its operations. That does not mean, however, that all such requirements, as set forth in regulations and statutes too numerous to count, must be reflected in an institution's Charter.

The Limited Participants also object to at least one of the proposed wording-changes because on their misperception of its intent and impact. Ms. Behm objects to a change in the Articles' description of the selection process for Board members. That change is, to her, "unacceptable and inaccurate." (Behm, at 8.) This is a non-issue for the Department for two reasons. First, the fact that it is "unacceptable" to one or more individuals is not important to the role of the Department under Section 6504. Second – and more important – the change in the Articles would not be a change in practice and would not affect the interests of the Limited Participants or other alumnae. Traditionally, and currently, the Alumnae Association chooses four members of the Wilson College Board of Trustees: the Association's President is automatically a member of the College's Board, and the Association selects three other members of the College's Board. Traditionally, and currently, this is solemnized by an election of the Board of Trustees itself. This has been and would be a matter for fleshing out in the Bylaws (not the Articles of Incorporation). Importantly, no aspect of the selection process would

change by virtue of the proposed change in the Articles of Incorporation. Currently, and under proposed Bylaws, the Association would control four seats (one by choosing an Association President who serves as an *ex officio* College Trustee, and three others by vote of the Association) and the ultimate election onto the Board is and would be a formality. In short, even if this issue were within the Department's authority to decide, it is in fact a non-issue because the election process for the Association's four "Board seats" remains unchanged. The proposed revisions to the Articles of Incorporation do not affect the role of the Association in selecting members to the Wilson College Board of Trustees.

In sum, although the Limited Participants would have the Department believe that these specific revisions to the Charter indicate the College's inclination to place itself in violation of Departmental regulations and the applicable statutes, nothing could be further from the truth. Moreover, these complaints are distractions having nothing to do with the Limited Participants' true objection to the Charter revisions, which is solely with respect to the coeducational language. Even if the Board of Trustees had made none of the other revisions to the 1993 Articles of Incorporation, i.e., those relating to endowment and faculty size, the revised Charter still would not satisfy the true objections of the Limited Participants.

II. <u>THE ROLE OF TITLE IX IN THE COLLEGE'S DECISION-MAKING</u>

As part of their critique of the deliberative process of those entrusted to chart the College's future, the Limited Participants imply that the Board of Trustees was operating on the basis of misinformation regarding the impact of Title IX. The concern of the Limited Participants is that the Trustees, after supposedly having been misinformed

about the law, may have taken an action that would be difficult to alter if the Board of Trustees ever chose to do so. This argument misses the mark for two reasons. First, we suggest that it is not the Department's proper role to ensure a future possible outcome. If there is a legitimate interest in ensuring that a college keeps all of its options open, that interest is for the college's Board of Trustees, rather than the Department of Education, to safeguard. Second, the Limited Participants' Title IX argument is legally wrong—Title IX does not limit the College's future options—and the advice Trustees received was accurate.

Title IX of the Education Amendments of 1972 does not apply to what is at the core of the current disagreement: whether the sex of the applicant can play a role in the admissions decisions of private undergraduate colleges. By not listing "private undergraduate institutions" as institutions subject to the antidiscrimination provisions in 20 U.S.C. §1681(a)(1), the law implicitly exempts such institutions from the law's coverage of admissions decisions. Accordingly, private undergraduate colleges may discriminate on the basis of sex with regard to admissions practices. A private undergraduate college's freedom to do so – that is, to be a single-sex institution -- is not affected by the existence or nonexistence of tradition, consistent policy, or continuity of practice. Thus, there is no basis for interpreting Title IX as a one-way ratchet that would decrease the future discretion of Wilson College's Board of Trustees to set admissions policy however the Board thinks best.

Legal analysts confirm the College's understanding of Title IX. "Private undergraduate institutions are not prohibited from discriminating in admissions on the basis of sex." William A. Kaplan and Barbara Lee, The Law of Higher Education, 762

(Vol. 1, 4th Ed.) (Wiley and Sons, Inc. 2006) (citing 20 U.S.C. §1681(a)(1) and 34 C.F.R. §106.15(d))(emphasis added). Courts have echoed this determination; see Naranjo v. Alverno College, 487 F. Supp. 635, 637 (E.D. Wis. 1980) ("By its express terms, it is apparent that the proscription of Section 1681(a) does not apply with regard to admissions to private institutions of undergraduate higher education"); see also Pottstown Sch. Dist. v. Hill Sch., 48 Pa. D. & C.4th 365, 369-70 (Com. Pl. 2000) aff'd, 786 A.2d 312 (Pa. Commw. Ct. 2001) ("neither secondary schools nor private undergraduate schools which receive federal financial assistance violate this Act (20 U.S.C. §1681(a)(1)) if they restrict their admissions to one gender").

The Limited Participants' Title IX argument, like their other arguments, does not provide a basis for disapproval by the Department of the Charter amendments that have been submitted to the Department. Even if the Limited Participants want the Department to function as a paternalistic protector of the Wilson College Trustees' future range of discretion, the plain language of Title IX makes clear that Title IX would not limit the Trustees' future choices. The deliberative process through which Wilson College mapped its future was not impaired by any misinformation about Title IX.

III. THE COLLEGE'S PROCESS FOR DEVELOPING THE REVISIONS

The Limited Participants only real objection is to the provision of the revised Charter that explicitly extends a coeducational approach across the board, specifically extending it to the College's residential program. A number of the Limited Participants opine that, in making this revision, the Board of Trustees violated its fiduciary duty to the institution by ignoring its history, tradition, and mission. Again, nothing could be further from the truth. Without repeating the long discussion of the Commission and Board

processes that led to the revisions to the Charter as set forth in the College's original submission, it is clear that the Board undertook a detailed study prior to voting on a five point plan, only one facet of which was coeducation at all levels of programming. Not only is it not a violation of the Board's fiduciary duty to periodically assess the mission, but it actually is a Board's duty to do so, and to assess the best ways to not only sustain the institution but empower it to grow and flourish. That is exactly what the Wilson College Board did.

The data available to the Trustees showed that the traditional undergraduate college (College for Women) had been under-enrolled for more than 40 years and that the numbers had remained flat despite numerous remediation efforts during the past three decades. In that factual context, the Board was convinced that "transformative change" (a term used frequently in the Commission process) was required to keep Wilson alive and achieve its goal of sufficient students and sustainability. The Board did not weaken its commitment to women's education or to the rigorous study of liberal arts. Rather, it expanded the opportunity to a broader student population across all programs (we reiterate that the Adult Degree Program – which consists of undergraduates – admitted male students for the entirety of its 31-year history). Just because the College chose to admit men in the traditional undergraduate residential school (again the College has, over many years, admitted sons of employees in the traditional undergraduate college) does not mean the College ceases to educate women, eliminates the Women with Children program, or becomes a "community college or a trade school." Such claims of the Limited Participants are not based in fact or supported by data. The Board of Trustees considered all available information and

opinion, and concluded that the College could not prudently take another 3-4 years to continue to try small changes on the margin and expect to see Wilson thrive. The Board of Trustees looked at the data, listened to the college community, and took action in a manner that they deemed appropriate. We understand that the Limited Participants disagree with the Board of Trustees' decisions in this regard; however, this does not mean, in any sense, that the Board of Trustees violated its fiduciary duty or improperly diverged from the College's history or traditions. Indeed, the Board of Trustees appropriately exercised its fiduciary duty in making the decisions that it did.

The Limited Participants urge the Department to accept the Participants' financial analysis rather than the financial analysis of the College's Board of Trustees. This would be: (1) improper, because financial analysis are not part of the standards for Articles of Incorporation under of Section 6504, and (2) numerically inaccurate. As just one example, Ms. Tishok presents her own financial analyses as evidence, but the analyses she submits are fatally flawed. In her documents (Tishok - attachments 13 and 14) she attempts to reconcile the numbers in the predictive financial model—which is inclusive of all new programs, revenue and expenses—with numbers prepared for a summary (Tishok - attachment 12) requested by Board Chair John Gibb that takes into account only changes in the undergraduate program and that excludes changes in graduate, adult degree and online programs. This document (Tishok - attachment 12) is not part of the predictive financial model and was never presented as such. The "unsubstantiated revenues" Ms. Tishok cites, as well as the variety of net tuition revenue figures, are entirely of her own creation arrived at through the selective use of figures taken out of context from documents never intended to be compatible. Those

figures do not support either a conclusion that the Trustees' decision-making process was flawed or that the Trustees' decision could be rejected under Section 6504.

In significant part, the Limited Participants dissent from the result by critiquing the process used as that result emerged. The College's main response is that opinions about the process – which is all that the Limited Participants have put forward -- simply cannot trigger a negative conclusion about the law and the standards of the Department under Section 6504. Even so, we respond to a few of the Limited Participants' process arguments, as follows.

Curiously, the Limited Participants cite each Trustee's knowledge of the true nature of the information before them as a reason for the Department to conclude that the Trustees' collective decision was improper. (Van Ness, at 10-11.) According to this theory, the fact that decisions were based on knowledge, rather than ignorance or misunderstanding is a reason to find that the Wilson College Board of Trustees violated some applicable statute, regulation, or formal Departmental standard. We disagree.

Melissa Behm argues that there was something "improper" about the College's understanding of the relationship between the law and certain changes in the Articles. (Behm, at 2 et seq.) There are three significant flaws in this objection. First, what is important under Section 6504 is the action taken by the Board of Trustees, not the quality or unanimity of the dialog that led to that action. Second, what was said to the stakeholders was that proposed changes "were meant to be consistent with state law." (Behm, at 3.) This is not a flaw in the process, because the statement is true. Third, Ms. Behm's criticism is only that the changes are not *compelled* by state law. (Id.) This may be true, but is beside the point. The point now is, and the statement at the time

was, that the changes are *consistent with* state law. For example, no participant in the College's process claimed that the extension of coeducational status to more Wilson College programs was *compelled by* state law, but only that it is *consistent with* state law. There is nothing in the dialog cited by Ms. Behm that taints the College's decision-making process. Wilson College Board members know the difference between being consistent with the law and being compelled by the law. The Board was not misled, and did not base its decisions on misleading information.

The testimony of Limited Participant Gretchen Van Ness includes nine pages of her chronology, followed by what she believes is the legal significance of her chronology. The first nine pages are dominated by subjective judgments that, while presumably sincere, should not be the basis for legal conclusions of any type. Near the beginning of her chronology, however, she says something that we agree is both important and true. In early 2012, Ms. Van Ness was an ex-Trustee of the College, and Leslie Durgin was a current Trustee. At that time, the Board of Trustees had approved the recommendation of College President Mistick to create a *Commission on Shaping the Future of Wilson College*. The Board of Trustees asked Ms. Durgin to chair the Commission, and Ms. Durgin asked Ms. Van Ness to serve on the Commission. Ms. Van Ness was concerned about whether the Commission was "just a cover for a decision that had already been made." (Van Ness, at 3.) Ms. Durgin assured Ms. Van Ness that while "everything was on the table" for consideration by the Commission, nothing had been decided. (Id.) While we question the accuracy of some parts of Ms. Van Ness' chronology, we do not question this. It is accurate. The Commission was not working from any preconceptions about the results.

The Limited Participants also seem to assert that the alumnae were not sufficiently involved in the process and that a majority of the alumnae did not agree with the co-educational part of the Board's decision-making. First, the alumnae were an important part of the entire process. The Commission included 6 alumnae and 1 husband or son of alumnae. The Board of Trustees in January 2013 included 14 alumnae and 3 husbands or sons of alumnae. Moreover, rather than reiterate the many efforts to involve the alumnae in the Commission process, we refer the Department to the College's original submission. Needless to say, they, like all other constituencies were asked for input and commentary. Furthermore, the Limited Participants and others went to considerable effort to gather supporters at the June 2013 annual meeting of the Alumnae Association held at Wilson College, where they introduced a motion to formally register opposition to the action of the Board of Trustees. Even in this favorable environment, that motion was not adopted. Thus, the Wilson College Alumnae Association refused to oppose the actions and decisions of the Board of Trustees.

Differences of opinion about the work of committees and commissions are inevitable, even if not always important. Some will believe that a commission should be smaller and more nimble; others will believe that a commission should be more inclusive and therefore larger. Some will believe that a commission is too slow to be effective; others will believe that a commission is too fast to fully consider the issues. Some will believe that experts are needed to develop mathematical models; others will believe that the models of experts are not sufficiently understandable to the layperson. Some will believe that the communications within the commission are too tightly controlled; others will believe that the communications within the commission are out of

control. Some will believe that a commission of planners should stay together to guide the implementation of the decisions; others will believe that planning and implementation are really different functions that are properly for different groups. Some will believe that each part of a large organization should have its own attorneys; others will believe that the organization's attorneys should serve all components of the organization. Some will believe that it is important to receive input from various public constituencies; others will believe that this input is meaningless unless the commission takes the additional step of responding to the public input. These differences are inevitable in any organization encompassing multiple constituencies.

Looking at the work of the Commission on Shaping the Future of Wilson College, Ms. Van Ness has an opinion on each of these issues, and others. The College itself, acting through its Board of Trustees, has a different opinion. Our point here is not to argue whether Ms. Van Ness is right or wrong on each of these points. Rather, the fundamental point here is that these subjective differences do not amount to a basis for concluding that the proposed amendments to the Articles do not conform to law, including the regulations of the Department. Thus, the complaints of Ms. Van Ness are ultimately minority dissents from the super-majority vote of the Board of Trustees, not factors that can justify a disapproval under 24 Pa CS §6504(c).

Ms. Van Ness quoted another Commission member as saying that "The process has driven us to a conclusion, which is different than consensus." (Van Ness, at 7.) Even if we were to take this at face value, what does it mean here, in this administrative forum? If there was a lack of consensus, this may be unfortunate, but it is not illegal or a reason not to approve the proposed changes in the Articles of Incorporation.

Ultimately, the work of the Commission, transmitted through the President to the Board, was adopted by more than a two-thirds super-majority of the Board of Trustees. That process was a sound one.

Ms. Van Ness distorts the facts to try to make a claim of illegality, when there is only a difference in the preferred result. This reaches apogee when Ms. Van Ness asserts that the Board of Trustees approved recommendations even though, according to Ms. Van Ness, the Trustees knew that the recommendations were based on information that was "inaccurate, incomplete, and misleading." This argument is based on what the individual Trustees supposedly "knew" when a super-majority of them voted in favor of a package of amendments. This argument therefore invites the Department to crawl inside the mind of each of the Trustees who voted for what Ms. Van Ness would not have voted for. This goes too far. The Limited Participants not only ask the Department to believe one mathematical model over another; they also ask the Department to make conclusions about what the various Trustees believed about those mathematical models. The Limited Participants are asking the Department to do what it cannot (and should not) do.

Section 6504 directs the Department only to determine whether an amendment to a college's Articles of Incorporation conforms to law, including the regulations of the Department and the standards and qualifications prescribed by the State Board. Under Section 6504, an established college's proposed amendments must be approved if a new institution of postsecondary education would receive a certificate of authority with the same sort of Articles of Incorporation. At its core, the question under Section 6504 is, therefore, whether a new institution, proposing to be coeducational, would receive a

certificate of authority from the Department notwithstanding the new institution's coeducational design. The Limited Participants have presented their minority opinion that the proposed change is undesirable; but this minority opinion does not compel, or even justify, a disapproval under Section 6504.

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