



Terri Kondeff
Director

Legislative Services Office Idaho State Legislature

Serving Idaho's Citizen Legislature

February 22, 2024

The Honorable Brent Crane
The Honorable John Gannon
The Honorable C. Scott Grow
The Honorable Wendy Horman
The Honorable Mike Moyle
The Honorable Bruce Skaug
The Honorable Melissa Wintrow

RE: University of Phoenix

Dear Members:

You requested a letter detailing my legal concerns about the State Board of Education's intended acquisition of the University of Phoenix. This acquisition is proposed to be accomplished through a corporation, the creation of which was authorized by the Board on May 18, 2023.

Although my concerns are many, my primary concern is this: the Board is attempting to escape its constitutional and statutory limitations by recreating itself as a private corporation. If the Board's conduct is allowed to stand, an incredibly dangerous precedent would be set, perhaps inspiring other state agencies impatient with their constitutional and statutory restrictions to follow suit. But the practice of governments creating corporations to avoid their constitutional limitations has been denounced by the United States Supreme Court, which observed in the case *Lebron v. National Railroad Passenger Corporation*: "It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form."¹

1. The Board has no constitutional or statutory authority to acquire, own, and operate a private institution or to assume its liabilities, either directly or indirectly through a corporation.

While this transaction is being described by its proponents as a mere "affiliation" between the University of Idaho and the University of Phoenix, the transaction is, in reality, an acquisition by the Board. Specifically, the Board voted on May 18 to: (1) authorize the creation of a corporation, NewU;

¹ 513 U.S. 374, 397, 115 S.Ct. 961, 973 (1995). In that case, Amtrak, a corporation created by Congress, claimed that because it was not a government entity, it was not bound by the First Amendment. The Court rejected the claim in an 8-1 opinion drafted by Justice Scalia and joined, among others, by Justice Ginsburg. Only Justice O'Connor dissented.

Paul Headlee, Deputy Director
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(2) authorize NewU to acquire “substantially all of the assets” and assume “certain liabilities” of the University of Phoenix; and (3) authorize “related transactions.”²

NewU, which subsequently changed its name to Four Three Education,³ has one member, the Board — or the University of Idaho, depending on which document⁴ you consult — which has the power to appoint and remove all of the corporation’s directors.⁵ The Articles of Incorporation provide that Four Three Education’s corporate purposes are to “establish, operate, conduct, and administer a degree granting and credit bearing institution of higher education affiliated with The Regents of the University of Idaho,” to provide for the instruction of students and the award of degrees, to offer and operate educational programs, and to engage in “any other lawful activity for which non-profit corporations may be incorporated.”⁶ Materials for the Board’s May 18 meeting make clear that the purpose of the corporation is to “operate an accredited institution of higher education in substantially the same manner as is currently operated” by the University of Phoenix.⁷

In other words, the intent of the Board in creating Four Three Education is to acquire a private institution and operate it as a private institution. Neither the Board nor the University of Idaho has requested the legislation necessary to convert the University of Phoenix into a state institution of higher education. Nor has the Board or the University of Idaho, to date, expressed a desire for such legislation.

This is significant because the State Board of Education has no constitutional or statutory authority to acquire, own, and operate a private institution of higher education or to assume its liabilities. Quite the opposite, in fact: under the Idaho Constitution, the Board has “general supervision of the *state* educational institutions and *public* school system of the state of Idaho.”⁸ The Board’s other powers and duties are those “prescribed by law.”⁹

For the authority to enter this transaction, the Board and the University invoke four sources: (1) Idaho State Board of Education Governing Policies and Procedures § V.C.1.c; (2) Article IX, Section 2 of the Idaho Constitution; (3) I.C. § 33-2802; and (4) the Idaho Nonprofit Corporation Act. Not one of these sources allows the Board and the University to do what they are proposing to do.

Board Policy § V.C.1.c

It should be stated at the outset that Board policy does not and cannot supersede or circumvent law, let alone the Idaho Constitution. That being said, the policy does not permit the Board to: (1) acquire, own, and operate a private institution; (2) assume a private institution’s liabilities; or (3) create a corporation that may acquire, own, and operate a private institution and assume its liabilities. The policy concerns the University of Idaho’s spending authority *for itself* and refers to the “constitutional status and unique

² Minutes of the State Board of Education 8, May 18, 2023 [*hereinafter* “Minutes”].

³ Articles of Amendment to Articles of Incorporation of NewU, Inc., filed June 21, 2023.

⁴ The Minutes and the Bylaws of Four Three Education state that the Board is the sole member of the corporation, but the Articles of Incorporation state that the University of Idaho is. *See* Articles of Incorporation of NewU, Inc., filed May 15, 2023 [*hereinafter* “Articles”], which identify the University of Idaho as the sole member in Article VII.

⁵ Minutes at 2. *See also* Meeting Materials of the State Board of Education 1, May 18, 2023 [*hereinafter* “Materials”].

⁶ Articles at V.

⁷ Materials at 1.

⁸ Idaho const. art. IX, § 2 (emphasis added).

⁹ *Id.*

standing” of the Board of Regents and the University of Idaho under state and federal law.

Any “unique standing” of the Board and the University under federal law may be easily dispensed with by pointing out that federal law explicitly requires the University of Idaho, as a land grant university, to “forever remain under the exclusive control” of the state.¹⁰ It is therefore doubtful that the Federal Government or federal courts would view with friendly eyes any argument by the Board or the University that they may safely ignore the Idaho Constitution and Idaho law because of their “unique standing.” Here, also, neither the Board nor the University has invoked any specific federal law that permits them to make the Phoenix transaction.

Regarding the “constitutional status” of the Board and the University, the policy does not specifically cite but likely refers to Article IX, Section 10 of the Idaho Constitution, which provides in full:

The location of the University of Idaho, as established by existing laws, is hereby confirmed. All the rights, immunities, franchises, and endowments, heretofore granted thereto by the territory of Idaho are hereby perpetuated unto the said university. The regents shall have the general supervision of the university, and the control and direction of all the funds of, and appropriations to, the university, under such regulations as may be prescribed by law. The regents may impose rates of tuition and fees on all students enrolled in the university as authorized by law. No university lands shall be sold for less than ten dollars per acre, and in subdivisions not to exceed one hundred and sixty acres, to any one person, company or corporation.

Interpreting this section of the Constitution, the Idaho Supreme Court has observed that the Board, in its capacity as the Board of Regents of the University of Idaho, is a “constitutional corporation with *granted powers*, and while functioning *within the scope of its authority* is not subject to the control or supervision of any other branch, board or department of the state government, but is a separate entity...with the right to exercise its discretion *within the powers granted*.”¹¹

To understand what the Court is saying here, it is necessary to understand what, exactly, a corporation is. A corporation is an artificial being created by law and capable of acting, within the scope of its charter, as a natural person.¹² Because a corporation is a “creature” of law,¹³ the creation of a corporation is a legislative function¹⁴ and “under the absolute control of the legislature.”¹⁵ A corporation “possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.”¹⁶ Significantly, a corporation may not exercise any power or authority that is not granted to it under its charter.¹⁷

A corporation may be created either by special act of a legislature or under general laws enacted by a

¹⁰ Idaho Admission Bill, 26 Stat. L. 215, ch. 656, § 8 (1890).

¹¹ *State v. State Board of Education*, 33 Idaho 415, 196 P. 201, 205 (1921) (emphasis added).

¹² *State v. Cosgrove*, 36 Idaho 278, 210 P. 393, 395 (1922).

¹³ *Id.*

¹⁴ *Cochran v. Black*, 240 Ark. 393, 397, 400 S.W.2d 280, 283 (Ark. 1966).

¹⁵ *Riddle v. Commission of Banking and Insurance*, 100 A. 692 (N.J. 1917).

¹⁶ *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 4 Wheat. 518, 636 (1819).

¹⁷ *Oregon Railway and Navigation Co. v. Oregonian Railway Co.*, 130 U.S. 1, 9 S.Ct. 409, 412 (1889).

legislature.¹⁸ When a corporation is created by special act, the special act serves as the corporation's charter.¹⁹ The charter of a corporation is the "measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental."²⁰ The United States Supreme Court, clarifying the differences between natural and artificial persons, stated that while a natural person may do anything "not forbidden by law," the artificial person — that is, a corporation — may do only what is permitted by its charter, as its "powers and immunities depend primarily upon the law of its creation."²¹ Otherwise, the corporation is "subject, like individuals, to the will of the law-making power."²²

The University of Idaho and its Board of Regents, a "body corporate," were created by special act of Idaho's Territorial Legislature in 1889.²³ The act grants the Board several specific powers, but the powers to acquire, own, and operate a private institution, to create a corporation to do so, or to authorize the creation of a corporation are not among them. While the Board is also granted powers "necessary or convenient to accomplish the objects and perform the duties prescribed by law,"²⁴ no object or duty prescribed in the act, or in any other law, is of a type that would require the acquisition and operation of a private institution or the creation of a corporation. The act, after all, creates a *public* university, the object of which is to "provide the means of acquiring a thorough knowledge of the various branches of learning connected with scientific, industrial and professional pursuits."²⁵ To accomplish this object, the Board is granted the power and duty to elect a president and faculty members, determine the qualifications of applicants for admission, prescribe rules and regulations for the management of university property, expend university income to erect buildings and purchase materials and equipment, and regulate the courses of instruction.²⁶ The Board is given no object or duty that it and the public university it oversees cannot, themselves, accomplish.

It is therefore beyond the scope of the Board's charter to acquire a private institution, own it, operate it, and assume its liabilities, whether directly itself or indirectly through a corporation.

The special act was the "only law in force" regarding the University of Idaho when the Idaho Constitution was adopted.²⁷ The "rights, immunities, franchises, and endowments" recognized in Article IX, Section 10 are therefore those provided in the special act, and only those.²⁸

Article IX, Section 10 also provides to the Board of Regents the "general supervision of the university"

¹⁸ See *Lord v. Equitable Life Assurance Society*, 94 N.Y.S. 65, 70, 47 Misc. 187, 194 (N.Y. 1905). A general law applies to all persons and subject matters in like situations, while a special law relates to particular persons or things. See *Mix v. Board of Commissioners of Nez Perce County*, 18 Idaho 695, 112 P. 215, 218 (1910).

¹⁹ *Lord*, 94 N.Y.S. at 70, 47 Misc. at 194. See also *State ex rel. Carter v. Harris*, 273 Ala. 374, 376, 141 So.2d 175, 176 (Alabama 1961).

²⁰ *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U.S. 24, 48, 11 S.Ct. 478, 484 (1891).

²¹ *Northwestern Fertilizing Co. v. Village of Hyde Park*, 97 U.S. 659, 666-667, 24 L.Ed. 1036 (1878).

²² *Id.* at 667.

²³ See An Act to Establish the University of Idaho, Territorial Session Laws 1888-1889, pp. 17-21.

²⁴ *Id.* at § 3, p. 17.

²⁵ *Id.* at § 9, p. 19.

²⁶ *Id.* at §§ 5, 6, and 8, pp. 18-19.

²⁷ *State v. State Board of Education*, 196 P. at 204.

²⁸ *Id.* at 204-205. See also *University of Utah v. Shurtleff*, 144 P.3d 1109, 1118 (2006), in which the Utah Supreme Court, analyzing similar language in the Utah Constitution, ruled that the language did not "create or confer any new powers or authority on the University. Rather, it simply 'perpetuated' the rights enjoyed by the University at the time our constitution was adopted."

and the “control and direction of all the funds of, and appropriations to, the university, under such regulations as may be prescribed by law.” Neither provision may reasonably be read to permit the Board to acquire, own, or operate a private institution, to assume its liabilities, or to create a corporation to do so. The general supervision of the University of Idaho does not require direct or indirect ownership of a private institution; neither does the control and direction of the University’s funds and appropriations, which are intended for the benefit of the University itself. The Board cannot invoke its authority to supervise the University of Idaho as justification to control another institution. That argument *might* have some relevance if the goal here were to integrate the University of Phoenix into the University of Idaho, but the Board and the University of Idaho have repeatedly made clear that the University of Phoenix will continue operating as a separate institution.

Article IX, Section 2

This provision of the Idaho Constitution, already discussed above, specifies that the State Board of Education shall have the “general supervision of the state educational institutions and public school system of the state of Idaho.” All other powers and duties are those “prescribed by law.”

The University of Phoenix is neither a state educational institution nor a public school, and the Board does not propose to make the University of Phoenix either a state educational institution or a public school. The Board therefore derives no power to acquire, own, and operate the University of Phoenix, or to form a corporation to do so, through this section of the Constitution. Nor does the Board derive any such power from law, since the Legislature has enacted no statute enabling such activities.

I.C. § 33-2802

Chapter 28, Title 33 of the Idaho Code, of which I.C. § 33-2802 is a part, is the codification of the Territorial Legislature’s special act establishing the University of Idaho. The section has been amended several times, but the substance remains the same: the “general supervision, government and control of the University of Idaho is vested” in the State Board of Education, otherwise known as the Board of Regents of the University of Idaho.

Nothing in this statute gives the State Board of Education the authority to acquire another institution or to supervise, govern, and control any institution other than the University of Idaho. Certainly there is nothing in this statute about the ability to form a corporation.

The Idaho Nonprofit Corporation Act

Chapter 30, Title 30 of the Idaho Code, the Idaho Nonprofit Corporation Act, is a general law allowing for the creation of nonprofit corporations as long as the requirements of the act and other pertinent statutes are satisfied. One such statute is I.C. § 30-501, which provides, “Every corporation organized for any lawful purpose or purposes, whether a general business corporation or a designated class of corporation, shall, by the act of filing incorporation documents with the state of Idaho, acknowledge and accept the provisions of the constitution of the state of Idaho as binding upon that corporation.”

Article III, Section 19 of the Idaho Constitution prohibits the Legislature from creating any corporation, and Article XI, Section 2 prohibits the Legislature from granting charters of incorporation. The effect of

these provisions is to ban the *state*, not merely the Legislature, from creating corporations. The Idaho Constitution is a limitation on power²⁹ that divides the “powers of the government” into three branches: the legislative, executive, and judicial.³⁰ No “person or collection of persons” in one branch may exercise any of the powers “properly belonging” to the others, “except as in this constitution expressly directed or permitted.”³¹

As discussed above, the creation of corporations is a legislative function. In the absence of constitutional restrictions, the Legislature would have the exclusive power to create corporations, because neither the executive branch nor the judiciary is expressly given that power elsewhere in the Constitution. By denying to the Legislature the power to create corporations, the Idaho Constitution has denied to the state such power. The state is limited to authorizing the organization of corporations under general laws.³²

While the Legislature has enacted a general law allowing municipalities to create public corporations,³³ it has not done so for state entities. Nor has the Legislature enacted a general law allowing state entities to form corporations under the Idaho Nonprofit Corporation Act. Nor can the specific power to organize a corporation under the Idaho Nonprofit Corporation Act be inferred from the Board’s charter, given that the Idaho Nonprofit Corporation Act did not exist in 1889. A general law allowing the organization of corporations for purposes other than profit did exist in Idaho Territory,³⁴ but the Board’s charter makes no mention of it or of the power to organize corporations in any way.

When the Legislature believes it necessary to directly create public entities with corporate powers, it does so by creating independent public bodies corporate and politic, because the Idaho Constitution recognizes the Legislature’s ability to create such bodies.³⁵ The distinction between an independent body corporate and politic and a prohibited corporation, according to the Idaho Supreme Court, is that private parties may not control or manage the independent body, nor may private parties change the independent body’s fundamental structure or public purpose.³⁶ The state, thus having the power to directly create bodies with corporate powers, does not need to avail itself of the Idaho Nonprofit Corporation Act or of any general law enabling the creation of corporations.

Because the state cannot directly create corporations, because the Legislature has enacted no general law enabling state entities to create corporations, and because neither the Board’s charter nor any other statute confers on the Board the specific power to create a corporation or authorize the creation of a corporation, I find unpersuasive the Board’s claim that it may avail itself of the Idaho Nonprofit Corporation Act.³⁷ It is my opinion that Four Three Education is not a valid corporation under Idaho law

²⁹ *Rich v. Williams*, 81 Idaho 311, 323, 341 P.2d 432, 439 (1959).

³⁰ Idaho const. art. II, § 1.

³¹ *Id.*

³² Idaho const. art. XI, § 2.

³³ See the Municipal Industrial Development Program, chapter 27, title 50, Idaho Code.

³⁴ See Revised Statutes of Idaho § 2760 (1887).

³⁵ See Idaho const. art. VIII, §1 (mentioning “independent public bodies corporate and politic created by law”).

³⁶ *Board of County Commissioners of Twin Falls County v. Idaho Health Facilities Authority*, 96 Idaho 498, 507, 531 P.2d 588, 597 (1974).

³⁷ I also find unpersuasive the claim that Four Three Education is a *nonprofit* corporation. A nonprofit corporation may not make distributions to its members except upon dissolution. I.C. §§ 30-30-904 and 30-30-905. A distribution is a “payment of...any part of the income or profit of a corporation to its members, directors or officers.” I.C. § 30-30-103(9). Under the

and does not possess legal existence.

What makes this so troubling is that, while the University of Idaho has repeatedly claimed that any risks of this transaction have been “mitigated,” it would seem that the primary risk mitigation strategy is the creation of Four Three Education. A member of a corporation is typically not liable for the “acts, debts, liabilities or obligations of the corporation.”³⁸ But if a corporation does not exist, and the people purporting to act as or on behalf of a corporation know it does not exist, then they are “jointly and severally liable for all liabilities created while so acting.”³⁹

I have discussed my concerns about Four Three Education’s legal existence with the University of Idaho’s general counsel as well as the University’s government affairs liaison. The University cannot, at this point, claim that it is unaware of these concerns. Certainly after the introduction of House Concurrent Resolution 26, it is doubtful that any person connected with Four Three Education can credibly claim they are unaware that there are concerns about the validity of Four Three Education’s legal existence.

Only the state can directly attack the legal existence of a corporation,⁴⁰ but some courts have allowed private parties to raise the issue of a corporation’s legal existence if the underlying case concerns the enforcement of private rights.⁴¹ I don’t know how likely such a court ruling would be in a case involving significant public as well as private interests. But given the potential liabilities here — the parties to the Phoenix transaction have agreed to a purchase price of \$550 million, with bonding in the amount of \$685 million,⁴² to say nothing of the liabilities that might be inherited from the University of Phoenix — “I don’t know” is not a good enough answer. It is my belief that if the State Board of Education and the University of Idaho proceed under the current terms of the proposed transaction, they do so at their peril. Far more disturbingly, they do so at the peril of the Legislature and the people of Idaho, who might be called on to rescue the University of Idaho from a disastrous financial judgment.⁴³

2. The Board has no constitutional or statutory authority to invent powers for itself.

Lacking the current constitutional and statutory authority to: (1) acquire, own, and operate a private institution; (2) assume the liabilities of a private institution; or (3) create or authorize the creation of a corporation, the State Board of Education may not decide to invent new powers for itself. The Idaho Constitution provides that all “political power is inherent in the people.”⁴⁴ The people, through their

Phoenix transaction, the University of Idaho “anticipates receiving financial benefits from [Four Three Education] in the amount of at least \$10,000,000 annually.” Minutes at 3. The University of Idaho is a member of Four Three Education pursuant to the Articles of Incorporation. If these “financial benefit” payments are derived from Four Three Education’s income or profits, as indicated in the Board’s meeting materials, and if the University of Idaho is in fact the sole member of the corporation, then the “financial benefits” being promised by the deal’s proponents would likely be an illegal distribution to a member for purposes of I.C. § 30-30-904.

³⁸ I.C. § 30-30-406.

³⁹ I.C. § 30-30-204.

⁴⁰ See the discussion below about actions in the nature of quo warranto.

⁴¹ 5A Fletcher Cyc. Corp. § 2331. See also e.g. *Hearth Corporation v. C-B-R Development Co., Inc.*, 210 N.W. 2d 632, 635 (Iowa 1973).

⁴² Minutes at 3.

⁴³ The Legislature has “absolute control over the finances of the state.” *Davis v. Moon*, 77 Idaho 146, 151, 289 P.2d 614, 617 (1955). The finances of the state are, of course, derived from tax revenues paid by the people.

⁴⁴ Idaho const. art. I, § 2.

adoption of the Idaho Constitution, chose to divide the powers of government among the legislative, executive, and judicial branches.⁴⁵ The State Board of Education is part of the executive branch.⁴⁶

Of the three branches of state government, the Legislature alone has the power to make law,⁴⁷ as it represents the “polity and its will.”⁴⁸ The Idaho Constitution distributes some powers and duties to the State Board of Education but specifies that other powers and duties are those “prescribed by law.”⁴⁹ Because the Board lacks the ability to make law, it has no ability to prescribe to itself new powers and duties, such as the power to operate a private institution or create a corporation. In attempting to give itself new powers, the Board has unconstitutionally encroached on the legislative power.

3. The Board is endangering sovereign immunity by claiming corporate membership for itself and the University of Idaho and by acting outside the scope of its legal authority.

The lack of transparency about the Phoenix transaction has made it extremely difficult to judge how much financial exposure the University and the state might have due to the transaction. Suffice it to say, potential litigants are unlikely to be dissuaded from trying to reach the University — and the state — simply because the Board has attempted to create a corporation.

States are generally immune from suit under the doctrine of sovereign immunity.⁵⁰ Ordinarily, a suit against the University of Idaho would be considered a suit against the state, and the University would be protected.⁵¹ However, “as a member of a corporation, a government never exercises its sovereignty.”⁵² Instead, the government “divests itself...of its sovereign character, and takes that of a private citizen.”⁵³ “The government, by becoming a corporation, lays down its sovereignty, so far as respects the transactions of the corporation, and exercises no power or privilege which is not derived from the charter.”⁵⁴ Furthermore, sovereign immunity does not protect states from suits alleging violations of the state’s constitution.⁵⁵ Finally, sovereign immunity does not protect state entities that have acted outside the scope of their legal authority.⁵⁶

States may waive their sovereign immunity in certain classes of cases, and Idaho has done so in, for example, the Idaho Tort Claims Act.⁵⁷ However, any such waiver should be made by the Legislature, as the Legislature is best suited to “weigh the conflicting public policies associated with waiving immunity and exposing the government to increased liability, the burden of which the general public must ultimately bear.”⁵⁸ The State Board of Education should not be able to recklessly surrender the state’s

⁴⁵ Idaho const. art. II, § 1.

⁴⁶ Idaho const. art. IV, § 20, and I.C. § 67-2402. *See also Ybarra v. Legislature by Bedke*, 166 Idaho 902, 905, 466 P.3d 421, 424 (2020) (describing the State Board of Education as an “executive branch agency”).

⁴⁷ *State v. Ahmed*, 169 Idaho 151, 163, 492 P.3d 1110, 1122 (2021).

⁴⁸ *Hans v. Louisiana*, 134 US 1, 21, 10 S.Ct. 504, 509 (1890).

⁴⁹ Idaho const. art. IX, § 2.

⁵⁰ *See e.g. Alden v. Maine*, 527 U.S. 706, 712-713, 119 S.Ct. 2240, 2246-2247 (1999).

⁵¹ *See e.g. Mazur v. Hymas*, 678 F.Supp. 1473 (D. Idaho 1988).

⁵² *Bank of the United States v. Planter’s Bank of Georgia*, 22 U.S. 904, 9 Wheat. 904, 908 (1824).

⁵³ *Id.* at 907.

⁵⁴ *Id.* at 909.

⁵⁵ 72 Am. Jur. 2d States, Etc. § 115.

⁵⁶ *Id.* at § 112.

⁵⁷ Chapter 9, title 6, Idaho Code.

⁵⁸ *Robbins v. Lostracco*, 578 S.W.3d 130, 135 (Texas App. 2019).

sovereign immunity by recreating itself as a corporation and acting beyond its granted powers.

4. To protect the people and the legislative power, the Legislature should request or file appropriate legal action, unless the Board is willing to abandon the Phoenix transaction or seek legislative approval of a restructured transaction.

Due to my concerns about the Phoenix transaction, I have recommended to all of you that the Legislature seek the initiation of appropriate legal action. I am willing to reconsider this recommendation if the Board:

- a. Repairs its encroachment of the legislative power by seeking legislative approval of the Phoenix transaction; and
- b. Restructures the Phoenix transaction so that it does not involve the state creation of a corporation and does not involve what is essentially state ownership and operation of a private institution.

If the Board proves unwilling to do either of the above, I advise the Legislature or its agents to request that the Attorney General file an action in the nature of quo warranto under I.C. § 6-602.

“Quo warranto” means “by what authority.”⁵⁹ The action may be brought by the Attorney General against a party that has abused, misused, or usurped a corporate franchise.⁶⁰ I believe an action in the nature of quo warranto should be brought: (1) against the State Board of Education in its corporate capacity as the Board of Regents of the University of Idaho, for the reason that it has acted beyond the scope of its charter; and (2) against Four Three Education for the purpose of cancelling, revoking, or nullifying its incorporation based on its unconstitutional and unlawful formation.

If the Attorney General refuses to bring the action, then I recommend that the Legislature or its agents retain private counsel experienced in civil litigation to advise the Legislature or its agents of its options. One possibility would include requesting a writ of mandamus from the Idaho Supreme Court ordering the Attorney General to file an action in the nature of quo warranto. Another possibility would be for the Legislature’s agents to apply with the district court for leave to file a quo warranto action on behalf of the people.⁶¹ Other forms of relief might be available as well.

The proposed Phoenix transaction is a matter of tremendous public importance, but the people and their elected representatives have so far been deprived of their right to have any meaningful say in the matter. The most solemn obligation of any public entity is to serve the public interest. If the State Board of Education and the University of Idaho have forgotten that — if, indeed, they have forgotten that they exist only by leave of the people, to perform duties for and on behalf of the people, using powers conferred on them by the people — they should be reminded. Neither the Board nor the University is private, and they have no legal right to act as if they are.

⁵⁹ Black’s Law Dictionary (11th ed. 2019).

⁶⁰ Bart W. Harwood, *The Law of Quo Warranto in Idaho*, 4 Idaho L. Rev. 26 (1967).

⁶¹ *See Toncray v. Budge*, 14 Idaho 621, 95 P. 26, 33 (1908).

Sincerely,



Elizabeth Bowen
Legislative Legal Counsel