

MEMORANDUM

To: Speaker of the House Mike Moyle
President Pro Tempore Chuck Winder
From: Preston N. Carter, Morgan D. Goodin, Givens Pursley LLP
Re: University of Phoenix Transaction – Board of Regents’ Legal Authority
Date: March 11, 2024

We have been asked to analyze whether the Board of Regents of the University of Idaho (Board) has the legal authority to create a private corporation to acquire the assets of the University of Phoenix and operate those assets, doing business as the University of Phoenix, separately from the University of Idaho.

EXECUTIVE SUMMARY

In May 2023, the Board authorized creation of Four Three Education, Inc. (Four Three), a private nonprofit corporation. University of Idaho is Four Three’s sole member. Shortly afterwards, Four Three and the Board signed a purchase and sale agreement (Agreement) under which Four Three will acquire most of the assets of the University of Phoenix. The purchase price is \$550,000,000 and will be funded by approximately \$685,000,000 in bond proceeds.

Four Three will operate the acquired assets, doing business as the University of Phoenix, in substantially the same form as the University of Phoenix is currently operated. The Board of Regents will appoint a board of directors for Four Three d/b/a University of Phoenix. The University of Idaho has represented that the majority of Four Three’s board-members will be independent from the Board of Regents, and that the University and Four Three d/b/a University of Phoenix will “affiliate,” though details of any such affiliations, apart from the transaction itself, are not within the document available for public review.

The Board of Regents is a constitutional corporation of the State of Idaho that “ha[s] the general supervision of the university [of Idaho]” and its funds “under such regulations as may be prescribed by law.” IDAHO CONST. art. IX, § 10. Existing caselaw establishes that the Board’s authority, when exercised within its proper scope, is broad and cannot be interfered with by other branches of government. However, this caselaw addresses the Board’s direct supervision of the University. The text and structure of the relevant constitutional and statutory provisions also establish the Board’s direct supervisory authority over the University of Idaho. Neither existing caselaw nor the relevant constitutional or statutory provisions provide the Board with authority to create a private corporation to acquire the assets of another university and operate those assets separately from the University of Idaho.

Based on our review of applicable legal authorities, in our opinion the Board lacks the legal authority to create a private corporation to acquire the assets of the University of Phoenix and operate those assets doing business as the University of Phoenix, separately from the University of Idaho.

LEGAL AND FACTUAL BACKGROUND

1. The transaction

The University of Phoenix is a private, for-profit University that currently serves approximately 85,000 students around the world.¹ The Board of Regents is a constitutional corporation of the State of Idaho charged with supervising the University of Idaho.

In May 2023, the Board of Regents authorized the incorporation of a non-profit corporation, currently known as Four Three Education. The University of Idaho is the sole member of Four Three. One of the stated purposes of Four Three is 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.”²

In May 2023, Four Three and the Board of Regents signed the Agreement, under which Four Three would pay \$550,000,000 to acquire certain assets and incur certain liabilities of the University of Phoenix. The purchase price will be funded by approximately \$685,000,000 in bond proceeds.

The bonds are reported to be “no recourse” bonds; that is, payment would be secured by Four Three with no recourse to the Board, the University of Idaho, or the state of Idaho. Under the Agreement, University of Idaho will guarantee payment on the bonds up to \$10,000,000 for up to five years for a total of \$50,000,000. The University of Idaho has funded approximately \$12,000,000 in due-diligence costs, which will be reimbursed by Four Three if the transaction closes.

The Board of Regents will appoint a board of directors to govern Four Three. The majority of this board will be independent from the Board of Regents and will be empowered to make certain decisions on Four Three’s behalf. The authority to make certain other major decisions will be retained by the Board of Regents. The president of the University of Idaho has indicated that he will not serve as the president of Four Three d/b/a University of Phoenix; it has been stated that Four Three d/b/a University of Phoenix will hire the University of Phoenix’s current leadership team.

The University of Idaho is not itself acquiring the assets of the University of Phoenix. Four Three is acquiring those assets. Four Three will operate those assets, using the University of Phoenix name, separately from the University of Idaho. Materials from the Board of Regents indicate that Four Three d/b/a University of Phoenix will operate the University of Phoenix assets “in substantially the same manner as [the University of Phoenix] is currently operated,” using the business name of University of Phoenix.

¹ This memorandum is based on the law currently in effect and documents currently available to the public. It should not be construed to address any issue other than those expressly addressed. It is our understanding that this memorandum may be provided to persons outside the scope of the attorney-client relationship and, as such, that this memorandum is not subject to attorney-client privilege.

² Articles of Incorporation of NewU, Inc. at § 5.1.

In sum, after the transaction, Four Three will own substantially all the assets of the University of Phoenix and some of its liabilities; the purchase will be funded by bond proceeds; Four Three will operate the University of Phoenix in substantially the same manner as the University of Phoenix is currently operated, using the University of Phoenix’s business name; and Four Three d/b/a University of Phoenix will be operated by a majority-independent board of directors, appointed by the Board of Regents, that will have authority to make certain decisions related to Four Three d/b/a University of Phoenix.

2. Relevant constitutional provisions, statutory provisions, and caselaw

Constitutional provisions. Article IX, section 10 of the Idaho Constitution provides, in relevant part,

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.*

IDAHO CONST. art. IX, § 10 (emphasis added). This is the only constitutional provision that expressly addresses the Board of Regents’ authority as to the University of Idaho.³

Statutory provisions. The authority of the Board is set forth in sections 33-2801 through 33-2816 of the Idaho Code. With a few exceptions, these statutory provisions were part of the territorial laws in place when the Idaho Constitution was adopted.⁴ A summary of these provisions is provided below.

Section 33-2802 vests “[t]he general supervision, government and control of the University of Idaho” with the state board of education, which also constitutes the board of regents of the University of Idaho.

Section 33-2804, entitled “General Duties of the Board,” provides in relevant part,

³ A different constitutional provision places the state board of education in charge of the state educational institutions and public school system within Idaho. IDAHO CONST. art. IX, § 2. This memorandum analyzes the Board’s powers only under article IX, section 10 because supporting legal analyses asserted that this transaction was completed under the authority granted by that section alone. *See* Feb. 28, 2024 Letter to the Board of Regents of the University of Idaho (Feb. 28, 2024 Letter) at 3 (“To reiterate, this transaction is being done under the powers of the Board of Regents secured in Article IX, Section 10.”).

⁴ Provisions authorizing the expenditure of funds for buildings and a library, confirming authority to create and maintain a college of agriculture, empowering the state treasurer to serve as the treasurer of the regents of the university, directing the management of money deposited with the treasurer, and authorizing certain mining-related classes for non-university students were passed in 1909, 1927, and 1945, respectively. *See* I.C. §§ 33-2807, 33-2809, 33-2810 and 33-2815.

The members of the state board of education in the performance of their functions as the board of regents of the university and their successors in office, shall constitute a body corporate, by the name of the regents of the University of Idaho, and shall possess *all the powers necessary or convenient to accomplish the objects and perform the duties prescribed by law*, and shall have the custody of the books, records, buildings and other property of said university.

(emphasis added).

Section 33-2806, entitled “Powers of the board – Sectarian tests prohibited,” provides in relevant part

“The board of regents shall enact laws *for the government of the university in all its branches*, elect a president and the requisite number of professors, instructors, officers and employees, and fix the salaries and the term of office of each, and determine the moral and educational qualifications of applicants for admission to the various courses of instruction; . . . The board of regents shall have power to remove the president or any professor, instructor or officer of the university, when, in their judgment, the interests of the university require it. The board may *prescribe rules and regulations for the management of the libraries, cabinets, museum, laboratories and all other property of the university and of its several departments*, and for the care and preservation thereof, with penalties and forfeitures, by way of damages for their violation, which may be sued for and collected in the name of the board before any court having jurisdiction of such action.

(emphasis added)

Section 33-2807 authorizes the Board “to expend such portion of the income of the university fund as they may deem expedient for the erection of suitable buildings and the purchase of apparatus, a library, cabinets and additions thereto.”

Section 33-2812 provides, in relevant part,

The object of the University of Idaho shall be to provide the means of acquiring a thorough knowledge of the various branches of learning connected with the scientific, industrial and professional pursuits, and *to this end it shall consist of the following colleges or departments*, to wit:

1. The college or department of arts.
2. The college or department of letters.

3. The professional or other colleges or departments, as may from time to time be added thereto or connected therewith.

(emphasis added).

Section 33-2813 provides that establishment of a college of agriculture is within the Board's authority, and "approve[s] and confirm[s]" the Board's actions in establishing the college of agriculture.

Section 33-2814 sets forth the components of the college of arts and the college of letters, and provides that science courses shall be expanded into distinct colleges of the university "as soon as the income of the university will allow, in such order as the wants of the public shall seem to require[.]"

Section 33-2815 provides that the Board "may prescribe a special course of instructions in practical prospecting, including a short course in practical mining . . . at the University of Idaho, or in a mobile unit of the school of mines," for students who are interested but who "may be ineligible for admission to enter the University of Idaho on account of having deficient entrance credits."

Caselaw. Few cases from the Idaho Supreme Court directly address the Board's authority under article IX, section 10 of the constitution. In *State ex rel Black v. State Board of Education*, the attorney general sought a writ of prohibition to stop the Board of Regents from taking certain actions: purchasing land to be used for agricultural experimentation for the sum of \$100; keeping \$75 in proceeds from the sale of a used boiler; and contracting for the Board's own lawyers rather than using the attorney general.⁵

The Supreme Court denied the writ, holding that the Board of Regents was a constitutional corporation and, as such, the Board was free to operate within its scope of authority without interference from other branches of government: "[T]he Board of Regents 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."⁶ Accordingly, the Court concluded, the Board of Regents could undertake the challenged actions without complying with procedures that would apply to other units of government. Specifically, the Board could keep and expend on behalf of the University "the proceeds of federal land grants, direct federal appropriates, and private donations" without appropriation by the legislature; the Board could sue and be sued and contract and discharge indebtedness on its own behalf, though not on behalf of the State of Idaho; the Board of Regents could purchase property (there, property for agricultural experimentation not to exceed \$100) without oversight from the Department of Public Works; the Board could purchase supplies, pay its own lawyers, and employ accountants and auditors using non-state-appropriated funds; and

⁵ 33 Idaho 415, 196 P. 201, 202-03 (1921).

⁶ *Id.* at 205 (emphasis added).

the Board could keep the proceeds of sold property (there, \$75 for the used boiler) without providing the proceeds to the State treasurer.⁷

Subsequent cases are consistent with *Black*'s holding that the Board is free to operate within its scope of authority without interference from other branches of government, but do not meaningfully address the scope of that authority. In *Dreps v. Board of Regents of University of Idaho*, a nurse, who was related to a Regent and worked at the University's infirmary, sued to recover her salary after the Board stopped paying it based on the Nepotism Act.⁸ The Court ruled in favor of the employee, reasoning that the Board's authority over employment at the University precluded legislative control over employment: "the legislature possesses no power to place any restrictions on the Board of Regents in the matter of their employment of professors, officers, agents, or employees; nor can they tell the Board whom they may and may not appoint."⁹

Several other cases indirectly address the power of the Board. In *State ex rel Miller v. State Board of Education*, the attorney general filed suit seeking to invalidate a statute that would have authorized the Board of Regents to obtain a federal loan of \$68,500 to construct an infirmary and hospital facilities at the University of Idaho.¹⁰ The loan would be repaid using revenues from the infirmary and a dormitory at the University.¹¹ The Attorney General argued that the loan violated article VII, section 3's restrictions on public debt.¹² The Court held that the Board was not subject to this restriction. The Court did not directly address the authority of the Board under article IX, section 10, though the holding does imply that the Board had the authority to take out the loan.

In *Moscow Hardware Co. v. Regents of University of Idaho*, the Court recognized that the Board had the authority to contract for the construction of an administration building, using funds of the University, and be sued for breach of that contract, but that the Board did not have authority to incur indebtedness against the state, as would occur if the Board contracted to pay with funds that it did not possess.¹³

⁷ *Id.* at 204-05.

⁸ 65 Idaho 88, 139 P.2d 467, 467 (1943).

⁹ *Id.* at 473. Idaho Code section 33-2860, which was in place with the constitution was adopted, expressly vests with Board with authority of professors, instructors, officers, and employees.

¹⁰ 56 Idaho 210, 52 P.2d 141, 141-42 (1935).

¹¹ *Id.*

¹² *Id.*

¹³ 19 Idaho 420, 113 P. 731, 734-35 (1911).

ANALYSIS

1. Existing caselaw does not directly address the Board's authority to form a private corporation to acquire and operate the assets of the University of Phoenix separately from the University of Idaho.

No Idaho court has addressed whether the Board of Regents has the authority to form a private corporation to acquire the assets of a university and operate that university separately from the University of Idaho.

Existing cases establish some basic principles. For example, *Black* stands for the proposition that the Board of Regents' decisions regarding University assets cannot be interfered with when the Board is acting *within the scope of its authority*. The case does not, however, purport to establish the scope of the Board's authority, beyond the particular actions at issue in the case: purchasing land, not to exceed \$100, for purposes of agricultural experimentation; keeping the proceeds from the sale of University assets, such as the \$75 from the sale of a used boiler; expending University funds to hire its own lawyers; and the power to sue and be sued.

Dreps establishes that the Board of Regents' decisions regarding employees cannot be interfered with when the Board is acting *within the scope of its authority*. But the *Dreps* Court does not address that scope, beyond employment of a nurse at the University infirmary.

Miller stands for the proposition that the Board can take out a loan to build an infirmary at the University, secured by University funds, though the existence of a statute authorizing the loan complicates the implication of the holding to some degree.

Moscow Hardware stands for the proposition that the Board can contract for the construction of buildings at the University of Idaho, and that the Board can be sued for breach of these contracts.

These basic principles, however, do not meaningfully address, much less definitively resolve, the authority of the Board to effectuate the transaction at issue here.

None of these cases involve the creation of a private corporation. Creation of Four Three, and Four Three's independence from the Board and the University, are key components of the transaction.

Each of these cases involved assets bought or sold by the University of Idaho itself, using funds of the University. By contrast, the transaction at issue here involves the purchase by Four Three of assets that will be owned by Four Three; that will be operated by Four Three through a majority-independent board; and that will primarily involve bond proceeds under the control of Four Three rather than funds of the University of Idaho itself.

In addition, each of these cases involved transactions that are ancillary to, and derivative of, the operation of the University of Idaho *as the University of Idaho*. Purchasing land for agricultural experimentation, building an infirmary, constructing buildings and the powers necessary to effectuate these things (to contract, to retain lawyers, to sue and be sued, etc.) are of

a nature and degree that are properly considered part and parcel of supervising the University of Idaho.

This transaction is different in both nature and degree. As to nature: the Board is not acquiring the assets of the University of Phoenix to operate those assets as part of the University of Idaho. The Board has created a private corporation, which will itself acquire the assets of the University of Phoenix and operate those assets, doing business as the University of Phoenix, as an educational institution separate from the University of Idaho.

As to degree: the University of Idaho enrolls around 10,000 students. The University of Phoenix enrolls around 85,000 students. The bond proceeds are expected to be approximately \$685 million. Existing caselaw cannot reasonably be read as addressing a transaction of this nature and degree.

2. Under existing law, the Board of Regents lacks the authority to form a private corporation to acquire the assets of the University of Phoenix and operate those assets separately from the University of Idaho.

As discussed above, the authority of the Board to create a private corporation to acquire the assets of, and operate, a university other than the University of Idaho is a question of first impression not resolved by existing caselaw. A review of the relevant constitutional and statutory provisions supports our opinion that the Board does not have this authority under existing law.

The relevant constitutional and statutory provisions are set forth above. Several interpretive principles can be brought to bear to assist in determining their meaning.¹⁴

First, provisions are interpreted according to their plain text.¹⁵

Second, provisions must be construed as a whole, in a manner that gives effect to all provisions, in harmony. One cannot seize on one particular clause, phrase, or section or phrase in a manner that would subvert or invert the overall structure.¹⁶

Third, the expression within a statute of certain items typically excludes items that are not expressed.¹⁷

¹⁴ It would be overly simplistic to rely on any single interpretive principle, or any single constitutional or statutory provision, standing alone. We do not advise this approach. The entire body of authority—constitution, statutes, and caselaw, and the tools generally used to interpret those authorities—should be considered as a whole.

¹⁵ See *Idaho State Ath. Comm'n v. Off. of the Admin. Rules Coordinator*, 542 P.3d 718, 735–36 (Idaho Jan. 29, 2024) (“The fundamental object in construing constitutional provisions is to ascertain the intent of the drafters by reading the words as written, employing their natural and ordinary meaning, and construing them to fulfill the intent of the drafters.” (citation omitted)). .

¹⁶ *Izaguirre v. R&L Carriers Shared Servs., LLC*, 155 Idaho 229, 234 (2013); *Sweitzer v. Dean*, 118 Idaho 568, 572 (1990).

¹⁷ *Local 1494 of Int'l Ass'n of Firefighters v. City of Coeur d'Alene*, 99 Idaho 630, 639 (1978). While the Idaho Supreme Court does not apply this principle of interpretation to constitutional provisions enumerating powers of one

Fourth, when a list of items are enumerated, all items within the list are to be interpreted as a similar type.¹⁸

Fifth, elephants are not hidden within mouseholes. In other words, something that would overturn or contradict the structure of a statute isn't likely to be within a minor or obscure provision of the statute.¹⁹

Applying these principles, the Board likely does not have the authority to create a private corporation to acquire the assets of the University of Phoenix and operate the University of Phoenix separately from the University of Idaho.

First, neither the plain language of the Idaho Constitution nor the plain language of the statutes expressly authorize the Board to form a nonprofit corporation; to operate a university other than the University of Idaho; or to oversee the funds of a university other than the University of Idaho.

Second, the authority that is expressly granted relates to the Board's supervision of the affairs of the University of Idaho and of the funds of the University of Idaho. Article IX, section 10 provides: "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*." IDAHO CONST. art. IX, § 10 (emphasis added).

The statutes echo this. Section 33-2804 provides that the Board shall have "all the powers necessary or convenient to accomplish the objects and perform the duties prescribed by law." Section 33-2802 provides, "The general supervision, government and control *of the University of Idaho*" is vested in the Board of Regents. I.C. § 33-3802 (emphasis added). The Board "shall enact laws for the government of *the university* in all its branches," and "may prescribe rules and regulations for the management of the libraries, cabinets, museum, laboratories and all other property *of the university and of its several departments*." I.C. § 33-2806 (emphasis added). The Board is authorized "to expend such portion of the income *of the university fund* as they may deem expedient for the erection of suitable buildings and the purchase of apparatus, a library, cabinets and additions thereto." I.C. § 33-2807 (emphasis added).

of the three branches of government (legislative, executive, judicial) because those branches possess inherent authority not granted by the Constitution, see *Idaho Press Club, Inc. v. State Legislature*, 142 Idaho 640, 642-43 (2006), this principle should apply to constitutional and statutory provisions regarding the Board of Regents. The Regents are not one of the three branches of state government. Constitutional bodies created by charter and statute do not have inherent power; the power of those bodies is delineated by the charters and statutes that created them. That is particularly true for the Board of Regents; the statutes that delineated its authority were in place at the time of statehood and incorporated into the constitution. See IDAHO CONST. art. IX, § 10 ("All the rights, immunities, franchises, and endowments, heretofore granted [to the University of Idaho] by the territory of Idaho are hereby perpetuated unto the said university."). In any case, even if this interpretive principle does not directly apply to article IX, section 10, it does apply to the relevant statutes and provides a background principle to be considered in a holistic review of the constitutional and statutory provisions.

¹⁸ *State v. Kavajecz*, 139 Idaho 482, 486-87 (2003).

¹⁹ *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

These repeated expressions of authority have one thing in common—the authority is over the University of Idaho and its funds. The repeated, consistent expression of supervisory authority over one, enumerated university—the University of Idaho—excludes supervisory authority of a second university, Four Three d/b/a University of Phoenix.

Third, section 33-2812 identified “[t]he object” or purpose of the University of Idaho: “to provide the means of acquiring a thorough knowledge of the various branches of learning.” I.C. § 33-3812. That same section lists the ways in which the University of Idaho is to pursue that object or purpose: “*and to this end* it shall consist of the following colleges or departments, to wit:

1. The college or department of arts,
2. The college or department of letters,
3. The professional or other colleges or departments, as may from time to time be added thereto or connected therewith.” (emphasis added).

The items in this list are colleges or departments of the University of Idaho. All items included in the list should be interpreted to be of the same kind or nature. The authority to establish the listed colleges or departments, and to create other colleges or departments of that same type, do not provide authority to form a separate corporation to acquire the assets of another university and operate it separately from the University of Idaho.

Fourth, the authorities that are expressly granted are specific, and of a scope and nature ancillary to, and derivative of, the operation of the University of Idaho. For example, the Board is authorized:

- To “have the custody of the books, records, buildings and other property of said university” and to elect a president and hire faculty, Idaho Code section 33-2804;
- To prescribe rules and regulations “for the management of the libraries, cabinets, museum, laboratories and all other property of the university,” Idaho Code section 33-2806;
- To “expend such portion of the income of the university fund as they may deem expedient for the erection of suitable buildings and the purchase of apparatus, a library, cabinets and additions thereto,” Idaho Code section 33-2807;
- To “establish[] and maintain[] a college of agriculture in connection with the university at Moscow,” Idaho Code section 33-2813;
- To “prescribe programs and courses of study,” including a college of arts, a college of letters, and a college of science as soon as possible, Idaho Code section 33-2814;
- To “prescribe a special course of instructions in practical prospecting” to interested persons who “may be ineligible for admission” to the University, Idaho Code section 33-2815.

In light of this detailed list, it would be surprising to find the power to form a private corporation to acquire the assets of a university with eight times the student enrollment of the University of Idaho and operate that university separately from the University of Idaho. If the Framers or the Legislature intended to bestow the authority to do so, that authority is so distinct in nature and degree from those that are identified that it would be expressly addressed. Reading any particular clause or phrase of these statutes to contain this immense power would be hiding an elephant in a mousehole.

Fifth, the constitutional and statutory provisions establish a structure that is simple, straightforward, and politically accountable. The Board of Regents is in charge of the affairs of the University of Idaho. If there is a problem at the University, the line of accountability is clear. The buck stops with the Regents.

Implying the authority to create a private corporation to acquire the assets of a separate university, and operate that university separate from the University of Idaho, would undermine this simplicity and transparency. Most decisions of Four Three d/b/a University of Phoenix will be made by its own majority-independent board, though the Board of Regents retains authority to make certain decisions on Four Three's behalf. Meetings of the Board of Regents, such as meetings to appoint Four Three's board of directors, will be open to the public. However, meetings of Four Three d/b/a University of Phoenix's board will not be subject to the public meetings law. The transparency and accountability inherent in the structure established in article IX, section 10 is in considerable tension with the structure of the transaction.

It is true that certain words, phrases, or clauses from within these provisions can be plucked from context and used to argue in favor of the Board's authority to effectuate the transaction. However, the text and structure, viewed in context, reveal a fundamental conclusion that cannot be escaped: the Board of Regents has authority over *the University of Idaho*, and over *the University of Idaho's* funds and assets. Within its proper scope, this authority can be exercised without interference. But supervisory authority over the University of Idaho does not imply the authority to create a private corporation to acquire the assets of a university that is *not* the University of Idaho, and to operate those assets as a university that is not the University of Idaho. The scale of the proposed acquisition, both in terms of dollars and of students, drives home this point. The authority to supervise the University of Idaho does not include the authority to create a private corporation to acquire the assets of the University of Phoenix and operate the University of Phoenix separately from the University of Idaho.

3. The legal analyses provided by the University of Idaho convey a degree of certainty that is not supported by existing legal authority.

The University of Idaho has provided several legal analyses related to the transaction.²⁰ These analyses convey a degree of certainty that is not supported by existing legal authority.

²⁰ Three analyses are publicly available: a June 7, 2023 Memorandum; a July 2023 Memorandum; and a February 28, 2024 Letter. The June 7, 2023 Memorandum refers to a June 2, 2023 memorandum, which is not publicly available. To be clear, we have great respect for the University of Idaho's attorneys. This memorandum reflects our view of the relevant legal authorities and nothing more.

The February 28 Letter purports to identify “extensive, relevant and specific legal jurisprudence of Idaho Supreme Court cases that validate the Board of Regents’ powers, breadth of authority and status.”²¹ In support, the letter cites *Ex rel Black*, quoting the Court’s statement that the Board is not subject to the control of other branches of the government “while functioning *within the scope of its authority*.”²² But that is precisely the question at issue here: does the Board’s scope of authority include the ability to create a private corporation to acquire the assets of the University of Phoenix and operate those assets separately from the University of Idaho? *Ex rel Black* does not answer this question. Neither does any other case cited within the legal analyses. There is no extensive, relevant, and specific legal jurisprudence from the Idaho Supreme Court regarding the Board’s authority to effectuate a transaction of this nature or degree.

Second, the analyses do not thoroughly review the relevant constitutional and statutory provisions. For example, one memorandum cites Idaho Code section 33-2812 for the proposition that the object of the University of Idaho is to “provide the means of acquiring a thorough knowledge of the various branches of learning[.]”²³ But the memorandum omits, through ellipses, the statute’s delineation of how this object is to be pursued: “and *to this end* it [the University of Idaho] *shall consist of the following colleges or departments*, to wit: 1. The college or department of arts. 2. The college or department of letters. 3. The professional or other colleges or departments, as may from time to time be added thereto or connected therewith.” I.C. § 33-2812 (emphasis added). A review of all relevant provisions is necessary to determine the scope of the Board’s authority. It is not enough to selectively cite certain clauses or phrases.

Third, the analyses rely heavily on the assertion that the Board’s authority to acquire the assets directly means that the Board has authority to acquire them indirectly through a private corporation.²⁴ The analyses do not cite any legal authority for this proposition. We are not aware of any legal authority in Idaho for this proposition in the context of this transaction.

In addition, the February 28 Letter shifts from a description of what the law is to a description of what the law should be: “If the Board of Regents could acquire assets directly, there *should be* no restriction on having a corporate entity acquire educational assets”²⁵ An assertion of what the law should be does not establish what the law is. Existing legal authority does not establish that the Board can create a corporate entity to acquire and operate the assets of the University of Phoenix separately from the University, even if the Board could acquire and operate the assets directly.

²¹ February 28, 2024 Letter at 1.

²² February 28, 2024 Letter at 1-2 (citing *Ex rel Black*, 196 P. at 205 (emphasis added)).

²³ June 7, 2023 Memorandum at 1 (quoting Sec. 9, 15th Territorial Sess. Laws) (later codified as Idaho Code section 33-2812).

²⁴ June 7, 2023 Memorandum at 2; February 28, 2024 Letter at 4.

²⁵ February 28, 2024 Letter at 4 (emphasis added).

The February 28 Letter also asserts that creating a corporation to acquire the assets provides “only benefit and not harm.”²⁶ That statement is, at a minimum, debatable. The Idaho Constitution and statutes establish a governance structure that is simple, transparent, and politically accountable: the Board of Regents supervises the University of Idaho. The transaction will establish a governance structure that is more complicated, more opaque, and less politically accountable, as described above. Any benefit associated with the indirect nature of the transaction comes at the cost of simplicity, transparency, and political accountability.

4. The Board’s lack of authority to create Four Three for this purpose creates uncertainty as to the liability protections afforded by Four Three’s corporate form.

A comprehensive analysis of the State’s potential exposure cannot be conducted without reviewing documents that are not currently available, such as the contracts and other documents related to the anticipated bond issuance.

That said, the University of Idaho has asserted that its liability is capped at approximately \$50 million. That assertion assumes that Four Three’s corporate form is valid and that it completely insulates the University of Idaho, the Board, and its members from all other liability associated with the transaction. However, the Board’s lack of authority to create Four Three casts doubt upon the validity of this assumption.

Existing legal sources do not definitively establish the consequences that would or could flow to the University of Idaho, the Board of Regents, or its members if a court were to determine, in the course of a dispute regarding (for example) liability for payment on the bonds, that the Board acted *ultra vires* in creating Four Three. The most extreme outcome would be to disregard Four Three’s corporate form entirely. This would open the door to imposing liability for the entire transaction on the University of Idaho or the Board of Regents, as Four Three’s sole member.

It is far from clear that a court would impose this consequence. The University or the Board may be able to assert sovereign immunity as a defense, although Idaho courts have held that the Board can “sue and be sued,” and have exercised jurisdiction over breach-of-contract actions against the Board.²⁷ The fundamental point is not that the Board’s actions are sure to expose the University or the Board to full liability for the transaction; the fundamental point is that the University’s assertions that its liability is firmly capped at \$50 million is predicated on a shaky foundation. At a minimum, the Board’s lack of express legal authority to create Four Three casts doubt upon the assertion that the University and the Board’s liability is definitively capped at \$50 million.

²⁶ *Id.*

²⁷ *Moscow Hardware Co. v. Regents of University of Idaho*, 19 Idaho 420, 113 P. 731, 735 (1911) (“[T]here can be no doubt but that the Board of Regents is a body corporate and may sue and be sued, and that, when they enter into a contract, they are liable to the process of the district court the same as any other corporation organized under the laws of the state.”).

5. Creation of an independent body politic may provide an avenue to potentially acquire assets from the University of Phoenix.

The Legislature has the authority to create independent bodies politic for educational and other purposes.²⁸ Creation of a new independent body politic, or revision to the authority of an existing body politic, may provide a platform to acquire and operate assets of the University of Phoenix.

Creation of an independent body politic for this purpose would require substantial revision to the existing transaction, which in turn would require the consent and extensive cooperation of all parties. From a legal perspective, significantly more information and analysis would be required to confirm the potential terms of a revised transaction, whether this approach is legally viable in light of the various parties' business and legal positions, and to otherwise address the large number of other issues that would inevitably arise in a transaction of this nature and scale.

²⁸ For example, the Regents of the University of Idaho, Lewis-Clark State College, Idaho State University, and Boise State University are independent bodies politic. *See* Idaho Code § 33-3803.