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VIA HAND DELIVERY AND E-MAIL

Board of Regents of the University of Idaho
650 West State Street, 3rd Floor
Boise, ID 83702

cc: Kent Nelson, Special Counsel, University of Idaho

Re: *House Concurrent Resolution No. 26 and LSO Letter Dated February 22, 2024*

Dear Members of the Board of Regents,

You have asked our firm to comment upon House Concurrent Resolution No. 26 pending in the 2024 Idaho Legislature ("HCR26") and a related letter from the Legislative Services Office dated February 22, 2024, authored by Legislative Legal Counsel (the "LSO Letter"). The recitals to HCR26 and in particular the LSO Letter raise a number of legal issues, and because we have previously advised the Board of Regents and the University of Idaho (the "University") on these issues, you have asked us to summarize our prior work and to relate it to the specific assertions in HCR26 and in the LSO Letter.

1. Summary

To summarize our analysis, we believe HCR26 and the LSO Letter misapply numerous legal theories and citations to authorities. Fundamentally, the HCR26 and the LSO Letter cannot avoid that the University's creation, and the powers and authority conferred upon the Board of Regents for the general supervision of the University is created by and embedded within the Idaho Constitution itself (via Article IX, Section 10). The Legislature cannot amend or alter, by house concurrent resolution or otherwise, the authority possessed by the Board of Regents that derives from the Idaho Constitution.

Neither document properly acknowledges the extensive, relevant and specific legal jurisprudence of Idaho Supreme Court cases that validate the Board of Regents' powers, breadth of authority and status. As was stated in *State ex rel. Black*:

> [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, but is a separate entity, and may sue and be sued, with power to contract and discharge indebtedness, with the right to exercise its discretion within the powers granted, without authority to contract indebtedness against the state, and in no sense is a claim against the regents one against the state.[1]

As discussed in Paragraph 3 below, the principal concern lies with the formation of Four Three Education as a nonprofit, and the assertion that this is beyond the scope of the Board of Regents' powers. We believe the Board of Regents, for good reasons, has simply followed the rules set by the Legislature in using the tools to form a nonprofit corporation that have been provided by the Legislature in the general laws of the State.

Furthermore, HCR26 and the LSO Letter invoke tangential theories that upon closer examination either actually support the legal theories under which we believe the Board of Regents is acting within its powers or are factually distinguishable.

2. Examples of Erroneous Premises

It is worth noting several erroneous statements and premises in the LSO Letter.

LSO Letter – Page 1

"[T]he Board is attempting to escape its constitutional and statutory limitations by recreating itself as a private corporation."

Response:

False. The University remains intact as it has always been. It is not "recreated" into anything else.

LSO Letter – Page 2

"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."

Response:

False. The Board of Regents remains a public body and will conduct the business of being the member of Four Three Education in accordance with its public mission and requirements. The Board

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[1] *State v. State Bd. of Educ.*, 33 Idaho 415, 196 P. 201, 205 (1921).

of Regents is cognizant of its responsibilities, will discharge its duties and powers under the Constitution and intends to appoint highly qualified members to the Four Three Education Board of Directors in a public process.

LSO Letter – Pages 2 and 5.

Page 2: "[T]he 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.' The Board's other powers and duties are those 'prescribed by law.'" (footnotes omitted)

Page 5: "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.'"

Response:

The Board of Regents has the authority to engage in education as a public purpose. That will still be the case. The reference to "public school system" probably refers to K-12[2], and relates to the State Board of Education directly under Article IX, Section 2 of the Idaho Constitution, rather than the Board of Regents under Article IX, Section 10. To reiterate, this transaction is being done under the powers of the Board of Regents secured in Article IX, Section 10. Although Article IX, Section 10 describes "regulations as may be prescribed by law," when referencing authority of the Board of Regents, this provision does not empower the Legislature to modify or limit the authority of the Board of Regents. The Idaho Supreme Court interpreted this provision in *State ex rel. Black*:

> The regulations which may be prescribed by law, and which must be observed by the regents in their supervision of the University, and the control and direction of its funds, refer to methods and rules for the conduct of its business and accounting to authorized officers. *Such regulations must not be of a character to interfere*

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2 *See Pike v. State Bd. of Land Comm'rs*, 19 Idaho 268, 113 P. 447, 447 (1911). ("The word "school," as used in sections 5 and 8 of article 9 of the Constitution, has reference to the public, free common schools, and clearly means the free school system which has been generally adopted in this country, and has specific reference to the district schools throughout the state established for the training and instruction of the youth of the state in the primary and elementary branches of learning below the grade or rank of "academy, seminary, college, university, or other literary or scientific institution.").

essentially with the constitutional discretion of the board, under the authority granted by the Constitution.[3]

LSO Letter – Page 5

"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."

Response:

The Board of Regents specifically structured this transaction where it acts as the member of the nonprofit Four Three Education, in contrast to the University Foundations, University Research Foundations and others which have self-perpetuating boards in the permitted nonprofit format of a nonprofit without members, because in this specific structure the Board of Regents appoints the board of directors who govern Four Three Education in a public meeting. The sole member of a nonprofit corporation is not the "owner" of the corporation or its assets. The activities of Four Three Education, by its articles of incorporation, bylaws, and 501c-3 designation are limited to public purposes, which cannot be changed without the affirmative consent of the Board of Regents.

LSO Letter – Page 5

"The Board therefore derives no power to acquire, own, and operate the University of Phoenix, or to form a corporation to do so, through [Article IX, Section 2] of the Constitution. Nor does the Board derive any such power from law, since the Legislature has enacted no statute enabling such activities."

Response:

Again, Article IX, Section 2 of the Idaho Constitution relates to the State Board of Education, whereas the Board of Regents' power is specifically provided for in the Idaho Constitution in Article IX, Section 10. The *assets* of the existing University of Phoenix corporation are being transferred. The Board of Regents has the power to acquire these assets in its own name to be used for educational purposes. If the Board of Regents could acquire assets directly, there should be no restriction on having a corporate entity acquire educational assets—because there is only benefit and not harm—in order to limit the University's potential liability; something any business would, and should, be allowed to do.

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[3] *State v. State Bd. of Educ.*, 33 Idaho 415, 196 P. at 204 (emphasis added).

3. Assertion that the Board of Regents Cannot Form Four Three Education, Inc.

The LSO Letter acknowledges that the Board of Regents was chartered by the Territorial Act, incorporated into the Idaho Constitution, and later into Idaho Code Chapter 28, Title 33, to control state universities and public education as the State Board of Education, and including controlling the University in the capacity as the Board of Regents. The main argument in the LSO Letter is that the Board of Regents' proposal to become the member in a private nonprofit corporation is outside its grant of authority under all of these guiding documents because the nonprofit is not a public entity.

This assertion is faulty for a number of reasons, as explained below.

a. Mistaken Factual Premise

Throughout the document, the author does not reference that the University is becoming a member of Four Three Education and that Four Three Education is acquiring the *assets* of Phoenix. Neither The University nor Four Three Education is acquiring the corporate entity of Phoenix. This is a mistaken factual assumption.

b. Inapplicability of the Case Cited to Try to Show State and Board of Regents Are Not Separate

The LSO Letter cites, *Lebron v. National Railroad Passenger Corporation*, a U.S. Supreme Court case from 1995, which found that Amtrak was bound by the First Amendment, as Amtrak had rejected a political message proposed to be placed on a billboard on Amtrak property. The Court found that Amtrak was created by Congressional legislation for governmental objectives and therefore took on the character of a governmental entity for purposes of the First Amendment (which is applicable only to governmental regulation of speech and association, not private regulation).

The *Lebron* case is easily distinguished. First, it involves the applicability of the First Amendment to a federal agency. Second, the authority for the Board of Regents' separateness is the Idaho Constitution, not that the Board of Regents was created by the Legislature. Amtrak was created by Congress, not by the U.S. Constitution.

c. The Board of Regents as a "Corporation"

The argument on page 3 of the LSO Letter attempts to characterize the University as simply another corporation, which is not correct. Although the LSO Letter is reciting general principles of corporate law, conventional corporate law principles are simply not relevant in the context of the Board of Regents and the control it exercises over the University under the authority and powers granted under the Idaho Constitution. Neither the Board of Regents, nor the University is a "corporation" in the sense of a corporation organized under the general corporation law

established by the Legislature, nor are they another type of "public corporation" created by special act of the Legislature that can have its authority restricted or changed by special act of the Legislature (e.g., municipal corporations or public schools established by special charter).[4] Thus, many of the principles referred to in this portion of the Letter and the recitals of HCR26, even if generally accurate on their face, are inapplicable because they miss the framework under which the Board of Regents operates—which is that of an entity established and granted authority under the Idaho Constitution itself, whose power cannot be limited by act of the Legislature.

The University was established by special act of the Territorial Legislature. However, when Idaho was admitted to the Union and adopted its Constitution, Article IX, Section 10 grounded the authority and powers of the Board of Regents and the University in the Idaho Constitution—thus embedding the authority and powers of the Board of Regents to provide for the general supervision of the University in the Idaho Constitution itself. As an entity with powers and authority granted by the people at the same time and in the same manner as all branches of state government,[5] the Board of Regents possesses broad discretion when acting within its authority granted under the Idaho Constitution.

d. Powers of the Board of Regents

Page 4 of the LSO Letter admits that the Board of Regents has the power to prescribe rules and regulations for the management of University property. The Board of Regents is exercising its governance and management of the University when it is only acting as the sole member of the nonprofit that is acquiring the University of Phoenix assets. Acting legally to set up a nonprofit under the Idaho Code is action within the Board of Regents' discretion to manage University property.

Nothing in the Idaho Constitution prohibits the Board of Regents to authorize the creation of a corporation. If the language of Article IX, Section 10 (perpetuating the Territorial Act creating the University) were to be strictly construed to only authorize powers specifically enumerated therein, this would directly conflict with Idaho case law evidencing the contrary and the conduct of business of the University and Board of Regents since its inception. As referenced in *State ex rel. Black*, the Board of Regents has the power to "sue or be sued, with power to contract and discharge indebtedness, with the right to exercise its discretion within the powers granted," even

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[4] *See, e.g., Howard v. Indep. Sch. Dist. No. 1 of Nez Perce Cnty.*, 17 Idaho 537, 106 P. 692, 692 (1910) (holding that a charter school district existing before the organization of the state of Idaho was an educational corporation within the context of Article XI, Section 2 under the control of the Legislature); *Bagley v. Gilbert*, 63 Idaho 494, 122 P.2d 227, 230 (1942) (holding that the Legislature may amend the charter of the City of Boise by special act).

[5] *See Dreps v. Bd. of Regents of Univ. of Idaho*, 65 Idaho 88, 139 P.2d 467, 471 (1943).

though no provision of the Constitution or Territorial Act creating the University provided for such specific powers.[6]

e. Equating the Board of Regents to the Legislature under Article XI Section 2

The LSO Letter argues that because the State cannot directly create corporations, the Board of Regents cannot utilize the Nonprofit Corporations Act. This ignores the powers of the Board of Regents under the Constitution to govern the University and its property, it mischaracterizes the Board of Regents as the "State" and also ignores the Nonprofit Corporations Act.

Article XI, Section 2 of the Idaho Constitution allows the Legislature to establish the general corporate law under which corporations may be created, but the *Legislature* is expressly prohibited from passing laws creating corporations in Article III, Section 19 and Article XI, Section 2 of the Idaho Constitution. This is a limitation only upon the Legislature, however—it is not a limitation on the ability for other entities to create a corporation. Idaho Supreme Court cases involving interpretations of these Constitutional prohibitions are limited to the Court evaluating *acts of the Legislature* in creating some sort of corporate body.[7] The Legislature has provided for the law under which corporations may be created, which does not conflict with the formation of the nonprofit of which the Board of Regents is the sole member. The Legislature has provided the tools for forming a nonprofit corporation and the Board of Regents has complied with the rules provided for in the Idaho Nonprofit Corporations Act in forming Four Three Education, Inc.

4. Nonprofit Distributions

In Footnote 37, the LSO Letter asserts that the payments to the University may be illegal distributions. This misstates the agreements that will be part of the transaction. Tax advisors to the University have made the University well aware of the limitations on nonprofit corporations, and any payments will be based upon contractual arrangements with adequate consideration and grants that are not treated as distributions under applicable state and Federal laws.

5. Sovereign Immunity Considerations

First and foremost, the issue of sovereign immunity asserted in the LSO Letter assumes that the Board of Regents has acted unconstitutionally, which is not the case as explained herein. The LSO Letter asserts that the Board of Regents' formation of a nonprofit corporation will result

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6 *State v. State Bd. of Educ.*, 33 Idaho 415, 196 P. at 205.

7 *See, e.g., State Water Conservation Board. v. Enking*, 56 Idaho 722, 58 P.2d 779 (1936); *Idaho Water Resource Board v. Kramer*, 97 Idaho 535, 548 P.2d 35 (1976); *Board of County Commissioners of Twin Falls County v. Idaho Health Facilities Authority*, 96 Idaho 498, 531 P.2d 588 (1974); *State ex rel. Williams v. Musgrave*, 84 Idaho 77, 370 P.2d 778 (1962).

in a waiver of sovereign immunity of both the Board of Regents and the State itself. The law of sovereign immunity is well-established in Idaho by virtue of our own case law, not by inferences from an 1824 U.S. Supreme Court opinion in the short-lived era of federally owned banks. The LSO Letter cherry-picks multiple quotes from the U.S. Supreme Court case of *Bank of U.S. v. Planters' Bank of Georgia*[8] for the proposition that the Board of Regents has waived its sovereign immunity by being the member of Four Three Education. The issue in that case was whether a bank of which a state is a member is immune from suit under the 11th Amendment by claiming for itself the immunity of the state. The Court held it was not. That is all. The case does not support the contention that there is a waiver of sovereign immunity as against the *state itself* just because it is a member of the corporation. On the contrary, it recites the principle that many states (at the time of the case) have interests in banks and are not suable even in their own courts, but that the corporation itself is not immune from suit.[9] The same should hold here—Four Three Education will not have immunity, but whatever immunity the Board of Regents or the State possess will not be affected.

The sovereign immunity issue can be summarized as follows: (i) Four Three Education is a nonprofit corporate entity and has no "sovereign" immunity at all,[10] (ii) the State can waive sovereign immunity only by explicit action of the State itself[11]—no action of the Board of Regents or Four Three Education can affect the sovereign immunity of the State, and (iii) there is no sovereign immunity in any event for contractual claims.[12] Putting aside that claims against the Board of Regents are not claims against the State,[13] even if the opposite were true, the State would be no worse off.

Finally, in order for a claimant to assert a claim directly against the Board of Regents under the structure with Four Three Education, the claimant would need to pierce the nonprofit corporate veil, yet the Idaho Nonprofit Act specifically provides that members are "not, as such, personally liable for the acts, debts, liabilities or obligations of the corporation."[14]. Piercing the corporate veil is generally exercised by courts "cautiously" and only in instances where the corporate form has been ignored to the extent that separateness no longer exists and otherwise some inequity or

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8 22 U.S. 904, 6 L. Ed. 244 (1824).

9 *Id.* at 907–08 (emphasis added).

10 *See Bott v. Idaho State Building Authority*, 122 Idaho 471, 835 P. 2d 1282 (1992) (holding that the ISBA was a public instrumentality and not a state "agency" for purposes of denying an award of attorney fees under I.C. Section 12-117. In so holding, the Court determined that the ISBA was an entity distinct and separate from the State of Idaho, citing Idaho Code section 67-6419 (the ISBA statute provides that the obligations and debts of the ISBA do not become the obligations and debts of the State).).

11 *See Von Lossberg v. State*, 506 P.2d 251 (2022).

12 *See Grant Construction Co. v. Burns*, 92 Idaho 408, 443 P. 2d 1005 (1968).

13 *State v. State Bd. of Educ.*, 33 Idaho 415, 196 P. at 205.

14 *See* Idaho Code § 30-30-406.

injustice would result.[15] Idaho courts have not adjudicated piercing the corporate veil as to members of nonprofit corporations, but other states have recognized its applicability to nonprofit corporations in the general sense.[16] However, application of this doctrine against nonprofit corporations' members appears rare, given that nonprofits cannot give distributions to their members and are often not funded through the sale of equity interests as is the case for for-profit corporations.[17]

[*Remainder of page left intentionally blank.*]

15 *See Lunneborg v. My Fun Life*, 163 Idaho 856, 868, 421 P.3d 187, 199 (2018).

16 *Krystkowiak v. W.O. Brisben Companies, Inc.*, 90 P.3d 859, 867 (Colo. 2004).

17 *See, e.g., Newcrete Prod. v. City of Wilkes-Barre*, 37 A.3d 7, 14 (Pa. Commw. Ct. 2012), *as amended* (Feb. 24, 2012); *Rademacher v. Ins. Co. of N. Am.*, 330 N.W.2d 858, 862 (Minn. 1983).

Conclusion

We have been honored to serve as legal counsel to the University of Idaho and provide our opinions on these important matters. In addressing the legal concerns expressed by HCR26 and the LSO Letter, we confirm our previous advice that the Board of Regents is within its powers to take the actions authorized at the May 18, 2023, meeting.

Sincerely,

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