

IN THE HOUSE OF REPRESENTATIVES

HOUSE CONCURRENT RESOLUTION NO. 26

BY STATE AFFAIRS COMMITTEE

A CONCURRENT RESOLUTION

1 STATING FINDINGS OF THE LEGISLATURE, REQUESTING THAT THE STATE BOARD OF ED-  
2 UCATION RECONSIDER CERTAIN ACTIONS, REQUESTING COOPERATION FROM THE  
3 STATE BOARD OF EDUCATION, THE UNIVERSITY OF IDAHO, AND THE UNIVERSITY  
4 OF PHOENIX, AND AUTHORIZING THE SPEAKER OF THE HOUSE OF REPRESENTATIVES  
5 AND THE PRESIDENT PRO TEMPORE OF THE SENATE TO ACT AS AGENTS OF THE LEG-  
6 ISLATURE FOR CERTAIN PURPOSES.  
7

8 Be It Resolved by the Legislature of the State of Idaho:

9 WHEREAS, on May 18, 2023, the State Board of Education, acting in its ca-  
10 pacity as the Board of Regents of the University of Idaho, voted to authorize  
11 the creation of a corporation; and

12 WHEREAS, the purpose of the corporation so authorized is to acquire the  
13 assets and assume certain liabilities of the University of Phoenix, a pri-  
14 vate institution; and

15 WHEREAS, the Board offered no meaningful opportunity for public comment  
16 or public participation before taking its vote; and

17 WHEREAS, because the Board held its vote after the Legislature ad-  
18 journed sine die, the Legislature had no opportunity to act in the immediate  
19 aftermath of the vote; and

20 WHEREAS, the University of Idaho was established by special act of the  
21 Territorial Legislature in 1889; and

22 WHEREAS, the special act vested the government of the university in the  
23 Board of Regents; and

24 WHEREAS, the special act established the Board of Regents as a corpora-  
25 tion with specific powers; and

26 WHEREAS, a corporation is an artificial being created by law that,  
27 within the scope of its charter, is capable of acting as a natural person; and

28 WHEREAS, a fundamental principle of corporate law is that a corporation  
29 may not act beyond the scope of its charter; and

30 WHEREAS, when a corporation is created by special act of a legislature,  
31 the special act serves as the corporation's charter; and

32 WHEREAS, the special act establishing the University of Idaho is there-  
33 fore the charter of the Board of Regents; and

34 WHEREAS, no provision of the charter permits the Board of Regents to au-  
35 thorize the creation of a corporation; and

36 WHEREAS, no provision of the charter permits the Board of Regents to,  
37 directly or indirectly, acquire a private institution and assume its liabil-  
38 ities; and

39 WHEREAS, in clarifying the differences between natural persons and cor-  
40 porations, the United States Supreme Court has stated that while a natural  
41 person may do anything not forbidden by law, a corporation may do only what  
42 its charter permits it to do; and

1           WHEREAS, the United States Supreme Court further stated in the case  
2 *Northwestern Fertilizing Company v. Village of Hyde Park*, 97 U.S. 659, that  
3 a corporation acting outside the law of its creation is "subject, like indi-  
4 viduals, to the will of the law-making power"; and

5           WHEREAS, the lawmaking power in the State of Idaho belongs to the Legis-  
6 lature; and

7           WHEREAS, the Idaho Supreme Court has stated that substantial matters of  
8 public policy should be decided by the Legislature; and

9           WHEREAS, the question of whether to allow a state institution of higher  
10 education to affiliate itself, financially or otherwise, with a private in-  
11 stitution is a substantial matter of public policy that should be decided by  
12 the Legislature; and

13           WHEREAS, the Legislature has enacted no law enabling the Board of Re-  
14 gents to acquire the assets and assume the liabilities of the University of  
15 Phoenix or to otherwise affiliate itself with the University of Phoenix; and

16           WHEREAS, it is a well-settled principle of American law that the cre-  
17 ation and authorization of corporations is a legislative function; and

18           WHEREAS, because the creation and authorization of corporations is a  
19 legislative function, and because the Idaho Constitution limits the Leg-  
20 islature's ability to create corporations in Article III, Section 19, and  
21 Article XI, Section 2, the Legislature does not believe that the state or any  
22 of its officers, employees, or entities may create a corporation; and

23           WHEREAS, the Idaho Admission Bill, the act of Congress that admitted  
24 Idaho as a state of the Union, provides that any land grant university must  
25 "forever remain under the exclusive control" of the State of Idaho; and

26           WHEREAS, the University of Idaho is a land grant university; and

27           WHEREAS, an affiliation by the University of Idaho with a private insti-  
28 tution could, depending on the nature of such affiliation, remove the uni-  
29 versity from the state's exclusive control, and therefore conflict with the  
30 Idaho Admission Bill; and

31           WHEREAS, the Legislature has additional legal, policy, and financial  
32 concerns about the proposed affiliation between the University of Idaho and  
33 a private institution; and

34           WHEREAS, one such concern is whether the State Board of Education and  
35 the University of Idaho would be protected by sovereign immunity in legal ac-  
36 tions by private parties relating to the affiliation; and

37           WHEREAS, courts have ruled that state entities may not assert sovereign  
38 immunity as a defense when such entities have acted beyond the scope of their  
39 legal authority, as the Board has done here; and

40           WHEREAS, courts have also ruled that state entities surrender their  
41 sovereign immunity when they engage in nongovernmental functions; and

42           WHEREAS, the Board's creation of a private corporation for the purpose  
43 of acquiring a private institution is a nongovernmental function; and

44           WHEREAS, the waiver of the state's sovereign immunity is a substantial  
45 matter of public policy that should be decided by the Legislature and clearly  
46 provided in statute; and

47           WHEREAS, the Legislature does not believe that the state's or the peo-  
48 ple's interests have been fully considered or protected by the parties to the  
49 proposed affiliation.

1           NOW, THEREFORE, BE IT RESOLVED by the members of the Second Regular  
2 Session of the Sixty-seventh Idaho Legislature, the House of Representa-  
3 tives and the Senate concurring therein, that the Legislature respectfully  
4 requests that the State Board of Education, in its capacity as the Board of  
5 Regents of the University of Idaho, reconsider its May 18, 2023, vote autho-  
6 rizing the creation of a corporation.

7           BE IT FURTHER RESOLVED that the Legislature respectfully requests that  
8 the State Board of Education, in its capacity as the Board of Regents of the  
9 University of Idaho, reconsider any actions that would affiliate the Univer-  
10 sity of Idaho in any way with the University of Phoenix unless and until the  
11 Legislature enacts a law authorizing such actions.

12           BE IT FURTHER RESOLVED that the Legislature respectfully requests that  
13 the State Board of Education, the University of Idaho, and the University of  
14 Phoenix cooperate fully with the Legislature as it considers matters relat-  
15 ing to the proposed affiliation.

16           BE IT FURTHER RESOLVED that the Legislature authorizes the Speaker of  
17 the House of Representatives and the President Pro Tempore of the Senate to  
18 act as agents of the Legislature in taking actions necessary to protect the  
19 legislative power and the people of Idaho in this matter, including the ini-  
20 tiation of appropriate legal action in any court of competent jurisdiction.