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A Question of Fairness: The Proper Standard of Review of School Board Just and Reasonable Cause Determinations in Teacher Termination Proceedings in Idaho

John E. Rumel
University of Idaho College of Law, jrumel@uidaho.edu

A QUESTION OF FAIRNESS: THE PROPER STANDARD OF REVIEW OF SCHOOL BOARD JUST AND REASONABLE CAUSE DETERMINATIONS IN TEACHER TERMINATION PROCEEDINGS IN IDAHO

JOHN E. RUMEL*

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Imagine this scenario: A long-time Idaho public school teacher has been accused by the school district administration of embezzling funds or stealing property belonging to the school district; or, the school district administration believes that the same teacher has been performing her job in an unsatisfactory manner. Pursuant to Idaho statutory law, the superintendent makes a recommendation to the school board that it discharge the teacher in the first instance, or not renew the teacher's contract in the second instance. The school board then notices the matter for hearing. The administration, through its

* General Counsel, Idaho Education Association; Adjunct Instructor, Department of Educational Administration, College of Graduate Studies and College of Education, University of Idaho—Boise Campus.

superintendent, presents its case against the teacher to the school board, and the teacher presents evidence attempting to rebut the accusations or allegations. The school board, after hearing the matter, issues a decision finding just and reasonable cause to accept the administration's recommendation of discharge or nonrenewal and terminates the teacher's employment.

The teacher believes that, because there is only slight evidence to support the administration's accusations, the administration failed to prove that she engaged in such misconduct or did not perform her job duties satisfactorily. The teacher also believes that, even if the evidence was sufficient to prove the conduct alleged, the school board's issuance of the ultimate employment sanction—termination—was not justified by the conduct. Not surprisingly, the school board and administration believe that the conduct was sufficient to support the nonrenewal or discharge decision, and that the "punishment" did fit the "crime." The teacher must now decide, in consultation with her attorney, whether she has meritorious grounds to challenge the school board's just and reasonable cause determination by filing a wrongful termination action. If the teacher files suit, the school district and its attorney must then analyze whether the school board's termination decision is defensible. In particular, an assessment of the merits of the action, by counsel for both sides, will turn on the standard of review that the court will apply to the school board's just and reasonable cause determination.

This article will argue that, based on Idaho law, and, more fundamentally, based on well-settled principles of procedural due process, judicial review of a school board's just and reasonable cause determination must be under a *de novo*, i.e. independent and non-deferential, standard of review. Part I of this article will discuss Idaho's administrative system and system of judicial review for teacher discharge and nonrenewal cases based on a just and reasonable cause determination by the school board. Part II will discuss existing Idaho case law on the standard of review or degree of deference issue, which clearly requires *de novo* judicial review of school board just and reasonable cause determinations. Part III will discuss procedural due process principles applicable to a school board decision terminating an employee who has a property interest in his or her employment and compensation. These principles require that the administrative and judicial review procedures in these cases, when viewed as a whole, must provide a level playing field upon which the teacher's right to continued employment is determined. Part IV will address relationship and procedural issues that impact the standard of review and procedural due process questions. It will first discuss the relationship between the superintendent and the school board. It will also discuss the teacher's

lack of ability to compel the attendance of witnesses to defend against allegations at the discharge or nonrenewal hearing before the board. Part V will evaluate those relational and structural realities against due process principles and conclude that *de novo* review, rather than some lesser, more deferential standard, must apply to judicial review of school board just and reasonable cause determinations. Finally, Part VI will identify and discuss the types of administrative hearing and judicial review systems that must be in place to satisfy due process requirements.

I. IDAHO'S ADMINISTRATIVE AND JUDICIAL REVIEW SYSTEM IN TEACHER DISCHARGE AND NONRENEWAL CASES

In Idaho, teachers in their first three years of teaching with the same school district are considered annual contract teachers. Teachers who have signed four or more consecutive employment contracts with the same school district are considered renewable or continuing contract teachers.[1] Idaho statutory law affords due process protection to annual contract teachers discharged in the middle of their contract term. Due process is also afforded to renewable contract teachers discharged either in the middle of their contract term or whose contracts are not renewed at the end of their contract term. As to renewable contract teachers, section 33-515 of the Idaho Code provides in pertinent part as follows:

> If the board of trustees takes action to immediately discharge or discharge upon termination of the current contract a certificated person whose contract would otherwise be automatically renewed, or to renew the contract of any such person at a reduced salary, the action of the board shall be consistent with the procedures specified in section 33-513(5), Idaho Code, and furthermore, the board shall notify the employee in writing

1. Brown v. Caldwell Sch. Dist. No. 132, 127 Idaho 112, 115, 898 P.2d 43, 46 (1995) (citing IDAHO CODE §§ 33-514, 33-515). At the time of the Idaho Supreme Court's decision in *Brown*, section 33-514 recognized only one type of contract under which school districts could hire annual contract teachers. During the 2000 legislative session, the legislature substantially amended section 33-514 to provide, among other things, three categories of contracts for annual contract teachers. *See* IDAHO CODE § 33-514(3)(a)–(c) (Michie 2001). Although the procedural rights of annual contract teachers vary depending upon the category under which they are hired, those teachers are still properly referred to as annual contract teachers after the 2000 amendments.

whether there is just and reasonable cause not to renew the contract or to reduce the salary of the affected employee, and if so, what reasons it relied upon in that determination.[2]

In turn, section 33-513 sets forth an elaborate notice and hearing regime, providing as follows:

> The board of trustees of each school district including any specially chartered district, shall have the following powers and duties:
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> . . . .
>
> 5. To suspend, grant leave of absence, place on probation or discharge certificated professional personnel for a material violation of any lawful rules or regulations of the board of trustees or of the state board of education, or for any conduct which could constitute grounds for revocation of a teaching certificate. Any certificated professional employee, except the superintendent, may be discharged during a contract term under the following procedures:
>
> (a) The superintendent or any other duly authorized administrative officer of the school district may recommend the discharge of any certificated employee by filing with the board of trustees written notice specifying the alleged reasons for discharge.
>
> (b) Upon receipt of such notice the board acting through their duly authorized administrative official, shall give the affected employee written notice of the allegations and the recommendation of discharge, along with written notice of a hearing before the board prior to any determination by the board of the truth of the allegations.
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> (c) The hearing shall be scheduled to take place not less than six (6) days nor more than twenty-one (21) days after receipt of the notice by the employee. The date provided for the hearing may be changed by mutual consent.
>
> (d) The hearing shall be public unless the employee requests in writing that it be in executive session.

2. IDAHO CODE § 33-515 (Michie 2001).

(e) All testimony at the hearing shall be given under oath or affirmation. Any member of the board, or the clerk of the board, may administer oaths to witnesses or affirmations by witnesses.

(f) The employee may be represented by legal counsel and/or by a representative of a local or state teachers association.

(g) The chairman of the board or the designee of the chairman shall conduct the hearing.

(h) The board shall cause an electronic record of the hearing to be made or shall employ a competent reporter to take stenographic or stenotype notes of all the testimony at the hearing. A transcript of the hearing shall be provided at cost by the board upon request of the employee.

(i) At the hearing the superintendent or other duly authorized administrative officer shall present evidence to substantiate the allegations contained in such notice.

(j) The employee may produce evidence to refute the allegations. Any witness presented by the superintendent or by the employee shall be subject to cross-examination. The board may also examine witnesses and be represented by counsel.

(k) The affected employee may file written briefs and arguments with the board within three (3) days after the close of the hearing or such other time as may be agreed upon by the affected employee and the board.

(l) Within fifteen (15) days following the close of the hearing, the board shall determine and, acting through their duly authorized administrative official, shall notify the employee in writing whether the evidence presented at the hearing established the truth of the allegations and whether the employee is to be retained, immediately discharged, or discharged upon termination of the current contract.[3]

3. IDAHO CODE § 33-513 (Michie 2004).

The "hearing . . . referred to in the statute denotes the right to confront witnesses, cross examine them, and present evidence on the teacher's behalf."[4] As such, the Idaho Supreme Court has referred to sections 33-515 and 33-513(5) as "statutory due process requirements."[5] Notably, although the statutes assume the superintendent or an authorized designee will present the school district administration's case against the teacher to the school board, the statutes do not authorize the teacher or administration to subpoena witnesses or documents.

As expressly set forth in section 33-515, a school board must have just and reasonable cause to discharge or not renew the employment contract of a renewable contract employee.[6] Likewise, by operation of law, an annual contract employee, like any other employee who an employer seeks to discharge in the middle of a contract term, is entitled to just cause or good cause protection.[7] Because the Idaho Legislature has not delineated a statutory scheme for judicial appellate review of a local school board's decision, a decision to dismiss a teacher is reviewable by two methods: "a mandamus application or a civil action for breach of the teacher's contractual, statutory or constitutional rights."[8]

Given the lack of statutory guidance, Idaho courts have had to grapple with the question of what degree of judicial deference, if any, a court must give to a school board's just cause determination in a teacher nonrenewal or discharge case. As discussed below, the Idaho Supreme Court, as well as two Idaho federal district court judges, has definitively concluded that a district court's review of a school board's

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4. Ferguson v. Bd. of Trs. of Bonner County Sch. Dist. No. 82, 98 Idaho 359, 363, 564 P.2d 971, 975 (1977) (interpreting statutory and regulatory predecessor to section 33-513(5)).

5. Lowder v. Minidoka County Joint Sch. Dist. No. 331, 132 Idaho 834, 839, 979 P.2d 1192, 1197 (1999).

6. IDAHO CODE § 33-515 (Michie 2001). Neither the Idaho Legislature nor the Idaho Supreme Court has defined just and reasonable cause. Just cause has been defined as "cause . . . which must be based on reasonable grounds, and there must be a fair and honest reason, regulated by good faith." BLACK'S LAW DICTIONARY 863 (6th ed. 1990). Likewise, the Idaho Supreme Court has defined the analogous term "good cause" as "[s]ubstantial reason, one that affords a legal excuse. Legally sufficient ground or reason." Allen v. Lewis-Clark State Coll., 105 Idaho 447, 455, 670 P.2d 854, 862 (1983) (quoting BLACK'S LAW DICTIONARY 623 (5th ed. 1979)).

7. *See* Rosecrans v. Intermountain Soap & Chem. Co., Inc., 100 Idaho 785, 787, 605 P.2d 963, 965 (1980); *see also* MARK A. ROTHSTEIN, EMPLOYMENT LAW § 8.8 at 696 (2d ed. 1999).

8. Kolp v. Bd. of Trs. of Butte County Joint Sch. Dist. No. 111, 102 Idaho 320, 322, 629 P.2d 1153, 1155 (1981); *see also* Bowler v. Bd. of Trs. of Sch. Dist. No. 392, 101 Idaho 537, 540, 617 P.2d 841, 844 (1980).

just cause or just and reasonable cause determination in a teacher discharge or nonrenewal must be *de novo*. Stated another way, the just cause issue must be tried completely anew and a school board's just cause determination is entitled to no deference whatsoever when the issue is tried in the district court.[9]

II. IDAHO CASE LAW ON THE STANDARD OF REVIEW/DEGREE OF DEFERENCE ISSUE

The Idaho Supreme Court has made clear that when a teacher is discharged by a school board under the just and reasonable cause standard set forth in Idaho Code section 33-515 and incorporated into the teacher's employment contract, he or she is entitled to a trial *de novo* in district court, where the board's decision is not binding.[10] In *Kolp*, the Idaho Supreme Court reversed, in part, the trial court's decision upholding a school board's decision discharging a renewable contract teacher under the just and reasonable cause provision set forth in section 33-515's statutory predecessor. Remanding the matter for trial under the teacher's statutory and breach of contract theories, the court held as follows:

> In the interests of justice, we remand that portion of the case dealing with the substantive issues to the district court with directions to grant a trial *de novo*. *Cf. Cooper v. Board of County Commissioners, supra* (Bakes, J., concurring opinion upon rehearing).
>
> That trial would present a proper forum for examination of the causes for the discharge. The teacher would have the bur-

9. The term "*de novo*" means "the court should make an independent determination of the issues." United States v. First City Nat'l Bank of Houston, 386 U.S. 361, 368 (1967). Similarly, "*de novo* trial" has been defined as "[t]rying a matter anew; the same as if it had not been heard before and as if no decision had previously been rendered." BLACK'S LAW DICTIONARY 435 (6th ed. 1990). For an excellent discussion of the various standards of judicial review used by courts in reviewing employer just cause determinations for discharge of employees, albeit a discussion that primarily addresses private sector cases and does not address the due process issues discussed below, see Jennifer M. Brun, Comment, *Determining the Appropriate Level of Judicial Deference to Public School Board Determinations of Cause in Wrongful Termination Cases*, 38 IDAHO L. REV. 781, 790–803 (2002).

10. *Kolp*, 102 Idaho at 327, 629 P.2d at 1160.

den of proof. The board's decision would not be binding on the court.

....

> Any substantive argument . . . [concerning issues on remand] would, of course, be an issue for consideration in the *de novo* proceeding.[11]

Justice Bistline, concurring and dissenting in *Kolp*, agreed that a teacher discharged under the just and reasonable cause standard would be entitled to a trial *de novo* on her statutory and breach of contract claims in district court. He further clarified that the board's de-

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11. *Id.* (emphasis added) (footnote omitted); *see also* Robinson v. Joint Sch. Dist. No. 150, 100 Idaho 263, 596 P.2d 436 (1979). It might be argued that the supreme court's references to a "trial *de novo*" and "*de novo* proceeding" pertained to a new trial in the district court and not necessarily to the standard of judicial review concerning the school board's just cause determination. This argument might be made because the supreme court was remanding the substantive issues for a second trial in the district court. A review, however, of Justice Bakes's concurring opinion in Cooper v. Bd. of County Comm'rs of Ada County, 101 Idaho 407, 614 P.2d 947 (1980)—the opinion upon which the *Kolp* majority relied in remanding the matter to the district court—makes clear that the supreme court's reference to a trial *de novo* does, in fact, pertain to the level of deference that the district court should pay to the school board's decision to discharge the teacher.

Justice Bakes, in his concurrence in *Cooper*, first noted that the district judge's conclusion that "on an appeal from the decision of the board of commissioners of Ada County he was 'in effect bound to rehear the validity of zoning disputes *de novo*'. . . or anew, was correct." 101 Idaho at 414, 614 P.2d at 954. Justice Bakes went on to state that

> [w]hen the matter was appealed and heard anew by the district court all of the proceedings that had occurred before the zoning commission or the Board prior to that time were of no significance . . . . [I]t was as if the slate were wiped clean, and the case proceeds in the district court "as though originally brought in said court . . . ."

Id.

As Justice Bakes saw it, "the only question before this Court is whether the district court properly tried the case *de novo*, or anew, rather than merely determining whether the Board of County Commissioners had 'abused their discretion.'" *Id.* Concluding that the district court failed to make "its own judgment of the facts and the law, unfettered by the opinion of the zoning board and the Board of County Commissioners below," Justice Bakes felt that the matter should have been "reverse[d] and remand[ed] to the district court for a true *de novo* decision . . . ." 101 Idaho at 415, 614 P.2d at 955.

Thus, any doubt that the *Kolp* majority's reference to a "trial *de novo*" pertained to the standard of review governing the district court's review of the school board's just cause determination is eliminated by a close reading of the authority upon which it relied, *i.e.*, Justice Bakes's concurring opinion upon rehearing in *Cooper*.

cision would be entitled to no deference whatsoever in that proceeding, stating as follows:

> This leads to my final area of concern—the weight to be given the decision of the Board. In a mandamus proceeding, or in an A.P.A. review, the decision of the Board would be given considerable weight, *i.e.*, the question would be whether the Board had abused its discretion. In a contract action, however, under the standard enunciated by this Court, the decision of the Board is entitled to absolutely no presumptive weight. [FN9]
>
> > FN9. For example, the district court noted in its opinion that the Board could have believed the students' version of how many times they were hit, rather than the teachers [sic]. But in a contract action, the trier-of-fact will determine whom to believe, and if the fact finder chooses to believe the teacher, then the question will be whether there was just cause to fire him for hitting the children six times. There will be no deference given to the Board's decision to believe the students and consider whether there was just cause given that he hit the students sixteen times.
>
> The Board is simply one of the parties to the contract. Whether the Board breached its contract will be determined by the finder-of-fact as an initial matter, without any deference to the discretion of the Board. While I believe this result is correct under current law, it raises substantial policy issues that the legislature may wish to consider.
>
> The legislature in I.C. § 33-513 carefully provided procedural due process to teachers threatened with dismissal. The legislature did not, however, explicitly provide a means of judicial review of the Board's decision. By holding that the proper method to test the substantive decision is through a breach of contract action, this Court is placing the power over hiring and firing teachers in the courts rather than in the school boards. A court and a school board may have different views on what constitutes just cause, and, in spite of the elaborate

> procedural safeguards imposed upon the Board, the Board's decision is totally meaningless when the issue goes before the court. It is for the legislature, not the Court to decide where dismissal decisions should be made.[12]

Similarly, United States District Judge Lynn Winmill, relying on *Kolp* and *Robinson*, refused to certify the question of the standard of judicial review of a school board decision finding just cause to terminate a tenured teacher to the Idaho Supreme Court, stating that "the . . . [Idaho high] [c]ourt has spoken with sufficient clarity as to the standard of review . . . ."[13] In so holding, Judge Winmill believed that a jury, rather than the school board, must be the final, independent arbiter of whether the school board had just and reasonable cause to discharge a teacher. According to Judge Winmill

> The remaining state claim is essentially a breach of contract claim. *In presenting this matter before a jury, the appropriate standard is the same as it would be in any other breach of contract claim.* Upon presentation of the facts, the jury would be called upon to determine whether or not the school board's action amounted to a breach of the employment contract between plaintiff and defendant. In other words, the jury must decide whether the school board had just cause for terminating the employment of [the teacher].[14]

And, United States District Judge Edward Lodge, again relying on *Kolp*, has likewise held that the *de novo* standard applies to review of a school board's decision discharging a renewable contract teacher.[15]

In sum, both the Idaho Supreme Court and two federal judges have determined that a school board's just cause determination in a

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12. *Kolp*, 102 Idaho at 333, 629 P.2d at 1166 (Bistline, J., concurring and dissenting). Brun fails to recognize that the court majority opinion in *Kolp* calls for *de novo* review of the just cause issue and mischaracterizes Justice Bistline's concurring and dissenting opinion as "stat[ing] that substantive decisions should be left to the school board." Brun, *supra* note 9, at 788 n. 37.

13. Browning v. Jefferson Joint Sch. Dist. No. 251, Civ. No. 99-194-E-BLW (D. Idaho Apr. 11, 2001) (order denying certification).

14. *Id.* (emphasis added).

15. Belcourt v. Wallace Sch. Dist. No. 393, Civ. No. 02-227-N-EJL, (D. Idaho Feb. 7, 2005) (order resolving state law question). Judge Lodge initially certified the standard of review question on a school board's just cause determination in a teacher discharge case to the Idaho Supreme Court. Belcourt v. Wallace Sch. Dist. No. 393, (D. Idaho Jan. 29, 2004) (order certifying questions of state law to the Idaho Supreme Court). The Idaho Supreme Court, however, declined to accept certification of the question. *In re* Order Certifying Questions of State Law to the Idaho Supreme Court, Belcourt v. Wallace Sch. Dist. No. 393, No. 99505, Ref. No. 04S-42 (Idaho Mar. 12, 2004) (order declining request to certify questions of state law). As a result, Judge Lodge was forced to resolve the question without additional guidance from the state high court.

teacher discharge or nonrenewal case is subject to *de novo* judicial review. The question then becomes whether a more deferential standard of review would be constitutionally acceptable given Idaho's procedural system and structure for making just cause determinations at the school district level. As discussed below, and given the requirements of procedural due process, the question must be resolved in the negative.

III. DUE PROCESS PRINCIPLES

Both the United States and Idaho Supreme Courts have held that, where a public school teacher has a legitimate expectation of continued employment, such that a school district can only sever employment for just cause or just and reasonable cause, the teacher has a property interest in employment protected by due process under the Fourteenth Amendment to the United States Constitution.[16] Procedural due process protections apply to adjudicative administrative proceedings, as well as to courts.[17] In both settings, procedural due process requires a "fair trial in a fair tribunal" and, specifically, a decision maker who is free from actual or probable bias.[18] As some courts have stated, a due process property holder is entitled to a "relatively level playing field" upon which to defend against deprivation of their constitutional property interest.[19]

In articulating the due process principles that govern adjudicative proceedings concerning educators and other professionals, the United States and Idaho Supreme Courts have accorded a presumption of honesty and integrity to administrative adjudicators.[20] The United States Supreme Court has cautioned, however, that "[c]ircumstances and relationships must be considered."[21] Both high

16. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538–39 (1985); Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 576–78 (1972); Lowder v. Minidoka County Joint Sch. Dist. No. 331, 132 Idaho 834, 839, 979 P.2d 1192, 1197 (1999).

17. Withrow v. Larkin, 421 U.S. 35, 46–47 (1975); Gibson v. Berryhill, 411 U.S. 564, 579 (1973); Tumey v. Ohio, 273 U.S. 510 (1927).

18. *Withrow*, 421 U.S. at 46–47 (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)).

19. *See, e.g.*, Nightlife Partners v. City of Beverly Hills, 133 Cal. Rptr. 2d 234, 242 (Cal. Ct. App. 2003) (citing *Withrow*, 421 U.S. at 46).

20. *Withrow*, 421 U.S. at 47; Ferguson v. Bd. of Trs. of Bonner County Sch. Dist. No. 82, 98 Idaho 359, 366, 564 P.2d 971, 978 (1977).

21. *In re* Murchison, 349 U.S. at 136.

courts, discussing the issue in the same context, have recognized that human frailties, either by themselves or stemming from certain structures or relationships, may cause a board to undermine an individual's due process rights. According to the United States Supreme Court

> [T]he [due process] inquiry was not whether the Board members were "actually biased but whether, in the natural course of events, there is an indication of a possible temptation to an average [person] sitting as a judge to try the case with bias for or against any issue presented to [the person]."[22]

Or, as the United States Supreme Court stated in *Withrow*, in rejecting a contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication:

> [Such contention] must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring [such] powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.
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> . . . .
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> . . . Of course, we should be alert to the possibilities of bias that may lurk in the way particular procedures actually work in practice.[23]

Thus, as the United States Supreme Court stated long ago in discussing the requirements of administrative due process, "the 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations . . . ."[24]

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22. *Gibson*, 411 U.S. at 571 (quoting Berryhill v. Gibson, 331 F. Supp. 122, 125 (M.D. Ala. 1971)). *Accord* Johnson v. Bonner County Sch. Dist. No. 82, 126 Idaho 490, 494, 887 P.2d 35, 39 (1994). The United States Supreme Court has indicated that, in addition to or as a form of actual or probable bias, where an administrative adjudicator may have prejudged the case, has a pecuniary interest in the case's outcome, or has been the target of personal abuse or criticism from the party before him or it, "the probability of actual bias on the part of the . . . decision maker is too high to be constitutionally tolerable." *Withrow*, 421 U.S. at 47 & nn.14–15; *see also* Stivers v. Pierce, 71 F.3d 732, 741 (9th Cir. 1995).

23. *Withrow*, 421 U.S. at 47, 54.

24. Morgan v. United States, 298 U.S. 468, 480 (1936), *quoted in* Breitling v.

In addition, both high courts have made clear that "due process is flexible and calls for such procedural protections as the particular situation demands."[25] Those same courts, as well as others, have held that more elaborate procedures at one stage of the administrative and judicial process may compensate for deficiencies at other stages.[26] Specifically, although certain administrative procedures and safeguards must be provided without fail, the existence of meaningful post-termination administrative judicial review will make up for deficiencies in the prior administrative process.[27] Ultimately, in determining what process is constitutionally required at a given stage of the proceeding, a court must consider the interests of the constitutional property holder (here the teacher) and the government (here the school district). It must also consider the value of and need for additional safeguards (here *de novo* judicial review) concerning the school board's deprivation of its employee's constitutional property.[28]

Before applying that balancing test, this article will identify and analyze the relational and procedural issues underlying the teacher discharge or nonrenewal hearing process.

Solenberger, 585 F. Supp. 289, 290 (W.D. Va. 1984), *aff'd mem.*, 749 F.2d 30 (4th Cir. 1984).

25. Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Bowler v. Bd. of Trs. of Sch. Dist. No. 392, 101 Idaho 537, 542, 617 P.2d 841, 846 (1980).

26. Bignall v. N. Idaho Coll., 538 F.2d 243, 246 (9th Cir. 1976) (citing Mathews v. Eldridge, 424 U.S. 319 (1976)).

27. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545, 547–48 (1985), *cited in* Brock v. Roadway Exp., Inc., 481 U.S. 252, 261–62 (1987); Prato v. Vallas, 771 N.E.2d 1053, 1065 (Ill. App. Ct. 2002); Allen v. Lewis-Clark State Coll., 105 Idaho 447, 464, 670 P.2d 854, 871 (1983); *but cf.* Concrete Pipe and Products of Cal., Inc. v. Constr. Laborers Pension Trust, 508 U.S. 602, 618 (1993) ("Even appeal and a trial *de novo* will not cure a failure to provide a neutral and detached adjudicator."). In *Allen*, the Idaho Supreme Court upheld the discharge of a chief of campus security under a "good cause" standard on the grounds that the State Board of Education had not acted arbitrarily, capriciously, or in abuse of its discretion under Idaho's Administrative Procedures Act (IDAPA). 105 Idaho at 457–58, 670 P.2d at 864–65. In *Smith v. Meridian Joint Sch. Dist. No. 2*, the Idaho Supreme Court distinguished *Allen* and refused to apply the deferential IDAPA standard of review to a school district nonrenewal decision on the grounds that school districts and school boards are not agencies under IDAPA. 128 Idaho 714, 721–22, 918 P.2d 583, 590–91 (1996). Although *Allen's* discussion of the importance of meaningful post-termination review is important to the due process issue, its application of the IDAPA's "arbitrary, capricious/abuse of discretion" judicial review standard does not change *Kolp's* holding that the *de novo* standard of review applies to employee discharge decisions by school boards, who are not governed by IDAPA.

28. *Mathews*, 424 U.S. at 335; *Bowler*, 101 Idaho at 542, 617 P.2d at 846.

IV. RELATIONAL AND PROCEDURAL ISSUES RELEVANT TO THE STANDARD OF REVIEW AND PROCEDURAL DUE PROCESS

A. Relationship Between the School Board and Superintendent

In Idaho, as in other jurisdictions, a locally-elected board of trustees governs a school district.[29] As one aspect of a school board's governance, a school board is charged with the power and duty to, where necessary and appropriate, "discharge certificated professional personnel."[30] To assist the school board in governing the school district and to implement the board's policies and decisions, the board is also obligated "to employ a superintendent of schools . . . , who shall be the executive officer of the board of trustees with such powers and duties as the board may prescribe."[31]

Based on this structural relationship, a number of courts have characterized the relationship between a superintendent as a "close working relationship."[32] Thus, the relationship is one in which "[o]ne of the superintendent's primary responsibilities is providing professional leadership to the Board,"[33] and one where the "superintendent and school board . . . [must have] a high level of confidence and trust."[34]

The Fifth Circuit Court of Appeals has provided the most comprehensive judicial discussion of the relationship between the board of trustees of a school district and its superintendent, stating as follows:

> Another consideration is whether a close working relationship is essential. [The superintendent] Kinsey occupied a high-level policymaker position. Under [state] law, the Board is a corporate body with the exclusive power to manage and govern its district's schools. It employs the superintendent, who "is the educational leader and the administrative manager of the school district." [C]onsideration should also be given to whether the employee acts as an adviser or formulates plans for the implementation of broad goals." One of Kinsey's pri-

29. IDAHO CODE § 33-501 (Michie 2001) ("Each school district shall be governed by a board of trustees.").

30. IDAHO CODE § 33-513(5) (Michie 2001).

31. IDAHO CODE § 33-513(2) (Michie 2001).

32. Kinsey v. Salado Indep. Sch. Dist., 950 F.2d 988, 995–96 (5th Cir. 1992); Patterson v. Ramsey, 413 F. Supp. 523, 542 (D. Md. 1976); *see also* Couper v. Madison Bd. of Police and Fire Comm'rs, 369 F. Supp. 721, 727 (W.D. Wis. 1974).

33. Kilmer v. Dillingham City Sch. Dist., 932 P.2d 757, 766 (Alaska 1997); *see also Kinsey*, 950 F.2d at 995–96.

34. *Kilmer*, 932 P.2d at 766 n.14; *see also Kinsey*, 950 F.2d at 996.

> mary duties was to advise the Board. He met with it in executive session and offered opinions and recommendations to guide its decisions. Kinsey also handled the School District's finances, and made recommendations to the Board on hiring teachers and principals. And, because the Board can act only by majority vote at duly called meetings, it was dependent upon Kinsey, its chief administrator, to implement its policies and decisions.
>
> Therefore, he possessed the power to "make or break" Board policies which "arguably afforded him the opportunity to thwart or to forward [its] goals." In addition to occupying a sensitive, high-level policymaking position in relation to the Board, Kinsey occupied a confidential relationship. During executive sessions, he could be called on to advise the Board on matters relating to real property transactions, personnel grievances and hearings, student discipline cases, and other confidential matters. Moreover, he was custodian of the Board's confidential records. These could include personnel and litigation files, sealed bids, drafts and working papers in the preparation of proposed rules and policies, student records and other confidential documents.
>
> In sum, a close working relationship was essential.[35]

Also, closer to home, the Executive Board of the Idaho School Boards Association (ISBA) recently articulated a number of trustee standards that expressly call for shared vision and unity between a school board and its superintendent.[36] Those trustee standards state, in pertinent part, as follows:

> **Vision**
>
> *The board/superintendent team creates a shared vision with a focus on improving learning and achievement for all students.*

35. *Kinsey*, 950 F.2d at 995–96 (citations omitted).

36. Trustee Standards promulgated by the Idaho School Boards Association, Idaho School Board Standards and Indicators *available at* http://www.idsba.org/standards/index.html (2004).

. . . .

Teamwork

The board and superintendent work as a unified team to lead the district toward the vision.

. . . .

Structure

The board/superintendent team provides a structure that supports the vision through aligned policy, goals, and financial resources.

. . . .

Accountability

The board/superintendent team adopts and implement[s] an accountability plan to evaluate progress towards the vision and reports the results to the public.

Indicators:

. . . .

The Team conducts regular and timely evaluations of the superintendent based on the vision, goals and performance of the district and ensures that the superintendent holds district personnel accountable.[37]

In addition to the close working relationship that most school boards have with a superintendent, courts have noted that most school board members do not have any particular expertise in education or personnel matters, stating as follows:

> The board of directors of any school district in our state is elected and for the most part are laymen as to the field of education; and it is these laymen who govern our schools. Ordinarily, the initial hearing on discharge is held before the board of directors. Its decision does not require the administrative expertise demanded in such regulatory areas as utility,

37. *Id.*

banking, tax, ecology, or professional fields.[38]

At least one commentator on public school reform has decried the malleability of school board members brought on by the over-reliance upon and deference to superintendents and other administrators and the board members' lack of expertise in the matters that come before them. According to him,

> [m]ost school board members are well-intentioned individuals who lack the political or educational savvy, sophistication and expertise to tackle and exert influence on powerful superintendents, administrators, teacher unions, and vocal minorities. In far too many cases, boards are overwhelmed by the educational establishment, showered with a massive blizzard of education papers and studies, and intimidated to accept staff recommendations with little discussion and understanding. Most Board members are brainwashed and expected to avoid controversy and present a unified public position. All too often, they are manipulated and relegated to being rubber stamps for staff decisions.[39]

Moreover, a school board's propensity to defer to the superintendent and rubber stamp his or her recommendations, notwithstanding the differences in their roles in a teacher due process hearing, is more than theoretical musing. Thus, where an Idaho school principal sought an injunction to prevent the school board from sitting as decision makers in her discharge hearing based on her belief that one or more of the board members would unfairly decide the issues in her case, one of the school board members testified as follows:

> Q. Do you have a lot of respect for [the superintendent]?
>
> A. A lot of respect, yes. . . . When I viewed him, I viewed him as not only a Doctor of Education, but literally as a physician of education. He could do a lot of good for our School District.
>
> * * *

38. Lines v. Yakima Sch. Dist. No. 7, 533 P.2d 140, 144 (Wash. Ct. App. 1975).

39. Chuck Sambar, School Reform: Who is Responsible? (Part 1 of 2) (personal commentary), *at* http://www.sambarpress.com/chuck/school_reform.htm (1999).

Q. And given your respect for [the superintendent] and given his recommendation, wouldn't it be extremely difficult for you to go against his recommendation of discharge?

A. No. You have to realize [the superintendent] is extremely professional. [The superintendent] knows his place. The Board of Trustees are the only ones authorized to make that kind of decision; he is not, and he knows that. All he is entitled to do is make a recommendation. . . . [T]he lines of authority are very clear; he knows where he stands, and we know where we stand. His thing, again, is a recommendation. To go against him -- it's not his decision to make; it's our decision to make.

Q. Okay. But given your respect for him and your characterization of him as not only as a doctor but a physician, would you not accord some deference to his recommendation?

A. Speaking for me personally, it's not -- I don't -- it's not his decision to make; it's mine. I wouldn't vote strictly to make him happy, no.

Q. Okay. That really wasn't my question, though. My question was: Given your relationship with him and your feelings about him, would you be inclined to accord any deference to his recommendation?

A. I'm not sure I understand your question.

Q. Well, you can start with a level playing field; and then under some scenarios, because of the nature of the recommendation or the recommendationer, there can be a slight deference, sort of an imbalance in the playing field because of the source of the recommendation. That is what I'm talking about when I say, "deference." Wouldn't it, under the circumstances, be the case that given your feelings about [the superintendent]'s qualifications that you would accord some deference to his recommendation?

A. I'm still not sure what you are asking. I am not sure of your questioning. . . .

Q. Well, do you -- basically, given what you know of [the superintendent] and your respect for him, would you pay his

recommendation more deference than if the recommendation came from a non-educator?

A. I believe that [the superintendent] is highly qualified to make this kind of recommendation or he wouldn't have made it unless it needed to be made.

Q. Okay. And given your feelings about that, do you accord that any more weight than you would to some other individual?

A. Yes.[40]

And, in an action brought by a renewable-contract teacher alleging, among other things, that a school board did not have just and reasonable cause to discharge him, a board member who participated in the school board's deliberations on its superintendent's recommendation of nonrenewal, testified as follows:

Q. The three gentlemen that voted in favor of the administration's recommendation . . . did you develop an impression as to why they voted the way they did?

A. Yes.

Q. What was the impression?

A. They followed the administration's recommendation; quote, "That's why we pay them."

* * *

40. Miller v. Bd. of Trs., Ririe Joint Sch. Dist. No. 252, No. CV-96-451, (Idaho 7th Dist. Ct., Jefferson County), Hearing on Plaintiff's Motion for Preliminary Injunction conducted on February 6, 1997, at pp. 182–85. The Idaho Supreme Court allows a teacher or principal to request a court to enjoin a school board or school board member from participating in a due process hearing upon a showing that there is a probability that the decision-maker will unfairly decide any issue presented at the hearing. Johnson v. Bonner County Sch. Dist. No. 82, 126 Idaho 490, 490–91, 887 P.2d 35, 35–36 (1994). Courts in other jurisdictions allow such challenge to be brought after the hearing has transpired. *See, e.g.*, Staton v. Mayes, 552 F.2d 908 (10th Cir. 1977).

Q. . . . As you were sitting there during the deliberations, did you view what you saw there; that is, the board's following the administration's recommendation because "that's what we pay them for," did you view this as something of a referendum on their approval of the administration?

A. Yes. Not just district administration, but building administrators, yes. So it means -- it depends on what you define as administration, but I would say yes to both.

Q. To both. It was kind of a referendum on both [the building principal's] administration of the building --

A. Yes.

Q. -- and on then interim . . . superintendent['s] . . . administration of the school district?

A. Yes.

Q. Did you develop the impression that the board felt that if it went against the recommendation, that would be kind of casting a vote of no approval or a vote of, "We don't think you're doing a good job" to the administration?

A. Certainly.

Q. Did you express your opinion about that?

A. I don't believe in those deliberations at that point I had the guts to.

Q. . . . Did you have an opinion at that time, even if you didn't express it?

A. If I did, it was in its infancy.

Q. What was it, sort of, in its embryonic state?

A. That they were yes-men. As far as I recollect, I withheld any statement to that effect.

* * *

> Q. . . . If you felt that over time you developed the impression, starting with Mr. Liebe's case, that the board were yes-men, did you feel that their decision in Mr. Liebe's matter was evidence of that?
>
> A. Yes.
>
> * * *
>
> Q. . . . Is that yes-men for the recommendations of the administration?
>
> A. Yes.[41]

To be sure, some board members are able to maintain independence from a superintendent in a discharge or nonrenewal proceeding. Likewise, irrespective of whether a school board has exercised the necessary independence from its superintendent to provide a teacher with a fair hearing, a school board may well be justified in discharging or not renewing the contract of the teacher for reasons amounting to just cause or just and reasonable cause. The fact remains, however, that a number of teachers discharged for alleged misconduct or ethics violations have been awarded unemployment compensation because the school district, as an employer, was not able to meet its burden of demonstrating to the Department of Labor or Industrial Commission that the teacher engaged in misconduct.[42] Similarly, in at least four cases where an Idaho school board has discharged a teacher based on alleged Code of Ethics violations, Idaho's Professional Standards Commission—the statewide agency vested with the responsibility of enforcing the Code of Ethics—has either declined to pursue or impose any sanctions against the teachers' professional certificates,[43] or is-

41. Liebe v. Idaho Falls Sch. Dist. No. 91, No. CV-97-1101, (Idaho 7th Dist. Ct., Bonneville County), deposition testimony of school board member taken on September 14, 1998, at pp. 37–40, 43.

42. *See, e.g.*, Folks v. Moscow Sch. Dist. No. 281, 129 Idaho 833, 933 P.2d 642 (1997); Eligibility Determination—Unemployment Insurance Claim for Claimant Bonnie J. Belcourt, Idaho Dep't of Labor (Feb. 5, 2001); Decision of Appeals Examiner re: Claimant Lane Anderson, Appeals Bureau, Idaho Dep't of Labor (Mar. 10, 1999); Decision of Appeals Examiner re: Claimant Martha Browning, Appeals Bureau, Idaho Dep't of Labor (Dec. 19, 1997).

43. Hanshew v. Browning, Idaho Professional Standards Commission, Case No. 97-025, Findings of Fact, Conclusions of Law, and Preliminary Order of the Hear-

sued the lesser sanction of a letter of reprimand or letter of concern.[44] And, in those same four cases, each of which went to litigation, one case was settled based on a substantial monetary payment and offer of reinstatement to the teacher from the school district.[45] Another was settled based on the school board's withdrawing its decision dismissing the teacher and reinstating the teacher "[b]ased upon the findings and conclusions of other tribunals."[46] Yet another was dismissed early on by the plaintiff,[47] and the other case remains pending.[48]

Thus, in a substantial number of cases where school boards have discharged teachers under a just and reasonable cause standard, other Idaho administrative bodies have refused to impose serious sanctions on the teacher or have refused to take adverse action at all. These results occurred, notwithstanding that the evidence concerning the teacher's alleged misconduct or code of ethics violation was essentially identical to the evidence presented by the school district administration to the school board.

B. Lack of Subpoena Power

It has frequently been said and recently reiterated that parties appearing before courts and other adjudicative bodies are entitled to "every man's evidence."[49] Unless a witness is willing to appear voluntarily, the witnesses' attendance and testimony at such proceedings may be compelled via a subpoena issued under the authority of the adjudicative body. In Idaho, subpoenas not only emanate from

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ing Panel (June 16, 1998); Letter from Dr. Michael P. Stefanic, Administrator, Professional Standards Commission, to Nikkie J. Miller (Jan. 27, 1998).

44. Stefanic v. Belcourt, Idaho Professional Standards Commission, Case No. 2000-01, Stipulated Agreement, (Apr. 26, 2002); Letter from Dr. Michael P. Stefanic, Administrator, Professional Standards Commission, to Ms. Lane M. Anderson (Jan. 27, 1999).

45. Release and Indemnity Agreement (Apr. 25, 2002) (settling Anderson v. Bd. of Trs., Richfield Sch. Dist. No. 316, Case Nos. CV99-00168 and CV98-00165, (5th Dist. Ct., Lincoln County)).

46. Confidential Settlement, Release and Indemnity Agreement and attached Joint Statement (June 2001) (settling Browning v. Jefferson Joint Sch. Dist. No. 251, Civ. No. 99-194-E-BLW (D. Idaho Apr. 11, 2001) (order denying certification)). The parties agreed that the other terms of the *Browning* settlement would remain confidential. *Id.*

47. Miller v. Ririe Joint Sch. Dist. No. 252, District of Idaho, Case No. Civ. 98-0379-E-BLW, Stipulation for Dismissal with Prejudice (filed Aug. 14, 2000), and Order of Dismissal with Prejudice (Aug. 18, 2000).

48. Belcourt v. Wallace Sch. Dist. No. 393, District of Idaho, Case No. Civ. 02-227-N-EJL.

49. United States ex rel. Watson v. Conn. Gen. Life Ins. Co., 2003 WL 203568, *4 & n.7 (E.D. Pa. 2003) (quoting United States v. Dionisio, 410 U.S. 1, 9–10 (1973)).

courts,[50] but also from arbitrators[51] and state administrative agencies.[52]

As mentioned earlier, section 33-513(5), the statutory provision governing teacher discharge or nonrenewal proceedings, does not provide for the issuance of subpoenas to compel testimony or production of documents relevant to the factual issues raised in such cases. Accordingly, as more fully discussed below, the lack of compulsory process may prevent a teacher from presenting evidence relevant to the just and reasonable cause issue.

V. DUE PROCESS PRINCIPLES APPLIED

As discussed previously, the United States Supreme Court and the Idaho Supreme Court have applied the following three factors in determining whether a particular procedural safeguard is required by due process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[53]

Turning to the first factor, the Idaho Supreme Court has tersely, but accurately, stated, "the interest of a teacher with renewable contract rights is substantial."[54] Obviously, the loss of present and future income associated with employment as a teacher cannot be gainsaid.

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50. *See* ID. R. CIV. P. 45(a)-(f); FED. R. CIV. P. 45.

51. *See* IDAHO CODE § 7-907 (Michie 2004).

52. *See* IDAPA 04.11.01.525 (2004).

53. Mathews v. Eldridge, 424 U.S. 319, 335 (1976); Bowler v. Bd. of Trs. of Sch. Dist. No. 392, 101 Idaho 537, 542, 617 P.2d 841, 846 (1980). The author is not aware of any courts that have applied the *Mathews* balancing test in determining whether *de novo* review is constitutionally required when a court reviews a school board's determination in a teacher discharge or nonrenewal case. However, a number of courts have applied the *Mathews* factors in determining whether due process requires *de novo* judicial review of other quasi-judicial administrative or judicial decisions. *See, e.g.*, Chmielewski v. Aetna Cas. and Sur. Co., 591 A.2d 101, 110–11 (Conn. 1991); *In re* Tyqwane V, 857 A.2d 963, 969–72 (Conn. App. Ct. 2004); United States v. Hardage, 663 F. Supp. 1280, 1290 (W.D. Okla. 1987).

54. *Bowler*, 101 Idaho at 543, 617 P.2d at 847.

The Idaho Supreme Court has also recognized that a public employee faced with discharge or nonrenewal has "an interest in avoiding a loss of reputation which may result in cases in which an employee is discharged for unjustifiable reasons."[55] And, beyond the employee's economic and reputational interests, most teachers have a psychological interest in continuing to perform their duties of serving and educating students—duties that have been referred to by some as "the noblest profession."[56] Thus, perhaps other than a teacher's family or faith, his or her continued employment as a teacher is of paramount importance. As such, the teacher's private interest in avoiding termination or curing a wrongful termination strongly militates in favor of *de novo* judicial review of a school board's just cause or just and reasonable cause determination.[57]

Second, the relational and procedural hallmarks of Idaho's administrative system governing teacher discharge and nonrenewal create a significant, intolerable risk of an erroneous deprivation of a teacher's property interest in continued employment. This risk is created several ways: 1) the superintendent acts as a teammate of and advisor to the school board; 2) the superintendent acts as the prosecutor or chief prosecution witness; 3) the board acts as jury and judge; and, 4) neither party has subpoena power in the administrative proceeding. No judicial system would countenance a trial court proceeding whereby the prosecutor or chief prosecution witness also serves as an advisor to or is an employee of the judge or jury. Likewise, no judicial system, except perhaps in the small claims setting, would allow the adjudication of substantial rights without compulsory process. Yet this very system is allowed in the administrative hearing process for Idaho teachers faced with nonrenewal or discharge.

Based on the due process decisions of the United States and Idaho Supreme Courts and the nature of school board decision making in nonrenewal and discharge cases, an "unlevel playing field" exists such that the system would not pass constitutional muster if a teacher

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55. Allen v. Lewis-Clark State Coll., 105 Idaho 447, 462, 670 P.2d 854, 869 (1983).

56. *See, e.g.*, ROBERT A. SULLO, THE INSPIRING TEACHER: NEW BEGINNINGS FOR THE 21ST CENTURY (1999).

57. The Washington Court of Appeals has written that

> [t]he impact of this decision, particularly where discharge occurs as opposed to nonrenewal for financial reasons, may seriously impair a teacher's possibility in gaining new employment in his profession. Under the continuing contract law a teaching position is of such value as to bring into play enough 'due process' notions as to entitle him to a full '*de novo*' hearing.

Lines v. Yakima Pub. Sch., Yakima Sch. Dist. No. 7, 533 P.2d 140, 143 (Wash. Ct. App. 1975) (footnotes omitted).

did not have the right to seek judicial review of a school board's just cause determination.[58] Under circumstances where a school board's decision to deprive a teacher of a constitutional property interest is suspect either because of the relationship between the board and superintendent or because of the inability of the teacher to compel witnesses to testify, it would be grossly unfair for a court to defer to a school board's just cause or just and reasonable cause determination by applying a deferential arbitrary and capricious/substantial evidence/abuse standard of review, rather than applying an independent *de novo* review standard.[59] Stated another way, it would be grossly unfair—indeed, constitutionally deficient—for a court to defer to the factual determinations of an administrative body where the proceedings before the administrative body itself are constitutionally wanting. As such, *de novo* judicial review is essential to ensuring that a school board's just cause determination is based on the law and the evidence and not, as the Supreme Court feared in *Morgan*, on "extraneous considerations."[60] For these reasons, *de novo* review is essential in mini-

58. *See* Kelly v. Bd. of Educ. of Monticello Indep. Sch. Dist., 566 S.W.2d 165, 168 (Ky. Ct. App. 1977) (where "the prospect of a fair trial at the Board level is an 'illusion' . . . a trial *de novo* . . . [would] cure any due process defects in the hearing before the Board"); *see also* Casada v. Booneville Sch. Dist. No. 65, 686 F. Supp. 730, 731–33 (W.D. Ark. 1988) (teacher denied procedural due process where school district failed to provide teacher with fair pretermination hearing and trial court review was not under *de novo* standard); *but cf.* Bd. of Fairfield Cmty. Sch. Dist. v. Justmann, 476 N.W.2d 335, 340 (Iowa 1991) (no due process violation where superintendent served as prosecutor before school board in teacher discharge case).

59. The ability to compel witnesses—particularly, a teacher's colleagues—to testify at a due process hearing may be crucial to the teacher's defense. The teacher's colleagues, however, may be reluctant or unwilling to testify due to indifference or, worse, due to perceived or real fear of retaliation from the school district administration. For these reasons, a number of courts in other settings have held that, where an administrative body lacks subpoena power and, as a result, a party to an administrative proceeding is not able to compel the presence of witnesses or documents, judicial review of such proceedings should be via a *de novo* evidentiary hearing. *See, e.g.*, Dawson v. Richmond Heights Local Sch. Bd., 700 N.E.2d 359, 362–63 (Ohio Ct. App. 1997) (review of school board decision suspending student); Scolaro v. D.C. Bd. of Elections and Ethics, 691 A.2d 77, 90 (D.C. 1997) (judicial review of election challenge); Higgins v. Kelley, 574 F.2d 789, 793–94 (3rd Cir. 1978) (judicial review of former FBI employee's claim for back pay and reinstatement).

60. Morgan v. United States, 298 U.S. 468, 480 (1936). As the State of Washington Supreme Court cogently observed in a case upholding the constitutionality of *de novo* review of school board discharge decisions as against a separation of powers challenge:

mizing or avoiding the risk of erroneous discharge or nonrenewal decisions.

Third, the school district's "interest . . . is that of maintaining the efficiency and discipline among its employees."[61] Certainly, the school district has an interest in discharging or not renewing the contracts of teachers whom it believes, because of misconduct or performance deficiencies, should not be in the classroom. Moreover, a more deferential standard of review would, at least as to the factual issues underlying school board just and reasonable cause determinations, make it less likely that teachers would challenge school board decisions and, as a result, would likely lead to less litigation and less expense for school districts (and their insurance carriers).[62] However, affording a teacher the right to *de novo* judicial review neither hinders nor makes more costly a school board's ability to make the initial, administrative decision to discharge a teacher. Furthermore, because school board discharge decisions are not subject to review under IDAPA but, instead, are treated as breach of contract/statutory violation cases, the creation of a new evidentiary record via trial in the district court, absent pretrial settlements, will inevitably occur. Also, even if a more deferential standard applied to a school board's just and reasonable cause determination, a trial would still be necessary, if only to allow a jury to act, not as the ultimate fact finder, but rather, to determine the reasonableness of the school board's discharge or nonrenewal decision.[63] As such, use of a *de novo* standard of review will not cause any

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> When a teacher receives notice of probable cause, he has only 10 days to prepare for the hearing and his chance to fully develop the record for later review is somewhat limited. The *de novo* review by the superior court acts as a safeguard against oppressive, hurried and often prejudged determinations made by school boards. Members of the board cannot devote their entire time to perfecting their knowledge of law--which is so necessary for the proper safeguarding of important rights. The integrity of administrative and legislative independence is not threatened by *de novo* review, but, in fact, *de novo* review in cases such as this assists in sharpening the lines separating each of the coequal branches of government.

Francisco v. Bd. of Dirs. of Bellevue Pub. Sch., Dist. No. 405, 537 P.2d 789, 794 (Wash. 1975) (en banc) (emphasis added).

61. Allen v. Lewis-Clark State Coll., 105 Idaho 447, 462, 670 P.2d 854, 869 (1983); *see also* Bowler v. Bd. of Trs. of Sch. Dist. No. 392, Shoshone County, Mullan, 101 Idaho 537, 543, 617 P.2d 841, 847 (1980).

62. *See* Gwathmey v. Atkinson, 447 F. Supp. 1113, 1121 (E.D. Va. 1976), *aff'd mem.*, 556 F.2d 572 (4th Cir. 1977). Legal issues, however, would remain subject to *de novo* review. *See, e.g.*, Gauer v. Kadoka Sch. Dist. No. 35-1, 647 N.W.2d 727, 730 (S.D. 2002).

63. Towson Univ. v. Conte, 862 A.2d 941, 949–55 (Md. 2004); *but cf. Gwathmey*, 447 F.Supp. at 1117 (summary judgment appropriate in teacher discharge case where deferential, rather than *de novo*, standard of review applied).

additional costs in the district court. Lastly, the school district's interest encompasses the public's interest.[64] Although the school district has an interest in efficiency and discipline, the school district's interest also encompasses the public's interest in providing an administrative and judicial review system in teacher discharge or nonrenewal cases that ensures accurate and fair decision making, not only for the affected teacher, but also for the school district's patrons and students.[65] Ultimately, the school district's interest, when viewed as a whole, weighs against *de novo* review, but not nearly as severe as surmised at first blush.

In sum, given Idaho's current administrative system for adjudicating teacher discharge and nonrenewal cases, upon challenge by the affected teacher, due process requires that a court review a school board's just and reasonable cause determination under a *de novo* standard.[66]

VI. CONSTITUTIONALLY ACCEPTABLE ADMINISTRATIVE HEARING AND JUDICIAL REVIEW SYSTEMS

The key to affording procedural due process in teacher discharge and nonrenewal cases is to set up at some stage an administrative and judicial review system that provides the teacher with a level playing

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64. *Allen*, 105 Idaho at 462, 670 P.2d at 869 (quoting Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (Powell, J., concurring)).

65. *See* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171–72 (1951) (Frankfurter, J., concurring); Morgan v. United States, 304 U.S. 1, 15 (1938); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-7, at 666–67 (2nd ed. 1988) (cited and discussed in John E. Rumel, *The Hourglass and Due Process: The Propriety of Time Limits on Civil Trials*, 26 U.S.F. L. REV. 237, 250–52 & nn.107–22 (1992)).

66. The author is aware of several cases that suggest or hold that *de novo* judicial review of a school board's decision discharging or not renewing the contract of a teacher is not required by the due process clause. *See, e.g.*, Barndt v. Wissahickon Sch. Dist., 475 F. Supp. 503 (E.D. Pa. 1979), *aff'd mem.*, 615 F.2d 1352 (3rd Cir. 1980); *Gwathmey*, 447 F. Supp. at 1117–19. In *Barndt*, however, the teacher admitted in her brief on summary judgment that *de novo* review was not constitutionally mandated, thereby eviscerating her argument that the "absence of [*d*]*e novo* judicial appeal deprive[d her] of any effective means to a hearing before an impartial tribunal." 475 F. Supp. at 506 (emphasis added). Likewise, in *Gwathmey* and *Barndt*, the district courts failed to address the practical temptation for well-meaning school board members to rubber stamp the recommendation of their superintendent because of the superintendent's perceived expertise in personnel matters and to further school board–superintendent relations. For these reasons, the *Barndt* and *Gwathmey* decisions are less than persuasive.

field. As discussed above, Idaho's present administrative system for teacher termination cases is only constitutionally acceptable under due process principles if accompanied by *de novo* judicial review.

Alternative administrative hearing processes exist which would obviate due process concerns. Such an alternative process in the present setting would require that the decision maker truly be an independent professional, have no relationship with the school district administration, possess expertise in public sector or, specifically, school district employment issues, and have the power to issue subpoenas to compel the attendance of witnesses and the production of documents. Only if such safeguards are in place could the alternative process then allow for review under a more deferential IDAPA arbitrary and capricious/substantial evidence/abuse of discretion standard. Although the details of any such alternative system are beyond the scope of this article, two well-recognized administrative and judicial review systems exist and have been used to good effect in a number of jurisdictions. First, Idaho statutory law itself recognizes binding arbitration, primarily in the non-employment context, followed by limited judicial review.[67] Furthermore, the Idaho Supreme Court has affirmed the right of local education associations and school boards to agree to binding arbitration in teacher nonrenewal matters.[68] Second, several jurisdictions have created Public Employee Relation Boards (followed, again, by limited judicial review) to address personnel matters and labor disputes, thereby professionalizing the employee and labor relations process.[69] Although those public boards are typically charged with resolving unfair labor practice claims brought by public employees, their expertise in labor and employment matters would readily translate to teacher nonrenewal and discharge proceedings.

VII. CONCLUSION

Idaho teachers possess significant, constitutionally-protected property interests in their employment with local school districts. Yet,

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67. Idaho's Uniform Arbitration Act validates written agreements to arbitrate, although the act does not currently apply to arbitration agreements between employers and employees (unless otherwise provided in the agreement). IDAHO CODE § 7-901 (Michie 2001). As mentioned above, section 7-901 of the act further provides for subpoena power, and section 7-912 provides extremely limited judicial review. Cady v. Allstate Ins. Co., 113 Idaho 667, 747 P.2d 76 (Idaho Ct. App. 1987).

68. Bear Lake Educ. Ass'n v. Bd. of Trs. of Bear Lake Sch. Dist. No. 33, 116 Idaho 443, 776 P.2d 452 (1989).

69. *See, e.g.*, KAN. STAT. ANN. § 75-4321 (2001); CAL. GOVT. CODE § 3541.3 (West 1995); MICH. COMP. LAWS ANN. § 423.201 (West 2001).

Idaho's statutory administrative system for teacher discharge and nonrenewal proceedings (where the superintendent acts as the prosecutor or chief prosecution witness, the school board acts as judge and jury, and compulsory process is unavailable) does not provide a level playing field upon which teachers can protect and defend their constitutional property. Without taking into account these relational and procedural defects, Idaho case law makes clear that judicial review of school board just cause or just and reasonable cause determination in teacher discharge and nonrenewal cases must be under a *de novo* standard. Even if it did not, well-settled principles of procedural due process lead to the same conclusion. In sum, unless the Idaho Legislature adopts an alternative statutory scheme that professionalizes the administrative process (an unlikely occurrence, at best, given the legislature's time-honored preference for local school board control over school district personnel matters), Idaho trial courts must review *de novo* the just and reasonable cause determinations of local school boards.