

**REGULATION OF TEACHER CERTIFICATION IN IDAHO:
PROCEEDINGS BEFORE IDAHO'S PROFESSIONAL
STANDARDS COMMISSION CONCERNING THE DENIAL OF
AN APPLICATION FOR OR ACTION AGAINST A TEACHING
CERTIFICATE**

JOHN E. RUMEL

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JOHN E. RUMEL*

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* Associate Professor of Law, University of Idaho College of Law. J.D., University of California Hastings College of Law; B.A., University of California, Santa Cruz. The author would like to thank his colleague University of Idaho College of Law Professor Richard Seamon for encouraging him to undertake this project and College of Law student Emily Joyce for her valuable research assistance on it. The author would also like to thank Deputy Attorney General Michael Gilmore for his many years of skilled and dedicated service as an attorney advisor to Professional Standards Commission (“PSC”) hearing panels. Prior to joining the College of Law faculty, the author practiced before the PSC for a number of years.

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I. INTRODUCTION

Idahoans, quite properly, care deeply about the quality of education in the Gem State¹ and, specifically, about the competency, quality, and fitness of its primary and secondary (“K-12”) school teachers and other professional educators² throughout the state.³

1. In a 2016 survey, 28.2% of the respondents identified “Education/School Funding” as “the most important issue facing Idaho today”—a percentage number more than three times higher than for any other issue. COREY COOK ET AL., BOISE STATE UNIVERSITY, SCHOOL OF PUBLIC SERVICE PUBLIC POLICY SURVEY 3 (2016), <https://sps.boisestate.edu/wp-content/uploads/2016/02/Poll-Presentation-for-Release.pdf> (link direct to powerpoint presentation). In the same survey, 57.5% of the respondents identified “Education” as what should be the top and second highest priorities of the Idaho Legislature—this time doubling the next highest priorities identified in the survey. *Id.* at 4.

2. When used in this Article, the term “teacher” will be used to include professional educators or other individuals employed by a school district in a capacity requiring a professional certificate.

3. In a 2015 poll, Idahoans identified the most important factors in improving public education as increasing teacher pay and work skill development. Bob Bernick, *Idaho Residents Say Increasing Teacher Pay Will Boost Performance*, IDAHO POLITICS WEEKLY (June 28, 2015),

And well they should: it is not uncommon for students to look to an elementary or high school teacher as an exemplar or role model and, long after the students have been enriched by the relationship, recall fondly that the teacher had a profound effect on their personal or professional development.⁴ Studies almost universally show that the quality of the teacher in the classroom is the single most important variable in the quality of a student's education.⁵

Idaho teachers and their primary professional organization and union are well aware of the important roles that they serve for students, parents and guardians, and the broader community.⁶ And, the vast majority of the time, teachers live up to those expectations and obligations.⁷ On occasion, however, teachers stray (or are falsely accused of straying) from the professional standards that govern their chosen profession. When that happens, i.e. when an aspiring teacher's right to commence—or a current teacher's

<http://idahopoliticsweekly.com/politics/415-idaho-residents-think-increasing-teacher-pay-will-boost-performance>.

4. See, e.g., Clark Corbin, *Educator Shares Inspiration During Teacher Appreciation Week*, IDAHO ED NEWS (May 6, 2015), <https://www.idahoednews.org/news/educator-shares-inspiration-during-teacher-appreciation-week/>.

5. AMY M. HIGHTOWER ET AL., *INSPIRING STUDENT LEARNING BY SUPPORTING QUALITY TEACHING: KEY ISSUES, EFFECTIVE STRATEGIES 2* (2011), http://www.edweek.org/media/eperc_qualityteaching_12.11.pdf.

6. See, e.g., *Ensuring a World Class Education for Every Idaho Child – Recommendations for State and Local Policymakers*, IDAHO EDUC. ASS'N (Jan. 2013), <http://idahoea.org/recommendations/> (“Parents entrust schools and teachers with their most precious treasures—their children. Teaching is an awesome responsibility.”).

7. During the period 2011–2013, approximately 15,500 teachers were employed in Idaho's public and private schools. See *How to Become a Teacher in Idaho*, TEACHER.ORG <http://www.teacher.org/state/idaho/> (last visited February 20, 2017). During the 2011–2012 and 2012–2013 academic years, Idaho's Professional Standard Commission reported that it had processed and disposed of 52 and 54 cases, respectively, of alleged misconduct by Idaho teachers, with a number of those cases resulting in no finding of an ethical violation by the teacher. See PROF. STANDARDS COMM'N, *ANNUAL REPORT 2011-2012* 2–5, <http://www.sde.idaho.gov/cert-psc/psc/archives/annual/2011-2012-Annual-Report.pdf>; see also PROF. STANDARDS COMM'N, *ANNUAL REPORT 2012-2013* 3–6, <http://www.sde.idaho.gov/cert-psc/psc/archives/annual/2012-2013-Annual-Report.pdf>.

right to continue in—the teacher’s career is questioned, both the teacher and Idaho citizens and residents should be concerned about the substantive standards and procedural rules governing resolution of the allegations against the teacher.

This Article will address substantive and procedural law concerning the regulation of K-12 teacher certification in Idaho. Specifically, the Article will focus on administrative rights and procedures that the Idaho Professional Standards Commission (“PSC”) must afford an applicant for or holder of an Idaho teaching certificate, if the PSC contemplates denying or taking adverse action against the certificate. Part II of the Article will delineate the statutory and regulatory scheme for regulating teacher certification in Idaho generally, noting that the PSC is the Idaho administrative agency primarily tasked with doing so.⁸ Part III will set forth the grounds pursuant to which the PSC may deny an initial application for an Idaho teaching certificate or, more commonly, take adverse action against an existing certificate.⁹ Part IV will discuss the allegation and investigation phases of the PSC’s assessment of possible unethical conduct by a teacher.¹⁰ Part V will then turn to a discussion of the initial complaining or charging document, i.e. the Administrative Complaint.¹¹ Part VI will discuss the PSC’s hearing process, addressing all aspects of the process—from the teacher’s initial request for a hearing to the hearing panel’s decision concerning the allegations in the Administrative Complaint.¹² Part VII will discuss Open Meetings Law requirements for PSC proceedings, including the PSC Executive Committee’s initial assessment of the allegations against a teacher, the hearing panel’s receipt of evidence and argument, and the hearing panel’s deliberations concerning the allegations, professional standards and the evidence admitted at the hearing.¹³ Part VIII will set forth the pro-

8. *See infra* Part II.

9. *See infra* Part III.

10. *See infra* Part IV.

11. *See infra* Part V.

12. *See infra* Part VI.

13. *See infra* Part VII.

cedure and standards for judicial review of the hearing panel's decision.¹⁴ And, lastly, Part IX will conclude that the legislative and administrative scheme for regulating teacher certification in Idaho—and, in particular, the peer review nature of the PSC hearing panel process—has achieved the goals of ensuing teacher competency, quality, and fitness in Idaho, while at the same time providing Idaho teachers fair administrative procedures that comport with due process.¹⁵

II. TEACHER CERTIFICATION AND REGULATION GENERALLY

The term “teacher” is defined broadly in Idaho. According to the legislature, a teacher is “any person employed in a teaching, instructional, supervisory, educational administrative or educational and scientific capacity in any school district. In case of doubt the state board of education [“SBE”] shall determine whether any person employed requires certification as a teacher.”¹⁶ As to certification, Idaho statutory law provides that:

Every person who is employed to serve in any elementary or secondary school in the capacity of teacher, supervisor, administrator, education specialist, school nurse or school librarian shall be required to have and to hold a certificate issued under the authority of the [SBE], valid for the service being rendered¹⁷

Although the term has not been defined by statute, the SBE has defined “certificate” to mean “[a] document issued by the Department of Education under the authority of the [SBE] allowing a person to serve in any elementary or secondary school in the capacity

14. *See infra* Part VIII.

15. *See infra* Part IX.

16. IDAHO CODE § 33-1001(25) (Supp. 2016). Idaho Code § 33-114 provides that “[s]upervision and control of the certification of professional education personnel is vested in the state board.” *Id.* § 33-114 (2015).

17. *Id.* § 33-1201.

of teacher, supervisor, administrator, education specialist, school nurse or school librarian.”¹⁸

The administrative agency primarily responsible for regulating teacher certification in Idaho is the PSC.¹⁹ The Idaho legislature created the PSC as part of the State Department of Education (“SDE”).²⁰ In so doing, the Legislature granted the PSC the “authority to adopt recognized professional codes and standards of ethics, conduct and professional practices which shall be applicable to teachers in the public schools of the state and submit the same to the [SBE] for its consideration and approval.”²¹ In addition, the Legislature assigned the PSC the responsibility to:

[M]ake recommendations to the [SBE] in such areas as teacher education, teacher certification and teaching standards, and such recommendations to the [SBE] or to the board of trustees of school districts as, in its judgment, will promote improvement of professional practices and competence of the teaching profession of this state. . . .²²

Based on these statutory mandates, the PSC has been assigned a significant role in recommending policy that may shape the contours of education policy in Idaho. This Article, however, will focus on the PSC’s role in adjudicating cases involving teacher certification.²³

18. IDAHO ADMIN. CODE r. 08.02.02.077.03 (2016).

19. IDAHO CODE § 33-1252 (2016).

20. *Id.* § 33-1252(1) (“A professional standards commission is hereby created in the department of education, consisting of eighteen (18) members The members shall be representative of the teaching profession of the state of Idaho . . .”).

21. *Id.* § 33-1254 (2015).

22. *Id.* § 33-1258.

23. For an informative document discussing all aspects of the PSC’s work and establishing internal procedural standards for the PSC in carrying out its statutory mandates, see PROF. STANDARDS COMM’N, PROCEDURES MANUAL (2016), <https://www.sde.idaho.gov/cert-psc/shared/ethics/PSC-Procedures-Manual.pdf> [hereinafter PSC PROCEDURES MANUAL].

III. GROUNDS FOR DENIAL OF AN APPLICATION FOR OR ADVERSE ACTION AGAINST AN INDIVIDUAL HOLDING A TEACHING CERTIFICATE

For many years prior to 2011, the Idaho legislature divided the statutory grounds for the PSC's denial of an application for or adverse action against a teaching certificate or an individual holding a teaching certificate into two categories: (1) grounds for which denial or adverse action may be taken; and (2) grounds for which permanent denial or permanent revocation must occur when the individual pleads guilty to or is found guilty of certain felony offenses against children.²⁴

Section 33-1208(1) addresses the former circumstances, providing as follows:

1. The professional standards commission may deny, revoke, suspend, or place reasonable conditions on any certificate issued or authorized under the provisions of section 33-1201, Idaho Code, upon any of the following grounds:
 - a. Gross neglect of duty;
 - b. Incompetency;
 - c. Breach of the teaching contract;
 - d. Making any material statement of fact in the application for a certificate, which the applicant knows to be false;
 - e. Revocation, suspension, denial or surrender of a certificate in another state for any reason constituting grounds for revocation in this state;

24. IDAHO CODE §§ 33-1208(1)–(2) (Supp. 2016). Although Sections 33-1208(1) and (2) make clear that the statutory grounds contained within them apply to the denial, revocation or suspension of an Idaho teaching certificate, Idaho Code § 33-1208(5) reiterates that “[t]he professional standards commission may deny the issuance of a certificate for any reason that would be a ground for revocation or suspension.” *Id.* § 33-1208(5); *see also* IDAHO ADMIN. CODE r. 08.02.02.077.04 (2016) (defining “Certificate Denial” as “[t]he refusal of the state to grant a certificate for an initial or reinstatement application.”).

- f. Conviction, finding of guilt, withheld judgment or suspended sentence, in this or any other state of a crime involving moral turpitude;
- g. Conviction, finding of guilt, withheld judgment, or suspended sentence in this state or any other state for the delivery, manufacture or production of controlled substances or simulated controlled substances as those terms are defined in section 37-2701, Idaho Code;
- h. A guilty plea or a finding of guilt, notwithstanding the form of the judgment or withheld judgment in this or any other state, of the crime of involuntary manslaughter, section 18-4006 2. or section 18-4006 3., Idaho Code;
- i. Any disqualification which would have been sufficient grounds for refusing to issue or authorize a certificate, if the disqualification existed or had been known at the time of its issuance or authorization;
- j. Willful violation of any professional code or standard of ethics or conduct, adopted by the state board of education;
- k. The kidnapping of a child, section 18-4503, Idaho Code;
- l. Conviction, finding of guilt, withheld judgment, or suspended sentence, in this state or any other state of any felony, the commission of which renders the certificated person unfit to teach or otherwise perform the duties of the certificated person's position.²⁵

Section 33-1208(2) addresses the latter circumstances, providing as follows:

2. The professional standards commission shall permanently revoke any certificate issued or authorized under the provisions of section 33-1201, Idaho Code, and shall deny the application for issuance of a certificate of a person who pleads guilty to or is found guilty of, notwithstanding the

25. By rule, the SBE has stated that a "Conviction" [r]efers to all instances regarding a finding of guilt by a judge or jury; a plea of guilt by Nolo Contendere or Alford plea; or all proceedings in which a sentence has been suspended, deferred or withheld." IDAHO ADMIN. CODE r. 08.02.02.077(09) (2016).

form of the judgment or withheld judgment, any of the following felony offenses against a child:

- a. The aggravated assault of a child, section 18-905, Idaho Code, or the assault with intent to commit a serious felony against a child, section 18-909, Idaho Code.
- b. The aggravated battery of a child, section 18-907, Idaho Code, or the battery with intent to commit a serious felony against a child, section 18-911, Idaho Code.
- c. The injury or death of a child, section 18-1501, Idaho Code.
- d. The sexual abuse of a child under sixteen (16) years of age, section 18-1506, Idaho Code.
- e. The ritualized abuse of a child under eighteen (18) years of age, section 18-1506A, Idaho Code.
- f. The sexual exploitation of a child, section 18-1507, Idaho Code.
- g. Lewd conduct with a child under the age of sixteen (16) years, section 18-1508, Idaho Code.
- h. The sexual battery of a minor child sixteen (16) or seventeen (17) years of age, section 18-1508A, Idaho Code.
- i. The sale or barter of a child for adoption or other purposes, section 18-1511, Idaho Code.
- j. The murder of a child, section 18-4003, Idaho Code, or the voluntary manslaughter of a child, section 18-4006 1., Idaho Code.
- k. The kidnapping of a child, section 18-4502, Idaho Code.
- l. The importation or exportation of a juvenile for immoral purposes, section 18-5601, Idaho Code.
- m. The abduction of a person under eighteen (18) years of age for prostitution, section 18-5610, Idaho Code.
- n. The rape of a child, section 18-6101, Idaho Code.

The general classes of felonies listed in subsection 2. of this section shall include equivalent laws of federal or other state jurisdictions. For the purpose of this subsection, “child” means a minor or juvenile as defined by the applicable state or federal law.²⁶

In 2011, and primarily in response to teachers with certification problems in other states or countries seeking certification or renewal of certification in Idaho, the Idaho legislature identified additional circumstances where the PSC’s Chief Certification Officer must deny an application for a teaching certificate:

For any person certified in another state and applying for certification in Idaho, and for any person previously certified in this state who is applying for certification in the event their certification has lapsed or is seeking renewal of a current certification, the chief certification officer shall deny an application for a new certificate or for a renewal of a certificate, regardless of the jurisdiction where such certificate was issued, if there are any unsatisfied conditions on such current or previously issued certificate or if there is any form of pending investigation by a state agency concerning the applicant’s teaching license or certificate. Provided however, the chief certification officer shall not automatically deny the application if such person authorized in writing that the chief certification officer and the professional standards commission shall have full access to the investigative files concerning the conditions on, or investigation concerning, such certificate in Idaho or any other

26. In addition to its effect on teacher certification, and because the Code of Ethics for Idaho Professional Educators has been adopted as an SBE rule, conduct which violates Section 33-1208 or, specifically, the Code of Ethics under Section 33-1208(1)(j), may lead to adverse employment consequences. *See id.* § 33-513 (“The board of trustees of each school district . . . shall have the following powers and duties . . . [t]o 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.”). Indeed, it is not uncommon for PSC proceedings concerning teacher certification to have been preceded by proceedings before a local school board concerning a teacher’s conduct—all based on the same allegations of unethical conduct. A discussion concerning those latter proceedings, however, is beyond the scope of this Article.

state or province. Upon review of the information authorized for release by the applicant, the chief certification officer shall either grant or deny such application or, upon denial and upon written request made by the applicant within thirty (30) days of such denial, shall afford the applicant with the procedures set forth in subsections (3) through (9) of this section. If the applicant does not execute the written authorization discussed herein, reapplication may be made once all investigations have been completed and all conditions have been satisfied, resulting in a clear certificate from the issuing state or province.²⁷

The number of teachers residing outside of Idaho and, therefore, likely to hold out-of-state certification, who apply for Idaho certification has been declining since 2007.²⁸ In addition, the number of those teachers having out-of-state certification problems giving rise to Section 33-1209(10) scrutiny is unlikely to be significant. Similarly, it is not likely that there will be factual or legal disputes

27. IDAHO CODE § 33-1209(10) (2015). The Statement of Purpose to House Bill 201, which contained new Section 33-1209(10) quoted above, alluded to the out-of-state certification applicant issue as follows:

This legislation will better protect Idaho's students and school districts from certificated school employees with a history of poor job performance or violating their professional code of ethics. It will make it easier for Idaho to reject certification for teachers and school administrators who have negative conditions attached to their certificates, or who are under investigation for ethical violations against *their state's* professional code of conduct, until all conditions and investigations are cleared. Too often, Idaho is a "soft landing" for individuals who have ethical problems, because Idaho's chief certification officer currently lacks the authority to deny an application for a certificate from such an individual.

Statement of Purpose to H.O. 201, 61st Leg., 1st Reg. Sess. (Idaho 2011), <https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2011/legislation/H0201SOP.pdf> (emphasis added).

28. See Devin Bodkin, *Teacher Shortage in East Idaho Called a "Famine,"* IDAHO ED NEWS (JUNE 7, 2016), <https://www.idahoednews.org/news/teacher-shortage-east-idaho-called-famine/>.

concerning whether an out-of-state certificate applicant or holder has pled or been found guilty of one of the felonies against children enumerated in Section 33-1208(2). Indeed, the vast majority of contested teacher certification cases in Idaho involve allegations that the certificate applicant or holder engaged in conduct actionable under Section 33-1208(1).²⁹ And, within Section 33-1208(1), a significant number of contested cases involve allegations that the certificate applicant or holder engaged in conduct that willfully violated a professional code, or standard of ethics, or conduct adopted by the SBE made actionable under Section 33-1208(1)(j).³⁰

As alluded to previously, and based on the recommendation of the PSC, the SBE has adopted and promulgated as rules the Code of Ethics for Idaho Professional Educators.³¹ The Code of Ethics “symbolizes the commitment of all Idaho educators and provides principles by which to judge conduct.”³² As such, the Code sets forth specific Aspirations and Commitments of the Idaho professional educator, and delineates ten (10) Principles guiding and governing educator conduct.³³ Specifically, those Principles establish a code of ethical conduct ranging from requiring professional educators to “abide[] by all federal, state and local education laws and statutes”³⁴ to “maintain[] a professional relationship with all students, both inside and outside the classroom. . . .”³⁵ to “exemplif[y] honesty and integrity in the course of professional practice.”³⁶ A detailed discussion of each of the ten (10) Principles—or, for that matter, the grounds for adverse action against a teaching certificate

29. See generally PROF. STANDARDS COMM’N, ANNUAL REPORT 2014-2015 5–7, <http://sde.idaho.gov/cert-psc/psc/archives/annual/2014-2015-PSC-Annual-Report.pdf>.

30. *Id.* (showing that vast majority of cases resolved by the PSC in 2014-2015 involved allegations of violation of the Code of Ethics).

31. See IDAHO ADMIN. CODE r. 08.02.02.076 (2016); see also IDAHO CODE § 33-1254 (2015). The current version of the Code of Ethics for Idaho Professional Educators may be found on the PSC’s website at <http://www.sde.idaho.gov/cert-psc/shared/ethics/Code-of-Ethics-for-Professional-Educators.pdf>.

32. IDAHO ADMIN. CODE r. 08.02.02.076 (2016).

33. *Id.*

34. *Id.* at 08.02.02.076.02.

35. *Id.* at 08.02.02.076.03.

36. *Id.* at 08.02.02.076.05.

set forth in Section 33-1208—is beyond the scope of this Article. However, two issues that may arise concerning the grounds set forth in Section 33-1208(1) and/or the Principles set forth in the Code of Ethics are worth mentioning.

The first issue involves the constitutionality and interpretation of Principle X(c)'s requirement that professional educators refrain from engaging in “[c]onduct that is offensive to the ordinary dignity, decency and morality of others.”³⁷ The Idaho Supreme Court has recognized that the right to practice one’s chosen profession—including teaching—is a valuable property right concerning which the state may not deprive a person without affording him or her the safeguards of due process.³⁸ One protection afforded by due process stems from the void-for-vagueness doctrine, which provides that a statute will be “unconstitutionally vague when its language does not convey sufficiently definite warnings as to the proscribed conduct, and its language is such that men [or women] of common intelligence must necessarily guess at its meaning.”³⁹ In the professional licensing context, the Court has taken what it has described as a two-pronged approach to the doctrine, stating that “[n]ot only are those whose activities are proscribed entitled to definite standards by which they may be guided, but it is equally important that the standards are there to guide those officers or agencies required to pass judgment on licensees called to account for their conduct.”⁴⁰ Applying these standards in license revocation

37. *Id.* at 08.02.02.076.11.c.

38. *Ferguson v. Bd. of Trs. of Bonner Cty. Sch. Dist. No. 82*, 564 P.2d 971, 976, 98 Idaho 359, 364 (1977) (cited in *H & V Eng'g, Inc. v. Idaho State Bd. of Prof'l Eng'rs & Land Surveyors*, 747 P.2d 55, 59, 113 Idaho 646, 649 (1987)); *Tuma v. Bd. of Nursing*, 593 P.2d 711, 714, 100 Idaho 74, 77 (1979)); *see also Arnzen v. State*, 854 P.2d 242, 249, 123 Idaho 899, 906 (1992); *Gardner v. Evans*, 719 P.2d 1185, 1197, 110 Idaho 925, 937 (1986); *Harkness v. City of Burley*, 715 P.2d 1283, 1286, 110 Idaho 353, 356 (1986).

39. *H & V Eng'g, Inc.*, 747 P.2d at 59, 113 Idaho at 649 (alteration in original) (citing *Wyckoff v. Bd. of Cty. Comm'rs of Ada County*, 607 P.2d 1066, 1069, 101 Idaho 12, 15 (1980)).

40. *Krueger v. Bd. of Prof'l Discipline of Idaho State Bd. of Med.*, 836 P.2d 523, 526, 122 Idaho 577, 580 (1992) (citing *Tuma v. Bd. of Nursing*, 593 P.2d 711, 717, 100 Idaho 74, 80 (1979)).

and suspension proceedings, the Court has found and concluded that statutes proscribing “misconduct” or “unprofessional conduct” in the engineering and nursing professions, respectively, were void-for-vagueness and not enforceable, absent further definition by the legislature or the administrative agency or absent a judicial construction limiting their application to conduct which renders a professional license or certificate holder unfit to practice his or her profession.⁴¹

Principle X(c)’s prohibition against professional educators engaging in conduct that is “offensive to the ordinary dignity, decency and morality of others” suffers from the same void-for-vagueness infirmities as the “misconduct” and “unprofessional conduct” standards found to be constitutionally deficient in the professional licensing statutes at issue in *H & V Engineering, Inc.* and *Tuma*. Similar to the vague “misconduct” and “unprofessional conduct” standards for engineers and nurses, respectively, in the above-mentioned two cases, the applicant for, or holder of, a teaching certificate is not given sufficient guidance by Principle X(c)’s “offensive to the ordinary dignity, decency and morality to others” language to conform their conduct to meet its standards. In turn, PSC hearing panel members are likewise left without a constitutionally-sufficient standard against which to evaluate the conduct of professional educators. Moreover, as in *H & V Engineering* and *Tuma*, neither the Idaho legislature nor the SBE (based on recommendations from the PSC) has further defined Principle X(c)’s requirements. As such, and as in *Morrison v. State Board of Education*, Principle X(c) will only be saved from constitutional demise by a narrowing administrative or judicial construction of its terms to proscribe only conduct which renders a professional educator unfit to teach.

The second issue involves the relationship between Section 33-1208(1)—which makes conviction of and similar judicial orders concerning certain enumerated felonies,⁴² and felonies and misde-

41. *H & V Eng’g, Inc.*, 747 P.2d at 56, 58–61, 113 Idaho at 647, 649–52; *Tuma*, 593 P.2d at 714–20, 100 Idaho at 77–83 (citing *Morrison v. State Bd. of Educ.*, 461 P.2d 375, 389 (Cal. 1969) (statute allowing for revocation of teaching license for “unprofessional conduct,” “immoral conduct,” or “moral turpitude” suffered from unconstitutional vagueness, but was saved by judicial construction narrowing meaning of statute to “unfitness to teach”)).

42. IDAHO CODE §§ 33-1208(1)(g), (h), (k) (2015).

meanors involving moral turpitude, grounds for denial of or adverse action against a teaching certificate⁴³—and Principle I of the Code of Ethics, a rule promulgated by the SBE which defines “unethical conduct” to “include the conviction of any felony or misdemeanor”⁴⁴

The United States Supreme Court has held that administrative “regulations, in order to be valid, must be consistent with the statute under which they are promulgated.”⁴⁵ Thus, the Court, in invalidating regulations inconsistent with the enabling legislation upon which they were based, has repeatedly stated that:

The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is . . . (only) the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.⁴⁶

Likewise, the Idaho Supreme Court has held that “[t]o be valid, an administrative regulation must be adopted pursuant to authority granted to the adopting body by the legislature”⁴⁷ and “[a] regulation that is not within the expression of the statute, however, is in excess of the authority of the agency to promulgate that

43. *Id.* § 33-1208(1)(f).

44. IDAHO ADMIN. CODE r. 08.02.02.76.02 (2016).

45. *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1334 (2013) (quoting *United States v. Larionoff*, 431 U.S. 864, 873 (1977)).

46. *Larionoff*, 431 U.S. at 873 n.12 (quoting *Manhattan Gen. Equip. Co. v. Comm'r*, 297 U.S. 129, 134 (1936)); *see also* *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213–214 (1976); *Dixon v. United States*, 381 U.S. 68, 74 (1965).

47. *Roeder Holdings, LLC v. Bd. of Equalization*, 41 P.3d 237, 241, 136 Idaho 809, 813 (2001) (citing *Curtis v. Canyon Highway Dist. No. 4*, 831 P.2d 541, 122 Idaho 73 (1992)).

regulation and must fail.”⁴⁸ Thus, “[i]n the absence of valid statutory authority, an administrative agency may not, under the guise of a regulation, substitute its judgment for that of the legislature or exercise its sublegislative powers to modify, alter, enlarge or diminish provisions of a legislative act that is being administered.”⁴⁹

Principle I of the Code of Ethics, when tested against Section 33-1208(1), is inconsistent with the statute. As alluded to above, various subsections of Section 33-1208(1)—specifically, subsections (g), (h), and (k)—make conviction, finding of guilt, withheld judgment or suspended sentence of or for certain felony offenses, grounds for denial of, or adverse action against, a teaching certificate. In addition, Section 33-1208(1)(f) makes a “[c]onviction, finding of guilt, withheld judgment or suspended sentence, in this or any other state of a crime involving moral turpitude” grounds for similar denial or adverse action. Further, subsection (l) provides that “conviction, finding of guilt, withheld judgment, or suspended sentence, in this state or any other state of any felony, the commission of which renders the certificated person unfit to teach or otherwise perform the duties of the certificated person’s position.”⁵⁰ Thus, under Section 33-1208(1), only convictions and similar judicial orders concerning certain enumerated felonies and crimes (both felonies and misdemeanors) involving moral turpitude or those which render a person unfit to teach or perform the requisite job duties—but excluding misdemeanors not involving moral turpitude—constitute grounds for denial of or adverse action against a teaching certificate. In contrast, instead of limiting its scope to certain enumerated felonies and crimes involving moral turpitude so as to be consistent with Section 33-1208(1), Principle I defines “unethical conduct” to “include the conviction of *any* felony or misdemeanor”⁵¹ Accordingly, because Principle I enlarges the provisions of Section 33-1208(1), i.e. the statute it administers, that

48. *Id.*; see also *Levin v. Idaho State Bd. Of Med.*, 987 P.2d 1028, 1031, 133 Idaho 413, 418 (1999).

49. *Roeder Holdings*, 41 P.3d at 241, 136 Idaho at 813, (citing *Roberts v. Transp. Dep’t*, 827 P.2d 1178, 121 Idaho 727 (Ct. App. 1991), *aff’d*, 827 P.2d 1174, 121 Idaho 723 (1992)).

50. IDAHO CODE § 33-1208(1)(l) (Supp. 2016).

51. IDAHO ADMIN. CODE r. 08.02.02.76.02 (2016) (emphasis added).

portion of Principle I which exceeds the limitations of the statute is unenforceable.

IV. ALLEGATIONS AND INVESTIGATION OF UNETHICAL CONDUCT

A. Allegations

Section 33-1208(3) authorizes the PSC to “investigate and follow the procedures set forth in Section 33-1209, Idaho Code, for any allegation of inappropriate conduct as defined in [Section 33-1208], by a holder of a certificate whether or not the holder has surrendered his certificate without a hearing or failed to renew his certificate.”⁵² In turn, Section 33-1209 provides that:

- (1) The professional standards commission may conduct investigations on any signed allegation of unethical practice of any teacher brought by:
 - (a) An individual with a substantial interest in the matter, except a student in an Idaho public school; or
 - (b) A local board of trustees.

52. Section 33-1208(3)'s authorization of an investigation when the certificate holder has surrendered his or her teaching certificate prevents a certificate holder, who knows (or fears) that he or she has engaged in unethical conduct or committed a crime, from avoiding an investigation—and adverse findings resulting from it—by surrendering his certificate or simply not renewing his certificate. On this latter point, Section 33-1208(3) further provides that “[i]n those cases where the holder of a certificate has surrendered or failed to renew his certificate and it was found that inappropriate conduct occurred, the commission shall record such findings in the permanent record of the individual and shall deny the issuance of a teaching certificate.” *Id.* Presumably, since the individual under these circumstances no longer has a valid, current certificate, denial of the issuance of the certificate, or non-renewal, would occur if and when the individual applies for a certificate, or renewal, in the future.

The allegation shall state the specific ground or grounds for the allegation of unethical conduct that could lead to a possible revocation, suspension, placing reasonable conditions on the certificate, or issuance of a letter of reprimand.⁵³

Currently, the PSC's website contains a link to an Ethics Complaint Packet, which explains the allegation and investigation process and provides a form that may be used for making an allegation of unethical practice against a teacher.⁵⁴ The statutory provisions relating to who may make an allegation of unethical practice against a teacher, set forth a fairly easily-satisfied standing requirement. Thus, although not further defined by rule or interpreted by the courts, the requirement that an individual have "a substantial interest in the matter"⁵⁵ complained about, clearly contemplates any adult individual familiar with the facts alleged, including parents and guardians of students, teachers, administrators and other school personnel, and school volunteers. By rule, the SBE also gives the SDE the authority to initiate a complaint of

53. The SBE has promulgated several rules defining terms that appear in Section 33-1209. Thus, an "[a]llegation" is "[a] purported violation of the Code of Ethics for Idaho Professional Educators or Idaho Code." IDAHO ADMIN. CODE r. 08.02.02.077.02. A "[s]tudent" is "[a]ny individual enrolled in any Idaho public or private school from preschool through grade 12." *Id.* at 08.02.02.077.23. As it relates to PSC proceedings, "the term 'teacher' shall include any individual required to hold a certificate pursuant to section 33-1201, Idaho Code." IDAHO CODE § 33-1209(11). In addition, the Code of Ethics for Idaho Professional Educators uses the term "professional educator" to encompass those persons falling within the definition of "teacher" in Idaho Code section 33-1001(25). *See* IDAHO ADMIN. CODE r. 08.02.02.076 (2016). The SBE has defined "educator" as "[a] person who holds or applies for an Idaho Certificate." *Id.* at 08.02.02.077.10. As noted previously, when used in this Article, the term "teacher" has been and will continue to be used in the broad sense of a person employed by a school district in a capacity requiring a professional certificate. *See supra* note 2.

54. PROF. STANDARDS COMM'N, HOW TO FILE AN ETHICS COMPLAINT AGAINST AN IDAHO CERTIFIED EDUCATOR OR ADMINISTRATOR, <http://www.sde.idaho.gov/cert-psc/psc/ethics/files/general/Ethics-Complaint-Packet.pdf> (last visited Feb. 20, 2017). The allegation of unethical practice against a teacher is the initial document filed against the teacher and is referred to as a "complaint" or "ethics complaint." Although the document filled out when making an allegation of unethical practice against a teacher is entitled "Complaint Form," it should not be confused, however, with the Administrative Complaint. The Administrative Complaint is the document by which the PSC's chief certification officer pursues a charge of unethical conduct against a teacher after the PSC's Executive Committee has determined that there is probable cause that a teacher has engaged in unethical conduct. *See infra* Part V.

55. IDAHO CODE § 33-1209(1)(a).

unethical practices by a teacher.⁵⁶ Conversely, the prohibition on students filing allegations of unethical practices against teachers reflects the view that students, due to immaturity, ulterior motive or both, may make allegations for improper reasons and, further, that a student's interests are typically adequately represented by parents or guardians. And, the express designation of local school boards as a proper complaining party reflects the fact that school districts, in their role as employers, often have knowledge of unethical conduct engaged in by teachers,⁵⁷ act officially through the collective action of their boards of trustees,⁵⁸ and have a statutory duty to report to the PSC any instance where a teacher separates from employment with a school district under circumstances that could constitute grounds for adverse action against his or her teaching certificate.⁵⁹

56. IDAHO ADMIN. CODE r. 08.02.02.077.06 (defining "Complaint" under Idaho Code § 33-1209(1) and providing that "[t]he State Department of Education may initiate a complaint"); *see also* PSC, PROCEDURES MANUAL, *supra* note 23, at 17 ("The chief certification officer may also initiate an allegation if public records indicate a person holding an Idaho credential may have been involved in ethical misconduct.").

57. *See supra* note 26.

58. *Indep. Sch. Dist. of Boise City v. C. B. Lauch Constr. Co.*, 278 P.2d 792, 794, 76 Idaho 126, 130 (1955).

59. Section 33-1208A of the Idaho Code provides in pertinent part that

The board of trustees of a school district, through its designee, shall within ten (10) days of the date the employment is severed, report to the chief officer of teacher certification the circumstances and the name of any educator who is dismissed, resigns or is otherwise severed from employment for reasons that could constitute grounds for revocation, suspension or denial of a certificate.

IDAHO CODE § 33-1208A (Supp. 2016). In addition, under section 33-1210(2)(a) of the Idaho Code, a school district which was conducting a personnel investigation concerning a "severed" employee must forward "the contents of the district's investigative file . . . to the [PSC] when the district submits the report required pursuant to section 33-1208A, Idaho Code." *Id.* § 33-1210(2)(a).

B. Investigation

Section 33-1209(1) sets forth the process for reviewing an allegation of unethical conduct against a teacher, providing as follows:

Upon receipt of a written and signed allegation of unethical conduct, the chief certification officer, in conjunction with the attorney general and the professional standards commission investigator, shall conduct a review of the allegation using established guidelines to determine whether to remand the issue to the school district to be resolved locally or to open an investigation and forward the case to the professional standards commission.

The PSC Procedures Manual establishes guidelines for determining whether the chief certification officer should remand the matter to the teacher's school district for local resolution or open an investigation for resolution by the PSC.⁶⁰ Thus, as to a decision not to proceed with an investigation, the PSC Procedures Manual provides as follows:

5. The administrator of the Professional Standards Commission, in conjunction with the Deputy Attorney General and the PSC investigator may determine a formal investigation is unnecessary if:
 - a. District remedies, including provisions of a district grievance procedure, have not been exhausted;
 - b. The complaint is a personnel matter, which should be handled by the local district, superintendent and board of trustees;
 - c. The complaint involves management style rather than unethical conduct;
 - d. The school district has responded appropriately to the complaint;
 - e. There is no written allegation or the complainant wishes to remain anonymous; or

60. PSC PROCEDURES MANUAL, *supra* note 23, at 17–18.

- f. The allegation is against a non-certificated employee.⁶¹

The guidelines established by the PSC for not conducting an investigation concerning a complaint against a teacher, and/or remanding the complaint to a local school district for possible investigation, recognize various circumstances where the PSC may properly decline to deploy its resources. The first four circumstances pertain to alleged teacher conduct which, even if proved, would not constitute an ethical violation or, at most, would constitute such a *de minimis* violation that the matter would be best resolved at the school district level. Examples of such conduct would include a teacher's grading practices, low-level discipline of a student, and other teaching performance issues. The last two circumstances pertain to jurisdictional issues in the sense that the complaining party has not met the minimum statutory requirements for asserting a complaint of unethical conduct against a teacher, or has asserted a complaint against a noncertificated school district employee, such as a custodian, bus driver, teacher's aide, or cafeteria worker, over whom the PSC does not have authority because the position that they hold or seek does not require them to possess a professional certificate.

Conversely, as to a decision to open an investigation, the PSC Procedures Manual states:

4. The administrator of the Professional Standards Commission, in conjunction with the Deputy Attorney General may determine if a formal investigation is necessary based on an assessment of the following:
 - a. The allegation is against a certificated person and there is a signed written complaint;
 - b. The complainant has exhausted all local district remedies, including appeal to the building principal, superintendent, and board of trustees;

61. *Id.*

- c. The district has reported the allegations according to the requirements of Idaho Code §33-1208A;
- d. The educator has been arrested (NOTE: An investigation may be opened, but not pursued, until such time as law enforcement/county prosecutor determines not to file formal charges or the courts make a final judgment or sentence.);
- e. The allegation is purported abuse of a student (i.e., physical, sexual, verbal, etc.);
- f. A fingerprint/background check reveals crimes in violation of 33-1208; and/or
- g. The NASDTEC [National Association of State Directors of Teacher Education and Certification] Clearinghouse reports that an educator's credential has been revoked, suspended, or denied in another state.⁶²

These guidelines set forth procedural and substantive circumstances where the PSC should take appropriate initial steps to fulfill its obligation to identify and appropriately discipline teachers who have deviated from their “responsibility to practice the profession according to the highest ethical principles.”⁶³ Procedural circumstances include information concerning possible or actual unethical or criminal conduct received from relatively credible sources—the most credible of which are judicial and law enforcement records and NASDTEC Clearinghouse reports.⁶⁴ Two catego-

62. *Id.*; see also IDAHO ADMIN. CODE r. 08.02.02.077.15 (2016) (providing that an “Investigation” is “[t]he process of gathering factual information concerning a valid, written complaint in preparation for review by the [PSC] Executive Committee, or following review by the Executive Committee at the request of the deputy attorney general assigned to the Department of Education”).

63. IDAHO ADMIN. CODE r. 08.02.02.076 (2016).

64. On its website, NASDTEC describes its Clearinghouse as follows:

The NASDTEC Educator Identification Clearinghouse is the national collection point for professional educator discipline actions taken by the fifty states, the District of Columbia, U.S. Department of Defense Educational Opportunity schools, and the U.S. Territories. NASDTEC, through the Clearinghouse maintains a database of all disciplinary actions reported by

ries which are of particular concern to the PSC are substantive circumstances that involve teachers who have been arrested and/or convicted of a crime, or committed acts or offenses injurious to the physical or emotional health of students.⁶⁵

Section 33-1209(1) further establishes the procedure that must be followed after the chief certification officer has determined that an investigation by the PSC is appropriate:

Within fourteen (14) days of the decision to forward the case, the chief certification officer shall notify the complainant and the teacher, in writing, that an investigation will be conducted and the teacher shall be afforded an opportunity to respond to the allegation verbally and in writing prior to the issuance of the complaint. The executive committee of the professional standards commission shall review the circumstances of the forwarded case at one (1) of the two (2) next regularly scheduled meetings, and determine whether probable cause exists to warrant the filing of a complaint and the requesting of a hearing.⁶⁶

NASDTEC members and disseminates this information to all participating NASDTEC jurisdictions. The goal of the Clearinghouse is to provide each NASDTEC member state/jurisdiction with a notification of an action taken against the certificate/license of an educator by other member states/jurisdictions and in doing so, to protect the interests of children served by the professional education community within the United States and beyond.

What is the Clearinghouse?, NAT'L ASS'N OF STATE DIRECTORS OF TCHR. EDUC. AND CERTIFICATION, http://www.nasdtec.net/?page=Clearinghouse_FAQ#what (last visited Mar. 20, 2017).

65. By specifically culling out allegations concerning the arrest of an educator or abuse of a student, the PSC has suggested, implicitly, if not expressly, its investigation and enforcement priorities. See PSC PROCEDURES MANUAL, *supra* note 23, at 17–18.

66. The State Board of Education defines the “Executive Committee” as “[a] decision-making body comprised of members of the [PSC], including the chair and/or vice-chair of the Commission. A prime duty of the Committee is to review purported violations of the Code of Ethics for Idaho Professional Educators to determine probable cause and direction for possible action to be taken against a Certificate holder.” IDAHO ADMIN. CODE r. 08.02.02.077.12 (2016).

This provision establishes a timeline for (1) notifying the complaining party and the teacher that the PSC will be conducting an investigation concerning the teacher's alleged conduct, and (2) having the PSC's Executive Committee review the results of the investigation and make a determination concerning whether a complaint should be filed by the Chief Certification Officer against the teacher. The provision also codifies the PSC's longstanding practice of allowing the teacher, who is the subject of an investigation, to respond to the allegations against him or her via both an interview with the PSC investigator and in a written statement provided to the Executive Committee. The teacher's response typically addresses the factual circumstances surrounding the allegations, either denying or admitting the allegations (and, if admitting the allegations, showing an awareness of the unethical nature of the conduct and an appropriate level of contrition). The response may also suggest what the teacher believes is the appropriate sanction for his or her conduct, ranging from no sanction at all to actions against, and/or reasonable condition placed upon, the teacher's certificate. The provision also retains the requirement that the Executive Committee sit as an "administrative grand jury" by making a probable cause determination concerning whether a complaint should be filed against the teacher.⁶⁷

Upon receiving the information compiled by the PSC as a result of its investigation, including the teacher's response, the Executive Committee is tasked as follows:

The Executive Committee will consider the allegation(s) and all additional relevant information and determine a course of action in one of the following ways:

The PSC Procedures Manual mirrors the requirements concerning investigation and referral to the Executive Committee, providing that "[t]he DAG [Deputy Attorney General] will oversee the investigation. Upon completion of the investigation, the DAG will submit the allegation, plus any additional necessary information, to the Executive Committee of the PSC. It is the responsibility of the Executive Committee to determine if probable cause exists to pursue discipline." PSC PROCEDURES MANUAL, *supra* note 23, at 18.

67. See IDAHO CODE § 33-1209(1) (2012).

- a. Postpone making a decision pending the receipt of additional information, including a response from the respondent to the allegation(s).⁶⁸
- b. Determine that there is no probable cause, in which case the DAG or PSC staff will advise the complainant and respondent in writing of such action.⁶⁹
- c. Determine that probable cause exists to support the allegation(s), at which time the PSC will assume jurisdiction and the DAG will advise the respondent in writing of such action⁷⁰

When the Executive Committee defers action on a decision pending the receipt of additional information, the Deputy Attorney

68. According to the SBE, the “respondent” is “[t]he legal term for the professional educator who is under investigation for a purported violation of the Code of Ethics for Idaho Professional Educators.” IDAHO ADMIN. CODE r. 08.02.02.077.20 (2016).

69. The SBE has not defined probable cause, however, it has defined “not-sufficient grounds,” the previous standard, as “[a] determination by the Executive Committee that there is not-sufficient evidence to take action against an educator’s certificate.” *Id.* at 08.02.02.077.17.

70. PSC PROCEDURES MANUAL, *supra* note 23, at 18. Both Section 33-1209(1) uses the term “probable cause” in describing the standard the Executive Committee must satisfy to issue an Administrative Complaint, as well as the PSC Procedures Manual in discussing the same issue. However, the term is not defined in either the Idaho Code or the PSC Procedures Manual. Previously, the standard in the PSC Procedures Manual was “sufficient grounds,” which is defined by the SDE as “sufficient grounds” as “[a] determination by the Executive Committee that sufficient evidence exists to issue an Administrative Complaint.” IDAHO ADMIN. CODE r. 08.02.02.077.24 (2016). In the criminal law context, the Idaho Supreme Court has defined probable cause as “such evidence as would lead a reasonable person to believe the accused party has probably or likely committed the offense charged.” *State v. Neal*, 314 P.3d 166, 168–69, 155 Idaho 484, 486–87 (2013) (quoting *State v. Gibson*, 675 P.2d 33, 36, 106 Idaho 54, 57 (1983)). Absent clarification from the Legislature or the SBE, the terms “probable cause” will be used with the assumption that the above-quoted criminal definition law applies to PSC matters.

General notifies the complainant and teacher of the deferral, receives the necessary information before its next meeting, and makes a decision on the allegations at that later time.⁷¹

If, however, the Executive Committee determines that no sufficient grounds exist to support the allegation of unethical practices, one of two outcomes may occur: first, as specified in the PSC Procedures Manual, the Deputy Attorney General, or PSC staff, will notify the complainant and the teacher of the Executive Committee's determination and no further action will be taken on the complainant's allegations;⁷² or second, although not provided for by statute or rule, the Executive Committee may send the teacher a letter of concern, indicating that, although sufficient grounds did not exist for the Chief Certification Officer to pursue a written complaint for ethics violations against the teacher, the Executive Committee has concerns about the propriety of the teacher's conduct. The letter of concern is sent to the teacher, but is not placed in the teacher's certification file. The letter is often an appropriate middle ground measure between (1) the Executive Committee's taking no action at all and (2) the Chief Certification Officer's pursuing a letter of reprimand⁷³ which, although not directed at the teacher's certification (and, therefore, not reported to the NASDTEC Clearinghouse),⁷⁴ is placed in the teacher's certification file.

If the Executive Committee determines there is probable cause to support the allegations, then the Deputy Attorney General notifies both the complaining party and the teacher. Because the teacher knows at this point that he or she faces the prospect of serious action (suspension or revocation of his or her teaching certificate), and because the Chief Certification Officer likewise knows what grounds and level of sanctions the Executive Committee has authorized him or her to pursue against the teacher, this point in the proceedings is often an opportune time for the teacher and Chief Certification Officer to attempt to settle the matter via

71. PSC PROCEDURES MANUAL, *supra* note 23, at 18.

72. *Id.*

73. See IDAHO DEPARTMENT OF EDUCATION, CODE OF ETHICS FOR IDAHO PROFESSIONAL EDUCATORS 6, <http://www.sde.idaho.gov/cert-psc/shared/ethics/Code-of-Ethics-for-Professional-Educators.pdf> (last visited April 13, 2017).

74. *Id.* at 16.

a Stipulated Agreement.⁷⁵ If the parties do not attempt or are unable to resolve the matter via a Stipulated Agreement, the matter will then move to the complaint and hearing phases of the proceedings.

V. THE ADMINISTRATIVE COMPLAINT

As alluded to above, if the Executive Committee determines there is probable cause that a teacher engaged in unethical practice, and the parties do not resolve the matter informally, the Chief Certification Officer initiates formal proceedings against the teacher.⁷⁶ In this regard, Section 33-1209(2) provides for the filing and service of an administrative complaint on the teacher, stating as follows:

Proceedings to revoke or suspend any certificate issued under section 33-1201, Idaho Code, or to issue a letter of reprimand or place reasonable conditions on the certificate shall be commenced by a written complaint against the holder thereof. Such complaint shall be made by the chief certification officer stating the ground or grounds for issuing a letter of reprimand, placing reasonable conditions on the certificate, or for revocation or suspension and proposing that a letter of reprimand be issued, reasonable conditions be placed on the certificate, or the certificate be revoked or suspended. A copy of the complaint shall be served

75. The Idaho Administrative Code provides that a "Stipulated Agreement" is

A written agreement between the respondent and the Professional Standards Commission to resolve matters arising from an allegation of unethical conduct following a complaint or an investigation. The stipulated agreement is binding to [sic] both parties and is enforceable under its own terms, or by subsequent action by the Professional Standards Commission.

IDAHO ADMIN. CODE r. 08.02.02.077.22 (2016).

76. PSC PROCEDURES MANUAL, *supra* note 23, at 18 ("A written administrative complaint detailing the charge(s) will be sent to the respondent by the Chief Certification Officer.").

upon the certificate holder, either by personal service or by certified mail, within thirty (30) days of determination by the executive committee or such other time agreed to by the teacher and the chief certification officer.⁷⁷

Section 33-1209(2)'s written complaint and service requirements satisfy notice requirements under fundamental notions of due process.⁷⁸ Although the statute does not contain a responsive pleading requirement, it is not uncommon for the certificate holder to file an answer to the administrative complaint, admitting or denying the allegations in the complaint and asserting affirmative defenses.⁷⁹

VI. THE HEARING

A. Right to and Request for a Hearing

Section 33-1208(4) provides that “[a]ny person whose certificate may be or has been revoked, suspended or denied” for any of the grounds listed in Section 33-1208 “shall be afforded a hearing according to the provisions of section 33-1209, Idaho Code.” Consistent with that right, Section 33-1209(3) allows a certificate holder served with an administrative complaint to request a hearing and further sets forth the consequences if he or she fails to do so, providing that:

Not more than thirty (30) days after the date of service of any complaint, the person complained against may request, in writing, a hearing upon the complaint. Any such request shall be made and addressed to the state superintendent of

77. The SBE has defined “Administrative Complaint” to mean “[a] document issued by the State Department of Education outlining the specific, purported violations of Section 33-1208, Idaho Code, or the Code of Ethics for Idaho Professional Educators.” IDAHO ADMIN. CODE r. 08.02.02.077.01 (2016).

78. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 546 (1985); see also *Huntley v. North Carolina State Bd. of Educ.*, 493 F.2d 1016, 1018–1019 (4th Cir. 1974) (ex parte invalidation of teaching certificate by State Superintendent of Public Instruction denied teacher due process).

79. The PSC Procedures Manual provides that “[t]he respondent has 30 days to respond to the charge(s) in writing” PSC PROCEDURES MANUAL, *supra* note 23, at 18. This provision does not reflect current law and, as such, any failure by the certificate holder to respond substantively and in writing to the allegations in the administrative complaint cannot be held against the certificate holder.

public instruction; and if no request for hearing is made, the grounds for suspension, revocation, placing reasonable conditions on the certificate, or issuing a letter of reprimand stated in the complaint shall be deemed admitted.

Just as Section 33-1209(2)'s written complaint and service provisions satisfy notice requirements under due process, Section 33-1209(3)'s grant of a hearing to a certificate holder, upon request, comports with the due process requirement that a teacher, faced with the possible deprivation of or adverse action against the constitutionally-protected property interest in the teaching certificate, be given an opportunity to be heard.⁸⁰ In addition, Section 33-1209(3)'s provision that a teacher admits the allegations in the administrative complaint if he or she does not request a hearing serves the same purpose as default judgment provisions in civil litigation: if a defendant fails to answer or otherwise respond to the allegations in a complaint, the court enters default judgment against the defendant, and the allegations in the complaint are deemed admitted.⁸¹ Thus, according to the PSC Procedures Manual, "[n]o response from the [teacher] in the time stipulated constitutes a basis to proceed on default."⁸²

80. *Loudermill*, 470 U.S. at 542, 546; *Huntley*, 493 F.2d at 1018–1019. Because a letter of reprimand is not directed toward a teacher's certificate, but rather, is placed in a teacher's certification file, it does not affect a teacher's constitutionally protected property interest. *See Pelozo v. Capistrano Unified Sch. Dist.*, 782 F.Supp. 1412, 1420 (C.D. Cal. 1992). If a letter of reprimand injures a teacher's professional reputation and standing, it may, however, affect a teacher's constitutionally protected liberty interest. *Swilley v. Alexander*, 629 F.2d 1018, 1021–1022 (5th Cir. 1980). Section 33-1209(3) makes no distinction between and amongst letters of reprimand. Rather, it provides a teacher with a due process hearing upon request concerning any and all letters of reprimands sought in an administrative complaint, irrespective of whether the letter of reprimand sought triggers a teacher's liberty interest under the due process clause.

81. *See, e.g., Davis v. Parrish*, 961 P.2d 1198, 1202, 131 Idaho 595, 599 (1998); *HICA Educ. Loan Corp. v. Lackie*, 2013 WL 633216, *1 n.1 (W.D. Tenn. 2013).

82. PSC PROCEDURES MANUAL, *supra* note 23, at 18.

B. Timing of the Hearing

Section 33-1209(3) further provides for the timing of the hearing after a request for hearing has been made, stating that:

Upon a request for hearing, the chief certification officer shall give notice, in writing, to the person requesting the hearing, which notice shall state the time and place of the hearing and which shall occur not more than ninety (90) days from the request for hearing or such other time agreed to by the teacher and the chief certification officer. The time of such hearing shall not be less than five (5) days from the date of notice thereof.

The inclusion of relatively short timelines for conducting the hearing constitutes a recognition by the Legislature that all stakeholders—Idaho citizens, students, school districts, and the teaching profession—have a substantial interest in the expeditious resolution of allegations of unethical practices against teachers. Meritorious allegations that are left unresolved for a significant period of time occasionally lead to unethical teachers finding employment in schools and school districts in Idaho and in other states. Conversely, the prolonged pendency of unmeritorious allegations will place an unwarranted cloud over a teacher's employability in the profession and ability to obtain a teaching certificate in another state.

C. Composition of the Hearing Panel

Section 33-1209(4) delineates the composition of the hearing panel in a contested case, providing as follows:

Any such hearing shall be conducted by three (3) or more panel members appointed by the chairman of the professional standards commission, a majority of whom shall hold a position of employment the same as the person complained against. One (1) of the panel members shall serve as the panel chair. The panel chair shall be selected by the chairman of the professional standards commission from a list of former members of the professional standards commission who shall be instructed in conducting administrative hearings. No commission member who participated in the probable cause determination process in a given case shall serve on the hearing panel.

The PSC's Procedures Manual has further explicated Section 33-1209(4)'s panel composition requirements and states as follows:

e. No PSC member who participated in the determination of probable cause in a given case will serve on the hearing panel.

. . . .

a. The chair of the PSC will appoint a panel consisting of a chair, who is a former member of the PSC and has been trained as a hearing panel chair, and two additional educators to hear the charges brought in the administrative complaint, as well as an alternate panel member.

b. Members of the panel shall not be from the same school district as the respondent to the complaint.

c. A majority of the panel will hold a similar position of employment or certification as the respondent.⁸³

Consistent with the peer-review nature of the proceedings,⁸⁴ and as required by rule, the chairman of the PSC appoints certificated educators—teachers, counselors, librarians, special services educators, or administrators—as opposed to noncertificated personnel—such as bus drivers, custodians, aides and the like—to serve on hearing panels.⁸⁵ In addition, the size of the panel has

83. PSC PROCEDURES MANUAL, *supra* note 23, at 18–19.

84. By rule, the SBE has made clear that “a hearing . . . is conducted by a panel of peers.” IDAHO ADMIN. CODE r. 08.02.02.077.13 (2016).

85. The SBE has defined “[h]earing panel” to include “[a] minimum of three (3) educators appointed by the chair of the [PSC].” *Id.* at 08.02.02.077.14. As discussed *supra* at note 53, an “[e]ducator” is “[a] person who holds or applies for an Idaho Certificate.” The SBE’s definition of “educator,” although properly including both current certificate holders and applicants for certificates within the class or persons who may be investigated for and charged with alleged unethical conduct, is overbroad in the context of defining who may serve on a hearing panel. In this regard, the author is not aware of any circumstances where an applicant for an Idaho teaching certificate, i.e. a person who does not currently hold such certificate, has been appointed as a hearing panel member.

typically been limited to three (3) panel members, although larger panels have been convened and, in at least one instance, a panel consisting of two (2) members was agreed to by stipulation of the teacher involved and the PSC.⁸⁶ The requirement that a majority of the panel members hold the same or similar position of employment or certification as the teacher contesting the allegations likewise reflects the policy judgment that teacher certification proceedings before the PSC should be peer-reviewed proceedings. In other words, the Legislature and PSC, in specifying the same or similar employment/certification requirement, have mandated that elementary school teachers should be judged by elementary school teachers, counselors should be judged by counselors, and administrators should be judged by administrators (or, more precisely, by a majority from each professional peer group). And, the requirement that the hearing panel not consist of any PSC member who participated in the initial probable cause determination concerning the teacher is consistent with the long-standing impartiality requirement prohibiting a member of a grand jury who determined probable cause to charge a defendant from sitting on a petit jury concerning that same defendant.⁸⁷ Likewise, the PSC's requirement that a member of the hearing panel not be employed in the same school district as the teacher in the contested proceeding reflects the same impartiality/bias concerns. The requirement is further designed to avoid potential divisiveness between and amongst employees in a school district caused by one co-employee sitting in judgment concerning another co-employee on a certification matter.

86. As discussed below, a panel size of less or more than three (3) members has significant implications for the Chief Certification Officer's convincing a majority of the panel members that a teacher has engaged in unethical conduct. See *infra* Section VI. H., after footnote 102.

87. See M. Bressler, Annotation, *Prior Service on Grand Jury Which Considered Indictment Against Accused as Disqualification for Service on Petit Jury*, 24 A.L.R. 3d 1236, Sec. 3 n. 19 (1969) (collecting cases and accompanying text) ("It is a widely accepted view that service on the grand jury which considered the indictment of the accused ordinarily implies such a bias on the part of a juror so serving as to provide at least a basis for challenge for cause upon his presentation for service on the jury before which the person indicted is to be tried."); see also *Hood v. State*, 523 So.2d 302, 311 (Miss. 1988) ("We do not think it right and now condemn any practice whereby the accuser may also be the trier of fact.").

D. Attorney Advisor

Again, although not specifically provided for in statute or rule, the PSC's longstanding practice has been to appoint an experienced attorney from the Office of the Attorney General to advise the hearing panel in a contested case. Unlike other administrative proceedings where a hearing officer decides issues in the case, the attorney advises the panel on pretrial motions, evidentiary objections, and its final determination on the allegations of unethical practices in the case. As such, the decisions on these issues remain at all times with the panel.

E. Location of the Hearing

Section 33-1209(3) provides that “[t]he hearing will be held within the school district in which any teacher complained of shall teach, or at such other place deemed most convenient for all parties.”⁸⁸

Section 33-1209(3) is essentially a venue requirement, placing venue for the hearing at the location where the teacher teaches at the time of the hearing. If the teacher remains employed or continues to reside in the school district at the time of the hearing, that location will invariably also be the most convenient location for all parties—particularly since the witnesses and documentary evidence concerning the allegations against the teacher will likely be located there as well. If, however, the teacher is no longer employed in the school district or resides elsewhere at the time of the hearing, or if the allegations against the teacher arose in a location other than the school district where the teacher is or was employed, then the teacher's new residence, place of employment, or the location of witnesses may be the most convenient place for the hearing.

88. The PSC Procedures Manual essentially mirrors this requirement, providing “[t]he hearing will be held within the school district in which the respondent teaches, or at such other place deemed most convenient for all parties.” PSC PROCEDURES MANUAL, *supra* note 23, §8(d), at 19.

F. Compelling the Attendance of Witnesses or Production of Documents at the Hearing

Section 33-1209(5) establishes the procedure for compelling the attendance of witnesses or the production of documents in PSC proceedings, providing that “[t]he state superintendent of public instruction, as authorized by the state board of education, has the power to issue subpoenas and compel the attendance of witnesses and compel the production of pertinent papers, books, documents, records, accounts and testimony.”

In most PSC matters, witnesses work cooperatively with either the chief certification officer’s counsel, the Deputy Attorney General assigned to the SDE, or the teacher and his or her attorney or with both. As a result, it is typically not necessary to compel a witness’s attendance or the production of documents with a subpoena. However, in some instances, a witness may not be cooperative or, although willing to cooperate, may need to provide proof to an employer that his or her attendance is required at the hearing. In these circumstances, counsel for either party may request and receive from the State Superintendent of Public Instruction subpoenas to compel the attendance of witnesses and/or the production of documents.⁸⁹

By requiring that the subpoena be issued by the State Superintendent of Public Instruction, a public official who has no direct involvement with the PSC hearing process, Section 33-1209(5) establishes a procedure far more cumbersome than comparable procedures in the civil litigation process, where attorneys as officers

89. Section 33-1209(5) is most commonly used to compel the attendance of witnesses and the production of documents at the hearing. *Id.* Nothing in the text of Section 33-1209(5), however, limits the State Superintendent of Public Instruction’s subpoena power to the hearing itself. *Id.* As such, the chief certification officer (or the teacher) may legitimately request the State Superintendent to issue subpoenas to obtain factual information concerning the PSC’s pre-hearing investigation or discovery.

of the court, may issue and sign subpoenas,⁹⁰ or with IDAPA contested proceedings, where the hearing officer may do likewise.⁹¹ And if a witness fails to comply with a subpoena, Section 33-1209(5) allows the SBE or its representative to seek a court order compelling the attendance of the witness or production of documents at the hearing.⁹² Because this procedure may take up to ten (10) days from date the SBE seeks the court order, the need to compel such attendance or production may require the hearing panel

90. FED. R. CIV. P. 45(a)(3) (“An attorney also may issue and sign a subpoena if the attorney is authorized to practice in the issuing court . . .”).

91. IDAHO ADMIN. CODE r. 04.11.01.525 (2016), promulgated under the authority of IDAHO CODE § 67-5206(4)(f) (2014).

92. IDAHO CODE § 33-1209(5) (2015) further provides that:

The state board or its authorized representative may, if a witness refuses to attend or testify or to produce any papers required by such subpoena, report to the district court in and for the county in which the proceeding is pending, by petition, setting forth that a due notice has been given of the time and place of attendance of the witnesses, or the production of the papers, that the witness has been properly summoned, and that the witness has failed and refused to attend or produce the papers required by this subpoena before the board, or its representative, or has refused to answer questions propounded to him in the course of the proceedings, and ask for an order of the court compelling the witness to attend and testify and produce the papers before the board. The court, upon the petition of the board, shall enter an order directing the witness to appear before the court at a time and place to be fixed by the court in the order, the time to be not more than ten (10) days from the date of the order, and then and there shall show cause why he has not attended and testified or produced the papers before the board or its representative. A copy of the order shall be served upon the witness. If it shall appear to the court that the subpoena was regularly issued by the board and regularly served, the court shall thereupon order that the witness appear before the board at the time and place fixed in the order and testify or produce the required papers. Upon failure to obey the order, the witness shall be dealt with for contempt of court. The subpoenas shall be served and witness fees and mileage paid as allowed in civil cases in the district courts of this state.

to continue the hearing or delay the close of the hearing to receive the evidence.⁹³

G. Nature and Purpose of the Hearing

Sections 33-1209(3) and (4) delineate the nature and purpose of the hearing, providing that “[a]ny such hearing shall be informal and shall conform with chapter 52, title 67, Idaho Code. . . . All hearings shall be held with the object of ascertaining the truth.”

The informal nature of the panel hearing reflects the fact that, although allegations of unethical conduct by a teacher are invariably a serious matter, the hearing is not a judicial proceeding and, instead, is an administrative proceeding with the teacher’s peers as the decision maker. Moreover, Section 33-1209(3)’s reference to chapter 52, title 67, Idaho Code means that the hearing panel proceedings must conform with procedures governing contested cases under the Idaho Administrative Procedure Act (“IAPA”).⁹⁴ Under the IAPA, the hearing panel chair must “afford all parties the opportunity to respond and present evidence and argument on all issues involved”⁹⁵ and “regulate the course of the proceedings to assure that there is a full disclosure of all relevant facts and issues, including such cross-examination as may be necessary.”⁹⁶ Section 33-1209(4) expressly tracks and, to some degree, augments those IAPA requirements, providing as follows:

Any person complained against may appear in person and may be represented by legal counsel, and may produce, examine and cross-examine witnesses, and, if he chooses to do so, may submit for the consideration of the hearing panel a statement, in writing, in lieu of oral testimony, but any such

93. Like the State Superintendent of Public Instruction, the SBE has no direct involvement with the PSC hearing panel process. As such, it is unclear why the Legislature assigned the SBE with the responsibility for seeking a court order compelling the attendance of witnesses or production of documents. The Legislature may want to consider amending Section 33-1209(5) to assign this responsibility to counsel for the party seeking the attendance of witnesses or production of documents at the hearing, i.e. counsel for the SDE or chief certification officer or counsel for the teacher.

94. *See generally* IDAHO CODE §§ 67-5201–5292 (2016).

95. *Id.* § 67-5242(3)(b) (2014).

96. *Id.* § 67-5242(3)(a).

statement shall be under oath and the affiant shall be subject to cross-examination.

Also, under the IAPA, the hearing panel is not bound by the Idaho Rules of Evidence.⁹⁷ Instead, relevant, non-privileged evidence “may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs”⁹⁸ and, as such, may include hearsay that would not be admissible in a judicial proceeding.⁹⁹ The hearing itself must “be recorded at the [PSC]’s expense”¹⁰⁰ and may be conducted, in whole or in part, “by telephone, television, or other electronic means.”¹⁰¹

Although informal, the hearing generally proceeds along the lines of a trial in a civil case, an APA hearing, or an arbitration. Thus, the order of proceedings typically includes (1) opening statements by counsel; (2) presentation of evidence—first, by the chief certification officer and second, by the individual complained of, followed by rebuttal evidence or surrebuttal evidence, if any, all of which is subject to direct and cross-examination; (3) closing argument by counsel; and (4) deliberation by the hearing panel. During the evidentiary portion of the hearing, the hearing chair, often advised by counsel for the hearing panel, rules on objections and determines the admissibility of documents (unless counsel for the chief certification officer and counsel for the party complained of have stipulated to their admissibility). In addition, at the conclusion of counsel’s examination of each witness, hearing panel members may direct questions to the witness. Unlike in civil trials, the hearing panel does not entertain mid-trial motions (akin to motions for directed verdict or for judgment as a matter of law) that, if granted, would resolve the matter prior to the hearing panel’s

97. *Higgins v. Larry Miller Subaru-Mitsubishi*, 175 P.3d 163, 167, 145 Idaho 1, 5 (2007); *Stolle v. Bennett*, 156 P.3d 545, 550–551, 144 Idaho 44, 49–50 (2007).

98. IDAHO CODE § 67-5251(1) (2016).

99. *Kootenai Med. Ctr. ex rel. Teresa K. v. Idaho Dept. of Health and Welfare*, 216 P.3d 630, 638, 147 Idaho 872, 880 (2009); *Lockhart v. State, Dept. of Fish and Game*, 903 P.2d 135, 139, 127 Idaho 546, 550 (Ct. App. 1995).

100. IDAHO CODE § 67-5242(3)(d) (2016).

101. *Id.* § 67-5242(3)(e).

deliberations. Likewise, and although hearing panel members will typically have the Administrative Complaint and Answer available to them at the commencement of the hearing, the hearing panel will generally not receive either pre-hearing or post-hearing briefs from the parties.

H. The Hearing Panel's Decision

Section 33-1209(6) addresses the time lines for, form of, and the range of dispositions that may be included in the hearing panel's decision in a contested proceeding:

Within twenty-one (21) days of the conclusion of any hearing dealing with the revocation, suspension, denial of a certificate, placing reasonable conditions on the certificate, or issuing a letter of reprimand, the hearing panel shall submit to the chief certification officer, to the person complained against and to the chief administrative officer of the public school employing the certificate holder, if any, a concise statement of the proceedings, a summary of the testimony, and any documentary evidence offered, together with the findings of fact and a decision. The hearing panel may determine to suspend or revoke the certificate, or the panel may order that reasonable conditions be placed on the certificate or a letter of reprimand be sent to the certificate holder, or if there are not sufficient grounds, the allegation against the certificate holder is dismissed and is so recorded.¹⁰²

Although not specified by statute or rule, the longstanding practice for PSC hearing panels has been that a majority of the panel members must conclude that the chief certification officer has proved his or her allegation(s) in order for the panel to conclude that the party complained of has engaged in unethical conduct and

102. The SBE has defined the various consequences that may be imposed on a certificate holder by a PSC hearing panel. Thus, "Revocation" is "[t]he invalidation of any Certificate held by [an] educator." IDAHO ADMIN. CODE r. 08.02.02.077.21 (2016). "Certificate suspension" is "[a] time-certain invalidation of any Idaho certificate as determined by a stipulated agreement or a due process hearing panel as set forth in Section 33-1209, Idaho Code." *Id.* at 08.02.02.077.05. A "Conditional Certificate" [a]llows an educator to retain licensure under certain stated Certificate conditions as determined by the Professional Standards Commission." *Id.* at 08.02.02.077.07. And, a "Reprimand" is "[a] written letter admonishing the Certificate holder for his conduct. The reprimand cautions that further unethical conduct may lead to consideration of a more severe action against a holder's Certificate." *Id.* at 08.02.02.077.19.

should be subject to sanctions. When the panel consists of three (3) members, this majority requirement is typically not an issue, since the assent of either two (2) or three (3) members will satisfy the requirement. However, with a panel of four (4) members, to obtain a majority, the chief certification officer must convince three (3) of the four (4) panel members that he or she should prevail. Conversely, in that relatively rare instance where the parties, because of the unavailability of a panel member, have stipulated to allow the case to be decided by two (2) panel members, the majority requirement means that the two (2) panel members must reach a unanimous decision. In cases alleging multiple ethical violations, the majority requirement is allegation specific. In other words, the majority requirement applies to each individual allegation in the Administrative Complaint. Thus, in a multiple allegation case, a majority of the hearing panel might conclude that the person complained of engaged in unethical conduct and suspend his or her certificate on one allegation, but dismiss the remaining allegations.

To reach and prepare the hearing panel's decision, the hearing panel typically meets with its attorney advisor to discuss the allegations of unethical conduct and the evidence presented in the case. The attorney advisor provides counsel to the hearing panel, but does not vote or otherwise determine the result in the case. Once the hearing panel reaches a decision, the attorney advisor drafts the panel's decision and circulates it amongst the panel members for review, revision and, ultimately, approval.

The hearing panel's written decision will track the format specified in Section 33-1209(6). Thus, the panel's decision will contain a concise statement concerning the nature of the proceedings, a summary of the testimony and documentary evidence, findings of fact and a decision on each allegation.¹⁰³ The decision on each allegation will include a determination on whether the individual complained of engaged in unethical conduct (or not) and, if so, the sanction imposed—revocation or suspension of the individual's teaching certificate, placement of conditions on the individual's

103. IDAHO CODE § 33-1209(6) (2016).

certificate or issuance of a letter of reprimand to the individual.¹⁰⁴ Per Section 33-1209(6)'s requirements, the decision is then submitted to the chief certification officer, the person complained of, and the chief administrative officer—usually the superintendent—of the school district employing the certificate holder.¹⁰⁵ And, immediately upon issuance of the hearing panel's decision, the decision is placed in and becomes a permanent part of the certificate holder's certification file,¹⁰⁶ and "[t]he administrative assistant for the PSC administrator will notify the NASDTEC Clearinghouse in a timely manner that a credential has been disciplined."¹⁰⁷

104. PSC PROCEDURES MANUAL, *supra* note 23, at 19. The PSC Procedures Manual provides that

The hearing panel may determine to suspend or revoke the certificate, or the panel may order that reasonable conditions be placed on the certificate or a letter of reprimand be sent to the certificate holder, or if there are not sufficient grounds, the allegation against the certificate holder is dismissed and is so recorded.

Id.

105. Presumably, "the public school employing the certificate holder" means the school district which employed the certificate holder at the time the allegations arose. The notice is intended to inform all significant stakeholders of the outcome of the hearing. Accordingly, if the certificate holder is no longer employed in that school district, then the notice should be sent to the school district which employed the certificate holder when the allegations arose *and* to any school district employing the certificate holder at the time of the decision. In addition, the hearing panel's compliance with Section 33-1209(6)'s notice requirement will satisfy the PSC's obligation under Section 33-1209(7), which provides:

Should the final decision be to place reasonable conditions upon the certificate holder or a suspension or revocation of the teaching certificate, the professional standards commission must notify the employing school district of the hearing panel's decision and to provide notice that such may negatively impact upon the employment status of the certificated employee.

106. IDAHO CODE § 33-1209(7) ("Within three (3) days of issuance, the hearing panel's decision shall be made a permanent part of the record of the certificate holder.").

107. PSC PROCEDURES MANUAL, *supra* note 23, at 19. An issue may arise concerning the circumstances that must exist for the PSC to subsequently issue a teaching certificate after a PSC hearing panel has either previously denied an application for or taken adverse action against a teaching certificate. As to this issue, Section 33-1209(9) provides as follows:

Whenever any certificate has been revoked, suspended or has had reasonable conditions placed upon it, or an application has been denied, the professional standards commission may, upon a clear showing that the cause constituting grounds for the listed actions no longer exists, issue a valid

VII. Open Meetings Law Requirements

The question of whether PSC Executive Committee and/or hearing panel proceedings must proceed in sessions open to the public or, alternatively, may proceed in whole or in part in closed, executive sessions depends on whether the proceedings are subject to the requirements of Idaho's Open Meetings Law ("OML"), Section 74-201 and the following sections.¹⁰⁸

Section 74-203 sets forth a general rule of transparency and openness, providing that, with certain exceptions, several of which are discussed below:

[A]ll meetings of a governing body of a public agency shall be open to the public and all persons shall be permitted to attend any meeting except as otherwise provided by this act. No decision at a meeting of a governing body of a public agency shall be made by secret ballot.

Section 74-206(3) further provides that "[n]o executive session may be held for the purpose of taking any final action or making any final decision."

Section 74-202 contains several definitions that govern the scope of the general rule. Thus, "[p]ublic agency' means ... any state board, commission, department, authority, educational institution or other state agency which is created by or pursuant to statute, other than courts and their agencies and divisions, and the judicial council, and the district magistrates commission . . ." or

certificate. Provided however, that no certificate shall be issued to any person who has been convicted of any crime listed in subsection 2. of section 33-1208, Idaho Code.

108. IDAHO CODE §§ 74-201–208 (repealing IDAHO CODE §§ 67-2340–2347 (2015)). In 2015, the Idaho Legislature, "[r]ecogniz[ed] a need to provide one place for citizens to find laws relating to government transparency." *Statement of Purpose*, H. 2015-RS23319, 63rd Sess. (Idaho 2015). To satisfy this need, the Legislature added a new title called "Transparent and Ethical Government" to the Idaho Code, relocating all statutes involving existing public record, open meeting, ethics in government, and prohibition against contracts with officers into this new title. 2015 Idaho Sess. Laws 344.

“any subagency of a public agency which is created by or pursuant to statute, ordinance, or other legislative act.”¹⁰⁹ In turn, “[g]overning body’ means the members of any public agency which consists of two (2) or more members, with the authority to make decisions for or recommendations to a public agency regarding any matter.”¹¹⁰ In addition, “[m]eeting’ means the convening of a governing body of a public agency to make a decision or to deliberate toward a decision on any matter.”¹¹¹ Further, “[d]ecision” means:

any determination, action, vote or final disposition upon a motion, proposal, resolution, order, ordinance or measure on which a vote of a governing body is required, at any meeting at which a quorum is present, but shall not include those ministerial or administrative actions necessary to carry out a decision previously adopted in a meeting held in compliance with this chapter.¹¹²

And, “[d]eliberation’ means “the receipt or exchange of information or opinion relating to a decision, but shall not include informal or impromptu discussions of a general nature which do not specifically relate to a matter then pending before the public agency for decision.”¹¹³

As discussed previously, the PSC was created by the Idaho Legislature as part of the State Department of Education (“SDE”).¹¹⁴ As such, the full PSC, both because it is a “commission . . . created by or pursuant to statute . . .” under Section 74-202(4)(a) and a “subagency of a public agency . . . [i. e. the SBE] created by or pursuant to statute” under Section 74-202(4)(d), is a public agency governed by the provisions of the OML. Likewise, the PSC Executive Committee and its hearing panels are subagencies of the PSC, created by statute, whose members, i.e. governing bodies, are authorized to make determinations and receive information concerning allegations of unethical conduct by teaching

109. IDAHO CODE §§ 74-202(4)(a), (d) (2016).

110. *Id.* § 74-202(5).

111. *Id.* § 74-202(6).

112. *Id.* § 74-202(1).

113. *Id.* § 74-202(2).

114. *See supra* note 20.

certificate applicants or holders and, therefore, attend meetings concerning their decisions on those matters.¹¹⁵ As such, they are public agencies which must comply with OML requirements.¹¹⁶ In sum, PSC Executive Committee and hearing panel proceedings concerning allegations of unethical conduct are subject to the open public hearing requirements unless an exception to the OML applies.¹¹⁷

The OML contains a number of exceptions to its open hearing requirement, several of which might apply to PSC Executive Committee and/or hearing panel proceedings. In this regard, Section 74-206(1) provides as follows:

An executive session at which members of the public are excluded may be held, but only for the purposes and only in the manner set forth in this section. The motion to go into executive session shall identify the specific subsections of this section that authorize the executive session. There shall be a roll call vote on the motion and the vote shall be recorded in the minutes. An executive session shall be authorized by a two-thirds (2/3) vote of the governing body. An executive session may be held:

. . . .

(b) To consider the evaluation, dismissal or disciplining of, or to hear complaints or charges brought against, a public officer, employee, staff member or individual agent, or public school student;

. . . .

(d) To consider records exempt from disclosure as provided in chapter 1, title 74, Idaho Code [Idaho's Public Records Act ("PRA")];

115. IDAHO CODE § 74-202(5) (2016).

116. *Id.* § 74-202(4).

117. *Id.* § 74-202.

. . . .

(f) To communicate with legal counsel for the public agency to discuss legal ramifications of and legal options for pending litigation, or controversies not yet being litigated but imminently likely to be litigated

Section 74-202(3) reiterates that “[e]xecutive session’ means any meeting or part of a meeting of a governing body which is closed to any persons for deliberation on certain matters.”

Idaho courts have not interpreted Sections 74-206(1)(b), (d), and (f) (and 74-202(3)) in the context of PSC Executive Committee or hearing panel proceedings. However, the answer to the question of whether any of Section 74-206(1)’s exceptive provisions apply to such proceedings may be gleaned from determining the meaning of and/or applying the statute’s language, applying other provisions of the OML and the PRA, and applying basic principles of statutory constructions.

As to Section 74-206(1)(b)’s provision allowing executive sessions concerning complaints or charges against employees or other individuals affiliated with a public agency, and as to OML exceptions generally, the OML expressly provides that “[t]he exceptions to the general policy in favor of open meetings stated in [Section 74-205] shall be narrowly construed.”¹¹⁸ Also, the Idaho Supreme Court, in discussing essentially-identical predecessor versions of Sections 74-206(1) and 74-202(3) pertaining to the use of executive sessions to deliberate concerning a decision affecting an “employee,” has stated that “executive . . . sessions are authorized for several types of matters, including when a governing body wishes to deliberate the dismissal of a public employee *working under the supervision of the body*.”¹¹⁹ In addition, Section 74-206(1)(b)’s predominant thrust is directed toward a public agency’s resolution of performance or misconduct issues involving individual—public officers, employees, staff members or agents, or public school students—who have an ongoing governing, administrative, employment, or educational relationship with the public agency conducting the meeting or hearing. And, by its terms, another OML exception, Section 74-206(1)(a), which allows a public agency to go into

118. IDAHO CODE § 74-206(2) (2016).

119. Gardner v. Evans, 719 P.2d 1185, 1189–1190, 110 Idaho 925, 929–930 (2003) (emphasis added); see also Nelson v. Boundary Cty., 706 P.2d 94, 96–98, 109 Idaho 205, 207–209 (Ct. App. 1985) (deliberations conducted by county commissioner in executive session concerning decision to terminate county employee held to be permissible).

executive session “[t]o consider hiring a public officer, employee, staff member or individual agent, wherein the respective qualities of individuals are to be evaluated in order to fill a particular vacancy or need,” can only apply to a public agency which intends to have an ongoing governing, administrative, or employment relationship with one of the candidates or applicants. Thus, when narrowly construed and read in conjunction with the other comparable exceptive provision contained in Section 74-206(1), the terms “employee” and “public officer” under Section 74-206(1)(b) would include employees and public officials of the public agency conducting the meeting or hearing, but would not include employees employed by or public officials involved in the governance or administration of public agencies, other than the public agency conducting the meeting or hearing.¹²⁰ As such, PSC Executive Committee and hearing panel proceedings considering complaints and charges against school district employees holding teaching certificates would not be considered a complaint against an employee or public officer within the meaning of Section 74-206(1)(b).¹²¹

120. This result would be consistent with the well-settled principle of statutory construction which provides that:

Other portions of the same act or section may be resorted to as an aid to determine the sense in which a word, phrase, or clause is used, and such phrase, word, or clause, repeatedly used in a statute, will be presumed to bear the same meaning throughout the statute, unless there is something to show that there is a different meaning intended, such as a difference in subject-matter which might raise a different presumption.

St. Luke's Magic Valley Reg'l Med. Ctr., Ltd. v. Bd. of Cty. Comm'rs, 237 P.3d 1210, 1215, 149 Idaho 584, 589 (2010).

121. In addition, because an applicant for a teaching certificate could not be employed in a certificated position in an Idaho school district until they obtain at least a provisional teaching certificate, a PSC hearing panel proceeding concerning such applicant would not even arguably fall within the exception to OML's public meeting requirements. As such, a reading of Section 74-206(1)(b)'s exceptive provisions as applying to PSC hearing panel proceedings would lead to the unreasonable, discriminatory and borderline-absurd result of allowing hearing panel proceedings concerning current certificate holders to be conducted in closed, executive session, while causing functionally-identical hearings concerning certificate applicants to only be conducted in open session. This additional reason supports the conclusion that Section 74-206(1)(b)'s exceptive provision does not apply to PSC hearing panel proceedings.

As to Section 74-206(1)(d)'s provision allowing a public agency to go into executive session to consider records exempt from public disclosure under the PRA, the PRA provides that "[u]nless otherwise provided by agency rule, information obtained as part of an inquiry into a person's fitness to be granted or retain a license, certificate, permit, privilege, commission or position" is exempt from disclosure. The PSC Executive Committee, in making a probable cause determination concerning allegations of unethical conduct against a teacher, and a PSC hearing panel, in making a decision on the allegations in an Administrative Complaint after receiving evidence at a hearing, both engage in inquiries into a person's fitness to teach. In so doing, both the Executive Committee and hearing panels consider records exempt from disclosure under the PRA. As such, and because neither the SBE nor PSC has otherwise addressed this issue by rule, the Executive Committee and hearing panels may properly go into executive session when making determinations or decisions, respectively, concerning certificate applicants or holders.

As to Section 74-206(1)(f)'s communication with counsel exception to the OML, this provision requires not only that a public agency communicate with counsel, but also that the communication concern pending or imminently likely litigation. The author is not aware of any instance where a certificate applicant or holder has brought suit against the PSC, its Executive Committee, or a hearing panel during the pendency of PSC administrative proceedings, although, as discussed later in this article, litigation may be or has been commenced after those proceedings have concluded.¹²² More likely, however, an applicant or certificate holder will threaten litigation if a PSC hearing panel ultimately denies or takes adverse action against a teaching certificate. As such, under limited circumstances involving pending or imminent litigation, and not merely because the PSC Executive Committee or hearing panel wishes to communicate with counsel regarding a certification matter generally, Executive Committee or PSC hearing panel members may go into executive session to discuss legal ramifications or legal options with counsel.

In sum, Idaho courts would likely hold that PSC Executive Committee and hearing panel proceedings are governed by the

122. See *infra* notes 124 and 127.

OML, that the Executive Committee's probable cause determination and a hearing panel's deliberation concerning its decision after receiving evidence and argument at hearing may be made in executive session, but that all other proceedings before the PSC hearing panel itself must be conducted in an open, public session.¹²³

VIII. JUDICIAL REVIEW OF THE HEARING PANEL'S DECISION

Section 33-1209(8) provides for judicial review of the hearing panel's decision, stating that

The final decision of the hearing panel shall be subject to judicial review in accordance with the provisions of chapter 52, title 67, Idaho Code, in the district court of the county in which the holder of a revoked certificate has been last employed as a teacher.¹²⁴

As discussed previously, Chapter 52, Title 67 of the Idaho Code is the IAPA.¹²⁵ Under the IAPA, the standard of judicial review of the hearing panel's decision is as follows:

123. This nuanced result concerning teacher certification matters before the PSC is in contrast to hearings before local school board concerning teacher employment matters. In those latter circumstances, Section 33-513(5)(d) provides that "[t]he hearing shall be public unless the employee requests in writing that it be in executive session." Thus, in employment matters, a teacher can unilaterally determine whether the school board hearing will be open or closed.

124. It is unclear why the Legislature chose to use the term "holder of a *revoked* certificate" in referring to the county where the affected teacher was last employed, since the Legislature clearly intended to allow—and the Idaho Supreme Court has allowed—judicial review of cases involving teachers who have suffered adverse consequences less significant than revocation of their teaching certificates. *Id.* (emphasis added); *see, e.g.* *Macrae v. Smith*, 890 P.2d 739, 126 Idaho 788 (1995) (judicial review allowed review of a decision by the SBE, which increased sanction imposed by a PSC hearing panel from a letter of reprimand to a one-year suspension of teaching certificate). Properly understood, the term "holder of a revoked certificate" should be read to mean "certificate holder," thereby allowing judicial review of any PSC hearing panel decision relating to the holder of an Idaho teaching certificate.

125. Idaho Administrative Procedure Act, IDAHO CODE §§ 67-5200–92 (2016); *see generally* PSC PROCEDURES MANUAL, *supra* note 23.

(3) When the agency was required by the provisions of this chapter or by other provisions of law to issue an order, the court shall affirm the agency action unless the court finds that the agency's findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) not supported by substantial evidence on the record as a whole; or
- (e) arbitrary, capricious, or an abuse of discretion.

If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary.

(4) Notwithstanding the provisions of subsections (2) and (3) of this section, agency action shall be affirmed unless substantial rights of the appellant have been prejudiced.¹²⁶

As of this writing, no reported Idaho district court or appellate decision has applied the IAPA's judicial review provisions to the final decision of a PSC hearing panel.¹²⁷ As a general matter, however, a "district court must affirm an agency action unless it both

126. IDAHO CODE §§ 67-5279(3)–(4) (2016).

127. The only reported Idaho judicial decision reviewing a decision concerning adverse action against a teacher's Idaho teaching certificate emanating from a PSC hearing panel is *Macrae v. Smith*, 890 P.2d 739, 126 Idaho 788 (1995). In *Macrae*, the Idaho Supreme Court vacated a decision of the SBE increasing the discipline imposed on an Idaho teacher for engaging in an inappropriate relationship with a student from a letter of reprimand to a one-year suspension. *Id.* at 739–40, 126 Idaho at 788–89. The Idaho high court did so because the SBE, which at that time was statutorily-assigned the role of reviewing decisions of PSC hearing panels concerning teacher certification issues, had failed to review the summary of testimony and exhibits presented to the hearing panel as required by the then-existing version of Section 33-1209(7). *Id.* at 741, 126 Idaho at 190. The Court did not base its decision on any failure by the SBE to comply with the statutory provisions of Section 67-5279, although the Court would have been justified in finding and concluding that the SBE, by failing to review the record before the PSC hearing panel, had made its decision "upon unlawful procedure" in violation of Section 67-5279(3)(c). Moreover, during the 1995 Legislative Session, and in response to the Supreme Court's decision in *Macrae*, the Legislature amended Section 33-1209(7) to remove the SBE as an intermediate administrative appellate body between the PSC hearing panel

(1) fails one of the statutory standards enumerated in I.C. § 67–5279, ... and (2) prejudices an appellant's substantial rights.”¹²⁸ In turn, the Idaho Supreme Court reviews a district court's decision under Section 67-5279 under the following standard:

“In an appeal from the decision of a district court acting in its appellate capacity under the [Idaho Administrative Procedure Act], this Court reviews the agency record independently of the district court's decision.” We review the decision of the district court to determine whether it correctly decided the issues presented to it. This Court “shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.” I.C. § 67–5279(1). This Court “instead defers to the agency's findings of fact unless they are clearly erroneous. In other words, the agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record.”¹²⁹

The concluding portion of Section 33-1209(8) is a venue provision. Typically, “the district court of the county in which the holder of a revoked certificate has been last employed as a teacher” will be in the county where the certificate holder was employed as a teacher, by a school district, at the time the alleged unethical conduct occurred. Occasionally, however, where the certificate holder obtains employment in another school district, outside the county, after the alleged unethical conduct occurred, venue will properly lie in the district court in the county of the second school district. And, the Legislature may want to consider also allowing venue to be properly laid in the district court in the county where the PSC

and the district court. H.B. No. 303, 1995 Idaho Laws Ch. 235 (Idaho 1995) (codified as amended at Idaho Code § 33-1209 (1995)).

128. *Two Jinn, Inc. v. Idaho Dep't of Ins.*, 293 P.3d 150, 152, 154 Idaho 1, 3 (2013).

129. *Altrua HealthShare, Inc. v. Deal*, 299 P.3d 197, 200, 154 Idaho 390, 393 (2013) (citations omitted).

hearing panel conducted the hearing—particularly since the IAPA generally allows for judicial review in the district court in the county where the hearing was conducted.¹³⁰

IX. CONCLUSION

Proceedings before the PSC concerning disputes over teacher certification—and, in particular, the peer review nature of PSC panel proceedings—have largely been successful in furthering the twin goals of an administrative system designed to ensure teacher quality in Idaho and protect the due process rights of individuals seeking or holding an Idaho teaching certificate. Stakeholders with a substantial interest in Idaho’s teaching profession—Idaho citizens and residents generally, and Idaho’s school districts, educators, and students specifically—are the better for it.

130. Idaho Code § 67-5272 provides that “[e]xcept when required by other provision of law, proceedings for review or declaratory judgment are instituted by filing a petition in the district court of the county in which: (a) the hearing was held; or (b) the final agency action was taken; or (c) the aggrieved party resides”