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Disclosure of Special Education Students' Records: Do the 1999 IDEA Regulations Mandate That Schools Comply With FERPA?

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DISCLOSURE OF SPECIAL EDUCATION STUDENTS' RECORDS: DO THE 1999 IDEA* REGULATIONS MANDATE THAT SCHOOLS COMPLY WITH FERPA?**

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INTRODUCTION

Dr. Carla Culver, the principal of Anytown High School, is sitting in her office, examining the files on Dawn Davenport and Fred Flynn. After Dawn and Fred, two of Anytown High School's special education students, vandalized the school's computer lab, Dr. Culver called the police. The police, who just left with Dawn and Fred, asked Dr. Culver to send the two students' records down to the police station. Dr. Culver is worried. She knows that federal law protects education records from most disclosures, except under certain circumstances. She also knows that special education students enjoy the same protections. On the other hand, 1997 amendments to one of the key special education statutes requires her to turn over certain records to authorities when she reports a

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* Individuals with Disabilities Education Act, Pub. L. No. 91-230, 84 Stat. 175 (codified as amended at 20 U.S.C. §§ 1400-1487 (1994 & Supp. IV 1998)).

** Family Educational Rights and Privacy Act, Pub. L. No. 93-380, 88 Stat. 57 (codified as amended at 20 U.S.C. § 1232g (1994 & Supp. IV 1998)).

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special education student's alleged criminal activity. Dr. Culver wants to follow the law. What should she do?

The preceding hypothetical illustrates a common concern of contemporary educators. As a result of the 1997 amendments to the Individuals with Disabilities Education Act ("IDEA"),[1] questions arise regarding the IDEA's interrelationship with the Family Educational Rights and Privacy Act ("FERPA").[2] These questions

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[1] Pub. L. No. 91-230, 84 Stat. 175 (codified as amended at 20 U.S.C. §§ 1400-1487 (1994 & Supp. IV 1998)). The purpose of the Act was "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. § 1400(d)(1)(A). Under the IDEA, participant states agree to provide a free appropriate public education to children with disabilities in exchange for federal financial assistance. *See, e.g.*, Board of Educ. v. Rowley, 458 U.S. 176, 203 (1982) (holding that "[t]he Act's [then called the Education for All Handicapped Act, 20 U.S.C. § 1401 (1976 & Supp. IV)] 'free appropriate public education' provision is satisfied when the state provides personalized instruction with sufficient support services to permit a handicapped child to benefit educationally from that instruction . . . [and s]uch instruction and services must be provided at public expense"); Dixie Snow Huefner, *Judicial Review of the Special Educational Program Requirements Under the Education for All Handicapped Children Act: Where Have We Been and Where Should We Be Going?*, 14 HARV. J.L. & PUB. POL'Y 483, 484-88 (1991) (critiquing the case law generated by the free appropriate public education provision and finding that "courts have interpreted ambiguous statutory and regulatory provisions in ways that are not consistent, especially with respect to the meaning of the requirement that students with disabilities receive a free appropriate public education").

[2] Pub. L. No. 93-380, 88 Stat. 57 (codified as amended at 20 U.S.C. § 1232g (1994 & Supp. IV 1998)). As a general rule, FERPA (also referred to as the Buckley Amendment) requires schools receiving federal assistance to allow parents and students to access "education records" and prohibits schools from disclosing these records without consent. FERPA, however, contains several exceptions to this general rule. *See generally* Ralph D. Mawdsley, *Litigation Involving FERPA*, 110 EDUC. L. REP. 897 (West 1996) (reviewing "the case law that has developed in litigating the rights of parents and students who have either been denied access to student records or whose records have been released in violation of FERPA"); Peter A. Walker & Sara J. Steinberg, *Confidentiality of Educational Records: Serious Risks for Parents and School Districts*, 26 J. L. & EDUC. 11 (1997) (addressing the problem of school districts disclosing the sensitive information contained in special educational records and proposing several measures they can take to protect the record's confidentiality); Perry A.

primarily concern the extent of a school's IDEA-imposed obligation to convey a special education student's records to law enforcement authorities when reporting the student's suspected criminal activity.[3] Enacted in part "to control the careless release of educational information" by educational institutions,[4] FERPA sets limits on a school's ability to disclose education records without the consent of the parents of *all* students[5]—not just special education students. Thus, FERPA seemingly restricts a school's power to transmit a special education student's records to law enforcement authorities. To resolve this apparent conflict between FERPA's consent provision[6] and IDEA's disclosure requirement (hereinafter "Section 1415(k)(9)"),[7] the IDEA regulations require

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Zirkel, *Caught in the Collision: A Disabled Child's Right to Confidentiality and the News Media's Right to "Sunshine,"* 117 EDUC. L. REP 429 (West 1997) [hereinafter Zirkel, *Caught in the Collision*] (exploring the relationship between FERPA and state open meetings and open records laws); John E. Theumann, Annotation, *Validity, Construction, and Application of Family Educational Rights and Privacy Act of 1974 (FERPA)*, 112 A.L.R. FED. 1 (1993) (analyzing the state and federal court decisions that have determined questions concerning the validity, construction, or application of FERPA).

[3] 20 U.S.C. § 1415(k)(9)(B) (Supp. IV 1998) (providing that "[a]n agency reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted [to] . . . the appropriate authorities to whom it reports the crime"). A related interpretative problem concerns the transfer of rights to an IDEA-eligible child at the age of majority, including rights to review and release special education records. If a state's age of majority is not eighteen, the age at which FERPA rights shift from parent to student, the two statutes arguably conflict. *See generally* Deborah Rebore & Perry Zirkel, *Transfer of Rights Under the Individuals with Disabilities [Education] Act: Adulthood with Ability or Disability?* 2000 BYU EDUC. & L. J. 33 (analyzing the status of the age of the majority of students under IDEA).

[4] Red & Black Publ'g Co. v. Board of Regents, 427 S.E.2d 257, 261 (Ga. 1993). For more information on FERPA's background, see *infra* Part III.C, discussing the policies underlying FERPA.

[5] 20 U.S.C. § 1232g(b)(1) (1994 & Supp. IV 1998).

[6] *Id.*

[7] 20 U.S.C. § 1415(k)(9)(B) (Supp. IV 1998). *See* Dixie Snow Huefner, *The Individuals with Disabilities Education Act Amendments of 1997*, 122 EDUC. L. REP. 1103, 1111 n.47 (West 1998) (noting the potential conflict between FERPA's consent provision and IDEA's disclosure requirement).

compliance with FERPA when releasing certain student records after contacting law enforcement officials concerning a special education student's criminal behavior.[8]

In attempting to apply the IDEA requirement of disclosing a special education student's records to law enforcement officials, questions arise as to whether there really is a conflict between IDEA and FERPA and what weight, if any, should the IDEA regulations be accorded. These important questions merit careful attention. To find the answers, as in any case of statutory interpretation, one first must closely examine the statutory text for evidence of legislative intent.[9] If the text is clear, the inquiry ends in all but the most unusual cases.[10] Clearly establishing that the best indicator of Congress' intent is the language Congress employed, the Supreme Court has declared: "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."[11]

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[8] 34 C.F.R. § 300.529(b)(2) (1999). For more information, see Perry A. Zirkel, *Prosecuting Disabled Students: IDEA '97 Effectively Negates* Chris L., THE SPECIAL EDUCATOR, June 4, 1999, at 6.

[9] *See, e.g.*, Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997) (explaining that the court's "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case").

[10] *Id.* (explaining that the "inquiry must cease if the statutory language is unambiguous"). *See also* Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992) (explaining that "[i]n a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue[,] judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished"); Burlington N. R.R. Co. v. Oklahoma Tax Comm'n, 481 U.S. 454, 461 (1987) (explaining that "in the absence of a 'clearly expressed legislative intention to the contrary,' the language of the statute itself 'must ordinarily be regarded as conclusive'") (quoting United States v. James, 478 U.S. 597, 606 (1986)). For a brief summary of the extremely exceptional factors that may cause a court to depart from a statute's plain meaning (i.e., plain-meaning reading entirely defeats statutory purpose), see *National Coalition for Students with Disabilities Educ. & Legal Defense Fund v. Allen*, 152 F.3d 283, 288-89 (4th Cir. 1998).

[11] Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992). *See also* Mountain Home Sch. Dist. v. T.M.J. Builders, 858 S.W.2d 74, 76 (Ark. 1993) (explaining that "[t]he first rule in considering the meaning of a statute is to construe it just as it reads, giving the words their ordinary and usually

Frequently, however, a legislature lacks clarity of expression and enacts an ambiguous statute. A statute is ambiguous if reasonable persons may differ as to its meaning.[12] If the statutory text is ambiguous, one then must engage in the methodical application of well-settled canons of statutory construction[13] to the problematic text, in a common-sense manner,[14] with the ultimate goal of illuminating murky legislative will.[15]

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accepted meaning in common language"); People v. Townsend, 62 Cal. App. 4th 1390, 1395 (Ct. App. 1998) (explaining that "[i]f there is no ambiguity or uncertainty, the Legislature is presumed to have meant what it said, and there is no need to resort to extrinsic indicia of legislative intent, such as legislative history"); University of Iowa v. Dunbar, 590 N.W.2d 510, 511 (Iowa 1999) (explaining that "[t]he intent of the legislature is the polestar of statutory construction and is primarily to be ascertained based on the language employed in the statute").

[12] *See* 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 45.02 (5th ed. 1992). *See also* Stockbridge Sch. Dist. v. Department of Pub. Instruction Sch. Dist. Boundary Appeal Bd., 550 N.W.2d 96, 99 (Wis. 1996) (stating that parties who interpret a statute differently do not create ambiguity, but that the Court has "recognized that different yet equally reasonable interpretations by various decision-making bodies is indicative that a statute may support more than one reasonable interpretation").

[13] Although the canons are occasionally subject to scholarly criticism, they are routinely consulted by litigants and judges. *See generally* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 25-28 (1997) (discussing the origins and purpose of canons in the legal system).

[14] *See, e.g.*, BFP v. Resolution Trust Corp., 511 U.S. 531, 546-47 (1994) (stating that the Supreme Court had responsibility to give "sensible content" to statutory provision); Sweetman v. State Elections Enforcement Comm'n, 732 A.2d 144, 153-54 (Conn. 1999) (explaining that "[i]n interpreting a statute, common sense must be used . . . [and that] the statute [is considered] as a whole with a view toward reconciling its parts in order to obtain a sensible and rational overall interpretation . . . [and i]f a statute can be construed in several ways, we will adopt the construction that is most reasonable").

[15] *See generally* Robert S. Summers, *Statutory Interpretation in the United States*, *in* INTERPRETING STATUTES: A COMPARATIVE STUDY 407 (D. Neil MacCormick & Robert S. Summers eds., 1991) (focusing on the interpretational practices of the Supreme Court during the decade, 1980-90). Canons of construction are aids to ascertaining legislative intent. *Connecticut Nat'l Bank*, 503 U.S. at 253. As such, they may not be used to defeat legislative will. The canons "must yield to clear contrary evidence of legislative intent." National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974).

Some commentators assert that, under the IDEA, FERPA's constraints do not apply in these situations. These commentators include Professor Susan Clark, who wrote: "[w]hen principals report crimes committed by students with disabilities, copies of special education and disciplinary records must be transmitted to the authorities; doing so does *not* violate confidentiality provisions of the Family Educational Rights and Privacy Act."[16] Furthermore, at least one special education hearing officer concluded that the IDEA's crime reporting provisions were an "exception" to FERPA.[17]

This Article argues that these authorities have not correctly stated the law because FERPA and the IDEA's disclosure requirements are capable of coexistence and IDEA regulations command this result. According to IDEA regulations, school officials *must* comply with FERPA when turning over records after reporting a special education student's suspected criminal activity in compli-

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[16] Susan G. Clark, *The Principal, Discipline, and the IDEA*, NASSP BULL., Nov. 1999, at 1, 7 (emphasis added). This Article disagrees only with the portion of Professor Clark's article that covers student records. The balance of Professor Clark's treatment is a brief, but accurate, summary of the IDEA's discipline requirements.

[17] Northside Indep. Sch. Dist., 28 IDELR 1118, 1122 (Tex. SEA 1998). This decision was issued prior to the effective date of the final IDEA regulations. Prior to the effective date of the regulations, two other administrative decisions discussed section 1415(k)(9)(B), but they have little instructive value. One decision did not concern the disclosure of any arguably protected records; thus, the reference to section 1415(k)(9)(B) appears to be gratuitous. Cabot Sch. Dist., 29 IDELR 300, 301 (Ark. SEA 1998). In the other case, the disclosure of records, which was to a juvenile probation officer after the commencement of juvenile proceedings, may have been permissible under one of FERPA's exceptions, but the hearing officer did not pursue this line of analysis. *See* Conecuh County Bd. of Educ., 30 IDELR 215 (Ala. SEA 1999). *See also infra* notes 43-52 and accompanying text (discussing the FERPA exceptions).

After the final IDEA regulations became effective in May 1999, only two administrative or judicial decisions cited the regulation in question. *See* Onteora Cent. Sch. Dist., 31 IDELR 203 (N.Y. SEA 1999) (regulations would not have changed outcome per review officer); Pottsdown Sch. Dist., 30 IDELR 651, 653 n.21 (Pa. SEA 1999). Neither case, however, discussed the validity of this regulation.

ance with section 1415(k)(9).[18] This regulation is a reasonable reading of FERPA and the IDEA and, consequently, a permissible exercise of rule-making power by the United States Department of Education in implementing the IDEA.[19] In addition, ignoring FERPA's commands under such circumstances is very risky business because its plain regulatory language provides for federal enforcement actions against FERPA violators.[20] Furthermore, courts have imposed liability on schools for damages to students under 42 U.S.C. § 1983 for violations of FERPA confidentiality.[21]

In anticipation of challenges to the validity of IDEA regulations implementing the crime reporting provisions, this Article analyzes the relevant statutory and regulatory texts. In Part I, the Article examines the language of the statutes and regulations, including the extent of the Department of Education's power to promulgate regulations under the IDEA. Part II of this Article examines whether the applicable texts are capable of simultaneous existence. In Part III, the Article analyzes whether common principles of statutory construction and public policy considerations offer any guidance in understanding the texts at issue. This article concludes that the regulation in question is valid. Schools must comply with FERPA when transmitting a special education student's records to authorities under section 1415(k)(9)(b).

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[18] 34 C.F.R. § 300.529(b)(2) (1999) (providing that "[a]n agency reporting a crime under this section may transmit copies of the child's special education and disciplinary records only to the extent that the transmission is permitted by the Family Educational Rights and Privacy Act").

[19] *See infra* Part I.A (discussing the interpretive powers Congress granted to the United States Department of Education to implement and enforce IDEA's requirements).

[20] If a school violates FERPA, it risks federal enforcement actions, including termination of federal financial assistance through the Department of Education's Family Policy Compliance Office. *See* 20 U.S.C. § 1232g(f) (1994); 34 C.F.R. §§ 99.60-.67 (1999).

[21] Under the prevailing judicial view a school may face liability for damages in an action under 42 U.S.C. § 1983. *See generally* Mawdsley, *supra* note 2 (stating that because courts have held that FERPA does not create a private cause of action, both parents and students have been more successful suing under section 1983); Zirkel, *Caught in the Collision*, *supra* note 2, at 430-32 (analyzing section 1983 cases where the news media requests information about a special education student and the parents assert confidentiality over that information).

I. THE INTERPRETIVE PROBLEM POSED BY DISCLOSURE REQUIREMENTS OF THE IDEA

The difficulty associated with section 1415(k)(9)(B) and its corresponding regulations is revealed when one considers how a school may transmit records as required by the IDEA and still comply with FERPA. To understand the IDEA-FERPA relationship, one must begin with the texts of the statutes and regulations themselves.[22] First, section 1415(k)(9)(B) states that "[a]n agency reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom it reports the crime."[23] The corresponding IDEA regulation repeats this language,[24] however, it contains important additional language. The regulation provides that "[a]n agency reporting a crime under this section may transmit copies of the child's special education and disciplinary records *only to the extent that the transmission is permitted by the Family Educational Rights and Privacy Act.*"[25] This additional regulatory language is at the heart of the dispute over whether FERPA's confidentiality provision applies within the context of the IDEA. Proponents of the view that FERPA's confidentiality provision does not apply to disclosure of records under the IDEA may argue that the power of the United States Department of Education to issue regulations does not extend so far as to allow it to impermissibly add a

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[22] *See, e.g.*, Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997) (stating that the "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case"); Estate of Cowart v. Nichols Drilling Co., 505 U.S. 469, 475 (1992) (stating that one must begin with the language of the statute, and that "when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning . . . is finished").

[23] 20 U.S.C. § 1415(k)(9)(B) (Supp. IV 1998). The text of the IDEA does not identify the "appropriate authorities." If disclosures under section 1415(k)-(9)(B), however, are subject to FERPA, the "appropriate authorities" would be those entitled to receive the records under FERPA.

[24] 34 C.F.R. § 300.529(b)(1) (1999).

[25] *Id.* § 300.529(b)(2) (emphasis added).

requirement not contained within the IDEA. This Article, however, argues that the crime reporting requirement—section 1415(k)(9)—does not unambiguously reveal whether FERPA's confidentiality provision should apply to the disclosure of records under the IDEA. As such, the United States Department of Education is charged with interpreting section 1415(k)(9)(B) and adopting regulations that inform schools on how to implement the IDEA's requirements. Further, this Article concludes that the regulation implementing section 1415(k)(9)(B), which requires schools to comply with FERPA before disclosing special education students' records, is a legitimate exercise of the Department of Education's rule-making power.

A. *The United States Department of Education's Interpretive Powers*

Congress charged the United States Department of Education with adopting regulations to implement and enforce the IDEA's requirements.[26] Under federal law, the Department's regulatory powers include the implicit power to resolve ambiguities in statutory language.[27] When the language of a statute is clear, the administering agency must apply the statute according to its plain meaning.[28] If there are reasonable differences in the statute's

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[26] 20 U.S.C. § 1417(b) (1994 & Supp. IV 1998).

[27] *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843-44 (1984). Pursuant to section 1417(b), Congress' narrow grant of regulatory authority—i.e., its grant of power to regulate only as "necessary to ensure that there is compliance with specific requirements of" the IDEA—is nevertheless broad enough to include an implicit grant of power to resolve ambiguities, should the "specific requirements" of the Act prove to be ambiguous. *See* Honig v. Doe, 484 U.S. 305, 325 n.8 (1988). In contrast, Congress could have granted the Department explicit power to resolve statutory ambiguities by regulation. *Chevron*, 467 U.S. at 843-44. The distinction has greatest force when analyzing the apparently different standards for sustaining subsequent regulation. *See infra* notes 29-31 and accompanying text (discussing the court's application of the principle of deference to administrative interpretations).

[28] *See, e.g.*, United States Nat'l Bank of Oregon v. Independent Ins. Agents of Am., Inc., 508 U.S. 439, 463 n.11 (1993) (concluding that "[b]ecause . . . the

meaning, however, the agency may resolve the dispute.[29] According to the Supreme Court of the United States, an agency's regulatory construction of an ambiguous statute pursuant to an implicit grant of authority is controlling if it is a "reasonable interpretation" of the statute.[30] An agency's construction of an ambiguous statutory text need not be the best possible construction; it need only be reasonable.[31]

In interpreting section 1415(k)(9) and the regulation providing that schools must comply with FERPA before disclosing a special education student's records to the appropriate authorities to whom it reports crimes, the questions that arise are whether section 1415(k)(9)(B) is ambiguous and whether this regulation is an unreasonable interpretation of the IDEA. When examining any portion of the IDEA, one must read the statute as a whole.[32] Specifically, section 1415(k)(9), the crime reporting provision, must be read together with the rest of the IDEA. The IDEA, like every

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meaning of the 1916 Act is plain . . . we need not consider the 1916 Act's legislative history . . . [n]or need we consider, again because the statute's meaning is unambiguous, what if any weight to accord the longstanding assumption"); *Estate of Cowart*, 505 U.S. at 476 (explaining that "[t]he controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes written"); Southeastern Community College v. Davis, 442 U.S. 397, 411 (1979) (explaining that "[a]lthough an agency's interpretation of the statute under which it operates is entitled to some deference, this deference is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose and history").

[29] Commissioner v. Asphalt Prods. Co., 482 U.S. 117, 121 (1987); *Chevron*, 467 U.S. at 843-44. The judiciary is especially inclined to defer to the Department of Education's administrative construction of the IDEA. *See Honig*, 484 U.S. at 325 n.8.

[30] *Chevron*, 467 U.S. at 844. In contrast, if the agency's legislative authority to resolve statutory ambiguities is express, agency interpretations will be upheld unless they are "arbitrary, capricious, or manifestly contrary to the statute." *Id.* The differing language suggests a different scope of judicial inquiry.

[31] *Id.* at 843 n.11. *See also* Atlantic Mut. Ins. Co. v. Commissioner, 523 U.S. 382, 389 (1998) (explaining that "the task that confronts us is to decide, not whether the . . . regulation represents the best interpretation of the statute, but whether it represents a reasonable one").

[32] Summers, *supra* note 15, at 413-14.

other statute, may not be "read as a series of unrelated and isolated provisions."[33]

B. Reading Section 1415(K)(9) in Context

Words used in a statute derive their meaning from their context, which can only be determined by examining the surrounding words, sentences, and sections.[34] Thus, the meaning of section 1415(k)(9) cannot be determined in isolation from the remainder of the IDEA. Although section 1415(k)(9), the IDEA's crime reporting provision, commands school districts to "ensure" that certain records are transmitted to law enforcement authorities,[35] 20 U.S.C. § 1417(c) requires the Secretary of Education to "assure the confidentiality" of records protected by FERPA[36] and 20 U.S.C. § 1412(a) requires states and local school districts to comply with FERPA.[37] These latter provisions are absolute because they create no exceptions or limitations. Notwithstanding the lack of exceptions, there are many ways in which a school may "ensure"[38] that

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[33] Gustafson v. Alloyd Co., 513 U.S. 561, 570 (1995).

[34] *See, e.g.*, Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997) (explaining that "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole"); King v. St. Vincent's Hosp., 502 U.S. 215, 221 (1991) (explaining "that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context").

[35] 20 U.S.C. § 1415(k)(9)(B) (Supp. IV 1998).

[36] *Id.* § 1417(c) (providing that "[t]he Secretary shall take appropriate action, in accordance with the provisions of section 1232g . . . to assure the protection of the confidentiality of any personally identifiable data, information, or records collected by the Secretary and by State and local educational agencies").

[37] *Id.* § 1412(a)(8) (providing that "[a]gencies in the State comply with section 1417(c) of this title (relating to confidentiality of records and information)").

[38] When construing a statute, one initially presumes that the words in question carry their ordinary meaning. *See* Walters v. Metropolitan Educ. Enters., Inc., 519 U.S. 202, 207 (1997). For that reason, it is customary to start with dictionary definitions. *See* Summers, *supra* note 15, at 412. The term "ensure" is defined as "to make sure or certain." AMERICAN HERITAGE COLLEGE DICTIONARY 458 (3d ed. 1993). The term is focused on outcomes, see *id.*, but

the required records are transmitted to law enforcement officials while concomitantly complying with FERPA.

After reading these three provisions of the IDEA together, Professor Clark's contention, that record disclosures pursuant to the 1997 IDEA amendments are not subject to FERPA,[39] is subject to question. This is because, at best, the relationship of the pertinent clauses is unclear. That is, the plain language of section 1415(k)(9)(B), read in context, does not clearly and unambiguously speak to whether this crime reporting provision is subject to FERPA's confidentiality provision. Consequently, the Department's regulation requiring that schools comply with FERPA before disclosing special education students' records to the appropriate authorities to whom it reports crimes is sustainable so long as it is a reasonable answer to the interpretative question. The remainder of this Article focuses on the issue of whether the Department of Education's regulation implementing section 1415(k)(9) is reasonable.

II. FERPA AND THE IDEA MAY COEXIST EFFECTIVELY

Under a fundamental principle of statutory construction, courts are required, where possible, to harmonize statutes if they are at all capable of coexistence.[40] Courts will not, unless absolutely necessary, assign statutory language a meaning that will render any

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silent as to methods. *See* Corey H. v. Board of Educ., 995 F. Supp. 900, 914-15 (N.D. Ill. 1998) (noting that state board of education had many ways to "ensure" that local school districts complied with the IDEA).

[39] Clark, *supra* note 16, at 7.

[40] Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 533 (1995). Like any other canon of construction, this rule yields to a statute's plain meaning. *See, e.g.*, Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992) (while explaining this rule, noting that "canons of construction are no more than rules of thumb that help courts determine the meaning of statutes"). In *Smith v. Wheaton*, a federal district court resolved a potential conflict between FERPA and the IDEA, regarding the transfer of records to a student's new school, by engaging in analysis similar to that used in the present article. *See* Smith v. Wheaton, 29 IDELR 200, 204-05 (D. Conn. 1998) (resolving a potential conflict between FERPA and the IDEA).

portion of a statute meaningless, redundant, or inoperative.[41] If two statutes cannot be harmonized, then courts resolve the deadlock by referring to other rules of statutory construction. For example, the more recent or more specific statute will take priority over an older or more general statute.[42]

The crime reporting language of section 1415(k)(9)(B), which requires schools to "ensure" disclosure of certain records, may be harmonized with FERPA. Thus, the Department of Education's regulation requiring schools to comply with FERPA is reasonable and must govern the application of the IDEA. This is because FERPA's broad-brushed rule prohibiting schools from disclosing education records without consent is limited by several exemptions and exceptions,[43] four of which are crucial to comprehending the relationship between FERPA and sections 1415(k)(9)(B) and 1417(c). First, FERPA allows school districts to disclose education records, pursuant to state statute, to officials specified in such statute, where the disclosure "concerns the juvenile justice system" and relates to the system's capacity to "effectively serve the student whose records are released."[44] If the relevant state statute was

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[41] *See, e.g.*, *Walters*, 519 U.S. at 209 (explaining that "[s]tatutes must be interpreted, if possible, to give each word some operative effect"); Freytag v. Commissioner, 501 U.S. 868, 877 (1991) (discussing that "[o]ur cases consistently have expressed a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment"); Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237, 249 (1985) (interpreting an act, "in light of the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative").

[42] *See infra* Part III.A (discussing the statutory construction rule against implicit repeal).

[43] *See* Perry A. Zirkel, *Disclosure of Student Records: A Comprehensive Overview*, THE SPECIAL EDUCATOR, Mar. 28, 1997, at 1 [hereinafter Zirkel, *Disclosure of Student Records*].

[44] 20 U.S.C. § 1232g(b)(1)(E) (1994). The corresponding regulation provides for the disclosure of records to State and local officials or authorities to whom this information is:

> (A) Allowed to be . . . disclosed pursuant to State statute adopted before . . . 1974, *if* the . . . disclosure concerns the juvenile justice system and the system's ability to effectively serve the student whose records are released; or (B) Allowed to be . . . disclosed pursuant to State statute adopted after . . . 1974, subject to the requirements of § 99.38.

passed after November 19, 1974, schools may only disclose the student's records "prior to adjudication"—i.e., prior to the finding of delinquency.[45] Further, for statutes enacted after November 19, 1974, recipient officials must certify in writing that they will not disclose the student's education records to a third party without consent, except as allowed by state law.[46]

Second, FERPA allows schools to disclose a student's education records in an emergency if it is "necessary to protect the health or safety of the student or other persons."[47] According to a United States Department of Justice handbook, "[o]n-campus disruptions that constitute criminal acts" fall within this exception.[48]

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34 C.F.R. § 99.31(a)(5)(A) (1999) (emphasis added). The regulation also provides the conditions that apply to disclosure of information as permitted by State statute adopted after 1974 concerning the juvenile justice system, namely, permitting an educational agency or institution to disclose education records under 34 C.F.R. § 99.31(a)(5)(i)(B) and requiring "officials and authorities to whom the records are disclosed . . . [to] certify in writing to the educational agency . . . that the information will not be disclosed to any other party, except as provided under State law, without the prior written consent of the parent of the student". 34 C.F.R. § 99.38 (1999). Note, however, that this exception does not appear to apply to students who face charges in an adult criminal justice system. *See* Thomas A. Mayes et al., The Intersections of Special Education Law and the Juvenile Justice System, Presentation at the Education Law Association's Forty-Fifth Annual Conference (Nov. 5, 1999). For more information on FERPA and the juvenile justice system, see MICHAEL L. MEDARIS ET AL., U.S. DEP'T OF JUSTICE, SHARING INFORMATION: A GUIDE TO THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT AND PARTICIPATION IN JUVENILE JUSTICE PROGRAMS (1997).

[45] 20 U.S.C. § 1232g(b)(1)(E)(ii)(I) (1994); 34 C.F.R. § 99.38(a) (1999).

[46] 20 U.S.C. § 1232g(b)(1)(E)(ii)(II) (1994); 34 C.F.R. § 99.38(b) (1999).

[47] 20 U.S.C. § 1232g(b)(1)(I) (1994); 34 C.F.R. § 99.31(a)(10) (1999). Professor Clark listed this FERPA exception and others in her article. *See* Clark, *supra* note 16, at 7. Although she noted some of FERPA's exceptions, she did not show how they relate to the disclosures required by section 1415(k)(9)(B) or how that impacts her analysis of this section. This Article questions her statements for several other reasons. First, she failed to acknowledge that education records may be disclosed to juvenile justice authorities under certain circumstances. Second, she did not state that schools, before complying with a court order or subpoena, must provide parents with notice.

[48] MEDARIS ET AL., *supra* note 44, at 7.

Third, FERPA provides that records made and maintained by a "law enforcement unit" of the district (such as an officer assigned to patrol a school's grounds) and used solely for law enforcement purposes are excluded from FERPA's definition of "education records."[49] To the extent that a school district uses this law enforcement unit record exception to FERPA's confidentiality provision to convey records that are required to be disclosed under section 1415(k)(9)(B), disclosure of these records under the IDEA does not implicate any interest protected by FERPA, because FERPA provides an express exception for disclosing such records even if a school was not obligated to disclose these records under the IDEA. In any event, these law enforcement unit records would be only a portion of the "special education and disciplinary records" that section 1415(k)(9)(B) would require a school to turn over.

Finally, FERPA authorizes disclosures of education records demanded in a court order or subpoena.[50] By regulation, schools must make a "reasonable effort" to give the protected party notice of the subpoena or court order, before compliance, so the protected party can challenge the subpoena or court order.[51] Before a court orders the disclosure of records, the person requesting the order may be required to demonstrate a need for them.[52]

As a result, these four exceptions to FERPA's confidentiality provision occur in contexts in which the IDEA crime reporting provision—section 1415(k)(9)—may effectively operate. In fact, schools may "ensure"[53] that law enforcement authorities receive a subject child's special education and discipline records while also following FERPA as is mandated by the Department of Education's

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[49] 20 U.S.C. § 1232g(a)(4)(B)(ii) (1994); 34 C.F.R. § 99.8 (1999).

[50] 20 U.S.C. § 1232g(b)(1)(J) (1994).

[51] 34 C.F.R. § 99.31(a)(9) (1999). In certain cases, such advance notice is not required if the recipient is ordered not to disclose the contents or existence of the subpoena. *Id.* § 99.31(a)(9)(ii).

[52] *See* Krauss v. Nassau Community College, 469 N.Y.S.2d 553, 555 (Sup. Ct. 1983).

[53] 20 U.S.C. § 1415(k)(9)(B) (Supp. IV 1998); 34 C.F.R. § 300.529(b)(1) (1999).

regulation implementing section 1415(k)(9).[54] This is because FERPA's exceptions would allow the records contemplated by section 1415(k)(9)(B) to eventually reach law enforcement authorities, while protecting legitimate student rights as well.[55] That is, if one FERPA exception does not apply, another one almost certainly will. Even if many of the FERPA exceptions do not apply, the school district may still comply with section 1415(k)(9)(B) and its implementing regulation by requiring a court order or subpoena to be obtained before releasing a special education student's records.[56] This exception to FERPA contains an element of judicial oversight, and, thus allows for disclosure only after a court has considered the merits of legitimate privacy interests asserted. Consequently, although the Department of Education's regulation implementing section 1415(k)(9)(B) imposes the barriers of FERPA consent to the required disclosures, those barriers are not insurmountable.[57] Thus, the Department's regula-

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[54] This Article assumes that some education and law enforcement professionals may question the wisdom of the regulation, as a matter of public policy. Public policy considerations may carry weight when a court is asked to construe an ambiguous statute. *See* Commissioner v. Asphalt Prods. Co., 482 U.S. 117, 121 (1987); Summers, *supra* note 15, at 417-18. When an agency is interpreting an ambiguous statute under its administration, however, it is vested with the primary authority to make public policy choices. Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 845 (1984) (citing United States v. Shimer, 367 U.S. 374, 382-83 (1961)). The judiciary will rarely disturb these choices.

[55] Some of these legitimate student rights may be of constitutional import because juvenile court defendants enjoy many of the same constitutional rights as adult criminal defendants. *See, e.g., In re* Gault, 387 U.S. 1, 31-59 (1967) (holding that juvenile court defendants enjoy many of the same constitutional rights as adult criminal defendants, including a right to notice of charges, to counsel, to confrontation and cross-examination of witnesses, and to the privilege against self-incrimination).

[56] *See* 34 C.F.R. § 99.31(a)(9) (1999) (permitting, with conditions, a records disclosure if "the disclosure is to comply with a judicial order or lawfully issued subpoena").

[57] To comply with section 1415(k)(9)(B), a school might find itself requesting a subpoena. Although this may seem somewhat awkward, this demonstrates that it is entirely within a school district's power to comply with FERPA and the IDEA simultaneously.

tion harmonizes the two operative sections of the IDEA and simultaneously honors their relevant underlying policies. This is because schools retain their obligation to disclose certain records regarding a special education student to law enforcement authorities, as provided in section 1415(k)(9)(B), while respecting legitimate privacy rights of such students. That is, any such disclosures must comply with FERPA, so as to safeguard legitimate student interests and satisfy section 1417(b). In this way, no word or phrase is rendered a nullity.

Other considerations support the view that FERPA and sections 1415(k)(9)(B) and 1417(b) may be harmonized. Under FERPA, most permitted disclosures to third parties are optional,[58] although other laws may require permitted disclosures or prohibit allowed disclosures.[59] Prior to the 1997 IDEA amendments and 1999 regulations, the IDEA regulations prohibited disclosure of education records that FERPA would have otherwise allowed.[60] Reading the amended IDEA and regulation in context with the prior versions, one may conclude that the amended IDEA *now* requires certain disclosures that FERPA already permits under its exceptions, but nothing more. Under this reading, which supports the Department of Education's regulation, all provisions of FERPA and the IDEA retain meaning and purpose.

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[58] *See* 34 C.F.R. § 99.31 (1999) (providing the conditions under which a school "may" disclose otherwise protected information).

[59] *See generally* Mawdsley, *supra* note 2 (reviewing the case law that has developed in litigating the rights of parents and students who have either been denied access to student records or whose records have been released in violation of FERPA); Walker & Steinberg, *supra* note 2 (providing an overview of relevant federal and state confidentiality laws); Zirkel, *Disclosure of Student Records*, *supra* note 43, at 1 (explaining that FERPA has two types of protection: "one which prohibits the disclosure of personally identifiable information that is contained in the student's record and the other that assures access for the parent or the student," and providing a checklist of legal forms of disclosure without written parental consent).

[60] 34 C.F.R. § 300.571 (1999). *See also* 34 C.F.R. pt. 300, Attachment 1-Analysis of Comments and Changes, 64 Fed. Reg. 12,537, at 12,631 to 12,632 (1999) (noting this anomaly); Mawdsley, *supra* note 2, at 913-14 (same); Zirkel, *Caught in the Collision*, *supra* note 2, at 429 n.2 (same). For a case applying the prior regulations, see *Sean R. v. Board of Educ.*, 794 F. Supp. 467 (D. Conn. 1992).

III. STATUTORY CONSTRUCTION AND OTHER CONSIDERATIONS

When construing a statute, a court will commonly look at the statute from several additional perspectives if a close examination of the text fails to resolve the dispute. These additional considerations include considerations of the statute's purpose, examining the statute in light of constitutional commands, and reviewing the statute's legislative history. This final section examines section 1415(k)(9)(B) from these additional vantages.

A. Construing the IDEA Against FERPA's Implicit Repeal

The rule against implicit repeal, another rule of statutory construction, provides additional support for the Department of Education's regulation. Although a more recent statute will occasionally override an earlier statute, this does not occur easily. The rule requiring construction of a statute to avoid implicit repeal provides that a newly enacted statute will not be presumed to repeal any portion of a previously existing statute unless the two are undeniably in conflict.[61] As a matter of fairness, the courts expect Congress clearly to state when a law is to be repealed.[62] Although enacted after FERPA, the 1997 IDEA amendments contain no express indication of any intention to repeal any portion of FERPA. Rather, the 1997 amendments to IDEA retain the statutory language incorporating FERPA by reference.[63] Further-

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[61] *See, e.g.*, Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992) (recognizing that "so long as there is no 'positive repugnancy' between two laws, a court must give effect to both"); United States v. Fausto, 484 U.S. 439, 452-53 (1988) (explaining that "the doctrine [of] repeals by implication [is] strongly disfavored, so that a later statute will not be held to have implicitly repealed an earlier one unless there is a clear repugnancy between the two"); Rodriguez v. United States, 480 U.S. 522, 524 (1987) (explaining that the court chose not to apply the unfavored repeal by implication doctrine to a statute, since it found no irreconcilable conflict from which an intent to repeal may be inferred).

[62] Summers, *supra* note 15, at 437-38.

[63] 20 U.S.C. §§ 1412(a)(8), 1417(c) (1994 & Supp. IV 1998).

more, FERPA and the IDEA are not in irreconcilable conflict.[64] The Department's regulation, applying FERPA to disclosures of a special education student's records to law enforcement authorities, is a permissible reading of the underlying statutes because, among other things, a very strong showing to the contrary has not been made.

Other commentators, however, have not agreed. In a decision prior to the effective date of the IDEA regulations, one special education hearing officer reached a contrary conclusion, opining that section 1415(k)(9) and FERPA were in irreconcilable conflict.[65] Consequently, the hearing officer concluded that section 1415(k)(9) trumped FERPA as the "later enacted and more specific statute."[66] This hearing officer's conclusion rests on an inadequate view of FERPA.[67] In his decision, the hearing officer made no mention of FERPA's exceptions. When considering FERPA's relationship to section 1415(k)(9)(B), one must take FERPA as a whole—both the general rule and the specific exceptions.[68] While FERPA's general rule may conflict with section 1415(k)(9), FERPA, considered as a whole, does not.[69] As the two statutes as a whole do not undeniably conflict with each other, the Department's regulation is permissible.

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[64] *See supra* notes 29-54 and accompanying text (demonstrating that the 1997 IDEA amendments and FERPA may be harmonized).

[65] Northside Indep. Sch. Dist., 28 IDELR 1118, 1122 (Tex. SEA 1998).

[66] *Id.*

[67] In fairness to the hearing officer, his conclusions may have their root in the unusual posture of the case before him and the arguments raised by the parties. The district, not the parent, sought nondisclosure of records. The student's parent asserted that the district violated IDEA when it failed to transmit the student's records to law enforcement, relying on section 1415(k)(9). *Northside* raised FERPA as a defense, arguing that the statute prevented it from transferring records. *Id.*

[68] *See, e.g.*, Gustafson v. Alloyd Co., 513 U.S. 561, 570 (1995) (recognizing that "every Act of Congress should not be read as a series of unrelated and isolated provisions").

[69] *See supra* Part II (showing how FERPA and the IDEA may be read in harmony).

B. General Versus Specific Statutes

Another common rule of construction provides that, if two conflicting statutes appear to apply in the same situation, the more "specific" statute takes precedence over the more "general" statute,[70] regardless of order of enactment.[71] One could argue that section 1415(k)(9)(B) is the more specific of the two statutes, as it covers only students with disabilities that are subjects of school referrals to law enforcement. In contrast, FERPA covers nearly all students, nearly all of the time. Assuming that section 1415(k)(9)(B) is the more specific of the statutes,[72] it would take priority over FERPA and regulations requiring compliance with FERPA only to the extent that there was an unmistakable conflict. The statutes, however, readily may be harmonized.[73]

C. Overarching Structure and Underlying Policy

In construing statutory language, courts routinely examine a statute's structure and purpose.[74] Under this principle of construc-

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[70] *See, e.g.,* Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 445 (1987) (holding that "where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment") (citations omitted); Simpson v. United States, 435 U.S. 6, 15 (1978) (supporting the "principle [of giving] precedence to the terms of the more specific statute where a general statute and a specific statute speak to the same concern").

[71] *See, e.g., Crawford Fitting*, 482 U.S. at 445.

[72] It is not axiomatic that section 1415(k)(9)(B) is more "specific" than FERPA. Section 1415(k) makes a brief reference to records disclosures. In contrast, FERPA has several sections of detailed rules regarding student record disclosures. One may make a colorable argument that FERPA is the more "specific" of the two statutes.

[73] *See supra* Part II (discussing how FERPA and the IDEA may be read in harmony).

[74] *See, e.g.,* Florence County Sch. Dist. v. Carter, 510 U.S. 7, 13-14 (1993) (examining IDEA's purpose when construing one of its sections); Crandon v. United States, 494 U.S. 152, 158 (1990) (stating that in "determining the meaning of the statute . . . [the Court] look[s] not only to the particular statutory language, but to the design of the statute as a whole and to its object and

tion, a close examination of the IDEA's purpose and the policies supporting the Department of Education's implementing regulation further undercuts the contention that section 1415(k)(9)(B) creates an "exception" to FERPA. Congress enacted the IDEA to ensure access to a free appropriate public education after it concluded that an intolerably high number of children with disabilities were entirely excluded from public education.[75] Many of these students were excluded under the guise of discipline.[76] In response, the IDEA provides a comprehensive system of procedural safeguards for children with disabilities and their families, including procedural protections concerning discipline.[77] These protections are not available to children without disabilities.[78] In a statute that grants children with disabilities increased protections, it would seem incongruous to construe section 1415(k)(9)(B) to eliminate FERPA's protections for those very children. The Department of Education's regulation corresponds to the IDEA's structure and purpose.

In addition to the IDEA's policy and purpose, one must likewise consider the policies underlying FERPA. FERPA was enacted, in part, to combat indiscriminate releases of student records, such as releases to potential employers or credit card issuers.[79] Schools may release student records without consent

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policy"); Summers, *supra* note 15, at 415-16, 426-27, 441-42 (explaining this principle of statutory construction).

[75] Board of Educ. v. Rowley, 458 U.S. 176, 187-92 (1982) (discussing the IDEA and its goals).

[76] *See, e.g.*, Honig v. Doe, 484 U.S. 305, 324-25 (1988) (citing Mills v. Board of Education, 348 F. Supp. 866 (D.D.C. 1972); Pennsylvania Ass'n for Retarded Children v. Commonwealth, 343 F. Supp. 279 (E.D. Pa. 1972)) (discussing the exclusion of difficult disabled students and the "disciplinary measures to bar children from the classroom").

[77] 20 U.S.C. § 1415 (Supp. IV 1998) (containing the IDEA's procedural protections).

[78] *See, e.g.*, Clark, *supra* note 16, at 1-2 (noting a "dual standard" of discipline).

[79] *See, e.g.*, Smith v. Duquesne Univ., 612 F. Supp. 72, 80 (W.D. Pa. 1985) (noting that "FERPA was adopted as a response to the growing nation-wide concern" about privacy of school records); Red & Black Pub. Co. v. Board of Regents, 427 S.E.2d 257, 261 (Ga. 1993) (citing Bauer v. Kincaid, 759 F. Supp. 575, 590 (W.D. Mo. 1991)) (discussing the Buckley Amendment's purpose "to

only in certain circumstances and to certain recipients. If section 1415(k)(9)(B) implicitly repealed FERPA, the privacy rights of students with disabilities would be significantly compromised. The only limitation placed on schools would be to transmit records to "appropriate authorities,"[80] which is an amorphous standard that would almost certainly be breached by well-meaning educators, either by doing too much or too little. By requiring that all record releases under section 1415(k)(9)(B) comply with FERPA, the Department of Education's regulation guards against the social evils that FERPA addressed, as well as provides additional guidance to school officials. The Department of Education's regulation implementing section 1415(k)(9)(B) advances the purposes of both the IDEA and FERPA.

D. Avoiding Constitutional Questions

As the Supreme Court of the United States illustrated in a case involving the IDEA, courts construe statutes to avoid constitutional difficulties.[81] Under this canon, courts presume that legislative bodies write statutes in compliance with the Constitution.[82] Statutes that exceed constitutional limitations are "void."[83] When constitutional problems may be avoided by a reasonable construc-

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control the careless release of educational information on the part of many institutions"); S. JAMES ROSENFELD ET AL., EDUCATION RECORDS: A MANUAL 49-53 (1997) (describing FERPA's background); MARK G. YUDOF ET AL., EDUCATIONAL POLICY AND THE LAW 376-77 (3d ed. 1992) (describing FERPA's background, but additionally noting specific troublesome disclosures, such as to employers or credit agencies); Mawdsley, *supra* note 2, at 905-912; Theumann, *supra* note 2, at 5 (discussing the penalties for indiscriminate release of a student's records).

[80] 20 U.S.C. § 1415(k)(9)(B) (Supp. IV 1998); 34 C.F.R. § 300.529(b)(1) (1999).

[81] Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 7 (1993); *accord* United States v. Witkovich, 353 U.S. 194, 201-02 (1957); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 71-72 (2d ed. 1988). If a statute of questionable constitutionality is clear and unambiguous and no other reasons for decision are available, then the court will decide the constitutional issue. *Id.*

[82] *See, e.g.*, Summers, *supra* note 15, at 417, 451 (stating that "the courts presume that the Congress intended to enact a valid statute").

[83] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

tion of a statute, the courts are more likely to select the reading that is on solid constitutional ground.[84] As read by Professor Clark and others, special education students whom districts refer to law enforcement would not be covered by FERPA; however, their non-special education classmates subjected to law enforcement referrals would still enjoy FERPA's protections. This interpretation, allowing differential treatment based on disability, creates a potential challenge under the equal protection guarantees of the Fifth and Fourteenth Amendments[85] and federal statutes prohibiting discrimination against people with disabilities.[86] The Department of Education acknowledged that it adopted the pertinent regulation to avoid this potential constitutional difficulty.[87]

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[84] *Zobrest*, 509 U.S. at 7. This rule does not require an asserted statutory reading to be unquestionably constitutionally defective; rather, the reading need only engender a colorable constitutional dispute. *See id.*

[85] U.S. CONST. amends. V, XIV. The Fifth Amendment constrains only the federal government; in contrast, the Fourteenth Amendment operates on the states. *Compare* Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833) ("the Fifth Amendment must be understood as retaining the power of the general government, not as applicable to the states") *with* The Civil Rights Cases, 109 U.S. 3, 10-11 (1883) (noting that the Fourteenth Amendment restricts the powers of the states). Although the Fifth Amendment does not contain an Equal Protection "Clause" as such, the United States Supreme Court has interpreted the Fifth Amendment's Due Process Clause as containing an equal protection component. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954); TRIBE, *supra* note 81, at 1437.

[86] *See, e.g.*, Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (1994 & Supp. IV 1998) (prohibiting disability discrimination by entities receiving federal funds); Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213 (1994 & Supp. IV 1998) (prohibiting discrimination against people with disabilities by employers, state and local governments, and private entities providing services to the public).

The Department of Education notes that schools may violate section 504 by discriminating against children with disabilities in reporting criminal activities (i.e., "only reporting crimes committed by children with disabilities"). 64 Fed. Reg. 12,537, at 12,631. For more information on section 504 and the ADA, see PERRY A. ZIRKEL & JEANNE M. KINCAID, SECTION 504, THE ADA, AND THE SCHOOLS (1995).

[87] 64 Fed. Reg. 12,537, at 12,631 (providing that "[t]o avoid this unconstitutional result, this statutory provision must be read consistent with the disclosures permitted in FERPA for the education records of all children").

The Department's regulation also avoids a peculiar differentiation among children with disabilities. Section 1415(k)(9)(B) applies only when school authorities report an alleged crime. By its terms, it does not apply when children with disabilities come to the attention of law enforcement officials in other ways, such as by a victim's complaint. Thus, the Department's regulation protects the interests of all children with disabilities, regardless of the manner in which their behavior comes under law enforcement scrutiny.

E. Legislative History

Although its use has become increasingly controversial,[88] legislative history is a common tool of statutory construction.[89] Even though courts and litigants frequently cite legislative history, it is relatively unimportant in resolving the present matter for two reasons. First, a strong text-based argument is almost always preferred to an argument grounded in legislative history.[90] The Department of Education's regulation stating that "[a]n agency reporting a crime . . . may transmit copies of the child's special education and disciplinary records only to the extent that the transmission is permitted by the Family Educational Rights and Privacy Act" is firmly grounded in a permissible reading of the statute's text.[91] Second, any reliance upon legislative history is of little help in the present case. This is because there is almost no legislative history regarding section 1415(k)(9)(B) and an argument

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[88] *See, e.g.*, SCALIA, *supra* note 13, at 29-37 (criticizing the use of legislative history); Summers, *supra* note 15, at 416-17, 438-40, 457-58 (noting the controversy). *See also*, Nathan F. Coco, Comment, *Has Legislative History Become History?: A Critical Examination of* Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 20 J. CORP. L. 555, 561 (1995) (discussing the Court's willingness to apply a "rigid textual approach" over an interpretation of legislative history and stare decisis).

[89] *See, e.g.*, Gustafson v. Alloyd Co., 513 U.S. 561, 575-76 (1995) (resorting to legislative history to analyze a statute).

[90] *See* Summers, *supra* note 15, at 434-41 (addressing the fact that "in recent years the Court has seldom allowed such evidence deriving merely from legislative history to override a credible ordinary meaning argument").

[91] 34 C.F.R. § 300.529(b)(2) (1999).

based on legislative history is nearly impossible.[92] Two of the most authoritative sources, the House and Senate Committee Reports,[93] offer no assistance. Without offering elaboration, the reports merely restate the requirements of section 1415(k)(9)(B).[94] Furthermore, the floor debates concerning the 1997 IDEA amendments contain only two references to the rule embodied in section 1415(k)(9)(B), neither of which mentioned FERPA.[95] Thus, the legislative history cannot be used to undermine the Department's regulation.

CONCLUSION

After considering the various rules of statutory construction and the policies and purposes underlying the IDEA and FERPA, this Article concludes that the Department of Education's regulation is clearly a permissible interpretation of section 1415(k)(9)(B). In fact, given the strength with which the various rules of statutory construction support the regulation in question, it is arguable that the Department's construction is the only permissible reading of section 1415(k)(9)(B). The subject regulation is valid law. Thus, schools must comply with FERPA when transmitting a special education student's records to law enforcement personnel.

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[92] *See, e.g.*, Board of Educ. v. Rowley, 458 U.S. 176, 204 n.26 (1982) (rejecting an argument that relied on legislative history, stating that the legislative history was "too thin a reed on which to base an interpretation" of the IDEA).

[93] Summers, *supra* note 15, at 424-25 (citing Thornburg v. Gingles, 478 U.S. 30, 43-44 (1986)).

[94] H.R. REP. No. 95, at 113 (1997), *reprinted in* 1997 U.S.C.C.A.N. 78, 111; S. REP. No. 17, at 33 (1997).

[95] *See* 143 CONG. REC. S4403 (daily ed. May 14, 1997); 143 CONG. REC. S4315 (daily ed. May 12, 1997).