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The Office of Information Practices (OIP) is authorized to issue decisions under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes (HRS) (the UIPA) pursuant to sections 92F-27.5 and 92F-42, HRS, and chapter 2-73, Hawaii Administrative Rules (HAR).

OPINION

Requester: Parent
Agency: Department of Education
Date: March 25, 2025
Subject: Record Requests Under the Individuals with Disabilities Education Act, and Title 8, Chapter 60, HAR, Provision of Free Appropriate Public Education for a Student with a Disability (U APPEAL 22-37)

REQUEST FOR OPINION

Requester[1] seeks a decision as to whether the State of Hawaii Department of Education (DOE) provided complete records as required by part III of the UIPA (Part III) in response to requests for Child's student records under the Individuals with Disabilities Education Act (IDEA), 34 CFR 300.613, and title 8, chapter 60, HAR (Chapter 60), relating to the provision of a free appropriate public education for a student with a disability.

Unless otherwise indicated, this decision is based solely upon the facts presented in an email from Requester to OIP dated May 24, 2022, with an attachment; an email from Requester to OIP dated June 6, 2022, with an attached

[1] Requester is the parent (Parent) of a child (Child), who is a DOE student receiving special education services outlined in an individualized educational plan (IEP). "Parent" at times herein may refer to both parents of Child. Throughout this opinion, Parent and Requester are used interchangeably.

email thread; an email from OIP to Requester dated June 6, 2022, with an attached email thread; an email from OIP to DOE dated June 7, 2022, with four attachments; an email from OIP to Requester dated June 7, 2022, with two attachments; an email from Requester to OIP dated June 23, 2022, with an attached email thread; two emails from Requester to OIP dated July 1, 2022, with attached email threads; an email from OIP to Requester dated July 1, 2022, with an attached email thread; an email from Requester to OIP dated July 14, 2022, with an attached email thread; an email from Requester to OIP dated July 19, 2022, with an attached email thread; an email from OIP to Requester dated July 19, 2022, with an attached email thread; an email from DOE to OIP dated July 20, 2022; an email from OIP to DOE dated July 20, 2022, with two attachments; an email from OIP to Requester dated July 20, 2022, with two attachments; an email from DOE to OIP dated July 26, 2022, with two attachments; a letter from DOE to OIP dated July 25, 2022; two emails from Requester to OIP dated August 3, 2022, one with an attachment and both with attached email threads; an email from OIP to Requester dated August 3, 2022, with an attachment and an attached email thread; an email from Requester to OIP dated September 1, 2022 with an attachment and an attached email thread; an email from OIP to Requester dated September 2, 2022, with an attached email thread; an email from Requester to OIP dated September 2, 2022, with an attached email thread; an email from Requester to OIP and DOE dated October 14, 2022; an email from DOE to OIP dated February 27, 2024, with an attachment; an email from OIP to Requester dated February 28, 2024, with an attachment; an email from Requester to OIP dated February 28, 2024, with an attached email thread; an email from OIP to DOE dated March 1, 2024, with an attached email thread; an email from OIP to DOE dated March 7, 2024, with an attachment; an email from OIP to Requester dated June 7, 2024, with an attachment; an email from Requester to OIP dated June 7, 2024, with an attachment and an attached email thread; an email from OIP to DOE dated June 14, 2024, with two attachments; an email from DOE to OIP dated June 14, 2024; an email from DOE to OIP dated August 2, 2024, with two attachments and an attached email thread; an email from DOE to OIP dated August 2, 2024 with a secured link to records; and four emails from DOE to OIP dated August 7, 2024, each with a secured link to records.

QUESTIONS PRESENTED

1. Whether it was reasonable for DOE to respond to Requester's record request for Child's records under the IDEA, 34 CFR 300.613, and its implementing administrative rules, Chapter 60, instead of under the UIPA.

2. Whether Parent can use the UIPA's enforcement mechanisms to appeal an alleged denial of a record request made under the IDEA, 34 CFR 300.613, and its implementing administrative rules, Chapter 60.

BRIEF ANSWERS

1. Yes. OIP finds that Requester requested access to Child's records not under the UIPA, but under a different applicable law, the IDEA, 34 CFR 300.613, and Chapter 60. OIP concludes that, although requesters are not required to cite to or reference the UIPA when making a record request thereunder, it was reasonable for DOE to respond under the IDEA's statutory and regulatory scheme, instead of the UIPA, because Requester's record requests clearly invoked the IDEA and Chapter 60, and did not reference, with sufficient clarity, any other basis for requesting records to give DOE fair notice that the requests were also a UIPA request. OIP further concludes that without fair notice of a recognizable UIPA request, DOE did not have a duty to respond under the UIPA's statutory scheme.

2. No. OIP concludes that the IDEA and UIPA are two separate and distinct statutory schemes for disclosure of records. The UIPA's statutory scheme, including its deadlines to respond, definitions, access provisions, and exceptions to disclosure, does not automatically apply to a request made under another statutory scheme, such as the IDEA. OIP further concludes that requesters cannot invoke the UIPA's enforcement mechanisms for requests made under the IDEA. Because the UIPA does not provide requesters a right to use the UIPA's enforcement process to pursue a denial of a request made under a different statutory scheme, OIP cannot determine whether DOE properly provided Requester with access to Child's educational records under the IDEA.

FACTS

As noted above, Requester is the Parent of Child, who is a DOE student receiving special education services outlined in an IEP. DOE schools adhere to the IDEA and Chapter 60, both relating to free appropriate public education (FAPE) for students with disabilities.[2] HAR § 8-60-1. The IDEA and its implementing regulations provide procedural safeguards, which include a parent's right to "inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part." 34 CFR § 300.613; accord HAR § 8-60-56 (providing parents of a student with a disability the right to inspect and review educational records). As discussed below, Parent cited to this access right when making her request for records.

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[2] Haw. State Dep't of Educ., Procedural Safeguards Notice for Parents and Students Under The Individuals With Disabilities Education Act and Hawaii Law and Regulations (May 2022) (Procedural Safeguards Notice), https://www.hawaiipublicschools.org/DOE%20Forms/Special%20Education/Procedural%20Safeguards/ProceduralSafeguards.pdf.

I. Record Requests Under the IDEA and Chapter 60

In an email dated March 1, 2022, Parent asked DOE for records (March 1 Request) as follows:

> Under the Procedural Safeguard Access Rights, 34 CFR 300.613, we are requesting access to the records for all of [Child's] . . . [f]eeding therapy sessions, for this current school year . . . [a]ll of these sessions have been virtual so we request access to that electronic record as there should be a history stored as part of her educational record.

(Emphasis added). Parent's March 1 Request thus explicitly requested access to Child's educational records under 34 Code of Federal Regulation (CFR) part 300, which are the IDEA's implementing federal regulations.[3]

On March 2, 2022, DOE provided Parent with responsive records. After reviewing the records, in emails to DOE dated March 8 and March 12, 2022, Parent claimed parts of responsive emails were deleted and reiterated that she requested access to the entire record, including all communications with Child's occupational therapist (OT) and the District office.

Parent emailed a request to access records dated March 15, 2022 (March 15 Request), to the OT, who provided therapy to DOE students, but does not appear to be a DOE employee, and copied DOE on that email. The March 15 Request stated,

> Under the Procedural Safeguard Access Rights, 34 CFR 300.613, we are requesting access to all of your *unedited* records for [Child's] Occupational Therapy Treatment. This includes all notes, all therapy sessions, all emails, all consultations with any and all DOE staff as well as any all others within or outside DOE with whom you have had consultations regarding our child. In addition, please include whatever recordings you have of her virtual sessions, and any stored electronic history record of her sessions as these are also part of her educational record.
>
> No doubt, the DOE may tell you not to communicate with us but as a health care provider, according to Federal law you are obligated to do so. Federal Rules Mandating Open Notes.

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[3] The procedural safeguard access right cited by Parent is also set forth in part B of the DOE's Procedural Safeguards Notice. Procedural Safeguards Notice, at 8.

> On April 5, 2021, federal rules implemented the bipartisan 21st Century Cures Act specifying that 8 types of clinical notes are among electronic information that must not be blocked and must be made available free of charge to patients without delay.

(Emphasis added).

The March 15 Request requested Child's OT records under IDEA regulations, 34 CFR 300.613, and other federal laws and regulations. In an email dated March 22, 2022, Parent resent the March 15 Request to only DOE and asked DOE to ensure that the requested records are provided to Parents.[4] On March 22, 2022, DOE provided Parent with some OT records and informed Parent that it was still waiting for records from other therapists.

On March 28, 2022, Parent emailed DOE asking when she should expect the rest of the records from other OTs, the District Educational Specialist (DES), and school principal (Principal). On March 29, 2022, Parent emailed DOE reiterating

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[4] The March 22 request also cited language, verbatim, from the U.S. Department of Education's webpage explaining parents' right under the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (FERPA), to request a correction of student records believed to "be inaccurate or misleading." U.S. Department of Education, Family Educational Rights and Privacy Act (FERPA), https://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html (last visited Oct. 4, 2024) [https://archive.is/https://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html]. After asserting the FERPA right to correct school records, Requester stated that DOE "must provide us with a full and complete accounting of any information" disseminated by a DOE staffer about Child's medical condition and any recordings of video conference meetings. Parent claimed in the March 22 request that a DOE staffer presented incorrect information about Child's condition and confidential medical information in violation of FERPA and "HIPPA." (Parent's reference to "HIPPA" likely meant the federal Health Insurance Portability and Accountability Act of 1996, Public Law 104-191 (HIPAA) and the rules promulgated under HIPAA, 45 C.F.R. Parts 160 and 164). Parent's request to appeal to OIP, dated May 24, 2022, did not seek review of her demand to correct educational records under FERPA (and did not mention HIPAA). Even if such a request was made, OIP lacks jurisdiction to review denials of requests to correct an educational record under FERPA or to review a denial of a request to correct a personal record under section 92F-24, HRS. HAR § 2-73-11 (authorizing OIP to review denials of access to government records and personal records under sections 92F-15.5 and 92F-27.5, HRS); see also HRS § 92F-25 (petitions to review a denial of a request to correct a factual error in personal record are made to the agency); HRS § 92F-27 (2012) (requesters may file a lawsuit challenging an agency's final determination to correct or amend a personal record); OIP Op. Ltr. 02-05 at 3-4 (opining that requesters should petition the agency to review a denial to correct a personal record).

that her March 15 Request "asked for any and all consultations with other staff so that would also include" the DES and Principal.

In an email to DOE dated April 19, 2022 (April 19 Request),[5] Parent followed up on her pending requests:

> We are wondering when we are going to be given the records requested. To reiterate, we requested the following:
>
> Webex recordings, emails, texts, all consultations by any and all DOE staff about our child- so that would also include [a]dministrative staff . . . [DES and Principal], etc. This includes Feeding, Speech, OT, BCBA, discussions about ESY, ESD, "Pre-game" meetings, etc. Any and all.
>
> Any information that . . . [a DOE staffer] has disseminated to individuals about . . . [Student's] medical condition. She presented an article for a meeting some time the last week in September and we have requested access to the article she presented and all commentary she provided in interpretation of our daughter's medical condition. In addition, any and all recorded video conferences must be provided to us for our review.
>
> (FYI . . . OT's withholding of this consultation records is also a violation of the Federal Rules Mandating Open Notes. We requested this from him on 3/15/22. It has been 5 weeks since our request, which is not consistent with the law, which sates [sic] that must not be blocked and must be made available free of charge to patients without delay.)

(Emphasis omitted). Parent's April 19 email further stated that "HAR Chapter 60" granted her access to Child's educational records. The April 19 email stated,

> As I am sure that you are aware, HAR Chapter 60 states, Procedures for granting access:
>
> - When an eligible student or parent requests to review educational records, the records are to be made available without unnecessary delay and at least within 30 working or school days or 45 calendar days of the request, whichever comes first.

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[5] The April 19 Request referred to the March 15 Request (an email to the OT) as having been sent March 14, but the sent date in the email shows as March 15, 2022.

- Notes: When a parent makes a request to inspect and review the student's records before any meeting regarding an IEP or before a hearing relating to the identification, evaluation, program or placement (including issues relating to discipline under Chapter 60), of the student, the principal or designee must make the records available in a timely manner prior to the meeting or hearing. When reviewing official school documents, a representative of the Department needs to be present to address any questions that may arise and to ensure the security of the documents.

II. Record Requests Appealed to OIP After IEP Meetings and Due Process Resolution Hearing

On or about May 6, 2022, Parent submitted a due process complaint[6] to DOE, on behalf of Child, alleging Child's DOE school had failed to comply with the IDEA and Chapter 60. Parent attended IEP meetings on March 3, 2022, May 5, 2022, and May 12, 2022, and a resolution meeting[7] on May 19, 2022, to address the allegations in their due process complaint.

After attempting to resolve their dispute with DOE through the process provided under the IDEA and Chapter 60, on May 24, 2022, Parent emailed OIP copies of the record requests described in section I and asked to appeal the requests to DOE as a denial of access to records under the UIPA. Specifically, based on her review of the emails provided, Parent asserted that DOE had:

> (1) Failed to provide records of "other individuals included on the emails [who] should have provided records but did not;"

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[6] "Due process complaint" is defined as "a request for an impartial hearing process to resolve an alleged violation relating to the identification, evaluation, or educational placement of a student with a disability or the provision of a FAPE to the student." HAR § 8-60-2.

[7] Chapter 60, HAR, defines "[r]esolution session" as

> a meeting convened within fifteen days of a parent filing a due process complaint in which the parent, a representative from the department and the relevant member(s) of the IEP team discuss the complaint and attempt to resolve the dispute that is the basis of the complaint prior to a due process hearing.

HAR § 8-60-2.

(2) Failed to provide complete records as "the records provided included deleted portions;" and
(3) "Neither answered our request, provided any records, or indicated to such record exists" for Principal, DES, CES and retired CAS.

Parent also complained of DOE actions that were apparently relevant to the access rights provided under federal law and Chapter 60, asserting that DOE:

(1) Had engaged in "a discussion/meeting about Student's private medical condition and associated disabilities, and none of that information was provided;" and
(2) "DOE's refusal to provide the requested records in a timely manner is also in violation of HAR Chapter 60" and as result "Parents were forced to attend two IEP meetings (5/5/22 and 5/12/22) and a Resolution Meeting (5/19/22) to address the Parent's Due Process request for Hearing, without being provided with the requested records to adequately prepare for the meetings."

On June 7, 2022, OIP issued a Notice of Appeal and provided DOE with Parent's issues on appeal. [8]

III. DOE Responded to Requests Under the IDEA, not the UIPA

In response to this appeal, DOE's letter dated July 25, 2022, explained that Parent's record requests and numerous communications with DOE cited to IDEA's implementing regulation, 34 CFR 300.613. It was DOE's "understanding that these requests were for student records pursuant to 34 CFR 300.613." Therefore, when responding to Parent's requests, DOE conducted every search for student's records with the IDEA in mind. DOE explained that it disclosed records responsive to the March 1 Request in full and without redactions, on March 4 and 22 and April 20,

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[8] OIP's administrative rules require that an "appeal based on the denial of records or information under chapter 92F" must "clearly identify or describe the records or information to which access has been denied and for which appellant is seeking review." HAR § 2-73-12(c). Parent submitted to OIP a "summary of the correspondence" between Parent and DOE which included a request dated April 15, 2022 (April 15 Request) for "everything connected" with Student's email address. However, Parent did not raise issues with the April 15 Request. Therefore, it will not be addressed in this appeal.

2022; and disclosed records responsive to the March 15 Request,[9] in full and without redactions, on April 19 and 26, 2022. With respect to the April 19 Request, DOE conducted a search for emails relating to Child; however, records not part of Child's student record were not disclosed. DOE also explained that once Parent filed a due process complaint on May 6, 2022, it "affected how the record search and disclosure was conducted" for the April 19 request; specifically, DOE's attorney searched for and disclosed records through the due process hearing process. Based on this understanding, DOE asserted that it complied with Parent's March 1, March 15, and April 19 Requests.

IV. Additional Record Requests After Appeal Opened

In response to DOE's answer to this appeal, Parent maintained that the responsive records were incomplete and asserted in an email to OIP dated September 1, 2022, that "DOE records are public records and . . . ANY and ALL documentation regarding our child should be produced upon request according to the Freedom of Information Act."[10] Subsequently, Parent copied OIP on a new request to DOE, dated October 14, 2022 (October 14 Request), for "any and all records pertaining to [Child], . . . dating back to March of 2022," including internal communication about Child between a list of DOE staff. The October 14 Request did not cite to the IDEA and asserted the records were "public records."

Upon learning that DOE had provided Parent with additional records after this appeal was opened, OIP asked Parent to identify the remaining issues in this appeal. On February 24, 2024, Parent asserted the following issues: (1) DOE over-redacted the additional records, (2) the records were incomplete, (3) DOE was nonresponsive to a request for disciplinary records (which was not provided to OIP as part of this appeal), (4) DOE failed to document its discussions prior to a meeting and presentation, and conversations with Child's new school regarding a school transfer, (5) DOE failed to support its decisions to discontinue feeding therapy with documentation, and (6) DOE produced the majority of the records after numerous IEP meetings took place and a settlement was reached for the due process hearing, in violation of Chapter 60.

DOE's response to Parent's revised issues, dated August 2, 2024, clarified that the additional records were provided to Parent in response to record requests

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[9] In some emails from OIP to DOE, the March 15 Request for OT records was misdated as the March 14, 2022, request. Thereafter, DOE referred to the March 15 Request as the March 14, 2022, request.

[10] The Freedom of Information Act, 5 U.S.C. § 552 (FOIA), is a federal law that governs access to federal agency records and is not applicable here.

received by DOE after this appeal opened. DOE indicated that it received the October 14 Request and another request dated October 24, 2022 (October 24 Request), for "any and all records pertaining to our daughter . . . dating back to January of 2020." Although Parent did not provide OIP with the October 24 Request, DOE acknowledged that these subsequent requests were made under the UIPA; therefore, DOE responded under the UIPA. DOE explained that Parent's subsequent UIPA requests were granted in part and denied in part; it disclosed responsive records to Parent in eleven increments[11] between December 2022 to September 2023, which DOE provided to OIP for *in camera* review.

In this appeal, Parent sought review of DOE's denial of access to records in response to the March 1, March 15, and April 19 Requests. This opinion will address those requests; it will not address DOE's response to new requests made after this appeal was opened, such as the October 14 and October 24 Requests, as they fall outside the scope of this appeal. See HAR § 2-73-12(c) (appeals must clearly identify or describe the records or information to which access has been denied and for which appellant is seeking review). OIP notes further that DOE was not asked to respond to those requests in the Notice of Appeal sent June 7, 2022, and DOE obviously had no opportunity to address requests that would not be made until October 2022 in DOE's response to this appeal submitted on July 25, 2022. Thus, notwithstanding OIP's efforts to informally resolve Parent's issues with the October 14 and October 24 Requests after Parent listed them as being among her remaining issues, OIP cannot make a determination herein on requests that were not raised in, and in fact were not even made until several months after, Parent's appeal to OIP.

DISCUSSION

Part II of the UIPA (Part II) governs the public's right to access "government records"[12] generally, whereas Part III governs an individual's right to access his or

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[11] DOE's Notice to Requester for the October 24 Request indicated that pursuant to chapter 2-71, HAR, the records would be made available in increments because the responsive records were voluminous and extenuating circumstances existed.

[12] "Government record" is defined as "information maintained by an agency in written, auditory, visual, electronic, or other physical form." HRS § 92F-3 (2012).

her own "personal record[s]."[13] Parts II and III require agencies to make government and personal records available for inspection and copying upon request, unless access is restricted or closed by law. HRS §§ 92F-11, -23 (2012 and Supp. 2024). This affirmative disclosure responsibility does not apply until a requester makes a "request." Id. In this appeal, DOE argued that it identified Parent's requests as IDEA requests, not UIPA requests, and followed the IDEA's requirements when responding to them. The issues for OIP to resolve are thus whether Parent's March 1, March 15, and April 19 Requests were reasonably recognizable as UIPA requests trigging the UIPA's statutory scheme and DOE's obligation to respond under the UIPA; and if not, whether Parent can enforce requests made under a different law, the IDEA, using the process provided by the UIPA.

I. Parent Did Not Make Recognizable UIPA Requests

A. Requests Need Not Cite to the UIPA

The types of records sought by Parent would generally be considered "personal records" under Part III of the UIPA as they are seeking records "about" and on behalf of their minor child. The UIPA requires agencies to provide individuals with access to their own personal records "within ten working days following the date of receipt of the request by the agency unless the personal record requested is exempted under section 92F-22[,]" HRS. HRS § 92F-23 (2012).

The UIPA does not require that a certain format be used to request personal records or specify the requirements of a request to access personal records under Part III. See generally HRS §§ 92F-3, -21, -22, -23, -27.5, -28 (2012) (setting out definitions and procedures and deadlines for processing personal record requests made under Part III); cf. HAR § 2-71-1 (establishing the scope of chapter 2-71, HAR, agency procedures and fees for processing government record requests made under Part II). As a general rule, the UIPA's "disclosure provisions should be liberally construed, its exceptions narrowly construed, and all doubts resolved in favor of disclosure." OIP Op. Ltr. No. 94-3 at 6. Thus, consistent with both the lack of a

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[13] "Personal record" is defined as

> any item, collection, or grouping of information about an individual that is maintained by an agency. It includes, but is not limited to, the individual's education, financial, medical, or employment history, or items that contain or make reference to the individual's name, identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.

HRS § 92F-3.

required format for requests and the general rule favoring disclosure over nondisclosure, neither OIP nor Hawaii's appellate courts have required record requesters under either Part II or Part III of the UIPA to cite to or reference the UIPA for a request to be considered valid.[14] A requester also cannot be required to provide a reason for a personal record request, but "need only furnish the agency with a reasonable description of the record, or records, the individual seeks." See, e.g., OIP Op. Ltr. No. 93-07 at 8 (finding a Part III requester did not need to show "a need for" his own medical record even if a prison policy required such a showing, and was not required to specify the specific personal record being sought, since a request for the requester's "entire medical file" was sufficient). OIP routinely advises personal record requesters to clearly describe the records sought, provide contact information so the agency can correspond with the requester, and verify that the requester is the same person (or is authorized to act on behalf of the person) that the requested records are about. A reasonable description of a record or records is one that enables an agency "employee familiar with the subject area to locate the records with a reasonable amount of effort." Id. (citing Marks v. Dep't of Justice, 578 F.2d 261, 263 (9th Cir. 1978); Brumley v. Dep't of Labor, 767 F.2d 444, 445 (8th Cir. 1985)).

This reasonableness standard is also reflected in OIP's administrative rules, chapter 2-71, HAR, setting forth the requirements of a formal[15] government record request (not a personal record request) as follows:

> (1) Information that would enable the agency to correspond with or contact the requester;
> (2) A reasonable description of the requested record to enable agency personnel to locate it with reasonable effort. The description should include, if known, the record name, subject matter, date, location, and any other additional information that reasonably describes the requested record;

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[14] A Part III record requester may be required to provide proof that they are who they purport to be, such as by showing an identification card.

[15] Government record requests can be either informal (such as an oral request) or formal (i.e., written and including required information). HAR §§ 2-71-11, -12. OIP recommends that individuals submit formal requests under the UIPA to avoid errors and confusion, because agencies have time limits to respond to formal requests, and because formal requests create a record if the requester pursues judicial remedies or an appeal to OIP. HRS § 92F-15; OIP Op. Ltr. 93-07 at 7 (recommending that UIPA request be in writing even though oral requests are acceptable). However, "agencies cannot require that record requests be in writing because the UIPA does not contain such a requirement." OIP Op. Ltr. No. 99-3 at 18.

(3) If applicable, a request for a waiver of fees for searching for, reviewing, or segregating the requested record, when the requester believes that a waiver would serve the public interest in accordance with section 2-71-32; provided that the request states the requester's identity and other facts that support the request for a waiver of fees; and
(4) A request to inspect or obtain a copy of the records described and, if applicable, the means by which the requester would like to receive the copy.

HAR § 2-71-12(b) (emphasis added). Section 2-71-12(b), HAR, requires that a government record request include a reasonable description of the requested record, but it does not require a requester to specifically cite or reference the UIPA. Although OIP's administrative rules apply to government record requests under Part II of the UIPA, and not personal record requests under Part III, the rules provide guidance for agencies when processing personal record requests in the absence of any statutory requirements and deadlines found under Part III.

OIP will also look for guidance in federal case law interpreting FOIA and the Privacy Act, 5 U.S.C. section 552a, when there is a similar counterpart provision in the UIPA. OIP Op. Ltr. No. 07-05. FOIA specifies two requirements for a request to access records: (1) it must "reasonably describe[]" the records sought; and (2) be "made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed." 5 U.S.C. § 552(a)(3)(A) (2018). In Newman v. Legal Services Corporation, 628 F. Supp. 535 (D.D.C. 1986), the court examined a FOIA request to a subcommittee of the House Judiciary Committee and held that under FOIA itself (as opposed to federal regulations thereunder) "a person need not title a request for government documents a 'FOIA request.'" Newman v. Legal Servs. Corp, 628 F. Supp at 543. In that case, the court examined FOIA, 5 U.S.C. section 552(a)(3)(A) itself, not federal regulations.

Unlike the UIPA, FOIA allows each federal agency to establish its own regulations governing how to submit a proper record request. 5 U.S.C. § 552(a)(3)(A). Some federal regulations require a record request to be labeled "FOIA Request" or "Privacy Act Request." E.g. 31 C.F.R. § 126(g)(1) (ii) (requiring a request to the United States Treasury Department, Internal Revenue Service, to "[s]tate that it is made pursuant to the Privacy Act or the regulations in this subpart, or have 'Privacy Act Request' written on both the request and on the envelope"); Burrus v. U.S. Dep't of Agric. USDA Forest Serv., 2022 U.S. Dist. LEXIS 163470 (E.D. Cal. Sept. 9, 2022) (finding that request was not properly made because plaintiff failed to follow agency regulation, 7 C.F.R. §§ 1.3(a)(4), requiring a requester to "place the phrase 'FOIA REQUEST' in capital letters on the front of their envelope, the cover sheet of their facsimile transmittal, or the subject line of their email."); Blackwell v. United States, EEOC, 1999 U.S. Dist. LEXIS 3708 at *2

(E.D.N.C. Feb. 12, 1999) (finding that a request was not properly made because plaintiff failed to follow agency regulations, 29 C.F.R. §§ 1610.5, 1610.7(c), requiring that a request be denominated explicitly as a request for information under FOIA and addressed to the regional attorney under 29 C.F.R. § 1610.4(c)). In contrast, the UIPA *and* its administrative rules set no requirement for requesters to cite to the UIPA when making a personal or government record request thereunder. HAR § 2-71-12(b) (requirements of a formal government record request). Thus, FOIA case law interpreting federal regulations that require specific labeling of FOIA or Privacy Act requests is inapposite to the UIPA.

The Washington Court of Appeals has addressed whether a requester is required to reference the State of Washington's Public Records Act (PRA), chapter 42.56, Revised Code of Washington (RCW). Wood v. Lowe, 102 Wn. App. 872, 10 P.3d 494 (2000) (holding the plaintiff's records request was ambiguous and could have been construed as a personnel file request, not a public record request). The PRA requires requesters to ask for "identifiable" public records but does not set out a required "official" format for a record request.[16] In Wood, the plaintiff asserted that the prosecutor's office, her soon-to-be former employer, failed to respond to her public record request within five business days as required by the Public Disclosure Act (PDA), section 42.17, Washington Revised Code (WRC).[17] Wood, 102 Wn. App. at 876, 10 P.3d at 496. The trial court denied the plaintiff's request for attorney fees, costs, and sanctions against the prosecutor's office under the PDA because her record request was ambiguous as to whether it was a public disclosure request or a personnel file request. Id. The trial court reasoned that the request was ambiguous because it failed to make a specific reference to the PDA. Id. at 878, 10 P.3d at 497. The Wood court disagreed with the trial court's rationale and opined that requesters are not required to specifically cite the act. Id. In reasoning so, the Washington Court of Appeals was "[m]indful of the PRA's broad mandate favoring disclosure" and feared that "such a requirement may raise a hypertechnical barrier behind which agencies can justify denial of otherwise legitimate requests for public records." Wood opined that requesters must "state the request with sufficient clarity to give the agency fair notice that it had received a request for a public record," which gave rise to Washington's "fair notice" test as discussed in section I.B.

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[16] Section 42.56.080(2), RCW, provides, "Agencies shall honor requests received ... for identifiable public records unless exempted by provisions of this chapter. No official format is required for making a records request." RCW § 42.56.080(2).

[17] Wood is centered upon the Public Disclosure Act (PDA), section 42.17, WRC. After Wood was decided, the State of Washington legislature passed the Public Records Act in 2005, which recodified section 42.17, Revised Code of Washington under a new chapter, 42.56, RCW, and made technical changes to the existing public record law.

OIP concurs with the rationale in Wood, and finds that requiring a requester to cite to or reference the UIPA may create a hyper-technical barrier that would allow agencies to justify denial of an otherwise legitimate request for personal records.[18] Given the lack of an express requirement for requesters to cite to the UIPA, either in statute or in rule, and the UIPA's general rule of construction stating that disclosure provisions should be liberally construed in favor of public access, OIP concludes that requesters are not required to reference or cite to the UIPA in a record request.

The issue raised by DOE, though, is not so much whether Parent was specifically required to reference to the UIPA, but the fact that the requests consistently referenced a different law, and instead asked for access "under" 34 CFR 300.613, an IDEA regulation, and referenced a parent's right to inspect and review student records under Chapter 60.[19] Next, OIP will address how to distinguish UIPA requests from those arising from other legal authorities.

B. Parent's Requests Did Not Give DOE Fair Notice of a Recognizable UIPA Request

The IDEA and UIPA both provide Parent with the right to access Child's school records.[20] DOE adheres to the IDEA and Chapter 60, both of which provide parents with a right to "inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part." 34 CFR § 300.613; accord HAR § 8-60-56. DOE is also an "agency" under the UIPA and its records, including student records, are available for inspection and copying as government or personal records unless an exception or exemption to disclosure applies. HRS §§ 92F-11, -23 (2012 & Supp. 2024). Parent expressly asked to access

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[18] As noted previously, OIP and the courts have never required record requesters to specify that requests were made under the UIPA for those requests to be considered valid, so OIP's concurrence with the Woods rationale does not represent a departure from OIP's longstanding interpretation of what is required for a UIPA request. Nonetheless, this opinion is the first in which OIP has been squarely presented with the question of whether an agency reasonably believed a request not to have been made under the UIPA.

[19] Hawaii fully implemented the purposes, guarantees, and protections of the IDEA into Chapter 60. HAR §§ 8-60-1 to 8-60-84; see also HAR § 8-60-1(b) ("This chapter shall be construed as supplemental to, and in the context of, the Individuals with Disabilities Education Act . . . and other federal laws and regulations relating to the provision of a free appropriate public education to a student with a disability.").

[20] The IDEA is codified at 20 U.S.C. 1401 et seq., and IDEA regulations are promulgated in 34 CFR Part 300 (2006 Part B regulations) and 34 CFR Part 303 (Part C).

records about Child under "the Procedural Safeguard Access Rights, 34 CFR 300.613," and "HAR Chapter 60," without referencing the UIPA. OIP and Hawaii's state and federal appellate courts have not addressed how to distinguish UIPA requests from those arising under the IDEA or other laws, so this appeal is a case of first impression.

Washington courts apply a "fair notice" test to distinguish requests arising under the PRA from those made based on a different legal authority. O'Dea v. City of Tacoma, 19 Wn. App. 2d 67; 493 P.3d 1245 (2012) (O'Dea). Wood established that a "specific request for [public] records" occurs when "the person requesting documents from an agency state[s] the request with sufficient clarity to give the agency fair notice that it had received a request for a public record." Wood at 102 Wn. App. at 877-78 (emphasis added); Germeau v. Mason County, 166 Wn. App. 789, 804, 271 P.3d 932 (2012) (Germeau). "[N]o single, comprehensive definition of 'fair notice' exists in the context of a record request." Germeau, 166 Wn. App at 805, 271 P.3d at 941. Washington courts established "factors that comprise 'fair notice'" that fall under "two broad categories: (1) characteristics of the request itself, and (2) characteristics of the requested records." Id. O'Dea summarized the factors weighed in each category:

> The factors relating to the characteristics of the request are (1) its language, (2) its format, and (3) the recipient of the request.
>
> The factors relating to the characteristics of the records are "(1) whether the request was for specific records, as opposed to information about or contained in the records," "(2) whether the requested records were actual public records," and "(3) whether it was reasonable for the agency to believe that the requester was requesting the documents under an independent, non-PRA authority."

O'Dea, 19 Wn. App. 2d at 81, 493 P.3d at 1252 (quoting Germeau, 166 Wn. App at 807, 271 P.3d at 941) (formatting altered).

Although Washington courts weigh all the factors above, if a request reasonably appears to be made under an authority other than the PRA, this factor can be dispositive. See Germeau at 166 Wn. App at 805, 271 P.3d at 94 (finding the plaintiff's request appeared to request documents under a collective bargaining agreement, not the PDA, despite most factors weighing in favor of fair notice).

OIP finds Washington's fair notice analysis persuasive, and an appropriate tool to analyze an agency's contention that it reasonably did not believe that it had received a UIPA request. OIP will therefore apply the fair notice analysis to this

appeal, in which DOE asserts it reasonably believed Parent's requests were made under the IDEA and not the UIPA.

a. Characteristic of the Requests

The language of the request weighs in favor of DOE's contention that it reasonably understood Parent's requests were made under the IDEA, not under the UIPA. As discussed in section I.A., record requesters are not required to cite or reference the UIPA; however, in this appeal, OIP finds that Parent's record requests expressly stated that access was sought "[u]nder the Procedural Safeguard Access Rights, 34 CFR 300.613," the IDEA's implementing federal regulations. The March 1 and 15 Requests also explained that the records were stored as part of Child's "educational records," which is a term of art[21] used and defined in the IDEA. 34 CFR § 300.611(b); 20 U.S.C. § 1232g(a)(4); 34 CFR § 99.3. Requesters are not required to use terms of art in their record requests, but when a requester chooses to do so, it is not unreasonable for an agency to apply the legal definitions of those terms of art when access is also sought under that same law.

In the April 19 Request, Parent explained her right to access the requested records under "HAR Chapter 60, [] Procedures for granting access," Hawaii's administrative rules supplementing the IDEA. Having reviewed DOE's Guidelines for Chapter 60 (Guidelines), OIP finds that the April 19 Request appears to have copied and pasted almost verbatim language from the Guidelines related to a parent's right to access educational records under section 8-60-56, HAR.[22] OIP further finds that the language of the March 1, March 15, and April 19 Requests clearly sought access to records under the IDEA and Chapter 60, and did not give DOE fair notice that access was also sought under the UIPA.

DOE argued that not only did the requests cite to the IDEA, but also Parent's numerous other communications with DOE, during the time the requests were made, cited to the IDEA. Based on its review of numerous email communications between Parent and DOE, OIP finds that Parent's email to DOE dated February 14, 2022, alleged IEP violations; Parent's email to DOE dated March 8, 2022, alleged IDEA violations; and Parent submitted a due process complaint to DOE on May 6, 2022, which is "a request for an impartial hearing process to resolve an alleged

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[21] A "term of art" is a word or phrase with "a specific, precise meaning in a given specialty, apart from its general meaning in ordinary context." Term of Art, Black's Law Dictionary (11th ed. 2019).

[22] Hawaii State Department of Education, Hawaii Administrative Rules, Chapter 60, Guidelines, at 76, https://www.hawaiipublicschools.org/DOE%20Forms/Special%20Education/Ch60Guidelines.pdf.

violation relating to the identification, evaluation, or educational placement of a student with a disability or the provision of a FAPE to the student." HAR § 8-60-2.

OIP further notes that Parent alleged in the request for an appeal that DOE's untimely response violated "HAR Chapter 60" and as a result "Parent's [sic] were forced to attend two IEP meetings (5/5/22 and 5/12/22) and a Resolution Meeting (5/19/22) to address the Parent's Due Process request for Hearing, without being provided with the requested records to adequately prepare for the meetings." In the request to OIP, Parent again copied and pasted verbatim language from the Guidelines related to a parent's right to access educational records under section 8-60-56, HAR. Under the UIPA, agencies generally must respond either with a notice or responsive records within ten business days of receiving a request for government records or personal records regardless of when an IEP or resolution meeting is scheduled. HAR § 2-71-13; HRS § 92F-23. On the other hand, the IDEA requires school districts to allow parents to inspect their child's records either within 45 days of the request, or before the next IEP meeting, due process hearing, or resolution session. 34 CFR § 300.613(a). When a parent believes a DOE school violated an IDEA procedural safeguard, the IDEA and Chapter 60 provide specific options to resolve disputes between a parent and school such as mediation, filing a complaint, or requesting an impartial due process hearing.[23] HAR §§ 8-60-54, -60, -61, -62. OIP does not administer the IDEA or have the authority to determine whether a DOE school violated the IDEA. HRS §§ 92-1.5; 92F-42 (2012 & Supp. 2024) (setting forth OIP's powers and duties).

The format and recipient of the requests, which are the second and third factors, do not weigh either for or against DOE's contention that it did not understand the requests to have been made under the UIPA. In this appeal, all requests were written in the text of emails to various DOE school staff. Email is an acceptable means to transmit a UIPA request to a government agency, but it is obviously also a format that can be and is used to communicate many other types of questions or requests. The requests did not involve any obvious indicators that they were intended as UIPA requests, such as the use of OIP's model Request to Access a Government Record form, nor were the requests directed to DOE's designated UIPA coordinator. While the UIPA does not require that requesters use the model request form or that they be sent to an agency's designated UIPA coordinator, doing so in a case such as this where the requests appeared to be made under a different law could have signaled that Parent perhaps did intend to make a UIPA request

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[23] The DOE Complaints Management Program, Monitoring and Compliance Branch, resolves complaints when a parent believes a DOE school is withholding information that it is entitled to under the IDEA. State Dep't of Educ., Special Education Impartial Due Process Hearing Cover Letter, https://www.hawaiipublicschools.org/DOE%20Forms/Special%20Education/RequestImpartialDueProcessHearing-CoverLetter.pdf.

instead of an IDEA request. As it is, though, the format and recipient of the requests did not provide any reason for DOE to think that the requests were actually intended to be made under the UIPA rather than the IDEA as the language of the requests indicated.[24]

b. Characteristics of the Records

The first factor related to the characteristics of the requested records is "whether the request was for specific records, as opposed to information about or contained in the records." This factor should not be construed to foreclose a requester from requesting a compilation or summary of records from information that is "readily retrievable by the agency in the form in which it is requested;" the UIPA specifically encompasses such requests. HRS § 92F-11(c) (2012). Rather, this factor distinguishes a UIPA request (which could still require the agency to spend a small amount of time compiling or summarizing information that is "readily retrievable") from a request that would require the agency to spend significant time pulling relevant information from its existing records to create a new compilation or summary of exactly the information a requester is seeking, thus effectively doing the requester's research for him or her, rather than providing the requester with the existing records so the requester can sort through them to find and analyze the information of interest to the requester.

Similarly, factor two asks whether the requested records were actual government records or personal records as defined in section 92F-3, HRS. Requesters are not required to describe the specific record being sought, and for a personal record requester, a request for one's entire file is sufficient. E.g., OIP Op. Ltr. 93-07. Personal record requesters "need only furnish the agency with a reasonable description of the record, or records, the individual seeks." OIP Op. Ltr. 93-07 at 8. A request is reasonable if it enables an agency "employee familiar with the subject area to locate the records with a reasonable amount of effort." Id. (citing Marks v. Dep't of Justice, 578 F.2d 261, 263 (9th Cir. 1978); Brumley v. Dep't of Labor, 767 F.2d 444, 445 (8th Cir. 1985)). A UIPA request must ultimately seek access to records that already exist, though; the UIPA does not apply to requests for an agency to respond to questions or to explain its actions. See OIP Op. Ltr. 97-8 (finding that the UIPA does not apply to oral conversations unless there is a physical record of them); State of Haw. Org. of Police Officers v. Soc'y of Prof'l Journalists-Univ., 83 Hawaii 378, 401, 927 P.2d 386, 393 (1996) (SHOPO) (opining that the UIPA does not obligate agencies "to maintain records]" but instead requires agencies to provide access to records "actually maintained"); HRS § 92F-3 (defining "personal record" as "any item, collection, or grouping of information about an

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[24] Although use of OIP's model Request to Access a Government Records form does put an agency on notice that it received a UIPA request, requesters are not required to use OIP's forms.

individual that is maintained by an agency.") In some cases, there may be existing records that provide such answers or explanations, but the UIPA does not require an agency to create a new record that answers questions or provides a requested explanation.

For the purpose of the UIPA, it will typically make sense to consider factors one and two together, as they both focus on whether a request seeks existing government or personal records, or whether it instead calls for an agency to create new records to answer a requester's questions or provide a precise statistic or explanation that the agency does not already maintain. Here, OIP finds that the March 1 and March 15 Requests reasonably described the records being sought such as "all of [Child's] . . . [f]eeding therapy sessions, for this current school year" and all "*unedited* records for [Child's] Occupational Therapy Treatment." The April 19 Request asked for records,[25] not a summary of information or answers or explanations. The April 19 Request also sought records of oral discussions or commentary that might or might not have been recorded in a tangible form: Parent asked for "all consultations by any and all DOE staff" and "all commentary . . . [by DOE staff] provided [at a past meeting] in interpretation of our daughter's medical condition," and argued on appeal that DOE failed to document its conversations, discussions, meetings, and presentations, and support of its decisions with documentation. For the purpose of factors one and two, even if DOE did not have recordings of the requested consultations or commentary a request for such recordings is still a request for actual records. To the extent that Parent is arguing that the UIPA required DOE to keep such recordings, though, Parent misunderstands the UIPA.

The UIPA does not apply to oral conversations unless they are memorialized in some physical form, e.g. reduced to writing or recorded. OIP Op. Ltr. No. 97-8 at 6. The information a requester seeks must be found in existing records because the UIPA does not compel an agency to create responsive records.[26] See OIP Op. Ltrs. Nos. F15-03 (finding that the UIPA did not require the university to provide requester with a certified copy of transcript because such a request requires the creation of new, original document and not simply a copy of an existing record); 97-8 (finding that the UIPA does not apply to oral conversations unless there is a physical record of them); SHOPO, 83 Hawaii 378, 401, 927 P.2d 386, 393 (1996) (opining that the UIPA does not obligate agencies "to maintain records" but instead requires agencies to provide access to records "actually maintained"); HRS § 92F-3

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[25] The records sought are "Webex recordings, emails, texts" and "recorded video conferences" about their child and "any information" disseminated about their child's medical condition, including an article.

[26] Other laws may require the creation or retention of government records, but the UIPA contains no such requirement. OIP Op. Ltr. No. 97-8 at 3.

(defining "personal record" as "any item, collection, or grouping of information about an individual that is maintained by an agency.") In contrast, unlike the UIPA, the IDEA includes in its right to review educational records the right to receive a response to "reasonable requests for explanations and interpretations of records" from a school district. 34 CFR § 300.613(b)(1). The UIPA does not have a similar counterpart.

OIP finds that overall, factors one and two related to the characteristics of the requested records do not sway the analysis in favor of or against DOE's assertion that it did not understand Parent's requests to be UIPA requests, because both the IDEA and UIPA generally provided Parent with a right to access records of the sort described in the requests at issue here.

The third factor relating to the characteristics of the record sought is whether it was reasonable for the agency to believe that Parent was requesting the documents under an independent, non-UIPA authority. This appeal does not involve a request erroneously citing to or referencing an inapplicable law (e.g., some requesters mistakenly cite to FOIA,[27] a federal law that applies to federal agencies, not state agencies, or to section 91-1, HRS, which some internet sources incorrectly state is Hawaii's open records law). Rather, Parent's requests at issue in this appeal consistently referenced only the IDEA, which as discussed on page 15 is a law to which DOE is subject and that gives Parent the right to access DOE's records about Child. HAR §§ 8-60-1, -56; 20 U.S.C. § 1415(b)(1); 34 C.F.R. §§ 300.501, 300.613; HRS § 92F-23. Therefore, OIP finds the third factor dispositive as it weighs heavily in favor of DOE's assertion that it did not understand Parent's requests to be made under the UIPA.

Based on the characteristics of the requests and the specifically identified records sought in the requests, OIP concludes that it was reasonable for DOE to believe that Parent's March 1, March 15, and April 19 Requests arose under different applicable laws, the IDEA and Chapter 60, and not under the UIPA. Even keeping the UIPA's spirit of openness in mind, Parent's March 1, March 15, and April 19 Requests did not state a UIPA request with sufficient clarity to put DOE on fair notice that Parent was requesting access to Child's records under the UIPA, and without fair notice that it had received a UIPA request, DOE did not have a duty to respond under the UIPA's statutory scheme.

II. The UIPA and IDEA Are Two Separate and Distinct Statutory Schemes Requiring Disclosure of Records

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[27] Based on the record, Requester argued in rebuttal to DOE's response to this appeal that they are entitled to the records under the "Freedom of Information Act" well after the March 1, March 15, and April 19 Requests were made.

As discussed in section I, DOE did not have fair notice that Parent had made a UIPA request, and thus had no obligation to respond to the March 1, March 15, and April 19 Requests under the UIPA. In response to this appeal, DOE explained that it had conducted its search for the requested records with the IDEA in mind and determined that some records were not part of Child's educational records. Parent then asserted that they are entitled to the records under the "Freedom of Information Act."

Section 92F-12(b)(2), HRS, requires an agency to disclose "[g]overnment records which, pursuant to federal law or a statute of this State, are expressly authorized to be disclosed to the person requesting access[.]" HRS § 92F-12(b)(2) (2012). This raises the remaining question of whether Parent can use the UIPA's enforcement mechanisms to appeal an alleged denial of an IDEA request on the basis that 92F-12(b)(2), HRS, also required disclosure of records to which IDEA expressly authorized access.

In Hawaii Police Department, County of Hawaii, v. The Honorable Peter K. Kubota, the Hawaii County Police Department (HPD) asserted the UIPA's frustration exception, section 92F-13(3), HRS, as one of its bases for objecting to a discovery subpoena, not a UIPA request, in a civil post-conviction proceeding. Haw. Police Dept., Cnty. of Haw., v. The Hon. Peter K. Kubota, 155 Hawaii 136, 557 P.3d 865 (2024) (Kubota). The Kubota court concluded that the "UIPA neither creates an evidentiary privilege nor applies to civil litigation." Id. at 153. Kubota cited to section 92F-3, HRS, exempting "nonadministrative functions of the courts of this State" from the UIPA, and concluded that the Hawaii Rules of Civil Procedure (HRCP) "control discovery of any matter, including government records[,]" in a civil lawsuit. Id. at 152. Kubota further opined that

> Exceptions to disclosure under the UIPA do not double as exceptions to discovery. This court has held that statutes and regulations governing public disclosure have no bearing on the scope of discovery in civil litigation. See Tighe, 55 Haw. at 424, 520 P.2d at 1348. Exceptions under one scheme do not simply port to the other. Id. at 34.

Id. at 152-53 (citing Tighe v. City & Cnty. of Honolulu, 55 Haw. 420, 422, 520 P.2d 1345, 1346 (1974) (discovery in civil proceedings cannot be limited by a charter provision that regulates public inspection and observations of books and records)).

In OIP Opinion Letter Number 95-16 (Opinion 95-16), the Department of Health (DOH) asked whether it should object to subpoenas requesting medical records under the UIPA's privacy exception, section 92F-13(1), HRS. OIP opined that the UIPA does not "afford a basis to object to the discovery of records sought pursuant to a clerk-issued subpoena, or under the rules of pretrial discovery." Id. at 2. OIP reasoned that "any person" may request to access government records under

the UIPA and "unlike pretrial discovery rules, a requesting party's need for the information, or its relevancy are wholly immaterial" under the UIPA. Id. at 14. OIP concluded "that the UIPA and the rules of pretrial discovery are two separate and distinct mechanisms for the discovery or disclosure of records." Id. at 1. OIP similarly noted in a later opinion that the "[d]iscovery of records in the course of litigation is a separate and distinct process from access to government records or personal records under the UIPA, and different standards apply." Op. Ltr. No. F20-04 at 7 n.4.

Here, too, the UIPA and IDEA have different access provisions and response timelines that serve different purposes. Compare HAR § 8-60-1 and 34 C.F.R. § 300.1 (purpose), with HRS § 92F-2 (purpose); compare HAR § 8-60-56 and 34 CFR § 300.613(b) (access provision), with HRS § 92F-23 (access to personal records). The distinct access provisions provided in the UIPA and IDEA overlap to some extent, but not entirely.[28] The IDEA and Chapter 60 ensure that students with a disability receive a FAPE and that parents of a student with a disability are "present at each IEP team meeting or are afforded the opportunity to participate." HAR §§ 8-60-1, -3, -46; 34 C.F.R. §§ 300.1, 300.101, 300.322. "Procedural safeguards are built into the IDEA to ensure that a child's education is fair and appropriate and the parents have an opportunity to participate in the IEP formulation process." L. J. v. Pittsburg Unified Sch. Dist., 850 F.3d 996, 1007 (9th Cir. 2017) (citing Doug C. v. Haw. Dep't of Educ., 720 F.3d 1038, 1043 (9th Cir. 2013)). On the other hand, the UIPA recognizes that "government agencies exist to aid the people in the formation and conduct of public policy" and "the only viable and reasonable method of protecting the public's interest" is to open government processes up to public scrutiny. HRS § 92F-2 (2012). The UIPA should be applied and construed to promote its underlying purposes, which are to:

(1) Promote the public interest in disclosure;
(2) Provide for accurate, relevant, timely, and complete government records;
(3) Enhance governmental accountability through a general policy of access to government records;
(4) Make government accountable to individuals in the collection, use, and dissemination of information relating to them; and

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[28] OIP notes that the facts presented in this appeal are distinguishable from OIP Opinion Letters 94-28, 95-03, and F23-03, wherein the agencies received a UIPA request and asserted that compliance with the UIPA was waived under section 92F-4, HRS, because compliance with the UIPA would jeopardize its federal funding under FERPA, which requires educational institutions to comply with provisions restricting disclosure of "educational records." In this appeal, DOE did not receive fair notice of a UIPA request in the first place because Parent's request sought access under the IDEA and its implementing rules and regulations, not the UIPA.

(5) Balance the individual privacy interest and the public access interest, allowing access unless it would constitute a clearly unwarranted invasion of personal privacy[.]

Id.

The IDEA and UIPA are two separate and distinct statutory schemes that set forth different disclosure deadlines. As previously explained, regardless of when an IEP or due process resolution hearing is scheduled, the UIPA provides access to a requester's own personal records within ten working days from the agency's receipt of the request *unless* one of the five exemptions to disclosure under section 92F-22, HRS, applies. HRS § 92F-23. By contrast, the IDEA provides parents a right to "inspect and review any education records relating to their children that are collected, maintained, or used by the agency" within 45 days of the request, or before the next IEP meeting, due process hearing, or resolution session. 34 CFR § 300.613(a). The deadlines to respond are completely different under the IDEA and UIPA.

The access provision and terms of art that steer an agency's search and disclosure of records are likewise separate and distinct under the IDEA and UIPA. Unlike the UIPA, the IDEA generally provides a right to *access* educational records, not a right to receive copies of records unless circumstances "effectively prevent the parent from exercising the right to inspect and review the records," in which case parents may obtain copies. 34 CFR § 300.613(b)(2). In contrast, the UIPA requires agencies to permit an individual to "review the record and have a copy made within ten working days." HRS § 92F-23 (emphasis added). As explained above, unlike the UIPA, the right to review educational records under the IDEA includes the right to receive a response to "reasonable requests for explanations and interpretations of records" from a school district. 34 CFR § 300.613(b)(1). The UIPA does not have a similar counterpart.

The IDEA grants access to "educational record(s)," whereas Part III of the UIPA grants access to "personal record(s)." The IDEA imports the definition of an "educational record" from FERPA, which defines educational records as "records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 34 CFR § 300.611(b); 20 U.S.C. 1232g(a)(4); 34 CFR § 99.3. The definition of educational records specifically

exempts six categories of records,[29] and there is a body of federal case law addressing when a record is part of a student's educational record, "directly relates" to the student, and is "maintained" by the school district.[30] In contrast, the UIPA does not recognize educational records as a category; instead, it recognizes "personal records" and "government records," as defined in section 92F-3, HRS (footnotes 12

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[29] The term "educational record" does not include:

(1) Records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record.

(2) Records of the law enforcement unit of an educational agency or institution, subject to the provisions of § 99.8.

(3) (i) Records relating to an individual who is employed by an educational agency or institution, that:

(A) Are made and maintained in the normal course of business;

(B) Relate exclusively to the individual in that individual's capacity as an employee; and

(C) Are not available for use for any other purpose.

(ii) Records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student are education records and not excepted under paragraph (b)(3)(i) of this definition.

(4) Records on a student who is 18 years of age or older, or is attending an institution of postsecondary education, that are:

(i) Made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity;

(ii) Made, maintained, or used only in connection with treatment of the student; and

(iii) Disclosed only to individuals providing the treatment. For the purpose of this definition, "treatment" does not include remedial educational activities or activities that are part of the program of instruction at the agency or institution; and

(5) Records created or received by an educational agency or institution after an individual is no longer a student in attendance and that are not directly related to the individual's attendance as a student.

(6) Grades on peer-graded papers before they are collected and recorded by a teacher.

34 CFR § 99.2

[30] E.g., Owasso Independent School Dist. No. I-011 v. Falvo, 534 U.S. 426, 433, 122 S.Ct. 934, 939 (2002) (opining that FERPA's use of the word "maintain" suggests that the record would "be kept in a filing cabinet in a records room at the school or on a permanent secure database. . . .").

and 13 of this opinion set forth those definitions), and further refined by Hawaii case law and OIP's own opinions. E.g., OIP Op. Ltr. No. 13-01; Painting Indus. of Hawaii Mkt. Recovery Fund v. Alm, 69 Haw. 449, 746 P.2d 79 (1987) (discussing the definition of a "personal record" under the statute preceding the UIPA). As explained above, records that are "educational records" for the purpose of IDEA can also be "personal records" for the purpose of the UIPA, but access to them can be withheld under the UIPA if one of the UIPA's exemptions to personal record disclosure applies. HRS § 92F-23. Educational records could similarly also be "government records" for the purpose of the UIPA, but access to them could then be withheld if one of the UIPA's separate and distinct exceptions to government record disclosure applies. HRS § 92F-13 (2012). At the same time, records that would not be available as "educational records" under the IDEA, perhaps because they fell within one of the six exclusions, could still be accessed as personal or government records under the UIPA and the fact that they were not available under the IDEA would not provide a basis to withhold access under the UIPA.

The IDEA and UIPA are thus two separate and distinct statutory schemes for disclosure of records. Applying the rationale in Kubota here, the elements of the UIPA's statutory scheme, including its deadlines to respond, definitions, access provision, and exceptions to disclosure, do not simply port to another statutory scheme, such as the IDEA. The disclosure provision in section 92F-12(b)(2), HRS, applies to record requests made under the UIPA; it recognizes that an agency cannot deny access to records under the UIPA if Parent already had a statutory right to them under the IDEA. As explained in section I, DOE did not have fair notice that Parent's requests were made under the UIPA and thus it did not violate the UIPA when it responded under the IDEA, not the UIPA. The enforcement mechanisms available for a request under the IDEA are provided in the IDEA. Parent cannot invoke the UIPA's enforcement mechanisms, which would have been available for a request made under the UIPA, for requests that were instead made under the IDEA. OIP notes Parent's argument that DOE's response did not follow the requirements of the IDEA. However, because the UIPA does not provide requesters a right to use the UIPA's enforcement process to pursue a denial of a request made under a different statutory scheme, OIP cannot determine whether DOE properly provided Parent with access to Child's educational records as required under the IDEA.[31]

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[31] As discussed on page 9, several months after Parent appealed DOE's denial of her March 1, March 15, and April 19 Requests to OIP, Parent made an additional record request or requests that did not reference the IDEA, which DOE understood as UIPA requests; however, those requests were not and are not part of this appeal. Given the elapsed time since Parent made those requests, OIP recommends that if Parent wants to pursue access under the UIPA (as opposed to the IDEA) Parent should resubmit those UIPA requests to DOE. If DOE denies access, Parent can then challenge the denial using the UIPA's enforcement mechanisms, which includes appealing a denial to OIP or the court.

RIGHT TO BRING SUIT

Requester is entitled to seek assistance directly from the courts. HRS §§ 92F-27(a), -42(1) (2012). An action against the agency denying access must be brought within two years of the denial of access (or where applicable, receipt of a final OIP ruling). HRS § 92F-27(f).

For any lawsuit for access filed under the UIPA, Requester must notify OIP in writing at the time the action is filed. HRS § 92F-15.3 (2012).

If the court finds that the agency knowingly or intentionally violated a provision under Part III, the personal records section of the UIPA, the agency will be liable for: (1) actual damages (but in no case less than $1,000); and (2) costs in bringing the action and reasonable attorney's fees. HRS § 92F-27(d). The court may also assess attorney's fees and costs against the agency when a requester substantially prevails, or it may assess fees and costs against Requester when it finds the charges brought against the agency were frivolous. HRS § 92F-27(e).

This opinion constitutes an appealable decision under section 92F-43, HRS. An agency may appeal an OIP decision by filing a complaint within thirty days of the date of an OIP decision in accordance with section 92F-43, HRS. The agency shall give notice of the complaint to OIP and the person who requested the decision. HRS § 92F-43(b) (2012). OIP and the person who requested the decision are not required to participate, but may intervene in the proceeding. Id. The court's review is limited to the record that was before OIP unless the court finds that extraordinary circumstances justify discovery and admission of additional evidence. HRS § 92F-43(c). The court shall uphold an OIP decision unless it concludes the decision was palpably erroneous. Id.

A party to this appeal may request reconsideration of this decision within ten business days in accordance with section 2-73-19, HAR. This rule does not allow for extensions of time to file a reconsideration with OIP.

This letter also serves as notice that OIP is not representing anyone in this appeal. OIP's role herein is as a neutral third party.

OFFICE OF INFORMATION PRACTICES

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APPROVED:

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