

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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UNITED STATES OF AMERICA,)
)
Petitioner,)
)
v.) Misc. No. 1:13-mc-00081 (ABJ) (AK)
) Assigned To: The Hon. Alan Kay
)
THE INSTITUTE FOR COLLEGE ACCESS & SUCCESS,)
)
Respondent.)
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**ANSWER TO PETITION FOR SUMMARY
ENFORCEMENT OF INSPECTOR GENERAL SUBPOENA**

Respondent The Institute for College Access & Success (“TICAS”), for its answer to the
Petition of the United States, alleges as follows:

Jurisdiction and Venue

1. Paragraph 1 contains only legal conclusions that require no answer.
2. Paragraph 2 contains only legal conclusions that require no answer.

Parties

3. TICAS admits the allegations of Paragraph 3.

4. TICAS admits the allegations of Paragraph 4.

Issuance of [sic] Service of Subpoena

5. TICAS admits that on or about June 28, 2012, it was served with a subpoena by the Office of Inspector General (“OIG”) of the United States Department of Education (“ED”). TICAS denies any remaining allegations of paragraph 5 that are not legal conclusions, which require no answer.

6. TICAS admits that it was served with a subpoena by ED OIG. TICAS was informed by ED OIG and believed that ED OIG was investigating whether ED Deputy Undersecretary Robert Shireman violated an ethics pledge signed when he joined ED. The Petition asserts for the first time that ED OIG is investigating whether Mr. Shireman violated Federal ethics laws. TICAS lacks information sufficient to form a belief as to the veracity of that allegation and, on that basis, denies it. Further, TICAS avers that ED OIG confirmed that TICAS is not the subject of the investigation. TICAS denies the remaining allegations of paragraph 6 other than the ones comprising legal conclusions, which require no answer.

7. TICAS admits that on or about June 28, 2012 it was served with a subpoena by ED OIG that stated a Date of Return of July 16, 2012.

8. TICAS admits the allegations of Paragraph 8. TICAS avers that it served written responses and objections to the subpoena by letter dated July 19, 2012.

9. TICAS admits that on August 8, 2012 it produced information responsive to one of three categories of documents requested in the subpoena. TICAS admits that in a letter dated July 19, 2012, and again in a further letter dated August 8, 2012, it objected to producing

documents responsive to the remaining two categories of documents requested in the subpoena on the grounds, *inter alia*, that the subpoena exceeded the scope of authority granted to ED OIG by the Inspector General Act of 1978, 5 U.S.C. App. 3; that it would impermissibly chill the First Amendment activities of TICAS and others; and that it was so overly broad that compliance with the subpoena would be unduly burdensome and disruptive to TICAS' work. TICAS denies the remaining allegations of Paragraph 9.

10. TICAS admits that it objects to producing documents responsive to the remaining two categories of documents requested in the subpoena, for the reasons stated in its letters to ED OIG dated July 19, 2012 and August 8, 2012. TICAS denies the remaining allegations of Paragraph 10.

AFFIRMATIVE DEFENSES

To the extent (if any) affirmative defenses should be pled, TICAS alleges an affirmative defense, and here relies upon, on each and every ground for denying, limiting, modifying or conditioning enforcement of, quashing, or granting other relief with respect to the Petition and the Subpoena stated in its accompanying Memorandum of Points and Authorities.

RELIEF REQUESTED

WHEREFORE, TICAS respectfully requests that the Court:

1. Deny enforcement of the Subpoena; or alternatively limit and/or modify the Subpoena, and/or impose terms or conditions on the enforcement of the Subpoena to any extent that it may be enforced consistent with Respondent's rights and duties under federal and state law;
2. Award Respondent its costs of suit and, to the extent permitted by law, its attorneys' fees in responding to and opposing the Subpoena and the Petition; and
3. Grant such other or further relief as may be just and proper.

Dated: March 22, 2013

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By: /s/ Sharon D. Mayo
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Attorneys for Respondent
The Institute for College Access & Success

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of March 2013, a copy of the foregoing Notice of Appearance was filed and served by operation of the Court's Electronic Case Filing system.

/s/ Natalie L. Walker
Natalie L. Walker

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Attorneys for Respondent

**MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO PETITION FOR SUMMARY ENFORCEMENT
OF INSPECTOR GENERAL SUBPOENA**

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Institute for College Access & Success (“TICAS”) is a policy, research and advocacy organization that focuses on access to higher education. In its Petition for Summary Enforcement of Inspector General Subpoena (the “Petition”), the government seeks to enforce a subpoena *duces tecum* issued to TICAS by the Office of Inspector General of the U.S. Department of Education (“ED OIG”) that is unprecedented in its reach, and extraordinary in its chilling effect. The Petition should be summarily denied.

First, the Inspector General Act, the source of ED OIG’s subpoena power, limits the investigative power of Inspectors General to waste, fraud and abuse investigations in federal programs, agency operations and the expenditure of federal funds. The statutory language, legislative history, and case law interpreting the statute all make clear that ED OIG exceeded its authority when it issued the subpoena to TICAS – a nonprofit organization that is privately funded, receives no federal funds, participates in no federal programs, and has not entered into any contracts with the government.

Second, among other things, the ED OIG subpoena seeks all of TICAS’ documents over a two-year period relating to its research, policy and advocacy work to strengthen U.S. Department of Education (“Department”) rulemaking pertaining to federal student aid. The subpoena is drafted to include all of TICAS’ analyses, internal deliberations, drafts, communications, notes, data, shared ideas, grant reports and communications with the press – a significant portion of TICAS’ core work product for that time period. This would impact not only TICAS, but also the organizations and individuals who partner with TICAS in its efforts, the students and whistle blowers who entrust their stories and experiences to TICAS, the policy makers and their staff who rely on TICAS’ expertise, and TICAS’ sources of funding. Enforcement of the subpoena

would have a chilling effect on the First Amendment rights of TICAS and each of these constituencies to engage in free speech, associate with others, and petition the government.

Third, ED OIG has an alternative source for the information it seeks. According to ED OIG, it is investigating whether former Department Deputy Undersecretary Robert Shireman violated the ethics pledge he signed when taking that position. ED OIG acknowledges that TICAS is not the subject of its investigation, but has not explained why it did not seek documents directly from Mr. Shireman, and has not claimed that it cannot do so. Indeed, ED OIG represented to TICAS that it had scheduled an interview with Mr. Shireman. There simply is no need for ED OIG to reach beyond the limits of its authority and infringe on the First Amendment rights of third parties to conduct its investigation.

Fourth, searching for and producing documents responsive to the subpoena would place substantial burdens on TICAS – a small, nonprofit organization with limited resources – and unduly interfere with its operations. Indeed, in an effort to cooperate with ED OIG, TICAS produced a limited set of documents responsive to one of the three categories in the subpoena related to a public meeting – a costly and challenging effort that would be many magnitudes more difficult if the remaining portions of the subpoena were enforced.

This case is not about an Inspector General's legitimate effort to investigate fraud, waste or abuse in federal programs or the expenditure of federal dollars. Instead, it presents an effort to assert power well beyond any statutory or judicial authorization that will trample upon important rights guaranteed by the Constitution. Enforcement of ED OIG's subpoena to TICAS should be denied.

STATEMENT OF FACTS

TICAS and Its Work

TICAS is an independent, nonpartisan, nonprofit 501(c)3 organization founded in 2004 and based in Oakland, California. TICAS works to make higher education more available and affordable for people of all backgrounds, by conducting policy-relevant research, educating the public and decision-makers, identifying opportunities for improvement and advocating on behalf of students and their families. Through these efforts, TICAS aims to improve the processes and public policies that can pave the way to successful educational outcomes for students and for society. Declaration of Lauren Asher in Support of TICAS' Opposition to Petition for Summary Enforcement of Inspector General Subpoena ("Asher Decl.") ¶ 4.

TICAS is a widely known and highly respected source of expertise on financial aid issues and their significance for students and taxpayers. Some examples of TICAS' work include the website www.IBRinfo.org, which provides information to consumers about the Income-Based Repayment program ("IBR") established by the College Cost Reduction and Access Act of 2007. The IBR plan, modeled directly on TICAS' Plan for Fair Loan Payments, caps student loan payments at a reasonable percentage of income, making those payments manageable for borrowers who hit hard times. The site has drawn more than 100,000 subscribers and a million visitors, and provides critical information and updates on student loan issues. *Id.* ¶ 6.

Other examples of TICAS' work include its annual state-by-state analysis of student debt, which has become an important resource for the media, other researchers, policymakers and the public. This report is cited in hundreds of news stories every year. And TICAS' reports on students' lack of access to federal loans at many community colleges have had an impact. The issue brief *Denied: Community College Students Lack Access to Affordable Loans* was the

subject of more than 100 news articles, and after TICAS' second report, *Getting with the Program*, the North Carolina state legislature mandated that all community colleges in that state participate in the federal loan program. *Id.* ¶ 7. TICAS' interactive online research tool, www.College-InSight.org, was rated one of the 10 best college websites by *US News & World Report*, and combines data from multiple sources to make it easy for both consumers and experts to compare debt levels, completion rates and other key indicators of student success, affordability and diversity at individual colleges. *Id.* ¶ 8.

TICAS regularly engages with the press, work that is central to TICAS' effectiveness in educating the public, policymakers and key constituencies about important findings, issues and policy options. Reporters and editorial writers at both national and regional news outlets turn to TICAS daily for data, policy analysis, story ideas and referrals to other experts and resources, as well as for on-the-record interviews. Reporters count on TICAS for rigorous and independent analysis and deep expertise in student aid policy and processes, and know that TICAS can be trusted with their ideas, questions and information while they are researching and writing pieces for publication. *Id.* ¶ 9.

A critical part of TICAS' work is forming and participating in effective coalitions with dozens of other organizations working on behalf of students, consumers, veterans, civil rights, college access, colleges and universities, financial aid administrators, student loan providers, teachers, public interest lawyers and other relevant constituencies. Coming together around common goals helps raise awareness across different populations and ensure that diverse voices are heard in public debates. It also increases capacity in the field by allowing TICAS and other organizations with limited resources to tap each other's complementary strengths. *Id.* ¶ 10.

TICAS is funded through a combination of sources including foundations, public charities and individual donations. The Pew Charitable Trusts, the Ford Foundation and the Bill & Melinda Gates Foundation are among the prominent national foundations that have provided substantial support for TICAS' work. Significantly, TICAS *does not receive any funds directly or indirectly from the federal government or federal programs*, nor does it contract with the federal government. *Id.* ¶ 12.

Negotiated Rulemaking

As part of its work, TICAS actively participates in the Department's "negotiated rulemaking" process. As described more fully in the Asher Declaration, "negotiated rulemaking" is the process the Department is required to use to make the regulations (or "rules") to interpret, implement and enforce Title IV of the Higher Education Act of 1965, as amended. In that process, representatives of designated stakeholder groups (such as students, colleges, state agencies and attorneys general, lenders and accreditors), along with Department officials, meet several times and negotiate the regulatory language, which is then published in the Federal Register for public comment. *Id.* ¶¶ 13, 14. TICAS has not, to date, itself been a negotiator in any Department rulemaking process but has played an active role in at least four different negotiated rulemaking processes involving student loan issues. *Id.* ¶ 15.

Engagement in the regulatory process has been a core element of TICAS' work for many years. For example, in a rulemaking on student loans initiated by the Department in spring 2011, TICAS submitted extensive public comments and served as a technical advisor to the student, consumer and legal aid negotiators. *Id.* ¶ 16. The coalition that TICAS worked with included more than a dozen advocates for students, consumers, higher education, civil rights and college

access. Importantly, action alerts sent to the thousands of TICAS subscribers led to more than 2,500 public comments calling for specific improvements. *Id.*

“Incentive Compensation” and “Gainful Employment”

In 2009, TICAS was actively involved with negotiated rulemakings aimed at updating and strengthening regulations intended to prevent the exploitation of students and protect taxpayer investments in federal student aid. *Id.* ¶ 17. These rulemakings included (1) “incentive compensation,” which addressed regulatory loopholes in 20 U.S.C. § 1094(a)(20) that allowed schools to pay their employees and contractors based on the number of students they enroll, how much students borrow, or other practices clearly prohibited by law; and (2) “gainful employment,” a phrase used in 20 U.S.C. §§ 1001 in the determination of what career education programs may participate in federal student aid programs, but undefined in the regulations. *Id.* ¶¶ 18-19. While both apply to all types of colleges, they have particular relevance in the for-profit college sector, which has much higher average borrowing and loan default rates than other sectors, relies more heavily on federal student aid for revenue, and has been the subject of frequent reports of aggressive sales tactics and other questionable recruiting and financial aid practices at some schools. *Id.* ¶ 20.

During the rulemaking process on program integrity issues including “incentive compensation” and “gainful employment,” TICAS engaged with dozens of other nonprofit organizations with a stake in these issues to ensure that each had an opportunity to make its voice heard. *Id.* ¶ 21. For example, TICAS co-created an informational website, www.protectstudentsandtaxpayers.org, to make it easy for the public to learn about the issues and write and submit their own comments on the draft regulations, and it helped to organize the submission of coalition comments signed by more than 40 organizations that advocate for

students, consumers, civil rights and college access. *Id.* In addition, TICAS closely monitored all the negotiations and disseminated its findings and recommendations through detailed public comments, press releases and fact sheets. *Id.* ¶ 22.

Hundreds of news stories nationwide drew on information provided by TICAS and helped call attention to the need to better protect students and taxpayers from unscrupulous career education programs. TICAS' findings or spokespeople were widely cited. *Id.* ¶ 23. Those who opposed stronger oversight of taxpayer funding for career education programs actively lobbied for legislation that would block the Department from issuing any final rule on gainful employment, filed Freedom of Information Act requests to the Department, and filed lawsuits seeking to block the regulations. *Id.* ¶ 24.

The Subpoena

On or about June 28, 2012, the Department of Education Office of the Inspector General (“ED OIG”) served the subpoena *duces tecum* at issue in this proceeding (the “Subpoena”). Declaration of Sharon Mayo in Support of TICAS’ Opposition to Petition for Summary Enforcement of Inspector General Subpoena (“Mayo Decl.”) ¶ 2 and Ex. 1. The Subpoena to TICAS sought the following three categories of documents for the time period February 3, 2009 to February 11, 2011:

- (1) Any and all communications (including email), and documentation of correspondence, between TICAS and Robert Shireman, including but not limited to communications between Pauline Abernathy and Robert Shireman.
- (2) To the extent not included above, any and all documents concerning Robert Shireman and/or any U.S. Department of Education negotiated

rulemaking, including but not limited to documents related to “gainful employment” or “incentive compensation.”

(3) Any and all communications (including emails) and documents related to the student loan repayment meeting/conference hosted by TICAS and attended by Robert Shireman in April 2010.

Robert Shireman, referenced in the Subpoena, was the founder of TICAS and was its president from 2004 to April 19, 2009. After taking an unpaid leave beginning February 2009, Mr. Shireman left TICAS to become the Department’s Deputy Undersecretary. Asher Decl. ¶ 26.

Counsel for TICAS discussed the Subpoena with Special Agent Lisa Foster of ED OIG. Mayo Decl. ¶ 3. In a conversation on July 10, 2012, Ms. Foster explained that ED OIG was conducting an investigation into whether Mr. Shireman had violated the “ethics pledge” he had signed upon assuming the position of the Department’s Deputy Undersecretary. Ms. Foster confirmed that TICAS was not a subject of the investigation, and that ED OIG had already reviewed Mr. Shireman’s email communications to and from his Department email account. *Id.* ¶ 3.

Ms. Foster confirmed that ED OIG was seeking all email communications with Mr. Shireman or referring to Mr. Shireman, along with all drafts, working papers, correspondence and any other documents related to Mr. Shireman and/or negotiated rulemaking, incentive compensation and gainful employment, as well as documents relating to an April 29, 2010 public meeting hosted by TICAS, and attended by Mr. Shireman. *Id.* ¶ 4. Counsel for TICAS explained to Ms. Foster TICAS’ objections to the Subpoena, including that it was not authorized by the Inspector General Act since TICAS was not a Department program participant and did not

receive federal funds, and that it would have a chilling effect on TICAS' exercise of its First Amendment rights. *Id.* ¶ 5. Ms. Foster agreed to a short extension of time for TICAS to consider its response to the Subpoena, but requested that any documents be produced before an interview ED OIG said it had scheduled with Mr. Shireman in late July 2012. *Id.* ¶¶ 6-8.

On July 19, 2012, TICAS formally objected to the Subpoena on several grounds. *Id.* ¶¶ 9-11 and Ex 2. Counsel for TICAS then engaged in further discussions with Ms. Foster and Benjamin Shapiro, Assistant Counsel to the Inspector General, U.S. Dept. of Education regarding the authority for and scope of the Subpoena, and the chilling effect it would have on TICAS' First Amendment rights. *Id.* ¶¶ 12-18.

Nonetheless, in an attempt to cooperate with the Department's OIG investigation to the extent that it could consistent with the asserted objections, TICAS voluntarily agreed to produce certain documents responsive to the third category listed in the Subpoena. Specifically, TICAS agreed to produce – and, on August 8, 2012, produced – certain documents relating to the planning of the April 29, 2010 public meeting it hosted relating to relief for distressed student loan borrowers (referred to in the Subpoena as a “student loan repayment meeting/conference”). *Id.* ¶¶ 17, 19 and Ex. 3. That meeting was attended by several other experts in the field, including Mr. Shireman, who attended with the Department's express authorization. *Id.* ¶¶ 12, 17. TICAS agreed to produce this limited set of documents because the meeting met the criteria of a public meeting, and therefore there was less of a “chilling effect” on the First Amendment rights of TICAS and its fellow advocates. *Id.* ¶ 17.

After TICAS made its production, Ms. Foster asked via an August 20, 2012 email whether TICAS would be producing further documents. Then, two days later Ms. Foster threatened that if the remaining documents were not produced by close of business on August 31,

2012, ED OIG would proceed to enforce the Subpoena through the U.S. Attorney's Office. *Id.* ¶ 20. On August 28, 2012, during a telephone call requested by Mr. Shapiro of ED OIG, counsel for TICAS confirmed that TICAS had reached the limits of its voluntary cooperation with ED OIG's investigation, and reiterated that TICAS stood on the objections set forth in its letters dated July 19th and August 8th. *Id.* ¶ 22. At the end of the conversation, Mr. Shapiro stated that both Ms. Foster and the AUSA responsible for the matter, Darrell Valdez, would call counsel for TICAS the following week to discuss the Subpoena further. *Id.*

After the August 28th call, TICAS received no further contact from Ms. Foster, Mr. Shapiro or the U.S. Attorney's Office, until nearly six months later when, on February 5, 2013, the government filed the instant Petition for Summary Enforcement of the Subpoena. *Id.* ¶ 23.

ARGUMENT

I. ED OIG HAS EXCEEDED ITS SUBPOENA POWERS UNDER THE INSPECTOR GENERAL ACT BECAUSE TICAS DOES NOT PARTICIPATE IN FEDERAL PROGRAMS AND DOES NOT RECEIVE FEDERAL FUNDS

In connection with an investigation into whether former ED Deputy Undersecretary Robert Shireman violated his ethics pledge, ED OIG has stretched beyond the limits of its statutory authority to seek documents from a nonprofit, research, policy and advocacy organization that receives no federal funds and participates in no federal programs. The Inspector General Act of 1978 – the sole authority for an Inspector General's powers – does not confer jurisdiction for merely *any* type of investigation, or for investigations of merely *any* private entity for *any* reason. Broad as they are, an Inspector General's powers are “not unlimited.” S. Rep. No. 95-1071, 95th Cong., 2d Sess. 28 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2676, 2703. The Inspector General Act most directly confers jurisdiction for

investigations that fall within the “oversight” mission of Inspectors General, especially internal investigations of agencies’ administration of programs. An Inspector General’s jurisdiction over *the public*, however, is much narrower.

Outside the agency context, the Inspector General Act has been construed to authorize investigations of private entities that participate directly in federal programs or that receive federal funds. These investigations obviously fall within an Inspector General’s oversight role. However, TICAS is not a program participant or fund recipient – and therefore the subpoena issued to TICAS satisfies none of the requirements necessary for the Inspector General to exercise jurisdiction over private entities.

A. Jurisdiction under the Inspector General Act Is Limited to Internal Agency Investigations, Program Participants and Fund Participants

Unquestionably, Congress charged Inspectors General to detect and prevent inefficiency, waste and fraud in federal agencies and programs. *See* 5 U.S.C.A. App. 3, § 2(2) (purpose of offices of Inspector General). Broad as this purpose is, the statute was intended to limit an Inspector General’s powers to matters *within* a federal agency or in the administration of its programs and funds. *See Burlington Northern R.R. Co. v. Office of Inspector General*, 983 F.2d 631, 641 (5th Cir. 1993) (citing *United States v. Montgomery County Crisis Ctr.*, 676 F. Supp. 98, 99 (D. Md. 1987)). This is evident from the language of the statute, as well as from its legislative history.

All of the duties and responsibilities of Inspectors General enumerated in the statute relate expressly to agency operations and program functions. Inspectors General are made responsible for conducting audits and investigations relating to “programs and operations,” 5 U.S.C.A. App. 3, § 2(1), for reviewing existing and proposed legislation “relating to programs

and operations,” *id.* § 4(a)(2), and for recommending policies “for the purpose of promoting economy and efficiency in the administration of . . . its programs and operations,” *id.* § 4(a)(3). Likewise, the language found throughout the Inspector General Act concerning the detection and prevention of fraud and abuse also relates directly to the administration of agency programs and the recipients of program funds. *See, e.g.*, 5 U.S.C.A. App. 3, § 2.¹

The legislative history of the Inspector General Act demonstrates that Congress intended for Inspectors General to focus on internal agency administration of programs and funds. For example, the Senate committee explained that “[t]he Inspector and Auditor General’s focus is the way in which Federal *tax dollars are spent by the agency*, both in its internal operations and its federally-funded programs.” S. Rep. No. 95-1071, 95th Cong., 2d Sess. 27 (1978), 1978 U.S.C.C.A.N. at 2702 (emphasis added). This focus on agency programs and funding is likewise apparent in the legislative history concerning the subpoena power. The Senate committee explained, “[t]here are literally thousands of institutions in the country which are somehow involved *in the receipt of funds from Federal programs*. Without the power necessary to conduct a comprehensive audit of these entities, the [Inspector General] could have no serious impact on the way *federal funds* are expended.” *Id.* at 34, 1978 U.S.C.C.A.N. at 2709 (emphases added).²

¹ Beyond the powers conferred on all Inspectors General, the Inspector General Act authorizes certain Inspectors General to carry out specific investigative tasks. *See, e.g.*, 5 U.S.C.A. App. 3, §§ 8, 8A, 8B, 8C, 8D, 8E, 8F, 8G, 8H and 8I (additional provisions relating to Inspectors General for the Departments of Defense, Treasury, Homeland Security and Justice, the Agency for International Development, the Nuclear Regulatory Commission, the Federal Deposit Insurance Corporation and other agencies). However, none of these special provisions applies to ED OIG.

² The legislative history is replete with language demonstrating that an Inspector General’s jurisdiction is limited to agency programs and expenditures. Inspectors General were intended to provide a “single focal point in each major agency for the effort to deal with fraud, abuse and waste in Federal *expenditures and programs*.” S. Rep. No. 95-1071, 95th Cong., 2d Sess. 6 (1978), 1978 U.S.C.C.A.N. at 2681 (emphasis added). Inspectors General were envisioned as internal agency auditors charged with conducting programmatic audits of agency operations and programs. *Id.* at 10-12, 1978 U.S.C.C.A.N. at 2685-87. Through the Inspector General Act, Congress expressly intended to address “fraud, abuse and

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One of the co-sponsors of the Inspector General Act made this clear by explaining the Inspector General's intended role:

[T]he Offices of Inspector General would not be a new "layer of bureaucracy" to plague the public. They *would deal exclusively* with the internal operations of the departments and agencies. *Their public contact would only be for the beneficial and needed purpose of receiving complaints about problems with agency administration and in the investigation of fraud and abuse by those persons who are misusing or stealing taxpayer dollars.*

124 Cong. Rec. 10404, 10405 (1978) (statement of Rep. Levitas) (emphases added). As the co-sponsor of the Inspector General Act, Representative Levitas' remarks "are an authoritative guide to the statute's construction." *North Haven Board of Education v. Bell*, 456 U.S. 512, 526-27 (1982). *See Adair v. Rose Law Firm*, 867 F. Supp. 1111, 1116 (D.D.C. 1994) ("Representative Levitas's statement and the Senate Report demonstrate that Congress understood the Act to give the Inspectors General the authority to investigate recipients of federal funds, such as government contractors, who may have misused or stolen the funds through fraud, abuse or waste.").

Under the Inspector General Act, then, the Inspector General's statutory authority to investigate fraud and waste relates to fraud *within* an agency or involving vendors or other recipients of public funds. *See* 5 U.S.C.A. App. 3, §§ 2, 4; *see also United States v. Hunton & Williams*, 952 F. Supp. 843, 848-50 (D.D.C. 1997) (discussing the Inspector General Act and the extent of its authority). It follows that an Inspector General's investigative powers reach only agencies and private entities that receive, directly or indirectly, public funds. An Inspector

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waste *in the operations of Federal departments and agencies and in federally-funded programs.*" *Id.* at 4, 1978 U.S.C.C.A.N. at 2679 (emphases added).

General's "main function is to detect abuse within agencies themselves," and public contact is appropriate only in certain limited situations, including as part of an investigation into the misuse of federal funds. *See Inspector Gen. of United States Dep't of Agric. v. Glenn*, 122 F.3d 1007, 1011 (11th Cir. 1997) ("we conclude that the Inspector General's public contact in this case was appropriate because it occurred during the course of an investigation into alleged misuse of taxpayer dollars.").³

Otherwise, an Inspector General would have virtually unlimited authority to investigate *any* private entity, without regard to whether the entity participates in a program or receives any federal funds from an agency covered by the Inspector General Act. Contrary to the statute and to Congress's intent, that is precisely the kind of power ED OIG is seeking here.

B. Enforcement of an Inspector General Subpoena against a Private Entity That Receives No Federal Funds Would Be Unprecedented

The grant of investigative authority to Inspectors General has never been interpreted by the Courts to allow the issuance of a subpoena outside the context of an investigation of participants in agency programs or entities receiving federal funds, directly or indirectly, through an agency program or department. In its Petition, ED OIG does not cite any case in which a subpoena under the Inspector General Act has been enforced against a private entity that receives no federal funds and is not a participant in an agency program. *See United States v. Morton Salt Co.*, 338 U.S. 632, 635-36 (1950) (upholding authority of Federal Trade Commission to require salt producers to submit reports detailing their compliance with earlier Court of Appeals' decree enforcing Commission cease and desist order); *Equal Employment Opportunity Commission v.*

³ *See also Montgomery County Crisis Ctr.*, 676 F. Supp. at 99 (refusing to enforce subpoena to crisis center concerning telephone call in which allegedly classified information was revealed because "investigation" related to alleged security breach, not the expenditure of federal funds).

Technocrest Systems, Inc., 448 F.3d 1035, 1037 (8th Cir. 2006) (EEOC subpoena issued to investigate charges of racial discrimination brought by employees of target of investigation); *Winters Ranch Partnership v. Viadero*, 123 F.3d 327, 328-29 (5th Cir. 1997) (subpoena issued by Inspector General of the Department of Agriculture to investigate compliance with eligibility requirements for participants of wool and mohair price support programs); *Resolution Trust Corp. v. Grant Thornton*, 41 F.3d 1539, 1548 (D.C. Cir. 1994) (“[W]e hold that the FIRREA confers no power on the [Resolution Trust Corp.] to subpoena information for the purpose of ascertaining the cost-effectiveness of litigation after the agency files suit against the subpoena recipient.”); *Donovan v. Shaw*, 668 F.2d 985, 989-90 (8th Cir. 1982) (subpoena issued by Department of Labor under authority from Federal Trade Commission Act to investigate ERISA violations by pension fund); *Equal Employment Opportunity Commission v. Chrysler Corp.*, 567 F.2d 754 (8th Cir. 1977) (EEOC subpoena issued to investigate charge of racial discrimination brought by former employee of target of investigation). And, importantly, in each of these cases cited by ED OIG, the subpoena recipient was *itself* the target of the investigation; here, ED OIG confirmed that TICAS is *not* the subject of its investigation. Mayo Decl. ¶ 3; Declaration of Special Agent Lisa Foster. ¶¶ 3, 4.

Our review of the case law has found no case in which the grant of investigative authority to Inspectors General has been interpreted to allow the issuance of a subpoena to a third party that does not participate in a federal program or receive federal funds either directly or indirectly. Instead, the cases are legion in which courts have enforced subpoenas in fraud, abuse or waste investigations of participants in agency programs or those receiving federal funds, directly or indirectly, through an agency program or department. *See, e.g., Winters Ranch Partnership*, 123 F.3d at 328-29 (agency oversight investigation of participants in wool and mohair price support

program); *Glenn*, 122 F.3d at 1009 (investigation of alleged fraud by participants in a federal disaster program); *United States Dep't of Justice v. Federal Labor Relations Auth.*, 39 F.3d 361, 363 (D.C. Cir. 1994) (investigation of INS agent pursuant to specific statutory authority under 5 U.S.C. App. 3, § 8E(b)(3)); *United States v. Aero Mayflower Transit Co.*, 831 F.2d 1142, 1143 (D.C. Cir. 1987) (investigation into potential price fixing with respect to Defense Department moving and storage contracts); *United States v. Westinghouse Elec. Corp.*, 788 F.2d 164, 166 (3d Cir. 1986) (investigation into defense contractor); *Hunton & Williams*, 952 F. Supp. at 846-47 (investigation of law firm retained by Resolution Trust Corporation); *Adair*, 867 F. Supp. at 1117 (investigation of law firm retained by Resolution Trust Corporation); *United States v. Custodian of Records, Southwestern Fertility Ctr.*, 743 F. Supp. 783, 785 (W.D. Okla. 1990) (subpoena of a medical clinic in connection with a fraud investigation into expenditure of federal funds through the CHAMPUS program); *United States v. Blue Cross & Blue Shield of Mich.*, 726 F. Supp. 1523, 1524 (E.D. Mich. 1989) (investigation into loss of federal Medicare funds); *United States v. Medic House, Inc.*, 736 F. Supp. 1531, 1534 (W.D. Mo. 1989) (Medicare fraud investigation); *United States v. Stouder*, 724 F. Supp. 951, 951-52 (M.D. Ga. 1989) (investigation of a defense contractor).

ED OIG is fully familiar with the appropriate use of its subpoena power. In *United States v. Teeven*, 745 F. Supp. 220 (D. Del. 1990), ED OIG issued a subpoena to a for-profit educational institution in connection with a fraud investigation into the expenditure of federal funds through federal student financial aid programs. In enforcing the subpoena, the district court noted that ED OIG “has the duty and responsibility of uncovering fraud, waste and abuse in, and to ensure the integrity of, federal programs such as the Stafford and Pell programs.” 745 F. Supp. at 224. In contrast, the subpoena ED OIG seeks to enforce here is not directed to a

participant in a Department program or a recipient of Department funds, and is therefore beyond the limits of its authority under the Inspector General Act.

II. ENFORCEMENT OF THE SUBPOENA WOULD VIOLATE TICAS' FIRST AMENDMENT RIGHTS OF FREE SPEECH, ASSOCIATION AND PETITION TO THE GOVERNMENT

Even assuming the subpoena fell within the authority granted ED OIG by the Inspector General Act, ED OIG cannot meet the extraordinary standard for justifying a subpoena served on a non-party to an investigation that implicates core First Amendment rights.

A. Enforcement of the Subpoena Should Be Denied because the Chilling Effect on TICAS' First Amendment Rights Outweighs ED OIG's Need for the Requested Documents

The First Amendment protects “a right to associate for the purpose of engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion.” *Roberts v. Jaycees*, 468 U.S. 609, 618 (1984). In *NAACP v. Alabama*, the Supreme Court quashed subpoenas issued to the NAACP on First Amendment grounds, holding that the “abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action,” especially where such action “would have the practical effect of discouraging the exercise of constitutionally protected political rights.” 357 U.S. 449, 461 (1958). As the Ninth Circuit noted in 2010, there is a long-standing “First Amendment *privilege*” against discovery requests that implicate such constitutional rights. *Perry v. Schwarzenegger*, 591 F.3d 1147, 1160 (9th Cir. 2010), *cert. dismissed*, 130 S. Ct. 2431 (2010) (emphasis in original).⁴

⁴ With respect to the First Amendment privilege, only a few appellate and state high-court decisions have considered these issues in the decades since the Supreme Court’s decision in *NAACP v. Alabama*: in particular, the D.C. Circuit, Ninth Circuit and Tenth Circuit, as well as the State Supreme Courts of Washington and California. As the Ninth Circuit recently noted, “the paucity of appellate precedent is not

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To assess whether the First Amendment privilege bars a subpoena, the court must balance TICAS' First Amendment rights, informed by its status as a non-party, against ED OIG's need for the requested documents. *Perry*, 591 F.3d at 1152 (“Where, as here, discovery would have the practical effect of discouraging the exercise of First Amendment associational rights, the party seeking such discovery must demonstrate a need for the information sufficient to outweigh the impact on those rights.”); *Grandbouche v. Clancy*, 825 F.2d 1463, 1466 (10th Cir. 1987) (“[W]hen the subject of a discovery order claims a First Amendment privilege not to disclose certain information, the trial court must conduct a balancing test before ordering disclosure.”); *Black Panther Party v. Smith*, 661 F.2d 1243, 1266 (D.C. Cir. 1981) (applying a “balancing inquiry . . . to determine whether a claim of [First Amendment] privilege should be upheld,” in which the “First Amendment claim should be measured against the defendant’s need for the information sought”), *vacated as moot*, 458 U.S. 1118 (1982);⁵ *In re Heartland Institute*, 2011 WL 1839482 at *3 (N.D. Ill. May 13, 2011) (applying a “heightened scrutiny balancing test” to assess the applicability of the First Amendment privilege); *Snedigar v. Hodderson*, 114 Wash. 2d 153, 164 (1990) (holding that there is a “balancing test involved in assessing a discovery request for associational information”).

In a District Court for the District of Columbia case, the court applied this balancing test to quash a non-party subpoena on First Amendment grounds. In *Wyoming v. U.S. Dep’t of*

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surprising because discovery disputes are not generally appealable on an interlocutory basis and mandamus review is very limited.” *In re Anonymous Online Speaker*, 661 F.3d 1168, 1175 (9th Cir. 2011).

⁵ Despite being vacated as moot, *Black Panther Party* remains good law in the D.C. Circuit. See *Int’l Action Center v. U.S.*, 207 F.R.D. 1, 3 n.6 (D.D.C. 2002).

Agriculture, 208 F.R.D. 449 (D.D.C. 2002), the State of Wyoming had alleged that the United States violated federal law in the promulgation of certain forest regulations. Wyoming issued subpoenas to three advocacy organizations demanding copies of all documents exchanged between the organizations and defendant USDA, as well as other documents related to the organizations' advocacy and activities related to the USDA's forest management practices. *Id.* at 452. The court quashed the subpoena in its entirety, noting that the organizations' First Amendment interest in keeping information about their advocacy and efforts to petition government out of the hands of the State of Wyoming was more important than Wyoming's need for any such information, which was marginal to its claims in the underlying litigation.

Applying the balancing test of the First Amendment privilege to the facts of this dispute demonstrates that this Court should follow the example set by the court in the *Wyoming* case and deny the government's Petition to enforce the Subpoena.

B. TICAS' First Amendment Interests in a Denial of the Enforcement of the Subpoena Are Strong

TICAS' advocacy efforts to make higher education more available and affordable for people of all backgrounds – including its efforts in the areas of “gainful employment” and “incentive compensation” to support strong Department regulations to protect students and taxpayers – are quintessential First Amendment activities accorded the highest constitutional protection. *NAACP v. Alabama*, 357 U.S. at 461. Correspondence and documents concerning any Department negotiated rulemaking, as demanded by the second request in the subpoena, are precisely the kind of political activity that courts have insulated from disclosure under the First Amendment privilege. *See Britt v. Superior County of San Diego County*, 20 Cal. 3d 844, 852 (1978) (striking party discovery that would have forced plaintiffs to reveal “peaceful and lawful

associational activity” about groups that “have protested operations at the San Diego airport and have attempted through traditional political efforts to influence the future conduct of such operations”). The broad range of documents sought in the subpoena – including *every* document created, sent or received by TICAS concerning Robert Shireman *and/or any* Department negotiated rulemaking – would, as a practical matter, disclose TICAS’ activities and advocacy work regarding access to education to the scrutiny of the Department.⁶

The status of TICAS, its fellow advocates, and members of the media as non-parties to the underlying investigation accords additional weight to their First Amendment interests. “[I]t is clear that a party seeking disclosure must clear a higher hurdle where the [object of discovery] is a non-party.” *McVicker v. King*, 266 F.R.D. 92, 95 (W.D. Pa. 2010); *see also North Carolina Right to Life, Inc. v. Leake*, 231 F.R.D. 49, 51 (D.D.C. 2005) (holding that “non-party status is also relevant in considering the burden” on First Amendment rights posed by discovery requests); *Wyoming*, 208 F.R.D. at 452-53 (“Non-party status is one of the factors the court uses in weighing the burden of imposing discovery.”). Non-party disclosure where First Amendment interests are implicated “is only appropriate in the exceptional case.” *Doe v. 2TheMart.com*, 140 F. Supp. 2d 1088, 1095 (W.D. Wash. 2001). As the accompanying declaration of Lauren Asher, TICAS’ president, demonstrates, TICAS has a genuine and well-founded fear that compelled

⁶ And it is not clear that the disclosure would be limited just to ED OIG. Entities including for-profit colleges and their trade associations, political consultants and lobbyists that actively oppose stronger oversight of taxpayer funding for career education programs have filed multiple Freedom of Information Act requests to the Department, and filed lawsuits seeking to block the regulations. *See, e.g., Coalition for Educational Success v. Dept. of Education*, U.S. District Court for the District of Columbia Case No. 1:11-cv-00213-JDB; *Association of Private Colleges and Universities v. Duncan*, U.S. District Court for the District of Columbia Case No. 1:11-cv-01314-RC; *Citizens for Responsibility and Ethics in Washington v. U.S. Dept. of Education*, U.S. District Court for the District of Columbia Case No. 1:11-cv-00878-CKK. If the subpoena were enforced, there is a tangible risk that information on TICAS’ analyses, strategies, internal deliberations, sources and communications with coalition partners could fall into the hands of those holding opposing viewpoints from TICAS on these issues.

disclosure of these documents will chill their First Amendment rights. TICAS has provided testimony that it fears that disclosing its advocacy strategies would substantively harm its work (Asher Decl. ¶¶ 29-36); chill the participation of coalition members, allies and subscribers in their work (Asher Decl. ¶¶ 32-36); cause it to lose funders and subscribers (Asher Decl. ¶¶ 31-32, 34); discourage policy makers and their staff from contacting TICAS for expertise on policy issues (Asher Decl. ¶ 35); chill reporters' willingness to consult TICAS (Asher Decl. ¶ 36); chill members of the public's willingness to provide information that informs TICAS' work (Asher Decl. ¶ 34); and chill TICAS' willingness to petition the federal government for redress. (Asher Decl. ¶¶ 29-30).

TICAS' First Amendment concerns are heightened insofar as the documents sought by ED OIG were related to and used for advocacy aimed at Department rulemaking, and may be contrary to the Department's interests. "[P]rivacy is important where the government itself is being criticized, for in this circumstance it has a special incentive to suppress opposition." *Black Panther Party*, 661 F.2d at 1265. Moreover, not only TICAS' First Amendment rights are at stake. In seeking the communications and wide range of documents listed in the first two document requests, ED OIG's subpoena implicates the First Amendment rights of TICAS' coalition partners, allies, media contacts, funders and subscribers – hundreds if not thousands of individuals and entities with no connection to ED OIG's investigation. The First Amendment "extends not only to the organization itself, but also to its staff, members, contributors, and others who affiliate with it." *Wyoming*, 208 F.R.D. at 454 (quoting *Int'l Union v. Nat'l Right to Work Legal Defense & Ed. Found., Inc.*, 590 F.2d 1139, 1147 (D.C. Cir. 1978)). Indeed, to the extent that disclosing communications and documents pertaining to TICAS' supporters and subscribers is required, the Subpoena amounts to compelled disclosure of the organizations'

membership lists, a quintessential violation of the First Amendment condemned in *NAACP v. Alabama*.

The Declaration of Lauren Asher, TICAS' president, establishes TICAS' strong First Amendment interests in denying enforcement of the subpoena. "[T]he litigant seeking protection need not prove to a certainty that its First Amendment rights will be chilled by disclosure." *Black Panther Party*, 661 F.2d at 1267-68; *see also Snedigar v. Hodderson*, 114 Wash. 2d 153, 158 (1990) ("[T]he Court of Appeals was not correct when it required an initial showing of *actual* infringement on First Amendment rights. The party asserting the First Amendment associational privilege is only required to show *some probability* that the requested disclosure will harm its First Amendment rights.") (emphases in original). TICAS has shown much more than "some probability" that the Subpoena will chill its First Amendment rights.

III. ED OIG HAS AN ALTERNATIVE SOURCE FOR THE DOCUMENTS THAT IS WITHIN ITS SUBPOENA POWER AND WILL NOT INFRINGE ON THE FIRST AMENDMENT RIGHTS OF THIRD PARTIES

The subject of ED OIG's investigation is former Department Deputy Undersecretary Robert Shireman. ED OIG has already reviewed Mr. Shireman's emails sent to and from his Department email account. Mayo Decl. ¶ 3. To the extent ED OIG believes it has a need to see any emails or documents sent to or from Mr. Shireman's personal email account, ED OIG can request or subpoena those documents directly from Mr. Shireman. And ED OIG has also acknowledged that it can interview Mr. Shireman to ask him the questions necessary for its investigation. Mayo Decl. ¶ 6. ED OIG has made no showing that any of these alternatives is unavailable, and has offered no explanation for failing (or refusing) to pursue them.

IV. ED OIG HAS EXCEEDED ITS SUBPOENA POWERS BY IMPOSING BURDENS THAT UNDULY INTERFERE WITH TICAS' OPERATIONS

An administrative subpoena is unduly burdensome if “compliance threatens to unduly disrupt or seriously hinder normal operations of a business.” *Federal Trade Comm’n v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977) (en banc). The Subpoena appears to request all documents concerning any Department negotiated rulemaking during a two-year period in which TICAS spent a significant portion of its efforts on negotiated rulemaking. Compliance with ED OIG’s subpoena would require TICAS to attempt to retrieve and review many thousands of electronic and hard copy documents and emails to determine whether the material was responsive to the Subpoena. Asher Decl. ¶ 37.

The search will also be constrained by a number of technical challenges. TICAS underwent a comprehensive information technology upgrade in 2011, at which time it disposed of almost all computer hardware in use during the time frame covered by the Subpoena, including its server and all workstations assigned to staff. *Id.* ¶ 39. Also in connection with the 2011 upgrade, TICAS replaced almost all software in use during the Subpoena time frame, including its email platform. *Id.* Staff involved with the rulemaking have left the organization, and their electronic records are not archived in a consistent or easily searchable manner. *Id.* In addition, TICAS does not have an information technology staff or appropriate software to identify responsive electronic files; accordingly, it would have to retain an IT consultant experienced in specialized electronic searches, at significant expense to TICAS. *Id.* ¶ 40. Adding to the challenge is the fact that TICAS moved offices in 2010, at which time paper archives became dispersed and difficult to search. *Id.* ¶ 39.

TICAS' assertions regarding the burdens imposed by the Subpoena are not made in a vacuum, but rather are informed by experience. Producing the set of documents delivered to ED OIG on August 8, 2012 regarding the planning for the April 29, 2010 student loan debt relief public meeting – a very narrow and well-defined production – required approximately 35 hours of staff time, and the retention of an information technology consultant experienced in the deployment of specialized search technology, in addition to many hours of time from TICAS' counsel. *Id.* ¶ 40. Searching for documents responsive to the remaining portions of the Subpoena would be many magnitudes more time-consuming and expensive. *Id.* ¶ 40. Moreover, reviewing the documents would seriously disrupt TICAS' core operations for an extended period of time. TICAS has only 12 permanent employees, and the administrative burden of reviewing many thousands of documents would directly and substantially interfere with TICAS' important work. *Id.* ¶¶ 38-40.

CONCLUSION: ENFORCEMENT OF THE SUBPOENA SHOULD BE DENIED

The government's bare-bones and conclusory Petition – which does not even attach, much less address, TICAS' significant objections to ED OIG's Subpoena – does not provide any basis for the Court to enforce the Subpoena. As demonstrated above, ED OIG has overstepped its statutory authority, and in doing so will have a chilling effect on TICAS' ability to engage in important, constitutionally protected activities. For all of the reasons set forth above, the Court should deny the government's Petition, and refuse to enforce ED OIG's subpoena to TICAS.

Dated: March 22, 2013

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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

)	
UNITED STATES OF AMERICA,)	
)	
Petitioner,)	
)	Misc. No. 1:13-mc-00081 (ABJ) (AK)
v.)	Assigned To: The Hon. Alan Kay
)	
THE INSTITUTE FOR COLLEGE ACCESS & SUCCESS,)	
)	
Respondent.)	
)	

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**DECLARATION OF LAUREN ASHER IN SUPPORT OF
TICAS' OPPOSITION TO PETITION FOR SUMMARY ENFORCEMENT
OF INSPECTOR GENERAL SUBPOENA**

I, LAUREN ASHER, declare as follows:

1. Except where otherwise indicated, I have personal knowledge of the facts stated in this declaration, and as to any facts of which I lack personal knowledge I am informed and believe they are true. If called upon as a witness, I could and would testify to the facts stated herein.

My Background

2. I am the president of The Institute for College Access & Success (“TICAS”). I have held this position for four years. My responsibilities as president of TICAS include overseeing all aspects of its work, including programmatic, operational, fiscal, and corporate; serving as its senior spokesperson; leading its executive team; and serving as liaison to its Board of Directors.

3. Prior to becoming president of TICAS in 2009, I joined TICAS and co-founded its Project on Student Debt in 2005, first serving as associate director, then vice president, and then briefly as acting president. From 2002 to 2005, I led Asher Policy Consulting, where my clients included foundations and national, state, and local nonprofits working to improve the lives of children, youth and working families. I have also held senior positions at the Kaiser Family Foundation, the National Partnership for Women & Families and the U.S. Department of Labor. I hold a Masters in Public Administration from Harvard’s Kennedy School of Government and received my Bachelor of Arts from Brown University. A recipient of the National Association of Student Financial Aid Administrator’s Robert P. Huff Golden Quill Award, I am the author of reports such as *Going to the Source: A Practical Way to Simplify the FAFSA*, and co-author of TICAS’ latest white paper, *Aligning the Means and the Ends: How to Improve Federal Student Aid and Increase College Access and Success*. As a nationally

recognized expert on student loans and financial aid, I have testified before Congress and am frequently quoted in national and regional media stories concerning student debt, college affordability, financial aid policy, and college access and completion.

Overview of TICAS

4. Founded in 2004, The Institute for College Access & Success is an independent, nonpartisan, nonprofit 501(c)3 organization based in Oakland, California. TICAS works to make higher education more available and affordable for people of all backgrounds, especially those currently underrepresented among U.S. college students and graduates. TICAS' work focuses primarily on lowering financial obstacles to enrollment and completion, nationally and in California. TICAS conducts policy-relevant research, educates the public and decision-makers, identifies opportunities for improvement, and advocates on behalf of students and their families. By conducting and supporting nonpartisan research, analysis and advocacy, TICAS aims to improve the processes and public policies that can pave the way to successful educational outcomes for students and for society.

5. TICAS is a widely known and highly respected source of expertise on financial aid issues and their significance for students and taxpayers. TICAS' work has shaped public understanding and influenced policy and practice at the federal, state and college levels.

6. For example, the College Cost Reduction and Access Act of 2007 ("CCRAA") established the new Income-Based Repayment program ("IBR"), which is modeled directly on TICAS' Plan for Fair Loan Payments. By capping student loan payments at a reasonable percentage of income, IBR assures that repayment will be affordable for borrowers who hit hard times. TICAS created www.IBRinfo.org to tell consumers about IBR and Public Service Loan

Forgiveness, another program established by the CCRAA. The site has drawn more than 100,000 registered users and a million visitors, and provides critical information and updates.

7. Another example of TICAS' work is its annual state-by-state analysis of student debt, which has become an important source of information for the media, other researchers, policymakers and the public. This report is cited in hundreds of news stories every year, including more than 2,000 stories for the most recent one alone (*Student Debt and the Class of 2011*). TICAS reports on students' lack of access to federal loans at many community colleges have spurred constructive debate about schools' participation in the federal loan program. The issue brief *Denied: Community College Students Lack Access to Affordable Loans* was the subject of more than 100 news articles, and after our second report, *Getting with the Program*, the North Carolina state legislature mandated that all community colleges in that state participate in the federal loan program. TICAS' two most recent reports on community colleges and student loans, *Still Denied* and *Making Loans Work*, have led some California colleges to revisit common assumptions about the financial challenges their students face and to consider the benefits as well as costs of providing access to federal student loans.

8. TICAS' interactive online research tool, College-InSight.org, was rated one of the 10 best college websites by *US News & World Report*. It combines data from multiple sources to make it easy for both consumers and experts to compare debt levels, completion rates, and other key indicators of student success, affordability and diversity at individual colleges. The web site for TICAS' Project on Student Debt was also among *US News'* top 10.

9. Working with the press is central to our effectiveness in educating the public, policymakers, and key constituencies about important findings, issues, and policy options. Reporters and editorial writers at both national and regional news outlets turn to us daily for data,

policy analysis, story ideas, and referrals to other experts and resources, as well as for on-the-record interviews. In 2012 alone, TICAS findings and spokespeople were featured in more than 4,000 news stories and editorials nationwide – from *The New York Times* to the *Akron Beacon Journal* – and hundreds more reflected background information we provided. Reporters know they can count on us for rigorous and independent analysis and deep expertise in student aid policy and processes, and that we can be trusted with their ideas, questions, and information before their stories are ready for publication.

10. A critical part of TICAS' work is forming and participating in effective coalitions with dozens of other national and regional organizations working on behalf of students, consumers, veterans, civil rights, college access, colleges and universities, financial aid administrators, student loan providers, teachers, public interest lawyers and other relevant constituencies. Coming together around common goals helps raise awareness across different populations and ensure that diverse voices are heard in public debates. It also increases capacity in the field by allowing TICAS and other organizations with limited resources to tap each other's complementary strengths. For example, a group with particular expertise in tax policy can help us understand the potential impact of a new tax proposal on college affordability, while we can help them navigate the intricacies of federal student loan regulations. In other cases, one organization with deep expertise in an issue will draft a coalition letter that other organizations in agreement sign on to, thereby increasing the letter's influence. By building and maintaining TICAS' reputation as a knowledgeable, responsive and trusted coalition partner, we grow the range of organizations and populations that recognize and take steps that reflect their own stake in the issues we focus on.

11. Federal and state policymakers frequently contact TICAS for advice and expertise and to seek support for their proposals. TICAS' assistance on higher education policy has been recognized in multiple statements by Members of Congress. TICAS has provided invited testimony at three different U.S. Senate and House of Representative committee hearings and has provided invited testimony at least 10 times for the California state legislature.

12. TICAS receives the funding necessary to conduct its work from a combination of sources including foundations, public charities, and individual donations. The Pew Charitable Trusts, the Ford Foundation, and the Bill & Melinda Gates Foundation are among the prominent national foundations that have provided substantial support for our work. However, TICAS does not receive any funds directly or indirectly from the federal government or federal programs, nor does it contract with the federal government.

**Negotiated Rulemaking and Department of Education
Regulations on Incentive Compensation and Gainful Employment**

13. Regulations (or "rules") are how federal agencies interpret, implement and enforce federal laws. The U.S. Department of Education (the "Department") is required to use a process called "negotiated rulemaking," in which representatives of designated stakeholder groups, such as students, colleges, state higher education agencies and attorneys general, lenders, and accreditors, along with Department officials, meet several times and attempt to reach consensus on a set of issues. If they reach consensus, their agreed-upon regulatory language becomes the draft that the Department, after review by the Office of Management and Budget ("OMB"), issues for public comment before finalizing. If they do not reach consensus, the Department develops its own draft, submits it to the OMB and then publishes it in the Federal Register for public comment.

14. The public comment period is typically 60 days but can be as short as 30 days. Anyone can submit comments. The Department is required to review and respond to the public comments before it publishes its final rules. Negotiators are prohibited from publicly critiquing the resulting rules if they are based on consensus. In most cases, final rules must be published by November 1st to go into effect the following July 1st.

15. TICAS has not, to date, been a negotiator in any Department rulemaking process but has played an active role in at least four different negotiated rulemaking processes involving student loan issues. It has served as a technical advisor to student, consumer, and legal aid negotiators, attended the public meetings, provided extensive public comments, submitted testimony at public hearings, conducted detailed analyses of rulemaking proposals, developed its own recommendations for regulatory changes, encouraged others to provide public comments and endorsed candidates for negotiators.

16. Engagement in the regulatory process has been a core element of TICAS' work for many years, beginning with the development of an administrative petition requesting regulatory changes to make student loan payments more manageable. The petition was submitted to the Secretary of Education by TICAS along with student groups, student loan agencies, and several other organizations on May 4, 2006. Most recently, TICAS submitted extensive public comments and served as a technical advisor to the student, consumer, and legal aid negotiators in a rulemaking on student loans initiated by the Department in spring 2011. In addition to submitting detailed comments on the resulting draft rules, TICAS worked with a coalition of more than a dozen advocates for students, consumers, higher education, civil rights and college access to submit joint comments. Action alerts to TICAS subscribers led to more than 2,500 public comments calling for specific improvements. *The Chronicle of Higher*

Education credited the coalition's joint comments and the influx of comments from the public with prompting the Department to change the final disability discharge regulations. The Department's spokesperson said that the outcome was an "example of public comment working exactly as it should."

17. In 2009, the Obama Administration initiated a negotiated rulemaking process to update and strengthen regulations intended to prevent the exploitation of students and protect taxpayer investments in federal student aid. Based on input at public hearings around the nation, the Department identified 14 areas needing revision, including but not limited to rules regarding "incentive compensation," which apply to all colleges that receive Title IV funds, and "gainful employment," which apply to career education programs.

18. **Incentive Compensation:** To protect students from high-pressure and deceptive sales tactics, federal law has long banned all colleges that receive federal student aid from providing "any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid." 20 U.S.C. § 1094(a)(20). However, several regulatory loopholes adopted in 2002 allowed schools to pay their employees and contractors based on the number of students they enroll, how much students borrow, or other practices clearly prohibited by law. These loopholes led to high-pressure and deceptive sales tactics that can leave vulnerable consumers with staggering debt they cannot repay.

19. **Gainful Employment:** Under federal law, career education programs (including most programs at for-profit colleges and all less-than-two-year programs at nonprofit and public colleges) may not participate in federal student aid programs unless they "prepare students for gainful employment in a recognized occupation." 20 U.S.C. §§ 1001(b)(1), 1002(b)(1)(A)(i), (c)(1)(A). However, because regulations did not define gainful employment, the law was not

effectively enforced. Beginning in 2009, the Department started to consider a definition that would flag and limit funding for career education programs from which students routinely left with large debts they could not repay.

20. While these regulations apply to public, nonprofit and for-profit colleges, the stakes for students and taxpayers are highest in the for-profit sector. For-profit colleges enroll a disproportionate share of African-American and Hispanic and low-income students, absorb nearly a quarter of all federal Pell grant and student loan dollars, and have much higher student debt and loan default rates than other types of schools. Through our ongoing research on student debt and analyses of financial aid policy, TICAS was aware of the disturbingly high average borrowing levels and default rates in the for-profit school industry, its heavy reliance on federal student aid for revenue, and frequent reports of aggressive sales tactics and other questionable recruiting and financial aid practices at some schools.

TICAS' Advocacy Efforts on These Important Education Issues

21. As the negotiated rulemaking process on program integrity issues including “incentive compensation” and “gainful employment” proceeded, TICAS and other organizations concerned with improving college access and outcomes and protecting both students and taxpayers from waste, fraud and abuse came together to support strong and effective regulation in these areas. TICAS ultimately engaged with dozens of organizations with a stake in these issues – such as student, consumer, civil rights, and veterans groups – to ensure that those most in need of stronger standards and protection were aware of the rulemaking process and had an opportunity to make their voices heard. For example, TICAS and several other groups co-created an informational website, www.protectstudentsandtaxpayers.org, designed to inform the public, the media and stakeholders about the issues and to make it easy for the public to write

and submit their own comments on the regulation. Ultimately, more than 27,000 people submitted comments in support of a strong gainful employment regulation, including nearly 2,000 submitted through the coalition website. In addition, TICAS helped organize the submission of coalition comments signed by more than 40 organizations that advocate for students, consumers, civil rights and college access. TICAS and several student organizations together also submitted 20 pages of detailed comments on the proposed regulations expanding on points in the shorter coalition letter.

22. Consistent with its work on negotiated rulemakings both before and after the one on program integrity issues, TICAS closely monitored all the negotiations, analyzed proposals and their likely impact on students and taxpayers, and shared detailed analyses and research with other interested organizations. In addition, TICAS disseminated key findings and recommendations through public comments, press releases, and fact sheets.

23. Often drawing on information provided by TICAS, newspapers around the country ran editorials in favor of strengthening the gainful employment regulation, including *The New York Times*, *USA Today*, the *Los Angeles Times*, the *St. Petersburg (FL) Times*, and the *Newark Star Ledger*. Hundreds of news stories nationwide helped call attention to the need to better protect students and taxpayers from unscrupulous career education programs, either by documenting waste, fraud and abuse or by covering aspects of the regulatory debate. TICAS' findings or spokespeople were cited in more than 50 print and broadcast stories, and dozens more cited one or more of our coalition partners.

24. Other entities, including for-profit colleges and their trade associations, political consultants and lobbyists, actively opposed stronger oversight of taxpayer funding for career education programs and sought to weaken or block new regulations on incentive compensation

and gainful employment. For example, the industry and those funded by it ran paid print, radio and TV advertising campaigns against the regulations, hired high-priced lobbyists, launched organizations and web sites with the sole mission of blocking new regulations, dramatically increased their campaign contributions and lobbying, lobbied for legislation that would block the Department from issuing any final rule on gainful employment, filed multiple Freedom of Information Act requests to the Department, and filed lawsuits seeking to block the regulations.

ED OIG's Subpoena to TICAS

25. On or about June 28, 2012, ED OIG served the subpoena *duces tecum* at issue in this proceeding (the "Subpoena"). The Subpoena sought the following three categories of documents for the time period February 3, 2009 to February 11, 2011:

- (1) Any and all communications (including email), and documentation of correspondence, between TICAS and Robert Shireman, including but not limited to communications between Pauline Abernathy and Robert Shireman.
- (2) To the extent not included above, any and all documents concerning Robert Shireman and/or any U.S. Department of Education negotiated rulemaking, including but not limited to documents related to "gainful employment" or "incentive compensation."
- (3) Any and all communications (including emails) and documents related to the student loan repayment meeting/conference hosted by TICAS and attended by Robert Shireman in April 2010.

A copy of the Subpoena is attached to the accompanying Declaration of Sharon D. Mayo as Exhibit 1. I had already left town on vacation when the Subpoena was served, and did not return until July 6, 2012.

26. Robert Shireman, referenced in the Subpoena, was the founder of TICAS and served as its president from 2004 to April 19, 2009, but was on an unpaid leave of absence beginning February 3, 2009. Mr. Shireman left TICAS permanently to become the Department's Deputy Undersecretary.

27. As set forth more fully in the Mayo Declaration, TICAS objected to the Subpoena on several grounds, including that it exceeds the authority granted to ED OIG by the Inspector General Act; it infringes on the First Amendment rights of TICAS, its officers and employees, board members, and fellow advocates for improved public policies to make higher education more available and affordable; and that responding to the Subpoena would be unduly burdensome and disruptive to TICAS' work.

28. Nonetheless, in an attempt to cooperate with the Department's OIG investigation to the extent that it could consistent with the asserted objections, TICAS voluntarily agreed to produce certain documents responsive to the third category listed in the Subpoena. Specifically, TICAS agreed to produce – and, on August 8, 2012, produced – certain documents relating to the planning of the April 29, 2010 meeting it hosted relating to relief for distressed student loan borrowers (referred to in the Subpoena as a “student loan repayment meeting/conference”), because it was considered a public meeting. The meeting was attended by Mr. Shireman and several other experts in the field, and Mr. Shireman received prior authorization from the Department to attend because it met the criteria for a public meeting.

The Subpoena's Chilling Effect

29. Producing documents responsive to the first two categories in the Subpoena would have a chilling effect on TICAS' ability to engage in free speech, associate with others, and petition the government, in several respects.

30. Enforcement of the Subpoena would cause TICAS to hesitate to exercise its First Amendment rights for fear of having its documents reviewed by the government (and potentially further produced to the public at large or to those working against positions TICAS supports) thus revealing TICAS' strategies, analyses, internal deliberations and relationships with other organizations and individuals who share TICAS' interests in expanding educational opportunities and strengthening federal policies.

31. Enforcement of the Subpoena would jeopardize TICAS' funding and ability to operate by discouraging foundations and public charities from making grants or contributions to TICAS or contracting with it for services, for fear that their own internal documents, such as grant reports and evaluations and private communications with TICAS would become public.

32. Enforcement of the Subpoena would discourage others from partnering with TICAS, thus impairing TICAS' ability to pursue its work on multiple fronts, including but not limited to efforts to improve student aid regulations. Current and prospective partner organizations would question TICAS' ability to maintain the trust and confidentiality required for successful coalition work of any type. For instance, TICAS often partners with other organizations in its research work. Recent examples of such collaboration include developing a public opinion survey; designing and implementing a multi-year pilot on community college campuses to test new approaches to student aid disbursement and communication; and

identifying college officials to interview for a jointly published report on community college practices related to federal student loans.

33. Enforcement of the Subpoena would discourage TICAS and other coalition members from speaking freely about issues of importance to our society for fear that their advocacy may make them a target of a subpoena, thus stifling political discourse on those issues.

34. Enforcement of the Subpoena would discourage students, borrowers in repayment, whistle-blowers and others from trusting TICAS with their stories and experiences. Their personal and confidential information helps TICAS identify where changes in policy or practice are needed. For instance, more than 6,000 borrowers who subscribe to TICAS emails responded to one of our surveys with the expectation that their individual responses would be kept confidential. The trust they have in TICAS – for example, that we will not share their names or put the media in touch with them without their express consent – would be impossible to restore.

35. Enforcement of the Subpoena would also discourage policy makers and their staff from contacting TICAS for expertise on policy issues out of concern that their questions and proposals may be turned over to the government.

36. Enforcement of the Subpoena would have a chilling effect on members of the press and their willingness to contact TICAS, stifling public discourse on issues where TICAS has unique information or expertise and preventing TICAS from using this important channel of communication with the public and decision makers. Reporters and editors would lack confidence that their communications, deliberations and sources would not be compromised by having contact with TICAS.

The Subpoena Would Place Substantial Burdens on TICAS

37. If enforced, the breadth of the Subpoena would place substantial burdens on TICAS. Specifically, the Subpoena requests all documents concerning any Department-negotiated rulemaking for a two-year period. During that time period, TICAS spent a significant portion of its efforts on the negotiated rulemaking described above. I estimate that responding to the Subpoena would require the review of many thousands of electronic and hard copy documents.

38. TICAS is a small, nonprofit organization with 12 permanent employees and does not have the financial resources or information technology staff to undertake this review. TICAS' staff would need to review all of these documents, preventing TICAS from engaging in the core research, advocacy and public policy work that is its purpose.

39. Moreover, there are significant technical challenges to searching for and accessing these documents. In the second half of 2011, TICAS underwent a major information technology change, replacing almost all of its computer hardware, including its server and most computers, changing its server's operating system and email platform, and upgrading software on all workstations, including the email program. In addition, the computer network profiles, email accounts and paper files of staff who were involved in the negotiated rulemaking process, but who have since left the organization, have been disabled and/or were not archived in a consistent or easily searchable manner. In addition, TICAS moved its offices in March 2010, just over halfway through the time period covered by the Subpoena, at which time TICAS' paper archives were dispersed and stored in ways that were not well recorded. For all these reasons, TICAS' electronic and paper records are difficult to search.

40. From the experience of producing the documents relating solely to the public meeting on relief for distressed student loan borrowers hosted by TICAS in April of 2010, which were delivered to Special Agent Lisa Foster on August 8, 2012, we know that constructing searches for, locating, and retrieving documents responsive to the Subpoena would be extraordinarily labor intensive and costly. Our in-house search tools are inadequate for this purpose, so we had to hire an information technology consulting firm experienced with special search software. Producing a comprehensive set of documents required multiple, overlapping queries, with staff reviewing each set of returns along the way. The time required for this small-scale search was notably disruptive to work, and expensive. Accomplishing that narrowly defined search required approximately 35 hours of staff time, in addition to many hours of time from our attorney and our information technology consultant. Producing documents responsive to the remaining portions of the Subpoena would be many magnitudes more difficult, time consuming and costly, placing a substantial burden on the organization and redirecting limited resources away from pursuing our mission as a public charity.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, and that this Declaration was executed at San Francisco, California on March 21, 2013.



LAUREN ASHER

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,

Petitioner,

v.

THE INSTITUTE FOR COLLEGE ACCESS &
SUCCESS,

Respondent.

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) Misc. No. 1:13-mc-00081 (ABJ) (AK)
) Assigned To: The Hon. Alan Kay
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**DECLARATION OF SHARON D. MAYO IN SUPPORT OF
TICAS' OPPOSITION TO PETITION FOR SUMMARY ENFORCEMENT
OF INSPECTOR GENERAL SUBPOENA**

I, SHARON D. MAYO, declare as follows:

1. I am an attorney licensed to practice law in the State of California. I am a senior counsel in the firm of Arnold & Porter LLP, counsel for Respondent The Institute for College Access & Success (“TICAS”) in this matter. I have personal knowledge of the facts set forth in this declaration and, if called as a witness, could and would competently testify thereto. I submit this declaration in support of TICAS’ Opposition to Petition for Summary Enforcement of Inspector General Subpoena.

2. The United States Department of Education Office of Inspector General (“ED OIG”) served TICAS with a subpoena *duces tecum* on or about June 28, 2012 (the “Subpoena”). The Subpoena was addressed to Lauren Asher, the president of TICAS, and the return date was July 16, 2012. A true and correct copy of the Subpoena is attached hereto as Exhibit 1.

July 10, 2012 Discussions with ED OIG Regarding the Subpoena

3. Ms. Asher was out on vacation until July 6, 2012. After exchanging a number of voicemail messages, I was finally able to reach Special Agent Lisa Foster of ED OIG on July 10, 2012 to discuss the Subpoena. Ms. Foster explained that ED OIG was conducting an investigation into whether former U.S. Department of Education (the “Department”) Deputy Undersecretary Robert Shireman had violated the “ethics pledge” he had signed upon assuming that position. Ms. Foster confirmed that TICAS was not a subject of the investigation, and that ED OIG had already reviewed Mr. Shireman’s email communications to and from his Department email account.

4. Ms. Foster explained that ED OIG was seeking all email communications with Mr. Shireman or referring to Mr. Shireman, along with all drafts, working papers, correspondence and any other documents related to Mr. Shireman and/or negotiated rulemaking,

incentive compensation and gainful employment. In addition, ED OIG was seeking documents relating to an April 29, 2010 public meeting hosted by TICAS, and attended by Mr. Shireman, concerning relief for distressed student loan borrowers.

5. During this July 10, 2012 telephone call with Ms. Foster, I explained that TICAS had serious concerns regarding the Subpoena, including that it was not authorized by the Inspector General Act since TICAS was not a participant in any Department program and did not receive federal funds, and that it would have a chilling effect on TICAS' exercise of its First Amendment rights. Ms. Foster stated that ED OIG was requesting TICAS' "voluntary compliance" with the subpoena, explaining that this was different from a grand jury subpoena. I understood Ms. Foster's comments to mean that, if TICAS did not voluntarily produce the requested documents, and ED OIG subsequently obtained sufficient evidence to convene a grand jury with respect to Mr. Shireman, then the government would serve TICAS with a grand jury subpoena.

6. I informed Ms. Foster that TICAS' president Lauren Asher had been out on vacation when the Subpoena was served, and that we would need more time to review the Subpoena, to understand the scope of documents that had been requested and to determine what TICAS' response would be. Ms. Foster agreed that TICAS could have more time, but asked whether the documents could be produced before July 23, 2012. Ms. Foster claimed that ED OIG would be in the San Francisco Bay Area between July 23 and 28, 2012 to interview Mr. Shireman, and would like to receive the documents before that date. I reiterated that I did not yet know what TICAS' response to the Subpoena would be, or whether it was even possible to produce documents on that schedule if TICAS did in fact decide to produce documents.

7. I contacted Mr. Shireman's counsel and learned that there was no such interview of Mr. Shireman requested or scheduled.

8. In a subsequent exchange of emails, Ms. Foster agreed to extend the deadline to respond to the Subpoena to July 24, 2012.

TICAS' July 19, 2012 Objections to the Subpoena

9. On July 19, 2012, I sent a letter to Ms. Foster setting forth TICAS' formal response and objections to the Subpoena. TICAS objected to the Subpoena on the grounds that, among other things, it exceeded the authority granted to ED OIG by the Inspector General Act; it infringed on the First Amendment rights of TICAS, its officers and employees, board members and fellow advocates for improved public policies to make higher education more available and affordable for all; and that responding to the Subpoena would be unduly burdensome and disruptive to TICAS' work. A true and correct copy of my July 19, 2012 letter is attached hereto as Exhibit 2.

10. In the July 19, 2012 letter, I confirmed the numerous technical challenges that TICAS would face in retrieving documents responsive to the Subpoena. Among these technical challenges were the facts that TICAS had moved its offices in the middle of the time period covered by the Subpoena; that some of its computers were no longer available (over time, they had stopped functioning, were repurposed or were donated); and that TICAS had gone through multiple shifts in its network hardware and software. As a result, there was a lack of consistency in format, location and retrievability of non-essential records from the time period. I informed Ms. Foster that TICAS would have to retain an information technology consultant to attempt to work through these issues.

11. As my July 19, 2012 letter made clear, TICAS had not at that time agreed to produce any documents; instead, TICAS was still evaluating what documents could reasonably be retrieved, and whether TICAS would voluntarily produce documents to ED OIG in an effort to cooperate with its investigation. I note that TICAS' objections were not attached anywhere to the Petition or supporting documents filed by the government.

July 20, 2012 Discussions with ED OIG Regarding the Subpoena

12. The day after I served TICAS' objections to the Subpoena, I had a lengthy telephone conference with Ms. Foster and Benjamin Shapiro, Assistant Counsel to the Inspector General, U.S. Dept. of Education. I reiterated TICAS' position that the Subpoena exceeded ED OIG's authority, and that it would have a chilling effect on the First Amendment rights of TICAS and those associated with the organization. Ms. Foster indicated that ED OIG was particularly interested in the agenda, planning documents and any minutes of the April 29, 2010 public meeting hosted by TICAS, and attended by Mr. Shireman, regarding relief for distressed student loan borrowers. Ms. Foster acknowledged that Mr. Shireman had received prior authorization from the Department to attend the April 29, 2010 meeting.

13. In this July 20, 2012 telephone conference, I discussed TICAS' First Amendment concerns with Ms. Foster and Mr. Shapiro. Using the second document request in the Subpoena as an example (calling for all documents over a two-year period relating to negotiated rulemaking), I explained that ED OIG was intruding into the very core of TICAS' advocacy work to make higher education more affordable and accessible to all, and that the Subpoena would have a strong chilling effect on those efforts. I noted that this particular request was not even limited to Mr. Shireman, to which Ms. Foster responded that ED OIG was broadly investigating negotiated rulemaking, including "what others were doing." Ms. Foster's comment

only heightened my concern that ED OIG, through the Subpoena, was seeking to broadly infringe upon First Amendment rights of free speech, association and petitioning the government – not only of TICAS, but also of the many other other organizations and individuals with whom TICAS works to advocate for strong and effective regulations and federal higher education policies.

14. We also discussed TICAS' position that the Subpoena exceeded the scope of ED OIG's authority. I reminded Ms. Foster and Mr. Shapiro that TICAS does not participate in any Department program, is not a government contractor and does not otherwise receive any federal funds. On that point, Ms. Foster and Mr. Shapiro's response was that they believed ED OIG needed only to make a showing of relevance to an investigation.

15. At the end of my July 20, 2012 telephone conference with Ms. Foster and Mr. Shapiro, we agreed to speak again in about a week, at which time I expected to know what documents could be retrieved and whether TICAS would voluntarily produce any documents in response to the Subpoena.

July 30, 2012 Discussions with ED OIG Regarding the Subpoena

16. On July 30, 2012, I had a further telephone conference with Ms. Foster and Mr. Shapiro regarding the Subpoena. We again disagreed as to ED OIG's authority to issue the Subpoena. Mr. Shapiro stated that he believed the Subpoena was within ED OIG's authority, without further explanation or citation to authority.

17. We then discussed TICAS' First Amendment concerns. I informed Ms. Foster and Mr. Shapiro that TICAS was greatly concerned by the chilling effect of the Subpoena, but that, without waiving its strong objections set forth in my July 19 letter, TICAS had decided it would voluntarily produce certain documents relating to the April 29, 2010 meeting it hosted

relating to relief for distressed student loan borrowers because it met the criteria for being a public meeting. That meeting was attended by Mr. Shireman and several other experts in the field. I explained that, because the April 29, 2010 meeting was considered a public meeting, there was less of a “chilling effect” on the First Amendment rights of TICAS and its fellow advocates.

18. Ms. Foster and Mr. Shapiro asked whether TICAS would agree to produce any emails sent to or from Mr. Shireman’s former TICAS email address. They also asked whether Mr. Shireman had access to that TICAS email address while he was Deputy Undersecretary. I explained that, upon Mr. Shireman’s departure from TICAS on unpaid leave in February 2009, TICAS changed the password to his email account. I further explained that because TICAS changed its computer system on May 20, 2009, it could not identify more precisely the exact date on which Mr. Shireman’s password was changed – but that it was sometime between February 5, 2009 and May 20, 2009, and that contemporaneous emails indicated that the password was changed within days after Mr. Shireman left TICAS. I further explained that it was TICAS’ understanding that Mr. Shireman did not have access to any TICAS email account, and that TICAS confirmed no emails had been sent from his TICAS email account, since his departure from TICAS. Ms. Foster asked about emails sent to Mr. Shireman that were addressed to both his Department email address and his TICAS email address. I explained that we were not aware of any such emails, but that in at least one instance, Pauline Abernathy of TICAS had sent an email to Mr. Shireman (and others at the Department) that was mistakenly addressed to Mr. Shireman’s TICAS email address as a result of the “autofill” function in the Outlook program. Within minutes, Ms. Abernathy realized her mistake and re-sent the email to Mr. Shireman’s Department email address. I noted that, in any event, Ms. Foster was already in possession of

those emails, as they were also addressed to Mr. Shireman's colleagues at the Department and forwarded to his Department email account.

TICAS' Production of Documents Relating to the April 2010 Public Meeting

19. On August 8, 2012, I sent Ms. Foster the documents relating to the April 2010 public meeting on distressed student loan borrowers, which TICAS had agreed to voluntarily produce in response to the Subpoena. In my August 8, 2012 cover letter, I noted that the production was subject to and without waiving the objections TICAS asserted in my July 19, 2012 letter, and I attached a copy of that letter. A true and correct copy of my August 8, 2012 letter is attached hereto as Exhibit 3. Along with the documents, I sent Ms. Foster a redaction log that set forth the few redactions made to the documents on the basis of the right of privacy and the First Amendment (certain personal cell phone and email addresses), or on the basis of the attorney-client privilege and work product doctrine (legal discussions within certain email strings that were not related to the April 2010 meeting on student loan debt relief).

20. On August 20, 2012, Ms. Foster contacted me by email and asked whether TICAS would be producing further documents. Before I had an opportunity to respond, Ms. Foster sent another email on August 22, 2012, stating that ED OIG had not received TICAS' response concerning the remainder of the documents requested by the Subpoena. Ms. Foster stated that if the remaining documents were not produced by close of business on August 31, 2012, ED OIG would proceed to enforce the Subpoena through the U.S. Attorney's Office.

21. On August 23, 2012, I responded to Ms. Foster's emails to correct certain misstatements and erroneous assumptions she made regarding Mr. Shireman's email account, the scope of TICAS' voluntary production and TICAS' objections to the Subpoena. A true and correct copy of my August 23, 2012 email to Ms. Foster is attached hereto as Exhibit 4.

22. On August 24, 2012, Mr. Shapiro emailed me requesting a further telephone conference regarding the Subpoena. We scheduled a call and spoke on August 28, 2012. I confirmed that TICAS had reached the limits of its voluntary cooperation with ED OIG's investigation, and reiterated that TICAS stood on the objections set forth in my letters of July 19 and August 8, 2012. I asked Mr. Shapiro if ED OIG had made any efforts to obtain the requested documents from Mr. Shireman, and Mr. Shapiro refused to answer. Mr. Shapiro then stated that the next step would be an enforcement proceeding, but explained that both Ms. Foster and the AUSA responsible for the matter, Darrell Valdez, would call me the following week to discuss the Subpoena further.

23. After my August 28, 2012 call with Mr. Shapiro, I received no further contact from Ms. Foster, Mr. Shapiro or Mr. Valdez until the instant Petition was filed six months later, on February 5, 2013.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, and that this Declaration was executed at San Francisco, California on March 22, 2013.


SHARON D. MAYO

Exhibit 1



United States Department of Education
OFFICE OF INSPECTOR GENERAL

Ms. Lauren Asher, President
The Institute for College Access and Success
405 14th Street, 11th Floor
Oakland, CA 94612

Dear Ms. Asher:

Pursuant to 5 U.S.C. app. 3, sections 4, 6(a)(4), the enclosed subpoena *duces tecum* has been issued by the Office of Inspector General of the United States Department of Education. The materials identified should be produced as indicated on the subpoena.

This subpoena may be satisfied by mailing the requested documents and a signed copy of the attached Declaration of Compliance to the address listed below on or before the specified date:

Special Agent in Charge Lisa Foster
U.S. Department of Education
Office of Inspector General
550 12th Street, SW # 8147
Washington, DC 20024

Failure to provide the requested documents at the time specified in the subpoena will be taken by this office as a failure to comply with the subpoena and we will exercise our legal right to seek judicial enforcement.

If for any reason any of the required materials are not furnished, list and indicate the location of such materials and the reason for nonproduction. In addition, if any document called for is withheld because of a claim of attorney-client privilege, identify: (a) the attorney and client involved; (b) all persons or entities who were involved in the preparation of the document; (c) all persons or entities who received the document; (d) all persons or entities known to have been furnished the document or informed of its substance; (e) the date of the document; and (f) the subject matter of the document.

It will be helpful in determining whether you have fully complied with this subpoena if the responsive materials are accompanied by an index of the documents produced.

If you have any questions, you may contact Special Agent Lisa Foster at (202) 245-7058.

Sincerely,

A handwritten signature in black ink, appearing to read "William D. Hamel".

William D. Hamel
Assistant Inspector General
for Investigations



**United States Department of Education
OFFICE OF INSPECTOR GENERAL**

SUBPOENA DUCES TECUM

TO: Ms. Lauren Asher, President
The Institute of College Access and Success
405 14th Street, 11th Floor
Oakland, CA 94612

YOU ARE HEREBY COMMANDED TO APPEAR BEFORE Special Agent in Charge Lisa Foster, a duly authorized representative of the Office of Inspector General, U.S. Department of Education, at 550 12th Street, SW, # 8147, Washington, DC 20024, by the 16th day of July, 2012, and produce certain documentary evidence specified below which is necessary in the performance of the responsibility of the Inspector General to conduct and supervise investigations, audits, and perform such other functions as are necessary to promote economy, efficiency, and effectiveness in the administration of, and to prevent and detect fraud, waste, and abuse in and relating to, the programs and operations of the U.S. Department of Education.

YOU ARE FURTHER COMMANDED to bring with you and produce and provide at said time and place the following:

See ATTACHMENT A – Copies may be provided. The Office of Inspector General reserves the right to require the production of originals upon request.

Please direct all inquires about this subpoena to:

Special Agent in Charge Lisa Foster
550 12th St, SW # 8147
Washington, DC 20024
(202) 245-7058

**ISSUED UNDER THE AUTHORITY OF THE INSPECTOR GENERAL ACT, TITLE 5
U.S.C. APP. 3, SECTIONS 4, 6(a)(4).**

OFFICE OF INSPECTOR GENERAL

William D. Hamel

DATE: 6/26/12



**United States Department of Education
OFFICE OF INSPECTOR GENERAL**

RETURN OF SERVICE

I hereby certify that on _____, 20__, I personally served this SUBPOENA DUCES TECUM on _____ by handing him/her a true copy hereof.

(Signature of person making return)

Name and Official Title

Date

**RETURN OF SERVICE
(SERVICE BY MAIL)**

I hereby certify that on _____, 20__, I served this SUBPOENA DUCES TECUM on _____, by causing to be mailed, postage prepaid, return receipt requested, a true copy hereof addressed to.

(Signature of person making return)

Name and Official Title

Date

DECLARATION OF COMPLIANCE WITH SUBPOENA

I, _____, having knowledge of the facts and circumstances relating to the production of documents in response to the subpoena *duces tecum* issued by the United States Department of Education, Office of Inspector General, to _____, dated _____, 20__, do hereby declare that all of the records commanded by the subpoena have been produced to the Office of Inspector General, and that the records provided are complete, authentic, and in full compliance with the subpoena and that no document required by the subpoena has been destroyed or altered since receipt of the subpoena. Any records required by the subpoena that have been withheld from production under a claim of privilege or otherwise have been identified on a separate document attached hereto and incorporated herein, along with the reason(s) for withholding the records.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Executed on this ___ day of _____, 20__.

By: _____
(Signature)

(Name)

(Title)

(Organization)

The Institute of College Access and Success
Subpoena Attachment A

INSTRUCTIONS

The following instructions are expressly incorporated into each specific demand for production as if fully stated therein:

1. Relevant Time Period. Unless otherwise specified, the scope of this subpoena includes all documents concerning the period from February 9, 2009, through February 11, 2011.
2. Duty To Supplement. The obligations created by this subpoena are continuing, and you shall supplement your responses if you locate additional responsive documents in your possession. You shall produce the specified materials to the Office of Inspector General as they are kept in the usual course of business or you shall organize and label them to correspond with the categories in this subpoena.
3. Scope Of Search Required. This subpoena calls for all documents in your possession, custody, or control. You are required to search all files reasonably likely to contain responsive documents. If there are no responsive documents to a particular request, please specify that you have no responsive documents.
4. Non-Production. Each document requested herein is requested to be produced in its entirety and without any deletion, excision, or redaction, regardless of whether you consider the entire document to be relevant or responsive to the requests, except as follows. If any documents responsive to any of the paragraphs of this Attachment will not be produced for any reason, please set forth the following information concerning each document:
 - (a) the type of document;
 - (b) the date of the document;
 - (c) the person who prepared or wrote the document;
 - (d) a description of the document's subject matter and physical size;
 - (e) all addresses of recipient(s) of the original or copy thereof, together with the date or approximate date that said recipient received said document;
 - (f) all other persons to whom the contents of the document have been disclosed, the date of such disclosure, and the means of such disclosures; and
 - (g) the nature of the privilege or the rule of law relied upon, or other reason for non-production.

If you have redacted any portion of a document, stamp the word "redacted," or otherwise note as such, on each page of the document from which you have redacted information. Redactions should be explained in accordance with the instructions in this paragraph along with withheld documents (e.g., in a privilege log).

5. All documents produced pursuant to this subpoena are to be submitted as found in the files of the person or entity with possession, custody or control over the documents and are to be organized in such a manner that all documents relating to a particular specification or request are grouped together and identified as being responsive to that specification or request.
6. All documents provided in response to this subpoena are to include all marginalia and post-its, as well as any attachments referred to or incorporated by the documents.
7. If information exists or can be retrieved from information stored in computerized form, this request includes the information on computer disk and the hard drive, if necessary, including an identification of the software program necessary to access and use the information.
8. If any documents requested herein have been lost, discarded, or destroyed, they shall be identified as completely as possible, including, without limitation, the following information: (a) The date of disposal; (b) The manner of disposal; (c) The reason for disposal; and (d) The person authorizing the disposal.

The Institute of College Access and Success
Subpoena Attachment A

DEFINITIONS

The following definitions are expressly incorporated into each specific demand for production as if fully stated therein:

- A. TICAS. The term "TICAS" refers to The Institute for College Access and Success and all subsidiaries, affiliates, divisions, and any other related corporation, partnership, proprietorship, association, or organization, and its officers, directors, employees, partners, consultants, agents, representatives, accountants.
- B. Your. The terms "you" or "your" refer to The Institute for College Access and Success and all subsidiaries, affiliates, divisions, and any other related corporation, partnership, proprietorship, association, or organization, and its officers, directors, employees, partners, consultants, agents, representatives, accountants.
- C. Robert Shireman. The term "Robert Shireman" refers to former TICAS President and owner Robert Shireman, and any corporation, partnership, joint venture or other entity owned, controlled or operated by Robert Shireman, or in which Robert Shireman was at any time a director, officer, shareholder, agent or signatory, or otherwise had a legal or equitable interest.
- D. Pauline Abernathy. The term "Pauline Abernathy" refers to TICAS Vice President Pauline Abernathy, and any corporation, partnership, joint venture or other entity owned, controlled or operated by Pauline Abernathy, or in which Pauline Abernathy was at anytime a director, officer, shareholder, agent or signatory, or otherwise had a legal or equitable interest.
- E. Department or ED. The terms "Department" or "ED" refer to the U.S. Department of Education.
- F. OIG. The term "OIG" refers to the U.S. Department of Education Office of Inspector General.
- G. Communication. The term "communication" refers to all manners of transmitting or receiving information, opinions, or thoughts, orally, in writing, in person, telephonically, or otherwise.
- H. Concerning. The term "concerning" means referring to, describing, evidencing, or constituting.
- I. Document. The term "document" means all records, correspondence, memoranda, notes, diaries, statistics, letters, telegrams, minutes, contracts, reports, studies, checks, statements, receipts, returns, summaries, pamphlets, books, prospectuses, inter-office or intra-office communications, telephone message slips, offers, notations of conversations, bulletins, drawings, plans, computer printouts, computer input or output, teletypes, telefaxes, invoices, worksheets, ledger books, books of account, and all drafts, alterations, modifications, changes, and amendments of any of the foregoing. The term "document" includes information whether in printed or electronic format, including information stored on computer hard drive, disks, or by any other electronic means. The term also includes all graphic or aural records or representations of any kind, including without limitation, photographs, charts, graphs, microfilm, videotape, recordings, motion pictures, and electronic, mechanical, or electrical records, or recordings of any kind, including, without limitation, tapes, cassettes, discs, and recordings. Any copy of a document which contains information or markings not contained on the original of the document should be considered a separate document.
- J. Person. The term "person" is defined as any natural person or any business, legal, or governmental entity or association.
- K. Possession. The term "possession" denotes both actual and constructive possession. For example, a document is in your possession if it is within the your custody or control, if you have a legal or equitable right to obtain such document from another person, or if it is in the possession of any present or former officer, director, employee, partner, corporate parent, subsidiary, or affiliate thereof.
- L. And/Or. The terms "and" and "or" are used interchangeably herein, operating both as conjunctive and disjunctive conjunctions.

The Institute of College Access and Success
Subpoena Attachment A

- M. Singular and Plural. The singular form of a noun or pronoun shall be considered to include within its meaning the plural form as well, and vice versa.
- N. Tenses. All present tenses of verbs or verb forms shall be considered to include within their meaning the future and past tenses as well, and vice versa.
- O. Refer. "Refer" means to discuss, report on, review, consider, evaluate, or explain by direct mention of the subject matter of the request.
- P. Relate. "Relate" means to comprise, explicitly or implicitly, refer to, be reviewed in conjunction with, or be generated as a result of the subject matter of the request, or to reflect, record, memorialize, discuss, evaluate, consider, review or report on the subject matter of the request.
- Q. Affiliated Organization. An "affiliated organization" is any organization that is directly or indirectly related or connected to the institution of higher education and includes, but is not limited to, alumni organizations, athletic organizations, and social, academic, and professional organizations.
- R. United States. "United States" means any government agency or representative of the government including the U.S. Department of Education.

The Institute of College Access and Success
Subpoena Attachment A

DOCUMENTS TO BE PRODUCED

For the period of February 3, 2009, to February 11, 2011:

1. Any and all communications (including email), and documentation of correspondence, between TICAS and Robert Shireman, including but not limited to communications between Pauline Abernathy and Robert Shireman.
2. To the extent not included above, any and all documents concerning Robert Shireman and/or any U.S. Department of Education negotiated rulemaking, including but not limited to documents related to "gainful employment" or "incentive compensation."
3. Any and all communications (including emails) and documents related to the student loan repayment meeting/conference hosted by TICAS and attended by Robert Shireman in April 2010.



United States Department of Education OFFICE OF INSPECTOR GENERAL

PRIVACY ACT NOTIFICATION

The Privacy Act of 1974, 5 U.S.C. § 552a(e), requires the Office of Inspector General (OIG), U.S. Department of Education (Department), to provide you with this notice when requesting information from you.

Authority for the Solicitation of Information

This information request is in connection with an official inquiry under the authority of the Inspector General Act of 1978, 5 U.S.C. app. 3, as amended, and the regulations governing the programs and activities of the Department contained in Title 34 of the Code of Federal Regulations. Department employees are required by paragraph VI.A.3 of ACS Directive OIG:1-102, "Cooperation with the Office of Inspector General," to respond to all official requests of representatives of the OIG unless providing information may tend to incriminate the employee. Individuals and entities that have contract- or grant-based relationships with the Federal government may be required, by the terms of such relationship, to provide information. Information requested by administrative subpoena is required to be provided to OIG. In all other circumstances, providing information to the OIG is voluntary.

Principal Purpose for Solicitation of Information

The Office of Inspector General will use the information you provide to evaluate Department programs and operations and to detect fraud, waste, abuse, or mismanagement in such programs and operations.

Routine Uses of the Solicited Information

The information you provide will be incorporated into a system of records known as the Investigative Files of the Inspector General ED/OIG. It may be disseminated outside of the Department in accordance with published routine uses set forth on the reverse of this form.

Consequences of Failure to Furnish Information

The failure of a Department employee to supply the requested information when disclosure of such information is mandatory may result in administrative sanctions against the employee including removal from the Federal service. The failure of a contractor or grantee to provide information required under the provisions of the contract, grant, or Department regulations may result in administrative sanctions. The failure of a subpoena recipient to supply requested documents and information may cause the OIG to seek judicial enforcement of the subpoena in an appropriate United States District Court. If the court enforces the subpoena and you thereafter fail to provide the information, you may be subject to civil and/or criminal sanctions for contempt of court.

ROUTINE USES OF THE INFORMATION

Information may be disseminated outside of the Department of Education in accordance with the following routine uses:

1. *Law Enforcement.* Information may be disclosed to any Federal, State, local, or foreign agency or other public authority responsible for enforcing, investigating, or prosecuting violations of law or regulation if that information is relevant to any enforcement, regulatory, investigative or prosecutorial responsibility of the receiving entity.

2. Information may be disclosed to public or private sources to the extent necessary to obtain information from those sources relevant to an OIG investigation, audit, inspection, or other inquiry.

3. *Employment, Employee Benefit, Clearance, Contracting Decisions.*

(a) Information may be disclosed to a Federal, State, local or foreign agency maintaining civil, criminal, or other relevant enforcement or other pertinent records, or to another public authority or professional organization, if necessary to obtain information relevant to a Department decision concerning the hiring or retention of an employee or other personnel action, the issuance or retention of a security clearance, the letting of a contract, or the issuance or retention of a license, grant, or other benefit. (b) Information may be disclosed to a Federal, State, local, or foreign agency, other public authority, or professional organization in connection with the hiring or retention of an employee or other personnel action, the issuance or retention of a security clearance, the letting of a contract, or the issuance or retention of a license, grant, or other benefit.

4. *Disclosure to Public and Private Sources in Connection with the Higher Education Act of 1965, as Amended (HEA).* The OIG may disclose information from this system of records as a routine use to facilitate compliance with program requirements to any accrediting agency that is or was recognized by the Secretary of Education pursuant to the HEA; to any educational institution or school that is or was a party to an agreement with the Secretary of Education pursuant to the HEA; to any guaranty agency that is or was a party to an agreement with the Secretary of Education pursuant to the HEA; or to any agency that is or was charged with licensing or legally authorizing the operation of any educational institution or school that was eligible, is currently eligible, or may become eligible to participate in any program of Federal student assistance authorized by the HEA.

(5) *Litigation Disclosure.*

(a) Disclosure to the Department of Justice. If the disclosure of certain records to the Department of Justice (DOJ) is relevant and necessary to litigation and is compatible with the purpose for which the records were collected, those records may be disclosed. Such a disclosure may be made in the event that one of the parties listed below is involved in the litigation, or has an interest in the litigation: (i) The Department or any component of the Department; (ii) Any employee of the Department in his or her official capacity; (iii) Any employee of the Department in his or her individual capacity where the Department of Justice has agreed to represent the employee or in connection with a request for such representation; or (iv) The United States, where the Department determines that the litigation is likely to affect the Department or any of its components.

(b) Other Litigation Disclosure. If disclosure of certain records to a court, adjudicative body before which the Department is authorized to appear, individual or entity designated by the Department or otherwise empowered to resolve disputes, Counsel or other representative, or potential witness is relevant and necessary to litigation and is compatible with the purpose for which the records were collected, those records may be disclosed as a routine use to the court, adjudicative body, individual or entity, Counsel or other representative, or potential witness. Such a disclosure may be made in the event that one of the parties listed below is involved in the litigation, or has an interest in the litigation: (i) The Department, or any component of the Department; (ii) Any employee of the Department in his or her official capacity; (iii) Any employee of the Department in his or her individual capacity where the Department has agreed to represent the employee; or (iv) The United States, where the Department determines that the litigation is likely to affect the Department or any of its components.

6. *Contractors/Consultants.* Information may be disclosed to the employees of any entity or individual with whom or with which the Department contracts for the purpose of performing any functions or analyses that facilitate or are relevant to an OIG investigation, audit, inspection, or other inquiry. Before entering into such a contract, the Department shall require the contractor to maintain Privacy Act safeguards, as required under 5 U.S.C. 552a(m) with respect to the records in the system.

7. *Debarment/Suspension.* Information may be disclosed to another Federal agency considering suspension or debarment action where the information is relevant to the suspension or debarment action. Information may also be disclosed to another agency to gain information in support of the Department's own debarment and suspension actions.

8. *Department of Justice.* Information may be disclosed to the Department of Justice, to the extent necessary for obtaining its advice on any matter relevant to Department of Education programs or operations.

9. *Congress.* Information may be disclosed to a member of Congress from the record of an individual in response to an inquiry from the member made at the written request of that individual. The member's right to the information is no greater than the right of the individual who requested it.

10. *Benefit Program.* Information may be disclosed to any Federal, State, local or foreign agency, or other public authority, if relevant to the prevention or detection of fraud and abuse in benefit programs administered by any agency or public authority.

11. *Overpayment.* Information may be disclosed to any Federal, State, local or foreign agency, or other public authority, if relevant to the collection of debts and overpayments owed to any agency or public authority.

12. *Disclosure to the Council of the Inspectors General on Integrity and Efficiency (CIGIE).* The OIG may disclose records as a routine use to members and employees of the CIGIE for the preparation of reports to the President and Congress on the activities of the Inspectors General.

13. *Disclosure for Qualitative Assessment Reviews.* The OIG may disclose records as a routine use to members of the CIGIE, the DOJ, the U.S. Marshals Service, or any Federal agency for the purpose of conducting qualitative assessment reviews of the investigative operations of the Department of Education, Office of Inspector General to ensure that adequate internal safeguards and management procedures are maintained.

14. *Disclosure to the Recovery Accountability and Transparency Board (RATB).* The OIG may disclose records as a routine use to the RATB for purposes of coordinating and conducting oversight of American Recovery and Reinvestment Act funds to prevent fraud, waste, and abuse.

15. *Disclosure in the Course of Responding to Breach of Data.* The OIG may disclose records from this system to appropriate agencies, entities, and persons when (a) the OIG suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (b) the OIG has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the Department or another agency or entity) that rely upon the compromised information; and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the OIG's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

These routine uses are published in full at 68 Fed. Reg. 38154-58 (June 26, 2003) and 75 Fed. Reg. 33608-10 (June 14, 2010).



**United States Department of Education
OFFICE OF INSPECTOR GENERAL**

**NOTIFICATION TO SUBMITTERS OF
CONFIDENTIAL
COMMERCIAL INFORMATION**

You have or may be asked to submit to the Office of Inspector General (OIG), U.S. Department of Education, information in connection with an investigation, audit, inspection, or other inquiry pursuant to the Inspector General Act of 1978, as amended, 5 U.S.C. app. 3. This is to notify you that if you deem any of this information to be "confidential commercial information," you may take steps to so designate that information to protect its confidentiality if at a future point in time a request is made for disclosure of this information under the Freedom of Information Act (FOIA).

"Confidential commercial information" means records that may contain material exempt from release under Exemption 4 of the FOIA (pertaining to trade secrets and commercial or financial information that is privileged or confidential), because disclosure could reasonably be expected to cause substantial competitive harm.

You may use any reasonable method you believe appropriate and which is acceptable to the OIG to indicate which documents and information you deem to fall into the category of confidential commercial information. Please be as specific as possible in segregating the information that you consider to be "confidential commercial information" from any other information you are providing to the OIG. This may be done before such information is provided to the OIG if feasible, but only if it will not delay or interfere with production of the information or delay or interfere with the OIG's investigation, audit, inspection, or other inquiry. Otherwise, you may so designate this information within a reasonable period of time after the information is provided to the OIG.

If a FOIA request is received by the OIG for information you have designated as confidential commercial information, the OIG is nevertheless required by law to make its own independent determination of whether the FOIA requires disclosure of the information or whether it should be withheld pursuant to Exemption (b)(4) or any other exemption of the FOIA. If the OIG determines that it may be required to disclose pursuant to the FOIA that information you have designated or other information that the OIG has reason to believe could reasonably be expected to cause substantial competitive harm, to the extent permitted by law, we will make a good faith effort to notify you and provide you with a reasonable opportunity to object to such disclosure and to state all grounds upon which you oppose disclosure. We will give careful consideration to all specified grounds for nondisclosure prior to making our final decision.

If we nonetheless believe that disclosure is required, we will provide you with a statement explaining why your objections were not sustained and specifying a disclosure date. To the extent permitted by law, this statement will be provided to you in a reasonable number of days prior to the specified disclosure date. Furthermore, if disclosure of the designated information is denied pursuant to an exemption under the FOIA and an administrative or judicial appeal is taken by the FOIA requester, we will make a good faith effort to notify you promptly.

The procedures outlined in this notice are intended only to improve the internal management of the OIG and are not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

Exhibit 2

ARNOLD & PORTER LLP

Sharon D. Mayo
Sharon.Mayo@aporter.com
+1 415.471.3296
+1 415.471.3400 Fax
7th Floor
Three Embarcadero Center
San Francisco, CA 94111-4024

July 19, 2012

VIA E-MAIL (LISA.FOSTER@ED.GOV)

Special Agent Lisa Foster
United States Department of Education
Office of Inspector General
550 12th Street, SW #8147
Washington, DC 20024

Re: ED OIG Subpoena to The Institute for College Access & Success

Dear Special Agent Foster:

On behalf of The Institute for College Access & Success (“TICAS”), we are in receipt of the subpoena issued by your office on June 26, 2012 (“Subpoena”). This letter shall serve as TICAS’ formal response and objection to the Subpoena.

First, TICAS objects to the Subpoena on the grounds that it exceeds the authority granted to the ED OIG by the Inspector General Act of 1978, 5 U.S.C. app. 3. As I advised you during our telephone conference of July 10, 2012, TICAS is not a government contractor, nor is it a recipient of any federal grant funds. Accordingly, TICAS views the Subpoena as a request for voluntary compliance with an ED OIG investigation. TICAS appreciates your assurance during my July 10 call with you that TICAS is not the subject of the ED OIG investigation.

Second, TICAS objects to the Subpoena on the grounds that it violates the First Amendment rights of free speech and association of TICAS, its officers and employees, board members, and fellow advocates for improved public policies to make education more available and affordable. TICAS is an independent nonprofit organization that, among other things, engages in advocacy and policy development to achieve its goals, and the Subpoena has an impermissible chilling effect on those efforts.

Third, TICAS objects to the Subpoena on the grounds that it seeks the production of all paper and electronic documents relating to overly broad requests over a two-year

ARNOLD & PORTER LLP

Special Agent Lisa Foster
July 19, 2012
Page 2

time period. Responding to the overly broad requests would not only be unduly burdensome and disruptive to TICAS' work, but would also be extremely time-consuming and expensive. As a non-profit organization, TICAS simply does not have the funding or staff to undertake the broad searches requested by the Subpoena.

Fourth, TICAS objects to the Subpoena on the ground that the specified date for production is unreasonable and unduly burdensome. As I advised you in our July 10 telephone call, the Subpoena – addressed to Lauren Asher, the President of TICAS – was served on June 28, 2012 while Ms. Asher was on vacation. By the time Ms. Asher returned from vacation, there were only five business days remaining to review the subpoena and attempt to locate responsive documents.

Fifth, TICAS objects to the Subpoena to the extent it calls for information that is more readily and efficiently available to ED OIG, or some other source that is more convenient, less burdensome or less expensive. By way of example, and not limitation, each request in the Subpoena seeks e-mails to or from Robert Shireman during the period in which he served as Deputy Undersecretary of the Department of Education; ED OIG already has available to it all of Mr. Shireman's e-mails on his Department of Education e-mail account.

Sixth, TICAS objects to the Subpoena to the extent it purports to require TICAS to search for and locate “any and all” documents, on the ground that it is overly broad and unduly burdensome.

Seventh, TICAS objects to the definitions of “you” and “your” in the Subpoena, which are defined to include not only TICAS, but also TICAS' “subsidiaries, affiliates, divisions and any other related corporation, partnership, proprietorship, association or organization, and its officers, directors, employees, partners, consultants, agents, representatives, [and] accountants.” This definition renders the subpoena vague, overbroad, burdensome and oppressive. For the same reasons, TICAS also objects to the definitions of “Robert Shireman” and “Pauline Abernathy.”

Eighth, TICAS objects to the definition of “and/or” in the Subpoena, in that it renders Request No. 2 in the subpoena hopelessly vague, overbroad, unintelligible, burdensome and oppressive.

ARNOLD & PORTER LLP

Special Agent Lisa Foster
July 19, 2012
Page 3

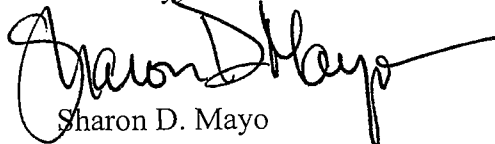
Ninth, TICAS objects to the Subpoena to the extent that it seeks the production of any documents or information subject to the attorney-client privilege, the attorney work product doctrine, or any other lawfully recognized doctrine or privilege.

Subject to and without waiving the foregoing objections, and as I previously informed you, TICAS is reviewing its systems to see what documents reasonably can be retrieved and what it will voluntarily produce to cooperate with the ED OIG investigation. These efforts are ongoing, but there are a number of obstacles and technical challenges that TICAS faces, including the facts that TICAS moved its offices in the middle of the time period at issue; some of its computers stopped functioning, were repurposed, or were donated over time; TICAS has gone through multiple shifts in its network hardware and software; and the e-mail accounts/network domain identities of former employees were inactivated and stored in different ways. As a result, there is a lack of consistency in format, location and retrievability of non-essential records from the time period at issue in the Subpoena. TICAS has had to retain an IT consultant to attempt to work through these issues and to see what can be retrieved.

Based on the information provided by its IT consultant, TICAS expects to be able to determine on or before Monday, July 30 what documents it can and will provide to the ED OIG. While we understand that you would like TICAS to produce documents by July 24, that simply is not possible.

I would be happy to continue to discuss these matters with you, and will let you know as soon as I have further information.

Sincerely,



Sharon D. Mayo

cc: Lauren Asher

Exhibit 3

ARNOLD & PORTER LLP

Sharon D. Mayo
Sharon.Mayo@aporter.com
+1 415.471.3296
+1 415.471.3400 Fax
7th Floor
Three Embarcadero Center
San Francisco, CA 94111-4024

August 8, 2012

VIA E-MAIL (LISA.FOSTER@ED.GOV)

Special Agent Lisa Foster
United States Department of Education
Office of Inspector General
550 12th Street, SW #8147
Washington, DC 20024

Re: ED OIG Subpoena to The Institute for College Access & Success
(TICAS)

Dear Special Agent Foster:

Transmitted with this letter are .pdfs containing documents bates stamped T0001 through T0120, constituting the response of TICAS to the above-referenced Subpoena dated June 26, 2012 issued by your office. These materials are produced subject to and without waiving the positions and objections set forth in my letter to you dated July 19, 2012, a copy of which is attached hereto and incorporated herein by this reference.

As set forth in my July 19, 2012 letter, it is TICAS' position that the Subpoena exceeds the authority granted to the ED OIG by the Inspector General Act, and that it has an impermissible chilling effect on TICAS' First Amendment activities. Nonetheless, and as I explained in our telephone conference on July 30, 2012, in an effort to cooperate with the ED OIG investigation, TICAS has agreed to produce the enclosed e-mail communications and documents relating to preparation for the public meeting it organized and held on April 29-30, 2010 concerning relief for distressed student loan borrowers.

The documents have not been altered, except for the addition of a bates number and, in a few instances, redactions of information subject to a right of privacy, the attorney-client privilege, or attorney work product doctrine. These redactions are clearly marked on the documents and are listed on the accompanying redaction log.

ARNOLD & PORTER LLP

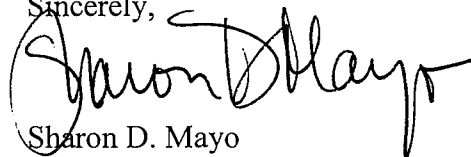
Special Agent Lisa Foster
August 8, 2012
Page 2

TICAS is furnishing the enclosed information solely for the use of the Department of Education Inspector General, and it is not intended for use by the Government for any other purpose except the investigation to which the Subpoena relates.

In submitting this information, TICAS expressly reserves all rights with respect to disclosures to third parties and has not waived any claim of privilege against disclosure. On TICAS' behalf, I request that TICAS be provided with prompt advance notice by telephone and letter of any request to disclose this letter or any of the produced documents, so that TICAS and its counsel may be heard on the question of the propriety of any proposed disclosure.

If you have any questions regarding this document production, please contact the undersigned.

Sincerely,

A handwritten signature in black ink, appearing to read "Sharon D. Mayo". The signature is written in a cursive style with a large initial "S".

Sharon D. Mayo

Enclosures as noted.

cc: Lauren Asher

Exhibit 4

Mayo, Sharon D.

From: Mayo, Sharon D.
Sent: Thursday, August 23, 2012 10:46 AM
To: 'Foster, Lisa'; Shapiro, Benjamin
Subject: RE: TICAS Production to ED OIG

Special Agent Foster,

I write in response to your e-mails of August 20 and 22, 2012, regarding TICAS' production of documents to ED OIG on August 8, 2012.

First, let me correct your apparent misinformation regarding Mr. Shireman's TICAS e-mail account. As I explained to you and Ben Shapiro in a telephone conference on July 30, 2012, TICAS changed the password on Mr. Shireman's e-mail account sometime between February 5, 2009 and May 20, 2009 (I never stated to you that his account was "cancelled"). TICAS cannot identify more precisely the exact date on which it blocked access to Mr. Shireman's TICAS e-mail account because TICAS changed its computer system on May 20, 2009. However, based on its review of contemporaneous internal e-mails, TICAS believes the password was changed very shortly after Mr. Shireman left TICAS in February in 2009. It is our understanding that Mr. Shireman has not had access to any TICAS e-mail account since he left TICAS in 2009, and we have confirmed that no e-mails were sent from his TICAS e-mail account since that time. The e-mails you reference from Ms. Abernathy that were addressed to Mr. Shireman's TICAS e-mail account were the result of the "auto-fill" function in Outlook, the e-mail program used by TICAS, which automatically fills in the e-mail address when you begin typing it, and were simply sent to the TICAS e-mail address in error. Moreover, you state that these e-mails addressed to Mr. Shireman's TICAS e-mail address were also cc'd to his government e-mail account. TICAS has not located any such e-mails; the e-mail that TICAS was able to locate was first sent by Ms. Abernathy to Mr. Shireman at his TICAS e-mail address and was cc'd to other government employees. The original e-mail was then forwarded by Ms. Abernathy to Mr. Shireman's government e-mail address just a few minutes later, likely when she realized that an "auto-fill" error had misdirected her message. In any event, as you acknowledge, the government already has copies of those e-mails, so it is not clear to me what you are seeking.

Second, while I advised you that TICAS had retained a computer technician to review TICAS' systems and to search for certain e-mails responsive to ED OIG's subpoena (because TICAS is a small organization and does not have any IT staff), I have made very clear in both our telephone conferences and my correspondence TICAS' objections and positions with respect to the subpoena, and what materials TICAS would voluntarily produce. To the extent that your August 20, 2012 e-mail suggests you understood that TICAS agreed to produce all documents responsive to all of ED OIG's original requests, that understanding is incorrect. My letters to you dated July 19 and August 8, 2012 set forth in detail TICAS' responses and objections to the subpoena, and the clear parameters of what TICAS would voluntarily produce in an effort to help your investigation. TICAS produced those documents to ED OIG under cover of my August 8 letter.

Third, before I had a chance to consult with TICAS and respond to your August 20, 2012 e-mail, I received your e-mail from yesterday morning, apparently demanding that TICAS now produce by August 31, 2012 all documents responsive to ED OIG's requests. You also assert that you "have not received [TICAS'] response concerning these outstanding items." As discussed above, TICAS has both objected and responded to ED OIG's subpoena. We have never received any response to TICAS' objections to the subpoena, particularly TICAS' objections that the subpoena exceeds the scope of ED OIG's authority, that it infringes upon important rights guaranteed to TICAS by the First Amendment, and that the subpoena is, in any event, overly broad, unduly vague and burdensome. Thus, we were surprised to receive your e-mail yesterday demanding immediate compliance with the original subpoena under threat of an enforcement action.

In any event, I am happy to discuss these matters further with you, Ben Shapiro, and/or AUSA Darrell Valdez. I can be available for a conference call with any or all of you today after 1:00 Pacific, Friday before noon Pacific, and I have additional availability next week.

Sharon Mayo

From: Foster, Lisa [mailto:Lisa.Foster@ed.gov]
Sent: Monday, August 20, 2012 11:01 AM
To: Mayo, Sharon D.; Shapiro, Benjamin
Subject: RE: TICAS Production to ED OIG

Good afternoon,

Thank you for the documents. We have had a chance to review them. I wanted to touch base with you to see if there were any other documents you would be providing and what the time frame you needed was.

I also have went back through some of the documents we have from Mr. Shireman's computer and it appears that he had a TICAS email account as late as May 2010. There are emails from Ms. Abernathy to Mr. Shireman sent directly from her TICAS account to his TICAS account and with a "cc" to his government email account. I understand you were told they cancelled his account when they went to a new server in 2009. We understood that they had a technician trying to recover some of the emails and other documents in our original request. We are still looking to get these documents as soon as possible.

If you would like, we can discuss these issues over the phone. Please let me know when a good time and date is. I am available all this week expect for after 1:00 EST on Thursday. I am out all the next week in training so if we can do this this week I would appreciate it.

Thank you,
Lisa

From: Mayo, Sharon D. [mailto:Sharon.Mayo@APORTER.COM]
Sent: Wednesday, August 08, 2012 7:56 PM
To: Foster, Lisa; Shapiro, Benjamin
Subject: TICAS Production to ED OIG

Special Agent Foster:

Please see the attached correspondence, documents, and redaction log.

Sharon

Sharon D. Mayo

Arnold & Porter LLP
Three Embarcadero Center, 7th Floor
San Francisco, CA 94111

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sharon.mayo@aporter.com
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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

_____)	
UNITED STATES OF AMERICA,)	
)	
Petitioner,)	Misc. No. 1:13-mc-00081 (ABJ) (AK)
)	
v.)	Assigned To: The Hon. Alan Kay
)	
THE INSTITUTE FOR COLLEGE ACCESS & SUCCESS,)	
)	
Respondent.)	
_____)	

**[PROPOSED] ORDER DENYING PETITION FOR SUMMARY
ENFORCEMENT OF INSPECTOR GENERAL SUBPOENA**

Upon consideration of the United States’ Petition for Summary Enforcement of Inspector General Subpoena and the Exhibits attached thereto, and Respondent The Institute for College Access & Success’s Opposition to Petition for Summary Enforcement of Inspector General Subpoena, supporting Declarations and the Exhibits attached thereto, it is hereby

ORDERED that the United States’ Petition for Summary Enforcement of Inspector General Subpoena (Docket No. 1) is **DENIED** in its entirety with prejudice.

It is so **ORDERED** on this ____ day of _____ 2013.

HON. ALAN KAY
United States Magistrate Judge