September 13, 2018

Aaron Washington
U.S. Department of Education
400 Maryland Avenue SW
Room 294-12
Washington, DC 20002

RE: Public Comments for Docket Number ED-2018-OPE-0076

To Whom It May Concern:

Thank you for the opportunity to submit these public comments into the above-referenced rulemaking docket at the Department of Education (ED). These comments are submitted on behalf of the Wisconsin Institute for Law & Liberty (WILL), a non-profit law and policy center based in Milwaukee, Wisconsin. WILL’s mission is to advance the public interest in the rule of law, individual liberty, constitutional government, and a robust civil society.

ED announced its intention to convene a negotiated rulemaking committee, and solicited “written comments on the topics suggested by the Department and suggestions for additional topics that should be considered for action by the negotiating committee.”¹ In response to that request, WILL respectfully submits these comments.

We are excited that ED has begun the process of reviewing these regulations. As outlined herein, the statutory constraints of the HEA largely work against the type of wholesale changes that are needed to truly reform the higher education system. That said, while the structural constraints of the Higher Education Act (HEA) largely work against significant changes to the status quo, there are some general guiding principles which the committee can work within to begin the improvement process.

I. Statutorily Mandated Committee Structure

We begin these comments by noting that the negotiated rulemaking committee will have structural faults that may not lend themselves well toward making significant changes. As a result of the statutory scheme of the HEA, any reform to the status quo will largely have to be made by those who are likely to have a vested interest in that status quo.

¹ See Federal Register, Vol. 83, No 147, p. 36814, Tuesday, July 31, 2018.
As the federal register notice announcing this rulemaking action indicates, Section 492 of the Higher Education Act (HEA)\textsuperscript{2} provides: “[p]articipants in the negotiations process shall be chosen by the Secretary from individuals nominated by”\textsuperscript{3} certain groups. Those groups are defined by the HEA as “groups involved in student financial assistance programs under this subchapter, such as students, legal assistance organizations that represent students, institutions of higher education, State student grant agencies, guaranty agencies, lenders, secondary markets, loan servicers, guaranty agency servicers, and collection agencies.”\textsuperscript{4}

Institutes of higher education must be accredited in order to be eligible for federal aid dollars under the HEA. Degree seeking students are thus drawn to such institutions and the educational programming they offer. The current accreditation-based higher education system encourages and rewards those who embrace the status quo. Too much innovation or change runs the risk of losing accreditation, and thus being cut off from the massive pool of students who are financially backed by the federal government.

While ED has made a commitment to selecting a diverse negotiating committee (stating in the rulemaking notice: “…we will select from the nominees individual negotiators who reflect the diversity among program participants.”\textsuperscript{5}), as noted above, the HEA is limiting in who may nominate such individuals. That is, those individuals nominated are, by and large, going to come from the very system that benefits off the current status quo. The limits of this rulemaking process fail to recognize a variety of other interested parties and groups who may be able to provide valuable input during negotiations.

As a result, ED should take great care when selecting committee participants and must acknowledge that some nominees (and ultimately some committee members) may, in fact, have a vested interest against any type of significant change to the status quo. While the committee may represent diverse interests from among the nominating parties, it is unlikely that they represent a wide cross section of interested parties as a whole (there are many interested in the success of this program who are not “involved in student financial assistance programs” as required by the HEA).

When establishing the committee, consideration should be given to select participants who are willing to challenge the status quo, otherwise this entire process will be for naught.

\textbf{II. Embracing Competitive Federalism}

Once the structure of the committee is in place, ED should ensure that the committee engages in a discussion of reforming the current accreditation system through an embrace of competitive federalism. In this way, the system can use competition as a means of spurring innovation and driving down costs for students.

\textsuperscript{2} 20 U.S.C. 1098a
\textsuperscript{3} 20 USC 1098a(b)(1)
\textsuperscript{4} 20 USC 1098a(a)(1)
\textsuperscript{5} See Federal Register, Vol. 83, No 147, p. 36815, Tuesday, July 31, 2018
The current system is almost entirely controlled by the federal bureaucracy. Regional accreditors who have been approved by ED set accreditation standards and work with higher education institutions to determine if they’re being met. A loss of accreditation would essentially force most any institution of higher learning to close down. In this way, those institutions are beholden to their accreditor. This connection between institutions of higher education and their accreditors is what largely maintains the status quo. Injecting competition or alternatives into this process would free institutions to move toward innovation, and would encourage new participants to engage in the area of higher education.

The goal of ensuring education quality while still allowing for innovation in higher education can be achieved through an embrace of competitive federalism. That is, do what our nation’s founding fathers envisioned from the start: allow the states a greater role to participate in this process.

Within the limitations of the HEA, and to the greatest extent possible, the committee should be instructed to find solutions that move away from the regional accreditation based system that we have relied upon for decades and establish alternatives that give greater higher education control to the states. Through greater involvement of the states we can foster innovation and new competition in higher education to the benefit of all.

As technology continues to advance, so should the way we consume higher education. Unfortunately, the current accreditation scheme, and the status quo that it propos up, has been too slow to change. This failure to innovate has only been exacerbated by booming tuition rates over the past several decades. We simply are not producing enough graduates in the fields we need, and those that do graduate are often hampered by significant debt loads.

The current system works very well for a great number of students who graduate and find gainful employment each year, but there is still so much more that can and must be done. With places like our home state of Wisconsin that having “an abundance of job openings, but not enough workers to fill them”7 – it is more important than ever that our higher education institutions are able to innovate and fill those growing workforce needs.

Utilizing the states as laboratories for higher education improvement makes perfect sense, and it’s specifically in line with what our founding fathers envisioned and our constitution requires. The federal education bureaucrats and their regional accreditation partners have done little to improve the system and have simply rewarded the status quo for decades.

While the committee will be limited in what it can do within the current HEA, ED should make it clear that embracing competitive federalism and encouraging more competition ought to be a part of the discussion going forward.

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6 According to *US News & World Report*, over the past twenty years CPI inflation has increased 52.7%, while at the same time tuition at national private universities is up 157% and in-state tuition at national public universities is up 237%. Report available at https://www.usnews.com/education/best-colleges/paying-for-college/articles/2017-09-20/see-20-years-of-tuition-growth-at-national-universities

Thank you again for the opportunity to provide these comments. We certainly look forward to following the committee’s work going forward.

Sincerely,

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