

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 02-80373-CIV-RYSKAMP  
MAGISTRATE: VITUNAC

INTERNATIONAL SCHOOL OF  
MIDWIFERY and ALAN HUBER

Plaintiffs,

v.

MIDWIFERY EDUCATION  
ACCREDITATION COUNCIL

Defendant.

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**AMICUS CURIAE BRIEF OF THE ASSOCIATION OF SPECIALIZED  
AND PROFESSIONAL ACCREDITORS IN SUPPORT OF  
MOTION OF DEFENDANT MIDWIFERY EDUCATION  
ACCREDITATION COUNCIL TO DISMISS COMPLAINT**

The Association of Specialized and Professional Accreditors (“ASPA”) submits this Amicus Curiae Brief in support of the Motion of Defendant Midwifery Education Accreditation Council (“MEAC”) to Dismiss the Complaint.

**Identity of Amicus Curiae**

ASPA is a private, not for profit corporation that includes 47 member organizations, all of which are accreditors of specialized and professional education programs and schools in the United States. ASPA’s member organizations are listed in Appendix A to this brief.<sup>1</sup> It works

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<sup>1</sup> MEAC is not a member of ASPA. However, it does meet the requirements for ASPA membership.

with higher education and government officials to enhance education and accreditation, and it functions as the only national voice for specialized and professional accreditation. It is headquartered in Chicago, Illinois, and is organized under the laws of the District of Columbia.

ASPA's members set national educational standards for programs and schools in nearly 50 specialized disciplines and defined professions. About two thirds of the ASPA members are recognized by the United States Department of Education ("USDE") as complying with the recognition criteria for accreditors prescribed in federal regulation, and thus as "reliable authorities regarding the quality of education or training offered by the institutions or programs they accredit."<sup>2 3</sup>

**Interest of ASPA as Amicus Curiae in This Case**

In addition to recognition by USDE, ASPA members share other characteristics with MEAC:

- (a) all ASPA members are private, as opposed to government, organizations;
- (b) all ASPA members accredit programs or schools throughout the United States;
- (c) almost all ASPA members (43) currently accredit programs or schools in Florida;
- (d) all ASPA members enter into agreements with accredited entities and prospective accredited entities whereby the accreditors agree to process applications or reapplications for accreditation pursuant to the accreditors' rules and policies, and the entities agree to pay a fee (usually approximating costs) and to follow the accreditors' rules and policies for accreditation;

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<sup>2</sup> 34 CFR 602.1(a).

<sup>3</sup> One significance of accreditor recognition by USDE is that, pursuant to several federal statutes, students who attend programs and schools that they accredit are eligible for federal student loans.

- (e) all ASPA members maintain confidentiality policies that are part of their accreditation rules and policies; and
- (f) some ASPA members accredit programs or schools that engage in health care education and clinical training, and are located in states with statutes that protect accreditation documents in the possession of accreditors from disclosure because they are health care quality assurance or peer review records.

The documents requested by plaintiffs<sup>4</sup> fall roughly into four categories: (1) documents relating to the plaintiff school, including the accreditation process and decision; (2) documents related to other Florida schools of midwifery accredited by MEAC; (3) documents related to schools of midwifery outside of Florida; and (4) other documents, such as correspondence between MEAC and its board of directors, that relate to MEAC generally, as opposed to particular schools.

A ruling in this case that such records in the possession of MEAC must be produced to plaintiff school under the Florida Public Records Act would cause ASPA members that accredit programs and schools in Florida to reassess and likely to alter their accreditation practices as they relate to programs and schools in Florida.

**Source of Authority for ASPA to File Amicus Curiae Brief**

ASPA submits this Amicus Curiae Brief subject to this Court's granting the Motion of ASPA for leave to file its Amicus Curiae Brief.

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<sup>4</sup> See, Complaint for Violation of Public Records Statute F.S. §119 and Petition for Immediate Hearing ("Complaint"), Exhibit E, Items 1-10.

## Argument

### 1. Plaintiffs' Theory

Apparently, it is plaintiff's theory that the requested documents are "public records," as defined in the Florida Public Records Act ("Act"),<sup>5</sup> as they were "made or received pursuant to law or ordinance or in connection with the transaction of official business" by MEAC, a private agency, acting on behalf of the Florida Council of Licensed Midwifery ("FCLM"), a Florida state agency,<sup>6</sup> which is an advisory body to the Florida Department of Health ("FDOH"), also a Florida state agency.

Plaintiffs state two variations on this theory in the Complaint:

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<sup>5</sup> "Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record or the custodian's designee...." F.S. 119.07(1)(a).

"Public records' means all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." F.S. 119.011(1).

"Agency' means any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency." F.S. 119.011(2).

<sup>6</sup> (3) The council [of Licensed Midwifery] shall:

(a) Assist and advise the department [of Health] in developing rules relating to: training requirements, including core competencies, for persons training to become licensed midwives; the licensure examination; fees; the informed consent form; responsibilities of midwives; emergency care plans; records and reports to be filed by licensed midwives; and other regulatory requirements developed by the department.

(b) Assist the department in developing rules to implement s. [467.205](#), relating to approval of midwifery training programs.

(c) Monitor and inform the department on the practice of midwifery in other states and countries by persons who are not nurses.

(d) Educate the public and other providers of obstetrical care about the role of licensed midwives.

(e) Collect and review data regarding licensed midwifery.

(f) Recommend changes in the Midwifery Practice Act to the department and the Legislature.

(g) Address concerns and problems of practicing licensed midwives in order to promote improved safety in the practice of midwifery.

F.S. 467.004(3).

FCLM and/or FDOH has delegated to MEAC certain functions that FDOH is required to carry out pursuant to F.S. §467.009(1)(B) and Rule 64B24.4.002,<sup>7</sup> concerning the approval or disapproval of midwifery schools.<sup>8</sup>

Defendant, MEAC, has also acted and continues to act on behalf of the Florida Department of Education (hereinafter, “FDOE”) in that FDOE has delegated to MEAC its functions, pursuant to F.S. §467.009(7),(8) and Rule 64B.24.4.002(1)(a), regarding accreditation of midwifery schools as an element of the licensing of such schools.<sup>9</sup>

Under the first variation, plaintiffs apparently assert: (1) the FDOH licenses midwives;<sup>10</sup> (2) one requirement for licensure is that an applicant shall have completed an “approved program” in midwifery;<sup>11</sup> (3) for this purpose, FDOH approves programs in midwifery<sup>12</sup> and

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<sup>7</sup> Rule 64B24-4.002. Approval of Training Program.

(1) Provisional approval shall be granted by the department to an organization to initiate a midwifery training program when it has presented documentation satisfactory to the department that it meets the following criteria:

(a) The training program shall be conducted in either an accredited public institution, or in a non-public institution licensed by the State Board of Independent Postsecondary Vocational, Technical, Trade and Business Schools and which is actively seeking accreditation by a member of the Council on Postsecondary Accreditation. All training programs shall include both classroom instruction and clinical training;

(b) The time required to complete the training program shall be pursuant to Section 467.009(2), F.S.;

(c) Educational Objectives pursuant to Rule 64B24-4.004, F.A.C.;

(d) Faculty pursuant to Rule 64B24-4.005, F.A.C.;

(e) Curriculum pursuant to Rule 64B24-4.006, F.A.C.;

(f) Clinical Training pursuant to Rule 64B24-4.007, F.A.C.; and

(g) Administrative Procedures pursuant to Rule 64B24-4.008, F.A.C.

(2) Training programs which have been granted provisional approval may be granted full approval upon demonstration to the department they are in compliance with established standards of the department, and at least 80 percent of the first graduating class qualified for licensure.

(3) A training program may be placed on probationary status when the department determines that the program falls below established standards, or fewer than 80 percent of the graduates qualify for licensure. Probationary status shall be on an individual basis for a specified period of time not to exceed 12 months.

(4) The department shall rescind approval of any training program which fails to meet standards established by this chapter, or fails to make satisfactory progress for corrections of deficiencies within the probationary time period designated by the department.

(5) Any training program having its approval rescinded shall have the right to reapply.

(6) The department shall, at least once every 3 years, audit the approval status of all training programs to determine if the program is in compliance with established standards.

<sup>8</sup> Complaint, Par. 3.

<sup>9</sup> Complaint, Par. 3.

<sup>10</sup> See, F.S. 467.003(6).

<sup>11</sup> See, F.S. 467.003(1); F.S. 467.205.

<sup>12</sup> See, F.S. 467.205.

develops rules for approval of programs in midwifery;<sup>13</sup> (4) in developing rules for approval of programs in midwifery for this purpose, FDOH is advised by the Florida Council of Licensed Midwifery (“FCLM”);<sup>14</sup> and (5) either (a) FDOH has delegated to MEAC the function of approval of programs in midwifery, or (b) FCLM has delegated to MEAC the function of advising FDOH in developing rules for approval of programs in midwifery.

Under the second variation, plaintiffs apparently assert that the Florida Department of Education licenses schools of midwifery.<sup>15</sup> Plaintiffs attach to the Complaint a Florida Department of Education letter that states that the FCLM and the State Board of Nonpublic Career Education “rely on MEAC.”<sup>16</sup>

Plaintiffs do not allege a precise connection between MEAC and the Department of Education resulting in its reliance upon MEAC. However, in this regard, ASPA urges the Court to take judicial notice of the following, which appears on the website of the State of Florida, Department of Education, at <http://www.firn.edu/doe/choice/acc.htm>:

***Accreditation of Private Schools in Florida June 2001***

Private schools operate as businesses or churches and are regulated accordingly. **They are not licensed, approved, accredited or regulated as schools by the state.** Accreditation is not a state function and state law does not require that private schools be accredited. There is no provision for state recognition of the various agencies that accredit private schools. All public and state university system schools in the southeastern states are regionally accredited by the Southern Association of Colleges and Schools (**SACS**). Many private schools are also SACS accredited. Those with accreditation other than SACS have adopted the academic and professional standards of an independent accrediting organization, usually affiliated with their religion or educational philosophy. There are many organizations, with widely variant quality standards and program requirements that accredit private schools. Consequently, the acceptance of diplomas,

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<sup>13</sup> See, F.S. 467.004(b).

<sup>14</sup> See, F.S. 467.004(b).

<sup>15</sup> See, F.S..009(8) (for nonpublic schools); but see, F.S. 467.009(7)(for public schools).

<sup>16</sup> Complaint, Exhibit C.

transcripts and transfer credits from private schools will be according to the requirements of the receiving institution. Requests for information about the accreditation of a specific school should be directed to the school staff or its designated accrediting agency. Requests for information about the acceptance of transfer credits from private secondary schools should be directed to the receiving school's admissions office. For admission to higher education programs, direct questions to the particular program's admissions office.

## **2. Facts**

Apparently, the International School of Midwifery, located in Miami Beach, Florida, applied for initial accreditation with MEAC located in Flagstaff, Arizona. Per MEAC's rules and procedures, plaintiff school likely paid MEAC a fee for its accreditation services. MEAC processed this application pursuant to its rules and procedures, and denied initial accreditation.

After MEAC's issuance of the accreditation decision, plaintiff school made a demand under the Florida Public Records Act that MEAC produce ten categories of documents.<sup>17</sup>

MEAC refused to produce these documents under the Florida Public Records Act, stating that the records in its possession do not fall within the scope of that Act.<sup>18</sup> Plaintiff school and its administrative vice-president have now sued MEAC to enforce its demand under the Florida Public Records Act for the documents.

## **3. Private Accreditation**

Accreditation is a credential sought from an accreditor by a program or school, and signifying that the accreditor has determined that the program or school substantially complies with the accreditor's accreditation standards. A program or school expects that its achievement of this credential will help it attract students, who in turn recognize that numerous persons, organizations and agencies place trust in and therefore rely upon the credential.

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<sup>17</sup> Complaint, Exhibit E.

<sup>18</sup> See, Complaint, Exhibit H.

Accreditation consists, basically, of three functions: (1) the establishment and periodic revision of publicly available accreditation standards; (2) the making of accreditation decisions, i.e., the measuring of compliance by programs and schools with accreditation standards; and (3) the accreditor's publication to the general public of a program or school's accreditation status in written materials, on websites, and otherwise. While administrative staff handle the day-to-day work of accreditation, each accrediting body has a trained volunteer decision-making body which is responsible for all accreditation actions. The decision-making body of USDE-recognized specialized accreditors must include both educators and practitioners and one volunteer public member for every seven members from the discipline.

The accredited entity or prospective accredited entity initiates the accreditation process by submitting a completed application (usually elaborate) to the accreditor, together with an accreditation fee. The accreditor processes the completed application pursuant to its rules and procedures, which process usually includes review of the application, a site visit (including interviews of students and school/program personnel) to confirm the information in the application and to gather additional information, an initial accreditation decision based on a testing of the facts relating to the program/school against the accreditor's accreditation standards, and (on occasion) an appeal of the initial decision, resulting in a final decision, which is made public.

#### **4. State Agencies Rely Upon Accreditation Decisions Without Accreditors' Acting "on Behalf of" the State Agencies**

Numerous persons and entities, throughout the United States and in some cases throughout the world, learn of accreditors' accreditation decisions and rely on the decisions. One example of such reliance is the United States Department of Education, which maintains a

formal recognition process for educational accreditors, and deems recognized accreditors as “reliable” for purposes specified in the recognition regulation.<sup>19</sup>

Pursuant to statute and regulation, state licensing boards often accept evidence of training in accredited programs and schools in satisfaction of educational requirements for professional licensure of individuals, and of requirements for licensure of schools. Also pursuant to statute and regulation, state and federal agencies responsible for administering government loan and grant programs accept evidence of enrollment in accredited programs and schools in satisfaction of loan and grant eligibility requirements. Students, prospective students, professional certifying boards and the general public also rely upon accreditors’ decisions. Accredited programs and schools that substantially comply with established educational accreditation standards are generally viewed as providing a quality educational experience for their students.

Instead of relying on accreditors’ decisions, government agencies could, and sometimes do, engage and rely on their own resources to gather information for decision making. There are disadvantages in doing this, not the least of which is cost to the state. There are also differences in approach, with the state relying on subpoena power to obtain information, and accreditors relying upon information usually produced in confidence and with the inducement that the peer review aspect of the accreditation process will result in the overall improvement of the accredited entity.

Ordinarily, there is no contractual relationship between the private accreditor and a government agency. Indeed, as stated above, the contractual relationship is with the accredited entity. The private accreditor unilaterally makes an accreditation decision, and it places the

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<sup>19</sup> “The Secretary recognizes accrediting agencies to ensure that these agencies are, for the purposes of the Higher Education Act of 1965, as amended (HEA), or for other Federal purposes, reliable authorities regarding the quality of education or training offered by the institutions or programs they accredit.” 34 CFR 602.1(a)

decision in the public domain. The government agency unilaterally decides to rely upon a particular accreditation decision of a private accreditor, or more commonly, upon all the accreditation decisions of a private accreditor.

The process by which USDE recognizes accreditors is stated in federal regulation, and it includes an application for recognition submitted to USDE by the accreditor. In contrast, most state agencies have no formal recognition process for accreditors. Instead, the accreditor is usually identified by name or discipline in statute, regulation or regulatory resolution, without the accreditor's having participated in any formal recognition process.

Also common in statute, regulation and regulatory resolution is the identification of a private agency that, in turn, conducts its own recognition process for accreditors, i.e., the Commission on Recognition of Postsecondary Accreditors (CORPA), or the current private recognizing agency. In these cases, pursuant to statute, regulation or regulatory resolution, the state agency recognizes as "reliable authorities" those accreditors that have, in turn, been recognized by the identified private agency.

Florida statute relating to the Department of Health recognizes an accreditor that is a "member" of CORPA.<sup>20</sup> The Complaint does not address this Florida statute, and it does not allege that MEAC is a member of CORPA.

Plaintiffs allege no contract between plaintiff school and MEAC, or anything other than a unilateral reliance upon MEAC's accreditation decisions. Thus, plaintiff school apparently had an accreditation agreement with MEAC pursuant to which it paid an accreditation fee, participated in an accreditation process, and received an accreditation decision. Thereafter, in

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<sup>20</sup> "Nonpublic educational institutions that conduct approved midwifery programs shall be accredited by a member of the Commission on Recognition of Postsecondary Accreditation and shall be licensed by the State Board of Nonpublic Career Education." F.S. 467.009(8).

the ordinary course, MEAC would have placed that decision in the public domain, as it must do as an accreditor recognized by USDE.<sup>21</sup> One or more Florida state agencies may have learned of, and unilaterally decided to rely upon, the accreditation decision.

MEAC maintains records relating to plaintiff school, including the accreditation process and decision. These documents were not “made or received pursuant to law or ordinance or in connection with the transaction of official business” of a Florida state agency. These documents are not maintained by MEAC, acting on behalf of a Florida state agency. These documents are not public records under the Florida Public Records Act.

MEAC maintains records relating to several other Florida schools. Assuming that MEAC followed similar procedures resulting in the accreditation decisions addressing these schools, these documents also were not “made or received pursuant to law or ordinance or in connection with the transaction of official business” of a Florida state agency. These documents are not maintained by MEAC, acting on behalf of a Florida state agency. These documents are not public records under the Florida Public Records Act.<sup>22</sup>

MEAC maintains documents relating to schools outside the State of Florida. These documents were not “made or received pursuant to law or ordinance or in connection with the

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<sup>21</sup> 34 CFR 602.26.

<sup>22</sup> Miami-Dade Community College Midwifery Program is part of a public school, and licensure by the Department of Education is not dependent upon accreditation. F.S. 467.009(7).

In addition, plaintiffs allege that Miami-Dade Community College “pays dues and/or membership contributions to MEAC, as a result of which all financial, business and membership records regarding MDCC which are in MEAC’s possession must be made available for inspection and copying pursuant to F.S. §119.012.” Complaint, Par. 7. But fees paid for accreditation services are not “dues or membership contributions” under F.S. §119.012. See, F.S. 216.345.

Finally, two of the schools that are subjects of plaintiffs’ record request, Florida School of Traditional Midwifery and Miami-Dade Community College Midwifery Program, may have been accredited by MEAC before any agency of the State of Florida began to rely upon the accreditation decisions of MEAC. See, Complaint, Exhibit D, p. 1 (“MEAC accreditation”). Assuming this is true, the Complaint does not allege how MEAC was acting on behalf of a Florida state agency prior to such reliance.

transaction of official business” of a Florida state agency. These documents are not maintained by MEAC, acting on behalf of a Florida state agency. These documents are not public records under the Florida Public Records Act.

MEAC maintains other documents, such as correspondence between MEAC and its board of directors, relating to MEAC generally, as opposed to particular schools. These documents were not “made or received pursuant to law or ordinance or in connection with the transaction of official business” of a Florida state agency. These documents are not maintained by MEAC, acting on behalf of a Florida state agency. These documents are not public records under the Florida Public Records Act.

## **5. Confidentiality and Accreditation**

Almost all ASPA members (43) currently accredit programs or schools in Florida. Likewise, all ASPA members maintain policies relating to the confidentiality of accreditation information and materials in their possession.<sup>23</sup> Adherence to confidentiality policies is vital to the operation of the accreditation process of ASPA members and, indeed, all accreditors.

Intrinsic to private accreditation is the promotion of candor within its process, which may include constructive criticism that leads to improvement in the educational quality of a program or school. Maintaining confidentiality within the accreditation process promotes candor. Personnel within accredited entities are more forthright and candid because they trust that the

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<sup>23</sup> ASPA members subscribe to the ASPA “Member Code of Good Practice,” (see, [www.aspa-usa.org](http://www.aspa-usa.org)) which provides, among other things, that each member “Exhibits integrity and professionalism in the conduct of its operation. . . . Demonstrates continuing care with policies, procedures, and operations regarding due process, conflict of interest, confidentiality, and consistent application of standards.” (emphasis provided).

information they disclose during the accreditation process will be used solely within that process and will not be otherwise released.<sup>24</sup>

Accreditors follow their confidentiality policies when investigating complaints that may impact the quality of the educational program. Students who believe that a program or school's failure to comply with accreditation standards is harming their education do contact accreditors. Faculty members or other "whistle blowers" connected to the program also contact accreditors. They often ask that the accreditor protect their identity while the complaint is investigated. Per its confidentiality policy, the accreditor contacts the program about the complaint without identifying the complainant, unless the complainant authorizes the disclosure of his/her identity. The accreditor restricts the use of the information received from the complainant and any investigation to the accreditation process.

Disclosure of accreditation records under public record laws (of any state, not just Florida) would have a "chilling effect" on the accrediting agency's ability to receive full and frank information and would ultimately reduce confidence in the quality assurance aspect of accreditation. This would be harmful to all who now rely on accreditation, including the public and prospective students.

An accrediting agency has no power to compel programs seeking accreditation to submit complete and accurate information, but must rely on programs and schools that apply for accreditation to provide information willingly. Assurance of confidentiality allows programs and schools to provide sensitive and sometimes proprietary information without fear of misuse by

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<sup>24</sup> Confidentiality is less important to the state regulatory process, inherent in which is the power to compel testimony and production of documents.

third parties who might wish to access confidential information for reasons unrelated to accreditation.

Lack of access to full information (because it is not protected and confidential) would hinder the ability of accreditors to do their job, which is to foster the provision of adequate training consistent with national standards. A ruling that accreditation records relating to programs and schools in Florida are subject to the Florida Public Records Act would destroy the confidentiality element of the process, and weaken accreditation. A ruling that the records of the accrediting agency relating to programs, schools, and general matters not directly related to Florida are subject to the Florida Public Records Act would create even broader harm. Accreditors would simply have to step back and decide, each individually, how much their performing accreditation functions in Florida would adversely affect their accreditation activities generally, and what to do about it.

#### **6. Federal Law Preempts the Florida Public Records Act**

It is manifest in the regulations governing USDE recognition of accreditors that the accreditation process of such accreditors is to be maintained as confidential. One such regulation refers to “the independence and confidentiality of the accreditation process.”<sup>25</sup> A second regulation refers to “confidential agency materials.”<sup>26</sup>

These two regulations were published as final in the Federal Register in 1999,<sup>27</sup> and they went into effect on July 1, 2000. However, they have remained in their current form since being

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<sup>25</sup> 34 CFR 602.14(c)(2).

<sup>26</sup> 34 CFR 602.30(c).

<sup>27</sup> 64 Fed. Reg. 56611 (October 20, 1999).

published in final form in 1994.<sup>28</sup> The United States Secretary of Education addressed the second of these regulations in the April 29, 1994 Federal Register:

The Secretary is aware that most accrediting agencies currently have confidentiality policies that prevent them from releasing information about an accredited institution or program to a third party without the prior approval of the institution. The Secretary is also aware that confidentiality is an important aspect of the peer review system on which accreditation is based.<sup>29 30</sup>

The recognition statute and its regulations stipulate that certain information be made public.<sup>31</sup> This is consistent with the accreditor's role, i.e., using confidential information to create decisions which are made public, and upon which the public may rely.

As a condition of continued USDE recognition, MEAC and other recognized accreditors must comply with document retention requirements that are prescribed in the recognition regulations:

**Administrative and fiscal responsibilities.**

The agency must have the administrative and fiscal capability to carry out its accreditation activities in light of its requested scope of recognition. The agency meets this requirement if the agency demonstrates that--

- (b) The agency maintains complete and accurate records of--
  - (1) Its last two full accreditation or preaccreditation reviews of each institution or program, including on-site evaluation team reports, the institution's or program's responses to on-site reports, periodic review reports, any reports of special reviews conducted by the agency between regular reviews, and a copy of the institution's most recent self-study; and

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<sup>28</sup> At intervals, the Secretary of the United States Department of Education issues new criteria for USDE recognition of accrediting agencies. The current recognition regulations implemented the 1998 reauthorization of the Higher Education Act of 1965. They were published in final form in the Federal Register in 1999, and went into effect on July 1, 2000. The current recognition regulations superceded regulations that implemented the 1992 reauthorization of the Higher Education Act of 1965. These were published in final form in 1994 and went into effect on July 1, 1994.

<sup>29</sup> 59 Fed. Reg. 22267.

<sup>30</sup> This comment addressed 34 CFR 602.4, which is now 34 CFR 602.30, and it was made in response to comments on proposed regulations.

<sup>31</sup> See, 20 USC §1099b(a)(8); 20 USC §1099b(c)(5); 20 USC §1099b(c)(6); 34 CFR 602.23(a).

(2) All decisions regarding the accreditation and preaccreditation of any institution or program, including all correspondence that is significantly related to those decisions.<sup>32</sup>

Yet, the Florida Public Records Act contains conflicting document retention requirements:

**Destruction of records regulated.--**

(1) Every public official shall systematically dispose of records no longer needed, subject to the consent of the records and information management program of the Division of Library and Information Services of the Department of State in accordance with s. 257.36.

(2) Agency orders that comprise final agency action and that must be indexed or listed pursuant to s. 120.53 have continuing legal significance; therefore, notwithstanding any other provision of this chapter or any provision of chapter 257, each agency shall permanently maintain records of such orders pursuant to the applicable rules and guidelines of the Department of State.<sup>33</sup>

The scheme of federal regulation of USDE recognized accreditors is sufficiently comprehensive that the federal government left no room for state regulation relating to disclosure of documents and information. Thus, the Florida Public Records Act as applied to USDE recognized accreditors is preempted by federal law.

**7. FERPA Student Record Privacy**

Schools that receive federal funding must comply with the Family Educational Rights and Privacy Act (“FERPA”) in order to retain their funding.<sup>34</sup> Under FERPA, access to student “educational records” is restricted. However, there is an express exception to FERPA allowing access to “accrediting organizations in order to carry out their accrediting functions.”<sup>35 36</sup> Once

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<sup>32</sup> 34 CFR 602.15

<sup>33</sup> F.S. 119.041

<sup>34</sup> 20 USC 1232g.

<sup>35</sup> 20 USC 1232g(b)(1)(G); 34 CFR 99.31 (a)(7).

<sup>36</sup> A fundamental part of the accreditation site visit is accessing original documents and data, which sometimes includes student records, (a) to verify information that has been presented to the accreditor by the program or school (.continued)

disclosed, the records are subject to redisclosure restrictions.<sup>37</sup> Also, an accreditor would not be carrying out its accrediting functions by disclosing FERPA protected records outside the accreditation process.

Plaintiffs' demand for production of documents does not except any documents that MEAC might possess that are protected by FERPA, and it certainly does not contain any student consents under FERPA. Thus, if the documents demanded by plaintiffs are ruled to be "public records" under the Florida Public Records Act, their disclosure would be preempted by provisions of FERPA.

#### **8. Peer Review/Quality Assurance Statutes**

MEAC accredits programs and schools that engage in clinical health care training. As such, the records of some accrediting agencies are protected from disclosure by quality assurance/peer review statutes. Several reported cases have held that records of the Joint Commission on Accreditation of Health Care Organizations are protected from disclosure by such statutes.<sup>38</sup> In some states, the peer review statute does not extend beyond the strict hospital peer review setting. Other states have statutes that are much broader. The Illinois statute, for

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in aggregate or more generalized form, (b) to determine whether information is being maintained in compliance with accreditation standards, and (c) to gather information in investigation of a complaint or other allegation (from a whistleblower, for example).

<sup>37</sup> 20 USC 1232g(b)(4)(B); 34 CFR 99.33.

<sup>38</sup> See, e.g., Variety Children's Hospital v. Mishler, 670 So.2d 184, 185-186 (Fla. Dist. Ct. App. 1996) (Joint Commission's compliance surveys were privileged under Florida law); Niven v. Siquiera, 109 Ill.2d 357, 366, 487 N.E.2d 937, 942, 94 Ill.Dec. 60, 65 (Ill. 1985) (materials in the hands of the Joint Commission are privileged under Illinois law); Humana Hospital Corporation, Inc. v. Spears-Petersen, 867 S.W.2d 858, 862 (Tex. Ct. App. 1993) (Joint Commission's accreditation reports are privileged from discovery under Texas law); Hofflander v. St. Catherine's Hospital, Inc., 247 Wis.2d 636, 635 N.W.2d 13, 2001 WL 943163 (Wis.App. 2001); Zion v. New York Hospital, 183 A.D.2d 386, 590 N.Y.S.2d 188 (N.Y.App. 1992).

example, extends well beyond the hospital setting, and is clearly broad enough to encompass records of educational accreditors.<sup>39</sup>

In addition, it is common for accredited health care clinical training programs to be sponsored by or to rotate through facilities of the Veterans Health Administration, which has its own quality assurance statute.<sup>40</sup> One reported case has held that JCAHO records relating to a VHA facility fell within this quality assurance statute.<sup>41</sup>

A ruling that MEAC's records fall within the Florida Public Records Act may very well conflict with state and federal quality assurance/peer review statutes if any MEAC accredited schools are located in or rotate through facilities subject to state or federal peer review/quality assurance laws.

## **9. Patient Privacy**

It is likely that midwifery education includes supervised student clinical training on actual patients. If this is the case, MEAC records may contain patient identified health information (examples are patient complaints and lists of procedures by student and patient). If this is true, the disclosure of MEAC records under the Florida Public Records Act would likely conflict with state and federal patient privacy laws.

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<sup>39</sup> 735 ILCS 5/8-2101.

<sup>40</sup> 38 USC §5705.

<sup>41</sup> Utterback v. United States, 121 F.R.D. 297 (W.D.Ky. 1987).

**Conclusion**

The Association of Specialized and Professional Accreditors respectfully urges this Court to grant the motion of Midwifery Education Accreditation Council to dismiss the Complaint.

ASSOCIATION OF SPECIALIZED AND  
PROFESSIONAL ACCREDITORS

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**Appendix A**  
**ASPA Membership Roster**  
 FY2001 - 2002

<b>ACUPUNCTURE</b>	Accreditation Commission for Acupuncture and Oriental Medicine (ACAOM); Greenbelt, MD
<b>ALLIED HEALTH</b>	Commission on Accreditation of Allied Health Education Programs (CAAHEP); Chicago, IL; (CAAHEP's membership in ASPA includes 17 allied health professions or occupations)
<b>ARCHITECTURE</b>	National Architectural Accrediting Board (NAAB); Washington, DC
<b>ART &amp; DESIGN</b>	National Association of Schools of Art and Design (NASAD); Reston, VA
<b>BUSINESS</b>	Association to Advance Collegiate Schools of Business (AACSB International); St. Louis, MO
<b>CHIROPRACTIC</b>	Commission on Accreditation: Council on Chiropractic Education (CCE-CoA); Scottsdale, AZ
<b>CLINICAL LABORATORY SCIENCES</b>	National Accrediting Agency for Clinical Laboratory Sciences (NAACLS); Chicago, IL
<b>CONSTRUCTION</b>	American Council for Construction Education (ACCE); Monroe, LA
<b>COUNSELING</b>	Council for Accreditation of Counseling and Related Educational Programs (CACREP); Alexandria, VA
<b>DANCE</b>	National Association of Schools of Dance (NASD); Reston, VA
<b>DENTISTRY</b>	Commission on Dental Accreditation: American Dental Association (ADA-CDA); Chicago, IL
<b>FAMILY &amp; CONSUMER SCIENCES</b>	Council for Accreditation: American Association of Family and Consumer Sciences (AAFCS-CFA); Alexandria, VA
<b>FORESTRY</b>	Committee on Accreditation: Society of American Foresters (SAF-CoA); Bethesda, MD
<b>HEALTH EDUCATION SCHOOLS</b>	Accrediting Bureau of Health Education Schools (ABHES); Falls Church, VA
<b>HEALTH SERVICES ADMINISTRATION</b>	Accrediting Commission on Education for Health Services Administration (ACEHSA); Washington, DC
<b>INDUSTRIAL TECHNOLOGY</b>	National Association of Industrial Technology (NAIT); Ann Arbor, MI
<b>INTERIOR DESIGN</b>	Foundation for Interior Design Education Research (FIDER); Grand Rapids, MI
<b>LANDSCAPE ARCHITECTURE</b>	Landscape Architectural Accreditation Board: American Society of Landscape Architects (LAAB-ASLA); Washington, DC
<b>LIBRARY &amp; INFORMATION STUDIES</b>	Committee on Accreditation: American Library Association (ALA-CoA); Chicago, IL
<b>MARRIAGE &amp; FAMILY THERAPY</b>	Commission on Accreditation for Marriage and Family Therapy Education: American Association for Marriage and Family Therapy (COAMFTE); Washington, DC
<b>MEDICAL EDUCATION</b>	Liaison Committee on Medical Education (LCME); Chicago, IL and Washington, DC
<b>MUSIC</b>	National Association of Schools of Music (NASM); Reston, VA
<b>NATUROPATHIC MEDICINE</b>	Council on Naturopathic Medical Education (CNME); Eugene, OR
<b>NURSE ANESTHESIA</b>	Council on Accreditation of Nurse Anesthesia Educational Programs: American Association of Nurse Anesthetists (COA-NA); Park Ridge, IL
<b>NURSING</b>	Commission on Collegiate Nursing Education (CCNE); Washington, DC
<b>NURSING</b>	National League for Nursing Accrediting Commission (NLNAC); New York, NY

<b>OCCUPATIONAL THERAPY</b>	Accreditation Council for Occupational Therapy Education: American Occupational Therapy Association (ACOTE); Bethesda, MD
<b>OPTOMETRY</b>	Accreditation Council on Optometric Education: American Optometric Association (ACOE); St. Louis, MO
<b>OSTEOPATHIC MEDICINE</b>	Bureau of Professional Education: American Osteopathic Association (AOA-BPE); Chicago, IL
<b>PHARMACY</b>	American Council on Pharmaceutical Education (ACPE); Chicago, IL
<b>PHYSICAL THERAPY</b>	Commission on Accreditation in Physical Therapy Education: American Physical Therapy Association (CAPTE); Alexandria, VA
<b>PHYSICIAN ASSISTANT</b>	Accreditation Review Commission on Education for the Physician Assistant (ARC-PA); Marshfield, WI
<b>PODIATRIC MEDICINE</b>	Council on Podiatric Medical Education: American Podiatric Medical Association (CPME); Bethesda, MD
<b>PSYCHOANALYSIS</b>	American Board for Accreditation in Psychoanalysis, Inc. (ABAP); Rockford, IL
<b>PSYCHOLOGY</b>	Committee on Accreditation: American Psychological Association (APA-CoA); Washington, DC
<b>PUBLIC AFFAIRS &amp; ADMINISTRATION</b>	Commission on Peer Review and Accreditation: National Association of Schools of Public Affairs and Administration (NASPAA-COPRA); Washington, DC
<b>PUBLIC HEALTH</b>	Council on Education for Public Health (CEPH); Washington, DC
<b>RABBINICAL &amp; TALMUDIC EDUCATION</b>	Association of Advanced Rabbinical and Talmudic Schools (AARTS); New York, NY
<b>RADIOLOGIC TECHNOLOGY</b>	Joint Review Committee on Education in Radiologic Technology (JRCERT); Chicago, IL
<b>RECREATION &amp; PARKS</b>	Council on Accreditation: National Recreation and Park Association (NRPA/AALR-CoA); Ashburn, VA
<b>REHABILITATION EDUCATION</b>	Commission on Standards and Accreditation: Council on Rehabilitation Education (CORE); Rolling Meadows, IL
<b>SOCIAL WORK EDUCATION</b>	Division of Standards and Accreditation: Council on Social Work Education (CSWE); Alexandria, VA
<b>SPEECH-LANGUAGE-HEARING</b>	Council on Academic Accreditation in Audiology and Speech-Language Pathology: American Speech-Language-Hearing Association (ASHA-CAA); Rockville, MD
<b>TEACHER EDUCATION</b>	National Council for Accreditation of Teacher Education (NCATE); Washington, DC
<b>TEACHER EDUCATION - MONTESSORI</b>	MACTE Commission: Montessori Accreditation Council for Teacher Education (MACTE-CoA); Kenosha, WI
<b>THEATRE</b>	National Association of Schools of Theatre (NAST); Reston, VA
<b>VETERINARY MEDICINE</b>	Council on Education: American Veterinary Medical Association (AVMA-CoE); Schaumburg, IL