**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**NORTHERN DIVISION**

STEVEN PICARD, M.D.,

*Plaintiff*,

v.

AMERICAN BOARD OF FAMILY MEDICINE,

*Defendant*.
_____/

CASE NO. 13-CV-14552

DISTRICT JUDGE THOMAS L. LUDINGTON
MAGISTRATE JUDGE PATRICIA T. MORRIS

**ORDER DENYING MOTION TO COMPEL DISCOVERY**
(Doc. 21)

## I. Background

The above-referenced motion to compel was referred to the undersigned magistrate judge on October 14, 2014. (Doc. 22.) A detailed factual background for this case is well-stated by United States District Judge Ludington in *Picard v. Am. Bd. of Family Medicine*, No. 13-cv-14552, 2014 WL 1389053, at *10 (E.D. Mich. Apr. 9, 2014).

For purposes of this motion, the following summary suffices. Defendant is a voluntary, non-profit, private corporation who assesses the fitness of physicians who specialize in family medicine. Defendant's governing standards require a physician to possess a valid, full, and unrestricted license to practice medicine in order to be eligible for certification by Defendant. Defendant's definition of a disqualifying restricted license is one where the physician is subject to special conditions, requirements, or limitations which affect, restrict, alter or constrain the practice of medicine, including but not limited to, supervision, chaperoning during patient

examination, limitations on the prescription of medicine, or limitation on the site or type of practice and limitations on hours of work.

Plaintiff is a physician who began practicing medicine in 1989, was certified by Defendant American Board of Family Medicine ("ABFM"), in 1998, was re-certified by ABFM in 2006, and retained his certification until 2011. Plaintiff is a recovering alcoholic and he suffered and self-reported a relapse in January of 2011. The Michigan Board of Medicine's disciplinary subcommittee erroneously suspended Plaintiff's license to practice medicine in March of 2011, but reversed its decision in July of 2011, restoring Plaintiff's license to practice medicine to a full and unrestricted status. Plaintiff has participated in a Health Professionals Recovery Program ("HPRP") several times previously but most recently signed a monitoring agreement with HPRP in April of 2012 that will remain in effect for three years, i.e., until April of 2015.

In November of 2012, Plaintiff was employed as a family physician with MidMichigan Community Health Services in Houghton Lake, Michigan. Plaintiff believed that he was certified by Defendant AMFM as a family physician but, in December of 2012, his employer discovered that Plaintiff was not ABFM certified. Plaintiff contacted Defendant ABFM and was informed that Plaintiff's certification was revoked based on the Michigan Board of Medicine's suspension of Plaintiff's license. Plaintiff appealed to Defendant ABFM, arguing that the suspension was in error and that his license to practice medicine had been fully restored in July 2011 by the Michigan Board of Medicine. Plaintiff contends that he was first informed by Defendant ABFM that his certification would be reinstated but was later told that his certification could not be restored until the conditions/restrictions of the HPRP monitoring agreement were removed. Plaintiff appealed, arguing that his license to practice medicine was fully restored and unrestricted by the Michigan

Board of Medicine. Plaintiff was unsuccessful in his appeal to Defendant ABFM and was terminated from employment in February of 2013 because of his inability to secure ABFM certification.

After a dispositive motion was decided, Plaintiff's remaining claim is that Defendant ABFM violated his common law due process rights under Michigan law. District Judge Ludington has held that Plaintiff has made a substantial showing that his substantial rights were implicated by Defendant ABFM's denial of certification and that Defendant's decision is to be reviewed under the "deferential 'arbitrary and capricious' standard." *Picard,* 2014 WL 1389053, at *10.

The instant motion to compel regards information sought under interrogatories 9, 10, 17-18, 19-20, and 21. (Doc. 21.) These interrogatories ask Defendant ABFM to identify all physicians and produce attendant documents concerning physicians who were granted or denied ABFM certification while subject to monitoring agreements. (Doc. 21.) Defendant responded (Doc. 24), and Plaintiff replied. (Doc. 25.) Oral argument was held on November 24, 2014; thus, the matter is ready for resolution.

## II. Applicable Standard

Under Rule 26(b) of the Federal Rules of Civil Procedure, "the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . ." Fed. R. Civ. P. 26(b)(1). "Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. "Relevant evidence need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). "The scope of discovery

. . . is traditionally quite broad." *Lewis v. ACB Business Services, Inc.*, 135 F. 3d 389, 402 (6th Cir. 1998). However, Rule 26(b)(1) requires a "threshold showing that the requested information is reasonably calculated to lead to the discovery of admissible evidence" in order to avoid the "proverbial fishing expedition, in hope that there *might* be something of relevance." *Tompkins v. Detroit Metro Airport*, 278 F.R.D. 387, 388 (E.D. Mich. 2012). Additionally, "[d]istrict courts have discretion to limit the scope of discovery where the information sought is overly broad or would prove unduly burdensome to produce." *Surles v. Greyhound Lines, Inc.*, 474 F.3d 288, 304-05 (6th Cir. 2007).

## III. Analysis

As indicated above, the common law due process claim under Michigan law[1] is to be reviewed under the "deferential 'arbitrary and capricious' standard." *Picard,* 2014 WL 1389053, at *10. The salient question for purposes of this motion is whether, in reviewing Defendant's decision, the district court's review is limited to the record regarding Defendant's decision as to Plaintiff alone. Defendant contends that this court's review is limited, and thus, that evidence regarding how the board treated other doctors, similarly situated or not, is irrelevant, inadmissible and therefore, not discoverable. (Doc. 24 at 18-19.) Defendant notes that Plaintiff has not filed a disparate treatment claim.[2] (*Id.*) Plaintiff, of course, disagrees and contends that Defendant's decisions as to similarly situated doctors is relevant and discoverable because if other similarly

[1]Defendant has not argued that Plaintiff's state law due process claim is preempted by federal law. *Cf. Lincoln Mem'l Univ. Duncan Sch. of Law v Am. Bar Ass'n*, No. 3:11-CV-608, 2012 WL 137851, at *9 (E.D. Tenn. Jan. 18, 2012) ("state-law due process claim appears preempted by federal law"), citing *Thomas M. Cooley Law School v. Am. Bar Ass'n*, 459 F.3d 705, 712-13 (6th Cir. 2006) and *Chicago Sch. of Automatic Transmissions, Inc. v. Accreditation Alliance of Career Schs. and Colls.*, 44 F.3d 447, 449 (7th Cir. 1994).

[2]It is unclear whether any such claim could have been viable even if it had been filed. *See Lincoln Mem'l Univ. Duncan Sch. of Law,* 2012 WL 137851, at *17-18 (collecting cases).

situated doctors were treated more favorably, then such evidence would tend to show that Defendant acted arbitrarily and capriciously as to Plaintiff. (Doc. 25 at 8-9.) Plaintiff therefore opines that the court may look outside the record of procedures involving the current parties and examine the decisions of the Defendant with respect to other doctors.

The court finds that Defendant's position garners more support from the paucity of case law on the topic. Plaintiff relies on *Dietz v. Am. Dental Ass'n*, 479 F. Supp. 554 (E.D. Mich. 1979). In *Dietz*, the plaintiff doctor sued the American Dental Association ("ADA") for breach of fiduciary duties and violations of the ADA's own constitution, by-laws and governing purposes based on its refusal to provide certification and diplomate status to the plaintiff. *Dietz*, 479 F. Supp. at 555-56. The court held that the decision of a professional association such as the ADA or ABFM should be reviewed under the arbitrary and capricious standard. *Id.* at 557-59. The plaintiff argued that the defendant acted arbitrarily and capriciously in using oral examinations, in grading plaintiff's examination, and in failing to provide notice as to the areas in which he was found to be deficient and an opportunity to be heard to contest such findings. *Id.* at 559-60. The court determined that a genuine issue of material fact remained as to whether the length of the oral examinations and the meager content of the examinations resulted in an arbitrary and capricious decision to deny the plaintiff diplomate status. *Id.* at 561. *Dietz* did not address the salient issue raised by the instant motion to compel. Even using implications from the court's holding, it appears that the court in *Dietz* would focus only on the record of proceedings between the plaintiff and the defendant. The court did not state that it would be referring to the length or breadth of examinations conducted with other dentists. The court stated that the plaintiff would be given the

opportunity to show that the defendant acted arbitrarily "in that his examinations were unduly short or devoid of discussion about endodontics." *Id.*

I have been unable to locate a case involving a private organization that certifies physicians which has expressly stated that a district court's review of the organization's decision should or should not be limited to the record governing the parties to the lawsuit. Review of decisions made by public agencies under the Administrative Procedures Act is limited to the record. 5 U.S.C. § 706; *see also Cline v. Comm'r of Soc. Sec.*, 96 F.3d 146, 148 (6th Cir. 1996). It would seem to follow that review of decisions made by private organizations would also be limited to the record, especially since review of decisions made by private accrediting or certifying organizations is even more limited than review of decisions made by public agencies. *See Soriano v. Neshoba Co. General Hospital Bd. of Trustees*, 486 F. App'x 444, 446 (5th Cir. 2012) (applying arbitrary and capricious standard to due process claim and appearing to limit review to the record); *Austin v. Am. Ass'n of Neurological Surgeons*, 120 F. Supp. 2d 1151, 1152 (N.D. Ill. 2000) (noting that review of the due process claim focused only on whether the association's procedures conformed to fundamental principles of fairness, a standard less strict than judicial standards of due process); *Peoria Sch. of Bus., Inc. v. Accrediting Council for Continuing Edu. and Training*, 805 F. Supp. 579, 583-84 (N.D. Ill. 1992) (applying arbitrary and capricious standard and looking only as to whether the council's internal rules provided a fair and impartial procedure for the plaintiff and whether the council followed its own procedures); *Lincoln Mem'l Univ. Duncan Sch. of Law v. Am. Bar Ass'n*, No. 3:11-CV-608, 2012 WL 137851, at *9 (E.D. Tenn. Jan. 18, 2012) (applying arbitrary and capricious standard to common law due process claim and noting that review of a private organization was "more limited" than review under the administrative procedures act such

that courts should focus on whether the private organization followed a fair procedure with the plaintiff and whether the organization conformed its actions to fundamental principles of fairness and should not engage in de novo review).

More importantly, cases involving analogous private associations that decide whether to provide accreditation for colleges and law schools have expressly held that review should be limited to the record governing the parties to the lawsuit. After noting that decisions of accrediting associations are to be reviewed under the arbitrary and capricious standard, the court stated:

> In applying this standard, courts have refused to consider claims that the school denied accreditation was treated differently, and more severely than other 'similarly situated' schools. Such a claim would require 'a determination by this court that [the accrediting body] was incorrect in its evaluation of [the school], which would take this court beyond the proper scope of review, which does not include de novo review of [the accrediting body's] review evaluative decisions.' Instead, courts have reviewed denials of accreditation similarly to decisions of administrative agencies, limiting review to the record before the accrediting body at the time of its decision.

*Foundation for Interior Design Educ. Research v. Savannah Coll. of Art and Design*, 39 F. Supp. 2d 889, 894 (W.D. Mich. 1998) (citations omitted), aff'd 244 F.3d 521, 529 (2001) (holding that where the district court found the college did not act arbitrarily or capriciously, the court did not err in declining to consider the plaintiff's claim that other schools were treated differently); *Thomas M. Cooley Law Sch. v. Am. Bar Ass'n*, 376 F. Supp. 2d 758, 767, 769 (W.D. Mich. 2005) (applying arbitrary and capricious standard to accreditation decision and noting that review of the private organization's decision is "extremely limited" and that "review of the ABA's decision is limited to the existing record").

I therefore find that the district court's review of Defendant ABFM's decision regarding Plaintiff's certification should be limited to the record concerning Plaintiff and should not include

an examination of Defendant ABFM's decisions with respect to any other physician. Consequently, I further find that the evidence sought in the motion to compel, i.e., identification of other similarly situated physicians and documents pertaining to Defendant ABFM's decisions with respect to those other physicians, is irrelevant to Plaintiff's due process claim. I therefore conclude that Plaintiff's motion to compel this information should be denied.

**IT IS SO ORDERED.**

Review of this order is governed by 28 U.S.C. § 636(b)(1), FED. R. CIV. P. 72, and E.D. Mich. LR 72.1(d).

Date: December 5, 2014

/S PATRICIA T. MORRIS
Patricia T. Morris
United States Magistrate Judge