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June 16, 2015

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National Board of Medical Examiners
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Michael P. Sawicki
Senior Vice President and General Counsel
Prometric
1501 South Clinton Street
Baltimore, MD 21224

Via first class and electronic mail

RE: Denial of Request for Non Standard Test Accommodations
In re: Natalie Hesselgrave

Dear Ms. Farmer and Mr. Sawicki:

We write on behalf of Natalie Hesselgrave regarding the denial of her request for non-standard test accommodations for the upcoming Medical Boards in August of 2015. Specifically, we ask that you reconsider your refusal to provide a private location to enable Ms. Hesselgrave to express breast milk during the examination, and further, that you review your policies and revise them where necessary to permit other nursing mothers to access similar accommodations during the examinations you administer elsewhere in the United States.

The medical benefits of breastfeeding are well established.¹ Accordingly, there is a strong public policy at both the state and federal level in favor of

¹ See, e.g., Am. Academy of Pediatrics, Section on Breastfeeding, *Breastfeeding and the Use of Human Milk*, 129 *Pediatrics* e827 (2012), available at <http://pediatrics.aappublications.org/content/129/3/e827.full.pdf+html> (recommending “exclusive breastfeeding for about 6 months, with continuation of breastfeeding for 1 year or longer as mutually desired by mother and infant, a recommendation [endorsed by] the W[orld] H[ealth] O[rganization] and the Institute of Medicine”); see also Alison Steube, *The Risks of Not Breastfeeding for Mothers and Infants*, 2 *Rev. Obstetrics & Gynecology* 222 (2009), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2812877/> (“For mothers, failure to breastfeed is associated with an increased incidence of premenopausal breast cancer, ovarian cancer, retained gestational weight gain, type 2 diabetes, myocardial infarction, and the metabolic syndrome.”).

accommodating the needs of nursing mothers in numerous contexts.² As the leading national major medical organization charged with accrediting medical professionals, NBME should be demonstrating its leadership in implementing this public policy in a meaningful way. Similarly, Prometric, as NBME's agent, should be fulfilling its stated mission "to provide reasonable testing accommodations that enable all test takers to take examinations on a level playing field."³ Suggesting that a nursing mother pump her breasts in a public bathroom, her car, or another public area, as NBME and its agent Prometric have done, falls far short of fulfilling that promise. Because Ms. Hesselgrave's request is reasonable and supported by medicine, law and public policy, we urge NBME to change its determination and grant her the accommodation she has requested.

BACKGROUND

Ms. Hesselgrave is a medical student at the University of Maryland who is expecting her second baby (her due date was June 8). She is scheduled to take the Medical Boards on August 10, 2015, when her baby will be approximately seven to eight weeks old.

As you are aware, the examination is structured in 7 units of 45-60 minutes, with a total of 60 minutes of break time to be used between units at the test taker's discretion. Ms. Hesselgrave sought an additional 45 minutes of break time, as well as a private location in which to express milk during those breaks. NBME informed Ms. Hesselgrave by letter dated January 28, 2015, that "as a courtesy" it would grant her the additional time she had requested; however, NBME failed to address her request for a private location in which to express milk. Following these communications, Ms. Hesselgrave made repeated attempts, both by phone and by email, to obtain this additional necessary accommodation, but was denied at every turn. Although we will not detail the entire correspondence, excerpts from the most relevant exchanges follow.

When Ms. Hesselgrave followed up on the January 28 letter by email with Lisa Brooks of NBME Disability Services on February 6, Ms. Brooks advised her that she would need to reach out directly to the test center, a subcontractor called Prometric, in order to arrange for a private place to pump. When she did so, Prometric advised her that the only public facility available is the restroom, but that there is a private room in which examinees with disabilities may take the test if granted such an accommodation by NBME. Prometric advised her to seek an accommodation from NBME in order to enable her to take the test in that room. On February 6, Ms. Hesselgrave reached out to NBME Disability Services via email to request that she be granted permission to take the test in this room and to use it during her breaks for pumping. The same day, Lisa Brooks of NBME Disability Services stated that the room "is a test administration area that is video monitored at all times," but advised her that NBME had reached out to Prometric directly to inquire about any space available. However, in an email dated

² See, e.g., U.S. Dep't of Health and Human Servs., Office of the Surgeon Gen., *The Surgeon General's Call to Action to Support Breastfeeding*, v (2011); Child Nutrition Amendments of 1992, Pub. L. No. 102-342, 106 Stat. 911 (1992) (requiring Secretary of Agriculture to establish a national breastfeeding promotion program to promote breastfeeding as "the best method of infant nutrition"); U.S. Dep't of Health and Human Servs., Office of Women's Health, *HHS Blueprint for Action on Breastfeeding* (2000); Md. Code Ann., Health-Gen. § 20-801 (West).

³ See Prometric: Prepare for Test Day: Arrange Testing Accommodations, <https://www.prometric.com/en-us/for-test-takers/prepare-for-test-day/pages/arrange-testing-accommodations.aspx> (last visited Jun. 9, 2015).

February 13, Jennifer Romero, Client Services Manager at Prometric, informed Ms. Hesselgrave that “there is no additional private space available at this location other than the restroom” and that “nursing mother [sic] is not an accommodation that we cover under the ADA law.” In response to Ms. Hesselgrave’s request for an accommodation permitting her use of the private room, Ms. Catherine Farmer, NBME’s Director of Disability Services further stated in an email dated March 19 that:

NBME Disability Services may approve a separate testing room as a test accommodation for individuals with disabilities. We do not authorize use of a testing room, separate or otherwise, for a non-examination activity, such as using a breast pump. Your request for a private room within which to use your breast pump during authorized examination breaks is correctly directed to the Prometric test centers, as they have knowledge and control of their own facilities.

Ms. Romero followed up on March 24, stating that Prometric provides a location for its own employees to pump as required by federal law, but that:

[d]ue to security considerations, Prometric will neither extend a nursing station reserved for its employees, to the extent one is available, to exam candidates, nor is it required to do so under the FLSA, PPACA, or any other federal or state law. Although you have been approved for extra break time accommodations to nurse [sic], **it is still up to you to find a place suitable to you to nurse; whether it is your car, a restroom, or any other public space accessible to you as an exam candidate.**

This was the last communication from NBME or Prometric on the subject. Ms. Hesselgrave then contacted the ACLU.

DISCUSSION

I. Ms. Hesselgrave’s Request For Accommodations to Express Breast Milk is Reasonable.

Ms. Hesselgrave’s request for accommodations that will enable her to express breast milk during the test is reasonable and medically supported. As we are sure you are aware, women who are breastfeeding and away from their children need to empty their breasts using a breast pump on approximately the same schedule as their babies’ feeding schedule.⁴ Failure to pump on this regular schedule can lead to health problems including engorgement (pain and swelling of the breasts due to build-up of pressure from unremoved milk), as well as the risk of developing serious medical problems such as mastitis (an inflammation of the breast tissue caused by an

⁴ See EEOC, Office of Legal Counsel, *Enforcement Guidance on Pregnancy Discrimination and Related Issues*, § I.A.4.b., (2014), available at http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm (advising that in order “[t]o continue producing an adequate milk supply and to avoid painful complications associated with delays in expressing milk, a nursing mother will typically need to breastfeed or express breast milk using a pump two or three times over the duration of an eight-hour workday”); U.S. Dep’t of Health and Human Servs., *Breastfeeding*, <http://www.womenshealth.gov/breastfeeding/going-back-to-work> (last visited Jun. 9, 2015) (pumping is typically required “about two to three times during a typical 8-hour work period”); U.S. Dep’t of Labor, Wage and Hour Division, *Reasonable Break Time for Nursing Mothers*, 75 Fed. Reg. 80073, 80075 (Dec. 21, 2010) (“The Department expects that nursing mothers typically will need breaks to express milk two to three times during an eight hour shift.”) [hereinafter “Break Time for Nursing Mothers”].

infection that can lead to pain, swelling, redness, fevers, chills, and flu-like aching) and blocked ducts (which can be painful, sometimes cause fevers, and can lead to the more serious condition of mastitis). It can also lead to a reduction in milk supply and a lack of sufficient milk to feed the baby. Thus, without a meaningful accommodation that enables her to express breast milk, Ms. Hesselgrave will face taking the test under conditions that not only jeopardize her performance on the test due to pain and distraction, but also place her health at risk.

While Ms. Hesselgrave appreciates the provision of additional break time during the test so that she can express breast milk, she will be functionally unable to pump without the provision of a private location in which to do so. The suggested solutions offered by Prometric—that Ms. Hesselgrave pump in her “car, a restroom, or any other public space accessible to you as an exam candidate” are not feasible, and betray both ignorance about the process and insensitivity to Ms. Hesselgrave’s medical needs.

Pumping in a public bathroom raises concerns of both comfort and sanitation: there is unlikely to be a place other than the floor or the toilet itself on which to sit down or place her equipment and supplies, and for obvious reasons, the production and handling of food for infants is not properly done in a toilet stall. *See Currier v. Nat’l Bd. of Med. Examiners*, 462 Mass. 1, 9, 965 N.E.2d 829, 836 (2012) (“It is not recommended that a restroom be used for expressing milk due to the risk of infection.”). Moreover, the process typically takes at least 15-20 minutes, during which time Ms. Hesselgrave will be tying up a restroom stall that would otherwise be used by test takers needing to take a restroom break, and will likely face interruptions from others wishing to use the facilities. For these reasons, among others, Federal policy is clear that expression of milk requires a private location that is free of intrusion, and that milk expression in a bathroom is at a minimum to be avoided, if not outright prohibited.⁵

The other solutions proposed by Prometric are similarly not viable. Breast pumping in “public spaces accessible to test takers,” as suggested by Ms. Romero, would compel Ms. Hesselgrave to use a personal medical device, which necessitates the exposure of her breasts, in a public area. *See Currier*, 965 N.E.2d at 836 (“Use of a breast pump requires a private location because all such pumps require a woman to expose her breasts in order to position the equipment properly during the pumping process.”). This might be expected to make both Ms. Hesselgrave and her fellow test-takers uncomfortable. Pumping in a car, as also suggested by Ms. Romero, is not a viable option under the circumstances for several reasons, including that (a) a car is not sufficiently private, having windows on all sides; (b) anticipated high temperatures created by sitting in an enclosed car in Maryland in August raises comfort and health concerns; (c) there is no access to an electrical outlet to plug in an electric pump; and (d) parking may be located at some distance from the testing facility, adding to the time the process will take.

The provision of a private location should not place an unreasonable burden on NBME or Prometric because Prometric test takers with qualifying disabilities are already permitted access

⁵ *See* 29 U.S.C. § 207(r) (employers covered by Fair Labor Standards Act are to provide nursing employees “a place other than a bathroom” for expression of breast milk that is “free from intrusion”); U.S. Dep’t of Health and Human Servs., *Breastfeeding*, <http://www.womenshealth.gov/breastfeeding/going-back-to-work> (last visited Jun. 9, 2015) (“Restrooms are unsanitary and there are usually no electrical outlets. It can also be difficult to manage a pump in a toilet stall.”); DOL, *Break Time for Nursing Mothers*, 75 Fed. Reg. at 80076 (discussing “health and sanitation concerns” raised by locations such as bathrooms and locker rooms).

to a private room in which to take the test. See Prometric, *The Right Solutions for Testing Accommodations*, <https://www.prometric.com/en-us/for-test-takers/prepare-for-test-day/documents/FINALTesting-Accommodations.pdf> (listing “testing room that delivers extra privacy” and provision of a proctor as possible accommodations for test takers with special needs). Indeed, Prometric personnel have admitted in conversations with Ms. Hesselgrave that this same room has been used by Prometric employees for this same purpose.

Moreover, the reasons provided by Prometric and NBME for withholding this accommodation from Ms. Hesselgrave are without merit. The argument that this accommodation is not intended for purposes other than taking the test provides no rational reason that it could not be made available for other purposes between test sessions. We are confident that any security concerns raised by extending on-site facilities for breast pumping to breastfeeding test takers could be mitigated by instituting measures such as inspections of any necessary equipment and supplies and the provision of a Proctor or escort to and from the private facility, if necessary. The presence of security cameras could likely be addressed through simple solutions such as the temporary disabling or covering of the cameras or the provision of a screened or curtained area within the room that is shielded from the cameras’ field of coverage.

Thus, because Ms. Hesselgrave’s request for a private location to pump is both reasonable and not unduly burdensome to NBME and Prometric—and because the alternatives suggested by Prometric are not feasible—her request should be granted.

II. Ms. Hesselgrave’s Request for Accommodations is Supported by Law.

As you are likely well aware, the NBME has faced this issue before when it refused to provide break time or a private location to express breast milk to an examinee in the state of Massachusetts. See *Currier v. Nat’l Bd. Of Med. Examiners*, 965 N.E. 2d 829 (Mass. 2012). The plaintiff in that case, Dr. Sophie Currier, had requested an additional 60 minutes of break time during her examination as well as a private location to express milk. After NBME denied her requests, she sought a preliminary injunction, which was granted by the court. *Id.* at 837. Upon further proceedings, the Massachusetts Supreme Judicial Court ultimately ruled in her favor, holding that offering accommodations to individuals with disabilities but not to lactating women constituted sex discrimination under applicable public accommodation law, and further, finding that it could also constitute intentional discrimination under the state Equal Rights Act. See *id.* at 841-44 (recognizing that “[t]he condition of lactation is inextricably linked to pregnancy and thus sex linked”); also cf. *EEOC v. Houston Funding II, Ltd.*, 717 F.3d 425, 428–30 (5th Cir. 2013) (holding that discrimination on the basis of lactation is prohibited sex discrimination under Title VII because it is a sex-linked condition and is related to pregnancy and childbirth); *Martin v. Cannon Bus. Solutions, Inc.*, No. 11-cv-02565, 2013 WL 4838913, at *8, n.4 (D. Colo. Sept. 10, 2013) (same).

Maryland state law similarly supports Ms. Hesselgrave’s request for accommodations—and indeed, offers even more explicit protection than was present in *Currier*. The Maryland Health Code explicitly provides that “[a] mother may breast-feed her child in any public or private location in which the mother and child are authorized to be,” and further provides that “[a] person may not restrict or limit the right of a mother to breast-feed her child.” Md. Code Ann., Health-Gen. § 20-801 (West). This provision is broad by design, and on its face applies to the current situation. The NBME and Prometric’s refusal to honor Ms. Hesselgrave’s need for a private location in which to express breast milk constitutes an interference with her right to

breastfeed her baby, as it will impede her ability to produce sufficient breast milk to feed her baby and potentially impact her breast milk supply.

Moreover, as was true in *Currier*, Prometric's denial of the accommodation of a private room in which to take the test to Ms. Hesselgrave so that she can express breast milk, while the same accommodation is provided to other individuals for reasons unrelated to pregnancy or breastfeeding, constitutes disparate treatment on the basis of sex, in violation of Maryland law prohibiting sex discrimination in public accommodations. *See Currier*, 965 N.E.2d at 843-44 (recognizing Prometric was a place of public accommodation, in light of the statute's "remedial purpose").⁶ Both NBME and Prometric have conceded that the accommodation of a private room is available to disabled individuals who need privacy for reasons other than breastfeeding.⁷ Thus, while we do not assert that breastfeeding or the need to express breast milk is itself a disability, offering the accommodation of a private room to individuals with disabilities under the ADA but not to lactating women constitutes prohibited sex discrimination. *See Currier*, 965 N.E. 2d at 840, 842; *also cf. Young v. U.P.S.*, 135 S. Ct. 1338 (2015) (denial of accommodations to women for pregnancy and related medical conditions that are given to employees for other reasons supports prima face case of sex discrimination under Title VII and can support a finding that non-discriminatory reasons for denial are pretext).⁸

⁶ Maryland's public accommodations law provides in relevant part: "An owner or operator of a place of public accommodation or an agent or employee of the owner or operator may not refuse, withhold from, or deny to any person any of the accommodations, advantages, facilities, or privileges of the place of public accommodation because of the person's . . . sex." Md. Code Ann. State Gov't § 20-304 (West).

⁷ The Board's obligation to provide such accommodations to ADA-qualified individuals is clearly established. *See* 42 U.S.C. § 12189; 34 C.F.R. § 36.309(b)(3). *See* 24 C.F.R. pt. 36, App. A (explicating regulations published under ADAAA on Sept. 15, 2010). The United States Department of Justice, which has authority to issue regulations specifically pertaining to examinations and courses used in admissions, has specified, for example, that when a student with a learning disability documented through an Individualized Education Plan seeks "extra time and a quiet room for testing," "a testing entity receiving such documentation should clearly grant the request for accommodations." *Id.* The Department has specified that requests for accommodation upon appropriate documentation of need from a "qualified professional who has made an individualized assessment of the applicant" should be granted "without further inquiry." *Id.*

⁸ Moreover, to the extent that the NBME receives any federal funds, either directly or indirectly, it is subject to Title IX of the Education Amendments of 1972. *See* 29 U.S.C. § 794; 34 C.F.R. § 106.2 (defining "financial assistance as including "[s]cholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity"); *cf. Bartlett v. New York State Bd. of Law Examiners*, 156 F.3d 321, 330 (2d Cir. 1998), *vacated on other grounds by* 527 U.S. 1031 (1999) (state board of law examiners liable as recipient of federal funds for purposes of § 504 of the Rehabilitation Act by virtue of receipt of vouchers provided to handicapped applicants to assist in payment of bar exam application fees). Title IX regulations make clear that recipients may not discriminate based on sex or pregnancy, including related conditions. *See* 34 C.F.R. § 106.40(b)(1); *see also* 34 C.F.R. § 106.40(b)(4) (providing that women affected by pregnancy-related conditions must be treated the same as other individuals affected by temporary disabilities); 34 C.F.R. § 106.21(b)(2) (prohibiting the use of admissions tests or criteria that have "a disproportionately adverse effect on persons on the basis of sex").

Finally, should Ms. Hesselgrave's claim be denied, she might also have an actionable claim against the Board under the Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e *et seq.*, which

Conclusion

Ms. Hesselgrave's request for a private location in which to express milk during the Medical Boards is reasonable and well-supported, and imposes no undue burden upon the administration of the examination. By contrast, refusing to grant the requested accommodation ignores Ms. Hesselgrave's medical needs, violates state law, and goes against public policy. The refusal to acknowledge that a woman who is nursing needs a private place in which to express milk ignores the practical reality of lactation and puts her at a significant disadvantage compared to other examinees. She is faced with the choice of expressing milk under unsanitary and potentially humiliating circumstances, or forgoing pumping altogether and facing significant risk to her own health, as well as impeding her chances of success due to pain and distraction. Should she decide she cannot endure taking the test under these circumstances, she will have no choice but to put off taking the test until she is no longer nursing, thus forcing her to choose between the pursuit of her educational and career goals and her and her baby's health needs. We trust that this is not a result the NBME, an esteemed medical institution, or Prometric, its agent, wish to endorse.

Accordingly, we ask that the decision by Prometric and the NBME Office of Disability Services be reversed and the requested accommodation granted. Moreover, we urge NBME and Prometric to also establish a nationwide policy that gives meaning to the weight of medical authority supporting breast feeding and fulfills their obligation to administer the test in a non-discriminatory manner.

Thank you in advance for your consideration of this appeal, and we look forward to your decision.

Sincerely,



Galen Sherwin
Senior Staff Attorney
ACLU Women's Rights Project



David Rocah
Senior Staff Attorney
ACLU of Maryland

CC: Humayun Chaudhry, President and CEO
Federation of State Medical Boards

prohibits discrimination in employment, including entities "interfering with an individual's employment opportunities with another employer." *Sibley Mem'l Hosp. v. Wilson*, 488 F.2d 1338, 1341 (D.C. Cir. 1973). See also *Bender v. Suburban Hosp., Inc.*, 159 F.3d 186 (4th Cir. 1998) (assuming without deciding that *Sibley* theory was available but deciding on other grounds that plaintiff had not adequately alleged an employment relationship with third parties); *Christopher v. Stouder Mem'l Hosp.*, 936 F.2d 870, 877 (6th Cir. 1991) ("[A] plaintiff is protected [under Title VII] if the defendant is one who significantly affects access of any individual to employment opportunities."); *Doe on Behalf of Doe v. St. Joseph's Hosp. of Fort Wayne*, 788 F.2d 411 (7th Cir. 1986); *Burns v. Terre Haute Reg'l Hosp.*, 581 F. Supp. 1301, 1303 (S.D. Ind. 1983); *Morrison v. Am. Bd. of Psychiatry & Neurology, Inc.*, 908 F. Supp. 582, 587 (N.D. Ill. 1996).