

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

07-J-434

SOPHIE C. CURRIER on behalf of herself and
on behalf of LEA M. GALLIEN-CURRIER

vs.

NATIONAL BOARD OF MEDICAL EXAMINERS.

ORDER

This matter is before the court on the petition of the plaintiff, Sophie C. Currier ("the petitioner"), on behalf of herself and behalf of her child, Lea, pursuant to G. L. c. 231, 118 (first par.), seeking interlocutory relief from an order of a Superior Court judge entered on September 18, 2007, that denied the plaintiffs' request for a preliminary injunction ordering the defendant, National Board of Medical Examiners ("NBME"), to provide the petitioner with an additional sixty minutes of break time per test day for the purpose of expressing milk by breast pumping during the administration of the United States Medical Licensing Examination ("USMLE").¹ After consideration of the petition and the papers submitted by the parties, the Superior Court judge's order is vacated, the petition is granted, and the defendant is directed to provide the break time relief requested.

As shall be discussed below, the petitioner, who is nursing a five-month-old child, has presented un rebutted evidence that

¹On September 20, 2007, the petitioner filed the instant petition for relief in this court, and filed a memorandum in support of the petition. The defendant-respondent filed its opposition memorandum on September 21. The single justice heard oral argument on September 25.

she needs to express milk every three hours; that she needs sixty minutes total for each of the two test day sessions to pump the milk; that the failure to do so will cause her physical pain and harm; and that the forty-five minutes of break time permitted to all test-takers to attend to their personal and other needs is insufficient to permit the petitioner to express the milk and accommodate her other personal and bodily functions. In order to put the petitioner on equal footing as the male and non-lactating female examinees, she must be provided with sufficient time to pump breast milk and to address the same physiological and other functions to which those examinees are able to attend. Because of the manner in which the examination is administered, with examinees not being permitted to review or change answers after they have left the examination room for break time, providing the petitioner with the relief requested will not give her with an unfair advantage over the other examinees. Moreover, the NBME has acknowledged that it has the technical capacity to accord the petitioner the additional break time, and, indeed has made similar time accommodations to test-takers who are deemed eligible for such relief under the Americans with Disabilities Act ("ADA").

Background. The petitioner is a thirty-three year-old resident of Brookline, Massachusetts, and the mother of Lea, who was born on May 1, 2007. (Verified Complaint, ¶ 2). She is a 1997 graduate of the Massachusetts Institute of Technology, and obtained a Master's degree in toxicology in 1999. (Id.) The petitioner enrolled in a dual doctorate degree program at Harvard Medical School in 1999, and obtained her doctorate in neuroscience in 2004. (Id.). She is scheduled to graduate from Harvard Medical School in November 2007 with her doctorate in medicine ("M.D."), and has accepted a residency position at

Massachusetts General Hospital ("MGH") in the field of clinical pathology. (Id.) The petitioner is scheduled to begin her residency position immediately upon graduating from medical school. (Id.)

NBME, a Pennsylvania non-profit corporation with its principal place of business in Philadelphia, Pennsylvania, is responsible for administering the USMLE. (Id. ¶ 3) The USMLE is divided into three "steps" or examinations, each of which must be passed in order to obtain a license to practice medicine in the Commonwealth. (Id. ¶ 4; 243 Code Mass. Regs. § 2.02[2]). The USMLE is offered at various scheduling and test centers operated by Prometric, a division of Thomson Learning, Inc. (Id.)

Step 2 CK is the second "step" of the USMLE and is comprised of approximately 370 multiple-choice test questions distributed equally into eight sixty-minute blocks. (Id. ¶ 5.) The Step 2 CK is administered by computer and thus examinees cannot review or revise their answers to questions in a block they have completed. (Id.) This medical examination is administered in one nine-hour testing session, with eight one-hour blocks of questions, a fifteen-minute tutorial at the beginning of the examination, and forty-five minutes of break time over the course of the examination during which examinees are permitted to leave the examination room to attend to personal needs, such as eating, drinking, and using the restroom. (Id.) Each examinee may allocate and use the forty-five minutes of break time as needed throughout the testing day. (Id. ¶ 6) Examinees are not permitted to bring food or drinks into the examination room. (Id.) Candidates must sign in and out each time they leave the testing room, but may roam anywhere they like during their break periods, including outside the building in which the test is being

administered. (Id.)

The petitioner is scheduled to take Step 2 CK at a Prometric's test site (the "test site") on October 4 and October 5, 2007. The examination rooms at the test site are video-monitored and are enclosed by glass on three of four sides to permit proctors to observe the examinees. (Id.) Each examinee is assigned to an individual cubicle containing a computer. (Id.) The women's restrooms at the test site are located approximately a one-minute walk from the testing rooms in a hallway that is shared with other businesses and require a key for entry. (Id.)

Because the petitioner was diagnosed with both Attention Deficit Hyperactivity Disorder and dyslexia when she was sixteen years old, she has received double time to take the USMLE and a separate room. (Id. ¶ 8). As such, she will have two days, rather than one, in which to take the Step 2 CK and a separate room which, similar to the main testing room, is also video-monitored and enclosed on three sides with glass walls. (Id.)

The petitioner must pass the Step 2 CK in order to begin her residency at MGH on November 7, 2007, and to graduate from Harvard Medical School. (Currier Affidavit, ¶ 6.) MGH has informed her that it expects her to begin her residency in November, and that it "cannot" keep the residency position open "indefinitely" if she does not pass Step 2 CK and graduate from Harvard Medical School in November. (Id.; Exhibit 3 to the Currier Affidavit.)

The American Academy of Pediatrics, the American College of Obstetricians and Gynecologists, and the American Academy of Family Practice recommend that an infant be exclusively

breast-fed for the first six months after birth and partially breast-fed for up to at least twelve months of age. (Verified Complaint ¶ 9; Affidavit of Alison Stuebe, M.D. ("Stuebe Aff."), ¶ 3, Exhibits A, B, C; Affidavit of Marsha Walker ["Walker Aff."], ¶ 5.)² It is well-established in the fields of medicine and public health that breastfeeding improves infants' general health, growth, and development, and significantly decreases the risk of numerous acute and chronic diseases. (Verified Complaint ¶ 9; Stuebe Aff., ¶ 4, and Exhibits A, D; Walker Aff., ¶ 6.) Breastfeeding also provides long and short-term benefits to mothers who nurse, including accelerated pregnancy-related weight loss and decreased risks of breast and ovarian cancer and osteoporosis. (Verified Complaint ¶ 9; Stuebe Aff., ¶ 4, Walker Aff., ¶ 6.) The public health benefits of breastfeeding include decreased health care costs due to reductions in infant morbidity. (Id.)

In accordance with these medical recommendations, the petitioner has breast-fed her infant daughter exclusively since birth and intends to continue doing so at least until the infant reaches six months of age. (Verified Complaint ¶ 12.) On October 4 and 5, 2007, petitioner will be breastfeeding her daughter approximately every two to three hours (Id. ¶ 13.) A nursing mother of a four to five-month-old infant should express breast milk a minimum of every three hours in order to maintain milk production and avoid engorgement, blockage of milk ducts, galactoceles (milk retention cysts), mastitits (an infection of

² These facts are further detailed in Ms. Currier's Verified Complaint, the Affidavit of Alison Stuebe, M.D., and the Affidavit of Marsha Walker, R.N. The defendant offered no affidavits or opposing evidence to dispute the averments in those affidavits regarding breastfeeding, the mechanics of breast pumps, or the utilization of breast pumps.

the breast caused by the blocking of the milk ducts), and breast abscesses. (Verified Complaint ¶ 11; Stuebe Aff., ¶ 5, Walker Aff., ¶¶ 5,7.) Incomplete expression of milk may also lead to blocked milk ducts, galactoceles, and mastitis. (Id.) Engorgement is a particular concern and can become severe, causing the breasts to redden and become painful. (Stuebe Aff., ¶ 5, Walker Aff., ¶ 7.) Mothers can even develop a low-grade fever which may signal infection. (Id.) The milk pooling in engorged breasts also releases chemical signals that decrease milk production. (Id.) If unrelieved, prolonged engorgement can initiate the weaning process, contributing to insufficient milk supply, and thereby directly affecting the health of the infant. (Id.)

When the petitioner is unable to breastfeed her daughter, she expresses breast milk through the use of an electric breast milk pump, commonly called a "breast pump." (Verified Complaint, ¶ 12; Stuebe Aff., ¶ 5, Walker Aff., ¶ 8.) Electric breast pumps are among the most efficient means by which to express breast milk when not nursing directly. (Verified Complaint, ¶ 12; Walker Aff., ¶ 8.) In order to properly express breast milk using a hospital grade breast pump, a nursing mother will require approximately three to five minutes to assemble the breast pump, ten to fifteen minutes to express milk, and five to ten minutes to disassemble and clean the breast pump and to dispense and/or store the expressed milk.³ (Verified Complaint, ¶ 12; Stuebe Aff., ¶ 6, Walker Aff., ¶ 9.) In total, a nursing mother will require twenty-five to thirty minutes per pumping session in order to properly express breast milk using an electric-grade

³It is possible to decrease the total amount of assembly and disassembly time needed to pump breast milk by approximately five to seven minutes by using extra (clean) pump parts. (Stuebe, Aff. ¶ 6, Walker Aff., ¶ 9.)

pump. (Id.)

It is recommended that a nursing mother consume an additional 500 calories and twenty-three ounces of liquids per day to maintain an adequate milk supply. Thus, nursing mothers require regular trips to the restroom. (Verified Complaint, ¶ 12; Stuebe Aff., ¶ 8, Walker Aff., ¶ 11.) It is possible to eat and/or drink while expressing milk using a breast pump, however, this is not recommended because it requires the mother to configure a chair, table and breast pump so that she can balance the pump flanges while eating. (Verified Complaint, ¶ 13; Stuebe Aff., ¶ 9, Walker Aff., ¶ 13.) Furthermore, to maintain proper hygiene, a nursing mother's hands and breast pump parts must be cleaned in a sink with potable running water after the pumping process. (Verified Complaint, ¶ 12; Stuebe Aff., ¶ 10, Walker Aff., ¶ 145.) Forty-five minutes is insufficient time for a nursing mother of a four to five-month-old infant to eat, drink, use the restroom and to fully and properly express breast milk using an electric pump two times over the course of nine hours. (Verified Complaint, ¶ 13; Stuebe Aff., ¶ 11, Walker Aff., ¶ 16.)

On or about June 19, 2007, the petitioner sent a written request to the NBME requesting additional break time in order to express breast milk during the examination. (Verified Complaint, ¶ 14; and Exhibit 1.) The NBME responded three weeks later, on July 11, 2007, rejecting the petitioner's request. (Id. ¶ 14 and Exhibit 2.)

On August 10, 2007, the petitioner, through counsel, again requested that the NBME provide her with additional break time and a private room in which to express milk (Id. ¶ 15, and Exhibit 3.) The NBME, through counsel, responded on August 17,

2007, again rejecting the petitioner's request and demanding additional information from the petitioner. (Id. and Exhibit 4.) On August 24, 2007, the petitioner supplied additional information through counsel. (Id. and Exhibit 5.) The NBME responded on August 28, 2007, through counsel, offering some accommodations for the petitioner, but excluding additional time to pump. (Id. and Exhibit 6.)

The NBME has offered the following to the petitioner: permission to express milk in a separate, private room with an electrical outlet at the test center during the allotted break time; permission to bring and use multiple breast pumps to express milk while in her separate testing room during the test and/or break time; within the constraints of security, providing her the privacy to pump in her separate testing room during the test and/or break time; permission to bring food and drink to her separate testing room, which she may consume at any time; and the option to leave the test center to breastfeed during the allotted break time. (Farmer Aff., ¶. 23.)

Discussion. In reviewing a petition filed pursuant to G. L. c. 231, § 118 (first par.), that seeks review of a trial court judge's order that denied a request for the issuance of a preliminary injunction, the single justice has the authority to engage in a limited review aimed at determining whether the motion judge abused his discretion. See Packaging Indus. Group, Inc. v. Cheney, 380 Mass. 609, 615 (1980); Edwin R. Sage Co. v. Foley, 12 Mass. App. Ct. 20, 25 (1981). Nothing prohibits the single justice from reviewing in some depth action taken by the motion judge. See Manfrates v. Lawrence Plaza Ltd. Partnership, 41 Mass. App. Ct. 409, 412 n.4, S.C. 423 Mass. 1114 (1996). Viewing the record through either lens, I conclude that the

requested preliminary injunction should have been issued.

"To succeed in an action for a preliminary injunction, a plaintiff must show (1) a likelihood of success on the merits; (2) that irreparable harm will result from denial of the injunction; and (3) that, in light of the plaintiff's likelihood of success on the merits, the risk of irreparable harm to the plaintiff outweighs the potential harm to the defendant in granting the injunction." Tri-Nel Management, Inc. v. Board of Health of Barnstable, 433 Mass. 217, 219 (2001), citing Packaging Indus. Group. Inc., supra, at 617.⁴

I. Likelihood of Success on the Merits. In arguing that she has a likelihood of success on her claims, the petitioner points to Article I of the Massachusetts Declaration of Rights and to the Massachusetts Equal Rights Amendment. Because a claim under both those provisions requires demonstrating that NBME is a state actor in the Commonwealth of Massachusetts, it is necessary to first address that question. Blixt v. Blixt, 437 Mass. 649, 660 (2002); Brackett v. Civil Service Commn., 447 Mass. 233, 244 (2006), citing Dickerson v. Attorney Gen., 396 Mass. 740, 743 (1986) ("The standard for equal protection analysis under our Declaration of Rights is the same as under the Federal Constitution.").

A. State Actor. Pursuant to G. L. c. 112, § 2 , and 243

⁴See also Packaging Indus. Group, Inc., supra at 617 n.12 ("Since the goal is to minimize the risk of irreparable harm, if the moving party can demonstrate both that the requested relief is necessary to prevent irreparable harm to it and that granting the injunction poses no substantial risk of such harm to the opposing party, a substantial possibility of success on the merits warrants imposing the injunction.").

Code Mass. Regs. § 2.02(2)(a)(6), in order to obtain a medical license from the Commonwealth of Massachusetts, a party must take and pass the Step 1, 2, and 3 exams of the USMLE. The NBME is the sole provider of the Step 1, 2, and 3 examinations. Thus, in order to obtain a medical license in the Commonwealth, a party must contract with NBME. In doing so, said party is required to accept the NBME's testing conditions.⁵

The NBME argues that it is not a state actor in Massachusetts because it has "no power to license doctors"; rather, it claims, it simply "creates and administers the USMLE, and reports the scores to state licensing boards" together with the Federation of State Medical Boards. The NBME's argument understates the role it plays in the licensing of physicians in Massachusetts. Under Massachusetts law, "if a nominally private entity is performing a function that is 'traditionally the exclusive prerogative of the State,' then all of the acts of that entity are State action." Phillips v. Youth Development Program, Inc., 390 Mass. 652, 654 (1983). Here, contrary to the NBME's argument, its extensive involvement in the licensing function makes it a state actor.

⁵As has been noted, the one-day examination is normally divided into a fifteen minute tutorial, eight one-hour examination blocks, and forty-five minutes of break time. Unless a party has a documented qualifying disability under the ADA, the NBME does not grant additional time on the exam or for breaks. It will, however, provide certain accommodations of the testing environment, several of which it has offered the petitioner.

As the petitioner has dyslexia and ADHD -- qualifying disabilities under the ADA -- she has already received eight hours of additional examination time. That the petitioner has additional time to take the examination is not relevant to the present issue, as due to her learning disabilities, she will need this additional time for the examination.

The Massachusetts Board of Registration of Medicine (the "Board") has determined that the USMLE is the only acceptable American examination for allopathic physicians seeking a medical license in the Commonwealth. 243 Code Mass. Regs. § 2.02(2)(a). In an exercise of its apparent discretion, the Board has given the NBME the authority to determine the scope of the Step 2 CK exam, the topics tested on said exam, and the testing structure. (Affidavit of Gerard F. Dillon, Ph.D. ("Dillon Aff."), filed with Defendant's Opposition, at ¶¶ 2, 5, 7). In doing so, the NBME creates and applies a test that evaluates all applicants, with the purpose to "assess a physician's ability to apply knowledge, concepts and principles, and to demonstrate fundamental patient-centered skills". (Id. at ¶¶ 2,5,7.) This includes setting a minimum passing score for all candidates. Moreover, the Board has provided the NBME the independent authority to develop educational eligibility criteria for candidates and the discretion to apply these criteria. (Id. at ¶¶ 2,5,7) In application, this permits the NBME to reject certain candidates not meeting its eligibility criteria. That these matters and eligibility criteria may be subject to further review by the Board does not diminish the substantial interconnection between the NBME and the Board, or NBME's role as an agent of the Board in the process culminating in the licensing of physicians. Indeed, the Board and the NBME have similar missions -- "to protect the health of the public." (Dillon Aff. ¶ 3) (See 243 CMR § 2.01(1) (the "purpose [of the Board's regulations] is to prescribe substantive standards governing the practice of medicine which will promote the public health, welfare, and safety").

Lastly, (and perhaps most significantly), the Board has granted the NBME the authority to consider all requests for

accommodations from all parties. This includes determining whether a party has a qualifying disability under the ADA and determining what, if any, accommodation is appropriate. Furthermore, as is the case here, the Board has implicitly delegated to the NBME its authority to act as its agent in determining whether a party is separately entitled to protections, including those of a constitutional tenor, within the exam format. The importance of these decisions in the process culminating in licensing is apparent from the NBME's premise that how an examinee fares under the test-taking conditions it establishes is a measure of professional suitability. In essence, the Board has asked the NBME to stand in its place and provide several stages of evaluations of candidates seeking a medical license in the Commonwealth. As such, it is a state actor, "performing a function that is 'traditionally the exclusive prerogative of the [Commonwealth of Massachusetts]." See Phillips, supra, at 654.⁶

II. Massachusetts Equal Rights Amendment. Count I of the petitioner's Verified Complaint asserts violation of Articles 1,

⁶The cases cited by NBME do not further its assertions. Indeed, in Johnson v. Educational Testing Service, 754 F.2d 20 (1st Cir. 1985), where the First Circuit determined that the Educational Testing Service was not a state actor in the litigation before it, the court, pointing to the fact-specific nature of state actor determinations, observed that "[t]his is not to say that ETS can never be a state actor engaging in state action." 754 F.2d at 25, n.2. NBME's reliance on an unpublished federal district court decision, Brown v. Federation of State Medical Boards, 1985 WL 1659 (N.D. Ill. May 31, 1985), is also misplaced because there the plaintiff failed to adduce sufficient facts. 1985 WL at *5. Finally, the NBME's suggestion that it is somehow on the same footing as the defendant in Tynecki v. Tufts University School of Dental Medicine, 875 F. Supp. 26 (D. Mass. 1994), is also unpersuasive because there the court found that the facts did not establish a sufficient nexus between the state and the dental school.

10, and 12 of the Massachusetts Declaration of Rights. The petitioner essentially asserts that the NBME's policy -- eight one-hour exams and forty-five minutes of break time for all test-takers except those with qualifying disabilities under the ADA -- has a disparate impact on a certain sub-group of women (nursing mothers), impinging on her decision to express breast milk to feed her infant child. The petitioner further asserts that the NBME's denial of her request for additional break time and its policy of providing her only non-time based accommodations, which do not provide for an adequate opportunity to express breast milk, amount to the knowing, and therefore intentional, interference with her right to breastfeed.

Article 1 of the Massachusetts Declaration of Rights, as amended by art. 106 of the Amendments (the Equal Rights Amendment), provides that "[E]quality under the law shall not be denied or abridged because of sex, race, color, creed or national origin." Conditions deny equality under the Equal Rights Amendment if they are applied in a discriminatory fashion. See School Comm. of Braintree v. Massachusetts Commn. Against Discrimination, 377 Mass. 424, 431-432 (1979) (facially neutral school policy unconstitutionally discriminatory against women). See also Buchanan v. Director of Div. of Employment Sec., 393 Mass. 329, 335 (Mass. 1984). Here, the undisputed evidence indicates that the petitioner is in need of an additional sixty minutes during the course of the nine hour exam day to express breast milk. The forty-five minutes of break time, presently accorded by the NBME, is patently insufficient to allow her to express the requisite breast milk, let alone satisfy her other bodily functions. Yet without the allocation of an additional sixty minutes, the petitioner must make a significant Hobbesian choice: use her break time to incompletely express breast milk

and ignore her bodily functions, or abnegate her decision to express breast milk, resulting in significant pain. Under either avenue, petitioner is placed at significant disadvantage in comparison to her peers. See Tarin v. Comm'r of the Div. of Medical Assistance, 424 Mass. 743, 755 (1997), quoting Opinion of the Justices, 423 Mass. 1201, 1232 (1996) ("The equal protection clause [] of . . . art. 1 of the Massachusetts Declaration of Rights, as amended by art. 106 of the Amendments, 'do[es] not protect against burdens and disabilities as such, but against their unequal imposition.'). Both options impinge on the petitioner's decision respecting the breastfeeding of her child. See Dike v. School Bd. of Orange County, Fla., 650 F.2d 783, 787 (5th. Cir. 1981) ("[T]he Constitution protects from excessive state interference a woman's decision respecting breastfeeding her child."), overruled on other grounds, Shahar v. Bowers, 114 F.3d 1097, 1102-03 (11th Cir. 1997); Berrios-Berrios v. Thornburg, 716 F. Supp. 987, 990 (E.D. Ky. 1989) (recognizing a woman possesses a Constitutionally protected interest in her decision to breast feed her child).

As "(p)regnancy is a condition unique to women, and the ability to become pregnant is a primary characteristic of the female sex", any condition premised on a pregnancy-related condition constitutes sex discrimination. Massachusetts Elec. Co. v. Massachusetts Commn. Against Discrimination, 375 Mass. 160, 167-168 (1978). As a post-pregnancy condition, breastfeeding is necessarily encompassed within the purview of these protections. See Dike, supra, at 787 ("Breastfeeding is the most elemental form of parental care. It is a communion between mother and child, that like marriage, is 'intimate to the degree of being sacred'"); Tarin, supra, at 756, quoting from Curtis v. School Comm. of Falmouth, 420 Mass. 749, 755 (1995) (recognizing parents

"possess a fundamental liberty interest, protected by the Fourteenth Amendment, to be free from unnecessary governmental intrusion in the rearing of their children."). As the NBME's test structure unfairly subjects breastfeeding women to greater hardships than other male test-takers solely on the basis of a sex-based distinction, strict scrutiny is appropriate. Brackett, supra, at 246 ("[U]nder the Massachusetts Equal Rights Amendment, classifications on the basis of sex are subject to a degree of constitutional scrutiny at least as strict as the scrutiny required by the Fourteenth Amendment for racial classifications.") (internal quotations omitted). See also Lowell v. Kowalski, 380 Mass. 663, 666 (1980) (same).

The NBME offers two arguments for the uniform break time condition: (1) "that the integrity of the testing process is a critical part of the NBME's obligation to protect the public safety" and (2) that the NBME "do[es] not currently have a form that includes the double testing time and the 60 minutes of extra break [time] that the plaintiff is requesting." (Dillon Aff. ¶¶ 3, 13.) The rationale for this uniform break time condition, which in operation creates an unreasonable barrier on the petitioner's attempt to enter a professional field, cannot transcend the harm accruing to the petitioner. See also Opinion of the Justices, 332 Mass. 763, 766 (1955) ("The right of the individual to engage in a lawful occupation is itself a right secured to [her] under both Constitutions. This right is subject to reasonable regulation in the public interest, but it cannot be destroyed.").⁷ The NBME has already demonstrated that it is

⁷ NBME also assumes responsibility for the Commonwealth of ensuring that "no group of examinees receives unfair advantage over another on the examination." (Dillon Aff. at 3.) Due to substantial disadvantages under which the petitioner must take this exam, there is a substantial question as to whether the NBME

willing to accord parties accommodations and that it is capable of modifying its computer-based exam to meet the varying needs of other parties.⁸ See Berrios-Berrios, *supra* at 990 (noting the prison system, which permitted inmates to bottle-feed infants during visiting hours, had no compelling interest in preventing inmates from breastfeeding infants during visitation hours). The NBME has made no showing that modifying the existing program to meet the petitioner's testing requirements is an unreasonable request financially or otherwise. Likewise, the NBME has not shown how allowing the petitioner to compete on a level playing field will in any way disrupt the integrity of the testing process. Contrast Southerland v. Thigpen, 784 F.2d 713, 717 (5th Cir. 1986) (prison system offered strong evidence that housing an inmate's infant in order to accommodate breastfeeding by inmate was incompatible with the objectives of the penal system and would create substantial financial and security problems).

Furthermore, although the NBME's application of its accommodations policy is facially neutral -- permitting accommodations to any party with a qualifying disability under the ADA -- its application in this instance disparately impacts the petitioner as a breastfeeding woman. Here, the petitioner has

is adequately performing this task. By failing to ensure fairness, the NBME may be violating the basic principles of its contract with the petitioner. See G. L. c. 93, § 102(a) (providing that "[a]ll persons within the commonwealth, regardless of sex, race, color, creed or national origin, shall have, except as is otherwise provided or permitted by law, the same rights enjoyed by white male citizens, to make and enforce contracts . . .").

⁸I note that the NBME, in this instance, in order to accommodate the petitioner's other disabilities (ADHD and dyslexia) altered the exam's computer program to provide two-hours of time on each one-hour exam block.

presented evidence that she has a condition (lactating) that cannot be relieved within the existing testing framework, and the lack of sufficient accommodations will cause the petitioner to suffer significant pain and engorgement during the exam. Two thirty-minute breaks (during each teach day) to express breast milk will minimize the condition's effects. As break time is only permitted after the completion of a one-hour exam unit (or in the petitioner's case, a two-hour exam unit), the two thirty-minute sessions for breast milk expression will not give the petitioner any additional advantage on the exam segments. In contrast, the denial of petitioner's reasonable request for break time solely for the expression of breast milk places her at a significant disadvantage in comparison to her peers.

As viewed from the present record, the NBME's application of its accommodations policy reflects knowing recognition of the need to accommodate a breastfeeding woman and an unsupported rejection of a means to effectuate both this woman's decision to breastfeed her child and her reasonable expectation of being placed on common ground with her test-taking peers. A jury could determine that the Board's willingness to accord other test-takers additional break time, but not the petitioner, is in effect consistent with an intent to discriminate against this woman's decision to breastfeed, especially given that the NBME has conceded it has the technical ability to modify the format. The offered accommodations -- a private room with an electrical outlet and permission to bring food into the exam room -- are entirely insufficient to permit the petitioner a full opportunity to express milk during the course of the exam and thereby place her on common footing with her peers. That the NBME is willing to accord the petitioner certain accommodations -- but not extra daily break time -- is unreasonable. See Strong v. Collators,

450 F. Supp. 1356, 1360 (D. Mass. 1978) (While the Commonwealth was not obligated to offer veterans public assistance, once it undertook to do so, compliance with the Equal Protection Clause was required). The record is devoid of any rationale for providing only non-time based accommodations to women in similar circumstances as the petitioner.

II. Irreparable Harm. As has been noted, a nursing mother in the petitioner's situation must express breast milk every three hours in order to avoid engorgement, blockage of milk ducts, galactoceles, mastitis, and breast abscesses, and to maintain milk production. (Stuebe Aff. ¶ 5) Engorgement causes the breasts to redden and become painful and if unrelieved can result in the release of chemical signals decreasing milk production. (Id.) A woman can avoid engorgement by using a breast pump at regular intervals to express breast milk. (Id.)

From Dr. Stuebe's experience, she has determined that it takes a woman using a breast pump approximately twenty-five to thirty minutes per pumping session.⁹ The petitioner's request for sixty additional minutes -- equivalent to the expression of milk every three hours during the test or twice during each testing administration -- is in accordance with this data.

⁹ Three to five minutes are spent assembling and attaching the pump, ten to twelve minutes are spent expressing milk, and five to ten minutes are spent detaching the pump and storing the milk. (Stuebe Aff. ¶ 6.) Affiant Marsha Walker, a Registered Nurse and International Board Certified Lactation Consultant, recommends a similar time frame for the proper expression of breast milk. (Walker Aff. ¶ 9.) Additional time is needed to walk from the testing room to the location where the petitioner will be pumping, disrobe, redress, clean-up and return to the testing room. (Stuebe Aff. II ¶ 5.)

It is of particular import that the NBME has not offered any contrary evidence. As such, on the state of the record as presently constituted, it is undisputed that the petitioner will suffer physical pain from breast engorgement if she is not permitted additional time. Under the NBME's present allotment of break time, the petitioner could only express milk once, leaving her as little as fifteen minutes during the nine-hour test-days for normal break time activities. When limited to a single opportunity to express breast milk, the petitioner will suffer physical pain from engorgement for at least several hours of each test day. Such physical pain constitutes an unfair burden on the mental energies required for this examination.^{10 11}

The NBME's alternative solution -- requiring the petitioner to delay testing until her child reaches an age where breast feeding or the continued expression of milk is unnecessary --

¹⁰ The NBME's assertion that the petitioner's allegations of harm are speculative is misplaced. Here, the record contains undisputed evidence from the affiants that the petitioner will suffer breast engorgement due to a physiological process if she is unable to express breast milk at regular intervals. While the NBME could certainly have offered evidence to question the degree of physical pain or harm the petitioner is likely to suffer, it did not choose to do so.

¹¹ That the petitioner might pass the test under the present conditions is not determinative in evaluating the harm to this petitioner. Here, the present conditions require the petitioner, when she takes the test, to suffer physical pain and to temporarily abnegate her decision to breastfeed her child. *Berrios-Berrios*, supra, at 991 (holding "substantial threat exists" of irreparable injury to inmate denied ability to breast-feed infant daughter during visitation hours). The NBME's reliance on *Baer v. National Bd. of Medical Examiners*, 392 F. Supp.2d 42, 49 (2005) (continuation of medical career without interruption at a particular university does not constitute irreparable harm to a student with non-qualifying learning disability who was denied accommodation on the Step 1 test) is therefore distinguishable, as the student in *Baer* was not forced to make this Hobbesian choice.

unfairly impinges on the petitioner's opportunity to pursue her medical career in conjunction with the rearing of her child. Requiring her to further delay the exam will result in a substantial hardship due to the loss of knowledge and the need for continued study. This is especially true where the allocation of one additional hour each day could ameliorate the harm to the petitioner.

Finally, in light of the harms that the petitioner would suffer, NBME's contention that monetary damages would provide adequate compensation is unpersuasive. See T & D Video v. City of Revere, 423 Mass. 577, 582 (1996) (loss of First Amendment rights constitutes irreparable harm); Packaging Industries Group, Inc., supra, at 616 ("moving party must show that without the requested relief, it may suffer a loss of rights that cannot be vindicated should it prevail after a full hearing on the merits."). Indeed, we note that the petitioner here has presented a claim only for declaratory relief, not for monetary damages.

III. Balancing of the Harms. In comparison to the irreparable harm to the petitioner, the harm to the NBME is minimal. Here, the record establishes that the NBME regularly alters its uniform testing procedures to comply with the ADA and that it is capable of producing tests to satisfy these accommodations. It has made no showing that permitting the petitioner sixty minutes of additional break time on each testing day will in any way disrupt the national standard for the exam or that creating an exam to meet the petitioner's particular needs will cause it any harm, financial or otherwise.

Finally, there is no evidence in the record that the public will be harmed in any way by a decision ordering a state actor to

respect and adequately accommodate the petitioner's decision to breastfeed her child. Permitting her two thirty-minute sessions on each day for the expression of breast milk does not jeopardize public safety. See also Berrios-Berrios, supra at 991 ("it will be a very sad day in America when allowing a mother to breast-feed her infant disservices the public interest.").

Conclusion. For the foregoing reasons, the plaintiffs' petition is allowed. The order of the Superior Court judge dated September 18, 2007, that denied the petitioner's request for a preliminary injunction is vacated. Upon the petitioner's payment to the Appeals Court of the fee required by G. L. c. 262, § 4, the court will enter a preliminary injunction against the National Board of Medical Examiners that requires the NBME to afford Sophie C. Currier an additional sixty (60) minutes of break time per test day at Ms. Currier's sitting for the United States Medical Licensing Examination on October 4 and 5, 2007. The Board is further ordered to ensure that Ms. Currier is provided with a private room with a power outlet at the testing center in order to express breast milk.

By the Court (Katzmann, J.),

Entered: September 26, 2007.