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David A. Wollin, Esquire, Chair  
Rhode Island Board of Bar Examiners  
Licht Judicial Complex  
250 Benefit St.  
Providence, RI 02903

Dear Chair Wollin and Members of the Board,

We write regarding the Rhode Island Board of Bar Examiners' policies and practices concerning non-standard testing accommodations for candidates who are breastfeeding at the time they are scheduled to take the bar exam. In response to inquiries from women who had sought and been denied accommodations related to breastfeeding and pumping during the examination in several states, the ACLU and Law Students for Reproductive Justice (LSRJ) launched an initiative to determine what policies and practices are in place across the country. We have conducted a survey of the processes for applying for accommodations in the 50 states, which included a review of the information on each state licensing body's website relating to testing accommodations, followed by calls to the contact in each state charged with processing requests for testing accommodations. We plan to release a report on our findings at the end of July, and are reaching out in advance of its release in order to share our findings and provide information and policy recommendations to improve access to accommodations in Rhode Island.

The ACLU has a long-standing focus on eliminating discrimination against women in employment, and specifically, discrimination related to pregnancy and childbearing. In light of this focus, the ACLU has targeted policies and practices that fail to take into account some women's physiological need for accommodations due to breastfeeding. LSRJ similarly strives to create a world where all people can exercise the rights and access the resources they need to thrive and to decide whether, when, and how to have and parent children with dignity, free from discrimination, coercion, or violence. This initiative fulfills our shared mission of eliminating persistent barriers to women entering the professions, and particularly, those related to pregnancy and motherhood.

Our investigation of publicly available information in Rhode Island, including an evaluation of the forms and procedures on your website related to non-standard testing accommodations, indicates that eligibility

for accommodations is limited to those with ADA-eligible disabilities. Despite several attempts at follow up contact by our volunteers, we were unable to reach anyone in your office. We have therefore been unable to confirm whether the Rhode Island Board of Bar Examiners categorically considers applicants in need of accommodations related to breastfeeding to be ineligible for them, or whether in practice it grants such accommodations under certain circumstances.

We are concerned that existing procedures for obtaining accommodations, coupled with the lack of clear policy extending eligibility to seek accommodations to those who are breastfeeding, places individuals who are breastfeeding at a serious disadvantage during the test. We therefore urge you to adopt a policy that explicitly extends eligibility for accommodations to those who are breastfeeding, and to modify your procedures and materials accordingly. Adoption of such changes would give meaning to the weight of medical authority supporting breastfeeding and better fulfill the Rhode Island Board of Bar Examiners' obligation to administer the test in a non-discriminatory manner. In addition, it would help ensure that Rhode Island keeps pace with its sister states in New England, such as Connecticut, Vermont, and New Hampshire, which do provide these accommodations in practice. Our recommendations are outlined in further detail below.

#### **A. Provision of Accommodations Comports with Laws and Policies Aimed At Promoting Breastfeeding and Gender Equality.**

There is a strong medical consensus that breastfeeding is associated with numerous benefits to mothers and infants.<sup>1</sup> Accordingly, there is a strong public policy at both the state and federal level in favor of breastfeeding promotion.<sup>2</sup>

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<sup>1</sup> The medical benefits of breastfeeding are well established. For example, the American Academy of Pediatrics' most recently issued guidelines recommend "exclusive breastfeeding for about 6 months, with continuation of breastfeeding for 1 year or longer as mutually desired by mother and infant, a recommendation concurred to by the WHO and the Institute of Medicine." Am. Academy of Pediatrics, *Breastfeeding and the Use of Human Milk*, 129 Pediatrics e827 (2012), available at <http://pediatrics.aappublications.org/content/129/3/e827.full.pdf+html>. 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.").

<sup>2</sup> See, e.g., United States Department of Health and Human Services, The Surgeon General's Call To Action To Support Breastfeeding (2011), [www.surgeongeneral.gov/topics/breastfeeding/calltoactiontosupportbreastfeeding.pdf](http://www.surgeongeneral.gov/topics/breastfeeding/calltoactiontosupportbreastfeeding.pdf) (describing breastfeeding promotion efforts by numerous federal and international bodies, and recognizing breastfeeding as "a key public health issue in the United States"); American Academy of Pediatrics, Breastfeeding Section, *Policy Statement: Breastfeeding and the Use of Human Milk*, 115 Pediatrics 496, 501 (2005), <http://aappolicy.aappublications.org/cgi/reprint/pediatrics;100/6/1035.pdf> (summarizing the

Numerous states' laws, including those in Rhode Island, protect the rights of women who are breastfeeding to do so anywhere they are authorized to be.<sup>3</sup> The provision of accommodations related to breastfeeding would therefore comport with this body of law and help give full effect to the important public health policy on which it is grounded.

Moreover, Rhode Island's public accommodation law protects against sex discrimination in public accommodations.<sup>4</sup> And at least one court has held that offering non-standard testing accommodations to individuals with disabilities under the ADA but not to those who are breastfeeding constitutes sex discrimination under applicable public accommodation law.<sup>5</sup> Assuming that Rhode Island Board of Bar Examiners is in compliance with the ADA, a policy or practice of providing such accommodations to individuals with other medical conditions while categorically denying access to candidates who are breastfeeding would raise serious concerns regarding compliance with these legal provisions. Therefore, in addition to serving the public policy goals discussed above, extending eligibility for those who are breastfeeding on equal terms to those with disabilities would help minimize the risk of legal liability.<sup>6</sup>

**B. Accommodations Will Frequently Be Necessary for Women Who Are Breastfeeding And Should Be Provided On The Same Terms As Accommodations For Other Medical Conditions.**

Access to non-standard testing accommodations will be necessary for many women who are breastfeeding because the default conditions for administering the test generally do not meet their needs. Rules restrict what test takers may bring into the test site, there is no access to a private location in which to express breast milk (other than the public restroom), and the existing breaks may, depending on the woman's circumstances, be insufficient for the necessary expression of breast milk.

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“benefits of breastfeeding to the infant, the mother, and the nation,” and setting forth principles to guide health care providers in promoting and supporting breastfeeding).

<sup>3</sup> Rhode Island protects the rights of women who are breastfeeding to do so anywhere they are authorized to be. R.I. Gen. Laws §§ 23-13.5-1, 23-13.5-2. Further, Rhode Island requires employers to make a "reasonable effort to provide a private, secure and sanitary room . . . other than a toilet stall, where an employee can express her milk or breastfeed her child." R.I. Gen. Laws § 23-13.2-1.

<sup>4</sup> R.I. Gen. Laws § 11-24-2.

<sup>5</sup> See *Currier v. National Bd. Of Med. Examiners*, 965 N.E. 2d 829 (MA 2012).

<sup>6</sup> The Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e *et seq.*, which prohibits sex discrimination in employment, has also been applied to third-parties 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 *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).

Women who are breastfeeding and are away from their babies need to extract milk from their breasts on roughly the same schedule as the baby's feeding schedule.<sup>7</sup> The process of expressing breast milk with an electric breast pump typically takes around half an hour, including time to set up and clean the necessary equipment.<sup>8</sup> Without the opportunity to express breast milk, many breastfeeding women taking the test will likely experience extreme pain and discomfort, causing serious distraction that could negatively impact their test results, and posing a risk to their health. Failure to express breast milk on schedule, or to completely empty the breasts, can lead to painful engorgement, fever, and even infection, as well as a reduction in the amount of breast milk produced.<sup>9</sup> Accommodations are therefore required in order to ensure that women do not suffer medical consequences.

Although the specific accommodations will differ for each individual based on their circumstances, there are several typical examples of accommodations that would be appropriate in many circumstances. These accommodations include the following:

1. *Permission to bring to and store at the testing site necessary medical equipment and supplies, including a breast pump, storage supplies, and a cooler or access to a refrigerator.*

Any applicable limitations on personal items that may be brought to or stored at the test facility must be waived in order to enable women to express milk efficiently; this is particularly critical given the limited time available.

2. *A private, sanitary location other than a bathroom in which to express breast milk.*

The space designated for pumping should be private, sanitary and secure from intrusion from other test takers or the public. Without such a location, lactating women may be forced to resort to expressing breast milk in a public restroom. In addition to being uncomfortable and unsanitary, pumping in public restrooms can be highly stressful: the time it takes to pump will tie up the available facilities for other test takers, leading to time pressure and disruptive requests by others to enter the facilities, and potentially impeding women's ability to express milk due to stress.

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<sup>7</sup> This schedule varies from woman to woman depending on numerous factors including the age of the child, the amount of solid food the baby is eating, and the physiological needs of the individual woman. See U.S. Department of Labor, Wage and Hour Division, *Request for Information, Reasonable Break Time for Nursing Mothers*, at <http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=24540>.

<sup>8</sup> This process may take more or less time, depending on the individual woman and the proximity of the location designated for pumping and cleaning equipment. *Id.*

<sup>9</sup> See, e.g., U.S. Dep't of Health and Human Services, Office of Women's Health, *Your Guide to Breastfeeding* 34 (2011), <http://www.womenshealth.gov/publications/our-publications/breastfeeding-guide/BreastfeedingGuide-General-English.pdf>.

3. *Access to an electrical outlet in the identified location.*

This will enable women with a portable electric breast pump to access an electrical power source so that they can express milk in the most efficient manner possible.

4. *Additional “stop the clock” break time to express breast milk on a periodic basis depending on individual need.*

Individuals who are breastfeeding typically need to express milk every two to three hours, though the frequency and duration of breaks needed varies depending on the individual’s medical needs. Although the existing test schedule may allow sufficient time in many cases to express breast milk, some test takers may need more frequent or longer breaks to enable them to pump on a schedule that is medically appropriate for them, and/or to permit them sufficient time to conduct any of the other activities to which the break period is typically dedicated—such as eating, going to the restroom, resting, walking, or stretching. Additional break time may therefore be necessary to ensure that candidates who are breastfeeding can meet their medical needs, or that they have sufficient time to enjoy the same benefits of the existing break as other applicants who do not have medical or physiological needs to address.

Provision of medically necessary accommodations to those who are breastfeeding is therefore critical in order to ensure that they are able to take the test without suffering a serious disadvantage. Each of these types of accommodations, and other reasonable accommodations, should be made available upon request, on the same terms as they are offered to others with medical conditions or disabilities (*e.g.* as supported by appropriate medical documentation from a treating health care provider that the candidate is breastfeeding and needs to pump, along with the recommended frequency and duration of breaks needed to do so).

**C. Public Information Materials, Policies and Forms Should Be Revised to Make Clear that Those Who Are Breastfeeding Are Eligible.**

Implementation of any policy extending eligibility for testing accommodations to candidates who are breastfeeding will require modification of the procedures currently used to handle such requests in Rhode Island. As discussed above, the information currently available on your website indicates that only ADA-qualified applicants are eligible to seek such accommodations. Because breastfeeding does not constitute a disability, the existing application process on its face excludes those who are breastfeeding from eligibility. Moreover, most or all of the questions on the required ADA-oriented non-standard testing accommodations forms are inapplicable to breastfeeding. For example, the forms include questions about the “diagnosis,” the nature of the disability, and the “treatment” of the condition or impairment. Likewise, many women will be unable to provide documentation verifying accommodation history, as they may not have received testing or other educational accommodations in the past. Unless these forms and procedures are

modified, many candidates in need of accommodations related to breastfeeding will be under the impression that they are ineligible, leading them to forgo seeking them. Moreover, should the forms be retained without modification, there is a substantial risk that any application submitted would be deemed incomplete or insufficient, resulting in it being denied.

### **Conclusion**

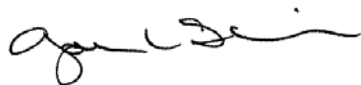
Candidates who need accommodations related to breastfeeding should not be forced to choose between taking the test under conditions that may place their health at risk and postponing their test date until they are no longer breastfeeding. Placing women in this position would fly in the face of public policy in favor of breastfeeding promotion, pose a barrier to women who wish to enter the legal profession, and send the message that being a mother is incompatible with entering a career in the law. We trust that this is not a message the Board wishes to endorse.

We therefore respectfully request that the Rhode Island Board of Bar Examiners institute the following reforms:

1. Adopt a policy that explicitly extends eligibility for non-standard test accommodations to those who are breastfeeding.
2. Modify your existing resources related to testing accommodations (i.e. forms, instructions, website and other materials) to clarify that breastfeeding women are eligible to seek such accommodations and ensure that all forms are made inclusive of and applicable to breastfeeding.
3. Provide training to all managers and staff responsible for fielding, processing and rendering determinations on such requests to ensure that consistent and correct information is given to those who inquire as to eligibility.

As mentioned above, the ACLU and LSRJ will be issuing a report of our findings at the end of July. A commitment on your part to revise your policy and improve procedures related to accommodations for breastfeeding would be reflected in the results contained in the report. We would be happy to discuss these issues with you in more depth and to serve as a resource to you as you examine your policies and materials, and will be following up with you within a few days to discuss your response. We look forward to speaking with you.

Sincerely,



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