

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"). After consideration of the

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

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

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. Engorgement is a particular concern

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;

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 preliminary judge abused his or her discretion. See Prackengainusa Group, Inc. v. Prackengainusa Group, Inc., 2011 WL 1234567 (S. Ct. 2011).

requested preliminary injunction should have been issued.

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

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

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

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

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 . . .").

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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 thereb

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 > 1whe•ñp, ÷6-öt×F† ög' F†R6Wf #f-÷2Â 7W & Åpr 'À %A Â

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
