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Joni Seko  
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Dear Ms. Seko,

We write to follow up on our previous correspondence dated July 23, 2015 regarding Ms. Rebekah Hiatt and the Utah State Bar's policies and practices concerning non-standard testing accommodations for candidates who are breastfeeding at the time they are scheduled to take the bar exam. We are pleased that as a result of that correspondence, Ms. Hiatt was permitted to bring a lactation pump to the exam and was provided a private pumping space during the lunch break.

However, while provision of accommodations for this individual was a positive step, we are concerned that without broader changes to the Board's policies and procedures for providing accommodations for those who are breastfeeding, other candidates in her situation may forgo or be wrongfully denied necessary accommodations. We therefore urge you to adopt a policy that explicitly extends eligibility for accommodations to those who are breastfeeding, and to modify your procedures, public information materials and forms to make them fully applicable to and inclusive of breastfeeding.

### *Background*

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. Law Students for Reproductive Justice (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.

As you may be aware, in response to inquiries from women like Ms. Hiatt, who had sought and been denied accommodations related to breastfeeding and pumping during the examination in several states, the ACLU and 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 released the results of our survey and analysis of the various accommodations policies in effect across the country. The results are available at the following URL: <https://www.aclu.org/map/breastfeeding-policies-during-bar-exam-state>. States that committed to review their policies or to implement changes in response to our campaign received a grade adjustment; following the accommodation of Ms. Hiatt and correspondence with the Utah State Bar, we adjusted Utah's grade to a "C+."

Our initial investigation of publicly available information in Utah suggested that eligibility for accommodations was limited to those with ADA-eligible disabilities. However, your response to Ms. Hiatt's case and to our follow-up survey indicated that in practice, the Utah State Bar permits applications for accommodations related to breastfeeding, and that such applications are considered and assessed on a case-by-case basis. While we commend you for permitting applications for accommodations related to breastfeeding, significant improvements are necessary to ensure that accommodations are truly available to those who need them. For instance, in Utah, for an applicant to acquire "stop the clock" break time to express milk, an applicant must fill out ADA-eligible disability forms at the time she applies for the bar exam. However, this information is not publicly and readily available to applicants, and many of the questions are inapplicable to women who are breastfeeding. As a result, some applicants may forgo seeking necessary accommodations, which can negatively influence their testing capabilities. To better fulfill the Utah State Bar's obligation to administer the test in a non-discriminatory manner, we have outlined our recommendations in detail below.

**A. Accommodations Will Frequently Be Necessary for Women Who Are Breastfeeding And Should Explicitly 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. Currently 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. As discussed in our July letter, accommodations may therefore be required in order to ensure that women do not suffer medical consequences.

Although the specific accommodations will differ for each individual depending 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.

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.*

As discussed in our July letter, 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.

Each of these types of accommodations, and other reasonable accommodations, should be made clearly available and accommodated 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).

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

In order for candidates who are breastfeeding to be able to access the accommodations that they need, they must be aware that such accommodations are available. However, as discussed above, the information currently available on your website suggests that only ADA-qualified applicants are eligible to seek such accommodations. Because breastfeeding/lactation does not constitute a disability, the application process appears on its face to exclude those who are breastfeeding from eligibility. Nor is there any information regarding the availability of accommodations for breastfeeding elsewhere on your website. Thus, many candidates in need of accommodations related to breastfeeding may be under the impression that they are ineligible, leading them to forgo seeking them.

Additionally, our survey suggests that those who do pursue further information by inquiring as to eligibility through your office by phone or email will be informed that all accommodations requests are considered and assessed on a case-by-case basis, that they therefore are permitted to submit an application for accommodations related to breastfeeding, and that they should bypass the ADA non-standard testing accommodations forms and fill out a Notice of Medical Alert instead. However, this process is not made clear on your website. Even if a candidate is able to ascertain the appropriate form, it is not clear that the form can be used to request accommodations, as it is geared toward the provision of emergency medical assistance and does not relate to accommodations. There is no place on the form to request a private room or additional break time. Therefore, a candidate seeking accommodations through your website is likely to fill out the ADA-oriented non-standard testing accommodations forms, if they fill out any forms at all. Most or all of the questions on these 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. Thus, even if a candidate should apply for accommodations related to breastfeeding, there is a risk that the information and documentation submitted would be deemed incomplete or insufficient, resulting in the application being

denied. Indeed, this problem has led to the denial of valid applications under similar policies in effect in at least three other states.<sup>1</sup>

### **Conclusion**

As appropriately reflected in your practice of permitting and considering applications for non-standard testing accommodations related to breastfeeding, those who need such accommodations 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. Yet, the hurdles we have identified may have precisely that effect.

We therefore urge the Utah State Bar to institute the following reforms:

- 1. Adopt a policy that explicitly extends eligibility for non-standard test accommodations to those who are breastfeeding (see attached model policy).**
- 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 to make them applicable to the medical condition of lactation.**
- 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.**

Implementation of these changes would comport with the strong public policy in the United States<sup>2</sup> and the state of Utah<sup>3</sup> in favor of breastfeeding promotion, and help eliminate barriers to new parents who are seeking to enter the legal profession.

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<sup>1</sup> See Galen Sherwin and Lauren Hall, *2 State Bars Have Done the Right Thing for New Moms Needing to Pump. We're Making Sure the 48 Left Do Too* (Apr. 28, 2015), <https://www.aclu.org/blog/speak-freely/2-state-bars-have-done-right-thing-new-moms-needing-pump-were-making-sure-48-left>.

<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 "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> Utah law protects the rights of women who are breastfeeding to do so anywhere they are authorized to be. Utah Code Ann. § 17-15-25 (West).

We hope you will take our recommendations and the model we have provided into consideration in determining how to make the exam fair and accessible for all candidates. Any changes you make will be reflected in regular updates of our report.

We would be happy to speak with you about these recommendations and answer any questions you might have. Please feel free to contact us directly at (212) 519-7819 or (501) 374-2842.

Sincerely,



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Enclosure

### **Accommodations for Health Related Conditions**

The Office of \_\_\_\_\_ will provide, upon written request, accommodations for health-related conditions not otherwise covered under our policy regarding non-standard testing accommodations for applicants with disabilities.

[General “health-related accommodations” policy here]

#### **Applicants who are breastfeeding**

Courtesy accommodations for applicants who are breastfeeding are available upon request to enable such applicants to express breast milk during the examination.

*Process for submitting requests:* Applicants should submit a request for accommodations in writing to [\_\_\_\_\_appropriate office/individual, with contact information.] A request for lactation accommodations will be granted upon submission of medical documentation from your child’s pediatrician or your qualified medical provider verifying that you are breastfeeding and the child’s date of birth. (Please be advised that applicants may, upon request of the Board of Bar Examiners, be required to submit additional medical documentation to support a request.)

Applicants should list all accommodations you believe will be necessary on the day of the exam with as much specificity as possible. Accommodations may typically include:

- Permission to bring a breast pump and accompanying equipment, storage containers, and a cooler if necessary.
- A private location for expressing milk (other than a bathroom), with an electrical outlet.
- Exam room seating that affords the swiftest possible route between the test room and the lactation area during breaks.
- Additional off-the clock break time if existing breaks are insufficiently frequent for an individual’s circumstances.

Except in extraordinary circumstances or due to a recently emergent event, requests for lactation-related accommodations must be received by the Board of Bar Examiners at least three (3) weeks prior to the first day of the bar examination.