

New York City Gender Marker Change Advisory Board Report

Prepared pursuant to §17-167.2 of the New York City
Administrative Code and submitted to the Mayor,
the Commissioner of Health and Mental Hygiene and
the Speaker of the Council.

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New York City Gender Marker Change Advisory Board Report

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Introduction

In January and February 2015, synchronized changes were made to the New York City Health and Administrative Codes, updating the requirements for changing the gender marker on a New York City birth certificate. The “convertive surgery” (interpreted as genital surgery) and name change requirement, in place since 1971, were eliminated and replaced by an affirmation or affidavit from a U.S. licensed health or mental health provider affirming the applicant’s gender. Another change to the Administrative Code required that an advisory board be convened to advise the Commissioner of Health on the effectiveness and implementation of the new requirements.

The advisory board is composed of four members appointed by the Commissioner of the New York City Department of Health and Mental Hygiene (DOHMH) and three members appointed by the Speaker of the New York City Council (CC), each of whom meets certain criteria specified in the Administrative Code. The Commissioner of Health (COH) was authorized to designate an additional ex officio member of the advisory board. The members are:

1. Carrie Davis, MSW, Advisory Board Chair [CC]
2. Ethan Rice, Esq., Advisory Board Co-Chair, Fair Courts Project Attorney, Lambda Legal [CC]
3. Katie Douglass, LCSW [CC]
4. Christian Huygen, PhD, Executive Director, Rainbow Heights Club [COH]
5. Paul Kobrak, PhD, Director of Risk Reduction in Vulnerable Populations, Bureau of HIV/AIDS Prevention and Control, DOHMH [COH]
6. Anya Mukarji-Connolly, Esq., Supervising Attorney, Brooklyn Defender Services – Family Defense Practice [COH]
7. Asa Radix, MD, MPH, Senior Director of Research and Education, Callen-Lorde Community Health Center [COH]
8. Gretchen Van Wye, PhD, MA, Assistant Commissioner, Bureau of Vital Statistics, NYC DOHMH [COH designee, ex officio member]

The Department’s Implementation of the New Requirements

Processes and Procedures

Prior to January 2015, when the new requirements went into effect, DOHMH’s Bureau of Vital Statistics (BVS) convened a work group of Department personnel to develop policies and procedures to implement the law change in addition to a plan for communicating these policies to all those who may be impacted including transgender applicants, providers, and advocates.

The group met weekly and produced the necessary materials, including a revised birth certificate correction application form, a provider affirmation template and an internal protocol for processing gender marker change applications (i.e. applications from registrants looking to change the sex field on their birth certificate from male to female or female to male). In order to most effectively manage the process, a small group of staff from the Corrections and Amendments Unit within BVS was selected to administer and oversee gender marker change corrections and received training on processing these applications. Additionally, all BVS staff underwent training provided by the Rainbow Heights Club, a mental health advocacy program for LGBTQ individuals, to learn best practices for working and communicating with transgender customers.

Communications

BVS developed a list of over 250 organizations advocating for and providing medical, mental health, and legal services to the LGBT community within the United States to widely disseminate information about the requirement change to providers who may be able to assist applicants. Understanding that NYC-born transgender individuals may live anywhere in the world, a far-reaching outreach plan was necessary to ensure that information was disseminated to as many organizations as possible. BVS also developed and presented webinars to this community to offer information regarding the change in law, instructions on completing gender marker change applications, updates on implementation and resources for transgender individuals. These webinars were held monthly from January through June 2015, quarterly from July through December 2015, and biannually starting in 2016.

BVS also worked with the DOHMH Bureau of Communications to develop content for the [DOHMH website](#) informing the public about the proposed law change. In addition, the BVS Corrections and Amendments Unit contacted transgender applicants who were previously ineligible under the old requirements but who were eligible to correct their birth certificate under the new requirements to inform them of the proposed policy change. If they agreed to have their applications held until the new law was implemented, the applications would then be quickly processed and approved. Upon implementation, the DOHMH website was updated to include application information and the template for the provider affirmation and affidavit letter. Furthermore, a 2015 City Health Information (CHI) bulletin on primary care for transgender adults was developed for medical providers, which included information on how to assist transgender patients in the gender marker change process. Strategies for communicating the changes were discussed by senior staff and advisors within the DOHMH Bureaus of HIV/AIDS, and Mental Health as well as External Affairs (including Communications). BVS will continue to coordinate with partners and DOHMH working groups, such as the LGBTQ Coordination Group (who provide support and a platform for collaboration among LBGTQ-related projects within DOHMH), to continue to disseminate information and facilitate outreach to the transgender community.

Assessment of Implementation

In addition to implementing the updated gender marker change requirements, the Department of Health issued the first amended birth certificate with an intersex designation in December 2016, which was to an

adult and prompted by a California court order.

Utilization and Impact of the New Gender Marker Change Requirements

BVS measured the impact of the new requirements using the following indicators:

- I. **Number of applicants:** Within one year of implementation (January 2015 – 2016) 338 new birth certificates were approved and issued to transgender applicants. As of February 23, 2017, a total of 731 new birth certificates were approved and issued to applicants who met the new requirements. Compared to years prior to the Health and Administrative Codes changes, only 20 gender marker change birth certificates were issued in 2012, while 22 gender marker change birth certificates were issued in 2013. In the first year that the new requirements were used, there was a 1400% increase in the number of approved and issued transgender birth certificates compared to 2013.
- II. **Male-to-Female vs. Female-to-Male Gender Marker Changes:** About 55.3% of the applicants were seeking to change their gender marker from male to female, while 44.7% were seeking a change from female to male. In the past, the convertive surgery requirement presented a significant challenge to transgender individuals, perhaps particularly to individuals seeking to change their gender marker from female to male. The increase in female to male applicants demonstrates that eliminating the surgery requirement may reduce the disparity between male to female and female to male applicants, as a lower percentage of registrants were eligible to pursue a change from female to male under the previous law. The data show a more even distribution of requested gender marker changes upon implementing the new requirements.
- III. **Age of Applicants:** The age of applicants seeking gender marker changes ranged from 5 to 76 years old. The average age of transgender customers at the time of application approval was 33.8 years. The most frequent age of customers at the time of application approval was 24 years. Additionally, 41 minors (individuals under the age of 18) were approved for a gender marker change since the law was implemented.
- IV. **Applicant Residence:** 56.8% (n = 415) of all applicants resided in New York City, while 8.9% lived in the rest of New York state (n = 65). Between January 2015 and February 2017, 251 transgender customers in 36 states outside of New York and 2 countries outside of the United States requested gender marker changes (34.3%).
- V. **Processing Time of Applications:** BVS has made processing gender marker change applications a high priority. BVS staff work closely with customers to successfully complete the process of changing one's gender marker in an expedited manner (relative to processing of these applications prior to the law change). Processing times for applicants vary and are influenced by the number of applicants, complexity of cases, and follow-up from customers on additional documentation that may be required. Turnaround time for gender marker change applications is calculated from the time when the application is entered into the Electronic Vital Events Registration System (EVERS) to the time the application is approved by the Corrections and Amendments Unit of BVS. For amendments excluding gender marker changes, the turnaround time in January 2017 ranged from 21 to 57.7 days. As of January 31, 2017 the average turnaround time for approving gender marker change amendments was 4.67 days.

VI. **Data on Provider Affirmation/Affidavit:**

Provider type	Percent of applicants (#)
Physician (MD/DO)	85.36% (n = 624)
Nurse Practitioner (NP)	3.28% (n = 24)
Licensed Clinical Social Worker (LCSW)	2.74% (n = 20)
Psychologist (PhD or PsyD)	1.50% (n = 11)
Licensed Master Social Worker (LMSW)	0.96% (n = 7)
Physician Assistant (PA)	0.68% (n = 5)
Mental Health Counselor (MHC)	0.27% (n = 2)
Marriage and Family Therapist (MFT)	0.14% (n=1)
Midwife	0.14% (n=1)
Unknown or previous application*	4.92% (n = 36)
Total	100% (n = 731)

* Three applicants who had convertive surgery (interpreted as genital surgery) and who had changed the gender marker on their birth certificate before 2015, applied for a new birth certificate after the law change that stated their gender identity. Their previous certificates had the gender box removed, and they wanted it reinstated with their gender identity. They did not need provider letters as BVS had their surgical records on file. Other unknown provider types were not recorded.

Despite the expanded list of professionals able to support gender marker change applications, physicians are the most common among transgender applicants (85.4%).

- VII. **Impact on access and discrimination:** In easing the requirements for changing the gender marker on a birth certificate, DOHMH aimed to reduce barriers that inhibit transgender individuals' access to healthcare and government resources. In providing gender-congruent birth certificates, DOHMH also aimed to work toward decreasing discrimination against transgender individuals. The New York City Transgender Health Survey, a five year longitudinal study, is currently being conducted to characterize the social and health impacts of the law change. These data are currently being collected and evaluated via voluntary surveys that are offered to transgender adults who have had their gender marker changed after the new requirements were implemented. The goals of the study are to identify the healthcare access and discrimination experiences at the time of and after issuance of a new gender-congruent birth certificate in addition to health issues specific to the transgender community.

Best Practices

During the implementation of the new requirements, a number of best practices have been utilized. Staff within BVS have been identified and trained to process gender marker change requests and work with

transgender individuals. Training focused specifically on the processes and procedures necessary for staff to amend gender marker changes. In addition, staff were trained to create a trans-friendly customer service environment. These staff continue to work closely with customers in order to successfully complete their applications. In limiting the number of staff who are permitted to process gender marker changes, BVS maximizes the confidentiality, quality, and efficiency of how the records are processed. Additionally, gender marker change requests are prioritized, and processing times typically are under one work week. Other efforts utilized for communicating with providers and the transgender community include the presentation of internationally available webinars offered by BVS that provide information and resources regarding gender marker changes.

The creation of specific tools to guide applicants through the gender marker change process supported smooth implementation of the law. One such tool is a provider template letter that facilitates easy provision of the information necessary to make the gender marker change. The list of providers from whom BVS accepts affirmations or affidavits, developed based on New York State Education Department requirements and their licensure, is built into this form and supports the maintenance of the integrity of vital records. This list was developed based on scope of practice guidance for licensure.

For individuals who have difficulty identifying a provider to write the affirmation, DOHMH has a physician on staff who will, after patient consultation, write the affirmation at no charge.

Feedback on Implementation

The response to the implementation of the gender marker change requirement has been positive. Many transgender individuals and advocates continue to express their appreciation to DOHMH for meeting the need of gender-congruent birth certificate issuance. Dedicated staff in the Corrections and Amendments Unit of the Bureau of Vital statistics have received many emails, phone calls and thank you cards from transgender individuals who have been issued amended birth certificates. The majority of people are appreciative for the diligence and kindness of BVS staff in working with customers to complete the application process. Members of the advisory board also agree that the law change is meeting a need for transgender individuals and are grateful to DOHMH for the successful implementation of the new law and continued service to transgender applicants.

New York City Transgender Health Survey

The New York City Transgender Health Survey collects feedback from transgender applicants regarding the changes in the law. All NYC-born transgender people who changed the gender marker on their birth certificate after January 2015 are invited to join the study and complete a survey. Within the survey, participants are asked to share how they think changing the gender marker on their birth certificate has improved their quality of life.

Approximately 200 participants thus far have shared their thoughts and experiences about the practical impact their gender-congruent birth certificate has and will have on their quality of life. General themes from the survey responses include:

- Less stress when presenting matching documents
- No discrepancy between documents and physical presentation
- Birth certificates were the last legal document that had to be changed
- Application for other IDs (passport, license, SSA) and update to records
- Ability to get married, adopt, get dual citizenship and avoid issues associated with inheritance
- Less worry about employment, school, and background checks
- Correct birth certificates as being self-affirming and applicants feeling affirmed in the eyes of the government
- Feelings of confidence, pride, happiness, completeness and relief
- Feelings of safety, comfort and peace of mind
- Decreased embarrassment and need to hide
- Normality (feeling normal, living normally in society, etc.)
- Uncertainty in how new birth certificate will impact one's life
- Reduced harassment and discrimination in various settings
- Lower risk of being asked inappropriate questions
- Ability to have burial documents and death certificates reflect gender identity
- Ease in updating other documents after changing birth certificate
- Reduction in the need to "out" oneself (reveal gender marker change)
- Ease in traveling in US and abroad
- Protection from "bathroom bills" (require a gender-congruent birth certificate to use appropriate bathroom)
- Less worry about being misgendered in workplace and social contexts

Participants also expressed their appreciation to the DOHMH for implementing the new requirements and enabling more NYC-born transgender people to change the gender marker on their birth certificate.

Comments from Public Meeting

On December 19, 2016, the advisory board held a public meeting, allowing the public, including transgender individuals and community advocates, to provide their comments and feedback on the new gender marker change policy.

Summary of comments from public meeting

- 19 attendees
- 4 oral testimonies given
- 5 total written testimonies provided
 - 4 of 5 comments showed support for new law
 - 4 of 5 comments advocated for self-attestation
 - 3 of 5 comments advocated for non-binary designation
 - 3 of 5 comments addressed cost as a barrier and were in support of fee waivers for gender marker changes
 - 4 of 5 comments listed physician affirmation/affidavit as a barrier

Barriers

Various persons providing testimony noted that the law change eased the process for changing one's gender marker. However, the testimonies also described continuing barriers for transgender persons who wish to change the gender marker on their birth certificate:

- **Access:** A concern raised was that transgender individuals may have limited access to health care professionals to provide the attestation on their behalf.
- **Notarization:** Another related challenge involved the process of getting a notarization if the provider is not an M.D. or D.O.. This poses an additional challenge to people who may not be familiar with the process of getting a notary or for people who receive affidavits from organizations that do not have a notary present on staff. Others claim that providers are confused and have difficulty writing the affidavit correctly.
- **Cost:** Cost was cited as another barrier in making a gender marker change to a birth certificate. The fee of \$55 (required for the correction and the cost of the new birth certificate) may be high for applicants, particularly those of low income. It was recommended by Kyle Rapiñan on behalf of the Sylvia Rivera Law Project, Legal Services NYC, and Peter Cicchino Youth Project as well as D'hana Perry on behalf of Callen-Lorde Community Health Center that DOHMH waive the \$55 fee associated with the gender marker change and new certificate for low income individuals. They additionally provide examples of other organizations such as the New York Division of Criminal Justice Services and New York City Civil Courts as organizations that do not require fees from low income individuals.
- **Self-Attestation:** Currently, the law requires that licensed medical and mental health providers write an affirmation or affidavit affirming the gender marker change. If the health care professional seeking to provide the affidavit is not a D.O. or M.D., then the affidavit must be notarized. Self-attestation, in which the applicant can attest to their own gender, was recommended by several attendees of the advisory board's public meeting. Advocates testifying at the board meeting point to other states, such as Nevada, and countries that have adopted self-attestation. In Nevada, individuals may submit their own affidavit stating their gender in addition to an affidavit of someone with personal knowledge of the applicant's gender. Additionally, advocates refer to other organizations within New York City such as IDNYC, which they feel successfully implemented a model of self-attestation.
- **Option to select non-binary designation:** It has been recommended that there be an option for gender non-conforming and non-binary individuals outside of male and female.

Recommendations of the Board

During the public meeting, those who testified discussed a number of barriers that may inhibit individuals from receiving a gender marker change. Among them was possible lack of transgender individual's access to providers to write the affirmation or affidavit required to make the gender marker change. They asserted that the requirement of the affirmation or affidavit from a third party may prevent some individuals from obtaining vital records. DOHMH provides free access to a US-licensed provider who can write this attestation letter for applicants without access to a provider. To date, one registrant has used this provider to submit a gender marker change, suggesting the need to further publicize this resource, including on the DOHMH website. Another barrier mentioned was the process of getting an affidavit notarized. The Board recommends that practices consider having one of their staff become a notary public. In addition, DOHMH may include information on notaries on the gender marker change section of its website. This will be further developed and discussed by the board.

With regard to cost as a barrier for gender marker change applicants, the fee for correcting or amending a birth certificate is not specific to gender marker changes. Any individual requesting a change is required to pay the fee. Non-profit organizations or other intermediaries can pay this fee on the behalf of the applicant. The Board discussed maintaining a list of non-profit organizations that could volunteer to assist applicants with the birth certificate corrections fee.

Advocates support self-attestation of the gender marker, asserting that there is no objective means of determining someone's gender and that the individual's attestation should suffice. Advocates, including some medical providers, wondered whether medical providers (or other service providers), can accurately determine an individual's gender. DOHMH is concerned that this could jeopardize the integrity of the birth certificate on the basis that self-attestation is currently not accepted for other facts on vital records, i.e. changes require documentary evidence. Many members of the board were not persuaded by the DOHMH concern. Future discussions will focus on self-attestation, misassignment of sex at birth, and why transgender individuals request to change their sex designation on their birth certificate later in life. The Board will additionally perform further research on self-attestation, specifically:

- Identify successes and failures in implementation in other organizations and jurisdictions
- Characterize issues that may impact the integrity of records
- Determine any rules or laws mandates that may exist prohibiting self-attestation
- Learn how other jurisdictions have addressed the concerns that are being articulated here

Finally, the board recognizes the interest in sex designations beyond "male" and "female." There have been four sex designation options on the NYC birth certificate, i.e. male, female, undetermined, and unknown, and recently the Department issued the first intersex birth certificate in the U.S., a fifth category. The board will conduct further research on the use of designations on birth certificates, i.e. document practices in other jurisdictions and understand how such a designation may impact an individual's ability to later acquire a state ID or passport.

Noting the array of complex issues and concerns that were brought up in Board meetings and in the public comments, the Board plans to continue to meet and to submit an interim report summarizing these issues, subsequent findings, and further recommendations.

Conclusion

After changing the requirements for gender marker changes in 2015, the New York City Department of Health and Mental Hygiene continues to be progressive in its efforts to provide vital records of high integrity to all entitled individuals. As previously mentioned, in December 2016 DOHMH issued the first amended intersex birth certificate under the gender marker change policy. While DOHMH efforts have received the support of many applicants, the advisory board recognizes the suggestions for improvement. The New York City Gender Marker Change Advisory Board plans to continue its evaluation of the identified barriers, processes and proposed recommendations, in order to improve the implementation of the gender marker change law.

Appendix

- I. City Health Information Volume 34 (2015) link
 - a. <https://www1.nyc.gov/assets/doh/downloads/pdf/chi/chi-34-2.pdf>
- II. Attached public comments:
 - a. Transcend Legal (Patricia Harrington on behalf of Noah Lewis)
 - b. New York Civil Liberties Union (Robert Hodgson)
 - c. Advocates with The Sylvia Rivera Law Project, Peter Cicchino Youth Project and Legal Services NYC (Kyle Rapiñan)
 - d. Michelle Miller
 - e. Callen – Lorde Community Health Center (Kimberleigh Joy Smith and D’hana D. Perry)



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New York City Department of Health and Mental Hygiene
Gender Marker Change Advisory Board

Monday, December 19, 2016

Comments on the Department's birth certificate
gender marker change requirements

by

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Executive Director
Transcend Legal

Transcend Legal welcomes the opportunity to comment on the Department's gender marker change requirements for NYC birth certificates.

Transcend Legal is a NYC-based national nonprofit that cultivates equitable social, medical and legal recognition of transgender people by offering culturally competent, transgender-led legal representation, public policy advocacy, community education & organizing, and public education.

One of our areas of service is assisting with name and gender changes for New York residents, many of whom were born in New York City. We have observed various barriers to getting doctor's letters for the correction.

Barriers under the existing policy

First, providers have trouble filing out the form correctly. In an effort to be supportive, the providers often list the individual's new name on the form. Edna Timbers has informed us that it must be the name on the birth certificate even though the form is being presented along with a name change order. There are often also misspellings of the new name. One provider used the person's nickname rather than the legal name they are adopting.

These errors are so common that we have had to take the step of filling out the client's information on the form prior to giving it to the provider.

There has also been confusion from providers about having to provide our clients with two separate letters—one for federal documents and one for the birth certificate. It would simplify things if NYC would accept the same letter that the federal government accepts for gender changes on federal documents such as Social Security, passports and immigration

documents.

Providers who specialize in transgender care are in high demand, and writing multiple letters and correcting errors on letters adds up to a significant drain on resources for already overworked providers.

Moreover, a person may have trouble finding a supportive provider, particularly if they live in a rural area or outside of New York City.

Finally, requiring a provider letter at all infringes on a person's rights to gender self-determination and privacy. The state has no interest in dictating the sex designation of any particular individual. An individual's sex is best determined by that individual. While many physical factors comprise one's sex such as chromosomes, hormone levels, secondary sex characteristics, reproductive organs, the most important factor is one's brain sex. An individual can readily attest to whether they are male or female. A medical provider is not required for this assessment given that that knowledge ultimately rests solely within that individual.

WPATH's 2015 Statement on Legal Recognition of Gender Identity notes that "[n]o particular medical, surgical, or mental health treatment or diagnosis is an adequate marker for anyone's gender identity, so these should not be requirements for legal gender change."¹ WPATH "urges governments to eliminate unnecessary barriers, and to institute simple and accessible administrative procedures for transgender people to obtain legal recognition of gender, consonant with each individual's identity, when gender markers on identity documents are considered necessary."²

Recommendation: self-attestation

We recommend that the Department adopt a procedure to change the sex designation that relies solely on an affidavit from the applicant. This procedure has been adopted in an increasing number of jurisdictions, including on NYC municipal ID cards.

¹ WPATH, 2015 WPATH Statement on Legal Recognition of Gender Identity, Jan. 15, 2015, https://amo_hub_content.s3.amazonaws.com/Association140/files/WPATH%20Statement%20on%20Legal%20Recognition%20of%20Gender%20Identity%201-19-15.pdf.

² *Id.*

Pennsylvania's policy, which allows for gender corrections for transgender youth upon receipt of a notarized affidavit from the parents, serves as a helpful model.

Internationally, countries such as Argentina,³ Denmark,⁴ Colombia,⁵ Malta,⁶ Ireland,⁷ and New Zealand⁸ have implemented self-attestation gender change policies for documents including birth certificates, national ID cards and passports. A similar policy is moving forward in Chile.⁹ The practices of these countries inform the following best practices in gender marker changes on state-issued identity documents.

³ An English translation of Argentina's Gender Identity Law is available at: <http://globaltransaction.files.wordpress.com/2012/05/argentina-gender-identity-law.pdf>.

⁴ Mitch Kellaway, *Denmark Passes Groundbreaking Gender 'Self-Determination' Law*, THE ADVOCATE, Sept. 3, 2014, <http://www.advocate.com/politics/transgender/2014/09/03/denmark-passes-groundbreaking-gender-self-determination-law>.

⁵ J. Lester Feder, *These Ten Trans People Just Got Their First IDs Under Colombia's New Gender Rules*, BUZZFEED NEWS, Jun. 10, 2015, https://www.buzzfeed.com/lesterfeder/these-ten-trans-people-just-became-the-first-to-celebrate-co?utm_term=.hmb7VJ7nA#.meYRP9Rg0.

⁶ Transgender Europe, *Malta Adopts Ground-breaking Trans and Intersex Law – TGEU Press Release*, Apr. 1, 2015, <http://tgeu.org/malta-adopts-ground-breaking-trans-intersex-law>.

⁷ Henry McDonald, *Ireland passes law allowing trans people to choose their legal gender*, THE GUARDIAN, July 16, 2015, <https://www.theguardian.com/world/2015/jul/16/ireland-transgender-law-gender-recognition-bill-passed>; Gender Recognition Act of 2015, <http://www.irishstatutebook.ie/eli/2015/act/25/enacted/en/pdf>.

⁸ New Zealand Department of Internal Affairs, *Information about Changing Sex / Gender Identity*, Sept. 29, 2016, <https://www.passports.govt.nz/what-you-need-to-renew-or-apply-for-a-passport/information> (allowing a gender change on a passport by completing a "Statutory Declaration indicating The sex / gender identity you wish to be displayed in your passport (M,F or X) [and] How long you have maintained your current sex / gender identity").

⁹ Michael Lavers, *Chilean Senate commission approves trans rights measure*, WASHINGTON BLADE, Aug. 5, 2016, <http://www.washingtonblade.com/2016/08/05/chilean-senate-commission-approves-trans-rights-measure>.

Medical consensus

Medical consensus favors transgender individuals being able to update their birth certificates—even without undergoing any particular medical treatment. WPATH advocates for amendments without requiring surgery.¹⁰ The American Psychological Association resolved in 2008 that it “encourages legal and social recognition of transgender individuals consistent with their gender identity and expression, including access to identity documents consistent with their gender identity and expression which do not involuntarily disclose their status as transgender for transgender people who permanently socially transition to another gender role.”¹¹

The American Medical Association adopted a policy in 2014 supporting the elimination of any government requirement that a transgender individual undergo surgery in order to amend their birth certificate.¹² Birth certificates exist apart from the intimate and private nature of medical treatments for transgender individuals, and the AMA resolution recognizes that states should not be concerned with the “fullness” of physical changes, but rather the individual’s intrinsic gender when acknowledging their transgender identity on updated legal documents.¹³

The National Association of Social Workers (“NASW”) has also stated that it “supports the legal recognition of transgender individuals as members of the gender with which they identify, regardless of assigned sex at birth or subsequent surgical or other medical interventions.”¹⁴

¹⁰ WPATH, Identity Recognition Statement, June 16, 2010, http://www.wpath.org/uploaded_files/140/files/Identity%20Recognition%20Statement%206-10%20on%20letterhead.pdf.

¹¹ APA, Policy Statement: Transgender, Gender Identity, & Gender Expression Non-Discrimination, August 2008, <http://www.apa.org/about/governance/council/policy/transgender.aspx>.

¹² American Medical Association (AMA), Conforming Birth Certificate Policies to Current Medical Standards for Transgender Patients (Resolution 5-A-13), (June 2014), <http://www.glad.org/uploads/docs/news/06-2014-ama--transgender-patients-birth-certificate-policies.pdf>

¹³ *Id.*

¹⁴ National Association of Social Workers, SOCIAL WORK SPEAKS: NASW POLICY STATEMENTS 2009-2012, at 347 (8th ed. 2009).

Conclusion

Thank you for considering these recommendations. If you have any questions or need further information, please contact Noah Lewis at nlewis@transcendlegal.org or (347) 612-4312.

TO CHANGE SEX/GENDER ON A PENNSYLVANIA CERTIFICATION OF BIRTH

Individuals Over the Majority Age of Eighteen

An individual who has reached the majority age of eighteen may request a change to the sex listed on his or her official Certification of Birth. The following documents shall be required:

1. One of the following:
 - a. If the individual possesses the Certification of Birth, he or she may request that change on the reverse side under the section "Corrections Desired."
 - b. If the individual does not possess the Certification of Birth, he or she may complete a correction form available on the Pennsylvania Department of Health website. He or she may list the correction under "Corrections Desired."
2. A completed Application for Certified Copy of Birth Record available on the Pennsylvania Department of Health website.
3. Either of the following:
 - a. A photocopy of the individual's government-issued photo identification card that verifies legal name and mailing address. The gender on this document will not be considered.
 - b. Two other forms of identification. Acceptable documents include utility bills, pay stubs, bank statement, income tax return/W2, car registration, lease/rental agreement, or credit card statement.
4. A check or money order in the amount of \$20.00 for the cost of the new Certification of Birth. Note that fees may be waived for individuals and their dependents who served or are currently serving in the Armed Forces.
5. A physician's statement from the attending medical physician for the individual's gender transition on office letterhead. An acceptable medical physician's statement shall meet the following conditions:
 - Full legal name of the patient and date of birth
 - Printed full name of physician and medical license/certificate number
 - Signature of physician and date of signature
 - Issuing state or country of medical license/certificate
 - Address and telephone number of the physician

- Language stating that he or she is the subject's attending physician and that he or she has a doctor/patient relationship with the subject.
- Language stating that the subject has completed or is in the process of appropriate clinical treatment for gender transition to the new gender (male/female).
- Language stating that "I declare under penalty of perjury under the laws of the United States that the forgoing is true and correct."

Note that subsequent amendments to the sex listed on the Certification of Birth for individuals over the majority age of eighteen shall require a court order.

Individuals Under the Majority Age of Eighteen

For an individual who has not reached the majority age of eighteen, the parent(s) listed on the Certification of Birth may request a correction to the sex listed on the minor individual's Certification of Birth. The following documents shall be required:

1. One of the following:
 - a. If the parent(s) possess the individual's Certification of Birth, they may list the correction on the reverse side under "Corrections Desired." The parent(s) listed on the Certification of Birth must sign where indicated in the presence of a notary. In addition, the notary must sign, date and affix their notary seal or stamp.
 - b. A correction form available on the Pennsylvania Department of Health website which includes:
 - Individual's name on the Certification of Birth
 - Individual's date of birth
 - Indicate which sex should appear on the individual's Certification of Birth

The parent(s) listed on the Certification of Birth must sign where indicated in the presence of a notary. In addition, the notary must sign, date and affix their notary seal or stamp.

2. A completed Application for Certified Copy of Birth Record, which is available on the Pennsylvania Department of Health website.
3. Either of the following:
 - a. A photocopy of the individual's government-issued photo identification card that verifies name and mailing address.

- b. Two other forms of identification. Acceptable documents to include utility bills, pay stubs, bank statement, income tax return/W2, car registration, lease/rental agreement, or credit card statement.
- 4. A check or money order in the amount of \$20.00 for the cost of the new Certification of Birth. Note that fees may be waived for individuals and their dependents who served or are currently serving in the Armed Forces.



NYCLU

NEW YORK CIVIL LIBERTIES UNION

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December 19, 2016

Emma Claye
Special Assistant to the Assistant Commissioner
Bureau of Vital Statistics
Department of Health and Mental Hygiene
125 Worth St., Room 204
New York, NY 10013

Re: **Comments for the Gender Marker Change Advisory Board**

Special Assistant Claye:

The New York Civil Liberties Union (“NYCLU”) welcomes the opportunity to comment on the implementation of the Department of Health and Mental Hygiene’s (“DOHMH’s”) policy changes regarding the correction of gender markers on birth certificates, as codified in Section 207.05 of Article 207 of the New York City Health Code.¹ That rule change removed outdated and severely discriminatory surgical requirements—requirements that had prevented many transgender and gender nonconforming New Yorkers from obtaining a corrected birth certificate—and it put in place a policy that instead requires a letter from one of a number of licensed providers confirming that a gender marker correction is necessary. Since the rule was updated at the end of 2014, an increased number of New Yorkers have been able to access the benefits of an identity document that accurately reflects their gender, and the NYCLU applauds this progress.

However, the policy could be further strengthened, and remaining barriers to access could be removed, by aligning New York City’s birth certificate gender marker policy with the more appropriate policy it has successfully employed in the context of New York City Municipal ID Cards and in the broader context of the New York City Human Rights Law: self-attestation. The Municipal ID policy is efficient, accurate, and protective, since it recognizes that an individual’s gender is best determined by that individual, and the Department should amend the current birth certificate policy to match it.

**Accurate birth certificates are vital for transgender
and gender nonconforming New Yorkers.**

As a fundamental identity document, an accurate birth certificate is critical to equal participation in society. In New York, birth certificates are required for, among other things:

¹ And in the parallel City Council action, Int. No. 491 and Int. No. 492, which also established the Advisory Committee tasked with monitoring implementation of these rule changes.

obtaining professional certifications; demonstrating work eligibility; registering for school; obtaining access to public facilities; obtaining a gun permit; and obtaining access to public benefits. For some, in particular for low-income New Yorkers, it is the only identify document available to be used when applying for job or obtaining health insurance.

In addition, having a valid birth certificate that accurately reflects one's identifying details is often necessary in order to obtain a host of other identity documents, and presenting a birth certificate is always required in order to obtain a New York State drivers' license or a United States passport. All of these forms of identification are then used to prove one's identity in countless everyday situations. In order to enter most schools, for example, a parent must show identification. The same is true for visitors at many hospitals, offices, and prisons. In addition, identification cards for many medical programs—programs that provide vital care—are necessary in order to ensure full access to services.

When a person is forced to show identification bearing a gender marker that conflicts with that person's appearance and gender identity, it not only creates confusion about whether the identification is genuine or fraudulent, it also "puts the person at risk of discrimination, harassment, and violence in nearly every aspect of daily life," since "[u]ncorrected documents have the potential to 'out' a person as transgender every time he or she begins a new job, applies for housing, credit, or public benefits, goes to a bar or club, is subject to a routine traffic stop, or boards an airplane."² Indeed, according to the results of a national survey, forty percent (40%) of transgender people who presented an uncorrected identity document in the course of their daily life experienced harassment as a result, and fifteen percent (15%) were asked to leave the building they were attempting to access.³

While using misgendered birth certificates can lead to accusations of fraud, harassment, discrimination, repeated outings, and denial of services, presenting a *corrected* birth certificate makes it possible for transgender and gender nonconforming New Yorkers to correct a host of other forms of identification and significantly reduce the incidence of such harmful experiences in their daily lives. In order to best facilitate access to the vast and life-changing array of benefits associated with the possession of accurate identity documents, the Department should thus adopt the most straightforward, efficient, and affirming policy option available to govern the correction process. That policy is self-attestation.

**Self-attestation aligns with successful existing New York City policies
regarding gender identity and eliminates unnecessary barriers to
obtaining accurate identity documents.**

² Harper Jean Tobin, *Fair and Accurate Identification for Transgender People*, LGBTQ Policy Journal at the Harvard Kennedy School (2011), available at <http://isites.harvard.edu/icb/icb.do?keyword=k78405&pageid=icb.page414493..>

³ Nat'l Gay and Lesbian Task Force, *Executive Summary of the National Transgender Discrimination Survey* (2011), available at http://www.endtransdiscrimination.org/PDFs/NTDS_Exec_Summary.pdf; see also *Wilson v. Phoenix House*, 42 Misc.3d 677, 688 (Kings County Sup. Ct. 2013) (noting that transgender people "often experience harassment and discrimination that results in social marginalization, including the denial of education, employment, housing opportunities, and health care.").

New York City already mandates that an individual's self-reported gender be respected in a number of contexts, including on other City-issued identity documents. Updating the City's birth certificate policy to align with these successful existing policies would add both consistency and simplicity to such a vital—and potentially daunting—process for transgender and gender nonconforming New Yorkers.

When New York City established its most recent form of City-issued identification, the Municipal ID Card, the City Council adopted a straightforward gender marker policy that allows transgender and gender nonconforming individuals to simply self-attest to their own gender.⁴ The policy has been successful and uncontroversial, and it recognizes that an individual's gender is best determined by that individual. It is also in keeping with City Commission on Human Rights guidance stating that asking for “proof” of a person's gender as a condition for them accessing sex-segregated facilities or programs is a form of discrimination.⁵ Similarly, the Department of Homeless Services mandates that an individual's self-reported gender determines their placement in a single-sex homeless shelter.⁶

By contrast, even a policy like the current DOHMH birth certificate rule, with its broad definition of the “proof” necessary to establish a person's gender, leaves in place lingering barriers that are unnecessary and invasive. Barriers to accessing the DOHMH-mandated providers who can verify a gender-marker correction application remain a significant concern, since transgender people are disproportionately unable to obtain medical care, mental health care, and access to related services due to a combination of discrimination, unemployment, and lack of health insurance. Transgender people are less likely to have health insurance and are more likely to delay medical treatment due to discrimination and/or inability to pay, and seventeen percent (17%) of transgender New Yorkers have been denied medical care simply for being transgender.⁷

In light of these systemic barriers, and of the City's successful implementation of a self-attestation standard in so many other contexts, the NYCLU recommends that the DOHMH consider adopting a similar policy of self-attestation for birth certificates. Such a policy would also bring New York City into line with other trans-inclusive jurisdictions to have adopted this most-protective and most-affirming standard for birth certificates.⁸

⁴ New York City Admin. Code § 3-115(c)(1).

⁵ New York City Commission on Human Rights, *Gender Identity/Gender Expression: Legal Enforcement Guidance*, (2015) (listing, as an example of a New York City Human Rights Law violation, “[r]equiring a transgender or gender non-conforming individual to provide proof of their gender in order to access the appropriate single-sex program or facility”).

⁶ New York City Department of Homeless Services, Division of Adult Services, *Transgender/Intersex Clients*, Procedure 06-1-31 (2006) (providing that transgender clients should have appropriate access to bathrooms and showers, and that residents may dress in accordance with their gender identity, regardless of what sex is listed on their ID).

⁷ Grant, Jamie M. et al., *Findings of the National Transgender Non-Discrimination Survey: New York Results*, (2011) at 2.

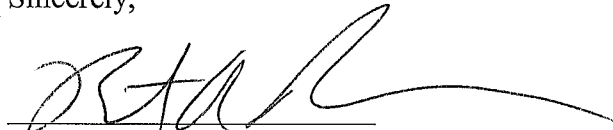
⁸ These jurisdictions include Argentina (*see* http://www.tgeu.org/Argentina_Gender_Identity_Law), Denmark (*see* <http://www.advocate.com/politics/transgender/2014/09/03/denmark-passes-groundbreaking-gender-self-determination-law>), Ireland (*see* <http://www.thejournal.ie/trans-rights-ireland-gender-recognition-self-declaration-2141181-Jun2015/>), and Colombia (*see* <http://www.americasquarterly.org/content/colombia-strikes-physical-exam-requirement-gender-change>).

Conclusion.

While the 2014 rule change has been a welcome step forward in fulfilling the City's mission to treat all New Yorkers equally, the NYCLU respectfully submits these comments in the hope that New York can continue to push forward and lead the way in protecting the rights of its transgender and gender nonconforming residents. By applying its existing self-attestation framework to birth certificates, New York City has the opportunity to create a uniform system consistent with existing policies and to make significant strides in ensuring equal opportunity for full participation in society by all New Yorkers.

Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'R. Hodgson', written over a horizontal line.

Robert Hodgson
Staff Attorney
New York Civil Liberties Union

MEMORANDUM

To: Whom It May Concern

From: Advocates with The Sylvia Rivera Law Project, Peter Cicchino Youth Project and Legal Services NYC

Date: December 19, 2016

Re: Birth certificate modernization for transgender, gender non-conforming and intersex New Yorkers

Recommendations: The Department of Health and Mental Hygiene (DOHMH) should adopt regulations to permit:

- 1) Self-attestation of gender/sex similar to idNYC;
- 2) The option to select a non-binary designation both for intersex and gender non-conforming/non-binary individuals, and;
- 3) Fee waivers for low-income New Yorkers to obtain and correct their birth certificates.

INTRODUCTION

Despite significant policy changes, the vast majority of New York City-born transgender people have inaccurate birth certificates. Previous to current policy, the majority of transgender women and men did not have the surgeries the NYC-1971 policy required. While the current policy is an outstanding achievement of the tireless advocacy of transgender, gender non-conforming and intersex communities, there are three concrete steps that the Department can change to dramatically improve the lives of TGNCI people. The Peter Cicchino Youth Project, the Sylvia Rivera Law Project and Legal Services of New York are three direct legal service providers that fought alongside others for the current law and who now submit these comments additional consideration.

As the Department knows, a birth certificate is a “key” that unlocks a number of important doors— it’s a living document that is used on a regular basis to participate in society. It is a prerequisite getting other identity documents and it is often the only form of ID that low-income New Yorkers have when applying for jobs, health insurance, or enrolling in school. Birth certificates in New York are required for, among other things: obtaining professional certifications; obtaining drivers’ licenses and passports; demonstrating work eligibility; registering for school; obtaining access to public facilities; obtaining a gun permit; and obtaining access to public benefits. Using mismatched birth certificates can lead to *other* mismatched ID documents, which all lead

to harassment, discrimination, accusations of fraud, and denials of service. Birth certificates are corrected routinely when they do not accurately reflect a person's identity. The information on them is used to confirm a person's *current* identifying details in many contexts like adoption or name changes.

When you have an identity document such as a birth certificate that does not match who you are, you become a target for discrimination, accusations of fraud, denials of service, and all sorts of other administrative and logistical problems. Often times a birth certificate is determinative of the gender marker listed on the rest of an individual's identity documents. Many of our clients and others face harassment when presenting identity documents that do not match. Many others report being denied entry or asked to leave an establishment, and some have even experienced physical assault due to mismatched ID.

While the current list of providers who can affirm or attest to the correct gender encompasses many different types of health care professionals, limiting or restricting to the set list of providers severely harms the people who most need accurate ID. As the success of idNYC shows, gender self-determination and self-attestation is key to the prevention of discrimination and harassment, not the reliance on a third party medical provider. Moreover, transgender people are often unable to access adequate medical care due to a combination of discrimination, unemployment, and lack of health insurance. TGNCI people are less likely to have health insurance and are more likely to delay medical treatment due to discrimination and/or inability to pay, and 17% of transgender New Yorkers have been denied medical care simply for being transgender.¹

Revising the policy after its laudable successes is a positive step towards continuing to improve the lives of people who have been excluded from fully participating in society on the basis of an inaccurate piece of paper. All people should be able to correct their sex on their birth certificate by their own decision, not the decision of others.

RECOMMENDATIONS

Recommendation 1: Self-attestation

TGNCI people still face barriers to getting the correct sex designated on their birth certificate. The current policy used by the DOHMH states that a medical provider must identify the person's gender and, if that provider is not a D.O. or M.D., that statement must be notarized. Many people have trouble finding a competent provider, particularly if they are not connected to social services or the LGBTQ community.

¹ See Findings of the National Transgender Discrimination Survey New York State Results, Jamie M. Grant, et al. Injustice at Every Turn: A Report of the National Transgender Discrimination Survey (2011), http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_state/ntds_state_ny.pdf/

Moreover, the fact that the form must be notarized even if it signed by a medical provider (who is not a D.O. or M.D.) creates additional confusion, miscommunication and hurdles when attempting to get this affidavit. We have heard, for example, that one major hospital corporation does not have a notary on staff available. This has created significant barriers to patients of that hospital accessing their correct birth certificates. It also infringes on a person's right to gender self-determination and privacy.

The City has no interest mandating the sex designation of any particular individual. An individual's sex is best determined by that individual and not by a physician or medical health care provider. TGNCI people know their genders themselves.

WPATH's 2015 Statement on Legal Recognition of Gender Identity notes that "[n]o particular medical, surgical, or mental health treatment or diagnosis is an adequate marker for anyone's gender identity, so these should not be requirements for legal gender change."² WPATH "urges governments to eliminate unnecessary barriers, and to institute simple and accessible administrative procedures for transgender people to obtain legal recognition of gender, consonant with each individual's identity, when gender markers on identity documents are considered necessary."³

States such as Nevada recently updated their birth certificate policy to permit self-attestation.⁴ Individuals can change their sex in Nevada by submitting an affidavit stating the gender requested and a second affidavit from someone who knows the person, or other verifiable evidence confirming the facts of the evidence. The second affidavit can be from anyone who has personal knowledge of the applicant's gender which may include a firsthand personal, familial, medical or professional relationship.

Internationally, countries such as Argentina,⁵ Denmark,⁶ Colombia,⁷ Malta,⁸ Ireland,⁹ and New Zealand¹⁰ have implemented self-attestation gender change policies for

² See 2015 WPATH Statement on Legal Recognition of Gender Identity, http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1635&pk_as_sociation_webpage=6639.

³ *Id.*

⁴ See Chapter 440 – Vital Statistics; Nevada Register of Administrative Regulations: R033-16, R066-16, R077-16, <https://www.leg.state.nv.us/NAC/NAC-440.html/>

⁵ See An English translation of Argentina's Gender Identity Law is available at: <http://globaltransaction.files.wordpress.com/2012/05/argentina-gender-identity-law.pdf>.

⁶ Mitch Kellaway, *Denmark Passes Groundbreaking Gender 'Self-Determination' Law*, THE ADVOCATE, Sept. 3, 2014, <http://www.advocate.com/politics/transgender/2014/09/03/denmark-passes-groundbreaking-gender-self-determination-law>.

⁷ See J. Lester Feder, *These Ten Trans People Just Got Their First IDs Under Colombia's New Gender Rules*, BUZZFEED NEWS, Jun. 10, 2015, https://www.buzzfeed.com/lesterfeder/these-ten-trans-people-just-became-the-first-to-celebrate-co?utm_term=.hmb7VJ7nA#.meYRP9Rg0.

documents including birth certificates, national ID cards and passports. A similar policy is moving forward in Chile.¹¹ The practices of these countries should inform New York City's best practices as well.

Therefore, we recommend that DOHMH adopt a procedure to change the sex identifier on a birth certificate relying solely on an affidavit from the applicant. This procedure would mirror the gender policy of idNYC and permit a change with minimal intrusion by the government or the medical community.

Recommendation #2: Non-binary designations

Current New York City policy limits gender designation to either male or female; it does not permit the designation of sex to be unspecified, non-binary, an "x" or any other designation. This policy leaves out intersex people, gender non-conforming people, and other people who identify outside the constructed gender binary.

"Intersex" is an umbrella term used to describe a range of bodily variations. Intersex people are born with sex characteristics that do not fit common notions of binary bodies designated "male," or "female." For some people, variations are visible at birth, while in others, they may not be apparent until puberty. Some variations may not be visible at all. Experts estimate that between .05 percent and 1.7 percent of the population is born with intersex traits.¹² Some intersex people do identify as male or as female,

⁸ See Transgender Europe, *Malta Adopts Ground-breaking Trans and Intersex Law – TGEU Press Release*, Apr. 1, 2015, <http://tgeu.org/malta-adopts-ground-breaking-trans-intersex-law>.

⁹ See Henry McDonald, *Ireland passes law allowing trans people to choose their legal gender*, THE GUARDIAN, July 16, 2015, <https://www.theguardian.com/world/2015/jul/16/ireland-transgender-law-gender-recognition-bill-passed>; Gender Recognition Act of 2015, <http://www.irishstatutebook.ie/eli/2015/act/25/enacted/en/pdf>.

¹⁰ See New Zealand Department of Internal Affairs, *Information about Changing Sex / Gender Identity*, Sept. 29, 2016, <https://www.passports.govt.nz/what-you-need-to-renew-or-apply-for-a-passport/information> (allowing a gender change on a passport by completing a "Statutory Declaration indicating The sex / gender identity you wish to be displayed in your passport (M,F or X) [and] How long you have maintained your current sex / gender identity").

¹¹ See Michael Lavers, *Chilean Senate commission approves trans rights measure*, WASHINGTON BLADE, Aug. 5, 2016, <http://www.washingtonblade.com/2016/08/05/chilean-senate-commission-approves-trans-rights-measure>.

¹² See *How common is intersex?* INTERSEX SOCIETY OF NORTH AMERICA, <http://www.isna.org/faq/frequency>

while others identify as intersex, third-gender, or other options all together. Intersex people may also be transgender or gender non-conforming.¹³

“Gender non-conforming” is an umbrella term for people who do not identify along a constructed gender binary. Gender non-conforming people may identify as combinations of genders, as no gender at all, or as varying genders that alter.

Gender non-conforming and intersex people who do not identify on the gender binary may use the singular pronoun “they,” “them,” and “their,” or other third person gender pronouns.¹⁴

Currently, there are no options for a non-binary designation with New York City birth certificates even though many intersex and gender non-conforming people would welcome, and are actively requesting, the change.

Other jurisdictions are moving in the direction of permitting non-binary designations. For instance, in the state of Oregon, a court order was issued determining Jaime Shupe’s gender to be “non-binary”.¹⁵ The Judge ordered the Department of Motor Vehicles to issue a State I.D. with the sex designation of Jamie to be listed as “X.” Moreover, in California, Sara Keenan became the second non-binary person, when a Santa Cruz decision ordered her gender to be corrected to non-binary.¹⁶ As advocates, we have been working with Sarah, and while she won her case, California only offered her an intersex birth certificate rather than a designation which would welcome Sara’s identity as gender non-conforming.

¹³ See “‘They,’ the Singular Pronoun, Gets Popular,” THE WALL STREET JOURNAL, April 10, 2015, <http://www.wsj.com/articles/can-they-be-accepted-as-a-singular-pronoun-1428686651>; Writing Around Gender, THE NEW YORK TIMES, Feb. 6, 2015 at <http://www.nytimes.com/times-insider/2015/02/06/writing-around-gender>; R.L.G., *Singular They: Why 2015’s Word Of The Year Is Rather Singular*, ECONOMIST, Jan. 15, 2016, <http://www.economist.com/blogs/prospero/2016/01/johnson-singular-they>.

¹⁴ See “‘They,’ the Singular Pronoun, Gets Popular,” THE WALL STREET JOURNAL, April 10, 2015, <http://www.wsj.com/articles/can-they-be-accepted-as-a-singular-pronoun-1428686651>; Writing Around Gender, THE NEW YORK TIMES, Feb. 6, 2015 at <http://www.nytimes.com/times-insider/2015/02/06/writing-around-gender>; R.L.G., *Singular They: Why 2015’s Word Of The Year Is Rather Singular*, ECONOMIST, Jan. 15, 2016, <http://www.economist.com/blogs/prospero/2016/01/johnson-singular-they>.

¹⁵ See ‘Jamie Shupe becomes first legally non-binary person in the US,’ THE GUARDIAN, June 16, 2016 at <https://www.theguardian.com/world/2016/jun/16/jamie-shupe-first-non-binary-person-oregon>. See also, *In the Matter of the Sex Change of Jamie Shupe*, 16-CV-13991, http://www.portlandmercury.com/images/blogimages/2016/06/15/1466024211-shupe_ruling.pdf.

¹⁶ See ‘Californian Becomes Second US Citizen Granted ‘Non-Binary’ Gender Status,’ NBC NEWS, Sept. 26, 2016, <http://www.nbcnews.com/feature/nbc-out/californian-becomes-second-us-citizen-granted-non-binary-gender-status-n654611>

These general principles are also mirrored in Federal regulations which signify that non-binary people are to be free from discrimination and prejudice. Section 1557 of the Affordable Care Act states that discrimination on the basis of gender identity for federally funded health care providers is prohibited by law.¹⁷ The section specifies that a person's gender may be, "may be male, female, neither, or a combination of male and female." Moreover, The Federal Register's website provides more context on why the section reads that way, stating, "The insertion of this clause helps clarify that those individuals with non-binary gender identities are protected under the rule."¹⁸

Federal courts are also responding to the plea that intersex and non-binary people be free from discrimination by the government. In the case of *Zzyym vs. Kerry*, an individual applying for a US Passport was rejected after requesting a non-binary designation. The District Court ordered that the Department of Homeland Security must justify its record for why the Department would reject an applicant on that basis.¹⁹ While the Passport Service currently recognizes passports from other countries that are labeled with an "X," they rejected petitioner's application without any rational reason or any record of why it was rational to do so.²⁰ Moreover, the Judge found that U.S. Passports did not have a requirement for sex designations until 1976 and because the agency lacked any reasonable basis to reject someone who is applying for a non-binary passport, it must come back with a rational reason. The lawyers for Zzyym are hopeful that due to the fact that there is no rational reason for the government to refuse to recognize someone's gender identity as accurate, they will become the prevailing party on remand.

Internationally, The International Civil Aviation Organization (CAO) standards for machine-readable travel documents permit the sex of a holder to be "X".²¹ Moreover,

¹⁷ See Section 1557 of the Patient Protection and Affordable Care Act. U.S. Department of Health and Human Services. <https://www.hhs.gov/civil-rights/for-individuals/section-1557/index.html>.

¹⁸ See Federal Digital System (FDsys), Federal Register. <https://www.federalregister.gov/documents/2016/05/18/2016-11458/nondiscrimination-in-health-programs-and-activities#h-7>

¹⁹ See *DZzyym v. Kerry*, No. 15-CV-02362-RBJ, 2016 WL 6879827 (*D. Colo.* Nov. 22, 2016).

²⁰ *Id.*

²¹ See ICAO Document 9303.

<http://www.icao.int/Security/mrtd/Pages/Document9303.aspx>. Also, The United States is an active member of ICAO, established by the Convention on Civil Aviation of 1944 (Chicago Convention). See *Wardair Can. Inc. v. Fla. Dep't of Revenue*, 477 U.S. 1, 9-10 (1986); see also 22 U.S.C. § 5501 ("It is the policy of the United States . . . to work through the [ICAO] to improve aviation security internationally."). ICAO is the sole international body that establishes global standards for travel document content and format.

countries such as Germany,²² Australia, Nepal, France (in part), Pakistan, Nepal and New Zealand permit third sex options.²³ This being said, some people who have third sex options want a binary designation. Such an option is the right selection for some people while a binary option is the right option for others. What is important is that there are options for markers that affirm the correct gender designation for individuals and the individual decides.

Recommendation #3: Fee waivers

Transgender people face disproportionate poverty—15% compared to 4% of the general population.²⁴ They cannot afford to order their birth certificate which is needed to file a name change petition.²⁵ They also cannot afford to correct their birth certificate following a name or gender change. Most recent reports indicate that the discrimination and poverty faced by non-binary people and gender non-conforming people is also alarming.²⁶

The uncompromising processing fee of \$40 in addition to \$15 for a new certificate, is out of step and an undue burden for low-income New Yorkers, especially low-income New Yorkers who are also people of color, TGNCI and/or surviving in underground economies. While some legal service providers pay for this \$55 fee for low-income people who are also receiving a name change, such as SRLP, PCYP, and LSNY the fee is significant and a cost that is unduly prohibitive to many people, especially people not connected to social services.

Therefore, please consider adopting a policy for free or reduced-fee certified copies and corrections for low-income people. The New York Division of Criminal Justice Services, for example, allows fee waivers for a criminal history record check when presented with an affidavit of hardship or a Common Benefit Identification Card.

²² See 'Germany got it right by offering a third gender option on birth certificates,' THE GUARDIAN, Nov. 10, 2013, <https://www.theguardian.com/commentisfree/2013/nov/10/germany-third-gender-birth-certificate>;

²³ See Lauren Bishop, *Gender and Sex Designations for Identification Purposes: A Discussion on Inclusive Documentation for a Less Assimilationist Society*, 30 WIS. J.L. GENDER & SOC'Y 131, 142 (2015).

²⁴ See Jamie M. Grant, et al. *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, 18 (2011); James, S.E., Herman, J.L., Rankln, S., Keisling, M., Mottet, L., & Anafi, M. (2016). *The report of the 2015 U.S. Transgender Survey*. Washington, DC: National Center for Transgender Equality.

²⁵ Fee waivers are available for court filing fees and costs pursuant to CPLR § 1101.

²⁶ See James, S.E., Herman, J.L., Rankln, S., Keisling, M., Mottet, L., & Anafi, M. (2016). *The report of the 2015 U.S. Transgender Survey*. Washington, DC: National Center for Transgender Equality.

The best policy would be a court affidavit of financial hardship as it would be the easiest for low income TGNCI people to obtain and retain.

CONCLUSION

In conclusion, New York City should continue to modernize its birth certificate policy by following the recommendations of transgender, intersex, and gender non-conforming people who have come forward today with specific requests that you focus on issues of self-attestation, providing fee waivers for low-income New Yorkers, and recognizing the gender identities of non-binary New Yorkers.. We also applaud the DOHMH for calling this public hearing and hope that you continue to work with the most affected New Yorkers as this policy is updated.

Respectfully submitted,

PETER CICCHINO YOUTH PROJECT

SYLVIA RIVERA LAW PROJECT

LEGAL SERVICES NYC

From: Michkabibble [mailto:yefefiyah@gmail.com]
Sent: Saturday, December 17, 2016 5:13 PM
To: Emma Claye
Subject: Testimony

Hi!

I got your email from Noah Lewis.

My non-binary 9.5 year old has written the following testimony to be presented on Monday. I will likely be there; they may not...

My name is Kol Barak Miller. I was born on April 1st, 2007. The doctor said, "It's a girl!" However, when I was 2.5 years old, I told my mom, "I'm a boy AND a girl." My mom never questioned me, and always accepted me for who I was, and who I am. My mom as helped me fight for my rights at school by making sure that the staff received training to use my preferred pronouns; they/them. Right now, I am legally changing my name to the one I have been using for two years. I am hoping to be able to legally change my gender to non-binary on my birth certificate and passport. I feel like I am being forced to be a boy or a girl.

NY is one of the most progressive states, and people should be able to be who they feel they are. This is why I think there should be a box for "non-binary".



December 19, 2016

Emma Claye, MPH
Special Assistant to the Assistant Commissioner
Bureau of Vital Statistics
NYC Department of Health and Mental Hygiene, Division of Epidemiology
125 Worth St., Room 204
New York, New York 10013

Re: Birth certificate modernization for transgender, gender non-conforming and intersex New Yorkers

Callen-Lorde is pleased, to respond to the NYC Department of Health and Mental Hygiene's Gender Marker Change Advisory Board meeting on December 19, 2016 regarding gender marker corrections on NYC birth certificates.

Callen-Lorde is a growing federally-qualified health center (FQHC) with a mission to reach lesbian, gay, bisexual and transgender communities and people living with HIV in addition to its geographic service areas. As a vital part of the dynamic healthcare infrastructure in New York City (NYC), Callen-Lorde provided a patient-centered medical home for 16,643 patients, who made 99,760 visits in 2015. With more than 3,500 trans*1 patients (21%), we have a deep expertise in transgender health. Overall, many of our patients are young, 65% are under 40 and 14% are under 25. Our trans* patients have access to hormone therapy as part of their comprehensive primary care as well as access to all of our clinical and programmatic services.

Further, Callen-Lorde has experienced significant growth in the last few years, with the number of patients increasing 10 percent from 2014 to 2015. Nearly 90% of patients accessed primary medical care; 9% accessed mental health services, 15% accessed dental care and 39% accessed supportive and enabling services, including care coordination and patient education. In 2015, we continued to address lack of insurance access in our communities, assisting 4,480 consumers with enrollment information and successfully enrolling 2,433 applicants. We also continued to serve those most in need among our communities; approximately 9% are homeless or unstably housed and 26% are uninsured, far exceeding the statewide average of 18% among health centers.

Callen-Lorde is a credible and respected provider of sexual health services, serving as the city's number one treater for gonorrhea with one of the largest syphilis treatment practices in the city, second only to the NYC DOHMH. We are an essential thread in New York's public health fabric.

Callen-Lorde is pleased that these regulations were put forth in 2014. We are deeply grateful to the New York City Health Commissioner for recognizing the need for New York's transgender communities to

have documents that are aligned with their gender. Callen-Lorde strongly and enthusiastically supports the current regulations and appreciates the city's efforts toward this end. We respectfully offer the following four comments in an effort to make the regulation stronger and more effective:

1) Self-attestation of gender/sex similar to idNYC

TGNC people continue to face difficulties correcting the gender marker that appears on their state and federal IDs. The current policy used by the DOHMH states that a medical provider must identify the person's gender and, if that provider is not a D.O. or M.D., that the letter must be notarized. The lack of medical providers with these specific credentials can make it difficult for patients who rely on nurse practitioners and physician's assistants for their primary care. It is our belief that if nurse practitioners and physician's assistants are capable of providing medical care, then they are of credible credentials to be the primary signature to affirm a patient's gender. Furthermore, we are in support of an individual's ability to self-attest to their own gender identity. The city currently supports self-attestation through the idNYC program and we propose that the DoHMH adopt a similar model for correcting birth certificates.

2) Non-binary designation both for intersex and gender non-conforming/non-binary individuals

Save for the New York City Municipal ID, gender non-conforming (GNC) and intersex people are currently unable to access identification documents and health care that accurately reflects their gender identity. Current policies limit the gender designation to either male or female when in fact, there are variety of gender identities and pronouns that exist. In our line of work, we see that other states like Oregon and California have begun to allow non-binary designations for GNC people. Additionally, intersex people are often placed in the unfortunate position to advocate for their identities throughout their adult lives. As seen in the idNYC program, having an "unspecified", or no designation would open doors for GNC and intersex people to access systems that are not designed to recognize these very real identities.

3) Fee waivers for low-income New Yorkers to obtain and correct their birth certificates

The Callen-Lorde Community Health Center's mission is to serve low-income LGBTQI New Yorkers, and our TGNC patient population reflects the most marginalized group of all of our patients. Sharp increases in poverty, homelessness, unemployment and lack of access to other basic needs are seen within this particular patient population. Moreover, the general lack of resources available to help TGNC people magnifies the barriers our patients face. The cost of document correction can be prohibitive for many TGNC New Yorkers. The New York City Civil Courts currently allow low-income people to apply for fee waivers when submitting a petition for a legal name change. Please consider a few waiver allowance for this population.

4) "Universal application" for both New York State and New York City birth certificates as well as the New York State DMV

The gender correction and name change process is complex and lengthy, requiring each person to go to every state and federal agency in person to submit applications for gender and name corrections. While adopting new procedures can take considerable time, we would like to propose a "Universal Application" for NYC residents who are in need of a name and gender

correction. Ideally this single application can be used to correct a New York City birth certificate, a New York State birth certificate, the New York State ID from the Department of Motor Vehicles and the New York City Municipal ID. We believe a single application for *all* New Yorkers will create efficiency and ease the burden on TGNC people who already experience tremendous amounts of stress and lack of access to many basic needs like identity documents.

On behalf of the Board, staff and patients of Callen-Lorde, I would like to thank the Department of Health and the Executive Chamber for its continued effort to improve the lives and the health of New York's transgender communities. We appreciate the opportunity to represent this voice, and we look forward to continuing to work with the state on these matters.

Please regard Callen-Lorde as a resource, and thank you again for the opportunity to comment on these regulations.

Respectfully Submitted,

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