



New York City Department of Health and Mental Hygiene  
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Comments on Proposed Amendment to Section 207.05 of Article 207  
of the New York City Health Code

by

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My name is Michael Silverman and I am executive director of the Transgender Legal Defense & Education Fund, or TLDEF. TLDEF is a nonprofit law office located in Manhattan. TLDEF is committed to ending discrimination based upon gender identity and expression and to achieving equality for transgender people through public education, test-case litigation, direct legal services and public policy efforts.

We bring test-case litigation around the country designed to advance the rights of the transgender community. One such case is our lawsuit against the City of New York and the New York City Department of Health & Mental Hygiene – filed in 2011 - challenging the requirement that transgender people undergo “convertive surgery” before the city will correct their birth certificates.

We also provide direct services to transgender New York City residents through our Name Change Project, which provides free legal name change services to transgender people through partnerships with private law firms and corporate legal departments. To date, we have served over 1,600 community members through the project. The data we collect on community members’ lives is stark: They are overwhelmingly poor, with nearly two-thirds receiving Medicaid or another form of public assistance. Two-thirds report an annual income of less than \$10,000, with most of those having no identifiable sources of income. 84% of clients reported an income of less than \$20,000.

Our deep understanding of the difficulties that transgender people face when seeking access to health care, employment, public benefits, housing, and many other matters animates our response to the proposed changes to the New York City Health Code (the “Code”) as

reflected in the Department’s proposed amendment to Section 207.05 of the New York City Health Code.

We commend and support the Department’s efforts to amend the Code. Eliminating the requirement that a person requesting a change to the gender marker on their New York City birth certificate present proof of convertive surgery is a step that is in line with changes made by other jurisdictions as well as with current standards of medical treatment for individuals diagnosed with gender dysphoria.

### **Accurate Birth Certificates are Vital for Transgender New Yorkers**

The vast majority of native transgender New Yorkers have inaccurate birth certificates. Eight out of ten transgender women and nine out of ten transgender men have not had the surgeries the Health Department currently requires to correct their birth certificates.<sup>1</sup> To correct the sex designation for transgender individuals, the Health Department currently requires proof of “convertive surgery,”<sup>2</sup> which is interpreted exclusively to mean genital reassignment surgery.

Accurate birth certificates are important because birth certificates are living documents that are increasingly used in many contexts to prove identity, age, and citizenship. They may be the only form of ID that low-income New Yorkers have when applying for jobs or public benefits.

Barriers to accurate identity documents further marginalize this already vulnerable population. Due to discrimination in housing, employment and education, transgender people are disproportionately unemployed, HIV+ and homeless.<sup>3</sup> When transgender people are forced to present incorrect ID, they are subject to harassment, discrimination, and accusations of fraud. They can even be turned away from receiving vital public services, such as Food Stamps, cash assistance, and HIV/AIDS Services Administration (HASA) benefits.

### **Medical Consensus Favors Accurate Identity Documents for Transgender Individuals**

The medical consensus recognizes that legal documents should reflect a transgender person’s affirmed sex. The American Medical Association, American Psychological Association, World Professional Association for Transgender Health, and National Association of Social Workers all support changing identity documents, including birth certificates, without requiring surgery.<sup>4</sup>

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<sup>1</sup> Grant, Jamie M. et al., *Injustice at Every Turn: A Report of the National Transgender Non-Discrimination Survey*, National Center for Transgender Equality (2011) at 79 <endtransdiscrimination.org/PDFs/NTDS\_Report.pdf>.

<sup>2</sup> This convertive surgery standard is also often applied to individuals with differences in sex development who need to correct the sex designation on their birth certificate past infancy.

<sup>3</sup> See generally, Grant, *supra* note 1.

<sup>4</sup> AMA, H-65.967 Conforming Birth Certificate Policies to Current Medical Standards for Transgender Patients <<https://ssl3.ama-assn.org/apps/ecomm/PolicyFinderForm.pl?site=www.ama-assn.org&uri=/resources/html/PolicyFinder/policyfiles/HnE/H-65.967.HTM>>; WPATH, Identity Recognition Statement <[http://www.wpath.org/uploaded\\_files/140/files/Identity Recognition Statement 6-6-10 on letterhead.pdf](http://www.wpath.org/uploaded_files/140/files/Identity%20Recognition%20Statement%206-6-10%20on%20letterhead.pdf)>; APA, Transgender, Gender Identity, & Gender Expression Non-Discrimination, <<http://www.apa.org/about/policy/transgender.aspx>>; NASW, Transgender and Gender Identity Issues, in *Social*

## NYC Has Fallen Behind Other Jurisdictions – Including New York State – That Have Updated Their Policies

Many states have updated their birth certificate policies in recognition of the fact that an individual's sex depends on more than just surgical status. The following jurisdictions require a health care provider's certification rather than proof of surgery: California,<sup>5</sup> New York State,<sup>6</sup> Oregon,<sup>7</sup> Vermont,<sup>8</sup> Washington,<sup>9</sup> District of Columbia,<sup>10</sup> Iowa<sup>11</sup> and the federal government (for U.S. citizens born abroad as well as for passports,<sup>12</sup> Social Security records,<sup>13</sup> and green cards and naturalization certificates<sup>14</sup>).

Transgender people seeking to amend their birth certificate's sex designation should be required to provide only *one* document from a treating or evaluating health care provider that

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*Work Speaks: National Association of Social Workers Policy Statements 2009-2012*, p. 347 (8th ed. 2009).

<sup>5</sup> Cal. Health and Safety Code § 103425-103445 (“The petition shall be accompanied by an affidavit of a physician attesting that the person has undergone clinically appropriate treatment for the purpose of gender transition, based on contemporary medical standards...”).

<sup>6</sup> Internal Policy of New York State Department of Health, on file with Transgender Legal Defense and Education Fund (June 2014).

<sup>7</sup> Or. Rev. Stat. § 33.460 (“A court . . . may order a legal change of sex and enter a judgment indicating the change of sex of a person if the court determines that the individual has undergone surgical, hormonal, or other treatment appropriate for that individual for the purpose of gender transition and that sexual reassignment has been completed.”).

<sup>8</sup> 18 V.S.A. § 5112 (“An affidavit by a licensed physician who has treated or evaluated the individual stating that the individual has undergone surgical, hormonal, or other treatment appropriate for that individual for the purpose of gender transition shall constitute sufficient evidence for the court to issue an order that sexual reassignment has been completed.”);

<sup>9</sup> Washington Dept. of Health Proc. CHS-B5 (2008) (requiring a physician's letter “stating that the requestor has had the appropriate clinical treatment.”).

<sup>10</sup> Code of the District of Columbia § 7-210.01 (“The individual has undergone surgical, hormonal, or other treatment appropriate for the individual for the purpose of gender transition, based on contemporary medical standards”). See also Birth Certificate Gender Designation Application Form <<http://doh.dc.gov/node/778482>> and Statement of Licensed Healthcare Provider Certifying the Applicant's Gender Change <<http://doh.dc.gov/node/778492>> (allowing a certification from a licensed physician, osteopathic physician, psychologist, clinical social worker, professional counselor, or nurse practitioner).

<sup>11</sup> Iowa Code, § 144.23(3) (“A notarized affidavit by a licensed physician and surgeon or osteopathic physician and surgeon stating that by reason of surgery or other treatment by the licensee, the sex designation of the person has been changed. The state registrar may make a further investigation or require further information necessary to determine whether a sex change has occurred.”)

<sup>12</sup> U.S. State Department Foreign Affairs Manual, 7 FAM 1300 Appendix M: Gender Change, *available at* <<http://www.state.gov/documents/organization/143160.pdf>> (“Sexual reassignment surgery is not a prerequisite for passport issuance.... The same documentary requirements specified above for passport services would pertain to amending gender in a [Consular Report of Birth Abroad of Citizen of the United States of America].”).

<sup>13</sup> Soc. Sec. Admin, *RM 10212.200 Changing Numident Data for Reasons other than Name Change* <<http://policy.ssa.gov/poms.nsf/lnx/0110212200>> (last updated Sept. 30, 2013) (requiring “medical certification of appropriate clinical treatment for gender transition in the form of an original signed statement from a licensed physician”).

<sup>14</sup> U.S. Citizenship & Immigration Services, Adjudication of Immigration Benefits for Transgender Individuals; Addition of Adjudicator's Field Manual (AFM) Subchapter 10.22 <<http://www.uscis.gov/iframe/ilink/docView/AFM/HTML/AFM/0-0-0-1/Chapter10-22.html>> (requiring a medical certification stating that “the individual has had appropriate clinical treatment for gender transition to the new gender”).

demonstrates that *clinically appropriate* treatment has been provided based on the person's individualized and particular medical needs. Such a policy would be comparable to the current policies of these four federal agencies, five sister states, New York State, and the NYS Department of Motor Vehicles.<sup>15</sup> It is also important that the proposed amendments would eliminate the requirement for an individual to change their name before their birth certificate can be amended. There are many reasons an individual may choose not to change their name, even when they are changing their sex designation. We commend the Department of Health and Mental Hygiene for proposing a policy that is in line with the updated policies being put in place across the country.

### **NYC DOHMH's Current Policy is Outdated and Inconsistent with Contemporary Standards of Care for Transgender Persons**

The scientific community has progressed since first recognizing transgender identities; yet the DOHMH policy continues to adhere to outdated concepts. DOHMH policy requirements in no way reflect contemporary medical and psychological standards of care which providers actually use in treating transgender people. The World Professional Association for Transgender Health (WPATH), an international, inter-disciplinary non-profit organization recognized by the American Medical Association as an authority in the field of transgender health issues,<sup>16</sup> has established standards of care to instruct healthcare providers about how to treat transgender people in the safest and most effective manner.<sup>17</sup> WPATH recognizes and emphasizes that, like all other people who seek medical care, individual transgender patients have different healthcare needs and “clinically appropriate treatments must be determined on an individualized basis with the patient’s physician.”<sup>18</sup> WPATH has called for updated policies that reflect these standards:

No person should have to undergo surgery or accept sterilization as a condition of identity recognition. If a sex marker is required on an identity document, that marker could recognize the person’s lived gender, regardless of reproductive capacity. The WPATH Board of Directors urges governments and other authoritative bodies to move to eliminate requirements for identity recognition that require surgical procedures.<sup>19</sup>

Other leading professional organizations have called on governments to use non-surgical standards as a predicate to officially recognizing a person’s gender identity or allowing them to change their sex designation on birth certificates and other important identity documents. In 2008, the American Psychological Association issued a policy statement encouraging “legal and

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<sup>15</sup> DMV Customer Support, [http://nysdmv.custhelp.com/app/answers/detail/a\\_id/405](http://nysdmv.custhelp.com/app/answers/detail/a_id/405) (last visited October 28, 2014)

<sup>16</sup> American Medical Association House of Delegates, Resolution 122: Removing Financial Barriers to Care for Transgender Patients (June 16, 2008).

<sup>17</sup> See WPATH, Standards of Care 1 (7<sup>th</sup> ed. 2011).

<sup>18</sup> *Id.* at 5, and 54-64. See also WPATH, Clarification on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A. 3 (June 17, 2008).

<sup>19</sup> WPATH, Identity Recognition Statement (June 16, 2010), [http://www.wpath.org/uploaded\\_files/140/files/Identity%20Recognition%20Statement%206-6-10%20on%20letterhead.pdf](http://www.wpath.org/uploaded_files/140/files/Identity%20Recognition%20Statement%206-6-10%20on%20letterhead.pdf) (last visited November 5, 2014).

social recognition of transgender individuals” including “access to identity documents consistent with their gender identity and expression which do not involuntarily disclose their status as transgender.”<sup>20</sup> Likewise, the National Association of Social Workers has 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.”<sup>21</sup> Similar views have been enthusiastically endorsed by other leading national and international health organizations, including the American Medical Association, American Academy of Family Physicians, National Commission on Correctional Health Care, American Public Health Association, and American College of Obstetricians and Gynecologists.<sup>22</sup>

The DOHMH policy also rests on the false assumption that all transgender people can and do undergo surgical intervention during their transition process. But in fact, two-thirds of transgender people do *not* undergo any surgical procedures as part of their gender transition.<sup>23</sup> Fewer than 1 in 5 transgender women (male-to-female) and fewer than 1 in 20 transgender men (female-to-male) have undergone genital reassignment surgeries.<sup>24</sup> This is usually because of prohibitively high costs, nearly universal coverage exclusions by public and private health insurance plans,<sup>25</sup> contraindications with other co-existing medical conditions, or an individual’s determination that surgery is not necessary for gender transition.<sup>26</sup> By contrast, 75% of survey respondents had received counseling and 62% had obtained hormones.<sup>27</sup> The DOHMH policy thus fails to serve the majority of transgender New Yorkers who do not, cannot, or will not meet its onerous surgical requirements. Further, it places these transgender New Yorkers in the position of having to disclose their transgender status to potential employers and landlords, police officers, and others when their gender-mismatched identification documents raise suspicion or questions of fraudulence, increasing the likelihood of experiencing discrimination and harassment.<sup>28</sup>

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<sup>20</sup> APA, Policy Statement: Transgender, Gender Identity, & Gender Expression Non-Discrimination (August 2008).

<sup>21</sup> NASW, Social Work Speaks: NASW Policy Statement 2009-2012, 347 (8<sup>th</sup> ed. 2009).

<sup>22</sup> Lambda Legal, Professional Organization Statements Supporting Transgender People in Health Care (revised June 8, 2012).

<sup>23</sup> Grant, *supra*, note 1 at 26 (2011).

<sup>24</sup> *Id.* at 79.

<sup>25</sup> See Lambda Legal, Transgender Related Health Care (2011) (citing official statements supporting insurance coverage of transition-related healthcare issued by AMA, APA, AAFP, NASW, WPATH, NCCHC, APHA and ACOG). See also American Medical Association, Resolution 122 (A-08), Removing Financial Barriers to Care for Transgender Patients (Apr. 2008).

<sup>26</sup> Grant, *supra* note 1 at 72-83 (2011).

<sup>27</sup> *Id.* at 84.

<sup>28</sup> See *supra* note 6. See also Dean Spade, *Medicaid Policy & Gender-Confirming Healthcare for Trans People: An Interview with Advocates*, 8 Seattle J. for Soc. Just. 497, 499 (2010) (examining the correlation between inaccurate identification documents and challenges securing employment for transgender people).

The DOHMH's surgery requirement is based on the incorrect premise that surgical intervention is the only acceptable proof of an individual's personal gender transition, and we support changing this policy immediately to ameliorate its harmful effects on transgender community members born in New York City.

### **Licensed professionals who can attest to applicant's gender identity**

The distinction in the proposed amendment from past policies regarding who can swear or affirm that an applicant's requested correction of sex designation accurately reflects their gender identity is important because of the realities of medical costs and access to health care. The proposed amendments would include licensed professionals who are doctoral level psychologists, clinical social workers, physician assistants, nurse practitioners, marriage and family therapists, mental health counselors, and midwives. We support the inclusion of these additional licensed professionals who can attest to an individual's gender identity.

Many transgender New Yorkers, particularly low-income individuals who make up the bulk of the community, are unable to seek health care from licensed physicians for their medical needs. The licensed professionals included in the proposed amendment to Section 207.05 are all licensed by the State of New York and accountable to the State for their professional actions.<sup>29</sup> All of these professionals have the requisite education, experience, and accountability to attest that in keeping with contemporary expert standards regarding gender identity, an applicant's requested correction of sex designation accurately reflects that applicant's gender identity.

Additionally, licensed master social workers should be included in the final version of these amendments. Licensed master social workers engage in the administration of tests and measures of psychosocial functioning, social work advocacy, case management, counseling, consultation, research, administration and management, and teaching.<sup>30</sup> Licensed master social workers may also practice licensed clinical social work under supervision.<sup>31</sup> As licensed master social workers are permitted to engage in most of the work that licensed clinical social workers do, we believe they should be included among the professionals who can attest to an individual's affirmed sex.

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<sup>29</sup> See generally, Title VIII of Laws of New York.

<sup>30</sup> Laws of New York, § 7701 (1) (a).

<sup>31</sup> Laws of New York, § 7701 (1) (b).