

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 for 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_association_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