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### WRITTEN COMMENT

Department of Health and Mental Hygiene (“DOHMH”)  
Public Hearing on Proposed Rule to amend Section 207.05 of Article 207 of the New York City Health Code to eliminate the requirement that a person requesting a change to the sex designation on a birth certificate present proof from a health professional, and instead require self-attestation, and to approve “X” as an additional sex designation option that is not exclusively female or male for birth certificate sex change requests.

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Respectfully Submitted by:

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## **Basis for Comments and Recommendations from the Sylvia Rivera Law Project**

The Sylvia Rivera Law Project (“SRLP”) works with transgender, gender non-conforming, and intersex people (“TGNCI”) who are of color or low-income. We offer direct legal services to people in the New York City area and those incarcerated in New York State prisons, including representing TGNCI individuals in name change proceedings and in updating identification documents to correctly list an individual’s gender identity.

Over the course of any given year, we work on over 300 cases involving TGNCI individuals in New York City and New York State. Close to 60 of those cases are applications for legal name changes, and, in any given year, we assist with updating between 20 and 40 New York City birth certificates. More than just providing direct services, though, we also work with the TGNCI community to advocate for policies and laws that actively advance the goal of self-determination of gender identity and expression. Self-determination of gender identity includes both being able to self-attest as to who we are, like any cisgender (non-transgender) person is allowed to do, and to recognize gender diversity by recognizing intersex and gender non-conforming identities (“GNC”).<sup>1</sup>

Our comment intends to advance concerns raised during the June 13, 2018 hearing and to issue our support for the proposed amendments.

## **Proposal to Eliminate the Requirement that a Person Requesting a Change to the Sex Designation on a Birth Certificate Present Proof from a Health Professional, and Instead Require Self-Attestation**

SRLP fully supports the proposed elimination of the health professional affidavit for an individual requesting a corrected sex designation. SRLP believes that every individual should be free to self-determine their gender identity and expression. No one, including a health care provider, has the authority or power to assert the correct way in which an individual identifies. Not only does the requirement create a substantial barrier for low-income and underinsured TGNCI people, it also reinforces the idea that gender identity is something that must be diagnosed—or at least confirmed—by a medical provider.

We know from our work that it is oftentimes difficult for low-income TGNCI individuals to obtain a medical affidavit because they may lack consistent access to healthcare. In addition, an individual can easily experience significant delays to obtain their birth certificate if the medical provider is unsure of what is expected or simply has no open availability to schedule a medical appointment.

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<sup>1</sup> Because GNC is the term that has been used to broadly encompassing individuals who do not identify as either male or female, we will also use this term. It is important to note that GNC is an umbrella identity that covers myriad of different non-binary identities.

Over our 16 years of operation, SRLP has often worked with doctors, nurses, and social workers from a range of medical care facilities on this subject. We have sat down with LGBTQ-specific agencies, private practitioners, city hospital, and even city jail providers to talk about the importance of providing medical affidavits for their patients. Many medical providers, quite rightly, have questioned why they and not their patient are seen as the authority on who their patient is. Providers have stated that while they are happy to provide these letters, it feels unusual that the State and City require these letters *only* for their transgender and gender non-conforming individuals, and not for a cisgender patient.

For individuals whose doctors do not believe in their identity—for any range of reasons from religious to personal morals, or even health care opinions long since left behind by any competent provider—the effect of not being able to update IDs is devastating. New Yorkers must show birth certificates to obtain state and federal IDs, to access benefits, to register as a student, and for a myriad other civic activities. A birth certificate is a vital piece of identification.

Individuals can be stuck with unwilling and misinformed medical providers for many reasons including a lack of available options of providers who have flexible hours, geographic location, child care options, lack of language access, and being un- or under-insured.

Additional complications arise for our incarcerated community members. Right now, SRLP is working with close to 40 individuals in the New York State prison system. The doctors employed by the prison system may recognize and affirm diagnoses of Gender Dysphoria and that an individual has identified and lived as their gender for many years, yet, they refuse to write the necessary medical affidavits that would allow these individuals to correct their birth certificates. These clients cannot change providers or get a second medical opinion as they are in state custody. Yet, the prejudice and ignorance of medical providers must not keep New Yorkers from asserting their rights. Being low-income, under state supervision, or under a guardianship order should not keep a person from accessing the same rights to identity as anyone else. Self-attestation removes the barriers that can make it impossible for our incarcerated clients to be legally recognized as who they are.

The current requirement of a medical attestation of one’s gender effectively strips away an individual’s right to self-determine their gender identity. Simply put, gender identity or expression is not a medical condition or diagnosis. The right to self-determine how one presents to the world cannot be delegated to a professional opinion—or subordinated by it. The individual expressing their gender identity is the sole authority of such gender expression. Because this proposal would both eliminate an unnecessary requirement and de-medicalize gender identity, SRLP strongly supports the elimination of the health professional affidavit requirement.

**Proposal to Approve “X” as an Additional Sex Designation Option that is not Exclusively Female or Male for Birth Certificate Sex Change Requests**

SRLP recognizes and wishes to amplify voices of concern to the proposed amendment, pointing specifically to the concerns that this proposal increases the state’s power to surveil individuals based

on gender identity; this proposal fails to take into consideration the fact that an “X” designation does not accurately define the gender identity of many GNC individuals; and this proposal fails to provide a satisfactory framework of implementation, specifically addressing concerns of inter-agency coordination. SRLP’s main focus is to prevent any additional harms or burdens that a change in the law may bring for GNC individuals, including minors.

The implementation of a third gender designation has gained increased popularity across the United States, with municipalities and states advancing legislation similar to the DOHMH’s proposal to the Board of Health.<sup>2</sup> SRLP recently invited members of the GNC community to present thoughts on the Department’s proposal to the Board. Opinion was divided as to whether this proposal accurately reflects the needs of GNC individuals.<sup>3</sup> There are several reasons for disagreement. For instance, state-issued identification serves to increase state surveillance, which increases the possibility of state-sanctioned violence and discrimination. Thus, the elimination of state-issued identification remains the end goal for many struggling for gender liberation.

*Recommendation 1: Eliminate sex designations on birth certificates, or allow for self-described sex*

State recognition of a specific identity category too frequently coincides with heightened policing and state surveillance.<sup>4</sup> Many within the community expressed concern that adding an “X” designation would run the risk of such increased surveillance. As with all actions that intrude on the privacy of individuals, we must ask whether the state, or, in this case the City, has a legitimate interest in documenting the gender of those born within its jurisdiction. SRLP stands by those within the community who raise this concern.

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<sup>2</sup> In 2017, Oregon became the first state in the U.S. to allow an “X” designation on state IDs and driver’s licenses. See Sam Levin, “‘Huge validation’: Oregon becomes first state to allow official third gender option,” *The Guardian* (June 15, 2017), <https://www.theguardian.com/us-news/2017/jun/15/oregon-third-gender-option-identity-law>. Washington, D.C. allows an “X” designation on resident ID cards, and California and Washington both allow an “X” designation on birth certificates. See Erin Rook, “Washington, DC joins Oregon in offering third gender marker on drivers’ licenses,” *LGBTQ Nation* (June 22, 2017), <https://www.lgbtqnation.com/2017/06/washington-dc-joins-oregon-offering-third-gender-marker-drivers-licenses/>; Melanie Mason, “Californians will no longer have only ‘male’ and ‘female’ as a choice on government documents,” *Los Angeles Times* (Oct. 16, 2017), <http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-californians-will-no-longer-have-only-1508137858-htm1story.html>.

<sup>3</sup> It is important to note that the at the last NYC Gender Marker Change Advisory Board meeting on June 12, 2018 individuals who voiced support for the “X” designation did not identify as GNC. Although this lack of representation by GNC individuals on the Advisory Board does not invalidate any individual’s support for a third gender option, it does raise concerns that the community most affected by this change, namely GNC individuals, was not given the opportunity to sit on the Advisory Board and participate in the process.

<sup>4</sup> See, e.g., Jim Harper, “The New National ID Systems,” CATO Institute (Jan. 30, 2018), <https://www.cato.org/publications/policy-analysis/new-national-id-systems>; James B. Rule, Douglas MCadam, Linda Stearns, and David Uglow, “Documentary Identification and Mass Surveillance in the United States,” *Social Problems* 31.2 (Dec. 1983), 222-34.

Furthermore, there is frequent criticism that an “X” designation simply does not adequately represent an individual’s gender identity. Primarily, the argument against the “X” designation stems from the fact that “X” is not a stand-in for “NB” (for non-binary) or “GNC,” nor does it capture intersex identities. Just as the “M” or “F” designations correctly indicate “male” or “female,” so too should additional gender designations correctly list the gender identity.

SRLP recognizes the importance of adding a third gender designation for GNC and non-binary individuals. However, we feel it necessary to include this concern, as voices from the community most impacted should be weighed accordingly. As such, to respond to our first two concerns, we wish to raise the option of eliminating sex designations on all birth certificates as an elegant solution to both the elimination of unnecessary governmental oversight over gender and inaccuracy in capturing gender. There is precedent for this action. For instance, in 2015, the Human Resources Administration eliminated sex markers on their Common Benefit Identification Cards (“CBIC”),<sup>5</sup> and with the launch of the New York City Municipal Identification Card, New Yorkers may choose to not list a gender.<sup>6</sup>

Removing all boxes leaves less room for assumptions and allows all people to self-determine not only who they are, but also decide who can access intimate details of their identity. SRLP therefore urges the Board of Health to at minimum consider allowing parents or legal guardians and/or the adult individual to insert their own language for self-identification, including the option of “NB” for individuals who identify as non-binary, and encourages the elimination of any gender designation.

*Recommendation 2: Create interim liaison position within DOHMH to ensure effective inter-agency communication*

SRLP raises significant concern regarding the lack of clear inter-agency guidelines that are necessary to ensure a smooth rollout of any third gender designation. Specifically, DOHMH has failed to address the real-life consequences on GNC individuals, who will face the challenges that come with mismatched identification documents. For instance, an “X” designation may impact an individual’s ability to receive a state-issued ID. Moreover, there is no clear guidance as to how an “X” designation on an individual’s birth certificate will impact their ability to access sex-segregated facilities.

As we know from our work, TGNCI individuals already face discrimination and additional burdens in receiving correct identification. We are hesitant to issue full support for a proposal that may create additional obstacles for GNC individuals. The individuals who would benefit from the creation of a third gender designation should not bear the burden of the City’s lack of appropriate planning. As such, SRLP strongly encourages the Board to consider creating an interim liaison position within DHMH to ensure effective inter-agency communication.

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<sup>5</sup>See OTDA, “Removal of Gender Field from Common Benefit Identification Card (CBIC) (May 5, 2015), <https://otda.ny.gov/policy/gis/2015/15DC018.pdf>.

<sup>6</sup> See Title 68 of the Rules of the City of New York, Chapter 6, § 6-02(a) (2014).

SRLP thanks the Board for the opportunity to submit this comment and participate in this process.

Respectfully Submitted,



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