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Dear Ms. Bryant, Ms. DeFreitas, Dr. Schwarz and Dr.
Thorpe:

On behalf of the New York City Bar Association, I write concerning the proposed amendment to Article 207 of the City's Public Health Code, which governs changes in the gender classification shown on an individual's birth certificate.

The New York City Bar Association (the "Association"), founded in 1870, has over 22,000 members in the New York area, around the United States, and in over 50 countries. The Association has a strong commitment to full equality under the law for transgender individuals. We strongly support the Department of Health's (the "Department's") goal of updating and amending Article 207

to ensure that transgender individuals are able to document their acquired gender appropriately. By taking this important step, the Department will help protect the basic rights of transgender people to live, work, and otherwise fully participate in society.

The draft amendment to Article 207, if adopted, will help transgender persons realize their full legal rights by, most importantly, eliminating the requirement that applicants undergo “convertive surgery” before they may obtain a new birth certificate. Current legal understandings of transgender identity, as recognized by the New York Department of Motor Vehicles and in the policies of other states, do not require genital reconstructive surgery. Indeed, relatively few transgender individuals undergo such surgery, both for personal reasons and because of the medical risks and enormous expenses associated with these procedures (expenses which are not covered by insurance). The draft policy would also assist transgender individuals by ensuring that their new birth certificates designate them as male or female, rather than effacing their sex designation altogether, as is the Department’s current practice.

While the Association believes that the current draft of the proposed amendment to Article 207 marks a substantial improvement over the 35-year-old policy now in place, we have a number of concerns about the amendment, as well as recommendations for ways of improving it. We urge the Department to revise the current draft of the amendment to Article 207 in accordance with the recommendations below, and to adopt the amendment as revised.

The Association’s concerns center primarily on the risk we believe the draft amendment would create for unnecessary and potentially harmful governmental intrusions into the private lives of transgender individuals. We are troubled in particular by the broad disclosures the amendment would require transgender persons to make regarding their medical and mental health histories. The draft amendment would require a person seeking to change his/her birth certificate gender to submit an affidavit from a physician including, *inter alia*, “[a] detailed diagnosis and case history of the applicant, including results from physical examinations and a description of all medical treatments received by the applicant for the purpose of modifying

sexual characteristics.” (Section 207.05(b)(1)(i)(D) of draft amendment to N.Y.C. Health Code (emphasis added).) The amendment would also require that a mental health professional submit an affidavit including, *inter alia*, “[a] detailed diagnosis and case history of the applicant including the applicant’s psychological treatments related to his or her gender transition,” and “[t]he affiant’s professional opinion regarding the applicant’s psychosocial adjustment and support network.” (Section 207.05(b)(1)(ii)(D) of draft amendment to N.Y.C. Health Code (emphasis added).)

The Association believes that the medical and mental health disclosures required by the draft amendment sweep considerably more broadly than necessary for the limited purpose Article 207 is intended to serve. The Department does not, in order to determine the validity of a citizen’s application to change his/her birth certificate gender, need to review the applicant’s entire “detailed . . . case history” or evaluate the sufficiency of his or her “support network.” In the context of an Article 207 application, an applicant’s medical or mental health “case history” can only be relevant insofar as such history relates directly to the applicant’s gender transition. The Department surely does not need to ascertain – and an applicant should not be required to divulge – information concerning other aspects of his or her private medical or psychological history, *i.e.*, intimate information relating to the diagnosis and/or treatment of medical or psychological conditions unrelated to his or her gender identity.

The requirement that a mental health professional opine as to the adequacy of an applicant’s “support network” is, we believe, similarly unwarranted and intrusive. The Department’s decision whether to grant or deny an application for a birth certificate gender change should not hinge on a concept as ill-defined and inherently subjective as that of “social network.” Furthermore, we do not perceive a rational, let alone important or compelling, interest on the part of the Department in acquiring information about an applicant’s social network, *however* that term might be defined. An individual who has transitioned from one gender to another should be entitled to a birth certificate modification recording this fact, whether or not a mental health professional or the Department deems the applicant to have an acceptable “support network.” The

proposed “support network” requirement would vest the Department with the authority to discriminate on the basis of subjective judgments it forms about an applicant’s relationships with his or her family and friends, based entirely on the affidavit of a mental health professional who, in turn, almost certainly has no personal knowledge of these individuals. We believe this broad, unfettered discretion and intrusion into applicants’ private lives called for by the draft amendment is unnecessary to the evaluation of an Article 207 application.

The Association also objects to section 207.05(c) of the draft amendment, which authorizes the Department to request “other information or evidence demonstrating the applicant’s transition to his or her acquired gender.” This proposed catch-all provision would confer unbounded discretion upon the Department to condition the issuance of an amended birth certificate on an applicant’s submission of whatever information a given Department official (who may or may not have any expertise in transgender issues) arbitrarily determines (based on undisclosed criteria) would more adequately demonstrate a specific applicant’s transition. An applicant who provides the detailed, sworn information specifically required by sections 207.05(b)(1)(i)-(ii) – excluding the information that, as discussed above, those sections inappropriately seek – has satisfied any legitimate criteria for the amendment of his or her birth certificate sex. The proposed catch-all provision serves no legitimate purpose and, like the “support network” requirement, raises substantial equal protection and due process concerns. It should therefore be omitted from the draft amendment.

In light of the foregoing objections, the Association recommends that, at a minimum, the draft amendment to Article 207 be revised to eliminate the requirements (i) that an applicant submit affidavits from a physician and mental health professional disclosing (1) a “detailed diagnosis” for the applicant, except insofar as such diagnosis relates directly to the applicant’s gender transition, and (2) the applicant’s medical or mental health “case history,” except insofar as such “case history” relates directly to the applicant’s gender transition; and (ii) that an applicant submit an affidavit from a mental health professional opining as to the applicant’s “support network.” The Association further recommends that the “catch-all”

provision of the draft amendment, *i.e.*, section 207.05(c), be deleted in its entirety.

Separately, to the extent that the amended Article 207 will require applicants to disclose any of the categories of medical and mental health information called for in the draft amendment, the Association believes that the Department should provide notice to applicants of the standards and processes by which it intends to evaluate this highly technical information. For example, what “results from physical examinations” or evidence of “medical [or psychological] treatments,” if any, will the Department of Health require be shown in an applicant’s “case history” in order for his or her application to be deemed sufficient? (Section 207.05(b)(1)(i)-(ii).) What “specialized courses,” if any, must a physician or mental health professional have taken – and what number of transgender patients, if any, must he or she have cared for – in order to be considered qualified to submit an affidavit on the “fullness” and “intended permanence” of an applicant’s gender transition? (*Id.*; Section 207.05(b)(1).) How can a physician or mental health professional demonstrate that he or she has “at least two years experience in the last five years relating to transgender treatment?” (Section 207.05(b)(1)(A)(b).) Must he or she have cared full-time for transgender individuals for two years (if so, the standard would be attainable by few, if any, providers in New York City), or is it sufficient for the provider to have treated one transgender patient and/or taken one “specialized course” on transgender issues sometime during the two-year period preceding the submission of the application in question? Must a physician or mental health professional have received his or her highest degree from one of a select group of institutions, as suggested by sections 207.05(b)(1)(i)(A) and 207.05(b)(1)(ii)(A)? If so, which institutions are included in this group?

Relatedly, what are the qualifications of the Department officials who will review Article 207 applications to determine the sufficiency of the highly technical “detailed diagnosis,” “case history,” “specialized courses,” and other information proposed to be submitted by medical and mental health providers, or to evaluate the “credentials” of such providers?

Without the foregoing information, applicants would have no way of knowing what criteria their applications must satisfy. An applicant could be denied the important right to a birth certificate which accurately reflects his or her acquired gender based on arbitrary considerations which he or she would have no way of knowing and thus no way of attempting to address in a subsequent, amended application. Such an applicant would be placed in legal limbo, unable to obtain an amended birth certificate and ignorant of the reasons for the Department's denial of his or her application. No rational governmental interest would be served by the Department of Health's withholding of the basic information requested. This information should therefore be disclosed to applicants under Article 207.

Finally, the Association urges the Department to make the following additional changes to the draft amendment:

- Eliminate the requirement under section 207.05(b)(1) that an applicant obtain a court-ordered name change before applying for or receiving an amended birth certificate. Many names are gender-neutral and may not require or suggest a need for alteration to conform to the applicant's post-transition gender.
- Amend section 207.05(b)(1) to eliminate the requirement of proof that an applicant has lived in the acquired gender for "at least two years" ending with the date on which the application is made. Although the Association takes no position as to whether or how long a transgender individual should be required to live in his or her acquired gender before applying for an amended birth certificate, we note that under widely-accepted guidelines issued by the World Professional Association for Transgender Health (formerly "HBIQDA"), individuals who live in their acquired gender for only one year are eligible for sex-reassignment surgery (which surgery is, properly, no longer even a condition for a change in birth certificate sex designation under the draft amendment). Thus, the draft amendment's two-year time requirement for simply changing one's birth certificate sex is substantially more onerous than that applicable to the often highly-invasive surgical procedures associated with sex

reassignment. And indeed, this time requirement is more onerous than the effective one-year requirement for birth certificate modifications under the existing regulation, which does require “convertive surgery.” Given the harassment and discrimination frequently faced by transgender persons, especially in employment and public accommodations settings, it may be excessively burdensome for an individual applicant to demonstrate that he or she has lived in the acquired gender for a continuous period of two years.

- Amend section 207.05(d) to specify that the applications and supporting materials submitted by applicants whose applications are denied by the Department will either be returned to the applicant, with no copies maintained by the Department, or placed under seal, like the applications and supporting materials submitted by successful applicants.
- Amend section 207.05(b)(1) to require applicants to submit an affidavit from a physician or mental health professional, but not both. The two-affidavit requirement is unreasonable. Many applicants will either be unable to afford the protracted medical and psychological care necessary to obtain such documentation and/or will live in geographical areas where they cannot obtain both a skilled physician and a skilled mental health professional – particularly a physician and mental health professional with the “qualifications” and “credentials” required by the draft amendment.
- Amend the “Notes” regarding subdivisions (b) and (c) as follows: (1) replace “authorize . . . to *apply for* a new birth certificate” with “authorize to . . . *obtain* a new birth certificate,” which more accurately expresses the purpose of the draft amendment; (2) for clarity, insert a comma after “birth certificate” in sentence two, so that the sentence reads, in pertinent part, “The former provision . . . , requiring a person to have had convertive surgery prior to filing for a new birth certificate, did not recognize the highly individualized health care now available”

Thank you again for your crucial efforts to modernize and improve Article 207. We look forward to assisting you in any way we can to improve the draft

amendment in order to ensure that the policy ultimately adopted by the Department is one which both ensures the right of transgender individuals to change their birth certificate gender, and also conforms with the basic rights of all citizens to privacy and equal treatment under the law.

Sincerely,

A handwritten signature in black ink, appearing to read 'A. Drexel', with a large circular flourish above the name.

Allen A. Drexel
Co-Chair, Committee on Lesbian, Gay, Bisexual and
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