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REPORT ON THE NEED TO MODERNIZE NEW YORK STATE POLICY REGARDING PROOF REQUIRED TO CHANGE GENDER DESIGNATION ON A NEW YORK STATE BIRTH CERTIFICATE

COMMITTEE ON LESBIAN, GAY, BISEXUAL AND TRANSGENDER RIGHTS NEW YORK CITY BAR ASSOCIATION

The Lesbian, Gay, Bisexual and Transgender (LGBT) Rights Committee of the New York City Bar Association believes that the New York State Department of Health (DOH) should modernize its policy regarding the requirements for a transgender person to change the gender designation on their state-issued birth certificate.

The current DOH policy provides that transgender[1] individuals may only alter the gender designation[2] on their New York State (NYS) birth certificate if they can provide four separate and distinct substantiating documents from both medical and psychological professionals to show that they have "completed" specific surgical procedures.[3] This onerous requirement runs counter to contemporary professional standards of care, which acknowledge gender transition[4] as

[1] "Transgender" is an umbrella term used to describe people whose gender identity, one's inner sense of being male or female, differs from their assigned or presumed sex at birth. Note that the terms "trans" and "trans*" are also commonly used in the transgender community as umbrella terms with essentially the same meaning. *See generally* Amy Ballard, Sex Change: Changing the Face of Transgender Policy in the United States, 18 Cardozo J.L. & Gender 775 (2012) (exploring legal and policy challenges to lack of uniform legal definition of "transgender" that appropriately reflects modern understanding).

[2] Strictly speaking, "gender" refers to a person's sense of identity and social expression of masculine and/or feminine characteristics, whereas "sex" refers to a person's biological, anatomical or chromosomal characteristics of being male or female. However, in many contexts these terms are used interchangeably, particularly in reference to "gender designations" of M or F on birth certificates, and undergoing gender or sex transition.

[3] The DOH policy is not published or made publicly available; however, it has been routinely identified in various iterations in letters issued by the DOH to individuals seeking to change their gender on their birth certificates. *See, e.g.*, Letter from NYS DOH Director of Vital Records Guy Warner to [redacted] (April 2012) (on file with the New York City Bar Association); Letter from NYS DOH Director of the Bureau of Production Systems Management Thomas L. Heckert, Jr. to [redacted] (March 28, 2011) (on file with the New York City Bar Association); and Letter from NYS DOH Director of Bureau of Production Systems Management Peter M. Carucci (Sept. 20, 2005), *available at* www.tsroadmap.com/reality/name/new-york-birth-certificate.html (last visited January 28, 2013); *see also* Lambda Legal, Sources of Authority to Amend Sex Designation on Birth Certificates (last updated January 1, 2012), *available at* www.lambdalegal.org/publications/sources-of-authority-to-amend (last visited January 28, 2013).

[4] "Transition" is a highly individualized and variable period of time when individuals change from the gender role associated with their sex assigned at birth to a different gender role, and usually involves learning how to live socially in the gender that feels most comfortable for them. Transition may or may not include feminization or

a highly individualized and personal process, and surgical intervention as an inappropriate benchmark for legal or social recognition of one's gender identity.[5] Several federal and state agencies have adopted these modern standards when revising their respective gender marker change policies, not only removing any surgery requirement but also reducing the required evidentiary proof of gender transition to only one letter from a treating medical provider. A modernized DOH policy should likewise reflect these contemporary standards of care.

The DOH policy's surgery requirement also creates a substantial barrier for most transgender people who need to obtain accurate birth certificates. Vital records are necessarily "living" documents that are required throughout a person's life to perform various activities and to access essential services.[6] Without a birth certificate that accurately reflects their gender identity, transgender people are routinely forced to disclose their transgender status, which results in increased difficulty accessing employment, educational opportunities, lines of credit, medical and life insurance policies, marriage licenses, driver's licenses, social security benefits and other government benefits. According to the groundbreaking National Transgender Discrimination Survey (NGLTF/NCTE survey), a staggering 44% of 6,450 transgender respondents reported harassment, assault or being asked to leave an establishment when they presented identifying documents that were incongruent with their visible gender expression.[7] A modernized DOH policy should seek to avoid these adverse consequences.

In order to address all of these concerns, we strongly recommend that the DOH modernize its policy to allow a transgender person to amend their birth certificate's gender designation by providing proof from *only one* treating physician, psychiatrist, or psychologist that the transgender person has received *clinically appropriate treatment* in order to achieve their individual gender transition. This new policy would not only utilize contemporary standards of care to ameliorate the substantial burden currently placed on transgender people born in New York, but it also would mirror those policies recently adopted by several federal agencies, sister states, and another NYS agency.

NYS DOH's Current Policy is Outdated and Inconsistent with Contemporary Standards of Care for Transgender Persons

The current process for a transgender individual to obtain a change of gender designation on a NYS birth certificate requires the individual to submit a completed correction application to

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masculinization of the body through hormones or other medical procedures. *See* World Professional Association for Transgender Health (WPATH), Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People 97 (7th ed. 2011).

[5] *See* WPATH, Identity Recognition Statement (June 16, 2010); WPATH, Standards of Care 8-10 (7th ed. 2011).

[6] *See generally*, Dean Spade, Documenting Gender, 59 Hastings L.J. 731 (2008) (using gender reclassification rules to illustrate trend of national standardization of local practices around ID policies and what it reveals about administrative governance).

[7] Jaime M. Grant et al., Injustice at Every Turn: A Report of the National Transgender Discrimination Survey 153, National Gay & Lesbian Task Force and National Center for Transgender Equality (2011) (hereinafter "NGLTF/NCTE survey").

the DOH.[8] Following its receipt of the application, DOH legal and medical staff engages in an approximately three-month-long review to determine whether an "error" was made at the time that the birth certificate was completed. As part of its review, the DOH requests the following supporting documentation from applicants:

(1) Statement(s) signed by surgeon(s) specifying date(s), place(s) and type(s) of procedures performed on the applicant. In cases of female-to-male gender reassignment, a bilateral mastectomy and a complete hysterectomy (removal of ovaries and uterus) are both required. In cases of male-to-female gender reassignment, proof of removal of penis and testes are required;

(2) Surgical report(s) made in the operating room describing in detail all procedures;

(3) A psychological report documenting "true transsexualism," inappropriate sexual identification or that one meets the "Harry Benjamin Society transsexual criteria"; and

(4) A statement from a physician regarding hormonal treatments.

This policy is intolerably outdated and inconsistent with contemporary standards of care. This is immediately apparent by its use of antiquated diagnostic terminology and clinical concepts that the medical community has long abandoned. The term "true transsexualism" was used by clinicians predominantly in the 1960s and 1970s to identify persons of either sex with "a characteristic path of atypical gender identity development that predicted an improved life from a treatment sequence that culminated in genital surgery."[9] The American Psychiatric Association (APA) first departed from this absolutist concept with "gender dysphoria syndrome" in 1980 and "gender identity disorder" in 1994,[10] both of which characterized the complex embodiments of gender identities and expressions more broadly. The forthcoming fifth edition of the APA's Diagnostics and Statistical Manual of Mental Disorders (DSM-5)[11] will feature the newest incarnation—"gender dysphoria." Relieved of harmful "disorder" stigma, this diagnosis effectively communicates the emotional distress resulting from gender-sex incongruity, and promotes affirmative treatment and transition-related care according to contemporary standards.[12] The scientific community has clearly progressed since first recognizing transgender identities; yet the DOH policy continues to adhere to outdated concepts.

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[8] *See supra* note 3.

[9] *See* WPATH, Standards of Care for Gender Identity Disorders 3-4 (6th ed. 2001).

[10] *Id*. *See also* Fields v. Smith, 712 F. Supp. 2d 830, 836 (E.D. Wisc. 2010) (holding gender identity disorder was "serious medical need" for purposes of 8th Amendment violation analysis).

[11] "Diagnostic and Statistical Manual of Mental Disorders" (DSM), 5th ed. *See* http://www.dsm5.org (last visited March 15, 2013).

[12] Zack Ford, "APA Revises Manual: Being Transgender Is No Longer A Mental Disorder," Think Progress (Dec. 3, 2012).

Furthermore, the DOH 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,[13] has established standards of care to inform health care providers how to most safely, effectively, respectfully and holistically treat transgender people.[14] WPATH recognizes and emphasizes that, like all other people who seek medical care, transgender patients each present different needs and "clinically appropriate treatments must be determined on an individualized basis with the patient's physician."[15] Thus, WPATH has called for modernized 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.[16]

Although the DOH policy refers to the standards established by WPATH under its previous name—the Harry Benjamin Society—as a basis for its requirements, it entirely fails to reflect any aspects of the modern standards of care endorsed by this reputable organization.

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 gender designation on birth certificates and other important identity documents. In 2008, the American Psychological Association issued a policy statement encouraging "legal and 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."[17] 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."[18] Similar views have been enthusiastically endorsed by other leading national and international health organizations, including the American Medical Association, American

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[13] American Medical Association House of Delegates, Resolution 122: Removing Financial Barriers to Care for Transgender Patients (June 16, 2008).

[14] *See* WPATH, Standards of Care 1 (7th ed. 2011).

[15] *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).

[16] WPATH, Identity Recognition Statement (June 16, 2010).

[17] APA, Policy Statement: Transgender, Gender Identity, & Gender Expression Non-Discrimination (August 2008).

[18] NASW, Social Work Speaks: NASW Policy Statement 2009-2012, 347 (8th ed. 2009).

Academy of Family Physicians, National Commission on Correctional Health Care, American Public Health Association, and American College of Obstetricians and Gynecologists.[19]

Finally, aside from its antiquated language and posture, the DOH policy also rests on the false assumption that all transgender people can and do undergo surgical intervention during their transition process. The NGLTF/NCTE survey found that two-thirds (2/3) of transgender people do *not* undergo any surgical procedures as part of their gender transition.[20] In fact, fewer than 1 in 5 transgender women (male-to-females) and fewer than 1 in 20 transgender men (female-to-males) have undergone genital reassignment surgeries.[21] This is usually because of prohibitively high costs, nearly universal coverage exclusions by public and private health insurance plans,[22] contraindications with other co-existing medical conditions, or an individual's determination that surgery is not necessary for gender transition.[23] By contrast, 75% of survey respondents had received counseling and 62% had obtained hormones.[24] The DOH policy thus serves to invalidate the gender identities of the majority of transgender New Yorkers who do not, cannot, or will not meet the 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.[25]

Therefore, the DOH's surgery requirement is clearly based on the incorrect and clinically debunked premise that surgical intervention is the only acceptable signifier of an individual's personal gender transition, and must be updated immediately to ameliorate these adverse effects.

Following the Lead: Modernized Policies Adopted by Other Agencies and Jurisdictions

A modernized policy for transgender people seeking to amend their birth certificate's gender designation should require only *one* document from a treating or evaluating healthcare provider that demonstrates *clinically appropriate* treatment has been provided based on the

[19] Lambda Legal, Professional Organization Statements Supporting Transgender People in Health Care (revised June 8, 2012).

[20] NGLTF/NCTE Survey at 26 (2011).
[21] *Id.* at 79.

[22] *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).

[23] NGLTF/NCTE Survey at 72-83 (2011).

[24] *Id.* at 84.

[25] *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).

person's individualized and particular medical needs. Such a policy would be comparable to the current policies of four federal agencies, three sister states, and another NYS agency.

In 2010, the U.S. Department of State (DOS) adopted a new policy for updating one's gender designation on U.S. passports[26] and also issued a policy regarding changing gender in Consular Reports of Birth Abroad.[27] Under these new policies, a person need only provide *one* certification from a licensed physician who has treated the person or reviewed and evaluated the medical history of the person that the person has undergone *appropriate clinical treatment* for gender transition. Both policies explicitly state that proof of surgery or other detailed medical information is not required and should not be requested.

On May 27, 2011, the U.S. Office of Personnel Management (OPM) issued guidance to the heads of all executive agencies and departments regarding gender transition in the workplace, including new procedures for updating gender designations in official federal personnel records.[28] This procedure provides for updating the designation based on submission of an updated passport, updated state driver's license or identification card, *or* a physician's certification that the employee has had *appropriate clinical treatment* for gender transition. As with the DOS policy, OPM's policy makes clear that additional medical information is not required and should not be requested.

On June 9, 2011, the U.S. Veterans Health Administration (VHA) issued a directive regarding transgender veterans, including how to update gender designations in patient records to be "consistent with the patient's self-identified gender."[29] The VHA procedures implementing this directive mirror the DOS's passport policy in that *one* physician's certification of *appropriate clinical treatment* for gender transition is sufficient to update the designation.

On April 10, 2012, the U.S. Citizenship and Immigration Services (USCIS) issued a policy memorandum regarding adjudication of immigration benefits for transgender individuals, which provided for updating the gender designation on various immigration documents.[30] This procedure provides for updating the designation based on submission of an updated passport, birth certificate, court order, *or* a physician's certification that the employee has had *appropriate clinical treatment* for gender transition. As with the DOS policy, USCIS's policy states that

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[26] U.S. Dept. of State, Office of the Spokesman, "New Policy on Gender Change in Passports Announced," Washington, D.C. (June, 9, 2010), *available at* http://www.state.gov/r/pa/prs/ps/2010/06/142922.htm (last visited March 15, 2013).

[27] *See* 7 FOREIGN AFFAIRS MANUAL 1320 app. M(b) (2011) (emphasis added).

[28] OPM, Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace (May 27, 2011) (with regard to what gender transition entails, "[m]anagers and supervisors should be aware that not all transgender individuals will follow the same pattern, but they all are entitled to the same consideration as they undertake the transition steps deemed appropriate for them, and should all be treated with dignity and respect").

[29] VHA, Directive 2011-024: Providing Health Care for Transgender and Intersex Veterans 3 (June 9, 2011).

[30] USCIS, PM-602-0061: Adjudication of Immigration Benefits for Transgender Individuals (April 10, 2012).

"[p]roof of sex reassignment surgery is not required to issue the requested document in the new gender and evidence of such surgery will not be requested."[31]

In addition to the above-mentioned federal agencies, three (3) states—Washington, Vermont and California—do not require evidence of surgical intervention in order to process a change of gender on a birth certificate. The Washington State policy, promulgated by the Director of the Center for Health Statistics in 2008, requires a person to submit, among other things, a "letter, on applicable letterhead, from the requestor's medical or osteopathic physician stating that the requestor has had the *appropriate clinical treatment*."[32] Vermont State law requires only that a licensed physician submit to the court an affidavit stating that they have treated or evaluated the petitioning individual, and "that the individual has undergone surgical, hormonal, or *other treatment appropriate for that individual* for the purpose of gender transition."[33] Finally, in 2011 the California State legislature modernized its statute by replacing the requirement for "surgical treatment" with a requirement that the applicant prove he or she "has undergone *clinically appropriate treatment* for the purpose of gender transition, based on contemporary medical standards, and a certified copy of the court order changing the applicant's name, if applicable."[34] These states provide sound models for the new policy that should be adopted by the NYS DOH to accurately reflect the contemporary standards of care for providing gender transition-related care to transgender people.

Even within NYS, there is an example of a state agency that has already modernized its requirements for proof of gender change for purposes of identity documents. The NYS Department of Motor Vehicles (DMV) provides that a transgender person can amend the gender designation on their driver's license simply by submitting, among other things, "proof of the sex change" in the form of a written statement printed on a letterhead from one physician, psychologist or psychiatrist that certifies that the new gender represents the applicant's "main gender (male or female)."[35] This policy mirrors the best practices established at the federal level for updating gender designations on official records and documents.[36] Given that the DMV does *not* require proof of any sort of surgery and requires only *one* document in support of such a

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[31] *Id.* at 4.

[32] Washington Dept. of Health, Ctr. for Health Stats., Proc. No. CHS-B5, Changing Gender on Birth Certificates (2008) (emphasis added). *See also* Wash. Rev. Code Ann. § 43.70.150 (West 2009).

[33] VT. Stat. Ann. tit. 18 § 5112(b) (West 2011) (emphasis added).

[34] California Health & Safety Code §§ 103425-103445 (2012) (emphasis added). *See also* Assemb. B. 433, 2011-12 Leg. Sess. (2011) ("The physician's affidavit shall be accepted as conclusive proof of gender change if it contains substantially the following language: 'I, (physician's full name), (physician's medical license or certificate number), am a licensed physician in (jurisdiction). I attest that (name of petitioner) has undergone clinically appropriate treatment for the purpose of gender transition to (male or female)'").

[35] DMV Customer Support, http://nysdmv.custhelp.com/app/answers/detail/a_id/405 (last visited March 15, 2013).

[36] Tom Manuel, "Transgender Drivers: New Norms in Customer Service," MOVE Magazine, pp. 29-32 (Spring/Summer 2011), *available at* http://www.nxtbook.com/nxtbooks/networkpartners/move_2011spring/#/34 (magazine of American Association of Motor Vehicle Administrators recently noted a similar trend in policies regarding driver's licenses and state identification cards). (Last visited March 15, 2013).

change, there appears to be no rational basis for the DOH to require surgery at all, let alone *four* different documents with intimate details from an individual's medical records in order to amend their birth certificate.

Conclusion and Recommendation

Given the aforementioned considerations, it is the Committee's recommendation that the State adopt a more inclusive policy that adequately reflects the modern medical, psychological and legal understanding of transgender people and their needs. Our suggested policy would include the language similar to the following:

> **A change of gender designation on birth certificates may occur upon receipt of one notarized statement from the registrant's licensed treating or evaluating physician, psychiatrist or psychologist stating that the registrant has undergone clinically appropriate treatment for that individual for the purpose of gender transition, based on contemporary medical standards, and that in the provider's professional opinion the registrant's gender designation should be changed accordingly.**[37]

This language incorporates several important considerations. Like the one adopted by the New York DMV, this new policy recognizes the competent and professional judgment of any *one* doctor, psychiatrist or psychologist who oversees and/or evaluates the transgender person's clinical treatment. The standard of "contemporary medical standards" not only properly grounds the new policy in findings of modern medicine, but also recognizes the inevitability of development in this area of research and understanding. The phrase "has undergone" is preferable to alternatives such as "completed" because it most accurately reflects the ongoing and sometimes lifelong nature of treatment experienced by a transgender person. Lastly and most importantly, this new policy acknowledges the individuality involved in any and all medical courses of treatment, including the highly individualized nature of gender transition with or without resorting to surgical intervention, through its requirement of "treatment clinically appropriate for that individual."

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[37] Lisa Mottet, Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People, 19 MICH. J. GENDER & L. 373 (2013) (examining laws and policies in all 57 birth certificate issuing agencies in U.S., analyzing appropriateness of policies in U.S. and abroad, considering constitutional concerns raised by existing policies, and recommending ameliorative and progressive statutory and policy language to be adopted by such agencies in the future).