



NEW YORK  
CITY BAR

**COMMITTEE ON  
LESBIAN, GAY, BISEXUAL AND TRANSGENDER RIGHTS**

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November 17, 2014

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**Re: Comments on Proposed Rule to Amend Section 207.05**

**Introduction**

The New York City Bar Association (the “City Bar”) is an organization of over 24,000 lawyers and judges dedicated to improving the administration of justice. The Committee on Lesbian, Gay, Bisexual and Transgender Rights (the “Committee”) addresses the legal and policy issues that affect lesbian, gay, bisexual, transgender individuals. The Committee respectfully submits these comments on the New York City Department of Health and Mental Hygiene’s (“Health Department”) proposed amendments to New York City Health Code Article 207, §207.05.

The proposed amendments, if enacted, will bring the policy for changing the gender marker on New York City issued birth certificates in line with the medical consensus and the policy in an increasing number of jurisdictions. The proposed rule will require one document from a health care provider affirming that, in keeping with contemporary expert standards regarding gender identity, the applicant’s requested correction of gender marker of male or female accurately reflects the applicant’s gender identity. This policy would lessen discriminatory barriers to transgender people’s obtaining accurate birth certificates. Therefore, the Committee supports the proposed amendments to the policy.

**Most Transgender New Yorkers Currently Have Inaccurate Birth Certificates**

The vast majority of New York City-born transgender individuals have inaccurate birth certificates. To correct the sex designation for transgender individuals, the Health Department currently requires proof of “convertive surgery,”<sup>1</sup> which is interpreted exclusively to mean genital reassignment surgery. 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

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<sup>1</sup> New York City Health Code Article 207 §207.05. 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 after infancy.

their birth certificates.<sup>2</sup> This problem has arisen because of discriminatory coverage exclusions by public and private health insurance plans,<sup>3</sup> contraindications with an individual's other co-existing medical conditions, or an individual's determination that surgery is unnecessary for them.<sup>4</sup> As a result of the current policy, most transgender New Yorkers have birth certificates that list the sex they were assigned at birth rather than the sex that accurately reflects who they are.

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

Accurate birth certificates are important because birth certificates are living documents that are increasingly used in many contexts to prove identity, age, and citizenship.<sup>5</sup> They are often the only form of ID that low-income New Yorkers have when applying for jobs or public benefits. A birth certificate that matches one's affirmed sex is more accurate and therefore more useful as a form of identification.

Barriers to accurate identity documents further marginalize an already vulnerable population. Due to discrimination in housing, employment and education, transgender people are disproportionately unemployed, HIV-positive and homeless.<sup>6</sup> When transgender people are forced to present incorrect ID, they are subject to harassment, discrimination, and accusations of fraud.<sup>7</sup> Presenting mismatched identification (such as a state ID with the correct gender marker and an uncorrected birth certificate) can lead to similar problems, such as being turned away from receiving vital public services like food stamps, cash assistance, and HIV/AIDS Services Administration (HASA) benefits. The National Transgender Discrimination Survey found that a staggering forty-four percent (44%) of respondents had been harassed, assaulted, or asked to leave after being forced to show mismatched identification.

### **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

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<sup>2</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, available at [http://endtransdiscrimination.org/PDFs/NTDS\\_Report.pdf](http://endtransdiscrimination.org/PDFs/NTDS_Report.pdf), hereinafter "NGLTF/NCTE Survey (2011)."

<sup>3</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>4</sup> NGLTF/NCTE Survey at 72-83.

<sup>5</sup> Goldberg, Dan, *De Blasio Administration Supports Transgender Bill*, Capital New York, Nov 10, 2014 available at <http://www.capitalnewyork.com/article/city-hall/2014/11/8556410/de-blasio-administration-supports-transgender-bill> (discussing City Council legislation to change the birth certificate gender marker change requirements).

<sup>6</sup> See generally, NGLTF/NCTE Survey (2011).

<sup>7</sup> NGLTF/NCTE Survey at 153; 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).

surgery.<sup>8</sup> Similar views have been endorsed by other leading national and international health organizations, including the American Academy of Family Physicians, National Commission on Correctional Health Care, American Public Health Association, and American College of Obstetricians and Gynecologists.<sup>9</sup>

This consensus reflects contemporary medical and psychological standards for transgender health care. The World Professional Association for Transgender Health (WPATH), an international, interdisciplinary nonprofit organization recognized by the American Medical Association as an authority in the field of transgender health issues,<sup>10</sup> has established standards of care to inform health care providers how to most safely, effectively, respectfully and holistically treat transgender people.<sup>11</sup> WPATH recognizes and emphasizes that, like all other people who seek medical care, transgender patients have different needs and “clinically appropriate treatments must be determined on an individualized basis with the patient’s physician.”<sup>12</sup> The City’s current policy must be updated so it no longer contravenes the medical standards of care but rather aligns with the reality of transgender people’s lives.

### **Other Jurisdictions – Including New York State – Have Modernized Their Policies**

Many states have modernized 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>13</sup> Iowa,<sup>14</sup> New York State, Oregon,<sup>15</sup> Vermont,<sup>16</sup> Washington,<sup>17</sup> District of Columbia<sup>18</sup> and the federal government

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<sup>8</sup> AMA, H-65.967 Conforming Birth Certificate Policies to Current Medical Standards for Transgender Patients <https://ssl3.ama-assn.org/apps/ecom/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 Work Speaks: National Association of Social Workers Policy Statements 2009-2012*, p. 347 (8th ed. 2009).

<sup>9</sup> Lambda Legal, Professional Organization Statements Supporting Transgender People in Health Care (revised June 8, 2012).

<sup>10</sup> American Medical Association House of Delegates, Resolution 122: Removing Financial Barriers to Care for Transgender Patients (June 16, 2008).

<sup>11</sup> See WPATH, Standards of Care 1 (7<sup>th</sup> ed. 2011).

<sup>12</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>13</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>14</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.”).

<sup>15</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>16</sup> 18 V.S.A. § 5112 (“An affidavit by a licensed physician who has treated or evaluated the individual stating that

(for U.S. citizens born abroad as well as for passports,<sup>19</sup> Social Security records,<sup>20</sup> green cards and naturalization certificates,<sup>21</sup> federal employee records,<sup>22</sup> and Veterans Health Administration records<sup>23</sup>). These modernized policies allow individuals who have had appropriate clinical treatment to correct their gender markers.

New York State modernized its birth certificate gender marker policy in June 2014. The Department of Health (“NYDOH”) will correct the gender marker on a birth certificate upon receipt of a physician's, nurse practitioner's or physician's assistant's affidavit stating that the individual has undergone “appropriate clinical treatment” for a person “diagnosed with Gender Dysphoria” in the current Diagnostic and Statistical Manual of Mental Disorders or for a diagnosis of “Transsexualism” as defined in the most current edition of the International Statistical Classification of Diseases and Related Health Problems.<sup>24</sup>

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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>17</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>18</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>19</sup> U.S. State Department Foreign Affairs Manual, 7 FAM 1300 Appendix M: Gender Change, available at [www.state.gov/documents/organization/143160.pdf](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>20</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>21</sup> U.S. Citizenship & Immigration Services, Adjudication of Immigration Benefits for Transgender Individuals; Addition of Adjudicator’s Field Manual (AFM) Subchapter 10.22, available at <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”).

<sup>22</sup> Office of Personnel Management, Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace (May 27, 2011), available at <http://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance> (allowing for the gender marker on records to be corrected 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).

<sup>23</sup> Veterans Health Administration, Directive 2011-024: Providing Health Care for Transgender and Intersex Veterans 3 (June 9, 2011) available at [http://www.va.gov/vhapublications/ViewPublication.asp?pub\\_ID=2863](http://www.va.gov/vhapublications/ViewPublication.asp?pub_ID=2863) (requiring that transgender veterans’ patient records be “consistent with the patient’s self-identified gender.”)

<sup>24</sup> New York Department of Health Bureau of Vital Records, Letter from the Director to individuals seeking to change the gender designation on their birth certificate (2014).

The NYDOH was not the first state agency to modernize its requirements for proof of gender change for purposes of identity documents. The NYS Department of Motor Vehicles (“DMV”) led the way in 1987. It provides that a transgender person can amend the sex designation on their driver’s license 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).”

Within New York City government, there is already precedent for recognizing the sex of transgender people without requiring proof of surgery. The forthcoming New York City Municipal Identification Card allows individuals to self-designate their gender regardless of their sex assigned at birth and without proof of medical treatment.<sup>25</sup> And New Yorkers already self-report their sex for purposes of placement in single-sex homeless shelters.<sup>26</sup> The New York City Commission on Human Rights also recognizes that transgender individuals may use single-sex facilities according to their affirmed sex,<sup>27</sup> and that asking them for identification is evidence of discrimination under the New York City Human Rights Law.<sup>28</sup> The New York City Department of Education has issued Transgender Student Guidelines that provide that in sex-specific contexts like sports participation, dress code compliance and restroom use, students will be treated according to the sex they consistently assert at school.<sup>29</sup> Modernizing the NYC birth certificate policy will bring Health Department policy in line with that of other city agencies.

### **Affidavits from Licensed Master Social Workers Should Be Accepted**

Provider affidavits should be accepted from Licensed Master Social Workers (LMSWs). The Health Department’s policy is more restrictive than the parallel provision introduced by City Council as the Health Department policy omits LMSWs as a class of providers who may submit affidavits in support of gender marker correction.<sup>30</sup> The New York State Office of Professions

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<sup>25</sup> New York City Administrative Code Title 3 Section 3-115(c)(1) (effective 1/10/2015) available at <http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=@LLADC+&LIST=LAW+&BROWSER=BROWSER+&TOKEN=25478952+&TARGET=VIEW>. (The program also allows individuals to forgo having a gender marker on the card.)

<sup>26</sup> NYC Department of Homeless Services, Division of Adult Services, *Transgender/Intersex Clients*, Procedure 06-1-31 (2006) [http://coalhome.3cdn.net/c7a840f68c28233a37\\_8qm6bngdv.pdf](http://coalhome.3cdn.net/c7a840f68c28233a37_8qm6bngdv.pdf) (providing that transgender clients should have appropriate access to bathrooms and showers, and that residents may dress in accordance with their gender identity, regardless of what sex is listed on their ID).

<sup>27</sup> New York City Commission on Human Rights, *Guidelines Regarding Gender Identity Discrimination, a Form of Discrimination Prohibited by The New York City Human Rights Law*, 5 (2006) [http://www.nyc.gov/html/cchr/downloads/pdf/publications/GenderDis\\_English.pdf](http://www.nyc.gov/html/cchr/downloads/pdf/publications/GenderDis_English.pdf) (“Not allowing individuals to use a restroom or other sex-segregated facility consistent with their gender identity or gender expression” suggests discriminatory conduct has occurred.).

<sup>28</sup> New York City Commission on Human Rights, *Guidelines Regarding Gender Identity Discrimination, a Form of Discrimination Prohibited by The New York City Human Rights Law*, 5 (2006) [http://www.nyc.gov/html/cchr/downloads/pdf/publications/GenderDis\\_English.pdf](http://www.nyc.gov/html/cchr/downloads/pdf/publications/GenderDis_English.pdf) (“Requiring individuals to provide identification as a means of identifying their gender before allowing them to use the restroom or other sex-segregated facility” suggests discriminatory conduct has occurred.).

<sup>29</sup> <http://schools.nyc.gov/RulesPolicies/TransgenderStudentGuidelines/default.htm>.

<sup>30</sup> Int 0492-2014: A Local Law to amend the administrative code of the city of New York, in relation to reporting and an advisory board on gender marker change requirement (2014) available at <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1937622&GUID=999F0597-AB0E-4E23-A046-34B5954ABCC7&Options=&Search=>

oversees and licenses both LMSWs and Licensed Clinical Social Workers (LCSWs), and there is no rational basis to exclude LMSWs from the practitioners designated by the policy. As a practical matter, LMSWs are the providers who are most likely to have direct patient contact while an LCSW may be acting in a supervisory role. Transgender people are often unable to access adequate medical care due to a combination of discrimination, poverty and lack of health insurance.<sup>31</sup> Transgender people are less likely to have health insurance, employer-based or public, and are more likely to delay medical treatment due to discrimination and/or inability to pay. In light of these factors, LMSWs provide primary mental health care to a large portion of the transgender community. The Health Department should mirror the proposal by the City Council and include LMSWs among the list of health care providers qualified to submit affidavits.

## **Conclusion**

The proposed amendments are comparable to the current policies of numerous state and federal agencies, including New York State, and accurately reflect the contemporary standards of transgender health care. We urge the Health Department to add LMSWs to the list of accepted providers and to adopt the proposed amendments.

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<sup>31</sup> NGLTF/NCTE Survey at 72-83.