

December 4, 2017

Washington State Department of Health
Center for Health Statistics
GenderChangeRuleMaking@doh.wa.gov

Re: Comments on Proposed WAC 246-490-075 “Changing sex designation on a birth certificate”

To the Department of Health:

We, the undersigned organizations, appreciate the Department’s attention to the need for a clear, accessible process through which Washington State residents can change the gender designation on their birth certificates. We write to support that concept, and to suggest specific changes to the proposed rule will ensure an accessible process that honors the gender of all Washingtonians.

Goals and Principles

Our organizations share the common goal of advancing the civil and human rights of all people regardless of gender, and to eliminate social and legal barriers that undermine the health, safety, and equality of people because of their gender. As the Department is aware, there is a growing recognition, in other states and at the international level, that binary gender markers on government documents, including birth certificates, are insufficient both as a means to accurately reflect gender and to ensure equality. For example, the inability to change the gender marker on one’s birth certificate could result in not just confusion, but, unfortunately, increased risk of violence and harm. Such a situation is untenable in a state where eradicating discrimination is a state interest of the highest order.¹

Ideally, Washington State could lead the nation in simply eliminating gender markers from its government documents. However, we understand that the Department’s rulemaking authority is limited by the requirement to collect “sex”² designations on birth certificates upon a child’s birth.

With that understanding, we provide suggestions for the draft rule based on the following principles:

- **Nondiscrimination:** Gender exists in many forms, and no one should be preferred over the other. All people who need to change their gender designation should have access to this process with as few barriers as possible.
- **Accessibility:** All people who need to change their gender designation on their birth certificate should be permitted to do so without significant expense, barriers, or arbitrary limitations.
- **Self-determination:** Individuals know their genders, and third parties need not be involved in this determination.
- **Safety and Privacy:** The private and identifying information provided by and for people seeking a gender marker change must be protected from public disclosure.

¹ See, e.g., *Tenino Aerie v. Grand Aerie*, 148 Wn.2d 224, 246, 59 P.3d 655 (Wa. S.Ct. 2002).

² We agree with the Department’s implied assessment that the term “sex” used here is interchangeable with “gender.” See, e.g., RCW 49.60.040(25) (“sex means gender”).

Comments on Draft WAC 246-490-075, Changing sex designation on a birth certificate

All adults should have access to this process. First, we support the rule's intent to allow adults to apply for a change of gender designation on their birth certificates on their own behalf, without the need for medical attestation. We strongly suggest that the rule also clearly allow a process for adults who have had guardians appointed for them because of legal incapacity. This will ensure that all adults, including adults with disabilities, have the right to have their gender accurately recognized on their birth certificates. To address this concern, we suggest that the rule be changed as follows:

(2) Only an adult or an adult through a guardian appointed pursuant to Chapter 11.92 RCW may apply to change sex designation on a birth certificate for oneself.

Unnecessary barriers should be eliminated from the proposed rule. We appreciate that the rule does not contemplate a fee; if a fee is ever imposed, it should be reasonable, meaning not more than \$20.

We understand that the Department has included the requirement that the applicant submit a notarized statement because the Department wants to protect the applicant from any unauthorized person seeking to change someone's birth certificate. While we appreciate that concern, we believe that the accessibility of the process to people who cannot access a notary outweighs that concern. This is particularly true in Washington, where a person's signature on a declaration made under penalty of perjury is sufficient for most legal purposes.³ As we have explained in previous comments, there are important reasons not to require a notarized statement. Incarcerated people, who should have equal access to this application process, may have no access to a notary at all. We request that the Department remove the notary requirement.

The categories that a person can choose when applying to change their gender designation should recognize the spectrum of gender. We appreciate the Department's recognition that any alternative designation to "male" or "female" should be broadly and non-exclusively defined, and we appreciate the drafter's efforts to include multiple genders in that non-exhaustive list. We have previously asked that the Department create an application form with a blank next to the word "Gender." Presuming that the Department will not provide that option, we recommend that the rule be changed as follows:

Applicants may request to change their sex (gender) designations to "X", "Nonbinary", "Male", "Female", and "Not Specified."

If the Department agreed to those alternatives, we propose that "X" be defined as the Department has specified in its draft (except for the word "nonbinary") and that "nonbinary" would be defined as follows: "another gender that is neither male nor female (including nonbinary genders) or no gender." Having a broader definition of nonbinary than in the current draft will help ensure that Washingtonians of any or no gender can designate the same on their birth certificate. Including "Not Specified" ensures that anyone, of any gender, has the option of keeping their gender private.

All minors should have access. We strongly urge the Department to recognize that gender non-conforming minors are overrepresented in foster care and in the homeless youth population. That means that they are extremely unlikely to have a parent or guardian who will submit this application on their behalf. To be truly cognizant of the needs of communities, the rule must account for minors who

³ See RCW 9A.72.085.

have no parent or guardian or who cannot safely seek parental support for the application. We propose that the rule be changed as follows:

(3) A minor may apply to change the sex designation on the minor's birth certificate under the following circumstances:

- a) when a parent or legal guardian completes the application on the minor's behalf; or
- b) when a foster parent or other designee of the Department of Social and Health Services completes the application on the minor's behalf; or
- c) when a licensed health care provider provides a signed statement that i) The minor identified on the application is under the care of the provider; and (ii) The provider has determined the request to change sex designation on the birth certificate is consistent with the minor's identity.

If medical attestation is required for minors, there should be no restriction on the type of health care provider who can sign the attestation. Some minors, for example, may have the support of their pediatrician; a pediatrician may have been treating a youth since birth, and be very knowledgeable about their gender identity, but not have a particular practice related to gender-affirming health care. A "licensed health care provider" should be able to make the attestation. Thus, we propose eliminating Section 8 from the current draft rule.

Safety and privacy should be protected. The rule should expressly state that applications for a change of gender designation are exempt from public disclosure. It could be particularly dangerous for people who choose the X or nonbinary designation to have that information readily available to anyone who made a request for those applications. Further, **the rule should ensure that the new birth certificate shall not in any way reference or indicate that it is not the original birth certificate of the applicant.** We propose that these two provisions be added to the rules as the final two sections of the rule.

Conclusion

We appreciate the Department of Health's attention to Washington residents' need for an accessible process for requesting a change of gender designation on a birth certificate. We look forward to continuing to work with the Department during the rulemaking process.

Sincerely,

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