

# Principals for Department of Health on Rulemaking Regarding Non-Binary Gender Markers



GENDER JUSTICE LEAGUE



To: Washington State Department of Health, Vital Statistics  
From: Danni Askini, Executive Director - Gender Justice League  
Date: September 11th, 2017  
Re: Re: Rule Making CR-101 for Chapter 246-490 WAC, Vital statistics - Non-Binary Gender Markers and Requirements for Sex Designation Change on Washington Birth Certificates

Gender Justice League along with Ingersoll Gender Center, National Center for Transgender Equality, Trans United, Legal Voice, Seattle Men's and Women's Chorus, LGBTQ Allyship, Greater Seattle Business Association, Equal Rights Washington, Third Gender Washington, Seattle Counseling Services, and Entre Hermanos would like to submit the following principals to the Washington State Department of Health Vital Statistics office for your consideration when considering rule making regarding sex designation / gender marker changes on Washington Birth Certificates.

Our organizations serve several thousands of two-spirit, non-binary, trans, and gender diverse though out Washington State. On behalf of our clients and community we are pleased that the Washington Department of Health has recognized the need for the State of Washington to expand sex designations beyond a binary male/female and is considering opening a rulemaking process to reevaluate the current policies and consider new procedures for changes of sex designation on birth certificates. We humbly submit the following commentary on behalf of the undersigned organizations on what we believe are some core principals the Washington Department of Health should consider when undertaking this rulemaking process.

#### **Principles in crafting a new policy on sex designations on birth certificates:**

1. **Washingtonians should be allowed to decide their sex or gender identity without confirmation from third parties.** We believe Washingtonians should not have to pay money to private physicians or therapists, undergo unnecessary medical or mental health treatment, or possibly be coercively made to undergo treatments they might not otherwise choose by third parties. This may include forced sterilization in some cases<sup>1</sup>. We believe the state should abandon requiring physician or therapist certification letters of "gender change". Self-attestation is the most accurate method of ensuring that the sex designation on a birth certificate matches the individual. There is currently no clear statutory definition of sex in Washington or clarity about what the designations "male" or "female" mean, clinicians are no more expert in ascertaining a client's sex than the client themselves. Relying on outdated indicators such as a doctor's attesting to a patient's primary or secondary sex characteristics is an unnecessarily invasive and often dehumanizing process that does not further any legitimate state interest. We believe Washingtonians are competent in ascertaining the most appropriate sex designation on their birth certificates.

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<sup>1</sup> European Court of Human Rights, A.P., Garçon and Nicot v. France  
<https://strasbourgobservers.com/2017/05/05/a-p-garcon-and-nicot-v-france-the-court-draws-a-line-for-trans-rights/>

2. **Sex designations and gender identity are an issue of freedom of speech and freedom of expression.** The state should not limit free speech or freedom of expression with regard to sex or gender identity.
3. **Sex designation options should not be limited to “male” and “female”.** The state should recognize that there is not a single acceptable alternative to “male and female”, and that gender identities and sexes in humans exist in a myriad of forms. We recognize that this complicates the process for selecting new designations, but we believe that complexity can and should be addressed.
4. **There are several other alternative approaches we would consider acceptable.** For example, issuing birth certificates with no sex designation may be acceptable. This would allow Washingtonians who do not wish to identify their sex to others to have a birth certificate that is valid, while not disclosing their sex. Additionally, in the instance of the birth of intersex children, this could allow the family and child time to decide a designation to be placed on the birth certificate. We would support a process for removing the gender marker on birth certificates or allowing for blank gender markers.
5. **Several established models offer acceptable alternatives to the status quo.** The term “non-binary” is one model, but using that term alone may not respectfully reflect the sex or gender of some people who are Intersex, Two-Spirit, Fa’afafine, Gender Fluid, Transgender, Transsexual, Agender, Māhū, Muxe, or Gender Queer, among others. Many municipalities have elected to use “X” for non-specified, and “U” for “unknown” or “unspecified”<sup>2</sup>. M, F, and X are all accepted designations under the International Civil Aviation Organization, which sets the standard for Passports around the world. To address the problem of categorizing many different groups of people under one possibly incorrect label, we suggest that the form allow a blank space after the word “Gender”, and that the term a person uses in that blank space would be the term that appears on their birth certificate. So, for example, the form could read “Gender:\_\_\_\_\_.” Washington State Birth Certificate forms have ample space on the sex designation line to support any gender an individual uses.
6. **The state should avoid arbitrarily erecting barriers to self-designation** such as limiting the options available to Washingtonians, requiring third parties to ‘attest’ to a change of gender, requiring Washingtonians to pay a fee to change designation, or requiring multiple letters, emails, or phone calls with the Department of Health to change designations. Only 14% of Washingtonians in the largest study of transgender people in this state reported that all of their IDs had the name and gender they preferred<sup>3</sup>, while 62% reported that none of their IDs had the name and gender they preferred<sup>4</sup>.. The state

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<sup>2</sup> <http://www.cnn.com/2017/07/04/health/canadian-baby-gender-designation/index.html>

<sup>3</sup> US Trans Survey, National Center for Transgender Equality.

<http://www.transequality.org/sites/default/files/docs/usts/USTS-WA-State-Report.pdf>

<sup>4</sup> US Trans Survey, National Center for Transgender Equality.

<http://www.transequality.org/sites/default/files/docs/usts/USTS-WA-State-Report.pdf>

should also consider carefully the impact of erecting barriers to youth who may wish to change their gender designation. Municipalities such as Seattle have recognized that many gender non-conforming and transgender youth have been subjected to so-called “reparative therapy” or other gender identity change efforts – requiring third party intervention may subject vulnerable minors to attempts to dissuade them from the sex or gender they know themselves to be. This can have lifelong harmful impacts on the mental health of young people.

- 7. The State should consult Native American tribes and gender diverse people of color here in Washington when considering gender marker changes.** Many indigenous communities have their own sex or gender designations beyond male and female; Washington State should uphold its treaty obligations to these tribes and recognize their sovereignty to self-identify the names of their genders. We encourage DOH to reach out to: Northwest Two-Spirit Society, U.T.O.P.I.A Seattle - United Territories of Pacific Islanders Alliance, QBASS - Queer Black Alliance of South Sound, QTPAX - Queer and Trans Pan African Exchange, Entre Hermanos, and Somos Seattle to gain further insight into how these changes could impact Native Americans and people of color. This outreach by the State is particularly important because regulatory processes are often conducted only in English, and not everyone receives notices of rulemaking, or can access the public opportunities to comment.
- 8. The state should coordinate among agencies to ensure a new gender designation policy is properly implemented.** We would encourage the Department of Health to consult or notify other departments such as Department of Licensing, DSHS, Public Health Departments, the Department of Corrections, OSPI, the Secretary of State’s office, and other key Washington State departments that collect gender related information or issued gender related identification of this change. There could be significant downstream impacts from these changes, especially if Washingtonians have mismatching sex designations on their identifications. Ideally, we would like to see an attempt to harmonize policies and procedures across government branches to reduce the likelihood of mismatched identification from State of Washington sources.
- 9. There should not be two distinct processes for getting a gender-neutral identifier, remove a sex designation all together, or to change a person’s sex designation.** Many providers may not be supportive of people changing their gender identities. Having one process will ensure the clearest and most accurate identifier. Additionally, many Washingtonians do not have access to a medical or mental health provider. We want to ensure that everyone has the same access to accurate identification and the ability to change their gender marker when needed, or to elect a non-binary gender designation.
- 10. The State should seal records related to name and sex designation changes.** Discrimination, violence, and harassment are commonplace for transgender and non-binary individuals in Washington State, with nearly 79% of transgender young people

experiencing verbal harassment or violence in schools<sup>5</sup>. Allowing access to information related to sex designation change may jeopardize Washingtonians. Every attempt should be made to have records sealed, that birth certificates not note old names or sex designations, have notices of 'amendments', and that "clean copies" are created with a new name and sex designation.

**With Sincerest Regards on behalf of the following organizations,**

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<sup>5</sup> US Trans Survey, National Center for Transgender Equality.  
<http://www.transequality.org/sites/default/files/docs/usts/USTS-WA-State-Report.pdf>