



Joint Memo of Support
Gender Recognition Act
A.3457-B (Ortiz)/S.0056-B (Hoylman)

We, the undersigned organizations, supported by hundreds of thousands of members, donors, clients, students, and other stakeholders throughout the State of New York, share the common goal of advancing the civil and human rights of all people regardless of gender and eliminating barriers that undermine the health, safety, and equality of people because of their gender. We support the rights of transgender, nonbinary, and intersex New Yorkers. We write to urge your support for the *Gender Recognition Act* (A.3457-B/S.0056-B).

The *Gender Recognition Act* would help transgender people, including nonbinary people, access documents that accurately reflect their identities. The bill would:

- Add a gender-neutral marker, X, as an option for birth certificates and DMV-issued IDs, so that nonbinary people can have identity documents that accurately reflect their gender identity;
- Remove the medical documentation requirement for gender marker changes, so that all transgender people can access documents that accurately reflect their gender identity;
- Allow parents to change their own name on their child’s birth certificate and choose the title of “father,” “mother,” or “parent” on an original or amended birth certificate for their child;
- Remove the outdated publication requirement for name changes as it can unnecessarily increase risk and violate privacy;
- Establish explicit jurisdiction for courts to issue orders recognizing an individual’s gender identity, as New Yorkers born out of state may need such orders to update identity documents in their state of birth;
- Clarify that minors, with parental permission, are able to change the gender marker on their state-issued birth certificates (as is already the case for New York City-issued birth certificates).

The *Gender Recognition Act* has had substantial input from the transgender, nonbinary, gender nonconforming, and intersex advocacy community – both in New York State and nationally. The

language in the bill is maximally effective, aligns with national trends (placing New York back at the forefront of progress), and genuinely addresses the issues faced by these communities on the ground. The *Gender Recognition Act* is a comprehensive bill which will address loopholes and contradictions in existing law.

Adding a Gender-Neutral Designation

We support the *Gender Recognition Act* (A3457-B/S56-B) because binary gender designations of “female” or “male” fail to adequately represent the diversity of human experience. Nonbinary people have gender identities that fall outside traditional conceptions of strictly male or female.

Twenty-one jurisdictions throughout the U.S. now offer gender-neutral designations on birth certificates, state IDs, or both, including: Arkansas, California, Colorado, Connecticut, Hawaii, Indiana, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, New York City, Nevada, New Hampshire, Oregon, Rhode Island, Utah, Vermont, Washington, and Washington D.C.¹

Over one-third of all transgender people in the U.S. identify as nonbinary, according to the [2015 U.S. Transgender Survey](#). A gender-neutral option on driver’s licenses and birth certificates would allow people whose gender is not male or female to display an accurate gender marker. There are currently New Yorkers born within the five boroughs, or in the abovementioned states’ jurisdictions, who have an X on their birth certificate but have no mechanism to get a matching driver’s license or state ID. Allowing the DMV to issue IDs with an X would allow nonbinary people to have matching documents.

Removing the Provider Attestation Requirement

Self-designation occurs when an individual reports information on an application, under penalty of perjury, that does not need to be verified by any secondary source, such as a medical provider. Since a person’s own report is the most accurate means of ascertaining the appropriate sex designation for their documents, removing the medical attestation requirement alleviates an unnecessary and often prohibitively expensive burden placed on transgender people seeking corrected documents. This will ensure better access to accurate gender marker designations for all transgender people.

Transgender people frequently do not have access to appropriate medical care. Nearly one-third (32%) of transgender individuals in New York who saw a health care provider in the previous year reported having a negative experience related to being transgender, including verbal harassment, refusal of treatment, or even physical or sexual assault. Many did not see a doctor when they needed to because they feared mistreatment for being transgender, and

¹ Movement Advancement Project, *Equality Maps: Identity Document Laws and Policies*, http://www.lgbtmap.org/equality-maps/identity_document_laws (February 6, 2020).

more than a quarter of transgender respondents in New York (28%) could not see a doctor because of cost.²

Requiring healthcare providers to attest to an individual's gender identity is costly, burdensome, and entirely unnecessary. Finding a competent provider who is able and willing to attest to an individual's gender identity is challenging, if not impossible, particularly for rural residents. Even if people are able to access a competent provider, each provider appointment can cost hundreds of dollars, and some providers require multiple visits before writing a certificate letter, making barriers particularly high for low-income people.³ In addition, as long as an X gender marker is not available, the state is effectively requiring providers and some transgender and intersex people to commit perjury when obtaining state-issued documents or amending the gender marker on their documents.

In addition to the provider letter required for changing a photo ID, in order to change the gender marker on a New York State birth certificate, the Department of Health requires that a doctor's signature be notarized. Because a transgender person seeking to amend their birth certificate is the only circumstance in which a doctor's signature is not "inherently" notarized under New York law, physicians are often unable to find a notary or unwilling to use personal time to find one outside their office. Oftentimes, since they are accustomed to not needing a notary, providers will refuse to seek one out because they believe it is unnecessary and that the patient is mistaken.

Removing Publication Requirements

The *Gender Recognition Act* takes an essential step towards protecting transgender individuals by eliminating the publication requirement for name changes, which also eliminates existing inconsistencies in how judges apply the publication requirement today. Currently, in order to get a name change in New York State, applicants are required to publish notice of their name change in a newspaper, including their old name, new name, home address, place of birth, and birth date. This essentially means that a transgender petitioner must run a newspaper advertisement that reveals the fact that they are transgender and where they live. This can put petitioners at real risk of violence; many transgender people face blatant discrimination and severe violence simply for being who they are.

Judges who are aware of these threats to safety have discretion to waive the publication requirement on an individual basis upon a showing, by the totality of the circumstances, of a threat to personal safety. Under current law, that threat does not need to be based on a

² 2015 U.S. Transgender Survey: New York State Report (October 2017)

<https://www.transequality.org/sites/default/files/USTS%20NY%20State%20Report%20%281017%29.pdf>

³ For example, in a recent analysis by the WA State Department of Health of a proposed rule that would remove the provider attestation requirement to update the gender marker on a WA birth certificate, the department estimated that the cost of obtaining an attestation letter from a licensed health care provider ranged from \$0 to \$910. Washington Department of Health, *Significant Rule Analysis: WAC 246-490-075 Changing sex designation on a birth certificate*, November 1, 2017, available at

https://fortress.wa.gov/doh/policyreview/Documents/SA_GenderChange_BirthCertificate.pdf.

personalized history of violence, but there is a lack of consistency in the granting of waivers. Some judges waive the publication requirement while others never do, even if the petitioner shows a particularized, individual threat to their personal safety. Outing oneself as transgender to the court and to the public always carries a threat to one's safety. If someone's transgender status is mentioned in their petition and publication is not waived, that document remains in the public domain and accessible by anyone who seeks it.

The following eighteen states have no publication requirement at all for legal name changes: Alabama, Arizona, Arkansas, Connecticut, Florida, Kentucky, Louisiana, Minnesota, Mississippi, New Hampshire, Oregon, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, and Washington. California has no publication requirement if the name change is related to gender.⁴

The publication requirement is no longer necessary for its original purpose of notifying creditors of a name change. Judges have discretion to require specific, direct notifications to creditors and other parties when appropriate, and financial institutions in the Internet age no longer require publication information to keep accurate records. At this point – aside from forcing transgender people to disproportionately incur the expense of publication since a legal name change is often a required element of transition – the only result of publication is to out a person as transgender. Not only does this place them at increased risk of violence, but it publicizes personal medical information when a more narrowly tailored option is available.

The publication requirement impacts all name change petitioners, whether transgender or not. Many people who file a name change petition on their own do not realize that publication is a condition of obtaining their final certified orders and then must restart the name change process because the time to publish as set forth in their order has expired. Removing the publication requirement would streamline and standardize this process for everyone.

Notably, there is no publication requirement for a person who seeks to change their name attendant to marriage or naturalization. The current law's treatment of marriage in particular as an acceptable reason for a name change, without question, while transgender people and others seeking a name change for equally important reasons are treated as presumptively suspect is an anachronistic holdover that relies on and entrenches old sexist and transphobic stereotypes. This unequal treatment calls into question the validity of the current statute under the New York Constitution's Equal Protection Clause.

The *Gender Recognition Act* also allows petitioners to request that their name change record be sealed. Explicitly allowing judges to consider transgender status as a justification for sealing records will further protect transgender petitioners. Currently, a name change record is sealed automatically when publication is waived. If the publication requirement is removed from the name change statute, we must ensure transgender people and other at-risk populations like

⁴ Information compiled from the ID Documents Center, National Center for Transgender Equality, available at: <https://transequality.org/documents>

domestic violence survivors have a mechanism to seal their records. New York State should adopt the *Gender Recognition Act* to ensure a safe, fair, and predictable process.

Allowing Transgender Parents to Update Information on Their Child's Birth Certificate

Many transgender people, including nonbinary people, are also parents. These parents must show their child's birth certificate when registering their child for school. These parents should be able to update their child's birth certificate to display their current legal name to ensure privacy and accuracy. Additionally, a nonbinary parent who does not identify as "mother" or "father" is currently unable to be correctly identified as "parent" on their child's birth certificate, setting them up for difficulties communicating with school personnel.

A transgender parent whose child was born prior to their name change is unable to change their name on their child's documents without a court order separate and in addition to their actual name change order. The Department of Health currently requires a second order explicitly ordering them to change the parent's name on the child's birth certificate. Beyond the additional court cost that falls almost exclusively on transgender people, judges in many counties will not issue such orders because name changes on birth certificates are generally an administrative matter. Indeed, a parent whose child has a New York City birth certificate is able to make this change administratively by simply sending their name change order to the New York City Department of Health & Mental Hygiene.

Currently, parents whose children were born outside of New York City must out themselves as transgender and present their name change order with their child's birth certificate when registering for school or sports, applying for a passport, or doing any number of ordinary activities. If the parent sought to change their own name on their own birth certificate, their name change order would be sufficient to do so, but the Department of Health does not comply with a certified court order when it dictates that a parent *shall* go by their new name and no other name. Allowing transgender parents in all of New York State to update their child's documents would ensure that correct records are kept – including when a child must use their birth certificate as foundational documentation to obtain new documents – and would ensure that transgender parents need not out themselves in the normal course of parenting.

Providing for Court Orders When Necessary

New York State courts do not currently have clear jurisdiction to issue orders recognizing an individual's gender. While people born within New York State may update their records administratively without a court order, many other states require a court order to change the gender designation on a birth certificate. Requiring a court order to change gender designations is highly burdensome, and we are glad this is not required in New York; the *Gender Recognition Act* makes clear that under no circumstance should such an order be required to change a document issued by New York State. However, for New York residents born elsewhere, if courts do not have explicit jurisdiction to issue the required order, there is effectively no mechanism to change a birth certificate.

The *Gender Recognition Act* would grant courts the power to issue an order recognizing an individual's gender identity, allowing New York State residents born out of state to update their birth certificates without the added expense and burden of traveling to the state of their birth, finding local counsel, and initiating a proceeding elsewhere. New Yorkers should be able to access the courts *where they live*.

Supporting Transgender and Nonbinary Youth

New York State does not currently allow minors to update the gender marker on their birth certificate. Indeed, Lambda Legal recently sued the state⁵ to change this policy. The present policy of prohibiting gender marker corrections for transgender youth is anomalous in New York and the nation. Minors born in New York City have the opportunity to correct their birth certificates at whatever age their parents and providers determine that that is appropriate for them. Similarly, the 12 jurisdictions that have modernized their birth certificate policies to eliminate surgery requirements all have the same policy regardless of age.

Many minors begin to transition both socially, and sometimes medically, prior to their 18th birthdays. The current policy results in minors having to out themselves any time they need to use their birth certificate. In particular, many young people graduate high school and enter college prior to their 18th birthday and, due to this policy, are unable to update their birth certificate prior to registering for college, which creates many complications for recordkeeping.

Birth certificate changes are important for transgender people regardless of their age. Being forced to use identity documents that do not accurately reflect a person's gender opens the door to harassment and discrimination. Youth who do not have appropriate identification documents face the risk of stigma, discrimination, and bullying if their transgender status is publicized as a result of their incorrect birth certificate. Beyond that, the longer a person must use incorrect foundational documents, the more subsequent documents are based on that information and must be changed later. The *Gender Recognition Act* ensures that youth have access to accurate birth certificates along with everyone else.

As transgender people face attack after attack from the federal government, and transgender youth specifically are being targeted in many states, it is essential that New York act to support its transgender, nonbinary, and intersex residents. The *Gender Recognition Act* goes a long way toward ensuring that every New Yorker can access documents that truly represent their identity and preserve their privacy. Please support this legislation to update the name change process and gender marker options in New York State.

For these reasons, we, the undersigned organizations, support the passage of the *Gender Recognition Act*.

⁵ *M.H.W. v. Cuomo*, No. 20-cv-00017 (N.D.N.Y.) – information available at <https://www.lambdalegal.org/in-court/cases/mhw-v-cuomo>

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