



Joint Memo of Support Gender Recognition Act S.4402 (Hoylman) / A.5465 (O'Donnell)

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* (S.4402/A.5465).

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- Remove the outdated publication requirement for name changes as it can unnecessarily increase risk and violate privacy;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;
- Clarify the circumstances under which a judge can require certain notifications or consent for a name change to be granted or for the petitioner to receive their certified name change orders;
- Require public and private entities to comply with a name change order with regard to updating documentation and records.

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* (S.4402/A.5465) 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-six jurisdictions throughout the U.S. now offer gender-neutral designations on birth certificates, state IDs, or both, including: Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Massachusetts, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York City, Nevada, New Hampshire, Oregon, Pennsylvania, Rhode Island, Utah, Virginia, 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. While there was an administrative policy change at the Department of Health to allow for X designations on New York State birth certificates, we would like to codify such a policy in statute so that a subsequent administration cannot revoke the policy change. There are also 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 in New York. Allowing the DMV to issue IDs with an X would allow nonbinary people to have matching documents and would align intrastate agency policy.

Allowing for Gender Designation Changes by Self-Attestation

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

¹ Movement Advancement Project, *Equality Maps: Identity Document Laws and Policies*, http://www.lgbtmap.org/equality-maps/identity_document_laws (March 24, 2021).

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 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, because the physician must attest that the person has transitioned to male or female and that one gender predominates, which is not the case for many transgender and nonbinary people.

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.

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.

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 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 twenty-two jurisdictions have no statutory publication requirement at all for legal name changes: Alabama, Arkansas, Connecticut, Florida, Iowa, Kentucky, Louisiana, Minnesota, Mississippi, New Hampshire, New Jersey, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Washington D.C. California and Colorado have 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. Self-represented petitioners may not realize they have the option to request a waiver, and others are unable to afford the publication fee within the required timeframe and also must start over. 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.

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

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 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" should easily be able to be correctly identified as "parent" on their child's birth certificate.

As of July 2020, the Department of Health made an administrative change to allow a transgender parent whose child was born prior to their name change to change their own name on their child's documents without a court order separate and in addition to their actual name change order. Prior to this change, the Department of Health required a second order explicitly ordering them to change the parent's name on the child's birth certificate. Beyond the additional court cost that fell almost exclusively on transgender people, judges in many counties do not issue such orders because name changes on birth certificates are generally an administrative matter. We would like to codify this change in statute so that it cannot be rolled back administratively at a later date.

If the policy were to be rolled back, parents whose children were born outside of New York City would be required to 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 previously did not comply with certified court orders dictating that a parent *shall* go by their new name and no other name, and there is concern such a policy could return without a statutory change. Allowing transgender parents in all of New York State to update their child's documents ensures that correct records are kept – including when a child must use their birth certificate as foundational documentation upon which other documents are based – 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 an out-of-state 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

Until recently, New York State did not allow minors to update the gender marker on their birth certificate. Indeed, the Department of Health's policy only changed after a settlement with Lambda Legal.⁵ While this administrative change was a positive one, like with the other proposals mentioned herein, there is concern that a simple administrative change is easily revocable. The policy of prohibiting gender marker corrections for transgender youth was anomalous in New York and the nation. Minors born in New York City have long had 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 17th birthdays. The previous policy resulted in minors having to out themselves any time they needed to use their birth certificate. In particular, many young people graduate high school and enter college prior to their 17th birthday and, due to this policy, were unable to update their birth certificate prior to registering for college, which created 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.

Requiring Justification for Notice & Consent in Name Change Matters

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>

Currently, the name change statute sets out the circumstances in which certain parties must be notified of a name change proceeding either before the proceeding can move forward or before the petitioner can obtain certified copies of their name change order. Specifically, minor petitioners must notify their legal parent(s) and petitioners with certain felony convictions must notify certain prosecutorial and supervisory entities. However, many judges go beyond the statute to require notification to and consent from parties outside the scope of the contemplated regime.

In some cases, for example, judges have required notification to or consent from an adult petitioner's parent or a judge or prosecutor who previously convicted/sentenced a petitioner in criminal court. In Manhattan Civil Court, the court requires spousal consent for all married petitioners before the matter can even go before a judge. The court calls it an acknowledgement to avoid the appearance that they are conditioning an adult's name change on some other party's consent, but in practice, it effectively functions as required consent.

These requirements are an infringement on a person's right to go by the name they choose. They have the potential to put petitioners in a dangerous situation if it is not safe for them to inform a spouse or parent of their name change or transgender status, or they may serve as an insurmountable barrier if the petitioner's spouse or parent cannot be located or refuses to provide consent. Regarding consent from a judge or prosecutor who previously oversaw a conviction, these parties have no standing to object to a petitioner's name change and have already punished the petitioner for whatever crime they were convicted of; they should not be able to further insert themselves into the petitioner's life to prevent them from moving forward as themselves.

In addition, notice to various federal immigration agencies is routinely ordered for individuals born outside the United States, whether documented or not, particularly in New York City Civil Court. Name change petitioners must ultimately update their name on their immigration documents at great cost. It is in their interest to make these updates so that they can begin using documentation with the appropriate information on it. It is not the City or State court's job to do the federal government's bidding with regards to immigration enforcement. This particular requirement unduly burdens some of the most vulnerable name change petitioners, creates confusion around whether notice in fact updates someone's documents and records (it does not), and potentially subjects them to immigration enforcement action simply for attempting to access the courts, which they have the right to do.

The *Gender Recognition Act* does not eliminate judicial discretion to order appropriate notifications. The bill simply clarifies under what circumstances notice is appropriate (the bill maintains the existing minor and felony notifications) and requires a judge to provide a written decision showing good cause why a person or entity outside the current standard must be notified in a given case. If the notice can be justified, a judge remains within their discretion to order it. If the notice cannot be justified, a petitioner has a written decision from which to appeal.

Requiring Compliance with Name Change Orders

When a name change petitioner obtains their certified name change order, they must go to every individual agency and entity with whom they need to change their information. At the agency level, there are generally standards by which clerks must process a name change and/or gender marker change. However, for private entities and other non-agency public entities, such as schools, there is no enforcement mechanism when a person's request to update their information is denied despite a court order saying they **shall** go by the new name. This results in a patchwork of standards that leaves people across the state unclear about whether they will be able to update a given document.

In the school context, oftentimes when a person returns to the institution they graduated from and requests a name change, they are met with refusal because "that is not the person who graduated" from the institution. A similar issue arises when a person who was married before their name change attempts to change the name on their marriage certificate. The Division of Vital Records' current policy is to have the couple divorce and remarry in order to obtain an accurate marriage certificate, purportedly because the original document was witnessed and thus cannot be amended. It is unclear why a new, amended document could not simply be re-witnessed, but this is obviously an absurd requirement with major implications for the lives of married transgender people. A divorce is a life event that needs to be disclosed in various contexts – including in a name change petition – and it is unjust to require someone who does not wish to divorce to do so simply to update a document.

The *Gender Recognition Act* proposal regarding document updates requires all entities to comply with a name change order by updating the requested documentation or record, and establishes a cause of action for an individual to file a complaint with the relevant enforcement agencies should anyone refuse to comply with the order. While New York is a common law name change jurisdiction, meaning that anyone can go by any name they wish as long as it is not for fraudulent purposes or to interfere with the rights of others, changing many official documents and records requires a court ordered name change. Transgender people should not be required to go through the judicial name change process just to get a court order that an entity can simply refuse to comply with, leaving them with no recourse.

As transgender people recover from years of attacks 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, and brings New York back to the forefront on transgender equity. 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*.

Sincerely,

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