

REPORT AND RECOMMENDATION OF HEARING OFFICER

Public Hearing: New Mexico Department of Health

Proposed Action: Repeal and Replace Part 7.2.2 NMAC "Vital Records and Statistics"

Hearing Date: October 1, 2019

Report Date: October 15, 2019

Report of Hearing Officer

A public hearing was held on October 1, 2019 at 9:00 AM in the Harold Runnels Building auditorium, 1190 South St. Francis Drive Santa Fe, New Mexico for the purpose of considering the Department of Health (DOH)'s proposed repeal and replacement of Part 7.2.2 NMAC ("Vital Records and Statistics").

Christopher L. Graeser presided as Hearing Officer pursuant to appointment by Secretary Kathyleen Kunkel. DOH was represented by Michelle E. (Shelley) Strong, Assistant General Counsel, Bureau Chief Mark Kassouf and Registrar Renée Valencia of the Bureau of Vital Records and Health Statistics and Bureau Chief Heidi Krapfl of the Environmental Health Epidemiology Bureau. Other parties present at the hearing included:

Emily Walker, Transgender Resource Center of New Mexico
Adrian N. Carver, Equality New Mexico
Shari Weinstein, Transgender Resource Center of New Mexico
Bennett Riley, Transgender Resource Center of New Mexico
Gabrielle D. Baca, Equality New Mexico
Susan Powers, Transgender Resource Center of New Mexico

The hearing sign in sheet is made an exhibit to the hearing (Exhibit 13).

The hearing was electronically recorded by the Hearing Officer. A digital copy of the recording is transferred with this report.

The Hearing Officer opened the hearing and introduced himself and Ms. Strong.

Ms. Strong identified and entered the following documentary evidence, which was admitted without objection:

Number	Exhibit
1	Notice of rulemaking hearing
2	Affidavit and proof of publication – Albuquerque Journal (August 21, 2019)
3	Affidavit and proof of publication – New Mexico Register (Volume XXX)
4	Proof of posting proposed rule on New Mexico Department of Health website

5	Proof of posting proposed rule on New Mexico Sunshine Portal
6	Affidavit of notice to the public, Franchesca Martinez (September 30, 2019)
7	Hearing officer appointment letter (September 10, 2019)
8	Proposed rule text
9	Proposed rule text – Reference copy with strikethroughs and underlines showing changes
10	Proposed repeal and replace language
11	Comments in support of proposed amendments by Transgender Resource Center of New Mexico (<i>Adrian Carver, sic</i>)
12	Comments in support of proposed amendments by National Center for Transgender Equality (<i>Arli Christian</i>)
13	Hearing sign in sheet
14	Community member comments

The Hearing Officer then asked for comments or questions.

Shari Weinstein, Staff Attorney at Transgender Resource Center of New Mexico, stated that the Transgender Resource Center of New Mexico was in full support of the proposal and that it was an important bill [2019 SB 20] for the trans and non-binary community in New Mexico to make it easier to amend birth certificates and add the “X” designation. New Mexico will be joining many other states that have self-attestation and the “X” designation. There is what looks like a typo on Page 10 at 7.2.2.17(F)(1)(b): “on” should read “one.”

Ms. Strong said that the change could be made.

Dr. Emily Walker, who has a 16 year-old transgender son and is going through the process of changing his records testified that the process is time consuming, tedious and expensive and is in full support of the proposed rule to make it easier for other families in the future.

Bennett Riley, a transgender college student, spoke in favor of the proposed rule and said that the change would make life easier and would not require the onus to be put on individuals requesting the birth certificate change to obtain surgery, but would make it easier and safer for people wherever they are in their journey.

Susan Powers, a retired trans person, supported the proposal because it does not require permanent sterilization or other expensive or medically untenable processes and also requested that the cost of changing the birth certificate be kept in check.

Ms. Strong stated that the statutory fee is \$10 for the amendment and \$10 for the birth certificate for a total cost of \$20.

Adrian Carver, the Executive Director of Equality New Mexico, stated Equality New Mexico partnered with the Transgender Resource Center of New Mexico and the National Center for Transgender Equality for the last six years to get the legislation passed by the Legislature and signed by the Governor in the past session. Equality New Mexico fully

supports the proposed rule to allow people to have an identity document that affirms and confirms a person's gender. Comments from 110 community members were introduced into the record.

The comments are made Exhibit 14 to the hearing. The comments are all in support of the proposed rule and identified reasons for support including:

- Trusting people to ensure their documents reflect their gender, without requiring unrealistic or unnecessary medical treatment.
- We should not be the gatekeeper for other consenting adults.
- Allowing people to correct their birth certificates for practical, personal and safety reasons.
- Self-attestation reflects the most accurate information about a person's gender.
- A gender-neutral sex designation is necessary to ensure accuracy and privacy on vital records.
- The rule change will help address discrimination in housing, employment, education and civil rights protections.
- The actions of the State should reflect acceptance, diversity, safety and equal opportunity.
- The "X" designation best describes the truth and experience of individuals submitting comments.
- The inability to be recognized by the name and gender of how a person identifies hinders obtaining medical care.
- The rule change will have a profoundly positive impact on affected individuals.
- Being scientifically intersex is a natural occurrence and all other gender non-conforming people are just as worth as needing or wanting this legal identity option.
- The rule change is heavily related to saving lives as an affirming choice/way to legitimize existence in the world.
- Allowing individuals to be comfortable and free of criticism with who they feel they are and the gender they identify as will allow them to add more value to the general community.
- Requiring proof of surgery is not reflective of the lived experience of non-binary individuals.
- One's humanity is not defined by race, creed or gender.
- The bill will allow my child to live the happiest, most authentic life possible.
- The Department is not following the law and needs to rule change to be compliant.
- This is a vital step to ensuring that transgender, gender diverse and intersex people in New Mexico have access to health equity.
- We owe it to our transgender, gender diverse and intersex family and friends to trust that they know who they are and what is in their best interest.
- It is a way to ensure that our gender non-binary community members are seen and validated in their identities.
- This is one systemic way to reduce minority stress and stigma associated with being a gender non-binary person in a predominantly gender binary world.
- I am anxious to become who I already am.

- This act will affirm the identities of people who are marginalized and impacted by discrimination every day.
- This is a small step toward a healthier and more equal world for all people.
- People know what their gender is, so let them put it on their official records. No other complication is required.
- Many of us presenting a mismatched gender marker on our IDs can get us second-guessed or harassed.
- I am personally very excited to not have to go through the awkward experience of checking the wrong box on forms.
- This act will save lives as individuals are validated and recognized for who they are and feel worthy to live their lives contributing as citizens to our community and our country.
- Allowing people to live their lives fully as their true gender is a form of suicide prevention.
- Non-binary children experience a great deal of discrimination and being able to correctly identify would be remarkable.
- I'm nonbinary and I hate the F on my license. Please let me change it.
- To be taken at my word and allowed to change my documents to affirm my gender identity would make me feel seen, supported and proud to live in New Mexico.
- When people are being separated into groups, you can show them your IDs too so they can't put you with the other people if you don't currently look like what you feel inside.
- I wouldn't have to worry so much while going to the public restrooms and that's a huge step in itself.
- New Mexico has and always will be an inclusive and enchanting place.
- People deserve to live authentically and their vital records must support that.
- Being unable to correct sex designation on birth certificates may be a HIPAA violation.
- I haven't been able to get my passport without a birth certificate so I can travel for surgery.
- I called Vital Records and had the worst interaction I have ever had. I was told I could not change my first name on my birth certificate without having surgery and that she would place a lock on my birth certificate so I couldn't make any changes in the future. I don't believe that making these types of changes should be this difficult when I have a court order and a social security card.
- We just want to live and contribute to our communities and be treated like other citizens of our state.
- I've so needed a change for sixty years.
- This will help set an example of acceptance for our country as a whole.
- Identification documents are often used as a tool to discriminate against trans or queer individuals. This act will not only protect but empower many New Mexicans.
- Let people chose what we want to call themselves!
- Cisgender people are not required to provide proof of their gender identity, so it is discriminatory and outdated to require the same for transgender people.

- The transgender community is a vulnerable population targeted by violence and discrimination, it must come to an end and this effort is one piece of that effort.
- It is particularly important to specifically indicate on the form that X is available to intersex individuals.
- A physician stating that they have noticed the clear difference in anxiety levels among their patients in New Mexico and in California, which already has adopted laws to allow gender-congruent identification.
- It's the humane thing to do for all.
- We need to treat people with dignity and respect, especially in this critical area.

The Hearing Officer then asked several questions of staff:

With respect to Section 7.2.2.7(E), is there a situation in which a court ordered custodian could be someone other than CYFD?

Ms. Strong responded that there are potentially circumstances where individuals other than CYFD could be a court ordered custodian. The reason DOH used the terminology to allow CYFD to do its duty as custodian while ensuring that someone with temporary custody could not make the changes permitted by the regulations.

What is the purpose of Section 7.2.2.10(E)(7) (requiring an order from a court of competent jurisdiction)?

Ms. Strong responded that the purpose was to make it easier for parents to get a delayed birth registration because often the parents do not have the required documents and have to engage in an extensive process to get a denial letter before going to court.

With respect to Section 7.2.2.11(A), should the text be changed from "man" to "person" on the fifth line?

Ms. Strong agreed that it should.

Does the term "adjudicated" in Section 7.2.2.17(D) imply a judicial act, although it is an affidavit process?

Ms. Strong explained that the term "adjudicated" is a term of art under the Uniform Parentage Act.

A question was then asked by a hearing participant whether the term "father" in the same section could be changed to "parent" because there are a lot of queer couples.

Ms. Strong replied that is a change that could be made.

Why is Section 7.2.2.17(E) struck in its entirety?

Ms. Strong explained that the section for amendment of given names was repetitive of the section for amendment of names generally. Mr. Kassouf confirmed that was the intention.

Is Section 7.2.2.17(F) supposed to include a minimum age at which a child could make a request to change a birth certificate?

Ms. Strong indicated that it may have been an oversight.

There was originally an intent that children under 14 would be required to have the consent of their parent or guardian in Section 7.2.2.17(A)(1) to make a change. Ms. Strong confirmed that the change could be made with a court order without parental consent.

Mr. Kassouf said that in meeting with the bill sponsor they addressed the intention to ensure that children 14 to 18 would also have to sign off that they agree to the amendment. He confirmed that there was no limitation in the proposed text on younger children requesting the change, because the bill language is broad.

Shari Weinstein pointed out that there was no intent regarding age in the bill and that including it may create a conflict. There may have been some comments if it had been in the proposed rule. There should be more discussion on the issue before making the change.

Ms. Strong explained that there are other limitations on the ability of a child under 18 to lawfully make a change without parental consent.

Adrian Carver stated that such a change should be made after full discussion in another process.

After the hearing, and upon further review, the Hearing Officer notes language in Section 7.2.2.17(A)(1) that "To amend a birth certificate, application may be made by both parents, the legal guardian or court ordered custodian, the registrant if 18 years of age or over..." (emphasis supplied). The Hearing Officer apologizes for the oversight.

To the extent that the limiting language is not in the statute, it does reflect the current status of New Mexico statute, specifically Section 28-6-1 ("Age of Majority"). Including the limitation will help avoid confusion or misunderstanding in the application of the rule. Therefore, it is appropriately included in the existing language and the proposed replacement.

Section 7.2.2.22, with the added language, does not appear to be a sentence.

Ms. Strong agreed that the period after "issue" should be a comma, that the "Or" should be lowercase "or" and that there should be a period at the end.

In Section 7.2.2.24, why was the penalty section removed?

Ms. Strong stated that it was removed because it was already in statute and NMDOH would not be enforcing it.

There being no other comments or questions, the Hearing Officer closed the hearing and thanked everyone for their attendance.

Recommendation of Hearing Officer

The Hearing Officer finds that the proposed text primarily implements 2019 SB 20 ("AN ACT RELATING TO VITAL STATISTICS; AMENDING A SECTION OF THE VITAL STATISTICS ACT TO PROVIDE FOR AMENDMENT OF SEX DESIGNATION ON VITAL RECORDS") and is both required by and is consistent with that legislation.

The Hearing Officer finds the written comments and oral testimony of parties to the hearing to be well taken and to be unanimously in favor of the proposed change.

The Hearing Officer finds that Section 7.2.2.17(F)(1)(b) contains a typographical error and that "on" should be changed to read "one."

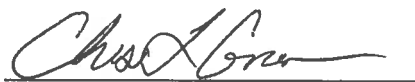
The Hearing Officer finds that in Section 7.2.2.11(A) the text should be changed from "man" to "person" on the fifth line to be consistent with the same change on the second line.

The Hearing Officer finds that in Section 7.2.2.17(D)(2) the term "father" should be changed to the more inclusive term "parent."

The Hearing Officer finds that the prefatory language in Section 7.2.2.22 should be amended to read "Upon notification of the state registrar by a law enforcement agency that a child born in this state is missing, the record shall be flagged "M.C., do not issue" or electronically flagged."

The Hearing Officer recommends that the Secretary adopt the proposed repeal and replacement of Part 7.2.2 NMAC "Vital Records and Statistics" amended as recommended above.

The original exhibit binder and audio recording is transmitted with this report and recommendation.



Christopher L. Graeser,
Hearing Officer

Date: 10-15-19