



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

December 5, 2018

TRANSMITTED VIAL U.S. MAIL AND EMAIL

The Honorable Heather Scott
Idaho State House of Representatives
P.O. Box 134
Blanchard, Idaho 83804
hscott@house.idaho.gov

Re: Questions Concerning Changes to Birth Certificate Gender Markers –
Our File No. 18-63549

Dear Representative Scott:

This letter is in response to your questions regarding the Idaho Department of Health and Welfare's pending rule amendments regarding a change of gender on birth certificates. These rules are set forth in IDAPA 16.02.08.201. For ease of reference, each of your questions are set forth below, with the answer following.

- 1. If an individual can change (not amend) his or her sex on a birth certificate, will state records such as censuses need to be changed to reflect the new information?**
 - a. Will all public schools need to change their history to reflect that information?**
 - b. Will hospitals need to change their records?**

While the U.S. government conducts a federal census every ten years, the Idaho government does not conduct a state census. The federal government has since the 1790 census asked for the sex of each person in the household, but does not currently query gender identity. A cursory review of the census information did not indicate that records would be changed retroactively to reflect a change in an individual's previous designation of sex.

At the state level, the Department of Health and Welfare's Bureau of Vital Records and Health Statistics maintains birth records which reflect the gender of a child at birth. When a person changes the gender marker on their birth certificate the original is retained in a sealed file which may only be accessed by court order.

Schools are subject to the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 C.F.R. §§ 99.00 et seq.), which is a federal law that protects the privacy of students educational records. Under FERPA, students, current or former, have a right to seek to amend their school records if they are "inaccurate, misleading, or in violation of the student's rights of privacy." (34 C.F.R. § 99.7(a)(2)(ii)). Transgender students wishing to change their name and/or gender marker on their educational records may seek such an amendment under this federal law. The policies and processes for the amendment of educational records are set by each individual school district. Any specific questions regarding those policies, including whether the records will be changed retroactively, should be directed to the students' local school district.

Hospitals are subject to a variety of federal and state governing laws and regulations regarding medical treatment for patients, including transgender individuals. Those regulations are too numerous to list here, but generally include requirements for accurate record-keeping and prohibit discrimination based upon gender identity. To ensure medically appropriate care, a transgender individual's records would necessarily need to contain accurate medical information regarding sex at birth as well as gender identity. Any questions regarding how records reflect this information, and specifically whether records are amended retroactively or prospectively, should be directed to individual hospitals.

2. How many times can an individual change his or her sex on a birth certificate?

Pursuant to IDAPA 16.02.08.201.08, once an item is amended on a vital record, that item cannot be amended again except upon receipt of an Idaho court order. This applies to an amended sex marker on a birth certificate.

3. Will the original birth certificate be destroyed? If the original birth certificate is destroyed and only the new birth certificate remains on record, does that wipe John or Jane Doe out of existence?

Original birth certificates are not destroyed upon the issuance of an amended birth certificate. When a birth certificate is amended to change the indicator of gender, the original certificate is retained in a sealed file along with the application for the amendment. Similar to a name change pursuant to adoption, a gender change does not "wipe" the person out of existence, but merely creates a record that reflects the new information with the original information retained in a secure manner.

In addition to having a historical account of any amendments to a birth certificate, there are many ways of ascertaining the identity and history of people, including: addresses, fingerprints, financial

records, background checks, DNA, social security numbers, criminal history, passports, driver's licenses, biometrics and other databases.

4. **If John or Jane Doe never existed, how would that affect legal documents such as mortgages, or marriage licenses?**
 - a. **For example: If John Doe applied for a loan, but then no record exists of him, is he still required to pay for the loan? Is there a possibility he or she could bring legal action against the loan company?**

Legal documents, such as mortgages and other contracts, are not affected by changing of a gender marker on a birth certificate. Legal obligations are not contingent upon a party's gender. For example, if an unmarried woman with a mortgage on her home is married and changes her name, the mortgage is still valid, and the mortgage company maintains the same legal rights and remedies that existed before the name change. Likewise, neither would a marriage license be affected by a gender change as long as the marriage was validly entered.

5. **How would that affect the crime system (refer to Q4)?**
 - a. **If John or Jane Doe committed a crime, but then is "erased" from public records via a new birth certificate could he or she sue the state for wrongful conviction? (The trial records state that John Doe committed the murder. There never was a John Doe, therefore, how could he have committed this crime?)**

Neither gender marker or name changes on a birth certificate can "erase" a person from public records, nor does it affect a person's liability for past criminal conduct. For criminal justice purposes, information regarding the identity and criminal history of individuals is contained and accessible from a variety of sources, including court records for name changes, birth certificates (with a court order), fingerprints, DNA, social security numbers, driver's licenses, passports and state and federal criminal justice databases.

6. **How will this affect biological women and girls who must now compete against biological males who say they are females and their "new" birth certificate reflects their "identified" sex?**

Various governing bodies have developed and implemented policies for participation in high school, collegiate and professional athletic competitions, as well as dance, cheerleading, speech arts and music at the high school level. For example, the Idaho Association of High School Athletes has enacted Rule 11.3 governing transgender student participation in athletics:

11-3 TRANSGENDER STUDENT PARTICIPATION

A transgender student, defined as a student whose gender identity differs from the student's assigned birth gender, shall be eligible to participate in interscholastic athletics that is consistent with the student's gender identity, under the following conditions:

- a. A female-to-male transgender student athlete who is taking a medically prescribed hormone treatment under a physician's care for the purposes of gender transition may participate only on a boys' team.
- b. A male-to-female transgender student athlete who is not taking hormone treatment related to gender transition may participate only on a boys' team.
- c. A male-to-female transgender student athlete who is taking medically prescribed hormone treatment under a physician's care for the purposes of gender transition may participate on a boys' team at any time but must complete one year of hormone treatment related to the gender transition before competing on a girls team.
- d. **Process:** A student athlete who has completed, plans to initiate, or is in the process of taking hormones under a physician's care as part of a gender transition shall submit the request to participate on a sports team to the administration of the student's school and to the IHSAA. The request shall include a letter from the student's physician documenting the student's intention to transition or the student's transition status if the process has already been initiated. This letter shall identify the prescribed hormonal treatment for the student's gender transition and the date the hormone treatment was initiated. The Executive Director shall make a determination whether the student is eligible to compete under the above criteria.
- e. Once the transgender student has been granted eligibility to participate in the sport consistent with his/her gender identity, the eligibility is granted for the duration of the student's participation and does not need to be renewed every sports season or school year.
- f. Once the transgender student selects the gender or the team on which the student wishes to participate, the student thereafter must consistently participate on teams of that gender in all sports for the duration of their high school career.
- g. **Appeals:** The decision of the Executive Director may be appealed to the Eligibility Committee. The decision of the Eligibility Committee may be appealed to the IHSAA Board of Directors for a review and hearing.
- h. **Confidentiality:** All discussions among involved parties and the required written supporting documentation shall be kept confidential.

Any specific questions regarding transgender student competition should be directed to the students' local school district.

7. If John Doe who was married claims via public record that he never existed, how would this affect the legal status of the person to whom he was married?

Since the United States Supreme Court's *Obergefell v. Hodges*, 133 S.Ct.2584 (2015) decision, states are prohibited from restricting marriage by gender. Regardless of gender, or gender transition status, a valid marriage continues to be valid unless a divorce or death of a spouse occurs. A change in gender during a marriage does not affect any related state or federal benefits.

8. Is there a way to appease both camps? Can we issue amended birth certificates that reflect a person's choice while at the same time keeping all other records (such as a census, school, and hospital) in their original state?

Each of the other referenced records - census, school and hospital - are all governed by governmental or private entities that must comply with governing laws and rules regarding the rights of transgender individuals. These laws include requirements for accurate and secure records. Any attempt to mandate the federal census bureau, local school districts and state and private hospitals to maintain records solely reflecting a patient's sex at birth would require extensive legislation, which under current law, would likely be challenged as unconstitutional.

9. Is there a way to have a birth certificate that has the scientific sex designation and a "Gender Birth Certificate" that has an identified gender?

On March 5, 2018, the United States District Court for the District of Idaho issued a decision holding that Vital Records' practice of categorically denying applications for the amendment of gender markers on a birth certificate violated the constitutional rights of two transgender plaintiffs. *F.V. v. Barron, et al.*, Case No. 1:17-CV-170-CWD. In that case decision, the court ordered the Bureau of Vital Records to process gender change applications in a constitutionally sound manner and further, that any constitutionally sound rule ***must not include the revision history as to sex or name to avoid impermissibly compelling speech***. As such, a birth certificate with both the sex designated at birth and the amended gender designation would likely be found to be compelled speech in violation of the First Amendment and the court's order in *FV v. Barron et al.*

10. How many sexes will be allowed on birth certificates? In Idaho, can a clinically appropriate medical treatment result in a person having a sex other than male or female?

In Idaho, there are three gender markers available on a birth certificate at the time of birth: male, female, and unknown. The designation of "unknown" has only been utilized in a small number of

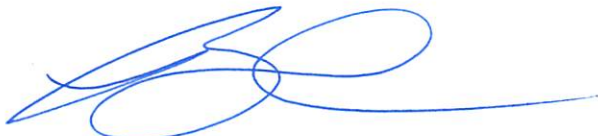
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births by a medical provider who, at the time of the individual's birth, is unable to determine the sex at birth. The rules of the Department allow for the amendment of a birth certificate to identify a sex at birth as male or female at such time when that determination is medically possible. Currently, the form for a gender change request provides for a change from male to female or female to male.

Your question regarding whether a clinically appropriate medical treatment could result in a person having a sex other than male or female is best posed to a medical professional.

I hope you find this brief analysis helpful.

Sincerely,

A handwritten signature in blue ink, appearing to read 'BRIAN KANE', with a long horizontal flourish extending to the right.

BRIAN KANE
Assistant Chief Deputy

BPK:kw