

Significant Rule Analysis

WAC 246-490-075

Changing sex designation on a birth certificate

November 1, 2017

Contents

- Section 1: Describe the proposed rule, including a brief history of the issue, and explain why the proposed rule is needed.
- Section 2: Is a Significant Analysis required for this rule?
- Section 3: Clearly state in detail the general goals and specific objectives of the statute that the rule implements.
- Section 4: Explain how the department determined that the rule is needed to achieve these general goals and specific objectives. Analyze alternatives to rulemaking and the consequences of not adopting the rule.
- Section 5: Explain how the department determined that the probable benefits of the rule are greater than the probable costs, taking into account both the qualitative and quantitative benefits and costs and the specific directives of the statute being implemented.
- Section 6: Identify alternative versions of the rule that were considered, and explain how the department determined that the rule being adopted is the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives stated previously.
- Section 7: Determine that the rule does not require those to whom it applies to take an action that violates requirements of another federal or state law.
- Section 8: Determine that the rule does not impose more stringent performance requirements on private entities than on public entities unless required to do so by federal or state law.
- Section 9: Determine if the rule differs from any federal regulation or statute applicable to the same activity or subject matter and, if so, determine that the difference is justified by an explicit state statute or by substantial evidence that the difference is necessary.
- Section 10: Demonstrate that the rule has been coordinated to the maximum extent practicable with other federal, state, and local laws applicable to the same activity or subject matter.
- Appendix A: Department of Health procedure “Gender Change on a Birth Certificate”.

SECTION 1:

Describe the proposed rule, including a brief history of the issue, and explain why the proposed rule is needed.

The Department of Health (department) is proposing adoption of a new section to the Washington Administrative Code, WAC 246-490-075. The chapter establishes vital statistics requirements for amending data on birth certificates in addition to requirements related to releasing vital records data and registering delayed births. The proposed rule would adopt the department procedure to request a change to the sex designation on birth certificates established in 2008¹. See Appendix A. The procedure was adopted in response to requests to change birth certificates based on an individual's clinically assessed sex or gender identity or both. The procedure allows individuals to change the sex designation on their birth certificate from male to female, or female to male. To change their birth certificate, the person must provide a letter with sufficient information to identify the record, contact information, and the change requested, along with a letter from a licensed medical doctor or osteopathic physician stating that the applicant has had the appropriate clinical treatment. The procedure was developed in collaboration with affected individuals, the Human Rights Commission, the Governor's office, and other stakeholders.

Since the department established the procedure, requests for sex designation changes on birth certificates have steadily increased. As of October 12, 2017, the department has processed 252 requests compared to 56 requests in 2013. Additionally, the department has received requests to change the sex designation to something other than male or female. This rule making is intended to meet the needs of those who identify as male or female, non-gendered, and non-binary including those born intersex.

The proposed rule would adopt the current department procedure to request a change to the sex designation on a birth certificate with some changes, including:

- Expanding the current procedure to allow sex designation as male, female, or X on birth certificates;
- Modifying the current procedure to require the sex designation change application of an adult to be notarized and signed under penalty of perjury rather than requiring attestation by a medical doctor or an osteopathic physician;
- Allowing minors to change the sex designation on their birth certificate with written consent of the parent or legal guardian, and a signed attestation by a licensed health care provider whose scope of practice allows for the attestation; and
- Increasing the types of licensed health care providers who can provide the attestation to those whose scope of practice allows them to make the determination that the sex designation change is consistent with the requestor's identity.

In Washington under chapter 246-491 WAC, sex is recorded at birth by the attending health care provider based on physical attributes as male, female, or undetermined for babies born intersex. This requirement is consistent with national standards for recording live births. Birth certificates are recorded at birth, but are used as a foundational identity document for the rest of a person's

¹ [Gender Change on a Birth Certificate](#)

life. However, identity goes beyond physical sex at birth and includes the person's gender identity as it develops over time.

For people whose gender identity does not match their sex designation as recorded on their birth certificates or other identity documents, having accurate identification documents is an issue of access and health equity. They are often faced with proving the validity of their identity documents. Some health care providers refuse service to transgender patients, including a Washington state hospital that is currently involved in a discrimination lawsuit with the American Civil Liberties Union². It is also common for these people to be subjected to abuse, harassment, or lack of privacy.

The national conversation on sex and gender is changing to be more inclusive of people who are transgendered and those who identify as neither male nor female. Federal agencies as well as many states and cities currently allow people to change their sex designation from male to female, or female to male on identity documents such as passports and driver licenses, and for receiving benefits. Legislation passed in Oregon and California this year allows individuals to change the sex designation on their birth certificate from male to female, female to male, or to something other than male or female. Internationally, laws related to sex and gender are becoming more inclusive, including Canada's 2017 law that protects gender identity and gender expression as a human right.³

As noted above, it is critical for the health and safety of transgender and gender non-conforming people to have identity documents, including birth certificates, match their lived identity. Through this rule making, the department will improve the public health and safety by recognizing the lived identity of those people who were born intersex and those whose physical sex, gender, or both have changed since their physical sex was recorded at birth.

SECTION 2:

Is a Significant Analysis required for this rule?

Yes, as defined in RCW 34.05.328, the proposed rule requires significant analysis because the proposed rule makes significant amendments to a policy of the department by allowing changes to the sex designation on birth certificates, and establishes requirements for amending birth certificates. The proposed rule also includes procedural application requirements that are not considered significant requirements under RCW 34.05.328 and are not analyzed in this document.

² <https://www.seattletimes.com/seattle-news/health/washington-state-family-sues-medical-center-for-refusing-services-to-transgender-son/>

³ <http://www.parl.ca/LegisInfo/BillDetails.aspx?billId=8269852&Language=E&Mode=1>

SECTION 3:

Clearly state in detail the general goals and specific objectives of the statute that the rule implements.

The general goals and specific objectives of RCW 43.70.150 are to create and maintain an accurate system of vital records that includes adopting rules related to recording, amending, and issuing birth certificates. The statute specially directs the Secretary of Health to "...have charge of the state system of registration of births, deaths, fetal deaths, marriages, and decrees of divorce, annulment and separate maintenance, and shall prepare the necessary rules, forms, and blanks for obtaining records, and insure the faithful registration thereof."

SECTION 4:

Explain how the department determined that the rule is needed to achieve these general goals and specific objectives. Analyze alternatives to rulemaking and the consequences of not adopting the rule.

As the proposed rule establishes generally applicable requirements for requesting amendment of birth records, the department has determined the rule is necessary to implement the general goals and specific objectives of RCW 43.70.150. If a rule is not adopted, the statutory direction to adopt rules for insuring the faithful registration of birth records would not be sufficiently met; therefore, the department has determined there is no feasible alternative to rule making.

SECTION 5:

Explain how the department determined that the probable benefits of the rule are greater than the probable costs, taking into account both the qualitative and quantitative benefits and costs and the specific directives of the statute being implemented.

The proposed rule establishes application requirements for adults and minors to request an amendment to the sex designation on their birth certificate from male to female, from female to male, or from female or male to X. The proposed rule defines X as:

a gender that is not exclusively male or female, including, but not limited to, intersex, agender, amalgagender, androgynous, bigender, demigender, female-to-male, genderfluid, genderqueer, male-to-female, neutrois, non-binary, pangender, third sex, transgender, transsexual, Two Spirit, and unspecified.

As identified in Sections 1 and 2 of this document, the proposed rule makes significant amendments to a policy of the department by allowing changes to the sex designation on birth certificates, and establishes requirements for amending birth certificates.

The proposed requirements analyzed in this section include submitting the following as part of the application for changing the sex designation on a birth certificate:

1. For adults, the application must be notarized and signed under penalty of perjury pursuant to chapter 9A.72 RCW.
2. For minors, the parent or legal guardian must give consent and the application must be signed by a health care provider attesting that the minor identified on the application is under the provider's care and the request to change sex designation on the birth certificate is consistent with the minor's gender identity. The attestation must be provided by a licensed health care provider whose scope of practice allows them to make the determination that the sex designation change is consistent with the minor's gender identity.

Allowing Sex Designation Changes to Birth Certificates: The proposed rule incorporates the recommendations of the National Center for Transgender Equality⁴. The department expects the proposed rule will address many obstacles of daily living and potentially reduce the risk of harm that gender diverse people face every day. Further, because printed birth certificates only reflect the effect of the requested change and no notation that a change was made, an individual will not be able to know what if any change was made to a birth certificate.

Having a birth certificate that accurately reflects the sex and gender of a person's lived experience benefits those whose identity has changed since their sex was recorded at birth. Every time a person must show their birth certificate and the sex does not reflect how they present themselves in public, they can experience a range of negative outcomes. These negative outcomes range from denial of employment, education, housing, health care, and public benefits, to verbal harassment and even physical violence.⁵ Both the 2015 U.S. Transgender Survey Report⁶ and Understanding Issues Facing Transgender Americans 2016⁷ document these effects.

Benefits: The primary benefit of this rule is a reduction in the negative outcomes gender diverse people experience in their daily lives. The department assumes the benefits of allowing a sex designation change on the birth certificate range from peace of mind that a person when producing a birth certificate with a sex identity that matches their presentation, to the avoided cost of worse health outcomes, lower education achievement, lack of employment and housing, and physical and emotional injury through acts of violence.

Costs: All amendments made to birth certificates are done free of charge. Therefore, the department assumes there are no probable costs associated with allowing sex designation changes to birth certificates.

Qualitative costs of changing a birth certificate are primarily related to using a Washington state birth certificate to obtain other identity documents and benefits. Those who choose X as their sex designation may be faced with other state and federal agencies not recognizing X as a valid sex identification indicator. For example, the U.S. Department of State currently allows only sex

⁴ *Updating Birth Certificate Gender Change Policies*, National Center for Transgender Equality

⁵ *Updating Birth Certificate Gender Change Policies*, National Center for Transgender Equality

⁶ <http://www.ustranssurvey.org/reports>

⁷ <http://www.lgbtmap.org/file/understanding-issues-facing-transgender-americans.pdf>

designation of male and female. This could also impact a person's ability to receive public benefits.

Requiring Notarized Applications for Adults:

The current department procedure requires an attestation from a medical doctor or osteopathic physician stating that the applicant has had the appropriate clinical treatment in order for the sex designation of a birth certificate to be changed from male to female, or from female to male. The department determined the decision to request a sex designation change on a birth certificate to match one's own sex or gender identity is the prerogative of an adult. However, to protect the subject of the record, the proposed rule requires a notarized signature on the application for birth certificate sex designation change to ensure the applicant is the subject of the record.

Benefits: Requiring an application be notarized and signed under penalty of perjury pursuant to chapter 9A.72 RCW protects the subject of the record by ensuring the identity of the applicant has been verified by an independent third party licensed under Washington State law. This protects the subject of the record from the potential malicious acts of others and provides a level of protection from error.

In addition, by not adopting the current procedure of an attestation from a medical doctor or osteopathic physician, the proposed rule reduces the current barrier for adults to change the sex designation on their birth certificates.

Costs: A notary is not required to charge a fee, and if a fee is charged, it may not be more than \$10 as established under WAC 308.30.020. The department offers notary services free of charge as do many banks, credit unions, and service organizations across the state. Therefore, the range for the cost of notarizing an adult application ranges from \$0 to \$10.

Requiring Parental or Legal Guardian Consent and Licensed Health Care Provider Attestation for Minors:

The proposed rule is consistent with the legal actions a minor can take without parental or legal guardian consent. The birth certificate is a legal document and serves as prima facie evidence of a person's identity. Therefore, a minor, as defined in the proposed rule, may not change the birth certificate without parental or legal guardian consent.

The proposed rule also requires attestation of a licensed health care provider in order for a minor to request a change to the sex designation on their birth certificate. The provider must sign the application attesting that the minor identified on the application is under the provider's care, and that the request to change sex designation on the birth certificate is consistent with the minor's gender identity. The attestation must be provided by a licensed health care provider whose scope of practice allows them to make the determination that the sex designation change is consistent with the minor's gender identity.

Currently, these licensed health care providers are:

- Psychologists
- Advanced social workers
- Independent clinical social workers
- Marriage and family therapists
- Mental health counselor
- Medical doctor
- Osteopathic physician
- Advanced registered nurse practitioner

Benefits: Changing sex on a birth certificate carries with it potential consequences that a minor may not fully comprehend or be able to manage. These include negative reactions to an X designation such as the potential denial of a driver license, passport, or public benefits. These risks are mitigated by requiring parental or legal guardian consent to ensure the minor understands and has the capacity to manage challenges posed by changing the sex designation on their birth certificate. Health care provider attestation is required to help ensure the sex designation on the minor's application is consistent with the minor's gender identity, and not the result of a transitory state of development, or the desire of a parent or legal guardian.

Costs: The department assumes the costs of this requirement are primarily related to obtaining licensed health care services. The department requested information from health care providers who indicated they provide services related to gender identity to minors. The results are summarized by generally describing the processes providers use and the costs of their services with and without insurance.

Step 1: Process to attest that the minor identified on the application is under care:

- Release of Information signed by the client and their guardian (if under 13) as part of one session.

Step 2: Process to attest that the provider has determined the request to change sex designation on the birth certificate is consistent with the minor's gender identity:

- Intake and 2 to 6 sessions depending on the client's situation, age, and understanding of the request to change sex designation. If the client is under 13, include the client's parent or guardian to attend sessions to learn about their experience and views regarding the request.

Costs per session:

- Most clients are covered by insurance with a co-pay between \$0 and \$30 per session. Private pay sessions are charged at \$130 per session.

The department assumes the costs of obtaining an attestation from a licensed health care provider range from \$0 for those with insurance, to \$910 (for 6 + 1 sessions at \$130 per session).

Summary of Benefits and Costs:

The probable benefits described in this analysis for those who seek to amend their birth certificates to reflect their lived experience of sex and gender are qualitatively and quantitatively substantial and important public health goals for health equity. Allowing a sex designation change on the birth certificate provides at a minimum peace of mind that a person is less likely to be challenged when they provide their birth certificate as proof of identity. More substantially, the rule may contribute to preventing negative health outcomes, lower education achievement, lack of employment and housing, and physical and emotional injury through acts of violence for those who are gender diverse.

The probable costs range from \$0 for notary services to \$910 (for 6 + 1 sessions at \$130 per session) for a minor required to obtain a health care provider attestation who does not have health insurance coverage. While the department recognizes requiring parent or legal guardian consent and provider attestation may pose a barrier to accessing a sex designation change on the birth certificate, the department determined the need for more certainty in the decision making of a minor given the potential consequences of changing a birth certificate outweighs the potential cost of the rule.

In conclusion, the department determined the probable benefits of the proposed rule outweigh the probable costs.

SECTION 6:

Identify alternative versions of the rule that were considered, and explain how the department determined that the rule being adopted is the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives state previously.

The department considered the following alternatives to the proposed rule and determined the proposed rule is the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives of RCW 43.70.150.

Require medical attestation for an adult to amend the sex designation of a birth certificate. Sex or gender identity is a deeply personal experience that an adult is capable of determining for themselves. Though the department currently requires an attestation from a licensed medical doctor or osteopathic physician for an adult, the department concluded that requiring such an attestation to confirm what an adult is capable of determining on their own is unnecessarily burdensome both in time and cost.

Allow self-attestation with no third party verification of an adult submitting the sex designation application. While the department determined the decision to request a sex designation change on a birth certificate to match one's own sex or gender identity is the prerogative of an adult, the proposed rule requires a notarized signature on the birth certificate sex designation change application. The department determined that requiring a notarized

signature is the least burdensome method of protecting the subject of the record from the potential malicious acts of others as well as providing a level of protection from error.

Include the list of licensed health care provider whose scope of practice allows them to make a determination that the sex designation change is consistent with a minor's gender identity. The department did not include the list of licensed health care providers because the department does not have the authority to set scope of practice under RCW 43.70.150. This authority resides with the legislature. However, to assist applicants in knowing which type of health care provider can sign the attestation, the application form and department birth certificate web page will include the current list of health care providers allowed to attest as provided by the licensing entities of each health care profession.

Additional recommendations provided by stakeholders through the informal comment process that would have had the greatest impact on the people requesting sex designation change.

Move the sex designation to the confidential section of the birth certificate. The department did not move the sex designation to the confidential section of the birth certificate for several reasons. Primarily, sex designation is required on all certificates issued by the state registrar under RCW 70.58.104, and the department does not have the authority to amend the data collected in the confidential section of the birth certificate. That authority lies with the State Board of Health under RCW 70.58.055. Additionally, sex designation is required for obtaining other identity documents and for receiving certain benefits. These documents include passports and driver licenses, and benefits include social security and insurance. If the sex designation were moved to the confidential section of the birth certificate, all children born in Washington State whose sex designation would not be included on the birth certificate after the rule change would be ineligible for these identity documents and benefits.

Create a field for gender separate from the sex designation on the birth certificate. Including both sex and gender on a birth certificate would not provide the same benefit as the proposed rule to those who request the birth certificate change. The person would not have the benefit of an identification document that clearly represents their lived identity and their sex or gender identity would remain in question to others.

Allow more than one alternative to male and female or allow a blank to write in gender on the birth certificate. The department carefully considered gender designation options beyond male and female. Ultimately the department chose to propose a single mark (X) rather than a word or a blank write-in space to capture this information. While "X" may not represent each person's ideal descriptor of themselves, it provides the most flexibility of the options available without the prohibitive added cost of updating the statewide data system to allow a write-in option. X is also becoming the national and international standard as described in Section 1 of this document.

Allow minors to submit a request with either a provider attestation OR parental consent rather than both. The department does not accept any birth certificate changes for any purpose from minors without parental or legal guardian consent. While this may be viewed as an unnecessary burden, it is the responsibility of the department to maintain the integrity of the vital records system. Under RCW 70.58.104, birth certificates are prima facie evidence of the facts contained in the certificate when certified by the state registrar. Because of this legal presumption, changes to the birth certificate must be made by persons deemed competent for

such action under the law. The rule reflects that in Washington State, adults, legal guardians, and emancipated minors are deemed competent for this purpose.

Allow all licensed health care providers to provide attestation for minors. As with adopting the list of licensed health care providers in rule, the department rule making authority related to the vital records system does not govern the scope of practice of licensed health care providers. The department cannot adopt in the proposed rule what services a specific licensed health care provider can and cannot provide under their license's scope of practice. This authority resides with the legislature.

SECTION 7:

Determine that the rule does not require those to whom it applies to take an action that violates requirements of another federal or state law.

The rule does not require those to whom it applies to take an action that violates requirements of another federal or state law.

SECTION 8:

Determine that the rule does not impose more stringent performance requirements on private entities than on public entities unless required to do so by federal or state law.

The proposed rule does not impose more stringent performance requirements on private entities than on public entities.

SECTION 9:

Determine if the rule differs from any federal regulation or statute applicable to the same activity or subject matter and, if so, determine that the difference is justified by an explicit state statute or by substantial evidence that the difference is necessary.

The rule does not differ from any applicable federal regulation or statute.

SECTION 10:

Demonstrate that the rule has been coordinated, to the maximum extent practicable, with other federal, state, and local laws applicable to the same activity or subject matter.

The department is the sole agency responsible for amending Washington State birth records.

To understand any impacts to other government agencies or the people they serve, and for the purpose of coordination with agencies who receive Washington State birth certificates in the exercise of their duties, the department notified the following agencies of our rule making: federal agencies including Selective Service, the Department of State, and the Department of Health and Human Services; Washington State agencies including the Department of Licensing, Department of Social and Human Services, and the Health Care Authority; Washington State local registrars; and state registrars in other jurisdictions.

DRAFT

Appendix A: Gender Change on a Birth Certificate

People who want to change their gender on their birth certificate must send:

A letter that includes:

- Name on record (first, middle, last)
- Date of birth (month, day, year)
- Place of birth (city or county)
- Mother/Parent full name listed on certificate (first, middle, last)
- Father/Parent full name listed on certificate (first, middle, last)
- Contact information (return mailing address and phone number)
- The change being requested and new information such as name and gender

And one of the following:

A letter, on applicable letterhead, from your medical (MD) or osteopathic physician (DO) stating that you have had the appropriate clinical treatment. The letter should include personal identifiers such as:

- Your name on your birth certificate
- Your date of birth
- Your new gender.

To ensure confidentiality, the letter should not include details of your treatment. We will not return the documentation.

OR

A CERTIFIED copy of a court order that states your name, date of birth, gender currently listed on birth record and new gender. Certified copies of court orders have an original signature or raised seal from the court clerk. Photo copies will not be accepted. The court order will be returned to you.

Available at:

<https://www.doh.wa.gov/LicensesPermitsandCertificates/BirthDeathMarriageandDivorce/GenderChange>