

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES
OF THE STATE OF MONTANA

In the matter of the amendment of) NOTICE OF AMENDMENT
ARM 37.8.311 pertaining to changing)
the identification of sex on birth)
certificates)

TO: All Concerned Persons

1. On June 10, 2022, the Department of Public Health and Human Services published MAR Notice No. 37-1002 pertaining to the public hearing on the proposed amendment of the above-stated rule at page 895 of the 2022 Montana Administrative Register, Issue Number 11.

2. The department has amended the above-stated rule as proposed.

3. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

COMMENT #1: Several commenters did not address the proposed rule and instead provided comment in opposition to the emergency rule adopted by the department under MAR Notice No. 37-1001.

RESPONSE #1: Comments on the emergency rule adopted by the department under MAR Notice No. 37-1001 are outside the scope of this rulemaking under MAR Notice No. 37-1002.

COMMENT #2: Several commenters did not address the proposed rule and instead provided comment in support of the emergency rule adopted by the department under MAR Notice No. 37-1001.

RESPONSE #2: The department appreciates the commenters' support of the Emergency Rule, but notes that such comments are outside the scope of this rulemaking under MAR Notice No. 37-1002.

COMMENT #3: Several commenters provided comment in opposition to Senate Bill 280 passed during the 2021 Legislative Session and did not address the proposed rule.

RESPONSE #3: Comments opposing Senate Bill 280 are outside the scope of this rulemaking under MAR Notice No. 37-1002. Indeed, as the department explained in the proposal notice, the department proposed, and now adopts, this rule as a result of the fact that it is preliminarily enjoined from enforcing Senate Bill 280, codified at

50-15-224, MCA. See the 2022 Montana Administrative Register pages 895 and 898 through 899 (June 10, 2022).

COMMENT #4: Several commenters expressed opposition to the proposed rule and suggested the department should return to a 2017 version of the rule, which permitted the department to "correct" the "gender" data element upon receipt of a correction affidavit accompanied by a "gender designation form" attesting that the individual had undergone gender transition, a copy of a government-issued identification with the correct gender identification, or a copy of a court order that the individual's gender had been changed. The commenters indicated the proposed rule conflicts with medical knowledge and science, unfairly targets transgender individuals, and will lead to increased rates of suicide. The commenters also indicated the proposed rule is unconstitutional and runs afoul of a preliminary injunction issued by the Montana Thirteenth Judicial District Court, Yellowstone County, in Cause No. DV 21-873.

RESPONSE #4: The department disagrees with these comments.

The department believes that all individuals should be treated with dignity and respect.

Under Montana law, the department is charged with establishing a statewide system of vital statistics; with adopting rules for vital statistics and vital records; and with ensuring the accuracy of such vital records. As explained in further detail in the proposal notice, those laws contemplate that birth certificates and other records of birth include the "sex" of the child, not the child's "gender" or "gender identity." See 2022 Montana Administrative Register at pages 896 through 897 and 901 through 902. And science and medical knowledge recognize the difference between "sex," which is a biological concept (and a biological fact), and "gender," which is a psychological, cultural, and/or social construct. See, e.g., *Id.* at pages 899 through 901. The rule, which implements the statutory directives to record the sex of a child on birth certificates and other birth records, thus, is consistent with the scientific and medical recognition of "sex" as a biological concept. This rule reflects the proper interpretation of the statutory provisions governing birth certificates/vital records and the vital records system that a person's sex, not his or her gender or gender identity, is required to be recorded on the birth certificate and other birth records. Accordingly, the department declines to return to the 2017 rule, which purported to redesignate, substitute, or conflate the "sex" data element on birth certificates as a "gender" data element.¹ But if the Montana legislature were to enact legislation requiring it, the department would add an optional gender marker data element to the birth certificate and other birth records (as one commenter suggested).

¹ The department notes that, although the 2017 rule provided that the "gender of a registrant, as cited on a certificate, may be corrected" and a "gender designation form" was created, the Montana birth certificate form was never changed and, throughout the time the 2017 rule was in effect, still used the word "sex."

These comments allege that the rule will lead to increased rates of suicide within the transgender community. The department does not believe that there is scientific evidence – and commenters presented no such evidence² -- that the failure of birth certificates to reflect transgender individuals' gender identity leads to an increase in suicide in the transgender community. The department acknowledges that there is some evidence that, for example, transgender youth are at higher risk of suicidal ideation and suicidal attempts. However, as one analysis noted, "caution is needed when interpreting these data because they do not show causality or directionality." L.J.J.J. Vrouenraets et al., *Early Medical Treatment of Children and Adolescents With Gender Dysphoria: An Empirical Study*, *Journal of Adolescent Health* 57 (2015) 367, 372, <https://doi.org/10.1016/j.jadohealth.2015.04.004>. Research and reports indicate that many people who identify as transgender and have gender dysphoria have co-existing mental or psychological problems or disorders, which make it difficult to establish causation or to attribute adverse mental health outcomes to their gender dysphoria or to the fact that their birth certificates do not reflect their gender identity.³

The department is committed to improving the behavioral health care system in Montana, so that all Montanans can access high quality behavioral health services.

The department further disagrees that the rule is unconstitutional and runs afoul of the preliminary injunction issued by the Montana Thirteenth Judicial District Court, Yellowstone County, in Cause No. DV 21-873. The rule is consistent with the preliminary injunction for the reasons set forth in the proposal notice, 2022 Montana Administrative Register at pages 898 and 899 and 903 and 904, and in the

² One commenter cited a study examining legal gender marker and name changes on passports and state driver's license/ID. While the study found that such changes are associated with lower negative emotional response to gender-based mistreatment and improved mental health outcomes among transgender populations, it did not examine gender marker changes on birth certificates and acknowledged certain limitations, including that it "does not purport to evaluate the psychological effects of policy change" and that "causation between policy changes and our outcomes cannot be claimed." See A. Restar et al., *Legal gender marker and name change is associated with lower negative emotional response to gender-based mistreatment and improve [sic] mental health outcomes among trans populations*, *SSM – Population Health* 11 (2020) 100595, <https://doi.org/10.1016/j.ssmph.2020.100595>. It should be noted that the department's Office of Vital Records continues to process name changes on birth certificates and other birth records for transgender persons in the same manner in which it processes name changes for other persons.

³ *Cf., e.g., Id.* at 370; Gender Identity Development Service (GIDS), Evidence Base, <https://gids.nhs.uk/professionals/evidence-base/> ("Most empirical studies around mental health of gender variant young people show that adolescents are at higher risk of other co-existing difficulties than the general population."; adolescents with post-puberty onset gender dysphoria "are more likely to also have significant psychopathology and broader identity issues than gender identity issues alone.") (citations omitted); Hillary Cass, MD, OBE, et al, *Independent review of gender identity services for children and young people: Interim report* (February 2022) ("Interim Report"), <https://cass.independent-review.uk>, ¶ 1.16 ("Another significant issue raised with us is one of diagnostic overshadowing – many of the children and young people presenting have complex needs, but once they are identified as having gender-related distress, other important healthcare issues . . . can sometimes be overlooked.")

department's response to plaintiffs' motion to clarify the preliminary injunction, State's Response to Plaintiffs' Motion to Clarify, filed on June 21, 2022.

COMMENT #5: Several commenters expressed privacy concerns with the proposed rule. These commenters indicated that the proposed rule violates Montana's constitutional right to privacy because it effectively requires nonbinary and transgender individuals to reveal their private information whenever their birth certificate is required to be made public to other individuals, organizations, companies, or governmental entities. The commenters also indicated that gender designation is a private matter that should be left to individual choice.

RESPONSE #5: The department disagrees. Under Montana law, a transgender person's privacy interests are only protected under Article II, § 10 if (1) the person has a subjective or actual expectation of privacy, and (2) society is willing to recognize that expectation as reasonable. The concern is usually about the circulation of private information.

The department notes that, to the extent a transgender individual ever has the need to disclose their birth certificate, it is the department's impression that such disclosure would generally occur to government personnel (federal, state, or local), or others, who would have a legal obligation to maintain the confidentiality of the information.

COMMENT #6: Several commenters stated the proposed rule conflicts with science and best medical practices. These commenters indicated the proposed rule misrepresents the complex science of gender and sex. A commenter stated that every medical society recognizes transgender individuals exist and that their choice of gender should be affirmed. Several commenters indicated that the best available medical evidence shows that the lives of transgender individuals are improved when gender identity is affirmed. The commenters also indicated gender identity cannot be predicted based on chromosomes.

RESPONSE #6: The department denies that the rule conflicts with science and best medical practices and that it misrepresents the science of sex and gender. Science is clear that "sex" is a biological variable defined by characteristics encoded in DNA – and that it is distinct from "gender." The rule is based on this longstanding scientific understanding of "sex" because the statutes that it implements contemplate that the data elements to be collected and included in a Montana birth certificate include the sex of the person. Because "sex" and "gender" are different concepts, the department would not read those statutory provisions concerning birth certificates or records of birth as including "gender" in the requirement to record the sex of the person. (The proposal notice, 2022 Montana Administrative Register page 895 (June 10, 2022) contains a more complete explanation of these points.) As a consequence, it is irrelevant that gender identity cannot be predicted based on chromosomes.

The department does not deny that medical societies recognize that transgender individuals exist – or that most medical societies recommend gender affirmation and gender affirming care.⁴ However, the commenters do not explain the relationship between the rule, these observations, and the department's interpretation of the statute.

COMMENT #7: Several commenters indicated the proposed rule fails to account for persons who are intersex or have Differences of Sexual Development (DSDs).

RESPONSE #7: In response to this comment, the department notes that literature cited in the proposal notice establishes that DSDs, including the intersex condition, are "very rare" and do not result in any additional sexes. The rule would permit a change to the sex identified on a person's birth certificate based on an affidavit and supporting documents, including the results from chromosomal, molecular, karyotypic, DNA or genetic testing, that establishes that the person's sex was misidentified on the original birth certificate.

⁴While several commenters contended that the "best available medical evidence" shows that the lives of transgender individuals are improved when gender identity is affirmed or gender affirming care is provided, several medical associations or public health authorities in other countries recognize that the scientific evidence on which such treatment recommendations are based are inconclusive or of low quality. See, e.g., The Royal Australian & New Zealand College of Psychiatrists, *Recognizing and addressing the mental health needs of people experiencing Gender Dysphoria/Gender Incongruence*, Position Statement 103 (August 2021), <https://www.ranzcp.org/news-policy/policy-and-advocacy/position-statements/gender-dysphoria> ("There are polarised views and mixed evidence regarding treatment options for people presenting with gender identity concerns, especially children and young people."; "Research on Gender Dysphoria is still emerging. At present, there is a paucity of evidence on the outcomes of these presenting with Gender Dysphoria."); PALKO/COHERE Finland, *Recommendation of the Council for Choices In Health Care in Finland: Medical Treatment Methods for Dysphoria Related to Gender Variance In Minors*, STM038:00/2020 (June 2020), https://segm.org/sites/default/files/Finnish_Guidelines_2020_Minors_Unofficial%20Translation.pdf (unofficial translation) ("As far as minors are concerned, there are no medical treatments that can be considered evidence-based."); Hillary Cass, MD, OBE, et al., Interim Report ¶ 1.23 ("Evidence on the appropriate management of children and young people with gender incongruence and dysphoria is inconclusive both nationally [in the U.K.] and internationally."); GIDS, Evidence Base ("Although hormone blockers and cross-sex hormones are recommended in young people with GD and widely used across the board, it should be noted that the research evidence for the effectiveness of any particular treatment offered is still low."); National Institute for Health and Care Excellence (2021b) *Evidence Review: Gender-affirming hormones for children and adolescents with gender dysphoria*, https://segm.org/sites/default/files/20210323_Evidence%20Review_Gender-affirming%20hormones_For%20upload_Final_download.pdf, at 50-51 ("This evidence review found limited evidence for the effectiveness and safety of gender-affirming hormones in children and adolescents with gender dysphoria, with all studies being uncontrolled, observational studies, and all outcomes of very low certainty."); Swedish National Board of Health and Welfare, *Care of children with gender dysphoria: Summary*, <https://www.socialstyrelsen.se/globalassets/sharepoint-dokument/artikelkatalog/kunskapsstod/2022-3-7799.pdf> (February 2022 Update) 3 (noting "the continued lack of reliable scientific evidence concerning the efficacy and the safety of" puberty suppression and gender-affirming hormonal treatment and that "[h]igh quality trials such as RCTs are still lacking and the evidence on treatment efficacy and safety is still insufficient and inconclusive for all reported outcomes").

COMMENT #8: Several commenters stated the proposed rule is unconstitutional. These commenters indicated the proposed rule violates the constitutional right to privacy and other basic civil rights including the First and Fourteenth Amendments of the United States Constitution and rights under the Montana Constitution. The commenters also indicated the proposed rule discriminates against and marginalizes transgender and non-binary individuals and is motivated by animus towards this community.

RESPONSE #8: The department seeks to further the health and well-being of all Montanans, but at the same time, must implement the laws as adopted by the Montana Legislature. In this rule, the department is implementing the laws governing the creation of a statewide system of vital statistics and adoption of rules for vital statistics and vital records in a constitutional manner.

The rule does not violate the Equal Protection Clauses of either the U.S. Constitution or the Montana Constitution. Such a violation occurs only when there is actual discrimination with respect to a protected class (or, in the case of the Montana Constitution, a listed class). Here, the rule applies equally to all individuals. Moreover, transgender individuals are not a protected or suspect class under Montana or federal law. Because transgender status is not a protected class, the highly deferential rational basis review applies. And there are important departmental and public health interests in the collection and maintenance of accurate vital statistics and records such as these and the prevention of fraud.

With respect to the right to privacy under the Montana Constitution, please see the response to Comment #5.

COMMENT #9: Several commenters stated the proposed rule runs counter to legislative recommendations made to the department and a foul of a preliminary injunction issued by the Montana Thirteenth Judicial District Court, Yellowstone County, in Cause No. DV 21-873. According to these commenters, the proposed rule enacts a process more restrictive than what is currently enjoined by the district court and violates the status quo.

RESPONSE #9: The commenters do not identify the legislative recommendations to which they contend the rule runs counter. However, the department believes that the rule is consistent with the legislative requirements and recommendations contained in the statutes under which the department is charged with establishing a statewide system of vital statistics; with adopting rules for vital statistics and vital records; and with ensuring the accuracy of such vital records. Please also see 2022 Montana Administrative Register at pages 903 through 904.

With respect to the commenters' assertions concerning the preliminary injunction and this rule, please see the response to Comment #4.

COMMENT #10: A commenter indicated the proposed rule is arbitrary because it conflicts with the stance taken by the department in 2017 when it enacted a rule that

formerly allowed for amendment of the "gender" data element upon receipt of a correction affidavit accompanied by a "gender designation form" attesting that the individual had undergone gender transition, a copy of a government-issued identification with the correct gender identification, or a copy of a court order that the individual's gender had been changed.

RESPONSE #10: The department denies that the rule is arbitrary because it conflicts with the policies adopted in the 2017 rule. There is no legal impediment to adopting a regulatory policy that conflicts with a prior regulatory policy. In an analysis that would seem equally applicable to the Montana Administrative Procedure Act (MAPA), the U.S. Supreme Court said, with respect to an agency's regulatory change of course,

It need not demonstrate to a court's satisfaction that the reasons for the policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates.

FCC v. Fox Television Stations, Inc. 556 U.S. 502, 128 S. Ct. 1800, 1811 (2009) (citations omitted; emphasis in original). Here (as set forth in the proposal notice), the rule is permissible under the statutes, the department has provided good reasons for the change in approach from the 2017 rule, and the department believes this approach to be better than the 2017 rule.

Under MAPA, a rule may be invalidated if it "was adopted with an arbitrary or capricious disregard for the purpose of the authorizing statute as evidenced by documented legislative intent." 2-4-506(2), MCA. The rule is fully consistent with the purpose of the implementing statutes as evidenced by the language of the statute itself, which is the best evidence of legislative intent: Recognizing that SB 280 is the clearest indicator of legislative intent with respect to changing the sex identified on a birth certificate, the rule provides that the new language is only effective when and to the extent that the department is subject to an injunction against enforcement of SB 280 or SB 280 has otherwise been invalidated. And the new language is consistent with the statutes under which the department is charged with establishing a statewide system of vital statistics; with adopting rules for vital statistics and vital records; and with ensuring the accuracy of such vital records.

COMMENT #11: Several commenters stated the proposed rule makes it more difficult for transgender, non-binary, and two spirit individuals to change their gender marker, which will result in increased mental health problems, rates of suicide, and harm the well-being of these individuals. Several of these commenters emphasized that Montana is currently experiencing high rates of suicide and expressed the belief that the proposed rule will only worsen these rates, particularly for transgender youth.

RESPONSE #11: The department acknowledges that Montana is currently experiencing high rates of suicide – but notes that the department is committed to improving the behavioral health care system in Montana, so that all Montanans can access high quality behavioral health care. It is concerned about the mental health of all Montanans, especially that of transgender youth with gender dysphoria, who also tend to have co-occurring mental health/psychiatric issues. At the same time, the commenters present no evidence that the inability of transgender, non-binary, and two spirit individuals to change the sex identified on their birth certificate – to align with their gender identity – would have an adverse effect on their mental health, rates of suicide, or well-being.

COMMENT #12: Several commenters expressed concerns that the proposed rule will result in inconsistent forms of Montana identification documents for transgender, non-binary, and two spirit individuals as well as identity documents that do not reflect the true gender identity of individuals. The commenters indicated this will result in the "outing" and stigmatization of individuals who are forced to present identification with a gender marker that does not match their true identity. The commenters also indicated this will adversely affect the ability of transgender, non-binary, and two spirit individuals to utilize public services, maintain housing, maintain employment, enroll in school, and utilize other basic civil processes. Several commenters stated that accurate and consistent gender markers on identification documents reduce the risk of violence, discrimination, and harassment for transgender, non-binary, and two-spirit individuals.

RESPONSE #12: The department does not find the comments persuasive. The department is interpreting the statutes for which it has responsibility – and has no authority over how other departments and agencies implement and interpret their statutes. Commenters present no argument as to why having inconsistent Montana-issued "identification documents" would present a problem for transgender persons. Similarly, no details or facts are provided in the comments as to why and how (1) such persons would have to present their birth certificates and (2) such presentation would adversely affect their ability to access services, maintain housing, maintain employment, etc.

COMMENT #13: Several commenters expressed concern that the proposed rule will lead to inconsistencies in identity documents issued by Montana and the federal government. The commenters indicated the proposed rule is inconsistent with the approach of the federal government, which allows amendment of gender marker identification without requiring proof of surgery. As a result, the commenters believe the rule will lead to individuals not being able to hold a birth certificate that reflects their true gender identity or that matches forms of other identification such as a U.S. Passport, Veteran ID Card, and other federal identification documents.

RESPONSE #13: As with Comment #12, commenters present no argument as to why having inconsistent Montana-issued and federal issued "identification documents" would present a problem for transgender persons. The department is responsible for interpreting (and implementing) its statutes.

COMMENT #14: A commenter indicated the proposed rule will prevent people born in Montana who currently reside in another state from updating documentation, such as a driver's license issued by the state in which they reside, to accurately reflect their gender identity.

RESPONSE #14: This comment presupposes that persons must have birth certificates that reflects their gender identity in order to obtain driver's licenses or other documentation from another state that reflects their gender identity. This is not the case in many states. See, e.g., Movement Advancement Program, *Identity Document Laws and Policies: Driver's License*, citations-id-drivers-license.pdf (lgbtmap.org) (current as of May 27, 2022).

COMMENT #15: Several commenters stated the proposed rule constitutes an inefficient use of department resources and taxpayer money. These commenters indicated the proposed rule is unnecessary and will not actually further the goal of maintaining accurate vital records and statistics. Several commenters also indicated the rule conflicts with other department goals such as preventing and reducing rates of suicide and promoting the public health of all Montanans.

RESPONSE #15: The department respectfully disagrees. It is never unnecessary or an inefficient use of department resources and taxpayer money to ensure that the department's rules conform to the proper interpretation of the statutes which the department is charged with implementing. This rule does just that, as set forth in greater detail in the proposal notice. See 2022 Montana Administrative Register at pages 896 and 897 and 901 and 902. The department further believes that the rule will advance the goal of maintaining accurate vital records and statistics. Finally, because the department is preliminarily enjoined from enforcing SB 280, there would be no process for changing the sex identified on Montana birth certificates without this rule (or the emergency rule that preceded it). The department has an obligation to provide clear rules on the subject.

The department does seek to achieve a number of health and public health goals to benefit all Montanans, including expanding access to quality behavioral health services; addressing the mental health and other causes of suicide, to prevent and reduce the rate of suicide; and to promote the health and well-being of all Montanans. But it recognizes that it must pursue these goals and objectives within the confines of the authority provided to it by the Montana Legislature. Unlike the 2017 rule, this rule is carefully structured to stay within the department's regulatory authority.

COMMENT #16: A commenter expressed opposition to the proposed rule and suggests it is inconsistent with state efforts to prevent sex trafficking, reduce substance use disorders, and rates of suicide. The commenter seeks an explanation from the department of why it believes the proposed rule is not inconsistent with these goals. The commenter also contends the rule is inconsistent with the Fourteenth Amendment of the United States Constitution and the Montana

constitutional provision concerning the inalienable right to seek their safety, health and happiness in lawful ways, and seeks an explanation of how the rule is related to a legitimate government interest. Additionally, the commenter indicates the department has failed to establish necessity for the proposed rule because there are other options.

RESPONSE #16: The department respectfully disagrees. The commenter provides no evidence or reasoning as to why this rule would have an impact on homeless LGBTQ youth and be inconsistent with the department's and the State's efforts to prevent sex trafficking, reduce substance use disorders, and impact suicide rates. In any event, as noted above, in response to Comment #15, the department must pursue its goals and objectives within the confines of its authority, which is what it is doing in this rule.

With respect to the Equal Protection Clause of the Fourteenth Amendment, please see the response to Comment #8.

Under 2-4-410(2)(a), MCA, an intended action has to be reasonably necessary to effectuate the purpose of the code section(s) being implemented. That standard is easily met by the rule, as set forth here and in the proposal notice. The rule is reasonably necessary to implement the statutory provisions relating to a statewide system of vital statistics and vital records, in particular, those code provisions that contemplate that birth certificates and other records of birth include the "sex" of the child. The commenter contends that the rule is not reasonably necessary because there are other options which have not been given due consideration – but fails to identify what such options are, so that the department could assess those options and respond.

Finally, nothing in the rule precludes Montanans from seeking their safety, health, and happiness in lawful ways. Some legal commenters have suggested that the Constitutional provision is primarily a hortatory statement or a statement of political philosophy. Even if it is more – and the rule is implicated by the provision – the provision textually empowers the State and its entities to "lawfully" limit individuals' pursuit of those rights. Thus, if the rule is implicated by this provision of the Montana Constitution, the rule is consistent with it.

COMMENT #17: Several commenters expressed support for the proposed rule. These commenters indicated the rule is supported by science because sex is determined at birth, does not evolve over time, and cannot be changed. The commenters also indicated accurate collection of demographics is critical to a properly functioning government and society.

RESPONSE #17: The department agrees and thanks the commenters for their support of the rule, as well as their recognition of the importance of interpreting the statutes governing the creation of a statewide system of vital statistics and the adoption of rules for vital statistics and vital records according to their plain language.

COMMENT #18: Several commenters expressed partial support for the proposed rule. Those commenters state that sex is determined at birth and it is a scientific fact that cannot be changed. However, the commenters believe a time limitation should be established for the data entry error exception set forth under ARM 37.8.311(5)(b)(i) and suggest a range of 30 to 90 days after the date of birth from which to correct a data entry or scrivener's error.

RESPONSE #18: The department thanks the commenters for their support for the rule. With respect to their suggestion of a time limit in which data entry or scrivener's errors could be corrected, the department appreciates the suggestion, but declines to so modify the final rule. It is concerned that such a time period may not be sufficient to correct the birth records, or that such errors may not be discovered within such time – and believes that the associated documentation requirements will ensure that the provision is only used to correct data entry or scrivener's errors.

4. These rule amendments are effective September 10, 2022.

/s/ ROBERT LISHMAN
Robert Lishman
Rule Reviewer

/s/ CHARLES T. BRERETON
Charles T. Brereton, Director
Department of Public Health and Human
Services

Certified to the Secretary of State August 30, 2022.