

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 37.8.102, 37.8.116, and )  
37.8.311 pertaining to fees for copies )  
of death certificates, the amendment )  
of birth certificate gender )  
designations, and issuance of a )  
replacement certificate )

TO: All Concerned Persons

1. On May 28, 2021, the Department of Public Health and Human Services published MAR Notice No. 37-945 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 608 of the 2021 Montana Administrative Register, Issue Number 10.

2. The department has amended the above-stated rules 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: A commenter stated that requiring a surgical procedure to update a birth certificate is burdensome, has the potential to be medically unnecessary, and amounts to government overreach into medical decisions. The commenter opposes use of the term "sex" rather than "gender" within the proposed rules. The commenter acknowledges that Senate Bill (SB) 280 has become law, but objects to the proposed rule changes as being potentially unconstitutional. The commenter also questions what types of surgical procedures allow for the amendment of sex designation, whether the department is seeking to force surgical procedures, and how the rules will apply to persons with amended birth certificates who relocate to Montana.

Response #1: With the exception of cases of correcting a data entry error, SB 280 allows the department to amend the sex designation on a birth certificate only when it receives a certified copy of an order from a court with appropriate jurisdiction indicating that the sex of the person has been changed by surgical procedure. The department must follow this law and cannot adopt rules that conflict with the requirements of SB 280. These rules do not add any additional requirements to the amendment process beyond what is provided for under SB 280.

The rules use the term "sex" rather than "gender" to be consistent with the terminology used in SB 280 and the requirement for the department to amend the rules to be substantively the same as those in existence prior to adoption of MAR

Notice No. 37-807. These rules do not require a specific type of surgical procedure to amend the sex designation on a birth certificate. The requirement under SB 280 is for a court order indicating sex has been changed by a surgical procedure. The rules do not force any person to undergo a surgical procedure. The rules apply only to birth certificates issued within Montana.

Comment # 2: Several commenters provided comment in opposition to SB 280 and did not address the proposed rules.

Response #2: SB 280 was passed during the 67th Legislative Session and is now law in Montana. The department must follow this law and cannot adopt rules that conflict with the requirements of SB 280.

Comment # 3: A commenter stated that persons seeking to change the gender designation on a birth certificate should be required to go through district court just like a request for a name change.

Response #3: Under SB 280 and these rules, a court order is required for the sex designation on a birth certificate to be amended unless the amendment is made to correct a data entry error.

Comment #4: A commenter stated the proposed rule is "reminiscent of the treatment of 'undesirables' by the Nazis during WWII."

Response #4: The department disagrees. Please see the response to comment #1.

Comment #5: A commenter expressed opposition to the proposed rules and believes the motivation behind the rules is to harm transgender individuals.

Response #5: The department disagrees. As detailed in the statement of reasonable necessity, the department is proposing adoption of these rules to comply with the statutory requirements set forth under SB 280.

Comment #6: A commenter expressed opposition to SB 280, questioned the meaning of the term "surgical procedure" within the bill, and suggested the department make the proposed rules vague and indecipherable.

Response #6: SB 280 directs the department to amend its rules to be substantively the same as those in existence prior to adoption of MAR Notice No. 37-807. The rules as proposed meet the requirements of SB 280.

Comment #7: A commenter stated the department should mitigate the threat posed by SB 280 to transgender persons.

Response #7: Please see the response to comment #1.

Comment #8: A commenter expressed opposition to the proposed rules on several grounds. First, the commenter states requiring a surgical procedure is highly problematic because surgery is frequently cost-prohibitive, not widely available, and not all transgender individuals seek surgery as part of their transition. Second, the commenter states the proposed rules will result in inaccurate birth certificates and force individuals to disclose their private medical history and transgender status to others. Third, the commenter states the proposed rules will lead to inconsistency between federal- and state-issued identity documents because many federal agencies no longer require proof of surgery to amend the gender marker for identification documents such as U.S. passports and veteran ID cards. The commenter requests the department revise the rule to broaden the circumstances under which sex designation may be amended on a birth certificate. The commenter suggests the surgical procedure language be removed and that language be used allowing for amendment based upon a physician's letter stating that the individual has or is undergoing transition through "appropriate clinical treatment."

Response #8: With the exception of cases of correcting a data entry error, SB 280 allows the department to amend the sex designation on a birth certificate only when it receives a certified copy of an order from a court with appropriate jurisdiction indicating that the sex of the person has been changed by surgical procedure. The department must follow this law and cannot adopt rules that conflict with the requirements of SB 280. The department does not have the rulemaking authority to amend the rule in the manner proposed by the commenter.

Comment #9: A commenter stated that requiring a surgical procedure and court order to change the gender marker designation on a birth certificate is harmful to transgender, nonbinary, and two-spirit persons in Montana.

Response #9: Please see the response to comment #1.

Comment #10: A commenter expressed opposition to the proposed rules and urged they be rejected. The commenter indicated the rules demonstrate a lack of understanding of what it means to be transgender and will jeopardize the safety of transgender individuals. The commenter stated most individuals choose not to undergo gender confirmation surgery and deserve to have the identity that correctly reflects who they are. The commenter indicated gender identity is a matter between the individual and their physician in accordance with medical guidelines and should not be subject to any governmental interference.

Response #10: Please see the response to comment #1.

Comment #11: A commenter expressed opposition to the proposed rules and stated they will harm transgender, nonbinary, and two-spirit youth who are disproportionately impacted by mental illness and experience increased rates of suicide. The commenter stated use of correct pronouns and gender can decrease the risk of suicide among transgender youth. The commenter indicated transgender

youth do not undergo surgery and the rules will prevent transgender youth from having the correct birth certificate gender marker.

Response #11: Please see the response to comment #1.

Comment #12: A commenter indicated that sex and gender are determined by more than biology.

Response # 12: Please see the response to comment #1.

Comment #13: A commenter stated the proposed rules will negatively impact the lives of transgender persons in Montana by putting their safety at risk, increasing discrimination, and preventing individuals from updating their birth certificate to conform with their gender identity. The commenter stated the existing rule allowing gender designation on a birth certificate to be corrected through use of an affidavit has been in place for several years, aligns with federal standards, and has worked well in Montana.

Response # 13: Please see the response to comment #1.

Comment #14: A commenter stated requiring a surgical procedure to amend the sex designation on a birth certificate disproportionately impacts individuals with limited financial means and those who lack family support. The commenter stated the proposed rules do not account for persons who are intersex. The commenter also stated the rules prevent correct identity documentation and the matter of gender identity should be between the individual and their physician free of any governmental interference.

Response # 14: Please see the response to comment #1.

Comment #15: A commenter stated gender confirmation surgery is a highly personal decision and often cost-prohibitive. The commenter also stated the government should not interfere with how a person chooses to identify.

Response # 15: Please see the response to comment #1.

Comment #16: A commenter indicated the department should withdraw the proposed rules because they are harmful to transgender individuals and particularly those of limited income due to the barriers and costs associated with gender confirmation surgery.

Response # 16: Please see the response to comment #1.

Comment #17: A commenter indicated the department should withdraw the proposed rules. If the proposed rules are not withdrawn, the commenter stated the department should take measures to minimize the impact of the rules on transgender individuals. The commenter suggested the department institute an

online process that provides for virtual court appearances as part of the birth certificate amendment process.

Response #17: The proposed rules are necessary to comply with the requirements of SB 280. The department cannot require courts to provide for virtual appearances.

Comment #18: A commenter stated youth very rarely undergo surgery as part of the transition process and indicated the proposed rules do not take into account the availability of medical treatment as an alternative to surgery under best practice medical guidelines. The commenter also stated the proposed rules do not take into account gender marker changes for intersex persons. The commenter noted SB 280 and the proposed rules do not define the term "surgical procedure."

Response #18: Please see the response to comment #1.

Comment #19: A commenter stated the proposed rules impose unnecessary requirements for transgender individuals to update birth certificates. The commenter also stated the proposed rules will impact the safety of transgender individuals and have a disproportionate impact on minorities and persons in poverty. The commenter indicated the department has authority to reject the proposed rules and should do so.

Response #19: Please see the response to comment #1.

Commenter #20: A commenter indicated they share the same concerns expressed by other commenters in opposition to the proposed rules and urged the department to consider those who will be impacted by the proposed rule change.

Response #20: Please see the response to comment #1.

Comment #21: A commenter expressed concern that the proposed rules will limit the ability of transgender individuals to have identification documents that reflect their gender identity.

Response #21: Please see the response to comment #1.

Comment #22: A legislator provided comment in opposition to the proposed rules stating they are unconstitutional and inevitably will be challenged through litigation.

Response #22: Please see the response to comment #1.

Comment #23: A commenter indicated they share the same concerns expressed by other commenters in opposition to the proposed rules and urged the department to consider delaying implementation of the rules.

Response #23: Please see the response to comment #1.

Comment #24: The primary bill sponsor of SB 280 provided comment in support of the proposed rules. The commenter indicated the proposed rules meet the requirements of SB 280 and noted the bill was duly passed by the Montana Legislature.

Response #24: The department agrees the rules as proposed meet the requirements of SB 280.

4. These rule amendments are effective July 24, 2021.

/s/ Robert Lishman  
Robert Lishman  
Rule Reviewer

/s/ Erica Johnston for  
Adam Meier, Director  
Public Health and Human Services

Certified to the Secretary of State July 13, 2021.