



Testimony before Pennsylvania Senate Democratic Policy Committee on Issues Facing the
Transgender and Nonbinary Community

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The Transgender Legal Defense & Education Fund (TLDEF) welcomes this opportunity to testify on the proposed changes to Pennsylvania’s name change regime.

TLDEF is a NYC-based national nonprofit whose mission is to end discrimination and achieve equality for transgender¹ people, particularly those in our most vulnerable communities. We do this through public education, impact litigation, and our Name Change Project, which provides pro bono legal services to community members through partnerships with some of the nation’s premier law firms and corporate law departments.

Our Name Change Project pairs eligible applicants with attorneys who represent them through the name change process and then assist with document changes. Many of our participants would be unable to access name and document changes without the help of an attorney, whether due to financial constraints or lack of access to other resources.

Our Name Change Project serves 9 sites, with two of our biggest service areas being Philadelphia and Pittsburgh. In 2019 and 2020, we – with our local partners – served 1100 participants total, including 360 in Pennsylvania.

Importance of Name Changes

Transgender people nearly universally require a judicial name change to bring their identity documents into accord with their current name. According to the 2015 US Transgender Survey of nearly 28,000 transgender people, only roughly 1 in 10 respondents (11%) had all of their IDs and records accurately listing their current name and gender.² More than two-thirds (68%) reported that *none* of their IDs or records had both their current name or gender.³

Forcing transgender people to have inaccurate identity documents subjects them to increased risk of harassment and discrimination in everyday situations such as renting an apartment, being called by name in a doctor’s office, interacting with law enforcement, or any situation where one must show proof of identity.

¹ A transgender person is a person whose gender identity does not align with their sex assigned at birth. Throughout this testimony, “transgender” will be used to include binary transgender people who identify as male or female and nonbinary people, who do not identify as their sex assigned at birth but also do not identify as male or female.

² S. E. James, J.L. Herman, S. Rankin, M. Keisling, L. Mottet & M. Anafi, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 85 (2016), <http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf> [hereinafter U.S. Transgender Survey].

³ *Id.*



A lack of appropriate identity documents can also deter people from applying for jobs, school, benefits, or even a library card. Having to present an ID that does not match one's appearance can, at best, cause embarrassment or confusion, or worse—subject the person to discrimination, accusations of fraud, or violence. Nearly one-third (32%) of individuals who have shown ID with a name or gender that didn't match their appearance have experienced negative experiences such as being harassed, denied services, or attacked.⁴ Risk of physical danger increases dramatically for transgender people of color, particularly Black transgender people.⁵

The ability to promptly change one's name is not only crucial to the wellbeing of transgender individuals, but there are also tangible economic repercussions to name change delays. Transgender individuals are often in urgent need of a name change so that they can apply for housing, jobs, or public benefits. A delay in the name change process can have serious consequences for a population that experiences disproportionately high rates of poverty, unemployment, and homelessness.⁶

Common law name changes do not provide the relief afforded by a statutory name change. While Pennsylvania allows for common law name changes,⁷ there is unique value in a statutory name change that common law name changes do not afford. Post-9/11, basic transactions that require presentation of identity documents include applying for public benefits such as Supplemental Nutrition Assistance Program,⁸ Social Security retirement benefits,⁹ Medicare,¹⁰ Social Security Disability Benefits,¹¹ or Medicaid.¹² Getting a job can require professional certifications and background checks, and all employees must fill out the US Citizenship and Immigration I-9

⁴ *Id.* at 89.

⁵ See generally 2015 U.S. Transgender Survey: Report on the Experiences of Black Respondents, available at <https://transequality.org/sites/default/files/docs/usts/USTSBlackRespondentsReport-Nov17.pdf> (accessed June 25, 2021).

⁶ *Id.* at 3 (“Nearly one-third (29%) of respondents were living in poverty, compared to 14% in the U.S. population. A major contributor to the high rate of poverty is likely respondents’ 15% unemployment rate—three times higher than the unemployment rate in the U.S. population at the time of the survey (5%). [N]early one-third (30%) of respondents have experienced homelessness at some point in their lifetime”); *National Transgender Discrimination Survey—New York Results*, National Center for Transgender Equality and the National Gay and Lesbian Task Force, 2011 http://www.endtransdiscrimination.org/PDFs/ntds_state_ny.pdf (“19% of respondents had a household income of \$10,000 or less, 12% were unemployed at the time of the survey, 18% had become homeless because of their gender identity/expression”).

⁷ *Linton v. First Nat'l Bank of Kittanning*, 10 F. 894 (W.D. Pa. 1882).

⁸ Social Security Administration, Supplemental Nutrition Assistance Program Facts, <https://www.ssa.gov/pubs/EN-05-10101.pdf> (requiring “ Identification such as a driver’s license, state ID, birth certificate, work or school ID card, health benefits card, voter registration card, or alien card” to apply).

⁹ Social Security Administration, Information You Need To Apply For Retirement Benefits Or Medicare, <http://www.ssa.gov/online/ssa-1.html> (may need to provide a birth certificate)

¹⁰ *Id.*

¹¹ Social Security Administration, Disability Benefits, 7 <https://www.ssa.gov/pubs/EN-05-10029.pdf> (requiring birth certificate).

¹² Pennie.com, *How to Enroll* (<https://pennie.com/learn/how-to-enroll/>) (requiring photo ID or other proof of identity) (accessed June 25, 2021).



form.¹³ Other situations include obtaining a non-driver ID or driver’s license,¹⁴ passport¹⁵ or gun permit,¹⁶ and getting married.¹⁷ One must have a passport to travel internationally and a photo ID to fly domestically.¹⁸ Regulations pursuant to the 2001 USA PATRIOT Act require banks to verify a person’s identity before they can open a bank account.¹⁹ Having the correct name on identity documents is thus important for engaging in everyday transactions and accessing basic rights and benefits. Many of these rights, including the right to vote, marry, travel²⁰, and bear arms, have constitutional implications.

A judicial name change is essentially required to get any identity documents in the new name. The Social Security Administration (SSA) does not honor common law name changes.²¹ Without being able to update one’s name at Social Security, one cannot receive a paycheck in one’s current name.

A court order is required to change the name on Pennsylvania birth certificates.²² The Pennsylvania Department of Transportation requires a marriage certificate, divorce documents, or a court-ordered name change to change the name on a driver license or non-driver ID card.²³ While the U.S. Department of State theoretically allows for common law name changes to change the name on a U.S. passport, to do so requires presenting “a valid ID issued in the name you currently use.”²⁴ While this assists people who had a common law name change years ago,

¹³ USCIS, Form I-9, Employment Verification, <https://www.uscis.gov/i-9>.

¹⁴ Pennsylvania Department of Transportation, *Identification and Residency Requirements for U.S. Citizens* (<http://www.dot.state.pa.us/Public/DVSPubsForms/BDL/BDL%20Publications/pub%20195us.pdf>) (accessed June 25, 2021).

¹⁵ U.S. Dep’t of State, U.S. Passport Application, <https://eforms.state.gov/Forms/ds11.pdf> (accessed June 25, 2021).

¹⁶ Pennsylvania State Police, *Carrying Firearms in Pennsylvania*, <https://www.psp.pa.gov/firearms-information/Pages/Carrying-Firearms-in-Pennsylvania.aspx> (requiring proof of residency, which includes photo ID) (accessed June 25, 2021).

¹⁷ For example, see Allegheny County Marriage License Application Process, available at <https://www.alleghenycounty.us/court-records/wills/marriage-license.aspx> (“Photo identification is required.”) (accessed June 25, 2021).

¹⁸ Transportation Security Administration, Identification, <https://www.tsa.gov/travel/security-screening/identification>.

¹⁹ 31 C.F.R. § 1020.220(a)(2)(ii) (2017) (requiring banks to verify identity by examining identity documents or using other identity verification measures).

²⁰ See *Shapiro v. Thompson*, 394 U.S. 618 (1969) (holding that an individual’s right to travel is a fundamental right).

²¹ The Social Security Administration’s Program Operations Manual System provides a list of events that are the basis for a name change. RM 10212.010 Evidence of a Name Change on the SSN (2014), <http://policy.ssa.gov/poms.nsf/lnx/0110212010>; SSA Program Operations Manual System, RM 10212.165 Examples of Name Changes and Corrections that SSA Cannot Process (2013), <http://policy.ssa.gov/poms.nsf/lnx/0110212165>.

²² Pennsylvania Department of Health Form HD002292 (Rev. 4/21), available at <https://www.health.pa.gov/topics/Documents/Certificates%20and%20Records/Request%20to%20Modify%20an%20Adult%27s%20Birth%20Record.pdf> (requiring certified court order for name changes) (accessed June 25, 2021).

²³ Pennsylvania Department of Transportation Form DL-80, page 2 (requiring a certified copy of a court order, marriage certificate, or other government issued ID to complete a name change) (available at <http://www.dot.state.pa.us/Public/DVSPubsForms/BDL/BDL%20Form/DL-80.pdf>) (accessed June 25, 2021).

²⁴ U.S. Department of State, Change or Correct a Passport, <https://travel.state.gov/content/passports/en/passports/services/correction.html>.



since there is no longer a viable mechanism to get a valid ID in the new name without a court-ordered name change, this policy is illusory.

Forcing a transgender person to use ID that publicizes their transgender status likely violates the right to privacy.²⁵ Here, forcing someone to use a name that does not match their gender could be found to be an unconstitutional disclosure of private medical information. An uncorrected document compels needless disclosure of confidential medical information to the government where the petitioner’s old legal name and new legal name clearly indicate their transgender status.²⁶

Being forced to use a name on a government-issued identity document with a name one has rejected is also likely a constitutionally-barred form of forced speech. The U.S. Supreme Court has held that “one important manifestation of the principle of free speech is that one who chooses to speak may also decide ‘what not to say.’”²⁷ The First Amendment protects “both the right to speak freely and the right to refrain from speech.”²⁸ Being forced to use an incorrectly gendered name is not only forced speech regarding the name itself, but also compels the person to publicly express a particular gender to the denial of their own viewpoint.

National Trends

Across the country, jurisdictions are updating their name and document change procedures to be more efficient, just, and accessible. Many are removing barriers that no longer serve their initial intended purpose, such as publication, and coming up with more narrowly tailored ways to adequately address concerns about the interests of the state or public while also facilitating access to the process.

Administrative Name Changes

²⁵ See *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999) (publicizing of an inmate’s transgender status by prison officials violated her constitutional right to privacy because “individuals who are transsexuals are among those who possess a constitutional right to maintain medical confidentiality”); *Love v. Johnson*, No. 2:15-cv-11834, 2015 WL 7180471, at *5 (E.D. Mich. Nov. 16, 2015) (recognizing an overly-restrictive policy for correcting the sex on Michigan driver licenses raised cognizable privacy claim under the Fourteenth Amendment); *K.L. v. State, Dep’t of Admin., Div. of Motor Vehicles*, No. 3AN-11-05431 CI, 2012 WL 2685183, at *6 (Alaska Super. Ct. Mar. 12, 2012) (finding that one’s transgender status is “private, sensitive information,” and that the lack of update procedures indirectly threatened transgender individuals with forced disclosure even though the disclosure was not directly required).

²⁶ The gender change evident from a name change order is sufficient to raise safety concerns. *In re E.P.L.*, 26 Misc 3d 336 (N.Y. Sup. Ct., Westchester County 2009) (waiving name change publication requirements and sealing the records for a transgender individual without a particularized history of violence or crime against him, finding that “there exist numerous documented instances of those targeted for violence based on their sexual orientation or gender identity”); *In re J.A.L., Jr.*, 53 Misc. 3d 1220(A) (N.Y. Sup. Ct. 2016) (same); *Ray v. Himes*, No. 2:18-CV-272, 2019 WL 11791719, at *9 (S.D. Ohio Sept. 12, 2019) (finding that gender incongruent documents infringe on the right to privacy for transgender people both because they disclose highly sensitive, personal information and because they expose transgender people to risk of bodily harm); *Arroyo Gonzalez*, 305 F. Supp. 3d at 333 (“Much like matters relating to marriage, procreation, contraception, family relationships, and child rearing, there are few areas which more closely intimate facts of a personal nature than one’s transgender status.”).

²⁷ *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995) (quoting *Pacific Gas & Electric Co. v. Public Utilities Comm’n of Cal.*, 475 U.S. 1, 11 (1986) (plurality opinion)).

²⁸ *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).



As a matter of safety, efficiency, and equal application, an administrative name change procedure is preferable to one involving the courts. Court costs are often higher than other agency fees and interacting with the courts can be an overwhelming and unmanageable experience for many people, particularly transgender pro se name change petitioners.

In the past several years, Oregon²⁹ and Maine³⁰ have adopted mechanisms whereby a person born in the state can obtain a name change through the state's Department of Health or similar office by simply submitting an application form. For both, a new birth certificate is issued, if applicable, and a certified document confirming the name change is provided to the individual. Hawaii³¹ has long had an administrative process for name changes, whereby the person submits their application to the Lieutenant Governor's office and that office issues an order acknowledging the change.³² Advocates in New York are also developing a system whereby people could obtain an administrative name change through the local clerk's office in a similar manner to obtaining a name change by marriage.

As will be discussed in further detail by other panelists, shifting to an administrative name change mechanism increases access to state-recognized name changes by reducing costs and technical burdens that disproportionately impact the transgender community given their need to access state-recognized name changes.

Notice and Criminal Conviction Bars

While there is a state interest in ensuring accurate recordkeeping, people also have a right to go by the name they choose. While several states, including Pennsylvania,³³ bar or limit the availability of a name change for people convicted of certain crimes,³⁴ there is no longer a need to deprive formerly convicted or incarcerated people of access to a state-recognized name change. Specific notifications can be made where appropriate to make sure the relevant government entities and/or other interested parties are aware of the name change. Although the asserted justification for the bar is to prevent fraud, allowing formerly convicted or incarcerated people to access state-recognized name changes in fact facilitates transparency and creates a paper trail that better serves the state's interest – if someone is unable to access a state-recognized name change, the use of a common law name actually creates confusion because there is no official record of the change.

²⁹ Oregon Health Authority, Application to Change the Name and/or Sex on a Record of Live Birth to Support Gender Identity Information Sheet (Jan. 2018), available at: <https://www.oregon.gov/oha/PH/BIRTHDEATHCERTIFICATES/CHANGEVITALRECORDS/Documents/OHA-2673.pdf> (accessed June 22, 2021).

³⁰ Maine Department of Health and Human Services, *Gender Marker Change on Birth Certificates Frequently Asked Questions*, <https://www.maine.gov/dhhs/mecdc/public-health-systems/data-research/vital-records/edrs/documents/pdf-files/QA-for-gender-marker.pdf> (the name may be changed administratively on a birth record, without a court order, when done at the same time as a gender change and for the purpose of aligning with the applicant's gender).

³¹ <https://ltgov.hawaii.gov/the-office/name-changes/> (accessed June 22, 2021)

³³ Pennsylvania's name change statute bars name changes for individuals with certain felony convictions, including aggravated assault (54 Pa.C.S. § 702(c)(2)).

³⁴ *Id.*



Not being able to get a name change also makes it harder for people to find jobs and contribute to their communities after incarceration. Due to racism in the criminal legal system and because of the greater vulnerability of transgender people of color to violence and discrimination when outed, the inability to update important documents disparately impacts transgender people of color. Most states do not completely bar people with convictions from getting state-recognized name changes (at least to the extent that Pennsylvania does), which means formerly convicted or incarcerated Pennsylvanians are at a unique disadvantage.³⁵

In addition, the felony bar to name changes as it exists does not impact name changes related to marriage, leading to inconsistent application. The current law's treatment of marriage in particular as an acceptable reason for a name change, without question, while transgender people and others seeking a name change for equally important reasons are treated as presumptively suspect, is an anachronistic holdover that relies on and entrenches old sexist and transphobic stereotypes, and results in unequal treatment.

Publication/Sealing

Removing the publication requirement for name changes is essential step towards protecting transgender individuals. Even where, as is the case in Pennsylvania, waiver is available, the decision about whether a petitioner will be required to publish is ultimately in the discretion of the judge. This leads to inconsistent application of the waiver standard and makes it difficult for petitioners to know whether or not their waiver request will be granted. It also means that petitioners who live in a particular county or end up in front of a particular judge may be required to publish regardless of the circumstance. Self-represented petitioners may not realize they have the option to request a waiver, and others are unable to afford the publication fee within the required timeframe and also must start over.

Publishing in the newspaper essentially requires the petitioner to run a newspaper advertisement that reveals the fact that they are transgender along with other personal information. This can put petitioners at real risk of violence; many transgender people face blatant discrimination and severe violence simply for being who they are. Outing oneself as transgender to the court and to the public always carries a threat to one's safety. If someone's transgender status is mentioned in their petition and publication is not waived/the record is not sealed, the document remains in the public domain and accessible by anyone who seeks it.

Twenty-three jurisdictions have no statutory publication requirement at all for legal name changes.³⁶ California and Colorado have no publication requirement if the name change is

³⁵ Information compiled from the National Center for Transgender Equality's ID Documents Center, available at <https://transequality.org/documents> (accessed June 25, 2021) and Movement Advancement Project. "Equality Maps: Identity Document Laws and Policies." https://www.lgbtmap.org/equality-maps/identity_document_laws (accessed 06/25/2021).

³⁶ *Id.* (Alabama, Arkansas, Connecticut, Florida, Iowa, Kentucky, Louisiana, Minnesota, Mississippi, New Hampshire, New Jersey, New York (effective December 20, 2021), North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Washington D.C.)



related to gender.³⁷ Regionally, New Jersey removed its publication requirement in 2020 and New York will no longer have a publication requirement effective December 20, 2021, with advocacy going on in other mid-Atlantic and northeastern states for such removal.

The publication requirement is no longer necessary for its original purpose of notifying creditors of a name change. Judges have discretion to require specific, direct notifications to creditors and other parties when appropriate, and financial institutions in the Internet age no longer require publication information to keep accurate records.

Document Changes

Self-attestation occurs when an individual reports information on an application, under penalty of perjury, that does not need to be verified by a secondary source, such as a medical provider. Since a person's own report is the most accurate means of ascertaining the appropriate sex designation for their documents – and indeed, government entities accept self-attestation for cisgender people when obtaining documents – removing the medical attestation requirement alleviates an unnecessary and often prohibitively expensive burden placed on transgender people seeking corrected documents.

In addition, for many transgender people, a male or female designation is inaccurate and an X designation is more appropriate. As long as an X gender marker is not available on any Commonwealth document for which a medical attestation is required (i.e., currently, birth certificates), the state is effectively requiring providers and some transgender and intersex people to commit perjury when obtaining Commonwealth-issued documents or amending the gender marker on their documents, because the physician must attest that the person has transitioned to male or female and that one gender predominates, which is not the case for many transgender people. Removing the medical certification requirement and permitting X designations on all Commonwealth-issued documents will ensure better access to accurate gender marker designations for all transgender Pennsylvanians.

Transgender people frequently do not have access to appropriate medical care. According to the 2015 US Transgender Survey, 15% of transgender Pennsylvania residents have been refused medical care due to their gender identity/expression, and 23% postponed needed medical care due to discrimination.³⁸ Many transgender people lack insurance, transportation, or access to an affirming provider, making it impossible to satisfy the medical documentation requirement.

Twenty states plus Washington DC allow for gender marker amendments on a photo ID without medical documentation³⁹, and twenty-three states plus Washington DC and New York City allow

³⁷ *Id.*

³⁸ 2015 U.S. Transgender Survey: Pennsylvania State Report (October 2017), https://transequality.org/sites/default/files/docs/resources/ntds_state_pa.pdf (accessed June 25, 2021).

³⁹ Movement Advancement Project. "Equality Maps: Identity Document Laws and Policies." https://www.lgbtmap.org/equality-maps/identity_document_laws (Driver's License) (accessed 06/25/2021).



for gender marker changes on a birth certificate without medical documentation.⁴⁰ Pennsylvania currently allows for self-attestation to change the gender marker on a driver's license but requires medical documentation to change the gender marker on a birth certificate.

Requiring health care providers to attest to an individual's gender is costly, burdensome, and entirely unnecessary. Finding a competent provider who is able and willing to attest to an individual's gender identity is challenging, if not impossible, particularly for rural residents. Even if people are able to access a competent provider, each provider appointment can cost hundreds of dollars, and some providers require multiple visits before writing a certificate letter, making barriers particularly high for low income people.⁴¹

Interplay with Federal Systems

Over the past approximately 5 years, over 20 US jurisdictions have updated their name and document change regimes to streamline and modernize the process. Aside from shifting to self-attestation rather than a doctor's certification and permitting X markers, states have also removed the publication requirement and allowed for name changes to be completed administratively, without court involvement or with limited court involvement on the part of the petitioner.

Although the blanket policy for federal agencies is generally to require a court order for gender-related name changes, these states have worked with the federal government so that their certified document is considered sufficient to update federal records in most circumstances. There is of course the possibility that an individual clerk may be unaware of this nuance and may ask for additional information, though ultimately, a conversation with a supervisor who is aware of the newer standards/procedures should resolve any issues. After all, agencies have long accepted other administrative documents such as marriage certificates as proof of a name change. As more states begin using administrative procedures, the federal government will eventually have to respond by changing their general standards to align with practice. There is already discussion ongoing about implementation of X gender markers at the federal level, with action expected in the near future.

Conclusion

Pennsylvania's current system for name and document changes results in barriers to access and increased risk for transgender people. In updating its name and document change regime, Pennsylvania would be in line with many states across the country working to remove discriminatory barriers that disparately impact transgender people.

⁴⁰ Movement Advancement Project. "Equality Maps: Identity Document Laws and Policies." https://www.lgbtmap.org/equality-maps/identity_document_laws (Birth Certificate) (accessed 06/25/2021).

⁴¹ For example, in a recent analysis by the WA State Department of Health of a proposed rule that would remove the provider attestation requirement to update the gender marker on a WA birth certificate, the department estimated that the cost of obtaining an attestation letter from a licensed health care provider ranged from \$0 to \$910. Washington Department of Health, *Significant Rule Analysis: WAC 246-490-075 Changing sex designation on a birth certificate*, November 1, 2017, available at https://fortress.wa.gov/doh/policyreview/Documents/SA_GenderChange_BirthCertificate.pdf (accessed June 25, 2021).