

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
VICINAGE OF TRENTON

JANE DOE,

Plaintiff,

v.

VINCENT T. ARRISI, IN HIS
OFFICIAL CAPACITY AS STATE
REGISTRAR, OFFICE OF VITAL
STATISTICS AND REGISTRY;
OFFICE OF VITAL STATISTICS AND
REGISTRY; CATHLEEN D. BENNETT,
IN HER OFFICIAL CAPACITY AS
COMMISSIONER OF NEW JERSEY
DEPARTMENT OF HEALTH; AND NEW
JERSEY DEPARTMENT OF HEALTH,

Defendants.

Hon. Michael A. Shipp, U.S.D.J.
Hon. Douglas E. Arpert, U.S.M.J.

Civil Action No. 3:16-cv-08640-
MAS-DEA

Motion Returnable on March 20,
2017

FILED ELECTRONICALLY

REPLY BRIEF ON BEHALF OF DEFENDANTS IN FURTHER SUPPORT OF THEIR
MOTION TO DISMISS PLAINTIFF'S COMPLAINT IN LIEU OF AN ANSWER
PURSUANT TO FED. R. CIV. P. 12(b)(6)

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PRELIMINARY STATEMENT

In New Jersey, a birth certificate necessarily describes a person's physical anatomy. Birth certificates do not contain a designation for gender identity. The legal cognizability of Plaintiff's claims challenging N.J.S.A. 26:8-40.12 dissipate with that inevitable conclusion.

According to Plaintiff, who identifies as female, a birth certificate that indicates she was born physically as a male is somehow "inaccurate," even though she was actually born physically as a male. Because birth certificates say nothing regarding gender identity, Plaintiff's conception of "accurate" is simply mistaken. N.J.S.A. 26:8-40.12 does not implicate Due Process concerns because it merely ensures that a birth certificate's physical description remains accurate until proof of an actual physical change is submitted.

Nor does N.J.S.A. 26:8-40.12 discriminate under either the Equal Protection Clause or the Americans with Disabilities Act (ADA). Rather, the statute ensures that the physical sex description on birth certificates remains accurate for all individuals, regardless of their specific situation. The law is facially neutral and any disparate effect it may have is the incidental result of inherent physical differences among the population. Further, the ADA exempts Gender Dysphoria from the definition of qualifying disability.

As the Complaint fails to state a cognizable claim for relief, the court should grant Defendants' motion to dismiss.

ARGUMENT

POINT I

PLAINTIFF FAILS TO IDENTIFY A FUNDAMENTAL RIGHT IMPLICATED BY N.J.S.A. 26:8-40.12.

In the moving brief, Defendants demonstrated how N.J.S.A. 26:8-40.12 does not implicate any of the alleged rights mentioned in the Complaint. Plaintiff's brief in opposition simply repeats the alleged "fundamental rights" listed in the Complaint. As Plaintiff has yet to identify how the statute at issue burdens a fundamental right, the substantive due process claim must be dismissed.

As an initial matter, Plaintiff's brief does not refute Defendant's argument that there is no recognized fundamental right to "define and express" an identity. (Df. Br. 10, 15).

Second, Plaintiff's brief does not address the point made in the moving brief that none of the alleged rights within the "zone of privacy" are supported by factual allegations. (Df. Br. 11). Plaintiff ignores this argument and fails to point to any factual allegations supporting the claim that the law infringes upon an "intimate life choice" within the zone of privacy.

Third, Plaintiff does not dispute that there is no fundamental right to an accurate birth certificate. (Df. Br. 12-13).

Fourth, the remaining rights asserted by Plaintiff all flow from her faulty assertion that her birth certificate is "inaccurate" so long as she is unable to change her birth certificate's physical sex description on demand.¹ However, Plaintiff never demonstrates how a birth record that lists her physical anatomy as that of a male can possibly be "inaccurate" when she actually has, and was born with, the anatomy of a male. Plaintiff does not challenge the notion that birth certificates record physical, anatomical sexual features. (Pl. Br. 10). N.J.S.A. 26:8-40.12 merely allows an individual whose anatomy has changed to update his or her birth record accordingly. Since N.J.S.A. 26:8-40.12 does not impede access to an "accurate" birth certificate, the statute does not implicate the remaining "fundamental" rights asserted by Plaintiff.

Plaintiff's sole argument in rebuttal is that there is a "factual dispute" regarding whether birth certificates "serve only one purpose." (Pl. Br. 10). According to Plaintiff, Defendants "ignore" that birth certificates serve as a "fundamental identification document" in addition to the acknowledged purpose of "recording a newborn's sex organs at the time of birth." (Pl. Br.

¹ For example, Plaintiff argues that her interest in "avoiding disclosure of personal matters" is implicated because "the Statute requires her to reveal private medical information to obtain an accurate birth certificate." (Pl. Br. 14). Similarly, Plaintiff asserts that the statute burdens her right to refuse unwanted surgery because she must undergo SRS to obtain what she believes is a "correct" birth certificate. (Compl. ¶ 51).

10-11 (emphasis in original)). This argument misses the mark.

First, the moving brief explicitly recognizes birth certificates' role as "breeder documents" used to establish identities for fraudulent purposes. (Df. Br. 18). Defendants specifically highlighted the importance of ensuring accurate birth certificates to prevent identity fraud. (Df. Br. 19-20).

Second, there is no material factual dispute here. Defendants accept the allegation that birth certificates are used for identification purposes as true for the purposes of this motion. The issue raised by the motion to dismiss is a legal one, premised upon a clear understanding of the information that birth certificates actually record. Plaintiff wrongly assumes that birth certificates are proof of an individual's gender identity. They are not. As explained, birth certificates are only proof of an individual's physical features, initially ascertained at birth. That birth certificates are used for identification purposes is thus immaterial to Plaintiff's claim that she is being denied access to an "accurate" birth certificate. The court should reject Plaintiff's attempt to manufacture a factual dispute.

Third, Plaintiff's reliance upon an Office of Vital Statistics form that uses the terms "gender" and "sex" interchangeably is specious. (Pl. Br. 11). In setting forth this argument Plaintiff mischaracterizes Defendants' position. According to Plaintiff:

Defendants argue that because the birth certificate form attached to Defendant Arrisi's Certification has only a check box for "sex," not gender, that "sex" therefore "necessarily refers only to external anatomical attributes" and, inferentially, that the box can't be changed until after sex reassignment surgery has been completed.

[Pl. Br. 11].

This passage distorts the moving brief. Defendants never relied upon mere terminology as proof that birth records only record physical sex. Rather, as Plaintiff acknowledges, a child's anatomical birth sex is ascertainable at birth, whereas a child's gender identity is not. (Compl. ¶ 34; Df. Br. 13); see also Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ., 97 F. Supp. 3d 657, 673 n. 15 (W.D. Pa. 2015), appeal dismissed (Mar. 30, 2016). This is true regardless of the technical terms used on the birth certificate. It undisputed that New Jersey birth certificates contain a description of physical anatomy, but do not contain any information regarding gender identity, as such information is simply not ascertainable at birth.

It is Plaintiff who attempts to swerve the issues by relying upon semantics. She argues that because an Office of Vital Statistics document mistakenly uses the term "gender" rather than "sex" on one occasion, this somehow creates an issue of fact regarding whether birth certificates record gender identity. (Pl. Br. 11). But she admits elsewhere that she is not challenging the

fact that birth certificates record a child's physical, anatomical attributes at birth. (Pl. Br. 10). The Office's one-time misuse of terms does not change the unassailable fact that birth certificates describe physical attributes, not gender identity.

Further, the very form cited by Plaintiff is entitled "Certificate of Sex Reassignment Via Surgical Procedure." (Compl. Ex. E) (emphasis added). It is impossible to modify gender identity via surgery. Therefore, it cannot reasonably be suggested that this form contains any reference to gender identity.

N.J.S.A. 26:8-40.12 places no impediment upon trans individuals who seek "accurate" birth certificates, because birth certificates simply do not say anything, one way or the other, regarding an individual's gender identity. Therefore, N.J.S.A. 26:8-40.12 does not implicate a fundamental right.

POINT II

**PLAINTIFF'S REFERENCES TO DRIVER'S LICENSE AND
PASSPORT REQUIREMENTS UNDERSCORE THAT N.J.S.A.
26:8-40.12 BURDENS NO FUNDAMENTAL RIGHT.**

Plaintiff attempts to demonstrate that the reason her birth certificate is a "crucial document for identification purpose" is because it can be used to obtain a State of New Jersey driver's license and a passport from the federal government. (Pl. Br. 5-6). While Defendants do not dispute that birth certificates are used for identification purposes, Plaintiff's reference to driver's licenses and passports strengthens Defendants' argument that

N.J.S.A. 26:8-40.12 does not burden or impede the Plaintiff in any way that could possibly affect a fundamental right.

According to the Complaint, the State of New Jersey does not require sexual reassignment surgery to change a gender marker on a driver's license. (Compl. ¶ 56). Nor does the federal government require proof of surgery to change the gender designation on a passport. (Compl. ¶ 54). By Plaintiff's own admission, she is free to obtain a driver's license and a passport without undergoing surgery to change her sex, and without on-demand access to a modified "gender-correct" birth certificate from Defendants. The Complaint's allegations and Plaintiff's own arguments thus undermine her substantive due process claim entirely. N.J.S.A. 26:8-40.12 does not impede or burden Plaintiff's access to identification documents, and thus burdens no fundamental right.

POINT III

PLAINTIFF HAS CONCEDED THAT N.J.S.A. 26:8-40.12 IS JUSTIFIED BY, AT THE VERY LEAST, A RATIONAL BASIS.

Plaintiff's opposition brief does not attempt to counter Defendants' well-supported argument that N.J.S.A. 26:8-40.12 furthers the legitimate state interest of ensuring accurate vital records. In fact, Plaintiff admits that "[t]he Complaint neither raises nor challenges the proposition that the State of New Jersey may have an interest in ensuring the correct anatomical sexual

organ designation at the time of birth on a birth certificate.” (Pl. Br. 10).

Plaintiff attempts to confuse the issue by arguing that birth records, in addition to accurately recording the birth, also serve as identification documents. (Pl. Br. 10). But for a statute to survive rational basis scrutiny, it need only be supported by one conceivable rational basis. See Madden v. Commonwealth of Kentucky, 309 U.S. 83, 88 (1940) (holding that plaintiff must negate “every conceivable basis which might support” legislation.) (emphasis added). As it is undisputed that N.J.S.A. 26:8-40.12 is a rational way to further the legitimate State interest in ensuring accurate vital records and preventing identity fraud, the statute withstands constitutional scrutiny.

POINT IV

**DIFFERING VERSIONS OF GENUINE BIRTH
CERTIFICATES CAN BE USED IN IDENTITY FRAUD
SCHEMES.**

Plaintiff seeks to minimize the State’s interest in ensuring the accuracy of birth certificates by arguing that requiring SRS does not combat fraud. (Pl. Br. 22). However, as explained in the moving brief, the most frequent birth certificate fraud is by individuals holding genuine birth certificates. (Df. Br. 18). If an individual could obtain a birth certificate with different physical identifying information upon demand and without proof, as Plaintiff seeks to do here, the State would be forced to create

multiple, conflicting versions of otherwise genuine birth certificates for one individual. These different versions could then be used by that individual, or sold to imposters, to establish fraudulent identities. Because birth certificates are foundational identification documents, preventing such fraud by cross referencing with other identifying documents would not be feasible.

The State has a powerful interest in preempting such fraudulent schemes by requiring proof of changes before modifying birth certificates. Cf. N.J.S.A. 26:8-40 (requiring proof of marriage before permitting change of surname of child born out of wedlock); N.J.S.A. 26:8-49 (Registrar may amend birth certificates upon submission of substantiating documentary proof); N.J.S.A. 26:8-53 (Registrar may refuse any correction or amendment in the absence of adequate substantiating documentary evidence).

POINT V

THE COMPLAINT FAILS TO ADEQUATELY STATE A PROCEDURAL DUE PROCESS CLAIM.

Plaintiff's procedural due process claim is premised upon the notion that N.J.S.A. 26:8-40.12 places a barrier to her obtaining a "gender-correct birth certificate." (Pl. Br. 16). This argument fails for two reasons.

First, there is no property interest in an "accurate" birth certificate. (Df. Br. 12-13). Plaintiff did not present a counter-argument to this point.

And second, Plaintiff's premise that the statute places a barrier to her obtaining a "gender-correct" birth certificate is simply false, as discussed previously, because birth certificates say nothing regarding gender identity. As Plaintiff's procedural due process claim is fatally flawed, it should be dismissed.

POINT VI

PLAINTIFF ASSERTS FLAWED EQUAL PROTECTION THEORIES.

In an attempt to salvage her Equal Protection claims, Plaintiff sets forth two unavailing theories that were not mentioned in the Complaint.

First, Plaintiff argues that N.J.S.A. 26:8-40.12 is "facially discriminatory" because, "on its face, [the statute] is limited solely to transgender individuals with Gender Dysphoria." (Pl. Br. 16-17). Not so. The statute mentions neither trans individuals nor individuals with Gender Dysphoria, and thus cannot constitute facial discrimination.

Second, Plaintiff argues that the statute is "facially neutral yet designed to impose different burdens on transgender individuals and that, even if applied evenhandedly, does in fact have the intended adverse effect." (Pl. Br. 17). To state a claim of intentional discrimination by discriminatory purpose for a facially neutral policy, a plaintiff is required to plead facts showing that "the actions of ... officials (1) had a discriminatory effect and

(2) were motivated by a discriminatory purpose." Doe ex rel. Doe v. Lower Merion Sch. Dist., 665 F.3d 524, 549 (3d Cir. 2011) (citation omitted). "Proof of [] discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977).

The Supreme Court has "consistently upheld statutes where gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances." Michael M. v. Superior Court of Sonoma Cty., 450 U.S. 464, 469 (1981). If the difference in treatment is the result of a "demonstrable" difference in situation, the statute does not contain an impermissible classification. Parham v. Hughes, 441 U.S. 347, 355 (1979). Here, the statute has no discriminatory effect because it does not treat Jane Doe differently from similarly-situated individuals. The statute is premised upon actual anatomical differences between men and women, and ensures that the birth certificate's physical sex description remains accurate. (Df. Br. 22). The statute does not therefore constitute invidious discrimination. (Df. Br. 23).

Moreover, the Complaint fails to adequately allege facts stating that the law was "motivated by a discriminatory purpose." Doe ex rel. Doe, supra, at 549. Indeed, as explained in the moving brief, the law was passed to benefit transgender individuals who

undergo SRS. Prior to the law's passage, an individual who underwent SRS could only obtain a birth certificate reading "female, corrected from male," or vice versa. (Df. Br. 4-5). The law was passed to ensure that updated birth certificates accurately reflect the new sex without reflecting the change. Ibid. Thus, the law was not passed with discriminatory intent. Nor is an inference of discriminatory purpose possible from the text of the law, as requiring proof of SRS is the only way for the Office of Vital Statistics to ensure that the physical anatomical description remains accurate before issuing a modified birth certificate.

Because the statute does not implicate the Equal Protection Clause, the question of whether transgender is a suspect classification need not be reached, although "neither the United States Supreme Court nor the Third Circuit Court of Appeals has recognized transgender as a suspect classification under the Equal Protection Clause." Johnston, supra, 97 F. Supp. 3d at 673 n. 15.

POINT VII

THE COMPLAINT FAILS TO ADEQUATELY ALLEGE A CLAIM UNDER THE AMERICANS WITH DISABILITIES ACT.

The Americans with Disabilities Act (ADA) expressly excludes transsexualism, "gender identity disorders not resulting from physical impairments," and "other sexual behavior disorders" from the statute's definition of "disability." 42 U.S.C. § 12211. Plaintiff, who is diagnosed with Gender Dysphoria (GD), is

accordingly exempted from the ADA's coverage. Plaintiff's argues that GD is not a "Gender Identity Disorder," and is therefore not covered by the exemption. (Pl. Br. 23-24). Plaintiff is mistaken.

The Complaint describes GD as "[t]he distress caused to a trans person by being an outcast," and cites the Diagnostic and Statistical Manual of Mental Disorders, 5th Edition ("DSM-V") for the proposition that GD is "associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning." (Compl. ¶¶ 38-40). However, the ADA was enacted in 1990. 42 U.S.C. § 12101. At that time, the Diagnostics Standards Manual III R (DSM-III-R) was in effect. According to the DSM-III-R, "transsexualism" is a "severe" gender identity "disturbance," in which an individual experiences "a persistent discomfort and sense of inappropriateness about one's assigned sex in a person who has reached puberty." Phillips v. Michigan Dep't of Corr., 731 F. Supp. 792, 796 (W.D. Mich. 1990), aff'd, 932 F.2d 969 (6th Cir. 1991).

The DSM-III-R definition of transsexualism and the definition of GD set forth in the Complaint are remarkably similar, as both are premised upon the stress and discomfort caused by the incongruence between birth sex and gender identity. Since the ADA expressly exempts transsexualism, Congress must have intended to

exempt GD from the ADA, as the definitions are so similar.² See also Johnston, supra, 97 F. Supp. 3d at 662 n.4. Notably, the exemption of transsexualism is independent of whether or not the disability is caused by a physical impairment.

Plaintiff argues in the alternative that if the ADA does exempt GD, the ADA is unconstitutional. (Pl. Br. 24). This argument need not be addressed as no claim against the ADA was raised in the Complaint. Nonetheless, the Complaint fails to adequately state an ADA claim. 42 U.S.C. § 12132. Plaintiff alleges that N.J.S.A. 26:8-40.12 "refuses accurate identification documents, a benefit provided to those individuals who are not trans people diagnosed with GD." (Compl. ¶ 65). As explained, Plaintiff's conception of "accurate" is mistaken. N.J.S.A. 26:8-40.12 does not deny anyone access to an accurate birth certificate based upon trans status. The Complaint states no cognizable ADA claim because the statute does not discriminate due to disability.

²This conclusion is in accord with other courts that have passed upon this issue. See Gulley-Fernandez v. Wisconsin Dep't of Corr., No. 15-CV-995, 2015 WL 7777997, at *3 (E.D. Wis. Dec. 1, 2015) (plaintiff, who was recommended to a Gender Dysphoria specialist, could not assert ADA claim due to the gender identity disorder exemption); Michaels v. Akal Sec., Inc., No. 09-CV-01300-ZLW-CBS, 2010 WL 2573988, at *6 (D. Colo. June 24, 2010) (noting that Gender Dysphoria is "specifically exempted as a disability" under the Rehabilitation Act, which exempts any "gender identity disorder"); Oiler v. Winn-Dixie Louisiana, Inc., No. CIV. A. 00-3114, 2002 WL 31098541, at *3 n. 47 (E.D. La. Sept. 16, 2002) (noting *in dicta* that Plaintiff did not assert ADA claim because Gender Dysphoria is specifically exempted).

POINT VIII

**PLAINTIFF CONCEDES THAT DEFENDANTS ARE IMMUNE
FROM ANY CLAIMS FOR MONETARY DAMAGES.**

Defendants argued that any claims for monetary damages asserted in the Complaint should be dismissed on sovereign immunity grounds. (Df. Br. 28). In response, Plaintiff ignored Defendants' argument that the monetary claims should be dismissed. Plaintiff instead argued that the Defendants are not immune from claims seeking injunctive and declaratory relief, even though Defendants never argued otherwise. (Pl. Br. 25-26). To the extent that the Complaint asserts claims seeking monetary damages, those claims should be dismissed for the reasons set forth in the moving brief.³

CONCLUSION

The court should dismiss the Complaint for the foregoing reasons and for the reasons set forth in the moving brief.

Respectfully submitted,

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By: s/Francesco Ferrantelli Jr. _____
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Date: March 13, 2017

³ Although the ADA allows suits for money damages to proceed against the State in certain circumstances, it does so only for "actual violations" of the Fourteenth Amendment, which are not properly alleged here. United States v. Georgia, 546 U.S. 151, 158 (2006); 42 U.S.C. § 12202.