

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Newport News Division

GAVIN GRIMM,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Case No. 4:15-cv-54
	)	
GLOUCESTER COUNTY SCHOOL	)	
BOARD,	)	
	)	
Defendant.	)	
_____	)	

PLAINTIFF'S NOTICE OF SUPPLEMENTAL AUTHORITY
IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Plaintiff Gavin Grimm respectfully submits a copy of the recent decision *F.V. v. Barron*, No. 1:17-CV-00170-CWD, ECF No. 39 (D. Idaho. Mar. 5, 2018) (attached as Exhibit A) as supplemental authority in opposition to Defendant's Amended Motion to Dismiss the Amended Complaint, ECF No. 135.

The decision provides further support for Plaintiff's arguments that discrimination against transgender individuals is subject to heightened scrutiny under the Equal Protection Clause because transgender status is a suspect or quasi-suspect classification, *see F.V. slip op.* at 22-25, and because discrimination based on transgender status is a form of discrimination on the basis of sex, *id.* at 20-22.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION
OF VIRGINIA FOUNDATION, INC.

/s/

Gail Deady (VSB No. 82035)
701 E. Franklin Street, Suite 1412
Richmond, Virginia 23219
Phone: (804) 644-8080
Fax: (804) 649-2733
gdeady@acluva.org

* Admitted pro hac vice.

Counsel for Plaintiff Gavin Grimm

Dated: March 6, 2018

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

Joshua A. Block*

Leslie Cooper*
125 Broad Street, 18th Floor
New York, New York 10004
Phone: (212) 549-2500
Fax: (212) 549-2650
jblock@aclu.org
lcooper@aclu.org

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of March, 2018, I filed the foregoing Notice of Supplemental Authority with the Clerk of the Court using the CM/ECF system, which will automatically serve electronic copies upon all counsel of record.

/s/

Gail Deady (VSB No. 82035)
American Civil Liberties Union
Foundation of Virginia, Inc.
701 E. Franklin Street, Suite 1412
Richmond, Virginia 23219
Phone: (804) 644-8080
Fax: (804) 649-2733
gdeady@acluva.org

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

F.V. and DANI MARTIN,

Plaintiffs,

v.

RUSSELL BARRON,¹ in his official
capacity as Director of the Idaho
Department of Health and Welfare;
ELKE SHAW-TULLOCH, in her official
capacity as Administrator of the Division
of Public Health for the Idaho
Department of Health and Welfare; and
JAMES AYDELOTTE, in his official
capacity as State Registrar and Chief of
the Bureau of Vital Records and Health
Statistics,

Defendants.

Case No. 1:17-CV-00170-CWD

**MEMORANDUM DECISION AND
ORDER (DKT. 28)**

INTRODUCTION

Transgender individuals born in Idaho cannot obtain a birth certificate with the listed sex matching their gender identity. The Idaho Department of Health and Welfare (IDHW) interprets state law to bar changes to the listed sex unless an applicant can show

¹ Russell Barron is now the Director of the Idaho Department of Health and Welfare. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Russell Barron is substituted for Richard Armstrong as a defendant in this suit.

there was an error of identification at birth. Therefore, as a policy, IDHW categorically and automatically denies applications to change the listed sex for any other reason. The questions presented to the Court are whether IDHW's interpretation, as applied, violates the Equal Protection and Due Process clauses of the Fourteenth Amendment to the Constitution of the United States, and whether it impermissibly compels speech in violation of the First Amendment.

As a preliminary matter, the Court notes the rare posture of the case. Plaintiffs, two transgender women born in Idaho, bring this action under 42 U.S.C. § 1983, asking the Court for a declaration that IDHW's policy violates their constitutional rights and the rights of others similarly situated. Plaintiffs request that the Court apply heightened scrutiny review, and declare that IDHW's policy violates the Equal Protection Clause. They also seek a ruling that the policy infringes upon due process rights to informational privacy, individual liberty, autonomy, and dignity. Plaintiffs request further that the Court find that IDHW's policy impermissibly compels speech in violation of the First Amendment to the Constitution. Plaintiffs ask the Court to enjoin Defendants, and others subject to the injunction, from enforcing the policy.

In turn, Defendants do not defend the constitutionality of the policy. Instead, *they admit* it is unconstitutional. Specifically, that it violates the Equal Protection Clause, failing minimum scrutiny review because "a prohibition against changing the sex designation on the birth certificate of a transgender individual who has undergone clinically appropriate treatment to permanently change his or her sex" bears no rational relationship to a conceivable government interest. (Ans. to First Am. Compl., Dkt. 19 at

2-3 ¶ 5.) Defendants assert that, once they have an order from the Court in hand, they will create a new rule permitting transgender individuals to change the sex listed on their birth certificates. (Oral Argument at 9:50, *F.V. v. Armstrong et al.*, No. 1:17-CV-00170-CWD (February 1, 2018).) Defendants indicate also that the new rule will include a provision that any revision history related to changes to the listed sex or name changes will not be marked on the reissued birth certificates of transgender individuals. Defendants further indicate they cannot proceed to create a rule until they receive a court order (Oral Argument at 9:51, *F.V. v. Armstrong et al.*, No. 1:17-CV-00170-CWD (February 1, 2018).)

Defendants assert that, because they have made these concessions, the Court should exercise judicial restraint and decide the Plaintiffs’ motion on the narrowest ground—that the current policy, as applied, is not rationally related to a legitimate government interest, violates the Plaintiffs’ equal protection rights, and is thus unconstitutional under minimum scrutiny review.

Plaintiffs counter that, in the face of pervasive government discrimination against transgender individuals, the Court has a constitutional duty and inherent authority to define the level of scrutiny that should be applied to their equal protection claim, and should determine favorable judgment is warranted on the basis of the other constitutional claims—in addition to fashioning a remedy mandating equal treatment.

The Court will not reach Plaintiffs’ Due Process or First Amendment claims for the following reasons. First, the Court finds resolution of the Equal Protection Clause claim captures “the essence of the right in a more accurate and comprehensive way” than

the Due Process Clause, “even as the two Clauses may converge in the identification and definition of the right.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015). The substance of Plaintiffs’ First Amendment claim is that if a birth certificate is reissued to a transgender individual, and the reissued birth certificate includes the revision history, it will impermissibly compel speech—i.e. it will force an individual to disclose their transgender status when they would not ordinarily do so. Given Defendants’ concession and agreement, the compelled speech concern falls away, and the merits of this claim need not be addressed by the Court.

After careful consideration, the Court finds IDHW’s policy of categorically and automatically denying applications submitted by transgender individuals to change the sex listed on their birth certificates is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. The Court finds further that any constitutionally sound rule must not include the revision history as to sex or name to avoid impermissibly compelling speech and furthering the harms at issue. The Court notes also that the new rule should withstand heightened scrutiny review to fall within the contours of equal protection law. To reasonably assure the rule and remedy comply with such existing law, the Court will discuss the same after presenting the background, introducing the parties, and outlining the standard of review.

BACKGROUND

1. Idaho Vital Statistics Laws

States are responsible for the development and implementation of laws related to vital events such as recording births and deaths. However, most states, including Idaho,

use the Model State Vital Statistics Act published by the Centers for Disease Control and Prevention as a basis for state law.² The Idaho Vital Statistics Act (Act), Title 39, Chapter 2 of the Idaho Code, authorizes the Idaho Board of Health and Welfare (Board) to propose rules to carry out its provisions related to vital statistics—the Vital Statistics Rules (Rules). IDAPA 16.02.08.000. IDHW is the state agency responsible for enforcement of the Act and the Rules, (together, vital statistics laws) for providing the official interpretation of such laws, and for developing temporary and final proposed rules. State legislative approval is necessary to enact final proposed rules into law.

Idaho’s vital statistics laws require that all amended birth certificates be marked as “amended,” including a record of the nature of the change, unless the change is made under one of the following circumstances: (1) minor corrections made within one year after the date of the event necessitating the correction; (2) voluntary acknowledgements of paternity and non-paternity; and (3) for changes to name and paternal and maternal information in instances of adoption. Idaho Code §§ 39-250, 39-258-59; IDAPA 16.02.08.201. In these circumstances, the vital statistics laws require the amendments not be marked or noted on the birth certificate.³ A catch-all provision applies to any

² See *Model State Vital Statistics Act and Model State Vital Statistics Regulations*, 2011 Revision, Centers for Disease Control and Prevention. Idaho’s Vital Statistic Act is based in large part on the 1992 Revision of the model rules.

³ For example: Idaho Code § 7-1106 allows a biological father to establish paternity via an affidavit of paternity. The affidavit must be signed by both the father and the birth mother. IDAPA 16.02.08.201.05.a. If the child’s birth certificate lists a different person as the father, a court order is required to change the father’s name. IDAPA 16.02.08.201.05.b. The reissued, amended birth certificate must not be marked amended or include any record of the paternity change. I.C. § 39-250(2), (3); IDAPA 16.02.08.201.05.c.

amendment not specifically provided for in the vital statistics laws. IDAPA

16.02.08.201.08. Notably, amendments made under the catch-all provision must be described on the birth certificate.

All applications to amend birth certificates are reviewed by the state registrar. The registrar's determination must serve the objectives of the vital statistics laws and the best interests of the public. IDAPA 16.02.08.201(e). When applications are denied, an individual has a right to petition a court for an order requiring the registrar make the requested amendment. Idaho Code § 39-250(5).

As explained above, IDHW interprets Idaho vital statistics law to prohibit changes to the listed sex unless there was an error in recording the sex at birth. Notably, IDHW asserts that Idaho birth certificates reflect the “sex” of a person at birth and do not contain a “gender marker” designation. (Ans. to First Am. Compl., Dkt. 23 at 2 ¶¶ 3-4.) From this interpretation comes IDHW's policy of automatically and categorically denying applications made by transgender individuals for the purpose of changing the listed sex to reflect their gender identity.⁴

2. Biological Sex, Gender Identity, Transition

There is scientific consensus that biological sex is determined by numerous elements, which can include chromosomal composition, internal reproductive organs,

⁴ Idaho counts as one of only four remaining states that do not permit transgender individuals to change the sex listed on their birth certificate. The other three states are Kansas, Ohio, and Tennessee. (Pl.s' Mem. of Law in Support of Mot. for Summ. Jgmt., Dkt. 28-1 at 19 n. 4.)

external genitalia, hormone prevalence, and brain structure.⁵ Sex determinations made at birth are most often based on the observation of external genitalia alone. World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* at 97 (7th Version, 2011) (hereinafter “WPATH *Standards of Care*”). For most people, this determination aligns with gender identity and gender expression. *Id.* Of importance here, however, are instances where it does not.

Gender identity, also known as core gender, is the intrinsic sense of being male, female, or an alternative gender. WPATH *Standards of Care* at 96. Transgender is an adjective used to designate “a person whose identity does not confirm unambiguously to conventional notions of male or female gender.”⁶ Put another way, transgender is an adjective used to describe a person who has a gender identity that differs, in varying degrees, from the sex observed and assigned at birth. WPATH *Standards of Care* at 97.

Transgender individuals often suffer emotional distress in the process of recognizing and responding to the complex social and personal scenarios that result because their gender identity does not align with birth-assigned sex. (Dkt. 28-5 at 8; See e.g., American Medical Association Resolution 122 (A-08) at 1 (2008)). A clinical

⁵ The American Psychology Association defines sex as “one’s biological status as either male or female” that “is associated primarily with physical attributes such as chromosomes, hormone prevalence, and external and internal anatomy.” Transgender People, Gender Identity and Gender Expression, American Psychological Association (2018), <http://www.apa.org/topics/lgbt/transgender.aspx> (last visited Mar. 3, 2018).

⁶ *Transgender*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/247649?redirectedFrom=transgender#eid> (last visited Feb. 7. 2018).

medical condition, known as gender dysphoria, can result from such distress.⁷ *Id.*

Symptoms include anxiety and depression, suicidality, and other serious mental health issues. *Id.*; WPATH *Standards of Care* at 25.

Transgender individuals, especially those suffering from gender dysphoria, often proceed through a process known as transition, defined as follows:

Transition is a period of time when individuals change from the gender role associated with their sex assigned at birth to a different gender role. For many people, this involves learning how to live socially in another gender role; for others this means finding a gender role and expression that is most comfortable for them. Transition may or may not include feminization or masculinization of the body through hormones or other medical procedures. The nature and duration of transition is variable and individualized.

WPATH *Standards of Care* at 97.

In other words, transition is the process where a person works to bring their lived experience and outer appearance into alignment with their gender identity. Transition can include medical treatments, such as hormone therapy and surgery, but is often limited to

⁷ The American Psychiatric Association describes gender dysphoria as follows:

People with gender dysphoria may often experience significant distress and/or problems functioning associated with this conflict between the way they feel and think of themselves (referred to as experienced or expressed gender) and their physical or assigned gender.

The gender conflict affects people in different ways. It can change the way a person wants to express their gender and can influence behavior, dress and self-image. Some people may cross-dress, some may want to socially transition, others may want to medically transition with sex-change surgery and/or hormone treatment. Socially transitioning primarily involves transitioning into the affirmed gender's pronouns and bathrooms.

Gender Dysphoria, American Psychiatric Association, Physician review by Ranna Parekh, M.D., M.P.H. (February 2016), <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> (last visited Mar. 5, 2018).

social transition. WPATH *Standards of Care* at 71, 97. Not all transgender people choose to undergo surgery as a part of the transition process. This is due to numerous potential factors, including whether surgery is medically necessary, and personal and financial factors such as lack of insurance coverage. (See First Am. Compl., Dkt. 19 at 6 ¶ 24; see also Ans. to First Am. Compl., Dkt. 19 at 5 ¶ 24.)

Social transition includes changes in clothing, name, pronouns, hairstyle, and identity documents to reflect one's gender identity. *Id.* at 9-10. "A complete transition is one in which a person attains a sense of lasting personal comfort with their gendered self, thus maximizing overall health, well-being, and personal safety." (Decl. of Dr. Randi Ettner, Dkt. 28-5 at 10.)

3. Discrimination Against Transgender Individuals

Mismatches between identification documents and outward gender presentation can create risks to the health and safety of transgender people. Transgender people who present mismatched identification are verbally harassed, physically assaulted, denied service or benefits, or asked to leave the premises. James et al., *The Report of the 2015 U.S. Transgender Survey*, Washington D.C., National Center for Transgender Equality at 7 (2016) (hereinafter *Transgender Survey*).⁸ According to the Federal Bureau of

⁸ Defendants note the survey "acknowledges that respondents in the study 'were not randomly sampled and the actual population characteristics of transgender people in the U.S. are not known. Therefore, it is not appropriate to generalize the findings in this study to all transgender people.'" (Dkt. 19-6). The Court similarly acknowledges the limitations of the survey. Yet, the survey is also "the largest survey examining the experiences of transgender people in the United States, with 27,715 respondents from all fifty states ..." (*Transgender Survey* at 4.) Thus, the Court views the statistics presented in the report as a reliable indicator of harassment and violence across the population.

Investigation, 1.7 percent of all hate crimes reported by law enforcement agencies in the United States in 2015 were motivated by gender-identity bias. *2015 Hate Crime Statistics*, FBI, Criminal Justice Information Services Division, https://ucr.fbi.gov/hate-crime/2015/topic-pages/victims_final.pdf (last visited Mar. 5, 2018).

Statistics regarding the ongoing discrimination transgender individuals face highlight why involuntary disclosure of transgender status creates these risks. For instance, nearly twenty-five percent of surveyed college students, when perceived as a transgender person, were verbally, physically, or sexually assaulted in 2015. *Transgender Survey* at 9. This figure tracks the percentage of workers reporting mistreatment in the workplace due to gender identity. *Id.* at 10. More than seventy-five percent of transgender workers take steps to avoid such mistreatment at work by hiding or delaying their gender transition, or by quitting their job. *Id.* at 11.

Across all environments, almost fifty percent of transgender people surveyed for the 2015 report responded that they had been verbally harassed due to their gender identity. *Id.* at 13. Nearly one in ten reported being physically assaulted because of their gender identity. *Id.* Notably, the reported lifetime suicide attempt rate for transgender people is nearly nine times the rate of the United States population on average. *Id.* at 8.

4. The Plaintiffs

Plaintiffs are two transgender women who were born in Idaho. Each Plaintiff has undergone the process of transition but is unable to obtain a birth certificate that reflects her gender identity.

F.V. is a 28-year-old woman born in Idaho. She is a transgender person who was assigned the sex of male at birth. Although F.V. states that she knew from approximately age 6 she was female, she began to live openly as a female when she was 15 years old. She has lived as a woman since that time, and asserts that doing so has been essential to her sense of self. F.V. relates that she “cannot imagine living life as a man” because she is not a man, and would be living a lie to try to do so. (Decl. of F.V., Dkt. 28-3 at 2.)

F.V. has taken steps, both medically and socially, to bring her body and expression of gender in line with her female gender identity.⁹ Her social transition has included legally changing her name from a traditionally male name to a traditionally female one, and changing her name and gender on her driver’s license, passport, and in her social security records. On March 17, 2017, F.V. contacted the Idaho Bureau of Vital Records and Health Statistics to inquire about changing the sex listed on her birth certificate. She was informed that IDHW does not consider such applications.

F.V. asserts that living with a birth certificate declaring she is male is a permanent and painful reminder that Idaho does not recognize her as she is—as a woman. Beyond this, she states that presenting an identity document that conflicts with her gender identity is both humiliating and dangerous: it puts her at risk of violence by disclosing against her will and intentions that she is a transgender individual.

⁹ Defendants “admit that they are aware of no rational basis justifying a prohibition against changing the sex designation on the birth certificate of a transgender person who has undergone clinically appropriate treatment to permanently change his or her sex.” (Ans. to First Am. Compl., Dkt. 23 at 2-3.) Defendants concede also, “that no rational basis justifies treating transgender persons like Plaintiffs differently than other persons.” (Dkt. 23 ¶ 5.)

Dani Martin (Dani) is a 31-year-old woman born in Idaho. Dani is a transgender person who was assigned the sex of male at birth. Like F.V., Dani states that she knew from a young age she was female. However, fear of rejection and bullying prevented her from coming out when she was younger. With the support of her spouse and her family, Dani began to transition in 2014. She has lived her life openly as a woman since that time.

Like F.V., Dani has taken steps, both medically and socially, to bring her body and expression of gender in line with her female identity. Her social transition has included legally changing her name from a traditionally male name to a traditionally female one, and changing her name and gender on her driver's license and in her social security records. Like F.V., Dani has been unable to change the gender on her birth certificate due to Idaho's prohibitory policy.

The mismatch between Dani's gender identity and the sex listed on her birth certificate has exposed her to harassment and embarrassment. She asserts the mismatch has also prevented her from making the change in other important records—perpetuating instances where she is forced to disclose her transgender status, face embarrassment, harassment, and potential physical violence.

5. The Defendants

The three Defendants are employees of IDHW. As supervisors and custodians of records, they are each variously responsible for the implementation, enforcement, development, and interpretation of Idaho's vital statistics laws.

Defendant Russell Barron is the Director of IDHW. He supervises the activities of IDHW, including the enforcement of the Vital Statistics Act, Vital Statistics Rules, and the agency's policies and interpretations of such laws.

Defendant Elke Shaw-Tullock is the Administrator of IDHW's Division of Public Health. The division includes the Bureau of Vital Records and Health Statistics. She supervises activities of the division, including enforcement of the Vital Statistics Act, Vital Statistics Rules, and the agency's policies and interpretations of such laws.

Defendant James Aydelotte is the State Registrar and Bureau Chief of the Bureau of Vital Records and Health Statistics at IDHW. He is the official custodian of vital records for the State of Idaho and also enforces the Vital Statistics Act, Vital Statistics Rules, and the agency's policies and interpretations of such laws.

STANDARD OF REVIEW

1. Standard of Review for Summary Judgment Motions

Summary judgment is appropriate where a party can show, as to any claim or defense, "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). One of the principal purposes of summary judgment "is to isolate and dispose of factually unsupported claims...." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). It is "not a disfavored procedural shortcut," but is instead a tool to prevent factually insufficient claims or defenses "from going to trial with the attendant unwarranted consumption of public and private resources." *Id.* at 327.

“The moving party is entitled to summary judgment if that party shows that each issue of material fact is not or cannot be disputed. To show the material facts are not in dispute, a party may cite to particular parts of materials in the record, or show that the materials cited do not establish the presence of a genuine dispute, or that the adverse party is unable to produce admissible evidence to support the fact.” *Ransier v. United States*, No. 2:12-CV-00538-EJL, 2014 WL 5305852, at *2 (D. Idaho Oct. 15, 2014); Fed. R. Civ. P. 56(c)(1)(A) & (B).

Federal Rule of Civil Procedure 56(e)(3) authorizes a court to grant summary judgment for the moving party “if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it. The existence of a scintilla of evidence in support of the non-moving party’s position is insufficient. Rather, ‘there must be evidence on which the jury could reasonably find for the [non-moving party].’” *Ransier* at *2 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)).

2. Standard for Permanent Injunction

To prevail on a motion for a permanent injunction, plaintiffs must demonstrate: (1) they have suffered an irreparable injury or harm; (2) remedies available at law are inadequate to compensate for such injury or harm; (3) considering the balance of hardships between the parties, an equitable remedy is warranted; and (4) public interest is not disserved by a permanent injunction. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

When a court grants injunctive relief, it must tailor the remedy to the specific harm shown by plaintiffs. *Hawaii v. Trump*, 859 F.3d 741, 785 (9th Cir.), *cert. granted sub nom. Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 198 L. Ed. 2d 643 (2017), and *cert. granted, judgment vacated*, 138 S. Ct. 377 (2017), and *vacated*, 874 F.3d 1112 (9th Cir. 2017); *Califano v. Tamasaki*, 422 U.S. 682, 702 (1979). The scope of the remedy fashioned by a court is dictated by the extent of the violation established by the plaintiffs. 859 F.3d 741, 785. Aside from these parameters, a court has significant discretion in fashioning an appropriate and proportionate remedy. *Id.*

LEGAL FRAMEWORK

1. The Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment requires that all similarly situated people be treated alike. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). Equal protection requirements restrict state legislative action that is inconsistent with bedrock constitutional guarantees, such as equality in treatment. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015). An equal protection claim is established when plaintiffs show they were treated differently than other similarly situated people. *City of Cleburne* at 439-440. Yet, states are given significant leeway to establish laws to effectively govern citizens and remedy societal ills. *Romer v. Evans*, 517 U.S. 620, 631 (1996). Because of this, successful equal protection claims additionally require plaintiffs to show the difference in treatment was the result of intentional or purposeful discrimination. *Stone v. Trump*, No. CV MJG-17-2459, 2017 WL 5589122, at *15 (D. Md. Nov. 21, 2017).

In this matter, Plaintiffs, transgender individuals born in Idaho, have adequately alleged they were treated differently from non-transgender people born in Idaho. IDHW practices a policy of automatically and categorically denying applications made by transgender people to amend the birth-assigned sex on their birth certificates to align with their gender identity. Plaintiff F.V. contacted IDHW to inquire about amending her birth certificate to align with her gender identity. IDHW informed F.V., consistent with its policy, that it does not consider applications made on that basis. Plaintiff Dani Martin's experience was the same. The IDHW Defendants provide no justification for the policy.

Yet, in turn, IDHW permits some classes of people, adoptive parents for instance, to make amendments to birth certificates without record of the amendment on the reissued certificate. IDHW has similar laws and policies related to the change of paternal information. These laws give certain people access to birth certificates that accurately reflect who they are, while denying transgender people, as a class, access to birth certificates that accurately reflect their gender identity. Therefore, as Defendants concede, Plaintiffs' equal protection claims are valid.

The Supreme Court of the United States has set forth a framework of tiered review for equal protection claims. *Latta v. Otter*, 19 F. Supp. 3d 1054, 1073 (D. Idaho), *aff'd*, 771 F.3d 456 (9th Cir. 2014). Each tier of scrutiny requires a different level of justification for the challenged law. *Id.* The level of scrutiny applied to the law is determined by the type of classification at issue. *Id.* If a law classifies on the basis of a suspect class or a quasi-suspect class, it is subject to heightened scrutiny review—and, depending on the type of suspect classification, such laws are subject to either strict

scrutiny review or intermediate scrutiny review. If a law does not classify on the basis of a suspect or quasi-suspect class, it is subject to minimum scrutiny—commonly called rational basis review. *Heller v. Doe*, 509 U.S. 312, 319–21 (1993).

Therefore, the most stringent level of review is strict scrutiny. The Supreme Court has carefully defined the limits of this level of review. It is applied when laws impermissibly interfere with fundamental rights or to the disadvantage of a suspect class. *Latta*, 19 F. Supp.3d at 1073. Strict scrutiny applies to classifications based on race, alienage, and national origin. IDHW’s policy makes a classification based on transgender status. Therefore, under clear Supreme Court precedent, it does not trigger strict scrutiny review.

In contrast, the most lenient level of scrutiny is rational basis review. This level of review is applied to laws that impose a difference in treatment between groups but do not infringe upon a fundamental right, or target a suspect or quasi-suspect class. *Heller* at 319–21. In such instances, if a court can identify any rational basis supportive of the government’s need for the law, it is upheld. *Id.* In this matter, IDHW Defendants concede no rational basis exists to support the categorical denial of requests to amend sex-assigned birth on the basis of correcting it to match one’s gender identity.

The Court notes the importance and potential implications of restrictions and restraints IDHW may place on the ability of transgender people to apply for and receive approval of applications to change the sex listed on their birth certificates. Because the Court does not have a proposed rule before it, it will not extrapolate on the potential legal ramifications of such restrictions—such topics are not ripe for its consideration.

However, any new rule must not subject one class of people to any more onerous burdens than the burdens placed on others without constitutionally-appropriate justification—for instance, to apply for a change in paternity information the applicant is not required to submit medical evidence, such as DNA confirmation, to prove paternity or non-paternity. Yet, all applicants for name changes are required to obtain a court order—regardless of the reason for the change. (*See supra* note 3 and accompanying text.)

The Court agrees there is no rational basis to support IDHW’s policy. The following facts make this conclusion apparent: (1) IDHW already has a process in place for making amendments to birth certificates, as is evidenced by Idaho’s vital statistics laws; (2) the vital statistics laws make certain that amendments or corrections are kept confidential when they pertain to sensitive personal and potentially private information, such as paternity or adoptive status; and (3) the laws make room for the amendment of any other information on the birth certificate with the proper form of application and evidence.

Thus, under an alternative, constitutionally-sound reading of Idaho’s vital statistics laws, amendments to the listed sex are not only possible, but procedures are in place to facilitate such amendments—and the Act allows the Board to draft a rule that does just that.¹⁰ As such, there is no rational basis for denying transgender individuals birth certificates that reflect their gender identity and IDHW’s policy, as applied, violates the Equal Protection Clause.

¹⁰ Idaho Code §§ 39-241(3); 39-250.

Yet, as explained above, Plaintiffs ask the Court to take a step further to find that IDHW's policy similarly fails to withstand heightened scrutiny, which includes the mid-tier of equal protection review—intermediate scrutiny. Historically, intermediate scrutiny applies to quasi-suspect classifications based on sex and illegitimacy. *Clark v. Jeter*, 486 U.S. 456, 461 (1988). For quasi-suspect classifications to be upheld, the state must show the classification is substantially related to an important governmental objective. “The purpose of this heightened level of scrutiny is to ensure quasi-suspect classifications do not perpetuate unfounded stereotypes or second-class treatment.” *Latta v. Otter*, 19 F. Supp. 3d 1054, 1073 (D. Idaho), *aff'd*, 771 F.3d 456 (9th Cir. 2014) (citing *United States v. Virginia*, 518 U.S. 515, 534 (1996)).

Plaintiffs argue that IDHW's refusal to treat transgender people like others of the same sex, i.e. other males or females, requires intermediate review because such treatment discriminates on the basis of sex or otherwise employs another quasi-suspect classification—transgender status. In other words, Plaintiffs suggest two ways for the Court to conclude that heightened scrutiny applies to government classifications based on transgender status. The first—the Court could find that discrimination based on transgender status is discrimination based on sex or gender. The second—the Court could conclude that transgender status is a suspect classification in and of itself. In either case, Plaintiffs contend IDHW's policy is not substantially related to an important governmental objective and fails intermediate scrutiny review. The merits of both prongs of the Plaintiffs' argument will be discussed in turn.

A. *Discrimination Based on Sex and Gender*

In 1977, the United States Court of Appeals for the Ninth Circuit held rational basis review appropriately applied to classifications based on “transsexual” status, because sex-based discrimination in the context of Title VII included only discrimination based on one’s anatomical gender—not a change in one’s gender or gender identity. *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977). Although the Ninth Circuit has not revisited the question, the reasoning employed in *Holloway* relies on markedly outdated notions of sex and gender that strongly indicate, that should it be presented today, the same holding would not issue.¹¹

The Supreme Court’s decision in *Price Waterhouse* is particularly important to the development of a more robust understanding of sex-based gender discrimination in the law. *Price Waterhouse*, 490 U.S. 228, 240 (1989). There, the Court held that Title VII bars discrimination based on the fact that a person is a woman or a man, *and* based on the fact that a person fails to act like a woman or a man—i.e. it protects people from discrimination based on their failure to adhere to society’s expectations of traditional gender roles. *Id.*

In 2000, the Ninth Circuit employed the reasoning from *Price Waterhouse* in a new statutory context. *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000). In *Schwenk*, the Ninth Circuit held that violence perpetrated against a transgender person,

¹¹ At that time, the court found that “transsexuals” were not an insular minority, and found also that transsexuality was not a “immutable characteristic determined solely by accident of birth.” *Id.* at 663-64. The court remarked: “[T]he complexities involved merely in defining the term ‘transsexual’ would prohibit a determination of suspect classification for transsexuals.” *Holloway* at 663 (footnote omitted).

because they presented as a certain gender, was violence motivated by gender for purposes of the Gender Motivated Violence Act. *Id.* Since *Schwenk*, at least one court in the Ninth Circuit has held *Schwenk*'s reasoning supports the follow-on conclusion that discrimination against transgender people is a form of sex discrimination subject to intermediate scrutiny review. *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1121 (N.D. Cal. 2015) (where the court found that *Schwenk* overruled the specific conclusions on which the *Holloway* decision relied); *see also Olive v. Harrington*, 2016 WL 4899177, at *5 (E.D. Cal. Sept. 14, 2016) and *Marlett v. Harrington*, No. 115CV01382MJSPC, 2015 WL 6123613, at *4 (E.D. Cal. Oct. 16, 2015) (*pro se* screening orders citing *Norsworthy*, stating discrimination on the basis of transgender status is subject to intermediate scrutiny).

Of particular importance, significant changes in the medical understanding of gender identity call for a reexamination of its place in the equal protection context in relation to sex-based discrimination. *Duronslet v. Cty. of Los Angeles*, 266 F. Supp. 3d 1213, 1223 (C.D. Cal. 2017) (discussing advances since *Holloway v. Arthur Andersen & Co.*, 566 F. 2d 659 (9th Cir. 1977)). “[I]t would not be inconsistent with *Holloway* ... to conclude, based on an adequately developed factual record, that our current understanding of transgenderism requires the application of heightened scrutiny.” *Id.*

Indeed, our medical understanding of biological sex and gender has advanced significantly in the forty-one years since *Holloway*. For instance, it is universally acknowledged in leading medical guidance that not all individuals identify as the sex they

are assigned at birth.¹² Despite the ongoing study to more fully understand the impact of differences in chromosomes, brain structure and chemistry, there is medical consensus that gender identity plays a role in an individual's determination of their own sex.

Therefore, to conclude discrimination based on gender identity or transsexual status is not discrimination based on sex is to depart from advanced medical understanding in favor of archaic reasoning.

B. Defining New Suspect Qualifications – Transgender Status

In the equal protection context, the Supreme Court “has recognized that new insights and societal understandings can reveal unjustified inequality [...] that once passed unnoticed and unchallenged.”¹³ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015). The Supreme Court employs a four-factor test to determine whether a class qualifies as suspect or quasi-suspect. *United States v. Windsor*, 570 U.S. 744 (2013). Heightened scrutiny is warranted where the state discriminates against a class that (1) has been “historically subjected to discrimination,” (2) has a defining characteristic bearing no “relation to ability to perform or contribute to society,” (3) has “obvious, immutable,

¹² As set forth in WPATH *Standards of Care* protocols for the care of transgender and gender nonconforming people, including individuals with gender dysphoria. The WPATH protocols are endorsed by the following medical associations: The American Medical Association, the Endocrine Society, the American Psychological Association, the American Psychiatric Association, the World Health Organization, the American Academy of Family Physicians, the National Commission of Correctional Health Care, the American Public Health Association, the National Association of Social Workers, the American College of Obstetrics and Gynecology, the American Society of Plastic Surgeons, and The American Society of Gender Surgeons. (See Dkt. 28-5 at 8.)

¹³ Responding to such insights and societal understandings, the Supreme Court has invalidated laws that imposed sex-based inequality in marriage, and inequalities in the institution of marriage arising from sex-based prohibitions. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015).

or distinguishing characteristics,” and (4) is “a minority or is politically powerless.”

Windsor v. United States, 570 U.S. 744 (2013).

Courts have applied this test and have found that government discrimination based on transgender status is discrimination against a quasi-suspect class and thus is subject to intermediate scrutiny. *Adkins v. City of New York*, 143 F. Supp. 3d 134 (S.D.N.Y. 2015).¹⁴ For example, in *Adkins*, a transgender person who had been arrested and imprisoned sued New York City and its officials, alleging equal protection violations based on discriminatory confinement conditions. *Id.* The court employed the test and found transgender people are a quasi-suspect class:

(1) Transgender people have suffered a history of persecution and discrimination (moreover this history of persecution and discrimination is not yet history); (2) Transgender status bears no relation to ability to contribute to society- i.e. simply by virtue of their status they are not any less productive than any member of society; (3) Transgender status is a sufficiently discernible characteristic to define a discrete minority class; (4) Transgender people are a politically powerless minority.

Id.

Similarly, in *Evancho v. Pine-Richland School Dist.*, the court concluded intermediate scrutiny applies to classifications based on transgender status. 237 F. Supp. 3d 267 (W.D. Pa. 2017). There, pursuant to a school board resolution, transgender high

¹⁴ See *Stone v. Trump*, No. CV MJG-17-2459, 2017 WL 5589122 (D. Md. Nov. 21, 2017) (finding transgender individuals appear to satisfy the criteria of at least a quasi-suspect classification, and that the classification at issue was a form of discrimination on the basis of gender); *A.H. v. Minersville Area School District*, No. 3:17-CV-391, 2017 WL 5632662, at *7 (M.D. Pa. Nov. 22, 2017) (both the parties and the court agreed heightened scrutiny applied to a transgender girl’s equal protection claims when she was excluded from using the girl’s bathroom at school because the sex listed on her birth certificate was male).

school students were limited to using either single-user bathrooms or bathrooms matching their birth-assigned sex. The court acknowledged that the transgender students' gender identity was:

... deeply ingrained and inherent in their very beings. Like “sex,” [...] gender identity is neither transitory nor temporary. Further, what buttresses that conclusion is the fact that the school community as a whole treats these Plaintiffs in all other regards consistently with their stated gender identities, along with the reality that these Plaintiffs live all facets of their lives in a fashion consistent with their stated and experienced gender identities.

Id. at 289.

The findings in *Adkins* and *Evancho* echo findings made regarding homosexual people as a class and recognized by this Court in *Latta*, the Ninth Circuit in *SmithKline*, and the Supreme Court in *Windsor* and *Obergefell*. Applying the four factor analysis, the cases found: (1) homosexual people have endured persecution and discrimination; (2) sexual orientation has no relation to aptitude or ability to contribute to society; (3) homosexual people are a discernable group with non-obvious distinguishing characteristics; and (4) the class is a politically weakened minority.

The pervasive and extensive similarities in the discrimination faced by transgender people and homosexual people are hard to ignore: (1) transgender people have been the subject of a long history of discrimination that continues to this day; (2) transgender status as a defining characteristic bears no “relation to ability to perform or contribute to society; (3) transgender status and gender identity have been found to be “obvious, immutable, or distinguishing characteristic[s];” and (4) transgender people are unarguably a politically vulnerable minority. *Norsworthy*, 87 F. Supp. 3d at 1119 n.8;

Adkins, 143 F. Supp. 3d at 140; *See generally*, *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481-84 (9th Cir. 2014). This is especially true in Idaho where transgender people have no state constitutional protections from discrimination based on their transgender status in relation to employment decisions, housing, and other services. Therefore, transgender people bear all of the characteristics of a quasi-suspect class and any rule developed and implemented by IDHW should withstand heightened scrutiny review to be constitutionally sound.

CONCLUSION

Defendants, as conceded, violate the Equal Protection Clause by failing to provide an avenue for transgender people to amend the sex listed on their birth certificates. Plaintiffs have sufficiently demonstrated that they have suffered irreparable injury and harm that cannot be remedied by ordinary remedies at law—and by Defendants’ acknowledgment, IDHW cannot proceed to create a new rule to remedy the harm without a court order. Furthermore, the balance of the hardships warrants an equitable remedy, because allowing such amendments would pose no new burden on Defendants: Idaho vital statistics laws allow IDHW to create and implement a constitutionally-sound rule, and IDHW already has in place processes and procedures to facilitate the amendment of birth certificates in the ordinary course of its everyday activities. Finally, the public interest is not disserved by a permanent injunction. A rule providing an avenue to obtain a birth certificate with a listed sex that aligns with an individual’s gender identity promotes the health, well-being, and safety of transgender people without impacting the rights of others.

ORDER

NOW THEREFORE IT IS HEREBY ORDERED:

- 1) The Court **GRANTS in part** and **DENIES in part** Plaintiff's Motion for Summary Judgment. (Dkt. 28.)
- 2) The Court **PERMANENTLY ENJOINS** the IDHW Defendants and their officers, employees, and agents from practicing or enforcing the policy of automatically rejecting applications from transgender people to change the sex listed on their birth certificates.
- 3) IDHW Defendants and their officers, employees, and agents must begin accepting applications made by transgender people to change the sex listed on their birth certificates **on or before April 6, 2018**; such applications must be reviewed and considered through a constitutionally-sound approval process; upon approval, any reissued birth certificate must not include record of amendment to the listed sex; and where a concurrent application for a name change is submitted by a transgender individual, any reissued birth certificate must not include record of the name change.

IT IS SO ORDERED.



DATED: March 05, 2018

C. W. Dale

Candy W. Dale
U.S. Magistrate Judge



Uniform Crime Report
Hate Crime Statistics, 2015

Victims

In the Uniform Crime Reporting (UCR) Program, the victim of a hate crime may be an individual, a business, an institution, or society as a whole. In 2015, the nation's law enforcement agencies reported that there were 7,173 victims of hate crimes. Of these victims, 52 were victimized in separate multiple-bias incidents.

The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, 18 U.S.C. §249 required the FBI to collect data concerning hate crimes committed by or directed against juveniles. Beginning in 2013, law enforcement began reporting the number of victims who are 18 years of age or older and the number of victims under the age of 18 in addition to reporting the number of individual victims. Of the 4,198 individuals for which victim age data were reported in 2015, 3,702 hate crime victims were adults, and 496 hate crime victims were juveniles.

In 2013, the national UCR Program began collecting revised race and ethnicity data in accordance with a directive from the U.S. Government's Office of Management and Budget. The race categories were expanded from four (White, Black, American Indian or Alaska Native, and Asian or Other Pacific Islander) to five (White, Black or African American, American Indian or Alaska Native, Asian, and Native Hawaiian or Other Pacific Islander). The ethnicity categories changed from "Hispanic" and "Non-Hispanic" to "Hispanic or Latino" and "Not Hispanic or Latino." (See the Methodology for more information about this program change as well as others.)

By bias motivation (Based on Table 1.)

An analysis of data for victims of single-bias hate crime incidents showed that:

- 59.2 percent of the victims were targeted because of the offenders' bias against race/ethnicity/ancestry.
- 19.7 percent were victimized because of bias against religion.
- 17.7 percent were targeted because of bias against sexual orientation.
- 1.7 percent were victims of gender-identity bias.

- 1.2 percent were targeted because of bias against disability.
- 0.4 percent (30 individuals) were victims of gender bias.

Further examination of these bias categories showed the following details:

Racial/Ethnicity/Ancestry bias (Based on Table 1.)

Among single-bias hate crime incidents in 2015, there were 4,216 victims of race/ethnicity/ancestry motivated hate crime.

- 52.2 percent were victims of crimes motivated by their offenders' anti-Black or African American bias.
- 18.7 percent were victims of anti-White bias.
- 9.3 percent were victims of anti-Hispanic or Latino bias.
- 3.8 percent were victims of bias against a group of individuals in which more than one race was represented (anti-multiple races, group).
- 3.3 percent were victims of anti-American Indian or Alaska Native bias.
- 3.2 percent were victims of anti-Asian bias.
- 1.1 percent were victims of anti-Arab bias.
- 0.1 percent (6 individuals) were victims of anti-Native Hawaiian or Other Pacific Islander bias.
- 8.1 percent were victims of anti-Other Race/Ethnicity/Ancestry bias.

Sexual-orientation bias (Based on Table 1.)

Of the 1,263 victims targeted due to sexual-orientation bias:

- 62.2 percent were victims of crimes motivated by their offenders' anti-gay (male) bias.

- 19.6 percent were victims of anti-lesbian, gay, bisexual, or transgender (mixed group) bias.
- 13.5 percent were victims of anti-lesbian bias.
- 2.8 percent were victims of anti-bisexual bias.
- 1.9 percent were victims of anti-heterosexual bias.

Religious bias (Based on Table 1.)

Of the 1,402 victims of anti-religious hate crimes:

- 52.1 percent were victims of crimes motivated by their offenders' anti-Jewish bias.
- 21.9 percent were victims of anti-Islamic (Muslim) bias.
- 4.3 percent were victims of anti-Catholic bias.
- 4.1 percent were victims of bias against groups of individuals of varying religions (anti-multiple religions, group).
- 3.6 percent were victims of anti-Eastern Orthodox (Russian, Greek, Other) bias.
- 3.4 percent were victims of anti-Protestant bias.
- 1.3 percent were victims of anti-Other Christian bias.
- 0.6 percent were victims of anti-Mormon bias.
- 0.4 percent were victims of anti-Hindu bias.
- 0.4 percent were victims of anti-Sikh bias.
- 0.1 percent were victims of anti-Jehovah's Witness bias.
- 0.1 percent were victims of anti-Buddhist bias.
- 0.1 percent were victims of anti-Atheist/Agnostic bias.
- 7.6 percent were victims of bias against other religions (anti-other religion).

Disability bias (See Table 1.)

Of the 88 victims of hate crimes due to the offenders' biases against disabilities:

- 52 were victims of anti-physical disability bias.
- 36 were targets of anti-mental disability bias.

Gender bias (See Table 1.)

Of the 30 victims of hate crime motivated by offenders' biases toward gender:

- 22 were categorized as anti-female.
- 8 were anti-male.

Gender-identity bias (See Table 1.)

Of the 122 victims of gender-identity bias:

- 76 were victims of anti-transgender bias.
- 46 were victims of anti-gender non-conforming bias.

By crime category (Based on Table 2.)

Of the 7,173 victims of hate crime, 62.5 percent were victims of crimes against persons, and 36.6 percent were victims of crimes against property. The remaining 0.9 percent were victims of crimes against society.

By offense type***Crimes against persons (Based on Table 2.)***

In 2015, 4,482 victims of hate crimes were victims of crimes against persons. Regarding these victims and the crimes committed against them:

- 18 persons were murdered, and 13 were raped. (Concerning rape, data for 12 rapes were submitted under the UCR Program's revised definition; 1 rape was submitted under the legacy definition. See the Methodology for more information about this and other program changes.)

- 41.3 percent of the victims were intimidated.
- 37.8 percent were victims of simple assault.
- 19.7 percent were victims of aggravated assault.
- 0.4 percent (20) were victims of other types of offenses, which are collected only in the National Incident-Based Reporting System (NIBRS).

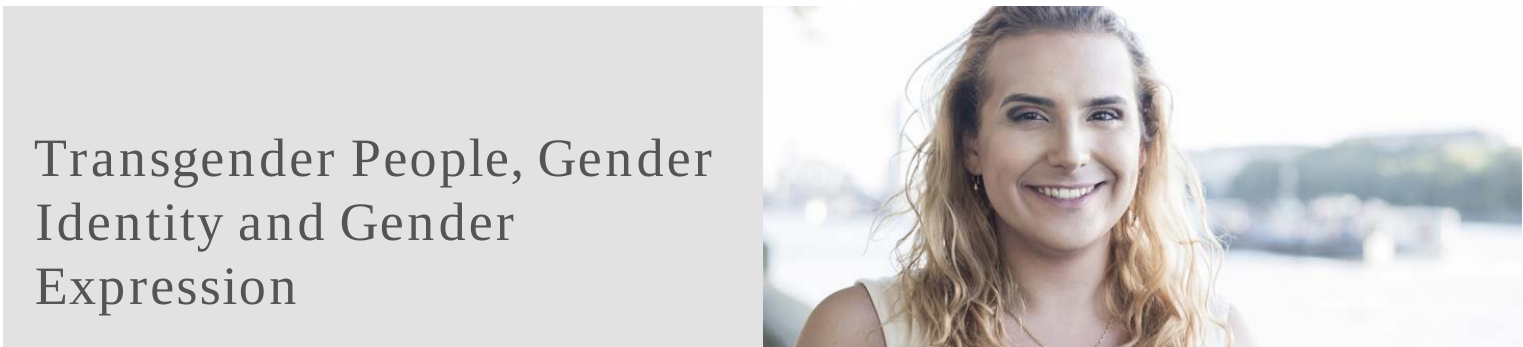
Crimes against property (Based on Table 2.)

In 2015, 2,626 victims of hate crimes were victims of crimes against property. Of these:

- 72.2 percent were victims of destruction/damage/vandalism.
- 10.4 percent were victims of larceny-theft.
- 6.6 percent were victims of burglary.
- 5.6 percent were victims of robbery.
- 1.4 percent were victims of arson.
- 0.9 percent (24) were victims of motor vehicle theft.
- 2.8 percent were victims of other types of hate crime offenses, which are collected only in NIBRS.

Crimes against society (See Table 2.)

There were 65 victims of hate crimes categorized as crimes against society. Crimes against society (e.g., weapon law violations, drug/narcotic offenses, gambling offenses) represent society's prohibition against engaging in certain types of activity; they are typically victimless crimes in which property is not the object.



What does transgender mean?

Transgender is an umbrella term for persons whose gender identity, gender expression or behavior does not conform to that typically associated with the sex to which they were assigned at birth. **Gender identity** refers to a person’s internal sense of being male, female or something else; gender expression refers to the way a person communicates gender identity to others through behavior, clothing, hairstyles, voice or body characteristics. “Trans” is sometimes used as shorthand for “transgender.” While transgender is generally a good term to use, not everyone whose appearance or behavior is gender-nonconforming will identify as a transgender person. The ways that transgender people are talked about in popular culture, academia and science are constantly changing, particularly as individuals’ awareness, knowledge and openness about transgender people and their experiences grow.

This pamphlet also is available in the following languages:

- [Arabic](#) (PDF, 191KB)
- [Traditional Chinese](#) (PDF, 376KB)
- [Simplified Chinese](#) (PDF, 297KB)
- [English](#) (PDF, 206KB)
- [Russian](#) (PDF, 140KB)
- [Spanish](#) (PDF, 568KB)

- ▶ [What is the difference between sex and gender?](#)
- ▶ [Have transgender people always existed?](#)
- ▶ [What are some categories or types of transgender people?](#)

▶	How prevalent are transgender people?
▶	What is the relationship between gender identity and sexual orientation?
▶	How does someone know that they are transgender?
▶	What should parents do if their child appears to be transgender or gender nonconforming?
▶	How do transsexuals make a gender transition?
▶	Is being transgender a mental disorder?
▶	What kinds of discrimination do transgender people face?
▶	How can I be supportive of transgender family members, friends, or significant others?
▶	Where can I find more information about transgender health, advocacy and human rights?
▶	References

Purchase This Brochure

Pamphlets in English and Spanish may be purchased in bundles of 25 for \$4.00 plus shipping by calling (800) 374-2721 or by [email](#).

Related Resources

[Transgender Identity Issues in Psychology](#)

[Guidelines for Psychological Practice with Transgender and Gender Nonconforming People \(PDF, 472KB\)](#)

[Sexual orientation and gender identity](#)

[APA LGBT Resources and Publications](#)

[Answers to Your Questions For a Better Understanding of Sexual Orientation and Homosexuality](#)

ADVERTISEMENT

ADVERTISEMENT

Advancing psychology to benefit society and improve people's lives



PSYCHOLOGISTS

[Standards & Guidelines](#)

[PsycCareers](#)

[Divisions of APA](#)

[Ethics](#)

[Early Career Psychologists](#)

[Continuing Education](#)

[Renew Membership](#)

PUBLICATIONS & DATABASES

[APA Style](#)

[Journals](#)

[Books](#)

[Magination Press](#)

[Videos](#)

[PsycINFO](#)

[PsycARTICLES](#)

[More Publications & Databases](#)

STUDENTS

[Careers in Psychology](#)

[Accredited Psychology Programs](#)

[More for Students](#)

ABOUT PSYCHOLOGY

[Science of Psychology](#)

[Psychology Topics](#)

ABOUT APA

[Governance](#)

[Directorates and Programs](#)

[Policy Statements](#)

[Press Room](#)

[Advertise with Us](#)

[Work at APA](#)

[Contact Us](#)

MORE APA WEBSITES

[ACT Raising Safe Kids Program](#)

[APA Practice Organization](#)

- [American Psychological Foundation](#)
- [APA Annual Convention](#)
- [APA Center for Organizational Excellence](#)
- [APA Education Advocacy Trust](#)
- [APA PsycNET®](#)
- [APA Style](#)
- [Online Psychology Laboratory](#)
- [Psychology: Science in Action](#)

GET INVOLVED

- 
Advocate
- 
Participate
- 
Donate
- 
Join APA

FOLLOW APA



[Privacy Statement](#) | [Terms of Use](#) | [Accessibility](#) | [Website Feedback](#) | [Sitemap](#)

© 2018 American Psychological Association
750 First St. NE, Washington, DC 20002-4242 | [Contact Support](#)
Telephone: (800) 374-2721; (202) 336-5500 | TDD/TTY: (202) 336-6123

1999 *Time Out N.Y.* 10 June 31/1 The airy Chelsea outpost of this West Coast chainlet offers advice on the gamut of social, religious, emotional and economic issues for gays, lesbians, bisexuals and transgenders.

(Hide quotations)

[Back to top](#)



Copyright © 2018 Oxford University Press . All rights reserved. | [Privacy policy and legal notice](#) || [Credits](#)

Your access is brought to you by:
[United States Court of Appeals Library - 9th Circuit](#)
[Log out](#)

[Gender Dysphoria](#)

What Is Gender Dysphoria?

Gender dysphoria involves a conflict between a person's physical or assigned gender and the gender with which he/she/they identify. People with gender dysphoria may be very uncomfortable with the gender they were assigned, sometimes described as being uncomfortable with their body (particularly developments during puberty) or being uncomfortable with the expected roles of their assigned gender.

People with gender dysphoria may often experience significant distress and/or problems functioning associated with this conflict between the way they feel and think of themselves (referred to as experienced or expressed gender) and their physical or assigned gender.

The gender conflict affects people in different ways. It can change the way a person wants to express their gender and can influence behavior, dress and self-image. Some people may cross-dress, some may want to socially transition, others may want to medically transition with sex-change surgery and/or hormone treatment. Socially transitioning primarily involves transitioning into the affirmed gender's pronouns and bathrooms.

People with gender dysphoria may allow themselves to express their true selves and may openly want to be affirmed in their gender identity. They may use clothes and hairstyles and adopt a new first name of their experienced gender. Similarly children with gender dysphoria may express the wish to be of the opposite gender and may assert they are (or will grow up to be) of the opposite gender. They prefer, or demand, clothing, hairstyles and to be called a name of the opposite gender. (Medical transition is only relevant at and after the onset of puberty.)

Gender dysphoria is not the same as gender nonconformity, which refers to behaviors not matching the gender norms or stereotypes of the gender assigned at birth. Examples of gender nonconformity (also referred to as gender expansiveness or gender creativity) include girls behaving and dressing in ways more socially expected of boys or occasional cross-dressing in adult men. Gender nonconformity is not a mental disorder. Gender dysphoria is also not the same being gay/lesbian.

While some children express feelings and behaviors relating to gender dysphoria at 4 years old or younger, many may not express feelings and behaviors until puberty or much later. For some children, when they experience puberty, they suddenly find themselves unable to identify with their own body. Some adolescents become unable to shower or wear a bathing suit and/or undertake self-harm behaviors.

Diagnosis

Treatment

Challenges/Complications

Diagnosis

The *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5) provides for one overarching diagnosis of gender dysphoria with separate specific criteria for children and for adolescents and adults.

In adolescents and adults gender dysphoria diagnosis involves a difference between one's experienced/expressed gender and assigned gender, and significant distress or problems functioning. It lasts at least six months and is shown by at least two of the following:

1. A marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics
2. A strong desire to be rid of one's primary and/or secondary sex characteristics
3. A strong desire for the primary and/or secondary sex characteristics of the other gender
4. A strong desire to be of the other gender
5. A strong desire to be treated as the other gender
6. A strong conviction that one has the typical feelings and reactions of the other gender

In children, gender dysphoria diagnosis involves at least six of the following and an associated significant distress or impairment in function, lasting at least six months.

1. A strong desire to be of the other gender or an insistence that one is the other gender
2. A strong preference for wearing clothes typical of the opposite gender
3. A strong preference for cross-gender roles in make-believe play or fantasy play

4. A strong preference for the toys, games or activities stereotypically used or engaged in by the other gender
5. A strong preference for playmates of the other gender
6. A strong rejection of toys, games and activities typical of one's assigned gender
7. A strong dislike of one's sexual anatomy
8. A strong desire for the physical sex characteristics that match one's experienced gender

For children, cross-gender behaviors may start between ages 2 and 4, the same age at which most typically developing children begin showing gendered behaviors and interests. Gender atypical behavior is common among young children and may be part of normal development. Children who meet the criteria for gender dysphoria may or may not continue to experience it into adolescence and adulthood. Some research shows that children who had more intense symptoms and distress, who were more persistent, insistent and consistent in their cross-gender statements and behaviors, and who used more declarative statements ("I am a boy (or girl)" rather than "I want to be a boy (or girl)") were more likely to become transgender adults.^{3, 4}

Definitions and Pronouns

Definitions^{1, 5, 6}

- Gender - denotes the public (and usually legally recognized) lived role as boy or girl, man or woman. Biological factors combined with social and psychological factors contribute to gender development.
- Assigned gender - refers to a person's initial assignment as male or female at birth. It is based on the child's genitalia and other visible physical sex characteristics.
- Gender-atypical - refers to physical features or behaviors that are not typical of individuals of the same assigned gender in a given society.
- Gender-nonconforming - refers to behaviors that are not typical of individuals with the same assigned gender in a given society.
- Gender reassignment - denotes an official (and usually legal) change of gender.
- Gender identity - is a category of social identity and refers to an individual's identification as male, female or, occasionally, some category other than male or female. It is one's deeply held core sense of being male, female, some of both or neither, and does not always correspond to biological sex.
- Gender dysphoria - as a general descriptive term refers to an individual's discontent with the assigned gender. It is more specifically defined when used as a diagnosis.

- Transgender - refers to the broad spectrum of individuals who transiently or persistently identify with a gender different from their gender at birth. (Note: the term transgendered is not generally used.)
- Transsexual - refers to an individual who seeks, or has undergone, a social transition from male to female or female to male. In many, but not all, cases this also involves a physical transition through cross-sex hormone treatment and genital surgery (sex reassignment surgery).
- Genderqueer - blurring the lines around gender identity and sexual orientation. Genderqueer individuals typically embrace a fluidity of gender identity and sometimes sexual orientation.
- Gender fluidity - having different gender identities at different times.
- Agendered - 'without gender,' individuals identifying as having no gender identity.
- Cisgender - describes individuals whose gender identity or expression aligns with the sex assigned to them at birth.
- Gender expansiveness - conveys a wider, more flexible range of gender identity and/or expression than typically associated with the binary gender system.
- Gender expression - the manner in which a person communicates about gender to others through external means such as clothing, appearance, or mannerisms. This communication may be conscious or subconscious and may or may not reflect their gender identity or sexual orientation.

Preferred Gender Pronouns

Some transgender and gender-nonconforming people may prefer gender-neutral or gender-inclusive pronouns when talking to or about them. "They" and "their" are sometimes used as gender-neutral singular pronouns. Singular gender-neutral pronouns also include "ze" (or "zie") and "hir."

+ References

Physician Review By:

Ranna Parekh, M.D., M.P.H.
February 2016

Expert Q & A: Gender Dysphoria

Find answers to your questions about Gender Dysphoria written by leading psychiatrists.

[View More](#)

Patient Stories: Gender Dysphoria

Read patient stories about Gender Dysphoria and learn how to share your story.

[View More](#)

[Become an APA Member](#)

[Learn More](#)

Explore APA

Psychiatrists

Residents & Medical Students

Patients & Families

About APA

Work At APA

Annual Meeting

Newsroom

News Releases

Psychiatric News

Message from President

APA Blogs

Join APA

General Members

Residents and Fellows

Medical Students

International

Become a Fellow

APA Sites

APA Publishing

APA Foundation

APA Learning Center

APA Annual Meeting

Psychiatric News

PsychiatryOnline

Workplace Mental Health

