



THE COLORADO FREEDOM INSTITUTE

March 27, 2017

Regarding HB17-1122 – Requiring Issuance of a New Birth Certificate
With A Gender Designation That Differs from One's Gender at Birth

My name is Michael J. Norton. I am president and general counsel of the Colorado Freedom Institute. Colorado Freedom Institute is a nonprofit legal organization dedicated to protecting religious freedom for Coloradans and for people across America.

Today, I am also privileged to represent Colorado Family Action. The mission of CFA is to advocate for laws and policies that will make Colorado a safe, prosperous, and wholesome climate for families.

Both Colorado Freedom Institute and Colorado Family Action oppose HB 17-1122 and urge you to vote against it.

In recent years, there has been an assault on the previously undisputed reality that human beings are created either male or female; that there are significant differences between the sexes; and that those differences result in at least some differences in the roles played by men and women in society.

This attack challenges the basic reality that all people have a biological sex, identifiable at birth and immutable through life, which makes them either male or female.

The truth about sexual differences is objectively knowable at birth. No one can change his or her birth sex. The DNA in every cell in a human being's body is marked clearly male or female. Hormones circulating in an unborn child's brain and body shape his or her development.

Psychiatrists and surgeons who have served transsexual clients know surgery does not change sex. George Burou, a Moroccan physician, admitted: "I don't change men into women. I transform male genitals into genitals that have a female aspect. All the rest is in the patient's mind."

HB17-1122 proposes to add a new statutory section at C.R.S. § 25-2-113.8 to require authorities to issue new birth certificates to a person born in Colorado “and who has a gender different from the gender denoted on that person’s birth certificate.” A new birth certificate would be required upon a requested accompanied by an affidavit from a licensed medical or mental health care which states “that the person has undergone surgical, hormonal, or other treatment appropriate for that person for the purpose of gender transition.”

HB17-1122 also provides that the new birth certificate reflect the new gender designation and, if applicable, the new name of the person seeking new birth certificate; that no “additional information or records” shall be required to affect the birth certificate change; and that the new birth certificate may not be marked “as amended or [to] indicate in any other manner that the gender designation or name on the certificate has been changed.”

HB17-1122 also would repeal current section C.R.S. § 25-2-115 which relates to changing the birth certificate of an individual who has undergone sexual reassignment surgery -- formerly, the only basis for a changed birth certificate.

There are at least three problems with HB17-1122:

- HB17-1122 will lead to frauds being perpetrated upon the people of Colorado.
- HB17-1122 will make the State of Colorado complicit in the perpetration of such frauds.
- HB17-1122 may raise Title IX concerns.

HB17-1122 Will Lead to Frauds Being Perpetrated Upon the People of Colorado

HB17-1122 will allow anyone who secures an affidavit from a single licensed health care provider to change his or her birth certificate to reflect a different sex than that listed on the person’s birth certificate at birth. And HB17-1122 forbids any identification of the certificate as having been amended. This will lead to unintended frauds upon the people of Colorado.

For example, one who was born male could change his birth certificate to state that he is now female, and then induce a man to propose to him without informing the man of his biological birth history. Something similar happened not long ago in

Texas. See *In re Estate of Araguz*, 443 S.W.3d 233 (Tex.App.2014), *pet. for review denied* (Sept. 4, 2015). *Araguz* concerns the estate of a male volunteer firefighter who died after allegedly being tricked into marrying a biological male. “Nikki” was born in 1975 with male sex organs. *Id.* at 236. His original birth certificate indicated that his name was Justin Graham Purdue and that his sex was male. *Id.* As Justin grew up, he transitioned to female. *Id.* Justin ultimately filed a petition in Texas to have his name changed to Nikki, which a court granted. *Id.* He then filed an application in California to have his birth certificate changed to reflect his new name, and California issued a new birth certificate. *Id.* He then obtained a driver’s license identifying him as female, and used that to obtain a license to marry Thomas Araguz. *Id.*

Two months before Thomas died, he gave a deposition during a custody dispute with his “ex-wife” Nikki. *Id.* at 237. He was asked whether he was aware that Nikki had been born male. *Id.* Thomas testified that he was *not* aware that Nikki had been born male or was not a natural born female. *Id.* He testified he was not aware that Nikki had undergone “gender surgery.” *Id.* Rather, Thomas testified that Nikki had always represented to him that Nikki was female. *Id.* at 237.¹

After Thomas’s death, his two children by a prior marriage were effectively “disinherited” by virtue of Thomas’s marriage to Nikki. *In re Estate of Araguz* is illustrative of what can easily happen in Colorado when changes are allowed to easily be made to birth certificates.

But it is not just fraudulent inducement to marry that is likely to occur if HB17-1122 is enacted. Other frauds may occur as well. For example, a student who believes he will not qualify for an athletic scholarship as a male could change his sex designation to female to gain a competitive advantage. Male students seeking admission to academic programs that favor female applicants because women have been historically under-represented, could likewise seek to change their sex designation. The easier it is to change one’s sex designation, the more likely it is that fraudulent activity will occur.

¹ Thomas died two months after giving this deposition, and Thomas’s mother and his ex-wife sued to have Thomas’s marriage to Nikki declared void under Texas law prohibiting same-sex unions. *In re Estate of Araguz*, 444 S.W. 3d at 237. The district court granted summary judgment, ruling as a matter of law that Nikki was a man at the time of his wedding to Thomas. *Id.* at 241. The appellate court ruled that whether Nikki was male at the time of the wedding was a question of fact, *id.* at 248, and remanded for further proceedings, *id.* at 250.

HB17-1122 makes such sex designation changes easier. Current law requires that those seeking to change their sex designation on their birth certificate first undergo a “surgical procedure” to “change[]” his or her sex. C.R.S. § 25-2-115. Then, the person must get a court order indicating that the person’s sex has been altered through surgery. *Id.* But HB17-1122 deletes that section and, in its place, allows the one seeking to change his or her sex designation to do so with a single affidavit from a single health care provider.

In addition, HB17-1122 expressly provides that “[t]he State Registrar shall not request any additional information or records” beyond this single affidavit. Thus, on the basis of one affidavit from one health care professional, birth certificates will be able to be changed virtually at will to reflect a different sex designation than that of a person’s sex at birth.

Significantly, it is not clear from HB17-1122 that the individual seeking to change his or her birth certificate sex designation must take any affirmative steps, such as surgery or even hormone therapy, to have the person’s physical body more closely correspond with the opposite sex. HB17-1122 provides that the health care professional shall provide an affidavit “that the person has undergone surgical, hormonal, or other treatment appropriate for that person for the purpose of gender transition.” Such “other treatment” presumably includes counseling; but, whatever it does include, it does not involve changes to the physical body, since it is not surgical or hormonal.²

By making it so easy to change one’s sex designation on birth certificates, and by preventing any notation that a certificate has been amended, HB17-1122 will make it more likely that fraud may occur.

HB17-1122 Will Make the State of Colorado Complicit in the Perpetration of Such Frauds.

As explained in the preceding section, HB17-1122 will lead to frauds being perpetrated upon the people of Colorado. Regardless of whether the State of

² The LGBT advocacy organization, Human Rights Campaign, explains that *transitioning*: is the process some transgender people go through to begin living as the gender with which they identify, rather than the sex assigned to them at birth. This may or may not include hormone therapy, sex reassignment surgery and other medical procedures.

Human Rights Campaign, “Transgender FAQ,” available at <http://www.hrc.org/resources/entry/transgender-faq#4> (last visited March 9, 2015).

Colorado might be legally liable for such frauds, the State of Colorado will have created the framework by which frauds can be perpetrated.

Though pressed to satisfy the insatiable political demands of the LGBTQ community, the members of the General Assembly have the duty to serve the best interests of all of the people of Colorado, not make it more likely that they will be subject to fraudulent activity.

HB17-1122 May Raise Title IX Concerns.

Title IX, codified at 20 U.S.C. §§ 1681-88, forbids sex discrimination by schools, and extends to all programs schools offer. The implementing regulations promulgated by the U.S. Department of Education require that schools provide “equal athletic opportunity for members of both sexes.” 34 C.F.R. § 106.41. One of the factors considered in determining whether a school complies with Title IX is whether “participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments[.]” *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 854 (9th Cir. 2014) (quoting 44 Fed. Reg. 71,413 (Dec. 11, 1979)).

By allowing male athletes to change their sex designation to female, HB17-1122 may implicate Title IX concerns by upsetting the balance of male to female students participating in sporting programs. It certainly will lead to a violation of the spirit of Title IX, which exists to provide equal opportunities for women.

For every biological male who takes a spot on a women’s or girls’ team, a biological female is excluded. And biological females forced to compete against biological males will almost certainly experience a competitive disadvantage because of differences in male-female muscular and skeletal structure.³

³ See, e.g., Perry Chiamonte, “California’s transgender law allows male high schooler to make girls’ softball team,” Fox News, February 14, 2014, *available at* <http://www.foxnews.com/us/2014/02/14/california-transgender-law-allows-male-high-schooler-to-make-girls-softball/print#> (last visited March 4, 2015) (noting that some object to having the boy play against girls gives him a competitive advantage); The Daily Caller, “California 2014: Strapping senior calling himself female to play on girls’ high school softball team,” February 15, 2014, *available at* <http://dailycaller.com/2014/02/15/california-2014-strapping-senior-calling-himself-female-to-play-on-girls-high-school-softball-team/> (last visited March 4, 2015) (noting that the male athlete competing with females has not undergone any procedures or treatments that would alter him physically).

This result will be inconsistent with the purpose of Title IX which is to provide female students equal opportunities.

Conclusion

Because HB17-1122 opens the door to a host of unintended, harmful consequences, Colorado Family Action opposes HB17-1122 and asks that you vote against it.