

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT - CHANCERY DIVISION

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2011 OCT 11 PM 3:33  
JUDITH BROWN

Lauren Grey et al.,

Plaintiffs,

v.

Damon T. Arnold, M.D., in his official capacity as  
State Registrar of Vital Records,

Defendant.

No. 11 CH 17091

Judge Hyman

NOTICE OF MOTION

TO: Mr. John A. Knight  
Mr. Harvey Grossman  
Roger Baldwin Foundation of ACLU, Inc.  
180 N. Michigan Ave., Suite 2300  
Chicago, IL 60601

Mr. David M. Kroeger  
Ms. Margaret J. Simpson  
Mr. Kyle Palazzolo  
Jenner & Block  
353 N. Clark Street  
Chicago, IL 60654

PLEASE TAKE NOTICE that on October 25, 2011, at 9:30 a.m. or as soon thereafter as counsel may be heard, I shall appear before the Honorable Michael B. Hyman, or any judge sitting in his stead, in Room 2405 of the Circuit Court of Cook County, Chancery Division, at the Richard J. Daley Center, Chicago, IL, and shall then and there present the attached **MOTION TO DISMISS and MEMORANDUM IN SUPPORT** thereof, a copy of which is herewith served upon you.

LISA MADIGAN  
Attorney General of Illinois  
Atty Code: 99000

Thomas A. Ioppolo  
THOMAS A. IOPPOLO  
Assistant Attorney General  
General Law Bureau  
100 W. Randolph St., 13th Fl.  
Chicago, Illinois 60601  
(312) 814-7198

CERTIFICATE OF SERVICE

The undersigned attorney states that a copy of the foregoing was mailed to the above named, at the addresses indicated, via U.S. Mail on October 11, 2011 at or before 5:00 p.m.

Thomas A. Ioppolo

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT - CHANCERY DIVISION

2011 OCT 11 PM 3:35  
JUDITH BROWN CLERK

Lauren Grey et al., )  
)  
Plaintiffs, )  
)  
v. ) No. 11 CH 17091  
)  
Damon T. Arnold, M.D., in his official capacity as )  
State Registrar of Vital Records, ) Judge Hyman  
)  
Defendant. )

**MOTION TO DISMISS**

The defendant, Damon T. Arnold, M.D., Director of the Illinois Department of Public Health, in his capacity as State Registrar of Vital Records,<sup>1</sup> by his attorney, Lisa Madigan, Attorney General of Illinois, moves the Court to dismiss the case under Section 2-619(a)(1) of the Code of Civil Procedure, 735 ILCS 5/2-619(a)(1), on the grounds that the Court lacks subject matter jurisdiction of the case because it is now moot.

In support of this motion, defendant states as follows:

1. Plaintiffs are transsexual persons who sought to change the sex identification designation on their Illinois birth certificates. Such requests are governed by the Illinois Vital Records Act, 410 ILCS 535/17(1), which requires a physician to certify that the applicant has had an "operation" that justifies changing the sex designation on the birth certificate. The Department initially denied the plaintiffs' requests on the grounds that they had not had genital surgery. Plaintiffs then filed this suit in May, 2011, alleging that the Department's interpretation of the Act was erroneous, and that a requirement of genital surgery violated the due process and privacy

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<sup>1</sup>Dr. Arnold recently resigned as Director of the Department. On September 30, 2011, Dr. Craig Conover was appointed Acting Director by the Governor.

clauses of the Illinois Constitution.

2. At the time of the Department's denial, the Department had promulgated a rule that required genital surgery in order to change the birth certificate. This proposed rule was subject to additional comment and revision under the Administrative Procedure Act, 5 ILCS 100/1-1 et seq. After additional comment, this rule was substantially revised and the requirement of genital surgery was dropped.

3. On July 13, 2011, defendant reported to the Court that the new revised rule was subject to approval by the Joint Committee on Administrative Rules. Based on the likelihood that the new rule would ultimately be approved, and the defendant's statement that genital surgery would not be required to obtain a new birth certificate, the Court ordered that the three named plaintiffs be issued birth certificates. The Department issued revised birth certificates to the named plaintiffs.

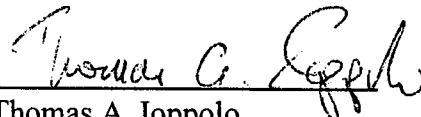
4. On October 3, 2011, the new rule went into effect after completion of the second notice period prescribed by the Administrative Procedure Act.

5. Based on these circumstances, the case is moot. The plaintiffs' action complained of the Department's practice requiring genital surgery as a prerequisite to obtaining a new birth certificate. That issue is no longer justiciable, based on the existence of the new rule and the Department's representation that genital surgery is not a necessary requirement for a new birth certificate.

6. A memorandum of law is submitted in support of this motion.

Respectfully submitted,

LISA MADIGAN  
Attorney General of Illinois

  
Thomas A. Ioppolo  
Assistant Attorneys General  
General Law Bureau  
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Chicago, Illinois 60601  
(312) 814-7198

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT - CHANCERY DIVISION**

Lauren Grey et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 11 CH 17091
	)	
Damon T. Arnold, M.D., in his official capacity as	)	
State Registrar of Vital Records,	)	Judge Hyman
	)	
Defendant.	)	

**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS**

**Background**

The three named plaintiffs, Lauren Grey, Victor Williams, and Nicholas Guarino are transsexual persons who sought to change the sex identification on their Illinois birth certificates. Requests to change birth records are governed by the Illinois Vital Records Act, 410 ILCS 535/ 1 et seq. The statute requires “an affidavit by a physician that he has performed an operation on a person, and that by reason of the operation the sex designation on such person’s birth record should be changed.” 410 ILCS 535/17(1)(d). The statute designates the Director of the Department of Public Health as the State Registrar of Vital Records with responsibility for administration of the law.

In April, 2011, plaintiffs’ applications for new birth certificates were denied by the Department of Public Health. At that time, the Department’s position was that the term “operation” in the statute meant the applicant had to have some form of genital surgery before a new birth certificate would be issued. This policy was expressed in the initial draft of a proposed DPH rule that was submitted to the Joint Committee on Administrative Rules (JCAR). (Ex. A).

After plaintiffs were notified of the denials, they filed this suit on behalf of themselves and an alleged class of similarly situated applicants on May 10, 2011. Plaintiffs alleged that the Department's interpretation of the Act was erroneous, because the term "operation" in the statute was not synonymous with genital surgery, and that the Department's requirement of genital surgery violated the due process and privacy clauses of the Illinois Constitution.

As required by the Administrative Procedure Act 5 ILCS 100/1-1 et seq., the proposed DPH rule was subject to public notice and comment. 5 ILCS 100/5-40(b). The rule changed substantially in the second notice period. The genital surgery requirement was dropped. The rule now states that the person must document with an affidavit from a licensed physician that the physician has performed an "operation on the applicant that has reassigned the gender of the applicant and that, by reason of the operation, the sex designation on the applicant's birth record (certificate) should be changed." 77 Ill. Adm. Code 500.43(a). (Ex. B). The physician must identify the nature of the operation or operations that justify changing the gender designation on the birth record. In the event the operation was performed out of the country, the applicant must submit an affidavit from a doctor licensed in the United States stating that the doctor has examined the person and can attest to the operation or operations that would support the applicant's request. *Id.* at (b).

JCAR did not object to the revised rule. After the passage of 45 days in the "second notice period," on October 3, 2011, the rule was sent to the Secretary of State for filing in the Illinois Register. As provided by statute, the rule became effective upon filing. 5 ILCS 100/5-40(d). (See Ex. B, adopted amendments).

On July 13, 2011, in anticipation of the likelihood that the rule would be changed, and in

reliance on the Department's statement that it was no longer requiring genital surgery as an absolute prerequisite to changing a birth certificate and that the three named plaintiffs would qualify under the criteria of the new rule, the Court ordered that the Department issue new birth certificates to the three named plaintiffs. The Department did so. The case was stayed until October 3, 2011, so that the rulemaking process could be completed.

### **Argument**

The Department has stated, in this Court, in the new rule, and in the attached affidavit from Assistant DPH Director Teresa Garate (Ex. C), that it is no longer construing the statutory requirement of an "operation" to mean that an applicant undergo genital surgery to change the gender designation on a birth certificate. The three named plaintiffs have now been given new birth certificates, none of whom, according to the complaint, has had genital surgery. It was that requirement of genital surgery which led to the initiation of this case.

Given this background, this case is moot. "It is a basic tenet of justiciability that reviewing courts will not decide moot or abstract questions or render advisory opinions." *In re J. T.*, 221 Ill.2d 338, 349 (2006). If plaintiffs have essentially obtained the requested relief which prompted the suit, "the underlying cause of action must be dismissed as moot as there is no longer an actual controversy pending." *Kostecki v. Dominck's Finer Foods, Inc., of Illinois*, 361 Ill.App.3d 362, 376-77 (1<sup>st</sup> Dist. 2005). Obviously the case is in a different posture from when it began. The Department had denied the three named plaintiffs birth certificates because they had not had genital surgery, and based on a pending rule that required genital surgery. The situation is different now. The plaintiffs have received birth certificates, and the rule, now approved by JCAR and effective as of October 3, 2011, no longer requires genital surgery.

Mootness in class action cases sometimes poses different considerations. It has sometimes happened in a class action, before a class is certified, that a defendant may try to offer the named representative the relief sought, moot the representative's claim, and thereby delay or impede the class action. In that situation, courts have held that a pending motion for class certification, even if not yet ruled on, prevents the defendant from mooting the class case by settling with the named class representative. In situations like this, courts look to whether there was a motion for class certification pending at the time of the settlement. See, e.g., *Barber v. American Airlines*, 241 Ill.2d 450, 455-58 (2011).

That is not the situation here, however. The three named plaintiffs, who had filed a motion for class certification the same day the complaint was filed, did receive birth certificates, as the Court ordered in July, 2011. But this was not an effort to "pick off" the named representatives while leaving the underlying challenged policy in place for other class members. As we noted in July, the JCAR process was already underway to modify the existing rule governing how the agency construed the word "operation" in the statute. A rule modification is a systemic change applicable to all, not an ad hoc solution covering just the three named plaintiffs. The Administrative Procedure Act defines "Rule" as "each agency statement of *general applicability* that implements, applies, interprets, or prescribes law and policy...." 5 ILCS 100/1-70 (emphasis added). An administrative rule has the force and effect of law, *Department of Central Management Services/Illinois Commerce Commission v. Illinois Labor Relations Board*, 406 Ill.App.3d 766, 771 (4<sup>th</sup> Dist. 2010), and its enactment is the result of a quasi-legislative process involving a special committee of state legislators. The affidavit from the DPH Assistant Director provides further support, though hardly necessary, that genital surgery is no longer



required. Dr. Garate notes that there are approximately 57 pending gender change applications awaiting action by DPH. Each application, of course, has to be reviewed individually, but none will be rejected because the applicant did not have genital surgery. No one in the purported class is in a position to allege a violation of statutory or constitutional rights stemming from a genital surgery requirement that no longer exists.

Requiring further litigation on the merits of plaintiffs' constitutional challenge would not only be a waste of judicial resources, it would be in effect the rendering of an advisory opinion having no tangible impact on a plaintiff class. It would also be contrary to the well-established principle, now codified in Illinois Supreme Court Rule 18, that courts avoid making constitutional decisions unless absolutely necessary (Court must state "that the finding of unconstitutionality is necessary to the decision or judgment rendered, and that such decision or judgment cannot rest upon an alternative ground....")

There are three exceptions to the mootness doctrine: where the issue is capable of repetition yet evading review; the public interest exception; the collateral consequences exception. *In re Alfred H.H.*, 233 Ill.2d 345 (2009). None would apply.

*Capable of repetition.* The issue does not require further litigation because it is capable of evading review. That exception requires that the challenged action be of a duration too short to be fully litigated prior to its cessation; and that there must be a reasonable expectation that the same complaining party would be subject to the same action again. *In re Alfred H. H.*, 233 Ill.2d at 358. In this situation, however, once someone has a new birth certificate, the dispute is over, and there is no possibility of recurrence.

*Public interest exception.* Similarly, the public interest exception permits courts to review

moot questions where the question is of a public nature; there is a need for an authoritative determination for the future guidance of public officers; and there is a likelihood of future recurrence of the question. *In re Alfred H. H.*, 233 Ill.2d at 256. Application of this exception is narrowly construed and rarely invoked. *Brown v. Duncan*, 361 Ill.App.3d 125, 134 (1<sup>st</sup> Dist. 2005). And if it were applied here it would violate Rule 18, because it would mean deciding an unnecessary constitutional issue. That would be especially inappropriate in this situation where the DPH rule has just been approved by JCAR under the Administrative Procedure Act. “A likelihood of future recurrence” is speculative after this formal rulemaking process.

*Collateral consequences.* The collateral consequences exception refers to situation where even though incarceration or the effects of a court order (for example, involuntary mental health commitment) has ceased, the plaintiff still could suffer ongoing stigma which could amount to actual injury requiring a judicial remedy. *In re Alfred H.H.*, 233 Ill.2d at 361. This exception would not apply here. Issuance of a new birth certificate after gender reassignment surgery does not carry any of the lingering adverse “collateral consequences” contemplated by this exception.

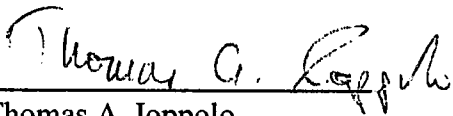
### **Conclusion**

The case is moot, not just as to the three named plaintiffs, but to all with a similar claim. “When it becomes apparent that an opinion cannot affect the results as to the parties or the controversy before it, the court should not resolve the question merely for the sake of setting a precedent or to govern potential future cases.” *Brown v. Duncan*, 361 Ill.App.3d at 134-135, quoting *Edwardsville School Service Personnel IEA-NEA v. Illinois Educational Labor Relations Board*, 235 Ill.App3d 954, 958 (4<sup>th</sup> Dist. 1992).

We ask the Court to grant the motion to dismiss on the grounds of mootness.

Respectfully submitted,

LISA MADIGAN  
Attorney General of Illinois

  
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**LIST OF EXHIBITS**

- A Proposed rule regarding birth certificates
- B Adopted rule regarding birth certificates (October 3, 2011)
- C Affidavit of Tere Garate, Ph.D., Assistant Director of the Illinois Department of Public Health

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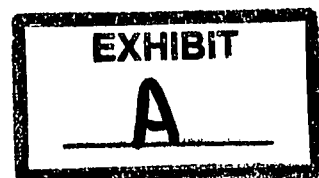
DEPARTMENT OF PUBLIC HEALTH

NOTICE OF PROPOSED AMENDMENTS

TITLE 77: PUBLIC HEALTH  
CHAPTER I: DEPARTMENT OF PUBLIC HEALTH  
SUBCHAPTER e: VITAL RECORDS

PART 500  
ILLINOIS VITAL RECORDS CODE

Section	
500.10	Definitions
500.20	Access to Vital Records
500.30	Delayed Records of Birth
500.40	Amendments, Additions or Corrections to Vital Records
500.43	<u>Amendments to Birth Records Following Gender-Related Surgery</u>
500.45	New Certificates of Birth
500.47	Illinois Adoption Registry and Information Exchange
500.50	Transportation and Disposition of Dead Human Body
500.60	Court Order to Restore Original Certificate of Birth
500.70	Availability of Medical and Health Information
500.80	Appointment and Removal of Local Registrars
500.90	Social Security Numbers of the Mother and Father of an Infant
500.APPENDIX A	Birth Records
500.ILLUSTRATION A	Certificate of Live Birth
500.ILLUSTRATION B	Information For Medical and Health Use Only
500.ILLUSTRATION C	Record of a Foreign Birth
500.ILLUSTRATION D	Certificate of Birth – Foundling Child
500.ILLUSTRATION E	Application for Search of Birth Record Files
500.ILLUSTRATION F	Application for Correction of a Birth Certificate
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500.ILLUSTRATION C	Filing a Delayed Record of Birth After the Seventh Birthday
500.ILLUSTRATION D	Application for Delayed Record of Birth
500.ILLUSTRATION E	Delayed Record of Birth (Registered After Seventh Birthday)
500.ILLUSTRATION F	Affidavit in Support of an Application for a Delayed Registration of Birth
500.APPENDIX C	Marriage Application and Record



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DEPARTMENT OF PUBLIC HEALTH

NOTICE OF PROPOSED AMENDMENTS

- m) When a request for a correction constitutes change in identity of the registrant or the father or mother, a court determination is required to reflect such change on the birth record.
- n) The State Registrar shall not, at the request of any person, change a written signature on a record under the correction provisions. Such a change shall ~~only~~ be reflected on the certificate only with a court determination.
- o) The State Registrar shall not, at the request of any person, change a file date on a certificate; therefore, the integrity of the record is protected.
- p) Provisions for the addition of the birth natural father's name and information to records:
  - 1) When the parents are not married:
    - A) Both parents shall ~~must~~ sign the major correction forms;
    - B) A court order is needed to change the child's surname; and
    - C) ~~If in the event~~ either parent is deceased, a court determination shall be required to add the father's name and information to the record.
  - 2) When parents are married at the time of the child's birth:
    - A) Both parents shall ~~must~~ sign the major correction forms (the State Registrar will accept a certified copy of the divorce decree or death record and obituary notice in lieu of either parent's signature);
    - B) A court order is needed to change the child's surname;
    - C) The married name shall ~~must~~ be added to the end of mother's name (if the mother is shown as an informant on record);
    - D) Legitimacy status shall must be changed on the record.

(Source: Amended at 35 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_)

**Section 500.43 Amendments to Birth Records Following Gender-Related Surgery**

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DEPARTMENT OF PUBLIC HEALTH

NOTICE OF PROPOSED AMENDMENTS

Changes to gender on birth records following surgical, pharmacological or other measures intended to or having the effect of reflecting, enhancing, changing, reassigning or otherwise affecting gender designation on an existing Illinois birth certificate shall be governed by this Section.

- a) Gender Changes Due To Elective Gender Change Surgery. A person born in Illinois, with an existing Illinois birth record, may submit an application to the Department seeking to have the gender changed on his or her own birth record after undergoing surgery intended to or having the effect of reflecting, enhancing, changing, or reassigning gender. The burden of proof shall be on the applicant to show, by clear and convincing evidence, that he/she has met the gender change criteria set forth in this Section. Changes brought about by pharmacological means shall not, in the absence of the criteria specified in this Section, qualify the applicant for a change of gender on any birth record. All requested changes shall be supported by an affidavit of a U.S. licensed examining physician and the applicant. The Department shall specify the form of the application and supporting affidavits and shall have the authority to request additional documentary proof, including copies of certified medical, surgical and other records.
- b) When a physician licensed to practice medicine in the U.S. or its territories personally performs all required surgery, no additional or subsequent physical examination shall be required. In such cases, the operative surgeon, having personally performed all required surgery, may supply the required physician's affidavit without additional examination.
- c) Specific Criteria for Gender Changes to Birth Records. A person applying to have his or her gender changed on an existing Illinois birth record shall comply with all criteria in either subsection (c)(1) or (c)(2).
  - 1) Gender Change, Male to Female. A person seeking to have the Department change his or her gender on an existing Illinois birth record from Male to Female shall present the Department with a completed affidavit, signed by a physician licensed to practice medicine in the U.S. or its territories, clearly demonstrating that after a personal examination of the applicant, who provided positive proof of identity in the form of a Passport, State/territory-issued driver's license or State/territory-issued photo ID card, the physician has personally determined that the applicant has undergone one of the following surgical procedures:
    - A) Vaginoplasty; or

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DEPARTMENT OF PUBLIC HEALTH

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B) Neocolporophy.

2) Gender Change, Female to Male. A person seeking to have the Department change his or her gender on an existing Illinois birth record from Female to Male shall present the Department with a completed affidavit signed by a physician licensed to practice medicine in the U.S. or one of its territories, clearly demonstrating that after a personal examination of the applicant, who provided positive proof of identity in the form of a Passport, State/territory-issued driver's license or State/territory-issued photo ID card, the physician has personally determined that the applicant has undergone one of the following surgical procedures. In addition, the applicant shall also have undergone a hysterectomy or have an anatomically absent uterus.

A) Metoidioplasty;

B) Phalloplasty; or

C) Centurion Procedure.

d) Name changes shall comply with separate criteria for name changes in this Part.

(Source: Added at 35 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_)



ILLINOIS REGISTER

DEPARTMENT OF PUBLIC HEALTH

NOTICE OF ADOPTED AMENDMENTS

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ILLINOIS REGISTER

DEPARTMENT OF PUBLIC HEALTH

NOTICE OF ADOPTED AMENDMENTS

D) Legitimacy status ~~shall~~ must be changed on the record.

(Source: Amended at 35 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_)

**Section 500.43 Amendments to Birth Records Following Gender Re-assignment**

Changes to gender on birth records following an operation having the effect of reflecting, enhancing, changing, reassigning or otherwise affecting gender designation on an existing Illinois birth record shall be governed by this Section. A person born in Illinois, with an existing Illinois birth record, may submit an application to the Department seeking to have the gender changed on his or her own birth record after undergoing an operation having the effect of reflecting, enhancing, changing, reassigning or otherwise affecting gender. The burden of proof shall be on the applicant to clearly demonstrate that he/she has met the gender change criteria set forth in this Section.

- a) Except as provided in subsection (b), all requested changes shall be supported by an affidavit of a physician, licensed to practice medicine in Illinois or any other State. The physician's affidavit shall clearly state that he or she has performed an operation on the applicant that has reassigned the gender of the applicant, and that, by reason of the operation, the sex designation on the applicant's birth record (certificate) should be changed. (Section 1(9) and 17(d) of the Act) The affidavit shall specify the name of the operation or operations that justify the change in gender on the applicant's birth record.
- b) Applicants who have undergone a gender reassignment operation outside of the United States shall submit an affidavit signed by an examining physician duly licensed to practice medicine in Illinois or any state in the United States. The affidavit shall clearly establish that the examining physician personally examined the applicant and shall clearly state that the identified operation previously performed has reassigned the applicant's gender and justifies a change in the applicant's gender on his/her birth record.
- c) The Department shall specify the form of the application and supporting affidavits and shall have the authority to request additional information and documentary proof, including copies of certified medical or other records.
- d) Name changes shall comply with separate criteria for name changes in this Part.

(Source: Added at 35 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_)

## AFFIDAVIT

1. My name is Teresa Garate. I am the Assistant Director of the Illinois Department of Public Health. The Division of Vital Records reports to me as well as maintains and issues birth records under the Illinois Vital Records Act, including the issuance of new birth records to persons seeking to change the gender designation on an Illinois birth record.

2. The Department recently developed a new administrative rule which went into effect on October 3, 2011. Under this rule, a person with an existing Illinois birth record seeking to change the gender designation on his or her own birth record will not be required to undergo genital reformation surgery. The Vital Records Act and the new rule require an "operation" or "operations" that "by reason of the operation" has changed the gender of the person seeking a new birth record. A US licensed physician must, by affidavit, list the operation that supports the application for gender change.

3. As of October 5, 2011, the Department had 57 open/pending applications for new birth records which sought a change in gender. Of these, 26 were male to female and 31 were female to male. Under the new administrative rule, the Division anticipates that it will be able to approve many of these applications. Some of the open/pending applications may have other issues or require additional documentation before they can be processed. However, under the new rule, applications will not be denied on the ground that the applicant did not have genital surgery.

*Darlene K. Linxwiler*  
Subscribed and sworn to  
before me this 11<sup>th</sup> day  
of October, 2011.

*Tere Garate, Ph.D.*  
Tere Garate, Ph.D, Assistant Director  
Department of Public Health

