

Dear Senators HEIDER, Souza, Jordan, and
Representatives WOOD, Packer, Chew:

The Legislative Services Office, Research and Legislation, has received the enclosed rules of
the Department of Health and Welfare:

IDAPA 16.02.08 - Vital Statistics Rules - Temporary and Proposed (Docket No. 16-0208-1801).

Pursuant to Section 67-454, Idaho Code, a meeting on the enclosed rules may be called by the
cochairmen or by two (2) or more members of the subcommittee giving oral or written notice to Research
and Legislation no later than fourteen (14) days after receipt of the rules' analysis from Legislative
Services. The final date to call a meeting on the enclosed rules is no later than 05/24/2018. If a meeting is
called, the subcommittee must hold the meeting within forty-two (42) days of receipt of the rules' analysis
from Legislative Services. The final date to hold a meeting on the enclosed rules is 06/22/2018.

The germane joint subcommittee may request a statement of economic impact with respect to a
proposed rule by notifying Research and Legislation. There is no time limit on requesting this statement,
and it may be requested whether or not a meeting on the proposed rule is called or after a meeting has
been held.

To notify Research and Legislation, call 334-4834, or send a written request to the address on the
memorandum attached below.



Eric Milstead
Director

Legislative Services Office

Idaho State Legislature

Serving Idaho's Citizen Legislature

MEMORANDUM

TO: Rules Review Subcommittee of the Senate Health & Welfare Committee and the House Health & Welfare Committee

FROM: Principal Legislative Research Analyst - Elizabeth Bowen

DATE: May 07, 2018

SUBJECT: Department of Health and Welfare

IDAPA 16.02.08 - Vital Statistics Rules - Temporary and Proposed (Docket No. 16-0208-1801)

The Department of Health and Welfare submits notice of temporary and proposed rulemaking at IDAPA 16.02.08. In order for the state to comply with a federal court decision in the case *F.V. v. Barron*, the Department must reissue birth certificates to transgender persons who wish to amend the gender marker on their original birth certificate. This temporary and proposed rule provides a process for the reissuance of such certificates.

Negotiated rulemaking was not conducted as it was deemed not feasible due to the provisions of the court decision. There is no anticipated negative fiscal impact on the state general fund. The Governor finds that the temporary rule is justified in order to comply with the court decision. The Department states that this rulemaking is authorized pursuant to Section 39-242, Idaho Code.

cc: Department of Health and Welfare
Frank Powell and Trinette Middlebrook

IDAPA 16 – DEPARTMENT OF HEALTH AND WELFARE

16.02.08 – VITAL STATISTICS RULES

DOCKET NO. 16-0208-1801

NOTICE OF RULEMAKING – TEMPORARY AND PROPOSED RULE

EFFECTIVE DATE: The effective date of the temporary rule is April 6, 2018.

AUTHORITY: In compliance with Sections 67-5221(1) and 67-5226, Idaho Code, notice is hereby given that this agency has adopted a temporary rule, and proposed regular rulemaking procedures have been initiated. The action is authorized pursuant to Section 39-242, Idaho Code.

PUBLIC HEARING SCHEDULE: Public hearing(s) concerning this rulemaking will be scheduled if requested in writing by twenty-five (25) persons, a political subdivision, or an agency, not later than May 16, 2018.

The hearing site(s) will be accessible to persons with disabilities. Requests for accommodation must be made not later than five (5) days prior to the hearing, to the agency address below.

DESCRIPTIVE SUMMARY: The following is the required finding and concise statement of its supporting reasons for adopting a temporary rule and a nontechnical explanation of the substance and purpose of the proposed rulemaking:

On March 5, 2018, the United States District Court for the District of Idaho issued a decision holding that Vital Records' practice of categorically denying applications for the amendment of gender markers on a birth certificates violated the constitutional rights of two transgender plaintiffs. *F.V. v. Barron, et al.*, Case No. 1:17-CV-170-CWD. The court ordered that Vital Records must begin accepting applications from transgender persons no later than April 6, 2018, and that it must process those applications in a constitutionally sound manner. This rule change establishes the standards and processes for such applications.

This rule change proposes to establish a process for the amendment of a gender marker on a birth certificate. Specifically, this rule change requires a notarized affidavit from the applicant; prohibits the marking of the replacement birth certificate as amended; and designates that a previous or concurrent name change must not show revision history, or be marked as amended.

TEMPORARY RULE JUSTIFICATION: Pursuant to Section(s) 67-5226(1)(b), Idaho Code, the Governor has found that temporary adoption of the rule is appropriate to comply with deadlines in amendments to governing law or federal programs, specifically, this rulemaking is being done to comply with a federal court order.

FEE SUMMARY: The following is a specific description of the fee or charge imposed or increased: N/A

FISCAL IMPACT: The following is a specific description, if applicable, of any negative fiscal impact on the state general fund greater than ten thousand dollars (\$10,000) during the fiscal year:

There is no anticipated fiscal impact to state general funds or any other funds except the costs of the rule promulgation, which includes printing and publication.

NEGOTIATED RULEMAKING: Pursuant to Section 67-5220(2), Idaho Code, negotiated rulemaking was not conducted. Negotiated rulemaking has been deemed not feasible since the Department must have the temporary rule in effect by April 6, 2018, as required by a federal court order.

INCORPORATION BY REFERENCE: No materials are being incorporated by reference in this rulemaking.

ASSISTANCE ON TECHNICAL QUESTIONS, SUBMISSION OF WRITTEN COMMENTS: For assistance on technical questions concerning the temporary and proposed rule, contact James Aydelotte at (208) 334-4969.

Anyone may submit written comments regarding this proposed rulemaking. All written comments must be directed to the undersigned and must be delivered on or before May 23, 2018.

Dated this 23rd day of March, 2018.

Tamara Prisock
DHW – Administrative Rules Unit
450 W. State Street – 10th Floor
P.O. Box 83720
Boise, ID 83720-0036
Phone: (208) 334-5500 / Fax: (208) 334-6558
E-mail: dhwrules@dhw.idaho.gov

**THE FOLLOWING IS THE TEMPORARY RULE AND THE PROPOSED TEXT
OF DOCKET NO. 16-0208-1801
(Only Those Sections With Amendments Are Shown.)**

201. COMPLETION AND CORRECTION OF CERTIFICATES.

01. Correction of Minor Errors on Certificates During the First Year. Except as otherwise provided in these rules, correction of obvious errors or transposition of letters in words of common knowledge, may be made by the State Registrar or an authorized agent within the first year after the date of the event either upon individual observation or query or upon request of any person with a direct and tangible interest as defined in IDAPA 16.05.01, "Use and Disclosure of Department Records," Subsections 011.01 and 011.03, or any person listed in Subsection 201.06.d. of these rules. The method of correction will be determined by the State Registrar, and is not subject to the requirements of Subsection 201.08 of these rules. When such minor corrections are made by the State Registrar, a notation as to the source of the information, together with the date the change was made and the initials of the authorized agent making the change must be made on the certificate in such a way as not to become a part of any certification issued. The certificate must not be marked as amended. (3-30-07)

02. Amendment of Registrant's Given Names or Surname on Birth Certificates Within the First Year. (12-26-83)

a. Until the registrant's first birthday, given names or surname may be amended upon written notarized request of: (11-20-87)

i. Both parents; (12-26-83)

ii. The mother in the case of a child born out of wedlock and the father's name is not shown on the certificate; (4-5-00)

iii. The father in the case of the death or incapacity of the mother; (12-26-83)

iv. The mother in the case of the death or incapacity of the father; or (12-26-83)

v. The legal guardian or agency having legal custody of the registrant. (12-26-83)

b. The certificate must be marked as amended. (3-30-07)

03. Amendment of Registrant's Given Name on Birth Certificate After the First Year. (12-26-83)

a. After one (1) year from the date of birth, the provisions of Subsection 201.06 of these rules must be followed to amend the given name if the name was entered in error at the time of the preparation of the birth

- certificate. (3-30-07)
- b.** In all other cases, a legal change of name order from a court of competent jurisdiction must be submitted to change a given name after one (1) year. (12-26-83)
- 04. Addition of Given Names on Birth Certificates.** (12-26-83)
- a.** Until the registrant's seventh birthday, given names, for a child whose birth was recorded without given names, may be added to the certificate upon written notarized request of: (12-26-83)
- i.** Both parents; (12-26-83)
- ii.** The mother in the case of a child born out of wedlock and the father's name is not shown on the certificate; (4-5-00)
- iii.** The father in the case of the death or incapacity of the mother; (12-26-83)
- iv.** The mother in the case of the death or incapacity of the father; or (12-26-83)
- v.** The legal guardian or agency having legal custody of the registrant. (12-26-83)
- b.** The certificate shall be marked as amended. (12-26-83)
- c.** After the registrant's seventh birthday, the provisions of Subsection 201.06 of these rules must be followed to add a given name. (3-30-07)
- 05. Acknowledgment of Paternity.** (12-26-83)
- a.** Subject to the provisions of Subsection 201.05.b. of these rules, a new certificate of birth will be prepared by the State Registrar for a child born out of wedlock in this state upon receipt of an affidavit of paternity signed by both parents and a written request by both parents. The child's surname will be changed on the certificate to that of the father if both parents so request. (3-30-07)
- b.** If another man is shown as the father of the child on the original certificate, a new certificate may be prepared only when a determination of paternity is made by a court of competent jurisdiction, or following adoption. (12-26-83)
- c.** The certificate must not be marked as amended. (3-30-07)
- 06. Amendment of Indicator of Gender.** (4-6-18)T
- a.** The State Registrar must issue an amended Idaho certificate of live birth for the change of the indicator of sex upon receipt of the following: (4-6-18)T
- i.** For a registrant eighteen (18) years of age and older, a completed and notarized application on a form approved by the State Registrar that includes the following information: (4-6-18)T
- (1)** The identity of the applicant; (4-6-18)T
- (2)** The Idaho certificate of live birth to be amended; (4-6-18)T
- (3)** A declaration that the registrant's indicator of sex on the Idaho certificate of live birth does not match the registrant's gender identity; and (4-6-18)T
- (4)** The gender indicator as it should appear on the amended certificate of live birth. (4-6-18)T
- ii.** For a registrant under the age of eighteen (18), a completed and notarized application on a form

approved by the State Registrar that includes the following information: (4-6-18)T

- (1) The identity of the applicant; (4-6-18)T
- (2) The Idaho certificate of live birth to be amended; (4-6-18)T
- (3) A declaration that the registrant's indicator of sex on the Idaho certificate of live birth does not match the registrant's gender identity; (4-6-18)T
- (4) The gender indicator as it should appear on the amended certificate of live birth; and (4-6-18)T
- (5) The consent of all parents listed on the certificate of live birth or the consent of the registrant's legal guardian. If a parent is deceased, a copy of the death certificate must be submitted with the application. If a parent cannot be located, the applicant must also submit a certified copy of an order from an Idaho court of competent jurisdiction ordering that the consent of only one (1) parent is required. (4-6-18)T

b. The amended certificate of live birth issued under this rule must not be marked amended, must not refer to the original certificate of live birth sex, and must show the amended gender as requested. The certificate of live birth being amended, application, and court order if required, must be placed in a sealed file which may only be opened by an order from an Idaho court of competent jurisdiction. (4-6-18)T

c. A one-time name change made under an amendment of sex on the certificate of live birth, whether made prior to, at the time of, or subsequent to a change of indicator of gender on a certificate of live birth must not be marked amended and must not refer to the original birth certificate name or indicator of sex. Any additional name changes are governed by Subsections 201.08 and 201.09 of this rule. (4-6-18)T

067. All Other Amendments. Unless otherwise provided in these rules or in Section 39-250, Idaho Code, all other amendments to vital records must be supported by: (3-30-07)

- a. An affidavit setting forth: (12-26-83)
 - i. Information to identify the certificate; (12-26-83)
 - ii. The incorrect data as it is listed on the certificate; and (3-30-07)
 - iii. The correct data as it should appear. (12-26-83)
- b. If one (1) year has elapsed since the date the event occurred, one (1) or more items of documentary evidence which support the alleged facts and which were established at least five (5) years prior to the date of application for amendment or within seven (7) years of the date of the event. (12-26-83)
- c. Any item of a medical nature can be amended only upon receipt of an affidavit from the person certifying such item, except that queries originating in the vital statistics office and subsequently completed and signed by the certifier may be used to complete or modify the reported cause of death. The State Registrar may require documentary evidence to substantiate the requested amendment. (3-30-07)
- d. Applications to amend a specific vital record will be accepted as follows: (12-26-83)
 - i. An application to amend a birth certificate may only be made by one (1) or both of the parents, the legal guardian, the registrant if eighteen (18) years of age or older, or the individual responsible for filing the certificate. (12-26-83)
 - ii. An application to amend a death certificate may only be made by the informant, the next of kin, the funeral director or person acting as such who signed the death certificate, or the certifying physician or coroner. (12-26-83)
 - iii. An application to amend a stillbirth certificate may only be made by a person listed in Subsections

201.06.d.i. or 201.06.d.ii. of these rules. (3-30-07)

iv. An application to amend a marriage or divorce certificate may only be made by the custodian of the official record from which the certificate was prepared, either of the parties to the marriage or divorce, or the individual responsible for filing the certificate. (12-26-83)

e. The State Registrar will evaluate the evidence submitted in support of any amendment, or require additional documentation. The State Registrar's decision and determination will be based upon serving the objectives of the vital statistics statutes and the best interests of the public. In the event the application is rejected or additional information is required, the State Registrar must advise the applicant of the reason for the action and the right to appeal pursuant to Section 39-250(5), Idaho Code. (3-30-07)

~~078.~~ **Amendment of the Same Item More Than Once.** Once an item is amended on a vital record, that item can not be amended again except upon receipt of a court order from an Idaho court of competent jurisdiction. (3-30-07)

~~089.~~ **Methods of Amending Certificates.** (12-26-83)

a. Certificates of birth, death, stillbirth, marriage, and divorce may only be amended by the State Registrar as follows: (12-26-83)

i. Preparing a new certificate showing the correct information when the State Registrar deems that the nature of the amendment so requires. The new certificate may be prepared on the form used for registering current events at the time of amendment. Except as provided elsewhere in these rules, the item number of the entry that was amended must be identified on the new certificate. In every case, except as provided elsewhere in these rules or the Idaho Code, the new certificate must show the date the amendment was made and be given the same state file number as the existing certificate. Signatures appearing on the existing certificate must be typed on the new certificate. (3-30-07)

ii. Completing the item in any case where the item was left blank on the existing certificate. (12-26-83)

iii. Drawing a single line through the item to be amended and inserting the correct data immediately above or to the side. The line drawn through the original entry must not obliterate such entry. (3-30-07)

iv. A certificate of birth amended in accordance with the provisions of Section 39-250(4), Idaho Code, must be amended as prescribed in Subsection 201.08.a.iii. of these rules. The fact that the name was changed in accordance with a court order must be stated on the certificate. (3-30-07)

b. Unless prohibited by statute or rule, there must be inserted on the face of the certificate the date the amendment was made and the initials of the person making the change; the certificate must be marked as amended. (3-30-07)