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ATTORNEY GENERAL

March 9, 2020

**OFFICIAL OPINION 2020-3**

The Honorable Jim Tomes  
Indiana State Senate  
200 W. Washington Street  
Indianapolis, IN 46204

**RE: Senate Bill 74 and Definition of gender under the Indiana Code**

Dear Senator Tomes:

This opinion is in response to your request for an official opinion of the Attorney General regarding a recent rule proposed by the Indiana Bureau of Motor Vehicles ("BMV").

**QUESTIONS PRESENTED**

1. Whether legislation is necessary to define gender, or whether gender and sex are synonymous in Indiana Code.
2. Whether the BMV has the authority to add a non-binary option to driver's licenses absent legislation.
3. Whether the Indiana State Department of Health ("ISDH") may allow for changes to birth certificates by way of a form absent legislation or a rule promulgated under the Administrative Rules and Procedures Act ("ARPA").

**BRIEF ANSWER(S)**

The BMV may not adopt a rule to define "gender" without statutory authority from the Indiana General Assembly. Absent authorizing legislation by the Indiana General Assembly, the BMV may not add a non-binary option to driver's licenses. Additionally, the ISDH may not allow changes to birth certificates absent a rule promulgated under the ARPA.

**BACKGROUND**

The Indiana Code provides that a rule is the whole or part "of an agency statement of general applicability that: (1) has or is designed to have the effect of law; and (2) implements, interprets, or prescribes: (A) law or policy; or (B) the organization, procedure, or practice requirements of an agency." Ind. Code § 4-22-2-3(b). The definition of an agency action includes rulemaking. Ind. Code § 4-22-2-3(d); *see also* Ind. Code § 4-21.5-1-4.

Current BMV regulations allow for a process by which an individual may change his or her gender from male to female or vice versa. As you noted in your request, the BMV previously proposed a rule in May 2019 regarding procedures to ensure uniformity in changes on a driver's license or an identification card. The initial rule, LSA No. 19-293, was recalled by the BMV due to the inadequacy of the Notice of Intent. In September 2019, the BMV proposed LSA No. 19-486 regarding procedures for amending gender information on a driver's license or identification card. Almost 700 comments were received in response to the proposed rule – approximately 37 in favor and 642 against. On January 22, 2020, the BMV recalled the proposed rule.

### ANALYSIS

- 1) *The BMV lacks statutory authority to define gender; gender and sex are synonymous within the Indiana Code; the BMV does not have the authority to add a non-binary option to driver's licenses absent legislation*

In early 2019, the BMV issued driver's licenses with a third, non-binary sex designation. According to the BMV, it stopped issuing non-binary licenses and identification cards until LSA No. 19-486 would be put into effect so that the BMV and the ISDH documents would align.<sup>1</sup> As discussed infra, the BMV and the ISDH each lack statutory authority to offer a third non-binary gender option. The General Assembly would have to delegate such power to these agencies and thus far it has not done so.

Administrative agencies like the BMV and the ISDH are creatures of the legislature whose powers are limited to their authorizing statutes. An administrative body has no power except that which is expressly granted, "plus whatever further power, if any, is granted by necessary implication." *See State ex rel. Licking Township v. Clamme, et. al.*, 134 N.E. 676, 682 (Ind. Ct. App. 1922). Agencies have inherent authority to interpret their own statutes, but such authority is not without limit. "An administrative agency has only those powers conferred on it by the legislature, and unless we find the grant of powers and authority in the statute, we conclude that no power exists." *Etzler v. Indiana Dep't of Revenue* 43 N.E.3d 250, 256 (Ind. Ct. App. 2015).

The BMV has authority to issue licenses,<sup>2</sup> and the ISDH has authority to correct birth certificates pursuant to Ind. Code § 16-37-2-10. The effect of the ISDH forms incorporated within the docket of LSA No. 19-486 would have created a third, non-binary gender on birth certificates and driver's licenses beyond the scope of the BMV's or the ISDH's grant of statutory authority. A non-binary option would not merely allow one to opt-out of choosing a gender. Rather, because a gender designation is required by the statute, a non-binary option would have the effect of creating a third gender designation.

While gender can be understood as "partly arbitrary but also partly based on distinguishable characteristics,"<sup>3</sup> sex is defined as "either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male especially

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<sup>1</sup> Indiana BMV puts non-binary gender option for IDs on hold, *Indiana Lawyer*, 2019 (last accessed 5 March, 2020)

<sup>2</sup> See Ind. Code § 9-24-11-2.

<sup>3</sup> Retrieved from <https://www.merriam-webster.com/dictionary/gender>

on the basis of their reproductive organs and structures.”<sup>4</sup> On credentials issued by the BMV, gender is displayed as “sex.”<sup>5</sup> As a result, the BMV has equated gender with sex. In contrast, actions by the ISDH or the BMV to create a third *non-binary* gender designation seek to make gender equivalent to *gender identity*.<sup>6</sup>

With respect to statutory authority, the issue turns on the definition of “gender.” Neither “sex” nor “gender” are defined within the Indiana Code, and throughout the Indiana Code, gender and sex are used interchangeably. For example, the legislature requires the BMV to include gender on a driver’s license.<sup>7</sup> Ind. Code § 9-24-11-5. However, on a driver’s license, sex is listed – not gender. ISDH, on the other hand, requires “sex” as a permanent record on a birth certificate. Ind. Code § 16-37-2-9. Because neither gender nor sex is defined, we turn to the rules of statutory construction.

The General Assembly has directed that to construe a statute,<sup>8</sup> words and phrases shall be taken in their plain, or ordinary and usual sense. *Id.* See also *Rainbow Realty Group, Inc. v. Carter* 131 N.E.3d 168, 174 (Ind. 2019) (“[W]hen a statutory term is undefined, the legislature directs us to interpret the term using its ‘plain, or ordinary and usual, sense.’”(citations omitted)). A plain reading of the Indiana Code shows only a contemplation of male and female. “Words importing the masculine only may be extended to females.” Ind. Code § 1-1-4-1. While “gender” is not defined in the Indiana Code, the ordinary and plain meaning, and its usage,<sup>9</sup> has been synonymous with “sex.”<sup>10</sup> Sex, by dictionary definition, is the biological male or female.<sup>11</sup> Beyond dictionary definitions, courts have interpreted gender and sex as synonymous. See *Farrell v. Butler University*, 421 F.3d 609, 616 (7<sup>th</sup> Cir. 2005) (“In order to advance a disparate impact claim, the plaintiff must first establish a prima facie case by a preponderance of the evidence that the employment policy or practice had an adverse disparate impact on women on the basis of their gender.” (citations omitted); see also *Griffin v. Sisters of Saint Francis, Inc.* 489 F.3d 838, 843 (7<sup>th</sup> Cir. 2007) (“[T]he PDA as a statute recognize[s], in effect, that pregnancy is a proxy for gender and, therefore, discrimination against pregnancy is discrimination against women.” (citing *Armando v. Padlocker, Inc.*, 209 F.3d 1319, 1320 (11<sup>th</sup> Cir. 2000) (“The analysis required for a pregnancy discrimination claim is the same type of analysis used in other Title VII sex-discrimination suits.”)). Based on the dictionary definitions and court interpretations, it is clear that gender and sex were used synonymously in 2007, when the BMV statute was amended, and are treated as a binary option. See Footnote 2. Because the BMV requires gender

<sup>4</sup> Retrieved from <https://www.merriam-webster.com/dictionary/sex>

<sup>5</sup> *Villegas v. Silverman*, 832 N.E.2d. 598, 610 (Ind. Ct. App. 2005).

<sup>6</sup> “A person’s internal sense of being male, female, some combination of male and female, or neither male nor female.” “Gender Identity,” *Merriam-Webster Dictionary*, retrieved on March 6, 2020, <https://www.merriam-webster.com/dictionary/gender%20identity>.

<sup>7</sup> Until 2007, BMV required “sex” on drivers’ licenses. In 2007, the General Assembly changed to gender to comply with the Real ID Act. The Real ID Act leaves it to States to define gender. 6 C.F.R. § 37.17(c).

<sup>8</sup> See Ind. Code § 1-1-4-1.

<sup>9</sup> Additionally, under Ind. Code § 20-20-8-8 the Dept. of Education reports gender categories as male or female. See 2019 ILEARN Grade 3-8 Corporation Results – Ethnicity and Gender Disaggregated.

<https://www.doe.in.gov/accountability/find-school-and-corporation-data-reports> (Last visited March 6, 2020). Also, *Ind. Code* § 21-21-3-8, entitled Gender Requirement, requires that the Indiana State University Board of Trustees include at least one woman.

<sup>10</sup> *Gender*, Webster’s New International Dictionary, 3<sup>rd</sup> (1993).

<sup>11</sup> *Sex*, Webster’s New International Dictionary, 3<sup>rd</sup> (1993).

to be included on licenses and gender, means sex in the Indiana Code, the BMV may not issue non-binary licenses. Similarly, because the ISDH is required to collect sex information,<sup>12</sup> the ISDH lacks the requisite statutory authority to create a third, non-binary gender marker to be used on state forms and documents.

Therefore, neither the BMV nor the ISDH may define gender as being anything other than sex without statutory authority. Notwithstanding the procedural issues raised by the requirements of ARPA discussed below, neither the BMV nor the ISDH are delegated power by the legislature to create this designation.

2) *The ISDH may not allow changes to birth certificates absent a rule promulgated under the ARPA*

Currently, Indiana Code provides that the ISDH has the authority to make additions or corrections to a birth certificate. See Ind. Code § 16-37-2-10. However, the ISDH may only make such changes “on receipt of adequate documentary evidence, including the results of a DNA test . . . or a paternity affidavit. . . .” *Id.* Additions to the birth certificate can only be based upon the results of a DNA test if no father is named on the certificate of birth and there is a statutory citation to this section noted on the certificate. *Id.*

The model forms produced by the ISDH as part of LSA No. 19-486 docket were designed to have the effect of law and were, themselves, subject to the ARPA. Proposed State Form 56712, “Changes to Birth Certificates,” provided a process by which one could make a change to his or her birth certificate to change the individual’s gender and also provides a third non-binary gender option. Courts have interpreted the scope of the ISDH’s statutory authority under Ind. Code § 16-37-2-10 to extend to name changes and gender. *See In re Petition for Change of Birth Certificate*, 22 N.E. 3d 707, 708-09 (Ind. Ct. App. 2014).<sup>13</sup> However, a court order is required for the ISDH to make those changes. *Id.* The forms had the same effect of a court order by enabling changes to birth certificates for individuals born in Indiana, and further assumed the function of a court order by a self-determination on State Form 56713 which reads that the form “is sufficient documentary evidence of a gender change for all Indiana state agencies.”

Any similar forms would likely have the effect of law and be subject to the rulemaking process under the ARPA. A rule has four characteristics: 1) an agency statement of general applicability; 2) applied prospectively to the class; 3) applied as though it has the effect of law; and 4) affects the substantive rights of a class. *See Villegas v. Silverman*, 832 N.E. 2d 598, 609 (Ind. Ct. App. 2005) *citing Blinzinger v. Americana Healthcare Corp.*, 466 N.E.2d 1371 (Ind.Ct.App. 1984). The Indiana Court of Appeals in *Villegas* held that the identification requirements issued by the BMV were subject to the ARPA. Similarly here, the forms at issue yielded these characteristics. They would have had general applicability, they would have been

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<sup>12</sup> Ind. Code § 16-37-2-9.

<sup>13</sup> Also see *In re Petition for Change of Birth Certificate* at 710 (“The legislature is free to craft specific requirements. Without such guidance, however, it is our view that the ultimate focus should be on whether the petition is made in good faith and not for a fraudulent or unlawful purpose.”).

applied prospectively, they would have had the effect of law, and they would have affected the rights of a class. Such forms would have categorically expanded the law by adding a third gender option and authorizing actions, i.e. gender change, previously only allowed by court order. *See Ward v. Carter*, 90 N.E.3d 660, 665 (Ind.), cert denied, 139 S. Ct. 240, 202 L.Ed. 2d 161 (2018) (holding an agency regulation carries the effect of law when it prescribes binding standards of conduct for persons subject to agency authority).

Therefore, the draft and use of those state forms would have constituted a rulemaking action on the part of the ISDH. *See Ward v. Carter*, 90 N.E.3d 660, 665 (Ind.), cert denied, 139 S. Ct. 240, 202 L.Ed. 2d 161 (2018). Even if alternative narrowly-tailored forms were used, the ISDH's process to change gender and the creation of a third gender marker would have had the effect of law. The drafting and use of such forms or processes would have taken the place of any rulemaking process, which allows for notice or comment by relevant stakeholders and the public. *See Villegas*, 832 N.E.2d at 609. Any process created to effect a gender change needs to be promulgated under ARPA to afford transparency because it prescribes to the public how to amend a birth certificate and therefore is intended to be generally applicable and have the effect of law. *See Ward v. Carter* 90 N.E.3d 660, 665 (Ind.), cert denied, 139 S. Ct. 240,202 L.Ed. 2d 161 (2018).

### CONCLUSION

No state agency has the authority to create a third non-binary gender because that authority has not been granted to any agency by the Indiana General Assembly. Only the General Assembly may determine whether the State of Indiana will codify any non-binary designations on State documents. Individuals wishing to change their binary designation on a driver's license or identification card may continue to utilize the process currently provided by the BMV rules.

Sincerely,



Curtis T. Hill, Jr.  
Attorney General

David P. Johnson, Chief Counsel