

January 3, 2023

Sen. Anne Carney, Chair
Rep. Matthew Moonen, Chair
Joint Standing Committee on the Judiciary
c/o Legislative Information Office
100 State House Station
Augusta, ME 04333

Re: Department of Administrative and Financial Services' Report on Resolves 2023, ch. 76
Resolve, to Establish a Plan for Adding a 3rd Option for Gender on State Forms

Senator Carney, Representative Moonen, and esteemed members of the Joint Standing Committee on the Judiciary, the Department of Administrative and Financial Services (“DAFS” or the “Department”), is pleased to submit this report and its findings for your consideration.

DAFS, which encompasses the State of Maine’s Bureau of Human Resources, supports the objective of Resolves 2023, ch. 76 (131st Legislature/LD 942). The State of Maine is an Equal Opportunity Employer that strives to create and maintain an inclusive and diverse workforce. Advancing inclusion and belonging of transgender, non-binary, and gender non-conforming individuals will only improve the State as an employer of choice and the services we provide to Maine residents.

The primary purpose of this report is to further advise the Committee on the logistical and fiscal challenges of implementing a requirement to include an “X” gender marker on all state forms, applications, and other documents, and to propose a potential plan for full implementation. Even as we raise these challenges for the Committee’s consideration, the DAFS supports the ultimate goal of improving the representation and inclusion of transgender, non-binary, and gender non-conforming individuals both as employees and as members of the public accessing the various services provided by the State of Maine.

Background

The initial draft of LD 942 would have required that all forms, applications, and other documents printed or made available online by a state agency that include a place for a person’s gender to be identified must include by November 1, 2024, a space to designate “X” for gender in lieu of “male” or “female.” In DAFS’ testimony on LD 942, we called to the Committee’s attention that this is easier said than done in many instances, particularly regarding online forms that feed into large computer systems. LD 942 was then amended to a Resolve directing DAFS to compile a list of all printed and electronic forms, applications and other documents used by those entities that require a person to designate that person’s gender and estimate the time and cost required to include within those forms, applications and other documents an option to designate “X” for gender. The Resolve

further directs DAFS to include any recommendations for expediting the process by which all state forms, applications, and other documents that require a gender designation be revised. Through the Bureau of Human Resources, DAFS coordinated with all executive branch and quasi-independent agencies and subdivisions, boards and commissions, the Executive Director of the Legislative Council, and State Court Administrator to compile a list of all printed and electronic forms, applications and other documents that require a person to designate that person's gender. Accompanying this report as Attachment A is the compiled list of all forms, applications, and other documents that request a person's gender.

DAFS requested information from a total of 405 executive branch and quasi-governmental agencies and subdivisions, and boards and commissions. The Department also requested information from the Judicial Court Administrator, Executive Director of the Legislative Council, the Maine Community College System, Maine University System, and Maine Maritime Academy. The Department received responses from 340 respondents. Fifty-one (51) of the non-responses are from quasi-governmental agencies, boards and commissions; 12 non-responses are from executive branch agencies. Additionally, the Maine University System and Maine Maritime Academy were non-responsive.

DAFS does not believe that the 51 non-responsive boards, commissions, and quasi-government agencies would result in a significant change to the recommendations of this report. Approximately 200 boards, commissions, and quasi-government agencies submitted responses to the Department and the vast majority indicated they do not publish forms. Of the few that noted forms that requested gender, none stated a cost associated with including an "X" marker.

Similarly, the non-responsive executive branch agencies are also not anticipated to significantly impact the recommendations and analysis of this report. The majority of these agencies are Independent and are unlikely to require gender information (*i.e.*, Commission for Community Service, Maine Arts Commission, and the Maine Historic Preservation Commission).

Estimated Costs

The primary purpose of this study and report is to provide a cost estimate for adding an "X" gender marker to all State of Maine forms, applications, and other documents when the form requests a person's gender. DAFS utilized two approaches: first, MaineIT prepared an estimate based on the digital forms and applications on the State's system, and second, the Bureau of Human Resources created an inventory based on information provided by the Departments.

Employing the first approach, MaineIT divided the State's computer applications and systems into four (4) categories: those requiring small, medium, large, and extra-large changes.

MaineIT Modeling of Costs			
Table 1.1			
Small Changes	Medium Changes	Large Changes	Extra Large Changes
Estimated number of paper forms unknown	Estimated number of systems: 240	Estimated number of systems: 50	Estimated number of Systems: 10
Estimated cost per form change: <\$300	Estimated cost per system: \$2,000	Estimated cost per system: \$21,000	Estimated cost per system: \$600,000

Based on the above estimates, MaineIT calculated it would cost approximately \$7.5 million to implement an “X” gender marker across all State computer applications and systems.

Using the second approach, the itemized costs compiled in Attachment A total \$851,942.20—the majority of that amount, totaling \$791,190, is attributable to the Department of Health and Human Services. However, it is essential to note that several agencies, including sub-divisions of DHHS and noted in the table below, were unable to estimate the cost of implementing the extra-large system changes required to comply.

Examples of Indeterminate Cost Estimates	
Table 1.2	
Departments	Agencies
DHHS	Office of Health Insurance Marketplace
DHHS	Center for Disease Control
DMR	Bureau of Marine Patrol
DOE	Maine School Safety Center
DOL	Bureau of Labor Standards
DOL	Bureau of Unemployment Compensation

The MaineIT modeling appears reasonable when compared to the self-estimated costs contained in Attachment A. For instance, the Office of Family Independence, which would require an extra-large application change, estimated a cost of \$690,000. Similarly, MaineIT estimated large application changes would average around \$21,000. Self-estimated costs came in at \$25,000 for the Maine Judicial Branch, \$40,000 for the Office of Aging and Disability, and \$18,000 Maine PERS.

Exceptions for Consideration

The Department is compelled to bring to the Committee’s attention three circumstances under which exemptions to the proposed requirement may have merit. The recommended exceptions would likely reduce costs.

1. Federal Law

Multiple Departments are required by federal law, or through federal grants, to use certain forms and/or collect certain data. The State of Maine generally has little to no input in the creation or use of these forms. A non-exhaustive list of examples include:

Examples of Federal Forms Used by State Departments
Table 2.1

Form Name	Federal Agency	State Agency	Description
1500 Claim Form	Centers for Medicare & Medicaid Services	MaineCare	Health Insurance Claim Form, Requests Sex, Male / Female only options
Unemployment Benefits Qualify Control Questionnaire	U.S. Department of Labor	Department of Labor Bureau of Unemployment Compensation	Requests Sex, Male / Female only options
Title I, Part D (Performance Reports, Supplemental Data Pages, Subpart 1 & 2)	U.S. Department of Education	Department of Education	Data reported for the National Evaluation and Technical Assistance Center for the Education of Children and Youth who are Neglected, Delinquent, or At Risk. Male / Female only options
OSHA Respirator Medical Evaluation Questionnaire	U.S. Department of Labor	Department of Corrections	Requests Sex, Male / Female only options
Recreational Boating Accident	U.S. Coast Guard	Inland Fisheries and Wildlife Warden Service	Requests Gender, Male / Female only options

The initial draft of LD 942 made no exception for federally required forms or collecting federally mandated data, which could force state agencies to choose between compliance with federal and state law, with federal non-compliance potentially compromising federal resources. It should, however, be noted that while there are several instances of the federal government requiring the collection of data on male/female genders only, they may not prohibit additional data collection. For example, the State of Maine is required to file the EEO-4 biennially, which reports the demographic makeup of State of Maine employees to the U.S. Equal Employment Opportunity Commission. This report only requires the collection of male/female gender data but permits other gender data to be reported in the comments section of this report.

The Department recommends exempting: 1) federally authored forms, applications, and other documents that are used by the State of Maine from adding an “X” gender marker, as well as, 2) any forms, applications, and other documents, that would conflict with federal data collection mandates by adding an “X” gender marker. If the addition of an “X” gender marker would not conflict with federal requirements (*i.e.*, would be permissible under federal requirements), the State should require an “X” gender option on forms, applications, and other documents that request gender information. In many instances, including an “X” gender marker would be an important

datapoint to collect, in order to analyze health, employment, housing, and other data specific to transgender, non-binary, and gender non-conforming individuals. That data would be useful in making future policy decisions that impact those communities.

2. Nationally Recognized Professional Standards

Like the above section involving federal law that requires the collection gender/sex information, several agencies use forms, applications, and other documents that are based on nationally recognized standards or multi-state cooperation. These forms, which are not controlled by the State of Maine agencies, request gender information for “male/female” only. A non-exhaustive list of examples includes:

Examples of Forms using Nationally Recognized Standards used by Agencies			
Table 2.2			
Form Name	National Organization	State Agency	Description
Application for Individual Producer	National Association of Insurance Commissioners	Bureau of Insurance	Licensing Application for Insurance Agents
Uniform Reporting System for Health Care Claims Data Sets	Substance Abuse and Mental Health Services Administration	Maine Health Data Organization	State mental health agencies (SMHAs) use the Uniform Reporting Systems (URS) to compile and report annual data as part of SAMHSA’s Community Mental Health Services Block Grant.
IAIABC Standard 3.0	International Association of Industrial Accident Boards and Commissions	Workers Compensation Board	National standards for workers compensation claim forms/data.
Alcohol Use Disorders Identification Test	AUDIT	Dorothea Dix Psychiatric Center	National health organization developed test used for alcohol screening.

Under the initially proposed LD, there was no exception for an agency utilizing a form, application, or other documents, that was either authored by or relied on professional guidance from a national professional organization. The Department recommends exempting forms, applications, and other documents, that are authored by or based on guidance from a nationally recognized professional organization.

The rationale for this exemption is that national organizations create a consistent reporting of data to better show national trends, which allow the State of Maine to better identify areas of concern and to implement policies to address those areas.

3. Data Regarding Sex Assigned at Birth

Multiple forms, applications, and other documents request information specific to a person’s sex assigned at birth. The Department of Corrections has multiple forms for intake and healthcare information that distinguishes between a person’s sex assigned at birth and gender identity. The purpose of this distinction is to allow medical professionals to assess health risks of residents and to appropriately assign housing within the facilities. The Department of Corrections already has various forms that include gender markers other than male and female. (*e.g.* transgender, non-binary, *etc.*)

The Department recommends that a distinction be recognized between requesting a person’s sex assigned at birth and requesting a person’s gender. If sex assigned at birth is requested for a legitimate purpose such as evaluating medical risks associated with a person’s sex assigned at birth, requests for sex assigned at birth should be exempt from adding an “X” option. The State could require that forms, applications, and other documents that request sex assigned at birth also request gender identity and provide an “X” gender option.

State Vendors

The State of Maine contracts with many private vendors to perform various functions for the State. Many of these vendors utilize their own forms and databases to complete those functions. A non-exhaustive list of examples is below:

Examples of Forms Used by State Hired Vendors			
Table 3.1			
Form Name	Vendor	State Agency	Description
Northeast Delta Dental Claims Form	Delta Dental	Office of Employee Health	This form is used by the vendor to enroll employees in the State’s Dental Insurance.
HR Management Systems	PRISM	Bureau of Human Resources	This system covers all employment functions by BHR. Importantly, this system is being updated and will include an X Gender Marker.
Paylocity Onboarding	Paylocity	Maine Veterans’ Home	The Maine Veterans’ Home has hired a vendor to manage their HR systems. There is no option for an X Gender Marker.
InterQual (Multiple Forms)	Optum	MaineCare	Provider of orthotic devices for MaineCare clients.

The State of Maine’s Office of Procurement can include contract language with private vendors requiring an “X” option for forms, applications, and other documents that request gender. DAFS strongly recommends the requirement be applied to new and renewing contracts to avoid the potential for having to renegotiate existing contracts at additional expense.

It should be noted that there is a limited pool of vendors for some services, and in some instances the State may have limited leverage, especially if the requirement would require the vendor to alter systems used to serve multiple states. The vendor could also build the associated costs of the require changes into their contract price.

Proposed Implementation Timeline

The Department recommends that all forms, applications, and other documents, that are not otherwise excluded from this requirement, be updated on an incremental/rolling basis. A proposed timeline and breakdown by categories is included below.

Implementation Timeline			
Table 4.1			
Category	Completion Date	Estimated Hours	Comments
Changes to Paper Forms	Immediately, but no later than December 31, 2024.	Unknown	
State Systems changes for which costs to include an “X” gender marker are absorbable within existing agency resources.	December 31, 2025.	4,800	This is based on the Small and Medium Changes listed in Table 1.1. This category represents updating approximately 80% of all State issued forms, applications, and other documents to include an “X” gender marker.
State Systems changes for which costs to include an “X” gender marker are <u>not</u> absorbable within existing agency resources and will require additional funds be appropriated.	June 30, 2027, contingent upon funding.	10,000	This is based on the Large Changes listed in Table 1.1. It is anticipated that additional funds will need to be appropriated to the agencies required to make changes within this category. This timeline provides the opportunity for agencies to submit requests for additional funding to be included in a biennial budget proposal. As of the completion of updating these systems, 96.7% of all state systems would be updated to include an ”X” gender marker.
Major State Systems upgrades/replacement required to include an “X” Gender Marker.	On a rolling basis, as systems are upgraded/replaced.	60,000	This is based on the Extra Large Changes listed in Table 1.1.

This timeframe is anticipated to give agencies sufficient time to assess which forms they are required to update based on any exclusions permitted by subsequent legislation the Committee has been authorized to report out by Resolves 2023, ch. 76. The agencies can then evaluate their total costs and begin implementing the required changes. It can be anticipated that many agencies could complete their changes prior to the applicable statutory deadlines—indeed many reported reviewing their forms and already making changes either to remove unnecessary questions about gender or include an “X” Gender Marker in response to this inquiry—however, the larger, more complex systems, would require additional appropriations and time.