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Gender X Markers on Vermont Birth Certificates

As it stands, Vermonters can change the gender marker on both their drivers' licenses and birth certificates to an 'X' marker to denote an intersex or non-binary identity on government documents. However, because of policy discrepancies between state bureaucracies, Vermont parents are unable to use gender 'X' markers on their children's birth certificates. No state currently allows parents to refrain from gendering their children from birth. This report delves into the current 'X' gender marker documentation abilities across the nation and the current policy dilemma in Vermont.

Intersex & Non-binary Identification Document Exclusion

Intersex people are individuals born with genitals, chromosomes, hormone differences or reproductive organs that don't fit into a male/female sex binary.¹ Estimates for the population of intersex individuals varies widely, mostly dependent on the number of conditions being included in the term "intersex", however, the widely accepted number by intersex rights organizations is about 1.7% of the US population.² For this population of people, "M" and "F" gender markers on identification documents force a binary choice onto physiology that is fundamentally on a spectrum, and can erase the identities of these people, which are often inextricable from their biology.³ Furthermore, outside of the realm of biological sex, there is a significant portion of the population that doesn't identify with binary gender for various other reasons, such as non-binary, genderqueer, genderfluid, and two-spirited individuals, among many others.⁴ According to the UCLA Williams Institute, an estimated 1.2 million adults in the U.S. identify as nonbinary, with seventy-six percent of them between the ages of 18-29. The prevalence of nonbinary individuals under the age of twenty-nine signals that the population of non-binary people will continue to

¹ Cleveland Clinic, "Intersex: What Is Intersex, Gender Identity, Intersex Surgery," n.d. Cleveland Clinic, <https://my.clevelandclinic.org/health/articles/16324-intersex#:~:text=People%20who%20are%20intersex%20have>.

² For some differences over how this is calculated, see A. Fausto-Sterling, *Sexing the Body: Gender Politics and the Construction of Sexuality* (New York: Basic Books, 2000); and "Intersex Population Figures," Intersex Human Rights Australia, September 28, 2013, <https://ihra.org.au/16601/intersex-numbers/>.

³ Human Rights Watch, "Mapping the Intersex Exceptions," 2022, Human Rights Watch, October 25, 2022, <https://www.hrw.org/feature/2022/10/26/mapping-the-intersex-exceptions>.

⁴ National Center for Transgender Equality, 2016, "Understanding Nonbinary People: How to Be Respectful and Supportive," National Center for Transgender Equality, July 9, 2016, <https://transequality.org/issues/resources/understanding-nonbinary-people-how-to-be-respectful-and-supportive>.

grow as generations who grew up in a more accepting society reach adulthood.⁵ The numbers from this recent research have demonstrated the deficiencies of the current system, and that there is a need for a legal apparatus that reflects the reality of shifting US demographics. Without the consideration of sex and gender outside of the binary, identification documents fail to do so in a fundamental, and meaningfully harmful way.⁶

Current VT X Gender Marker Law/Other State Examples

Vermont currently has policies allowing for an X gender marker on both driver's license and birth certificates, but with different regulations. For driver's license specifically, current Vermont Department of Motor Vehicles policy cites gender as a "self-designated" descriptor, meaning that no documentation is required to select gender initially or update your gender marker later.⁷ As a result, all that is needed to make this change is the submission of a new ID application form indicating the correct gender marker.⁸ This can be done either in-person, by mail, or online.⁹

The process of a non-binary gender marker on Vermont birth certificates requires greater administrative intervention. The Vermont General Assembly adopted a policy including a non-binary gender marker on birth certificates in H. 628, Sec. 2. 18 V.S.A. § 5112. The statute identifies the non-binary gender marker's usage as one requiring a change of birth certificate, stating that "an individual may amend the marker on a birth certificate to reflect the individual's gender identity, including a third non-binary marker."¹⁰ These changes are conducted through the State Vital Records Office and require an "affidavit by a licensed physician who has treated or evaluated the individual stating that the individual has undergone surgical, hormonal, or other treatment appropriate for that individual for the purpose of gender transition...."¹¹ This process means that it is not possible to assign a non-binary gender marker on a birth certificate, as no treatment has been undergone by the newborn to assert their non-binary status.

Certain states beyond Vermont have taken steps to include a non-binary gender marker on their legal documents as well. As of November 2023, twenty-two states as well as Washington D.C. allow for the use of an "X" non-binary gender marker on driver's licenses or state-issued IDs.¹²

⁵ Bianca D.M. Wilson and Ilan H. Meyer. 2021, "Nonbinary LGBTQ Adults in the United States," Williams Institute, June 2021, <https://williamsinstitute.law.ucla.edu/publications/nonbinary-lgbtq-adults-us/>.

⁶ Jonah, DeChants, "Association of Updating Identification Documents with Suicidal Ideation and Attempts among Transgender and Nonbinary Youth," *International Journal of Environmental Research and Public Health*, vol. 19, 9 5016. 20 Apr. 2022, <https://pubmed.ncbi.nlm.nih.gov/35564417/>

⁷ Vermont Department of Motor Vehicles, "Self-Designated Descriptors," Vermont Department of Motor Vehicles, September 29, 2022, <https://dmv.vermont.gov/licenses/identity-documents/self-designated-descriptors>.

⁸ VTLawHelp.org, "Name and Gender Marker Changes in Vermont," Legal Services Vermont and Vermont Legal Aid, September 8, 2023, <https://vtlawhelp.org/name-and-gender-marker-changes-vermont>.

⁹ Vermont Department of Motor Vehicles, "How do I change the gender on my license/ID?" Vermont Department of Motor Vehicles, October 3, 2022, <https://dmv.vermont.gov/faq/how-do-i-change-the-gender-on-my-license-id#VOR>.

¹⁰ Vermont General Assembly, HB 628, 18 V.S.A. § 5112, 2022.

¹¹ Vermont Legislature, House, HB 111, 2017.

¹² Movement Advancement Project, "Identity Document Laws and Policies," Movement Advancement project, updated November 29, 2023, https://www.lgbtmap.org/equality-maps/identity_documents.

None of these states require provider certification for the implementation of this marker.¹³ The policies in these states regarding a non-binary gender marker on birth certificates varies. There are varying requirements for this gender marker across territories, ranging from the resubmission of an application form to proof of gender reassignment surgery.¹⁴ No currently available knowledge indicates that there is any state with policy that allows the use of a non-binary gender marker from birth. The table below indicates which U.S. states allow for a non-binary gender marker and on what documents this is accessible.

State Policies on Non-Binary Gender Markers

Opposition to the implementation of gender markers is present in some states, aligning with the recent rise in anti-LGBTQ rhetoric among politicians. Legislatively, some states have acted against the use of a non-binary gender marker for birth certificates, specifically North Dakota and Oklahoma which have both banned this gender marker from state documents.¹⁵ In North Dakota House Bill No. 1474, the guidelines for how one’s gender identity may be defined are specified, with no inclusion of a label for non-binary individuals.¹⁶ Oklahoma has a similar policy, with their Senate Bill 1100 stating “the biological sex designation on a certificate of birth issued under this section shall be either male or female and shall not be nonbinary or any symbol representing a nonbinary designation including but not limited to the letter “X”.”¹⁷

At the federal level, non-binary gender markers are available for U.S. passports as of April 11, 2022.¹⁸ The “X” gender marker is an available option “even if their selected gender differed from their other citizenship or identity documents.”¹⁹ Additionally, the U.S. Department of State’s Bureau of Consular Affairs has stated that “beginning in late 2023, you will be able to select X as a marker if you are applying for a Consular Report of Birth Abroad.”²⁰ Both of these changes represent a move towards federal policies supporting the implementation of non-binary gender markers nationwide. The Social Security Administration, on the other hand, maintains a policy that requires a sex designation of male or female and cannot accommodate gender non-conforming identities.²¹

The table below represents the status of each state and their current non-binary documentation abilities. This data is not representative of states that allow gender changes from M to F or vice

¹³ Movement Advancement Project, “Identity Document Laws and Policies.”

¹⁴ Movement Advancement Project, “Identity Document Laws and Policies.”

¹⁵ Movement Advancement Project, “Identity Document Laws and Policies.”

¹⁶ North Dakota Legislative Assembly, House, HB. 1474, 2023.

¹⁷ Oklahoma Legislature, Senate, SB 1100, 2023.

¹⁸ Antony J. Blinken, “X Gender Marker Available on U.S. Passports Starting April 11: Press Statement,” U.S. Department of State, March 31, 2022, <https://www.state.gov/x-gender-marker-available-on-u-s-passports-starting-april-11/>.

¹⁹ Antony J. Blinken, “X Gender Marker Available on U.S. Passports Starting April 11: Press Statement.”

²⁰ U.S. Department of State Bureau of Consular Affairs, “Selecting A Gender Marker,” U.S. Department of State, September 9, 2023, <https://travel.state.gov/content/travel/en/passports/need-passport/selecting-your-gender-marker.html>.

²¹ Social Security Administration, “Gender Identity,” accessed December 1, 2023, <https://www.ssa.gov/people/lgbtq/gender-identity.html#:~:text=Currently%2C%20our%20record%20systems%20require,address%20this%20in%20the%20future.>

versa, rather it exclusively documents whether a non-binary gender marker is accessible through amendment.

State/Territory	Non-binary Gender Marker Available on Driver's License/ State ID?	Non-binary Gender Marker Available on Birth Certificate (through amendment only)?
Alabama	No	No
Alaska	No	No
American Samoa	No	No
Arizona	No	No
Arkansas	Yes	No
California	Yes	Yes
Colorado	Yes	Yes
Connecticut	Yes	Yes
Delaware	No	No
Florida	No	No
Georgia	No	No
Guam	No	No
Hawaii	Yes	No
Idaho	No	No
Illinois	No	Yes
Indiana	No	No
Iowa	No	No
Kansas	No	No
Kentucky	No	No
Louisiana	No	No
Maine	Yes	Yes
Maryland	Yes	No
Massachusetts	Yes	No
Michigan	Yes	Yes
Minnesota	Yes	No
Mississippi	No	No
Missouri	No	No
Montana	No	No
Nebraska	No	No
Nevada	Yes	Yes
New Hampshire	Yes	No
New Jersey	Yes	Yes
New Mexico	Yes	Yes
New York	Yes	Yes
North Carolina	No	No
North Dakota	No	No
Northern Mariana Islands	No	No
Ohio	No	Yes
Oklahoma	No	No
Oregon	Yes	Yes
Pennsylvania	Yes	No
Puerto Rico	No	No
Rhode Island	Yes	Yes
South Carolina	No	No
South Dakota	No	No
Tennessee	No	No

Texas	No	No
U.S. Virgin Islands	No	No
Utah	Yes	Yes
Vermont	Yes	Yes
Virginia	Yes	No
Washington D.C.	Yes	Yes
Washington	Yes	Yes
West Virginia	No	No
Wisconsin	No	No
Wyoming	No	No

Table 1: United States Territories and their Policies on the Usage of a Non-Binary Gender Marker for Legal Documentation as of November 2023

Source: Movement Advancement Project, “Identity Document Laws and Policies,” Movement Advancement Project, updated November 29, 2023, https://www.lgbtmap.org/equality-maps/identity_documents.

The Current Stance of The Vermont Department of Health

We reached out to the Vermont Department of Health to better understand their stance on the issue. They told us that Vermont requires that the initial birth certificate filed with them include the infant’s “binary sex” – either male or female – based upon the infant’s “anatomical and other biological characteristics.” They claim that “sex assigned at birth” is important for “measuring differences in health-related characteristics and is used to make population estimates and projections.” They cited 18 V.S.A. § 5112, arguing that pursuant to Vermont’s legislation “the Department of Health adopted a rule that provides a simple process by which an individual can amend the sex on their birth certificate to reflect their gender identity, including a third, non-binary marker.”²² This can be done at any time once the original birth certificate has been registered, and all evidence of the earlier birth certificate is confidential.”²³ They were clear that a non-binary gender marker “X” is not an option at the time of birth, and if the parents wish to change the sex on their baby’s birth certificate to reflect a non-binary gender, they can do so after the initial binary birth certificate has been registered with the Department of Health by completing an “affidavit of gender identity.”²⁴

Conclusion

This report finds that many states have made changes to include gender non-conforming people into their documentation abilities. Most states do not easily allow nonbinary and intersex people to identify as such on birth certificates and drivers’ licenses, and there remains discrepancies in the execution of the standing policy in Vermont. Different policies between organizations within

²² Vermont Department of Health Vital Records Division of Health Statistics & Information, email message to authors, December 5, 2023.

²³ Vermont Department of Health, Vital Records Rule, 10.0, “Amending a Gender Marker on a Birth Certificate,” November, 2022, https://www.healthvermont.gov/sites/default/files/documents/pdf/Vital_Records%20clean.Nov_.2022.FinalAdopted.Final_.pdf

²⁴ Vermont Department of Health, “Order Vital Records,” accessed December 14, 2023, www.healthvermont.gov/stats/vital-records-population-data/order-vital-records. Accessed 5 Dec. 2023.

Vermont preclude the use of gender ‘X’ markers from birth. This report elucidates the wide breadth of policies regarding this issue across the nation, and the current policy impasse in Vermont.

This report was completed on December 14, 2023, by Liz Fitzsimmons, Liam Johnson, and Zane Zupan under the supervision of VLRS Director, Professor Anthony “Jack” Gierzynski in response to a request from Representative Taylor Small.

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