

JOURNAL OF THE HOUSE

NINETY-SIXTH SESSION

THIRTY-SEVENTH DAY

STATE OF SOUTH DAKOTA
House of Representatives, Pierre
Monday, March 29, 2021

The House convened at 11:00 a.m., pursuant to adjournment, the Speaker presiding.

The prayer was offered by the Chaplain, John Fette, followed by the Pledge of Allegiance led by House pages Alexis Moran, Nolan Rounds, and Ajaye Hicks.

Roll Call: All members present except Rep. Olson who was excused.

APPROVAL OF THE JOURNAL

MR. SPEAKER:

The Committee on Legislative Procedure respectfully reports that the Chief Clerk of the House has had under consideration the House Journal of the thirty-sixth day.

All errors, typographical or otherwise, are duly marked in the temporary journal for correction.

And we hereby move the adoption of the report.

Which motion prevailed.

Respectfully submitted,
Spencer R. Gosch, Chair

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COMMUNICATIONS AND PETITIONS

March 18, 2021

Mr. Speaker and Members of the House:

I have the honor to inform you that on March 18, 2021, I approved House Bills 1084, 1094, 1124, 1127, 1143, 1189, 1191, 1197, 1235, 1254, and 1258, and the same have been deposited in the office of the Secretary of State.

Respectfully submitted,
Kristi Noem
Governor

March 21, 2021

Mr. Speaker and Members of the House:

I have the honor to inform you that on March 21, 2021, I approved House Bills 1017, 1018, 1020, 1021, 1026, 1038, 1039, 1047, 1085, 1111, 1140, 1153, 1166, 1169, 1171, 1210, 1212, 1232, 1256, 1264, 1266, and 1273, and the same have been deposited in the office of the Secretary of State.

Respectfully submitted,
Kristi Noem
Governor

March 24, 2021

Mr. Speaker and Members of the House:

I have the honor to inform you that on March 24, 2021, I approved House Bill 1155, and the same has been deposited in the office of the Secretary of State.

Respectfully submitted,
Kristi Noem
Governor

March 25, 2021

Mr. Speaker and Members of the House:

I have the honor to inform you that on March 25, 2021, I approved House Bills 1013, 1061, 1064, 1065, 1080, 1081, 1096, 1102, 1110, 1114, 1130, 1131, 1139, 1154, 1179, 1192, 1199, 1203, 1204, 1228, 1259, 1261, 1263, and 1265, and the same have been deposited in the office of the Secretary of State.

Respectfully submitted,
Kristi Noem
Governor

1 March 19, 2021

2 Dear Legislators:

3 I respectfully return to you House Bill 1217 with the following recommendations as to STYLE
4 and FORM.

5 I believe that boys should play boys' sports, and girls should play girls' sports. As the legislative
6 findings in the original version of the bill set out, "[w]ith respect to biological sex, one is either male
7 or female[,]" and "[p]hysiological differences between males and females include 'those most
8 important for success in sport: categorically different strength, speed, and endurance.'"

9 That is why House Bill 1217 properly provides that females should have opportunities to play
10 youth sports on teams comprised of females and against teams of females. Unfortunately, as I have
11 studied this legislation and conferred with legal experts over the past several days, I have become
12 concerned that this bill's vague and overly broad language could have significant unintended
13 consequences.

14 For example, Section 2 of House Bill 1217 requires a student athlete to verify, each year, that
15 the student "is not taking and has not taken, during the preceding twelve months, any performance
16 enhancing drugs, including anabolic steroids."

17 Presumably, this requirement was included to address a student taking these drugs as a part
18 of a gender transition, but House Bill 1217 is not limited in this way. Rather, if a male student athlete
19 failed to make the football team, and later learned that another student on the team was taking
20 steroids without disclosing it, the student who didn't make the team would be entitled to sue both
21 the school and the steroid-using student for damages.

22 In addition, Section 2 creates an unworkable administrative burden on schools, who under its
23 terms must collect verification forms from every student athlete, every year, as to age, biological
24 sex, and use of performance-enhancing drugs; and furthermore must monitor these disclosures
25 throughout the year so that if "reasonable cause" is found of a false or misleading form, the school
26 can take action to avoid civil liability.

27 I am also concerned that the approach House Bill 1217 takes is unrealistic in the context of
28 collegiate athletics. In South Dakota, we are proud of our universities' athletic programs, and in
29 particular the great strides we have taken to gain national exposure and increase opportunities for
30 our next generation over the past two decades.

31 South Dakota has shown that our student athletes can compete with anyone in the country,
32 but competing on the national stage means compliance with the national governing bodies that
33 oversee collegiate athletics. While I certainly do not always agree with the actions these sanctioning
34 bodies take, I understand that collegiate athletics requires such a system – a fifty-state patchwork
35 is not workable.

36 To achieve the legislative intent of protecting girls' sports, while simultaneously avoiding
37 potential unintended consequences, I recommend the following Style and Form changes to the
38 Enrolled version of House Bill 1217:

39 1. **Revise Section 1 to read:**

40 **13-67-1** Athletic teams and sports--Designation by sex--Participation.

41 Any athletic team or sport that is sponsored or sanctioned by an accredited elementary or
42 secondary school ~~public school~~, a school district, or an association meeting the requirements
43 of § 13-36-4, ~~or an institution of higher education under the control of the Board of Regents~~
44 ~~or the South Dakota Board of Technical Education~~ must be expressly designated as being:

- 45 (1) A male team or sport;
46 (2) A female team or sport; or
47 (3) A coeducational team or sport.

1 A team or sport designated as being female is available only to participants who are female,
2 based on their biological sex, as reflected on the birth certificate or affidavit provided upon
3 initial enrollment in accordance with ~~verified in accordance with § 13-27-3.1~~ ~~13-67-2.~~

- 4 2. **Strike Section 2;**
- 5 3. **Revise former Section 3 to read:**

6 **13-67-2** ~~3~~ Complaint—Investigation—Adverse Action.

7 A governmental entity, licensing or accrediting organization, or athletic association or
8 organization may not entertain a complaint, open an investigation, or take any adverse
9 action against an accredited elementary or secondary school, or a school district, or an
10 association meeting the requirements of § 13-36-4 ~~or an institution of higher education,~~ or
11 against any person employed by, or a governing board member of, such an elementary or
12 secondary school, or school district, ~~or institution,~~ or an association meeting the
13 requirements of § 13-36-4, for maintaining athletic teams or sports in accordance with §
14 13-67-1.

15 4. **Strike Section 4.**

16 The proposed revisions limit House Bill 1217 to elementary and secondary school athletics,
17 which are primarily conducted among South Dakota schools and at the high school level are
18 governed by the South Dakota High School Activities Association, a creature of South Dakota
19 law. The proposed revisions will also remedy the vague language regarding civil liability and the
20 use of performance-enhancing drugs.

21 Overall, these style and form clarifications protect women sports while also showing empathy
22 for youths struggling with what they understand to be their gender identity. But showing empathy
23 does not mean a biologically-female-at birth woman should face an unbalanced playing field that
24 effectively undermines the advances made by women and for women since the implementation of
25 Title IX in 1972. The Supreme Court of the United States has recognized that the Equal Protection
26 Clause of the Fourteenth Amendment allows for the law to treat women and men differently, and in
27 this instance that equal protection afforded women absolutely should apply on our state’s
28 elementary and high school playing fields.

29 I support this legislation and hope that House Bill 1217, with the changes I am proposing,
30 becomes law. I respectfully request that you concur with my recommendations as to STYLE and
31 FORM.

32 Respectfully submitted,
33 Kristi Noem
34 Governor

35 **CONSIDERATION OF EXECUTIVE VETOES AND RECOMMENDATIONS**

36 The House proceeded to the consideration of the recommendations of the Governor as to
37 changes of errors in style or form of **HB 1217**, as found on page 569 on the House Journal as
38 provided in Article IV, Section 4, of the Constitution of the State of South Dakota.

39 The question being "Shall the recommendations of the Governor as to changes of errors in
40 style or form of **HB 1217** be approved?"

41 And the roll being called:

42 Yeas 2, Nays 67, Excused 1, Absent 0

1 Yeas:
2 Anderson and Tidemann

3 Nays:
4 Aylward, Bartels, Barthel, Beal, Blare, Bordeaux, Chaffee, Chase, Cwach, Davis, Dennert,
5 Derby, Deutsch, Drury, Duba, Finck, Fitzgerald, Goodwin, Lana Greenfield, Gross, Hansen,
6 Haugaard, Healy, Hoffman, Howard, Jamison, Kevin Jensen, Phil Jensen, Chris Johnson, Karr, Keintz,
7 Koth, Ladner, Lesmeister, Marty, May, Mills, Milstead, Miskimins, Mortenson, Mulally, Odenbach,
8 Ernie Otten, Overweg, Perry, Kent Peterson, Sue Peterson, Pischke, Pourier, Randolph, Reed,
9 Rehfeldt, Reimer, Schneider, Jamie Smith, Soye, St. John, Stevens, Thomason, Vasgaard, Weis,
10 Weisgram, Wiese, Willadsen, Wink, York, and Speaker Gosch

11 Excused:
12 Olson

13 So the question not having received an affirmative vote of a majority of the members-elect,
14 the Speaker declared the recommendations of the Governor as to changes of errors in style or form
15 lost.

16 Rep. Gosch moved that the House do now recess.

17 Which motion prevailed and at 11:16 a.m., the House recessed.

18 **RECESS**

19 The House reconvened at 3:34 p.m., the Speaker presiding.

20 **REPORTS OF STANDING COMMITTEES**

21 Mr. SPEAKER:

22 The Committee on Legislative Procedure respectfully reports that the House and Senate have,
23 pursuant to the recommendation of the Governor as to corrections in style and form of **HB 1217**,
24 not approved the recommendation and has returned the same to her Excellency, the Governor, at
25 11:54 a.m., March 29, 2021.

26 Respectfully submitted,
27 Spencer R. Gosch, Chair

28 There being no objection, the House reverted to Order of Business No. 4 - Communications
29 and Petitions.

30 **COMMUNICATIONS AND PETITIONS**

31 March 29, 2021

32 Dear Governor Noem:

33 Attached is House Bill No. 1217 which you returned to the House of Representatives with a
34 recommendation as to changes of errors in style or form.

1 The House failed to approve your recommendation and is returning herewith HB 1217 for your
2 reconsideration.

3 The House rejected your recommended changes to errors in style or form with a vote of 67
4 nays and 2 yeas. (One member was excused.)

5 Sincerely,
6 Patricia K. Miller
7 Chief Clerk

8 March 29, 2021

9 Dear Mr. Speaker and Members of the House of Representatives:

10 I have received your message that the House of Representatives failed to approve my
11 recommendations as to changes of style and form of House Bill 1217.

12 Article IV, § 4 of the Constitution of the State of South Dakota states that:

13 *Bills with errors in style or form may be returned to the Legislature by the Governor with*
14 *specific recommendations for change. Bills returned shall be treated in the same manner as*
15 *vetoed bills except that specific recommendations for change as to style or form may be*
16 *approved by a majority vote of all the members of each house. If the Governor certifies that*
17 *the bill conforms with the Governor's specific recommendations, the bill shall become law.*
18 *If the Governor fails to certify the bill, it shall be returned to the Legislature as a vetoed bill.*

19 Given the House action, I cannot certify that the bill conforms with my specific
20 recommendations. Therefore, my only option consistent with the constitution is the fail to certify
21 the bill and to return it to you.

22 Pursuant to the constitutional provision above, returning the bill is not a veto. Rather, the
23 constitution provides that the legislature's failure to accept my recommendations requires that the
24 bill be treated as if it was vetoed.

25 Respectfully submitted,
26 Kristi Noem
27 Governor

28 March 29, 2021

29 Dear Madam Governor,

30 I have received your message dated March 29, 2021 relative to the House of Representative's
31 rejection of your specific recommendations as changes in "errors in style or form" of House Bill 1217.

32 Article IV, Section 4 of the Constitution of the State of South Dakota states, in relevant part:

33 Bills with errors in style or form may be returned to the Legislature by the Governor
34 with specific recommendations for change. Bills returned shall be treated in the
35 same manner as vetoed bills except that specific recommendations for change as to
36 style or form may be approved by a majority vote of all the members of each house.
37 If the Governor certifies that the bill conforms with the Governor's specific
38 recommendations, the bill shall become law. If the Governor fails to certify the bill,
39 it shall be returned to the Legislature as a vetoed bill.

40 Under the portion of Article IV, Section 4, which provides that "[b]ills with errors in style or
41 form may be returned to the Legislature by the Governor with specific recommendations for change,"

1 you returned House Bill 1217 to the Legislature on March 23rd, 2021 with specific recommendations
2 for change.

3 Further, under the portion of Article IV, Section 4 which provides that “[b]ills returned shall be
4 treated in the same manner as vetoed bills except that specific recommendations for change as to
5 style or form may be approved by a majority vote of all the members of each house,” the House of
6 Representatives did take under consideration your specific recommendations and rejected your
7 recommendations on a vote of 67 yeas and 2 nays, with 1 member excused. The House of
8 Representatives did then transmit House Bill 1217 back to you.

9 In your letter dated March 29, 2021, you stated that you “*fail to certify the bill . . .* (emphasis
10 added).” Under Article IV, Section 4, “[i]f the Governor fails to certify the bill, it shall be returned
11 to the Legislature as a vetoed bill.”

12 Notwithstanding your failure to certify this bill, your assertion that this is not a veto, having
13 clouded the constitutional issue, the House of Representatives remains in recess awaiting your
14 clarification as to whether you have chosen to veto House Bill 1217.

15 Cordially,
16 Spencer Gosch
17 Speaker of the House

18 When presented with **HB 1217** by the House of Representatives, the Office of the Governor
19 refused acceptance.

20 The Speaker ruled that regardless of the Governor's interpretation that she has not vetoed
21 **HB 1217**, her actions were clear under Article 4, Section 4, and Governor Noem clearly caused
22 **HB 1217** to be vetoed. The House then proceeded to Consideration of Executive Vetoes.

23 **CONSIDERATION OF EXECUTIVE VETOES AND RECOMMENDATIONS**

24 The House proceeded to the reconsideration of **HB 1217**, pursuant to the veto of the Governor
25 and the veto message found in the House Journal of the thirty-seventh day as provided in Article IV,
26 Section 4, of the Constitution of the State of South Dakota.

27 The question being "Shall **HB 1217** pass, the veto of the Governor notwithstanding?"

28 And the roll being called:

29 Yeas 45, Nays 24, Excused 1, Absent 0

30 Yeas:

31 Aylward, Beal, Blare, Chaffee, Dennert, Deutsch, Drury, Finck, Fitzgerald, Goodwin, Lana
32 Greenfield, Gross, Hansen, Haugaard, Hoffman, Howard, Jamison, Kevin Jensen, Phil Jensen, Chris
33 Johnson, Karr, Ladner, Marty, May, Mills, Milstead, Mulally, Odenbach, Ernie Otten, Overweg, Perry,
34 Kent Peterson, Sue Peterson, Pischke, Randolph, Reimer, Schneider, Soye, St. John, Vasgaard,
35 Weis, Wiese, Wink, York, and Speaker Gosch

36 Nays:

37 Anderson, Bartels, Barthel, Bordeaux, Chase, Cwach, Davis, Derby, Duba, Healy, Keintz, Koth,
38 Lesmeister, Miskimins, Mortenson, Pourier, Reed, Rehfeldt, Jamie Smith, Stevens, Thomason,
39 Tidemann, Weisgram, and Willadsen

40 Excused:

41 Olson

42 So the bill not having received an affirmative vote of a two-thirds majority of the members-
43 elect, the Speaker declared the bill lost, sustaining the Governor's veto.

1 The following prayer was written by the Chaplain, John Fette, and offered by the Speaker.

2 Father, thank you for all your help today. Please give us assurance that our efforts have been
3 successful. Give us traveling mercies as we go home. Draw us and our families to you. This I ask in
4 Jesus' name.

5 Amen.

6 Rep. Kent Peterson moved that the House do now adjourn sine die, which motion prevailed
7 and at 4:03 p.m. the House adjourned.

8 Patricia Miller, Chief Clerk