



— STATE OF SOUTH DAKOTA —
OFFICE OF THE GOVERNOR
KRISTI NOEM | GOVERNOR

March 19, 2021

Dear Legislators,

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

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

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

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

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

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

I am also concerned that the approach House Bill 1217 takes is unrealistic in the context of collegiate athletics. In South Dakota, we are proud of our universities' athletic programs, and in

particular the great strides we have taken to gain national exposure and increase opportunities for our next generation over the past two decades.

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

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

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

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

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

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

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

2. **Strike Section 2;**

3. **Revise former Section 3 to read:**

13-67-2 3 Complaint—Investigation—Adverse Action.

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

4. **Strike Section 4.**

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

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

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

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Kristi Noem", with a long, sweeping horizontal line extending to the right.

Governor Kristi Noem