Lambda Legal
making the case for equality

March 12, 2021

Via Electronic Mail

Governor Kristi Noem
Erin Tobin, Vice-Chair
South Dakota Office of the Governor
500 East Capitol Avenue
Pierre, SD 57501

Re: House Bill 1217 concerning student athletics – VETO

Governor Noem:

For the following reasons, Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") respectfully urges you in the strongest possible terms to veto H.B. 1217, concerning student athletics. Founded in 1973, Lambda Legal is the oldest and largest national legal organization dedicated to achieving full recognition of the civil rights of lesbian, gay, bisexual, transgender, and queer ("LGBTQ") people and people living with HIV through impact litigation, education, and public policy work. In 1993, Lambda Legal opened its Midwest Regional Office in Chicago, which leads cases in the Midwest, including in South Dakota, concerning issues of anti-LGBTQ and HIV discrimination in all areas of law including health care, identity documents, employment discrimination, students' rights, family law, and marriage equality.

We write to express our deep concern about H.B. 1217, which would categorically ban transgender South Dakotan student athletes from participating in sports on teams that match their gender identity. We must advise you that this legislation is not only misguided as a policy matter, but it will likely result in expensive litigation for the State because, although the resolution against the State might arrive relatively quickly, awards of attorney fees for plaintiffs' counsel are likely.

H.B. 1217 irrationally and unlawfully targets some of South Dakota's most vulnerable young people—transgender students. If the bill is enacted, it would stigmatize and discriminate against transgender students, create serious privacy and harassment risk for all girls and young women interested in sports participation, and invite no-win litigation against school districts.

First, if H.B. 1217 were enacted, it would cause serious, irreparable harm for transgender students, who already experience well-documented stigma, bullying and discrimination.[1] Excluding transgender students from athletics denies them the "life-long benefits of equal opportunity and participation" and "the value of inclusive and welcoming sports environments."[2]

[1] *See* Movement Advancement Project et al, *Separation and Stigma, Transgender Youth & School Facilities, Spotlight Report*, *available at* https://www.lgbtmap.org/file/transgender-youth-school.pdf.

[2] *See* Brief of Amici Curiae 176 Athletes in Women's Sports, the Women's Sports Foundation, and Athlete Ally in Support of Plaintiffs-Appellees and Affirmance, *Hecox v. Little*, Ninth Circuit Case Nos. 20-35813,

School athletics provide students uniquely valuable opportunities to develop self-confidence, teamwork, sportsmanship, and leadership skills, as well as a personal work ethic, discipline, responsibility, and good habits of exercise and attention to physical health. Denying transgender students these opportunities would irreparably harm those students.

Second, harming transgender students by excluding them from participation in athletics, as H.B. 1217 intends, would constitute sex discrimination in violation of federal law and would place schools at great risk of liability. For example, H.B. 1217 would require schools to prohibit transgender girls from participating with other girls and transgender boys from participating with other boys, which effectively bars them from participating and violates Title IX of the Education Amendments of 1972 (the federal law banning sex discrimination). The U.S. Supreme Court (in *Bostock v. Clayton County, Georgia*) confirmed that excluding people from employment because they are transgender is discrimination against them because of sex in violation of federal law. Even before *Bostock* was decided, courts were clear that transgender students are similarly protected under Title IX,[3] as well as by the U.S. Constitution.[4] And since *Bostock*, multiple federal circuit courts have further confirmed that it is unlawful discrimination to deny transgender students equal treatment,[5] and no federal circuit court has agreed with this type of discriminatory policy. Also, in the one case addressing a law like these proposals, the federal court enjoined the law on constitutional grounds.[6]

Third, H.B. 1217, if enacted, would place schools at risk of legal liability by inviting litigation against them from both directions. On the one hand, it invites claims by cisgender[7] students who object to participation by transgender students and those they believe might be transgender; meanwhile, as noted, schools that deny the ability of transgender students to

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20-35815, *available at* https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/athletes_in_womens_sports_amicus_brief_hecox_v._little.pdf.

[3] *See, e.g., Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ*., 858 F.3d 1034 (7th Cir. 2017); *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ*., 208 F. Supp. 3d 850, 870 (S.D. Ohio 2016).

[4] *See, e.g., Evancho v. Pine-Richland School District*, 237 F. Supp. 3d 267, 283 (W.D. Pa. Feb. 27, 2017) (policy restricting transgender students' restroom access violated Equal Protection).

[5] *E.g., Adams v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286 (11th Cir. 2020) (affirming right of Lambda Legal client to access school restroom consistent with his gender identity). *Accord*, *Parents for Privacy v. Barr*, 949 F.3d 1210, 1228 (9th Cir. 2020) (rejecting Title IX and constitutional claims of cisgender students based on having to share single-sex restrooms and locker facilities with transgender students).

[6] *Hecox v. Little*, No. 1:20-CV-00184-DCN, 2020 WL 4760138, at *28, 35 (D. Idaho Aug. 17, 2020) (holding Idaho law like H.B. 1217 violated federal law, and citing *Karnoski v. Trump*, 926 F.3d 1180, 1201 (9th Cir. 2019), which held heightened constitutional scrutiny applies "if a law or policy treats transgender persons in a less favorable way than all others"). The *Hecox* court also noted that to suggest that transgender girls are free to play, but that they must play on boys' teams, is akin to saying gay and lesbian people were free to marry when they were only permitted to marry a person of the other sex.

[7] The term "cisgender" refers to a person who is not transgender.

participate or that subject some students to privacy violations because others suspect them of possibly being transgender would violate the federal rights of the students excluded or so targeted. All litigation tends to be costly, especially when attorneys' fees are considered. Given the status of existing law, the likelihood of a successful legal challenge to H.B. 1217, if enacted into law, is obvious.

This bill also creates the risk of loss of federal funding. The U.S. Department of Education's Office for Civil Rights ("OCR") enforces Title IX's nondiscrimination requirements in education programs and activities that receive federal financial assistance. Importantly, President Biden's January 20, 2021 executive order—*Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*—directs all federal agencies to fully implement the principles of equal treatment under the law by applying the reasoning in *Bostock*, which prohibits sex discrimination based on gender identity or sexual orientation.[8] Specifically affirming the rights of young people and citing Title IX, the Executive Order states, "Children should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, *or school sports*."[9] Accordingly, a recipient of federal financial assistance that refuses to comply with Title IX by excluding transgender students or otherwise engaging in gender identity discrimination risks termination of such funds and is also likely to incur significant attorney fees in responding to any OCR investigation and probable funding termination proceedings. These serious consequences are not to be taken lightly.

Finally, H.B. 1217's definitions of sex are factually mistaken and legally indefensible. The bill's definitions make the same mistake that analogous policies and laws have made, which has rendered them invalid. By ignoring medical science and attempting to limit a complex human reality with a legislative "say so," such policies create and impose discrimination which cannot be defended when challenged in court. More specifically, the bill imposes a definition of "sex" that is inconsistent with how sex and gender are understood and explained in science and in the law. To begin with, courts have thoroughly rejected artificial, inaccurate, limiting conceptions of "biological sex."[10] For example, the Seventh Circuit refused to adopt such a definition in a school policy excluding transgender students because such a definition does not exist in Title IX.[11]

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[8] Available at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/.

[9] *Id*., Section 1 (emphasis added).

[10] *See, e.g., Adams v. Sch. Bd. of St. Johns Cty., Fla*., 318 F. Supp. 3d 1293 (M.D. Fla. 2018), *aff'd*, 968 F.3d 1286, (11th Cir. 2020); *Doe v. Boyertown Area Sch. Dist*., 897 F.3d 518, 522 (3d Cir. 2018); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ*., 858 F.3d 1034 (7th Cir. 2017); *Hecox v. Little*, No. 1:20-CV-00184-DCN, 2020 WL 4760138, at *3 (D. Idaho Aug. 17, 2020); *R.M.A. v. Blue Springs R-IV Sch. Dist.*, 568 S.W.3d 420 (Mo. 2019), *reh'g denied* (Apr. 2, 2019); *J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 396 F. Supp. 3d 833 (S.D. Ind. 2019); *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704 (D. Md. 2018).

[11] *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ*., 858 F.3d 1034 (7th Cir. 2017).

Similarly, the Fourth Circuit and the Eleventh Circuit both have rejected similar attempts to narrow the definition of "sex" to exclude transgender youth.[12]

Medical experts also have rejected the narrow definitions of "biological sex" that are offered in H.B. 1217. Human beings are complicated, and each person's sex has multiple different elements, including chromosomes, hormones, anatomy, and gender identity. Chromosomal makeup is more complicated and varied than most people realize; for example, a significant number of people have more than two sex chromosomes. Moreover, some people appear female but have XY chromosomes, and some people who appear male have XX genetics.[13] There also is much more variation of observable "reproductive biology" among infants than many people realize. Some have ambiguous genitalia; some have an uncommon combination of features. The term "intersex" covers a range of variations that defy the simplistic assumption used in the definitions in these bills. In sum, multiple elements combine to determine an individual's sex or gender and it is now widely recognized among experts that the most important of these is gender identity.[14]

H.B. 1217 is a solution in search of a problem and would needlessly invite harm to women, LGBTQ people, and other vulnerable South Dakotans and the contentiousness and expense of litigation merely to inscribe discrimination into statute—at least temporarily—for no legitimate reason. It is important for elected leaders to uphold the statutory and constitutional guarantees that protect everyone in this state, especially including marginalized populations like those who would

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[12] *See Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020), *reh'g en banc denied*, 976 F.2d 399 (4th Cir. 2020), *cert. petition filed*, Case No. 10-____ (Feb. 19, 2021); *Adams v. Sch. Bd. Of St. Johns Cty*., 968 F.3d 1286 (11th Cir. 2020).

[13] *See Schroer v. Billington*, 424 F. Supp. 2d 203, 213 fn. 5 (D.D.C. 2006). As the court explained, "While the biological components of sex align together in the vast majority of cases, producing a harmony between outward appearance, internal sexual identity, and legal sex, variations of this pattern that lead to intersexed individuals are real, and cannot be ignored. For example, androgen insensitivity syndrome (AIH) appears in approximately 1 out of every 20,000 genetic males. Complete AIS can produce an individual with "male" (XY) chromosomes and testes, but whose body does not respond to the virilizing hormones the testes produce. As a result, these individuals typically have a female sexual identity, appear feminine, and have female external genitalia, but lack female reproductive organs. *See* "The Necessity of Change: A Struggle for Intersex and Transex Liberties," 29 Harv. J.L. & Gender 51, n. 2 (2006) (citing James E. Griffin, Androgen Resistance: The Clinical and Molecular Spectrum, 326 New Eng. J. Med. 611 (1992)). Discrimination against such women (defined in terms of their sexual identity) because they have testes and XY chromosomes, or against any other person because of an intersexed condition, cannot be anything other than "literal[ ]" discrimination "because of ... sex." *Ulane I*, 581 F. Supp. at 825. If, as some believe, sexual identity is produced in significant part by hormonal influences on the developing brain in utero, this would place transsexuals on a continuum with other intersex conditions such as AIS, in which the various components that produce sexual identity and anatomical sex do not align."

[14] See Expert Report of Walter Bockting Ph.D, paragraph 13, submitted in *Schroer v. Billington*, Case No. 05-1090 (JR), U.S. District Court for the District of Columbia (Sept. 14, 2006), *available at* https://www.aclu.org/sites/default/files/field_document/asset_upload_file236_30367.pdf.

be disparately impacted by the proposed legislation at issue. We appreciate your consideration of the above submission and hope that it informs your decision to veto H.B. 1217.

Thank you for your kind attention to these matters. Please do not hesitate to contact us at (219) 669-1445 or via kingelhart@lambdalegal.org should you have questions or if additional information about these matters would be helpful.

Sincerely,

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