March 17, 2023

The Honorable Secretary of State, Chuck Gray
Secretary of State's Office
Herschler Building East,
122 W. 25th Street, Suites 100
Cheyenne, Wyoming 82002

RE: SF0133/SEA No. 0092 Student Eligibility in Interscholastic Sports

Dear Secretary Gray,

I have taken the fullest extent of my time to deliberate on SEA No. 0092 Student Eligibility in Interscholastic Sports (SEA 0092) for a number of reasons. First, while I support and agree with the overall goal of fairness in competitive female sports, I am concerned that the ban included in this legislation is overly draconian, is discriminatory without attention to individual circumstances or mitigating factors, and pays little attention to fundamental principles of equality. Let me be clear that there are two sides to this issue and my heart goes out to any student athlete who would be denied a scholarship or a competitive berth on a team because another athlete of another sex enjoyed an unfair advantage. We must recognize this topic does not lend itself to a facile solution. There are victims on both sides of any action, which is why I believe a commission that can fully consider the implications and factors at play in each situation, such as the one contemplated in the second part of SEA 0092, offers a superior course of action.

Nevertheless, while I freely acknowledge the intent of this legislation is well-meaning as a way to protect the integrity and fairness of women's sports in our state, by enacting an outright ban on transgender individuals participating in sports teams I believe Wyoming sends a harmful message that these individuals and their families do not deserve the same opportunities as others. Messages like these, whether explicit or implicit, can have a devastating impact on the mental health and well-being of individuals who already face significant discrimination and marginalization. In saying this, I do not diminish the awkwardness inherent in situations where transgender athletes participate. These are circumstances that have been addressed before, often successfully without harm. While it is certainly possible that an individual may want to enjoy a competitive advantage either for glory or for scholarships, it is hard to believe most transgender athletes would be motivated by such purely competitive urges, or would cling to that single-minded intensity and be willing to endure the abuse so many transgender youth regularly face. It is important to note that transgender youth face significant challenges in their daily lives, including high rates of bullying, discrimination and suicide. Wyoming continues to lead the nation in suicide rates, and I am concerned that by enacting a ban we may be pushing these students farther

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down this road rather than finding ways to support them. It is well known that participating in team sports can foster a sense of belonging, potentially averting ostracization and depression.

As I noted, this is not an easy issue nor can it be dealt with simplistically without hurting someone in the process. Female athletes deserve to be confident that in competition and perhaps in their quest for athletic scholarships, that their path is free of hesitation. I can thus understand the Legislature's desire to protect the integrity and fairness of women's sports in our state; but SEA 0092 implies that fairness in competitive female sports is not currently being met in Wyoming and that an existing problem requires drastic state government intervention. With only four known transgender students competing in school athletics out of 91,000 students total, this seems to call for individualized consideration, where families, students, teams, and others can thoughtfully address specific circumstances, rather than such a punitive, ostracizing broad-brush approach.

As a matter of fact, the Wyoming High School Athletic Association implemented a process nine years ago that appears to have been effective in addressing on a case-by-case basis the very small number of student-athletes who are looking to find a sense of connection and community without threatening the safety of participants or altering the competitiveness of women's sports. While I can appreciate the notion of a real threat to the fairness in women's sports in Wyoming generally (even if that threat has been amplified by a national discussion on the topic), I cannot see that Wyoming or her schools have so far failed in its responsibilities to assure fairness, security or safety, nor has either neglected its responsibility to be compassionate and supportive.

If we are creating policy for a problem that does not exist, my hope is we can be more thoughtful when it comes to our students. I support placing broader policy decisions at the state level to ensure consistency and fairness across school districts in this case, but we should leave room at the local level to be able to address specific circumstances individually. One should hope for the best for all of our students. In my view, as I mentioned above, this enabling part of the bill should have been enough to address the complexities of transgender athletes without having to enact a ban. It would have allowed families and schools more flexibility to address individual concerns with humanity and broad-mindedness while still achieving the stated goals of assuring integrity and fairness in women's sports. Participation in activities is critical for the healthy development of all students – those going on to collegiate, professional or Olympic sports, and those who will not.

In any event, this legislation will not go into effect until July 1st allowing students to finish their year without significant impact to their schedules. I am committed to working with the State Superintendent of Public Instruction prior to the start of next school year, to ensure that there is clear guidance from the Wyoming High School Activities Association regarding the opportunities that will exist moving forward for transgender students to have some means to participate safely in interscholastic activities after this law goes into effect, recognizing sadly that may mean these young people may not be able to compete in athletics.

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With several lawsuits being litigated across the country, we know that, if implemented, SEA 0092 is an invitation for a lawsuit. It is difficult for me to sign legislation into law that knowingly will cost the State and taxpayers money to litigate and may be challenged under Title IX and the Equal Protection Clause of the United States Constitution. While the outcome of potential litigation is unknown, there are at least three ways this legislation could be problematic. First, a plaintiff may sue under 42 U.S.C. § 1983, alleging that a specific right arising from federal law (whether constitutional or statutory) has been violated. This type of suit may subject the state to judgment of monetary damages, as well as attorneys' fees. Second, given the United States Department of Education's position, it is likely that this act will put educational institutions in violation of Title IX of the Education Amendments of 1972, which amended the Civil Rights Act of 1964. A Title IX violation jeopardizes all federal assistance from the United States Department of Education, assistance from other federal agencies that support education programs, including school nutrition funding from the U.S Department of Agriculture, and various other sources of federal funding for educational programs. Finally, Title IX allows for a private cause of action and plaintiffs who prevail in litigation are generally awarded attorneys' fees.

Understanding the political reality that will prolong these very divisive debates, I am willing to let this pass into law without the benefit of my signature. I reiterate my belief that hate and discrimination have no place in Wyoming. As we move forward over the next couple of years, I urge the Legislature to carefully consider policies that promote inclusion and equality for all individuals.

Sincerely,

Mark Gordon
Governor

MG:rm:kh

cc: The Honorable Albert Sommers, Speaker of the House
The Honorable Ogden Driskill, President of the Senate
Chief Clerk, Wyoming House of Representatives
Chief Clerk, Wyoming Senate