

# The Fiscal Impact of North Carolina's HB2



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## Executive Summary

An estimated 1.7% of youth (aged 13-19) and 0.3% of adults in the United States identify as transgender.<sup>1</sup> Applying these percentages to the number of youth and adults living in North Carolina indicates that the state is home to approximately 15,600 transgender youth aged 13-19 and 22,200 adults aged 20 and older.<sup>2</sup>

House Bill 2/Session Law 2016-3<sup>3</sup> (HB2) requires state and local government entities and public educational institutions to restrict use of restrooms according to “biological sex.” The bill defines “biological sex” as “the physical condition of being male or female, which is stated on a person’s birth certificate.”<sup>4</sup> This policy is in conflict with several federal laws that prohibit discrimination against transgender people. This memorandum analyzes the potential fiscal impact on North Carolina as a result of the conflicts between House Bill 2 and seven such federal laws: Title IX of the Education Amendments of 1972, Executive Order 13672, the Workforce Innovation and Opportunities Act, the Violence Against Women Act, the Affordable Care Act, the Equal Access Rule, and Title VII of the Civil Rights Act of 1964.<sup>5</sup>

The potential fiscal impact of HB2 includes:

- Loss of federal educational funding of up to \$4.7 billion annually as a result of Title IX violations;
- Loss of federal contracts to state and local government entities of an estimated \$35 million to \$65 million annually as a result of Executive Order 13672 violations;
- Loss of federal funding to support NCWorks of up to \$108 million annually;
- Loss of federal grants authorized by the Violence Against Women Act of an estimated \$5 million to \$5.6 million or more annually;
- Loss of federal funding from the U.S. Department of Health and Human Services as a result of Affordable Care Act violations;
- Loss of federal funding from the U.S. Department of Housing and Urban Development as a result of Equal Access Rule violations; and
- Costs incurred as a result of litigation and federal administrative enforcement under Title IX, Executive Order 13672, the Workforce Innovation & Opportunity Act, the Affordable Care Act, the Violence Against Women Act, Title VII of the Civil Rights Act of 1964, and the Equal Access Rule promulgated under the Housing Act of 1949.

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## **I. Funding for Education under Title IX**

Title IX of the Education Amendments of 1972 prohibits discrimination based on sex in all federally funded education programs and activities.<sup>6</sup> Title IX applies broadly to educational institutions, prohibiting discrimination against students, teachers and staff<sup>7</sup> and in all operations by state, local, and private schools that receive federal funding, with a few limited exceptions.<sup>8</sup>

The U.S. Department of Education has interpreted Title IX to prohibit discrimination based on gender identity<sup>9</sup> and its Office for Civil Rights (OCR) has resolved complaints by requiring school districts to allow transgender students to access restrooms and other facilities that correspond to their gender identity.<sup>10</sup> The Office for Civil Rights has explicitly determined that permitting a transgender student to use a separate, gender-neutral facility (a single-stall faculty restroom) does not absolve a school district of Title IX liability,<sup>11</sup> rather schools must allow students to access shared restrooms and facilities corresponding to their gender identity.<sup>12</sup>

On May 4, 2016, the Department of Justice notified Governor Pat McCrory that HB2 violates Title IX as well as Title VII of the Civil Rights Act and the Violence Against Women Act.<sup>13</sup> The Department of Justice stated in the notice that state officials have until May 9, 2016 to confirm that they will not enforce HB2.<sup>14</sup>

North Carolina's public educational institutions are at risk of losing federal funding because HB2 requires them to restrict use of restrooms based on biological sex. The Department of Education could revoke or withhold funding from educational institutions that refuse to correct the violation.<sup>15</sup> Each year, North Carolina receives a substantial amount federal funding to support public education. In fiscal year 2015, North Carolina's expenditures for elementary and secondary public educational institutions included \$1.4 billion in federal funding, which represented 11.5% of the state's total support for these institutions in that year.<sup>16</sup> In addition, higher and other educational institutions in North Carolina will receive an estimated \$3.3 billion in federal grant funding from the U.S. Department of Education in fiscal year 2016, and this funding is projected to grow to \$3.5 billion by fiscal year 2017.<sup>17</sup> House Bill 2 puts this funding at risk of being revoked or withheld by the Department of Education.

## **II. Federal Contracts under Executive Order 13672**

Executive Order 13672, which amends Executive Order 11246, prohibits federal contractors that receive more than \$10,000 in federal contracts annually from discriminating against employees and job applicants based on gender identity.<sup>18</sup> The Office of Federal Contract Compliance Programs has issued guidance stating that Executive Order 13672 requires contractors to "allow employees and applicants to use restrooms consistent with their gender identity," and defines gender identity as "one's internal sense of one's own gender. It may or may not correspond to the sex assigned to a person at birth, and may or may not be made visible to others."<sup>19</sup>

HB2 puts state and local government entities at risk of losing federal contracts and being barred from future bidding opportunities because the law requires public entities to discriminate against transgender individuals in violation of Executive Order 13672.<sup>20</sup> In the past three fiscal years, state and local

government entities (including public schools) in North Carolina have received between \$35.6 million and \$65.1 million in federal contracting dollars annually.<sup>21</sup> State and local entities that received contracts during this period included North Carolina's Departments of Administration, Environment and Natural Resources, Health & Human Services, Motor Vehicles, Agriculture & Consumer Services, Public Safety, and Transportation. In addition, the following received federal contracts: Asheville, Charlotte, Havelock, Brunswick County, Cumberland County, Jackson County, Elizabeth, Fayetteville, McDowell County, Onslow County, Stanly County, Fayetteville State University, North Carolina State University, the University of North Carolina system, and Vance-Granville Community College.<sup>22</sup>

As a result of HB2, North Carolina's state and local government entities are at risk of losing \$35 million to \$65 million in federal contracts annually, and state and local entities may also be debarred from bidding on future federal contracting opportunities.

### **III. Funding to Support NCWorks**

The Workforce Innovation and Opportunity Act is a federal law that provides financial support to states to "help job seekers access employment, education, training, and support services" and to match employers with skilled employees.<sup>23</sup> In North Carolina, the program is administered by NCWorks.<sup>24</sup> The Workforce Innovation and Opportunity Act prohibits funding recipients from discriminating against employees and program participants based on sex.<sup>25</sup> The U.S. Department of Labor has issued a proposed regulation interpreting the sex non-discrimination requirement to prohibit discrimination based on gender identity.<sup>26</sup> The regulation specifically states that recipients of funding under the Workforce Innovation and Opportunity Act are prohibited from "denying individuals access to the bathrooms use by the gender with which they identify."<sup>27</sup>

HB2 puts at risk funding received by North Carolina under the Workforce Innovation and Opportunity Act. Under the law, all NCWorks facilities and centers that are considered state and local entities would be prohibited from allowing transgender employees and program participants to use restrooms that correspond to their gender identity, violating the Department of Labor's proposed regulation and potentially resulting in suspension or termination of funding.<sup>28</sup> For the 2016 program year, North Carolina will put at risk a total of \$88.2 million in federal funding to support NCWorks: \$25.2 million to support the Youth Activities Program; \$24.1 million to support the Adult Activities Program; and \$38.8 million to support the Dislocated Worker Activities Program.<sup>29</sup>

### **IV. Grants Issued under the Violence Against Women Act**

The Violence Against Women Act authorizes 24 grant programs "to reduce domestic violence, dating violence, sexual assault, and stalking."<sup>30</sup> The Act prohibits discrimination based on gender identity by grant recipients.<sup>31</sup> Under guidance issued by the Office of Justice Programs in the U.S. Department of Justice, sex-specific programs or services should be made accessible based on an individual's self-identified gender.<sup>32</sup> The non-discrimination requirement applies to all operations of grant recipients (not only the operations funded by the grant), and protects grant beneficiaries as well as employees of grant recipients.<sup>33</sup> State and local governments that receive or administer grant funding under the Act

must comply with the requirements.<sup>34</sup> As described in Section I, the Department of Justice has issued a notification to Governor Pat McCrory stating that HB 2 violates the non-discrimination requirements of the Violence Against Women Act.

HB2 puts at risk \$5 million to \$5.6 million in grants each year under the Violence Against Women Act.<sup>35</sup> The North Carolina Department of Public Safety has received most of this funding during the past three years, with grants of \$3.8 million to \$4.3 million annually.

Further, guidance issued by the Office of Justice Programs states that the gender identity non-discrimination requirement that applies to grants authorized by the Violence Against Women Act may also apply to one or more other grant programs administered by the Office of Justice Programs.<sup>36</sup> The guidance does not specify which grant programs these may be, but states that the Office of Justice Programs will notify grant applicants and recipients that these non-discrimination requirements apply during the grant-making process. If state or local entities in North Carolina receive additional grants administered by the Office of Justice Programs, they may also be at risk of having the funds suspended or terminated for not complying with the Violence Against Women Act's gender identity non-discrimination requirement.

## **V. Funding for Health Care Programs and Activities under the Affordable Care Act**

The Affordable Care Act prohibits discrimination based on gender identity in health care programs or activities.<sup>37</sup> A proposed regulation issued by the U.S. Department of Health and Human Services (HHS) incorporated Title IX regulations to prohibit discrimination based on sex using the same language that the Department of Education and the Department of Justice have interpreted to require access to shared restrooms based on gender identity.<sup>38</sup> The comments on the proposed regulations indicated HHS intends to promulgate regulations "consistent with...recent guidance issued and enforcement actions taken by the U.S. Department of Education, the U.S. Department of Justice, and the Equal Employment Opportunity Commission," and cited to recent enforcement actions requiring access to shared restrooms.<sup>39</sup> The non-discrimination requirement applies to all operations of funding recipients (not only the federally funded operations).<sup>40</sup> State and local governments that receive such funding must comply with the non-discrimination requirements.<sup>41</sup>

HB2 puts at risk federal Affordable Care Act funding issued to state and local entities by HHS, and could result in suspension or termination of funding.<sup>42</sup> Given available data sources, it is not possible to track the amount of HHS funding issued to state and local government entities in North Carolina.<sup>43</sup> Nonetheless, available data show that the state, in general, receives a significant amount of funding for Department of Health and Human Services programs. For example, North Carolina received an estimated \$8.8 billion in Medicaid funding in fiscal year 2015,<sup>44</sup> and will receive an estimated \$448.2 million in CHIP funding in fiscal year 2016.<sup>45</sup> Some portion of this funding would likely go to state and local government entities that administer health programs and activities funded by HHS.

## **VI. Funding from the U.S. Department of Housing and Urban Development**

The Housing Act of 1949 charged the U.S. Department of Housing and Urban Development (HUD) with accomplishing “the goal of a decent home and a suitable living environment for every American family.”<sup>46</sup> In 2012, HUD established the Equal Access Rule through the Code of Federal Regulations, which required that HUD-funded housing be made equally accessible regardless of gender identity and prohibited inquiries into a person's gender identity in the provision of housing that receives HUD funding, but did “not prohibit lawful inquiries of an applicant or occupant's sex where the housing provided...is temporary, emergency shelter that involves the sharing of sleeping areas or bathrooms.”<sup>47</sup> After monitoring the results of that exception, HUD determined that further guidance and regulations were needed to explicitly require that individuals be given access to sex-segregated spaces in accordance with their gender identity.<sup>48</sup> The proposed regulations remove the previous exception allowing inquiries into gender identity and require that “[p]lacement and accommodation of individuals in shelters and other buildings and facilities with...shared sleeping quarters or shared bathing facilities shall be made in accordance with the individual’s gender identity,” except “[u]nder narrow circumstances...[when] necessary to ensure health and safety.”<sup>49</sup> The proposed regulations would apply to recipients and sub-recipients of HUD assistance, including state and local governments. Entities that violate the Equal Access Rule “will be subject to all sanctions and penalties ... including the withholding of HUD assistance.”<sup>50</sup>

HB2 puts at risk any HUD funding issued to state and local entities. Under HB2, any single-sex shelters considered state or local government entities would be required to restrict access to restrooms based on biological sex. This policy violates HUD's guidance that requires placement in single-sex facilities based on gender identity, and could result in suspension or termination of funding. Based on available data sources, it is not possible to determine the amount of HUD funding received by state or local government-run shelters.

## **VII. Costs of Litigation and Other Enforcement Actions**

By creating conflicts with federal law, HB2 also exposes state and local governments to litigation costs, including a challenge to the law and individual enforcement actions. Days after HB2 was enacted, legal organizations filed a suit against state government officials and the University of North Carolina in federal district court on grounds that the law violates the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment and Title IX.<sup>51</sup> The State of North Carolina will incur the costs of defending the law in court against the challenge.

Further, all seven of the federal laws discussed in this memo allow individuals to file administrative complaints of discrimination.<sup>52</sup> For example, under Title IX, any individual is permitted to file a complaint alleging that a school policy violates the law; the person need not have experienced discrimination under the policy.<sup>53</sup> Similarly, any individual may file a complaint under the Workforce Innovation and Opportunity Act if he or she believes that any specific class of individuals has been subjected to discrimination.<sup>54</sup> Complaints filed under the laws trigger administrative enforcement

procedures, such as investigations and compliance reviews.<sup>55</sup> These procedures may be burdensome to state and local entities, particularly those that are under-resourced and understaffed.

In addition, all seven federal laws allow the Department of Justice (or another federal agency) to bring suit against entities that fail to comply with the laws.<sup>56</sup> Further, three of these laws, Title IX, Title VII, and the Affordable Care Act, provide a private right of action, allowing individuals who have been discriminated against to file lawsuits alleging discrimination directly in court.<sup>57</sup> State and local government entities are not immune from suits brought under Title IX and Title VII, as the U.S. Supreme Court has held that Congress validly abrogated states' Eleventh Amendment sovereign immunity under both laws.<sup>58</sup> The same would likely be true for suits brought under the Affordable Care Act, since the statute expressly incorporates the scope and enforcement of Title IX protections.<sup>59</sup>

A case recently filed under Title IX in Virginia demonstrates that parents and legal organizations are willing to take schools to court for not allowing transgender students to use the restroom consistent with their gender identity.<sup>60</sup> In addition, employees may file lawsuits under Title VII if their employers refuse to allow them to use the restroom consistent with their gender identity. Several federal courts and the U.S. Equal Employment Opportunity Commission have held that gender identity discrimination is a form of sex discrimination prohibited by Title VII.<sup>61</sup> The Equal Employment Opportunity Commission and the Department of Justice have specifically interpreted Title VII to require employers to provide employees access to workplace restrooms and changing facilities consistent with their gender identity.<sup>62</sup> In line with these interpretations, the Department of Justice has issued a notification to Governor Pat McCrory stating that HB 2 violates the non-discrimination requirements of Title VII.<sup>63</sup>

With thousands of transgender youth and adults in North Carolina, the costs and burden associated with litigation and administrative enforcement could be significant.

## **Conclusion**

HB2 conflicts with the gender identity non-discrimination requirements of federal laws including Title IX, Executive Order 13672, the Workforce Innovation and Opportunity Act, the Violence Against Women Act, the Affordable Care Act, the Equal Access Rule and Title VII by restricting restroom access to individuals based on "biological sex." As a result, state and local government entities in North Carolina are at risk of losing up to \$4.7 billion in federal funding for education, \$35 million to \$65 million in federal contracts, \$108 million in federal funding for NCWorks, \$5 million to \$5.6 million in grants authorized by the Violence Against Women Act, and funding to state and local entities from the Department of Health and Human Services and the Department of Housing and Urban Development. In addition, the legislation would likely give rise to litigation and administrative enforcement actions that impose burdens and costs on the state.

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## About the Williams Institute

The Williams Institute on Sexual Orientation and Gender Identity Law and Public Policy at UCLA School of Law advances law and public policy through rigorous, independent research and scholarship, and disseminates its work through a variety of education programs and media to judges, legislators, lawyers, other policymakers and the public. These studies can be accessed at the Williams Institute website.

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## Endnotes

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<sup>1</sup> JODY L. HERMAN, CHRISTY MALLORY & BIANCA D.M. WILSON, THE WILLIAMS INSTITUTE, ESTIMATES OF TRANSGENDER POPULATIONS IN STATES WITH LEGISLATION IMPACTING TRANSGENDER PEOPLE 1 (2016), *available at* <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Estimates-of-Transgender-Populations.pdf>.

<sup>2</sup> Percentages were applied to population numbers reported in U.S. Census Bureau, Population Division, Annual Estimates of the Resident Population by Single Year of Age and Sex for the United States, States, and Puerto Rico Commonwealth: Apr. 1, 2010 to July 1, 2014, *available at* [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP\\_2014\\_PEPSYASEX&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2014_PEPSYASEX&prodType=table).

<sup>3</sup> H.B. 2, 2015-2016 Gen. Assem., 2nd Extra Sess. (N.C. 2016), 2016 North Carolina Laws 3.

<sup>4</sup> *Id.*

<sup>5</sup> In addition, other federal funding laws that prohibit discrimination based on sex may also be interpreted to prohibit discrimination based on gender identity. To the extent that those laws are implicated by House Bill 2, North Carolina's funding under those federal statutes may also be at risk.

<sup>6</sup> 20 U.S.C. § 1681 (2015).

<sup>7</sup> See, e.g., *North Haven v. Bell*, 456 U.S. 515, 537 (1982).

<sup>8</sup> *Id.* § 1681(c); U.S. Dep't of Justice, Title IX Legal Manual at C.1, <https://www.justice.gov/crt/title-ix#B.%C2%A0%20Recipient> (last visited Mar. 30, 2016).

<sup>9</sup> OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (2014), *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

<sup>10</sup> Finding Letter from Timothy C.J. Blanchard, Office for Civil Rights, U.S. Dep't of Educ., to Stephen M. Tomlinson, Superintendent, Broadalbin-Perth Central School Dist., Re: Case No. 02-13-1220 (Dec. 22, 2015), *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/02131220-a.pdf> (finding that school district violated Title IX when it refused to allow transgender student to access restroom consistent with the student's gender identity, even when it provided a single-stall, gender-neutral facility for the student's use); Finding Letter from Adele Rapport, Office for Civil Rights, U.S. Dep't of Educ., to Daniel E. Cates, Superintendent, Township High School District 211, Re: OCR Case No. 05-14-1055 (Dec. 3, 2015), *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/05141055-a.pdf> (finding that school district violated Title IX when it prohibited a transgender student from accessing a shared locker room consistent with her gender identity); Finding Letter from Kay Bhagat, Office for Civil Rights, U.S. Dep't of Educ., to Tony Zeiss, President, Central Piedmont Community College, Re: OCR Complaint No. 11-14-2265 (Aug. 14, 2015), *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/11142265-a.pdf> (finding that college violated Title IX when it refused to allow transgender student to access restroom consistent with her gender identity).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Jim Morrill, *US Justice Department: HB2 Violates Federal Civil Rights Act*, CHARLOTTEOBSERVER.COM, May 4, 2016, <http://www.charlotteobserver.com/news/politics-government/article75601912.html>.

<sup>14</sup> *Id.*

<sup>15</sup> OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., CASE PROCESSING MANUAL 18, 28 (2015), *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>. To date, the Office for Civil Rights has been able to reach resolution agreements with educational institutions in all but one case of gender identity discrimination. Resolution Agreement, Broadalbin-Perth Central School District, OCR Case No. 02-13-1220, *available at*



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<http://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/02131220-b.pdf> (last visited Mar. 30, 2016); Agreement to Resolve, Between Township High School District 211 and the U.S. Dep't of Educ., Office for Civil Rights, OCR Case No. 05-14-1055, *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/05141055-b.pdf> (last visited Mar. 30, 2016); Voluntary Resolution Agreement, Central Piedmont Community College, OCR Complaint No. 11-14-2265, <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/11142265-b.pdf> (last visited Mar. 30, 2016). In all of these resolution agreements, educational institutions have voluntarily agreed to provide transgender students access to shared restrooms and facilities that correspond with their gender identity. *Id.* In the final case, where a resolution has not been reached, the Office for Civil Rights' investigation is ongoing, and the student's mother filed a case in federal court on behalf of the student. *G.G. v. Gloucester County School*, ACLU.org, Nov. 23, 2015, <https://www.aclu.org/cases/gg-v-gloucester-county-school-board>; Complaint, *G.G. v. Gloucester County Sch. Bd.*, No. 5:15cv54 (E.D. Va. June 11, 2015). In that case, a Virginia district court found in favor of the school district, and on appeal, the Fourth Circuit ruled that the trial court improperly denied deference to the Department of Education's interpretation of Title IX that requires transgender students be given permission to use shared restrooms in conformity with their gender identity. *G.G. v. Gloucester County Sch. Bd.*, No. 15-2056 (4<sup>th</sup> Cir. Apr. 19, 2016), *available at* <http://www.ca4.uscourts.gov/Opinions/Published/152056.P.pdf>.

<sup>16</sup> Facts and Figures 2015-16, NCpublicschools.org, <http://www.dpi.state.nc.us/docs/fbs/resources/data/factsfigures/2015-16figures.pdf> (last visited Apr. 11, 2016).

<sup>17</sup> Funding estimate may include some funding to private institutions. U.S. DEP'T OF EDUC., FUNDS FOR STATE FORMULA-ALLOCATED AND SELECTED STUDENT AID PROGRAMS 76 <http://www2.ed.gov/about/overview/budget/statetables/17stbystate.pdf> (last visited Apr. 7, 2016).

<sup>18</sup> Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 23, 2014); 41 C.F.R. § 60-1.5 (2015).

<sup>19</sup> See Office of Federal Contract Compliance Programs, *Frequently Asked Questions EO 13672 Final Rule*, U.S. DEP'T OF LABOR, [http://www.dol.gov/ofccp/LGBT/LGBT\\_FAQs.html](http://www.dol.gov/ofccp/LGBT/LGBT_FAQs.html) (last visited Mar. 28, 2016).

<sup>20</sup> The executive order and its implementing regulations provide for several enforcement mechanisms. A contractor that has violated EO 13672 may have its name published for failing to comply; may have its contracts canceled, terminated, or suspended; and may be prohibited from receiving future contracts for a period of at least six months. Office of Fed. Contractor Compliance Programs, *OFCCP Debarred Companies*, U.S. DEP'T OF LABOR, <http://www.dol.gov/ofccp/regs/compliance/preaward/debarlst.htm> (last visited Mar. 30, 2016). Debarred entities are available at System for Award Management, <https://www.sam.gov/portal/SAM/##11> (search Classification: All, State/Province: All, Country: All, Agency: United States Department of Labor, Exclusion Status: Active, Exclusion Program: Procurement).

According to the federal government's System for Award Management database, 29 entities are currently barred from bidding on federal procurement contracts because they violated contracting laws enforced by the Department of Labor. Office of Fed. Contractor Compliance Programs, *OFCCP Debarred Companies*, U.S. DEP'T OF LABOR, <http://www.dol.gov/ofccp/regs/compliance/preaward/debarlst.htm> (last visited Mar. 30, 2016). Debarred entities are available at System for Award Management, <https://www.sam.gov/portal/SAM/##11> (search Classification: All, State/Province: All, Country: All, Agency: United States Department of Labor, Exclusion Status: Active, Exclusion Program: Procurement).

<sup>21</sup> Advanced Data Search, [usaspending.gov](https://www.usaspending.gov), <https://www.usaspending.gov/Pages/AdvancedSearch.aspx> (last visited Apr. 11, 2016) (select Fiscal Year: FY-2015, 2014, and 2013), select Recipient State: North Carolina, select Place of Performance State: North Carolina, select Contractor Type: Educational Institution, Local Government, State Government). The data that resulted from this search were downloaded and contracts to private educational institutions were removed. Additionally, contracts to entities that received less than \$10,000 in contracting dollars during the year were removed because the executive order does not apply to such contractors. The remaining contract amounts were summed.

<sup>22</sup> See contractor lists generated using methodology in note 21, *supra*.

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<sup>23</sup> *WIOA Overview*, U.S. DEP'T OF LABOR, <https://www.doleta.gov/WIOA/Overview.cfm> (last visited Apr. 8, 2016).

<sup>24</sup> NCWORKS, <https://www.ncworks.gov/vosnet/Default.aspx> (last visited Apr. 12, 2016).

<sup>25</sup> 29 U.S.C. § 3248(a)(2).

<sup>26</sup> 81 Fed. Reg. 4494, 4550 (Jan. 26, 2016).

<sup>27</sup> *Id.* at 4508.

<sup>28</sup> *Id.* at 4571.

<sup>29</sup> The amounts were similar for 2015. During the 2015 program year, North Carolina received \$83.2 million dollars in federal funding to support NCWorks: \$26.3 million to support the Youth Activities Program; \$25.1 million to support the Adult Activities Program; and \$31.7 million to support the Dislocated Worker Activities Program. *Youth Activities State Allotments: Comparison of PY 2016 Allotments vs PY 2015 Allotments*, U.S. DEP'T OF LABOR, [https://www.doleta.gov/budget/docs/16you\\$.pdf](https://www.doleta.gov/budget/docs/16you$.pdf) (last visited Apr. 11, 2016); *Adult Activities State Allotments: Comparison of PY 2016 Allotments vs PY 2015 Allotments*, U.S. DEP'T OF LABOR, [https://www.doleta.gov/budget/docs/16adu\\$.pdf](https://www.doleta.gov/budget/docs/16adu$.pdf) (last visited Apr. 11, 2016); *Dislocated Worker Activities State Allotments: Comparison of PY 2016 Allotments vs PY 2015 Allotments*, U.S. DEP'T OF LABOR, [https://www.doleta.gov/budget/docs/16dw\\$.pdf](https://www.doleta.gov/budget/docs/16dw$.pdf) (last visited Apr. 11, 2016).

<sup>30</sup> *Grant Programs*, U.S. DEP'T OF JUSTICE, Sept 9, 2015, <https://www.justice.gov/ovw/grant-programs#cgpa>.

<sup>31</sup> 42 U.S.C. § 13925(b)(13)(A).

<sup>32</sup> Office of Justice Programs Office for Civil Rights, *Frequently Asked Questions: Nondiscrimination Grant Condition in the Violence Against Women Reauthorization Act of 2013*, U.S. DEP'T OF JUSTICE 8-9 (Apr. 9, 2014), <https://www.justice.gov/sites/default/files/ovw/legacy/2014/06/20/faqs-ngc-vawa.pdf>.

<sup>33</sup> *Id.* at 4.

<sup>34</sup> *Id.* at 5.

<sup>35</sup> 42 U.S.C. §§ 13925(b)(13)(c); 3789d(c)(2)(B)-(D). In the past three fiscal year periods, state and local entities in North Carolina have received \$5.0 million to \$5.6 million in grants authorized by the Violence Against Women Act. In 2015, the total was \$5,000,215. Grantees included the Department of Public Safety (\$4.2 million) Buncombe County (\$445,000) and the University of North Carolina Chapel Hill (\$300,000). *FY 2015 OVW Grant Awards by State*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/ovw/awards/fy-2015-ovw-grant-awards-by-state#NC> (last visited Apr. 9, 2016). In 2014, the total was \$5,563,956: Department of Public Safety (\$4.4 million); Haywood County (\$300,000); Pitt County (\$650,000); and the University of North Carolina at Wilmington (\$300,000). *FY 2014 OVW Grant Awards by State*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/ovw/awards/fy-2015-ovw-grant-awards-by-state#NC> (last visited Apr. 9, 2016). In 2013, the total was \$5,532,940 in grants: the Department of Public Safety (\$3.8 million); Chatham County (\$300,000); Pitt County (\$200,000); Mecklenburg County (\$900,000). *FY 2013 OVW Grant Awards by State*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/ovw/awards/fy-2013-ovw-grant-awards-by-state#nc>.

<sup>36</sup> U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, FREQUENTLY ASK QUESTIONS: NONDISCRIMINATION GRANT CONDITION IN THE VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT OF 2013 3 (2014), <https://www.justice.gov/sites/default/files/ovw/legacy/2014/06/20/faqs-ngc-vawa.pdf>.

<sup>37</sup> 42 U.S.C. § 18116; 80 Fed. Reg. 54172, 54216 (Sept. 8, 2015). The comment period for the proposed rule has closed, and the agency is in the process of developing the final rule.

<sup>38</sup> The proposed regulations explicitly define "on the basis of sex" to include on the basis of gender identity. 80 Fed. Reg. 54172, 54216 (Sept. 8, 2015). Additionally, they incorporate Title IX implementing regulations at 45 C.F.R. § 86.31(b)(1) through (8), which use the exact same language as 34 C.F.R. § 106.31(b)(1) through (7). This language was used to explain that prohibiting transgender students from using shared restrooms that conform with their gender identity is a violation of Title IX: "[T]he District excluded the Student, on the basis of sex, from

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participation in and denied the Student the benefits of its education program; provided different benefits or benefits in a different manner; subjected the Student to different rules of behavior; and to different treatment, in violation of the regulation implementing Title IX, at 34 C.F.R. § 106.31." Finding Letter from Timothy C.J. Blanchard, Office for Civil Rights, U.S. Dep't of Educ., *supra* note 10 at 5.

<sup>39</sup> 80 Fed. Reg. 54172, 54188, citing Resolution Agreement Between the Arcadia Unified School District, the U.S. Dep't of Educ., Office for Civil Rights, and the U.S. Dep't of Justice, Civil Rights Division, OCR Case Number 09–12–1020, *available at* <https://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadiaagree.pdf>.

<sup>40</sup> *Id.* at 54173.

<sup>41</sup> *Id.* at 54194-54195.

<sup>42</sup> The Affordable Care Act states that “[t]he enforcement mechanisms provided for and available under such title VI, title IX, section 794, or such Age Discrimination Act shall apply for purposes of violations of [the non-discrimination requirement.” 42 U.S.C. § 18116. The enforcement mechanisms provided for in these other laws include suspension or termination of funding if a recipient is in violation of the law’s non-discrimination requirements. See 80 Fed. Reg. 54192 (Sept. 8, 2015).

<sup>43</sup> For a list of the types of entities covered by the rule, see Elizabeth Cornachione, MaryBeth Musumeci & Samantha Artiga, *Summary of HHS’s Proposed Rule on Nondiscrimination in Health Programs and Activities*, KFF.ORG, Oct. 19, 2015, <http://kff.org/disparities-policy/issue-brief/summary-of-hhss-proposed-rule-on-nondiscrimination-in-health-programs-and-activities/>.

<sup>44</sup> NATIONAL ASSOC. OF STATE BUDGET OFFICES, STATE EXPENDITURE REPORT 48 (2015), *available at* <http://www.nasbo.org/sites/default/files/State%20Expenditure%20Report%20%28Fiscal%202013-2015%29S.pdf>.

<sup>45</sup> Medicaid and CHIP Payment and Access Comm., Exhibit 33. Federal CHIP Allotments, FY 2016, millions, <https://www.macpac.gov/wp-content/uploads/2015/01/EXHIBIT-33.-Federal-CHIP-Allotments-FY-2016-millions-1.pdf> (last visited Apr. 14, 2016).

<sup>46</sup> 42 U.S.C. §1441.

<sup>47</sup> 24 C.F.R. §5.105(a)(2)(ii).

<sup>48</sup> 80 Fed. Reg. 72642, 72642-43 (Nov. 20, 2015).

<sup>49</sup> *Id.* at 72649. The comment period for the proposed rule has closed, and the agency is in the process of developing the final rule.

<sup>50</sup> 77 Fed. Reg. 5671 (Feb. 3, 2012).

<sup>51</sup> Complaint, Carcaño v. McCrory, No. 1:16-cv-236 (M.D.N.C. Mar. 28, 2016).

<sup>52</sup> Office for Civil Rights, *How to File a Discrimination Complaint with the Office for Civil Rights*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/about/offices/list/ocr/docs/howto.html> (last visited Mar. 31, 2016); Office of Federal Contract Compliance Programs, *Executive Order 11246*, U.S. DEP’T OF LABOR, <http://www.dol.gov/ofccp/regs/compliance/fs11246.htm> (last visited Mar. 31, 2016); 29 C.F.R. § 38.70 (2015); U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, FREQUENTLY ASK QUESTIONS: NONDISCRIMINATION GRANT CONDITION IN THE VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT OF 2013 9 (2014), <https://www.justice.gov/sites/default/files/ovw/legacy/2014/06/20/faqs-ngc-vawa.pdf>; 42 U.S.C. § 2000e-5(b); Office for Civil Rights, *OCR Enforcement Under Section 1557 of the Affordable Care Act Sex Discrimination Cases*, DEP’T OF HEALTH AND HUMAN SERVICES, <http://www.hhs.gov/civil-rights/for-individuals/section-1557/ocr-enforcement-section-1557-aca-sex-discrimination/index.html> (last visited Apr. 14, 2016); 77 Fed. Reg. 5671 (Feb. 3, 2012).

<sup>53</sup> Office for Civil Rights, *How to File a Discrimination Complaint with the Office for Civil Rights*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/about/offices/list/ocr/docs/howto.html> (last visited Mar. 31, 2016).

<sup>54</sup> 29 C.F.R. § 38.70 (2015).

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<sup>55</sup> OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., CASE PROCESSING MANUAL 17-28 (2015), *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>; OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, U.S. DEP'T OF LABOR, FEDERAL CONTRACT COMPLIANCE MANUAL (2014), *available at* [http://www.dol.gov/ofccp/regs/compliance/fccm/FCCM\\_FINAL\\_508c.pdf](http://www.dol.gov/ofccp/regs/compliance/fccm/FCCM_FINAL_508c.pdf); 29 C.F.R. §§ 38.70-38.101 (2015). U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, FREQUENTLY ASK QUESTIONS: NONDISCRIMINATION GRANT CONDITION IN THE VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT OF 2013 9 (2014), <https://www.justice.gov/sites/default/files/ovw/legacy/2014/06/20/faqs-ngc-vawa.pdf>; 42 U.S.C. § 2000e-5(b); 80 Fed. Reg. 54192 (Sept. 8, 2015); 77 Fed. Reg. 5671 (Feb. 3, 2012).

<sup>56</sup> OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., CASE PROCESSING MANUAL 28 (2015), *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>; Exec. Order. No. 11,246, § 209(2)-(4), 3 C.F.R. 339 (1964-1965) (as amended); 29 U.S. § 3248(c); 42 U.S.C. §§ 13925(b)(13)(C); 3789d(c)(2)(E); 42 U.S.C. § 2000e-5(f); 80 Fed. Reg. 54,191-54,192 (Sept. 8, 2015); 42 U.S.C. § 5309.

<sup>57</sup> Cannon v. Univ. of Chicago, 441 U.S. 677 (1979); 80 Fed. Reg. 54,192 (Sept. 8, 2015).

<sup>58</sup> Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

<sup>59</sup> 42 U.S.C. § 18116; 80 Fed. Reg. 54192 (Sept. 8, 2015).

<sup>60</sup> See *supra* note 15.

<sup>61</sup> Glenn v. Brumby, 663 F.3d 1312m 1317 (11th Cir. 2011); Barnes v. City of Cincinnati, 401 F.3d 729, 733 (6th Cir. 2005); City of Salem, 378 F.3d 566 (6th Cir. 2004); Schroer v. Billington, 577 F. Supp. 2d 293, 307-08 (D.D.C. 2008); Macy v. Holder, EEOC App. No. 012012821, 2012 WL 1435995, at \*1 (Apr. 20, 2012).

<sup>62</sup> Attorney General Memorandum, Dec. 15, 2014, *Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964*; Lusardi v. McHugh, EEOC App. No. 0120133395 (Apr. 1, 2015).

<sup>63</sup> See Section I., *supra*.