

# Wisconsin Legislature Employs Halftime Adjustment: How Wisconsin's "New" Indian Mascot Law Changes the Outlook for Future Challenges to the Use of Discriminatory Nicknames, Mascots, and Logos in Wisconsin Schools

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## COMMENTS

# WISCONSIN LEGISLATURE EMPLOYS HALFTIME ADJUSTMENT: HOW WISCONSIN'S "NEW" INDIAN MASCOT LAW CHANGES THE OUTLOOK FOR FUTURE CHALLENGES TO THE USE OF DISCRIMINATORY NICKNAMES, MASCOTS, AND LOGOS IN WISCONSIN SCHOOLS

*"I have a feeling all this madness will eventually pass . . . ."*<sup>1</sup>

### I. INTRODUCTION

In the sports industry, it is customary for every team to represent itself with a particular name and image.<sup>2</sup> These nicknames, mascots, and logos serve as shorthand for identifying a team and are intended to evoke positive feelings amongst a team's supporters.<sup>3</sup> However, sometimes these names or images are viewed as being hostile, offensive, or discriminatory.<sup>4</sup> For example, the use of Native American<sup>5</sup> words or symbols in connection with sports teams has been extensively critiqued for many years.<sup>6</sup> The debate—

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1. John B. Rhode, Comment, *The Mascot Name Controversy: A Lesson in Hypersensitivity*, 5 MARQ. SPORTS L.J. 141, 160 (1994) (quoting Angus Lind, *Colleges Need Some Name-Dropping*, TIMES-PICAYUNE (New Orleans), Oct. 20, 1993, at E1 (suggesting, in 1993, that the controversy surrounding the use of Native American mascots would soon pass because the issue was being taken too seriously)).

2. Jeff Dolley, *The Four R's: Use of Indian Mascots in Educational Facilities*, 32 J.L. & EDUC. 21, 21 (2003).

3. *Id.*

4. *Id.*

5. This Comment will generally use the terms Native American, American Indian, and Indian interchangeably.

6. See generally Dolley, *supra* note 2; see also Cathryn L. Claussen, *Ethnic Team Names and Logos—Is There a Legal Solution?*, 6 MARQ. SPORTS L.J. 409, 409 (1996); Scott R. Rosner, *Legal Approaches to the Use of Native American Logos and Symbols in Sports*, 1 VA. SPORTS & ENT. L.J. 258, 258 (2002); Stacie L. Nicholson, Note, *Indian Mascot World Series Tied 1–1: Who Will Prevail*

often referred to as the “Indian mascot controversy”<sup>7</sup>—surrounds all levels of athletics, including professional, collegiate, and high school sports teams.<sup>8</sup> Several commentators have outlined the basic arguments both supporting and opposing the use of such imagery.<sup>9</sup> Others have analyzed the various legal methods utilized to challenge Indian mascots.<sup>10</sup> For instance, student discrimination laws have served as a source for making these challenges.<sup>11</sup> In May of 2010, Wisconsin reportedly became the first state to implement a law specifically devoted to challenging Indian mascots.<sup>12</sup> Since its enactment, this “Indian mascot law”<sup>13</sup> has received considerable attention throughout Wisconsin<sup>14</sup> and has even gained the interest of the national media.<sup>15</sup>

This Comment provides an analysis of the history of the Indian mascot controversy as it has played out in Wisconsin high schools. Part II examines Wisconsin’s pupil nondiscrimination statute, the initial legal basis employed to challenge a school district’s use of Indian names and logos. Thereafter, Part III shifts the focus to Wisconsin’s “new” Indian mascot law by providing a thorough analysis of the “new” law, including its legislative history, specific provisions, rules for enforcement, decisions, and potential responses. Next, Part IV compares the two statutes used in Wisconsin to challenge Indian

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*as Champion?*, 29 AM. INDIAN L. REV. 341, 341 (2004–2005).

7. See, e.g., Gavin Clarkson, *Racial Imagery and Native Americans: A First Look at the Empirical Evidence Behind the Indian Mascot Controversy*, 11 CARDOZO J. INT’L & COMP. L. 393, 393 (2003).

8. Rhode, *supra* note 1, at 142.

9. See, e.g., Dolley, *supra* note 2, at 26–28; Nicholson, *supra* note 6, at 342–47; William N. Wright, Note, *Not in Whose Name?: Evidentiary Issues in Legal Challenges to Native American Team Names and Mascots*, 40 CONN. L. REV. 279, 286–92 (2007).

10. See Claussen, *supra* note 6, at 410–21; andré douglas pond cummings, “*Lions and Tigers and Bears, Oh My*” or “*Redskins and Braves and Indians, Oh Why*”: *Ruminations on McBride v. Utah State Tax Commission, Political Correctness, and the Reasonable Person*, 36 CAL. W. L. REV. 11, 11–37 (1999); Dolley, *supra* note 2, at 31–37; Jack Achiezer Guggenheim, *Renaming the Redskins (and the Florida State Seminoles?): The Trademark Registration Decision and Alternative Remedies*, 27 FLA. ST. U. L. REV. 287, 304–07 (1999); Jack Achiezer Guggenheim, *The Indians’ Chief Problem: Chief Wahoo as State Sponsored Discrimination and a Disparaging Mark*, 46 CLE. ST. L. REV. 211, 215–16 (1998); Rosner, *supra* note 6, at 259–73; Nicholson, *supra* note 6, at 348–55; Rhode, *supra* note 1, at 143–60; Wright, *supra* note 9, at 292–303.

11. See Claussen, *supra* note 6, at 417–21; Dolley, *supra* note 2, at 33–35; Rosner, *supra* note 6, at 263–66; Rhode, *supra* note 1, at 143–53.

12. Patrick Marley, *Mukwonago Defends Use of Indian Identity*, MILWAUKEE J. SENTINEL, Aug. 28, 2010, at 1B [hereinafter *Mukwonago Defends Use of Indian Identity*].

13. WIS. STAT. § 118.134 (2010–11).

14. See, e.g., Amy Nixon, *Mascot Arguments Challenged*, LIVING LAKE COUNTRY (Aug. 10, 2010), <http://www.livinglakecountry.com/mukwonagochief/news/100348719.html>.

15. See, e.g., Judy Keen, *Controversial Mascot Ejected: Wis. Community to Choose Name After Dropping ‘Indians’ Name Used Since 1936*, USA TODAY, Oct. 7, 2010, at 3A.

mascots and discusses the effects of their differences. Finally, Part V analyzes the "new" law, proposes implications for future challenges, and offers concluding remarks on the Indian mascot controversy within Wisconsin.

## II. WISCONSIN'S PUPIL NONDISCRIMINATION STATUTE

Several media outlets have touted Wisconsin as being the first state to implement an Indian mascot law.<sup>16</sup> While it appears true that Wisconsin is the first state to enact a law specifically devoted to challenging such mascots,<sup>17</sup> the media has largely ignored the fact that challenging a school district's use of Native American names or images has been possible in Wisconsin since the early 1990s. Consequently, to determine the true impact of this "new" and revolutionary law, it is essential to analyze Wisconsin's recently enacted Indian mascot law in light of past developments concerning the Indian mascot issue within the state.

Many states have a law that prevents discriminatory conduct in educational settings.<sup>18</sup> These laws were crafted primarily to mirror the provisions of Title VI of the Civil Rights Act of 1964.<sup>19</sup> Accordingly, section 118.13 of the Wisconsin Statutes prohibits such pupil discrimination: "[N]o person may be denied admission to any public school or be denied participation in, be denied the benefits of or be discriminated against in any curricular, extracurricular, pupil services, recreational or other program or activity because of the person's . . . race, . . . national origin, [or] ancestry . . ."<sup>20</sup> In the early 1990s, this antidiscrimination statute became a test case for mounting a legal challenge to a school district's use of Native American names and logos.

### A. Milton School District

In 1990, Carol Hand wrote a letter to the Milton School District expressing concern that the district's use of the "Redmen" nickname in conjunction with other symbols created a hostile and discriminatory educational environment.<sup>21</sup> The school board appointed an advisory

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16. See, e.g., *Mukwonago Defends Use of Indian Identity*, *supra* note 12.

17. Patrick Marley, *Mukwonago Told to Give up Logo*, MILWAUKEE J. SENTINEL, Oct. 10, 2010, at 4B.

18. Lauren Brock, Comment, *A New Approach to an Old Problem: Could California's Proposed Ban on "Redskins" Mascots in Public Schools Have Withstood a Constitutional Challenge?*, 12 SPORTS LAW. J. 71, 80 (2005).

19. *Id.* at 81 (citing Civil Rights Act of 1964, Pub. L. No. 100-259, 102 Stat. 28 (1988)).

20. WIS. STAT. § 118.13(1) (2010–11).

21. *Hand v. Milton Sch. Dist. (In re Redmen)*, No. 91–118–001, at 2 (Wis. State Superintendent

committee to examine the issue, and—after conducting several meetings—the committee recommended that Milton continue to use the “Redmen” nickname.<sup>22</sup> Thereafter, Hand filed a formal complaint with the school board pursuant to Wisconsin’s pupil nondiscrimination statute.<sup>23</sup> In response, the school board determined that Hand lacked standing to challenge the nickname and logo because she was “neither a pupil nor the parent of an affected pupil.”<sup>24</sup> Further, the board indicated that section 118.13 of the Wisconsin Statutes was not “an appropriate vehicle for dealing with [her] concerns.”<sup>25</sup> Hand appealed to the state Department of Public Instruction (DPI), asking the state superintendent to declare that the use of Native American nicknames, mascots, or logos violates section 118.13.<sup>26</sup>

The department first concluded that it had jurisdiction over Hand’s appeal.<sup>27</sup> Next, the DPI denied the school board’s motion to dismiss, holding that Hand had standing as a resident of the school district and had stated a claim upon which relief could be granted.<sup>28</sup> Although the department did not hold that the pupil nondiscrimination statute could be utilized to challenge school districts’ allegedly discriminatory mascots, the DPI’s decision implied that such use of the statute was appropriate, as it requested the parties’ subsequent briefs to address the elements of section 118.13 and the rules enforcing it.<sup>29</sup> The department’s insinuation was confirmed less than a year later by the state attorney general.

### *B. Attorney General Opinion*

In 1992, then-State Superintendent of Public Instruction Herbert J. Grover requested that then-Attorney General James E. Doyle answer two narrow questions: (1) “Does the use by public schools of American Indian logos, mascots or nicknames, singly or in combination, come within the purview of *section 118.13 of the Wisconsin statutes?*”; and (2) “Is Wisconsin

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of Pub. Instruction Nov. 19, 1991) (on file with author).

22. *Id.* at 3.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 5.

27. *Id.* at 23. Wisconsin’s pupil nondiscrimination statute allows a person who receives a negative determination from the school board to appeal to the state superintendent. WIS. STAT. § 118.13(2)(b)–(3)(a) (2010–11).

28. *In re Redmen*, No. 91–118–001, at 23.

29. *Id.* at 24.

Administrative Code chapter PI 9 consistent with legislative intent?"<sup>30</sup> Doyle answered both questions in the affirmative.<sup>31</sup>

At the outset, Attorney General Doyle determined that the statute was ambiguous with regard to "the definition of discrimination as applied to 'any curricular, extracurricular, pupil services, recreational or other program or activity.'"<sup>32</sup> To resolve the ambiguity, Doyle analyzed the legislative intent and noted that, under the statute, "the Legislature gave the superintendent of public instruction the power to create rules to administer [the state's] anti-discrimination statute."<sup>33</sup> Doyle noted that, pursuant to this authority, the DPI created Wisconsin Administrative Code Chapter PI 9, which provides the following definitions:

"Discrimination" means any action, policy or practice, including bias, stereotyping and pupil harassment, which is detrimental to a person or group of persons and differentiates or distinguishes among persons, or which limits or denies a person or group of persons opportunities, privileges, roles or rewards based, in whole or in part, on . . . race, national origin, [or] ancestry, . . . or which perpetuates the effects of past discrimination.<sup>34</sup>

"Pupil harassment" means behavior towards pupils based, in whole or in part, on . . . race, national origin, [or] ancestry, . . . which substantially interferes with a pupil's school performance or creates an intimidating, hostile or offensive school environment.<sup>35</sup>

"Stereotyping" means attributing behaviors, abilities, interests, values and roles to a person or group of persons on the basis, in whole or in part, of their . . . race, national origin, [or] ancestry . . .<sup>36</sup>

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30. 80 Op. Att'y Gen. Wis. 321, 1992 Wis. AG LEXIS 26, at \*1 (1992) (emphasis in original).

31. *Id.* Chapter PI 9 of the Wisconsin Administrative Code outlines the rules used to enforce section 118.13 of the Wisconsin Statutes. *See* WIS. ADMIN. CODE PI § 9.01 (2011).

32. 80 Op. Att'y Gen. Wis. 321, 1992 Wis. AG LEXIS 26, at \*2.

33. *Id.* at \*3 (citing WIS. STAT. § 118.13(3)(a)2 (1991-92)).

34. *Id.* at \*3-4 (citing PI § 9.02(5) (1986)).

35. *Id.* at \*4 (citing PI § 9.02(9) (1986)).

36. *Id.* (citing PI § 9.02(14) (1986)).

After considering several factors, including the fact that the rule had to go through an extensive review process,<sup>37</sup> Doyle determined that section PI 9 is not ambiguous.<sup>38</sup>

Returning to the Indian mascot problem, Doyle concluded that “the language of the statute and the rule is comprehensive enough that an American Indian logo, mascot or nickname used by a public school could be a violation of section 118.13.”<sup>39</sup> He noted, however, that Indian mascots “are not per se violations of section 118.13,” as certain names or images may be neither negative nor offensive.<sup>40</sup> Thus, each mascot must be analyzed on a case-by-case basis after a contested case hearing.<sup>41</sup> Finally, Doyle opined that discrimination could exist regardless of intent.<sup>42</sup>

### C. Reaction to the Attorney General Opinion

The attorney general opinion was an important step in the Indian mascot controversy as it unequivocally provided a legal basis for challenging a school district’s use of Native American names and images. Not surprisingly, the opinion drew an immediate reaction from the state legislature, the state superintendents of public instruction, and the affected school districts.

Despite the clear imputation of Doyle’s attorney general opinion, the controversy surrounding the use of Indian nicknames, mascots, or logos remained an issue within the Wisconsin legislature.<sup>43</sup> In 1995, Representative Steve Nass introduced an assembly bill that sought to override the attorney general opinion by providing that Wisconsin’s pupil nondiscrimination statute (section 118.13) did *not* apply to a school district’s use of an Indian mascot.<sup>44</sup> The bill received little support,<sup>45</sup> however, indicating the divisiveness of the issue, even within the state legislature. In fact, between the 1993 and 2005 legislative sessions, seven separate proposals were introduced to advance the

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37. *Id.* at \*4–5.

38. *Id.* at \*6.

39. *Id.* at \*7.

40. *Id.*

41. *Id.* at \*8. The statute implies that a hearing before the state superintendent is a contested case: “Decisions of the state superintendent under this subdivision are subject to judicial review under ch. 227.” WIS. STAT. § 118.13(3)(a)1.

42. 80 Op. Att’y Gen. Wis. 321, 1992 Wis. AG LEXIS 26, at \*8.

43. See Memorandum from Joyce L. Kiel, Senior Staff Attorney, Wis. Legis. Council, to Members of Special Comm. on State-Tribal Relations (Jan. 18, 2007), available at [http://www.legis.state.wi.us/lc/committees/study/2006/STR/files/memo5\\_str.pdf](http://www.legis.state.wi.us/lc/committees/study/2006/STR/files/memo5_str.pdf) [hereinafter Memorandum].

44. *Id.* at 2 (citing Assemb. 488, 1995–1996 Leg., Reg. Sess. (Wis. 1995)).

45. *Id.*

process used to challenge discriminatory names, mascots, or logos.<sup>46</sup> Challenges pursuant to these legislative bills likely would have been more successful for complaining residents. Notwithstanding these continuous efforts, no bill progressed past the committee stage.<sup>47</sup>

In addition to the legislative responses, the three individuals who served as state superintendent subsequent to the attorney general opinion each expressed a similar commitment to eliminating the use of Indian names and logos in Wisconsin schools.<sup>48</sup> Pursuant to section 118.13 of the Wisconsin Statutes, the individual school board is responsible for making the threshold determination as to whether the use of an Indian nickname, mascot, or logo promotes pupil discrimination.<sup>49</sup> If a resident is dissatisfied with the school board's decision, he or she may appeal to the state superintendent of public instruction.<sup>50</sup> Nevertheless, the state superintendents in charge of administering these appeals all made it clear that discriminatory names and images were inappropriate—regardless of the legality—and that school districts should discontinue their use of such mascots.<sup>51</sup>

Few Wisconsin school districts heeded the advice of the state superintendents and took steps to eliminate, reduce, or modify their use of discriminatory names, mascots, or logos.<sup>52</sup> A 2003 study conducted by the Associated Press revealed that 58 of the state's 431 public high schools used American Indian nicknames and logos during the 1992–1993 school year.<sup>53</sup> Since then, 6 schools have replaced their names and logos, while 32 schools have kept their nicknames but altered their logos.<sup>54</sup> Notwithstanding these positive measures, many arguably offensive Native American names and symbols remain in use by school districts throughout Wisconsin.<sup>55</sup>

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46. *Id.* at 2–3.

47. *Id.*

48. *See id.* at 4.

49. § 118.13(2)(a).

50. § 118.13(2)(b).

51. *See* Memorandum, *supra* note 43, at 1–2, 4; *see also* *Munson v. State Superintendent of Pub. Instruction*, No. 97–145097–1450, 1998 WL 61018, at \*1 (Wis. Ct. App. Feb. 17, 1998); Patrick Marley, *Burmester Urges Schools to Drop Indian Team Names*, MILWAUKEE J. SENTINEL, Dec. 31, 2005, at 1A.

52. *See* Melissa Trujillo, *Indian Logos Fading from State High Schools: Most Schools with Such Mascots 10 Years Ago Have Removed Some Imagery*, MILWAUKEE J. SENTINEL, July 6, 2003, at 7B.

53. *Id.*

54. *Id.*; *see also* *Trailblazers*, AISTM.ORG, <http://aistm.org/fr.trailblazers.htm> (last visited Jan. 11, 2012).

55. *See* Trujillo, *supra* note 52 (stating that twenty of the fifty-eight schools have retained their nicknames and logos); *see also* *Status of Race-Based Nicknames in Wisconsin Schools*, INDIANMASCOTS.COM, [http://www.indianmascots.com/wisconsin\\_lists\\_updated.pdf](http://www.indianmascots.com/wisconsin_lists_updated.pdf) (last updated

*D. Decisions Rendered Pursuant to Wisconsin's Pupil Nondiscrimination Statute*

Despite the efforts of the state legislature and state superintendents, the DPI received few appeals regarding a school board's decision to retain an allegedly discriminatory name or logo. Consequently, the department issued individual decisions involving challenges to only three school districts—Mukwonago, Mosinee, and Osseo-Fairchild—though these appeals were not successful in the movement to eliminate the use of Indian mascots within Wisconsin schools.

1. Mukwonago Area School District

On October 22, 1993, Renee P.—on behalf of her son—requested that the Mukwonago Area School District remove all Native American names and logos from the district's athletic program.<sup>56</sup> After several months of research, meetings, and discussions, the school board determined that the district's use of an Indian logo (an Indian wearing a full feather headdress) did not constitute pupil discrimination under section 118.13; consequently, the school board elected to retain the names and logos.<sup>57</sup> The board did, however, recommend increased cultural awareness within the district regarding Native Americans.<sup>58</sup> Renee P. appealed the school board's decision to the state superintendent of public instruction.<sup>59</sup>

After conducting its own investigation, the DPI first concluded that the district met nearly all of the statute's requirements regarding pupil discrimination policies and procedures.<sup>60</sup> Relying on the attorney general opinion, the department then acknowledged that a school district's use of an American Indian nickname, mascot, or logo may create a violation of the state's pupil nondiscrimination statute.<sup>61</sup> Nevertheless, the DPI held that the high school's logo was not discriminatory in and of itself because it was “not clear that a reasonable person, similarly situated to Student A, would find that it present[ed] a negative, detrimental stereotype of American Indians.”<sup>62</sup> The

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Sept. 22, 2011) (claiming that thirty-three schools have removed their Indian mascots, while thirty-two schools continue such use).

56. *In re Pupil Discrimination Compl. & Appeal by Renee P. ex rel. Student A v. Mukwonago Area Sch. Dist.* (Wis. State Superintendent of Pub. Instruction Nov. 3, 1995) (on file with author).

57. *Id.* at 3–7.

58. *Id.* at 4.

59. *Id.* at 8; *see* § 118.13(2)(b).

60. *In re Renee P.*, at 16; *see* § 118.13(2)(a).

61. *In re Renee P.*, at 18.

62. *Id.* at 19.

department did, however, find that the Mukwonago Area School District violated section 118.13 by failing to correct the harassment endured by Student A.<sup>63</sup> In reaching this determination, the DPI relied on guidelines established by the Office of Civil Rights (OCR) to conclude that (1) a racially hostile environment existed, (2) the school district had notice of the hostile environment, and (3) the school district failed to take steps to redress the hostile environment.<sup>64</sup> The department ordered the school district to submit a corrective action plan focused on cultural education of the staff and students as well as the surrounding community.<sup>65</sup>

## 2. School District of Mosinee

The Mosinee complainants were the only district residents in the state who exercised their right to judicial review of the DPI's decision under Wisconsin's pupil nondiscrimination statute.

### *a. DPI Decision*

In May 1994, Barbara Munson and her three children—all former students of Mosinee High School—filed a formal complaint against the school district, alleging that its “Indians” nickname and logo violated section 118.13 of the Wisconsin Statutes.<sup>66</sup> After a hearing, the Mosinee School Board voted 7–2 to retain the Indian logo; the Munsons promptly appealed the board's decision to the state superintendent.<sup>67</sup> During its investigation, the DPI discovered instances of name-calling and stereotyping as well as a failure by the school to educate students on American Indian culture.<sup>68</sup> Despite these findings, and despite concluding that the logo was clearly offensive to the Munsons, the department held that it was “not clear that a reasonable person, similarly situated to the appellant[s], would find that the logo present[ed] a negative stereotype of American Indians.”<sup>69</sup> In reaching this conclusion, the DPI emphasized that Indian logos are not per se discriminatory and should be reviewed independently on a case-by-case basis.<sup>70</sup> Furthermore, the

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63. *Id.*

64. *Id.* at 19–22.

65. *Id.* at 24.

66. *In re Pupil Discrimination Compl. by Barbara M. v. Sch. Dist. of Mosinee* (Wis. State Superintendent of Pub. Instruction Mar. 12, 1996) (on file with author). The logo depicted an American Indian wearing a full feather headdress. *Id.* at 2.

67. *Id.* at 7.

68. *Id.* at 6–8.

69. *Id.* at 11.

70. *Id.*

department determined that the school district did not have notice of “a severe, persistent and pervasive pattern of racially hostile acts” rising “to the level of a racially hostile environment.”<sup>71</sup> Therefore, the Mosinee School Board did not violate the state’s pupil nondiscrimination statute.<sup>72</sup>

*b. Munson v. State Superintendent of Public Instruction*

The Circuit Court for Marathon County granted the Munsons’ petition for review; however, on appeal, the court affirmed the DPI’s decision.<sup>73</sup> The Wisconsin Court of Appeals affirmed as well, stating that “the record supports the department’s determination that the Indian logo does not reflect a negative stereotype and was not detrimental to a protected class.”<sup>74</sup> Moreover, the court ruled that the DPI did not err in referring to OCR guidelines that had been applied in cases dealing with racially hostile environments.<sup>75</sup> In applying the guidelines, the department properly reviewed the nature, frequency, severity, and persistence of the allegedly discriminatory conduct.<sup>76</sup> In addition, the school had actually taken steps over the years to reduce “use of the logo, mascot and certain [Indian] cheers.”<sup>77</sup> Finally, the court concluded that the Munsons failed to prove that the logo and nickname caused “severe,” “persistent,” and “pervasive” racial harassment.<sup>78</sup>

### 3. Osseo-Fairchild School District

On May 18, 2004, the DPI received a complaint alleging that the Osseo-Fairchild School District’s Indian nickname, mascot, and logo violated section 118.13.<sup>79</sup> The department referred the complaint to the Osseo-Fairchild School Board because the DPI did not have jurisdiction to review direct appeals.<sup>80</sup> Instead, a complainant must have first exhausted the district’s

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71. *Id.* at 13.

72. *Id.* at 14.

73. *Munson*, 1998 WL 61018, at \*3. Under section 118.13 of the Wisconsin Statutes, decisions made by the state superintendent are subject to a limited type of judicial review. § 118.13(3)(a)1.

74. *Munson*, 1998 WL 61018, at \*5.

75. *Id.* at \*6.

76. *Id.*

77. *Id.*

78. *Id.* at \*7.

79. *See generally* Decision for & Referral of Pupil Nondiscrimination Appeal (*In re* Osseo-Fairchild Sch. Dist. I), No. 04-PDA-03 (Wis. State Superintendent of Pub. Instruction June 11, 2004) (on file with author).

80. *Id.* at 2.

policies and procedures for handling allegations of pupil discrimination.<sup>81</sup>

Notwithstanding the department's referral, the Osseo-Fairchild School Board declined to take any action vis-à-vis the complaint.<sup>82</sup> As a result, the DPI ordered all district administrators to "attend training regarding pupil discrimination and harassment complaint investigation and resolution."<sup>83</sup> Nevertheless, the department concluded that the school district did not violate section 118.13.<sup>84</sup> The logo—an American Indian wearing a full feather headdress—was not discriminatory in and of itself.<sup>85</sup> Likewise, a reasonable person similarly situated to the complainant would not find the logo offensive.<sup>86</sup> In fact, American Indians within the Osseo-Fairchild community disagreed as to whether the logo depicted a negative, detrimental stereotype.<sup>87</sup> Finally, the DPI found that "[t]he allegations of harassment were not sufficiently severe, pervasive, or persistent to rise to the level of a racially hostile environment."<sup>88</sup>

### III. WISCONSIN'S INDIAN MASCOT LAW

When analyzing the development of the Indian mascot controversy since the attorney general opinion, it is readily apparent that the opinion's intended effect did not come to fruition. Few residents filed complaints under the pupil nondiscrimination statute, and the few complaints that were filed were generally unsuccessful. Thus, efforts intensified to pass a bill specifically devoted to challenging the use by schools of allegedly discriminatory nicknames, mascots, or logos. Ultimately, these efforts proved successful, and Wisconsin enacted its Indian mascot law in May of 2010.

Considering the many previous attempts to implement a similar law, it is important to analyze the process of enacting the Indian mascot law, including its specific provisions and the rules enforcing it. Also, in addressing the potential impact of this law, it is necessary to examine the initial decisions rendered by the DPI as well as potential responses to the law itself.

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81. *Id.*; see WIS. ADMIN. CODE PI § 9.04 (2011).

82. See generally Decision for Pupil Nondiscrimination Appeal (*In re Osseo-Fairchild Sch. Dist. II*), No. 04-PDA-11 (Wis. State Superintendent of Pub. Instruction Apr. 11, 2005) (on file with author).

83. *Id.* at 2.

84. *Id.* at 3.

85. *Id.* at 2.

86. *Id.* at 2-3.

87. *Id.* at 3.

88. *Id.*

### A. Legislative History

The Indian mascot controversy continued to be an issue within the Wisconsin state legislature as companion bills were introduced in the state assembly<sup>89</sup> and state senate<sup>90</sup> during the 2009–2010 legislative session. These bills sought to create section 118.134 of the Wisconsin Statutes—“Race-based names, nicknames, logos, and mascots”—and were identical to the bills proposed during the 1999, 2001, 2003, and 2005 legislative sessions.<sup>91</sup> However, unlike previous years, the bills did not simply stall at the committee stage.

Assembly Bill 35 moved quickly through the state assembly and was passed after only a few modifications. The adopted amendments included a possible extension of time for compliance with the statute,<sup>92</sup> an exception to the statute if the school has approval from a specific American Indian tribe,<sup>93</sup> and a scheme in which the burden of proof regarding the legality of the mascot shifts depending on the specific name or logo in question.<sup>94</sup> With these amendments, on February 25, 2010, Assembly Bill 35 passed by a vote of 51–42.<sup>95</sup>

In contrast, Senate Bill 25 encountered a much more extensive modification process, as the senate refused to adopt several offered amendments. The failed amendments included a provision to keep the initial decision with the individual school board,<sup>96</sup> a provision providing financial assistance from the state via the DPI,<sup>97</sup> and a provision that would shift the burden of proof to the complaining resident if a Native American resident supported the school’s use of the nickname, mascot, or logo.<sup>98</sup> Without these

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89. Assemb. 35, 2009–2010 Leg., Reg. Sess. (Wis. 2009).

90. S. 25, 2009–2010 Leg., Reg. Sess. (Wis. 2009).

91. See discussion *supra* Part II.C.

92. 2009 Wis. Assemb. 35, *amended by* Assemb. Substitute Amend. 1 (adopted Feb. 23, 2010).

93. 2009 Wis. Assemb. 35, *amended by* Assemb. Substitute Amend. 1, *amended by* Assemb. Amend. 2 (adopted Feb. 23, 2010).

94. 2009 Wis. Assemb. 35, *amended by* Assemb. Substitute Amend. 1, *amended by* Assemb. Amend. 3 (adopted Feb. 23, 2010).

95. Wisconsin Assembly 2009–2010 Session: AB 35, Use of Ethnic Names, Nicknames, Logos, and Mascots, Passage, WISCONSIN.GOV (Feb. 25, 2010), <http://legis.wisconsin.gov/2009/data/votes/av0413.pdf>.

96. 2009 Wis. S. 25, *amended by* S. Substitute Amend. 3, *amended by* S. Amend. 1 (offered Apr. 13, 2010).

97. 2009 Wis. S. 25, *amended by* S. Substitute Amend. 3, *amended by* S. Amend. 2 (offered Apr. 13, 2010).

98. See 2009 Wis. S. 25, *amended by* S. Substitute Amend. 3, *amended by* S. Amend. 4 (offered April 13, 2010).

three amendments, Senate Bill 25<sup>99</sup> narrowly passed the senate by a vote of 17–16.<sup>100</sup>

Just one week later, the Wisconsin State Assembly concurred in the passage of Senate Bill 25,<sup>101</sup> and the bill was signed into law on May 5, 2010,<sup>102</sup> by outgoing Governor Doyle—the same individual who rendered the attorney general opinion in 1992. Wisconsin's Indian mascot law, section 118.134 of the statutes, took effect on May 20, 2010.<sup>103</sup>

### B. Race-based Nicknames, Logos, Mascots, and Team Names

By enacting section 118.134, the legislature created a specific and separate legal basis for addressing the Indian mascot controversy as it relates to high school athletics in Wisconsin. Moreover, the specific provisions of the law indicate the legislature's intent to create a more effective process for challenging such discriminatory mascots.

#### 1. Complaint and Initial Determination by State Superintendent

Under section 118.134, a resident may object to a school's use of a race-based nickname, logo, mascot, or team name by filing a complaint with the state superintendent.<sup>104</sup> If the resident objects specifically to a school's nickname or team name, the state superintendent must make an initial determination as to whether the name, "alone or in connection with a logo or mascot, is ambiguous as to whether it is race-based."<sup>105</sup> The state superintendent then notifies the school board of the complaint and the initial determination<sup>106</sup> and schedules a contested case hearing within forty-five days after the filing of the complaint.<sup>107</sup> The state superintendent may, however, determine that a contested case is not necessary if the school board submits

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99. The senate did adopt some amendments before it passed Senate Bill 25. See 2009 Wis. S. 25, amended by S. Substitute Amend. 3 (offered Apr. 7, 2010). These amendments incorporated the provisions of Assembly Bill 35 as passed as well as several additional provisions. See *id.* Because the text of this amendment became the enacted statute, a discussion of the specifics of Substitute Amendment 3 is not necessary here. See discussion *infra* Part III.B.

100. Wisconsin Senate Roll Call 2009–2010 Session: SB 25 Passage, WISCONSIN.GOV (Apr. 13, 2010), <http://legis.wisconsin.gov/2009/data/votes/sv0206.pdf>.

101. Wisconsin Assembly 2009–2010 Session: SB 25, Use of Race-Based Names, Concurrence, WISCONSIN.GOV 25 (Apr. 20, 2010), <http://legis.wisconsin.gov/2009/data/votes/av0498.pdf>.

102. 2009 Wis. Act 250.

103. *Id.*

104. WIS. STAT. § 118.134(1) (2010–11).

105. *Id.*

106. § 118.134(1)(a).

107. § 118.134(1)(b).

evidence that the nickname, mascot, or logo references, depicts, or portrays a specific, federally recognized American Indian tribe and the tribe has granted approval to the school board.<sup>108</sup>

## 2. Burden of Proof

At the contested case hearing, the school board must prove “by clear and convincing evidence that the use of the race-based nickname, logo, mascot, or team name does not promote discrimination, pupil harassment, or stereotyping.”<sup>109</sup> Nevertheless, if the state superintendent initially determines that the school’s nickname or team name is ambiguous as to whether it is race-based, then the burden of proof shifts to the complaining resident.<sup>110</sup> However, if the state superintendent initially determines that the name “is ambiguous as to whether it is race-based but that the use of the . . . name in connection with a logo or mascot is race-based,” then the burden of proof remains with the school board.<sup>111</sup>

## 3. State Superintendent Decision and Order

The state superintendent must issue a decision and order within forty-five days after the hearing.<sup>112</sup> If he or she finds that the school’s “use of the race-based nickname, logo, mascot, or team name does not promote discrimination, pupil harassment, or stereotyping,” then the state superintendent must dismiss the complaint.<sup>113</sup> However, if the state superintendent finds that the nickname, mascot, or logo does promote discrimination, pupil harassment, or stereotyping, then he or she must order the school board to terminate such use within twelve months after the order is issued.<sup>114</sup> A school that fails to comply with the state superintendent’s decision and order may be fined between \$100 and \$1000 for each day of noncompliance.<sup>115</sup> Decisions rendered under section 118.134 are subject to Chapter 227 judicial review.<sup>116</sup>

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108. § 118.134(1m)(a).

109. § 118.134(2)(a).

110. § 118.134(2)(b)1.

111. § 118.134(2)(b)2.

112. § 118.134(3)(a).

113. *Id.*

114. *Id.*

115. § 118.134(5).

116. § 118.134(1m)(b)1, (3)(c). Chapter 227 governs administrative procedure and review in Wisconsin. *See* WIS. STAT. ch. 227 (2010–11).

#### 4. "Extenuating Circumstances" Extension

The state superintendent may extend the time within which the school board must terminate its nickname, mascot, or logo if the school board presents evidence of "extenuating circumstances"—including an undue financial burden on the school district<sup>117</sup>—that render compliance within twelve months impossible or impracticable.<sup>118</sup> Although the extension of time is generally limited to twenty-four months,<sup>119</sup> the state superintendent may grant an additional extension of up to ninety-six months if the school board presents evidence that compliance with a portion of the order can be accomplished through a regularly scheduled maintenance program and that the cost of compliance with that portion exceeds \$5000.<sup>120</sup>

#### C. Rules for Enforcing the Law

The statute also provides that the state superintendent must "promulgate rules necessary to implement and administer" the provisions of Wisconsin's Indian mascot law.<sup>121</sup> After several meetings, including a public hearing,<sup>122</sup> the DPI published the rules for enforcing the new law. The rules define various terms<sup>123</sup> and describe the specific procedures for filing a section 118.134 complaint.<sup>124</sup> More importantly, the rules outline particular names and symbols that are presumed to promote discrimination, pupil harassment, or stereotyping.<sup>125</sup> A nickname or team name is unambiguously race-based if it includes the name of any specific federally recognized American Indian tribe, "Indians," "Braves," or "Redmen."<sup>126</sup> Likewise, any use of the terms "arrows, blackhawks, chiefs, chieftains, hatchets, raiders, red raiders, warriors, or warhawks" in connection with a logo that depicts a Native American

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117. § 118.134(3)(b)1.

118. § 118.134(3)(b)2a.

119. *Id.*

120. § 118.134(3)(b)2b.

121. § 118.134(4).

122. See Final Rep., Clearinghouse Rule 10-074, Chapter PI 45, Race-Based Nicknames, Logos, Mascots and Team Names (2010), available at [http://docs.legis.wi.gov/code/chr/related/2010/cr\\_10\\_074/cr\\_10\\_074\\_agency\\_report\\_to\\_legislature\\_part\\_1.pdf](http://docs.legis.wi.gov/code/chr/related/2010/cr_10_074/cr_10_074_agency_report_to_legislature_part_1.pdf). [hereinafter Final Rep.].

123. WIS. ADMIN. CODE PI § 45.02 (2011). The definitions for "discrimination," "pupil harassment," and "stereotyping" are essentially the same as the definitions used in the rules for enforcing section 118.13, Wisconsin's pupil nondiscrimination statute. See discussion *supra* Part II.B.

124. PI § 45.03.

125. PI § 45.04.

126. PI § 45.04(2).

person; feathers; a headdress; traditional Indian weapons, such as arrows, bows, spears, tomahawks, or hatchets; or traditional Indian drums, pipes, beadwork, clothing, or footwear is presumed unambiguously race-based.<sup>127</sup> A school district may, however, present clear and convincing evidence to rebut these presumptions.<sup>128</sup>

#### *D. Complaints Filed and Decisions Reached*

At the time of this writing, the DPI had resolved complaints filed under the Indian mascot law against four school districts—Osseo-Fairchild, Kewaunee, Mukwonago, and Berlin.

##### 1. Osseo-Fairchild School District

The DPI received its first complaint regarding a school's use of a race-based nickname, mascot, or logo on the same day the new law took effect.<sup>129</sup> Fifteen residents alleged that the Osseo-Fairchild School District violated section 118.134 by using a race-based name and logo that promotes discrimination, pupil harassment, or stereotyping.<sup>130</sup> The state superintendent immediately reviewed the complaint and determined that (1) the district's use of the "Chieftains" nickname was unambiguously race-based and that (2) the district did not have permission from a federally recognized tribe to use the nickname or "Chieftain Logo."<sup>131</sup> Consequently, at the hearing, the Osseo-Fairchild School District had the burden of proving that the nickname and logo did not promote discrimination, harassment, or stereotyping.<sup>132</sup>

Following the hearing, the department first reaffirmed that the district's use of the "Chieftains" nickname and "Chieftain Logo" was unambiguously race-based.<sup>133</sup> The DPI concluded that, for the last forty years, "Chieftain" in the Osseo-Fairchild School District meant an American Indian leader; the district confirmed this meaning in its mandatory "Osseo-Fairchild Logo Use Policy" of 2004.<sup>134</sup> Furthermore, although the "Chieftain Logo" was designed to represent Frank Thunder, a member of the Ho-Chunk Nation and a former

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127. PI § 45.04(3).

128. PI § 45.04(1).

129. See generally *In re Osseo-Fairchild Sch. Dist. Nickname & Logo*, No. 10-LC-01 (Wis. State Superintendent of Pub. Instruction July 27, 2010).

130. *Id.* at 1.

131. *Id.*

132. *Id.* at 1–2.

133. *Id.* at 4.

134. *Id.* at 5.

Fairchild resident,<sup>135</sup> most people saw the logo as nothing more than a Native American wearing a feather headdress.<sup>136</sup>

The department also reaffirmed that the district did not have permission to use the "Chieftains" nickname or "Chieftain Logo."<sup>137</sup> The descendants of Frank Thunder testified that the nickname and logo were being used with their permission.<sup>138</sup> However, under the statute, permission from a single American Indian family is not sufficient approval.<sup>139</sup>

Finally, the department concluded that the district failed to rebut the presumption that its nickname and logo promoted discrimination, pupil harassment, and stereotyping.<sup>140</sup> Several witnesses described harassing behavior by students including participating in name calling, performing mock war dances, and wearing feather headdresses.<sup>141</sup> In addition, the DPI held that the wholly "respectful" use of a race-based nickname, mascot, or logo may still constitute stereotyping<sup>142</sup> and that a race-based logo may violate section 118.134 even if its use is limited.<sup>143</sup> Furthermore, the district did not present any evidence to contradict the empirical research demonstrating the detrimental effects of such names and symbols.<sup>144</sup> Several academic studies have shown that exposure to stereotypical Indian mascots lowers the self-esteem of Native American students "*regardless of whether the image involved is positive or negative.*"<sup>145</sup> These studies also indicate that such exposure "increases the tendency of children of any race to endorse stereotypes of other racial minorities."<sup>146</sup>

Based on the foregoing determinations, the department ordered the Osseo-Fairchild School District to terminate its use of the "Chieftains" nickname and "Chieftain Logo."<sup>147</sup> Shortly after the order, the district exercised its right under the statute to appeal the DPI decision; nevertheless, the appeal was dismissed because the district failed to send certain documents to the

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135. *Id.* at 3.

136. *Id.* at 4–5.

137. *Id.* at 5.

138. *Id.*

139. *Id.*

140. *Id.* at 6.

141. *Id.*

142. *Id.*

143. *Id.* at 6–7.

144. *Id.* at 7.

145. *Id.* (emphasis added).

146. *Id.* (emphasis added).

147. *Id.* at 8.

complaining residents on time.<sup>148</sup>

## 2. Kewaunee School District

On June 25, 2010, the DPI received its second complaint under the new law when a district resident brought a claim against the Kewaunee School District.<sup>149</sup> The state superintendent initially determined that (1) the Kewaunee School District's use of the "Indians" nickname and of a logo depicting a Native American wearing a feather headdress was unambiguously race-based and that (2) the district did not have permission to use such a nickname or logo.<sup>150</sup> Therefore, the department scheduled a contested case hearing where the district had the burden of proving that its name and logo did not promote discrimination, harassment, or stereotyping.<sup>151</sup> The day before the hearing, however, the Kewaunee School District informed the DPI that it would voluntarily discontinue its use of the "Indians" nickname and logo.<sup>152</sup> Consistent with this decision, the department ordered the district to fully discontinue use of its race-based mascot within twelve months as required by the statute.<sup>153</sup>

## 3. Mukwonago Area School District

While the first two decisions were pending, the DPI received a complaint alleging that the Mukwonago Area School District's use of the "Indians" nickname and of a logo depicting a Native American wearing a feather headdress violated section 118.134.<sup>154</sup> Again, the state superintendent determined that (1) the district's use of the name and logo was unambiguously race-based and that (2) the district did not have permission from a federally

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148. Andrew Fefer, *Judge Denies School's Appeal to Keep Current Mascot and Logo*, WEAU.COM (Nov. 18, 2010), [http://www.weau.com/education/headlines/Judge\\_denies\\_108984854.html](http://www.weau.com/education/headlines/Judge_denies_108984854.html). A successful write-in campaign resulted in "Thunder" replacing "Chieftains" as the nickname of the Osseo-Fairchild School District. *Osseo-Fairchild Picks "Thunder" as New Nickname*, WEAU.COM (Nov. 28, 2011), [http://www.weau.com/home/headlines/BREAKING\\_NEWS\\_Osseo-Fairchild\\_picks\\_Thunder\\_as\\_new\\_nickname\\_134644473.html](http://www.weau.com/home/headlines/BREAKING_NEWS_Osseo-Fairchild_picks_Thunder_as_new_nickname_134644473.html).

149. *See generally In re Kewaunee Sch. Dist. Nickname & Logo*, No. 10-LC-02 (Wis. State Superintendent of Pub. Instruction Aug. 11, 2010).

150. *Id.* at 1.

151. *Id.*

152. *Id.* at 2.

153. *Id.* After forming a committee and administering a community-wide vote, the Kewaunee School District chose "Storm" to replace its "Indians" mascot. Tina Gohr, *Kewaunee School District Chooses Storm to Replace Indians Mascot*, POST-CRESCENT (Wis.), Oct. 8, 2010, at APC.

154. *See generally In re Mukwonago Sch. Dist. Nickname & Logo*, No. 10-LC-03 (Wis. State Superintendent of Pub. Instruction Oct. 8, 2010).

recognized tribe to use the name and logo.<sup>155</sup> Thus, the nickname and logo was presumed to promote discrimination, pupil harassment, or stereotyping.<sup>156</sup>

Following the contested case hearing, the department first concluded that its 1995 decision regarding the same school district and mascot was not relevant because the current complaint "require[d] an entirely different analysis."<sup>157</sup> The DPI reasoned that "it would be inappropriate to rely on the legal conclusions of a decision issued under" Wisconsin's pupil nondiscrimination statute to resolve a complaint filed under the state's new Indian mascot law "[g]iven the significant differences between [section] 118.13 . . . and [section] 118.134."<sup>158</sup>

Moreover, the department concluded that the district had failed to present clear and convincing evidence that its use of the "Indians" nickname and logo did not promote discrimination, harassment, or stereotyping.<sup>159</sup> Although testimony at the hearing established that individual Native Americans disagreed as to whether the nickname and logo was offensive, the DPI held that such testimony did not constitute sufficient evidence to rebut the presumption.<sup>160</sup> In addition, the district's efforts to police "disrespectful" behavior such as the tomahawk chop, war chants, and face paint demonstrated that the name and logo clearly did promote stereotyping.<sup>161</sup> Likewise, a film shown during freshmen orientation to educate incoming students on appropriate use of the "Indians" mascot perpetuated stereotyping as it generalized and inaccurately portrayed American Indians who once resided in the Mukwonago area.<sup>162</sup> Lastly, the district failed to present evidence to counter the various empirical studies that have demonstrated the detrimental effects of Indian nicknames, mascots, and logos on children.<sup>163</sup>

In sum, the DPI found that the Mukwonago Area School District used a race-based mascot in violation of section 118.134.<sup>164</sup> Thus, the department ordered that the district must terminate its "Indians" nickname and logo within twelve months of the decision.<sup>165</sup>

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155. *Id.* at 1.

156. *Id.*

157. *Id.* at 4. For a discussion of the DPI's 1995 decision, see *supra* Part II.D.1.

158. *In re Mukwonago*, No. 10-LC-03, at 4.

159. *Id.*

160. *Id.* at 5.

161. *Id.*

162. *Id.* at 5-6.

163. *Id.* at 6.

164. *Id.*

165. *Id.* at 7. The legislature later amended the Indian mascot law, granting schools until January 15, 2013 to comply with an order to terminate, provided that the DPI decision was rendered on or

#### 4. Berlin Area School District

The DPI went eight months before receiving another complaint under the Indian mascot law. On June 20, 2011, a district resident alleged that the Berlin Area School District used a nickname and logo in violation of section 118.134.<sup>166</sup> As in the previous decisions, the department first determined that (1) the district's use of the "Indians" name and logo was unambiguously race-based and that (2) the district did not have permission from a federally recognized tribe to use the name and logo, placing the burden on the school district at the contested case hearing.<sup>167</sup>

Following the hearing, the DPI concluded that the school district failed to refute the presumption that its name and logo promoted stereotyping and discrimination.<sup>168</sup> Although the school had taken steps to eliminate "insensitive" uses of the name, the department noted that a witness had observed stereotypical behavior "on at least one occasion."<sup>169</sup> Furthermore, the district did not educate students on the background of its name and logo, and the logo did not represent an accurate portrayal of any American Indian tribe that it claimed to honor.<sup>170</sup> The department then recounted the various empirical studies, determining that the research is "reliable" and "broadly applicable" and that the district failed to provide any evidence to refute these studies.<sup>171</sup> Finally, the DPI held that testimony regarding the offensiveness of the name and logo, a survey demonstrating overwhelming support for retaining the name and logo, and evidence of an American Indian presence in the Berlin area did not constitute evidence that the use of the nickname and logo did not promote discrimination, harassment, or stereotyping.<sup>172</sup> Thus, the school was ordered to terminate its use of the "Indians" nickname and two logos.<sup>173</sup>

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before July 1, 2011. *See* § 118.134(3)(d).

166. *See generally In re Berlin Area Sch. Dist. Nickname & Logo*, No. 11-LC-01 (Wis. State Superintendent of Pub. Instruction Sept. 16, 2011). The district used two logos—the head of a man wearing a feather headdress and an arrow and a feather. *Id.* at 2.

167. *Id.* at 1.

168. *Id.* at 3.

169. *Id.*

170. *Id.*

171. *Id.* at 4.

172. *Id.*

173. *Id.* at 5. In October 2011, several residents from the Berlin Area School District filed a lawsuit challenging the constitutionality of the state's Indian mascot law, the hearing conducted before the DPI, and the department's order. *Compl., Butler v. Wis. Dept. of Pub. Instruction*, No. 11-CV-0197 (Green Lake Cnty. Cir. Ct. Oct. 31, 2011).

*E. Responses to the Indian Mascot Law*

Less than a year after the statute was enacted, efforts were launched to contest the Indian mascot law, including a lawsuit and potential legislation.

*1. Court Challenge*

Unhappy with the DPI's decision, two Mukwonago district residents filed a lawsuit challenging the constitutionality of Wisconsin's race-based mascot law.<sup>174</sup> The Waukesha County Circuit Court first determined that the residents—as taxpayers—had standing to challenge the law.<sup>175</sup> Despite reasoning that the statute “‘is an uncommonly silly law,’” the court concluded that the statute itself did not violate the Equal Protection Clause.<sup>176</sup> Likewise, the statute survived a facial challenge under the Due Process Clause.<sup>177</sup> Nevertheless, the court held that the district was denied its right to procedural due process because it did not receive a hearing before “an impartial decision-maker.”<sup>178</sup> The decision-maker “exhibited an impermissibly high risk of bias” given that (1) he knew that the DPI supported removal of all Indian mascots; (2) he could not explain how the district would know what evidence to provide; and (3) he could not articulate what evidence the district could have presented to satisfy its burden.<sup>179</sup> Therefore, the court granted summary judgment in favor of the district residents because the race-based mascot law was unconstitutional as applied at the Mukwonago hearing.<sup>180</sup> The court did note, however, that any repeal of the statute would have to come from the legislature.<sup>181</sup>

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174. Jim Stevens, *Judge Won't Dismiss Suit Over Logo Change*, MILWAUKEE J. SENTINEL, Dec. 15, 2010, at B.

175. *Schoolcraft v. Evers*, No. 10–CV–4804, at 10 (Waukesha Cnty. Cir. Ct. Sept. 29, 2011), available at <http://www.masd.k12.wi.us/mhs/Documents/11-Court-Logo.PDF>.

176. *Id.* at 21.

177. *Id.* at 11.

178. *Id.* at 18–19.

179. *Id.* at 16–19.

180. *Id.* at 21. By granting the residents summary judgment, the court enjoined the DPI from enforcing section 118.134 against the Mukwonago Area School District. *Id.* at 1. Thus, the district would not have to comply with the department's order to terminate its use of the “Indians” nickname and logo. See discussion *supra* Part III.D.3. Nevertheless, Attorney General J.B. Van Hollen—on behalf of the DPI—appealed the circuit court ruling. Erin Richards, *State Appeals Pro-Mascot Ruling*, MILWAUKEE J. SENTINEL, Dec. 21, 2011, at B3.

181. *Schoolcraft*, No. 10–CV–4804, at 21.

## 2. Potential Repeal

Legislative efforts to repeal 2009 Wisconsin Act 250 had begun months before the hint from the Waukesha County Circuit Court. On February 22, 2011, State Representative Nass introduced Assembly Bill 26.<sup>182</sup> The proposed bill would repeal section 118.134, void any decisions issued by the DPI, dismiss with prejudice any pending complaints, and dismiss with prejudice any DPI order for which judicial review was pending.<sup>183</sup> As of the time of this writing, the bill was in the Assembly's Committee on Homeland Security and State Affairs.<sup>184</sup>

### IV. COMPARISON OF SECTION 118.13 AND SECTION 118.134

Since 1992, Wisconsin residents have been able to challenge a school district's use of a discriminatory mascot under the state's pupil nondiscrimination statute.<sup>185</sup> Still, the legislature clearly felt that it was necessary to implement a law specifically devoted to making such challenges. As a result, a close comparison of the two statutes is needed to determine why the legislature desired this "new" law and what the legislature sought to accomplish by enacting it.

While sections 118.13 and 118.134 of the Wisconsin Statutes may both be used to challenge a school's use of a race-based mascot, the statutes are significantly unique. Under section 118.134, a district resident is permitted to file his or her complaint directly with the state superintendent, therefore bypassing a decision by the individual school board.<sup>186</sup> Also, the analysis required by each statute is entirely different. To have standing under section 118.13, a person must demonstrate specific instances of discrimination, harassment, or stereotyping. Therefore, a pupil must meet the three-pronged racially hostile environment test.<sup>187</sup> In contrast, any district resident may file a complaint under section 118.134.<sup>188</sup> Furthermore, the "new" statute—unless the nickname, logo, mascot, or team name is ambiguous as to whether it is

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182. Assemb. 26, 2011–2012 Leg., Reg. Sess. (Wis. 2011). Nass is the same state representative who, in 1995, unsuccessfully introduced legislation to override the 1992 attorney general opinion. See discussion *supra* Part II.C.

183. 2011 Wis. Assemb. 26.

184. Kevin Hoffman, *Legislators Move to Repeal Mascots Law*, GAZETTEXTRA.COM (Feb. 25, 2011), <http://gazetteextra.com/news/2011/feb/25/legislators-move-repeal-mascots-law/>.

185. See discussion *supra* Part II.

186. Compare WIS. STAT. § 118.134(1) and PI § 45.03 with WIS. STAT. § 118.13(2) and PI § 9.04.

187. For a discussion of the racially hostile environment test, see *supra* Part II.D.

188. WIS. STAT. § 118.134(1).

race-based—places the burden of proof on the school board rather than the complaining resident.<sup>189</sup> The rules enforcing section 118.134 even specify names, terms, and symbols that are unambiguously race-based.<sup>190</sup> Finally, the remedy granted by each statute is much different. Schools that violate the state's pupil nondiscrimination statute are required to implement a corrective action plan that is subject to review by the state superintendent.<sup>191</sup> Conversely, the race-based mascot law contains an explicit provision for terminating the use of a discriminatory nickname, logo, mascot, or team name.<sup>192</sup>

Although the statutes are not mutually exclusive, challenges to a discriminatory mascot via Wisconsin's pupil nondiscrimination statute are now obsolete given the significant advantages of the race-based mascot law. Under section 118.13, controversies surrounding questionable school names and logos were primarily local, and—given the significant latitude granted by the state superintendent—decisions ultimately remained in the hands of the individual school boards.<sup>193</sup> By enacting section 118.134, which allows a resident to bypass the school board for immediate state involvement, the legislature was clearly concerned with protecting the rights of a relatively powerless minority. The education of each and every student was further protected by creating a presumption that certain names and logos promote discrimination, pupil harassment, or stereotyping. This shift in the burden of proof alone will make challenges under section 118.134 considerably more successful than challenges under section 118.13. Likewise, the state's race-based mascot law is distinctly more appealing because a positive determination leads to the desired outcome—the termination of a discriminatory nickname, mascot, or logo.

## V. CONCLUSION

Consequently, the "new" race-based mascot law will likely effectuate the demise of American Indian nicknames and symbols in Wisconsin public high schools. The names, terms, and symbols listed in the rules enforcing the statute are so extensive that it is questionable whether an ambiguously race-based name or logo even exists.<sup>194</sup> Therefore, the school board will always

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189. See § 118.134(2).

190. PI § 45.04.

191. See WIS. STAT. § 118.13(2)–(3).

192. § 118.134(3)(a).

193. See discussion *supra* Part II.D.

194. In fact, the DPI has stated that the "rule is not intended to exhaustively list all unambiguously race-based nicknames." Final Rep., *supra* note 122.

have the burden of proving that the name or logo does not promote discrimination, pupil harassment, or stereotyping. Based on the initial DPI decisions, no school board will be able to produce clear and convincing evidence to rebut this presumption, especially given the department's extreme reliance on empirical research demonstrating the detrimental effects that Native American stereotypes have on children.

Analyzing the provisions of Wisconsin's race-based mascot law—in connection with the rules enforcing the statute and the initial DPI decisions—it is apparent that the legislature intended to create a law that would bring about the end of American Indian nicknames, mascots, and logos. By enacting such a stringent statute, the legislature sought to encourage school districts to voluntarily abandon their use of such names and symbols rather than fight a virtually unwinnable battle. If this was in fact the goal, then the legislature should have drafted a bill that would permanently eliminate all unambiguously race-based nicknames, logos, mascots, and team names. Maybe such a law would never have passed. Maybe such a law would be unconstitutional. In either case, requiring the DPI to rule on each mascot on a case-by-case basis seems to be a waste of time and resources—especially when the result is seemingly a foregone conclusion.

Overall, the use of Native American nicknames, mascots, and logos by schools is clearly a contentious, divisive, and important issue. By passing a law specifically devoted to challenging the use of such mascots, Wisconsin has placed this controversy into the public forum. Thus far, however, this public debate has not been constructive, as it seems to have only polarized the sides while increasing the prevalence of discriminatory logos.<sup>195</sup> The real goal should be to educate citizens on the potential damaging effects that stereotypical names and logos have on children of all races. Nevertheless, given the reaction to Wisconsin's Indian mascot law, all this madness may never pass.

Jeremy Daniel Heacox

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195. See, e.g., *Lawsuit Filed By Mukwonago Residents Claim Mascot Law Unconstitutional*, FOX6Now (Dec. 21, 2010), <http://waukesha.fox6now.com/content/lawsuit-filed-mukwonago-residents-claim-mascot-law-unconstitutional>.