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WISCONSIN'S RACE-BASED MASCOT LAW: AN UPDATE

JEREMY DANIEL HEACOX*

INTRODUCTION

The madness continues. In 2010, Wisconsin passed a law establishing a process for school district residents to file a complaint objecting to their school's use of a race-based nickname, logo, mascot, or team name.¹ I predicted that the law—believed to be the first of its kind at the time²—would “likely effectuate the demise of American Indian nicknames and symbols in Wisconsin public high schools” because the law made it extremely difficult for school boards to keep a challenged name or symbol.³ I was wrong. Before the ink was dry on that prediction, and with Republicans taking control of the state senate,⁴ the legislature amended the law in 2013 to favor school boards rather than complainants.⁵ Those amendments quelled the momentum for change—for a

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1. See Race-based nicknames, logos, mascots, and team names, 2009 WIS. ACT 250 (2010) (creating Wis. Stat. § 118.134).

2. See Patrick Marley, *Hearing Gets Heated on GOP Bill to Change Indian Mascot Restrictions*, MILWAUKEE J. SENTINEL, (Oct. 4, 2013), <https://archive.jsonline.com/news/education/hearing-set-on-gop-bill-to-change-indian-mascot-restrictions-b99112408z1-226300751.html/>, (noting that the law was “the first of its kind in the nation”).

3. See Jeremy Daniel Heacox, Comment, *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*, 22 MARQ. SPORTS L. REV. 651, 673 (2012).

4. See Patrick Marley, *Republicans Reclaim Control of State Senate*, MILWAUKEE J. SENTINEL, Nov. 7, 2012, at 1B.

5. See Race-based nicknames, logos, mascots, and team names, 2013 WIS. ACT 115 (2013)

time.

Flash forward a few years, and the appetite again was whet for change. Spearheaded by the Black Lives Matter movement, the demand for racial justice and equality shined a spotlight on other historically marginalized groups and symbols of racism.⁶ Dozens of Confederate statues and monuments were removed from public display.⁷ Thousands gathered to protest racism against Asian Americans related to the COVID-19 pandemic.⁸ And others renewed the push for dropping the use of race-based nicknames, logos, mascots, and team names.⁹ Two of the major professional sports franchises still using American Indian names and imagery, the Washington Redskins and the Cleveland Indians, announced that they were moving in a different direction.¹⁰ At the state level, Maine became the first state to completely ban Native American mascots in its public schools and colleges.¹¹ Other states followed suit.¹²

This article provides an update on how the Indian mascot controversy has played out in Wisconsin over the last decade or so. Part I summarizes the events leading up to and through the passage of Wisconsin's race-based mascot law in 2010, including the decisions and lawsuits that seemed to signal the end of Native American names and symbols in the state's public-school districts. Part II picks up where the controversy left off in 2012 and explains several key developments that stifled the momentum for change and allowed schools to retain their potentially race-based mascots. Part III argues that the remaining districts should eliminate their arguably race-based names or symbols and

(amending WIS. STAT. § 118.134).

6. Reuters, *U.S. Saw Summer of Black Lives Matter Protests Demanding Change*, U.S. NEWS (Dec. 7, 2020), <https://www.usnews.com/news/top-news/articles/2020-12-07/us-saw-summer-of-black-lives-matter-protests-demanding-change>.

7. Rachel Treisman, *Nearly 100 Confederate Monuments Removed In 2020, Report Says; More Than 700 Remain*, NPR (Feb. 23, 2021, 5:48 PM), <https://www.npr.org/2021/02/23/970610428/nearly-100-confederate-monuments-removed-in-2020-report-says-more-than-700-remai>.

8. Li Cohen, *Thousands Protests Violence Against Asian Americans During National Day of Action Protests*, CBS NEWS (Mar. 27, 2021, 6:04 PM), <https://www.cbsnews.com/news/asian-american-protests-national-day-of-action-condemn-violence-against-asian-americans/>.

9. Gillian R. Brassil, Giulia McDonnell Nieto del Rio, Billy Witz and David Waldstein, *In Campaign Against Racism, Team Names Get New Scrutiny*, N.Y. TIMES (July 10, 2020), <https://www.nytimes.com/2020/07/10/sports/football/washington-redskins-name-change-mascots.html>.

10. Deena Zaru, *For Native Americans, the Fight Against Mascots is Much Bigger Than Sports*, ABC NEWS (Dec. 31, 2020, 5:00 AM), <https://abcnews.go.com/US/native-americans-fight-mascots-bigger-sports/story?id=74736944>.

11. Bob Cook, *The Fight to Ban Native American Mascots Is Very Local, and Very Slow*, FORBES (May 22, 2019, 6:54 PM), <https://www.forbes.com/sites/bobcook/2019/05/22/the-fight-to-ban-native-american-mascots-is-very-local-and-very-slow/?sh=459a265e3d7a>.

12. Nat'l Cong. of Am. Indians, *"Ending 'Indians' Mascots" Initiative – State Activity Tracker*, <https://ncai.org/Ending.Indian.Mascots.Initiative.State.Activity.Tracker.pdf> (Aug. 17, 2021).

analyzes the different methods to compel schools to change. Finally, this article offers concluding remarks on the Indian mascot controversy in Wisconsin.

I. HOW IT STARTED

In 1992, then-Attorney General James E. Doyle issued an opinion declaring that “American Indian logos, mascots and nicknames used by public schools may violate section 118.13.”¹³ That statute prohibits pupil discrimination in Wisconsin schools:

[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 sex, race, religion, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation or physical, mental, emotional or learning disability.¹⁴

The attorney general opinion, however, had little effect on the movement to eliminate the use of such names and symbols in Wisconsin schools, as residents filed complaints under section 118.13 against only three school districts—Mukwonago, Mosinee, and Osseo-Fairchild—and none were successful.¹⁵ In each case, the Wisconsin Department of Public Instruction (the state agency charged with handling appeals under section 118.13) determined that it was not clear that a reasonable person similarly situated to the complainant would find that the challenged name or logo presented a negative, detrimental stereotype of American Indians.¹⁶ Nevertheless, the state superintendents of public instruction clearly expressed that the use of discriminatory names and images was inappropriate regardless of its legality. They urged school districts to review and eliminate their use of American Indian logos and mascots,¹⁷ but few districts took that advice.¹⁸ Legislative efforts to create a more streamlined process for

13. 80 Op. Att’y Gen. Wis. 321, 1992 Wis. AG LEXIS 26, at *9 (1992).

14. WIS. STAT. § 118.13(1) (2020–21).

15. See Heacox, *supra* note 3, at 658–61.

16. See *id.*

17. See Memorandum from Joyce L. Kiel, Senior Staff Attorney, Wis. Legis. Council, to Members of Special Comm. on State-Tribal Relations (Jan. 18, 2007), https://docs.legis.wisconsin.gov/misc/lc/study/2006/special_committee_on_state_tribal_relations.

18. 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; see also *Status of Race-Based Nicknames in Wisconsin Schools*, INDIANMASCOTS.COM,

challenging such names and symbols also repeatedly failed,¹⁹ until a breakthrough in 2010 when Democrats controlled the state senate, the state assembly, and the governor's office.²⁰

In May 2010, Wisconsin enacted its race-based mascot law.²¹ Unlike section 118.13, the new statute, Wis. Stat. section 118.134, provided a specific process for challenging the use of race-based nicknames, logos, mascots, and team names in Wisconsin schools. The statute permitted a school district resident to file a complaint directly with the state superintendent, therefore bypassing a decision by the individual school board.²² The school board avoided a hearing on the complaint if it had approval from a federally recognized American Indian tribe to use the challenged nickname, logo, mascot, or team name.²³ If not, the state superintendent scheduled a contested-case hearing, at which (in most cases, due to an extensive list of unambiguously race-based names and symbols)²⁴ the school district had the burden to prove "by clear and convincing evidence that the use of the race-based nickname, logo, mascot, or team name [did] not promote discrimination, pupil harassment, or stereotyping."²⁵ Failure to meet that burden resulted in an order to terminate the use of the challenged name or symbol within twelve months²⁶ and potential fines for noncompliance.²⁷ The statute also contained an "extenuating circumstances" provision, which allowed for an extension of the deadline if (among other things) compliance posed "an undue financial burden on the school district."²⁸

Residents filed complaints under section 118.134 against four school districts: Osseo-Fairchild, Kewaunee, Mukwonago, and Berlin.²⁹ The Kewaunee School District agreed to discontinue its use of the Indians nickname and a logo depicting a Native American wearing a feather headdress, but the other complaints proceeded to hearings.³⁰ In each of those three cases, the Department of Public Instruction (DPI) determined that the challenged name or

http://www.indianmascots.com/wisconsin_lists_updated.pdf (Jan. 2, 2012).

19. See Heacox, *supra* note 3, at 656–57.

20. See *Party Control of Wisconsin State Government*, BALLOTPEdia, https://ballotpedia.org/Party_control_of_Wisconsin_state_government (last visited Dec. 1, 2021).

21. See 2009 Wis. Act 250 (2010) (James E. Doyle, the former attorney general, signed the bill into law as Wisconsin's outgoing governor).

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

23. *Id.* § 118.134(1m).

24. WIS. ADMIN. CODE PI § 45.03 (2015).

25. WIS. STAT. § 118.134(2) (2010–11).

26. *Id.* § 118.134(3)(a).

27. *Id.* § 118.134(5).

28. *Id.* § 118.134(3)(b).

29. See Heacox, *supra* note 3, at 666–70.

30. See *id.*

symbol was unambiguously raced-based and that the school district had failed to rebut the presumption that the name or symbol promoted discrimination, pupil harassment, or stereotyping.³¹ The DPI also relied on academic research showing that exposure to stereotypical Indian mascots lowers the self-esteem of Native American students “regardless of whether the image involved is positive or negative” and “increases the tendency of children of any race to endorse stereotypes of other racial minorities.”³² Thus, the DPI ordered each school district to terminate the challenged name or symbol.³³

Unsatisfied with the DPI’s decision, two Mukwonago district residents filed a lawsuit seeking to bar the DPI from enforcing section 118.134, arguing that the statute was facially unconstitutional and unconstitutional as applied to the Mukwonago School District.³⁴ The Waukesha County Circuit Court granted the residents’ motion for summary judgment, finding that (1) the residents had standing as taxpayers to challenge the constitutionality of the statute, (2) the statute was not facially unconstitutional, (3) the statute did not violate the right to equal protection, and (4) the school district was denied the right to procedural due process, as the DPI administrator responsible for making decisions under section 118.134 “was not a fair and non-biased decision maker.”³⁵

The DPI appealed, and the Wisconsin Court of Appeals reversed because the residents did not have “standing to bring a due-process challenge to a procedure they were not part of.”³⁶ First, the court noted that the circuit court based its due-process finding on the fact that *the school district* was denied the right to a fair hearing.³⁷ Second, the court noted that the residents were not parties to that hearing, did not seek to intervene in that action, and did not petition for judicial review of the DPI’s adverse decision.³⁸ Finally, the court determined that the residents’ status as taxpayers did not afford them standing, as they did not participate in the administrative complaint process.³⁹ After the Wisconsin Supreme Court denied the residents’ petition for review,⁴⁰ the circuit

31. *See id.*

32. *See id.* at 667.

33. *See id.* at 666–70.

34. *See Schoolcraft v. Evers*, No. 10-CV-4804, (Waukesha Cty. Cir. Ct. Sept. 29, 2011).

35. *See id.*

36. *Schoolcraft v. State Dep’t of Pub. Instruction*, No. 2011AP2917, 2013 Wisc. App. LEXIS 8, at *1 (Wis. Ct. App. Jan. 3, 2013).

37. *Id.* at *4.

38. *Id.* at *4–5.

39. *Id.* at *7–8.

40. *Schoolcraft v. State Dep’t of Pub. Instruction*, No. 2011AP2917, 2013 Wisc. LEXIS 546 (Wis. June 12, 2013).

court dismissed the action.⁴¹

Several Berlin district residents also filed a lawsuit challenging the constitutionality of section 118.134.⁴² The Green Lake County Circuit Court granted the residents' request for a temporary injunction, which halted the DPI's order.⁴³ However, after the Wisconsin Court of Appeals issued its decision in the Mukwonago case, the Berlin residents agreed to drop theirs.⁴⁴

II. HOW IT'S GOING

What a difference a few years can make. When I wrote about Wisconsin's "new" race-based mascot law back in 2012, the early returns suggested that any American Indian name or symbol would be eliminated if challenged and that schools would choose to voluntarily abandon such names or symbols rather than fight an unwinnable battle. What I failed to appreciate then was how strongly some communities—read: school boards—would dig in to keep their race-based nicknames, logos, mascots, and team names; Mukwonago is a good example of that. The issue became so polarized and politicized that change became inevitable, given a change in the composition of the state government.

And that's exactly what happened. Republicans used their state government trifecta (holding the governor's office, a majority in the state senate, and a majority in the state assembly) to gut Wisconsin's race-based mascot law. If the creation of section 118.134 was a halftime adjustment, then the amendments to that statute amounted to a wholesale regime change—a new owner moving in a different direction by firing the coach and the general manager after only three years at the helm. The amendments forced proponents of removing race-based names and symbols from Wisconsin schools to either achieve their own trifecta or come up with non-legislative, creative solutions.

A. 2013 Wisconsin Act 115

Legislative efforts to repeal Wisconsin's race-based mascot law began less than a year after its enactment. In February 2011, representatives of the Wisconsin State Assembly introduced a bill that would have repealed section

41. See <https://wcca.wicourts.gov/case.html> (search Waukesha County Circuit Court Case No. 2010CV004804).

42. See *Mukwonago Schools Refuse to Drop American Indian Mascot*, WISN, (Jul. 23, 2013, 2:49 PM), <https://www.wisn.com/article/mukwonago-schools-refuse-to-drop-american-indian-mascot/6316589>; see also <https://wcca.wicourts.gov/case.html> (search Green Lake County Circuit Court Case No. 2011CV000197).

43. Sharif Durhams, *State Halted from Changing Berlin High Mascot Name*, MILWAUKEE J. SENTINEL, Apr. 13, 2012, <https://archive.jsonline.com/news/wisconsin/state-halted-from-changing-berlin-high-mascot-name-mo507ft-147351785.html/>.

44. *Mukwonago Schools Refuse to Drop American Indian Mascot*, *supra* note 42.

118.134 and voided any decided or pending complaints.⁴⁵ The bill did not make it out of committee.⁴⁶ Nevertheless, following the 2012 election cycle, Republicans increased their majority in the state assembly⁴⁷ and gained control of the state senate.⁴⁸ Shortly thereafter, members of the state assembly reintroduced their bill to wholly repeal section 118.134.⁴⁹ Representatives later amended the bill to keep the general framework of section 118.134 intact; however, the amended bill modified the complaint process to make it easier for school districts to keep their challenged names and symbols.⁵⁰ The amended bill moved quickly through the state assembly, passing along party lines, 52–41.⁵¹ The bill had similar success in the state senate, which concurred in the passage of the bill by the narrowest of margins, 17–16, also along party lines.⁵² On December 19, 2013, then-Governor Scott Walker, a Republican who replaced Democratic Governor Doyle in 2011,⁵³ signed the bill into law.⁵⁴ The amended law, 2013 Wisconsin Act 115, took effect the following day.⁵⁵

If the process under the pre-2013 law made it very difficult for school districts to retain challenged names and symbols, the changes contained in 2013 Wisconsin Act 115 had the exact opposite effect: under the new law, it will be nearly impossible for a complainant to succeed. This is so, because the legislature made several modifications to deliberately favor school districts over complainants.

1. 10% Petition

Whereas under the old law a single complaining resident could trigger review of an allegedly race-based nickname, logo, mascot, or team, now, a

45. Assem. B. 26, 2011–2012 Leg., Reg. Sess. (Wis. 2011).

46. *See id.*

47. *See Wisconsin State Assembly Elections, 2012*, BALLOTPEdia, https://ballotpedia.org/Wisconsin_State_Assembly_elections_2012 (last visited Dec. 1, 2021).

48. *See Wisconsin State Senate Elections, 2012*, BALLOTPEdia, https://ballotpedia.org/Wisconsin_State_Senate_elections_2012 (last visited Dec. 1, 2021).

49. *See* Assem. B. 297, 2013–2014 Leg., Reg. Sess. (Wis. 2013).

50. *See* Assem. B. 297, Assem. Sub. Amend. 1, 2013–2014 Leg., Reg. Sess. (Wis. 2013).

51. *See* “School Nicknames and Mascots Act of 2013: Roll Vote No. 154.” Assem. B. 297, 2013–2014 Leg., Reg. Sess. Record 52:41 (Oct. 15, 2013). <https://docs.legis.wisconsin.gov/2013/related/votes/assembly/av0154>.

52. *See* “2013 Wisconsin Act 115: Roll Call No. 213.” Leg., Reg. Sess. Record 17:16 (Nov. 05, 2013), <https://docs.legis.wisconsin.gov/2013/related/votes/senate/sv0213>.

53. Mary Spicuzza and Dee J. Hall, *Walker Defeats Barrett to Win Governor’s Race*, MADISON.COM (Nov. 3, 2010), https://madison.com/wsj/news/local/govt-and-politics/elections/walker-defeats-barrett-to-win-governors-race/article_d112cfd0-e6f9-11df-83c9-001cc4c002e0.html.

54. *See* 2013 WIS. ACT 115.

55. *See id.*

section 118.134 complaint must contain “a number of signatures of school district electors equal to at least 10 percent of the school district’s membership.”⁵⁶ The term “elector,” as used in the statute, “means a U.S. citizen age 18 or older who resides in the school district.”⁵⁷ Current students and staff therefore generally cannot participate in the complaint process. Moreover, to be valid, signatures must be obtained “within the 120-day period before the complaint is filed with the state superintendent.”⁵⁸ As seen with previous complaints, residents in favor of retaining race-based mascots far outnumber (or far outcry) those who want such mascots eliminated—after all, it is a minority issue.⁵⁹ Thus, requiring complaints to be supported by a petition rather than a single complainant will likely result in few, if any, complaints being filed.

2. Reviewing Body

2013 Wisconsin Act 115 also changed the administrative body in charge of reviewing complaints filed under section 118.134. Under the old law, the state superintendent of public instruction (or its designee) reviewed complaints, decided whether a hearing was necessary, and issued decisions following a hearing.⁶⁰ Although complaints are still filed with the state superintendent, if a hearing is needed the superintendent must refer the matter to the Division of Hearings and Appeals,⁶¹ an agency within the State Department of Administration.⁶² The Division of Hearings and Appeals is responsible for conducting hearings and issuing decisions.⁶³

Though subtle, this change neutralizes any bias in favor of complainants, as the state superintendents historically have favored the removal of race-based nicknames, logos, mascots, and team names. Recall the Mukwonago case, where the circuit court granted summary judgment in favor of the district residents trying to declare the old law unconstitutional because the decision-maker, an administrator with the DPI, “exhibited an impermissibly high risk of bias.”⁶⁴ While some may argue that this modification simply leveled the playing field, the likely goal was to flip the bias the other way. Unlike the non-partisan

56. WIS. STAT. § 118.134(1) (2020–21).

57. WIS. ADMIN. CODE PI § 45.02(5) (2011).

58. WIS. STAT. § 118.134(1) (2020–21).

59. *See, e.g.*, Patrick Marley, *Mukwonago Defends Use of Indian Identity*, MILWAUKEE JOURNAL SENTINEL, Aug. 28, 2010, at 1B.

60. WIS. STAT. §§ 118.134(1)–(3), 2010–11).

61. WIS. STAT. § 118.134(1)(b) (2020–21).

62. *See* State of Wisconsin, Department of Administration: Division of Hearing and Appeals, Department of Administration, <https://doa.wi.gov/Pages/AboutDOA/HearingsAndAppeals.aspx>.

63. WIS. STAT. §§ 118.134(1), (3) (2020–21).

64. *Schoolcraft v. Evers*, No. 10-CV-4804, at 21 (Waukesha Cty. Cir. Ct. Sept. 29, 2011).

state superintendent's office, the Department of Administration is more closely aligned with the governor in power.⁶⁵ And despite public statements to the contrary,⁶⁶ the governor at the time of the new law's enactment, seemed to support the continued use of race-based mascots.

3. Burden of Proof

While the first two changes only indirectly favor school districts, the next change does so explicitly. Under the old law, the state superintendent immediately reviewed complaints and determined whether the challenged name or symbol was ambiguous as to whether it was race-based.⁶⁷ The rules enforcing that law listed so many names, terms, and symbols that were considered unambiguously race-based that the burden at the hearing was always on the school district to prove that the challenged name or symbol did not promote discrimination, pupil harassment, or stereotyping. School districts faced with a complaint under the old law could not overcome that presumption, and it is unlikely they ever would have.

2013 Wisconsin Act 115 flips the burden on its head. First, the new law prohibits the state superintendent from “promulgat[ing] a rule that creates a presumption that a nickname, logo, mascot, or team name is race-based or promotes discrimination, pupil harassment, or stereotyping.”⁶⁸ The administrative code, therefore, no longer lists any presumptively race-based names, terms, or symbols.⁶⁹ Second, the complaining district resident now “has the burden of proving by clear and convincing evidence that the use of the race-based nickname, logo, mascot, or team name does not promote promotes discrimination, pupil harassment, or stereotyping.”⁷⁰

Placing the burden on the complainant aligns section 118.134 with other discrimination laws.⁷¹ However, it seems unlikely any complainant will be able to satisfy that burden. Under the old law, specific instances of discrimination, harassment, or stereotyping—while helpful—were not needed to get rid of race-based names and symbols. Rather, the presumption and academic studies

65. Jessica VanEgeren, *Scott Walker Signs Indian Mascot Bill, Informs Tribes of Reasoning in Letter*, THE CAP TIMES (Dec. 19, 2013), https://madison.com/ct/news/local/writers/Jessica_vanegeren/scott-walker-signs-indian-mascot-bill-informs-tribes-of-reasoning-in-letter/article_fc764c8c-68e3-11e3-a8ec-0019bb2963f4.html.

66. *See id.*

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

68. WIS. STAT. § 118.134(4) (2020–21).

69. *See* WIS. ADMIN. CODE PI ch. 45 (2011).

70. WIS. STAT. § 118.134(2) (2020–21).

71. *See, e.g., Abrego v. Wilkie*, 907 F.3d 1004, 1012 (7th Cir. 2018) (noting that employees have burden to prove discrimination under Title VII).

generally were enough.⁷² Now a complaining resident, assuming he or she can gather the required signatures, must provide specific examples of discriminatory conduct. And, as we saw with complaints filed under section 118.13, a few instances of discriminatory conduct will not be sufficient.

4. Previous Decisions and Pending Complaints

2013 Wisconsin Act 115 voids all decisions issued under the old law, as well as any complaints pending with the state superintendent prior to its effective date.⁷³ Thus, the Mukwonago and Berlin school districts can keep names and symbols that, according to the DPI, promote discrimination, pupil harassment, or stereotyping. Both districts decided to keep their “Indians” nickname, though they have moved away from using American Indian imagery in connection with that name.⁷⁴

5. Wisconsin Interscholastic Athletic Association

2013 Wisconsin Act 115 forbids a school district from being a member of an interscholastic athletic association that prohibits the use of a race-based nickname, logo, mascot, or team name unless the use of the race-based name or symbol violates section 118.134, as modified. This essentially means that the Wisconsin Interscholastic Athletic Association—the regulatory body for all high school sports in the state—cannot ban race-based mascots.

6. Untouched Provisions

2013 Wisconsin Act 115 also retains several provisions from the old law. For example, a hearing still is not needed if a federally recognized American Indian tribe approves the school district’s use of an American Indian nickname, logo, mascot, or team name.⁷⁵ The new law specifies that the tribe must have historical ties to the state of Wisconsin; however, the tribe does not need to have any ties to the area where the school district is located.⁷⁶ The remedy also remains unchanged: if the Division of Hearings and Appeals determines that the race-based nickname, logo, mascot, or team name promotes discrimination, pupil harassment, or stereotyping, then the district must terminate its use of the

72. See Heacox, *supra* note 3, at 666–70.

73. WIS. STAT. §§ 118.134(3)(d), (5). (2020–21).

74. JR Radcliffe, Anya Johnson, and Alex Growth, *31 Wisconsin Schools Use Native American Mascots. a School Board Is Calling for Them All to Be Retired*, MILWAUKEE JOURNAL SENTINEL, (Aug 14, 2019, 6:00 AM), <https://www.jsonline.com/story/news/education/2019/08/14/resolution-calls-schools-retire-native-american-mascots/1997256001/>.

75. *Id.* § 118.134(1m).

76. *Id.* § 118.134(1m)(a)(2).

challenged name or symbol within twelve months of that decision.⁷⁷ The deadline may be extended if the school board shows extenuating circumstances that render full compliance impossible or impracticable, including when compliance poses an undue financial burden on the district.⁷⁸ School districts that fail to comply within the deadline shall be fined between \$100 and \$1,000 for each violation.⁷⁹ Finally, decisions rendered under section 118.134 remain subject to judicial review under chapter 227 of the Wisconsin Statutes.⁸⁰

B. The Impact of 2013 Wisconsin Act 115

The new law has had its desired effect: since the amendments, no school district resident has filed a complaint under section 118.134. Nevertheless, several school districts have voluntarily agreed to stop using a race-based team names: Auburndale Apaches (Eagles), Elmwood-Plum City Raiders (Wolves), La Crosse Central Red Raiders (RiverHawks), Menomonee Falls Indians (Phoenix), Seneca Indians (undecided), and Weyauwega-Fremont Indians (Warhawks). A few others like Berlin (Indians), Lake Holcombe (Chieftains), Lancaster (Flying Arrows), Mosinee (Indians), Mukwonago (Indians), Ozaukee (Warriors), and Stockbridge (Indians) still use a potentially race-based name but appear to have eliminated their use of American Indian imagery. Still, a handful of districts refuse to make any changes to their name or logo: Baldwin-Woodville Blackhawks, Belmont Braves, Big Foot Chiefs, Black Hawk Warriors, Cornell Chiefs, Fort Atkinson Blackhawks, Greenwood Indians, Kewaskum Indians, Mishicot Indians, Muskego Warriors, Osceola Chieftains, Potosi Chieftains, Prairie du Chien Blackhawks, Rib Lake Redmen, Riverdale Chieftains, Shiocton Chiefs, Tomahawk Hatchets, Waunakee Warriors, and Wisconsin Dells Chiefs.⁸¹

C. School Board Resolutions

In July 2019, the Wausau School Board unanimously passed a resolution recommending legislation that would require school districts to retire Native American mascots.⁸² The proposal noted that the continued use of Native

77. *Id.* § 118.134(3)(a).

78. *Id.* § 118.134(3)(b).

79. *Id.* § 118.134(5).

80. *Id.* § 118.134(3)(c).

81. See Tom Dombeck, *A Symbol of Pride or Racism? Native American Sports Mascots Debate Hot in Wisconsin*, HAROLD TIMES REPORTER (Mar. 13, 2018, 5:18PM), <https://www.htrnews.com/story/sports/high-school/2018/03/13/change-native-american-sports-mascots-has-been-slow-some-say/383863002/>.

82. See JR Radcliffe et al., *supra* note 74; see also Laura Schulte, *Wausau School Board Pushes*

American mascots, symbols, images, logos, and nicknames:

- “undermines the educational experiences of members of all communities”;
- “establishes an unwelcome, divisive and hostile learning environment for Native American students that affirms negative stereotypes that are promoted in mainstream society”;
- “is an offensive and intolerable practice to Native American Tribal Nations that must be eradicated”;
- “has a negative impact on other communities by allowing for the perpetuation of stereotypes and stigmatization of another cultural group”; and
- “undermines the ability of Native American Tribal Nations to portray respectful and accurate images of their history, culture, government, sovereignty, customs and traditions.”⁸³

The proposal further noted that the American Psychological Association called for the retirement of Native American names and symbols in 2005 based on research showing the harmful effects such names and symbols have on all students.⁸⁴ Finally, the proposal noted that most school districts do not comply with Wisconsin Act 31, a law passed in 1989, “requiring instruction in the history, culture, and tribal sovereignty of the eleven federally-recognized American Indian nations and tribal communities in Wisconsin public school districts.”⁸⁵ Based on those recitals, the Wausau School Board recommended that the Wisconsin Association of School Boards pass a resolution “support[ing] legislation requiring school districts to retire Native American mascots.”⁸⁶

The Wausau School District does not use a potentially race-based nickname, logo, mascot, or team name.⁸⁷ Nevertheless, its proposal recognized

Measure to Ban Native American Mascots Statewide, WAUSAU DAILY HERALD (Aug. 13, 2019, 4:41 PM), <https://www.greenbaypressgazette.com/story/news/2019/08/13/native-american-mascot-ban-proposed-wausau-school-board-state/1996336001/>.

83. *See Resolution Recommending Legislation Requiring School Districts Retire Native American Mascots*, Wausau School Board (July 29, 2019) [hereinafter *Wausau Resolution*].

84. *See id.*

85. *See id.*

86. *See id.*

87. *See* JR Radcliffe et al., *supra* note 74.

that the use of such names and symbols is not simply a local issue, as students may transfer to or from a district that does use a discriminatory name or logo, or may be exposed to such use at an athletic or scholastic event.⁸⁸ The proposal also recognized that the “[c]ontinued use of Native American mascots, symbols, images, log[o]s, and nicknames is a form of discrimination, oppression, and racism.”⁸⁹

Despite being sponsored by eighteen school districts, the Wisconsin Association of School Boards declined to adopt the proposed resolution at its delegate assembly in January 2020.⁹⁰ One hundred and one delegates voted to adopt the proposed resolution, while 218 delegates voted against it.⁹¹ The theme among those in opposition was that the state should not get involved in what the school board association deemed a local issue.⁹² Indeed, the committee that considered the proposed resolution characterized the proposal as “a bit unusual (and perhaps unprecedented)” because, the Wisconsin Association of School Boards “has a strong tradition of local control and opposing, rather than supporting, mandates on [its] member boards.”⁹³

The Wausau School Board submitted a similar proposed resolution the following year.⁹⁴ The Wisconsin Association of School Boards referred the proposal to its Policy and Resolutions Committee, which substantially rewrote the proposal.⁹⁵ The 2021 delegate assembly adopted the watered-down proposal by a vote of 182–67.⁹⁶ The adopted resolution does not mention Native American names or symbols or require the school board association to support any legislation.⁹⁷ Rather, it simply reads:

The [Wisconsin Association of School Boards] encourages school boards and districts to identify imagery, practices or processes that may create a school environment that is not safe

88. See Wausau Resolution, *supra* note 84.

89. *Id.*

90. Terrance Falk, *At Annual Conference, School Boards Reject Retiring Native American Mascots*, WISCONSIN EXAMINER (Jan. 28, 2020, 2:10PM), <https://wisconsinexaminer.com/2020/01/28/at-annual-conference-school-boards-reject-retiring-native-american-mascots/>.

91. *Id.*

92. *Id.*

93. Wisconsin Association of School Boards, Proposed Resolutions for the 2021 Delegate Assembly, at 40 (Oct. 2020).

94. Terrance Falk, *School Boards Confront Racial Mascots*, WISCONSIN EXAMINER (Jan. 26, 2021, 6:15AM), <https://wisconsinexaminer.com/2021/01/26/school-boards-confront-racial-mascots/>.

95. *Id.*

96. *Id.*

97. See Wisconsin Association of School Boards, Resolution 2021–10 (Jan. 22, 2021).

and welcoming to all students, regardless of their race, ancestry or ethnicity, and to initiate discussions at the district level that would lead to the retirement of mascots, logos, imagery, practices or processes that may create a hostile, divisive or unwelcoming school environment.⁹⁸

The committee's report concerning the resolution did recognize that supporters of ending the use of race-based names and symbols argue that such use "interferes with learning," "teaches or encourages students to stereotype groups of people on the basis of race, ancestry, or ethnicity," and "creates barriers to learning by making school an inhospitable place for some children."⁹⁹

D. Budget Plan

In 2018, Wisconsin citizens voted Scott Walker out of office in favor of Tony Evers, the former state superintendent.¹⁰⁰ Governor Evers proposed that a small portion of the 2021–2023 state budget be set aside to provide financial assistance to school districts wanting to eliminate their use of a race-based name or symbol.¹⁰¹ Under Governor Evers's budget proposal, \$400,000 in tribal gaming revenue would be used to create a grant program to assist schools in making the switch: \$200,000 each in fiscal years 2022 and 2023.¹⁰² The grant would be available to school boards whether changed voluntarily, in response to a complaint, or in compliance with a decision by the Division of Hearings and Appeals.¹⁰³ The amount of the grant could not exceed the greater of \$50,000 or the actual cost to replace the race-based name or symbol.¹⁰⁴ The Republican-controlled legislature, however, removed the grant proposal,¹⁰⁵ and it was not

98. *See id.*

99. *See* Wisconsin Association of School Boards, *Report to the Membership on Proposed 2021 Resolutions*, at 6 (Nov. 18, 2020).

100. Monica Davey, *Tony Evers Wins Wisconsin Governor's Race; Scott Walker Concedes*, N.Y. TIMES (Nov. 7, 2018, 1:41 PM), <https://www.nytimes.com/2018/11/07/us/elections-wisconsin-governor-evers-walker.html>.

101. Molly Beck, *Gov. Tony Evers Wants to Provide State Money to Help School Districts Shift Away from Native American Mascots and Logos*, MILWAUKEE JOURNAL SENTINEL Feb. 18, 2021, <https://www.jsonline.com/story/news/politics/2021/02/18/evers-wants-help-schools-shift-away-native-american-mascots/6788646002/>.

102. *See* Tony Evers, STATE OF WISCONSIN EXEC. BUDGET, at 515 (2021).

103. *See* Assemb. B. 68, 2021–2022 Leg., Reg. Sess. (Wis. 2021).

104. *See id.*

105. *See Opportunity Wasted: Legislature Removes Nearly All Items Promoting Racial Equity from the State Budget*, KIDS FORWARD (July 2021), <https://kidsforward.org/research/opportunity-wasted-legislature-removes-nearly-all-items-promoting-racial-equity-from-the-state-budget/>.

included in the enacted budget.¹⁰⁶

III. HOW IT'LL END

Since 2012, the state legislature neutralized the effectiveness of section 118.134, the state school board association rejected supporting legislation requiring school districts to retire their Native American mascots, and the state legislature declined to create a financial incentive for change. Given these developments, how can the remaining twenty-five or so school districts that continue to use a race-based name or symbol be compelled to eliminate their use? Some may criticize that question for jumping the gun—and argue that such mascots *should not* be eliminated—but I don't think so. Others have discussed at length the arguments presented by those who support the retention of race-based names and symbols by educational institutions.¹⁰⁷ Thus, I will only briefly explain why none of those arguments are persuasive before turning to potential remedies.

A. Wisconsin School Districts Should Completely Discontinue Their Use of Race-Based Nicknames, Logos, Mascots, and Team Names

Supporters of the continued use of race-based names and symbols by educational institutions frequently repeat the same flimsy arguments.

1. Those Who Are Offended by Race-Based Mascots Are Overly Sensitive

Some think that the American Indian mascot controversy is completely overblown—it's an issue not worthy of attention.¹⁰⁸ Recall, for example, the circuit court judge in the Mukwonago case, who referred to Wisconsin's race-based mascot statute as an uncommonly silly law.¹⁰⁹ In framing the issue as one of political correctness (or, in modern times, a symptom of “cancel culture”), these individuals downplay the significant psychological effects race-based names and symbols can perpetuate, especially among children.

In 2005, the American Psychological Association issued a resolution “support[ing] and recommend[ing] the immediate retirement of American

106. See 2021 Wis. Act 58.

107. See, e.g., Jeff Dolley, *The Four R's: Use of Indian Mascots in Educational Facilities*, 32 J.L. & EDUC. 21, 26–28 (2003); Stacie L. Nicholson, Note, *Indian Mascot World Series Tied 1–1: Who Will Prevail as Champion?*, 29 AM. INDIAN REV. 341, 342–47 (2004–2005); 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).

108. See, e.g., John B. Rhode, Comment, *The Mascot Name Controversy: A Lesson in Hypersensitivity*, 5 MARQ. SPORTS L.J. 141, 160 (1994).

109. See *Schoolcraft v. Evers*, No. 10-CV-4804, at 21 (Waukesha Cty. Cir. Ct. Sept. 29, 2011).

Indian mascots, symbols, images, and personalities by schools, colleges, universities, athletic teams, and organizations.”¹¹⁰ The resolution based its recommendation on peer-reviewed psychological research showing (among other things) that the continued use by schools of American Indian names and symbols “establishes an unwelcome . . . learning environment for American Indian children,” “appears to have a negative impact on the self-esteem of American Indian children,” “presents stereotypical images of American Indian communities,” and “is a form of discrimination.”¹¹¹ More recent research confirmed those findings.¹¹² The issue therefore transcends political correctness. It is about discrimination and stereotyping—two concepts school districts must take very seriously.

Moreover, assuming for the sake of argument that there are more important issues facing school districts, then there really is no controversy: just get rid of the potentially discriminatory name or symbol. There are endless other harmless mascots to choose from. The fact that some schools refuse to give up their nicknames, logos, mascots, and team names when challenged shows that mascots do matter to them.

2. School Districts That Use Race-Based Mascots Are Honoring Native Americans

A common refrain from those who support the continued use of race-based mascots is that school districts do not intend to discriminate; rather, the name or symbol is meant to honor Native Americans.¹¹³ The road to hell, however, is paved with good intentions. Also, most Native Americans do not endorse the use by schools of race-based names and symbols. It appears that no federally recognized American Indian tribe has approved any Wisconsin school district’s use of a race-based nickname, logo, mascot, or team name.¹¹⁴ Likewise, the federally recognized tribes native to the Great Lakes region passed a unanimous resolution “condemn[ing] the use of ‘Indian’ logos as offensive.”¹¹⁵ School

110. *APA Resolution Recommending the Immediate Retirement of American Indian Mascots, Symbols, Images, and Personalities By Schools, Colleges, Universities, Athletic Teams, and Organizations*, AMERICAN PSYCHOLOGICAL ASSOCIATION (Sept. 2005), <https://www.apa.org/pi/oema/resources/indian-mascots>.

111. *Id.*

112. *See, e.g.*, Laurel R. Davis-Delano et al., *The Psychosocial Effects of Native American Mascots: A Comprehensive Review of Empirical Research Findings*, 23 RACE ETHNICITY AND EDUCATION 5, 613–33 (2020).

113. *See, e.g.*, Dombeck, *supra* note 82.

114. *See id.*

115. *Resolution No. 99-01.05*, GREAT LAKES INTER-TRIBAL COUNCIL, INC. (Jan. 21, 1999), <http://www.indianmascots.com/new-niea-resolution-adopted.pdf>.

boards should defer to Native Americans on whether such mascots are offensive, even if the community at large doesn't see it that way.

To be sure, not *all* Native Americans support the removal of names and symbols that depict American Indians.¹¹⁶ But the lack of total consensus on the issue does not justify the continued use of race-based mascots. In other words, school districts that claim to have the blessing of a single Native American community member are not immune from promoting discrimination, pupil harassment, or stereotyping.

3. Banning American Indian Names and Symbols in Schools Erases History

Some who oppose the removal of race-based names and symbols from athletic teams argue that American Indians risk being erased from cultural history. For example, one state representative who voted against Wisconsin's race-based mascot law stated, "I think that the tribes, by contracting themselves and taking all the references out of our cultures outside the reservation . . . limit their opportunities to explain and define themselves and talk about their contributions to our society."¹¹⁷ He continued, "I wish they would've used that opportunity to go into our schools and to explain why that mascot is honorable."¹¹⁸ Tom Decorah, a gym teacher at Waunakee High School and a member of the Ho-Chunk nation, expressed a similar sentiment when discussing Waunakee's use of the Warriors nickname and American Indian imagery: "You need to talk about the history, as bad as the history was about how my people got here and how they survived, so it doesn't happen again."¹¹⁹

History lessons, however, are better reserved for the classroom, not the athletic field. Indeed, Wisconsin law already requires that all public-school districts provide instruction on the state's American Indian tribes, and it appears that many school districts are failing that mandate.¹²⁰ The use of race-based names and symbols does not enhance this educational requirement.

116. *See, e.g.*, Dombeck, *supra* note 82 (claiming that one of the "biggest supporters" of Greenwood High School athletics (Indians) was a Native American, "and he's never had a problem with [the school's] nickname or logo"). Also, the Native American Guardian's Association is a non-profit organization whose mission is to preserve Native American names and symbols, including within athletic teams. *See* <https://www.nagaeducation.org/>.

117. Ian Quillen, *Wisconsin Mascot-Name Law Seen as Modest Start*, EDUCATIONWEEK (June 3, 2010), <https://www.edweek.org/policy-politics/wisconsin-mascot-name-law-seen-as-modest-start/2010/06>.

118. *Id.*

119. Ayomi Wolff, *Waunakee School Board to Keep Indigenous Imagery, For Now*, MADISON 365 (May 10, 2021), <https://madison365.com/waunakee-school-board-to-keep-indigenous-imagery-for-now/>.

120. *See* WIS. STAT. § 118.01(c)7-8 (1989).

4. The Use of Race-Based Mascots is a Local Issue

Another familiar refrain is that decisions on whether to keep a race-based mascot should be made at the local level, not mandated by the state. That is what the Mukwonago school board claimed when it defied the DPI's order to terminate its Indians name and related symbols under the old race-based mascot law.¹²¹ Local control also was former governor Scott Walker's stated reason for amending the race-based mascot law, despite his claimed personal belief that schools should move away from "seriously offensive" team names and symbols.¹²² And the Wisconsin Association of School Boards rejected the proposed resolution supporting legislation to eliminate Native American mascots primarily to "[p]rotect local control."¹²³

The problem with this argument is that the use of race-based mascots in Wisconsin schools is not purely a local issue. Even if a school district chooses not to use a name or symbol depicting American Indians, students can still be exposed to other schools' use when they transfer schools or when they attend athletic or other scholastic events. Therefore, uniform rules are needed to protect these students from race-based nicknames, logos, mascots, and team names that promote discrimination, pupil harassment, and stereotyping.

5. Banning Race-Based Mascots Infringes on Free Speech

When former governor Walker signed the amended race-based mascot law, he released a statement expressing concern that the old law infringed on free speech:

I am very concerned about the principle of free speech enshrined in our U.S. Constitution. If the state bans speech that is offensive to some, where does it stop? A person or persons' right to speak does not end just because what they say or how they say it is offensive.¹²⁴

121. See Associated Press, *Mukwonago School District Votes Against Changing "Indians" Mascot*, DAILY JEFFERSON COUNTY UNION (Jul. 24, 2013), https://www.dailyunion.com/news/Jefferson_county_area/mukwonago-school-district-votes-against-changing-indians-mascot/article_e4ff54c4-f479-11e2-8d6e-0019bb30f31a.html.

122. See Associated Press, *New Law Makes It More Difficult to Force Schools to Drop Indians Nicknames*, DAILY JEFFERSON COUNTY UNION (Dec. 20, 2013), https://www.dailyunion.com/news/article_2d51997c-6986-11e3-935c-0019bb30f31a.html.

123. Falk, *supra* note 91.

124. *New Law Makes It More Difficult to Force Schools to Drop Indians Nicknames*, *supra* note 123.

As others have pointed out, Walker's free-speech argument misses the mark.¹²⁵ The old law did not, as Walker suggested, regulate individuals' right to speak—Mukwonago students were free to continue chanting “We Are the Indians” at their athletic events. Rather, the law regulated how local school districts—arms of the state—could speak. But there are no First Amendment issues when a government chooses how to express its own ideas and messages.¹²⁶

B. Potential Methods for Compelling School Districts to Discontinue Their Use of Race-Based Nicknames, Logos, Mascots, and Team Names

Wisconsin school districts should stop using race-based nicknames, logos, mascots, and team names in connection with their athletic programs. Many have, and it's likely that others will too. But how can residents force holdout districts to take action?

1. Section 118.134

The state's race-based mascot law, section 118.134, was designed to do just that. But that law is no longer effective in accomplishing its original goal. The amendments to section 118.134 have made it nearly impossible for residents to compel school districts to eliminate their discriminatory race-based names and symbols. Requiring complainants to obtain a number of signatures of school district residents eighteen years of age or older equal to at least ten percent of the district's membership has completely stifled the complaint process. In fact, no complaints have been filed since the legislature made that change. Assuming a complainant somehow could clear that towering hurdle, her chances of winning are still slim to none given that: (1) complaints are no longer heard by the DPI; (2) the burden is now on the complaining resident to prove that the challenged nickname, logo, mascot, or team name promotes discrimination, pupil harassment, or stereotyping; and (3) the state superintendent cannot create a rule establishing that certain names or symbols are presumed to be discriminatory. So section 118.134, at least in its current form, is out.

2. Section 118.13

What about Wisconsin's generic pupil nondiscrimination statute, section 118.13? The state's race-based mascot law does not preclude filing a complaint under section 118.13. But decisions under that statute largely remain

125. *See id.*; *see also* Massoud Hayoun, *Maine Banned Native American Mascots in Public Schools*, PACIFIC STANDARD (June 3, 2019), <https://psmag.com/social-justice/maine-banned-native-american-mascots-in-public-schools>.

126. *See* Hayoun, *supra* note 126.

in the hands of local school boards, which historically have been the most resistant to change. Also, complainants under section 118.13 must demonstrate that the challenged name or symbol caused a racially hostile environment, and a successful complaint does not result in an order to terminate.¹²⁷ Thus, like section 118.134, the state's pupil non-discrimination statute is not effective in ending the use of race-based names, logos, mascots, or team names.

3. Complete Ban

Wisconsin could completely ban public schools from using race-based mascots (with an exception for names and symbols that are endorsed by one of Wisconsin's federally recognized tribes). A direct prohibition would muzzle criticism of the one-sided process established by section 118.134, before heavily favoring complaints and now school districts. However, given the legislative history of Wisconsin's race-based mascot law, the only way the state could outlaw the use of Native American names and symbols in its public schools is if Democrats gain control of both houses of the state legislature and retain control over the governor's office. In the last thirty years, that has happened only twice: in 2009 and 2010—that is, when the state passed the original race-based mascot law.¹²⁸

4. Amend Section 118.134

Another option is to amend the state's race-based mascot law, again. But a return to the old process is not a good idea (and, like a full ban, would require a Democratic trifecta). Volleying the process back and forth, depending on which political party is in control at the time, does not serve anyone's interest and does not result in lasting change. A bipartisan bill is required. That will be difficult, and maybe even impossible, given that the votes on all previous bills have fallen along party lines. Thus, a compromise bill would need to address the concerns of Republicans, the party historically skeptical about the elimination of race-based names and symbols in Wisconsin schools. So what would a proposed bill look like?

A good starting place is the proposed bipartisan amendment to the amended race-based mascot law. State Senators Dale W. Schultz (a Republican) and Mark Miller (a Democrat) introduced the proposal as a compromise between the status quo and repealing section 118.134.¹²⁹ The amended bill would have

127. See Heacox, *supra* note 3, at 653–61.

128. See *Party Control of Wisconsin State Government*, BALLOTPEDIA, https://ballotpedia.org/Party_control_of_Wisconsin_state_government (last visited Dec. 1, 2021).

129. Assemb. B. 297, S. Subs. Amend. 1, 2013–2014 Leg. (Wis. 2013), https://docs.legis.wisconsin.gov/2013/related/amendments/ab297/ssa1_ab297.

required the state superintendent to review all nicknames, logos, mascots, and team names and identify each school board that used a potentially race-based name or symbol.¹³⁰ The school board would then review its use of the identified name or symbol, including issuing a public notice and allowing for two rounds of public comments.¹³¹ However, the school board review process would not be triggered if Wisconsin's federally recognized tribes approved of the school board's use of the identified name or symbol.¹³² Upon completion of the review process, the school board would issue a decision on whether the identified name or symbol promoted discrimination, pupil harassment, or stereotyping.¹³³ If it did, then the school board would terminate its use of the name or symbol within twelve months of the decision or risk a monetary forfeiture, subject to an extension for extenuating circumstances.¹³⁴ A school board could, however, continue to use or reinstate the use of an identified name or symbol if it entered into an agreement with one of the state's tribes.¹³⁵

The amended bill also would have created a process to review the school board's decision. "Upon receipt of a petition containing at least a number of signatures of school district electors equal to 10 percent of the school district's membership . . . in the previous school year," or at the request of a state tribe, the Division of Hearings and Appeals would schedule a contested-case hearing, after which it would issue its own decision on the matter.¹³⁶ Decisions by the Division of Hearings and Appeals would have been subject to chapter 227 judicial review.¹³⁷

The amended bill had a few other components. Like the bill that eventually passed, it would have voided previous decisions issued under section 118.134, prohibited the state superintendent from assessing or collecting a forfeiture stemming from a previous decision,¹³⁸ and voided any pending complaints.¹³⁹ Unlike the passed bill, however, the amended bill would have required the state superintendent to create specific rules to implement and administer the amended statute.¹⁴⁰

The state senate rejected the proposed amended bill, 17–16; only Senator

130. *Id.* § 1.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* § 2.

140. *Id.* § 1.

Schultz broke with his party, joining the Democratic senators in voting in favor of the amendment.¹⁴¹ It's difficult to see why senate Republicans opposed that compromise. Under the amended bill, the initial determination would have been made by local school boards after input from the community. In other words, the bill would have addressed Republicans' purported goal in amending section 118.134: protecting local control. When asked about Senator Schultz's proposed compromise, the chief of staff of the state representative who introduced the initial bill to repeal (and later amend) section 118.134 stated, "At this point, he has already compromised as much as he's going to."¹⁴² That quote, as well as the rejection of the amended bill, demonstrates that the local-control defense was just a stalking horse to justify retaining potentially race-based names and symbols.

Although the amended bill likely was dead on proposal, a few additional provisions could lead to a similar compromise being adopted in the future (notwithstanding a change in the composition of the state legislature). First, the bill could include an educational component. Many supporters in favor of race-based names and symbols claim that they are honoring Native American history. However, previous educational attempts sometimes perpetuated stereotyping by generalizing and inaccurately portraying American Indians who resided in the area.¹⁴³ Requiring public schools to educate its pupils on Native American history and positive cultural exchange would help foster a better understanding about the harmful effects of discrimination and stereotyping felt by Native Americans.

Second, the bill could provide a financial incentive to change. Some states, like Connecticut, withhold funding from municipalities with schools that continue to use an American Indian nickname, logo, mascot, or team name without approval from a local tribe.¹⁴⁴ In Wisconsin, the state could condition the receipt of tribal gaming revenue on not having a school that uses a potentially race-based name or symbol, as identified by the state superintendent. Other states, like Michigan, use gaming funds to create a grant program for school districts' rebranding efforts.¹⁴⁵ Governor Evers included a similar

141. S. Roll Call on A.B. 297, S.S.A. 1, 2013–2014 Leg. (Wis. 2013), *available at* <https://docs.legis.wisconsin.gov/2013/related/votes/senate/sv0210>.

142. Jessica VanEgeren, *Sen. Dale Schultz to Offer Compromise to Controversial Indian Mascot Bill*, CAP TIMES (Oct. 22, 2013), https://madison.com/ct/news/local/writers/jessica_vanegeren/sen-dale-schultz-to-offer-compromise-to-controversial-indian-mascot-bill/article_dd4fb7cc-3a8e-11e3-9f22-0019bb2963f4.html.

143. *See, e.g.*, In re Mukwonago Sch. Dist. Nickname & Logo, No. 10-LC-03, at 5-6 (Wis. State Superintendent of Pub. Instruction Oct. 8, 2010).

144. *See* 2021 Conn. Pub. Acts. 21-1.

145. *See* Second Amendment to a Compact Between the Nottawaseppi Huron Band of Potawatomi Indians and the State of Michigan Providing for the Conduct of Tribal Class III Gaming By the

provision in his most recent state budget proposal. However, the legislature did not include the grant program in the final state budget. Perhaps incorporating this financial carrot within section 118.134, rather than the state budget process, would lead to its adoption. After all, the grant program addresses another of race-based mascot supporters' concerns: the high cost of removing all references to a race-based name or symbol.

5. Voluntary Relinquishment

Arguably the best remedy is a non-legal one: convincing school districts to voluntarily relinquish their potentially race-based nicknames, logos, mascots, and team names. In fact, many more schools have decided to give up such names and symbols than have been ordered to do so. This movement for change is spearheaded by current students, who are largely left out of the legal complaint process even though they are the ones directly affected by the issue. For example, in 2017, students within the Mosinee School District recommended that the district relinquish its Indians name and mascot after a survey found that students and staff overwhelmingly favored a change.¹⁴⁶ The school board, however, voted 5–3 to retain the Indians name.¹⁴⁷ But students should not give up. They should continue to use their voices to influence change, if that's what they desire, through protests, walkouts, boycotts, or other forms of societal pressure. Progress may be slow, but with enough pressure the adults eventually will have to listen.

CONCLUSION

Change is hard. It's difficult to break free from the past, to let go of what has always been. But sometimes change is necessary. To right a wrong. To prevent future harm. And to heal. Eliminating the use of race-based nicknames, logos, mascots, and team names in Wisconsin schools is one simple way school districts can demonstrate their commitment to inclusion and diversity. These names and symbols are offensive to some indigenous people, and that alone should be a good enough reason to stop using them. They have told us so. And their complaints have been corroborated by empirical research. Although Wisconsin law has a process for enacting such change, the best means to this end is to pressure school districts to drop their potentially race-based names and symbols and to involve the community—and especially the students—in its rebirth. It is time to finally put an end to all this madness.

Nottawaseppi Huron Band of Potawatomi Indians, Pot.-Mich., Dec. 12, 2016, § 17(C)(5)(b).

146. Dombeck, *supra* note 82.

147. *Id.*