

Report From Agency
FINAL REPORT
CLEARINGHOUSE RULE 10-074
CHAPTER PI 45
RACE-BASED NICKNAMES, LOGOS, MASCOTS AND TEAM NAMES

Analysis by the Department of Public Instruction

Statute interpreted: s. 118.134, Stats.

Statutory authority: s. 118.134 (2) (a), (b) 1. and 2 and (4), Stats.

Explanation of agency authority:

2009 Wisconsin Act 250 allows a school district resident to object to the use of a race-based nickname, logo, mascot, or team name by the school board of that school district by filing a complaint with the state superintendent.

Under s. 118.34 (4), the state superintendent is required to promulgate rules necessary to implement and administer this provision.

Specifically under s. 118.34 (2) (a) and (b) 1. and 2., Stats., rules must define whether the use of the race-based nickname, logo, mascot, or team name promotes discrimination, pupil harassment, or stereotyping.

Related statute or rule: Chapter PI 9, pupil discrimination.

Plain language analysis:

2009 Wisconsin Act 250 allows a school district resident to object to the use of a race-based nickname, logo, mascot, or team name by the school board of that school district by filing a complaint with the state superintendent. If a complaint objects to the use of a nickname or team name by a school board, the state superintendent must immediately review the complaint and determine whether the use of the nickname or team name by the school board, alone or in connection with a logo or mascot, is ambiguous as to whether it is race-based.

If the state superintendent determines that the use of the nickname, logo, mascot or team name is unambiguously race-based, the school board 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 discrimination, pupil harassment, or stereotyping as defined by the state superintendent by rule.

If the state superintendent determines that the use of the nickname or team name by a school board is ambiguous as to whether it is race-based but that the use of the nickname or team name in connection with a logo or mascot is race-based, at the hearing the school board has the burden of providing by clear and convincing evidence that the use of the nickname or team name in connection with the logo or mascot does not promote discrimination, pupil harassment, or stereotyping, as defined by the state superintendent by rule.

If the state superintendent determines that the use of the nickname or team name by a school board is ambiguous as to whether it is race-based, the use of the nickname or team name by the school board is presumed to be not race-based and at the hearing the school district resident who filed the complaint has the burden of proving by clear and convincing evidence that the use of the nickname or team name promotes discrimination, pupil harassment, or stereotyping, as defined by the state superintendent by rule.

If the school board receives approval from a specific, federally recognized American Indian tribe to use the nickname, logo, mascot or team name, the state superintendent may determine that no contested case hearing is necessary or that a hearing date may be postponed for the purpose of obtaining additional information.

Under the Act, the state superintendent is required to promulgate rules to define whether the use of the nickname, logo, mascot, or team name promotes discrimination, pupil harassment, or stereotyping and other rules necessary to implement and administer this provision.

The rules specify that the use of any of the following nicknames or team names are unambiguously race-based and presumed to promote discrimination, pupil harassment or stereotyping unless the school district produces clear and convincing evidence refuting this presumption.

- A nickname or team name is unambiguously race-based if it includes any of the following terms: 1. the full or partial name of any specific, federally recognized American Indian tribe, 2. Indians, 3. Braves, or 4. Redmen.
- A nickname or team name is unambiguously race-based if it includes any of the terms arrows, blackhawks, chiefs, chieftains, hatchets, raiders, red raiders, warriors, or warhawks and is used in connection with any of the following logos or mascots: 1. A depiction of an American Indian person or persons, 2. Feathers or feather headdress, 3. Arrows, bows, spears, tomahawks, stone hatchets, or other historical or traditional American Indian weapons or tools, or 4. Historical or traditional American Indian drums, pipes, beadwork, clothing or footwear.

The rules establish procedural timelines as to when and what information must be submitted to the state superintendent by a school board and when a contested case hearing may or may not be scheduled.

Rules must be submitted to legislative council staff no later than November 1, 2010. The department intends to promulgate these rules as emergency rules.

Summary of, and comparison with, existing or proposed federal regulations: N/A.

Comparison with rules in adjacent states:

Illinois, Iowa, Michigan, and Minnesota do not have administrative rules relating to Indian nicknames, logos, mascots, and team names.

Summary of factual data and analytical methodologies:

Current law, s. 118.13, Stats., prohibits discrimination against pupils on a number of grounds, including race and ancestry. Complaints relating to race-based names, logos, mascots and team names have been filed under this statute in the past. Under s. 118.13, Stats., the burden of proof is on the complainant to prove by a preponderance of the evidence that use of a nickname, logo, mascot, or team name results in pupil discrimination. In addition, the complaint first must be filed with the school board and then appealed to the department. 2009 Wisconsin Act 250 provides that a school district resident may object to a school board's use of a race-based name, nickname, logo, mascot, or team name by filing a complaint directly with the state superintendent of public instruction. This Act creates a presumption that use of a race-based nickname, logo, mascot, or team name promotes discrimination and requires school boards to provide clear and convincing evidence to refute that presumption.

2009 Wisconsin Act 250 is supported by the 11 tribal governments in Wisconsin, the Great Lakes Inter-Tribal Council, the Wisconsin Indian Education Association, the Wisconsin Education Association Council, other Indian nations and

organizations across the country, various national non-profit and faith-based organizations, and most recently the National Collegiate Athletic Association (NCAA).

Analysis and supporting documents used to determine effect on small business or in preparation of economic impact report: N/A.

Anticipated costs incurred by private sector: N/A.

Effect on small business:

The proposed rules will have no significant economic impact on small businesses, as defined in s. 227.114 (1) (a), Stats.

Agency contact person: (including email and telephone)

Carolyn Stanford Taylor, Division Administrator, Division for Learning Support: Equity and Advocacy, carolyn.stanfordtaylor@dpi.wi.gov, or (608) 266-1649.

Place where comments are to be submitted and deadline for submission:

The department published a hearing notice in the *Administrative Register* which included this information.

Public hearings to consider the proposed rule were conducted by the department on July 29, 2010, in Madison. Persons were asked to register in favor, generally in favor (except for . . .), against, generally against (except for . . .), or for information only.

Madison Hearing, July 29, 2010

NAME	ORGANIZATION	IN FAVOR OR GENERALLY IN FAVOR	OPPOSED OR GENERALLY OPPOSED	OTHER
Dave de Felice	Senator Cogg	X		
Carol S. Gunderson	Self	X		
Harvey Gunderson	Self	X		
Gary Kiltz	Menomonee Falls High School		X	
Barbara Munson	Wis Indian Education Assoc. (WIEA) "Indian" Mascot and Logo Taskforce	X		
Robert Munson	WIEA Mascot taskforce	X		
Ron Nagel	Self		X	
David Retroff	Menomonee Falls High School		X	
Ezra Zeitlet	(WIEA) Mascot and Logo Taskforce	X		

The following persons submitted written testimony:

NAME	ORGANIZATION	IN FAVOR OR GENERALLY IN FAVOR	OPPOSED OR GENERALLY OPPOSED	OTHER
Mark Brewer	Self			X

NAME	ORGANIZATION	IN FAVOR OR GENERALLY IN FAVOR	OPPOSED OR GENERALLY OPPOSED	OTHER
Mark R. Connolly, PhD	Self			X
Andrea Frank	Self			X
Heather M. Heuer	Self			X
Nicholas Kedrowski	Self			X
Carrie Klatt	Self			X
Nanete Lahn	Self			X
Paul Majors	Self			X
Dorothy Nelson	Self			X

Summary of public comments relative to the rule, the agency's response to those comments, and changes made as a result of those comments:

Comments – Some testimony questioned why the use of Indian logos, mascots and nicknames was discriminatory.

Discussion – 2009 Wisconsin Act 250 creates a presumption that the use of a race-based nickname, logo, mascot, or team name promotes discrimination and requires school boards to provide clear and convincing evidence to refute that presumption. Additional information may be found from *Common Themes and Questions about the use of "Indian" Logos*, by Barbara E. Munson, a woman of the Oneida Nation, at: http://www.indianmascots.com/common_themes/Common%20Themes.pdf.

Comments – Why is the use of a logo/mascot not left to be a local issue? Why would the department so willingly become involved in a very political issue?

Discussion – 2009 Senate Bill 25 was passed by both houses of the legislature and signed by the governor. Once signed into law, it became 2009 Wisconsin Act 250 and created statutory language under s. 118.134 that allows a school district resident to object to the use of a race-based nickname, logo, mascot, or team name by a school board of that school district by filing a complaint with the state superintendent. Under the law, the state superintendent is required to promulgate rules necessary to implement and administer this provision and must define whether the use of the race-based nickname, logo, mascot, or team name promotes discrimination, pupil harassment, or stereotyping.

Changes – None.

Comments – Why is the department holding a hearing after it has already made a decision on the Osseo-Fairchild complaint?

Discussion – This public hearing was held on the administrative rule relating to the use of race-based nicknames, logos, mascots, and team names by school boards. It was not a public hearing regarding a complaint. On May 20, 2010, the department received a complaint alleging the Osseo-Fairchild School District uses a race-based nickname, logo, mascot, or team name which promotes discrimination, pupil harassment, or stereotyping in violation of section 118.134 of the Wisconsin Statutes. A hearing regarding the complaint was held June 28, 2010. The department issued its findings of fact, conclusions of law, and order on July 27, 2010.

Changes – None.

Comments – Some had concerns regarding the cost of changing uniform or gym floors that have logos.

Discussion – Prior to Act 250, 21 Wisconsin School Districts changed their "Indian" logos. Uniforms eventually need to be replaced and floors sanded. With planning, it can be done economically.

However, s. 118.134 (3) (b), Stats., provides for “extenuating circumstances” in which the costs of compliance with an order pose an undue financial burden on the school district. If a school board presents evidence to the department that such a circumstance exists, the department may issue an order to extend the time within which the school board must terminate its use of the race-based nickname, logo, mascot or team name.

Changes – None.

Comments – Complainants should be instructed to submit their name, the date, their status as resident in the school district and the fact that they object to the district’s use of its “Indian” nickname, mascot, logo, or name. This should be on a form on the department’s web site. This information should be the only information shared with the district until the hearing. The complainant’s phone number should be redacted from all copies of the complaint that are forwarded. The school district or its representatives should not be allowed to contact the complainant directly regarding a complaint unless the complainant has given permission to do so. Neither the school district nor the department should provide the name of the complainant to the newspaper.

Discussion – Complaints will include the information suggested in this comment and any other information complainants choose to include. Chapter 227, Stats., will control sharing information related to the complaint with the school district. Public records law will control determinations regarding release of the complainant’s name or other information related to the complaint to the public.

Changes – None.

Comments – Case records should be made available to future complainants via CD Rom.

Discussion – Public records law will control determinations regarding the release of case records.

Changes – None.

Comments – The use of “Chiefs,” “Chieftains” and “Thunderhawk” should be considered unambiguously race based and moved to the list under s. PI 45.04 (2) instead of (3).

Discussion – Use of the terms “chiefs” or “chieftains” may be determined to be unambiguously race-based depending upon the circumstances presented in a specific complaint. This rule is not intended to exhaustively list all unambiguously race-based nicknames. At this time, no public school district uses the “Thunderhawk” nickname.

Changes – None.

Comments – Unofficial logos should be addressed.

Discussion – The department does not have the authority to address unofficial logos as part of this rule. Requirements or complaints regarding unofficial logos would require statutory language through legislative action.

Changes – None.

Comments – The department should educate school districts and communities about this issue to help them understand what happened and why.

Discussion – The department has provided numerous conference presentations to educators regarding this issue over the years and will continue to review our educational efforts.

Changes – None.

Comments – If a federally recognized American Indian tribe approves the use of a logo, mascot or nickname, the school district should use the full name of the tribe.

Discussion – Section 118.134 (1m), Stats., requires that the nickname, logo, mascot or team name that is used by the school board and that is the basis of the complaint is a reference to or depiction or portrayal of or the name of a specific, federally recognized, American Indian tribe and that the tribe has granted approval to the school board to refer to or depict or portray the tribe in a nickname, logo or mascot or to use the name of the tribe as a team name in the specific manner used by the school board and has not rescinded that approval. A tribe would not be permitted to approve anything other than a reference to or depiction or portrayal of or the name of a specific, federally recognized, American Indian tribe.

Changes – None.

Comments – If the complainant is an indigent student, former student or parent of a student, the school district should be required to reimburse the complainant no less than \$250 if the complainant prevails or if the school district voluntarily drops the mascot/logo. The department could also establish a maximum fee for school districts to pay to help reimburse the complainant for mileage, photocopying, reports, postage, attorney fees, etc. Finally, the department could provide a \$250 grant to each complainant up front and recover those costs directly from the school district.

Discussion – The department does not have the authority to charge a fee under this rule. Such a requirement would require statutory language through legislative action.

Changes – None.

Changes made as a result of oral or written testimony: None.

Changes to the analysis or the fiscal estimate: None.

Responses to Clearinghouse Report:

4. Adequacy of References to Related Statutes, Rules and Forms:

- a. Recommendation accepted, change made.
- b. Recommendation accepted, change made.

5. Clarity, Grammar, Punctuation and Plainness:

Recommendation accepted, change made.

FINAL REGULATORY FLEXIBILITY ANALYSES

Summary of Final Regulatory Flexibility Analysis:

The proposed rules will have no significant economic impact on small businesses, as defined in s. 227.114(1)(a), Stats.

Summary of Comments:

No comments were reported.