

Publication Date: June 1, 2010
Effective Dates: June 1, 2010 through October 28, 2010

**ORDER OF THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION
ADOPTING EMERGENCY RULES**

The state superintendent of public instruction hereby creates Chapter PI 45, relating to the use of race-based nicknames, logos, mascots, and team names by school boards.

ANALYSIS BY THE DEPARTMENT OF PUBLIC INSTRUCTION

Statute interpreted: s. 118.134, Stats.

Statutory authority: s. 118.34 (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 will be publishing a hearing notice in the *Administrative Register* which will include this information.

SECTION 1. Chapter PI 45 is created to read:

CHAPTER PI 45
USE OF RACE-BASED NICKNAMES, LOGOS, MASCOTS, AND TEAM NAMES
BY SCHOOL BOARDS

PI 45.01 Purpose. (1) Section 118.134 (1), Stats., 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.

(2) Under s. 118.134 (4), Stats., the state superintendent is required to promulgate rules necessary to implement and administer this provision.

(3) Under s. 118.134 (2) (a), (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.

(4) This chapter identifies specific nicknames or team names that used alone or with a combination of logos or mascots 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. The rules also 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.

PI 45.02 Definitions. In this chapter:

(1) "Approval by a specific, federally recognized American Indian tribe" means approval by the governing body of that tribe for the specific use of a nickname, logo, mascot, or team name which is a reference to, or depiction or portrayal of, or the name of the tribe and which is factually traced to and claimed exclusively by that tribe.

(2) "Bias" means an inclination for or against a person or group of persons based, in whole or in part, on race that inhibits impartial or objective judgment affecting pupils.

(3) "Board" means the school board in charge of the public schools of a district.

(4) "Department" means the Wisconsin department of public instruction.

(5) "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, or which perpetuates the effects of past discrimination based in whole or in part on race.

(6) "Logo" means any written, printed, graphic, photographic, badge, emblem, caricature, image, statue, artifact or other symbolic depiction representative of or in any way connected to the identity of a school, district or board.

(7) "Mascot" means a person, costume, insignia, dance, song, rhythmic beat, or any other object or thing representative of or in any way connected to the identity of a school, district or board.

(8) "Nickname" means any name, title, label, word, or any other designation of any kind representative of or in any way connected to the identity of a school, district or board, but does not include the official name of a school or school district.

(9) "Pupil harassment" means behavior towards pupils based, in whole or in part, on race, which substantially interferes with a pupil's school performance or creates an intimidating, hostile or offensive school environment.

(10) "School district" has the meaning defined under s. 115.01 (3), Stats.

(11) "Specific, federally recognized American Indian tribe" means a tribal entity recognized and eligible for funding and services from the Bureau of Indian Affairs by virtue of its status as an Indian tribe.

(12) "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.

(13) "Use" includes adoption of nicknames, logos, mascots, or team names by a school district board as representative of or in any way connected to the identity of a school, district or board or the display of nicknames, logos, mascots, or team names at any school or school sponsored event.

PI 45.03 Complaint procedures. (1) A complaint filed under s. 118.134 (1), Stats., shall be submitted to the state superintendent in writing and include all of the following information:

(a) The complainant's contact information.

(b) A statement that the complainant is a resident of the school district to which the complaint is directed.

(2) Upon receipt of a complaint, the state superintendent shall notify the school district of the complaint. A complaint received under this section shall include a review by the department of all nicknames, logos, mascots, or team names in use in the school district.

(3) (a) Within 10 business days of receiving the notice under sub. (2), the school board shall submit to the state superintendent a list of all nicknames or team names in use in the school district and a photograph, copy or other accurate description or depiction of any logo or mascot in use in the school district. Upon receipt of this information, the state superintendent shall notify the school board of the state superintendent's determination regarding whether the use of the nickname or team name alone or in connection with a logo or mascot is unambiguously race-based.

(b) If applicable, within 10 business days of receiving the notice under sub. (2), the school board shall submit evidence that it has received approval from a specific, federally recognized American Indian tribe to use the nickname, logo, mascot or team name in a specific manner used by the school board and in the manner to which the school district resident objects in the complaint filed under sub. (1) and that the tribe has not rescinded that approval.

(4) (a) Except as specified under par. (b), the state superintendent shall schedule a contested case hearing within 45 days after the complaint is filed.

(b) Under s. 118.134 (1m) (a), Stats., 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 sub. (3) (b) from the school board.

PI 45.04 Discrimination, harassment or stereotyping. (1) The use of any of the unambiguously race-based nicknames or team names listed under this section is presumed to promote discrimination, pupil harassment or stereotyping unless the school district produces clear and convincing evidence refuting this presumption.

(2) A nickname or team name is unambiguously race-based if it includes any of the following terms:

(a) The full or partial name of any specific, federally recognized American Indian tribe.

(b) Indians.

(c) Braves.

(d) Redmen.

(3) (a) 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.

4. Historical or traditional American Indian drums, pipes, beadwork, clothing or footwear.

FINDING OF EMERGENCY

Pursuant to SECTION 3 of the nonstatutory provisions of 2009 Wisconsin Act 250, the Department of Public Instruction is not required to provide evidence that this rule is necessary for the preservation of the public peace, health, safety, or welfare and is not required to provide a finding of emergency.

The rules contained in this order shall take effect upon publication as emergency rules pursuant to the authority granted by s. 227.24, Stats.

Dated this 1st day of June, 2010

Tony Evers, PhD
State Superintendent