Native-American Mascots In Public Schools & Colleges

Are They Worth Keeping?

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Introduction

The use of Native American mascots is pervasive at every level of competitive team sports–professional, college, and high school. Common mascots and team names include "redskins," "braves," "redmen," "blackhawks," "wahoos," "chiefs," "savages," "Indians," and "injuns."[1] The typical mascot is painted in red tones, sometimes as "Chief Wahoo," dances an "Indian dance" on the sideline, leads the crowd in a rallying "tomahawk chop" or other chain rituals, and rides a pony bareback onto the field.[2] In each team's home community, souvenirs bearing mock Native American logos and slogans are pervasive.[3] As of 1995, some 97 colleges and universities and countless elementary-secondary schools across the county use nicknames and mascots alluding to Native Americans.[4]

Many Native Americans find these depictions racially and ethnically offensive, and stereotypical of their race as savage warriors.[5]

Even though the focus of this analysis is on high schools, it is also important to review the use of Native American mascots by college and professional sports teams, because elementary-secondary schools tend to mirror them..

Case Law, Litigation, and Voluntary Actions

High Schools

For forty years, the use of racially offensive mascots for sports teams has been strenuously debated. In the 60s and 70s, during the early days of the civil rights movement, the use of Confederate Rebel high school mascots, which perpetuated black-white racial tensions, dominated the discussion. Protests and litigation over the Rebel mascots led to their eventual elimination in most cases.[6] The 80s were a period of general dormancy for the mascot debate.[7]

From the 90s to the present, however, the high school mascot controversy has revived and shifted its focus to Native American mascots, prompting protests and school board reviews of such mascots. For example, in 1992, the Wisconsin Attorney General stated in a published opinion that although Native American mascots are not per se violations of a state statute, an individual mascot could be found to be a form of discrimination, regardless of intent, if a hostile environment is created.[8] Subsequently in 1993, the Wisconsin Legislature passed a resolution requiring all school boards in Wisconsin to review stereotypical depictions of Native Americans in school mascots.[9] As a result, by April of 1994, Wisconsin's Superintendent of Instruction sent letters to all school districts in Wisconsin that still use Native American mascots to stop using them.[10] Similarly, there is a current movement in Maine to eliminate the use of Native American mascots in some of its high schools.[11]

In March of 1999, the U.S. Justice Department launched an investigation into whether a North Carolina high school violated the civil rights of Native American students by creating a "racially hostile environment" by its use of the names "Warriors" and "Squaws" for its teams.[12] The school ultimately retained "Warrior" but eliminated "Squaw," since the term means either prostitute or a vulgar term for female genitalia in some Native American languages.[13]

Colleges and Universities

Recently, colleges and universities have also confronted the controversy over Native American mascots. In response to Native Americans' protests, many colleges have eliminated the use of such mascots, and have refused to play against teams which employ them.

In the early 70s, Dartmouth College and Stanford University were among the first to abandon the "Indian" as a mascot.[14] In 1991, Big Ten Conference member, the University of Iowa, asked rival the University of Illinois' Fighting Illini not to bring its mascot, Chief Illiniwek, to its campus.[15] In the same year, the University of Minnesota, after a protest over University of Illinois' Chief Illiniwek mascot, the university chose to no longer play non-conference home games against schools with Native American mascots.[16] Subsequently in 1993, after Native Americans protested a game against the Alcorn State (Mississippi) University's ASU-Scalping Braves, the University of Wisconsin adopted a policy barring the scheduling of regular season games against teams with "inappropriate mascots."[17] However, Wisconsin University's policy does not apply to its traditional foes such as the North Dakota Fight Sioux and Big Ten Conference rival the Illinois Fighting Illini.[18] Thereafter, in 1994, Marquette University followed suit and abandoned its First Warrior mascot and symbol (originally conceived as a grinning, tomahawk-swinging Indian caricature named "Willie Wampum") in favor of the Golden Eagle as its new mascot.[19] Closer to home, San Diego State University has announced that its Monty Montezuma mascot will have to abandon its spear-twirling ways and behave in a manner to be determined by experts on Aztec culture by 2003.[20]

Professional Sports Teams

At the professional sports level, the use of the "The Washington Redskins," "Redskin," and "Redskinette" trademarks was canceled in 1999 by the Trademark and Appeals Board "on the grounds that the subject marks may disparage Native Americans and may bring them into contempt or disrepute" in violation of section 2(a) of the Trademark Act.[21]

In a related decision, the Utah Supreme Court held in 1999 that the opinion of a reasonable objective person must be employed in determining whether license plates with the word "redskin," in honor the Washington Redskins team, was derogatory.[22] The court stated:

> "It is hoped that one day all offensive and derogatory language, speech, and symbols, predicated on race will be completely eradicated from our culture. In the meantime, public officials have the obligation to ensure that they are not used with the imprimatur of the State."[23]

The momentum nationally has shifted in favor of Native American protestors at the high school, college and professional sports levels. The interest in eliminating the use of offensive Native American mascots in high schools is highest, because compulsory schooling laws make minors captives of the more restrictive elementary-secondary school environment. In colleges and universities where students have a choice of attendance, the First Amendment interests in freedom of expression must be balanced against the offensive use of Native American mascots. Finally, at the professional sports level where teams are privately owned, the use of offensive Native American mascots may be protected by the First Amendment as commercial speech, regulated only by the rules on registration of trademarks and the like.

Federal Statute: Title VI of the Civil Rights Act

The primary federal statute applicable to elementary-secondary schools and colleges in eliminating the use of offensive Native American mascots is Title VI of the 1964 Civil Rights Act.24 Title VI states:

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[25]

Under Title VI and its implementing regulations,[26] the Office for Civil Rights (OCR), U.S. Department of Education, adopted an investigative approach to follow when investigating issues of discrimination against students based on racial incidents, such as the use of offensive Native American mascots.[27] This investigative approach incorporates into Title VI the "hostile Environment" analysis long used by the Equal Opportunities Employment Commission to weight claims of harassment and discrimination in employment under Title VII of the Civil Rights Act.[28]

To establish a violation of Title VI under the hostile environment theory, OCR must find, based on the totality of the circumstances, that (1) a racially hostile environment which was sufficiently severe, pervasive or persistent existed, (2) the school had actual or constructive notice of the racially hostile environment, and (3) the school failed to respond adequately to redress the racially hostile environment. An alleged harasser need not be a school agent or employee because liability under Title VI is premised on a school's general duty to provide a nondiscriminatory educational environment.[29]

Should a Title VI violation be found, a school district or college may lose its federal funding. In order to bring a private action under Title VI, the plaintiff must be an intended beneficiary or, or applicant for, or participant in a federally funded program.[30]

However, a recent U.S. Supreme Court decision in Alexander v. Sandoval holds that there is no private right of action to enforce disparate-impact regulations promulgated under Title VI.[31] Ruling 5 to 4 on § 602 of Title VI, the court held that Congress had limited the kind of private lawsuits that can be brought under the act to enforce a ban on discrimination in programs that receive federal money. Suits could be brought only for intentional discrimination on the basis of race and national origin, and not for policies that have a discriminatory impact. The case before the court was a class-action lawsuit contending that the State of Alabama violated federal law by requiring applicants for drivers' licenses to take the written examination in English. Alabama, which like all states receives federal law enforcement and highway money, is the only state to limit its drivers' license exams to English.[32] Two lower federal courts ruled that the policy had the prohibited effect of discriminating on the basis of national origin.

State Statutes

There are several state statutes applicable to an action against a school district sponsoring offensive Native American mascots.

Education Code section 200 et seq. is a comprehensive statutory scheme which prohibits sex, ethnic group identification, race, national origin, religion, mental or physical disability discrimination in education in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance or enrolls pupils who receive state student financial aid. Section 200 et seq. also bars discrimination of any basis that is contained in the prohibition of hate crimes under Penal Code section 422.6, subdivision (a). The provisions of this law are applicable to all educational institutions located in California which receive or benefit from state financial assistance or enroll students who receive state financial aid. Therefore, many private educational institutions are subject to the requirements of this legislation.

Education Code section 233 provides that the State Board of Education shall adopt policies, guidelines and curricula toward creating a school environment free from discriminatory attitudes, practices, and acts of hate violence. It further requires the State Board of Education to revise the school curriculum to include human relations education, with an aim to fostering an appreciation of the diversity of California's population and discouraging the development of discriminatory attitudes and practices.

Education Code section 233.5 provides that each teacher shall endeavor to impress upon the minds of the pupils the principles of moral justice free from discriminatory attitudes, practices, events or activities in order to prevent acts of hate violence.

Education Code sections 250-253 require educational institutions to submit assurances of compliance reports and to conduct compliance reviews pursuant to receipt of state financial assistance or state student financial aid.

Education Code sections 260, 261, and 262.3 along with Education Code sections 66292-66292.2 provide for remedies, including freedom from discrimination, filing of discrimination complaints, appeals and civil law remedies.

Education Code 262.4 provides for the enforcement of this act through a private civil action.

Education Code section 51500 prohibits teachers and school districts from instructing or sponsoring any activity which reflects adversely upon persons because of their race, sex, color, creed, heredity, national origin, or ancestry. It is unclear whether this section provides for a private right of action.

Government Code section 11135 et seq. prohibits discrimination based on ethnic group identification, religion, age, sex, color, or disability in any program or activity that is funded directly by the state or receives any financial assistance from the state. Violation of this section results in the loss of state funds.

Conclusion

In conclusion, there is a sea change in support of eliminating offensive Native American mascots from use by high school, college and professional sports teams. The interest is highest in elementary-secondary schools, where students are captives to institutionally sanctioned school activities. A growing body of case law finds that the use of Native American mascots is both offensive and degrading to a reasonable person. As a result, there is already a trend for school boards to review their policies and practices, and to replace Native American mascots with non-offensive themes. Finally, where such representations create a hostile environment, both federal and state statutes provide for enforcement of laws to combat such offensive representations of Native Americans.[33]

Driven by both changing social norms and remedies provided under the law, stereotyped Native-American mascots will likely fade from the sports fields and stadiums of our public schools and colleges.

Endnotes

1 See, generally, Douglas & Cummings, "Lions and Tigers and Bears, Oh My" or "Redskins and Braves and Indians, Oh Why": Ruminations on McBride v. Utah State Tax Commission, Political Correctness, and the Reasonable Person 36 Cal.W.L.Rev.11 (2000); Comment, Cancellation of the Washington Redskins' Federal Trademark Registration: Should Sports Team Names, Mascots and Logos Contain Native American Symbolism? 10 Seton Hall J. Sports L. 389 (2000); Notes, A Public Accommodation Challenge to the Use of Indian Team Names and Mascots in Professional Sports 112 Harv.L.Rev. 904 (1999); Note, Native American Mascots, Schools, and the Title VI Hostile Environment Analysis 1995 U. Ill. L.Rev. 971 (1995); Comment, The Mascot Name Change Controversy: A Lesson in Hypersensitivity 5 Marq. Sports. L.J. 141 (1994).

2 Id.

3 Id.

4 See, supra, note 1, 1995 U.Ill.L.Rev. 971, note 112.

5 Id.

6 See, e.g., Banks v. Muncie Community Schools, 433 F.2d 292 (7th Cir. 1970) [black students' class action suit in which injunction was denied but where Indiana high school ultimately volunteered to change its Confederate Rebel mascot to a cannon, but kept the name "Rebel"]; Augustus v. School Board of Escambia County, Fla., 507 F.2d 152 (5th Cir. 1975) [black students' class action suit where Florida High School was temporarily enjoined to use the Rebel mascot]; Crosby v. Holsinger, 852 F.2d 801 (4th Cir. 1988) [upheld principal's right to ban use of "Johnny Reb" mascot, which led to school going by "Rebels" without any mascot].

7 See, supra, note 1, 5 Marq. Sports L.J.,141, 152-153.

8 See, e.g., 25-92 Ops.Wis.Atty.Gen. (1992).

9 1993 WI A.J.R. 27.

10 See, supra, note 1, 5 Marq. Sports L.J. 141.

11 Cohen, Activists Wants Mascot Change, Portland Press Herald (Jan. 12, 2001) [potential lawsuit against Maine school districts for use of "Redskins" for sports teams].

12 See, supra, note 1,10 Seton Hall J. Sports L. 389, note 49.

13 Ibid.

14 See, supra, note 1, 5 Marq. Sports L.J. 141, 152-153 and note 77.

15 Id. at p. 157 and note 108.

16 Id. at p. 157 and notes 106-107.

17 Ibid.

18 Ibid.

19 Ibid. at pp. 153-155 and notes 78-96.

20 Monty Makeover Ordered at SDSU, San Diego Union Tribune, May 16, 2001.

21 Harjo v. Pro-Football, Inc. Cancel. No. 21,069 to Reg. Nos. 1,6060,810; 1,085,902; 987,127; 986,668; 978,824; and 836,122 (1999) [1999 TTAB LEXIS 181; 50 U.S.P.Q.2d (BNA) 1705], at *157.

22 McBride v. Motor Vehicle Division of Utah Tax Com. 977 P.2d 467 (1999).

23 Id.

24 42 U.S.C. § 2000d (2000).

25 Id.

26 34 C.F.R. § 100.1.

27 Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed.Reg. 11448 (1994).

28 See 29 C.F.R. § 1604.11 (1993).

29 See, supra, note 26.

30 See 42 U.S.C.S. § 2000d (2000); Simpson v. Reynolds Metals Co. 629 F.2d 1226 (1980 CA7 Ill.).

31 Alexander v. Sandoval, __ U.S. __ [121 S. Ct. 1511; 149 L. Ed. 2d 517; 2001 U.S. LEXIS 3367] (April 24, 2001).

32 Id.

33 However, the mere existence of a Native American mascot, without more, is not necessarily actionable.

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