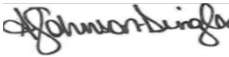





THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK / ALBANY, NY 12234

**TO:** P-12 Education Committee

**FROM:** Angelique Johnson-Dingle 

**SUBJECT:** Proposed Addition of Part 123 of the Regulations of the Commissioner of Education Relating to Prohibiting the Use of Indigenous Names, Mascots, and Logos by Public Schools

**DATE:** December 1, 2022

**AUTHORIZATION(S):** 

#### **SUMMARY**

#### **Issue for Discussion**

Should the Board of Regents adopt a new part 123 of the Regulations of the Commissioner of Education relating to prohibiting the use of Indigenous names, mascots, and logos by public schools?

#### **Reason for Consideration**

State statute (Education Law §10 *et seq.*, the “Dignity for all Students Act”).

#### **Proposed Handling**

The proposed amendment is presented to the P-12 Education Committee for discussion at the December 2022 meeting of the Board of Regents. A copy of the proposed amendment is attached (Attachment A).

#### **Procedural History**

A Notice of Proposed Rulemaking will be published in the State Register on December 28, 2022, for a 60-day public comment period. Supporting materials are available upon request from the Secretary to the Board of Regents.

## **Background Information**

The New York State Education Department (SED) has consistently opposed the use of Indigenous mascots. In 2001, former Commissioner of Education Richard P. Mills issued a memorandum “conclud[ing] that the use of Native American symbols or depictions as mascots can become a barrier to building a safe and nurturing school community and improving academic achievement for all students.” Commissioner Mills recognized that, while a role for local discretion existed, “there is a state interest in providing a safe and supportive learning environment for every child.” He asked boards of education “to end the use of Native American mascots as soon as practical.”

Many school districts have heeded Commissioner Mills’ directive. Most recently, the Waterloo and Lyme Central School Districts retired their mascots. SED commends the efforts of these districts and the many others that have or are embarking on this process. Other school districts have not complied. Among them, until recently, was the Cambridge Central School District. After extensive study in 2020 and 2021, Cambridge voted to retire its “Indians” team name, logo, and mascot in June 2021. It hastily reversed itself in July 2021 upon the election of a new board member. Community members challenged this action in an appeal to the Commissioner of Education under Education Law § 310.

In *Appeal of McMillan, et al.*,<sup>1</sup> the Commissioner held that: (1) Cambridge “offered no meaningful explanation as to why [it] no longer found the information it had previously cited persuasive”; and (2) Cambridge’s retention of the “Indians” logo “inhibit[ed] the creation of a safe and supportive environment for all students.” On the latter point, the Commissioner noted that:

- A 2020 literature review on studies of Native American mascots by Laurel R. Davis-Delano, *et al.* concluded that each study reviewed “demonstrate[d] either direct negative effects on Native Americans or that these mascots activate[d], reflect[ed], and/or reinforce[d] stereotyping and prejudice among non-Native persons.”
- The New York Association of School Psychologists (NYASP) concluded that “research studies have consistently shown that the use of mascots and Indigenous symbols and imagery have a negative impact on not only Indigenous [students], but all students ...”
- The Dignity for All Students Act (the Dignity Act, sometimes referred to as DASA) prohibits “the creation of a hostile environment ... that ... reasonably causes or would reasonably be expected to cause ... emotional harm to a student,” a condition that could be created through the use of Native American mascots.<sup>2</sup>
- The Board of Regents (BOR) has taken affirmative measures, consistent with the Dignity Act, to promote positive learning environments in schools, including its

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<sup>1</sup> 61 Ed Dept Rep, Decision No. 18,058, *available at* <http://www.counsel.nysed.gov/Decisions/volume61/d18058>.

<sup>2</sup> The Department is the agency tasked by the Legislature to administer the Dignity Act.

Culturally Responsive-Sustaining Education Framework and policy on Diversity, Equity, and Inclusion.

Cambridge appealed the Commissioner's decision. Supreme Court (Albany County) affirmed the Commissioner's determination in its entirety on June 22, 2022. Crucially, the court held that the Commissioner:

*determined correctly that the continued use of the 'Indians' nickname and imagery, given the 20 years that have passed since Commissioner Mills' directive, and given the imperatives of the District's Diversity Policy, was itself an abuse of discretion ....*

Thus, the court's decision establishes that public schools are prohibited from utilizing Indigenous mascots. Arguments that community members support the use of such imagery or that it is "respectful" to Indigenous persons are no longer tenable.

In a memorandum dated November 17, 2022<sup>3</sup>, the Department informed the field of the Commissioner's decision in *Appeal of McMillan et al.* and their concomitant need to eliminate the use of Native American mascots.

The Department now proposes a regulation to clarify public schools' obligations in this respect. In addition to prohibiting the use of Indigenous names, mascots, or logos by public schools, the regulation:

- defines Indigenous name, mascot, or logo and provides that such definition does not include a public school building, public school, or school district named after an Indigenous tribe;
- provides timelines by which such names, mascots, and/or logos must be eliminated;
- creates exceptions for federally or State-recognized tribes to (1) utilize such names, mascots, and/or logos for sports teams comprised of their tribal members; and (2) allows a public school to utilize an Indigenous name, mascot, or logo if an agreement exists in writing between the tribal nation and public school prior to the effective date of the proposed rule; and
- provides that public schools shall prohibit school officers, employees, and all individuals when located on school property or at a school function from utilizing or promoting any Indigenous name, logo, or mascot. This provision does not apply to individuals who are members of tribal nations.

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<sup>3</sup> <http://www.nysed.gov/common/nysed/files/programs/main/indigenous-native-american-mascot-memo.pdf>

**Related Regents Items**

Not applicable.

**Recommendation**

Not applicable.

**Timetable for Implementation**

It is anticipated that the proposed amendment will be presented for permanent adoption at the April 2023 Regents meeting after publication of the proposed amendment in the State Register and expiration of the 60-day public comment period required under the State Administrative Procedure Act. If adopted at the April 2023 meeting, the proposed amendment will become effective as a permanent rule on May 3, 2023.

AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to Article 2 and sections 101, 207, 305, 308, 309, and 2854 of the  
Education Law

Subchapter E of the Regulations of the Commissioner of Education is amended  
by adding a new Part 123 to read as follows:

Part 123

Use of Indigenous Names, Logos, or Mascots Prohibited

§123.1 Definitions.

As used in this Part, “Indigenous name, logo, or mascot” means a name, symbol, or image that depicts or refers to Indigenous persons, tribes, nations, individuals, customs, symbols, or traditions, including actual or stereotypical aspects of Indigenous cultures, used to represent a public school, including but not limited to such schools sports teams. It does not include a public school, school building, or school district named after an Indigenous tribe.

§123.2 Prohibition.

Except as provided in section 123.4 of this Part, no public school in the State of New York may utilize or display an Indigenous name, logo, or mascot.

§123.3 Timelines.

(a) Boards of education must commit, via resolution, to eliminating use of all Indigenous names, logos, and mascots by the end of the 2022-23 school year. Such resolution shall identify a plan to eliminate all use of the prohibited name, logo, or

mascot within a reasonable time, which shall be no later than the end of the 2024-2025 school year.

(b) Upon a showing of good cause, the commissioner may grant an extension of the timelines prescribed in subdivision (a) of this section.

#### §123.4 Exceptions; Tribal Use or Approval.

(a) Tribal Use. Nothing in this section shall be construed to prohibit a federally recognized tribal nation within the State of New York or a New York State recognized tribal nation from choosing to use an Indigenous name, logo, or mascot for a sports team comprised of its tribal members, including an Indigenous name, logo, or mascot for a sports team comprised of its tribal members, including a tribal school or intramural league.

(b) Tribal Approval. This Part shall not apply where a written agreement exists prior to the effective date of this part between a federally recognized tribal nation within the State of New York or a New York State recognized tribal nation and a public school permitting the use of an Indigenous name, mascot, or logo that is culturally affiliated with such tribe. A public school shall not offer or accept any money, consideration, or thing of value pursuant to any such agreement. The tribal nation shall have the right and ability to revoke any such agreement at any time. Upon termination of such an agreement, the public school shall have the remainder of the school year in which such agreement is revoked and one additional school year to discontinue its use of an Indigenous name, logo, or mascot.

#### §123.5 Implementation.

Public schools shall prohibit school officers, employees, and all individuals when located on school property or at a school function from utilizing or promoting any Indigenous name, logo, or mascot. This provision shall not apply to any individual who is a member of a tribal nation and is utilizing or promoting an Indigenous name, logo, or mascot of such tribal nation.