



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

**TO:** P-12 Education Committee

**FROM:** Angelique Johnson-Dingle *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:** April 6, 2023

**AUTHORIZATION(S):** *Don McG* *Bellotti*

#### **SUMMARY**

#### **Issue for Decision**

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”) and review of policy.

#### **Proposed Handling**

The proposed amendment is submitted to the P-12 Education Committee for discussion and recommendation to the Full Board for adoption as a permanent rule at the April 2023 meeting of the Board of Regents. A copy of the proposed amendment is attached (Attachment A).

#### **Procedural History**

The proposed amendment was presented to the P-12 Education Committee for discussion at the December 2022 meeting of the Board of Regents. A Notice of Proposed Rulemaking was published in the State Register on December 28, 2022, for a 60-day public comment period.

Following publication in the State Register, the Department received comments on the proposed amendment. An Assessment of Public Comment is included (Attachment B). In response to public comment, the Department has made a non-substantial revision to the proposed rule as outlined below. 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.”

In the intervening 22 years, many school districts have heeded Commissioner Mills’ directive. Recently, the Waterloo, Lyme, Watkins Glen, and Candor Central School Districts are retiring 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 ...”

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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>.

- 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 Culturally Responsive-Sustaining Education Framework<sup>3</sup> and policy on Diversity, Equity, and Inclusion.

Cambridge appealed the Commissioner’s decision. The 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>4</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.

If adopted, the Department plans to draft and release guidance for the field in partnership with educators and Indigenous Nations.

### **Proposed Amendment**

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;

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

<sup>3</sup> <http://www.nysed.gov/common/nysed/files/programs/crs/culturally-responsive-sustaining-education-framework.pdf>

<sup>4</sup> <http://www.nysed.gov/common/nysed/files/programs/main/indigenous-native-american-mascot-memo.pdf>

- 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.

### **Non-Substantial Revisions to the Proposed Amendment**

Following the 60-day public comment period the Department proposes to make two non-substantial revisions to the proposed amendment. First, as discussed above, the original proposed rule required that public schools 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.

The Department recognizes that public schools may not be able to successfully enforce this provision as it relates to individuals who are not officers or employees of such public schools. Therefore, the Department proposes to revise this provision to remove the requirement that public schools prohibit “individuals” from utilizing or promoting any Indigenous name, logo, or mascot when located on school property or at a school function.

Second, the Department received a comment suggesting that school districts could not display or use Indigenous team names, logos, or mascots for educational purposes. While the Department does not believe that this use is prohibited by the regulations as written, the Department has made a non-substantial revision to clarify that the regulation does not pertain to the display or use of such names, symbols, or images in the context of classroom instruction.

### **Related Regents Items**

December 2022: [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](https://www.regents.nysed.gov/common/regents/files/1222p12d2.pdf)

(<https://www.regents.nysed.gov/common/regents/files/1222p12d2.pdf>)

May 2021: [The New York State Board of Regents Policy Statement on Diversity, Equity, and Inclusion In New York State Schools](https://www.regents.nysed.gov/common/regents/files/521bra7.pdf)

(<https://www.regents.nysed.gov/common/regents/files/521bra7.pdf>)

### **Recommendation**

It is recommended that the Board of Regents take the following action:

VOTED: That Part 123 of the Regulations of the Commissioner of Education be added, as submitted, effective May 3, 2023.

### **Timetable for Implementation**

If adopted at the April 2023 meeting, the proposed amendment will become effective as a permanent rule on May 3, 2023.

## Attachment A

### 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 other than for purposes of classroom instruction.

###### §123.3 Timelines.

(a) Boards of education must commit, via resolution, to eliminating the 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 and employees 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 school officer or employee who is a member of a tribal nation and is utilizing or promoting an Indigenous name, logo, or mascot of such tribal nation.



ASSESSMENT OF PUBLIC COMMENT

Since publication of the Notice of Proposed Rule Making in the State Register on December 28, 2022, the Department received the following comments on the proposed rule:

1. COMMENT: The Department received several comments supporting the proposed regulatory change from organizations including the Shinnecock Indian Nation, Oneida Indian Nation, and Washington County Democratic Committee. The Department also received supportive comments from residents of school districts throughout New York State. These included residents of the Cambridge Central School District, who spoke to the personal and social toll wrought by the mascot debate and expressed their hope that no more school districts experience such vitriol and division. Additionally, multiple residents of the Mahopec Central School District expressed their support for the proposed regulation.

DEPARTMENT RESPONSE: The Department appreciates these supportive comments, which do not necessitate amendment of the proposed regulation.

2. COMMENT: The Department received multiple comments expressing general opposition to the proposed regulation, which included comments from several residents of the Mahopec Central School District. Multiple Mahopec residents expressed the sentiment, as one commenter put it, that “[t]he Indian name came about to honor those people[,] not deride them.”

DEPARTMENT RESPONSE: The Department’s position, as set forth in Senior Deputy Commissioner Jim Baldwin’s November 2022 memorandum and the underlying

item, is that the creation and maintenance of Indigenous mascots cause harm to all students regardless of their identity or background. No commenters submitted any proof of the intent underlying the creation of any specific Indigenous team name, logo, or mascot.

In any event, the Department’s proposed rule is based upon the harmful impact of Indigenous mascots, not the avowed intentions of previous or current school district officials. In this respect, the Department notes that a 2020 literature review by Laurel R. Davis-Delano, et al. concluded that every 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.” Those findings remained consistent regardless of “the stated intent of those who support[ed] Native mascots (*i.e.*, to ‘honor’ Native Americans)” (*see Appeal of McMillan, et al.*, 61 Ed Dept Rep, Decision No. 18,058). No changes to the proposed rule are necessary.

3. COMMENT: Several commenters expressed interest in increasing the amount of Native American history and culture in P-12 curricula.

DEPARTMENT RESPONSE: While outside the scope of the proposed regulation, the Department supports efforts to further incorporate Native American culture into local school curricula. As the Commissioner of Education indicated in *Appeal of McMillan, et al.*: “[r]etiring ... mascot[s] is not an end in and of itself; it is a small but important part of increasing the nature and quality of Native American education.”<sup>5</sup>

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<sup>5</sup> 61 Ed Dept Rep, Decision No. 18,058.

New York State, however, does not mandate the content of local curricula. One of the Department's responsibilities is to set student learning expectations (standards) for what all students should know and be able to do as a result of instruction. It is the responsibility of each local school district to develop curricula based on these Learning Standards, select textbooks and instructional materials, develop pacing charts for learning (scope and sequence), and provide professional development for staff to ensure that all students have access to instruction leading to attainment of these learning standards. No changes to the proposed rule are necessary.

4. COMMENT: Several commenters objected to the “costs” that replacement of their team name, mascot, or logo will entail. Others characterized the prohibition as an “unfunded mandate.”

DEPARTMENT RESPONSE: The proposed rule respects the dignity of Indigenous persons and the psychological harm caused by stereotypical team names, logos, or mascots. The Department believes that the importance of prohibiting offensive or stereotypical imagery outweighs any attendant costs.

Additionally, as other commenters explained, most of these expenses could have been avoided by phasing out team names, mascots, or logos decades ago. As one commenter put it with respect to her school district: “... there was a very long lead time announced, 20 years ..., for this impending change. The school did not plan appropriately, did not educate itself regarding the issues of appropriation, did not make a financially sound ‘[phase] out’ arrangement that would take into consideration the need for replacing scoreboards, uniforms, and other logo appearances.” Thus, as the

commenter explained, this district's claims of sudden, unexpected costs could have been mitigated, if not avoided, with better planning.

Finally, as noted in the Regulatory Impact Statement accompanying the proposed rule, "costs to school districts associated with the removal of the use and display of such Indigenous names, mascots, or logos from buildings, signage, gym floors, and sports fields can be offset by building aid. Building aid is available for certain approved capital outlays and debt services for school buildings where the construction costs of the project equal or exceed \$10,000, excluding incidental costs." No changes to the proposed rule are necessary.

5. COMMENT: Several commenters expressed the sentiment that the elimination of their team name, logo, or mascot would "erase the history and general understanding of [Indigenous] culture throughout New York."

DEPARTMENT RESPONSE: This argument suggests a false dichotomy; namely, that Indigenous communities are entitled to stereotypical representations or no representation. The Department rejects this premise. Indigenous persons deserve representation in curricula *and* to be depicted accurately and respectfully. With respect to representation in curricula, see the Department's response above concerning curricula. No changes to the proposed rule are necessary.

6. COMMENT: Several commenters expressed opposition to a proposed provision of the regulation requiring that school districts "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." Some commenters argued that this prohibition, as applied to "all individuals," is inconsistent with the First

Amendment. Other commenters indicated that this would present practical difficulties in enforcement.

DEPARTMENT RESPONSE: The overall intent of the section the commenter describes, 8 NYCRR 123.5, is to avoid circumvention of the Indigenous mascot prohibition by allowing district to display “retired” mascots in connection with school or athletic events. While the Department continues to have concerns on this point, in response to public comment, the Department has engaged in a nonsubstantial revision of the regulation to remove “all individuals” from its scope. Thus, school districts will only be responsible for ensuring that their officers and employees refrain from promoting a Native American team name, logo, or mascot. This is consistent with a public employer’s duty to prevent its employees from engaging in violations of the Dignity for All Students Act (Education Law §§, 11 [4], 12 [1], 1125 [3]).

7. COMMENT: A public school district seeks clarification regarding the provision prohibiting the use of retired mascots on school property. The school district asks whether it would be prohibited from “display[ing] ... photographs, trophies, [or] banners” that feature a retired team name, logo, or mascot. The school district further requests additional time “to fully implement the changes” required by the regulation.

DEPARTMENT RESPONSE: The Department does not recommend the destruction or alteration of historical artifacts such as photographs, trophies, or banners. The intent of this regulation is not to pretend that Indigenous mascots were never used but to eliminate their use going forward. Harmful as they may be, the use of indigenous mascots, like the forced relocation of Native American tribes, is a historical fact that must be acknowledged (*see generally McGirt v. Oklahoma*, 591 US --- [2020]).

With respect to extensions of time, the regulation permits school districts to request an extension of the deadlines identified in the regulation based “[u]pon a showing of good cause” (8 NYCRR 123.3 [b]). Therefore, school districts that require additional time may utilize this process. No changes to the proposed rule are necessary.

8. COMMENT: A public school district seeks clarification as to why the Department is seeking to change team names, logos, and mascots, but not the names of school buildings.

DEPARTMENT RESPONSE: School districts within the United States have historically reduced Native Americans to caricatures in the form of team names, logos, and mascots. As scholars C. Richard King and Charles Fruehling Springwood have argued, “these kinds of images dehumanize and demonize Native Americans, constraining the ability of the non-Indian community to relate to Indians as contemporary, significant, and real human actors.”<sup>6</sup> Indeed, the commenter acknowledged this history, stating: “We do understand that Indigenous imagery can be perceived as disrespectful by some members of the Indigenous community.” To the Department’s knowledge, there is no comparable tradition with respect to the legal names of school buildings or districts. No changes to the proposed rule are necessary.

9. COMMENT: A “parental rights group” asserts that the Mahopec Central School District’s “Indian mascot is being vilified by those who do not live in our community and or [sic] understand the importance of our history.” The commenter alleges that the Department’s actions have sown “division” within their school community and suggest

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<sup>6</sup> Introduction in *Team Spirits: The Native American Mascots Controversy* [Lincoln: Univ. of Nebraska Press, 2001], 8; see also *id.* at p. 7 (“Native American mascots perpetuate inappropriate, inaccurate, and harmful understandings of living people, their cultures, and their histories.”).

that a prohibition on Indigenous mascots is inconsistent with “free speech and expression.”

DEPARTMENT RESPONSE: See the Department’s response above to the argument that Indigenous mascots “honor” Indigenous persons or communities. The Department further notes that is well aware of the importance of the history of Indigenous mascots; that it did not create the movement to eliminate Indigenous mascots, which originated with Indigenous persons and groups; and that school districts have some discretion, but not a First Amendment right, to select a team name, mascot, or logo (see *Appeal of McMillan, et al.*, 61 Ed Dept Rep, Decision No. 18,058; *Appeal of Tobin, 25 id.* 301, Decision No. 11,591 [holding that the Commissioner of Education may overturn a local decision regarding a team name, mascot, or logo where the school district abused its discretion]). No changes to the proposed rule are necessary.

10. COMMENT: A public school administrator asked whether the term “Indians” could be appropriate under any circumstances. The administrator argues that this term is akin to “American,” which is utilized by certain schools. The commenter further suggests that “the nation of Indians” is analogous to “American.” The commenter further asks whether the use of a “feather” in a logo would be inappropriate.

DEPARTMENT RESPONSE: The commenter’s first question was squarely addressed by the Commissioner of Education in *Appeal of McMillan et al.* (61 Ed Dept Rep, Decision No. 18,058). In that appeal, the Commissioner found that a school district’s “continued use of the ‘Indians’ team name, logo, and mascot constitutes an abuse of its discretion.” The commenter presents no information that would distinguish

his proposed hypothetical from the evidence presented in that appeal regarding the Cambridge Central School District's use of "Indians."

The commenter's equation of "Indian" with "American" is inaccurate. "Indian" is a historical term used to apply to Native American tribes; it originates with Christopher Columbus's mistaken conclusion that he and his crew had arrived in the West Indies. It does not describe a specific tribe. "Indian nation[s] or tribe[s]," by contrast, are comprised of nine sovereign nations within the State of New York (Indian Law § 2). Thus, the generic term "Indian" is not analogous to the term "American," which refers to citizens of the United States of America—and which includes individuals of Indigenous descent.

The appropriateness of a logo containing a feather must be evaluated in context. While there is nothing inherently offensive about a feather, such images take on a different meaning when used by school districts, such as the commenter's employer, that have a history of utilizing stereotypical names and imagery. The Department does not anticipate that any team names, logos, or mascots that contain vestiges of prohibited team names, logos, or mascots will be considered acceptable. No changes to the proposed rule are necessary.

11. COMMENT: A resident of the Glens Falls City School District states that his district will no longer use an arrowhead as its logo. He argues that an arrowhead "isn't offensive to anyone's culture or race or nationality since all our ancestors used it and benefitted from its use."

DEPARTMENT RESPONSE: The Department cannot opine as to the Glens Falls City School District's reasoning for making the decision about which the commenter



complains. However, to the extent that Glens Falls may have a history of utilizing stereotypical names and imagery, see the above response regarding the Mahopec Central School District's question about using a feather in a logo. No changes to the proposed rule are necessary.

12. COMMENT: The superintendent of the Mahopec Central School District requests that the Department consider the “[a]llowance of mascot names that exhibit strength such as “Braves” or “Warriors,” citing dictionary definitions of these words. She opines that these words “do not refer to Native Americans but certainly describe the strength, courage, and determination of our students.”

DEPARTMENT RESPONSE: As with the above comment considering the use of a feather, these issues must be considered in context. The question is not whether the words “braves” or “warriors” are offensive in the abstract, but whether their use is appropriate in school districts that have a history of utilizing stereotypical names and imagery. No changes to the proposed rule are necessary.

13. COMMENT: After expressing support for the proposed regulations, a commenter offers five specific proposals:

1. Give school districts two years to eliminate the use of Indigenous team names, logos, and mascots so that school districts are not “harmed by the upfront cost of removing and enacting new iconography”;
2. Revise the definition of “Indigenous name, logo, or mascot” to the following: “any person, animal or object used to represent a school district which names, refers to, represents, or is associated with Native American, including aspects of Native American cultures and specific Native American tribes”;

3. Provide additional guidance regarding the definition of federally recognized tribes. In this respect, the commenter notes that school districts have, and continue to attempt to, engage in “tribal shopping” whereby they seek a tribe’s approval to use an Indigenous team name, logo, or mascot;
4. Ascertain whether school districts “can tap into cultural funds within NYSED” to defray costs; and
5. Promote additional education about Indigenous peoples in local curricula.

DEPARTMENT RESPONSE:

1. Following final adoption of this regulation, school districts will have more than two years to eliminate the use of Indigenous team names, logos, and mascots. Additionally, the Department provided advance notice of its intentions in James N. Baldwin’s November 17, 2022 memorandum, which provided districts with an additional five months’ notice. See also the Department’s response above regarding extensions of time.
2. While the Department appreciates the suggested changes, Department staff have elected to maintain the original proposed language, as it believes that it is broader and will more accurately capture the team names, logos, and mascots that the Department seeks to prohibit.
3. The Department of the Interior’s Bureau of Indian Affairs maintains an electronic database that allows users to search all federally recognized tribes: <https://www.bia.gov/service/tribal-leaders-directory/federally-recognized-tribes> (last accessed Mar. 18, 2023). With respect to “tribal shopping,” the Department did not intend the “tribal approval” provision (8 NYCRR 123.4 [b]) to constitute an

invitation for school districts to obtain such agreements. As Deputy Commissioner Baldwin's November 2022 memorandum suggested, the intention of this provision was to recognize any pre-existing agreements between a federally or State recognized tribe ("Those school districts that continue to utilize Native American team names, logos, and/or imagery without current approval from a recognized tribe must immediately come into compliance"). The Department, however, selected the effective date of the regulation as it may only promulgate regulations with prospective effect.

4. See the Department's response regarding costs.
5. See the Department's response above regarding curricula.

14. COMMENT: Two members of the assembly, on behalf of nine other members, write to express their "severe disappointment" that the regulation affects two school districts within their Assembly district. They argue that the issue should be decided by local school boards. They further assert that the State Education Department "threaten[ed] to remove duly elected school board members and withhold millions of dollars ...." Finally, they characterize the regulation as an "unfunded mandate" and assert that the Department "should pay for its implementation."

DEPARTMENT RESPONSE: While the Department also hoped that this matter could have been handled at the local level, dozens of school districts ignored, or took *pro forma* steps to implement, Commissioner Mills' 2001 directive. It has become readily apparent that many school boards will not make this necessary change on their own. Given the literature on the harm of Native American mascots and the intervening

passage of the Dignity for All Students Act, the Department considers it its responsibility to ensure the protection of all students.

The Department objects to any insinuation that it “threaten[ed]” school districts with the removal of school officers or withholding of State Aid. While Deputy Commissioner Baldwin informed school districts that their willful maintenance of an Indigenous mascot could result in such consequences, these are set forth in statute (Education Law § 306 [2]). School boards that comply with the regulations will face no consequences.

On the characterization of the regulation as an “unfunded mandate,” see the Department’s response above concerning costs. No changes to the proposed rule are necessary.

15. COMMENT: The New York State School Boards Association and New York State Association of School Attorneys argue that the prohibition on “all individuals ... utilizing or promoting any Indigenous name, logo, or mascot” exceeds the Department’s jurisdiction and is inconsistent with the First Amendment. These organizations further argue that the regulation does not contain an exception for displaying or discussing mascots for “educational or historical purpose[s].”

DEPARTMENT RESPONSE: As indicated above, the Department has engaged in a nonsubstantial revision of 8 NYCRR 123.5 to remove the reference to “all individuals.”

With respect to the display or use of Indigenous team names, logos, or mascots, the Department does not believe that such uses are prohibited by the regulations as written. Nevertheless, the Department has made a nonsubstantial revision to 8 NYCRR

123.2 to clarify that the regulation does not pertain to the display or use of such names, symbols, or images in the context of classroom instruction.

16. COMMENT: A commenter asks who is responsible for “making the final determination on what is or isn't acceptable.” The commenter further suggests that “if the group that makes this ultimate decision doesn't include native Americans, it is being just as offending as what this ruling is trying to prohibit.” The commenter further suggests the creation of an appeals “process for schools that have their logos challenged or denied by the State.”

DEPARTMENT RESPONSE: The Board of Regents, the head of the State Education Department, is responsible for the adoption of all regulations proposed by the Department (N.Y. Const. Art. V § 4; Art. XI § 2; Education Law § 207). As relevant here, the Department notes that it has convened an Indigenous Mascot Advisory Group comprised of tribal leaders. This group advised and continues to advise, the Department in making determinations regarding actual or proposed team names, logos, or mascots.

With respect to an appeals process, the regulation places the responsibility of eliminating Indigenous team names, logos, or mascots on local school boards. Therefore, it is the responsibility of each school board to determine the applicability of the regulation and ensure their district's compliance therewith. If a school district refuses to take action, the Department will notify the school district and attempt to achieve compliance. The Department anticipates that school districts will cooperate in good faith. If that cannot be accomplished, the statutory means of enforcement, as

described above, including the removal of school officers and withholding of State aid.

No changes to the proposed rule are necessary.