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# NATIVE IMAGES IN SCHOOLS AND THE RACIALLY HOSTILE ENVIRONMENT

Lawrence R. Baca

*Many American Indian students attend schools that also have Indians as their mascots. They and their parents often find the stereotyped images that these schools use offensive and are searching for a legal challenge to the use of negative images of Indians by public schools. Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin in any federally funded program. The Department of Education's Office for Civil Rights has interpreted Title VI to prohibit schools from creating, encouraging, or tolerating a "racially hostile environment." This essay addresses the legal standards for the application of the racially hostile environment regulations to schools that have American Indian mascots.*

**Keywords:** *American Indians; athletic mascots; civil rights; racism; Indian education*

In the great spectrum of race relations in America, we can say without equivocation that American Indians<sup>1</sup> are treated differently than other minority races. For example, negative images of American Indians are accepted where comparable images for other racial and ethnic groups are not. The Frito Bandito is gone, the image of Little Black Sambo is gone, and yet, hundreds of comparable false, stereotyped, and offensive images of American Indians continue to exist. In 2002, a popular clothing manufacturer produced a T-shirt with Asian caricatures on it and the saying "Two Wongs don't make it White," and because of protests by Asian Americans and others about the stereotype, the shirt and its offensive images were gone within days of arrival at the stores—removed by the manufacturer.

In Washington, D.C., in 1999, an employee of the city government was removed from his position by the mayor for using the word "niggardly" in a discussion with a Black employee. Nigger, a word so infamous that it is often referred to on the national television news as the "N" word, and niggardly have no relationship to each other in their root or in their meaning. But the power of the "N" word is such that a sound alike word resulted in a formal complaint being filed, and the employee against whom it was filed was disciplined for the proper use of a proper English language word.<sup>2</sup> Also in 2002, Trent Lott resigned as speaker of the House of Representatives because of criticism he received for implying that he supported Strom Thurman's seg-

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regationist views. In the same city, the local National Football League team is the Washington Redskins. Many of us who are Indians consider the word *Redskin* to be the Indian country "R" word. The patent and trademark hearing board has ruled that "redskin" is a pejorative that cannot be patented.<sup>3</sup> Two states (California and Utah) have ruled that the "R" word is too offensive to be allowed on automobile license plates. But the team continues to use the name. Fans continue to wear jackets, hats, and T-shirts with a racial pejorative on them, and this is generally accepted by the public. Imagine a T-shirt or jacket with a pejorative against any other race or ethnic group—nigger, wop, kike, slope, spic—being allowed at the work place or at a public school. The good news is that you probably cannot imagine this. Better still, you do not have to because it is not going to happen to another race or ethnic group. Indians are treated differently.

In the national effort to eliminate the use of stereotyped and caricatured American Indian images, American Indians are using logic, education, and the law to bring about change. In this article, I will address the one area where the law may provide an avenue to seek relief from these practices in educational institutions. I should state, however, that as of this writing, there has been no successful administrative or court challenge to the use of faux and caricatured American Indian images in schools under these statutes. As one of my colleagues has noted, the law with respect to negative American Indian images has not advanced to the same level that it has with respect to other racial or ethnic minorities.<sup>4</sup> I will address the analysis that I think is most fruitful and the difficulties of its success. Those difficulties might be encapsulated in the words, "White folks just don't get it."

#### THE RACIALLY HOSTILE ENVIRONMENT ANALYSIS

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One way to look at the negative effects that stereotyped images of American Indians have is to apply a racially hostile environment analysis. The essential core of this analysis is in the term "hostile environment," which was first developed in the context of the workplace. The analysis readily flows over into the educational arena and is of particular concern here. Remember that when the Supreme Court struck down the concept of separate but equal, it did so first in education. Although I am offended by the image of Chief Wahoo of the Cleveland Indians baseball team and the name of the Washington Redskins, I do not have to go to the stadium and subject myself to them. And although that image and name prevent me from attending a game or truly enjoying one if I did, I ascribe a lesser importance to that than the same imagery at an elementary or secondary school or college. Education is more important than my right to partake of a place of public accommodation. As an adult, I can choose to not go. The choices of a child in elementary or secondary school or even those of a college-age student are not so clear. Whereas the images and names of some sports teams do, in my mind, violate my right to full and equal enjoyment of the baseball or football stadium, I have greater concerns about the effects of negative Indian imagery on children in our schools.

Title VI of the 1964 Civil Rights Act provides, “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.” Every federal agency that provides funding to other entities writes regulations that the fund recipient must agree to abide by or lose their funds. The Department of Education has written regulations that provide that no recipient can cause or allow a racially hostile environment.

The context in which these cases will arise is when, in the case of an elementary or secondary school student, a parent will complain that the school is creating or maintaining a racially hostile environment, which prevents their children from fully participating in the educational program. The leading and most thoroughly researched article in this area is “Native American Mascots, Schools, and the Title VI Hostile Environment Analysis,” by Daniel J. Trainor (1995). Let me note without equivocation that the article is written with its primary purpose being to defend the continued use of the mascot Chief Illiniwek at the University of Illinois. While Trainor argues quite persuasively that American Indian mascots should be removed from elementary and secondary schools, he then boldly, and incorrectly, argues that they should not be removed from colleges and universities. While he correctly notes that the analytical framework must be adjusted to the age and experience of the student, his basic and most flawed position is that you simply cannot have a racially hostile environment at the college or university level because the Indian students who are offended by the mascot will know about it in advance and will not apply to go to the school in the first place.

He is half right. The Indians who are offended will not come because there is a racially hostile environment that prevents them from applying. Trainor is so adamant about defending the University of Illinois that he misses his own point. The very knowledge that prevents them from coming to a school with a racially offensive mascot is knowledge of an environment of racial hostility in which they find that they will not be able to enjoy the full educational benefits of the educational program offered.

The racially hostile environment analysis established by the Office for Civil Rights (OCR) can be summarized as follows: Is there harassing conduct at the school, (whether physical, verbal, graphic, or written) that is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student’s ability to participate in or benefit from the services, activities, or privileges it provides? The regulations provide that a school may not effectively cause, encourage, accept, tolerate, or fail to correct a racially hostile environment of which it has actual or constructive notice.

To establish a violation, OCR must find, based on the totality of the circumstances, that (a) a racially hostile environment existed, (b) the school had actual or constructive notice of the racially hostile environment, and (c) the school failed to respond adequately to redress the racially hostile environment. It is also important to note that an alleged harasser need not be a

school agent or employee. Liability under the Title VI regulations premised on a school's general duty to provide a nondiscriminatory educational environment.

In determining whether the racial harassment is sufficiently severe, pervasive, or persistent, OCR will examine the context, nature, scope, frequency, duration, and location of racial incidents. It is unlikely that casual or isolated racial incidents will be found to create a hostile environment. OCR looks at a sliding scale of the combination of the severity of the incidents and the pervasiveness or persistence of the events. A single highly charged incident could be given the same weight as more pervasive or persistent conduct that is less severe. OCR notes that it is also important to consider the number of harassers involved and their relationships to the victim.

To determine severity, OCR will consider the nature and location of the incidents and the size of the educational institution. Incidents of lesser severity or a smaller number of incidents can create a racially hostile environment in the smaller locality of a primary school as opposed to the larger environment of a college campus. An event that occurs in a public place on campus will be received differently than the same event in a private local. It does not matter whether the instances of harassment are directed at the complainant; even those directed at others are considered in determining whether a hostile environment exists.

OCR will apply a variation of the reasonable person standard to determine that the harassment is severe enough to adversely affect the enjoyment of some aspect of the educational program. The question, then, is whether the environment would affect a reasonable person of the same age and race as the victim. OCR believes that the conduct in question must be judged from the perspective of a person of the same race as the victim. Where elementary-school-aged students are involved, the standard as applied to a child must take into account the age, intelligence, and experience of children of the same age and race.

And, finally, OCR does not require the harassment to result in a tangible injury to the victims of the harassment. It only requires that the harassment negatively affect the enjoyment of an educational program offered by the fund recipient.

So, how are Indian complainants losing cases under this standard? School officials create and maintain the images. They know of their existence. School officials may mistakenly believe that these images are benign, but once an Indian parent or child comes forward and says that they are not, the school has knowledge of the offense. And what about the scope, frequency, and duration? No matter how minor the school officials attribute the harm of racial caricatures, they are so pervasive that their presence is overwhelming. And they are always present throughout the school year. Failure of non-Indians to accept that these images interfere with the child's ability to participate in the educational programs allows for the continued use of American Indian mascots. It is the overwhelming presence of these images that has numbed non-Indians into accepting these images as neutral, if not

positive, images. At schools named to honor Black leaders, the students do not dress in “African dress,”—whatever they may think that to be—and engage in what they believe to be African dance rituals at half time of school sporting events.

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#### WHITE FOLKS JUST DON’T GET IT

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The most famous, or infamous, of the OCR’s Indian mascot investigations is that of the University of Illinois. Charlene Teters, a Spokane woman, was recruited to come to the university. When she arrived, Teters found that she and her young children were assaulted by the persistent presence of what she calls “the severed head” of Chief Illiniwek, known locally as “the Chief.” Likewise, she found the antics and faux Indian dance of the student who portrays “the Chief” at school events to be insulting and offensive to Indian people and Indian culture. Teters began a many-year-long protest of the denigration of Indian culture. During her many protests about “the Chief,” Teters has been called vile names, has had trash and other objects thrown at her, and has even been spit on by supporters of “the Chief.”

Teters also filed a complaint with the OCR at the United States Department of Education. OCR accepted her complaint and conducted an investigation. The eventual finding was in favor of the university. The OCR stated in its letter that the incidents of hostility were not severe enough or pervasive enough to rise to the level of a hostile environment. They also found that the incidents of physical and verbal assaults were not necessarily associated with the mascot but may have been a result of the protest. There seemed to be an overreliance on a necessity for incidents of physical hostility associated with the mascot.

Therefore, I ask the question, What about the hostility against the mind? In *Brown v. Board of Education* (1954), the court focused on the nature of the separation of the races as the primary evil of the doctrine of separate but equal. The court noted that even if schools were equal, the separation of the races, especially with the imprimatur of the state, would have negative effects on young Black children.

To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

The court found that the separation was a badge of inferiority to “the colored race.”

The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro [sic] group. A sense of inferiority affects the motivation of a child to learn.

Let us compare this notion of being treated differently to the experience of the American Indian child at a school that maintains an American

Indian mascot. The Indian child who attends a school with an American Indian mascot theme is confronted with false and offensive images constantly from the moment of arrival to the bus ride home. Let us assume that a severe event of a racially harassing nature, such as a Black man hung in effigy in the middle of a campus or a swastika burned into the lawn of a Jewish fraternity house, although it may not be a physical confrontation, can be likened to a punch in the nose—a blow that knocks someone to the ground. Now let us assume that the false image of your race posted on campus is a racially harassing event no more severe than a touch of a finger on someone's shoulder. Imagine that you go to your place of employment and a coworker touches you on the shoulder as you get out of your vehicle. Another touches you on the shoulder as you get to the front door of your building, and another touches you as you get into the elevator. Your colleague touches you as you arrive at your desk, when you go to the coffee room, and again when you return. Imagine that this behavior is done only to members of your race. No single touching is itself a severe harassing event, but the cumulative touchings would drive most people to strike out or stop coming to work. Most of us would reach the point very quickly where we are not capable of fully participating in or enjoying the benefits of our workplace in this environment, even though we are receiving mere touches.

Now think about the reality for the Indian child who attends school where there is an American Indian mascot. The child arrives at school, and when the child gets off of the bus, he or she is confronted with the 22-foot-tall statue of an American Indian, usually in some form of "warrior" dress, such as a loincloth and nothing more. The "warrior" will wear one or more feathers and most likely hold a spear, club, or tomahawk. The Indian child walks into the school and sees a painting of this same image on the wall outside the principal's office or perhaps a caricature with a large belly and an over-exaggerated nose, often with a bent feather in a headband. The child goes to class and sees the faux image on the classroom wall and on schoolbook covers. When the child goes to the gym, the same ubiquitous, but not real, Indian is painted on the floor, and non-Indian students run back and forth over the face bouncing a basketball. If the child attends a school sporting event, it is likely that a White student will dress up in some form of Indian "costume" and perform fake ritualistic dances for the fans. These events occur daily, weekly, hourly. These images are omnipresent in the life of the Indian child while the child attends school. She does not see any other race singled out for this kind of caricature treatment. And, these images are all done with the acquiescence and the imprimatur of the state. In *Brown*, the court specifically noted that the very nature of separation of the races, which was the badge of inferiority of the Black race, was made even more severe because it was done with the sanction of the state. Here, the characterizations, the faux imagery, the secular use of religious iconography are only those of American Indians, and they are sanctioned by the state. The Indian

child internalizes that her race is treated differently and that she is looked on by her classmates as different. That difference is not a uniqueness that causes others to want to be your friend or to learn from your cultural world view, but rather, it is more often a point of mockery and, perhaps, open ridicule. The stereotypes that trap Indian people and culture in a pre-Columbian amber also represent the failure to recognize the continued existence of Indians as living cultures and peoples. The Indian child recognizes that using the Indian race as a mascot is a badge of inferiority. And, equally important is the ease with which one culture becomes safe to mock and caricature when others are not. The images are ubiquitous, they are omnipresent, and they are so pervasive as to become white noise or wallpaper to the non-Indian. To the Indian child, they are an insidious invasion of their educational experience.

The non-Indian child also receives a subtle message. In their subconscious, they note, "my culture is not caricatured. My religious heritage is held with respect, such that our iconography will not be used in a secular manner at my school. No person of another race will paint their face white and engage in imitations of what they associate with my race. Therefore, my culture must be superior." These may be subtle messages, but they are powerful messages.

According to statistics generated by the United States Department of Justice, an American Indian is four times more likely to be the victim of a violent crime by a person not of their race than any other racial or ethnic group. Likewise, Indians are victims of hate crimes at a rate that is far out of proportion to their numbers in the population at large.

The prevalence of fake and negative images of American Indians is a contributing factor to these crime rates. The ability to objectify an entire race of people and to amalgamate them under the singular false image of the dancing, prancing, tomahawk-chopping, savage warrior contains within it the ability to physically assault the individuals to whom one ascribes these characteristics. When a people are only stereotypes, they are not real.

Today, education is perhaps the most important function of state and local governments. Both compulsory school-attendance laws and the great expenditures for education demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even for service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing the child for later professional training, and in helping the child to adjust normally to his or her environment.

Whether it is being denied a seat at the restaurant of our choice or failing to receive a loan at the bank, what the American population at large has failed to accept is that the stereotypes created by school and professional sports mascots carry over into the everyday lives of American Indians.

## AUTHOR

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**Lawrence R. Baca**, Pawnee, is a past president of the National Native American Bar Association and chairman of the Federal Bar Association Indian Law Section.

## NOTES

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1. I use the terms "American Indian" and "Indian" interchangeably in this article. Historically inaccurate though the terms may be, Indian is the term used in the Constitution and, therefore, it is the "legal name" of those peoples indigenous to the 48 connected states of the United States.
2. The employee was later reinstated when common sense prevailed.
3. In 2003, the U.S. District Court overturned this decision, finding that there was not sufficient evidence presented at the initial trial to demonstrate that the trademarks were disparaging.
4. It is also unfortunate that no studies have been undertaken with respect to how stereotypes and negative images affect the academic performance of American Indian children.

## REFERENCES

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