COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

COMMONWEALTH OF PENNSYLVANIA,	:	
HUMAN RELATIONS COMMISSION,	:	
Complainant	:	
	:	
v,	:	**PHRC CASE NO. 201501536**
	:	
NESHAMINY SCHOOL DISTRICT,	:	
Respondent	:	

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

FINDINGS OF FACT*

1. The Complainant in this case is the Pennsylvania Human Relations Commission. (N.T. 68-69; S.D. 212)
2. The Respondent in this case is the Neshaminy School District. (N.T. 6; S.D. 212)
3. There are over 8,000 students that attend the 11 schools that make up the Neshaminy School District. (N.T. 237)
4. Neshaminy High School is one of the 11 schools in the Neshaminy School District. (N.T. 237)
5. Between 2,500 and 3,000 students attend Neshaminy High School. (N.T. 923)
6. Neshaminy High School is operated by over 300 staff members. (N.T. 924)
7. While the District's enrollment process allows for the identification of a student's race and ancestry, registrants are not compelled to identify either their race or their ancestry. (N.T. 1278)
8. Accordingly, enrollment data does not provide the District with accurate information regarding how many District students identify as Native American. (N.T. 1276, 1280; S.D. 37; C.D. p. 19)

* To the extent that the Opinion which follows recites facts in addition to those here listed, such facts shall be considered to be additional Findings of Facts. The following abbreviations will be utilized throughout these Findings of Fact for reference purposes:

N.T.	Notes of Testimony
S.D.	Respondent Exhibit
C.E.	Commission Exhibit
C.D.	Copeland Deposition
Y.D.	Yancey Deposition
D.D.	Davidson Deposition
M.D.	Moya-Smith Deposition

9. In or about 1932, the Neshaminy High School began to use the word “Redskins” for its sports teams, its yearbook and other purposes. (N.T. 101; S.D. 206)

10. Through the 1980’s the Neshaminy High School had a live mascot, however, at present, the Neshaminy High School does not. (N.T. 114, 122)

11. Logos and generic caricature images of Native Americans are displayed in and around the Neshaminy High School and near its athletic playing field. (N.T. 160, 161, 164, 292-294, 402)

12. The District’s expert witness, Andre’ Billeudeaux, (hereinafter “Billeudeaux”) described the currently displayed “warrior” image in Neshaminy High School as a plains warrior that is a common native themed image. (N.T. 213, 226-227)

13. Billeudeaux indicated the image was historically misaligned and testified that he informed the District and the then Principal of the Neshaminy High School, Dr. Robert McGee, (hereinafter “McGee”), that he should change it. (N.T. 213, 214)

14. Billeudeaux has 30 years experience working with Native American organizations and approximately 100 different tribes as he attempts to understand the concerns and cultures of Native Americans. (N.T. 92-93, 97, 107, 177-178)

15. Billeudeaux offered that Native Americans want to be understood and represented and to sustain their cultures. (N.T. 98)

16. Billeudeaux is a representative of the Native American Guardian Association (NAGA), a non-profit organization that tries to help people understand there are two sides to the question regarding the use of the word “Redskins” in an effort to preserve positive symbols and imagery, as well as tributes to Native American culture. (N.T. 112; Y.D. pp 48-55)

17. The phrase Billeudeaux and NAGA use is “Education not Eradication.” (N.T. 107, 130, 207; Y.D. pp. 42)

18. Billeudeaux testified that there are various Native American tribes that, as a part of their cultures, paint themselves red for burial, for various sacred ceremonies, to prepare for battle, and to be initiated into a tribe. (N.T. 102, 183)

19. Billeudeaux indicated that there are over 600 different tribes with different cultures, histories, beliefs, and varied languages and dialects. (N.T. 123, 218)

20. Indeed, the words “Native American” do not refer to a homogenous giant monolithic or holistic idea, but over time the words have become commonly used to describe what is in reality a collection of discrete separate nation tribes of indigenous people with separate languages, societies, cultures, and social systems. (N.T. 160)

21. As for the term Redskin, Billeudeaux offered that, while the term can be derogatory, there are tribes that, as part of their cultures, proudly paint themselves red and call themselves “red-painted people, redmen and redskins” and are known to promote the use of the term Redskin. (N.T. 102-103,104)

22. Counter to this view, dictionary definitions include information that indicates the term Redskin can be offensive, inappropriate and disparaging. (N.T. 197, 283-284, 361)

23. The expert called by the PHRC, Ellen Straurowsky, (hereinafter “Straurowsky”), observed that one source that had been cited by Billeudeaux indicated that the word Redskin is a racial pejorative. (N.T. 284)

24. The term Redskin is also known to be associated with a dark period in the nation's history when the term was used to refer to the monetary reward given as a bounty for the killing of a Native American. (N.T. 316)

25. Straurowsky testified that the term is similar to the "N" word and other racially offensive names that are considered racial slurs. (N.T. 284-285)

26. When the PHRC's Executive Director was asked what the meaning of the word Redskin was, he indicated that the term is a derogatory term that is meant to dehumanize or debase someone. (N.T. 64)

27. Billeudeaux offered that it would be ok to use the term Redskin as long as the name and symbols are both informed appropriately and accurately. (N.T. 120, 153)

28. Billeudeaux indicated that a school should be able to keep the Redskin name and logo so long as the term and logos are given the dignity and respect they deserved and are displayed carefully, with cultural sensitivity and in a historically accurate manner. (N.T. 123, 154)

29. Billeudeaux further submitted that to be authentic as possible, modifications must be done to the Neshaminy High School to ensure historical accuracy. (N.T. 120, 154)

30. Billeudeaux noted that during a tour of Neshaminy High School, he saw a photograph of a student wearing feathers and that, in his opinion, this photograph should be removed. (N.T. 222-223)

31. Billeudeaux compared the wearing of feathers by an individual who did not earn them with the wearing of military medals not earned. (N.T. 215)

32. Billeudeaux referred to this as "stolen valor." (N.T. 215)

33. Both Billeudeaux and Straurowsky commented on two surveys taken of Native Americans with regard to whether the Washington D.C. team name “Redskins” was offensive. (N.T. 128-129, 190, 277, 282, 280, 358: S.D. 167)

34. The Annenberg study of 2004 found that 9 of 10 Native American fans of the Washington D.C. football team said the term Redskins was not offensive. (N.T. 190)

35. The Washington Post survey in 2016 obtained a similar result. (N.T. 190, 195)

36. Numerous witnesses for the District testified about the meaning of the word Redskin:

a. Joseph Turchi, a coach for local youth organizations and a resident of the District with 2 daughters that cheer for the Neshaminy High School indicated that to him the word Redskin means a sense of pride. (N.T. 801, 807)

b. Richard Kain, a graduate of Neshaminy High School and a 25 year teacher in the District testified that to him, the word Redskin is a sense of pride for the District and that while he is aware others consider the word a slur, he does not. (N.T. 819, 822, 832) Kain also indicated that he would not be upset if the name changed. (N.T. 839)

c. Neil French, a 21 year employee of the district and the assistant varsity football coach testified that the word speaks to the tradition of honor and bravery. (N.T. 977-988) He also offered that the name is a tribute to those who came before and to the Native American tribes in the area. (N.T. 1000-1001)

d. Robert Wood, a 14 year employee of the District, whose Great Grandfather was Chippewa, testified that he is not offended by either the name or imagery. (N.T. 1107) He indicated that, while he is not surprised the dictionary defines

the word as a racial slur and agrees racism is harmful, he does not believe the term is a slur. (N.T. 1112, 1116) Finally, he testified that he does not really feel pride in his Native American heritage. (N.T. 1118)

e. Shayne Spingler testified that her Father is African American and Lenape and that she has 2 children in the District, and that to her, the term means pride in the community. (N.T. 1120, 1126) She offered that she does understand that others see the word as a slur and that the dictionary says the word is a slur, however, the caricatures and logos in and around the high school are not offensive to her. (N.T. 1132, 1133-1134)

f. Jim King, a Father of 6 children, 3 of whom attended school in the District with the last to graduate in 2013, says that to him, the word means Neshaminy and he does not find the word offensive. (N.T. 1261)

g. Steve Pirritano, a member of the District's School Board since October 2013, testified that to him, the word means the area's culture has a proud and determined heritage. (N.T. 1211-1213) He offered that he agrees that the dictionary definition is usually derogatory and that to others the word is a slur, but to him, the word is not a racial slur. (N.T. 1213, 1239, 1257)

h. Robert Copeland, the superintendent of Neshaminy School District from October 1, 2012 through June 30, 2015, testified that he realized some Native Americans found the word Redskin offensive. (C.D. pp. 42) Copeland offered that he went back and forth on the issue over time, sometimes agreeing and sometimes not. (C.D. p 54) He also testified that after reading written materials his decision was influenced to a point where he did agree that the

term is harassing and offensive and that the District should stop using Native American imagery and consider changing the name. (C.D. pp. 54, 62-63)

i. Mark Yancey, who identifies himself as a Chirrichua Apache, and who, along with several others including Billeudeaux, recently formed the organization NAGA. (Y.D. pp. 13, 44, 86, 96) In 2014, before participating in the formation of NAGA, Yancey had formed two fan clubs of the Washington Redskins: Native American Redskin Fans; and Native American Redskin Nation Fan Group. (Y.D. pp. 24-25, 121, 122, 128, 174) Yancey testified that he and many other Native Americans think of the word Redskin as a positive word. (Y.D. pp. 35) Yancey offered that he does not believe the word Redskin was used when there were bounties on Native Americans and considers this "false history." (Y.D. pp. 43) Yancey also regards the wearing of unearned feathers as inappropriate and does not condone the wearing of costumes that are intended to depict Native Americans. (Y.D. pp 63, 138, 143-144)

j. Eunice Davidson, also a founding member of NAGA, testified by deposition that she is a Dakota Sioux. (D.D. pp 8, 40) She offered that she is generally familiar with how Native Americans view the use of Native American names and imagery in sports. (D.D. pp. 22) She testified that, while some are offended by the term Redskin, many Native Americans with whom she spoke are not offended by the term. (D.D. pp. 37, 67. 89-90, 102; EX 1) She revealed that the leader of her own tribe did not support the use of the name Redskin. (D.D. pp. 72-73)

37. Others testified for the PHRC indicating that the word is offensive, including:

a. Randy Wehrs, a 2001 student editor-in-chief of the Neshaminy High School's newspaper, the Playwicken, testified that he personally found the word Redskin to be a racial slur. (N.T. 630-631)

b. Zachary Uzupus, a 2001 graduate of Neshaminy High School testified that the term Redskin is racially offensive. (N.T. 640-641)

c. Suzanne Drake, a 25 year teacher at the Neshaminy High School testified that, to her, the term is absolutely derogatory, a racial pejorative, and a slur. (N.T. 612) She further offered that one cannot get around the Native American imagery in the high school and that the use of the word harms students by making them embarrassed, anxious, closed off from others and results in underperforming in the classroom. (N.T. 622)

d. Gillian McGoldrick, a 2015 graduate of the Neshaminy High School testified that she began on the side that believed the word Redskin was used for tradition as the logo was everywhere, but after listening to the views of other students and doing independent research, she was persuaded that the term is a slur. (N.T. 507) She offered that after forming the opinion that word is racist and discriminatory, she felt that she had been lied to regarding the word being a tradition. (N.T. 510-511)

e. Eishna Rangonatha, testified that she too came to a different conclusion after doing research and now sees the word as discriminatory. (N.T. 410-411)

f. Madison Buffardi, a 2015 graduate of the Neshaminy High School testified that when she was young, her Mother was an educator at a local nature preserve at which there were Lenni-Lenape individuals on site with whom she interacted. (N.T. 691-692) She indicated that the Native Americans with whom

she came in contact spoke of the word Redskin as being offensive and like the "N" word. (N.T. 693) She added that the tribe considered the word to be a slur and that she felt the same way. (N.T. 693, 728)

g. Timothy Cho, a 2016 graduate of the Neshaminy High School who is Asian testified that he felt he had a responsibility to represent voices that are not heard as he found the term racist in both context and in origin. (N.T. 654)

h. Tara Huber, an English teacher at the high school and advisor to the Playwicken, testified that to her, the term is a racist term. (N.T. 455) She offered that she had attended a conference in Reno, Nevada, at which there were approximately 5,000 Native Americans representing over 500 different tribes discussing the term Redskin. (N.T. 423) Huber offered that she formed the opinion that some Native Americans found the word offensive and hurtful and others would say the term is a term of honor. (N.T. 423)

i. Simon Moya-Smith, of the Oglala Lakota Nation, testified that since childhood, he has pushed against the use of Native Americans as mascots. (M.D. p. 13) In his opinion, the term Redskin is a racial slur harmful to the mental health and stability of children. (M.D. pp. 16, 56) He further offered that the use of the term is dehumanizing as it ridicules and objectifies Native Americans and should have no place in society as the term is akin to black face and is offensive. (M.D. pp. 20, 22, 30)

38. The PHRC's expert witness, Straurowsky filed a report that attempts to answer 3 questions: (1) does Native American sports imagery create a racially hostile environment for Native American children? (2) is the support of Native American imagery a form of institutional racism which promotes insensitivities to Native

Americans and things about them?; and (3) does Native American sports imagery prevent schools from complying with state education standards? (N.T. 285-290; S.D. 145)

39. Straurowsky testified that in her opinion, Native American sports imagery does have the capacity to create a racially hostile learning environment, promote insensitivity to Native Americans and things about them, and class rooms should be inclusive where every student has the opportunity to fulfill their promise without impediments. (N.T. 286-290)

40. Straurowsky also offered her opinion that stereotyping of Native Americans creates a level of insensitivity to Native Americans and fosters a prejudicial view of others where stereotyping of minority groups is acceptable. (N.T. 291, 305-306, 307-308)

41. Straurowsky observed that when a child only hears “bravery, strength, fighting spirit, and warrior spirit” as general stereotypes, they miss the view of Native Americans as empathetic, caring, concerning, devoted to family, and devoted to a different way of life. (305-306)

42. Straurowsky indicated that there are over 100 academic reports that agree that Native American sports imagery threatens the health and well being of Native American students, generally by lowering achievement levels and the self-esteem of Native American children. (N.T. 288, 310)

43. Straurowsky referenced a 1968 resolution by the National Congress of American Indians, which represents 260 tribes, and which called for the elimination of stereotyping of Native Americans in sports imagery. (N.T. 307)

44. Straurowsky also referenced a 2001 statement made by the U.S. Commission on Civil Rights on the Use of Native American Images and Nicknames as Sports Symbols which states the following;

> The U.S. Commission on Civil Rights calls for an end to the use of Native American images and team names by non-Native schools. The Commission deeply respects the rights of all Americans to freedom of expression under the First Amendment and in no way would attempt to prescribe how people can express themselves. However, the Commission believes that the use of Native American images and nicknames in school is insensitive and should be avoided. In addition, some Native American and civil rights advocates maintain that these mascots may violate anti-discrimination laws. These references, whether mascots and their performances, logos, or names, are disrespectful and offensive to American Indians and others who are offended by such stereotyping. They are particularly inappropriate and insensitive in light of the long history of forced assimilation that American Indian people have endured in this century.
>
> Since the civil rights movement of the 1960's many overtly derogatory symbols and images offensive to African-Americans have been eliminated. However, many secondary schools, post-secondary institutions, and a number of professional sports teams continue to use Native American nicknames and imagery. Since the 1970's, American Indian leaders and organizations have vigorously voiced their opposition to these mascots and team names because they mock and trivialize Native American religion and culture.
>
> It is particularly disturbing that Native American references are still to be found in educational institutions, whether elementary, secondary or post-secondary. Schools are places where diverse groups of people come together to learn not only the "Three Rs," but also how to interact respectfully with people from different cultures. The use of stereotypical images of Native Americans by educational institutions has the potential to create a racially hostile educational environment that may be intimidating to Indian students. American Indians have the lowest high school graduation rates in the nation and even lower college attendance and graduation rates. The perpetuation of harmful stereotypes may exacerbate these problems.
>
> The stereotyping of any racial, ethnic, religious or other groups when promoted by our public educational institutions, teach all students that stereotyping of minority groups is acceptable, a dangerous lesson in a diverse society. Schools have a responsibility to educate their students; they should not use their influence to perpetuate

misrepresentations of any culture or people. Children at the elementary and secondary level usually have no choice about which school they attend. Further, the assumption that a college student may freely choose another educational institution if she feels uncomfortable around Indian-based imagery is a false one. Many factors, from educational programs to financial aid to proximity to home, limit a college student's choices. It is particularly onerous if the student must also consider whether or not the institution is maintaining a racially hostile environment for Indian students.

Schools that continue to use Indian imagery and references claim that their use stimulates interest in Native American culture and honors Native Americans. These institutions have simply failed to listen to the Native groups, religious leaders, and civil rights organizations that oppose these symbols. These Indian-based symbols and team names are not accurate representations of Native Americans. Even those that purport to be positive are romantic stereotypes that give a distorted view of the past. These false portrayals prevent non-Native Americans from understanding the true historical and cultural experiences of American Indians. Sadly, they also encourage biases and prejudices that have a negative effect on contemporary Indian people. These references may encourage interest in mythical "Indians" created by the dominant culture, but they block genuine understanding of contemporary Native people as fellow Americans.

The Commission assumes that when Indian imagery was first adopted for sports mascots it was not to offend Native Americans. However, the use of the imagery and traditions, no matter how popular, should end when they are offensive. We applaud those who have been leading the fight to educate the public and the institutions that have voluntarily discontinued the use of insulting mascots. Dialogue and education are the roads to understanding. The use of American Indian mascots is not a trivial matter. The Commission has a firm understanding of the problem of poverty, education, housing, and health care that face many Native Americans. The fight to eliminate Indian nicknames and images In sports is only one front of the larger battle to eliminate obstacles that Confront American Indians. The elimination of Native American nicknames and images as sports mascots will benefit not only Native Americans, but all Americans. The elimination of stereotypes will make room for education about real Indian people, current Native American issues, and the rich variety of American Indian cultures in our country.

(N.T. 307-308; S.D. 106)

45. Straurowsky also referenced an NCAA policy that was adopted and unveiled in 2005 which prohibited member institutions from participating in NCAA-sanctioned

postseason events if, without the permission of a local tribe, the institution maintained a mascot, moniker, nickname or logo that was offensive to Native Americans. (N.T. 261)

46. In 2001, following the publication of the U.S. Commission on Civil Rights statement about use of Native American names and imagery in schools, several student editors of the Playwicken decided to raise the issue regarding Neshaminy High Schools name. (N.T. 626)

47. Since the 1930's, the Playwicken has been the Neshaminy High School's newspaper. (N.T. 455)

48. The Playwicken is both owned and funded by the School District and is a part of the school's academic program. (N.T. 539, 938)

49. With the approval of Principal McGee, an April 20, 2001 editorial written by student editor Zachary Uzupus entitled "Reading, Writing and Racism," was published. (N.T. 628-629, 640; C.E. 1)

50. A majority of the editorial staff considered the term Redskin to be a culturally insensitive antiquated racist slur. (N.T. 450 630-631)

51. By publishing the editorial, Playwicken editors were seeking to change the name of Neshaminy High School, to make others aware the name Redskins is offensive, and to ban publication of the term Redskin in the Playwicken. (N.T. 390-319, 393, 630—631, 640)

52. As a result of the editorial, the Redskins name did not change. (N.T. 400, 646-647)

53. Beginning in approximately September 2012, Donna Boyle, an individual of Cherokee and Choctaw ancestry and 30 year resident of the Neshaminy

community, began to complain to the Neshaminy Hight School Assistant Principal, Thomas Magdalinskas, that the term Redskin is a personally offensive racial slur. (N.T. 845, 847)

54. Donna Boyle is the Mother of two boys, one of which had previously graduated and the younger son, Keith Boyle, was presently attending Neshaminy High School. (N.T. 844, 875)

55. Donna Boyle informed the Assistant Principal that the imagery at the school was not of area Native Americans. (N.T. 847)

56. Donna Boyle related her view that the term related to a bloody history when whites were paid a bounty to exterminate Native Americans to obtain their land. (N.T. 846, 848)

57. Donna Boyle tried to convey the thought that other racial slurs would not be allowed and used the “N” word as an example. (N.T. 848)

58. No action was taken in response to Donna Boyle’s concerns. (N.T. 848)

59. Donna Boyle then focused her complaints on Principal McGee who told her that everyone in Neshaminy is a proud Redskin. (N.T. 849)

60. Donna Boyle told Dr. McGee that her family is not proud of the term. (N.T. 849)

61. As well as making verbal complaints, Donna Boyle frequently sent Dr. McGee psychological and educational research explaining how the use of the term Redskin has long-term harmful effects on self-esteem and achievement of Native Americans and also has long-term negative effects on non-Native Americans as well. (N.T. 850, 926)

62. Once again, no action was taken on Donna Boyle’s complaints. (N.T. 851)

63. Donna Boyle also expressed her complaints at School Board meetings and with School Board members outside of meetings. (N.T. 853, 855)

64. Donna Boyle sent both Dr. McGee and School Board members “hundreds” of emails attempting to explain the harm being suffered by her son and asking that action be taken to stop the harm she believed her son was enduring. (N.T. 855, 856, 874, 926)

65. Donna Boyle testified with respect to her observations of Keith’s behavior from mid-April 2015 through October 2015. (N.T. 878-890)

66. Donna Boyle indicated that Keith seemed anxious, his self-esteem was affected and he was known to leave school at times. (N.T. 879-880)

67. Dr. McGee testified that Donna Boyle had informed him that Keith left school on one occasion because of a photo shown at an assembly of students who had painted themselves red for a football game. (N.T. 933)

68. Donna Boyle observed that, to be at school only when necessary, Keith entered a work release program where he would be in school until 11 and then go to work. (N.T. 878)

69. The School District did not conduct a study regarding the effects Native American imagery had on students. (N.T. 859)

70. In September 2013, Donna Boyle filed a PHRC Complaint on behalf of her son, Keith. (S.D. 264)

71. The September 2013 Complaint alleged ancestry-based harassment of Keith as a result of the pervasive use of the word Redskin in the school environment. (S.D. 264)

72. The investigation of that Complaint resulted in a probable cause finding and the matter was scheduled for a Public Hearing but, for reasons unknown, the Complaint was voluntarily withdrawn just days before the Public Hearing was scheduled to begin. (N.T. 890, 937, 1347; S.D. 211, 257)

73. In 2014, Donna Boyle invited Principal McGee to attend a symposium at Drexel University at which a Native American speaker was scheduled to talk about rights of Native Americans and the use of the term Redskins. (N.T. 860, 930)

74. Dr. McGee attended the symposium and listened to the views of the speaker. (N.T. 860)

75. Dr. McGee made arrangements for Keith to receive a yearbook without the Redskins name on it. (N.T. 870, 1309)

76. For publication in the October 23, 2013, edition of the Playwicken, Dr. McGee approved two editorials: one supporting a ban on the use of the term Redskins and the other opposing such a ban. (N.T. 412; S.D. 216, 217)

77. Prior to the publication of the editorials, students became aware of and discussed Donna Boyle's concerns and again confirmed that the majority of the Playwicken's editorial staff considered the term Redskin to be offensive, so they decided, by a vote of 14 to 7, to write the editorial declaring that the Playwicken would no longer use the word Redskin in the newspaper. (N.T. 403, 655; S.D. 216)

78. The editorial written to counter the notice that there would be a ban on the use of the word Redskin, was written by an editor that, at the time, did not find the word offensive, however, later, after reflection and more research, changed her mind. (N.T. 405, 409, 410-411; S.D. 217)

79. The plan to ban the use of the term Redskin from the Playwicken was put on hold by the administration. (N.T. 412-413)

80. In an October 28, 2013 email from Dr. McGee to the Playwicken's advisor, Huber, Dr. McGee advised Huber that the ban was on hold until there could be further consideration on the impact of such a ban and whether the ban would infringe on the rights of other students. (N.T. 956, 958; S.D. 16)

81. While other slurs could still be redacted, the term Redskins could not be banned. (N.T. 414-415)

82. After the ban was placed on hold, student editors reached out to the Student Law Center, which resulted in the editors being provided free legal representation. (N.T. 956-959)

83. On November 21, 2013, a meeting was held at which Dr. McGee and the Assistant Principal, Thomas Magdalinskas, met with a group of Playwicken student editors, their parents and Huber. (N.T. 419, 523, 660, 960-961, 1012)

84. Approximately 50 people attended the meeting. (N.T. 961)

85. At the beginning of the meeting Dr. McGee gave the student editors a packet of over 50 pages outlining the administration's reasons why the administration held the view that the students did not have the right to make a decision to ban the use of the word Redskin. (N.T. 420, 522, 716; S.D. 32)

86. The meeting lasted approximately 2 hours, 1 hour and 45 minutes taken up by the administration's position and 15 minutes of the student's position. (N.T. 716)

87. Several of the student editors felt they were talked at, bullied, intimidated and harassed. (N.T. 421, 716)

88. During the meeting, there was discussion about concerns over negative reactions by students and the community, mainly on social media, about the attempt to ban the use of the word Redskin. (N.T. 524)

89. Following the meeting the hold on the ban stayed in place. (N.T. 422)

90. At the time of the meeting, the District had in place School Board policy No 547 which outlines how discrimination and harassment were to be handled. (S.D. 33)

91. Some student editors were of the opinion that the use of the word Redskins violated policy 547 because the word is inherently offensive and racist. (N.T. 524)

92. After the meeting, Dr. McGee was provided with a collection of internet posts that illustrated the kinds of negative reactions student editors had been receiving. (N.T. 582, 586, 971-972; S.D. 218)

93. One student editor testified that she felt threatened. (N.T. 711)

94. Another student, Madison Buffardi, through her parents, informed the superintendent that she became upset and embarrassed when a teacher yelled at her in front of other students saying that she was ungrateful and how dare she write articles criticizing the term Redskins. (N.T. 697, 699, 702)

95. The superintendent conveyed the complaint to Dr. McGee who then called the teacher in and instructed the teacher to apologize to the student. (N.T. 791, 1084-1085)

96. To address the concerns students editors had, on November 25, 2013, Dr. McGee went on the Neshaminy High School PA system to deliver a message that generally asked all students to face the controversy and debate the issues as adults. (N.T. 1022-1023; S.D. 221)

97. Subsequently, in November 2013, Playwicken editors published an approved editorial critical of the decision to put the ban on hold. (S.D. 266)

98. During the winter of 2014, the School Board began the process of revising School Board Policy No. 600 regarding school publications. (N.T. 1223-1224; S.D. 68)

99. There was a Policy Committee that had numerous public meetings at which students attended and were allowed to express their opposition. (N.T. 528)

100. In June 2014, the Board voted to approve the revised Policy 600. (S.D. 68)

101. The new policy declared that "the term 'Redskins' when referring to the School District mascot and when used to express the writer's viewpoint about the term shall not be construed as a racial or ethnic slur and is not intended by the Board of the School Directors as a racial or ethnic slur. Consequently, no student or school official shall censor or prohibit use of the term or of an article or editorial that has been submitted that contains the word." (S.D. 68)

102. Student editors read the new policy as no longer permitting them to treat the term Redskins as they would other racial slurs in other than news stories. (N.T. 414-415, 434-435; S.D. 68)

103. In May 2014, a letter to the editor was submitted by a student that contained the word Redskin. (N. T. 435; SD. 61)

104. Because they considered the word offensive, student editors attempted to redact the word. (N.T. 436)

105. Dr. McGee and then Superintendent Copeland would not allow the redaction and the student editors were informed to publish the letter in full. (N.T. 436, 576, 1042-1046)

106. The student editors did not run the letter but instead, without prior approval, ran an editor's note. (N.T 437, 578; S.D. 39)

107. Because there had not been prior review, Dr. McGee attempted to collect the published paper that contained the unapproved editor's note. (N.T. 1044)

108. After May 2014, numerous students were upset with student editors, newspapers were torn up in the hallways of Neshaminy High School and friendships were lost. (N.T. 442-443)

109. Back in 2010, the Neshaminy High School began to hold a male pageant called "Mr. Redskin." (N.T. 823)

110. The pageant was named by student council officers. (N.T. 823)

111. When the controversy began, students voted unanimously to keep the name Mr. Redskin. (N.T. 825)

112. In or around March or April 2016, an article about the Mr. Redskin pageant was submitted for publication by the Playwicken. (N.T. 666)

113. Two votes were taken on the question of whether to permit the word Redskin to be used of not. (N.T. 669, 1070; S.D. 228)

114. The first vote was 14-13 in favor of allowing the word. (N.T. 669, 1076)

115. The second vote was only of the editorial board of the Playwicken. (N.T. 669-672, 1076)

116. The second vote was 8 to 1 in favor of banning the word. (N.T. 672-673)

117. The editors decided to print the article online with the word redacted. (N.T. 443, 676 1078; S.D. 203)

118. The parents of the author of the article called Dr. McGee who took the article down off the internet and published the unredacted version. (N.T. 445, 1081)

119. Dr. McGee then directed that students could only upload articles to the school's website under Huber's direction. (N.T. 473)

120. While there is minimal instruction in the school district's curriculum regarding Native Americans, there is no instruction provided to students regarding the term Redskins. (N.T. 759-760, 766, 1243-1244)

121. Approximately 3 days after Donna Boyle voluntarily withdrew the Complaint she had earlier filed in 2013, the PHRC filed a two count Complaint against the District. (S.D. 212)

122. Count one alleges that the District engaged in the unlawful discriminatory practice of denying equal educational opportunities to both Native American students and non-Native American students. (S.D. 212)

123. Count two alleges that the use of the term Redskin subjects Neshaminy High School students to a hostile learning environment. (S.D. 212)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission (hereinafter "PHRC") has jurisdiction over the parties and the subject matter of this case.

2. The parties have fully complied with the procedural prerequisites to a Public Hearing.

3. Section 9(a) of the PHRA declares that "[t]he Commission upon its own initiative…may…make, sign and file…" a complaint.

4. The District is a public accommodation within the meaning of Sections 4(l) and 5(i) of the PHRA.

5. The PHRC has jurisdiction over public school districts.

6. The District's maintenance of the term Redskins and associated logos and imagery constitute acts that are continuing in nature.

7. The PHRC's failure to call a Native American student to testify results in an adverse inference being drawn that no Native American student would have offered testimony that they were in some way harmed.

8. The evidentiary rule on Hearsay is a fundamental rule of law.

9. Hearsay evidence that is properly objected to should not be admitted and any hearsay evidence admitted without objection may only be used if corroborated by other competent evidence found in the record.

10. The PHRC has established that Native American logos and imagery at the Neshaminy High School are harmful to non-Native American students as such logos and imagery create impermissible stereotypes.

11. The PHRC has broad discretion in fashioning a remedy.

OPINION

This case arises on a Complaint filed by the Pennsylvania Human Relations Commission, (hereinafter "PHRC"), against Neshaminy School District (hereinafter the "District"), on or about October 8, 2015, at PHRC Case Number 201501536. Generally, the PHRC Complaint contains two counts: (1) alleged denial of equal educational opportunity since 2006 because of race/ancestry, Native American by creating a hostile racial environment harmful to Native American children. Count One also alleges through a combination of paragraphs 37, 39, 41, 42 and 48 that non-Native American children are harmed by the District allowing non-Native American children to develop inappropriate stereotypical attitudes and beliefs about Native Americans; and (2) harassment of Native American children based on their race/ancestry, Native American.

On December 15, 2017, the PHRC filed an Amended Complaint which amplifies the earlier filed Complaint by incorporating the allegation that the District has denied equal educational opportunities to Native American children since at least 1950. Additionally, the December 15, 2017 Amended Complaint also specifies that certain actions that have occurred since 2001 have caused harm to Native American children. With respect to non-Native American children allegedly being harmed, the Amended Complaint merely renumbers paragraphs 37, 39, 41, 42 and 48 that are found in the initial Complaint.

The PHRC's claims of a denial of an equal educational opportunity by creating a hostile racial environment harmful to both Native American children and non-Native American children and harassment of Native American children allege violations of Section 5(i) of the Pennsylvania Human Relations Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§951 et seq. (hereinafter "PHRA").

Pennsylvania Human Relations Commission (hereinafter "PHRC") found probable cause to credit the allegations of discrimination. The PHRC and the parties attempted to eliminate the alleged unlawful practices through conference, conciliation and persuasion. The efforts were unsuccessful, and this case was approved for public hearing. The hearing was held on January 7 through 11, 2019, at the Bucks County Community College in Newtown, Pennsylvania, before Carl H. Summerson, Permanent Hearing Examiner. The state's interest in the PHRC's allegations was presented at the Public Hearing by PHRC Assistant Chief Counsels Lisa M. Knight, Esquire; Dana Prince, Esquire; Morgan Williams, Esquire; and Jelani Cooper, Esquire. Craig D. Ginsburg, Esquire and Joseph McAlee, Esquire represented the District. Post-Hearing briefs were submitted by the parties on July 1, 2019. Additionally, the parties jointly requested the opportunity to file reply briefs. This request was granted and reply briefs were submitted on August 15, 2019.

Section 5(i)(1) of the PHRA provides in relevant part:

> It shall be an unlawful discriminatory practice…for any person being the owner, lessee, proprietor, manager, superintendent, agent or employee of any public accommodation…to:
>
> (1) Refuse, withhold from, or deny to any person because of his race…ancestry…either directly or indirectly, any of the accommodations, advantages, facilities or privileges of such public accommodation…

In relevant part, Section 4(l) defines the term public accommodation as:

> …any accommodation … which is open to, accepts or solicits the patronage of the general public, including but not limited to …primary and secondary schools, high schools… and all educational institutions under the supervision of this Commonwealth…

In the District's post-hearing brief, a myriad of issues are presented. The first main issue raised is the District's assertion that the PHRC lacks jurisdiction over the District. The District generally submits that Section 5 of the PHRA only

applies to the District as an employer and that Section 5(i) does not apply to public school districts.

The District argues that it is not a "person" as defined by Section 4(a) of the PHRA. However, as indicated by both the PHRC's post-hearing brief and reply-brief, the case of *PHRC v. Chester School District*, 233 A.2d 290 (Pa. 1967) illustrates that the Pennsylvania Supreme Court has clearly held that the PHRC does have jurisdiction over school districts in the Commonwealth. Additionally, in the case of *Chestnut Hill College v. PHRC,* 158 A.3d 251 (Pa. Commw. Ct. 2017), the Commonwealth Court declared that "Public schools are places of public accommodation subject to the Commission's jurisdiction to protect students from racial discrimination." Finally, as noted in the PHRC's reply-brief, the District admitted that they are under the supervision of the Commonwealth. In order to secure the full enjoyment of public accommodations, the PHRA must be read liberally, with open minds attuned to the clear and strong purposes of the PHRA. Here, it is fundamental that the PHRC has jurisdiction over the District with respect to the allegations of the PHRC Complaint and Amended Complaint in this case.

The District next argues that any claim that is for a matter outside the 180 day statute of limitations period should be barred. The District asserts that the Complaint in this matter was filed on October 8, 2015 and that anything that is alleged to have occurred prior to April 11, 2015 should be barred as untimely.

The two components of the Complaint in this case both deal with the alleged effects of the use of the word Redskins and associated logos and imagery in the Neshaminy High School. As long as the word Redskins and associated logos and imagery can be shown to have been in place during the relevant 180

day period prior to the filing of the Complaint in this case, the "continuing violation" doctrine steps in to embrace the continual use of the word Redskins and associated logos and imagery that allegedly occurred outside the 180 day filing period. Here, it is clear that the use of the word Redskins and associated logos and imagery was not an isolated instance but instead, were continually used in the Neshaminy High School from the 1950s to the present. For this reason, the District's attempt to limit the applicable period to April 11, 2015 to October 8, 2015 is rejected.

In years past, on the one hand, there have been both voluntary efforts and legal challenges attempting to eliminate Native American names, logos and imagery from our public schools and universities because, to many, they are considered harmful to children and others. On the other hand, there are those who believe the use of Native American names, logos and imagery is respectful and an appropriate way to preserve dignity and respect for Native American culture. To be clear, this case presents a perfect example of the two sides to this ongoing debate where each side is steadfast and passionate in their convictions.

The evidence reveals that as far back as 1993, the National Congress of American Indians, (NCAI), an organization that is said to represent over 500 Native American tribes, adopted a resolution voicing opposition to the use of the word "Redskin" saying the word is disparaging to a substantial portion of Native Americans. The PHRC's expert Dr. Staurowsky offered that NCAI has continually called for the elimination of stereotyping Native Americans in sport imagery. (N.T. 307) Then in 2005, the NCAA declared that any collegiate sports team which allowed the use of Native American mascots and nicknames would no longer be

allowed to participate in postseason tournaments. (N.T. 261) The NCAA deemed Native American nicknames to be hostile and abusive towards either one's race and ethnicity or national origin.

Then in 2001, as fully set forth in the above Findings of Fact, the U.S. Commission on Civil Rights issued a statement that listed several reasons why Native American names, logos and imagery should not be used. The U.S. Commission on Civil Rights called for an end of the use of Native American names and imagery because they are disrespectful and offensive to Native Americans and others. The statement expressed deep concern that inaccurate representations of Native Americans is a distorted view of the past and stereotypes Native Americans which encourage biases and prejudice towards a minority group. Unfortunately, seeking voluntary curtailment of the use of Native American names, logos and imagery was not wholly successful.

In the NFL, since the 1930's, the Washington D.C. professional football team has used the name Redskins as the name of the team. Legal attempts have been mounted seeking to eliminate the Washington football team's use of the term Redskins. In the case of *Harjo v. Pro-Football, Inc*., No. 21,069, 1999 W.L. 329721 (P.T.Q. 1999) a court initially ruled that under the federal trademark registration program, (the Lanham Act), the issuance of trademarks to the Washington team for the word "Redskins" must be cancelled because the term Redskins may disparage approximately 30% of Native Americans and bring them into contempt or disrepute. Subsequently however, another appellate court ruled that the suit had not been brought soon enough. The legal theory of "latches" was used to set aside the finding that the term Redskins should not be used. In that

case, the appellate court also held that the finding of disparagement was unsubstantiated.

In the case of *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439 (E.D. Va., 2015), the court reviewed a lower court order that cancelled six trademark registrations presented by the Washington football team on the grounds that at the time of the registration, the trademarks may disparage a substantial composite of Native Americans and bring them into contempt or disrepute. (N.T. 106) In this case, the court recognized that numerous dictionaries state that the term Redskin is an offensive term. Additionally, the court indicated that literary, scholarly and media sources as well as statements from individuals and Native American groups help establish the idea that the term Redskin "may disparage" a substantial composite of Native Americans. With respect to dictionary definitions, the court did recognize that there are alternate non-vulgar definitions for the term Redskin. The case listed 11 dictionary definitions which in part define the term Redskin as offensive or contemptuous and 25 examples of scholarly, literary and media references that weigh in favor of finding the term Redskin as offensive. Additionally, this case referenced NCAI saying that NCAI represents a majority of Native Americans in federally recognized tribes and is the best organization to consult to discern an understanding that it is the Native American's position that the word Redskin is a racial slur. This case further references an earlier 1993 NCAI resolution which provides in pertinent part that "the term Redskins is not and has never been one of honor or respect, but instead it has always been and continues to be a pejorative, derogatory, denigrating, offensive, scandalous,

contemptuous, disrespectful, disparaging and racist designation for Native Americans." *Id* at 483.

Two additional trademark cases show that words alone can disparage an entire group. These cases are *In re Heeb Media,, LLC,* 89 U.S.P.Q. 2d (BNA) 1071 (T.T.A.B. 2008) and *In re Lebanese Arak Corp.,* 94 U.S.P.Q. 2d (BNA) 1215 (T.T.A.B. 2009). The *In re Heeb* case examined whether the word "Heeb" may disparage Jews, and *In re Lebanese Arak* asked whether the work "Khoran" may disparage the beliefs of Muslims. In both of these cases, the TTAB ruled that the words could not be registered as trademarks because the words are offensive.

There have been other efforts to eliminate Native American names, logos and imagery from use by sports teams. Suits have been attempted under Title VI, group libel suits have been brought, and there have been cases attempting to show there has been an intentional infliction of emotional distress.

Here, in this case, the PHRC brought the action under the PHRA's public accommodation provision. In this regard, two separate allegations have been articulated.

Although listed second, this opinion begins with an analysis of the allegation that the use of the term Redskins violates Section 5(i) of the PHRA by creating an intimidating, hostile and offensive educational environment on the basis of race/ancestry, Native American. In the PHRC post-hearing brief, the PHRC lists the requisite elements for establishing a claim of hostile environment as: (1) an employee suffered intentional discrimination because of the individual's protected status; (2) the discrimination was pervasive and regular; (3) the discrimination

detrimentally affected the individual; (4) the discrimination would detrimentally affect a reasonable person of the same protected class; and (5) respondeat superior liability. *Citing Hoy v. Angelone*, 691 A.2d 476 (Pa. Super. Ct. 1997). To modify these recommended *prima facie* factors to better apply to the present circumstance, the requisite *prima facie* showing would be: (1) a Native American student or students suffered harm because of their race/ancestry; (2) the cause of the harm was pervasive; (3) the harm detrimentally affected the Native American student or students; (4) the harm would detrimentally affect a reasonable person who is also a Native American; and (5) that the District can be held liable under the respondeat superior theory.

One key factor that must be shown in an alleged harassment claim is that someone was in fact harassed. Here, there is a dispute with respect to the value of the testimony of Donna Boyle as it relates to her son ,Keith Boyle, and his reactions to the alleged source of the alleged harassment, the word Redskin and associated logos and imagery. The District seeks to exclude Donna Boyle's testimony about her son's reactions as hearsay while the PHRC's reply brief, in effect, suggests that the PHRC is not bound by the strict rules of evidence and if the evidence is relevant and reasonably probative it may be received.

The District correctly observes that the rule regarding hearsay is a fundamental rule and as such the following rule applies in an administrative hearing: "Hearsay evidence, properly objected to, is not competent evidence to support a finding… Hearsay evidence admitted without objection, will be given its natural probative effect and may support a finding …if it is corroborated by any competent evidence in the record, but a finding of fact based solely on hearsay will

not stand." *Citing Walker v. Unemployment Compensation Board of Review*, 367 A.2d 366 (Pa. Cmwlth. Ct. 1975).

During the Public Hearing, the District objected to Donna Boyle's testimony that Keith became uncomfortable and angry at school when a picture was put up at an assembly depicting kids in the student section at a football game with their chest painted, their faces painted and feathers in their hair. (N.T. 879) Donna Boyle then offered that this impacted Keith's self-esteem. (N.T. 880) Finally, Donna Boyle declared that Keith seemed to be having some anxiety. (N.T. 879).

The District's post-hearing brief argues that Donna Boyle's assertions regarding Keith had to be the product of out-of-hearing statements that Keith made to her and were therefore hearsay statements offered to prove the truth of the claim that Keith was harmed. The District further argues that one cannot tell whether perhaps Keith exaggerated regarding what happened to him when he spoke with his Mother. The District notes that the evidence reveals that on occasion, Keith left school without telling his Mother suggesting that Keith did not tell his Mother everything.

The District also submits that Donna Boyle's testimony that Keith suffered harm is neither reliable nor corroborated. In the District's opinion, Donna Boyle was on a mission to present her opinions about the harms caused by the word Redskin and associated logos and imagery and may well have exaggerated or misstated what happened to her son.

Frankly, what could have easily cleared up any and all question about Keith Boyle's experiences would have been his testimony. It is unclear why he was not called as a witness, but in fact, he was not. One would normally expect that he

would have testified and because he did not, an adverse inference is appropriate under the circumstances. The adverse inference to be drawn here is that had Keith Boyle testified he would not have offered testimony that he was harmed in any way. This point is extraordinarily damaging to the effort to show there was harm to a Native American student or students.

Similarly, the testimony of Suzanne Drake, an English Teacher at the Neshaminy High School outlined her opinion that the environment at the school was very tense after a vote to ban to term Redskin. (N.T. 612) She also testified that, in her opinion, the term Redskin is a slur that harms students by making them feel embarrassed, anxious, closed off from others and leads to a student underperforming in class. (N.T. 622)

Once again, there must be a showing that a Native American student or students were harmed. The evidence in this case identified two additional Native American students at the high school, neither of which were called to testify. Once again, an adverse inference is taken that had they been called, neither Native American student would have offered testimony that they were harmed in some way. Apparently, there were no other known Native American students at the high school as none were identified and called as witnesses. In the U.S. Supreme Court case of *Harris v. Forklift Systems, Inc*., 114 S.Ct. 367 (1993), the court held that an objectively hostile or abusive environment requires both that a reasonable person would find an environment abusive or hostile and there also must be a showing that a victim subjectively perceived that the environment was abusive. Here, no Native American victim testified leaving only speculation on whether Native American students were harmed. Dr. Straurowsky did offer that when the

term Redskins is used, you can assume harm has occurred, (N.T. 334) however, with the Harassment component of this case, no such assumption should be made.

In the case of *Bailey v. Binyon,* 583 F. Supp. 923 (N.D. Ill. 1984), the court did hold that the "N" word is discrimination "*per se."* However, the word Redskins is very different from the "N" word. In almost any context, the "N" word is a racial slur, while the term Redskins is associated with both positive and negative connotations. Accordingly, Dr. Straurowsky's idea that harm can be assumed is not accepted.

Having failed to present sufficient evidence that a Native American student or students were harmed by the use of the word Redskin and the associated logos and imagery, this portion of the PHRC Complaint should be dismissed.

Although dismissal of this portion of the Complaint may be appropriate under the circumstances presented here, other changed circumstances might result in a different conclusion. If at some point, Native American students in the District come forward with complaints about the use of the term Redskins and the associated logos and imagery and they can offer admissible relevant testimony on the issues, a finding of harassment could be established. The District would be well advised to take preventative measures to ensure this does not ever happen.

At this point, we turn to the remaining component of the PHRC Complaint: that the educational environment at the Neshaminy High School was in some way harmful to both Native American and non-Native American students.

The District asks that the testimony and expert opinion of Dr. Straurowsky not be given any weight. Prior to the Public Hearing, the District's Motion in Limine

on this issue was granted in part and denied in part. The ruling on the Motion in Limine held that Dr. Straurowsky's testimony would not be accepted with respect to the impact the use of the word Redskins and associated logos and imagery had on students in the District, but would be accepted regarding the impact the name Redskins and associated logos and imagery might have in an educational setting on both Native American students and non-Native American students.

The District argues that Dr. Straurowsky is not qualified to render opinions on the issues of this case. The District argues that Dr. Straurowsky lacks the education, training and experience she would need to render an opinion in this case and that, in any event, Dr. Straurowsky's opinion was premised wholly on inadmissible hearsay because her testimony is merely a conduit for the opinions of others.

The PHRC reply-brief notes that at the time of the Public Hearing, the District did not object to Dr. Straurowsky's acceptance as an expert. Further, a full review of the record reveals that the record does contain sufficient information regarding Dr. Straurowsky's education, training and experience to make it proper to have accepted her testimony and opinion as an expert.

On the question of whether Dr. Straurowsky merely repeated the opinions of others, the record shows that she did conduct extensive research, wrote pertinent articles and taught courses in discrimination in an educational setting. One particular course she taught dealt specifically with the issues related to Native American mascots.

Accordingly, the Districts arguments are once again rejected and the testimony of Dr. Straurowsky was properly accepted as expert testimony and opinion.

Once again, we are cognizant of the simple fact that not a single Native American student was called to testify. Instead, the District posed a similar question to numerous student witnesses: Did you ever witness any intentional discrimination of any Native American student? The answer was always "no." Accordingly, we find that there is insufficient evidence that Native American students experienced educational harm.

We therefore turn to whether non-Native American students were harmed in some way. We note that the District's focus on this question is on the editors of the Playwicken because of varied negative reactions they received to the effort to ban the word Redskins from the newspaper. The educational harm found in this case does not focus on the reactions of Playwicken editorial staff students who experienced negative reactions, but instead on those students who, because of the stereotypical environment, displayed their insensitivities.

Under the circumstances present in this case, the educational environment harm is found in the fundamental concept that schools have a fiduciary duty owed to its students to avoid social harm. Schools have a responsibility to ensure an atmosphere of respect and sensitivity for all who attend and participate in the school and to teach students how to interact respectfully with other cultures. Indeed. Schools are charged with the academic and moral education of children. *See Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986) and Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). Here, the use of the name

Redskins and the associated logos and imagery are one-dimensional stereotypes that consciously and subconsciously influence how people act and feel towards Native Americans. Further, the name Redskins and the associated logos and imagery bear the imprimatur of the District and the Neshaminy High School.

It is a fundamental concept that the use of stereotypes has the potential to lead to discrimination and even violence. Stereotyping of any racial, ethnic, religious or other group, when promoted by our public educational institutions, teaches students who have little to no contact with Native Americans that stereotyping of minority groups is acceptable. Clearly, this is a dangerous lesson in our diverse society. As the U.S. Commission on Civil Rights recognized, schools have the responsibility to educate students, not use the school's influence to perpetuate misrepresentations of any culture or people.

The District's expert, Andrew Billeudeaux, observed that when names and logos and imagery of Native Americans are used in a school, they should be as authentic, appropriate and accurate as possible. (N.T. 107-108, 120) When a Native American name and logos and imagery are used, the use must be done carefully with cultural sensitivity and come with specific standards of education that accounts for the diversity between Native American tribes. (N.T. 108, 123) Billeudeaux testified that the imagery used by the Nashaminy High School is a warrior image. (N.T. 101, 114, 133, 138, 144) In fact, Billeudeaux testified that the current warrior image used in the school is of a plains warrior not a local tribal image. (N.T. 213) On this point, he testified that he would recommend changing that image because it is misaligned and not regionally specific. (N.T. 213-214, 215, 217, 226-227) He offered that Native American symbols are often sacred

traditions. (N.T. 134) He further submitted that the decisions of how and when to use a Native American name and associated logos and imagery should be made with sufficient information so that the name and associated logos and imagery are given the proper dignity and respect and displayed in a historically accurate manner. He testified that it is possible that in the right context, the term Redskins may be offensive to Native Americans. (N.T. 164) He testified that it is culturally insensitive to treat Native Americans as monolithic and culturally ignorant not to be able to correctly identify the imagery being used. (N.T. 218) In effect, Billeudeaux confirmed that the District's benign use of the name Redskin and associated logos and imagery should be changed.

Dr. Straurowsky's testimony further illuminated the issue with the Neshaminy High School name and associated logos and imagery. She offered that sports imagery that is used is generally generic like that used in the Neshaminy High School. Dr. Straurowsky indicated that when imagery does not attempt to portray a particular tribe or individual region, the imagery results in the portrayal of Native Americans in monolithic fighting terms that are frozen in time, such as bravery, strength, fighting spirit and warrior spirit. (N.T. 306) As such, such imagery imparts negative stereotypical attitudes and beliefs about Native Americans. (N.T. 304-305) Using only warrior imagery passes over other important traits of Native Americans such as empathy, care, concern, devotion to family or devotion to a way of life. (N.T. 306) Contributions, perspectives and the struggles of Native Americans in this age are overshadowed by stereotypes and students are deceived about the true nature of Native Americans. Cultural

diversity in physical features, customs and language are ignored when logos and imagery promote misconceptions of Native Americans.

Allowing students to wear feathers at football games is a primary example of how the District allows a stereotype to mock and denigrate a sacred symbol corroborating the idea that Native American logos and imagery are not used to honor Native Americans but, instead, to inappropriately portray them as a spectacle and thereby perpetuate a racial stereotype. (N.T. 215, 615, 654, 664) Both Billeudeaux and another witness called by the District, Mark Yancey, agreed that the wearing of feathers by students in the District is similar to stealing valor by wearing unearned military medals. (N.T. 215; Y.D. 142-143) At the Neshaminy High School, the sacred traditions associated with feathers are mimicked not for ceremonial or religious reasons but for entertainment. This inappropriate use of a sacred symbol can result in the normalization of culturally insensitive behaviors.

The District also permits the sale of clothing items at the Neshaminy High School store where students work. Many items sold have the term Redskins on them and are worn to school.

Another factor that leads to the conclusion that many non-Native American students were not given the educational tools that would prevent them from consciously or unconsciously concluding that it was acceptable to discriminate against Native Americans. This factor is the simple fact that the District never conducted a study to ascertain the effects the use of the name Redskins and associated logos and imagery had on students. (N.T. 400) The testimony of one of the then School Board members, Steve Pirritano, confirmed that no study had been done regarding whether the use of the name, logos and imagery had

negative effects on students. (N.T. 1243) Without such a study, we look at the totality of the circumstances to determine whether students were harmed by forming the idea that stereotyping of Native Americans is acceptable.

Numerous witnesses confirmed that in the district, there is no meaningful instruction about Native Americans and the school's name and associated logos and imagery given to impressionable students to better enable them to avoid the idea that it is alright to tolerate racism and to form the idea that discrimination is acceptable. David Heaney, a 31 year social studies teacher at the Neshaminy High School offered that there has been no instruction regarding the term Redskins or how the school adopted the name. (N.T. 759-760). Past students Gillian McGoldrick, Timothy Cho and Randy Wehrs collectively confirmed that there was no Native American history or culture classes or any information provided regarding what the painting of the body signifies. (N.T. 504, 634, 680) Even the principal of the Neshaminy High School, Dr. McGee, relayed that there was no training provided regarding the origin of the term Redskins or tribes that paint themselves red. (N.T. 1295) Finally, then Superintendent Joseph Jones agreed that neither teachers nor students receive training on the word Redskins. The lack of training in the face of extreme controversy over the meaning of the term Redskins leaves students desensitized and wholly unprepared to understand the negative effects the name and imagery used around them has on them. Several past students testified that after independent research and more in-depth information their views on the term Redskins changed dramatically. They went from thinking the term Redskins was not offensive to an awareness of just how offensive the term actually is to so many. One student, Jessica McClelland,

testified that when she used the term when she was a student at Neshaminy High School, it was done without an awareness that the term is offensive. (N.T. 1160) She termed her view and actions when in school as “ignorant discrimination.” (N.T. 1166) Now, she is aware that the term Redskins can be a racial slur and it is wrong to appropriate another’s culture. (N.T. 1167) Another student, Gillian McGoldrick, who had been on the side of the use of the word Redskins as a tradition changed her view after hearing the views of other students and conducting independent research. (N.T. 507) She testified that she felt that she had been lied to about the word Redskins. (N.T. 511)

The final factor in the ultimate conclusion that non-Native Americans were harmed by being surrounded by negative stereotypes which can cause cultural insensitive behavior are the negative experiences testified to by numerous Playwicken staff members after speaking out against the term Redskins. Several extremely well written and thoughtful editorials attempted to convey the opinion that the name Redskins is a slur and discriminatory and should not be used. Non-Native American student reactions reveal just how uninformed these students were about their own insensitivity towards a distinct group, many of whom consider the term discriminatory, and their tolerance of what many find to be racism. For the sake of the name of school athletics, cultures are demeaned, insulted, harassed and misrepresented, however, non-Native Americans were unprepared to even consider this as a possibility. Instead, newspapers were torn up, members of the Playwicken staff felt intimidated, and even threatened by the reactions of other students. One student testified that she resigned from the Playwicken because the bullying got to be too much. (N.T. 1158) Another Playwicken staff member

testified that he was cornered by a number of the high school's football players and called derogatory names. (N.T. 640-641) Yet another Playwicken staff member testified that, because of negative student reactions, she contemplated withdrawing from all school activities and there were times when she did not want to go to school. (N.T. 532) This student testified that she was always anxious, lost sleep and had trouble concentrating. (N.T. 534) She offered that, for her, the Playwicken offices were a safe haven from negative student reactions. (N.T. 534) Additionally, this student delivered a number of social media postings to Dr. McGee. (N.T. 586) Yet another student testified that the editorials created tension and a distance grew between him and several friends. (N.T. 659) This student offered that there were arguments and occasional aggression and that he lost friends over the issues. (N.T. 659, 661, 684)

Looking at the entirety of the circumstances of this case, we conclude that the District, aware of the existence of numerous stereotypes of Native Americans displayed at the Neshaminy High School, failed to provide non-Native American students with the information necessary to prevent the formation of the idea that specifically stereotyping Native Americans is acceptable and, by extension, generally, the idea that stereotyping other minorities is also acceptable. Such a learning environment is unacceptable.

Of course, this aspect of the case is quite novel. To be held liable, the District must be found to have violated the PHRA. On this point, Section 12(a) of the PHRA sets forth the following guiding principle: "The provisions of this act shall be construed liberally for the accomplishment of the purposes thereof…"

The harm in this case results from the District's use of stereotypical Native American logos and imagery. The language of Section 5(i)(1) of the PHRA appears to be limited to instances where advantages and privileges of a public accommodation are denied because of "his" race or ancestry. However, by operation of the mandate of the PHRA's section 12(a), we find that the harm to non-Native American students amounts to prohibited discrimination.

For example, in the context of retaliation cases, normally, to violate the PHRA, an claim of retaliation must allege that a Complainant either opposed unlawful discrimination or participated by filing a complaint, testifying or assisted, in any manner, in any investigation, proceeding or hearing under the PHRA. (See Section 5(d) of the PHRA).

However, courts have considered whether requesting an accommodation for a disability can be the protected activity that activates the basis for an alleged retaliation claim. In the case of *Shellenberger v. Summit Bancorp,* 318 F3d 183 (3rd Cir. 2003), the court held that requesting an accommodation for a disability is protected activity that implicates the retaliation provisions of the ADA. The court held that the right to request an accommodation in good faith is no less a guarantee than the right to file a complaint. The court in *Shellenberger* declared "it would seem anomalous…to think congress intended no retaliation protection for employees who request a reasonable accommodation unless they file a formal charge. This would leave employees unprotected if an employer granted the accommodation and shortly thereafter terminated the employee in retaliation." *Citing Soileau v. Guilford of Maine Inc.*, 105 F.3d 12 (1st Cir. 1997).

Like in *Shellenberger*, the court in *Sulima v. Tobyhanna Army Depot*, 602 F.3d 177 (3rd Cir. 2010) declared that prohibited discrimination includes retaliation against an employee that has requested an accommodation.

In the PHRC case of *Myers v. The Brethrean Home Community*, PHRC Case No. 200505802, (Final Order issued in 2015), both *Shellenberger* and *Sulima* were cited for the general principal that an employee who has requested an accommodation for a disability is protected from retaliation for having made such a request.

Technically, the language of the PHRA does not specifically protect those who request an accommodation from acts of retaliation, but, the use of Section 12(a)'s liberal construction mandate reaches out to cover what at face value does not appear to be covered.

Another useful analogy deals with cases found in the housing area. When testers are used, those testers are not really interested in the property being tested, however, when disparity in treatment is uncovered, the PHRC can bring an action to remedy the harm that was revealed. In the present case, the harm uncovered is harm to non-Native American students. The act of stereotyping Native Americans results in harm to non-Native American students that, with a liberal application, is covered by the PHRA.

In housing, non-targeted bystanders have been found to have a cause of action. In 1972, the U.S. Supreme Court case of *Trafficante v. Metro Life Ins. Co*., 409 U.S. 205 (1972), held that a white tenant of an apartment unit within an apartment complex had standing to bring an action for the discrimination the landlord was taking against black prospective rental applicants. *Trafficante*

declared that the white non-targeted Complainant had standing to sue for the loss of interracial associations as a result of the discriminatory actions of the landlord who targeted black applicants.

Trafficante is a prime example of liberally allowing a cause of action for injuries to a non-targeted group. While the lower court had narrowly ruled that the white tenant did not have standing because he was not the object of the discrimination and therefore not within the "class of persons" entitled to sue, the supreme court held that the term "aggrieved persons" should be construed broadly. Rather than limit standing to those directly victimized by racial discrimination, standing was liberally broadened. Those bystanders who allege that racism affected the quality of their lives now can also bring suit. In *Trafficante*, the court observed that the entire community was affected by the landlord's racism. Both blacks and whites suffered an injury-in-fact even though whites were not the targets of the landlord's discrimination.

Cases subsequent to *Trafficante* have applied the same rationale for organizations. In *Wheatley Hights Neighborhool Coalition v. Henna Resale Co.*, 81 FRD 641 (S.D.N.Y. 1979), white members of an association had standing to challenge the discriminatory practices of steering of minority perspective home buyers to particular neighborhoods.

In the present case, the District's use of stereotypical logos and imagery of Native Americans impacts everyone. The non-Native American student bystanders are impacted by the District's discrimination against Native Americans in that the non-Native American students are denied a proper educational environment in a public accommodation. By allowing stereotyped images and

logos of Native Americans to be used for school spirit, the District is, in effect, saying they are acceptable. While the logos and imagery are not part of the educational curriculum, students are sill, in effect, taught that stereotyping of another group is acceptable.

In the employment area, some courts have given non-minority bystanders standing to challenge the effects of discrimination that targets minorities. Indeed, many courts have adopted an extremely broad approach. In *Waters v. Heublein*, 547 F.2d 466 (9th Cir. 1976), white bystanders were given standing to sue an employer for discriminating against women, blacks and Spanish surnamed individuals. The non-minority bystanders had the protectible interest of having an opportunity to interact with people of other races. Similarly, in *Clayton v. White Hall School District*, 875 F.2d 676 (8th Cir. 1989), standing was given to a white school cafeteria worker to sue her employer when the employer denied a black co-worker's right to enroll their child in the school. The court acknowledged the intangible benefit of being able to work in an environment free from racial discrimination.

With claims of sexual harassment, those who merely witness what they believe to be sexual harassment in the workplace have standing to bring suit for a bystander injury. *See Leibovitz v. New York City Transit Auth*. 4 F. Supp. 2d 144 (E.D. N.Y. 1979). The key question is whether sexual conduct in the workplace unreasonably interferes with an individual's work performance or creates an intimidating, hostile or offensive working environment. Sexual harassment occurs under many different circumstances, but for the principle applicable here, the victim of the sexual harassment does not have to be the person harassed, but

could be anyone affected by the offensive conduct. Civil rights statutes are construed liberally to support a broad prohibition against discrimination, regardless of who is the direct target of the acts of discrimination. Indeed, discriminatory conduct can reach groups of people and not simply the individual who is the target of the animus.

Certainly, the PHRC should be broad enough to cover bystander individuals who are injured but were not the target of the acts of discrimination. Accordingly, we find that the District is liable for a violation of Section 5(i)(1) of the PHRA.

Therefore, we move to consideration of an appropriate remedy.

The PHRC has broad equitable power to fashion relief. Section 9(f) of the PHRA provides in pertinent part:

> If, upon all the evidence at the hearing, the Commission shall find that a respondent has engaged in or is engaging in any unlawful discriminatory practice as defined in this Act, the Commission shall state its finding of fact, and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action, including, but not limited to reimbursement of certifiable travel expenses in matters involving the complaint, hiring, reinstatement…with or without back pay…and any other verifiable, reasonable out-of-pocket expenses caused by such unlawful discriminatory practice…as, in the judgment of the Commission, will effectuate the purposes of this act, and including a requirement for report of the manner of compliance.

In *Murphy v. Cmwlth. Pa. Human Relations Commission*, 506 Pa./ 549, 486 A. 2d 388 (1985), the Pennsylvania Supreme Court commented on the extent of the Commission's power by stating; "We have consistently held that the Commissioners, when fashioning an award, have broad discretion and their actions are entitled to deference by a reviewing court." The expertise of the Commission in fashioning a

remedy is not to be lightly regarded. The only limitation upon the Commission's authority is that its award may not seek to achieve ends other than the stated purposes of the Act. *Consolidated Rail Corp. v. PHRC*, 136 Pa. Commonwealth Ct. 147, 152 A.2d 702, 708 (1990).

The function of the remedy in employment discrimination is twofold. First, the remedy must ensure that the Commonwealth's interest in eradicating unlawful discrimination is vindicated. Vindication of this interest is non-discretionary. It necessitates entry of an order, injunctive in nature, which required the Respondent to cease and desist from engaging in unlawful discriminatory practices.

The second purpose of any remedy focuses on entitlement to individual relief. It's purpose is not to punish a Respondent, but simply to make a Complainant whole by returning the Complainant to the position in which he would have been, absent the discriminatory practice. See *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 10 FEP Cases 1181 (1975); *PHRC v. Alto-Reste Park Cemetery Association*., 306 A.2d 881 (Pa. S. Ct. 1973). The remedy should also discourage future discrimination. *Williamsburg Community School District v. PHRC*, 99 Pa. Commonwealth Ct. 206, 512 A.2d 1339 (1986).

In the PHRC's post-hearing brief, the PHRC generally submits that one of the things the District should be ordered to do is to cease using the term Redskins. However, we are mindful that there are various views held about the term Redskins, both within Native American tribes and with non-Native Americans.

There are those on one side of the controversy who hold the opinion that the term Redskins is always a racial slur and there are others who argue, depending on the context, the meaning of the term Redskins can be positive. Both Billeudeaux and

Yancy, members of NAGA, put forth the idea that the way to handle the term is to "educate not eradicate."

After thoughtful consideration, at this time, the name Redskins may remain. Once non-Native American students have been properly educated about both the negative attributes associated with the term and the positive reasons to retain the term, the chance of a student learning to appreciate a racial stereotype should be significantly lessened. Education can better equip students to begin to understand that there are differences among Native Americans about the term Redskins and what these differences are.

With such a longstanding history and as presently used at Neshaminy High School, standing alone, the term Redskins has been shown to evoke feelings of loyalty in many and does create a sense of unity with which fans of the sports teams identify. It is the stereotypical logos and imagery that pose the problem. Additionally, when a Native American custom, tradition or cultural concept is wrongly appropriated and allowed to translate into behavior that, in effect, mimics and mocks sacred Native American traditions for the sake of sport entertainment, this must cease. Culturally insensitive behaviors must not be allowed to be normalized. The continuation of such behaviors genuinely promotes racial stereotyping, something that, without question, runs counter to our educational ideals and social morals.

Allowing the commonly used term Redskins at this time may also avoid the opposite effect on students who may otherwise strongly resist change. If the term were to be suddenly removed without fully educating everyone why, this may well result in a negative backlash that might just solidify the misguided idea that stereotyping is acceptable. The best way to approach the issue is with proper education.

Also, as NAGA would urge, allowing the continued use of the term Redskins would further the preservation of accurate education of non-Native American students about the widely varied cultures of the many different tribes. Yancy, a NAGA member offered that eradicating the term would help erase Native Americans from the fabric of America. Billeudeaux testified that along with being understood and represented, Native Americans want to maintain a dignified and respected footprint in society in such a way as to secure the meaning of their culture and identity. He would say that having a footprint creates a greater awareness that there are Native Americans among the general public.

A remedy for the limited finding in this case can possibly be accomplished by both the removal of Native American logos and imagery that depict negative stereotypes and the exposure of non-Native American students to a thoughtful and meaningful educational experience.

Such an educational experience should, at a minimum, cover the fundamental concept that before Europeans arrived in the western hemisphere, there were indigenous people living in literally hundreds of tribes who were residents of their own nations. Further, such education should include the fact that these indigenous tribes were not homogenous and monolithic but were instead living in widely varied tribes with separate languages, cultures, customs, and religions. Next, such education should encompass the general erosion of Native American tribes through the clashing between various Native Americans and the Europeans. On this point, the educational experience should cover the theory of the genesis of the term Redskins as the name is said to have been used in several U.S. territories in a highly pejorative manner to refer

to the bounty paid to whites for the body parts of Native Americans used as proof of a killing of a Native American.

The educational experience must cover the information Billeudeaux shared about numerous tribes who do paint themselves red for varied ceremonial and spiritual purposes. Such tribes are said to call themselves Redskins.

To assist the District with the educational requirement, it is recommended that the District attempt to enlist the assistance of the Playwicken student writers to bring to life a better understanding of varies issues. In evidence is this case are outstanding editorials written by students as they sought to ban the use of the term Redskins. Now the Playwicken may well be useful to broaden the range of understanding the issues that surround the term.

Additionally, there is evidence that Dr. McGee attended a symposium at Drexel University that dealt with the use of the term Redskins. The portion of the symposium that covered Native American issues was presented by a Native American, Susan Shaun Harjo, a woman who was one of several Native Americans who brought the law suit against the Washington Redskins football team seeking to end the trademark protection of the term. Perhaps, either she or someone like her can assist the District to bring about a meaningful educational experience.

Billeudeaux testified that most of the logos and imagery at Neshaminy High School are not regionally appropriate and are historically misaligned and should be changed. He identified some imagery as stereotypical of Native Americans as warriors. Here, the District must cease to be the vehicle that supports and displays racial stereotypes. Native Americans are not limited to the distorted picture that their role is

as a warriors which, in effect, denies the strength, order and beauty found in the variety of cultures associated with many different tribes.

Each of the logos and imagery found at Neshaminy High School must be reviewed independently to determine whether the logo or imagery depicts a negative stereotype.

In the case of *Crosby v. Holsinger,* 852 F.2d 801 (4th Cir. 1988), a cartoon symbol that was present in a school was appropriately removed after it was found to be discriminatory. The symbol was of "Johnny Reb" and African American students were offended and lodged complaints. This case cited the U.S. Supreme Court case of *Timber v. Des Moines Independent Community School District,* 393 U.S. 503 (1969), which held that school officials need not sponsor or promote all student speech, especially when the public might reasonably perceive the logo bears the imprimatur of the school. *Citing Hazelwood School District v. Kuhlmeier,* 484 U.S. 260 (1986). Because logos and imagery bear the stamp of approval of the school, school authorities are free to disassociate the school from such logos and imagery due to educational concerns.

An appropriate order follows.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

COMMONWEALTH OF PENNSYLVANIA, HUMAN RELATIONS COMMISSION, Complainant	:	
v,	:	**PHRC CASE NO. 201501536**
NESHAMINY SCHOOL DISTRICT, Respondent	:	

RECOMMENDATION OF PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that the PHRC has that the District allowed the inappropriate stereotypical use of logos and imagery of Native Americans that harmed non-Native American students in violation of Section 5(a) of the PHRA. It is, therefore, the Permanent Hearing Examiner's recommendation that the attached Findings of Fact, Conclusions of Law, and Opinion be approved and adopted. If so, approved and adopted, the Permanent Hearing Examiner further recommends issuance of the attached Final Order

PENNSYLVANIA HUMAN RELATIONS COMMISSION

_____
Date

By:_____
Carl H. Summerson
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

COMMONWEALTH OF PENNSYLVANIA, HUMAN RELATIONS COMMISSION, Complainant	:	
v,	:	**PHRC CASE NO. 201501536**
NESHAMINY SCHOOL DISTRICT, Respondent	:	

FINAL ORDER

AND NOW, this _____ day of _____, 2019 after a review of the entire record in this matter, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Findings of Fact, Conclusions of law, and Opinion of the Permanent Hearing Examiner. Further, the Commission adopts said Findings of Fact, Conclusions of Law, and Opinion into the permanent record of this proceeding, to be served on the parties to the complaint and hereby.

ORDERS

1. That, absent an extension for good cause shown, within 90 days the District shall cease and desist from the use of any and all logos and imagery in the Neshaminy High School that negatively stereotypes Native Americans.

2. That, at this time, the use of the term Redskins shall be permitted so long as the requisite educational information is provided to District students to ensure that students do not form the idea that it is acceptable to stereotype any group. The educational requirement shall continue as long as the District continues the use of the term Redskins. If, at any time, the District elects to discontinue the use of the term Redskins, the requisite educational information must still be provided to District students for a period to two years.
3. The statue of a member of the Lenape tribe found at the Neshaminy High School may also remain because it is a representation of a regional Native American tribe member.
4. That the District shall develop an appropriate educational experience consistent with the points outlined in the opinion.
5. That, within thirty days of the effective date of this Order, that the District shall report to the PHRC on the manner of its compliance with the terms of this Order by letter addressed to Lisa M. Knight, Esquire, Assistant Chief Counsel, Pennsylvania Human Relations Commission, 110 North 8th Street, Suite 501, Philadelphia, PA 19107.
6. That 90 days after the effective date of this Order, the District shall file a report with respect to whether the District has removed all negative stereotypical images or logos of Native Americans. Additionally, as long as the District continues to use the name Redskins, 6 months after the effective date of this Order, the District shall report on the actions it has taken to comply with the educational requirements of this Order. Thereafter, during

the month of May, the District shall report annually on the manner of its compliance.

PENNSYLVANIA HUMAN RELATIONS COMMISION

By: _____
M. Joel Bolstein
Chairperson

Attest:

_____
Dr. Raquel O. Yiengst
Vice Chairperson