IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHEASTERN DIVISION

Amber Annis, Lisa Casarez, William Crawford, Sierra Davis, Robert Rainbow, Margaret Scott, Franklin Sage, and Janie Schroeder, Plaintiffs, vs. Jack Dalrymple, in his official capacity, Wayne Stenehjem, in his official capacity, North Dakota Board of Higher Education, The University of North Dakota, and the State of North Dakota, Defendants.	)	Case No. 2:11-cv-73 **ORDER GRANTING DEFENDANTS' MOTION TO DISMISS**

INTRODUCTION AND SUMMARY OF HOLDING

The University of North Dakota's ("UND") use of the "Fighting Sioux" nickname and logo for its athletic teams has been the source of considerable strife and debate for many years. The battle over the "Fighting Sioux" nickname and logo has been waged in the media, the North Dakota Legislature, the courts, and most recently, at the ballot box.

The federal courts have not been spared the onslaught of contentious litigation. Recently, in Spirit Lake v. National Collegiate Athletic Ass'n, the Court dismissed a suit brought by the Spirit Lake Tribe and individual petitioners seeking to preserve the use of the nickname and logo at UND. The instant case is also brought by Native American plaintiffs but seeks the opposite relief—retirement of the "Fighting Sioux" nickname and logo and redress for damages they claim arise from the use of the allegedly offensive marks. The "Fighting Sioux" nickname and logo dispute divides families, tribes, and the people of North Dakota into three identifiable camps: (1) those who

adamantly support the continued use of the nickname and logo; (2) those who are equally solid in their opposition to the nickname and logo; and (3) those who simply wish the issue would go away.

The June 12, 2012 vote on Referred Measure 4 ("Measure 4") would appear to have finally ended any meaningful opposition to the retirement of the "Fighting Sioux" nickname and logo, as the people resoundingly voted to repeal the statutory bar to retirement of these marks and to restore power over the nickname question to the State Board of Higher Education, which has been seeking to retire the nickname since 2010. While some last gasps of further political action are still echoing across the state, it appears that as a political issue, the "Fighting Sioux" nickname and logo dispute has been resolved and the losing position consigned to the dust heap of history.

While the political issue is apparently settled, there remain legal issues that must be resolved by the Court. Before the Court are two motions to dismiss (Docs. #13 and 17) filed by the defendant State of North Dakota and its named subsidiary institutions and officials ("the State.")[1] The State moves to dismiss the Amended Complaint (Doc. #12) brought by Amber Annis, William Crawford, Sierra Davis, Robert Rainbow, Margaret Scott, Franklin Sage, and Janie Schroeder, who are Native American students at UND ("the Students.") The Students allege a number of enumerated violations: (1) violations of Title VI of the Civil Rights Act of 1964, (2) the full faith and credit provisions of 28 U.S.C. § 1738, (3) the North Dakota Human Rights Act, and (4) civil deprivations under 42 U.S.C. § 1983. The Students seek injunctive and declaratory relief ordering the retirement of the "Fighting Sioux" nickname and logo by UND, along with an order declaring the statute that

[1] The State also moved to dismiss the original complaint prior to the filing of the Amended Complaint by the Students. (Doc. #9). While the Court has considered the incorporated arguments from this motion, the motion itself is moot in light of the filing of the Amended Complaint.

mandates UND's continued use of the "Fighting Sioux" nickname and logo to be void and unenforceable. The Students also seek damages as a result of the alleged Title VI violations. The State urges that the majority of the Students' claims are moot in light of the recent statewide referendum repealing N.D. Cent. Code § 15-10-46, and that the remaining Title VI claim should be dismissed for failure to state a claim upon which relief can be granted.

The defeat of Measure 4 in the referendum held on June 12, 2012 reinstated North Dakota Senate Bill 2370 which repealed the statutory impediment to UND's retirement of the "Fighting Sioux" nickname and logo. As a result, the State Board of Higher Education and UND have made clear their imminent intent to retire these marks. This renders Counts II through V of the Amended Complaint **MOOT**, and these claims are therefore **DISMISSED**. Further, the Students are unable to meet the minimal pleading requirements to establish a plausible Title VI claim. Count I is therefore **DISMISSED** in accordance with this Order.

FACTS

In considering a motion to dismiss, the Court must accept the facts as pled by the plaintiff to be true, regardless of the probability of ultimate success on the claims. Bell Atlantic Corp. v. Twombly, 550 U.S. 444, 556 (2007). Accordingly, the Court adopts the factual setting set forth by the Students in their Amended Complaint.

1. "Fighting Sioux" nickname and logo

The tortuous history of the "Fighting Sioux" nickname controversy is incapable of full explanation here. Suffice it to say that there are passionate supporters and opponents of UND's continued use of the nickname and logo, and that this use has generated heated debate within the state of North Dakota and beyond. While this debate has been ongoing for many years, it

reached a new level of acrimony following the National Collegiate Athletic Association's ("NCAA") adoption of its championship policy in 2005 which banned the use of Native American nicknames and imagery during its championship events and subjected institutions under its auspices to sanctions for the use of these marks. The NCAA later granted several universities exemptions from the policy after they received permission from their namesake tribes, thus providing UND with a potential avenue to retain the "Fighting Sioux" nickname and logo free of sanctions.[2]

In 2007, the State brought suit against the NCAA in North Dakota state court in response to the implementation of the championship policy. The parties reached a settlement agreement in October 2007 which provided UND with a grace period in which it could seek tribal approval for the nickname and logo and compete free of the sanctions that otherwise would be imposed. (Doc. #12-1, Settlement and Release). If UND could secure approval from both the Spirit Lake and Standing Rock Sioux tribes by November 30, 2010, then the university would be granted an exemption from the policy. (Id. at p. 4). If such approval was not obtained, however, the settlement agreement provided that UND must transition away from the "Fighting Sioux" nickname and logo before August 15, 2011, or face the delineated sanctions. (Id. at p. 6). Notably, the settlement did not require UND to retire the nickname and logo, but merely provided the school with a window during which it could attempt to gain tribal approval and avoid the sanctions which would otherwise attach should UND choose to continue using these

[2] Central Michigan University ("Chippewas"), Florida State University ("Seminoles"), and the University of Utah ("Utes") utilized this avenue. Other schools found different ways to retain their nicknames. For example, the University of Illinois ("Fighting Illini") was permitted to retain its nickname after dropping its "Chief Illiniwek" logo and mascot because the nickname has predominantly non-Indian connotations. Obviously this was not an option for UND.

marks.

UND secured written approval from the Spirit Lake Tribe for the use of the "Fighting Sioux" nickname and logo, but the Standing Rock Tribe never took action on the issue. As a result, UND began to transition away from the marks in 2010. This move was preempted, however, by the North Dakota Legislature's enactment of N.D. Cent. Code § 15-10-46, which provides:

> The intercollegiate athletic teams sponsored by the university of North Dakota shall be known as the university of North Dakota fighting Sioux. Neither the university of North Dakota nor the state board of higher education may take any action to discontinue the use of the fighting Sioux nickname or the fighting Sioux logo in use on January 1, 2011. Any actions taken by the state board of higher education and the university of North Dakota before the effective date of this Act to discontinue the use of the fighting Sioux nickname and logo are preempted by this Act. If the national collegiate athletic association takes any action to penalize the university of North Dakota for using the fighting Sioux nickname or logo, the attorney general shall consider filing a federal antitrust claim against that association.

As a result of this legislation, UND retained the "Fighting Sioux" nickname and logo as statutorily required.

Like the nickname debate itself, N.D. Cent. Code § 15-10-46 has its own winding history. Following the NCAA's refusal to relax its stance on the sanctions imposed as part of the championship policy, or to abandon the terms of the 2007 settlement agreement, the North Dakota Legislature repealed the statute in the 2011 Special Legislative Session through Senate Bill 2370. See 2011 N.D. Sess. Laws ch. 580, § 2. With the statutory bar removed, UND retired the "Fighting Sioux" nickname and logo at the end of 2011.

This retirement was short-lived. Following a referendum petition drive, the repealing legislation was placed on the June 2012 ballot for a vote by the North Dakota electorate.

Successful placement of this issue on the ballot restored N.D. Cent. Code § 15-10-46 to legal force, and UND once again resumed use of the nickname and logo in February 2012 in conformance with the statute. This resumption too proved to be fleeting, as the citizens of North Dakota voted overwhelmingly on June 12, 2012, to uphold the repeal of N.D. Cent. Code § 15-10-46. This result once again removed the statutory impediment to UND's retirement of the "Fighting Sioux" nickname and logo, and the university has made clear its intent to immediately and permanently retire these marks.

2. The Students' experiences at UND

The Students are enrolled at UND and are members of various American Indian tribes. Throughout the course of their tenure at UND, they allege that the school's use of the "Fighting Sioux" nickname and logo has created a hostile educational environment that has constitutionally deprived them of the same opportunities provided to non-Indian students. For example, the Students cite to a 2001 statement released by the United States Commission on Civil Rights calling for the elimination of Native American nicknames in collegiate athletics, and to an independent study conducted by a University of Arizona researcher which concluded that the use of these nicknames and logos has a negative psychological influence on Native American students.

The Students urge that these fears are realized on the UND campus. According to the Students, the Native image is denigrated by having the "Fighting Sioux" logo stitched onto arena seating, emblazoned on alcoholic beverage cups, and painted onto athletic surfaces where it is trampled and skated upon. They assert, however, that these affronts pale in comparison to vulgar taunts and apparel, as well as racist remarks from passing motorists that have been inflicted upon

them. The Students point to postings on physical and virtual bulletin boards that have crassly threatened Native American students with retaliation if the "Fighting Sioux" nickname and logo are retired. The Students allege that these incidents have deprived them of the full breadth of the college experience enjoyed by their peers and have led to acute feelings of discrimination.

Most of these generalized incidents were not necessarily directed to the individual plaintiffs themselves. The Students, however, allege that they have also been the target of specific discrimination and harassment as a result of UND's use of the "Fighting Sioux" nickname and logo. William Crawford asserts that while attending a UND hockey game, fans pointed at him in a harassing manner while a video montage of Sioux culture played on the arena screen. He alleges he further witnessed fans engaged in the "tomahawk chop" cheer, as well as vulgar slurs using the Sioux name. Franklin Sage contends that he was subjected to crude comments in classroom discussions such as "I thought you Indians liked to be honored," "war whooping" from young boys as he studied outside, and racist and vulgar taunts as a member of a student diversity organization.

As a result of this general and individualized discrimination perceived by the Students, they brought suit against the State in August 2011. In September 2011, the Students amended their complaint and now raise five distinct counts: (1) Violation of Title VI of the Civil Rights Act of 1964 for denial of benefits in a program receiving federal financial assistance; (2) Violation of 42 U.S.C. § 1983 because State officials have deprived the Students of their federal constitutional rights; (3) Enforcement of the settlement agreement between the NCAA and the State under the full faith and credit provisions of 28 U.S.C. § 1738; (4) Violation of the North Dakota Human Rights Act; and (5) Declaratory and Injunctive Relief preventing further use of

the "Fighting Sioux" nickname and logo mandated by N.D. Cent. Code § 15-10-46. (Doc. #12, Amended Complaint). In addition to the equitable relief sought, the Students also seek reasonable attorneys' fees and costs, and damages stemming from the alleged Title VI violations. (Id.)

The State moved to dismiss both the original and Amended Complaint. (Docs. #9, 13), and later moved to dismiss on the grounds of mootness following the initial repeal of N.D. Cent. Code § 15-10-46 by the North Dakota Legislature. (Doc. #17). Magistrate Judge Karen Klein issued a report and recommendation in this matter which was later rescinded following the placement of the nickname law referendum on the June 2012 ballot. (Docs. #25, 27). Both parties agreed that this matter should wait until the results of the referendum election before proceeding to resolution. With the election now final, the State's Motion to Dismiss is now ripe for consideration by this Court.

DISCUSSION

In considering a motion to dismiss, "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Estate of Rosenberg by Rosenberg v. Crandell, 56 F.3d 35, 37 (8th Cir. 1995) (quotation omitted). A court may grant a motion to dismiss only if it is clear that no relief can be granted under any facts that could be proven consistent with the complaint. McMorrow v. Little, 109 F.3d 432, 434 (8th Cir. 1997). To survive a motion to dismiss, the facts that are introduced in the complaint must raise a facially plausible claim. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Facial plausibility does not equate with probability, but it does require more than the sheer possibility that a reasonable inference can be raised that the defendants are liable for the misconduct

alleged. Id. While a Court must accept as true the allegations raised by the Students, threadbare recitals supported by conclusory statements do not suffice to meet the plausibility requirement. Id.

In addition to the motion to dismiss standard, this case also presents conspicuous justiciability questions based on mootness. A court must not consider issues which have become moot because any resulting opinion would be advisory in nature. See Princeton University v. Schmid, 455 U.S. 100, 103 (1982). A case is moot when the issues are no longer "live" or when the parties lack a legally cognizable interest in the outcome. City of Erie v. Pap's A.M., 529 U.S. 277, 287 (2000). When there is no reasonable expectation that the challenged conduct will be repeated, a court is powerless to grant effectual relief for that conduct. Id.

The Students have raised five claims in their Amended Complaint. Count I seeks damages as a result of an allegedly racially hostile educational environment fostered at UND, and equitable relief preventing further violations. The historical nature of this claim and the relief sought foreclose a finding of mootness. Counts II through V seek solely equitable relief relating to N.D. Cent. Code § 15-10-46 and UND's continued use of the "Fighting Sioux" nickname and logo. This statute has now been repealed and UND has announced and demonstrated its intent to permanently retire these marks. Consequently, Counts II through V raise obvious mootness questions.

Count I: Violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d

The Students allege that Title VI of the Civil Rights Act of 1964 has been violated by UND, the State Board of Higher Education, and the State of North Dakota, because federal funding has been used to support higher education at UND, yet Native American students have

intentionally been discriminated against on the basis of race. Codified at 42 U.S.C. § 2000d, Title VI provides, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." The Students allege that the named defendants are liable for damages because the use of the "Fighting Sioux" nickname and logo created a racially hostile learning environment that was deficient for the Students and other Native American pupils. The Students claim that liability attaches both for harassment received from other students and from the State itself. The State urges this Count should be dismissed because the Students cannot make the claim that either the State intentionally discriminated against them, or that it was deliberately indifferent to a hostile learning environment at UND.

Title VI operates as a contract between the federal government and a recipient of federal funds, conditioning an offer of funding on a promise by the recipient not to discriminate. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286 (1998). Title VI prohibits only intentional discrimination, and proof of disparate impact is not sufficient. Mumid v. Abraham Lincoln High Sch., 618 F.3d 789, 794 (8th Cir. 2010). The intentionality requirement can be overcome if the challenged conduct is facially discriminatory. See Mumid at 794 (citing UAW v. Johnson Controls, Inc., 499 U.S. 187, 199 (1991)). In the absence of a facially discriminatory course of action, however, intentional discrimination must be proven in the school setting through facts evidencing direct action or deliberate indifference to known racial harassment. Faccio v. Eggleston, 2011 WL 3666588 at *10 (N.D.N.Y. Aug. 22, 2011) (citing Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 (2009)). The Students contend that a plausible claim for both forms

of discrimination is established in their Amended Complaint.

The only factual circumstance that the Students have raised allegedly proving intentional discrimination by the State's direct action is the use of the "Fighting Sioux" nickname and logo by UND. There is no allegation of any faculty member, government official, or other defendant directly engaging in acts done intentionally to discriminate against the Students. While the propriety of the use of the nickname and logo may never be settled, the very fact that reasonable disagreement exists on the issue forecloses the possibility that the use of these marks constitutes intentional discrimination rising to the level of a Title VI violation. The Students have strongly expressed their revulsion to the use of Native American imagery at UND and have cited to a study and a government directive addressing the negative implications of such use. These sentiments are not universally shared even by Native Americans who are enrolled Sioux tribal members, as is evidenced by the Spirit Lake Sioux Tribe itself which resolved to see that the use of the nickname and logo continued, going so far as to sue in both North Dakota state court and this Court to press the issue. The Students are undoubtedly aware of this opposing viewpoint, as they cite to the settlement history and the North Dakota state case in their Amended Complaint. See Davidson v. State, 2010 ND 68, ¶ 6, 781 N.W.2d 72. This vastly different response to the same imagery by American Indian groups makes it impossible for the Students to claim that use of these marks is facially discriminatory. Simply put, the State's use of the "Fighting Sioux" nickname and logo at UND alone cannot form the basis of a Title VI violation.

The Students therefore must prove that the State intentionally discriminated against them through its deliberate indifference to the allegedly racially hostile environment that was fostered at UND as a result of the use of the nickname and logo. "The deliberate indifference standard

. . . does not require a showing of personal ill will or animosity toward the [plaintiff], but rather can be inferred from a defendant's deliberate indifference to the strong likelihood that pursuit of its questioned policies will likely result in a violation of federally protected rights." Meagley v. City of Little Rock, 639 F.3d 384, 389 (8th Cir. 2011). The United States Supreme Court has explained the deliberate indifference standard for student-on-student sexual harassment under Title IX, which is directly applicable to racial harassment under Title VI because the former statute was modeled after the latter. See Gebser, 524 U.S. at 286. Citing Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999), this test was summarized in Maislin v. Tennessee State Univ., 665 F.Sup.2d 922, 931 (M.D.Tenn. 2009):

> To sustain a student-on-student harassment claim against a school, the plaintiff must demonstrate the following elements: (1) the harassment was so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school; (2) the defendant had actual knowledge of the harassment; and (3) the defendant was deliberately indifferent to the harassment.

The Students argue that they were the victims of racial harassment in the ways described earlier in this order, such as harassment from fans at a hockey game, insensitive remarks online and in the classroom, and vulgarities and insensitive comments from moving vehicles, t-shirts, and young boys in a park. All of these incidents could plausibly constitute racial harassment, but less clear is what connection or control the State had over them. The privity between passing motorists, third party spectators, and internet postings to UND is tenuous at best, and likely non-existent in most circumstances. Title VI and IX case precedent from across the nation addressing deliberate indifference has been confined to student-on-student harassment and harassment received from school officials. To attempt to hold the State and its officials responsible for the actions of unrelated and unknown third parties is a novel position that is

inconsistent with the developed law under Title VI and IX. This is not surprising as Titles VI and IX are not intended to make the state officials guarantors of good conduct by third parties who happen to be in the state. Rather, their liability is limited to their own acts and the students in their charge when they have a meaningful opportunity to keep the harassment from happening.

Deliberate indifference requires that the State (through UND and its staff) had actual knowledge that the racial harassment complained of was occurring or was likely to occur, and intentionally refused to take action to remedy the situation. The incidents alleged in the Students' complaint appear to be isolated and remote, and there is no allegation that State officials were made aware of these incidents. Further, based on these incidents' anomalistic nature, State officials could not have expected that it was substantially likely they would occur. For example, while the Students highlight the crass messages they have previously read online or received from passing motorists, they fail to demonstrate in any way how State officials were aware that these messages actually were received or were substantially likely to be received, that they were somehow within the State's control, and that State officials nonetheless intentionally chose to ignore the problem. Whether the incidents complained of by the Students rose to such a level that their federally protected rights were infringed is debatable. However, what is not debatable is that the Amended Complaint is entirely devoid of any facts showing that State officials were on notice of these incidents, or that these incidents should have been foreseen as a substantial likelihood of the use of an athletic nickname.

The Students' deliberate indifference claim is doomed by their failure to plead any facts showing that the State had any knowledge that the incidents in question happened or were substantially likely to happen, and yet intentionally declined to take action. This failure in

pleading alone forms the basis of the Court's dismissal of the Students' deliberate indifference claim. While not properly considerable in a motion to dismiss because it is outside the pleadings, the Court notes that UND has established a comprehensive anti-harassment policy with defined reporting procedures. The Students' failure to utilize these channels, and the State's action in having them in place, would strongly support a motion for summary judgment were this case appropriate to proceed that far.

Because the Students have failed to plead any facts showing that the State directly discriminated against Native American students or deliberately failed to act upon incidents of racial animus rising to the level of an infringement of federally protected rights, Count I must be dismissed. The Students' bare assertions are conclusory and lack the factual specificity to establish a plausible claim under Iqbal and Twombly. Accordingly, the State's motion to dismiss Count I is granted.

Count II: Violation of 42 U.S.C. § 1983

The Students allege that all defendants except the State of North Dakota have violated 42 U.S.C. § 1983 because they have deprived the Students of their constitutional rights under color of law. Specifically, the Students urge that they have received an inferior educational experience than that received by their non-Native peers at UND. To remedy this alleged deficiency, they seek an order from the Court preventing the enforcement of N.D. Cent. Code § 15-10-46 mandating the continued use of the "Fighting Sioux" nickname and logo.

As described earlier, the challenged statute was repealed initially by the Legislature, and then again by the voters of the state of North Dakota. Following the repeal, UND announced its immediate and clear intent to retire the "Fighting Sioux" nickname and logo permanently. The

Court is powerless to grant the relief sought by the Students in Count II because UND, the State, and its citizens have already made the decision to retire the challenged imagery. "A case that no longer presents a live case or controversy is moot, and a federal court lacks jurisdiction to hear the action." Minnesota Humane Soc'y v. Clark, 184 F.3d 795, 797 (8th Cir. 1999).

An otherwise moot issue may still be litigated if the challenged conduct is capable of repetition but evades review. Clark at 797. However, this is "an extraordinarily narrow exception to the mootness doctrine" that requires both a short duration for the challenged action and a reasonable expectation that the same action will be carried out again. Randolph v. Rogers, 170 F.3d 850, 856 n.7 (8th Cir. 1999). The Students note that the "Fighting Sioux" nickname and logo may not be permanently retired because a petition drive is apparently ongoing to place a measure on a future ballot to enshrine the use of these marks in the North Dakota Constitution. While no one can be absolutely certain as to whether the effort to get the constitutional measure on the ballot will be successful, its likelihood of ultimate passage is extremely dubious at best when viewed in light of the resounding defeat of Measure 4. The existence of this possible initiated measure does not give rise to a "reasonable expectation" that the nickname and logo will return, and therefore does not meet the narrow circumstances to litigate what is a moot issue in light of the requested relief and the unambiguous intentions of UND and the State. Count II is therefore dismissed.

Count III: Application for Enforcement of Judgment Pursuant to 28 U.S.C. § 1738

Count III is based on the settlement agreement entered into between the State and the NCAA. The Students seek an order from this Court compelling the State to retire the "Fighting Sioux" nickname and logo in accordance with the settlement, which was recognized as a binding

judgment by the North Dakota Supreme Court in Davidson. The Students misapprehend the terms of the settlement agreement, which never required the retirement of the nickname and logo. The settlement agreement merely provided the State with an opportunity to retain these marks free of sanctions while it sought tribal approval for their continued use. If tribal approval was not obtained within the specified time period, then continued use of the nickname and logo by UND would result in sanctions under the championship policy. Nowhere in the agreement was it required that the nickname and logo be retired.

Nonetheless, the relief sought by the Students is an order requiring the State to immediately retire the "Fighting Sioux" nickname and logo. Because these efforts are already being undertaken independent of any action by this Court, the issue is moot. Accordingly, Count III is dismissed.

Count IV: Violation of the North Dakota Human Rights Act

The Students contend that all of the defendants have violated the North Dakota Human Rights Act, which codifies the state of North Dakota's policy "to prohibit discrimination on the basis of race" and other classifications in "state and local government services." See N.D. Cent. Code § 14-02.4-01. The Students urge that they received adverse treatment and unequal access to the services and accommodations provided by UND. To remedy this alleged inequality, they "seek a permanent injunction barring any Defendant from executing or enforcing" the statute mandating UND's continued use of the nickname and logo, N.D. Cent. Code § 15-10-46. Because the statute has now been permanently repealed following the referendum on June 12, 2012, entry of the desired injunction would have no practical effect. Count IV is moot and is therefore dismissed.

Count V: Declaratory and Injunctive Relief

Reincorporating requests from the earlier Counts, the Students seek a judgment declaring N.D. Cent. Code § 15-10-46 to be null and void and enjoining the State and all other defendants from enforcing it. Because the statute has now been repealed, the equitable relief sought by the Students is inapplicable and the issue is moot. Count V is dismissed.

CONCLUSION

Counts II through V of the Students' Amended Complaint seek equitable relief relating to UND's use of the "Fighting Sioux" nickname and logo and the statute that previously mandated their use, N.D. Cent. § 15-10-46. Because the statute has been repealed and UND has made clear its intent to immediately and permanently retire the challenged marks, these issues are moot and are therefore dismissed.

Count I seeks damages stemming from Title VI violations alleged by the Students. Having taking all of the facts pled by the Students as true, there is not a sufficient factual basis to show direct discrimination by the State or deliberate indifference to rights violations on the UND campus. Because the pleadings are insufficient to establish a plausible Title VI claim, Count I must be dismissed as well.

It is **ORDERED** that the State's Motion to Dismiss at Doc. #9 is **MOOT** due to the Students' filing of their Amended Complaint. The State's Motion to Dismiss at Doc. #13 is **GRANTED** as to Count I and the State's Motion to Dismiss for Lack of Jurisdiction (Mootness) at Doc. #17 is **GRANTED** as to Counts II through V. The Students' pending Motion to Strike at Doc. #29 is **DENIED**, and their claim for attorneys' fees and costs is **DISMISSED**.

IT IS SO ORDERED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 3rd day of August, 2012.

/s/ *Ralph R. Erickson*
Ralph R. Erickson, Chief Judge
United States District Court