

## ***Students Charged and/or Convicted of a Felony are Ineligible for WIAA Competitions***

On April 17, 2019, the Wisconsin Interscholastic Athletic Association (“WIAA”) approved a significant change to the eligibility rules for student-athletes. Schools need to review their athletic codes to ensure they incorporate and implement this change to the eligibility rules, or schools risk forfeiting WIAA competitions and awards. Per the revised WIAA Handbook:

Any student charged and/or convicted of a felony shall, upon the filing of felony charges, become ineligible for all further participation until the student has paid his/her debt to society and the courts consider the sentence served (including probation, community service, etc.)

(“WIAA Felony Rule”).

### **BACKGROUND ON ATHLETIC CODE VIOLATIONS**

Prior to the new rule, the WIAA rules required schools to immediately suspend any student-athlete for at least one competition who possessed or used alcohol, tobacco, or controlled substances during the season. This rule was generally enforced through a school investigation, which allowed the student-athlete to be heard regarding the allegations, followed by a finding (when supported) that the student-athlete engaged in the alleged conduct, and imposition of the required consequences established by the school’s athletic code and the WIAA eligibility rules. If a school’s athletic code permits, student-athletes that are ineligible for competition due to athletic code violations may still practice with the team. Schools can also choose to prohibit a student-athlete from practicing while ineligible for competition; however, schools should be aware of the injury risk a student-athlete faces upon return to eligibility if the student-athlete is unable to practice or condition while ineligible for competition.

Schools can establish an appeal process whereby a student-athlete can appeal any suspension imposed under the athletic code (and establishing such a process has become common among schools). However, per the WIAA Handbook, the student-athlete is ineligible for competition while his/her appeal is pending. Schools should remember that athletic code appeals involve discussions of confidential pupil information. Therefore, it is generally inappropriate for an athletic appeal board to have student members. Additionally, schools should consider the applicability of the Open Meetings Law with respect to athletic appeal board meetings, particularly in light of State ex rel. Krueger v. Appleton Area Sch. Dist. Bd. of Educ., 2017 WI 70.

### **THE WIAA FELONY RULE**

Concern has been expressed that the new WIAA Felony Rule forces schools to suspend student-athletes from competition before there is sufficient verification that the student-athlete engaged in the conduct

for which the student-athlete is charged. However, the rule does not prohibit schools from providing an opportunity to be heard to student-athletes. Providing a student-athlete with an opportunity to be heard will allow the school to verify that the student-athlete was charged or convicted of a felony. This can also help avoid a case of “mistaken identity” where, for example, the charge or conviction might relate to a different person with the same name as the student-athlete.

Some believe the WIAA Felony Rule results in student-athletes being deemed “guilty until proven innocent.” However, it is important to note that WIAA participation is a privilege and not a right, so due process and the presumption of innocence do not necessarily apply. Student-athletes with felony charges and convictions can still file an appeal under the school’s code of conduct (if the school has adopted an appeal process). However, as long as the student-athlete remains charged or convicted of a felony (and hasn’t paid his/her debt to society), the athletic appeal board will only have the limited jurisdiction to verify that the student has been charged with or convicted of the felony.

## **THE OBLIGATION TO INVESTIGATE THE CONDUCT UNDERLYING FELONY CHARGES**

When a student-athlete is charged with a felony (or when felony charges are being investigated by law enforcement), it is likely that the conduct underlying that felony charge or investigation constitutes a violation of the school’s athletic code. The WIAA Felony Rule does not replace a school’s obligation to investigate and apply the school’s athletic code to the conduct underlying what may become felony charges. This generally means the school should gather relevant evidence, interview witnesses, allow the student-athlete to be heard regarding the allegations about the conduct, make a finding (when supported) that the student-athlete engaged in the alleged conduct, and impose the consequences established by the school’s athletic code and the WIAA eligibility rules. However, regardless of the application of the school’s athletic code, if the student is ultimately charged or convicted of a felony, the student will be ineligible for athletic participation until the student has paid his or her debt to society as determined by the judicial system.

## **SCHOOLS MUST HAVE NOTICE OF THE FELONY CHARGES OR CONVICTIONS**

The WIAA currently interprets its eligibility rules as requiring schools to apply their athletic code and declare student-athletes ineligible as soon as schools become aware of a student-athlete’s violation of the athletic code, including becoming aware of felony charges or convictions against student-athletes.

School districts might find out about felony charges against student-athletes from law enforcement, the district attorney, or the county clerk of courts. Law enforcement agencies are permitted to share information with school officials proactively regarding acts for which a student was taken into custody based on the officer’s belief that the youth committed a crime. Wis. Stat. § 938.396(1)(b)2. This information alone is not proof that felony charges were filed, but the information can put schools on notice of student-athlete conduct that might violate the school’s athletic code.

Additionally, when a district attorney issues a criminal complaint against a student who is 17 or older or files a petition for a waiver to try a student that is 14 years or older as an adult, and the district attorney reasonably believes the person charged is a pupil enrolled in a school district, the district attorney must make a reasonable attempt to notify the school board of the charges pending against the pupil. The district attorney must also notify the school board of the final disposition of the charges. Wis. Stat. § 950.08(2w).

The county clerk of courts must notify a school board if a petition of delinquency has been filed that alleges that a student who is not yet 17 years old committed a delinquent act that would be a felony if committed by an adult. Wis. Stat. § 938.396(2g)(m)1.

The WIAA has had substantial conversations regarding how to handle the filing of a petition of delinquency for a crime that would have been a felony if the juvenile were an adult. In at least one instance, the WIAA has opined that the filing of such a petition of delinquency is not equivalent to the filing of felony charges, and therefore, the WIAA Felony Rule would not apply. However, this is one area of potential uncertainty that schools will have to address with the WIAA and district legal counsel on a case-by-case basis.

Once a school is aware that a student-athlete has been charged with a felony, the school can request police records under Wis. Stat. § 938.396(1)(b)2 provided the school agrees to keep the information as a confidential pupil record under Wis. Stat. § 118.125. Under Wis. Stat. § 118.127, a school district can use police records as the sole basis for taking action against a pupil under the school district's athletic code. However, a school district may not use police records as the sole basis for taking any disciplinary action against a pupil under the school's general code of conduct.

Under the WIAA Felony Rule, it is likely that schools will have to request law enforcement or court records with respect to student-athletes charged with felonies in order to verify that the student-athletes have been charged with or convicted of a felony. The Wisconsin Consolidated Court Automation Program (CCAP) does not usually allow access to juvenile records, which means schools generally cannot rely on CCAP to determine the existence of felony charges against student-athletes, particularly those that are not yet 17 years old.

## COMPLYING WITH THE WIAA FELONY RULE

A student-athlete is ineligible under the WIAA Felony Rule as soon as felony charges are filed. However, schools should be aware that an arrest is not equivalent to the filing of charges. Generally, following an arrest, law enforcement completes its investigation, and forwards its report to the district attorney who then decides whether to file charges with the court. The filing of charges might happen shortly after an arrest, or the filing might be delayed for any number of reasons. A student-athlete might not be incarcerated when charges are filed, and thus could still be attending school when charges are filed.

The WIAA Felony Rule states that the student is ineligible “until the student has paid his/her debt to society and the courts consider the sentence served (including probation, community service, etc.)” The WIAA currently interprets this clause to mean that ineligibility under the WIAA Felony Rule spans from the initial filing of felony charges through the duration of any incarceration and extended supervision imposed on a convicted student-athlete. A student-athlete on extended supervision may be allowed to attend school, but the student-athlete will still not be eligible for WIAA competitions. The WIAA Felony Rule also makes a student-athlete ineligible for the duration of any deferred, stayed, or suspended sentence, until such time as the extended supervision required by such a sentence is successfully completed

The WIAA currently interprets the WIAA Felony rule to implicitly mean that if felony charges are dropped or the student-athlete is found not guilty, the student-athlete once again becomes eligible for competitions, subject to any penalties that a school might have imposed on the student-athlete based on the conduct underlying the charges.

## CONCLUSION

School districts might wish to use the WIAA Felony Rule as an opportunity to review and update their athletic codes in their entirety. School districts need to ensure key employees and stakeholders are

aware of, and are properly implementing, the WIAA Felony Rule. This might include, but is not limited to, building principals and assistant principals, athletic directors, coaches, student-athletes, and parents. Finally, given the complexity of navigating and understanding the various components of the criminal justice process, including the differences between juvenile and adult proceedings, school administrators are encouraged to work with the WIAA and if warranted, district legal counsel, when determining when to declare student-athletes ineligible based on the WIAA Felony Rule or based on the conduct underlying felony investigations, felony charges, or convictions. Failing to properly declare such a student-athlete ineligible once a school is aware of felony charges or convictions against the student-athlete could result in that student-athlete's teams forfeiting competitions, in addition to penalties for the student-athlete's participation in individual sports.

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