

**ORANGE COUNTY COURT
GRAND JURY
SPECIAL TERM 1**

Report # 2019-001

March 29, 2019

In re: NEWBURGH ENLARGED CITY SCHOOL DISTRICT

**GRAND JURY REPORT
CPL § 190.85(1)(c)**

**Holly Dexter
Foreperson**

**Barbara Edwards
Secretary**

**DAVID M. HOOVLER
ORANGE COUNTY DISTRICT ATTORNEY**

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ORANGE COUNTY COURT GRAND JURY

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GRAND JURY REPORT, CPL § 190.85(1)(c)

“There is still no oversight. I don’t believe there is still any oversight. Nobody is watching the store. They act, like, they’re doing something. I don’t believe anything has been done to address some of these issues.”¹ – District employee

“We should all be ashamed of ourselves and . . . we are sitting here again six years later after that basketball investigation and we are looking at the same thing.”² – District employee

PRELIMINARY STATEMENT

The Orange County Grand Jury, Special Term 1, was empaneled on January 10, 2019, by order of the Honorable Craig Stephen Brown, County Court Judge.³ Over the course of six weeks, the Grand Jury heard testimony from 15 witnesses and considered 31 exhibits, including tens of thousands of entries of data from Infinite Campus and APEX Online Learning as well as hundreds of pages of attendance records. The testimony produced over 900 pages of transcripts. Pursuant to the Criminal Procedure Law, all of those who testified before this Grand Jury received immunity.

According to an Orange County District Attorney’s Office Investigator who testified before the Grand Jury (hereinafter “DA Investigator”), the allegations that gave rise to this grand jury investigation were first made in 2017 by a former teacher and varsity athletics coach at the Newburgh Free Academy (hereinafter “Newburgh Free Academy”), the high school in the Newburgh Enlarged City School District (hereinafter “the District”). Those allegations included attendance record manipulation for student athletes, and on a larger scale, chronic student absenteeism. Documents obtained from the multiple Grand Jury

¹ Grand Jury Testimony of Witness H, p. 67.

² Grand Jury Testimony of Witness H, p. 68.

³ The Grand Jury thanks the Honorable Craig Stephen Brown. The Grand Jury also thanks Orange County District Attorney David M. Hoovler as well as Assistant District Attorney Matt Ross and Orange County District Attorney Investigator Gary Cooper.

subpoenas, as well as documents obtained from the execution of several search warrants at the District for documents, e-mails, and other digital and hard-copy evidence, were examined by the Grand Jury. The Orange County District Attorney began presenting this evidence before this Grand Jury in January 2019 so that the Grand Jury could make specific recommendations as to how the Newburgh Enlarged City School District can better safeguard the integrity of student attendance in order to foster the proper environment for education and extracurricular activities. During the course of investigating these issues, the Grand Jury, aided by the Orange County District Attorney's Office, discovered improper usage by the Newburgh Free Academy of the APEX Online Learning software (hereinafter sometimes referred to as "APEX") – a credit recovery program – and as such, specific recommendations are offered on this issue as well. For privacy reasons, the names of witnesses have been omitted, and instead they will be referred to simply as "Witness [A, B, C, etc.], whose identity is known to the Grand Jury."

This report is being submitted to the Court by the Grand Jury pursuant to New York State Criminal Procedure Law § 190.85(1)(c). This report summarizes the lack of procedures and oversight that allowed: (1) Newburgh Free Academy virtually limitless manipulation of student-athlete attendance records in order to conceal violations of Newburgh Enlarged City School District attendance policies; (2) obfuscation of the chronic absenteeism among the Newburgh Free Academy student body that went unremedied for years; and (3) the misuse of the APEX Online Learning software at Newburgh Free Academy in order to artificially increase graduation rates.

The Newburgh Enlarged City School District School Board has, as of May 2018, taken steps to tighten the District's school attendance policy, both in general and as it relates to participation in extracurricular activities. Additionally, as recently as the beginning of February 2019, teachers have taken it upon themselves to seek clarification from the District as to how to effectively and properly run the APEX Online Learning program. However, much work remains to be done in both addressing potential loopholes and vagaries in the newest iteration of the attendance policy, and also in its implementation and enforcement.

Notwithstanding APEX teachers requesting clarification on APEX policies from the Newburgh Enlarged City School District, the District has still failed to promulgate any definitive policies.

The Grand Jury intends that this report be delivered in as neutral a tone as possible so that the facts can speak for themselves. To that end, the Grand Jury believes it is imperative that the facts of this report be made public. This report offers practical recommendations that, if adopted, would cause the Newburgh Enlarged City School District, its administrators, faculty, and school board, along with state oversight agencies, to strengthen its accountability procedures and better serve the educational needs of the students of the Newburgh Enlarged City School District. Since the issues presented to this Grand Jury involve education, it would behoove the New York State Education Department to participate in meaningful discussions and collaborative efforts to remedy the issues outlined in this report.

PART 1: STRUCTURE OF THE NEWBURGH ENLARGED CITY SCHOOL DISTRICT

A BREAKDOWN OF THE NEWBURGH ENLARGED CITY SCHOOL DISTRICT SCHOOLS, ADMINISTRATORS, THE DISTRICT SCHOOL BOARD, AND NEWBURGH FREE ACADEMY SPORTS AND COACHES

The Newburgh Enlarged City School District in Orange County, New York, contains the following schools: Balmville, Fostertown, Gardnertown, GAMS Tech, Horizons-on-the-Hudson, Meadow Hill, New Windsor, Temple Hill, Vails Gate, Heritage Middle School, South Middle School, and Newburgh Free Academy, the high school. Newburgh Free Academy is further broken up into three campuses – Main, North and West. According to testimony in the Grand Jury, as of 2018-2019, the Newburgh Free Academy Main campus has approximately 2,200 students; the North campus has approximately 900 students; and the West campus has approximately 120 students. Students from all three Newburgh Free Academy campuses play as one sports team in respective sports.

According to publicly available information and testimony adduced in the Grand Jury, the current Superintendent of the Newburgh Enlarged City School District is Dr. Roberto Padilla, who has been the

Superintendent since 2014. The current Deputy Superintendent is Ed Forgit. The current Assistant Superintendent of Human Resources is Michael Mclymore. The former Superintendent of Human Resources was MaryEllen Liemer. The current Newburgh Enlarged City School District Athletics Director is Edgar Glascott. The former Newburgh Enlarged City School District Athletics Director was Jason Semo, from 2015 through 2017. These current and former Newburgh Enlarged City School District Administrators are hereinafter referred to as “District Administrators.”⁴

According to publicly available information and testimony adduced in the Grand Jury, the current members of the Newburgh Enlarged City School District School Board are President Carole Mineo, Vice President Susan Prokosch, members Ramona Burton, Phillip Howard, R. Andrew Johnston, Mark Levinstein, Sylvia Santiago, Darren Stridiron and William Walker. The Newburgh Enlarged City School District School Board, past and present members, is hereinafter referred to as the “School Board.”⁵

According to publicly available information and testimony adduced in the Grand Jury, Newburgh Free Academy, as mentioned above, is broken up into three campuses – Main, North and West. The current Principal of Newburgh Free Academy Main Campus is Raul Rodriguez and has been since at least 2015. The current Principal of Newburgh Free Academy North Campus is Matteo Doddo and has been since at least 2015. The current Principal of Newburgh Free Academy West is Kevin Rothman. There are several current and former Assistant Principals at Newburgh Free Academy including Jeffrey Woody, Roberto Cruz, and Margaret Chesser. These current and former Newburgh Free Academy Administrators are hereinafter

⁴ Titles of current Newburgh Enlarged City School District Administrators are publicly available on the Newburgh Enlarged City School District website at <https://www.newburghschools.org/page.php?page=14> and <https://www.newburghschools.org/page.php?page=35>. District employee witnesses, whose identities are known to the Grand Jury, testified regarding previous Newburgh Enlarged City School District Administrators.

⁵ Titles of current Newburgh Enlarged City School District Board Members are publicly available on the Newburgh Enlarged City School District website at <https://www.newburghschools.org/page.php?page=28>.

referred to as “Building Administrators.”⁶ Newburgh Free Academy also has numerous teachers of various subjects.⁷

Newburgh Free Academy has sports teams (varsity, junior varsity and freshman), including the following: boys varsity baseball coached by Scott Seabury, boys varsity basketball coached by Frank Dinnocenzio, boys varsity indoor track coached by Malcolm Burks, girls varsity indoor track coached by Kathi Workman (formerly coached by Bruce Green), boys varsity football coached by Bill Bianco, boys varsity soccer coached by Matthew Iorlano, and boys wrestling coached by Christopher Leggett.⁸

PART 2: ATTENDANCE AT NEWBURGH FREE ACADEMY

A REVIEW OF NEWBURGH ENLARGED CITY SCHOOL DISTRICT ATTENDANCE POLICIES, THE MYRIAD OF WAYS IN WHICH THEY WERE VIOLATED, THE 2009-2010 BASKETBALL SCANDAL, AND HOW ATTENDANCE VIOLATIONS CONTINUED UNABATED

“I think it’s too easy. It’s too easy a process. You know, we’re pushing these kids through school. We’re not focusing on academics like we should.”⁹ – District employee

I. ATTENDANCE AT NEWBURGH FREE ACADEMY EXPLAINED

A. Attendance Generally

According to the testimony of Witness A, an Infinite Campus senior employee whose identity is known to the Grand Jury (hereinafter “Witness A”), every teacher at Newburgh Free Academy has unique log-ins for both their in-class computers and for the “Infinite Campus” software for attendance-keeping purposes. According to Witness A, Infinite Campus is a company that maintains the attendance record data,

⁶ Titles of current Newburgh Free Academy Building Administrators are publicly available on the Newburgh Enlarged City School District website at <https://www.newburghschools.org/staffdirectory.php?Location=NFA>. District employee witnesses, whose identities are known to the Grand Jury, testified regarding previous Newburgh Free Academy Building Administrators.

⁷ Titles of current Newburgh Free Academy teachers are publicly available on the Newburgh Enlarged City School District website at <https://www.newburghschools.org/staffdirectory.php?Location=NFA>.

⁸ Titles of current Newburgh Free Academy coaches are publicly available on the Newburgh Enlarged City School District website at <https://www.newburghschools.org/page.php?page=35>. District employee witnesses, whose identities are known to the Grand Jury, testified regarding previous Newburgh Free Academy coaches.

⁹ Grand Jury Testimony of Witness B, p. 94.

but administration of the attendance records is handled in the first instance by teachers, and then transmitted to the Newburgh Free Academy Attendance Office for review and edits, if applicable. According to Witness B, a Newburgh Enlarged City School District employee whose identify is known to the Grand Jury (hereinafter “Witness B”), the Data Processing Clerk is the head of the Newburgh Free Academy Main Campus Attendance Office and the Attendance Office is typically staffed with between two and five attendance personnel.

According to Witness A, after a teacher logs in to the teacher’s Infinite Campus account, the teacher then proceeds to mark any of the students in the class absent or tardy – the default status in Infinite Campus indicates that the student is present. If a student is marked absent or tardy, those designations are initially marked as “unknown.” Witness A further testified that a teacher has a 24-hour window to change an absence to a tardy or an absence to a present – but once that 24-hour window closes, and the Attendance Office is in receipt of the attendance records, only the Data Processing Clerk can modify a record. According to Witness B, the initial modification by the Attendance Office after the 24-hour window is called a “reconciliation.” Witness B further testified that during the reconciliation process, all unknown absences and tardies are given a designation – generally either excused or unexcused. All absences that do not have documentation for an excuse, are batch marked as “unexcused.” However, all tardies, by default and without documentation, are automatically batch marked as “excused.” According to Witness B: “That’s just how the district handles it.”¹⁰

Witness B further testified that teachers do not have the ability to override the Infinite Campus system to change an unexcused absence or tardy to excused even during the 24-hour window. According to the various attendance policies within the Newburgh Enlarged City School District between 2015 and 2018 (hereinafter “Comprehensive Student Attendance Policies”): “Only building administrators are authorized to change a student’s attendance record (e.g., changing an unexcused absence to an excused

¹⁰ Grand Jury Testimony of Witness B, p. 80.

absence). When any such change is made to a student's attendance record, the name of the administrator authorizing the change, the date of the change, and the reason for the change must be documented in the student management system, if possible, or in a written document placed in the student's file."¹¹ According to Witness B, any such change must be made by the Attendance Office.

The Comprehensive Student Attendance Policies further list several acceptable excuses for a student's absence, tardiness or early departure.¹² Outside of this list, the Comprehensive Student Attendance Policies provide that "[a]ny absence, tardy or early departure not provided for on the excused list shall be deemed unexcused, including family vacations and trips, unless the Building Principal determines that the parent has presented valid exceptional circumstances to demonstrate that such absence or a portion of such absence should be deemed an excused absence. The Building Principal shall maintain a written record of the determination and the reasons therefor."¹³ According to Witness B, if a student provides a doctor's note for an absence that occurred the previous day, the student must provide the note to the Attendance Office for any possible modification of the Unexcused Absence. According to the Comprehensive Student Attendance Policies, "[f]or absences, the written excuse should be presented by the student on the day when returning to school following such absence but must be presented within five (5) school days after returning to school. For tardies and early departures, the written excuse should be presented to the school on the day of the tardy or early departure with the reason for the tardy or early departure."¹⁴ According to Witness B, this policy statement was interpreted by Building Administrators and teachers to mean that the 5-day rule applied only to *full day* absences; that is, if a student was absent for only *one class* in a given school day, the

¹¹ Grand Jury Ex. #1 – "Parent Notification Manual 2017 2018 (5100)" – Appendix F – "Comprehensive Student Attendance Policy 5100," pp. 27-31.

¹² See *id.* *Note: This list has been expanded between 2015 and 2018 in various iterations of the Comprehensive Student Attendance Policy, all contained in Grand Jury Ex. #1.

¹³ *Id.*

¹⁴ *Id.*

student could provide a doctor's note after five days upon returning and the recorded absence could still be modified to "Excused." Witness B understood that this interpretation was implemented in practice.

B. Chronic Absenteeism

The Comprehensive Student Attendance Policies stated that "[a]ll students must maintain at least 93% attendance, exclusive of excused absences, in all classes, which is defined as three (3) or fewer unexcused absences to class within a marking period. Attendance will be monitored on a daily basis."¹⁵ According to Witness B, this policy statement does not take into account absences deemed and registered as "Excused" under the Comprehensive Student Attendance Policies. The Comprehensive Student Attendance Policies go on to note that "[a]ny student who accumulates a total of three (3) unexcused absences in a quarter shall be deemed a chronic attendance code violator."¹⁶ They further state: "Chronic attendance code violators will be addressed on a case-by-case basis, including but not limited to meetings with guidance counselor, social worker, attendance teacher or building administrator, contact with parents/guardian, meeting with parents/guardian, as well as contact with local social services agencies, as appropriate."¹⁷ Lastly they state: "A chronic attendance code violator may be considered for placement in an alternative program."¹⁸

According to Witness C, a Newburgh Enlarged City School District employee whose identity is known to the Grand Jury (hereinafter "Witness C"), by virtue of the witness's rights of access to Infinite Campus student attendance records, the witness was privy to not only the witness's own students' records, but to those of the entire Newburgh Free Academy student body. As a faculty member of Newburgh Free Academy, Witness C was also familiar with many of the students who attended Newburgh Free Academy. Upon a review of the 2015-2016 Newburgh Free Academy student attendance records, including students

¹⁵ *Id.* at 27-31.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

in the witness's own classes, Witness C stated that to the witness's knowledge, virtually no student who qualified as a "[c]hronic attendance code violator" under the Comprehensive Student Attendance Policies was ever addressed through meetings with Building Administrators, guidance counselors, or teachers, as the Comprehensive Student Attendance Policies require. However, Witness B did testify that such actions were undertaken, but whether they were followed up on by Building Administrators was, according to Witness B, unclear.

C. Participation in Athletics and Extracurricular Activities

The Comprehensive Student Attendance Policies state that:

Students that exceed three (3) unexcused absences in a class during a quarter will be ineligible to participate in the next game, performance, contest or, if the student does not participate in extracurricular activities, a privilege event or activity as determined by the Building Principal. For each subsequent unexcused absence in a quarter, a student will not be permitted to participate in a game, performance, competition or, if the student does not participate in extracurricular activities, one privilege event or activity, as determined by the Building Principal. Privilege events and activities include but are not limited to non-curricular field trips, proms, dances, etc. The student's attendance will be monitored for the remainder of the marking period.¹⁹

The Newburgh Enlarged City School District has a separate policy for participation in athletics and extracurricular activities; however, those policies say virtually the same thing as the above section from the Comprehensive Student Attendance Policies. Policy # 5441 is titled "Eligibility for Student Athletic and Extracurricular Activity Participation" (hereinafter "Student Athletic Policy").²⁰ It provides: "Students are expected to maintain a minimum of 93% attendance, exclusive of excused absences, in all classes, which is defined as three (3) or fewer unexcused absences to class within a marking period."²¹ It further provides that "[s]tudents that exceed three (3) unexcused absences in a class during a quarter will be ineligible for the next game, performance, or contest. For each subsequent unexcused absence in a quarter, a student will not

¹⁹ *Id.*

²⁰ Grand Jury Ex. #1 – "Policy # 5441 – Eligibility for Student Athletic and Extracurricular Activity Participation for 2015-2016," pp. 1-3. *Note, this policy is sometimes seemingly incorrectly numbered as 5411. Upon information and belief, Policy 5441 and Policy 5411 are the same.

²¹ *Id.*

be permitted to participate in a game, performance or competition.”²² According to Witness C, this policy has been in effect between June 2015 and May 2018, except for some minor revisions.

According to Witness C, because the policy excludes excused absences from its ineligibility mandate, a student could have any number of excused absences so long as they did not exceed three (3) *unexcused* absences. Furthermore, according to Witness C, the policy was written as class-specific, so a student could accumulate three (3) unexcused absences in every class and still be eligible to participate in athletics and extracurricular activities under the Comprehensive Student Attendance Policies and the Student Athletic Policy (hereinafter collectively referred to as “Both Attendance Policies”) as long as no individual class (e.g., History, Biology, etc.) exceeded the three unexcused absence threshold. Additionally, under Both Attendance Policies, ineligibility was marking period/quarter/semester specific,²³ so, according to Witness C, if a given athletic activity extended into an additional marking period, once that new marking period began, the student’s attendance record would be wiped clean or “reset” for purposes of athletics and extracurricular participation. In other words, according to Witness C, a student-athlete could be ineligible to participate in the first part of a given sports season with excessive unexcused absences, but would still be eligible to participate in the latter part of that season – including playoffs and state championships – as long as that student-athlete did not go beyond the three unexcused absence threshold in that latter part of the sports season.

Both Attendance Policies discuss tardies, but nowhere in Both Attendance Policies does it specifically address what impact, if any, tardies will definitively have on athletics or extracurricular participation. Both Attendance Policies state:

Students who have excessive tardies and/or early departures will be addressed by the Building Principal or other administrator, who will regularly monitor the students. A student’s continued

²² *Id.*

²³ The terms “marking period,” “quarter,” and “semester” will all be used throughout this report interchangeably and all denote the same time periods within a given school year.

tardiness and/or early departures **may** result in the student being suspended from participation in extracurricular activities, including athletics, and privilege events and activities (emphasis added).²⁴

Despite this possibility, according to Witness C, in practice, a student-athlete's excessive tardies never resulted in the student being ineligible to participate in athletics.

In sum, according to Witness C, a student-athlete could have any number of excused absences, and any number of excused or unexcused tardies in a given marking period, but as long as she/he did not exceed three unexcused absences in any given class in any given marking period, the student-athlete could participate in any and all athletic and extracurricular activities. According to Witness D, a Newburgh Enlarged City School District Board Member whose identity is known to the Grand Jury (hereinafter "Witness D"), this was not the intended scope of the attendance policy for athletic and extracurricular activities. Although the language of Both Attendance Policies states "[s]tudents that exceed three (3) unexcused absences *in a class* ...,"²⁵ according to Witness D, the intended interpretation of that language was that student-athletes could not exceed three unexcused absences overall, among all classes, in a given marking period, in order to maintain eligibility for athletic and extracurricular activities. Therefore, if a student-athlete was absent unexcused for an entire day, the student-athlete would be ineligible to participate under the intended interpretation of Both Attendance Policies. According to Witness C, however, this was not how Both Attendance Policies were interpreted and enforced. In other words, according to Witness C, Both Attendance Policies were understood to apply to individual class absences. Witness D acknowledged that Both Attendance Policies did not necessarily read the way the witness had hoped they would be interpreted. According to Witness E, a Newburgh Enlarged City School District employee whose identity is known to the Grand Jury (hereinafter "Witness E"), the generally understood interpretation of Both Attendance

²⁴ Grand Jury Ex. #1 – Comprehensive Student Attendance Policies and Student Athletic Policy.

²⁵ *See id.* (emphasis added).

Policies, i.e., class specific, made the policies too lenient: “If you are going to miss three or four classes, you are not making much of an attempt to get through it.”²⁶

II. VIOLATIONS OF ATTENDANCE POLICIES AT NEWBURGH FREE ACADEMY

A. Multiple Student-Athletes Participated While Ineligible

According to Witness C, between 2015 and 2017, excessive numbers – “triple digits” – of students participated in athletics while ineligible under Both Attendance Policies.²⁷ Witness C noted that while the witness diligently reviewed the witness’s own student-athletes’ attendance to ensure their eligibility, the same could not be said about all of the athletics coaches, though the witness acknowledged that some did also actively review their student-athletes’ attendance. Witness C additionally noted that between 2015 and 2017, the Athletic Director’s responsibility under the policy was to both monitor the student-athletes’ attendance, and to ensure that the coaches were monitoring it as well. According to Both Attendance Policies:

Coaches and advisors shall be responsible for monitoring student attendance of the students participating in the particular activity(ies) and ensure compliance with this policy. The Athletic Director shall monitor the coaches and the Building Administration shall monitor the advisors to ensure that this policy is being followed.²⁸

The Student Athletic Policy provides an additional mandate that reads: “The coach, athletic director, building principal and/or activity advisor, as applicable, will monitor student attendance on a daily basis.”²⁹ According to Witness C, neither mandate was being generally followed from coaches, up to and including the building Principal.

Witness F, a former Newburgh Enlarged City School District employee, whose identity is known to the Grand Jury (hereinafter “Witness F”) testified that student-athlete attendance reviews were only done on a spot-check basis because the policy required that the *coaches* review attendance for their student-athletes

²⁶ Grand Jury Testimony of Witness E, p. 77.

²⁷ Grand Jury Testimony of Witness C, p. 45.

²⁸ *Id.*

²⁹ Grand Jury Ex. #1 – Student Athletic Policy at 2.

on a daily basis. According to Witness F, this spot-check occurred up until late 2016. But Witness G, a Newburgh Enlarged City School District employee whose identity is known to the Grand Jury (hereinafter “Witness G”) testified that prior to late 2016, the witness relied on District Administrators to offer a second level review of the student-athlete attendance. For instance, Witness G testified that the witness would e-mail higher level Administrators identifying students that he found to be eligible, but that this Administrator could have/should have corrected him if the witness was mistaken regarding an individual student’s eligibility. According to Witness G, it was incumbent upon the second level reviewer to ensure the accuracy of the witness’s initial reviews. Witness G, like many of the other witnesses who testified, simply delegated the responsibility of ensuring eligibility accuracy to someone else. Witness F testified that “[y]ou were basically flying on your own, and nobody ever went through any of that stuff.”³⁰ Nobody seemed to take full ownership of their responsibility to not only check student-athletes’ attendance, but to ensure the accuracy of those reviews.

Witness G was presented with numerous examples of several of the witness’s student-athletes who, prior to November 2016, participated in various games and contests while ineligible. In other words, these student-athletes hit their threshold of four (4) unexcused absences in a given class, and nonetheless participated in the next game or contest. Asked how this could happen if these student-athletes’ attendance records were being monitored regularly, Witness G could not provide an explanation.

This issue spanned more than just one sport. There were multiple sports between 2014 and 2017 whereby student-athletes participated while ineligible. The fact that multiple student-athletes were participating in athletics while ineligible under the policy is supported by the attendance records themselves and news media accounts of the student-athletes’ participation. According to a Hudson Valley Crime Analysis Center Data Analyst known to the Grand Jury (hereinafter “Data Analyst”), an analysis of the Infinite Campus attendance records between 2014 and 2017 showed that 17 student-athletes across various

³⁰ Grand Jury Testimony of Witness F, p. 32.

sports – including Newburgh Free Academy Boys Soccer, Boys and Girls Track, Baseball, Football, and Wrestling – had 29 different instances of participating while ineligible.³¹ In other words, these student-athletes participated in a game/sport/contest immediately following their 4th, 5th, and in some cases 6th and 7th unexcused absence in a given class in a given marking period.³² The Data Analyst testified that he culled media reports, newspaper articles, publicly available box scores and publicly available contest results in order to confirm that these student-athletes, across these various sports, did in fact participate. One instance featured a student-athlete's photograph in the local newspaper of him on the field in the contest in which he was ineligible to play.³³ There could have been more such instances of student-athletes playing while ineligible, but the Data Analyst testified that he could not confirm their participation due to a lack of publicly available data on all of the student-athletes' games and contests.

B. Attendance Record Manipulation

i. Modifications and Deletions

According to Witness A, since the Infinite Campus data does not retain overridden data beyond 30 days, there is no way, other than pulling a printout of an earlier attendance record and a later attendance record, to tell from what entry an attendance record was modified. However, according to Witness A, Infinite Campus does record the modified date and time, and the modifying user. With access to both the earlier printouts of all Newburgh Free Academy student attendance records for 2016³⁴ as well as the later snapshots in the Infinite Campus records,³⁵ the Data Analyst was able to note that presently, if reviewing the later snapshots in the Infinite Campus records, it would only *appear* that some of these same student-athletes were then eligible to participate. According to the Data Analyst, there are earlier student-athlete

³¹ Grand Jury Ex. #29.

³² *See id.*

³³ *See id.*

³⁴ Grand Jury Ex. #6.

³⁵ Grand Jury Ex. #11.

attendance records and later snapshots of student-athletes' attendance records indicating that some student-athletes were ineligible prior to a particular game or contest in which they participated.³⁶ Based on the evidence presented in the Grand Jury, it appears that it was only after certain internal investigations were conducted in the summer and fall of 2016 that those records from months prior were subsequently changed.

As recounted by Witness C, in one particular instance, while reconciling grades for the witness's class in June 2016, the witness noticed that one of the witness's students was ineligible for participation in athletics. Witness C testified that, duty-bound, the witness notified the Building Administrators by e-mail.³⁷ That e-mail was sent on June 10, 2016 and there happened to be a championship for that student-athlete's sport that same weekend – June 10-June 11, 2016. Witness C's e-mail therefore put Building Administrators on notice that the student was ineligible to participate before the championship took place. However, Witness H, a Newburgh Enlarged City School District employee whose identity is known to the Grand Jury (hereinafter "Witness H") testified that despite initially being told by the student's coach that the student had not participated, the witness subsequently learned that this student did actually participate in that championship. When Witness C checked that student's attendance records again on June 14, 2016, the records had been changed. According to the evidence and Witness C's testimony, on June 10, 2016, the student had unexcused absences in all of her classes on May 13, 2016 and unexcused absences for the 1st, 2nd, 3rd, and 5th periods (this student did not have class during 4th period), and an unexcused tardy in her 6th period class on May 2, 2016.³⁸ However, a re-check of the student's attendance records on June 14, 2016 disclosed that the student's unexcused absences on May 13, 2016 were all changed to an Exempt/Excused Absence for Administrator Approved Circumstances, and the student's unexcused absences on May 2, 2016 were also changed to an Exempt/Excused Absence for Administrator Approved Circumstances.³⁹ The

³⁶ Grand Jury Ex. #29.

³⁷ Grand Jury Ex. #2.

³⁸ Grand Jury Ex. #3. According to Witness C, the designation "04" means unexcused absence and "67" means unexcused tardy.

³⁹ See *id.* According to Witness C, the designation "AA15" means Administrator Approved Circumstances.

student's unexcused tardy on May 2, 2016 was changed to an excused tardy.⁴⁰ According to Witness C, the notation under the Administrator Approved Circumstances contained the name of one of Newburgh Free Academy's Building Administrators.

Additionally, based on the evidence and the testimony from Witness C, this student had unexcused absences in her 2nd period class on May 10, 2016 and April 26, 2016, which were present on her attendance record as of June 10, 2016, but which no longer appeared on her attendance record as of June 14, 2016.⁴¹ Except for one further minor adjustment, the student's attendance record remained this way when Witness C ran one final attendance report for the student on June 23, 2016.⁴²

According to the evidence, on June 10, 2016, the student had more than three (3) unexcused absences in 6 out of her 7 classes for that 4th quarter/marking period of the school year.⁴³ On June 14, 2016, after the above noted changes and deletions, the student had more than three (3) unexcused absences in 0 out of her 7 classes for that 4th quarter/marking period of the school year.⁴⁴ Thus, based on the evidence, four days after being identified as being ineligible in an e-mail to Building Administrators, it appeared that the student was now eligible to participate in athletics. Witness C also noted that the student's ineligibility (i.e., when she accumulated her fourth unexcused absence in the witness's class alone) was actually as far back as May 4, 2016 – more than a month prior to the June 10-June 11, 2016 championships.

In another instance, noted previously, according to one student-athlete's "before" snapshot (the hard copy attendance record for this student), he hit his critical ineligibility threshold on September 30, 2016.⁴⁵ According to the Data Analyst, he nonetheless participated in a game on October 5, 2016. However, according to the Data Analyst's examination of the records, this student-athlete's "after" snapshot (the

⁴⁰ See *id.* According to Witness C, the designation "66" means excused tardy.

⁴¹ See *id.*

⁴² See *id.*

⁴³ See *id.*

⁴⁴ See *id.*

⁴⁵ Grand Jury Ex. #29.

Infinite Campus attendance record for this student) revealed that the unexcused absence on September 30, 2016, making him ineligible to participate on October 5, 2016, had, at some point after October 5, 2016, been deleted entirely or otherwise changed to a “present.”⁴⁶

According to the Data Analyst, this was actually a fairly common situation. The Data Analyst’s examination of the records revealed that 3 other student-athletes’ attendance records were changed⁴⁷ and but for the “before” snapshot of what their attendance actually was, we would never know that these students had multiple unexcused absences changed to excused absences. The Data Analyst also testified that the “before” snapshots for these student-athletes actually contained the date they were accessed and printed – October 17, 2016. The “after” snapshots showed that the unexcused absences for these student-athletes were modified to excused absences on October 18, 2016 and October 19, 2016.

ii. Attendance Record Patterns

Aside from outright modification and deletion of attendance records, the Data Analyst also identified what he deemed “patterns” of unusual absences and tardies. The Data Analyst prepared examples of several student-athletes, each with a corresponding spreadsheet containing charts and graphs detailing their entire Infinite Campus attendance history.⁴⁸ The Data Analyst testified that he then identified not only when each marking period began and ended in each given school year, but when that student-athlete’s sport fell within any given marking period or multiple marking periods. According to the Data Analyst, since many sports overlapped into more than one marking period, he created separate charts and graphs for the “off season” of the marking period and then the “on season,” i.e., when, in the given marking period(s) the sport was played. The Data Analyst testified that he charted every given attendance designation as denoted in the Infinite Campus records – excused absences, unexcused absences, exempt absences, early release excused absences, unexcused tardies, and excused tardies. In so plotting, the Data Analyst presented the Grand Jury

⁴⁶ See *id.*

⁴⁷ See *id.*

⁴⁸ See *id.*

with a sample of one student-athlete each from Newburgh Free Academy boys track, boys basketball and boys soccer who exhibited curious patterns of attendance.⁴⁹

For example, one Newburgh Free Academy boys track athlete's attendance record which began in 2013-2014 showed neither absences nor tardies of any designation (excused, unexcused, exempt) during the 1st quarter of the year when there was no outdoor track.⁵⁰ During the 2nd quarter of the year and a portion of the 3rd quarter when there also was no outdoor track, this student's attendance record showed high numbers of excused tardies (e.g., 8 in one class in the 2nd quarter; 5 in one class in only a portion of the 3rd quarter).⁵¹ During the portion of the 3rd quarter encompassing the outdoor track season, this student simply had very low numbers of excused tardies (e.g., 2 in one class). But during the last quarter which also encompassed the outdoor track season, this student had a jump in the number of excused absences (e.g., 4+ in 6 different classes) and exempt absences (e.g., 5+ in 3 different classes).⁵² During the portion of the last quarter of the 2013-2014 year when there was no outdoor track, this student had very low attendance numbers.⁵³ The 2014-2015 school year represented virtually the same pattern.⁵⁴ This student-athlete's attendance records showed neither absences nor tardies of any designation (excused, unexcused, exempt) during the 1st quarter of the year when there was no outdoor track.⁵⁵ During the 2nd quarter of the year and a portion of the 3rd quarter when there also was no outdoor track, this student's attendance record showed high numbers of excused tardies (e.g., 1+ in 3 different classes in the 2nd quarter; 7 in one class in only a portion of the 3rd quarter).⁵⁶ During the portion of the 3rd quarter encompassing the outdoor track season, this student-athlete's attendance records showed neither absences nor tardies of any designation (excused,

⁴⁹ *See id.*

⁵⁰ *See id.*

⁵¹ *See id.*

⁵² *See id.*

⁵³ *See id.*

⁵⁴ *See id.*

⁵⁵ *See id.*

⁵⁶ *See id.*

unexcused, exempt).⁵⁷ But during the last quarter which also encompassed the outdoor track season, this student again had a jump in the number of excused absences (e.g., 4 in 5 different classes) and exempt absences (e.g., 5 in one class).⁵⁸ During the portion of the last quarter of the 2014-2015 year when there was no outdoor track, this student-athlete's attendance records showed neither absences nor tardies of any designation (excused, unexcused, exempt).⁵⁹ In the 2015-2016 school year, this student-athlete's attendance records again showed neither absences nor tardies of any designation (excused, unexcused, exempt) during the 1st quarter of the year when there was no outdoor track.⁶⁰ During the 2nd quarter of the year and a portion of the 3rd quarter when there also was no outdoor track, this student's attendance record showed an even greater increase in the number of excused tardies than years prior (e.g., 18 in one class and 14 in another class in the 2nd quarter; 10 in one class and 13 in another class in only a portion of the 3rd quarter).⁶¹ During the portion of the 3rd quarter encompassing the outdoor track season, this student had increased numbers of excused absences (e.g., 2+ in 4 different classes) and excused tardies (e.g., 7+ in 2 different classes).⁶² During the last quarter which also encompassed the outdoor track season, this student once again saw a jump in the number of exempt absences (e.g., 5+ in 4 different classes).⁶³

Below is a redacted copy of the Data Analyst's charted and graphed attendance history for the Newburgh Free Academy boys track athlete discussed above.

⁵⁷ *See id.*

⁵⁸ *See id.*

⁵⁹ *See id.*

⁶⁰ *See id.*

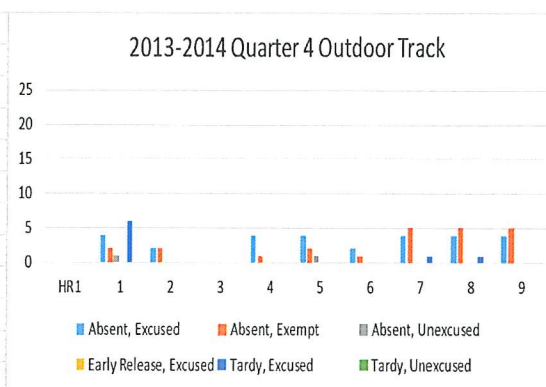
⁶¹ *See id.*

⁶² *See id.*

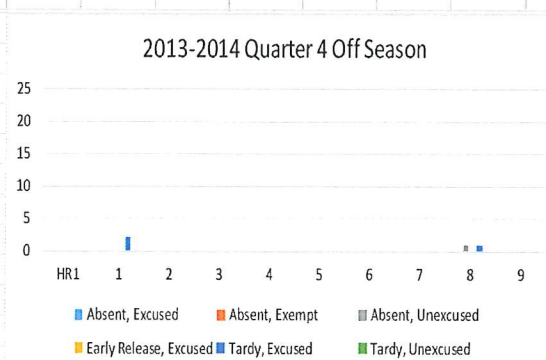
⁶³ *See id.*



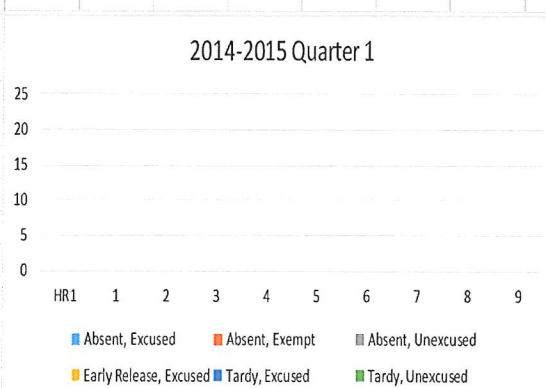
2013-2014 Quarter 4 - Track Season							
	Absent, Excused	Absent, Exempt	Absent, Unexcused	Early Release, Excused	Tardy, Excused	Tardy, Unexcused	Total
HR1	0	0	0	0	0	0	0
1	4	2	1	0	6	0	7
2	2	2	0	0	0	0	4
3	0	0	0	0	0	0	0
4	4	1	0	0	0	0	5
5	4	2	1	0	0	0	7
6	2	1	0	0	0	0	3
7	4	5	0	0	1	0	9
8	4	5	0	0	1	0	9
9	4	5	0	0	0	0	9



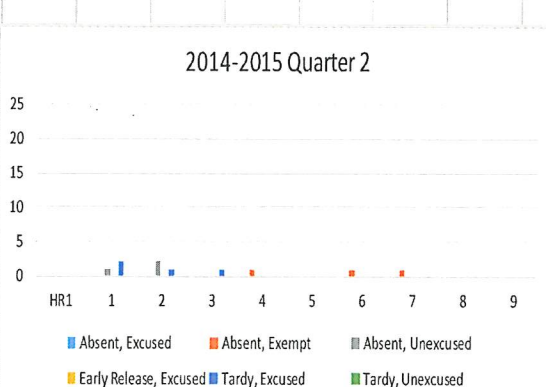
2013-2014 Quarter 4 - Off Season							
	Absent, Excused	Absent, Exempt	Absent, Unexcused	Early Release, Excused	Tardy, Excused	Tardy, Unexcused	Total
HR1	0	0	0	0	0	0	0
1	0	0	0	0	2	0	0
2	0	0	0	0	0	0	0
3	0	0	0	0	0	0	0
4	0	0	0	0	0	0	0
5	0	0	0	0	0	0	0
6	0	0	0	0	0	0	0
7	0	0	0	0	0	0	0
8	0	0	1	0	1	0	1
9	0	0	0	0	0	0	0



2014-2015 Quarter 1 - Off Season							
	Absent, Excused	Absent, Exempt	Absent, Unexcused	Early Release, Excused	Tardy, Excused	Tardy, Unexcused	Total
HR1	0	0	0	0	0	0	0
1	0	0	0	0	0	0	0
2	0	0	0	0	0	0	0
3	0	0	0	0	0	0	0
4	0	0	0	0	0	0	0
5	0	0	0	0	0	0	0
6	0	0	0	0	0	0	0
7	0	0	0	0	0	0	0
8	0	0	0	0	0	0	0
9	0	0	0	0	0	0	0

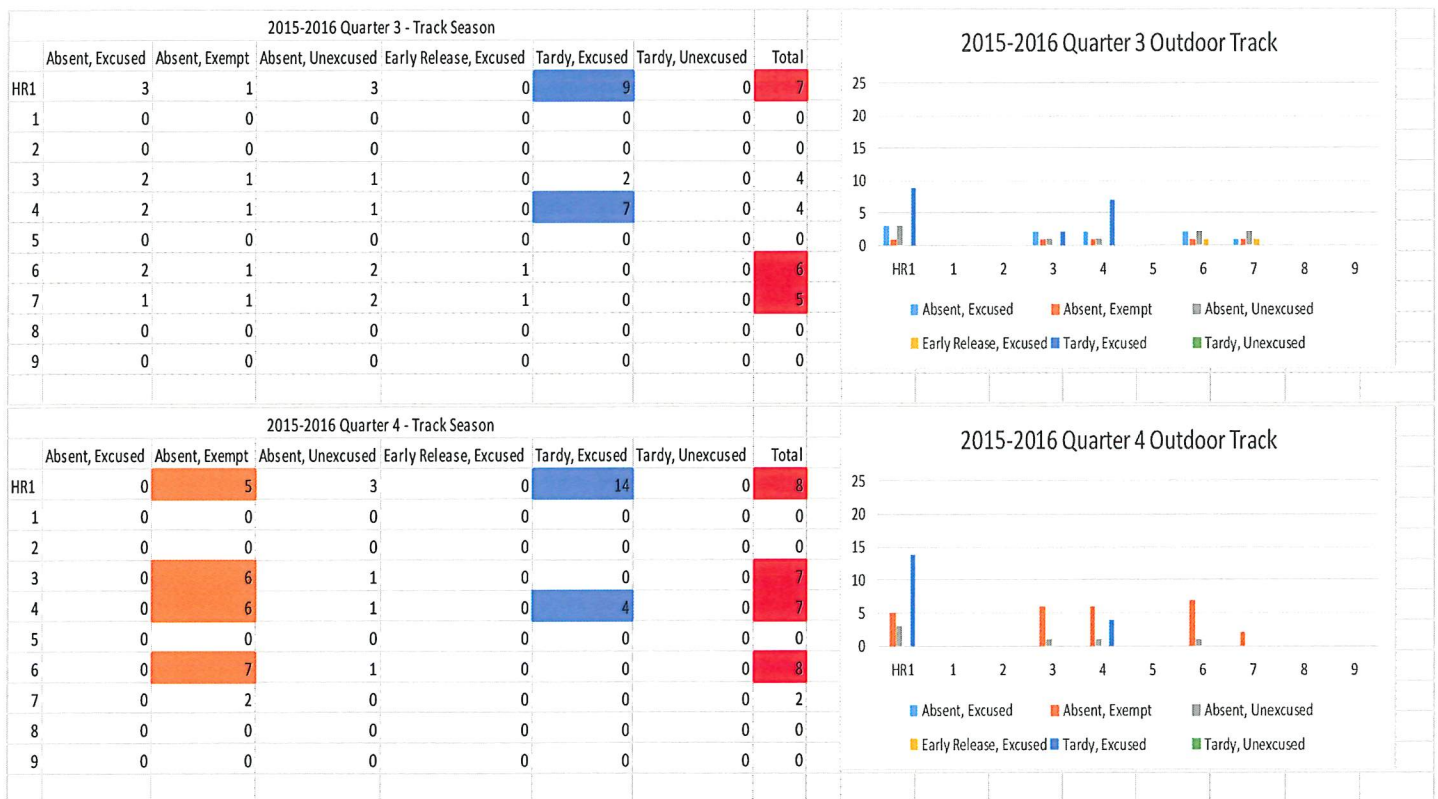


2014-2015 Quarter 2 - Off Season							
	Absent, Excused	Absent, Exempt	Absent, Unexcused	Early Release, Excused	Tardy, Excused	Tardy, Unexcused	Total
HR1	0	0	0	0	0	0	0
1	0	0	1	0	2	0	1
2	0	0	2	0	1	0	2
3	0	0	0	0	1	0	0
4	0	1	0	0	0	0	1
5	0	0	0	0	0	0	0
6	0	1	0	0	0	0	1
7	0	1	0	0	0	0	1
8	0	0	0	0	0	0	0
9	0	0	0	0	0	0	0









GRAND JURY EXHIBIT #29

Another example was one Newburgh Free Academy boys basketball player's attendance record that began in 2013-2014, which showed a very high number of unexcused absences during the 1st quarter prior to the start of basketball season (e.g., 7+ in 6 different classes).⁶⁴ However, immediately prior to and during the basketball season (2nd quarter and a portion of the 3rd quarter), this same student-athlete's attendance records showed neither absences nor tardies of any designation (excused, unexcused, exempt).⁶⁵ Then, in the portion of the 3rd quarter when the basketball season had concluded, this student had high numbers of unexcused absences again (e.g., 4+ in 6 different classes).⁶⁶ The same was true for the last quarter of the 2013-2014 year when no basketball was played (e.g., 4+ in 4 different classes).⁶⁷ The number of exempt

⁶⁴ See *id.*

⁶⁵ See *id.*

⁶⁶ See *id.*

⁶⁷ See *id.*

absences increased as well (e.g., 7+ in 4 different classes).⁶⁸ For the 1st quarter prior to the start of the basketball season in 2014-2015, there were some tardies and absences, but not many.⁶⁹ Immediately prior to and during the basketball season (2nd quarter and a portion of the 3rd quarter), this student-athlete's attendance records again showed neither absences nor tardies of any designation (excused, unexcused, exempt).⁷⁰ Then, in the portion of the 3rd quarter when the basketball season had concluded, this student now had several unexcused absences (e.g., 2+ in 6 different classes).⁷¹ In the last quarter of the 2014-2015 year when no basketball was played, this student's unexcused absences jumped even more (e.g., 4+ in 5 different classes with 1 class having 7 and 1 class having 12 unexcused absences).⁷² The number of exempt absences increased as well (e.g., 8+ in 4 different classes).⁷³ This pattern repeated itself for the 2015-2016 year.⁷⁴ For the 1st quarter prior to the start of basketball season in 2014-2015, there were some tardies and absences, but not many.⁷⁵ Immediately prior to and during the basketball season (2nd quarter and a portion of the 3rd quarter), this student-athlete's attendance records again showed neither absences nor tardies of any designation (excused, unexcused, exempt).⁷⁶ But the number of unexcused absences increased in the portion of the 3rd quarter when the basketball season had concluded (e.g., 4+ in 5 different classes with 1 class having 9 and 1 class having 11 unexcused absences).⁷⁷ The number of unexcused absences was even higher in the last quarter of the 2015-2016 year when no basketball was played (e.g., 7+ in 7 different classes with 3 classes having 10+ unexcused absences).⁷⁸ Also, the number of exempt absences increased again (e.g., 3+ in 6 different classes).⁷⁹ In 2016-2017, this student had several absences and tardies in the 1st quarter and the

⁶⁸ See *id.*

⁶⁹ See *id.*

⁷⁰ See *id.*

⁷¹ See *id.*

⁷² See *id.*

⁷³ See *id.*

⁷⁴ See *id.*

⁷⁵ See *id.*

⁷⁶ See *id.*

⁷⁷ See *id.*

⁷⁸ See *id.*

⁷⁹ See *id.*

portion of the 2nd quarter immediately prior to the start of the basketball season.⁸⁰ But during the portions of the 2nd quarter and 3rd quarter that encompassed the basketball season, this student-athlete's attendance records showed neither absences nor tardies of any designation (excused, unexcused, exempt).⁸¹ Yet, in the portion of the 3rd quarter when the basketball season had concluded, this student had unexcused absences (e.g., 7+ in 2 different classes).⁸² In the last quarter of the 2016-2017 year when no basketball was played, this student's unexcused absences were at their highest levels (e.g., 6+ in 7 different classes with 5 classes having 10+ unexcused absences).⁸³ The number of exempt absences was the same as in the last quarter of the 2015-2016 school year (e.g., 3+ in 6 different classes).⁸⁴

Below is a redacted copy of the Data Analyst's charted and graphed attendance history for the Newburgh Free Academy boys basketball player discussed above.



⁸⁰ See *id.*

⁸¹ See *id.*

⁸² See *id.*

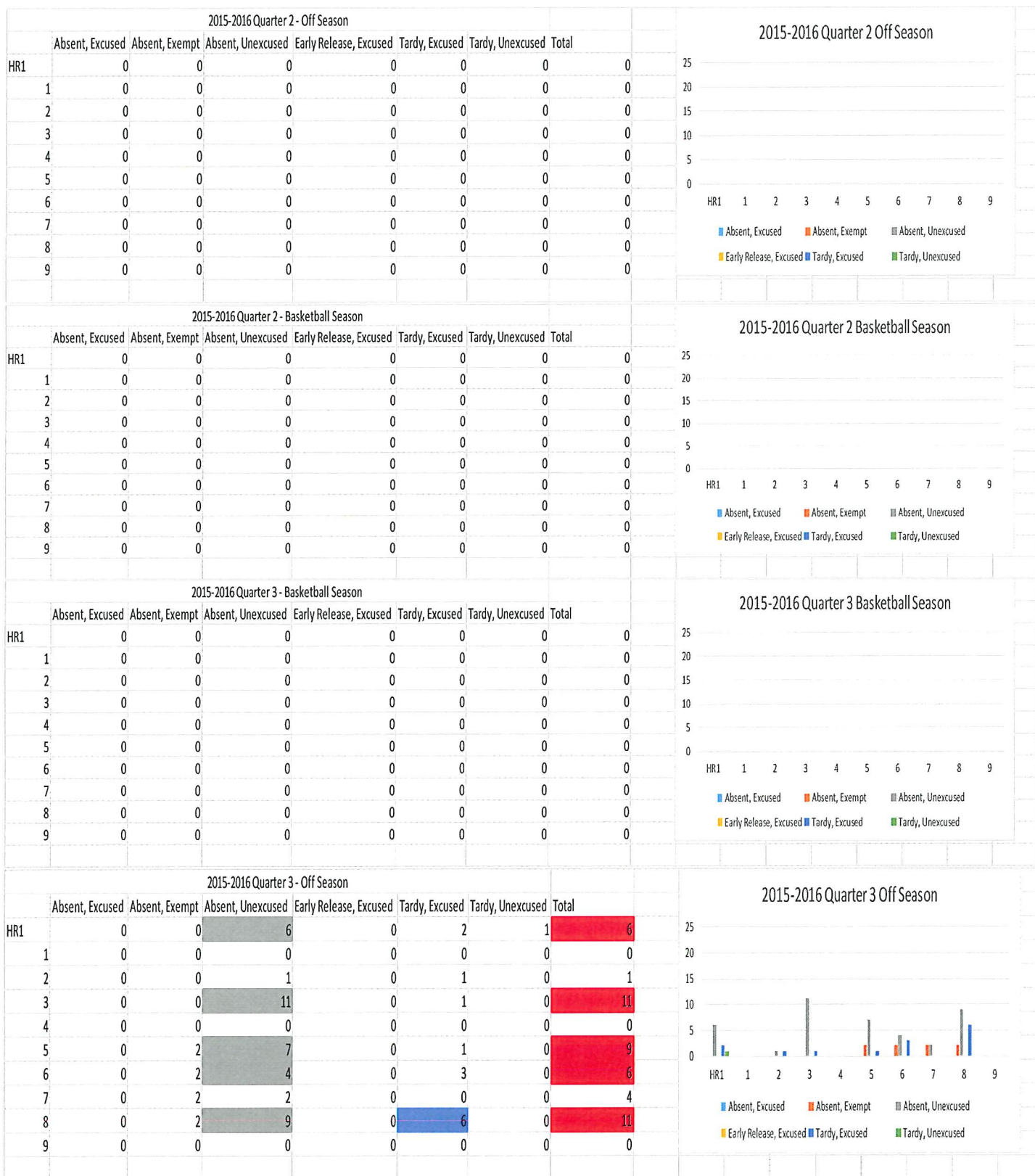
⁸³ See *id.*

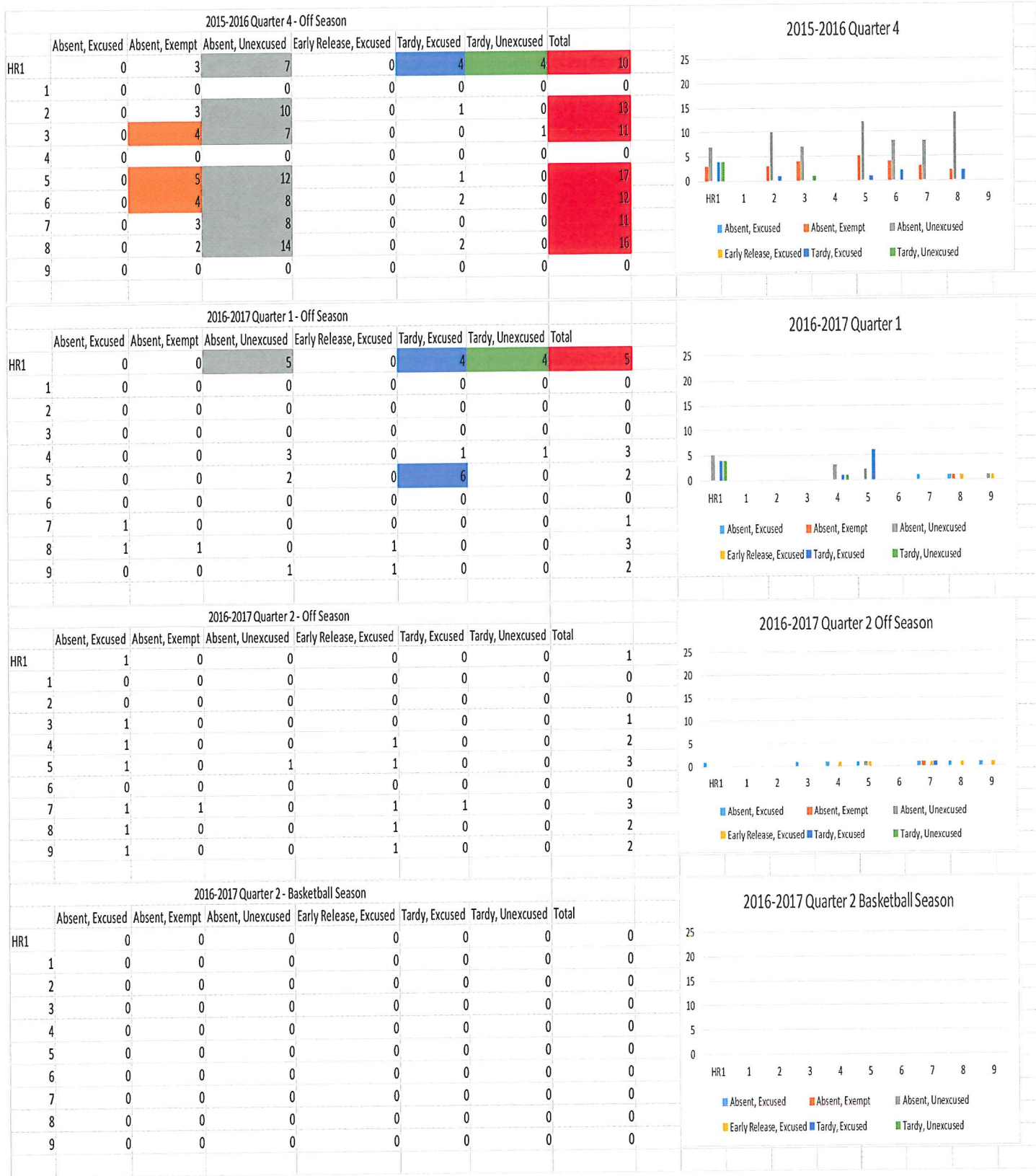
⁸⁴ See *id.*

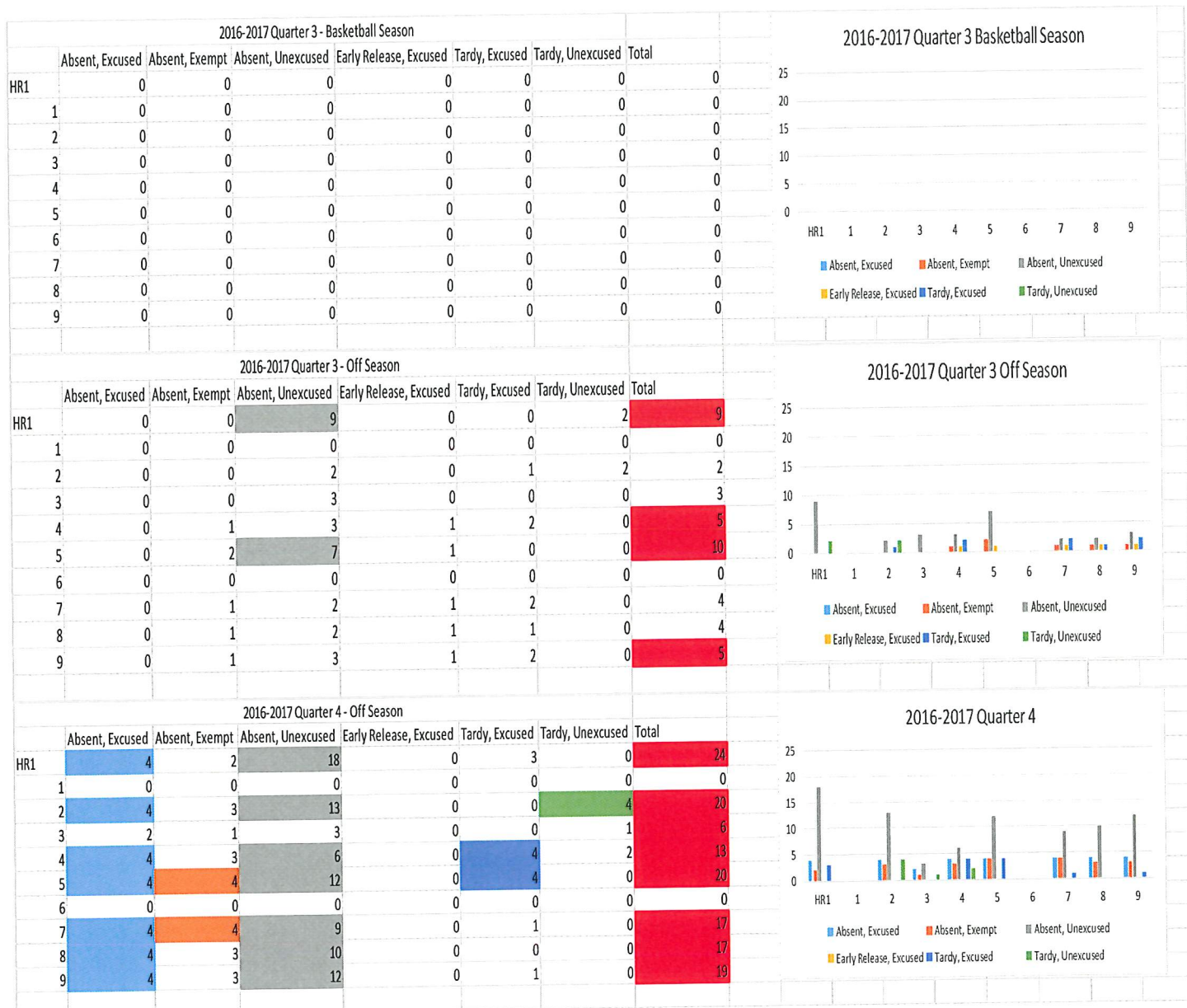












GRAND JURY EXHIBIT #29

Yet another example was one Newburgh Free Academy boys soccer player's attendance record that began in 2014-2015, and showed only a few excused, exempt and unexcused absences during the portion of the 1st quarter prior to the start of the soccer season.⁸⁵ During the end of the 1st quarter that encompassed the soccer season, this student's attendance again had low numbers of excused, exempt and unexcused

⁸⁵ See *id.*

absences.⁸⁶ During the start of the 2nd quarter that also encompassed the soccer season, this student-athlete's attendance records showed neither absences nor tardies of any designation (excused, unexcused, exempt).⁸⁷ But during the latter part of the 2nd quarter after the soccer season had concluded, this student began to accumulate higher numbers of unexcused absences (e.g., 2+ in 4 different classes with 1 class having 6 unexcused absences).⁸⁸ In the quarter following the soccer season, this student again had increasing numbers of unexcused absences (e.g., 7 in 1 class).⁸⁹ In the last quarter of the 2014-2015 year when no soccer was played, this student's unexcused absences increased substantially (e.g., 3+ in 4 different classes with 1 class having 18 and 2 classes having 9 unexcused absences).⁹⁰ During the portion of the first quarter prior to the start of the soccer season in the 2015-2016 year, this student still had high numbers of unexcused absences (e.g., 3+ in 5 different classes).⁹¹ But during the end of the 1st quarter which encompassed the soccer season, this student's attendance had low numbers of excused and exempt absences.⁹² During the start of the 2nd quarter which also encompassed the soccer season, this student-athlete's attendance records again showed neither absences nor tardies of any designation (excused, unexcused, exempt).⁹³ But during the latter part of the 2nd quarter after the soccer season had concluded, the number of unexcused absences for this student increased substantially (e.g., 13+ in 4 different classes with 1 class having 32 unexcused absences).⁹⁴ In the quarter following the soccer season, this student again had a very high numbers of unexcused absences (e.g., 13+ in 4 different classes with 1 class having 40 unexcused absences).⁹⁵ In the last quarter of the 2015-2016 year when no soccer was played, this student's unexcused absences were still significantly high (e.g., 10+ in

⁸⁶ *See id.*

⁸⁷ *See id.*

⁸⁸ *See id.*

⁸⁹ *See id.*

⁹⁰ *See id.*

⁹¹ *See id.*

⁹² *See id.*

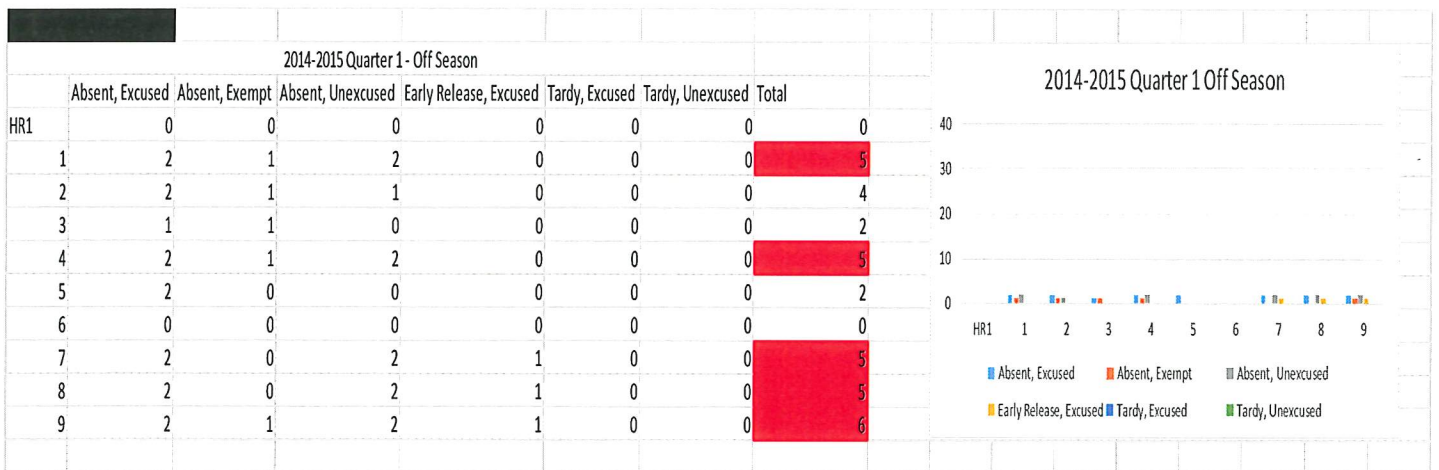
⁹³ *See id.*

⁹⁴ *See id.*

⁹⁵ *See id.*

2 different classes with 1 class having 32 unexcused absences).⁹⁶ Yet at the start of the 2016-2017 year, during the portion of the 1st quarter prior to the start of the soccer season, this student's unexcused absences dropped back down (2+ in only 2 classes).⁹⁷ But the trend continued – in the latter part of the 2nd quarter after the soccer season had concluded, the number of unexcused absences increased again (e.g., 13+ in 4 different classes), and in the quarter following the soccer season, the number of unexcused absences continued to climb (e.g., 14+ in 4 different classes with 2 classes having 22+ unexcused absences), culminating in a last quarter that saw this student's highest numbers of unexcused absences (e.g., 9+ in 7 different classes with 4 classes having 22+ and 2 classes having 32+ unexcused absences).⁹⁸

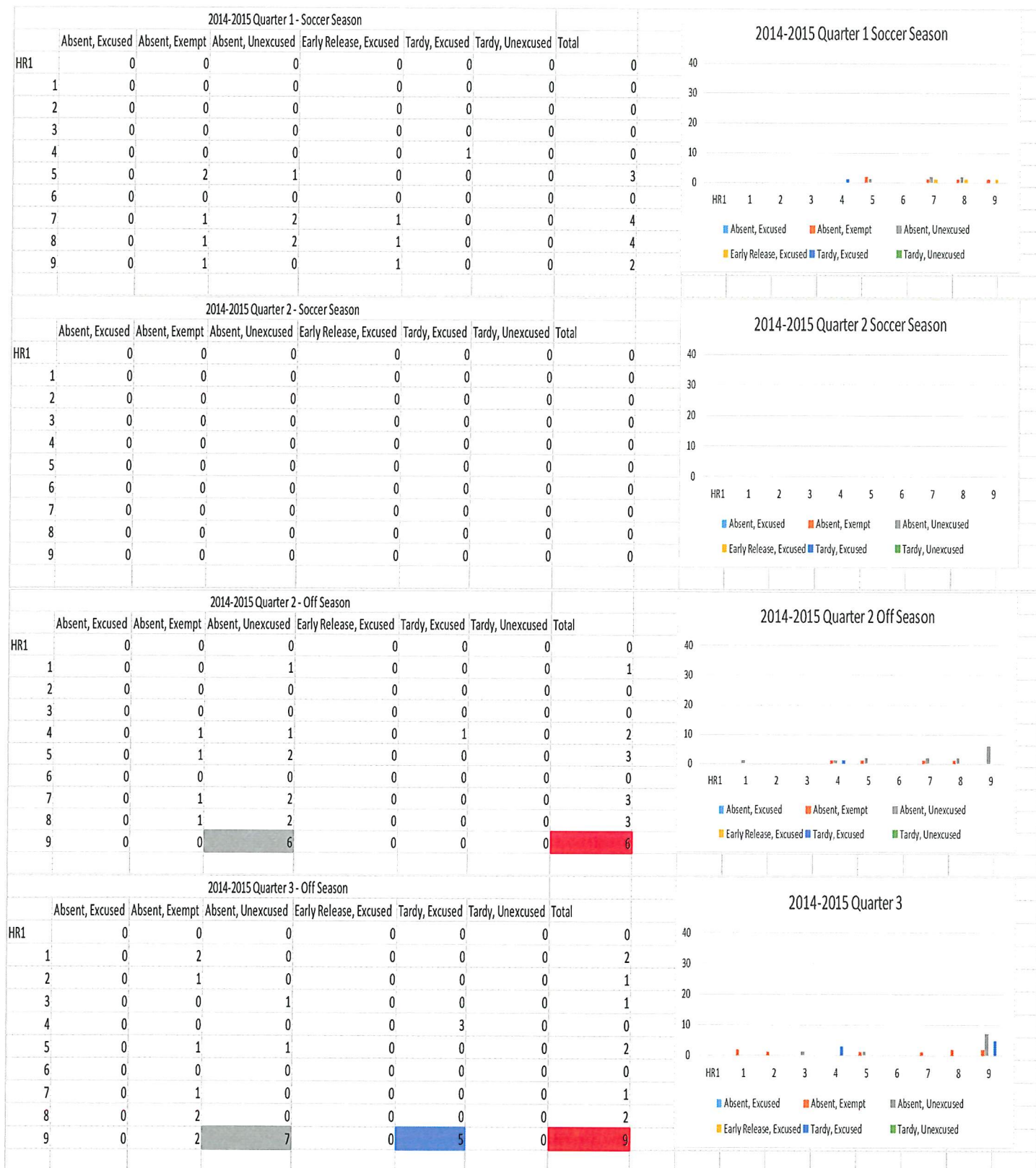
Below is a redacted copy of the Data Analyst's charted and graphed attendance history for the Newburgh Free Academy boys soccer player discussed above.



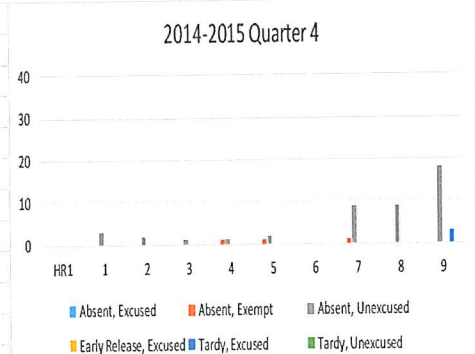
⁹⁶ See *id.*

⁹⁷ See *id.*

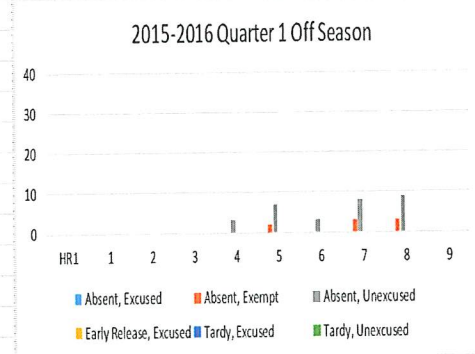
⁹⁸ See *id.*



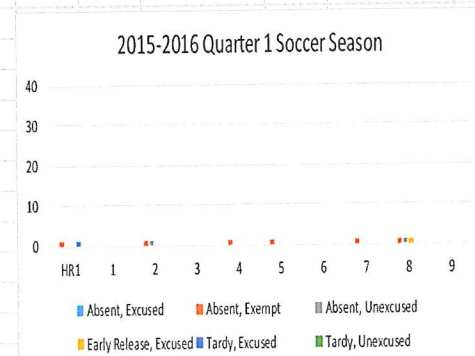
2014-2015 Quarter 4 - Off Season							
	Absent, Excused	Absent, Exempt	Absent, Unexcused	Early Release, Excused	Tardy, Excused	Tardy, Unexcused	Total
HR1	0	0	0	0	0	0	0
1	0	0	3	0	0	0	3
2	0	0	2	0	0	0	2
3	0	0	1	0	0	0	1
4	0	1	1	0	0	0	2
5	0	1	2	0	0	0	3
6	0	0	0	0	0	0	0
7	0	1	9	0	0	0	10
8	0	0	9	0	0	0	9
9	0	0	18	0	3	0	18



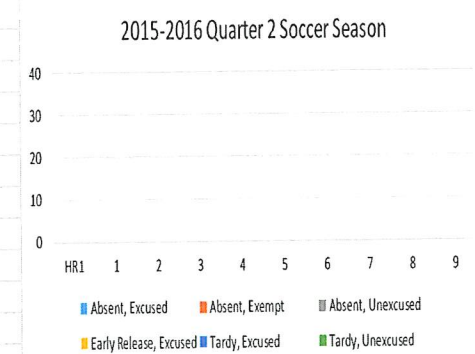
2015-2016 Quarter 1 - Off Season							
	Absent, Excused	Absent, Exempt	Absent, Unexcused	Early Release, Excused	Tardy, Excused	Tardy, Unexcused	Total
HR1	0	0	0	0	0	0	0
1	0	0	0	0	0	0	0
2	0	0	0	0	0	0	0
3	0	0	0	0	0	0	0
4	0	0	3	0	0	0	3
5	0	2	7	0	0	0	9
6	0	0	3	0	0	0	3
7	0	3	8	0	0	0	11
8	0	3	9	0	0	0	12
9	0	0	0	0	0	0	0

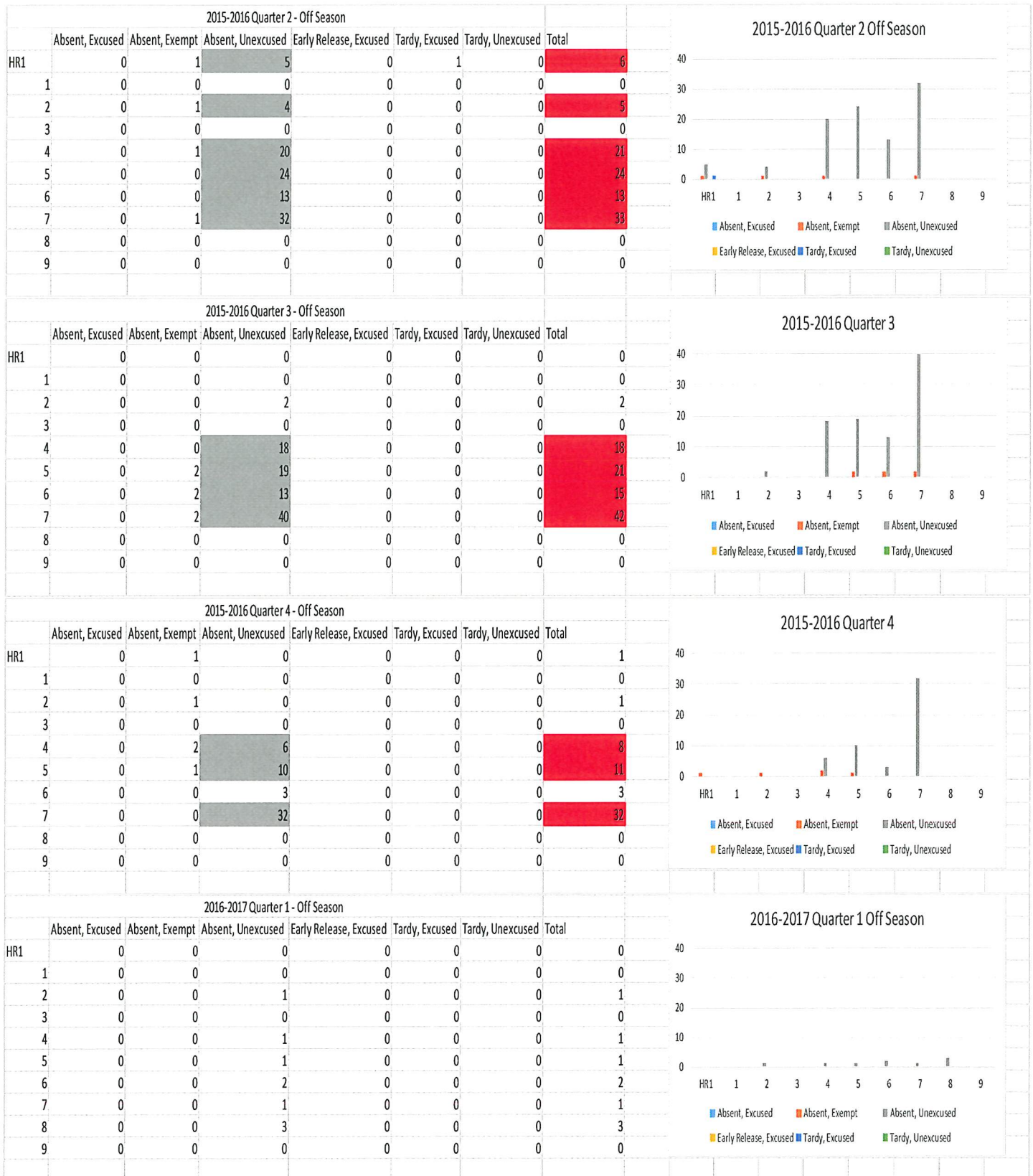


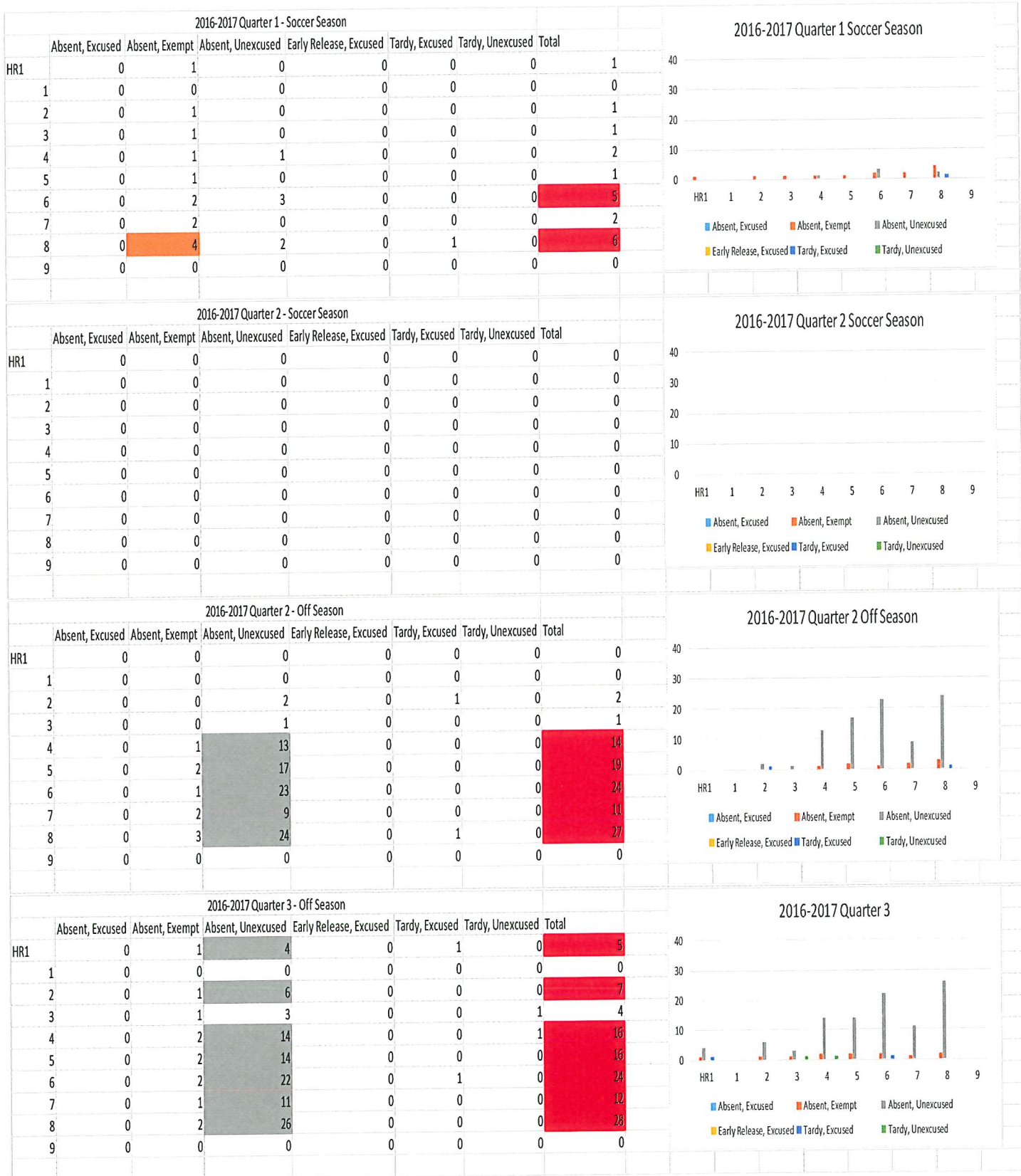
2015-2016 Quarter 1 - Soccer Season							
	Absent, Excused	Absent, Exempt	Absent, Unexcused	Early Release, Excused	Tardy, Excused	Tardy, Unexcused	Total
HR1	0	1	0	0	1	0	1
1	0	0	0	0	0	0	0
2	0	1	1	0	0	0	2
3	0	0	0	0	0	0	0
4	0	1	0	0	0	0	1
5	0	1	0	0	0	0	1
6	0	0	0	0	0	0	0
7	0	1	0	0	0	0	1
8	0	1	1	1	0	0	3
9	0	0	0	0	0	0	0



2015-2016 Quarter 2 - Soccer Season							
	Absent, Excused	Absent, Exempt	Absent, Unexcused	Early Release, Excused	Tardy, Excused	Tardy, Unexcused	Total
HR1	0	0	0	0	0	0	0
1	0	0	0	0	0	0	0
2	0	0	0	0	0	0	0
3	0	0	0	0	0	0	0
4	0	0	0	0	0	0	0
5	0	0	0	0	0	0	0
6	0	0	0	0	0	0	0
7	0	0	0	0	0	0	0
8	0	0	0	0	0	0	0
9	0	0	0	0	0	0	0









GRAND JURY EXHIBIT #29

The Data Analyst testified that he had identified these types of patterns in various other student-athletes' attendance records across other Newburgh Free Academy sports as well.

III. THE PROBLEMS CONTINUED UNADDRESSED

While forces were working inside of Newburgh Free Academy to try to remedy an open and obvious attendance problem, some on the Newburgh Enlarged City School District School Board (hereinafter "School Board") were attempting to effect changes from the outside. For many years, both of these attempts were to no avail.

A. **Basketball Attendance Scandal of 2009-2010**

An Investigative Sports Reporter, whose identity is known to the Grand Jury (hereinafter "Investigative Reporter"), testified that in 2009-2010, a similar attendance issue befell the Newburgh Enlarged City School District. The Investigative Reporter testified that after several months of investigations which began as a "Where are they now?" piece for the 2009-2010 Newburgh Free Academy Class AA boys varsity basketball championship team, it was discovered that 4 out of the 5 starting players for that team had not yet graduated as of the writing of the story in 2011. Additionally, according to the Investigative Reporter, it was determined – based on interviews with the student-athletes, teachers, and the attendance records themselves – that the starting basketball players on that 2009-2010 championship team cut "hundreds" of

classes during the school year, but never missed a game. But according to the Investigative Reporter, the investigation was met with resistance from the athletics department and an overall lack of District cooperation. Nonetheless, owing to the disservice bestowed upon these student-athletes, the Investigative Reporter published the findings in an article in the Times-Herald Record newspaper/online on March 6, 2011, titled: “NFA state hoops champs no-shows in classroom.”⁹⁹ Lastly, the Investigative Reporter testified that the then 2009-2010 NFA Boys Varsity Basketball coach was recently re-hired as the current NFA Boys Varsity Basketball coach.

B. Investigations Lead Nowhere

As early as November 22, 2014, Witness D testified that District Administrators in the Newburgh Enlarged City School District were made aware by e-mail of student-athletes participating in their respective sports while not maintaining the mandatory minimum level of attendance.¹⁰⁰ According to Witness D, that e-mail was responded to by District Administrators with assurances that the issue would be investigated. But according to Witness D, for three years, the problem persisted and went unaddressed – both in practice and in policy. According to Witness D, among the responsibilities of the Newburgh Enlarged City School District School Board are to discuss and vote on issues relating to school district attendance. According to Witness D, some School Board members were resistant to the idea that a problem existed, instead questioning how one particular School Board member obtained information not ordinarily available to School Board members.¹⁰¹

In June 2016, Witness H was made aware of an issue involving the attendance of two student-athletes at Newburgh Free Academy who were still participating in athletics despite being ineligible under Both Attendance Policies. Witness H undertook an internal investigation by interviewing several individuals. At

⁹⁹ Grand Jury Ex. #31.

¹⁰⁰ Grand Jury Ex. #8.

¹⁰¹ According to Witness D, School Board members cannot be active faculty or administrators at a District school and, as a result, they would not have direct access to Infinite Campus attendance records.

the conclusion of these interviews, Witness H issued a report in August 2016 detailing what the witness believed to be shortcomings in the guidelines surrounding attendance and eligibility for participation in sports and extracurricular activities.¹⁰² These shortcomings included, among other things, a lack of frequent review of student-athlete attendance by coaches and Administrators, a lack of utilization of functions within the Infinite Campus attendance software to more seamlessly manage student-athlete attendance – which included, somewhat obviously, an Excessive Absence Report that was not being utilized by coaches or Administrators, a lack of checks and balances and accountability on the part of school Administrators to ensure that attendance was being meaningfully and dutifully monitored, and lapses in Policy #5441 that did not account for unlimited tardies.¹⁰³ These determinations came despite, as Witness H came to learn, falsehoods told by several of the individuals interviewed regarding the subject students' participation in their respective sports.

For instance, Witness H noted in the report that the witness was told that one student-athlete was no longer on a particular team as of April 2016 due to excessive unexcused absences,¹⁰⁴ however, Infinite Campus data showed that the student had excused/exempt absences for “SPORTS/GAME” as late as June 2016.¹⁰⁵ Also, as noted earlier in this report, Witness H was separately told that a student-athlete did not participate in a June 2016 state championship, but that coach later changed his story and said that the student did in fact participate in that championship.

Witness H testified that the witness forwarded the report and recommendations along to District Administrators. However, because of the small sample size of the allegations, Witness H noted in the report the inability to identify whether the attendance issue was systemic or isolated. Several months later, another allegation came to the attention of Witness H regarding an additional student who was also participating in

¹⁰² Grand Jury Ex. #12.

¹⁰³ See *id.*

¹⁰⁴ See *id.*

¹⁰⁵ Grand Jury Ex. #11.

another sport, despite being ineligible. Witness H testified that this information was again forwarded to District Administrators for a more thorough follow-up investigation.

Witness H testified that for several years, including on the heels of the much publicized 2009-2010 Boys Basketball attendance scandal at Newburgh Free Academy, the witness tried to effectuate changes to both the Student Athletic Policy, and to how it was being enforced, but to no avail. Witness H in effect stated of the oversight in student-athlete attendance at Newburgh Free Academy: “There is still no oversight. I don’t believe there is still any oversight. Nobody is watching the store. They act, like, they’re doing something. I don’t believe anything has been done to address some of these issues.”¹⁰⁶ Witness H testified that the witness advised the Newburgh Enlarged City School District School Board that: “We should all be ashamed of ourselves and . . . we are sitting here again six years later after that basketball investigation and we are looking at the same thing.”¹⁰⁷

According to Witness F, in the fall of 2016, attempts were made to create some checks and balances to ensure that those who were tasked with monitoring student-athletes’ attendance were doing so on a daily basis. Witness F testified that new software features in Infinite Campus were designed by the technology department in the School District. A video tutorial with step by step instructions was sent out by e-mail to all District coaches.¹⁰⁸ According to Witness F, an attendance review log was created in order to monitor which coaches were regularly checking their student-athletes’ attendance, and how frequently. All of this was done, according to Witness F, several months after the investigation that was conducted internally in the summer of 2016.

Witness F testified that there were initially implementation problems caused by technological issues that prevented certain coaches from accessing the software. However, according to Witness G, those problems only persisted for a few months. According to Witness F, these issues also did not prevent others

¹⁰⁶ Grand Jury Testimony of Witness H, p. 67.

¹⁰⁷ *Id.* at 68.

¹⁰⁸ Grand Jury Ex. #19.

from printing out attendance rosters for those affected coaches. But according to Witness F, unless coaches asked for printouts, they did not receive them. The testimony from Witness F was that certain coaches who did not teach at Newburgh Free Academy – and therefore were off-campus most of the time – did not have the proper credentials to access the Infinite Campus software. However, Witness G testified that the witness was not a full-time teacher at Newburgh Free Academy, but that as a coach, the witness had ample access to the witness’s student-athletes’ records, often even logging in remotely from home on weekends. The testimony from Witness F also revealed that these procedures were disseminated to the entire District coaching staff.¹⁰⁹ However, Witness G testified that the witness never knew of any such email, such software implementation, nor the implementation of any additional checks and balances to ensure regular adherence to the student-athlete attendance review. Whichever is true, it was clear from all of the testimony that uniformity was lacking, and that implementation was still spotty, at best.

Further to this point, according to Witness D, on March 8, 2017 it was announced at a meeting of the School Board that an investigation had been conducted into the student-athlete attendance issues by Newburgh Enlarged City School District Administrators and that it had been determined that there were no attendance issues warranting further action. As a result of that meeting, Witness D e-mailed members of the School Board with additional proof that the student-athlete attendance issues persisted until as recently as the fall of 2016.¹¹⁰ That e-mail contained the attendance records of a particular sports team for which several players were ineligible in the fall of 2016 under Both Attendance Policies, but who nonetheless were participating.¹¹¹ According to Witness D, once again, the response was simply that it would be looked into. At a subsequent School Board committee meeting in April 2017, Witness D testified that the student-athlete attendance records were again discussed, but with continued resistance from some members of the School

¹⁰⁹ *See id.*

¹¹⁰ Grand Jury Ex. #9.

¹¹¹ *See id.*

Board as well as Newburgh Enlarged City School District Administrators, and that no remedial action was taken.

C. The Problem *Was* Systemic

Although Witness H testified that resources were not available to conduct a thorough enough investigation to determine whether the student-athlete attendance issues extended beyond a handful of students, the data indicates that the problem was widespread. According to Witness B, the Student Attendance Policy was ripe for abuse: “I think it’s too easy. It’s too easy a process. You know, we’re pushing these kids through school. We’re not focusing on academics like we should.”¹¹²

i. The “5-Day Rule”

The Student Attendance Policy provided that “[f]or absences, the written excuse should be presented by the student on the day when returning to school following such absence but must be presented within five (5) school days after returning to school.”¹¹³ According to Witness B, this “5-day rule” was only sometimes adhered to for full day absences, and almost never adhered to for individual class absences (referred to as “cuts”). When asked if the Student Attendance Policy stated anything about a distinction between a whole day absence or an individual class absence, Witness B admitted that it did not. Indeed, the policy says “[f]or absence” without any specification as to whether that meant a whole day absence or a class absence. According to Witness B, the determination as to whether the 5-day rule was adhered to was made indiscriminately by Building Administrators and according to Witness C, it was known throughout the Newburgh Free Academy that following the 5-day rule was not always done. Witness C also reiterated that adherence was dependent upon the individual Building Administrator, despite the acknowledgement that the 5-day rule was written as a hard and fast rule, not discretionary. Witness B noted instances when absences would be cleared from months prior.

¹¹² Grand Jury Testimony of Witness B, p. 94.

¹¹³ Grand Jury Ex. #1.

In some of the most extreme examples, unexcused absences were changed to excused tardies – not even excused absences, but tardies – 190, 210, and 215 days after the actual absence.¹¹⁴ Those modifications were so far after the actual absence that the change was authorized the next school year.¹¹⁵ On this issue, Witness B testified: “This is one of my shake my head moments.”¹¹⁶ When asked how a teacher could all of a sudden remember six months after the fact that a given student was not actually absent, but instead tardy, Witness B responded: “Do I think it’s credible? No, I don’t, but at the same time, it happens every day.”¹¹⁷ Witness B further stated that there even existed an unofficial list of teachers who were known to frequently clear unexcused absences well after the fact – Witness B noted they were on the “hot list.”¹¹⁸ Yet despite raising these issues with many individuals within the District, Witness B testified that, ultimately, it always “falls on deaf ears.”¹¹⁹

According to the Data Analyst, the disparate adherence to the 5-day rule was evident in the notations of the Infinite Campus attendance records. The Data Analyst prepared spreadsheets detailing the instances in which the 5-day rule was “broken,” meaning the times it was not adhered to for full day absences; and instances in which the 5-day rule was “upheld,” meaning the times it was upheld for individual class absences.¹²⁰ The Data Analyst testified that it was his understanding through the course of his investigation that the 5-day rule was applied by Newburgh Free Academy faculty and Building Administrators to full-day absences, but not to individual class absences. The Data Analyst’s review of the Infinite Campus attendance records showed that this was not uniformly the case.

For example, one student’s Infinite Campus records showed that he was unexcused absent for periods HR1 through 8 (exclusive of period 6, potentially a lunch period) on September 29, 2015, which the

¹¹⁴ Grand Jury Ex. #11.

¹¹⁵ *See id.*

¹¹⁶ Grand Jury Testimony of Witness B, p. 100.

¹¹⁷ *Id.* at 102.

¹¹⁸ *Id.* at 95.

¹¹⁹ *Id.* at 94.

¹²⁰ Grand Jury Ex. #29.

Data Analyst considered a full day absence.¹²¹ The Data Analyst testified that the student did not have a full day absence the following day – or if the following day was a weekend, the next Monday – so that the 5-day period to clear that unexcused full-day absence began at the latest on October 2, 2015. According to the Data Analyst, that would give the student until October 6, 2015, to provide documentation to clear the absence. Instead, according to the Data Analyst, the Infinite Campus attendance records showed that the unexcused absence for September 29, 2015, was modified to an excused absence (cleared) on November 6, 2015, with a note in the comments section that read: “ILL per note; Rec’d 10/09 [Building Administrator name omitted].”¹²² As the Data Analyst noted, October 9, 2015 was more than 5 days after October 2, 2015 – the latest date upon which the student’s 5-day clock would have begun.

Another example was for a student’s Infinite Campus attendance records that showed that he was unexcused absent for periods HR1 through 9 (exclusive of period 8, potentially a lunch period) on February 2, 2017, which the Data Analyst considered a full day absence.¹²³ The Data Analyst testified that the student did not have a full day absence the following day – or if the following day was a weekend, the next Monday – so that the 5-day period to clear that unexcused full day absence began at the latest on February 5, 2017. According to the Data Analyst, that would give the student until February 9, 2017, to provide documentation to clear. Instead, according to the Data Analyst, the Infinite Campus attendance records showed that the unexcused absence for February 2, 2017, was modified to an excused absence (cleared) on March 17, 2017, with a note in the comments section that read: “SICK PER NOTE; RECEIVED 3/17; [Building Administrator name omitted]”¹²⁴ As the Data Analyst noted, March 17, 2017, was significantly more than 5 days after February 5, 2017 – the latest date upon which the student’s 5-day clock would have begun.

¹²¹ See *id.*

¹²² See *id.*

¹²³ See *id.*

¹²⁴ See *id.*

Conversely, the Data Analyst testified regarding an example of a student whose individual class unexcused absence for his 1st period class on October 18, 2013, was not cleared due to adherence to the 5-day rule, even though this was not a full day absence. The Infinite Campus attendance records revealed that this student's unexcused absence was "modified" but actually never changed to anything other than remaining an unexcused absence on October 30, 2013.¹²⁵ The comments section for this entry read: "Note received after 5 days (10/30). Not cleared."¹²⁶

The evidence demonstrated that there were approximately 1,100 instances of the 5-day rule being broken by various Attendance Office personnel and in some instances, as noted above, a corresponding Building Administrator approving the change, compared to only approximately 200 instances of the 5-day rule being upheld.¹²⁷

Below is a redacted snapshot from the Data Analyst's spreadsheets of the two above-mentioned entries in which the 5-day rule was not followed.

Name	Period	Date	modifiedDate	Comments	Modified By	Mod Diff
		2 02/02/2017	2017-03-17 09:49:00	SICK PER NOTE; RECEIVED 03/17		43
		3 02/02/2017	2017-03-17 09:49:00	SICK PER NOTE; RECEIVED 03/17		43
		5 02/02/2017	2017-03-17 09:49:00	SICK PER NOTE; RECEIVED 03/17		43
	HR1	02/02/2017	2017-03-17 09:49:00	SICK PER NOTE; RECEIVED 03/17		43
		7 02/02/2017	2017-03-17 09:49:00	SICK PER NOTE; RECEIVED 03/17		43
		9 02/02/2017	2017-03-17 09:49:00	SICK PER NOTE; RECEIVED 03/17		43
		4 02/02/2017	2017-03-17 09:49:00	SICK PER NOTE; RECEIVED 03/17		43
		6 02/02/2017	2017-03-17 09:49:00	SICK PER NOTE; RECEIVED 03/17		43
		2 9/29/2015	11/6/2015 7:40	ILL per note; Rec'd 10/09		38
		3 9/29/2015	11/6/2015 7:40	ILL per note; Rec'd 10/09		38
		4 9/29/2015	11/6/2015 7:40	ILL per note; Rec'd 10/09		38
		5 9/29/2015	11/6/2015 7:40	ILL per note; Rec'd 10/09		38
		7 9/29/2015	11/6/2015 7:40	ILL per note; Rec'd 10/09		38
		8 9/29/2015	11/6/2015 7:40	ILL per note; Rec'd 10/09		38
	HR1	9/29/2015	11/6/2015 7:40	ILL per note; Rec'd 10/09		38

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¹²⁵ See *id.*

¹²⁶ See *id.*

¹²⁷ See *id.*

ii. Too Easy to Get Absences Cleared

According to Witness C, for the absences that were not changed to excused, many were changed to “Exempt” under the guise of Administrator Approved Circumstances. Witness B also testified that while many of the Building Administrators required some documentation to warrant an Administrator Approved Circumstance exempt absence, others were incredibly lax about simply granting them when they felt the circumstances – whatever those might have been – in their estimation warranted it. According to Witness B, it appeared that there was very little uniformity in that regard - the process was as easy as a student just asking a Building Administrator to clear (exempt) her/his absence. In Witness B’s words, the application of the policy was “selective.”¹²⁸

Witness B testified that there would be a multitude of e-mails virtually every day with requests to clear (excuse) absences without any proof whatsoever. Witness B testified that Building Administrators made it known that proof did not need to be provided in a request to clear an absence/cut – if a request is made to clear, it can be cleared. This appeared to be true, in that one e-mail suggested that a student-athlete was “supposed to be marked excused” but instead his attendance reflected a “cut” and a request was made to clear the absence.¹²⁹ Witness B confirmed that it was as easy as that. Witness B also stated that there would be anywhere between 25 and 50 similar e-mails requesting a cleared (excused) cut/absence in any given day. According to Witness B, even if proof was submitted to excuse an absence, Newburgh Free Academy only kept such records for one (1) year. After that year, the records were shredded. According to Witness B, those records used to be maintained for seven (7) years, but the Newburgh Enlarged City School District changed the policy four or five years ago to simply keep the records for one (1) year.

However, according to Witnesses E and G, under the new system of checks and balances attempted to be implemented by Witness F, a coach would have no idea how many excused absences a student-athlete

¹²⁸ Grand Jury Testimony of Witness B, p. 108.

¹²⁹ Grand Jury Ex. #14.

had – unless the coach sought to check – because the then existing Student Attendance Policy only required the student-athletes to sit out a game/contest based on unexcused absences. Witness G was asked about student-athlete attendance prior to the new system of checks and balances in which several student-athletes participated while ineligible, but Witness G stated that at the time, the witness did not know that they were ineligible. After the system of checks and balances was purportedly implemented in late 2016, Witness G was asked about a different issue specific to these same previously ineligible athletes, namely, that while they now appeared to be eligible since their number of unexcused absences had not hit the 93% threshold, their attendance records otherwise demonstrated something curious. Witness G was presented with information that in 2016-2017, several student-athletes all exhibited excused absences for illness, followed immediately by exemptions for participation in the sports contests, followed again by excused absences for illness. Witness G was further presented with information that some of these student-athletes had absences for illness for multiple days the day before the given sports event, followed the next day by an absence again for illness. Witness G was also asked if the witness was aware that these same students had combined individual excused/unexcused class absences of 100+ in one school year. Witness G’s response was simply: “If he was sick . . . he’s eligible to compete.”¹³⁰

iii. Requests to Clear Always Seemed to Come During a Sports Season

Additionally, according to Witness B, it was apparent that the clearing of absences – be it by the teachers, or some type of “proof” in the way of parent or doctor notes, came in a flurry during a student-athlete’s sports season. Witness B stated that on the day of an important championship or meet, there would often be double-digit numbers of students requesting printouts of their attendance records only to have them return later in the day with a multitude of unexcused absences cleared by teachers. Despite the seemingly obvious requirement to have the teachers provide some type of documentation for the excuse,

¹³⁰ Grand Jury Testimony of Witness G, p. 137.

according to Witness B, Building Administrators were satisfied with simply the teacher's unilateral and unsubstantiated determination, which came by way of a signature or initial which, according to Witness B, may or may not have been forged by the students. Witness B stated that it was a daily occurrence for multiple students to look to have unexcused absences cleared. Once the given sports season was over for those respective student-athletes, however, the absence clearing ceased. Witness B testified that this went on for decades.

Witness E verified that as a teacher at Newburgh Free Academy, the witness would receive requests from student-athletes to clear their unexcused absences from the witness's class, typically the day of a contest or game. Of the absences that Witness E did clear, the witness was never required to ask for any type of proof from the student by way of a parent or doctor note.

iv. Tardies Did Not Matter

It also appears that not only in policy, but in practice, tardies were of no concern to Building and District Administrators. According to Witness B, while a student's absence was initially reconciled with the Attendance Office as unexcused, a student's tardy was always reconciled as *excused*. Witness B explained that this is the way Building Administrators opted to deem tardies – default excused. The only way a student's tardy would be unexcused would be if the student reported first to the Attendance Office where the student would receive an unexcused tardy pass to go to class. If the student bypassed the Attendance Office, the student's tardy would be marked excused by default. Therefore, for those students unlucky enough to get caught going to the Attendance Office upon late arrival, Witness B testified that students would often write fake names in the register, such as "Abraham Lincoln," so that the unexcused tardy could not be attributed to them.¹³¹

¹³¹ Grand Jury Testimony of Witness B, p. 126.

v. Excessive Absences

The Data Analyst testified that when he examined the Infinite Campus attendance records for the 110+ student-athletes subpoenaed, he was able to identify student-athletes who, over the course of 2-5 years at Newburgh Free Academy, had accumulated over 400 individual class absences (excused, exempt and unexcused).¹³² His analysis showed that there were student-athletes – some of whom were demonstrated as having performed in sports contests – with over 1,000 total absences and over 1,500 total absences and tardies combined.¹³³ On a per year basis, 65 out of 115 of the student-athletes examined averaged 100 individual class absences per year or more.¹³⁴

Below is a redacted copy of the Data Analyst's spreadsheet detailing the total number and average number of absences and tardies for the reviewed student-athletes.

¹³² Grand Jury Ex. #29.

¹³³ *See id.*

¹³⁴ *See id.*

Name	Number of Absences and Tardies	Number of Absences	Years in NFA	Absences and Tardies Per Year	Absences Per Year
	3548	2276	4	887	569
	1565	1343	4	391	336
	1331	1265	4	333	316
	1543	1222	5	309	244
	1582	1094	5	316	219
	1382	1002	4	346	251
	1517	946	5	303	189
	1011	940	4	253	235
	1210	862	5	242	172
	1624	802	4	406	201
	884	777	4	221	194
	1336	747	4	334	187
	1012	735	4	253	184
	1175	728	4	294	182
	755	727	4	189	182
	1175	717	3	392	239
	847	716	4	212	179
	882	698	4	221	175
	1163	691	3	388	230
	1005	651	4	251	163
	897	635	4	224	159
	859	621	4	215	155
	947	560	3	316	187
	666	525	3	222	175
	817	520	4	204	130
	649	503	4	162	126
	831	503	3	277	168
	602	500	4	151	125
	514	484	4	129	121
	701	480	4	175	120
	904	476	4	226	119
	781	465	4	195	116
	492	462	3	164	154
	685	460	4	171	115
	576	452	4	144	113
	740	449	2	370	225
	613	448	4	153	112
	640	441	4	160	110
	453	418	4	113	105
	454	414	3	151	138
	638	414	4	160	104
	610	413	4	153	103
	649	413	3	216	138
	507	409	3	169	136
	571	409	4	143	102
	529	405	3	176	135
	813	396	4	203	99
	403	386	4	101	97
	545	385	3	182	128
	500	376	4	125	94
	751	374	4	188	94
	502	371	3	167	124
	449	362	4	112	91
	620	350	4	155	88

[continued on next page]

Name	Number of Absences and Tardies	Number of Absences	Years in NFA	Absences and Tardies Per Year	Absences Per Year
	673	347	3	224	116
	451	334	2	226	167
	479	333	2	240	167
	428	330	3	143	110
	444	321	4	111	80
	385	314	4	96	79
	499	310	4	125	78
	383	302	4	96	76
	497	301	3	166	100
	482	299	3	161	100
	559	289	2	280	145
	412	286	3	137	95
	500	285	4	125	71
	608	284	4	152	71
	408	283	2	204	142
	307	273	4	77	68
	396	269	4	99	67
	382	265	2	191	133
	284	258	1	284	258
	504	256	4	126	64
	388	248	3	129	83
	374	247	4	94	62
	348	244	2	174	122
	382	243	3	127	81
	272	237	3	91	79
	481	237	3	160	79
	299	232	3	100	77
	310	227	2	155	114
	326	226	2	163	113
	255	221	2	128	111
	297	214	3	99	71
	286	207	5	57	41
	203	196	3	68	65
	334	194	2	167	97
	218	178	3	73	59
	257	175	4	64	44
	223	172	3	74	57
	292	169	2	146	85
	223	158	2	112	79
	231	158	4	58	40
	194	157	2	97	79
	255	156	4	64	39
	202	147	2	101	74
	152	146	2	76	73
	155	143	2	78	72
	150	135	3	50	45
	159	134	2	80	67
	131	127	2	66	64
	137	126	4	34	32
	232	124	3	77	41
	130	122	2	65	61
	135	121	2	68	61
	199	117	1	199	117
	118	113	3	39	38
	176	107	1	176	107
	442	106	1	442	106
	147	103	2	74	52
	118	96	1	118	96
	99	93	2	50	47
	104	89	2	52	45
	80	58	2	40	29

GRAND JURY EXHIBIT #29

vi. Attendance Not Even Taken

Witness B testified that once an unexcused absence is marked as present, the record would disappear from the Infinite Campus system since the Infinite Campus software did not record a student being present – only absent or tardy. While it sounds like a rare instance where a teacher would inadvertently mark a student absent when the student was present (teachers had 24 hours to make any such changes before it would be closed to them for any further modification), according to Witness B, this was a frequent occurrence. In one particular instance, Witness C was able to capture a before and after of a student's attendance record – a difference of 4 days – and it very clearly showed two (2) unexcused “cuts” from a class that were marked present more than two (2) months after the actual absences.¹³⁵ This, according to Witness B, was not an uncommon practice.

Lastly, Witness B testified that some teachers did not even keep attendance at all. Their attitude, according to Witness B, was simply that attendance was not important. Every student was always marked present. Witness B stated that despite repeated attempts to get these teachers to take attendance, some simply refused, exacerbating the problem.

vii. Failure to Follow Through on Remedial Measures

Between 2015 and 2018, the Comprehensive Student Attendance Policy provided for remedial measures for chronic absenteeism. One of those measures provided: “Student attendance records shall be reviewed by the Principal of each school building in the District or his/her administrative designee for the purpose of initiating appropriate actions to address unexcused student absences, tardiness and early departures.”¹³⁶ The Comprehensive Student Attendance Policy also provides:

Chronic attendance code violators will be addressed on a case-by-case basis, including but not limited to meetings with guidance counselor, social worker, attendance teacher or building administrator,

¹³⁵ Grand Jury Ex. #3.

¹³⁶ Grand Jury Ex. #1 – Comprehensive Student Attendance Policy 5100 (formerly 5200).

contact with parents/guardian, meeting with parents/guardian, as well as contact with local social services agencies, as appropriate.¹³⁷

Witness B testified that while many, if not all, of those measures are initiated on a daily basis by filing what is called a “P.O.P.” – a notation in Infinite Campus – whether those actually get looked at “is questionable.”¹³⁸ Witness B continued: “chronic kids will fall between the cracks.”¹³⁹ Witness B testified that daily, on average, 200 to 250 students come in late and unexcused. According to Witness B, these students are given an unexcused tardy pass to go to class, but whether they go is also questionable. The suggested remedy, according to Witness B, would be for Building Administrators to be more proactive than they are currently, by reviewing those tardy students’ attendance and addressing why they are constantly late or absent. But according to this witness, that is not being done.

D. Revised Attendance Policy

It was not until May 22, 2018, that the School Board finally made meaningful changes to Policy #5441 – Eligibility for Student Athlete and Extracurricular Activity Participation (hereinafter “New Attendance Policy”).¹⁴⁰ In the New Attendance Policy, many of the same provisions remain, e.g., “[t]he coach, athletic director, building principal and/or activity advisor, as applicable, will monitor student attendance on a daily basis.”¹⁴¹ Importantly, however, the New Attendance Policy now provides that: “Students are expected to maintain a minimum of 91% attendance, excused absences and unexcused absences totaling 10% or more of the students enrolled time will identify the student as chronically absent.”¹⁴² The noticeable difference between the New Attendance Policy and Both Attendance Policies previously noted is that the attendance standard now includes excused absences as well as unexcused

¹³⁷ *Id.*

¹³⁸ Grand Jury Testimony of Witness B, p. 114.

¹³⁹ *Id.*

¹⁴⁰ Grand Jury Ex. #10.

¹⁴¹ *Id.* at 2.

¹⁴² *Id.*

absences in the minimum requirement. Previous iterations, as this report has detailed, excluded excused absences from consideration in chronic absenteeism or participation in athletics and extracurricular activities.

The next portion of the New Attendance Policy states:

A student must attend school regularly and be in attendance for all classes scheduled. Students who have an illegal class absence(s) or daily absence, on record during a school week will have five (5) school days to clear the illegal class absence(s) or daily absence(s). If the illegal class absence is not cleared, the student will be ineligible to participate in the next scheduled activity or game.¹⁴³

This portion of the New Attendance Policy is also different from the previous iterations because failure to clear *any* absence now has ramifications for participation in athletics and extracurricular activities, whereas under the Student Attendance Policy, as long as the unexcused absences did not exceed three (3) in a given marking period, no clearing was necessary. The New Attendance Policy remains unchanged as far as tardies and any impact they have on athletics and extracurricular participation – that is, there is no mandated action.¹⁴⁴

As encouraging as the New Attendance Policy is in terms of being a step in the right direction for stricter requirements for school attendance, according to Witness B, as of January 2019 – some 7 months after the drafting of this policy – it is still not widely known to District personnel despite it being publicly available for download on the Newburgh Enlarged City School District's Athletics Department website as of January 28, 2019. According to Witness B, the witness has yet to be made aware of the New Attendance Policy despite the fact that the witness holds a position within Newburgh Free Academy which would necessitate awareness of the most current attendance requirements. Witness B stated that it was only during the witness's actual testimony and after being shown the actual New Attendance Policy that the witness came to learn that there was a new attendance policy in place for Student Athletic and Extracurricular Participation within the Newburgh Enlarged City School District. Witness B expressed outrage that neither the witness, nor the witness' colleagues, were made aware of the policy. Witness B testified that he would

¹⁴³ *Id.*

¹⁴⁴ *See id.*

often have to seek out the most current policy rather than being informed and provided the information directly. “When it comes to attendance, we have to go hunting for it ourselves.”¹⁴⁵

However, Witnesses E and G testified that the New Attendance Policy is in effect at least as far as participation in athletics is concerned. According to these witnesses, currently the attendance reports from Infinite Campus will identify any student-athlete with even one unexcused absence that has not yet been cleared in 5 days. This, according to Witnesses E and G, makes the process of eligibility more straightforward than under Both Attendance Policies, which effectively required coaches to tally the number of unexcused absences in all individual classes. However, as Witness E testified, there is virtually no way to know whether the 5-day rule is being followed. While the 5-day rule under the New Attendance Policy states that a student “will have five (5) school days to clear the illegal class absence(s) or daily absence(s),” that was evidently not always the case under Both Attendance Policies. Witness E stated that coaches would not be privy to whether an illegal class or daily absence was cleared more than 5 days after returning to school. Realistically, according to Witness E, the only way a coach would be able to determine that would be for the coach to check that student’s attendance every day for 5 straight days.

E. Lack of State Oversight

When it comes to issues involving public education in New York State, one would think that state oversight and intervention would help remedy the situation. But that did not happen in this case. Evidence before the Grand Jury showed that the New York State Education Department was unresponsive to teachers’ requests for assistance with remedying the attendance issues at Newburgh Free Academy, and that the New York State Department of Education did not cooperate or assist the Orange County District Attorney’s Office or the Grand Jury in the investigation, despite being asked to do so.

¹⁴⁵ Grand Jury Testimony of Witness B, p. 120.

According to the DA Investigator, on several occasions, efforts were made by the Orange County District Attorney's Office to develop its investigation with the assistance of the New York State Department of Education. According to both the DA Investigator and Witness C, the issue was first raised with the New York State Department of Education through their Fraud, Waste and Abuse online reporting system.¹⁴⁶ Witness C testified that after seeing no real remedial measures taken by the Newburgh Enlarged City School District in response to the witness' allegations of attendance manipulation, Witness C wrote a detailed letter to the New York State Department of Education.¹⁴⁷ That letter was sent on May 20, 2017.¹⁴⁸ To date, this witness has still not yet received a response.

According to the DA Investigator, he, along with other members of the Orange County District Attorney's Office attempted to schedule meetings with the New York State Department of Education in December 2018 and left a voicemail with the Director of Education Finance at the New York State Department of Education on January 10, 2019, informing him that an attendance and graduation investigation was being conducted by the Orange County District Attorney's Office and that their assistance could prove to be useful. According to the DA Investigator, no meetings were ever scheduled, and the voicemail went unreturned.

The DA Investigator testified that on March 18, 2019, he, along with members of the Orange County District Attorney's Office, had a conference call with the New York State Education Department. The DA Investigator stated that after briefing the New York State Education Department on the status of the Grand Jury's investigation, the New York State Education Department was invited to testify before the Grand Jury on March 29, 2019 as to what investigation, if any, was done on the complaint made regarding Newburgh Free Academy's attendance issues. According to the DA Investigator, as of March 29, 2019, the State Education Department has not responded to that invitation to testify.

¹⁴⁶ Grand Jury Ex. #7.

¹⁴⁷ *See id.*

¹⁴⁸ *See id.*

PART3: APEX ONLINE LEARNING

AN OVERVIEW OF APEX ONLINE LEARNING, HOW IT WORKS, ITS SETTINGS AND RECOMMENDED BEST PRACTICES, AND NEWBURGH FREE ACADEMY'S USE AND MISUSE OF THE PROGRAM

*“There is always pressure to graduate, but, yes, fourth quarter, when everyone is e-mailing you, guidance counselors are showing up, ‘where are they, how far are they in the program, are they going to graduate. We have numbers. We need to know.’
Yes, there was lots of pressure.”¹⁴⁹ – District employee*

I. WHAT IS APEX ONLINE LEARNING?

A. Overview

According to Witness I, an APEX Online Learning senior employee whose identity is known to the Grand Jury (hereinafter “Witness I”), APEX Online Learning (hereinafter “APEX”) is a web-based software tool that is licensed out to school districts nationwide which provides, among other things, credit recovery for students in educational need. According to Witness J, a Newburgh Enlarged City School District employee whose identity is known to the Grand Jury (hereinafter “Witness J”), if a student is failing a Biology class in the first quarter/marking period of a given school year, for instance, depending on eligibility requirements for the specific schools, the school can purchase a license from APEX (based in Seattle, WA) for Biology software for use with that particular student in order to begin using the software in a subsequent semester on the school computers in a designated APEX classroom. That student would report to that classroom according to a designated schedule in order to begin instruction of the APEX Biology course. According to Witness J, if the student successfully completes the APEX Biology course, the grade earned on that course gets averaged with the grade the student received in the student’s biology class the prior marking period. The resulting average score becomes the new score for the first quarter reflected on the student’s transcript at the end of the year.

¹⁴⁹ Grand Jury Testimony of Witness K, p. 65-66 (internal quotations added for clarity).

B. How does APEX Online Learning Software Work?

According to Witness J, the APEX classroom is essentially proctored by APEX designated teachers at Newburgh Free Academy. Witness J explained that the process of proctoring involves the APEX students logging in to their respective computers to take their courses, and the APEX teachers serve to assist the students if needed.

i. Resets and Overrides

According to Witness I, depending on the type of program the student is licensed to take, and the duration of the program the student is expected to complete in order to gain credit recovery, there are various graded assessments a student must attempt, which include, but are not limited to, several quizzes, section tests (known as CSTs) and/or a final test. Witness I testified that for quizzes, a student generally has the ability to reset a quiz several times on her/his own before an APEX teacher must approve another reset.

Additionally, according to Witness I, the software allows for APEX teachers to manually adjust a scored assessment (quizzes or CSTs) – called an “override” – as a departure from the student’s actual earned score. Witness I testified that APEX remotely captures all such overrides – known as a “Grade Override” – in its software data collection in a file known as the Grade Book Audit.¹⁵⁰ According to Witness I, the “Earned Score” for a quiz – i.e., the score actually earned by the student taking the quiz as opposed to the Override Grade which, as just mentioned, would be a grade manually entered by the APEX teacher – reflects the last-in-time taken quiz, be it the first attempt or the tenth.

ii. Classroom Settings

According to Witness I, APEX designed its software so that questions on quizzes and CSTs are randomized with each new instance. For instance, if a student or APEX teacher resets Quiz #1 in Biology

¹⁵⁰ Grand Jury Ex. #20.

10, that reset quiz will default to having either its questions in a different order than the previous attempt of Quiz #1, or alternatively, the questions and answers themselves will be randomized from a question bank. However, according to Witness I, depending on the number of quiz resets, it is still possible given the finite number of questions and answers in the question bank for questions to repeat even on the Question Randomization setting. But the ultimate goal of the Question Randomization setting, according to Witness I, is to preserve academic integrity.

Witness I also stated that APEX designed its software so that if a student answers a question incorrectly, the correct answer is not automatically revealed. This is done, according to the witness, so that the student can work through the question again on a re-test, rather than simply selecting what the student knows to be the correct answer. This is known as the Question Feedback setting.

However, APEX does provide for Classroom Settings options that allow APEX teachers to deselect these two settings. Therefore, an APEX teacher can opt to turn off the Question Randomization setting, effectively repeating the same questions, and an APEX teacher can turn on the Question Feedback setting, effectively allowing the student to see which answer is correct. According to Witness I, APEX remotely captures all such setting changes in its software data collection in a file known as Section Detail.¹⁵¹

iii. Grading

Witness I further testified that there are various categories of grading that can be, but need not be, utilized in a given APEX course. As an initial matter, any specific course subject will have a given number of possible points earned by a student, depending on the length of the subject. According to the witness, an APEX teacher may, at the teacher's discretion, exclude any number of qualified points from the scoring of that subject in order to make it reasonable for a student to complete the specific course within a shorter allotted timeframe such as summer school. According to the testimony of Witness J, Building

¹⁵¹ See *id.*

Administrators also have the ability to exclude any number of qualified points from the scoring of a course subject.

Witness I testified about two categories of progress report calculations that get displayed by the APEX software on an APEX teacher's interface. One category is known as the "Grade To Date", which reflects a student's score (in a percentage out of 100) based on graded coursework completed thus far. In other words, according to Witness I, if a student has only taken two scored assessments at that point in time, and the student scored 100 on both, her/his Grade To Date will be an average of those two scored assessments/assignments (100). According to Witness I, alternatively, a second category known as "Overall Grade" is reflective of a student's score on all scored assessments (in a percentage out of 100). If that same student above scored 100 on her/his first two scored assessments/assignments and subsequently scored zeros on remaining assignments, those zeros would be averaged with those two scores of 100 for an Overall Grade. According to the witness, the confusing part of these calculations is that if a teacher does not set deadline dates within the APEX software, the software does not know whether there are any further scored assessments or assignments to be completed, and so the Grade To Date score may be different than the Overall Grade score. Regardless of this possibility, according to Witness I, an APEX teacher still has the option to use either the Grade To Date or the Overall Grade as the student's "Final Grade" because the Final Grade is not an automatically generated score – the Final Grade is an APEX teacher-manually entered score. According to this witness, APEX teachers ultimately can enter in any score they want – be it higher or lower than the Final Grade. But according to Witness I, the APEX recommended Final Grade is the Overall Grade score since that is generally the most accurate measure of a student's overall success (or failure) in a given course subject. According to Witness K, a Newburgh Enlarged City School District employee whose identity is known to the Grand Jury (hereinafter "Witness K"), deadlines dates for scored assessments are not entered into APEX by some of the Newburgh APEX teachers, thereby making the Grade To Date score misleading as far as measuring true overall progress in a course subject.

iv. Duration

Witness I testified that there are many variables that impact how long a licensed student is expected to take to complete a given course subject. Some of those variables include whether the course subject is “Prescriptive” or “Core.” As Witness I explained it, a Prescriptive designated course subject would allow for a student to “test out” of certain portions of the overall subject, so, whereas the full course would be expected to take a certain amount of time to complete, if a student shows some mastery in some of the areas of that subject, the student could “test out” and take an abbreviated version of the course subject. “Core” on the other hand, according to Witness I, is not designed for “testing out” and so the student enrolled in this is expected to complete the entire course subject, except for points that may be excluded by a teacher or Building Administrator.

Furthermore, according to Witness I, some Core course subjects are marking-period specific, and some are full year courses that extend beyond just a given marking period and may encompass multiple marking periods. Those designations are identifiable on the APEX data that APEX collects in its Enrollment Details file.¹⁵²

C. Training and Best Practices

Witness I testified that upon initially contracting with a school district for the assignment of software licenses, APEX will offer training to designated APEX representatives on how to use the software. Additionally, according to Witness I, APEX offers literature on best practices for school districts and their implementation of the software to its students (hereinafter “APEX Best Practices”). As a supplement to that training and literature, the witness testified that there are a whole host of resources available to every APEX teacher through their own log-in dashboards, which includes Best Practices policies, training materials, downloadable materials, as well as video tutorials – all accessible at no additional charge.

¹⁵² Grand Jury Ex. 20.

One particular area of focus in APEX's training and Best Practices is on limiting Assessment Attempts "to prevent students from attempting to preview all assessment items in the question bank."¹⁵³ To counter that, APEX Best Practices details its Assessment Security which, among other things, randomizes questions on assessments, providing:

Computer-scored assessments are designed so that no two students take the same assessment and any retakes are original to the student. Randomization occurs in three distinct ways:

- Questions are randomly selected from question banks for each learning objective
- The order of questions is randomized within each assessment
- Answer options are randomized within each question¹⁵⁴

Under this category of focus, APEX Best Practices also suggests not showing question feedback "to prevent students from being shown the correct answers during a computer-scored quiz."¹⁵⁵

Another area of focus in the APEX Best Practices is on blocking Question and Answer websites. APEX Best Practices advises that these question and answer websites "pose a significant threat to academic integrity," especially in instances where "students have unsupervised and unrestricted access to the Internet during assessment."¹⁵⁶

Yet another area of focus in APEX's Best Practices is to investigate suspected dishonesty. APEX describes the characteristics of dishonesty as including: "unusually short assessment durations," "large numbers of teacher-entered scores for computer-scored assessments," "low scores on first and second attempts combined with high scores on a subsequent attempt," and "sudden increase in scores."¹⁵⁷

¹⁵³ Grand Jury Ex. 21.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

II. NEWBURGH FREE ACADEMY USE OF APEX

A. Excessive Numbers of Grade Overrides

Witnesses J and K, as well as Witness L, a Newburgh Enlarged City School District employee known to the Grand Jury (hereinafter “Witness L”), all testified to having made at least several, up to numerous grade overrides for quizzes and CSTs, while teaching APEX at the Newburgh Free Academy North and West campuses. Witnesses J, K, and L further testified that they had no idea that the APEX Best Practices explicitly suggested that such excessive overrides were an area of suspected dishonesty. According to these witnesses, there were no Newburgh Free Academy guidelines established on the number of overrides a teacher should be giving, nor any guidelines on how much of an override should be made.

According to Witness I, APEX maintains data on every grade override performed in its Grade Book Audit file.¹⁵⁸ Witness J was presented with a multitude of instances of overrides attributable directly to her.¹⁵⁹ Witness J testified that the witness would only override a grade with an increase of anywhere between 2 and 6 points on assessments that had typical maximum scores of 10 or 20. When asked why, Witness J testified that the witness would often work through a quiz with a student, and might inadvertently suggest the wrong answer, and then give the student credit for those incorrectly answered questions. When asked further if the witness thought it proper in the first instance to be working through a quiz – a closed book scored assessment – with a student already in educational need, Witness J conceded that it should not be done, nor would it be done in a traditional classroom setting. Witness J testified: “There were never guidelines and protocols we couldn’t help kids when the program was enrolled. Logically, you think about it. In my classroom that wouldn’t happen, but we were never given guidelines.”¹⁶⁰

¹⁵⁸ Grand Jury Ex. #20.

¹⁵⁹ *See id.*

¹⁶⁰ Grand Jury Testimony of Witness J, p. 91.

However, Witness J was presented with many grade overrides in the APEX Grade Book Audit file attributable to the witness exceeding an increase of 2 to 6 points, and the witness could not answer how that was possible.¹⁶¹ Witness J speculated that because there are multiple APEX designated teachers in the APEX classroom at any given time, and that there may simply be one teacher-designated computer, if the witness was logged in and left to go to the bathroom, for instance, other teachers would have the ability to make changes under the witness's credentials if it was still logged in. When asked why certain overrides attributable to Witness J that exceeded the 2 to 6 point increase were made days and sometimes weeks and even months after a scored assessment, Witness J could not provide an answer other than shock that such large increases – a score of 12 overridden and increased to a 36 out of 40 points – were made almost 5 months after the earned score by the student.

Similarly, Witness K was presented with an even greater number of grade overrides from the APEX Grade Book Audit file, spanning small incremental increases to much larger increases.¹⁶² Witness K also testified that the point increases were attributable to sitting and working through a quiz or CST with a student. In the event a wrong answer was suggested by the witness, Witness K would increase that student's score by the number of points of the wrong answer. When asked if Witness K would suggest answers to students in a traditional classroom setting with the frequency in which it was admittedly done in APEX, Witness K testified "No."¹⁶³ Furthermore, Witness K testified that often times she was working through quizzes with students on a subject area she was not even certified to teach. Both Witness J and Witness K acknowledged that this should not be done, and that ultimately it was doing a disservice to the students.

When asked why certain grade overrides were made weeks after a scored assessment, Witness K testified that as a student got closer to graduation, if the student noticed her/his overall APEX grade was too low to pass, the student would request to review old quizzes. This review, according to Witness K,

¹⁶¹ Grand Jury Ex. #20.

¹⁶² *See id.*

¹⁶³ Grand Jury Testimony of Witness K, p. 29.

would not actually be a reset of the quiz, but rather an off-line review of the wrong questions. According to Witness K, based on this off-line review, Witness K would go back in and override a quiz grade to a higher score. Notably, Witness I testified that the only instance where it would be appropriate for a teacher to be working with a student during an actual scored assessment would be if the student was receiving some type of special educational services such as an individualized education plan (IEP). Neither Witness K nor Witness J testified that any student with whom they worked during, or after a scored assessment, received any special accommodations.

Witness K was also showed grade overrides in the APEX Grade Book Audit file where there was no earned score at all.¹⁶⁴ Contrary to some of the instances noted above where an earned scored assessment score was *increased* with an override, Witness K was shown examples of grade overrides (manually entered scores) where APEX did not record a scored assessment at all. The column on the APEX Grade Book Audit file that lists the Student's Earned Scores revealed several blank notations without a recorded score.¹⁶⁵ Yet, multiple grades were recorded as entered in the Grade Override column of the APEX Grade Book Audit file, attributable to Witness K.¹⁶⁶ Witness K stated that some of these grades could have been carryover grades from previous programs that the student was enrolled in, but switched out of, but that given the sheer volume of these instances, no explanation was provided as to instances where there was no carryover. Once again, when presented with the idea that all of this looks more like cheating in an effort to pass an otherwise failing student, Witness K acknowledged that it did.

The Data Analyst testified that several APEX teachers had grade overrides of previously scored student assessments as well as overrides of assessments that were potentially never even attempted in that APEX did not record any score at all. The Data Analyst noted that inclusive of overrides of previously scored and unscored assessments, one APEX teacher had 99 grade overrides, one had 275 overrides, and

¹⁶⁴ Grand Jury Ex. #20.

¹⁶⁵ *See id.*

¹⁶⁶ *See id.*

one had 325 overrides between 2016 and 2018.¹⁶⁷ It was so prevalent and commonplace that 33 different APEX teachers had at least one grade override between 2016 and 2018.¹⁶⁸

B. Unlimited Number of Quiz Resets

Witness I testified that APEX Best Practices recommends no more than 3 quiz resets for any given student on any given quiz. According to Witness I, typically the student has the ability to reset her/his quiz one time, and after that, the teachers must enable the quiz resets. According to Witnesses J, K, and L, it is “possible” they were told during APEX training to limit the number of quiz resets to 3, but that the APEX teachers were never told by Building Administrators to cap the number of quiz resets at 3, and rather, were affirmatively told that they *could* reset a quiz an “unlimited” number of times. In fact, these witnesses testified that they did in fact reset many quizzes more than 3 times. When Witness J was asked whether the witness understood why APEX recommended no more than 3 resets; namely, that eventually the questions would start to repeat themselves despite the question randomization being on, Witness J testified “I see it now.”¹⁶⁹

Even more problematic from an academic integrity standpoint, Witness I had testified that the Classroom Settings for the APEX software defaulted to the Question Feedback option being turned off. Witness I testified that this was another point emphasized in APEX’s Best Practices: “The following course settings support teachers and administrators in ensuring academic integrity: Do Not Show Question Feedback to prevent students from being shown the correct answers during a computer-scored quiz.”¹⁷⁰ Witness J testified that when students took quizzes, the Question Feedback setting was always on and the witness did not even know there was an option to turn this setting on and off. Witness K testified that all APEX teachers and Building Administrators had access to the Classroom Settings such as the Question Feedback option and that sometimes hers was on, and sometimes it was not. Coupling that with the

¹⁶⁷ Grand Jury Ex. #30.

¹⁶⁸ *See id.*

¹⁶⁹ Grand Jury Testimony of Witness J, p. 106.

¹⁷⁰ Grand Jury Ex. #21, pp. 2-3.

unlimited number of quiz resets, Witnesses J and K testified that they recognized that this was a serious integrity problem.

C. Grading

i. Determining the APEX Final Grade

Perhaps the biggest issue from an academic integrity standpoint is Newburgh Free Academy's memorialization of APEX Final Grades. As mentioned before by Witness I, the APEX Final Grade entered into the APEX software is a teacher-inputted grade. It is not automatically generated. Despite recommendations from Witness I to adhere to the Overall Grade as the best measure of the student's actual APEX Final Grade, there is no mandate by APEX. Nor is there a mandate by Newburgh Free Academy, according to Witnesses J and K. Witness J testified that while the witness always utilized the Overall Grade as the accurate mark of the APEX Final Grade, the witness could not say whether other APEX teachers did as well. Witness K on the other hand testified that the witness sometimes used the Grade To Date as the APEX Final Grade and sometimes used the Overall Grade. As discussed above, the Grade To Date, according to Witness I, is not the most accurate measure of a student's actual progress on a course subject if there are no deadline dates entered into APEX. When asked, Witness K conceded that deadline dates were not entered into APEX, and therefore a student's Grade To Date was inaccurately higher than a student's Overall Grade. Nonetheless, Witness K testified that the witness would sometimes use the Grade To Date as the student's APEX Final Score. As with other instances of the APEX program, when Witness K was asked whether the witness understood how utilizing the Grade To Date – without deadlines set in APEX – was an entirely inaccurate measure of the student's success/failure in a given course, Witness K testified that now the witness understood. However, Witness K could not explain why there was vacillation between the witness's use of both the Grade To Date and Overall Grade measures.

ii. Grade Resolution Forms

Witnesses J and K testified that the way a student's transcript grade is calculated is by averaging the student's underlying failing grade in the traditional course with the her/his APEX Final Grade. The resulting grade is what appears on the student's transcript at the end of the year. According to Witness K, those two scores are given equal weight even though a traditional course could span a quarter or a full year, while an APEX course could be completed in as little as an hour. This calculation, however, is done on an NFA form called an APEX Online Learning Grade Resolution Form (hereinafter "Grade Resolution Form").¹⁷¹ These Grade Resolution Forms require the student's name, the student's enrolled APEX course, the respective marking period for the course subject, the completion date, the grade earned, and the signature and date of the APEX Online Learning teacher of record.¹⁷² Underneath the signature and date, there is an attestation that reads: "By signing above, I attest to the fact that the above named student completed and earned the grade written for the course specified. When completed, please forward to administrator."¹⁷³

Below that section, there is an area for "Grade earned in traditional course," "Grade earned on APEX Online course," and "Resolved grade (this is the grade which will appear on transcript)" – all to be completed by the "APEX administrator."¹⁷⁴ Below this section, there is an area for the classroom teacher's signature for the underlying course and the guidance counselor's signature, both which also contain attestations, and then a final signature line for an administrator, which does not contain an attestation.¹⁷⁵ According to Witness J, the APEX teacher of record may simply be one of the APEX teachers whose name was attached to a given course subject, but that teacher may not necessarily have administered that subject to every student linked to the teacher.

¹⁷¹ Grand Jury Ex. #22.

¹⁷² *See id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *See id.*

Witness J was shown two (2) Grade Resolution Forms for two different students who both took Economics – Full Course in 2018, signed and attested to by her, in which “Grade earned on APEX Online course” was higher than the APEX Final Score recorded in the APEX Enrollment Details file.¹⁷⁶ For instance, one Grade Resolution Form signed and attested to by Witness J listed a “Grade earned on APEX Online course” as an 86,¹⁷⁷ whereas the APEX Final Grade in the Enrollment Details file did not contain any entry for this student having taken Economics – Full Course in 2018 or at any other time.¹⁷⁸ In another instance, a Grade Resolution Form signed and attested to by Witness J listed a “Grade earned on APEX Online course” as a 83,¹⁷⁹ whereas the APEX Final Grade in the Enrollment Details file was a 75 – manually entered by Witness J.¹⁸⁰ Upon seeing both of these inaccurate Grade Resolution Forms and their discrepancy with the APEX Enrollment Details data, Witness J could not provide an explanation. The first of these Grade Resolution forms was signed by both a guidance counselor and a Newburgh Free Academy North Campus Building Administrator and the second of these Grade Resolution forms was signed by just a Newburgh Free Academy North Campus Building Administrator.¹⁸¹

According to testimony, Witness K also filled out Grade Resolution Forms. When asked if the Grade Resolution Forms were filled out accurately and honestly, Witness K responded “Yes.”¹⁸² However, Witness K was presented with two (2) Grade Resolution Forms for two different students who both took Economics – Full Course in 2018, signed and attested to by Witness K, in which “Grade earned on APEX Online course” was higher than the APEX Final Score recorded in the APEX Enrollment Details file.¹⁸³ For instance, one Grade Resolution Form signed and attested to by Witness K listed a “Grade earned on

¹⁷⁶ Grand Jury Ex. #20.

¹⁷⁷ Grand Jury Ex. #24.

¹⁷⁸ Grand Jury Ex. #20.

¹⁷⁹ Grand Jury Ex. #25.

¹⁸⁰ Grand Jury Ex. #20.

¹⁸¹ Grand Jury Ex.'s #24 and #25.

¹⁸² Grand Jury Testimony of Witness K, at 52.

¹⁸³ Grand Jury Ex. #20.

APEX Online course” as an 84,¹⁸⁴ whereas the APEX Final Grade in the Enrollment Details file was a 76 – also manually entered by Witness K.¹⁸⁵ In another instance, a Grade Resolution Form signed and attested to by Witness K listed a “Grade earned on APEX Online course” as a 92,¹⁸⁶ whereas the APEX Final Grade in the Enrollment Details file was an 83 – also manually entered by Witness K.¹⁸⁷ Upon seeing both of these inaccurate Grade Resolution Forms and their discrepancy with the APEX Enrollment Details data, Witness K could not provide an explanation. However, one thing Witness K did note was that as far as the second Grade Resolution Form,¹⁸⁸ it appeared that the signature attributable to the witness was not in fact the witness’s signature. When asked to elaborate, Witness K noted that some of the angles in the letters of the signature did not match the signature on the first Grade Resolution Form, which Witness K admits is in fact the witness’s signature.¹⁸⁹ Witness K also testified that the Administrator’s Signature on the second Grade Resolution Form – attributable to the Newburgh Free Academy North Building Administrator – did not match the signature on the first Grade Resolution Form – also attributable to the Newburgh Free Academy North Building Administrator.¹⁹⁰ When asked if Witness K believes someone was forging Grade Resolution Forms in order to boost student’s grades surreptitiously, Witness K was unsure who, if anyone, would do that.

While those issues existed, adding to the overall disconnect is the fact that Witness L testified that at the Newburgh Free Academy West campus, the witness had never even seen or heard of a Grade Resolution Form.

¹⁸⁴ Grand Jury Ex. #26.

¹⁸⁵ Grand Jury Ex. #20.

¹⁸⁶ Grand Jury Ex. #27.

¹⁸⁷ Grand Jury Ex. #20.

¹⁸⁸ Grand Jury Ex. #27.

¹⁸⁹ Grand Jury Ex. #26.

¹⁹⁰ Grand Jury Ex.’s #26 and #27.

D. Unusually Short Assessment Durations

Witness I testified about the difference between what APEX measures as “log in” time versus “access time.” “Log in” time, as it was explained, is simply when a student logs into her/his APEX dashboard, but does not yet start any work (although the log in time would include that as well). “Access time,” in contrast, was time spent by a student actually working on her/his assignments and assessments. Thus, by using the “access time” as the measure of the student actually attempting to complete work, the Enrollment Details data showed a very large number of completed courses with unusually short duration times.¹⁹¹

Witness J was shown one such example of an unusually short duration time. One student was shown to have completed an APEX course in 18 minutes – a student whose APEX Final Grade was inputted by Witness J. The number of assessments taken, according to the Enrollment Details data, was four 10-question quizzes.¹⁹² When asked how Witness J could explain how a student could complete even four scored 10-question quizzes in only 18 minutes with an APEX Final Grade of 98 (out of 100), Witness J testified that to finish four 10-questions quizzes in 18 minutes was “insane.”¹⁹³ Witness J further testified that one could not even read all those questions in 18 minutes, let alone answer them correctly.

According to the Data Analyst, he examined the APEX Enrollment Details data¹⁹⁴ and created a spreadsheet which filtered down this data into all of the enrolled APEX students who were designated as completing their respective course in under two (2) hours, and who received a passing grade of a 70 or above.¹⁹⁵ The Data Analyst testified that he found over 100 such instances. Some of these passing grades were in fact well above a 70 including scores of 97, 98, and 99, all achieved in well under two (2) hours.¹⁹⁶

¹⁹¹ Grand Jury Ex. #20.

¹⁹² *See id.*

¹⁹³ Grand Jury Testimony of Witness J, p. 143.

¹⁹⁴ Grand Jury Ex. #20.

¹⁹⁵ Grand Jury Ex. #30.

¹⁹⁶ *See id.*

The Data Analyst also read off the names of the various APEX teachers who had assigned these final grades, and there were a multitude of them.

Below is a redacted copy of the Data Analyst's spreadsheet on completed APEX courses in under two (2) hours with a grade of 70 or above, sorted by shortest duration to longest duration.

Organization Name	School Year	Classroom Name	Student First Name	Student Last Name	Time Spent	Final Grade	Final Grade Assigned By	Passing
Newburgh North/West	SY 16-17	QR3 Field Biology			0:16	90		Yes
Newburgh North/West	SY 16-17	QR3 Field Biology			0:17	97		Yes
Newburgh North/West	SY 17-18	QR3 Pre-College Algebra			0:17	90		Yes
Newburgh North/West	SY 16-17	QR3 Field Biology			0:18	77		Yes
Newburgh North/West	SY 17-18	QR3 Pre-College Algebra			0:18	98		Yes
Newburgh North/West	SY 17-18	QR3 Pre-College Algebra			0:20	81		Yes
Newburgh North/West	SY 16-17	QR2 English 12A			0:25	95		Yes
Newburgh Enlarged City School District	SY 17-18	2018 SS English 11 231 Brescia			0:27	70		Yes
Newburgh Main	SY 17-18	17-18 Field Biology Q1			0:29	87		Yes
Newburgh North/West	SY 16-17	QR4 English 12			0:29	78		Yes
Newburgh North/West	SY 16-17	QR4 English 12			0:30	78		Yes
Newburgh Main	SY 17-18	17-18 Field Biology Q4			0:31	96		Yes
Newburgh Main	SY 17-18	17-18 Field Biology Q1			0:33	80		Yes
Newburgh North/West	SY 16-17	QR3 Field Biology			0:33	80		Yes
Newburgh North/West	SY 16-17	QR3 Field Biology			0:36	83		Yes
Newburgh North/West	SY 16-17	QR3 Field Biology			0:37	90		Yes
Newburgh North/West	SY 16-17	QR4 English 12			0:39	85		Yes
Newburgh North/West	SY 17-18	QR2 English 9			0:40	88		Yes
Newburgh Main	SY 17-18	17-18 Field Biology Q3			0:41	99		Yes
Newburgh North/West	SY 16-17	QR3 Field Biology			0:41	70		Yes
Newburgh North/West	SY 16-17	QR4 English 12			0:42	87		Yes
Newburgh North/West	SY 16-17	QR4 English 12			0:46	72		Yes
Newburgh North/West	SY 16-17	QR3 Field Biology			0:46	77		Yes
Newburgh North/West	SY 16-17	QR3 English 12			0:47	76		Yes
Newburgh North/West	SY 16-17	QR3 Field Biology			0:47	76		Yes
Newburgh North/West	SY 16-17	QR2 English 12B			0:50	85		Yes
Newburgh North/West	SY 16-17	QR4 English 12			0:51	78		Yes
Newburgh North/West	SY 16-17	QR3 English 12			0:54	94		Yes
Newburgh North/West	SY 17-18	QR3 Pre-College Algebra			0:54	86		Yes
Newburgh North/West	SY 16-17	QR3 English 12			0:55	77		Yes
Newburgh Main	SY 17-18	17-18 Field Biology Q3			0:58	92		Yes
Newburgh North/West	SY 16-17	QR2 English 12A			0:58	87		Yes
Newburgh North/West	SY 16-17	QR2 English 12B			0:58	75		Yes
Newburgh North/West	SY 16-17	QR2 English 12A			0:59	87		Yes
Newburgh North/West	SY 16-17	QR2 English 12A			1:00	80		Yes
Newburgh North/West	SY 16-17	QR3 English 12			1:01	84		Yes
Newburgh North/West	SY 16-17	QR2 English 12A			1:01	92		Yes
Newburgh North/West	SY 16-17	QR1 Field Biology			1:01	84		Yes
Newburgh North/West	SY 16-17	QR3 Field Biology			1:02	73		Yes
Newburgh North/West	SY 16-17	QR3 English 12			1:03	87		Yes
Newburgh North/West	SY 16-17	QR3 English 12			1:04	95		Yes
Newburgh North/West	SY 16-17	QR2 English 12A			1:05	84		Yes
Newburgh North/West	SY 16-17	QR1 Living Environment A			1:05	92		Yes
Newburgh Main	SY 16-17	QR1 Field Biology			1:06	71		Yes
Newburgh North/West	SY 16-17	QR4 English 12			1:07	83		Yes
Newburgh Enlarged City School District	SY 16-17	2017 SS English 10 - 11			1:09	79		Yes
Newburgh Main	SY 17-18	17-18 Field Biology Q4			1:09	86		Yes
Newburgh North/West	SY 16-17	QR2 English 12A			1:09	74		Yes
Newburgh North/West	SY 16-17	QR2 Earth Science A			1:09	85		Yes
Newburgh North/West	SY 16-17	QR4 English 12			1:09	78		Yes

[continued on next page]

Organization Name	School Year	Classroom Name	Student First Name	Student Last Name	Time Spent	Final Grade	Final Grade Assigned By	Passing
Newburgh North/West	SY 16-17	QR1 Field Biology			1:10	78		Yes
Newburgh North/West	SY 16-17	QR2 English 12A			1:13	85		Yes
Newburgh North/West	SY 16-17	QR3 Field Biology			1:15	87		Yes
Newburgh Main	SY 17-18	17-18 Pre-College Algebra Q2			1:16	96		Yes
Newburgh Main	SY 17-18	17-18 Field Biology Q1			1:17	96		Yes
Newburgh North/West	SY 17-18	QR3 Pre-College Algebra			1:17	91		Yes
Newburgh North/West	SY 16-17	QR3 Field Biology			1:18	86		Yes
Newburgh North/West	SY 16-17	QR1 Earth Science A			1:19	85		Yes
Newburgh Main	SY 16-17	17-18 English 9 Q3			1:20	78		Yes
Newburgh Main	SY 17-18	17-18 Advanced Algebra Q2			1:22	97		Yes
Newburgh Main	SY 17-18	17-18 Field Biology Q3			1:23	89		Yes
Newburgh North/West	SY 16-17	QR3 English 12			1:23	83		Yes
Newburgh North/West	SY 16-17	QR3 Field Biology			1:23	71		Yes
Newburgh North/West	SY 16-17	QR2 Field Biology			1:23	79		Yes
Newburgh Main	SY 16-17	QR3 Field Biology			1:24	70		Yes
Newburgh North/West	SY 16-17	QR4 English 12			1:24	79		Yes
Newburgh North/West	SY 16-17	QR1 Algebra 2			1:24	73		Yes
Newburgh North/West	SY 16-17	QR3 English 12			1:27	74		Yes
Newburgh North/West	SY 16-17	QR3 English 12			1:29	93		Yes
Newburgh North/West	SY 16-17	QR2 Economics			1:29	70		Yes
Newburgh North/West	SY 16-17	QR3 Government			1:29	76		Yes
Newburgh North/West	SY 16-17	QR2 English 12A			1:30	91		Yes
Newburgh North/West	SY 16-17	QR2 English 12A			1:32	91		Yes
Newburgh Main	SY 16-17	QR3 Field Biology			1:33	84		Yes
Newburgh North/West	SY 16-17	QR3 English 12			1:34	92		Yes
Newburgh Main	SY 17-18	17-18 QR2 Field Biology			1:37	80		Yes
Newburgh North/West	SY 16-17	QR2 English 12A			1:37	80		Yes
Newburgh North/West	SY 16-17	QR3 English 12			1:37	78		Yes
Newburgh North/West	SY 16-17	QR3 English 12			1:38	84		Yes
Newburgh North/West	SY 16-17	QR4 English 12			1:38	80		Yes
Newburgh Main	SY 16-17	QR1 Field Biology			1:39	78		Yes
Newburgh North/West	SY 16-17	QR1 English 12			1:40	71		Yes
Newburgh North/West	SY 16-17	QR3 English 12			1:40	90		Yes
Newburgh North/West	SY 16-17	QR2 English 12A			1:43	91		Yes
Newburgh North/West	SY 16-17	QR4 English 12			1:44	93		Yes
Newburgh North/West	SY 16-17	QR2 English 12A			1:45	81		Yes
Newburgh Main	SY 17-18	17-18 QR2 Field Biology			1:46	88		Yes
Newburgh North/West	SY 16-17	QR3 Government			1:48	85		Yes
Newburgh North/West	SY 16-17	QR3 Global 2			1:48	82		Yes
Newburgh North/West	SY 16-17	QR4 English 12			1:49	75		Yes
Newburgh North/West	SY 16-17	QR2 English 12B			1:50	84		Yes
Newburgh North/West	SY 16-17	QR3 English 12			1:50	89		Yes
Newburgh North/West	SY 16-17	QR4 government			1:50	94		Yes
Newburgh North/West	SY 16-17	QR2 English 12A			1:51	73		Yes
Newburgh North/West	SY 16-17	QR3 English 12			1:51	83		Yes
Newburgh North/West	SY 16-17	QR1 US History C			1:52	71		Yes
Newburgh North/West	SY 16-17	QR2 Living Environment A			1:53	84		Yes
Newburgh North/West	SY 16-17	QR2 English 12A			1:54	83		Yes
Newburgh North/West	SY 16-17	QR2 English 12A			1:54	74		Yes
Newburgh North/West	SY 17-18	QR3 Pre-College Algebra			1:54	81		Yes
Newburgh Main	SY 17-18	17-18 Pre-College Algebra Q2			1:57	90		Yes
Newburgh North/West	SY 16-17	QR2 English 12A			1:57	87		Yes
Newburgh North/West	SY 16-17	QR3 English 12			1:57	75		Yes
Newburgh North/West	SY 16-17	QR2 Field Biology			1:57	85		Yes
Newburgh Main	SY 17-18	17-18 Financial Literacy Q1			1:58	86		Yes
Newburgh North/West	SY 16-17	QR2 English 12A			1:58	77		Yes
Newburgh North/West	SY 16-17	QR3 English 12			1:58	85		Yes

GRAND JURY Ex. #30

E. Attendance Requirements Ignored

Witness J testified multiple times that the eligibility requirement to be placed into APEX was that the student must adhere to the 93% attendance requirement as outlined in the Student Attendance Policy noted previously. Witness K testified, however, that while the witness believed that the 93% attendance requirement did *not* apply to APEX enrollment, if it did, it certainly was not adhered to. Witness K testified that APEX teachers would be given lists of students – even those with known chronic attendance issues – and told by Building Administrators to enroll them. But according to Witness J, if a student, during her/his traditional courses, did not meet the 93% attendance standard which was defined as no more than three (3) unexcused absences in a given marking period, per class, then the student was not supposed to be placed into APEX. According to Witness K though, in practice, regardless of the students' attendance, anyone who was passed along by guidance counselors to be enrolled in APEX were approved for enrollment by the Newburgh Free Academy North campus Building Administrators. Asked if Witness K ever checked a student's attendance, the witness responded "No."¹⁹⁷ While attendance was taken for the actual attendance in the underlying APEX courses, according to Witness K, nothing was done if an enrolled student was chronically absent from APEX.

According to the Data Analyst, he compiled a spreadsheet of the APEX enrolled students' attendance in their underlying Newburgh Free Academy courses and then filtered those out by the students who did not meet the 93% attendance threshold (more than 3 unexcused absences in a given course in a given marking period) as prescribed in the Comprehensive Student Attendance Policy.¹⁹⁸ He further testified that he broke up the attendance by marking period utilizing the start/end dates for those marking periods as delineated by Infinite Campus. Based on that, the Data Analyst testified about one particular student who he identified as having taken English 12 during the 2nd semester of the 2016-2017 school year. There were

¹⁹⁷ Grand Jury Testimony of Witness K, p. 63.

¹⁹⁸ Grand Jury Ex. #30.

43 days in that semester, and this student had 40 unexcused individual class absences during that time.¹⁹⁹ This student's attendance percentage in the underlying English 12 class at Newburgh Free Academy during the 2nd semester of the 2016-2017 school year was 6.98%, far below 93%.²⁰⁰ Nevertheless, this student appeared in the APEX Enrollment Details data and therefore was enrolled in credit recovery for APEX English 12.²⁰¹

The Data Analyst noted another student who was enrolled in 4 different APEX courses, despite not meeting the 93% attendance threshold in any of the underlying Newburgh Free Academy classes. This student had 17 unexcused absences in 2 semesters of one class, 28 unexcused absences in 1 semester of another class, 17 unexcused absences in 1 semester of another class, and 22 unexcused absences in 1 semester of another class – all in one school year.²⁰² Nevertheless, this student appeared in the APEX Enrollment Details data and therefore, she was enrolled in credit recovery for these 4 APEX courses.²⁰³

In total, there were 42 different course enrollments that the Data Analyst was able to identify where the students fell below the 93% attendance threshold between 2016 and 2018.²⁰⁴

Below is a redacted copy of the Data Analyst's spreadsheet detailing APEX enrolled students' underlying class attendance for their corresponding APEX enrolled course subjects.

¹⁹⁹ *See id.*

²⁰⁰ *See id.*

²⁰¹ Grand Jury Ex. #20.

²⁰² Grand Jury Ex. #30.

²⁰³ Grand Jury Ex. #20.

²⁰⁴ Grand Jury Ex. #30.

Name	Year Class	Semester	Number of Unexcused Absences in Semester	Number of Days in Semester	Percent of Absences in Semester	Percent of Attendance
	1617 US History	1	4	39	10.26%	89.74%
	1617 English 12	2	40	43	93.02%	6.98%
	1718 English 12	2	23	46	50.00%	50.00%
	1718 Global 1	1234	20	180	11.11%	88.89%
	1718 Economics	12	17	90	18.89%	81.11%
	1718 English 12	3	28	42	66.67%	33.33%
	1718 Field Biology	3	17	42	40.48%	59.52%
	1718 English 12	2	22	46	47.83%	52.17%
	1718 Government	3	4	42	9.52%	90.48%
	1718 English 12	1	14	40	35.00%	65.00%
	1718 Economics Full Course	12	47	90	52.22%	47.78%
	1718 Economics Full Course	12	38	90	42.22%	57.78%
	1718 Government	3	17	42	40.48%	59.52%
	1718 English 12	2	19	46	41.30%	58.70%
	1718 English 12	3	33	42	78.57%	21.43%
	1718 Economics	12	19	90	21.11%	78.89%
	1718 Pre College Algebra	2	7	46	15.22%	84.78%
	1718 Living Environment	1	12	40	30.00%	70.00%
	1718 Algebra I	2	9	46	19.57%	80.43%
	1718 English 12	3	6	42	14.29%	85.71%
	1718 Econ R	1	18	40	45.00%	55.00%
	1718 Field Bio	1	9	40	22.50%	77.50%
	1718 Living Environment	1	5	40	12.50%	87.50%
	1718 Field Bio	1	6	40	15.00%	85.00%
	1718 Algebra I	1	10	40	25.00%	75.00%
	1718 Economics	2	20	46	43.48%	56.52%
	1718 Field Bio	2	9	46	19.57%	80.43%
	1718 Field Bio	3	26	42	61.90%	38.10%
	1718 English 12	2	12	46	26.09%	73.91%
	1718 English 12	1	8	40	20.00%	80.00%
	1718 Biology	1	4	40	10.00%	90.00%
	1718 Economics	1	8	40	20.00%	80.00%
	1718 Government	3	5	42	11.90%	88.10%
	1718 Government	3	14	42	33.33%	66.67%
	1718 English 9	2	11	46	23.91%	76.09%
	1718 US History	2	28	46	60.87%	39.13%
	1718 US History	1	16	40	40.00%	60.00%
	1718 Government	3	20	42	47.62%	52.38%
	1718 Government	3	4	42	9.52%	90.48%
	1718 Chemistry	1	5	40	12.50%	87.50%
	1718 English 12	2	5	46	10.87%	89.13%
	1718 Geometry	2	6	46	13.04%	86.96%

GRAND JURY EX. #30

F. No Guidelines, No Best Practices

Multiple times, Witnesses J, K and L testified that there simply were no policies or procedures in place for teachers and students in taking the APEX program. According to these witnesses, teachers were never advised that it was recommended that students not take scored assessments at home, due to the difficulty, if not impossibility, of monitoring for academic integrity. In light of internet-based answer boards, cell phone accessibility, and other means of dishonestly taking these assessments, Witness I testified that these were issues that lead to the suggestion that scored assessments be taken at school, not at home. Witnesses J and K had to concede, however, that despite not being affirmatively directed to discourage such practices, the APEX Best Practices could have been ascertained through their own APEX software dashboards, though they never took the opportunity to find it.

Witness K testified that early on in the program, the witness recognized that the use of cell phones by students – even in the APEX designated lab classrooms – was a problem for academic integrity. The witness stated that at one point in time, students were taking pictures of their assessments and posting them on apps to be shared with others. As a result, Witness K proposed to Building Administrators to institute a “no phone” policy. This proposal was made 3 to 4 years ago, but according to Witness K, no such policy was ever formulated by the Building Administrators. Instead, according to Witness K, due to the inaction, the APEX teachers themselves created their own “no phone” policy, instituted last year.

Additionally, Witness K testified that since Newburgh Free Academy was offering quarterly recovery courses – and specifically – fourth quarter recovery, APEX teachers had to creatively design courses in a scaled down version from the APEX Core and Prescriptive courses generally offered. According to Witness K, this made for make-shift selection of subject areas within a given course while perhaps not fully providing the students with the broad spectrum of educational offering. Furthermore, Witness K testified that APEX teachers were not qualified in certain subject areas to trim down these courses in the manner that they did.

In addition to the testimony that some of the APEX teachers were not properly and effectively prepared to run the APEX program was the fact that Witness K testified that Building Administrators were even less prepared. Witness K testified that on APEX matters, the witness reports to the building Principal, but by no means was the building Principal qualified to run the APEX program. When asked if any Building Administrator could step in to run the program in Witness K's absence, Witness K testified that they could not. When asked if the APEX program is run uniformly among the three Newburgh Free Academy campuses, Witness K testified that as far as the witness knows, it is not.

G. Pressure to Have Students Graduate

When asked if there was pressure to graduate students, Witness K testified that there was pressure felt, especially during the 4th quarter when the witness would be provided a list of 12th grade/senior students who had failed the 4th quarter and who needed to graduate. According to Witness K: "There is always pressure to graduate, but, yes, fourth quarter, when everyone is e-mailing you, guidance counselors are showing up, where are they, how far are they in the program, are they going to graduate. We have numbers. We need to know. Yes, there was lots of pressure."²⁰⁵ Witness K testified that because the 4th quarter was the last quarter of the school year, and that transcript grades were due soon thereafter, it only left at most a week for these students to complete their APEX course. Despite this, not only were these students still enrolled in APEX, Witness K testified that the majority of them did pass and did graduate. Witness K admitted, however, that some of these students would complete their APEX course in perhaps no more than an hour. Witness K testified that the thought process was that APEX was "something to raise that grade, to get them to that field, but the education wasn't supposed to come from this program per se."²⁰⁶ Witness K stated further: "[T]he numbers come from this program. The education comes from the

²⁰⁵ Grand Jury Testimony of Witness K, p. 65-66.

²⁰⁶ *Id.* at 66.

classroom.”²⁰⁷ Due to all of the failures of oversight, protocol, procedures and Best Practices, coupled with the issues outlined that call into question the academic integrity of many of Newburgh Free Academy APEX grading practices, Witness K conceded that the Newburgh Free Academy graduation rate over the last several years appears to have been artificially increased.

H. Current Status of APEX

Witness K testified that as of March 1, 2019, Newburgh Free Academy is no longer operating the APEX Online Learning program. Witness K stated that the teachers’ union has advised that during the uncertainty surrounding the investigation of the APEX program, and until more clarity is given with regard to how to properly run the program, the teachers will not be teaching the program. Witness K stated that on February 11, 2019, an email was sent to Newburgh Enlarged City School District officials requesting answers to several questions, including: what circumstances can a quiz be reset, the number of times a quiz can be reset, when to move a student forward if the student has not successfully completed an assignment, how long students have to complete the assignments, which assignments are excluded and who is responsible for making that decision, and which, if any, assignments a student can take at home.²⁰⁸ According to Witness K, as of March 1, 2019, there has been no response from the Newburgh Enlarged City School District.

PART 4: FINDINGS & RECOMMENDATIONS

A REVIEW OF THE GRAND JURY FINDINGS ON VARIOUS ISSUES AND THE GRAND JURY’S RECOMMENDATIONS TO REMEDY THE IDENTIFIED ISSUES

The following findings summarize the evidence and testimony presented in the Grand Jury and the following recommendations are made by the Grand Jury in order to address, remedy, and prevent the identified issues from reoccurring in the future. This list is not meant to be exhaustive, and any suggestions by the Newburgh Enlarged City School District are welcomed and should be discussed in an open forum.

²⁰⁷ *Id.* at 67.

²⁰⁸ Grand Jury Ex. #28.

INDEPENDENT ATTENDANCE MONITOR

- FINDINGS: The entirety of the testimony before the Grand Jury demonstrated one uniform revealing fact: Student-athlete attendance monitoring and enforcement should not be jointly left to the coaches, the Athletic Director, or any other Building Administrators, because each appears to be relying on others to handle the responsibility. The resulting effect is a systemic failure to identify chronic absenteeism, ineligible athletic participation, and suspicious patterns of absence-clearing for the student-athletes.
- RECOMMENDATIONS: Since it appears that coaches, the Athletic Director and other Building Administrators either do not want the responsibility of ensuring student-athlete attendance compliance, or that a culture of circumvention has simply taken hold, an outside monitor is highly recommended to review attendance daily with all coaches and Building Administrators. This independent monitor would be hired at the School District's expense, but would not be an employee of the School District, in order to avoid the appearance of impropriety or bias. In the event an issue is identified, e.g., a student-athlete has chronic absences (excused or unexcused); a student-athlete is participating while ineligible; or a student-athlete appears to have an inordinately large number of absences cleared well after the fact, this independent monitor could thereafter conduct its own investigation which may include interviews with the subject student-athletes, her/his teachers who are signing off on the absences, or the coaches allowing the student-athlete to participate. It is only in this way that the intent of Both Attendance Policies and the New Attendance Policy can be preserved without undue influence or manipulation.

CONSOLIDATION OF ATTENDANCE POLICIES

- FINDINGS: Several witnesses who were in a position to reasonably be aware of and familiar with the attendance policies in the Newburgh Enlarged City School District were only generally aware of the existence of such policies and could only state with certainty the "93%" attendance standard. Many did not know the policy numbers, or where they could be publicly accessed, or the multitude of other provisions that Both Attendance Policies covered. Witness B testified that some school personnel were not even given a copy of the policy and that they had to chase down the policies from Building Administrators. The problem, to some degree, was that the Newburgh Enlarged City School District had two distinct attendance policies that sometimes, but not always, were duplicative. Policy #5100 (formerly, and confusingly, #5200) was known as the Comprehensive Student Attendance Policy. Relatedly, Policy #5441 (also confusingly and erroneously numbered #5411) was known as the Participation in Athletics and Extracurricular Activity Policy (collectively in the report known as "Both Attendance Policies"). Both Attendance Policies have gone through numerous revisions throughout the years as is indicated on the bottom of several versions. However, the revisions for Both Attendance Policies do not happen at the same time, making uniformity almost impossible. Furthermore, the main crux of Both Attendance Policies, i.e., a 93% attendance requirement (exclusive of excused absences) defined as no more than three (3) unexcused absences in a given class in a given marking period for athletic and extracurricular participation, are provided for in Both Attendance Policies. Then complicating things further, a new version of the Participation in Athletics and Extracurricular Activity Policy was drafted in May 2018 which changed the 93% attendance requirement to 91% attendance *inclusive of both* excused and unexcused absences (in the report known as the "New Attendance Policy"). Since, as of the date of this report, the Comprehensive Student Attendance Policy (#5100) is no longer available on the Newburgh Enlarged City School District's website, it is unclear whether the current

Participation in Athletics and Extracurricular Activity Policy (91%) is in conflict with the Comprehensive Student Attendance Policy (93%).

- **RECOMMENDATIONS:** All of the above problems can simply be avoided by consolidating attendance policies and adopting one uniform policy that gets submitted to the Newburgh Enlarged City School District School Board for vote and approval on a yearly (or more frequent) basis. This uniform attendance policy would cover all issues related to attendance – general school attendance/chronic absenteeism, participation in athletic and extracurricular activities, and eligibility for APEX or other credit recovery programs. Furthermore, that uniform policy would have to be disseminated not only to parents/students, but to all school personnel, coaches, teachers and Building Administrators and additionally, the uniform policy should be made publicly accessible on the Newburgh Enlarged City School District’s website in one easily identifiable location.

REVISE THE ATTENDANCE POLICY FURTHER

- **FINDINGS:** As noted, there is, as of May 2018, a New Attendance Policy – Participation in Athletics and Extracurricular Activity Policy – requiring 91% attendance regardless of excused or unexcused absences. The New Attendance Policy additionally requires that for any participation in athletic or extracurricular activities, any unexcused/illegal absence must be cleared within 5 days or that student is ineligible to participate in the next game/contest/activity. While certainly a step in the right direction, the New Attendance Policy fails to address two key problems noted throughout the report: (1) tardies – the New Attendance Policy says nothing regarding tardies and their *mandatory* effect on a student’s participation in athletic or extracurricular activities; and (2) proof – the New Attendance Policy says nothing regarding any proof necessary to clear an unexcused/illegal absence. The testimony and evidence adduced in the Grand Jury demonstrated how both of these issues were not only ripe for abuse, but were in fact abused. There was evidence regarding unexcused absences being changed to tardies some 210 days after the fact. There was evidence of the number of tardies rising curiously during a given sports season and then falling off in place of unexcused absences after the sports season. There was testimony regarding how easily a student could have her/his absences cleared – sometimes it was simply an email and other times it was simply a teacher’s initials with no parent or doctor note, or any other type of proof necessary or required. If proof was provided, it was only kept on record for one (1) year, and then shredded.
- **RECOMMENDATIONS:** For an attendance policy to be effective, there must be accountability, and there must be every effort to tighten the areas that create uncertainty and lead to lax or non-enforcement. A consolidated and uniform attendance policy should (1) set a maximum number of tardies (excused or unexcused) allowed in a given marking period, generally for all students; (2) set a maximum number of tardies (excused or unexcused) allowed in a given marking period for participation in athletic and extracurricular activities as well as enrollment in APEX or other credit recovery programs; and (3) require written proof kept on record for a minimum of a four (4) year period in the student’s file in the form of a verified parent or doctor note, or some other type of verifiable documentation excusing/clearing the absence or tardy.

LIMIT THE USE OF EXEMPT ABSENCES

- **FINDINGS:** The evidence adduced in the Grand Jury demonstrated a serious abuse of the Exempt Absence – Administrator Approved Circumstances designation for certain students. One student in

particular had several unexcused absences changed to Exempt Absences under the guise of Administrator Approved Circumstances weeks after the absences but only several days after the student's ineligibility for participation in an athletic championship was brought to the attention of the building Principal. The impropriety of such a change is readily apparent. Unfortunately, Building Administrator discretion at Newburgh Free Academy is seemingly unchecked.

- **RECOMMENDATIONS:** "Exempt" Absences have been and should continue to be used for instances such as half days, early departures, sports/games, or other school related departures that are applicable to a larger group of students, and not just a select few. Otherwise, absences for illness, college visits, guidance counselor office visits, and the like, should require, as all other absences should, verifiable documentation noting where the student was on a given day/time. If proof is provided and is deemed legitimate, the absence should be marked "Excused." If not, the absence should be marked "Unexcused." "Exempt" Absences should not be left to the discretion of Building Administrators.

BETTER ADMINISTRATION AND GUIDANCE EFFORTS FOR CHRONIC ABSENTEEISM AND LATENESS

- **FINDINGS:** Both Attendance Policies address remedial measures to be taken when a student is found to be chronically absent. However, the testimony of Witness B calls into question just how far those remedial efforts go. Based on the attendance record patterns of many of the student-athletes, their chronic absenteeism appears to go unaddressed, since many continue to exhibit the same patterns year after year, e.g., high numbers of unexcused absences before and after a sports season. The fact that these students are still participating as was evidenced by the Data Analyst, shows that the Building Administrators and guidance counselors are turning a blind eye to what is very clearly chronic absenteeism. Additionally, the Data Analyst testified that absent any patterns, the overall total of absences (excused and unexcused) from some of these student-athletes are staggeringly high. This is indicative of either a snapshot of a larger systemic attendance issue at Newburgh Free Academy, or an identification of a subset of the student body who seemingly get special treatment to come and go as they please. It is fair to say that more often than not, these students are simply not in school. Even when they do go to school, their tardy numbers are extraordinarily high, as was also evidenced by the Data Analyst.
- **RECOMMENDATIONS:** Building Administrators and guidance counselors need to take a more proactive approach in identifying and addressing chronic absenteeism at Newburgh Free Academy. These students cannot possibly be receiving the education they need and deserve with absences in the triple digits. There cannot be learning if there is nobody there to learn, and it is incumbent upon Building Administrators and guidance counselors in the first instance to address the root cause of this absenteeism. If it is an economic issue, a familial issue, or simply a lack of motivation or interest, there are programs and agencies available as resources for the school and for these students. Currently, it appears that the primary focus for District Administrators, Building Administrators, and guidance counselors is that these students compete and excel solely in athletics, to the detriment of their education. Additionally, given the number of tardies many of these students exhibit, there should be increased truancy enforcement throughout the hallways and parking lots of the Newburgh Free Academy campuses to ensure that students are not simply roaming the halls or surrounding areas of the school when they should be in class.

STRICTER MANAGEMENT OF THE INFINITE CAMPUS SOFTWARE

- **FINDINGS:** The testimony in the Grand Jury demonstrated that after an initial 24-hour window where the teachers have the ability to mark a student from present to absent or present to tardy (but cannot change from unexcused to excused/exempt), the window to make these adjustments closes, leaving the Newburgh Free Academy Attendance Office solely with the capability to make further adjustments, including modifications from unexcused to excused or exempt. This reconciliation period by the Attendance Office was seemingly open indefinitely, as the testimony revealed that some unexcused absences were modified to excused tardies several *months* after the fact. Testimony further revealed that during certain parts of the year – prom for example – there would be a rush to clear absences from months prior. Additionally, the testimony revealed that all tardies that do not come in through the Attendance Office in the first instance are batch marked as excused, without any real explanation as to why that is the case. There was testimony that confirmed that a student was better off bypassing the Attendance Office since in that instance, the student's tardy would be marked excused, rather than unexcused. Lastly, there was testimony and data demonstrating the uneven application of the "5-day rule" in that in some instances, a full day absence was cleared (marked excused) well after 5 days from the student's return to school, and other instances where an individual class absence was not cleared (remained unexcused) after 5 days, despite testimony that the rule generally did not apply to individual class absences.
- **RECOMMENDATIONS:** The reconciliation period for adjustments and modification to Infinite Campus attendance records should be limited to a finite period after a given attendance incident. For instance, if a student is marked unexcused absent on January 1, the Attendance Office should not have the capability to make a change to that entry 3, 4, or 5 months after that absence. The window to modify every attendance incident should be limited (perhaps 30 days) and only modifiable in the extreme circumstance of a student being absent for a lengthy period of time, and after providing documentation upon the student's return. As such, there should only be one Building Administrator tasked with access to that student's Infinite Campus attendance record in such a situation, with the modification being traceable to one person only. While not perfect, this will at least eliminate the modifications that are currently allowable months after an absence or tardy and thereby to some degree eliminate the rush to clear absences that was demonstrated by the testimony. Additionally, there is no logical explanation for a policy of batch marking tardies as excused for students who bypass the Attendance Office. If anything, those are the tardies that should be batch marked unexcused. If a student does check in first in the Attendance Office, better vetting should be done to investigate whether the student's lateness is justifiable, and her/his Infinite Campus designation could then be marked accordingly. Lastly, there needs to be strict and uniform adherence to the 5-day rule. Any attempts by a student, teacher, or coach to have a student's absence cleared in Infinite Campus beyond the 5 days upon that student's return to school should have to go through the building Principal and if a modification is subsequently authorized, there needs to be sufficient documentation to support that change.

INDEPENDENT APEX MONITOR

- **FINDINGS:** The testimony in the Grand Jury revealed blind administration of a program of learning that ultimately served as a disservice to the students most in need of it. Some APEX teachers failed to educate themselves on proper Best Practices, and instead, administered the program in a way that violated virtually every Best Practices guideline, but which nonetheless served the Newburgh Free

Academy's interests in increased graduation rates. The motivation to continue to operate the program in such a way is therefore clear.

- **RECOMMENDATIONS:** It is strongly recommended that if Newburgh Free Academy is going to continue to run the APEX Online Learning program at its campuses, that an independent monitor be hired at the District's expense in order to not only oversee the administration of the program, but to effectively run it according to APEX's Best Practices. The motivation to raise grades in order to artificially increase the graduation rate would thereby be eliminated entirely since those tasked with the program's administration would not be employees of the District. Furthermore, those hired to teach APEX by this independent monitor should be APEX certified. This would ensure that the newly designated APEX teachers were fully familiar with not only the Best Practices and its strict application, but the functions of the software itself and how best to utilize them for effective education purposes. This monitorship should be coordinated and administered in conjunction with the New York State Education Department.

RECOMMENDED APEX TRAINING AND BEST PRACTICES

- **FINDINGS:** As noted in the recommendation above, one of the many universal themes throughout the Grand Jury testimony was the lack of training many of the APEX teachers received on the proper and effective operation of the APEX Online Learning software, including fundamentally critical Best Practices in order to preserve academic integrity. There was testimony that some of the APEX teachers were unaware of resources that were available at their fingertips through their respective APEX dashboards. The testimony revealed that not only were some of the APEX teachers unaware of APEX Best Practices, but they were operating in direct contravention of those Best Practices, seriously jeopardizing the academic integrity of the APEX Online Learning program.
- **RECOMMENDATIONS:** If an independent monitor is not retained by the District, it is highly recommended that the Newburgh Enlarged City School District arrange for annual, if not bi-annual training through APEX on the Best Practices uses of the APEX software. These trainings should be made available immediately upon the hire of any new APEX designated teachers or coordinators. The Newburgh Enlarged City School District should make available in hard copy form the APEX Best Practices policies and adopt those Best Practices as mandatory Newburgh Enlarged City School District APEX policy, disseminated to all District faculty, District Administrators, and Building Administrators.

PROPER USAGE OF APEX FUNCTIONS

- **FINDINGS:** The testimony in the Grand Jury revealed several settings built into the APEX Online Learning software that, while recommended not be used according to APEX Best Practices, was still available for use by APEX teachers. Specifically, two settings available as on/off settings related to Question Randomization and Question Feedback. The Question Randomization setting, according to testimony, randomized the questions and answers on scored assessments. The Question Feedback setting, according to testimony, revealed the correct answer to incorrect selections on scored assessments, as opposed to simply noting that an answer was incorrect. These settings, when used properly, would help ensure academic integrity. When used improperly, it had the potential for abuse and dishonesty. The evidence also revealed that during the course of approximately two (2) years, over 1,000 grade overrides were made to scored assessments by 33 different APEX teachers. The main reason

given for these overrides was that APEX teachers were working through answers with students. The testimony further revealed that quizzes were reset an unlimited number of times because APEX teachers did not know it was discouraged and that it was done in attempts to help raise the students' scores. Lastly, the APEX software requires a manual input from an APEX teacher of a student's APEX Final Score, but according to testimony, that grade need not be based on any scoring the student achieved on her/his respective APEX subject. The testimony demonstrated that different APEX teachers were utilizing different APEX measures of a student's progress throughout a course subject and depending on the software settings, one measure was significantly more misleading than the other.

- RECOMMENDATIONS: Even with a Newburgh Enlarged City School District APEX-specific Best Practices policy put in place, policies are only as effective as their adherence. While the many functions and settings in the APEX software serve a legitimate purpose, it is nonetheless suggested that APEX consider implementing any number of the following changes to its software to ensure that its Best Practices are adhered to:
 - Disable the ability to turn off the Question Randomization setting – it does not serve any honest or beneficial purpose to turn off the Question Randomization setting but instead, it serves primarily as a tool for cheating
 - Disable the ability to turn on the Question Feedback setting – it does not serve any honest or beneficial purpose to turn on the Question Feedback setting but instead, it serves primarily as a tool for cheating
 - Cap the number of grade overrides for a given student/license – with seemingly endless teacher grade overrides permissible, it defeats the ultimate purpose of a student earning a grade on her/his own
 - Cap the number of quiz resets – as it stands, APEX allows for an endless number of teacher-initiated quiz resets which defeats the ultimate purpose of a student earning a grade legitimately
 - Disable manual input of a Final Score – the APEX Final Score should be an APEX generated score based on every possible grading option contained within the software, and not subject to manual override or input

CONCLUSION

The significant financial investment in attendance administration through Infinite Campus and the APEX Online Learning program is commendable, but its improper application allows for manipulation with a resulting failure of its educational objectives of encouraging class attendance and providing credit recovery. Independent administration as suggested above is highly advisable in order to ensure that every student in the Newburgh Enlarged City School District gets an unconflicted opportunity to earn a proper education.