The University of the State of New York

**The State Education Department**
**State Review Officer**
www.sro.nysed.gov

**No. 12-207**

**Application of the BOARD OF EDUCATION OF THE CAIRO-DURHAM CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability**

**Appearances:**
Girvin & Ferlazzo, P.C., attorneys for petitioner, Tara L. Moffett, Esq., of counsel

Family Advocates, Inc., attorneys for respondent, RosaLee Charpentier, Esq., of counsel

**DECISION**

## I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to reimburse the parent for the cost of the student's unilateral placement for the March through June portion of the 2010-11 school year and for the 2011-12 school year. The parent cross-appeals from the portion of the IHO's decision denying reimbursement for the costs of an independent educational evaluation (IEE) and transportation to and from the unilateral placement. The appeal must be sustained. The cross-appeal must be dismissed.

## II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law. § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C.

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings conclusions and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

**III. Facts and Procedural History**

The student was initially referred for special education services in the sixth grade due to an increasing number of behavioral issues at school (Joint Ex. 30 at p. 1). While the student showed potential to succeed academically, he had difficulty staying on task and experienced poor peer relationships that included instances of verbal and physical aggression (Tr. p. 383-4; Joint Ex. 30 at p. 1, 2).

The CSE met on March 25, 2010 to develop an IEP for the 2010-11 school year (Joint Ex. 23). The CSE found the student eligible to receive special education services and related services as a student with an emotional disturbance (Tr. p. 28; Joint Ex. 23 at p. 1).[1] While the precise description of the student's emotional disturbance varied across reports, anxiety, depression, and emotional fragility were recurrent themes throughout (Tr. 31-32, 74-75, 197-198; Parent Ex. E; Dist. Ex. 1; Joint Ex. 30 at pp. 1-3, 6-8). In addition, school staff reported that the student expressed suicide ideation and made suicidal gestures (Tr. pp. 32, 41, 42). Pursuant to the March 2010 IEP, the CSE recommended placement in a general education classroom with related services including a resource room for three periods per week and individual counseling once a week for 30 minutes (Joint Ex. 23 at p. 2). The March 2010 IEP also included a number of program and testing accommodations (id. at pp. 2-3). The student attended the district's recommended program during the 2010-11 school year until in or about October, 2010 (Tr. pp. 590-91).

In or about October 2010, an incident involving the student was brought to the attention of the school psychologist and ultimately resulted in a two day suspension (Tr. pp. 55-58; 63-68; Dist. Ex. 1 at p. 1). After the incident, the district met with the student's parent, and although the parent's and district's accounts of the incident and the meeting differ, the end result was that the student did not return to public school (Tr. pp. 244-45, 248, 402, 591-93). The CSE reconvened in November 2010 and January 2011 in order to recommend a program for the student; however, neither meeting resulted in a finalized IEP and the March 2010 IEP continued as the last IEP in effect for the student (Tr. p. 239; Joint Exs. 21-23).[2] The district provided at-home tutoring services for the student from November 2010 through January 2011; however, the at-home tutoring services ended and the student remained at home without receiving services in January and February 2011 (Tr. pp. 83; 594-96).

The parent sent an e-mail to the district dated February 19, 2011, advising the district that she decided to place the student at the Hudson Valley Sudbury School ("HVSS") and requesting that the district forward the student's records to HVSS and provide the student with transportation to and from HVSS (Joint Ex. 25). [3]The parent enrolled the student at HVSS for a one week trial period on February 28, 2011 (Tr. pp. 417, 444-45; Joint Ex. 3). The student's grandmother sent another e-mail to the district in April 2011, informing the district that the student was enrolled at HVSS on a temporary basis and advising the district of the parent's intention to seek reimbursement for the cost of the student's education at HVSS if a FAPE [wa]s not offered within ten days (Parent Ex. I). Beginning in or around February 2012, after not receiving counseling for an extended

[1] The student's eligibility for special education and related services as a student with an emotional disturbance is not in dispute in this appeal (see 34 CFR 300.8[c][4]; 8 NYCRR 200.1[zz][4]).

[2] The hearing record is not clear as to whether or not the June 2011 IEP for the student's 2011-12 school year was finalized as the district conceded that it did not offer the student a FAPE for either of the 2010-11 and 2011-12 school years (Joint Ex. 24; Tr. p. 495).

[3] While HVSS has been granted a charter to serve as a non-public school by the NYS Board of Regents, the Commissioner of Education has not approved HVSS as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

period of time, the student started individual counseling through a county mental health clinic on a bi-weekly basis (Tr. pp. 599, 602, 624, 677; Parent Ex. E).

### A. Due Process Complaint Notice

The parent requested a due process hearing by a due process complaint notice dated March 30, 2012 (Joint Ex. 1). The parent sought reimbursement for tuition and transportation for part of the 2010-11 school year and the entire 2011-12 school year, as well as the cost of an independent educational evaluation (IEE) (id. at pp. 4-6).

In the due process complaint notice, the parent detailed the student's history—alleging that the student had been misdiagnosed as having attention deficit hyperactivity disorder (ADHD), that the student suffered significant bullying while attending district schools in the seventh and ninth grades, that the district unfairly dismissed the student from school after an incident in October, 2010, and that the student's diagnosis was depression (Joint Ex. 1 at pp. 4-6). The parent objected to the CSE's failure to implement recommendations made by the parent's private evaluator (Joint Ex. 1 at pp. 4, 6). The parent also objected to the goals and objectives contained in the IEP's for the 2010-11 and 2011-12 school years, claiming that they were inappropriate, were not implemented and were ignored (id.).

The parent acknowledged that the district recommended two nonpublic schools as potential placements for the student; however, she asserts that the student was not accepted into one of the schools based on an incorrect belief that the student refused counseling and that the other school would not have been appropriate for the student (Joint Ex. 1 at p. 5). The parent also objected to the only services the student received, which were home based and without counseling (id.). The parent alleged that the counseling offered by the district was inappropriate because it paired the student with another student who was inappropriate (id.).

The parent asserts that her placement of the student at HVSS was appropriate for the student because it offered the student a safe environment, where he would not be bullied (Joint Ex. 1 at p. 5). The parent further asserts that HVSS meets New York State guidelines for a high school and that the student could "graduate" with a “certificate diploma” rather than an IEP diploma (id. at p. 6).

### B. Impartial Hearing Officer Decision

An impartial hearing convened on June 28, 2012 and was concluded on August 7, 2012 after four days of non-consecutive hearing dates (Tr. pp. 1- 724). In a decision dated October 1, 2012, the IHO determined that that the district conceded that it failed to offer the student a FAPE for the 2010-11 and 2011-12 school years (IHO Decision at p. 14). The IHO then went on to find that the parent's placement of the student at HVSS was appropriate for both the 2010-11 and 2011-12 school years (id. at pp. 14-19). The IHO also found that equitable considerations did not weigh against awarding relief to the parent and awarded the parent reimbursement for the cost of the student's tuition at HVSS for the March through June portion of the 2010-11 school year and for the entire 2011-12 school year in an amount not to exceed $5,000.00 per year upon presentation of proof of payment (id. at pp. 19-21, 22-23).

In reaching the conclusion that HVSS was an appropriate placement for the student, the IHO determined that HVSS addressed the student's social/emotional and behavior issues, noting that the placement decision was directed at addressing the student's social/emotional issues rather than academics (IHO Decision at p. 14, 16). The IHO also found that HVSS addressed a number of the student's issues that were described in the district's neuropsychological evaluation, including depression, attention problems, atypicality, withdrawal, adaptability, study skills, social skills, and anxiety (id. at p. 15).[4] The IHO explained that the school provided the student with opportunities for social development, thus reducing his withdrawal, depression, and anxiety (id.). The IHO acknowledged that HVSS did not offer formal counseling for the student, but determined that the student's needs for counseling were reduced by his improved social skills, noting progress in that the student was less isolated and spent time with others (id. at pp. 15-16). The IHO also found that the student progressed in other respects, engaging other students, developing interests in computers, playing the piano, and participating in group activities, as well as exhibiting reduced isolation and a reduction in hostility towards his family (id. at p. 16-17).

The IHO described the school's application process as the most significant factor establishing the appropriateness of HVSS (IHO Decision at p. 16). The IHO found that the because the student attended the school for a one week trial period, the school and parents had an opportunity to observe the student in the placement and felt that it was appropriate for him, which then rendered the parent's decision appropriate (id.). The IHO also found that although the student was suspended from HVSS, the suspension further shows the appropriateness of the school as the student had to convince the school's staff and other students that he was remorseful (id.). The IHO went on to find that the student did not engage in similar behaviors at HVSS as he did while attending public school (id. at pp. 17-18). Specifically, the IHO described the HVSS program as a democratic process with elaborately detailed rules in place pointing out that a majority of the offenses at HVSS would not be part of the disciplinary process in public school (id.).

Acknowledging the district's argument that HVSS offered no academic curriculum, the IHO decided to overlook academic issues as the student did not exhibit significant academic delays (IHO Decision at p. 17). The IHO also noted that at the time the student was placed at HVSS, the student was excluded from the public school and was receiving minimal home instruction and further noted that the parent's main concern was the student's emotional issues, rather than academics (id.).

The IHO also determined two issues in favor of the district, finding (1) that the parent did not meet the burden of proving entitlement to the cost of transporting the student to and from HVSS, and (2) that the parent was not entitled to reimbursement for the cost of the portion of the IEE paid for by the student's family because the district's policy of limiting payment to $1,800.00 was reasonable (IHO Decision at pp. 21-22).

Prior to awarding the parent reimbursement for the cost of the student's tuition at HVSS, the IHO found that equitable considerations did not weigh against the parent's requested relief (IHO Decision at p. 19-20). The IHO determined that the parent cooperated with the district in

[4] The IHO found that placement at HVSS was also consistent with the recommendations contained in the IEE (IHO Decision at pp. 18-19).

viewing suggested placements, consented to the district's evaluation and obtained an IEE, and notified the district with sufficient notice by e-mail of their intention to enroll the student at HVSS (id.). Although the IHO noted that the parent may have refused a subsequent request by the district to evaluate the student, the IHO found that the parent's refusal was insufficient to warrant a reduction in an award of tuition reimbursement (id. at p. 20).

The IHO also addressed the parent's standing, finding that although the student's tuition at HVSS was paid for by the student's grandmother, the student's parent had standing to seek tuition reimbursement (IHO Decision at p. 22). The IHO reasoned that the student's grandmother was an integral part of the student's education and was not an outside source to whom the parent incurred no debt (id.).

**IV. Appeal for State-Level Review**

The district appeals, seeking reversal of the IHO's October 1, 2012 decision and asserting that the IHO erred (1) in finding the parent had standing to seek tuition reimbursement, (2) in finding HVSS to be an appropriate placement for the student, (3) in applying an incorrect legal standard regarding a unilateral placement, and (4) in finding that equitable considerations supported the parent.

Regarding standing, the district asserts that the parent should be barred from seeking tuition reimbursement because she has not proven the cost of the student's tuition at HVSS and she has not provided any evidence that either she made payments to HVSS or incurred a legal obligation to repay the student's grandmother for payments the grandmother made to HVSS. The district objects to the IHO's conclusion that the parent has standing because of the student's grandmother's involvement in the student's education.

The district asserts that the IHO applied an incorrect standard in finding that HVSS was an appropriate placement for the student. The district points to Frank G. v. Bd. of Educ., 459 F.3d 356 (2d Cir. 2006) and Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105 (2d Cir. 2007), highlighting the use of the phrases "educational benefits" and "education instruction" in those decisions. In support of its argument that HVSS was inappropriate, the district focuses on the lack of formal classes and academic curriculum at HVSS. The district emphasizes that HVSS does not offer instruction other than what the student initiates and that most instruction is performed by the students. The district further points out that HVSS does not assign grades, has no grade levels, and—in agreement with the IHO finding—that HVSS offers no promise of an appropriate academic placement.

The district asserts that the IHO's reliance on the student's attendance at HVSS for a one week trial period as evidence of the school's appropriateness is misplaced, as the only testimony regarding the trial period were conclusory statements made by the school staff and student's family.

In addition, the district disagrees with the IHO's finding that the student made social/emotional progress at HVSS. The district argues that the student has not progressed because he continued to exhibit behavioral issues while attending HVSS, including comments that resulted

in a suspension at the end of the 2011-12 school year.[5] The district further asserts that although the student may have shown interest in computer programming and playing the piano, those are isolating activities and are not a sign of socialization. As additional support for its position, the district references the testimony of the student's counselor, which the district argues supports a finding that the student required professional counseling even after attending HVSS for over a year. The district objects to the IHO's conclusion that the student's ability to relate socially reduced his need for formal counseling services, which had been recommended in the district's evaluation and the IEE. As a further objection to placement at HVSS, the district argues that HVSS could not address the student's social/emotional needs because it offered no special education services to address social and emotional problems. As evidence of the student's need for counseling, the district observes that the parent obtained counseling for the student a year after he began attending HVSS and the student's therapist testified that he continued to require counseling services.

Regarding equitable considerations, the district asserts that the parent did not timely notify the district that the parent was removing the student from the public school and placing the student at HVSS. The district acknowledges a February 2011 e-mail from the parent requesting that the student's records be forwarded to HVSS, but alleges that in April 2011, the district was notified that the student was in a trial placement at HVSS. The district also alleges that the parent did not cooperate with the district in placing the student. Specifically, the district alleges that because the parent failed to cooperate with the intake process at the nonpublic schools recommended by the district, one of the programs was no longer available at the time of the January 2011 CSE meeting. The district further alleges that, in the 2011-12 school year, the parent obstructed the district's ability to conduct an annual review and refused any placement other than HVSS. The district requests that these factors, weighed together, preclude an award of tuition reimbursement.

The parent answers the district's petition, opposing the district's positions and reiterating the IHO's findings that HVSS was an appropriate placement for the student considering the student's social/emotional needs and that equitable considerations weighed in favor of awarding the parent tuition reimbursement. The parent also cross-appeals from the IHO's decision, seeking reimbursement for the cost of transportation to and from HVSS and for the portion of the IEE not already covered by the district. In support of her claim for transportation costs, the parent breaks down the miles she drove in dropping off and picking up the student from HVSS and requests that an SRO award her an unspecified reasonable reimbursement rate per mile. Regarding the IEE, the parent argues that the district is obligated to pay the full amount of the IEE because it was close to the same rate that was charged by two evaluators recommended by the district. In an answer, the district denies the arguments contained in the parent's cross-appeal and asserts that the parent's answer and cross-appeal is untimely.

## V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and

[5] The district further objects to the IHO's conclusion that the student's participation in the judicial committee while at HVSS reduced the student's withdrawal, depression, and anxiety as being against the weight of the evidence.

independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). '"[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP"' (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998] [quoting Rowley, 458 U.S. at 206]; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]).

Because the district conceded that it did not offer the student a FAPE for the March through June portion of the 2010-11 school year and for the 2011-12 school year, I need not address this issue and I will move on to the issue of whether the parent's unilateral placement of the student at HVSS was appropriate.

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd.

of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement…'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Bd. of Educ. v. Rowley, 458 U.S. 176, 207 [1982]) and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

## VI. Discussion

### A. Timeliness of Cross-Appeal

The district asserts that the parent's cross-appeal is untimely. State regulations provide that respondent shall, within 10 days after the date of service of a copy of the petition, answer the same, either by concurring in a statement of facts with petitioner or by service of an answer, with any written argument, memorandum of law, and additional documentary evidence (8 NYCRR 279.5). A cross-appeal shall be deemed timely if it is included in an answer that is served within the time permitted by section 279.5 of the state regulations (8 NYCRR 279.4[b]).

The affidavit of service accompanied with the petition indicates that the petition was served on the parent's attorney via facsimile, electronic mail, and federal express on November 2, 2012 (Petition at p. 18). The petition also includes a letter, counter-signed by the parent's attorney, indicating that the parent's attorney agreed to accept service on behalf of the parent; however, it does not indicate an agreement to waive the requirement of personal service or to accept service via federal express, facsimile, or electronic means (id. at p. 19). It should be noted that personal service of a petition for review on a respondent is required and may only be waived under certain circumstances (8 NYCRR 275.8, 279.1[a]; see Application of the New York City Dep't of Educ., Appeal No. 12-120; Application of the Bd. of Educ., Appeal No. 12-100).[6] According to the affidavit of service contained in the parent's answer and cross-appeal, the parent's attorney served the district by mailing a copy of the answer and cross-appeal to the district's attorneys on November 13, 2012 (Answer at p. 20). In this instance, although the letter signed by the parent's attorneys did not specifically waive personal service of the petition, service of the petition is deemed waived because the parent has appeared by serving an answer and cross-appeal without raising service as an objection (Application of the Dep't of Educ. Appeal No. 07-037). However, considering the circumstances, I decline to find that the parent's cross-appeal was late, as the parent was not personally served with the petition in the first instance. It should also be noted that if service via overnight delivery were available as a method of service of the petition—which it is not— it is customary under New York laws to often allow an additional day to respond to service

[6] An appeal from an IHO's decision to an SRO is initiated by timely personal service of a verified petition and other supporting documents upon a respondent (8 NYCRR 279.2[b], [c]). Exceptions to the general rule requiring personal service include the following: (1) if a respondent cannot be found upon diligent search, a petitioner may effectuate service by delivering and leaving the petition, affidavits, exhibits, and other supporting papers at respondent's residence with some person of suitable age and discretion between six o'clock in the morning and nine o'clock in the evening, or as otherwise directed by the Commissioner (8 NYCRR 275.8[a]; Application of the Bd. of Educ., Appeal No. 12-059; Application of a Student with a Disability, Appeal No. 12-042; Application of the Dep't of Educ., Appeal No. 08-056; Application of the Dep't of Educ., Appeal No. 08-006); (2) the parties may agree to waive personal service (Application of the Dep't of Educ., Appeal No. 08-056; Application of the Dep't of Educ., Appeal No. 07-037; Application of the Dep't of Educ., Appeal No. 05-082; Application of the Bd. of Educ., Appeal No. 05-067; Application of the Bd. of Educ., Appeal No. 04-058); or (3) permission is obtained from an SRO for an alternate method of service (8 NYCRR 275.8[a]; Application of the Dep't of Educ., Appeal No. 08-056; Application of a Student with a Disability, Appeal No. 08-022; Application of the Dep't of Educ., Appeal No. 08-006; Application of the Dep't of Educ., Appeal No. 05-082; Application of a Child with a Disability, Appeal No. 05-045; Application of the Bd. of Educ., Appeal No. 01-048).

via overnight delivery (NY CPLR Rule 2103[b][6]; see 8 NYCRR 279.5, 279.4[b]).[7] Including such an additional day to the parent's time to file a cross-appeal would have made the cross-appeal timely. In view of the forgoing considerations, I decline to reject the parent's cross-appeal as untimely and I will address the cross-appeal herein.

**B. Appropriateness of Hudson Valley Sudbury School**

Regarding the parent's placement of the student at HVSS for the 2010-11 and 2011-12 school years, I address the district's arguments that HVSS is inappropriate because it does not offer an academic program and does not offer special education services to address the student's special education needs.

Some review of the background information relating to the student's academics and functioning in the public school setting is in order. Pursuant to the information available at the time the parent placed the student at HVSS, while the student showed potential to succeed academically, he had difficulty staying on task and experienced poor peer relationships that included instances of verbal and physical aggression (Tr. p. 383-4; Joint Ex. 30 at p. 1, 2).[8] Specifically, the district completed a psychoeducational evaluation in January 2008, which included behavioral observations in multiple settings, teacher and parent behavior rating surveys, and standardized measures of intellectual and academic functioning (Joint Ex. 30). According to the psychoeducational evaluation report, the student exhibited varied behavioral responses to assessment activities, several of which paralleled behaviors exhibited in the general education setting (id. at p. 2). For example, when the student was actively engaged in novel problem solving and feeling successful, the student expressed delight in the activity and was able to remain attentive to task (id.). In contrast, when confronted by an assessment task that he found challenging, he became agitated and began to cry (id.). Similarly, during classroom observations conducted as part of the psychoeducational evaluation, the student exhibited an array of behaviors from being focused and engaged to lying on the classroom floor, wandering about the room, talking to himself, and posing random questions to the teacher, all of which occurred during whole group classroom instruction (id.). The student required frequent prompts to remain on task and modify inappropriate behaviors (id. at pp. 2-3). The results of behavior rating scales completed with two of the student's teachers and with the student's parent highlighted multiple concerns across both home and school settings (id. at pp. 6-8). Specifically, while both his teachers indicated clinically significant concerns regarding hyperactivity, depression and anxiety, his parent's rating of her son's behaviors was within the clinically significant range for depression only (id. at p. 6-7).

[7] There is no indication in the hearing record that parent's attorney agreed to accept service via facsimile or electronic means and barring a written agreement to accept service via facsimile or electronic means, they cannot be considered appropriate methods of service (see NY CPLR Rule 2103[b][7]).

[8] Despite the student's social/emotional and behavioral challenges, his performance on measures of cognitive functioning included in the school district's 2008 initial evaluation revealed overall functioning within the average range for a student his age, with some subtest scatter evidenced (Joint Ex. 30 at pp. 4-5). Similarly, some scatter was seen in the student's performance on measures of academic achievement, which spanned from low average (numerical operations) to superior (decoding and word recall), with the majority of subtest scores well within the average range when compared with other students his age (id. at pp. 4-5).

In an attempt to address the student's needs, the March 2010 CSE proposed a variety of supports and modifications (Joint Ex. 23 at pp. 2-4). To supplement the general education program, the CSE recommended resource room support three times per week for 42 minutes per session (id. at p. 2). The IEP also included one thirty-minute session of individual counseling per week (id. at p. 2).[9] The student's needs and subsequent program modifications included assistance with organization, check-in points for long-term projects and assignments, a structured environment with high expectations for behavior and minimal distractions, extra time to move between classes, refocusing and redirection, presets for changes in activities, clearly defined rules, and a positive behavior management plan, among others (id. at p. 2, 5). The IEP also included a recommendation for the special education teacher to consult with the general education teacher and provide recommendations for modifications and supports based on strategies designed for students with disabilities (id. 23 at p. 3). Test accommodations included extended time, administration of tests in a small group in a separate location, and breaks during testing (id.). The IEP also included the expectation that the student would take state and [general education] district assessments with grade level peers (id.). Finally, the IEP also denoted the expectation the student would graduate with a Regents high school diploma (id. at p. 7).

The student attended the district program; however, notwithstanding the provision and attempted provision of a variety of programmatic interventions, the student continued to present with significant social/emotional and behavioral concerns that prevented him from functioning effectively within the general education setting (Tr. pp. 39, 41-43, 155; Dist. Ex. 1; 2; 3; Joint Exs. 15; 16). Although accounts differ, the student was removed from public school in or about October, 2010 and the parent placed him at HVSS in February 2011 (Tr. pp. 244-45, 248, 402, 591-93; Parent Ex. A at p. 1; I).

**1. Academics at HVSS**

According to the hearing record, HVSS is chartered by the New York State Board of Regents as a non-public school (Tr. p. 333). The school accepts students from kindergarten through grade twelve and has a total student population of approximately 50 students, with seven staff members (Tr. pp. 332, 335). Students at HVSS are not grouped together by age or grade level, but students of all ages are mixed together to promote social skills and all students are free to determine how to spend their time each day (Parent Ex. B at p. 3, 4). In the nine years that HVSS has been in operation, approximately eight or nine students have "graduated" and received the school-issued credential entitled, "Certificate of Graduation" (Tr. pp. 335, 338, 517; Parent Ex. A at p. 1).[10] Additionally, HVSS describes itself as a democratic school, whereby all decisions regarding the operation of the school, including the hiring of staff members, are made by a vote of

[9] Over the course of the years during which the student received special education and related services in the school district, the individual assigned to provide counseling changed a number of times for a variety of reasons, including a change in a counselor's employment, parent distrust/disapproval of the counselor, the student's difficulty "making a connection" or establishing rapport with a specific counselor, and the parent's or student's intermittent denial of the need for counseling (Tr. pp. 39, 61, 240- 241, 244, 247, 444, 578).

[10] Although the HVSS teacher testified that the school is licensed to provide a second level New York State diploma, but is not licensed to issue a Regent's diploma, HVSS has not yet issued any diploma to any of its graduates (Tr. p. 335).

the students and staff members (Tr. pp. 341-53; Parent Exs. A at pp. 2-3; B). All students, from the youngest to the oldest, and every staff member, have a single vote and each "has the same voice and power" in the day-to-day operation of the school, which is determined through a democratic process referred to as "school meeting" (Parent Ex. B at p. 4-5).

According to the evidence, HVSS does not offer a formal academic curriculum, but adheres to a philosophy of approaching "education through life" (Tr. p. 339). Students at HVSS are responsible for their own education (Parent Ex. A at p. 2; B at p. 1). "Students have total control over what they learn, how they learn, their educational environment and how they are evaluated" (Parent Ex. B. at p. 1). As an alternative to attending regularly scheduled classes, HVSS student learning may occur at a computer or in the library, often independent of other students and/or staff, although occasionally students sharing a common interest may form a group in what might appear to be a class (Tr. pp. 334, 508-10). Students determine their own curriculum and they are free to determine how they spend their day, whether that entails working on an art project, building a fort, writing a story, playing sports, or climbing a tree, the decision rests in the hands of the child (Tr. p. 518; Parent Ex. B. at pp. 1, 10-11). Interests, needs and progress are self-determined and self-assessed by each student and as a result, staff members do not provide redirection or guidance unless the student makes an explicit request for staff input (Tr. p. 518). The school does not have grades; it does not promote or advance students from grade to grade; there are no tests or formal evaluations (Tr. pp. 354-55; Parent Ex. B at p. 3).

In finding HVSS to be appropriate, the IHO acknowledged that HVSS did not offer an appropriate academic curriculum and decided to overlook academic issues (IHO Decision at p. 17). The parent argues that the student's academics were "not a concern" to her at the time she placed the student at HVSS, essentially arguing that the student's disability was not effecting him academically (Tr. p. 604). However, in order to find a parent's unilateral placement appropriate, the placement must be reasonably calculated to enable the student to receive educational benefits (Gagliardo, 489 F.3d at 112). Accordingly, academic progress is an important factor in determining the appropriateness of a private placement (see Berger, 348 F.3d at 522). "Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit" (Gagliardo, 489 F.3d at 112). Grading and advancement is an important factor in determining educational benefit (Rowley, 458 U.S. at 203).

Due to the structure and organization of HVSS, there is no evidence in the hearing record that the student made any academic progress while attending HVSS. Specifically, HVSS does not evaluate students' progress, but relies on students to evaluate themselves (Tr. p. 350). The school's official transcript asserts that "HVSS offers no periodic evaluations of any kind—no grades, no written or oral reports, and no informal letters of recommendation (or derogation)" (Parent Ex. A at p. 3). Furthermore, the official transcript avows that HVSS does not keep a record of the student's progress, as "the only meaningful account of the student's work at Hudson Valley Sudbury School must be obtained from the student directly" (Parent Ex. A at p. 1). Students choose "if, how and when to be evaluated" (Parent Ex. B at p. 1). If a student does not explicitly share their concern with a staff member regarding their lack of progress, the student will be left alone to do whatever they wish (Tr. p. 518). This practice is inclusive of students with disabilities; as stated by school staff; "In general, the student is responsible for meeting their goals, whatever their goals may be. That may or may not include IEP goals" (Tr. pp. 506-507).

The absence of any objective evidence of academic progress in the hearing record also suggests that HVSS was not providing the student with an appropriate academic program that would allow the student to receive an educational benefit. Despite his long-term social/emotional and behavioral challenges, the student had consistently shown he was able to benefit from academic instruction; it was the social/emotional demands of the classroom that thwarted the student's ability to participate fully in the general education setting (Tr. pp. 28, 29; Dist. Ex. 4; Joint Ex. 30).[11] The purpose of specially designed instruction is to ensure students with disabilities access the general education curriculum to meet the educational standards that apply to all students (see 34 CFR 300.39[b][3][ii]; 8 NYCRR 200.1[vv]). While a unilateral placement need not observe all of the formalities of the IDEA, such as preparing an IEP with goals memorialized therein,[12] this purpose behind the specially designed instruction cannot be addressed by abandoning academics altogether.

**2. Student's Progress at HVSS**

While there are indications that the student may have made some improvement socially while at HVSS, a review of the hearing record as a whole does not support the IHO's finding that the student made significant social and emotional progress while attending HVSS.

The student's HVSS teacher testified that the student had "blossomed" socially and provided a few examples to support this statement (Tr. pp. 359, 365-68). Specifically, she noted the student had made some friends and that he spent time with other teenagers, working on group projects, cooking, and playing music (id.). The student's mother also noted that she believed a democratic education would be beneficial for her son, and noted that the student actually worked together with other students in a group project building a playground at HVSS (Tr. pp. 596, 603). In addition, the HVSS teacher opined that the school helped to raise the student's self-esteem by helping him to advocate for what he wanted through the democratic process; as an example, she pointed to the student's advocacy to be "reinstated" (i.e., allowed to return to school) after his indefinite suspension (Tr. pp. 361-63).

However, despite attending HVSS for more than year, the hearing record includes evidence of ongoing difficulties with interpersonal relationships, many of which resemble those exhibited while the student attended the public school (Tr. p. 700; Dist. Ex. 1; 8). The student continued to isolate himself, often playing the piano alone and spending a fair amount of time engaged in solitary endeavors on the computer (Tr. pp. 359-60, 519-20). Furthermore, the judicial committee

[11] According to the student's March 2010 IEP, he had been expected to graduate with a Regents diploma (Joint Ex. 23 at p. 7). However, because HVSS lacks an appropriate academic curriculum, the student will not even be able to obtain a local diploma (Tr. pp. 84, 340-41; Joint Exs. 23 at pp. 7; 31; Parent Ex. A; see 8 NYCRR 100.5[a]). Instead, the student's mother expects him to obtain a GED and an HVSS issued "Certificate of Graduation" (Tr. p. 604).

[12] For example, the statutory language regarding IEP goals alludes to this underlying purpose—to "[m]eet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum" 20 U.S.C § 1414[d][1][A][i][II] [emphasis added]. Once again, while a formal IEP or goals are not prerequisites for a unilateral placement, evidence that there is specially designed instruction and supportive services being provided to the student for the purpose of allowing the student to access the regular education curriculum is required.

cited the student for multiple rules infractions, including swearing, inappropriate comments, and failing to follow instructions, all of which are reminiscent of incidents that occurred while the student attended public school (Tr. pp. 631-34; compare Parent Ex. C, with Dist. Ex. 1).[13] HVSS did not develop a program to address these behaviors, but rather relied on either ignoring inappropriate behavior or addressing it through the school's judicial committee (Tr. pp. 344, 348). The hearing record also provides evidence suggesting the student's social interaction skills may have actually worsened while attending HVSS; when describing the precipitating event of the student's long-term suspension, the parent acknowledged that the student had not previously demonstrated that particular offending behavior (Tr. pp. 638-39; Parent Ex. C at p. 8).

In finding HVSS appropriate, the IHO also found that the school's democratic process provided the student with opportunity for social skill development reducing his withdrawal, depression, and anxiety (IHO Decision at p. 15). However, there is no evidence that the student's need for counseling services diminished while attending HVSS and there is virtually no evidence to establish that any real improvement in the student's social/emotional functioning can be properly attributed to his attendance at HVSS (Tr. pp. 359, 364-68, 601-03, 685-687, 714-15). The student's therapist testified that when the student began working with her in February 2012, approximately a year after he had been enrolled in HVSS, the student presented as "very reserved and quite depressed" and appeared to have difficulty making eye contact, poor hygiene and difficulty in asking for his needs (Tr. pp. 677, 678, 690).[14] After working with him for approximately six months, the therapist testified that she wanted to continue to work with the student and that although he was starting to make progress, he still presented as an emotionally fragile individual, engaging in self-isolation, negative self-talk and self-blame, as well as showing excessive anger and signs of depression (Tr. pp. 694, 700-702).[15] Additionally, although the student's therapist opined that HVSS was an appropriate setting for the student, she acknowledged that she was

[13] One of the few programs at HVSS that requires mandatory participation is the disciplinary system referred to as "judicial committee" (Tr. pp. 343-44). The judicial committee is run by two elected "judicial clerks," one or both of whom may be students (Tr. pp. 341-44). The judicial committee enforces the school's rule book, which is formulated by vote at the school meeting (Tr. pp. 342-43). Sentences can be in the form of a monetary fine, additional duties, or restrictions from engaging in certain activities or entering certain portions of the school and range from a warning up to suspension (Tr. pp. 525-41, 552-53). Based on the HVSS teacher's testimony, every student is required to serve on the judicial committee for a one-month term approximately every two years (Tr. p. 344).

[14] The student received counseling services through a county mental health clinic on a bi-weekly basis (Tr. pp. 599, 602, 624, 677). Although the student's therapist testified that she began seeing the student in February 2012, she submitted a report indicating that she had begun seeing the student in March 2012 (Tr. p. 677; Parent Ex. E).

[15] In the September 2011, the student participated in an independent educational evaluation (IEE) with a neuropsychologist chosen by the parent (Tr. p. 421; Joint Ex. 29). The evaluator offered a number of recommendations, perhaps most notably that the student should be provided with a therapeutic environment in a small class setting, "which allows for careful monitoring and support" of the student's behavior and academic performance (Joint Ex. 29 at p. 13). The neuropsychologist further recommended the student receive regular psychiatric input, intensive psychotherapy 1-2 times per week, and the availability of professional and paraprofessional staff capable of addressing any social/emotional conflicts that might disrupt the student's day (id. at pp. 12-13). The student's ongoing need for counseling throughout the school day, despite the student having been in attendance at HVSS for over six months, is further evidence that the student's need for counseling was not diminished by his attendance at HVSS (Tr. p. 687; Joint Ex. 29 at pp. 12-13).

unfamiliar with his educational history and admitted that she had not observed the student at HVSS and based her opinion solely on information obtained from the student (Tr. pp. 684-85, 692, 709-11).

While evidence of progress at a private school is relevant, it does not itself establish that a private placement is appropriate or inappropriate (Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]; see Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377 at *10 [S.D.N.Y. Feb. 4, 2013]). Considering the absence of academic progress and the student's continued signs of depression after being enrolled at HVSS for over a year, along with the fact that the student continued to exhibit the same types of behaviors the student exhibited while attending public school, in weighing this factor, I cannot find that the student made more than minimal progress while attending HVSS. In addition, because the student was not receiving counseling services at HVSS, but was receiving it as an outside service delivered by the county (Tr. pp. 676-77; Parent Ex. E), and considering the student's continued need for counseling, I find that any social or emotional progress the student may have made while attending HVSS was more than likely attributable to the student's therapy sessions rather than to HVSS.

**3. Lack of Counseling at HVSS**

I next turn to the parties' dispute over the absence of therapy or counseling services at HVSS. There is little evidence in support of the IHO's determination that the student's need for counseling services diminished while he attended HVSS. In the 2008 psychoeducational evaluation report, the school psychologist recommended that the student receive counseling at school, with the focus on improving the student's social skills and building his interpersonal relationships (Joint Ex. 30 at p. 8). The student's parent, as well as the parent's private psychologist, and the student's therapist, agreed that the student required ongoing counseling services to address his emotional needs (Tr. pp. 599, 600-02, 687; Joint Ex. 30 at p. 13). In addition, the student's HVSS teacher recommended that the parent and student attend family counseling because of certain behaviors the student exhibited at school (Tr. pp. 600-01).

As noted above, the student actually continued to show signs of depression and anxiety after he had been attending HVSS for approximately one year, and he currently continues to require therapy sessions (Tr. pp. 677, 687).[16] The student's parent, as well as the parent's private psychologist, and the student's therapist, agree that the student requires counseling services to address his emotional needs (Tr. pp. 599, 600-02, 687; Joint Ex. 30 at p. 13). The student's HVSS teacher even recommended that the parent and student attend family counseling because of certain behaviors the student exhibited at school (Tr. pp. 600-01). At the time the parent placed the student at HVSS, counseling was the student's most significant area of need, and it continues to be his most significant area of need (Tr. pp. 39, 41-42, 603-05, 687; Joint Ex. 29 at p. 12; 30 at p. 8).

[16] The HVSS teacher confirmed that the student was left on his own for a number of months while attending HVSS before he began to socialize with other students (Tr. p. 358).

The hearing record indicates that HVSS did not provide the student with any sort of individualized attention or intervention designed to address the student's social/emotional and behavioral needs (Tr. pp. 337, 503).[17] HVSS staff testified that the school was not equipped to provide counseling or psychological services and if a problem arose that might require such services, the school might suggest that the student find services outside the school (Tr. pp. 337). In addition, the student's HVSS teacher testified that the private school did not have an established plan to respond should a student threaten to harm themselves or others, or express suicidal ideation, behaviors the student had manifested in the past (Tr. p. 504; see Dist. Ex. 1; 2). The HVSS staff member indicated that responding to such an event "flips out of the normal route of the school" (Tr. p. 504). She went on to explain that when such an event had occurred with a different student, the student was asked to refrain from returning to "until we had a note from the student's psychologist that [the student] was safe to be at school (Tr. p. 504). When asked if the school provided "social skills training for students who may have difficulty with peer interaction," HVSS staff indicated there was no formal curriculum, but explained that these needs might be addressed "informally in the [judicial committee]" (Tr. p. 505). While I acknowledge the possibility that the democratic process central to HVSS could possibly serve to promote the development of peer relations and social skills in a general way, it cannot be substituted in this instance for the counseling services that the student required and cannot be considered specially designed instruction to meet this student's unique needs.

Additionally, although the student's behaviors were an area of concern, HVSS did not develop a program to address those behaviors, but rather relied on its judicial committee to address the student's behaviors (Tr. 343-48, 522-24). While the January 2008 evaluation report recommended the identification and reinforcement of the student's positive behaviors, the focus of the judicial committee was on punishment for inappropriate behaviors (Joint Ex. 30 at p. 8). Sentences for transgressions included restrictions from physical contact, restrictions to or from certain portions of the school, restrictions from playing certain games, fines, and additional duties (Tr. pp. 525-26, 530, 537). One of the most troubling examples of a sentence issued by the judicial committee was related to the student's recurrent violation of the school's check-in rule, requiring students to sign in upon entering the building (Tr. p. 535; Parent Ex. C). These violations resulted in escalating sentences, culminating with a sentence requiring the student to wear a sign reminding him to check into the school every day for five days (Tr. pp. 720-21). The HVSS teacher testified that the student did not like it at all and that it became a "big deal" and had to be rescinded (id.).

Punishment requiring this student, who is described as depressed, self-isolating, and emotionally fragile, to wear a sign that further isolates him from his peers, is inconsistent with the evidence of the recommendations of the psychologists who examined him and the observations of his therapist who worked with him (Tr. p. 700; Joint Exs. 29; 30). Additionally, there is nothing in the hearing record to indicate that the students on the judicial committee, who determined the

[17] Although the parent testified that she believed HVSS could offer counseling if required, the HVSS teacher indicated that HVSS does not provide counseling services and that the student does not receive counseling services during the school day (Tr. pp. 503-04, 546-47, 622). Instead, the student receives publically provided individual therapy twice per month outside of HVSS, substantially less therapy than is recommended by the independent evaluator in the September 2011 psychoeducational evaluation report (Tr. pp. 602, 677; Joint Ex. 29 at p. 12-13).

student's punishment, had any training or qualifications to address the student's behavioral needs or were aware of his special education needs (Tr. pp. 1-725; Dist. Exs. 1-8; Parent Exs. A-I; Joint Exs. 1-31). Under these circumstances, I decline to find that HVSS's judicial committee, run by fellow students, is appropriate as a means to address this student's social/emotional and behavioral needs.

Considering the absence of an academic program at HVSS, the limited indications of social/emotional progress, the lack of necessary counseling throughout the school day and the inappropriateness of the school's judicial committee to address the student's behaviors, HVSS is not an appropriate placement for the student.

**C. Reimbursement for Independent Educational Evaluation**

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]). IEEs are defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent disagrees with an evaluation conducted by the district (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392 at *5 [S.D.N.Y. Jan. 13, 2012]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). A parent, however, is only entitled to one IEE at public expense "each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]; see R.L., 363 F. Supp. 2d at 234-35). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, ensure that either an IEE is provided at public expense or initiate an impartial hearing to show that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii];[5] 8 NYCRR 200.5[g][1][iv]; see, e.g., A.S. v. Norwalk Bd. of Educ., 183 F. Supp. 2d 534, 549 [D. Conn. 2002] [upholding order of reimbursement where the district failed to demonstrate that its evaluation was appropriate]).

In this case, upon the parent's request, the district agreed to pay for an IEE at public expense (Joint Ex. 13 at p. 1; 25). The district also sent the parent a letter explaining its policy regarding IEE's and listing two evaluators who were approved by the district (Joint Ex. 13 at p. 1). The district notified the parent of its policy to pay up to $1,700.00 towards the cost of an IEE, which it later increased to $1,800.00 (Joint Exs. 6; 9). The district then sent a letter, dated April 14, 2011, to the independent evaluator, setting forth the district's criteria for conducting the evaluation and confirming that the district would pay $1,800.00 towards the cost of the evaluation (Joint Ex. 6 at p. 1). The evaluator countersigned the letter acknowledging that he would accept $1,800.00 from the district with the balance of his fee payable by the parent (Joint Ex. 7). The district also sent a copy of its letter to the parent (Joint Ex. 8). As per its agreement, the district paid $1,800.00 towards the cost of the IEE and the parent's mother paid the remaining balance (Joint Ex. 28). Federal regulations permit the district to apply its cost containment policy to the amount it reimburses for private evaluations (34 CFR 300.502[e][1]; see Individual Educational Evaluation, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]). If the parent had rejected the district's policy, the parent could have demonstrated that "unique circumstances justif[ied] selection of an evaluator whose

fees fall outside the [district's] cost containment criteria" (Independent Educational Evaluation, 71 Fed. Reg. 46689-90). The facts in this instance support the IHO's conclusion that the parent accepted the district's cost containment policy in hiring the evaluator, therefore the parent is not entitled to reimbursement for the balance of the cost of the IEE.

**VII. Conclusion**

Having determined that the parent did not establish the appropriateness of HVSS for the March through June portion of the 2010-11 school year or for the 2011-12 school year, it is not necessary to determine the issue of whether equitable considerations support the parent's claim or whether the parent is entitled to reimbursement for transportation costs, and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of the Dep't of Educ., Appeal No. 11-130; Application of the Bd. of Educ., Appeal No. 11-078). The IHO properly found the parent was not entitled to reimbursement for the balance of the cost of the IEE, as the parent had agreed to accept the district's cost containment policy in hiring the evaluator.

I have considered the parties' remaining contentions and find them unnecessary to address in light of my determinations herein.

**THE APPEAL IS SUSTAINED.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the IHO's decision dated October 1, 2012 decision is modified by reversing those portions which determined that HVSS was appropriate for the student for the March through June portion of the 2010-11 school year and for the 2011-12 school year and directed the district to pay for the cost of the student's tuition at HVSS.

**Dated:** **Albany, New York**
**September 6, 2013**

**JUSTYN P. BATES**
**STATE REVIEW OFFICER**