

**Docket No. 181-SE-0104**

**Student b/n/f Parent** § **BEFORE A SPECIAL EDUCATION**  
v. § **HEARING OFFICER**  
**GANADO INDEPENDENT** § **FOR THE STATE OF TEXAS**  
**SCHOOL DISTRICT** §

**DECISION OF THE HEARING OFFICER**

**Statement of the Case**

This case arises under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §1400 et seq. The petitioner filed the case with the Texas Education Agency on January 26, 2004 and the original decision due date was March 11, 2004. Following several continuances to accommodate the schedule of the attorneys, the parties tried the case on May 19, 2004. By agreement, the parties presented closing argument in writing on June 7, 2004 and the agreed due date for the decision is on or before June 21, 2004.

Attorney Christopher Jonas represents petitioner, Student ("petitioner" or "Student"). Student's parents and next friends are his father, Parent, and his mother, Parent, Attorney Eric Nichols, of the Houston office of Henslee Fowler Hepworth & Schwartz, LLP, represents Ganado Independent School District ("Respondent," "Ganado ISD," or "the District").

**Issues Raised and Relief Requested**

Petitioner claims Ganado ISD failed to carry out parts of his Behavior Intervention Plan ("BIP"), and his Individual Education Plan ("IEP"). The parts that petitioner claims Ganado ISD failed to carry out pertained to sending a notebook containing homework assignments back and forth between the teachers and the family and providing counseling. The parents claim that when the school district didn't provide the counseling, they had to pay for it out of their own pocket. They seek reimbursement of payments for counseling services and travel expenses incurred in taking Student into the nearby town of Victoria to receive the counseling. They also seek compensatory educational services in the form of academic tutoring for the times when the District didn't implement the BIP and IEP. These were the stated issues. A closely related issue was tried by consent. This was the issue of whether the IEP for the current year is inadequate because it sets no clear or measurable standards, goals, or objectives for the counseling services the District will provide for Student in apparent violation of the IEP requirements of 34 CFR § 300.347.<sup>1</sup>

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<sup>1</sup> This issue was developed throughout the record by both the petitioner and the respondent without either side objecting that it was not one of the agreed issues in this case. See Tr. 46-48; 51-52; 57-63; 108-111, 115, 118. "An issue is tried by consent when a party introduces evidence to support the issue that is not

## Findings of Fact

1. Student is a \*\*\*-year-old \*\*\* grade student who resides within the jurisdictional boundaries of Ganado ISD, a political subdivision of the State of Texas and a duly incorporated school district. Ganado ISD is responsible for providing Student with a free appropriate public education under the provisions of the IDEA.
2. Student is eligible for special education services under IDEA as a student with Other Health Impairment (“OHI”) for Attention Deficit Hyperactivity Disorder (“ADHD”). He has also been diagnosed as dysgraphic.<sup>2</sup>
3. Student’s ADHD manifests itself, in part, by Student being extremely disorganized. He also lacks social skills with peers and has a history of impulsivity.<sup>3</sup>
4. Because of his disorganization, Student has difficulty keeping up with homework assignments. As an accommodation to his disability, he is allowed to turn in homework late provided that it comes in during the semester.<sup>4</sup> Before the ARD committee found a way to keep his parents informed of his homework assignments through the notebook, he often allowed uncompleted homework assignments to stack-up until the end of a semester. Instead of an even flow of homework during the semester, Student then had crunch periods at the end of every semester. In these crunch periods, he would have more work than he could easily complete. His difficulty in completing all the work at the end of a semester adversely affected his performance. As a cure, Student’s ARD Committee designed a notebook to go back and forth between Student’s parents and his teachers so Student’s parents would be aware of his homework assignments and could work with him to assure their timely completion. The notebook is also used to give Student’s parents timely information of any behavioral issues.<sup>5</sup>
5. The notebook has been part of the BIP and IEP adopted at Student’s most recent ARD meetings including the annual ARD meeting for 2003-2004<sup>6</sup> and has been part of all modifications of the 2003-2004 BIP and IEP adopted during the year.<sup>7</sup>
6. Sheets from the notebook for the period August 26, 2003 to December 2, 2003 are in evidence.<sup>8</sup> They reveal Student teachers use the notebook inconsistently. Some regularly use it and others don't. As a result, Student still misses homework

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included in the written pleadings and no objection is made to the lack of pleadings. Issues tried by consent are treated in all respects as if they were raised by the pleadings." See Tex. R. Civ. P. 67.

<sup>2</sup> Tr. 19.

<sup>3</sup> Tr. 21.

<sup>4</sup> Tr. 39.

<sup>5</sup> Petitioner's Exhibit 7, page 4; Tr. 30-32, 67.

<sup>6</sup> Annual ARD for the 2003-2004 School Year dated May 12, 2003 is Petitioner's Exhibit 7.

<sup>7</sup> Petitioner's Exhibits 10 (August 29, 2003) and 13 (October 1, 2003).

<sup>8</sup> Petitioner's Exhibit 8.

during the course of the semester and experiences crunch periods at the end of a semester in courses taught by the teachers who don't use the notebook.<sup>9</sup>

7. Student's report card for the first three six weeks of the 2003-2004 academic year is in evidence.<sup>10</sup> He has maintained fairly high grade averages despite his problems in getting the homework in on time and the crunch periods at the end of the semester caused by the teachers who don't use the notebooks. His averages for the first three six week periods were as follows:

English 7	***
Band 7	***
Texas History	***
P.E. Boys 7-8	***
Health 7	***
7th Science	***
Reading 7	***
Pre Algebra 7	***

There is no evidence that these grades represent anything other than his actual achievements during the year or that they have dropped off in the remainder of the year.

8. Student is on medication for his ADHD. Shortly after the beginning of the 2003-2004 school year, his doctor tried out a new drug on Student that offered the potential of improving his condition. Unfortunately, the drug didn't work on Student. He had increased anxiety and anger leading to increased altercations with other students. He went through periods when he couldn't sleep alternating with periods when he couldn't wake up. Presumably the change in medication was primarily responsible for the discipline problems Student experienced for the period August 26, 2003 to October 16, 2003. In addition to changing Student back to the medication that he was on before experimenting with the new medication, the doctor recommended that Student receive counseling.<sup>11</sup>
9. In response to the doctor's recommendation, his parents took him to a counselor in the nearby town of Victoria.<sup>12</sup> The evidence does not show the number of times they took him to counseling, the qualifications of the counselor, or the cost of the counseling sessions for which Student's parents seek reimbursement. The record does not show the parents notified the District the Doctor had recommended direct counseling services for Student or that they requested direct counseling services from the school district before taking Student to the counselor in Victoria.

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<sup>9</sup> Tr. 56-57, 79.

<sup>10</sup> Respondent's Exhibit 36.

<sup>11</sup> Tr. 21-22, 55.

<sup>12</sup> Tr. 55.

10. Student did not receive any direct counseling from Ganado ISD in the 2003-2004 school year. Direct counseling services are not part of his BIP or IEP. The district prepared its most recent counseling report for Student on April 9, 2002 (two years ago before Student went into the \*\*\* grade).<sup>13</sup> The report is in evidence and was relied on in the BIP and the IEP for the 2003-2004 school year. At page 5 of the counseling report, the evaluator has checked that the following statement applies to Student, "*Based on this evaluation, it appears that this student requires counseling as a related service in order to benefit from special education.*" (Italics added).
11. However, the evaluator does not recommend that Student receive direct counseling services. Instead, the evaluator's recommendation is only for consultative services. This recommendation reads as follows:

*"Types of Services:* Individual Counseling has been provided for approximately 2 1/2 years. Student's physical aggression towards others appears to have decreased considerably, however, the quality of his social interactions with peers and his organizational skills have not significantly improved, if anything, may have gotten worse. He continues to be very unorganized, which in turn is affecting his opportunities for social interactions -- having lunch detention as a result of poor organization and being left out of group rewards, such as movies because he failed to make grade in conduct. *Because of this, only consultative services are recommended at this time.* (Italics added)."
12. The record contains no precise definition of the term, "consultative services." However, Ms. \*\*\* is the Director of Special Education for Jackson County Special Services Co-op. She testified as a witness for Ganado ISD. The gist of Ms. \*\*\* testimony is that the term, "consultative services," refers to consultations between a counselor and Student's teachers. They discuss Student's progress toward meeting his goals and the counselor suggests strategies which the teachers might use to help Student improve his performance. The term does not refer to direct counseling services.<sup>14</sup> I found Ms. \*\*\* a credible witness and accept her explanation of what the April 9, 2002 counseling report meant by the term, "consultative services." I also find that Ms. \*\*\* explanation is consistent with the term's apparent meaning when I read it in context in the April 9, 2002 counseling report and in the BIP for the 2003-2004 school year and its modifications.
13. Student's mother, Parent, was a member of the ARD committee that developed the Annual BIP and IEP for the 2003-2004 school year which restricts counseling to "consultative services" rather than direct counseling services. She signed it and checked that she agreed with the Annual BIP and IEP. She also signed and acknowledged her agreement with the modifications of the Annual BIP and IEP.

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<sup>13</sup> Petitioner's Exhibit 3.

<sup>14</sup> Tr. 105.

14. Student has no IEP which contains measurable goals and objectives related to the consultative counseling services. Modifications of the annual BIP do not specify the frequency or duration of services that the District will provide. There is no provision for reporting to the parents on service delivery or results of the service delivery.
15. Special Education Director \*\*\* believes that since the District provides consultative counseling services to Student indirectly through his teachers instead of providing them to Student directly, the IEP for these services does not need to meet the standards that 34 CFR § 300.347 requires for direct services<sup>15</sup>.

#### Conclusions of Law

1. The District has found that Student requires counseling as a related service to benefit from special education<sup>16</sup>. Therefore, I have concluded the law requires the District to create an IEP meeting 34 CFR §300.347 requirements for any counseling service that it provides Student. I will therefore order the District to develop such an IEP.
2. The evidence is conflicting but indicates that Student may still need direct counseling services instead of only the consultative services presently provided. This is a fact issue rather than a legal issue and I cannot determine it on the evidence before me. The ARD Committee needs to determine it based on an updated assessment of Student's present need for counseling services.
3. I conclude that the IEP with regard to the notebooks meets the requirements of 34 CFR §300.347 but has not been properly implemented. The ARD Committee should address this problem by providing Student an accommodation such as tutoring services to help him complete any homework assignments that are still outstanding at the end of any semester as a result of teachers not following the IEP with regard to the notebooks.
4. I conclude the law does not require the school district to reimburse the parents based on the evidence before me. The parents have failed to prove their claim for reimbursement for counseling services. Without more information than is contained in this record, I cannot determine whether these services were appropriate. Also, direct counseling services are not in Student BIP or IEP and the parents did not put the District on notice and give the District an opportunity to provide the counseling services before the parents bought them from a private counselor.<sup>17</sup>

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<sup>15</sup> Tr. 109.

<sup>16</sup> Page 5, Petitioner's Exhibit 3 and Fact Finding No. 10 above.

<sup>17</sup> Counseling services are eligible for reimbursement only if provided by qualified social workers, psychologists, guidance counselors or other qualified personnel. 34 C.F.R. §300.249(b)(2). There is no evidence in this record on which I could find that the counselor who provided these services meets these requirements.

5. The evidence will not support an order for any compensatory education in the form of tutoring services. Although he raised the issue in his pleadings, the petitioner presented no evidence about any compensatory education services which may be due him to compensate him for education which he missed because of the District's violation of IDEA. Therefore, I conclude that petitioner has not carried his burden on this issue.
6. Student has been denied a FAPE in the current school year because (having determined that use of the notebook and counseling services are necessary to give Student a FAPE) the ISD has failed to implement the IEP with regard to the notebook and the ARD Committee has failed to properly design an IEP meeting the standards of 34 CFR §300.347 with regard to the counseling services.

### Order

After due consideration of the record and the findings of fact and conclusions of law, I ORDER Ganado ISD to convene an ARD Committee meeting within 30 days from the date of this decision for the purpose of determining, and including in Student's IEP, understandable and measurable goals and objectives for the counseling services as required by 34 CFR §300.347 based on an updated assessment of Student's needs. I also order the ISD to review the plan for transmitting homework assignments and information from the school district to the parent and to consider providing an accommodation in the form of tutoring to help him with any assignments that may stack up at the end of a semester as a result of teachers not following the IEP.

All other and further relief not expressly granted herein is denied.

IT IS FURTHER ORDERED that Ganado I.S.D. shall timely implement this decision within 10 school days (except as otherwise provided herein) in accordance with 19 TAC §89.1185(q) and 34 CFR §300.514. The following must be provided to the Division of Complaints Management at the Texas Education Agency and copied to the Petitioner within 15 school days from the date of this decision: (1) documentation demonstrating that the decision has been implemented; or (2) if the timeline set by the Hearing Officer for implementing certain aspects of the decision is longer than 10 school days, the district's plan for implementing the decision within the prescribed timeline, and a signed assurance from the superintendent that the decision will be implemented.

SIGNED this the 15th day of June 2004.

/s/Larry J. Craddock  
Larry J. Craddock  
Special Education Hearing Officer

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**SYNOPSIS**

**ISSUE:** Whether the district failed to implement the IEP by failing to send a notebook back and forth between teachers and home to keep parents apprised of homework and behavior issues?

**CFR CITATION:** 34 CFR §300.347  
**TEXAS CITATION:** 19 TAC § 89.1055

**HELD:** **For the Student** - Some teachers followed this part of the IEP and some didn't.

**ISSUE:** Whether the district failed to implement the IEP with respect to counseling services?

**CFR CITATION:** 34 CFR §300.347  
**TEXAS CITATION:** 19 TAC § 89.1055

**HELD:** **For the School District** - The petitioner did not meet his burden of showing that the district did not provide the indirect counseling services specified in the IEP.

**ISSUE:** Whether the student's parents are entitled to reimbursement for out of pocket expenses, including transportation, incurred in purchasing counseling services for the student?

**CFR CITATION:** 34 CFR §300.249(b)(2);34 CFR §300.347  
**TEXAS CITATION:** 19 TAC § 89.1055

**HELD:** **For the School District** - The petitioner did not notify the district before purchasing the services and the evidence did not include sufficient detail as to the counseling services provided and the qualifications of the counselor.

**ISSUE:** Whether the IEP for counseling services complies with IEP drafting requirements?

**CFR CITATION:** 34 CFR §300.347

**TEXAS CITATION:** 19 TAC § 89.1055

**HELD:** **For the Student** - The IEP does not conform to the drafting requirements for an IEP under IDEA.