BEFORE THE
SPECIAL EDUCATION DIVISION
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: STUDENT, Petitioner, vs. MT. DIABLO UNIFIED SCHOOL DISTRICT, Respondent.	OAH No. N2005070062

DECISION

Administrative Law Judge Mary-Margaret Anderson, Office of Administrative Hearings, State of California, heard this matter in Concord, California on July 12, 13 and 14, 2005.

William Rowen, Attorney at Law, represented Petitioner Student (Student), who was not present. Foster Mother, Student's foster mother, was present. In addition, Guardian, Student's legal guardian, was present for a portion of the hearing.

Kimberly B. Shulist, Attorney at Law, represented Respondent Mount Diablo Unified School District (District).

In evidence are the following exhibits: Student's exhibits 1 through 23 (identified by page numbers 1 through 139) and District's exhibits 1 through 14.

The record closed on July 14, 2005.

ISSUE

Whether District must continue providing (from November 2003 forward) the in-home program Intensive Behavior Intervention (IBI) to Student.

FACTUAL FINDINGS

1. Student was born November 22, 1998, and is currently 6 years and 8 months old. He was exposed to drugs in utero and his diagnoses include agenesis of the corpus callosum,[1] colpocephaly,[2] mild cerebral palsy, autism and moderate mental retardation. Three days after birth he was placed in the foster home of Foster Mother, where he has lived since.

2. In November 2001, when Student was 2 years and 11 months old, District representatives conducted an assessment. He was found eligible for special education services and on December 4, 2001, the initial individualized education plan (IEP) was prepared. Student's medical and psychological problems have resulted in significant delays in his ability to communicate. His need to learn communication skills is identified repeatedly in his IEPs and other records.

During one IEP meeting, Foster Mother requested that the District provide an in-home program of discrete trial training (DTT). Such a program, P.L.A.Y., was provided beginning in February of 2003. The September 17, 2003 IEP provides that the Intensive Behavior Program (IBI) program would begin on the same date. On a date not exactly clear in the record, the IBI program replaced P.L.A.Y. IBI was taught by tutors for seven and one-half hours each week. An additional two hours of management services was also provided.

3. At the November 2003 IEP meeting, District recommended that the IBI program be terminated. Foster Mother did not agree with the recommendation, did not consent and did not sign the IEP. IBI was continued until March 2004, but only because District owed Student some compensatory "make-up" services.

4. On April 5, 2004, Student filed a request for due process hearing and for a stay-put order. On April 22, 2004, a stay-put order was issued for the instructional hours only. IBI began again on May 4, 2004, and has been provided since.

5. DTT programs address communication and play skills, among other areas, within a very structured learning environment. The instruction is provided by trained tutors

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[1] The connection between the cerebral hemispheres of the brain failed to develop. (See Dorland's Medical Dict. (27th ed. 1988) pp. 37 and 384.)

[2] "Colpocephaly is a disorder in which there is an abnormal enlargement of the occipital horns-the posterior or rear portion of the lateral ventricles (cavities or chambers) of the brain. This enlargement occurs when there is an underdevelopment or lack of thickening of the white matter in the posterior cerebrum. Colpocephaly is characterized by microcephaly (abnormally small head) and mental retardation. Other features may include motor abnormalities, muscle spasms, and seizures." (*Cephalic Disorders Fact Sheet* (Sept. 2003) National Institute for Neurological Disorders and Health <http://www.ninds.nih.gov/disorders/cephalic_disorders/detail_cephalic_disorders.htm> [as of Aug. 3, 2005].)

who work one-on-one with the children, under the supervision of someone with extensive training in DTT methods. The service is often provided during the preschool years to help ready a child for school. In addition, in-home programs may be provided by District at other times when it is determined that the student needs special training in addition to school to achieve success in the classroom environment. Most of the children in District receiving an in-home program of DTT have a diagnosis on the autism spectrum and are 18 months to 6 years old.

6. In July 2003, Student was enrolled in a Spectrum Center[3] school and was placed in an autism-intensive classroom on the Pittsburg campus. He currently attends from 9 a.m. until 2 p.m., or a total of about 25 hours per week. The program at Spectrum includes DTT three times during the day– one one-hour and two half-hour sessions. In addition, Student receives occupational therapy and speech therapy in the school but outside the classroom setting.

7. Louise Dombrowski is an early intervention specialist with District and she supervises its in-home programs, including IBI. It was she who recommended at the November 2003 IEP meeting that the program terminate. Dombrowski provided a written report at that meeting (dated November 6, 2003) that contains a summary of Student's progress in the IBI program. Among her conclusions is that:

> [Student] has increased his ability to learn and imitate significantly over the last few months. He is responsive and playful and enjoys social interactions associated with play. I observed [Student] at school and found his ability to learn and imitate has also increased significantly.

Dombrowski also wrote:

> Since [Student] is learning his academics in the classroom, I recommend [Student's] afternoon support his learning in the classroom with naturalistic learning through play… [Student] needs social interaction and downtime after being at school all day so I recommend continuing social and language practice through playtime.

Dombrowski orally recommended at the meeting that IBI be phased out using a transition plan. She believed that Student was making such progress that the in-home program was no longer needed.

8. Lorean Quirk has been Student's teacher at Spectrum for about one year. Quirk believes that Student has improved in the areas of social skills and self-help. He is

[3] Spectrum Center is a nonpublic school for children with special needs.

more independent in toileting and feeding himself. Student has an increased awareness of others, including his peers and staff. Tantrums are less frequent. He is able to generalize his skills across the different environments within the school grounds. Quirk did not opine regarding the benefits and detriments of an in-home DTT program. She did state her belief that the services Spectrum provides are sufficient to meet Student's IEP goals.

9. Because of the IBI program's hiatus between March and May of 2004, the opportunity arose to observe whether Student regressed when he was not receiving in the program. Dombrowski does not believe regression occurred in a significant way and Quirk concurred. Although there were some compliance issues with Student's behavior, he was able to meet his IEP goals with only his formal school program during the "break."

10. Dombrowski wrote two additional reports that track Student's progress in the IBI program. Her last, dated November 8, 2004, was after she observed Student in the classroom. She wrote:

> [Student] was working well with a variety of people across settings. He worked well in the cubicle with his teachers and he also worked well with the speech therapist on the carpet area with other children around. He still has some issues with transitions from one activity to another. [Student] seemed happy [and] participated with the class activities and complied with the majority of demands.

11. Dombrowski's hearing testimony was consistent with her reports and previous recommendation to discontinue the IBI program. She believes that Student functions well in the classroom environment and that Spectrum can meet his educational needs. Although previously Dombrowski opined that a transition plan be instituted to phase out the IBI program, she no longer believes this is necessary. This is because another DTT program is currently being provided to Student in the home.

12. On November 1, 2004, the Regional Center of the East Bay authorized provision of an in-home behavioral program for Student. STA-NORCAL is the service provider. The agreement calls for 270 hours to be provided from April 1, 2005 until August 31, 2005. As a result, the STA tutors have overlapped two hours each week with the IBI tutors. Although the purpose of this second DTT program is somewhat different in that the focus is on behavior control as opposed to educational needs, the concept and delivery methods are very similar. Student has adjusted to the newer tutors, and, hence, a transition of sorts has already been accomplished.

13. In contrast to the opinions of Dombrowski and Quirk, Foster Mother believes the IBI program is still needed by Student. Although he has not made as much progress as she would hope, the IBI program has helped Student be able to better communicate his needs to her. This is because the same system is used at school. In contrast also to the opinions of District witnesses, Foster Mother observes regression when Student is not receiving the

program. During the hiatus, it was difficult for her to retain Student's routine. Foster Mother tried to maintain the program as best she could, but she did see some regression. And she is concerned that what Student was doing last year at this time is very similar to what he is doing now. However, she also stated that Student has made "maybe 50 percent progress" since last year.

In sum, Foster Mother feels she needs the IBI program at home and that it helps Student. She would need to see him make more progress before she would agree to terminate it. In her view, the STA-NORCAL program alone is not adequate.

LEGAL CONCLUSIONS

1. The purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §1400 et seq.)[4] is to ensure a free and appropriate public education (FAPE) to children with disabilities. Appropriate education under IDEA includes not only traditional classroom instruction, but also related services necessary to effectuate the goals of the student's educational plan. Services must provide for a student's unique needs for "further education, employment and independent living." (§ 1400(d)(1)(a).) Home instruction is specifically identified as a related service. (§ 1401(16).) California law is consistent. It defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.)

2. The extent of services required was addressed by the United States Supreme Court in the case of *Hendrick Hudson Central Sch. Dist. Bd. of Ed. v. Rowley* (1982) 458 U.S. 176. The court held that FAPE "expressly requires the provision of 'such . . . supportive services . . . as may be required to assist a handicapped child to *benefit* from special education.' §1401(17) (emphasis added). We therefore conclude that the 'basic floor of opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." (At p. 201.)

On the other hand, the *Rowley* court expressly held that IDEA does not require that each child's potential be maximized. The court found "no additional requirement that the services so provided be sufficient to maximize each child's potential "commensurate with the opportunity provided other children" and that "to require . . . the furnishing of every special service necessary to maximize each handicapped child's potential is, we think, further than Congress intended to go." (At pp. 198-199.)

3. The case of *Gregory K. v. Longview School District* (1987) 811 F.2d 1307, involved factual circumstances not unlike those in this matter. The District's proposal did not include the services of a particular tutor, whom Gregory's parents believed had greatly assisted him. Citing *Rowley*, the court focused on the question of whether the District's

[4] All statutory references are to 20 U.S.C. unless otherwise indicated.

placement provided educational benefit for Gregory– not on whether what the parents proposed was better and/or what the parents preferred. The *Gregory* court concluded, at page 1314:

> An "appropriate" public education does not mean the absolutely best or "potential-maximizing" education for the individual child… We must uphold the appropriateness of the District's placement if it was reasonable calculated to provide Gregory with educational benefits.

4. It is therefore clear that an "appropriate" education under the law does not require that the best education or services available must be provided or that maximum potential be realized. A primary purpose of a DTT in-home program such as IBI is to help children to generalize their behavior across settings. There is no doubt that the ability to generalize information is a very important goal. But the evidence demonstrated that Student has made and continues to make progress in that area and he is able to fully participate in his classroom. Foster Mother's concern about regression is insufficient to overcome the credible evidence of Student's progress. To continue the IBI program at this time would require District to provide services that maximize potential rather than to provide threshold educational services. It is therefore concluded that Student is receiving the educational benefit guaranteed him by the law from the services provided without the additional provision of IBI at this time.

5. District prevailed on the sole issue for determination. (Ed. Code, § 56507, subd. (d).)

ORDER

Student's request for relief is denied. District is not required to continue providing the in-home program Intensive Behavior Intervention (IBI) to Student.

DATED: August 11, 2005

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MARY-MARGARET ANDERSON
Administrative Law Judge
Office of Administrative Hearings

NOTICE OF APPEAL RIGHTS

The parties are advised that they have the right to appeal this Decision to a state court of competent jurisdiction. Appeals must be made within 90 days of receipt of this Decision. Or, a party may bring a civil action in United States District Court. (Ed. Code, § 56505, subd. (k).