**JUNE 27, 2012**

# **COMMONWEALTH OF MASSACHUSETTS**

# **DIVISION OF ADMINISTRATIVE LAW APPEALS**

# **BUREAU OF SPECIAL EDUCATION APPEALS**

**IN RE: BOSTON PUBLIC SCHOOLS**

**BSEA #12-7614**

### **BEFORE**

###### **LINDSAY BYRNE**

#### **HEARING OFFICER**

# **ANDREA ALVES-THOMAS, ATTORNEY FOR THE SCHOOL**

# **PARENT, PRO SE**

**RE: Wilma[[1]](#footnote-1) and Boston Public Schools**

**BSEA #12-7614**

**DECISION**

This Decision is issued pursuant to M.G.L. c71B and 30A, 29 U.S.C §1400 et. seq. and 29 U.S.C.§794 and the regulations promulgated thereunder. The Hearing was held on June 5, 2012 at the Department of Elementary and Secondary Education in Malden, MA. Those participating in parts or all of the proceeding were:

Leslie Boor Special Education Student Services (SESS) Coordinator, Boston Public Schools

Natalie Ake Supervisor, Office of Special Education, Boston Public Schools

Wynne Freed Occupational Therapist, Boston Public Schools

Paul Kennedy Special Education Teacher, Boston Public School

Dean Grubb General Education Teacher, Boston Public School

Joe Cooper Law Clerk, Boston Public Schools

Andrea Alves-Thomas Attorney, Boston Public Schools

Mr. & Mrs. W. Parents

Lindsay Byrne Hearing Officer

The official record of the Hearing consists of documents submitted by the Parents marked P-1 through P-16;[[2]](#footnote-2) documents submitted by the School marked S-1 through S-10; and approximately 4 hours of recorded oral testimony. The Parents were at all times self-represented. Boston Public Schools was represented by an Attorney. The Parties elected to make oral closing arguments immediately after presentation of the evidence and thus the record closed on June 5, 2012.

ISSUE

Whether Wilma requires one-to-one paraprofessional support in all educational settings in order to receive a free, appropriate public education?

SUMMARY OF THE EVIDENCE

As the issue is narrow and most of the pertinent facts uncontested this summary is brief.

1. Wilma is a 14 year old student nearing completion of the 8th grade at the HPM School, within B.P.S. Wilma is legally blind with poorer residual sight on the right side, unreliable depth perception and weak horizontal scanning skills. In addition Wilma has difficulty with reading mechanics and comprehension, math skills, memory, concentration, focus, self regulation and modulation, and social pragmatics.. Wilma is reading at a 3.5-5 grade level and participates in an alternate MCAS assessment for Math. She uses eyeglasses, a cane, monocular, audiotape, a Perkins brailler, magnifiers, preferential seating, a scribe and a laptop to navigate her environment, access the curriculum and perform class and homework assignments. Wilma has a history of inappropriate behavior in the classroom, including tantrums and crying jags, associated with redirection, frustration and/or over-stimulation. Wilma is described as an eager, independent student with solid friendships with a small group of other girls. (P-4, S-4; P-5; P-6; P-7; P-8; P-9; P-10;

P-1; S-1; P-16; S-9; Kennedy; Freed; Grubb)

2. Wilma currently attends an “inclusion school” within the Boston Public Schools. All special education instruction and related services are provided in an inclusion setting. Paul Kennedy, who has been her special education teacher for English Language Arts (ELA) for the 2010-2011 and 2011-2012 academic years, described the program for Wilma. During the 2011-2012 academic year there have been 22 students in Wilma’s class, seven of whom have IEPs. The Students move as a group to different teachers for different academic subjects. The ELA class is co-taught. The regular education teacher selects the curriculum and plans the lessons. Mr. Kennedy implements the accommodations and modifications outlined in the IEPs for Wilma and the other students who require them. A City Year Intern provides some assistance to the classroom but there is no dedicated classroom paraprofessional. During the previous school year (2010-2011) Wilma’s ELA class also had 22 students, one regular education teacher, one special education teacher, and a classroom paraprofessional. (Kennedy)

Mr. Kennedy sees Wilma for 55 minutes each day. Otherwise he is not involved in her educational program. (Kennedy). Mr. Kennedy testified that Wilma functions in the middle of the group of special education students, though she needs more support than the others. Wilma uses a laptop computer “for everything”. She takes it from class to class and between school and home in order to access and organize the curriculum and produce her responses. Mr. Kennedy noted that the laptop assigned to Wilma had been out of service for at least four weeks at the time of the hearing. He did not know who was responsible for repairing or replacing it. (Kennedy)

Mr. Kennedy also testified that Wilma’s behavioral regulation skills had improved over the course of the 2 years he has worked with her. During the 2010-2011 school year Wilma was frequently “obstinate” “argumentative” or “screaming” in response to teacher redirection. Wilma’s undesirable behaviors were “extremely disruptive and not age appropriate”. (P-8) When those behaviors occurred Mr. Kennedy referred her for out of classroom discipline. There were no behavioral evaluations performed or formal behavior plans implemented for Wilma during either school year. Mr. Kennedy testified that there have been no major behavioral episodes in the ELA classroom during the 2011-2012 school year. He attributes the improvement in Wilma’s behavior to the consistency of the environment and staff as well as Wilma’s own maturation. Mr. Kennedy noted that Wilma responded well to a classroom wide reward/incentive system and to walking breaks to an adjacent life skills class.

Mr. Kennedy stated that Wilma had demonstrated good growth in reading comprehension skills by consistently implementing learned strategies. Written language, though improved, continues to be an area of significant weakness for Wilma. Mr. Kennedy testified that he thought Wilma would be frustrated by the constant attention of a 1:1 paraprofessional.

3. There are no documents in evidence concerning behavioral evaluations, behavioral incident reports, behavioral plans or strategies, behavioral contracts, data sheets or discipline records.

4. Dean Grubb is the regular education teacher responsible for 8th grade Civics instruction to Wilma’s class. He testified that Wilma is able to “access most” of the curriculum independently by using her laptop. The co-special education teacher creates shorter assignments for Wilma when necessary. Mr. Grubb has noted an increase in independence and a decrease in off-task behavior over the course of this school year. (Grubb)

5. Wynn Freed, an Occupational Therapist, has worked directly with Wilma in a twice weekly, small group, life skills class during the 2011-2012 school year. She had known Wilma as a younger student in a different elementary school, though it is not clear from the record whether Ms. Freed provided direct occupational therapy (OT) services to Wilma then. The life skills class is designed to assist students to develop social and community skills as well as self-regulation and hand skills. The group works on “brain-gym”, sequencing, hygiene, tool use and decision-making. Ms. Freed testified that over the course of the 2011-2012 school year Wilma demonstrated improved interactions with teachers and peers, better independent management of her visual aids, improved compliance with teacher directions and redirection, and better organizational skills. Ms. Freed testified that Wilma’s regular education teachers filled in a “contract” for positive social interactions through which Wilma could earn a reward. Ms. Freed did not participate in that reward system. (Freed)

6. The Team met in March 2011 to plan for Wilma’s 2011-2012 8th grade year. Wilma’s teachers reported that Wilma demonstrated significant problematic behaviors in the classroom which interfered with her learning and that of other students. (P-7; P-8; P-10; S-9) The Parents presented, and the members present discussed, a recommendation from Dr. Timothy Yu, of the LADDERS Program at Massachusetts General Hospital, that a “classroom aide” be assigned to Wilma. In the report Dr. Yu stated that a classroom aide was recommended “to help [Wilma] academically and behaviorally and minimize disruptions both to her and her class.” (P-2) The Parents requested that a 1:1 aide be provided for Wilma to assist her with accessing academic instruction, navigating the physical and social environment of the school, and regulating her behavior. (P-14)

7. In August, 2011, five months after the March Team meeting, Boston issued an

N-1 and proposed 2011-2012 IEP. (P-14, S-8; P-15; S-9) The N-1 explained that the school team members considered the Parents and Dr. Yu’s request for a 1:1 aide and rejected it finding “the current level of support and additional systems that will be put into place” would be sufficient to support Wilma. The IEP proposed for the 2011-2012 school year did not provide for a 1:1 paraprofessional, nor did it contain any guidance, therapeutic or behavioral evaluations or services. The goal of improving “Self Regulation” skills was assigned to two forty minute service periods per week by the occupational therapist. The Parents accepted the placement in an inclusion program at the HPM School for 2011-2012 and partially rejected the services proposed IEP due to the failure to provide 1:1 paraprofessional support for Wilma. (P-14)

8. Dr. Yu saw Wilma again in October, 2011. He wrote a brief report outlining his recommendations for appropriate educational programming, among them: “[Wilma] also needs the services of a 1:1 aide to help her navigate not only her behavioral issues but the social challenges she faces in her school setting. (P-1) Dr. Yu has not observed Wilma in school or talked to any of Wilma’s services providers. (Borr)

9. The Team re-convened on March 12, 2012. Leslie Borr, a Special Education Student Services Coordinator for Boston attended the Team. She testified that the Team discussed the Parents’ ongoing request for 1:1 paraprofessional support for Wilma. According to Ms. Borr the School members of the Team rejected the Parents’ request because Wilma had the capacity to conform her behavior to the norms of the HPM School without a 1:1 aide and therefore the service was not necessary for her safety or the safety of other students. The Team did not have, and therefore did not consider, Dr. Yu’s second report and recommendation arising out of his evaluation of Wilma in October 2011. (P-1; Borr)

Ms. Borr testified that 1:1 aides are assigned to students when they are unable to access the curriculum without one, or to ensure the safety of the student or others. (Borr; but see testimony of Ake that there are no set criteria for assignment of 1:1 aides.) There are currently three students at HPM with 1:1 aides. All are non-verbal. (Borr)

10. An IEP dated the same day as the Team meeting, March 12, 2012, was produced by the Boston Public Schools. (S-1) The proposed IEP did not provide for a 1:1 aide. The proposed IEP reduced consultation services in the area of orientation and mobility and increased them in perceptual skills; reduced direct services in independent functioning skills and increased them in reading and writing; and did not add any therapeutic, behavior or guidance services. (Compare P-13, S-1 and P-16, S-9.)

11. An N-1 produced by Boston Public Schools on March 15, 2012 notes that no options other than those recorded on the earlier proposed IEP were considered and rejected. (P-12)

12. The parents rejected the proposed March 2012-November 2012 IEP on April 23, 2012 due to the lack of 1:1 paraprofessional assistance. (S-1) The parents accepted all other services as well as the placement at HPM which is expected to continue into Wilma’s 9th grade year.

FINDINGS AND CONCLUSIONS

There is no dispute that Wilma is a Student with special learning needs and is thus entitled to a free, appropriate public education pursuant to M.G.L. c.71B and 20 U.S.C.§1400 et seq. The question for decision here is whether Wilma can receive a free appropriate public education in her current educational placement without the assistance of an individually assigned paraprofessional? As the party challenging the status quo and seeking relief from the BSEA the Parents bear the burden of proving that Wilma is not currently receiving a free appropriate public education, and that the 3/2012-11/2012 IEP developed by Boston is not reasonably calculated to ensure that Wilma will receive a free appropriate public education. Schaffer v. Weast, 546 U.S. 49 (2005). After careful consideration of the evidentiary record and of the thoughtful arguments of both Parties, I find that the Parents have carried their burden of proving by more than a preponderance of the credible evidence that Boston Public Schools is not currently providing a free appropriate public education to Wilma and that the IEP proposed for the 2012-2013 school year is not custom tailored to address Wilma’s unique education needs. D.B. v. Esposito, 675 F.3d 26 (1st Cir. 2012). 20 U.S.C. 1414 (d). My reasoning follows:

At the outset I note that the Hearing record is sparse. Documents relevant to the School’s procedural practices and to the development of the two IEPs in the record may indeed exist. This Decision, however, is based only on the official Hearing record. That record leads me to conclude that an interplay of procedural lapses and inattention on the School’s part resulted in a denial of a free appropriate public education to Wilma during the 2011-2012 school year.

First, the 2011-2012 IEP was not produced in a timely manner. The Team met in March 2011 to develop the 2011-2012 IEP. The resulting IEP was not sent to the parents until mid-August 2011, five months later. This substantial delay impeded the Parents’ ability to secure alternate or additional evaluations, observations, or opinions regarding the usefulness of a one-to-one aide for Wilma. 34 CFR 300. 322, 323. The delay also obscured the fact that despite Parent and teacher concerns about Wilma’s frequent obstructionist and inappropriate classroom behaviors, no formal behavioral observations or functional behavioral evaluations took place as part of the Team planning process. (Kennedy) Further none were proposed. Nor were any direct behavioral services proposed in the 2011-2012 IEP. Though the 2011-2012 IEP refers to a behavior intervention plan none was included with the IEP and neither of Wilma’s teachers recalled seeing one. (P-16, S-9; Kennedy; Grubb) The 2011-2012 IEP also refers to “additional supports” for developing pro-social behaviors but does not elucidate those supports, or assign them to a setting or instructor. Instead, the number of adults permanently assigned to Wilma’s classroom was reduced from 3 in 2010-2011 to 2 in 2011-2012. 34 CFR 300,324 (1) (2) (i).

Second, the record reflects that Boston’s inattention to Wilma’s needs and her Parents’ requests for assistance were not confined to the development of the 2011-2012 IEP, but persisted throughout the school year. For example I credit the parents’ assertion that the October 2011 report of Dr. Yu of the LADDERS Program was sent to Boston during the fall 2011. The Team did not reconvene nor were the Parents or Dr. Yu contacted to discuss his recommendations. Also, although Wilma’s teachers testified that she made noticeable behavioral progress over the course of the 2011-2012 school year, no contemporaneous data were kept or submitted to support those assertions. (Grubb, Kennedy) When the Team reconvened on March 12, 2012 to discuss Wilma’s 2011-2012 performance and to plan for the 2012-2013 school year, Boston handed the Parents a fully developed IEP to sign. The Parents were thus effectively shorn of their right to participate in the evaluation and planning phase of their daughter’s IEP process. Interestingly, though Boston witnesses recalled discussing Dr. Yu’s report and the Parents’ renewed request that a 1:1 aide be assigned to Wilma at the March 12, 2012 Team meeting, the N-1 that followed that meeting, dated March 15, 2012, noted that no options other than those set out in the IEP had been discussed or considered by the Team. The proposed IEP did not address the Parents’ concerns about Wilma’s access to the curriculum without the requested one to one aide. Furthermore the N-1 did not explain why some direct special education and related services had been reduced, some added, and some settings changed. Without that information, and the evaluations and recommendations supporting those actions, the Parents could not reasonably be expected to knowingly exercise their right to accept or reject the proposed 2012-2013 IEP.

Most disturbing, however, is the issue of Wilma’s access to the curriculum. Mr. Kennedy, Ms. Freed and Mr. Grubb testified that due to her visual impairment Wilma uses the tools available to her on a laptop computer to participate in all aspects of her school day. The laptop is Wilma’s primary mode of access to the general curriculum. (Kennedy; Freed; Grubb; see also: P-11; S-1; P-13; P-16; S-9) Mr. Grubb stated that with the laptop Wilma could access “most” of the 8th grade Civics curriculum. (¶P-4 ) Mr. Kennedy stated that Wilma uses the laptop for “everything.” (¶2) Yet at the time of the hearing Wilma had been without a functioning laptop for at least four weeks. No one explained at the hearing how, or if, Wilma was participating in classroom instruction or assignments, completing homework, or otherwise accessing the full range of educational opportunities available daily to her non-disabled peers. No one at the hearing explained how, or if, instructional methods were modified or alternate accommodations were put in place to address the absence of Wilma’s primary means of access to the curriculum. No one at the hearing knew whose responsibility it was to ensure that Wilma had a working computer, and no one took on that responsibility on her/his own. No one knew the process for securing a repair or replacement for the computer. No one knew when a repair or replacement might be available for Wilma to use. I am persuaded by these facts that Boston has, since at least April 2012, failed to ensure that Wilma has had meaningful access to the general curriculum, has failed to ensure appropriate implementation of the accepted portions of her 2011-2012 IEP, and has neglected its responsibility to reconvene the Team to develop additional or alternate methods of meeting its obligations to Wilma under the IDEA and M.G.L. c 71B.

These findings do not specifically address the issue originally brought to the BSEA for resolution: Whether Wilma requires the full time assistance of a dedicated paraprofessional in order to receive a free appropriate public education. The evidence on that discrete issue, removed from its context, is insufficient to support a reasonable finding. On the one hand there is the unrebutted testimony of Mr. Kennedy, Mr. Grubb and Ms. Freed that Wilma has demonstrated growth in academic and behavioral skills over the course of the 2011-2012 school year without the assistance of a paraprofessional. On the other hand, in addition to the direct recommendation of Dr. Yu, there is ample evidence to support a reasonable inference that absent the assistance of a paraprofessional Wilma has not been able to participate in the general curriculum at all for a significant period of time.

It cannot be known with certainty whether the presence of a 1:1 aide dedicated to Wilma during the 2011-2012 school year would have averted or shortened the time during which she has been denied a free appropriate public education due to the lack of her primary means of access to the curriculum. There is no evidence in the hearing record directly bearing on this precise issue. I can only infer that it would be simpler for one person to assume daily responsibility for ensuring that the tools and accommodations necessary for one student to participate meaningfully in school as an individual aide would do, than it is to supervise the implementation of 7 IEPs as Mr. Kennedy must. Therefore I find that further evaluation is necessary to determine whether Wilma requires a 1:1 aide to implement her IEP, to ensure her full access to the general curriculum and environment, and to support her social and behavioral growth. (BSEA Rule X (B) (12). Boston shall immediately arrange, with the Parents’ consent, a comprehensive independent evaluation to be conducted by a person or facility with substantial expertise in the evaluation of, and program development for, students with visual impairments, learning disabilities, and related behaviors. The evaluation must include, at a minimum, the following components: a functional vision assessment, a functional behavioral evaluation, psychoeducational and academic assessments, assistive technology assessment, and an observation of Wilma in school and in at least one community setting. The evaluator(s) should be prepared to make specific recommendations to the Team, to assist in the development of an appropriate IEP, to remain available to the Team for consultation during the implementation phase, and to testify at a further hearing, if necessary. In addition Boston shall arrange for an assessment (by an independent person or facility with expertise in the education of students with visual impairments) of the physical, technological and instructional environment of the HPM School as Wilma’s unique needs. This assessment must be completed no later than October 2012.

In the interim Boston shall take the following measures, at a minimum, to ensure that Wilma has full and complete access to her special education program at all times:

a) Boston shall immediately provide Wilma with a working laptop computer loaded with all necessary and appropriate software and assistive-technology;

b) Boston shall ensure that an equivalent replacement laptop computer is provided to Wilma immediately if her laptop requires adjustment, repair or replacement;

c) Boston shall ensure that an additional adult trained in the learning and technology needs of students with visual impairments and with experience in implementing positive behavioral supports is present in any education environment in which Wilma participates;

d) Boston shall ensure that all teachers, aides and related service providers who are part of Wilma’s school day are appropriately trained to handle the technology and learning needs of students with visual impairments.

ORDER

The Parent has proven by a preponderance of the evidence that Boston has failed to ensure that Wilma received a free appropriate public education during the 2011-2012 academic year. The evidence concerning whether Wilma currently requires the assignment of a dedicated 1:1 aide in order to access a full education program is incomplete and equivocal. Therefore the Hearing is suspended to allow time for the Parties to develop additional information. Boston shall immediately arrange for a comprehensive independent educational evaluation of Wilma. The Parties shall reconvene the Team at the conclusion of that evaluation to develop a new IEP for Wilma. The Hearing record will remain open for receipt of that evaluation and any associated testimony. The Parties shall submit written status updates on August 31, 2012 indicating their availability for a hearing in September 2012, if necessary. Boston shall also report on its compliance with the interim measures outlined in this Decision.

By the Hearing Officer

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Dated: June 27, 2012

1. “Wilma” is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public. [↑](#footnote-ref-1)
2. Parents’ Exhibit #3 was admitted de bene for authentication of handwriting on the document. Due to oversight authentication did not occur. The proposed exhibit is, however, otherwise identical to the document submitted by the School as S-2. Therefore P-3 will remain in the record for its typed content only. Any handwritten additions will be disregarded. [↑](#footnote-ref-2)