The Lindsey R. Case:

Increased Stability for Parents and Districts

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The 7th Circuit Appeals Court has brought stability to certain important areas of special education law. This stability will benefit parents, districts, and students in the future.

We would like to call your attention to the Seventh Circuit Federal Appellate Court decision of *Board of Education of Township High School District 211 v. Michael and Diane Ross et al.*, decided on May 11, 2007. This was an appeal of Federal court decision filed by the Hon. Matthew Kennelly on August 15, 2005, in which the school district prevailed on a so-called "full inclusion" issue. The administrative hearing phase of this case took forty-two days over a span of seven months, resulting in a written Administrative decision in excess of sixty pages. There were over 10,000 pages of transcripts and a like amount of documentary evidence. The Appellate Court referred to this case as "*Ross I*" because shortly after the issuance of Judge Kennelly's opinion in favor of the school district, the family, on behalf of the student who had by then reached her majority, sued the parties again. This second case was decided by Judge Plunkett, again in favor of the school district and was also appealed, resulting in a second opinion by the Appellate Court, issued the same day as *Ross I*, and labeled by the Court as "*Ross II*." The appellate panel in both *Ross I* and *Ross II* held in favor of the school district, however the decisions solidified areas of the special education law that will favor both parents and districts going forward.

In this case, we represented School District #211 and the central issue was the "full inclusion" of a profoundly delayed student with severe disabilities. It is our understanding that *Ross I* was the longest special education hearing ever held in any state, even though the record is replete with numerous attempts by the school district to settle the matter.[1] The Appellate Court in *Ross I* held that trial Judge Matthew Kennelly was correct in his support of the administrative hearing officer's detailed and comprehensive decision in favor of the school district.

The Appellate Court outlined the facts of the case, stating that the student is a girl with Rett Syndrome, the effects of which are apraxia (speech, hand, and gross motor movements) and significant and profound cognitive delays. She is nonverbal and requires appropriate assistive technology for communication. The student also suffers from numerous medical ailments, some of which require periodic hospitalization. Uncharacteristic to Rett Syndrome generally, the student was also unintentionally aggressive to herself and other staff members, resulting in frequent and significant injuries.

As can be seen in the attached decision, which is similar to the *Beth B.* Federal appellate decision, the school district went to extraordinary measures in an attempt to defer to the parents' wish to have their daughter educated in a mainstream environment. However, after nearly three years of trying, due to the student's extensive and unique

[1] For example, the parents rejected numerous offers of full payment for private facilities both on and off the ISBE state approved list of nonpublic facilities nationwide, stating they wanted their daughter to be "fully included" rather than placed in a program geared to intensively teach the functional skills the district personnel sincerely felt she needed to learn.

disabilities, district staff determined that she desperately required more intensive programming than could be provided in the traditional high school classes preferred by the parents. The district decided to take a principled position over and above parental objections and recommended that she be placed in a self-contained, multi-needs classroom, at full district expense, after numerous offers of appropriate private placements were rejected. The parents disagreed with this recommendation, asserting that the school district should create an appropriate program for the student in her "home school," and insisted that she be educated "within her own community." This was a classic "full inclusion" dispute.

The Appellate Court described the staff's ethical expression of conscience that was presented at an IEP meeting in August 2003:[2]

> *By the end of her ninth grade year…staff members who worked closely with Lindsey sincerely believed she was receiving virtually no educational benefit in the mainstream. Based on these beliefs, public school personnel recommended a placement at a separate school designed to appropriately meet Lindsey's needs.*
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> *[T]he belief among District #211 staff that Lindsey is not being appropriately served in the mainstream still exists…However, staff is also advised by legal counsel that the settlement agreement continues to control and therefore they will in good faith implement whatever IEP is agreed upon today. Were it not for the settlement agreement, as a matter of conscience, public school personnel would continue to recommend an appropriate public or private self-contained setting.*

The parents interpreted this statement as a "predisposition" of the IEP by school staff. In fact, the Appellate Court took it as it was: a sincere expression of concern on the part of the staff that the controlling settlement agreement was forcing them to make a recommendation that they felt ethically they could not make without explanation.

At the conclusion of the exceptionally lengthy administrative proceedings, the hearing officer thoroughly considered all of the evidence and held for the District that a self contained multiple needs program was the minimally restrictive and appropriate placement where the student could receive a free and appropriate public education. Subsequent to publication of the case by LRP, parents appealed at the Federal court level, and Judge Matthew Kennelly, in a written opinion, supported the hearing officer, dismissing the parents' claims.[3] Parents then appealed the decision to the Seventh Circuit, which resulted in the attached opinion.[4] In parallel with *Lindsey I*, another lawsuit was filed against District 211 and certain individuals shortly after the trial level decision was filed by Judge Kennelly. This action was ostensibly on behalf of the student, who had reached her majority and allegedly had decided to proceed independently, even though

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[2] This statement was drafted by Brooke Whitted during a break in the IEP meeting after staff expressed their heartfelt concern that their decisionmaking was being guided by an active settlement agreement which was compelling them to recommend a placement they did not feel was appropriate.

[3] Board of Educ. of Tp. High School District No. 211 v. Ross, 105 LRP 40802 (N. D. Ill. Aug. 15, 2005)

[4] Board of Educ. of Tp. High School District No. 211 v. Ross, 2007 WL 1374919 (7th Cir. 2007)

there were serious questions about her capacity to do so. Judge Plunkett, in another written opinion, also held for the school district on the basis that they had already had their day in court in *Lindsey I* and shouldn't be given another bite of the apple.[5] This decision was also appealed by the student and her parents, which resulted in a second Appellate Court decision in favor of the school district.[6] Both cases are significant for parents and schools for the reasons examined below.

Implications of *Ross II* – Finality of Settlement Agreements

Shortly after the District Court issued its opinion in *Ross I*, Lindsey and her parents filed a second federal suit against the school district, its Director of Special Education, and a medical expert who appeared in the administrative hearing for the district. Damages were sought, however the second case arose from the same facts as the first case. The only difference was that Lindsey had reached her majority, and was ostensibly suing on her own behalf with her parents as her next friends. Judge Plunkett held in favor of the school district based on claim preclusion and the Appellate Court in *Ross II* affirmed.

The *Ross II* case is a positive development for both parents and school districts in special education cases. In the case of parents as plaintiffs, often school lawyers are reluctant to settle special education matters because, they argue, a student can reach his or her majority and sue the district all over again on his or her own behalf. The *Ross II* case puts this argument to rest and conforms this issue to the well established federal policy of encouraging non-court resolution of special education disputes. Likewise, school districts need no longer worry (in this jurisdiction) about the adult former student coming after them even after the parents have sued previously. In other words, *Ross II* benefits both parents and school districts by bringing increased stability and finality to settlement agreements entered into by parents on behalf of their children. The Seventh Circuit has made it clear that once parents bring such actions, the student is precluded from having another bite of the litigation apple once he or she becomes an adult. Current case law now more strongly encourages amicable settlement in conformity with the IDEIA policy.

Implications of *Ross I* – Parental Participation and LRE

The *Ross I* case is quite complex due to its chronology and the controlling settlement agreement that led to the administrative hearing being held, pursuant to a Federal court order, in the first place. We will not summarize the full chronology of the case here but suggest a close reading of the attached opinion for those who are interested, especially pages 4-9. The court mentions that the administrative hearing officer (hereafter "IHO") held that the parents were *maximally* involved in the IEP process, including its implementation and modification – contrary to the position of the parents. This is in full compliance with the *Rowley* case in which the US Supreme Court required, as far back as 1982, that parent involvement must be maximized. The court compares the

[5] Ross v. Board of Educ. of Tp. High School Dist. 211, 2006 WL 695471 (N. D. Ill. Mar. 14, 2006)
[6] Ross ex rel. Ross v. Board of Educ. of Tp. High School Dist. 211, 2007 WL 1374863 (7th Cir. 2007)

facts in *Ross I* with the *Target Range* case (where the IEP was prepared without any parent participation) and concludes *Ross I* is a "far cry" from *Target Range*.

The court also makes short work of the parents' arguments that the school district was biased from the beginning due to the statement of conscience (outlined above) as well as the fact that the district had a lawyer positioned at the courthouse and ready to file, depending on what the IEP participants decided. The court felt that the statement of conscience was just that, and that the lawyer-at-the-courthouse argument did not have the sinister meaning the parents attached to it.

Finally, the court deals with the least restrictive environment ("LRE") issue in which parents argued that as long as Lindsey is receiving "some benefit" she must be kept in the mainstream. The court said this was not enough, and instead asked whether education in the conventional school was satisfactory, and if not, whether reasonable measures would have made it so. The court listed some examples of how the school district attempted in good faith to serve Lindsey educationally, concluded that these were proper attempts, and that the decision to move the student to a more restrictive setting complied with relevant statutes and decisional case law.

It is clear that in this jurisdiction, with *Ross I* and the *Beth B.* cases, the LRE definition is not education with nondisabled students to the maximum extent *possible.* LRE in the Seventh Circuit means education to the maximum extent *appropriate*, with appropriate being the controlling term.

Conclusion

Ross I and *Ross II* bring increased stability to two special education areas. In the LRE area, the Seventh Circuit takes a common sense approach and unequivocally rejects the complicated multi-tiered tests developed in other circuits. An LRE analysis is now simpler and more concrete and easy for both educators and parents to comprehend and implement. In the public policy area, *Ross II* lays to rest the possibility that a student whose parents have prosecuted a hearing or settled a special education claim on his or her behalf could, upon reaching majority come back after a school district on the same issues. This lends stability to decisions made by hearing officers and judges and encourages settlement agreements because all claims will be fully resolved with no doubts about the future. Both cases are therefore quite beneficial for all parties in special education cases going forward.

One final point deserves mention. While these cases concern a public school district, the reasoning is consistent with cases involving private schools, where plaintiffs seek to force these institutions to change in some fundamental way. Courts will not generally support such efforts in either the public or private sector as long as the facility is otherwise legally compliant. We feel the Ross cases help to bring clarification and stability to both public and private sectors on this issue.