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No. 51

Jesus Fuentes, as a Parent of a
Disabled Child,
Appellant,

v.

Board of Education of the City of
New York, Barry Mastellone,
Administrator of the HHVI of the
Board of Education of the City of
New York, and Denise Washington,
Chief Administrator of the
Impartial Hearing Office of the
Board of Education of the City of
New York,

Respondents.

David J. Lansner, for appellant.
Scott Shorr, for respondents.

JONES, J.:

In this certified question case, we are called upon to
decide whether a non-custodial parent retains the right to make
decisions regarding the child's education where the divorce
decree and custody order are silent on this issue. The pertinent
facts of this case are recited below.

Plaintiff Jesus Fuentes and his wife were divorced in 1996. Family Court entered an order granting the wife exclusive custody of the three children, including a son, M.F., who, due to a genetic disorder, was legally blind. M.F. attended public school in New York City and received special education services to accommodate his disability.

In 2000, plaintiff believed that M.F.'s special education services and accommodations were inadequate and requested a reevaluation. When the Committee on Special Education for the Hearing, Handicapped, and Visually Impaired responded that M.F.'s services were adequate, plaintiff requested a hearing from the Impartial Hearing Office of the New York State Department of Education to review that determination. In 2001, plaintiff's request for a hearing was denied based on his status as the non-custodial parent of M.F. The Office concluded that because plaintiff was not the "person in parental relation" (Education Law § 3212), he did not have the right to make educational decisions pertaining to M.F. and, consequently, did not have a right to request a hearing.

Plaintiff then commenced an action in the United States District Court for the Eastern District of New York alleging, among other things, that he was denied his right under the federal Individuals with Disabilities Education Act (IDEA) to a hearing to review the determinations of the Board of Education. After a dismissal, appeal, and remand on issues not pertinent to

the certified question, the district court dismissed plaintiff's case for lack of standing under the IDEA. On appeal, the United States Court of Appeals for the Second Circuit found that no precedent from this Court directly addressed the dispositive issue and certified the following question:

"Whether, under New York Law, the biological and non-custodial parent of a child retains the right to participate in decisions pertaining to the education of the child where (1) the custodial parent is granted exclusive custody of the child and (2) the divorce decree and custody order are silent as to the right to control such decisions"

(Fuentes v Board of Educ of the City of New York, 540 F3d 145, 153 [2d Cir 2008]).

The purpose of the IDEA is to provide "all children with disabilities" with a "free appropriate public education" (20 USC § 1400 [d] [1] [A]). Such an education must include "special education and related services" designed to meet the particular needs of the child (20 USC § 1401 [9]). A qualifying child's educational needs "and the services required to meet those needs must be set forth at least annually in a written individualized education plan ('IEP')" (M.C. ex rel. Mrs. C. v Voluntown Bd. of Educ., 226 F3d 60, 62 [2d Cir 2000]). A "parent" who is dissatisfied with an IEP "may file a complaint with the state or local educational agency," to be resolved through a due process hearing (id. at 62-63).

The Second Circuit previously discussed a non-custodial parent's rights under the IDEA in Taylor v Vermont Dept. of Educ.

(313 F3d 768 [2d Cir 2002]). In Taylor, a non-custodial parent demanded a hearing under the IDEA even though her Vermont divorce decree expressly provided that the custodial parent was "allocate[d] all legal rights and physical rights regarding the choice of schooling for the child" (id. at 772). The Court concluded that the federal statutory scheme required the courts to turn to state law "to establish which potential parent has authority to make special education decisions for the child" (id. at 779). Applying Vermont law, the Court held that the non-custodial parent lacked standing to request a hearing under the IDEA because her "parental right to participate in her daughter's education has been revoked by a Vermont family court" (id. at 782).

This case presents an issue unanswered by Taylor -- namely, whether a non-custodial parent has the right to initiate a hearing under the IDEA where the New York divorce decree and custody order grant exclusive custody to the custodial parent but are silent as to who has the authority to make decisions concerning the child's education. In Weiss v Weiss (52 NY2d 170 [1981]), a Judge of this Court first alluded to the principle that a custodial parent has the right, absent controlling contrary provisions in a separation agreement, to determine the child's secular and religious education program (id. at 177 [Meyer, J. concurring]). It is now well settled in the Appellate Division that, absent specific provisions in a separation

agreement, custody order, or divorce decree, the custodial parent has sole decision-making authority with respect to practically all aspects of the child's upbringing (see e.g., Fedash v Neilsen, 211 AD2d 1003 [3d Dept 1995]; De Luca v De Luca, 202 AD2d 580 [2d Dept 1994]; De Beer v De Beer, 162 AD2d 165 [1st Dept 1990]; Stevenot v Stevenot, 133 AD2d 820 [2d Dept 1987]; Bliss v Ach, 86 AD2d 575 [1st Dept 1982]).

In appropriate circumstances, courts routinely include specific provisions in custody orders addressing decision-making authority between the parents (see e.g., Wideman v Wideman, 38 AD3d 1381 [4th Dept 2007]; Chamberlain v Chamberlain, 24 AD3d 589 [2d Dept 2005]; Davis v Davis, 240 AD2d 928 [3d Dept 1997]). Plaintiff asks this Court to recognize an implied right of non-custodial parents to exercise decision-making authority with respect to their child's education notwithstanding the custody order's silence on this subject. We decline to do so and emphasize the importance of parties determining these issues at the time of separation or divorce.

Finally, we note the distinction between a non-custodial parent's right to "participate" in a child's education and the right to "control" educational decisions. Generally, there is nothing which prevents a non-custodial parent (even one without any decision making authority) from requesting information about, keeping apprised of, or otherwise remaining interested in the child's educational progress. Such parental

involvement is to be encouraged. However, unless the custody order expressly permits joint decision-making authority or designates particular authority with respect to the child's education, a non-custodial parent has no right to "control" such decisions. This authority properly belongs to the custodial parent. In light of our discussion, we see fit to reformulate the certified question to read as follows:

Whether, under New York Law, the non-custodial parent of a child retains decision-making authority pertaining to the education of the child where (1) the custodial parent is granted exclusive custody of the child and (2) the divorce decree and custody order are silent as to the right to control such decisions.

Accordingly, as reformulated, the certified question should be answered in the negative.

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Following certification of a question by the United States Court of Appeals for the Second Circuit and acceptance of the question by this Court pursuant to section 500.27 of the Rules of Practice of the New York State Court of Appeals, and after hearing argument by counsel for the parties and consideration of the briefs and the record submitted, certified question, as reformulated, answered in the negative. Opinion by Judge Jones. Judges Ciparick, Graffeo, Read, Smith and Pigott concur. Chief Judge Lippman took no part.

Decided April 30, 2009