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When parents divorce, schools can be caught in the middle

For non-custodial parents, the issue can be rights – or respect

By the New York State Association of School Attorneys

At your neighborhood supermarket, you pass a neighbor who, unfortunately, is going through a bitter divorce. "I'm glad I ran into you because I wanted to talk to you," he says. "I'm being treated unfairly by your district. They told me I couldn't attend my daughter's parent-teacher conference because my ex-wife didn't want me there. And she wants the school to stop giving my son resource room. Just because I don't have custody doesn't mean I have no rights when it comes to my kids' education!"

You tactfully promise to refer the matter to district's legal counsel. As you return to your shopping list, you wonder: Do non-custodial parents have any legal rights? What does a district do if divorced parents cannot agree on an educational decision? How can a district avoid getting tangled up in the acrimony that often accompanies a divorce or separation?

Answers to many of these questions can be found in a recent New York State Court of Appeals decision in *Fuentes v. Board of Education of the City of New York*, which addressed the issue of whether or not a non-custodial parent has the right to make decisions about his or her child's education absent a court order expressly granting decision-making authority. The court also discussed rights of the non-custodial parent to receive information about, and generally participate in, their child's education.

In *Fuentes*, a student received special education services to accommodate a disability. A re-evaluation of the student was conducted by the school district. At the committee on special education (CSE) meeting at which the results of the re-evaluation were discussed, a consensus was reached that the special education services provided to the student were adequate. The father disagreed and requested an impartial hearing to review the determination. The mother, however, believed that the district was providing her son with what the law requires – a free appropriate public education (FAPE). She did not want an impartial hearing.

The school district determined that the father, as non-custodial parent, did not have the right to make educational decisions, and thus did not have the right to request an impartial hearing. While the divorce decree explicitly awarded custody to the mother, it was silent on the issue of whether or not the non-custodial father had a right to participate in educational decisions. The father filed a federal lawsuit alleging that he was denied his legal right to request an impartial hearing to review the CSE's determination.

A federal district court dismissed the father's case based on its reading of New York law on who qualifies as a parent with legal rights. It concluded that a non-custodial parent had no right to make educational decisions where the divorce decree and custody order were silent on the issue of who has the power to make educational decisions for the child.

The father appealed to the U.S. Court of Appeals for the Second Circuit, which certified the legal issue for decision to the New York State Court of Appeals, the highest court in New York State. In its decision, the Court of Appeals made it clear, for the first time, that non-custodial parents have no implied right to "exercise decision-making authority with respect to their child's education notwithstanding the custody order's silence" on the issue. The ultimate decision-making power under the federal Individual with Disabilities Act (IDEA) – i.e., the right to invoke a due process hearing – rests with the custodial parent, absent some other agreement in the divorce decree or custody order.

The court took pains, however, to explain what it considered to be an important distinction between the right to participate in, versus the right to control, the child's education. It stressed that a non-custodial parent should be encouraged to participate and be involved in the child's education. Generally, the non-custodial parent has a right to the student's records and to receive notice of, and participate in, parent-teacher meetings. The court said schools should encourage parental activities such as discussing a child's strengths and weaknesses with teachers, attending and encouraging participation in extracurricular activities, assisting the child with homework, and providing input in the CSE process towards developing the student's educational placement and program.

While the decision only discussed parent-teacher conferences in passing, it clearly favored the inclusion of non-custodial parents. The fact that parents are not getting along or the custodial parent doesn't want the non-custodial parent present at a meeting is not a valid legal reason to bar the non-custodial parent from participating. The burden is on the custodial parent to obtain an affirmative court order that strips the non-custodial parent of the right to participate in his or her child's education.

In a case decided subsequently, *Zeichner v. Mamaroneck UFSD,* the question arose as to what are the responsibilities of the district where there is no divorce decree because the parents were never married. Like *Fuentes,* the case involved an educational decision regarding a disabled student. The CSE recommended that the student be evaluated for possible learning disabilities. The mother, who had actual physical custody, had initiated the request for testing. The father disagreed and sent a letter to the district stating that "he was adamantly opposed" to his son's undergoing the testing requested by the mother.

The father filed suit in state Supreme Court seeking an injunction to prevent his son from being tested. He did not seek to invoke an impartial hearing. The district defended by asserting that the father had failed to exhaust his administrative remedies.

Unlike the *Fuentes* court, the state Supreme Court in *Zeichner* found for the father and against the district. It held that under the circumstances presented, the father had an equal right to make educational decisions for the child and, thus, he had standing to object to his son's evaluation and seek injunctive relief. The court held that the father was not required to exhaust his administrative remedies because there was no available administrative remedy that could compel the district to stop the evaluation. The father's only recourse was to go directly to court to seek injunctive relief.

What should school board members, school administrators and school attorneys glean from these holdings? The law is clear that the district is not legally required to honor the educational decisions of the non-custodial parent where the divorce decree explicitly provides that the custodial parent has the right to make educational decisions or where it awards custody to one parent and is silent as to the other's authority to make educational decisions. However, where parents have joint decision-making authority, but cannot agree, the legal obligations of the district are less than clear. It appears that in such a situation either parent can invoke due process rights under the IDEA.

Several issues remain unanswered. These include where a special education student should be placed in cases when one parent has consented to a change but the other has not, and the divorce decree provides joint decision-making authority. Also unsettled is whether both parents have the right to fully participate as a party in formal hearings.

It is clear, however, that unless the divorce decree takes away the right of non-custodial parents to receive educational records, attend meetings and otherwise generally participate in their child's education, districts should be sensitive and responsive to the rights of non-custodial parents. Understanding that emotions run high in this type of situation, it is incumbent on school personnel to explain, clearly and compassionately, the rights of non-custodial parents and the legal limits placed on these rights. It should be stressed that the non-custodial parent's input is valued, but that, if no consensus can be reached, the ultimate decision is that of the custodial parent, unless the divorce papers provide otherwise. That should go a long way towards building a rapport that may lead to a positive joint decision in the best interests of the child.

Awareness of the law and working closely with your school attorney and administrative team is the best way to ensure that the rights of all parents are acknowledged and unnecessary litigation is avoided. You may even be able to avoid some awkward conversations at the local supermarket.

Members of the New York State Association of School Attorneys represent school boards and school district. This article was written by Robert H. Cohen of Lamb & Barnosky, LLP, a law firm on Long Island. For a copy of this article with case references, see www.nysasa.org. We gratefully acknowledge New York State School Boards Association's permission to reprint this article.

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