

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term 2008

4 (Argued: January 29, 2008

Decided: June 15, 2009)

5 Docket No. 06-4715-pr

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7 JESUS FUENTES, as a Parent of a Disabled Child,

8 Plaintiff-Appellant,

9 -- v. --

10 BOARD OF EDUCATION OF THE CITY OF NEW YORK, BARRY

11 MASTELLONE, Administrator of the HHVI of the Board of

12 Education of the City of New York, and DENISE

13 WASHINGTON, Chief Administrator of Impartial Hearing

14 Office of the Board of Education of the City of New

15 York,

16 Defendants-Appellees.

17 -----x

18 B e f o r e : WALKER, CALABRESI, and RAGGI, Circuit Judges.

19 Plaintiff-Appellant Jesus Fuentes appealed from an order of
20 the United States District Court for the Eastern District of New
21 York (Frederic Block, Judge) dismissing his complaint on behalf
22 of himself and his disabled son, pursuant to the Individuals with
23 Disabilities Education Act, that challenged the adequacy of

1 special education services in his son's public school. The
2 district court dismissed Plaintiff's complaint on the basis that
3 Plaintiff, as the non-custodial parent of the child, lacked
4 standing to bring such an action. We certified a question to the
5 New York Court of Appeals. Having received an answer from that
6 court, we now AFFIRM the judgment of the district court.

7 LAWRENCE W. POLLACK, Dewey &
8 LeBoeuf LLP (Lisa A. Keenan, Dewey
9 & LeBoeuf LLP, Rebecca C. Shore and
10 Miranda B. Johnson, Advocates for
11 Children of New York, Inc., and
12 David J. Lansner, Lansner
13 Kubitschek Schaffer & Zuccardy, on
14 the brief) New York, NY, for
15 Petitioner-Appellant.

16
17 SCOTT SHORR, Senior Counsel, for
18 Michael A. Cardozo, Corporation
19 Counsel, City of New York Law
20 Department, New York, NY, for
21 Respondents-Appellees.

22
23 PER CURIAM:

24 The facts of this case are set forth in detail in our
25 earlier opinion in this case. See Fuentes v. Bd. of Educ. of
26 City of N.Y., 540 F.3d 145, 146-48 (2d Cir. 2008). In relevant
27 part, Jesus Fuentes ("Fuentes"), the biological and non-custodial
28 parent of Mathew Fuentes ("Mathew"), a disabled child, challenged
29 the special education services Mathew received from the New York
30 public schools as inadequate. Id. at 147. After the Committee
31 on Special Education for the Hearing, Handicapped, and Visually
32 Impaired determined that Fuentes, as Mathew's non-custodial

1 parent, did not have the right to participate in educational
2 decisions affecting Mathew, Fuentes filed a pro se complaint in
3 the United States District Court for the Eastern District of New
4 York against the New York City Board of Education under 42 U.S.C.
5 § 1983 and Section 1415(f) (1) of the Individuals with
6 Disabilities Education Act ("IDEA"), 20 U.S.C. § 1415(f) (1)
7 seeking, inter alia, to vindicate rights granted by the IDEA.

8 The district court twice dismissed Fuentes's case for lack
9 of standing on the basis that under New York law, a non-custodial
10 parent has no right to make special education decisions for the
11 child. Fuentes, 540 F.3d at 147-48. On appeal of the second
12 dismissal, although "lower court authority strongly indicates
13 that under New York law a non-custodial parent does not retain
14 the right to participate in educational decisions for the child,"
15 we could find "no controlling New York Court of Appeals authority
16 on point." Id. at 153. In light of the "paramount state
17 concern" posed by custodial arrangements, we certified the
18 following question to the New York Court of Appeals:

19 Whether, under New York law, the biological and
20 non-custodial parent of a child retains the right to
21 participate in decisions pertaining to the education of
22 the child where (1) the custodial parent is granted
23 exclusive custody of the child and (2) the divorce decree
24 and custody order are silent as to the right to control
25 such decisions.

26
27 Id.

28 The New York Court of Appeals accepted this case on

1 certification and modified the question as follows:

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

8
9 Fuentes v. Bd. of Educ. of City of N.Y., 12 N.Y.3d 309, 314
10 (2009) (emphasis added).

11 On April 30, 2009, it issued its decision answering the
12 question in the negative. See id. The Court of Appeals
13 explained that "unless the custody order expressly permits
14 joint decision-making authority or designates particular
15 authority with respect to the child's education, a non-
16 custodial parent has no right to 'control' such decisions.
17 This authority properly belongs to the custodial parent."
18 Id.

19 As we have explained, where a plaintiff "does not have
20 the authority to make educational decisions on behalf of [a
21 child]," the parent "lacks standing to demand a hearing
22 under the IDEA on the appropriateness of defendants' IEP
23 evaluation." Taylor v. Vermont Dep't of Educ., 313 F.3d
24 768, 782 (2d Cir. 2002). Consequently, the appropriate
25 question, for standing purposes, is not whether the non-
26 custodial parent may "'participate' in a child's education,"
27 but rather, whether such a parent has "the right to
28 'control' educational decisions." Fuentes, 12 N.Y.3d at

1 314. The New York Court of Appeals concluded that, under
2 New York law, a non-custodial parent lacks the decision-
3 making authority to "control" a child's education when
4 neither the custody order nor the divorce decree explicitly
5 provides Fuentes, the non-custodial parent, any authority
6 respecting Mathew's education. Id. The holding of the New
7 York Court of Appeals therefore resolves the present suit,
8 and we conclude that Fuentes lacks standing to sue as a
9 "parent" under the IDEA.

10 For the foregoing reasons, the judgment of the district
11 court is AFFIRMED.