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LEONOR ALCANTARA, individually and as)
Guardian ad Litem for E.A.; LESLIE)
JOHNSON, individually and as Guardian) OAL DOCKET No:
ad Litem for D.J.; JUANA PEREZ,	) EDU 11069-2014S
individually and as Guardian ad Litem)
for Y.P.; TATIANA ESCOBAR	) Agency Ref. No.:
individually; and IRA SCHULMAN,	) 156-6/14
individually and as Guardian ad Litem)
for A.S.	) BRIEF IN SUPPORT
	) OF MOTION FOR
Plaintiffs,	) LEAVE TO
	) PARTICIPATE AS
v.	) AMICUS CURIAE
DAVID HESPE, COMMISSIONER OF THE NEW	) PURSUANT TO
JERSEY DEPARTMENT OF EDUCATION; the	) N.J.A.C. 1:1-16.6
NEW JERSEY STATE BOARD OF EDUCATION;)
and the NEW JERSEY DEPARTMENT OF)
EDUCATION)
)
Defendants)
-----)

Petitioners, Leslie Johnson, individually and on behalf of D.J.; Juana Perez, individually and on behalf of Y.P.; Ira Schulman, individually and on behalf of A.S.; and Martina Pineda Castellanos, individually and as Guardian ad Litem for G.M., by and through their attorney hereby submit this brief in support of Paul L. Tractenberg's motion for an order granting leave to participate as amicus curiae pursuant to N.J.A.C. 1:1-16.6.

Introduction

This motion should be a simple one to resolve. Pursuant to R. 1:1-16, a movant can be given leave to "participate" in a matter before the OAL, either as an intervenor or amicus curiae, if the movant can demonstrate a significant interest in the proceeding and, in the case of an amicus, the ability to assist the tribunal and the parties to resolve the matter effectively. For an amicus, the significant interest standard can be satisfied by a demonstrated commitment to the public interest and the ability to help the tribunal to advance that interest. The decision on the motion is largely at the discretion of the ALJ.

There is no doubt that this matter strongly implicates the public interest, involving as it does the constitutional right of Lakewood students to a "thorough and efficient" education. Similarly, there can be no doubt that Professor Tractenberg's participation can help to advance that interest. His motion should be granted and we should proceed to the merits of this important case without further delay.

Professor Tractenberg has a significant interest in this matter.

Ever since he joined the Rutgers law faculty in 1970, Professor Tractenberg's main professional and academic focus

has been on advancing the educational interests of New Jersey's public school students, especially those for whom an excellent education is crucial to their life prospects. That includes students who are low income, limited English proficient, disadvantaged and disabled. Although his work has involved virtually every cutting edge educational issue of those four and a half decades, the centerpiece has been school funding reform and the educational reforms that equalized funding can provide.

It is true that most of his school funding advocacy has been on behalf of students in poor urban districts, but the *Bacon* case and ELC's involvement in it expanded the focus to poor rural districts.

Ironically, although Lakewood has been a party to *Bacon*, it is already among the largest municipalities in the state and growing more rapidly than any other. When properly measured, it is among the poorest school districts in the state and an overwhelming percentage of its public school students is low income and many are LEP. Thus, Lakewood fits squarely within Professor Tractenberg's longstanding professional and academic interests and his long pursuit of the public interest.

Beyond that, however, Professor Tractenberg has had a

direct connection with the constitutional and educational issues involving the Lakewood school district for the past three years, ever since I was a student in his Education Law and Policy seminar at the law school. My seminar paper dealt with the Lakewood district and ever since then Professor Tractenberg and I have remained in periodic contact about the situation and, more recently, about this case that I filed on behalf of Lakewood students.

By virtue of his expertise and long experience, Professor Tractenberg can assist the tribunal and the parties.

Paul L. Tractenberg is the Rutgers Board of Governors Distinguished Service Professor and the Alfred C. Clapp Distinguished Public Service Professor of Law at Rutgers Law School-Newark. **In 1973**, he established and for three years directed the Education Law Center. In 2000, he established the Rutgers Institute on Education Law and Policy Center, an interdisciplinary applied research program, and he continues to direct it.

Professor Tractenberg was heavily involved in litigating *Abbott v. Burke*, and its predecessor case, *Robinson v. Cahill*, the most important state court cases of the twentieth century, as overwhelmingly voted by New Jersey judges and lawyers.

In *Robinson*, he was the main Rutgers lawyer representing

amici curiae ACLU of New Jersey and the NAACP Newark chapter education committee throughout the litigation in the trial court and New Jersey Supreme Court. In *Abbott*, he was involved in the OAL, trial court, appellate division and supreme court as a result of the Education Law Center's legal representation of the urban student plaintiffs throughout the litigation. All told, in *Robinson* and *Abbott*, Professor Tractenberg has argued before the New Jersey Supreme Court 14 times.

Professor Tractenberg's unique experience and expertise can assist the tribunal and the parties in dealing with the complexities of New Jersey's school funding and education laws and their relationship to the state constitution's education clause in the context of the Lakewood school district's distinctive character. Professor Tractenberg's expertise and experience can assist with regard to both a determination of constitutionality and an appropriate remedy should the finding be one of unconstitutionality.

A major benefit of Professor Tractenberg's expertise and long experience with New Jersey school funding and other litigation will be his ability to assist the tribunal to penetrate to the essence of the constitutional and educational issues raised by this case, which, when the minutiae and distractions are stripped away, is conceptually quite simple:

1) the unique demographic status of Lakewood, 2) the failure of the state school funding laws, and the calculation of state aid under them, to reflect and respond to that unique status; and 3) the resulting violation of the constitutional rights of Lakewood public school students.

Granting Professor Tractenberg's motion for leave to participate in this case as amicus curiae is clearly within the ALJ's discretion and he should exercise his discretion by doing so.

Despite Professor Tractenberg's unique expertise and long experience in the very type of litigation that is now before the OAL, and his lifelong advocacy for and interest in the welfare of public school children, State Respondents oppose the participation of Professor Tractenberg as amicus. Student Plaintiffs do not know why State Respondents object or the basis of any such opposition, particularly in this case.

R. §1:1-16.6 of the OAL provides that any "person or entity with a significant interest in the outcome of a case may move for permission to participate." Under this rule, "[p]articipation is the administrative hearing's equivalent of *amicus curiae*." 37 *New Jersey Practice, Administrative Law and Practice* § 5.21, at 262 (Steven L. Lefelt, et al.).

Ironically, Judge Lefelt was the ALJ in *Abbott* who presided over a lengthy trial and issued a massive recommended decision

to the commissioner of education that, ultimately, became the foundation of the New Jersey Supreme Court rulings of unconstitutionality in *Abbott*.

A search of "amicus" in the Rutgers New Jersey Administrative Law Decisions database produced 44 cases since 1997.¹ The terminology of "significant interest" in R. §1:1-16.6 does not limit participation to persons with financial or personal interest, but also includes experts with professional or intellectual interests. The Uniform Administrative Procedure Rules (UAPR) assume the participation of law professors and other "disinterested" experts, disinterested in the sense that they have no personal or financial interest. Canon 3 of the Code of Judicial Conduct for Administrative Law Judges provides that on "notice, a judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge, by amicus curiae or as otherwise authorized by law, if the judge affords the parties reasonable opportunity to respond." N.J.A.C. 1:1, Appx. (2015). According to the official commentary, the "proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not *participants* in the proceeding." (emphasis added). Hence, for

¹<http://njlaw.rutgers.edu/collections/oal/>

Professor Tractenberg and other "disinterested" experts to be able to assist the ALJ or a judge in complex cases such as this one, they must have the status of "participants" pursuant to R. §1:1-16-6.

The "significant interest" of an amicus under R. §1:1-16.6 should be distinguished from a "substantial" or "direct" interest of an intervenor.²

To act as an amicus, one must have some interest in the outcome of the suit. This interest may consist in being the attorney of record in a pending suit involving similar questions, **a specific public interest**, the desire to protect a minor's estate, the desire to prevent a collusive suit, **pointing out error to the court** or the protection of a criminal defendant. However, to intervene, one must have a direct interest in the *res* of the suit." Frank M. Covey, Jr., *Amicus Curiae: Friend of the Court*, 9 DePaul L. Rev. 30, 31 (1959-1960) (emph. added).

Although the precise outer limits of the Rule's key phrase—"significant interest," might be debated, there seems little or no doubt that Professor Tractenberg's career-long commitment to the educational rights of New Jersey's students, especially those who labor under a disadvantage, constitutes a "specific public interest" in this proceeding, and that his expertise and long experience can assist the tribunal to avoid error.

² Rule §1:1-16.1 provides that anyone "who will be substantially, specifically and directly affected by the outcome of a contested case, may on motion, seek leave to intervene."

Several other relevant points are equally clear. First, the participation of amicus is a matter for the "sound discretion" of the tribunal. The cases, federal and state, supporting that proposition are legion. For a recent New Jersey example, see *In the Matter of the State of New Jersey, through the Essex County Prosecutor's Office, Compelling the Jury Manager to Provide Information on Prospective Jurors*, 427 N.J.Super. 1, 6 (Law Div. 2012). In that case, the court permitted the ACLU of New Jersey to participate as amicus even though it tended to favor one party's position:

The ACLU-NJ has established that it meets the requirements of Rule 1:13-9. First, the ACLU-NJ filed its motion in a timely manner. Second, the ACLU-NJ's participation will assist in resolving an issue of public importance. The ACLU-NJ's expertise on privacy issues, and its experience participating as amicus curiae in other cases involving the jury selection process, will assist the court in resolving the privacy issues presented in this case. Third, while the position of the ACLU-NJ is clearly more aligned with that of the Public Defender and the defense bar than that of the State, no party to the litigation will be unduly prejudiced by the ACLU-NJ's participation. This case has broad implications and is of general public interest because the results of the case will affect the experiences of many prospective jurors. Therefore, the relevant court rule and case law support the participation of the ACLU-NJ in this matter.

Second, law professors are typically allowed to participate as amici in the United States Supreme Court. One commentator noted that "[d]uring the 2010 Term, in which the Supreme Court decided 85 cases, it received 56 briefs on behalf of groups of

self-identified legal scholars or law professors. . . .³

³ Brief of Amicus Curiae Nicholas Johnson in Support of Petitioners, *Am. Elec. Power Inc.*, 131 S.Ct. 2527 (No. 10-174), 2011 U.S. S. Ct. Briefs LEXIS 184; Brief of Law Professors as Amici Curiae in Support of Petitioners, *Am. Elec. Power Inc.*, 131 S.Ct. 2527 (No. 10-174), 2010 U.S. S. Ct. Briefs LEXIS 2268 (urging that the Court grant certiorari) and for respondent (Brief Amici Curiae of Tort Law Scholars in Support of Respondents, *Am. Elec. Power Inc.*, 131 S.Ct. 2527 (No. 10-174), 2011 U.S. S. Ct. Briefs LEXIS 368 Brief of Environmental Law Professors as Amici Curiae in Support of Respondents, *Am. Elec. Power Inc.*, 131 S.Ct. 2527 (No. 10-174), 2011 U.S. S. Ct. Briefs LEXIS 372; Brief of Law Professors as Amici Curiae in Support of Respondents, *Am. Elec. Power Inc.*, 131 S.Ct. 2527 (No. 10-174), 2011 U.S. S. Ct. Briefs LEXIS 360); *AT&T v. Concepcion*, 131 S. Ct. 1740 (2011), in which there were four briefs in support of respondent (Brief of Civil Procedure and Complex Litigation Professors as Amici Curiae in Support of Respondents, *AT&T*, 131 S.Ct. 1740 (No. 09-893), 2010 U.S. S. Ct. Briefs LEXIS 1940; Brief of Federal Jurisdiction Professors as Amici Curiae in Support of Respondents, *AT&T*, 131 S.Ct. 1740 (No. 09-893), 2010 U.S. S. Ct. Briefs LEXIS 1932; Brief of Contracts Professors as Amici Curiae in Support of Respondents, *AT&T*, 131 S.Ct. 1740 (No. 09-893), 2010 U.S. S. Ct. Briefs LEXIS 1934; Brief of Arbitration Professors as Amici Curiae in Support of Respondents, *AT&T*, 131 S.Ct. 1740 (No. 09-893), 2010 U.S. S. Ct. Briefs LEXIS 1936) and one in support of petitioner (Brief Amici Curiae of Distinguished Law Professors in Support of Petitioner, *AT&T*, 131 S.Ct. 1740 (No. 09-893), 2010 U.S. S. Ct. Briefs LEXIS 1042); and *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060 (2011), in which there were two briefs for petitioner (Brief Amici Curiae of 41 Law, Economics, and Business Professors in Support of Petitioner, *Global-Tech Appliances, Inc.*, 131 S. Ct. 2060 (No. 10-06) 2010 U.S. S. Ct. Briefs LEXIS 2329; Brief Amici Curiae of 26 Law, Economics, and Business Professors in Support of Petitioner, *Global-Tech Appliances, Inc.*, 131 S. Ct. 2060 (No. 10-06) 2010 U.S. S. Ct. Briefs LEXIS 2054) and one for respondent (Brief of Law Professors, as Amicus Curiae, in Support of Respondent, *Global-Tech Appliances, Inc.*, 131 S. Ct. 2060 (No. 10-06), 2010 U.S. S. Ct. Briefs LEXIS 5). In four additional cases, there was one professors' brief on each side. See *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011) (Brief for Law Professors Robert Bartlett, et al, as Amici Curiae in Support of Petitioners, *Erica P. John Fund, Inc.* 131 S. Ct. 2179 (No. 09-1403), 2010 U.S. S. Ct. Briefs LEXIS 306; and, Brief of Law Professors as Amici Curiae in Support of Respondents, *Erica P. John Fund, Inc.* 131 S. Ct. 2179 (No. 09-1403), 2010 U.S. S. Ct. Briefs LEXIS 424); *Mayo Found. v. U.S.*, 131 S. Ct. 704 (2011) (Brief of Amicus Curiae Professor Kristin E. Hickman in Support of Respondent, *Mayo* 131 S. Ct. 704 (No. 09-837), 2010 U.S. S. Ct. Briefs LEXIS 1925; and, Brief of Tax Professor Carlton M. Smith as Amicus Curiae in Support of the Petitioners, *Mayo* 131 S. Ct. 704 (No. 09-837), 2010 U.S. S. Ct. Briefs LEXIS 1260); *Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653 (2011) (Brief for Dr. Khaled el Emam and Jane Yakowitz, Esq. as Amici Curiae for Respondents, *Sorrell* 131 S.Ct. 2653 (No. 10-779), 2011 U.S. S. Ct. Briefs LEXIS 433; and, Brief of Amici Curiae Electronic Privacy Information Center (EPIC) and Legal Scholars and Technical Experts in Support of the Petitioners, 131 S.Ct. 2653 (No. 10-779), 2011 U.S. S. Ct.

Richard H. Fallon, Jr., *Scholars' Briefs and the Vocation of a Law Professor*, 4 J. LEGAL ANALYSIS 223, 223-24 (2012). In one recent case, the Court ordered the parties to "be prepared to address at oral argument the arguments raised in the brief of Professor Stephen E. Sachs as amicus curiae in support of neither party." *Atlantic Marine Construction Co. v. United States District Court for the Western District of Texas* 571 U.S. ____ (Dec 3, 2013).⁴

Although some courts have been less hospitable to law professor amici briefs, including sometimes the federal 3rd Circuit, two prominent judges of that circuit have spoken out strongly against that view. One, Judge Higginbotham, wrote that "[E]ven in a court as learned as ours, we might be able to avoid some unnecessary catastrophes if we have the will and the patience to listen to legal educators." *American College of Obstetricians & Gynecologists v. Thornburgh*, 699 F.2d 644,647 (3rd Cir. 1983) (Higginbotham, J., dissenting). Judge (now Justice) Alito, writing for the Third Circuit almost two

Briefs LEXIS 267); and *Stern v. Marshall*, 131 S. Ct. 2592 (2011) (Brief of Amici Curiae Law Professors S. Todd Brown, G. Marcus Cole, Ronald D. Rotunda, and Todd J. Zywicki in Support of Respondent, *Stern* 131 S. Ct. 2592 (No. 10-189) 2010 U.S. S. Ct. Briefs LEXIS 2346; and, Brief in Support of Petitioner for Amici Curiae Professors Richard Aaron, et al, *Stern* 131 S. Ct. 2592 (No. 10-189) 2010 U.S. S. Ct. Briefs LEXIS 2094). Fallon at 265-66. nt. 3

⁴ <http://www.scotusblog.com/case-files/cases/atlantic-marine-construction-co-v-united-states-district-court-for-the-western-district-of-texas/>

decades after *American College*, wondered about this “sharply divided panel . . . [questioning] whether or not the *American College* panel was correct in its narrow interpretation of Rule 29's ‘interest’ requirement. . . .” *Neonatology Associates, P.A. v. C.I.R.*, 293 F.3d 128, 131 (3rd Cir., 2002).

One of the issues in dispute among some federal judges has been whether adequate representation of both parties negates the need for amici curiae. Justice Alito has strongly rejected that view.

“Denying motions for leave to file an amicus brief whenever the party supported is adequately represented would in some instances deprive the court of valuable assistance.” 293 F.3d at 132.

Although I believe that I am adequately representing my clients in this matter, in fairness I have to reiterate that, by many benchmarks, I am an underdog litigating this case against the State and its hundreds of lawyers. After all counsel for the plaintiffs/petitioners is a full-time public school teacher and a part-time lawyer without the benefit of a law firm, legal assistance or staff, let alone access to hundreds of lawyers.

In that context, Professor Tractenberg could play a crucially important role, not as an advocate for the plaintiffs/petitioners, but as the foremost authority in the

state, if not the nation, on school funding litigation and related education reform issues. As indicated, he could assist the parties and the tribunal in fairly resolving the complex issues, and his participation as amicus would meet even the strictest judicial standards.

Given the strong public interest aspects of this case, its complexity, and the elusive nature of its issues, a learned amicus curiae is necessary.

Many courts have recognized that “[T]he classic role of amicus curiae [is] by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration.” *Miller-Wohl Co., Inc. v. Commissioner of Labor and Industry State of Mont.*, 694 F.2d 203, 204 (9th Cir. 1982).

Historically, the role of amicus was “to provide impartial information on matters of law about which there was doubt, especially in matters of public interest. *U.S. v. State of Mich.*, 940 F.2d 143, 164 (6th Cir. 1991).

“Courts should grant leave ‘when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.’” *Ryan v. Commodity Futures Trading Com'n*, 125 F.3d 1062, 1063 (7th Cir. 1997, citations omitted)

New Jersey also accepts this traditional role of amicus as the "disinterested" friend of the court rather than the interested partisan. "Amicus curiae has been said to be one who gives information to the court on some matter of law in respect of which the court is doubtful, or who advises of certain facts or circumstances relating to a matter pending for determination. *Casey v. Male*, 63 N.J.Super. 255, 258 (N.J. Super. 1960).

Under New Jersey Court Rules, the amicus is required to state:

"The nature of the public interest therein and the nature of the applicant's special interest, involvement or expertise in respect thereof. The court shall grant the motion if it is satisfied under all the circumstances that the motion is timely, the applicant's participation will assist in the resolution of an issue of public importance, and no party to the litigation will be unduly prejudiced thereby." R. 1:13-9.

Those standards clearly have been satisfied by Professor Tractenberg's motion and he should be granted leave to participate in this case as amicus curiae. Student petitioners, whose own Board of Education has refused to support their petition or assist with their legal effort, support the application of Professor Paul L. Tractenberg to participate as a friend of the court.

Respectfully Submitted,

Arthur H. Lang, Esq.
Dated January 28, 2015