

IN THE SUPREME COURT OF OHIO

**STATE EX REL. CITIZENS FOR)
COMMUNITY VALUES, INC. :**

208 East State Street, 2nd Floor)
Columbus, Ohio 43215 :

ORIGINAL ACTION IN MANDAMUS

**STATE EX REL. GENOA CHRISTIAN :
ACADEMY)**

7562 Lewis Center Road :
Westerville, Ohio 43082)

STATE EX REL. MONCLOVA)
CHRISTIAN ACADEMY :

7819 Monclova Road)
Monclova, Ohio 43542 :

STATE EX REL. JEN BECKER :

3515 Beekley Woods Drive)
Cincinnati, Ohio 45241 :

JACOB BOWLING :

5760 Headgates Road)
Hamilton, Ohio 45011 :

JENNIFER BOWLING :

5760 Headgates Road)
Hamilton, Ohio 45011 :

JODI DIDOMENICA :

258 E. 323rd Street)
Willowick, Ohio 44095 :

JASON DUBEANSKY :

7916 Butterfly Street)
Painesville, Ohio 440077 :

KATHLEEN DUBEANSKY :

7916 Butterfly Street)
Painesville, Ohio 440077 :

LYNETTE FILSON :

10391 Misty Ridge Drive)
Painesville, Ohio 44077 :

| | |
|--------------------------------|---|
| DANIEL GARMAN | : |
| 2129 Blanton Drive |) |
| Miamisburg, Ohio 45342 | : |
| |) |
| ABBY GARMAN | : |
| 2129 Blanton Drive |) |
| Miamisburg, Ohio 45342 | : |
| |) |
| KORINNA GLENN | : |
| 6062 Spring Lake Drive |) |
| Hamilton, Ohio 45011 | : |
| |) |
| GUYNN GREEN | : |
| 5526 Edisto Drive |) |
| Fairfield Township, Ohio 45011 | : |
| |) |
| DANNY GREEN | : |
| 5526 Edisto Drive |) |
| Fairfield Township, Ohio 45011 | : |
| |) |
| TONYA HARRISON | : |
| 1025 Oakmont Avenue |) |
| Hamilton, Ohio 45013 | : |
| |) |
| VANESSA LUCKEY | : |
| 9601 Wildbrook Lane |) |
| Cincinnati, Ohio 45231 | : |
| |) |
| JACKIE MOSKAL | : |
| 11935 Oakhurst Avenue |) |
| Concord, Ohio 44077 | : |
| |) |
| JOHN PAVOSEVIC | : |
| 111 E 213th Street |) |
| Euclid, Ohio 44123 | : |
| |) |
| SUSAN PAULIC | : |
| 10661 Buckingham Place |) |
| Painesville, Ohio 44077 | : |
| |) |
| CINTHIA PICCIUTO | : |
| 7036 Austin Pointe Drive |) |
| Concord Twp, Ohio 44077 | : |
| |) |
| NICOLE SACKENHEIM | : |
| 455 Sheerin Drive |) |

| | |
|---|---|
| Hamilton, Ohio 45013 | : |
| |) |
| Relators, | : |
| |) |
| -v- | : |
| |) |
| GOVERNOR MIKE DEWINE | : |
| 77 South High St., 30 th Floor |) |
| Columbus, Ohio 43215 | : |
| |) |
| OHIO DEPARTMENT OF EDUCATION: | : |
| 25 South Front Street |) |
| Columbus, Ohio 43215-4183 | : |
| |) |
| STATE BOARD OF EDUCATION | : |
| c/o LAURA KOHLER, PRESIDENT |) |
| 25 South Front Street | : |
| Columbus, Ohio 43215-4183 |) |
| | : |
| PAOLA DEMARIA, OHIO |) |
| SUPERINTENDENT OF PUBLIC | : |
| INSTRUCTION |) |
| 25 South Front Street | : |
| Columbus, Ohio 43215-4183 |) |
| | : |
| Respondents. |) |

COMPLAINT FOR A WRIT OF MANDAMUS

Michael A. Roberts, Esq. (0047129)
 Brian W. Fox, Esq. (0086851)
(Counsel of Record)
 Graydon Head & Ritchey LLP
 312 Walnut St., Suite 1800
 Cincinnati, Ohio 45202
 (513) 629-2799
 Fax: (513) 333-4330
 mroberts@graydon.law
 bfox@graydon.law
Attorneys for Relators

PETITION AND COMPLAINT FOR WRIT OF MANDAMUS

This action is brought in the name of the State of Ohio on the relation of (i) the Citizens for Community Values, Inc.; (ii) the “School Relators,” Genoa Christian Academy and Monclova Christian Academy; and (iii) nineteen “Family Relators,” Jen Becker; Jacob and Jennifer Bowling; Jodi DiDomenica; Jason and Kathleen Dubeansky; Lynette Filson; Daniel and Abby Garman; Korinna Glenn; Guynn and Danny Green; Tonya Harrison; Vanessa Luckey; Jackie Moskal; John Pavosevic; Susan Paulic; Cinthia Picciuto; and Nicole Sackenheim. Together these Relators file this Petition for a Writ of Mandamus. The allegations in the Complaint are supported by the Affidavit of Aaron Baer (the “Baer Affidavit,” filed contemporaneously herewith).

INTRODUCTION

Late on January 31, 2020, Ohio’s General Assembly passed, on a *non-emergency* basis, and Governor DeWine signed, Senate Bill 120 (“SB120”) which purports to *immediately* postpone the vested February 1, 2020, scholarship awarding process for tens of thousands of Ohio students under Ohio’s Educational Choice Scholarship (“EdChoice”) Program.

In addition to causing irreparable harm to Ohio’s children and families (including the Family Relators) the attempted postponement of the award of EdChoice Scholarships and the apparent plan to materially change who will receive EdChoice Scholarships deleteriously impacts hundreds of Ohio’s public and private schools (including the School Relators).

In relevant part, SB120 states: “up to \$10,000,000 **in fiscal year 2021** shall be used to pay scholarships” and the Ohio Department of Education (“ODE”) “shall (delay the time to) accept, process, and award...scholarships (until) April 1, 2020...”

However, SB120 is not in effect and will not have any effect until May 1, 2020, if then, because: (1) the relevant appropriation is not an appropriation “for the current expenses of the state government and state institutions;” and (2) SB120 was not passed on an “emergency” basis and there was no separate vote to make SB120 an emergency bill. (*See*, Sections 1c and 1d, Article II, Ohio Constitution; *State ex rel. Ohio AFL-CIO v. Voinovich* (1994), 69 Ohio St.3d 225, 236, 631 N.E.2d 582).

Thus, the EdChoice Scholarship law in place prior to January 31, 2020, remains in place. And, as of February 1, 2020, the ODE is violating the law by refusing to receive, process, and award EdChoice Scholarships.

Moreover, these EdChoice Scholarships for tens of thousands of Ohio’s children became a vested right in November 2019 when a population of eligible students was identified and they and their families began making decisions to receive EdChoice Scholarships. For those families and children, their desire to choose an educational experience they deem best for the 2020-2021 academic year cannot now be revoked (should the General Assembly now attempt to materially reduce the number of children entitled to EdChoice Scholarships under the law). (*See*, Article II, Section 28 of Ohio’s Constitution: “general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts...”).

Thus, the General Assembly may not now pass any law modifying the population of children eligible to receive EdChoice Scholarships for the 2020-2021 academic year. That patently unlawful effort would “affect acts or facts occurring, or rights accruing” and offend Ohio’s Constitution. *Bielat v. Bielat*, 87 Ohio St.3d 350, 353, 721 N.E.2d 28 (2000). For that reason, the right of Ohio’s citizens to apply for and obtain EdChoice Scholarships for 2020-2021 is vested and may not be rescinded or modified in any way.

Dozens, if not hundreds, of Ohio's public and private schools have taken steps (including important decisions with regard to staffing, budgets, and facilities) since November 1, 2019, to operate consistent with the applicable law when the pool of EdChoice Scholarship eligible students was objectively identified. Requiring those families and schools to "sit tight" while the General Assembly attempts to revoke those scholarships, which may or may not occur, is against the law and an unjustifiable and overwhelming burden that threatens to irreparably harm schools and families.

For all of these reasons, a Writ of Mandamus must be issued forthwith directing the ODE to immediately, as applicable law requires, accept, process, and award EdChoice Scholarships. The Relators right to require the ODE to perform its obligations is clear, and there is no valid excuse for Respondents not being directed to immediately take all steps necessary to accept and process EdChoice Scholarship applications and award scholarships.

PARTIES / JURISDICTION

1. Relator Citizens for Community Values ("CCV") is an Ohio not for profit corporation with a principal place of business in Franklin County, Ohio. CCV sometimes does business as the Ohio Christian Education Network ("OCEN"), which is a coalition of schools and community members. Some of those schools participate in the EdChoice Scholarship program and educate Ohio's children who deem those schools best for them.

2. Relator Genoa Christian Academy ("GCA") is a private Christian School in Westerville, Ohio that accepts EdChoice Scholarships. A number of public schools located near GCA appeared on the EdChoice-Designated list for the first time in 2019, which led to an increase in families expressing interest in sending their children attending GCA. The 60-Day freeze causes irreparable harm to GCA because the school budgets and plans for the next school year in mid-February based on the enrollment applications and trends. This affects what staff

they will hire, whether they need to split classes, and what programming they can have for the following school year.

3. Relator Monclova Christian Academy (“MCA”) is a private Christian school in Monclova, that accepts EdChoice Scholarships. Like GCA, a number of public schools located near MCA appeared on the EdChoice-Designated list for the first time in 2019, which led to an increase in families expressing interest. Due to the General Assembly’s actions, MCA will not know which families will be able to afford to attend next year, which creates incredible problems for the school as it attempts to budget, hire staff, and plan classes.

4. Relator Jen Becker of Cincinnati and her husband both work as full-time teachers in order to pay tuition for their 10th grade son enrolled in high school at Cincinnati Christian Schools. Jen receives a discount on tuition since she teaches at CCS and volunteers outside of school hours, but this still leaves approx. \$5,000 on her son’s tuition. Their son was assigned to Princeton City High School on the EdChoice Designated List. Their daughter graduates high school this year, and the family had planned to help her with college tuition. Furthermore, without the scholarship, the Beckers are unsure how they can properly save for retirement and budget going forward.

5. Relators Jacob and Jennifer Bowling of Hamilton are the parents of four children, who all attend Cincinnati Christian School. Two of the children are currently in High School at Cincinnati Christian, and under the new list of EdChoice-designated schools, would have been eligible for the EdChoice Scholarship for the 2020-21 school year. This would have saved the family upwards of \$12,000 per year.

6. Relator Jodi DiDomenica of Willowick has a daughter in middle school that will be going into 9th grade next year. She currently attends Willowick Middle School and is

assigned to an EdChoice designated high school for 2020-2021. Without the EdChoice scholarship, her daughter will be forced to attend high school with a student who bullied her in school. The registration and sign-up for classes at Lake Catholic is February 22nd. Losing the EdChoice Scholarship would be devastating for the family.

7. Relators Jason and Kathleen Dubeansky of Painesville have a daughter who will be entering 9th grade and their assigned high school is on the EdChoice Designated List, without the \$6,000 scholarship, their daughter will be forced to attend the high school where she feels unsafe.

8. Relator Lynette Filson, also of Painesville, was excited that her options for choosing the best school for her two sons expanded with the EdChoice Designated list last November. Her oldest is currently in high school, and her younger son will be a freshman this fall. However, because of the delay, she lost her ability to choose as her preferred school's enrollment deadline is in three weeks, well before the delay is set to end. Without the delay, Evan could have joined his older brother Liam at his high school, but now he will be going to another school as his family cannot afford the \$26,000 out of pocket for them both to go to the high school.

9. Relators Daniel and Abby Garman of Miamisburg have four children and live in Miamisburg, Ohio. Two of their children are assigned to an Ed-Choice Designated elementary school that appeared on the EdChoice designated list for the first time for the 2020-2021 school year. The current fourth grader has attended public school in the past, and was on an IEP. When the child was in public school, they had such a negative experience, the family decided to home educate. Yet after Bauer elementary re-appeared on the EdChoice list, they re-enrolled the child

for the remainder of the school year, so they could be eligible to send them to Dayton Christian on the scholarship next year.

10. Relator Korinna Glenn and her husband have two boys in 10th grade and 7th grade. Both are enrolled at Cincinnati Christian School, though assigned to EdChoice Designated List schools within the Fairfield City School District. In expectation of receiving an EdChoice scholarship for their older son, Korinna put the costs of car repairs on their credit card, thinking that they would be paying less for tuition. Her husband is a new small business owner and she works full-time for a catalog company. In order to make ends, she has a photography business on the side as well. They have already incurred credit card debt and will have to take out of his 401K in order to make ends meet.

11. Relators Guynn and Danny Green are the parents of two boys currently in 11th and 6th grade at Cincinnati Christian Schools (CCS). In 2018, they moved out of the Winton Woods school district into Fairfield City, which had elementary, middle, and high schools on the November 4th EdChoice Designated List. Her younger son has epilepsy, and both parents work full time in addition to working three janitorial and supervision shifts at CCS in order to decrease tuition. In anticipation of the EdChoice scholarship, Guynn and Danny adjusted their budget and began making down payments on home improvements. Without the scholarship, they may be forced to forfeit payments made.

12. Relator Tonya Harrison is the parent of a current sophomore at CCS. She and her husband both work full-time jobs. Her daughter was assigned to a Hamilton public high school on the EdChoice Designated List. In expectation of the EdChoice scholarship, the Harrisons planned to make urgent home improvements. Now they may be forced to pull from their home equity in order to pay off the remaining costs for their needed home repairs.

13. Relator Vanessa Luckey and her husband are the parents of two children with medical and special needs. Her daughter is a recipient of the Jon Peterson Special Needs Scholarship and attends St. Rita. Her son is a sophomore student at Cincinnati Christian Schools. Making just above 200% the federal poverty level, she takes on janitorial work at the school to reduce tuition, as in addition to seeking financial help from her father. She works for \$12 an hour at a nonprofit organization for additional income. Her son was assigned to Winton Woods High School and they expected to receive an Ed Choice scholarship in reliance on the Nov. 4th EdChoice Designated List. In expectation of the scholarship, Vanessa had planned to work with her dad on making much-needed improvements on her home, without the scholarship these repairs may now be impossibility.

14. Relator Jackie Moskal of Concord and her husband have four children, and were thrilled to be eligible for EdChoice for the first time in November. With a new college freshman, and the rest of their children graduating every two years, without EdChoice, they will have to choose between sending their older children to college or their younger children to their preferred high school. This year alone, it cost them \$40,000 out of pocket to send all of their children to school.

15. Relator John Pavosevic of Euclid and his wife have two children attending private school and assigned to schools on the new EdChoice Designated List. Despite passing levies, John says that the school district seemed to get worse and worse every year in education and safety, including news media coverage on school violence involving students and teachers. Without the EdChoice scholarship, John would have to get a second job, as his wife is disabled and cannot work. Has already had to dip into \$401K to purchase another used car after his

previous used car was totaled in a collision, and they are not certain how they will get by without the EdChoice scholarship.

16. Relator Susan Paulic of Painesville has been working to put her two children in a school that excels academically, has rigorous extracurricular, and excellent sports teams. She wants to continue sending her children to the school they have been excelling in, but is worried that she won't be able to afford it even with how much she's working. With their local assigned school appearing on the EdChoice Designated list, EdChoice would give her the true choice to be able to choose the best education option for her kids to be successful.

17. Relator Cinthia Picciuto of Concord Twp. and her husband chose to send their son to Notre Dame-Cathedral Latin School because of its Catholic faith community, extensive extracurricular programs, and rigorous college-preparatory curriculum. However, it comes at a great cost, as they have to drive their son 14 miles each way to school and back every single day, on top of the tuition. The EdChoice scholarship would have dramatically reduced the strain on their budget.

18. Relator Nicole Sackenheim of Hamilton has a pre-schooler currently attending Immanuel Luther Pre-School. She wanted to enroll him for Kindergarten, but has now been forced to delay her decision. Ultimately, because priority enrollment began on February 1st, and public enrollment begins March 1st, Nicole feels like she's being forced to send her son to a failing public school. She's worried about how that will affect her son's health, whose has high anxiety that has been greatly mitigated by the small class sizes and more personalized attention from his teachers.

19. These Family Relators are all citizens and residents of the State of Ohio with a child or children who have a vested right to an EdChoice Scholarship.

20. The Respondents, the Governor, the Ohio Department of Education (“ODE”), the State Board of Education of Ohio, and Paola Demaria, the Ohio Superintendent the Board of ODE govern and control ODE’s compliance with the presently applicable EdChoice Scholarship law.

21. This Court possess jurisdiction over the subject matter of this action and over Respondents pursuant to Article IV, Sec. 4.02(B) of the Constitution of the State of Ohio and Ohio Rev. Code 2731.02.

FACTS

22. Ohio’s EdChoice Scholarship program was started in 2005 to provide opportunities to students assigned to certain public schools. (*See*, R.C. 3310.01 – 3310.17).

23. An EdChoice Scholarship is currently \$4,650 for grades K-8 and \$6,000 for grades 9-12. EdChoice pays either the Scholarship amount or the private school’s tuition, whichever is less. Participating private schools are required to accept the Scholarship as full tuition for students whose families are at or below 200 percent of the federal poverty level.

24. The present cap on EdChoice Scholarships is 60,000 (with the potential for increase). Approximately 29,000 are provided EdChoice Scholarships in the 2019-2020 academic year.

25. In November 2019, a published list of 1,227 schools identified the population of students eligible for EdChoice Scholarships. On that basis, thousands of families then made important education, housing, and other decisions.

26. And pursuant to R.C. 3310.16, the application period for an EdChoice Scholarship was to open on February 1, 2020. That is, as of February 1, 2020, Respondent ODE

was obligated to “open” and begin “accept(ing)” and “process(ing)” applications for the “award(ing)” of scholarships for the 2020-2021 academic year.

27. Students currently receiving an EdChoice Scholarship can renew that scholarship for the 2020-2021 school year (and each year through grade 12) as long as they: (a) take all required assessments for their grade level, (b) do not have more than 20 unexcused absences in the 2019-2020 school year, and (c) do not move out of the school district in which they became eligible.

28. New EdChoice Scholarship applicants for 2020-2021 have slightly different requirements.

29. Under the law, as of February 1, 2020, students identified with those 1,227 schools had a vested right to an EdChoice Scholarship through the EdChoice Scholarship program if they met stated conditions.

30. Delaying the EdChoice Scholarship award process causes irreparable harm thousands of children and families are harmed, examples are identified above with respect to the Family Relators.

31. Public schools, too, are harmed by the uncertainty and ambiguous path forward in terms of planning, budgeting, staffing, and forecasting enrollment. The School Relators are harmed as identified above.

32. Dozens, if not hundreds, of Ohio’s public and private schools have taken steps (including making important decisions with regard to staffing, budgets, and facilities) since November 1, 2019, to operate consistent with the applicable law when the pool of scholarship eligible students was objectively identified.

33. Requiring those families and schools to “sit tight” while the General Assembly attempts to substantially change the existing law, which may or may not occur, is against the law and an unjustifiable and overwhelming burden that threatens to irreparably harm schools and families.

SB120 AND THE OHIO CONSTITUTION

34. Late on January 31, 2020, Ohio’s General Assembly passed, on a *non-emergency* basis, and Governor DeWine signed, Senate Bill 120 (“SB120”) which purports to *immediately* postpone the vested February 1, 2020, scholarship awarding process for tens of thousands of Ohio students.

35. In addition to causing irreparable harm to Ohio’s children and families, the attempted postponement and plan to materially change who will receive scholarships deleteriously impacts hundreds of Ohio’s public and private schools.

36. SB120 is an attempt to amend the permanent law of Ohio. In relevant part, SB120 states: “up to \$10,000,000 in **fiscal year 2021** shall be used to pay scholarships...(and) the [ODE] shall (delay the time to) accept, process, and award...scholarships (until) April 1, 2020...” (See, Exh 1A, pp. 20-21; Appropriation Item 200550d).

37. At 9:28pm on January 31, ODE issued an “update” on EdChoice Scholarships to “EdChoice Providers.” It states: “[t]he Governor has signed amendments added to Senate Bill 120 which will take effect immediately. These amendments delay the application window to April 1st for the Traditional EdChoice Program and set up two processes for that program: (i) or newly-eligible students based on the EdChoice Designated List for the 2020-2021 school year, \$10M in state funds is appropriated for a first-come, first-served approach to distribution; (ii) for students who have previously been eligible for a traditional EdChoice scholarship (regardless of

whether they took the scholarship or not), they will continue to be funded through deductions from their resident school districts. The amendments do NOT affect the EdChoice Expansion Program. The application window for the EdChoice Expansion Program will open February 1st, 2020, as required by law. We know you have many questions and we are working on providing you with more information. Thanks.”

38. Despite this guidance by ODE and the language of SB120, Ohio law requires that SB120 not take effect for 90 days in order to allow for referendum. (*See*, Section 1c, Art. II, Ohio Constitution; *State ex rel. Ohioans for Fair Districts v. Husted*, 130 Ohio St.3d 240, 2011-Ohio-5333, 957 N.E.2d 277, ¶ 2 (2011)).

39. There are just three exceptions to this 90 day delay for: (1) laws provide for tax levies, (2) appropriations provide for current expenses, and (3) emergency laws are necessary for the immediate preservation of the public peace, health, or safety. (*See*, *LetOhioVote v. Brunner*, 123 Ohio St.3d 322, 2009 Ohio 4900, ¶ 26). But, none of these exceptions apply for SB120:

- a. The exception for “appropriations for the current expenses of the state government and state institutions” does not apply because the relevant appropriation of SB120 is for “**fiscal year 2021**,” not “current expenses.” (*See*, *State ex rel. Preston v. Ferguson*, 170 Ohio St. 450, 454, 166 N.E.2d 365, 369 (1960); *State ex rel. Janes v. Brown*, 112 Ohio St. 590, 600, 148 N.E. 95, 98 (1925)); and.
- b. The exception for “emergency” legislation does not apply because it is undisputed that SB120 was not enacted as emergency legislation and there was no separate vote identifying SB120 as an emergency bill.

40. Because no exception to the 90 day referendum time applies, changes to the EdChoice Scholarship program contemplated in SB120 have no impact, presently.

41. Accordingly, ODE is presently obligated under the law to “accept, process, and award” EdChoice Scholarships (up to the long accepted legal cap) for qualifying students from the 1,227 schools on the November 2019 list.

42. SB120's attempt to modify the EdChoice Scholarship program can have no effect until May 1, 2020, if ever.

43. A writ of mandamus must issue because there is a clear legal right to the requested relief and a corresponding clear legal duty on Respondents' part. (See, *State ex rel. Heffelfinger v. Brunner*, 116 Ohio St.3d 172, 2007 Ohio 5838, 876 N.E.2d 1231, ¶ 13). In addition, Relators have no adequate remedy at law and relief cannot otherwise be obtained except through this Complaint for a Writ of Mandamus. (See, *State ex rel. LetOhioVote.org v. Brunner*, 123 Ohio St.3d 322, 2009 Ohio 4900, ¶¶15-17)

REQUESTED RELIEF

For the reasons set forth above, Relators respectfully request that this Court:

- A. Issue a preemptory writ of mandamus and/or a writ of mandamus ordering: (1) all Respondents to treat the EdChoice Scholarship Section(s) of SB120 as subject to the constitutional right of referendum; (2) by having the Governor set forth in both the paper and electronic journals kept by the Secretary of State that SB120 shall not be effective until May 1, 2020, if then; (3) the ODE Respondents to immediately begin accepting, processing, and awarding EdChoice Scholarship applications from all eligible as of February 1, 2020; and (4) Respondents to not take any action for the 2020-2021 academic year that would impact the value or amount of EdChoice Scholarships available to the population identified on November 1, 2019;
- B. If the Court requires further evidence or briefing, issue an alternative writ with an expedited schedule for the presentation of evidence and briefs;
- C. Award Relators their litigation expenses, including reasonable attorney fees and costs, incurred in bringing this action; and
- D. Such further and additional relief as is necessary and appropriate.

Respectfully submitted,

/s/ Michael A. Roberts

Michael A. Roberts, Esq. (0047129)

Brian W. Fox, Esq. (0086851)

(Counsel of Record)

Graydon Head & Ritchey LLP

312 Walnut St., Suite 1800

Cincinnati, Ohio 45202

(513) 629-2799

Fax: (513) 333-4330

mroberts@graydon.law

bfox@graydon.law

Attorneys for Relators