

**IN THE CHANCERY COURT OF
DAVIDSON COUNTY, TENNESSEE
TWENTIETH JUDICIAL DISTRICT AT NASHVILLE**

**THE METROPOLITAN GOVERNMENT)
OF NASHVILLE AND DAVIDSON)
COUNTY, METROPOLITAN)
NASHVILLE BOARD OF PUBLIC)
EDUCATION, AND SHELBY COUNTY)
GOVERNMENT,)**

Plaintiffs,)

v.)

) Case No. 20-0143-I

**TENNESSEE DEPARTMENT OF)
EDUCATION, PENNY SCHWINN, in)
her official capacity as Education)
Commissioner for the Tennessee)
Department of Education, and BILL)
LEE, in his official capacity as)
Governor for the State of Tennessee,)**

Defendants,)

BRIA DAVIS, STAR BRUMFIELD,)

Intervenor-Defendants.)

MEMORANDUM IN SUPPORT OF INTERVENTION

Bria Davis and Star Brumfield respectfully move this Court under Tenn. R. Civ. P. 24 to intervene in this matter. Proposed Intervenor-Defendants are parents of schoolchildren in the Nashville school district who will attend Lighthouse Christian School a category two (2) and three

(3) school (Nashville parents). They have interests of the highest order at stake: the education of their children. Nashville parents are not accounted for among the current parties but they respectfully submit that they should be. They fit the criteria for intervention set forth in Tenn. R. Civ. P. 24.01 and 24.02. A proposed Answer-in-Intervention as required under Tenn. R. Civ. P. 24.03 is attached as Exhibit 1. In support of this motion and brief, Nashville parents submit as follows.

INTRODUCTION

Proposed Intervenors, Bria Davis and Star Brumfield, are Nashville parents with children in Nashville public schools who qualify for, and intend on using, the Education Savings Account (ESAs) program. They intend on sending attend Lighthouse Christian Academy, a Category 2, 3, school. The perspective of Nashville parents is crucial. Even as they share in a common question of law with existing parties, they should be allowed to intervene before the fate of the ESA program, and their children’s educational future, is decided.

In short, Nashville parents are exactly who the ESA program is for. Courts routinely grant intervention to the parents of children who wish to rely on a school choice program that has been challenged in court. (Mem. of Intervenor at 4 (Feb. 10, 2020)) (citing cases). Intervention should be allowed because “no one would be hurt and the greater justice could be attained.” *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994); see *Am. Materials Techs., LLC v. City of Chattanooga*, 42 S.W.3d 914, 916 (2000) (Tennessee rule on intervention substantially identical to federal rule). At this early stage, intervention would not prejudice the existing parties, but would permit the parents to protect their children’s

educational future, but also benefit this Court to hear their distinct perspective.

FACTUAL BACKGROUND

According to the state’s website [here](#), the purpose of the Education Savings Account Program (ESAs) is to provide “[l]ow income students the same opportunities as every other kid in this state.”¹ With an ESA, eligible students will have unparalleled educational opportunity and control. Students assigned to schools in Davidson County, Shelby County, or the Achievement School District can use state and local Basic Education Program (BEP) funds toward expenses, such as tuition or fees, at participating private schools. *Id.*

The ESA program

The ESA program is available to the parents of all eligible students who are seventeen (17) years or younger. Tenn. Code. Ann. § 49-6-2603(a). It allows parents access to BEP funds to pay for tuition and fees at private schools, as well as textbooks, tutoring, transportation fees, computer hardware, and a variety of other educational related expenses. Tenn. Code. Ann. § 49-6-2603(a)(4). With any left-over funds, students can save for tuition and textbooks for college or any eligible postsecondary institution. Tenn. Code. Ann. § 49-8-2603(4)(I), (J).

An eligible student is a Tennessee resident in grades kindergarten through twelve (K-12) who:

- meets one (1) of the following enrollment requirements:

¹Also available at: <https://www.tn.gov/content/tn/education/school-options/esa-program.html> (last viewed on Feb. 13, 2020).

- Was previously enrolled in and attended a Tennessee public school for the one (1) full school year immediately preceding the school year for which the student receives an ESA;
 - Is eligible for the first time to enroll in a Tennessee school; or
 - Received an ESA in the previous school year;
- Is zoned to attend a school in Shelby County Schools, Metro Nashville Public Schools, or is zoned to attend a school that was in the Achievement School District on May 24, 2019; and
 - Is a member of a household with an annual income for the previous year that does not exceed twice the federal income eligibility guidelines for free lunch.

Tenn. Code. Ann. § 49-6-2602(3).

Only non-public schools classified as Category one (1), two (2), or three (3) may participate in the ESA program. *See* Tenn. Code Ann. 49-9-2602(9); Tenn. Comp. R & Regs. 0520-01-16.02(11). Tennessee Department of Education (TDOE) describes these categories on its publicly available website [here](https://www.tn.gov/education/school-options/non-public-schools/non-public-school-categories.html).² A Category 1 school has been approved by the state Board of Education. A Category 2 school has been approved by a private school accrediting agency which has been approved by the Tennessee State Board of Education. A Category 3 school has been regionally accredited (by, for example, the Southern Association of Colleges and Schools (SACS)). *See id.* A spreadsheet listing the non-

² Also available at: <https://www.tn.gov/education/school-options/non-public-schools/non-public-school-categories.html> (last viewed on Feb. 13, 2020).

public schools, their categories, and which Local Education Agency (LEA) here.³ See Ex. 2.

Lighthouse Christian School, a participating school.

Lighthouse Christian School is a K-12 school located at 5100 Blue Hold Road in Antioch, TN. Lighthouse states on its publicly available website [here](#) that it endeavors:

to satisfy a student's spiritual, academic, social, and physical needs in the following ways:

1) By striving to offer a chapel program that includes revivals and special events. Additionally, Biblical integration is included in each academic subject and there are several leadership groups that strive to make disciples of fellow students.

2) By providing an excellent academic schedule that exceeds the requirements of the Tennessee Board of Regents.

(3) By offering extracurricular activities that are geared toward addressing the social needs of students.

(4) By providing a sports program including basketball, football, baseball, and soccer for boys; and basketball, volleyball, softball, and cheerleading for girls. We also provide a comprehensive physical education program that begins in Kindergarten.⁴

³ Also available at:

[https://www.tn.gov/content/dam/tn/education/nonpublic/non_pub/non_public_schools_201920%20\(3\).xls](https://www.tn.gov/content/dam/tn/education/nonpublic/non_pub/non_public_schools_201920%20(3).xls) (last viewed Feb. 10, 2020).

⁴ Also available at: <http://www.golcslions.org/welcome-from-head-of-school> (last viewed Feb. 13, 2020).

According to the spreadsheet publicly available on TDOE's website, Lighthouse Christian School is classified as a Category 2 and 3 school. Ex. 2 at 9. The spreadsheet also states that Lighthouse is located in the Davidson County LEA. *Id.*

Lighthouse has submitted an Intent to Participate form to TDOE. Marta W. Aldrich, *These 57 private schools want in on Tennessee's new voucher program*, <https://chalkbeat.org/posts/tn/2020/01/21/here-are-the-57-private-schools-wanting-to-participate-in-tennessees-new-voucher-program/> (Jan. 21, 2020) (last viewed on Feb. 13, 2020). Lighthouse intends on enrolling children under the ESA program in Fall of 2020. The ESA will cover the cost of both parents' tuition.

Proposed Intervenor-Parents

Bria Davis is a single-mother who lives in Nashville and grew up in Nashville public schools. Ex. 3 (Davis Decl.) She is the mother of two children both of whom currently attend a public school in Nashville. She is the mother of a 9-year old boy, EJ, currently in third grade. She also is the mother of PW, a 6-year old girl currently in 1st grade. Her household income level is approximately \$37,000. She is eligible for the ESA program and has taken all of the steps available to apply. *Id.*

As a single mother, Bria is striving to put her children in the best position. *Id.* She believes that enrolling her children at Lighthouse is the best way to give them the opportunities that she never had growing up attending Nashville public schools. As a single parent, she does not have the extra income that would make Lighthouse accessible. The ESA program would fully fund a tuition at Lighthouse. *Id.* Without the ESA program, she would either have to keep her children in public schools,

hope for financial assistance, or otherwise undergo financial hardship to send them to Lighthouse. *Id.*

Star Brumfield is a single parent as well, raising six school-aged children. Ex. 4 (Brumfield Decl.) Her 11-year old child, MB, is an exceptionally bright 6th grader. MB is also in Nashville public school, but is oftentimes frustrated by the learning environment. After touring Lighthouse, Star became convinced that Lighthouse would be a much better fit for MB. It was at her tour of Lighthouse that she learned of the ESA program. She also learned that Lighthouse would participate, and the ESA would fully cover the cost of Lighthouse's tuition. *Id.* Elated by this opportunity, Star immediately began the process of enrolling MB at Lighthouse for Fall, 2020. Star has another child who would benefit too who she would love to send, but she is unfortunately not eligible because she currently home schools. Without the ESA, she simply could not afford the tuition. MB would be forced to remain at his current school where he would not be getting the same opportunity to achieve his potential. *Id.*

LEGAL OVERVIEW

Intervention in Tennessee courts is governed by Tenn. R. Civ. 24. Rule 24 recognizes both intervention by right and permissive intervention. *See* Tenn. R. Civ. P. 24.01 (by right); 24.02 (permissive). Nashville parents qualify under both.

A party must be permitted to intervene (by right) in a matter if it has a legal interest that may be impaired by the matter's outcome and the existing parties cannot adequately represent that interest. Tenn. R. Civ. P. 24.01. In the case of intervention by right, a party moving for

intervention must make this showing in a timely fashion. *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 190-91 (Tenn. 2000). An “interest” is a direct claim on the subject matter of the suit,” such that the intervenor would either gain or lose depending on the result. *Id.* at 192.

A party also may be permitted to intervene if its claim or defense has a factual or legal question in common with the main action. *See* Tenn. R. Civ. P. 24.02. Once a common question of fact or law is established, it is a matter of trial court discretion to allow intervention. *Ballard v. Herzke*, 924 S.W.2d 652, 658 (Tenn. 1996). When considering whether to exercise discretion, the court shall consider whether intervention will unduly delay or prejudice the rights of the original parties. Tenn. R. Civ. P. 24.02(2). Courts typically find that the parties are not prejudiced when the intervenor does not seek to add any new claims or issues to the case. *See Kocher v. Bearden*, 546 S.W.3d 78, 84 (Tenn. Ct. App. 2017).

ARGUMENT

Nashville parents should be allowed to intervene by right, but alternatively, this Court should allow for permissive intervention. Nashville parents are exactly who the ESA program is for: single parents in the Davidson County LEA who qualify and are seeking out better educational opportunities for their children. They have interests of the utmost and personal importance at stake and respectfully submit that this Court should grant their motion to intervene.

Intervention of right

First, Nashville parents unquestionably have an interest of the highest order in the education of their children. *See Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1935); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). The Tennessee Supreme Court has recognized that the interest of a parent “to its [child’s] tutorage” is “sacred.” *In re Knott*, 197 S.W. 1097, 1098 (Tenn. 1917). Nashville parents have a “direct claim” on that interest because they are the ones who intend on using the ESA. *See Brown & Williamson*, 18 S.W.3d at 192. If plaintiffs succeed, then they would lose the ESA that they will rely on. Nashville parents would plainly and directly “gain or lose” based on the result of this case. They therefore have an interest in the outcome if this case.

Second, Nashville parents’ request is timely. *See Mills v. Shelby Cty. Election Comm’n*, 218 S.W.3d 33, 35 (Tenn. Ct. App. 2006) (intervention timely when filed one month after suit was filed). The length of time during which the intervenor reasonably should have known of its interest is a relevant factor in determining timeliness. *See Am. Materials Techs., LLC v. City of Chattanooga*, 42 S.W.3d 914, 916 (Tenn. Ct. App. 2000). Nashville parents acted with great speed, filing this motion shortly after the case was initiated. At this point, Defendants have not even responded.

Third, the other parties may not adequately represent Nashville parents interests. This factor is a low bar. An intervenor need only show that her interests “may be” inadequately protected, a burden described by the Supreme Court as “minimal.” *Trbovich v. United Mine Workers*,

404 U.S. 528, 538 n.10 (1972); accord *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1248 (6th Cir. 1997). This burden does not require an intervenor to show that representation “will in fact be inadequate.” *Miller*, 103 F.3d at 1247; see *Am. Materials Techs.*, 42 S.W.3d at 916 (relying on the Sixth Circuit standard). If the intervenor’s interest is similar but not identical to an existing party’s interest, then intervention should generally be allowed. *Ballard v. Herzke*, 924 S.W.2d 652, 657–58 (Tenn. 1996). As an example, if the existing parties may not make all of the prospective intervenors arguments then this factor is met. *Miller*, 103 F.3d at 1247.

Nashville parents more than meet their “minimal” burden. *Trbovich*, 404 U.S. at 538 n.10. Their status as the intended beneficiaries of the ESA program deserves legal protection. Plaintiffs are laboring to undo the program. The state will certainly defend it. Even though the state and Nashville parents are aligned in defending the ESA program’s constitutionality, the parents are the ones who will actually *rely* on the program. The State has a *legal* duty to defend the laws, but that obligation is not the same as the “sacred” interest that a parent has in the “tutorage” of their own children. See *In re Knott*, 197 S.W. at 1098. Intervention should be allowed when distinct interests inform the reasons for ligation. See, e.g., *Miller*, 103 F.3d at 1248 (state refused to seek interlocutory review of preliminary injunction not in intervenor’s interest). With a greater stake in avoiding a potential disruption to the program, as well as an interest in immediate implementation, Nashville parents have interests that “are not identical [to the state], and intervention is appropriate.” See *Ballard*, 924 S.W.2d at 658.

Miller is analogous. In *Miller*, the plaintiffs challenged the constitutionality of a Michigan law. 103 F.3d at 1243. The Chamber of Commerce sought intervention, and the Sixth Circuit held that it should have been permitted to intervene by right and permissively. The Sixth Circuit ruled that the party affected by the statute's regulations "would harbor an approach and reasoning for upholding the statutes that will differ markedly from those of the state, which is cast by the statutes in the role of the regulator." *Id.* at 1247. The same holds true in this case. The state is in the role of the regulator. Nashville parents are "the target of the statute's regulations." *Id.* at 1248. Naturally, the interests overlap but are not identical. As the ones who will (or will not) rely on the ESAs, the parents' "approach and reasoning" for defending their program is different and personal. *Id.* at 1247. The parents face the direct *injury* that will result to the parents and children who will lose the ESA program, making them analogous to the Chamber of Commerce in *Miller*.

Not even the other proposed-intervenors have precisely the same interest. They are parents in the *Shelby County LEA* who wish to enroll in *Category 3* schools. (Mem. of Intervenor at 3-4 (Feb. 10, 2020)); *see* Ex. 2 at 3 (Christian Brothers High School), 11 (Pleasant View). Nashville parents are in *Davidson County LEA* and wish to use the ESA program in a *Category 2* school. Certainly Shelby County parents who wish to use *Category 3* schools have equally vital interests. They are, nevertheless, distinct as evidenced by the decision to categorize the LEAs differently and schools with private school accreditation from a preapproved agency (*Category 2*) separately from those with regional accreditation (*Category*

2).⁵ Collectively, both intervenors will represent the ESA's programs intended beneficiaries from both LEAs covered by the pilot program. Both intervenors' motions should therefore be granted in recognition of the diverse interests.

Permissive Intervention

Even if Nashville parents do not meet the factors for mandatory intervention, then they should be permitted to intervene. Both they and the Defendants seek to resolve the common legal question of whether the ESA program is constitutional as a matter of Tennessee law. *See* Tenn. R. Civ. P. 24.02(2) (2019) (any person may be permitted to intervene upon timely motion in an action when movant's defense and the main action have a question of law or fact).

Nashville parents otherwise meet all of the factors for permissive intervention. First, as shown above, Nashville parents' motion is certainly timely. Second, the purpose of intervention is solely to defend the constitutionality of the program and to bolster the proof necessary to establish that the ESA program furthers legitimate governmental purposes. *See Am. Materials Techs.*, 42 S.W.3d at 916 (purpose of intervention is a relevant factor). In other words, Nashville parents' goal is to protect the ESA program, and that correlates with the existing thrust of this case. Third, Nashville parents' defense involves a common question of law and fact. They intend on focusing solely on defending

⁵ As pointed out above, a description of the different categories is provided by TDOE's website here: <https://www.tn.gov/education/school-options/non-public-schools/non-public-school-categories.html> (last viewed on Feb. 12, 2020).

against the constitutional claims brought by Plaintiffs. They will not present cross-claims, complicate the factual record, or introduce any issues unrelated to Plaintiffs' constitutional challenge. *See Kocher*, 546 S.W.3d at 84 (intervention will not prejudice the parties with new claims or issues.) Fourth, no party will suffer prejudice from intervention. Instead, Nashville parents will provide the fullest understanding and defense of this important matter of Tennessee constitutional law. Finally, Nashville parents will be represented by the Beacon Center, a Tennessee organization that has been a longstanding advocate of school choice generally, and this ESA program in particular. *Tennessee school voucher plan passes key hurdle*, THE TENNESSEAN (Jan 20, 2016) ("This is a big step in the right direction for this school choice bill that has the potential to help so many Tennessee families,; said Justin Owen, CEO of the Beacon Center of Tennessee.") available at <https://www.tennessean.com/story/news/education/2016/01/20/tennessee-school-voucher-plan-passes-key-hurdle/79054140/>; *With new governor, House speaker, backers of school vouchers see opportunity in Tennessee*, THE TENNESSEAN (Jan. 25, 2019) available at <https://www.tennessean.com/story/news/education/2019/01/25/bill-lee-glen-casada-school-vouchers-tennessee-education-savings-accounts/2646775002/>. These factors warrant permissive intervention.

The Tenn. R. Civ. P. 24.01 and 24.02 factors weigh in favor of allowing Nashville parents to intervene.

CONCLUSION

This Court should grant the motion.

Dated: February 13, 2020.

Respectfully submitted,

s/ B.H. Boucek
BRADEN H. BOUCEK

DECLARATION OF BRIA DAVIS

1. I am Bria Davis, a citizen of the United States, a resident of Nashville, Tennessee, and over 18 years old.
2. I am fully competent to make this Declaration.
3. I have personal knowledge of the facts contained in this Declaration.
4. I, Bria Davis, am the proposed Intervenor in the case no. 20-0143-I, in Davidson County Chancery, represented by the Beacon Center.
5. I am the mother of two school-aged children with the initials of EJ and PW.
6. I am a single parent.
7. As of this date, EJ is a 9-year old in 3d grade.
8. As of this date, PW is a 6-year old in 1st grade.
9. Both of my children are enrolled in Rocketship Public Schools.
10. Rocketship is Tennessee public school located in Nashville, TN.
11. Both of my children have enrolled and continuously attended Nashville public schools for their entire school career.
12. We are currently zoned to attend a school in Metro Nashville Public Schools.
13. I entered in my name and contact information on the state's ESA webpage.
14. Our household income for the previous year for a household of three (3) was approximately \$37,000.
15. I wish to utilize the ESA program to send my children to Lighthouse Christian School.
16. I first found out about Lighthouse when other children their aftercare told them that Lighthouse provided excellent one-on-one teaching with the students.

17. In late fall of 2019, I google searched area schools and their cost and learned that Lighthouse was roughly \$7,000 per student.

18. Shortly thereafter, I told my parents about my interest in Lighthouse. We were discussing the costs and my parents ability to assist when my father told me about the ESA program.

19. I then reached out through Lighthouse's website to gather more information. They then called me and we discussed the ESA program. Lighthouse told me that if I qualified, then it would be tuition-free. Lighthouse asked me to come in and tour.

20. On February 11, 2020, I filled out the eligibility form available at: <https://www.edchoice.org/school-choice/eligibility-test/?program=10543>. It told me I may be eligible and directed me to the state's ESA webpage.

21. I want to send my children to Lighthouse because I want them to have the best educational opportunities possible and, as a mother, I believe Lighthouse provides the best opportunity. It will give them opportunities I never had growing up in Nashville and attending local schools.

22. My children deserve the ESA program. As a single, African-American mother, it is hard avoiding becoming a statistic. I strive to put their children in better situations. I work very hard as a single parent to make a way out of so little. We are barely making ends meet but still holding things together. I try every day to make a better way for my children. I strive to do right by the law and the children and should benefit from a program that allows me to direct where the funding for my children's education is directed. The benefit from the ESA program will help me provide equal opportunity for my children.

23. If the ESA program remains available, then I intend on sending both of my children to Lighthouse starting in the Fall of 2020.

24. If I am unable to rely on the ESA program, then I would hope for financial assistance to attend Lighthouse, or otherwise place our family under financial pressure to afford to send them there.

25. I declare under penalty of perjury under the laws of the United States and the State of Tennessee that these factual statements are true and if called upon to testify I would competently testify as to them.

Dated: **02/13/20**



BRIA DAVIS

DECLARATION OF STAR-MANDOLYN BRUMFIELD

1. I am Star-Mandolyn Brumfield, a citizen of the United States, a resident of Nashville, Tennessee, and over 18 years old.
2. I am fully competent to make this Declaration.
3. I have personal knowledge of the facts contained in this Declaration.
4. I, Star Brumfield, am the proposed Intervenor in the case no. 20-0143-I, in Davidson County Chancery, represented by the Beacon Center.
5. I am the mother of six school-aged children. I am interested in using the ESA program for my eleven year-old (11) son (MB).
6. I am a single parent.
7. As of this date, my 11 year-old son is currently in 6th grade at Thurgood Marshall Middle School.
8. Thurgood Marshall is Tennessee public school located in Davidson County, TN.
9. MB has been continuously attended Thurgood Marshall for 5th and 6th grade since he enrolled prior to his 5th grade year. He has been continuously in Tennessee public schools since January of 2018 and will be throughout the remainder of his 6th grade year.
10. We are currently zoned to attend a school in Metro Nashville Public Schools.
11. On February 11, 2020, I filled out the eligibility form available at: <https://www.edchoice.org/school-choice/eligibility-test/?program=10543>. It told me I may be eligible and directed me to the state's ESA webpage.
12. I entered in my name and contact information on the state's ESA webpage.
13. I made approximately \$32,000 last year as income.
14. I wish to utilize the ESA program to send MB to Lighthouse Christian School.

15. I first found out about Lighthouse when my friends who have sent children there recommended it.

16. I have toured Lighthouse. After we toured and did the assessment, Lighthouse personnel told me that the ESA program would fully pay for the tuition for eligible parents, and it would open in February of 2020.

17. I want to send my MB to Lighthouse because the learning environment and style of teaching would best bring out my child's strengths and weaknesses. Even prior to learning about the ESA program, MB had expressed eagerness to attending.

18. My child deserves the ESA program. He is gifted, and has great potential. He is often frustrated in his current school by behavioral distractions that interfere with the learning process.

19. If the ESA program remains available, then I will use it to send MB to Lighthouse starting in the Fall of 2020.

20. I have another child in grade school as well, but she is currently home schooled.

21. If the ESA program was available to home schooled children, I would send another child as well.

22. If I am unable to rely on the ESA program, then I would have to keep MB in his current school. I would not be able to send him to Lighthouse. I strongly believe MB would not be getting the opportunity he needs to reach his full potential.

23. I declare under penalty of perjury under the laws of the United States and the State of Tennessee that these factual statements are true and if called upon to testify I would competently testify as to them.

Dated: 2-13-2020



STAR BRUMFIELD