

**COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION 1
CASE NO. 06-CI-00554**

ALBERT M. PENNYBACKER, et al.

PLAINTIFFS

JUDGMENT AND ORDER

**STEVEN L. BESHEAR (formerly ERNIE L. FLETCHER),
in his official capacity as Governor of
the Commonwealth of Kentucky.**

DEFENDANT

**UNIVERSITY OF THE
CUMBERLANDS**

INTERVENING DEFENDANT

and

VERNIE McGAHA, et al.

INTERVENING DEFENDANTS

In April 2006, the Kentucky General Assembly appropriated \$10 million to the Defendant, University of the Cumberlands (University), to finance construction of a new pharmacy school building on the University's campus. 2006 Ky. Acts 252. (The "Budget Bill"—House Bill 380). In the same legislation the General Assembly also appropriated \$2 million to begin a pharmacy student scholarship program, and committed to permanently fund the scholarship program through coal severance tax revenue.

The Plaintiffs brought this action claiming the legislation violates Sections 2, 3, 5, 51, 59, 171, 184, and 189 of the Kentucky Constitution. The Plaintiffs and the

Defendants filed motions and cross motions for summary judgment and fully briefed the issues before the Court. There are no genuine issues of material fact to be decided in this case and summary judgment is appropriate. *Steelvest, Inc. v. Scansteel Service Ctr., Inc.*, 807 S.W.2d 476 (Ky. 1991).

This Court finds the appropriation of public funds to the University of the Cumberlands for the construction of a pharmacy building violates Sections 5 and 189 of the Kentucky Constitution. This Court also finds that the enactment of Part XXIV of the 2006 Ky. Acts (Pharmacy Scholarship Program), codified in KRS Chapter 164, violates Section 51 of the Kentucky Constitution.

THE PHARMACY BUILDING

The appropriation of \$10 million in public bond funding to the University for the capital construction of a Pharmacy building on the University Campus in Whitley County contained no particular restrictions on the use of the building. The Defendants have filed an “Agreement” in this action between the Commonwealth (Governor and the Office for Local Development) and the University. This “Agreement” is titled a “Memorandum of Understanding” and purports to guarantee the building will be used strictly for secular educational purposes and, if not, will be transferred to Whitley County. The “Agreement” can also be cancelled at any time by either party for “cause.”

Section 5 of the Kentucky Constitution provides: “No preference shall ever be given by law to any religious sect, society or denomination: nor to any particular creed, mode of worship or system of ecclesiastical polity....” Section 189 of the Kentucky

Constitution provides: “No portion of any fund or tax now existing, or that may hereafter be raised or levied for educational purposes, shall be appropriated to, or used by, or in aid of, any church, sectarian or denominational school.”

The University of the Cumberlands (formerly Cumberland College) is a “private university located in Williamsburg, Whitley County, Kentucky. It has historically served students primarily, though not exclusively, from the Appalachian mountains region.”

“The school offers students from all backgrounds, including diverse religious backgrounds, a broad-based liberal arts program enriched with Christian values.”

(Defendant University of The Cumberlands’ Statement of Undisputed Facts in Support of Motion for Summary Judgment). The University has been and continues to be affiliated with the Kentucky Baptist Convention. “The relationship of Cumberland College and the Kentucky Baptist Convention clearly fulfills a denominational and religious purpose.”

(Covenant Agreement between Kentucky Baptist Convention, Inc. and Cumberland College. 11/21/86 --- included as Exhibit 2 in the Plaintiffs memorandum for Summary Judgment).

There is no question that the appropriation of \$10 million tax dollars to the University to construct a pharmacy building is a direct payment to a non-public religious school for educational purposes. This type of direct expenditure is not permitted by the Constitution of Kentucky. Assuming the laudatory public purpose of increasing the supply of health professionals in an underserved area,¹ the General Assembly has chosen a mechanism specifically rejected by the Kentucky Supreme Court in *Fiscal Court of*

¹ The Plaintiffs argue this is not an effective means to achieve the stated goal and the Legislature did not develop adequate findings to support its decision. This Court’s function is not to second guess the policy decisions of the General Assembly but only to ensure those decisions comport with constitutional requirements and restrictions.

Jefferson County v. Brady, 885 S.W.2d 681 (Ky. 1984). In *Brady* the issue was whether public tax dollars could be furnished by county governments directly to non-public schools to subsidize student transportation. The Kentucky Supreme Court, finding such a subsidy violated Section 189 of the Kentucky Constitution, noted:

There is a fundamental difference between providing school transportation to nonpublic school children along with public school children through Fiscal Court appropriation to the board of education, and providing direct payment to selected eligible schools.

Id. at 685.

Likewise, there is a fundamental difference between providing scholarships to Kentucky residents to attend the public or private college of their choice and providing direct payments to selected non-public schools to develop and operate educational programs. There is little question that the students who would attend the pharmacy school would benefit from the program, but it remains public tax dollars “appropriated to, or used by, or in aid of . . . (a) sectarian or denominational school.” *Ky. Const. Sec. 189*.

The Kentucky Supreme Court also found the direct grants in *Brady* violated Section 5 of the Constitution. The Court found the funding fostered “an excessive government entanglement with religion.” *Brady* at 686, citing *Lemon v. Kurtzman*, 403 U.S. 602 (1971). One only has to read the arguments in this case to understand the implications of direct government funding of sectarian private higher education. The Plaintiffs argue that the University discriminated against a student based upon expressions of free speech while the University maintains its actions were based upon University forbidden conduct. This Court does not need to decide this issue to reach a decision in this case but this is exactly the “entanglement” between government interests

and religious institutions that the Kentucky Constitution prohibits. Although *Brady* was a 4 to 3 decision, the dissent focused on the nature of the expenditures to determine that there were no entanglement problems. Justice Wintersheimer, writing for the minority, found that tax funds expended for transportation of non-public school children did not “involve the excessive entanglement with either church or state” as transportation is not necessarily educational in nature. *Brady* at 687. (Justice Wintersheimer dissenting). He did, however, distinguish between transportation subsidies and textbooks; “it is simply impossible to classify textbooks as anything but educational.” *Id.* at 688, (Dissent) citing *Fannin v. Williams*, 655 S.W. 2d 480 (Ky. 1983).

In the present case it is simply impossible for this Court to classify a classroom building as “anything but educational.”

The possibility that sectarian religious issues could become part of a government sponsored academic program can sometimes lead to a need for supervision or surveillance of the academic program within the nonpublic school. This is the kind of entanglement which the Establishment Clause and the United States Supreme Court have sought to avoid.

Id. at 688, (Dissent) citing *Wolman v. Walter*, 433 U.S. 229 (1977).

THE PHARMACY SCHOLARSHIP PROGRAM

The 2006 Budget Bill also provided for funding for scholarships “to persons who declare an intent to enroll in a Pharm. D. program at an institution in the Commonwealth and practice in the Commonwealth” 2006 Ky. Acts 252, Part XXIV, Section 1 (2). For purposes of this opinion this Court assumes that Section 1 (1) of the legislation, which expresses the intent of the General Assembly that these scholarships are only to be

used at a pharmacy school in the Appalachian region, is advisory only. To do otherwise would be to find this to be special legislation in violation of Section 59 of the Kentucky Constitution. “A statute which relates to persons or things *as a class* is a general law, while a statute which relates to particular persons or things *of a class* is special. *Johnson v. Commonwealth ex rel. Meredith*, 291 Ky. 829, 165 S.W.2d 820, 825 (1942), citations omitted.

The Constitutional problems with the Pharmacy Scholarship program concern the use of the 692 page omnibus Budget Bill to enact new programs and amend current statutes. Section 51 of the Kentucky Constitution provides:

No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title, and no law shall be revised, amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revised, amended, extended or conferred, shall be reenacted and published at length.

Section 51 is commonly considered to have 2 sections, the “title” provision and the “revision and reenactment” section. Two significant Kentucky Supreme Court cases have analyzed the “title” section when reviewing challenged legislation. *Sweasy v. King’s Daughters Memorial Hospital*, 771 S.W.2d 812 (Ky. 1989), applied the title section “strictly” to strike down a malpractice provision within an omnibus health care bill. In *Com. Ex rel. Armstrong v. Collins*, 709 S.W.2d 437 (Ky. 1986), the Supreme Court applied the title section “liberally” to approve the suspension or modification of certain statutes in the 1984 omnibus Budget Bill. The *Armstrong* Court stated specifically that “The title need only furnish general notification of the general subject in the act. If the title furnishes a “clue” to the act’s contents, it passes constitutional muster. *Id.* at 443, citing *Talbott v. Lafoon*, 257 Ky. 773, 79 S.W.2d 244 (1935).

The title of the 2006 Budget Bill (HB 380) and the title of the 1984 Budget Bill (HB 474) are substantially identical. Following the ruling in *Armstrong*, the inclusion of the Pharmacy Scholarship Program in the Omnibus Budget Bill of 2004 did not violate the title section of Ky. Const. Sec. 51.

Ky. Const. Sec. 51 also requires that in order for the General Assembly to amend or revise any law, it must be “reenacted and published at length” and cannot be referred to by title only. The Kentucky Supreme Court, in *Armstrong v. Collins*, interpreted this restriction in Sec. 51 to permit, in times of unanticipated fiscal crises, the suspension of statutes requiring certain expenditures and the transfer of certain funds without complying with the reenactment provision. The Court found the challenged actions to be “merely temporary, determinable suspensions of the operation of the statutes relating to appropriation of public funds.” *Armstrong* at 446.

The question of whether the routine suspension of certain statutes in the biennial budget bill amounts to an effective repeal without complying with Sec. 51 is not before the Court at this time. What is challenged in this action is the use of the Budget Bill to enact a permanent program (Pharmacy Scholarships) and amend an appropriation statute (KRS 143.090) to fund the program without complying with the reenactment provisions of Sec. 51 of the Kentucky Constitution.

In addition to Ky. Const. Sec. 51, KRS 48.310 provides:

- (1) No provision of a budget bill shall be effective beyond the second fiscal year from the date of its enactment. A budget bill enacted at a special session of the General Assembly shall not be effective past July 1, of the year in which the next regular session takes place.
- (2) A budget bill may contain language which exempts the budget bill or any appropriation or the use thereof from the operation of a statute for the effective period of the budget bill.

In the 2006 Budget Bill the General Assembly funded the Pharmacy Scholarship Program from coal severance tax revenue levied under KRS 143.020. KRS 143.090 appropriates the funds from KRS 143.020 to specific agencies or the general fund, “unless otherwise provided by the General Assembly in a budget bill. . . .” KRS 143.090(3). Pursuant to Ky. Const. Sec. 51 and KRS 48.310 this specific appropriation would be for 2 years. However, under the heading, “PHARMACY SCHOLARSHIP PROGRAM,” the General Assembly provided the following:

Notwithstanding KRS 48.310, the following statute is created to read as follows and shall have **permanent** effect, subject to future actions by the General Assembly[.] (emphasis added).

In essence, the General Assembly suspended KRS 48.310 to create a permanent program in the Budget Bill. This alone probably violates the “title” section of Const. Sec. 51; however, it is clear this action violated the reenactment section of Const. Sec. 51. It amends the appropriations provided for in KRS 143.090 without referring to the statute, let alone by title, and does so on a **permanent** basis. This amounts to an “appropriation of public funds. . .(not). . .within the legislative authority as set out in . . . Ky. Const. Sec. 51, the amendment section.” *Armstrong v. Collins*, 709 S.W.2d at 446.

This Court cannot “liberally” interpret the plain meaning of “permanent” to determine the Act has not violated Constitutional proscriptions. “The purposes which impelled the framers of the constitution to place the limitations imposed upon the General Assembly by Section 51 of the constitution were inherently sound and ought not to be eroded to the vanishing point by judicial interpretation. *Armstrong v. Collins* at 450 (Justice Vance dissenting).

CONCLUSION

For the reasons stated, this Court declares that the General Assembly violated Sections 5 and 189 of the Kentucky Constitution when it appropriated \$10 million to a private, religion-based University for an educational purpose. The General Assembly also violated Section 51 of the Kentucky Constitution when it permanently amended a law without reenacting or publishing the statute at length.

The Plaintiffs' Motion for Summary Judgment is **GRANTED**.

This is a final and appealable judgment.

So **ORDERED** this 6th Day of March, 2008.

Roger Crittenden, Special Judge
Franklin Circuit Court

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