9-17-2007

Respondent's Opposition to Motion for Reconsideration of Ruling re: RCW 28A.150.210 07-2-02323-2-53

THE HONORABLE PARIS K. KALLAS

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

MATHEW & STEPHANIE McCLEARY, on their own and on behalf of KELSEY & CARTER McCLEARY, their two children in Washington's public schools; ROBERT & PATTY VENEMA, on their own behalf and on behalf of HALIE & ROBBIE VENEMA, their two children in Washington's public schools; and NETWORK FOR EXCELLENCE IN WASHINGTON SCHOOLS ("NEWS"), a state-wide coalition of community groups, public school districts, and education organizations,

Petitioners,

v.

STATE OF WASHINGTON,

Respondent.

NO. 07-2-02323-2 SEA

RESPONDENT'S OPPOSITION TO MOTION FOR RECONSIDERATION OF RULING RE: RCW 28A.150.210

I. INTRODUCTION

On August 24, 2007, the Court denied Petitioners' Motion for Summary Judgment regarding all liability and remedy issues in the case. One of the rulings the Court rejected was a declaration that RCW 28A.150.210 was passed in order to "define" the substantive content of a basic education. With such a declaration in hand, Petitioners hoped to convince the Court

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that Article IX of the state constitution required the State to ensure successful educational outcomes for all Washington students without regard to the adequacy or inadequacy of education funding. In opposition, the State urged the Court to rule instead, as a matter of law, that a claim for alleged breaches of the Article IX duty had to be tied to proof of constitutionally inadequate funding and that the State had no Article IX duty to ensure successful outcomes regardless of the adequacy of funds provided.[1] The Court declined to issue either ruling.

Now Petitioners move the Court to reconsider its denial of summary judgment on this issue of the interpretation and construction of RCW 28A.150.210. No new or different grounds are urged. Petitioners merely incorporate by reference arguments on the merits that were previously rejected by the Court. They then contend that issuance of one of the previously denied rulings will eliminate trial altogether (if the Court adopts the State's requested ruling) or will promote judicial economy. Finally, they contend that the ruling they have requested will provide marching orders to the legislature as it continues to exercise its constitutional prerogative to reform education.

The Court should deny the Motion. First, Petitioners fail to satisfy the legal standards that govern motions under CR 59 and CR 56. Second, the Court correctly concluded that issues of fact and law required rejection of Petitioners' requested ruling. Finally, unsubstantiated allegations that judicial economy and expediency will result if the Court issues either Petitioners' or Respondents' requested ruling do not constitute a valid basis for awarding either party summary judgment or for issuing marching orders to the Legislature as to how to fulfill its duty to reform education. To the contrary, given the substantial increase in funding for education--$1.8 billion more in the 2007 legislative session alone—and Washington Learns' emphasis on educational reform that promotes better student

[1] In fact, the State's expert, Dr. Hanushek, has provided this Court with undisputed testimony that there is no connection between poor student achievement and alleged underfunding.

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achievement through accountability, the Court should continue to resist Petitioners' demand for judicial intervention in ongoing legislative reform.

II. ARGUMENT

Petitioners' Motion for Reconsideration is deficient under the Civil Rules and is based entirely on previously rejected arguments and new arguments that are irrelevant to the grant or denial of summary judgment. Moreover, it is an improper attempt to meddle with the Legislature's ongoing education reform efforts.

A. Petitioners' Motion Fails to Satisfy the Legal Requirements for Reconsideration and Summary Judgment.

The legal basis for Petitioners' Motion is CR 59(a)(9). Under that rule, the "party aggrieved" must show injury "materially affecting [their] substantial rights" because "substantial justice has not been done." Of the nine grounds allowed for reconsideration motions, CR 59(a)(9) is a final "catch all" category. In Washington, granting reconsideration for "lack of substantial justice" should be relatively rare. *See Knecht v. Marzano*, 65 Wn.2d 290, 297, 396 P.2d 782 (1964).

CR 59 Motions are addressed to the trial court's discretion. *Lilly v. Lynch*, 88 Wn. App. 306, 321, 945 P.2d 727 (1997). Denial of such a motion is an abuse of discretion only where the decision rests on untenable grounds or reasons. *Kleyer v. Harborview Medical Center*, 76 Wn. App. 542, 545, 887 P.2d 468 (1995). Motions for reconsideration do not provide litigants with the opportunity for a "second bite at the apple"; courts will not permit parties to merely reargue issues already addressed. *See Anderson v. Farmer's Ins. Co. of Washington*, 83 Wn. App. 725, 923 P.2d 713 (1996), *as cited in* 15A Tegland & Ende, *Wash. Handbook on Civil Procedure* § 65.1, at 488 (2007). (Copy attached as Attachment A). Nor does CR 59 permit reconsideration based upon new arguments that could have been made earlier. *E.g., Eugster v. City of Spokane*, 121 Wn. App. 799, 811, 91 P.3d 117 (2004) and

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Sterling Savings Ass'n v. Ryan, 751 F. Supp. 871 (E.D. Wash.1990), *vacated on other grounds*, 959 F.2d 241 (9th Cir. 1992).

Though the federal rule is different, motions for reconsideration under Fed. R. Civ. P. 59 are governed by the same principles:

> Motions for "reconsideration" will not [be] granted absent "highly unusual circumstances"—they do not provide litigants an opportunity for a "second bite at the apple" or allow them, like Emperor Nero, to "fiddle as Rome burns", or license a litigation "game of hopscotch", allowing parties to switch from one legal theory to a new one "like a bee in search of honey". Such motions are not vehicles for relitgating old issues. Courts properly decline to consider new arguments or new evidence on reconsideration where those arguments or evidence were available earlier.

(Citations omitted). Baicker-McKee-Janssen & Corr, *Federal Civil Rules Handbook*, at 962 (2006). (Copy attached as Attachment B). Indeed, as one of the numerous court decisions in this portion of the *Handbook* noted in denying reconsideration of a summary judgment order: Mere disagreement with the Court's ruling on summary judgment does not support a Rule 59 motion. *U.S. ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284, 290 (4th Cir. 2002). Thus, neither the recapitulated arguments previously rejected by this Court nor the additional arguments raised for the first time in the Motion for Reconsideration satisfy CR 59's requirement.

Petitioners' Motion also fails under standards governing summary judgment motions. Petitioners are telling the Court that it must pick either of the two rulings proposed by the parties as the law of the case regarding the interpretation and construction of RCW 28A.150.210. This is incorrect. Both parties, in effect, cross-moved for summary judgment on this issue. However, even if the parties agree that there are no factual issues, the parties can never force the Court to award summary judgment. "The fact that both parties simultaneously are arguing that there is no genuine issue of fact...does not establish that a trial is unnecessary thereby empowering the court to enter judgment as it sees fit." Wright, Miller & Kane, *Federal Practice* § 2720 (3d. Ed. 1998). *See also United States v. Fred A.*

Arnold, Inc., 573 F2d 605 (9th Cir. 1978) (The filing of cross-motions, both parties asserting there are no issues of material fact, does not vitiate court's responsibility to determine whether issues of fact preclude summary judgment).

Indeed, when the facts are undisputed, but reasonable minds can draw different conclusions from them, summary judgment must be denied. *Fleming v. Stoddard Wendle Motor Co.*, 70 Wn.2d 465, 467, 423 P.2d 926 (1967); *Money Savers Pharm. V. Koffler Stores*, 73 Wn. App. 602, 608, 682 P.2d 960 (1984). Differing factual conclusions about the intent and meaning of this statute preclude summary judgment.

Petitioners try to avoid this result by arguing the construction of a statute is a legal issue. However, as noted below, there are disputed fact issues about the meaning of, and intent behind, the statute that are not resolvable on summary judgment.

B. Issues of Fact About the Meaning and Legislative Intent of RCW 28A.150.210 Preclude Summary Judgment for Petitioners.

The Court correctly ruled that it could not grant Petitioners the ruling they requested concerning RCW 28A.150.210. That ruling should stand because Petitioners raise no new arguments about the statute, its language or the intent behind the statute, or of its application, if any, to the State's duty under Article IX.[2] Petitioners' contention that this statute was a 15-year delayed response to *Seattle Sch. Dist. No 1 v. State* is contradicted by the fact that the statute amended a prior statement of statutory "goals" that had existed since the passage of the Basic Education Act of 1977. Nothing in the statute or its legislative history suggests that it "defines" or is "the substantive content" of basic education. *See* Salvi and Wilhoft Decls.

That the statute somehow "defines" basic education is flatly contradicted by the statute's language. RCW 28A.150.210 expressly provides that it is a statement of "goals" and

[2] Petitioners incorrectly claim that this issue is a pure issue of law. Where, as in this case, both sides have conflicting views about the construction of a statute, the Court must review the statutory language itself, the legislative history and other sources to resolve the conflict. *Ballard Square Condo. Owner Ass'n, v. Dynasty Constr. Co.*, 158 Wn.2d 603, 612, 146 P.3d 914 (2006). That extrinsic, factual evidence contradicts the scant evidence Petitioners cite regarding the meaning and effect of this statute.

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"opportunities," not "outcomes." RCW 28A.150.220 specifically provides that those "goals" are deemed implemented by the program of basic education set forth in .220 which, in turn, is deemed "fully funded" by amounts appropriated pursuant to RCW 28A.150.250 and .260. Petitioners' claim that the statute was intended to "define" basic education is also contradicted by the undisputed testimony about the passage of, and intent behind, this statute that is contained in the Salvi and Wilhoft Declarations.

Nor can RCW 28A.150.210 be interpreted or construed to impose a duty on the State to provide successful educational outcomes. As outlined in Respondent's Supplemental Brief of August 3, 2007, neither Article IX's language, nor the *Seattle Sch. Dist. No. 1 v. State* decision construing Article IX, support imposing such a duty. To the contrary, our Supreme Court held that the State's obligation under Article IX was to define and make ample provision for funding whatever the State's Article IX duty is: whether it be "basic education" or "a program of basic education," or both.[3] (*See* Attachment C hereto for summary of holding in *Seattle Sch. Dist. v. State*).

Finally, as demonstrated in Respondent's Supplemental Memorandum of August 3, 2007, there is no support, factually or legally, in Washington or elsewhere, for this Court to rule that the State has a constitutional duty to provide successful outcomes for Washington's students. Evidence of outcomes is relevant; however, as the State's WASL expert has testified, the State's assessment of student performance was intended to measure progress toward the improved student performance goals of RCW 28A.150.210, not the performance of Article IX obligations.

[3] The sole support Petitioners cite for the proposition that Article IX imposes two duties, to provide "basic education" and a "program of basic education," is the Table of Contents the Supreme Court provided at the outset of its opinion. 90 Wn.2d at 484. This aid to organizing a very lengthy opinion is not the substantive decision. The holding of the case, 90 Wn.2d at 519-20, indicates that the alleged dual obligation is actually one and the same duty and that the State fulfills that duty by defining it and fully funding it.

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C. Unsubstantiated Allegations About Efficiencies and Judicial Economy Are Not Grounds for Awarding Summary Judgment.

Even if the Motion were appropriate under Rules 59 and 56, Petitioners' unsubstantiated claims that discovery will be less expensive, that there might be a shorter trial or no trial at all and that the Court and parties will avoid the protracted process of appeals and remands experienced elsewhere do not justify entering summary judgment in their favor. CR 56 does not recognize "efficiencies" or "judicial economy" as grounds for summary judgment. Neither does CR 59 embrace those concepts as proper grounds for a motion for reconsideration. The focus is on whether the moving party proves that there are no issues of fact material to the merits and also proves entitlement to judgment as a matter of law. CR 56(c).

However, even if such considerations were germane to summary judgment, Petitioners claim, but fail to demonstrate, that granting a partial summary judgment will eliminate or shorten this case or diminish its expense. Indeed, the claim is dubious. If the Court entered the ruling requested by the State, that the State has no duty to ensure successful outcomes without regard to the adequacy of funding provided, the ruling will terminate the case only if Petitioners non-suit their entire case in the face of such a ruling. Otherwise, it is only a partial summary judgment ruling. CR 56(d).

Without resolution of the entire case, Petitioners' claims that discovery will be limited and less expensive are not credible. Their entire case boils down to whether or not the State is making ample provision for education in compliance with Article IX. That case inevitably will concern itself with the sufficiency of resources the State is providing; i.e., the constitutional adequacy of funding. In fact, the adequacy of funding will be the sole issue for trial as the Petitioners have already conceded—in oral argument and in their current Motion—that there is no complaint regarding the State's "definition" of basic education or its "definition" of the program of basic education. Petitioners will have to abandon their curious

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position that their education "adequacy" lawsuit (in contrast to every such lawsuit brought in Washington and elsewhere) has nothing to do with the adequacy of funding provided.

Finally, there is no basis to conclude that entering a ruling on RCW 28A.150.210 will avoid the typically protracted course and expensive nature of education adequacy cases. To suggest that ruling now on this issue will avoid appeals is nonsense. Cases of this magnitude and, particularly, concerning the adequacy of funding for public education inevitably are appealed and, in most instances, retried in whole or in part. They are also expensive and frequently involve many fact and expert witnesses, taking several weeks to try. However, Petitioners lose sight of the one factor that sets this litigation apart from all the others and it has nothing to do with the requested ruling. The Article IX duty and its implementation were established by our Supreme Court almost 30 years ago. The parties in this case have not started from scratch. There is considerable appellate court precedent—the *Seattle Sch. Dist. No. 1*, *Tunstall*, *Camer* and *Brouillet* decisions—as well as the trial court education cases cited in the State's Opposition, to provide guidance to the parties and this Court. The danger of "ping pong" litigation is a hollow threat and Petitioners' unswerving reluctance to invest the time and money to fulfill their obligation to prove their case is no basis for forcing the Court into the improvident grant of summary judgment.

D. This Court Should Not Issue Advisory Opinions to the Legislature nor Interject Itself into the Legislature's Constitutional Right to Reform Education.

The final ground urged for entering summary judgment is the "opportunity" Petitioners see for court intervention in, and direction of, the Washington Learns reform effort. In essence, Petitioners want the Court to issue an advisory opinion because this ruling is not based upon some finding by the Court that such an order is necessary or warranted under the facts of the case. As noted at 4, line 8, in the State's Opposition, the Legislature is charged, in the first instance, with periodic review and reform of education and its funding. (*School Funding* II, Conc. of Law 9.) Unless and until the Legislature reforms the definitions

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and/or funding of education, there is no justiciable controversy over what the Legislature has yet to accomplish through Washington Learns. *See Seattle Sch. Dist. v. State*, 90 Wn.2d at 519, fn.14.[4] Indeed, as noted in our Opposition at 4, line 21, Petitioners cannot meet their heavy burden to prove that judicial intervention and direction is necessary as long as the State is actively engaged in the reform of basic education. (*School Funding II*, Conc. of Law 16.)

The opportunity to issue an advisory opinion about ongoing but uncompleted legislative activity is no basis for an award of summary judgment. Nor is it a basis for reconsideration. The Court should reject the solicitation to inject itself into a reform process our Supreme Court has said is the proper duty and prerogative of the legislative branch.

III. CONCLUSION

Petitioners filed this case on January 11, 2007. By bringing a total summary judgment motion at the outset of the case, Petitioners have prevented the State's discovery and the preparation of its defense for several months. The Motion for Reconsideration is another backward step as it raises the same arguments the Court has rejected, interposes arguments about the convenience of the parties and judicial economy that are factually incorrect and legally irrelevant to the entry of summary judgment and invites the Court to issue an advisory ruling about the Legislature's ongoing education reform efforts. The Court should deny the Motion.

DATED this 17th day of September, 2007.

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[4] The Supreme Court declined to opine on the Basic Education Act, which was in the process of enactment while *Seattle School District* was still a pending case.

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 17th day of September, 2007, at Seattle, Washington.

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ATTACHMENT A

WASHINGTON PRACTICE SERIES™

Volume 15A

WASHINGTON HANDBOOK ON CIVIL PROCEDURE

2007 EDITION

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The trial court's decision on a motion for reconsideration is discretionary. Lilly v. Lynch, 88 Wn.App. 306, 945 P.2d 727 (1997); Kleyer v. Harborview Medical Center of University of Washington, 76 Wn.App. 542, 887 P.2d 468 (1995); Schultz v. Werelius, 60 Wn.App. 450, 803 P.2d 1334 (1991). The motion does not provide litigants with an opportunity for a second bite at the apple. Courts will not permit parties to merely re-argue issues already addressed. See Anderson v. Farmers Ins. Co. of Washington, 83 Wn.App. 725, 923 P.2d 713 (1996). And courts may decline to consider new arguments or new evidence on reconsideration where those arguments or evidence were available earlier. E.g., Eugster v. City of Spokane, 121 Wn.App. 799, 91 P.3d 117 (2004) (CR 59 does not permit a plaintiff, finding a judgment unsatisfactory, to suddenly propose a new theory of the case); Marquis v. City of Spokane, 76 Wn.App. 853, 888 P.2d 753 (1995) (unpleaded allegation not timely raised on motion for reconsideration of order granting summary judgment); Webber v. Mefford, 43 F.3d 1340 (10th Cir.1994) (counsel must show that evidence is either newly discovered or, if available, how counsel made diligent, though unsuccessful, attempts to obtain it); Sterling Savings Ass'n v. Ryan, 751 F.Supp. 871 (E.D.Wash. 1990), vac'd on other grounds, 959 F.2d 241 (9th Cir.1992) (motion for reconsideration may not be used for offering theories of law that were available at the time of the initial ruling).

The rule on consideration of additional evidence has been relaxed somewhat in the context of a summary judgment. See Applied Indus. Materials Corp. v. Melton, 74 Wn.App. 73, 872 P.2d 87 (1994) (on summary judgment, there is no prejudice to any findings if additional facts are considered); Meridian Minerals Co. v. King Cy., 61 Wn.App. 195, 203, 810 P.2d 31, 35, review denied, 117 Wn.2d 1017, 818 P.2d 1099 (1991) ("Although not encouraged, a party may submit additional evidence after a decision on summary judgment has been rendered, but before a formal order has been entered."). But if there was ample opportunity to submit the evidence prior to the summary judgment hearing, it is not error for the trial court to refuse to consider additional evidence on reconsideration. Wagner Development, Inc. v. Fidelity & Deposit Co., 95 Wn.App. 896, 977 P.2d 639 (1999). For further discussion of reconsideration of judgments entered on dispositive motions, see Section 70 of this Handbook, below.

Local rule alert: Most counties regulate the use of motions for reconsideration to some extent. Many counties provide that the motion will be considered on briefs and affidavits only, without oral argument, unless argument or a telephone conference is called for by the court. Local rules may or may not authorize the submission of a response and/or reply. As always, familiarity with the applicable rules is a must. Local rules are readily available from a number of sources (see note at beginning of Chapter 6).

ATTACHMENT B

FEDERAL CIVIL RULES HANDBOOK

2006

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however, the applicable legal analysis will depend on the grounds asserted for the relief requested.[64]

Motions for "reconsideration" will not granted absent "highly unusual circumstances"[65]—they do not provide litigants with an opportunity for a "second bite at the apple"[66] or allow them, like Emperor Nero, to "fiddle as Rome burns",[67] or license a litigation "game of hopscotch", allowing parties to switch from one legal theory to a new one "like a bee in search of honey".[68] Such motions are not vehicles for relitigating old issues.[69] Courts properly decline to consider new arguments or new evidence on reconsideration where those arguments or evidence were available earlier.[70]

Motions to Include Prejudgment Interest

Generally, motions to amend to include an award of either mandatory or discretionary prejudgment interest are treated under this Rule and, thus, must be sought within 10 days of entry of the judgment or be deemed waived.[71]

ADDITIONAL RESEARCH REFERENCES

Wright & Miller, *Federal Practice and Procedure* §§ 2801–21.

C.J.S. Federal Civil Procedure §§ 1061–1103 et seq., 1233–1251 et seq.

West's Key No. Digests, Federal Civil Procedure ⇐2311–2377, 2641–2662.

64. *See Jennings v. Rivers*, 394 F.3d 850, 855 (10th Cir. 2005) (because litigant sought relief based upon attorney mistake, motion filed within 10 days would nevertheless be evaluated under Rule 60(b)(1)).

65. *See McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir.1999). *See also United States ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284, 290 (4th Cir. 2002) (simple disagreement with the court's ruling will not support Rule 59(e) relief).

66. *See Sequa Corp. v. GBJ Corp.*, 156 F.3d 136 (2d Cir.1998); *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1231 (3d Cir.1995); *Senza-Gel Corp. v. Seiffhart*, 803 F.2d 661, 664 (Fed.Cir.1986).

67. *Vasapolli v. Rostoff*, 39 F.3d 27, 36 (1st Cir.1994)(Selya, J.)("Unlike the Emperor Nero, litigants cannot fiddle as Rome burns. A party who sits in silence, withholds potentially relevant information, allows his opponent to configure the summary judgment record, and acquiesces in a particular choice of law does so at his peril").

68. *See Cochran v. Quest Software, Inc.*, 328 F.3d 1, 11 (1st Cir.2003) (noting that litigants "frame the issues in a case before the trial court rules" and, once framed, should not be permitted to switch from theory to theory thereafter).

69. *See Michael Linet, Inc. v. Village of Wellington*, 408 F.3d 757, 759 (11th Cir. 2005); *Templet v. HydroChem Inc.*, 367 F.3d 473, 478–79 (5th Cir. 2004); *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir.2000); *Sequa Corp. v. GBJ Corp.*, 156 F.3d 136 (2d Cir.1998).

70. *See Michael Linet, Inc. v. Village of Wellington*, 408 F.3d 757, 759 (11th Cir. 2005); *Templet v. HydroChem Inc.*, 367 F.3d 473, 478–79 (5th Cir. 2004); *Rivera v. Puerto Rico Aqueduct & Sewers Auth.*, 331 F.3d 183, 193 (1st Cir.2003); *Moysis v. DTG Datanet*, 278 F.3d 819, 829 n. 3 (8th Cir.2002).

71. *See Osterneck v. Ernst & Whinney*, 489 U.S. 169, 173–78, 109 S.Ct. 987, 989–82, 103 L.Ed.2d 146 (1989) (mandatory prejudgment interest); *McCalla v. Royal MacCabees Life Ins. Co.*, 369 F.3d 1128, 1130–34 (9th Cir. 2004) (mandatory prejudgment interest); *Crowe v. Bolduc*, 365 F.3d 86, 92–93 (1st Cir. 2004) (mandatory or discretionary prejudgment interest).

ATTACHMENT C

Seattle School District No.1 v. State, 90 Wn.2d 519-520

"....we shall refer to the Legislature's obligation as one to provide "basic education" **through** a basic program of education as distinguished from total "education" or all other "educational" programs, subjects, or services which might be offered."

"...the Legislature has heretofore enacted laws to "provide for a general and uniform system of public schools." However, it has not as yet fully implemented Const. art. 9, ss 1 and 2 by defining or giving substantive content to "basic education" **or** a basic program of education."

"We are confident the Legislature will consider each of these concerns as well as all other appropriate matters when framing its definition of basic education and when giving **substantive content to a basic program of education**."

"Finally, the constitution requires **more than a mere definition** of " basic education" **or** a basic program of education.....the State **also** has an affirmative paramount duty to make ample provision for **funding** the "basic education" **or** basic program of education defined."