

Number range CHAPTER0001

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF ALABAMA
3 SOUTHERN DIVISION

4
5 CASE NUMBER: CV83-M-1676-S

6
7 JOHN F. KNIGHT, JR., and ALEASE S.
8 SIMS, et al., individually and on
9 behalf of others similarly situated,
10 Plaintiffs and Plaintiffs-Intervenors

11
12
13 UNITED STATES OF AMERICA,
14 Plaintiff-Intervenor,

15
16 v.

17
18 THE STATE OF ALABAMA, et al.,
19 Defendants.

20
21

22 DEPOSITION TESTIMONY OF:
23 DR. MICHAEL E. MALONE

0002

1 S T I P U L A T I O N S

2 IT IS STIPULATED AND AGREED by
3 and between the parties through their
4 respective counsel that the deposition
5 of DR. MICHAEL E. MALONE, may be taken
6 before Casey L. Atchison, a Court
7 Reporter and Notary Public for the
8 State at Large, at the law offices of
9 Adams and Reese/Lange Simpson, 2100
10 Third Avenue North, Suite 1100,
11 Birmingham, Alabama, on the 12th day of
12 April, 2004, commencing at
13 approximately 10:00 a.m.

14 IT IS FURTHER STIPULATED AND
15 AGREED that the signature to and the
16 reading of the deposition by the
17 witness is waived, the deposition to
18 have the same force and effect as if
19 full compliance had been had with all
20 laws and rules of Court relating to the
21 taking of the depositions.

22 IT IS FURTHER STIPULATED AND

23 AGREED that it shall not be necessary
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1 for any objections to be made by
2 counsel to any questions except as to
3 form or leading questions and that
4 counsel for the parties may make
5 objections and assign grounds at the
6 time of trial or at the time said
7 deposition is offered in evidence, or
8 prior thereto.

9 In accordance the Federal Rules of
10 Civil Procedure, I, Casey L. Atchison,
11 am hereby delivering to James U.
12 Blacksher, Esq., the original
13 transcript of the oral testimony taken
14 the 12th day of April, 2004, along with
15 exhibits.

16 Please be advised that this is the
17 same and not retained by the Court
18 Reporter, nor filed with the Court.
19
20
21
22
23

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1 I N D E X

2
3 EXAMINATION BY: PAGE NO.
4 Mr. Blacksher 8
5 Mr. Hunter 149
6 Mr. Foshee 162
7
8

9 E X H I B I T S

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22 FOR THE DEFENDANTS:

23 No. 04-1 149

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1 A P P E A R A N C E S

2

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22

23

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1 FOR THE DEFENDANTS:

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14 Pauline Miller, Esq. (via telephone)

15 Jeremiah Glassman, Esq. (via telephone)

16 Department of Justice

17 950 Pennsylvania Avenue NW

18 PHB 4300

19 Washington, D.C. 20530

20

21 ALSO PRESENT:

22 Marcia Smith

23

0007

1 I, Casey L. Atchison, a Court
2 Reporter and Notary Public, State of
3 Alabama at Large, acting as Notary,
4 certify that on this date, pursuant to
5 the Federal Rules of Civil Procedure
6 and the foregoing stipulation of
7 counsel, there came before me at the
8 law offices of Adams and Reese/Lange
9 Simpson, Birmingham, Alabama,
10 commencing at approximately 10:00 a.m.,
11 on the 12th day of April, 2004, DR.
12 MICHAEL E. MALONE, witness in the above
13 cause, for oral examination, whereupon
14 the following proceedings were had:

15

16 DR. MICHAEL E. MALONE
17 being first duly sworn, was examined
18 and testified as follows:

19

20 COURT REPORTER: Usual
21 stipulations?

22 MR. BLACKSHER: Yes, except
23 that since this is a trial

0008

1 deposition -- I don't have my rules
2 with me, but I think it's 32(b)
3 something or other -- says that the
4 usual reservation of objections to
5 relevancy and materiality can still be
6 raised at trial unless, the rule says,
7 the problem could have been obviated by
8 identifying it at the deposition.

9 So if there is an objection to
10 relevancy and materiality that I have a
11 chance of curing, I would like the
12 opportunity to do that before it gets
13 to the Court, since this is a trial
14 deposition.

15

16 EXAMINATION BY MR. BLACKSHER:

17 Q. Would you give your full name
18 and address, please?

19 A. Michael E. Malone. My legal

20 address is 508 Ridge Road, Birmingham;
21 I work in Montgomery.

22 Q. Your residence address is in
23 Birmingham?

0009

1 A. Yes, sir.

2 Q. And what position do you hold
3 with Alabama Commission on Higher
4 Education?

5 A. I'm the executive director,
6 Alabama Commission on Higher Education.

7 Q. And how long have you held that
8 position?

9 A. In my second year; coming up on
10 20 months.

11 Q. And prior to being executive
12 director of ACHE?

13 A. I was president of the Dothan
14 campus, Troy State University, and I
15 was vice-chancellor of the Troy State
16 system.

17 Q. How long did you hold that Troy
18 State position?

19 A. Six years.

20 Q. And before that?

21 A. I was associate vice-chancellor
22 for academic affairs at Western
23 Carolina University in Cullowhee, North

0010

1 Carolina. And I was there for seven
2 years.

3 Q. Okay.

4 A. Prior to that, I was at Old
5 Dominion University in Norfolk,
6 Virginia, eight years. Prior to that,
7 I was at the University of Alabama for
8 eight years.

9 Q. Okay.

10 A. My daughter said I can't hold a
11 job.

12 Q. But that's a lot of years when
13 you add them all up. So when you
14 started at the University, your
15 employment at the University of
16 Alabama, what was that position?

17 A. I was assistant dean of
18 admissions. Actually, prior to that I

19 was assistant director of student
20 services at Jefferson State Junior
21 College. Prior to that, I was a
22 youthful offender counselor here at the
23 Birmingham City Jail. And then prior
0011

1 to that, I was a teacher of English,
2 social studies, and coach, and
3 everything else at Ragland High School
4 in St. Clair County.

5 Q. And what is your highest earned
6 degree?

7 A. I have a Ph.D. in behavioral
8 studies, University of Alabama.

9 Q. Okay. From the School of
10 Education?

11 A. Yes, sir.

12 Q. Okay. And what year was that?

13 A. 1976.

14 Q. Okay. Are you a native of
15 Alabama?

16 A. Yes, sir; Birmingham.

17 Q. Okay. So you went to K-12 in
18 Alabama?

19 A. Robinson Elementary and Banks
20 High School.

21 (Ms. Jones joins via telephone.)

22 (Discussion held off the record.)

23

0012

1 (Plaintiff's Exhibit No. 1 was marked
2 for identification and is attached.)

3

4 Q. Okay. Dr. Malone, I've marked
5 as Exhibit 1 the home page I printed
6 off the ACHE web site that has the
7 student database on it.

8 A. Yes, sir.

9 Q. And I'm just going to be using
10 that as a reference.

11 Do you recognize that?

12 A. Yes, sir.

13 Q. I want to ask some questions
14 about data that is available in the
15 student database. As I understand it,
16 it is a what they call a student unit
17 database; is that correct?

18 A. (Witness nods head.)

19 Q. You have to --

20 A. Yes, sir, it is a student unit
21 database. We have six years -- it was
22 required by statute in 1995. And it
23 was part of viability legislation that
0013

1 it was a major reform in higher
2 education in the mid-'90s. And we now
3 have entered our sixth year of student
4 data, so it will soon become a rich
5 source of data analysis in the future.

6 Q. Okay. Explain what a student
7 unit database is.

8 A. Well, a student unit database
9 primarily takes what we call cohort
10 data which tracks students by their
11 identification numbers. So if you
12 wanted to do a retention study, you
13 wanted to do a graduation study, you
14 would literally, you could follow by
15 the individual student without,
16 obviously, being able to identify the
17 student.

18 But instead of being able to
19 say, well, this is an aggregate, what
20 you can do is actually follow a class
21 by student units and then determine
22 whatever answers to the questions that
23 you put into the database.

0014

1 Q. So each person who has been a
2 high school graduate in Alabama --

3 A. Yes, sir.

4 Q. -- is entered by his or her
5 identification number of some sort?

6 A. Yes, sir.

7 Q. And includes his name and
8 address?

9 A. Right.

10 Q. Which you don't use, obviously,
11 for privacy purposes?

12 A. That's right.

13 Q. All right. And the student
14 unit database begins -- the person
15 enters it at what point in his or her
16 education career, is what I'm trying to

17 ask?

18 A. Well, we receive it at the
19 point of the student's completion in
20 high school.

21 Q. Right.

22 A. It is our hope in the future to
23 be able to partner with the State

0015

1 Department of Education to be able to
2 actually follow the students from the
3 ninth grade forward.

4 Q. Who do you receive it from?
5 The State Department of Education?

6 A. Yes.

7 Q. Are they required by the same
8 1995 statute to participate in this
9 student unit database?

10 A. Not aware that they're
11 specifically mentioned in the statute.

12 Q. Okay.

13 A. I don't recall. We work very
14 closely with office of post-secondary
15 as well as the State department.

16 Q. But you wouldn't have in your
17 student unit database students who
18 dropped out of high school?

19 A. No, sir.

20 Q. Do you know whether the State
21 department would have that?

22 A. I don't know. I would hope
23 they would, but I don't know for sure.

0016

1 Q. And you don't know -- I'm going
2 to be taking Dr. Richardson's
3 deposition tomorrow; I might ask him
4 some of these questions too. But you
5 don't know at what point in the career
6 of the student that he or she enters
7 the State department's database?

8 A. No, sir. We also are the
9 repository of -- we're the accountable
10 agency to submit student data to the
11 National Center for Education
12 Statistics. And you often hear those
13 data referred to IPEDS, which is
14 Integrated Post-Secondary Data System.
15 And so some of the data that you have

16 received -- I would suspect most of the
17 data you received -- is coming to you
18 by the way of IPEDS. That's been a
19 long-existing submission.

20 Q. Now, you say that when you have
21 six years of data, you'll be able to do
22 more than you can do now; is that what
23 you're --

0017

1 A. Yes, sir.

2 Q. Okay. Explain that.

3 A. As I understand it -- and
4 again, I'm 20-month wonder here coming
5 into this. But the first two years of
6 data submissions were not all that
7 clean, as they say. There were --

8 Q. Do you know what years those
9 were?

10 Was there a start-up lag?

11 A. If I gave you a year, it might
12 be inaccurate.

13 Q. Okay. By looking at something
14 like the data dictionary or anything
15 else on that page, can you --

16 A. Well, yeah. If you look back
17 to the compilation of the data
18 dictionary, what -- I don't want to
19 sound like I know more about this than
20 I do -- but typically when you have a
21 student database or faculty database,
22 any kind of database that is
23 unit-driven, you have agreed-upon

0018

1 elements that go into the database.

2 And those are defined by way of the
3 data dictionary.

4 In reading of the statute,
5 obviously, there was very general
6 references to how -- what should be
7 done. And the data dictionary was
8 compiled by colleagues representing the
9 four-year and the two-year systems.
10 That's group is called the HEGAG group.
11 They're institutional research types.
12 And they came together in '97-'98 and
13 developed the data dictionary. And
14 from those elements we will be able to

15 extract information.

16 Now, obviously, too, that's a
17 dynamic process, and sometimes you
18 add -- add elements.

19 Q. So if '97-'98, you think, was
20 the first date, even though it wasn't
21 clean data?

22 A. Those were the -- that was the
23 date that the data dictionary was put
0019

1 together, so that would be, yes, sir.

2 Q. Now, what will you be able to
3 do with six years of data that you
4 can't do now, to go back to my
5 question?

6 A. Well, for instance, the -- if
7 you're tracking traditional-age
8 students -- traditional-age defined as
9 18 to 22 years of age -- we know that
10 students do not graduate in four years
11 anymore, and --

12 Q. Very few do?

13 A. No, sir. About a quarter, as a
14 matter of fact. And therefore, you
15 would want to be able to take a class
16 and track them for at least five years,
17 if not six. And on the IPEDS, we're
18 required to present, I think I'm
19 correct in saying, at least five years
20 of tracking data.

21 Q. Is there some federal reg or
22 statute, something like "No Child Left
23 Behind" or -- that's probably not it;
0020

1 that's a K-12 measure -- but that
2 establishes a six-year period as sort
3 of a nationwide measure for completion?

4 A. Well, this was my -- my pause
5 is that I believe it is five years for
6 reporting. That we are required to
7 report five years' worth of graduation
8 to the National Center for Educational
9 Statistics.

10 Q. And again, this is a lot of
11 stuff that comes off your web site.
12 But I'm going to go ahead and mark it
13 for exhibit purposes.

14

15 (Plaintiff's Exhibit No. 2 was marked
16 for identification and is attached.)

17

18 Q. Can you identify this document?

19 A. This would be the -- this is
20 involved with the data dictionary and
21 those elements that define the units
22 that would appear and their -- and how
23 they appear for programming. In other
0021

1 words, there would be -- it would be a
2 student identifier, and then there
3 would be a field. These are fields
4 that drive the database that have been
5 agreed upon by the HEGAG order.

6 Q. So if we wanted to know what
7 specific data you capture for each
8 student, we would look at Exhibit 2?

9 A. Yes, sir. For the individual,
10 individual data field, yes, sir. And
11 these are -- are standard.

12 Q. All right. Now, let me see.
13 What you do have from the database that
14 you've already accumulated you have,
15 going past layouts here, intention
16 reports for fall of 1998 through fall
17 of 2001. Let me see if I didn't print
18 out one of those. I printed out two.
19 Let me just mark them so we can see
20 what it looks like.

21

22 (Plaintiff's Exhibit No. 3 was marked
23 for identification and is attached.)

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1

2 Q. Okay. Can you identify
3 Plaintiff's Exhibit 3.

4 (Witness reviews document.)

5 Q. That came off your web site;
6 right? I mean --

7 A. This would be extracted from
8 the student database, yes, sir.

9 Q. But when I go to the web site
10 and to see what is available in terms
11 of reports for us to look at based on
12 your database, this is one of those

13 reports?

14 A. Yes, sir.

15 Q. And it only provides us
16 information about the cohort of
17 entering freshman and how many return
18 for their, I guess, their sophomore
19 year; is that correct?

20 A. Yes, sir.

21 Q. This report doesn't track them
22 through any further than their
23 sophomore year.

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1

2 (Plaintiff's Exhibit No. 4 was marked
3 for identification and is attached.)

4

5 Q. So, for example, let me show
6 you Exhibit 4 here, which is the one I
7 printed off for -- under the fall
8 2001 --

9 A. Uh-huh.

10 Q. -- report. It seems, again,
11 only to show one cohort for a one-year
12 return period.

13 A. In this particular extract,
14 yes, sir, that's what it does.

15 Q. Okay. But you could, if you
16 wanted to, take that 1998 cohort that's
17 in Exhibit 3 and your computer people
18 could print out where those people went
19 in their junior, their senior, or
20 subsequent years?

21 A. You could be able to track them
22 if they appear in the -- in that year's
23 extraction. I'm not aware at this

0024

1 point that we can tell you that they
2 transferred to Auburn University and
3 subsequently graduated from there.
4 That's what I hope to be able to do.

5 Q. So you're saying --

6 A. But this is a cohort unit table
7 that says that Auburn University had
8 3,755 freshmen in the fall of 2001, and
9 where were they relative to Auburn
10 University in the fall of 2002. They
11 were either there or not there. And

12 that's the -- that's what a cohort unit
13 tracking does for you.
14 Q. But if they transferred from
15 Auburn to Troy State, Troy State would
16 report that that person by that
17 identity unit --

18 A. We can do that now. We can do
19 that now because, again, we're tracking
20 on student identifiers.

21 Q. Right. These are units, that's
22 what's unique about this?

23 A. Yes, sir.

0025

1 Q. As you say, it's not
2 aggregates, which is what we used to
3 have do to deal with.

4 A. Well, they are aggregated.

5 Q. They're aggregated in this
6 report.

7 A. Yes, sir. But you're tracking
8 a student, Mike Malone, through the
9 system by way of an aggregate.

10 Q. My point is -- well, let me ask
11 the question this way. If we wanted,
12 or if you wanted to ask your computer
13 people to do it, as long as the student
14 unit, John Doe, who starts out in 1998
15 stays in a public institution in
16 Alabama, no matter how many times he or
17 she transfers around --

18 A. That's right.

19 Q. -- you have the capability of
20 tracking that person?

21 A. Yes, sir.

22 Q. Okay. Now, what if the person,
23 what if the student transfers to a

0026

1 private institution?

2 A. We do not have that capability.
3 We have offered that opportunity to our
4 independent colleagues, and they choose
5 not to participate.

6 Q. You mean the private schools in
7 Alabama?

8 A. Yes, sir.

9 Q. What about public or private
10 institutions out of state?

11 A. No, sir.
12 Q. Okay. Is the federal
13 government going to gobble these I.D.s,
14 these units up in into their grand
15 database so that Big Brother will
16 always know where they are?
17 A. The Higher Education Act is
18 coming up for reauthorization, we hear,
19 in the year 2005. And we're being very
20 deliberate and circumspect about having
21 some input into what that -- to answer
22 your question, we would hope that there
23 would be some delimiters and parameters
0027

1 to be able to protect the --
2 Q. Well, it raises a lot of public
3 policy questions.
4 A. Yes, sir, it does.
5 Q. I'm just trying to identify
6 what these reports are you have on your
7 web site.
8 A. Sure.

9
10 (Plaintiff's Exhibit No. 5 was marked
11 for identification and is attached.)
12

13 Q. Can you identify Exhibit 5
14 please?
15 A. Yes, sir. This is an extract
16 from the student database that's
17 looking at the undergraduate transfers
18 for the fall term of 2002. So this is
19 fairly recent data.
20 Q. Okay. One of the questions I
21 wanted to ask about Exhibit 5 is, there
22 seems to be an "out-of-state" category
23 there that I wanted to ask you about.
0028

1 (Witness reviews document.)
2 A. Well, I would -- this is the
3 institution transferred to. So if
4 you -- if you are domiciled out of
5 state and you come into the state of
6 Alabama, then you're going to have
7 your -- you can be tracked that way.
8 It's the outward migration that I think
9 was your first question.

10 Q. Right. And that answers it.

11 A. Yes, sir.

12 Q. Let's see. I'm going to mark
13 this one as 6.

14

15 (Plaintiff's Exhibit No. 6 was marked
16 for identification and is attached.)

17

18 Q. Can you identify 6, please?

19 A. This is a tuition and residency
20 report whereby we track those students
21 who are -- the word is "Alabama
22 "residents"; take that to mean
23 domiciled in Alabama -- and this
0029

1 represents the fall, entering fall term
2 2002.

3 I would add that in the same
4 statute that created -- that we call
5 the viability statute of '95 that
6 created student database and faculty
7 database, that tuition also was spoken
8 to in that part of the statute that
9 requires out-of-state students to pay
10 two times in-state, at a minimum. And
11 so this report's important to the
12 public as well as the state legislature
13 and the governor as we advise them on
14 policy.

15 Q. The 1995 statute expressed an
16 interest on the part of the state
17 legislators in how many out-of-state
18 students there were at each
19 institution?

20 A. Yes, sir.

21 Q. All right.

22

23 (Plaintiff's Exhibit No. 7 was marked
0030

1 for identification and is attached.)

2

3 Q. And on the same theme, would
4 you identify Exhibit 7, which I also
5 printed off the web site.

6 A. Yes, sir. Also part of that
7 statute that students who lived within
8 50-mile radius of the campus would

9 be -- their tuition would be considered
10 the same as an in-state domicile. And
11 this is a tracking report in the same
12 vein as the other.

13 Q. Okay. Now, I'll tell you that
14 I clicked on the tab that says "Fall
15 2002 High School Report" to get the one
16 I've marked as Exhibit 8.

17

18 (Plaintiff's Exhibit No. 8 was marked
19 for identification and is attached.)

20

21 A. And you noticed the disclaimer?

22 Q. No, actually I didn't.

23 MR. HUNTER: Why don't you read
0031

1 the disclaimer into the record.

2 MR. BLACKSHER: I'm trying to.
3 Oh, you have to click on it to read it.

4 MR. HUNTER: Okay.

5 A. Yes, sir. But I would take the
6 parenthetic from the top of the report
7 that says this is the "High School
8 Report 2001-2002 Alabama Public High
9 School Seniors," parenthesis, "As
10 reported by the Alabama State
11 Department of Education."

12 And so that I -- I'm sure
13 that's the disclaimer, that these are
14 data that we received from our partners
15 in the Department of Education.

16 MS. MILLER: Excuse me for
17 interrupting. This is Polly Miller. I
18 know I got in late.

19 Are you looking at a web site
20 while you're doing this deposition,
21 Jim? I couldn't quite tell.

22 MR. BLACKSHER:
23 www.ache.state.al.us. And then go to
0032

1 the student database.

2 MS. MILLER: Okay. Will do.
3 Thank you.

4 Q. (By Mr. Blacksher) I know
5 there's a question that's been in the
6 news lately about the way the State
7 Department of Education measures high

8 school dropout rates. But is there any
9 reason to question -- any systemic
10 reason or methodological reason you
11 know of to question the accuracy of
12 these data that are Exhibit 8 that you
13 get from the State department?

14 A. No, sir. Only if there were
15 inconsistent patterns of reporting,
16 that would be my only question. But I
17 have no reason to know that, that there
18 were inconsistent patterns.

19 Q. And these are from the student
20 unit database?

21 A. That is taken from the State
22 department that's transferred to us,
23 and that we post on our web site.

0033

1 Q. So when you say how many, when
2 you aggregate how many -- and by the
3 way, this is just the first page,
4 obviously; it's a much larger report
5 than this. But for purposes of
6 explanation, Abbeville High School, how
7 many of the 73 high school seniors
8 enrolled in two-year college, how many
9 enrolled in four-year colleges, you
10 could actually break that down by
11 institution; right?

12 A. (Witness nods head).

13 Q. You could say how many went to
14 Alabama State, how many went to the
15 University of Alabama, and so on?

16 A. Yes, sir. If we take, for
17 instance -- show my age -- if you take
18 a data tape, and I suspect it's all
19 electronic now, if you take a data tape
20 and you just do an I.D. matchup and you
21 say, okay, I see this I.D. from this
22 student Abbeville; and then a year
23 hence, that student's at Northeast

0034

1 State Community College.

2 Q. And according to Exhibit 2,
3 race or ethnicity is among the
4 information that you collect?

5 A. Yes, sir, that's correct.

6 Q. All right. Let me ask some

7 questions about a couple of the reports
8 you guys provided as they provided us
9 in our discovery responses.

10 A. Yes, sir.

11 Q. Okay. The first one is
12 "Attachment A" to your response to our
13 request "5. d iv. 1." Just take a look
14 at that.

15 In fact, I think I'll mark that
16 as Exhibit 9.

17
18 (Plaintiff's Exhibit No. 9 was marked
19 for identification and is attached.)

20
21 A. As far as I recall the
22 communication for discovery, there were
23 some items that you were requesting

0035

1 from us that would have to come from
2 the Department of Education. This may
3 be one of them.

4 Q. Just describe what that shows.

5 A. Yes, sir. This is the number
6 of seniors enrolled in higher ed -- no,
7 I'm sorry. This is number of seniors
8 that were in the Alabama public high
9 schools as of 1999. And then there's
10 a -- the number of seniors 2000, number
11 of seniors 2001, 2002. And it's
12 43,000, 44,000; 44,800, 44,700,
13 respectively. Those are the number of
14 seniors.

15 Then there's a chart that gives
16 the total that were enrolled in higher
17 education in that same year, broken
18 down by four-year and two-year. 1999,
19 there were 16,623, 17,908 --

20 Q. You won't have to read the
21 numbers. When you say "enrolled in
22 higher education," do you mean in a
23 public institution in Alabama or

0036

1 anywhere?

2 A. Let me read the footnote here.
3 (Reading) These data are based on the
4 number of high school seniors in a
5 public high school who enrolled in

6 Alabama public college or university
7 the immediate fall after high school.

8 Q. All right. The document
9 explains that.

10 A. Yes, sir.

11 Q. Just looking at that -- first
12 of all, we're talking about the number
13 of seniors, we're not talking about
14 high school graduates?

15 A. Right.

16 Q. Right.

17 A. The first column is the, I
18 would assume, the aggregate numbers.

19 Q. But this would indicate that --
20 and I'm looking at an e-mail I got from
21 Dr. Mabrey about this, and he says it
22 shows a 26 percent growth in the number
23 of four-year students and a 13 percent
0037

1 growth for two-year students, 19
2 percent overall if you combine them,
3 over that four-year period.

4 Now, I'm not asking to you
5 verify his numbers, but can you agree
6 that those numbers are increasing?

7 A. Yes, sir.

8

9 (Plaintiff's Exhibit No. 10 was marked
10 for identification and is attached.)

11

12 Q. And then if you look at
13 Exhibit 10 here, which was "Attachment
14 B" to that various discovery requests
15 in Request No. 5. d.

16 A. This relates to the number of
17 seniors in those same reporting periods
18 that were enrolled in higher ed any
19 time through the summer of 2003, so
20 these would be recent tracking data.

21 Q. Okay. Just take a quick look
22 at it.

23 A. And from '99 to 2002, it looks
0038

1 like a slight decrease.

2 Q. Yes. The number of seniors
3 column appears to be the same as in
4 Exhibit 9.

5 A. Yes, sir.

6 Q. But this appears to be tracking
7 them, what, four years later?

8 A. This would be -- well, let's
9 see. Yeah, it would be --

10 Q. For '99 people, it would be
11 four years later?

12 A. That's right.

13 Q. What strikes me about Exhibit
14 10 here -- and maybe I'm just looking
15 at this wrong; this is me talking
16 now -- it looks to me like you had more
17 of the 1999 high school class still in
18 public higher ed in Alabama in 2003
19 than you did of the 2002 class.

20 Am I looking at that wrong?

21 (Witness reviews document.)

22 A. This would -- it's a busy
23 chart. This would show you numbers of
0039

1 students who were representing the
2 senior classes who, when this snapshot
3 was taken, were still enrolled.

4 Q. Right. And for the sake of my
5 point here, can we agree that the
6 number of seniors column has
7 essentially substantially the same
8 number of seniors in each of those four
9 years, '99 through '02? One's 43,700,
10 and the highest one is 44,800?

11 A. This is a unduplicated count,
12 so that would be correct.

13 Q. So even though you have more or
14 less the same number of seniors, it
15 seems like the more recent seniors are
16 enrolling at a lesser rate than the
17 1999 seniors, is what I'm trying to get
18 at; is that a fair inference to draw
19 from those numbers?

20 A. When I add the two together --

21 Q. Can I remind my question? I
22 said "enrolling." That's a snapshot,
23 as you say. So I guess it shows that

0040

1 they're there; that they are enrolled
2 as of the summer of -- what is it,
3 2003?

4 A. Yes, who enrolled in a
5 institution any time from the immediate
6 fall after high school graduation. So
7 they -- this is not a, you know, a
8 tracking you, this could be, you were
9 here once, maybe you were gone for a
10 while, now you're back in.

11 Q. Right.

12 A. That's the nature of
13 unduplicated head count.

14 MR. HUNTER: Can I ask a
15 question just for clarification?

16 Is the data of people who are
17 enrolled on a particular day, or is it
18 data of people who have enrolled any
19 time between the time of high school
20 graduation and the time of summer 2003?

21 Q. Well, read what it says in Item
22 3 at the bottom.

23 A. (Reading) These data are based
0041

1 on the number of high school seniors in
2 public institutions who enrolled in a
3 four-year -- same was on the
4 two-year -- any time from the immediate
5 fall after high school graduation
6 through the summer, so.

7 MR. HUNTER: So it doesn't mean
8 there still there that summer, they're
9 just enrolled?

10 THE WITNESS: Of the seniors in
11 2002, when we looked at it in the
12 summer of 2003, there had been 22,651
13 who had been there. My problem is, I'm
14 adding the two columns over here, and
15 there's got to be a caveat. In other
16 words, you add up the two-year and the
17 four-year, and you come up with 25,000.
18 See if there's a disclaimer here.

19 (Reading) It does not match the
20 sum of students enrolled in a four-year
21 plus the number in a two-year. The
22 total of those two columns would
23 include students who transferred from
0042

1 two-year and four-year, so they're --
2 I answered my own question. They're

3 moving about.

4 Q. (By Mr. Blacksher) But the fact
5 that the number that's listed in
6 enrolled in four-year or two-year
7 institutions through the summer of 2003
8 means that at any time --

9 A. Right.

10 Q. -- during the period --

11 A. Between fall of 2000.

12 Q. -- since they were seniors?

13 A. Yes, sir.

14 Q. That might explain to some
15 extent why there are more from the 1999
16 class who had been enrolled during that
17 four-year period than those from the
18 2002 class, who haven't had as much
19 time to get into the system --

20 A. Right.

21 Q. -- as the ones from '99?

22 A. I would infer that, yes, sir.

23 Q. And since this is not a cohort

0043

1 analysis, that really doesn't
2 necessarily tell us there's a falloff
3 in enrollment.

4 To the contrary, Exhibit 9
5 indicates there is a increasing student
6 enrollment from high school seniors;
7 that is, an increasing percentage of
8 high school seniors are enrolling in
9 Alabama institutions?

10 A. Well, because it is an
11 unduplicated count; in other words, if
12 you're there, you're counted once,
13 you're not counted as a duplicate.
14 Therefore, to be able to do an
15 unduplicated head count, we must track
16 you through the system.

17 So, yes, it is part of the
18 cohort study. Or otherwise, it would
19 all -- it would just be duplicated
20 numbers.

21 Q. But you see the -- and I'm
22 trying to understand this for my own
23 purposes here as much as anything else.

0044

1 But if you compare the numbers of

2 students enrolled in the year that they
3 graduate from high school --

4 A. Right.

5 Q. -- with the numbers -- which
6 is Exhibit 9 -- with the numbers on
7 Exhibit 10 which show numbers who were
8 enrolled at any time during this
9 four-year period, the numbers in
10 Exhibit 10 are larger because you're
11 giving them more time to get in?

12 A. That's right, yeah.

13 Q. You're giving them more time to
14 get in.

15 But the best indicator of --
16 well, isn't it true that the best
17 indicator of the increasing number of
18 students that public higher ed in
19 Alabama is being called on to education
20 are the numbers in Exhibit 9, which
21 show enrollment going up?

22 A. Yes.

23 Q. Okay.

0045

1 A. Yes.

2 Q. All right. Let's see.

3 A. And again, we're talking in the
4 aggregate; we're not breaking those
5 down by men, women, black, white,
6 Asian, Hispanic, whatever. We are
7 breaking it four-year, two-year; and
8 that's as much desegregation as you see
9 in that chart.

10 Q. What about, could we get it
11 done? How long would it take us to do
12 a race analysis of this data?

13 A. Well, let me go back to an
14 earlier statement I made. We had been
15 doing reports to the federal government
16 by way of the IPEDS, Interdisciplinary
17 Postsecondary Data System, for years.
18 I mean, as long as I can -- as long as
19 I've been in this business. There's
20 been changes in the way the federal
21 requirements and some of the data
22 elements. But basically, that is -- we
23 can do what you just asked by way of

0046

1 IPEDS.

2 I'm looking forward to the time
3 when we can do IPEDS like studies using
4 our state database. I'm very proud of
5 this. The Speaker of the House
6 deserves lots of credit for having this
7 where it is. And I have promised him
8 that we are going to use this as a
9 data-rich source to complement what
10 we've doing for a number of years
11 through IPEDS, if that makes any sense.

12 Q. Okay. A lot of these questions
13 I'm asking so that the consultants I'm
14 using will know what --

15 A. Yes.

16 Q. -- might be available, even
17 though we don't have a lot of time left
18 to get information from you, we might
19 come back and try to get maybe some of
20 those files that can be released so
21 that they can look at some of this data
22 and --

23 A. Certainly.

0047

1 Q. Different ways.

2 A. And I know they're familiar
3 with IPEDS because that's been the
4 common data submission report.

5

6 (Plaintiff's Exhibit No. 11 was marked
7 for identification and is attached.)

8

9 Q. The last of the documents from
10 your discovery response is "Attachment
11 C." I marked it at 11. And it just
12 shows transfers out of the two-year
13 system into the four-year universities?

14 A. Okay.

15 Q. Can -- and because those, as
16 you say, are unduplicated individuals
17 and the transfer could have occurred at
18 any time during that four-year period,
19 right, depending --

20 A. Prior to fall of 2000.

21 Q. Depending on when the student
22 actually entered.

23 So the declining numbers don't

0048

1 necessarily mean that the number of
2 students annually transferring from
3 two-year to four-year is decreasing;
4 you can't look at that and tell, can
5 you?

6 A. No, you wouldn't -- no, you
7 wouldn't infer that from this chart.

8 Q. So to get a good look at that,
9 you would have to look at the data
10 another way?

11 A. Uh-huh.

12 Q. Okay.

13 A. Yes.

14 Q. All right. Now, my consultants
15 have compared Attachment A, which is
16 Exhibit 9, with the core university
17 funding from the Education Trust Fund
18 that was allocated to higher ed over
19 that same four-year period.

20 A. Uh-huh.

21 Q. And they conclude -- and I'm
22 going to tell you what they conclude so
23 that -- since I know you don't have the

0049

1 data in front of you, I'm not going to
2 ask you to verify this -- let me just
3 ask the question this way.

4 A. Yes, sir.

5 Q. Isn't it true that the amount
6 of money that's being allocated to
7 higher ed from the Education Trust Fund
8 is not going up at the same rate as
9 your student rate is increasing and
10 student enrollment rate is increasing?

11 A. I haven't seen that
12 correlation.

13 Q. Okay. So you can't answer
14 that?

15 A. Because of the second part of
16 that is basing the appropriations
17 against the increases in enrollment,
18 no, I wouldn't -- I wouldn't care to
19 comment on that.

20 Q. Okay.

21 (Discussion held off the record.)

22 (Break taken.)

23 Q. (By Mr. Blacksher) Dr. Malone,
0050

1 I want to talk to you next about the
2 issue of rising tuition at Alabama's
3 four-year and two-year institutions.

4 Is that a matter of concern to
5 ACHE?

6 A. Yes, sir, it is a matter of
7 concern to ACHE and their director.

8 Q. And how big of a concern is it,
9 and why is it a concern?

10 A. If I can beg some personal
11 privilege here, there were only three
12 people on both sides of either side of
13 my family to ever attend college. One
14 was in Michigan State, and she had some
15 opportunities I didn't have. And my
16 people go back to the 18th century in
17 this state. And very, very few ever
18 got out of high school, not to mention
19 college.

20 And so I am a product of the
21 Great Society. If it hadn't been for
22 the federal aid, I probably would not
23 have had the means to go to school,
0051

1 even if I had thought that was the
2 thing to do. But I was trying to
3 impress the love of my life's parents,
4 who were both college graduates, and I
5 thought, well, I don't know how to do
6 it, but I'll find a way to do it.

7 And so I'm sitting here as a
8 product of that. And so I have a real
9 kinship with first-generation students
10 who do not have an understanding of the
11 background or maybe even the value of
12 higher education.

13 So yes, I have a personal
14 concern. And because higher education
15 has been my life for 30 years, it
16 continues to be a concern.

17 Q. Has it been going up by double
18 digits in the last several years?

19 A. Yes, sir, it certainly has.
20 That is a national trend, regional
21 trend, and a trend here in Alabama.

22 Q. And do you expect it to
23 continue to go up by double digits?
0052

1 A. I suspect this year, this next
2 year, will be double digits. I serve
3 on the Prepaid Affordable College
4 Tuition board of trustees. And we have
5 looked at some assumptions in trying to
6 develop our contracts for the future.
7 And one of the assumptions that we have
8 built into those contracts, pricing
9 those contracts, is at least two more
10 years of double digit and then
11 hopefully some amelioration in the,
12 what I call the out years, down to
13 single digits.

14 Q. What about in the two-year
15 system?

16 A. They're tracking the same
17 trends. Of course, the two-year system
18 has typically been half the cost of the
19 credit hours relative to the public
20 four-years. But their increases have
21 been significant in the last three
22 years. And they will go up again this
23 next year.

0053

1
2 (Plaintiff's Exhibit No. 12 was marked
3 for identification and is attached.)
4

5 Q. I've marked as Exhibit 12 and
6 editorial from the Montgomery
7 Advertiser on February the 15th, 2003,
8 that questions the State's commitment
9 to investment in postsecondary
10 education. And it cites Alabama State
11 University, to cite one example, it
12 says, recently raised tuition rates 24
13 percent.

14 Can you verify that that was
15 the increase that Alabama State made in
16 2003?

17 A. No, sir, I can't verify that.

18 Q. Okay. It also says that
19 Chancellor Roy Johnson of the
20 Postsecondary System, the two-year

21 system, said that tuition will a rise
22 10 to 12 percent at those institutions.
23 This was in February of 2003.

0054

1 Can you can you verify that
2 that was the case?

3 MR. HUNTER: Are you asking him
4 to verify the tuition will rise by 10
5 to 12 percent, not whether this article
6 said that, or what --

7 MR. BLACKSHER: No, no. I'm
8 asking him whether, in fact, it did
9 rise by 10 or 12 percent.

10 A. I'm not aware of the specific
11 amount. I do know the State board has
12 passed on some tuition increases. I'm
13 not aware of the exact amount.

14
15 (Plaintiff's Exhibit No. 13 was marked
16 for identification and is attached.)

17
18 Q. Okay. Here is a an article out
19 of the September 20, 2003, Birmingham
20 News. And it quotes Dr. Portera,
21 Chancellor Malcolm Portera, as saying
22 that, "The days of inexpensive tuition,
23 food, room and books may be a thing of
0055

1 the past."

2 And I wanted to ask if you'll
3 agree with that statement.

4 A. With all due respect to my good
5 friend Chancellor Portera that I've
6 known for a number of years, he and I
7 are approximately the same age. And we
8 remember the days of you pay, you write
9 one check, and it's probably \$500 for
10 that semester, and you're in the dorm.
11 So those the days that he and I, and
12 probably people around this table
13 lament, are those days when it's --
14 that will never return.

15 Q. Okay. He also says in this
16 article that the "universities expect
17 flat or shrinking support from the
18 state."

19 Do you agree with that

20 statement from Chancellor Portera?

21 A. Yes. I think considering

22 the -- yes, sir, I agree with that.

23 Q. For however in the future, the
0056

1 indefinite future?

2 A. The Education Trust Fund is --
3 the revenues feed the trust fund by way
4 of income tax and sales tax. And in
5 times of when the economy's good, as we
6 saw in '97, '98, '99, then the trust
7 fund is flush with cash, as we say.
8 The times when we lose jobs and we
9 lose -- and we're not buying the big
10 ticket items and the trust funds
11 suffers -- and we are in that period --
12 in Alabama, we call that proration.

13 So will 2006, '07, '08 be
14 better? The economists would have to
15 tell us yes or no on that. And if they
16 are, then the trust fund will grow.
17 And we have seen some slight growth,
18 but not much.

19

20 (Plaintiff's Exhibit No. 14 was marked
21 for identification and is attached.)

22

23 Q. Okay. I've marked as Exhibit
0057

1 14, an article, February 14, '03,
2 quoting President Robert Potts,
3 University of North Alabama, soon to
4 leave for other pastures.

5 A. Yes.

6 Q. And he says, or it's attributed
7 to him that between 1995 and 2000 state
8 support in Alabama has dropped by \$906
9 per student. And he says, "Regionally,
10 state governments have increased
11 support of higher education by \$40 per
12 student."

13 Now, I don't expect you to be
14 able to verify those numbers, but is
15 what President Potts is saying about
16 the opposite trends in Alabama and
17 regional states true, to your
18 knowledge?

19 A. I have to couch Dr. Potts's
20 statement here in that he is looking at
21 appropriation that does not consider
22 the medical schools or the pharmacy
23 schools or veterinarian schools. And
0058

1 therefore, if you take those out, then
2 you will see a drop in per student
3 funding relative to the Southeast.

4 Q. And if you put funding for the
5 medical schools -- are you talking
6 about funding out of the Education
7 Trust Fund for education at the medical
8 schools?

9 A. Right. The 906 per student,
10 I'm fairly certain he is talking about
11 just the students who are not
12 enrolled -- just the students who are
13 enrolled in a traditional education. I
14 don't know -- I don't know the source
15 of this.

16 Q. All right.

17 A. I am speculating.

18 Q. And if you were to include the
19 medical schools, how would that change
20 President Potts's conclusion?

21 A. I really shouldn't have brought
22 that up if I couldn't answer that
23 second question.

0059

1 Q. Okay.

2 A. I'm afraid I know these people
3 too well, and I probably should not
4 speculate.

5 Q. All right. But as executive
6 director of ACHE, without -- I mean, we
7 have a lot of numbers, and I'm not
8 trying to get you to put into the
9 record the numbers themselves. The
10 record will eventually speak for itself
11 about what the numbers are.

12 A. Right.

13 Q. But what I want to get from you
14 as the policy maker, overseer,
15 executive director of ACHE: Is it true
16 that the per student dollar
17 appropriation for higher ed in Alabama

18 is dropping?

19 A. I would support that. But I
20 would also be very quick to say,
21 Alabama is unusual in the fact that the
22 public institutions in Alabama are
23 educating 90 percent of the students in
0060

1 education. Alabama does not have a
2 Duke, a Vanderbilt, a Miami or Tulane
3 or Emory, and therefore, that's
4 probably an occurrence that you would
5 expect to happen. As the State
6 appropriation flattens and goes down,
7 then the education, the unit amount per
8 student would probably be declining as
9 well. That would be what you would
10 expect.

11 Q. And wouldn't you expect, again,
12 as a policy maker in higher education,
13 that the number of students enrolling
14 in higher education, whether it's
15 public or private, will continue to
16 increase as the need for a higher
17 education degree becomes more important
18 economically and socially?

19 A. That would -- as a taxpayer and
20 a policy maker, I would -- that would
21 be my hope.

22 Q. We'll get to the 90 percent,
23 perhaps, in a minute.

0061

1 A. All right.

2 Q. Now, this particular article,
3 Exhibit 14, is talking about the
4 appearance of university presidents
5 before the legislature's Joint
6 Committee on Finances and Budgets, the
7 annual trek to the legislature to --

8 A. I know it well.

9 Q. -- ask, plead your cause. And
10 the article goes on to say that under
11 the needs assessment that the higher
12 education group submitted to the
13 legislature, "The colleges and
14 universities would like to see an
15 additional \$350 million annually to
16 support operations. That money would

17 be used to make faculty salaries
18 competitive and keep tuition in check."

19 That's the second to last
20 paragraph at the bottom there. I've
21 tried to highlight it.

22 A. Uh-huh.

23 Q. Is that figure, \$350 million,
0062

1 does that correspond roughly to what
2 ACHE would also say is needed by these
3 institutions for those purposes?

4 A. Part of our statutory
5 requirement is to develop a unified
6 budget for higher education in the
7 state of Alabama that represents
8 the requests for all of education.

9 Q. Budget recommendation?

10 A. Yes, sir. And the actuality is
11 that once those data are available to
12 the governor and to the legislature,
13 then the college presidents come back
14 together, and then they may use the
15 UBR, the unified budget request, or
16 they may not. It's been my experience
17 that oftentimes they did not and then
18 developed dollars asked based on their
19 own analyses.

20 And the reason I'm saying that
21 is that I'm not sure where this \$350
22 million came from. I'm not sure that
23 that's reflective of the UBR.

0063

1 Q. We've got the UBRs for the past
2 several years; that was provided in
3 discovery.

4 A. Right.

5 Q. But when ACHE is preparing the
6 UBRs, the unified budget
7 recommendation, do you put into the UBR
8 the actual need or do you take account
9 of the finance realities that you're
10 facing and pare down your request
11 accordingly?

12 A. That's a -- I'll give you a
13 relative answer to that specific
14 question, is that what we do is we work
15 with the universities and the colleges

16 in developing what we call scenarios.
17 And you can have a scenario that's
18 based on just using the so-called
19 reasonable or the ACHE formula that
20 then says that, okay, one scenario is
21 to get all of the colleges and the
22 universities up to or toward the
23 regional --

0064

1 Q. -- standard?

2 A. -- standard. Another scenario
3 may be that we just want -- we want to
4 forget that, and we want to just dwell
5 on trying to get the average faculty
6 salaries up to some point of the
7 regional average.

8 Another one may be that we want
9 to use half of one and half of the
10 other.

11 Another one may be that we just
12 want to recoup inflation costs.

13 It's been my experience that we
14 could have as many as eight scenarios
15 on the table that as colleagues we then
16 have to agree on one that's presented
17 to the state legislature.

18 Q. And isn't it true that there's
19 always a discussion when you're
20 preparing the UBR with participation of
21 the various institutions, there's
22 always a debate about whether to
23 highball or lowball for purposes of

0065

1 trying to get the best possible result
2 ultimately in the legislature?

3 A. Yes, sir. It's a healthy
4 discussion.

5 Q. Okay. The last paragraph in
6 this article, Exhibit 14, says,
7 additionally, higher education
8 advocates would like to see a \$1
9 billion bond issue that would be used
10 to repair and replace campus buildings.
11 ACHE estimates that colleges have put
12 off \$900 million of needed repair and
13 maintenance on campuses across the
14 state, and a \$1 billion bond issue --

15 \$1 billion -- bond issue would require
16 \$75 million a year to pay off the debt.

17 Now, this was February of '03,
18 a little over a year ago. But I want
19 to ask you if that representation about
20 what ACHE estimates as the deferred
21 maintenance needs is roughly correct?

22 A. Yes, sir, it is correct. We
23 are required to capture those data

0066

1 every two years.

2 Q. What is the impact of the
3 increasing, the rising tuition on the
4 need for students to have financial aid
5 or to incur indebtedness?

6 A. You would -- you would infer
7 that there would be a greater need that
8 if I -- if the cost is going up and I
9 wish to participate, then I'm going to
10 have to come up with the money.

11 What is remarkable and maybe
12 fortunate in this period of time we're
13 talking about is that enrollments are
14 going up. And it's almost an inverse
15 correlation. And there's some --
16 there's some evidence that would
17 support the fact that you have this one
18 trend of tuitions going up and the
19 enrollments tracking right with them.

20 Q. Okay. But the people, the
21 students who are enrolling are also
22 having to incur either greater
23 indebtedness or find financial aid

0067

1 somewhere --

2 A. Yes, sir.

3 Q. -- to cover the additional
4 costs of tuition, of fees, and the cost
5 of living?

6 A. Definitely on the second part,
7 that they're having to find means to be
8 able to do it.

9 Q. Now, in Alabama a student
10 enrolling in a four-year institution, a
11 public institution of higher education,
12 has what sources for student loans?

13 A. They have the guaranteed

14 student loans and the supplemental
15 student loans that -- through the --
16 through the federal government.

17 Q. All right. Can you be more
18 specific about what those federal loans
19 are?

20 A. I haven't been into that like
21 in previous life.

22 Q. Stafford loans and so forth?

23 A. They're low-interest loans that
0068

1 have to be paid back upon completion.

2 Q. Do you know what the current
3 annual limit is on student borrowing
4 from the federal government?

5 A. No, sir, I don't recall. If I
6 gave you a figure, it may be from a
7 previous life.

8 Q. Okay. Isn't it true that the
9 current administration, federal
10 administration is proposing, last I
11 saw, that they were proposing to keep
12 the amount of Pell grants and other
13 federal financial aid more or less flat
14 and slightly increase the limits on
15 lending?

16 A. I haven't seen that in a policy
17 document. I believe I heard that on
18 public radio, but I haven't seen it in
19 a policy document.

20 Q. I'm looking at page 29 of the
21 ACHE October 2002, 2003 Annual Report.
22 I'm not going to mark it. Well, maybe
23 I will. Might as well mark it as an
0069

1 exhibit. We'll put a number on it.

2 15.

3

4 (Plaintiff's Exhibit No. 15 was marked
5 for identification and is attached.)

6

7 Q. And I'm referring you to page
8 29 of that report. I've highlighted
9 some language there that talks about
10 financial aid that's provided by the
11 State of Alabama.

12 A. Yes, sir.

13 Q. How much financial aid is being
14 provided in the current school year,
15 which is 2003-'04 by the State of
16 Alabama? How much need-based financial
17 aid?

18 A. Taking this off my head, which
19 is scary, it's approximately \$800,000.

20 Q. And do you have any idea what's
21 pending in the legislature with respect
22 to that line presently?

23 A. I have asked the state

0070

1 legislature to restore that line item
2 in my budget back to the \$1.5 million
3 that it was in 2000. It was there at
4 one point, and the state legislature
5 has reduced it.

6 Q. You're familiar with this
7 report that came out last year called
8 "Losing Ground" that was published by
9 the National Center for Public Policy
10 in Higher Education?

11 A. Is that the Lumina Foundation?

12 Q. No, no, it's not the Lumina.
13 This is the one from last year that's
14 called "Losing Ground." Do you want to
15 take a look at it?

16 I'm showing what was Tab 18 in
17 the presentation I made before the
18 Court on January the 8th, and it has
19 the Alabama appendix in it.

20 A. We have received this report,
21 yes, sir. It's been a while.

22 Q. Isn't it true that Alabama is
23 one of the three lowest states in the

0071

1 U.S. with respect to the amount of
2 State need-based financial aid
3 provided?

4 A. Yes, sir, that's correct.

5 Q. Do you know what the other two
6 states are?

7 A. I better not speculate. I
8 think I would be correct on one of
9 them, but I should not speculate.

10 Q. All right. Since you mentioned
11 the Lumina report, let's just go ahead

12 and go to that.

13

14 (Plaintiff's Exhibit No. 16 was marked
15 for identification and is attached.)

16

17 Q. Okay. I have marked as Exhibit
18 16 the cover page, table of contents,
19 and executive summary from the Lumina
20 report which came out, what, just a
21 couple of weeks ago, I believe.

22 A. Yes, sir.

23 Q. Are you familiar with that

0072

1 report?

2 A. I am familiar with this report.
3 I have perused it. Obviously, I can't
4 take a quiz on it, but I think I
5 understand the two basic premises from
6 that report.

7 Q. Well, if you turn to the
8 highlighted portion there in the
9 executive summary on the left-hand
10 side; see at the bottom there?

11 A. "The impact of state finance
12 strategies"?

13 Q. Yes. Where one of the
14 conclusions that study makes is that
15 there's a positive correlation between
16 need-based financial aid and completion
17 of high school, I believe it is, isn't
18 it? A correlation between need-based
19 financial aid and higher ed --

20 MR. HUNTER: Are you asking him
21 what the report says?

22 MR. BLACKSHER: Yes.

23 MR. HUNTER: You want to read

0073

1 that last sentence that's highlighted,
2 I guess?

3 THE WITNESS: Yeah. I'm trying
4 to understand it.

5 A. (Reading) Need-based grants had
6 a positive, parentheses,
7 nonsignificant, association with high
8 school graduation rates in
9 fixed-effects analysis.

10 I'm not sure.

11 Q. Okay. You're not up to speed
12 on that aspect of the Lumina report?

13 A. No.

14 Q. All right. Turn to the
15 conclusion on the next page. I've
16 highlighted a portion of the
17 conclusion. Can you read that?

18 A. Yes, sir. Conclusions. "To
19 maintain financial access for
20 low-income students, states must raise
21 funding for need-based grants. If the
22 federal government does not make any
23 additional investment in grants, each
0074

1 state should maintain funding for
2 need-based grants at least equal to
3 one-quarter of the average tuition
4 charge."

5 Q. Okay. Now, do you agree with
6 that finding and conclusion?

7 A. That is -- that is one
8 hypothesis that I find interesting,
9 that there would be some type of
10 tagging of need-based tuition -- of
11 need-based assistance to rises in
12 tuition. I find that an interesting
13 approach. That may be one of many.
14 The other -- the other one of
15 the two premises that I've concluded
16 from this summary was that there also
17 needs to be a closer partnership
18 between state and federal in developing
19 policy and procedures for increasing
20 student aid. I'm a big believer in
21 partnerships.

22 Q. Isn't it true that if the State
23 of Alabama doesn't find a way
0075

1 substantially to increase the amount of
2 need-based financial aid it provides
3 for higher education, that in the
4 future higher educations will become
5 less and less accessible to low-income
6 students?

7 A. I can't -- I can't cite you a
8 source that would indicate that there
9 is a direct correlation. I have -- I

10 have a real personal concern for that
11 because of, as I said, my background.

12 Q. Okay.

13 A. But we're living in a time
14 right now in the last couple of years
15 that would say that that is not
16 necessarily a viable conclusion, as
17 awkward as it may sound.

18 Q. Let's look at the Exhibit 15,
19 which is the 2002-'03 ACHE Annual
20 Report. On page 28, let me just read
21 this, and then I'll hand it to you.

22 It says: "Alabama currently
23 ranges 23rd of the 50 states in
0076

1 population. Enrollment in higher
2 education currently puts Alabama at
3 20th in the nation - indicating that
4 the lack of scholarship and grant
5 assistance has not denied Alabama
6 residents access to higher education.
7 The availability of federal student
8 loans primarily in public four-year
9 (versus two-year) institutions likely
10 has contributed to students' choice and
11 persistence in these institutions.
12 Unfortunately, the additional reliance
13 on loans to pay college costs indicates
14 that students are willing to mortgage
15 their futures to meet their educational
16 goals."

17 So I'll hand that to you and
18 let you look at it one more time. And
19 then I'm going to ask you if you concur
20 with that statement.

21 A. The statement in the highlight
22 of financial aid activity says -- the
23 highlighted area says, "indicating that
0077

1 the lack of scholarship and grant
2 assistance has not denied Alabama
3 residents access to higher education."

4 Q. Right. And is the evidence
5 cited for that conclusion the evidence
6 you rely on to come to that same
7 conclusion; namely, a comparison of
8 state population and state and

9 enrollment in higher education?
10 The report bases the conclusion
11 that lack of scholarship and grant
12 assistance has not denied access on the
13 comparison of the population of Alabama
14 with the rank of Alabama in enrollment
15 in higher education.

16 Is that the evidence you rely
17 on to reach that conclusion?

18 A. That -- yes.

19 Q. Is there any other evidence
20 besides those comparisons, the
21 comparison of census with enrollment,
22 that you believe indicates that the
23 absence of need-based financial
0078

1 assistance in Alabama is not impeding
2 access to higher education?

3 A. My own experience, the tone
4 that the leadership sets at the
5 individual institution in improving
6 enrollment for all sectors, all areas
7 within the enrollment, is extremely
8 important. And if the leader sets the
9 tone and reallocates the resources for
10 student recruitment as well as student
11 retention, then that, to me, also goes
12 a long way in being able to ameliorate
13 the declines in enrollment. And I
14 don't wish to minimize that.

15 MR. HUNTER: And Jim, in
16 fairness to you, and in fairness to the
17 witness in case you want to ask him
18 more about it, earlier today he has
19 testified about increasing enrollment
20 figures in response to some of your
21 charts, while student aid is going
22 down. And you've already questioned
23 him about that some. But in fairness
0079

1 to both of you, I think he has cited
2 that as one reason for his conclusion.

3 Q. The fact that enrollments
4 continue to rise in spite of the fact
5 that there's not need-based financial
6 aid in Alabama is the basis for your
7 conclusion; is that right?

8 A. I'm saying there are other
9 factors, other mitigating factors that
10 are stimulating enrollments in the
11 state of Alabama.

12 Q. What you said about leaders at
13 the institutions, are you talking about
14 the administrations?

15 A. Yes, sir.

16 Q. Of the four-year and the
17 two-year institutions?

18 A. Yes, sir.

19 Q. And you say they can set a
20 tone?

21 A. Yes, sir. And more than that.

22 Q. Are you talking about them
23 using some of their ONM funds for need
0080

1 based-assistance?

2 A. Well, of course, they could.
3 But the tone and the action that I'm
4 referring to under -- in leadership is
5 the CEO directs the strategic planning
6 operation of the institution. That's
7 an action item rather than setting the
8 tone. But once the strategic plan is
9 there and there's an emphasis on
10 increasing enrollment, particularly of
11 race enrollment, then you would expect
12 for some resources to follow. And
13 that's a variable. That's a
14 mitigating, important variable that
15 might very well offset the need -- the
16 notion of need-based.

17 Q. Okay. I'm still struggling to
18 understand what you mean. Hold on a
19 second.

20 Are you saying that the CEO,
21 which would be the president of a
22 university --

23 A. Yes, sir.

0081

1 Q. -- could allocate more
2 institutional money to financial
3 assistance?

4 A. Again, could. But at the same
5 time, it's more than that.

6 Q. All right.

7 A. And it doesn't necessarily have
8 to be ONM. It could be external
9 dollars.

10 Q. Let me just stop on the
11 institutional financial aid.

12 A. Okay.

13 Q. Are you saying that in fact
14 some of Alabama's four-year
15 universities have been allocating
16 larger shares of their ONM to
17 need-based financial assistance?

18 A. I don't know that for a fact.
19 I can't show you. I'm just saying what
20 can be a mitigating and important
21 factor.

22 Q. Okay.

23 A. From personal experience.

0082

1 Q. All right. So you don't know
2 whether or not the use of institutional
3 funds for need-based assistance is
4 having any impact on access, in actual
5 fact?

6 A. No, sir.

7 Q. All right. What are some of
8 these other factor that you say that
9 the institution can use to increase
10 enrollment despite the fact that
11 there's no financial aid, state-based
12 financial aid?

13 A. Well, if you look at the three
14 ways a public institution receives
15 revenue. Obviously, the first is
16 student tuition and fees and the state
17 appropriation, state assistance. As
18 well as any kind of extramural funding
19 that the institution can bring in. And
20 then those are allocated out
21 accordingly. If there is an emphasis
22 from the top and it gets into the
23 strategic plan, then external dollars

0083

1 can be fed into the recruitment
2 retention as well, enrollment as well.
3 So there are ways. If there's an
4 emphasis.

5 Q. Have you actually observed this

6 happening at some of the institutions
7 in Alabama?

8 A. I can't cite you specifics
9 other.

10 Q. Okay.

11 A. But if I may, I know my
12 colleagues well, the CEOs at the 16
13 senior institutions, and Chancellor
14 Johnson, and I know of their personal
15 commitment to what I'm saying.

16 Q. What is the commitment that
17 they have?

18 A. To offer leadership to improve
19 enrollment for all students at their
20 institutions.

21 Q. To find some way to pay for the
22 education of even students who are at
23 the lowest income levels?

0084

1 A. To find ways to recruit and
2 retain. And oftentimes that is --
3 that's not necessarily a direct cash
4 contribution to the student. It's
5 creating the environment that this is a
6 hospitable environment for adult
7 students, or for traditional-age
8 students or other race students.

9 Q. Let me ask you that. To your
10 knowledge, has ACHE done any systematic
11 study of the extent to which the
12 students who are not attending higher
13 education in Alabama are impeded in any
14 way by the lack of financial
15 assistance?

16 A. Have we done a study? No, sir.

17 Q. Have you done a study to
18 determine the income levels of the
19 students who are not enrolling in
20 higher education in Alabama?

21 A. A formal study, no, sir. But
22 again, when you talk about higher
23 education, you are also talking about

0085

1 the two-year --

2 Q. Absolutely.

3 A. -- as well as the four-year.

4 Q. Two-year as well as the

5 four-year.

6 A. But a study to that effect, no,
7 sir.

8 Q. Has ACHE, to your knowledge,
9 ever done, taken a look at the extent
10 to which the absence of state financial
11 aid disproportionately impacts
12 African-American high school students?

13 A. No, sir.

14 Q. In Alabama. So if we manage in
15 the trial of this case to pull together
16 some evidence about that racial impact
17 of the funding policies here in
18 Alabama, that would be the first time
19 or that would be novel in terms of
20 what's actually been done before?

21 A. To my knowledge, yes, sir.

22 Q. Okay.

23 A. But you're saying the results

0086

1 of funding impacts. But I would also
2 invite to you look at the enrollment
3 numbers, because that's, you know,
4 that's also what we're talking about.

5 Q. You mean the enrollment numbers
6 of African-Americans is continuing to
7 go up?

8 A. Yes.

9 Q. Okay. And what --

10 A. And completions.

11 Q. And what does that tell you?

12 A. That that's a point of
13 celebration for the state of Alabama.

14 Q. Okay. Does it tell you that
15 there is no adverse impact on
16 African-American students being caused
17 by the absence of state financial aid?

18 A. Sir, I don't know that. That
19 study has not been done. I'm just
20 talking about the numbers.

21 Q. Okay.

22 A. That I can speak to.

23 Q. All right. We can all look at

0087

1 the numbers, and those will all be put
2 in evidence. And they will show that
3 the number of African-American students

4 is going up. Okay. But what this case
5 is about is whether the combination of
6 rising tuition and the absence of state
7 financial assistance is
8 disproportionately impacting low-income
9 students.

10 A. Yes, sir.

11 Q. And what I understand from what
12 you're testifying is that you can't say
13 systematically whether there is a
14 correlation between those two things?

15 A. As a trained social scientist,
16 I can't say -- say -- point to any
17 study.

18 Q. All right. I'm going to mark
19 this document as Exhibit 17.

20

21 (Plaintiff's Exhibit No. 17 was marked
22 for identification and is attached.)

23

0088

1 Q. I'm going to hand you an
2 article out of the Birmingham News
3 dated January 30, '04, of this year.
4 Marked it as 17. Give you a chance to
5 look it over before I ask you any
6 questions about it.

7 (Witness reviews document.)

8 A. Yeah, I recall the interview.

9 Q. Just look at it, and then I'll
10 ask you some questions.

11 A. Okay.

12 Q. Okay. I just wanted to give
13 you a chance to look at it before I
14 asked you some questions.

15 A. Yes.

16 Q. The article begins: (Reading)
17 Almost one in four of Alabama future
18 high school graduates will come from
19 poverty, and the number of Hispanic
20 graduates will increase. The
21 projections raised concerns with
22 Alabama's higher education community,
23 which is already struggling to make

0089

1 college life receptive to minorities
2 and affordable to all.

3 Do you agree with that
4 statement?

5 MR. HUNTER: Which part are you
6 asking does he agree with?

7 Q. That the projections from this
8 study raised concerns within Alabama's
9 higher education community, which is
10 already struggling to make college life
11 receptive to minorities and affordable
12 to all?

13 A. If that's what the study says,
14 that's what the study says. I didn't
15 say that.

16 Q. Okay. Then it quotes you,
17 quote, We do need to really get beyond
18 the partisan barking and screaming to
19 actually say, what does this mean for
20 the future, closed quotes, said Michael
21 Malone.

22 Are you accurately quoted
23 there?

0090

1 A. Ms. Orndorff is usually very
2 accurate in her reporting, and it
3 sounds like a sound bite I would have,
4 yeah.

5 Q. Okay. And then it goes on to
6 quote you, "If we are not willing to
7 change our policies to accommodate
8 this, then we will end up paying the
9 price," closed quote.

10 Is that an accurate quote?

11 A. I don't know the context. It
12 was a very lengthy, very lengthy
13 interview, as I recall. But again, if
14 that's how she quoted me, I -- it's
15 been a while.

16 Q. Let's see. This is on the
17 "Knocking At The College Door" study,
18 is what it's referring to.

19 A. Uh-huh.

20 Q. The article quotes David
21 Longanecker, executive director of the
22 Western Interstate Commission for
23 Higher Education, which produced this

0091

1 "Knocking On The Door" report, as

2 saying the states are probably going to
3 have to solve these problems on their
4 own.

5 As executive director of
6 Alabama's Commission on Higher
7 Education, do you agree with that
8 statement?

9 A. Well, my earlier statement that
10 I support the notion of partnerships, I
11 would hope that we would be state,
12 federal, and corporate partnership that
13 will help solve these.

14 Q. State, federal, and private
15 sources of additional income to support
16 the rising costs of higher education?

17 A. Yes, sir. Corporate also gets
18 into internships. All kinds of things.
19 It's not just -- I guess I would have
20 to take issue with my colleague from
21 WICHE that it remains -- it remains a
22 partnership issue with all facets.

23 Q. Okay. You're quoted again in
0092

1 the following paragraph: In Alabama,
2 the lack of financial aid for needy
3 students is already a severe problem
4 that will not subside based on the
5 report's projections; Alabama's only
6 state-funded aid program for poor
7 students, which already was less
8 generous than 46 other states, was cut
9 by 11 percent this year, and college
10 tuition continues to climb by double
11 digits annually.

12 And then it quotes you as
13 saying, these -- those two things alone
14 bode badly for the future, closed
15 quote.

16 Are you accurately quoted
17 there?

18 A. Again, in context. But also
19 let me put this, which was probably a
20 30-minute interview over the telephone,
21 in context. We had just come off a
22 very contentious session. The
23 referendum on Amendment 1 had been

0093

1 summarily defeated.

2 Q. September 9 of '03.

3 A. Yes, sir. And we went into our
4 regular session to then move on the
5 budget. And it was then that -- I
6 mean, all state budgets were cut
7 severely. Mine, you know, was part of
8 that. I'm not overly whining on that.
9 But it was a very, very tough time.

10 And that was also when my state
11 assistance line was cut again. And so
12 it was then Ms. Orndorff happened to
13 call me, when I was coming off of that
14 particular time of contentious session
15 with the legislature. Legislature had
16 to do what it had to do. I made my
17 case. And they did what they thought
18 they had to do.

19 Q. Well --

20 A. That's in the context of the
21 letter.

22 Q. This is dated January 30, '04.
23 What session of the legislature are you
0094

1 just coming out of?

2 A. This would have been, you know,
3 the session was shut down pending the
4 result of the referendum. And then --

5 Q. So this was the special
6 session?

7 A. (Witness nods head.)

8 Q. That followed the September
9 9 --

10 A. Right. That's right.

11 Q. -- 2003 referendum on
12 Amendment 1?

13 A. That's right.

14 Q. Okay.

15 A. And I'll be honest with you. I
16 was feeling some shock from that. And
17 I think that's what I -- and believe I
18 said that to Ms. Orndorff during our
19 interview.

20 Q. Are you trying to distance
21 yourself from these statements, then?

22 A. Philosophically, I am very
23 concerned about that. Philosophically,

0095

1 I continue to be concerned about that.
2 The hard data, again, is questionable
3 on whether my philosophical concerns
4 are --

5 Q. The "hard data" being?

6 A. The relationship between
7 enrollments and completions. The
8 positive relation between enrollments
9 and completions of all students,
10 particularly African-Americans.

11 Q. The mere fact that they're
12 going up?

13 A. Yes, sir.

14 Q. Do you know how much they're
15 going up?

16 A. I do.

17 Q. Haven't you prepared some
18 figures that y'all are going to put in
19 evidence here?

20 A. I'd rather not take those off
21 the top of my head.

22 Q. Okay. And is there any other
23 hard data besides those figures that

0096

1 you're relying on when you say -- wait
2 a minute. Let me back off.

3 Are you saying that the lack of
4 financial aid, state need-based
5 financial aid in Alabama is not a
6 problem?

7 A. I'm not saying that.

8 Q. Are you saying that it's not a
9 problem of access for low-income
10 students?

11 A. I'm saying that there's not any
12 data that would support that, that last
13 statement, that I have seen or been
14 aware of.

15 Q. What data would you want to see
16 to support that statement, in what
17 form?

18 A. There would be ways to test
19 that both quantitatively and
20 qualitatively. I'd like to see both.
21 Focus groups.

22 Q. Since we want to test that in

23 this case, can you think for a minute
0097

1 about how you would design a data test
2 of that proposition?

3 A. Well, again, I come from a
4 school of operation that puts -- that
5 would say, we need to do a qualitative
6 study as well as a quantitative. You
7 can look at hard data. And then if you
8 don't really get into the meat of it by
9 face-to-face focus groups and
10 conversation; to answer your question,
11 yes, sir, it could be done.

12 Q. Specifically, what hard numbers
13 would you want to put together in order
14 to take a look at the question of the
15 extent to which the lack of financial
16 aid is impacting low-income students?

17 A. Again, I could set up a
18 research design on that. I mean, it
19 would take some thought, some graduate
20 students, and some designs and some
21 help from the universities, but it
22 could be done.

23 Q. Off the top of your head, are
0098

1 there any particular sets of data that
2 you would want to compare?

3 A. Well, to indicate that there is
4 some kind of positive relationship
5 between lack of student assistance,
6 particularly to low-income students,
7 and their lack of attendance, you would
8 start there. And then you would need
9 to get into that, well, would you
10 have -- I could formulate all kinds of
11 hypotheses sitting here.

12 Q. What about comparing the number
13 of --

14 MS. MILLER: Jim, excuse me.
15 This is Polly. I just e-mailed
16 Jeremiah. If you could take a
17 couple-minute break and give him a
18 chance to call in, I'd appreciate it.

19 MR. BLACKSHER: All right.

20 MS. MILLER: Okay. Thank you.

21 (Break taken.)

22 Q. (By Mr. Blacksher) I'm still on
23 Exhibit 17, which is the Mary Orndorff
0099

1 article we were talking about.

2 A. Yes, sir.

3 Q. When you were quoted as saying,
4 "If we're not willing to change our
5 policies to accommodate this, then we
6 will end up paying the price," what
7 policies were you referring to?

8 A. I think that was, again, a
9 reflecting back. I tend to processes
10 and procedures sometimes as policies.

11 Q. You weren't talking about any
12 funding policies at all?

13 A. I would have probably have
14 included that as one. But also, you
15 know, the way we -- the way we approach
16 our business, the whole higher
17 education process, I've been a
18 proponent for a higher education report
19 card. I'm working currently with the
20 state legislature to change our statute
21 to include part of our role in policy
22 as well as procedure to develop an
23 accountability report card for higher
0100

1 education. Performance-based
2 budgeting. There's a number of things
3 that I have put before the governor and
4 the legislature that I think would
5 improve how we go about our business.

6 Q. Well, specifically what funding
7 policies need to be changed?

8 A. I have been an advocate for a
9 new budgeting process that would
10 basically put our current formula
11 aside, and then have it studied, have
12 it debated, and look for a funding
13 formula that would include other areas
14 that maybe aren't included to people's
15 satisfaction right now.

16 Let me say, I personally think
17 we have a good formula. I didn't
18 necessarily think so in my previous
19 life as a college president, once I've
20 looked at it. But I do think what we

21 need is, as taxpayers, is a budget
22 that's maybe predicated more on
23 performance. And to do that, you have
0101

1 to have a report card to be able to
2 look at those areas. Those are
3 processes, procedures that work their
4 way into public policy if that can be.

5 Q. All right. Aren't increasing
6 revenues among the policies that need
7 to be made -- the changes in policies
8 that need to be made?

9 A. There is not an educator alive,
10 Mr. Blacksher, that would not say
11 education can use more revenue.

12 Q. So the answer is "yes," it does
13 include increasing revenues?

14 A. My answer was that if you ask
15 that question to any educator, K-12,
16 higher education, we would all say
17 education can improve with additional
18 revenues.

19 Q. But that includes you?

20 A. Yes. But I would also be quick
21 to say as a leader in higher education
22 that where that needs to occur first is
23 in K-12. We would all say that.

0102

1 Because if we didn't have a good K-12
2 system, we would not have a higher
3 education system.

4 Q. Okay. Before we get -- and
5 we'll get to K-12.

6
7 (Plaintiff's Exhibit Nos. 23 and 24
8 were marked for identification and are
9 attached.)

10

11 Q. I've marked as Exhibit 23 a
12 news article dated May 18, 2002, by
13 Stan Bailey of the Birmingham News,
14 captioned "TSU's Malone To Lead ACHE."
15 And it says in the second paragraph,
16 Malone said his top goal would be to
17 restore cuts to the higher education
18 budget and to work for what he
19 considers higher education's one-third

20 fair share of Education Trust dollars.

21 And I want to ask you if you're
22 accurately cited there?

23 A. I can't tell you what I

0103

1 specifically said. But let me put --
2 may I put this in context? That's back
3 to May, two years ago?

4 The university presidents were
5 very eager to see a person come into
6 this position -- my position -- not
7 necessarily as a strict bean counter,
8 but as a person who understood Alabama
9 higher education, understood all of
10 Alabama education, and could therefore
11 be an advocate for higher education as
12 well as assume the coordinating and
13 regulatory role.

14 That came at a time when right
15 after I was -- it was announced that I
16 was the person because that was the way
17 the Council of Presidents wanted it to
18 be; they wanted an advocate there that
19 would help not only regulate and
20 coordinate higher education but also
21 help to advocate for higher education.

22 Q. Are you testifying now that you
23 no longer have as a goal restoring the

0104

1 two-year and four-year college share at
2 30 percent of the Trust Fund's
3 proceeds?

4 A. I think -- I can't sit here and
5 say that would not be a bad thing; that
6 would be a good thing.

7 Q. I'm asking: Is it one of your
8 goals?

9 A. It's not as an important goal
10 now as it was then, to be honest.

11 Q. What's changed?

12 A. I see different priorities in
13 the state of Alabama. And it's not
14 just all related to money. I have said
15 this to my commission, I've said this
16 to my former colleagues: That in two
17 years I have learned that there's
18 some -- there's some other priorities

19 that need to be accomplished, and not
20 necessarily just returning the Trust
21 Fund back to a two-thirds/one-third
22 split. And I think I'm consistent
23 today in enumerating some of those.
0105

1 Accountability is one of them.

2 Q. Okay. So --

3 A. We grow; we change; we learn.

4 Q. So you're thinking that
5 before -- before the share of Education
6 Trust Funds going to higher education
7 increases, there ought to be more
8 accountability for higher education?

9 A. I would say they go hand in
10 hand, yes, sir.

11 Q. Okay. That seems like a
12 familiar theme these days, doesn't it?

13 A. I was out there long before it
14 became the thing to say; the buzz word.

15 Q. Let's say for a federal judge
16 who is the fact finder in this case,
17 and he lives in the state of Georgia
18 and not in the state of Alabama --

19 A. Hypothetically.

20 Q. -- and isn't it true that at
21 present for the last several months,
22 the lead story about public policy in
23 Alabama has been a dispute between the
0106

1 Alabama executive, the governor's
2 office, about accountability being the
3 highest priority and the alleged higher
4 priority for increased funding that is
5 going on in the legislature; isn't that
6 true?

7 A. You hear the word
8 "accountability" almost to the point
9 ad nauseam today. When I use it, I'm
10 trying to use it in a little bit higher
11 context, I hope.

12 Q. Okay. By the way, are any of
13 the accountability measures that
14 Governor Riley is proposing in the
15 current legislative session related
16 directly to higher education?

17 A. Yes, sir. There is a bill in

18 the House and Senate that's being
19 referred to as the "ACHE Bill" even
20 thought I didn't write it.

21 Q. Well, what will it do?

22 A. It's been amended significantly
23 in the House, and will be in the Senate
0107

1 Wednesday. The original bill called
2 for my position become -- being an
3 appointed position, a cabinet-level
4 position. That has now been amended to
5 say my position will be appointed by
6 the governor -- I mean, by the
7 Commission as it is currently, in
8 change of terms. But there was also
9 language in the bill that would give
10 the Commission on Higher Education the
11 authority to decide mission of the
12 various institutions, two-year and
13 four-year across the -- there's the
14 report card that I've advocated for
15 two-years that's in the bill, and it's
16 basically been somewhat --

17 Q. What would be the components of
18 the report card in this legislation?

19 A. A lot of the information that
20 you and I have been discussing today.
21 Retention, completions. We would be
22 using the student database and the
23 IPEDS to ask various questions about
0108

1 what are ways that we can make our
2 higher education more viable and better
3 and accountable, if you will. And I
4 think the report card would do that.

5 There's also some -- the
6 original bill, I took away the -- oh,
7 we go to out-of-state tuitions are
8 going to go up three times instead of
9 two times. But it's a significant
10 piece of legislation that basically, I
11 think, has been made better by the
12 House, and hopefully be made better by
13 the Senate.

14 Q. Okay. To get back to this
15 Exhibit 17, Mary Orndorff article.

16 A. Yes.

17 Q. Again, you're quoted as saying
18 that two things bode badly for the
19 future in Alabama, and one of them is
20 the lack of financial aid for needy
21 students, already a severe problem.

22 Are you no longer holding that
23 opinion that you expressed on January
0109

1 30th, 2004?

2 A. Sir, I worry about that. I do
3 worry about that. And again, it's
4 more -- more of my personal feelings
5 than --

6 Q. As opposed to what other --
7 what other kind of feelings do you have
8 that aren't personal?

9 A. I'm also am a data guy. I like
10 to see relationships built based on
11 hard data. And, you know, I'm a
12 right-brain/left-brain thinker, and I
13 get -- those two oftentimes get in
14 conflict with each other, quite
15 honestly.

16 Q. Isn't it true that over the
17 last year or so there's been a
18 national-level report that's come out
19 every, I don't know, two or three
20 months that says that the key to the
21 future of access to higher education is
22 going to be state-based financial aid?

23 A. I don't know that.

0110

1 Q. You haven't seen those reports,
2 "Knocking At The Door" --

3 A. Well --

4 Q. "Losing Ground," the Lumina
5 report?

6 A. Yes, I have seen those. I
7 don't know that that's the case,
8 because I also know there are other
9 factors related to enrollment other
10 than need-based aid.

11 Q. Okay. I didn't ask you whether
12 you agreed with those national
13 studies --

14 A. Yes.

15 Q. -- I'm just asking you: Isn't

16 it a fact that there is a large number
17 of studies that have been done, all of
18 which focus on need-based financial
19 assistance?

20 A. They're all calling for the
21 same result. Now, Alabama
22 specifically, that's where we have the
23 dearth of information.

0111

1
2 (Plaintiff's Exhibit No. 18 was marked
3 for identification and is attached.)
4

5 Q. Okay. Here's a news article
6 dated December 5, 2003, from the
7 Birmingham News. I've marked it as
8 Exhibit 18. The caption is, "Costs
9 bite state college student. Many work
10 part time to pay for tuition fees at
11 Alabama universities." And one of the
12 sentences in this article says, "With
13 tuition rising 45 percent since 2000 at
14 Auburn, more students than ever are
15 working harder and turning to student
16 loans to make ends meet."

17 Would you agree with that
18 statement?

19 A. I don't know about Auburn
20 specifically. I haven't looked at
21 Auburn's data. But I do know that they
22 have a very robust enrollment at that
23 university. Two years ago they

0112

1 actually had a waiting list for
2 freshmen. But as far as their -- the
3 Auburn mix changing to loans, no, sir,
4 I don't know that.

5 Q. Do you know anything about the
6 income levels of students who attend
7 Auburn?

8 A. No, sir. Not that I would --
9 be speculative.

10 Q. Further in this article it
11 says, in 2000, according to Mike
12 Reynolds, director of financial aid at
13 Auburn, Auburn students took out about
14 \$55 million in federal loans this year,

15 December 2003, that's the current
16 school year --

17 A. Yes, sir.

18 Q. -- this year that number is up
19 to \$64 million.

20 Do you have any reason to
21 question the accuracy of those figures?

22 A. No, sir. If Mr. Reynolds said
23 that, I'm sure that's what it is.

0113

1 Q. Is the rising indebtedness of
2 students in Alabama to attend college
3 of any concern to you as executive
4 director of ACHE?

5 A. Yes, sir. It is a personal
6 concern as well.

7 Q. You keep saying it was a
8 "personal concern." Is that --

9 A. I can't remove that. I can't
10 remove myself and my personal feelings
11 from --

12 Q. Can you remove yourself from
13 your official position as director of
14 aid?

15 A. Very difficult to do that. And
16 I don't apologize for that.

17 Q. Okay. The article goes on to
18 say: Our undergraduate students can
19 borrow up to a total of \$23,000 from
20 the federal government for their
21 education, which means many of them
22 must work their way through college.

23 Does that figure, \$23,000,

0114

1 sound right to you?

2 A. Again, Mr. Reynolds is one of
3 the best financial aid people in the
4 region. If that's what he says, I'm
5 sure he's -- has sound data.

6 Q. The article also says: The
7 student living expenses often exceed
8 the cost of tuition and fees; Auburn's
9 bursar office estimates total living
10 expenses, including tuition, for an
11 in-state student are \$14,000. The
12 estimate includes a meal plan and
13 allows for \$2,500 in personal expenses

14 and transportation.

15 Have you, as ACHE director,
16 examined the cost of living expenses
17 for students, or has ACHE itself done
18 any studies of the increases in living
19 expenses for students?

20 A. We have not, but I'm sure the
21 Financial Aid Association have those
22 data.

23 Q. Let me read another section.

0115

1 And this is a little longer, but I need
2 to read it all to ask the question.

3 A. Sure.

4 Q. It says, and again, it's
5 quoting Mike this time. It's quoting
6 Mike Dannelly, general manager of the
7 Ole Auburn Ale House.

8 A. Okay.

9 Q. He says, "Quite a few of my
10 employees have loans and grants."

11 And then the article goes on to
12 say, "That option is shrinking, though.
13 Because of the state's financial
14 problems, the pool of money available
15 for grants to lower-income students
16 dropped from about \$1.32 million last
17 year to \$820,000 this year, according
18 to ACHE."

19 A. Yes, sir.

20 Q. Is that correct? Those
21 figures?

22 A. Yes, sir.

23 Q. The state had to return

0116

1 \$446,119 to the federal government
2 because it cut its budget so much it no
3 longer qualified for the matching
4 money."

5 Is that correct?

6 A. Yes, sir.

7 Q. What was the program that
8 created matching federal dollars?

9 A. I'm trying to -- its LEPA. And
10 I'm trying to remember what that is.
11 It's a -- it was a program that was
12 developed in the, I believe the

13 mid-'90s, or it might have been the
14 late '80s, that allowed for matching
15 from the federal government to state
16 funds.

17 Q. Matching what for what is what
18 I'm trying to get at. Is this
19 financial aid?

20 A. Yes, sir. It's about a
21 two-to-one match, I recall.

22 Q. So for every dollar of state
23 aid, financial aid, is that need-based?

0117

1 A. Yes, sir, under LEPA.

2 Q. The federal government matches
3 two dollars?

4 A. At least two dollars.

5 Q. Is that money still on the
6 table? I mean, if this legislative
7 session increased need-based aid to
8 \$100 million, would we get 200 million
9 more from the feds?

10 A. I would be on a plane tomorrow
11 back to D.C. to negotiate for that.

12 Q. Okay. Is that a "yes" answer?

13 A. Yes, sir.

14 Q. Okay. Mike Reynolds again is
15 quoted as saying, Auburn has money
16 available to supplement the loss of the
17 state need-based financial aid, but
18 some smaller schools don't.

19 Do you agree with that
20 statement?

21 A. I would speculate that that
22 would probably be the case. A smaller
23 school like Montevallo, yes.

0118

1

2 (Plaintiff's Exhibit No. 19 was marked
3 for identification and is attached.)

4

5 Q. I've marked as Exhibit 19 an
6 article out of the October 16, 2003,
7 Montgomery Advertiser that gave some
8 bad press to Alabama State University.
9 "More students than ever are enrolling
10 at Alabama State University but 3 of 4
11 are not graduating - the lowest rate

12 among the state's larger campuses and
13 one of the lowest in the region, a
14 report says."

15 Do you recall that news coming
16 out?

17 A. I do recall that coming out.
18 President Lee is one of the best
19 presidents in the state of Alabama.
20 I've known him for a while. And this
21 is a -- I know for him, personally,
22 that retention of students is a very
23 high priority. And he, I believe, has
0119

1 taken some strategic to work with the
2 faculty and try to at least ameliorate
3 that situation.

4 Q. The article says that ASU's 25
5 percent graduation rate is well below
6 the state's average rate for retention,
7 which is 49 percent.

8 Do you know whether that's
9 accurate or not?

10 A. That's -- I don't know about 49
11 percent, but I know it is in the 40s; I
12 recall that.

13 Q. And the article goes on to say,
14 officials at ASU say it's not just a
15 problem of academics. A few students
16 hold down full-time jobs; some have
17 children or return home to care for
18 family.

19 Do you know whether that's
20 accurate or not?

21 A. I would say that that's, unless
22 I missed something, that's probably the
23 case for most adult learners

0120

1 everywhere.

2 Q. Do you know whether or not
3 there is a financial component to the
4 low graduation rate at Alabama State
5 University? That is, financial in the
6 sense of availability of student aid.

7 A. No, sir, I don't know that.

8 Q. Okay. The article says that a
9 high number of students coming to ASU
10 are from rural school systems where

11 they weren't offered college
12 preparatory courses to get them ready
13 for the rigors of higher education.

14 Do you agree with that
15 statement?

16 A. I don't know that specifically
17 for Alabama State. But there is a --
18 the ACT and College Board data for
19 years has shown that there's a
20 relationship between the courses taken,
21 the rigor of courses taken in high
22 school and success in college. Those
23 studies I know about.

0121

1 Q. And the rural school systems
2 that do not have K-12 curricula that
3 include college preparatory courses are
4 mostly in the Black Belt area of
5 Alabama, aren't they?

6 A. As best I recall. Now, there
7 are some very good and very interesting
8 things happening in the Black Belt with
9 some institutions bringing in via the
10 virtual library and network of academic
11 libraries those prep courses, those
12 prep courses that may not be afforded
13 at the local school system.

14 Q. Okay. But my question was --

15 A. Well, yeah. Yeah. I'm the
16 eternal optimist here.

17 Q. Okay. It is true, isn't it,
18 that the Black Belt school systems have
19 much fewer college prep courses in
20 their curricular --

21 A. I haven't looked at it, but I
22 would surmise, yes, sir.

23 Q. And it is true, isn't it, that

0122

1 the adequate funding of k-12 education
2 is a factor in access ultimately to
3 higher education?

4 A. It is a factor. Not
5 necessarily "the" factor, but is the a
6 factor.

7 Q. Not necessarily "the." Is
8 there a "the" factor?

9 A. The longer I live, the longer I

10 know there is not "the" factor.
11 Q. "The" factor. Right. The
12 Amendment 1 package that was defeated
13 on September 9, 2003, that Governor
14 Riley proposed and the legislature
15 passed and got defeated, what, three to
16 one, 75 percent against, something like
17 that?

18 A. Yeah.

19 Q. That package did include,
20 didn't it, a proposal that Governor
21 Riley had come forth with to set up
22 additional scholarships?

23 A. Scholarships, yes, sir, it did.

0123

1 Q. Can you tell us what the rough,
2 generally, what the terms of that
3 scholarship program would have been?

4 A. Oh, wow. I recall that it was
5 modeled on the Taylor scholarships of
6 Louisiana, which basically set aside X
7 amount of millions of dollars that
8 would cover students' tuition fees. It
9 was a finite pot of money that would
10 under certain circumstance of high
11 school graduation, it would then allow
12 students to have access to tuition and
13 fee money. It was sort of a mix
14 between merit and need.

15 Q. And need?

16 A. Yes, sir.

17

18 (Plaintiff's Exhibit No. 20 was marked
19 for identification and is attached.)

20

21 Q. It says in the article that I
22 have marked as 20, which was August 17,
23 '03 -- this is before the referendum --

0124

1 talking about that scholarship
2 proposal, tuition would be paid to
3 four-year colleges for students who
4 graduate with an advanced high school
5 diploma, a "B" average, and a 20 on the
6 ACT.

7 That would be merit-based,
8 wouldn't you call that?

9 A. Yes, sir.

10 Q. And would not be available to
11 students who attend schools where an
12 advanced diploma is not available?

13 A. Well, that was -- I recall that
14 was one provision. There were several
15 provisions.

16 Q. Well, I'm going to go on.

17 A. Okay.

18 Q. Tuition would be paid to
19 two-year college for students who
20 graduated with a 2.5 grade point
21 average.

22 A. And no ACT, I believe.

23 Q. It doesn't say here.

0125

1 A. No, sir.

2 Q. No ACT requirement for getting
3 two-year?

4 A. No, sir.

5 Q. And then it goes on to say, the
6 law sets no minimum spending level, and
7 it caps spending at \$50 million in the
8 2004 year and \$120 million annually
9 thereafter.

10 Is that correct, to the best of
11 your knowledge?

12 A. Best of my knowledge, yes, sir.

13 Q. Talk for a minute, Dr. Malone,
14 about the policy implications of a
15 state choosing merit-based versus
16 need-based financial aid. Say, for
17 example, comparing Georgia's Hope
18 Scholarship Program or the one that
19 Governor Riley was proposing here with
20 the kind of need-based financial aid
21 that you're getting \$800,000 for.

22 What are the policy
23 implications for those two ways to go?

0126

1 A. Policy implications. The
2 institutions would then have the
3 ability to look at what I call
4 "packaging," that is, being able to
5 package need and merit, that they
6 haven't had that opportunity before. I
7 don't really think it needs to be an

8 either/or.

9 Q. Can be both?

10 A. Yes, sir. What I hear from our
11 friends in Georgia is the unintended,
12 maybe consequences, of the Hope
13 Scholarship was that it really had an
14 effect on parental involvement in the
15 school systems in helping to change
16 curriculum as well as having parents,
17 grandparents, involved in the school
18 system.

19 Q. And as Judge Murphy would know,
20 of course, about the Hope Scholarship
21 Program in Georgia, that is a
22 scholarship program; it's not the same
23 as the PACT Program we have in Alabama,
0127

1 which is an investment program, right?

2 A. That's right, yes, sir.

3 Q. We'll talk about the PACT
4 Program in just a second.

5 But Alabama doesn't have either
6 a merit-based or a need-based
7 scholarship program?

8 A. The state does not have a
9 merit-based. The closest thing to a
10 need-based is the student assistance
11 program that we've talked about.

12 Q. Okay. Can you give us any idea
13 of the extent to which institutional
14 budgets in Alabama are used to provide
15 scholarships?

16 A. Only to say that -- well, if I
17 use the word "all," there may be one.
18 Most of the institutions that I'm
19 familiar with also offer their
20 individual packages on need, slash,
21 merit and/or needs and merit.

22 Q. Well, we're actually collecting
23 the financial aid data from each of the
0128

1 institutions if they were --

2 A. I would be -- I guess I would
3 be surprised if a institution did not
4 have such.

5 Q. All right. If Alabama had a
6 merit-based, Hope-like scholarship as

7 well as need-based, would the
8 merit-based scholarships also include
9 access for low-income students?

10 A. Not only can -- if I can't
11 answer the former, I can't answer the
12 latter.

13 Q. Okay.

14 A. We would only hope.

15 Q. We would only hope. No pun
16 intended?

17 A. None intended.

18
19 (Plaintiff's Exhibit No. 21 was marked
20 for identification and is attached.)

21
22 Q. I've marked as 21 another
23 article about that same scholarship.

0129
1 Do you want to look at it for a second?

2 The Riley scholarship proposal.

3 A. Yeah.

4 Q. Now, let me ask you about the
5 PACT Program. You said you were on the
6 board.

7 A. I'm a new appointee to the --
8 as a trustee to the board.

9 Q. Briefly state for the record
10 what the PACT Program is.

11 A. The Prepaid Affordable College
12 is the ability for parents,
13 grandparents, godparents, significant
14 others, to purchase either in a lump
15 sum or over a period of five years a --
16 basically, a contract that guarantees
17 the tuition and fees for that person at
18 a certain age, that from infancy to
19 ninth grade that would cover at the
20 date of contract the tuition and fees
21 for that student.

22 Q. Okay.

23 A. And there's another 529 program
0130

1 which has come into effect recently
2 that would allow a family to have more
3 to do with how the investments are
4 made.

5 Q. A what kind of program?

6 A. It's a 529 program. It's a
7 federal.

8 Q. Okay.

9 A. It's the federal 529. And we
10 have just added that to our package
11 recently.

12 Q. So it's kind of like a
13 state-subsidized, guaranteed annuity of
14 sorts?

15 A. Yes. That's a good way to look
16 at it.

17
18 (Plaintiff's Exhibit No. 22 was marked
19 for identification and is attached.)

20

21 Q. And I'm looking at a document
22 I've marked Exhibit 22, which is a --

23 A. An important issue here since
0131

1 you said the subsidy.

2 Q. Okay.

3 A. It is run through, it is
4 offered through the Treasurer of the
5 State of Alabama's office. Therefore,
6 it brings with it the faith and the
7 credit.

8 Q. The full faith and credit of
9 the State?

10 A. Yes, sir.

11 Q. And I'm looking at an editorial
12 from the Montgomery Advertiser,
13 December 6th, 2003, that says that,
14 "The lump sum of a cost of a PACT
15 contract for an infant this year was
16 \$15,528, a whopping \$3,913 higher than
17 in 2002."

18 Do you know whether that's
19 correct?

20 A. Yes, sir, that is correct.

21 Q. As a member of the PACT board,
22 can we expect that the cost will
23 continue to rise in the future?

0132

1 A. That big jump came as a result
2 as much of the bear market that we saw
3 from '99 through 2001, as much as the
4 significant increases in tuition.

5 Now, the question -- to answer
6 your question, we would need two
7 variables. One, we need to make sure
8 that the fund that we're managing is
9 managed in such a way that we could be
10 able to absorb such incredible market
11 turndowns -- God forbid that we'll ever
12 see what we saw.

13 And the other piece is to keep
14 an eye on the environment of higher
15 education; that is, the speculation of
16 increased tuition increases.

17 Q. So for middle income or even
18 high income families in Alabama who
19 want to use the PACT program, the
20 increasing tuition at the state's
21 universities will drive the cost of the
22 PACT?

23 A. That will be a variable.

0133

1 MR. HUNTER: I object to the
2 form of that question.

3 Q. But you can answer it.

4 A. I would say -- I have said that
5 tuition is a variable, and obviously,
6 has to be. Now, whether --

7 Q. It's not the only variable. We
8 can agree that it's not the only
9 variable?

10 A. That's right.

11 Q. I understand that.

12 A. Market conditions, stewardship
13 of how well the State --

14 Q. But it is the one of the
15 variables?

16 A. Yes, sir.

17 Q. In fact, if double-digit
18 tuition increases continue, that's
19 going to be a variable that even a
20 wonderful investment strategy is not
21 going to be able to overcome entirely,
22 is it?

23 A. We spend a lot of time as a

0134

1 board talking about that. One of the
2 things I have been very impressed with
3 Treasurer Baxley, and now with

4 Treasurer Ivey, is the time and effort
5 that they give to making sure that they
6 keep administrative costs low, and at
7 the same time trying to anticipate
8 those, and also get the best yields
9 that they can get; that we can get. So
10 it's -- but we're committed to honoring
11 contracts around through every
12 contract.

13 Q. Full faith and credit?

14 A. Yes, sir.

15 Q. But you're saying that Kay Ivey
16 is going to be able to keep the price
17 of the PACT contract from going up
18 even --

19 A. That's why we have a board. We
20 have some very bright people --
21 brighter than me -- on this board.

22 Q. Well, she's not -- I mean,
23 we're sort of bantering here.

0135

1 But to get the question and
2 answer straight: It's true, isn't it,
3 that the treasurer of Alabama is not
4 going to be able to prevent the cost of
5 the contract from going up if tuition
6 continues to rise at the current rate?

7 A. I can't say that, because what
8 if we -- what if we have done a good
9 job of our -- a terrific job in our
10 investments? And we could very well
11 see -- you know, there was a time that
12 the PACT contracts were funded at 120
13 percent. I hope it can return there
14 again. It's going to take good
15 stewardship to get there. In lieu of
16 the tuition increases. I know that's
17 where you're coming from.

18 Q. What if the State invests the
19 entire Exxon verdict in higher
20 education? That would make a
21 difference too, wouldn't it? Of
22 course, they have to collect it
23 eventually.

0136

1 A. I don't know. I don't know.

2 Q. Okay. I want to ask you now

3 about faculty salaries. This is an
4 article out of the Birmingham News
5 dated June 20, '03; this is during the,
6 I guess, the campaign days.

7 A. Special session.

8 Q. No. It was before the special
9 session. Anyway, they were talking
10 about Amendment 1.

11 A. Okay.

12 Q. It was in some phase or
13 another. And it says, System
14 Chancellor Malcolm Portera said the
15 schools cannot compete for faculty
16 salaries if the state reduces the
17 amount of money it sends to the
18 universities; he says the University of
19 Georgia system receives 40 percent of
20 its budget from the state government
21 while the University of Alabama system
22 receives 18 percent of its budget from
23 the state.

0137

1 Do you know whether that's
2 correct?

3 A. I have heard Dr. Portera say
4 that, yeah.

5 Q. Well, more generally, what
6 about faculty salaries? Aren't faculty
7 salaries, on average, at the public
8 universities in Alabama substantially
9 lower than they are in the other SREB
10 states?

11 A. I don't know "substantially."
12 Probably, if I don't have it before me,
13 I shouldn't be quoting it. But I
14 believe the SREB average is 55, and our
15 faculty is at 54 as a median. And if
16 you can verify that.

17 Let me also say, too, about
18 faculty salaries: It's one thing to
19 draw, to take a mean or a median on the
20 average salaries when you have
21 assistant professors, instructors,
22 associate professors, professors, and
23 then you have them by discipline. Some

0138

1 people make their livings just

2 crunching faculty salary data.

3 Q. I'm going to mark this as 26.

4 This is your response to our discovery
5 request.

6

7 (Plaintiff's Exhibit No. 26 was marked
8 for identification and is attached.)

9

10 Q. Louisiana, Mississippi,
11 Oklahoma, West Virginia are lower than
12 our -- can you identify that document
13 I've marked as 26? You gave it to us.

14 A. It came from the SREB, yes,
15 sir.

16 Q. And that compares, over time,
17 Alabama's average faculty salaries with
18 other states?

19 A. Yeah. I was right on about the
20 Alabama at 54.

21 Q. 54?

22 A. Yes, sir. I was a little low
23 with the SREB.

0139

1 Q. Okay.

2 A. It's full-time faculty. So
3 5,000 off the median.

4

5 (Plaintiff's Exhibit No. 25 was marked
6 for identification and is attached.)

7

8 Q. Let me show you an article
9 dated August 7th, 2003, "UA Leader
10 Stumps for Tax Plan." This is about
11 President Witt of the University of
12 Alabama going around the state
13 campaigning for passage of Amendment 1.
14 And "Speaking in an interview with the
15 Associated Press, Witt said he saw the
16 impoverished Black Belt region and
17 other parts of Alabama that could
18 benefit from the plan while visiting
19 university trustees in their
20 hometowns."

21 Quote, "I've learned that there
22 is a substantial percentage of our
23 state's population" -- well, first of

0140

1 all, let me ask you: Would Black Belt
2 region in particular have benefitted
3 from passage of Amendment 1?

4 A. I think -- it was a very
5 comprehensive package. I think they
6 would have benefitted, as would have
7 most of Alabama.

8 Q. He's quoted as saying this:
9 "I've learned there is a substantial
10 percentage of our state's population
11 that does not have access to the social
12 services - and I would include
13 education in that package - that will
14 provide their sons and daughters with
15 an opportunity to participate in the
16 future and a better quality of life."

17 Well, there's nothing to
18 disagree in that statement, I suppose.

19 A. I think President Kennedy had
20 it right: A rising tide does float all
21 boats.

22 Q. Is that what President Kennedy
23 said?

0141

1 A. That's what I've always heard.
2 That's what I quote him, anyway.

3 Q. Goes on to say, "But tuition
4 increases could force many students to
5 quit college if the plan does not
6 pass."

7 And you say there's no evidence
8 that it has?

9 A. None that I've seen.

10 Q. Have you seen any evidence to
11 the contrary; that is, that it has not
12 caused any students to quit college,
13 the increased tuition over the past
14 several years?

15 A. Again, it's a simple -- in my
16 mind, a simple deduction that probably
17 needs some further scrutiny. But one
18 would say: If we have seen rising
19 costs, then wouldn't you expect a
20 concomitant trend of a loss of
21 enrollment? And that really hasn't
22 occurred.

23 Q. Well, we're talking about how

0142

1 there are more variables than one in
2 explaining any phenomenon.

3 A. Agreed.

4 Q. And won't you agree that there
5 are several reasons why there should
6 continue to be increasing black
7 enrollment and even graduation from
8 college in addition to the financial
9 factors such as -- and I'll ask you
10 this: Isn't one of those factors the
11 increasing necessity of getting a
12 college diploma or an associate's
13 degree to get into the job market?

14 A. Yes, sir. We know the
15 difference -- I mean, just look at the
16 2000 census data. You can look at the
17 potential for a high school graduate
18 versus the earning power over a 70-year
19 lifetime with a baccalaureate; it's
20 significant. It's in the millions.

21 Q. And --

22 A. Also, people with exposure to
23 higher education are your people who

0143

1 volunteer. They run your philanthropic
2 organizations. On and on and on. The
3 quality of life, there's no question
4 about that. At least in my mind.

5 Q. And here's another factor I
6 want to propose to you and see if you
7 don't agree; and that is that
8 African-Americans are -- hold on a
9 second.

10 I'm going to show you Tab 12
11 from these January 8 documents. This
12 is from SREB source, U.S. Census
13 Bureau, and it says educational
14 attainment of the adult population by
15 racial, ethnic group, the states in the
16 SREB region; and I'm going to ask you
17 if it doesn't show that Alabama, the
18 percent of blacks with a bachelor's
19 degree are higher in 2000, was 11.5, as
20 compared with 21.2 percent of whites?

21 A. Yes, sir, that's what it says.

22

23 (Plaintiff's Exhibit No. 27 was marked
0144

1 for identification and is attached.)

2

3 Q. And here is, marked as 27, is
4 U.S. Department of Commerce, U.S.
5 Census Bureau, Current Population
6 Survey, October '98, '99, and 2000,
7 "High school completion rates of 18-
8 through 24-year-olds not currently
9 enrolled in high school or below, by
10 state." It's a chart. And I've drawn
11 a yellow line through Alabama's median
12 there.

13 Isn't it true that Alabama has,
14 among the states in the U.S., one of
15 the lowest high school completion rates
16 as of 2000?

17 MR. HUNTER: Is your question,
18 whether this chart shows that?

19 MR. BLACKSHER: Yes.

20 Q. I'm sorry. Isn't that what
21 that chart shows? And where I'm going
22 with these two exhibits is predicates
23 to the question: Isn't one of the

0145

1 variables, Dr. Malone, that may explain
2 rising black enrollments in higher ed
3 and completions, the fact that they're
4 so far behind and they have a lot to
5 make up?

6 A. Are you asking me to agree or
7 disagree?

8 Q. I'm asking you if you wouldn't
9 agree with that.

10 A. I don't know what you just said
11 to be for a fact.

12 Q. You don't know that there are
13 disproportionately fewer blacks with
14 bachelor's degrees than whites?

15 A. Yes.

16 Q. Well, that's what the SREB data
17 shows, the percentage of blacks who
18 have bachelor's degrees are half the
19 percentage of whites who have
20 bachelor's degrees in Alabama.

21 A. That's right.

22 Q. So --

23 A. I was looking for a cause and
0146

1 effect here, and I didn't connect it.

2 I'm sorry.

3 Q. You can't connect -- you don't
4 think there is a factor of catching up
5 involved in the increasing numbers of
6 black enrollments in higher ed
7 vis-a-vis white enrollments?

8 A. The way you just stated that,
9 yes, sir, I do believe that. There's
10 catching up to do, yes, sir.

11 Q. That's what I meant.

12 A. Yes, sir, I agree with that.

13 Q. Isn't it true that private
14 colleges in Alabama, whether at Samford
15 or Talladega College or Oakwood or
16 whatever, are also impacted by the
17 decreasing amount of state need-based
18 financial aid? I should say, students
19 who attend those private colleges.

20 A. I have -- maybe Dr. Burdy or
21 Dr. Corts would be able to respond to
22 that. Again, I haven't seen that
23 relationship between the cuts in their
0147

1 student grant program and their
2 enrollments of low-income students.

3 Q. Let me be specific here. I
4 can't find the news article I was
5 looking for.

6 My understanding is that some
7 of the state need-based financial aid
8 administered by ACHE is available to
9 students who go to the private
10 institutions; am I wrong?

11 A. No, sir, you're not wrong.

12 Q. Is there some portion of it
13 that's set aside for students, or do
14 they compete on a equal footing with
15 students going to public schools?

16 A. No, sir. There is another line
17 item in the Commission budget that's
18 called student grants program. And
19 that's money that has been set aside by
20 the legislature specifically for

21 students who attend the independent
22 schools.

23 Q. Okay. And is that line also
0148

1 disappearing?

2 A. Yes, sir.

3 Q. My understanding is your lawyer
4 is going to have a few questions for
5 you to introduce him.

6 MR. BLACKSHER: Is that
7 correct?

8 MR. HUNTER: That's correct.

9 MR. BLACKSHER: I think I'll
10 turn the witness over to you at this
11 time.

12 MR. HUNTER: Do the others have
13 questions?

14 MR. BLACKSHER: Jeff, do you
15 have any?

16 MR. FOSHEE: No.

17 MR. HUNTER: Jeremiah, do you
18 have any questions of the witness?

19 MR. GLASSMAN: No.

20 MR. HUNTER: Do you need a
21 break?

22 THE WITNESS: No.

23

0149

1 (Defendant's Exhibit No. 04-1 was
2 marked for identification and is
3 attached.)

4

5 EXAMINATION BY MR. HUNTER:

6 Q. I've marked our exhibits with a
7 prefix "04" to distinguish them from
8 exhibits we've used in past trials and
9 hearings.

10 Dr. Malone, earlier you
11 testified about ACHE's obligation to
12 maintain and report certain data; do
13 you recall that?

14 A. Yes, sir.

15 Q. State Defendant's Exhibit 04-1
16 shows completion data. Is this among
17 the data ACHE is required to maintain
18 and report?

19 A. Yes, sir. This is the

20 Integrated Postsecondary Education Data
21 System, otherwise affectionately
22 referred to as IPEDS.

23 Q. And certainly won't go through
0150

1 all the data. But just to get a feel
2 for this data, the first block of data,
3 can you tell us what that is?

4 A. The public institutions, the
5 senior institutions are listed. I do
6 not see -- yeah, Athens is there.
7 Okay.

8 The baccalaureate-granting
9 institutions are listed in the left
10 column. And these are data that
11 compare the academic year '91-'92 to
12 academic year 2002 and -'3, and it is
13 broken down by black, white, and other.
14 And the chart looks at baccalaureate
15 and postbaccalaureate certificates,
16 graduate and first professional. And
17 then a second page, in the same format,
18 looks at the total completions.

19 Q. So if we look at the
20 baccalaureate and postbaccalaureate
21 degrees awarded, is it correct that
22 this shows that from '91, which was
23 when this Court first found violation,
0151

1 to the 2002-'03 year, the percentage of
2 degrees awarded to blacks, or there has
3 been an 82.7 percent change in the
4 number of degrees awarded to blacks at
5 these institutions?

6 A. Yes, sir. During that, this
7 chart would indicate that.

8 Q. And during that same period,
9 the degrees awarded to whites has
10 dropped by 14.4 percent?

11 A. Yes, sir.

12 Q. And the total degrees awarded
13 by these institutions has dropped by
14 1.6 percent?

15 A. Of the baccalaureate and
16 postbaccalaureate certificates, yes,
17 sir.

18 Q. Right. And if we skip over to

19 the second page to look at the totals,
20 similarly, during this period, the
21 degrees awarded to blacks has almost
22 doubled, 96.4 percent; is that correct?

23 A. Yes, sir.

0152

1 Q. While the degrees awarded to
2 whites has dropped by 8.2 percent?

3 A. Yes, sir.

4 Q. And the degrees awarded, total
5 in the system have increased by only
6 5.9 percent; is that correct?

7 A. Yes, sir.

8 Q. Can you identify State
9 Defendant Exhibit 4-2?

10 A. This is another IPEDS source
11 that looks at the enrollments in the
12 fall of 1991. These are the
13 enrollments of fall of 2002. And in
14 Exhibit 04-002, this is a summary by
15 race and ethnicity which includes the
16 historically black colleges and
17 universities in the tabulation.

18 Q. So when you were discussing
19 enrollment trends, these data relate to
20 those trends comparing '91 to '02; is
21 that correct?

22 A. Yes, sir. This is enrollment,
23 where the other chart was completions.

0153

1 And if you go to the undergraduate
2 full-time, you see in 1991 the
3 percentage of African-American students
4 in the system was 19.87 percent.

5 Similar comparison in the fall of '02
6 would indicate 25.90 percent.

7 Q. Okay. And if we want to look
8 at the changes, that would be the
9 bottom grouping of data; is that
10 correct? It would show that -- well,
11 if we look at total enrollment, for
12 example.

13 A. That's the full-time plus the
14 part-part.

15 Q. Right. The change in black
16 enrollment from '91 to 2002 is almost
17 56 percent; is that correct? For the

18 total enrollments. This is the lower
19 right-hand, just so that we can get our
20 bearings.

21 A. That's correct. The change
22 would be 55.97 percent, yes, sir.

23 Q. And that's at a time when the
0154

1 SREB average increased only 41.73
2 percent?

3 A. Yes, sir.

4 Q. And the U.S. average only 27
5 percent?

6 A. Yes, sir.

7 Q. White enrollment during that
8 same period has done what in the state
9 of Alabama?

10 A. It would -- there has been a
11 decline in looking at the benchmark
12 periods. We're looking at white
13 enrollment in the fall of '91 was 77.97
14 percent. And the 2002 enrollment for
15 white students is 67 percent, which was
16 obviously a decline to the tune of
17 12.33 percent.

18 Q. Okay. And so we can see what's
19 happened to enrollments by race in
20 Alabama, the SREB states, and in the
21 U.S., from this data; is that correct?

22 A. Yes, sir.

23 Q. Can you identify State Exhibit
0155

1 4-003?

2 A. Exhibit 04-003 are similar data
3 from the previous chart, but it
4 excludes the HBCU -- that's
5 historically black colleges and
6 universities -- and just gives you the
7 black enrollment in the Alabama public
8 universities during this same period of
9 time.

10 Q. So by excluding the HBCUs,
11 basically, this Alabama data here is
12 for the historically white
13 institutions?

14 A. Yes, sir.

15 Q. To show that the figures from
16 Exhibit 3 aren't -- or show how they're

17 affected by inclusion of the
18 historically black institution and
19 exclusion.

20 So at the historically white
21 institutions, then, this would show an
22 increase in white undergraduate
23 enrollment of almost 58 percent during
0156

1 this period; is that correct?

2 A. Let's see. Yes, uh-huh.

3 Q. And while enrollment at the
4 historically white institutions dropped
5 by almost 13 percent; is that correct?

6 A. That's right.

7 Q. And the total change in
8 enrollment, it was almost flat, 0.61
9 percent?

10 A. Yes, sir.

11 Q. Can you identify State
12 Defendant's Exhibit 4-4?

13 A. Exhibit 04-004 are the
14 Education Trust Fund appropriations for
15 the period academic year '90-'91
16 through academic year 2003-'04. And it
17 is broken down by K-12; higher
18 education, which would include
19 two-year, four-year; other, which is a
20 miscellaneous grouping of non-K-12 and
21 higher ed; and in total. And then we
22 see the percentage increases or
23 decreases on this chart.

0157

1 Q. And the difference between the
2 top half and the bottom half is the
3 inclusion of the "other" in the top
4 half; is that correct?

5 A. Yes, sir.

6 Q. And so this shows that while
7 the higher education portion of the
8 Education Trust Fund perhaps has
9 decreased over this period -- indeed,
10 it has decreased -- the total
11 appropriation has increased?

12 A. Right.

13 Q. Who makes the decision as to
14 the split, as to the proportion that
15 goes to K through 12 and the portion

16 that goes to higher education?
17 A. As I testified earlier, the
18 higher education community makes its
19 recommendation to the governor and to
20 the legislature by way of the unified
21 budget request, and then after that is
22 included at the same time that the
23 Department of Education submits its
0158

1 budget to the governor and to the
2 legislature; then it goes through the
3 decision process, and the decision
4 ultimately is made by the legislature,
5 usually with the consent of the
6 governor.

7 Q. In earlier testimony and with
8 respect to Exhibit 14, you were
9 questioned about some comments that Dr.
10 Potts made. And you've made some
11 comments that you thought his funding
12 figures did not include medical
13 schools, vet schools, et cetera.

14 Who decides what proportion or
15 what funds from Education Trust Fund go
16 to medical schools, vet schools, et
17 cetera, and what portions go to other
18 needs?

19 A. Well, that's -- that is all
20 part of the unified budget process.
21 The medical schools are not excluded.
22 Veterinarian school at Auburn is not
23 excluded. And those are all in the
0159

1 unified budget request. The
2 legislature then makes those decisions.

3 Q. And you testified earlier that
4 your line item for need-based financial
5 aid has been cut, I think, maybe in
6 half; is that correct?

7 A. Yes, sir.

8 Q. Was that done at a time when
9 the appropriation for higher education,
10 the total appropriation went up?

11 A. If you look at -- yes. Yes.

12 Q. So who made the decision to cut
13 your line item -- excuse me?

14 A. If you go back -- yeah -- no.

15 I'm sorry. It was a slight increase.

16 Q. Who made the decision to cut
17 that particular line item when the
18 overall appropriation nonetheless was
19 going up?

20 A. That is the purview of the
21 state legislature.

22 Q. Can you identify State
23 Defendant's Exhibit 04-5?

0160

1 A. Yes, sir. This is the
2 appropriation of state tax funds for
3 operating expenses related to higher
4 education. This looks at the 16-state
5 SREB and looks at the appropriation and
6 the '03-'04 budget, and then compares
7 that over time -- over time, back to
8 1983.

9 Q. I noticed some differences in
10 the appropriation to Alabama and
11 particularly in the percentage change
12 from '02-'03 to '03-'04 on Exhibit 5
13 than those given on Exhibit 4.

14 Can you generally tell us why
15 those numbers differ?

16 A. I would think that the source
17 on this one is --

18 Q. "This one," you're talking
19 about 5?

20 A. I'm sorry. 04-005. -- shows a
21 less increase than the other exhibit in
22 ETF appropriation. I would attribute
23 that to the fact that this source is

0161

1 grapevine, which is extracted from the
2 SREB data. And it's quite possible,
3 because this is sometimes a moving
4 target where we submit what we call
5 cleanup data to the IPEDS, that they
6 were using comparison numbers in '02
7 that were probably more than they
8 should have been. That's my surmise.

9 Q. What is the significance of
10 these percentage changes shown on
11 Exhibit 5?

12 A. This, again, gives you an
13 interesting snapshot over time of the

14 fact that in what some of my colleagues
15 refer to as the "glory years," there
16 were some significant increases in
17 state appropriation that go back to
18 that period of time, '83 through '89,
19 that amounted to a 73 percent increase.
20 I guess we would say that that would be
21 front-loaded and therefore
22 those significant increases back in
23 '80s have carried -- have carried
0162

1 through. So you have double-digit
2 increases through the period that we're
3 talking about right now.

4 Q. I believe that's all I have.
5 Thank you.

6 MR. FOSHEE: I have a couple of
7 questions, just to clarify something.
8

9 EXAMINATION BY MR. FOSHEE:

10 Q. If you'd take a look, sir, at
11 Exhibit 04-001 again.

12 A. Yes, sir.

13 Q. I just wanted to make sure I
14 understand this chart correctly. Of
15 course, I'm interested in the lines
16 having to do with Athens State
17 University. And I see in the chart,
18 for example, with respect to black
19 students, it shows 49 in 1991-'92, and
20 71 for 2002-'03; is that correct?

21 A. Yes, sir.

22 Q. What are those figures
23 referring to? Is that the number of
0163

1 individuals receiving a degree that
2 year, or is it something else?

3 A. No, sir. It's the number of
4 degrees that were conferred,
5 disaggregated by race. In other words,
6 these are black students who received
7 baccalaureate or certificate in
8 reporting periods.

9 Q. All right. And that would be
10 the number that were conferred a degree
11 during that school year --

12 A. Yes, sir.

13 Q. -- is that correct.

14 A. Yes, sir.

15 Q. Now, have you reported or
16 provided to Mr. Blacksher similar data
17 with regard to the two-year
18 institutions?

19 A. I'm trying to remember the
20 discovery.

21 Q. I believe it was asked for.

22 A. Yes.

23 MR. BLACKSHER: Not this chart.
0164

1 MR. FOSHEE: Not this chart.
2 But I believe you've asked for the
3 similar data for the two-years schools.

4 Q. (By Mr. Foshee) But
5 regardless, let me ask you something
6 different: Does the Commission on
7 Higher Education staff track similar
8 data for the two-year colleges?

9 A. Yes, sir.

10 Q. All right. And with respect to
11 the two-year colleges, is that tracking
12 with respect to degrees only also?

13 A. No, sir. We track on
14 certificates because they do a healthy
15 business in what we call non-credit
16 programs that would lead to a
17 certificate.

18 Q. But with respect to the
19 four-year and two-year institutions,
20 this data would not, for example,
21 include someone who had completed all
22 the requirements for a degree but
23 simply did not pay whatever fee there

0165

1 was to go through graduation services
2 or receive the actual degree itself?

3 A. If Athens State says that they
4 had two graduates in a particular
5 semester, they certify that to us,
6 then, they had two graduates in that
7 semester.

8 Q. That received a degree?

9 A. Yes, sir. By their definition.

10 Q. All right. If they have
11 students who completed all of the

12 course work but do not apply for a
13 certificate or degree, those would not
14 be included in your reports; is that
15 correct?

16 A. If the institution did not
17 submit those as a completer, then, no,
18 sir.

19 Q. All right. How about someone
20 who had, let's say, was in a four-year
21 program at an institution, went to
22 school for three years, and then got a
23 job in the industry they wanted a job
0166

1 in? Would they show up on Exhibit
2 04-001?

3 A. In the two-year institutions,
4 they're allowed to count for completion
5 if that student stayed in their field
6 of employment. In other words, if they
7 were in a welding program, and they
8 went into a welding program, they would
9 be counted as completed.

10 Q. But that would not be the case
11 with respect to four-year schools?

12 A. No, sir.

13 Q. Okay. Thank you, sir.

14 MR. BLACKSHER: I have no
15 questions.

16 MR. HUNTER: Anything,
17 Jeremiah?

18 MR. GLASSMAN: No.

19 MR. HUNTER: This brings this
20 to a close.

21 END OF DEPOSITION

22 (1:30 p.m.)

23

0167

1 C E R T I F I C A T E

2

3 STATE OF ALABAMA)

4 JEFFERSON COUNTY)

5 I, Casey Atchison, Court Reporter,
6 Notary Public, State at Large, do
7 hereby certify that I recorded, by
8 means of stenotype, the foregoing
9 proceedings at the time and place
10 stated in the caption hereof. That

11 later, under my supervision, the
12 proceedings were transcribed by means
13 of computer-aided transcription, and
14 the foregoing represents a full, true,
15 and correct transcript of the
16 proceedings on said occasion.

17 I further certify that I am neither
18 of counsel nor of kin to any parties of
19 said cause, nor am I in any manner
20 interested in the result thereof.

21

22

23 Casey Atchison, Notary