

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

BROWN UNIVERSITY IN PROVIDENCE
IN THE STATE OF RHODE ISLAND,
AND PROVIDENCE PLANTATIONS;

THE TRUSTEES OF COLUMBIA
UNIVERSITY IN THE CITY
OF NEW YORK;

CORNELL UNIVERSITY;

THE TRUSTEES OF DARTMOUTH
COLLEGE;

PRESIDENT AND FELLOWS OF
HARVARD COLLEGE, MASSACHUSETTS;

MASSACHUSETTS INSTITUTE OF
TECHNOLOGY;

THE TRUSTEES OF PRINCETON
UNIVERSITY;

THE TRUSTEES OF THE UNIVERSITY
OF PENNSYLVANIA; and

YALE UNIVERSITY,

Defendants.

Civil Action No. 91-CV-3274

GOVERNMENT'S POST-TRIAL
PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

7/23/92

GOVERNMENT'S POST-TRIAL PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW

TABLE OF CONTENTS

	<u>PAGE</u>
I. INTRODUCTION	1
A. The Financial Aid Process	1
B. MIT And The Ivy Overlap Group	3
C. MIT's Principal Competitors	5
D. Interstate Commerce	7
1. MIT's Financial Aid Practices Constitute Trade Or Commerce.	7
2. MIT's Financial Aid Practices Substantially Affect Interstate Commerce.	9
II. MIT AND THE IVY OVERLAP SCHOOLS AGREED TO APPLY A COMMON NEEDS ANALYSIS METHODOLOGY . .	9
A. The Ivy Needs Analysis Agreements Deviated From The Uniform Methodology And Congressional Methodology	10
1. Non-custodial Parents	11
2. Multiple Siblings In College.	12
3. Income Definition And Losses.	13
B. MIT Followed The Ivy Needs Analysis Agreements	13
C. The Purpose And Effect Of The Ivy Needs Analysis Agreements Were To Increase Family Contributions	15
III. MIT AND THE IVY OVERLAP SCHOOLS FIXED THE FAMILY CONTRIBUTIONS OF COMMONLY-ADMITTED AID APPLICANTS.	16
A. The Purpose Of The Family Contribution Agreements Was To Eliminate Price Competition	17
B. Family Contribution Agreements At The Annual Spring Meeting In Wellesley, Massachusetts.	18

	<u>PAGE</u>
C. "Post-Overlap" Family Contribution Agreements.	21
D. The Ivy League Schools Fixed The Self-Help Of Commonly-Admitted Aid Applicants.	21
IV. MIT AND THE IVY OVERLAP SCHOOLS AGREED NOT TO AWARD MERIT SCHOLARSHIPS TO AVOID COMPETING FOR THE MOST DESIRABLE STUDENTS . .	22
V. MIT AND THE IVY OVERLAP SCHOOLS EXCHANGED PROSPECTIVE SELF-HELP AND TUITION THAT MIT USED IN ITS BUDGET PROCESS.	24
VI. THE OVERLAP AGREEMENTS WERE ENFORCED.	26
A. Enforcement At The Spring Overlap Meeting	26
B. Cheating Was Rare And, When It Occurred, Provoked Vigorous Complaints.	26
VII. THE ANTICOMPETITIVE PURPOSES OF THE OVERLAP AGREEMENTS.	27
A. The Purpose Of The Overlap Agreements Was To Eliminate Price Competition And Prevent Bidding Wars.	27
B. Stanford Was Recruited To Join Overlap Because It Was A Competitive Threat . . .	28
VIII. THE ANTICOMPETITIVE EFFECTS OF THE OVERLAP AGREEMENTS.	31
A. The Overlap Agreements Eliminated Price Competition Between The Ivy Overlap Schools For Financial Aid Applicants And Would-Be Merit Scholars. .	32
B. The Overlap Agreements Increased Family Contributions And Generated Collusive Revenues.	33
C. The Overlap Agreements Adversely Affected Some Students' Enrollment Decisions	38

	<u>PAGE</u>
D. The Overlap Agreements Increased Average Net Revenue	39
IX. MIT'S DEFENSES ARE CONTRARY TO THE EVIDENCE .	44
A. The Overlap Agreements Are Not Necessary To Preserve Need-Based Aid And Need-Blind Admissions	44
B. The Overlap Agreements Are Not Required By Federal Law Or Consistent With Federal Policy	49
C. The Overlap Agreements Are Not Necessary To Enhance The Fairness And Accuracy Of Family Contributions.	51
PROPOSED CONCLUSIONS OF LAW	53

I. INTRODUCTION

Plaintiff, the United States of America ("Government"), submits the following Post-Trial Proposed Findings Of Fact And Conclusions Of Law. In this filing, the Government has supplemented its pre-trial Proposed Findings, filed June 25, 1992, based on additional evidence adduced at trial and has replaced certain citations with those from the trial record.

A. The Financial Aid Process

1. To apply for financial aid, high school seniors and their families complete the College Scholarship Service's ("CSS") Financial Aid Form ("FAF") (Government Exhibit ("GX") 190). After entering these income and assets data for processing, CSS transmits this information to the U.S. Department of Education, which determines each aid applicant's family contribution under the Congressional Methodology. CSS sends a Financial Aid Form Needs Analysis Report ("FAFNAR") to the schools designated by the applicant on the FAF and a Student Aid Report to the aid applicant (McCullough Tr. 42-46).

2. The family contribution is the amount of money that schools expect a family to contribute towards the educational expenses of a college student for one year. It has two parts: the parent contribution, determined from the parents' income and assets, and the student contribution (McCullough Tr. 44, 53).

3. The Congressional Methodology is the needs analysis methodology required by Congress in the Higher Education Amendments of 1986 for the awarding of federally-funded or federally-guaranteed financial aid (GX 237, MIT Admission No. 33). Congressional Methodology became effective in the 1988-89 academic year (GX 237, MIT Admission No. 34). Before it became effective, family contribution was determined under the "Uniform Methodology," which was developed by the higher education community and subsequently approved by the United States Department of Education as an acceptable methodology for distributing federal financial aid funds (GX 237, MIT Admission No. 35).

4. In certain circumstances, a financial aid officer may exercise "professional judgment" by adjusting the Congressional Methodology family contribution to allow for the treatment of an individual applicant with "special circumstances." Professional judgment must be used on an individual, case-by-case basis; it cannot be used to adjust the family contributions for groups of students (20 U.S.C. § 1087tt(a); McCullough Tr. 56-61).

5. Individual schools may require additional information from aid applicants. In addition to the FAF, MIT requires applicants to file an MIT financial aid application and copies of the parents' and student's latest federal tax forms (Hudson Tr. 1281-83). MIT then makes its own family contribution determination following the Ivy Needs Analysis

Agreements, a needs analysis methodology agreed upon with the other Ivy Overlap schools (see Section II).

6. MIT determines an aid applicant's "financial need" by subtracting its family contribution determination from the applicant's "student budget" (GX 237, MIT Admission No. 30). The "student budget" includes tuition, room and board, and educational and personal expenses, such as books, materials, and travel (GX 237, MIT Admission No. 25).

7. A financial aid package may include two parts, grants and "self-help" (GX 237, MIT Admission No. 32). Self-help is the part of the aid package consisting of loans and school-year employment opportunities (GX 237, MIT Admission No. 31).

B. MIT And The Ivy Overlap Group

8. The Ivy Overlap Group consisted of MIT and the eight Ivy League schools, Brown, Columbia, Cornell, Dartmouth, Harvard, Princeton, the University of Pennsylvania, and Yale (GX 237, MIT Admission No. 1). MIT participated in the Ivy Overlap Group since at least 1958 (GX 237, MIT Admission No. 2).

9. The Ivy Overlap Group usually met four times a year (Gallagher Tr. 154). At an annual Spring meeting in Wellesley, Massachusetts, the nine schools fixed the family contributions for commonly-admitted aid applicants (see Section III). At annual winter meetings, usually held in New York City, the Ivy Overlap schools discussed and agreed upon the Ivy Needs

Analysis Agreements and exchanged prospective self-help and tuition figures (Routh Tr. 284, 287-88; see Sections II & V).

10. The family contribution agreements and Ivy Needs Analysis Agreements were developed pursuant to the Manual of the Council of Ivy Group Presidents ("Ivy Manual") (GX 3). The Council of Ivy Group Presidents is composed of the eight Ivy League schools (GX 237, MIT Admission No. 5). MIT's president attended meetings of the Ivy Council (Gray Tr. 566), and "MIT [was] considered a member of the Ivy group for purposes of [the financial aid] rules" stated in the Ivy Manual (GX 3 at X-30; Routh Tr. 276-77).

11. MIT has also been an associate member of the Pentagonal/Sisters Overlap Group (GX 237, MIT Admission No. 11), which included the five "Pentagonal" schools (Amherst, Williams, Wesleyan, Bowdoin, and Dartmouth), the "Seven Sisters" schools (Barnard, Bryn Mawr, Mount Holyoke, Radcliffe, Smith, Vassar, and Wellesley), and four other schools (Colby, Middlebury, Trinity, and Tufts) (GX 237, MIT Admission Nos. 9-10).

12. MIT is a major research university and a significant economic entity, with a 1990-91 operating budget of approximately \$1.1 billion, an endowment of about \$1.5 billion, and tuition and other related income of about \$158 million (DX 7 at 18, 19, 23; GX 191; Gray Tr. 898).

13. MIT and the Ivy Overlap schools are among the wealthiest schools in the nation. As of June 30, 1991, MIT's endowment was the eighth highest in the nation and four other Ivy Overlap schools were ranked even higher (GX 191 at USA 17).

C. MIT's Principal Competitors

14. A relevant market is a set of sellers that, if acting together or if controlled by a single entity, could significantly and profitably raise the price of a product they sell (Leffler Tr. 652). The relevant market for purposes of this case is the eight Ivy League schools, MIT, and Stanford (Leffler Tr. 654-65; GX 230).

15. Colleges compete with each other for, among other things, high-quality undergraduate students (Leffler Tr. 648; Routh Tr. 395-97). MIT considers its principal competitors to be Harvard, Stanford, Yale, and Princeton (Gray Tr. 930-31; Culliton Tr. 542-43; Leffler Tr. 656-59; GX 145 at 10 10194; GX 161; GX 168 at 10 10769). Three of these schools are members of the Ivy Overlap Group and the fourth, Stanford, was invited to join the Ivy Overlap Group (see Section VII.B.).

16. To identify its principal competitors, MIT has regularly conducted Cancellation (or Reply) Studies based on information provided by admitted students. Each of these studies, in a section entitled "The Competition," analyzes MIT's "yield" (the percentage of undergraduate students admitted to MIT that decide to enroll at MIT) against schools

with the highest number of cross-admitted students. The 1984, 1986, 1987, and 1988 Studies showed that MIT's "primary competitors" were other Ivy Overlap Group schools and Stanford (GX 173 at 17 10010, 17; GX 174 at 17 10107-13; GX 175 at 17 10184-85; GX 176 at 17 10257-60).

17. In 1988, 82% of all students admitted to MIT and 88% of the admitted students considered to be "highest achievers" actually enrolled at MIT, an Ivy League school, or Stanford (GX 230). These figures are analogous to market shares for for-profit firms (Leffler Tr. 662-65).

18. The attempts to recruit Stanford to join Overlap demonstrate that Stanford was MIT's closest competitor outside the Ivy Overlap Group and that MIT was concerned about losing students to Stanford for financial reasons (Leffler Tr. 659-60; GX 76 at HA 1018; see Section VIII.B.).

19. In setting its tuition and self-help for 1987-88 and 1988-89, MIT compared its estimated increases with the estimated increases of the Ivy League schools, Stanford, and the California Institute of Technology (GX 42 at 10 10796; GX 43 at 10 10055). MIT's aid director, Len Gallagher, regularly exchanged prospective tuition and self-help increases with the Ivy Overlap schools at their January meetings. That information was forwarded to MIT's vice president for financial operations for use in the annual discussions leading to the setting of MIT's tuition and self-help (Gallagher Tr. 223-26; GX 237, MIT Admission No. 62). These exchanges of prospective

tuition and self-help are relevant in defining a market, in that they show towards whom MIT is price sensitive (Leffler Tr. 656).

20. The existence and viability of the Ivy Overlap Group for over 30 years, and its effect on prices charged students and their families, is evidence that the Ivy Overlap Group had market power (Leffler Tr. 653-55).

D. Interstate Commerce

1. MIT's Financial Aid Practices
Constitute Trade Or Commerce

21. MIT's student budget is the price for one year of an MIT education paid by students and families not receiving financial aid (see GX 237, MIT Admission No. 25; McCullough Tr. 46). MIT's current student budget, including charges for tuition, room and board, travel, and incidental expenses is about \$25,000 (Gray Tr. 881).

22. MIT's family contribution determination is the price for one year of an MIT education paid by students and families receiving financial aid (see McCullough Tr. 44; Routh Tr. 279-80, 300). The self-help portion of the financial aid package also constitutes a payment obligation by students and their families. MIT's standard self-help level for the 1991-92 academic year was \$6,100 (see GX 24).

23. Colleges grant financial aid out of their self-interest in order to attract a high-quality, diverse student body, not out of "charity." As MIT's expert witness, William

Bowen, testified, a non-profit college cares who purchases its product "because the clientele -- the students in a university, for example, themselves, affect the quality of the product, if you will, that the [college] provides" (Bowen Tr. 1027). Similarly, MIT's chairman, Paul Gray, testified that the "academic enterprise" at MIT is critically dependent on the recruitment of high quality students in order to attract good faculty (Gray Tr. 868). Thus, although Yale University could fill its undergraduate class with only full-paying students, it does not because that "would not produce at all the kind of a class, that we think is valuable both to the institution and to the students" (Routh Tr. 361). Instead, in setting its tuition level and aid policies, a college's objective "is to find the combination of tuition and student aid levels that will produce the most income while maintaining the quality and diversity of the student body" (GX 195 at Y 5036002).

24. MIT's "Cost of Education" study (DX 6) suggests that all students at MIT, even those paying the full tuition price, receive "charitable" subsidies. This study fails to account for the fact that graduate students cost more to educate than undergraduate students (Gray Tr. 919), and also includes financial aid, unsponsored research and alumni association expenses (Gray Tr. 921-23). Even if students paying the full price are subsidized, however, MIT's chairman, Paul Gray, would not find agreements on the full tuition price proper or defensible (Gray Tr. 924).

2. MIT's Financial Aid Practices
Substantially Affect Interstate Commerce

25. MIT's financial aid activities are interstate in nature. Each year, MIT receives applications from large numbers of students who are not Massachusetts residents, many of whom matriculate at MIT (GX 173-76). Many of MIT's admissions applications are transported to MIT from other states. MIT receives tuition payments and non-refundable application fees from out-of-state residents (GX 236, MIT Interrogatory Answer No. 8).

II. MIT AND THE IVY OVERLAP SCHOOLS AGREED TO
APPLY A COMMON NEEDS ANALYSIS METHODOLOGY

26. At their annual winter meetings in New York, MIT and the Ivy Overlap schools agreed on several needs analysis principles used to determine the family contributions of their aid applicants (Routh Tr. 288-89). These meetings were held pursuant to the Ivy Manual, which stated:

So that the process of comparing financial aid awards among member institutions can be facilitated, Ivy Group financial aid directors shall meet as necessary to agree on the basic principles of a financial needs analysis system. In particular they shall agree on a common system for measuring parental ability to pay and also seek to reduce differences in the other elements of needs analysis. . . .

(GX 179 at X-31; Routh Tr. 284.)

27. These agreed-upon principles, called the Ivy Needs Analysis Agreements, were distributed to the Ivy Overlap schools following the January meeting (Routh Tr. 288-89). The 1989 Ivy Agreements were distributed with a cover memorandum

stating, "[a]ttached are the agreements for need analysis we made in New York" (GX 33 at COL 360; GX 500 at ¶ 12; see also GX 104 (1988 Agreements); GX 193 at Y 4029010 (1987 Agreements); GX 133 at HA 994 (1986 Agreements); GX 99 at HA 1153-54 (1985 Agreements)). Stan Hudson, MIT's representative at the January, 1989 meeting, referred to the 1989 Agreements as the "usual needs analysis agreements" (Hudson Tr. 452-53 & GX 70 at LIT 10 100601; see also Routh Tr. 289).

A. The Ivy Needs Analysis Agreements Deviated From The Uniform Methodology And Congressional Methodology

28. Most of the Ivy Agreements deviated from, or were not included in, the Uniform Methodology and Congressional Methodology (Gallagher Tr. 160-63; see also Routh Tr. 293-95, 390 & GX 206). Although the Government is not required to prove that the Ivy Overlap schools systematically deviated from these methodologies as part of its affirmative case, the higher family contributions resulting from the Ivy Agreements are relevant to Overlap's effects (see Section VIII.B.) and also rebut MIT's argument that Overlap was required by federal law and was consistent with federal policy (see Section IX.B.).

29. Of the ten or more annual agreements, three were the most important: the agreement to seek a parental contribution from the non-custodial parent; the agreement to apportion the family contribution when more than one child was attending college; and the agreement to redefine income, such as

disallowing capital losses, depreciation losses, and losses from secondary businesses. In 1984, Princeton's director of financial aid claimed that the Ivy Overlap schools, by having a large number of idiosyncratic differences with Uniform Methodology, were "nickel-and-diming ourselves to death" and doing a lot of "wheel spinning" when most of their "savings" could be realized by limiting their differences to these three exceptions (GX 38 at LIT 10 102208). Professional judgment may be invoked to support each of these exceptions only where it can be justified by "special circumstances" involving a particular applicant. Professional judgment cannot be used to establish a systematic policy to follow these exceptions in every case (20 U.S.C. § 1087tt(a)).

1. Non-custodial Parents

30. The Congressional Methodology, like its predecessor, Uniform Methodology, does not require a financial contribution from the non-custodial parent in cases in which an aid applicant's parents are divorced or separated (McCullough Tr. 51-52; Gallagher Tr. 163-64).

31. Every year, the Ivy Overlap schools agreed to require a contribution from at least two parents in divorced/separated cases, including, in many of those years, a non-custodial parent contribution. In 1984, in a description of the Ivy Overlap Group's existing policies, the Group's Needs Analysis Subcommittee stated that the schools agreed to require

a non-custodial parent contribution except in certain limited instances. In addition, if the custodial parent remarried, the agreement was, "federal rules to the contrary notwithstanding," to require contributions from the two natural parents (GX 69 at LIT 10 101519-21; Hudson Tr. 451).

32. The Ivy Agreements from 1985 to 1989 evidence similar agreements. In 1985, the schools agreed to "use incomes of only two parents; preferably those of the natural parents" (GX 99 at HA 1153). In 1986 and 1987, they agreed to "[u]se two parental incomes, not three or four" (GX 133 at HA '994; GX 193 at Y 4029010). In 1988, they agreed to "use two parental incomes" and noted that "[m]ost schools prefer to use income from two natural parents (Penn & Prin use custodial unit)" (GX 104). In 1989, they agreed to "normally expect contributions from 2 parents" and added that "[e]ach school has its own approach concerning the treatment of stepparent and natural parent support, and we agree to meet at [the Spring] Overlap [meeting]" (GX 33 at COL 361).

2. Multiple Siblings In College

33. In cases in which more than one child is attending college, the Congressional Methodology evenly apportions the parental contribution. For example, if two children are in college, Congressional Methodology apportions half the parental contribution to each student (Gallagher Tr. 161-63). The Uniform Methodology followed this same approach.

34. Each year, MIT and the Ivy Overlap schools agreed to depart from the Uniform Methodology and Congressional Methodology by apportioning the parental contribution based on the costs of the colleges involved (e.g., GX 33 at COL 361; Gallagher Tr. 163). This agreement apportioned a greater part of the parental contribution towards the charges of MIT and the other Ivy Overlap schools, which are high-cost schools (Hudson Tr. 1290, 1387-88).

3. Income Definition And Losses

35. Each year, the Ivy Overlap schools agreed to disregard certain losses reported on parents' 1040 tax forms. Consequently, these losses were included as part of the family income and used to determine the parental contribution. The Ivy Needs Analysis Agreements excluded rental losses, capital losses, depreciation, and secondary business losses (GX 33 at COL 361; GX 104; GX 193 at Y 4029010; GX 133 at HA 994; GX 99 at HA 1153). Congressional Methodology allows these losses (Gallagher Tr. 163-64).

B. MIT Followed The Ivy Needs Analysis Agreements

36. MIT's financial aid office held its own needs analysis meeting in January, following the Ivy Overlap January meeting (Hudson Tr. 454; Levine Tr. 466-67). Minutes of the Ivy Overlap meeting and the Ivy Needs Analysis Agreements were circulated at MIT's meeting (Hudson Tr. 1397; Levine Tr. 467;

GX 101). Like CSS, MIT had a computer program for its internal needs analysis system (Hudson Tr. 1398).

37. A number of the adjustments MIT made to the Congressional Methodology were in agreement with the Ivy Overlap schools (Levine Tr. 470-71; GX 236, MIT Interrogatory Response No. 2).

38. MIT's needs analysis policies differed from the Ivy Overlap schools in three respects - disallowing graduate student expenses, disallowing private schooling expenses, and in its treatment of student assets (GX 38 at LIT 10 102207-08). Despite these differences, MIT's family contribution determinations made prior to the Spring Overlap Meeting were at the median of the Ivy Overlap and Pentagonal/Sisters Overlap groups (Gallagher Tr. 165-66; GX 35 at 10 10287).

39. Even in cases where these practices did produce "widely-disparate" family contributions at the Spring Overlap Meeting, MIT assured the Ivies that its practices "will retreat to the closet" (GX 38 at LIT 10 102207). With respect to its treatment of student assets, MIT assured the Ivies that it would not be "refractory, but always be ready to do overlap business" (GX 39 at LIT 10 101493; Gallagher Tr. 182-83).

C. The Purpose And Effect Of The Ivy Needs Analysis Agreements Were To
- Increase Family Contributions

40. The plain import of most of the Ivy Needs Analysis Agreements is to increase the family income or assets available for determining the family contribution. The three most significant Ivy Agreements - involving divorced or separated parents, multiple siblings in college, and disallowing certain losses - nearly always raise the family contribution (Hudson Tr. 1387-88). In fact, these three agreements were the three examples used in DX 45 where "professional judgment" was invoked to raise family contribution (*id.*) (see also Routh Tr. 390-91 (divorced/separated and multiple sibling agreements raised family contribution)).

41. Contemporaneous documents demonstrate that the purpose and effect of the Ivy Agreements was to increase family contributions. As early as 1981, the Ivy Council's Ad Hoc Committee on Financial Aid reported that Ivy Group aid officers were adjusting "weak points" in the Uniform Methodology in a way that caused family contributions to increase (GX 126 at D 22069). Skip Routh, Yale's director of financial aid, in explaining why Yale saved approximately \$300,000 in its financial aid budget in 1982-83, stated that:

. . . as we continue to dig deeper for non-taxable income and to deviate from the so-called Uniform Methodology of needs analysis (in concert with the Ivy Group) in such areas as divorced and separated parents, IRA/Keogh funds and the treatment of siblings in less expensive colleges, we are generating larger parental contributions than in previous years.

(GX 206 at Y 6002001; Routh Tr. 293-95.)

42. Similarly, MIT increased its family contribution determinations and saved money using the Ivy Needs Analysis Agreements. MIT's associate director of financial aid estimated that MIT saved \$2,000 per needy applicant in 1985 by using its methodology instead of the Uniform Methodology applied by the College Scholarship Service (Jones Tr. 411 & GX 74 at LIT 10 101582; see also Section VIII.B.).

III. MIT AND THE IVY OVERLAP SCHOOLS FIXED THE FAMILY CONTRIBUTIONS OF COMMONLY-ADMITTED AID APPLICANTS

43. At their annual Spring meeting, MIT and the Ivy Overlap schools fixed the family contributions of aid applicants admitted to more than one Overlap school. These Spring meetings were held pursuant to the Ivy Manual, which stated:

Moreover, in order to insure that financial awards to commonly admitted candidates are reasonably comparable, all Ivy Group institutions will share financial information concerning admitted candidates in an annual "Ivy Overlap" meeting just prior to the mid-April common notification date. . . .

Family contributions shall be compared and adjusted if necessary so that, as a general rule, families will be asked to pay approximately the same amount regardless of the Ivy Group institution they choose to attend.

(GX 3 at X-30.)

44. MIT agreed with the other Ivy Overlap schools to compare and adjust family contributions to accomplish this goal (GX 32 at LIT 10 102163; Gray Tr. 569-70; Gallagher Tr. 137).

A. The Purpose Of The Family Contribution Agreements Was To Eliminate Price Competition

45. The express purpose of the family contribution agreements made at the Spring meeting was to eliminate financial considerations as a basis of choice between the Ivy Overlap schools: "[t]he purpose of the overlap agreement is to neutralize the effect of financial aid so that a student may choose among Ivy Group institutions for non-financial reasons" (GX 3 at X-30; Routh Tr. 311).

46. MIT's purpose was the same: "[t]he purpose of this meeting is to discuss mutual aid applicants and to agree on similar parent contributions so that the student will receive comparable aid packages from these schools" (GX 32 at LIT 10 102163; see also Gray Tr. 573; Gallagher Tr. 180).

47. Other Ivy Overlap schools shared this anticompetitive purpose. A January, 1988 memorandum by Yale's financial aid director and others stated, "[t]he main purpose of the meeting is to agree on the family contributions. . . . The result for a student admitted to more than one of the participating schools is that the cost to the family is essentially the same at each school. The student's decision can then be based on factors other than cost, consistent with the principle adopted by the Council of Ivy Group Presidents in 1979" (GX 211 at Y 6132003; see also Routh Tr. 299-300).

B. Family Contribution Agreements At The Annual Spring Meeting In Wellesley, Massachusetts

48. Prior to the Spring meeting, MIT and the other Ivy Overlap schools sent data concerning their admitted aid applicants to Student Aid Services, a private data processing corporation owned by three Harvard administrators and a Bowdoin administrator (GX 237, MIT Admission No. 64; Hudson Tr. 1400). With this information, Student Aid Services prepared a "master" roster listing all aid applicants admitted to an Overlap school, separate "bilateral" rosters listing those admitted by only two Overlap schools, and "multilateral" rosters listing students admitted by three or more Overlap schools (GX 237, MIT Admission No. 66). For each applicant, the rosters listed each school's proposed family contribution, self-help, and grant (GX 237, MIT Admission No. 65). MIT paid Student Aid Services for these services (Gallagher Tr. 150; Hudson Tr. 1400).

49. The Spring meeting lasted two or more days (GX 36). The Ivy Overlap Group divided into two multilateral meetings chaired by a "driver" who called out each applicant's name and the schools which had admitted that applicant (Gallagher Tr. 173). Bilateral meetings were held to discuss applicants admitted to only two schools (GX 32; Gallagher Tr. 150).

50. Because the purpose of the Spring meeting was to eliminate price competition, not all of the applicants were discussed. Aid applicants admitted to only one school were not discussed (GX 237, MIT Admission No. 72). Family contribution differences of \$500 or less were usually considered close

enough so that these applicants were not discussed (GX 237, MIT Admission No. 74). More often than not, the family contribution determinations made prior to the Spring meeting were similar because the schools were following a similar needs analysis methodology (GX 237, MIT Admission No. 63; Gallagher Tr. 232-33). Aid applicants whose applications were incomplete were also usually not discussed (GX 237, MIT Admission No. 73).

51. Family contribution agreements were reached in a majority of cases that were discussed; the Ivy Overlap schools "agreed to disagree" in only a small minority of cases (Routh Tr. 311; Gallagher Tr. 144, 174; GX 180 at PR 31206; see also Case Tr. 1249 (all Overlap schools disagreed in less than 2% of cases)). MIT's 1988 Overlap rosters evidence numerous agreements reached at the Spring meeting (GX 85; GX 86; GX 219; Jones Tr. 429-33) (describing "verbal agreements" noted on roster)).

52. In many cases, MIT and the Ivy Overlap schools "met in the middle" to resolve their differences (GX 85; GX 87). Meeting in the middle was in the "spirit of Overlap" (Jones Tr. 435-36).

53. Schools often compromised on what they believed to be the "right" family contribution for the sake of striking a deal. On the 1988 Overlap roster entry for one student, MIT's Associate Aid Director Sam Jones wrote, "Don't like but . . .," and raised MIT's family contribution from \$3,920 to \$5,120 (GX 86 at LIT 10 100092). Similarly, in an April, 1986

"bitnet" computer message to Cornell, Jones' discussion of several students included, "[redacted name] is a minority, and I'd like to hold on to him, but I'll come up a bit if you want" and "[redacted name] is a minority. Would like to hold. Can come up toward middle if you insist" (GX 87 at LIT 10 101887). Princeton's Overlap instructions illustrate this spirit of compromising: "In MULTI's, go to compromise. . . In BI's, if within \$100 don't change. If not try to move them toward us or compromise as you see fit" (GX 181 at PR 31890). In July, 1989, Harvard's associate director of financial aid wrote: "if we decided to continue with the Overlap process but to stick to our guns about what contribution feels right for each family (instead of trying so hard to 'meet in the middle'), we would probably spend about \$250,000 more in aid to students" (GX 135 at HA 1071-72).

54. When questions were raised about the legality of Overlap, the Ivy Overlap schools recognized that meeting in the middle was a problem. A proposed response to a May, 1989 Wall Street Journal article analogizing Overlap to a price-fixing cartel recommended "discontinuation of the practices of matching on self-help and meeting in the middle" (GX 37 at MIT 10 11456). At the June, 1989 Ivy Group meeting, Dartmouth's aid director noted, "Meeting in the middle is a problem. We need to make a considered effort to reach the right # [number]" (GX 114 at D 746).

C. "Post-Overlap" Family Contribution Agreements

55. After the Spring meeting, MIT and the Ivy Overlap schools notified their aid applicants of their family contributions and their financial aid packages (GX 237, MIT Admission No. 87). The schools continued to agree on family contributions for students whose applications were incomplete at the time of the Spring meeting, students who appealed their family contribution agreement made at the Spring meeting, and students admitted from a school's wait list (GX 237, MIT Admission Nos. 88, 90).

56. These "post-Overlap" or "Overlap II" agreements were made pursuant to the Ivy Manual, which stated, "[m]ember institutions shall continue to compare late awards and adjustments to awards after the formal overlap session until the student decides which college he or she will attend" (GX 3 at X-30). The Spring meeting agreements remained in force until the student selected a school or until a new family contribution consensus was reached (GX 237, MIT Admission No. 92; see GX 95 (Harvard asked MIT for bilateral agreement so it could "fall in line"))).

D. The Ivy League Schools Fixed The Self-Help Of Commonly-Admitted Aid Applicants

57. At the Spring meeting, the Ivy League schools not only agreed on family contributions, but also often matched self-help levels for common applicants (GX 3 at X-30; Gallagher

Tr. 138-39). These self-help agreements reduced the "competitiveness amongst [the Ivy League] schools" (GX 167 at MIT 10 10585).

IV. MIT AND THE IVY OVERLAP SCHOOLS AGREED
NOT TO AWARD MERIT SCHOLARSHIPS TO AVOID
COMPETING FOR THE MOST DESIRABLE STUDENTS

58. MIT agreed with the Ivy Overlap schools not to grant merit scholarships (or "merit aid"). MIT agreed with the Ivy Overlap schools to award financial aid based solely upon the demonstrated financial need of each individual applicant (Answer ¶ 18(a)). Because merit scholarships are granted on criteria other than financial need - such as academic achievement, talent, leadership qualities, and exemplary participation in extracurricular activities (GX 237, MIT Admission No. 15; Gallagher Tr. 119) - MIT agreed not to award merit aid.

59. The purpose of the agreement not to offer merit aid was to avoid competing for the most desirable students. In a letter responding to a complaint about Overlap, MIT's former President Gray admitted, "we have no desire to get into bidding wars for 'stars'" (GX 60 at LIT 10 100550). Dr. Gray's testimony is even more candid: "We don't bid for stars because we agreed with a set of institutions we would not" (Gray Tr. 615).

60. The other Ivy Overlap schools shared MIT's desire to avoid using merit aid to compete for students. As Skip Routh, Yale's director of financial aid, wrote:

A crucial factor in the effectiveness of our shared policies and practices, including the overlap process, is the willingness of all of the participants to let the marketplace operate without resort to financial warfare. Thus, the yield rates . . . reflect the "price-less" hierarchy of institutions within the Ivy Group.

(GX 212 at Y 7237044.)

61. Unlike the Ivy Overlap schools, most colleges grant merit scholarships (Gray Tr. 579; Behnke Tr. 1441). For example, Temple University offers full-tuition scholarships to top students graduating from Philadelphia area public high schools (Somerville Tr. 1566-68). Other universities that grant merit scholarships include the University of Chicago, Rice University, Washington University, and Johns Hopkins (GX 237, MIT Admission No. 24; Gallagher Tr. 179-80).

62. The Overlap ban on merit scholarships is inconsistent with MIT's own policies concerning graduate student aid; "At the graduate student level, financial aid is awarded primarily on the basis of academic merit" (GX 23 at LIT 5 100042; see also Culliton Tr. 539). Nearly all graduate aid is based on merit at other Ivy Overlap schools as well (Widmer Tr. 1486-87). MIT's provost noted the "logical discontinuity" between the policies on undergraduate and graduate aid in his correspondence with William Bowen, Princeton's president (GX 9 at PR 7128).

V. MIT AND THE IVY OVERLAP SCHOOLS EXCHANGED
PROSPECTIVE SELF-HELP AND TUITION THAT
MIT USED IN ITS BUDGET PROCESS

63. According to the Ivy Manual, the Ivy Overlap schools had "a further goal of establishing a balance between scholarship and self-help that is roughly comparable" (GX 3 at X-30). All of the Ivy Overlap schools regularly exchanged prospective self-help and tuition information at their January meetings (GX 237, MIT Admission No. 62; GX 40; GX 97; GX 98; GX 99; GX 133; GX 193). Financial aid is "itself a function of the level of student charges and that, therefore, it would have been logically difficult to talk about them as if they were independent, when they were not" (Bowen Tr. 532; GX 11).

64. MIT's aid director, Len Gallagher, participated in the January round-robins beginning within a few years of his joining MIT's financial aid office in 1966 (Gallagher Tr. 184-85). Gallagher collected the information to forward to his supervisor for use in the annual discussions leading to the setting of MIT's self-help level and tuition for the following year (Gallagher Tr. 191-95; GX 237, MIT Admission No. 62).

65. These prospective exchanges ended in 1988, when three schools refused to exchange prospective tuition and budget estimates (GX 41). The reason given by Yale, one of the reluctant schools, was that they had been advised by their general counsel not to bring that information to the meeting (GX 105 at COL 320; Routh Tr. 287-88; Gallagher Tr. 186-87).

66. In the late 1980s, MIT's president, Paul Gray, decided that MIT's self-help should be closer to that of Harvard, Yale, Princeton and Stanford - MIT's "principal competition" (Gallagher Tr. 210-12). Gray also participated in round-robin exchanges of self-help and tuition with the presidents of the Ivy League universities (GX 53; GX 54; GX 55; Gray Tr. 588-92). During one such round-robin exchange of prospective tuition, room and board charges, the Ivy-MIT presidents expressed concern that they were "pricing [them]selves out of the market" and inviting public criticism with their supra-inflationary price increases (GX 55; Gray Tr. 591-99).

67. The prospective information collected by Gallagher showed how close MIT's estimated self-help and tuition increases were to the estimated increases of the Ivy League schools, Stanford, and California Institute of Technology (GX 42; GX 43). This information was forwarded, along with historical comparisons, to MIT's president and executive committee, which set MIT's self-help and tuition, room and board charges (Gallagher Tr. 197).

68. In fiscal year 1988, all of the schools in the Ivy-MIT-Stanford group, except for Cornell, had total student charges within \$165 of \$17,000 (GX 300 at PR 11032). Consequently, the full list prices of these schools differed by less than \$500, the same difference not considered significant enough to justify a discussion about family contributions at the Spring Overlap Meeting.

VI. THE OVERLAP AGREEMENTS WERE ENFORCED

A. Enforcement At The Spring Overlap Meeting

69. The Spring Overlap Meeting enforced the agreement that family contributions should be comparable so that aid applicants would choose a college for non-financial reasons. The rosters for each meeting showed each school's calculations of family contribution, self-help, and grant levels (GX 85; GX 86). According to MIT's chairman, Paul Gray, "the principal purpose of the spring overlap meeting, beyond the narrow task of getting agreement on a common measure of parental contribution, was to keep folks honest" (Gray Tr. 574).

B. Cheating Was Rare And, When It Occurred, Provoked Vigorous Complaints

70. As a result of the Spring meeting and the prospect of strong sanctions for violating the Overlap agreements, cheating on the agreements was rare. Dartmouth noted the possible penalty for violating the agreed-upon ban on merit aid: "If Dartmouth had merit scholarships, the effect on our Ivy League 'membership' would be radical. We would effectively be out of the League, and this would have a serious impact on our applicant pool" (GX 120 at D 2790-91).

71. When cheating occurred, it provoked strong complaints from other Ivy Overlap members. In February, 1989, Dartmouth's assistant aid director complained to his supervisor that Harvard had reduced the parent contribution for a star soccer player without talking to Dartmouth: "Also [Harvard]

spelled out the award in detail contrary to our Ivy Agreement as you described it to me. . . . Either we have an agreement we all stick to or we do not have any agreement! I'm tired of being taken advantage of" (GX 116 at D 1386).

72. In October, 1986, Princeton began offering \$1,000 "research" scholarships without regard to need "to help persuade some of our best applicants to attend Princeton" (GX 6 at PR 22063). At the January, 1987 Ivy Overlap meeting, "[e]veryone agreed that this program . . . caused much unhappiness at all levels of administration at other schools because of the possible impact on admission yield" (GX 97 at LIT 10 101307). Documents from Harvard, Yale, and Dartmouth show that those schools saw the Princeton Scholars Program as a merit scholarship program that could lure top students to Princeton (GX 137 at HA 1252; GX 210 at Y 6102008; GX 123, at D 13303; see also Bowen Tr. 518-19). At the December, 1986 Ivy Presidents meeting, the presidents of Dartmouth and Yale protested to Princeton President William Bowen (GX 124 at D 13538).

VII. THE ANTICOMPETITIVE PURPOSES OF THE OVERLAP AGREEMENTS

A. The Purpose Of The Overlap Agreements Was To Eliminate Price Competition And Prevent Bidding Wars

73. The purpose of the Overlap agreements is apparent: to "let the marketplace operate without resort to financial warfare" (GX 212 at Y 7237044); to create a "price-less hierarchy of institutions within the Ivy Group" (*id.*); "to

neutralize the effect of financial aid so that a student may choose among Ivy Group institutions for non-financial reasons" (GX 3 at X-30); to prevent institutions from "compet[ing] for whomever they see as the most desirable students" (Gray Tr. 907); and to prevent "a bidding war" over "prized" students (GX 136 at HA 1187).

74. MIT's proffered purposes for the Overlap agreements - that they were designed to preserve need-blind admissions and enhance the "fairness" and "accuracy" of its family contribution determinations - are legally irrelevant and contrary to the evidence (see Section IX).

B. Stanford Was Recruited To Join Overlap Because It Was A Competitive Threat

75. The anticompetitive intent of the Ivy Overlap schools is also evident from their efforts to recruit Stanford, their closest competitor, to join Overlap. The Ivy Overlap schools were concerned about "losing common candidates" and "market share" to Stanford, which did not follow the Ivy Needs Analysis Agreements (Routh Tr. 395-97; GX 76). Stanford expressed concerns that Overlap violated the antitrust laws and rejected the invitation (GX 76 at HA 1018).

76. Stanford's methodological differences led to significantly disparate family contributions (Gallagher Tr. 247-48). By 1986, the Ivy Overlap schools were concerned that they were losing common applicants to Stanford because of

differences in needs analysis (Routh Tr. 340; GX 198 at Y 5163004; GX 84 at WI 8178 6 10808).

77. In September, 1986, MIT's Sam Jones and Yale's Skip Routh met with Stanford Aid Director Robert Huff, Dean of Admissions Jean Fetter, and Associate Provost Tim Warner (Routh Tr. 323-24). The goals of these meetings included "need analysis convergence" (GX 200 at Y 5163013), "comparing awards prior to and as a condition for more or less similar offers" (*id.*), "developing a common methodology" (Routh Tr. 326), and increasing communications so that the Ivy Overlap schools "could feel free of any sense of disadvantage" (GX 198 at Y 5163006). As MIT's Jones wrote, "We want [Stanford] to get enough on our wavelength in need analysis to look like one of the Ivies, meaning not off the reservation too often, for one" (Jones Tr. 419, GX 200 at Y 5163014).

78. Stanford expressed concerns that Overlap violated the antitrust laws. MIT's Jones warned Routh and others before meeting with Stanford that Harvard's dean of admissions and financial aid, Bill Fitzsimmons, and its dean, Faculty of Arts and Sciences, Michael Spence, had reported:

the legal implications of overlap continue to bother Stanford (not just Huff and Fetter), and that probably a Stanford overlap is not going to happen soon. He suggests that we concentrate on exchange of information, and charm the hell out of everybody. He agrees with me however that there are back channels and informal ways to handle rough differences. If we can get a clear picture from Huff as to how he deals with various kinds of cases, and maybe bring him into line (broadly speaking), so that we can have some confidence that statistically Stanford will look more or less

like the rest of us in terms of deriving FC's, we will have done a good day's work.

(GX 78 at LIT 10 101931.)

79. After their meetings, Jones and Routh sent Huff a draft report on the meetings (GX 82). After receiving comments from Jones, Routh responded: "Sam, I share your concern. . . . I guess they are just too paranoid of the subject of collusion . . . they are clearly getting more than their market share of div/sep (and possibly multiple sibs) by virtue of the systematic differences in our procedures" (GX 198 at Y 5163006). The use of the term "market share" referred to the schools' competition for undergraduate students (Routh Tr. 395-97). If Stanford had agreed to follow the Ivy Group's needs analysis policies, the Ivy Group's share of students would have increased (Routh Tr. 336).

80. At the October 26, 1986 Ivy Overlap meeting, Jones and Routh submitted their final report on their Stanford meetings, again expressing concern about methodological differences and losing students:

8) Stanford, and particularly the Provost (James Rosse, an economist who specializes in anti-trust matters), continues to be troubled by the possible analogy of Overlap (pre-notification price-fixing, as it were), and restraint of trade. Accordingly, and despite our arguments to the contrary, we doubt very much that Stanford would entertain an invitation from the Ivy Group in the near term for anything like full-scale "Overlap." Nevertheless, we believe that post-notification comparison, combined with joint technical discussions, will serve to reduce the concern that the Ivy Group may be losing common candidates to Stanford because of methodological differences in need analysis and packaging policies.

(GX 76 at HA 1018).

VIII. THE ANTICOMPETITIVE EFFECTS OF THE OVERLAP AGREEMENTS

81. Both for-profit entities and non-profit colleges can collude for the same motives and with the same anticompetitive effects. By colluding on price (family contributions, self-help levels, or tuition), non-profit colleges can, like for-profit entities, minimize price competition and raise their prices. Non-profit colleges have incentives to collude to increase their revenues in order to fund their various objectives (GX 224; Leffler Tr. 643-52; Carlton Tr. 1591-92, 1595, 1666-67; see also Fleming Tr. 836-37).

82. MIT's expert economist, Dr. Carlton, agreed that if the Ivy Overlap schools transferred any revenues they received as a result of the Overlap agreements to educational purposes other than financial aid, "I would not allow that except in exceptional cases." The reason for that opinion is "really knowing are they spending the money on a worthy cause or just really getting together as a cartel to drag up the price to students to pay the faculty a little more" (Carlton Tr. 1682-83; see also Carlton Tr. 1667-69, 1678-79). In this connection, Nannerl Keohane, Wellesley's president, testified that savings from Overlap allowed "more money for other priorities of the school" (Keohane Tr. 1000).

83. The economic victims of Overlap are those students and their families who paid a higher price to attend an Ivy Overlap school, those students who did not attend the schools where their interests and those of the universities would best be satisfied, those students who otherwise would have received merit aid, and those students who did not apply to the Overlap schools because of their high cost and high family contributions (Leffler Tr. 719-20, 1804).

A. The Overlap Agreements Eliminated Price Competition Between The Ivy Overlap Schools For Financial Aid Applicants And Would-Be Merit Scholars

84. The Overlap agreements achieved their stated goal of "neutraliz[ing] the effect of financial aid" (GX 3 at X-30), thus preventing aid applicants and their families from considering price differences when choosing between the Ivy Overlap schools. For commonly-admitted aid applicants, the Spring meeting ensured that family contributions would differ by \$500 or less (GX 237, MIT Admission No. 74). For all aid applicants, the Ivy Needs Analysis Agreements produced more uniform family contributions (GX 237, MIT Admission No. 63; Gallagher Tr. 232-33; GX 47 at 10 11499). The ban on merit scholarships eliminated competitive bidding for high-quality students (see Section IV). Finally, the matching of self-help levels for common aid applicants by the Ivies, and MIT's use of other schools' self-help estimates in its own budget process, produced more uniform self-help levels (see Sections III.D. & V).

85. As Yale's director of financial aid, Skip Routh, recognized, the Ivy Overlap schools were successful in creating a "price-less hierarchy of institutions. . . ." (GX 212 at Y 7237044). Including Stanford in his analysis of price competition faced by Yale, Routh wrote: "In summary of the undergraduate situation, we have every reason to believe that, with the exception of Stanford's treatment of [divorced/separated] students (and Stanford is not a subscriber to the Ivy compact), financial aid can be dismissed as a factor in the analysis of admit and yield rates" (id.). If family contributions differed, families would have been able to consider price differences in selecting a college (Routh Tr. 320-21).

B. The Overlap Agreements Increased Family Contributions And Generated Collusive Revenues

86. The Overlap agreements, particularly the Ivy Needs Analysis Agreements, increased family contributions and generated "savings" (i.e., collusive revenues) for the Ivy Overlap schools. The facial purpose and effect of the Ivy Needs Analysis Agreements is to increase the family income and assets available for determining the family contribution (see Section II.C). William Bowen, Princeton's former president, expected that the different elements of the Ivy Group needs analysis policy would increase family contributions above the Congressional Methodology (Bowen Tr. 496-97). Numerous studies and compilations and contemporaneous statements of Overlap

participants show that the effect of Overlap was to raise family contributions.

87. The Ivy Needs Analysis Agreements increased MIT's family contribution determinations in both 1987 and 1988. An analysis of data produced by MIT showed that in 1987, for aid applicants that ultimately enrolled at another school, MIT's average family contribution prior to the Spring Overlap Meeting was \$1,361 higher than the average family contribution for the same applicants under the Uniform Methodology. In 1988, for aid applicants that ultimately enrolled at MIT, MIT's average family contribution prior to the Spring meeting was \$609 higher than the average family contribution for the same applicants under Congressional Methodology. These results are statistically significant and support the conclusion that Overlap resulted in increased prices and affected students' decisions of which school to attend (GX 225; GX 236, MIT Answer to Interrogatory 19; Leffler Tr. 669-73).

88. Needy minority students and their families paid higher prices as well. In 1987, MIT compared its calculation of expected parental contributions for needy minorities and needy non-minorities with the family contributions for the same applicants using Uniform Methodology (GX 158 at LIT 17 100095). For both needy minorities and non-minorities attending MIT, parental incomes were, on average, higher under MIT's methodology than under the Uniform Methodology. MIT's average parental contributions were \$993 higher for blacks,

\$329 higher for Mexican-Americans, \$2,116 higher for Puerto Ricans, and \$1,318 higher for needy non-minorities. Thus, Overlap increased the price paid by needy minority students - students in which MIT claims a special interest - as well as other students (Leffler Tr. 691-94; GX 158 at LIT 17 100095; GX 229).

89. MIT's exhibit purporting to show Overlap's benefits to minority students, DX 56, actually confirms that Overlap increased family contributions for minorities. DX 56 incorrectly included the Congressional Methodology family contributions of two students (#184 and #515) that should have been excluded from the calculation because their MIT family contribution determinations were excluded (Hudson Tr. 1415-18; GX 602). When properly analyzed, these data show that MIT's family contributions for needy African-Americans in 1988 were, on average, \$700 higher than under Congressional Methodology. For all minorities, MIT's family contributions were, on average, about \$300 higher than under Congressional Methodology (Leffler Tr. 1800-04; GX 466; GX 467).

90. MIT's family contribution determinations were higher than those determined by Stanford for the same aid applicants. Based on the MIT-Stanford "post-Overlap" study in 1988, MIT's average family contributions were \$713 higher for the 33 students who attended MIT and \$3,423 higher for the 66 students who attended Stanford. On average, the Ivy Overlap methodology increased family contributions by about \$2,500 as compared to

Stanford's methodology (Leffler Tr. 674-75; GX 48b; GX 226). This study also demonstrates that price affects students' decisions on which school to attend (Leffler Tr. 674-76).

91. Harvard, Yale, and Princeton also participated in "post-Overlap" studies with Stanford, and their family contributions were higher than Stanford's for common aid applicants in 1988. Average family contributions were \$1,055 higher at Harvard, \$2,399 higher at Yale, and \$939 higher at Princeton (Leffler Tr. 676-77; GX 227 (summary); GX 187 (Harvard); GX 188 (Princeton); GX 189 (Yale)).

92. Increased family contributions reduced the financial "need" of MIT's aid applicants and saved MIT money. MIT's associate director of financial aid estimated that MIT saved \$2,000 per needy applicant in 1985 by applying its needs analysis methodology instead of the Uniform Methodology applied by the CSS (GX 74 at LIT 10 101582; Jones Tr. 411).

93. The Overlap agreements increased family contributions and generated collusive revenues at other Overlap schools as well. Yale's Skip Routh attributed his school's financial aid "savings" in 1982-83 to the higher parental contributions caused by the Ivy Needs Analysis Agreements (GX 206 at Y 6002001; Routh Tr. 293-95). Harvard's associate director of financial aid estimated that Harvard's participation in Overlap saved \$250,000 (GX 136 at HA 1187; see also GX 135 at HA 1071-72). Similarly, the financial aid director at Wellesley College, a member of the Pentagonal/

Sisters Overlap group, stated that Wellesley's participation in Overlap saved the school money (GX 311 at WY 2147).

94. The Overlap agreement not to award merit scholarships increased the price paid by students who otherwise would have received them (Leffler Tr. 650, 720; Carlton Tr. 1673-74).

95. Although the primary effect of the Spring meeting was to eliminate any remaining price competition after the Ivy Needs Analysis Agreements were applied, there is evidence indicating that the Spring meeting agreements increased family contributions. Both the Government's and MIT's experts found no statistically significant change in the average family contribution, just as a result of the Spring Overlap Meeting (Leffler Tr. 679-80; Carlton Tr. 1649-50). However, an MIT study of the 1988 Spring Overlap Meeting showed that the aggregated family contributions of MIT's admitted applicants increased by \$13,000 and that grants decreased by \$52,000 (Hudson Tr. 446-48; GX 68 at LIT 10 100840). Stan Hudson's published statement that the Spring meeting increased MIT's aid was contrary to his review of the 1988 data and was based only on a "feeling" (Hudson Tr. 1408-13).

96. The Spring meeting also increased the "best available price" for many students. The Government's expert, Dr. Leffler, analyzed data for approximately 110 students who were admitted to MIT and another Ivy Overlap school in 1988 and whose family contribution was changed at the Spring meeting.

Dr. Leffler's analysis shows that students' best financial opportunity (the lowest family contribution before the Spring meeting) increased by \$1,091 on average, a statistically significant result (Leffler Tr. 677-87; GX 228). This anticompetitive effect on students' "best available price" as a result of the Spring meeting is in addition to the anticompetitive effects of the Ivy Needs Analysis Agreements on family contributions determined prior to the Spring meeting (Leffler Tr. 688-89).

C. The Overlap Agreements Adversely Affected Some Students' Enrollment Decisions

97. The Overlap agreements prevented the Ivy Overlap schools from sending appropriate "price signals" to particularly desirable students by making better financial aid offers. This inability led to a misallocation of students within the Ivy Overlap group (Leffler Tr. 651, 690-91, 719-20; GX 224).

98. The Overlap agreements also caused the misallocation of students to schools outside the Ivy Overlap group by raising the price of attending the Ivy Overlap schools (Leffler Tr. 650, 690; GX 224).

99. The merit aid ban and higher family contributions may have hurt the Ivy Overlap schools' yield of minority students. In a September, 1986 meeting of Columbia's Committee on Admissions and Financial Aid, Columbia's admissions director indicated that the difficulty with declining yields for

minorities "seems to be with financial aid packages, . . . many colleges outside the Ivy League may determine financial need differently, often to the student's benefit, and many also offer athletic and merit scholarships to some students" (GX 107 at COL 341; see also GX 110 at COL 659).

100. Harvard's associate director of financial aid indicated that the family contribution agreements at the Spring meeting prevented Harvard from doing "need analysis the way we would really like to" (GX 136 at HA 1187). For financial aid applicants, Harvard found that cost played an important role in its yield against Stanford (id. at HA 1186).

D. The Overlap Agreements Increased Average Net Revenue

101. Both the Government's and MIT's experts performed analyses of Overlap's effect on the participating schools' average net revenue - defined as tuition, room and board, and fees, minus the average amount of financial aid per student (Carlton Tr. 1623-24; Leffler Tr. 715) - even though they disagree as to its significance. MIT's expert, Dr. Carlton, believes that Overlap's effect on average net revenue is the "basic issue" in the case (Carlton Tr. 1624). The Government's expert, Dr. Leffler, believes the central issue is whether Overlap caused a significant number of families to pay higher prices, not how the collusive actors disbursed their collusive profits (Leffler Tr. 1769-70).

102. The analyses conducted by Dr. Leffler show that the Overlap agreements increased the schools' average net revenue by a statistically significant amount. The analyses by Dr. Carlton are both unreliable and inconclusive.

103. Dr. Leffler's analysis compared the revenues of the Ivy Overlap schools with the revenues of schools that are most comparable to the Ivy-MIT institutions (Leffler Tr. 714-19, 1781-93; GX 231; GX 463). Dr. Leffler's analysis used private schools classified as "Research 1" or "Research 2" by the Carnegie Foundation - schools that are most comparable to MIT according to MIT's own expert witness, Dr. William Bowen (Bowen Tr. 1047-48).

104. Dr. Leffler's analysis showed that the average net revenue per student for the Ivy Overlap schools was between \$1,326 and \$1,557 higher than for the other comparable schools for the period 1984-85 through 1989-90. These results are statistically significant. Although these differences are not entirely attributable to Overlap, they support the conclusion that Overlap increased the price paid by students (Leffler Tr. 707, 714-19, 751; GX 231).

105. Dr. Leffler also performed an analysis using only the most selective private schools in the Research 1 and 2 categories. This group of 15 schools includes all of the Ivy schools and MIT for which there was data plus seven other schools. This analysis showed that the Ivy Overlap Group for the period 1984-85 through 1989-90 had consistently higher

average net revenue each year than the other most selective private schools (Leffler Tr. 1778-85; GX 462; GX 463).

106. Dr. Leffler performed another analysis based on schools with an acceptance rate of less than 50%. This analysis included schools that are not in the Research 1 and 2 categories, utilizing the acceptance rate variable that MIT's expert, Dr. Carlton, considered a good measure of a high quality school. This analysis showed that the Ivy Overlap Group (again, for the period 1984-85 through 1989-90) had consistently higher average net revenue each year than non-Research 1 and 2 category schools with acceptance rates of less than 50% (Carlton Tr. 1744, 1746-47; Leffler Tr. 1778-83; GX 463).

107. Finally, Dr. Leffler performed two weighted average net revenue regressions using the same variables used by Dr. Carlton in his analysis. Both of these regressions adjusted the yearly figures for inflation in college costs during the period 1984-90, rather than adjusting the yearly figures based on the Consumer Price Index as Dr. Carlton had done. The regression analysis for both public and private schools with acceptance rates of 50% or less shows a statistically significant effect of higher average net tuition of \$1,686 for the Ivy Overlap schools. The regression analysis for highly selective private Research 1 and 2 schools shows a statistically significant effect of \$2,886 higher average net revenue for the Ivy Overlap schools (Leffler Tr. 1784-93; GX 464; GX 465).

108. Dr. Carlton's multiple regression analysis (Carlton Tr. 1620-23; DX 37) is flawed and should not be relied upon. Even if it had been properly performed and was reliable, however, its only conclusion is that there is no statistically significant support that Overlap raised average net prices (Carlton Tr. 1629, 1683). Therefore, one cannot conclude on the basis of this regression analysis that Overlap did or did not increase the revenues of MIT and the other Overlap schools (Carlton Tr. 1689-91).

109. Dr. Carlton's regression analysis used data from a group of 226 public and private colleges and universities to compare the revenues of the Ivy Overlap schools with that of "comparable" non-Overlap schools (Carlton Tr. 1736-41). The schools used in the regression analysis included schools that are very different in many characteristics from the Ivy-MIT schools. For example, the group of 226 schools include schools with large percentages of part-time students and students over the age of 25, in contrast to the student body at MIT. The group of 226 schools also includes schools with library facilities of 100,000 or fewer volumes compared to MIT's library of 2 million bound volumes (Carlton Tr. 1742-49; GX 459).

110. A relevant factor in deciding what schools students consider substitutes for MIT is to look at which other schools admit the same applicants as MIT (see Section I.C.). Of the 226 schools used in Dr. Carlton's regression analysis, 55% had

either no or only one common admit with MIT in 1988 (Carlton Tr. 1754-55; GX 176).

111. Dr. Carlton's regression analysis used data from Peterson's Annual Survey of Undergraduate Institutions (Carlton Tr. 1624-25; DX 18). Although Dr. Carlton performed some checks to account for "potential data errors," he made no "systematic survey of the schools to determine whether what they were reporting to Peterson was correct" and no "individual investigation" of the data he used (Carlton Tr. 1637, 1714, 1731).

112. The Peterson data used in Dr. Carlton's regression analysis contains numerous data errors and inaccuracies. Dr. Carlton conceded that one reason he did not find a statistically significant effect from Overlap could be from using data that does not allow for an accurate estimate (Carlton Tr. 1691-92). These data are poor and were inappropriate to use for the type of analysis performed by Dr. Carlton (Leffler Tr. 1773).

113. For example, one of the variables used in the regression analysis is "wealth," defined as the percentage of students not receiving need-based aid (Carlton Tr. 1710-11; DX 18; DX 37). The data used for this variable show many sharp changes in the number of students receiving need-based aid from the same institution (GX 451). Among the schools for which inaccurate data were used by Dr. Carlton are Adelphi

University, Austin College, and Ball State University (Carlton Tr. 1711-18, 1721-28; GX 453-57).

114. The data for MIT used in Dr. Carlton's regression analysis also appears inaccurate. That data indicates that the percentage of MIT students receiving aid declined from about 57% in 1984 and 1985 to only slightly over 40% in 1986 (Carlton Tr. 1728-32; GX 451). MIT's director of financial aid, Stan Hudson, testified that about 57% of the students receive need-based aid (Hudson Tr. 1267). Dr. Carlton made no effort to confirm whether the data he used for MIT was accurate and admitted that he had "to assume . . . that number is not accurate" (Carlton Tr. 1731).

IX. MIT'S DEFENSES ARE CONTRARY TO THE EVIDENCE

115. Most of MIT's defenses are legally irrelevant. Even if relevant, however, they are contrary to the weight of the evidence.

A. The Overlap Agreements Are Not Necessary To Preserve Need-Based Aid And Need-Blind Admissions

116. MIT's primary defense is that the Overlap agreements are a necessary competitive restraint to preserve its current need-based aid and need-blind admissions policies, which enhance educational access, socioeconomic diversity, and other worthy social policies. This "social policy" defense, even if it were legally relevant, is contrary to the facts.

117. There is no causal link between membership in an Overlap group and need-blind admissions. Brown University had need-conscious admissions in 1982 while Overlap was still in effect (Routh Tr. 353-54; GX 209 at Y 6010004; see also Widmer Tr. 1479-80). Conversely, some non-Overlap schools have maintained need-blind admissions and need-based aid policies, such as Hanover College in Indiana (McCullough Tr. 110-12). In addition, MIT Chairman Gray testified that all of the schools belonging to the Consortium on Financing Higher Education ("COFHE"), many of which do not belong to an Overlap group, have aid policies similar to MIT's (Gray Tr. 904).

118. The Overlap agreements have not been necessary for MIT to maintain its need-blind admissions policy in the past (Gray Tr. 565) and will not be necessary in the future (Gallagher Tr. 234-36; 256-57). Indeed, the suspension of Overlap since 1990 has had no effect; MIT still follows the same financial aid policies it did during Overlap (Hudson Tr. 1352).

119. In the absence of the Overlap agreements, MIT is free to decide unilaterally not to grant merit scholarships. If it decides to begin granting merit aid, it is free to reallocate funds from other budget priorities or to increase revenues to maintain its need-blind admissions policy (Leffler Tr. 784-86). During its budget cycle, MIT considers various levels of tuition and self-help levels and their effect on the financial aid budget (e.g., GX 141 at LIT 5 100363, 366). Any

revenue received by MIT may be used for many different purposes. For example, some university financial officers believe that undergraduate tuition subsidizes research activities (Leffler Tr. 708-14; GX 129 at HA 223; GX 139 at LIT 5 100048).

120. MIT's financial aid budget is not a fixed, unchangeable amount. For example, in order to market itself more effectively, MIT adopted the MIT "Opportunity Awards" program in fiscal year 1988. This "differential" self-help packaging program, which was projected to raise financial aid costs about \$1 million, has not affected MIT's other financial aid policies (Leffler Tr. 1794-95; GX 50; GX 51).

121. MIT has substantial financial resources from which it could fund additional financial aid, if it chose to do so. MIT is one of the wealthiest schools in the country, with an endowment of about \$1.5 billion (GX 191 at USA 17). Over the five years ending June 30, 1991, the market value of MIT's investments increased by 51% to a new high of almost \$1.8 billion (DX 7 at 12). In addition, MIT just completed a major fundraising campaign that raised over \$700 million, including \$50 million for additions to the endowment for undergraduate financial aid (Gray Tr. 871).

122. Although MIT spent about 4-5% of its endowment market value each year Paul Gray's presidency (Gray 898-99), the return on MIT's endowment averaged about 14% during the 1980s. Consequently, MIT could have spent 9% of its endowment

and still have been "on the margin" of maintaining the real value of its endowment (Gray Tr. 948).

123. Undergraduate financial aid is a relatively small budget expenditure for MIT. In 1990-91, MIT spent \$7,812,000 and \$11,617,000 in undergraduate grant aid from its restricted and unrestricted funds, respectively (Leffler Tr. 698-99, 702-03; GX 232). MIT Chairman Gray estimated that MIT used about \$10 million a year in general funds for undergraduate scholarships (Gray Tr. 884). Using the figure of \$11,617,000, MIT's institutional grants from unrestricted funds constitute only 1.1% of its total 1990-91 operating budget, 4.4% of its instructional costs, and 3.6% of its available endowment flow (Leffler Tr. 699-703; GX 232).

124. Although MIT asserts that its institutional financial aid budget increased significantly in the 1980s, this is due in large part to its dramatic tuition increases, at a rate far above inflation. MIT's 1991 tuition is over 2-1/2 times its tuition in 1981 and 10 times its tuition in 1961 (GX 24 at 12 100018; Hudson Tr. 1362-66; Gray Tr. 913-15).

125. Merit scholarship expenditures do not "break the bank." The average annual amount of merit aid awarded by those schools in the Carnegie Foundation Research 1 and 2 groups that award merit aid in 1991 dollars was slightly over \$2 million per school - an amount representing only .2% of MIT's 1990-91 operating budget and 1.5% of its available endowment flow (Leffler Tr. 704-07; GX 232). Also, in 1989, the National

Association of Student Financial Aid Administrators conducted a survey showing that among those high-cost, highly-selective private colleges that award merit scholarships, merit aid constituted only 6% of institutional grant aid (Martin Tr. 1157).

126. A college's budget-setting process involves making choices among competing priorities (Bowen Tr. 1057). Some of MIT's expenditures are unique among its peers: for example, no other school in the Ivy-MIT-Stanford group has a salaried chairman, and MIT's chairman works part-time and is paid about \$200,000 per year (Gray Tr. 951). Ultimately, if MIT's commitment to need-blind admissions and need-based aid is as strong as it claims, it should be willing to reallocate the necessary resources to maintain those policies (Leffler Tr. 784-86).

127. MIT's "social policy" argument also assumes that it actually meets the full need of its aid recipients. MIT's stated commitment to "need"-based aid must be viewed in light of its agreements with its closest competitors on how to define "need" (see GX 90 at CIG 166: "Do we really meet need? Not by a long shot"). By increasing family contributions (and thus decreasing "need") (see Section VIII.B.), the Overlap agreements actually lessened educational access and diversity. For example, during the 1972-86 period while William Bowen was Princeton's president, the representation of students from all

income groups, except the top decile, declined (Bowen Tr. 1077-78; GX 300).

128. The ban on merit scholarships may have also hurt the Overlap schools' yield of minority students by not permitting the Overlap schools to meet better financial aid packages offered minorities by non-Overlap schools (GX 107 at COL 341). At MIT, overall enrollment of blacks declined during the 1980s (Gray Tr. 913). Although MIT's admission director testified that 44% of MIT's undergraduate class are minority students (Behnke Tr. 1432), MIT's "Imagination" publication states that underrepresented minorities (Blacks, Mexican-Americans, Native Americans, and Puerto Ricans) constitute only 10% of its enrollment (DX 3 at 37).

B. The Overlap Agreements Are Not
Required By Federal Law Or
Consistent With Federal Policy

129. The Overlap agreements are not required by federal law (Gray Tr. 614). Schools are not required to agree to ban merit scholarships, to exercise professional judgment in the same way, or to match family contributions for commonly-admitted aid applicants (McCullough Tr. 63, 74-75; Martin Tr. 1154).

130. Although federal regulations prohibit schools from awarding aid in excess of need to any student that receives money from certain federal aid programs, colleges are not prohibited from granting merit scholarships in combination with aid from other federal programs (such as Pell grants), or

solely with their own institutional funds (McCullough Tr. 74). In fact, most colleges grant merit scholarships (Gray Tr. 579; Behnke Tr. 1441).

131. MIT's assertion that the Overlap agreements are "consistent" with federal financial aid policies is irrelevant to this antitrust case. Moreover, this assertion is inconsistent with the facts. Although most federal aid programs have been need-based, there have been federal merit scholarship programs, such as the G.I. bill (Fleming Tr. 832), the Robert C. Byrd Honors Scholarship Program, the Paul Douglas Teacher Scholarship Program, and the National Science Scholars Program (McCullough Tr. 66-70).

132. There is no evidence that the Department of Education ever approved, ratified or endorsed agreements among schools to ban merit scholarships, to exercise professional judgment in the same way, or to match family contributions for commonly-admitted aid applicants (McCullough Tr. 63, 75; Martin Tr. 1148, 1167).

133. The Overlap agreements, by significantly altering the definitions of need under the federally-approved Uniform Methodology and the federally-required Congressional Methodology (see Section II.A), were inconsistent with federal aid policies. Moreover, the manner in which the Ivy Overlap schools routinely exercised "professional judgment" contravened the Department of Education's guidance to exercise professional judgment "sparingly" (GX 335 at LIT 10 100980; McCullough Tr. 61).

134. In April, 1985, the Department of Education found that Princeton was in non-compliance with federal regulations because of systematic changes it made to the Uniform Methodology (GX 326 at 8). The Ivy Overlap schools were aware that the Ivy Needs Analysis Agreements might be construed as improper "systematic" professional judgment (Jones Tr. 415 & GX 75 at MIT 10 10811 ("No one was prepared to say specifically what systematic 'professional judgment' calls would be made. I certainly didn't feel comfortable in addressing this with the two feds present")); see also Case Tr. 1234-35 & GX 350 at 10 10569 (at November, 1987 Pentagonals Group meeting, Ivy Group members advocated using "wholesale" professional judgment to bring Congressional Methodology "into incidence" with the schools' determinations of parent contributions)).

C. The Overlap Agreements Are Not
Necessary To Enhance The Fairness
And Accuracy of Family Contributions

135. MIT's claim that the Overlap agreements were designed to "get it right" - meaning to enhance the fairness and accuracy of its family contribution determinations - is legally irrelevant under the antitrust laws. Even if it were relevant, nothing in the record suggests that the Overlap agreements are necessary to achieve "fair," "accurate," or "reasonable" prices. In fact, the Ivy Overlap schools often compromised the principle of "getting it right" to reach a family contribution agreement that would eliminate price competition.

136. In many cases at the Spring meeting, the Ivy Overlap schools simply "met in the middle" to settle their differences rather than "stick[ing] to [their] guns about what contribution feels right for each family" (GX 135 at HA 1071-72; see also GX 114 at D 746 ("Meeting in the middle is a problem. We need to make a considered effort to reach the right # [number]")); Section III.B.).

137. MIT was willing to have its three differences in needs analysis policy "retreat to the closet" at the Spring meeting in order to reach family contribution agreements (GX 38 at LIT 10 102207-08; Gallagher Tr. 175).

138. In cases involving student assets and adjusted income for certain minorities, MIT compromised the principle of "getting it right" even further: it matched family contributions at the Spring meeting and then changed them back to the "right" amount if the student decided to attend MIT (GX 39 at LIT 10 101493; Gallagher Tr. 183-84; Jones Tr. 427-28; GX 84 at WI 6 10810-11).

139. In considering how to respond to competition outside the Overlap Group, Harvard's associate director of financial aid indicated that Overlap prevented Harvard from doing "need analysis the way we would really like to" (GX 136 at HA 1187).

PROPOSED CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties in this case.

2. This Court has jurisdiction over the subject matter in this case pursuant to Section 4 of the Sherman Act, 15 U.S.C. § 4.

3. Venue in this Court is proper.

4. MIT is engaged in interstate commerce and its financial aid activities are in the flow of, and substantially affect, interstate commerce.

(a) The Sherman Act applies to the service sector and to the professions. See FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990); FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986); Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982); National Society of Professional Engineers v. United States, 435 U.S. 679 (1978); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

(b) The Sherman Act applies to non-profit entities. NCAA v. Board of Regents of the University of Oklahoma, 468 U.S. 85, 100 n.22 (1984); American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 576 (1982).

(c) The Sherman Act applies with full force to all commercial conduct. See NCAA v. Board of Regents of the Univ. of Oklahoma, 468 U.S. 85, 117 (1984) (recognizing the

commercial aspects of the NCAA's television rights plan); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (sale of legal services not exempt from the Sherman Act).

(d) MIT's selling and discounting of educational services to consumers is a fundamentally commercial aspect of its activities and, therefore, constitutes trade or commerce under Section 1 of the Sherman Act, 15 U.S.C. § 1.

5. The concerted action requirement of Section 1 of the Sherman Act has been established. MIT and the Ivy Overlap schools shared a "unity of purpose or a common design and understanding, or a meeting of minds." American Tobacco Co. v. United States, 328 U.S. 781, 810 (1946). See Englert v. City of McKeesport, 872 F.2d 1144, 1149-50 (3d Cir.), cert. denied, 493 U.S. 851 (1989); Link v. Mercedes-Benz of North America, 788 F.2d 918, 922 (3d Cir. 1986).

6. The Overlap agreements are a per se violation of Section 1 of the Sherman Act, 15 U.S.C. §1.

(a) An agreement that interferes with the setting of price by free market forces is illegal on its face. National Society of Professional Engineers v. United States, 435 U.S. 679, 692 (1978); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221, 223 (1940).

(b) The use of an agreed-upon formula to determine price is a per se violation of Section 1. Socony, 310 U.S. at 222.

(c) Agreements to ban or limit discounts violate Section 1. Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980).

(d) Agreements to ban or limit competitive bidding violate Section 1. Professional Engineers, 435 U.S. at 692-93.

7. Alternatively, the Overlap agreements constitute an unreasonable restraint of trade under Section 1 of the Sherman Act, 15 U.S.C. § 1.

(a) Agreements not to compete on the basis of price do not require elaborate industry analysis to demonstrate anticompetitive effects. FTC v. Indiana Federation of Dentists, 476 U.S. 447, 459 (1986); NCAA v. Board of Regents of the University of Oklahoma, 468 U.S. 85, 109 (1984); National Society of Professional Engineers v. United States, 435 U.S. 679, 692 (1978).

(b) In determining the relevant market, the court may consider a number of factors including the price, use, and qualities of the services in question. United States v. E.I. Du Pont de Nemours & Co., 351 U.S. 377, 404 (1956); Tunis Brothers Company, Inc. v. Ford Motor Company, 952 F.2d 715, 722 (3d Cir. 1991), cert. denied, 1992 U.S. LEXIS 4628 (1992). A well-defined submarket, whose boundaries are determined by

practical factors such as industry or public recognition, the product's peculiar characteristics and uses, and distinct customers and prices, may also constitute a relevant market. Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962); Tunis, 952 F.2d at 723; Rothery Storage & Van Co. v. Atlas Van Lines, 792 F.2d 210, 218, 219 n.4 (D.C. Cir. 1986), cert. denied, 479 U.S. 1033 (1987); Miller v. Indiana Hospital, 1992-1 Trade Cas. (CCH) ¶ 69,797 (W.D. Pa. 1992).

(c) The anticompetitive purposes of the Overlap agreements may help the Court interpret facts and predict anticompetitive effects. Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918).

8. MIT's social-policy argument - that the Overlap agreements are necessary to preserve need-blind admissions and need-based aid - is legally irrelevant. Antitrust analysis is confined to a consideration of competitive effects. FTC v. Superior Court Trial Lawyers Association, 493 U.S. 411, 423-24 (1990); National Society of Professional Engineers v. United States, 435 U.S. 679, 690, 695 (1978).

9. The Higher Education Act does not immunize the Overlap agreements from antitrust prosecution.

(a) The antitrust laws have not been impliedly repealed by the Higher Education Act. "Implied antitrust immunity is not favored, and can be justified only by a

convincing showing of clear repugnancy between the antitrust laws and the regulatory system." National Gerimedical Hospital v. Blue Cross, 452 U.S. 378, 388 (1981) (quoting United States v. National Ass'n of Securities Dealers, 422 U.S. 694, 719-20 (1975)). "Repeal is to be regarded as implied only if necessary to make the [subsequent law] work, and even then only to the minimum extent necessary." Id. at 389 (quoting Silver v. New York Stock Exchange, 373 U.S. 341, 357 (1963)). MIT has made no such showing.

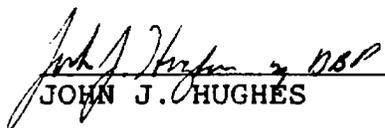
(b) MIT's argument that Overlap was "consistent" with the Higher Education Act and Department of Education regulations is legally irrelevant to this antitrust case. See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 227-28 (1940).

10. MIT's argument that Overlap was necessary to achieve "fair," "accurate," or "reasonable" prices (here, family contributions) is legally irrelevant. Price-fixing agreements are illegal regardless of the purported reasonableness of the agreement or the prices ultimately charged. Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647 (1980). See also FTC v. Superior Court Trial Lawyers Association, 493 U.S. 411, 423 (1990); Arizona v. Maricopa County Medical Society, 457 U.S. 332, 345 (1982).

11. Plaintiff is entitled to injunctive relief for the purpose of permanently restraining MIT from entering into, maintaining, or participating in any combination and conspiracy similar to the Overlap agreements.

Dated: July 24, 1992

Respectfully submitted,



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Certificate of Service

On July 23, 1992, I caused copies of the foregoing
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Conclusions of Law," to be served, by overnight courier, on:

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