

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action  
No. 91-CV-3274

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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, MA;

MASSACHUSETTS INSTITUTE OF TECHNOLOGY;

THE TRUSTEES OF PRINCETON UNIVERSITY;

THE TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA; AND

YALE UNIVERSITY,  
Defendants.

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***MASSACHUSETTS INSTITUTE OF TECHNOLOGY'S  
PROPOSED FINDINGS OF FACT  
AND CONCLUSIONS OF LAW***

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Defendant Massachusetts Institute of Technology ("MIT") submits the following supplemental proposed findings of fact and conclusions of law.

**PROPOSED FINDINGS OF FACT**

**The Goals and Objectives of Overlap Are  
Consistent With Those of Federal Financial Aid Policy**

**Origins of Federal Financial Aid Programs**

1. The financial aid programs created and administered by the federal government have for several decades been based upon principles of access, opportunity, choice, and the employment of scarce resources to meet need rather than to award prizes to non-needy students. (Tr. 803:1-12; 805:10-24; 806:2 through 808:6, Fleming).

2. Prior to World War II, financial aid for post-secondary education was virtually all private, and even these limited funds were of little consequence in creating educational access. The limited federal aid that did exist was primarily in the form of a college employment program operated by the National Youth Administration during the Roosevelt administration. (Tr. 801:16-23, Fleming).

3. The federal government's policy of promoting educational access and diversity through federal financial aid programs originated in World War II era legislation. (Tr. 802:1-25, Fleming).

4. In 1944, Congress passed the Serviceman's Readjustment Act of 1944 (the "GI Bill") to address the anticipated unemployment problems arising from the curtailment of the war effort and the large-scale demobilization of the armed forces; to reward veterans; and to increase the general educational level of the work force. (Tr. 802:2-22, Fleming).

5. The GI Bill guaranteed financial assistance to any veteran who wanted to attend college after the war. These benefits were available to veterans without regard to their need. (Tr. 802:23-25, Fleming).

6. Colleges and universities expanded to accommodate the large numbers of veterans who took advantage of the educational opportunities afforded by the federal government under the GI Bill. Thereafter, because of declining birthrates in the Depression years, competition for students intensified, and schools began to use their financial aid funds competitively to obtain the best students from among the comparatively fewer candidates seeking admission. (Tr. 802:1-22, Fleming).

7. The rapid expansion of federal aid programs was very costly, as increasing numbers of students took advantage of the federal financial aid programs, and the costs of attending college grew. As a result, the government shifted the emphasis in aid programs from grants and scholarships to student loan programs. (Tr. 808:7 through 809:17, Fleming).

8. The first need-based federal financial aid program was embodied in the National Defense Education Act of 1958 (the "NDEA"), which created National Defense (later Direct) Student Loans. The NDEA was enacted in response to the

Russian launching of *Sputnik I* and *II*, which prompted the federal government to take dramatic measures to maintain American competitiveness in the sciences.

(Tr. 805:10-24, Fleming).

9. In this legislation, Congress stated explicitly the federal aid policy that was already implicitly established:

The Congress hereby finds and declares that the security of the Nation requires the fullest development of the mental resources and technical skills of its young men and women. The present emergency demands that additional and more adequate education opportunities be made available. The defense of the Nation depends upon the mastery of modern techniques developed from complex scientific principles. It depends as well upon the discovery and development of new principles, new techniques, and new knowledge.

We must increase our efforts to identify and educate more of the talent of our Nation. This requires programs that will give assurance that no student of ability will be denied an opportunity for higher education because of financial need. . . .

(National Defense Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 1580).

(codified as amended in scattered sections of 20 U.S.C.)).

10. Under this program, the federal government provided funds directly to institutions, which then disbursed the funds in the form of student loans. The legislation required that schools distribute these funds only to students "in need" of assistance, but it did not define how need should be measured or who should measure it. (National Defense Education Act of 1958, Pub. L. No. 85, 864, 72 Stat. 1585).

11. In 1965, Congress enacted the Higher Education Act, which significantly expanded federal student loan programs and introduced a new system for

defining the characteristics of financial need and measuring need for purposes of determining student eligibility. (Tr. 806:2-14, Fleming).

12. Need-based financial aid programs have been influential in improving the composition of the student bodies at both public and private colleges and universities to include a mix of students with a greater diversity of socioeconomic backgrounds. (Tr. 806:15 through 808:6, Fleming).

**Like the Overlap Group Schools, The Federal Government Distributes  
Student Financial Aid on the Basis of Need**

13. Under the federal financial aid scheme, a student and his or her family are expected to rely on their combined financial resources to finance the student's college education. *See* 20 U.S.C. §§ 1078(a)(2) and 1087mm (1989). The amount of money that a student's family is expected to contribute toward his or her education is known as the "family contribution." (Tr. 44:13-16, McCullough; 486:4-10, Bowen).

14. If the family's combined resources are insufficient to meet the basic expenses of attending college, the student then will be eligible for federal loans or loan guarantees. *See* 20 U.S.C. §§ 1078(a)(2), 1087kk and 1087mm (1989); (Tr. 94:11-17, McCullough).

15. Whether a student is eligible for financial assistance depends, in the first instance, on the results of an analysis of the financial circumstances of the student's family according to a prescribed methodology. *See* 20 U.S.C. §§ 1087oo, 1087pp and 1087qq (1989). (Tr. 1189:15 through 1190:9, Case).

16. Approximately 99% of all federal financial aid money is awarded based only upon need. (Tr. 1269:19-21, Hudson).



17. Even though the federal financial aid programs are based upon need, they do not meet the full need of all eligible applicants; it is rare that the amount of federal money awarded to a student meets his or her full need, as determined under the federal formula. (Tr. 1270:5 through 1271:7, Hudson).

18. During the 1988-1989 academic year, the average need of all MIT financial aid recipients as calculated under the federal formula was approximately \$13,300.00; federal aid satisfied only 30% of that amount on average. 90% of this federal aid was awarded in the form of loans, and 10% was awarded as grant aid. On the other hand, 90% of MIT's institutional aid was awarded in the form of grants and only 10% was loan funds. (Tr.1270:5 through 1271:7, Hudson).

19. Federal law constrains MIT in its determination of how much of its own money it may award to a particular student. For example, if a student receives any federal need-based aid at all, the institution is prohibited by law from awarding additional funds to the student in an amount that exceeds the student's need as calculated under the federal formula. *See* 34 C.F.R. §§ 674.14, 675.14 and 676.14 (1991). This would be considered an "overaward." If a student is "overawarded," he or she must forfeit all federal aid in the amount of the "overaward." (Tr. 72:18 through 73:6, McCullough; 372:13-20, Routh; 1273:3 through 1274:3, Hudson).

20. If a student receives one dollar from a federal need-based aid program, all financial aid funds given to that student must be awarded based on need. A recipient of federal need-based aid would be "overawarded" if he or she receives an award that is based upon a factor other than need, such as the student's academic or

athletic merit, if the total award exceeds the student's calculated need. (Tr. 80:7-20; 82:17-20, McCullough).

21. Sanctions for "overawarding" federal aid recipients can be significant, and the Department of Education can and does audit private financial aid programs to ensure compliance with the need-based requirements of federal law. See 34 C.F.R. §§ 668.23, 668.24, 674.14(d) and 676.14(d)—(1991); (Tr. 101:7-16, McCullough; 1274:4-9, Hudson).

22. One of the objectives of federal financial aid policy is the achievement of horizontal equity in providing federal financial aid so that students who are similarly situated will be treated the same regardless of which institution, or aid officer within an institution, reviews the application. (Tr. 78:11-25, McCullough; 1161:9-13, Martin).

23. Another objective of federal financial aid policy is the achievement of vertical equity so that a student in better financial circumstances does not receive more financial aid than a student in worse circumstances. (Tr. 79:9-20, McCullough; 1134:15 through 1135:11, Martin).

#### **The Origins of a Uniform National Need Analysis System**

24. A heightened awareness of the disparities of educational opportunity between different segments of society and the effect of those inequities on disadvantaged socioeconomic groups led schools and the federal government to search for principles of and mechanisms for aid administration that would eliminate the

inequities in the distribution of scarce funds. (Tr. 1115:16 through 1116:25, Martin; 362:2-25, Routh).

25. From the inception of need-based federal financial aid programs, government agencies and college administrators recognized that it would be necessary to establish uniform principles of need analysis in order to have a meaningful system of need-based aid. (Tr. 1114:1-11, Martin).

26. In 1954 the College Scholarship Service ("CSS") was formed as an adjunct of the College Entrance Examination Board to facilitate the development of a uniform and equitable national system of need analysis. (Tr. 43:7-9, 11-12, McCullough; 804:7 through 805:9, Fleming; 1113:18 through 1114:15, Martin).

27. CSS historically has acted as a central clearinghouse for financial aid programs, collecting financial information from aid applicants, processing the information using a standardized formula, and distributing the information to participating schools, including both private and public institutions. (Tr. 1113:18 through 1114:15, Martin).

28. The standardized formula used by CSS was, from the beginning, employed by financial aid officers as a baseline for their assessments of students' financial need, to which they would apply their professional judgment in making their final need determinations. (Tr. 1118:19 through 1119:9, Martin).

29. Each year CSS publishes a Manual for Student Financial Aid Administrators which is a comprehensive record of CSS and institutional policies and procedures related to financial aid practices. (Exhibit D-10; Tr. 363:5-10, Routh).

30. This practice of sharing information among institutions about mutual aid candidates was encouraged by CSS and incorporated into its annual summary of "Practices Of Financial Aid Administration." (Exhibit D-10, p. 1.2 ¶ 18).

31. CSS continues to play a key role in the implementation of federal and private financial aid programs, acting as a "multiple data entry" contractor engaged by the United States Department of Education to process information supplied by applicants for federal financial aid. (Tr. 43:15-19, McCullough).

### **The Uniform Methodology**

32. By the early 1970's, the federal government was encouraging schools that administer federal financial aid to standardize their approach to "need analysis" in order to promote uniformity in need assessment. (Tr. 370:13 through 371:3, Routh).

33. The Keppel Task Force, chaired by the former head of the Federal Office of Education, Frank Keppel, was instituted by the College Board and 24 or 25 associations to develop a more uniform method of assessing need. (Tr. 1115:13 through 1117:25, Martin).

34. These efforts were prompted in large part by concerns that different approaches to need analysis (such as those adopted by CSS and others) would lead to chaos in the awarding of financial aid, and thereby undermine the government's need-based approach to the allocation of financial aid. (Tr. 1115:13 through 1117:25, Martin).

35. As a result of the Keppel Task Force work, a standard system was implemented through the efforts of CSS and schools which established rules for need

analysis and developed broad "benchmarks" to measure need. (Tr. 370:13-22, Routh; 1118:17 through 1119:4, Martin).

36. These benchmarks were published by CSS and distributed to participating schools and eventually became known as the "Uniform Methodology." (Tr. 1118:17 through 1119:4, Martin).

37. Among the basic principles for evaluating need that were accepted under the Uniform Methodology was the continued use by financial aid administrators of their professional judgment to take into account the specific facts and circumstances of each case or category of cases. (Tr. 1119:7 through 1120:8, Martin).

38. Examples of areas in which Uniform Methodology allowed the use of professional judgment included: taking into account the financial resources of the non-custodial parent in cases where the student's parents are divorced or separated, and apportioning the available family resources among multiple siblings attending college based upon the actual costs incurred by each sibling, rather than equally among them. (Tr. 1140:8-20, Martin; Exhibit D-45).

39. The Uniform Methodology was not intended to preclude cooperation among schools regarding the exercise of professional judgment generally or with respect to particular students. (Tr. 1119:7 through 1122:14, Martin; Exhibit D-10, P. 1.2 ¶ 18).

40. The Uniform Methodology was approved by the United States Department of Education for awarding federal financial aid; there was no alternative federal formula until the 1988-1989 academic year. (Tr. 45:9-12, McCullough).

## **The Congressional Methodology**

41. In the 1986 amendments to Part F of the Higher Education Act of 1965, Congress codified a standard approach to need analysis, affording schools flexibility in awarding financial aid through the exercise of professional judgment. *See* 20 U.S.C. §§ 1087oo, 1087pp and 1087qq (1989). This approach to need analysis has become known as the "Congressional Methodology." (Tr. 45:2-4, McCullough).

42. The 1986 amendments to the Higher Education Act of 1965 first governed federal financial aid for the 1988-1989 academic year. Pub. L. No. 99-498, sec. 406(b)(1)-(3), *as amended* by Pub. L. No. 100-50, sec. 22(e)(1), (3), 101 Stat. 361 (1987). (Tr. 45:6, McCullough).

43. Congressional Methodology incorporated most of the Uniform Methodology principles. (Exhibit D-11, p. 1).

44. There are two components to need analysis under Congressional Methodology. First, there are specific rules regarding income, assets and other variables which the CSS computer uses to calculate a raw family contribution figure. Second, Congress expressly reserved to colleges and universities the ability to exercise "professional judgment" in assessing an applicant's need. (Tr. 57:6-7; 77:8-22, McCullough; 1279:24 through 1280:8, Hudson).

45. Under Congressional Methodology, all students applying for federal financial aid are required to supply CSS with certain financial information on the standardized financial aid form (or "FAF"). (Tr. 42:15-23, McCullough; Exhibit D-4).

46. The information required by the FAF includes: the adjusted gross income of the student and his or her parents from the previous year's federal income tax return; the number of dependents; the number of family members enrolled in private elementary, secondary and post-secondary institutions and the net assets of the student and the parents. (Tr. 43:1-4, McCullough).

47. From the information provided on the FAF, the CSS computer calculates an amount of money that the federal government expects a student and his or her family to contribute toward the cost of the student's education. This is known as the family contribution. (Tr. 1282:2-12, Hudson).

48. This calculation is provided by CSS to each college listed by the student on the FAF. (Tr. 1282:2-12, Hudson).

49. For purposes of awarding federal financial aid, an applicant's "need" is calculated by subtracting the family contribution from the student budget. (Tr. 1270:10-15, Hudson).

50. The student budget generally includes tuition, room and board charges, fees, books and allowances for educational and personal expenses, including travel. (Tr. 46:21-25, McCullough; 1337:20-23, Hudson).

51. Few colleges and universities rely solely on the CSS computer-driven family contribution number when making their financial aid awards. Most schools require that students complete a school-specific financial aid application, which contains additional information from which a school can exercise professional judgment to determine a family's true financial need. Different schools exercise

professional judgment in different ways, ~~often based~~ on different data, and the result can be two very different evaluations of ~~student~~ financial need. (Tr. 1141:16 through 1142:8, Martin; Tr. 1191:6-17, Case).

52. The small number of schools ~~that~~ rely solely on the CSS computer formula and do not exercise professional judgment are institutions that do not have much private aid and do not attempt to meet the full need of their students. (Tr. 1142:22 through 1143:20, Martin; 1335:8-23, Hudson).

53. To arrive at the "family contribution," an aid officer may use professional judgment to increase, decrease or leave unchanged CSS's initial determination, and the student's need is ~~adjusted~~ accordingly. (Tr. 1284:15-25, Hudson).

54. The application of professional judgment to the CSS computer figure tends to increase the family contribution for families with higher incomes. (Tr. 1284:15-25, Hudson).

55. For lower income families, the application of professional judgment to the CSS figure tends to lower the family contribution figure. (Tr. 1285:1-4, Hudson).



**The Cooperative Activities of the Overlap Group Schools  
in Distributing Financial Aid Are Charitable in Nature**

**Background and History of MIT**

56. MIT was incorporated by the General Court of the Commonwealth of Massachusetts in 1861. (Tr. 854:9-12, Gray; Exhibit D-2).

57. According to its charter, MIT was incorporated:

for the purpose of instituting and maintaining a society of arts, a museum of arts, and a school of industrial science, and aiding generally, by suitable means, the advancement, development and practical application of science in connection with arts, agriculture, manufactures and commerce . . . .

(Exhibit D-2, p. 1).

58. Since its founding, MIT has been an independent coeducational university. (Exhibit D-3, p. 41).

59. MIT is organized as a non-profit corporation, and is fully qualified as a charitable, tax-exempt organization under section 501(c)(3) of the Internal Revenue Code. (Tr. 854:9-21, Gray).

60. The governance of MIT rests in the MIT Corporation, over which the Chairman presides, and an Executive Committee. The Corporation is comprised of 70 elected volunteer members, including distinguished leaders in science, engineering, industry, education and public service, and eight ex officio members. The Governor of the Commonwealth of Massachusetts, the Chief Justice of the Massachusetts Supreme Judicial Court and the Massachusetts Commissioner of Education are all ex officio members of the Corporation. (Tr. 855:23 through 856:25, Gray).

61. The members of the MIT Corporation hold the Institute in public trust, and are accountable to the Attorney General of the Commonwealth of Massachusetts in seeing that MIT operates in accordance with its charitable purpose. (Tr. 855:3-12, Gray).

62. If MIT ceased to operate in accordance with its charitable purpose, its assets would be distributed, under the supervision of the Attorney General of the Commonwealth of Massachusetts, to other universities or research institutions with charitable purposes consistent with those of MIT. (Tr. 855:1-18, Gray).

63. Under its charter, MIT is empowered to award degrees on such conditions and according to such standards of proficiency "as shall best promote the interests of sound education in this Commonwealth [of Massachusetts]." (Exhibit D-2)

64. MIT seeks to serve the public interest by maximizing the development and transmission of knowledge through education and research, and to provide to its students an education of the highest possible quality. (Tr. 862:23 through 864:24; 867:19 through 868:21, Gray).

#### **MIT's Students**

65. MIT's students are the critical component that determines the quality and character of the institution. (Tr. 868:7-21, Gray).

66. The educational experience of MIT's students is enhanced by both the quality and diversity of viewpoints represented within the student body. (Tr. 908:1-13, 563:23 through 564:1-20, Gray).

67. Typically, MIT receives six to seven applications for each space in its entering class. (Tr. 873:21-23, Gray; 1428:22-24, Behnke).

68. Brown University admits approximately 2500 students out of a total of 12,000 student applicants. Wellesley College admits approximately 550 students out of a total of 2400 applicants. (Tr. 975:20 through 976:10, Keohane; 1465:21 through 1466:8, Widmer).

69. MIT, as well as many schools, would be able to fill its entire class with full-paying students. (Tr. 361:14-16, Routh).

70. In considering the qualifications of those who apply, MIT evaluates their grades, class rank, performance on scholastic aptitude and achievement tests, the quality of their academic program, and personal accomplishments. (Tr. 873:24 through 874:11, Gray; 1426:9 through 1428:18, Behnke; Exhibit D-3, p. 38).

71. MIT seeks to admit very able students: in the 1991-1992 academic year, 259 of the 880 MIT freshmen who had high school ranks were class valedictorians, and 83% were in the top 5% of their high school classes. In the same entering class, 50% had math SAT scores above 750 (out of a possible 800) and 80% had math scores over 700. The average math SAT score for the 1992-1993 freshman class is 735. (Tr. 875:2-13, Gray; 1431:1-15, Behnke).

72. The most important factor students consider in soliciting a college or university is the overall quality of the school. (Tr. 1436:14-20, Behnke).

73. Many students who have the qualifications to be admitted to MIT and are interested in MIT's science-based curriculum do not apply for a number of

reasons, including their belief that they could not afford the cost. (Tr. 1437:3 through 1438:13, Behnke).

74. Because of their superior qualifications, students who are admitted to MIT can also gain admission to virtually any other institution of higher education. (Tr. 1439:6-12, Behnke).

75. Among the top twelve schools with which MIT shares the most commonly admitted students are Cornell, Stanford, University of California at Berkeley, California Technological Institute, University of Michigan, Duke, Harvard and Rennslear Polytechnic Institute. (Tr. 1439: 13-25, Behnke).

76. Among the factors considered by students in deciding where to apply and attend is the nature of the curriculum offered by schools. (Tr. 1433:5-18, Behnke).

77. Most students who apply to and attend MIT do so because of MIT's strong programs in engineering or fields of science. (Tr. 1433:19 through 1434:14, Behnke).

78. Students who are interested in engineering and the sciences are also likely to consider other schools that emphasize these fields, like Georgia Technological Institute, Duke, Rice, University of Texas, Stanford, California Technological Institute, University of California at Berkeley, University of Michigan, University of Illinois, Purdue, Northwestern, Penn State, and Rennslear Polytechnic Institute. (Tr. 1435:7-17, Behnke).

79. Students who are interested in engineering and sciences are unlikely to consider the schools within the Ivy League that do not have strong programs in these fields. (Tr. 1435:18-22, Behnke).

80. There are many schools outside the Ivy League that offer academic programs that are reasonable alternatives to those offered by MIT. (Tr. 1436:21 through 1437:12, Behnke).

81. In the United States alone, there are approximately 2,000 four-year colleges and universities. (Tr. 1438:17-19, Behnke).

82. Of the approximately 2,250,000 college applicants in 1989, only approximately 1.7% applied to either MIT (0.3%) or one of the Ivy League schools (1.4%). (Exhibit D-42).

83. Of the approximately 1.2 million students who enrolled during the 1991/92 academic year in a four year college or university, only approximately 1% enrolled at MIT or one of the Ivy League schools. (Tr. 1438:17 through 1439:5, Behnke).

#### **MIT's Need-Blind Admissions**

84. Throughout much of the history of higher education in the United States, the financial barriers to attending colleges and universities effectively placed a college education out of the reach of able and talented students who were not born into affluent families. (Tr. 804:7-22; 806:15 through 807:12, Fleming).

85. The admission criteria used by any college or university determines the types of students who will attend. (Tr. 959:15 through 960:13, Keohane).

86. Historically, MIT has sought to admit the most qualified students without regard to their resources insofar as MIT's limited charitable resources would permit. (Tr. 873:7 through 874:23, Gray; Exhibit D-3, p. 36).

87. Even so, MIT operates under a "need-blind admissions" system, which eliminates from the admissions process any consideration of an applicant's ability to pay. (Tr. 560:2-8; 873:16 through 874:23, Gray).

88. To implement this policy, MIT has structured its admissions process such that the Admissions Office does not have and therefore does not consider any information regarding an applicant's financial resources, and does not even know which applicants are seeking financial aid. (Tr. 1429:5-25, Behnke; Exhibit D-3, p. 39).

89. Similarly, the MIT Student Financial Aid Office does not have information about an applicant's academic record and therefore does not consider an aid applicant's relative merit. (Tr. 1263:16 through 1264:7, Hudson; Exhibit D-3, p. 39).

90. Because the Admissions Office does not consider the financial circumstances of applicants for admission, many of the students that MIT admits are unable to attend without financial aid and many who are rejected could pay the full price. (Tr. 1429:5-25, Behnke).

### **MIT's Commitment to Meeting Full-Need and Need-Based Financial Aid**

91. In addition to admitting students based upon merit and irrespective of need, since 1967 MIT has been committed to meeting the full need of every admitted student. (Tr. 876:7 through 877:24, Gray; Exhibit D-3, p. 39).

92. In order to ensure that its limited financial aid resources are used to provide educational opportunity to as many needy students as possible, MIT has, since 1965, had a policy of awarding financial aid only on the basis of demonstrated need, and not awarding aid to students who have not demonstrated a need for aid. (Tr. 554:23 through 555:1, Gray).

93. It is a widely accepted principle that financial aid awarded on the basis of need enables the greatest number of students to begin or to continue their education. (Exhibit D-10, pg. 1.1; Tr. 93:22 through 94:1, McCullough).

94. Colleges have an obligation to assist in realizing the national goal of equality of educational opportunity. (Exhibit D-10, pg. 1.1; Tr. 94:5-10, McCullough).

95. MIT's need-based aid policy is an integral part of MIT's commitment to maintaining access and opportunity for talented students from all backgrounds, by ensuring that MIT's limited charitable financial aid resources go to those students who need them. (Tr. 1041:22 through 1042:22, Bowen; 1128:12-24, Martin; 1532:6-18; 1536:6 through 1538:2, Sanchez).

96. MIT's philosophy that resources should be allocated on the basis of need has long been a part of MIT's educational philosophy, as illustrated by the words of the 1867 MIT Committee on Free Scholarships:

It being the intention to offer the honor of the scholarship as a prize to the best scholars, but to make it a point of honor with those who obtain but do not need it to transfer the nomination to the best scholar to whom the free tuition shall be deemed a positive benefit.

(Exhibit D-1, p. 6).

97. This policy improves the quality and diversity of MIT's student body, effectuates the charitable intent of its donors, and furthers public policy goals embraced by Congress. (Tr. 1040:18 through 1042:15, Bowen; 1128:12-24, Martin; 1532:9-15, Sanchez; 1521:23 through 1522:9, Martinez; 872:4-20, Gray).

98. MIT's policies of need-blind admissions and need-based aid have opened the door to thousands of students with the ability, but not the independent means, to attend MIT. During the 1991-92 academic year, students from all fifty states, and over ninety foreign countries enrolled at MIT. The undergraduate enrollment was approximately 4,400 students, with approximately 1400 women and 3000 men. Of the undergraduates, approximately 44 % were from American minority groups (African American, Asian American, Chicano/Mexican American, Native American, and Puerto Rican). By contrast, three decades ago, little more than 3 % or 4 % of MIT's undergraduate population were from American minorities. (Tr. 1431:16 through 1432:6, Behnke; Exhibit D-3, p. 37).



**The Demonstrated Effects of Need-Blind Admissions  
and Full-Need Financial Aid Programs**

99. Need-blind admissions and full need financial aid programs improve the overall quality and diversity of student populations. (Tr. 1470:7 through 1471:8; 1503:11 through 1504:25, Widmer; 964:6-25; 968:16-19, Keohane; 1041:8-22, Bowen).

100. Need-blind admissions and full-need financial aid programs are relatively rare in higher education today. There are few schools outside of the Overlap schools that are able to implement these policies. Not a single non-Overlap school testified at trial that it practiced both need-blind admissions and meeting full need. (Tr. 579:4-7, Gray; 1430:11-22, Behnke).

101. Many schools are not able to admit students on a need-blind basis due to limited financial resources. At Brown University, for example, only a portion of each class is admitted on a need-blind basis. Once Brown has expended its financial aid funds, Brown considers student applicants' ability to pay in making its admissions decisions. (Tr. 1459:24 through 1460:17, Widmer).

102. In the absence of a fully need-blind admissions program, regardless of how qualified a needy student may be, once the funds run out, that student will be denied access to the institution in favor of a less-qualified applicant who has the ability to pay. (Tr. 1465:5-20; 1467:9 through 1468:1, Widmer).

103. In response to Brown's disclosure that it provides need-blind admissions to only a portion of its entering class, students at Brown University

occupied the administration building in April, 1992. (Tr. 1470:7 through 1471:8, Widmer).

**MIT's Reliance upon Charitable Donations  
to Support its Financial Aid Program**

104. MIT's commitment to need-blind admissions and need-based aid has required ever-increasing support from MIT's endowment and from contributions by its alumni and benefactors, particularly as the federal government has cut back on funding for financial aid programs. (Tr. 883:17 through 885:15, Gray).

105. In the 1990-1991 academic year, 57% of MIT's admitted class needed and received financial aid from MIT. (Tr. 1267:5-11, Hudson).

106. During the 1970's and 1980's, the federal government greatly reduced the funding available for federal financial aid grant programs. For example, in 1980, 30% of all grant aid given to MIT students came from the federal government, while in 1991 the federal contribution dropped to below 10%. (Tr. 884:24 through 885:13, Gray).

107. In response to decreasing federal aid, and in keeping with its commitment to meet the full need of all admitted students, MIT increased its share of the grant aid provided to its students from 50% to 80.7% between 1980 and 1991. (Exhibit D-41).

108. MIT provides approximately seven dollars of private scholarship aid to its undergraduate students for each dollar of federal scholarship aid provided by the federal government. (Tr. 1267:15-19, Hudson).

### **MIT Subsidizes the Cost of Education For All Students**

109. For all undergraduates, tuition is set well below the full cost of educating a student, and the costs not covered by tuition are subsidized through the generosity of charitable donors who contribute to MIT. (Tr. 575:13-16, 23-25; 890:1-23, Gray).

110. At present, the cost of the educational program at MIT is approximately twice MIT's tuition revenues. This ratio is consistent with historical relationships between cost and tuition revenues at MIT. In 1991, the total cost to educate all the MIT students was \$280,065,000 while the tuition income for those same students was only \$138,983,000. (Tr. 575:6-12, Gray; Exhibits D-6, D-7, D-38, D-39, D-40).

111. For all undergraduates for whom this subsidy and available loans are not sufficient to meet their needs, MIT provides outright grants of institutional aid. (Tr. 876:7 through 877:24, Gray; 1336:24 through 1338:15, Hudson).

112. For admitted students who are unable to contribute financially to their own education, MIT not only pays for their education but may also provide them with financial assistance to meet basic needs. (Tr. 1336:24 through 1338:14, Hudson; 876:7 through 877:24, Gray).

113. The educational costs not covered by tuition revenues, and the expenditures by MIT to meet the full need of all admitted students, are funded by income from MIT's endowment and current gifts. (Tr. 575:13-16, 23-25, Gray).

114. The source of the endowment funds and current gifts is charitable donations by private, mostly individual, donors. The income from these funds must be allocated between and among a wide range of uses throughout MIT, only one of which is financial aid. (Tr. 871:5-13; 898:11 through 899:19, Gray).

#### **Differences Between For-profits and Not-for-profits**

115. Profit-maximizing business entities and nonprofit entities are fundamentally different as a matter of basic economic theory. (Tr. 1585:11 through 1589:25, Carlton).

116. By definition, the primary goal of for-profit firms is to maximize net revenues on behalf of "owners" of the business, generally the stockholders, partners or proprietors. (Tr. 727:19-24, Leffler; 817:17 through 818:14, Fleming; 1026:21-24; 1034:12-20, Bowen; 1584:20-24; 1585:17-20, Carlton).

117. Profit-maximizing firms have an incentive to charge consumers the highest possible price for their products or services, up to the point at which increased revenues resulting from price increases are offset by declining market share caused by price increases. (Tr. 1587:8-21, Carlton).

118. Consequently, for-profit firms generally are not interested in who buys their products. (Tr. 1027:5-14, Bowen).

119. Unlike profit-maximizing firms, profit maximization is not necessarily the primary goal of non-profit firms. (Tr. 727:25 through 728:3; 780:12-21, Leffler; 1585:21 through 1586:15; 1667:5-14, Carlton).

120. Because non-profit firms do not have a well-defined set of "owners," the incentives of non-profit firms can differ from those of for-profit firms. (Tr. 647:18 through 648:1, Leffler; *see also* 727:3 through 728:3, Leffler; 1026:17 through 1027:19, Bowen; 1585:11 through 1586:15, Carlton).

121. Non-profits, in contrast to profit-maximizing firms, generally are formed to pursue social goals (other than profit maximization). The goals and incentives of a nonprofit firm depend upon the purposes underlying its formation and operation. (Tr. 1026:25 through 1027:4, Bowen; 1586:16 through 1587:5; 1667:5-14, Carlton).

122. The goals of non-profit firms may be inconsistent with profit maximization. (Tr. 1587:22 through 1589:25, Carlton).

123. Nonprofit status is a legal status which confers certain benefits, such as exemption from federal and/or state income taxes, as well as certain restrictions on behavior. (Tr. 1594:12-19, Carlton).

124. Non-profit corporations are legally incapable of distributing excess revenues to their owners, and operate under a set of goals and incentives very different from those of commercial, profit-maximizing entities. (Tr. 1585:11 through 1589:25, Carlton).

125. There are many different kinds of nonprofit firms. On one extreme are organizations which, while technically possessing nonprofit legal status, have as their principal mission the advancement of the interests, including the commercial interests,

of their for-profit constituents. Trade and professional organizations are examples of this type of nonprofit entity. (Tr. 1594:1-8, Carlton).

126. On the other extreme of the nonprofit spectrum are entities that are organized exclusively for a charitable purpose. (Tr. 1586:16 through 1587:5, Carlton).

127. Although trade and professional associations are afforded nonprofit status, because the organizations are designed to further the commercial interests of their for-profit constituents, they are not entitled to the tax benefits bestowed on organizations — like MIT — that are devoted strictly to charitable purposes. See I.R.C. §170(c).

128. Specifically, Section 501(c)(3) of the Internal Revenue Code provides that qualifying charitable organizations, including "educational" institutions, are exempt from federal tax. In addition, donations made to 501(c)(3) organizations are deductible as charitable contributions. (Tr. 1495:12-19, Carlton).

129. In order to qualify for this special tax treatment, an entity must be "organized and operated exclusively" for one or more qualifying charitable purposes. I.R.C. 501(c)(3). In order to maintain 501(c)(3) status, no part of the net earnings of an organization may inure to the benefit of "private shareholders or individuals." Thus, a 501(c)(3) organization cannot provide employees with excessive salaries or fringe benefits and may not engage in below-market transactions with an "insider." See I.R.C. §501(c)(3).

130. The special status given to such private charitable organizations reflects a policy judgment that charitable organizations serve an important function in society which should be sanctioned and encouraged. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 591 (1983). The favorable treatment bestowed on charities also recognizes that in the absence of private charitable organizations, the government and the taxpayers would have to shoulder the burden of fulfilling the social functions which are now served by these organizations. *See H. R. Rep. No. 1860, 75th Cong., 3d Sess., reprinted in 1939-1 C.B. 772 (part II).*

131. Because universities and colleges are non-profit organizations, they pursue objectives that differ from those of profit-maximizing firms. (Tr. 727:16 through 728:3, Leffler; 818:23 through 820:2, Fleming; 1026:11 through 1027:19, Bowen; 1586:2-15; 1588:1-14, Carlton).

132. Universities and colleges, for example, consider the goals and objectives of various interest groups, including students, faculty, administrators, and donors. (Tr. 780:12-21, Leffler; 1028:5-23; 1033:18 through 1034:8, Bowen; 1586:2-15; 1588:1-14, Carlton;).

133. Universities and colleges, in contrast to for-profit firms, are very much concerned about who attends. (Tr. 1027:5-19, Bowen; 1457:5-23; 1462:19 through 1463:25; 1470:10 through 1471:8; 1503:11 through 1504:25, Widmer; 972:14 through 973:7, Keohane; see also Exhibit G - 385, p.4).

134. The "full" tuition charged by most universities — including all of the defendants — is well below the fully allocated cost of educating a student, and well

below the revenue-maximizing price. (*See e.g.*, Tr. 1468:8-25; 1492:24 through 1493:8, Widmer; 890:1 through 891:1, Gray).

135. As a process for distributing charitable dollars to needy applicants who, even at the "full" tuition rate, are heavily subsidized by the respective schools, Overlap is purely charitable, and non-commercial in nature. (Tr. 890:1-23; 895:9 through 896:25, Gray).

136. Many schools deny admission to many applicants who undoubtedly would be willing to pay the "full" rate. (*See e.g.*, Tr. 1466:14-17, Widmer). Such behavior is not commercial in nature, helps rather than harms consumers in general, and does not produce pernicious market effects addressed by the antitrust laws. The net effect is to expand choice and widen access to educational opportunity, not to restrict output or produce "monopoly profits." (Tr. 498:5 through 499:3; 1040:8 through 1041:14; 1044:21 through 1045:18; 1046A:6 through 1046B:12, Bowen; 975:5-9, Keohane).

#### **Differences in Predicted Economic Behavior of For-profits versus Non-profits**

137. Profit-maximizers have as their primary goal increasing the amount of money that the owners of the firm are making. (Tr. 1584:8-25, Carlton).

138. Given that profit-maximizers have as their underlying motivation to increase profits, economic theory predicts that cooperative activity among profit-maximizers will produce supracompetitive prices, except when the participants lack market power to sustain an elevated price. (Tr. 645:18-23, Leffler; 1585:3-10; 1591:1-17, Carlton).



139. Non-profit firms, on the other hand, may or may not have as their primary focus maximizing profits. (Tr. 1585:14 through 1586:1, Carlton).

140. Therefore, economic theory cannot generally predict whether cooperative behavior among non-profit organizations will generate supracompetitive prices. (Tr. 1591:18 through 1592:10, Carlton).

### **Need Analysis and the Overlap Process**

#### **MIT's Need Analysis System**

141. The family contribution figure generated by the CSS computer provides the starting point for MIT's needs analysis procedure. (Tr. 1279:24 through 1280:8; 1283:13-23; 1284:15-25, Hudson).

142. Like the federal government, MIT expects a student and his or her family to use their combined financial resources to finance the student's college education. (Tr. 876:7 through 877:24, Gray).

143. To determine an applicant's financial need, MIT uses Congressional Methodology, including professional judgment, and applies this analysis to financial information provided by the applicant. (Tr. 1279:19 through 1284:9, Hudson).

144. As a "multiple data entry" contractor, CSS enters into a computer the data supplied by financial aid applicants and transmits the data electronically to the Department of Education for processing. (Tr. 44:2-5, McCullough).

145. MIT receives back from CSS their computer-generated family contribution figure. (Tr. 1282:2-12, Hudson).

146. When the combination of family resources and available government resources cannot meet a student's needs, MIT turns to its own resources. (Tr. 876:7 through 877:6, Gray).

147. In addition to the required information contained on the FAF, MIT also relies on the supplemental information contained on the FAF, as well as the information provided by the student on MIT's "Financial Aid Application," and copies of actual tax returns of the student and his or her parents. (Tr. 1281:7-19, Hudson; Exhibit D-5).

148. In cases in which an aid applicant's parents are divorced or separated, the student also submits a "divorced or separated parent statement," which contains financial information for both the custodial and noncustodial parent. MIT utilizes this additional information in order to obtain a more complete picture of the family's financial circumstances. (Tr. 1281:7 through 1282:1, Hudson).

149. Upon receiving the FAF for a student, MIT assigns a financial aid officer to that student's case, and the officer reviews in detail all of the information that was provided to, and generated by, CSS. (Tr. 1282:2 through 1283:12, Hudson).

#### **MIT's Exercise of Professional Judgment**

150. Based upon more than thirty years of experience in performing need assessments, MIT has developed protocols of professional judgment for enhancing the accuracy of need determinations in cases involving recurring issues of need analysis. (Tr. 1283:13 through 1284:2, Hudson).

151. MIT financial aid officers apply these protocols individually on a case-by-case basis to determine the need of each individual financial aid applicant. (Tr. 1283:13 through 1284:2, Hudson).

152. Once an MIT financial aid officer has studied all relevant, available information concerning the student's need, the officer applies professional judgment to determine the family contribution. The family contribution may be higher, lower or the same as the family contribution calculated by the CSS computer, and the student's need is adjusted accordingly. (Tr. 1284:15-25, Hudson).

153. MIT's practice of always having an aid officer personally review and evaluate every aid application helps MIT achieve accurate need assessments, not only because of the refinements made to the CSS formula, but also because the CSS computer calculation may contain errors. (Tr. 1283:13 through 1284:19, Hudson).

154. MIT's need analysis system also looks more closely at the specific circumstances of an applicant's family than does the CSS computation. (Tr. 1281:7 through 1285:10, Hudson).

155. In a case in which an aid applicant's parents are divorced or separated, MIT, as well as other schools, generally seeks a financial contribution from the applicant's natural parents, and not from the stepparent. (Tr. 1288:1-22, Hudson; Exhibit D-11 pp. 31-32).

156. In situations where MIT believes that for whatever reason, the noncustodial parent will not contribute to the child's education, MIT simply looks to the custodial parent's financial resources, if any. (Tr. 1288:1-22, Hudson).

157. By contrast, the CSS computer presumptively utilizes the financial circumstances of the custodial parent and stepparent. (Tr. 51:12-20, McCullough)

158. Another example in which MIT uses its professional judgment to make a more accurate assessment of a student's financial circumstances is in situations in which an applicant's family has more than one child in school. In these situations, the CSS computer-driven formula simply divides the expected family contribution from the parents equally between siblings regardless of the educational expenses actually incurred by each. (Tr. 1290:2-17, Hudson).

159. MIT, on the other hand, apportions the parents' contributions to their children's education based upon the actual educational cost incurred by each child. (Tr. 1290:2-17, Hudson).

160. In some cases, MIT's use of professional judgment decreases the family contribution. This can occur in situations where CSS does not account for certain financial obligations. (Tr. 1291:4-11, Hudson).

161. As another example, Congressional Methodology deems up to 6% of the family assets and 35% of the student's assets to be available for the cost of the student's education. As a result of professional advice from financial planners and other business counselors, many aid applicants transfer most of the child's assets to the parents' accounts. MIT's Student Financial Aid Office has observed that the neediest families generally do not avail themselves of such advice. Therefore, in order not to disadvantage those families and to more fairly and accurately determine need, if it appears that an inordinate amount of money is maintained under the child's

name, MIT will impute a large portion of this money to the parents. This approach always decreases the family contribution. (Tr. 1291: 8 through 1292:10, Hudson).

162. Conversely, the additional information provided to MIT may lead to the determination that the financial circumstances of the family are such that a decrease in the student's need from that which was calculated by the CSS computer is warranted. (Tr. 1290:2-21, Hudson).

### **MIT's Aid Package**

163. Once an applicant's financial need is determined, MIT develops a financial aid package to meet that need. Such a package typically includes various components, including: long-term loans at below-market interest rates; work-study employment that enables a student to earn money during the academic year through an on-campus job; and grants consisting of outright gifts of money that the student is never required to repay. (Tr. 1337:8-15, Hudson; Exhibit D-3, p. 39).

164. The annual amount of student loans, in combination with term-time student earnings, is often referred to as the "self-help" portion of a student's financial aid package. (Tr. 1337:16-19, Hudson).

165. The method by which students meet this self-help level differs with each student — some students borrow the entire amount of self-help, while others work more and borrow less. (Tr. 1337:16 through 1338:1, Hudson).

166. Awards of self-help alone satisfy the demonstrated financial need of fewer than 9% of all aid recipients at MIT. (Tr. 1338:5-8, Hudson).

167. For the remaining students, whose need exceeds the self-help level, more financial assistance is required to meet their need. This additional assistance is given to 91 % of all aid recipients in the form of an outright grant. (Tr. 1338:5-8, Hudson).

168. In the 1990-1991 academic year, 57% of MIT's students received financial aid totalling \$35.9 million, including \$25.9 million in grants and \$9.0 million in loans, with the average grant amounting to approximately \$10,288.00. Ten years ago, 50% of MIT's students received financial aid totalling \$10.3 million dollars, including \$8 million in grants and \$2.3 million in loans, with the average grant being approximately \$3,458.00. Thirty years ago, only 43% of MIT students received financial aid. (Tr. 1267:5-19; 1268:14-23, Hudson).

### Overlap

169. The members of the Ivy League are: Brown University, Columbia University, Cornell University, Dartmouth College, Harvard University, Princeton University, University of Pennsylvania and Yale University. (*See Complaint*).

170. The Ivy Overlap Group was created in or about 1958 by the Ivy League schools and MIT as a mechanism for coordinating certain aspects of their financial aid programs in an effort to pursue common goals of providing educational opportunity and utilizing scarce charitable resources in a wise and responsible manner. (Tr. 488:5-10, Bowen).

171. The purpose of Overlap was to facilitate the optimal use of limited charitable resources by ensuring that charitable resources would not be given to students who did not need them, and to help ensure that the participating schools could continue to provide access to able but economically disadvantaged students by preventing the transfer of valuable financial aid resources to non-needy students. (Tr. 906:2-11, Gray; 1042:3-15, Bowen).

172. Overlap was intended to enhance the efficiency and accuracy of need analysis. (Tr. 137:10-13, Gallagher; 367:12-17; 379:2-16, Routh; 1339:14-25, Hudson).

173. Overlap was also intended to benefit needy students and was not intended to enhance revenues or reduce aid expenditures among the participating schools. (Tr. 568:15-20, Gray; 972:7-13; 989:5 through 990:18, Keohane; 1352:9-11, Hudson).

174. The purpose of Overlap is consistent with widely accepted and longstanding principles concerning the purposes and goals of higher education and its role in our society, and the importance of providing educational access to qualified students. (Tr. 362:2-25; 364:4 through 365:5, Routh; 568:11-20, Gray; 1150:1-12, Martin).

175. The practices of the Ivy Overlap Group enhanced choice among students by providing needy students with educational opportunities that would not otherwise have been available. (Tr. 498:5 through 499:3, Bowen).

**The Department of Education Has Been Aware  
of Overlap for the Last Three Decades**

176. The activities of the Ivy Overlap Group were conducted openly for more than thirty years. The members of the Group did not attempt to keep their activities secret. To the contrary, these schools informed students and their parents of the Overlap process and the United States Department of Education was provided with complete access to the records of the financial aid offices of these schools. (Tr. 358:4 through 359:1, Routh; 493:17 through 495:11, Bowen; 1146:19 through 1148:4, Martin; 1185:14 through 1186:11, Case; Exhibit G-4).

177. The Department of Education has conducted many program reviews of the financial aid offices of the Overlap schools to insure compliance with federal regulations. As part of the reviews, the Department of Education analyzes in detail the student financial aid files and issues a report to the schools at the end of the review. (Tr. 1213:17 through 1214:6, Case).

178. The Department of Education conducts comprehensive audits and program reviews of the Overlap schools, including MIT. (Tr. 101:1 through 102:25, McCullough).

179. When the Department of Education's audits and program reviews reveal a school's failure to comply with regulations, the school is cited for those failures and instructed to take corrective action. (Tr. 101:17-23, McCullough).



180. The United States Department of Education never told anyone at MIT or any other Overlap school that Overlap was improper. (Tr. 104:12-15, McCullough; 367:1-5, Routh).

181. Because of its excellent record of compliance with the federal regulatory system concerning financial aid, MIT was selected as a member of the Department of Education's quality control pilot program in 1985. (Tr. 1274:15 through 1276:25, Hudson).

182. In 1989, the Department of Education awarded a Certificate of Superior Performance to MIT under the quality control pilot program for its compliance with the federal regulatory system concerning its financial aid practices. (Tr. 1274:15 through 1276:25, Hudson).

183. The Department of Education has been aware of Overlap for the last three decades. (Tr. 1146:6 through 1148:4, Martin; 1185:9 through 1186:11, Case).

#### **The Agreement to Award Aid Based Only on Need**

184. Overlap involved an agreement by the participating schools to award financial aid based only upon the demonstrated need of admitted applicants, and not on the basis of academic or athletic merit independent of need. (Tr. 481:11-13, Bowen; 254:20 through 255:2, Gallagher).

185. The Overlap schools applied this principle uniformly; regardless of how "desirable" a student was, he or she was afforded financial aid only if needy. Thus,

the Overlap schools agreed not to award any athletic scholarships beyond the demonstrated need of any student athlete. (Tr. 1099:8-14, Bowen)

186. The consent decree entered at the request of the Antitrust Division in this case includes a provision that endorses the schools' agreement not to award aid based upon athletic merit. (Consent Decree).

187. The principal of awarding financial aid only on the basis of need is not unique to the Overlap schools. (Tr. 1127:21 through 1128:24, Martin).

188. CSS endorsed a set of "Principles of Student Financial Aid Administration" that states that:

[t]he purpose of any financial aid program — institutional, governmental or private — should be to provide monetary assistance to students who can benefit from further education but who cannot do so without such assistance. The primary purpose of a collegiate financial aid program should be to provide financial assistance to accepted students who, without such aid, would be unable to attend that college.

(Exhibit D-10, p. 1.1; see also Exhibit D-35, p. I-3).

189. The 1992-93 CSS policies and procedures manual for student financial aid administrators (the "CSS Manual") states that:

[f]inancial aid should be offered only after determination that the resources of the family are insufficient to meet the student's educational expenses. The amount of aid offered should not exceed the amount needed to meet the difference between the student's total educational expenses and the family's resources.

(Exhibit D-10, p. 1.1; Tr. 94:11-21, McCullough; see also Exhibit D-35, p. I-3).

190. The CSS Manual is a publication that is in general circulation within the financial aid community and at the Department of Education. (Tr. 95:13-19, McCullough).

191. Certain colleges and universities offer financial awards to students who have no need. Such awards, generally referred to as "no-need aid" or "merit aid," are based upon factors other than the demonstrated financial need of the applicant. Awards based on athletic or artistic ability, or some form of demonstrated academic achievement, are common forms of no-need aid. (Tr. 119:16-23, Gallagher).

192. Those schools who use no-need aid do so to provide a financial incentive to attract desirable students. (Tr. 1441:11-15, Behnke; 1353:8-18, Hudson).

193. No-need aid awards reduce the funds available to aid able but needy students. The more funds are diverted from needy to non-needy students, the more able but poor students will be excluded in favor of wealthier students. (Tr. 498:5-18, Bowen).

#### **The Agreement to Seek Consensus on the Definition of Need**

194. Second, recognizing that without some standard measurement for defining "need" their common commitment to a policy of need-based aid would have no meaning or efficacy, the Overlap schools developed uniform principles for assessing an applicant's financial need. (Tr. 486:19 through 487:3, Bowen; 1339:14-25, Hudson).

195. In order to implement their common commitment to need-based aid, the Overlap schools met to share information about their use of professional judgment,

and to discuss various elements of need analysis, including the determination of family contribution under the Congressional Methodology. (Tr. 486:19 through 487:3, Bowen; 1339:14-25, Hudson).

196. The purpose of the Overlap meetings was to share and pool information on approaches to need analysis in order to establish fair and rational principles upon which need assessment practices might be based and professional judgment might be exercised. (Tr. 486:19 through 487:3, Bowen; 1339:14-25, Hudson).

197. This component of Overlap helped the schools to achieve the objective embodied in the first. That is, in order for an agreement to award financial aid based upon need alone to have any efficacy, there also must be agreement on the criteria used to determine need. (Tr. 487:4-11, Bowen).

198. At their meetings, the financial aid administrators from the Ivy Overlap schools shared information about recurring fact situations in which the CSS computer-driven formula did not fully address or accurately reflect a student's financial need. As a result of these meetings, the Overlap schools reached consensus on several principles of need analysis. (Tr. 284:18-25; 290:25 through 291:14, Routh).

199. For example, while each school had its own approach concerning the treatment of parent and stepparent, the schools generally believed that in cases in which the student's parents are divorced or separated, the most accurate picture of the family's financial circumstances is achieved by looking to the financial circumstances of both natural parents as opposed to custodial parents. (Tr. 290:1-24; 310:17 through 311:11, Routh; 1349:25 through 1350:21, Hudson).

200. The schools also agreed that in circumstances in which more than one sibling is in school, it is most accurate to divide the family's resources among siblings based on the educational costs actually incurred by each sibling. (Tr. 1290:2-17, Hudson).

201. Many of the principles of need analysis on which the Overlap schools tried to reach consensus were similar or identical to principles articulated in the government-approved Uniform Methodology. (Exhibit D-10; Exhibit G-218).

202. It was understood by the members of Overlap that the schools were not bound to follow the consensus in all cases. (Tr. 377:19 through 378:3, Routh; 422:8-13, Jones).

203. MIT differed from the other Overlap schools in several of the ways in which it treated aspects of need analysis. (*See, e.g.*, Tr. 1340:23 through 1341:21, Hudson).

204. Further, unlike the other Overlap schools, MIT does not require a minimum parental contribution from every family because for certain very poor families even a small contribution may not be possible. This occurs for approximately 350 MIT families. For these 350 families, MIT uses its charitable resources to pay all educational and living expenses, including tuition, room, board, books and travel expenses except for the standard self-help amount. (Tr. 1338:9-25, Hudson).

205. MIT also transfers back to the family account certain student assets in circumstances where leaving it in the student's account would unfairly increase the family contribution. (Tr. 1391:4-14, Hudson; Exhibit D-45).

206. Each Overlap school remained free to determine need in individual cases by considering all available information and basing their decision on any factors thought to be appropriate, excluding only the relative merit of the applicant. (Tr. 1391:4-14, Hudson).

207. Every student application for financial aid was reviewed personally by a financial aid officer and determinations were made, and professional judgment was exercised, on a case-by-case basis. (Tr. 1187:20 through 1188:8; 1197:9-18, Case; 1283:13 through 1284:2, Hudson).

208. The Overlap schools were not the only schools that shared information in order to improve the abilities of their financial aid officers to exercise professional judgment. (Tr. 822:23 through 823:20, Fleming).

209. For example, the Pentagonal/Sisters Overlap Group similarly identified "Guidelines of Professional Judgment" which served as a basis for exercising professional judgment in need analysis. (Tr. 1199:5-13, Case; Exhibit D-12).

210. In addition, many trade publications over the years have encouraged financial aid administrators to share their experiences in exercising professional judgment in order to identify the most accurate means of determining need. For example, the National Association of Financial Aid Administrators published a monograph regarding professional judgment that identifies a variety of situations in

which professional judgment may be exercised. (Tr. 1133:13 through 1134:6; 1137:3 through 1138:3, Martin; Exhibit D-11).

211. The CSS Manual also encourages:

the continued professional development of financial aid administrators by providing opportunities to join and participate in professional aid administrators' associations and organizations dedicated to the advancement of sound principles and practices and the extension of knowledge to student financial aid administrators.

(Exhibit D-10, p. 1.2; Tr. 369:24 through 370:12, Routh).

**The Agreement to Discuss Individual Circumstances in Order to Ensure that Financial Aid Was Not Awarded Beyond Demonstrated Need**

212. The schools realized that by sharing information and exchanging judgments about the particular circumstances of financial aid applicants, aid administrators could more efficiently and accurately determine the ability of a student's family to contribute to his or her education. Thus, representatives of the schools met to discuss the circumstances of commonly admitted students, and attempted to reach consensus on the actual need of those students. (Tr. 488:21 through 489:3, Bowen).

213. The Overlap schools decided independently which applicants would be admitted, and then independently made determinations of each applicant's expected family contribution and the size and form of his or her aid package. (Tr. 1340:7-22; 1349:9-19, Hudson).

214. Each Overlap school sent this information to a central data processing service, which printed rosters listing each school's calculated family contribution and the financial aid award for every financial aid applicant admitted by two or more Overlap schools. (Tr. 149:22 through 150:8, Gallagher; 300:17-23, Routh).

215. Bilateral rosters (for students admitted to any two Overlap schools), multilateral rosters (for those admitted to three or more schools within the same Overlap group), and a comprehensive master roster (for all aid applicants) were provided to the Overlap schools at a meeting held every spring. (Tr. 150:6-12; 151:3-8, Gallagher; 302:9-15, Routh).

216. The schools exchanged this data so that each aid officer could examine the findings of his or her colleagues. (Tr. 488:21 through 489:3, Bowen).

217. For those students for whom the family contributions differed by an amount sufficient to indicate that the schools' independent determinations were based upon different data concerning the applicant's family circumstances, or reflected consideration of factors other than need, the schools that had admitted a given applicant compared supporting information in an effort to determine the reasons for the difference. Where the information revealed previously unknown family obligations, hardships or personal limitations, the family contribution figure was reduced. Differences of more than \$500 generally gave rise to discussion. Conversely, in cases in which a school discovered that the student's financial aid application had failed to include all of the financial resources, that school would



increase its previous family contribution calculation. (Tr. 322:5-10; 380:2 through 381:4, Routh; 488:21 through 489:3, Bowen).

218. In some cases schools adjusted the family contribution to a point in the middle of the range of differences that most accurately reflected the financial need of the applicant. (Tr. 1343:15 through 1347:25, Hudson).

219. Despite their efforts to reconcile differences in certain aid awards, schools were not bound to accept the reasoning or position of another, and when disagreements continued, the schools simply made different aid awards. (Tr. 143:10-14, Gallagher; 311:15-20, Routh; 1349:9-24, Hudson).

220. In some cases, one or more of the Overlap schools obtained information about an aid applicant after the spring meeting. In order to enable each school that admitted the applicant to consider the additional information in determining the applicant's need for financial assistance, the new information was typically shared either at an informal meeting later in the spring or by telephone or electronic communication. (Tr. 378:8-24, Routh; 1402:6-21, Hudson).

221. MIT made an independent determination of the composition of the aid package, including the grants, loans or self-help. Thus, even when the schools reached a consensus on the family contribution, the manner in which the financial aid package was administered differed among institutions. (Tr. 569:4-18, Gray).

222. MIT packaged its financial aid to students, including the self-help levels, without regard to the financial aid packages of the other Overlap schools. (Tr. 138:25 through 139:3, Gallagher; 569:16-18, Gray).

223. Cooperative efforts by colleges and universities to share financial information about individual students have not been limited to the Overlap schools. CSS regularly provided an overlap service to different groups of schools by supplying lists of applicants for financial aid at two or more schools within each group. For example, during the 1974-75 academic year, there were at least 24 different "overlap" groups whose membership included 138 public and private institutions. These schools were encouraged to use this information to confer about common aid applicants before announcing their financial aid awards. (Exhibit D-36; Tr. 145:18 through 146:25, Gallagher; 386:15-20, Routh).

224. The 1992-93 CSS Manual endorses intercollegiate consultation among schools about common aid applicants. In paragraph 18, that publication encourages:

sharing information with other institutions and agencies  
about mutual aid candidates to ensure comparable  
financial aid awards, thereby permitting a student  
freedom in choosing an institution.

(Exhibit D-10, p. 1.2; see also Exhibit D-35, p. I-3).

#### **Rule of Reason Findings**

225. Conduct challenged under Section One of the Sherman Act is "reasonable" under a rule of reason analysis if, on balance, the economic evidence demonstrates that it does not harm or does promote competition. *See Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918); *Balaco, Inc. v. Upjohn Co.*, 1992 WL 131150, at 1 (E.D. Pa. 1992).

226. Challenged conduct engaged in by non-profit educational institutions can also be justified for non-economic reasons. *NCAA v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 135 (1984).

### The Economic Effects of Overlap

#### Overlap Did Not Increase Price and Therefore Did Not Produce Anticompetitive Effects

227. The principle determinants of competitive effects are price, output and quality. *Tunis Bros. Co. v. Ford Motor Co.*, 952 F.2d 75, 728 (3d Cir. 1991); see *NCAA v. Board of Regents*, 468 U.S. at 110; *Sitken Smelting & Ref. Co. v. F.M.C. Corp.*, 575 F.2d. 440, 447 (3d Cir.) *cert. denied*, 439 U.S. 866 (1978).

228. It is undisputed that output was not restricted by Overlap.

229. Educational quality was enhanced by Overlap. (See Findings 264-269, below).

230. Thus, the relevant inquiry to determine the economic effects of Overlap is to determine its effect on price. (Tr. 1598:9-18, Carlton).

231. The appropriate analysis for determining whether the price of education at MIT and the other Overlap schools has increased as a result of Overlap is to measure the effect of Overlap on the average net revenue per student. (Tr. 1598:12-18; 1624:3-21, Carlton; 1809:6 through 1810:5, Leffler).

**Dr. Carlton Performed an Econometrically Sound  
Analysis That Convincingly Established That  
Overlap Did Not Increase Average Net Revenues**

232. MIT's expert, Dr. Dennis Carlton, performed a detailed and rigorous statistical analysis involving a multiple regression in which he isolated the effects of Overlap on the average net revenue per student. (Tr. 1620:12-14; 1623:13-19, Carlton; Exhibit D-37).

233. A multiple regression analysis is a well-accepted standard statistical procedure used to isolate the effect of a single variable in a complex factual environment containing multiple variables. (Tr. 1598:21 through 1599:2, Carlton).

234. Dr. Carlton defined average net revenue as gross tuition plus room and board plus miscellaneous fees minus average aid per student. (Tr. 1623:20 through 1624:2, Carlton).

235. In his regression analysis, Dr. Carlton controlled for characteristics of a school, other than participation in Overlap, that could affect average net revenues. (Tr. 1622:20 through 1623:3, Carlton). By controlling for these other factors, it is possible to obtain estimates of the effect of Overlap membership on price. (Tr. 1620:12-14, Carlton).

236. Among the variables that Dr. Carlton controlled for in his study are:

1. public or private;
2. religiously affiliated;
3. Ivy League plus MIT;
4. other overlap school;
5. SAT scores;
6. average state income;

7. Carnegie classification;
8. percentage of applicants accepted;
9. percentage of undergraduates not receiving aid; and
10. percentage of freshmen completing degree.

(Tr. 1625:15 through 1627:1, Carlton; Exhibits D-18 and D-47).

237. Dr. Carlton gathered annual data for each of these variables for 1984-1990 for approximately 225 schools, and included all of the schools with available data that participated in Overlap. (Tr. 1623:4-12; 1736:8-9, Carlton). The Carnegie Foundation classifies schools into a variety of categories. (Tr. 1621:4-7, Carlton). He included all schools with available data that were in any Carnegie category that included any of the 23 schools that participated in the overlap meetings. (Tr. 1620:19 through 1621:16, Carlton).

238. In isolating the Overlap effect, Dr. Carlton compared the Overlap schools to approximately 225 other colleges and universities that are statistically comparable. (Tr. 1621:25 through 1623:12; 1736:8-9, Carlton).

239. The results of the analysis reveal that there is no statistically significant effect of Overlap on average net price, and therefore no scientific basis for the conclusion that Overlap increased price. (Tr. 1629:2-11; 1675:22 through 1676:8, Carlton).

240. The results of Dr. Carlton's analysis reveal that the most likely effect of Overlap was to reduce average net revenue. (Tr. 1631:9-20, Carlton).

241. Dr. Carlton performed a number of analyses and statistical tests to test the reliability of his conclusions. The results are unambiguous. (Tr. 1628:13 through 1629:1, Carlton).

**The Division's Economist  
Failed To Establish That Overlap  
Produced Anticompetitive Effects**

242. At his deposition in this case, the Government's expert, Dr. Keith Leffler, assumed, based upon a theoretical model, that Overlap had a positive effect on average net revenue. (Tr. 1805:6-16, Leffler).

243. By contrast, several of the other independent variables did have a statistically significant positive effect on average net price. (Tr. 1634:14 through 1636:1, Carlton).

244. Dr. Leffler also assumed that the common need analysis methodology employed by the Overlap schools resulted in a misallocation of students among those schools and between the Overlap schools and others. (Tr. 666:15-25, Leffler).

245. Dr. Leffler attempted to measure the effect of Overlap by employing certain benchmarks. (Tr. 1646:11 through 1648:20; 1652:25 through 1657:2, Carlton).

246. Dr. Leffler's comparison of the CSS computer number with the MIT award is not a reasonable benchmark to use in measuring the effect of Overlap. (Tr. 1646:11 through 1648:20, Carlton).

247. It is not reasonable to assume that the financial aid policies of MIT and the Ivy league schools would mirror those of Stanford University in the absence of Overlap, and thus Stanford is not a reasonable benchmark for measuring Overlap's effect. (Tr. 1652:25 through 1657:2, Carlton).

248. After reviewing Dr. Carlton's analysis, Dr. Leffler conducted his own analysis of the effects of Overlap, using an uncontrolled comparison of the average net revenues of MIT and Ivies with those of certain other schools. (Tr. 1640:15 through 1642:12, Carlton; Exhibit G-231).

249. Dr. Leffler also performed two regression analyses using a limited set of data. Though Dr. Leffler claimed otherwise, the first regression showed no statistically significant positive effect from Overlap. The second regression contained data from only 15 schools, and thus was statistically suspect. (Tr. 1642:13 through 1645:18, Carlton; 1790:1-3, Leffler).

250. Dr. Leffler concluded that Overlap served to increase average net revenues for the Overlap schools. (Tr. 1644:11-15, Carlton).

251. The Court finds that Dr. Leffler's conclusion is not supported by the evidence. (Tr. 1645:15-18, Carlton).

252. MIT's average net revenues per student were indistinguishable from those of non-Overlap schools, and thus MIT did not enhance its revenues as a result of Overlap. (Tr. 1631:1 through 1632:23, Carlton).

#### **Overlap Enhanced Competition by Improving Consumer Choice**

253. Throughout much of the history of higher education in the United States, the financial barriers to attending colleges and universities effectively placed a college education out of the reach of able and talented students who were not born into affluent families. (Tr. 804:16-20; 806:15 through 808:6, Fleming).

254. The practices of need-blind admissions and full-need aid have been instrumental in removing the financial barrier to admissions for economically disadvantaged students. (Tr. 1562:8 through 1563:13, Somerville; 1151:16 through 1153:3, Martin).

255. Schools that are committed to these policies admit students based only on merit, irrespective of need, and once admitted, provide financial aid funds to meet the full extent of their need. (Tr. 963:25 through 964:25, Keohane; 1151:16 through 1153:3, Martin).

256. Need-blind admissions and full-need financial aid programs are relatively rare in higher education. Given the enormous financial commitment that these policies require, there are few, if any, schools outside of the Overlap schools that remain able to commit to these policies. (Tr. 579:4-7, Gray; 1430:11-22, Behnke; 822:8-13, Fleming; 1151:24 through 1152:18, Martin).

257. The practices of need-blind admissions and full-need aid, made possible by Overlap, enhanced educational access and student choice by providing opportunities for needy students that otherwise would not have been available. (Tr. 498:5 through 499:3; 1040:18 through 1041:14; 1044:21 through 1045:18, Bowen; 975:5-9, Keohane).

258. While increasing choice for needy students, Overlap did not limit choice among non-needy students, who did not require financial assistance to attend the Overlap schools. (Tr. 975:1-9, Keohane; 842:17-22, Fleming; 498:19-24, Bowen).



259. By removing the financial barrier to admissions for poor students, Overlap increased the number of qualified students able to compete for freshmen seats at the Overlap schools and thus, enhanced competition in the admissions office. (Tr. 1470:7 through 1471:8; 1503:11-1504:25, Widmer; 1041:18-22, Bowen; 972:14 through 973:7, Keohane).

260. Overlap increased intercollegiate competition in areas such as student-faculty interaction, the curriculum and campus life. (Tr. 506:17 through 507:8, Bowen).

#### **Overlap Enhanced Socio-Economic Diversity**

261. It is well recognized that diversity within a student body plays an important role in the educational process and in the quality of a student's education. (Tr. 1046A:18 through 1046B:1, Bowen; 361:14 through 362:1, Routh; 972:14 through 973:7, Keohane).

262. The distribution of financial aid is a crucial factor in fostering a diverse student body. (Tr. 968:16-19, Keohane).

263. Need-based financial aid programs have been influential in altering the composition of the student bodies at both public and private colleges and universities to include a mix of students with a greater diversity of socioeconomic backgrounds. (Tr. 806:15 through 808:6, Fleming).

264. Need-blind admissions and full need financial aid programs have helped transform the perception of many low income students that they would be unable to

attend the overlap schools because of their limited financial resources, and caused a broader range of students to apply to the Overlap schools, thereby increasing the socioeconomic diversity of students ultimately admitted. (Tr. 1044:24 through 1045:2, Bowen).

265. Once students have been admitted to these institutions on a need-blind basis, the full-need policy has enabled them to attend the institution regardless of the extent of their need. (Tr. 877:7-24, Gray; 1531:24 through 1532:18, Sanchez).

266. As a result of the implementation of these policies at MIT and the Overlap schools, the socioeconomic diversity of the student bodies at these institutions was enhanced. (Tr. 1041:18 through 1042:15; 1044:21 through 1045:18, Bowen; 842:14-16, Fleming).

267. By improving diversity among the student bodies at Overlap institutions, need-blind admissions and full-need financial aid programs improved the quality of education for all students. (Tr. 1470:7 through 1471:8; 1503:11 through 1504:25, Widmer; 1041:18-22, Bowen; 972:14 through 973:7, Keohane).

#### **Effects of Eliminating Overlap**

268. The elimination of Overlap will, over time, undermine the principles of merit admission and need-based aid. (Tr. 384:10-23, Routh; 488:11-16; 489:10 through 492:19, Bowen, 556:12-21; 906:12 through 908:13, Gray; 971:7 through 972:6; 973:8 through 975:9, Keohane).

269. Preventing schools from working together to develop standards and procedures for measuring need, sharing information and making assessments concerning the determination of need will make it more difficult to assess need accurately, and will decrease the likelihood that financial aid resources will be allocated based upon actual need. (Tr. 384:10-23, Routh; 489:10-20, Bowen; 906:12 through 908:13, Gray; 971:7 through 972:6; 973:8 through 975:9, Keohane).

270. The MIT Financial Aid Office has already begun to observe aid awards given to students from other Ivy League schools that were not based on need only. (Tr. 1405:9-17, Hudson).

271. While in theory there is a specific dollar amount that accurately reflects the need of any given applicant, in practice determination of need is an imprecise and subjective endeavor. (Tr. 384:10-23, Routh; 1045:24 through 1046:8, Bowen).

272. Thus, different aid officers attempting to assess the need of the same student, without the benefit of being able to share information about the applicant or to coordinate their judgments about the principles of need analysis, may arrive at assessments of need that are very different. (Tr. 384:10-23, Routh; 906:14-24, Gray).

273. Absent coordination on methods of need analysis, differential analysis of need will result in need assessments that less accurately reflect true need, and will ultimately force schools away from a purely need-based system. (Tr. 384:10-23, Routh; 491:10 through 492:6, Bowen; 1443:2-6, Behnke).

274. Differential aid awards will inevitably affect students' decisions about which school to attend, and this will inject a competitive element into the need analysis process. (Tr. 906:12 through 908:13, Gray).

275. Need-based aid will also deteriorate in the absence of Overlap because of the internal pressures that schools face to misallocate scarce aid resources by awarding no-need aid to particularly desirable students. (Tr. 498:5-18, Bowen; 1442:5 through 1443:6, Behnke).

276. While schools independently may resolve not to give merit aid, it will be difficult to maintain that resolve in the absence of a consistent definition of need, and in the face of constant pressure from various segments of the university to use school resources to attract applicants of particular interest to that segment. (Tr. 490:1 through 491:9, Bowen; 971:7-19; 974:1-12, Keohane).

277. Awarding merit aid to a select few students and aid only up to need for everyone else will cause a sense of second-class citizenship for the need-only students. (Tr. 969:14 through 970:11, Keohane).

278. College and universities generally have objectives which may be promoted by adhering to the principles of educational access and opportunity underlying need-based aid, and also have objectives which may be advanced by awarding financial aid prizes in the form of no-need aid. (Tr. 490:1 through 491:9, Bowen; 907:11-20, Gray; 1353:9 through 1354:6, Hudson; 1470:7 through 1471:8; 1503:11 through 1504:25, Widmer; 1041:18-22, Bowen; 972:14 through 973:7, Keohane).

279. Once no-need aid is available, or is perceived to be available, other schools will respond. (Tr. 490:16-21, Bowen).

280. The likelihood that some no-need aid will be provided, and the certainty that other schools will respond, are underscored by instances in which certain Overlap schools complained in response to specific awards that were perceived as not need-based. (Tr. 517:12-25; 523:1-11, Bowen).

281. Some donors make charitable donations to colleges and universities because of the need-blind admissions and need-based aid programs at those schools. (Tr. 872:4-20, Gray; 968:1 through 969:3, Keohane; 1521:23 through 1522:9, Martinez).

282. If MIT is forced to alter its need-blind admissions policy or to adopt a merit aid system, some donors will no longer make charitable donations to MIT for financial aid. (Tr. 872:4-20, Gray).

283. For any academic institution, the process of creating a budget requires weighing competing demands for scarce funding for equally worthy purposes. This process necessarily imposes limitations on the ability of any institution to increase the amount of funds that are available for financial aid. (Tr. 810:1 through 811:10; 822:1-13; 836:15-21, Fleming; 989:12 through 990:18, Keohane; *see also* 1459:24 through 1460:25, Widmer).

284. Any diversion of funds from those who need them to those who do not will increase the already intense financial pressure on schools to reduce their commitment to needy students. This already has occurred at several colleges and

universities previously committed to need-blind admissions. (Tr. 975:1-9, Keohane; 908:1-8, Gray; 498:5-18, Bowen).

285. For example, students at Brown University occupied the administration building in April 1992 in reaction to Brown's disclosure that it provides need-blind admission to only 80% of each entering class, and that it considers ability to pay in admitting the remaining 20%. (Tr. 1470:7 through 1471:8, Widmer).

286. In the most recent year only 2 of the 150 students who were admitted to Brown from its wait list received financial aid. (Tr. 1467:11-1468:1, Widmer).

**Prohibiting Overlap Has Had A Chilling Effect  
On The Collegial Environment That Had Previously Existed**

287. Prohibiting Overlap will have, and indeed already has had, a chilling effect on important and desirable modes of cooperation among institutions of higher education. (Tr. 1046A:7-25, Bowen).

288. Administrators of large colleges and universities are routinely required to make complex decisions concerning a wide variety of issues involving the generation, management and allocation of financial resources; the good will, morale and commitment of the various constituencies that comprise a university, including students, faculty, alumni and donors; and the development and implementation of educational policy. (Tr. 810:1 through 811:10, Fleming; 860:3 through 862:22, Gray; 473:2-18; 1020:2-23, 1028:5-23, Bowen).

289. As a result of common goals and issues, as well as the nature of the academic environments in which they operate, school administrators traditionally have

shared information, exchanged ideas and engaged in cooperative behavior regarding virtually every aspect of operating a college or university. (Tr. 816:2 through 817:12; 822:25 through 824:11, Fleming; 1028:24 through 1031:10; 1033:9 through 1034:8, Bowen).

290. This culture of collegial cooperation and free exchange of ideas has been instrumental in promoting the effective and efficient administration of colleges and universities, and the fulfillment of their important role in our society. (Tr. 1028:24 through 1031:10; 1033:9 through 1034:8, Bowen).

291. This harmful chilling effect on cooperation caused by prohibiting Overlap is not limited to colleges and universities, but is likely to affect other non-profit, charitable institutions as well. Charitable organizations such as the Mellon Foundation routinely cooperate with one another in making decisions about how charitable resources should be allocated and in jointly funding projects, and frequently require cooperation among their charitable recipients. (Tr. 1016:1-4, 24, 25 through 1019:19, Bowen).

292. Cooperation and coordination increasingly will be required in the future to make efficient use of limited resources. For example, it is absolutely essential to the continued vitality of the higher education research library system that acquisitions be coordinated so as not to waste scarce resources on unduly duplicating new acquisitions. Similarly, new technologies require common standards and protocols if they are to facilitate maximum utilization of scarce resources. (Tr. 1029:12-25; 1030:17-24, Bowen).

293. Need-based financial aid programs have been instrumental in promoting access for talented but economically disadvantaged students. Historically, for example, an education at an Ivy League institution was available mainly to students who came from wealthy or well-connected families. (Tr. 807:21-25, Fleming).

294. The advent of need-based financial aid, offered by both the federal government and by the Ivy League institutions themselves, provided educational opportunity for many highly qualified students who lacked the financial resources and family connections that traditionally had been required to obtain admission. (Tr. 806:2 through 808:6, Fleming).

295. A less direct but nonetheless significant consequence of the dismantling of Overlap will be a further reduction of the federal commitment to financial aid. Because each new recipient of institutional no-need aid will be ineligible for any federal assistance, their entire award must be funded with private, charitable funds. Therefore, in order to give no-need aid to "high-need" students, schools will have to replace with private funds the large need-based federal awards that these students otherwise would receive. Awards to "no-need" students, on the other hand, will involve no loss of federal funds and will be comparatively cheap. As a result, schools will have a strong incentive to channel merit aid to wealthy students. (See *generally*: Tr. 80:4 through 81:2, McCullough).



## **PROPOSED CONCLUSIONS OF LAW**

1. The conduct at issue does not constitute "trade or commerce" within the meaning of the Sherman Act.

a. Section One of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal." 15 U.S.C. § 1 (Supp. II 1990). Thus by its express terms, Section One applies only to restraints "of trade or commerce."

b. Congress intended the "trade or commerce" requirement to limit the Act's reach to conduct with a significant commercial component. See 21 Cong. Rec. 2658-59 (1890) (reprinted in E. Kintner, *The Legislative History of the Federal Antitrust Laws and Related Statutes* 252 (1978)).

c. The "trade or commerce" requirement does not extend to conduct that is non-commercial in nature. See *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 (1940); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 n.7 (1959); *National Org. for Women, Inc. v. Scheidler*, 1992 WL 145233 (7th Cir. June 29, 1992); *Marjorie Webster Junior College, Inc. v. Middle States Ass'n Colleges & Secondary Schs., Inc.*, 432 F.2d 650 (D.C. Cir.), cert. denied, 400 U.S. 965 (1970).

d. Conduct motivated by educational or social objectives is not "trade or commerce" within the meaning of the Sherman Act, and therefore is not subject to scrutiny under the Sherman Act notwithstanding any incidental effects on commercial activities. See *College Athletic Placement Service, Inc. v. NCAA*, 1975-1

Trade Cas. (CCH) ¶ 60,117, 65,267 (D.N.J.), *aff'd*, 506 F.2d 1050 (3d Cir. 1974); *Marjorie Webster Junior College*, 432 F.2d at 654-55; *National Org. for Women*, 1992 WL 145233 at \*4, 7.

e. Given the Court's finding that the challenged conduct was motivated by non-commercial educational objectives and that MIT neither sought nor obtained any financial or commercial benefit from the challenged practice, the Court concludes that MIT's participation in Overlap was not "trade or commerce" within the meaning of the Sherman Act.

2. The challenged conduct does not constitute a per se violation of Section One of the Sherman Act.

a. Section One of the Sherman Act prohibits only those restraints that "unreasonably" restrain trade. *See Standard Oil Co. v. United States*, 221 U.S. 1, 59-60 (1911).

b. The rule of reason is the "prevailing standard of analysis" used to evaluate the legality of most restraints of trade. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977).

c. The per se rule is a limited exception to the rule of reason that applies only to those agreements or practices that are "manifestly anticompetitive," *id.* at 50, "[having a] pernicious effect on competition and lack[ing] . . . any redeeming virtue . . . ." *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958).

d. The per se rule applies only when a court can look back upon unambiguous judicial experience demonstrating that the challenged practice is a

"naked restraint of trade with no purpose except stifling of competition." *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963). Such experience arises only after a history of cases involving a certain type of conduct in which application of the rule of reason has almost always resulted in a finding of anticompetitive effect. See *Larry V. Meko v. Southwestern Pa. Bldg. & Constr. Trades Council*, 670 F.2d 421, 428 (3rd Cir.), *cert. denied*, 459 U.S. 916 (1982).

e. When challenged conduct contains a significant, bona fide non-commercial component, that aspect of the challenged conduct must be considered in evaluating the legality of the conduct, and a blanket prohibition of such conduct under the per se rule is inappropriate. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788-89 n.17 (1975); *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 696 (1978); *F.T.C. v. Indiana Fed'n of Dentists*, 476 U.S. 447, 458-59 (1986).

f. Even where conduct may have had some price effect, this would not automatically require application of the per se rule. See *NCAA v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 100, 104 (1984); *Broadcast Music, Inc. v. CBS, Inc.* 441 U.S. 1, 9 (1979). "[D]etermining whether two or more potential competitors have literally "fixed" a "price" . . . does not . . . establish that [a] particular practice is one of those types that is "plainly anticompetitive" and very likely "without redeeming virtue." *Id.*

g. To determine whether the challenged practice is properly characterized as per se price fixing, the inquiry must focus on the effect and the purpose of the challenged practice. *Id.* at 19.

h. Because MIT is a non-profit charitable organization, the presumption underlying the *per se* rule — that conduct will always produce effects that are consistent with the goals of profit maximization — does not apply to MIT's participation in Overlap.

i. Given the Court's finding that: (1) MIT's participation in Overlap was motivated by a desire to promote social and public policy goals; (2) there has been no judicial experience in applying the antitrust laws to this kind of behavior; (3) the challenged conduct was not engaged in for the purpose of increasing revenues; and (4) the challenged conduct did not result in any increase in revenues to MIT, the Court concludes that the *per se* rule does not apply to this case. Thus, the challenged conduct must be evaluated under the rule of reason.

3. Under economic analysis, the challenged conduct is not an unreasonable restraint of trade and therefore does not violate the Sherman Act.

a. Under the rule of reason, the plaintiff bears the burden of proving that the challenged practices is an unreasonable restraint of trade. *Tunis Bros. Co. v. Ford Motor Co.*, 952 F.2d 715, 728 (3d Cir. 1991), *cert. denied*, 1992 WL 104713 (U.S. June 29, 1992); *Evans v. S.S. Kresge Co.*, 544 F.2d 1184, 1193-94 (3d Cir. 1976), *cert. denied*, 433 U.S. 908 (1977).

b. Because Congress designed the Sherman Act as a "consumer welfare prescription," *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1978)); *NCAA v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 107 (1984), evaluating the reasonableness of conduct under Section One of the Sherman Act requires an

examination of all of the effects, purposes and justifications of the challenged conduct to determine whether it is, on balance, harmful to competition and consumers. See *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977).

c. To determine whether conduct is unreasonable under the rule of reason, a court must consider:

the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

*Chicago Board of Trade*, 246 U.S. at 238.

d. In evaluating the reasonableness of conduct under the rule of reason, courts must also consider the impact of the challenged conduct on the relevant market. See *Tunis Bros. Co. v. Ford Motor Co.*, 952 F.2d 715, 722 (3d Cir. 1991), *cert. denied*, 1992 WL 1040713 (U.S. June 29, 1992).

e. In order to assess the market impact of a challenged restraint, it is necessary to define the relevant market, and identify the effects of the restraint within that market, particularly with respect to price, quantity and product quality. See, e.g., *id.* at 728; *NCAA v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 100 (1984); *Sitkin Smelting & Ref. Co. v. F.M.C. Corp.*, 575 F.2d 446, 448 (3d Cir.), *cert. denied*, 439 U.S. 866 (1978).

f. For antitrust purposes, the relevant product market consists of those "commodities reasonably interchangeable by consumers for the same purpose." *United States v. E.I. DuPont de Nemours Co.*, 351 U.S. 377, 395 (1956).

g. "Courts have repeatedly rejected efforts to define markets by price variances or product quality variances," holding that "[s]uch distinctions are economically meaningless where the differences are actually a *spectrum* of price and quality differences." *In Re Super Premium Ice Cream Distribution Antitrust Litigation*, 691 F. Supp. 1262, 1268 (N.D. Cal. 1988), *aff'd sub nom. Haagen-Dazs Co., Inc. v. Double Rainbow Gourmet Ice Creams, Inc.*, 895 F.2d 1417 (9th Cir. 1990). See also *Frank Saltz & Sons, Inc. v. Hart Schaffner & Marx*, 1985-2 Trade Cas. (CCH) ¶ 66,768 (S.D.N.Y. 1985).

h. Given the Court's findings that students may choose to attend a variety of institutions of higher education other than MIT, Stanford and the Ivy League, the Court concludes that the relevant market in this case is not limited to MIT, Stanford and the Ivy League schools.

i. Based upon the Court's finding that Overlap did not increase average price, reduce output or reduce quality, the Court concludes that the Division has failed to satisfy its burden of establishing that Overlap was, on balance, harmful to competition and consumer welfare. Given the Court's findings that: (1) Overlap advanced the quality of education for all students; (2) increased consumer choice for economically disadvantaged students while having no effect on student choice for wealthy students; (3) increased merit competition among student applicants; (4)

neither affected the average net revenue (price) per student nor enhanced MIT's revenues; and (5) any commercial effects were incidental to the primary educational purpose of Overlap, the Court concludes that the challenged conduct was not harmful to consumer welfare, and therefore is not an unreasonable restraint of trade or commerce under Section One of the Sherman Act.

4. Given the noncommercial justifications for the challenged conduct, the Court concludes that Overlap was not unreasonable.

a. Noncommercial justifications appropriately are considered when evaluating whether the noncommercial conduct of non-profit institutions is reasonable under the rule of reason. *See NCAA v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85, (1985) (White, Rhenquist, JJ., dissenting); *Ass'n for Intercollegiate Athletics for Women v. NCAA*, 735 F.2d 577, 584 n.8 (D.C. Cir. 1984). *See also National Org. for Women v. Scheidler*, 1992 WL 145233 (7th Cir. June 29, 1992); *Marjorie Webster Junior College, Inc. v. Middle States Ass'n Colleges & Secondary Schs., Inc.*, 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970).

b. Non-economic justifications are particularly relevant in evaluating the reasonableness of noncommercial conduct of nonprofit educational institutions. *NCAA v. Board of Regents*, 468 U.S. at 135.

c. Given the Court's findings that (1) MIT participated in Overlap for the purpose of promoting access and opportunity for talented but economically disadvantaged students and (2) Overlap served to effectuate legitimate and well-recognized educational objectives such as increasing socioeconomic diversity in the

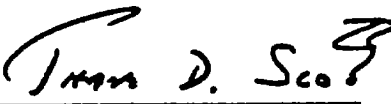
student body and enhancing the quality of education for all students, the Court concludes that Overlap was, on balance, reasonable.

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