



**DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING**  
**UNITED STATES OF AMERICA**  
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

:

NEW YORK UNIVERSITY, :

:

Employer, : CASE No. 2-RC-22082

and :

:

INTERNATIONAL UNION, UNITED AUTOMOBILE, :

AEROSPACE AND AGRICULTURAL IMPLEMENT :

WORKERS OF AMERICA (UAW), AFL-CIO, :

:

Petitioner. ::

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**PETITIONER UAW'S BRIEF IN**  
**SUPPORT OF THE REGIONAL**  
**DIRECTOR'S DECISION AND**  
**DIRECTION OF ELECTION**

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## **TABLE OF CONTENTS**

Introduction 1

Facts 7

A. NYU and The Assistants Unit 7

B. Assistants Perform Services for the Benefit of NYU 8

1. Teaching Assistants 8

a. Teaching Assistants are Overwhelmingly Responsible for Teaching  
the Core Curriculum in the College of Arts and Sciences 14

(i) Expository Writing Program ("EWP") 14

(ii) Morse Academic Plan ("MAP") 16

(iii) Language Instruction 19

(b) In the School of Education TAs Serve as Field Supervisors 20

(c) Teaching Assistants Also Perform Other Services 21

2. Graduate Assistants (GAs) 24

a. Services performed by Graduate Assistants in the School of  
Education Metro Center 26

(b) Services Performed by Other Graduate Assistants 28

3. Research Assistants 32

4. Assistants' Hours of Work 34

## 5. Continuity of Employment 35

1. NYU Hires and Assigns Graduate Assistants on the Basis of Their Pre-existing Skills and Abilities 36

(a) Teaching Assistants (TAs) 37

(b) Graduate Assistants 39

(c) Research Assistants 40

C. Assistants Perform Their Duties Under the NYU's Direction and Control 41

D. NYU Treats Assistants as Employees 42

1. Assistants Receive Compensation For Their Services 42

1. NYU Processes Assistant Compensation As Payroll And Treats the Cash Paid to Assistants as Salaries/Wages 44

3. NYU Budgets Assistants' Cash Payments as Personnel Costs 46

4. Assistants Are Covered by NYU's Workers Compensation Policy 46

5. Assistants Are Subject to Discipline For Poor Performance 47

6. NYU Trains Graduate Students to Perform As Assistants 48

7. NYU Refers to the Assistantship Relationship as Employment 50

E. Assistantships Are Not Directly Related to the Educational Programs of the Students Who Serve in These Positions 51

1. The Overwhelming Majority of NYU Departments and Programs Have no Requirement that Graduate Students Serve as Assistants 51

2. The Evidence Establishes That Assistantships Are Not Related to Graduate Students' Academic Programs 53

(a) TAs Often Teach Outside of Their Areas of Academic Concentration 53

(b) Assistants Teach Courses, and Perform other Duties, Involving Skills and Content With Which They Are Already Fully Versed 54

(c) Most TAs Are Neither Observed Nor Evaluated by Faculty Members 56

(d) The Training Given to Assistants is Job-Related not Career Related 56

(e) Many Assistants Perform Routine Clerical and Administrative Duties 57

(f) Assistantships Interfere With Graduate Students' Academic Programs 57

a. Graduate Students Generally Accept Assistantships Because

They Need the Money 58

F. Students Classified as Assistants in the Sackler Institute of Graduate Biomedical Sciences Perform No Services for NYU 59

G. Biology RAs Perform No Services For NYU 62

H. Physics RAs Do Not Perform Services For NYU 63

I. CNS RAs Do Not Perform Services for NYU 64

Argument 65

I. THE REGIONAL DIRECTOR WAS CORRECT TO USE THE COMMON LAW TEST TO DETERMINE WHETHER THE ASSISTANTS ARE EMPLOYEES WITHIN THE MEANING OF THE ACT 65

II. THE REGIONAL DIRECTOR CORRECTLY FOUND THAT THE ASSISTANTS

ARE EMPLOYEES UNDER THE COMMON LAW TEST 72

A. The Record Demonstrates That Assistants Perform Services for NYU, Under its Direction and Control, and for Which They Are Compensated. Therefore, the Assistants Are Employees under the Common Law Test Who Are Entitled to the Protections of the Act 73

B. Assistants Have a Substantial Interest in the Terms and Conditions of Their Employment 77

III. THE REGIONAL DIRECTOR CORRECTLY CONCLUDED THAT NEITHER THE LANGUAGE OF THE ACT NOR DECISIONAL LAW PERMIT THE BOARD TO EXCLUDE ASSISTANTS, WHO OTHERWISE MEET THE COMMON LAW EMPLOYEE TEST, FROM COVERAGE UNDER THE ACT ON PUBLIC POLICY GROUNDS 82

A. There is no Basis in the Statute or Decisional Law to Exclude Assistants From the Coverage of the Act on Public Policy Grounds 83

B. Even If The Board Could Consider NYU's Policy Claims, There Is No Basis for Overturning the Regional Director's Decision 85

1. Collective Bargaining Will Not Interfere With Academic Freedom, University Governance or Educational Policy 87

2. Collective Bargaining Will Not Interfere With Mentoring Relationships 88

IV AS THE SACKLER GAs AND THE PHYSICS, BIOLOGY, CHEMISTRY AND CNS RAs ARE NOT REQUIRED TO PERFORM ANY SERVICES FOR NYU, THEY ARE NOT EMPLOYEES UNDER THE ACT AND THE REGIONAL DIRECTOR CORRECTLY EXCLUDED THEM FROM THE ELECTION UNIT 90

A. The Science RAs Do Not Perform Services For NYU, They Only Perform Their Own Dissertation Research 92

B. In Contrast To The Science RAs, Non-Science RAs, Do Perform Services For NYU 94

C. The Region Correctly Applied the Common Law Test, and Legal Precedents Including the Board's Decision in Leland Stanford to find that the Science RAs are not Employees. 95

Conclusion 97

### **TABLE OF AUTHORITIES**

#### *NLRB CASES*

Adelphi University, 195 NLRB 639 (1972) 84

Boston Medical Center Corporation, 330 NLRB No.30 (1999) 2, 3, 5, 65, 67-71, 75, 78, 79, 82, 84-86, 88, 90, 95, 96

Cedars-Sinai Medical Center, 223 NLRB 251, (1976) 2, 68, 71, 72, 81, 95, 96

Cooper Union, 273 NLRB 1768 (1985) 83

Crest Wine and Spirits, Ltd., 168 NLRB 754 (1967) 77

Delight Bakery, Inc., 145 NLRB 893 (1964) 77

Display Sign Service, Inc., 180 NLRB 49 (1969) 77

Fairfax Family Fund, Inc. a wholly owned subsidiary of Spiegel, Inc., 195 NLRB 306 (1972) 77

Farmers Insurance Group, et al., 143 NLRB 240 (1963) 77

General Electric Co., 131 NLRB 100 (1961). 75

Goodwill Industries of Denver, 304 NLRB 764 (1991) 83

Goodwill Industries of Southern California, 231 NLRB 536 (1977) 84

Goodwill Industries of Tidewater, 304 NLRB 767 (1991) 83

Hearst Corporation, San Antonio Light Division, 221 NLRB 324 (1975) 77, 79

Joseph A. Goddard Co., 83 NLRB 605 (1949) 78

Kelly Bros. Nurseries, 140 NLRB 82, 85 (1962) 79

Kendall School of Design, 279 NLRB 281 (1986) 83

Key Opportunities, Inc., 265 NLRB 1371 (1982) 84

L & B Cooling, Inc., 267 NLRB 1 (1983) 79

Leland Stanford Junior University ("Leland Stanford"), 214 NLRB 621 (1974) 71, 84, 90-92, 96, 97

Lewis University, 265 NLRB 1239 (1983) 83

Massachusetts Institute of Technology (SEIU Local 254) ("Massachusetts Institute of Technology"), 218 NLRB 1399 (1975), *enfd*, 535 F.2d 1335 (1<sup>st</sup> Cir. 1976) 67

Newport News Shipbuilding and Dry Dock Co., 57 NLRB 1053 (1944) 75

Road Home Construction Corp., 170 NLRB 668 (1968) 79

Saltwater, Inc., 324 NLRB 343 (1997) 79

San Francisco Art Institute, 226 NLRB at 1253 78, 80

Sandy's Stores, Inc., 163 NLRB 728 (1967) 77

Six Flags Over Georgia, Inc., 215 NLRB 809 (1974) 77

St. Clare's Health & Hospital Center, 229 NLRB 1000 (1977) 2, 96

The Globe Co., 60 NLRB 1312 (1945) 78

University of Great Falls, 325 NLRB 83 (1997) 83

UTD Corp., 165 NLRB 346 (1967) 75

WBAI Pacific Foundation, 328 NLRB No. 179 (1999) 95

#### *FEDERAL CASES*

Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass, 404 U.S. 157 (1971) 83

NLRB v. Town & Country ("Town & Country"), 516 U.S. 85 (1995) 3, 69, 70, 80, 95, 97

NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974) 83

NLRB v. Hendricks County Rural Elec. Membership Corp. ("Hendricks County"), 454 U.S. 170, 189-90 (1981) 71

Phelps Dodge Corp. v. NLRB ("Phelps Dodge"), 313 U.S. 177, 185-86 (1941) 70

Sure-Tan, Inc. v. NLRB ("Sure-Tan"), 467 U.S. 883, 891 (1984) 70

#### *FEDERAL STATUTES*

NLRB Act 28 U.S.C. §152(3) 83

NLRB Act. 29 U.S.C. §152(3) 5, 69

#### *OTHER AUTHORITIES*

Directory of Faculty Contracts and bargaining Agents in Institutions of Higher Education, (The National Center for the Study of Collective Bargaining in Higher Education and the Professions, School of Public

Affairs, Baruch College, City University of New York, 1997) at 98-100 89

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**Introduction**

On April 25-27, 2000, 1500 Teaching Assistants, Teaching Fellows, Graduate Assistants and Research

Assistants (hereafter referred to collectively as "Assistants") of New York University's ("NYU," the "University" or the "Employer") cast ballots in the first National Labor Relations Board ("NLRB" or the "Board") representation election among graduate assistants at private universities. Boiled down to its essence, NYU's asks the Board to set aside that election based on unfounded speculation about the adverse impact to educational policy that will allegedly result from granting Assistants collective bargaining rights, and to disregard the clear mandate of the National Labor Relations Act to accord bargaining rights to individuals who are employees. Petitioner UAW urges the Board to affirm the Region 2 Decision and Direction of Election ("Decision"), and to afford the Assistants their democratic right to vote for union representation.

In the Decision, the Regional Director found that the Assistants were employees within the meaning of section 2(3) of the Act because they met all of the elements of the common law test -- i.e. Assistants are required to perform services for the University, under the University's direction and control, for approximately 20 hours a week, for which the Assistants are compensated. Applying the same legal test, the Region excluded the Graduate Assistants in the Sackler Institute and the Research Assistants in the Physics, Biology, Chemistry and Neural Science Departments (hereafter referred to collectively as the "Sciences RAs"), because they are not required to perform any services for NYU.

The Region applied the Board's recent decision in Boston Medical Center Corporation ("Boston Medical"), 330 NLRB No.30 (1999), in which the Board reversed its prior holdings in Cedars-Sinai Medical Center ("Cedars-Sinai"), 223 NLRB 251 (1976), and St. Clare's Health & Hospital Center ("St. Clare's Health & Hospital"), 229 NLRB 1000 (1977), that students working for their educational institutions are excluded from coverage under the Act, and made clear that, henceforth, it will apply the common law agency test to determine if an employee, who is matriculating for a degree at the educational institution where she works, is entitled to coverage under the Act.

In its Request for Review ("Request"), NYU challenges the Decision on three grounds. First, NYU argues that as a matter of policy Assistants should not be covered under the Act, because collective bargaining by Assistants will impermissibly intrude into educational policy by requiring the University to bargain over issues involving academic freedom, and educational standards; and, that the exercise of such bargaining rights will necessarily interfere with the student-advisor (mentor- mentee) relationship.

Second, NYU argues that, in any event, the NYU Assistants are not employees under the common law test because that they do not perform a service for which they are compensated. Instead, NYU argues that their services actually are part of their graduate education programs, and that their stipends are not compensation but financial aid provided to allow students to complete their graduate studies. Thus, it asserts that the Region incorrectly relied on the Boston Medical, which it characterizes as a limited holding concerning interns and residents that is neither conceptually nor factually applicable to Assistants. While conceding that an intern's performance of medical services may fairly be characterized as work, NYU argues that an Assistants' teaching of an undergraduate course or grading papers is actually part of their graduate education. NYU cites alleged factual differences between the situation of interns and Assistants by noting, *inter alia*, that in Boston Medical the Board found that interns and residents spent up to 80% of their time performing medical care services, and only 20% of their time in traditional academic study, while Assistants spend only 20% of their time performing services and 80% of their time in traditional academic settings.

Finally, NYU argues that if the Board finds that the Act applies to Assistants, there is no basis for excluding the Science RAs, whom, it asserts, stand factually in the same shoes as all other Assistants.

Below, Petitioner UAW shows that the record in this proceeding, and settled decisional law, support the Region's factual findings and legal conclusions. In particular, we show that there is substantial record evidence to support the Regional Director's finding that Assistants are employees under the Act. Applying the common law test articulated by the Supreme Court in NLRB v. Town & Country, 516 U.S. 85 (1995), the Regional Director found that Assistants perform services for NYU which services are part of its normal



operations. The vast majority of the Assistants perform teaching services for NYU's undergraduate students. In the principal undergraduate college, the College of Arts and Sciences ("CAS"), Assistants teach a substantial portion of all undergraduate classes, and the overwhelming majority of the core curriculum classes required of all undergraduate students in CAS. Regular or adjunct faculty would have to teach these courses if Assistants were unavailable. There is also abundant evidence that Graduate Assistants and non-Science Research Assistants provide valuable services to NYU.

The evidence demonstrates that the Assistants perform the services under NYU's direction and control. The courses each TA teaches, when and where they teach the courses, and the content of the courses, are all determined by NYU. GAs and non-Science RAs are, likewise, given specific assignments and told how they should be performed. Assistants are compensated for these services with an academic-year salary, which is paid bi-weekly through NYU's payroll department (with appropriate payroll tax deductions). And, the Regional Director found that the Assistants have a substantial interest in their terms and conditions as they generally work 20 or more hours each week, for an average of three and one-half years. Thus, applying traditional Board law, the Regional Director correctly found that Assistants are employees.

To the extent the Board deems it relevant, the record also establishes that the services NYU requires Assistants to perform are separate and distinct from their graduate educational programs. The Regional Director found, inter alia, that the number of assistantships created by NYU is based on undergraduate enrollment, that Assistants are subject to discipline (up to removal from their assistantships) for poor performance, but can not be removed from their graduate degree programs for poor performance as an Assistant, that only 10% of graduate students at NYU hold assistantships, and that NYU trains graduate students to be Assistants separate from the academic training they receive in connection with obtaining their degrees. Decision at 30-31. Thus, the record supports the Regional Director's finding that performance as an Assistant is not part of a graduate student's academic program.

Further, we show below that the Regional Director correctly held that, as a matter of law, there is no policy basis for excluding Assistants, who otherwise meet the common law employee test, from coverage under the Act. 29 U.S.C. §152(3) ("The term 'employee' shall include any employee ...unless this subchapter explicitly states otherwise..."). Moreover, there is no factual record to support NYU's claim that collective bargaining interferes with academic freedom or the mentor/mentee relationship. There is not a scintilla of evidence in this record to even suggest that the exercise of collective bargaining rights by Assistants would undermine NYU's educational program. Indeed, in Boston Medical the Board characterized the identical argument as merely a "doomsday cry." In fact, there is a record of twenty years of successful assistants' collective bargaining in public universities, some of which are NYU's direct competitors. Further, as the amicus brief of the American Association of University Professors will show, faculty, who have the greatest interest in preserving academic freedom, do not believe that academic freedom has been adversely impacted by assistants' bargaining at universities where such bargaining has been allowed.

Lastly, the Regional Director's exclusion of the Science RAs also finds support in settled Board law and the factual record in this proceeding. During the hearings, NYU offered testimony that the Science RAs did not perform any services for NYU, but merely conducted research for their own dissertations. Thus, NYU proclaimed they could not possibly be considered employees under the common law test. Now, after the Regional Director excluded the Science RAs from the voting unit precisely because they perform no services for the University, NYU has reversed direction and argues that the Science RAs really do perform a distinct service for the University and should have been found to be employees. To justify this switch in positions, NYU defines the service as the "benefit" to the University which it receives from the RAs' successful completion of their dissertation research. Request at 26-30. However, in attempting to rehabilitate its position, NYU simply goes too far! On the basis of its new definition of "service," every graduate student at NYU would be an employee, a position NYU clearly does not adopt. In fact the record of testimony by NYU's department chairs is clear and unambiguous that the Science RAs perform no service for NYU, but only conduct their dissertation research. Applying the rationale of Leland Stanford Junior University, 214

NLRB 621 (1974), where the Board excluded research assistants under the common law test because they only worked on their dissertation research and did not otherwise perform a service for their university, the Regional Director correctly excluded the Science RAs from the Assistants' unit.

Therefore, as the Regional Director's factual findings are supported by substantial record evidence, and as his legal conclusions are based on well-established Board and federal court decisional law, the Board should affirm the Decision and direct the counting of the ballots.

## Facts

### **A. NYU and The Assistants Unit**

NYU is a major metropolitan research university with approximately 39,000 students, half of whom are graduate students and half undergraduate. EX4. NYU is composed of thirteen (13) schools and institutes -- the College of Arts and Sciences ("CAS"), the Graduate School of Arts and Sciences ("GSAS"), School of Education, Stern School of Business ("Stern"), School of Continuing and Professional Studies, Wagner School of Public Service, School of Social Work, Tisch School of the Arts ("Tisch"), Gallitan School of Individualized Study ("Gallitan"), School of Dentistry, School of Medicine, School of Law, and the Courant Institute of Mathematical Sciences. EX 2 at 1-2; EX 5.

There are approximately 17,000 graduate students at NYU matriculating for M.A., PhD and other advanced degrees. Tr. 151; EX 4. During the Spring 1999 semester, approximately 1700 graduate students worked as Assistants, as defined in the petitioned-for unit. EX 5 and 6. The bulk of these Assistants were graduate students pursuing PhD degrees. Tr. 165.

All of the Assistants are classified, for payroll purposes (Tr. 285), in four codes -- 101, 111, 130 and 131 (JTX 1; JTX 3; EX 6), except for Science RAs in the Sackler Institute who are classified in the NYU Medical Center pay code 0200 (Tr. 5368).

Of the individuals who were classified by NYU as Assistants during the Spring 1999 semester, approximately 1023 were classified as Teaching Assistants or Teaching Fellows. EXs 5 and 6; Tr. 250. Approximately 360 individuals were classified as Graduate Assistants and 262 were classified as Research Assistants. EXs 5 and 6. The Regional Director found that the students classified as GAs in the Sackler Institute and as RAs in the Physics, Biology, Chemistry and Neural Science (CNS) Departments (referred to herein collectively as Science RAs) should be excluded from the unit because they do not perform services for NYU and are, therefore, not employees under the common law test. Decision at 36-37.

By far the largest concentration (approximately 45%) of Assistants is in the Faculty of Arts and Sciences ("FAS"), which is comprised of CAS and GSAS. EX 5. Approximately 450 of these 700 Assistants worked as TAs. EX 24 at 2. The number of TAs equaled the number of the full time faculty employed in FAS. Tr. 249; EX 24 at 2.

### **B. Assistants Perform Services for the Benefit of NYU**

The evidence in the record shows that Graduate Assistants, unlike graduate students who are not Graduate Assistants, are required to perform services for NYU under the direction and control of the University, for which they are compensated. Tr. 526.

#### **1. Teaching Assistants**

Most of the Assistants at NYU serve as TAs, and most of the TAs serve in the College of Arts and Sciences. Tr.250. While some TAs are assigned to help professors in self-contained lecture

courses at both the graduate and the undergraduate level, most serve as the sole instructor for discussion or laboratory sections associated with large lecture courses, or as the instructor of record for small self-contained classes in the Expository Writing Program ("EWP") or for language instruction classes.

The Employer's own data shows the extent to which NYU is dependent on the labor of TAs in providing for the education of its students, particularly undergraduates in CAS. PX 108. In CAS, a majority of all classes offered in the spring 1999 semester, 933 classes out of 1572 offered or 59%, were taught by TAs. Even more remarkable, 82.4% of all classes which were part of the CAS core curriculum, courses deemed so essential to a basic liberal arts education that they are required of *all* students in CAS, as well as of many students in other schools at NYU, were taught by TAs. PX 108. Even when one looks at the entire data set provided by NYU, which includes graduate programs in which courses are seldom taught by TAs, as well as entire schools within NYU where TAs do not teach any courses at all, or only very few courses, the data shows that 20% of *all* of the 5,137 classes offered at NYU in the spring 1999 semester were taught by TAs. PX 108.

All TAs at NYU are required to perform services for the Employer. EX 8; Tr. 109, 471, 1460, 1650. While many, like the TAs in EWP, and those involved in language instruction, are the instructors of record for stand alone classes (EX 130A; PX 64; PX 86E; PX 86F; Tr. 69, 197, 279, 2942, 3434, 3605, 3811-12, 4602-03, 4661), most, like the TAs in the MAP program, teach recitation sections (EX 54; EX 128B; PX 48A; Tr. 196-97, 251, 356, 471, 673-74, 1079, 1452, 1526, 2185, 2252, 2439, 2441, 2444, 2747, 3272, 3802, 4287; 4727, 5393) or lab sections (EX 128E; Tr. 196-97, 251, 355-56, 471, 1526-31, 1627, 2747, 5398, 5403) which students are required to register for when they enroll in certain larger lecture classes. A more limited number of TAs are assigned to help in lecture classes that do not have sections associated with them. Tr. 1454, 2026, 2649, 2658, 3802, 4662-63. In addition, as detailed below, TAs perform a host of non-teaching clerical and administrative functions.

The record shows that it is NYU's own needs, primarily that of providing instruction for its undergraduates, and not the needs of its graduate students, that determines how TAs are assigned and used at the University. Vice President Berne testified that in deciding whether to assign a TA to lead a section the Employer considers such factors as student enrollment, curriculum requirements and faculty availability (Tr. 142), and that, at least in some cases, tasks done by Assistants would be done by professors, or others, if Assistants were not available. Tr. 161-62, 171. Similarly, Professor Benhabib testified that if there were no TAs, others would have to teach the courses now being taught by TAs. Tr. 324.

NYU's own documents state that "assistantships mainly serve to meet teaching needs" (EX 20 at 9, 19); that "[f]or the university as a whole the assistantship budget pays for undergraduate teaching needs" (EX 20 at 22); that "TAs play a large role in the undergraduate educational experience at NYU" (EX 24 at 2); and that "when [a student] formally becomes a teaching assistant, [they] will play a vital role in maintaining excellence in our classrooms" (EX 17 at 2).

The documentary and testimonial record is replete with similar acknowledgments of the central role played by TAs in the education of undergraduates at NYU. See EX 24 at 4 ("As a TA, you represent the university and are on the 'same side of the fence' as the professor . . . [T]he undergraduates will perceive your position and the position of the professor as being very similar . . ."); PX 32 at 19 ("Assignment of teaching assistants to individual courses depends on enrollment in undergraduate courses and the needs of the undergraduate program"); PX 69 ("[W]e will continue to look at different models of meeting the department's need for high quality student assistance . . ."); PX 86G (stating that assistants provide "essential teaching support" adding that, because the Applied Psychology Program is growing, faculty rely increasingly on assistants for teaching and advisement support"); Tr. 708-11, 748-49 (Professor Furmanski testifying that laboratory sections, which are staffed by TAs, are offered because they serve the educational goals of given courses, and that the number of undergraduates enrolled, and the educational needs of these students, are factors in determining the number of lab sections which will be associated with a given course); Tr. 1627- 28, 1685-86 (Professor Matthews testifying that undergraduate enrollment patterns are an important factor in determining TA

assignments, that it would be a waste of resources to assign TAs where they would not be useful, and describing the departmental needs that TAs fill including the need to staff Introductory Psychology, and the need for close supervision of undergraduates in courses with laboratory sections); Tr. 3258-60, 3301, 3369 (Director of Graduate Studies in the Cinema Studies Department testified that his department relies on the labor of TAs in order to deliver teaching to undergraduates, and stating that "[c]learly one of the most important functions of the university is the teaching of undergraduate students and in a tuition driven institution like NYU they provide a lot of the bread and butter . . .").

See also EX 8 ("Welcome to the ranks of the undergraduate instructors at NYU"); EX 10 and EX 11 at 10 (Economics Department documents stating that "[i]nstruction is taken very seriously in the Department and TA's (sic) are an essential part of that instruction . . .," and that "[o]ur available hours of TA resources are limited [and] [t]here is a high demand for their services"); EX 20 at 1; EX 20 at 2 ("In the College issues surrounding teaching assistants such as workload and problems of communication, . . . raise the specter that the gains in student quality and national reputation may be slowed"); EX 20 at 20 ("Some departments have few, if any, assistantships because they have no undergraduate program, and thus, no teaching needs"); EX 51; PX 10C (telling students in specifying assignment preferences to "be realistic about the kinds of needs that the department has"); PX 86E (stating that growth of undergraduate program may necessitate adding another assistantship); PX 88; PX 90; Tr. 385-86; Tr. 1089-90; Tr. 1101 (Professor Walkowitz stating that TAs help to meet undergraduate teaching needs); Tr. 1157-58 (Walkowitz testifying that professors may limit enrollment for their courses if they are not given a TA to assist them); Tr. 1376; Tr. 1380-82, 1387-88 (Professor Seigal testifying that TA assignments are tied to enrollment, and that where enrollment reaches a certain level that "it's going to be hard for the faculty member to teach the course properly without some help"); Tr. 1982; Tr. 2947; Tr. 3270-71; Tr. 3805 (Dean Marcus testifying that TAs in Culture and Communication help in teaching "core courses" in what is "a very large service academic area for the university"); Tr. 3386 ("we would have great difficulty indeed in being able to teach, particularly the large undergraduate classes if we did not have assistants"); Tr. 4014-15 (Professor Bishop testifying that the French Department trains TAs because it has a duty to make sure that they are competent to provide undergraduate instruction); Tr. 4211 (Professor Sokal testifying about the educational need for recitation sections).

NYU's own witnesses established the important undergraduate educational role Assistants play by leading undergraduate recitation and lab sections. See Tr. 893-94 (Professor Chazan, Director of MAP, explaining that the contact time between MAP TAs and undergraduates is more intense than the contact time that the undergraduates have with MAP professors). See also Tr. 3272 (Professor Miller testifying that TAs in his department are "responsible for the vast majority of face- to-face small group teaching sometimes called recitations or sections rather than the large venue of the professor standing in front of hundreds" and that, as a result, in sections led by TAs "there is an opportunity for undergraduate students to sit down and actually have small group face-to-face interaction with an expert.").

Thus, it is not surprising that in GSAS, where most departments have a Director of Undergraduate Studies ("DUGS") and a Director of Graduate Studies ("DGS"), it is usually the DUGS and not the DGS who takes the lead in recruiting and placing TAs. See e.g., EX 22A (announcement of TA positions available in the English Department sent out by the DUGS for the English Department); Tr. 200, 230, 255-56, 279, 281, 313, 3270. The DUGS is also often the central player in departmental TA training programs. Tr. 225, 4147-55, 4169. Similarly, Dean Elton testified that the Undergraduate Dean of Stern constantly monitors the performance of TAs and may decline to use TAs provided by the graduate program if they prove to be unprepared to be undergraduate teachers. Tr. 4305-06.

In fact, where programs have been developed to improve the teaching ability of TAs, the evidence suggests that this has been motivated not so much by a desire to prepare graduate students for future careers in which they may or may not teach, but by a desire to improve the quality of education being provided to undergraduates. For example, Professor Sokal of the Physics Department testified that his department's teaching practicum was developed in direct response to complaints from undergraduates, called to the

attention of the department by its Director of Undergraduate Studies, about the quality of teaching that undergraduate students were receiving from TAs. PX 73; Tr. 4147-55, 4169. The Practicum was designed to enable TAs to "do their job better" Tr. 4199. See also EX 10 (stating that it is "very important" for TAs to attend the departmental training in the Economics Department because the department takes instruction "very seriously"); Tr. 4352 (Dean Elton testifying that TAs receive training in Stern so that they will be good teachers from the time they first walk into the classroom); Fact Section E(2)(d), infra.

### **(a) Teaching Assistants are Overwhelmingly Responsible for Teaching the Core Curriculum in the College of Arts and Sciences**

#### **(i) Expository Writing Program ("EWP")**

The critical role played by TAs at NYU is well exemplified by EWP, a program staffed almost exclusively by TAs, who are referred to by the program as Instructors. EWP offers a two semester sequence which is part of the core curriculum required of all students in CAS. It is also required for most other undergraduates at NYU. Tr. 953. Taught almost exclusively by TAs, EWP is designed to provide "a fundamental and foundational education for writing and thinking . . ." Tr. 953, 956. Yet, despite the importance placed on this program by NYU, its Director, Professor Hoy, is the only full time faculty member assigned to the program. Tr. 956. The program refers to the TAs as "staff" and as "faculty" and requires them to attend "faculty development" workshops. EX41; Tr. 1007-08, 1013, 1029-30. TAs are central to the delivery of educational services in EWP. As Professor Hoy stated in discussing the teaching methodology used by EWP: "[a] great deal of interactive teaching" goes on. Tr. 973.

EWP teaches approximately 3,000 undergraduates per semester (Tr. 958), and Professor Hoy is authorized to hire as many TAs as are necessary to maintain a ratio of one TA for every 15 students (Tr. 1028). This authority "depends, primarily, on the need to educate undergraduates." Tr. 1026. He also has the authority to replace teachers who are not doing their jobs. If removed from the classroom they would not continue to receive compensation. Tr. 1021-24, 1063. Instructors (TAs) can be "put on probation" if they seem unwilling to work on problems identified by directors. EX 42A at 11.

TAs are not selected to work in EWP by their own academic departments or advisors. Rather, applicants must fill out an application and be interviewed by EWP staff. Tr. 958. Applicants are also asked to edit a piece of student writing, and to answer several essay questions about dealing with students and classroom situations. Tr. 2553-54.

Most EWP TAs teach two sections per semester, each of which meets twice a week. They are required to hold individual conferences with each student at least twice a semester, to evaluate the students and to grade their work. Tr. 964, 974-75, 2560-66. Because EWP makes a major commitment to staff development, once selected, a TA has a good deal of "job security" and generally remains with the program for 3-5 years. EX 42A at 11; Tr. 961, 2564, 2586, 3424. Requests for leaves of absence will be granted only in exceptional circumstances. EX 41; EX 42C.

#### **(ii) Morse Academic Plan ("MAP")**

MAP, a general education requirement for all CAS undergraduates, as well as undergraduates in Stern, the School of Education, and parts of Tisch, consists of a three semester sequence called Foundations of Scientific Inquiry ("FSI") and a four semester sequence called Foundations of Contemporary Culture ("FCC"). Tr. 830, 884-85. In the 1998-99 academic year nearly 10,000 students enrolled in MAP courses. Tr. 836. All of the courses offered as part of the MAP program include recitation or lab sections taught by TAs, who are referred to as Preceptors. Tr. 839, 846.

MAP courses are considered the foundation of an undergraduate liberal arts education at NYU, and NYU's

own witnesses concede that the TAs play a critical instructional role in the program. Professor Chazan, Director of the MAP program, stated that "Preceptors are an extremely important ingredient in the success of courses." Tr. 893. Asked to explain why the TAs are so important to the MAP program Professor Chazan responded:

First of all, they have, just looking at it quantitatively, one-third of the contact time with the students, which is a significant amount. But beyond that, the contact time that the Preceptors have, is actually much more intense, because they're relating to 20 students at a time, rather than 60 or 120 or whatever. So in that sense there is a real connection between the Preceptors and the undergraduate students. . .

Secondly, in terms of the activities that the Preceptors are responsible for, they are absolutely critical to running the course . . . In FSI, the lab activities are crucial. This is an effort to give non-science students a lab based science experience, and the Preceptors are - - they are (sic) the major responsibility for the lab base part of it. And in the FCC courses, readings and themes are discussed in much greater depth in the smaller sections. And I would say, thirdly, the Preceptors are responsible for a lot of the skill development that's - - lies at the heart of the program as well.

Tr. 893-94.

In fact, in the brochure describing the MAP program for the 1999-2000 academic year, NYU brags that starting this year MAP will have lower student-teacher ratios, so that "students will have the opportunity to work more closely with both faculty members and Preceptors." EX 33. In this regard, NYU admits that it counts TAs as teachers in calculating student-teacher ratios. Tr. 889.

The central role played by MAP Preceptors is also reflected in NYU documents. When graduate students are hired to serve as Preceptors they receive a letter which tells them that Preceptors "play a vital role in the success of MAP classes and of the overall initiative," warning them that "MAP Preceptorships are full time, demanding appointments" and advising that they should "not accept other employment within the University for the duration of their appointments." EX 35; PX 7V (emphasis added). Another NYU document states that "[p]receptors play a central role in the success of MAP classes" and adds that "[p]receptors understand that teaching in MAP requires greater preparation time and they expect to work hard for the additional compensation they receive." EX 37 at 3.

In addition to leading sections, Preceptors are expected to arrange reserve readings, to grade assignments and exams, to deal with registration issues and administer course evaluations, to hold office hours, to attend lectures, to proctor exams, and to help develop syllabi and exams. EX36, Tr. 855-56, 2038, 2115, 2122-24, 2127, 2193-95, 2333, 4848-49, 4852. Assistants who served as Preceptors testified that they also ordered books (Tr. 2038), did photocopying (Tr. 2038), and kept track of attendance (Tr. 2115).

In response to complaints by Preceptors, professors, and even the director of the MAP program himself, that the workload of MAP TAs was excessive and interfered with their academic work, the workload for Preceptors was recently reduced from three sections per semester to two sections. Tr. 855, 890-91, 906. It is noteworthy that, despite the widespread view that the previous workload was interfering with the ability of graduate students to function within their own academic programs, calls for change were met with resistance by the University. Tr. 904-06. This resistance did not relate to concerns about providing the optimal educational experience for the TAs, but rather, was based on financial considerations - specifically, concerns that MAP would be too expensive to run if the work requirement for the TAs was reduced. Tr. 890-91, 904-06, 1099-1100.

The number of Preceptors hired is directly related to the number of undergraduates being served by the program. Tr. 903. The MAP program seeks TAs with "previous teaching experience." EX 34. In a memorandum dated March 12, 1999, NYU states that applicants "should possess records of excellence in

their previous studies and teaching assignments implying ability to offer undergraduate instruction of the highest quality," as well as "competence appropriate to the material to be taught." EX 34 (emphasis added). Once selected, it is expected that Preceptors will only resign their positions for "good cause." EX 34. In addition, Professor Chazan testified that he had the authority to remove a Preceptor if that Preceptor was not performing adequately. Tr. 926-30.

### **(iii) Language Instruction**

The final area included in the core curriculum is foreign language instruction. The record reflects the fact that the vast majority of beginning and intermediate language instruction at NYU is provided by TAs, who serve as instructors of record for most language courses. PX 108; EX 145A and B; Tr. 471, 1749, 1855-58, 3512-14, 3981, 4001-02. This means that TAs are providing basic language instruction to thousands of students per semester.

TAs serving as language instructors often teach as many as eight class sessions per week. Tr. 1757, 1763, 1864-65, 1868-71, 1873-74, 1877-81, 3513-14. TAs prepare lessons and syllabi, correct homework, prepare and exams and hold office hours. Tr. 1759-60, 1864-65, 1871, 1881, 1884, 3513-14, 3970, 3982. Language TAs are also assigned to handle student tutorial sessions (Tr. 1880-82, 1944, 3554), to help with special events and newsletters (Tr. 3554), and to help faculty members with their research (Tr. 3516-17). TAs in these departments have offices in the same area as faculty members (Tr. 3554) and are called upon to write formal recommendations on behalf of their students, which they do at the direction of their departments (Tr. 1886-88).

Teaching assignments are based in part on linguistic ability. Tr. 3956. Many of the students serving as TAs are native speakers of the languages they are teaching or are otherwise fluent in those languages. Tr. 1747, 1862, 3563. While language TAs often receive fairly extensive training, Professor Campbell admits that one purpose of this training is to further their ability to "competently teach the undergraduate students," which, she acknowledges, reflects an obligation which the University has to the undergraduates. Tr. 4014-15. The bottom line, however, is meeting NYU's need to have instructors in the classroom. As a result, assignments are sometimes made more on the basis of the need to cover scheduled classes than on what would be an appropriate assignment (Tr. 1955), and TAs have been placed in classrooms without training when last minute needs make this necessary (Tr. 1804). Language TAs can be, and have been, removed from the classroom for incompetence, resulting in their assistantships not being renewed. Tr. 4016-17.

### **(b) In the School of Education TAs Serve as Field Supervisors**

In the School of Education, extensive use is made of TAs (and some GAs) to supervise both undergraduate and graduate students who participate in field placements as part of their educational programs. In some programs field supervision forms the major part of what TAs are assigned to do. Tr. 3813-14, 3940, 4075. The field placement for students involved in teacher training programs is student teaching, which is taken for credit, and which is a requirement for obtaining the degree that will allow them to be certified as teachers. Tr. 3941, 4063, 5448-49. The School of Education takes its role as gatekeeper for the profession quite seriously. Its charge is deciding whether students are ready to enter into school settings where they will be entrusted with the supervision and education of children. Tr. 5448-49. The manner in which student teachers are supervised is a factor which is considered by agencies which accredit NYU to grant degrees in the field of education. Tr. 5452.

Despite the importance that NYU places on its role as gatekeeper of the profession, TAs are assigned responsibility for "the observation, the mentoring of the student in the field, the communicating and sharing of assessment with the field, [with] the classroom teacher on-site, as well as with the professor in charge of the program." Tr. 3814. The TA is "responsible for assessing both the quality of the experience and providing guidance and instruction to the student." Tr. 3815- 16. TAs observe lessons once or twice a week, meet with

the student ahead of time, discuss the observation with them after the lesson, and conduct consultations with the classroom teacher. Tr. 3939, 4077-78. In any given semester a TA may be the only representative of NYU observing a student teacher in the classroom. Tr. 5448.

The services performed by TAs functioning as field supervisors are the same as those performed by adjuncts hired to fulfill the same function. Tr. 4078. Regular meetings held to discuss field supervision are attended by all field supervisors - TAs, adjuncts, and regular faculty members. Tr. 4079, 5421-22, 5446.

TAs perform similar services in connection with other types of field placements required of students in the School of Education. PX 86B-D; PX 86F; PX 86H-L; Tr. 3877-79, 4621. For example, TAs supervise Applied Psychology students in their field placements, helping the undergraduates in that program to "develop skills and competencies." Tr. 3816-17. Supervision of these students, a requirement for their degrees, is also required by the American Psychology Association. Tr. 4686.

### **(c) Teaching Assistants Also Perform Other Services**

In addition to the core responsibility of teaching either stand alone classes, or recitation and lab sections, TAs perform numerous services for NYU. In addition to actual teaching and lesson planning, TAs are frequently involved in writing syllabi and developing the overall curricula for classes they teach, and assist with. EX 126; PX 86F; Tr. 68, 210-211, 282, 316-17, 471, 673, 1759, 1884, 2425, 2443, 2660, 3272, 3430, 3435, 3812-13, 4642, 4662, 4843, 4845, 5407. They often write or help to write examinations. EX 54; EX 128B; Tr. 212, 283, 674, 1453, 1530-31, 1759, 1871, 2661, 3430, 5393. TAs are also generally required to grade class assignments and exams (EX 54; EX 127 at 1; EX 128B-C; PX 32 at 6; PX 86A; PX 86H; PX 86J; PX 88; Tr. 69, 210, 212, 471, 661, 674, 1079, 1219, 1355, 1453, 1760, 1865, 1944, 2030, 2185, 2254, 2426, 2441-42, 2444, 2649- 50, 2656, 2659, 2661, 2749-50, 3272, 4663, 4845, 5393, 5399, 5403), and to serve as exam proctors (EX 54; EX 128C; Tr. 266, 760).

Not only are TAs critical to the undergraduate program because of the classes and sections which they teach, they are also critical because of the service they provide as undergraduate advisors. Virtually every TA who testified stated that they were required to hold regularly scheduled office hours. EX 54; PX 32 at 20; PX 48A; PX 86B; PX 86C; PX 88; Tr. 211, 356, 681, 1219, 1452, 1759- 60, 1864, 2030, 2185, 2440, 2444, 2649, 2656, 2659, 2661, 2749, 4663, 4724-25, 4756. As one faculty witness called by NYU testified, a TA keeps "the faculty member from being inundated with a lot of very, very elementary questions," adding that "having that teaching fellow as a buffer can be very, very valuable." Tr. 4725-26.

Further, in some departments, most notably in the School of Education, TAs are assigned to serve as general student advisors, helping undergraduates, and sometimes graduate students, not only with specific course-related issues, but also with any of the multiplicity of academic and non-academic issues for which students may seek assistance. EX 130A; PX 86D-G; Tr. 471. Thus, TAs often serve as the NYU representatives to whom undergraduates go, at least in the first instance, when they are seeking help with both personal and academic crises. As stated in one document from the Applied Psychology program: "[a]s advisement support for both the academic and field-based components of the programs, they are invaluable." PX 86G.

TAs also put readings on reserve (EX 54; EX 128B; PX 32 at 21; PX 86B; Tr. 2029, 2425, 2439, 2444, 2649, 2659), do photocopying (EX 54; PX 32 at 21; PX 86A; Tr. 1079, 2029, 2425, 2439, 2444, 2649, 2659), perform background research for professors (EX 54; EX 128B, C and E; EX 130B; Tr. 68-69, 2444), set up and coordinate internship programs (EX 130B; PX 86B; PX 86D; PX 86F; Tr. 1569-70), supervise students administering psychological and educational tests (PX 86A; PX 86C), and, in large departments and programs, coordinate the work of other TAs (EX 130B; Tr. 661, 1530-31, 1796).

TAs also find, gather and order materials (EX 128B; PX 86B; Tr. 1219, 2439), keep records (PX 86B; Tr. 2441-42, 4726), set up and break down lab equipment (Tr. 5399, 5403), help run computer labs (EX 129; Tr.



69, 197-98, 4636); conduct review sessions (Tr. 2661), manage video and film equipment (EX 129; PX 48A; Tr. 2906-07), edit written material (EX 128C), support software development (Tr. 69), design sets (Tr. 3812), do media coordination (EX 54), develop productions (Tr. 3812), and help professors with outside projects (Tr. 2426, 2531).

In some cases TAs are expected to fill in for professors when they are late or absent (PX 32 at 20; PX 50B; Tr. 1282, 2426, 5402-03), and TAs have been asked by professors to write official recommendations for their students (PX 86F; Tr. 1886-88, 2650, 2659). One TA testified that the professor she worked with asked her to write student recommendations because she "had more contact with the students and knew them better . . ." Tr. 2650.

In many cases TAs are also assigned administrative and/or departmental duties which, while they benefit NYU, are not directly related to the TA's class-based responsibilities. For example, the Anthropology Department requires TAs to organize and run three annual departmental parties assigning TAs tasks such as decorating, shopping, cleaning the facility once the party is over, washing dishes, and tending bar. PX 20; PX 21; Tr. 2030-31. Other departments ask TAs to help with and manage events and conferences (EX 128C; EX 130A-B; PX 48A), assist with registration and orientation activities (EX 8; EX 130B; PX 48A) as well as student recruitment (EX 130A-B), assist with grant writing (EX 128E), conduct an annual survey of alumni (EX 130B), do data entry (EX 130B), and maintain websites (EX 130B; Tr. 4728).

## 2. Graduate Assistants (GAs)

Unlike teaching and research assistantships which, despite substantial diversity, consistently involve teaching and research functions, graduate assistantships are not so easily described. GAs provide a wide-range of services to NYU, including administrative, technical, clerical, and pedagogical services, that enable the University and its programs to function on a day-to-day basis. What all Assistants have in common is that they all have certain responsibilities which they must fulfill in order to receive their stipend. Tr. 109.

The evidence shows that NYU benefits from and depends upon the services provided by GAs. See e.g., PX 51 ("your work experience must parallel the department's specific needs"); PX 56 (instructing applicants to state how the department will benefit from their work and stating that a good GA "demonstrates professionalism"); PX 86E (GAs "play an invaluable role in the daily functioning of the program"); PX 86G (the support of GAs "significantly contributes to the quality of the program offerings"); PX 93 (GAs must arrange coverage for absences "because there must always be GA coverage"); EX 126 (Art and Art Professions Program document stating that "graduate assistants . . . play an integral role in the pedagogical efforts of our degree programs and media areas"); Tr. 3253-54 (Professor Miller testifying that one reason Cinema Studies uses GAs is because there are administrative functions the department needs done); Tr. 3302-03 (Miller testifying that GAs perform "vital administrative duties" that "need to be performed"); Tr. 3827 (Dean Marcus testifying that GAs in the School of Education perform duties that "are strengthening the program as a whole"); Tr. 4417 (Marcus testifying that the duties associated with one position, described in EX 129, involve "supporting the entire instructional program of the department").

See also Tr. 1566-67 (Professor Matthews testifying that the Subject Pool Coordinator in the Psychology Department is a job that involves "challenging organizational skills" and is "an extremely sensitive role which, if not done well, could damage the research programs in several laboratories"); PX 85A; Tr. 4511-13, 4541, 4552 (stating that one GA in the Near East Studies Program, serves as "an employee and representative of New York University . . ." and is needed keep the Ettinghausen Library open, while another serves as the Editor of the program's newsletter with direct responsibility for getting the newsletter out); Tr. 3164 (GAs do things that "have to get done in connection with [a] production"); Tr. 4401-02 (Dean Marcus testifying that the Music Business Program GA is the person who "works most directly with the students . . ."); Tr. 4457-58 (one GA maintains, and supervises work in, a technologically advanced studio which contains very sensitive equipment); PX 86F and Tr. 4606-08 (one GA in the Applied Psychology Department ("APBS") "represent[s]

the APBS program . . . at school-wide events such as Parent's Day and Transfer Information Day"); PX 86H-J (counseling GAs "participate fully in the governance and other related activities of the counseling programs."); PX 88 and Tr. 4728-31 (Stern GAs are assigned to administrative offices (Admissions, Development, Career Development, Computing, Academic Advising, Student Activities) where they help with administrative functions).

While many GA positions require Assistants to exercise fairly advanced skills, others involve far more mundane tasks. For example, in the Comparative Literature Department GAs staff the departmental reception desk, performing basic clerical functions under the supervision of a non- faculty administrator. Tr. 1198-1200, 1209-11. The job description for one position in Tisch states that "in addition to working on the productions, Assistants are responsible for some of the more unglamorous, though necessary, chores which help the shop run smoothly." PX 58. See also Tr. 2933-34 (Dean Campbell testifying that, despite recent changes, some positions in Tisch may still mostly involve working in administrative offices); PX 93 (job description for the Stern GA who works in the Office of Career Development stating that "[t]here will never be an absence of grunt work," and that they must drop all other work if the reception desk needs coverage).

### **(a) Services performed by Graduate Assistants in the School of Education Metro Center**

One of the largest employers of GAs at NYU is the Metro Center, which consists of "an assortment of technical assistance and research programs designed to improve [and] strengthen urban education" (Tr. 3783) and to help high school students stay in school through graduation. EX 140 at 2, 5. The Metro Center is "one of 15 federally funded regional technical assistance centers "designed to assist schools." Tr. 3903. As a participant in this program, NYU is obligated to implement the programs which they propose and for which they receive funding. Tr. 3897. The funding sources for the program "expect results." EX 140 at 6.

Participation in this technical assistance program lends prestige to NYU. Tr. 3903-04. It also helps NYU maintain good relations with the New York City Public Schools, which is important to the School of Education due to large number of students who perform their internships in these schools. Tr. 3896. The schools in which they are placed rely on the GAs, referred to as Tutors. It is therefore important that the tutors live up to their commitment to the program. Tr. 3908. In its own literature about the program, NYU admonishes the Tutors: "we must remember that we are professionals representing New York University . . . [W]e are also 'ambassadors' from NYU and at times are required to use great tact and diplomacy." PX 67 at 7-8; EX 140 at 12. To continue as part of the program "NYU has to provide quality services to schools." Tr. 3903-04.

Metro Center Tutors work in teams, with school personnel, to establish tutoring and mentoring programs involving the provision of academic assistance and counseling to students. Tr. 3783-84. Tutors become "an integral part of the instructional program" at the schools in which they work. PX 67 at 4. In some schools they have their own room and children are scheduled or drop by, in others, the Tutors assist in classrooms. Tr. 3794. Tutors typically work at the schools to which they are assigned 3-4 days a week for 4 hours a day. Tr. 3794-95, 4789, 4811. They help students with academic work, as well as with other issues and concerns. Tr. 4789-92, 4811. Tutors attend staff meetings at the schools in which they work. EX 140 at 15. The schools may ask Tutors to focus their work on certain areas which they perceive as priorities. EX 140 at 6, 12; Tr. 4805.

Tutors are allowed three sick days, and three additional absences per semester. PX 67 at 5. Continued appointment during each semester, as well as receipt of their stipend, assumes satisfactory evaluation of their performance and attendance. Id. Tutors are required to punch time cards, and are entitled to lunch breaks when they work more than five hours on a given day. Id. at 6. Tutors are responsible for being on time and prepared. EX 140 at 8.

Tutors must also attend a seminar which is only open to the Tutors. Tr. 3788, 3791-93. While NYU argues

that the existence of this seminar demonstrates that serving as a Tutor is part of a student's educational program, it concedes that one of the purposes of the seminar is to make them more effective in their positions as Tutors. Tr. 4486-88; EX 141A-B.

To meet its commitments under the program, NYU seeks Tutors with the skills necessary to perform effectively. Tr. 3795. This is reflected in the application which solicits information about a candidate's previous teaching and tutoring and experience, languages which they speak, and countries and cultures with which the candidate is familiar. PX94C-D. The ability to speak foreign languages and familiarity with other cultures are important because of the diverse nature of the student population being served. Tr. 4801-02.

### **(b) Services Performed by Other Graduate Assistants**

The range of duties assigned to GAs is extremely broad. While some GAs serve as skilled technicians, editors, grant writers and student advisors, others are largely assigned unskilled and semi-skilled clerical duties. In other positions skilled and unskilled duties are combined.

For example, in Tisch, GAs are responsible for most of the production and design tasks required by the school's various programs. GAs are assigned to such important positions as Master Electrician (PX 42A), Master Carpenter (EX 97A), Audience Development Coordinator (EX 97B), Box Office Manager (EX 97B; EX 127), House Manager (EX 97B; EX 127), Costume Shop Assistant (EX 97C), Properties Coordinator / Prop Master (EX 97D), and Scenic Artist (EX 97E). They are also assigned, however, to perform such routine duties as maintaining and organizing shops and storage areas (EX 97A; EX 97C; EX 97E; PX 42A; PX 58), ordering supplies (EX 97E; PX 50C-D; PX 58), scheduling rehearsal, performance and production space (PX 50A; PX 50D; PX 64; Tr. 2911-12), moving wardrobe boxes (PX 58) and even doing laundry (PX 58).

Some of the other duties assigned to Tisch GAs include repairing and maintaining equipment (EX 97C; EX 127; PX 42A; PX 58), maintaining inventories (EX 97E; PX 42A; PX 50C-D; PX 58), building and painting scenery (PX 97A; PX 97E; Tr. 3087), videotaping performances (PX 50A; PX 50C), recording graduate recitals (EX 127), dubbing videos (PX 50B), organizing and maintaining costume collections (PX 50A), repairing costumes (PX 58), preparing concert master tapes (PX 50D), coordinating publicity for productions and other events (EX 97B; PX 64; PX 127; Tr. 4394, 5044, 5057), handling audience conflicts (EX 97B), acting as draper and stitcher for undergraduate productions (EX 97C), building costumes (EX 97C), assisting with complicated alterations (EX 97C), providing time/cost estimates (PX 97D), building, maintaining and repairing props (PX 97D; Tr. 3087), purchasing equipment (EX 127), maintaining purchase and rental records (PX 97D), establishing and enforcing prop loan procedures (PX 97D), creating lighting designs (Tr. 2910-11), taking apart and rebuilding computers (Tr. 2909-10), welding (Tr. 3087), cleaning (Tr. 3164) and unloading trucks and moving equipment (Tr. 3164).

In addition, GAs in Dramatic Writing coordinate acting and directors' companies, coordinate a weekly reading series, administer the Resident Writers Program, and serve as theater liaisons for undergraduates seeking work. PX 64; Tr. 3601-02. Tisch GAs also serve a pedagogical role - training, supervising and evaluating unpaid student crews. EX 97A-E; EX 127; PX 42A; Tr. 3087.

Elsewhere at the University, GAs are also responsible for a number of key administrative and pedagogical functions. Thus, as was true for some TAs (see supra at Section B(1)(c)), GAs play a central role in student advisement and counseling, particularly in the School of Education. See EX 127; EX 130B; PX 86F; Tr. 4605-08 (GAs serve as advisors for all undergraduate juniors and seniors and are expected to "ensure that all students graduate on time" and also to address student emergencies); PX 86H-J; PX 86L; Tr. 1568-69 (in the Psychology Department GAs provide counseling for "droves of" undergraduate and masters students interested in clinical training); Tr. 3828-29, 3854, 4730-31. GAs are also given key roles in the recruitment, admissions and orientation of new students. See, EX 126-127; EX 130B; PX 48A; PX 64 (coordinates admissions process); PX 86A-B (reads applications, conducts interviews and helps in selection process); PX

86C (coordinates screening of, and maintains contact with, applicants); PX 86F; PX 86J; PX 86L; Tr. 3826-27, 3829, 3826, 3831, 3855, 4730-31.

GAs also play a central administrative and pedagogical role in connection with clinical and artistic internships and externships. Thus, GAs serve as Assistants to the Director of Clinical Training in APBS (PX 86H-I), Internship Coordinators in the Dramatic Writing Department (PX 64), and elsewhere are assigned to develop internships, advise students about internships, coordinate placements with cooperating teachers, and recruit field supervisors, among other tasks. EX 127; EX 130B; PX 86A; Tr. 461, 4694-95. Discussing the role of GAs in recruiting and maintaining relationships with field supervisors, Professor Allen testified that he assigned GAs rather than office staff to this task because these "relationships need to be managed very carefully." Tr. 4694-95. GAs are also assigned to maintain contact with adjunct professors and to follow up on adjuncts' status and contracts. EX 127; EX 130B.

GAs serve as assistants to directors of academic programs (EX 127; PX 86B; Tr. 3827), and have responsibility for grant writing (EX 126; EX 128A; Tr. 3828, 4525) and proposal development (Tr. 3834). In one department a GA is assigned major responsibility for overseeing the accreditation process. See PX 86D ("The APA accreditation is vital for the reputation and survival of our program and this will be a time-consuming and demanding job"); Tr. 4643-44, 4673 (NYU witness testifying that this GA is responsible for gathering information about training sites and the status of program graduates, as well as writing about the curricular philosophy of the program, and further testifying that without the report prepared by the GA, accreditation would be lost). GAs are also involved in program management at the Wagner School (Tr. 71, 80), in helping carry out the student disciplinary procedure in Applied Psychology (PX 86F), and in assisting the student government in the School of Education (Tr. 3831-32). They also attend, and take minutes at, departmental meetings (EX 130B; PX 86A-B; PX 86F; Tr. 4616, 4622, 5043-44), participate in program assessment (EX 126), and track alumni (EX 127; EX 129; PX 64; Tr. 4730-31). In one program, Assistants help coordinate 30 jazz ensembles, serve as liaisons for guest composers, and even function as Director of an NYU company, Village Records. EX 127.

GAs organize conferences, workshops, symposia, lecture series and a wide range of special events (EX 126; EX 127; EX 130B; PX 48A; PX 64; PX 85; PX 86F; PX 93; Tr. 112-13, 461, 1082, 1132, 3588-89, 3598-3600, 3605, 3672-73, 4517-19, 4524-26, 4547-48, 5048, 5056), administer video, slide, script, film and book collections (EX 127; PX 50C; PX 64; PX 85; Tr. 4514-15), and assist students in various labs and studios (EX 127; EX 129; PX 85, 4516-17, 4546-47, 4565). They also have a major role performing editorial and production work, in some cases having primary editorial responsibility for journals and newsletters, including, Middle East Reports, the Waverly Review and Script Magazine. PX 64; Tr. 1082, 1130-31, 2918, 2995-96, 4521-22, 4527-28, 4552.

In contrast, many GAs are assigned functions which are essentially clerical such as photocopying (PX 7A; PX 50B; PX 93; Tr. 1197-98, 2932-33, 3262-64, 3321-24), answering phones (EX 97B; PX 85A; PX 86B; PX 93; Tr. 112-13, 1198), filing (PX 86F; PX 93; Tr. 112-13), typing (EX 97B; Tr. 112-13, 1198, 3598), making appointments (PX 86C; Tr. 3598, 4730-31), proofreading (Tr. 5050), drafting memos and letters (PX 64; PX 86B-C; PX 86L; PX 93; Tr. 3598), doing mailings (PX 86A; Tr. 112-13, 5056), staffing reception desks (PX 93; Tr. 1198, 2997), sending faxes (PX 93; Tr. 1198), booking rooms (EX 128D; PX 86C; Tr. 112-13, 5056) and taking dictation (Tr. 3598). GAs have also been assigned to run errands (Tr. 1198), straighten up (PX 85; Tr. 2024), arrange catering (PX 86C; Tr. 112-13, 5056), go shopping (PX 58; PX 64; Tr. 3588-89, 3671-72), water plants (Tr. 2024) order tickets (Tr. 3598), and send dissertations for binding (PX 86A).

GAs are also assigned research functions such as obtaining library materials (EX 130B; PX 7A; Tr. 1196-97, 3262-63), doing library research (EX 126; EX 130B; Tr. 5045, 5047), developing and implementing research instruments and designs (Tr. 3834-35), conducting field interviews (Tr. 5045-48), collecting and processing research data (EX 129), supervising students conducting on-site research (EX 128A), clearing rights (Tr. 3263-64), writing abstracts (Tr. 5045) and doing bibliographic work (Tr. 1196-97).

Evidence was also presented that GAs help in a libraries (PX 64; PX 85; Tr. 461, 2024, 3826), organize reserve readings (PX 85; Tr. 2024, 3262), maintain databases (PX 64; PX 86D; PX 86I; Tr. 4730-31), do computer troubleshooting (Tr. 3022), prepare and hang art exhibitions (Tr. 4394), monitor websites ((EX 128A) and design and maintain web pages (EX 128A), and set up and/or operate audio visual and other equipment (PX 50B; PX 64; PX 85).

### **3. Research Assistants (RAs)**

While there are significant differences between research assistantships in the hard sciences and those in other NYU departments and programs, all RAs, except for those in the Physics, Chemistry, Neural Science and Biology Departments, are required to perform duties which support the research of faculty members. See e.g., PX 48A; Tr. 277-78, 4335, 4658, 4913. There is evidence that NYU uses these assistantships as a recruitment tool, promising prospective faculty members that they will be given RA or GA assistance if they accept positions Tr. 1083, 1107, 3289-90, 3384, 3390. Current faculty members are also motivated to make sure that they are assigned someone to assist them with their work. See e.g., Tr. 2198-99.

RAs in the social sciences and humanities spend most of their time assisting professors by performing clerical and low level research functions. The evidence shows that they do basic bibliographic work (Tr. 234, 535, 1080, 1249, 1258, 2436, 3862), check references (EX 118 at 16; Tr. 1249, 2200-01), do photocopying (EX 118 at 16; PX 32 at 23; PX 48A; Tr.1258, 3329, 4098, 4101), obtain library materials (EX 118 at 16; Tr. 1249, 1258, 2437-38) and help with correspondence (PX 48A; PX 86M). They also assist professors by placing materials on reserve (PX 48A; Tr. 1249, 1258, 2436), proofreading (Tr. 1118), copyediting (PX 86M; Tr. 1118) and performing archival work (Tr. 535, 2200, 2918, 2974).

In schools and departments, other than hard science departments, where professors are involved in experimental research (e.g. Stern, Economics, some departments in the School of Education) RAs assist professors by collecting data (EX 118 at 16; PX 86M-N; Tr. 234, 3864, 4098), analyzing data (PX 86M-N; Tr. 234, 3864, 4265-7, 4336-37, 4897), recruiting subjects (PX 86N; Tr. 4596-97, 4897, 4913-15) and performing data entry and other elementary computer tasks (EX 118 at 16; PX 32 at 23; PX 86M; Tr. 2201, 4897, 4915). RAs also design and implement experiments for professors (Tr. 3862, 4268), do field research (Tr. 4266), train and supervise experimental testers (PX 86M-N), write abstracts (Tr. 234), take minutes at meetings (PX 86M), help professors write up experimental findings (PX 86M), organize meetings (PX 86N), help with special events, and provide administrative office help (PX 48A).

RAs in Psychology perform various support tasks that help to maintain the laboratories to which they are assigned. While these RAs may use some of their appointed hours to work on their own research (Tr. 1574-75), as a condition to their appointments they are also obligated to perform general duties each week, amounting to up to 25% of their total time in the laboratory, in support of the laboratories in which they work. Tr. 1574-76, 1734. Such support work can include tasks such as maintaining a computer system (Tr. 1574, 2311, 2316), maintaining a database (Tr. 2311, 2315-16, 3200, 3204), serving as a resource to undergraduates in the lab (Tr. 2311, 2317, 3200, 3204-05) and helping with recruitment of experimental subjects (Tr. 2311).

There are a small number of RAs in the basic sciences, those serving in the Biology, Chemistry, Physics and Neural Science departments, who do not provide any services for NYU. As discussed below, the evidence supports the Regional Director's finding that these RAs, along with the Assistants in Sackler, are not employees within the meaning of the Act..

#### **4. Assistants' Hours of Work**

The evidence establishes that in most cases Assistants are expected to work 20 hours per week (Tr. EX8; EX 47; EX 97A-F; EX 118 at 15; EX 125B-D & G; EX 136 at 12; EX 140 at 8; PX 32 at 19, 22; PX 48A; PX 50A-D; PX 51; PX 67 at 5; PX 68; PX 86M; PX 87; Tr. 304, 4267-68, 4377), and do in fact work, approximately 20 hours per week (EX 164; EX 166; EX 172; Tr.1264, 1290, 1762-64, 2252, 2333, 2437-38, 2440, 2442, 2445, 3129, 3273, 3598-3600, 3610, 3908, 4098, 4704). However, many students report working more than 20 hours a week, particularly TAs working in MAP and in language instruction. Tr. 1215-16, 1760, 1764-65, 1865, 1871, 1874, 1881- 82, 2039, 2186, 2195, 2564, 2657, 2663. One department in the School of Education has an explicit expectation that Assistants work for 22-23 hours per week. PX 86E at 1.

In a limited number of cases there is evidence that Assistants are expected to work, or actually do work some semesters, for fewer than 20 hours a week (EX 54; EX 118 at 15; EX 125A; EX 136 at 12; EX 170; PX 21; PX 88-91; Tr. 356, 681, 1883, 2034, 2312, 2752, 3206, 3518, 3982, 4310-11, 4511), though in some cases NYU faculty witnesses gave estimates of time expectations that were contradicted by student witnesses. For example, while faculty witnesses from the French department testified that TAs were only expected to work 12-15 hours a week (Tr. 3518, 3982), a TA who taught German language classes, assigned duties similar to TAs in the French Department, reported that he worked 30-40 hours a week for 6 of the 7 semesters he served as a TA, basing his testimony on a log he had kept at the suggestion of the Language Coordinator in his department. Tr. 1865, 1871, 1874, 1881-83, 1950. This example is not unique.

#### **5. Continuity of Employment**

NYU graduate students who take employment as Assistants spend, on average, half of the semesters that they are at NYU serving as Assistants. PX 168. For doctoral students, who comprise the majority of students serving as Assistants at any given time (Tr. 5695-96), this means that on average they will work for NYU for over three years, excluding summers, before they graduate from the University. PX 168.

The figures cited above are based on a study conducted for the hearing by NYU. In addition, extensive testimony was received on the subject of how many semesters individuals work as Assistants while at NYU, not only from the 14 students and former students who testified, but also from faculty members and administrators called by both parties, including Vice President Berne, Dean Stimpson and others.

There is also evidence in the record that approximately half of all Phd candidates in the Graduate School of Arts and Sciences support themselves solely through serving as Assistants.

## **6. NYU Hires and Assigns Graduate Assistants on the Basis of Their Pre-existing Skills and Abilities**

NYU seeks students to fill assistantship positions who possess skills that will allow them to perform their assigned duties competently. There is ample evidence that NYU looks beyond academic performance in deciding both which students to hire, and where to place students who are hired. Further, there is evidence that NYU, to the extent that it does consider academic performance, does this with the knowledge that undergraduates are most likely to benefit from contact with the best graduate students. Tr. 1376.

### **(a) Teaching Assistants (TAs)**

In selecting Teaching Assistants NYU looks for applicants with a background in the area to be taught, applicants with previous teaching experience, and applicants who have demonstrated that they are likely to function as reliable, responsible employees.

The evidence shows that many departments seek to hire students with previous teaching experience. For example, the application for TA positions in the English Department requests that applicants include "details about all teaching experience." EX 22A. MAP also seeks TAs with previous teaching experience. EX 34. Similarly, the School of Education application for assistantships, including teaching assistantships, asks for references who can address an applicant's teaching ability, and for a list of previous "employment," explicitly including all prior assistantships. PX 68. Applicants are also asked what subjects they are "qualified to teach." *Id.* The Psychology Department, in selecting students to serve as "Super-TAs" looks for applicants who not only have good organizational skills, and who are "seasoned, and good and talented," but also for applicants who have demonstrated such abilities in connection with their previous service as TAs. Tr. 1531-32.

Furthermore, even in departments that do not explicitly seek students with previous teaching experience, NYU seeks to hire students who are well versed in the subjects they will be teaching, and who otherwise possess skills that will allow them to be competent teachers. For example, Professor Seigal testified that the History Department looks for academic excellence because undergraduates are most likely to benefit from contact with "the best graduate students" (Tr. 1376), and further stated that the department would not give an assistantship to someone who was incapable of teaching undergraduates. Tr. 1377. Dean Benhabib, in a similar vein, testified that FAS tries to assign TAs based on their interests, adding that "[t]his helps the undergraduates because they are getting a teacher who is competent in the area." Tr. 281.

See also Tr. 1152 (Professor Walkowitz testifying that he tries to pick TAs who will be responsible, good in class, and who have some interest in the subject matter); EX 11 at Appendix A and Tr. 202, 268, 279, 313 (the Economics Department, in making assignments, considers a student's background and "expertise," and reserves the right to remove Assistants for non-performance, or on the basis of bad evaluations by faculty members); Tr. 955-56 (EWP Mentors are selected based on what they know about writing and teaching, and their potential for leadership in the program); Tr. 3258-59, 3267-68 (Professor Miller, DGS for Cinema Studies, testifying that his department looks for TAs with "the right blend of skills and character

to be a competent professional teacher of undergraduate students," adding that they want people with mastery of the discipline in order to maintain the quality of the undergraduate program and have students and parents get their money's worth); Tr. 4289, 4291, 4305-06 (Dean Elton testifying that Stern always assigns students to teach within their area of academic expertise and tries not to use anyone without adequate English language skills, adding that if he provides TAs who are not prepared to the undergraduate program, he will lose the opportunity to place them in the future.)

In addition there was testimony that second-year MBA students "shop around" for assistantship positions using their resumes (Tr. 4722-23), that initial TA assignments in Biology are to introductory courses in part because the department assumes that students will have had "sufficient experience and prior exposure" to be able to teach these courses (Tr. 663) and that it is the policy in the Psychology Department that only students who were psychology majors as undergraduates can be TAs for Introductory Psychology (Tr. 1677).

### **(b) Graduate Assistants**

As described above, the nature of the tasks performed by GAs varies greatly between school, department and position. Therefore, NYU seeks students who possess specific skills and qualifications to fill these positions.

For example, in Tisch, the Dramatic Writing Department informs students applying for graduate assistantships that their "work experience must parallel the department's specific needs," adding that for each position they look "for the most qualified person for the job." PX 51. One student in that department testified that she was hired to serve as an Assistant to the chair of the department after highlighting her background working as an executive assistant. Tr. 3583-86. Another student in the department was hired as a GA to work in the admissions office because she had worked for 5 years in the admissions office at the University of Atlanta. Tr. 3649.

Other Tisch departments also seek GAs with specific skills relevant to the tasks to which they will be assigned. See PX 61 (memo to Design Department students interested in being GAs asking them to "outline [their] skills in terms of which position(s) [they] are most interested in"); EX 94 (stating that factors considered in selecting Design Department GAs include whether they have the "needed skill" for the position and, for returning Assistants, how they performed in the previous year); Tr. 3067, 3142 (Department Chair Hilferty testifying that Design GAs must demonstrate the basic skills required for their positions, and be capable of working at a higher level than what is required of unpaid student crews); PX 56 (instructing applicants for assistantships in the Film Department to state how the department will benefit from their work); Tr. 2994 (Dean Campbell testifying that it is important for Dance/Video GAs to have a background in video, dance, dance history and performance, and skills needed for dance documentation); Tr. 2909 (Campbell testifying that ITP (Physical Computing) GAs must be familiar with relevant computer software).

The School of Education application for assistantships asks applicants for information on their research and technical skills and other areas of competence PX 68. The Dean has also conceded that GAs are picked, in part, on the basis of qualifications. Tr. 3845-46. See also Tr. 4416-17



(Dean Marcus commenting that one position, identified in EX 129, "really is for someone with a high degree of research proficiency," adding that these Assistants must work with "highly sophisticated equipment.").

See also Tr. 1568-69 (NYU witness testifying that clinical internship/clinical advisor GAs in the Psychology must be individuals who have demonstrated, through their own clinical work, that they are likely to be "competent counselors"); Tr. 1566-67 (Psychology GA who serves as Subject Pool Coordinator serves in "an extremely sensitive role which, if it's not done well, could damage the research programs in several laboratories; Tr. 4732 (The typical MBA student has three or more years of experience in the business world and comes to NYU with "a lot of very solid experience [that] can be used by some of the administrative departments to do very helpful things"); Tr. 4517 (Ettinghausen Library GA assigned to language laboratory must have an "advanced command of Arabic"); Tr. 4514-15 (Near East Studies Program GA assigned to coordinate video collection should have foreign language ability relevant to the region); Tr. 4527-29 (GA assigned to do the editorial work for the journal Middle East Report must know the field).

### **(c) Research Assistants**

NYU Vice President Berne testified that, in connection with a two-year grant that allows him to hire an RA, that he might select a new RA for the second year if he needs "a different set of skills." Tr. 163. Dean Marcus testified that the School of Education's faculty, in selecting Assistants to help with their research, look for students with the "greatest research potential." Tr. 3865. Also, as stated above, the School of Education's application for all assistantships asks applicants to detail the research skills which they possess. PX 68. Similarly, Professor Allen of the Applied Psychology Department stated that his department looks for students with strong academic backgrounds and potential as researchers. Tr. 4593. Finally, commenting on the useful skills brought to NYU by RAs in Stern, Dean Elton testified that many have "high powered analytical training" that enables them to work on a discrete part of a problem for a faculty member. Tr. 4267. Further, continuing to serve as a Stern RA depends on satisfactory performance (EX 125A; EX 136 at 12; Tr. 4315-16), and, if an Assistant's work is not satisfactory they can be terminated immediately (EX 125A and C; Tr. 4319-20).

### **C. Assistants Perform Their Duties Under the NYU's Direction and Control**

It is undisputed in the record that NYU has ultimate authority to determine what work is assigned to Assistants and how that work will be done.

The evidence shows that NYU both assigns Assistants to their specific positions (see e.g., Tr. 1758, 2027, 2194) and trains them to perform their tasks in particular ways. See e.g., Tr. 1038, 1761, 1862-63, 2027-28, 2184. In addition, TAs are either provided with syllabi to use in their classes, or, when they write their own syllabi, these syllabi are subject to review and approval by the Employer. See e.g., 1759, 1884, 1926, 2943-44, 3970. Similarly, NYU either chooses or approves textbooks (see e.g., Tr. 1774, 1863, 1877, 2943-44, 4007), chooses or approves test questions (see e.g., Tr. 1864, 1926, 2662, 3970), and, at least in some cases, chooses the teaching method for TAs to use (see e.g., Tr. 1030-32, 2945-46). Further, the large number of

job descriptions in the record, many of them extremely detailed, make it clear that NYU defines the specific duties for which each Assistant will be responsible. See e.g., PX 42A-B; PX 50A-D; PX 53; PX 64; PX 70; PX 83-84; PX 85; PX 86A-N; EX 97A-F; EX 128A-E; EX 129; EX 130A-B.

As Dean Campbell testified, using one of the departments which she is responsible as an example: "it is the responsibility of the Chair of the Cinema Studies Department, along with his faculty who have selected TAs, to meet with them, and to define the responsibilities for the course, and the pedagogical techniques and goals of the course." Tr. 2945-46.

## **D. NYU Treats Assistants as Employees**

### **1. Assistants Receive Compensation For Their Services**

Assistants receive cash, tuition remission and discounts at the book store as compensation for performing services as Assistants. See, e.g., Tr. 63; EX18C, EX23B. The compensation, stated as a gross amount per semester, is paid in 17 bi-weekly pay checks. See, e.g., EX 18B; EX 23C; EX 35; EX 88B. The amount of cash each Assistant receives varies by department from a low of approximately \$6,500 for the academic year in the Met Center to a high of approximately \$20,000 a year in the hard sciences. PX 11A; Tr. 73, 204, 347, 445-46, 747.

The specific amount of cash paid by each department varies based on the resources available to that department (see e.g., Tr. 244), and on the basis of supply and demand. Specifically, determinations as to levels of compensation are informed by the competition between NYU and its competitors for the most qualified graduate students. Tr. 102, 168, 348-9. As Jess Benhabib, Interim Dean of FAS, explained:

Q: [W]ith respect to the stipend levels ... how is the stipend level set ...?

A: Stipend levels are set by the Deans after discussion about - after some budgetary discussions...We try to take into account some competitive elements into the decision...So the variance in level is -- within divisions depends on the quality -- academic quality of the department and market pressures, as well.

Q: When you say the market pressures what are you referring to?

A: Well, the market is the market for attracting graduate students. So that -- we certainly cannot set a stipend level that is half of Columbia's or we will not get students. So we have to sort of watch the standard stipend pay is across the country and try to adjust to it...

Tr. 246-47. This explanation was echoed by Dean Stimpson of GSAS.

Q: What factors did you consider as reasons why the stipend should be increased, and what factors did you look to try to decide what level to bring the stipend to?

A: [T]here were several. One was, what is the national norm. What is the national norm for this particular for this particular field. The second -- and this is related to the question of national

norm -- what does it take in a particular field to be competitive with our peer institutions. Third consideration is having listened to faculty and students, was that a larger stipend would be helpful to them.

Q: Among the most important [factors.]

A: -- were competitive factors, competitive with other similar institutions, and then the livelihood needs of the graduate students.

Tr. 537-38.

In addition to cash compensation, Assistants receive tuition remission for up to 18 credits per semester, and remission of their matriculation fees. EX16; Tr. 63, 105, 166, 460. Assistants also receive a 15% discount at the NYU book store. EX 169.

The cash which Assistants receive for their services is treated differently than the cash received by graduate students who are on scholarships or fellowships. Scholarship and/or fellowship payments, which have no associated work requirement, are processed through the Financial Aid Office, no payroll taxes are deducted and they are paid on a monthly basis. JTX 1.

Assistants must sign a document agreeing to comply with the "Conditions of Award," which sets forth requirements for their positions. EX 18E. Among these conditions is the requirement that Assistants perform services for NYU for up to 20 hours a week. Id. There is no similar condition for graduate students receiving scholarships or fellowships. Id.

## **2. NYU Processes Assistant Compensation As Payroll And Treats the Cash Paid to Assistants as Salaries/Wages**

Cash paid to Assistants is processed through NYU's payroll department. JTX 1 at 3. Cash paid to students receiving fellowships is processed through the General Accounting Office (id. at 4), and cash paid to students receiving scholarships is processed through the Employer's Financial Aid office (id.) Tr. 102. When graduate students accept assistantships, they are classified in codes 101, for Graduate/Teaching Assistants and 130/131 for Research Assistants. JTX 1 at 3. These codes appear on the Human Resource employment forms in the section identified at "Job Assignment Data." JTX 3 at 5, 8, 9. These codes are used in the academic appointment system and as payroll codes. Compare JTX 1 at 3 and Tr. 101, 285, PX 7N.

Students who work as Assistants receive paychecks from NYU's payroll department. JTX 1; EX 18E ¶13 . The money they receive is referred to variably as a salary, in Human Resource documents, or as a salary/stipend in assistantship offer letters. See, e.g., JTX 3 at 6; EX 23C; PX 7H, 7Q, 7W, 7CC; PX 10A. The salary/stipend is stated as a gross amount for the semester, and it is paid in bi-weekly paychecks. JTX 1. The bi-weekly amount is referred to as the pay rate. See, e.g., PX 7BB. When students accept assistantships, data is entered into NYU's Human Resources Information System on a form entitled "Employment - Primary." JTX 3 at 1, 5. Copies of this form are transmitted to the Office of Academic Appointments and the Payroll Department. Id. at 1. Thereafter, any changes in a student's assistantship are recorded on additional forms that are transmitted to the Office of Academic Appointments and the Payroll

Departments. *Id.* at 1, 2, 3, 6-9. When students accept assistantships they must fill out IRS W-4 and INS I-9 forms. JTX 1 at 5; PX 7D. These forms are not required for students receiving fellowships or scholarships. *Id.* The pay which Assistants receive is subject to employee payroll tax deductions as provided for by the Internal Revenue Code. JTX 1. As noted above, these payments are processed through the NYU payroll department, which processes payroll for conceded employees. Fellowships and scholarships are not subject to payroll taxes, and such money is not distributed through the payroll department.

In its own publications, NYU repeatedly refers to the cash payments made to Assistants as salaries, wages or payroll:

- In the NYU Faculty Handbook, payments to TAs are referred to as "Salary Payments." PX 1 at 59.
- The Psychology Department's letter informing Assistants of their appointments explains that their cash will be paid in "17 payroll checks." PX 10B.
- The Assistant reappointment form issued by the Comparative Literature Department refers to the Assistants' cash payments as "Base Salary." PX 7Q.
- TA Guidelines in the Anthropology Department refer to the cash Assistants receive as "Paychecks" and "Salary." PX 20 at 2.
- The Met Center refers to the cash paid to Assistants as "Paychecks." PX 67 at 9.
- At Stern, Assistants' cash is referred to as their "salary" (PX 81 at 2), and the letter offering research assistantships, identifies the cash payments associated with these positions as "research assistant wages." EX 125A-G.
- In describing its McCracken Fellowship program, NYU notes that in their three non-teaching years, students receive stipend checks. During the two years in which the students must perform as Assistants, however, they receive "paychecks." EX 17 at 5.
- The "Conditions of Award," to which all Assistants must agree, provides that Assistants receive paychecks from the payroll department, while students receiving fellowships/scholarships receive stipend checks from the financial aid office. EX 18E.

### **3. NYU Budgets Assistants' Cash Payments as Personnel Costs**

Joseph Juliano, the Executive Director of Administration for FAS, testified that there is a yearly budget for FAS, as well as for each department within the FAS. Tr. 4028. These departmental budgets have a section which allocates resources for personnel costs, identified on the budget form as "PS." Tr. 4031; PX 71A and B; PX 72. Personnel services includes the salaries and fringe benefits of conceded employees, e.g., faculty, office clerical staff. PX 71 A and B; PX 72. Also included under personnel services are the cash amounts paid to GAs, RAs and TAs. Tr. 4030- 4031; PX 71A and B; PX 72.

Amounts paid to students on scholarships and fellowships are not recorded as personnel costs in

these budgets. They are separately listed under "financial aid." Tr. 4032; PX 71A and B; PX 72. This dichotomy is illustrated in the treatment of McCracken awards. In the years that McCrackens are required to work as Assistants, the cash they receive is budgeted as a personnel cost, but in the non-teaching fellowship years it is budgeted as financial aid. Tr. 4031-4032.

Department chairs testified that the monies paid to Assistants are considered part of the personnel costs of operating their departments. The cash paid to students as fellowships and scholarships, however, is not considered part of departmental labor costs. See, e.g. Tr. 783-84.

#### **4. Assistants Are Covered by NYU's Workers Compensation Policy**

§ 10 of New York State's Workers' Compensation Law provides, in pertinent part, that:

Every employer subject to this chapter shall in accordance with this chapter ... secure compensation to his employees and pay or provide compensation for their disability ... in the course of the employment...

NYU covers its Assistants under its Workers Compensation Policy. Tr. 4923-24. On September 15, 1999, NYU distributed a memorandum to "All Employees," including all Assistants, notifying them of their workers' compensation coverage. PX 98.

#### **5. Assistants Are Subject to Discipline For Poor Performance**

Assistants who do not perform properly as Assistants are subject to traditional employee discipline. For instance, Dean Benhabib testified that TAs who perform poorly in classrooms can be removed from the classroom and reassigned to perform other services for NYU. Tr. 268, 312. Similarly, Professor Furmanski, the Chair of the Biology Department, testified that TAs who do not perform competently have been removed from their classrooms. Tr. 762. Dean Elton, of Stern, testified that Assistants who perform poorly not only can be removed from their positions but can lose their compensation. Tr. 4319-20; EX 125A and C.

NYU's ability to discipline Assistants is set forth in its own documents. For example, the Resource Book for the Metropolitan Center program states that:

Your continued appointment during each semester assumes satisfactory evaluation of your performance and attendance. Your stipend for the year depends on your attendance.

PX 67 at 5. The assistantship employment contract in Stern provides that "missed hours [of work] must be made up" (PX 89), and that the continuation of the assistantship "is contingent upon this work commitment." PX 90 at 1. Further, Stern RAs' cash payments are contingent on their performing "work assignments satisfactorily." Assistants who do not meet this requirement "may be terminated immediately." EX 125A-D. See also, EX 137 at 12; Tr. 4315-16, 4319-20.

An internal NYU memo advises faculty that MAP Assistants can only resign their positions for "good cause." EX 34 at 1. In addition Professor Chazan testified that he had the authority to remove a MAP Preceptor if they were not performing adequately. Tr. 926-30.

Hoy testified that he has the authority to replace teachers in EWP who are not doing their jobs.

Assistants removed from the classroom would not continue to receive compensation. Tr. 1021-24, 1063. Instructors (TAs) can also be "put on probation" if they seem unwilling to work on weaknesses in their teaching, as identified by their directors. EX 42A at 11. See also EX 11 at Appendix A and Tr. 202, 268, 279, 313 (the Department of Economics, in making assignments, considers a student's background and "expertise", and reserves the right to remove Assistants for non-performance, or on the basis of bad evaluations by faculty members).

## **6. NYU Trains Graduate Students to Perform As Assistants**

NYU expends considerable resources in training its graduate students to perform as Assistants. These training programs are neither required of, nor made available to, graduate students who are not Assistants.

Dean Stimpson testified that NYU has recently undertaken "an expanded TA educational development program." Tr. 478. The formal name of the program is the "Teaching Assistant Educational Development Program ["Program"]." EX 26- 27. The program is specifically designed to teach students how to be Assistants. EX 26 ("The training of teaching assistants has emerged, especially since the mid-1980s, as a persistent and pressing concern for universities across the United States."). The TA training program consists of University-wide training ("plenary session") involving discussions on "the problems of teaching ... [and] what it means to be a teaching assistant"(Tr 482), and specific departmental training, conducted by many departments, to introduce the Assistants to the specific issues relating to being a TA in that department. EX 27 at 2; Tr. 482.

To further assist the students who will be TAs, NYU supplies them with a TA handbook Tr. 25. NYU also runs an office called EQUAL which distributes a newsletter and provides assistance on teaching issues to both faculty members and TAs in order to "promote teaching effectiveness." EX 26 at 7; See also, Tr. 483, 541; EX 24 at 43-44; PX 3; EX 28. In addition, NYU provides support services to TAs, holding workshops and TA "rap groups" throughout the year. Tr. 484. International students who are TAs are required to attend the International Teaching Assistant Training Program. EX 23B; Tr. 482-83.

TAs in EWP are required to attend a separate training sessions. EX 42A-C. Hoy, the EWP director, testified that the mandatory training was quite extensive. Tr. 975. Students are required to attend six (6) training workshops for which they receive \$500, in addition to the compensation paid for teaching. Tr. 976, 979. EWP TAs are also given TA handbooks specifically tailored to their program. EX 42A-C.

Indeed, most departments mandate that graduate students who accept assistantships participate in TA training programs. PX 10B (Psychology); PX 57A (Interactive Telecommunications Program); PX 77 (Physics); PX 10-11 (Economics); EX 118 (Stern); EX 113 (foreign language workshop); EX 109, 109A, 110 (Metro Center); EX 108A-B (Education).

As explained by Prof. Sokal, in connection with his own department, the TA training is geared specifically to instructing someone in how to be a TA, not how to be a professor.

The primary motivation of the course was to teach them to how to teach physics, in particular

how to teach the things that they would need to teach as teaching assistants in the big undergraduate physics course.

Tr. 4164. He testified that the curriculum for the training program is specifically geared to the topics Assistants would be teaching as TAs. Tr. 4179. The program does not focus on developing a curriculum because syllabus development, though a critical skill for faculty members, is not important to the duties of a TA in the Physics Department. Tr. 4225. The "primary purpose of the course was to prepare our future TAs to be TAs." Tr. 4225.

## **7. NYU Refers to the Assistantship Relationship as Employment**

Documents promulgated and utilized by NYU establish that it recognizes an employment relationship with its Assistants. When graduate students accept an assistantship, that fact is entered into a document maintained in NYU's Human Resources and Payroll Departments which expressly uses the word "Employment" to describe the relationship. JTX 3 at 1, 5. Similarly, when an Assistant is offered continued employment, these same departments record that fact on a reappointment form which identifies the Assistant as an "Employee" and records certain "Job Information." *Id.* at 1, 6. Assistants also must complete an IRS W-4 form which identifies them as an "Employee" and NYU as their "Employer." PX 7D at 1; JTX 1 at 5. The Assistant must fill out an INS I-9 form which identifies the Assistant as an "Employee." PX 7D at 2; JTX 1 at 5.

The letter which informs graduate students at Stern that they are being offered research assistantships refers to their "employment as a Research Assistant." PX 79 at 1. When a Stern student accepts "employment as a Research Assistant," he/she must complete a "New Hire Information" form. PX 80.

NYU puts Assistants on notice that the money they receive is "contingent upon working" as an Assistant for NYU. PX 88. To be an Assistant, students must meet the departments "criteria for hiring." *Id.* In Stern, Assistants must actually execute a contract whereby they accept the "terms and conditions" of the job, including hours of work required per week, and the requirement to make up missed hours. PX 89. This document states that the students are "employed as Teaching Fellows or Graduate Assistants." *Id.* Indeed, internal departmental memoranda specifically refer to Assistants' "work obligations" and the "hiring process" for Assistants. PX 90 and 91. The Basic Information section of the Stern website advises Assistants that they receive tuition remission "for the semester employed." PX 92 at 3.

In the School of Education, students applying for an assistantship position must fill out an application that asks them to list information about previous employment, and that their employment histories should include prior assistantships. PX 68; PX 94A-C. Mark Dunetz, a former GA in the Metro Center, testified that after filing out the application he had to participate in an interview in which he was questioned extensively on his prior employment. Tr. 4788.

## **E. Assistantships Are Not Directly Related to the Educational Programs of the Students Who Serve in These Positions**

## **1. The Overwhelming Majority of NYU Departments and Programs Have no Requirement that Graduate Students Serve as Assistants**

NYU is comprised of 13 schools with over 100 departments, many of which grant more than one degree. EX 2; Tr. 47-50. No department or program requires students to serve as a GA or an RA in order to obtain a graduate degree. Similarly, the overwhelming majority of these departments do not require students to serve as TAs. EX 3A-Q; Tr. 269-270, 496, 1096, 1218, 1428, 1456-57, 1762, 1859, 2025, 2181, 2419, 2633, 2647, 2975, 3153, 3257, 3509, 3873, 4102, 4316-18, 4320-21, 4350-51, 4556, 4651, 4747, 4796, 4862, 4910-11, 5055.

Of all of the departments at NYU, only three, Psychology, Physics and Neural Science, require graduate students to serve as TAs. In Psychology, which only began, as a department, to require teaching in the Fall 1999 (Tr. 1655-56), the record establishes that all graduate Ph.D. students are fully funded (Tr. 1511, 1645), that most served as TAs even before teaching was required as a condition of their funding, and that, therefore, the new requirement has little actual practical significance. Tr. 1665. While the new policy requires students to teach for just three semesters (Tr. 1517), the record establishes that many teach for eight or more semesters before graduating. Tr. 1579-81, 1652. Further, it is beyond dispute that the TAs in Psychology provide a service to NYU for which they are compensated. Psychology, which has a huge undergraduate program, has a dire need to staff its large introductory classes with TAs. Tr. 1529-30, 1685-86. Requiring graduate students to teach is clearly a way of meeting this need.

The Physics and Neural Science Departments also guarantee full funding to all entering doctoral candidates, and serving as a TA is generally part of the package. Tr. 346-47, 357, 2735, 2737-38. As with the Psychology Department, these departments require the services of TAs in order to meet their undergraduate teaching needs. Tr. 383, 385-86, 2747, 2821, 4211. These departments also mirror Psychology in the fact that it is common for students in to serve as TAs for a number of semesters exceeding each department's nominal requirements. Tr. 5412.

## **2. The Evidence Establishes That Assistantships Are Not Related to Graduate Students' Academic Programs**

While there is no dispute that many Assistants learn from their experiences on the job, the evidence shows that these experiences are not directly related to their academic programs. Further, while NYU may argue that these experiences prepare Assistants for future careers, as do many work experiences, the record shows that this is often not the case. In addition, while teaching for one or two semesters may be helpful for students seeking to become professors, teaching for additional semesters is of marginal benefit at best. See e.g., Tr. 1982, 3285-86, 4088. Nonetheless, a TA may be assigned to teach the same course repeatedly. Tr. 755, 1038, 1678, 4840.

### **(a) TAs Often Teach Outside of Their Areas of Academic Concentration**

While NYU generally tries to place TAs in courses in which they are familiar with the content to be taught, see supra, Fact Section B(7), in many cases NYU assigns TAs to teach, or perform other services, outside of their areas of interest and/or expertise. See e.g., PX 9 and Tr. 1395,



1403-04 (Professor Seigal acknowledging that some TAs need to be placed outside their areas of expertise and stating that he regrets this fact); Tr. 807; Tr. 959 (Professor Hoy testifying that EWP TAs come from throughout the University); Tr. 1086-87 (Professor Walkowitz testifying that the placement of TAs in the History Department rarely matches their areas of specialization); Tr. 1202, 1237, 1267; Tr. 1340-41, 1418 (Professor Seigal testifying that his department is not always able to place TAs in classes which match their academic or intellectual interests); Tr. 2042; Tr. 2185-86; Tr. 2420, 2423 (Ms. Krupat testifying that the chair of her department encouraged her to seek assistantships in EWP and MAP for financial reasons, and that she found positions through a process of "scrounging up a job from term to term and year to year."); Tr. 2934 (Dean Campbell acknowledging that further progress is needed in making positions relevant to a student's training); Tr. 3369 (Professor Miller testifying that he would like assistantships in Cinema Studies to have more educational content, but that the department's priorities are "getting the labor performed that [they] need to deliver [their] teaching.").

GAs in the Cinema Studies Department are allocated to professors on the basis of seniority, not by matching them to professors doing work which is relevant to their programs. See Tr. 3258, 3324-25. Thus, junior faculty are assigned whatever GAs remain after the selections of the senior faculty, whether or not that GA's interests and background coincide with the work being done by the professor to whom they are assigned. Id.

### **(b) Assistants Teach Courses, and Perform other Duties, Involving Skills and Content With Which They Are Already Fully Versed**

Some students hired as TAs already have extensive experience teaching at the college level. See Tr. 2411-13, 2457, 2495-97, 4133-34. Similarly, in most cases, TAs assigned to teach foreign languages are fluent (Tr. 1747, 1862) or even native speakers (Tr. 1756, 3563) of the language they are teaching. Most of the TAs who testified stated that they were already familiar with the content they were called upon to teach. See e.g., Tr. 678, 1539, 1779-80, 1862, 3282-83, 3348, 3365, 4866. In addition, to the extent that they were exposed to new material, this material was not applicable either to their own graduate course work (Tr. 1171, 1774-76, 1781, 2036-37, 2193, 2195, 2197, 2366, 2660, 3265, 3302, 3600-01) or to their dissertations (Tr. 534, 2036-37, 2193, 2195, 2197, 2653, 2657-58, 2660, 4876-77). Furthermore, in many cases the placement preferences of Assistants were not even solicited. Tr. 2026-27, 2184, 2194, 2196, 2332.

NYU elicited testimony that even students who are already familiar with the content of a course they are teaching will learn that content in a deeper manner when they teach it to others. However, this was also uniformly true for faculty members who testified about their experiences. See Tr. 215 (Benhabib); Tr. 453 (Stimpson testifying that "I am still surprised by how much I learn every time I walk into a class"); Tr. 658, 685, 698-701 (Furmanski); Tr. 1047, 1055 (Hoy); Tr. 1119 (Walkowitz); Tr. 1440-41, 1468-79 (Seigal); Tr. 3521, 3557-58, 3561 (Bishop); Tr. 4178, 4235 (Sokal); Tr. 4306-07, 4351-52 (Elton); Tr. 4496 (Marcus); Tr. 4739, 4765-66 (Wachtel stating that he still learns even after 27 years as a professor); Tr. 5442, 5453 (Rust, stating that she wishes that she had the time to be a Metro Center tutor because the experience would be valuable to her).

Many graduate students hired as Assistants already have extensive skills applicable to the duties that they are required to perform. See e.g., EX 140 at 14; PX 51; Tr. 3155, 5453. See also Fact Section B(7), supra. Thus, it is not surprising that there was extensive testimony from Assistants that they were already familiar with the skills which were required of them in their capacity as Assistants. Tr. 1203, 1256, 2201, 2313, 2327.

### **(c) Most TAs Are Neither Observed Nor Evaluated by Faculty Members**

Most TAs are never observed teaching by a professor during a given semester. Tr. 1882, 2041, 2186, 2195-96, 2334, 2428, 2440-42, 3478. See also Tr. 869 (Professor Chazan testifying that in MAP it is up to professor whether or not to observe her Assistant). Therefore, it is perhaps not surprising that TAs rarely receive written evaluations of their performance from the professors they work with. See Tr. 871-72 (there is no procedure in MAP for faculty evaluations), 1216, 1282, 1865, 1870-71, 1874, 2035, 2041, 2186, 2195-96, 2334, 2428-29, 2441-42, 2651, 2657, 2660, 2663, 3475, 4229 (the Physics Department does not require professors to write evaluations of TAs), 4359- 60, 4657 (no policy in Applied Psychology requires evaluations), 4793.

### **(d) The Training Given to Assistants is Job-Related not Career Related**

While the training provided to Assistants may teach useful skills, the evidence shows that its primary function is to prepare them to be competent employees. See EX 10 (stating that it is because "[i]nstruction is taken very seriously in the [Economics] Department and TAs are an essential part of that instruction [that] it is very important that [TAs] attend the Department's training sessions"); EX 41 (referring to EWP's training program as "staff development"); PX 6 (memo from the Assistant Director of MAP stating that "there are obvious moral practical/pedagogical arguments for training graduate students for the work they are appointed to do"); Tr. 2028; Tr. 2602 (EWP Mentor testifying that EWP's training program is designed to improve ability of TAs to teach in the program); Tr. 3275, 3341 (Professor Miller testifying that TA training in Cinema Studies is done by the DUGS because he is the one familiar with the undergraduate curriculum which they will be teaching); Tr. 4200, 4225 (Professor Sokal testifying that the Physics Department Teaching Practicum is designed to prepare students for the kind of teaching they will do as TAs not the kind of teaching they may subsequently do as professors); Tr. 4305-06 (Dean Elton testifying that he must prepare Stern TAs to teach undergraduate classes, and that if he fails to do so, the Undergraduate Dean may take these assistantship opportunities away); Tr. 4352.

### **(e) Many Assistants Perform Routine Clerical and Administrative Duties**

There is also extensive evidence on the record, detailed above, that many of the duties performed by Assistants (e.g., photocopying, typing, putting books on reserve, arranging catering for events), are routine clerical and administrative tasks that, despite Dean Stimpson's testimony that administrative work can be part of a student's educational experience (Tr. 793), cannot fairly be considered to be part of a doctoral education. See e.g., Tr. 2933-34 (The Dean of Tisch admitting that some positions primarily involve working in administrative offices and

acknowledging that further progress is needed in making positions relevant to a student's educational training); Tr. 3163 (Professor Hilferty acknowledging that some of the tasks required of GAs, taken alone, have no connection to training students in the Design Department); Tr. 3336-37 (Professor Miller testifying that when he asked his RA whether she had gotten anything out of her assistantship experience she responded that it involved too much photocopying).

#### **(f) Assistantships Interfere With Graduate Students' Academic Programs**

Students who accept assistantships must perform their work duties in addition to all of the normal requirements of their academic programs. It is not contested that graduate students are not given academic credit for serving as Assistants.

Despite the fact that Assistants may learn from their experience working for NYU, there is evidence in the record that serving as an Assistant, far from contributing to a student's academic progress, interferes with it. See EX 20 at 22 ("Somewhere in the vicinity of half of all Ph.D. candidates are supported only on assistantships and never have the relative luxury of being able to devote full time to their studies and research") (emphasis added); PX51 and Tr. 3001 (showing that until this academic year Dramatic Writing Department students who chose to serve as GAs were expected to take three years, rather than the normal two years, to complete the program; Tr. 1224; Tr. 1289; Tr. 1459 ("[T]here is a sense in which being a teaching assistant interferes with a student's work . . ."); Tr. 1778; Tr. 1885; Tr. 2035; Tr. 2040-41 (Cattelino testifying that the Chair of her department advised her not to take a full course load the semester that she served as a TA for MAP because of the demands on her time that being a MAP TA would entail); Tr. 2334 (Williams testifying that his advisor suggested that he reduce his course load while he was serving as a TA in MAP); Tr. 2569 (Stewart testifying that serving as a TA interfered with his academic progress).

#### **(g) Graduate Students Generally Accept Assistantships Because They Need the Money**

Finally, many Assistants testified that they chose to teach, or otherwise serve as Assistants, even though it was not a degree requirement, not because they thought that it was a valuable educationally, but because they needed the money in order to live while they completed their degrees. See e.g., PX 94; Tr. 1212, 1762, 1819, 1825, 1885, 1963, 1970-71, 1982, 2435, 3580.

There is also evidence that many departments and faculty members, apparently understanding the fact that students need assistantships for financial reasons, are more concerned with finding placements for their students than insuring that such placements are relevant to the students' academic interests. See PX 10C (Psychology Department memo warning students that if they do not consider departmental needs in indicating TA placement preferences they will increase the chances of getting a placement outside of their area); Tr. 1085 (Professor Walkowitz testifying that the History Department tries to place students outside of the department in order to maximize resources); Tr. 1283, 1300; Tr. 2554-55, 2615-17, 2625, 2630 (Stewart testifying that the Performance Studies Department asks students applying for financial aid to apply for TA positions in EWP, and that once he began serving as an EWP TA his department would not consider him for a departmental assistantship).

## **F. Students Classified as Assistants in the Sackler Institute of Graduate Biomedical Sciences Perform No Services for NYU**

The Sackler Institute of Graduate Biomedical Sciences ("Sackler") offers PhD and MD/Ph.D. programs in biomedical sciences. Tr. 3696-97; EX 3E. Currently, there are approximately 140 Phd students and 80 joint Phd/MD students at Sackler. Tr. 3695. There are seven departments in Sackler (EX3E), all of which are departments of the Medical School (Tr. 3749).

All students admitted to Sackler are classified as GAs for their entire tenure. Tr. 3723. The classification is automatic, students do not apply for or request assistantships. Tr. 5345. In a 1978 memo creating the Sackler GA position, the former Dean explained that the title would be used, at that time, for Sackler students "who participate in departmental teaching and/or research." PX 110. However, this is no longer the case. Currently, no Sackler student teaches, nor has any Sackler GA taught during Dean Oppenheim's five year tenure. Tr. 5647.

Sackler students also are not expected to perform departmental research apart from their own doctoral research. Tr. 3727, 3735, 5593. Sackler GAs have no duties, tasks or responsibilities other than meeting the academic requirements of their program. Tr. 5347, 5351. Oppenheim explained that a first year GA is only required to complete her course work. Tr. 5348. In the second through sixth years a Sackler GA is only required to work on her dissertation research. Tr. 5350. Oppenheim conceded that being a GA at Sackler was co-extensive with being a student. Tr. 5334.

Q: In those circumstances where a Sackler student is supported by a faculty research grant, their contribution to the grant is what?

A: To carry out the research that's discussed in the grant and that is part of their dissertation project.

Q: And is there any difference between what they contribute to the grant and their own research?

A: No.

Tr. 3760.

Q: Professor, am I correct that the research which a graduate assistant, what is called a graduate assistant in Sackler, is performing in the laboratory, is the research towards their own dissertation?

A: That's correct.

Tr. 3761.

Q: In terms of the services and work that's performed, the graduate assistant is performing their dissertation research. Is that correct?

A: Correct.

Tr. 5640-41.

Q: You have previously testified that their duties in year two through five are to do their research dissertation, is that right, research for their dissertation?

A: Dissertation research, correct.

Q: Do they have any duties and tasks other than doing their dissertation research?

A: No, they are doing their dissertation research.

Tr. 5593.

Precisely because Sackler GAs have no duties independent of their studies, Oppenheim repeatedly testified that he did not know why Sackler students were classified as GAs. Tr. 5353. Moreover, Oppenheim could not identify any document which is sent from his office to Sackler students which identifies these students as GAs (Tr. 5339, 5344), or which describes the cash they receive as a stipend associated with assistantships (Tr. 5366). The portions of the forms which the students sign for their financial support do not contain the job title of GA. See PX 150 A-B.

### **G. Biology RAs Perform No Services For NYU**

A Biology RA carries out research directly related to the completion of their dissertation and has no other responsibilities. Tr. 5157, 5166-68, 5177.

There are five (5) RAs in the Biology Department. "The research that they do that is related to the grant is entirely coincident with their research that they are doing for their dissertation." Tr. 649. This research would "necessarily" go towards the student's Phd Tr. 649. The student's purpose in working on the grant "is to develop their research project which is going to become part or entirely their dissertation, and for which they will receive credit and will be part of their training and their development as a scientist. So the two are completely coincident in that regard." Tr. 649. Students supported by training grants also "perform research in relation to the development of their doctoral dissertation." Tr. 657. Students supported on training grants have no specific responsibilities associated with receiving this support. Tr. 657. This is reflected in the fact that the letters informing them of funding, unlike those given to TAs, do not list associated duties Tr. 756-57; EX5.

[The] way that the University categorizes and catalogues individuals in various positions is based on a system that is somewhat different than what we use in the Biology department. A Research Assistant, as we understand it, is simply a student who is in every way, the same as all of the other doctoral students who are within the department, pursuing their Phd, but happen to receive the bulk of their stipend and tuition remission from a grant, rather than from other sources of support.

Tr. 730.

## H. Physics RAs Do Not Perform Services For NYU

There are five (5) RAs in the Physics Department. Tr. 2755-2790. Prof. Ferrar, the Chair of the Department (Tr. 2729), testified that the RAs work on their dissertations so that their responsibilities are "coincident" with being students. Tr. 2785-2790.

Normally, a student identifies what area they want to work on and identifies then a thesis adviser. And then it's really just a matter of whether that adviser has the support through their grants to be able to provide the stipend. What the student does is identical in the two cases. Whether they are supported or not supported.

Tr. 2763. See also Tr. 2785 (Blyakham's RA responsibilities are coincident with his own thesis research. There is no difference); Tr. 2787-88 (RA Yun has no responsibilities other than his dissertation research); Tr. 2790 (RA Fleysler has no responsibilities other than his research dissertation).

Ferrar's testimony was corroborated by Sokal, an eleven (11) year professor of Physics, who testified that during his tenure students have been classified as RAs when they were funded from professors' grants which provided RA lines, but that the only task assigned to students with this classification is to perform their own dissertation research. Tr. 4090-91, 4144.

[A]t least in our department, in my experience, the title of Research Assistantship is a misnomer, that it's simply a way of financing graduate students with funds from outside agencies that supplement the other sources of funds in the department.

Tr. 4192.

But certainly the main thing RA-ships are used for is simply financing students in the last years of their graduate studies. It's just one of many ways of financing them, to do their dissertation.

Tr. 4193.

I have no knowledge of how NSF or NIH or any other grants are administered in other departments, and whether RAs are used as in our department, primarily as just a way of paying them while they're finishing their own dissertation, or whether in other departments they're used to actually provide services to the faculty.

Tr. 4223.

## I. CNS RAs Do Not Perform Services for NYU

During the Spring 1999 semester there were 8 RAs in CNS. Tr. 367. The research performed by these RAs is the same as their dissertation research. Tr. 370, 372-74. Students are classified as RAs not because of the nature of their work, but because their dissertation research happens to be covered by an outside grant. Tr. 367, 372.

## Argument

The task of determining whether the NYU Assistants are employees within the meaning of the Act must begin, as the Board indicated in Boston Medical Center Corp. ("Boston Medical"), 330 NLRB No.30 (1999), with an analysis of whether the Assistants are employees under the common law test, as the Regional Director determined. If the Board determines that the Regional Director erred in finding that the Assistants meet the common law test for employee status, the Board will not have to address the question of whether the Assistants should be excluded from the protections of the Act on public policy grounds.

As we show below, the Regional Director was correct, and followed long-established Board and court precedents, both in finding that the common law test was the proper method for determining employee status under the Act, and in applying this test to determine that the Assistants are employees within the common law meaning of that term.

### **I. THE REGIONAL DIRECTOR WAS CORRECT TO USE THE COMMON LAW TEST TO DETERMINE WHETHER THE ASSISTANTS ARE EMPLOYEES WITHIN THE MEANING OF THE ACT**

Contrary to NYU's assertion that the Decision in this case is "unprecedented" (Request at 1), the Regional Director did no more than to apply the long-accepted common law test for determining employee status. In so doing, the Regional Director relied on a long line of Supreme Court and NLRB precedents. Decision at 21-23.

Just last year, in Boston Medical, a case, which like this one, involved students employed by the educational institution which they attended as students, the Board reiterated its position that employee status under the Act should be determined by applying the common law test. It is also notable that in one case, decided before Boston Medical, the Board determined that a graduate student paid as a Research Assistant and tutor was an employee for purposes of §8(b)(1)(A) enforcement. See Massachusetts Institute of Technology (SEIU Local 254) ("Massachusetts Institute of Technology"), 218 N.L.R.B. 1399 (1975), enfd, 535 F.2d 1335 (1<sup>st</sup> Cir. 1976).

The rule of law articulated in Boston Medical governs the present dispute. If the Regional Director was correct in finding that Assistants are employees under the common law test, a finding which is overwhelmingly supported in the record, then the Decision below should be affirmed. The fact that the Assistants are students attending the institutions for which they also serve as employees, is simply of no moment. As stated by the Board, addressing the employee status of medical interns and residents, the advanced training in the specialty the individual receives is not inconsistent with employee status, but rather

complements, indeed enhances, the considerable services the Hospital receives from the house staff, and for which house staff are compensated. That they also obtain educational benefits from their employment does not detract from this fact. Their status as students is not mutually exclusive of a finding that they are employees. . . .

Nor does the fact that interns, residents and fellows are continually acquiring new skills negate

their status as employees. Members of all professions continue to learn throughout their careers . . . [P]lainly, many employees engage in long-term programs designed to impart and improve skills and knowledge. Such employees are still employees, regardless of other intended benefits and consequences of these programs.

Id. at 10. Cedars-Sinai at 256 (dissent).

At common law, employee status evolved out of the master/servant relationship. As the Board explained in Boston Medical, "[a]t common law, a servant was one who performed services for another and was subject to the other's control or right of control. Consideration, i.e., payment, is strongly indicative of employee status." Boston Medical at 9 (citations omitted). As explained by Board member Fanning in his dissent in Cedars-Sinai, found by the Boston Medical Board to be persuasive (Boston Medical at 12):

The term 'employee' is the outgrowth of the common law concept of the 'servant.' At common law, a servant was a 'person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right of control. . . . [T]he conventional meaning of the word implies someone who works or performs a service for another from whom he or she receives compensation.

Cedars-Sinai at 254-55.

The rule of law articulated in Boston Medical is consistent with the plain language of the Act, its legislative history, and Supreme Court cases interpreting the scope of the Act's coverage. Under the NLRA:

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise. . . . but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act .

29 U.S.C. § 152(3) (emphasis added).

As recognized by the Board in Boston Medical, this statutory language is extremely broad. "The phrasing of the Act seems to reiterate the breadth of the ordinary dictionary definition, for it says "[t]he term 'employee' shall include *any* employee." 29 U.S.C. §152(3)" Boston Medical at 9 (citing Town & Country).

In Town & Country, for example, the Supreme Court applied the common law test to determine that a worker may be a company's employee, within the meaning of the NLRA, even if, at the same time, a union pays that worker to help the union organize the company. In defining "employee" under the Act the Court looked both to the dictionary definition of "employee" and the legislative history of the Act. Reviewing the legislative history of the Act, the Court concluded:



[T]he Board's broad, literal interpretation of the word "employee" is consistent with several of the Act's purposes, such as protecting "the right of employees to organize for mutual aid without employer interference," . . . and "encouraging and protecting the collective- bargaining process." . . . And, insofar as one can infer purpose from congressional reports and floor statements, those sources too are consistent with the Board's broad interpretation of the word. It is fairly easy to find statements to the effect that an "employee" simply "means someone who works for another for hire," H.R. Rep. No. 245, 80<sup>th</sup> Cong., 1<sup>st</sup> Sess., 18 (1947), and includes "every man on a payroll." 79 Cong. Rec. 9686 (1935) (colloquy between Reps. Taylor and Connery). . . . At the same time, contrary statements, suggesting a narrow or qualified view of the word, are scarce or nonexistent - except, of course, those made in respect to the specific (here inapplicable) exclusions written into the statute.

Town & Country, (some citations omitted); Also cited in Boston Medical at 9.

The Supreme Court has repeatedly instructed that the common law test turns on an evaluation of four primary factors: (1) are the putative employees performing services which are part of employer's normal operations, (2) are the services performed under the employer's direction and control, (3) are the putative employees compensated for their services, and (4) do the putative employees have a substantial interest in wages, hours and working conditions? NLRB v Town & Country ("Town & Country"), 516 U.S. 85 (1995).

The Court's position in Town & Country is consistent with numerous other decisions in which the Court has read the Act's coverage broadly. See Sure-Tan, Inc. v. NLRB ("Sure-Tan"), 467 U.S. 883, 891 (1984) ("[The] breadth of § 2(3)'s definition is striking: the Act squarely applies to 'any employee'"). See also Phelps Dodge Corp. v. NLRB ("Phelps Dodge"), 313 U.S. 177, 185- 86 (1941) (job applicants are employees); NLRB v. Hendricks County Rural Elec. Membership Corp. ("Hendricks County"), 454 U.S. 170, 189-90 (1981) (certain confidential employees found to be covered under the Act).

As held by the Board in Boston Medical, there is nothing in the language of the Act, or in its legislative history, that suggests that individuals who meet the common law test of employee status, and who are not explicitly excluded from coverage of the Act, should be denied the protections of the Act based on the fact that they are employed by the educational institution at which they are also students. This position was articulated clearly by Fanning, in his Cedars-Sinai dissent, embraced by the Board majority in Boston Medical:

[T]he issue in these cases is not how to exploit semantic distinctions between the terms 'students' and "employees." One does not, necessarily, exclude the other and, indeed, this Board has included 'students' in bargaining units in numerous cases and has authorized elections in which the voting group was composed *exclusively* of 'students.' The touchstone has always been whether the 'students' were *also* employees.

Since the statutory exclusions do not mention and the policy underlying the nonstatutory exclusions does not reach 'students,' the relationship between 'student' and 'employee' cannot be said to be mutually exclusive. The fundamental question then is *always* whether the individual before us, be that individual 'primarily a carpenter' or 'primarily a student,' is,

*nevertheless*, an ‘employee’ under the Act.

Cedars-Sinai at 254 (emphasis in the original).

Students can only be excluded from the protections of the Act, as they were in Leland Stanford Junior University ("Leland Stanford"), 214 NLRB 621 (1974), where they do not meet the common law definition of employee, or are otherwise explicitly excluded by the Act. As explained by Fanning:

We do not exclude students from coverage because they are students (even less the case where they are ‘primarily students’). In certain cases, they will be excluded because, as students, *they do not work or perform a service for* an employer. In other cases, they will be excluded *from the unit* found appropriate because, as students, their interests may not be aligned with those of *other* employees. There is, on the other hand, simply no basis either in the Act or in our precedents for concluding that under any circumstances students and employees are antithetical entities.

Cedars-Sinai at 255 n14 (emphasis in original).

Thus, if the Decision was correct in concluding that the NYU Assistants perform services for NYU under its direction and control (or right of direction and control), for which they are compensated, and that they have a sufficient interest in the terms and conditions of their employment, then the Board must sustain the finding that they are employees within the meaning of the Act entitled to vote in a representation election.

## **II. THE REGIONAL DIRECTOR CORRECTLY FOUND THAT THE ASSISTANTS ARE EMPLOYEES UNDER THE COMMON LAW TEST**

The Regional Director found that the NYU Assistants perform services for the University for which they receive compensation (Decision at 4-5, 26), that these services are provided under the direction and control of NYU (*id.* at 14-15, 26), that the Assistants’ period of employment is substantial (*id.* at 29 n.43), and that they, therefore, clearly fall within the common law definition of employee (*id.* at 26). The record, as summarized in the Fact Section above, provides overwhelming support for these findings.

### **A. The Record Demonstrates That Assistants Perform Services for NYU, Under its Direction and Control, and for Which They Are Compensated. Therefore, the Assistants Are Employees under the Common Law Test Who Are Entitled to the Protections of the Act**

As detailed above at Fact Section B, *supra*, the NYU Assistants are all required to perform services for NYU in return for the compensation which they receive. The services which they perform are varied but include, *inter alia*: the teaching of approximately half of all undergraduate classes in the College of Arts and Sciences, including 82% of the classes that comprise the core curriculum; the provision of advisement services to large numbers of undergraduate students; the coordination and supervision of field placements; the provision of research support to NYU

faculty members; the provision of technical and other production services to the various departments and programs that comprise the Tisch School of the Arts, and; the provision of, often critical, support services to a host of administrative offices.

The record is replete with statements made by NYU witnesses, and included in NYU documents, acknowledging the importance to the University of the services provided by the Assistants. NYU also implicitly recognizes the importance of the work being performed by Assistants by seeking students to fill these positions who possess skills that will allow them to perform their assigned duties competently. See Fact Section B(6), supra. There is ample evidence that NYU looks beyond academic performance in deciding, both which students to hire, and where to place the students who are hired. While NYU argues that teaching assistantships are primarily designed to provide graduate students with the teaching experience they need to prepare them for future academic careers, this claim, to the extent that the Board considers it relevant, is belied by evidence that many departments explicitly seek to hire students with previous teaching experience. Further, to the extent that NYU does consider academic performance, this should be viewed as but one more qualification. When NYU argues that Assistants are chosen on the basis of academic excellence, rather than qualifications, it is creating a false distinction. As NYU's own witnesses admit, undergraduates are most likely to benefit from contact with the best graduate students. See e.g., Tr. 1376. Also, the considerable resources expended in training is directed at making students proficient as Assistants, and not as future teachers. See Fact Sections D(6) and E(2)(d), supra.

NYU has also argued that the experience of being an Assistant, while rarely required, is nonetheless an integral part of the overall graduate educational experience at the University. However, under the common law test, the question of how related the experience of serving as an Assistant is to the education of the students serving in these positions, is legally irrelevant to the question of whether the Assistants are employees. The fact that there may be an educational component to some positions, or that an employee may learn new skills on the job, is not a basis for excluding that employee from the protections of the Act. See, Boston Medical, 330 NLRB No. 30 at 10. See also UTD Corp., 165 NLRB 346 (1967); General Electric Co., 131 NLRB 100 (1961). See also Newport News Shipbuilding and Dry Dock Co., 57 NLRB 1053 (1944) (apprentices are employees under the Act).

Even if it can be established that most Assistants learn something through their service to NYU, or that their service helps to prepare them for future careers, this does not mean that the Assistants are not employees. The fact that a job may help to prepare an employee for future occupational advancement, or may result in positive recommendations from supervisors when the work is performed well, does not prove that it is not a job. Previous experience, and the development of relationships in a work setting, are often valuable in the search for employment, particularly in markets as tight as the academic job market.

Nonetheless, to the extent that the Board considers it relevant, an extensive record has been developed on the issue of relatedness. This record, as summarized in Fact Section E(2), supra, shows that the experience of serving as an Assistant varies enormously from Assistant to Assistant, as does the degree of relatedness between each student's assistantship experience and their graduate academic experience. In general, however, the degree of relatedness is minimal.

Further, the record shows that NYU has treated the assistantship experience in a manner inconsistent with its claimed view that assistantships exist, primarily, to serve the educational needs of graduate students. Thus, for example, the record reveals that TAs are often not observed or evaluated by faculty members (Fact Section E(2)(c), supra), that students are often placed in assignments outside of their areas of interest and expertise (Fact Section E(2)(a), supra), and that Assistants rarely learn new skills that are applicable to their academic work from their assistantships (Fact Section E(2)(b), supra).

Neither does the fact that NYU trains some of its Assistants help its case. The record establishes that the training which is provided is job training designed to increase the competence with which Assistants perform their assigned tasks. See Fact Section E(2)(d), supra. Certainly, the fact that an employer provides relevant job training does not mean that the recipients of this training are not employees under the Act.

It is undisputed that the services performed by the Assistants are performed under the direction and control of NYU. See Fact Section C, supra. Insofar as NYU argues that Assistants are students participating in directed learning activities, it implicitly acknowledges that they perform the tasks assigned to them under the direction and control of the University. In addition, the record establishes that, while the degree and nature of control may vary from Assistant to Assistant, NYU has ultimate authority over the work that is assigned to Assistants, and how that work is performed. NYU chooses the Assistants from among the applicants for these positions, assigns them to particular classes and positions, maintains the right to decide how the work will be performed, and reserves the right to terminate Assistants who do not perform adequately, or to not renew their appointments. NYU also promulgates detailed job descriptions detailing assistantship duties.

Finally, Assistants are compensated with a salary, referred to by NYU as a stipend, and tuition remission, for performing these services. See Fact Section D, supra. Students must perform the services which they are assigned in order to be compensated. Further, the Assistants are covered by the Employer's workers' compensation policy, and their wages are subject to employee payroll deductions.

Thus, there is abundant evidence to support the Regional Director's finding that the NYU Assistants meet the common law test of employee status. Insofar as students, who are also employees, are not explicitly excluded from the coverage of the Act, the Assistants should be afforded the Act's protections unless it can be established that some public policy basis exists for granting them this protection.

## **B. Assistants Have a Substantial Interest in the Terms and Conditions of Their Employment**

Under established Board law the determination of whether student or other part-time employees are entitled to collective-bargaining representation depends upon whether the nature of their employment gives them a sufficient interest in wages, hours, and other working conditions to justify such representation. The sufficiency of this interest will ordinarily turn on such factors as continuity of employment, regularity of work, the relationship of the work performed to the

needs of the employer, and the substantiality of their hours of work. Hearst Corporation, San Antonio Light Division, 221 NLRB 324 (1975); Crest Wine and Spirits, Ltd., 168 NLRB 754 (1967); Six Flags Over Georgia, Inc., 215 NLRB 809 (1974); Farmers Insurance Group, et al., 143 NLRB 240 (1963); Delight Bakery, Inc., 145 NLRB 893 (1964); Sandy's Stores, Inc., 163 NLRB 728 (1967); Display Sign Service, Inc., 180 NLRB 49 (1969); Fairfax Family Fund, Inc. a wholly owned subsidiary of Spiegel, Inc., 195 NLRB 306 (1972).

San Francisco Art Institute, 226 NLRB at 1253 (Fanning and Jenkins)(dissent).

In Boston Medical the Employer argued that because the house officers were students who rarely remained at the hospital once they had completed their educational programs, they held "no genuine interest in affecting the enduring relationship between their program and future medical trainees." 330 NLRB No. 30 at 15. The Board squarely rejected this argument finding that the house officers, who work for the Employer on average for three to seven years, were not temporary employees, and were entitled to the protections of the Act:

[T]he Board has never applied the term "temporary" to employees whose employment, albeit of finite duration, might last from 3 to 7 or more years, and we will not do so here. In many employment relationships, an employee may have a set tenure and, in that sense, may not have an indefinite departure date. . . . To extend the definition of 'temporary employee' to such situations . . . would be to make what was intended to be a limited exception swallow the whole.

Id. at 15.

The record establishes that Assistants work an average of 20 hours a week (see Fact Section B(4), supra), for approximately three and a half (3  $\frac{1}{2}$ ) years (see Fact Section B(5), supra) while they are attending NYU. There is no question that, under Board law, employees who work 20 hours a week, or even less, have sufficient interest in the terms and conditions of their work to justify granting them representational rights. See e.g., Joseph A. Goddard Co., 83 NLRB 605 (1949) (employees who worked 16 hours a week had a sufficient interest); The Globe Co., 60 NLRB 1312 (1945) (students who worked 10-15 hours a week had a sufficient interest). Moreover, the average length of service of the Assistants is well within the range found to be sufficient by the Board in Boston Medical. In Hearst Corporation, San Antonio Light Division, 221 NLRB 324 (1975), the Board held that students were entitled to representation although their average length of employment was only 8.9 months, far less than the average length of employment for the Assistants of NYU.

While an Assistant may not work for NYU every semester that they attend NYU as a student, given the fact that students work as Assistants for an average of seven (7) academic semesters, the likelihood that any given student will work for NYU in the future is high. In prior cases involving seasonal workers the Board has found that employees are eligible to vote in representation elections where they have a "reasonable expectation of re-employment." L & B Cooling, Inc., 267 NLRB 1 (1983); Road Home Construction Corp., 170 NLRB 668 (1968). Seasonal workers have been allowed to vote in representation elections where as few as 30% of the workers were likely to return to work for the employer in the following season. See e.g., Saltwater, Inc., 324 NLRB 343 (1997); Kelly Bros. Nurseries, 140 NLRB 82, 85 (1962).

Thus, under Boston Medical, and established Board standards, the Regional Director was correct to conclude that the NYU Assistants work a sufficient number of hours, and have sufficient continuity of service, to conclude that they have a substantial interest in bargaining over the terms and conditions of their employment. Decision at 29 n.43.

Assistants receive cash, tuition remission and a book store discount as compensation for the work they perform. See Fact Section D(1), supra. The compensation is stated as a gross amount per semester, paid in 17 bi-weekly checks, from which payroll taxes are deducted. Id. Whereas Assistants' paychecks are processed through the payroll department, scholarship and fellowship checks, from which no payroll deductions are made, are processed by the Financial Aid Office. Id.

NYU, in an argument similar to that raised by Boston Medical Center, contends that graduate students view, or should view, assistantships as part of their educational program and not as employment. This claim, to the extent that it is deemed relevant, is belied by NYU's admission that it must keep stipend levels competitive with those offered by other competing universities. Tr. 246- 47, 537-38. There is a clear inference that graduate students considering assistantships at NYU *are* indeed concerned with the terms and conditions of their employment.

In any event, the Supreme Court has determined that the subjective motivation of job applicants is simply irrelevant to their status as employees. Thus, in Town & Country, "salts" who applied for jobs for the sole purpose of union organizing, were nonetheless found to be employees. As stated by Fanning and Jenkins in their dissent in San Francisco Art Institute:

The sufficiency here of the student janitors' interest in their employment conditions is not diluted by their primary interest in their studies nor by the fact that, for the most part, their employment will terminate upon their graduation. . .

[T]he substantiality of the students' employment interest in its relationship to their right to collective bargaining must be measured by the continuity, regularity, and extent of the work performed and not by the character of their employer.

Id. at 1254-55.

Even if it was found that students, who subsequently served as Assistants, came to NYU primarily because of the quality of its academic programs, this would not mean that they are not employees under the Act. As explained by Fanning, discussing house officers in his Cedars-Sinai dissent:

I fail to perceive how the fact that an individual desirous of becoming an orthopedic surgeon chooses a residency program based on its quality and the opportunity for extensive training bears relevance to the question whether, having done so, he or she is an employee under the Act.

Id. at 257.

In any event, even if the Board does consider the subjective intent of the graduate students serving as Assistants to be relevant, there is substantial evidence in the record that most students

serve as Assistants because they need the compensation which they receive in return for this service. See Fact Section E(2)(g), supra. See also Tr. 1212 (Tannenbaum testifying that she served as an Assistant because she "needed a means of support" while she completed her studies); Tr.1981-82 (Greene testifying that he would have taught fewer semesters if he did not need his assistantship to support himself); Tr. 2435 (Krupat testifying that she sought an assistantship because she "needed a salary").

Further, graduate students serve as Assistants, not because they believe that such service augments their academic experience at NYU, but despite the fact that such service interferes with their ability to complete the academic work which is required of them by their various programs. See Fact Section E(2)(f), supra.

Therefore, as the Assistants work regular part-time hours for an average of three and a half years, for which work they receive a salary and tuition remission, they have a substantial interest in the terms and conditions of their employment. The Regional Director was, therefore, correct to direct an election to allow the Assistants to choose whether they want to be represented by Petitioner.

### **III. THE REGIONAL DIRECTOR CORRECTLY CONCLUDED THAT NEITHER THE LANGUAGE OF THE ACT NOR DECISIONAL LAW PERMIT THE BOARD TO EXCLUDE ASSISTANTS, WHO OTHERWISE MEET THE COMMON LAW EMPLOYEE TEST, FROM COVERAGE UNDER THE ACT ON PUBLIC POLICY GROUNDS**

NYU argues that even if Assistants meet the common law employee test, there is a significant policy reason to exclude them from coverage under the Act.

NYU does not argue that collective bargaining should be denied to graduate assistants "merely because they are employed by an educational institution while enrolled as a student" (Decision at 36), but that such bargaining should be denied because it would be disruptive of the educational relationship between students and NYU.

Request at 25. Simply put, NYU asserts that granting Assistants collective bargaining rights would interfere with the University's right to set educational policy which, it continues, would result in unwarranted intrusion into principles of academic freedom. Request at 3. It also argues that extending collective bargaining rights to Assistants would be disruptive of mentor/mentee relationships at the University. The apparent basis for this "doomsday cry" is its wild allegation that "almost any issue as to which the Union would wish to bargain will involve academic policy." Request at 21.

In particular, NYU argues that when viewed in its entirety, the Assistants relationship with NYU is educational and not employment in nature. In addition, NYU argues that if Assistants are granted collective bargaining rights: (1) negotiations will necessarily interfere with the University's right to set educational policy; (2) the exercise of such rights will interfere with undergraduate education; (3) it will discourage the mentoring relationship between students and advisors; and, (4) it will adversely affect the existing University governance system. Request at

19-24.

Below, we show that the Regional Director considered NYU's policy arguments, and correctly rejected them on the basis of the express language of the Act and the Board's recent decision in Boston Medical which addressed identical policy arguments. Moreover, as NYU did not develop a factual record showing any actual, or even potential, collective bargaining interference in the University's ability to establish educational policy or to preserve academic freedom, there is no policy question to consider.

#### **A. There is no Basis in the Statute or Decisional Law to Exclude Assistants From the Coverage of the Act on Public Policy Grounds**

In his Decision, the Regional Director emphasized that the statute covers "any" employee. 28 U.S.C. §152(3). There is no statutory exclusion for employees working in educational institutions. Indeed, the Director noted that the Board has traditionally granted collective bargaining rights to employees, including professorial employees, at educational institutions. Decision at 34. See e.g., University of Great Falls, 325 NLRB 83 (1997); Cooper Union, 273 NLRB 1768 (1985); Kendall School of Design, 279 NLRB 281 (1986); Lewis University, 265 NLRB 1239 (1983).

Moreover, responding to NYU's argument that the Board has in the past excluded employees from coverage under the Act because of "persuasive policy reasons," the Regional Director showed that the cases cited by NYU, NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974) (managerial employees) and Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass, 404 U.S. 157 (1971) (retirees), involved exclusions which were based either upon "a careful examination of the legislative history of the Act" (managerial) or the plain language of the Act (retirees). Decision at 33, fn. 48. Either an employee is excluded by legislative mandate, on the basis of either the explicit language of the statute or an interpretation consistent with the legislative intent of the statute, or the employee must be granted rights under the Act.

In its Request for Review, NYU also cites Goodwill Industries of Tidewater, 304 NLRB 767 (1991) and Goodwill Industries of Denver, 304 NLRB 764 (1991), two cases involving severely disabled individuals enrolled in skills training programs. In these cases, and in others which we expect NYU to cite involving non-profit rehabilitative enterprises, the Board has determined that, in some cases, disabled individuals involved in vocational rehabilitation programs are not employees within the meaning of the Act. See also Key Opportunities, Inc., 265 NLRB 1371 (1982); Goodwill Industries of Southern California, 231 NLRB 536 (1977).

As the Regional Director found, these cases are clearly inapposite. Decision at 31-32. These cases involve severely disabled individuals, hired on the basis of the severity of their disabilities. These individuals are allowed to work at their own pace and are not required to meet production or service standards. They are also provided with substantial counseling. If they show themselves sufficiently competent they are placed in permanent jobs, but are allowed to return to the sheltered workplace if they prove unable to cope with regular employment. In contrast, Assistants are highly educated and skilled individuals, hired on the basis of pre-existing skills, and required to meet high standards of performance. If they prove unable to perform their work



competently they are not hired as Assistants during subsequent semesters.

The Regional Director, relying on Boston Medical, correctly determined that the Board put to rest any lingering policy question as to whether a student can also be an employee at the institution at which they are enrolled.

...the rationale in Boston Medical essentially undermines this interpretation [NYU's interpretation of Adelphi University, 195 NLRB 639 (1972) and Leland Stanford Junior University, 214 NLRB 621 (1974) decisions] and precludes the automatic exclusion of students from the definition of employee.

Decision at 26 (explanation added). Indeed, this was precisely the holding of the Board in Boston Medical:

As a policy matter, we do not believe that the fact that house staff are also students warrants depriving them of collective bargaining rights or withholding the statutory obligations attendant to those rights.

330 NLRB No. 30 at 13.

Significantly, the employer in Boston Medical raised the identical policy claims that NYU raises here and, the Board rejected those concerns, not only because there was no evidence in the record to support them, but also because of a lack of statutory authority. In rejecting NYU's argument that the NLRB should carve out as public policy exception excluding Assistants from the Act's coverage, despite the fact that no such exclusion was provided for by Congress, the Regional Director relied on this recent finding. The Regional Director found, quoting the Board decision in Boston Medical, that:

the parties can identify and confront any issues of academic freedom as they would any other issue in collective bargaining . . . . if there is anything we have learned in the long history of this Act, it is that unionism and collective bargaining are dynamic institutions capable of adjusting to new and changing work contexts and demands in every sector of our evolving economy.

Decision at 35-36 (quoting Boston Medical at 13-14).

Thus, there is no lawful basis under the statute or case law for the Board to exclude Assistants, who otherwise meet the common law employee test, on policy grounds.

### **B. Even If The Board Could Consider NYU's Policy Claims, There Is No Basis for Overturning the Regional Director's Decision**

As noted above, NYU advances two primary policy arguments. First, it claims that granting collective bargaining rights to Assistants would undermine academic freedom at the University. Second, it contends that such rights would be disruptive of mentor/mentee relationships. Even if the Board were to find that it has the authority to exclude classes of employees from the protections of the Act, where there is no basis for doing so in the language of the Act or its legislative history, there is simply no evidence here to support NYU's dire predictions as to the

negative effects that allowing Assistants to bargain collectively would have on the University. Nowhere in the voluminous record of the representational hearing is there even a scintilla of evidence demonstrating any of these alleged harms.

As the Regional Director pointed out, NYU's argument boils down to a blanket claim that the "NLRB should deny collective bargaining rights to employees because of this anticipated impact of collective bargaining." Decision at 35. The Region rejected this hypothetical attack on collective rights citing Boston Medical Center. Id. The Board's reasoning in that case is particularly important:

We simply cannot say, either as a matter of law or as a matter of policy, that permitting medical interns, residents and fellows to be considered as employees entitled to the benefits of the Act would make them any less loyal to their employer or to patients. Nor can we assume that unions that represent them will make demands upon them or extract concessions from their employers that will interfere with the educational mission of the institutions they serve, or prevent them from obtaining the education necessary to complete their professional training. If there is anything we have learned in the long history of this Act, it is that unionism and collective bargaining are dynamic institutions capable of adjusting to new and changing work contexts and demands in every sector or our evolving economy.

An employer is always free to persuade a union that it cannot bargain over matters in the manner suggested by the union because of these [academic] restrictions. But that is part of the bargaining process: the parties can identify and confront any issues of academic freedom as they would any other issue in collective bargaining.

330 NLRB No. 30 at 13-14.

The arguments NYU advances are really generalized arguments which are commonly raised by all sorts of employers. If the Board were to consider every employer's "hypothetical" arguments that collective bargaining would reek havoc in its industry, there would be no collective bargaining rights. In any event, under scrutiny, none of the arguments has even surface validity which would require Board review.

### **1. Collective Bargaining Will Not Interfere With Academic Freedom, University Governance or Educational Policy**

As an initial matter, NYU's argument is tautological and should be rejected out-of-hand. First, NYU self-servingly defines educational policy and academic freedom to include the statutory areas for bargaining including setting wage levels (stipends), hours of work and other conditions (e.g. health insurance deductibles), and then it argues that the exercise of collective bargaining will interfere with educational policy and academic freedom. This sleight-of-hand reasoning can not mask the basic fact that the Board has never recognized that the exercise of rights under the Act precludes collective bargaining in institutions of higher education. If faculty members can bargain over terms and conditions under the auspices of the Act without interfering with academic freedom, certainly Assistants can. As the Regional Director found:

[I]t is precisely because collective bargaining negotiations can be limited to only those matters affecting wages, hours, and other terms and conditions of employment that the critical elements of academic freedom need not be compromised.

Decision at 34.

Moreover, the argument fails under the unchallenged facts of this case. The record evidence overwhelmingly demonstrates that assistantships are not directly related to the Assistants' academic programs. The Regional Director found (Decision at 10, 28), and NYU concedes (Request at 9), that in almost all cases assistantships are not required for degrees. The Regional Director also found that the work performed by Teaching Assistants and Graduate Assistants, which together comprise approximately 90% of the unit, either involves class content with which they are already fully versed (TAs) or involve clerical and administrative tasks/skills (GAs) unrelated to their academic studies. Decision at 28-29. This finding is amply supported by the record. See Fact Sections B(2) and E(2), *supra*. As the identifiable tasks of employment are not directly related to the Assistants' academic programs, there is virtually no likelihood that exercising the right to bargain will interfere with educational policy.

In Boston Medical Center the Board specifically addressed the concern now raised by NYU, explaining that collective bargaining is a dynamic process and that the Board could adequately police bargaining to insure that only mandatory subjects related to employment were negotiated.

[T]he parties can identify and confront any issues of academic freedom as they would in any other issue in collective bargaining. . . . if there is anything we have learned in the long history of this Act, it is that unionism and collective bargaining are dynamic institutions capable of adjusting to new and changing work contexts and demands in every sector of our evolving economy.

Decision at 35-36, quoting 330 NLRB at 14. The Board's reasoning is based on sixty-five (65) years of enforcement of the Act.

With respect to the governance claim, to the extent that NYU argues that it should be permitted to set wages and other compensation by committees on which they permit employees to sit, such arguments were rejected by Congress and the Board sixty-five (65) years ago and certainly do not need to be revisited here. Indeed, that is precisely the position of the Region when it analogized NYU's claims as merely a veiled argument in favor of rejecting any and all forms by which the Assistants might be allowed a collective voice. Decision at 34-35. Clearly, as to the issues raised by NYU in this regard, there is nothing to review.

## **2. Collective Bargaining Will Not Interfere With Mentoring Relationships**

Similarly, NYU's second policy argument, that collective bargaining will interfere with mentor/mentee relationships, is without even surface merit. Again, as with all of the other policy arguments, there is not a scintilla of record evidence upon which the allegation can stand. Indeed, a similar lack of evidence in Boston Medical Center is the precise reason why the Board in that case characterized these arguments as merely the employer's "doomsday cry."

Further, in most cases assistantships are not even with an Assistant's advisor. In any event, levels of compensation and conditions of employment (e.g. health insurance) are not issues over which the professors exert control, and negotiations over these issues would, therefore, not interfere with the Assistant/advisor relationship. Indeed, the unchallenged factual finding is that, in most cases, Assistants are not observed by professors (whether or not they are the Assistant's advisor) while performing their assistantship duties, nor are they evaluated on their performance in relation to their academic programs.

Thus, even if the Board decides that it has the authority to craft a new exclusion from the Act's coverage, not included in the Act by Congress, based on its view of national educational policy, there is no basis for doing so here. NYU's policy arguments are inconsistent with the functioning of the Act and with the Board's decision in Boston Medical, and are factually unsupported in the record (indeed there simply is no record addressing the claims).

**IV. AS THE SACKLER GAs AND THE PHYSICS, BIOLOGY, CHEMISTRY AND CNS RAs ARE NOT REQUIRED TO PERFORM ANY SERVICES FOR NYU, THEY ARE NOT EMPLOYEES UNDER THE ACT AND THE REGIONAL DIRECTOR CORRECTLY EXCLUDED THEM FROM THE ELECTION UNIT.**

The Regional Director excluded the Sackler GAs and the Physics, Biology, Chemistry and CNS RAs (hereinafter referred to collectively as the "Science RAs") from the Assistants unit, finding that they are not employees under the Act because they do not perform work for NYU (they "are not required to commit a set number of hours performing specific tasks for NYU") and, therefore, they "have no expectation placed upon them other than their academic advancement, which involves research." Decision at 36. The Region relied on the Board's holding in Leland Stanford Junior University, supra, where the Board found that research assistants who only conducted research for their own dissertations, as is true for the Science RAs here, did not meet the common law employee test because they did not perform any service for the university .

"...the relationship of the RA and Stanford is not grounded on the performance of specific tasks where both the task and the time of its performance is designated and controlled by the employer.

Rather, it is a situation of students within certain academic guidelines having chosen particular projects on which to spend the time necessary as determined by the projects needs."

214 NLRB at 623.

During the hearings, NYU argued that none of the Assistants are employees because, to the extent that they provide services which are not required by their graduate programs, such services nevertheless are part of their general educational development. However, in the case of the Science RAs, NYU went further, presenting extensive testimony that these Assistants are not

required to perform any services distinct from what is otherwise required of them by their academic programs. Thus, in the case of Science RAs, NYU argued that there could be no basis to find them employees because it conceded, the Science RAs did not provide any services to NYU.

Now, in the wake of the Regional Decision, NYU claims that the Science RAs do indeed perform services for the University and, if the other Assistants are employees, then the Science RAs should be found to be employees as well. In particular, NYU asserts that Science RAs provide services by performing research, albeit their own doctoral dissertation research, on faculty research grants from which the Assistants' stipends and tuition are usually funded. In addition, NYU asserts that Science RAs provide a service in that NYU benefits from the Assistants' dissertation research through increased prestige for the faculty and the University. NYU Request at 26-29. Finally, NYU argues that the Region's reliance on the Board's decision in Leland Stanford does not provide a sufficient legal basis to exclude the Science RAs, even if the Board determines that their services are mainly their dissertation research. Therefore, according to NYU, if Assistants generally are employees there is no basis to distinguish the Science RAs.

Below, we show that the undisputed record evidence establishes that the Science RAs have no duties distinct from working on their own dissertations and completing the work assigned to them in their courses. Unlike the other Assistants, including the non-Science RAs, who are required to perform services for NYU separate and distinct from the requirements of their academic programs, the Science RAs are not required to perform any duties which can be distinguished from the rest of their academic programs. Students are not assigned to particular dissertation projects, but choose their projects based on their personal interests. If they happen to be interested in a project supported by external funding they may receive support from the grant and be classified as an RAs. Thus, the basis for the Science students' classification as RAs is not the nature of the work they are performing but rather the source of their financial support. The undisputed fact that Science RAs perform no services for NYU separate and apart from what is required by their own immediate academic studies, is sufficient under the common law test to exclude them from coverage under the Act. In Leland Stanford the Board applied the common law employee test to Science graduate students similarly situated to the Science RAs here, and found, as did the Regional Director here, that they were not employees.

#### **A. The Science RAs Do Not Perform Services For NYU, They Only Perform Their Own Dissertation Research**

The record evidence establishes that the "task" assigned to Science RAs' is merely to perform their own dissertation research. See, Fact Sections F-I supra. Indeed, NYU concedes this point. In each of the departments at issue the deans or chairs testified in detail that these students' only responsibilities are to perform their own dissertation research. In every respect being a Science RA is "coincident" with being a student. Id.

Indeed, Sackler Dean Oppenheim could not even explain why the Sackler students are classified as GAs, because, he acknowledged, they had no duties or responsibilities apart from their Ph.D. studies. In fact, it appears that the Sackler GAs are not even informed that they are GAs.

Apparently, the title was created in the 1970s when the Sackler students *were* required either to teach or to perform laboratory assistant work. However, at this time, and indeed for at least the last five years, no Sackler student has been required to perform such services. See Fact Section F, supra.

In Physics, Professor Sokal testified, un rebutted, that the RA title is used because students' money comes from research grants which have budget lines for Research RAs. See Fact Section H, supra. Sokal explained, the money is really just a "gift" to the students to support them while they do their own research. Thus, the money the Science RAs receives is in the nature of a scholarship and not compensation for services rendered. Id.

Similarly, Biology students are classified as RAs because that is the title of the budget lines in the research grants from which their stipends come. The title does not connote a position with distinct responsibilities because they only perform their own dissertation research. See Fact Section G, supra.

In CNA, Prof. Lennie, the Dean of Science for the Faculty of Arts and Sciences, testified that RAs receive funding from faculty NIH grants, and are expected only to perform their dissertation research. They have no other duties or responsibilities as RAs. Tr. 370, 372-74. See also Fact Section I, supra.

NYU's belated attempt to define RAs' dissertation research as a "service" to the University is clearly without merit. All doctoral candidates must perform research, but only a limited number are classified as RAs. NYU does not assign research topics to the Science RAs, as it assigns courses to teach or grading tasks to Assistants. Thus, the non-Sackler science students are not classified as RAs because of the work they are performing but solely because the student independently chooses to do her dissertation research in a subject area where a faculty member had a research grant with a vacant RA budget line. The Sackler students, on the other hand, are all classified as RAs even though none are assigned duties distinct from their own course work and dissertation research.

NYU's argument, that the Science RAs are employees because their work benefits NYU, is equally unavailing. Under this theory NYU argues that Science RAs' research confers a benefit on the University by enhancing its prestige. This benefit, NYU asserts, constitutes a service to the University. The fallacy of this argument is self evident. Under NYU's theory, all students who conduct research or perform satisfactorily in their classes confer a benefit on the University. Yet, NYU does not argue that all students should have been eligible to vote as employees. Moreover, this generalized benefit can not be quantified into a service which is required to be performed in a defined period of time, as is the case with an Assistant teaching a course for a particular semester, or an Assistant performing administrative tasks assigned by a department chair. Thus, despite the titles bestowed on them by NYU, Science RAs are in fact students receiving fellowships rather than employees receiving compensation for services performed for the University. Like other students who receive fellowships and scholarships, their only obligation is to maintain good academic standing. NYU has never argued that if the Board determined that RAs were eligible to vote in the representation election that students on fellowship should be included in such a unit.

## **B. In Contrast To The Science RAs, Non-Science RAs, Do Perform Services For NYU**

The absence of any requirement for the Science RAs to perform duties or services for NYU stands in stark contrast to RAs in non-science departments who are required to perform services for the University. For instance, the record establishes that RAs in other departments assist with the research of the professors to whom they are assigned by or performing laboratory support functions or by compiling bibliographies, checking references, photocopying, retrieving materials from libraries, collecting and entering data, drafting correspondence, copy editing and proofreading, recruiting subjects, and assisting professors in writing up experimental findings, to name just a few of the services performed. See Fact Section B(3), supra

Indeed, even in science departments other than Sackler, Biology, Chemistry, CNS and Physics, RAs are required to perform general laboratory support activities and to assist with the professors' research. For example, in Psychology, RAs duties include maintaining computer databases, serving as resources to undergraduates and recruiting experiment subjects. Id.

Thus, contrary to NYU's claims, the record establishes that the circumstances of the Science RAs distinguish them from RAs in every other department at NYU, and from the Assistants generally. In Sackler, Biology, Chemistry, CNS and Physics, the GAs/RAs only do their own course work and dissertation research. The Science RAs perform no services for departmental professors or NYU, in contrast to the services which are cleanly provided by non-science RAs and Assistants generally.

## **C. The Region Correctly Applied the Common Law Test, and Legal Precedents Including the Board's Decision in Leland Stanford to find that the Science RAs are not Employees.**

As discussed in Point I above, in Boston Medical the Board held that it would henceforth apply the common law agency test to determine if a student was an employee under the Act. 330 NLRB No. 30 at 9. ("That house staff may also be students does not thereby change the evidence of their 'employee' status."). A critical component of this test is that the putative employee performs services for the employer. Town & Country, supra, 516 U.S. at 93-95; Boston Medical, 330 NLRB at 9; WBAI Pacific Foundation, 328 NLRB No. 179 (1999).

In former Member Fanning's dissent in Cedars-Sinai, which the Board cited as persuasive in Boston Medical, 330 NLRB at 12, he explained that the question of whether a student performs services for the educational institution which she attends as a student, is a pivotal factor in determining employee status. Cedars-Sinai, 223 NLRB 251, 255 (1976) ("[t]he conventional meaning of the word [employee] implies someone who works or performs a service for another for whom he or she receives compensation.") Fanning cited the Board's decision in Leland Stanford Junior University ("Leland"), 214 NLRB 621 (1974), in which it held that 83 Research RAs in that school's physics department, whose only responsibility was to perform research for their own dissertations, were not employees.

The research they conducted was thesis oriented ... the research assistants did not perform a service for Stanford.

223 NLRB at 255 n14 (emphasis in original). As Fanning explained, the Board declined to find that the Research RAs were employees, not because they were students, but because they did not perform any services for that school.

We do not exclude students from coverage because they are students (even less the case where they are 'primarily students'). In certain cases, they will be excluded because, as students, they do not work or perform a service for an employer.

Id. (emphasis in original).

In his dissent in St. Clare's, Fanning again emphasized that it was the "absence of work" and not student status which caused the Board to exclude the Leland Stanford RAs.

Plainly, it was not the *nature* of work of the research RAs which prompted the dismissal of the petition in Leland Sanford, but, rather, the *absence* of work in their duties, at least as the term is used in the classic definition of 'an employee' - one who works for another subject to the latter's control, for which work compensation is given."

229 NLRB at 1008.

However, even if the Board does not rely on Leland Stanford, merely applying the standard common law test is sufficient to exclude the Science RAs. As we have previously shown, a critical element of this test is that the putative employee perform a service for compensation. As the facts demonstrate, the Science RAs do not perform any services for NYU. Thus, whether under Leland Stanford or Town & Country, there is no legal basis to find that the Science RAs are employees under the Act. Therefore, the Regional Director correctly excluded them from the Assistants' unit.

### **Conclusion**

For all of the foregoing reasons the NLRB should affirm the Regional Director's Decision and Direction of Election.

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Respectfully submitted,

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