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PRELIMINARY STATEMENT

This case represents the first time in the history of the Act that an election has been ordered in a bargaining unit of graduate students who provide services to their school through teaching, research, and other activities related to their studies. The Regional Director reached this result – which would set aside precedent that has stood for more than 25 years – through an erroneous interpretation of the Board's recent ruling in Boston Medical Center Corp., 330 N.L.R.B. No. 30 (Nov. 26, 1999), and a failure to accord proper weight to the vital policy reasons why graduate assistants should be excluded from the coverage of the Act.

In holding graduate assistants of New York University ("NYU") to be employees, the Regional Director ignored the significant differences between them and the medical house staff held to be employees in Boston Medical. Most importantly, the Regional Director failed to consider the "entire nature" of the relationship between graduate assistants and the University, which the Board said was necessary in Boston Medical. The extensive record in this case shows that this relationship is dominantly and decisively educational.

NYU's graduate assistants are students who are receiving training, under the guidance of experienced faculty members, as part of their educational programs leading to graduate degrees. Medical house staff are doctors who have graduated from medical school, received their M.D. degrees, and are gaining post-graduate experience to become certified in a medical specialty. The Board found it significant in Boston Medical that house staff spent up to 80 percent of their time in direct patient care. In contrast, graduate assistants spend, on average, just 15 percent of their time over the course of their academic career on their assistantship activities, compared with 85 percent on all other educational activities, including coursework, research, and writing. Unlike house staff, graduate students have all of the attributes of students in a regular academic setting, and receive almost none of the benefits provided to NYU employees. All of these facts were overlooked or dismissed as insignificant by the Regional Director.

The Regional Director also erred in finding that there were no policy reasons to warrant exclusion of the graduate assistants from statutory coverage. Both Supreme Court and Board decisions have made clear that the Act's definition of "employee" must be construed in light of economic and policy considerations. Here, there are important reasons (not present under the different factual circumstances of Boston Medical) to find that collective bargaining between graduate assistants and the University would not further the purposes of the Act, and would present a real risk of intrusion into areas of educational policy, contrary to important principles of academic freedom.

Finally, if the Regional Director was correct in his determination that most of NYU's graduate assistants are employees, he wrongly excluded from the bargaining unit graduate assistants in Biology, Chemistry, Neural Science, Physics, and Basic Medical Sciences (the Sackler Institute of Graduate Biomedical Sciences) who perform research under government-funded grants. The Regional Director's finding that these graduate assistants are not employees because they do not perform services for the University is contrary to the record establishing that their research is conducted under the supervision of faculty members in fulfillment of the University's obligation under the terms of the grants. There is no logical basis for distinguishing these graduate assistants from all others.

STATEMENT OF FACTS**A. Background**

1. Overview of NYU

New York University is one of the leading academic and research institutions in the world. (Tr. 61) It consists of 13 schools, colleges and divisions centered in New York City. (Decision at 3; EX 2 at 1, 10) Many of the 13 schools are further broken down into formal departments and less formal programs with close to 100 different departments University-wide. (Tr. 50) The University is governed both broadly by a central administration and locally by individual schools, departments and programs, each with its own academic traditions, programs and faculty. (Tr. 47-50; EX 2 at 1) The evidence at the hearing focused on the four schools containing the vast majority of NYU's graduate assistants: the Graduate School of Arts and Science, the Tisch School of the Arts, the Stern School of Business and the School of Education.

The Graduate School of Arts and Science ("GSAS") is the largest graduate school at NYU and is home to some 2,500 doctoral students and 1,600 masters students. The school's 43 different departments and programs are divided for certain administrative purposes into three divisions – Sciences (e.g., Biology, Physics and the Center for Neural Science), Social Sciences (e.g., Economics and Psychology), and Humanities (e.g., History, Music and Foreign Languages). (Tr. 48) Administratively, GSAS falls within the Faculty of Arts and Science ("FAS"), which also oversees the undergraduate College of Arts and Science, the Courant Institute of Mathematical Sciences and the Institute of Fine Arts. (EX 2 at 10)

The Stern School of Business (the "Stern School") offers both a Ph.D. program for graduate students seeking academic careers and an M.B.A. program for graduate students pursuing professional business careers. (Tr. 4249, 4251) The doctoral program, which includes over 100 students, is a five-year research intensive program. (Tr. 4260-61; EX 137 at 3) The full-time M.B.A. program is a two-year course-based program that is home to over 800 students. (Tr. 4714-17)

The Tisch School of the Arts ("TSOA" or "Tisch"), one of the nation's premier arts schools, offers a variety of programs that focus mainly on film and cinematic studies and the performing arts. (Tr. 2871-72) The school is comprised of 12 departments – 9 of which offer graduate degree programs, with a total of some 500 graduate students. (Tr. 2872, 2875-76; see EX 91) TSOA's primary mission is to train students pursuing professional careers in the arts. As such, most of its programs adhere to a philosophy of conservatory training in which students collaborate with each other and become "completely immersed in the experience of making the artistic product." (Tr. 2873) Unlike the traditional academic model that dominates at GSAS, the bulk of the classroom experience for Tisch graduate students involves working on these artistic productions. (Tr. 2874) Most programs require two to three years to complete and lead to one of a variety of masters degrees. (Tr. 2879-84)

The School of Education ("SED") is primarily a graduate school, offering through its 13 departments both masters and Ph.D. degrees in health, education and communications, as well as creative and performing arts. (Tr. 3772-75; see also EX 3(k) at 19) SED's graduate programs are characterized by applied kinds of professional training necessary to prepare its students for careers as clinicians and practitioners, as well as scholars and researchers. (Tr. 3772) SED has approximately 3,500 masters students and 900 Ph.D. students. (Tr. 3776)

2. Graduate Education

NYU's graduate programs are a critical component of the University's mission. (Tr. 55) About one half of the University's 35,000 students are graduate students seeking masters, Ph.D. or other advanced degrees. As Dr. Robert Berne, NYU's Vice President for Academic Development, explained, "[G]raduate education is the way in which knowledge and scholarship is passed from one generation to the next. It's how a new generation of scholars and thinkers are educated and trained . . ." (Tr. 55) Two defining characteristics of graduate education are small class sizes and the importance of relationships with faculty mentors. (Tr. 433)

(a) Ph.D. Programs

The Ph.D. or doctorate degree is generally the most advanced degree that a graduate student can obtain and is available in a range of academic disciplines at NYU. (Tr. 57) It is considered a research degree and is usually pursued by students seeking careers in academia. (Tr. 428) To earn a Ph.D., a student must demonstrate a mastery of a broad array of knowledge in a general field as well as a command of specific knowledge and the ability to do independent research. (Tr. 57-58; see also 349-52) Ph.D. students typically begin their course of study by completing a series of required and elective classes in their field of study for a two to three year period. (Tr. 59-60) During that time, the students acquire general knowledge which is tested early on in the form of a qualifying exam. (Tr. 58) Later on, near the conclusion of their required coursework, students typically must take an oral or written exam to demonstrate that they have acquired a sufficient breadth of knowledge in their field of study and specialization. (Tr. 58)

Following successful completion of the examination, doctoral students move to the dissertation phase of their graduate studies. The dissertation requires them to identify an issue or theory, conduct original research and present their findings to a faculty committee both orally and in writing. (Tr. 58) Although there is a large degree of variation in the amount of time it takes to earn a Ph.D. from start to finish, many programs contemplate a four to five year period in residence. (Tr. 59)

(b) Masters Programs

There are a large number of masters degrees at NYU that vary by school. For instance, graduate students in the Tisch School of the Arts may earn a Masters of Fine Arts, students in the Stern School of Business seek a Masters of Business Administration, and students in the School of Education earn a Masters of Public Health or Masters of Arts. (Tr. 57, 60; see EX 3(k) at 22, 23) Masters degree programs are usually more course-based than their doctoral counterparts. (Tr. 60) In most cases, masters students are also required to complete a masters thesis, project or exam prior to the completion of their studies. (Tr. 60; Decision at 4) A masters degree can function as a pathway to a Ph.D. program, a credential for a profession, or a source of intellectual enrichment. (Tr. 428) The typical time to degree for students enrolled full-time is one to three years. (Tr. 60-61)

3. Graduate Financial Aid

NYU, like other universities, provides financial aid to attract and retain graduate students, who usually do not have the means to support themselves while they pursue their studies. Financial aid often varies by school or department because programs structure their financial aid in different ways in order to meet the needs of students in their particular field, and to compete with other academic institutions to attract the highest quality applicants to their programs. (Tr. 62-65, 633, 4262) Generally, doctoral programs offer a higher level of support to a larger proportion of their students than professional and masters programs. (Tr. 62) Likewise, financial aid packages are typically higher in the sciences than in the arts and the humanities. (See Tr. 204, 347, 377, 632, 5286) One of the common characteristics of graduate financial aid is that it is provided by NYU based on merit, rather than need, taking into account students' academic qualifications and promise, as well as their ability to be strong contributors to their field. (Decision at 18; Tr. 157-58, 199-201, 1318-21, 3817-18, 3850, 3865, 4717-18)

The most common types of financial aid are fellowships, scholarships and assistantships. (Tr. 62-63; JX 1 at 2) Fellowships, which come in the form of cash stipends, and scholarships, which come in the form of tuition reductions, may be endowed through outside sources or funded by the University's own resources. (Tr. 62-63; JX 1 at 4) Assistantships, which typically include a combination of stipends and tuition remission, are a form of financial aid support that carries with it the obligation to perform some activities related to a student's academic program. (Tr. 63, 157) Assistantships are only available to students enrolled in one of NYU's graduate programs. (Tr. 76, 460, 3346)

(a) Graduate School of Arts and Science

Under the new financial aid system adopted by GSAS, virtually all doctoral students entering this fall will be Henry M. MacCracken Fellows, and will receive four to five years of full financial support (depending on the department), including a minimum nine-month stipend of \$13,500 (for Academic Year 2000-01), remission of tuition and fees, and a health insurance subsidy. (Tr. 5725-26; EX 173) Teaching by graduate students will be completely integrated into this support structure. All MacCracken Fellows will be required to teach a minimum of two and a maximum of six semesters, as determined by their department, as a condition of the financial aid award. (Tr. 5726, 5732; EX 173 at 2) Students will receive the same stipend, remission of tuition and fees, and health insurance subsidy over the entire four or five year period in which they are supported, regardless of whether or not they are teaching in a particular semester. The teaching obligation imposed as part of the new program ensures that all students will have that experience, which the school considers "vital to the preparation of our doctoral students for a range of careers involving teaching and research." (EX 173 at 2)

The new MacCracken Fellowship program is an expansion of the system that was previously in place for some 450 doctoral students (or about 20-25 percent of all Ph.D. students) in GSAS. (Tr. 5730-31) Until this year, GSAS awarded MacCracken Fellowships to the most highly qualified applicants from individual departments, and provided three years of fellowship support and two years of support as a TA. (Tr. 205, 330, 442-45, 452-53; EX 17, EX 20 at 7) Applicants not awarded MacCracken fellowships were considered by departments for graduate assistant positions based principally on their academic qualifications. (Tr. 157-58, 199-200, 1318-20) Even before expansion of the MacCracken program, all doctoral students were fully funded in Psychology, Physics, Biology, Basic Medical Sciences (the Sackler Institute), and Neural Science. (Tr. 346-47, 631-32, 1511, 2734-35, 3723) As is the case with MacCracken Fellows, students in each of these programs receive the same financial support each semester regardless of whether they are serving as a graduate assistant.

(b) Stern School of Business

All students in the Doctoral Program at the Stern School of Business are fully supported for five years. Upon acceptance to the Doctoral Program, students are automatically appointed to assistantship positions; no separate application process is required. Doctoral students serve as Research Assistants during their first three to four years in the program. (EX 137 at 12) In the spring of their third year or fall of their fourth year, students are assigned as TAs, and the following semester they serve as course instructors. (Tr. 4261, 4287-89) In their fifth year, students are supported through some combination of fellowship and assistantship awards. (Tr. 4259, 4297, 4299; EX 137 at 12) Students receive a standard package of \$20,250 per year in stipends plus full tuition remission, regardless of whether they are funded in a particular semester through an assistantship or a fellowship (with no teaching or research obligations). (Tr. 4258-59, 4262, 4374-76) First year M.B.A. students in the Stern School are awarded scholarships, providing partial tuition remission, based on academic merit. (Tr. 4717-19, 4765) These scholarship students are offered renewed tuition support in their second year through service as a Teaching Fellow or Graduate Assistant. (Tr. 4719-20) Other students can apply for any remaining assistantship positions provided they meet certain academic requirements. (Tr. 4719-21) Assistantships awarded to M.B.A. students do not provide a stipend. (Decision at 13, n.23)

(c) Tisch School of Arts

Graduate students in Tisch School of the Arts receive financial aid primarily through graduate assistantships. Assistantships at Tisch are "crafted based on the professional requirements of the field" and are "designed to give students an opportunity – based on their conservatory training – to immerse themselves in a particular specialty area and to get practice and involvement in that area over and beyond what they would get for their normal classroom assignments." (Tr. 2896) Assistantship positions generally are awarded to upper-level masters students based primarily on academic merit. (Tr. 3068) In most departments faculty committees

select graduate assistants based on "the strength of the students work up to date, their commitment to the discipline [and] their probability of completing their course of study successfully. . . ." (Tr. 3031) Moreover, because most of the Graduate Assistant positions in Tisch are funded predominantly by the federal government's work study program, graduate students must demonstrate their need for financial aid under federal guidelines in order to be eligible for such assistantships. (Tr. 2902-03, 3031; EX 93) Assistantships include full tuition remission, which is worth about \$24,000 per year, and a stipend that ranges from \$4,000 to \$10,000 per year depending on the department. (Tr. 2894-95; EX 93)

(d) School of Education

The School of Education offers its students financial aid primarily through assistantships that involve teaching, performing other academically-related responsibilities at NYU, or tutoring in the public schools. (Tr. 3776-77, 3783) All assistants receive a financial aid award consisting of tuition remission and a stipend of \$8,500 - \$10,000. (Tr. 3784, 3849-50, 3860) On their admissions application to SED programs, students indicate their interest in an assistantship. (Tr. 3817-18) Students complete an assistantship application, which is referred to their home departments for evaluation and selection for positions based on academic merit. (Tr. 3817-18) Students are appointed to assistantships for a maximum of two years. (Tr. 3777)

4. NYU's Policy Concerning Graduate Assistantships

In February 1998, a group of Deans and administrators, led by Vice President Berne, initiated a University-wide examination of the nature of graduate assistant positions and the relationship that those positions have to students' academic programs. (Tr. 45, 85) In light of the fact that assistantships are awarded "locally" by individual schools and departments, and due to the substantial degree of change that had taken place in recent years at the graduate level at NYU, the University believed it was an appropriate time to study its use of assistantships. (Tr. 86) The study group issued a report that detailed its findings and made recommendations for clarifying and standardizing the awarding and use of graduate assistantships University-wide. (Tr. 85; see EX 6) These recommendations were immediately adopted by the University. (Tr. 92-93)

First, the group recommended the adoption of a set of core principles regarding assistantship activities. (EX 6 at 2) Those principles were embodied in a Statement Concerning the Purpose and Importance of Graduate Student Assistantships, which was intended to

clarify and better define the three categories of assistantships – Teaching, Research, and Graduate – most common to NYU. It also sets forth NYU's basic commitment to provide assistantship experiences that are directly relevant to students' academic pursuits and career development. In general, this statement will serve as the framework around which each school designs and implements its assistantship programs.

(EX 6 at 2, emphasis added, see also Tr. 91-92) The Statement itself provides:

One important, indeed defining characteristic of the modern research university in The United States is the active presence of graduate students. They elect to attend graduate school in order to pursue advanced knowledge, earn advanced degrees, and prepare for careers, most often as scholars, researchers, and teachers. From time to time during this process, many graduate students take on a position commonly known as assistant. More precisely, the research university offers three such positions that can in practice overlap: 1) That of teaching assistant, who develops and exercises teaching skills; 2) That of research assistant, who develops and exercises research skills; 3) That of graduate assistant, who develops and exercises a

variety of professional and technical skills.

Uniting these three positions is the fact that they provide an educational experience for graduate students that strengthens a student's pursuit of advanced knowledge and degrees, and, ultimately a career. The educational experience of an assistant demonstrates that students effectively learn a craft by practicing it – with appropriate guidance and counsel. Thus, a teaching assistant becomes a better teacher by teaching; a research assistant becomes a better researcher by doing research; a graduate assistant becomes more skillful by engaging in a professional and technical task.

(EX 6 at Attachment B)

The next recommendation called for the modification of appointment practices across the University in order to strengthen the distinctions between assistantships, which are directly related to a graduate student's academic and professional training, and work study positions, which are casual, part-time employment intended to supplement a student's income. (Tr. 91-92; EX 6 at 2) The study group drafted a set of guidelines, which set forth revised titles, codes and definitions for the three categories of assistantships that differentiate the positions based on the nature of the duties performed. (Tr. 92; EX 6 at 2 and Attachment C) The guidelines state that a graduate assistant "is a graduate student pursuing a prescribed course of study at this institution who, because of outstanding qualifications, is appointed to part-time duties concurrent with his or her academic program." (EX 6 at Attachment C) More specifically, they provide:

Teaching Assistant – Code 101

. . . The duties of a teaching assistant are related to the field or discipline of a student's degree studies at NYU and are primarily focused on the development and exercise of teaching skills. Generally, such appointments entail stipend support and tuition remission.

Graduate Assistant – Code 130

. . . The duties of a graduate assistant are related to the field or discipline of a student's degree studies at NYU and are primarily focused on the development and exercise of a variety of professional and technical skills. Generally, such appointments entail stipend support and tuition remission.

Research Assistant – Code 131

. . . The duties of a research assistant are related to the field or discipline of a student's degree studies at NYU and are primarily focused on the development and exercise of a variety of research- related skills. Generally, such appointments entail stipend support and tuition remission.

B. Graduate Assistant Positions

1. Teaching Assistants

Teaching Assistants ("TAs") generally are assigned to assist a faculty member in teaching a particular course; in some cases, they may be assigned to lead a class on their own. (Tr. 68-69) According to the University's Guide to Administrative Planning, Policies and Procedures, "The princip[al] role of teaching assistants should . . . be in sections (recitations/discussions/laboratories) associated with a lecture course taught by full-time faculty or in language/writing sections." (EX 9 at 2) TAs are the most prevalent form of graduate

assistantships. (Tr. 250, 461)

(a) TA Responsibilities

Although TA responsibilities vary from department to department and course to course, they typically include some or all of the following: () assisting a faculty member in developing a syllabus and curriculum; () researching and preparing of course materials; () preparing, or assisting in preparing, tests and exams; () grading, or assisting in grading, homework assignments, papers, tests and exams; () leading a small recitation or laboratory section for the course; () holding office hours; () attending lectures or other meetings of the course to which assigned; and () delivering a lecture. (Decision at 6; see, e.g., Tr. 68-69, 197-98, 211-12, 471, 673-74, 855-56, 1452-55, 1527-29, 1543-44, 2747-49, 3513-14, 3812-13, 3981-82)

One common pattern for large courses is for classes to meet twice per week for a lecture by the faculty member (typically 1-1.5 hours) and once per week in a smaller recitation section led by a TA. (Tr. 68-69, 198, 855) The TAs go over assigned course materials, discuss faculty lectures, review writing assignments and tests, and answer student questions. (Tr. 69, 197-98, 210-11, 1452, 2747-48, 5393-94) The TAs may also assign and discuss additional readings or other materials to supplement the basic course materials, and may collaborate with the course professor in preparing and grading exams and other assignments. (Tr. 211-15, 1453-55, 3351-52, 3430-35) Similarly, in courses in which TAs lead a laboratory section, the TA will give a presentation at the beginning of the lab, describe and monitor assigned experiments, answer questions and grade and review students' written lab reports and research papers. (Tr. 676-78, 1529, 2749-50, 5399)

The Expository Writing Program ("EWP") and foreign language programs are the principal places in which TAs serve as the primary classroom instructor for an undergraduate course under the supervision and guidance of a faculty member. In both of these areas, TAs are supervised by faculty members who are responsible for the course structure and content and, in the case of foreign languages, for the detailed syllabus. (Tr. 3981-82; EX 42(a); see also 965) In the Stern Business School, doctoral students also are appointed as course instructors, typically following a semester in which they serve as a TA for the same course with a leading faculty member (who is referred to as a Master Teacher). (Tr. 4286, 4288-89) In the School of Education, doctoral students teach small introductory classes in Speech and Interpersonal Communication in subjects such as voice and diction, under the close observation of the director of the program who mentors the TAs in teaching students this skills-based curriculum. (Tr. 3805-06)

TAs typically spend an average 10 to 20 hours per week on their responsibilities. Although the number of hours varies, the Regional Director exaggerates the evidence in stating that "[almost all graduate assistantships require a 20-hour a week time commitment" and that TAs "often . . . devote more than 20 hours a week to their duties." (Decision at 13-14, n.25) Moreover, TAs are informed of these expectations and are, in many departments, specifically advised to discuss the situation with an appropriate faculty member if they are regularly exceeding the expected number of hours. (Tr. 3518-19, 3983; see also 220, 3206-08)

Instruction by TAs represents a relatively small fraction of total teaching throughout the University. A study of course coverage at NYU during the Spring 1999 semester shows that 84.2 percent of all hours of instruction were taught by faculty, and just 13.9 percent by TAs. Viewed from another perspective, that of a hypothetical student taking every course in the University, 89.5 percent of all contact time would be with faculty members, and only 6.6 percent with TAs.

(b) TA Selection and Assignment

In almost wholly ignoring the process by which graduate students are selected and assigned to serve as TAs, the Regional Director failed to acknowledge the important educational considerations that are at the core of this process. To begin with, as the Regional Director recognized, service as a TA is a requirement for obtaining a doctoral degree in some of the largest departments at GSAS: CNS, Biology, Psychology and

Physics. (Decision at 10; Tr. 357, 658, 767, 1517, 2736-37; EX 54) In other schools and departments, service as a TA is an informal requirement that, as a practical matter, is satisfied by all or nearly all Ph.D. students. (Tr. 3501, 3509, 3527-28, (French), 4261, 4286-87, 4305-06, (Stern School of Business) Indeed, beginning this year, virtually all doctoral students entering GSAS will be fully supported as MacCracken fellows and obligated to teach for a minimum of two and a maximum of six semesters. (Tr. 5725-26, 5732; EX 173)

In most schools and departments, doctoral students are automatically considered for TA positions. The selection and assignment of graduate students to fill available TA opportunities is generally a two-step process that is controlled "locally" at the departmental level. (Tr. 199-200, 335, 3031-32, 3064-65, 3507-08, 3817, 4593, 4626) For example, in GSAS, graduate students are first selected to serve as graduate assistants by the Director of Graduate Studies ("DGS") or a committee of faculty members from within their department. (Tr. 199-200, 472; EX 16 at 4) The selection process is merit-based and involves consideration of a student's academic program, academic standing, achievements in conferences and other non-classroom activities, and the student's academic promise and progress toward his or her degree. (Tr. 199-200, 1318-20)

Students are then assigned as TAs for particular courses based upon input from a number of sources, including a student's advisors, a committee of faculty members in the department, and the department's Directors of Graduate and Undergraduate Studies. (Tr. 199-202, 357, 1325-30, 1533-35, 3347-48) Often, students are encouraged to inform the department of their course preferences. (Tr. 357, 1326, 1328, 1533-34, 2753-54, 2841-42; EX 51) In some cases, professors may inform the department of their preference if they have a particular student in mind to serve as a TA in their course. (Tr. 259, 357, 848-49, 1328, 1534) The driving consideration in this process is matching students to teaching opportunities that are within their general area of study and will expand their knowledge and breadth of teaching experience. (Tr. 667-68, 1533, 2754, 3956-57) Indeed, departments try to ensure that students have a progression and diversity of teaching assignments. (Tr. 3956-57 (French Department attempts to assign TAs to teach a range of courses in order to learn the different techniques applicable to teaching different levels of languages), 667-68 (Biology Department attempts to give TAs a progression from introductory to advanced courses), 1533 (Psychology Department student's advisory committee recommends appropriate teaching assignments based on "what the best kind of teaching experience would be" at that point in the student's doctoral career), 2754 (Physics Department TAs are assigned to variety of courses to gain broader experience)) Ultimately, the DGS usually plays the central role in assigning students to particular courses based on these considerations. (Tr. 199, 335-36, 1534-35)

(c) TA Educational Development

NYU provides extensive educational development programs for graduate students who serve as TAs. The Regional Director and the UAW misconstrue the nature and purpose of these programs as simply training for the TAs' "jobs" as undergraduate instructors. (See Decision at 9-10, 28-29; UAW Opp. at 7, n.6) In fact, they are designed primarily to prepare students for their future careers as professors. (Tr. 4351-52; EX 36 at 2; EX 17 at 2; see also 876-77) While the programs obviously assist students in their responsibilities as TAs, they go far beyond what would be necessary for that purpose alone.

Catherine Stimpson, the Dean of GSAS, has placed special emphasis on enhancing the school's educational development programs for TAs. Soon after she became Dean in 1998 she identified "enhancing programs that further the educational development of teaching assistants" as one of her paramount school-wide priorities for the 1998-99 academic year, and commissioned a study and report regarding the school's TA Educational Development Program. (See Tr. 480-82; EXs 21, 26) There are a number of different components to GSAS's teacher development program. To begin with, all TAs participate in a two-day Training Program at the beginning of the school year, during which faculty members and former TAs address issues such as teaching techniques, teaching pedagogy, and available resources and support. (Tr. 223, 482, 668-69, 867, 1544-45, 3963, 4854; EX 10, EX 27) As a result of Dean Stimpson's efforts, GSAS has adopted several other school-wide initiatives. The school offers workshops throughout the year relating to various teaching issues,

organizes regular sessions in which TAs from different departments confer in small groups about their teaching experiences, and has expanded its TA Resource Center. (Tr. 484) In order to monitor and evaluate the success of these different initiatives, GSAS has established a faculty advisory committee to oversee all aspects of its educational development program. (Tr. 484; EX 28)

Many departments have additional educational activities for TAs, including training for TAs throughout the year, designed to address the specific needs of the particular academic discipline. (Tr. 483-84, 1546; EX 26 at Appendix 3) In the Physics Department, for example, doctoral students are required to take the four-credit "Practicum in the Teaching of Physics," in which they read materials about teaching Physics and participate in practice lectures and recitation sessions in front of the class. (Tr. 2739-40; EX 3(i) at 235, EX 159) These lectures are videotaped and discussed with the course professor during individual conferences. (Tr. 2739-40) The final exam for the course consists of students conducting an actual lab or recitation, during which they are observed and graded by four faculty members, including the DGS and DUG. (See EX 159 at 2)

The Psychology Department requires its doctoral students to TA in three courses, beginning with Introductory Psychology, which is particularly conducive to teacher training. (Tr. 1542; EX 54) The department also holds seminars throughout the year that are required for first-year TAs and encouraged for other TAs, during which issues concerning teaching Psychology are discussed, and runs a Summer Teaching Practicum, in which doctoral students teach undergraduate classes for the department's summer school offerings under the guidance of a faculty mentor. (Tr. 1546, 1562; EX 56)

Similar programs are provided in other schools and departments. For example, in the Stern School of Business, doctoral students in the first phase of their training serve as a TA for a Master Teacher for one semester, in which they assist with class preparation and answering student questions. (Tr. 4261, 4284-85) During the second phase of their training, students attend a summer teaching workshop, in which faculty teach students about practical and pedagogical techniques for the classroom. Students also give presentations that are critiqued by the school's faculty. (Tr. 4286-87; EX 121) After this training, students take on the responsibility of teaching a section of a course. (Tr. 4287; EX 125(d); see also 3802-04 (School of Education); 662-64, 668- 71 (Biology))

In those departments in which TAs are primary instructors for certain courses, TAs are provided with even more extensive training and support. In the foreign language departments, TAs receive the most intensive part of their training in the teaching methods workshops for language courses that take place during the week prior to the start of the semester. (Tr. 1761, 1920-21, 3963-66; EX 58; see generally EX 113) In addition to these workshops, TAs in the French Department receive additional training throughout the semester. (Tr. 3967-68) For example, they learn the art of preparing tests and exams by producing several drafts of all tests that are discussed with Dr. Kim Campbell, the department's Director of Language Instruction, and the instructor in charge of the course. (Tr. 3970) Although Dr. Campbell could more easily write the tests herself, "it wouldn't be beneficial for the TA's training" if she did that. (Tr. 3970-71) "[L]earning how to write a good question . . . is a long process of training and development." (Tr. 3973)

Similarly, TAs in the Expository Writing Program also receive extensive training. As Professor Hoy stated, EWP "provide[s] the most fundamental and extensive training in teaching that's available in the university." (Tr. 991) Two weeks before the start of the fall semester, EWP holds a six day workshop taught by the five faculty directors of the Program, during which topics such as essay writing, grading, and teaching methodologies are reviewed with the TAs. (Tr. 975-76) First year TAs are required to take a formal course (for which they receive academic credit) during the semester, the Graduate Practicum in Teaching Expository Writing, in which the TAs examine learning and writing theories. (Tr. 979-80, 1003; see EX 41) EWP TAs also must attend seven meetings each term with their mentor, who is a senior EWP TA, during which they discuss issues regarding their teaching. (Tr. 964, 980-81, 2600-01)

(d) Faculty Observation and Evaluation of TAs

TAs typically work closely with their supervising professors. They meet regularly to discuss a range of topics, including, for example, the progress of the course, suggestions for course improvement, the way in which material should be taught, topics for papers and tests and problems students are having understanding material. (Tr. 197, 213-15, 671-72, 856, 864-65, 1123-25, 1127-28, 1355-57, 1546-47, 1549; EX 37 at 3; see EX 54; Tr. 2376-80, 3430, 4288, 4848-49, 4851, 5401-02)

Professors view themselves as responsible for guiding TAs and training them as teachers. (Tr. 357-58, 956, 1123, 1546; EX 37 at 3; EX 36 at 2; EX 42(a) at 10) In fact, many departments have formal guidelines in place that require faculty members to train and mentor their TAs. MAP policy expressly encourages faculty to "help your preceptors develop their teaching skills in preparation for their future careers." (EX 37 at 3) To that end, professors often observe TAs in their discussion sections or labs and provide feedback on how they can improve their teaching methods. (Tr. 869, 984, 1128, 1586-88, 3355-56, 3433, 3804-05, 3973; EX 37 at 4) Likewise, the instructor's handbook in the Psychology Department states that faculty are expected to meet regularly with their TAs to review the progress of the course and discuss their teaching experience. (Tr. 1547) In other cases, weekly meetings between faculty members and their TAs is an unwritten norm. (Tr. 213, 670, 3430, 4848, 5398, 5401, 5422-23)

In the French Department, the Director of Language Instruction, Dr. Kim Campbell, observes all students during their first year of teaching and meets with them afterwards to discuss "what happened in the class and what kinds of issues need to be worked on." (Tr. 3973-74) TAs are also videotaped and then evaluated in review sessions led by Dr. Campbell that last approximately five hours. (Tr. 3973-74, 3976) New TAs are also observed in the classroom by the instructor in charge of their course, as well as by another senior faculty member when possible. (Tr. 3977) Experienced TAs are also observed once during the semester. (Tr. 3977) Following any classroom observations of TAs, the faculty member prepares a formal evaluation on a standard form provided by the department that is discussed with the TA. (Tr. 3977-78; see EX 111) The UAW's own student witnesses from other foreign language programs testified that they too were regularly observed and evaluated during the course of their TAships. (Tr. 1796-97, 1865, 1870-71, 1874-75, 1926-27)

Numerous witnesses testified about the observation and evaluation that takes place in other schools and departments. Dean Marcus stated that TAs in the School of Education's Department of Culture and Communication are observed by faculty a minimum of three to four times each semester. (Tr. 3804-05) Dean Benhabib testified that the Economics Department requires faculty members to complete written evaluation forms for their TAs, which are then reviewed by the Directors of Graduate and Undergraduate Studies and subsequently discussed with the TA. (Tr. 229-30; see EX 11 at App. A) Professor Hoy explained that TAs in the Expository Writing Program are observed during the semester both by EWP Directors and mentors. (Tr. 955-57, 984) According to Professor Hoy, these classroom visits are always followed by consultation between the visitor and the TA during which the nature and effectiveness of the TA's teaching is discussed. (Tr. 984; accord 2602) Associate Dean Matthews testified that the Psychology Department requires professors to evaluate their TAs by completing a departmental evaluation form, which is shared with the TAs, and professors are told that they should observe TAs teach their recitation section at least once during the semester. (Tr. 1550-51; EXs 54, 55) In the MAP program, faculty "are encouraged also to observe each of the recitation sections at least once during the course of the term." (EX 37 at 4; see also Tr. 2942-44 (Mary Campbell, Dean of the Tisch School of the Arts, testified that advanced TAs in the Cinema Studies Department who are assigned to teach their own course are supervised by the Chair of the department who attends and evaluates certain class sessions))

As part of this supervision, many professors invite their TAs to give one of the course lectures, which the professor observes and discusses with the TA. (Tr. 868-69, 1128, 3433, 4368, 5395-96, 5405-06) Contrary to the Regional Director's misleading suggestion (Decision at 6), the purpose of offering TAs the opportunity to present a class lecture is to develop and enhance the TAs' own skills and experiences and not to somehow reduce the professor's work load. (Tr. 356 (professors in CNS provide TAs with the opportunity to deliver one class lecture "as an exercise to train the teaching assistant . . ."), 869 ("It offers an opportunity for graduate

students to lecture to a large group and get some kind of feedback about the lecturing experience."), 4368 ("Oftentimes [TAs] will be asked to teach a session. . . . The purpose of that is to give them some practice . . . under an instructor's supervision in teaching a course.") During her TAship in an American Literature course, for example, Mia Manzulli had the opportunity to deliver one of the course lectures. The professor met with her first to discuss the topic of her lecture, observed Dr. Manzulli deliver her lecture, and provided her with feedback afterwards. (Tr. 3433; see also 5395- 96, 5405-06 (CNS student James Cavanaugh testified that he was invited to give lectures on topics of his choice during two courses in which he was a TA, his professors helped him prepare for the lectures, and he received feedback and suggestions thereafter), 1216, 1281 (Laura Tanenbaum stated that her professors observed her deliver class lectures and teach a recitation section in Comparative Literature and provided feedback to her afterwards))

Many departments have formal evaluation procedures for TAs. (Tr. 229-30, 984, 4295; EX 11, App. A, EX 124) In addition, most TAs receive written evaluations from the students in their classes, which are reviewed with them by the professor with whom they are serving as a TA. (Tr. 227-29, 983-84, 872-73, 1217, 2602; EX 11 at App. A; see Tr. 1547-48, 1551-52, 3355, 3978-80, 4295-96, EXs 38(a), 38(b), 39, EX 54, EX 112, EX 124 at 3) Finally, many witnesses testified that students receive evaluations and feedback from their professors in an oral, rather than written, form. (Tr. 984, 1271, 1281, 1926-27, 3475, 3484, 4368-69, 2130, 5406)

2. Research Assistants

Most Research Assistants ("RAs") perform experiments or other research in close collaboration with a faculty member in support of the faculty member's research project. (See, e.g., Tr. 67, 235, 687-88, 4268, 5536-37, 5574-75, 5609) Often, the faculty member is the RA's faculty advisor and the research conducted by the RA also serves as the RA's own dissertation research. (See, e.g., Tr. 67, 235-36, 687, 3727, 4279, 5537, 5572-73)

Because the Regional Director's decision dealt separately with the RAs in Biology, Chemistry, Neural Science, Physics and Sackler, they are discussed separately below.

(a) Science RAs

Most Research Assistants in GSAS are in the natural sciences departments, namely Biology, Neural Science (the "Center for Neural Science"), Physics, Chemistry, and Basic Medical Sciences (the Sackler Institute of Graduate Biomedical Sciences) (hereafter referred to collectively as "Science RAs"). (Tr. 66-67) These RAs conduct research that is required by a faculty member's research grant. (Tr. 5477-78, 5497-98, 5530-31, 5574-75) They do so in collaboration with the faculty member, in the faculty member's laboratory. (Tr. 370, 397, 687-88, 2782, 3715-16, 5536-37, 5609) The resultant research also serves as the RA's dissertation research. (Tr. 370, 372-73, 649, 3727, 5478, 5497, 5531)

In order to obtain a research grant, a faculty member submits a proposal on behalf of the University to a funding source – usually the National Institutes of Health – to perform certain research. (Tr. 363, 5475-76, 5486, 5497-98, 5530, 5573-74) The agency then awards the grant to the University to fund the proposed research. (Tr. 5476, 5497-98, 5530-31, 5573-74) The research grant pays the tuition and the stipend of any RA who is working on the grant – i.e., performing research that the grant was intended to fund. (Tr. 5475, 5478, 5497-98, 5528-29, 5531, 5574-75)

During the first year of the doctoral program in the sciences, students are made aware of the particular research being conducted by the faculty in their department. (Tr. 370, 642- 44, 3714-15; see EX 3(i) at 56, EX 87 at 6) Those faculty who have been awarded research grants are responsible for the research called for by the grant. (Tr. 5476, 5497-98, 5500, 5530-31) Where a student is interested in that faculty member's research, the student and the faculty member discuss the possibility of the student conducting his or her dissertation research under the faculty member's supervision. (See Tr. 396, 653, 3715-16, 3727, 5563-64) The

decision that a student will work under a particular faculty member is a "mutual decision a partnership" that results from "a coalescence of [the] individual interests" of the student and the faculty member. (Tr. 653, 5187; see also 396-97, 2763-64, 3727) If the student's research helps to fulfill the University's obligations under the research grant, the student is designated as an RA and his or her support is paid out of the grant. (See Tr. 5476-78, 5497-98, 5530-31, 5574-75)

A Science RA performs his or her research in the faculty member's laboratory under the faculty member's tutelage. (See Tr. 355, 370, 687-88, 2782, 3715-16, 5479, 5481-82, 5485, 5497-98, 5538-40, 5579-80) The faculty member (who is also the principal investigator for the research grant) is designated as the RA's research advisor. (Tr. 5479, 5481, 5485, 5497-98, 5535, 5537-38, 5572-73) In addition, each student is assigned several other faculty – who together with the student's research advisor are designated as the student's advisory committee – who periodically review the RA's progress and offer guidance. (Tr. 354-55, 635, 637-38, 3716-18; see EX 87 at 8) An RA's dissertation proposal must be approved by his or her advisory committee. (Tr. 354-55, 405-06, 637-38, 3718-19; see EX 87 at 8) In addition, the RA will be awarded a doctorate only if and when the committee approves the RA's dissertation. (Tr. 640-41, 3718-19; EX 3(i) at 56, 219, 233, EX 87 at 7-8)

Given the nature of the work that the Science RAs are performing, their supervision by the faculty research advisor/principal investigator can only be described as close. Professor Furmanski, Chair of the Biology Department and former FAS Dean, testified that he meets with his RA "literally on a daily basis" to discuss the RA's research:

We look at his results, we talk about the experiments that he is planning and thinking about. We discuss the implications of his findings. And plan out what needs to be done next. And that is done on a very continuing regular basis.

(Tr. 5485) Professor Carol Reiss, who is a member of Furmanski's department, interacts with the RA on her research grant in much the same way:

She supervises him, she is the one who initiated the project, and – with him – developed this particular component of the project which serves as his thesis dissertation research. She interacts with him on a very regular basis, to look at his results, to examine the consequences, the findings of his experiments, to design new experiments, [and] guides him

(Tr. 5481-82) Furmanski's and Reiss' supervision of their RAs is typical of the relationship between faculty and their RAs in Biology. (Tr. 5485)

The same is true at Sackler. Sackler students perform research under the supervision of their faculty research advisor who also serves as the principal investigator on the grant. (Tr. 3716, 5572-73; see p. 91 n.69, below) Faculty direction and supervision of the graduate assistant's research "is a literally ongoing daily process." (Tr. 5609)

When asked the extent to which a particular faculty research advisor/principal investigator (Prof. Borowiec) supervised his graduate assistant (Yaron Daniely), the Director of Sackler, Joel Oppenheim, testified that the faculty member

does [Yaron's] research with him on a daily basis almost, goes over results of experiments that have been discussed that Yaron carries out, they carry on a dialogue on where to go next. . . . Their desks are literally next door to each other. It's a very intimate relationship.

(Tr. 5579-80) Dr. Oppenheim further testified that this is typical of the relationship between faculty principal investigators and their graduate assistants at Sackler. (Tr. 5580; see also 5539-40 (Physics faculty supervise their RAs "100 percent"))

The RA's dissertation research is viewed as a collaborative effort between the RA and his or her faculty advisor. (Tr. 397, 687-88, 2847-48, 5609) As a result, the research is customarily published with both the RA and the faculty member identified as co-authors. (Tr. 5487, 5497-98, 5540-41, 5584-85) For example, at Sackler, the graduate assistant's thesis research results in publication, with the faculty research advisor/principal investigator serving as co-author, "almost 100 percent of the time." (Tr. 5585; see also 5580, 5582, 5587-89; EX 163 at 9, 16, 31)

(b) Other RAships

Although RA positions are more prevalent in the sciences, there a number of such positions in the Social Sciences and Humanities departments at GSAS and in the Stern School of Business and School of Education as well. (Tr. 67, 3777, 4260-61) As with the sciences, most of the support for these other RAships in GSAS comes from faculty research grants. (Tr. 196) The responsibilities of RAs in the Social Sciences and Humanities vary depending on the nature of the research project with which they are assisting.

Often, RAs are responsible for conducting experiments, collecting data, performing statistical analyses, summarizing literature on a topic, or collecting bibliographic material. (Tr. 234, 1314, 1344-46, 2281-83) For example, Psychology Professor Susan Carey testified regarding one of her Research Assistants who was supported from her grant in the Fall of 1998. (Tr. 3199) The purposes of Professor Carey's grant are to study perceptual and cognitive processes in two sets of non-linguistic creatures, human babies and monkeys. (Tr. 3201-02) The research that her RA conducted, which concerned the cognitive capacities of baby monkeys, "will be a spectacular piece of his thesis [research]." (Tr. 3201-02) Similarly, Judy Goldberg testified that during her Research Assistantship for Professor Schotter in the Economics Department, she conducted experiments for his research on game theory, recorded and analyzed data, and reviewed drafts of papers. (Tr. 4896-97, 4900) These Research Assistantships provide an opportunity for graduate students to explore a possible dissertation topic, learn about research techniques, and develop an expertise in a particular field. (Tr. 235, 4904-05, 4909-10)

Doctoral students in the Stern School of Business serve as RAs during their first three to four years in the program. (EX 137 at 12) In the first year, RAs are assigned to a faculty member in their area of interest and assist the faculty member with his or her research, learning research techniques and resources. (Tr. 4262-63, 4335) During their second year, RAs take a more active role, collaborating with their faculty member to design and carry out research projects. (Tr. 4268, 4340) In their third and fourth years, RAs spend most of their time performing their own dissertation research under the tutelage and supervision of their faculty advisor. (Tr. 4279, 4377-78)

In the School of Education, Research Fellowships are typically awarded to first-year students as an important recruitment tool to attract those students to NYU. (Tr. 4593-94; see 3868) Research Fellows typically assist faculty members on a particular research project in their area of interest. (Tr. 3864-65, 4594) They participate in the research project by collecting and analyzing data and performing research for bibliographies. (Tr. 3862-63, 3864-65, 4595-96) For example, Professor Allen testified that one of the Research Fellows in the Department of Applied Psychology in SED assists on a research project concerning language development in small children, audiotaping conversations between small children and their parents and analyzing the content and quality of the conversation. (Tr. 4596-97) Through Research Fellowships, graduate students develop research skills to use both in their doctoral programs and in their future careers as researchers. (Tr. 3866-67)

3. Graduate Assistants

Graduate students with Graduate Assistant ("GA") appointments are engaged in a wide variety of activities that differ substantially depending on the field of study. (Tr. 70) In general, these positions are designed to provide students with experience related to their academic or professional training. (Tr. 70; EX 6 at 5) At the outset, it is important to understand that commencing this fall, virtually all GA positions in GSAS are being eliminated as part of the school's financial aid reform plan.

Most GA positions are filled by masters students in professional training programs, rather than doctoral students who are pursuing careers in academia. In the Tisch School of the Arts, for example, GA positions are designed to provide masters students with enhanced training in some aspect of their professional discipline. (Tr. 2896) Students in the Design program serve in a variety of production positions and gain technical experience that is critical to developing scenic, lighting and costume design skills. (Tr. 3118-19) Similarly, GAs in the Graduate Film Department acquire cinematography, directing, and production skills by assisting faculty members in teaching advanced courses and assisting students in carrying out their directing, editing, and film making assignments. (Tr. 2905-07) In the Interactive Telecommunications Program ("ITP") students serving as GAs receive training in the most advanced technologies used in the department, in order to serve as a mentor for other students in the ITP labs and foster their professional development. (Tr. 2908-10; PX 57(a) at 2) In each case, the academic program and career goals of these students differ substantially from doctoral students studying to become university professors. The Regional Director, however, ignored this difference and the direct relationship between these positions and the professional skills that masters students at Tisch are developing through their studies. Instead, he devoted the bulk of his description of GAships at Tisch to the existence of various "job descriptions" that exist for some of these positions. (Decision at 12-14)

The experiences of GAs in the School of Education vary widely. Some GAs are program assistants, in which they participate in curriculum development, recruitment and orientation, research projects, and some field supervision or teaching responsibilities. (Tr. 3826-27) Other GAs in SED participate in assistantships that are designed to prepare them for life as a practitioner. Many students serve as tutors and mentors for public school students in high schools, middle schools and elementary schools throughout the five boroughs of New York City. (Tr. 3783-84) As part of their assistantships, all tutors participate in a year-long seminar, which they may take for credit, during which they review tutoring and counseling techniques as well as social situations the tutors are likely to encounter in urban schools. (Tr. 3786, 3789) Some students who are pursuing degrees in Higher Education Administration serve as GAs in the office of the Associate Dean for Student Affairs, through which they assist with recruitment and student activities, thus preparing them for their future careers as deans of students or student activity directors. (Tr. 3829-30) Finally, a number of GAs participate in externally funded field initiative projects, such as efforts to prevent drug abuse in schools, in which they assist in the implementation and assessments of those projects. (Tr. 3834-35)

Prior to the changes being made as part of the school's financial aid reform, GA positions in GSAS have involved such responsibilities as editing a journal, assisting in arranging for academic conferences, and performing research. (Tr. 1132, 1344-46, 1566-72, 2285, 4511-12, 4514-17, 4521-26) For example, the GA for the History Department Program in Women and Gender arranged for guest speakers for the program, and organized both conferences for graduate students to discuss their work and meetings for students interested in gender issues under the supervision of the faculty director of the program. (Tr. 1132, 2285-86, 2288-89; see EX 71 at 7-8) Similarly, a GA at the Center for Near Eastern Studies planned and organized workshops and conferences in conjunction with the program's faculty. (Tr. 4524-26) Another GA assisted the book review editor of the Middle East Report, a leading academic journal, by reading submitted books or abstracts and making initial decisions regarding which submissions to review. (Tr. 4527-29)

By taking isolated examples of certain GA duties out of context and discussing these positions without reference to the graduate students' academic programs, the Regional Director and UAW provide an unbalanced view of these GA positions and mischaracterize the very nature of these assistantships. (See, e.g., Decision at 11-15; UAW Br. at 23-32) In many cases, emphasis is placed on clerical functions that are either a small, ancillary part of a GA's responsibilities or that have been eliminated altogether in response to the

directives of the graduate assistant study group. For example, one of the GA activities described by the Regional Director is a position in the Dramatic Writing Program at Tisch that was eliminated over a year ago. (Decision at 15; Tr. 3009, 3661) As discussed in more detail below (see pp. 62-65, below), GA positions provide students with the opportunity to gain experience in areas related to their future professions, and students serving as GAs often may receive academic credit for their assistantship activities.

ARGUMENT

II. THIS CASE IS NOT GOVERNED BY THE BOARD'S DECISION IN BOSTON MEDICAL CENTER

The Board's decision in Boston Medical Center Corp., 330 N.L.R.B. No. 30 (Nov. 26, 1999), overruled precedent that had stood for some 25 years in finding that medical interns, residents and fellows ("house staff") are "employees" within the meaning of Section 2(3) of the Act. That decision, however, did not address the status of graduate students serving as graduate assistants in connection with their studies, such as those involved in this case.

The record here demonstrates that NYU's graduate assistants are significantly different from the house staff involved in Boston Medical, and that the holding in that case should not be applied in the very different setting of a university graduate school. Most importantly, consideration of the "entire nature" of the relationship between graduate assistants and NYU, as the Board said was necessary in Boston Medical, slip op. at 13, shows that the relationship is primarily and overwhelmingly educational. Graduate students are awarded graduate assistant positions to provide teaching, research and other experience as an integral part of their educational programs. Graduate assistants are not compensated for providing services; rather, their assistantships are part of an integrated system of financial aid that provides many students with the identical stipend and tuition remission whether they serve as graduate assistants or not. The "essential elements" of the graduate assistants' relationship with the University do not define an employer-employee relationship, as the Board found in Boston Medical, slip op. at 9, but rather that of students in a traditional academic institution.

A. The Board's Caselaw Prior to Boston Medical Center Excluded Students

from Collective Bargaining with Their Educational Institutions

For more than 25 years prior to its decision in Boston Medical, the Board ruled that "students [who] perform services at their educational institutions which are directly related to their educational program" are not employees within the meaning of the Act. See St. Clare's Hosp. and Health Ctr., 229 N.L.R.B. 1000, 1002 (1977); see also Adelphi Univ., 195 N.L.R.B. 639 (1972); Leland Stanford Junior Univ., 214 N.L.R.B. 621 (1974); Cedars-Sinai Med. Ctr., 223 N.L.R.B. 251 (1976).

In Adelphi, the Board considered the status of graduate teaching and research assistants, who were expected to devote some 20 hours per week to their assistantship duties, for which they received payment and free tuition for their coursework. Teaching assistants in the science disciplines taught laboratory courses, while non-science teaching assistants had no regular classes but sometimes substituted for absent faculty and assisted in preparing examinations and grading papers. As the Board described them, "The graduate assistants are graduate students working toward their own advanced academic degrees, and their employment depends entirely on their continued status as such." 195 N.L.R.B. at 640. The Board concluded that although they performed "some faculty-related functions," the graduate assistants were "primarily students" and, therefore, excluded them from the bargaining unit of regular faculty members. Id. at 640.

In Stanford, the Board followed Adelphi, concluding that research assistants who were Physics doctoral candidates engaged in performing research were not "employees" under the NLRA. Service as a research assistant was not required for a doctoral degree in Physics. Instead, the Board noted that this was one of

several forms of financial aid provided to graduate students in order to support them in pursuing their degrees:

It is clear that the policy of Stanford is to provide financial aid for its graduate students by means of a stipend for doing what is required of them to earn their degrees. The student aid takes many forms; some have fellowships, some loans, some research assistantships, and others teaching assistantships.

214 N.L.R.B. at 622. The Board noted that the research assistants were "like the graduate teaching and research assistants who we found were primarily students in Adelphi University . . ." 214 N.L.R.B. at 623. It ruled that the research assistants, therefore, were "not employees within the meaning of Section 2(2) of the Act." Id.

In Cedars-Sinai, the Board similarly held that interns, residents, and clinical fellows who performed services for a hospital while they received advanced medical training were not employees under the Act. The Board stated that "[i]t is the educational relationship that exists between the house staff and Cedars-Sinai (a teaching hospital) which leads us to conclude that the house staff are students rather than employees, *i.e.*, that the house staff's relationship with Cedars-Sinai is an educational rather than an employment relationship." 223 N.L.R.B. at 253. The Board further explained in St. Clare's that "national labor policy does not require — and in fact precludes — the extension of collective-bargaining rights and obligations" in situations where students are performing services for their educational institution that are directly related to their educational program. 229 N.L.R.B. at 1002. It made clear that its decisions in this area reflected not only the basic incompatibility of collective bargaining and the structure of higher education, but also serious concerns about governmental intrusion upon traditional academic freedom. Id. at 1003.

B. The Boston Medical Center Decision

In Boston Medical, the Board expressly overruled Cedars-Sinai and St. Clare's, and held that interns, residents and fellows were "employees" within the meaning of Section 2(3) of the Act. The Board began its analysis with the definition of "employee" contained in Section 2(3), noting the breadth of the definition and the absence of any express exception in the statute for the category "students." Slip op. at 9. The Board also relied on the common law definition of "employee," as any "person who works for another in return for financial or other compensation." Id. (citing NLRB v. Town & Country Elec., Inc., 516 U.S. 85, 90-91 (1995)). While suggesting that other statutory or policy reasons might justify excluding individuals from coverage as "employees", it found none applicable to house staff:

unless there are other statutory or policy reasons for excluding house staff, they literally and plainly come within the meaning of "employee" as defined in the Act. We find no such reasons.

Boston Medical, slip op. at 9.

The Board then explained the basis for its holding that house staff fall within the broad statutory definition of "employee" "notwithstanding that a purpose of their being at the hospital may also be, in part, educational." Id. It reasoned:

That house staff may also be students does not thereby change the evidence of their "employee" status. As stressed above, nothing in the statute suggests that persons who are students but also employees should be exempted from the coverage and protection of the Act. The essential elements of the house staff's relationship with the Hospital obviously define an employer-employee relationship.

Id. (emphasis added). The Board proceeded to identify three such "essential elements":

First, the "house staff work for an employer within the meaning of the Act." Id.

Second, house staff receive compensation for their services in the form of a stipend. Id. The stipends are not excluded as income under the Internal Revenue Code, and the hospital withholds federal and state income taxes, as well as social security, from their salaries. Id. The house staff also receive fringe benefits and other emoluments reflective of employee status. Id.

Third, house staff provide patient care for the Hospital. Id. "Most noteworthy is the undisputed fact that house staff spend up to 80 percent of their time at the Hospital engaged in direct patient care." Id. at 9-10. The Board found that the advanced training house staff received simply complemented the services provided by the house staff, for which they were being compensated, and was not inconsistent with "employee" status. Id. at 10.

Concluding its discussion of Section 2(3), the Board emphasized that house staff differed from students in a traditional academic setting in a number of important respects:

While house staff possess certain attributes of student status, they are unlike many others in the traditional academic setting. Interns, residents, and fellows do not pay tuition or student fees. They do not take typical examinations in a classroom setting, nor do they receive grades as such. They do not register in a traditional fashion. Their education and student status is geared to gaining sufficient experience and knowledge to become Board-certified in a specialty.

Id. at 10.

Next, the Board looked to two other statutory considerations. It discussed at length the legislative history of the 1974 Healthcare Amendment, which it viewed as demonstrating that Congress thought house staff to be statutory employees. Id. at 11. That legislative history obviously has no application to the status of graduate students in an academic institution. The Board also found that Section 2(12)(b) of the Act, defining "professional employee", applied to house staff, supporting the conclusion that they are statutory employees. Id. at 10-11. As demonstrated below, the opposite is true with respect to graduate assistants. (See pp. 50-51, below)

In the final portion of its decision, the Board addressed "other considerations" that supported its decision to overrule Cedars-Sinai and its progeny. Boston Medical, slip op. at 12-14. It looked to the opinions of other courts and administrative agencies that have addressed the issue under a number of state public employment laws, finding that virtually all had concluded that house staff were employees, and the experience of collective bargaining by public sector house staff. Id. at 12. Lastly, the Board rejected the Hospital's argument that granting employee status to house staff would improperly permit intrusion by collective bargaining into areas involving academic freedom. Id. at 13. It found it unnecessary to define the boundaries between permissive and mandatory subjects of bargaining concerning house staff, stating that "the parties can identify and confront any issues of academic freedom as they would any other issue in collective bargaining," and that the Board would address any unresolved issues at the appropriate time. Id.

The Board concluded by emphasizing that its interpretation of the statute, finding house staff to be employees under the Act, was "a reasonable one that takes into account the entire nature of the house staff-hospital relationship." Id.

C. Graduate Assistants at NYU Are Significantly Different

From the House Staff at Boston Medical Center

Purporting to apply the common law definition of employee endorsed by Boston Medical, the Regional Director concluded that NYU's graduate assistants are employees based on the finding that they "perform services under the control and direction of the Employer, in exchange for compensation." (Decision at 26) In reaching this conclusion, however, he essentially ended the inquiry without considering the "entire nature of the relationship" between graduate assistants and the University, which the Board in Boston Medical said was necessary. The "essential elements" of that relationship do not define an employer-employee relationship, as the Board found in Boston Medical, but rather that of students in a traditional academic institution. This is made clear by numerous important distinctions between NYU graduate assistants and the house staff addressed by the Board in Boston Medical, which were ignored by the Regional Director.

1. The Nature of the Graduate Assistant-University

Relationship is Predominantly Educational

The Board in Boston Medical emphasized that it based its decision on "the entire nature of the house staff-hospital relationship." Slip op. at 13. It made clear in that regard that the educational benefits and training received by house staff were secondary to the primary purpose of providing services to the hospital. Id. at 9-10. Indeed, it found "most noteworthy" that "house staff spend up to 80 percent of their time at the Hospital engaged in direct patient care." Id. The nature of the relationship between the graduate assistants and NYU is radically different.

First, all graduate assistants must be enrolled at NYU as graduate students seeking advanced degrees. (Tr. 76, 460) They apply to NYU and are admitted into educational programs as students – not as graduate assistants. House staff, in comparison, apply to hospitals for admission as interns, residents or fellows. The Board said in Boston Medical that "a purpose of [house staff] being at a hospital may also be, in part, educational." Slip op. at 9 (emphasis added). In contrast, the only purpose of a graduate assistant being at NYU is to study for an advanced degree.

Once admitted, house staff remain in that capacity on a full-time year-round basis for the entire 3-5 year duration of their program. Id. at 1. As the Regional Director recognized, graduate students are typically appointed as assistants only for 14-15-week academic semesters, and are awarded such positions on average only about one-half of the semesters they are in graduate school. (Decision at 29; EX 168) This pattern of multiple temporary appointments interspersed with periods without assistantships further differentiates this case from Boston Medical.

Most significant is the difference in how graduate students and house staff divide their time. The Boston Medical house staff spent some 80 percent of their time engaged in direct patient care and just 20 percent of their time in "didactic" activities (such as lectures, conferences and classes). Slip op. at 3, 9-10. NYU graduate assistants, in contrast, spend only about 15 percent of their time on their assistant activities over the course of their academic careers, and some 85 percent of their time on all other educational activities.

On this basis alone, it is apparent that the nature of the relationship between graduate assistants and NYU differs fundamentally from the relationship between house staff and a hospital. Moreover, apart from statistical comparisons, the basic purpose of the graduate assistant position is educational in nature. As discussed in detail in Point II below, graduate assistant positions are an integral part of students' educational programs, providing important training in teaching, research and other academic or professional skills.

2. Graduate Assistants Receive Financial Aid,

Not Compensation for Services

The stipends and tuition remission graduate assistants receive are part of an integrated financial aid structure,

and viewed in that context, cannot fairly be characterized as compensation for services. The Regional Director acknowledged that "students in the fully funded departments receive the same amount of financial aid regardless of whether they are providing services to NYU." (Decision at 28 n.42) He further conceded: (i) that under the MacCracken fellowship program, some 20-25 percent of all doctoral students in the Graduate School of Arts and Science presently receive uniform funding over five years, including three years on fellowship support and two years as a TA (Id. at 19 n.34); (ii) that this program is being extended to virtually all incoming doctoral students in GSAS who will have full funding for four or five years, effective this year (Id.); and that (iii) all doctoral students in Psychology (the largest GSAS department), Physics, Biology, Neural Science, and the Stern Business School are similarly fully funded and receive the same stipend and tuition remission, whether or not they are assigned as a graduate assistant in a given semester. (Id. at 32) Nonetheless, he dismissed this evidence without explanation, stating only that it does not "persuade me that the graduate assistants are not receiving compensation in exchange for services rendered." (Id. at 28 n.42)

But it is impossible to understand how stipends and tuition remission can be viewed as compensation for services when the same amounts are received by all students in these programs. Obviously, the stipends and tuition remission cannot be compensation for services in semesters when the students are performing no services. It makes little sense to say that the very same amounts are compensation in other semesters when students happen to be appointed as graduate assistants. Indeed, it appears that the Regional Director would reach the same illogical conclusion even if all students in every one of NYU's graduate programs were fully funded, and everyone received the same amount without any consideration of whether or not they were serving as a graduate assistant at a particular time.

There are other important reasons why the Regional Director's holding that stipends and tuition remission are compensation is erroneous. Stipend levels are based on the amount necessary to attract and retain the most promising students, and the amounts provided are far above market rates. (Tr. 242-49, 318-19, 348-49, 1102, 3129-30, 3160, 3565, 4290-91) Moreover, stipends do not vary based on the amount of work performed or the skill and experience of the individual graduate assistant. (Tr. 4262; see 246-49, 348-49, 539-40, 1046, 5358) Thus, the economic relationship between the University and the graduate assistants is fundamentally different from that normally existing between an employer and employee.

In addition, and further distinguishing this case from Boston Medical, the tax treatment of stipends and tuition remission does not support viewing these amounts as compensation for services. (See Decision at 27) A stipend received by a graduate assistant is taxable income under the Internal Revenue Code, but so is a stipend paid to a graduate student on a fellowship or scholarship. Tuition remission provided to graduate assistants (which amounts to approximately two-thirds of the support package provided to most graduate students who are taking courses), like tuition remission provided to graduate students on fellowships, is not subject to income tax under IRS guidelines. (JX 1 at 5) In comparison, graduate tuition remission provided as a fringe benefit to University employees is taxable. (EX 169) Although income tax is withheld from assistantship stipends, FICA generally is not. (JX 1 at 5)

The Regional Director also relied on the fact that the stipends are "treated like any other personnel salary in that they are processed through the payroll department and distributed in bi-weekly checks." (Decision at 26-27) The Board, however, has rejected a similar argument in Leland Stanford Junior University, 214 N.L.R.B. 621 (1974) (which the Regional Director elsewhere relies on as Board law (Decision at 36)). In holding that research assistants in that case were not employees covered under the Act, it gave no weight to the argument that they "are paid through Stanford's normal payroll machinery for work they are required to perform in order to obtain their salaries." Leland Stanford, 214 N.L.R.B. at 621. Instead, the Board concluded that the payments to the RAs were a form of financial aid and were "in the nature of stipends or grants to permit them to pursue their advanced degrees" Id. at 621.

Similarly here, there can be no doubt that graduate assistant positions are an integral part of the University's financial aid system for graduate students, as numerous witnesses testified. (Tr. 97, 330, 460, 1315, 1642-43,

3058-59, 3173-74, 3501-02, 3776, 4509) Graduate assistant positions are also described as financial aid in the official bulletins of each of the schools addressed at the hearing, and in numerous school, department and program brochures, applications for admission and websites. Likewise, the letters sent to students by the University notifying them that they have been awarded graduate assistant positions are typically generated by the Office of Financial Aid or refer to the assistantship as a form of financial aid.

3. Graduate Assistants Have All of the Attributes

of Students In A Traditional Academic Setting

The Board was careful to note in Boston Medical that "while house staff possess certain attributes of student status, they are unlike many others in the traditional academic setting." Slip op. at 10. Graduate assistants at NYU in contrast, are graduate students in a traditional academic setting, and possess each of the attributes identified by the Board as lacking among the Boston Medical house staff.

- Graduate assistants, unlike interns, residents and fellows, are charged tuition and fees as students. These charges are remitted as part of the financial aid provided to graduate assistants.
- Graduate assistants take typical examinations in a classroom setting and receive grades for their coursework as graduate students.
- Graduate assistants register in a traditional fashion. Indeed, graduate assistants must be enrolled as graduate students at NYU.
- Graduate assistants' education and student status is geared towards receiving a graduate degree – either a Ph.D. or a Masters. In contrast, house staff are gaining "experience and knowledge to become Board-certified in a specialty," following completion of the M.D. degree.

(Slip op. at 10; see Tr. 57-61, 63, 76)

4. Graduate Assistants Work Under Close Faculty Supervision

The Board found that the Boston Medical house staff performed numerous medical procedures with little or no direct supervision by attending physicians, ranging from routine tests to surgical procedures and responding to life-threatening emergencies. Although attending physicians ultimately have responsibility for patient care, interns and residents make numerous patient care decisions on their own every day. Slip op. at 2-4.

Most NYU graduate assistants, in contrast, work under relatively close supervision by faculty members. Thus, faculty in all cases are primarily responsible for the content and structure of a course. (EX 9 at 2) TAs leading recitation sections typically meet regularly with faculty to discuss the course material, and how to approach the material with students in the section. (Tr. 213-15, 671-72, 856, 864-65, 946, 1355-57, 1360, 1546-47, 1549, 3430, 4288, 4615, 4848-49, 4851, 5401-02; see also EX 54) In those courses where TAs are the principal classroom instructors (e.g., Expository Writing Program and foreign languages), there is close supervision over the curriculum and guidance in classroom techniques. (Tr. 976-80, 3963-65, 3970)

Similarly, TAs in the School of Education who supervise student teachers in the field receive extensive guidance from faculty. For example, in the Department of Teaching and Learning, TAs in the field participate in weekly meetings with the DUG and the nine faculty members who also supervise student teachers, during which they discuss approaches to supervision, related reading material, and their experiences in the field. (Tr. 5416, 5421-22) In addition, each student teacher also has a faculty mentor in their area of academic interest with whom they meet once a week. (Tr. 5419, 5422-23)

Similarly, RAs work closely with their faculty advisors, conferring almost daily to discuss the results of the RAs' research and its implications, review ways of analyzing data, and plan the next step in the research project. (Tr. 660, 691, 5481-82, 5485, 5538-39, 5579-80) Many GAs also work in close collaboration with, or supervision by, faculty members, including GAs in the Tisch School of the Arts and the School of Education. (Tr. 2915-16, 4620, 4629-30, 5421-22)

5. Graduate Assistants Do Not Receive Fringe

Benefits Provided to NYU Employees

The Board found it significant that house staff in Boston Medical received fringe benefits reflective of employee status. Slip op. at 9. The Regional Director accorded no significance to his finding that graduate assistants receive virtually none of the benefits provided to NYU's faculty staff and administration. (Decision at 4 n.8; see EX 169) Viewed from another perspective, and again unlike house staff in Boston Medical, graduate assistants receive all benefits and services generally provided to graduate students at NYU. NYU employees are not eligible for any of these student benefits. (Tr. 5693; EX 169 at 1)

While the Regional Director noted that graduate assistants are covered by NYU's workers compensation policy (Decision at 4 n.8), he failed to state that they are not covered by other statutorily-mandated benefits received by NYU employees, including unemployment and disability insurance. (EX 169 at 1) Moreover, coverage under workers compensation is broadly required under New York State law even for individuals who plainly are not "employees" under the National Labor Relations Act.

6. Graduate Assistants Have Not Yet Received Their Degrees,

and Are Not Professional Employees under Section 2(12)

In Boston Medical, the Board observed that Section 2(12)(b), "literally read . . . embraces house staff." Slip op. at 10. They are individuals who have completed a course of specialized intellectual instruction and study in an institution of higher learning or a hospital, and are performing related work under the supervision of a professional to qualify to be a professional as defined in the Act. Id. Graduate assistants in contrast, have not completed their courses of specialized intellectual instruction and study. Literally read, Section 2(12)(b) thus excludes graduate assistants, precisely because they are still graduate students. This same statutory provision which was relied upon as supporting the conclusion that house staff in Boston Medical were statutory employees, therefore, points in exactly the opposite direction here.

III. GRADUATE ASSISTANT POSITIONS ARE

P ALIGN="CENTER">PREDOMINANTLY EDUCATIONAL IN NATURE

A. Overview of Graduate Education

Doctoral programs at NYU use a number of means to develop graduate students into scholars with the requisite research and teaching skills. Classes and seminars provide graduate students with broad foundational knowledge and familiarity with the most current thinking in their field. The dissertation requires doctoral students to engage in original research under the guidance of experienced scholars. Graduate assistant positions provide opportunities to acquire teaching, research and other skills, also under the tutelage of experienced faculty members.

Indeed, much of the training of graduate students occurs outside the formal coursework (which typically lasts only two to three years) and preparation of a dissertation. Most graduate students are expected to attend departmental seminars, to present papers at and attend academic conferences and to publish articles in scholarly journals. (Tr. 314, 4380-81, 4906; see EX 14 at 4 (Section I. J)) These activities are not required for

the degree, just as service as a graduate assistant is not required in most departments. But all of these activities are an integral part of the Ph.D. students' educational program. (See Tr. 314, 1049-50, 1793, 4380-81, 4906; EX 6 at Attachment B, EX 14 at 4 (Section I. J), EX 69 at 3)

While masters degree programs are typically more course-based than their doctoral counterparts, the graduate assistant positions play a comparable role in complementing a student's formal coursework. (Tr. 60, 2896, 2934, 3076, 3181-82, 3851-52, 3854-56, 4738-39, 5053-54) They provide a variety of experiences that enrich students' studies and help train them for their professional careers.

B. Graduate Assistant Positions Further Educational

Programs in a Variety of Ways

The core purpose of graduate assistant positions is expressed in NYU's policy that such positions be "directly relevant to students' academic pursuits and career development." (EX 6 at 2; see also Tr. 91-92) Indeed, the record makes clear that the overwhelming majority of graduate assistant positions fulfill this purpose and form an integral part of a graduate assistant's education. Although the Regional Director and UAW focus on a number of atypical examples of graduate assistant activities, the Board's decision should be guided by an analysis of the predominant characteristics of graduate assistant positions and the University's central policies concerning assistantships. North Am. Van Lines, 288 N.L.R.B. 38, 42 (1988). In fact, the activities described by the Regional Director and UAW often represent a small fraction of a particular graduate assistant's overall responsibilities. Likewise, they rely on testimony about positions held in the past, that have since been eliminated altogether or modified in accordance with the policies reinforced by Vice President's Berne's 1998 study group. (Tr. 1262, 1264, 3611, 3661-62; EX 47 at 16, EX 48 at 16) A more comprehensive evaluation of the graduate assistant activities demonstrates the close connection between these positions and graduate students' academic programs and preparation for future careers.

1. The Relationship Between Service as a TA and

Students' Educational Programs

Experience as a TA is related to graduate students' educational programs in numerous ways. To begin with, as discussed above, teaching has been required for a doctoral degree in some of the largest departments in GSAS (Psychology, Physics, Biology and Neural Science), and is an informal requirement that is satisfied by all or nearly all Ph.D. students in the Stern School of Business; as of this fall, virtually all doctoral students entering GSAS will be required to teach for a minimum of two and a maximum of six semesters. (Decision at 10, 19 n.34) Indeed, "[t]he Graduate School of Arts and Science considers teaching experience to be an integral part of [a student's] graduate education." (EX 17 at 2) As Dean Stimpson testified, teaching is "an essential and crucial part" of doctoral education because "when you teach you learn." (Tr. 454) In addition, serving as a TA offers students the opportunity to develop teaching and communication skills and to garner the experience necessary to successfully pursue academic and other careers following their graduation from NYU. Dean Stimpson explained:

The second reason why we think teaching is an essential and crucial part of a MacCracken Fellow's and other graduate student's education is this: Many . . . Ph.D.'s are going to go onto academic careers in academic institutions, and if they go onto a career in an academic institution they are going to be teachers. If you look at job advertisements from academic institutions of higher education you will see them explicitly asking for people who have teaching competence. So that as we prepare our doctoral students for their vocations it is our obligation, it is our responsibility, to educate them as educators.

(Tr. 454-55) Serving as a TA also provides an opportunity for a graduate student to develop strong mentoring relationships with experienced faculty members who provide guidance on pedagogical techniques and other issues as students develop their teaching skills. (Tr. 694)

(a) Learning to Teach

The primary purpose of most doctoral programs is to prepare students for an academic career involving teaching at the college or university level. (Tr. 231, 357-58, 428, 454, 3526-27, 4250; EX 37 at 3, EX 115 at 2, EX 137 at 1, PX 81 at 1) Virtually all of the doctoral students testifying at the hearing indicated an interest in pursuing an academic career involving teaching at a college or university. (Tr. 1787, 1931-32, 2018, 2090, 2181, 2454, 2646, 4839, 5053-54, 5390; see also 1360, 3401, 3664-65; EX 45 at 5, EX 103 at 3)

Gaining teaching experience as a TA is an important step in preparing students for their future roles as professors. Many faculty members stressed that TA positions are an important part of a graduate student's education. As Professor Chazan, Director of MAP, testified, "[I]f the graduate school was not concerned about developing teaching skills, it would be failing in its responsibility to its graduate students. . . . I think it would personally be a dereliction of duty on the part of the school if it didn't address the issue of teaching skills. . . ." (Tr. 932); accord 230- 31, 876-77, 883-86, 988-91, 1361-62, 1553-54, 3501, 4347-49) Similarly, students testified that the experience of serving as a TA made them better teachers. (Tr. 2622, 3457-58, 4860-61, 5408-09, 5410-11)

Graduate students develop a range of teaching skills through their TAs, including, for example: () techniques for communicating knowledge in a way that students can understand it; () methods of running a class discussion; () instruction in the design and development of syllabi, tests and course assignments; () approaches to a wide variety of pedagogical problems that might arise in the classroom; () mechanics of how to teach in front of a classroom and effectively use audio-visual aids or a blackboard; () effective means of introducing multi-media into the classroom; () ideas for utilizing computer-assisted learning programs; and () skills for managing and using a website. (Tr. 970, 1367-68, 1940, 3967, 3970, 3973, 3975-76, 4286-87, 5408-11; EXs 121 and 122) TAs enable graduate students to develop these skills through working closely with faculty, and engaging in discussions with professors concerning why certain material has been selected, how to present concepts and ideas to students and discussions of other pedagogical techniques. Regular meetings between TAs and the faculty member teaching the class are common. (Tr. 197, 213, 669-72, 854-66, 946, 964, 980-81, 1547, 3351, 3967-69, 4615, 4848-49)

Experience as a TA is also excellent preparation for a graduate student's future teaching career because it is common for TAs to teach courses after they graduate that are similar to those for which they have served as a TA. (Tr. 3823-24, 4885; see Tr. 3401, EX 100 at 2) For example, learning to teach language acquisition is considered an essential skill for students in foreign language departments. At colleges and universities throughout the country, junior faculty members joining departments of foreign language and literature "always . . . begin by teaching language courses." (Tr. 3499) Indeed, the Union's own witnesses acknowledged that junior faculty must teach language courses, and that an important qualification for obtaining those positions is having prior teaching experience. (Tr. 1787-88, 1963-64, 1987) Similarly, English Ph.D.'s, who often serve as TAs in the EWP program, are commonly expected to teach writing and composition after graduation. (Tr. 959-60, 989; see also 3401; EX 100 at 2)

(b) Understanding Subject Matter of Discipline

As a number of witnesses testified, teaching is learning. "Teaching a subject also teaches the teacher as well as the student." (EX 17 at 2) Teaching as a TA requires not only familiarity with the material in a course, but a deeper understanding of that material in order to convey it effectively to other students. Dean Stimpson explained:

When you teach you understand your subject matter better, you have to go deep into a subject, but you have to be clear at the same time. You have to organize it. You have to understand it. You have to be able to talk about your subject with conviction and accuracy to a number of different kinds of students, that teaching is a unique way of immersing yourself in the subject and then transmitting its value, nature and importance.

(Tr. 454) The testimony of numerous other faculty and student witnesses reinforced this important proposition. (Tr. 230-31 (Dean Benhabib: "[TAs] are forced to understand the subject they are teaching at a much deeper level than they otherwise would."); 358 (Dean Lennie: "[L]earning how to explain something to other people very often sharply clarifies your own understanding of what it is you're explaining."); 1554-55 (Professor Matthews: "It's clear that students who teach a body of material, experience that material differently than those who read about it. In particular, it's the difference between understanding something and being able to explain it."); 3457 (Dr. Manzulli: "My experience TA'ing . . . deepened my knowledge of an enormous span of American literature that I was not previously familiar with."); 3990 (Dr. Kim Campbell: "[A]ll TAs improve their competence and their understanding of French through the teaching of the language."); see also 658-59, 3521, 4351-52)

Many graduate students have not taken introductory or survey courses in their discipline since their first and second year as an undergraduate. The opportunity to serve as a TA in these courses updates graduate students on new developments in the field, and exposes graduate students to new texts and other material not previously studied. (Tr. 662-63, 5408) Similarly, serving as a TA for undergraduate classes can expand a graduate student's base of knowledge. (Tr. 4860 (Sandra Graham stated that her TAs hip in Music "greatly increased my repertory of knowledge. I consider it having like a second undergraduate education"); accord 5402, 5406) As Professor Seigel, Chair of the History Department, explained, teaching an undergraduate course is also "intellectually of considerable value to graduate students" because it compels them to think more broadly about their otherwise narrowly-focused graduate level studies. (Tr. 1362) Finally, learning how to prepare and grade assignments, tests and exams also contributes to a TA's understanding of the subject matter. (Tr. 211-13, 684; see also 3970-71)

In a misleading attempt to suggest that graduate students do not derive educational value from their TA experiences, the Regional Director and UAW erroneously contend that students, including those in MAP, are often placed in assignments outside of their department or area of academic interest. (Decision at 5; UAW Br. at 56, 93) The evidence in the record, however, directly contradicts these claims. For example, both Dean Stimpson and Professor Robert Chazan, the Director of MAP, testified that in most cases, TAs in MAP are teaching with faculty members from their own department and area of concentration. (Tr. 803, 912, 940) Moreover, these professors are often the students' faculty advisors. (Tr. 803, 850-51, 912, 940, 2116, 2214-15, 2242, 2331-32, 2370, 2373, 4846, 4852, 5460) Even where that is not the case, TAs are involved in teaching subjects within their academic program or area of interest. (Tr. 531; see also 914 (Professor Chazan is unaware of any case where a TA was assigned to assist with a course unrelated to his field of study))

(c) Developing Communication Skills

Developing the ability to communicate effectively and to transmit complicated information is an important part of graduate education. This is true regardless of whether students pursue academic or non-academic careers.

TA appointments help students develop their communication skills through the process of transmitting their knowledge to others. Professor Furmanski explained that "we firmly believe that teaching expands and enhances the students' abilities in communicating ideas, in organizing themselves, organizing their thoughts." (Tr. 659) For example, Sandra Graham, a doctoral student in the Music Department, explained that in teaching the introductory Elements of Music course, she had to learn to communicate concepts that she has

been familiar with her whole life: "[The elements of music were] intuitive understanding for me. I never had to make that explicit and content knowledge for someone else. And that was a huge learning experience for me . . ." (Tr. 4860) Likewise, James Cavanaugh, a doctoral student in the Center for Neural Science, testified: "It is experience in conveying your ideas to others . . . [B]eing able to communicate – [and] let people in on knowledge that they don't have, is a skill that really needs to be developed and I felt that the teaching experience definitely helped me with that." (Tr. 5408-09; accord 2926-28)

Developing effective communication skills is equally important for students who will spend their careers doing scientific research rather than teaching. Professor Matthews noted:

[W]hat one does as a scientist . . . is to communicate one's work. And we find that very often people who do superb work, their careers falter because they are not effective at communicating it. One of the benefits of teaching certainly is learning how to communicate one's . . . fairly arcane stuff in a digestible and essential form.

(Tr. 1556-57; accord 659 (Professor Furmanski: "[A] good deal of science is involved in aspects of communication. . . ."); 454 (Dean Stimpson: students pursuing careers involving research are "going to have to be able to communicate ideas, and you're going to have to be able to communicate ideas with clarity, with accuracy, with coherence and with conviction"); see also 5408-09; EX 17 at 2)

2. Relationship Between Service as an RA and Students' Educational Programs

(a) Completing a Dissertation

Completion of a dissertation is a universal requirement for earning a Ph.D. at NYU. (See Tr. 58) Most students serving as Research Assistants are, in the course of their assistantships, performing the very research necessary to complete their dissertations. (Tr. 370, 374, 414-15, 649, 1576, 1708-09, 2785-87, 2789-90, 3727, 5478, 5497-98, 5531, 5583; see 235, 3202, 3217, 4279, 4377)

In those instances where a student has not selected a dissertation topic, experience as an RA provides the student with the opportunity to explore a research area as a potential dissertation subject. (Tr. 235, 3861, 4263) Similarly, these RAs are encouraged to engage in research during their assistantships that will be the basis for papers they do in their courses. (Tr. 4270) Accordingly, no matter what stage of their studies graduate students are in, the research they perform in connection with their Research Assistantships constitutes an integral part of their educational programs.

(b) Developing Research Skills

Research Assistantships also provide students with the opportunity to develop research skills in an area of their academic interest. (Tr. 649-50, 653, 4594, 4598) Through their RAships, students learn how to initiate a research project, to acquire and collect relevant data, and to analyze that data in a sophisticated environment. (Tr. 235, 370, 649-50, 3866-67, 4265-66, 4303, 4597-98, 5605-06) As Professor Elton explained, while students can learn some general research philosophies in their courses, the "bulk of . . . learning how to do research has to be that you try to have [a faculty member] sitting there critiquing what you're doing." (Tr. 4270) Students utilize these research skills in completing their dissertations as well as in other areas of their academic programs. (Tr. 235, 649-50) For example, one student testified about how she used the research techniques she had learned as an RA to research and draft her required third year paper. (Tr. 4904)

The research skills students develop through their RAships are also essential to their future success in obtaining and progressing in research positions in academia or other industries after graduation. (Tr. 235, 3867, 4305, 4905; EX 119 at 3) For example, Professor LaRue Allen of the School of Education testified that "[a]ll of the skills listed in [the position description for Research Fellows] are skills that people like me use on

a regular basis. If you're going to be an active researcher, you have to know how to do every single one of these things." (Tr. 4597-98) Similarly, Professor Elton noted that the academic institutions in which the Stern Doctoral Program seeks to place its students are "going to care about how good a researcher . . . they are." (Tr. 4305) It is for this reason that all doctoral students at Stern are required to engage in RA activities, even those that are fully funded from other sources when they enroll at NYU. (Tr. 4304)

Thus, these research skills are directly related to students' academic programs, which "are designed to train them as research scientists." (Tr. 650; accord 4598)

(c) Publishing Scholarly Articles

Many graduate students have written scholarly articles or conducted presentations at conferences based on the research they performed as an RA. These articles and presentations are usually a collaborative effort between the supervising faculty member and an RA. (Tr. 235, 687, 689, 5580, 5584-85, 5588-90, 3861, 4276, 5606; see EX 30 at 22, 23, 26, 37, EX 163 at 9, 31, 16, EX 117) For example, in the Stern Doctoral Program, a review of a listing of papers prepared by Stern doctoral students in 1997-98 demonstrates that over one-half of the students' working papers and published papers were co-authored with their RA advisor. (Tr. 4274-75; EX 117) Papers that RAs co-author with faculty members, moreover, are often part of the students' dissertations. (Tr. 235, 5585) As previously noted, publishing research papers and presenting research at academic conferences are an important part of a graduate student's doctoral program.

3. The Relationship Between Service as a GA and Graduate

Students' Educational Programs

(a) Students Receive Academic Credit For Their GA Activities

In a number of programs, students receive academic credit, or fulfill degree requirements, through their GA activities. In the School of Education, graduate assistants serving as public school tutors may receive three credits for participating in a seminar that is required in connection with their assistantships. (Tr. 3789, 4811; see EX 108(a), 141(a), 141(b)) Tutors may also count their tutoring hours towards the New York State requirement that students have at least 100 hours of field experience prior to student teaching. (Tr. 5445-46) Masters students in the Higher Education Administration program may satisfy their internship requirements through serving as a GA in the office of the Associate Dean for Student Affairs. (Tr. 3829-30, 3873) Likewise, doctoral students in the Department of Applied Psychology may fulfill their supervisory requirements through their assistantships. (Tr. 4684, 4699) GAs may also be able to count some of the hours that they spend in meetings with faculty during their assistantship towards their supervised hours requirement. (Tr. 4684, 4699)

In the Tisch School of the Arts, masters students in the Design Department must participate in "crew" – a graded activity that provides students with an understanding of the production process – for seven and a half hours per week during their first two years in the program in order to earn their degree. (Tr. 3137-38, 3140) For Design students serving as GAs, however, their assistantship satisfies this requirement. (Tr. 3061, 3138)

(b) Learning Skills Relevant to a Student's Academic

or Professional Discipline

Experience as a GA provides graduate students with an opportunity to learn skills directly relevant to their academic or professional field of study. In the School of Education, a number of GAs serve as tutors in the New York City public schools, where they have the opportunity to teach in small group settings and "expand their portfolio of understanding of teaching and learning." (Tr. 3799) As approximately 70 percent of the tutors are enrolled in teacher education programs in the Department of Teaching and Learning, their tutoring

experiences enhance their academic programs and prepare them for professional careers in teaching. These students, who usually begin their careers in urban schools, "are really getting very strong, direct experience in how to apply what they know about curriculum and pedagogy in an urban school. So they are thus strengthened in their understanding of their own studies as well as their career preparation." (Tr. 4430; see also 5439-41)

Graduate students in SED who serve as program assistants strengthen both their academic and professional credentials within their field. (Tr. 3855-56) One student testified about how her activities as a GA in planning courses, developing syllabi, teaching classes, and making educational judgments were all skills that she will use in her professional life as either a professor or a school administrator. (Tr. 5053-54) Similarly, through advising less experienced students and recruiting prospective students, GAs deepen their own understanding of the curriculum and gain interactive development skills necessary to their future careers as either educators or human service professionals. (Tr. 3854-56) As Professor Allen explained, due to the nature of the profession, "no more than half of what you need to know can come from formal classroom instruction" and many of the necessary skills require students "to practice under supervision in order to get good at." (Tr. 4625-26)

In the Tisch School, students in the artistic departments enhance their professional training through their experiences as GAs. As Dean Campbell explained, the school's educational philosophy "is one that concentrates on learning by doing," and is driven by the goal of helping students develop skills "they will use when they walk out in their professional lives" (Tr. 2919) The tasks that are crafted for GAs are designed to be integral to that philosophy of training. (Tr. 2919) For example, through assisting undergraduate students in their computer projects, the GAs in the Interactive Telecommunications Program become more familiar with both the physical infrastructure of the computers and the software that operates a computer. (Tr. 2910; PX 57(a) at 2) A Dance GA, who assists and manages the production of a dance performance, is preparing for a professional career in a dance company, in which it will be necessary to perform these responsibilities. (Tr. 2911-12) GAs in the Design Department likewise learn how to execute their designs, which is "critical" to their future success as scenic, costume or lighting designers, and is something they can only learn through their participation in the production process. (Tr. 3122, 3125-26)

GAs in GSAS also obtain experience that develops their professional skills. In Psychology, the GA serving as the clinical adviser to undergraduates and masters students has the opportunity to develop skills in clinical interaction and career counseling, which students are expected to master in their programs. (Tr. 1568, 1572) In the Center for Near Eastern studies, the masters student who is appointed as the Newsletter GA – who is studying to be a journalist in the Middle East – develops the skills needed for writing about the Middle East. (Tr. 4521, 4532-33) Similarly, the Book Review GA in the Center gains exposure to the latest texts in the field and also learns how to edit and publish an academic journal. (Tr. 4536)

4. TAs, RAs, and GAs Develop Mentor Relationships with Faculty Members

One of the hallmarks of graduate education is the importance of mentor-mentee relationships between faculty and graduate students. (Tr. 433) A mentor is an experienced faculty member who acts as a guide and advisor for the graduate student, supervises the student's academic and professional development, and assists the student in starting his or her post-graduate career.

It is common for graduate students who serve as TAs to be assigned to courses taught by faculty members who are either their principal advisors or members of their dissertation committees. (Tr. 686-87, 850-51, 1218, 1220, 1276, 1334-35, 1352-53, 1358-59, 1579-82, 2037, 2370-71, 2666-67, 3429-30, 3451-53, 4846) It is also common for doctoral students to identify their dissertation advisor or dissertation committee members as a result of their TA experience. (Tr. 237-38, 686-87, 2698-99, 4846, 4861-62) Similarly, it is the usual practice for RAs to work with their advisors or members of their dissertation committee. (Tr. 235-36, 686-89, 1738, 2197-98, 2209, 2310, 2755, 2785-90, 3198-99, 3715-16, 4278-79, 5481, 5485, 5572-73)

Experience as a graduate assistant provides students with a unique opportunity to develop a relationship with a faculty member in an informal environment. (Tr. 238, 478, 1351-52, 2380, 3451, 3529-30, 3991-92, 4307-08, 5397-98) RA positions are particularly effective at developing close relationships between graduate students and faculty members because of their mutual academic interests and their almost daily interaction in labs and elsewhere to discuss their research projects. (Tr. 691, 5481-82, 5485, 5579-80; accord 5046-47)

Furthermore, relationships with faculty often permit integration of TAs into the intellectual and social life of a department, which may not always occur with students who do not serve in these positions. (Tr. 3529-30, 4493-94) As Professor Bishop described, once a student assumes the role of a teacher, the "teaching assistant [becomes] my colleague also. Not just my student, and that happens through the teaching assistantship process." (Tr. 3529-30; accord 4493- 94 (Dean Marcus testified that the graduate assistants' experiences in the School of Education "socialize them, not simply into a faculty role but also importantly into roles of senior professionals in the fields they hope to enter."))

The relationships that are developed with faculty members as a result of their assistantships are also critical to students in their search for academic and professional positions after graduation. Professors regularly write letters of recommendations and make phone calls to colleagues at other universities on behalf of their former graduate assistants. (Tr. 235, 687, 692-94, 1587, 3484, 3992, 4308, 4856, 4858; EX 137 at 14) For example, Professor Furmanski explained how he helped one of his former RAs obtain a faculty position at another university by providing written evaluations, and oral recommendations to faculty members at other institutions, and by having discussions with the student two to three times per week to provide advice concerning the application process. (Tr. 692-94) Professor Elton testified that with respect to doctoral students at the Stern School, "[t]he person who helps them find their first job is their thesis advisor which is almost always an outgrowth of their RA experience." (Tr. 4309) In the Tisch School, Dean Campbell testified concerning the important relationships that graduate assistants develop with faculty members that can directly benefit them in their professional careers. (Tr. 2919-20) For example, on more than one occasion, Graduate Film students who served as Graduate Assistants for the noted director Spike Lee when he taught at Tisch ended up working for him upon their graduation. (Tr. 2919-20) Similarly, as a result of their work with active professional writers who teach at NYU, Graduate Assistants have had their own works read by those professionals and then recommended to an agent. (Tr. 2920; see also 82-83 (Vice President Berne testified that one of his former GAs currently works for him now at NYU); 4528-29, 4535-37 (Professor Mitchell testified about the important professional contacts with leading academics that the Book Review GAs develop through their assistantship activities))

Indeed, these mentor relationships often become enduring professional relationships. For example, Professor Elton estimated that he has probably co-authored 20 papers with former RAs, has written letters recommending them for tenure at their institutions, and has appointed two of his former students as Program Chairs for the prestigious American Financial Association. (Tr. 238-39, 4307-08; see also 5397-98)

IV. PERSUASIVE POLICY REASONS

SUPPORT EXCLUSION OF GRADUATE

ASSISTANTS FROM THE ACT'S COVERAGE

A. The Board Must Consider Relevant Public Policy When Determining

Whether To Include Graduate Assistants In The Definition Of Employee

Well-established precedent directs that the Board consider relevant public policy when determining whether to include graduate assistants in the Act's definition of "employee." Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 168 (1971) ("[I]n doubtful cases resort must still be had to economic

and policy considerations to infuse §2(3) with meaning"); NLRB v. Hearst Publications, Inc., 322 U.S. 111, 129 (1944) (the term "employee" "must be understood with reference to the purpose of the Act and the facts involved in the economic relationship"); Physicians Nat'l House Staff Ass'n v. Fanning, 642 F.2d 492, 497 (D.C. Cir. 1979) ("[F]or policy reasons persons who are literally 'employees' may nonetheless be excluded from coverage under the Act"), cert. denied, 450 U.S. 917 (1981); WBAI Pacifica Found., 328 N.L.R.B. No. 179, 1999 N.L.R.B. LEXIS 586, at *10 (Aug. 26, 1999) ("At the heart of each of the Court's decisions is the principle that employee status must be determined against the background of the policies and purposes of the Act").

The Board and reviewing courts have held that persons who otherwise fall within the Act's definition of "employee" may nonetheless be denied collective bargaining rights where there are persuasive policy reasons for doing so. In NLRB v. Bell Aerospace, 416 U.S. 267, 289 (1974), for example, the Court rejected the Board's inclusion of certain managerial employees within the Act's coverage as contrary to a long line of precedent that had excluded those employees to further the Act's policy of maintaining a distinct line between management and labor. The Pittsburgh Plate Glass Court similarly excluded retirees from the Act's coverage, reasoning that inclusion of retirees would not further the Act's policy of preventing disruption to commerce caused by interference with the organization of active "workers." See 404 U.S. at 166.

Other cases hold similarly. See, e.g., NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 495-96, 499 (1979) (declining to exercise jurisdiction over teachers at church-operated schools because doing so would necessarily entangle the Board in matters of religious education and run afoul of the First Amendment); Retail Clerks Int'l Ass'n v. NLRB, 366 F.2d 642, 644 (D.C. Cir. 1966) (collecting cases where the Board has refused to include individuals within the definition of employee where doing so might create a potential conflict of interest with those employees' job responsibilities), cert. denied, 386 U.S. 1017 (1967); Goodwill Indus. of Tidewater, Inc., 304 N.L.R.B. 767, 768 (1991) (considering policy factors when refusing to include workers at a rehabilitative facility within the definition of employee and holding that because the employment relationship was not based on typical economic factors, granting those individuals collective bargaining rights would not serve the policies of the Act); Hoover Co., 55 N.L.R.B. 1321, 1323 (1944) (refusing to extend collective bargaining rights to confidential employees (even in a unit composed exclusively of confidential employees) because doing so would require the employer to handle labor relations matters with individuals who had advance access to employer collective bargaining information and would frustrate the purposes of the Act).

B. The Policies Underlying The NLRA Would Not Be Served By Extending Collective Bargaining to Graduate Assistants Because They Do Not Have A Traditional Economic Relationship With NYU

Granting graduate assistants collective bargaining rights would not further the policies underlying the NLRA because graduate assistants do not have a traditional economic relationship with NYU. A "central policy of the Act is that the protection of the right of employees to organize and bargain collectively restores equality of bargaining power between employers and employees and safeguards commerce from the harm caused by labor disputes. The vision of a fundamentally economic relationship between employers and employees is inescapable." WBAI Pacifica Found., 328 N.L.R.B. No. 179, 1999 N.L.R.B. LEXIS 568, at *11 (emphasis added).

In accord with this policy, when determining employee status, the Board analyzes the employment relationship to determine whether or not it is guided by traditional economic factors. "When the relationship is guided to a great extent by business considerations and may be characterized as a typically industrial relationship, statutory employee status has been found." Goodwill Indus. of Tidewater, 304 N.L.R.B. at 768. When, by contrast, the relationship is primarily aimed at training individuals in how to secure outside employment through a process of on-the-job training, counseling services, and job placement assistance, and where the employer is not guided by the typical goals of increasing productivity, maximizing cost efficiency

and securing profits, "employee" status has not been found. In that case, the Board held that workers were not "employees" under the Act (despite fact that they were subject to same work rules as employer's other employees) where they were hired based on "who need[s] assistance and support"; they received counseling in connection with their jobs; discipline was imposed only in extreme cases; and long-term employment in the current job was not contemplated as the goal was to prepare workers for private jobs. Id.; see also Goodwill Indus. of Denver, 304 N.L.R.B. 764, 765 (1991) (workers were not statutory employees where employer's "lack of emphasis on production by the [workers] and its reliance on counseling, with use of discipline and discharge only in extreme cases, indicate that the working conditions of the [workers] are not primarily guided by economic or business considerations and are not typical of those in the private sector").

As in these cases, the evidence here demonstrates that graduate assistants do not have a traditional economic relationship with NYU. The graduate assistant position is not intended to maximize cost efficiency for the University, but to help graduate students pay for their education and provide relevant training and experience to obtain their degrees and to help them secure outside employment at the conclusion of their studies. Faculty advisors provide mentoring and counseling services to the graduate assistants. (See pp. 65-68, above) There is a student career placement office to help them obtain outside employment after graduation. (See, e.g., EX 3(b) at 193, EX 3(d) at 134-35, EX 3(i) at 285, EX 3(k) at 230, EX 3(n) at 68-69, EX 3(o) at 86-87) Graduate assistants are not "hired" "based on their competence," but on their academic merit and their needs in connection with their academic program. (See pp. 17-18, above) When problems arise in the course of an assistantship, faculty mentors and students consult to resolve the issues; traditional methods of employer discipline – personnel actions such as discipline and termination – are foreign to the assistantship process. (Tr. 760-64, 1494-95, 4317) Contrary to the Regional Director's far-fetched finding that graduate assistants and NYU have a "relationship akin to that in a traditional business environment" (Decision at 31), all of these factors make this case similar to the Goodwill cases and militate against the finding of a traditional economic relationship suitable for collective bargaining.

Indeed, the "employment" relationship between the graduate assistants and NYU is fundamentally inconsistent with the typical economic relationship, because the University pays graduate assistants far above the market rate for the services provided. Whereas the typical financial package paid to TAs in compensation for their services is valued in excess of \$30,000 per year, the University could secure an adjunct professor – who has previous teaching experience and has already obtained a Ph.D. – to perform the same services for only \$7,000 to \$8,000. (Tr. 242-43; EX 173 at 1; see also 1102, 3565, 4290-91) In addition, there are substantial additional costs borne by the University in using TAs that would not be needed if it simply hired adjuncts, including the costs associated with teacher training programs and faculty time devoted to supervision and evaluation of TAs. (Tr. 243, 293, 318-19) As Dean Benhabib (who is an economist) testified:

If we were trying to hire employees in the market, we would pay the least amount possible. And we would pay the market rate. We would hire adjuncts only. Why would we ever pay [more] to attract people . . . whose presence would not improve the economic condition of the institution. The only reason is that we don't do it for profit . . . We are interested in providing graduate education at a loss.

(Tr. 248; see also 318-19 (Benhabib: "the University is not giving financial aid to students in order to obtain their teaching services, but for another purpose. If they were doing it to obtain cheap labor they would simply hire adjuncts . . . and they would have a substantially lower cost"))

Moreover, while NYU does not dispute that TAs provide valuable teaching services to the University in connection with their assistantships, the Regional Director's conclusion that the number of TA positions available is based on undergraduate teaching needs is simply contrary to the evidence. (Decision at 30 and n.47) As Dean Benhabib testified, the allocation of teaching assistantships is based primarily on "the ability of a department to train successful graduate students." (Tr. 244; see also 1616-17) The Deans may also allocate assistantships based on their strategic desire to strengthen a particular department. Thus, additional

assistantships may be awarded to a department to promote its "intellectual development" and maintain or improve its competitive standing in the graduate school community. (Tr. 247) A department's undergraduate teaching needs are not among the factors considered in the allocation of teaching assistantships. (Tr. 244-45) Instead, GSAS allocates adjunct and other non-tenure track faculty positions to satisfy teaching needs. (Tr. 245)

As Dean Benhabib summarized "[i]t's not a good business proposition to run a graduate school." (Tr. 243) Under these circumstances, it is clear that the primary purpose of the graduate assistant program is to benefit the graduate students – at the expense of the employer's economic interests – and that the "fundamentally economic relationship" contemplated by the Act is wholly lacking.

C. Extending Collective Bargaining To Graduate

Assistants Would Be Contrary To Public Policy

In addition to the fact that the relationship between graduate assistants and NYU is predominantly educational, and not economic, there are persuasive policy reasons for excluding graduate assistants from the Act's coverage. Treating graduate assistants as employees would: (1) entangle the Board in academic policy-making; (2) require the University to bargain with students over educational policy; (3) interfere with student-faculty mentor relationships; and (4) disrupt existing student involvement in University governance. These are not just hypothetical problems, as the UAW argues (UAW Opp. at 10), but a necessary and inevitable result of according graduate assistants status as employees under the Act.

1. Extending Bargaining Rights to Graduate Assistants Would Entangle The

Board in Academic Policy Making and Infringe NYU's Academic Freedom

The Supreme Court has long recognized the importance of protecting a university's academic freedoms under the First Amendment. See, e.g., Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) ("[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment"); Regents of University of Mich. v. Ewing, 474 U.S. 214, 226 n.12 (1985) ("Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also . . . on autonomous decision making by the academy itself") (citation omitted). As Justice Frankfurter explained in Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring), academic freedom encompasses "four essential freedoms" – freedom to decide "who may teach, what may be taught, how it shall be taught, and who may be admitted to study."

If graduate assistants are treated as employees under the Act, the Board will necessarily become involved in issues that threaten to undermine the University's freedom to establish academic policy. For example, the Board will undoubtedly face Section 8(a)(3) cases where a student claims that he or she was denied enrollment in, or dismissed from, a graduate program based on union activities. Deciding the merits of the case will require the Board to evaluate what discretionary academic standards are required for admission and continued enrollment in the program, whether those standards are fair, and whether they were applied properly to the aggrieved individual.

Similarly, the Board will inevitably face cases where a graduate assistant claims that he or she received a poor grade on an exam in retaliation for union activities. There, the Board will have to read the aggrieved student's exam, and then read all the other students' exams, to evaluate whether the faculty member graded the first one fairly. Even more problematic would be a claim based on failure to pass orals or rejection of a dissertation. Indeed, at this level of advanced study, it is no exaggeration to say that any such evaluation would simply be beyond the technical competency of the Board. Not only does the Board have absolutely no experience or training in making such educational evaluations, but doing so would require the Board to

second-guess the academic standards and subjective academic decisions of the University – a role never contemplated by the NLRA and contrary to the academic freedoms implied in First Amendment. As the Supreme Court stated in Regents of Univ. of Michigan v. Ewing, academic decisions made daily by faculty members "require an expert evaluation of cumulative information and [are] not readily adopted to the procedural tools of judicial or administrative decision making." 474 U.S. at 226.

Additional difficulty would arise if graduate assistants exercise their Section 7 right to strike. Because of the educational nature of their positions, a strike by graduate assistants would be fundamentally different than a strike by students working, for example, in the school cafeteria. As discussed above, service as an RA or TA is required in a number of departments and uniformly expected in many others. If students in these departments refuse to engage in their teaching or research activities (particularly for an extended time), the University may decide to impose academic sanctions. Any complaint that the University thereby violated Section 8(a)(1) or (3) would clearly require the Board to assess the educational justification for the University's actions and weigh the right to strike against a student's academic obligations.

2. Extending Bargaining Would Require the University to Bargain With Students Over Decisions Concerning Educational Policy

If NYU's graduate assistants are found to be covered by the Act, the University will be subject to collective bargaining with its students over educational policy-making. The Board has made clear that an employer's duty to bargain over terms and conditions of employment is very broad, see Production Plated Plastics, Inc., 254 N.L.R.B. 560, 563 (1981), and that the duty is no less broad in the educational context. Kendall College, 228 N.L.R.B. 1083, 1088 (1977) (rejecting employer's argument that the "law requiring bargaining on mandatory subjects requires a different interpretation in the hall of academia than it does in an industrial shop"), enforced, 570 F.2d 216 (7th Cir. 1978); see also Catholic Bishop of Chicago, 440 U.S. at 503 (noting that "nearly everything that goes on in the schools affects teachers and is therefore arguably a "condition of employment") (citation and quotation omitted). The problem with allowing bargaining by graduate assistants in this context is that the terms and conditions of their "employment" are so inextricably intertwined with the terms and conditions of their education that almost every issue about which the Union will want to bargain will infringe on NYU's ability to set educational policy.

For example, the Union made its position plain at the hearing that the new financial aid program for doctoral students in the Graduate School of Arts and Science was a mandatory subject of bargaining that would have to be bargained about with the Union. (Tr. 5718) Dean Benhabib's testimony made clear that the establishment of this program was based on educational policy considerations. (Tr. 5725-40) In the words of the memo announcing the program, it was adopted in order

to attract the most promising, able, and diverse graduate students; to provide greater consistency of financial aid; to expand the time students have for research and scholarship; to enhance the educational development of future educators; and to forge partnerships with departments to insure a vision of excellence while maintaining the departments' central role in the development of our graduate programs.

(EX 173 at 1) There is no doubt, however, that the Union would seek to bargain over every significant aspect of this program, effectively eliminating the University's current freedom to implement such a plan based on educational policy.

The Union would surely want to bargain over the number of semesters of teaching required under the GSAS framework. As Dean Benhabib's testimony made clear, however, the stated requirement of between two and six semesters was based on academic policy, and represents an assessment of the needs of the students' academic careers. (Tr. 5734) Another issue over which the Union would likely seek bargaining is the number of assistantships available in each department. (See Tr. 5718) Again, Dean Benhabib's testimony left no doubt

that the number of assistantships is based on academic policy – the capabilities of each department's faculty to train graduate students and place them in academic jobs. (Tr. 5729)

Even the amount of the stipend – over which the Union is certain to seek bargaining – is determined based on educational policy. As Dean Benhabib testified, stipends are set at the level which is believed to be necessary to attract the best students to enroll at NYU. (Tr. 246-49) In addition, higher stipends are used to reward academically strong departments which are in the best position to train successful graduate students. (Tr. 244) Indeed, as discussed above, stipend levels are not based on economic considerations typically involved in establishing employee wages. (See p. 45, above)

These and many other examples (e.g., procedures for selection, assignment and evaluation of graduate assistants) show that permitting collective bargaining between graduate assistants and the University would put the University in a position where it was constantly asked to compromise its educational judgment in order to satisfy the Union's obligation to provide for the needs of its members.

The Regional Director's dismissal of these concerns with the superficial assurance that "it 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), demonstrates a complete lack of understanding of the interrelationship between students' activities as graduate assistants and their educational programs as demonstrated by the above examples. Similarly misplaced is the Regional Director's reliance on the Board's statement in Boston Medical that "the parties can identify and confront any issues of academic freedom as they would any other issue in collective bargaining." Id. at 34 (quoting Boston Medical, slip op. at 13). The facts here are very different from those before the Board in Boston Medical, in which educational activities were only a small complement to the 80 percent of their time that the doctors spent providing patient care. Id. at 9- 10. Here, the graduate assistants are all full-time graduate students; and even the 15 percent of the time that they devote to their assistantship responsibilities is directly related to their academic programs. (See pp. 42-43, above)

Finally, it must be emphasized that because of the way in which NYU operates, the effect of graduate student collective bargaining on educational policy-making would be extremely widespread and touch matters never contemplated by the Act. For example, because most students in a department receive the identical financial aid, regardless of whether the student has an assistantship in any given semester, bargaining over the amount of aid for students with assistantships will inevitably also determine the amount of aid given to students without assistantships (who are not in the bargaining unit). Thus, any change in the \$13,500 minimum stipend under the new GSAS program that was bargained by the Union for graduate assistants would apply as well to GSAS graduate students who are not graduate assistants. The Regional Director failed to understand this relationship in suggesting that there would be no problem with graduate assistants receiving higher stipends than other graduate students in the same department as the result of collective bargaining. (Decision at 33 n.49) Any such scheme would fundamentally alter the new GSAS financial aid structure, however, which is premised on uniform funding for all graduate students in each department, regardless of whether they are serving as a graduate assistant during a particular semester.

In the same way, many services that would ordinarily be viewed as bargainable such as health insurance, housing, and child care, are typically provided on a uniform basis to all graduate students – not just to those who are serving as graduate assistants in a particular semester. The result is that either the union would effectively be bargaining on behalf of all graduate students, or there would be a senseless patchwork of benefits and conditions that apply as students enter and leave assistantship positions on a regular basis. Moreover, NYU would be prohibited from implementing changes in benefits for all graduate students (such as the new GSAS financial aid plan or improvements in health insurance) without first bargaining over such changes with graduate assistants.

Nor would the impact on educational policy be limited to graduate education at NYU. The vast majority of

the TAs teach undergraduate students. Bargaining over the TAs' assignments and responsibilities is certain to affect undergraduate instruction, including sacred academic decisions as to "who may teach, what may be taught, and how it shall be taught." Sweezy, 354 U.S. at 263.

3. Granting Bargaining Rights To Graduate Students Will Threaten Student-Mentor-Relationships

Collective bargaining with graduate assistants will also discourage mentoring relationships between graduate students and their faculty advisors. The record herein makes clear how extraordinarily valuable these relationships are to the graduate students and the graduate education process. (See pp. 65-68, above) The Regional Director again dismisses this concern without consideration of the extensive record evidence concerning these relationships. (Decision at 33-34)

Contrary to the UAW's assertion (UAW Opp. at 14), furthermore, many graduate students do serve as assistants with their faculty advisors, as the Regional Director correctly found (Decision at 6 n.15; Tr. 686-88, 850-51, 1334, 2037, 2666-67, 3199, 3429-30, 4846, 5532, 5536-37) and most assistants are observed and evaluated by professors. (See pp. 48-49, 66, above) The prospect of students and faculty opposing each other not only in bargaining, but in grievances, arbitrations, and Board proceedings raises the inevitable likelihood that these important relationships will be altered and strained.

4. Permitting Collective Bargaining Between Graduate Assistants and NYU

Would Disrupt Existing Student Involvement in University Governance

Finally, permitting collective bargaining between graduate assistants and NYU would have a disruptive impact on existing means of graduate student involvement in University governance. There are a number of different ways in which graduate students have input into the academic decision-making of NYU. For example, the Students Senators Council, which is comprised of twenty-two elected and appointed students from across the University and is a component of the University Senate, may consider any issue that involves the rights, interests or responsibilities of NYU students. (Tr. 52; EX 2 at 8-9) The Graduate Commission is comprised of one elected faculty member and one elected student from each school offering a graduate program, as well as academic officers from Central Administration. The Graduate Commission makes policy recommendations to the President and Board of Trustees concerning issues relating to graduate education. (Tr. 434-35; EX 2 at 10) Additional mechanisms permit graduate students to participate in governance on the school or departmental level. (Tr. 436; EX 137 at 1)

Permitting graduate assistants to unionize and bargain with the University would unsettle this existing structure of University governance, as NYU would be required to deal exclusively with the Union over many issues that are routinely addressed in these bodies with student participation. It would deprive other graduate students, who are not serving as assistants, of any voice in addressing these issues. Indeed, a holding that graduate assistants are "employees" under the Act would threaten the viability of these existing organizations and, arguably, result in their being deemed violations of Section 8(a)(2) of the Act.

* * *

In sum, the Regional Director fundamentally misunderstood the profound impact that collective bargaining with graduate assistants will have on the University, in suggesting that "[t]he asserted anticipated interference with academic freedom essentially appears to be a fear that collective action over graduate students conditions of employment will be more influential and powerful than individual action." (Decision at 34-35) Indeed, this very statement reveals that the Regional Director viewed the University as no different from an automobile factory, without recognition of the very different considerations applicable to establishing educational policy, as compared to setting wages and shift schedules for workers on an assembly line. 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 the students and NYU.

V. THE REGIONAL DIRECTORS DECISION

INCORRECTLY EXCLUDED THE SACKLER GAs AND

RAs IN BIOLOGY, CHEMISTRY, NEURAL SCIENCE AND PHYSICS

After incorrectly deciding that most of NYU's graduate assistants are "employees" under the Act, the Regional Director compounded that error by excluding more than 200 GAs and RAs in Sackler, Biology, Chemistry, Neural Science, and Physics (hereafter referred to collectively as "Science RAs") who perform research funded by external grants which pay their tuition and provide their stipends, on the grounds that they do not provide a service to the University. (Decision at 36-37)

The Regional Director reached the conclusion that the Science RAs are not employees based upon the Board's 1974 decision in Leland Stanford Junior Univ., 214 N.L.R.B. 621 (1974). In Leland Stanford, the Board ruled that 83 physics research assistants were not employees under the Act because they were "primarily students." Id. at 623. Thus the Board's opinion in that case concluded as follows:

In sum, we believe these research assistants are like the graduate teaching and research assistants who we found were primarily students in Adelphi University, 195 NLRB 639, 640 (1972). We find, therefore, that the research assistants in the physics department are primarily students, and we conclude they are not employees within the meaning of Section 2(2) of the Act.

Id.

The Regional Director, faced with the obvious conflict between the above and the first part of his decision (holding that graduate assistants who are primarily students are nonetheless employees under the Act), attempted to sidestep this conflict by relying on former Board Member Fanning's interpretation of Leland Stanford as set forth in his Cedars-Sinai dissent. According to Fanning, the real reason that the research assistants in Leland Stanford were held not to be employees was because they provided no service to the university. The Regional Director here adopted Fanning's interpretation of Leland Stanford, found that NYU's Science RAs also provide no service to the University, and concluded that the Science RAs should be excluded based upon Leland Stanford:

Former Board member Fanning . . . noted in his Cedars-Sinai dissent that the Leland Physics RAs were not being excluded from coverage because they were students, but because, "they do not work or perform a service for an employer." The same is true of the RAs in the sciences and the Sackler GAs here who are supported by outside grants.

(Decision at 36; citation omitted)

Even assuming *arguendo* that the Leland Stanford decision did turn on whether the research assistants provided a service to the university, the Regional Director's factual conclusion here that the Science RAs do not provide a service to NYU is clearly erroneous. The Science RAs are "supported" with monies provided by faculty research grants. (Decision at 16-18; see Tr. 367, 3724, 5475, 5497-98, 5528-29, 5567-68) Each such grant obligates the University to undertake and perform certain research, and the RA who is charged to the grant – *i.e.*, whose stipend and tuition are paid for out of the grant – performs a portion of that research. (Tr. 5477-78, 5497-98, 5530-31, 5574-75) In doing so, the RA provides a service to the University. (Tr. 372-73, 5486-92, 5494-95, 5498, 5520, 5531, 5540-41, 5575, 5582-86) As Professor Furmanski, the Biology Department Chair and former FAS Dean, explained:

Since the University is obligated to carry out research under the grant that they have accepted to support the research, the RA carrying out that research is helping the university to fulfill that obligation.

(Tr. 5520; see Tr. 5474)

For example, Biology Professor Carol Reiss is the principal investigator on a faculty research grant which funds research aimed at defining the mechanisms by which viruses are recognized and eliminated from the human body. (Tr. 5479-80) When the human immune system recognizes that it has a virus, it begins to recruit defense mechanisms through molecules called interleukins. (Tr. 5480) One component of the research grant concerns the mechanisms by which one of the interleukin molecules (called interleukin 12) functions. (Tr. 5480) The RA who is supported by the grant is researching "how this signaling event occurs" – how when interleukin 12 is produced, other cells recognize it "and begin to use that information to activate themselves to fight off the virus disease." (Tr. 5480-81) Thus the RA's research fulfills in part NYU's obligation under the grant and enables the University to charge the RA's tuition and stipend to the grant.

Similarly, Jun Yu, a Physics doctoral student and Research Assistant, is performing research pursuant to a research grant held by Professor Andy Kent, who is the principal investigator for the grant. (Tr. 5532, 5535) The purpose of the grant, which involves investigators at several universities, is to improve the memory capabilities of magnetic recording devices (such as computer hard drives). (Tr. 5533-34) To perform NYU's portion of the research, Professor Kent and Mr. Yu prepare magnetic films and examine their structure under a microscope. (Tr. 5532, 5534) The goals of this grant, which are very specific, include a timeline of projects that must be accomplished during each year. (Tr. 5533)

That an RA whose tuition and stipend are paid out of government research grant monies must in return conduct research that helps to fulfill the University's obligation under the terms of the grant is explicitly required by the regulations that govern such grants. The Grants Policy Statement of the federal National Institutes of Health (which provides most research grants in Biology, Chemistry, Neural Science, and Sackler (Tr. 362-63, 5486, 5498, 5501, 5573), expressly states that in order for a doctoral student's tuition and stipend to be charged to an NIH research grant, the payments must be "conditioned explicitly upon the performance of necessary work." (NIH Grants Policy Statement, Part II: Terms and Conditions of NIH Grant Awards, "Compensation of Students," pt. 4 at 14 (http://grants.nih.gov/grants/policy/nihgps/part_ii_4.htm))

The University benefits from the RAs' research in other ways as well. The research performed by an RA in a faculty member's lab enhances that faculty principal investigator's own research portfolio, and increases his or her productivity. (Tr. 5486-87, 5540, 5582-83) Indeed, the RA's doctoral thesis normally results in one or more published research papers that are co-authored by the faculty member. (Tr. 5487, 5540-41, 5584-85, 5587-90; see, e.g., EX 163 at 9, 16; see also p. 30, above) These publications and research increase the faculty member's stature and reputation. (Tr. 5487, 5491-92, 5541, 5583, 5586; see Tr. 687-88, 694; EX 30 at 22, 23, 26, 37)

One of NYU's primary missions is to carry out research. (Tr. 5491, 5495, 5586) Indeed, NYU is classified as a research university by the Carnegie Foundation in recognition of its substantial commitment to integrating research into its educational and service missions. (Tr. 5495-96) The faculty principal investigator, whose productivity and reputation are enhanced by his or her RA's research, helps the University to fulfill this mission in several ways.

As a result of the RA's research, the faculty principal investigator is better able to attract future research grants or continue existing grants. (Tr. 5487, 5489-90, 5540-41, 5585) The funding of a faculty member's research proposal by an agency is dependent on the member's track record. (Tr. 5488-89, 5583, 5585) Accordingly, the research performed for one grant typically becomes part of the next grant proposal, and plays an important role in the success of that proposal before the agency. (Tr. 5489-90) The monies provided

by these additional research grants enable the University to support more student researchers and otherwise contribute to the capacity of the University to carry out research, including expansion into other research areas. (Tr. 5490, 5583-84)

The additional grants also further enhance the University's reputation. As prospective students are attracted to NYU by the success of its researchers, the faculty member's success in research works to increase both the number of students interested in attending the University, as well as the quality of the prospective students that NYU attracts. (Tr. 5490-91, 5586) Success in research further serves the University by attracting donors and funders. (Tr. 5494-95)

Incredibly, the Regional Director's decision, while not challenging the University's contention that the Science RAs "help NYU fulfill its obligations under the research grant" and perform services in other ways as well, nonetheless concluded – on some unexplained basis – that these services are insufficient and, therefore, that the Science RAs are not "employees" under the Act:

The Employer asserts that these GAs and RAs do perform services for the University in that they help NYU fulfill its obligations under the research grant. NYU further claims that it benefits from the RAs research because the publications that result from the research increase the faculty member's stature and reputation and the faculty member is better able to attract future research grants, or to continue existing grants. This, in turn, leads to attracting more students, expansion of areas in which to research, attracting donors and otherwise enhancing NYU's reputation as a research university. While all of this may be true, it is not directly relevant to the inquiry of whether or not an individual is providing services to the Employer under its control in exchange for compensation, and I have concluded that these particular individuals classified as RAs and GAs do not.

(Decision at 36, n.50)

Surely there can be no question that the Science RAs perform research under the University's "control." (See pp. 27-30, above) Nor could the Regional Director plausibly be arguing that the support that the Science RAs receive from the University – which comes out of government grant money paid to the University in return for research that the RA is performing – is any different from the support provided to all of the University's other graduate assistants, which he found to be "compensation."

As set forth above, it is the University's position that all of its graduate assistants should be denied collective bargaining rights because their relationship with the University is predominantly that of students. However, if one is to hold otherwise, there is simply no reasoned basis for treating the Science RAs at issue here – who are being "paid" for performing government-funded research – differently from the University's other graduate assistants. Surely the Regional Director has failed to provide a persuasive, or even a comprehensible, rationale for distinguishing the Science RAs whom he has excluded from all of the other graduate assistants (whom he has deemed to be "employees").

This is illustrated by the decision's inability to differentiate the Science RAs from numerous other graduate assistants who, under the stated rationale, also provide no services to the University. The most obvious example is its inclusion in the unit of 80 graduate assistants in the School of Education who tutor in the public schools as part of a course and are supported by external grants. (See Tr. 3783-84, 3786, 3795; see 3896-97, 5414; EX 140 at 1) Another example are the third and fourth year doctoral students serving as RAs in Stern who spend virtually all of their time doing their own dissertation research. (See Tr. 4279, 4376-77)

The Regional Director's decision does not attempt to explain his rationale for not excluding the School of Education tutors. He did offer the following explanation for his inclusion of the Stern RAs as well as RAs in Psychology and Economics:

[I]t appears from the record that the RAs in these departments are assigned specific tasks, and that they work under the direction and control of the faculty member, as opposed to the Sackler GAs and the Science RAs who are working on their own dissertation.

(Decision at 37, n.51) Yet it is clear from the record (a) that the Science RAs (including the Sackler GAs) who are working on their own dissertations also work "under the direction and control of the faculty member" (see pp. 27-30, and p. 91 n.69, above); and (b) that Stern, Psychology, and Economics RAs are also working on their own dissertations. (Tr. 235, 1708-09, 4376-77)

As for the Science RAs not performing "specific tasks," the distinction that the decision attempts to draw between RAs assigned specific tasks and those "who are working on their own dissertation" is simply erroneous. As an initial matter it should be noted that the issue of whether RAs perform specific tasks was not raised during the hearings. Petitioner never contended that any of the Science RAs ought to be excluded because they did not perform specific tasks; nor did counsel or the Hearing Officer question witnesses with respect to the extent to which RAs perform specific tasks. In any event, there is no reason why an RA who is doing dissertation research (which is also fulfilling the requirements of a faculty research grant) cannot also be performing specific tasks in connection with or as part of that research. One would expect such research to be comprised of a series of specific tasks and related decisions. Certainly there is no basis in the record for concluding that the Science RAs do not perform specific tasks in connection with their research.

Furthermore, there is no precedent under the Act for finding that persons who do not perform specific tasks are not employees (we note that the decision cites no precedent other than Leland Stanford which, as discussed on p. 86 n.65, above, is inapposite). Neither common law agency principles nor the Restatement of Agency which the decision relies upon, identify the performance of specific tasks as a requirement for qualifying as an "employee." See Decision at 22 n.37; Restatement (Second) of Agency § 220.

It should also be noted that the decision's attempt to distinguish the work performed by the Science RAs from that performed by other graduate assistants is belied by the NIH Grants Policy Statement which as noted above (on p. 89) governs most faculty research grants in Biology, Chemistry, Neural Science, and Sackler. (NIH Grants Policy Statement, Part II: Terms and Conditions of NIH Grant Awards, "Compensation of Students," pt. 4 at 14) The NIH Grants Policy Statement (as noted above) not only requires that an RA perform "necessary work"; it further requires that there be "a bona fide employer-employee relationship between the student and the organization" receiving the research funding (i.e., NYU). Id.

These provisions of the NIH Grants Policy Statement are based upon Section J-41 of Office of Management and Budget (OMB) Circular No. A-21 which applies to all federal research grants awarded to colleges and universities. See Office of Management and Budget, OMB Circular No. A-21, §J.41 (rev. Oct. 27, 1998) (<http://www.whitehouse.gov/omb/circulars/a021/a021.html>) A recent report to Congress by the U.S. General Accounting Office described the effect of OMB A-21 in this regard as follows:

Each year, the Department of Defense, the National Science Foundation, NIH, and other departments and agencies of the federal government provide universities with billions of dollars for basic and applied research under federal grants. The universities in turn use these funds to pay the costs of the research, including the salaries of professors and GSRs [Graduate Student Researchers].

OMB Circular No. A-21 (July 1993) establishes the principles to be applied in determining allowable costs for research and development, training, and other sponsored work performed by colleges and universities under grants, contracts, and other agreements with the federal government. It applies to compensation provided by colleges and universities to graduate students who work on federally sponsored research projects at those institutions.

The OMB circular states that tuition remission and other forms of compensation, paid as or in lieu of wages, to students performing necessary work are allowable provided that (1) a bona fide employer-employee relationship exists between the student and the institution for the work performed, [and] (2) the tuition or other payments are . . . conditioned explicitly upon the performance of necessary work . . . (emphasis added)

Robert H. Hast, Gen. Accounting Office, Report on Federal Research Grants: Compensation Paid to Graduate Students at the University of California, No. B-282325, at 4 (June 1999) (<http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.21&filename=os99008.txt&directory=/diskb/wais/data/gao>).

Of course, the fact that OMB characterizes the Science RAs as employees of the University for purposes of its grants is not binding on the Board here. (Just as a university's characterization of the relationship as employment in certain documents was deemed not to be "conclusive on the Board" by Leland Stanford. (See p. 46, above)) OMB's obvious purpose in doing so was to assure that research grant monies were being paid to students who were in fact performing the research that the grant was intended to pay for under the supervision of the faculty principal investigator. These regulations do make clear, however, that it is nonsensical to contend, as does the Regional Director's decision, that the Science RAs are distinguishable from all the other graduate assistants (whom he deems to be employees under the Act) because they do not provide a service to NYU or because there is something unique about the work that they perform (such as that it does not consist of specific tasks).

On the other hand, the fact that a graduate assistant's relationship with the University includes the provision of a service to the University is only one of the factors that ought to be considered in determining whether the RA ought to be deemed an employee under the Act. As noted earlier in this brief, the services that the graduate assistants perform for NYU – all of which are related to their area of study – do not transform the fundamental nature of their relationship with the University. They are students, not employees.

Indeed, in excluding the Science RAs, the Regional Director reached the right conclusion for the wrong reasons. The Science RAs should be determined not to be employees under the Act because their relationship with NYU is predominantly that of students; because their appointment as RAs provides them with an educational experience that strengthens their pursuit of advanced knowledge and degrees; and because the work that they perform as RAs is directly related to their studies. All of NYU's other graduate assistants should be excluded as well on that same basis.

CONCLUSION

The Regional Director's unprecedented decision that NYU's graduate assistants are employees entitled to engage in collective bargaining under the Act incorrectly applies this Board's decision in Boston Medical, improperly equates graduate students with the post-graduate physicians involved in that case, and implausibly treats a fundamentally educational relationship as "akin to that in a traditional business environment." The decision, furthermore, ignores the compelling policy reasons why extending collective bargaining rights to graduate assistants would not further the purposes of the Act and would threaten principles of academic freedom. The decision, therefore, should be reversed and the petition dismissed.

In the event that the Board sustains the Regional Director's decision granting collective bargaining rights to the graduate assistants, however, it should set aside that portion of the decision denying such rights to Research Assistants in Biology, Chemistry, Neural Science, and Physics and Graduate Assistants in Basic Medical Sciences (the Sackler Institute of

Biomedical Sciences); and remand the case to the Region for a determination of whether the Graduate Assistants at Sackler ought to be excluded on community of interest grounds.

Respectfully submitted,

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