

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

----- x  
NEW YORK UNIVERSITY, :  
Employer, :  
-and- :  
GSOC/UAW, : Case No. 2-RC-23481  
Petitioner :  
: :  
----- x

**BRIEF ON REVIEW OF NEW YORK UNIVERSITY**

**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF AUTHORITIES .....	iii
PRELIMINARY STATEMENT .....	1
FACTS .....	3
1. Overview of New York University.....	3
2. Prior Representation of NYU’s Graduate Students .....	4
3. The Current Petition.....	5
4. Graduate Education at NYU .....	7
A. The Graduate School of Arts & Science.....	8
B. The Courant Institute of Mathematical Sciences .....	9
C. The Steinhardt School of Culture, Education and Human Development .....	11
5. Graduate Student Financial Support at NYU.....	12
A. Financial Aid in GSAS and Courant.....	12
B. Financial Aid in Steinhardt .....	15
6. Adjunct Faculty.....	16
7. Research Assistants.....	18
A. The Role of RAs in the Sciences Has Not Changed Since 1999 .....	18
B. RAs in Courant are Indistinguishable from Science RAs.....	21
C. RAs in the Social Sciences Are Indistinguishable From RAs in the Sciences .....	23
8. Hourly-Paid Student Workers.....	26
ARGUMENT .....	28
I. THE RECORD OF THIS CASE PROVIDES NO BASIS ON WHICH TO OVERRULE OR MODIFY BROWN .....	28
A. This Case Does Not Present an Appropriate Occasion for Reconsideration of Brown.....	28
B. The Record of this Case Does Not Support Modification or Overruling of Brown....	31
i. NYU’s Experience under the Graduate Assistant CBA .....	33
ii. The Voos Study.....	35
II. RESEARCH ASSISTANTS ARE NOT EMPLOYEES UNDER § 2(3) OF THE ACT..	36
A. Brown Properly Holds that RAs, Who Have a Purely Educational Relationship with the University, Are Not Statutory Employees .....	37
B. Even if Brown is Modified or Overruled, RAs Are Not Employees under Leland Stanford and NYU I.....	38

C. Collective Bargaining with Respect to RAs Would Necessarily Intrude on Academic Issues.....	43
III. STUDENT ADJUNCTS ARE PROPERLY INCLUDED IN THE ADJUNCT BARGAINING UNIT.....	45
A. Student Adjuncts Are Already Part of the Existing Adjunct Faculty Bargaining Unit .....	45
B. Even Under Specialty Healthcare, Student Adjuncts Teaching Non-Credit Courses Belong in the Same Unit as All Other Adjuncts .....	47
C. The Acting Regional Director Erroneously Singled Out Student Adjuncts Teaching Non-Credit Courses.....	58
IV. HOURLY-PAID STUDENT WORKERS ARE EXCLUDED FROM BARGAINING ..	62
V. STUDENT ADJUNCT INSTRUCTORS, RESEARCH ASSISTANTS AND HOURLY-PAID STUDENT WORKERS DO NOT SHARE A COMMUNITY OF INTEREST AND SHOULD NOT BE INCLUDED IN THE SAME BARGAINING UNIT .....	66
VI. THE BOARD DOES NOT HAVE A QUORUM TO DECIDE THIS CASE .....	71
CONCLUSION.....	72

## TABLE OF AUTHORITIES

Page

### CASES

<i>Barnard College,</i> 204 NLRB 1134 (1973) .....	57
<i>Boston Med. Ctr. Corp.,</i> 330 NLRB 152 (1999) .....	55, 56
<i>Brown University,</i> 342 NLRB 483 (2004) .....	passim
<i>Columbus Symphony Orchestra, Inc.,</i> 350 NLRB 523 (2007) .....	65
<i>Cornell Univ.,</i> 202 NLRB 290 (1973) .....	57
<i>Ctr. for Soc. Change, Inc.,</i> 358 NLRB No. 24 (Mar. 29, 2012).....	72
<i>Delight Bakery, Inc.,</i> 145 NLRB 893 (1964) .....	57
<i>Display Sign Serv., Inc.,</i> 180 NLRB 49 (1969) .....	57
<i>Georgetown Univ.,</i> 200 NLRB 215 (1973) .....	57
<i>Georgia-Pacific Corp.,</i> 201 NLRB 760 (1973) .....	55
<i>Hearst Corp.,</i> 221 NLRB 324 (1975) .....	56
<i>Humphrey v. Moore,</i> 375 U.S. 335 (1964).....	58
<i>Int’l Ass’n. of Machinists &amp; Aero Workers,</i> 355 NLRB 1062 (2010) .....	58
<i>Kansas City Repertory Theatre, Inc.,</i> 356 NLRB No. 28 (November 16, 2010) .....	66

<i>Kendall College,</i> 228 NLRB 1083 (1977), <i>enforced</i> , 570 F.2d 216 (7th Cir. 1978) .....	43
<i>Leland Stanford Junior University,</i> 214 NLRB 621 (1974) .....	passim
<i>Lone Star Boat Mfg. Co.,</i> 94 NLRB 19 (1951) .....	55
<i>New Process Steel, L.P. v. NLRB,</i> 130 S. Ct. 2635 (2010) .....	71, 72
<i>New York University,</i> 332 NLRB 1205 (2000) .....	passim
<i>New York University,</i> 356 NLRB No. 7 (October 25,2010) .....	5, 28, 33
<i>NLRB v. Catholic Bishop of Chicago,</i> 440 U.S. 490 (1979) .....	43
<i>NLRB v. Insurance Agents' Int'l Union,</i> 361 U.S. 477 (1960) .....	45
<i>Production Plated Plastics, Inc.,</i> 254 NLRB 560 (1981) .....	43
<i>Radio Broadcasting Co.,</i> 277 NLRB 1112 (1985) .....	63
<i>Regents of the Univ. of Cal. v. Bakke,</i> 438 U.S. 265 (1978) .....	44
<i>Regents of University of Michigan v. Ewing,</i> 474 U.S. 214 (1985) .....	44
<i>Rossllyn Concrete Constr. Co.,</i> 261 N.L.R.B. 732 (1982), <i>enf'd</i> , 713 F.2d 61 (1983) .....	55
<i>Saddleback Cmty. Hosp.,</i> 223 NLRB 247 (1976) .....	63
<i>Saga Food Serv. of Cal.,</i> 212 NLRB 786 (1974) .....	66
<i>San Francisco Art Inst.,</i> 226 NLRB 1251 (1976) .....	66

<i>Specialty Healthcare &amp; Rehab. Ctr. of Mobile,</i> 357 NLRB No. 83 (Aug. 26, 2011) .....	47, 48, 49
<i>Speedrack Prods. Group v. NLRB,</i> 114 F.3d 1276 (1997).....	55
<i>Sweezy v. New Hampshire,</i> 354 U.S. 234 (1957).....	44
<i>System Auto Park &amp; Garages, Inc.,</i> 248 NLRB 948 (1980) .....	56
<i>Terri Lee, Inc.,</i> 103 NLRB 995 (1953) .....	55
<i>The Grand,</i> 197 NLRB 1105 (1972) .....	71
<i>United Operations, Inc.,</i> 338 NLRB 123 (2002) .....	49
<i>United Steel Workers of America, Local 14693, and Skibeck, P.L.C.,</i> 345 NLRB 754 (2005) .....	47
<i>Univ. of West Los Angeles,</i> 321 NLRB 61 (1996) .....	56, 57
<i>Winsett-Simmonds Eng'rs., Inc.,</i> 164 NLRB 611 (1967) .....	55

**OTHER AUTHORITIES**

“Students or Employees? The Struggle Over Graduate Student Unions in America’s Private Colleges and Universities,” 36 <i>Journal of College and University Law</i> 615 (2010).....	32
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----

## PRELIMINARY STATEMENT

The Board's June 22, 2012 Notice and Invitation to file briefs in this case asks the parties and interested amici to address four questions:

1. Should the Board modify or overrule *Brown University*, 342 NLRB 483 (2004), which held that graduate student assistants who perform services at a university in connection with their studies are not statutory employees within the meaning of Section 2(3) of the National Labor Relations Act, because they "have a primarily educational, not economic, relationship with their university"? 342 NLRB at 487.
2. If the Board modifies or overrules *Brown University*, supra, should the Board continue to find that graduate student assistants engaged in research funded by external grants are not statutory employees, in part because they do not perform a service for the university? See *New York University*, 332 NLRB 1205, 1209 fn. 10 (2000) (relying on *Leland Stanford Junior University*, 214 NLRB 621 (1974)).
3. If the Board were to conclude that graduate student assistants may be statutory employees, in what circumstances, if any, would a separate bargaining unit of graduate student assistants be appropriate under the Act?
4. If the Board were to conclude that graduate student assistants may be statutory employees, what standard should the Board apply to determine (a) whether such assistants constitute temporary employees; and (b) what the appropriate bargaining unit placement of assistants determined to be temporary employees should be?

These questions unfortunately suggest that the Board intends to use this case – together with the separate case involving Polytechnic Institute of New York University – as a vehicle to make sweeping changes in settled law regarding graduate students at the nation's private universities, regardless of the actual issues presented in this case or the evidence developed in 19 days of hearing. There is nothing in the record of this case to support such profound changes. Indeed, the Board seems prepared to abandon precedent, potentially causing grievous damage to graduate education, based not on any new evidence or arguments, but solely on its changed political composition.

New York University (“NYU”) urges the Board to engage in principled decision-making based upon the record of this case, with due respect for established precedent, and responds to the Board’s specific questions in that context as follows:

1. Because NYU no longer has Teaching Assistants (“TAs”), this case does not present an appropriate occasion for reconsideration of *Brown University*, 342 NLRB 483 (2004) (“*Brown*”). There is no dispute regarding the employee status of NYU’s graduate students who, unlike the TAs involved in *Brown* and *New York University*, 332 NLRB 1205 (2000) (“*NYU I*”), volunteer to teach as adjunct faculty, are paid separately for such teaching and are treated in all respects the same as non-student adjunct faculty in the adjunct faculty bargaining unit. In any event, *Brown* remains sound to the extent it is viewed in the context of NYU’s Research Assistants (“RAs”) who have a purely educational relationship with the university.

2. RAs do not provide services to the University in exchange for compensation; they are simply performing the research required by their advanced academic programs and receive the same financial support as all other graduate students in the same programs. This is true of all RAs at NYU, as the Regional Director properly found that there is no distinction between NYU’s RAs in the natural sciences, who were held not to be employees in “*NYU I*”, and RAs in other academic disciplines. Regardless of whether *Brown* is modified or overruled, there can be no justification for reversal of precedent that has stood for nearly 40 years by overruling *Leland Stanford Junior University*, 214 NLRB 621 (1974) (“*Leland Stanford*”), and holding that NYU’s RAs can be treated as employees under the Act.

3. The Acting Regional Director erred in holding that, if *Brown* is reversed, NYU’s graduate student adjuncts teaching non-credit courses, RAs in all disciplines, and hourly-paid graduate students with certain job titles would comprise an appropriate bargaining unit.

Graduate students appointed as adjuncts have been included with all other adjunct faculty in the existing adjunct faculty bargaining unit since the inception of that unit eight years ago. In any event, there is no basis for separating out student adjuncts teaching non-credit courses from all other adjuncts, students and non-students alike, with whom they share an overwhelming community of interest. In addition, even if RAs and hourly-paid student workers are considered employees, they do not share a community of interest with each other, or with students appointed as adjunct faculty. The Acting Regional Director inappropriately included students in these vastly disparate positions in a single bargaining unit based solely on their status as students.

4. NYU's 8,000 hourly-paid student workers, including some 1560 graduate students, fill a wide variety of clerical and administrative positions throughout the university. Their appointments typically last for one or two semesters at most and often involve only a minimal amount of work over that time. Under long-standing Board precedent, they should be excluded from collective bargaining as casual or temporary employees.

In sum, the Regional Director's dismissal of the Petition should be affirmed, on the basis that: (i) graduate student adjuncts covered by the Petition are included in an existing bargaining unit; (ii) RAs are not employees within the meaning of Section 2(3) of the Act; and (iii) hourly-paid student workers are casual or temporary employees who should be excluded from collective bargaining.

## FACTS

### 1. Overview of New York University

New York University was founded in 1831 to be a national center of scholarship, teaching and research. NYU has approximately 40,000 students, half of whom are pursuing graduate degrees. The University employs about 2,000 full-time faculty members, 4,300 adjunct

faculty members and over 12,000 employees in total. (Tr. 359; EX 56, EX 58)<sup>1</sup> NYU consists of some 12 different schools, colleges and institutes, including the schools most directly involved in this case: the Graduate School of Arts & Science (“GSAS”), which together with the College of Arts and Science comprise the Faculty of Arts & Science (“FAS”); the Courant Institute of Mathematical Sciences (“Courant”); and the Steinhardt School of Culture, Education and Human Development (“Steinhardt”). Most these schools and institutes are further broken down into departments of study. (Tr. 358-60)

## 2. Prior Representation of NYU’s Graduate Students

In *NYU I*, the Board held that NYU graduate students appointed as Teaching Assistants (“TAs”), Graduate Assistants (“GAs”), and Research Assistants (“RAs”) (collectively referred to as “graduate assistants”) were employees under the Act. While finding that the majority of NYU’s graduate assistants were employees, the Board held that GAs in the Sackler Institute of Graduate Biomedical Sciences and RAs in science departments funded by external grants were not employees and were properly excluded from the unit on the ground that they perform research on their dissertation topics rather than provide specific services for the University.

The NLRB subsequently certified the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO (“UAW”) as the bargaining representative for NYU graduate assistants, and in January 2002, NYU entered into a collective bargaining agreement with the UAW and UAW, Local 2110, covering the graduate assistant bargaining unit (the “Graduate Assistant CBA”). (Tr. 681; PX 6)

---

<sup>1</sup> Employer Exhibits are referred to herein as “EX”, Petitioner Exhibits as “PX” and Board Exhibits as “BX”. Transcript references are indicated as “Tr.” followed by the page number.

On July 13, 2004, the Board issued its decision in *Brown*, overruling *NYU I* and returning to the Board's long-held position that graduate student assistants, such as those then represented at NYU by the UAW, are not employees under the NLRA. In light of this decision, NYU requested that three separate committees (which included faculty, students, and administrators) evaluate the impact of graduate assistant union representation and formulate recommendations regarding the continued recognition of the UAW. (Tr. 683-84) The resulting committee reports uniformly recommended that NYU not enter a successor agreement with the UAW based on the negative impact unionization had on faculty/student relationships as well as the threat it posed to academic freedom crucial to NYU's mission as an institution of higher learning. (EX 38, EX 39)

Following the issuance of these reports, the University leadership determined that it was in the University's best interest to withdraw recognition of the UAW, and NYU did so after the Graduate Assistant CBA expired in August 2005. (Tr. 748-50; EX 4)

### 3. The Current Petition

On May 3, 2010, Petitioner, GSOC/UAW filed a petition seeking to represent "all individuals enrolled in graduate level programs at NYU, who are employed to perform the functions of teaching assistants, research assistants, and graduate assistants (regardless of job title)." (BX 1) The Regional Director dismissed the Petition on June 7, 2010, concluding "that it seeks an election among graduate assistants that are clearly not employees under *Brown*." (BX 1, at 4) Petitioner filed a Request for Review of the Order dismissing the Petition on June 21, 2010. (BX 1, at 3) On October 25, 2010, the Board granted the Petitioner's Request for Review, reinstated the Petition and remanded the case to the Regional Director for a hearing and issuance of a decision. *See New York University*, 356 NLRB No. 7 (Oct. 25, 2010).

The hearing directed by the Board commenced on November 18, 2010. The evidence presented at the hearing, as discussed below, demonstrated that the financial aid structure existing at NYU has undergone a significant change since the hearing in *NYU I*. Prior to 2009, graduate students receiving internal fellowship support were required to provide at least two years of teaching or other service to the University as either TAs or GAs. Among other changes, as a result of financial aid reforms (in both GSAS and Steinhardt), the requirement that students supported by fellowships provide service to the University in connection with their financial aid was eliminated.

Accordingly, TA and GA positions were eliminated. The duties and responsibilities of TAs had been substantially the same as those of graduate students appointed as adjunct faculty prior to financial aid reform; the distinction in those classifications was based only on the nature of the funding. As a result, all graduate students who voluntarily choose to teach now do so as adjunct instructors and are automatically included in the adjunct faculty bargaining unit represented by UAW Local 7902, if they meet the minimum “contact hours” specified in the contract. They are paid for their teaching in accordance with the adjunct contract over and above the uniform stipend provided to all doctoral students. The duties performed by former GAs were mostly reassigned to graduate students (and undergraduates) who fill many thousands of hourly-paid part-time jobs classified by the University as Code 118 and Code 119 appointments. As most RAs were externally funded, these financial aid reforms had had no impact on RAs.

Petitioner amended the petition on January 31, 2011 to include “all graduate student employees of New York University who are receiving stipends from the University and who perform work for the University, including those classified as research assistants, graduate

assistants and those performing teaching, administrative and other duties.”<sup>2</sup> The stated purpose of the amendment was an effort to define the current unit to recreate the previously certified graduate assistant unit that, according to Petitioner, was distinguished from the adjunct unit based on its members’ receipt of stipends. (Tr. 1226)

On June 16, 2011, the Acting Regional Director issued a decision dismissing the petition in accordance with the holding in *Brown*. He went on to find, however, that in the event the Board reconsiders the employee status of graduate students, “a unit including all graduate students would be appropriate.” (Decision at 26) Notwithstanding that broad description, the decision defines the unit as including: graduate student adjuncts teaching non-credit courses, RAs in all disciplines, and hourly graduate students with the job title “research assistant” and hourly employees whose job title indicates that they are providing assistance to a specific faculty member. (Decision at 26-27, n.23)

#### 4. Graduate Education at NYU

Approximately half of NYU’s nearly 40,000 students are graduate students, of whom 1,700 are pursuing a doctoral degree, generally a PhD. (Tr. 366) A Doctor of Philosophy (“PhD”) is a research degree which culminates with the successful defense of a doctoral thesis or dissertation, *i.e.*, a piece of original research. (Tr. 367-68, 402-03) While time to degree varies by field, it generally takes five to seven years to complete. (Tr. 440-41) Doctoral study typically involves two to three years of coursework followed by independent research leading to the dissertation. Many students perform this research as RAs, whereby they collaborate with a professor on an externally-funded research project related both to their dissertation and the

---

<sup>2</sup> Petitioner is not seeking to represent, and has expressly excluded from its petition, the GAs at the Sackler Institute and all graders and tutors. (Tr. 143-44, 1224)

professor's research interests. (Tr. 398, 402, 467, 473, 478-79, 527-28, 533, 867-68; *see also* Tr. 180-81)

In addition to the doctoral students, there are approximately 16,000 students in Master's programs at NYU. (Tr. 366) Master's programs typically take two years to complete and tend to be "standalone" programs that lead to some kind of specialization. Master's programs are more focused in their areas of training, do not generally involve original research, and do not train students to pursue academic careers, which usually require more than a Master's Degree. (Tr. 368-69)

The students whom Petitioner seeks to represent are studying primarily in GSAS, Courant and Steinhardt. Each of these schools offers both PhD and Master's degrees. (Tr. 365-66, 510, 520, 808)

A. The Graduate School of Arts & Science

As described by Dr. Jess Benhabib, Interim Dean of FAS, GSAS is administratively part of FAS. There are three divisions within FAS: Humanities, Sciences, and Social Sciences, each of which has a Divisional Dean. (Tr. 369, 378)

PhD students in GSAS devote their first two to three years of study to completing coursework, fulfilling a certain number of credits and passing various oral and written examinations. (Tr. 367, 415, 1162) A doctoral degree in GSAS requires a minimum of 72 credits; students must register for at least 12 credits each semester to maintain full-time status. (Tr. 396) There is no requirement that students in any department teach in order to receive a doctoral degree in GSAS. (Tr. 375, 1164, 1584)

While completing their coursework, PhD candidates explore possible dissertation topics. (Tr. 367) At the same time, students are also expected to team with a professor conducting

research in their chosen field, who ultimately will become their thesis advisor. (Tr. 367, 410, 1162) The advisor supervises the thesis work, providing feedback and certifying that the student is making appropriate progress toward completing a dissertation. (Tr. 410) Further, the thesis advisor is a member of the student's thesis committee, which ultimately determines whether or not to confer the PhD. (Tr. 367, 411) In addition to playing a crucial role in the completion of a PhD, the thesis advisor commonly takes on a career development role, advising the student on available options, writing recommendations, and introducing students to academic colleagues; this close relationship often continues after a student has graduated. (Tr. 422-23)

Following the completion of their coursework and required field or oral examinations, students spend the balance of their time at NYU engaged in more focused research related to their dissertations, meeting weekly with their advisors and discussing their work. (Tr. 416, 1162) The successful completion of the dissertation is generally a two-stage process. First, after conducting substantial research, the student presents a proposed topic to a group of faculty members. (Tr. 411) Once the topic is approved, the student will refine it while completing the paper. Often a student will seek to publish sections of this research, either in conjunction with their advisor or another student. These published works frequently become part of the dissertation. Finally, the student submits and defends the dissertation before a committee of professors. If the committee approves the thesis, the PhD is conferred. (Tr. 367-68, 411, 416-17)

#### B. The Courant Institute of Mathematical Sciences

As described by Dr. Robert Kohn, Professor of Mathematics, Chair of the Mathematical Finance Committee and Courant's former Deputy Director, Courant is a unit of NYU that encompasses the Mathematics and Computer Science Departments. (Tr. 503-07) Although

Courant essentially functions as an independent school in the University, there are parts of Courant that report administratively to the FAS Dean. (Tr. 432-33)

At the time of the hearing, Courant had 193 doctoral students, 107 in Mathematics and 86 in Computer Science, as well as many Master's students. (Tr. 510; EX 15) Doctoral students usually take a full course load in the first year followed by a written comprehensive examination. (Tr. 520) In the second year, students continue coursework and prepare for their oral examination, which has two parts: a general section associated with typical PhD level classes and a special part associated with the student's anticipated research. Because the latter part focuses on a student's dissertation work, students choose a faculty advisor while preparing for this part; "This system helps make sure that students act quickly into preparation for research and are quickly affiliated with a potential thesis advisor." (Tr. 521)

After students have successfully completed the oral examination, they concentrate heavily on thesis research. In a partnership with their faculty advisors, students select a thesis topic and then commence researching and writing a dissertation. During this time, students are encouraged to take one or two lecture classes while using the balance of their credit requirements for research that will become part of their dissertation. (Tr. 521) Research credits are graded by the faculty advisor and count toward a student's full-time status. (Tr. 521, 534) When the faculty advisor considers the thesis to be ready for additional scrutiny, it is read by two other faculty members. If this group agrees that the thesis is complete, the student then defends it before a committee consisting of the advisor, the other readers and two additional faculty members. If the defense is successful, the PhD is awarded. (Tr. 523) Most students in the Mathematics Department finish this process in their fourth or fifth year. The process in Computer Science is

very similar, with slight differences in the examination structure. (Tr. 522) There is no requirement that students teach in order to receive their PhD in Courant. (Tr. 559)

C. The Steinhardt School of Culture, Education and Human Development

As explained by Dr. Perry Halkitis, Associate Dean for Research and Doctoral Studies and Professor of Applied Psychology, Steinhardt currently has eleven departments, including: Applied Psychology; Communicative Sciences and Disorders; Media Culture and Communications; Music and the Performing Arts Professions (“MPAP”); Nutrition, Food Sciences and Public Health; Occupational Therapy; and Physical Therapy. (Tr. 806)

Steinhardt has approximately 400 doctoral students as well as over 2,500 undergraduate students and 3,500 students working towards Master’s degrees or advanced certificates. (Tr. 808-10) Steinhardt offers PhDs in all departments except for Physical Therapy and Visual Arts. (Tr. 813-14) It also offers clinical doctoral degrees such as an Education Doctorate, Doctor of Physical Therapy, Doctor of Professional Studies, and many Master’s programs. (Tr. 808)

As in GSAS, the PhD program culminates in a dissertation based on independent research. Students often know even during the admissions process what area of study they want to pursue for their doctoral degree and who the relevant scholars are and therefore apply to programs that have faculty members with whom they want to work, and the school attempts to match students with their desired faculty member. (Tr. 856)

PhD students in Steinhardt take 12 credits per semester to meet the 45 to 60 credit requirement of most programs, many of which are research courses. (Tr. 854-55)

At the conclusion of their coursework, which generally takes three years, students take competency or candidacy examinations, prepare a research database paper and take a theory examination. Successful students are admitted to candidacy. (Tr. 854-55, 1454) Students are

matched with a faculty member as their thesis advisor and focus on completing their dissertations. (Tr. 856, 1452) Typically this process takes five to six years. (Tr. 855) Students in Steinhardt are not required to teach. (Tr. 817, 820)

## 5. Graduate Student Financial Support at NYU

Doctoral students at NYU typically receive financial aid to support their studies in the form of either a fellowship or RA appointment. (Tr. 373) In general, a fellowship is internally-sponsored University financial support that does not require a specific project and therefore has “no strings attached.” (Tr. 474) An RA position provides financial support through a student’s research, usually in connection with an externally-funded research project for a faculty member. (Tr. 373, 474)

Master’s students generally are not fully supported, but are eligible for appointment as adjunct instructors or graders, and also can receive financial aid through partial scholarships and/or stipends drawn from restricted or endowed accounts. (Tr. 510, 1220, 1457, 1615-16, 1628)

### A. Financial Aid in GSAS and Courant

Virtually all PhD students in GSAS and Courant are supported under the MacCracken Financial Aid Program (the “MacCracken program”).<sup>3</sup> (Tr. 372(c)-372(d), 506-07; EX 11)

After its introduction in 1992, the MacCracken program underwent several changes, referred to as financial aid reforms, to make the funding package more competitive. Each reform expanded coverage and reduced the amount of teaching that students on fellowships were required to provide to the University as a condition of their support. (Tr. 372(b)-72(c); EX 11)

---

<sup>3</sup> In very limited circumstances, unsupported students are admitted to doctoral programs in GSAS. These students are either entirely externally funded, for instance by a foreign government fellowship, or are pursuing a PhD in math or computer science which have “robust job markets.” (Tr. 512)

In 2000, the MacCracken program was extended to fund all admitted doctoral students. (EX 11, at 2)

Prior to 2009, students receiving internal fellowship support were required to provide at least two years of teaching or other service to the University as either TAs or GAs. (Tr. 385, 1196, 1260, 1561-1562, 1568)

On September 1, 2009, Financial Aid Reform 4 (“FAR4”) became effective in GSAS and Courant for the 2009-2010 academic year. (Tr. 636, 712-13; EX 11) Under FAR4, all students receive the same components of support, which include a stipend, tuition remission and student health insurance, as well as an additional \$1,000 “start-up award.” (Tr. 374-75, 1562) The guidelines for the 2010-2011 academic year set the minimum nine-month stipend at \$23,000. (Tr. 372(c), 372(d), 373, 374; EX 11) Most departments provide this support for five years. However, individual departments within GSAS retain the discretion as to how to allocate their portion of internal funding according to both the number of students matriculating and the amount of external funding available. (Tr. 438-40, 510-11)

Individual departments also may set the stipend amounts, including the amount that RAs will receive. (Tr. 271) Certain departments provide greater stipends to remain competitive in recruiting students. *Under University standards, however, all students within each department, both fellows and RAs, receive the same stipend.* (Tr. 374-75, 511)

In a significant departure from the requirements under the prior MacCracken program, doctoral students receiving fellowships under FAR4 no longer are required to perform any services in exchange for full support. (Tr. 372, 372(c), 559, 1196, 1584; EX 11) Under FAR4, students are required only to make satisfactory progress toward their degrees and be within seven years of their first term of enrollment to maintain full support. (Tr. 395-96; EX 11) By

eliminating any service requirements, FAR4 aims to decrease the time to degree by allowing students to dedicate more time to their studies.<sup>4</sup> (Tr. 484, 1588)

Although graduate students are no longer required to teach, NYU recognizes that teaching is still an important part of doctoral education. GSAS, Courant and Steinhardt do not have TAs or require their graduate students to teach but doctoral students are nonetheless advised that it is important to gain the teaching experience that future employers (in academia and elsewhere) will expect. (Tr. 375, 584, 601, 895-96, 912, 1483-84) In fact, when considering these financial aid reforms, the schools sought to “model teaching opportunities to best support progress toward a degree and to mentor students as teachers.” (Tr. 664, 667; PX 27) As such, the policy guidelines for both FAR4 in GSAS and Courant and FAR3 (*see* p. 14, below) in Steinhardt specifically note the continued importance of teaching for PhD students even under financial aid reform. (EX 11 at 6, EX 46 at 4)

Students who wish to teach on a voluntary basis may apply to do so as adjunct instructors. (Tr. 372, 372(c), 376, 386, 560) Student adjunct instructors are considered employees and are paid over and above their stipend in accordance with the salary schedule set forth in the collective bargaining agreement applicable to adjunct instructors. (Tr. 372, 372(c), 376, 386, 562, 714-15; EX 11) Similarly, students can take on part-time, hourly-paid positions within their departments and elsewhere in the University. Under FAR4, any teaching or part-time work is entirely voluntary and not required as a condition of receiving an academic degree or financial aid. (Tr. 372, 372(c), 715-16, 1196, 1584; EX 11) Consequently, there are no TAs or GAs in GSAS or Courant. (Tr. 1569; EX 55)

---

<sup>4</sup> Even prior to FAR4, GSAS had been working on reducing teaching by graduate students by transitioning teaching in a number of departments, including the language departments and Expository Writing, to full-time faculty. (Tr. 484-85, 490) Further, in connection with the adoption of FAR4, an implementation team investigated the teaching needs of each department to determine where the use of part-time faculty could be further reduced. (Tr. 1587-88, 1590-91)

## B. Financial Aid in Steinhardt

In Steinhardt, as in GSAS and Courant, PhD students are currently fully supported either through internally-funded fellowships or research assistantships. (Tr. 815, 819-20) Historically, PhD students were not uniformly funded. Various forms of support existed that required students to serve as either TAs or GAs. (Tr. 815, 819)

Beginning in academic year 2010, Steinhardt instituted its current financial aid reform which was referred to as Financial Aid Reform 3 (“FAR3”).<sup>5</sup> (Tr. 816, 822, 1456; EX 46) FAR3 is very similar in design to FAR4 in GSAS. (Tr. 817) For academic year 2010-2011, Steinhardt students received a stipend of \$23,046 as well as a tuition award (which allows the student to take courses in the fall, spring and summer) and health insurance. (Tr. 821; EX 46) Students are funded internally through fellowships or scholarships, or externally through research assistantships, for three to five years depending on the department.<sup>6</sup> (Tr. 819-20; EX 46) *As in GSAS, doctoral students who are supported as RAs on external research grants receive the same level and components of funding as students receiving internal support as fellows.* (Tr. 816-17, 834-35, EX 46, EX 51)

As with FAR4 in GSAS, the hallmark of FAR3 is that students on fellowship and scholarship no longer are required to provide any service to Steinhardt, either as a TA or a GA. (Tr. 817, 831, 1483; EX 46) If they choose to, students can take on appointments, such as an adjunct faculty position or part-time job, to supplement their funding under FAR3. (Tr. 887; EX 46) Accordingly, as a result of FAR3’s implementation, there are no longer any TAs or GAs in Steinhardt. (Tr. 1483, 1488, 1651, 1659; EX 55)

---

<sup>5</sup> Steinhardt and GSAS have separate financial aid programs. Accordingly, Steinhardt’s FAR3 is wholly unrelated to GSAS’s FAR4.

<sup>6</sup> Students who are receiving scholarships are still internally funded and are therefore referred to as fellows. (Tr. 832)

## 6. Adjunct Faculty

In addition to NYU's approximately 2,000 full-time faculty members, who receive various types of appointments, NYU employed approximately 4,300 part-time faculty in 2010, whom it refers to as adjunct faculty. (Tr. 361; EX 56, EX 58).<sup>7</sup>

These adjunct faculty members have extremely diverse interests and backgrounds, and include industry professionals, distinguished artists, government officials, students (usually graduate students) from NYU and other universities as well as "career adjuncts" for whom teaching as an adjunct instructor is their principal occupation. (Tr. 361-62, 718, 1302)

In early 2002, Adjuncts Come Together, ACT/UAW, AFL-CIO filed a petition for an adjunct faculty bargaining unit at NYU. (Tr. 698) In that petition, ACT/UAW sought to represent "all adjunct faculty and non tenure track instructional staff employed by the New York University in New York metropolitan area." (PX 22) The petitioned-for unit contained no exclusions based on other pursuits of individual adjuncts, including student status. On or about April 18, 2002, the University entered into a Stipulated Election Agreement with ACT/UAW and the Federated Adjuncts of NYU (a rival labor organization), which provided for an election in the following unit:

All adjunct or part-time faculty employed by the Employer who provide (1) a total of 40 contact hours of instruction in one or more courses during an academic year (i.e., September 1 through August 31) or (2) a total of 75 contact hours of individual instruction or tutoring during a semester, including faculty in positions currently designated under Code 112 and any equivalent or successor code to which such faculty may be appointed in the future.

(Tr. 696, 700-01; EX 42) Again, none of the listed unit exclusions were based on outside pursuits of the individual adjunct, including current registration as a student at NYU or anywhere

---

<sup>7</sup> Data for academic year 2010 includes fall semester appointments only, unless otherwise noted.

else. (EX 42) The UAW was aware that there were graduate students serving as adjunct instructors at the time of the petition, and more than 10% of the eligible voters on the “Excelsior List” provided to ACT/UAW in that case were NYU graduate students. (Tr. 709, 1000; EX 59)

On July 9, 2002, ACT/UAW was certified as the adjunct bargaining representative and ultimately delegated that responsibility to Local 7902. (Tr. 698) The certification defined the bargaining unit exactly as in the Stipulated Election Agreement. (PX 23) In April 2004, the parties’ agreed on a collective bargaining agreement, which remained in effect at the time of the hearing in this case.<sup>8</sup> (Tr. 707; EX 43) The recognition clause of the Adjunct CBA mirrors the certification. (EX 43 at 1-2) Thus, the terms of that agreement extend to all adjunct instructors who meet the eligibility criteria, whether students at NYU, students elsewhere, or non-students. (Tr. 376, 379, 707, 727, 1086, 1469) Likewise, those adjuncts who fail to meet the minimum contract hour requirements for inclusion in the unit, student or non-student, are not covered. (Tr. 703-04)<sup>9</sup>

Graduate students serving as adjuncts have been part of the adjunct bargaining unit since its inception and continue to be eligible for coverage under the Adjunct CBA. (Tr. 376-77, 379, 707, 727, 1469) In 2008, the year prior to FAR 4’s implementation, 422 NYU students were appointed as adjunct faculty members, of whom 296 were bargaining unit eligible. (EX 56) As a result of the implementation of FAR4 in GSAS, somewhere between 400 and 600 additional graduate students were appointed as adjunct instructors and met the criteria for coverage under the Adjunct CBA. (Tr. 721)

---

<sup>8</sup> The parties reached agreement on a successor Adjunct CBA on March 31, 2011.

<sup>9</sup> The purpose of the minimum contact hour requirement is to ensure that the individual teaching as an adjunct has a sufficient connection to NYU and the unit to have an interest in the outcome of collective bargaining. (Tr. 702-03)

In the fall of 2009, NYU notified Local 7902 about FAR4 and the resulting appointment of additional students as adjuncts. (Tr. 720) Shortly thereafter, UAW representatives met with Terrance Nolan, NYU's Deputy General Counsel and Director of Labor Relations, to discuss this change. During their meeting, Nolan explained that "graduate students would now be compensated separately as adjuncts and that graduate students had been in the adjunct unit since the unit's inception." (Tr. 723-24) In the recently completed negotiations for a successor Adjunct CBA, Local 7902 never raised any issue with NYU regarding the continued inclusion of graduate students in the adjunct bargaining unit. (Tr. 725) In fact, at no time since learning of FAR4, did Local 7902 or the UAW file a grievance regarding the change in status of graduate students performing teaching duties, challenge the shift before the NLRB or lodge any other kind of formal objection. (Tr. 721-22)

In the fall 2010 semester, a majority of both student and non-student adjuncts met the contractual eligibility requirements: 1,752 of the 3,367 non-student adjunct instructors (52%) and 705 of the 937 graduate student adjuncts (75%) were bargaining unit eligible. (Tr. 988-89; EX 56, EX 58)

## 7. Research Assistants

As described above, many NYU graduate students are supported as RAs, primarily through externally-funded research grants awarded to NYU. (Tr. 232-33, 272, 419, 473, 819-20) In the fall of 2010, there were a total of 300 RAs at NYU (EX 55), including 114 in science departments, 92 in Courant, and 94 others, principally in the social sciences and Steinhardt.

### A. The Role of RAs in the Sciences Has Not Changed Since 1999

In *NYU I*, the Board affirmed the Regional Director's decision to exclude "those research assistants funded by external grants in the Physics, Biology, Chemistry and Center for

Neuroscience (CNS) Departments” on the grounds that they were not employees under the Act. 332 NLRB at 1221. As of Fall 2010, there were 114 students serving as externally funded science RAs: 43 in Biology; 4 in the Center for Neural Science; 24 in Chemistry; 24 in Physics; and 19 in Psychology. (EX 55) While Psychology was not considered a science by NYU in 1999, today it is part of the Science Division of the FAS.<sup>10</sup> (Tr. 321, 441)

As explained by the Regional Director in *NYU I*:

These ... RAs have no expectations placed upon them other than their academic advancement, which involves research. They receive stipends and tuition remission as do other GAs, RAs, and TAs, but are not required to commit a set number of hours performing specific tasks for NYU. The research they perform is the same research they would perform as part of their studies in order to complete their dissertation, regardless of whether they received funding. The funding for the Sackler GAs and the science RAs, therefore, is more akin to a scholarship.

*NYU I* at 1220. He made clear in his decision that “students classified as RAs in these departments are performing the research required for their dissertations, which is the same research for which the professor has obtained an outside grant. No specific services are required of these RAs – the students are simply expected to progress towards their dissertations.” *Id.* at 1214 (footnote omitted).

As explained by Dean Benhabib, *there has been no change in the responsibilities of science RAs since 1999; either in terms of their relationship to the academic programs, their duties and tasks or the amount of time RAs are expected to dedicate to their research.* (Tr. 400) As in 1999, the research done by an RA is the same research he or she would perform as part of their program of study regardless of the source of funding. (Tr. 400-403)

---

<sup>10</sup> NYU determined that Psychology has become much more “science-like especially with the development of perception issues in psychology and its close connection to neuroscience.” (Tr. 441)

The continuing validity of the Regional Director's 1999 finding that the research work performed by science RAs is indistinguishable from the research required as part of their academic programs was exemplified by the testimony of Petitioner's witness John Freudenthal. Freudenthal is in the sixth year of his doctoral study in Chemistry and is working on his dissertation. (Tr. 166) He matriculated as full-time student at NYU in the fall of 2009 in order to continue *studying* under Professor Bart Kahr, who came to NYU from the University of Washington at that time. (Tr. 166-67, 209) Freudenthal had to apply for admission as a student and he was admitted as a MacCracken fellow with a RA appointment. (Tr. 162; 175-76, 179; EX 5; PX 8) In accordance with his appointment as an RA, Freudenthal receives the exact same stipend, tuition remission and student health benefits as all other doctoral students in the Chemistry Department, irrespective of whether the other students are performing research. (Tr. 212-13; 631; PX 8)

To earn the 36 credits required to receive a PhD, Freudenthal is enrolled in research courses with his thesis advisor and attends weekly colloquia. (Tr. 180-81, 183) There is no distinction between the work he is doing in the laboratory and the work he is doing for his research courses, for which Kahr serves as the professor. (Tr. 180-181) In fact, Freudenthal testified that he had "never specifically done coursework for those research credits given." (Tr. 180-81) Freudenthal concedes that there is no distinction between his work in the laboratory and the work he does for his research credits. (Tr. 181) Indeed, no one ever has made a distinction between Freudenthal's role as a graduate student and his role as an RA. (Tr. 195-96)

B. RAs in Courant are Indistinguishable from Science RAs

The RAs in Courant are essentially indistinguishable from those in the sciences.<sup>11</sup>

Indeed, the evidence demonstrates that the RA positions in Courant are equally, if not more, integral to the students' doctoral studies as the RAs in science departments who were expressly excluded from the unit in *NYU I*.

Some students in Courant are appointed as an RA in their first or second year of doctoral study. For these students, the *only* duties associated with their appointments are to engage in “normal academic activity; coursework, preparing for departmental required exams.” (Tr. 533) Unlike in other schools at NYU, Courant students can be both RAs and receive a fellowship in the same semester, and they may be simultaneously funded through fractional RA appointments and fractional MacCracken fellowships. (Tr. 532-33) Thus, there is no correlation between what the student is doing and the source of the funding, or how much of it is drawn from an external grant.<sup>12</sup> (Tr. 533)

Once a student has chosen a thesis topic, the research on that thesis mirrors research under the grant so that students “do not separate tasks for the grant from the research which is part of their thesis and the academic career that they’re building.” (Tr. 534) At this point, students enroll in a research course for academic credit with the PI on the applicable grant, who assigns a grade for the research credit. The PI is almost always the thesis advisor for students who are working as RAs on that grant. (Tr. 534-37) Students funded through fellowships also take research credits with their advisors, and “[s]tudents choose their research directors without

---

<sup>11</sup> There was no evidence presented in *NYU I* regarding RAs in Courant and there was, accordingly, no direct ruling on their status as employees.

<sup>12</sup> The only significance of the partial RAship appointment is that, when a student is working in an area where grant funds are available, the department uses those funds to support that student to the greatest extent possible in order to preserve the department's internal funds for students doing research in other areas. (Tr. 533)

regard to source of funding.” (Tr. 534, 596) In short, there is absolutely no distinction between the activities undertaken as an RA and those undertaken simply as a student completing his or her academic program. (Tr. 534, 592)

The funding of Mathematics student Peter Bella, a PhD student performing research with Dr. Kohn, is illustrative. (Tr. 523) Bella recently received a letter notifying him that, because he had made adequate progress in his studies, he would be receiving funding for the following year. The letter, however, does not identify the source of Bella’s funding. (Tr. 524-25; EX 18)

In fact, a significant amount of Bella’s support came from his appointment as a partial RA on one of Dr. Kohn’s research grants. (Tr. 525) However, because the source of funding is irrelevant to a student, Bella was not informed that he was a partial RA (supported 78% on the grant and 22% through a GSAS fellowship) until the end of the semester, when he was asked by letter to provide a brief account of his activity on the research grant for reporting purposes. (Tr. 525-26; EX 19) The letter specifically notes that “because of the nature of the research in the mathematical sciences, it is perfectly reasonable to mention coursework and preparation for written or oral exams if that work is relevant to preparation for research in the grant area.” (EX 19) This language reflects that Bella was being externally funded to do nothing beyond completing his doctoral research. (Tr. 527-28) Bella’s response describing his research is equally applicable to his grant work and his dissertation, demonstrating that his dissertation work and research under the grant were indistinguishable. (Tr. 530; EX 20)

Testimony regarding Professor Kohn’s other RAs further demonstrates that the research students perform as RAs in Courant is indistinguishable from their studies and dissertation research. Kohn currently holds an NSF grant that has supported several PhD students as RAs including Hala Al Hajj Shehadeh, Xi Chen and Jens Jorgensen in addition to Bella. (Tr. 542-43,

550-51; EX 22) Of these four students, Bella and Jorgensen are Kohn's current advisees; Al Hajj Shehadeh and Chen are former advisees. (Tr. 506, 551) Both Al Hajj Shehadeh and Chen wrote their theses on the topic set forth in the grant. (Tr. 542-43) In addition, Bella's and Jorgensen's doctoral research is encompassed by the grant. (Tr. 534, 542) In his first year, Jorgensen's RA position only required him to prepare for his oral examinations. (Tr. 610) While doing so, however, Jorgensen was studying the math associated with composite materials as well as some background on wave propagation. Therefore, the plan between Jorgensen and Kohn "was to choose a topic that combines these two, and that is what has happened; he is doing a thesis related to metamaterials." (Tr. 610)

The Computer Science Department, unlike Mathematics, typically does not award partial RA positions. Instead, students are funded entirely through an RA appointment in one semester and a fellowship in another. (Tr. 531) There is no distinction between what doctoral students do during semesters when they are being supported through an RA appointment and those on fellowship. (Tr. 532) Early in the semester, RAs in Computer Science usually receive a letter notifying them of the source of their funding and requesting that they submit a brief description of their research on the grant. (Tr. 558; EX 23) Like the corresponding letter sent to Mathematics RAs, this letter explains that "because of the nature of the research in the mathematical sciences and computer sciences, it is perfectly reasonable to mention coursework and preparation for written/oral exams, if that work is relevant to preparation for research in the grant area." (EX 23)

### C. RA's in the Social Sciences Are Indistinguishable From RA's in the Sciences

There are 94 RAs outside the science departments (in GSAS) and Courant. They are largely students in the social sciences and Steinhardt. As found by the Acting Regional Director,

“the research assistants in the hard sciences are indistinguishable from RAs in the social sciences and humanities....” (Decision at 27)

As in the natural sciences, students in the social sciences and Steinhardt usually select an advisor with whom to perform research as an RA and that faculty member becomes the student’s thesis advisor. (Tr. 411, 855-56, 901) This process is a result of a “convergence of interests between the professor’s area of specialty and the research projects that the professor [is working on] and the student’s interest.” (Tr. 398) All graduate students must identify a topic on which they will produce original research. One way to do this is to join a professor’s research project and work with that professor, modifying and narrowing the research throughout, until a specific dissertation topic emerges. (Tr. 402-403, 855) Benhabib testified when deciding to work with an RA, he takes into consideration the student’s research interests so that the RA appointment will directly benefit the student’s education. (Tr. 467)

He noted, “students would make sure that they become RAs in a project that is going to, is going to be very closely related, or in some cases identical with their – dissertation.” (Tr. 402) The research that RAs perform on a grant is the same research they would perform as part of their program of study regardless of the source of funding. (Tr. 402-03) As Benhabib explained: “it’s very hard to define and separate out the work that the student does as an RA versus a student who does what is on dissertation,” concluding that it is “impossible to separate out the two.” (Tr. 478-79)

In Steinhardt, after students have completed the first few years of the doctoral program, they spend most of their time in the laboratory. This is where their dissertations are derived. (Tr. 867) As Halkitis explained: “almost always what ends up happening with individuals who are assigned as research assistants or chosen to be research assistants, that those individuals are

working on research projects that end up being their own dissertation work. So that's a recognition that you're part of this research project, you are an RA, it's going to develop you further as a researcher because you're part of this project, and it's going to lead probably in 9.9 times out of 10 to your dissertation." (Tr. 853)

RA positions also provide numerous opportunities for publication by the student, an important part of successful doctoral study. (Tr. 398-99) "Publications count a great deal towards getting, and advancing in, an academic position, so it's of great benefit to a student, especially to a student who has published prior to the PhD." (Tr. 437; *see also* Tr. 868-69)

While RAs nominally have a 20 hour per week commitment to their grant research, "it's almost impossible to disentangle what part is for dissertation and what part is for research. They're basically the same activities." (Tr. 391, 401-02)

Finally, in the social sciences, the skills learned as an RA are critical to a career as a social scientist. As Halkitis testified, the PhD is a research degree that "trains individuals to become researchers in communication or psychology or in education. It is a science degree. It is a degree where research in the social science, education, health paradigm is the center of the work." (Tr. 856) While PhD students may study basic elements of design and analysis useful for research in a classroom setting, they learn how to do actual research in the laboratory. (Tr. 902-03) As Benhabib explained, "[i]n the lab when a student is working, they learn a lot by designing experiments. They make mistakes, they correct them." (Tr. 472) Benhabib continued, "You have to do experiments. You have discussions with your professor. You don't learn how to research entirely in a course, that would be impossible." (Tr. 408) Thus, "[p]art of being a doctoral student means that you are involved in research." (Tr. 859)

The research that RAs perform on Halkitis's current grant aptly demonstrates the importance of RA positions in social science education. Halkitis currently has an NIH grant as well as a small pilot grant from the Center for AIDS Research at the Medical School. (Tr. 862) Under this grant Halkitis is studying 675 18 year-old men who have had sex with another man in the preceding six months in order to analyze sexual risk taking, drug use and mental health burdens, as well as to determine if patterns emerge over time and if risk is affected by certain childhood or adolescence factors. (Tr. 862-63) The work of RAs on this grant directly relates to their dissertations and provides invaluable knowledge of how to be a social scientist – the reason they are seeking a PhD. For example, Sandy Kupprat, a first year doctoral student in Counseling Psychology, is learning how to recruit study participants, conduct assessments, obtain consent from human subjects, connect study participants to real world medical, and other service providers, and ensure accurate data management and tracking systems relating to a social science research project, all as an RA on the grant. (Tr. 863-65) As Halkitis noted, Kupprat's work is "totally about her doctoral program" and her work on this project will likely constitute some portion of her dissertation. (Tr. 865-66, 899-900)

#### 8. Hourly-Paid Student Workers

Petitioner originally sought to include students serving as GAs in the bargaining unit. The record evidence demonstrates, however, that as a result of the changes in financial aid at GSAS and Courant (FAR4) and Steinhardt (FAR3) GA positions were eliminated at these schools.<sup>13</sup> (Tr. 1483-84, 1488, 1569, 1651, 1659; EX 55) Once it became clear that GAs had been eliminated, Petitioner amended the unit description contained in the Petition to include

---

<sup>13</sup> There was no testimony regarding the duties or appointment conditions of the few GAs that still exist at other schools including the School of Nursing, the Wagner School and the School of Social Work. (EX 55)

students receiving stipends who perform “administrative duties”. The amendment encompasses students who perform administrative, as well as other duties, in hourly-paid jobs classified by NYU as Code 118 and Code 119 positions.

Code 118 and 119 hourly-paid positions are available and awarded to both graduate and undergraduate students. (Tr. 1231, 1671-72) Although the number varies from year to year, typically there are a total of over 8,000 students with Code 118 and 119 appointments at NYU each year, approximately 1600 of whom are graduate students. (Tr. 1672, EX 81)

Code 118 appointments are supported by federal work-study funds; Code 119 appointments are not. (Tr. 1230, 1476, 1547, 1668) Federal work-study students receive, as part of their financial aid packages, assistance from the government that constitutes some percentage of the compensation for their hourly work. The balance is contributed by the University. (Tr. 1230, 1667) With respect to the appointment process and job duties, there is no difference between Code 118 and Code 119 student workers. (Tr. 1667-68)

Students must certify that they are currently enrolled at NYU to apply for a Code 118/119 appointment. If a student withdraws from the University, he or she is no longer eligible for such an appointment. (Tr. 1670; EX 105)

The typical duration for a Code 118/119 appointment is either a single semester or academic year; although they are often short-term assignments, such as one month or even one weekend. (Tr. 1551) Code 118/119 appointments rarely exceed one academic year. (Tr. 1551-52) Moreover, Code 118/119 appointments often require only sporadic work throughout a semester. Thus, it is possible that a student may actually work only a few hours, although the Code 118/119 appointment is recorded as lasting the entire semester. (Tr. 1712) In fact, some

students with Code 118/119 appointments only work 5 or 6 hours during an entire semester. (EX 116)

## ARGUMENT

### I. THE RECORD OF THIS CASE PROVIDES NO BASIS ON WHICH TO OVERRULE OR MODIFY *BROWN*

---

The Board's June 22, 2012 Notice and Invitation to File Briefs asks the parties and interested amici to address whether the Board should modify or overrule *Brown*. While reversal of *Brown* may be a "pre-ordained result", as Member Hayes has predicted (*New York University*, 356 NLRB No. 7 at 3 (Oct. 25, 2010)), the record of this case provides no basis for that result.

#### A. This Case Does Not Present an Appropriate Occasion for Reconsideration of *Brown*

Petitioner's Request for Review argues that *Brown* should be reconsidered and reversed based on its assertion that NYU graduate students appointed as adjunct faculty are "employees" under Section 2(3) of the Act. But NYU did not contest the employee status of graduate student adjuncts. It agreed that they were statutory employees. Indeed, NYU applied the terms of its collective bargaining agreement with UAW Local 7902, covering adjunct faculty, to their employment in all respects. The issue presented at the hearing as to the graduate student adjuncts was not their employee status, but whether they were properly treated as part of the existing adjunct bargaining unit.

Petitioner treats this case as if the clock can simply be rolled back 12 years, stating it seeks to represent the same unit of graduate student employees of NYU that it represented following the decision in *NYU I*. (Request for Review at 1) It pretends that the case involves teaching assistants, who no longer exist at NYU, asserting that "[t]he only difference between teaching assistants and graduate students who receive adjunct appointments . . . is the label placed on the payments to student employees." (Request for Review at 29) Petitioner thus

disingenuously disregards the fundamental restructuring of graduate student financial aid programs that resulted in the elimination of teaching assistants.

Under financial aid reform adopted in GSAS in 2009, and in Steinhardt in 2010, all doctoral students receive the same components of support, including a stipend, tuition remission and student health insurance. In a significant departure from requirements under prior financial aid programs (including those in effect at the time of *NYU I*) students are not required to perform any services in exchange for this support. Students who wish to teach now do so on a voluntary basis as adjunct instructors. They are paid a salary for their work as adjuncts over and above the uniform stipend in accordance with the salary schedule set forth in the Adjunct CBA. As such, they are treated the same as hundreds of graduate students who were not eligible for financial support as TAs, and who have been appointed as adjunct faculty each year for many years.

Petitioner ignores these fundamental changes, suggesting that NYU “magically” transformed teaching assistants into adjunct employees. (Request for Review at 8) The record, however, demonstrates the significant changes made by NYU in connection with graduate student financial aid reforms, which separated, to the greatest extent possible, the work done by graduate students as teachers from their other activities as students. As a result, the current graduate student adjuncts differ in a number of important respects from the teaching assistants whose status was examined by the Board in both *NYU I* and *Brown*, and many of the concerns expressed by the Board in *Brown* regarding treating graduate students as statutory employees are, therefore, inapplicable.

- In *Brown*, all doctoral students received the same level of financial support whether they were on fellowship or performing services as TAs. 342 NLRB 483, 485 (2004).

Thus, as the Board reasoned, the services provided by the TAs were “not related to the

money received.” *Id.* In *NYU I* as well, all funded students received the same amount of funding each year regardless of whether they provided services to the University. 332 NLRB at 1206-1207. In contrast, NYU graduate students who serve as adjunct instructors are compensated separately for their efforts and receive this pay in addition to the standard support provided for all graduate students as financial aid in connection with their academic pursuits.

- The majority of the TAs at issue in *Brown* were required to teach as a condition of receiving both their degrees and university funding. 423 NLRB at 485. The same was true in *NYU I*, where many students had to serve as TAs to receive a degree and all were required to provide service of some kind to the University in order to receive funding. 332 NLRB at 1212, 1215. Now teaching is entirely voluntary. The only requirements for a degree and funding are that NYU students maintain their full-time status and make “satisfactory progress” toward their dissertation.
- Finally, in *Brown* and *NYU I*, the TAs had to be enrolled as students. 342 NLRB at 488; 332 NLRB at 1212. Here, student status is not required to serve as an adjunct instructor. Indeed, some 291 individuals have held adjunct appointments as both students and non-students – often serving for multiple years as adjuncts in each capacity.

Under these circumstances, the question of whether the Board should continue to apply *Brown* to the type of teaching assistants considered in that case and *NYU I* is simply not presented.

Nor is there any basis for reconsideration of *Brown* with respect to other categories of graduate students involved in this case. Indeed, Petitioner’s Request for Review does not even

mention the two other groups of students that the Acting Regional Director included in a potential bargaining unit in the event *Brown* is reversed: research assistants and hourly-paid student workers in certain job titles. Neither group can properly be considered employees under the Act, regardless of whether *Brown* is overruled.

The Board has long held that research assistants in the sciences who are supported on grants while performing research leading to their dissertations are not employees. *See NYU I* at 1208; *Leland Stanford*, 214 NLRB 621 (1974). Here, the Acting Regional Director held “the research assistants in the hard sciences are indistinguishable from the RAs in the humanities and social sciences. . . .” (Decision at 27) Thus, there is no basis on the record of this case to draw any such distinction, or to reconsider *Brown* solely in the context of RAs outside of the natural sciences. As discussed in Section II below, however, the record shows the continuing vitality of *Brown* with respect to all RAs who are performing research as an integral part of their doctoral programs.

*Brown* also has no applicability to the hourly-paid student workers who should be excluded from collective bargaining because they are temporary or casual employees. (*See* Section IV, below)

B. The Record of this Case Does Not Support Modification or Overruling of *Brown*

Even if this case could be viewed as an appropriate occasion to reconsider *Brown*, the record developed at the hearing does not support modification or overruling of that decision. Petitioner asks the Board to reverse *Brown* based almost entirely on nothing more than a rehashing of the same arguments presented to and considered by the Board in *Brown*. Indeed, Petitioner’s Request for Review relies extensively on the dissenting opinion in that case. There

is no need for repetition here of the reasons that those arguments were correctly rejected by the majority opinion in *Brown*.

The Board has an overriding obligation to ensure stable labor relations and to make decisions based on a sound rational basis – rather than changing precedent with every Presidential election. Doing so only serves to create an atmosphere which denies the Act any predictability and deprives both employers and employees of any certainty in understanding how the Board will interpret and apply the law. To revise precedent relating to the employee status of graduate students for the third time in twelve years based on nothing more than the changed political composition of the Board would not only rob the Act of all predictability over this important issue, but call into serious question the Board’s expertise in interpreting the relevant statutory provision. Indeed, the Board’s June 22, 2012 Notice suggests that the Board is considering not only reversing *Brown*, and reinstating *NYU I*, but also whether it should overrule *NYU I* in so far as that case holds that research assistants supported on external grants are not statutory employees – potentially unsettling law that has stood unchanged for almost 40 years. Such “[c]onstant reversals and re-reversals rob the law of predictability and undermine the Board’s integrity as its decisions look inherently political.” “Students or Employees? The Struggle Over Graduate Student Unions in America’s Private Colleges and Universities,” 36 *Journal of College and University Law* 615 (2010).

The only new evidence relied on by Petitioner to supplement the same stale arguments rejected in *Brown* consists of (i) a preliminary study of the attitudes of students at public universities about the effects of unionization which was properly disregarded by the Acting Regional Director; and (ii) a distorted view of NYU’s experience under its collective bargaining agreement covering graduate assistants. As discussed below, neither provides support for

reconsideration of *Brown*. Despite some 1700 transcript pages and 200 exhibits compiled over 19 days of hearing, it remains true that Petitioner is unable to “raise, allege, or reference a single fact, circumstance, argument, legal precedent or claim that was not in existence and clearly before the Board when it rendered its decision in *Brown*” (*New York University*, 356 NLRB No. 7 at 2 (dissenting opinion)).

i. NYU’s Experience under the Graduate Assistant CBA

Contrary to Petitioner’s assertions, NYU’s experience under the Graduate Assistant Collective Bargaining Agreement from 2002-2005 confirmed the Board’s concerns in *Brown* over the impact of collective bargaining on academic freedom and student/faculty relationships.

Notwithstanding provisions in the CBA providing NYU with broad authority over academic decision-making,<sup>14</sup> the University was faced with multiple grievances and arbitrations that threatened its academic autonomy. Petitioner’s claim that there was no harm because NYU succeeded in defending itself against the threats is cold comfort. (Request for Review at 26) What is significant is not the results of the arbitration decisions, but the union’s repeated assaults on NYU’s academic freedom. Surely, it is not necessary to wait for one or more of the assaults to succeed to appreciate the very real threat that they posed.

Petitioner points out that three separate University committees studied NYU’s experience with graduate assistant collective bargaining, but seriously distorts what the committees found. All of the committees agreed that the threat posed by continued representation of the UAW was an unacceptable risk to the University, and recommended withdrawal of recognition in order to safeguard the University’s academic freedom.

---

<sup>14</sup> See PX 6 at 19-20.

The Faculty Advisory Committee on Academic Priorities (consisting of senior faculty members who advise the Provost on academic matters) expressed its “concern” that grievances filed in connection with the Graduate Assistant CBA had “threatened to impede the academic decision-making authority of the faculty” over several issues, including the staffing of the undergraduate curriculum, the appropriate measure of academic progress and the terms and conditions of fellowships that do not involve assistantships. (EX 39 at 2) Specifically, the Faculty Advisory Committee noted the willingness of the union to arbitrate such grievances and the possibility that an arbitrator not familiar with the University environment would severely restrict the faculty’s academic freedom. As the Committee stated:

The readiness of the United Auto Workers to grieve issues of academic decision-making and the nature of the arbitration process leads the Committee to conclude that it is too risky to the future academic progress of NYU for it to have graduate assistants represented by a union that has exhibited little sensitivity to academic values and traditions....

*(Id.)*

Similarly, the Senate Academic Affairs Committee and Executive Committee (each of which consists of students, faculty and administrators) jointly reported that notwithstanding some benefits from collective bargaining, “it became obvious that there have also been substantial disadvantages from union representation by the UAW.” (EX 38) Specifically, the Senate Committees worried that “[o]ver time, a number of these grievances, if successful, have the potential to impair or eviscerate the management rights and academic judgment of the University faculty to determine who will teach, what is taught, and how it is taught.” (EX 38 at 8)

Petitioner’s imaginative attempt to portray the committee reports as finding only positive effects from unionization turns the reports upside down. It presents only selected comments by

individuals that were meant to reflect the diversity of the opinions throughout NYU, and not the findings or conclusions of the reports. Petitioner simply ignores numerous comments in the committee reports stating that unionization did have a negative impact on areas such as recruitment, the quality of student-faculty relationships, and other areas (EX 38 at 9-10, EX 39 at 1-2), as well as the unanimous conclusion of all three committees that it was in the best interests of the University to withdraw recognition from the union.

ii. The Voos Study

Petitioner presented testimony by Dr. Paula Voos, a professor in the Department of Labor Studies and Employment Relations of Rutgers University, about a study comparing the attitudes of graduate students at selected public universities with and without unions, regarding faculty/student relationships and academic freedom. As the Acting Regional Director found, the testimony presented only “preliminary results of an unpublished study...which have neither been fully analyzed nor subjected to the peer-review process.” (Decision at 24) So far as NYU can determine, the study still has not been published in the nearly two years since Dr. Voos’s testimony. Petitioner nevertheless asks the Board to rely on the study as disproving assumptions made by the Board in *Brown*. In doing so, Petitioner misrepresents both the results of the study, as testified to by Voos, and the serious criticisms of the study by Dr. Henry Farber, a Professor of Economics at Princeton University.

The most Voos could conclude, based on the incomplete study, was that the study “*found no evidence*” that either the student/teacher relationship or academic freedom “was worse or damaged in the context of graduate student representation.” (Tr. 57-59) As Dr. Farber explained, while Professor Voos’ preliminary results indeed “found no evidence that the student/teacher relationship was worse or damaged in the context of graduate student

representation” (Tr. 1028-29), it also found no evidence that that student/teacher relationship was *not* worse in the context of graduate student representation either. Dr. Farber pointed out that:

at the end of the day you can't draw with confidence any conclusions about union/non union differences in the measures she's looking at. Based on the evidence that Professor Voos presents, there is a reasonable possibility that the relationship [between student and teacher] was worsened [by the presence of a union] just as there is some probability as it was helped. You just can't really learn much because of the imprecision of the evidence.

(Tr. 1031-33)

In addition, Dr. Farber explained that the study was not predictive of relationships “where there is a union and . . . about what would happen if you took a place that was non union and made it union”. (Tr. 1035) Because the study looks only at certain differences, and not underlying causation, “at the end of the day . . . you can learn precisely nothing from Voos’ study about what would happen at a place like NYU [or at some other university] were they to move from being non union to union.” (Tr. 1037-38)<sup>15</sup>

In short, Petitioner has presented nothing that contradicts the Board’s view in *Brown* that treating graduate assistants as employees would risk interference with student-faculty relations and threaten to interfere with a University’s academic freedom. Neither the Voos study nor the experience at NYU supports any modification or overturning of *Brown*.

## II. RESEARCH ASSISTANTS ARE NOT EMPLOYEES UNDER § 2(3) OF THE ACT

Measured by any conceivable standard, NYU’s RAs are not employees under Section 2(3) of the Act. They not only fall squarely within the holding of *Brown*, but demonstrate

---

<sup>15</sup> Farber similarly explained why the study by Gordon Hewitt of faculty attitudes provided no basis for drawing conclusions about the effect of unionization of graduate students. (Tr. 1039-41) Hewitt’s study, in any event, was available at the time of the *Brown* decision, and, indeed, was cited by the dissent in *Brown*. It therefore does not represent any changed circumstances that would justify reconsideration of that decision.

precisely why that case correctly held that graduate assistants whose relationship with their school is primarily educational cannot properly be treated as employees under the Act. Moreover, even if the Board overrules *Brown*, NYU's RAs are not statutory employees under the almost 40-year old holding of *Leland Stanford*. The facts of this case demonstrate the continuing vitality of that decision, which was applied 12 years ago in *NYU I* with respect to externally-funded RAs in the sciences at NYU.

A. *Brown* Properly Holds that RAs, Who Have a Purely Educational Relationship with the University, Are Not Statutory Employees

It is indisputable that the relationship between NYU and its RAs is “primarily an educational one, rather than an economic one.” *Brown* at 489. Indeed, there is no question that all of NYU's RAs satisfy the criteria articulated in *Brown* for holding graduate assistants in that case (including research assistants in the social sciences and humanities) not to be employees under the Act.

First, as in *Brown*, all RAs must be enrolled as students and maintain full-time student status to obtain and keep their RA appointments. (Tr. 398, 513, 854) RAs are appointed and do not apply for these positions. (Tr. 175-76, 179-80, 400-01; EX 5)

Second, the faculty member serving on the research grant is almost always the RA's thesis advisor and is the instructor for the RA's associated research credits. (Tr. 411, 534-537, 596 855, 859-60, 1560)

Third, RAs receive the same measure of support as those students supported by fellowships. All RAs in a department receive the same financial support, including tuition remission and a stipend, which is the same as the financial support provided to other students in that department. (Tr. 374-75, 403-04, 533, 834-35, 875) As such, the amount of money they

receive is completely unrelated to the nature or quality of their research on the grant. Instead, it is purely based on their student status.

Finally, the work that RAs perform on their research grants is directly related to – and in most cases identical to – work required for their doctoral degree. As Petitioner’s witness John Freudenthal testified, there is no distinction between the work he performs as an RA in the laboratory and the work he does for research credits required by his Chemistry Department doctoral program. (*See pp. 19-21, above*) At Courant, it is similarly impossible to distinguish between work done as an RA and that done in furtherance of the student’s academic program. Indeed, in Courant, students often receive support as RAs on a grant for doing nothing more than completing coursework and preparing for exams. (*See pp.22-24, above*) The same is true in the social science departments and in Steinhardt where students perform research on a grant that most often is the same research required for their dissertations. (*See pp.24-26, above*)

Viewed in the context of these undisputed facts as to the NYU’s RAs, *Brown’s* holding that graduate assistants are not employees under the Act remains correct.

B. Even if *Brown* is Modified or Overruled, RAs Are Not Employees under *Leland Stanford* and *NYU I*

The Board held almost 40 years ago in *Leland Stanford* that students appointed as RAs who are performing research in connection with their doctoral programs are not employees under the Act. This conclusion follows from the fundamental fact that the students are not performing a service for the University for which they are compensated – they simply receive the same financial aid package as all other graduate students and carry out the research required for their advanced degrees. This precedent has remained undisturbed for nearly four decades despite the Board’s changing composition and its shifting decisions concerning other graduate students.

Regardless of whether *Brown* is overruled, *Leland Stanford* remains sound and requires the conclusion that NYU's RAs are not statutory employees.

In *Leland Stanford*, the Board reasoned that even though doctoral students in Physics serving as RAs received stipends for their work, which were processed through the University's payroll system, such payments did not reflect wages as they were in the form of financial aid and were "not based on the skill or function of the particular individual or the nature of the research performed" and there was "no correlation between what [was] being done and the amount received by the student. . ." *Id.* at 621-622.

Further, although the students may have participated in research that did not always fit into their ultimate thesis, it was "clear, however, that all steps lead to the thesis and [were] toward the goal of obtaining the Ph.D. degree... 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." *Id.* at 622. The Board emphasized that "[a]ll the research they are doing as RA's is accepted in partial satisfaction of their degree requirements, and the same research is required whether they receive financial aid as RA's or no financial assistance at all." *Id.* Based on these factors, the Board determined that the RAs were "primarily students" and, as such, were "not employees" within Section 2(3) of the Act. *Id.* at 623.

Notwithstanding the Board's decision in *NYU I* finding certain other graduate student assistants to be employees, it followed *Leland Stanford* and affirmed the Regional Director's decision excluding the Sackler Institute GAs and science department RAs funded by external grants because the evidence failed to demonstrate "that the research assistants perform a service for the Employer and, therefore, they are not employees as defined in Section 2(3) of the Act." *Id.* at 1209, n. 10.

Specifically, the Regional Director found that “students classified as RAs in these departments are performing the research required for their dissertations, which is the same research for which the professor has obtained an outside grant.” *Id.* at 1214. He stated that “[n]o specific services are required of these RAs – the students are simply expected to progress towards their dissertations” and emphasized that “RAs in these departments do not specifically apply for these positions (these departments are fully funded); instead, the positions are awarded to them.” *Id.* In concluding that these RAs were like the RAs found not to be employees in *Leland Stanford*, the Regional Director explained:

These ... RAs have no expectations placed upon them other than their academic advancement, which involves research. They receive stipends and tuition remission as do other GAs, RAs, and TAs, but are not required to commit a set number of hours performing specific tasks for NYU. The research they perform is the same research they would perform as part of their studies in order to complete their dissertation, regardless of whether they received funding. The funding for the Sackler GAs and the science RAs, therefore, is more akin to a scholarship.

*Id.* at 1214.

Finally, the Regional Director rejected the assertion that RAs performed services for NYU by helping the University fulfill its obligations under the research grants, or by helping to increase the University’s and faculty members’ stature and reputation. *Id.* at 1220 n. 50.

The record in this case shows no changed circumstances that would justify the Board’s reexamination of *Leland Stanford* or *NYU I*. Moreover, the Acting Regional Director correctly found that “the research assistants in the hard sciences are indistinguishable from RAs in the social sciences and humanities” in that both are working on projects “closely related to their thesis and they work under the mentorship of their faculty advisor.” (Decision at 27) Thus, he found:

- “consistent with *Brown* and *NYU* [the RAs on external grants] are not performing work for the Employer and, therefore, are not employees within the meaning of the Act” (Decision at 6)
- the benefits of research to NYU are the same now as in 1999-2000, when *NYU I* was decided (*Id.* at 20)
- there have been no significant changes in the past 12 years with respect to NYU’s process for applying for and administering research grants, including the guidelines and policies for experiments and patent rights (*Id.* at 21)
- the responsibilities of RAs under externally funded grants are the same as those of students performing research funded by the school -- students pursue research in consultation with their thesis advisor/professor (*Id.*)
- because the research is intertwined with the subject matter of the student’s dissertation, it is difficult to “tease apart the hours spent as an RA from the hours spent advancing the dissertation” (*Id.*)
- once students in the Courant Institute have selected a research topic for their dissertations and are appointed as research assistants, “there is no distinction between the activities that the students undertake as RAs and the activities undertaken as students.” (*Id.* at 23)
- students in Courant register for credits while conducting research as if they were taking a course, in which case their advisor is the instructor of record (*Id.*)

Similarly, as in both *Leland Stanford* and *NYU I*, it cannot be said that RAs receive any compensation for services. All RAs in a department receive the same financial support, including tuition remission and a stipend, which is the same as the financial support provided to other students in that department. (Tr. 374, 403-04, 511) Therefore, such support is “not based on the skill or function of the particular individual or the nature of the research performed” and as such provides “no correlation between what [is] being done and the amount received by the student. . .” *Leland Stanford*. at 621-22.

Instead of identifying any change in the RAs’ duties, which do not exist, the Acting Regional Director emphasized documents stating that RAs are expected to provide “up to twenty hours per week engaged in a research project.” (Decision at 21) The consistent evidence --

including the testimony of Petitioner's sole RA witness -- was that the stated 20-hour expectation had no effect on actual practice, that RAs work for many more hours on their research, and that it is not possible to distinguish between work done as an RA and work done as a student. (Tr. 181, 195-96, 391-92, 401-02, 405, 478, 532, 534, 867-68) Moreover, the same 20-hour expectation existed at the time of the hearing in *NYU I* and for the RAs at issue in *Leland Stanford*. See 332 NLRB at 1213.<sup>16</sup>

Also ignoring the actual duties of RAs, Petitioner attempted to argue that the role of research has been increasingly emphasized by the University. Not only does such a change in emphasis have no effect on the duties, or student status, of RAs, it simply is untrue. The role of research and RAs at the University has not changed since 1999. NYU has always encouraged research activity in all schools and departments, particularly those offering the research-based PhD degree. (Tr. 365) In addition, the benefits that research brings to the University are the same as they were in 1999. (Tr. 488) It is wholly irrelevant that the amount of research at NYU has increased over the past decade, and the University is making significant investments to enlarge its research capacity. (Tr. 250, 257-58) Notably, the significance of research funds as a component of the University's budget has not materially changed since 1998. In 1998, NYU received external research funds at the Washington Square campus of some \$60 Million, which represented approximately 4.4% of the University's overall budget. While funding for external research grants increased in the past 12 years to approximately \$120 Million (Tr. 321), this still amounts to less than 6% of NYU's total operating budget of approximately \$2 Billion. (PX 4 at 28)

---

<sup>16</sup> Also, as in 1999, the stipend amount is budgeted on the grant as personnel costs and referred to by the government as a "salary." (Tr. 272, 323, 590) The same was true in *Leland Stanford*. 214 NLRB 621 at fn. 5.

C. Collective Bargaining with Respect to RAs Would Necessarily Intrude on Academic Issues

The continuing validity of *Brown* and *Leland Stanford* with regard to RAs is evident through even cursory consideration of potential collective bargaining over the terms and conditions of RA's "employment", which is wholly synonymous with their academic pursuits. 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 NLRB 560, 563 (1981), and that the duty is no less broad in the educational context. *Kendall College*, 228 NLRB 1083, 1088 (1977) (rejecting employer's argument that the "law requiring bargaining on mandatory subjects requires a different interpretation in the halls of academia than it does in an industrial shop"), *enforced*, 570 F.2d 216 (7th Cir. 1978); see also *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 503 (1979) (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 Board's observation in *Brown* with respect to graduate assistants generally is particularly apt with respect to RAs: "[T]he broad power to bargain over all Section 8(d) subjects would, in the case of graduate student assistants, carry with it the power to intrude into areas that are at the heart of the educational process." *Brown* at 492.

What would be the wages, hours and terms and conditions of employment that comprise the mandatory subjects of bargaining with respect to RAs? RAs are not compensated for their research and receive the same stipend as graduate students not appointed as RAs. Surely, NYU is not obligated to bargain over the level of financial aid that it provides to graduate students as a whole. Bargaining over the methods used by RAs to conduct their research or the number of hours they are required to spend doing so would be akin to bargaining over what books an

English Literature PhD candidate needs to read or how much time must be spent in that pursuit. Similarly, bargaining over performance evaluations would mean bargaining over student grades.

Indeed, it is difficult to imagine any bargaining with respect to the RAs that would not directly infringe on NYU's right to determine the nature and requirements of its academic programs. *See 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.’”). The Supreme Court has long recognized the importance of protecting a university's academic freedoms under the First Amendment. *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 Michigan 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).

Furthermore, even if some limited scope of bargaining could be envisioned without trampling on NYU's academic freedom, the use of economic weapons as a necessary component of the statutory scheme for resolving bargaining disputes would make no sense in the context of RAs. RAs would jeopardize their academic standing if they engaged in a strike against NYU and withheld work on their own thesis research. Similarly, any lockout of RAs by NYU would serve only to prevent the RAs from performing the research required for their academic programs. Nor would NYU have any ability, or need, to hire “replacements” for RAs who are, by definition, engaged in long-term research projects designed to fulfill their individual academic requirements. A failure in bargaining, accordingly, would result not in the typical forms of

economic pressure but instead in the inability of students to make academic progress – perhaps for an extended period of time. As “the presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized,” (see *NLRB v. Insurance Agents’ Int’l Union*, 361 U.S. 477, 489 (1960)) the unavailability of such economic weapons serves to emphasize further the absence of type of employee/employer relationship between RAs and NYU that is amenable to collective bargaining under the Act.

### III. STUDENT ADJUNCTS ARE PROPERLY INCLUDED IN THE ADJUNCT BARGAINING UNIT

The Regional Director’s decision that an appropriate bargaining unit would include student adjuncts teaching non-credit courses errs by separating student adjuncts from the rest of the existing adjunct bargaining unit and then compounds that error by creating an untenable distinction between student adjuncts based on whether they are teaching credit or non-credit courses.

#### A. Student Adjuncts Are Already Part of the Existing Adjunct Faculty Bargaining Unit

There can be no doubt on this record that many hundreds of graduate students have been represented effectively as part of the overall adjunct bargaining unit for the past eight years. Joel Schlemowitz, President of Local 7902, conceded that graduate students have been in the bargaining unit since its inception. (Tr. 1303; PX 32)

Although it explicitly excludes certain classifications of NYU faculty, the unit description contained in the Adjunct CBA does not exclude students from NYU, or any other university. (EX 43) By definition, therefore, all adjunct instructors, student or non-student, who meet the minimum contact hour criteria spelled out in the Adjunct CBA are bargaining unit eligible. (See pp. 13-16, above)

The Acting Regional Director stated that it is unclear whether the Adjunct CBA is applied to what he termed “former teaching assistants.” (Decision at 27) The record evidence, however, plainly demonstrates that the rights and obligations set forth in the Adjunct CBA apply equally to all students who receive adjunct appointments. (707, 711-12, 728, 1085-86) No distinction is made in the CBA or by NYU in the terms and conditions of adjuncts based on whether they would have been classified as TAs prior to financial aid reform – and, indeed, no such distinction is possible.

Nor is there any significance to the Acting Regional Director’s statement that “[a]lthough appointment letters reference the adjunct agreement and inform students of the obligation to pay union dues, it does not appear that the union-security clause has been enforced.” (Decision at 14). Whether the union chose to enforce the union security clause with respect to graduate students is an internal union matter that cannot detract from the undisputed evidence that the Adjunct CBA is applied to graduate students in all substantive respects. Furthermore, the evidence presented by the Union to show that it rejected dues authorization cards from graduate students did not distinguish between students who the Union believed were appointed as adjuncts only as a result of financial aid reform in GSAS and Steinhardt and those who would have been appointed as adjuncts previously; many of the sample rejected cards were from students who were themselves previously appointed as adjuncts and/or in schools unaffected by any financial aid reform. (Tr. 1311-15)

Moreover, notwithstanding Schlemowitz’s letter of May 14, 2010, purporting to disclaim interest in representing graduate students adjuncts, Local 7902 cannot unilaterally modify the certified unit of *all adjuncts* based on Schlemowitz’s mere say so. (Tr. 1304; BX 3)

The Board's decision in *United Steel Workers of America, Local 14693, and Skibeck, P.L.C.* ("Skibeck"), 345 NLRB 754 (2005), is especially instructive here. In *Skibeck*, a collective bargaining agreement covered all relevant construction work performed by employees of the company in New York, Ohio and Pennsylvania. As a result of the union's agreement with a sister union, it attempted to limit the coverage of the collective bargaining agreement to work done in Pennsylvania, however this proposal was rejected in the course of bargaining. When the employer began a project in Ohio the union sent a letter, similar to Schlemowitz's letter described above, disclaiming any interest in representing the employees working on the Ohio project. The Board found this purported disclaimer ineffective and unlawful. In reasoning directly applicable to Local 7902's purported disclaimer, the Board stated:

The Respondent unilaterally asserted that it would no longer represent certain employees in the contractual bargaining unit and implied that the collective-bargaining agreement would no longer apply to those employees. By such conduct, the Respondent, in essence, effectuated a unilateral change in the scope of the unit, which has long been recognized as a matter that may not be unilaterally altered by either party.

345 NLRB at 755. Similarly here, Local 7902 cannot unilaterally alter the scope of the adjunct bargaining unit that has included graduate students since its inception.

B. Even Under *Specialty Healthcare*, Student Adjuncts Teaching Non-Credit Courses Belong in the Same Unit as All Other Adjuncts

Even if graduate students were not already included in the existing adjunct bargaining unit, there would be no basis for the Acting Regional Director's decision to separate student adjuncts teaching non-credit courses from other adjuncts performing the same duties under the same terms and conditions of employment in accordance with the recently announced *Specialty Healthcare* standards. *Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 NLRB No. 83 (Aug. 26, 2011)

The first prong of the *Specialty Healthcare* analysis cannot be satisfied, as student adjuncts teaching non-credit courses are not a readily identifiable group of employees under the standard articulated in that case. In *Specialty Healthcare*, the Board stated that a group may be readily identifiable “based on job classifications, departments, functions, work locations, skills, or similar factors.” *Id.* at 12. Student status is not a “similar factor” that can be used to identify a group of employees, as it has no relationship to the job being performed.

Similarly, there is no reasonable way to identify a group of employees in the same job classification in the same department and paid in the same manner based on whether they teach credit or non-credit courses; indeed, there is no such distinction among the non-student adjuncts in the adjunct bargaining unit.

As the Board held in *Specialty Healthcare*, furthermore, even if a petitioned-for unit is a readily identifiable group, it is nevertheless inappropriate where other employees share an overwhelming community of interest with the included employees. 357 NLRB No. 83 at 1. Here there can be no real dispute that all adjunct faculty share an overwhelming community of interest, including non-students, students teaching for-credit courses and students teaching non-credit courses.<sup>17</sup>

In determining whether employees in a proposed unit share a separate community of interest the Board examines:

[W]hether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work,

---

<sup>17</sup> The Acting Regional Director erroneously applied an accretion analysis in finding that student adjuncts teaching non-credit courses are not part of the adjunct bargaining unit. (Decision at 27) When NYU eliminated the TA positions as part of its financial aid reform, however, there was no unit of “former TAs” that could have been accreted into the adjunct bargaining unit. NYU student adjuncts always have been part of the adjunct bargaining unit and the fact that NYU now hires more students as adjunct faculty (and does not utilize non-bargaining unit TAs) does not implicate an accretion analysis. In any event, as discussed in connection with *Specialty Healthcare*, all student adjuncts, including those teaching non-credit courses, share an overwhelming community of interest with other adjuncts, so that they would belong in the same unit as other adjuncts even under an accretion analysis.

including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

*Id.* at 9, citing *United Operations, Inc.*, 338 NLRB 123, 123 (2002).

The Acting Regional Director's finding that graduate student adjuncts do not share a community of interest with other adjuncts ignores undisputed evidence showing that student and non-student adjuncts satisfy almost every relevant factor identified in Board precedent for determining community of interest. Furthermore, the few factors discussed by the Acting Regional Director are based on clear factual errors or are not significant.

To begin with, the Regional Director completely ignored undisputed evidence as to the following lengthy list of community of interest factors shared by all NYU adjuncts -- students and non-students alike:

- All adjuncts share the same wage structure (Tr. 786; *see also* Tr. 376, 564-65, 622, 823, 1085-1086, 1133, 1164, 1220, 1473; EX 77A, EX 77B, EX 93A, EX 93B, EX 94A, EX 94B)
- Within their departments, adjunct instructors perform the same duties, including serving as instructors of record and recitation section leaders. (Tr. 626-27, 823, 879, 954, 1083-85, 1163, 1178, 1184-87, 1213, 1280-81, 1459, 1468, 1475 ; EX 35; EX 54; EX 76C; EX 76D)
- Student and non-student adjuncts perform the same functions in those roles. (Tr. 386-87, 954, 823, 879, 1177-78, 1184-87, 1280-1281, 1459, 1468, 1475; EX 35, EX 54, EX 76C, 76D)
- All adjuncts have the same underlying skills (Tr. 461-62, 486, 1128-29, 1145, 1164-65, 1188)
- There is a high degree of interchange among student and non-student adjuncts. (Tr. 396-97, 1177-78, 1184-87; EX 76C, EX 76D)
- Student adjunct instructors often continue to teach in that capacity after they graduate, and non-student adjunct instructors often become students who are then appointed to adjunct faculty positions. Thus, a student adjunct instructor can become a non-student adjunct instructor and *vice versa*. (Tr. 1093, 1110; EX 120)

- Within each course, all adjuncts have frequent interaction with one another, including meetings with full-time faculty. (Tr. 1089-90, 1182-83, 1187, 1280-81)
- Within each department, all adjuncts are subject to the same terms and conditions of employment. (Tr. 563-572, 619, 623-24, 1086-88, 1133, 1188-91, 1210-11, 1281-82, 1470, 1473; EX 13, EX 24-EX 31, EX 63, EX 64, EX 69, EX 70, EX 77A, EX 77B, EX 93A, EX 93B, EX 94A, EX 94B)
- Within their departments all adjuncts are supervised in the same way. (Tr. 1084-85, 1469-70)
- Within their departments all adjuncts receive the same training. (Tr. 1084, 1090-91, 1132-33, 1136-37, 114; EX 62, EX 72)
- Within their departments all adjuncts are subject to the same policies and procedures, and expectations. (Tr. 573, 575-76, 622, 1084, 1086, 1090-91; EX 32, EX 33, EX 34, EX 62, EX 68)
- Within their departments all adjuncts are subject to the same evaluation process. (Tr. 880, 1192-93, 1093-95, 1138-41; EX 53, EX 66, EX 67; EX 73A, EX 73B, EX 74, EX 78)
- All adjunct appointments are for the same duration and subject to the same reappointment process. (Tr. 719-20, 1091-93, 1134-35, 1091-92, 1108-11)
- All adjunct instructors have similar working hours. (Tr. 395, 560, 1085-86, 1175-77, 1184; EX 63, EX 64, EX 76C, EX 76D)
- All adjuncts are eligible for the same adjunct benefits, including annuity and health plans. (Tr. 655-56, 728, 730-31, 780-81; EX 43)

Ignoring this evidence of a close and inseparable community of interest among all adjuncts, the Acting Regional Director found that:

“graduate students share a separate community of interest based on the nature of the work and the level of responsibility that they have for the course. Further, the students share educational goals and concerns. Adjuncts work on a distinct and different track, as evidenced by the selection and hiring process, course autonomy, and minimal departmental participation.”

(Decision at 18)

Each of these factors relied on by the Acting Regional Director is either factually incorrect or legally insignificant.

(i) *There is no evidence that students and non-student adjuncts perform different work or have different levels of responsibility for courses.* To the contrary, there is extensive evidence that students and non-student adjuncts serve in the same roles -- for both credit and non-credit courses -- and perform exactly the same duties in those roles. Indeed, they very often work side-by-side in a course. (Tr. 387-88, 426, 626-27, 1083-85, 1163-64, 1213; EX 35) For instance, both students and non-students served as instructors of record in numerous departments, including Anthropology, Art History, Creative Writing, East Asian Studies, Economics, English, French, Hebrew & Judaic, Italian, Irish Studies, Music and Spanish & Portuguese departments. (Tr. 387, 954; EX 54) In these positions, student and non-student adjuncts have the same duties and responsibilities. (Tr. 387) Further, a student adjunct could serve as the instructor of record for a class one semester and a non-student adjunct could teach the same class the next semester. (Tr. 396-97) In fact, in the Fall 2010 semester, students comprised half of 268 the adjunct instructors who taught credit courses in the FAS. (Tr. 946-47; EX 54)

As in the FAS, student and non-student adjuncts in Steinhardt also serve as instructors of record and perform the same duties in each department. (Tr. 823, 879, 1130-31) For instance, in MPAP both students and non-students teach private music or voice lessons to undergraduates. (Tr. 1473-74; EX 93B, EX 94B)

In addition, both student and non-student adjunct instructors serve as recitation and laboratory leaders for many large lecture classes throughout the University. For instance, in the Fall 2010 semester, adjunct instructors taught 809 non-credit recitation and laboratory sections in the FAS. Students taught 743 of these non-credit sections, and non-students taught 66. (EX 54) Student and non-student adjuncts both taught non-credit sections in a number of departments,

including Chemistry, Physics, and Environmental Studies, as well as in MAP. (Tr. 1177-78, 1184-87)

In their roles as recitation and laboratory leaders, student and non-student adjuncts perform the same duties. In MAP, all recitation instructors, student and non-student, are required to attend the two weekly lectures associated with the course for which they are responsible, lead two weekly recitation sections, grade under faculty supervision and perform various other tasks, such as meeting with students, completing administrative queries and providing letters of recommendation. (Tr. 1084-85; Tr. 1187)

Likewise, in the Physics Department there is no difference in the responsibilities of student and non-student adjuncts. (Tr. 1187) As recitation section leaders, both student and non-student adjuncts clarify the concepts that have been discussed in lectures, answer students' questions in a smaller setting, review problem sets and assignments to solidify the students' understanding of the coursework, and grade problem sets and exams. (Tr. 1166, 1169, 1191) As laboratory section instructors, adjuncts are responsible for both teaching and maintaining the safety of the lab itself, briefing the students on the proper use of the equipment, supervising the students in their experiments, and grading. (Tr. 1167-68, 1170) Student and non-student adjuncts serve interchangeably as both recitation section leaders and laboratory instructors. (Tr. 1209-10, 1213)

(ii) *The Decision erroneously finds a significant difference in the selection and hiring process for student and non-student adjuncts.* The Acting Regional Director mistakenly said that "the record is clear that graduates are recruited or referred based on their area of study or the faculty lecturer's preference to work with certain graduates. Accordingly, the selection and purpose for hiring is different than the employer's need for adjuncts." (Decision at 18-19) First,

the Decision relies solely on evidence about MAP in support of the conclusion that selection and hiring are different for graduate student adjuncts. MAP, however, had only 107 (or less than 11 per cent) of the 987 graduate student adjuncts appointed in the Fall 2010. (Decision at 17; EX 57) Evidence about this relatively small fraction of the total graduate student adjunct population cannot be treated as representative of the process for selecting and hiring adjuncts throughout NYU. To the contrary, the Department of Music Performance and Professions (MPAP) had approximately the same number of graduate student adjuncts (104 in Fall 2010) as MAP and Lawrence Ferraro, Chair of MPAP, testified that there was no difference in that department in the selection and hiring process of graduate student adjuncts as compared to other adjuncts. (Tr. 1470, 1473, 1475; EX 57, EX 93A, EX 93B) Furthermore, Acting FAS Dean Benhabib testified that, as a general matter, FAS (which had 656 total student adjuncts in Fall 2010, including 549 outside of MAP) employs the same criteria for student and non-student adjuncts seeking to fill the same positions, *i.e.*, academic merit and relevant scholarship. (Tr. 461-62) As an example, Benhabib testified that in the Economics Department, when an adjunct instructor is needed, the department will look for individuals -- students or non-students -- who are proficient in the field and whom the department believes will make good teachers. (Tr. 426) Similarly, Professor David Grier testified that in Physics (21 graduate student adjuncts in Fall 2010) the focus in hiring for adjunct positions is not on student status but on expertise and qualifications. (Tr. 1165, 1188; EX 57) In Gallatin, the School of Individualized Study, (6 graduate student adjuncts in Fall 2010) -- dismissed by the Acting Regional Director as "an outlier" (Decision at 18) -- the student status of an adjunct is not even known to the curriculum committee making hiring decisions unless the applicant's student status is noted on his or her CV, and, in any event, is not considered as a factor in hiring. (Tr. 1128; EX 57)

Finally, the Acting Regional Director misstated the testimony even as to MAP. As Vincent Renzi explained, while many recitation instructors are recruited from a faculty member's department, MAP also hires students to serve as recitation instructors from other departments in the University as well as non-students. (Decision at 17, Tr. 1080-81, 1083) As to the Decision's unsupported claim that the "purpose" of hiring students in MAP differs from that of non-graduate student adjuncts, Renzi testified that the primary concerns -- hence the purpose of any hiring -- are whether the adjunct is a good teacher and whether his/her area of expertise matches the program's needs. (Tr. 1092)<sup>18</sup>

(iii) *The Decision repeatedly refers to the graduate student adjuncts' unique connection to the school as students.* The Acting Regional Director emphasized the students' connection to the department, educational goals and institutional concerns, (Decision at 17-18, 27), which have nothing to do with the terms and conditions of their employment as adjuncts. NYU does not dispute that its graduate students have a relationship with the university and their departments that differs from that of non-student adjuncts. But this is a direct consequence of the students' status and role as students, and has nothing to do with the terms and conditions of their employment to teach at NYU -- which, as discussed above, are identical to those of all other adjuncts. These differences have no significance in determining the community of interest among student and non-student adjuncts as University employees.

All graduate students -- whether appointed as an adjunct, appointed to another position at NYU, holding outside employment or simply a student without any outside endeavors -- share a connection to the school different from non-students. All students, by virtue of being students,

---

<sup>18</sup> Without any elaboration, the Decision also refers to a difference in mentoring received by graduate student adjuncts and other adjuncts. To the contrary, the record evidence demonstrates that within the various departments, all adjuncts receive the same mentoring, supervision, training and access to resources. (Tr. 573-76, 622, 879-80, 1084-85, 1090-91, 1132-33, 1136-37, 1192-93)

obviously share similar academic goals. (Decision at 18, 26-27) Similarly, as noted by the Acting Regional Director, graduate students take courses for a number of years, work closely with faculty who serve on their dissertation committees, are part of the intellectual life of the department and attend departmental colloquia and workshops, often are part of faculty search committees and other departmental committees, put together special programs, conferences and events, and are expected to attend symposia and lectures. (Decision at 18) What the Regional Director completely ignored, however, is that Board precedent holds that the determination of community of interest is based on the individuals' status as employees and not factors -- such as student status -- outside the employment relationship. *See Winsett-Simmonds Eng'rs., Inc.*, 164 NLRB 611, 612 (1967); *Terri Lee, Inc.*, 103 NLRB 995 (1953); *Lone Star Boat Mfg. Co.*, 94 NLRB 19 (1951); *Georgia-Pacific Corp.*, 201 NLRB 760 (1973); *Roslyn Concrete Constr. Co.*, 261 N.L.R.B. 732 (1982), *enfd*, 713 F.2d 61 (1983); *Speedrack Prods. Group v. NLRB*, 114 F.3d 1276, 1280 (1997). This is all the more true in a unit of adjunct faculty, which includes several thousand individuals with disparate backgrounds and experience, including industry professionals, Wall Street professionals, distinguished artists, government officials, students (usually graduate students) from NYU and other universities as well as "career adjuncts" for whom teaching as an adjunct instructor is their principal occupation. (Tr. 361-62, 563, 718, 1302)

Even more significantly, the Regional Director ignored cases cited by NYU holding that students and non-students working for their schools who share traditional community of interest factors are properly included in the same bargaining unit. "The Board traditionally looks to whether students work in the same capacity as other workers and what their stake in the outcome of negotiations would be, just as it does with every other set of employees." *Boston Med. Ctr.*

*Corp.*, 330 NLRB 152, 161 (1999); *see also Univ. of West Los Angeles*, 321 NLRB 61, 61 (1996).

Indeed, the Board has recognized the appropriateness of including students and non-students in a single unit in other contexts, most significantly in *Boston Medical Center* the very case the Board relied on in holding that graduate student assistants were employees in *NYU I*. In *Boston Medical Center*, after holding that the house staff (who were viewed as students) were employees under the NLRA, the Board rejected the union's argument that the house staff should be included in a separate unit of their own and found a single unit of all physicians (house staff and attendings) appropriate. In language equally applicable to the adjunct faculty involved in this case, the Board said, "it can fairly be said that house staff possess the types of skills and are required to perform the types of job duties common to other physicians, at similar, albeit not identical, skill levels." 330 NLRB at 167. The Board held that any difference in skills and duties were not sufficient to warrant the creation of a separate unit under the health care unit rules, and that to do so "would unduly fragment a fairly homogenous grouping of medical professionals."<sup>19</sup> *Id.*

In cases involving students working for employers other than their school, the Board has repeatedly found that where, as here, a community of interest exists between student and non-student employees, "the sole fact that they are students provides no basis for their exclusion" from a bargaining unit. *Hearst Corp.*, 221 NLRB 324, 325 (1975) (student and non-student customer service employees properly in same unit); *System Auto Park & Garages, Inc.*, 248 NLRB 948, 949 (1980) (student parking attendants properly included in unit of regular full and

---

<sup>19</sup> Although the health care unit rule is not a factor in this case, the Board's reasoning in *Boston Medical* is equally applicable in rejecting the proposition that graduate student adjuncts should be separated from other adjuncts based solely on the fact that they are still pursuing their advanced degrees.

part-time non-student employees); *Display Sign Serv., Inc.*, 180 NLRB 49, 50 (1969) (including student sign manufacturer and installer in bargaining unit of non-student employees); *Delight Bakery, Inc.*, 145 NLRB 893, 905-06 (1964) (part-time students properly in unit with non-student bakery employees).

In those cases where the Board has declined to include students and non-student employees in the same bargaining unit, it has done so because the students and non-students did not share a community of interest. *See generally Cornell Univ.*, 202 NLRB 290, 291-92 (1973); *Georgetown Univ.*, 200 NLRB 215, 217 (1973); *Barnard College*, 204 NLRB 1134, 1135 (1973) Those cases are readily distinguished; here the student and non-student adjunct faculty share a close community of interest, as discussed above.

In *University of West Los Angeles*, the Board clarified that these earlier cases did not establish a *per se* rule mandating the exclusion of students from bargaining units in their educational institutions. 321 NLRB at 61. Rather, the Board included student and non-student library clerks in a single bargaining unit based on a finding that they shared a community of interest where all clerks had similar wages, hours of work, common supervision, and other employment conditions. The Board also found that the students' employment in that case was not directly related to their continued enrollment at the educational institution, as there was evidence that a number of students continued to serve as library clerks even after graduation. Here, there is a similar history; a significant number of individuals have served as adjunct instructors both while they were students and also while not students. (EX 120; Tr. 1093)

Not only does the Decision improperly ignore Board law by defining the bargaining unit based on a supposed community of interest resting on "their identity as students" (Decision at 26), it illogically excludes from that unit student adjuncts who teach credit courses, and who

share all of the same student attributes that supposedly support a graduate student bargaining unit.

Finally, the supposed divergence of interests between student and non-student adjuncts found by the Acting Regional Director is belied by eight years of bargaining history, in which Local 7902 has successfully represented both student and non-student adjuncts in a single bargaining unit. The distinctions between students and non-students emphasized by the Acting Regional Director have always existed, yet there is absolutely no evidence of any differing interests in bargaining that negatively impacted the adjunct unit. Moreover, it is one of the well-recognized functions of a bargaining representative to reconcile and balance the often-divergent interests of employees in the unit. *Int'l Ass'n. of Machinists & Aero Workers*, 355 NLRB 1062 (2010); *Humphrey v. Moore*, 375 U.S. 335 (1964). NYU is not aware of any precedent -- and the Acting Regional Director certainly cited none -- in which employees in the same job classification, performing the same duties, at the same location, under identical terms and conditions of employment, have been split into separate bargaining units.

C. The Acting Regional Director Erroneously Singled Out Student Adjuncts Teaching Non-Credit Courses

The Acting Regional Director's decision that only graduate student adjuncts teaching non-credit courses would be included in the putative bargaining unit proceeds from a fundamental, and clearly erroneous, finding that "prior to 2009 [when FAR4 became effective] graduate students were classified as adjuncts and placed in the adjunct unit only if they were appointed as the course 'instructors of record,' and were responsible for the course, just like an outside adjunct." (Decision at 13) This finding is wrong in every respect. Prior to the implementation of FAR4 in 2009, graduate students who were appointed as adjuncts served as

both instructors of record and as recitation and lab section leaders in non-credit courses.

Similarly, outside adjuncts served in both roles, then as now.

Indeed, there never was even a contention at the hearing that any such distinction existed in the role of graduate students in the “historical adjunct unit”. To the contrary, the Petitioner contended that the distinction between graduate students who were appointed as adjuncts and those who had been TAs was based on whether they received a stipend. Thus, in amending its petition during the hearing, counsel for Petitioner stated that the amendment was “intended to track closely the bargaining history and draw the line based upon the evidence and consistent with the evidence developed by the Employer, which we believe shows that historically the distinction between adjuncts who are included in the Local 7902 bargaining unit and those who, prior to 2006, were represented in the GSOC bargaining unit, is the distinction between those who were on the stipend and those who were not.” (Tr. 1226) Similarly, President Schlemowitz testified that Local 7902 did not claim to represent graduate student adjuncts receiving stipends, conforming his testimony to the union’s amended petition, and making no distinction between student adjuncts teaching credit courses and those teaching non-credit courses. (Tr. 1298)

In rejecting the Petitioner’s suggested unit definition, the Acting Regional Director correctly found that the receipt of a stipend was not a meaningful way to define the bargaining unit. (Decision at 27, n. 23) Contrary to the Acting Regional Director’s attempted distinction based on teaching of credit versus non-credit courses, however, the record plainly shows that the distinction between appointment of graduate students as adjunct faculty and TAs, prior to the implementation of FAR4, was based solely on the nature of their financial support (although not necessarily receipt of a stipend) and not on the nature of their duties.<sup>20</sup>

---

<sup>20</sup> Many of the graduate students serving as adjuncts prior to FAR 4 were doctoral students in their post-MacCracken years, Master’s candidates or students in other schools at NYU that did not provide financial support to graduate

As Roberta Popik, Associate Dean for Graduate Enrollment Services and Graduate School Administration, explained, prior to FAR 4, any student who was asked to teach and who was not eligible for MacCracken funding<sup>21</sup> was hired as an adjunct faculty member. (Tr. 634-35) Popik explained that there were various reasons for a student not to have MacCracken funding and, thus, hired be as an adjunct, rather than appointed as a TA:

[T]he various reasons would have been a student who was beyond the term of their McCracken and their financial aid eligibility as a McCracken.... We had master students in GSAS who were teaching. They were hired as adjuncts. We occasionally in arts and science had students from other NYU schools teach in arts and science. Someone from the Law School, someone from Gallatin, they would have been hired as adjuncts.

(Tr. 636) This testimony was not disputed.

The scant evidence relied on by the Acting Regional Director simply does not support his conclusion. (Decision at 13) Acting Dean of the Faculty of Arts and Sciences Jess Benhabib testified that prior to FAR4 graduate students performed a wide variety of roles as TAs, including instructors of record, section leaders and course assistants. (Tr. 380-81) Consistent with Popik's testimony, Benhabib confirmed that prior to FAR4 graduate students would have been appointed as adjunct faculty rather than TAs when they did not have MacCracken funding - - such as after their sixth or seventh year of study when they would no longer be eligible for MacCracken funding. (Tr. 382) He did not testify that graduate students appointed as adjuncts served only as instructors of record in credit courses.

---

students (e.g. the Law School). (Tr. 382-83, 635-36, 1580-83; EX 101, EX 102, EX 103) There also were a significant number of graduate students receiving stipends, however, who had adjunct faculty appointments. In academic year 2008-2009, for example, 71 of the 422 students serving as adjunct instructors were receiving stipends. (Tr. 1697-98, Exs. 56, 115) Indeed, the only student witness who testified about pre-FAR 4 employment as an adjunct, Rachel O'Connell, had an adjunct faculty appointment outside GSAS in the spring of 2009 while she was receiving MacCracken program funding. (Tr. 1349-50, 1685-86; EX 111, EX 112, EX 113)

<sup>21</sup> The MacCracken program provided five years of full funding, including a stipend, tuition and health benefits to doctoral students in GSAS. (Tr. 369, 372 (g), 438-40, 511; EX 17) Prior to FAR4, students were eligible for additional support through TA appointments for one or two additional years. (Tr. 452, 468, 1342, 1351, 1538)

The only other witness cited for this proposition is Vincent Renzi, Associate Director of the Morse Academic Plan (MAP), the core curriculum for undergraduates in CAS and certain other schools. But Renzi's testimony does not show that the graduate students were appointed as instructors of record in MAP. To the contrary, "The MAP was designed specifically with the intent of putting only regular members of the faculty in charge of the lectures and the teaching teams." (Tr. 1074) Thus, graduate students were appointed as instructors in MAP courses only as leaders of recitation sections.<sup>22</sup> (Tr. 1083; Decision at 13) Whether graduate students serving as MAP recitation instructors were supported by their departments as TAs or appointed as adjunct faculty made no difference in their responsibilities.<sup>23</sup> (See Tr. 1101) Renzi testified, consistent with Popik, only that graduate students were appointed as adjuncts in MAP prior to FAR4 if they were Master's degree students, doctoral students beyond seven years in the program or if they were graduate students in "quasi-GSAS" programs, such as Cinema Studies, Performance Studies or the Institute of Fine Arts. (Tr. 1083)

In the same way, the Decision finds -- without citation to any evidence or any support in the record -- that "[a]s a corollary, the historical graduate unit was mostly comprised of graduate students teaching non-credit courses." (Decision at 14, n. 14) In fact, the Regional Director's decision in *NYU I* discusses numerous TAs included in that bargaining unit who served as instructors of record in credit courses -- for example in the Expository Writing Program and language instruction. See 332 NLRB at 1211-12. The evidence in this case also demonstrated that TAs were instructors of record pre-FAR4. (Tr. 380-81)

---

<sup>22</sup> This was equally true at the time of the hearing in *NYU I*. See 332 NLRB at 1212, n.12.

<sup>23</sup> The only other evidence relied on by the Acting Regional Director "as an example" involves English Department graduate students who "could possibly be appointed to teach a course for which they are fully responsible", during the summer session. (Decision at 13) NYU cannot locate any support in the record for this unattributed finding. Even if correct, however, this single example of summer teaching in one department cannot possibly support the finding of a supposed uniform practice of appointing graduate student adjuncts only to teach as instructors of record.

The Acting Regional Director's effort to bolster his erroneous conclusion with mathematical computations involving the numbers of graduate student adjuncts is so confused as to be worthless. For example, he postulated that the number of graduate student adjuncts teaching credit courses in the College of Arts and Sciences for current academic year would be double the 134 who taught such courses in the Fall 2010, and that 268 is approximately the same as the average number of graduate students in the historical adjunct bargaining unit. (Decision at 13) Even assuming that all graduate student adjuncts in FAS were teaching as instructors of record in credit courses prior to 2009 -- which was plainly not the case -- graduate students in FAS constituted only about one-third of the graduate students in the adjunct bargaining unit prior to 2009, so that his false equation proves nothing as to what most graduate student adjuncts were doing. (EX 56) Similarly, there is no basis in the record for the assertion that the 734 graduate student adjuncts and 66 outside adjuncts appointed in the Fall 2010 was "consistent with the typical number of TAs responsible for recitation and laboratory sections in the past." (Decision at 13)<sup>24</sup>

#### IV. HOURLY-PAID STUDENT WORKERS ARE EXCLUDED FROM BARGAINING

Without explanation or any evident rationale, the Decision includes in the bargaining unit "hourly graduate students with the job title 'research assistants,' and, hourly employees whose job title demonstrate that they are providing assistance to a particular faculty member". (Decision at 26-27, n.23)

---

<sup>24</sup>The Decision contains numerous other errors in its findings with respect to the number of students and non-students in various positions and efforts to analyze that data. By way of example only, the Decision states that the population of hourly workers in Fall 2010 included 1560 undergraduates, 207 graduate students, and 6233 others. (Decision at Chart H) In fact, there were 1560 graduate students in hourly positions, *including* 207 who received stipends. (EX 81, EX 85, EX 116) The balance of the estimated total of over 8,000 student hourly workers was undergraduates. (Tr. 1672) The number 6233 represents the difference between the Acting Regional Director's erroneous assumption that there were *exactly* 8,000 hourly-paid workers, and 1767, which he mistakenly believed was the total number of students (1560 + 207) in these positions.

The Acting Regional Director stated that “the graduate assistants are distinct from the pool of hourly employees dispersed throughout the Employer’s expansive facilities, due to the vastly different skill set and qualifications the graduates bring to the departmental work” (Decision at 27) but offered no basis for singling out graduate students in these hourly-paid job titles from the 1560 graduate students in hourly positions in Fall 2010. (EX 81) Moreover, the Decision ignored the cases cited by NYU that the hourly-paid graduate students are casual or temporary employees who should be excluded from the bargaining unit.

There was no evidence at the hearing as to the duties of graduate students in specific hourly-paid jobs. While witnesses described the duties of the hourly-paid student workers generally as including a wide variety of clerical and administrative duties, they explained that it was not possible to identify the duties of any specific students based on their job titles. (Tr. 1261, 1656, 1658) Indeed, the list of graduate students in hourly positions in Fall semester 2010 contains numerous closely-related titles, including Assistant, Office Assistant, Research Assistant, Project Assistant, Assistant to Prof., Program Assistant, Student Assistant, Production Assistant, Lab. Assistant, Library Assistant and Technical Assistant, among many others. (EX 80) The Acting Regional Director’s inclusion of certain graduate students based on their job titles alone departs from Board precedent that bargaining unit determination must be based on evidence of employees’ actual working conditions and duties, and not simply on job titles. *See Radio Broadcasting Co.*, 277 NLRB 1112, 1126 (1985); *Saddleback Cmty. Hosp.*, 223 NLRB 247, 249 (1976).

The only evidence offered regarding the job duties of specific hourly student workers was that as part of the FAR4 implementation, the job duties of all GA positions were closely reviewed and “an evaluation was made of whether that really was RA work, research assistant

work, for the doctoral student or whether it was more administrative.” (Tr. 1573) The positions that involved research assistant work were converted to RAs and those that were administrative were converted to hourly positions. (*Id.*) The fact that a position was converted to an hourly position, regardless of job title, means that it was not considered similar to an RA position.

The Acting Regional Director recognized that, despite the similarity in titles, “students appointed to do research for a professor on an hourly basis are performing a different level of work than students appointed as research assistants.” (Decision at 19)<sup>25</sup> Thus, their inclusion in the unit cannot be justified on any theory that their work is similar to that of the RAs. Nor is there any basis to find that graduate students in the specified hourly job titles represent a continuation of the Graduate Assistants (GAs) who were included in the former bargaining unit. As the Acting Regional Director found, the GA classification essentially no longer exists, and the work formerly done by GAs is mostly performed by hourly-paid student workers. (Decision at 19) The record showed, however, that there is no way to identify any particular hourly-paid positions that constitute the former GA positions -- and certainly not those in the job titles identified by the Acting Regional Director. (Tr. 1484-85, 1580, 1601-04, 1657-60) Indeed, graduate students have served in hourly-paid positions as research assistants and assistants to faculty members for many years during the same time that other students were performing similar functions as GAs. (Tr. 1562-63, 1572-73, 1576-77; EX 100; EX 100I)

---

<sup>25</sup> The Decision incorrectly states that RA positions in the social sciences were reviewed as part of the GSAS financial aid reform, and that two-thirds of the work was determined to be administrative. (Decision at 19) It was not RA positions in social science, but all GA positions in the FAS, that were re-examined, and no change was made to RA positions at that time. (Tr. 1569-70)

Although the Decision states that the record “did not fully explore the typical duration or expectation to an hourly position for doctoral students”<sup>26</sup> there was testimony that the typical duration for such an assignment was either a single semester or an academic year, although they are often short-term assignments, such as one month or even one weekend. Appointments rarely exceed one academic year. (Tr. 1551-52) Moreover, the evidence showed that even when an appointment may last for an entire semester or academic year, the position may only require sporadic work during that period. (Tr. 1712) Some students worked as few as 5 or 6 hours in a total semester. (EX. 116).

For this reason, graduate students in hourly-paid positions are like temporary or “casual” employees who do not have a sufficient interest in the nature of collective bargaining to participate in the process. *See Columbus Symphony Orchestra, Inc.*, 350 NLRB 523, 524 (2007).

In *NYU I*, graduate students working as graders and tutors were excluded from the unit as temporary employees, where they worked for varying periods of time (from one week to one semester) and had no substantial expectancy of continued employment in those jobs. 332 NLRB at 1221. Similar to the grader and tutor positions excluded in *NYU I*, hourly-paid student jobs are typically awarded on a semester by semester basis and rarely, if ever, exceed a single academic year. As in *NYU I*, students working in hourly-paid jobs have no substantial expectancy of continued employment in these positions. (Tr. 1551-52; EX 105)

In addition, many students in these positions actually work for only a small number of hours each week or semester. One excellent example of how minimal the work in these jobs can be was provided by Petitioner’s witness, Rachel O’Connell -- *the only student to testify about an hourly-paid job*. She had an appointment as a Code 119 tutor in the McGhee Division of the

---

<sup>26</sup> NYU assumes that the reference to doctoral students in this context is inadvertent, as many graduate students in hourly positions are Masters’ students. (*See* EX 80)

School of Continuing and Professional Studies academic year 2008-2009, in which she worked a total of just nine hours over the course of the year. (Tr. 1684-85; EX 110)<sup>27</sup>

The Decision ignores the Board precedent cited by NYU, holding that students who work for their universities in a variety of part-time clerical, administrative and similar jobs “are best likened to temporary or casual employees” and thus are excluded from collective bargaining under the Act. *San Francisco Art Inst.*, 226 NLRB 1251, 1252 (1976); *see also Saga Food Serv. of Cal.*, 212 NLRB 786 (1974).

**V. STUDENT ADJUNCT INSTRUCTORS, RESEARCH ASSISTANTS AND HOURLY-PAID STUDENT WORKERS DO NOT SHARE A COMMUNITY OF INTEREST AND SHOULD NOT BE INCLUDED IN THE SAME BARGAINING UNIT**

The Acting Regional Director compounded the errors discussed above by including graduate student adjuncts, research assistants in all disciplines, and graduate students in certain part-time hourly jobs in a single bargaining unit, in which they share no community of interest based on the terms and conditions of their postulated employment.

The Acting Regional Director based his unit determination solely on a finding that “[t]he community of interest for those in the petitioned-for unit rests on their identity as students.” (Decision at 26) The Decision failed entirely to examine the applicable community of interest factors, which demonstrate that these disparate groups of students do not belong in the same bargaining unit.

---

<sup>27</sup> The Board’s decision in *Kansas City Repertory Theatre, Inc.*, 356 NLRB No. 28, 17-RC-12647 (November 16, 2010), which found certain orchestra members who worked intermittently to be employees under the Act is inapposite. In determining that the orchestra members employed by the Kansas City Repertory Theatre have a right to organize, the Board underscored that the musicians at issue consistently worked whenever musicians were needed for a show. Thus, they had an expectation of employment each time the occasion for employment arose. In contrast, NYU appoints different students to Code 118/119 positions every semester and no individual has an expectation of being employed for any more than his or her appointment – and certainly there can be no employment after the individual ceases being a student at NYU. (Tr. 1670; EX 105)

i. They do not share the same Compensation Structure

RAs do not receive any compensation for the research they perform pursuant to their RA position but receive the same student support as any other funded doctoral student irrespective of the source of funding. (Tr. 369, 374-75, 511, 630-31, 834-35, 875; EX 11, EX 46) Student adjunct instructors are compensated based on the number of contact hours associated with the class they are teaching as determined by reference to the Adjunct CBA. (Tr. 786, 1085-86)<sup>28</sup> Finally, students with part-time, hourly positions are compensated on an hourly basis at a rate of between \$7.50 and \$20.00 per hour, based upon their submitted timesheets. (Tr. 1669, 1675, 1702)

ii. They do not Perform the Same Duties

RAs perform research that is almost always related to their dissertation topic. (Tr. 185-86, 400-01, 421-22, 533-34, 853, 911) Student adjuncts serve as instructors of record or recitation or laboratory section leaders, performing teaching-related duties – and do not perform any research. (Tr. 559-61, 1073, 1084-85, 1166, 1169-70, 1191, 1363, 1457) Finally, part-time hourly workers perform exclusively administrative and clerical tasks. (Tr. 1549, 1672-73) To the extent that part-time, hourly student workers perform any research-related activity, it is at a low, administrative level and is not related to their own study. (Tr. 1560)

iii. They do not Require the Same Skills

Adjunct instructors employ skills related to academic achievement in their field and their ability to teach. (Tr. 461-462, 486, 1145, 1164-65, 1188) RAs skills are akin to those of a researcher and student; accordingly when agreeing to work with an RA, a full-time faculty member often will consider only whether a student's research interest aligns with his or hers.

---

<sup>28</sup> Student adjuncts also are eligible to and do participate in adjunct benefit programs in which those students who serve as RAs or Code 118/119 workers cannot participate. (Tr. 730-31; EX 119, PX 77)

(Tr. 905-06) Finally, the skills involved in the work of part-time, hourly student workers vary as widely as the nature of their appointments, but involve primarily clerical and administrative skills. (Tr. 1571-72)

iv. They Have Little Interchange

In accordance with federal and University guidelines, students who have full RA appointments *cannot* serve as adjunct instructors or take on any part-time or hourly appointment while they are an RA. (Tr. 390, 1195, 1585) Unless an RA was funded by a partial RA appointment, as is common only in Courant, the University would almost always deny a student request to take on an adjunct appointment that overlapped with the RA appointment. (Tr. 1585-86) As a result, in these roles, there is little interchange among RAs and student adjunct instructors.

In academic year 2009, of the 1244 students who served as adjunct instructors, only 5 had overlapping appointments as RAs for the entire year and another 10 had overlapping appointments for a full semester. (PX 76; EX 117) Moreover, excluding Courant, which is the only school that regularly supports students as fractional RAs, there were no full year overlaps and only three same semester overlaps. (Tr. 532, 1709-10; PX 117)

There is no evidence of interchange between Code 118 or Code 119 appointments and either RAs or student adjuncts.

v. They Are Not Supervised in the Same Manner

Student adjunct instructors are supervised by the faculty member teaching the course in which they are teaching who is not necessarily in the student's school or department. (Tr. 1353, 1358, 1363) RAs work under the direct supervision of the PI on their research grant, who is nearly always the RA's thesis advisor and is also responsible for grading the RA's research in

order for the RA to receive academic credit. (Tr. 167, 176, 411, 521-22, 534, 536-37, 855) In contrast, part-time, student hourly workers are typically supervised by a departmental administrator or faculty member, depending on the position, who is not in any way associated with their graduate work. (Tr. 1477, 1550, 1675)

vi. They Are Not Subject to the Same policies and Procedures

Student adjunct instructors are subject to the same policies that are applicable to all other adjuncts, including various departmental policies and procedures relating to teaching, receive handbooks and guidelines regarding the same, and are subject to certain expectations with respect to their teaching. (Tr. 697-98, 707, 711-12, 1301-03) Neither RAs nor part-time, student hourly workers are subject to these policies.

Because they are funded by federal grants, the research that RAs do must comply with numerous federal guidelines. (Tr. 291; PX 28) In addition, RAs must comply with many University policies with respect to testing on human or animal subjects, obtaining consent and conflicts of interest, among other things. (Tr. 236, 243-44) These policies do not apply to student adjunct instructors or part-time hourly workers.

vii. They Are Not Subject to the Same Hiring and Appointment Procedures

Departments post open adjunct teaching positions on their websites, sometimes notifying students of the available positions. Students submit their *curriculum vitae* and are selected for the position. (Tr. 465, 583-84, 619, 624-25, 914-16) Application forms are rarely used for adjuncts. (Tr. 1114-15, 1133-34) In contrast, to apply for an open part-time, hourly position, students must first complete two separate forms at the University's Wasserman Center, certifying their student status and then go through the application process within the relevant department. (Tr. 1670, 1674; EX 105) RAs do not apply for their appointments. Instead, they form a

relationship with a professor who works in their field of interest, and often the professor simply arranges for such students to be funded by his or her grant. (Tr. 420-21; 855-56) Thus, none of these groups has anything in common with respect to the appointment process.

viii. Only Adjuncts Can Maintain Their Positions Following Graduation

As discussed above, students may continue to serve as adjunct instructors following their graduation from the University. In contrast, students cannot continue to serve in their part-time, hourly positions as they must certify that they are students to receive a position. Likewise, as RAs must be students in order to serve in that capacity; their appointments necessarily end upon graduation as well.

ix. They Do Not Perform Their Duties During the Same Hours

Student adjunct instructors teach classes, and therefore work during scheduled class times. The amount of time that they spend performing their duties as adjunct instructors is dictated by the number of contact hours associated with a course and the applicable class schedule. (Tr. 560, 1085-86; EX 43)

Part-time hourly workers work on a variety of schedules depending on their position, and needs of the department or unit where they are working. (Tr. 1712; Ex. 116)

As the “work” RAs perform on their grants is nearly impossible to distinguish from their dissertation research, it is also impossible to determine how much time RAs actually spend, or when they spend it, on the duties associated with their research assistantship and their own doctoral study. (Tr. 180-81, 391, 401-402, 590-92, 867-68)

x. They Do Not Share a Common Bargaining History

There previously was a bargaining unit of NYU TAs, GAs and certain RAs outside of the sciences. As discussed above, however, TA and GA positions have been eliminated as a result of financial aid reform in GSAS and Steinhardt. Student adjuncts teaching non-credit courses

certainly do not equate to the former TAs. Similarly, the record demonstrates no identifiable link between individuals in 118 /119 positions and the former GAs. (Tr. 1570-77, 1601-02, 1608, 1611-12) Tellingly, certain functions previously performed by GAs were also performed by students in hourly-paid positions, even prior to financial aid reform. (Tr. 1556-60, 1562-64, 1568; EX 100A – EX 100M) There is simply no way to identify any group of the 1,560 graduate students in Code 118/119 jobs (including those with the title “Research Assistant” or similar titles) who can be equated to the former GAs. In addition, the unit identified by the Acting Regional Director includes science department RAs who were excluded from the prior bargaining unit. Thus, there is no common bargaining history among the students in the petitioned-for unit.

The only trait they have in common is that they attend the same university as students – a fact unrelated to the terms and conditions of their appointments. Even assuming *arguendo* that the student status of these individuals is somehow relevant to a community of interest analysis, such a “single element of common interest does not ... supply a sufficient bond to overcome the diversity of interests among employees in this otherwise random grouping of heterogeneous classifications.” *The Grand*, 197 NLRB 1105, 1106 (1972).

In sum, there is no justification for combining the occupants of these dissimilar positions into a single bargaining unit based solely on the irrelevant fact that they are all graduate students. RAs, students serving as adjunct faculty, and part-time hourly-paid workers do not share a single identifiable community of interest factor with respect to their appointments at NYU.

#### VI. THE BOARD DOES NOT HAVE A QUORUM TO DECIDE THIS CASE

The current Board consists of only two members who were properly appointed and is not legally permitted to operate without the required quorum of at least three members. *New Process*

*Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010). Despite purporting to operate with four members,<sup>29</sup> Board members Sharon Block and Richard Griffin were improperly appointed by President Obama as “recess” appointments on January 4, 2012 even though the Senate was not in recess at the time. Therefore, these appointments were not valid and the Board only has two properly appointed members – Chairman Pearce and Member Hayes. We are aware that the Board previously has considered and rejected this argument. *See, e.g., Ctr. for Soc. Change, Inc.*, 358 NLRB No. 24 (Mar. 29, 2012). NYU, however, requests that the Board reconsider this issue and find that it does not have the necessary quorum to decide this matter.

CONCLUSION

The Petition in this matter should be dismissed in its entirety.

New York, New York  
July 23, 2012

Respectfully Submitted,

PROSKAUER ROSE LLP



Edward A. Brill

Peter D. Conrad

Brian S. Rauch

Attorneys for New York University

11 Times Square

New York, NY 10036

(212) 969-3000

Of Counsel:  
Terrance J. Nolan  
Deputy General Counsel  
& Director of Labor Relations  
New York University  
70 Washington Square South - 1168  
New York, NY 10012  
(212) 998-225

---

<sup>29</sup> Member Flynn, the Board’s fifth member, submitted his resignation on May 24, 2012 to be effective July 24, 2012 but has recused himself from all agency business.

**CERTIFICATE OF SERVICE**

This is to certify that copies of the within Brief on Review of New York University in Case No. 2-RC-23481 has been served by electronic mail on this date on:

Thomas W. Meiklejohn, Esq.  
Livingston, Adler, Pulda, Meiklejohn  
& Kelly  
557 Prospect Ave.  
Hartford, CT. 06105  
twmeiklejohn@lapm.org  
Counsel for the Petitioner  
GSOC/UAW

Nick Velluzi  
International Representative  
International Union, UAW  
256 West 38<sup>th</sup> St., 12<sup>th</sup> Floor  
New York, NY 10016  
nvelluzzi@uaw.net

Ava Barbour, Esq.  
Associate General Counsel  
International Union, UAW  
8000 East Jefferson Ave.  
Detroit, MI. 48124  
ABarbour@uaw.net

Ted Feng  
Region 9A UAW  
113 University Place  
2<sup>nd</sup> Floor  
New York, NY 10003  
tfeng@uaw.net

Karen P. Fernbach  
Regional Director  
National Labor Relations Board  
Region 2  
26 Federal Plaza – Room 3614  
New York, NY 10278-0104  
Karen.Fernbach@NLRB.gov

James G. Paulsen  
Regional Director  
National Labor Relations Board  
Two Metro Tech Center  
5th Floor  
Brooklyn, NY 11201  
James.Paulsen@NLRB.gov

Dated: July 23, 2012  
New York, New York



---

Brian Rauch