

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 10**

**DUKE UNIVERSITY**

**-and-**

**SERVICE EMPLOYEES INTERNATIONAL  
UNION (SEIU)**

**Case No. 10-RC-187957**

**DUKE UNIVERSITY'S POST-HEARING BRIEF**

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## PRELIMINARY STATEMENT

Service Employees International Union (“SEIU” or the “Union”) filed its petition on November 10, 2016, seeking certification as representative of a bargaining unit consisting of:

“All PhD and Masters students in Duke University departments housed at Duke’s campuses in Durham and Beaufort, North Carolina, who are working toward degrees offered by the Duke Graduate School and who are employed by Duke University to provide instructional services in undergraduate courses or graduate-level courses or labs (including, but not limited to, Teaching Assistants, Graduate Assistants, Laboratory Assistants, Teaching Apprentices, Instructors, Graders, Preceptors, Section Leaders, and Tutors) or to provide research services (including, but not limited to, Research Assistants and Graduate Assistants).”<sup>1</sup>

In accordance with Section 102.63 of the National Labor Relations Board’s (“NLRB” or the “Board”) Rules and Regulations (the “Rules”), Duke University (“Duke” or the “University”) filed its Statement of Position (Form NLRB-505) with the Board’s Regional Office on November 21,<sup>2</sup> identifying the following issues for hearing, among others: (a) the “employee” status of the petitioned-for graduate students under Section 2(3) of the National Labor Relations Act (“NLRA” or the “Act”); (b) the inappropriateness of the unit sought based on the inclusion of graduate students pursuing a PhD degree together with Master’s students; (c) the appropriate voter eligibility formula; and, (d) the necessity for a manual ballot in the event that any election is directed.

A hearing on SEIU’s petition began on November 28 before Hearing Officer Jenny Dunn at the Durham County Courthouse, in Durham, North Carolina. On the first day of the hearing,

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<sup>1</sup> Hereafter, Duke University PhD students performing “instructional services” and/or “research services,” as defined in the petition, are referred to as “Teaching Assistants” and “Research Assistants,” respectively; at times these students are collectively referred to as “Graduate Assistants.”

<sup>2</sup> Pursuant to an Order of the Board issued on November 17, granting the University’s Special Appeal from the Acting Regional Director’s refusal to postpone the hearing from November 21 to November 28, the due date for submission of Duke’s Statement of Position was extended from November 18 to November 21.

SEIU moved to amend its petition to limit the bargaining unit to graduate students seeking PhD degrees who perform instructional and research services. The Union withdrew its claim for representation of Master's students providing those services. SEIU's amendment was unopposed and granted by the Hearing Officer, eliminating the issue.

With respect to the Section 2(3) status of the remaining petitioned-for PhD students -- whom Duke has maintained from the inception are readily distinguished from their counterparts at Columbia University -- the Hearing Officer advised that the Acting Regional Director would require an offer of proof pursuant to Section 102.66 of the Board's Rules, demonstrating that the Board's holding in *Columbia University*, 364 NLRB No. 90 (2016), would not apply on the facts at Duke.<sup>3</sup> The University's offer of proof on that issue was submitted on November 28.

On November 29, Hearing Officer Dunn notified the parties that upon consideration of Duke's offer of proof and SEIU's opposition, the Acting Regional Director had accepted (*i.e.*, granted) the University's offer in its entirety, and that the hearing would proceed on the Section 2(3) issue. At the same time, the Hearing Officer advised that questions concerning voter eligibility (including the proper formula for determining eligibility) and the mechanics of the election (*i.e.*, manual vs. mail ballot) would not be "litigable" in the proceeding, but that the parties would be permitted to state their positions on the record concerning those important issues.

At the Union's request, the hearing was then adjourned to allow the parties time to explore stipulations of fact relating to the employee status issue. After several hours of negotiation, a 22-paragraph Stipulation was reached and made a part of the record. (Bd. Ex. 4) The Stipulation encompassed fully 80% of the facts contained in the University's offer of proof, and provided,

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<sup>3</sup> In distinguishing *Columbia*, Duke does not suggest in any way that the students at issue in that case were employees within the meaning of the Act. To the contrary, Duke maintains that *Columbia* was wrongly decided. (See pp. 38-43, below.)

however, that Duke would be permitted to adduce additional testimony on matters addressed therein, it being understood that the offer of proof on which the Stipulation had been based was simply a summary of the testimony and other evidence that the University would present in support of its position. The parties' detailed Stipulation, reciting extensive agreed-upon facts, virtually eliminates the need for the Regional Director to make factual findings with respect to the material issues in this case. Duke and SEIU have done that for him in the Stipulation, a copy of which is attached as "Appendix A."

Although the Stipulation itself leads to the inescapable conclusion that the graduate students who are the subject of this proceeding are not "employees" within the meaning of Section 2(3) of the Act, the University presented testimony from four witnesses in support of the petition's dismissal: Paula McClain, Dean of the Graduate School; Adam Wax, Professor and Director of Graduate Studies of Biomedical Engineering; Christopher Nicchitta, Professor and Associate Dean of Research Training of the Duke Medical School; and, Shanna Fitzpatrick, Associate Dean of Finance and Administration. The Union followed with a case consisting almost entirely of graduate student testimony that, for the most part, supported the University's position that the Graduate Assistants whom SEIU seeks to represent undertake instruction and research as an integral part of their academic program, demonstrating their primarily educational relationship to the University, and confirming that the "salient economic character" of the relationship that the NLRB found to exist in *Columbia*, between the student assistants and the university there, simply does not exist at Duke.

With respect to the so-called non-litigable issues, *i.e.*, the proper voter eligibility formula and the mechanics of the election, the Hearing Officer limited the parties' presentations to

statements of counsel on the record and the submission of documentary evidence, including two affidavits offered by Duke and received into the record.

As concerns the eligibility formula, the Hearing Officer/Regional Director erred in denying an opportunity to litigate. Their ruling was flatly inconsistent with General Counsel Griffin's *Guidance Memorandum on Representation Case Procedure Changes*, issued on April 6, 2015. Memorandum GC 15-06 (Apr. 6, 2015). That memorandum expressly instructs that such an issue "*must be litigated in a pre-election hearing if in dispute. . .*" *Id.* at 13 (emphasis added). Precluding litigation of that issue was clearly erroneous and prejudicial to the University, whose separate offer of proof on voter eligibility was inexplicably rejected by the Regional Director.

In nearly the same breath as Duke's offer was rejected, the Hearing Officer disclosed that the Regional Director had received, and that he intended to consider as part of the decision-making process, five affidavits provided by SEIU to the Regional Office -- but not to Duke or its counsel -- prior to the commencement of the hearing, *i.e.*, outside the record, a procedure to which the University voiced the strongest objection.<sup>4</sup> The University first became aware of these "secret affidavits" on what had been expected to be the final day of hearing, when in response to Duke's argument that the Union had submitted *no* evidence in support of its requests for either a mail ballot election or a non-standard eligibility formula, SEIU disclosed for the first time that secret affidavits had been submitted to the Regional Office during the investigation of the petition,

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<sup>4</sup> Section 102.68 of the Board's Rules is very specific as to what constitutes the "record" in a representation proceeding. "The record . . . shall consist of: the petition, notice of hearing with affidavit of service thereof, statements of position, responses to statements of position, offers of proof made at the pre-election hearing, motions, rulings, orders, the stenographic report of the hearing and of any oral argument before the regional director, stipulations, exhibits, affidavits of service, and any briefs or other legal memoranda submitted by the parties to the regional director or to the Board, and the decision of the regional director, if any." Nowhere is there any mention of affidavits (other than affidavits of service) or any other materials submitted to the Regional Office *ex parte* during a pre-hearing investigation of a petition for representation. Plainly, the affidavits, unless received in evidence at hearing, are *not* part of the "record."

including from two Union witnesses whose testimony at hearing it turned out was at variance with statements contained in their affidavits.

The Hearing Officer informed the parties that the Regional Director would rely on those secret affidavits, even though a public record was being developed on the same issues, and she went on to advise Duke that neither she nor the Regional Director could (or would) require SEIU to make the affidavits available to the University. In other words, their contents would remain unknown to Duke, yet be part of a secret record on which a decision in this case would be based.<sup>5</sup> This is completely at odds with the definition of the “record” in Section 102.68 of the Board’s Rules. *See supra* note 4. What happened here was highly irregular. Indeed, it was an unquestionable deprivation of Duke’s fundamental due process rights, and one that contributes mightily to Duke’s concerns about the fairness of these proceedings.

This post-hearing brief is submitted in support of the University’s position (i) that SEIU’s petition should be dismissed on the ground that it fails to raise a question concerning the representation of “employees” (*i.e.*, Duke’s PhD students) within the meaning of the Act; (ii) that in the event any election is directed, despite the compelling evidence of record that the petitioned-for graduate students are not “employees,” that eligibility to participate in the voting should be limited to those who are on the University’s payroll during the period immediately preceding a decision and direction of election; and, (iii) that any election that may be conducted by the Board on SEIU’s petition should be an in-person, manual ballot election, on campus and during the

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<sup>5</sup> SEIU agreed to provide the five affidavits to Duke. Upon receipt, the University sought to introduce the affidavits simply to preserve its rights on appeal to challenge the highly irregular procedure followed by the Regional Office in this case, while at the same time making it abundantly clear that those self-serving extra-judicial statements should not be accepted for the truth of the matters asserted therein, particularly in light of the fact that two of the affiants had already testified in the proceeding, and that under cross-examination, at least one of them had contradicted certain statements in his affidavit. (Tr. 1176-77, 1223-25) Curiously, SEIU objected to the introduction, and the Hearing Officer refused to receive the secret affidavits. Instead, the affidavits were placed in the rejected exhibit file, once again keeping them hidden from view.

Spring '17 semester, when classes are in session, not during intersession when students are on vacation.

### **SUMMARY OF ARGUMENT**

The petition should be dismissed because the Teaching Assistants and Research Assistants whom SEIU seeks to represent are *students*, not “employees” as defined in Section 2(3) of the Act and the Board’s recent decision in *Columbia University*, 364 NLRB No. 90 (2016). Furthermore, *Columbia* was wrongly decided by the NLRB. *Brown University*, 342 NLRB 483 (2004) and *Leland Stanford Junior University*, 214 NLRB 621 (1974), improperly overruled in *Columbia*, represent the only sound interpretation of the NLRA regarding the status of graduate student assistants. The Board should return to *Brown* and *Leland Stanford*.

In Point I, below, we demonstrate that Duke’s Teaching and Research Assistants do not meet the “common law” test of employee status applied in *Columbia*, and that the “salient economic character” of the relationship found to exist in *Columbia* between the university and its graduate student assistants simply does not exist at Duke.

To start, unlike *Columbia*, where the Board relied heavily on the fact that teaching opportunities for graduate students were geared toward fulfillment of the University’s instructional needs for the undergraduate student body (*i.e.*, to staff Columbia’s “core curriculum”), it is beyond dispute that Teaching Assistantships at Duke are an integral part of the student’s education, related to their course of study, and are designed to train students to teach and become true experts in their academic discipline.

Also unlike in *Columbia*, where the Board found that teaching assistants were “thrust wholesale into many of the core duties of teaching,” suggesting that their service “extend[ed] beyond the mere desire to help inculcate teaching skills,” *Columbia*, 364 NLRB No. 90, slip op.

at 16, Duke's Teaching Assistants receive extensive training from both their department and the Graduate School to prepare them for their Teaching Assistantships.

Further distinguishing *Columbia*, and the Board's observation in that case that "teaching assistants who do not adequately perform their duties to the university's satisfaction are subject to corrective counseling or removal," 364 NLRB No. 90, slip op. at 15, the proof here unquestionably demonstrates that their counterparts at Duke are not handled in that manner; they are not subject to removal from their appointments for poor performance -- instead, they are trained and treated as students learning to teach.

Lastly, the Teaching Assistants here, unlike the instructional officers in *Columbia*, receive "full financial award[s][that are not] conditioned upon [the students'] performance of teaching duties." *Id.* Thus, it cannot be said that Duke's Teaching Assistants are "exchanging services for compensation," as found in *Columbia*.

In Point I we also demonstrate that Duke's Research Assistants are not "employees" under the *Columbia* test. In that case, the Board found that the university exercised extensive control over the research that was performed. In other words, research assistants in *Columbia* were not "permitted to simply pursue their educational goals at their own discretion, subject only to the general requirement that they make academic progress." *Id.* at 18. By contrast, and as discussed below, Duke's Research Assistants engage in research that is inextricably intertwined with their doctoral studies and the research that they have elected to conduct in furtherance of their dissertation. Nor are Duke's Research Assistants restricted to performing research tasks dictated by the grant that may fund their studies, distinguishing them even further from their counterparts in *Columbia*. Lastly, we demonstrate that like Duke's Teaching Assistants, its

Research Assistants are eligible to receive a full financial award that is not conditioned upon their performance of specific research duties.

Finally, we demonstrate in Point I not only that Duke's Teaching and Research Assistants fall short of the test of employee status under *Columbia*, but also that *Columbia* was wrongly decided and that the correct standard against which to evaluate the record here is the standard that the Board established 12 years earlier in *Brown*, one based on whether the relationship between the graduate student and university is primarily educational, not economic in nature. Here, there can be no doubt that the relationship is indeed educational, not economic. That said, we acknowledge, as we must, that the Regional Director may be bound by *Columbia* today. Nevertheless, Duke preserves its rights, in full, to argue for *Columbia*'s reversal and a return to *Brown* and *Leland Stanford* when the issue is again considered by the Board, as is certain to be the case in the near future.

In Point II, we demonstrate that if any election is to be conducted in this case, the Regional Director must apply the Board's standard voter eligibility formula, *i.e.*, all Teaching Assistants and Research Assistants who are on Duke's payroll and working at the end of the pay period immediately preceding a decision and direction of election. SEIU has failed to present evidence to show that a different eligibility formula should be applied here, *i.e.*, one that also would include PhD students who served as Teaching and Research Assistants during the preceding academic year.

As the party seeking to depart from the Board's standard eligibility formula, SEIU bears the burden on that issue and simply has not met it here. No showing has been made that PhD students who provided instructional and/or research services during the 2015-2016 academic year, but not during the Fall 2016 semester, have a "continuing interest in the terms and

conditions of employment of the unit” based on a likelihood that they will provide such services in the future. *See Columbia*, 364 NLRB No. 90, slip op. at 21.

Although in *Columbia* the Regional Director found that a one-year look-back was appropriate, she did so only after a day-long hearing on that issue, an opportunity that was improperly denied here. In any event, had a hearing been held on the issue, which the Hearing Officer/Regional Director erroneously ruled was non-litigable, *see* Memorandum GC 15-06, it would have demonstrated that because Duke’s teaching and research expectations of PhD students vary considerably across the Graduate School, depending on department or program, so do their expectations of re-appointment, militating strongly in favor of application of the standard eligibility formula.

In Point III, we demonstrate that a manual ballot election is the only appropriate voting method if an election is directed at all. There can be no dispute that the Board applies a presumption in favor of manual ballot elections, resorting to mail ballots only in the rarest circumstances.

Under longstanding Board policy, a mail ballot election is appropriate where eligible voters are “scattered” in the sense that their duties are performed over a wide geographic area or their work schedules vary significantly, such that they are not present at common location at common times, or where a strike, lockout or picketing is in progress. None of these circumstances is present here. Therefore, the presumption in favor of a manual ballot election controls.

In any event, and as we demonstrate below, a mail ballot would needlessly complicate the election and greatly increase the likelihood of challenges and objections, particularly if such a vote is taken during intersession/vacation, because of serious questions that exist as to the correct

address -- among the multiple addresses on file for the vast majority of graduate students -- to mail the ballots. The attendant risk of disenfranchisement is substantial and must prevail over all other considerations. To fully effectuate the purposes of the Act, any election held in this case must be by manual ballot, on campus and while classes are in session, during the Spring '17 semester.

## **STATEMENT OF FACTS**

### **I. The Duke University Graduate School**

Duke University is a private research university located in Durham, North Carolina. Duke has approximately 6,500 undergraduate students and 8,000 graduate and professional students. (Tr. 379) The University is comprised of 10 schools, each of which has a dean who reports to the Provost of the University, or in the case of the Nursing and Medical Schools, to the Chancellor for Health Affairs.<sup>6</sup> (Er. Ex. 2) The Graduate School, one of the 10, operates under the leadership of Dean Paula McClain. (Er. Ex. 2) Dean McClain is responsible for overseeing all PhD and research-based Master's programs homed in any of the other nine schools at Duke. (Tr. 122-23)

A total of 47 PhD programs are offered through the Duke Graduate School. (Er. Ex. 3) These programs are grouped into four different divisions: Humanities, Social Sciences, Natural Sciences, and Basic Medical Sciences. (Tr. 128-29) Each program has a Director of Graduate Studies, who serves as both the official administrator of the rules and regulations of the Graduate School for that program, as well as the designated advocate for the needs of the graduate

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<sup>6</sup> Trinity School of Arts and Sciences, the Divinity School, the Fuqua School of Business, the Graduate School, the Law School, the Nicholas School of the Environment, the Pratt School of Engineering, the Sanford School of Public Policy, the School of Medicine, and the School of Nursing. (Er. Ex. 2)

program and its students. (Er. Ex. 9) Approximately 2,500 PhD students currently are enrolled in the Graduate School.<sup>7</sup> (Tr. 128-29)

## **II. The Educational Relationship Between the Graduate School and Duke's PhD Graduate Assistants**

The Duke Graduate School has a published credo, entitled “Best Practices and Core Expectations” (hereafter referred to simply as “Core Expectations”), which outlines the core components of a graduate student’s education, and defines the expectations and obligations of each constituency that participates in that education. (Bd. Ex. 4, ¶¶ 3-4) Every PhD student receives a copy of the Core Expectations during orientation. (Bd. Ex. 4, ¶ 3) Two of the four core components of a graduate student’s education at Duke, as stated in the Core Expectations, are (i) training in teaching, and (ii) research. (Er. Ex. 16)

### **A. Teaching is an Integral Component of a Duke PhD Student’s Education**

At Duke -- as stipulated by the Union -- learning to teach and to evaluate student work is fundamental to the education of graduate students and their preparation for careers in teaching and scholarship. (Bd. Ex. 4, ¶ 4) Indeed, one of the four core components of graduate education at Duke, as emphasized in the Core Expectations, is “preparation for and experience in a variety of teaching roles.” (*Id.*; Er. Ex. 16; Tr. 1016) Teaching skills are stressed, for among other reasons, because they enable students to convey complex theories to a wide audience. (Tr. 169-70) This ability is transferrable not only to future positions in academia, but also to careers in industry, non-profit organizations, and elsewhere. (Tr. 170-71) It was stipulated that to fulfill this core component of PhD education and training, the opportunity to teach is offered to all doctoral students through Teaching Assistantships. (Bd. Ex. 4, ¶ 5)

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<sup>7</sup> The Graduate School’s Bulletin sets forth the formal requirements for earning a PhD, which include taking courses as determined by the student’s degree program, training in the Responsible Conduct of Research, passing preliminary and final examinations, and completing the dissertation. (Er. Ex. 5, p. 58)

i. *Teaching Assistantships Provide Valuable Teacher Training to Graduate Students*

As Dean McClain testified, teaching is a “learned skill” that must be developed.

(Tr. 169-70) Teaching Assistants assist with all aspects of teaching. As stated in the Core Expectations, this includes “course development, lecture preparation, classroom communication, examining and grading.” (Bd. Ex. 4, ¶ 4; Er. Ex. 16) They grade papers and examinations, conduct tutorials, hold office hours and review sessions, attend lectures, and lead discussion sections. (Tr. 211-13, 1039-43) Discharging these responsibilities as a Teaching Assistant is especially valuable for the many PhD students who seek future careers in higher education. And students, including the Union’s witnesses, recognize it as such. (Tr. 875, 879-80, 890-92, 896-900, 1023-26, 1033-34, 1044)

Although service as a Teaching Assistant or in some other instructional position is a critical component of a doctoral education, the Graduate School has imposed a 19.9 hours per week limitation on such activities to ensure a balance between teacher training on the one hand, and dissertation/coursework on the other. (Er. Ex. 5, 16) The Graduate School monitors and enforces this cap. (Er. Ex. 8, Tr. 154-56) In some cases, students spend significantly fewer than 19.9 hours (*i.e.*, 5-10 hours) per week fulfilling Teaching Assistant responsibilities. (Tr. 331, 862-63) Thus, although the skills developed as a Teaching Assistant are an integral part of a Duke graduate education, the time commitment is relatively small in comparison to the remainder of a student’s educational endeavors. (Tr. 188)

Through their experience as Teaching Assistants, PhD students are afforded opportunities to acquire knowledge in areas within their disciplines, but beyond the specific focus of their dissertation research. (Bd. Ex. 4, ¶ 10) This experience is invaluable when students enter the job

market, as most employers seek candidates who have demonstrated versatility as teachers, with a broad base of knowledge in and out of their chosen field. (*Id.*)

Students who teach in areas unrelated to the focus of their dissertations also expand their pool of potential employment opportunities, which is crucial in the current competitive academic job market. (Tr. 1025-26) Alyssa Granacki, for example, a student in Romance Studies whose dissertation is narrowly focused on representations of women in medieval Italian literature, acknowledged that her employment opportunities in that particular area might be limited. (*Id.*; Tr. 993) As such, she agreed that her teaching experiences in other areas would be valuable in expanding her career opportunities. (*Id.*) Additionally, teaching experience prepares PhD students for work outside academia, as the ability to convey complex information in a clear and effective manner is essential in most any professional endeavor. (Bd. Ex. 4, ¶ 10) Indeed, one Union witness readily agreed that teaching skills are “entirely transferrable to any industry I choose to go to.” (Tr. 733)

ii. *The Graduate School’s Teaching Programs*

PhD students are encouraged to participate in one or more teacher training programs offered by the Graduate School as an integral part of their academic experience. It is undisputed -- and indisputable -- that Duke administers some of the leading pedagogical skills programs in their breadth and scope. (Bd. Ex. 4, ¶ 11) Approximately 25 percent of Duke’s PhD students participate in these programs in any given semester. (Er. Ex. 32, 33; Tr. 128-29)

1. The Certificate in College Teaching Program

The Certificate in College Teaching (CCT) program is designed to provide PhD graduate students with a foundation for learning how to teach in a college or university setting. (Bd. Ex. 4, ¶ 11) Nearly 500 PhD graduate students, from across all four divisions of the Graduate

School, are enrolled in this program. (*Id.*; Er. Ex. 33) Indeed, demonstrating the centrality of pedagogical training to Duke's PhD program, *each* of the four students who testified on behalf of the Union had taken CCT-eligible courses. (Tr. 729-30, 773-74, 967, 1022)

To complete the CCT program, students must fulfill three requirements:

- Complete two courses in college teaching, which can be either general or specific to a particular discipline. More than 20 courses are offered by different departments on pedagogy unique to that discipline;
- Serve in a formal teaching role for at least one semester, and both observe and be observed by peers in the CCT program; and
- Complete an online teaching portfolio, designed to be used in a job search for a teaching position in higher education.

## 2. The Preparing Future Faculty Program

The Preparing Future Faculty (PFF) program provides an opportunity for PhD students to learn about faculty roles and responsibilities through regular interaction with faculty mentors at six partner institutions in North Carolina. (Bd. Ex. 4, ¶ 11) The PFF is designed to prepare graduate students for the variety of classroom environments that may be encountered. (*Id.*) Students are paired with a faculty member and shadow that professor for a semester while they teach and attend faculty meetings. (*Id.*) Participation in the PFF (or completing the CCT), is recorded on the student's transcript, along with coursework, grades, comprehensive examinations, and other academic achievements. (Bd. Ex. 4, ¶ 16)

## 3. The Bass Instructional Fellowships

The Bass Instructional Fellowships are competitive fellowships awarded each year to PhD students seeking to gain substantive pedagogical experience as: Bass Instructors of Record,

Bass Instructional Teaching Assistants, or Bass Online Apprentices. (Bd. Ex. 4, ¶ 11) Bass Instructors of Record design and teach their own course. (Bd. Ex. 4, ¶ 12) There are approximately 18 fellowships awarded in this category each year. (*Id.*) Bass Teaching Assistants are students seeking a degree in a department that has no undergraduates, and therefore limited teaching opportunities, who apply for a fellowship to be funded as a Teaching Assistant in another department. (Bd. Ex. 4, ¶ 13) A handful of these fellowships are awarded annually. (*Id.*) Bass Online Apprentices work with Duke’s Center for Instruction Technology in designing and producing Massive Online Open Courses (“MOOC’s”), which are free classes online that are open to the public. (Bd. Ex. 4, ¶ 14)

4. Other Graduate School Teacher Training Opportunities

The Graduate School offers a number of other programs on teaching and research to assist PhD students in their job search upon graduation. (Bd. Ex. 4, ¶ 15) For example, the Graduate School offers a Professional Development Series of workshops and panel discussions. (*Id.*) The Series alternates between academic and non-academic opportunities to ensure that students are presented with information on the full range of careers available to them. (*Id.*) Additionally, the Graduate School has a Professional Development Blog, where graduate students are encouraged to share their professional development experiences. (*Id.*) Finally, the Graduate School puts on a Teaching IDEAS Series of workshops, designed to assist PhD students in improving their teaching skills. (*Id.*) The series addresses topics relevant to classroom teaching, dealing with students, faculty life and career paths. (*Id.*)

iii. *Departmental Requirements for Training Graduate Students in Teaching*

Graduate departments must “provide a range of teaching opportunities relevant to likely career prospects” for students. (Bd. Ex. 4, ¶ 4; Er. Ex. 16) Although all departments at Duke are

governed by this mandate, each approaches the training of graduate student teachers in discipline-specific ways.

Of the 47 PhD-offering academic departments and programs at Duke, 41 treat service as a Teaching Assistant as integral to the degree program, and either strongly encourage or require teaching as part of a student's professional development. (Bd. Ex. 4, ¶ 7; Er. Ex. 17) In the six departments where teaching is neither required nor encouraged, all within Duke's Medical School, Teaching Assistantships generally are made available to PhD students who wish to gain teaching experience.<sup>8</sup> (Bd. Ex. 4, ¶ 7)

Many departments offer standalone courses that explore pedagogical techniques specific to certain disciplines, such as "Teaching College Mathematics," and "Theories and Techniques of Teaching Foreign Languages." (Er. Ex. 32) There are over 20 such courses offered across the 47 departments. (*Id.*) Some Graduate School academic departments have established guidelines as to which semesters PhD students are eligible to serve as Teaching Assistants, while others do not. (Bd. Ex. 4, ¶ 7) For example, to fulfill the Teaching Assistant requirement for a doctoral degree in Biochemistry, students must serve as a Teaching Assistant during their second year of study. (*Id.*) By contrast, in Biomedical Engineering, where PhD students must teach two semesters to meet academic requirements for graduation, the department does not specify when. (*Id.*) That is left to the student to decide.<sup>9</sup>

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<sup>8</sup> Ms. Granacki testified that in the Romance Studies Department, teaching is an academic requirement, explaining that it "is presented to us as an essential part of our program." (Tr. 1004, 1035-36) Similarly, teaching is an academic requirement in Religious Studies, although Joseph Longarino testified that he "believed" students could earn a PhD in his department without teaching. (Er. Ex. 17; Tr. 867-68) But, he was unable to name any student who had done so. (Tr. 867-68)

<sup>9</sup> Dr. Jack Bookman, Professor Emeritus in the Mathematics Department, testified (for the Union) that students in his department could complete their PhD degrees without serving as a Teaching Assistant under certain circumstances. (Tr. 989-90) In fact, teaching is an academic requirement in the Mathematics program. (Er. Ex. 17) The Department website states that teaching is "essential" to completion of the Mathematics degree. *See*

Because graduate students are not expected to be effective Teaching Assistants upon arrival at Duke, teaching opportunities are appropriately timed and sequenced. (Tr. 170-71) For example, in the Romance Studies Department, students are required to take a class on foreign language pedagogy (Romance Studies 700) prior to teaching. (Tr. 996, 1022) Students in the English Department must complete a “Teaching Apprentice” program during their first two years, in which they observe two undergraduate courses and meet weekly with the professors to discuss pedagogical issues. (Bd. Ex. 4, ¶ 6) For their third through fifth years, these students will serve either as a Teaching Assistant or Instructor-of-Record for a course. (*Id.*)

The Nursing School also has a highly structured teaching requirement for its PhD students. (Bd. Ex. 4, ¶ 9) By the end of the third year, students pursuing a PhD in Nursing must complete a Teaching Practicum for course credit. (*Id.*) The Teaching Practicum is an exercise designed to expose students to specific teaching methods, and to document their professional growth in their portfolio. (*Id.*)

In the Engineering School, PhD students are required to attend a teaching orientation before serving as a Teaching Assistant. (Bd. Ex. 4, ¶ 8) The orientation addresses communication technique, interaction with undergraduate students, conducting effective discussion sections, and how to grade assignments. (Er. Ex. 23; Tr. 326) Engineering students also are required to take a seminar on teaching concurrently with each of their Teaching Assistant appointments, which affords additional pedagogical instruction and a venue in which to discuss and improve upon their teaching experiences. (Tr. 326-27)

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<https://math.duke.edu/graduate/teaching-assistant-training>. Dr. Bookman went onto note, consistent with Duke’s approach to PhD education, that if a student were deemed “not capable of doing a good job teaching,” he or she may instead be assigned grading responsibilities for a course. (Tr. 989-90) Indeed, this adaptation of responsibilities is in line with the Mathematics Department’s stated approach to assist students who are having difficulty teaching, namely, that “a plan is designed to help that individual graduate student improve his or her teaching.” See <https://math.duke.edu/graduate/teaching-assistant-training>.

If a Teaching Assistant is performing poorly, their faculty adviser will intervene to provide training and other resources necessary to enable the student to become more effective. (Tr. 178-79) In the Engineering School, for example, a struggling Teaching Assistant may be encouraged to register for a remedial course in teaching, or to repeat their Teaching Assistant assignment. (Tr. 332-33) Students do not get “fired” for poor performance, and are very rarely removed from Teaching Assistant positions. (Tr. 179, 331-32)

iv. *Matching PhD Students to Teaching Assistant Assignments*

PhD students who are serving as Teaching Assistants in a given semester typically are matched with appropriate teaching opportunities at the department level. (Tr. 330) The matching process considers student preference. (Tr. 330-31, 731, 741-42, 860-61) A majority of the PhD students assist with courses in the same department in which they are seeking their degree. (Bd. Ex. 4, ¶ 10) It is stipulated that Duke, unlike Columbia, does not have an undergraduate “core curriculum” program requiring PhD students to teach outside their area of interest or a closely related field of study. (*Id.*) As a result, students may (and do) choose to assist with courses that are directly relevant to their dissertations. For example, Mr. Longarino testified that “Paul’s Letter to the Romans” was a foundational text for his dissertation and thus influenced his decision to accept a Teaching Assistant appointment in a course entitled “Paul: His Life in Letters.” (Tr. 852, 860-61) Likewise, Ms. Granacki stated that she accepted a Teaching Assistant appointment in a course entitled “Dante’s Divine Comedy,” which was directly related to her PhD studies.<sup>10</sup> (Tr. 1032-34) When students teach outside their department, it is generally because they have asked to do so to further their own academic

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<sup>10</sup> Ms. Granacki also testified that Romance Studies PhD students “have the option to propose a course and teach it based on [their] own research,” and that she plans to do so. (Tr. 1046-48)

interests, such as a PhD student in the Biology Department opting for a relevant teaching opportunity in Evolutionary Anthropology. (Bd. Ex. 4, ¶ 10)

In departments where the number of PhD students with teaching requirements exceeds the available teaching opportunities, the Graduate School and the department make every effort to create a Teaching Assistant position, even if not justified by course enrollment. (Bd. Ex. 4, ¶ 18) In some departments and programs, where there is no undergraduate enrollment, PhD students must meet their teaching requirement by serving as Teaching Assistants in graduate-level courses. (*Id.*) In those situations when an appropriate teaching opportunity cannot be identified, a student may be assigned to assist a professor in developing a new course or to some other activity enhancing the student's educational development. (Tr. 195-96)

**B. Research is Also an Integral Component of the Completion of a PhD Degree**

Like teaching, research is another critical component of earning a PhD at Duke. (Bd. Ex. 4, ¶ 17) As explained in the Core Expectations, Duke is committed to ensuring that each graduate student engages in “development of an individual research agenda.” (*Id.*) Graduate students at Duke are expected to “learn the research methods, ethical dimensions, and historical knowledge bases of the discipline ... [and] [t]o discover and pursue a unique topic of research in order to participate in the construction of new knowledge in the chosen field and application of that knowledge to new problems/issues.” (*Id.*) Through Research Assistantships and a centrally administered research training program, Duke enables PhD students to achieve that expectation.

i. *PhD Student Research Assistantship Assignments*

Research Assistants are paired with a faculty advisor who guides and assists them in navigating various research projects. (Tr. 192-93, 259-65) As stipulated by the Union, for many PhD students serving as Research Assistants, their dissertations are inextricably intertwined with

the research for their faculty advisor. (Bd. Ex. 4, ¶ 20; Tr. 699, 703, 753) Students serving as Research Assistants on research related to their dissertations are not subject to any weekly hours limitation on that research; in fact, their hours are not tracked at all. (Tr. 192-93, 554, 712)

Among other things, Research Assistants in the Humanities and Social Sciences engage in research projects and write papers with faculty advisors, who often also serve as their dissertation advisors.<sup>11</sup> (Tr. 263, 805, 813-14, 825-27) These projects train students in methods of scholarly research, *e.g.*, conducting literature reviews, researching primary texts, creating indices for published works, *etc.*, under a professor's guidance. (Tr. 814-16, 830, 832-35) All this prepares a student to do the same for their own dissertation. (*Id.*) Often, the research conducted by a Research Assistant will become part of a published paper on which the student will be credited as a co-author. (Tr. 263) Each Research Assistant's project is calibrated to benefit the student's intellectual growth, and assist the student in building a theoretical foundation for his or her PhD dissertation research. (Tr. 280, 496, 816)

Many students appointed as Research Assistants are enrolled in the Engineering and Medical Sciences. (Bd. Ex. 4, ¶¶ 18, 20-22) In the Engineering School, PhD students are admitted to work with a particular faculty member selected upon admission by the prospective student. (Bd. Ex. 4, ¶ 20; Tr. 696-97) For their entire course of study, these students learn research skills and techniques in that faculty member's laboratory. (Bd. Ex. 4, ¶ 20; Tr. 311) They are given assignments to help develop their laboratory skills, before choosing a dissertation topic closely related to their research in the lab. (*Id.*) From that point on, the vast majority of their time spent in the laboratory is dedicated to their dissertation research. (Tr. 713-14) The overlap between laboratory research and dissertation research is often complete. In fact, one

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<sup>11</sup> The terminology used to refer to graduate students in these roles varies; sometimes they are designated as "Graduate Assistants," or "Research Apprentices." (Bd. Ex. 4, ¶ 18; Tr. 266)

student testified that her work as a Research Assistant and her dissertation work were “kind of the same thing.” (Tr. 753) She acknowledged on cross-examination that fully 85% of the time she spends in the lab is dissertation research, with much of the remainder spent on cleaning up after her experiments. (Tr. 681, 705-07) It is also worth noting that she owns part of a patent and submitted an abstract at a professional conference (*i.e.*, a summary of her research data) based on her dissertation-related research in the laboratory. (Tr. 693-94, 722-26)

Because the research is academic training, a student’s performance in the lab is never a basis for dismissing them from the academic program. (Tr. 361) If for some reason either the student or the faculty advisor wishes to terminate the relationship, the Director of Graduate Studies for the student’s department is expected to mediate and, if necessary, broker a new match between the student and another professor. (Tr. 313-14)

Similarly, PhD students in the Medical School engage in laboratory research directly related to the grant of their faculty advisor. (Bd. Ex. 4, ¶ 21) During their first two years, students in the Medical School rotate between laboratories at six to eight week intervals, conducting various experiments. (*Id.*) At the end of their second year, each PhD student is expected to affiliate with a laboratory where they will spend the next three to five years researching their dissertation, with mentoring from the principal investigator (“PI”) for that laboratory. (*Id.*) The student and PI collaboratively determine the research direction that most aligns with the student’s interests. (Tr. 540) The student’s research in the lab and their dissertation research is “one and the same.” (Tr. 551) The overall goal of the research training is for the student to gain the independence necessary to direct a research project on their own. (Tr. 545) To that end, professors give students great latitude to design and execute their own experiments. (Tr. 573)

ii. *Research Training Administered by the Graduate School*

Duke takes seriously its obligation to train all PhD students in ethical research practices. (Bd. Ex. 4, ¶ 19) Every PhD student is required to complete a six-hour Responsible Conduct in Research (“RCR”) orientation, and to complete six to twelve additional hours of RCR training during their first four years of study. (*Id.*; Er. Ex. 19) The requirement can be met by attending RCR Forums, *i.e.*, two-hour workshops, offered each semester, on a wide range of topics. (Bd. Ex. 4, ¶ 19) This hands-on ethical research training is evidence of Duke’s commitment to training its students as ethical researchers, and is unique among Duke’s peer institutions. (Tr. 191)

**III. Financial Support for PhD Students at Duke**

**A. Financial Aid at Duke**

Full-time doctoral students pay no tuition or fees through at least the first five years of study. (Bd. Ex. 4, ¶ 1) They also receive a guaranteed stipend for five years and free coverage under the Student Medical Insurance Plan (“SMIP”) for six years. (*Id.*; Er. Ex. 6; Tr. 144-45) In some schools and departments, financial support may continue through the sixth year and beyond. (Tr. 319) The amount of the yearly stipend is set by the Graduate School and is uniform for all PhD students, except for minor variations between programs. (Bd. Ex. 4, ¶ 1; Er. Ex. 7; Tr. 150-51) Each doctoral student within a given program is offered the same base stipend upon admission. (Bd. Ex. 4, ¶ 5)

Although a portion of each graduate student’s stipend may be allocated to different funding sources, such as a Teaching Assistantship, Research Assistantship, Graduate Assistantship or fellowship, the overall stipend corresponds to the amount established by the Graduate School. (Bd. Ex. 4, ¶ 1; Er. Ex. 7) Stipend amounts do not change from one semester

to the next, even though the funding sources may vary as a result of internal accounting entries by the Graduate School that are neither visible nor meaningful to the student. (Tr. 147-49)

Teaching and Research Assistantships are included in financial aid packages for students, and are considered part of those students' academic program. (Bd. Ex. 4, ¶ 5) The portion of a student's stipend allocated to a Teaching or Research Assistantship is neither lost nor reduced because of poor performance as a Teaching or Research Assistant. (Tr. 179) Funding for all Assistantships comes from the Graduate School budget, not out of the funds from which University employees are compensated. (Bd. Ex. 4, ¶ 5)

The amount of a student's stipend is not affected by whether the student is serving as a Teaching or Research Assistant. (Tr. 630-31) Nor is the amount affected by the number of hours spent in service as a Teaching or Research Assistant. (Tr. 149, 312, 727-28) Students receive the same stipend amount from year to year, across the Graduate School, subject to cost of living adjustments, even though in many departments the teaching or research expectations/requirements may increase or decrease from one year to the next. (Bd. Ex. 4, ¶ 6) In the Medical School, for example, although students are not engaged in research for their first two years of study, and from years three to five are expected to conduct laboratory research, they receive the same pre-determined stipend each year, without regard to the number of hours spent in the lab. (Bd. Ex. 4, ¶ 21) Sometimes -- in the Engineering School, for example -- a student may be expected to serve simultaneously as a Teaching and Research Assistant. (Bd. Ex. 4, ¶ 8) Even when serving in both positions at the same time, there is no effect on the stipend amount. (*Id.*; Tr. 632, 728) And, during an academic year when a student is not expected to teach, their stipend continues nevertheless at the same level. (Tr. 1045) There is no relationship between stipend amount and instructional or research services performed.

When a PhD student is expected by their department or program to serve as a Teaching or Research Assistant but is unable to do so, the Graduate School's policy is that the student still must receive their full stipend for that semester. (Tr. 149) Reduction of funding is not permitted. (Tr. 633) In the rare instance when it has come to the Graduate School's attention that a department attempted to reduce a stipend because the student was unable to serve as a Teaching Assistant, the Graduate School has required the department to fund the student anyway.<sup>12</sup> (Tr. 150)

If a Research Assistant is funded by a research grant and the grant is either not renewed or lost, the Graduate School has a "backstop policy" under which the student still receives funding, from either the department or the Graduate School itself. (Er. Ex. 20; Tr. 194-95, 558-59) In the Engineering School, if a student discontinues service as a Research Assistant for his/her faculty advisor and is no longer funded, the department will assume responsibility for funding tuition and stipend until another faculty advisor can be found. (Tr. 314)

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<sup>12</sup> The Graduate School will allow a department to reduce a student's stipend if they choose to put their PhD studies on pause. For example, Dean McClain testified that in one instance, a student who had not passed their qualifying exam and chose to spend a semester in activities unrelated to their PhD work had their stipend reduced. (Tr. 394-95)

Additionally, Scott Muir, a student in Religious Studies, testified that his stipend was reduced by the department for two semesters because he chose not to serve as a Teaching Assistant. (Tr. 927-28, 932-33, 935) However, for one of those semesters, Mr. Muir taught as an adjunct faculty member at Western Carolina University, in lieu of serving as a Teaching Assistant, and was compensated by Western Carolina University for that position. (Tr. 933-34) In the other semester, Mr. Muir opted out of teaching to devote his attention to studying for exams. (Tr. 927-28) However, he did not bring the reduction of his stipend to the attention of the Graduate School. (Tr. 961-63) Had he done so, the Graduate School's policy that a student's stipend may not be reduced under those circumstances would have been enforced and the department would have been directed to restore his stipend to the full amount. (Tr. 382)

The Union introduced a letter from the Religious Studies Department to Mr. Longarino advising that he was expected to be available to teach to receive his full stipend. (Pet. Ex. 21) However, contrary to the letter, Mr. Longarino conceded that students may choose not to teach in a given year without impacting their stipend. (Tr. 766, 803-04, 829, 838-39) In fact, he recalled a fellow Religious Studies student who elected not to teach, with no reduction to her stipend. (Tr. 846) Once again, it is the Graduate School's policy not to permit departments or programs to reduce a student's funding. (Tr. 633)

Additionally, although many Research Assistants are funded by external research grants that are awarded to advance certain areas of science, a research grant is not a contract under which a PI and their Research Assistants are required to perform strictly in accordance with the terms of the grant in exchange for funding. (Tr. 548) Often, new avenues of research will open up as a result of the student's experiments, causing the research to veer away from the grant's original purpose. (*Id.*)

A significant number of graduate students also receive financial aid during the summer. (Tr. 151-53) Research Assistants in the Engineering School and in the Medical School are funded year-round by their faculty advisors' research grants. Their academic work continues during the summer. (Bd. Ex. 4, ¶ 22) For students who have no other summer support, the Graduate School offers summer research fellowships of \$5500 following their first and second academic years of study. The student need only provide a brief proposal outlining how the summer funding will be used to advance the student's educational pursuits. (Bd. Ex. 4, ¶ 22; Er. Ex. 5) In addition, the Graduate School has 43 endowment accounts that fund an additional 150 students without summer support in the third year and beyond. (*Id.*) The purpose of these grants is to allow students the freedom to engage in coursework and research related to their course of study so that they are not forced to engage in outside employment to support themselves. (Tr. 151-53)

#### **B. Benefits for PhD Students at Duke**

Doctoral students' benefits differ significantly from benefits provided to Duke employees. (Bd. Ex. 4, ¶ 2) In addition to the SMIP, premiums for which are paid in full by the Graduate School through the sixth year, students are eligible for the following benefits, among

others, whether or not they are serving as a Research or Teaching Assistant in any particular semester:

- A Child Care Subsidy of up to \$5,000 per year to help defray childcare costs, and seven weeks of paid parental leave (*Id.*; Er. Ex. 14);
- A Medical Assistance Program, which provides PhD students with up to \$5,000 -- and sometimes more, depending on the circumstances -- for medical expenses not covered by SMIP (Bd. Ex. 4, ¶ 2; Er. Ex. 15); and
- Short term loans of up to \$2500 at competitive interest rates offered through a program negotiated between the Graduate School and the Duke Credit Union, and emergency loans of up to \$1,000 from an endowment earmarked specifically for loans to Graduate Students. (Bd. Ex. 4, ¶ 2; Er. Ex. 13)

These benefits are provided through the Graduate School, not Duke’s Human Resources and Benefits Departments, which administer benefits for the University’s employees. (Bd. Ex. 4, ¶ 2) In the aggregate, the value of the tuition, stipend, and benefits provided to PhD students through five years of study is approximately \$350,000. (Bd. Ex. 4, ¶ 1)

## **ARGUMENT**

### **I. Duke Teaching and Research Assistants Are Not Employees Under the *Columbia* Common Law Agency Test**

In *Columbia*, the Board applied the “common law agency doctrine” in reaching its erroneous conclusion that the student assistants in that case were “employees” under Section 2(3) of the Act. *Columbia University*, 364 NLRB No. 90, slip op. at 4. The common law test “generally requires that the employer have the right to control the employee’s work, and that the

work be performed in exchange for compensation.” *Id.* at 15. On that basis, the Board held in *Columbia* that student assistants were statutory employees because they performed teaching and research services directed by the university in exchange for compensation.

In doing so, the NLRB rejected the standard established decades before in *Adelphi University*, 195 NLRB 639 (1972), *Leland Stanford Junior University*, 214 NLRB 621 (1974), and later refined in *Brown University*, 342 NLRB 483 (2004), which turned on whether graduate assistants are “primarily students and have a primarily educational, not economic, relationship with their university.” *Brown University*, 342 NLRB at 487. Although the Board purported to apply the common law test in *Columbia*, the decision actually rested on what it considered the “salient economic character” of the relationship between the student assistants and the university. 364 NLRB No. 90, slip op. at 16.

The NLRB’s holding in *Columbia* was specific to the facts at that institution. As it said, “[w]e do not hold that the Board is required to find workers to be statutory employees whenever they are common-law employees, *but only that the Board may and should find here that student assistants are statutory employees.*” *Id.* at 4 (emphasis added). In other words, the Board did not purport to make a finding controlling at *all* private universities across the country, where the facts may be distinguishable from *Columbia*. Thus, the holding is limited to the facts of that case.

The facts at Duke are decidedly different.<sup>13</sup> Unlike as was found in *Columbia*, the record here shows that there is no “salient economic character” to the relationship between Teaching Assistants and Duke; the relationship is not driven by the educational requirements of the

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<sup>13</sup> Although Duke can establish that its facts are sufficiently distinguishable from *Columbia*, the University disagrees with the Board’s holding in *Columbia* for the reasons stated in Section I.C., below (*see* pp. 38-43). The Board’s holding in *Columbia* represents an unwarranted departure from decades of firmly established Board law and has not yet withstood the test of judicial review.

undergraduate student body; Teaching and Research Assistants are not subject to the University's direction and control; and, there is no exchange of services for compensation. Therefore, the petition must be dismissed as the students whom SEIU seeks to represent are not employees as defined in the Act.

**A. Teaching Assistants at Duke Are Not Employees Under the *Columbia* Test**

- i. *Unlike in Columbia, Teaching Opportunities at Duke Are Part of the Academic Curriculum and Accompanied by Appropriate Academic Training Opportunities*

Although the *Columbia* Board reversed *Brown* and thus found it “unnecessary to delve into the question of whether the relationship between student assistants and their universities is primarily economic or educational” -- the standard properly applied in *Brown* -- the Board nevertheless engaged in a lengthy analysis of that issue. *See* 364 NLRB No. 90, slip op. at 15-16.

In *Columbia*, the Board found that teaching assistants were “thrust wholesale into many of the core duties of teaching,” suggesting that the purpose of students serving as teaching assistants “extend[ed] beyond the mere desire to help inculcate teaching skills,” and underscored the “salient economic character” of the student assistants’ relationship to the university. *Id.* at 16. Relying on the “salient economic character” of the student-university relationship that was found in *Columbia*, the Board held that the students in the petitioned-for unit were employees. At Duke, however, there is no “salient economic character” to the relationship between Teaching Assistants and the University. Far from being “thrust wholesale” into instructional duties, Duke Teaching Assistants typically receive training provided by both their department and the Graduate School in advance of and while serving as Teaching Assistants, reinforcing the academic nature of pedagogy.

For example, and as stipulated by the Union, PhD students in the Pratt School of Engineering are required to attend a teaching orientation before they become Teaching Assistants. (Bd. Ex. 4, ¶ 8) They also must take a course on teaching concurrent with their first Teaching Assistant assignment. (Tr. 326-27) There are examples of this sequential, academic approach to teaching in other departments as well. In the Nursing School, students must complete a “teaching practicum” for course credit, which is “a mentored teaching experience for students to gain experience in university teaching in nursing; to learn specific teaching methods; and to document their teaching and professional growth in their portfolio.” (Bd. Ex. 4, ¶ 9) And, in the English Department students serve as “Teaching Apprentices” before they become Teaching Assistants. (Bd. Ex. 4, ¶ 6) As Teaching Apprentices, they observe two undergraduate courses and meet weekly with the instructors to discuss pedagogical issues. (Bd. Ex. 4, ¶ 6; Er. Ex. 27) Thus, in contrast to the instructional fellows in *Columbia*, most Duke PhD students must participate in training programs before and/or while they will serve as Teaching Assistants.

Duke places an extraordinary emphasis on training that assists students in developing their pedagogical skills. Duke’s Certificate in College Teaching, the Preparing Future Faculty Program, and the Bass Instructional Fellowships are Graduate School programs designed to help students hone their teaching skills.<sup>14</sup> (Bd. Ex. 4, ¶¶ 11-16) The Union stipulated that these programs are “leading” among Duke’s peer institutions in their breadth and scope. (Bd. Ex. 4, ¶ 11) Many of the departments in the Graduate School also offer courses that train students on academic discipline-specific pedagogical techniques. (Er. Ex. 32) For example, in the Romance Studies Department, students are required to take a course on foreign language pedagogy. (Tr.

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<sup>14</sup> With respect to the Certificate in College Teaching alone, approximately 500 PhD students voluntarily enroll without receiving any compensation in exchange. (Bd. Ex. 4, ¶ 11)

1022) There are over 20 such courses offered by the departments. (Er. Ex. 32) The training and teaching associated with these programs and courses are strictly educational. Duke trains Teaching Assistants to enhance their abilities and to provide valuable experience. (Tr. 178-79) This involves a considerable expenditure of resources for which Duke receives no financial return or other tangible benefit. (See Bd. Ex. 4, ¶¶ 11-16)

Duke's unparalleled emphasis on training and development of pedagogical skills, coupled with the various departmental requirements for sequenced teaching opportunities, contrasts sharply with the "salient economic character" of the relationship between instructional fellow and university that was the basis for the Board's decision in *Columbia*. There is no evidence here to support any finding that Duke's Graduate Assistants have an economic relationship to the University. Indeed, the proof shows that the relationship is purely educational.

- ii. *Teaching Opportunities at Duke Are Not in Service of Undergraduate Course Requirements or Enrollment, as Duke Students Invariably Teach Courses that Are Related to Their Course of Study*

In further support of the "salient economic character" of the relationship between teaching assistants and the university found by the Board in *Columbia*, the Board noted that some students taught components of "the core curriculum, which is Columbia's signature course requirement for all undergraduate students regardless of major." *Columbia*, 364 NLRB No. 90, slip op. at 14. As stipulated here, Duke has no core curriculum for undergraduate students. (Bd. Ex. 4, ¶ 10) Thus, unlike in *Columbia*, there is no need for the University to assemble a cadre of graduate students available to teach broad survey courses to undergraduates. To the contrary, and again as the Union stipulated, at Duke virtually all teaching assignments that PhD students will handle in the course of their studies will be within their department or program, *i.e.*, within his or her area of study. (*Id.*) For example, Ms. Granacki and Mr. Longarino conceded, during

their appearances on behalf of the Union, that they served as Teaching Assistants in courses directly related to their PhD studies. (Tr. 852, 860-61, 1032-34) In the instances when a student teaches outside his or her department, it is at the choice of the student, not at the instigation of the University. (Bd. Ex. 4, ¶ 10)

Additionally, the record establishes that some PhD students, particularly in the Medical School, receive teaching appointments to graduate level courses because there is no undergraduate enrollment. (Bd. Ex. 4, ¶ 18)

In contrast to *Columbia*, where the Board relied heavily on the fact that teaching opportunities for graduate students were geared toward fulfillment of the university's instructional needs for the undergraduate student body, teaching opportunities for PhD students at Duke are designed to train PhD students how to teach, in furtherance of their educational and future career objectives.

iii. *Teaching Assistants Are Not Removed From Their Positions, Even if They Are Struggling or Inadequate; Therefore, They Are Not Under the University's "Control"*

A materially different relationship exists between Duke faculty and Teaching Assistants than was found to exist in *Columbia*. In *Columbia*, the Board found that the university maintained "control" over the work of teaching assistants based on evidence "that teaching assistants who do not adequately perform their duties to the University's satisfaction are subject to corrective counseling or removal." 364 NLRB No. 90, slip op. at 15.

Dean McClain and Dr. Adam Wax, Professor and Director of Graduate Studies of Biomedical Engineering, testified that although poorly performing Teaching Assistants at Duke may be given remedial assignments or coursework to improve their teaching skills, *they are not subject to removal from their positions*. (Tr. 179, 331-33) Dr. Wax testified about a recent

situation involving a student who received unsatisfactory ratings on his teaching. Dr. Wax could have asked the student to teach the course again; instead he had the student attend a seminar to work on his teaching skills. (Tr. 332-33) As the purpose of serving as a Teaching Assistant is for students to learn how to teach, removing a struggling Teaching Assistant from teaching would disserve that objective.

The undisputed fact that Duke Teaching Assistants are not subject to removal even when they may discharge their responsibilities ineffectively, demonstrates that Duke does not exercise “control” over Teaching Assistants in the manner contemplated by the *Columbia* Board’s common law test. No contrary evidence was -- or could be -- introduced by the Union.

- iv. *Unlike in Columbia, PhD Students at Duke Receive Their Full Stipends Even When They Cannot Serve as a Teaching Assistant and, Therefore, Are Not Exchanging Services for Compensation*

The Board in *Columbia* held that the instructional fellows in that case received compensation in exchange for “instructional services.” In reaching that conclusion the Board relied on the fact that “[r]eceipt of a full financial award is conditioned upon their performance of teaching duties,” and that “[w]hen they do not perform their assigned instructional duties, the record indicates they will not be paid.” 364 NLRB No. 90, slip op. at 15. The Board found that this “explicit conditioning of awards on performance of teaching duties, demonstrates that the University offers student assistants stipends as consideration for fulfilling their duties to perform instructional services on the University’s behalf.” *Id.* This is not so at Duke.

The Graduate School does not permit departments or programs to reduce a PhD’s funding if the student fails to perform expected Teaching Assistant duties. (Tr. 633) Dean McClain testified that there are many instances in which students may, for a variety of personal and other reasons, be unable to complete their Teaching Assistantship, yet will nevertheless retain their full

stipend based on Duke's commitment to fully funding PhD students for at least their first five years of study. (Tr. 144-45; *see also* Bd. Ex. 4, ¶ 1) Dean McClain gave a specific example of a student who was expected to serve as a Teaching Assistant but could not do so for personal reasons. (Tr. 149-50; 633-34) The department attempted to withhold the Teaching Assistant portion of the student's stipend, but the Graduate School required the department to continue his funding unreduced.<sup>15</sup> (Tr. 149-50)

The record also establishes that in the Engineering School there is *no* connection between a student's funding and Teaching Assistant responsibilities. As stipulated, each student is required to be a Teaching Assistant for two semesters, though they are funded by research grants that are unrelated to their teaching obligations. (Bd. Ex. 4, ¶ 8)

Because Duke students receive their full stipends even when they cannot fulfill their instructional duties as expected, it cannot be said that they are receiving compensation in exchange for services as required by the common law test articulated in *Columbia*.<sup>16</sup>

For all these reasons, the Board cannot find that Duke's Teaching Assistants are employees as defined in the Act.

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<sup>15</sup> As discussed in greater detail, *supra* note 12, the Graduate School will allow a department to reduce a student's stipend for failure to teach only in rare circumstances.

<sup>16</sup> The Graduate School and departments occasionally use terms like "work" or "service" to describe tasks performed by Teaching Assistants or Research Assistants, but Dean McClain explained that these terms are "imperfect administrative shorthand." (Tr. 257-58, 270) They have no legal significance here, nor does the fact that the IRS taxes student stipends. The IRS collects taxes from many individuals who are not "employees" under the Act, *e.g.*, independent contractors. *See* <https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-defined>. The use of such terminology has no bearing on the relationship between the students and the University. Likewise, the common law test applied by the Board in *Columbia* -- whether an individual receives compensation in exchange for services -- does not require inquiry into the terminology used by the purported employer.

**B. Research Assistants at Duke Are Not Employees Under the *Columbia* Test**

i. *Research Assistants Are Not Subject to the University's Control Because They Choose Their Own Areas of Research*

The Board in *Columbia* found that the university exercised the requisite control over research assistants to render them statutory employees because, although funded under the terms of a research grant, the research assistants were not “permitted to simply pursue their educational goals at their own discretion ... subject only to the general requirement that they make academic progress.” 364 NLRB No. 90, slip op. at 18. At Duke, however, from the moment a PhD student steps onto campus, their activities as a Research Assistant and their academic progress towards their degree are completely aligned.

As Dr. Wax testified, and as stipulated by the Union, students in the Engineering School choose to work with a specific professor prior to admission to Duke, generally picking a professor in charge of a lab that is investigating an area in which the student has strong interest. (Bd. Ex. 4, ¶ 20; Tr. 700) The students’ dissertations will be based on research conducted under the mentorship of that professor. (Bd. Ex. 4, ¶ 20) Although the topics that these students research generally fall within the scope of the professor’s grant -- because the students choose to research similar areas -- the grant does not limit the students’ ability to “pursue their educational goals at their own discretion.” *See Columbia*, 364 NLRB No. 90, slip op. at 18. Rather, that discretion is exercised by the student at the time they select their laboratory. Indeed, Jacqueline Robinson-Hamm, a PhD student in Biomedical Engineering and the Union’s first witness, testified that she applied to a specific professor because his work was congruent with the studies

that she intended to pursue. (Tr. 700) She added that had she not been accepted to research in that lab, she would not even have enrolled at Duke.<sup>17</sup> (Tr. 696, 700)

After selecting a laboratory, students then choose a dissertation topic related to their laboratory research. (Bd. Ex. 4 ¶ 20) Ms. Robinson-Hamm acknowledged that her dissertation research and the research she performs as a Research Assistant are “kind of the same thing.” (Tr. 753) She conceded that 85% of the time she spends in the lab is dissertation-related, and much of the remainder is spent cleaning up after dissertation-related experiments.<sup>18</sup> (Tr. 681, 705-07) Similarly, the Union stipulated that for many PhD students serving as Research Assistants, their dissertations are “inextricably intertwined” with their research performed as a Research Assistant. (Bd. Ex. 4, ¶ 20) Even the *Columbia* Board would have to agree that students performing dissertation research cannot, by reason of that fact alone, be considered statutory employees. Because Research Assistants control the research they perform, they are not employees under the *Columbia* common law test.

- ii. *Duke Research Assistants Do Not Perform Services for Compensation Because They Do Not Perform “Defined Tasks” as a Condition of Grant Aid*

In *Columbia*, the Board found that research assistants were sufficiently subject to the University’s direction and control to meet the common law definition of “employee” because students had to “fulfill[] the duties defined in the grant” and, therefore, “performance of defined

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<sup>17</sup> The Medical School operates in a similar manner. Although students do not select a professor at the time of Duke admission, following a rotation through laboratories during their first two years, they will affiliate with a specific laboratory in their area of interest. (Bd. Ex. 4, ¶ 21) As in Engineering, students choose their research topic by selecting a laboratory in which to work.

<sup>18</sup> Not only do PhD students use their research as Research Assistants as the basis for their dissertations, those students parlay that research to advance their career opportunities in other ways. For example, Ms. Robinson-Hamm testified that she shares ownership in a patent that stemmed from her laboratory research. (Tr. 693-94, 724-26) She also submitted an abstract at a conference which resulted directly from her research studies. (Tr. 693-94, 722-25)

tasks [was] a condition of the grant aid.” *Columbia*, 364 NLRB No. 90, slip op. at 18. This narrow concept of a research grant is not supported by the facts at Duke.

Duke students studying on research grants are encouraged to explore and design their own experiments. Indeed, Dr. Wax testified that even when a student suggests an experiment that he knows will fail, he allows them to proceed as a learning experience. (Tr. 348-49) Because grants are intended to fund research advancing a particular field of study, allowing a student to move ahead with a self-designed, albeit flawed, experiment as an educational exercise, demonstrates that Duke does not condition funding on the performance of defined research tasks. Dr. Wax added that students “don’t necessarily have to do exactly what’s written in the grant.” (*Id.*)

Similarly, Dr. Chris Nicchitta, Professor of Cellular Biology and Associate Dean of Research Training, testified that a grant is not a “contract.” (Tr. 548) A student’s ideas or suggestions may well lead to a promising new area of study, beyond the purposes of the grant. That Duke Research Assistants are not restricted to performing research tasks dictated by the grant that funds their studies distinguishes them from the research assistants in *Columbia*, who performed services “as a condition of the grant aid.” *See* 364 NLRB No. 90, slip op. at 18.

- iii. *Duke Research Assistants Are Not Exchanging Services for Compensation Because They Are Guaranteed Funding Even if They Cease to Be Funded by Their Research Grant*

The parties stipulated that Duke PhD students are guaranteed funding through the first five years of study. (Bd. Ex. 4 ¶ 1) Even if a Research Assistant leaves a research lab, the student’s full funding continues. As Drs. Wax and Nicchitta both testified, in their respective schools if a relationship between a student and professor is not working out, and either the professor asks the student to leave the lab or the student chooses to do so, full funding is still

guaranteed by the department. (Tr. 335-37, 549, 557-58, 564, 577-79) Dr. Wax cited a very recent situation involving a PhD student who was not working well with his faculty advisor. (Tr. 335-37) Dr. Wax informed the student that he could switch labs and still receive financial support while transitioning, even though not performing any services in the interim period. (*Id.*) So long as that student progresses towards her degree, she will continue to receive funding indefinitely, despite not being funded by a specific research grant.<sup>19</sup> (Er. Ex. 20; Tr. 194-95, 558-59) Dr. Nicchitta testified that when a student is disaffiliated from a lab, the Medical School still funds the student, and “[t]he funding [source] is secondary to their intellectual pursuit.” (Tr. 577-79)

Similarly, even when a research grant is not renewed by the funder (*e.g.*, the National Institute of Health (NIH), *etc.*) the student supported by that grant will continue to receive funding by either the department or the Graduate School, pursuant to the Graduate School’s backstop agreement. (Tr. 336-38) Dr. Wax cited another recent example where the department supported a student’s stipend and tuition when the faculty advisor lost the grant that had supported the student’s studies.<sup>20</sup> (*Id.*)

The record firmly establishes that at Duke receipt of a full financial award is *not* conditioned upon a student’s performance of specific research duties. Unlike in *Columbia*, full

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<sup>19</sup> As with Teaching Assistants, Research Assistants are not subject to removal for poor performance. (Tr. 271-72) For example, Dean McClain stated that “there are all different situations where a student is not able to carry out her service requirement [and] that does not result in the student being dismissed from a program.” (*Id.*)

<sup>20</sup> Like Teaching Assistants, Research Assistants’ relationship to the University does not have an “economic character,” as the Research Assistant position is created specifically for the benefit of the student, not the University. (Tr. 278-80) Dean McClain testified that Research Assistants “work[] with faculty to benefit their intellectual growth.” (Tr. 279) She added that although Research Assistants provide some benefit to their faculty advisors, “[e]verything I do with my research assistants is done to benefit them in their intellectual development as well.” (Tr. 280)

funding is available even for students whose research is not specifically dictated by a grant that was the basis for their admission.

Accordingly, Research Assistants at Duke do not meet the common law test of employee status.<sup>21</sup>

**C. The *Columbia* Test of Employee Status is Erroneous and Must Be Revisited**

The University maintains not only that its Graduate Assistants are distinguishable from their counterparts in *Columbia*, but also that the Board's decision in that case was clearly erroneous and must be reconsidered. Among other fatal flaws, the Board disregarded the fundamentally educational nature of the relationship between students and the university. For decades, those considerations had driven the Board to exclude graduate research and teaching assistants from the Act's coverage. In *Columbia*, the Board failed to identify any significant changed circumstance warranting reversal of that position. The decision is an aberration that furthers no legitimate purpose of national labor policy, while at the same time threatening serious harm to graduate education at private colleges and universities across the United States.

Although Duke recognizes that the Regional Director may be bound to follow *Columbia* in this case until that decision is overruled by the Board, the University preserves its right to

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<sup>21</sup> Even if the Regional Director determines against all the evidence that any Teaching Assistants and Research Assistants are "employees" under the common law test applied in *Columbia*, the PhD students seeking degrees in the Carolina-Duke Graduate Program in German Studies must be excluded from the unit. This is a joint program of Duke and the University of North Carolina at Chapel Hill ("UNC"), a public institution. The degrees granted in the German Studies program are conferred by both UNC and Duke. (Tr. 1057) Because these students participate in publicly-funded programs, the Board cannot assert jurisdiction over them. *Northwestern University*, 362 NLRB No. 167, slip op. at 5 (2015). Indeed, collective bargaining in the public sector is illegal in North Carolina. N.C. Gen. Stat. Ann. § 95–98 (declaring public sector collective bargaining illegal and unlawful). Additionally, because these students alone attend classes and potentially serve as student assistants at another university, they fail to share a community of interest with all other students in the petitioned-for bargaining unit. *See U.S. Postal Service*, 200 NLRB 1143 (1972). Therefore, they must be excluded.

argue on appeal here and in any related proceedings that *Columbia* was wrongly decided. In furtherance of that objective, Duke emphasizes the following for the record.

The Board historically has recognized that imposing collective bargaining on an educational relationship would be both unwarranted and inappropriate. More than 40 years ago, in *Adelphi University*, 195 NLRB 639, 640 (1972), the Board held that graduate students serving as teaching and research assistants were “primarily students” because they were “working toward their own advanced academic degree.” *Id.* As such, they were excluded from a bargaining unit of university faculty. The Board observed that unlike the largely autonomous work performed by regular faculty, graduate student assistants were “guided, instructed, assisted, and corrected in the performance of their assistantship duties by the regular faculty members” who supervised their work. *Id.*

Shortly thereafter, in *Leland Stanford Junior University*, 214 NLRB 621, 623 (1974), the Board relied on *Adelphi* to reach the same conclusion regarding research assistants, noting that any “compensation” that they received from the university came in the form of financial aid, either stipends or grants, “to permit them to pursue their advanced degrees,” offered without regard to the “skill or function of the particular individual” or the “‘services’ rendered or their intrinsic value.” *Id.* at 621-22.

The Board adhered to this sensible analysis in subsequent rulings in the higher education sphere. *See, e.g., Cedars-Sinai Medical Center*, 223 NLRB 251, 253 (1976) (holding that house staff were “primarily engaged in graduate educational training” and, therefore, were not hospital employees); *St. Clare’s Hospital & Health Center*, 229 NLRB 1000, 1002 (1977) (holding that when students perform services directly related to their educational program, “the mutual interests of the students and the educational institution in the services being rendered are

predominantly academic rather than economic in nature” and “completely foreign to the normal employment relationship”).

These early cases involving students exemplified the generally-accepted principle -- then and now -- that the Act should be applied only where a fundamentally economic relationship exists between an employer and its employees. See *WBAI Pacifica Foundation*, 328 NLRB 1273, 1275 (1999) (A “central policy of the Act is that the protection of the right of employees to organize and bargain collectively restores equality of bargaining power between employers and employees . . . The vision of a fundamentally economic relationship between employers and employees is inescapable.”).

Then, in *New York University*, 332 NLRB 1205 (2000), the Board startlingly, and without cause, departed from this longstanding precedent and held, for the first time in the history of the NLRB, that graduate students serving as teaching and research assistants were employees within the meaning of Section 2(3) of the Act. In reaching that unjustifiable conclusion, which was soundly rejected just four years later in *Brown*, 342 NLRB 483 (2004), the *NYU* Board ignored the primarily educational nature of the relationship between students and their university. Relying on selected elements of the relationship that gave it the appearance of employment, the Board simplistically held that “graduate assistants are not within any category of workers that is excluded from the definition of ‘employee’ in Section 2(3).” *Id.* at 494. In addition, it mischaracterized both the faculty direction of teaching and research assistants as “right of control,” and the financial aid provided to graduate students as “compensation” for services. *Id.*

Demonstrating the weakness of the Board’s result-oriented analysis in *NYU*, that decision was promptly overruled in *Brown*. The NLRB returned to the rationale advanced in prior decisions, concluding once again that graduate student assistants are not Section 2(3) employees.

In *Brown*, the Board identified a multitude of factors supporting its conclusion that the relationship between graduate assistant and university is primarily educational, including:

- Graduate student assistants are admitted into, not hired by, the university;
- Graduate student assistants must be enrolled in the university to receive an instructional or research appointment, and their status is contingent on continued enrollment as students;
- Graduate students focus principally on obtaining a degree, *i.e.*, being a student, and service time as a graduate assistant is limited;
- Teaching is an important component of most PhD programs offered by the university, and often is required as a condition to receive the PhD degree;
- Graduate student assistants perform their service under the direction and control of department faculty members, often the same faculty who serve as the student's dissertation advisor;
- The university provides financial support only to students, and only for the period in which the students are enrolled;
- Fellows without appointments receive the same financial aid as do students with instructional and/or research appointments; the aid is not "consideration for work"; and
- The vast majority of doctoral students receive financial aid.

*Brown*, 342 NLRB at 488-89. On the basis of all that, the Board properly concluded in *Brown* that treating graduate student assistants as employees would be inconsistent with the purposes of the Act and the definition of employee, adding that "there is a significant risk, and indeed a strong likelihood, that the collective-bargaining process will be detrimental to the educational process." *Id.* at 488-90, 493.

Unfortunately, the pendulum has swung back. On August 23, 2016, the Board returned to the flawed reasoning of *NYU* in its *Columbia University* decision, concluding once again that "student assistants who have a common-law employment relationship with their university are

statutory employees under the Act.” *Columbia*, 364 NLRB No. 90, slip op. at 2. Without justification, the Board overruled nearly 40 years of precedent.<sup>22</sup>

Application of the NLRA should not be determined, as in *Columbia*, by cookie-cutter application of the common law definition of “employee,” without regard for the Act’s core purposes. As the Board correctly stated in *Brown*, Section 2(3) “contains no detailed provisions for determining statutory employee status.” 342 NLRB at 492. Accordingly, “[t]hat issue . . . must be examined in the context of the Act’s overall purpose.” *Id.*

It is as true today as in 1972, when the Board decided *Adelphi*, that universities cannot be “square[d] with the traditional . . . structures with which [the] Act was designed to cope in the typical organizations of the commercial world.” 195 NLRB at 648. The *Columbia* Board erred in imposing the NLRA on the primarily educational and non-economic relationship between students and their university, ignoring the Supreme Court’s cautionary note in *NLRB v. Yeshiva University*, 444 U.S. 672, 680-81 (1980) (citing *Syracuse University*, 204 NLRB 641, 643 (1973)), that “principles developed for use in the industrial setting cannot be imposed blindly on the academic world”).

In addition, persuasive policy reasons call for reconsideration of *Columbia*. For one, the decision unacceptably infringes on academic freedom. By treating graduate students as Section 2(3) employees, the Board necessarily becomes involved in issues that undermine the University’s freedom to establish academic policy.

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<sup>22</sup> The Board has had an unfortunate history of flip-flopping on important issues as its political composition has shifted, for which it has been criticized by many circuit courts. *See, e.g., Seafarers Local 777, Democratic Organizing Committee v. NLRB*, 603 F.2d 862, 872 (D.C. Cir. 1978) (finding “any great amount of deference” “inappropriate” “because of the Board’s history of vacillation”); *Mosey Mfg. Co. v. NLRB*, 701 F.2d 610 (7th Cir. 1983) (noting Board’s “fickleness” and criticizing its “inability to decide what standard to use.”); *Epilepsy Foundation v. NLRB*, 268 F.3d 1095, 1102 (D.C. Cir. 2001) (noting that the Board’s conclusion was “debatable” because the Board “changed its mind several times in addressing this issue.”). The Board should not allow another instance of politically-motivated reversal to stand, and should return to its well-reasoned and longstanding precedent in *Brown*.

The Board also failed to give serious consideration, as it should have, to the contrary treatment of graduate teaching and research assistants under other statutory schemes, most notably the Fair Labor Standards Act. The Board was unimpressed by a recent U.S. Department of Labor guidance advising that graduate assistants, like those in *Columbia*, would be exempt from the FLSA coverage because they, like virtually all other PhD students who serve as teaching or research assistants, are in an “educational relationship not an employment relationship with the school or grantor.” Under that DOL guidance, “[a]n employment relationship will generally exist with regard to students whose duties are not part of an overall educational program and who receive some compensation.” U.S. Department of Labor, Wage and Hour Division, *Guidance for Higher Education Institutions on Paying Overtime under the Fair Labor Standards Act* (May 18, 2016), <https://www.dol.gov/whd/overtime/final2016/highered-guidance.pdf>. That, of course, was not the case with the graduate assistants in *Columbia*. Nor is it the case here at Duke.

For these and other reasons, Duke maintains that *Columbia* must be revisited. The mistakes made by the Board in that case should not be compounded by a direction of election here.

**II. In the Event That an Election is Directed, the Board’s Standard Voter Eligibility Formula Should Be Applied**

The standard voter eligibility formula applied by the NLRB in representation elections includes all employees in the petitioned-for classifications who are on the employer’s payroll and working as of the close of the pay period immediately preceding either the issuance of a decision and direction of election, or the approval of a stipulated election agreement. *See Plymouth Towing Co.*, 178 NLRB 651 (1969); *Greenspan Engraving Corp.*, 137 NLRB 1308 (1962); *Gulf*

*States Asphalt Co.*, 106 NLRB 1212 (1953); *Reade Mfg. Co.*, 100 NLRB 87 (1952); *Bill Heath, Inc.*, 89 NLRB 1555 (1950); *Macy's Missouri-Kansas Division v. NLRB*, 389 F.2d 835 (8th Cir. 1968); and *Beverly Manor Nursing Home*, 310 NLRB 538 n.3 (1993). Administrative notice can be taken that the standard formula has been followed in other graduate student elections conducted by the NLRB, including NYU and Harvard, and, if an election is directed at Yale (Case No. 01-RC-183014), that formula will be followed there as well based on the agreement reached at the close of the hearing on October 7, 2016.

When the parties disagree on the formula for determining voter eligibility, as in this case, the Board has said that unless “the evidence adduced at the hearing . . . support[s] a deviation from our usual eligibility requirements, eligibility will be determined by the usual payroll period.” See *B-W Construction Co.*, 161 NLRB 1600, 1602 n.4 (1966), citing *R.B. Butler, Inc.*, 160 NLRB 1595 (1966).

In his recent *Guidance Memorandum on Representation Case Procedure Changes Effective April 14, 2015*, General Counsel Griffin confirmed that “[i]f a party contends that a different eligibility formula than the Board’s standard formula must be used, this matter must be addressed before the election.” Memorandum GC 15-06 at 17. The eligibility formula was specifically identified by the General Counsel as one of only about a dozen issues that “must be litigated at a pre-election hearing if in dispute.” *Id.* at 13. That instruction was ignored in this case; Duke was precluded from litigating this issue.

Here, there is a sharp dispute between the parties over the correct formula to be used to determine voter eligibility. The University maintains that the Board’s standard eligibility formula, as described above, should be used. The Union, on the other hand, advocates for a one-year look-back period, under which any PhD student who either currently performs instructional

or research services or who did so during the preceding academic year, would be eligible to vote. (Tr. 1077-78) Because the Union is seeking an other-than-standard formula to determine eligibility, the burden was on it to present evidence demonstrating that a one-year look-back is appropriate. *See B-W Construction Co.*, 161 NLRB 1600 (1966). The Union has dramatically failed to meet that burden.

Eligibility of PhD students who held appointments as Teaching Assistants or Research Assistants during the prior academic year, but were not serving in that capacity during the Fall 2016 semester, turns on whether those students have a “continuing interest in the terms and conditions of employment of the unit,” *i.e.*, are they likely to be appointed again. *See Columbia*, 364 NLRB No. 90, slip op. at 21. An evidentiary hearing on the issue would be required to make such a determination, but here, litigation was foreclosed.

In *Columbia*, the Regional Director determined in a Supplemental Decision and Direction of Election issued on October 31, 2016, that a non-standard voter eligibility formula, with a one-year look-back period, was appropriate. However, she made that determination after a day-long hearing on remand by the Board. 364 NLRB No. 90, slip op. at 22. (*See also* Tr. 1217) Here, no hearing was allowed on the issue, despite the Board’s instruction in *Columbia* and the clear instruction in Memorandum GC 15-06 that one is required. Duke even went so far as to make an offer of proof, although none should have been necessary on an issue that is designated for a pre-election hearing. Duke’s offer was rejected by the Regional Director, depriving the University of any opportunity to make a record on that important issue.

More importantly, the facts in *Columbia*, especially as they related to eligibility, are markedly different. Here at Duke, teaching and research expectations vary widely by department and school, based on degree requirements. As a result, there can be no single answer across the

Graduate School as to whether any particular Graduate Assistant who held an appointment in the past, is likely to hold one in the future. (Tr. 1067-68, 1213) Indeed, SEIU has failed to produce any evidence to support a finding that such students would have a reasonable expectation of re-appointment, utterly failing to meet its burden of proof. As a result, it has not been shown -- let alone proven -- that graduate students who held a Teaching or Research Assistantship in the past, have the necessary “continuing interest” in the terms and conditions of employment to justify their participation in any election.

For these reasons, the Regional Director should apply the standard eligibility formula proposed by the University in the event that an election is directed. Alternatively, the case must be remanded to the Hearing Officer to take further testimony and other evidence on this issue so that a factual determination can be made on a proper record.

The ex parte affidavits that the Union submitted to the Regional Office prior to the hearing, of which the University had no notice until near the end of the hearing, do not constitute a proper record. Section 102.68 of the Board’s Rules defines the “record” in a representation proceeding and the ex parte affidavits, which the Hearing Officer would not admit into evidence, are not part of the “record.” See 29 CFR § 102.68. Once the Regional Director decided to conduct a hearing, soliciting the parties’ positions concerning the appropriateness of a mail ballot election and voter eligibility formula, among other matters related to the petition, he may only render a decision based on the official “record,” *i.e.*, testimony, other evidence, and argument presented at the hearing. (Tr. 1069-88, 1097-1144, 1180-1192, 1195-1223, 1226-1233, 1239-1249)<sup>23</sup> No “backdoor” litigation should be allowed, through affidavits from individuals who

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<sup>23</sup> The Hearing Officer attempted to defend the Regional Director’s decision to consider the previously undisclosed affidavits because in her view, they pertained to “non-litigable” issues: voter eligibility and voting method. We disagree. The Union’s affidavits plainly address issues beyond voter eligibility and voting method, proffering facts

have not been subject to cross-examination at all, or in the case of two witnesses, about the contents of their secret affidavits. The unfairness of such a procedure is too obvious to require further discussion.<sup>24</sup>

### **III. Directing a Mail Ballot Election Would Be Inappropriate in This Case**<sup>25</sup>

If the Regional Director directs an election, a manual ballot would be the only appropriate voting method. The Casehandling Manual provides that “[t]he Board’s longstanding policy is that representation elections should, as a general rule, be conducted manually.” NLRB Casehandling Manual (Part Two), Representation Proceedings, Section 11301.2 (September 2014). Similarly, the cases apply a presumption in favor of manual ballot elections. *See Nouveau Elevator Industries, Inc.*, 326 NLRB 470, 470-71 (1998) (“Under Board precedent and policy, the applicable presumption favors a manual, not a mail-ballot election.”). Mail ballots are to be utilized *only* in “unusual circumstances.” Office of the General Counsel, *An Outline of Law and Procedure in Representation Cases*, Section 22-110 (August 2012) (emphasis added).

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that purport to show that Duke’s PhD students are statutory “employees.” Even the portions of the affidavits seemingly intended to address the eligibility and mail ballot issues should not be considered because those assertions of fact are inextricably intertwined with assertions of fact related to the employee status issue. (Tr. 1164) Moreover, the General Counsel Memorandum cited above, GC 15-06, clearly states not merely that voter eligibility is “litigable,” but rather that it “*must* be litigated if in dispute.” (Emphasis added)

<sup>24</sup> To be sure, the affidavits submitted from students whom the Union called as witnesses in the hearing held here should not be given any weight. For example, one of those affidavits, provided by Mr. Longarino, contradicted his testimony at the hearing. Mr. Longarino’s affidavit states that PhD students in his department, Religious Studies, must be a Teaching or Research Assistant every semester to receive their full stipend, unless for a particular semester the student receives funding through a fellowship or a teaching position at a different institution. But on cross-examination, he admitted that another student was allowed to conduct research outside of the Durham area in lieu of her teaching obligation without any adverse impact on her stipend. (Tr. 846) Mr. Longarino also contradicted his affidavit by conceding on cross-examination that students in his department are allowed to take a year off from teaching at any point between the students’ second through fifth years of study. (Tr. 804)

<sup>25</sup> The Hearing Officer would not permit litigation over the mechanics of the election, repeatedly advising the parties that it was a non-litigable issue. (Tr. 1152, 1155-56, 1159, 1161-62, 1164-65, 1174-75, 1181) Accordingly, a proper record was not made on this important issue. Although Duke was permitted to submit affidavits and make argument in support of its position that a manual election should be held, no witnesses were allowed. (Er. Ex. 39, 40; Tr. 1181)

In *San Diego Gas & Electric*, 325 NLRB 1143 (1998), the Board articulated the following three factors for Regional Directors to consider in determining whether to direct a mail ballot election, suggesting that such an election is appropriate only:

- 1) Where eligible voters are “scattered” because of their job duties, over a wide geographic area;
- 2) Where eligible voters are “scattered” in the sense that their work schedules vary significantly so that they are not present at a common location and common times; and
- 3) Where there is a strike, a lockout or picketing in progress.<sup>26</sup>

Graduate Assistants at Duke are not “scattered” in any sense of the word. Geographically, all graduate students are based at the Durham campus, with the exception of the approximately 16 graduate students who perform instructional/research services at the Beaufort campus.<sup>27</sup> (Tr. 1101, 1118-19) Although Teaching Assistants and Research Assistants may not be required at all times to perform their duties and/or engage in their studies on campus, the record reflects that most do so.

The Duke campus may be somewhat larger than urban campuses where the Board recently has conducted graduate student elections, but it is not so sprawling as the Union would have the Regional Director believe. It is easily accessed from all directions and there is abundant parking on campus. For those who do not have their own transportation, a campus bus service is available that provides access to all areas. (Bd. Ex. 5; Er. Ex. 43, 44, 45, 46, 47; Tr. 1071-72, 1101-02, 1227-30) There is also a public bus -- free for Duke students -- which runs from Duke’s main campus to downtown Durham, including a stop at the Carmichael Building, Duke’s

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<sup>26</sup> The third prong of the *San Diego Gas & Electric* test is inapplicable here. No Graduate Assistants are on strike, locked-out or picketing.

<sup>27</sup> Duke has agreed to a polling location on the Beaufort campus. (Tr. 1065, 1076)

downtown campus. (Er. Ex. 44; Tr. 1228) The buses run nearly around the clock on all weekdays.<sup>28</sup> (Er. Ex. 46, 47) This transportation system makes it very easy to get to the campus and to move around freely once there.

Neither are Duke's Teaching Assistants and Research Assistants scattered in terms of their scheduling. Like many other workforces, Teaching Assistants and Research Assistants work at different times of the day and on different days of the week. (Tr. 1103) However, their schedules do not "vary significantly," such that there is no time when all could vote. Duke proposed an on-campus election on two days from 7:00 AM to 9:30 PM. (*Id.*; Tr. 1066, 1080) This would allow polls to open one hour before classes begin and close one hour after classes end, more than sufficient time to give all eligible voters the opportunity to vote. (Tr. 1080)

Because none of the three factors identified in *San Diego Gas & Electric* is present here, a mail ballot election cannot be squared with the Board's own policies and procedures. Even if the Regional Director were to find that the Graduate Assistants are "scattered" as defined in *San Diego Gas & Electric*, it would not automatically follow that a mail ballot election should be held. The Casehandling Manual instructs that if any of the above three factors is present, "the Regional Director also should consider [1] the desires of all the parties, [2] the likely ability of voters to read and understand mail ballots and [3] *the availability of addresses for employees.*" NLRB Casehandling Manual (Part Two), Representation Proceedings (September 2014), Section 11301.2 (emphasis added).

*First*, Duke has made it abundantly clear that its preference is for a manual ballot to enhance voter turnout. That preference should be accorded weight.<sup>29</sup> The D.C. Circuit has held

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<sup>28</sup> The parties agreed that any manual ballot election would be held on weekdays. (Tr. 1240-41)

<sup>29</sup> The graduate assistant elections at NYU, Columbia and Harvard were all manual ballot elections held during the semester. (Tr. 1122-23) In a pending case at Yale University, the parties agreed that if an election is held, it will be

that “the use of mail balloting, at least in situations where any party is not agreeable to the use of mail ballots, should be limited to those circumstances that clearly indicate the *infeasibility* of a manual election.” *Shepard Convention Services, Inc. v. NLRB*, 85 F.3d 671, 673-74 (D.C. Cir. 1996) (emphasis added). The Union has failed to demonstrate that a manual ballot election is infeasible. On the contrary, Duke has convincingly shown that a manual ballot is not only feasible, it is optimal.

*Second*, although the University maintains records of student addresses, the vast majority of the PhD students in the proposed bargaining unit -- about 81% of all eligible voters -- have multiple addresses on file with Duke. Some have as many as five or six addresses listed. (Er. Ex. 39; Tr. 1104-07, 1109) Regina Nowicki de Guerra, Database Analyst at the Graduate School, provided a detailed affidavit documenting that if a mail ballot election is directed, Duke would not know which addresses to use to ensure that the ballots are received. (Er. Ex. 39; Tr. 1109-11) The University does not require students to designate a “preferred” address. (Er. Ex. 39; Tr. 1110-11) Thus, if a mail ballot election is ordered, Duke would be left to guess which address to use for about 1200 of the nearly 1500 voters. (*Id.*)

*Third*, the evidence establishes that the University rarely communicates with PhD students by U.S. Mail. (Er. Ex. 40; Tr. 1107, 1117) John Zhu, Senior Public Affairs Officer and Communications Strategist for the Graduate School, who is in a position to know, provided an affidavit documenting that the Graduate School typically communicates with students via email. (Er. Ex. 40) This includes bills for fees, tuition, or any other goods or services; all are sent by

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by manual ballot. (Tr. 1123) The Union urges a mail ballot, noting that the Region had directed such an election for adjunct faculty at Duke earlier this year. However, adjunct faculty are quite different. They typically have professional lives outside Duke, and may have adjunct faculty appointments at other schools. Many travel to campus from outside Durham and do not have offices on campus. (Tr. 1136) Their connection to Duke simply is not as strong as Teaching and Research assistants.

email. (Tr. 1185-86) When mailing documents, the Graduate School requests in advance that the student provide a current mailing address. (*Id.*) For example, any student who wants tickets for their PhD hooding ceremony sent by mail must provide their current mailing address or tickets will not be sent. (*Id.*)

It is apparent that a mail ballot would be even more problematic were an election to be directed during intersession, when many students leave the Durham area. Between semesters, it would be nearly impossible for the University to determine with any accuracy the proper address to use. (*Id.*) As such, it is highly likely that ballots would be mailed to locations where students would not be present to receive them, with the result that the ballots would not be cast in a timely manner, causing disenfranchisement. (Tr. 1104-05) Undoubtedly, students spend the holiday season outside the Durham area, with family, on vacation, or traveling. Given the considerable likelihood that there would not be a representative showing in the event of an intersession mail ballot election, directing one plainly would not effectuate the purposes of the Act.

The Union's claim that graduate students may work outside the Durham area, making a mail ballot preferable, cannot be taken at face value. The Union utterly failed to specify on the record who, where, or how many students perform their duties elsewhere. As already noted in Section II, unknown to the University the Union submitted secret ex parte affidavits to the Regional Director at some point prior to the hearing, which purport to support, if only obliquely, its argument in favor of a mail ballot election. For the reasons already stated above, the affidavits are not part of the "record," as defined in the Board's Rules, and the Regional Director may not consider them.

In any event, the affidavits do no more than generally state that some PhD students may occasionally be located outside the Durham area. They consist of unsubstantiated and

conclusory assertions regarding the whereabouts of the affiants' classmates or friends, and at most show that a small number of eligible voters may work remotely from time-to-time.

Moreover, even if some PhD students temporarily leave the Durham area, the University would not know for certain how those voters could be reached by mail. (Tr. 1109-11, 1140-41)

Nor is it any answer to say, as the Union suggests, that if the Regional Office sends a ballot to the wrong address, the eligible voter can simply inform the Board and receive a duplicate. That would unnecessarily burden the process and substantially increase the likelihood of confusion and possible shenanigans. Voters would have to first recognize that they have not received a ballot; inform the Regional Office of their correct address; request a duplicate ballot; wait to receive the replacement; and finally mark and return the ballot to the Regional Office. The Board's mechanism for sending, receiving, and counting duplicate ballots is prone to error. If a voter requests a duplicate ballot and receives two, only the ballot in the envelope with the earlier postmark may be counted. NLRB Casehandling Manual (Part Two), Representation Proceedings, Section 11336.4 (September 2014). And, if the voter returns both ballots in the same envelope -- a not uncommon occurrence -- the procedure calls for that ballot to be challenged. *Id.* Because the University would be forced to guess the most appropriate address for 81% of eligible voters, many students are likely to request duplicate ballots, which will needlessly increase the likelihood of challenges and objections that could be easily avoided by directing a manual ballot election.

For all the reasons discussed above -- and particularly at this late date, with classes and exams at an end -- Duke submits that any election that may be directed in this case should be conducted at an appropriate date after the start of the Spring 2017 semester on January 11, on campus and by manual ballot.

## CONCLUSION

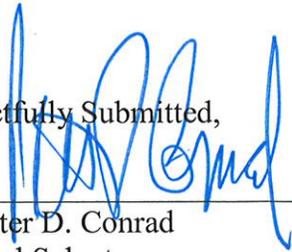
The PhD students whom SEIU seeks to represent are not “employees” within the meaning of Section 2(3) of the NLRA as recently interpreted by the Board in *Columbia University*. Therefore, the petition fails to raise a question concerning representation of employees and must be dismissed. In the event that the Regional Director concludes otherwise and an election is directed, the only Teaching Assistants and Research Assistants who should be eligible to vote are those who are on the Duke payroll and providing instructional or research services during the pay period immediately preceding a direction of election. Any other voter eligibility formula will require an evidentiary hearing, with witnesses subject to cross-examination, to determine the continuing interest in terms and conditions of “employment” as Teaching or Research Assistants of students who may have been providing services during some prior period but who are not doing so at the time a decision may be issued in this case. That issue cannot be determined without taking further evidence at a hearing. Finally, to ensure maximum participation by eligible voters and fully effectuate the purposes of the Act, if any election is conducted it must be by manual ballot, on the Duke campus when classes are in session.

Dated: December 21, 2016  
New York, New York

Of Counsel:

Steven J. Porzio  
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Respectfully Submitted,

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# **APPENDIX “A”**

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 10**

**DUKE UNIVERSITY**

**and**

**SERVICE EMPLOYEES INTERNATIONAL  
UNION (SEIU)**

**Case No. 10-RC-187957**

**STIPULATION**

Duke University (“Duke”) and Service Employees International Union (SEIU) hereby stipulate to the following in connection with the proceeding referenced above.

1. The parties have entered into the below Stipulation of Facts in this matter.
2. The Stipulation of Facts shall not prevent either party from presenting witness testimony and documentary exhibits in support of their position. Both parties agree that they will use their best efforts to reduce overlap and cumulative testimony and documentary evidence.
3. Neither party shall cross-examine witnesses or offer documentary evidence seeking to controvert stipulated facts.

**STIPULATION OF FACTS**

- (1) Although the experiences of PhD students at Duke vary by discipline and by academic department, certain aspects are common to PhD students seeking degrees from the Graduate



School. All full-time doctoral students pay no tuition or fees whatsoever through at least the first five years of study, at a cost to Duke of approximately \$350,000 or more per student throughout his or her PhD studies. In addition to tuition and health care, students receive annual nine or twelve-month stipends (depending on the student's department), which are guaranteed for at least five years. The stipend amount is uniform for all PhD students, with slight variations based on the school that the student's degree program is homed in.<sup>1</sup> Although each PhD student may have a different mix of funding sources that makes up his or her stipend, such as a Teaching Assistantship, a Research Assistantship, a Graduate Assistantship or a Graduate School or other external fellowship, the stipend amounts are established by the Graduate School. The Graduate School permits students to "supplement" their stipend on their own by up to \$3,000 during the course of the year, with additional TA or RA assignments.<sup>2</sup>

(2) Doctoral students' benefits reflect their status as students, and the benefits they receive are significantly different from benefits offered to Duke employees. All doctoral students receive, at no cost, student health coverage through the Duke Student Medical Insurance Plan ("SMIP"), a platinum-level plan. They also are eligible for a child care subsidy of up to \$5,000 per year per student to help defray childcare costs, as well as seven weeks of paid parental leave for graduate students. Separate and apart from the SMIP, there is also a medical assistance program which provides Ph.D. students up to \$5,000 -- and sometimes more, depending on the circumstances -- for medical expenses that are not covered by the SMIP. PhD students are also eligible for short term loans of up to \$2,500 at competitive interest rates offered through a

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<sup>1</sup> See [https://gradschool.duke.edu/sites/default/files/documents/tuition\\_fees\\_stipend\\_schedule.pdf](https://gradschool.duke.edu/sites/default/files/documents/tuition_fees_stipend_schedule.pdf). The stipend for the 2016-17 academic year for PhD candidates is as follows:

Arts and Sciences and Nicholas School Departments - \$29,960  
Basic Medical Sciences and Nursing Departments - \$30,310  
Engineering Departments - \$29, 835  
Fuqua School of Business - \$27,000

<sup>2</sup> See [https://gradschool.duke.edu/sites/default/files/documents/policy\\_stipend\\_supplementation.pdf](https://gradschool.duke.edu/sites/default/files/documents/policy_stipend_supplementation.pdf).

program negotiated between the Graduate School and the Duke Credit Union. Emergency loans of up to \$1,000, for general expenses or unexpected emergencies, are also available to PhD students, from an endowment account earmarked specifically for loans to graduate students. All such student benefits are provided through the Graduate School; Duke's Human Resources and Benefits departments, which handle these matters for employees, do not provide or administer any such benefits for PhD students. Employee benefits are significantly different from the benefits made available to PhD students.

(3) Learning to teach and to evaluate student work is fundamental to the education of graduate students and their preparation for professional lives in teaching and scholarship. This guiding principle is contained within the Graduate School's published credo, called "Best Practices and Core Expectations<sup>3</sup>," which every new PhD student receives during orientation. One of the four core components of a graduate education, as listed in the Core Expectations, is "preparation for and experience in a variety of teaching roles."

(4) The Core Expectations also define the mission of the Graduate School, and establish expectations of every constituency that participates in a graduate student's education, namely: Graduate Faculty, Graduate Students, Graduate Departments and Programs, and the Graduate School. Each stakeholder has a role to play in sharpening students' pedagogical skills, which include:

- **Graduate Faculty** - "To encourage and assist students in developing teaching and presentation skills, including course development, lecture preparation, classroom communication, examining and grading."

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<sup>3</sup> Available at <https://gradschool.duke.edu/academics/academic-policies-and-forms/standards-conduct/best-practices-and-core-expectations>.

- **Graduate Students** - “To receive an appropriately sequenced variety of teaching opportunities relevant to their career expectations and likelihoods.”
- **Graduate Departments and Programs** - “To provide pedagogical training appropriate to and regular assessment of the TA assignments given to graduate students... [and] to provide a range of teaching opportunities relevant to likely career prospects.”
- **The Graduate School** - “To ensure that fair and reasonable guidelines are in place to regularize the assignment of graduate teaching and research assistantships.”

(5) The opportunity to engage in teaching is offered to all doctoral students through a Teaching Assistantship. Teaching Assistantships awarded to doctoral students come out of the Graduate School’s budget, not the budget from which Duke employees are compensated. All doctoral students within a given program are offered the same base stipend at the time of admission. Their teaching opportunity is included in the financial aid package and is considered part of the student’s academic program. In the rare event that a student participating in required teaching is unable to find an appropriate teaching opportunity in a given semester, he or she nevertheless will receive financial support through some other means for that semester.

(6) Other departments have a highly structured sequence of teaching courses and opportunities that PhD students must progress through. For example, each of the 64 total PhD students in the English department, in their first and second years, do not serve as TAs, but rather must complete a “Teaching Apprentice” program, in which they observe two undergraduate courses and meet with the professors of those courses each week to discuss pedagogical issues. For the third through fifth years of their PhDs, English students will serve either as a TA or as the instructor-of-record for a course. In the sixth year, students are not allowed to serve as TAs or instructors, so that they may focus on the completion of their dissertation; they are fully

funded by the department. Significantly, students receive the same stipend amounts for years one through six of their course of study, although the teaching expectations/requirements vary greatly from year to year.

(7) While teaching is an academic and financial requirement in some of Duke's 47 PhD-offering academic departments and programs, learning how to teach is an expectation for most doctoral students as part of their training. Specifically, 41 of these 47 departments and programs in the Graduate School treat service as a TA as integral to the program, and is heavily encouraged as part of a student's professional development; indeed, in 29 of those departments, it is an academic requirement. In the other six departments, which are all housed within the Medical School, Teaching Assistantships are generally available to PhD students who desire to gain teaching experience. Some Graduate School academic departments have guidelines indicating which semesters PhD students are eligible to teach, while others do not. For example, in order to fulfill the TA requirement for a doctoral degree in Biochemistry, students must serve as a TA during their second year of study.<sup>4</sup> In the Biomedical Engineering department, although PhD students are required to teach for two semesters to graduate, the department does not specify at what point in their academic career a student must do so.

(8) In some departments, students are required to serve as both a TA and an RA. For example, each of the approximately 600 PhD students in the five departments within Pratt School of Engineering is required to attend a teaching orientation<sup>5</sup>, then serve as a TA for two engineering courses. This is true even though every engineering PhD is funded by either a

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<sup>4</sup> See <https://www.biochem.duke.edu/phd-program>.

<sup>5</sup> See <http://pratt.duke.edu/sites/pratt.duke.edu/files/u49/Fall%202016%20TA%20Seminar.pdf> for the August 2016 Orientation Program.

research grant or an external fellowship, the amount of which is set independent of whether a student teaches or not.

(9) The Nursing School also has a highly structured teaching and research requirement for each of its 37 PhD students. In the first two years, each Nursing PhD student must complete a Research Practicum, and by the end of the third year, a Teaching Practicum, for course credit. The purpose of the Research Practicum is to enhance student knowledge and skills in research through work on one or more research projects. The Teaching Practicum is a mentored teaching experience for students to gain experience in university teaching in nursing; to learn specific teaching methods; and to document their teaching and professional growth in their portfolio.

(10) The teaching TAs perform is related to their academic discipline. The majority of PhD TAs assist with courses in the same department in which they are seeking their degree. Duke, unlike Columbia University, does not have an undergraduate “core curriculum” program, requiring PhD TAs to teach outside of their or a closely related field of study. In the instances when TAs teach outside their department, it is because the student seeks permission to do so to advance their own academic interests. For example, a PhD student enrolled in the Biology Department may obtain a relevant teaching opportunity in another academic department or program, such as Evolutionary Anthropology, which is related to the student’s interests. Through their experience as teaching assistants, PhD graduate students are afforded opportunities to develop knowledge in areas within their disciplines outside the focus of their dissertation research, both within and outside of their home academic department. This experience is invaluable when students enter the job market, as most employers seek candidates who are versatile teachers with a broad base of knowledge within and beyond their given fields. Teaching experience also prepares graduate students for work outside academia, as the ability to

convey complicated information in a clear and effective manner is essential to a PhD in any employment setting.

(11) PhD TAs are encouraged to participate in one or more teaching training programs offered centrally by the Graduate School, which are the leading pedagogical programs among Duke's peer institutions in their breadth and scope. For example, Duke offers the Certificate in College Teaching (CCT) program.<sup>6</sup> This voluntary program is designed to provide PhD graduate students with a foundation for learning how to teach in a college or university setting. Since its inception in 2011, enrollment in the CCT program has increased by at least 17 percent every year. Currently, nearly 500 PhD graduate students, with representation across each of the four divisions<sup>7</sup> of the Graduate School, are voluntarily enrolled in this program. To complete the CCT program, students must fulfill three requirements:

- Complete two courses in college teaching, which can be either general or discipline-specific. There are eight courses offered directly by the Graduate School that are not specific to any particular discipline, and more than 20 courses that are offered by specific academic departments teaching pedagogy unique to those particular disciplines;
- Serve in a formal teaching role for at least one semester, and both observe and be observed by peers in the CCT program; and
- Complete an online teaching portfolio, designed to be used in a job search for a teaching position in academia.

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<sup>6</sup> See <https://gradschool.duke.edu/professional-development/programs/certificate-college-teaching>.

<sup>7</sup> Humanities, Social Sciences, Natural Sciences, and Basic (Medical) Sciences.

Duke also offers the Preparing Future Faculty (PFF) program.<sup>8</sup> The PFF provides an opportunity for PhD students to learn about faculty roles and responsibilities by interacting regularly with faculty mentors at six partner institutions in North Carolina. The PFF, originally a national program that was funded by the Pew Charitable Trust, is now funded by the Graduate School at Duke, and is designed to prepare graduate students for the variety and complexity of classroom environments they will encounter. Students are paired with a faculty member at one of the six partner institutions, and shadow that faculty member for a semester while they teach and attend faculty meetings. PhD students are awarded a stipend of \$500 to offset travel costs to and from the partner institutions. Each year, 25 PhD students enroll in the PFF program as a result of a competitive process.

Finally, the Graduate School offers Bass Instructional Fellowships<sup>9</sup>, which are competitive fellowships awarded each year to PhD students seeking to gain substantive pedagogical experience in one of three ways: by being Bass Instructors of Record, Bass Instructional Teaching Assistants, or Bass Online Apprentices.

(12) Bass Instructors of Record design and teach their own course. There are approximately 18 fellowships awarded in this category each year.

(13) Bass Teaching Assistants are students who are seeking a degree in a department that has no undergraduates, and therefore limited teaching opportunities, and apply for the fellowship to be funded as a TA in another department. For example, a PhD student in Cell Biology, which is housed in the Medical School and therefore has no undergraduates, could be funded through a Bass fellowship as a TA in the Biology department. There are 5 to 6 of these fellowships awarded per year.

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<sup>8</sup> See <https://gradschool.duke.edu/professional-development/programs/preparing-future-faculty>.

<sup>9</sup> See <https://gradschool.duke.edu/professional-development/programs/bass-instructional-fellowships>.

(14) Bass Online Apprentices work with Duke's Center for Instruction Technology in designing and producing Massive Online Open Courses ("MOOC's"), which are free classes online that are open to the public.

(15) The Graduate School also offers a number of other opportunities and programs through which PhD students are encouraged to learn more about teaching and develop their teaching and research skills to assist them in their job search upon graduation. For example, the Graduate School offers a Professional Development Series of workshops and panel discussions every year. The theme for the Series alternates between academic jobs, and jobs beyond academia, to ensure that students are presented with information on the full range of careers available to them. The theme for the 2016-17 year is "Careers Beyond Academia"<sup>10</sup>, and includes the following workshops and panels:

- "Take Your Teaching Skills Anywhere: Identifying Transferable Skills From Your Teaching Experiences."
- "Sharing Academic Research With a Broad Audience: Insights From Dr. Tovah Klein, Psychology Professor and 'Toddler Whisperer.'"
- "How to Identify And Leverage Your Transferable Skills," with separate workshops for Humanities and Social Sciences Disciplines, and Science, Technology, Engineering and Mathematics Disciplines.

Additionally, the Graduate School has a Professional Development Blog<sup>11</sup> where graduate students are encouraged to share their professional development experiences. Recent posts by graduate students include "How to Take Your Teaching Skills Anywhere," and "From the Lab to

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<sup>10</sup> See <https://gradschool.duke.edu/professional-development/programs/professional-development-series#beyondacademia>.

<sup>11</sup> <https://gradschool.duke.edu/professional-development/blog>.

Wall Street: An Interview with the Director of Investor Relations at Intercept Pharmaceuticals.”

Finally, the Graduate School puts on a Teaching IDEAS Series of workshops<sup>12</sup>, designed to assist PhD students in improving their teaching skills and address topics relevant to classroom teaching, dealing with students, faculty life and career paths. Past workshops have included “Daring to Debate: Strategies for Teaching Controversial Topics in the Classroom,” and “FLIP a Lesson! Creating an Engaging Learning Environment.”

(16) Assisting in teaching is an important part of the students’ doctoral studies. When graduate students complete the CCT, or participate in the PFF, it is noted on their transcript, along with coursework, grades, comprehensive examinations, and other academic milestones. Virtually all students enrolled in the Graduate School are registered for full-time study as they pursue a PhD.

(17) Along with teaching, research is another critical component of PhD student education at Duke. As stated in the Core Expectations, Duke is committed to ensuring that each graduate student engages in “development of an individual research agenda.” Each stakeholder in graduate students’ education is given expectations regarding developing students’ research, including:

- **Graduate Faculty** - “To provide appropriate guidelines, including expected timetables, for completion of research projects, and to respect students’ research interests/goals and to assist students in pursuing/achieving them.”
- **Graduate Students** - “To learn the research methods, ethical dimensions, and historical knowledge bases of the discipline ... [and] [t]o discover and pursue a unique topic of

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<sup>12</sup> <https://gradschool.duke.edu/professional-development/programs/teaching-ideas-series>.

research in order to participate in the construction of new knowledge in the chosen field and application of that knowledge to new problems/issues.”

- **Graduate Departments and Programs** - “To provide appropriate resources, both faculty and facilities, to allow students to complete their education and research in a timely and productive manner.”; and
- **Graduate School** - “To facilitate, where possible, promotion and publication of graduate student research through research grants, conference travel grants, and other centrally administered mechanisms.”

(18) In academic departments in which there are a greater number of PhD students who are required to teach than there are available teaching opportunities, the Graduate School and the academic departments make every effort to create a TA position, even when course enrollment does not justify the position in terms of numbers. For example, in the Medical School, there is no undergraduate enrollment, meaning there are few teaching opportunities. In some of these academic departments and programs, PhD students meet their teaching requirement by serving as TAs for graduate-level courses. As noted above, the Graduate School also will assist these students in finding relevant teaching opportunities in related fields, through the Bass Instructional Fellowships and other means. When an appropriate teaching opportunity cannot be identified or created, the Graduate School frequently designates doctoral students as “Graduate Assistants,” and identifies opportunities for them, such as research projects or literature reviews. Doctoral students who seek to fulfill a teaching requirement or expectation for which no teaching or professional development opportunity can be identified or created still receive full funding even though they do not teach during a given term.

(19) Duke also takes very seriously its obligation to train all PhD students in ethical research practices. To this end, every PhD student is required to complete a six-hour Responsible Conduct in Research (“RCR”) orientation, and to complete six to twelve additional hours of RCR training during their first four years of study.<sup>13</sup> This requirement can be met by attending RCR Forums, which are two-hour workshops, offered each semester, on a wide range of topics. For example, for the Fall 2016 semester, there are RCR Forums entitled, “An Introduction to Human Subjects Review,” and “Ethics in the Era of Inveillance: Data Mining in Biomedical, Scientific & Social Science Research.”

(20) For many PhD students serving as Research Assistants, their dissertations are inextricably intertwined with the research in which they are assisting their faculty advisor. For example, in the Engineering School, each of the approximately 600 total PhD students are admitted to work with one specific faculty member selected by the prospective student and the faculty in advance. For the entirety of their academic journey at Duke, these students learn research skills and techniques alongside the faculty member they are admitted to work with. Additionally, they choose to write their dissertations on a topic that is closely related to that research.

(21) Similarly, PhD students in the Medical School engage in research directly related to the grant of a faculty advisor who runs the research lab they have joined. PhD students in the Medical School do not engage in research for their first two years of study. During those two years, the students pay no tuition and receive a full stipend (approximately \$30,000 per year) for their course work. They rotate between laboratories every 6-8 weeks that are investigating particular scientific issues. At the end of two years, each PhD student is expected to affiliate with a laboratory within the Medical School investigating specific issues, where they spend the

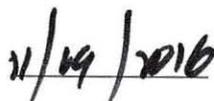
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<sup>13</sup> See <https://gradschool.duke.edu/professional-development/programs/responsible-conduct-research/rcr-forums>.

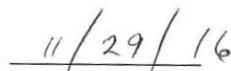
next three to five years researching alongside the faculty member who runs the laboratory. They receive a pre-established stipend that does not vary with the hours spent working in the lab. Students and faculty members may co-author papers on their work together, which usually is directly related to the student's doctoral dissertation.

(22) Many RAs, including in the Engineering School and in departments in the Basic (Medical) Sciences, are funded year round by their faculty advisor's research grants, and continue their academic pursuits during the summers. For students that have no summer support, the Graduate School guarantees summer research fellowships after their first and second academic years of study.<sup>14</sup> In addition, the Graduate School has 43 endowment accounts that fund an additional 150 students without summer support in years 3 and beyond. The purpose of these fellowships is to allow PhD students to dedicate the summer months to their research and making progress on their degree without distractions. When applying for these fellowships, students must submit to their Directors of Graduate Studies a brief proposal outlining how the summer funding will be used to advance their educational pursuits.

  
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For Duke

  
\_\_\_\_\_  
Date

  
\_\_\_\_\_  
For SEIU

  
\_\_\_\_\_  
Date

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<sup>14</sup> See <http://registrar.duke.edu/sites/default/files/graduate/2016-17/index.html>.