

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10, SUBREGION 11**

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| In the matter of: |) | |
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| |) | |
| DUKE UNIVERSITY, |) | |
| Employer, |) | |
| |) | Case No. 10-RC-187957 |
| and |) | |
| |) | |
| SERVICE EMPLOYEES INTERNATIONAL |) | |
| UNION CLC/CTW, |) | |
| Petitioner. |) | |
| |) | |

PETITIONER’S POST-HEARING BRIEF

Petitioner Service Employees International Union CLC/CTW (the “Union”) submits this post-hearing brief on the issue of whether the petitioned-for graduate students¹ at Duke University (“Duke” or the “Employer”) are “employees” under Section 2(3) of the National Labor Relations Act (the “Act”). This is a straightforward case. Under *Columbia University*, 364 NLRB No. 90 (2016), the graduate students at Duke providing teaching or research services are plainly employees under the Act, just like the graduate students at Columbia. Graduate students performing teaching or research services, whether as teaching assistants, instructors of record, or research assistants, are employees because Duke controls their work and compensates them for it. Duke failed to produce evidence distinguishing this case from *Columbia* in any meaningful way.

¹ As amended during the hearing, the Union’s petition for representation is only for PhD students providing instructional or research services at Duke. (Tr. pp. 14-15.) Therefore, the terms “graduate students” and “PhD students” are used interchangeably in this brief.

FACTS

I. Graduate Students Work as Teaching and Research Assistants In Order to Receive Funding from Duke.

A. Duke is an Educational and Research Institution With 2,478 PhD Students.

Duke is a premier private research university and higher educational institution. (Tr. pp. 197-99.) There are 1,714 tenured or tenure-track faculty teaching at Duke, along with over 1,700 non-tenure-track faculty. (Pet. Ex. 20, p. 12.) In 2016, Duke had 6,379 undergraduate students and 8,135 total graduate and professional students. (Pet. Ex. 20, p. 12.) Of the graduate and professional students, there are about 2,478 PhD students. (Tr. p. 129.)

A central facet of Duke's mission is to educate its undergraduate students. (Tr. pp. 198-99.) Duke earns substantial income from undergraduate student tuition. Duke's gross revenue from tuition and fees was \$733 million in fiscal year 2016. (Pet. Ex. 20, p. 6.) Its revenue from undergraduate tuition that year was approximately \$328 million.²

Duke is one of the largest research universities in the country. (Tr. p. 197.) In fiscal year 2016, its total revenue from research grants and contracts was approximately \$1.13 billion. (Pet. Ex. 20, p. 12.) An average research professor, or principal investigator ("PI"), receives about \$1 million per year in research grants. (Tr. p. 341.) Fifty-seven percent of the amount of a research grant is deemed overhead and is directed to Duke rather than the research professor and his staff. (Tr. pp. 364-65.) Duke expects a PI to recoup 50 percent of her salary through external grant funding. (Tr. p. 568.)

² Duke's annual tuition for undergraduate students is \$51,510. See <https://financialaid.duke.edu/undergraduate-applicants/cost> (last visited Dec. 21, 2016).

All PhD degrees are awarded by the Graduate School, one of the schools that comprise Duke. (Tr. pp. 124-25.) There are 47 PhD programs or departments at Duke, which operate under the auspices of the Graduate School. (Tr. pp. 126-27; Er. Ex. 3.) The Graduate School sets the overall degree requirements for PhD's, and then the departments establish the specific requirements for their degrees. (Tr. p. 126.)

Applications for PhD programs are first evaluated by a particular department, which then makes recommendations for admission to the Graduate School. (Tr. p. 125.) The Graduate School then makes the final approval for admission. (Tr. p. 125.) In some departments, such as the engineering departments, applicants are matched with specific research faculty as part of the application process. (Tr. pp. 307, 309-10.)

B. Duke's Funding for PhD Students Includes Teaching and Research Assistantships.

Admitted PhD students are guaranteed five years of funding by Duke. (Tr. p. 145.) The funding covers the costs of tuition and fees, and also provides a stipend that ranges from \$27,000 to \$30,310. (Bd. Ex. 4, ¶ 1.) The stipend can be comprised of fellowships, which do not require any work by the graduate student, or teaching or research assistantships, which do require work. (Tr. pp. 145, 292; Bd. Ex. 4, ¶ 1; Er. Ex. 9, p. 46.) Stipends are provided on a 12-month basis for students working under research grants, and on a 9-month basis for other students. (Tr. pp. 148, 312.) Many departments do not guarantee funding for graduate students after their fifth year, though students may receive funding from their department or from external sources, or may earn money by working as research or teaching assistants. (Tr. pp. 147, 253; Er. Ex. 31.)

The amount of the stipend is established by the Graduate School. (Tr. p. 150.) In setting the amount, the Graduate School seeks to be competitive with the stipends paid by peer institutions. (Tr. pp. 150, 252.) It also considers the cost of living in Durham, North Carolina. (Tr. pp. 150-51; Er. Ex. 31.)

Graduate students are informed of the service requirements of their funding packages through Graduate School admission letters, department award letters, and annual reappointment letters. (Tr. pp. 206-07, 229.) The Graduate School maintains acceptance letter templates to notify students of their acceptance into a PhD program. (Er. Ex. 9, pp. 30-39; Tr. p. 205.)³ The templates are organized by the type of work the student is required to perform in order to receive funding. Students receiving a fellowship or external funding are not required to provide any service or work as a condition of funding. (Tr. p. 281.) As a result, when an admitted student receives the “External Funding Letter” or the “Standard Fellowship Letter,” the Graduate School does not notify them of any service requirements. (Er. Ex. 9, pp. 30-31, 34-35.) For students receiving the “Research Assistantship Letter,” the Graduate School notifies them that their offer “includes a first-year research assistantship, which will compensate you with tuition remission and a stipend for the services you will be providing.” (Er. Ex. 9, pp. 32-33.) Students receiving the “Teaching Assistantship Letter” are informed that “your stipend will consist, in part, of a salary that will be earned through providing teaching assistant support to your department or program[.]” (Er. Ex. 9, pp. 36-37.) Students receiving the “Department Notices of Service

³ Although Duke issues an admissions letter to every one of the approximately 2,500 PhD students enrolled, Duke provided only a few dozen in response to the Union’s subpoena duces tecum for all such letters. (Er. Ex. 25; Tr. pp. 474-75.) Although Duke is expected to issue reappointment letters for every PhD student each year, Duke provided only a few dozen of those letters in response to the Union’s subpoena duces tecum for all such letters. (Er. Ex. 25; Tr. pp. 359, 474-75.)

Letter” are told that “[a]ny service requirements related to this offer of admission will be communicated to you directly by your admitting department or program[.]” (Id. pp. 38-39.)

In addition to the letters sent by the Graduate School, many individual departments also send students letters upon admission, setting forth the terms of their financial package. (Tr. p. 229.) Many of these letters make clear that students must work. The Sociology Department states that “Funding in all non-fellowship years will be paid through a combination of research and teaching assistantships.” (Er. Ex. 25, Duke 002784). The Department of Psychology states that financial “support may come in any number of forms, including, for example, service as a teaching assistant, research assistant, and/or a Graduate School fellowship stipend.” (Er. Ex. 25, Duke 002776). The Department of Electrical & Computer Engineering Department states that the department will “work . . . to support you at or above the standard departmental level through a combination of fellowship and research assistantship funds for the duration of your studies[.]” (Er. Ex. 25, Duke 002753). The Medical Physics Graduate Program states “all PhD students in our program . . . are expected to serve as a Teaching Assistant (TA) or perform an equivalent amount of service to the program for two semesters during the course of their graduate studies.” (Er. Ex. 25, Duke 002766.) *See also, e.g.*, (Er. Ex. 25 Duke 002650 (Business); Duke 002750 (Economics); Duke 002779 (Religion); Duke 002781 (Romance Studies)).

The Graduate School also directs departments to send annual “reappointment letters.” (Er. Ex. 9, p. 51; Tr. pp. 276-77.) The reappointment letters are to “fully describe the details of student funding and differentiate specifically between fellowship amounts paid to the student and assistantship compensation for work performed (teaching and/or research).” (Er. Ex. 9, p. 51.) The “Reappointment Letter Template” includes various options a department can select,

depending on whether specific work is required for receipt of a financial award. (Er. Ex. 25, Duke 002641-2649 (noting that assistantship payments “represent[] a reasonable value for the services you will be providing”).)

Departments follow the Graduate School’s instructions, and send annual appointment letters making clear that students are required to work as a condition of their stipend. For example, the English Department’s reappointment letter states that “the stipend consists of a fellowship component . . . for which no work service is required, and a teaching assistantship in the amount of [redacted] which represents a reasonable value for the services you will be providing.” (Er. Ex. 25, Duke 002661). A sample Classical Studies reappointment letter states, “You are required to assist the American office of L’Année Philologique as part of your aid package” requiring “a commitment from you for up to 15 hours per week on average[.]” (Er. Ex. 25, Duke 002681; *see also* id. Duke 002720). A Biochemistry reappointment letter states “your funding . . . will consist of a work stipend of [redacted] which represents a reasonable value for the services you will be providing.” (Er. Ex. 25, Duke 002715). *See also, e.g.*, (Er. Ex. 25, Duke 002648 (Mechanical Engineering); Duke 002663 (Music); Duke 002725 (Art, Art History, and Visual Studies); Duke 002739 (Cell Biology); Duke 002743 (Civil and Environmental Engineering); Duke 002748 (Computer Science)); (Pet. Exs. 4, 5 p. 10 (Marine Laboratory)).

The standard work requirements for funding packages vary by department. Among the 47 PhD programs, many require graduate students to work as a teaching assistant at some point, while many other departments have no teaching requirement. (Tr. p. 175; Er. Ex. 17.) Duke recognizes that the requirement to serve as a teaching assistant “is intended to benefit both the school (by providing teaching support) and the student (by gaining experience from the various

responsibilities of teaching).” (Pet. Ex. 17, p. 10; *see also* Pet. Ex. 16 (Political Science appointment letter stating “RA work is an essential element of what makes our funding of PhD students worthwhile.”).)

For example, in Religious Studies, students are required to work as either a teaching assistant or research assistant during all but one of their first five years in the department in order to receive the full stipend. (Tr. pp. 765-66.) Similarly, in Romance Studies, students are required to work as either a teaching assistant or research assistant during all but one of their first five years in the department. (Tr. p. 993.) In Biomedical Engineering, students must work as a teaching assistant for two semesters before graduating and typically must work as a research assistant during every semester. (Tr. pp. 319, 658, 663, 688.) In Mathematics, working as a teaching assistant, grader, or research assistant is not required in order to receive a PhD degree, but is required in order to receive the full stipend. (Tr. pp. 988-90.)

Generally, if a student obtains an external fellowship that provides outside funding to Duke, the student then is relieved of the responsibility of working as a teaching or research assistant. (Tr. p. 281.) Some fellowships, such as from the National Science Foundation, prohibit additional “employment” at the same time, and thus prevent a student from working as a teaching or research assistant. (Tr. p. 438.)

Duke also has a policy that graduate students are not supposed to work more than 19.9 hours per week in “non-dissertation-related research appointments, teaching assistantships or other instructional positions, or other employment (both on and off campus).” (Er. Ex. 5, p. 47; Tr. p. 154.) One reason for this policy is that Duke seeks to spread the limited number of assistantship positions as widely as possible for students. (Tr. p. 154.) Another reason for the

policy is to make sure students have enough time to focus on their academic studies rather than their work for Duke. (Tr. p. 154.)

II. Graduate Students Work as Teaching and Research Assistants Under the Direction and Control of Duke.

Graduate student assistants at Duke can generally be divided into three categories:

Instructional Workers, such as Instructors, Teaching Assistants, and Graders; Research Assistants in the humanities; and Research Assistants in the sciences. Work in each of these categories is directed and supervised by Duke faculty.

A. Instructional Workers.

Teaching assistants at Duke supplement and enhance the instruction of undergraduate students provided by faculty. (Tr. pp. 219, 629.) Their duties can include giving lectures, leading discussion sessions, leading lab sessions, grading papers or other homework, grading exams, holding office hours, responding to student questions, and leading review sessions. (Tr. pp. 211-12, 217, 689-92, 769-70, 779.) For example, when Jacqueline Robinson-Hamm first worked as a teaching assistant for a class in Biomedical Engineering, she split many of the critical jobs with the faculty member—such as grading exams, lecturing, and holding office hours—while fully assuming other responsibilities. (Tr. pp. 689-92.) Similarly, Joseph Longarino’s teaching assistant and preceptor positions in Religious Studies and the Divinity School required him to lead discussion sections unattended by faculty, grade papers and exams, hold office hours, and lead review sessions. (Tr. pp. 769-70, 779.)

Teaching assistants perform work in credit-bearing courses for which undergraduate students pay tuition. (Tr. pp. 688-89, 768-69, 774, 778, 1018, 1038.) They perform instructional

work for courses that are required for the receipt of certain undergraduate degrees. (Tr. pp. 688-89, 778, 998-1000.) If PhD students were not doing this work, faculty—who are ultimately responsible for the task—would have to perform them, or Duke would be forced to hire additional workers to fill the role of the PhD students. (Tr. pp. 202-03, 744, 747.)

As instructors of record, graduate students serve as the primary instructor for undergraduate, credit-bearing courses. (Tr. pp. 213, 216-17, 994-95.) Instructors conduct lectures, design the lesson plan for each class, create and grade homework and exams, and handle all interaction with students. (Tr. pp. 995-97.) For example, as the instructor of record for Italian 101 and Italian 102, Alyssa Granacki prepared lessons, taught each class, prepared quizzes and tests, graded the quizzes and tests, and handled all student questions. (Tr. pp. 995-97.) Instructors of record are indistinguishable from a tenure-track faculty member or an adjunct faculty member teaching the same course. (Tr. pp. 995-1001.)

Substantial portions of the undergraduate curriculum, including courses that students must complete to receive an undergraduate degree, are provided through PhD students acting as instructors of record. Duke requires all undergraduate students to take three semesters of foreign language classes, or otherwise reach a 300-level course. (Tr. p. 998.) The Romance Studies Department relies on PhD students and adjunct faculty to teach all of its introductory language courses in French, Spanish, Italian, and Portuguese. (Tr. pp. 999-1001, 1005-06.) Indeed, when Ms. Granacki taught Italian 101 and Italian 102, at least half of the sections for those classes were taught by PhD students, with the remainder taught by adjuncts. (Tr. pp. 999-1000, 1006; Pet. Ex. 27.) Tenure-track faculty do not teach these introductory language classes. (Tr. pp. 999-1001.) Many students take these introductory language classes. (Tr. p. 998.)

Similarly, the Math Department relies extensively on the labor of its PhD students. During the Fall 2016 semester, 34 of the 52 100-level courses offered by the Math Department list PhD students as the instructors of record. (Pet. Exs. 25, 26.) During that semester, 50 percent of all courses offered by the department were taught by PhD students. (Pet. Exs. 25, 26.)

All instructional workers are assigned their position with a specific course by Duke, at the department level. (Tr. pp. 330, 742, 771-72, 929, 996.) Students can be assigned to teach outside of their degree program. (Pet. Ex. 24; Tr. pp. 400-01, 742, 778, 929-30.) Teaching does not provide academic credit necessary for degrees. (Tr. pp. 236, 370.)

Departments can make teaching assistant assignments without regard to the student's academic or personal interests. (Tr. p. 1001.) For example, Ms. Granacki was assigned to teach introductory Italian courses even though she has no interest in teaching students foreign languages, the teaching is not relevant to her dissertation research, and the pedagogical techniques in such classes are almost entirely distinct from those in her chosen area of studies. (Tr. pp. 1001-02.) The modern Italian that she taught to undergraduate students is a different language from the medieval Italian that is the focus of her academic studies. (Tr. p. 1001.) Similarly, some of Mr. Longarino's teaching assistant assignments have no relation to his academic focus or research. (Tr. pp. 866, 874.) And Ms. Robinson-Hamm fulfilled her teaching assistantship requirement in a Biomedical Engineering course that bears no relation to her academic interests or dissertation. (Tr. pp. 732, 735.)

Duke faculty assign the specific duties for each instructional worker. (Tr. p. 211.) The Graduate School directs departments to "offer each [teaching assistant] a contract at the time of assignment that clearly specifies both the expectations of the position . . . and the financial

remuneration the student will receive.” (Er. Ex. 9, p. 133.) Teaching assistants are given specific work assignments by the faculty member teaching the course. (Tr. pp. 211, 691, 770.) Faculty also provide direction as to how to conduct the duties. For example, faculty can ensure that there is consistent advising and grading. (Tr. pp. 220, 770, 780.) Instructors are often told exactly what material to teach in a course. For example, in the Romance Studies department, instructors of record in the introductory language classes are provided with a pre-established syllabus and textbook. (Tr. p. 995.) The graduate student instructors are responsible for creating daily lesson plans based on the syllabus. (Tr. p. 995.)

Duke does not mandate specific instructional training for all graduate students prior to serving as a teaching assistant, though a few departments require some training. In order to work as a teaching assistant, a graduate student is required only to be proficient in English and in good academic standing. (Er. Ex. 9, p. 132.) Duke offers various teaching improvement programs to graduate students, as it does to faculty. In addition to pedagogy courses students can elect to take, Duke offers the Certificate in College Teaching and Bass Instructional Fellowships, which are voluntary programs to improve teaching skills. (Bd. Ex. 4, ¶¶ 11-15; Tr. pp. 172, 182.) The Teaching IDEAS Workshop series “is open to all faculty, postdocs, and graduate students at Duke” and covers “topics related to effective undergraduate teaching.” (Er. Ex. 9, p. 140.)

The training mandated by departments for teaching assistants varies significantly. For example, the Biomedical Engineering department currently requires students to take a pedagogy seminar at the same time as their teaching assistantship. (Tr. pp. 326-27.) The English department requires students to complete a “teaching apprentice” program during their first two years as PhD students. (Bd. Ex. 4, ¶ 6.) In Romance Studies, Ms. Granacki completed a

language pedagogy class before she taught her first class as an instructor of record. (Tr. p. 996.)

Mr. Longarino's training for his first teaching assistantship in Religious Studies consisted only of a college certificate teaching course. (Tr. pp. 773-774). However, before Ms. Robinson-Hamm worked as a teaching assistant in Biomedical Engineering, her training consisted of a single course that lasted about one hour, discussing such topics as professionalism, relationships with students, grading, and safety procedures. (Tr. pp. 323, 369, 691-92; Er. Ex. 23.)

The English Department distinguishes between "teaching apprenticeships," which is training that does not require the student to provide services, and "teaching assistantships." (Er. Ex. 27, pp. 15-16.) It describes "teaching apprenticeships" as "NOT 'service work' – grading, substituting, etc. – but pedagogical and mentoring opportunities" for the PhD student, for which the student receives "audit credit" but no compensation. (Er. Ex. 27, pp. 15-16, 20.) It describes "teaching assistantships" as requiring teaching classes and grading papers, for which the students receive compensation but no audit credit. (Er. Ex. 27, pp. 15-16, 20.)

Duke imposes workplace rules on instructional workers, just as it would on any employee. (Er. Ex. 23, pp. 20, 23 (teaching assistants prohibited from having romantic relationships with their students); (Tr. pp. 691-92) (describing training in which teaching assistants are told not to connect to students on Facebook and to maintain professionalism in relationships).)

Duke monitors instructional workers' performance, and directs them to improve if Duke identifies any deficiencies. (Tr. pp. 178, 222, 322-33, 482, 990.) The Graduate School directs departments to develop their own procedures for providing feedback, including "a formal written evaluation . . . direct observation . . . and follow up consultations." (Er. Ex. 9, p. 134.)

Teaching assistants who do not adequately perform their duties are subject to corrective counseling or removal. (Tr. pp. 178, 388.) The Graduate School holds students to all “rules and regulations of the university currently in effect,” reserving the right to take “such disciplinary action . . . as may be deemed appropriate for failure to abide by such rules and regulations.” (Er. Ex. 9, p. 147.) If a teaching assistant is not performing satisfactorily, the Graduate School expects that the faculty supervising the assistant will counsel and train the assistant. (Tr. p. 178.) Discipline can result in a student being removed from their assistantship position, despite the student still being permitted to receive their PhD degree, though such removals are rare. (Tr. pp. 179, 388.) For example, in the Mathematics department, a student who fails to perform adequately as an instructor of record is disallowed from teaching future classes. (Tr. p. 990.)

B. Research Assistants in the Humanities.

Research assistants in the humanities support the work of Duke’s faculty. (Tr. pp. 278-80.) Research assistants are assigned by their department to work for a specific professor on a semester or school-year basis. (Tr. p. 766.) The professor then tells the student the specific work he or she is expected to perform. (Tr. p. 767; Er. Ex. 37.) Research assistants’ duties can include summarizing academic literature, checking the accuracy of citations, finding specific original texts, locating sources on microfilm, creating indices for a book, scanning documents, and proctoring exams. (Tr. pp. 263, 415, 767-68, 770, 817-21; Pet. Ex. 13.) Research assistants perform work that is indispensable to a faculty member’s research or teaching. As Dean McClain remarked of literature reviews, a staple of research assistant work: “If [the research assistants] didn’t do it, then I would have to do it.” (Tr. p. 496.) If a research assistant

completes all assignments given by a professor, that professor can then assign the research assistant to work for a different professor. (Tr. pp. 812-13.)

Tasks assigned by professors to students can be completely unrelated to the student's academic development. (Tr. pp. 768, 805-06.) For example, when Ms. Granacki was a research assistant, one supervisor directed that she scan books and images for an upcoming course; another directed her to proctor exams. (Tr. pp. 1051-53.) When Mr. Longarino was a research assistant, his supervisor directed that he create indices for a book the supervisor was publishing. (Tr. pp. 767-68, 818-21.) This task, which benefited the professor's scholarship and Duke's prestige, could have been performed by any Duke undergraduate student, let alone the professor, the publisher, or a clerical employee. (Tr. p. 768.)

C. Research Assistants in the Sciences.

Research assistants in engineering, natural sciences, and medical sciences work in research labs run by faculty members. (Tr. p. 311.) They conduct scientific research at the direction of a professor who is the "principal investigator" ("PI"), pursuant to external research grants. (Tr. pp. 343-47, 540-41.) These grants are from government entities—such as the National Science Foundation, National Institute of Health, or Department of Defense—non-profit organizations, or corporations. (Tr. p. 315, 343, 567-68.)

Research assistants work under the direction of a PI and the staff of the PI's lab. (Tr. pp. 311-12.) PI's are responsible for all activity that goes on in the lab, and benefit from the research conducted in the lab. (Tr. pp. 349, 541.) For instance, PI's typically receive authorship credit on papers produced from research conducted within their lab, and credit on patents based on research in their lab. (Tr. pp. 574, 725). PI's supervise research assistants' work, either through

personal direction or by delegating supervision to post-doctoral fellows or staff research technicians. (Tr. pp. 312, 343, 589.) When another lab requires the expertise of a particular research assistant, a PI can assign that assistant to collaborate with the other lab on a project. (Tr. p. 671.) PIs are required to provide periodic progress reports to grantors about work conducted on the grant, including work performed by staff and research assistants. (Tr. p. 368.)

Research assistants are not free to conduct any research they choose. Instead, their research is limited to subjects funded by their PI's external grant, with their work meeting research goals associated with that grant. (Tr. pp. 548, 594.) A student's dissertation topic is selected with the guidance of the PI in order to dovetail with the PI's grant funding. (Tr. p. 711.) Students are not permitted to conduct unfunded research. (Tr. p. 594 (“[Y]ou can’t do unfunded research. It’s expensive.”).)

For example, Ms. Robinson-Hamm is specifically listed in the “personnel” section of her PI's external grant, and a description of her thesis appears as work that must be completed under the terms of that grant. (Tr. pp. 346-47, 665.) Although her research work does not always contribute to her own dissertation, she never performs any research that does not contribute to the satisfaction of her PI's grant, or a grant held by another Duke faculty member. (Tr. pp. 671-72, 674.) Like many research assistants, her dissertation topic is “inextricably intertwined” with work for her PI's grant. (Tr. pp. 318, 668.) But if she were to leave her position in the lab, her PI would still be required to complete Ms. Robinson-Hamm's research. (Tr. pp. 667-68.) Her PI therefore would be required to hire another researcher to complete the work that would otherwise have provided the foundation for Ms. Robinson-Hamm's dissertation. (Tr. pp. 667-68.)

Research assistants work alongside other Duke employees who are not pursuing degrees, such as post-doctoral fellows, research technicians, and lab managers. (Tr. pp. 342, 569-70, 668-669.) These staff can perform the same types of tasks as research assistants. (Tr. pp. 668, 670-71, 677.) Just like research assistants and a PI, staff researchers can receive credit on papers and patents based upon research in a PI's lab. (Tr. pp. 350-52; Pet. Ex. 8.) Research assistants can fill in for lab technicians and postdoctoral researchers when they go on vacation. (Tr. pp. 677.) Duke has a vacation policy for lab-based research assistants, which states that they are entitled to at least 10 days of vacation annually. (Pet. Ex. 9; Tr. p. 357.)

A significant portion of research assistants' work can involve tasks that are mundane and could be completed by other Duke employees. (Tr. pp. 670-71, 680.) Some of these tasks are menial, such as cleaning lab devices, that are performed by non-students in other academic settings. (Tr. pp. 670-71, 678.) Ms. Robinson-Hamm testified that every month she is required to sterilize tips, a task that is unrelated to her research and serves primarily to reduce costs for her PI. (Tr. p. 707.) Other labs simply buy new tips rather than force research assistants to sterilize them. (Tr. p. 707.) Others tasks – such as the repetitive execution of research kits and daily trips to confirm that research mice are still alive – are related to their research but nevertheless could be completed by non-student employees, do not further the assistant's academic development, and do not require assistants to rely on their academic experience. (Tr. pp. 670, 673.)

Research assistants are subject to Duke's policy on patents and intellectual property in the same fashion as faculty and non-student employees in labs. (Tr. p. 355; Pet. Ex. 8.) Under Duke's policy, all patents developed using Duke facilities or using external funds directed to

Duke are owned by Duke. (Tr. p. 355-56; Pet. Ex. 8, p. 4.) Patents developed by research assistants in their PI's lab are thus owned by Duke. (Tr. pp. 352, 693-94.)

Duke provides mandatory training to graduate students for their research work through the Responsible Conduct of Research ("RCR") program. (Er. Ex. 19; Tr. p. 191; Bd. Ex. 4, ¶ 19.) RCR training is required under the terms of federally-funded grants for anyone working under the grant. (Tr. pp. 425-26.)

PI's have the authority to hire research assistants and are not obligated to have research assistants in their labs. (Tr. p. 569.) In the Engineering departments, PI's select research assistants based in part on their work experience. (Tr. p. 653.) In the medical sciences, they select research assistants based in part on their performance in lab rotations. (Tr. p. 598.)

PI's have the authority to discipline research assistants and separate assistants from their lab. (Tr. pp. 313, 659; Pet. Ex. 28.) PI's counsel research assistants who are not productive or working enough time in the lab. (Tr. pp. 336, 555-56, 563). PI's can and do separate research assistants from the lab for poor performance, or if the PI does not believe the assistant is the right fit for the lab. (Tr. pp. 313-14, 577 (medical sciences departments annually have two to four research assistants separated from labs at the request of the PI), 659.)

If a separated research assistant wishes to continue in the PhD program, she must convince another PI to offer them a research assistant position in their lab and to guarantee their funding. (Tr. pp. 362-63, 661-62.) The separated research assistant therefore must find a PI who is willing to pay the student to continue her research, or adjust their research to suit the grant and funding needs of a particular PI. (Tr. pp. 661-62.) If the research assistant cannot find another PI, then that student may be forced to leave the PhD program. (Tr. pp. 362-63, 580-81, 661-62.)

III. Graduate Students Are Compensated By Duke for Their Work as Teaching and Research Assistants.

Duke's graduate student stipends include compensation for their work as teaching or research assistants. The Director of Graduate Studies Manual recognizes that "[a]ssistantship stipends . . . are considered compensation for services . . . even if the service is a requirement for the degree." (Er. Ex. 9, p. 53; *see also* id. at 51 (stating requirement to provide description of "assistantship compensation for work performed (teaching and/or research)"); id. (referring to "TA/RA compensatory awards"); Tr. p. 254 (Dean McClain acknowledging that the portion of stipends for assistants is treated as a "compensatory" payment by Duke).)

"Assistantship payments for teaching or research are made through the faculty/staff payroll system and are paid on the 25th of each month." (Er. Ex. 9, p. 52.) Graduate student workers are assigned codes in the payroll system based on various official job descriptions, including positions titled "teaching assistant," "graduate assistant," and "research assistant, PhD student." (Pet. Ex. 7, pp. 4-6, 11-13, 17-19 (each "occupational summary" stating, "Employment is secondary to their academic pursuit."); Tr. p. 479.) On the other hand, "[f]ellowship stipends have no service requirement and are paid through the non-compensatory payment system on the last working day of each month." (Er. Ex. 9, p. 52.) As the Graduate School explained in its presentation to students on finances, students are supposed to receive a W-2 tax form for assistantship payments as "wages." (Pet. Ex. 19, p. 8; Tr. pp. 459, 785, 1002, 1004.) Assistants must fill out an I-9 tax form and establish their employability before accepting an assistantship. (Er. Ex. 9, p. 54; Tr. p. 298.)

Duke's tuition, fee, and stipend schedule establishes students are paid \$6,000 for a position as teaching assistant and \$3,000 for a position as grader. (Tr. p. 148; Er. Ex. 7.) For research assistants, Duke's policy states that student stipends "coupled with tuition remission and fringe benefits must reflect appropriate compensation for work services performed on the research grant or institutional research project." (Er. Ex. 9, p. 53.) Students who are beyond the five years of guaranteed funding and are not receiving a stipend are paid \$6,000 per course or semester if they work as a teaching or research assistant. (Tr. p. 253.)

Graduate students can earn additional compensation above the amount of their base stipend, including by performing supplemental teaching or research assistantships. (Tr. p. 161; Er. Ex. 9, p. 47.) For example, Mr. Muir spent a year working as both a teaching assistant and a research assistant in order to earn more money than his base stipend. (Tr. pp. 974-76.) Mr. Longarino earned an additional \$1,500 per semester by working as a teaching and learning coordinator for his department. (Tr. pp. 783-84.) Duke limits the amount a student can earn from additional assistantships to \$3,000. (Tr. p. 161; Er. Ex. 10, p. 2.)

Beyond working additional assignments, students can receive "bonuses" for providing Duke especially important benefits or services. Departments are permitted to and do offer premium pay to entice students to perform certain types of work, such as serving as a "Head" teaching assistant for particular courses. (Pet. Ex. 14; Tr. p. 419.) Students can receive up to \$5,000 on top of their base stipend if they secure a sufficient amount of funding from an external fellowship. (Er. Ex. 10, p. 1; Tr. pp. 293-94.) Students also can receive additional stipend funds if they secure their own health insurance. (Er. Ex. 9, p. 39.)

If students refuse to perform required work, Duke can reduce the amounts of their stipends. Graduate School Dean Paula McClain described in detail the process required for reducing a student's stipend. (Tr. p. 489.) Dean McClain admitted that on the two occasions someone brought such reductions to her attention, she approved one reduction and instructed that the department rescind the other.⁴ (Tr. pp. 150, 382-84.)

Many departments explicitly recognize that stipends will be reduced for a failure to fulfill work requirements. For example, for many departments in the medical sciences, the Director of Graduate Studies Manual states that all students past their second year of study are "required to work as research assistants funded by an advisor's research grant or other institutionally funded research project." (Er. Ex. 9, p. 46.) The Economics department states on its "Financial Support" web page that funding is provided to students through assistantship and grader positions, and that "[s]tudents who decline employment contracts will not receive funding." (Pet. Ex. 18, p. 2.) The School of the Environment's graduate student handbook states, "*Loss of assistantship:* Failure on the part of the student to carry out assigned duties properly . . . constitute reason for withdrawing the assistantship award at the end of any given semester." (Pet. Ex. 17, p. 10.)⁵

Other departments make the possibility of stipend reduction clear in their appointment or acceptance letters. For example, the Electrical & Computer Engineering department informs its

⁴ The instances of stipend reductions known to Deans McClain and Fitzpatrick are not representative of how frequent such reductions occur. Dean McClain admitted that stipend reductions are not required to go across her desk, and that she would not know of all instances where a student's stipend was reduced. (Tr. pp. 365, 383, 388.) Dean Fitzpatrick admitted that she has only learned of stipend reductions when the student brings it to her attention. (Tr. pp. 633-34, 639-40.)

⁵ Duke questioned the validity of its Environment School's graduate student manual, which is currently posed on Duke's website, but references the 2009-10 school year on the cover. (Tr. pp. 441-43.) Duke failed, however, to identify and offer a more current manual.

students that “financial support is *contingent upon . . . satisfactory performance as a Graduate Research Assistant.*” (Er. Ex. 25, Duke 002659 (emphasis in original).) The Biomedical Engineering department uses identical language. (Er. Ex. 25, Duke 002570; *see also* Pet. Ex. 11 (Mechanical Engineering)). The Math department states that “Financial support for years 2-5 is contingent on . . . adequate performance in any teaching and research responsibilities you may be assigned.” (Er. Ex. 25, Duke 002759.) The Physics department states “[y]our Teaching Assistant stipend is contingent upon you fulfilling your TA duties responsibly.” (Er. Ex. 25, Duke 002771.) The German department states that “support is contingent on stipend holders meeting satisfactory performance criteria[.]” (Er. Ex. 25, Duke 002754.) The Literature department’s appointment letter informs a student that they will work in a particular course, states the amount they will be paid for doing so, and states, “Failure to fulfill the responsibilities may result in termination of this contract.” (Pet. Ex. 6.) The Religious Studies department states, “Graduate students who are funded through the program must perform service to the University in order to receive the full stipend.” (Pet. Ex. 23, p. 2.)

Dean McClain described a department letter that stated stipends could be reduced as a “threat.” (Tr. p. 489.) Departments can and do follow through with such threats. For example, the Religious Studies department’s appointment letter states: “In order to get the full stipend, students must be available for service each semester.” (Er. Ex. 25, Duke 002779.) This statement is consistent with how the department describes its official practice to students, which is “to withhold the teaching portion of a student’s stipend if the student elects not to teach for some reason[.]” (Pet. Ex. 22, p. 2; Tr. pp. 776-77.) The department informed its students that it

had “recently reviewed this policy with the Graduate School and was told that it seemed reasonable and legitimate[.]” (Pet. Ex. 22, p. 2.)

Religious Studies follows this policy and reduces funding for students who elect not to teach. For example, in late 2014, Mr. Muir told the department that he did not want to work as a teaching assistant during the spring semester of 2015 so he could focus on the comprehensive exam for his PhD. (Tr. pp. 925, 927; Pet. Ex. 24.) The department told him that doing so would mean “forfeiting \$3000 that you would have earned in teaching stipend.” (Pet. Ex. 24, p. 2.) When Mr. Muir subsequently declined to teach that semester, Duke paid him less than his full stipend. (Tr. pp. 932-33.) Duke again reduced Mr. Muir’s stipend the following semester when he elected to teach at a different university that offered him greater compensation for his services. (Tr. pp. 933-34.) In both semesters, Duke reduced Mr. Muir’s stipend even though he still was actively pursuing his PhD degree and remained in good academic standing. (Tr. pp. 928, 933-36.)

Students required to work as engineering or science research assistants face a similar situation. At times, students are either fired or separated from their research assistant position, or are unable to convince a faculty member to offer them such a position. (Tr. pp. 313, 336, 662.) Such students are provided a period of “backstop” funding while they attempt to find a faculty member (or PI) willing to sponsor their research assistantship. (Tr. pp. 314, 362, 578.) Duke usually limits such “backstop” funding to no more than nine months. (Tr. p. 362.) If a student is unable to find a PI willing to fund a research assistant position within the nine months, Duke can cut off their funding entirely if the student has not already decided to leave the program. (Tr. pp. 362-63, 580.) Duke will encourage the students to leave, i.e. “Master[] out.” (Tr. p. 662.)

ARGUMENT

This case is controlled by *Columbia University*, 364 NLRB No. 90 (2016), which recognized that graduate students are employees under the Act when they perform work that is controlled by a university in exchange for compensation. *Id.* at *17.

The evidence here demonstrates the employment status of graduate students even more strongly than the facts supporting the decision in *Columbia*. As with *Columbia*, Duke relies on graduate students to provide services that are central to its success as a major research university, and it has the right to control and direct the work graduate students perform. Duke admits that it compensates graduate students for their work. Students must work to receive their full stipends, can increase their stipends by working more assignments or premium assignments, and can receive less than their full stipend if they fail to provide required services.

The purported distinctions raised by Duke are either legally irrelevant under *Columbia* or factually inaccurate. The Board in *Columbia* made clear that educational benefits, if any, derived from graduate student work does not mean they are not employees. The receipt of equalized stipends across semesters does not mean students are not being paid for work. Work contributing to a dissertation can still be performed in the context of an employment relationship. Minor differences between how Duke and *Columbia* structure undergraduate education do not mean that Duke's graduate students are not employees. And the availability of discretionary "backstop" funding for students separated from their research lab does not mean that students paid to work in labs are not employees.

This is an easy case, directly controlled by recent Board precedent. Duke has already delayed proceedings for well over a month, raising baseless allegations about purportedly

material differences between how it and Columbia treat graduate student workers. After an eight-day hearing, Duke failed to introduce any evidence demonstrating that any meaningful differences exist.

The Region should find in the Petitioner's favor, and direct an election forthwith.

I. *Columbia University Holds that Graduate Students Who Perform Services in Exchange for Compensation Are Employees Under the Act.*

In *Columbia University*, 364 NLRB No. 90 (2016), the Board recently affirmed that undergraduate and graduate student assistants are statutory employees where they provide services under the direction of the university in exchange for compensation. *Id.* at *1. The decision overruled *Brown University*, 342 NLRB 483 (2004), which had held that student assistants were not employees under Section 2(3) of the Act when they had a primarily educational relationship with the university.

The flawed reasoning underlying *Brown* had been rejected by the Board in *Boston Medical Center Corp.*, 330 NLRB 152 (1999). In that case, the Board found that medical interns and residents in teaching hospitals were employees under the broad scope of the Act. The Board extended that reasoning in *New York University*, 332 NLRB 1205 (2000) (“*NYU*”), which overturned *Leland Stanford Junior University*, 214 NLRB 621 (1974), and concluded that student assistants were entitled to statutory coverage as employees despite the existence of an educational relationship with the employer.

Like *Boston Medical Center* and *NYU*, the Board in *Columbia* correctly recognized that the plain language of Section 2(3) of the Act indicates that the term “employee” shall be construed broadly to “include any employee,” subject to specified exemptions. *Columbia*, 364

NLRB No. 90, at *1; *see also Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984) (“The breadth of § 2(3)’s definition is striking: the Act squarely applies to ‘any employee.’”). A broad interpretation of Section 2(3) upholds the “unequivocal policy of the Act ... to ‘encourag[e] the practice and procedure of collective bargaining’ and to ‘protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing.’” *Columbia*, 364 NLRB No. 90 at *2. It follows that “[t]he exclusions listed in the statute are limited and narrow, and do not, on their face, encompass . . . ‘students.’” *Boston Med. Ctr. Corp.*, 330 NLRB at 160.

Where a statute does not define the term “employee,” it is well-established that courts should interpret the term according to common law agency doctrine. *Columbia*, 364 NLRB No. 90, at *6. This doctrine provides that student assistants have an employment relationship where “the employer ha[s] the right to control the employee’s work, and that the work be performed in exchange for compensation.” *Id.* at *17.

The Board in *Brown* erroneously concluded that extending statutory coverage to student assistants, even assuming they are common law employees, would contravene the fundamental policy of the Act. 342 NLRB at 488. Neither a proper reading of the statute nor empirical evidence supported this reasoning. *Columbia*, 364 NLRB No. 90, at *2. Rather, available data drawn from the experiences of tens of thousands of unionized graduate assistants in the public sector and medical interns and residents demonstrates that collective bargaining does not adversely impact the educational process. *Id.* at *5. Indeed, nothing in the Act’s legislative history indicates a desire to exclude students or other employees who receive valuable professional skills and experience while working. *Id.* at *17, n. 111. Thus, the key question

when determining statutory coverage is whether a student provides services, at the direction of the university, in exchange for compensation. *Id.* at *1, 14. The existence of any other relationship, including an educational relationship, is irrelevant. *Id.* at *7.

In *Columbia*, the Board found persuasive that the university has the power and incentive to control teaching assistants' work as it "advances a key business operation of the University: the education of undergraduate students." *Id.* at 15. Similarly, for research assistants, the university has an interest in directing and controlling work performed as a condition of receiving a stipend, or in fulfillment of grant specifications. *Id.* at *17.

The Board in *Columbia* also found that research and teaching assistants are clearly being compensated for their services. The receipt of funding is conditioned on the performance of work such that pay can be withheld if students fail to fulfill their duties. *Id.* at *15. Stipends for student assistants are subject to W-2 reporting and treated as part of the university's payroll system. *Id.* at *15. Teaching assistants are compensated for providing some of the same services as faculty such as conducting lectures, grading exams, and leading class discussions, and take on significant teaching duties at the university. *Id.* These services undoubtedly "assist in the business of universities by providing instructional services for which undergraduate students pay tuition." *Id.* at *16. With respect to research assistants, the Board noted that work is performed as a condition of receiving grant aid. *Id.* at *18. In order to receive their financial packages, research assistants must fulfill the conditions set forth by the grant, and lack the freedom to pursue their own educational interests outside of those conditions. *Id.*

Thus, the fact that teaching or research may be a degree requirement or carry educational importance does not detract from the reality that student assistants contribute valuable services to

the university in exchange for compensation. *Id.* As discussed below, the facts in *Columbia* closely mirror those at Duke. As there are no meaningful differences in the facts, graduate students at Duke are employees under the Act just like those at Columbia.

II. Under *Columbia*, PhD Students at Duke Who Perform Instructional or Research Services In Exchange for Funding Are Employees.

In determining whether graduate student workers were “employees” under Section 2(3) of the Act, *Columbia* considered whether the university has “the right to control the employee’s work” and whether the work was “performed in exchange for compensation.” *Columbia*, 364 NLRB No. 90, at *15. Duke’s graduate students at least meet, if not indeed exceed, these criteria compared to their counterparts at Columbia.

A. Duke Has the Right to Control Graduate Students’ Work.

Duke’s offer of proof presented no facts indicating it lacks the ability to control graduate students’ work. It is therefore unnecessary for the Region to explore this question. Should the Region find it necessary to explore this issue, the record shows that Duke has and regularly exercises the right to control each of the three general categories of graduate student assistants.

1. Duke Has the Right to Control Instructional Workers.

Duke has the right to control and does control the work of graduate student instructional workers. Duke enrolls about 6,379 undergraduate students, and in fiscal year 2016 generated more than \$328 million in undergraduate tuition revenue. (Pet. Ex. 20, p. 12.) Like Columbia, Duke therefore “possesses a significant interest” in directing and overseeing student assistants’ teaching activities, as it “advances a key business operation of the University: the education of undergraduate students.” *Columbia*, 364 NLRB No. 90, at *15; *see also id.* at *16 (noting that Columbia generates “nearly a billion dollars in annual tuition revenue”).

Duke's educational workers provide services central to Duke's identity as a prestigious higher educational institution. Teaching assistants at Duke provide materially indistinguishable services from comparable workers at Columbia. Just as at Columbia, they "frequently take on a role akin to that of faculty" and "conduct lectures, grade exams, and lead discussions."

Columbia, 364 NLRB No. 90 at *16, (2016); *see* (Tr. pp. 211-12, 217, 689-92, 769-70, 779).

Duke graduate student instructors of record have even more responsibilities than teaching assistants, as they fully assume the role of a faculty member for their assigned course. (Tr. pp. 213, 216-17, 994-97.) Both teaching assistants and instructors of record provide these services in credit-bearing courses that fulfill graduation requirements for undergraduates and generate substantial revenue for Duke. (Tr. pp. 688-89, 778, 998-1000.)

Duke relies even more extensively on the labor of its PhD students than Columbia. Substantial portions of the undergraduate curriculum are provided through PhD student workers serving as the faculty member. For example, during the Fall 2016 semester, 34 of the 52 100-level courses offered by the Math Department list PhD students as the instructors of record. (Pet. Ex. 25, 26.) The Romance Studies department relies on PhD students and adjunct faculty to teach all of its introductory language courses in French, Spanish, Italian, and Portuguese. (Tr. pp. 999-1001, 1005-06.) Even when an actual faculty member is assigned to a course, PhD student workers can assume some of the most burdensome aspects of teaching, such as grading, corresponding with students, and holding office hours. (Tr. pp. 689-92, 769-70, 779.) If PhD students did not perform this work, Duke still would have to provide it, either by burdening its faculty with the responsibilities, or hiring additional workers to fill the role of the PhD students.

Duke has an incentive to control the work of instructional workers because their work is central to the university's primary product. Duke undeniably exercises that control. Duke ultimately assigns every instructional worker their position, and can do so without regard to the worker's academic or personal interests. (Tr. pp. 330, 732, 735, 742, 771-72, 866, 874, 929, 996, 1001-02.) Like the instructional officers at Columbia, Duke's teaching assistants work "with the guidance of a faculty members" and instructors of record work "under the direction of an academic department." *Columbia*, 364 NLRB No. 90, at *17; *see* (Tr. pp. 211, 220, 691, 770, 780, 995). Duke professors tell their designated teaching assistants the work that they must do. (Tr. pp. 211, 691, 770.)

Like those at Columbia, instructional workers "who do not adequately perform their duties" are "subject to corrective counseling." *Columbia*, 364 NLRB No. 90, at *15; *see* (Tr. pp. 178, 388). In *Columbia*, the Board recognized that the removal of single student assistant for poor performance was sufficient to establish the university's control of graduate student labor. *Columbia*, 364 NLRB No. 90, at *15. At Duke, discipline can result in a student being removed from their assistantship position, despite the student still being permitted to receive their PhD degree, though such removals are rare. (Tr. pp. 179, 388.) For example, Professor Emeritus Jack Bookman testified that when the Math department concluded a graduate student was "not capable of doing a good job teaching," the department reassigned the student "a grading responsibility." (Tr. pp. 989-90.) Given that the Graduate School expressly reserves the right to take any "disciplinary action . . . as may be deemed appropriate" against graduate student workers for violating any of the "rules and regulations of the university," (Er. Ex. 9, p. 147), Duke plainly has the right to take any number of corrective actions against student workers.

Duke collects a tremendous amount of money from undergraduate students who pay tuition to receive an education. Duke relies extensively on the labor of its PhD students in order to provide that education. Given that Duke's financial well-being depends on PhD students teaching, Duke does not allow instructional workers to teach without direction or guidance. Duke thus retains and exercises the right to control and direct instructional workers.

2. Duke Has the Right to Control Research Assistants in the Humanities.

Duke also has the right to control research assistants working in the humanities. These research assistants are assigned to specific professors. (Tr. p. 766.) The assigned professor controls the student's work, which often supports necessary components of the professor's professional work. (Tr. pp. 496, 767.) If a research assistant completes all of the assignments given by a professor, that professor can then assign the research assistant to work for a different professor. (Tr. pp. 812-13.)

Professors have wide leeway in the tasks they ask their research assistants to perform. Some tasks may be relevant to the students' academic discipline, but still constitutes work that benefits the institution. For example, research assistants can conduct literature reviews that otherwise must be completed by the professor. (Tr. p. 496.) Professors also are free to assign administrative or clerical tasks completely unrelated to students' academic pursuits. For example, when Ms. Granacki was a research assistant, one supervisor directed that she scan books and images for his upcoming course; another directed her to proctor exams. (Tr. pp. 1051-53.) When Mr. Longarino was a research assistant, his supervisor directed him to index a book, check footnotes, and expand the size of microfilm copies so that they were the size of normal

pages. (Tr. pp. 818-21.) Research assistants in the humanities perform whatever tasks they are assigned by their faculty member. Research assistants work at Duke's direction.

3. Duke Has the Right to Control Research Assistants in the Natural and Medical Sciences.

In *Columbia*, the Board recognized that for research assistants to be statutory employees, a University must “exert[] the requisite control over the research assistant’s work[.]” 364 NLRB No. 90, at *17. The Board in *Columbia* engaged in an in-depth exploration of a subset of student workers who were funded by external grants provided to the university. It recognized that the work of these assistants, “while advancing the assistants’ doctoral theses, also meets research goals associated with grants from which the University receives substantial income.” *Id.* at *17. Because the assistants worked “under the direction of their departments to ensure that particular grant specifications are met,” and because they were “not permitted to simply pursue their educational goals at their own discretion,” the Board found that Columbia exerted the necessary control over the assistants’ research. *Id.* at *17-18.

Duke’s laboratory-based research assistants provide Duke with nearly identical services to those provided at Columbia. They contribute directly to the satisfaction of grants through which Duke generates more than \$1 billion dollars annually. (Pet. Ex. 20, p. 12.) They also contribute to the development of intellectual property, including patents, over which Duke retains ownership. (Tr. p. 355-56; Pet. Ex. 8.)

Given the importance of their labor to Duke’s financial health, Duke controls almost every aspect of a research assistant’s work. As with the research assistants at Columbia, they “are not permitted to simply pursue their educational goals at their own discretion, subject only

to the general requirement that they make academic progress[.]” *Columbia*, 364 NLRB No. 90, at *18. Instead, they limit their research to subjects funded by PI’s external grants, with their work meeting research goals associated with that grant. (Tr. pp. 548, 594.) The dissertation topic is not one selected at whim by the student, but selected with the guidance of the PI in order to dovetail with the PI’s grant funding. (Tr. p. 711.) Research assistants are not permitted to conduct unfunded research. (Tr. p. 594.) If a research assistant were to leave their position, their PI would be required to hire an additional researcher to perform the research previously assigned to the assistant. (Tr. pp. 667-68.) A research assistant who is separated from her lab would need to change her research focus to match that of a new PI, or to find a PI willing to fund her research. (Tr. pp. 661-62.)

As at Columbia, Duke’s research assistants work “under the direction of their departments to ensure that particular grant specifications are met.” *See Columbia*, 364 NLRB No. 90, at *17-18. PI’s are responsible for all research conducted in their office, and supervise research assistants either directly or by delegating supervisory responsibilities to other lab employees. (Tr. pp. 312, 343, 349, 541, 589.) The extent of PI’s control is demonstrated by the fact that they can direct research assistants to work on projects required for another PI’s grant, even when that work does not relate to the research assistant’s own dissertation. (Tr. p. 671.)

Duke also controls the terms and conditions of research assistants’ employment just as they would any other employee. *See Boston Med. Ctr. Corp.*, 330 NLRB at 187 (considering the treatment of hospital “house officer” residents as employees with regard to benefits such as leave, vacation, and insurance supported employee status). Duke’s research assistants can perform the same tasks as other researchers employed by their PI who are not pursuing degrees,

such as technicians and analysts. (Tr. pp. 668, 670-71, 677.) They must complete the same RCR training as must be provided to all research staff working on federal grants. (Tr. pp. 425-26.) Assistants are not permitted to take time off without Duke's approval, and receive a limited number of paid vacation days. (Pet. Ex. 9; Tr. p. 357.)

Duke's ability to discharge research assistants also demonstrates that they are employees. *See Columbia*, 364 NLRB No. 90, at *15; *cf. Leland Stanford*, 214 NLRB 621, 623 (1974) (finding inability to discharge research assistants supported non-employee status). At Duke, research assistants can be selected because of their past relevant work experience. (Tr. p. 653.) They can also be separated when they fail to meet the performance expectations of their PI. Such terminations are not uncommon. (Tr. pp. 313-14, 577, 659.) For example, in the medical science departments, two to four research assistants are separated from their lab each year at the request of their PI. (Tr. p. 577.) If a separated research assistant wishes to continue in the PhD program, they must convince another PI to offer them a research assistant position in their lab. (Tr. pp. 362-63, 661-662.)

Duke is one of the country's leading and largest research universities. It generates a tremendous amount of revenue by fulfilling highly competitive research grants, and creating patents or businesses from that research. Its fulfillment of those grants expressly depends on the labor of its graduate student research assistants. Duke has the ability to control and direct the work of those research assistants, the incentive to control and direct that work, and does, in fact, exercise that control.

B. PhD Students at Duke Who Perform Instructional or Research Services Are Compensated for Their Work.

Common-law employment requires that “work be performed in exchange for compensation.” *Columbia*, 364 NLRB No. 90, at *15. Duke, like Columbia, pays its graduate student workers a portion of their stipends as compensation for the services they provide the university.

As Duke’s policies make clear, stipends paid to graduate students include compensation for work performed. According to Duke’s tuition, fee, and stipend schedule, the portion of a stipend for a teaching assistantship is \$6,000 for an instructor and \$3,000 for a grader. (Tr. p. 148; Er. Ex. 7.) This is the exact same amount that is paid to a PhD student for performing the same tasks after the student has exhausted their guaranteed stipends. (Tr. p. 253.) For research assistants, Duke’s policy states that student stipends “coupled with tuition remission and fringe benefits must reflect appropriate compensation for work services performed on the research grant or institutional research project.” (Er. Ex. 9, p. 53 (emphasis added).)

The Director of Graduate Studies Manual recognizes that “[a]ssistantship stipends . . . are considered compensation for services . . . even if the service is a requirement for the degree.” (Er. Ex. 9, p. 53 (emphasis added); *see also* id. at 51 (stating requirement to provide description of “assistantship compensation for work performed (teaching and/or research)”; id. (referring to “TA/RA compensatory awards”); Tr. p. 254 (Dean McClain acknowledging that the portion of stipends for assistants is treated as a “compensatory” payment by Duke).) “Assistantship payments for teaching or research are made through the faculty/staff payroll system and are paid on the 25th of each month.” (Er. Ex. 9, p. 52.) Students are to complete an I-9 tax form before beginning an assistantship, receive their assistantship payments through the payroll system, and

then receive a corresponding W-2. (Er. Ex. 9, p. 54; Pet. Ex. 19, p. 8; Tr. pp. 298, 459, 785, 1002, 1004); *see NYU*, 332 NLRB at 1206 (“Graduate assistants are paid for their work and are carried on the Employer’s payroll system.”) Because Duke admits that it pays student assistants for services performed, no further inquiry is necessary.⁶ *See Columbia*, 364 NLRB No. 90, at *5; *NYU*, 332 NLRB at 1206 (holding that a common law employment relationship exists when an individual “performs services for another, under the other’s control or right of control, and in return for payment.”).

Regardless, additional facts make clear that graduate students are paid for their work. Duke expressly conditions the receipt of financial aid on work performed; pays students more if they take on additional work assignments; and pays students less if they fail to perform required services.

1. Duke Expressly Conditions the Receipt of Financial Aid on Work Performed.

The Graduate School and individual departments expressly condition students’ financial awards on work performed. This is communicated to students through acceptance letters from

⁶ At the hearing, Duke’s primary objection seemed to be that it considered students to be performing a required “service” instead of “work.” (Tr. pp. 207, 220, 233.) Duke went so far as to instruct one witness on the stand to stop using the use “work,” stating “I don’t want my witnesses to testify that anything that is done is work.” (Tr. pp. 233-34.) This objection is frivolous doublespeak. In the official manual issued by the Graduate School, Duke repeatedly refers to student labor as “work” or “work service” when discussing how that labor relates to students’ pay. (Er. Ex. 9, pp. 46, 51.) Duke has job descriptions applicable to the various assistantship positions available to graduate students that describe the positions’ work expectations. (Pet. Ex. 7.) Regardless, any distinction between “service” and “work” is legally irrelevant. The first sentence of *Columbia* acknowledges that the question before the Board was “whether students who perform services at a university” were statutory employees. 364 NLRB No. 90, at *1 (emphasis added).

the Graduate School, award letters from their department, and annual reappointment letters from their department.

From the moment they are accepted into the Graduate School, Duke puts students on notice that they must work to get paid. For students receiving the “Research Assistantship Letter,” the Graduate School notifies them that their offer “includes a first-year research assistantship, which will compensate you with tuition remission and a stipend for the services you will be providing.” (Er. Ex. 9, pp. 32-33.) Students receiving the “Teaching Assistantship Letter” are informed that “your stipend will consist, in part, of a salary that will be earned through providing teaching assistant support to your department or program[.]” (Er. Ex. 9, pp. 36-37.)

In addition to the letters sent by the Graduate School, many individual departments also send students letters upon admission setting forth the terms of their financial package. (Tr. p. 229.) Through these letters, Departments make clear that students must work to receive their stipend. (*See, e.g.*, Er. Ex. 25, Duke 002784 (“Funding in all non-fellowship years will be paid through a combination of research and teaching assistantships.”); Duke 002776 (stating that financial “support may come in any number of forms, including, for example, service as a teaching assistant, research assistant, and/or a Graduate School fellowship stipend”).)

The Graduate School also directs departments to send annual reappointment letters describing the sources of student funding and “differentiat[ing] specifically between fellowship amounts paid to the student and assistantship compensation for work performed (teaching and/or research).” (Er. Ex. 9, p. 51.) The “Reappointment Letter Template” includes various options a department can select, depending on whether specific work is required for receipt of a financial

award. (Er. Ex. 25, Duke 002641-2649 (noting that assistantship payments “represent[] a reasonable value for the services you will be providing”).) Departments follow the Graduate School’s instructions, and send annual appointment letters making clear that students are required to work as a condition of their stipend. (*See, e.g.*, Er. Ex. 25, Duke 002661 (“the stipend consists of a fellowship component . . . for which no work service is required, and a teaching assistantship in the amount of [redacted] which represents a reasonable value for the services you will be providing.”); Duke 002715 (““your funding . . . will consist of a work stipend of [redacted] which represents a reasonable value for the services you will be providing.”).)

In addition to admitting that assistantship payments are provided as compensation for work performed, Duke expressly conditions the receipt of graduate students’ full stipends on the completion of work service requirements. Graduate student assistants are therefore employees under the Act.

2. Graduate Students Are Paid More When They Agree to Additional or Premium Assignments.

In addition to requiring graduate assistants to work in order to receive their base stipend, Duke allows assistants to increase their stipends through additional work assignments. (Tr. p. 161; Er. Ex. 9, p. 47.) Students may earn up to \$3,000 a year beyond their base stipend by agreeing to take on additional teaching or research assistantships. (Tr. pp. 161, 974-76; Er. Ex. 10, p. 2.) Students who are beyond the five years of guaranteed funding and are not receiving a stipend are paid \$6,000 if they work as a teaching or research assistant. (Tr. p. 253.) Departments also can and do offer additional pay to entice students to perform certain types of

assistantship work, such as serving as a “Head” teaching assistant for particular courses. (Pet. Ex. 14; Tr. p. 419.)

Duke cannot maintain that students are not paid for their services while simultaneously paying students more money when they accept more work assignments. Wages are undeniably provided “in exchange for services” provided by graduate student assistants.

3. Graduate Students Are Paid Less When They Refuse Required Work Assignments.

Duke also has the power to reduce or eliminate students’ stipends when they do not perform required work. When assistants “do not perform their assigned instructional duties, the record indicates that they will not be paid.” *Columbia*, 364 NLRB No. 90, at *15.

Many departments make the threat of stipend reduction clear in their policies, award letters, and reappointment letters. *See, e.g.*, (Pet. Ex. 18, p. 2 (“Students who decline employment contracts will not receive funding.”); Er. Ex. 25, Duke 002771 (“Your Teaching Assistant stipend is contingent upon you fulfilling your TA duties responsibly.”))

Departments can and do follow through on such threats, as demonstrated by the two times that the Religious Studies Department reduced Mr. Muir’s stipend when he declined to accept a required teaching assistant position. (Tr. pp. 923-34.) A group of Religious Studies students later petitioned the department to change this policy because it penalized students performing research away from Duke’s campus. The department refused their request and noted that this policy had been reviewed and approved by the Graduate School. (Pet. Ex. 22.)

Duke attempted to downplay this point by emphasizing occasions when it might decline to cut students’ stipends. First, Dr. Wax suggested that students who lose their research assistantships are nevertheless entitled to five years of full funding. (Tr. pp. 313-14.) He later

conceded that this was not the case. Instead, his department provides such students a period of “backstop” funding for a length of time left to Duke’s discretion. (Tr. p. 362.) If students are unable to secure a new research assistant position within their allowed time, Duke will cut off their financial support. (Tr. pp. 362-63, 580.)

Similarly, Dean McClain gave ambiguous testimony regarding a recent occasion when she required a department to reinstate a student’s full stipend. (Tr. pp. 381-82.) Because she refused to provide any details regarding this occasion, it is impossible to determine the reason for her decision. Regardless, Dean McClain also admitted that she had approved the only other stipend reduction to cross her desk. (Tr. pp. 383-84.) Dean McClain therefore confirms what Mr. Muir’s situation demonstrated: Duke has the power to reduce students’ stipends whenever it deems it appropriate.

By emphasizing those occasions when Duke voluntarily declined to cut an assistant’s pay, Duke is addressing the wrong question. When establishing an employment relationship, “the common law does not require that control must be exercised[.]” *Browning-Ferris Indus. of California, Inc.*, 362 NLRB No. 186 at *18 n.73 (Aug. 27, 2015). It is instead “not so much the actual exercise of controls as possession of the right to control which is determinative.” *Id.* at *18 (quoting *The Law of Agency and Partnership* § 50 (2nd ed. 1990)). Here, it is undisputed that Duke has the right to reduce or eliminate a student’s stipends when they do not perform required work. That Duke may occasionally decline to exercise that right does not diminish the existence of its entitlement. Duke can and does reduce students’ stipends when they do not complete required work assignments. PhD students working as teaching and research assistants are undeniably employees.

III. The Purported Distinctions Raised by Duke Are Irrelevant.

Duke raised a several purported distinctions between its graduate assistants and those at Columbia. These distinctions, to the degree not already soundly rejected by the Board in *Columbia*, are either nonexistent or irrelevant.

A. Graduate Assistants Are Employees Regardless of Whether There Is Any Educational Component to their Work.

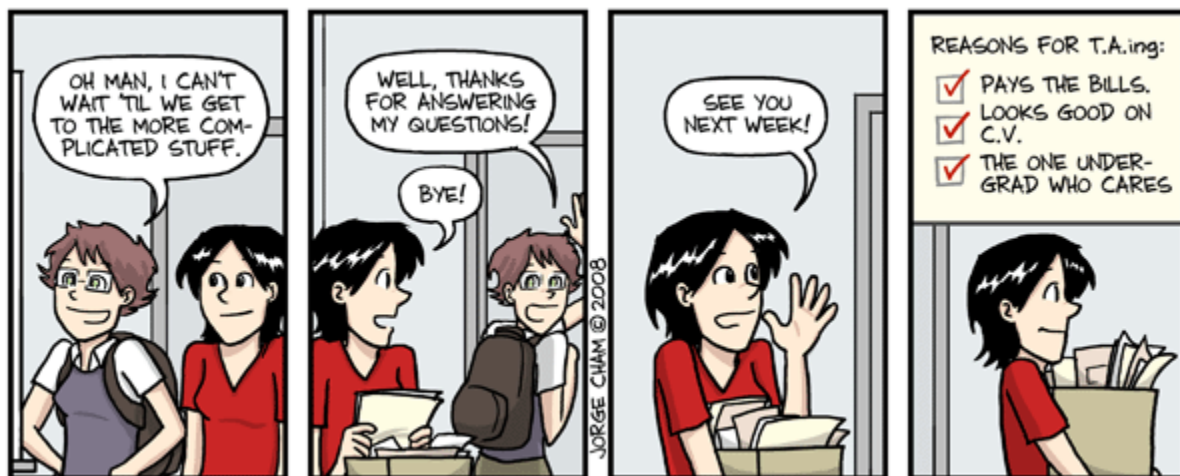
Duke asserts that graduate student workers are not employees because there is an overwhelming educational component to their work. This argument, however, is foreclosed by *Columbia*, which “rejected an inquiry into whether an employment relationship is secondary to or coextensive with an educational relationship.” 364 NLRB No. 90, at *17. The Board instead found that “[s]tatutory coverage is permitted by virtue of an employment relationship; it is not foreclosed by the existence of some other, additional relationship that the Act does not reach.” *Id.* at *2. The economic nature of an employment relationship is not rendered irrelevant if there is a robust educational component. “Even when such an economic component may seem comparatively slight, relative to other aspects of the relationship between worker and employer, the payment of compensation, in conjunction with the employer’s control, suffices to establish an employment relationship for purposes of the Act.” *Id.* at *6.

Graduate student workers at Duke plainly have an employment relationship with the institution. *See* Section II.B, *supra*. Under *Columbia*, the extent to which workers also receive educational benefits from that relationship is irrelevant. 364 NLRB No. 90, at *6; *see also Boston Med. Ctr. Corp.*, 330 NLRB 152 at 160 (“[I]nterns, residents and fellows fall within the broad definition of ‘employee’ under Section 2(3), notwithstanding that a purpose of their being at a hospital may also be, in part, educational.”)

The Union does not dispute that for some students, assistantships provide the student both educational and financial benefits, while also providing benefits to Duke. Duke itself recognizes this fact. For example, School of the Environment's graduate student handbook recognizes that the requirement to serve as a teaching assistant "is intended to benefit both the school (by providing teaching support) and the student (by gaining experience from the various responsibilities of teaching)." (Pet. Ex. 17, p. 10.)

Nevertheless, many PhD students receive very little educational benefit from their work.⁷ For example, students are often required to teach in contexts that do not provide them with a meaningful educational experience. Students can be required to teach outside of their degree program. (Pet. Ex. 24; Tr. pp. 400-01, 742, 778, 929-30.) They can be required to teach courses that are entirely irrelevant to their academic discipline and goals. For example, Ms. Granacki is forced to teach introductory Italian courses, despite the fact that she has no interest in teaching foreign languages, the teaching is not relevant to her dissertation research, and the pedagogical

⁷ The reality that PhD students work as teaching assistants first and foremost for financial reasons rather than educational reasons is exemplified by a comic strip from Duke's own training to teacher assistants, (Er. Ex. 23, p. 35):



techniques in such classes are almost entirely distinct (and this unhelpful) from those in her chosen area of studies. (Tr. pp. 1001-02.)⁸ The irrelevant nature of these courses to her scholarship is underscored by the vast linguistic differences between modern Italian, which she teaches, and medieval Italian, which is the focus of her academic studies. (Tr. p. 1001.) Similarly, Ms. Robinson-Hamm and Mr. Longarino have both worked as teaching assistants in courses that bear no relation to their academic interests or dissertation. (Tr. pp. 732, 735, 866, 874.) Regardless of whether there is an educational component to their work, Duke requires students to work because it needs the work done.

Moreover, many of the tasks assigned to Teaching Assistants are menial or administrative tasks unrelated to their development as academics. Instead, these tasks simply reduce the workload on Duke's faculty. Teaching does not provide academic credit necessary for degrees. (Tr. pp. 236, 370.) Several PhD programs do not require students to teach in order to graduate. (Er. Ex. 17.) Others allow students to avoid teaching obligations by securing external funding or accepting other non-instructional work assignments. (Tr. pp. 989-90 (Math students who are incapable of teaching can work as graders); Er. Ex. 27, p. 15 (English students can serve as research assistants instead of teaching assistants).) In programs that require students to teach in order to receive funding, students can generally be excused from their teaching requirements without any academic consequences. (Tr. pp. 932-35, 989-90.)

Duke recognizes that students' work responsibilities can be unrelated to their academic pursuits, and can instead detract from their academic studies. That fact is one of the reasons

⁸ Plus, Ms. Granacki acquired a considerable amount of foreign language teaching experience before enrolling as a PhD Duke student: "I would actually defer to the fact that the vast majority of pedagogical training happened before I got to Duke." (Tr. p. 1026.)

Duke prohibits students from working for more than 19.9 hours per week in “non-dissertation related research appointments . . . instructional positions, or other employment (both on and off campus).” (Er. Ex. 5, p. 47; Tr. p. 154.) The English Department goes so far as to distinguish between pedagogical teaching positions, which it labels “teaching apprenticeships,” and employment teaching positions, which it labels “teaching assistantships.” (Er. Ex. 27, pp. 15-16.) It describes “teaching apprenticeships” as “NOT ‘service work’ -- grading, substituting, etc.-- but pedagogical and mentoring opportunities” for the PhD student, for which the student receives “audit credit” but no compensation. (Er. Ex. 27, pp. 15-16, 20.) It describes “teaching assistantships” as positions requiring the student to teach classes and grade papers, for which the student receives compensation but no audit credit. (Er. Ex. 27, pp. 15-16, 20.)

Laboratory research assistants also perform work that is unrelated to their academic advancement. A significant portion of research assistants’ work can involve tasks that are mundane and could be completed by other Duke employees. (Tr. pp. 670-71, 680.) Some of these tasks are menial tasks, such as cleaning lab devices. (Tr. pp. 670-71.) Others tasks—such as the repetitive execution of research kits and daily trips to confirm that research mice are still alive—are related to their research but nevertheless could be completed by non-student employees, do not further the assistant’s academic development, and do not require assistants to rely on their academic experience. (Tr. pp. 670, 673.) Other labs hire non-student employees to provide some of these services; Duke saves money by requiring its research assistants to complete the work. (Tr. p. 678.)

Similarly, Humanities research assistants perform whatever tasks are assigned to them by their professors. (Tr. p. 767.) These tasks can also be clerical tasks irrelevant to their academic

development—such as manipulating images, scanning, proctoring, cite-checking, or indexing. (Tr. pp. 263, 415, 767-68, 770, 817-21.) This work does not advance the student’s education. Instead, it simply relieves the faculty member of some of their more menial responsibilities, without forcing the faculty member to hire additional non-student support staff.

Duke requires PhD students to work, at least in part, because Duke needs the work to be performed. Some graduate student assistants may also learn new skills in the course of their assistantships. But “[m]embers of all professions continue learning throughout their careers[.]” *Boston Med. Ctr. Corp.*, 330 NLRB at 161. “[M]any employees engage in long-term programs designed to impart and improve skills and knowledge.” *Id.* “Such individuals are still employees, regardless of other intended benefits and consequences of these programs.” *Id.*⁹ The fact that some PhD students may, like all other employees, learn and improve while working is not mutually exclusive with status as employees under the Act.

B. Duke’s Attempts to Disavow the Compensatory Nature of Its Payments to Graduate Students Are Without Merit.

Duke contends that graduate students are not employees because they receive the same amount of stipend whether or not they are performing any teaching or research services. This argument rests on two premises: first, that students are paid the same amount regardless of whether they work; and second, that any such pay equalization would result in student workers not being employees. The first premise is false. The second was rejected by *Columbia*.

⁹ As one of Duke’s attorneys remarked in cross-examining a graduate student: “Well, I will tell you, as a lawyer, I’m developing my skills all the time. There’s always something to learn, right? Isn’t there?” (Tr. p. 1027).

First, the evidence shows that students are not paid the same amount regardless of whether they work. As discussed above, Duke can and does pay students more when they work more. *See* Section II.B.2, *supra*. Duke can and does pay students less when they work less. *See* Section II.B.3, *supra*. Students who are beyond the five years of guaranteed funding and are not receiving a stipend are paid \$6,000 if they work as a teaching or research assistant. (Tr. p. 253.) Duke's argument regarding pay equalization thus rests on an inaccurate premise.

Second, even if Duke did completely equalize graduate students' stipends, that fact would be irrelevant. *Columbia* concluded that pay equalization across semesters did not negate an employment relationship. "Students are required to work as a condition of receiving this tuition assistance during semesters when they take on instructional duties, and such duties confer a financial benefit on Columbia to offset its costs of financial aid, even if it chooses to distribute the benefit in such a way that equalizes financial aid for both assistants and nonassistant students." *Columbia*, 364 NLRB No. 90, at *15. At Duke, as at Columbia, "in semesters where a student assistant would normally be required to work as a condition of funding, he or she may opt not to work only if he or she finds a source of outside fellowship aid." *Id.*; *see* (Tr. p. 281). At Duke, as at Columbia, "the stipend portion of the financial package given to assistants is generally treated as part of university payroll and is subject to W-2 reporting and I-9 employment verification requirements." *Columbia*, 364 NLRB No. 90, at *15; *see* (Er. Ex. 9, p. 54; Pet. Ex. 19, p. 8; Tr. pp. 298, 459, 785, 1002, 1004). To the extent Duke engages in stipend equalization, *Columbia* renders that fact irrelevant.¹⁰

¹⁰ Duke also failed to present any witnesses with direct knowledge about the university's practices regarding variations in student stipends. Deans McClains and Fitzpatrick admitted that instances of stipend reductions do not necessarily come to their attention. *See supra* n.4. The

Duke did not deny that its PhD students are required to work in order to receive stipends, only that the work that they do should be called “service.” Duke admitted that students are required to provide the university services. (Tr. pp. 206-07); *see* Section II.B.1, *supra*. Duke also did not claim that a student, once assigned to a work position, can abandon that position on a whim without repercussion. Indeed, the evidence demonstrates that there are consequences for a failure to complete required duties. *See* Section II.B.3, *supra*. Because Duke pays its PhD students for teaching and research services, they are employees under the Act.

If PhD students were not forced to teach the majority of introductory language courses, Duke would be required to hire more faculty to teach those courses. If PhD students did not teach the majority of math courses, Duke would be required to hire more faculty to teach them. If PhD students did not fill hundreds of research roles in Duke’s research laboratories, Duke’s faculty would be forced to hire other researchers to satisfy their grant obligations. Duke cannot negate the obvious employment relationship between it and its graduate workers simply by equalizing their pay across semesters.

C. The Fact That Not All Departments Require All Students to Serve as Teaching Assistants is Irrelevant.

Duke may contend that *Columbia* is inapplicable because not all departments require all students to work as teaching assistants. This is also irrelevant and, if anything, undermines Duke’s argument about education being the primary purpose and benefit of graduate student service. *Columbia* recognized that “Students are required to work as a condition of receiving this

evidence demonstrates that this is the case, as Mr. Muir’s two stipend reductions were apparently never brought to their attention. (Tr. pp. 932-35.) Dean McClain was also unfamiliar with the departmental policies that required stipend reductions for students who failed to fulfill employment requirements. (Tr. pp. 448-50; *see* Pet. Exs. 17, 18.)

tuition assistance during semesters when they take on instructional duties[.]” *Columbia*, 364 NLRB No. 90, at *15 (emphasis added).

Duke assigns individual graduate students teaching responsibilities as part of their funding packages. *See* Section II.B.1, *supra*. Regardless of whether individual departments require universal participation in teaching duties, it is clear that once a student assumes an assistantship, they are unable to simply abandon it without repercussion. *See* Section II.B.3, *supra*; *see also Columbia*, 364 NLRB No. 90, at *6 fn. 52. (noting that student assistants cannot be fairly categorized as “volunteers”). Students are required to work during semesters when they take on instructional duties. If they do not, Duke can reduce or remove their funding. The fact that some students may not be required to take on instructional duties is simply irrelevant.

D. Duke’s Lack of a “Core Curriculum” Is Irrelevant.

Duke apparently contends that *Columbia* is inapplicable because Duke’s undergraduate students are not subject to “core curriculum” requirements. This is irrelevant. The Board’s analysis in *Columbia* did not turn on the existence of a core curriculum. Indeed, only some – not all – teaching assistants at Columbia taught core curriculum classes. *Columbia*, 364 NLRB 90 at *14 (“Notably, some Instructional Officers teach components of the core curriculum, which is Columbia’s signature course requirement for all undergraduate students regardless of major.” (emphasis added)) .

Duke may argue that the lack of a core curriculum shows that teaching assistants are more likely to teach in their own department. However, graduate students at Duke can be assigned to teach outside of their degree program. (Pet. Ex. 24; Tr. pp. 400-01, 742, 778, 929-

30.) Any such argument would simple be a variation on Duke’s “educational component” argument, which the Board has rejected. *See* Section III.A, *supra*.

Regardless, Duke graduate students serve as instructors and teaching assistants in courses that provide undergraduate students with academic credit. (Tr. pp. 688-89, 768-69, 774, 778, 1018, 1038.) They do so in courses that fulfill general undergraduate education requirements, (Tr. p. 998), or the requirements for specific undergraduate degrees, (Tr. pp. 688-89, 778, 998-1000). Any differences between how Duke and Columbia structure their undergraduate programs are simply irrelevant to whether instructional workers are employees under the Act.

E. The Relationship Between Research Assistants’ Dissertation Topics and Work Responsibilities is Irrelevant.

Duke apparently contends that laboratory research assistants are not employees because research assistants affiliate with faculty members who fund them through their own research grants, and the research they do for their faculty member’s grant will also provide the basis for their dissertation. *See* Duke’s Offer of Proof, p. 2 (point (5)); p. 4-5 (paragraph (4)); p. 19 (paragraph (25)). These are not grounds to distinguish *Columbia*.

“[T]he fact that a research assistant’s work might advance his own educational interests as well as the University’s interests is not a barrier to finding statutory-employee status.” *Columbia*, 364 NLRB No. 90, at *17-18. Research assistants’ research topics are controlled by the PI to whom the research assistant is assigned. (Tr. pp. 548, 594.) Dissertation topics are selected with the guidance of the PI in order to dovetail with the PI’s grant funding. (Tr. p. 711.) Students are not allowed to conduct unfunded research. (Tr. p. 594.) Although research in the lab typically provides the foundation for the research assistant’s dissertation, it also fulfills the

PI's research requirements under a grant that would otherwise have to be conducted by another paid researcher. (Tr. pp. 346-47, 665, 667-68.) Duke generates hundreds of millions of dollars from these grants. (Pet. Ex. 20, p. 12.) Duke's research assistants are employees, regardless of whether their work also provides the basis for a dissertation.

F. The Existence of “Backstop” Funding for Laboratory Research Assistants Is Irrelevant.

Duke apparently contends that its provision of “backstop” funding for laboratory research assistants whose PI has lost external funding shows that research assistants are not employees. *See* Duke's Offer of Proof, p. 2 (point 6). This is irrelevant. *Columbia* addressed graduate student workers whose work was supported by external grants, and students whose work was supported independently of such grants. *Columbia*, 364 NLRB No. 90 at *2, *17-18. Both categories of workers were employees, regardless of funding source. *Id.* That an individual might move between the two categories is irrelevant.

Moreover, for programs in engineering or the medical sciences, all students are required to work as a research assistant. (Er. Ex. 9, p. 46; Tr. pp. 317-18, 543-44.) If a student is separated from their research assistantship with a particular PI, they are required to secure a new position or they will lose their funding. (Tr. pp. 362-63, 661-662.) The fact that Duke provides temporary “backstop” funding for students who cannot be funded through a grant does not negate the fact that students must work in order to receive their stipend.

CONCLUSION

The Union respectfully requests that the Region find that the petitioned-for graduate students at Duke are employees under the Act and direct an election forthwith.

Respectfully submitted, this the 21st day of December, 2016.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was filed electronically via the National Labor Relations Board's e-filing service, and was served via e-mail to the following:

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