

BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION TWO

In the Matter of: :
 :
THE NEW SCHOOL, :
 :
Employer, :
 :
and :
 :
STUDENT EMPLOYEES AT THE NEW :
SCHOOL-SENS, UAW, :
 :

Petitioner. :

Case No. 02-RC-143009

FEBRUARY 13, 2017

SUPPLEMENTAL BRIEF OF THE PETITIONER TO THE REGIONAL DIRECTOR

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I. INTRODUCTION

This petition, seeking a unit of student employees, has been remanded by the Board after twice being dismissed by the Regional Director on the authority of *Brown University*, 342 N.L.R.B. 483 (2004). On August 23, 2016, the Board issued its decision in *Columbia University*, 364 N.L.R.B. No. 90, explicitly overruling *Brown*. Four months later, on December 23, 2016, the Board remanded this case to the Regional Director for further proceedings “consistent with *Columbia University*, including reopening the record, **if necessary.**” (emphasis added)

This memorandum is submitted in support of the Union’s position that it is not necessary to reopen the record. Rather, consistent with *Columbia*, the Regional Director should direct an election in the unit sought in the petition.

The Order remanding this case summarized the *Columbia* decision as containing the following elements:

1. Student assistants who have a common-law employment relationship with their school are employees under the NLRA;
2. A unit of student employees including doctoral, master’s and undergraduate student assistants is appropriate;
3. No student assistants should be excluded from the unit as temporary employees; and
4. The Regional Director should establish an appropriate voting eligibility formula.

The Board’s remand thus calls upon the Regional Director to apply these four holdings to the instant case.

Seven days of hearing have already been held. During those proceedings, the parties presented evidence regarding the employment relationship between the student

assistants and the school. The Employer also presented evidence to support its contention that student assistants are temporary employees. On the basis of the holding of *Columbia* and the record already made in this case, it is clear that the petitioned-for employees are statutory employees and that they have the right to organize, regardless of whether they are regarded as temporary employees. The Employer was offered an opportunity at the hearing to challenge the petitioned-for unit, and it did not do so.

The Union has already submitted its position with respect to an eligibility formula. All other potential issues may be resolved on the basis of the record.

II. FACTS

A. The Overall Operations of the Employer

The Employer is engaged in operating institutions of higher education in New York City (Tr. 8, 53; Dec. 1, 3).¹ The New School derives 85% of its revenues from tuition (Tr. 102-03; Er. Ex. 6, 2nd page; Dec. 4). Those revenues total approximately \$300 million per year (Tr. 42).

The University is divided into five schools or divisions: the New School for Social Research (“NSSR”), which contains the graduate faculty; the Eugene Lang College, which is a liberal arts undergraduate school; the New School for Public Engagement (“NSPE”); the Parsons School of Design; and the Performing Arts School. The Performing Arts School was recently formed from the merger of three programs: the

¹ References to the record in this proceeding shall be indicated as follows:
Regional Director’s Supplemental Decision and Order Dismissing Petition .. Dec. (followed by page number)
Transcript of the 2015 Hearing Tr. (followed by page number)
Employer Exhibits Er. Ex. (followed by Exhibit number)

Mannes School of Music, the Drama School and the Jazz School (Tr. 47-48; Dec. 3, 16-17).

The New School for Social Research is exclusively a graduate school (Tr. 183; Dec. 3). All but 59 of the 550 doctoral students at the University are enrolled at NSSR (Tr. 65-66, 187-88; Dec. 3). Most of the original research conducted by the Employer is performed at NSSR (Tr. 188). NSSR offers doctoral programs in various social sciences and the humanities (Er. Ex. 5, 3rd page; Tr. 189-90; Dec. 3). NSSR also offers Masters' of Arts in several humanities and social science fields, including the fields in which it offers doctoral degrees (Er. Ex. 5, 3rd and 4th pages; Tr. 189). Students enrolled in NSSR perform instructional and research services in the positions sought in the petition in several schools throughout the University (Tr. 225, 317, 544). At NSSR itself, the Employer utilizes the services of Teaching Assistants, Research Assistants and Research Associates, but it does not use the services of Course Assistants, Tutors or Teaching Fellows (Tr. 200-01; Dec. 17).

The Eugene Lang School is exclusively an undergraduate school, offering B.A. degrees in a variety of arts, humanities and social science fields (Tr. 317-18; Er. Ex. 3, 5th page; Dec. 3). It is the only one of the divisions of the New School that does not offer graduate programs (Tr. 54-55, 318; Dec. 3, 16-17). While there are thus no graduate students enrolled at Lang, the school does utilize graduate students from other divisions to serve as Research Assistants, Teaching Assistants, Teaching Fellows, and Course Assistants (Tr. 317; Dec. 16).

The New School for Public Engagement includes both graduate and undergraduate students in four divisions or "colleges": the Bachelor Program for Adults

and Transfers; the Milano School of International Affairs, Management and Urban Policy; the School of Media Studies; and the School of Writing (Tr. 48, 255; Er. Ex. 2, p. 6). About 1,400 graduate students and 600 undergraduate students were enrolled in NSPE at the time of the hearing (Tr. 255). NSPE offers several Bachelor's and Master's degrees and a Ph.D. in Public and Urban Policy at the Milano division (Er. Ex. 2, p. 6; Tr. 257). NSPE utilizes the services of Teaching Assistants, Teaching Fellows, Research Assistants, Course Assistants, and Tutors, but not Research Associates (Tr. 256; Dec. 17).

The Parsons School of Design enrolls about 5,000 students, one-half of the student body of the University, in various programs related to art and design (Tr. 542-43). This includes approximately 860 Master's students and no Ph.D. students (Tr. 543). The Parsons School utilizes the services of Teaching Assistants, Teaching Fellows, Research Assistants (referred to as Student Assistants III), Research Associates, and Tutors, but no Course Assistants (Tr. 542; Dec. 17). Most of the students who provide these services at Parsons are Ph.D. students enrolled at other schools (Tr. 543-44; Dec. 17).

Within the Performing Arts School, the Employer utilizes the services of Tutors to assist students in one class, Techniques of Music (Er. Ex. 67; Dec. 17).

B. Duties of the Positions Included in the Proposed Unit

1. *Teaching Positions*

Student employees in all of the instructional classifications included in the petitioned-for unit provide services related to teaching students at the New School, primarily undergraduate students at Lang.

Course Assistants assist classroom instructors by performing duties that do not entail classroom teaching responsibilities. These include help with grading, preparation of class presentations, assisting with presentations in the classroom, and generally supporting a faculty member in presenting the course to students (Tr. 80, 117, 328; Tr. 8-9). Course Assistants may be called upon to meet outside of class with students who are having trouble with the class (Tr. 284). Their support duties may include photocopying, setting up equipment, and other administrative duties (Tr. 284; Dec. 4).

Teaching Assistants (“TAs”) provide more advanced support services to faculty members, generally including some teaching responsibilities (Tr. 77; Dec. 4, 5). Their duties include preparing documents for the instructor, locating reading materials or other information requested by the instructor, distributing materials to the students, and holding office hours to meet with students in the class (Tr. 109-10, 118; Dec. 5). Many Teaching Assistants assist in large lecture classes, including the University Lecture (“ULEC”) classes (required classes for undergraduate students from across the University) and large lecture classes offered at Parsons (Tr. 510-11, 543-44; Dec. 6). These TAs attend the large lecture classes taught by faculty members and conduct recitation sections, or in-depth discussion sessions, with smaller groups of students from the class (Tr. 121-22, 205-06, 544; Dec. 5-6). The TAs will then often meet with the instructor to discuss what has been taking place in the recitation sessions, determine whether the students are grasping the materials, and discuss techniques to ensure that the students are learning the material of the course (Ibid). In general, the duties performed by Teaching Assistants depend upon the needs of the course (Tr. 118; Dec. 5).

The *Teaching Fellow* (“TF”) position is a more advanced teaching position entailing greater responsibility (Tr. 77-78, 111-12; Dec. 6). Teaching Assistant positions are available to students at varying educational levels, whereas Teaching Fellow positions are generally limited to Ph.D. students or students in a terminal Master’s program who have completed the majority of the degree requirements (Tr. 112, 522; Dec. 5). A Teaching Fellow is the instructor of record with responsibility for the syllabus of the class and for teaching and grading the class under the supervision of a department chair or program director (Tr. 521-22, 547; Er. Ex. 46; Dec. 6). They teach classes, read and grade assigned work, revise the syllabus, develop class assignments in consultation with faculty, assess student learning, and generally take responsibility for a class (Er. Ex 46). The University considers movement from a Teaching Assistant to a Teaching Fellow to be “the natural progression.” (Er. Ex. 74, 2nd page; see Tr. 112). Thus, there is a continuum from Course Assistant to TA to TF (Tr. 283).

Tutors provide one-on-one assistance to students who need help with their classwork (Tr. 79-80, 287, 288-89; Er. Ex. 56; Dec. 9). The University provides various “learning centers” which are staffed by Tutors to assist foreign students who need help with English, students who need help with creative writing, and students in foreign language classes who need help with written or spoken languages (Tr. 79-80, 289; Er. Ex. 56; Dec. 9).

2. *Research Positions*

Research Assistants and Research Associates work with faculty members conducting research at the University.

The University allocates up to \$5,100 to each full-time faculty member to pay *Research Assistants* to provide assistance with the faculty member's work (Tr. 78-9, 116, 308; Dec. 9).² The duties performed by Research Assistants are determined by the research projects and areas of interest of the particular faculty member (Tr. 78-9, 326; Er. Ex. 50; Dec. 7). The particular duties assigned can vary widely (Dec. 7). Research Assistants collect and analyze data or literature related to a professor's research (Tr. 113, 206; Dec. 7). Research Assistants in the social sciences may interview and work with human subjects to collect information for the faculty member's study (Tr. 206, 227-28; Dec. 7). Some faculty members assign Research Assistants to prepare materials to be presented at a conference or to help write a paper (Tr. 274, 326-27, 417; Dec. 7-8). Other faculty members assign their Research Assistants to help with correspondence, maintain websites, and perform other administrative tasks (Tr. 274, 416; Dec. 7). The Deputy Provost testified that Research Assistants, "generally speaking", work in fields that they are interested in, but that the particular assignment depends upon the interests of the faculty member (Tr. 79; Dec. 7). Thus, for example, a Research Assistant who is interested in policing methods and plans to write her dissertation about the use of surveillance by the NYPD will be working with a professor whose interests lie in sociology of religion and the Middle East (Tr. 485).

Research Associates are more advanced Ph.D. students or occasionally Master's students on a path toward a Ph.D. (Tr. 79; Dec. 8). Generally, Research Associates are "supported," or paid with funds provided by a research grant from a government or other outside source (Tr. 79, 357, 363; Er. Ex. 63; Dec. 8). To obtain a

² More money may be available for faculty at the NSSR in departments that attract grants from outside sources to support research (Tr. 116; Dec. 7).

grant, a faculty member, known as the Principal Investigator or “PI,” must submit a detailed description of the research he or she plans to conduct (Tr. 357; Er. Ex. 64). A Research Associate conducts research and performs duties related to the grant (Dec. 10). For example, a Psychology Professor, Michael Schober, used Research Associates in a study to determine whether respondents to a survey conducted by iPhone answer questions differently depending upon whether the questions are asked via text or voice and upon whether the questions are administered by a human interviewer or automated system (Tr. 359-60; Er. Ex. 64; Dec. 8). Several Research Associates worked on this project, including one who designed interactive dialog systems to be used in the surveys (Tr. 361, 362-63; Dec. 8). In all cases, the work performed by the Research Associate must be in furtherance of the grant (Tr. 237-38, 376; Dec. 10).

C. The Hiring Process

Most teaching positions are filled through an annual call for applicants for Teaching Assistantships and Teaching Fellowships (Tr. 513, 519; Dec. 13). The University Provost’s office disseminates information about the requirements and duties of the positions and invites eligible students to apply (Er. Ex. 46, 47, 70, 71 and 72; Tr. 318, 513-14, 519; Dec. 13). To be eligible, students must meet certain minimum academic standards (Tr. 512-13; Er. Ex. 46, 70; Dec. 13). Applicants for these positions fill out an on-line application form, providing personal information, e.e.o. information, and information regarding the applicants’ preferences (Tr. 514, 519; Pet. Ex. 24). As with many job application forms, this form requires the applicant to disclose any criminal history and authorizes the Employer to conduct a background check (Pet. Ex. 24, p. 4).

The Provost transmits the applications to the Dean's office of the school in which each applicant is enrolled to verify that the applicant meets the minimum academic requirements (Tr. 514, 519; Dec. 13). After verification, the Provost forwards the applications to the faculty in the departments where the teaching positions are located (Tr. 514, 519; Dec. 13). Those faculty members review the applications, interview applicants, and make their selections (Tr. 514, 519-20; Dec. 13). A faculty member conducting an interview and making a selection is referred to as "the hiring faculty." (Tr. 126; Pet. Ex. 13; Er. Ex. 72). The purpose of the interview is to enable the faculty member to assess whether the applicant has the qualifications to do a good job in the position (Tr. 126, 375, 531). After the hiring faculty make their selections, the Provost's office reviews the selection to ensure that no individual is hired for more than two TA positions in one semester or more than one TF position (Tr. 514; Dec. 13).

When students apply for positions within the school in which they are enrolled, the Provost's office may not be involved, but the candidates are still evaluated for their qualifications to perform the duties of the job (Dec. 14). For example, applications for employment by NSSR students for positions at NSSR are handled within the school, through the Dean's office, without involvement of the Provost of the University (Tr. 223, 268; Dec. 14). Students are sent an announcement of available positions within NSSR, including research positions, and those who wish to apply must complete a similar application to the one used by the Provost's office (Tr. 203, 268; Er. Ex. 30). Students applying for these positions may indicate an interest in a particular position, but many express a willingness to work with any professor in a department in order to maximize their chances of obtaining a job (Er. Ex. 32; Tr. 482). Students also obtain positions

less formally through referrals by other students who have held a particular position (Tr. 407, 466; Pet. Ex. 19; Dec. 14-15).

The University sends an e-mail to successful applicants officially offering the position. A student at NSSR who is appointed to a position within NSSR receives an e-mail from the Dean's office, spelling out the number of hours the appointee is expected to "work," the amount of compensation, and information regarding payments (Er. Ex. 31).³ While the precise wording varies, an offer letter for a TA position in Sociology is representative of the letters introduced by the Employer. After announcing the selection, the e-mail continues:

You are expected to work no more than a total of 150 hours, which breaks down to 10 hours per week in the semester(s) in which you are assigned. You must be registered in order to receive your RA or TA-ship. Please contact the professor you will be working with several weeks before the semester begins to go over your TA duties.

Your stipend for this position is: \$4125.

The funds will be disbursed to you in equal, biweekly installments in the semester(s) in which you are working, including the winter break if your award is for the full academic year. Please note that the IRS regulations consider this stipend taxable income and taxes will be withheld for each payment according to the tax withholding documents that you have on file with the University Payroll Office. You cannot receive your award if you are not a registered student.

Please print, sign and return a copy of this letter to our office by April 30, 2013 to indicate your acceptance.

(Er. Ex. 31, 1st page). The letters all include the number of hours of work expected, the level of compensation, and the taxation information, but some refer to the payment as a "salary" rather than a "stipend" (Er. Ex. 31, 4th sample e-mail, Research Assistantship).

³ Employer Exhibit 31 consists of four sample offer letters.

Offer letters sent by the Provost's office to applicants selected to serve as Teaching Fellows are more formal and legalistic (Pet. Ex. 38; Er. Ex. 39, 48). The letter informs the student of the class she has been selected to teach, the compensation, the identity of the department chair or program director who will be supervising her work, the schedule, and other administrative information. The letter states, "Working under the guidance of the supervising department chair/program director, your duties for the course will include revising or creating a syllabus, developing assignments, assessing student learning, and making yourself available to students for individual academic assistance." The letter reiterates that enrollment as a student is a requirement of serving as a Teaching Fellow, and contains information regarding training provided by the University to Teaching Fellows. The letter continues with this cautionary language:

A Teaching Fellowship constitutes student employment at The New School and, therefore, this appointment provides no entitlement to employee status and/or benefits, including but not limited to part-time faculty status or benefits. In addition, this assignment may be modified or terminated for poor performance or conduct without notice or entitlement right to further compensation or participation within the program. **Please note that, as with any teaching opportunity, enrollment in a course is a variable that is difficult to control and which often determines whether or not a section/course will run.**

(Pet. Ex. 38; Er. Ex. 39, 48) (emphasis in original). The letter further specifies that Teaching Fellows are expected to work 10 hours per week and reminds students of the need to have a Social Security number in order to be paid.

Thus, in order to obtain an instructional or research position, a student must go through a process that is entirely separate and distinct from the admissions process. He must fill out an application form, including criminal information and authorization for a background check. The University screens the applications to ensure that the

applicant meets the minimum academic standards. The faculty member who seeks the services of an instructional or research person interviews the applicant to assess his qualifications. The University sends a letter to a successful applicant, formally offering a position. If the student accepts the offer, he is placed on the University payroll system and performs services in exchange for pay. In short, these positions are filled through a hiring process typical of an employment relationship.

D. Pay for Performing Services in these Positions

At the hearing, the Employer characterized the payments made to the student employees in these classifications as “financial aid.” This is a very different kind of financial aid from scholarships, which are provided on the basis of merit or need (Tr. 557). These student employees receive payment, “for particular duties that the person performs” (Tr. 341, 564). The students take these positions and perform these duties in order to earn money (Tr. 373, see also Tr. 306, 472-73). The Employer pays them through a payroll account, with withholding for income taxes (Tr. 73-74, 169-70, 452; Er. Ex. 31). In order to work in these positions, the student employees must produce I-9 documentation (Tr. 170; Pet. Ex. 15). Course Assistants, TAs, TFs, Research Assistants, and Research Associates are paid in the form of a stipend or salary, which does not vary between pay periods on the basis of the number of hours worked (Tr. 170, 204-05, 225-26, 299-300, 517). Some Tutors are paid hourly, while other Tutors receive a stipend (Er. Ex. 56; Tr. 292-93, 552).

The amount of compensation is related to the nature and value of the services provided by the student employee. The Employer’s witnesses testified that the rate of pay for particular positions depends upon the number of hours the Employer anticipates

will be required to fulfill the duties of the position, the amount of work required, the availability of resources to pay the student employee, the skills and expertise that the position requires, the amount of responsibility that the position entails, and the nature of the project (Tr. 105-06, 230-31, 307, 533-34, 550). A document prepared by the Provost's office listing TA positions states that compensation is determined by a formula based upon the number of hours the Provost anticipated that the position will require, multiplied by an hourly rate of \$28.19 (Pet. Ex. 42). All of these factors that go into setting the rate of pay for these graduate student employees are the types of considerations that play a role in determining the rate of pay for any job. Moreover, at least with respect to TAs, the Dean of Academic Planning at Parsons testified that the cost of hiring students to work as TAs was comparable to what it would cost the University to hire part-time faculty to perform the same functions (Tr. 562-63).⁴ The evidence is unambiguous that the student employees receive compensation for the work they do.

E. The Work Performed by These Student Employees Benefits the Employer

The student employees in each of these classifications perform services that help to fulfill the function and purposes of the University. The mission of the New School is to teach and to increase knowledge through research (Tr. 175, 185, 232-33, 559).

The record is replete with evidence of the importance of the work of graduate student employees in the mission of the Employer. Teaching Fellows, as described

⁴ The Regional Director noted that the Employer claimed it would be less expensive to hire part-time faculty to perform the duties of TAs (Dec. 20). The Employer's witness testified that the Employer pays \$4,100 per semester for a TA, and that it would cost about \$4,000 to hire part-time faculty to serve as recitation section instructors (Tr. 562-63). Thus, the amount the Employer pays for TAs is very close to what it considers to be the market rate for other employees to provide the same services.

above, serve as the instructor of record for a class. They thus fulfill the same role in the teaching mission of the University as the regular and part-time faculty. According to the testimony of the Deputy Provost, Teaching Fellows as well as Teaching Assistants contribute to providing undergraduate students with “the best educational experience [we] can...” (Tr. 120). The role of Teaching Assistants is to assist faculty members and to help undergraduates to succeed (Tr. 118). Teaching Assistants enable the students to “dive deeper into the content” of the classes (Tr. 529-30). The expectation is that this will enable the undergraduates to learn, “which is the purpose of the class.” (Tr. 530, 558). Course Assistants likewise help to deliver an education to undergraduate students, providing the faculty with “whatever they need” to help out in the classroom (Tr. 117). By playing a role in grading students, both Course Assistants and Teaching Assistants help to fulfill the expectations of the undergraduate students in the classes and to assess their progress (Tr. 294). The University likewise hires Tutors to help students “succeed in their education” (Tr. 117).

Thus, student employees in instructional classifications help to fulfill the educational mission of the University. Their services are directed primarily to the education of undergraduate students. Tuition paid by undergraduate students provides most of the income of the Employer (Tr. 102-03; Er. Ex. 6, 2nd page). Thus, student employees in the instructional categories help to fulfill the mission of the University and provide services that generate income for the University.⁵

⁵ This is not to suggest that the New School is in business to make a profit. However, the University does require money to fulfill its mission, and it generates \$300 million dollars annually to fulfill that mission. Individuals who get paid to help fulfill that mission and generate that income have an economic relationship to the University.

Research Assistants similarly help to fulfill the mission of the Employer. They perform a variety of assignments to help faculty members with their research (Tr. 114-15, 209, 227-29, 326-27). This research is a part of the function of the faculty members as employees of the University (Tr. 559). The Assistant Dean for Faculty Affairs at Lang explained that the duties of Research Assistants “vary very much depending on what the faculty member wants. The student might be asked to help in translations, prepare for conferences, that kind of thing. It’s really – it’s so dependent on **whatever it is that the faculty member needs.**” (Tr. 326-27) (emphasis added). Thus, the record establishes that Research Assistants help faculty members to fulfill their role in the University.

Research Associates make an even greater contribution to the research mission of the University. The importance of that contribution is reflected in a much higher level of compensation. Research Associates are compensated from funds provided by government or foundations (Tr. 79, 357, 363). To obtain such a grant, a faculty member, referred to as the Principal Investigator or “PI”, must submit an application to a funding source. The application must explain the proposed research project in such a way as to appeal to the funding source (Tr. 357; Er. Ex. 64). The grant proposal may call for Research Associates to assist in conducting the proposed research (Tr. 361, 362-63). A grant proposal must include a budget describing how the funds will be spent in the event the grant is approved (Tr. 377). If Research Associates are to perform services, the budget will include a provision for the stipends to be paid to the Research Associates (Tr. 379). These costs are described as “personnel costs” in the grant proposal, and the stipend is termed a “salary” (Tr. 379-80).

In the sample grant proposal of Professor Michael Schober, introduced into the record by the Employer, one graduate student from Parsons was hired to work in each of the three years of the project (Tr. 386). During the first year of the project, the proposal called for this Research Associate to receive a salary of \$30,000, plus tuition and reimbursement of other costs (Tr. 379-80; Er. Ex. 64, 43rd page).⁶ The Budget Explanation for hiring this student expounds upon the importance of the Research Associate to the work to be done on the grant: "Supporting the collaboration of graduate students is critical to the success of the projects. The proposal includes studies that require technical expertise and work that cannot be done by inexperienced or uncommitted part-time assistants who do not fully understand the project's rationale." (Er. Ex. 64, 47th page). Thus, according to the grant proposal, the work performed by the Research Associate was "critical" to the research. This grant proposal was approved by the National Science Foundation ("the NSF") (Tr. 357-58; Er. Ex. 63). The work done by Research Associates on this project thus helped to fulfill the research mission of the University. Indeed, the PI is obligated, under the terms of the grant, to ensure that the services provided by any Research Associate are necessary to the grant (Tr. 237-38, 376-77; Er. Ex. 34; Dec. 10).

Working to fulfill the research mission is not the only way that Research Associates contribute to the University. Funds awarded pursuant to a grant are received by the University (Tr. 114, 375; Dec. 10). Much of this money must be applied

⁶ The pages of this document are not numbered. The numbers at the bottom of each page are numbers assigned to the project by the National Science Foundation and do not count pages. Locating a page, therefore, requires a manual counting through the pages, to the 43rd page, which is captioned "**SUMMARY PROPOSAL BUDGET YEAR 1**" for the New School. As this project involved collaboration with the University of Michigan, there are also budget pages for the University of Michigan. The budget page described herein is the budget for the New School.

to defray the direct cost of the research, including the salary of the Research Associates, but federal guidelines permit a university to receive reimbursement for “indirect costs” as part of a grant (Tr. 381). The New School has negotiated an agreement with the federal government under which it receives payment for indirect costs at a rate of 61.5% of salaries and wages paid pursuant to the grant (Tr. 235, 381-82, 392-93; Dec. 10). Payments to Research Associates are considered salaries for this purpose, just like the salaries of any other employees working on the project, and are included in this calculation (Tr. 380, 382). Thus, in the case of Professor Schober’s grant, the University was awarded 61.5% of the Research Associate’s \$30,000 salary, or \$18,450, to cover indirect costs (Tr. 382; Er. Ex. 64, 47th page). Indirect cost funds are awarded to the University in addition to the direct costs of the grant (Tr. 394, 396). According to Professor Schober, “Universities are able to do what they will with the indirect costs” (Tr. 397). As another witness put it, “those monies are available at the discretion of the receiving institutions” (Tr. 235; Dec. 10). Thus, the work of Research Associates contributes to the finances of the University as well as to its research mission.

F. Supervision

It is undisputed, and the record establishes, that the student employees in all of the classifications at issue are directed in their work by members of the faculty (Tr. 88-89, 122, 206, 354, 376-77, 446).

III. ARGUMENT

A. The Petitioned-For Employees are Common Law Employees and Therefore Statutory Employees

The Board in *Columbia* clearly enunciated the conditions that must be met to establish common law and therefore statutory employee status. An employment relationship exists where the individual performs work for the employer, the employer has the right to control the individual's work, and the individual receives compensation for performing the work. 364 N.L.R.B. No. 90 at 3, 17. The findings of the Regional Director and the record of the hearing establish that the petitioned for employees meet these criteria.

The Regional Director found:

In some respects the evidence shows that the work performed by the graduate students benefits The New School as an institution in the same way as the work of faculty or support staff. Graduate assistants support the New School's mission by educating the undergraduate students. Research Assistants help fulfill the conditions of grants awarded to The New School, which contribute generally to the financial health of The New School, as well as, its academic reputation.

The New School's other students benefit from the instruction provided by the graduate student assistants in classrooms and one-on-one encounters. Break-out sections of large lecture classes provide a chance to ask questions in a smaller group setting and allow time for discussion. Some classes are specifically designed with roles for Teaching Assistants and Teaching Fellows. In its offer letters to graduate students for Teaching Assistant positions in the Riggio Honors Program, The New School expresses its belief that, "The work of the Teaching Assistants is vital to the success of the students in the Riggio Honors Program."

(Dec. 20).

As noted above, it is undisputed that the student employees work under the direction and control of the University (Tr. 88-89, 122, 206, 354, 376-77, 440). The Board in *Columbia* found that, where the student employees advance an important

objective of a university, then the university has a strong interest in maintaining control over their work. Finally, the facts outlined above demonstrate that the petitioned-for student employees are paid only during semesters when they are hired to perform services. Admission to the New School does not guarantee any stipend or income. In order to receive pay, a student must go through a hiring process and be selected to perform certain duties in exchange for a stipend, salary or wage. The rate of pay depends upon the nature of the duties performed and the number of hours of work anticipated. Thus, there is no question that student employees are compensated for their services.

Under *Columbia*, the petitioned-for employees are common law employees and accordingly statutory employees.

B. The Petitioned-For Unit is Appropriate

The Board in *Columbia* found appropriate a unit that included undergraduate, master's and doctoral students. In finding this unit to be appropriate, the Board noted that all of these employees provided supplemental instructional and research services and were "functionally integrated into a system designed to meet the university's teaching and research missions...." 364 N.L.R.B. No. 90 at 19. The same is true of the student employees in the unit sought in this case. The Board in *Columbia* found that most student assistants were appointed on a semester basis. *Ibid.* Again, the same is true in this case. The Board found that student assistants at all levels of their education have a community of interest that arises out of the need to balance their educational needs and their financial and employment needs. *Columbia* at 20. The Regional Director found that the work hours of student assistants in the petitioned-for unit at the

New School are limited for that reason. Like the student employees at Columbia, student employees at the New School are subject to different policies from other employees of the University (See Er. Ex. 8-27, all of which contain policies that apply to other employees and not to student employees). The record in this case establishes the existence of the factors relied upon by the Board in *Columbia* to find a unit of undergraduate, master's and doctoral students to be appropriate.

Indeed, the unit sought in this case is essentially identical to the unit found appropriate in *Columbia*. Both cases seek units composed of student employees who provide teaching or instructional services and those who provide research services. The only differences in the unit description flow from differences in the job titles utilized at the two universities. Moreover, the Employer did not raise any issues regarding the appropriateness of the unit during the hearing.

Therefore, the Regional Director should find that the unit sought in the petition is appropriate.

C. **Student Employees Should Not Be Denied the Right to Vote on the Ground That They Are Temporary Employees**

The Board rejected Columbia's argument that undergraduate and master's assistants should be excluded from the unit in that case on the ground that they are temporary employees. 364 N.L.R.B. No. 90 at 20-21. The Employer in this case argued that *all* of the unit employees should be denied the right to organize on the ground that their employment is temporary. (Employer's post hearing brief at 34-39). The claim that arguably temporary employees do not have the right to organize has been soundly rejected by the Board. *Columbia* at 21, fn. 133, citing *Kansas City Repertory Theatre*, 356 N.L.R.B. 147 (2010). All of the employees in this case work on

a semester basis. Therefore, on the authority of *Columbia*, no employee should be excluded from the unit as a temporary employee.

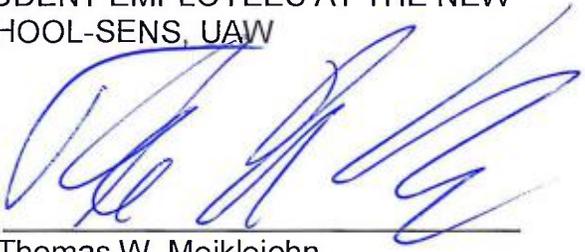
III. CONCLUSION

No further legal proceedings are necessary. The evidence presented in seven days of hearing and the findings of the Regional Director clearly establish that these student employees are common law employees and therefore statutory employees under *Columbia*, and that the petitioned-for unit is appropriate. Therefore, the Regional Director should direct an election in the following unit:

Included: All student employees who provide teaching, instructionally-related or research services, including Teaching Assistants (Course Assistants, Teaching Assistants, Teaching Fellows, Student Assistants 3 at the Parsons School, and Tutors); and Research Assistants (Research Assistants and Research Associates).

Excluded: All other employees, Student Assistants at schools other than Parsons, guards and supervisors as defined in the Act.

ON BEHALF OF THE PETITIONER,
STUDENT EMPLOYEES AT THE NEW
SCHOOL-SENS, UAW

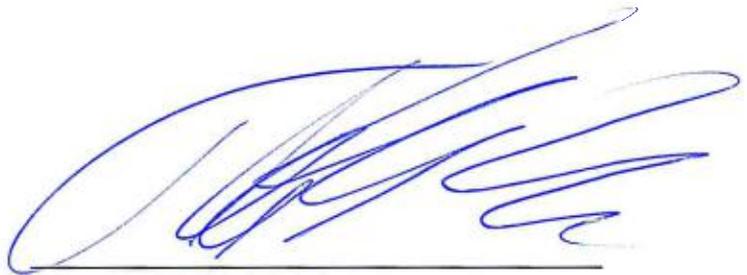
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Supplemental Brief of the Petitioner to the Regional Director was sent via email, on this 13th day of February, 2017, to the following:

Douglas P. Catalano
Clifton, Budd & DeMaria, LLP
The Empire State Building
350 Fifth Avenue, 61st Floor
New York, NY 10118

A handwritten signature in blue ink, appearing to read 'T. Meiklejohn', is written over a horizontal line. The signature is fluid and cursive.

Thomas W. Meiklejohn