

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

**ICAHN SCHOOL OF MEDICINE AT
MOUNT SINAI,**

and

SINAI STUDENT WORKERS-UAW.

Case No. 02-RC-319437

**ICAHN SCHOOL OF MEDICINE AT MOUNT SINAI'S REQUEST FOR REVIEW OF
THE REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION**

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PRELIMINARY STATEMENT

Icahn School of Medicine at Mount Sinai (“ISMMS” or the “Graduate School”) respectfully submits that there are compelling grounds for review and vacatur of the Regional Director’s September 11, 2024 Decision and Direction of Election (“Decision” or “DDE”) pursuant to Section 102.67 of the Rules and Regulations of the National Labor Relations Board.

Review is warranted because the Regional Director’s finding that ISMMS’s Ph.D. graduate students in the Biomedical Sciences, Neuroscience, and dual degree MD/Ph.D. programs (“Ph.D. Graduate Students”) are “employees” under Section 2(3) of the National Labor Relations Act (“NLRA” or the “Act”) is a significant departure from the Board’s decision in *Trustees of Columbia University in the City of New York & Graduate Workers of Columbia-GWC*, 364 NLRB 1080 (2016) (“*Columbia*”). Review is further warranted because the DDE is based on factual findings that are clearly erroneous and that have absolutely no support in the record. Indeed, the record flatly contradicts a number of the Regional Director’s factual findings. The undisputed record evidence and proper application of Board precedent require a finding that ISMMS’s Ph.D. Graduate Students are not employees because they do not satisfy the Board’s common-law test for employment—*i.e.*, they do not provide services under the control of the school in exchange for compensation.

As a threshold matter, the DDE ignores the common-law “compensation” and “control” test articulated in *Columbia* and instead rests on the untenably broad proposition that the Ph.D. Graduate Students are employees simply because the academic research they perform in pursuit of their Ph.D. degrees also furthers ISMMS’s “mission to conduct ‘groundbreaking research.’” (DDE at 8-9). That simplistic formulation is incompatible with *Columbia*. The students at issue in *Columbia* were employees, according to the Board, because they had a service requirement in

addition to their academic pursuits as a condition for their funding: the students either had to serve as teaching assistants, or as research assistants where they were required “to ensure that particular grant specifications are met” to receive their aid package. *Columbia*, 364 NLRB at 1096.

In *Columbia*, the Board expressly recognized that not all students who receive funding are employees. Indeed, and particularly relevant here, the Board distinguished the employee research assistants at issue in *Columbia* from students who are “permitted to simply pursue their educational goals at their own discretion, subject only to the general requirement that they make academic progress.” *Id.* at 1096-1097. The Board acknowledged that funding that “further[s] a student’s education by effectively giving the student unconditional scholarship aid, and allowing the student to pursue educational goals without regard to achieving any of the funder’s own particular research goals,” would not satisfy the common-law employment test. *Id.* at 1096. That is the very scenario that exists here.

The Board recently reaffirmed this principle in *Mass. Inst. of Tech.*, No. 01-RC-304042, 2024 WL 3455477, at *1 n.1 (2024) (“*MIT*”). In denying the union’s request for review, the Board relied on the Regional Director’s finding “that the petitioned-for graduate fellows, as a whole, ‘do not perform work controlled by the Employer in exchange for compensation. Rather, they perform research (or, occasionally, teach) to further their own academic purposes and are provided with funding to do so **regardless of whether their activities also benefit the Employer.**’” *Id.* (emphasis added). Because there were “no employment responsibilities or service requirements to receive or maintain” their funding, the students were not employees and the petition was appropriately dismissed. *Id.* In fact, the Board reiterated the guardrails it established in *Columbia*, “distinguishing student assistants satisfying the common-law employment standard from nonemployees who ‘simply pursue their educational goals at their own discretion, subject only to

the general requirement that they make academic progress.” *Id.* (citing *Columbia*, 364 NLRB 1080, 1094, 1096-1097).

The Ph.D. Graduate Students at issue here do not have any service requirement whatsoever. The undisputed record evidence is that students’ funding is not conditioned on performing teaching or instructional services, and it is not conditioned on performing services in a research laboratory under the direction or supervision of a Principal Investigator (“PI”). The undisputed record evidence established that the only condition on the students’ receipt of funding is the maintenance of satisfactory academic progress—a fact reinforced by both of Petitioner’s witnesses, who admitted that their funding was not conditioned on what they did in the lab or how they did it, and that they were not required to teach or to conduct any research outside of their thesis topic to maintain their funding. In these circumstances, the features of “compensation” and “control” that satisfied the common-law test in *Columbia* are glaringly absent here. The Regional Director’s failure to adhere to the Board’s standard in *Columbia*, which it reiterated just two months ago in *MIT*, warrants reversal.

In addition to the profound departure from the Board’s decision in *Columbia*, the DDE contains a multitude of clearly erroneous and prejudicial factual findings that are completely untethered to the record—all in a transparent attempt to create some similarity to the students at issue in *Columbia*. For example, the Regional Director erroneously concluded that “a student’s thesis research must further the objectives of any grant that provides funds for the student’s research.” (DDE at 9.) The Regional Director also distorted the record to find other indicia of employment, such as faculty supervision and lack of academic freedom, among other things, that have no evidentiary support. The undisputed record evidence, including testimony from both of Petitioner’s witnesses, confirmed that a student’s funding was *never* conditioned on performing

research in furtherance of a grant. In fact, all ISMMS Ph.D. Graduate Students (i) have absolute academic freedom to design their thesis; (ii) have absolutely no service requirements tied to the funding they receive; and (iii) are not required to work on a PI's research project to maintain their funding. Indeed, the notion that the Ph.D. Graduate Students could be required to do anything other than maintain satisfactory academic progress as a condition for their funding—the *sine qua non* for students to be classified as employees—is belied by the undisputed record evidence.

The Regional Director also inappropriately brushed aside the effect his decision will have on international students. There can be no dispute that a determination that the Ph.D. Graduate Students at issue here are employees based on the fact that they perform research in a lab—virtually all of which is devoted to the student's own dissertation—would cause an undue hardship on the international student population. That is because international students attend ISMMS on an F-1 student visa—a visa classification that contains a federally-mandated limit of on-campus employment of twenty hours per week. A finding of employment status for Ph.D. Graduate Students would necessarily cap international students' thesis research at 20 hours per week, while domestic students would not be subject to any such restriction—an appropriate concern that motivated the Regional Director in Region 1 to dismiss the petition in *MIT*.

For these reasons, ISMMS seeks the Board's review of the Regional Director's Decision and submits that it should be vacated.

PROCEDURAL HISTORY

On June 6, 2023, Petitioner filed a Petition for Representation ("Petition") with Region 2 of the National Labor Relations Board ("NLRB") seeking to represent "[a]ll graduate students enrolled at Icahn School of Medicine at Mount Sinai who are employed to provide research or instructional services at any of the employer's facilities, regardless of funding source." (Bd. Ex.

1, at 6.) The petitioned-for unit includes Ph.D. Graduate Students, as well as self-funded students in the Clinical Research Ph.D. program who provide instructional services. (Tr. 11-12, 21.)

ISMMS filed its Statement of Position on June 21, 2023, arguing, *inter alia*, that the graduate students in the petitioned-for unit are not “employees” as defined in Section 2(3) of the NLRA.¹ A six-day hearing was held beginning on July 6, 2023, and the parties filed post-hearing briefs on August 3, 2023. On September 11, 2024, the Regional Director issued a Decision and Direction of Election finding that the Ph.D. graduate students were employees under Section 2(3) of the NLRA, that the petitioned-for unit was appropriate, and directing that an election be held on September 25, 2024.

FACTUAL BACKGROUND

I. The Icahn School of Medicine at Mount Sinai and its Graduate Programs

The Mount Sinai Health System is one of the largest academic medical systems in the New York metropolitan area and consists of more than 43,000 individuals working across eight hospitals, over 400 outpatient practices, nearly 300 research labs, a nursing school, a medical school and a graduate school. (Pet. Ex. 45.) ISMMS is a private medical school and research institution and is part of the Mount Sinai Health System. (Tr. 72; Pet. Ex. 45.) ISMMS is comprised of two schools: the Medical School and the Graduate School.

The mission of the Graduate School is “to train the next generation of leaders in scientific and clinical discovery, innovation, education, health policy, clinical care, and advocacy, in a diverse, equitable, and inclusive learning environment.” (Tr. 81; see also ISMMS Ex. 2 at 3.) To accomplish this, the Graduate School offers numerous post-graduate degree programs, including

¹ ISMMS also reserved its right to argue that *Columbia* was wrongly decided (and does so again here), though that issue was not litigated at the Region.

four Ph.D. programs (three conventional Ph.D. programs and one dual-degree MD/Ph.D. program) in the following specialties: (i) Biomedical Sciences; (ii) Neuroscience; (iii) Clinical Research;² and (iv) the dual-degree MD/Ph.D. Medical Scientist Training Program (“MSTP”) (the “MD/Ph.D. Program”). (Tr. 74.)

ISMMS’s Graduate School offers “multiple tiers of support for [its] students” including “academic support” and “scientific support” at “every single level, in the classroom and beyond,” to ensure that each student has the tools necessary to complete their degree. (Tr. 277.) The Graduate School also has an Office of Student Affairs, which helps “support the students in all elements of their education and their time at Mount Sinai outside of the direct training in the lab, or the direct training in the classroom.” (Tr. 242-43.)

In addition, and as set forth more fully below (see *infra* at 16), the Graduate School provides funding packages, including stipends and the full cost of tuition and health insurance for all Ph.D. Graduate Students for the duration of their studies. This funding is conditioned only on the maintenance of satisfactory academic progress toward their degrees. (Tr. 90, 185; ISMMS Ex. 3.)

II. Ph.D. Programs in Biomedical Sciences and Neuroscience

A. Core Curriculum & Path to Degree

i. Admission and Year 1 of the Program

If a student is selected for acceptance into the Graduate Program, an acceptance letter is sent by the Graduate School. (ISMMS Ex. 3.) The letter details information regarding the student’s funding package, noting in particular that it “is guaranteed to [the student] for the duration

² Students enrolled in the Ph.D. Program in Clinical Research are self-funded, which means they do not receive any funding from the Graduate School. Self-funded Ph.D. students in the Graduate School were not encompassed by the petition here with respect to their research, but the petition included Ph.D. students in Clinical Research who hold a Teaching Assistant position. (Tr. 11-12, 21.)

of [their] PhD program, *so long as [they] continue to make satisfactory progress* in [their] education and research training.” (ISMMS Ex. 3, at 1) (emphasis added.) Notably, when Ph.D. students in Biomedical Sciences and Neuroscience start their education at Mount Sinai, they are not required to complete an I-9 employment verification form. (Tr. 415.)

Upon admission, Ph.D. students in ISMMS’s Biomedical Sciences and Neuroscience Programs are not assigned to a particular lab or to a specific faculty member, nor to research a particular topic. (Tr. 153.) Neither admission nor funding is conditioned on students serving in a teaching or research assistantship as part of their program requirements. (Tr. 147-48; 152-53.) Instead, a lab with which the student affiliates, the selection of a faculty mentor and research topic, and the performance of any teaching services are decisions made by the Ph.D. student, in their complete discretion, after they start the Program. (Tr. 147.) Thus, the student’s selection of a particular research area within the Ph.D. Program has no impact on their admission or continued receipt of their funding package. (Tr. 147-48; 152-53.)

During their first year of study, students enrolled in ISMMS’s Ph.D. Programs in Biomedical Sciences and Neuroscience take core curriculum classes that account for approximately 50% of their time. (Tr. 157; ISMMS Ex. 4.) First-year students spend the other 50% of their time in a course known as “Lab Rotations.” (Tr. 157; ISMMS Ex. 4.)

As background, ISMMS operates numerous research labs on its campus. (Tr. 157-58.) The ISMMS labs are run by a PI who utilizes the facilities to perform research in their area of expertise. (Tr. 158.) It is generally understood that each lab focuses on a broad area of research. (Tr. 158.) In order to complete their research objectives—and to fulfill terms and conditions of grants used to fund the research—PIs often hire postdoctoral fellows and research assistants to work in the lab. (Tr. 386-87.) The postdoctoral fellows and research assistants become the “fundamental pillars”

of the lab (Tr. 387), as they are responsible for performing tasks in furtherance of the PI's grant and other related research projects. (Tr. 178-79, 230-31, 312, 334-35, 386-88.) Ph.D. students also perform research in the lab, but that research is in furtherance of their own thesis proposal and dissertation. (Tr. 94, 173, 259, 308.) The opportunity to perform research in a laboratory setting alongside a PI provides Ph.D. students with hands-on scientific training, including the learned skills of how to "ask a scientific question, formulate specific aims, [and] formulate a project." (Tr. 331.)

Ph.D. students have "complete control" to choose the lab in which they want to perform their thesis/dissertation research after participating in the Lab Rotation course during their first year. (Tr. 248; *see also* Tr. 472, 548-50.) Both of Petitioner's witnesses acknowledged this academic freedom. Mr. Bremy Albuquerque testified that he chose which labs to rotate through simply by "reach[ing] out" to PIs "to ask if [he] could rotate" through their labs. (Tr. 472.) Mr. Sam McConnell also acknowledged that he chose to rotate through specific labs because "neuroscience [was] something that [he was] interested in ... prior to [his] entrance into the Ph.D. program" and that he had control over the labs through which he rotated—as well as the lab that he ultimately chose. (Tr. 548-550.)

Additionally, after they start the Program, the Ph.D. Graduate Students have complete discretion to select a faculty mentor and research topic, and decide whether to perform any teaching services. (Tr. 147.) Thus, the student's selection of a particular research area within the Ph.D. Program has no impact on their admission or funding package. (Tr. 147-48; 152-53.)

In order for a PI to participate in the Lab Rotation, the PI must demonstrate that they have sufficient funds available to support a Ph.D. student for at least two years of their thesis/dissertation research. (Tr. 203-04; ISMMS Ex. 5 at 3.) This funding obligation on the part of the lab is to

“protect the student” and provide assurance that the lab the student ultimately chooses can cover the costs of both the student’s funding package and the costs associated with researching the student’s thesis/dissertation project; costs which, as acknowledged by Petitioner’s own witness, are “expensive.” (Tr. 204, 247-48, 478.)

In general, first-year Ph.D. students in Biomedical Sciences and Neuroscience spend 6-8 weeks in each lab rotation as part of their Lab Rotation course. (ISMMS Ex. 2, at 144-45.) During this time, students have an opportunity to get a sense of the expertise area of each laboratory and determine whether or not it is the “right fit” for their Ph.D. thesis and dissertation studies. (Tr. 248, 274, 325). Importantly, both the Dean of ISMMS’s Graduate School, Dr. Marta Filizola, and Senior Associate Dean, Basil Hanss, testified that first-year students are not actually required to perform any research during their Lab Rotations, their funding is not conditioned on the performance of any tasks during lab rotations, and “there really aren’t any expectations” that these students will generate data or perform any research in furtherance of their PI’s grant during this time. (Tr. 119, 245-47, 327, 475, 552.)

Notwithstanding the short time frame of the rotation placements, lab rotations are an important part of a Ph.D. student’s curriculum because, as explained by Petitioner’s witness Mr. Albuquerque, they help the student “find a good fit” and a lab that they “would feel comfortable” in to develop their thesis proposal and dissertation. (Tr. 470; *see also* Tr. 119, 274, 325.) Importantly, ISMMS relies “on the student [to make] the final determination if the laboratory is the right and best fit for them.” (Tr. 248; *see also* Tr. 161, 163.) Accordingly, ***ISMMS will never assign a student to a particular lab.*** (*Id.*) In fact, a Ph.D. student can decline a PI’s offer to join a lab if he/she feels that “there was another lab that was either scientifically or intellectually or personally more aligned with them.” (Tr. 328.)

By the end of the first year, Ph.D. students must choose a lab and declare that lab's PI as their faculty mentor—also referred to as a “dissertation (or thesis) advisor.” (Tr. 257.) A student's relationship with their faculty mentor/dissertation advisor is a “true mentoring relationship.” (Tr. 167.) A dissertation advisor serves as a “mentor and a guide” (Tr. 258) for the student so that the student can “reach their full potential of training.” (Tr. 167.)

ISMMS never assigns a mentor to a student; the pairing is only by mutual agreement of the student and PI. (Tr. 162-63.) Both the mentor and student are provided with a “compact” that describes the expectations for both the student and PI for the duration of the relationship. (ISMMS Ex. 5 at 1.) There is nothing in that document (or otherwise) that remotely suggests a student's funding is conditioned on the performance of research services for the PI or ISMMS. *Id.*

ii. *Year 2 of the Program and Beyond*

In their second year of the program, Ph.D students in Biomedical Sciences and Neuroscience generally spend about 25% of their time completing traditional classroom coursework and the remaining 75% of their time researching towards their thesis proposal in their chosen laboratory. (Tr. 165.) A Ph.D. student's thesis proposal, which is presented at the end of the second academic year, acts as a qualifying exam and is intended to provide a roadmap that details how the student will complete their dissertation on time. (Tr. 169, 333.)

A thesis proposal is an academic requirement and one of the student's first academic milestones after choosing a lab. (ISMMS Ex. 45; Tr. 94-95.) Conducting research toward their chosen thesis topic is an essential component of a Ph.D. student's academic curriculum. (Tr. 171-72.) Indeed, when researching towards their thesis proposal, second year Ph.D. students must enroll in a pre-proposal research course—BSR 8000—where the student receives a grade for the research they perform in their chosen lab. (ISMMS Ex. 45; Tr. 172.) If a student makes

satisfactory progress toward their thesis proposal, the student receives a grade of “SP”—or Satisfactory Progress—which is recorded on the student’s transcript. (Tr. 172.) Satisfactory completion of BSR 8000 is a degree requirement. (Tr. 172.)

In the second year of the Program, Ph.D. students, in consultation with their PI, select faculty members to join their Thesis Advisory Committee, which assists the student in the development of his/her thesis proposal. (Tr. 166-69; ISMMS Ex. 4.) A student’s Thesis Advisory Committee meets with him or her at least once per semester to monitor progress toward obtaining a Ph.D. degree, provide scientific feedback in the development of the student’s aims, and provide career development advice. (Tr. 169.) As the student’s mentor, a PI will provide the Thesis Advisory Committee with progress reports on the student’s research, but it is the Thesis Advisory Committee—not the PI—who will ultimately determine the student’s academic progress.³ (Tr. 271-74.) The Thesis Advisory Committee is responsible for evaluating the student’s thesis and academic progress, and also for hearing issues pertaining to potential disciplinary proceedings. (Tr. 103-04, 169, 269.)

A Ph.D. student’s PI serves as the only non-voting member of the four-member Thesis Advisory Committee and is not permitted to take part in the deliberation or vote on any matter presented to the Committee relating to the student’s academic performance or discipline. (Tr. 101, 103-05, 169-70, 269, 276, 394-95). Importantly, a PI “cannot make decisions about a student’s progress and fate in the program,” and instead, the PI must bring all disciplinary issues before the student’s Thesis Advisory Committee. (Tr. 276.) As Dr. Daniel Wacker testified, Ph.D. students “are not my employees, they’re students at the school who respond more to the graduate school”

³ The PI submits a progress report via the student’s periodic “Advisory Committee Report,” which delineates the student’s academic progress in the lab and contains an Individual Development Plan (“IDP”) to track the student’s career objectives. (Tr. 271-74; ISMMS Ex. 9.)

and, as such, a PI does not have the ability to unilaterally remove, expel or otherwise discipline the Ph.D. students in their lab, which is in sharp contrast to a PI's control over postdocs. (Tr. 99, 276, 394-95.)

After a student successfully passes the thesis proposal exam at the end of year two, years three through seven are dedicated entirely to the student's dissertation research. (Tr. 171-73; 259; 307; 343; 388.) Accordingly, at the start of year three and for every subsequent year of the program, Ph.D. students enroll in a post-proposal research course—BSR 9000—where the student receives a grade for the research they perform in their chosen lab. (ISMMS Ex. 45; Tr. 172.) Like the BSR 8000, if a student makes satisfactory progress towards their dissertation, the student will receive a grade of “SP”—or Satisfactory Progress—which will be recorded on the student's transcript, and satisfactory completion of BSR 9000 is considered a degree requirement. (Tr. 172.)

To graduate and earn their degree, Ph.D. students in Biomedical Sciences and Neuroscience must deposit and successfully defend their dissertation once receiving approval from their Thesis Advisory Committee. (Tr. 92.)

B. Satisfactory Academic Progress

In order to stay enrolled in the Ph.D. Programs for Biomedical Sciences or Neuroscience, Ph.D. students must maintain satisfactory academic progress. (Tr. 105-06.) The Graduate School establishes minimum criteria that all students, regardless of program, must meet, which include: (i) maintaining a cumulative grade point average of 3.0 or higher; (ii) completing course work on time; and (iii) making timely progress toward a degree. (Tr. 98; ISMMS Ex. 2, at 56.) Importantly, maintaining satisfactory academic progress does not include the performance of any service requirements, such as serving as a teaching assistant or research assistant or performing specific research to fulfill the terms of a PI's grant. (Tr. 90, 98.) Failure to maintain satisfactory academic

progress could affect a student's academic standing. (Tr. 105; ISMMS Ex. 2, at 58.) For Ph.D. students in Biomedical Sciences or Neuroscience, all students must complete six program "milestones," and other related academic requirements in order to maintain satisfactory academic progress.⁴ (Tr. 124.)

C. **Expectations for Students in Stipend-Granting Ph.D. Programs While in the Lab**

For every year in which a Ph.D. student in Biomedical Sciences and Neuroscience spends time in their chosen lab (*i.e.*, year 2 and beyond), the student will devote ***virtually 100% of their lab time performing research in furtherance of their thesis and/or dissertation.*** (Tr. 173, 259, 307, 343, 388.) In fact, when asked how much of a student's time in the lab should be spent researching toward their thesis/dissertation (as opposed to research outside the scope of their thesis/dissertation), ISMMS witnesses uniformly testified that one-hundred percent of their time should be dedicated to thesis/dissertation related research:

- Dr. Matthew O'Connell: "100 percent" (Tr. 173, 236);
- Dr. Basil Hanss: "all of it should be" (Tr. 259);
- Dr. Talia Swartz: "all of it" (Tr. 307);
- Dr. Scott Russo: "100 percent" (Tr. 343);
- Dr. Daniel Wacker: "virtually 100% of their time is dedicated towards that goal." (Tr. 388.).

⁴ These six program milestones include: (i) completing their core curriculum; (ii) forming an advisory committee; (iii) meeting with their advisory committee once per semester and completing their Advisory Committee Reports; (iv) completing their thesis proposal exam; (v) documenting when the student is ready to defend their thesis within the next six months; and (vi) depositing and defending their thesis within the seven-year limit (usually completed in the student's fifth year). (ISMMS Ex. 2, at 56,136-37.) Additionally, students must: (i) complete at least 14 letter-graded credits of coursework; (ii) enroll in journal clubs, works-in-progress, and seminars as required by the student's MTA; (iii) demonstrate an ability to grow research skills and move towards project goals after selecting a PI/dissertation advisor; and (iv) produce data equivalent to that needed for a first author publication in a high-quality, peer-reviewed journal (a manuscript need not be submitted or accepted). (ISMMS Ex. 2, at 135-37.)

Importantly, when paired with a lab, Ph.D. students in Biomedical Sciences and Neuroscience are not assigned or beholden to the specific research project of the PI. (Tr. 185-86, 306-07, 340.) While the student may elect to perform research consistent with the “research expertise of the PI” since “after all, that’s how they chose the lab”—there is no requirement that the student align his/her dissertation topic with the PI’s grant or research focus. (Tr. 170-71.) Students maintain complete academic freedom to choose their research topic. (Tr. 170-72, 184-85, 340.) For this reason, every Ph.D. student’s funding package is portable—*i.e.*, they have the freedom to change labs without losing their funding. (*Id.*)

Indeed, students can change labs at any time without consequence including, for example, if they want to change their research direction or feel they are not “getting along w[ell] enough with their labs and feel they could do better in another environment.” (Tr. 179, 329.) In such instance, the student maintains their funding and the graduate school will provide the student with an opportunity to find another mentor to help them complete their degree. (Tr. 329.) Ph.D. students even have the academic freedom to pursue new research topics of their choice, and that PI will assist the student in locating alternate funding. (Tr. 184-185, 340). As Dr. Matthew O’Connell testified, if the student decides to change topics, they have complete discretion and ability to do so. (Tr. 185.) In fact, when asked whether Ph.D. students in his lab must develop their thesis topic around his research, Dr. Russo testified “no, definitely not” and explained how there have been “several times” where a student is interested in pursuing a research topic that his lab was “not studying at all.” (Tr. 340). A Ph.D. student’s only requirement is to move toward their final goal, “which is to write, and defend, and deposit their dissertation.” (Tr. 185.)

To demonstrate the portability of funding for Ph.D. students, another witness, Dr. O’Connell explained that if a student’s PI left ISMMS for another institution, the student would

not lose funding, nor would they be required to leave with their PI. (Tr. 186-87; ISMMS Ex. 2, at 152.) If a student has passed their thesis proposal exam, the student can choose to “remain enrolled at Mount Sinai, but conduct the experiments at the location where the PI’s lab is” or they can move to another lab at ISMMS. (Tr. 186-87; ISMMS Ex. 2, at 152.) As an example, Dr. O’Connell explained that an ISMMS student whose PI leaves for Columbia University could remain enrolled at ISMMS and receive funding “identically as if they were physically on the Mount Sinai campus,” including housing and health insurance, all while “perform[ing] research in a Columbia lab.” (Tr. 186-87).

When asked whether any of the research performed by Ph.D. students should be in furtherance of the aims specified in a PI’s grant, four witnesses—all of whom are PIs—provided the following answers:

- Dr. Filizola: “No” (Tr. 97.);
- Dr. O’Connell: “No. Or it should not.” (Tr. 177.);
- Dr. Swartz: “No.” (Tr. 308.);
- Dr. Wacker: “They do not work on such aims. They do not work towards the goals of a specific type of proposal.” (Tr. 387-88.).

Rather, when in a lab, the expectation is that Ph.D. students will “reach their full potential of training” and complete the program milestones required for their degree. (Tr. 167-68.; ISMMS Ex. 5). Ph.D. students are in a lab to generate and perform their own research—not the research of their PI—and ISMMS can, and has, intervened in the rare event a student feels as though “they were spending some time on some work for the [PI’s] grant” instead of their own dissertation. (Tr. 285-86; *see also* Tr. 260-61, 316-17.)

Ph.D. students in the Biomedical Sciences and Neuroscience programs are able to set their own research schedule. The unrefuted testimony shows that Ph.D. students do not have “a set

schedule or a set number of hours” as to the amount of time they spend researching in the lab. (Tr. 308, 337-38, 389.) PIs have a “very loose, flexible strategy” (Tr. 338) that allows Ph.D. students to make their own schedules and research “as much as possible” (Tr. 414) to complete their thesis. (Tr. 308, 389.) Similarly, while the graduate student handbook states that students in a Stipend-Granting Ph.D. Program are entitled to two weeks’ vacation, the unrefuted testimony established that students have the flexibility to take as much vacation time as they would like without any diminution in their stipend, and are not required to submit formal requests prior to taking vacation. (Tr. 338). Multiple ISMMS witnesses also confirmed that most students take much more than two weeks’ vacation each year without any consequence. (Tr. 133, 180, 311, 338-39.)

III. Funding Packages and Benefits

A. Components of the Funding Package

ISMMS guarantees that all active Ph.D. students in the Biomedical Sciences and Neuroscience Programs will receive a comprehensive funding package for the duration of their studies, including: (i) full tuition coverage; (ii) full health insurance coverage; (iii) a stipend of \$47,000 for the 2023–2024 academic year; and (iv) access to subsidized housing. (Tr. 82-83; ISMMS Ex. 2, at 21; ISMMS Ex. 3.) ISMMS provides this funding package to its Ph.D. students to “defray their living expenses” and allow them to “focus on their studies.” (Tr. 152.) Importantly, ISMMS witnesses uniformly testified that this stipend was *not in exchange for any services* to be performed for the school. (Tr. 83, 152, 235.) The stipend amount is uniform for all Ph.D. students and neither the Graduate School nor the PI may provide Ph.D. students with funding above the stated stipend amount. (Tr. 396-97.)

In addition to the stipend, Ph.D. students in Biomedical Sciences and Neuroscience receive health insurance, the cost of which is covered by the Graduate School or the PI depending on the

year of the Program. (Tr. 90-91; ISMMS Ex. 6.) Ph.D. students are also provided with the opportunity to participate in dental and vision plans at their own cost. (Tr. 90-91; ISMMS Ex. 6.) These benefits, which are provided to Ph.D. students, are not available to employees of ISMMS or members of the larger Mount Sinai community. (Tr. 90-91.) All benefits-related information is accessed through the portal referred to as “Sinai Cloud.” Sinai Cloud is used by “[a]ll members of the Mount Sinai Community,” including students at ISMMS, and uses nomenclature—such as words like “salary” and “manager”—that is not part of the Graduate School lexicon. (Tr. 269, 433-34, 436, 459-60; ISMMS Ex. 6; ISMMS Ex. 22.) Sinai Cloud also uses this same terminology for self-funded students where no employment relationship is alleged to exist. (Tr. 11-12, 564; ISMMS Ex. 22.)

B. Sources of Funding

Depending upon the year of the program, Ph.D. students in Biomedical Sciences and Neuroscience receive components of their funding package from different sources. (Tr. 400.) In the first year, ISMMS provides 100% of the student’s funding package. (Tr. 181; ISMMS Ex. 5, at 3.) Once students join a lab in their second year of studies, the Graduate School provides 25% of their funding and their PI in their chosen lab provides the remaining 75%.⁵ (Tr. 181; ISMMS Ex. 5, at 3.) In their third year and beyond, Ph.D. students in Biomedical Sciences and Neuroscience receive 100% of their funding from their PI. (Tr. 181; ISMMS Ex. 5, at 3.)

Ph.D. students may choose to apply for external grants or fellowships, such as a National Institute of Health (“NIH”) “F” grant. (Tr. 187-88.) To the extent a student’s external grant does

⁵ Please note that page 21 of the Graduate School Handbook (ISMMS Ex. 2) contains a typographical error that reverses the percentages of funding sources for second-year Ph.D. students in Biomedical Sciences and Neuroscience. The correct funding sources are as follows: for a second-year Ph.D. student in Biomedical Sciences or Neuroscience, the Graduate School provides 25% of a student’s funding, while a student’s PI funds the remaining 75%. (Tr. 84-85.)

not fully cover the cost of the Ph.D. funding package, the Graduate School or the student's PI will provide supplemental funding to bring the student to the appropriate funding level. (Tr. 188.) Students who receive external grants also receive an additional \$2,000 from ISMMS in recognition of the additional funding that was awarded. (Tr. 187-88, 402.) PIs are encouraged to match that \$2,000 stipend. (Tr. 187-88, 402.) Students on external funding who receive \$2,000 from ISMMS and/or their PI "operate similarly to all other Ph.D. students in the graduate school" (Tr. 403) and are: (i) not required to perform any services for ISMMS (Tr. 187-88, 236.); (ii) not "subjected [] to any different funding conditions than all other Ph.D. students" (Tr. 402-03); and (iii) not monitored by ISMMS as to whether or not the student is "adher[ing] to the terms of [their] grant." (Tr. 402.)

PIs receive funding from "essentially three sources": (i) grant funding from federal agencies, such as the NIH; (ii) funds from a philanthropic or private organization; and/or (iii) startup package funds from ISMMS, sometimes referred to as "seed funding." (Tr. 397.) Depending on the specific portion of the student's funding package, a PI may need to use different funds to support the entirety of the package. (Tr. 350.) For instance, a student's tuition must be paid for using philanthropic funds or private foundation funds, as federal agencies, such as the NIH and NSF, have limits on how a PI may use federal funding for students. (Tr. 350.) Similarly, a student's stipend may come from various sources to complete the full package and will not necessarily be tied to a federal agency grant. (Tr. 350.)

Not only are PIs responsible for funding a Ph.D. student's funding package, but they are also responsible for covering the costs of any research performed by the Ph.D. student, including the equipment, reagents and other lab tools that the student will need to complete their research—which, as Petitioner's witness, Mr. Albuquerque, admitted can be "expensive." (Tr. 478; see also

Tr. 204, 247-48, 350-51.) In fact, Dr. Russo testified that a student's funding package is "the smallest" part of his financial responsibility and pales in comparison to the approximately "\$50,000" spent per month on necessary equipment for the research, including rats and mice. (Tr. 350-51.) PIs use their funding to pay for these costs. (Tr. 351.)

C. **Conditions of Student Funding**

Regardless of the source of funding for Ph.D. students in the Biomedical Sciences or Neuroscience Programs—including from ISMMS, a PI, or external funds—the student's comprehensive funding package is **not** conditioned on the student's performance of any service requirements. (Tr. 90, 96-97, 185, 187-88, 263-64, 310, 402-03; *see also* ISMMS Ex. 3 ("funding package is guaranteed to you for the duration of your PhD program, so long as you continue to make satisfactory progress in your education and research training.") In fact, when asked whether students would be "required to perform services outside of their academic requirements to remain funded," Dr. Filizola emphatically stated "not in our program." (Tr. 185.)

Specifically, the unrefuted record evidence established that a Ph.D. student in Biomedical Sciences and Neuroscience will **not** lose funding if any of the following occur: (i) the student decides to change labs⁶ (Tr. 179, 264, 329-30); (ii) the student spends only a certain number of hours in the lab (Tr. 264, 308); (iii) the student exhibits poor performance in their lab (Tr. 310); (iv) the student fails to perform any specific tasks in a lab (Tr. 552); (v) the student's PI loses funding (Tr. 264-65); and/or (vi) the student decides not to take on a teaching or research assistantship (Tr. 235, 310, 430-31.).

⁶ If a student decides to change labs, ISMMS will provide interim bridge funding for the student from the student's program, department or ISMMS itself so that the student can continue making progress towards their degree while they look for a new lab and a new mentor/PI. (Tr. 329-30.)

For Ph.D. Students in the Biomedical Sciences and Neuroscience Programs, the only condition placed on a student's funding is that they *continue to make satisfactory academic progress toward their degree*. (Tr. 90, 275; ISMMS Ex. 3.)

IV. The MD/Ph.D. Program

Students enrolled in ISMMS's dual-degree MD/Ph.D. Program receive both their MD degree and their Ph.D. degree simultaneously. (Joint Ex. 1, at 1.) The petitioned-for unit includes students in the MD/Ph.D. Program, but only when they are enrolled in the Ph.D. portion of the dual-degree program. (Tr. 11.)

Students in the Ph.D. portion of the MD/Ph.D. Program function identically to Ph.D. students in the Biomedical Sciences and Neuroscience Programs. (Joint Ex. 1, at 1.) As made plain in the letter offering admission to the dual-degree program, students are advised as follows:

As a student in our MD-PhD Program, you will receive a comprehensive fellowship package, which will include tuition and fees, and an annual stipend (\$47,000 for the 2023-2024 academic year). You will also have guaranteed access to subsidized Mount Sinai housing for your entire time in the program. ***This fellowship is guaranteed to continue as long as satisfactory progress is made*** and will end on the day you receive your final degree. . . .

(ISMMS Ex. 10, emphasis added).

Like their peers in the Ph.D. programs in Biomedical Sciences and Neuroscience, when in the Ph.D. portion of the MD/Ph.D. Program, the dual degree MD/Ph.D. students: (i) are not required to complete an I-9 employment verification form (Tr. 415); (ii) are not admitted or assigned to a specific program, lab or PI (Joint Ex. 1, at 1-2); (iii) follow the same guidelines for lab rotations as all first-year Ph.D. students in Biomedical Sciences and Neuroscience (Joint Ex. 1, at 2); (iv) have the academic freedom to select which lab they would like to join for their thesis/dissertation research (Joint Ex. 1, at 2); (v) have the flexibility to choose both a specific

research topic and faculty mentor (Tr. 306-07; Joint Ex. 1, at 2); (vi) spend all of their time in a lab researching toward their thesis and/or dissertation (Tr. 307-10); (vii) are neither expected nor required to fulfill any service requirements to maintain funding (Tr. 307-10); (viii) choose their own schedules and can spend as many hours in the lab as necessary to complete their research (Tr. 307-10); and (ix) receive funding subject to the exact same funding conditions and procedures as Ph.D. students in Biomedical Sciences and Neuroscience—*i.e.*, students are not required to do anything outside of their academic program to remain funded and need only maintain satisfactory academic progress towards their degree (Tr. 307-10).

V. Differences Between Students in Stipend-Granting Ph.D. Programs, Postdocs, and Research Assistants

Ph.D. students in ISMMS's Stipend-granting Ph.D. Programs conduct research alongside other individuals in the lab including other Ph.D. candidates, self-funded students (*i.e.*, Master's students), postdocs, and research assistants. (Tr. 177-78.) While in the lab, Ph.D. students perform research in furtherance of their own thesis that is distinct from the research other constituents perform in the lab, such that there is “no overlap” in the duties performed by Ph.D. students and others in the lab. (Tr. 230-31; *see also* Tr. 178-79, 312, 334-35, 386-88.)

For instance, Ph.D. students are in a lab to develop their own dissertation, rather than the project of their PI, and spend their time learning how to conduct research towards their own academic goals. (Tr. 178-79, 334-35, 386.) Conversely, postdocs come to ISMMS fully trained to assist with a PI's research and “funding aims.” (Tr. 334-35, 386-88.) Postdocs take direction from the PI, are there to further the lab's objectives, and *must* complete the required objectives and tasks specified in a PI's grant. (Tr. 178-79, 312, 334-35, 386-87.) Similarly, and unlike Ph.D. students, research assistants are “hired to carry out specific tasks” and function as “supporting actors in several large-scale projects, typically run by postdocs or junior faculty” in the lab. (Tr.

230-31, 334.) A PI is able to discipline and/or terminate a postdoc or research assistant, but cannot discipline or expel Ph.D. students. (Tr. 265-66, 395-96.)

In addition, graduate students, on the one hand, and faculty, postdocs and research assistants, on the other, have different e-mail domains. (Tr. 91.) While graduate students receive an official ISMMS email address with the distinct, student-only domain “@icahn.mssm.edu,” all ISMMS employees, including postdocs, PIs, and research assistants, have email domains of “@mssm.edu.” (Tr. 91.) Moreover, ISMMS uses a different email server for graduate students than the one used for employees. (Tr. 92.)

VI. International Students in Stipend-Granting Ph.D. Programs

About 70 Ph.D. students enrolled in the Biomedical Sciences and Neuroscience Programs are international students, roughly one quarter of the student population in those programs. (Tr. 143, 407.) To enter and remain in the United States, international Ph.D. students must secure a visa. (Tr. 407.) Given that students in Ph.D. Programs are enrolled in a full-time academic program, these students come to ISMMS on an F-1 visa. (Tr. 407.) An F-1 visa is a *student* visa that requires a recipient to be engaged in a “full course of study” (*i.e.*, to be enrolled as a full-time student). (Tr. 407, 409-10; ISMMS Ex. 15.)

Because F-1 visa holders must continue to be full-time students to maintain their visa status, the federal government places restrictions on activities that may interfere with a student’s full course of study—such as on-campus employment. (Tr. 411.) Pursuant to 8 C.F.R. §214.2(f)(9)(i), F-1 visa students “must not exceed 20 hours a week” of on-campus employment while school is in session. If a student exceeds the 20 hour per week cap, they could jeopardize their visa status. (Tr. 411.)

The federal government does not, however, place any restrictions on the amount of time F-1 visa students spend on activities required for their degree. (Tr. 414.) Completing their academic obligations is integral to their purpose in the United States and students “are expected to study as much as possible.” (Tr. 414.) Thus, the time that an international Ph.D. student spends researching in a lab does not count as on-campus employment and is, therefore, not counted towards their 20 hour per week cap. (Tr. 413-14.) Students can spend as much time in the lab as necessary to complete their degree requirements. (Tr. 413-14.)

By contrast, postdocs at ISMMS are typically in the United States on a J-1 research visa. (Tr. 410.) These visas are provided “to people that will come [to the United States] to engage in specific research activities.” (Tr. 410.) The federal government does not place a cap on the number of hours that postdocs on a J-1 visa can spend researching in their positions. (Tr. 413.)

ARGUMENT

Pursuant to Section 102.67(d) of the Board’s Rules and Regulations, the Board should grant a request for review upon a showing that (1) a “substantial question of law or policy is raised” because of the absence of, or a departure from, Board precedent; or (2) the Regional Director’s decision concerning a “substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.” Here, compelling reasons exist to grant ISMMS’s Request for Review on both grounds.

I. THE REGIONAL DIRECTOR DEPARTED FROM THE BOARD’S DECISION IN *COLUMBIA*

The Regional Director departed from the Board’s decision in *Trustees of Columbia University in the City of New York & Graduate Workers of Columbia-GWC*, 364 NLRB 1080 (2016), by holding that the Ph.D. Graduate Students at issue here are employees within the meaning of Section 2(3) of the NLRA. Although the Board in *Columbia* reopened the door for

graduate-student unionization at private universities by finding that the students at issue there were employees, the Board did not hold that *all* graduate students are “employees” under the NLRA. In *Columbia*, the Board held that to conclude that an individual qualified as an “employee” for purposes of Section 2(3), the purported employer must “have the right to control the employee’s work” and the work must “be performed in exchange for compensation.” *Id.* at 1094.

The linchpin of the Board’s decision in *Columbia* is that the students there were required to perform services for the school outside of their own academic pursuits in exchange for their funding, such as by serving as a teaching assistant or research assistant. Thus, the Board held, “where a university exerts the requisite control over the research assistant’s work, *and specific work is performed as a condition of receiving the financial award*, a research assistant is properly treated as an employee under the Act.” *Id.* at 1096 (emphasis added).

In *Columbia*, the “Graduate Research Assistants in Ph.D. programs must *both* comply with the duties specified by the grant *and* simultaneously carry out research that they will ultimately present as part of their thesis.” *Id.* at 1093 (emphasis added). The Board noted that the research assistants “work under the direction of their departments to ensure that particular grant specifications are met.” *Id.* “Further, a research assistant’s aid package requires fulfillment of the duties defined in the grant.” *Id.* Students, when working as research assistants, are not permitted to simply pursue their educational goals at their own discretion, as they would be in semesters where they were under some form of financial aid other than a research grant. *Id.* In other words, if the students did not teach, or provide research to fulfill the terms of their PI’s grant, they would lose their funding. *Id.* at 1092. Because “the performance of defined tasks is a condition of the grant aid,” the Board found the research assistants to be under Columbia’s control and, therefore, employees under the Act. *Id.* at 1097.

However, the Board in *Columbia* was careful to establish boundaries, recognizing that not all students who receive funding from a school are statutory employees. The Board distinguished the funding requirements associated with the students at issue in *Columbia* from funding that “further[s] a student’s education by effectively giving the student unconditional scholarship aid, and allowing the student to pursue educational goals without regard to achieving any of the funder’s own particular research goals.” *Id.* at 1096. The Board then acknowledged that students pursuing their own academic interests subject only to the condition of maintaining satisfactory academic progress **would not** satisfy the common law definition of employee that it articulated in that case. *Id.* at 1096-97.

Just two months ago, the Board denied the petitioning union’s request for review in a case involving graduate fellows at MIT. *See MIT*, 2024 WL 3455477, at *1 n.1 (2024). In *MIT*, like here, the graduate students had no service requirements tied to their funding and were not required to direct their research in accordance with a PI’s grant. *Id.* Instead, the graduate student funding was akin to a scholarship, which the student received to pursue their own academic programs and objectives, without any conditions other than satisfactory academic achievement. The Regional Director appropriately dismissed the petition because the students were not employees under *Columbia*. *Id.* In denying review of that decision, the Board relied on the Regional Director’s finding that the students at issue “perform research (or, occasionally, teach) to further their own academic purposes and are provided with funding to do so regardless of whether their activities also benefit the Employer.” *Id.* Because those students “must meet no employment responsibilities or service requirements to receive or maintain their fellowship awards,” the Regional Director correctly dismissed the petition on the grounds that the students were not employees. *Id.*

In denying review, the Board expressly reaffirmed the boundaries it established in *Columbia*, which “distinguish[ed] student assistants satisfying the common-law employment standard from nonemployees who ‘simply pursue their educational goals at their own discretion, subject only to the general requirement that they make academic progress.’” *Id.* (citing *Columbia*, 364 NLRB at 1094, 1096-97).

The Regional Director here ignored these boundaries entirely and therefore departed from *Columbia*. The undisputed record evidence is that the only condition on the students’ receipt of funding was the maintenance of academic progress; students were not required to perform any services for ISMMS to receive their funding. (Tr. 90, 185; ISMMS Ex. 3.) Satisfactory academic progress consists of maintaining a minimum grade point average, completing course work on time, and making timely progress toward a degree—hallmarks of an academic relationship, not one of employment. (Tr. 98; ISMMS Ex. 2, at 56.) Importantly, maintaining satisfactory academic progress does not include the performance of any service requirements, such as serving as a teaching or research assistant or a requirement that the thesis research fulfill the terms of a PI’s grant. (Tr. 90, 98). The student’s comprehensive funding package is **not** conditioned on the student’s performance of any service requirements at all. (Tr. 90, 96-97, 185, 187-88, 263-64, 310, 402-03.) In these circumstances, the undisputed record evidence compels the conclusion that the Ph.D. Graduate students in the petitioned-for unit do not satisfy the compensation and control test under *Columbia*.

The Regional Director disregarded this test and found instead that Ph.D. students are employees simply because the research they perform for their dissertations generally aligns with ISMMS’s mission to conduct research, and therefore somehow benefits the Graduate School. (DDE at 8-9). But that is not the test under *Columbia*, as it sidesteps the compensation and control

inquiries underlying common-law employment. Indeed, the Board recently made this clear in *MIT*. See *MIT*, 2024 WL 3455477, at *1 n.1 (noting that students who receive funding to perform research to further their own academic interests “do not perform work controlled by the Employer in exchange for compensation . . . *regardless of whether their activities also benefit the Employer.*”) (emphasis added).

The Regional Director also erroneously claimed that ISMMS seeks to revert to the rule under *Leland Stanford Junior Univ.*, 214 NLRB 621 (1974), which the Board overruled in *Columbia*. (DDE at 8). This is a quintessential straw man. In *Columbia*, the Board rejected the notion that the existence of a student relationship—where students perform tasks that advance their educational goals—could negate an employment relationship, which had been the rule under *Leland Stanford*. *Columbia*, 364 NLRB at 1096. *Columbia* held that student status is no longer a barrier to finding statutory employee status. *Id.* But that is not what ISMMS is suggesting here in any respect. The nonemployee status of the Ph.D. Graduate Students here is not based *solely* on their status as students (as was the case in *Leland Stanford*), but rather because the students do not have any service requirements associated with their funding and therefore do not satisfy the common law compensation and control test under *Columbia*.

The Regional Director—relying solely on the Board’s denial of a request for review in *The Rand Corporation*, No. 31-RC-308974, 2024 WL 3741320, at *1 n.1 (2024)—found that “[w]hile the graduate students may perform their research for pedagogical purposes, this does not negate the presence of a common-law employment relationship between the students and the Employer.” (DDE at 9.) *Rand Corp.*, however, is completely inapposite. The students in *Rand Corp.* had service requirements in addition to their academic research. Indeed, the Board expressly noted that the students’ fellowship funding was “*not a grant*” because it “*comes with a work*

requirement.” 2024 WL 3741320, at *1 n.1 (emphasis added). Moreover, the graduate students were paid “only for the exact number of hours they work on the Employer’s projects [and] if they do not work enough hours to cover their fellowship funding, *they owe the Employer money,*” while also being able to earn additional compensation if they worked more hours than required to cover the cost of their fellowship. *Id.* (emphasis added). In addition, the graduate students in *Rand Corp.* “log[ged] their work hours in the Employer’s Workday system and code[d] which projects they are working on, similar to the Employer’s research staff.” *Id.* None of these indicia of compensation and control are present here.

Because the Regional Director departed from the Board’s common law test for employee status under *Columbia*, the Board should grant the request for review and vacate the DDE.

II. THE DDE CONTAINS NUMEROUS FINDINGS THAT ARE CLEARLY ERRONEOUS, CONTRADICTED BY UNDISPUTED RECORD EVIDENCE, AND PREJUDICIAL TO ISMMS

The Regional Director’s attempts to create equivalence between the Ph.D. Graduate Students in the petitioned-for unit and the students at issue in *Columbia* are predicated on clearly erroneous factual findings that are highly prejudicial to ISMMS. The undisputed record evidence confirms that ISMMS lacks the requisite compensation and control over the Ph.D. Graduate Students within the meaning of *Columbia*.

A. ISMMS Does Not Exert Control Over Ph.D. Students

In *Columbia*, the Board held that the university exercised control over research assistants who “work under the direction of [the school] to ensure that particular grant specifications are met.” *Columbia*, 364 NLRB at 1096. There, the Board found that Columbia had retained sufficient control over the graduate assistants to render them employees under the NLRA because: (i) it “directed” the graduate assistants to work on faculty member grants, to ensure that “particular grant specifications are met”; (ii) graduate assistants were required to log a certain number of hours

each week, namely 15-20, including on “grading papers,” “holding office hours,” “leading discussion or laboratory sessions,” or “assuming most or all the teaching responsibilities for a given course”; and (iii) graduate assistants had to complete assignments at the direction of a faculty member or risk removal from the program. *Id.* at 1093-97. Columbia’s model of requiring graduate students to participate in instructional teaching for undergraduates, the Board determined, “achieves the efficiency of avoiding a traditional hiring process for these jobs.” *Id.* at 1095.

None of those “control” factors from *Columbia* are present here.

i. *ISMMS Students Are Not Required to Perform Services in Furtherance of Any Grant*

As an initial matter, there is absolutely no record evidence to support the Regional Director’s finding that “a student’s thesis research must further the objectives of any grant that provides funds for the student’s research.” (DDE at 9.) Unlike in *Columbia*, where research assistants were required to “comply with the duties specified by the [relevant] grant,” 364 NLRB at 1093, ISMMS’s Ph.D. students are *not* required or expected to perform work or complete assignments in furtherance of their PI’s grant, or “work towards the goals of a specific type of proposal.” (Tr. 387-88.)

As Dr. Filizola and other ISMMS witnesses testified, “making progress on a PI’s grant . . . is not a factor” (Tr. 263, 265) in considering the Ph.D. student’s academic standing or progress towards their degree. (*See also* Tr. 97, 177, 308, 313, 387-88.) Both of Petitioner’s own witnesses even admitted that their funding was not conditioned on the performance of specific tasks. (Tr. 475, 552.) To be sure, as five of ISMMS’s witnesses testified, the school expects students to spend ***virtually 100% of their time performing research in furtherance of their own thesis.*** (Tr. 173, 236, 259, 307, 343, 388); *see also* supra at 13.

That a student receives funding from a PI's grant should not be surprising as the student chooses their lab and thesis research topic based on the type of research performed in that lab. (Tr. 170-171, 176-77, 340-42.) It should be expected that the student's research topic falls within the broad scope of their PI's grant; however, this does not mean that the student is required to fulfill the terms and conditions of a PI's grant in order to remain funded or to maintain satisfactory academic progress. To the contrary, Ph.D. students are not required to perform *any* services in furtherance of a particular grant and have absolute academic freedom to design their own thesis research without regard to the terms of a PI's grant. This academic freedom is the polar opposite of the type of control necessary for employee status. *See Columbia*, 364 NLRB at 1096 (observing that "funders may wish to further a student's education by effectively giving the student unconditional scholarship aid, and allowing the student to pursue educational goals without regard to achieving any of the funder's own particular research goals.").

Further demonstrating that there is no record evidence to support the Regional Director's finding that a student's thesis research must advance the objectives of a grant, the undisputed evidence established that students are never listed as key personnel on a grant, and none of the PIs who testified had ever listed Ph.D. students as "key personnel" on a grant application. (Tr. 87, 97, 121, 177, 184, 308, 312-13, 387-88, 398-99.) For purposes of NIH grant applications, "key personnel" are individuals who are "contributing substantially" to the aims of the grant and, as Ph.D. Graduate Students are not tasked with fulfilling the requirements of their PI's grant, they are not listed as "key personnel." (Tr. 86-87.)⁷

⁷ It should also be noted that, as a general matter, Ph.D. students are not included on grant applications because "it's not conducive to the chances of the proposal succeeding with a review committee that typically regard Ph.D. students as trainees that . . . lack sufficient expertise to carry out these goals." (Tr. 398.) Postdocs, by contrast, are "regarded as experts" and "they significantly increase the chances of funding being obtained." (*Id.*)

Nor would appearing on a grant obligate a student “to perform any services for the PI outside of their academic thesis requirements.” (Tr. 137.) Even in the rare instance when a Ph.D. student is personally identified on a grant, it is as non-key personnel and only because the subject of the grant aligns with the student’s thesis research.⁸ Such an identification does not constitute “a contract for services to be performed,” but rather a “research proposal.” (Tr. 183, 522.) Moreover, being named as non-key personnel would not: (i) “obligate[]” or “tie[]” the student to the grant; (ii) prevent the student from choosing “to perform [their] research in another lab”; or (iii) limit the student’s freedom to decide to discontinue with the project and pursue an entirely different research topic or thesis. (Tr. 519-22.) Nor would the student’s decision to change labs or discontinue with the project “jeopardize [their] funding in any way.” *Id.*

This absence of control over the Ph.D. Graduate students stands in stark contrast to the control over postdocs and research assistants—constituents in the lab who are obligated to fulfill the research objectives specified in the PI’s grant. *See supra* at 21-22.

Thus, the evidence unequivocally established that students are never required to do anything other than maintain satisfactory academic progress—*i.e.*, coursework and thesis research that is required to obtain a Ph.D. degree—to remain funded.⁹ The Board in *Columbia* held the research assistants to be employees because of the conditions Columbia placed on those students to gain admission to the program and to remain funded—*i.e.*, the performance of specific research services to fulfill the terms of grants the school received under the school’s supervision. *Columbia*, 364 NLRB at 1096-97. That control is absent here.

⁸ Out of ISMMS’s five PI witnesses, only *one witness*, Dr. O’Connell, listed a Ph.D. student on a grant and that was solely for budgeting purposes. (Pet. Ex. 51.)

⁹ While Petitioner repeatedly asserted in its Post-Hearing Brief that students must conduct research to meet the requirements of the PI’s grant, Petitioner failed to cite any record evidence in support of this baseless assertion. (Pet. Br. at 16, 23-24, 27.) The Regional Director also failed to cite anything to support this finding. (*See* DDE at 9.)

ii. *ISMMS Ph.D. Students Cannot be Assigned to Conduct Research Unrelated to Their Thesis*

The Regional Director incorrectly suggests that students can be required to perform research outside of their thesis research topic. (DDE at 10). This, too, is completely devoid of evidentiary support. The Regional Director points to the testimony of a single student, Mr. Albuquerque, as purported support for this conclusion, but this one example does nothing to rebut the undisputed evidence that students are not required to perform specific research tasks under a PI's supervision in order to remain funded. In the spring of 2020, COVID-19 caused an unprecedented worldwide health crisis that required "all hands on deck" from many individuals in the scientific and medical communities, including healthcare employees, students, and volunteers. (Tr. 488.) Mr. Albuquerque testified that the research for his dissertation was "interrupted" when "all the members of the lab dropped whatever they were working on" to help respond to this national health emergency. (Tr. 453-54.) Significantly, however, as Mr. Albuquerque admitted, he would not have lost his funding if he declined to volunteer with COVID-19-related efforts in order to continue with his thesis research. (Tr. 489.) Indeed, the record is devoid of any evidence to suggest that this student was "forced" or required to perform this research, nor was he told that there would be "consequences" if he did not help with the research efforts. (Tr. 488-89.) Mr. Albuquerque made a personal decision to "help to respond to this important need—for this important research" and "contribute" to the concerted effort to understand the virus in the wake of an unprecedented worldwide health crisis without jeopardizing his funding in any respect. *Id.* In any case, this outlier example in such unique and extraordinary circumstances cannot possibly be extrapolated to the broader student population. To be sure, if there were any students who ISMMS required to perform research outside of their thesis topic, the Petitioner would have called them to testify.

In this regard, the Regional Director also incorrectly states that “there is no indication” that the Graduate School would intervene if a PI was assigning research unrelated to a student’s thesis. (DDE at 10). That is wrong. As Dr. Hanss, the Senior Associate Dean for Student & Postdoctoral Affairs testified—without contradiction—ISMMS *has* actually intervened in the rare (*i.e.*, once every few years) event that a student is asked to perform research beyond their thesis. (Tr. 285-86; *see also* Tr. 260-61, 316-17.) The “first line of defense” against such an incident, Dr. Hanss testified, is the Thesis Advisory Committee, a member of which “will oftentimes have a conversation with the PI and – and ask them to – to redirect the focus of the student back towards the work that they’re supposed to do.” (Tr. 260-61.) If this approach is not successful, the issue will be escalated, including to “the program leadership itself, the [Multidisciplinary Training Area], or the program director,” and even the Office of Student Affairs. *Id.* Should this become a “persistent problem,” the Dean of ISMMS’s Graduate School, Dr. Filizola, will step in and resolve the matter. *Id.* Petitioner did not dispute the evidence of this “multi-tiered approach,” and notwithstanding this unequivocal evidence concerning how the school addresses these issues, the Regional Director erroneously concluded that ISMMS had no recourse in the event of a PI who demanded a student perform work for a PI grant or otherwise beyond their thesis. (DDE at 10.) This finding is fully contradicted by the undisputed record evidence.¹⁰

¹⁰ Notably, in *MIT*, the Regional Director found no employment relationship between the school and its graduate fellows despite the fact that, “[m]ultiple graduate students testified that they are . . . regularly asked to perform work unrelated to their own research.” *MIT*, at 7 n12. In reaching that conclusion, the Regional Director noted that *MIT*, like ISMMS, generally prohibited assignment of non-research tasks to its graduate fellows. *Id.* at 7. In fact, there is no evidence in this record that *even a single student* was required to perform research outside the scope of their thesis research, whereas in *MIT*, “multiple” students were asked to do so—a fact that the Regional Director nevertheless deemed insufficient to establish an employment relationship there.

iii. *PIs Offer Ph.D. Graduate Students Academic Feedback and Mentorship—Not Supervision*

The Regional Director further ignored the unrebutted testimony concerning the role of the PI as the students' mentor, and instead characterizes that function as supervisory control. (DDE at 9). In the DDE, the Regional Director erroneously determined that ISMMS "possesses a significant interest in maintaining . . . control" over Ph.D. students based on a PI's work providing "mentoring, guidance, direction, and oversight to graduate students." *Id.* As Dr. O'Connell explained, however, a PI's role is solely to provide "scientific direction, guidance and advice" to the student and is not to tell them how to conduct their own research. (Tr. 163.) Indeed, Dr. Russo explained that "all of" a student's thesis research is self-directed, and that the role of a PI is to help the student answer a question in which the *student*—not the PI—is interested. (Tr. 342.)

As a mentor, Dr. Russo explained that he will provide students with "feedback on what they should be doing," (Tr. 342), such as "track change" edits "that [the student] can accept or reject" if the student "agrees with [him] or not," (Tr. 340), but ultimately, the student guides the direction of the research. Further, while a PI may inform a Ph.D. student of specific training opportunities, such as conferences, retreats and practice presentations, it is "entirely up to [the student]"—not the PI or the school—if they decide to participate. (Tr. 393-94.)

This relationship and the lack of control stands in stark contrast to *Columbia*, where the research assistants had to "comply with the duties specified by the grant" and then "work under the direction of their departments to ensure that particular grant specifications are met." *Columbia*, 364 NLRB at 1093, 1096.

The Regional Director's notion of control is further belied by the PI's role on a student's Thesis Advisory Committee. A PI is the lone *non-voting* member of a Ph.D. student's Thesis Advisory Committee. (Tr. 104, 170; ISMMS Exhibit 2, at 154.) Although a PI is required to

submit progress reports for the students in their lab, those reports focus on the student's academic progress which includes information about the research performed by the student toward their thesis, the student's receipt of awards or prizes, and the student's academic and career goals. (Tr. 271-274.) Importantly, the PI is not responsible for evaluating the student's thesis or the ultimate determination concerning a student's academic progress—that role is reserved for the Thesis Advisory Committee. (Tr. 103-04, 169, 269, 274.) In the face of all this overwhelming evidence, there is not a scintilla of competing evidence to suggest that a student's funding would be in jeopardy if that student did not follow directions from the PI or if the PI was dissatisfied with the student's work. That is the antithesis of the type of control that existed over the students in *Columbia*.

iv. *Ph.D. Graduate Students Enjoy Academic Freedom to Mold Their Research and Select Their Laboratories*

Next, the Regional Director completely ignores the academic freedom students have to design their own research program and select their labs. While the DDE notes that laboratories must also decide whether to extend an offer to a student (DDE at 9), the Regional Director omits the undisputed fact that the final decision belongs to the student, and that a student can decline an invitation from a lab for any reason without jeopardizing funding. (Tr. 248, 328.) By contrast, the students in *Columbia* were required to “tak[e] on teaching or research[ing] duties [as] a condition for full receipt of [] funding.” *Columbia*, 364 NLRB at 1092. *Columbia*'s research assistants were funded by grants from external sources “to support a specified research task” that required them to “both comply with the duties specified by the grant and simultaneously carry out research that they will ultimately present as part of their thesis.” *Id.* at 1092-93. Notably, the language of *Columbia*'s aid packages for research assistants expressly “require[d] fulfillment of the duties

defined in the grant,” leaving students no choice but to accept these research duties even if unrelated to their thesis research in exchange for funding. *Id.* None of these facts are present here.

At ISMMS, Ph.D. students have “complete control” to choose their dissertation topic, PI, and the lab in which to perform their research based on their individual academic interests. (Tr. 248, 257.) In fact, ISMMS’s Graduate Program is designed so that Ph.D. students are allowed to rotate through multiple labs before selecting the lab they wish to pursue their studies in, which means that the student—not the PI—is in charge of the direction of his or her education. (Tr. 157-58.) “We like to provide our students with the opportunity to really mold their . . . education. And part of that requires that they have a good understanding of the landscape, of the types of work that . . . we are expert[s] in.” (Tr. 325.) As Dr. Russo explained:

The program requires that students do at least one rotation through a lab, but recommend two to three rotations so that they can get a sense of what the expertise are of the – of the laboratories here, and decide whether or not it's the right fit, both personally, professionally, intellectually for them to conduct their PhD thesis studies.

(Tr. 325.)

Drs. Filizola’s and O’Connell’s testimony underscore the freedom ISMMS’s Ph.D. students have in selecting their topic of study and laboratory assignment, stating that students are “strongly encouraged” to “pursue their own interests” (Tr. 95) and that “it’s completely up to the student to choose the laboratory within which they’ll do their dissertation work.” (Tr. 247.) In fact, as Dr. Russo explained, “there are definitely cases where the student . . . build[s] a program that’s something completely out of our wheelhouse” or where the student is interested in pursuing a research topic that the lab was “not studying at all,” but which the school nevertheless supports and finds funding for. (Tr. 340-41.)

v. *ISMMS Students Maintain Complete Control Over Their Schedules and are not Bound by the Graduate Student Handbook's Vacation Policy*

The Regional Director's finding that the Ph.D. Graduate Students' entitlement to two paid weeks of vacation each year is an "an emolument reflective of employee status" completely ignores the unrebutted evidence that students had the ability to take much more than two weeks of vacation without any diminution in their stipend. (DDE at 10.) ISMMS's Ph.D. students maintain complete autonomy over their schedule, including hours in the lab and vacation time. Students have the flexibility to determine their own research schedule, including how much time they spend in the lab (Tr. 308, 389), when they spend it (Tr. 308, 389), and how much time they take for vacation. (Tr. 311, 338-39.) Although the graduate student handbook contains a provision that Ph.D. students are entitled to two weeks of vacation, the undisputed record evidence is that this number is only a floor—students are encouraged to take at least two weeks but regularly take more *without suffering any diminution in their stipend*. (Tr. 133, 180, 311, 339.) In addition, Ph.D. students do not submit formal requests for vacation time. As Dr. Russo explained, he has never in the "fifteen years that [he has] been running a lab" had a student ask to take time off. (Tr. 338.) There is simply no record evidence here that a single student has been required to perform research for a required minimum number of hours or during specific times/days, had a request for vacation denied, or has been asked by their PI to report to the lab outside of their own schedule.

B. Ph.D. Graduate Students Do Not Receive Compensation Within The Meaning Of *Columbia*

i. *Ph.D. Graduate Students' Funding Packages do not Constitute Compensation in Exchange for Services*

The Regional Director's finding with regard to the compensation prong also ignores the unrebutted testimony in this case. Citing *Columbia*, the Regional Director found that "[t]he

method of payment is consistent with compensation for performing service, in this case research.” (DDE at 11). This finding ignores the overwhelming record evidence.

ISMMS presented undisputed testimony that the funding Ph.D. students receive is not in exchange for services performed and is, therefore, nothing like *Columbia*:

Q: Are the monies that the student receive that we – that you just described, is that in exchange for services performed for the Icahn School of Medicine?

A: No.

Q. Is the amount of the stipend or any other component of this package in exchange for services to be performed for the Graduate School?

A. No, there’s no stipulation.

Q. Is that stipend in exchange for the performance of services to the PI?

A. No.

(Tr. 83, 152, 235.)

The undisputed evidence presented at hearing showed that ISMMS’s Ph.D. students did not have the same “service” requirements that the graduate student research assistants in *Columbia* had to fulfill as “a condition for full receipt of [their] funding.” *Columbia*, 364 NLRB at 1092. In *Columbia*, the graduate students at issue were required to serve as research assistants and/or teaching assistants. *Id.* at 1093 (“Graduate Research Assistants in Ph.D. programs must both comply with the duties specified by the grant and simultaneously carry out research that they will ultimately present as part of their thesis.”). Because the students in *Columbia* “work[ed] under the direction of their departments to ensure that particular grant specifications are met,” the Board deemed the research assistants’ “aid package” to be “compensation.” *Id.* at 1096. Here, by sharp

contrast, the undisputed record evidence shows that the Ph.D. students do not have any such service requirements on top of their thesis research. (Tr. 96, 263-64, 428-29, 555.)

Further, the NLRB in *Columbia* found that the teaching assistants were required to perform “defined tasks” and “instructional services,” such as “grading papers,” “holding office hours,” “leading discussion or laboratory sessions” or “assuming most or all the teaching responsibilities for a given course.” *Columbia*, 364 NLRB at 1093, 1096-97. In looking at the “salient economic character” of the *Columbia* graduate students’ relationship to the university, the NLRB described Columbia’s graduate students as being “thrust wholesale into many of the core duties of teaching,” such that the students’ services “extend[ed] beyond the mere desire to help inculcate teaching skills.” *Id.* at 1095. The NLRB also noted that “[r]eceipt of a full financial award [wa]s conditioned upon [the students’] performance of teaching duties,” and that “[w]hen they do not perform their assigned instructional duties, the record indicates they will not be paid.” *Id.* at 1094. This “explicit conditioning of awards on performance of teaching duties, demonstrates that the University offers student assistants stipends as consideration for fulfilling their duties to perform instructional services on the University’s behalf.” *Id.* The NLRB determined that under such facts, Columbia’s graduate students were employees under the common-law test when serving as research assistants and performing instructional services.

The undisputed record evidence establishes, contrary to the Regional Director’s erroneous finding (DDE at 10), that the opposite of *Columbia* is true at ISMMS. ISMMS’s Ph.D. students have ***no teaching assistantship responsibilities whatsoever***—if they choose to teach, it is completely voluntary. (ISMMS Ex. 13.):

Q: Do PhD students in biomedical science or neuroscience need to be a research assistant in order to maintain funding?

A: No.

Q. Are PhD students in biomedical science or neuroscience required to be teaching assistants in order to complete their degrees?

A. No.

Q. And why not?

A. Because the students are here to pursue their education and we want the students to focus on their studies and academic research not on additional work outside of that.”

(Tr. 185, 428-29.) A Ph.D. student’s funding is not—in any way—dependent upon the performance of services to ISMMS. *Columbia*, 364 NLRB at 1095. As Drs. O’Connell and Filizola testified:

Q: Do PhD students in biomedical science or neuroscience need to fulfill any service requirements like being a TA in order to maintain funding?

A: No.

Q: [Are] Ph.D. students in biomedical science or neuroscience required to perform any service to maintain the funding and benefits outline[d] here?

A: No.

Q: Is the amount of the stipend or any other component of this package in exchange for services to be performed for the Graduate School?

A: No, there’s no stipulation.

Q: Is a PhD student’s funding conditioned on them fulfilling the requirements of their PI’s grants?

A. No.

(Tr. 152-53, 185.)

Even the *Petitioner's witnesses* testified that they received funding free and clear of any teaching or research obligations. (See Sam McConnell testimony: Q: "None of those benefits [stipend, affordable housing or health insurance] were conditioned on you serving as a teaching assistant, correct? A: Correct." (Tr. 555); See Bremy Albuquerque testimony: Q: And you also understood that if you weren't interested . . . you could have declined to work on COVID related initiatives without losing your stipend, correct? A: Correct. I don't expect to have lost my stipend if I – if I didn't contribute to this the way I had." (Tr. 489).)

Petitioner's Exhibit 32 further illustrates this point. That exhibit is a printout from a PI's website describing openings in that PI's lab. For both the postdoc position and the position of bioinformatics staff, the tasks those individuals would be expected to perform in the lab are described with specificity on the face of the document. (Pet. Ex. 32.) That is in sharp contrast to the opening for a graduate student, which does not contain any "job description" or tasks to be performed at all and simply informs interested students to contact the PI. *Id.*

Unlike the graduate students at issue in *Columbia*, the unrebutted evidence shows that funding for ISMMS's Ph.D. students is contingent solely upon the student's ability to achieve "satisfactory academic progress." (Tr. 90.) The portability of a student's funding further supports that it is not in exchange for services performed. The undisputed evidence established that a Ph.D. student's funding follows them regardless of the academic direction they decide to pursue, and the graduate school "has mechanisms in place to cover [the] cost" of a student's funding package, sometimes for "multiple years" if necessary, "to allow them to complete their degree." (Tr. 264-65.) As Mr. Albuquerque testified, a change in research direction, including a change in labs, may mean that "the source [of funding] would change, but [the students] would still be paid." (Tr.

484-85.) Thus, if a Ph.D. student receiving grant funding is no longer interested in researching their selected topic, or the student's PI leaves ISMMS, the student can be taken off the relevant grant in which case the PI (or ISMMS) will help the student find funding elsewhere. (Tr. 184-85.)

As described by Dr. O'Connell:

Q. If a student's PI lost funding, would the PhD student in that lab lose funding?

A. No.

Q. Who would – who if anyone would absorb that funding?

A. Various sources. The department may be able to provide funds. The institute to which that department aligns may be able to provide funding. And generally those two suffice. And when not available, the school would pickup the funding.

Q. Doctor, if a PhD student's PI left Mount Sinai, would -- what happens to the student?

A. In general, if they have already passed their qualifying exam, they remain enrolled at Mount Sinai, but conduct the experiments at the location where the PI's lab is. But the expectations, milestones, etc., are unchanged. If they have not passed their qualifying exam, then they would also have the option to either go down that path or, or consider a different opportunity on campus.

Q. So in the instance where a student has already passed his qualifying exam and let's say the PI moves to Columbia, the student would follow the PI to Columbia and perform services in a Columbia lab?

A. They would perform research in a Columbia lab.

Q. Thank you. They would perform research in the Columbia lab. Who if anyone would pay the student's stipend during the time that the student was performing research in Columbia's lab?

A. It would be paid identically as if they were physically on the Mount Sinai campus.

Q. So Mount Sinai would continue to pay the stipend?

A. They are enrolled students at Mount Sinai, so they have their housing, their health insurance, etc.

(Tr. 186-87.)

The portability of a student’s funding—even when a student is performing research at a different institution while receiving funding from ISMMS—highlights the primacy placed on a student’s academic research, not service to the institution. As attested to by Dr. Filizola, “funding is not [the Ph.D. student’s] problem. Funding is the problem of the PI or the institution. [The Ph.D. student] should concentrate on their thesis, and that is the purpose to provide them [with] those funds If they are in the program they will never lose their funding.” (Tr. 89.)

The record evidence thus leaves no doubt that ISMMS’s Ph.D. students’ funding package is not compensation in exchange for services performed because—unlike the graduate research assistants in *Columbia*—all funding is conditioned only on the maintenance of satisfactory academic standing; students are not required to perform any services for ISMMS or their PI in exchange for their stipends. The Regional Director failed to consider the unrebutted testimony that the stipend was not in exchange for services performed and, therefore, does not constitute compensation within the meaning of *Columbia*.

ii. *The Mount Sinai Records on Which the Regional Director Relied do not Evince a Common Law Employment Relationship*

The Regional Director’s reliance on nomenclature in the graduate student handbook and documents within ISMMS’s human resources system, Sinai Cloud, is misplaced. Not only did the Regional Director elevate form over substance, he ignored the unrefuted testimony that the students’ characterizations on a handful of cherry-picked documents does not establish the type of compensation and control that *Columbia* requires. As purported proof of employment status, the Regional Director points to: (i) the graduate student handbook’s reference to students as “employees” and the inclusion of a drug testing policy; (ii) documents that refer to the stipend

Ph.D. students receive as “direct compensation”; and (iii) Sinai Cloud’s default use of “employment”-related terminology for graduate students.

At the outset, the Regional Director’s decision to accord weight to the “title” attached to the Ph.D. students in Sinai Cloud, a human resources system that applies to the *entire* 40,000+ person Mount Sinai community, and the graduate student handbook runs afoul of the Board’s well-established position that it does not consider the title attached to a particular disputed position to be determinative. *See Westinghouse Elec. Corp.*, 163 NLRB 723, 726 n.18 (1967) (holding that “it is clear that an individual’s status under the Act is determined by his job content and responsibilities rather than by his title.”); *Dole Fresh Vegetables, Inc.*, 339 NLRB 785, 785 (2003) (status of supervisor under the Act “is determined by an individual’s duties, not by his title or job classification”), *quoting T.K. Harvin & Sons, Inc.*, 316 NLRB 510, 530 (1995). Accordingly, it is what the students actually do that drives the employment analysis.

Next, the Regional Director’s reliance on the reference to students as employees in the substance abuse policy in the Handbook is also inapt. Of note, that same policy also refers to undergraduate students and self-funded students as employees—students whom Petitioner conceded are not employees notwithstanding this policy definition. (Tr. 11-12, 21.)

The same holds true with respect to the handbook’s use of “direct compensation” to describe the students’ stipend. As set forth above, every single witness uniformly and convincingly testified that the stipend payments were not in exchange for services performed. (Tr. 83, 152, 235.) That testimony was not disputed.

The Decision’s reliance on references to “employment” on certain documents printed from Sinai Cloud is equally unavailing. Sinai Cloud is the human resource system used by “[a]ll members of the Mount Sinai community,” (Tr. 433), spanning more than 43,000 individuals

working across eight hospitals, over 400 outpatient practices, nearly 300 labs, a nursing school and ISMMS. (Tr. 583; Pet. Ex. 45.) The undisputed testimony is that Sinai Cloud uses different terminology than the graduate school, and its database is made available for graduate students as an administrative convenience for them. (See Tr. 269 (“Sinai Cloud . . . use[s] a nomenclature for that larger entity,” which is the Mount Sinai “institution”); 433 (“Ph.D. students have access to Sinai Cloud to pull up relevant documents to them, to access other systems within the Mount Sinai network...and to view pertinent material to – to their placement within the system.”); 433-34 (Sinai Cloud uses different nomenclature than the graduate school with respect to graduate students because it is a “wide system that works with everyone inside the institution” and “it often defaults to terminology used there”); 436 (Sinai Cloud’s default terminology refers to a student’s funding package as “salary” while “[the graduate school] would use ‘stipend’...to refer to the payments that are going out to the students who are conducting research in the lab”).

The Regional Director failed to consider the undisputed evidence that this same verbiage—e.g., “employment info,” “legal employer,” and “job”—also is used with respect to self-funded students who Petitioner concedes are not employees, and who have the same access to the same documents as students in the petitioned-for unit. (Tr. 433, 563; ISMMS Ex. 6, including attachments 6a-6b; ISMMS Ex. 21, including attachments 21a-21f; ISMMS Ex. 22.)

Petitioner’s own witnesses further confirmed that the verbiage used on the Sinai Cloud forms is meaningless. For example, Kathleen Dilks is listed as the student’s line manager. (Pet. Ex. 27.) But, Mr. Albuquerque testified that he does not even know who Ms. Dilks is, has never communicated with her, and that he has had no interaction with her with respect to research he performed in the lab. (Tr. 486-87.) Dr. Van Bakel, Mr. Albuquerque’s PI and putative “supervisor” when he studied DNA in Dr. Van Bakel’s lab (Tr. 485, 452), does not appear

anywhere on Mr. Albuquerque’s Sinai Cloud profile. (*See* Pet. Ex. 27.) In sharp contrast to the types of documents that reside on Sinai Cloud that apply to the entire Mount Sinai community generally, there are no comparable employment-type references to students on the website that pertains to ISMMS specifically. Indeed, on Mr. Albuquerque’s online biography on the ISMMS website, he is classified—appropriately—as a “Graduate *Student*.” (ISMMS Ex. 18, emphasis added). Similarly, his PI is listed as his “mentor”—not supervisor or manager. *Id.* Accordingly, there was no evidentiary basis for the Regional Director to rely on this verbiage to find an employment relationship with respect to the Ph.D. students at issue here.

III. THE REGIONAL DIRECTOR FAILED TO CONSIDER THE EFFECT OF THE DDE ON INTERNATIONAL PH.D. GRADUATE STUDENTS

The Regional Director neglected to give appropriate weight to the effect of the DDE on international students—more than 25% of the students in the petitioned-for unit—completely sidestepping the consequences of employees’ status on their ability to perform their dissertation research. (DDE at 10.)

For international students to enroll and remain in ISMMS’s Ph.D. programs, they must obtain an F-1 student visa pursuant to which they must maintain a “full course of study” to preserve active immigration status. 8 C.F.R. § 214.2(f)(6); 8 C.F.R. § 214.2(f)(9)(i). A full course of study includes “research in a lab . . . that’s associated with [the student’s] studies.” (Tr. 414.) Since an F-1 visa is a *student visa*, not an employment visa, federal immigration regulations set strict rules regarding the amount of time international students may spend on employment, such as an on-campus job, limiting such employment to a maximum of 20 hours per week. 8 C.F.R. 214.2(f)(9)(i). As explained by ISMMS witness, Hamel Vyas, the federal government places these limits on F-1 visa students since “their primary purpose is to be a student and to study.” (Tr. 413.) Given this “primary purpose,” the federal government does *not* place any limit on the amount of

time that students can spend in a given week toward “research that’s associated with their studies.” (Tr. 414.)

The Regional Director’s finding that Ph.D. students are employees by virtue of their thesis research necessarily means that their time in the lab performing research would be considered “on-campus employment.” As such, ISMMS would be required by federal law to ensure that international Ph.D. students on F-1 visas spend no more than 20 total hours per week conducting any research at ISMMS—including any research on their thesis or dissertation.

Such an outcome inevitably would have detrimental consequences to ISMMS’s international students. First, this could significantly hinder an international student’s ability to make timely progress towards their degree. While domestic Ph.D. students at ISMMS would not have “a set schedule or a set number of hours” (Tr. 308) and would be encouraged to spend as much time as necessary to complete their degree (Tr. 337-38, 389, 414.), international students would be faced with a very rigid time limit that would prevent them from conducting *any* research beyond the federally-imposed 20-hour per week limit. This result would not only require these students to engage in additional semesters of research to receive their degree, but failure to abide by the 20-hour per week limit would violate the terms of the students’ visas and subject them to deportation. 8 C.F.R. 214.2(f)(9)(i). Moreover, as it is likely that all of an international student’s employment allotment would be consumed by their thesis/dissertation research, that student would be prohibited from taking on additional on-campus employment roles, such as a teaching assistant, and benefiting from both the valuable training and development opportunities that accompany such a position, as well as the chance to receive additional financial support.

Indeed, the Regional Director of Region 1 found these consequences to be significant in issuing its decision that the graduate students at MIT were not “employees” under the Act. The

Regional Director explicitly stated, “contrary to the Petitioner’s assertion, *all thesis research performed by graduate students cannot constitute service to MIT*, lest international students be placed at a grave disadvantage by the 20-hour employment caps set by federal immigration regulations.” *Mass. Inst. of Tech.*, No. 01-RC-304047, at 11 (March 13, 2023) (emphasis added). The Regional Director should have been motivated by this very same concern instead of brushing the issue aside.

IV. THE REGIONAL DIRECTOR’S INCLUSION OF FIRST-YEAR PH.D. STUDENTS STRAYS EVEN FURTHER FROM *COLUMBIA*

Even if certain Ph.D. Graduate students are deemed to be employees—and, for all of the reasons discussed above, they should not be—first-year students should be excluded from any unit because the Regional Director’s conclusion with respect to the employee status of first-year students is even more unfounded. (DDE at 11-12.)

Specifically, the Decision states that first-year students “perform work at the direction of” lab advisers, PIs, and postdocs during their lab rotations, such as “preparing specimens, performing procedures and behavioral tests, and conducting calculations and other analyses.” *Id.* The Regional Director failed to consider that first-years are predominantly doing coursework in a classroom, and to the extent they are rotating through various labs, such rotations are solely to assess their own interest in that lab for their thesis research in subsequent years. (Tr. 119, 160.) Both of Petitioner’s witnesses admitted that the purpose of lab rotations, and the tasks performed during these rotations, was to find the right fit for them to perform their thesis research, rather than to assist the lab with specific research. (Tr. 470, 549.) Lab rotations are integral to a student’s curriculum, and students receive a grade for their time spent in a lab rotation—they are not performing services for compensation for ISMMS. (Tr. 119-20; 247-48.)

In fact, ISMMS witnesses testified that students on rotation typically do not perform much research at all, given their limited time in the lab. (Tr. 247, 327.) Dr. Russo explained that “there’s not much actual research that can be done in six weeks” and “there’s not a whole lot we can have [rotation students] do.” (Tr. 347.) Ph.D. students on rotation may spend time “interacting with and observing the research of all of the members of [a] lab to get a general sense of what type of research projects they enjoy” but they are not expected to complete any assignments based on their limited rotation period. (Tr. 347.)

Although Petitioner’s witnesses discussed some of the discrete projects they individually undertook while on rotation, neither of Petitioner’s witnesses testified that they were required to complete any of this research. Significantly, both Petitioner witnesses testified that their funding was not conditioned on their performance of *any* research during their first-year lab rotations and that the purpose of the rotation was to see if the lab matched their academic interests. (Tr. 470, 475, 549, 552.)

ISMMS does not control in which labs the students perform their rotations. To the contrary, the students have complete academic freedom to choose which labs through which to rotate, as well as the lab in which they ultimately conduct their thesis research. Dr. Hanss testified that when a student’s lab rotations are complete, the student has “complete control” to choose which lab they would like to join and ISMMS relies “on the student [to make] the final determination if the laboratory is the right and best fit for them.” (Tr. 248.) Even when a PI offers a student to join a lab, the student has the ability to decline an offer and join another lab. (Tr. 248, 328.) In fact, Dr. Russo testified that students have previously declined offers to join his lab after rotating if “they felt that there was another lab that was either scientifically or intellectually or personally more aligned with them.” (Tr. 328.)

Because the undisputed record demonstrates that neither the compensation nor the control prongs of the common-law employment test are satisfied as it relates to the first-year Ph.D. students engaged in lab rotations, the Board should review and vacate the DDE on that basis as well.

CONCLUSION

For the foregoing reasons, ISMMS respectfully requests that the Board grant review of the Regional Director's Decision and vacate it in its entirety.

Dated: September 25, 2024

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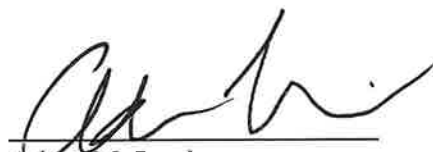
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