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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF KICKERTZ,

Respondent,

-against-

No. 29

NEW YORK UNIVERSITY,

Appellant.

20 Eagle Street
Albany, New York 12207
February 10, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 29, Matter of
2 Kickertz v. New York University.

3 Counsel, you want any rebuttal time?

4 MR. FEINBERG: Two minutes, please, Your
5 Honor.

6 CHIEF JUDGE LIPPMAN: Two minutes, go
7 ahead. You're on.

8 MR. FEINBERG: May it please the court, my
9 name is Ira Feinberg. I'm counsel for appellant New
10 York University in this appeal. There are three
11 points that I'd like to emphasize today. First, the
12 Appellate Division erred in ordering that Kickertz's
13 petition should be granted without - - - when NYU had
14 never had an opportunity to answer the complaint.

15 CHIEF JUDGE LIPPMAN: Let's stay - - -
16 let's stay on that point, counsel. I gather that the
17 Appellate Division felt strongly that the university
18 had not given the plaintiff any rights - - - or the
19 student any rights in terms of the hearing that went
20 on, and that's why they directed - - - without an
21 answer that they directed judgment as some kind of
22 violation of due process.

23 Where - - - where does that go wrong? If
24 it was clear to them that the school was - - -
25 inappropriately handled the hearing or whatever they

1 believe, why did they have to give you a chance to
2 answer?

3 MR. FEINBERG: Well, first of all, due
4 process is not the right standard here. This is a
5 private institution. This - - - the - - - the due
6 process requirements that might apply to a public
7 institution are simply irrelevant here. The standard
8 of - - - of review is far more deferential than that.
9 And this decision can only be annulled if it was
10 arbitrary or capricious or if the university didn't
11 substantially comply with the requirements.

12 CHIEF JUDGE LIPPMAN: Assuming they - - -
13 assuming they thought it was arbitrary and
14 capricious, do they have to give you a chance to
15 answer?

16 MR. FEINBERG: Yes. Yes. You get - - -

17 CHIEF JUDGE LIPPMAN: Why? That's my
18 question.

19 MR. FEINBERG: Well, they're - - - well,
20 the - - -

21 CHIEF JUDGE LIPPMAN: If they had converted
22 it a summary judgment, they didn't have to give you a
23 chance to answer?

24 MR. FEINBERG: If the court had converted
25 it into a summary judgment motion, sec - - - CPLR

1 3211 says, number one, you have to give the
2 respondent notice that you're doing that, and you
3 have to give the respondent an opportunity to submit
4 any evidence that the - - - that they want - - -

5 CHIEF JUDGE LIPPMAN: Let's say in effect -
6 - -

7 MR. FEINBERG: - - - which we didn't have
8 here, Your Honor.

9 CHIEF JUDGE LIPPMAN: Let's - - - let's say
10 in effect they were converting it to a summary
11 judgment and they did give you a chance and they just
12 found you totally wrong. That would have been okay,
13 right?

14 MR. FEINBERG: Well, if we had had a - - -

15 CHIEF JUDGE LIPPMAN: Whether it was - - -

16 MR. FEINBERG: If we had had an opportun -
17 - -

18 CHIEF JUDGE LIPPMAN: - - - arbitrary and
19 capricious or whatever the test was?

20 MR. FEINBERG: The court - - - the court
21 only had one side of the case here and never heard
22 from NYU and never heard NYU's side of the case. And
23 - - - and ultimately - - -

24 JUDGE RIVERA: Is that because you argued
25 assuming all the facts are true as she has argued

1 them?

2 MR. FEINBERG: That'd be - - - that'd be -
3 - -

4 JUDGE RIVERA: She has presented them?

5 MR. FEINBERG: - - - exactly right. On a
6 motion to dismiss, that's what you do. We said that
7 her comp - - - her petition was legally in - - -
8 insufficient because the facts she admitted in the
9 petition were sufficient to show that she wasn't
10 entitled to relief. And - - - and on a motion to
11 dismiss, you - - - you're not taking a position that
12 - - - that there aren't other facts that you might
13 bring to bear if - - - if the court denies the motion
14 to dismiss. You assume you're going to be able to go
15 forward and litigate the case and - - - and present
16 your side of the case thereafter. But - - -

17 JUDGE STEIN: And then even if the court
18 found that you hadn't followed the - - - the
19 necessary procedures, then the court could have
20 remanded for - - - for a new hearing?

21 MR. FEINBERG: It - - - it - - - in this
22 case it could have and it should have. But,
23 actually, our position is that the - - - the - - -
24 the court was wrong to say - - - was not only wrong
25 to say that the - - - the - - - NYU didn't follow the

1 procedures that it should have in the 2009 ethical
2 code, but that the - - - the complaint in this case,
3 or rather, the petition in this case, in fact
4 demonstrated that she was not entitled to relief.
5 She - - - she in fact got the hearing. She - - - she
6 had notice of what the charges were against her. And
7 the charges were - - -

8 JUDGE STEIN: But - - - but she - - - she
9 had no - - - what opportunity did she have to - - -
10 to question witnesses? Or, in fact, wasn't there a
11 lot of documentary support for the charges that was
12 missing from - - - from the record and still missing
13 from the record?

14 MR. FEINBERG: NYU's 2009 disciplinary code
15 deliberately set up a student-led peer review system.
16 It wasn't intended to put the - - - to a - - - a
17 student on trial. It was intended to be informal.
18 It was intended to be a student's - - - in the first
19 instance, at least, evaluating the conduct of their
20 peers.

21 CHIEF JUDGE LIPPMAN: Yeah, but they have
22 some opportunity to be heard, right? I mean, you
23 don't - - - you certainly wouldn't deny them an
24 opportunity to be heard?

25 MR. FEINBERG: She did have an opportunity

1 to be heard. She had notice of what the charges were
2 against - - -

3 CHIEF JUDGE LIPPMAN: Well, the court - - -

4 MR. FEINBERG: - - - her, that report.

5 CHIEF JUDGE LIPPMAN: The court obviously -
6 - - the Appellate Division obviously thought it was
7 not much of an opportunity.

8 MR. FEINBERG: Well, the court took the
9 wrong - - - took legally the wrong approach and
10 applied a much more stringent standard - - -

11 CHIEF JUDGE LIPPMAN: Are you asking that
12 we find for you or just to give you the right to
13 answer?

14 MR. FEINBERG: Well, we make two requests.
15 One is, at a minimum, we should be entitled to answer
16 and present our side of the case. But in addition to
17 that, we're saying that Justice Schlesinger was right
18 to have dismissed the - - - this petition.

19 JUDGE READ: So you want us to reinstate
20 what she - - -

21 MR. FEINBERG: We would like you to
22 reinstate the - - - the ruling dismissing the - - -
23 the petition. The - - -

24 JUDGE READ: And in terms of the missing
25 documents, are there any documents missing other than

1 the ones that - - - that she destroyed? Are there
2 other missing documents in the record?

3 MR. FEINBERG: In terms of the record not
4 being complete - - -

5 JUDGE READ: Yeah.

6 MR. FEINBERG: - - - here, Your Honor?

7 JUDGE READ: Yeah.

8 MR. FEINBERG: Yes. The - - - the peer
9 review board - - - board - - - the peer review board
10 prepared a - - - a summary of the October 7th hearing
11 that was held which lays out what happened, lays out
12 what her testimony was, and which lays out what the
13 peer review board's conclusions were as
14 to why it was recommending dismissal. That report is
15 not part of the record in this case. That - - -

16 JUDGE READ: But it exists?

17 MR. FEINBERG: It exists. Yes, it does.
18 The - - - that - - - after that, the college - - -
19 the faculty college review board - - -

20 JUDGE READ: And this is the - - - this is
21 the kind of stuff - - - or the kind of material you
22 would put in if - - - if you were able to litigate
23 the case, if you were to answer it and move forward?

24 MR. FEINBERG: Absolutely, Your Honor. The
25 college review board made a determination to uphold

1 that recommendation of the student-led peer review
2 board. That document also is not in the record.
3 There is - - - most of the correspondence between Dr.
4 Palatta and - - - and Ms. Kickertz is - - - is not in
5 the record before the court.

6 CHIEF JUDGE LIPPMAN: Your main argument is
7 the fraudulent, you know, documents that - - - that
8 were submitted to - - -

9 MR. FEINBERG: Her com - - - her - - - her
10 - - -

11 CHIEF JUDGE LIPPMAN: - - - get other
12 credits? I mean that's the - - - the - - - the crux
13 of - - - of what the university's - - -

14 MR. FEINBERG: You - - - you have to appre
15 - - -

16 CHIEF JUDGE LIPPMAN: - - - complaint is
17 against her?

18 MR. FEINBERG: The - - - the conduct here
19 is extremely serious. She - - -

20 CHIEF JUDGE LIPPMAN: That's what I want to
21 know.

22 MR. FEINBERG: She - - - she - - -

23 CHIEF JUDGE LIPPMAN: What - - - what is
24 the crux?

25 JUDGE FAHEY: She denies that conduct,

1 doesn't she? She - - - she denies that conduct.

2 MR. FEINBERG: Her petition admits it, Your
3 Honor.

4 JUDGE FAHEY: She - - - you're saying she
5 admits - - -

6 MR. FEINBERG: She - - - she admits - - -
7 she - - -

8 JUDGE FAHEY: Slow down. Slow down.

9 MR. FEINBERG: All right.

10 JUDGE FAHEY: I'm going to let you answer
11 me. She admits falsifying plaintiff records - - - or
12 patient records?

13 MR. FEINBERG: She admits that she created
14 what she calls encounter forms, which are the
15 documents where she claimed that she had provided
16 treatment to four different patients and submitted
17 them and then paid the bills herself, when, in fact,
18 she had never seen those patients.

19 JUDGE FAHEY: Yeah.

20 MR. FEINBERG: And NYU - - - may I go on,
21 Your Honor?

22 JUDGE FAHEY: Go ahead, yeah, sure.

23 MR. FEINBERG: NY - - - those records then
24 go into NYU's system, and there are computerized
25 records that reflect these patients were given these

1 treatments on certain days. And from that, NYU would
2 bill providers, would bill Medicaid, Medicare, the
3 insurance company for the work that had been
4 allegedly performed that she, in fact, never
5 performed. This is very serious misconduct.

6 JUDGE FAHEY: Okay.

7 MR. FEINBERG: Now, in addition to that,
8 the one piece that she now denies is that she
9 falsified a patient's chart. Well, she admitted that
10 to the people - - - to the students interviewed her
11 in connection with the peer review board. She
12 admitted that to Doctors Meeker and Hershkowitz.
13 She's now denying it and that is a disputed issue of
14 fact here.

15 But the - - - the consequences of that were
16 entries into a - - - into a patient's permanent
17 medical record that she - - - that this patient had
18 had six teeth extracted that day, that her blood
19 pressure was such and such, that she had been
20 administered anesthesia.

21 JUDGE FAHEY: Now, let's not go too far now
22 and waste too much in a rabbit hole then. Let me
23 just go to the 2009 rules, I guess, which were rules
24 that were put into place about two months before that
25 were applied to her. At this hearing, were - - -

1 were there any witnesses at all, or was it all
2 documentary evidence?

3 MR. FEINBERG: The - - - the witnesses were
4 Ms. Kickertz, who gave - - - who had a chance to
5 present her side of the story as to what had
6 happened, and her mother.

7 JUDGE FAHEY: I see. Thank you.

8 MR. FEINBERG: But the - - -

9 CHIEF JUDGE LIPPMAN: Okay, counsel. Go
10 ahead, finish off. I'm sorry.

11 MR. FEINBERG: The - - - the - - - the - -
12 - the - - - the bulk of the evidence was the report
13 of the investigating panel.

14 JUDGE FAHEY: It was all documentary
15 evidence.

16 MR. FEINBERG: That was presented in
17 writing.

18 JUDGE FAHEY: The reason I - - -

19 MR. FEINBERG: And there's nothing wrong
20 with that.

21 JUDGE FAHEY: Let me just explain the
22 reason I asked the question. Because I saw in the
23 rules that you're able to question the witnesses,
24 it's all documentary evidence, and the con - - - and
25 in this context, there couldn't be any questioning.

1 That's why I asked it, but you answered accurately.

2 Thank you.

3 MR. FEINBERG: And - - - and the - - - if I
4 might, the - - - the - - - the code provision that
5 says you have the right to question any witness who
6 was presented doesn't guarantee that any witnesses
7 will necessarily be called.

8 JUDGE FAHEY: Of course not. Of course.
9 Yeah, sure.

10 MR. FEINBERG: It just says you have the -
11 - - if any witness is called, you have the right to.

12 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank
13 you.

14 Counselor.

15 MR. ARBEIT: May it please the court, my
16 name is Bryan Arbeit, and I represent the petitioner-
17 respondent Katie Kickertz. I first - - -

18 CHIEF JUDGE LIPPMAN: Counsel, why
19 shouldn't we give them a chance to answer? Aren't
20 there some disputes here as to what went on?

21 MR. ARBEIT: Your Honor, there are not
22 disputes, because they're not disputes as to the
23 material issues of facts. And if you look to - - -

24 CHIEF JUDGE LIPPMAN: They don't have a
25 right to - - - to state - - - they - - - we're

1 assuming you're right on the - - - on the - - - you
2 know, what you're alleging. But can't they answer
3 and put things in - - - at issue? This is not a
4 summary judgment situation where they were given the
5 chance to present their proof. Why in the world
6 wouldn't we give them a chance to answer?

7 MR. ARBEIT: Your Honor, I ask that - - -
8 that you look at the record, you look at the pretty
9 thick record, and you look at the brief at pages 17
10 through 20.

11 CHIEF JUDGE LIPPMAN: It was a motion to
12 dismiss, right?

13 MR. ARBEIT: They didn't treat it as a
14 motion to dismiss. They did not assume the facts as
15 truth.

16 CHIEF JUDGE LIPPMAN: You're saying that
17 the court and everybody else there treated it as a
18 summary disposition?

19 MR. ARBEIT: They - - - they - - - they
20 used the documentary evidence. They - - - the
21 hearing procedures and what happened at the hearing,
22 it was not disputed between the parties. It was - -
23 -

24 CHIEF JUDGE LIPPMAN: So they knew that
25 they had to put all their proof in and that they put

1 it in and - - - and that then looking at the proof on
2 both sides, the court decided to not let them answer?
3 Is that what happened there?

4 MR. ARBEIT: What happened here is that the
5 - - -

6 CHIEF JUDGE LIPPMAN: Is that what happened
7 there?

8 MR. ARBEIT: I don't know whether that's
9 what happened. But what happened here - - -

10 CHIEF JUDGE LIPPMAN: And if it's not, why
11 shouldn't they be able to answer?

12 MR. ARBEIT: Because the court here is - -
13 - it's a summary proceed - - - it's a special
14 proceeding, a summary proceeding. And if the - - -

15 JUDGE PIGOTT: No, it's not a summary
16 proceeding.

17 MR. ARBEIT: It - - -

18 JUDGE PIGOTT: And - - - and in 3211, even
19 in 3211(a) (7) or (8) where you - - - where you move
20 to dismiss based on documentary evidence, generally
21 speaking, if you fail, then your - - - your - - - the
22 motion's denied and you get, you know, usually thirty
23 days to answer. In the event that you think it's
24 close, speaking of the court now, that's when you
25 give notice that you're going to treat it as a motion

1 for summary judgment. And you - - - then you allow
2 people to treat the motion as a 3212. And then - - -
3 then you can put in whatever other evidence. Which
4 may include evidence that there's a question of fact.
5 Not that the case ought to be dismissed, but there is
6 a question of fact. And I didn't see that here.

7 MR. ARBEIT: Well - - - well, here there
8 was not - - - there was not a dispute as to what
9 happened at the hearing to the fact that there were -
10 - - there was no documentary evidence presented.

11 JUDGE PIGOTT: Well, the - - - well, the
12 PRB - - - or I'm getting the initials messed up, but
13 somebody said she - - - she admitted that she forged
14 these documents. Now, if that's true, she probably
15 ought to be thrown out. You're going to dispute
16 that, I'll bet.

17 MR. ARBEIT: We dispute that - - - that she
18 forged this patient record. She says that she - - -
19 she did give the encounter form. And I do need to
20 clarify that this encounter form related only to the
21 PMV requirement, which is a self-pay schedule.

22 CHIEF JUDGE LIPPMAN: Counsel.

23 MR. ARBEIT: And it doesn't deal with
24 Medicare or Medicaid at all.

25 CHIEF JUDGE LIPPMAN: Counsel, but doesn't

1 that make the point? If it's disputed, then let them
2 answer and let's get the dispute here. And - - - and
3 then we decide cases. That's what happens in our
4 system. Unless you are put on notice - - - both
5 sides are put on notice, give everything in and - - -
6 and end of story, we're going to decide this on what
7 you put in. And even at that point, if there's a - -
8 - a dispute of fact, which there appears to be here,
9 then the case moves on, moves forward.

10 MR. ARBEIT: Your Honor, the - - - the
11 dissent at the Appell - - - at the Appellate Division
12 recognized that there were disputed issues, but the
13 majority recognized that there wasn't a dispute as to
14 the material issues. And in - - - in both - - -

15 CHIEF JUDGE LIPPMAN: There were no
16 material issues at issue here? Not - - - that are
17 disputed here?

18 MR. ARBEIT: In order to determine whether
19 or not N - - - NYU substantially complied with the
20 code - - - and the reason why is because NYU's - - -

21 JUDGE RIVERA: And you're saying what's
22 important is whether or not they followed the
23 procedure?

24 MR. ARBEIT: Correct.

25 JUDGE RIVERA: Putting aside her conduct

1 that may have resulted in the launching and the
2 initiating of - - - of this investigation and the
3 proceedings. What matters is whether or not they
4 followed their protocols?

5 MR. ARBEIT: And it really is a - - - a
6 legal issue, because they keep taking the position
7 that this was an informal proceeding. But if you
8 look at the code itself, it talks about a formal
9 disciplinary proceeding, student adjudicators present
10 - - - presenting charges and evidence, using
11 witnesses, and having a fair opportunity to question
12 - - -

13 CHIEF JUDGE LIPPMAN: So there's one legal
14 issue, and that is whether or not they followed their
15 own protocols and that's dispositive?

16 MR. ARBEIT: That is dispositive, and
17 that's what the Appellate Division found.

18 JUDGE RIVERA: But isn't that only
19 dispositive as to whether or not the petition should
20 have been dismissed?

21 MR. ARBEIT: It's - - - it's whether or not
22 - - - well, and then the Appellate Division found
23 that it should be granted. And under - - - under the
24 circumstances, we contend that since she had - - -

25 JUDGE RIVERA: Based on the merits?

1 MR. ARBEIT: Based on the - - - on the fact
2 that she had completed all her graduation
3 requirements.

4 And we'd also like to address whether or
5 not this shocks one's sense of fairness. And
6 considering - - - NYU emphasizes that this is - - -
7 they're a private institution. But under the
8 Education Law, they're part of the Board of Regents.
9 And the Board - - - Board of Regents' purpose is to
10 educate. It's to provide education, Education Law
11 201 and 216. And they ask for - - -

12 JUDGE RIVERA: Determination on the shocks
13 of consciousness. Was that necessary to the - - -
14 the decision for the majority?

15 MR. ARBEIT: They said - - - they said they
16 would have affirmed even if they didn't find it to
17 substantially comply. So when you're looking at an
18 education institution - - -

19 JUDGE STEIN: But what - - - what evidence
20 were they - - - were - - - was the respondent
21 entitled to put in on this motion that would have
22 given their position and their rationale for - - -
23 for the - - - for - - - for the action they took?

24 MR. ARBEIT: Sorry, Your Honor?

25 JUDGE STEIN: Well, did - - - did they have

1 a chance to argue about why their action in - - - in
2 terminating this student was appropriate under the
3 circumstances?

4 MR. ARBEIT: Of course. They - - - it's in
5 their brief. I mean, I think the NYU made an
6 excessive motion. They addressed the - - - the
7 merits. They addressed the documentary evidence.
8 And - - - and the record is excessive. And I think
9 what they did is they tried to delay this by calling
10 it a motion to dismiss.

11 JUDGE PIGOTT: Let me ask you this. Let -
12 - - let's assume for a minute a student, other than
13 this student, all right, did, in fact, forge
14 documents that - - - that - - - that formed the basis
15 of - - - of - - - of his graduation, and everything
16 that happened here where the Appellate Division said
17 eith - - - under either code they didn't follow their
18 procedure. Does that mean that the person who forged
19 documents for purposes of gaining remuneration should
20 be made - - - should get a - - - should get a
21 license? Or you - - -

22 MR. ARBEIT: And that's - - - that's a good
23 question, because this - - - this is, again, an
24 education institution and not a regulatory or
25 licensing body. This - - -

1 JUDGE PIGOTT: All right, let's say get - -
2 - get a diploma. I - - - what I'm - - - what I'm
3 suggesting is you can't say all right, I'm a forger,
4 but I caught them because the - - - the court says
5 under 5 and 9, either one of the - - - the Codes of
6 Ethics, they didn't follow the procedure. So they
7 have to give me, a known felon who has been forging
8 documents, they have to give me a diploma. Boy, are
9 they stupid. Or - - - or should we give them an
10 opportunity to do it right?

11 MR. ARBEIT: Well, in this case, she was
12 given an opportunity to do - - - do it right, because
13 Katie continued to go to the clinic after she
14 allegedly forged these documents. She completed her
15 PMV requirement, and she did even more than that. So
16 under NYU's standards, she has completed all her
17 requirements for her degree. And under their own
18 code, they have the right to suspend her or suspend
19 her privileges if there is a threat to patient safety
20 or wellbeing or if there is - - - they're unable to
21 have an effective continuation of the education
22 process.

23 JUDGE PIGOTT: So are you suggesting that
24 the remedy is give her the diploma. She's graduated
25 NYU Dental School. But then call the - - - call the

1 medical board and say you got to suspend this lady
2 because she's - - -

3 MR. ARBEIT: Well - - - well that they have
4 also under - - - under the code itself to put this on
5 her transcript. And the transcript is going to get
6 sent to the regulatory body - - - in this case, the
7 New York Department of Education Office of
8 Professions - - -

9 JUDGE RIVERA: But - - - but why isn't - -
10 - why isn't the remedy - - -

11 MR. ARBEIT: - - - which requirement is
12 good moral character.

13 JUDGE RIVERA: Why isn't the remedy for
14 failing to substantially comply with your own
15 procedures that you have to go back and actually
16 follow the procedures?

17 MR. ARBEIT: I - - - I think you - - -

18 JUDGE RIVERA: Make a decision based on the
19 proper applicable procedures. Why isn't that the
20 remedy?

21 MR. ARBEIT: I mean, at - - - at some point
22 the - - - the court has to be able to step in and
23 make a decision. Under CPLR 7 - - -

24 CHIEF JUDGE LIPPMAN: Why - - - why do we
25 have to step in and take their role in something that

1 they should be deciding? Our review powers here are
2 narrow in these kind of situations. Why - - - why
3 would we take on that job? Why wouldn't the
4 university do it?

5 MR. ARBEIT: Well, the review powers are
6 narrow, but under CPLR 7806, the court has the power
7 not only to affirm, modify, but they can order the
8 university to act.

9 CHIEF JUDGE LIPPMAN: We know that, but
10 when should they do that? When should the court do
11 that, in what circumstance?

12 MR. ARBEIT: The - - - under the
13 circumstances where it seems to be futile to send it
14 back. Here you have a student who has finished all
15 her requirements for grad - - - graduation.

16 CHIEF JUDGE LIPPMAN: Okay. Let me ask you
17 another question. Hasn't she finished her dentistry
18 now, the - - - her degree?

19 MR. ARBEIT: After - - - after years of - -
20 -

21 CHIEF JUDGE LIPPMAN: Yes, yeah.

22 MR. ARBEIT: - - - of trying to achieve
23 that and having this black clou - - - dark cloud over
24 her head. She was able to do that. But that's - - -
25 that doesn't disregard the fact that she deserves in

1 - - - her degree from NYU.

2 CHIEF JUDGE LIPPMAN: Okay.

3 MR. ARBEIT: But just to - - - to address
4 also this - - -

5 CHIEF JUDGE LIPPMAN: Go ahead, counsel.

6 MR. ARBEIT: - - - the - - - the peer
7 review board minutes. NYU didn't attach those
8 minutes to the motion, which they - - - they moved up
9 based on documentary evidence, because the peer
10 review - - - review board didn't find her guilty.
11 They said that they found it curious that - - - KK's
12 statement that she never falsified the patient
13 records. But even if this was true, she still
14 admitted to paying procedures.

15 JUDGE PIGOTT: Are - - - are those in the
16 record? Are - - -

17 MR. ARBEIT: It's in - - - it's in the
18 First Department record at page 120.

19 JUDGE PIGOTT: You submitted it as part of
20 the - - - at the nisi prius court?

21 MR. ARBEIT: It's - - - it's as - - - as
22 part of our appeal from the judgment. So - - - so
23 the - - - there's a reason why they omitted the stuff
24 from the record. Because it would show that they
25 never even found them guil - - - found her guilty of

1 falsifying the records. She didn't have a fair
2 proceeding. And it's - - - this court has the - - -
3 the power and the authority to order that she be
4 awarded her degree. And we ask that - - -

5 JUDGE READ: Has that ever happened in New
6 York? Has a court ever awarded a university to - - -
7 or ordered a university to award a degree?

8 MR. ARBEIT: I - - - I believe - - -

9 JUDGE READ: That's pretty extraordinary.

10 MR. ARBEIT: It is extraordinary. I
11 believe they - - - they - - - there are cases
12 discussed in Olsson where they have awarded a degree.
13 And under the circumstances where a student has
14 completed all her requirements, there's not a
15 question of competency here, because she continued to
16 - - - to treat patients.

17 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank
18 you, counsel.

19 Counselor, rebuttal.

20 MR. FEINBERG: Very quickly; just a couple
21 of points. Your Honor, counsel was reading from a
22 portion of the record in the Appellate Division
23 appeal that he has filed that we tried to submit to
24 this court, but that he moved to strike and you
25 granted that motion. So it's not actually part of

1 the record in this case.

2 Two points I'd - - - I'd like to make. One
3 is that it is not true that in the proceedings in the
4 trial court that - - - that this was treated as - - -
5 as a - - - a motion for summary judgment. NYU
6 submitted only one - - - or a short affidavit which
7 just was there to establish the point that the 2009
8 code applied and the 2005 code had been superseded.
9 I don't even hear counsel obje - - - arguing at this
10 point that the 2005 code should have applied.

11 More important, I - - - I - - - I want to
12 urge you to - - - the - - - the Appellate Division in
13 this case standard of review and approach was really
14 improper. It did not show the appropriate deference
15 to the - - - to the decision of the - - - of - - - of
16 the - - - the university to - - - to dismiss her.
17 She did receive all of the process that she - - -
18 that she was due under the code.

19 The objections that the - - - that the
20 Appellate Division raised here are objections that -
21 - - that it could have glossed on the - - - the code
22 that - - - to require trial-type procedures, calling
23 of witnesses, presence of counsel, which are simply
24 not appropriate here. The university deliberately
25 decided it didn't want that type of proceeding.

1 Deliberately - - -

2 JUDGE RIVERA: If you substantially failed
3 to comply with your own procedures, is the most that
4 she can get just a hearing where you actually follow
5 your protocols?

6 MR. FEINBERG: That is correct, Your Honor.
7 And - - - and if that was - - - if that ultimately
8 were the result of this lawsuit, that is the only
9 remedy. And we would have to redo the proceeding - -
10 - proceedings.

11 CHIEF JUDGE LIPPMAN: Okay.

12 JUDGE READ: Can't order you to - - - we
13 can't order you to award a degree?

14 MR. FEINBERG: I - - - in answer to your
15 question, Your Honor, I don't think so, and I don't
16 think that this court has ever done that.

17 CHIEF JUDGE LIPPMAN: Because even in the -
18 - - even in the situation that - - - that your
19 adversary raises where someone has completed all the
20 requirements, the court couldn't do that if that were
21 the situation?

22 MR. FEINBERG: I'm - - - I'm not aware of
23 the court - - - of a court ever ordering a degree to
24 be awarded by an institution.

25 CHIEF JUDGE LIPPMAN: Okay. Thank you.

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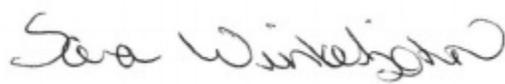
Thank you both. Appreciate it.

(Court is adjourned)

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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Kickertz v. New York University, No. 29 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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