

**Court of Appeals**  
**STATE OF NEW YORK**

---



LEONARD EIDLISZ,

*Plaintiff-Respondent,*

—against—

NEW YORK UNIVERSITY and the  
NEW YORK UNIVERSITY COLLEGE OF DENTISTRY,

*Defendants-Appellants.*

---

**AMICUS CURIAE BRIEF IN SUPPORT OF  
THE POSITION OF NEW YORK UNIVERSITY**

---

R. BRIAN BLACK  
MARTIN MICHAELSON  
HOGAN & HARTSON, LLP  
875 Third Avenue  
New York, New York 10022  
Telephone: (212) 918-3000  
Facsimile: (212) 918-3100

ADA MELOY  
JESSIE BROWN  
AMERICAN COUNCIL ON EDUCATION  
One Dupont Circle NW, 8th floor  
Washington, DC 20036-1193  
Telephone: (202) 939-9361  
Facsimile: (202) 833-4762

*Attorneys for Movants American Council on Education; American Association of  
State Colleges and Universities; American Dental Education Association;  
Association of American Universities; Association of Public and Land-grant  
Universities; Barnard College; Colgate University; Cornell University;  
Fordham University; Hofstra University; Long Island University;  
New York Institute of Technology; Teachers College,  
Columbia University; and University of Rochester*

April 23, 2010

---

---

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to 22 NYCRR 500.1(f), Movants American Council on Education, American Association of State Colleges and Universities, Association of American Universities, Association of Public and Land-grant Universities, Barnard College, Fordham University, Hofstra University, and Long Island University state that they are non-profit corporations and have no parent corporations, subsidiaries, or affiliates.

Movant American Dental Education Association states that it is a non-profit corporation with no parent corporations or subsidiaries and that ADEAGies Foundation is a non-profit affiliate.

Movant Colgate University states that it is a non-profit corporation with no parent corporations or affiliates and that its subsidiaries are:

The Colgate Inn, LLC  
Hamilton Initiative, LLC  
Palace Theater, LLC  
Hamilton Theater, LLC

Movant Cornell University states that it is a non-profit corporation with no parent corporations or affiliates and that its subsidiaries are:

Cornell Center of New York Inc.  
MRSI Management Inc.  
Tower Innovative Learning Solutions Inc.  
Cornell Real Property Services Inc.  
Cornell Research Foundation Inc.  
CU Transit Inc.

Lenroc Real Estate Brokerage Inc.  
Ithaca LLP

Movant New York Institute of Technology states that it is a non-profit corporation and has no parent corporations. It identifies Wheatley Advertising and Computer Graphics Laboratories, Inc. as affiliates and Computer Graphics Laboratories Studios, Inc. as a subsidiary.

Movant Teachers College, Columbia University states that it is a non-profit corporation and has no parent corporations. It is affiliated with Columbia University. Teachers College Innovations and TC in Japan are wholly owned subsidiaries.

Movant University of Rochester states that it is a non-profit corporation with no parent corporations or affiliates and that its subsidiaries are:

Campus Radio Corporation  
Crittenden Boulevard Housing Co., Inc.  
Excell Partners, Inc.  
F.C.U.R., Inc.  
Highland Community Development Corporation  
Highland Facilities Development Corporation (HFDC)  
The Highland Foundation, Inc.  
Highland Hospital of Rochester  
The Highlands Living Center, Inc.  
The Meadows of Westfall, Inc.  
Medical Administrative Associates, Inc.  
Rochester BioVenture Center, Inc.  
Strong Physician-Hospital Organization, Inc.  
Strong Home Care Group  
Strong Partners Health System, Inc.  
U. of R. Broadcasting Corporation

University of Rochester Employee Benefits Trust

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. Brian Black', written over a horizontal line.

R. Brian Black  
Hogan & Hartson, LLP  
875 Third Avenue  
New York, NY 10022  
(212) 918-3000

April 23, 2010

*Attorneys for Movants*

**Table of Contents**

Table of Authorities .....ii

I. COURTS SHOULD AVOID SUBSTITUTING THEIR JUDGMENT  
FOR THE ACADEMIC JUDGMENT OF AN EDUCATIONAL  
INSTITUTION IN MATTERS RELATED TO THE CONFERRAL OF  
DEGREES .....2

II. THE NATION RELIES ON THE EXPERTISE OF ITS ACCREDITED  
COLLEGES AND UNIVERSITIES .....5

CONCLUSION .....10

**Table of Authorities**

Cases

*Bilut v. Northwestern Univ.*,  
269 Ill. App. 3d 125, 645 N.E.2d 536 (1994).....4

*Bleicher v. Univ. of Cincinnati Coll. of Med.*,  
78 Ohio App. 3d 302, 604 N.E. 2d 783 (1992).....5

*Bd. of Curators v. Horowitz*,  
435 U.S. 78 (1978).....3

*Clifton-Davis v. Oklahoma*,  
930 P.2d 833 (Okla. App. 1996).....4

*Eidlisz v. New York University et ano.*,  
61 A.D.3d 473, 876 N.Y.S.2d 400 (1st Dep’t 2009).....1, 10

*Gordon v. Purdue Univ.*,  
862 N.E. 2d 1244 (Ind. App. 2007).....5

*Grutter v. Bollinger*,  
539 U.S. 306 (2003).....2

*Jallali v. Nova Southern Univ.*,  
992 So. 2d 338 (Fla. Dist. Ct. App. 2008).....5

*Lekutis v. Univ. of Osteopathic Med. & Health Sci.*,  
524 N.W. 2d 410 (Iowa 1994).....5

*Mahavongsanan v. Hall*,  
529 F.2d 448 (5th Cir. 1976).....5

*Militana v. Univ. of Miami*,  
236 So. 2d 162 (Fla. Dist. Ct. App. 1970) (per curiam).....4

*Olsson v. Board of Higher Education*,  
49 N.Y.2d 408, 402 N.E.2d 1150, 426 N.Y.S.2d 248 (1980).....3, 4, 9

*Paulsen v. Golden Gate Univ.*,  
25 Cal. 3d 803, 602 P.2d 778 (1979) (en banc) .....4

<i>Regents of the Univ. of Michigan v. Ewing</i> , 474 U.S. 214 (1985).....	2, 3
<i>Sweezy v. New Hampshire</i> , 354 U.S. 234 (1957) (Frankfurter, J., concurring).....	2
<i>Trustees of Dartmouth Coll. v. Woodward</i> , 17 U.S. 518 (1819).....	5
<i>Univ. of Mississippi Med. Ctr. v. Hughes</i> , 765 So. 2d 528 (Miss. 2000).....	5
<u>Statutes and Regulations</u>	
8 NYCRR 59-79 .....	7, 8
Cal. Bus. & Prof. Code § 1634.1 .....	8
Fla. Stat. Ann. § 466.006 .....	8
Mass. Gen. Laws Ann. 112 § 45.....	8
<u>Other Materials</u>	
Accreditation Council for Occupational Therapy Education; American Occupational Therapy Association, <i>Standards and Interpretive Guidelines</i> (2009) .....	6
Association of Specialized and Professional Accreditors, <i>Accreditation in the United States</i> (June 22, 2002).....	7
Carnegie Commission on Higher Education, <i>Reform on Campus: Changing Students, Changing Academic Programs</i> (1972) .....	6
Commission on Accreditation, American Psychological Association, <i>Guidelines and Principles for Accreditation of Programs in Professional Psychology</i> (2007) .....	6
Commission on Dental Accreditation, American Dental Association, <i>Accreditation Standards for Dental Education Programs</i> (2007) .....	6, 7

Council of the Section on Legal Education and Admission to the Bar,  
American Bar Association, *2009-2010 Standards for Approval of Law  
Schools* (2009) .....6

National Council for Accreditation of Teacher Education, *Professional  
Standards for the Accreditation of Teacher Preparation Institutions*  
(2008).....7

American Council on Education, the national association representing all sectors of American higher education; American Association of State Colleges and Universities; American Dental Education Association; Association of American Universities; Association of Public and Land-grant Universities; Barnard College; Colgate University; Cornell University; Fordham University; Hofstra University; Long Island University; New York Institute of Technology; Teachers College, Columbia University; and University of Rochester have moved this honorable Court for leave to file an *amicus curiae* brief in support of the original brief of Appellants New York University and the New York University College of Dentistry (collectively, “NYU”). NYU seeks to reverse the decision of the Appellate Division, First Department in *Eidlisz v. New York University et ano.*, 61 A.D.3d 473, 876 N.Y.S.2d 400 (1st Dep’t 2009), ordering that NYU grant Appellee a doctorate degree in dentistry despite NYU’s reasoned academic judgment that Appellee lacked the knowledge and skill for a degree leading to professional licensure.

Judicial deference to decisionmaking in academic matters is a longstanding tradition. Colleges and universities exercise substantial academic judgment when they assess whether a student has demonstrated the minimum competence necessary to receive a degree. The contention that the courts are an appropriate forum to second-guess the reasoned judgment of experienced educators as to

educational matters is contrary to well-established precedent. Moreover, if left to stand, the Appellate Division's holding would vitiate the role that accredited colleges and universities serve in substantiating the qualifications of individuals for state and federal governments, employers, and the general public.

**I. COURTS SHOULD AVOID SUBSTITUTING THEIR JUDGMENT FOR THE ACADEMIC JUDGMENT OF AN EDUCATIONAL INSTITUTION IN MATTERS RELATED TO THE CONFERRAL OF DEGREES.**

In addition to this Court's precedent cited by NYU, the United States Supreme Court "ha[s] long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003). The Court thus affords universities a degree of deference in decisions that affect academic matters because courts have a "responsibility to safeguard [universities'] academic freedom." *Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214, 226 (1985) (internal quotations omitted). As Justice Frankfurter explained,

[T]he dependence of a free society on free universities . . . means the exclusion of governmental intervention in the intellectual life of a university. It matters little whether such intervention occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor.

*Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

Based on those venerable freedoms, the U.S. Supreme Court has acknowledged that universities must make “complex educational judgments in [] areas that lie[] primarily within the expertise of the university.” *Grutter*, 539 U.S. at 328-29. These educational judgments often require “an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decision making.” *Ewing*, 474 U.S. at 226 (citation omitted).

Parallel to this Court’s holding in *Olsson v. Board of Higher Education*, 49 N.Y.2d 408, 402 N.E.2d 1150, 426 N.Y.S.2d 248 (1980), the U.S. Supreme Court has recognized, in particular, that courts should accord “great respect for the faculty’s professional judgment” in assessments of student competence “based on an evaluation of the entirety of [the student’s] academic career.” *Ewing*, 474 U.S. at 225; accord *Bd. of Curators v. Horowitz*, 435 U.S. 78, 89-90 (1978) (upholding the dismissal of medical student that “rested on the academic judgment of school officials that she did not have the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress toward that goal”). Justice Powell explained that “University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation.” *Horowitz*, 435 U.S. at 96 n.6 (Powell, J., concurring), *quoted with approval in Ewing*, 474 U.S. at 225 n.11;

*accord Olsson*, 49 N.Y.2d at 416, 402 N.E.2d at 1155, 426 N.Y.S.2d at 253 (“In light of the serious policy considerations which militate against judicial intervention in academic disputes, the courts should shun the ‘diploma by estoppel’ doctrine whenever there is some question as to whether the student seeking relief has actually demonstrated his competence in accordance with the standards devised by the appropriate school authorities.”).

Deference to the judgment of colleges and universities in conferring academic degrees is equally well-established in other jurisdictions. *See, e.g., Paulsen v. Golden Gate Univ.*, 25 Cal. 3d 803, 602 P.2d 778 (1979) (en banc) (“To direct that Paulsen receive a degree after he had demonstrated his inability to survive academically under the basic conditions required for other degree students would lead to a judicially mandated erosion of the university’s academic standards.”); *Bilut v. Northwestern Univ.*, 269 Ill. App. 3d 125, 645 N.E.2d 536 (1994) (“[O]ur court is ill equipped to run private colleges and universities.”); *Militana v. Univ. of Miami*, 236 So. 2d 162 (Fla. Dist. Ct. App. 1970) (per curiam) (“Courts are not supposed to be learned in medicine and are not qualified to pass opinion as to the attainments of a student in medicine.”); *Clifton-Davis v. Oklahoma*, 930 P.2d 833, 835 (Okla. App. 1996) (“On the question of determining whether a student has failed to meet the academic requirements of a school, there is an absolute discretion permitted the school authorities and the courts will not

interfere unless such authorities . . . acted in bad faith or exercised their discretion arbitrarily and capriciously.”).<sup>1</sup>

## **II. THE NATION RELIES ON THE EXPERTISE OF ITS ACCREDITED COLLEGES AND UNIVERSITIES.**

The American higher education system is the best in the world because the nation’s colleges and universities, not government, are ultimately responsible for the establishment and administration of educational standards. Since the U.S. Supreme Court in *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819), endorsed the right of independent colleges to be free from undue governmental control, our higher education system has become unique in the world in the variety and quality of institutions and educational missions. In this country, unlike others, no national curriculum or centralized education ministry constrains

---

<sup>1</sup> See also *Mahavongsanan v. Hall*, 529 F.2d 448 (5th Cir. 1976) (reversing lower court’s decision and holding that university was not required to confer graduate degree on plaintiff who failed comprehensive exam twice); *Bleicher v. Univ. of Cincinnati Coll. of Med.*, 78 Ohio App. 3d 302, 307, 604 N.E. 2d 783 (1992) (“[T]he college’s authority to dismiss appellant did not derive from its status as a state institution, but, rather, was a power of the college *qua* college.”); *Gordon v. Purdue Univ.*, 862 N.E. 2d 1244 (Ind. App. 2007) (upholding dismissal of doctoral student who failed to complete tasks outlined by the department’s policy committee); *Lekutis v. Univ. of Osteopathic Med. & Health Sci.*, 524 N.W. 2d 410, 413 (Iowa 1994) (“When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty’s professional judgment. Plainly, they may not override it unless it is such a substantial departure from academic norms as to demonstrate that the person . . . did not actually exercise professional judgment.”); *Jallali v. Nova Southern Univ.*, 992 So. 2d 338 (Fla. Dist. Ct. App. 2008) (student dismissal after failure to pass exam even with extended deadline was upheld by appeals court.); *Univ. of Mississippi Med. Ctr. v. Hughes*, 765 So. 2d 528, 542 (Miss. 2000) (upholding dismissal of students who failed medical licensing exam, noting, “in light of the great deference due faculty judgments resulting in academic dismissals, the Executive Faculty’s decision . . . cannot be said to be arbitrary and capricious.”).

educational choice or progress, and students here can select among a wide array of excellent academic programs. See Carnegie Commission on Higher Education, *Reform on Campus: Changing Students, Changing Academic Programs* 35 (1972).

Nongovernmental, voluntary accrediting associations provide and oversee quality assurance for American higher education. To facilitate that, the U.S. Secretary of Education recognizes but does not administer dozens of accrediting organizations, including regional and national organizations as well as specialized accrediting organizations.<sup>2</sup> These organizations are critically important to maintaining the viability of academic freedom in higher education. They utilize peer reviews, unencumbered by government participation. As such, when an institution is approved by an independent accrediting organization, degrees granted from that institution are trusted by employers and the public at large as providing a level of education that satisfies the standards defined by the organization.

In specialized fields, highly experienced, expert accreditors prescribe accreditation standards. *E.g.*, Commission on Dental Accreditation, American Dental Association, *Accreditation Standards for Dental Education Programs* (2007), available at <http://www.ada.org/prof/ed/accred/standards/predoc.pdf>.<sup>3</sup> To

---

<sup>2</sup> A list of accrediting agencies recognized by the Department of Education are available online at [http://www2.ed.gov/admins/finaid/accred/accreditation\\_pg6.html](http://www2.ed.gov/admins/finaid/accred/accreditation_pg6.html).

<sup>3</sup> See also Council of the Section on Legal Education and Admission to the Bar, American Bar Association, *2009-2010 Standards for Approval of Law Schools* (2009), available at <http://www.abanet.org/legaled/standards/standards.html>; Commission on Accreditation,

be accredited, professional schools must ensure that students who receive a degree meet various core competencies. *E.g.*, Commission on Dental Accreditation, *Accreditation Standards for Dental Education Programs* 13-15 (identifying competencies in “behavioral sciences”, “practice management”, “ethics and professionalism”, “information management and critical thinking”, and “clinical sciences” that students must have to graduate from an accredited dental program). Degrees from an accredited institution thus provide a nationally recognized standard of quality that identifies the graduates as “competent for entry into the workplace or for advanced practice.” Association of Specialized and Professional Accreditors, *Accreditation in the United States* 1 (June 22, 2002), available at <http://www.aspa-usa.org/documents/usaccreditation.pdf>.

In consequence, state and federal governments, employers, prospective students, and the general public rely on training at an accredited institution as a key indicator of the graduate’s competence. For example, state governments often accept a degree from an accredited institution as satisfaction of the educational requirements for professional certification or licensure. *E.g.*, 8 NYCRR § 61.1(a)

---

American Psychological Association, *Guidelines and Principles for Accreditation of Programs in Professional Psychology* (2007), available at <http://www.apa.org/ed/accreditation/about/policies/guiding-principles.pdf>; Accreditation Council for Occupational Therapy Education; American Occupational Therapy Association, *Standards and Interpretive Guidelines* (2009), available at <http://www.aota.org/Educate/Accredit/StandardsReview/guide/42369.aspx>; National Council for Accreditation of Teacher Education, *Professional Standards for the Accreditation of Teacher Preparation Institutions* (2008), available at <http://www.ncate.org/documents/standards/NCATE%20Standards%202008.pdf>.

(2010) (requiring that applicants to practice dentistry complete a dental education program “accredited by an accrediting organization”); Cal. Bus. & Prof. Code § 1634.1(b) (2010) (requiring “Satisfactory evidence of having graduated from a dental school approved by the board or by the Commission on Dental Accreditation of the American Dental Association” for licensure); Fla. Stat. Ann. § 466.006 (2009) (requiring applicants who wish to take the exam to practice dentistry in Florida to be in their final year of study at or “a graduate of a dental school accredited by the Commission on Accreditation of the American Dental association . . . or any other nationally recognized accrediting agency.”); Mass. Gen. Laws Ann. 112 § 45 (2010) (requiring proof of diploma from “the faculty of a dental college accredited or recognized as accredited by the Commission on Accreditation of Dental and Dental Auxiliary Educational Programs of the American Dental Association. . .”).<sup>4</sup> Because states so extensively defer to the professional judgments of accredited institutions on who is qualified to receive a degree, the institutions must be accorded a corresponding authority to exercise their judgment in such matters. The Nation’s confidence in academic degrees

---

<sup>4</sup> Reliance on the professional judgment of those granting degrees at accredited institutions is not limited to the practice of dentistry. The New York State Department of Education grants forty-eight (48) professional licenses. *See* <http://www.op.nysed.gov/prof/>. *See generally* 8 NYCRR §§ 59-79. Many have educational requirements that require a degree from an institution that is registered as a licensure-qualifying institution in New York or is accredited by a recognized accrediting organization. *E.g.*, 8 NYCRR § 75.1 (requiring degree from accredited institution or institution registered with the Department for license as speech-language pathologist); 8 NYCRR § 74.1 (social worker); 8 NYCRR § 60.1(a) (physician).

would be weakened were non-academic authority empowered to require an accredited institution to award degrees to students it does not deem competent. Courts are not equipped to make such educational judgments; it is appropriately left to experts at the institutions themselves.

This Court aptly summarized the concern in *Olsson*:

When an educational institution issues a diploma to one of its students, it is, in effect, certifying to society that the student possesses all of the knowledge and skills that are required by his chosen discipline. In order for society to be able to have complete confidence in the credentials dispensed by academic institutions, however, it is essential that the decisions surrounding the issuance of these credentials be left to the sound judgment of the professional educators who monitor the progress of their students on a regular basis. Indeed, the value of these credentials from the point of view of society would be seriously undermined if the courts were to abandon their long-standing practice of restraint in this area and instead begin to utilize traditional equitable estoppel principles as a basis for requiring institutions to confer diplomas upon those who have been deemed to be unqualified.

49 N.Y.2d at 413, 402 N.E.2d at 1153, 426 N.Y.S.2d at 251.

In this case, NYU made the type of complex educational judgment to which courts traditionally defer. The Dean of the College of Dentistry reviewed Appellee's entire academic career and concluded as a matter of professional judgment that Appellee lacked the minimum competence to receive a doctorate degree in dentistry. Notwithstanding the Dean's undisputed expert conclusion (and indeed, without even itself assessing Appellee's competence), the First Department ordered NYU to confer a degree. Thus, the First Department implicitly determined

that Appellee met nationally accepted standards to practice dentistry. Preservation of the integrity of the academic degree as pertinent to professional competence requires that courts accord colleges and universities discretion to determine whether a student has the knowledge and skill to graduate.

### CONCLUSION

For the foregoing reasons, *Amici* respectfully urge the Court to reverse the decision of the Appellate Division, First Department in *Eidlisz v. New York University et ano.*, 61 A.D.3d 473, 876 N.Y.S.2d 400 (1st Dep't 2009), and to reinstate the decision of the Supreme Court.

Dated: April 23, 2010

Respectfully submitted,



R. Brian Black  
Martin Michaelson  
Hogan & Hartson, LLP  
875 Third Avenue  
New York, NY 10022  
(212) 918-3000

Ada Meloy  
Jessie Brown  
American Council on Education  
One Dupont Circle NW, 8th floor  
Washington, DC 20036-1193  
(202) 939-9361

*Attorneys for Movants*