

No. ____

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In the
Supreme Court of the United States

GERARD M. LYNCH,

Petitioner,

vs.

NEW YORK STATE JUSTICE CENTER
FOR THE PROTECTION OF PEOPLE WITH SPECIAL NEEDS,

Respondent.

**On Petition for a Writ of Certiorari to
the New York Supreme Court,
Appellate Division**

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

The Respondent “Justice Center,” a New York State agency, has a standard practice of routinely allowing uncorroborated hearsay evidence—for example, unsworn witness statements—to adjudicate whether or not healthcare workers are guilty of neglect or abuse under the state social services law. The administrative adjudication often results in not only the termination of the accused healthcare worker’s employment, but also branding the worker an “abuser” and then permanently “debarring” the individual from their chosen occupation.

The Appellate Division of the New York State Supreme Court routinely upholds such administrative adjudications, even when the healthcare worker was afforded no opportunity to confront their accuser notwithstanding the accuser’s credibility and truthfulness being at issue.

The question presented in this case is:

Does it violate due process of law for a state agency to routinely adjudicate accusations of wrongdoing on hearsay evidence alone (in over 95 percent of its adjudicatory hearings), denying the accused workers such as Petitioner here the ability to face their accuser even when the accuser’s credibility and veracity are at issue?

List of Parties, Proceedings & Related Cases

All parties appear in the caption of the case on the cover page.

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Gerard M. Lynch, Petitioner, and New York State Justice Center for the Protection of People with Special Needs (“Justice Center”), Respondent.

Judicial Proceedings below include:

Lynch v. Justice Center, N.Y.S. Appellate Div., Third Dept., No. 530536, Memorandum Decision dated January 7, 2021, reported at 2021 WL 55006, motion for leave to appeal to the N.Y.S. Court of Appeals denied by Order dated June 3, 2021.

The Question Presented in this petition is identical to that set forth in the companion petition for certiorari of *Rotimi Salu v. Justice Center*.

Table of Contents

QUESTION PRESENTED	i
List of Parties, Proceedings & Related Cases.....	ii
Table of Contents.....	iii
Index of Appendices	iv
Table of Authorities	iv
PETITION FOR CERTIORARI	1
Opinions Below	1
Jurisdiction	1
Constitutional Provision at Issue.....	2
Introduction and Summary of Argument	2
STATEMENT OF THE CASE.....	3
A. Factual Background.....	3
B. “Report” in 2015 of alleged Wrongdoing by Mr. Lynch in Early 2014.....	4
C. Fact-finding Hearing in 2018	4
D. Appellate Division Decides rules on “Substantial Evidence” alone	7
E. Justice Center Potentially denies Due process to 100’s or even 1,000’s of Healthcare workers.....	8
REASONS FOR GRANTING THE WRIT	11
I. The Justice Center’s Routine Refusal to Allow Workers to Confront their Accusers Violates Due process.....	11
II. There is a Split Among Federal Circuits regarding “Right of Confrontation” in administrative proceedings	13
CONCLUSION.....	16

Index of Appendices

Appendix A— <i>Lynch v. Justice Center, 190 A.D.3d 1063</i> (3d Dept. 2021), opinion dated January 7, 2021.....	A-2
Appendix B— Justice Center’s Final Determination and Order after Hearing in <i>Matter of Gerard M. Lynch</i> , dated June 29, 2018, with Recommended Decision after Hearing dated May 15, 2018 (Case Nos. 521052865, 5210508990).....	A-8
Appendix C—Order of the N.Y.S. Court of Appeals, <i>37 N.Y.3d 903 (2021)</i> , dated May 3, 2021, denying leave to appeal.....	A-29

Table of Authorities

Cases

<i>Alford v. U.S.</i> , 282 U.S. 687 (1931)	10
<i>Crawford v. Washington</i> , 541 U.S. 36 (2004).....	10
<i>Doe v Univ. of Scis.</i> , 961 F3d 203 (3d Cir 2020)	12
<i>Doe v Univ. of Scis.</i> , 961 F3d 203 (3d Cir. 2020)	12
<i>Doe v. Baum</i> , 903 F.3d 575 (6th Cir. 2018).....	12
<i>Haidak v Univ. of Massachusetts-Amherst</i> , 933 F3d 56 (1st Cir 2019).....	12
<i>Knapp v. Wing</i> , 72 Vt. 334, 47 A. 1075 (1900)	11
<i>Louisville & N.R. Co.</i> , 227 U.S. 88 (1913).....	11
<i>Martin v. Elden</i> , 32 Ohio St. 282 (1877)	11
<i>Mathews v Eldridge</i> , 424 US 319 (1976).....	13
<i>Pointer v. Texas</i> , 380 U.S. 400 (1965)	10
<i>The Ottawa</i> , 70 U.S. 268 (1865)	11
<i>Wolff v McDonnell</i> , 418 U.S. 539.....	12

Other Authorities

N.Y.S. OFFICE FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES PART 625 HANDBOOK ("Guidelines for Frequent False Reporting of Abuse, Neglect, or Mistreatment"), updated September 2019	6
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Constitutional Provisions

U.S. Constitution, Amend. XIV, § 1	2
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PETITION FOR CERTIORARI

Gerard M. Lynch (“Petitioner” or “Mr. Lynch”) respectfully requests that this Court issue a writ of certiorari to review the judgment of the Appellate Division of the New York Supreme Court.¹

Opinions Below

The opinion dated January 7, 2021 of the Appellate Division, Second Department, of the New York Supreme Court, is reported as *Lynch v. Justice Center*, 190 A.D.3d 1063 (3d Dept. 2021), and is reproduced at Petitioner’s Appendix (Pet. App.) A. The determination and order of the Respondent New York State Justice Center for the Protection of People with Special Needs (“Justice Center”) is unreported and is reproduced at Pet. App. B. The decision dated June 3, 2021 of the Court of Appeals of New York, 37 N.Y.3d 903 (2021), denying review is reproduced at Pet. App. C.

Jurisdiction

Petitioner objected to not being permitted to cross-examine his accusers at the Justice Center’s adjudicatory hearing, and challenged this constitutional deprivation when he sought direct review by the N.Y.S. Appellate Division and then the N.Y.S. Court of Appeals.

The Order of the N.Y.S. Court of Appeals denying Petitioner’s timely motion for leave to appeal from the Appellate Division was issued June 3, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a), and this petition is timely

¹ The Question Presented in this petition is identical to that set forth in the companion petition for certiorari of *Rotimi Salu v. Justice Center*.

pursuant to Rule 13 and the Court's pandemic order extending the time to petition.

Constitutional Provision at Issue

The Due Process Clause of the Fourteenth Amendment, including the basic principle in our jurisprudence that an accused person be allowed to face their accuser.

U.S. Constitution, Amend. XIV, § 1:

"... No state shall make or enforce any law which shall ... deprive any person of ... liberty, or property, without due process of law...."

Introduction and Summary of Argument

This case raises the nationally important question of whether the administrative state can deprive citizens of liberty and property without allowing the citizen to face their accuser even when witness credibility or veracity is at issue. This case involves New York's Justice Center adjudicating cases where, in over 95% of its adjudicatory trials, this state agency relies exclusively on the administrative prosecutor's hearsay evidence.

As a result, Mr. Lynch, a healthcare worker, was found to have committed "sexual abuse and neglect" on the say so of two drug addict rehabilitation patients, without having been given any opportunity to cross-examine his accusers as to the possibility of mistaken identity or possibility of mischief by concocting a false story. Without the benefit of cross-examination, the administrative judge relied on unsworn statements alone, to conclude that Mr. Lynch committed "sexual abuse" (e.g., by making a salacious comment and touching the women's back below the waist line). Based upon this adjudication, Mr. Lynch lost his job and has been

permanently barred from working almost any job he is qualified for in the healthcare field in New York State (as he received a lifetime “debarment” from any job covered by the statewide jurisdiction of the Justice Center).

This case involves only the federal due process question.

The deprivation healthcare workers suffer when determined by the Justice Center to have committed a “category one” abuse or neglect is much more egregious than, for example, that suffered by a college student administratively determined to have committed sexual misconduct (e.g., “date rape”) where college expulsion may result.

In public college student discipline cases, there is a split among the federal circuits as to when confrontation of an accuser is constitutionally required. This case is a perfect one for providing meaningful judicial guidance on an issue of nationwide importance, namely the question of when due process requires cross-examination or other meaningful confrontation of an accuser.

Granting certiorari in this case will provide the Court with an opportunity to make clear, in a factually simple case, that administrative adjudications must reasonably allow an accused to confront his or her accuser when credibility or veracity is at issue, especially when significant liberty and property interests such as healthcare workers’ careers are at stake.

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

This case arises out of Mr. Lynch’s employment as a chemical dependency counselor for a state-licensed substance abuse treatment program at the

Westchester Medical Center or its affiliates (collectively “WMC”). Mr. Lynch is a college graduate and upstanding citizen who had an excellent professional reputation and many years’ experience as a substance abuse counselor prior to becoming the target of a Justice Center administrative prosecution.

**B. “REPORT” IN 2015 OF ALLEGED WRONGDOING
BY MR. LYNCH A YEAR EARLIER, IN 2014**

In 2015, an accusation was made that in January and/or February 2014 (a year earlier), Mr. Lynch groped and sexually harassed two substance abuse patients. The Justice Center’s investigator determined that the allegations should be “substantiated” as a category one patient abuse/neglect. This Justice Center determination resulted in Mr. Lynch being fired and placed on the “Vulnerable Persons’ Central Register” prohibiting his further employment in his occupation.

C. FACT-FINDING HEARING IN 2018

Mr. Lynch appealed the determination by requesting a fact-finding hearing before a Justice Center hearing officer. A hearing was held on January 17 and 18, 2018 (about four years after the drug addicts alleged the wrongdoing, and three years after being fired and placed on the debarment list).

At the fact-finding hearing, the Justice Center produced its investigator as its only witness. It did not produce the two drug addict accusers, nor is there any evidence that their whereabouts were known to anyone.² At no time did the Justice

² The Justice Center has no independent power to compel attendance at its administrative hearings. A court filing by the accused, asking for a court order to compel, would be needed.

An unemployed accused such as Mr. Lynch and his attorney would certainly regard attempting service of a subpoena upon two long-gone drug addicts as a wasteful effort even had they known that the prosecutor would not present these accusers. The Appellate Division’s view that this was an option for Mr. Lynch defies practical reality.

Center allow Mr. Lynch or his counsel to question or confront his two drug addict accusers prior to the fact-finding hearing, and the Justice Center procedures do not permit discovery.

Justice Center Investigator Joseph Mazzone III was the only witness to testify on behalf of the Justice Center. At the fact-finding hearing, the hearing officer admitted into evidence the unsworn statements of Mr. Lynch's two drug addict accusers. The hearing officer rejected Mr. Lynch's defense of mistaken identity, and rejected his defense that he did nothing inappropriate with these two women, indicating that he was always accompanied by a nurse or other female employee.

The hearing officer determined that Mr. Lynch committed the alleged wrongdoing notwithstanding that the evidence against him was the unsworn statements by two drug addicts who were friends of each other and irrelevant anecdotes. The hearing officer rejected the live testimony of Mr. Lynch, and that of the three healthcare professionals who testified on his behalf.

The hearsay evidence from accuser No. 1 was that Mr. Lynch:

“groped her buttocks and made lewd comments to her while she was a patient on the unit.”³

The hearsay evidence from accuser No. 2 was that Mr. Lynch:

“made sexually charged comments to her and tried to rub her buttocks.”⁴

³ See, *Lynch v. Justice Center*, 190 A.D.3d 1063, 1065 (3d Dept. 2021) and Appx. A.

⁴ *Id.* The Justice Center's administrative determination can be viewed online on the Justice Center's website, in redacted form at:

These almost identical accusations were made by the two female drug addict friends. Confrontation by the accused was clearly necessary to explore a jointly concocted story. Yet the hearing officer accepted the hearsay statements of these two women on its face, concluding that the accusers' out-of-court statements were "credible" (perhaps meaning "credible," perhaps not).

Mr. Lynch offered three in-person witnesses in his defense, who testified that Mr. Lynch could not likely do what was alleged, as coworkers were always present. Petitioner Lynch and his witnesses were ignored. Thus, based solely on hearsay evidence, the Justice Center affirmed its investigator's prior substantiation of sexual abuse and the Justice Center's placement of Mr. Lynch's name on its "permanent exclusion list." All on the incredible, yet unchallengeable, say-so of two drug addicts.⁵

Obviously, with no opportunity to confront his accusers, Mr. Lynch was unable to inquire into possible mistaken identity, or inquire into prior false claims of sex abuse against others by these women, or possible profit motive, or other possible mischief by his accusers (both of whom were drug addicts with histories of psychiatric problems). Had Mr. Lynch been able to confront his accusers, cross-

<https://www.justicecenter.ny.gov/system/files/documents/2019/07/2018-092.pdf> .

⁵ *Id.* Petitioner Lynch filed his due process claims in federal court before filing the Article 78 proceeding in state court. He exhausted his federal case, including a certiorari petition. *See, Salu et ano. v. Miranda, et al*, 141 S.Ct. 2643 (2021).

Mr. Lynch sought federal court review because his counsel (the undersigned) believed, based upon prior Appellate Division decisions, that the Appellate Division would uphold a Justice Center finding of guilt notwithstanding the denial of the right of confrontation. This is what occurred. And it is why certiorari should be granted now.

examination may have influenced the hearing officer to heed the warning from the N.Y.S. Psychiatric Association, Inc. (“NYPA”) that:⁶

“patients with serious mental illness have learned that they can make baseless complaints to the Justice Center to gain attention, secure a forum to voice their baseless complaints and merely harass their treatment provider.” (*emphasis added*)

In sum, Mr. Lynch has been branded a sex abuser, fired and permanently restricted in his employment and chosen healthcare occupation based upon what easily may have been demonstrated, upon cross-examination, to be either mistaken identity or, alternatively, manufactured allegations by two conniving drug addicts seeking to do mischief.

D. APPELLATE DIVISION DECIDES RULES ON “SUBSTANTIAL EVIDENCE” ALONE

New York State case law allows administrative fact-findings to be upheld upon less than a preponderance of the evidence—upon merely the lower burden of proof called “substantial evidence” (essentially any evidence that might support a jury verdict if there were a jury—on the theory that the jury or other factfinder adjudges witness credibility). The N.Y.S. Appellate Division reviewed the Justice Center’s administrative determination and held that the unsworn written evidence was sufficient to uphold the hearing officer’s recommendation. The Court acknowledged that the proof “raised a credibility issue,” and held that the hearing

⁶ See, letter from NYPA to Justice Center Executive Director Jeff Wise dated September 25, 2015. See also, Appendix 3 to N.Y.S. OFFICE FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES PART 625 HANDBOOK (“Guidelines for Frequent False Reporting of Abuse, Neglect, or Mistreatment”), updated September 2019, available at <https://opwdd.ny.gov/system/files/documents/2020/01/final-part-624-hanbook-updated-9-2019.pdf> (e.g., page 178—false reports of physical, sexual or psychological abuse).

officer was “free to ... resolve [the credibility issue⁷] against [Mr. Lynch]” based upon hearsay alone. Basically, the Appellate Division ruled that if the unsworn out-of-court statements of accusers could convince a jury, no confrontation is necessary. Under this approach, the accused is essentially presumed guilty, and because of this, is denied the necessary tool to put on a defense, namely, the tool of cross-examination needed to confront the accuser to prove his innocence.

The Appellate Division stated that Mr. Lynch did not “attack the ... administrative hearing on due process grounds,” yet the record is clear that Mr. Lynch did. He timely objected at hearing to the hearsay evidence—the use of out-of-court statements—and that was all that was needed to preserve a due process challenge based upon the denial of the right of confrontation. Mr. Lynch’s was a direct appeal to the Appellate Division. He did all that was needed to preserve the constitutional question.

E. JUSTICE CENTER POTENTIALLY DENIES DUE PROCESS TO 100’S OR EVEN 1,000’S OF HEALTHCARE WORKERS

Petitioner’s counsel examined 588 cases posted on the Justice Center’s website for the period 2016 through 2018, and discovered that in about 97 percent of these cases, the Justice Center prosecution relied solely upon hearsay evidence, almost always offered through its investigator.⁸ Many of these cases involved credibility issues. As to every case that involved a credibility issue (Mr. Lynch’s or

⁷ As mentioned above, the hearing officer wrote that he “credited” the accusers’ unsworn statements. He did not write that he determined these unsworn statements to be “credible.” Thus, the credibility issue remained unresolved, and yet Mr. Lynch was found guilty.

⁸ The Justice Center’s cases are available at <https://www.justicecenter.ny.gov/administrative-hearings-decisions>.

Ms. Walker's⁹) or an issue where the evidence needed explanation, clarification or an actual accuser (e.g., Mr. Salu's companion case), the Justice Center deprives the healthcare workers of their ability to exonerate themselves by denying them the opportunity to confront the prosecution's evidence and to face the accuser.

As stated on the agency's official website, the Justice Center was established in 2013 and has jurisdiction over more than 1,000,000 individuals receiving services across six State Oversight Agencies.¹⁰ Accordingly, a large number of healthcare workers are subject to potential Justice Center investigation and administrative prosecution. Petitioner Lynch and Mr. Salu (in the companion petition for certiorari) are just two of many low-level healthcare workers subjected to a procedure whereby guilt is established before any hearing whatsoever is offered, and eventually a hearing is given where, in almost all of the cases, the administrative prosecution's case is based upon hearsay evidence alone.

Through 2019, a total of 652 individuals have been placed on the Justice Center's exclusion list, and presumably each of them was found "guilty" (the "substantiated" finding) without first receiving any hearing whatsoever. As indicated in the Justice Center official reports, many more thousands of healthcare workers were found guilty of category two or category three abuse or neglect. For example, of the 15,188 "reports" of abuse or neglect made to the Justice Center in 2019, the Justice Center "substantiated" 3,745, or about 25 percent.¹¹ It appears

⁹ See note 12 *infra*.

¹⁰ See, e.g., <https://www.justicecenter.ny.gov/about-nys-justice-center>.

¹¹ See, *id.*, at pages 19, 22, 24 and 25.

that over 50% of these healthcare workers (417) lost their employment based upon Justice Center “substantiation.”¹²

Thus, as to these fired workers, it is of little consolation that they were afforded a “de novo” hearing close to two years after being fired. Perhaps this explains why the Justice Center conducted a mere 200 hearings in 2019 (as a Justice Center hearing cannot restore lost employment or award back pay).

From the Justice Center’s own publications, it appears that, as to the workers who actually went to hearing, approximately 30% are exonerated. This 30% figure would undoubtedly be much higher if this Court were to mandate cross-examination when accuser credibility is involved, especially since Justice Center prosecutors rely solely on hearsay in over 95% of their cases.

Using rough numbers, if 50% of workers are fired after substantiation and 30% of substantiations are reversed by Justice Center hearing officers, this suggests that perhaps as much as 15% of accused healthcare workers are erroneously fired. This amounted to about 562 cases in 2019 alone. It is a strong reason for this Court

¹² Ms. Walker, Mr. Salu and Mr. Lynch have no connection to each other, other than that each independently sought the undersigned’s professional help. Another person who did so was Ms. Kerry Walker, who encountered the same the Justice Center due process-violative procedures as Salu and Lynch. *See, Walker v. Greystone Programs Inc., et al*, 18 Civ. 7757 (SDNY). Ms. Walker’s Justice Center adjudication (redacted) ,Adjud. Case # 521047076, is found on the Justice Center’s website at:
<https://www.justicecenter.ny.gov/system/files/documents/2019/07/2018-088.pdf>.

The undersigned attempted to find redress in federal court for each of these individuals. However, the federal courts essentially viewed the issues raised as state court “Article 78 proceeding” matters. This Court declined to grant certiorari to the U.S. Second Circuit earlier this year.

to step in and examine the systemic denial of due process by the Justice Center, especially its denial of the right to confront accusers.

REASONS FOR GRANTING THE WRIT

I. THE JUSTICE CENTER’S ROUTINE REFUSAL TO ALLOW WORKERS TO CONFRONT THEIR ACCUSERS VIOLATES DUE PROCESS

Especially when credibility is at issue and a person’s livelihood is at stake, due process requires that accused individuals be allowed to confront the evidence against them, including being allowed to face and cross-examine their accuser. This applies even in administrative proceedings. *See, e.g., Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963). The right to confront one’s accuser is “Due Process 101.” It is perhaps the most basic notion in our common law adversarial system of justice. It is a “bedrock procedural guarantee.” *See, Crawford v. Washington*, 541 U.S. 36, 42 (2004), quoting *Pointer v. Texas*, 380 U.S. 400, 406 (1965)(“right of [a criminal] accused to confront the witnesses against him is likewise a fundamental right...”). “[N]o one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth....” *Id.*

The right of confrontation is more basic than criminal law protection. It is a right that has “ancient roots” that “finds expression in the Sixth Amendment.” *Id.* It is “one of the safeguards essential to a fair trial.” *Id.*, 380 U.S. at 404, quoting *Alford v. U.S.*, 282 U.S. 687, 692 (1931)(“It is the essence of a fair trial that reasonable latitude be given the cross-examiner,...”).

Even an incarcerated criminal disputing good time credits (a liberty interest)

is entitled to confront and cross-examine witnesses in an administrative proceedings. *See, Wolff v McDonnell*, 418 US 539, 556-59 (1974). A healthcare worker certainly should be afforded no less constitutional protection. After all, the healthcare workers is an employed, upstanding citizen facing the loss of liberty and property interests.

In support of this right to confront, the Supreme Court in *Alford* cites the civil cases *Knapp v. Wing*, 72 Vt. 334, 47 A. 1075, 1077 (1900)(denying cross-examination .., deprived the defendant of a legal right.”) and *Martin v. Elden*, 32 Ohio St. 282, 289 (1877)(“...we think prejudice to the adverse party should be presumed to arise from the denial of the right to a fair and proper cross-examination.”).

In a non-criminal case, this Court has explained that:

“Cross-examination is the right of the party against whom the witness is called, and the right is a valuable one as a means of separating hearsay from knowledge, error from truth, opinion from fact, and inference from recollection, and as a means of ascertaining the order of the events as narrated by the witness in his examination in chief, and the time and place when and where they occurred, and the attending circumstances, and of testing the intelligence, memory, impartiality, truthfulness, and integrity of the witness...”

See, The Ottawa, 70 U.S. 268, 271 (1865). As the Court emphasized in *ICC v. Louisville & N.R. Co.*, 227 U.S. 88, 93 (1913), “...manifestly there is no hearing when the party ... is not given an opportunity to test, explain, or refute.”

Petitioner Lynch was not given the opportunity to test the Justice Center’s unsworn hearsay statements against him. Witness credibility and veracity were unquestionably at issue. Yet the court below essentially upheld an administrative

conviction because there was some evidence against Mr. Lynch (the unsworn statements), while ignoring the fact that he was not allowed to defend himself in the most appropriate and only meaningful way—by being allowed to confront and cross-examine his accusers and anecdotal witnesses.

This was constitutional error.

II. THERE IS A SPLIT AMONG FEDERAL CIRCUITS REGARDING “RIGHT OF CONFRONTATION” IN ADMINISTRATIVE PROCEEDINGS

In public university student disciplinary matters, there is a split among the federal Courts of Appeals regarding whether, and to what extent, denial of confrontation and cross-examination result in a denial of an accused student’s due process rights. *See, Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018) (a public university student accused of sexual misconduct and facing discipline including expulsion is entitled to face his accuser); *Haidak v Univ. of Massachusetts-Amherst*, 933 F3d 56, 68 (1st Cir 2019) (inquisitional method of confronting accuser); *Doe v Univ. of Scis.*, 961 F3d 203, 215 (3d Cir. 2020)(Title X sex discrimination); *cf., Horton v Westling*, 765 Fed Appx 531, 532 (2d Cir. 2019) (Second Circuit declined review of alleged hearing officer violation of rights).

As stated by the Third Circuit in *Doe v Univ. of Scis.*, 961 F3d 203 (3d Cir 2020), a private university student disciplinary case:

“Procedural fairness is a well-worn concept. Pennsylvania courts have made clear that, at private universities, ‘basic principles of ... fundamental fairness [are] adhered to [when] the students involved[] ... [are] given notice of the charges and evidence against them, [are] allowed to be present and to participate in the hearing assisted by faculty, to call their own witnesses and to cross-examine the witnesses against them, and [are] fully apprised of the findings of the [h]earing [p]anel.’”

Id., at 214. In this *Doe* case, the investigation and adjudication used, and held to be insufficient by the Third Circuit, was quite similar to the Justice Center's.

A student's liberty and property interests in remaining in a public university are much less substantial than, as here, a long-term healthcare worker's liberty and property interest in his career and livelihood. Under this Court's teachings in *Goldberg v. Kelly*, 397 U.S. 254 (1970), *Mathews v. Eldridge*, 424 U.S. 319 (1976) and their progeny, a timely and adequate hearing is a due process necessity. *See, e.g., Mathews, supra*, 424 U.S. at 341. ("... the degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decisionmaking process."),

Just as the Justice Center routinely uses hearsay, the Appellate Division routinely affirms abuse or neglect determinations based upon hearsay evidence alone even when witness credibility and veracity are at issue.

Petitioner acknowledges that direct testimony by firsthand witness is not always necessary to establish a fact or a case. Yet a review of three years' of Justice Center online decisions revealed that in 588 cases, the Justice Center prosecutor's entire case was built on hearsay alone, with the hearing officer almost always allowing the Justice Center's case to be built on hearsay alone.¹³ It is clear from examining the Justice Center's online decisions, with many (if not most) of these cases involving accuser credibility or other factual issues that should require in-person testimony by the accuser (or at least some reasonable means of

¹³ *See* note 10 *supra*.

confrontation) to be fair to the accused healthcare worker.


Instead, as a review of the Justice Center's online cases reveals, the hearing officer routinely accepts, and basically assumes to be true, the Justice Center's hearsay evidence. It then becomes the healthcare worker's burden to disprove what is stated on paper, with no ability to test such evidence through cross-examination.

Obviously, an elderly or handicapped witness must be treated with respect and care. Courts know how to do this. The Justice Center should too. A Justice Center hearing officer can certainly supervise cross-examination sufficiently so that an elderly or handicapped individual is treated respectfully, just as courts allow, and supervise, the cross-examination of children who are witnesses in criminal cases. The testimony could be done by videoconference or, worst case, simply by telephone. Any of these options would allow confrontation, even if on a sliding scale of formality.

The Justice Center's routine policy of basing its cases on hearsay accusations, and thus denying accused healthcare workers such as Mr. Lynch of the ability to confront the prosecution's evidence and face the accuser, is constitutionally offensive. It denies an accused of the basic due process protection that the Bill of Rights was intended to provide.

CONCLUSION

The petition for writ of certiorari should be granted.

A handwritten signature in black ink, appearing to read "Michael D. Diederich, Jr.", is written over a horizontal line.

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