

NO. ____

In the
Supreme Court of the United States

ROTINI SALU,

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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Questions Presented

The Respondent is an agency of the State of New York which has a standard practice of routinely allowing uncorroborated hearsay evidence (unsworn “out-of-court”) witness statements to be used to adjudicate substantial rights of accused administrative respondents even when witness credibility and truthfulness is at issue, or when, as here, in-person testimony is necessary to determine whether an actual accuser even exists. The absence of first hand prosecution witnesses subject to cross-examination often results in not only the termination of such accused’s employment, but also, as here, the loss of the person’s career in the healthcare field.

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 the accusers and even when credibility, veracity or the basis for an accusation is 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 it is not clear that an actual accuser even exists, and if an accuser exists, the credibility and veracity of such accuser?

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:

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

Proceedings below include:

Salu v. Justice Center, N.Y.S. Appellate Div., Third Dept., No. , 530535, Memorandum Decision dated January 7, 2021, reported at 190 A.D.3d 1059 (3d Dept 2021).

Motion for leave to appeal to the N.Y.S. Court of Appeals denied by Order dated June 3, 2021, 37 N.Y.3d 903 (2021).

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

Table of Contents

Questions Presented.....	i
List of Parties, Proceedings & Related Cases.....	ii
Table of Contents	iii
Index of Appendices	iii
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.....	5
A. Essential Facts.....	5
B. The Photographs Show Mr. Salu’s Innocence.....	7
C. Objection at Hearing “Preserved” the due process issue for the Appellate Division’s Review (and now this Court’s review).....	8
D. “No Effort to Subpoena the Teenage Psychiatric Patients or Facility Staff....	9
REASONS FOR GRANTING THE WRIT	11
I. The Justice Center’s Denial of Mr. Salu’s Right to Confront its Accusations and Evidence Violated 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>Salu v NYS Justice Ctr. for Protection of People with Special Needs</i> , No. 530535, 190 A.D.3d 1059 (3d Dept. 2021)	A-1
Appendix B—Justice Center’s Final Determination and Order after Hearing in <i>Matter of Rotimi Salu</i> dated September 24, 2018, with Recommended Decision after Hearing dated September 7, 2018 (Case No. 521064797).....	A-7
Appendix C—Order of the N.Y.S. Court of Appeals dated June 3, 2021, 37 N.Y.3d 903, denying leave to appeal.....	A-18
Appendix D—Photographs of Mr. Salu and teenage patient G.G. in hospital hallway	A-19

Table of Authorities

Cases

<i>Alford v. U.S.</i> , 282 U.S. 687 (1931)	11
<i>Crawford v. Washington</i> , 541 U.S. 36 (2004).....	11
<i>Doe v Univ. of Scis.</i> , 961 F3d 203 (3d Cir 2020)	13
Doe v Univ. of Scis., 961 F3d 203 (3d Cir. 2020)	13
<i>Doe v. Baum</i> , 903 F.3d 575 (6th Cir. 2018)	13
Haidak v Univ. of Massachusetts-Amherst, 933 F3d 56 (1st Cir 2019).....	13
<i>Knapp v. Wing</i> , 72 Vt. 334, 47 A. 1075 (1900)	12
<i>Louisville & N.R. Co.</i> , 227 U.S. 88 (1913).....	12
<i>Martin v. Elden</i> , 32 Ohio St. 282 (1877)	12
<i>Mathews v Eldridge</i> , 424 US 319 (1976).....	14
<i>Pointer v. Texas</i> , 380 U.S. 400 (1965)	11
<i>The Ottawa</i> , 70 U.S. 268 (1865)	12
<i>Wolff v McDonnell</i> , 418 US 539 (1974)	12

Constitutional Provisions

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

Rotimi Salu (“Petitioner” or “Mr. Salu”) 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 *Salu v. Justice Center*, 190 A.D.3d 1059 (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 confront the evidence against him and his accusers (if any) at the Justice Center’s adjudicatory hearing, and challenged this constitutional deprivation when he sought direct review by the Appellate Division of the N.Y.S. Supreme Court.

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 almost identical to that set forth in the companion petition for certiorari of *Gerard Lynch v. Justice Center*. Both Mr. Salu’s case and Mr. Lynch’s case were argued before the Appellate Division by the undersigned on the same day, and thereafter decided on the same day. The N.Y.S. Court of Appeals denied leave on the same day.

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 the accused be allowed to confront the evidence against them and 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 confront the evidence against them and face their accuser.

In this case, there were no “accusers” per se, but only a Justice Center investigator who was the only Justice Center witness and who presented only hearsay evidence that Mr. Salu allegedly committed a neglect.² The hearsay evidence did not establish a statutory neglect. The photographic evidence, as the Court can see for itself,³ actually exonerated Mr. Salu. The prosecution offered no *bona fide* accuser and no evidence that established a cognizable violation of law. There were no first-hand witnesses, and thus no person whom Mr. Salu could cross-examine as to the relevant facts. The Justice Center did not present any witness

² Neglect as defined by the statute under which the Justice Center operates.

³ Appendix D shows Mr. Salu and the patient he was supervising, alone in a vacant hospital hallway. Mr. Salu was attacked by another patient after he entered the room.

These two photographs sum up the entire case.

who could unequivocally articulate a specific neglect that Mr. Salu had committed, or how he actually endangered the teenage psychiatric patient he was supervising, as seen in the photographs (Appx. 19-20).

Because the Justice Center offered no accuser or other person with first-hand knowledge of the relevant facts at the fact-finding hearing, Mr. Salu had no one whom he could cross-examine to establish his innocence. There was no accuser to confront (only the Justice Center's investigator, who simply parroted hearsay evidence).

Thus, in this administrative proceeding, with his job and career at stake, Mr. Salu was presumed guilty and left with no procedural means to defend himself.

This Justice Center fact-finding hearing, like the vast majority of its fact-finding hearings, denied the person accused of the basic due process right to confront the prosecution's evidence. As also pointed out in the companion *Lynch v. Justice Center* case, at these hearings the Justice Center permits its administrative prosecutors to rely solely on hearsay evidence in over 95% of its trials, which includes a large number of situations where witness credibility or veracity is at issue.

In both this case and the companion *Lynch* case the healthcare workers were denied the ability to confront the Justice Center's evidence and to face their accusers. In the *Lynch* case, the accusers were identifiable—to women who accused Mr. Lynch of sexual misconduct and whose unsworn statements resulted in a “category one” finding against Mr. Lynch. In the present case, it is unclear whether

there actually was an accuser against Mr. Salu, other than the Justice Center's investigator.

The fact-finding proceeding in Mr. Salu's case was Kafkaesque. Mr. Salu was found to have committed a "category three" neglect which, though this need not result in a termination of employment, it did. It did because, like so many of these cases, the imprimatur of Justice Center's official finding of "neglect" results in adverse employment action—job termination. And thus this young Penn State graduate's career was destroyed on ambiguous or nonexistent accusations, without even a single first-hand witness called by the prosecution in support of the Justice Center's case against him.

The constitutional harm done to Mr. Salu is much worse than the constitutional harm done to college students similarly denied the right of confrontation in sexual misconduct/"date rape" cases. Because there is a split among the circuits as to the extent of the due process right of confrontation, this case provides an ideal opportunity for this Court to explain individuals' due process right of confrontation in an administrative law context. This case involves only this constitutional question.

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 the evidence against them, rather than being assumed guilty on hearsay alone—to be allowed to confront the accuser, if there is one.

New York's healthcare workers are entitled to basic due process, especially when their careers and livelihoods are at stake.

STATEMENT OF THE CASE

A. ESSENTIAL FACTS

This case arises out of Mr. Salu's employment as a patient care technician in the adolescent psychiatric department of the Westchester Medical Center ("hospital"), a facility licensed by the Office of Mental Health.

In May 2015, Mr. Salu was assigned to supervise G.G., a juvenile patient who suffered from certain mental health diagnoses. As Mr. Salu and the patient were walking alone down the vacant hallway, Mr. Salu entered another patient's room with G.G. immediately behind him, Mr. Salu was attacked by the teenage patient in that room, T.S., whereupon other hospital staff immediately came to the scene to assist Mr. Salu. The patient Mr. Salu was supervising was at all times standing in the hallway, and no harm came to him. Nor was there any risk of harm to G.G., as the photographic evidence clearly shows him standing alone in a vacant hallway.

Appx. D.

As a result of T.S.'s altercation with Mr. Salu, the Justice Center received a report alleging that Mr. Salu had (1) physically abused T.S., as alleged by T.S. and/or his parent(s), and (2) neglected G.G. by failing to provide proper "one on one" supervision under the hospitals constant observation policy.

The hospital immediately suspended Mr. Salu without pay.

Following an investigation, in March 2017 (almost two years after the incident) the Justice Center issued a report finding that the allegation of physical

abuse against T.S. was unsubstantiated but determining that Mr. Salu's conduct with respect to G.G. constituted category three neglect.⁴

Mr. Salu administratively appealed the neglect finding and the matter was referred for an administrative fact-finding hearing. Following the hearing, the hearing officer issued a recommended decision stating that she found that Mr. Salu had committed a category three neglect.

The Justice Center adopted the hearing officer's recommended decision. Mr. Salu thereafter sought state-court judicial review resulting in direct review by the Appellate Division of the state supreme court under N.Y.S. CPLR article 7804(g)).

There is no dispute that on the day in question Mr. Salu was assigned to provide one-to-one constant observation of G.G. and that the hospital's unsigned written policy requires "eyes on" the patient. As Mr. Salu passed the room of T.S., he paused, looked into the room and then entered it, leaving G.G. behind him in the hallway, as the photographs at A-19 and A-20 show.

The court below wrote that Mr. Salu's account of events "did not contradict ... that he exercised 'bad judgment' and violated protocol...." Upon this conclusion alone, the lower court upheld the Justice Center's administrative adjudication, concluding that "his conduct placed G.G. in potential danger[]" and that "the investigator's hearsay account of the incident ... provided the requisite substantial evidence to support the Justice Center's finding."

However, a young healthcare worker's self-deprecation to express remorse for

⁴ See, N.Y.S. Social Services Law § 493 (4)(c).

violating a “protocol” did not establish a statutory neglect here. The court below did not articulate in its opinion a statutory violation by Mr. Salu. Instead, it revealed itself to be in need of this Court’s instruction as to what due process demands, namely, that an accused be allowed to confront the prosecutor’s accusations and evidence.

The roughshod manner in which the Appellate Division dismissed Mr. Salu’s efforts to overturn the Justice Center’s adjudication is shown next.

B. THE PHOTOGRAPHS SHOW MR. SALU’S INNOCENCE

The Appellate Division wrote that:

Based on the foregoing, we are satisfied that the investigator's hearsay account of the incident, which was corroborated by still photographs and numerous supporting depositions from facility staff, coupled with petitioner's [Mr. Salu's] admissions, provided the requisite substantial evidence to support [the Justice Center's] finding that [Mr. Salu] neglected a service recipient [juvenile patient] and that such neglect constituted category three neglect” *(emphasis added)*

However, this Court’s review of the actual photographs reveals that the actual evidence does not support the Appellate Division’s assertions.

Specifically, the still photographs show the teenager a foot or two behind Mr. Salu in a vacant hospital hallway. Thus he did not have “eyes on.” The child remained in the hallway when Mr. Salu stepped into the other teenager’s room (and what attacked there). The affidavits (not “depositions”⁵) establish only that Mr. Salu violated the hospital’s internal “one-on-one” policy, its “protocol.”

However, violating an employer’s “protocol” does not equate to violating state

⁵ The use of the word “deposition” suggests the possibility that Mr. Salu or his attorney could ask questions. Mr. Salu had no such opportunity. The “depositions” are merely sworn statements.

statute. The evidence does not show that Mr. Salu's deviation from policy caused or threatened to cause any actual harm to the teenager he was supervising. Mr. Salu sought to defend on the grounds that the "eye on" policy was not strictly applied by the hospital, yet without any witness to cross-examine (apart from the investigator, who had no personal knowledge), this was impossible.⁶

The Appellate Division wrote that this placed the teenager in "potential danger," yet "potential danger" does not constitute a violation of law. Anything is "potentially" possible. Yet the "potential danger" that a teenager left alone for a few seconds in a totally vacant hospital hallway amounts to a danger that is infinitesimal. This is not a legally cognizable risk. Had Mr. Salu been given the opportunity to cross-examine a hospital accuser on this point (if there were an accuser), it would have established the fact that there was no real risk.

C. OBJECTION AT HEARING "PRESERVED" THE DUE PROCESS ISSUE FOR THE APPELLATE DIVISION'S REVIEW (AND NOW THIS COURT'S REVIEW)

Procedurally, this case involves the direct review by the Appellate Division of the Justice Center's administrative adjudication. Mr. Salu objected to the admission of hearsay evidence at the Justice Center hearing. Thus, the Appellate Division erred when it wrote that:

"[Mr. Salu] did not attack the conduct of the investigator or subsequent administrative hearing on due process grounds...."

⁶ Presumably the hospital has policies that may state that all employees are to work during their shift without expressly authorizing a bathroom break. If so, would the Justice Center argue that an employee rest room break constitutes neglect? After all, the brief reduction in supervisory staff means patients are left with less supervision and thus put at increased risk?

Strict application of the "eyes on" policy is just as ridiculous as would be criticism of an employee for taking a bathroom break.

Mr. Salu's hearsay objection was preserved Appellate Division review, for the simple reason that the Appellate Division was the first and only forum that engaged in any review. Thus, Mr. Salu's hearsay objection was preserved.

D. “NO EFFORT TO SUBPOENA THE TEENAGE PSYCHIATRIC PATIENTS OR FACILITY STAFF

The only question at issue in the Justice Center hearing was whether there was a Social Services Law “neglect” by Mr. Salu failing to be in proximity and “eyes on” the teenage patient whom Mr. Salu was supervising in a vacant hospital hallway. By Mr. Salu not keeping his “eyes on” the teenager when Mr. Salu was viciously attacked by another teenage psychiatric patient, Mr. Salu was alleged to have violated an (unsigned) written hospital policy, and then found guilty of this (low level) dereliction by the Justice Center.

The Appellate Division wrote that Mr. Salu did not:

“... make any effort to subpoena or call the service recipients or any other facility staff to testify at the hearing or claim the right to cross-examine them. Thus, having failed to raise these issues at a time when they could have been addressed, his present attempts to do so are unpreserved for our review” (*emphasis added*)

However, the Appellate Division's view is misplaced. There was no one to call, and thus no one to cross-examine, because the Justice Center offered no hospital accuser.

Specifically, the Justice Center offered no witness to testify based upon first hand knowledge a) that deviation from an unsigned written policy constitutes *per se* neglect and b) that Mr. Salu did anything that resulted in any reasonable risk to the safety of the child he was supervising. The Justice Center offered only its

investigator, whom Mr. Salu could not effectively cross-examine as to either (a) or (b) above, because the investigator had no personal knowledge.

Moreover, because there was no actual accuser (other than the investigator), the identity of the person or persons Mr. Salu might subpoena was not reasonably known to him. He could guess. Yet that is not how the American adversary system works. The state is required to put on its evidence, which the Respondent or Defendant is entitled to confront through cross-examination.

The teenager Mr. Salu was supervising was neither harmed in any way nor an accuser. Thus, there was no reason for Mr. Salu to subpoena the child. And Mr. Salu was not informed of any staff member accusing him of committing a neglect within the meaning of the applicable law. Thus, there was no staff person for Mr. Salu to subpoena.

What Mr. Salu was left with was a presumption of guilt against him, yet no accuser to confront and cross-examine (other than the Justice Center's investigator, who had no first-hand knowledge nor any expertise with adolescent psychiatric patients).

Mr. Salu committed a trivial deviation (which he admitted to), yet this was not a social services law neglect, and thus the government (via the Justice Center) branding him as officially neglectful was wrongful. It was a finding that destroyed this young man's career in the healthcare field. Because the Justice Center likely destroys many careers in similar unlawful fashion, by denying the basic right to confront the accuser, this Court must intercede.

REASONS FOR GRANTING THE WRIT

I. THE JUSTICE CENTER’S DENIAL OF MR. SALU’S RIGHT TO CONFRONT ITS ACCUSATIONS AND EVIDENCE VIOLATES DUE PROCESS

Where accusations are vague, where the accuser is an agency investigator with no first-hand knowledge of relevant facts, and where an accused employee’s career and livelihood are at stake, due process demands that the accused be allowed to confront the accuser and the state’s evidence, including being allowed to face and cross-examine the state’s witnesses.

The right to confront the accuser 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.”

Mr. Salu was not given the opportunity to confront the Justice Center’s evidence against him. Relevant facts, including whether the patient G.G. was exposed to any real risk of harm during the incident in question, were in dispute,

and yet the Justice Center offered no witnesses whom Mr. Salu could confront as to the facts.

Yet the court below essentially upheld an administrative conviction because there was some evidence against Mr. Salu, 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 the state's witnesses.

This was constitutional error.

II. THERE IS A SPLIT AMONG FEDERAL CIRCUITS REGARDING “RIGHT OF CONFRONTATION” IN ADMINISTRATIVE PROCEEDINGS⁷

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:

⁷ This portion of the petition for certiorari is identical to that of the companion *Lynch v. Justice Center* petition.

“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.⁸ 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 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. Salu 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

⁸ See note 10 *supra*.

Rights was intended to provide.

CONCLUSION

The petition for writ of certiorari should be granted.

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