CHAPTER 18

YOUR RIGHTS AT PRISON DISCIPLINARY PROCEEDINGS*

A. Introduction

This Chapter is to help prisoners facing disciplinary action for breaking prison rules. It talks about what disciplinary proceedings must include under federal law, especially New York State disciplinary proceedings. If you are in prison outside New York, you should look up the rules and regulations for disciplinary proceedings in your state before you get ready for your defense.[1]

This Chapter starts with your constitutional rights during prison disciplinary proceedings. Part B explains "due process of law" in disciplinary proceedings. Part C explains due process in prisons by talking about the U.S. Supreme Court case Sandin v. Conner. Part D explains your rights in disciplinary proceedings. Part E explains disciplinary proceedings in New York and what prison officials must do before putting you in disciplinary segregation. Finally, Part F explains what officials in New York State must do before putting you in administrative segregation, as well as what federal prisons must do.

Prison officials have power to punish prisoners who break the law or who break prison rules and regulations. They also have power to put prisoners in administrative segregation if they threaten prison safety and security. Prison officials have a lot of discretion in disciplinary and administrative matters, and courts will usually agree with the officials' decisions. However, there are limits. To protect you from unfair abuses of power, federal and state laws make officials follow procedural requirements (guidelines) when they punish you or put you in administrative segregation. If officials do not follow these guidelines, and you suffer "atypical and significant hardship" because of that (more on this below), you can claim that your rights under the Due Process Clause of the U.S. Constitution have been violated.

This Chapter describes rights related to how you are confined. To protect these rights, you must first use your institution's administrative grievance procedure. Chapter 15 of the *JLM* has more on inmate grievance procedures. If using the prisoner grievance procedures did not work, you can bring an action under 42 U.S.C. § 1983 (in some cases) or file a tort action in state court. If you are in New York, you can bring a tort action in the Court of Claims, or file an Article 78 petition in state court. You can find more information on these types of cases in *JLM* Chapter 5, "Choosing a Court and Lawsuit," *JLM* Chapter 14, "Prison Litigation Reform Act," *JLM* Chapter 16, "42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law," *JLM* Chapter 17, "The State's Duty to Protect You and Your Property: Tort Actions," and *JLM* Chapter 22, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules." If you decide to bring a claim in federal court, read Chapter 14 of the *JLM* on the Prison Litigation Reform Act (PLRA). If you don't follow PLRA requirements, you could lose your good-time credit and you would have to pay the full filing fee for future claims in federal court.

B. Definition of "Due Process"

The Constitution's Fifth and Fourteenth Amendments keep the government from taking your life, liberty, or property without due process. The Fifth Amendment limits the power of the federal government, which includes federal prison officials. The Fourteenth Amendment limits the power of state prison officials the same way. Both federal and state courts have authority to review the actions of prison officials to make sure they followed due process requirements.[2] Therefore, the Due Process Clause of the Fourteenth Amendment keeps the government from treating you unfairly. It gives you two kinds of rights: substantive and procedural. Substantive rights include basic rights to "life, liberty, and property," and the specific guarantees in the Bill of Rights, like freedom of speech and religion. Substantive due process means the

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1. See Chapter 2 of the *JLM*, "Legal Research," for information on how to conduct legal research in prison.

2. Article III of the Constitution grants federal courts jurisdiction to hear cases "arising under this Constitution." State courts have "concurrent jurisdiction," which means that they are as able as federal courts to decide cases involving the U.S. Constitution.

government must treat people with "fundamental fairness." The government cannot interfere with these rights unless it is absolutely necessary for a more important public need.

If the government restricts your substantive rights, procedural due process means they must follow certain procedures (rules). Procedural rights include the right to know about a hearing before it happens (advance notice) and the opportunity to be heard. The government must follow different rules in different cases. Courts decide which rules to follow by comparing your interests to the government's.

C. Due Process in Prison

Due process means something different in prison than outside. The Constitution only gives you a right to due process when the government tries to take away your "life, liberty, or property." So, a court must decide that you had a "liberty interest" at stake before it considers the required "due process" in your disciplinary hearing.[3] In other words, Fourteenth Amendment due process only applies when prison officials try to take away this recognized interest.

The Supreme Court's decision in Sandin v. Conner[4] changed the law a lot. During the 1960s and '70s, the Supreme Court started saying prisoners had constitutional rights. Sadly, the *Sandin* decision changed things by limiting when prisoners may petition the courts for these constitutional rights. Sandin v. Conner is important because it sets the minimum standard that all other federal and state courts must follow. States can give prisoners more rights than those in Sandin v. Conner, but they cannot give fewer.

In Sandin v. Conner, a prisoner in Hawaii had a disciplinary proceeding because he used "abusive or obscene language" when trying to stop prison employees from strip searching him.[5] The prison disciplinary committee did not let the prisoner present witnesses at the hearing, stating that all witnesses were unavailable.[6] They sentenced the prisoner to a thirty-day disciplinary segregation in the Special Holding Unit (SHU) and he sought administrative review of the decision. Administrators later dropped the charge, deciding there was no proof.[7] In the meantime, however, the prisoner filed a Section 1983 claim, saying that his civil rights had been violated.

According to the Supreme Court, even if you have a large, negative change in your confinement, this does not necessarily hurt a liberty interest protected by due process rights (rights dealing with procedural fairness).[8] If the new conditions are "within the normal limits or range of custody which the conviction has authorized the State to impose," the Due Process Clause will not apply.[9] However, even if how you are confined is not a due process violation, you could still use the Due Process Clause because of the way you were confined. The Supreme Court has held that states avoiding some types of confinement can create a protected liberty interest. For that to work in your state, your state must have made a law or regulation that makes prison officials follow certain procedures before changing your prison conditions.[10]

Even then, not all such laws or regulations create a protected liberty interest. In *Sandin*, the Supreme Court held that such laws and regulations only invoke the Due Process Clause when the new conditions impose "atypical [uncommon] and significant [major] hardship on the inmate in relation to the ordinary incidents of prison life."[11] To determine this, a court will generally compare ordinary prison conditions with a

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3. This "liberty interest" refers to the liberty described in the 5th and 14th Amendments. Individuals cannot be deprived of liberty (including being imprisoned) without due process of law.

4. Sandin v. Conner, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 430 (1995) (holding that due process liberty interests created by prison regulations will generally be limited to freedom from restraints that impose an atypical and significant hardship on the prisoner in relation to the ordinary incidents of prison life).

5. Sandin v. Conner, 515 U.S. 472, 475, 115 S. Ct. 2293, 2296, 132 L. Ed. 2d 418, 424 (1995).

6. Sandin v. Conner, 515 U.S. 472, 475, 115 S. Ct. 2293, 2296, 132 L. Ed. 2d 418, 424 (1995).

7. Sandin v. Conner, 515 U.S. 472, 476, 115 S. Ct. 2293, 2296, 132 L. Ed. 2d 418, 425 (1995).

8. Meachum v. Fano, 427 U.S. 215, 225, 96 S. Ct. 2532, 2538, 49 L. Ed. 2d 451, 459 (1976) (holding that the transfer of a prisoner to a prison, the conditions of which are substantially less favorable to him, does not necessarily violate a liberty interest protected by the Due Process Clause of the 14th Amendment).

9. Meachum v. Fano, 427 U.S. 215, 225, 96 S. Ct. 2532, 2538, 49 L. Ed. 2d 451, 459 (1976); *see also* Montanye v. Haymes, 427 U.S. 236, 242–43, 96 S. Ct. 2543, 2547, 49 L. Ed. 2d 466, 471–72 (1976) (holding that no Due Process Clause liberty interest is infringed when a prisoner is transferred from one prison to another within the State, unless there is some right or expectation that can be derived from state law that a prisoner will not be transferred except for misbehavior or upon the occurrence of other "specified events").

10. Sandin v. Conner, 515 U.S. 472, 483–84, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 429–30 (1995) (citing Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974)).

11. Sandin v. Conner, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 430 (1995).

fact-based analysis of the length and extent of your hardship. In *Sandin*, the Supreme Court decided that, "[b]ased on a comparison between inmates inside and outside disciplinary segregation, the state's actions in placing him there for thirty days did not work a major disruption in his environment."[12] The court concluded that the prisoner's thirty-day disciplinary segregation was not the "atypical, significant deprivation [(hardship)] in which a State might conceivably create a liberty interest."[13] Because the prisoner did not have a protected liberty interest, the prison officials leading the disciplinary proceeding did not have to follow the constitutional due process requirements or state regulations about disciplinary procedures.

In sum, if you wish to make a claim that your due process rights were violated by a problem with the procedures that confined you in the SHU, you must show that:

(1) The confinement constituted an "atypical and significant hardship" compared with the deprivations experienced in the general population; and
(2) The state, through language in a statute, had created a protected liberty interest by avoiding that form of confinement.

Unfortunately, the Court's opinion in *Sandin* sets a very high bar for showing that the prison's procedures actually violated your right to due process, and you can usually only make this claim after confinement. However, even if you cannot prove a due process violation with the *Sandin* standard, there are other options. You may still use other protections against state actions that unfairly make your confinement worse. You may either:

(1) Use internal prison grievance procedures[14] and state judicial review (review by state courts under state laws or state constitutional protections) where available; or
(2) Make a claim under the Eighth Amendment of the Constitution, which protects against cruel and unusual punishment.[15]

Since the Supreme Court decided *Sandin*, different courts around the country have applied the *Sandin* test differently when deciding what makes an "atypical and significant hardship" protected by state regulation. This Chapter looks at when courts (especially in New York) have read regulations as mandatory (and creating a liberty interest) and how they applied *Sandin* to disciplinary and administrative segregation, transfers, good-time credits, and work release programs.

The rest of this Part will look at which prison practices make an "atypical and significant hardship." Remember that this only matters if the state has a statute creating a protected liberty interest.

1. Disciplinary and Administrative Segregation

Prison officials in New York may put a prisoner in a Segregated Housing/Holding Unit (SHU) for a set period of time if they find that the prisoner broke a rule.[16] Before the disciplinary hearing and during investigation, the prisoner may be placed in administrative segregation.[17] Prison officials may also hold a prisoner in administrative segregation in a SHU if the prisoner threatens the safety or security of the prison.[18] Disciplinary segregation must be based on a finding—after a formal hearing—that the prisoner violated the New York State Department of Corrections and Community Supervision (DOCCS) Standards of Prisoner Behaviors.[19] However, administrative segregation is based on a determination after an informal hearing that a prisoner's presence in the general prison population threatens prison safety and security. Disciplinary confinement takes place for a set time period. In contrast, administrative segregation is not considered punishment and can continue until the superintendent finds the threat is over.[20] For more on the procedural requirements for disciplinary and administrative segregation in New York prisons, see Parts E and F of this Chapter.

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12. Sandin v. Conner, 515 U.S. 472, 486, 115 S. Ct. 2293, 2301, 132 L. Ed. 2d 418, 431 (1995).
13. Sandin v. Conner, 515 U.S. 472, 486, 115 S. Ct. 2293, 2301, 132 L. Ed. 2d 418, 431 (1995).
14. See Chapter 15 of the *JLM*, "Inmate Grievance Procedures," for more information.
15. See Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law," for more information.
16. *See* N.Y. Comp. Codes R. & Regs. tit. 7, §§ 254.7(1), 301.2(a) (2007).
17. *See* N.Y. Comp. Codes R. & Regs. tit. 7, § 301.3(a) (2007).
18. *See* N.Y. Comp. Codes R. & Regs. tit. 7, § 301.4(b) (2007).
19. *See* N.Y. Comp. Codes R. & Regs. tit. 7, §§ 254.7(1), 301.2(a) (2007).
20. *See* N.Y. Comp. Codes R. & Regs. tit. 7, §§ 301.2(a), 301.4 (2007).

Courts in New York State and the Second Circuit look at both disciplinary and administrative detention proceedings under the *Sandin* test above. The court judges claims from both kinds of segregation to decide if:

(1) There are procedures explicitly required of prison officials; and
(2) An "atypical and significant hardship" exists.[21]

This Section will first help you figure out if the procedures that put you in disciplinary or administrative detention met requirement (1). Then, it will look at how courts judge a prisoner's confinement in the SHU under requirement (2). This Section focuses specifically on the law for courts in the Second Circuit (federal courts in New York, Vermont, and Connecticut). Analysis by courts in other jurisdictions may be different. Unfortunately, some courts outside of the Second Circuit have held that no liberty interests may arise from administrative detention.[22] If you live outside the jurisdiction of the Second Circuit, you should look up how courts in your jurisdiction interpret your prison's rules and if they consider administrative detention a protected liberty interest.

(a) The State-Created Liberty Interest Requirement

Even if your segregation was "atypical and significant," courts will not find a due process violation if you cannot show you had a constitutional or state-created liberty interest in avoiding the segregation. Some New York district courts rely on cases from before *Sandin*. They hold that state and federal regulations for disciplinary confinement[23] and administrative segregation[24] automatically give prisoners a liberty interest that protects them from certain prison conditions and that the Due Process Clause of the U.S. Constitution protects these rights. The Second Circuit, however, does not accept this clear rule. The Second Circuit finds that a prisoner only has a federal due process claim if, upon careful analysis, specific state statutes and regulations create protected liberty interests. The prison must also regularly uphold these protected interests.[25] It is important to remember that courts outside of New York State do not always find that state

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21. *See, e.g.*, Sealey v. Giltner, 197 F.3d 578, 584–85 (2d Cir. 1999) (interpreting *Sandin* to require consideration of: whether, first, a prisoner has a protected liberty interest in avoiding administrative confinement, and, second, the confinement imposed an atypical and significant hardship); Giano v. Kelly, No. 89-CV-727(C), 2000 U.S. Dist. LEXIS 9138, at *8 (W.D.N.Y. May 16, 2000) (*unpublished*) ("[C]onfinement implicated due process only if it was an atypical and significant hardship and if DOCS regulations conferred a liberty interest in remaining free from such confinement.").

22. *See* Crowder v. True, 74 F.3d 812, 815 (7th Cir. 1996) (holding administrative detention cannot give rise to a protected liberty interest); Moore v. Ham, No. 92-3305, 1993 U.S. App. LEXIS 826, at *5 (10th Cir. Jan. 13, 1993) (*unpublished*) (quoting Frazier v. Dubois, 922 F.2d 560, 562 (10th Cir. 1990) (citing Hewitt v. Helms, 459 U.S. 460, 472, 103 S. Ct. 864, 871, 74 L. Ed. 2d 675, 688 (1983))) ("If segregation is non-punitive in nature and is done for administrative or supervisory reasons, the inmate has no due process rights prior to administrative confinement unless prison regulations provide him with a liberty interest."); Awalt v. Whalen, 809 F. Supp. 414, 416 (E.D. Va. 1992) (holding regulations providing for staff procedures and time frames, but not mandating release upon a hearing and specific findings, do not create a liberty interest in release from administrative detention). *But see* Muhammad v. Carlson, 845 F.2d 175, 177 (8th Cir. 1988) (holding that a liberty interest may be created by prison regulations if those regulations impose substantive criteria limiting or guiding prison officials' discretion); Maclean v. Secor, 876 F. Supp. 695, 701–02 (E.D. Pa. 1995) (holding regulations limiting prison officials' discretion in administrative detention decisions created a liberty interest).

23. *See, e.g.*, Nicholas v. Tucker, No. 95 Civ. 9705, 2000 U.S. Dist. LEXIS 749, at *19 (S.D.N.Y. Jan. 27, 2000) (*unpublished*) (finding New York State regulations grant prisoners a protected liberty interest in freedom from disciplinary confinement); Wright v. Miller, 973 F. Supp. 390, 395 (S.D.N.Y. 1997) (finding a state-created liberty interest in being free from disciplinary confinement); Gonzalez v. Coughlin, 969 F. Supp. 256, 257–58 (S.D.N.Y. 1997) (holding state regulations on disciplinary segregation create a liberty interest in freedom from disciplinary confinement).

24. *See, e.g.*, Tellier v. Fields, 280 F.3d 69, 81 (2d Cir. 2000) (holding that 28 C.F.R. § 541.22 creates a liberty interest); Gonzalez v. Coughlin, 969 F. Supp. 256, 257–58 (S.D.N.Y. 1997) (concluding that New York State rules regarding administrative confinement create a liberty interest).

25. *See* Sealey v. Giltner, 197 F.3d 578, 583–84 (2d Cir. 1999) (finding that *Sandin* rejected the idea that "a state's establishment of a specific substantive predicate for restrictive confinement of a prisoner is sufficient to create a protected liberty interest"); Welch v. Bartlett, 196 F.3d 389, 392 (2d Cir. 1999) (holding that a prisoner who brings a due process claim premised upon a state law liberty interest, has the burden to establish that the law does, in fact, create such a liberty interest). The Second Circuit's method of analysis, is based on the Supreme Court's opinion in Hewitt v. Helms, 459 U.S. 460, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983). The Supreme Court explicitly rejected the *Hewitt* analysis, however, as the primary means of determining the existence of a due process claim. Sandin v. Conner, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 430 (1995). Despite the Supreme Court's ruling in *Sandin*, the Second Circuit held that, in combination with *Sandin's* "atypical and significant hardship" test, the procedure established by the Second Circuit in *Sealey* and *Welch* is still an appropriate way to determine whether a legitimate due process claim is present.

statutes and regulations create a liberty interest that protects prisoners from disciplinary and administrative segregation.

(b) The "Atypical and Significant Hardship" Requirement

In determining whether your confinement in the SHU involves a protected liberty interest, a court will analyze disciplinary segregation the same way as administrative segregation. The court looks at whether the facts of your confinement in a segregated facility reach an "atypical and significant hardship . . . in relation to the ordinary incidents of prison life."[26] A court will look at the facts of your confinement in its analysis.[27] There is no clear way to decide if a given SHU confinement is an "atypical and significant hardship," but courts will look at two main things in their analysis:

(1) the length of your confinement; and
(2) the extent of your deprivation.[28]

The court will look at both factors "since especially harsh conditions endured for a brief interval and somewhat harsh conditions endured for a prolonged interval might both be atypical."[29]

(i) Duration of Your Confinement

If you are filing a claim within the Second Circuit, the length of your confinement is the actual time that you were detained in the SHU. This is the period for which a prison official may be responsible for violating your due process rights. Therefore, when you file your claim, you will state how long you actually spent in detention and not how long you could have spent.[30] You should count the total number of days that you spent in the SHU before, during, and after the disciplinary or administrative hearing.[31] If they move you from one SHU directly to another SHU in a different prison facility, count the total number of days that you were detained. Your transfer does not restart the duration of confinement for the court.[32]

Courts have not strictly defined what makes an "atypical and significant" period of SHU confinement, but the Second Circuit has indicated general rules for such claims. The Second Circuit recently suggested that SHU confinement of approximately 305 days or more probably involves a protected liberty interest.[33] Periods of less than 305 days but more than 101 days may involve a protected liberty interest. Whether it involves a protected liberty interest heavily depends on the extent of your deprivation.[34] (This second factor

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26. Sandin v. Conner, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 430 (1995).

27. Miller v. Selsky, 111 F.3d 7, 9 (2d Cir. 1997) (holding that *Sandin* did not create a blanket rule and that "courts must examine the circumstances of a confinement to determine whether that confinement affected a liberty interest").

28. Sealey v. Giltner, 197 F.3d 578, 582–83 (2d Cir. 1999).

29. Sealey v. Giltner, 197 F.3d 578, 586 (2d Cir. 1999).

30. *See* Scott v. Albury, 156 F.3d 283, 286–87 (2d Cir. 1998) (holding that the measure of liberty derivation under *Sandin* is the actual confinement that the prisoner endured—in this case 60 days—rather than the potential, maximum penalty that the prisoner faced—indefinite detention).

31. *See* Sealey v. Giltner, 197 F.3d 578, 587–88 (2d Cir. 1999).

32. *See* Giano v. Selsky, 238 F.3d 223, 226 (2d Cir. 2001) (holding that a court must consider the cumulative period of time that a prisoner was held in administrative segregation at two facilities, because his detention at the two facilities was continuous, based on the same administrative rationale, and under nearly identical conditions); *see also* Sims v. Artuz, 230 F.3d 14, 23–24 (2d Cir. 2000) (suggesting that "some or all" of a series of separate SHU sentences "should be aggregated for purposes of the *Sandin* inquiry" when they are imposed within a period of days or hours of each other and add up to a sustained period of confinement).

33. *See* Colon v. Howard, 215 F.3d 227, 231 (2d Cir. 2000) (holding that confinement in a SHU for 305 days under "normal conditions" is a departure from standard prison life, which warrants due process protection under *Sandin*).

34. *See* Colon v. Howard, 215 F.3d 227, 231 (2d Cir. 2000); *see also* Beckford v. Portuondo, 151 F. Supp. 2d 204, 219 (N.D.N.Y. 2001) (holding plaintiff's confinement, which lasted less than a week, was not sufficiently atypical to implicate a protected liberty interest); Prince v. Edwards, No. 99 Civ. 8650 (DC), 2000 U.S. Dist. LEXIS 6608, at *16 (S.D.N.Y. May 17, 2000) (*unpublished*) (dismissing procedural due process claim because the prisoner did not allege that the conditions of his 66-day confinement constituted an atypical or significant hardship under *Sandin*); Jones v. Kelly, 937 F. Supp. 200, 202–03 (W.D.N.Y. 1996) (concluding that the prisoner's 191 days in segregated confinement did not impose an atypical and significant hardship, but that "[t]he length of SHU confinement is not necessarily dispositive of whether a liberty interest is implicated"); Tulloch v. Coughlin, No. 91-CV-0211E(M), 1995 U.S. Dist. LEXIS 19624, at *9 (W.D.N.Y. Dec. 28, 1995) (*unpublished*) (holding that the prisoner's 180-day disciplinary segregation in SHU did not represent a due process violation, because the conditions of the SHU segregation did not "present an atypical or significant hardship in relation to the normal incidents of prison life"); Carter v. Carriero, 905 F. Supp. 99, 104

is discussed more below.) Confinement for less than 101 days probably does not involve a *Sandin* liberty interest unless you can prove unusually severe conditions in the SHU.[35] Finally, confinement under typical SHU conditions for less than thirty days will probably not result in a successful due process claim.[36]

In addition to weighing the length of your confinement and the extent of your deprivation, courts also look at how often prisoners endure similar periods of non-disciplinary SHU confinement to decide if a particular period of segregation is "atypical." In other words, courts may compare your period of confinement with "periods of comparable deprivation typically endured by other prisoners in the ordinary course of prison administration" for non-disciplinary reasons.[37]

(ii) Extent of the Deprivation Compared to "Ordinary Incidents of Prison Life"

Courts will compare how much hardship you suffered in disciplinary or administrative segregation to the "ordinary incidents of prison life."[38] The Second Circuit says that, under *Sandin*, a prisoner does not have a due process claim if other prisoners have about the same hardship under ordinary prison administration.[39] There is some dispute about the meaning of "ordinary incidents of prison life."[40] Courts will let you compare what you experienced in the SHU to what the general population experiences at your prison.[41] Thus, to be an "atypical and substantial deprivation," your hardships in the SHU must be "substantially more grave" than what you would ordinarily experience as the general prison population.[42]

(W.D.N.Y. 1995) (finding that the prisoner's 270 days in a SHU did not violate a protected liberty interest, because the nature of the deprivation did not impose "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life").

35. *See* Sealey v. Giltner, 197 F.3d 578, 589–90 (2d Cir. 1999) (holding that a prisoner's 101 day confinement under standard SHU conditions did not constitute an "atypical and significant" deprivation under *Sandin*). *But see* Colon v. Howard, 215 F.3d 227, 232 n.5 (2d Cir. 2000) (noting that confinement for periods of 101 days or less "could be shown on a record more fully developed than the one in *Sealey* to constitute an atypical and severe hardship under *Sandin*"); Welch v. Bartlett, 196 F.3d 389, 394 (2d Cir. 1999) (holding the prisoner's 90-day confinement in a SHU may be "atypical and significant" if the deprivation that the prison suffered "was more serious than typically endured by prisoners as an ordinary incident of prison life").

36. *See, e.g.*, Benton v. Keane, 921 F. Supp. 1078, 1079-80 (S.D.N.Y. 1996) (noting that thirty days of confinement does not implicate liberty interest); Hendricks v. C. Centanni, No. 92–5353, 1996 WL 67721, at *1, *3 (S.D.N.Y. Feb. 16, 1996) (noting that thirty days of confinement does not implicate liberty interest); Martin v. Mitchell, No. 92–CV–716, 1995 WL 760651, at *3 (N.D.N.Y. Nov. 24, 1995) (noting that thirty days of confinement does not implicate liberty interest).

37. Scott v. Coughlin, 78 F. Supp. 2d 299, 307 (S.D.N.Y. 2000) (noting that "[a]long with duration, the Court must examine the frequency with which inmates are confined to the SHU in the ordinary course of the prison administration"); *see also* Colon v. Howard, 215 F.3d 227, 231 (2d Cir. 2000) (holding that 305 days in SHU confinement is atypical under *Sandin*, because the government could not show that a 305-day confinement was comparable with that "typically endured by other prisoners in the ordinary course of prison administration"); Brooks v. DiFasi, 112 F.3d 46, 49 (2d Cir. 1997) (holding that, while New York prison regulations allow for lengthy administrative confinement, these regulations do not necessarily mean that lengthy disciplinary confinement is compatible with due process, and that after *Sandin* "a court must examine the specific circumstances of the punishment").

38. Sandin v. Conner, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 430 (1995).

39. Sandin v. Conner, 515 U.S. 472, 486, 115 S. Ct. 2293, 2301, 132 L. Ed. 2d 418, 430 (1995).

40. *See* Sealey v. Giltner, 197 F.3d 578, 588–89 (2d Cir. 1999) (noting unresolved questions about: (1) whether the "ordinary incidents of prison life" requirement asks courts to compare SHU conditions to the conditions within administrative confinement or to the conditions within the general population, and (2) whether the "ordinary incidents of prison life" requirement asks courts to compare SHU conditions to those conditions within the particular prison, to prison conditions across the state, or to prison conditions nationwide).

41. *See, e.g.*, Sealey v. Giltner, 197 F.3d 578, 589 (2d Cir. 1999) (finding on appeal that the prisoner's trial evidence was sufficient when he only compared the conditions of his SHU confinement to the conditions among the general population within his particular prison); Welch v. Bartlett, 196 F.3d 389, 394 (2d Cir. 1999) (comparing the conditions of a prisoner's SHU segregation to the deprivation that other prisoners endure in the ordinary course of prison administration); Giano v. Kelly, No. 89-CV-727(C), 2000 U.S. Dist. LEXIS 9138, at *17 (W.D.N.Y. May 16, 2000) (*unpublished*) (comparing the conditions that the prisoner faced in administrative segregation to the typical conditions that the prison's general population endured).

42. Sandin v. Conner, 515 U.S. 472, 486, 115 S. Ct. 2293, 2301, 132 L. Ed. 2d 418, 430 (1995); *see also* Welch v. Bartlett, 196 F.3d 389, 392 (2d Cir. 1999) (finding that, after *Sandin*, a prisoner who experiences a deprivation under mandatory state regulations does not have a federal due process claim if other prisoners in the prison's general population typically experience approximately the same deprivation in the ordinary administration of the prison); Frazier v. Coughlin, 81 F.3d 313, 317 (2d Cir. 1996) (holding that when a prisoner was confined in the SHU for 12 days while awaiting the disposition of disciplinary proceedings, his due process rights were not violated, despite the fact that

Like the length of your confinement, courts have no strict rule for what makes your deprivations in SHU "substantially grave" enough to be "atypical and significant." Rather, the court will look at various factors to decide whether your deprivation violates the Due Process Clause. For example, in a case from the Southern District of New York, Giano v. Kelly, the court noted significant differences between conditions in the SHU and in the general population, including:

(1) Significantly greater isolation;
(2) No organized, meaningful activity, such as job assignments, vocational training, or classroom instruction; and
(3) No social and recreational activity, such as drug and alcohol counseling, religious services, group meals, or group exercise.[43]

The *Giano* court also found more distinctions. SHU prisoners were confined to their cells for twenty-three hours per day. They only had one hour of daily exercise in a separate, slightly larger cell with no equipment. Plus, SHU prisoners only got two showers per week, one non-legal visit per week, and no telephone calls (except in an emergency or with permission). Finally, the prisoner's cell was ten feet by ten feet, often dirty, and usually dark, with covered windows to prevent eye contact with the other prisoners.[44]

Even if prisoners in the general population sometimes experience similar deprivations, you could still have a due process claim.[45] The *Giano* court said that, while general population prisoners under "lock-down" have conditions similar to those in the SHU, the duration and extent of SHU "inactivity or cell confinement, long-term isolation, and idleness are far less typical outside of SHU."[46] This analysis, which looks at how and how long you are confined, seems typical of recent Second Circuit cases.[47]

Remember that the length of time you are in administrative or disciplinary segregation is one of two factors the court will look at when comparing your detention to the ordinary incidents of prison life. Thus, if you claim that your due process rights were violated when confined in administrative or disciplinary segregation for less than 305 days, you should present any and all available evidence of SHU conditions, any evidence of psychological effects of prolonged confinement in isolated conditions, and the exact number of times you were placed in SHU confinements of varying durations.[48] In addition to your own testimony, you should also obtain and submit other, independent evidence about your detention conditions.

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the prisoner was denied certain privileges because the conditions of his confinement were not prohibited by law).

43. Giano v. Kelly, No. 89-CV-727(C), 2000 U.S. Dist. LEXIS 9138, at *18–20 (W.D.N.Y. May 16, 2000) (*unpublished*).

44. Giano v. Kelly, No. 89-CV-727(C), 2000 U.S. Dist. LEXIS 9138, at *18–21 (W.D.N.Y. May 16, 2000) (*unpublished*).

45. Giano v. Kelly, No. 89-CV-727(C), 2000 U.S. Dist. LEXIS 9138, at *21 (W.D.N.Y. May 16, 2000) (*unpublished*).

46. Giano v. Kelly, No. 89-CV-727(C), 2000 U.S. Dist. LEXIS 9138, at *21 (W.D.N.Y. May 16, 2000) (*unpublished*).

47. *See, e.g.*, LaBounty v. Kinkhabwala, No. 99-0329, 2001 U.S. App. LEXIS 1696, at *6–7, 2 F. App'x. 197, 201 (2d Cir. Feb. 5, 2001) (*unpublished*) (instructing the district court to compare both the specific conditions of the prisoner's disciplinary segregation and the duration to the conditions of other categories of confinement); Vaughan v. Erno, No. 00-264, 2001 U.S. App. LEXIS 10585, at *3, 8 F. App'x 145, 146 (2d Cir. May 18, 2001) (*unpublished*) (finding no due process violation where the prisoner failed to allege any adverse conditions of the confinement other than its duration); Sealey v. Giltner, 197 F.3d 578, 587–89 (2d Cir. 1999) (finding that plaintiff's 101-day confinement in administrative segregation did not impair a protected liberty interest since the confinement was not of such duration and in such conditions as to meet the *Sandin* atypicality standard); Welch v. Bartlett, 196 F.3d 389, 394 (2d Cir. 1999) (holding that the relevant comparison concerning duration is between the period of deprivation endured by the plaintiff and periods of comparable deprivation typically endured by other prisoners in the ordinary course of prison administration); Nicholas v. Tucker, 95 Civ. 9705, 2000 U.S. Dist. LEXIS 749, at *13–14 (S.D.N.Y. Jan. 27, 2000) (*unpublished*) (holding that in determining whether a confinement constitutes an atypical and significant hardship, courts should consider the effect of the segregation on the length of the plaintiff's prison confinement, the extent to which conditions differ from other prison conditions, and the duration of the disciplinary confinement compared to the potential duration of discretionary confinement). All of these cases compared the individual experience of the prisoner in the SHU under the conditions imposed by applicable regulations to experiences of the general prison population.

48. *See, e.g.*, Colon v. Howard, 215 F.3d 227, 232 (2d Cir. 1999) (recommending to the district courts that this information would be helpful in evaluating on appeal whether segregation is atypical and significant); *see also* Taylor v. Rodriguez, 238 F.3d 188, 195 (2d Cir. 2001) (reinforcing the finding in *Colon* that a "fully developed record" along with the length of confinement would be helpful in determining atypicality); Sealey v. Giltner, 197 F.3d 578, 589 (2d Cir. 1999) (noting evidence of "conditions of administrative confinement at other New York prisons, as well as the frequency and duration of confinements imposing significant hardships, might well be relevant to a prisoner's liberty claim").

2. Transfers

You can trigger due process analysis when you move to a different facility. The Supreme Court says you do not have a protected liberty interest in staying at a specific prison.[49] But you may have a claim if the move was a result of using your constitutional rights.[50]

You also do not have a recognized liberty interest in staying in a specific prison even if the new prison has a different level of security.[51] For example, a discretionary transfer from a minimum security prison to a medium security prison is not worse than the ordinary disruptions of prison life.[52] Likewise, moves from the general population to maximum security can be "within the normal limits or range of custody which the conviction" lets the state impose, even when maximum security conditions are much worse.[53] How often you move between prisons does not matter.[54]

The courts use this same reasoning for deportation. You do not have a protected liberty interest in moving to a prison in your home country, even if conditions in the United States are worse than in your home country.[55]

3. Good-Time Credits

Good-time credits alone do not mean you have a protected liberty interest.[56] To claim a liberty interest, your state must have created an interest.[57] For example, in Reynolds v. Wolff, a Nevada law allowed prisoners to accumulate good-time credits "unless the prisoner ha[d] committed serious misbehavior."[58] The court found that this law offered a "right of 'real substance'" by providing good-time credits. This gave rise to

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49. *See* Meachum v. Fano, 427 U.S. 215, 224–25, 96 S. Ct. 2532, 2538–39, 49 L. Ed. 2d 451, 459–60 (1976) (holding that the "Due Process Clause [does not] in and of itself protect a duly convicted prisoner against transfer from one institution to another within the state prison system," such that a transfer within a state is within the normal range of custody), *rehearing denied*, Meachum v. Fano, 429 U.S. 873, 97 S. Ct. 191, 50 L. Ed. 2d 155 (1976); Olim v. Wakinekona, 461 U.S. 238, 247, 103 S. Ct. 1741, 1746, 75 L. Ed. 2d 813, 821 (1983) (transfer for confinement in another state is within the normal range of custody). *But see* Vitek v. Jones, 445 U.S. 480, 494, 100 S. Ct. 1254, 1264, 63 L. Ed. 2d 552, 555–56 (1980) (transfer to a mental hospital is not within the normal range of custody).

50. *See* Merriweather v. Coughlin, 879 F.2d 1037, 1046 (2d Cir. 1989) (holding that a jury could reasonably conclude that prisoners were transferred solely because they exercised their 1st Amendment rights, and thus had a valid claim, where the prisoners were transferred after critiquing the prison administration).

51. *See* Meachum v. Fano, 427 U.S. 215, 224–25, 96 S. Ct. 2532, 2538–39, 49 L. Ed. 2d 451, 459–60 (1976); Moorman v. Thalacker, 83 F.3d 970, 973 (8th Cir. 1996) (holding that discretionary transfer of prisoner from minimum to medium security prison, as a result of disciplinary action, was not a disruption exceeding ordinary incidents of prison life and, thus, did not implicate a due process liberty interest); Keenan v. Hall, 83 F.3d 1083, 1089, 96 Cal. Daily Op. Service 3261, 96 Daily Journal DAR 5331 (9th Cir. 1996) (noting the standard for determining whether a prisoner had a protected liberty interest in prison transfer depends on whether conditions at the facility to which a prisoner was transferred imposed significant and atypical hardship).

52. *See* Moorman v. Thalacker, 83 F.3d 970, 973 (8th Cir. 1996) ("[S]uch assignments are discretionary, so long as they are not done for prohibited or invidious reasons.").

53. Meachum v. Fano, 427 U.S. 215, 225, 96 S. Ct. 2532, 2538–39, 49 L. Ed. 2d 451, 459 (1976) (concluding transfer to prison with more severe rules does not in itself signify a 14th Amendment liberty interest violation).

54. *See* Maguire v. Coughlin, 901 F. Supp. 101, 106 (N.D.N.Y. 1995) (asserting transfer of prisoner between four different correctional facilities in the span of three weeks did not implicate a protected liberty interest).

55. *See* Marshall v. Reno, 915 F. Supp. 426, 431–32 (D.D.C. 1996) (stating that it was beyond the authority of the courts to order where a defendant (in this case, a Canadian) is to be incarcerated, because this is the role of the Bureau of Prisons); *see also* Meachum v. Fano, 427 U.S. 215, 224, 96 S. Ct. 2532, 2538, 49 L. Ed. 2d 451, 459 (1976) ("The initial decision to assign the convict to a particular institution is not subject to audit under the Due Process Clause, although the degree of confinement in one prison may be quite different from that in another."); Wong v. Warden, FCI Raybrook, 999 F. Supp. 287, 290 (N.D.N.Y. 1998) aff'd, 171 F.3d 148 (2d Cir. 1999) (holding that there an incarcerated alien did not have a liberty interest in being transferred to his home country, although a denial of transfer could not be based upon discriminatory intent).

56. *See* Wolff v. McDonnell, 418 U.S. 539, 557, 94 S. Ct. 2963, 2975, 41 L. Ed. 2d 935, 951 (1974) (holding actual restoration of good-time credits could not be handled in a civil rights suit—habeas corpus was the proper remedy—but declaratory judgment regarding good-time withdrawal procedures, as a predicate to a damage award, was not barred).

57. *See* Wolff v. McDonnell, 418 U.S. 539, 557, 94 S. Ct. 2963, 2975, 41 L. Ed. 2d 935, 951 (1974); *see also* Leacock v. DuBois, 937 F. Supp. 81, 83–84 (D. Mass. 1996) (holding a prisoner may not be divested of a state-created right to good-time credit without a minimum of due process, including written notice of claimed violations, qualified right to call witnesses and present evidence, and written statement of fact-finders as to evidence relied upon and reasons for action).

58. Reynolds v. Wolff, 916 F. Supp. 1018, 1023 (D. Nev. 1996).

a liberty interest under the due process analysis.[59] Finding prisoners guilty of "serious misbehavior" would make the prisoners lose good-time credits. Therefore, before Nevada prisons find prisoners guilty, they must tell prisoners the charges against them and give them a chance to be heard.[60]

The chance to earn good-time credits, however, is not a protected liberty interest by itself.[61] For example, in Luken v. Scott,[62] the prisoner was put in administrative segregation and could not, therefore, receive more good-time credits that would have helped him get parole. Still, the court found no liberty interest because the "loss of opportunity to earn good-time credits ... is an [unsure] consequence of administrative decisions [that] do not create constitutionally protected liberty interests."[63] Similarly, in Bulger v. U.S. Bureau of Prisons, losing a prison job did not involve a liberty interest even though the prisoner could not automatically accrue good-time credits anymore.[64]

The Supreme Court case of Edwards v. Balisok is a big deal for claims about losing good-time credits.[65] According to that case, if you want to bring a federal Section 1983 claim about the results (rather than procedures) of a hearing about good-time credit issues, you must first have that disciplinary hearing reversed in state court.[66] The application of the *Edwards* standard varies. The Second Circuit, for instance, only applies *Edwards* to good-time credit cases.[67] The Seventh Circuit and some district courts, however, have read the case as needing an administrative or court reversal in all disciplinary or even administrative segregation cases before a prisoner can sue for damages.[68] See *JLM* Chapter 35, "Getting Out Early: Conditional & Early Release," for more information about good-time credits.

4. Work Release Programs

In Young v. Harper, the Supreme Court held that the prisoner had a liberty interest in his pre-parole release program, because the release program was very similar to parole.[69] The standard is similar for work release programs. Courts consider whether your program gives you "substantial freedom" and whether you have been "released from incarceration."[70] You enjoy "substantial freedom" if your work release program is more similar to release from incarceration. If your situation is still similar to institutional life, the court will not find that you have a liberty interest.[71]

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59. Reynolds v. Wolff, 916 F. Supp. 1018, 1023 (D. Nev. 1996); *see also* Zamakshari v. Dvoskin, 899 F. Supp. 1097, 1106–07 (S.D.N.Y. 1995) (noting that loss of good time constitutes protected liberty interest in New York under *Sandin*).

60. *See* Reynolds v. Wolff, 916 F. Supp. 1018, 1023 (D. Nev. 1996).

61. *See* Luken v. Scott, 71 F.3d 192, 193 (5th Cir. 1995).

62. Luken v. Scott, 71 F.3d 192, 193 (5th Cir. 1995).

63. Luken v. Scott, 71 F.3d 192, 193 (5th Cir. 1995) (alterations in original).

64. Bulger v. U.S. Bureau of Prisons, 65 F.3d 48, 50 (5th Cir. 1995); *see also* Rivera v. Coughlin, No. 92 CIV 3404, 1996 U.S. Dist. LEXIS 560, at *17 (S.D.N.Y. Jan. 22, 1996) (*unpublished*) (holding no protected liberty interest existed where loss of good-time credit under New York regulations was a recommendation and, therefore, only tentative).

65. Edwards v. Balisok, 520 U.S. 641, 117 S. Ct. 1584 (1997); *see also* Rivera v. Coughlin, No. 92 CIV 3404, 1996 U.S. Dist. LEXIS 560, at *9 (S.D.N.Y. Jan. 22, 1996) (*unpublished*) (finding no protected liberty interest existed where loss of good-time credit under New York regulations was a recommendation and, therefore, only tentative).

66. Edwards v. Balisok, 520 U.S. 641, 647–48, 117 S. Ct. 1584, 1588–89, 137 L. Ed. 2d 906, 914–915 (1997); Interview with Kenneth Stephens, Esq., The Legal Aid Society, Prisoners' Rights Project, in N.Y., N.Y. (Oct. 22, 1999).

67. *See* Jackson v. Johnson, 15 F. Supp. 2d 341, 360 (S.D.N.Y. 1998) (holding that where prisoner had not lost good-time credits and was not otherwise challenging the fact or duration of his confinement, he could use a § 1983 suit rather than habeas corpus to make a due process challenge to a disciplinary hearing); *see also* Brown v. Plaut, 131 F.3d 163, 166 (D.C. Cir. 1997) (finding that a former prisoner who brought a § 1983 action seeking damages for being placed in administrative segregation without due process was not required to raise the claim via writ of habeas corpus).

68. *See* Stone-Bey v. Barnes, 120 F.3d 718, 722 (7th Cir. 1997) (holding that prisoner's § 1983 claim that disciplinary segregation violated due process was barred because disciplinary judgment had not been overturned and claim would necessarily imply its invalidity).

69. *See* Young v. Harper, 520 U.S. 143, 152-53, 137 L. Ed. 2d 270, 117 S. Ct. 1148 (1997) (finding that the Oklahoma "pre-parole conditional supervision program" was sufficiently like parole to invoke the procedural protections outlined in Morrissey v. Brewer, 408 U.S. 471, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972)); *see also* White v. Steuben County, 2011 U.S. Dist. LEXIS 110404, 23, 2011 WL 4496504 (N.D. Ind. Sept. 27, 2011) (*unpublished*) (stating that "the Supreme Court has found protected liberty interests inherent in the Due Process Clause after an inmate is released from institutional confinement").

70. Callender v. Sioux City Residential Treatment Facility, 88 F.3d 666, 668 (8th Cir. 1996) (stating that the Due Process Clause gives rise to a liberty interest when the prisoner is given substantial freedom and that the trigger is if the prisoner has been "release[d] from incarceration").

71. *See* Callender v. Sioux City Residential Treatment Facility, 88 F.3d 666, 668 (8th Cir. 1996) (finding the work

The deciding factor for whether you have been "release[d] from institutional life altogether" is where you live.[72] In Edwards v. Lockhart, the court found that a work release program participant had a protected liberty interest because she no longer lived in an institution.[73] In Roucchio v. Coughlin, however, the court found no inherent liberty interest in continued placement in a work release program. In that case, the participant was on "5" and "2" status (spent five nights a week at home and two at the institution).[74] The court found that "although the [prisoner] 'did enjoy some conditional liberty while participating in the work release program, he had not been released from institutional life altogether.'"[75] Courts also consider any other restrictions that the program puts on your life.[76]

You don't have a state-created right to be placed in a work release program.[77] However, you might have a state-created interest once you are placed in a work release program.[78] In some states, removal from a work release program is considered an "atypical and significant hardship" under the *Sandin* analysis.[79] New York is one state that creates this liberty interest.[80] In New York, this process must be followed before you can be removed from temporary work release:[81]

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release program in question "did not provide the sort of substantial freedom that gives rise to a liberty interest" because it "was more analogous to institutional life than it was to probation or parole").

72. Weller v. Lawson, 75 F. Supp. 2d 927, 934, 1999 U.S. Dist. LEXIS 18385 (N.D. Ind. 1999) (finding that "the dispositive characteristic that marks the point at which the Due Process Clause itself implies a liberty interest . . . is the fact of release from incarceration.").

73. Edwards v. Lockhart, 908 F.2d 299, 302 (8th Cir. 1990); *see also* U.S. v. Stephenson, 928 F.2d 728, 732 (6th Cir. 1991) (finding inherent liberty interest in continued placement in supervised release program allowing convicts to live in society); Young Ah Kim v. Hurston, 182 F.3d 113, 118, 1999 U.S. App. LEXIS 13330 (2d Cir. N.Y. 1999) (finding that the defendant had a liberty interest in continued placement in a work release program, the loss of which "imposed a sufficiently serious hardship to require compliance with at least minimal procedural due process," because the defendant worked, lived at home, and regularly reported to a facility).

74. Roucchio v. Coughlin, 923 F. Supp. 360, 369 (E.D.N.Y. 1996), 1996 U.S. Dist. LEXIS 5656 (E.D.N.Y. 1996) (acknowledging that the defendant held a full-time job, lived at home with his mother, and reported twice a week to the institution to sleep over and meet with his counselor).

75. Roucchio v. Coughlin, 923 F. Supp. 360, 369 (E.D.N.Y. 1996), 1996 U.S. Dist. LEXIS 5656 (E.D.N.Y. 1996) (quoting Whitehorn v. Harrelson, 758 F.2d 1416, 1421 (11th Cir. 1985)).

76. White v. Steuben County, 2011 U.S. Dist. LEXIS 110404, 25, 2011 WL 4496504 (N.D. Ind. Sept. 27, 2011) (*unpublished*).

77. *See* Roucchio v. Coughlin, 923 F. Supp. 360, 371 n.3 (E.D.N.Y. 1996), 1996 U.S. Dist. LEXIS 5656 (E.D.N.Y. 1996) (stating that "a New York prisoner has no state-created liberty interest in the initial determination" about participation in a work release program in a case about revocation of work release privileges); *see also* Greenholtz v. Prisoners of Nebraska Penal and Correctional Complex, 442 U.S. 1, 9, 99 S. Ct. 2100, 2105, 60 L. Ed. 2d 668, 676 (1979) ("There is a crucial distinction between being deprived of a liberty one has ... and being denied a conditional liberty that one desires."); Lee v. Governor of the State of N.Y., 87 F.3d 55, 58 (2d Cir. 1996) (holding that since prisoners had not previously participated in work release program, new rules rendering him ineligible for such programs did not impose an "atypical and significant hardship, and therefore did not give rise to a liberty interest); Whitehorn v. Harrelson, 758 F.2d 1416, 1422 (11th Cir. 1985) (determination of initial placement in work release program, and removal of prisoner from such program, present different inquiries).

78 *See* Roucchio v. Coughlin, 923 F. Supp. 360, 368-374 (finding that there was no liberty interest under the due process clause, but that there was a state-created liberty interest in work release program); *see also* Sandin v. Conner, 515 U.S. 472, 115 S. Ct. 2293, 2301, 132 L. Ed. 2d 418 (1995) (finding that the focus should be on the nature of the deprivation and whether the disciplinary action is the "type of atypical, significant deprivation in which a State might conceivably create a liberty interest"); Hamilton v. Peters, 919 F. Supp. 1168, 1171, 1996 U.S. Dist. LEXIS 3307 (N.D. Ill. 1996) (stating that under *Sandin*, courts should look to the nature of the deprivation suffered by a prisoner, not to the language of prison regulations, to determine if a liberty interest exists).

79. *See* Roucchio v. Coughlin, 923 F. Supp. 360, 374–75 (E.D.N.Y. 1996), 1996 U.S. Dist. LEXIS 5656 (E.D.N.Y. 1996) (where prisoner removed from work release program after 15 months, the "revocation of [his] conditional freedom" gave rise to a liberty interest, even though there was no liberty interest that was created by the Constitution itself). *But see* Dominique v. Weld, 73 F.3d 1156, 1160 (1st Cir. 1996) (finding no liberty interest implicated when prisoner was removed from work release program in which he participated for almost four years; although "return from the quasi-freedom of work release to the regimentation of life within four walls" may have been a significant deprivation, it was not atypical, because his confinement was an "ordinary incident of prison life"); Asquith v. Volunteers of Am., 1 F. Supp. 2d 405, 415, 1998 U.S. Dist. LEXIS 3795 (D.N.J. 1998) (finding that there was no state created liberty interest in a work release program under *Sandin,* because removal is not an atypical hardship, and because the New Jersey law isn't written in a way that gives a prisoner the right not to be removed); Hamilton v. Peters, 919 F. Supp. 1168, 1172 (N.D. Ill. 1996) (finding no liberty interest under *Sandin* when prisoner was removed from work release in a disciplinary transfer).

80. Quartararo v. Catterson, 917 F. Supp. 919, 940 (E.D.N.Y. 1996), 1996 U.S. Dist. LEXIS 838 (E.D.N.Y. 1996)

(1) Written notice of the alleged violation of the program's rules or conditions;
(2) A statement of the actual reason for consideration of your removal from work release;
(3) A report or summary of the evidence against you;
(4) An opportunity to be heard and to present evidence;
(5) Advance notice of a temporary release committee hearing;
(6) The right to confront and cross-examine witnesses testifying against you;
(7) A TRC (temporary release committee) composed of neutral decision makers; and
(8) A post-hearing written account of the actual reason for removal and a summary of the evidence supporting that reason.[82]
(9) Additionally, removal from a temporary work release program does not meet due process requirements "unless the findings of the [temporary release committee] are supported by some evidence in the record."[83]

5. Parole

You do not have a liberty interest in obtaining parole.[84] But once you obtain parole, you do have certain rights if your parole is being revoked. In *Morrisey*, the Supreme Court outlined the procedural rights that you have before your parole can be revoked.[85] When you are first arrested or charged with a violation, you have a right to a preliminary hearing. The purpose of the hearing is to make sure there are facts that support the alleged violation. This hearing should be conducted near where you were arrested or where the violation took place, and as soon afterwards as possible. The hearing should be done by someone who is not directly involved in your case. You should receive notification of the preliminary hearing before it takes place, including information about why the hearing is happening and the allegations against you.[86] You can present information and question anyone testifying against you at the hearing. After the preliminary hearing, there will be a parole revocation hearing. You have the right to:

(1) a parole hearing reasonably soon after your arrest;
(2) written notice of the claims against you;
(3) information about the evidence against you;

(affirming the "continued vitality of *Tracy* [*v. Salamack*] in light of *Sandin*; Friedl v. City of New York, 210 F.3d 79, 84, 2000 U.S. App. LEXIS 6257, 46 Fed. R. Serv. 3d (Callaghan) 146 (2d Cir. N.Y. 2000) (stating that prisoners on work release have a liberty interest in continued participation in such programs, that under Sandin, the Due Process Clause protects inmates against "atypical and significant" deprivation of liberty, and that therefore prisoners are entitled to procedural due process before they are removed from work release); Tracy v. Salamack, 572 F.2d 393, 396 (2d Cir. 1978), 1978 U.S. App. LEXIS 12277 (2d Cir. N.Y. 1978) (holding that in the State of New York, a prisoner can't be removed from a work release program without an individualized due process hearing). In Anderson v. Recore, 317 F.3d 194 (2d Cir. 2003), the Second Circuit concluded that the Supreme Court in *Sandin*, by affirming the validity of Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972) and Meachum v. Fano, 427 U.S. 215, 96 S. Ct. 2532, 49 L. Ed. 2d 451 (1976), implicitly affirmed Tracy v. Salamack, 572 F.2d 393, because *Tracy* explicitly rests upon *Morrissey* and *Meachum*. *But see* Duffy v. Selsky, No. 95 CIV 0474, 1996 WL 407225, at *11 (S.D.N.Y. Jul. 18, 1996) (*unpublished*) (holding no liberty interest in admission to the Temporary Release Program).

81. *See* Anderson v. Recore, 446 F.3d 324, 329, 2006 U.S. App. LEXIS 11358 (2d Cir. N.Y. 2006) (stating that "an inmate's significant liberty interest in continuing in a temporary release program requires a pre-deprivation hearing that includes protections similar to those set forth in Morrissey.")

82. Tracy v. Salamack, 572 F.2d 393, 396 (2d Cir. 1978) (defining the circumstances under which removal would be proper after a due process hearing).

83. Friedl v. City of N.Y., 210 F.3d 79, 85, 2000 U.S. App. LEXIS 6257, 46 Fed. R. Serv. 3d (Callaghan) 146 (2d Cir. N.Y. 2000) (quoting Superintendent, Mass. Corr. Inst. v. Hill, 472 U.S. 445, 454, 105 S. Ct. 2768, 2773, 86 L. Ed. 2d 356, 364 (1985)).

84. *See* Bd. of Pardons v. Allen, 482 U.S. 369, 373, 107 S. Ct. 2415, 2418, 96 L. Ed. 2d 303, 309–10 (1987) (citing Greenholtz v. Prisoners of Neb. Penal and Corr. Complex, 442 U.S. 1, 11, 99 S. Ct. 2100, 2106, 60 L. Ed. 2d 668, 677–78 (1979)) (stating that "the presence of a parole system by itself does not give rise to a constitutionally protected liberty interest in parole release"); *see also* Bowser v. Vose, 968 F.2d 105, 106 (1st Cir. 1992) (holding that there is no liberty interest in continuing to participate in furlough); Brown v. United States Parole Comm'n, 2003 U.S. Dist. LEXIS 1214, 12, 2003 WL 194206 (S.D.N.Y. Jan. 27, 2003) (stating that a state has no duty to create a parole system).

85. *See* Morrissey v. Brewer, 408 U.S. 471, 485–88, 92 S. Ct. 2593, 2602–04, 33 L. Ed. 2d 484, 496–98 (1972) (holding that minimum due process requirements for parole revocation include preliminary hearing to determine probable cause "as promptly as convenient after arrest," as well as revocation hearing).

86. *See* Morrissey v. Brewer, 408 U.S. 471, 478-86, 92 S. Ct. 2593, 2599-603, 33 L. Ed. 2d 484 (1972) (laying out the minimum due process requirements before parole can be revoked).

(4) speak at your hearing and present witnesses and evidence;

(5) question witnesses testifying against you (unless the hearing officer specifically finds that there is good cause (a good reason) for not allowing this);

(6) a 'neutral and detached' hearing body, such as a traditional parole board; and

(7) a written statement by the fact finders explaining the evidence against you and the reasons for revoking parole.[87]

Even though the Constitution doesn't give you a liberty interest in obtaining parole, you may have a state-created interest. If a state statute creates an "expectation of parole", then it also creates a liberty interest in getting parole.[88] This varies from state to state and depends on the language in the statute.[89] If a parole law uses "mandatory language," then it might create a liberty interest. For example, if the statute says that the parole board "shall" release a prisoner on parole "unless" certain conditions aren't met, an expectation of parole is created by the statute, and you have a liberty interest.[90]

Generally, confinement in either administrative or disciplinary segregation that may also affect your parole opportunities does not give rise to a protected liberty interest under *Sandin*.[91] Therefore, even if your release date has been postponed because you have spent time in segregation, you still do not have a liberty interest at stake when you are initially charged with a violation.

D. Prisoners' Basic Rights in Disciplinary Procedures

In Wolff v. McDonnell,[92] the Supreme Court described how prison disciplinary procedures should be conducted in order to comply with constitutional due process requirements. If you have been placed in administrative segregation, this Part doesn't apply to you. Go to Part F of this chapter to learn more about your rights. This Part applies if you have been deprived of a recognized liberty interest, such as a loss of good-time credits or something else very severe. This Part explains the *Wolff* due process rights you can use

87. Morrissey v. Brewer, 408 U.S. 471, 488–89, 92 S. Ct. 2593, 2604, 33 L. Ed. 2d 484 (1972).

88. *See* Bd. of Pardons v. Allen, 482 U.S. 369, 376–78, 107 S. Ct. 2415, 2420–21, 96 L. Ed. 2d 303, 311–13 (1987) (finding the Montana statute, which includes mandatory language, "creates a liberty interest in parole release"). This remains true even under *Sandin*. *See* Wilson v. Kelkhoff, 86 F.3d 1438, 1446 n.9 (7th Cir. 1996) ("It appears that the Court [in *Sandin*] intended to leave undisturbed the cases holding that a protectable liberty interest exists in parole statutes that create an 'expectancy of release.'"); Ellis v. Dist. of Columbia, 84 F.3d 1413, 1417–18, 318 U.S. App. D.C. 39 (D.C. Cir. 1996) (noting that *Sandin* did not overrule Greenholtz v. Prisoners of Neb. Penal and Correctional Complex or Board of Pardons v. Allen, and holding that liberty interest in parole stems from state parole statutes).

89. *See, e.g.*, Watson v. DiSabato, 933 F. Supp. 390, 394 (D.N.J. 1996) (New Jersey parole statute creates a sufficient expectation of parole eligibility to give rise to a liberty interest); Allison v. Kyle, 66 F.3d 71, 73–74 (5th Cir. 1995) (noting that there is no state-created liberty interest in parole procedures in Texas); Harper v. Young, 64 F.3d 563, 564–65 (10th Cir. 1995), *aff'd*, 520 U.S. 143, 117 S. Ct. 1148, 137 L. Ed. 2d 270 (1997) (declining to address whether a state-created liberty interest remained in Oklahoma parole revocation proceedings after *Sandin*, but holding that "program participation is sufficiently similar to parole or probation to merit protection by the Due Process Clause itself"); Clarkson v. Coughlin, 898 F. Supp. 1019, 1040 (S.D.N.Y. 1995) (holding that the state-created a limited protected liberty interest in New York parole proceedings extends as far as prisoner's right to be heard and right to know reasons for parole denial); Wilson v. Kelkhoff, 86 F.3d 1438, 1446 (7th Cir. 1996) (holding that the Illinois parole statute provides "for protectable liberty interest in release" for most prisoners).

90. *See* Board of Pardons v. Allen, 482 U.S. 369, 377-378, 107 S. Ct. 2415, 96 L. Ed. 2d 303 (1987) (finding that "the Montana statute ... uses mandatory language ("shall") to creat[e] a presumption that parole release will be granted when the designated findings are made"); Wilson v. Kelkhoff, 86 F.3d 1438, 1447 n.9, 1996 U.S. App. LEXIS 14826, 35 Fed. R. Serv. 3d (Callaghan) 1062 (7th Cir. Ill. 1996) ("It appears that the Court intended to leave undisturbed the cases holding that a protectable liberty interest exists in parole statutes that create an 'expectancy of relief'."); Watson v. DiSabato, 933 F. Supp. 390, 392–93 (D.N.J. 1996) (holding that mandatory language created "expectancy of release," and that *Greenholtz* and *Allen* remain good law after *Sandin* on the subject of a liberty interest in parole); *see* Clarkson v. Coughlin, 898 F. Supp. 1019, 1040 (S.D.N.Y. 1995) ("Mandatory language in a state parole statute may create such an interest" in parole board proceedings).

91. *See* Meachum v. Fano, 427 U.S. 215, 229 n.8, 96 S. Ct. 2532, 2540 n.8, 49 L. Ed. 2d 451, 462 n.8 (1976) (noting that a possible effect on parole decision does not create a liberty interest); Haff v. Cooke, 923 F. Supp. 1104, 1119 (E.D. Wis. 1996) (citing Sandin v. Conner, 515 U.S. 472, 487, 115 S. Ct. 2293, 2302, 132 L. Ed. 2d 418, 431–32 (1995)) (noting that a disciplinary violation that may "later affect a parole decision does not implicate a liberty interest because prisoner's disciplinary record is only one of many criteria used to determine parole").

92. *See* Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).

to defend yourself at your disciplinary proceeding or to challenge your punishment on appeal in court.[93] First, you need to establish that a disciplinary action was an atypical and significant hardship affecting a protected liberty interest. In other words, the court needs to find that you have due process rights. Then, the court asks "whether the deprivation of that liberty interest occurred without due process of law,"[94] or whether the required processes were followed. If your punishment isn't severe enough to give you a due process right, you may have other options. Your prison regulations may state that certain disciplinary procedures must be followed. Prison officials must follow their own rules.[95] So, even if you can't fight the outcome in federal court, you may still be able to file an administrative appeal within the prison system. Therefore, while you might not be able to appeal the outcome in federal court, you may still be able to file an administrative appeal within the prison system. Either way, you will have a better chance at success if you know what procedures the officials in your prison must follow. That way, you can take advantage of the procedures at your disciplinary hearing.

1. The Prison Must Publish Rules Governing Your Conduct

You have a basic right not to be punished for an act that your prison rules do not prohibit (unless you break the law). For example, in Richardson v. Coughlin,[96] prison officials disciplined a prisoner for circulating a petition without permission. The prisoner won the case because the prison rules didn't require prisoners to get permission before handing out petitions.[97] Therefore, it was unfair to punish the prisoner for an activity that he reasonably believed the prison allowed. The Supreme Court described this principle of fairness in Grayned v. City of Rockford,[98] stating that "because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."[99] In other words, you need to be given a fair chance to follow the rules.

You also have a right not to be punished based on a vague (unclear) regulation. For example, a federal court in Ohio struck down as unconstitutionally vague a regulation that prohibited "objectionable" conduct between a prisoner and his or her visitor.[100] The word "objectionable" was considered vague because it can mean different things to different people. To meet the standard of due process, the regulation has to spell out exactly what type of conduct qualifies as "objectionable." A regulation can also be found vague as applied to

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93. Wolff v. McDonnell, 418 U.S. 539, 557, 94 S. Ct. 2963, 2975, 41 L. Ed. 2d 935. 951 (1974) (finding that once the State created the right to good-time credits and recognized that taking away good time credits can only be done based on major misconduct, the prisoner's interest in good-time credits "has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated").

94. Sealey v. Giltner, 116 F.3d 47, 51–52 (2d Cir. 1997) (quoting Bedoya v. Coughlin, 91 F.3d 349, 351–52 (2d Cir. 1996)) (finding that plaintiff must be given opportunity to develop facts relevant to establishing a liberty interest because the plaintiff had no notice that the lower court intended to consider dismissal of his complaint based on the absence of a liberty interest).

95. *See* Uzzell v. Scully, 893 F. Supp. 259, 263 n.10 (S.D.N.Y. 1995) (finding that though a prisoner's treatment did not amount to a deprivation of his right to due process, the prisoner remained free to raise a claim of procedural error on the ground that the State failed to adhere to its own rule requiring a prisoner to be given 24-hour notice of charges filed against him that resulted in his administrative segregation).

96. Richardson v. Coughlin, 763 F. Supp. 1228, 1991 U.S. Dist. LEXIS 5287 (S.D.N.Y. 1991) (holding that anti-noise ordinance was not unconstitutionally vague).

97. Richardson v. Coughlin, 763 F. Supp. 1228, 1235, 1991 U.S. Dist. LEXIS 5287, at **15 (S.D.N.Y. 1991).

98. Grayned v. City of Rockford, 408 U.S. 104, 121, 92 S. Ct. 2294, 2306, 33 L. Ed. 2d 222, 235 (1972) (holding that anti-noise ordinance was not unconstitutionally vague or overbroad).

99. Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S. Ct. 2294, 2298–99, 33 L. Ed. 2d 222, 227 (1972) (concluding that an anti-noise ordinance was not impermissibly vague because it was written specifically for its context, enabling the impact of prohibited disturbances to be easily measured, but an anti-picketing ordinance was found unconstitutional on equal protection grounds).

100. *See* Taylor v. Perini, 413 F. Supp. 189, 233–34 (N.D. Ohio 1976); *see also* Jenkins v. Werger, 564 F. Supp. 806, 807 (D. Wyo. 1983) (invalidating rule against "unruly or disorderly" conduct for vagueness); Laaman v. Helgemoe, 437 F. Supp. 269, 321–22 (D.N.H. 1977) (invalidating prison rule forbidding "poor conduct" for vagueness, because it didn't apprise prisoners of what conduct was prohibited). *But see* El-Amin v. Tirey, 817 F. Supp. 694, 701 (W.D. Tenn. 1993) (holding that while due process requires certain minimum standards of specificity in prison regulations, it does not require the same degree of specificity that is required in criminal laws or in statutes that apply outside of prison), *aff'd*, 35 F.3d 565 (6th Cir. 1994).

your particular case. In Rios v. Lane,[101] the court found a regulation that prohibited "engaging or pressuring others to engage in gang activities" unconstitutionally vague when it was applied to a prisoner who allegedly shared information about Spanish-language political radio stations. In other words, a regulation that is not vague when you read it may be considered vague in your particular situation if it is used to punish you for an activity that is typically considered lawful.

No matter what, you are presumed (assumed) to have knowledge of the penal law (criminal statutes). Therefore, you cannot claim that your rights have been violated if you aren't given copies of your state's penal law.[102] As one court put it, "the law presumes that everyone knows the law, and ignorance of the law is not an excuse for its violation."[103] You are also presumed to have knowledge of statewide rules of misbehavior if you have previously served time in another prison in New York and were provided with a copy of the statewide rules at that time.[104]

Unlike the penal law, you must be given an opportunity to learn your prison's rules. Although you cannot be punished for violating a prison regulation that is temporarily posted on a bulletin board,[105] you can be punished if the regulation is posted permanently.[106] New York law requires that you be given a personal copy of the prison rules.[107] Some prisons also require you to affirm in writing that you received the prison disciplinary handbook.[108] All regulations must be printed in both English and Spanish,[109] and the possible punishments for each type of violation must be clearly noted.[110]

If you do not have a copy of your prison's regulations, ask prison officials to give you one. If you do not understand English, or if you read Spanish better than English, ask for a copy of the regulations in Spanish.[111] If you are brought before a prison disciplinary board, remember that you usually cannot be punished for violating a rule that is not published in the prison regulations. You also can't be punished if you have not been given a copy of the regulations.

2. Written Notice Requirement

Under Wolff v. McDonnell,[112] you have the right to receive notice of (know about) the charges against you at least twenty-four hours before your disciplinary hearing is scheduled to begin. An oral (spoken) explanation of the charges is not enough. The charges must be in writing, and they must be clear enough to allow you to prepare your defense.[113] At least one court has found that a prisoner was denied due process

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101. Rios v. Lane, 812 F.2d 1032, 1037 (7th Cir. 1987). *See also* Adams v. Gunnell, 729 F.2d 362, 364 (5th Cir. 1984) (finding a regulation that prohibited "conduct which disrupts the orderly running of the institution" was unconstitutionally vague when used to punish a prisoner for writing and circulating a petition).

102. *See* McRae v. State, 157 S.E.2d 646, 648, 116 Ga. App. 407, 410 (Ga. Ct. App. 1967) (holding that prison is not required to inform every prisoner of consequences of escape or attempt to escape and failure to so inform prisoner did not render sentence for escape void).

103. McRae v. State, 157 S.E.2d 646, 648, 116 Ga. App. 407, 409 (Ga. Ct. App. 1967).

104. *See* Johnson v. Coughlin, 205 A.D.2d 537, 539, 613 N.Y.S.2d 192, 193 (2d Dept. 1994) (holding that prisoner's due process rights were not violated by officials' failure to provide him with a prisoner rule book in a timely manner where prisoner had previously been incarcerated and received various manuals governing prisoner conduct at another facility).

105. *See* Taylor v. Perini, 413 F. Supp. 189, 235 (N.D. Ohio 1976) (finding that a prisoner manual did not adequately inform prisoners of prohibited conduct since the posting of regulations on a bulletin board does not constitute fair notice given their transitory effects).

106. *See* Forbes v. Trigg, 976 F.2d 308, 314–15 (7th Cir. 1992) (finding that a prisoner had fair notice of a prison rule requiring urine tests since the posting of the rule was not temporary or transitory).

107. N.Y. Correct. Law § 138(2) (McKinney 2011).

108. N.Y. Comp. Codes R. & Regs. tit. 9, § 7002.9(d) (2012).

109. N.Y. Correct. Law § 138(1) (McKinney 2011); *see also* Burgos v. Kuhlmann, 137 Misc. 2d 1039, 1040, 523 N.Y.S.2d 367, 368 (Sup. Ct. Sullivan County 1987) (holding that disciplinary charges must be dismissed and the prisoner's record cleared on the ground that the Spanish-speaking prisoner did not have meaningful notice of prison rules where he was only provided with the English version of the rules).

110. N.Y. Correct. Law § 138(3) (McKinney 2011).

111. If you are incarcerated outside New York, the prison may not be required to provide you with a copy of the prison regulations. Copies may also be available in Spanish. Research the rules and regulations of your state to see if this is the case where you are incarcerated. See Chapter 2 of the *JLM* for information on conducting legal research.

112. Wolff v. McDonnell, 418 U.S. 539, 564, 94 S. Ct. 2963, 2979, 41 L. Ed. 2d 935, 956 (1974).

113. *See* Spellmon-Bey v. Lynaugh, 778 F. Supp. 338, 344 (E.D. Tex. 1991) (holding that prison disciplinary board could not, consistent with due process, rely solely on testimony of the charging officer regarding hearsay statements of

because although he was given notice twenty-four hours in advance, he was only allowed to review the actual written charges five hours in advance of his hearing.[114] With only five hours to study the twelve charges against him, the prisoner had to rely largely on his memory to gather evidence and prepare his defense. This put him at a big disadvantage.[115] The purpose of the twenty-four hour notice requirement is to give you a fair chance to prepare your defense by informing you of the specific nature of the charges.[116]

New York law gives you even more rights than you have under *Wolff*. In New York, you also have the right to receive written notice of the charges at least twenty-four hours before the hearing.[117] Unlike Wolff v. McDonnell, which did not require the notice to have any particular content,[118] New York requires the notice to contain the date, time, place, and nature of the allegation (including information about what you did and what rule you violated). If more than one inmate was involved in the incident, the specific role played by each inmate must be included.[119] If you do not speak English, you have the right to translations of the notice of the charges and statements of evidence.[120] You are also entitled to have a translator present at your disciplinary hearing.[121] If you are deaf or hard of hearing, you have similar rights.[122]

Prison staff should bring you a copy of the written charges or "ticket." Since you may not know exactly when the proceedings will be held, you should start preparing your defense right away. This process is outlined below.

3. "Substitute Counsel" (Employee Assistant)

In Baxter v. Palmigiano,[123] the Supreme Court held that prisoners do not have a right to counsel at disciplinary proceedings. The *Wolff* Court did, however, recognize two circumstances in which you are

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unidentified informer to support revocation of prisoner's good-time credit).

114. *See* Benitez v. Wolff, 985 F.2d 662, 665 (2d Cir. 1993) ("Although *Wolff v. McDonnell* did not state expressly that the inmate must be allowed to retain for 24 hours the written notice given him, we think this requirement is fairly inferred from the requirements that there be advance notice, that it be in writing, and that it be given to the inmate at least 24 hours in advance.").

115. Benitez v. Wolff, 985 F.2d 662, 665 (2d Cir. 1993).

116. *See* Wolff v. McDonnell, 418 U.S. 539, 564, 94 S. Ct. 2963, 2978, 41 L. Ed. 2d 955, 955 (1974) ("Part of the function of notice is to give the charged party a chance to marshal the facts in his defense and to clarify what the charges are, in fact."); *see also* McKinnon v. Patterson, 568 F.2d 930, 940 (2d Cir. 1977), *cert. denied,* 434 U.S. 1087, 98 S.Ct. 1282, 55 L.Ed.2d 792 (1978) (listing "inform[ing] the inmate of what he allegedly has done so that he can prepare a defense, if he chooses, to the specific charges set forth, based on whatever evidence he can muster, given the limited time available and the lack of an opportunity to interview or call witnesses" among the purposes of the notice requirement); Hameed v. Mann, 849 F. Supp. 169, 172 (N.D.N.Y. 1994) (holding that notice received by prisoner prior to disciplinary hearing was sufficient, but acknowledging that "a notice lacking the required specifics which fail to apprise the accused party of the charges brought against him must be found to be unconstitutional because then, the accused party cannot adequately prepare a defense").

117. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.6(a) (2012).

118. Wolff v. McDonnell, 418 U.S. 539, 563–65, 94 S. Ct. 2963, 2978–79, 41 L. Ed. 2d 955, 956 (1974) (holding advance written notice "of the charges against him" is required by due process but not providing details for the content of the notice). Some federal courts have created certain minimum standards. For example, in Spellmon-Bey v. Lynaugh, the court held that notice must contain at least a description of the specific acts upon which the charges are based, as well as the times that these acts allegedly occurred, unless it is an exceptional situation where the threat to prison security interests outweighs the prisoner's interests. Spellmon-Bey v. Lynaugh, 778 F. Supp. 338, 342–43 (E.D. Tex. 1991).

119. N.Y. Comp. Codes R. & Regs. tit. 7, § 251–3.1(c)(2012). *See also* Howard v. Coughlin, 190 A.D.2d 1090, 1090, 593 N.Y.S.2d 707, 708–09 (4th Dept. 1993) (finding notice insufficient when it provided the wrong date for when the alleged misconduct occurred); McCleary v. LeFevre, 98 A.D.2d 866, 868, 470 N.Y.S.2d 841, 843–44 (3d Dept. 1983) (finding notice was insufficient when it failed to inform prisoners of facts upon which charges were based). *But see* Vogelsang v. Coombe, 105 A.D.2d 913, 914, 482 N.Y.S.2d 348, 350 (3d Dept. 1984), *aff'd*, 66 N.Y.2d 835, 489 N.E.2d 251 (1985) (referring to the disciplinary problem in question as the "incident" was sufficient notice where notice contained references to a "readily identifiable" event: a four-day riot, rule violations, and prisoner's offensive conduct).

120. N.Y. Comp. Codes R. & Regs. tit. 7, § 254.2 (2012); *see also* Reyes v. Henderson, 121 Misc. 2d 970, 971–72, 469 N.Y.S.2d 520, 521 (Sup. Ct. Albany County 1983) (holding that a Spanish-speaking prisoner was denied procedural due process where he was given notice of the charges against him in English only).

121. N.Y. Comp. Codes R. & Regs. tit. 7, § 254.2 (2012).

122. N.Y. Comp. Codes R. & Regs. tit. 7, § 254.2 (2012).

123. *See* Baxter v. Palmigiano, 425 U.S. 308, 315, 96 S. Ct. 1551, 1556–67, 47 L. Ed. 2d 810, 819–20 (1976) ("We see no reason to alter our conclusion so recently made in Wolff that inmates do not have a right to either retained or appointed counsel in disciplinary hearings.") (internal citations omitted).

entitled to a "counsel-substitute" (a phrase referring either to a prison employee or a fellow prisoner who assists you in the preparation of your case). First, if you are illiterate.[124] Second, if your case is really complicated.[125] The Court did not define "complexity." Therefore, it is unclear how complex the facts involved must be before you can demand help from an employee assistant. If you face some clear personal barrier to preparing your defense (for example: illiteracy, language, mental illness, or restrictive confinement), you should tell prison officials about it. These barriers will make your claim for assistance stronger.

The New York law is broader than the *Wolff* standard. New York regulations guarantee an employee assistant for certain prisoners, including:

(1) Non-English speaking prisoners;
(2) Illiterate prisoners;
(3) Prisoners who are deaf or hard-of-hearing (who may be provided with sign language interpreters);
(4) Prisoners who are charged with drug use as a result of urinalysis tests; and
(5) Prisoners confined to a special housing unit (SHU) while waiting for a superintendent's hearing.[126]

In the case of non-English speaking prisoners, a court held that a prisoner who spoke only Spanish had the right to meet with a Spanish-speaking assistant at least twenty-four hours before his disciplinary hearing.[127] In the case of segregated prisoners, a court ruled that a prisoner who cannot adequately prepare his defense because of his segregation or transfer has a due process right to assistance.[128] In these situations, correction officers must perform the investigatory tasks that the prisoner would perform for himself were he able.[129] However, note that assistants are only required to answer questions you specifically ask, and to perform tasks you specifically request.[130] Finally, if you are entitled to an assistant, New York law requires your hearing take place no less than twenty-four hours after your initial meeting with that assistant.[131]

When you receive notice of the charges against you, you will be given a list of employees who serve as employee assistants.[132] You are entitled (have the right) to choose an employee assistant from the list, but you might not get your first choice. If you are given someone whom you do not want as an employee assistant, tell that person that you object to the assignment.[133] If you are still not happy with your employee assistant at your hearing, tell the hearing officer that you object. It is important to realize that if you do not pick an employee assistant from the available list, you may waive the right to any assistance (meaning you would be considered to have given up your right to assistance).[134]

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124. Wolff v. McDonnell, 418 U.S. 539, 570, 94 S. Ct. 2963, 2982, 41 L. Ed. 2d 935, 959 (1974).

125. Wolff v. McDonnell, 418 U.S. 539, 570, 94 S. Ct. 2963, 2982, 41 L. Ed. 2d 935, 959 (1974) (stating that all prisoners should be provided with assistance when "the complexity of the issue makes it unlikely that the [prisoner] will be able to collect and present the evidence necessary for an adequate comprehension of the case").

126. N.Y. Comp. Codes R. & Regs. tit. 7, § 251–4.1(a) (2012).

127. Rivera v. Smith, 110 A.D.2d 1043, 1043–44, 489 N.Y.S.2d 131, 131 (4th Dept. 1985). *But see* Valles v. Smith, 116 A.D.2d 1002, 1002, 498 N.Y.S.2d 623, 624 (4th Dept. 1986), *rev'd sub nom.* Davidson v. Smith, 69 N.Y.2d 677, 504 N.E.2d 380, 512 N.Y.S.2d 13 (N.Y. Dec 18, 1986) (finding a Spanish-speaking prisoner was not entitled to have employee assistant translate for him at disciplinary proceeding just as English speakers are not entitled to the employee assistant's presence at the proceeding; translation assistance from Spanish-speaking prisoner was enough).

128. *See* Eng v. Coughlin, 858 F.2d 889, 898 (2d Cir. 1988) ("[A]n assigned assistant who does nothing to assist a disabled prisoner—one who is segregated from the general prison population—has failed to accord the prisoner his limited constitutional due process right of assistance.").

129. *See* Eng v. Coughlin, 858 F.2d 889, 898 (2d Cir. 1988) (describing the role of the employee assistant as corresponding to "those actions that an inmate facing disciplinary charges can undertake himself" when not separated from others).

130. *See* Serrano v. Coughlin, 152 A.D.2d 790, 792–93, 543 N.Y.S.2d 571, 573 (3d Dept. 1989) (holding that prisoner was not denied meaningful employee assistance because he did not specify the documents he wanted produced).

131. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.6(a) (2012).

132. N.Y. Comp. Codes R. & Regs. tit. 7, § 251-4.1(a) (2012); *see also* Jones v. Coughlin, 112 Misc. 2d 232, 234, 446 N.Y.S.2d 849, 850–51 (Sup. Ct. Albany County 1982) (finding that prisoner's due process rights were violated when prison designated employee assistant other than one prisoner had selected, despite prisoner's oral and written objections).

133. You may also write to the superintendent and request your original choice.

134. *See* Walker v. Coughlin, 202 A.D.2d 1034, 1034, 609 N.Y.S.2d 471, 471 (4th Dept. 1994) (holding that prisoner waived his right to employee assistant by refusing to sign employee assistant selection form).

The employee assistant should help you prepare for your hearing by explaining the charges to you, interviewing witnesses, and helping you obtain documentary evidence or written statements.[135] However, do not expect the employee assistant to do anything that you do not specifically ask him or her to do.[136] You must ask for assistance. If you fail to make an affirmative request, you waive your right to assistance. For example, in Newman v. Coughlin, the prisoner made a general request for assistance from the law library staff, but did not specifically request that the employee assistant help him prepare his case.[137] As a result, the prisoner was responsible for his own lack of representation.

On the other hand, the assistant does not need to act as your advocate the way a lawyer would, or even be present at your hearing.[138] However, due process does require that your assigned assistant carry out basic, reasonable, and non-disruptive requests.[139] For example, one court held that an employee assistant's refusal to collect necessary and available evidence violated the prisoner's due process rights.[140] Another court held that an employee assistant, who did not report back to the prisoner with the results of his investigation and witness interviews, deprived the prisoner of his right to defend himself.[141]

You may or may not want to give your employee assistant "your side of the story." The advantage is that it might help the employee assistant find good witnesses, as described in the next Section. However, one disadvantage is that if the story you tell your employee assistant is different from the testimony you give at your hearing, it may make you look untruthful and give prison officials an excuse to discredit your testimony.

4. Witnesses

In Wolff v. McDonnell, the Supreme Court recognized your limited constitutional right to call witnesses at disciplinary hearings.[142] In *Wolff*, the Court stated that a prisoner in a disciplinary proceeding "should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals."[143] In other words, you can call witnesses unless prison officials decide that allowing you to do so would negatively impact either the safety of the prison or the prison officials' ability to operate the prison. Furthermore, prison officials are not required to call every witness you request to testify for you. A prison official may exercise his "discretion to keep the hearing within reasonable limits."[144] This has been interpreted to mean that the official may decline

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135. N.Y. Comp. Codes R. & Regs. tit. 7, § 251–4.2 (2012).

136. *See* Horne v. Coughlin, 155 F.3d 26, 29, 31 (2d Cir. 1998), *amended by* 191 F.3d 244 (2d Cir. 1999). In the case, a mentally retarded prisoner was sentenced to six months in the SHU and six months recommended loss of good time. The prisoner argued that his employee assistant should not have merely followed his instructions but should also have developed a defense strategy. The court disagreed, saying that the assistant was not required to do anything besides follow the specific instructions of the inmate, because a counsel substitute acts as a surrogate for the prisoner, not as an attorney.

137. Newman v. Coughlin, 110 A.D.2d 981, 981, 488 N.Y.S.2d 273, 274 (3d Dept. 1985).

138. *See* Gunn v. Ward, 71 A.D. 2d 856, 856, 419 N.Y.S. 2d 182, 183 (2d Dept. 1981), *aff'd*, 52 N.Y.2d 1017, 420 N.E.2d 100 (1981) (holding failure of employee assistant to appear at superintendent's proceeding violates neither New York law nor a prisoner's right to due process).

139. *See* Silva v. Casey, 992 F.2d 20, 22 (2d Cir. 1993) (discussing the duties of employee assistants and holding that (1) prisoner has no constitutional right of assistance per Wolff v. McDonnell so that failure of assistant to call other prisoners involved in alleged violation did not violate prisoner's due process rights, and (2) assistant had no obligation to go beyond bounds of prisoner's specific instructions in interviewing prisoners and gathering evidence). *See also* Tumminia v. Coughlin, 100 A.D.2d 732, 732–33, 473 N.Y.S.2d 618, 619 (4th Dept. 1984) (finding that assistant's failure to investigate prisoner's reasonable factual claim violates due process); Hilton v. Dalsheim, 81 A.D.2d 887, 888, 439 N.Y.S.2d 157, 158 (2d Dept. 1981) (finding that assistant's failure to interview witnesses as requested by prisoner violates the prisoner's rights under New York law).

140. *See* Giano v. Sullivan, 709 F. Supp. 1209, 1215 (S.D.N.Y. 1989) (holding that the prisoner was denied his constitutional right to assistance in a disciplinary hearing when the employee assistant refused to obtain documentary evidence for the prisoner, and then proceeded with the hearing despite the prisoner's protest that he was not prepared).

141. *See* Brooks v. Scully, 132 Misc. 2d 517, 519, 504 N.Y.S.2d 387, 389 (Sup. Ct. Dutchess County 1986) (holding that the failure of the employee assistant to inform the prisoner of investigation results and interviews with witnesses deprived the prisoner of meaningful and effective assistance in preparation for a disciplinary hearing).

142. Wolff v. McDonnell, 418 U.S. 539, 566–67, 94 S. Ct. 2963, 2979–80, 41 L. Ed. 2d 935, 956–57 (1974).

143. Wolff v. McDonnell, 418 U.S. 539, 566, 94 S. Ct. 2963, 2979, 41 L. Ed. 2d 935, 956 (1974).

144. Wolff v. McDonnell, 418 U.S. 539, 566, 94 S. Ct. 2963, 2980, 41 L. Ed. 2d 935, 956–57 (1974).

to call witnesses whose testimony would be immaterial[145] (unimportant) or unduly redundant[146] (unnecessary).

This qualified constitutional right to call witnesses was initially expanded and clarified in Powell v. Ward, also known as *Powell II*.[147] In *Powell II*, the court stated that while prisoners may not be able to call witnesses to testify in the prisoner's presence at a hearing, "witnesses must be allowed to be present at disciplinary proceedings, unless the appropriate officials determine that [their presence] would jeopardize institutional safety or correctional goals."[148] If it is determined that witnesses may not be present at the disciplinary hearing, the witness may be interviewed and tape-recorded out of your presence.[149] The tape or transcript of the interview must be made available to you before or at the hearing, unless the hearing officer decides that this also "would jeopardize institutional safety or correctional goals."[150] In such a case, you must be given an explanation for the denial.[151]

Under New York regulations, the notice that you receive before the hearing must inform you of your right to call witnesses.[152] You may request a witness either by informing your employee assistant or hearing officer before the hearing, or by informing your hearing officer during the hearing.[153] You have a right to request that your employee assistant interview prisoner witnesses.[154] If your employee assistant interviews witnesses outside of your presence, you also have a right to receive a tape or transcript of the interview or an explanation of their denial.[155]

If permission to call a witness is denied in New York, you must receive a written statement from the hearing officer that specifically states the reasons for the denial, including the specific threat to institutional safety or correctional goals presented.[156] Statements that give a conclusion without an explanation, like "[it] does not meet with Security Procedure or Correctional goals for you to be present during those interviews," have been found by courts to be insufficient.[157] Although the explanation that a witness' testimony is "redundant" (meaning it repeats evidence available from other sources) can be a valid reason to deny you a witness, prison officials do not have unlimited discretion to decide when a witness' testimony would be considered redundant.[158] On the other hand, courts do not require these explanations to be detailed. Rather,

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145. *See* Finney v. Coughlin, 2 F. App'x. 186, 191 (2d Cir. 2001) (stating that a prison hearing officer may exercise his "discretion to keep the hearing within reasonable limits" by declining to call immaterial witnesses to testify (quoting Wolff v. McDonnell, 418 U.S. 539, 566, 94 S. Ct. 2963, 2980, 41 L. Ed. 2d 935, 956–57 (1974)).

146. *See* Russell v. Selsky, 35 F.3d 55, 59 (2d Cir. 1994) (finding that disciplinary hearing officer did not violate any of the prisoner's rights in excluding certain witness testimony as "cumulative" [(redundant)], where the officer had already heard substantially identical testimony from earlier witnesses).

147. Powell v. Ward, 487 F. Supp. 917 (S.D.N.Y. 1980), *aff'd*, 643 F.2d 924 (2d Cir. 1981).

148. Powell v. Ward, 487 F. Supp. 917, 929 (S.D.N.Y. 1980).

149. Powell v. Ward, 487 F. Supp. 917, 929 (S.D.N.Y. 1980).

150. Powell v. Ward, 487 F. Supp. 917, 929 (S.D.N.Y. 1980).

151. Powell v. Ward, 487 F. Supp. 917, 929 (S.D.N.Y. 1980)*; but see* Ponte v. Real, 471 U.S. 491, 492, 105 S. Ct. 2192, 2193–94, 85 L. Ed. 2d 553, 556 (1985) (stating that although due process requires that prison officials state their reasons for refusing to call witnesses, such reasons do not have to be in writing or made part of the administrative record).

152. N.Y. Comp. Codes R. & Regs. tit. 7, § 251-3.1(d)(2) (2012).

153. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.5(c) (2012); N.Y. Comp. Codes R. & Regs. tit. 7, § 254.5(c) (2012).

154. *See* Burke v. Coughlin, 97 A.D.2d 862, 863, 469 N.Y.S.2d 240, 242 (3d Dept. 1983) (stating that New York State regulations give prisoners the right to have a chosen employee interview any witnesses requested in investigating the prisoner's reasonable factual claims and submit a written report including witness statements).

155. *See* Burke v. Coughlin, 97 A.D.2d 862, 863, 469 N.Y.S.2d 240, 242 (3d Dept. 1983) (stating that the constitutional right of due process requires a prisoner to either be present when a witness is interviewed, or to be provided a tape or transcript of the interview or an explanation of the denial).

156. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.5(a) (2012), N.Y. Comp. Codes R. & Regs. tit. 7, § 254.5(a) (2012); *see also* Moye v. Selsky, 826 F. Supp. 712, 716–17 (S.D.N.Y. 1993) (explaining that prison officials may have to give prisoners an explanation for exclusion of witnesses from disciplinary hearing).

157. *See* People *ex rel.* Selcov v. Coughlin, 98 A.D.2d 733, 735, 469 N.Y.S.2d 148, 151 (2d Dept. 1983) (internal quotations omitted) (holding that without evidence that prisoner's presence would create any threat to prison security or correctional goals, prisoner's due process rights were violated when hearing officer did not allow prisoner to be present when officer interviewed witnesses).

158. *See* Fox v. Coughlin, 893 F.2d 475, 477–78 (2d Cir. 1990) (holding that officials did not deprive prisoner of clearly established statutory or constitutional rights where they called only some of the witnesses he requested but emphasizing that failing to provide an inmate assistance in interviewing requested witnesses without a valid reason may in the future provide a sufficient basis for a viable § 1983 action); Wong v. Coughlin, 137 A.D.2d 272, 274, 529

the court "must accord due deference to the decision of the [prison] administrator."[159] The court will uphold the prison official's denial even if the witness could have provided testimony that might have cleared the prisoner.[160] When prison officials base their decision to deny witnesses on security concerns, courts will almost always uphold that determination.[161]

5. Confronting and Cross-Examining Witnesses

Even though you generally have the right to call witnesses on your behalf, the Supreme Court in Wolff v. McDonnell held that you do not have a constitutionally guaranteed right to confront and cross-examine the other side's witnesses (in other words, to ask them questions). The Court found that such a right would create "considerable potential for havoc [or problems] inside prison walls."[162] One court interpreting *Wolff* described the security issues posed by confrontation and cross-examination as including the likelihood of retaliation against adverse witnesses and informants (those testifying unfavorably or against you), which can often result in death or injury, in addition to the "potential for breakdown in authority."[163] Due to the prison's strong interest in preserving safety, the right to confront and cross-examine adverse witnesses is much more limited than the right to present witnesses who testify on your behalf. Whether you will be allowed to confront and cross-examine witnesses is left up to the prison officials.[164] Prison officers are not required under the Due Process Clause to provide you with a written report of the reasons for denying you the right to confront your accusers or to cross-examine witnesses.[165]

In New York, courts have held that prisoners do not have the right to be present when adverse witnesses testify.[166] Prison officials must, however, provide some objective evidence to support a decision to interview witnesses outside your presence.[167] They may also be required to give you a tape or transcript of the

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N.Y.S.2d 45, 46 (3d Dept. 1988) (removing disciplinary violation from prisoner's record where hearing officer's basis for refusing to allow officer who had prepared misbehavior report to testify was based only on guessing or predicting that his testimony would be redundant); Fox v. Dalsheim, 112 A.D.2d 368, 369, 491 N.Y.S.2d 820, 821 (2d Dept. 1985) (holding that hearing officer abused his discretion where he refused to call two witnesses requested by prisoner due to "redundancy of the testimony" based on prediction that the two witnesses' testimony would only repeat what was in misbehavior report). In Fox v. Dalsheim, the court said that "[a]lthough the revised superintendent's hearing rules and regulations ... now permit exclusion of a witness's testimony when it is redundant or immaterial, this provision does not afford the hearing officer the unlimited right to exclude testimony relevant to an inmate's defense." Fox v. Dalsheim, 112 A.D.2d 368, 369, 491 N.Y.S.2d 820, 821 (2d Dept. 1985).

159. Zamakshari v. Dvoskin, 899 F. Supp. 1097, 1107 (S.D.N.Y. 1995) (holding that hearing officer's denial of request for gallery listing so prisoner could identify other possible witnesses did not violate due process).

160. Zamakshari v. Dvoskin, 899 F. Supp. 1097, 1107 (S.D.N.Y. 1995).

161. *See, e.g.*, Laureano v. Kuhlmann, 75 N.Y.2d 141, 147–48, 550 N.E.2d 437, 440–41, 551 N.Y.S.2d 184, 187–88 (1990) (upholding denial of right to call witness where hearing officer informed prisoner that victim of assault feared retaliation and officer showed prisoner form where witness indicated desire not to testify); Cortez v. Coughlin, 67 N.Y.2d 907, 909, 492 N.E.2d 1225, 1225, 501 N.Y.S.2d 809, 809 (1986) (upholding exclusion of prisoner from his disciplinary hearing during witness testimony on basis of institutional safety and disciplinary reports documenting violent behavior when prisoner was allowed to listen to taped testimony instead).

162. Wolff v. McDonnell, 418 U.S. 539, 567, 94 S. Ct. 2963, 2980, 41 L. Ed. 2d 935, 957 (1974).

163. Smith v. Farley, 858 F. Supp. 806, 816–819. 822 (N.D. Ind. 1994) (finding violation of prisoner's due process rights where prisoner was denied admittance of letter that could potentially clear his name without valid security concerns being provided for denial) (citing Young v. Kann, 926 F.2d 1396, 1400, 1402 (3d Cir. 1991)), *aff'd*, Smith v. Parke, 56 F.3d 67 (7th Cir. 1995) (unpublished table decision).

164. *See* Sanchez v. Roth, 891 F. Supp. 452, 458 (N.D. Ill. 1995) (holding that where prisoner did not follow proper procedure for requesting witnesses, prison officials' refusal to allow witnesses to testify at disciplinary proceeding did not violate prisoner's due process rights).

165. *See* Ponte v. Real, 471 U.S. 491, 492, 105 S. Ct. 2192, 2193–94, 85 L. Ed. 2d 553, 556 (1985) (holding that superintendent was not constitutionally required to provide reasons in administrative record for refusing to allow respondent to call requested witnesses). *But see* Scarpa v. Ponte, 638 F. Supp. 1019, 1023 (D. Mass. 1986) (distinguishing *Ponte* because in that case, prison officials failing to provide reasons in administrative record had an explanation related to safety or correctional goals, in contrast to the clear absence of threat to prison security in *Scarpa*).

166. *See* Graham v. N.Y. State Dep't of Corr. Servs., 178 A.D.2d 870, 870, 577 N.Y.S.2d 728, 729 (3d Dept. 1991) (holding that prisoner did not have right to be present during testimony of witness called by Hearing Officer because "the right to be present applies only when an inmate calls a witness"); Honoret v. Coughlin, 160 A.D.2d 1093, 1094, 533 N.Y.S.2d 573, 574–75 (3d Dept. 1990) (dismissing prisoner's claim that his due process rights were violated when he was not allowed to be present at testimony of witness called by Hearing Officer because "[o]nly when an inmate calls a witness on his behalf does he have any right to be present").

167. *See* Burnell v. Smith, 122 Misc. 2d 342, 347, 471 N.Y.S.2d 493, 497 (Sup. Ct. Wyoming County 1984)

testimony, if doing so does not undermine the prison's interest in safety. For example, in Martin v. Coughlin, a disciplinary ruling was dismissed where the state refused to provide the prisoner with a tape or transcript of a witness' testimony without giving any reason for the denial.[168] Also, if a hearing officer intends to consider information that will be kept confidential (secret) from the prisoner, he must at least inform the prisoner of that intention and give some reason for keeping the information confidential.[169] Despite these limits, you can always ask the hearing officer to question adverse witnesses for you. Prison officials, however, are not required to ensure that informants are telling the truth; the Due Process Clause does not usually require prison officials to assess the reliability of confidential informants testifying during disciplinary hearings. Prison officials are only required to judge the reliability of confidential informants in situations where the prisoner has an established right to such a judgment. If your version of the event differs from the witness' version, point this difference out to the hearing officer and comment on the evidence presented at the hearing.

6. "Impartial" Hearing Officer

According to Wolff v. McDonnell, you have the right to have an impartial (unbiased) hearing officer preside over your disciplinary proceeding.[170] The hearing officer does not have to meet the strict standard of impartiality that applies to judges.[171] The officer, however, must not be so biased against you as to create a "hazard of arbitrary decisionmaking . . . violative of due process."[172] To prove bias, you must provide "evidence that the decisionmaker has actually prejudged the case or [had a] direct personal involvement in the underlying charge."[173] For example, one court found a hearing officer's refusal to consider introduced evidence to be proof of possible bias.[174] The court explained, "where a hearing officer indicates on the record that, without considering the evidence, he finds a prisoner's factual defense inconceivable, we cannot conclude that the prisoner had a full and fair opportunity to litigate the issue."[175] In another case, the court dismissed a disciplinary determination where a hearing officer's remarks and attitude (especially the remark, "Okay now. You have to convince me that you're not guilty") suggested bias against the prisoner.[176]

The New York regulations touch on the issue of impartiality, but they do not in any way guarantee you an impartial hearing officer. There are different rules for disciplinary hearings and for superintendent hearings. An officer of the rank of lieutenant or above may preside over a disciplinary hearing.[177] In a

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(removing disciplinary violation from prisoner's record where no substantive reason was given for refusal to allow prisoner to be present during witness' testimony).

168. Martin v. Coughlin, 139 A.D.2d 650, 651, 526 N.Y.S.2d 1018, 1018 (2d Dept. 1988).

169. *See* Boyd v. Coughlin, 105 A.D.2d 532, 533, 481 N.Y.S.2d 769, 770 (3d Dept. 1984) (holding that "it is fundamental that the hearing officer must, at the time of the hearing, inform the inmate that he will consider certain information which will remain confidential and articulate some reason for keeping the information confidential"); Freeman v. Coughlin, 138 A.D.2d 824, 826, 525 N.Y.S.2d 744, 745 (3d Dept. 1988) (applying the *Boyd* rule to find the hearing officer's decision to keep information confidential without informing the prisoner was not a harmless error, resulting in a new hearing for the prisoner). *But see* Laureano v. Kuhlman, 75 N.Y.2d 141, 147, 550 N.E.2d 437, 440, 551 N.Y.S.2d 184, 187 (N.Y. 1990) ("[A] disciplinary determination cannot stand when a denial of the inmate's request to call a witness, or to be present when his witness testifies, is wholly unexplained, but will not be set aside if the record discloses the basis for the denial.").

170. Wolff v. McDonnell, 418 U.S. 539, 592, 94 S. Ct. 2963, 2992, 41 L. Ed. 2d 935, 972 (1974) (Marshall, J. concurring in part and dissenting in part).

171. Moore v. Selsky, 900 F. Supp. 670, 676 (S.D.N.Y. 1995) (finding that a hearing officer may be allowed to have a predetermined view that a scientific test for evidence is reliable, so long as the hearing officer would be willing to consider impartially that he may be mistaken in his view).

172. Wolff v. McDonnell, 418 U.S. 539, 571, 94 S. Ct. 2963, 2982, 41 L. Ed. 2d 935, 959–60 (1974).

173. Wade v. Farley, 869 F. Supp. 1365, 1376 (N.D. Ind. 1994) (citing Underwood v. Chrans, No. 90 C 6713, 1992 U.S. Dist. LEXIS 12616, at *10 (N.D. Ill. Aug. 20, 1992) (*unpublished*)) (holding that although hearing officer had been involved in prisoner's previous disciplinary proceeding, he was impartial with respect to present proceeding); *see, e.g.*, Francis v. Coughlin, 891 F.2d 43, 46 (2d Cir. 1989) (noting that a prison disciplinary hearing in which the result is arbitrarily and adversely predetermined violates a prisoner's right to due process).

174. *See* Colon v. Coughlin, 58 F.3d 865, 871 (2d Cir. 1995) (holding that where a hearing officer "indicates on the record that, without considering the evidence, he finds a prisoner's factual defense inconceivable," the prisoner did not have "a full and fair opportunity to litigate the issue").

175. Colon v. Coughlin, 58 F.3d 865, 871 (2d Cir. 1995).

176. Tumminia v. Kuhlmann, 139 Misc. 2d 394, 397, 527 N.Y.S.2d 673, 675 (Sup. Ct. Sullivan County 1988).

177. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.1(a) (2012).

disciplinary hearing, the regulations prohibit the appointment of a hearing officer who has (1) participated in the investigation; or (2) prepared or ordered the preparation of the misbehavior report.[178] Generally, a superintendent's hearing will be conducted by the superintendent, deputy superintendent, captain, or commissioner's hearing officer. In superintendent hearings, the regulations prohibit the use of a hearing officer who: (1) actually witnessed the event; (2) was directly involved in the incident; (3) is a review officer who reviewed the misbehavior report; or (4) has investigated the incident.[179] Note that the superintendent may in his discretion permit other correctional facility employees to act as hearing officers in a superintendent's or disciplinary hearing.[180]

If you feel your hearing officer is biased, you should think about making an objection. You should also consider objecting if your hearing officer is closely connected to prison security or known to have a strong dislike for prisoners. Remember that it is usually to your advantage to make any possible objections at your hearing so that you create a strong "record" for future appeals.

7. "Use" Immunity

Most violations of prison regulations are punished solely through disciplinary proceedings within the prison. Sometimes a violation of a prison rule will also be a violation of a criminal statute. To take an extreme example, stabbing a guard is certainly a severe violation of prison regulations. More importantly, it is also a criminal offense for which a prisoner can be tried and convicted in court.

A situation like the one described above raises special problems. You might feel compelled to testify at the proceeding in order to avoid a potentially severe punishment. On the other hand, you may worry that something you say at your hearing could incriminate you in a later criminal trial.

To avoid this problem, prisoners often seek "use" immunity in disciplinary hearings. "Use" immunity does not immunize you from prosecution, but it prevents any statements you make at your disciplinary hearing from being used against you in such prosecution.[181] Immunity in criminal proceedings comes from the U.S. Constitution's Fifth Amendment privilege against self-incrimination.[182] An individual accused of a crime has the right to remain silent.[183] Nonetheless, when the state demands that you testify, the state must grant "use" immunity.[184] If you choose not to testify in your disciplinary hearing and your silence is used as evidence of your guilt, you must also be granted "use immunity."[185] If that was not the case, the state would be punishing you for exercising your Fifth Amendment right.

The Supreme Court faced this dilemma in Baxter v. Palmigiano,[186] which involved a prisoner facing disciplinary action for violations that were also crimes under state law. The *Baxter* Court held that while a prisoner's silence can be considered evidence of guilt in a disciplinary proceeding,[187] silence alone is not enough. Other evidence must be produced in order to establish guilt.[188]

If a prisoner chooses to testify in cases where he is not required or compelled to testify, according to *Baxter*, any statements he makes at disciplinary hearings can be used against him in subsequent criminal proceedings.[189] Therefore, a prisoner does not have a constitutional right to immunity in those cases. When the prisoner must testify, however, "use" immunity must be granted to protect his Fifth Amendment right to remain silent.[190] In reality, it is unlikely that after *Baxter* prison officials will compel a prisoner to testify

178. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.1(b) (2012).

179. N.Y. Comp. Codes R. & Regs. tit. 7, § 254.1 (1990). See Part E of this Chapter for an explanation of "superintendent's," "disciplinary," and "violation" hearings, which are the three types of hearings in New York State.

180. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.1(a) (1987); N.Y. Comp. Codes R. & Regs. tit. 7, § 254.1 (1990).

181. *See* 18 U.S.C. § 6002 (2011) (granting immunity from the use of compelled testimony and evidence derived from it); Kastigar v. U.S. 406 U.S. 441, 452–53, 92 S. Ct. 1643, 1661, 32 L. Ed. 2d 212, 221(1972) (holding that immunity from use and derivative use follows the scope of the privilege against self-incrimination).

182. U.S. Const. amend. V.

183. U.S. Const. amend. V.

184. 18 U.S.C. § 6002 (2011).

185. U.S. Const. amend. V.

186. Baxter v. Palmigiano, 425 U.S. 308, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976).

187. Baxter v. Palmigiano, 425 U.S. 308, 317–18, 96 S. Ct. 1551, 1557–58, 47 L. Ed. 2d 810, 821 (1976).

188. Baxter v. Palmigiano, 425 U.S. 308, 317–18, 96 S. Ct. 1551, 1557–58, 47 L. Ed. 2d 810, 821 (1976).

189. Baxter v. Palmigiano, 425 U.S. 308, 316, 96 S. Ct. 1551, 1557, 47 L. Ed. 2d 810, 820 (1976). Please note that you can be compelled to testify at your prison disciplinary proceeding.

190. Baxter v. Palmigiano, 425 U.S. 308, 316, 96 S. Ct. 1551, 1557, 47 L. Ed. 2d 810, 820 (1976). "Use" immunity must be granted where a defendant is forced to give up his right to remain silent, but immunity need not be granted

since: (1) adverse inferences may be drawn from a prisoner's silence; and (2) the problem of whether to grant immunity can be avoided if the official does not compel testimony.

New York currently grants prisoners "use" immunity at all disciplinary proceedings.[191] You have the right to "use" immunity even if criminal charges have not been filed against you. You must be notified of your right in the following language: "You are hereby advised that no statement made by you in response to the charge, or information derived therefrom may be used against you in a criminal proceeding."[192] This warning will appear in the notice of charges, which must be given to you at least twenty-four hours before the proceeding. Because there are grave dangers associated with disciplinary proceedings that could be followed by a criminal trial, you should consult with your criminal attorney, if you have one, before you make any formal or informal statements in regard to the events in question.

8. The Ruling and the Requirement of a Written Record

At the close of the proceeding, the hearing officer may, at his discretion, do one of several things: he may affirm or dismiss charges, or he may affirm some charges and dismiss others.[193] The only requirement is that some evidence support the hearing officer's final decision. This standard is very low. It does not require the hearing officer to produce substantial evidence or a preponderance of evidence against you. Generally, if any evidence exists at all, the court will uphold the hearing officer's conclusion. Also, the fact finder (here, the hearing officer) is not required to make a decision solely upon the evidence presented at the hearing. In Baxter v. Palmigiano,[194] the Supreme Court explained that, in the unique prison environment, facts that may not come to light until after the formal hearing should not be excluded in determining what happened, since they may help officials understand the incident and tailor penalties to further penal goals. The Court also clarified that the fact finder must provide a written statement of the evidence that he relied on and the reasons for the disciplinary action taken.[195]

Often, the only or primary evidence against a prisoner is the misbehavior report itself. New York's regulations require that misbehavior reports present a detailed written account of the alleged incident, so the report alone may provide enough evidence to support a disciplinary ruling.[196] In one case where reports merely restated that all of the prisoners in the mess hall were part of a disturbance, without describing their specific misbehavior, the evidence was found insufficient to support a disciplinary finding against them.[197]

With certain exceptions, Wolff v. McDonnell also guarantees your constitutional right to receive, from the hearing officer, a written statement of the evidence relied upon and a statement of the reasons for the decision.[198] This requirement prevents the hearing officer from merely stating that you were found guilty of a particular offense based on certain interviews and reports without providing enough detail. The hearing record must include reasons for the decision, copies of any reports relied on, and summaries of any

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where no right to remain silent exists. If you are incarcerated outside of New York, you should research your state's rules and regulations governing disciplinary proceedings to find out whether you can get some form of immunity at your disciplinary proceeding. See Chapter 2 of the *JLM* on how to conduct legal research.

191. N.Y. Comp. Codes R. & Regs. tit. 7, § 251-3.1(d)(1) (2012).New York City, on the other hand, differs from New York state, such that prisoners in city jails are ordinarily not granted "use" immunity. Interview with Kenneth Stephens, Esq., The Legal Aid Society, Prisoners' Rights Project (Dec. 1, 1999).

192. N.Y. Comp. Codes R. & Regs. tit. 7, § 251-3.1(d)(1) (1995).

193. Superintendent, Mass. Corr. Inst., Walpole v. Hill, 472 U.S. 445, 455–56, 105 S. Ct. 2768, 2774, 86 L. Ed. 2d 356, 365 (1985) (stating that due process requirements are satisfied if there is evidence in the record that could support the board's conclusion in order to prove that the prison disciplinary board's decision was justified).

194. Baxter v. Palmigiano, 425 U.S. 308, 322 n.5, 96 S. Ct. 1551, 1560 n.5, 47 L. Ed. 2d 810, 824 n.5 (1976).

195. Baxter v. Palmigiano, 425 U.S. 308, 322 n.5, 96 S. Ct. 1551, 1560 n.5, 47 L. Ed. 2d 810, 824 n.5 (1976).

196. *See* James v. Strack, 214 A.D.2d 674, 675, 625 N.Y.S.2d 265, 266 (2d Dept. 1995) (holding that the misbehavior report was "sufficiently detailed, relevant and probative to constitute substantial evidence supporting the Hearing Officer's finding of guilt"); Nelson v. Coughlin, 209 A.D.2d 621, 621, 619 N.Y.S.2d 298, 299 (2d Dept. 1994) (holding that the misbehavior report provided substantial evidence that prisoner violated rule prohibiting prisoners from making or possessing alcoholic beverages and that officials were not required to chemically test beverage for presence of alcohol).

197. *See* Bryant v. Coughlin, 77 N.Y.2d 642, 649–50, 572 N.E.2d 23, 26–27, 569 N.Y.S.2d 582, 585–86 (1991) (concluding that misbehavior reports, which did not specify the particulars of prisoner misconduct and only alleged a mass incident, were insufficient).

198. Wolff v. McDonnell, 418 U.S. 539, 564, 94 S. Ct. 2963, 2979, 41 L. Ed. 2d 935, 956 (1974).

interviews conducted.[199] In addition, New York regulations provide that you must receive the written statement as soon as possible, and no later than twenty-four hours after the end of the hearing.[200]

Constitutional and New York standards allow the hearing officer to exclude (keep out) items of evidence from the written statement that, if presented, would threaten "personal or institutional safety." For example, in Laureano v. Kuhlmann, New York's highest court ruled that a hearing officer does not have to disclose to the prisoner the details of a confidential informant's testimony or circumstances that might reveal his identity, where the officer provided a revised summary of essential points of the testimony.[201] If evidence has been excluded, the written statement you receive informing you of the decision must disclose this.[202]

The written statement and the tape recording of the hearing will be central parts of your disciplinary hearing "record." This record is very important; the court will examine it if you seek judicial review of an unfavorable disciplinary hearing decision in state or federal court.

E. New York Disciplinary Proceedings and Appeal Procedures

1. Types of Disciplinary Proceedings

New York regulations create a three-tier disciplinary system.[203] Violation hearings, which are used for minor offenses, make up the first tier.[204] Disciplinary hearings, which are used for serious offenses, make up the second tier.[205] Finally, superintendent's hearings, which are for the most serious offenses, make up the third tier.[206] The nature of the wrongdoing of which you are accused determines both the type of hearing that you face and the type of punishment you can receive. Sandin v. Conner drastically affects New York's three-tier system. Under that case, prisoners are entitled to due process only when the punishment they receive constitutes an "atypical and significant hardship ... in relation to the ordinary incidents of prison life."[207] In other words, if the court does not regard the punishment you are given as especially severe, there is no requirement to hold a hearing beforehand. Whether a punishment is severe is based on the specific facts of your case.[208] The punishments imposed after violation and disciplinary hearings, such as loss of privileges and placement in disciplinary segregation, do not satisfy *Sandin*'s "atypical and significant hardship" test. Only the more severe punishments imposed after superintendent's hearings—loss of good-time credits or segregated confinement for lengthy periods—can trigger due process protection under *Sandin*.[209]

Accordingly, New York is not constitutionally required to conduct violation and disciplinary hearings at all. The regulations, however, still provide for all three types of hearings, and prison officials are required to follow their own rules.[210] For example, if a prison official decided to revoke your visiting privileges or to place you in a SHU for no reason without giving you a hearing, you could file an appeal within the prison system. In a case like this, however, you could not seek relief in federal court because according to *Sandin*, you no longer have a constitutional right to be free from all arbitrary and unfair punishment, only from "atypical

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199. *See* McQueen v. Vincent, 53 A.D.2d 630, 631, 384 N.Y.S.2d 475, 476–77 (2d Dept. 1976) (remanding case to determine whether due process requirements were met in light of incomplete hearing record); *see also* People *ex rel.* Lloyd v. Smith, 115 A.D.2d 254, 255, 496 N.Y.S.2d 716, 717 (4th Dept. 1985) (holding that failure to include superintendent's proceeding minutes in the record made adequate review impossible, resulting in remand for review of minutes).

200. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.7(a)(5) (2012); N.Y. Comp. Codes R. & Regs. tit. 7, § 254.7(a)(5) (2012).

201. Laureano v. Kuhlmann, 550 N.E.2d 437, 441, 75 N.Y.2d 141,148, 551 N.Y.S.2d 184, 188 (1990).

202. Wolff v. McDonnell, 418 U.S. 539, 565, 94 S. Ct. 2963, 2979, 41 L. Ed. 2d 935, 956 (1974).

203. N.Y. Comp. Codes R. & Regs. tit. 7, § 270.3(a) (1998).

204. N.Y. Comp. Codes R. & Regs. tit. 7, § 270.3(a)(1) (1998); N.Y. Comp. Codes R. & Regs. tit. 7, § 252 (1983).

205. N.Y. Comp. Codes R. & Regs. tit. 7, § 270.3(a)(2) (1998); N.Y. Comp. Codes R. & Regs. tit. 7, § 253 (2012).

206. N.Y. Comp. Codes R. & Regs. tit. 7, § 270.3(a)(3) (1998); N.Y. Comp. Codes R. & Regs. tit. 7, § 254 (2012).

207. Sandin v. Conner, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300, 132 L. Ed 2d 418, 430 (1995).

208. Miller v. Selsky, 111 F.3d 7, 8 (2d Cir. 1997) ("*Sandin* did not create a per se blanket rule that disciplinary confinement may never implicate a liberty interest."); Lee v. Coughlin, 26 F. Supp. 2d 615, 635 (S.D.N.Y. 1998) (arguing *Sandin* "did not say that segregated confinement could never constitute an atypical and significant hardship").

209. Sandin v. Conner, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300, 132 L. Ed 2d 418, 430 (1995).

210. *See* Uzzell v. Scully, 893 F. Supp. 259, 263 n.10 (S.D.N.Y. 1995) (stating that, because prison officials must adhere to their own rules, prisoners may administratively challenge their keeplock confinement by raising procedural error claims).

and significant" punishment.[211] It is still unclear whether you could appeal your case successfully in a New York state court. New York must follow the minimum due process rules set out in *Sandin*, which means it has to comply with due process of law before it can subject a prisoner to an "atypical and significant hardship."[212] New York can choose to give prisoners more rights than federal law requires, but it cannot provide fewer rights. Therefore, when reviewing the rest of this Section, bear in mind that if prison officials violate these rules, the federal courts will not be able to remedy the situation unless your case involves revocation of good-time credits or some similarly severe punishment.

Under New York's regulations, both disciplinary and superintendent's hearings may result in loss of one or more specified privileges for a specific period of time.[213] Where the prisoner has been involved in improper conduct related to correspondence or visiting privileges with a particular person, a superintendent's hearing may result in loss of those privileges with that person.[214] Disciplinary hearings may not result in loss of correspondence privileges and cannot lead to the loss of visiting privileges for more than thirty days.[215] Both types of hearings may result in confinement in your cell (keeplock) or in a SHU, but disciplinary hearings may only result in such confinement for up to thirty days.[216] Restitution (the payment of money) may be required for loss or intentional damage to property at both hearings.[217] A superintendent's hearing may result in a restricted diet[218] and loss of a specific period of good time.[219] Both types of hearings may allow for a delay before any penalty is imposed.[220]

The punishments that violation officers may impose after violation hearings are less severe than the punishments listed above. If the violation officer finds you guilty of committing an offense, he can order any two of the following penalties to be served within a thirteen-day period:[221]

(1) Loss of all or part of recreation (for example, game room, day room, television, movies, yard, gym, special events) for up to thirteen days;[222]

(2) Loss of at most two of the following privileges: one commissary buy (excluding items related to your health and sanitary needs), withholding of radio for up to thirteen days, withholding of packages for up to thirteen days (excluding perishables that cannot be returned);[223]

(3) The imposition of one work task per day, other than a regular work assignment, for a maximum of seven days (excluding Sundays and public holidays), to be performed on your housing unit or other designated area (must be not more than eight hours per day); and[224]

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211. *See* Cliff v. De Celle, 260 A.D.2d 812, 814, 687 N.Y.S.2d 834, 835 (3d Dept. 1999), *app. denied*, 93 N.Y.2d 814, 719 N.E.2d 922, 697 N.Y.S.2d 561 (1999) (holding that because the maximum penalty that could be imposed would be loss of privileges and/or confinement of no longer than 30 days, the punishment is not "atypical" or "significant").

212. Sandin v. Conner, 515 U.S. 472, 483–84, 115 S. Ct. 2293, 2300, 132 L. Ed 2d 418, 430 (1995).

213. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.7(a)(1)(ii) (2012) (period specified for loss of privileges as a result of disciplinary hearings is "up to 30 days"); N.Y. Comp. Codes R. & Regs. tit. 7, § 254.7(a)(1) (2012).

214. N.Y. Comp. Codes R. & Regs. tit. 7, § 254.7(a)(1)(ii) (2012).

215. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.7(a)(1)(ii) (2012). New York procedures for the suspension of visitation rights are contained within a consent decree issued in Kozlowski v. Coughlin, 539 F. Supp. 852 (S.D.N.Y. 1982), *den. of modif. aff'd*, 871 F.2d 241 (2d Cir. 1989).

216. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.7(a)(1)(iii) (2012); N.Y. Comp. Codes R. & Regs. tit. 7, § 254.7(a)(1)(iii) (2012).

217. N.Y. Comp. Codes R. & Regs. tit. 7, § 254.7(a)(1)(v) (2012); N.Y. Comp. Codes R. & Regs. tit. 7, § 253.7(a)(1)(iv) (2012). At disciplinary hearings, restitution is limited to $100. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.7(a)(1)(iv) (2012).

218. N.Y. Comp. Codes R. & Regs. tit. 7, § 254.7(a)(1)(iv) (2012). The diet must at all times contain a "sufficient quantity of wholesome and nutritious food." N.Y. Comp. Codes R. & Regs. tit. 7, § 304.2(e) (1999). While there has not been litigation about this, it is possible that at some point, the diet provided may be so unhealthy as to amount to "cruel and unusual punishment" in violation of the 8th Amendment. For a discussion of the 8th Amendment, see *JLM* Chapter 16, "42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law."

219. N.Y. Comp. Codes R. & Regs. tit. 7, § 254.7(a)(1)(vii) (2012).

220. N.Y. Comp. Codes R. & Regs. tit. 7, § 254.7(a)(4) (2012); N.Y. Comp. Codes R. & Regs. tit. 7, § 253.7(a)(4) (2012). The specified time period for suspensions is up to 180 days from a superintendent's hearing and up to 90 days from a disciplinary hearing.

221. N.Y. Comp. Codes R. & Regs. tit. 7, § 252.5(a) (2012).

222. N.Y. Comp. Codes R. & Regs. tit. 7, § 252.5(a)(1) (2012).

223. N.Y. Comp. Codes R. & Regs. tit. 7, § 252.5(a)(2) (2012).

224. N.Y. Comp. Codes R. & Regs. tit. 7, § 252.5(a)(3) (2012).

(4) Counsel and/or reprimand.[225]

The violation officer has discretion to suspend these punishments for thirteen days.[226]

A review officer can order any one of the three types of hearings to be held (violation, disciplinary, or superintendent's hearings). The choice will depend on the seriousness of the reported offense.[227] If a guard, or any other prison employee, believes that you have committed a violation that creates a "danger to life, health, security, or property," he must file a formal report of your conduct (referred to by prisoners as a "ticket") "as soon as practicable" with the review officer.[228] The staff person who observed the alleged violation (or who got the facts) must report in writing the nature, date, time, and place of its occurrence.[229] Minor infractions or other violations "that do not involve danger to life, health, security, or property" need not be reported.[230] The misbehavior report becomes the basis for the review of an officer's choice of the type of hearing to be held.

An officer will place you in solitary confinement if he believes you present an "immediate threat to the safety, security or order of the facility or an immediate danger to other persons or to property."[231] You cannot be confined to your cell or elsewhere for more than seven days without a hearing.[232] Such a hearing must be completed within fourteen days after the misbehavior report is written, unless a delay is authorized.[233] If you are placed in keeplock or a Special Housing Unit (SHU) solely because of the charges against you, your hearing must begin within seven days of being confined, unless special circumstances exist.[234] An officer may also confine you to your cell or room for your own protection, but you can be confined for only seventy-two hours and, within that time period, you must be transferred to another housing unit, scheduled for transfer to another facility, released from confinement, or placed in protective custody.[235]

The validity of the rules stated above is questionable in light of Sandin v. Conner.[236] A federal court in New York has suggested that Sandin v. Conner undermines the validity of New York regulations that afford prisoners liberty interests in remaining free from administrative and disciplinary segregation.[237] As a result, in federal court you will not be able to argue successfully that you have a constitutionally protected right to remain free from administrative and discplinary segregation. However, you may still be able to assert such rights under New York regulations within the prison system or in New York state court.

2. Important Exceptions at Violation Hearings

At violation hearings, you are not entitled to all of the rights you have at disciplinary or superintendent's hearings. For example, you must receive written notice about a disciplinary or superintendent's hearing, but not for violation hearings. Therefore, you may not have enough time to prepare your defense.

However, once the misbehavior report is written against you, the violation hearing must be held within seven days.[238] The regulations grant you the right to be present at your violation hearing.[239] This right gives

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225. N.Y. Comp. Codes R. & Regs. tit. 7, § 252.5(a)(4) (2012).
226. N.Y. Comp. Codes R. & Regs. tit. 7, § 252.5(a) (2012).
227. N.Y. Comp. Codes R. & Regs. tit. 7, § 251-2.2(b) (2012).
228. N.Y. Comp. Codes R. & Regs. tit. 7, § 251-3.1(a) (2012).
229. N.Y. Comp. Codes R. & Regs. tit. 7, § 251-3.1(b), (c) (2012).
230. N.Y. Comp. Codes R. & Regs. tit. 7, § 251-1.5 (2012).
231. N.Y. Comp. Codes R. & Regs. tit. 7, § 251-1.6(a) (2012).
232. N.Y. Comp. Codes R. & Regs. tit. 7, §§ 251-5.1(a)–(c) (2012).
233. N.Y. Comp. Codes R. & Regs. tit. 7, § 251-5.1(b) (2012).
234. *See* Gittens v. LeFevre, 891 F.2d 38, 42–43 (2d Cir. 1989) (holding that failure of New York regulations to provide prisoners an adequate opportunity to be heard within a reasonable time of their administrative confinement (more than a seven days wait was unreasonable) violates due process requirements, but that officials had acted reasonably in reliance on New York regulations which were unclear at that time). *But see* Scott v. Coughlin, 727 F. Supp. 806, 809–10 (W.D.N.Y. 1990) (holding that prisoner's due process rights were violated where he was confined to keeplock for 14 days without a misbehavior report being issued or a disciplinary hearing being conducted).
235. N.Y. Comp. Codes R. & Regs. tit. 7, § 251-1.6(b) (2012).
235. Sandin v. Conner, 515 U.S. 472, 487, 115 S. Ct. 2293, 132 L. Ed. 2d 418, 1995 U.S. LEXIS 4069, 63 U.S.L.W. 4601, 95 Cal. Daily Op. Service 4627, 95 Daily Journal DAR 7920, 9 Fla. L. Weekly Fed. S 207 (U.S. 1995) (holding that there was no liberty interest in remaining free from disciplinary segregation.).
237. *See* Rodriguez v. Phillips, 66 F.3d 470, 479–80 (2d Cir. 1995) (holding that prison officials' belief that prisoner's three-day administrative confinement, without opportunity to be heard, did not violate prisoner's 14th Amendment due process rights was reasonable).
238. N.Y. Comp. Codes R. & Regs. tit. 7, § 251-5.1(c) (2012).

you a chance to defend yourself by orally explaining your version of the events to the violation officer, presenting documentary evidence (for example, a time card showing your presence at your work-station rather than at the scene of the alleged incident), or submitting a written statement on your own behalf.[240] You do not, however, have the right to call witnesses at violation hearings,[241] which might make it difficult for you to prove your version of the events. If you believe you have been accused of an offense you did not commit, request the violation officer to investigate further before issuing a decision.

The differences among the three types of disciplinary proceedings can be confusing. To simplify matters, the differences in the rights you have are illustrated in Figure I:

Disciplinary/Superintendent's Hearing	Violation Hearing
Right to a written notice of proceeding at least twenty-four hours before the hearing.[242]	Right to a copy of the misbehavior report at the hearing.[243]
Right to a completed hearing completed within fourteen days after report, unless authorized by the commissioner.[244]	Right to a completed hearing within seven days of the writing of the misbehavior report.[245]
Limited right to substitute counsel.[246]	No right to substitute counsel.
Limited right to appear before the hearing officer.[247]	Limited right to appear before the violation officer.[248]
Limited right to call witnesses.[249]	No right to call witnesses.[250]
Right to "use" immunity. (Statements you make in response to a charge of misbehavior cannot be used against you in criminal proceedings.)[251]	Right to "use" immunity. (Statements you make in response to a charge of misbehavior cannot be used against you in criminal proceedings.)[252]
Right to an impartial hearing officer.[253]	No declared right to an impartial violation officer.

239. N.Y. Comp. Codes R. & Regs. tit. 7, § 252.3(a)(2) (2012).

240. N.Y. Comp. Codes R. & Regs. tit. 7, § 252.3(a)(3) (2012).

241. N.Y. Comp. Codes R. & Regs. tit. 7, § 252.3(a)(3) (2012).

242. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.6(a) (2012) (rule governing disciplinary hearings); N.Y. Comp. Codes R. & Regs. tit. 7, § 254.6(a)(1) (2012) (rule governing superintendent hearings); Wolff v. McDonnell, 418 U.S. 539, 564, 94 S. Ct. 2963, 2979, 41 L. Ed. 2d 935, 956 (1974) (holding that notice is only required for hearings where more rights are at stake such as a disciplinary or superintendent hearing but not a violation hearing).

243. N.Y. Comp. Codes R. & Regs. tit. 7, § 252.3(a)(1) (2012).

244. N.Y. Comp. Codes R. & Regs. tit. 7, § 251-5.1(b) (2012).

245. N.Y. Comp. Codes R. & Regs. tit. 7, § 251-5.1(c) (2012).

246. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.4 (2012) (rule governing disciplinary hearings); N.Y. Comp. Codes R. & Regs. tit. 7, § 254.4 (2012) (rule governing superintendent hearings); Wolff v. McDonnell, 418 U.S. 539, 566–70, 94 S. Ct. 2963, 2979–82, 41 L. Ed. 2d 935, 956-59 (1974) (holding that prisoners do not have a right to an attorney but can collect documents and have a fellow prisoner assist them when they are illiterate or unlikely to understand the charges against them so long as these rights will not create a "risk of reprisal or undermine authority").

247. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.6(b) (2012) (rule governing disciplinary hearings); N.Y. Comp. Codes R. & Regs. tit. 7, § 254.6(a)(2) (2012) (rule governing superintendent hearings).

248. N.Y. Comp. Codes R. & Regs. tit. 7 § 252.3(a)(2) (2012).

249. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.5 (2012) (rule governing disciplinary hearings); N.Y. Comp. Codes R. & Regs. tit. 7, § 254.5 (2012) (rule governing superintendent hearings); Wolff v. McDonnell, 418 U.S. 539, 566, 94 S. Ct. 2963, 2979–80, 41 L. Ed. 2d 935, 957 (1974) (holding that an inmate should be permitted to call witnesses "when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals").

250. N.Y. Comp. Codes R. & Regs. tit. 7, § 252.3(a)(3) (2012).

251. N.Y. Comp. Codes R. & Regs. tit. 7, § 251-3.1(d)(1) (2012).

252. N.Y. Comp. Codes R. & Regs. tit. 7, § 251-3.1(d)(1) (2012).

253. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.1(b) (2012) (rule governing disciplinary hearings); N.Y. Comp. Codes R. & Regs. tit. 7, § 254.1 (2012) (rule governing superintendent hearings); Wolff v. McDonnell, 418 U.S. 539, 571, 94 S. Ct. 2963, 2982, 41 L. Ed. 2d 935, 959 (1974).

Disciplinary/Superintendent's Hearing	Violation Hearing
Right to receive a copy of a written record of the disposition.[254]	Right to receive a copy of a written record of the disposition.[255]
Disposition of hearing may be made part of prisoner's institutional records.	Disposition of violation hearing not made part of prisoner's institutional records.[256]

Figure 1: Comparison of the Rights of Prisoners at Disciplinary or Superintendent's Hearings and Violation Hearings in New York[257]

Once you receive written charges, you know that a disciplinary proceeding will take place in the near future. If you are in solitary confinement because of the charges, the disciplinary or superintendent's hearing must begin within seven days of your confinement.[258] If you are not confined, the hearing must be completed within fourteen days from the time the written charges were made against you.[259] The Commissioner of Correctional Services or a person designated to act for the Commissioner can, however, authorize a delay beyond these time limits.[260] Such delays are often authorized.

3. Appeal Procedures

In New York, prisoners have an absolute right to make an administrative appeal to another prison official.[261] You must pursue this administrative appeal process in order to preserve your right to pursue further appeals in the courts (your right to judicial review).[262] This means that in order to have a court hear your case at a later stage, you must make an administrative appeal. Most other states also provide appeal procedures. If you are incarcerated elsewhere, you should research the rules and regulations governing disciplinary proceedings in your state. The appeal procedures differ for disciplinary hearings, superintendent's hearings, and violation hearings. For this reason, they are discussed separately below.

(a) Disciplinary Hearings

You can begin the review process by writing to the superintendent of your facility and requesting that he review the decision made at your disciplinary hearing. You must submit your request no later than seventy-two hours (three days) after you receive your hearing disposition (the decision).[263] If your written request is submitted after the seventy-two hour deadline, you may lose your right to have your hearing reviewed.[264] After receiving your appeal, the superintendent or a person designated to act for the superintendent must review your case and issue a decision within fifteen days.[265]

When appealing a disciplinary hearing, you should also consider writing to the superintendent. A superintendent has the power to reduce your penalty at any time an imposed penalty is in effect.[266]

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254. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.7(a)(5) (2012) (rule governing disciplinary hearings); N.Y. Comp. Codes R. & Regs. tit. 7, § 254.7(a)(5) (2012) (rule governing superintendent hearings); Wolff v. McDonnell, 418 U.S. 539, 564, 94 S. Ct. 2963, 2979, 41 L. Ed. 2d 935, 956 (1974).

255. N.Y. Comp. Codes R. & Regs. tit. 7, § 252.5(b) (2012).

256. N.Y. Comp. Codes R. & Regs. tit. 7, § 252.5(d) (2012).

257. See Part E(1) of this Chapter for more information on the different levels of disciplinary proceedings.

258. N.Y. Comp. Codes R. & Regs. tit. 7, §§ 251-5.1(a) (2012).

259. N.Y. Comp. Codes R. & Regs. tit. 7, §§ 251-5.1(b) (2012).

260. N.Y. Comp. Codes R. & Regs. tit. 7, §§ 251-5.1(a), 251-5.1(b) (2012).

261. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.8 (2012) (rule governing disciplinary hearings); N.Y. Comp. Codes R. & Regs. tit. 7, § 254.8 (2012) (rule governing superintendent hearings).

262. To institute a New York Article 78 proceeding or a federal § 1983 claim, you must first exhaust your administrative appeal possibilities. For more information, see *JLM* Chapter 22, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules," *JLM* Chapter 16, "42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law," and *JLM* Chapter 14 on the Prison Litigation Reform Act.

263. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.8 (2012).

264. *See* Lane v. Hanberry, 593 F.2d 648, 649 (5th Cir. 1979) (holding that when a prisoner is advised of his right to an administrative appeal, constitutional due process does not require that he also be advised that if he chooses not to make an administrative appeal, he will not be allowed to challenge the disciplinary hearing in a court of law).

265. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.8 (2012).

266. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.9 (2012).

(b) Superintendent's Hearings

The process for appealing a superintendent's decision is similar to the appeal procedure for disciplinary hearings discussed above. The major differences are (1) the person you write to, (2) the number of days you have to submit your written appeal, and (3) an appeal of a superintendent's decision can never result in a harsher penalty.

After a superintendent's hearing, you should submit your appeal in writing to the Commissioner of Correctional Services, not to the superintendent.[267] Once your receive the superintendent's decision, you have thirty days to submit your written appeal.[268] Address your appeal to:

Commissioner _____
New York State Department of Correctional Services
State Office Campus, Building 2
1220 Washington Avenue
Albany, New York 12226

The Commissioner or person designated to act for him or her must issue a decision within sixty days of receiving your appeal.[269] Under no circumstances can appealing a superintendent hearing result in a harsher penalty.[270]

When appealing a superintendent's hearing to the Commissioner, you should also consider writing to the superintendent. A superintendent has the authority to reduce your penalty imposed at the superintendant's hearing at any time during which an imposed penalty is in effect.[271] The superintendent can reduce your penalty even if the Commissioner decides not to reverse or modify the decision made at your superintendent's hearing. Writing to your superintendent may be particularly worthwhile if he did not preside over your hearing.

(c) Violation Hearings

To appeal the decision in your violation hearing, you must write to your superintendent within twenty-four hours of receiving notification of the decision and request that he review your case.[272] The superintendent or the person designated to act for the superintendent must then issue a decision within seven days.[273] The superintendent may reduce the penalty imposed at your hearing.[274]

After a superintendent's hearing, you may want to appeal an unfavorable decision to a court of law.[275] However, after Sandin v. Conner,[276] it is not likely that you would be able to successfully appeal an unfavorable decision from a violation or disciplinary hearing. Furthermore, if the penalty imposed at your violation hearing is relatively minor, filing an appeal may not be worth the trouble. Since an appeal creates more work for prison officials, submitting an appeal may only annoy them. Moreover, violation hearings cannot be made part of a prisoner's institutional records.[277] In any event, the minor infraction cannot be held against you at a later date.

F. Administrative Segregation Proceedings

As with disciplinary confinement, for you to receive procedural protection in the context of administrative segregation, a court must find that the laws or regulations applicable to your prison create a protected liberty interest.[278] In other words, unless your state has a law or regulation that entitles you to

267. N.Y. Comp. Codes R. & Regs. tit. 7, § 254.8 (2012).
268. N.Y. Comp. Codes R. & Regs. tit. 7, § 254.8 (2012).
269. N.Y. Comp. Codes R. & Regs. tit. 7, § 254.8 (2012).
270. *See* N.Y. Comp. Codes R. & Regs. tit. 7, § 254.8 (2012).
271. N.Y. Comp. Codes R. & Regs. tit. 7, § 254.9 (2012).
272. N.Y. Comp. Codes R. & Regs. tit. 7, § 252.6 (2012).
273. N.Y. Comp. Codes R. & Regs. tit. 7, § 252.6 (2012).
274. N.Y. Comp. Codes R. & Regs. tit. 7, § 252.7 (2012).
275. Remember that you must exhaust your administrative remedies before petitioning the courts. You should review Chapter 22 of the *JLM*, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules," for more information on Article 78 appeals in New York State court.
276. Sandin v. Conner, 515 U.S. 472, 115 S. Ct. 2293, 123 L. Ed. 2d 418 (1995).
277. N.Y. Comp. Codes R. & Regs. tit. 7, § 252.5(d) (1997).
278. *See* Sandin v. Conner, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 430 (1995) (holding that a

avoid segregation from the general prison population, you do not have a right to a formal hearing before being confined in administrative or protective custody. Not all jurisdictions have found a protected liberty interest in the context of administrative segregation. But courts in the Second Circuit have decided that some state and federal regulations regarding administrative segregation create a protected liberty interest.[279] This Part will first discuss the procedures that officials in New York must follow and then those that federal prisons within the Second Circuit must follow before and during your administrative detention.

The due process protections for disciplinary action discussed above do not apply to administrative segregation. This means that the requirements of Wolff v. McDonnell[280] do not apply to administrative segregation. The key case for understanding the basic requirements in the administrative segregation process is Hewitt v. Helms.[281] *Hewitt* concerned a prisoner who was placed in administrative segregation after a riot in a state prison. The next day, he was given notice of a misconduct charge against him. After five days of confinement, a hearing committee reviewed the evidence against him, including a report of his version of the events at issue. The committee did not reach a decision about the prisoner's guilt, but decided that he posed a threat to the safety of other prisoners and prison officials and that his confinement in administrative segregation should be continued. The Supreme Court concluded that the prison officials' review process was adequate and did not violate the prisoner's due process rights.

The Supreme Court established a standard for hearings to determine whether a prisoner represents a security threat, or whether he should be confined to administrative segregation pending an investigation into misconduct charges. The Court stated that an informal, non-adversarial (not focused on the dispute or conflict) review of the evidence will satisfy the due process requirements of the Fourteenth Amendment. Thus, for administrative segregation hearings, the procedural safeguards you are entitled to are:

(1) Some notice of the charges against you;
(2) An opportunity to present your views orally or in writing to the prison officer who will decide whether or not to transfer you to administrative segregation;
(3) An informal proceeding held within a reasonable time after your transfer to administrative segregation; and
(4) Periodic review of the charges and available evidence by the decision-maker.[282]

These are the minimum procedural requirements prison officials must follow. State or federal regulations that govern your prison may set out additional, specific guidelines.

New York State prisons may place you in administrative segregation only if prison officials find that your presence in the general prison population poses a threat to the general safety and security of the facility.[283] You are entitled to submit a written statement responding to the charges against you. Prison officials may, in their discretion, let you make your case in person. Although you are not entitled to be present at each review hearing, you may be entitled to a report of the results of the review hearings and an opportunity to respond to those findings.[284] You are also entitled to have a committee review your status of confinement in administrative segregation every sixty days.[285] A three-member committee consisting of a representative of the facility executive staff, a security supervisor, and a member of the guidance and

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prisoner has a liberty interest protected by the Constitution's Due Process Clause only when his administrative segregation reaches levels of atypical and significant hardship); Hewitt v. Helms, 459 U.S. 460, 472, 103 S. Ct. 864, 871–72, 74 L. Ed. 2d 675, 688–89 (1983) (holding that the proceeding involving an informal non-adversarial review of evidence provided to a prisoner who was placed in administrative segregation satisfied the due process requirements for continued confinement).

279. *See* Tellier v. Fields, 280 F.3d 69, 83 (2d Cir. 2000) (holding that federal rule 28 C.F.R. § 541.22 "contains mandatory language that gives rise to" a liberty interest); Gonzalez v. Coughlin, 969 F. Supp. 256, 257–58 (S.D.N.Y. 1997) (concluding that New York rules regarding administrative confinement create a protected liberty interest).

280. Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).

281. Hewitt v. Helms, 459 U.S. 460, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983).

282. *See* Hewitt v. Helms, 459 U.S. 460, 476–77, 103 S. Ct. 864, 874, 74 L. Ed. 2d 675, 691–92 (1983).

283. N.Y. Comp. Codes R. & Regs. tit. 7, § 301.4(b) (2012).

284. *See* Giano v. Kelly, No. 89-CV-727(C), 2000 U.S. Dist. LEXIS 9138, at *50–51 (W.D.N.Y. May 16, 2000) (*unpublished*) (suggesting that to constitute sufficient notice and opportunity to respond to charges, a prisoner should be informed of the dates and results of his reviews, how long he can expect to be confined and what he might do to change his status, and should have a real opportunity to present information in his defense that he was no longer a threat to the facility).

285. N.Y. Comp. Codes R. & Regs. tit. 7, § 301.4(d) (2012).

counseling staff will examine your institutional record and prepare and submit a report to the superintendent.[286] The report must state:

(1) Reasons why you were initially determined to be appropriate for administrative segregation;
(2) Information on your subsequent behavior and attitude; and
(3) Any other factors that favor keeping you in or releasing you from administrative segregation.[287]

The law that applies to prisoners in federal prison is slightly different. If you are placed in administrative detention in a Special Housing Unit (SHU) in a federal prison you are entitled to a copy of the "Administrative Detention Order" containing the reasons for your detention, usually within twenty-four hours of your placement.[288] However, you will not receive an administrative detention order if you were placed in administrative detention pending classification or while in holdover status.[289] A Segregation Review Official (SRO) must conduct an initial review to evaluate the merits of the segregation within three days of your placement in a SHU (not counting the day you were admitted, weekends, and holidays).[290]An SRO must formally review your status at a hearing that you can attend within seven days of continuous placement in a SHU.[291] After that, the SRO will review your records in your absence, once every seven calendar days of continuous placement. After every thirty days of continuous placement in a SHU, the SRO will formally review your status at a hearing that you can attend.[292]

Unlike in New York State, some formal hearings are required by federal laws for federal prisons. This means that you have the right to appear and present your opinion at those hearings about your detention status. After every thirty days of continuous placement, mental health staff will examine you, including a personal interview.[293] If the reasons for your confinement no longer exist, you must be released from administrative detention.[294] However, courts have held that the warden's original decision to place you in administrative detention is discretionary, and courts will generally respect and uphold the warden's decision as long as certain procedural requirements are met.[295]

For both federal and state prisons in the Second Circuit, there must be compelling reasons for placing you in confinement and continuing your confinement in administrative segregation upon periodic review.[296] The reason given at a later review hearing may be the same as the original reason, but it must be deemed compelling, and it must take into account all the evidence available at the time of each review.[297] If new, relevant information arises after your initial hearing, the committee must consider that new evidence in determining whether you still pose a threat to the safety or security of the prison. If a review of all the then-available evidence does not support a finding that you pose such a threat, prison officials may not keep you in administrative segregation.[298] If the reason for your confinement in administrative segregation changes, you have the right to know the new reason and to respond to it.[299]

There must be a record of those meetings showing that there was actually "meaningful consideration" of the reasons for the segregation status.[300] In Giano v. Kelly, a district court in New York found that the

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286. N.Y. Comp. Codes R. & Regs. tit. 7, § 301.4(d)(1) (2012).
287. N.Y. Comp. Codes R. & Regs. tit. 7, § 301.4(d)(1) (2012).
288. 28 C.F.R. § 541.25(a) (2012).
289. 28 C.F.R. § 541.25(a)(2012).
290. 28 C.F.R. § 541.26(a) (2012).
291. 28 C.F.R. § 541.26(b) (2012).
292. 28 C.F.R. § 541.26(c) (2012).
293. 28 C.F.R. § 541.32(b)(2012); 28 C.F.R. § 541.26(c) (2012).
294. 28 C.F.R. § 541.33(a)(2012).
295. *See* Tellier v. Fields, 280 F.3d 69, 82 (2d Cir. 2000) (stating that although a warden's decision to place a prisoner in administrative detention is discretionary, this discretion is not "boundless and continuing").
296. Giano v. Kelly, No. 89-CV-727(C), 2000 U.S. Dist. LEXIS 9138, at *48 (W.D.N.Y. May 16, 2000) (*unpublished*) (holding that confinement in administrative segregation must be based on a compelling reason, and upon review the decision-maker must determine if that reason is still valid).
297. Giano v. Kelly, No. 89-CV-727(c), 2000 U.S. Dist. LEXIS 9138, at *48–49 (W.D.N.Y. May 16, 2000) (*unpublished*); *see* Hewitt v. Helms, 459 U.S. 460, 477, 103 S. Ct. 864, 874, 74 L. Ed. 2d 675, 692 (1983).
298. *See* Giano v. Kelly, No. 89-CV-727(c), 2000 U.S. Dist. LEXIS 9138, at *49 (W.D.N.Y. May 16, 2000) (*unpublished*) (noting periodic review hearings must consider all evidence available at the time of the review hearing).
299. *See* Young Ah Kim v. Hurston, 182 F.3d 113, 119 (2d Cir. 1999) (holding that liability exists for failure to inform a prisoner of the correct reason for removal from a temporary release program).
300. *See* Taylor v. Rodriguez, 238 F.3d 188, 193 (2d Cir. 2001) (stating that a hearing for placement in administrative segregation "is not 'meaningful' if a prisoner is given inadequate information about the basis of the

committee did not conduct "meaningful" reviews of a New York State prisoner's segregation status and therefore violated the prisoner's due process rights. There were two main reasons for this finding. First, records of the committee meetings did not show that there was deliberation on evidence available after he was first confined. Second, the records of the reviews contained no conclusions reached by the committee on the specific question of whether the prisoner continued to pose a threat to the safety or security of the prison.[301] Reviewing courts will generally defer to prison officials' reasons and decisions. But the court in Giano v. Kelly did conclude the reason for the plaintiff's initial confinement was no longer an adequate reason for his continued confinement.[302] The decision about what constitutes a threat to the security of the prison does not need to be based on any single determining factor, and there does not need to be a finding that the prisoner committed some sort of misconduct.[303] In making the decision, the committee may consider the character of prisoners confined in the particular facility, as well as recent and long-standing relations among prisoners and between prisoners and guards.[304]

In Taylor v. Rodriguez, the Second Circuit addressed what constitutes meaningful review for administrative segregation in the context of gang affiliation.[305] In that case, a prisoner confined to a Connecticut prison was placed in administrative segregation because of "recent tension in B-Unit involving gang activity" and "statements by independent confidential informants."[306] The prisoner's request for specific factual allegations was denied. The Second Circuit concluded that this notice was not enough to allow the prisoner to adequately prepare his defense. This means that if there are allegations that you are currently involved in a gang, prison officials have to tell you the specific facts supporting those allegations.[307] Unclear statements or definitive statements of fact without evidence are not enough.

In *Taylor*, the Second Circuit also found that the review of evidence at the prisoner's hearing did not meet due process requirements. To satisfy due process, "the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board."[308] The report of the hearing provided no details to support the decision to segregate the prisoner in administrative housing. The report referred to attached statements of confidential informants, but no such statements were actually attached for review by the court.[309] Prison officials do not have to reveal the identity of confidential informants, or have those informants testify at the hearing. But prison officials must make an independent assessment of a confidential informant's credibility.[310] In *Taylor*, the record did not contain an assessment of

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charges against him"); Giano v. Kelly, No. 89-CV-727(C), 2000 U.S. Dist. LEXIS 9138, at *49–55 (W.D.N.Y. May 16, 2000) (*unpublished*) (holding that an administrative segregation committee did not give meaningful consideration to a prisoner's confinement in part because the prisoner was neither permitted to appear before nor submit information to the committee, and did not regularly receive information regarding the committee's recommendations); *see also* Mathews v. Eldridge, 424 U.S. 319, 333, 47 L. Ed. 2d 18, 32, 96 S. Ct. 893, 902 (1976) (establishing that the kind of meaningful consideration that satisfies due process is not satisfied by a standard set of procedures, but depends on the context in which the hearing is held).

301. Giano v. Kelly, No. 89-CV-727(C), 2000 U.S. Dist. LEXIS 9138, at *49 (W.D.N.Y. May 16, 2000) (*unpublished*).

302. Giano v. Kelly, No. 89-CV-727(C), 2000 U.S. Dist. LEXIS 9138, at *53–54 (W.D.N.Y. May 16, 2000) (*unpublished*) (concluding that since his attacker was now at a different facility, the prisoner could no longer pose a security risk).

302. Giano v. Kelly, No. 89-CV-727(C), 2000 U.S. Dist. LEXIS 9138, at *47 (W.D.N.Y. May 16, 2000).

304. *See* Giano v. Kelly, No. 89-CV-727(c), 2000 U.S. Dist. LEXIS 9138, at *46-47 (W.D.N.Y. May 16, 2000) (*unpublished*).

305. Taylor v. Rodriguez, 238 F.3d 188, 193–94 (2d Cir. 2001) (holding notice given to a prisoner was too vague to allow him to prepare a defense, and a decision-maker must assess the reliability of a confidential informant if relying on the informant's testimony). See *JLM* Chapter 31, "Security Classification and Gang Validation," for more information.

306. Taylor v. Rodriguez, 238 F.3d 188, 193 (2d Cir. 2001).

307. Taylor v. Rodriguez, 238 F.3d 188, 193 (2d Cir. 2001).

308. Superintendent v. Hill, 472 U.S. 445, 455–56, 105 S. Ct. 2768, 2774, 86 L. Ed. 2d 356, 365 (1985) (holding due process is satisfied if some evidence supports a prison disciplinary board's decision to reverse good-time credits).

309. Taylor v. Rodriguez, 238 F.3d 188, 194 (2d Cir. 2001).

310. Taylor v. Rodriguez, 238 F.3d 188, 193–94 (2d Cir. 2001) (citing Giakoumelos v. Coughlin, 88 F.3d 56, 61–62 (2d Cir. 1996)) (reasoning that confidential informant's identity in prison disciplinary hearing need not be disclosed because the "requirements of prison security are unique"). *See also* Giakoumelos v. Coughlin, 88 F.3d 56, 61 (2d Cir. 1996) (stating that a confidential informant's testimony is sufficient to support a prison disciplinary finding as long as there has been some examination of the informant's credibility); Russell v. Scully, 15 F.3d 219, 223 (2d Cir. 1993) (holding that the prisoner had not been deprived of a protected liberty interest because he was only subject to administrative confinement pending his hearing and appeal and thus the question of whether he had a clearly

the confidential informant's credibility around the time of the hearing. Instead, the record contained only an official statement by a prison officer submitted two years after the hearing. The court found that this official statement was insufficient to place a prisoner in administrative detention.

G. Conclusion

If prison officials have changed the conditions of your confinement for the worse, and you believe they acted unfairly (for example, by not allowing you to present evidence on your behalf), you may be able to bring a due process challenge in federal court. This will depend on whether your state has made a law or regulation creating a protected liberty interest, and whether the change in your confinement taking away that liberty is "atypical and significant." Even if the change in your confinement does not meet this standard, you still may be able to challenge it through the prison administrative process or in state court. Prison officials must follow their own rules, and you can challenge the change in your confinement if these rules have been violated. In all cases, your first step is to go through your prison's administrative process. You should learn what steps you need to take to do so. Sometimes, your prison must provide you with help in bringing your case, but you must ask for this help.

established right to an independent examination of the confidential informants' credibility did not need to be decided).