

CHAPTER 18

YOUR RIGHTS AT PRISON DISCIPLINARY PROCEEDINGS*

A. Introduction

This Chapter is meant to help prisoners who are 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

* This Chapter was written by Miranda Berge based in part on previous versions by Rachel Wilgoren, Marjorie A. Adams, Jennifer L. Hurt, Ivan A. Sacks, and James A. Skarzynski. Special thanks to Kenneth Stephens of The Legal Aid Society, Prisoners’ Rights Project for his assistance in the revision of this Chapter.

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. U.S. CONST. art. III.

government must treat people with “fundamental fairness.”³ 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.⁴ 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*⁵ changed the law a lot. During the 1960s and ‘70s, the Supreme Court had extended constitutional rights to prisoners without limiting them. 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.⁶ The prison disciplinary committee did not let the prisoner present witnesses at the hearing, stating that all witnesses were unavailable.⁷ They sentenced the prisoner to a thirty-day disciplinary segregation in the Special Holding Unit (SHU)⁸ and he sought administrative review of the decision. Administrators later dropped the charge, deciding there was no proof.⁹ In the meantime, however, the prisoner filed a Section 1983 claim, arguing that his civil rights had been violated.

According to the Supreme Court, even if you have a significant, negative change in your confinement, this does not necessarily hurt a liberty interest protected by due process rights (rights dealing with fairness of procedures).¹⁰ 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.¹¹ However, you could still use the Due Process Clause in certain circumstances. 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.¹²

3. *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L. Ed. 791, 794 (1935) (“[I]n safeguarding the liberty of the citizen against deprivation through the action of the state, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions.”).

4. 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.

5. *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).

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, 475, 115 S. Ct. 2293, 2296, 132 L. Ed. 2d 418, 424 (1995).

8. Please note that the SHU acronym is used throughout this paper to describe different names for solitary confinement units.

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

10. *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 another prison with harsher conditions does not necessarily violate a liberty interest protected by the Due Process Clause of the 14th Amendment).

11. *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”).

12. *Sandin v. Conner*, 515 U.S. 472, 483–84, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 429–30 (1995) (citing Wolff

Even then, laws that avoid types of confinement 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.”¹³ To determine this, a court will generally compare ordinary prison conditions with a 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.”¹⁴ 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.”¹⁵ 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 procedures¹⁶ 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.¹⁷

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)¹⁸ for a set period of time if they find that the prisoner broke a rule.¹⁹ Before the superintendent’s hearing and during investigation, the prisoner may be placed in administrative segregation.²⁰ Prison officials may also hold a prisoner in administrative segregation in a SHU if the prisoner threatens the safety or security of the prison.²¹ 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.²² 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.

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

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

14. *Sandin v. Conner*, 515 U.S. 472, 486, 115 S. Ct. 2293, 2301, 132 L. Ed. 2d 418, 431 (1995).

15. *Sandin v. Conner*, 515 U.S. 472, 486, 115 S. Ct. 2293, 2301, 132 L. Ed. 2d 418, 431 (1995).

16. See Chapter 15 of the *JLM*, “Inmate Grievance Procedures,” for more information.

17. 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.

18. Subsequent uses of “SHU” will refer to how it is used in New York.

19. See N.Y. Comp. Codes R. & Regs. tit. 7, §§ 254.7(a)(1), 301.2(a).

20. See N.Y. Comp. Codes R. & Regs. tit. 7, § 301.3(a)(1).

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

22. See N.Y. Comp. Codes R. & Regs. tit. 7, §§ 254.7(a)(1), 301.2(a).

Disciplinary confinement takes place for a set time period. In contrast, administrative segregation is not considered punishment and can continue until the superintendent finds that the threat is over.²³ For more on the procedural requirements for disciplinary and administrative segregation in New York prisons, see Parts E and F of this Chapter.

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.²⁴

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.²⁵ 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. The Second Circuit and New York district courts hold that New York state regulations for disciplinary confinement²⁶ and administrative segregation²⁷ 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 finds that a prisoner only has a federal due process claim if, upon careful analysis, specific state statutes and regulations create protected liberty interests. Where these interests have been created, the prison must also regularly uphold these protected interests.²⁸ It is important to remember that courts

23. See N.Y. Comp. Codes R. & Regs. tit. 7, §§ 301.3(a), 301.4.

24. See, e.g., *Wilkinson v. Austin*, 545 U.S. 209, 223, 125 S.Ct. 2284, 2395 (2005) (“Such an interest may arise from state policies or regulations, subject to the important limitations set forth in *Sandin*, which requires a determination whether OSP assignment ‘imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.’”),

25. 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)) (“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).

26. 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).

27. See, e.g., *Tellier v. Fields*, 280 F.3d 69, 83 (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).

28. See *Houston v. Cotter*, 7 F. Supp. 3d 283, 295 (E.D.N.Y. 2014) (noting that “[s]tate statutes and regulations also confer liberty interests on prisoners); *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*

outside of New York State do not always find that state 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.”²⁹ A court will look at the facts of your confinement in its analysis.³⁰ 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.³¹ 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 [i.e. length] might both be atypical.”³²

(i) Actual Length 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.³³ You should count the total number of days that you spent in the SHU before, during, and after the disciplinary or administrative hearing.³⁴ 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.³⁵

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.³⁶ Periods of less than 305 days but more than 101 days may involve a protected liberty interest.³⁷ Whether it

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.

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

30. *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.”).

31. *See Ruggiero v. Prack*, 168 F. Supp. 3d 495, 519 (W.D.N.Y. 2016) (listing factors the court may consider to determine atypical and significant hardship as: “(1) the duration of the deprivation; (2) the extent of the deprivation; (3) the availability of other out of cell activities; (4) the opportunity for in-cell exercise; and (5) the justification for the deprivation”); *Davis v. Barrett*, 576 F.3d 129, 133 (2d Cir. 2009) (citing *Sandin v. Conner*, 515 U.S. 472, 484 (1995) (“Factors relevant to determining whether the plaintiff endured an ‘atypical and significant hardship’ include ‘the extent to which the conditions of the disciplinary segregation differ from other routine prison conditions’ and ‘the duration of the disciplinary segregation imposed compared to discretionary confinement.’”)).

32. *See Samuels v. Fischer*, 168 F. Supp. 3d 625, 642 S.D.N.Y. 2016) (citing *Sealey v. Giltner*, 197 F.3d 578, 586 (2d Cir. 1999) (holding that a sentence of 30 months in SHU prevents a motion to dismiss for failure to state a due process claim).

33. *See Paul v. Selsky*, 2012 U.S. Dist. LEXIS 90939, at *18 (W.D.N.Y. Jun. 29, 2012) (*unpublished*) (“In assessing atypicality under *Sandin*, a court must look to the ‘actual punishment’ imposed.” (citing *Scott v. Albury*, 156 F.3d 283, 286–87 (2d Cir. 1998))).

34. *See Nieves v. Prack*, 172 F. Supp. 3d 647, 652 (W.D.N.Y. 2016) (discussing ranges of days in SHU that could implicate due process rights and holding that 90–101 days can be within the range of typical).

35. *See Fludd v. Fischer*, 568 Fed. Appx. 70, 73 (2d Cir. 2014) (noting that, “[f]or the purpose of establishing a liberty interest, a district court should consider the entire “sustained period of confinement” (citing *Giano v. Selsky*, 238 F.3d 223, 226 (2d Cir. 2001)); *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).

36. *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*).

37. *See Gonzalez v. Hasty*, 802 F.3d 212, 223 (2d Cir. 2015) (declaring that “a period of confinement under typical SHU conditions lasting longer than 305 days ... triggers a protected liberty interest, whereas a period of confinement

involves a protected liberty interest heavily depends on the extent of your deprivation.³⁸ (This second factor is discussed more below.) Confinement for less than 101 days probably does not involve a *Sandin* liberty interest unless you experienced unusually severe conditions in the SHU.³⁹ Finally, confinement under typical SHU conditions for less than thirty days will probably not result in a successful due process claim.⁴⁰

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.⁴¹

(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.”⁴² The Second Circuit says that, under *Sandin*, a prisoner does not have a

lasting between 101 and 305 days may trigger a protected liberty interest, depending on the specific conditions of confinement”); see also *Palmer v. Richards*, 364 F.3d 60, 64–65 (2d Cir. 2004) (“Instead, our cases establish the following guidelines for use by district courts in determining whether a prisoner’s liberty interest was infringed. Where the plaintiff was confined for an intermediate duration—between 101 and 305 days—‘development of a detailed record’ of the conditions of the confinement relative to ordinary prison conditions is required.” (citing *Colon v. Howard*, 215 F.3d 227, 234 (2d Cir. 2000))).

38. See *Davis v. Barrett*, 576 F.3d 129, 133 (2d Cir. 2009); see also *Houston v. Cotter*, 7 F. Supp. 3d 283, 298 (E.D.N.Y. 2014) (citing *Earl v. Racine Cnty. Jail*, 718 F.3d 689, 691 (7th Cir. 2013) (“When an inmate is placed in conditions more restrictive than those in the general prison population, whether through protective segregation like suicide watch or discretionary administrative segregation, his liberty is affected only if the more restrictive conditions are particularly harsh compared to ordinary prison life or if he remains subject to those conditions for a significantly long time.”)); *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); *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”); *Carter v. Carrier*, 905 F. Supp. 99, 104 (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”).

39. See *Ortiz v. McBride*, 380 F.3d 649, 654 (2d Cir. 2009) (“We have said that under abnormal or unusual SHU conditions, periods of confinement of less than 101 days may implicate a liberty interest.”); see also *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 *Holmes v. Grant*, 2006 U.S. Dist. LEXIS 15743, at *11 (S.D.N.Y. Mar. 31, 2006) (*unpublished*) (denying defendant’s motion to dismiss where plaintiff alleged specific health problems resulting from 24-hour lighting during a 35-day stay in SHU); *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”).

40. See, e.g., *Houston v. Cotter*, 7 F. Supp. 3d 283, 298 (E.D.N.Y. 2014) (“Absent a detailed factual record, courts typically affirm dismissals of due process claims where the period of time spent in SHU was short—e.g., thirty days...); *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 Civ. 5353, 1996 U.S. Dist. LEXIS 1662, at *9 (S.D.N.Y. Feb. 16, 1996) (*unpublished*) (noting that thirty days of confinement does not implicate liberty interest); *Martin v. Mitchell*, No. 92–CV–716, 1995 U.S. Dist. LEXIS 19006, at *4 (N.D.N.Y. Nov. 24, 1995) (*unpublished*) (noting that thirty days of confinement does not implicate liberty interest).

41. *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”).

42. See *Wilkinsin v. Austin*, 545 U.S. 209, 210, 125 S. Ct. 2384, 2384, 162 L. Ed. 2d 174, 182 (2005) (“Such an interest may arise from state policies or regulations, subject to the important limitations set forth in *Sandin*, which requires a determination whether OSP assignment “imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.” (citing *Sandin v. Conner*, 515 U.S. 472, 483–484, 115 S. Ct. 2293, 2300, 132 L.

due process claim if other prisoners have about the same hardship under ordinary prison administration.⁴³ There is some dispute about the meaning of “ordinary incidents of prison life.”⁴⁴ Courts will let you compare what you experienced in the SHU to what the general population experiences at your prison.⁴⁵ 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.⁴⁶

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.⁴⁷

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.⁴⁸

Even if prisoners in the general population sometimes experience similar deprivations, you could still have a due process claim.⁴⁹ 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.”⁵⁰ This analysis, which looks at how and how long you are confined, seems typical of recent Second Circuit cases.⁵¹

Ed. 2d 418, 430 (1995)).

43. *Wilkinson v. Austin*, 545 U.S. 209, 222–223, 125 S. Ct. 2384, 2394, 162 L. Ed. 2d 174, 190 (2005) (citing the standard of “atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life” outlined in *Sandin v. Conner*, 515 U.S. 472, 486, 115 S. Ct. 2293, 2301, 132 L. Ed. 2d 418, 430 (1995)).

44. *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).

45. *See Ortiz v. McBride*, 380 F.3d 649, 654 (2d Cir. 2009); *See also, 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).

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

47. *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*).

48. *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*).

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

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

51. *See, e.g., Gonzalez v. Hasty*, 802 F.3d 212, at *23 (2d Cir. 2015) (“A period of confinement under typical SHU conditions lasting longer than 305 days . . . triggers a protected liberty interest, whereas a period of confinement lasting between 101 and 305 days may trigger a protected liberty interest, depending on the specific conditions of confinement.”); *J.S. v. T’Kach*, 714 F.3d 99, 106 (2d Cir. 2013) (instructing district court to grant leave to amend

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.⁵²

In addition to your own testimony, you should also obtain and submit other, independent evidence about your detention conditions. For example, if you complained of unhygienic conditions or other unmet medical needs, you should try to obtain records of these complaints.⁵³

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.⁵⁴ But you may have a claim if the move was a result of exercising your constitutional rights.⁵⁵

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.⁵⁶ For example, a discretionary transfer from a minimum security prison to a

complaint that sufficiently pleads violation of Fifth Amendment based on duration of 188 days in SHU and no contrary factual findings); *Palmer v. Richards*, 364 F.3d 60, 64-66 (2d Cir. 2004) (articulating duration guidelines for district courts and noting that dismissal is appropriate only when prisoner spent fewer than 30 days in SHU); *LaBounty v. Kinkhabwala*, 2 F. App'x. 197, 201 (2d Cir. 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*, 8 F. App'x 145, 146 (2d Cir. 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).

52. *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"); *Edwards v. Mejia*, No. 11 Civ. 9134 (ALC), 2013 U.S. Dist. LEXIS 37006, at *6-*7 (S.D.N.Y. Mar. 15, 2013) (*unpublished*) (finding claim of difficulty breathing because of adequate air ventilation and physical and psychological anguish was sufficient to plead atypical and significant hardship); *Brown v. Doe*, No. 13 CIV. 8409 (ER), 2014 U.S. Dist. LEXIS 152925, at *16-*17 (S.D.N.Y. Oct. 28, 2014) (*unpublished*) (finding complaint deficient because, although plaintiff claimed he was unable to sleep, he did not point to a specific condition of confinement that caused emotional harm).

⁵³ *See Davis v. Barrett*, 576 F.3d 129, (2d Cir. 2009) (rejecting district court's determination that plaintiff's claim of unhygienic conditions was insufficient because of lack of evidence of complaints); *Wheeler v. Butler*, 209 F. App'x 14, 16 (2d Cir. 2006) (*unpublished*) (finding that plaintiff's denied requests for his hearing aids while in SHU were relevant to determination of whether he was subjected to atypical conditions) (*unpublished*).

54. *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).

55. *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); *Hill v. Laird*, No. 06-CV-0126 (JS) (ARL), 2014 U.S. Dist. LEXIS 43994, at *22 (E.D.N.Y. Mar. 31, 2014) (*unpublished*) (citing authority).

56. *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

medium security prison is not worse than the ordinary disruptions of prison life.⁵⁷ 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.⁵⁸ How often you move between prisons does not matter.⁵⁹

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.⁶⁰

3. Good-Time Credits

Having good-time credits does not necessarily mean that you have a protected liberty interest.⁶¹ To claim a liberty interest, your state must have created an interest.⁶² For example, in *Reynolds v. Wolff*, a Nevada law allowed prisoners to accumulate good-time credits “unless the prisoner ha[d] committed serious misbehavior.”⁶³ The court found that this law offered a “right of ‘real substance’” by providing good-time credits. According to the court in *Reynolds*, this created a liberty interest under the due process analysis.⁶⁴ 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.⁶⁵

The chance to earn good-time credits, however, is not a protected liberty interest by itself.⁶⁶ For example, in *Luken v. Scott*,⁶⁷ the prisoner was put in administrative segregation and could not, therefore, receive any 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.”⁶⁸ Similarly, in *Bulger v. U.S.*

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).

57. 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.”).

58. *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).

59. 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).

60. See *Wong v. Warden, FCI Raybrook*, 999 F. Supp. 287, 290 (N.D.N.Y. 1998), *aff'd*, 171 F.3d 148 (2d Cir. 1999) (stating that an incarcerated alien did not have a liberty interest in being transferred to his home country, unless the denial of transfer was discriminatory based on race or national origin); *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.”); see also *Marshall v. Reno*, 915 F. Supp. 426, 431–32 (D.D.C. 1996) (finding no due process claim where Canadian plaintiff was not transferred to Canadian prison according to his sentencing judge’s recommendation, because the Bureau of Prisons determines prison locations and the Attorney General determines whether to transfer inmates pursuant to treaty).

61. 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).

62. 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).

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

64. *Reynolds v. Wolff*, 916 F. Supp. 1018, 1023 (D. Nev. 1996). District courts in New York are divided about whether the loss of good time credits implicates a protected liberty interest under the due process clause. See *Duamutef v. O’Keefe*, No. 94-CV-470, 1996 U.S. Dist. LEXIS 22055, at *12 - *14 (N.D.N.Y. Jan. 30, 1996) (*unpublished*) (citing cases).

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

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

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

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

Bureau of Prisons, losing a prison job did not automatically involve a liberty interest even though the prisoner could no longer automatically accrue good-time credits through that job.⁶⁹

The Supreme Court case of *Edwards v. Balisok* is a big deal for claims about losing good-time credits.⁷⁰ 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.⁷¹ The application of the *Edwards* standard varies. The Second Circuit, for instance, only applies *Edwards* to good-time credit cases.⁷² 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.⁷³ 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.⁷⁴ The standard is similar for work release programs.⁷⁵ Courts consider whether your program gives you “substantial freedom” and whether you have been “released from incarceration.”⁷⁶ 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.⁷⁷

69. *Bulger v. U.S. Bureau of Prisons*, 65 F.3d 48, 50 (5th Cir. 1995); see also *Rivera v. Coughlin*, No. 92 CIV 3404 (DLC), 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).

70. *Edwards v. Balisok*, 520 U.S. 641, 117 S. Ct. 1584 (1997); see also *Rivera v. Coughlin*, No. 92 CIV 3404 (DLC), 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).

71. *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).

72. 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).

73. 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).

74. 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*, No. 1:11-CV-019, 2011 U.S. Dist. LEXIS 110404, at *23 (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”).

75. See *Young Ah Kim v. Hurston*, 182 F.3d 113, 118 (2d Cir. 1999) (finding final phase of work release, where plaintiff lived at home, worked at a job, and reported to prison was “virtually indistinguishable from either traditional parole or the Oklahoma program considered in *Young*”); *United States v. Rivard*, 184 F.3d 176, 179 (2d Cir. 1999) (rejecting defendant’s claim that his work-release program was analogous to pre-parole which constituted a protected liberty interest in *Young v. Harper* because defendant only had substantial freedom on weekdays); *Nelson v. Skrobecki*, No. 4:14CV3010, 2014 U.S. Dist. LEXIS 83481, at *7–*8 (D. Neb. June 18, 2014) (*unpublished*) (citing cases that found a liberty interest in revocation of conditional release programs).

76. *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”).

77. See *Young Ah Kim v. Hurston*, 182 F.3d 113, 118 (2d Cir. 1999) (finding that work release where plaintiff lived at home was “virtually indistinguishable” from parole); *Callender v. Sioux City Residential Treatment Facility*, 88 F.3d 666, 668 (8th Cir. 1996) (finding the work 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”); see also *Bock v. Gold*, 408 F. App’x 461, 463–64 (2d Cir. 2011) (conditional release did not clearly establish liberty interest because of restraints on plaintiff’s ability to be with family and friends); *Gonzalez-Fuentes v. Molina*, 607 F.3d 864, 887–88, 890 (1st Cir. 2010) (finding conditional release created liberty interest where plaintiffs had to remain at home unless at a job or school and had to wear an electronic tracking device).

The deciding factor for whether you have been “release[d] from institutional life altogether” is where you live.⁷⁸ 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.⁷⁹ 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).⁸⁰ 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.’”⁸¹ By contrast, in *Young*, the participant in the pre-parole program lived in his home at all times.⁸² Courts also consider any other restrictions that the program puts on your life.⁸³

To be clear, you do not have a state-created right to be placed in a work release program.⁸⁴ However, you might have a state-created interest once you are placed in a work release program.⁸⁵ In some states, removal from a work release program is considered an “atypical and significant hardship” under the *Sandin* analysis.⁸⁶ New York is one state that creates this liberty interest.⁸⁷ In New York, the following process must be followed before you can be removed from temporary work release:⁸⁸

78. *Weller v. Lawson*, 75 F. Supp. 2d 927, 934, (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.”); *see* *Haley v. Kintock Group*, 587 F. App’x 1, 3 (3d Cir. 2014) (*unpublished*) (finding parolee’s release to halfway home did not create protected liberty interest because “the conditions of parole [] determine the liberty interest”).

79. *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 an 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, (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).

80. *Roucchio v. Coughlin*, 923 F. Supp. 360, 369 (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).

81. *Roucchio v. Coughlin*, 923 F. Supp. 360, 369 (E.D.N.Y. 1996) (quoting *Whitehorn v. Harrelson*, 758 F.2d 1416, 1421 (11th Cir. 1985)).

82. *Young v. Harper*, 520 U.S. 143, 148, 137 L. Ed. 2d 270, 117 S. Ct. 1148 (1997) (finding that pre-parolee’s life was similar to a parolee’s and therefore he had a protected liberty interest in remaining on pre-parole).

83. *White v. Steuben County*, No. 1:11-CV-019, 2011 U.S. Dist. LEXIS 110404, at *25, (N.D. Ind. Sept. 27, 2011) (*unpublished*); *see* *Haley v. Kintock Group*, 587 F. App’x 1, 3-4 (3d Cir. 2014) (*unpublished*) (noting that parolee had to remain at halfway house unless he received permission to leave, had to stand count several times a day, had curfew, was monitored, and could not see friends and family without visitation privileges); *Gonzalez-Fuentes v. Molina*, 607 F.3d 864, 887-88 (1st Cir. 2010) (considering restrictions placed on prisoners on conditional release, including wearing unremovable electronic tracking anklet and submitting list of restrictions on alcohol and substance abuse).

84. *See* *Roucchio v. Coughlin*, 923 F. Supp. 360, 371 n.3 (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); *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) (stating that the determination of initial placement in work release program, and removal of prisoner from such program, present different inquiries).

⁸⁵ *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 (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).

86. *See* *Roucchio v. Coughlin*, 923 F. Supp. 360, 374–75 (E.D.N.Y. 1996) (finding that where a prisoner was removed from a 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 a prisoner was removed from the work release program in which he participated for almost four years and that although his “return from the quasi-freedom of work release to the regimentation of life within four walls” may have been a significant deprivation, it was

- (1) Written notice must be given to you of your removal and 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.⁸⁹
- (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."⁹⁰

If you have been removed from temporary work release and any of these steps were not followed, you may have a valid claim that you were deprived of your liberty interest in remaining in the program without due process.⁹¹

5. Parole

The mere opportunity to obtain parole does not necessarily grant you a liberty interest in obtaining parole.⁹² But 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.⁹³ This varies from state to state and depends on the language in the

not atypical, because his confinement was an "ordinary incident of prison life"); *Asquith v. Volunteers of Am.*, 1 F. Supp. 2d 405, 415 (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).

87. *Quartararo v. Catterson*, 917 F. Supp. 919, 940 (E.D.N.Y. 1996), 1996 U.S. Dist. LEXIS 838 (E.D.N.Y. 1996) (affirming the "continued vitality of *Tracy v. Salamack* in light of *Sandin*"); *Friedl v. City of New York*, 210 F.3d 79, 84 (2d Cir. 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) (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* implicitly affirmed *Tracy v. Salamack*, 572 F.2d 393 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), because *Tracy* explicitly rests upon *Morrissey* and *Meachum*. *But see* *Duffy v. Selsky*, No. 95 CIV 0474 (LBS), 1996 U.S. Dist. LEXIS 10069, at *40-*41 (S.D.N.Y. Jul. 18, 1996) (*unpublished*) (holding no liberty interest in admission to the Temporary Release Program).

88. *See Anderson v. Recore*, 446 F.3d 324, 329 (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*").

89. *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).

90. *Friedl v. City of New York*, 210 F.3d 79, 85 (2d Cir. 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)).

91. *See Anderson v. Recore*, 446 F.3d 324, 328-29 (2d Cir. 2006) (citing *Friedl v. City of New York*, 210 F.3d 79, 84-85 (2d Cir. 2000) and *Young Ah Kim v. Hurston*, 182 F.3d 113, 118 (2d Cir. 1999)).

92. *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).

93. *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); *Robles v.*

statute.⁹⁴ 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.⁹⁵

Generally, confinement in either administrative or disciplinary segregation that may also affect your parole opportunities does not implicate a protected liberty interest under *Sandin*.⁹⁶ 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.

Once you obtain parole, you do have certain rights if your parole is being revoked.⁹⁷ In *Morrissey*, the Supreme Court outlined the procedural rights that you have before your parole can be revoked.⁹⁸ 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.⁹⁹ The hearing should be done by someone who is not directly involved in your case.¹⁰⁰ You should receive notification of the preliminary hearing before it takes place, including information about why the hearing is

Dennison, 745 F. Supp. 2d 244, 261 (N.D.N.Y. 2010) (“Although there is no constitutional right to parole, a state may create a liberty interest in parole by means of its statutes and regulations governing the parole decision-making process.”).

94. See, e.g., *Robles v. Dennison*, 745 F. Supp. 2d 244, 263-65, 271-74 (N.D.N.Y. 2010) (analyzing the language of prior parole statute and current parole statute to determine whether protectable liberty interest remained); *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); *Watley v. Robertson*, No. 10-3726 (SDW), 2011 U.S. Dist. LEXIS 116910, at *19 (D.N.J. Oct. 6, 2011) (*unpublished*) (holding the same); *Crump v. Lafler*, 657 F.3d 393, 401-04 (6th Cir. 2011) (comparing Michigan’s parole statute with the statutes at issue in *Allen* and *Greenholtz* to determine whether the Michigan statute creates protectable liberty interest); *Haggard v. Curry*, 631 F.3d 931, 936 (9th Cir. 2010) (noting that California’s parole law creates a protectable liberty interest which encompasses California’s requirement that parole decisions be supported by “some evidence”); *Thompson v. Veach*, 501 F.3d 832, 836-37 (7th Cir. 2007) (stating that the District of Columbia parole statute does not create a protectable liberty interest); *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”).

95. 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.’”); *Crump v. Lafler*, 657 F.3d 393, 399 (6th Cir. 2011) (asking whether parole there is mandatory language “that creates a presumption of release” in the statute, regulations, or policy statements of prison or parole officials); *Moor v. Palmer*, 603 F.3d 658, 661 (9th Cir. 2010) (stating that statute creates protectable liberty interest as long as statute has mandatory language and limits discretion of parole decision-makers).

96. 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”); *Newell v. Unknown Borgen*, No. 2:14-cv-172, 2015 U.S. Dist. LEXIS 12171, at *6-*7 (W.D. Mich. Feb. 3, 2015) (*unpublished*) (stating that administrative segregation generally does not implicate a protected liberty interest because it is not an atypical and significant hardship); *Labat v. Williams*, No. 08-4041 Section “N”(4), 2010 U.S. Dist. LEXIS 83260, at *64-*68 (E.D. La. Jul. 8, 2010) (*unpublished*) (finding that prisoner’s placement in segregation that caused delay in pursuing parole opportunities did not violate a liberty interest).

97. See *Green v. McCall*, 822 F.2d 284, 289-90 (2d Cir. 1987) (stating that even parole grantees who have not yet been paroled have protectable liberty interest).

98. 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).

99. *Morrissey v. Brewer*, 408 U.S. 471, 485, 92 S. Ct. 2593, 2602, 33 L. Ed. 2d 484, 497 (1972) (noting the need for timeliness and proximity so that “information is fresh and sources are available”).

100. *Morrissey v. Brewer*, 408 U.S. 471, 485-86, 92 S. Ct. 2593, 2603, 33 L. Ed. 2d 484, 497 (1972) (stating that due process requires someone other than the supervising parole officer or caseworker, such as a judicial officer or independent officer appointed by the State).

happening and the allegations against you.¹⁰¹ 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) receive written notice of the claims against you;
- (3) receive information about the evidence against you;
- (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.¹⁰²

You may have a claim if you are a parolee and there is a violation of any of the seven rights or procedures listed above. You may also have a claim if you are a prisoner granted parole but not yet on parole. Depending on your state’s parole statute, you may also have a liberty interest in obtaining parole.

D. Prisoners’ Basic Rights in Disciplinary Procedures

In *Wolff v. McDonnell*,¹⁰³ 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 may not apply to you. Go to Part F of this chapter to learn more about your rights if you have been. 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 to defend yourself at your disciplinary proceeding or to challenge your punishment on appeal in court.¹⁰⁴ 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,”¹⁰⁵ 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.¹⁰⁶ 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. 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*,¹⁰⁷ prison officials disciplined a prisoner for

101. *Morrissey v. Brewer*, 408 U.S. 471, 486–87, 92 S. Ct. 2593, 2599–603, 33 L. Ed. 2d 484 (1972).

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

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

104. *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 ensure that the state-created right is not arbitrarily abrogated”).

105. *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).

106. *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).

107. *Richardson v. Coughlin*, 763 F. Supp. 1228 (S.D.N.Y. 1991) (holding that anti-noise ordinance was not unconstitutionally vague).

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.¹⁰⁸ 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*,¹⁰⁹ 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."¹¹⁰ In other words, you need to be given a fair chance to follow the rules and you should only be punished for breaking those rules or for breaking the law.

You also have a right not to be punished based on a vague (unclear) regulation.¹¹¹ 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.¹¹² 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."¹¹³ A regulation can also be found vague as applied to your particular case. In *Rios v. Lane*,¹¹⁴ 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 just because you aren't given copies of your state's penal law.¹¹⁵ 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."¹¹⁶ You are also presumed to have knowledge of statewide prison 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.¹¹⁷

108. *Richardson v. Coughlin*, 763 F. Supp. 1228, 1235 (S.D.N.Y. 1991). For more examples, see *Wallace v. Nash*, 311 F.3d 140, 143-45 (2d Cir. 2002) (finding that prisoner had valid claim that he was improperly disciplined because the cited prohibition was for possession of a weapon and he was punished for use of a pool cue as a weapon); *Coffman v. Trickey*, 884 F.2d 1057, 1060-61 (8th Cir. 1989) (finding prisoner's due process rights were violated where he was punished for unspecified prison rule); *Hayes v. Fla. Dep't of Children & Families*, No. 4:10cv541-MP/CAS, 2012 U.S. Dist. LEXIS 95698, at *13 - *15 (N.D. Fla. May 11, 2012) (*unpublished*) (citing authority for proposition that prisoners must have notice of prison rules before being punished for violating those rules).

109. *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).

110. *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).

111. *See Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 2299, 33 L. Ed. 2d 222, 227 (1972) (stating that an regulation is void for vagueness if it is not clear what it prohibits. That vagueness is a violation of due process).

112. *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).

113. *See Taylor v. Perini*, 413 F. Supp. 189, 233-34 (N.D. Ohio 1976) (describing how classifying conduct as merely "objectionable" was too vague to justify such severe sanctions).

114. *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).

115. *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).

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

117. *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

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,¹¹⁸ you can be punished if the regulation is posted permanently.¹¹⁹ New York law requires that you be given a personal copy of the prison rules.¹²⁰ Some prisons also require you to affirm in writing that you received the prison disciplinary handbook.¹²¹ All regulations must be printed in both English and Spanish,¹²² and the possible punishments for each type of violation must be clearly noted.¹²³

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.¹²⁴ 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 at some point.

2. Written Notice Requirement

Under *Wolff v. McDonnell*, 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.¹²⁵ An oral (spoken) explanation of the charges is not enough.¹²⁶ The charges must be in writing, and they must be clear enough to allow you to prepare your defense.¹²⁷ At least one court has found that a prisoner was denied due process 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.¹²⁸ 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 huge disadvantage.¹²⁹ 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.¹³⁰

facility).

118. *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 temporary posting of regulations on a bulletin board does not constitute fair notice since postings on bulletin boards go up and down frequently and are not permanent).

119. *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).

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

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

122. 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).

123. N.Y. Correct. Law § 138(3) (Consol., Lexis Advance through 2016 released chapters 1-519)(McKinney 2011).

124. 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.

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

126. *Wolff v. McDonnell*, 418 U.S. 539, 564, 94 S. Ct. 2963, 2979, 41 L. Ed. 2d 935, 955–56 (1974).

127. *Wolff v. McDonnell*, 418 U.S. 539, 564, 94 S. Ct. 2963, 2979, 41 L. Ed. 2d 935, 955–56 (1974); *see also Spellmon-Bey v. Lynaugh*, 778 F. Supp. 338, 342 (E.D. Tex. 1991) (holding that notice was inadequate where the charged was given in writing, but the specific acts that gave rise to the charge were unclear and consequently it was impossible to prepare an adequate defense as he did not know what conduct gave rise to the charge).

128. *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.”).

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

130. *See Wolff v. McDonnell*, 418 U.S. 539, 564, 94 S. Ct. 2963, 2978, 41 L. Ed. 2d 955, 955 (1974) (holding that advance written notice “of the charges against him” is required by due process but failing to state what content or details or required for notice to satisfy due process and that “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) (explaining that the notice requirement requires “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.”); *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

New York law gives you even more rights than you have under *Wolff*. In New York, you still have the right to receive written notice of the charges at least twenty-four hours before the hearing.¹³¹ Unlike *Wolff v. McDonnell*, which did not require the notice to have any particular content,¹³² 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).¹³³ If more than one inmate was involved in the incident, the specific role played by each inmate must be included.¹³⁴ If you do not speak English, you have the right to translations of the notice of the charges and statements of evidence.¹³⁵ You are also entitled to have a translator present at your disciplinary hearing.¹³⁶ If you are deaf or hard of hearing, you have similar rights.¹³⁷

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*, the Supreme Court held that prisoners do not have a right to counsel at disciplinary proceedings.¹³⁸ The *Wolff* Court did, however, recognize two circumstances in which you are entitled to a “counsel-substitute.” Your “counsel-substitute” can either be a prison employee (“employee assistant”) or a fellow prisoner who assists you in the preparation of your case). First, you are entitled to a counsel-substitute if you are illiterate.¹³⁹ Second, if your case is really complicated, although the Court did not define what “complicated” means.¹⁴⁰ 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 specifically 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),

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”).

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

132. *Wolff v. McDonnell*, 418 U.S. 539, 563–65, 94 S. Ct. 2963, 2978–79, 41 L. Ed. 2d 955, 956 (1974) (holding that advance written notice “of the charges against him” is required by due process but failing to state what content or details or required for notice to satisfy due process). 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).

133. N.Y. Comp. Codes R. & Regs. tit. 7, § 251–3.1(c).

134. N.Y. Comp. Codes R. & Regs. tit. 7, § 251–3.1(c); see also *Howard v. Coughlin*, 593 N.Y.S.2d 707, 708–709, 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 (App. Div. 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 (App. Div. 1984) (finding notice to be sufficient where the written notice referred to the disciplinary problem in question as the “incident” but also contained references to a “readily identifiable” event: a four-day riot, rule violations, and prisoner’s offensive conduct).

135. N.Y. Comp. Codes R. & Regs. tit. 7, § 254.2; 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).

136. N.Y. Comp. Codes R. & Regs. tit. 7, § 254.2.

137. N.Y. Comp. Codes R. & Regs. tit. 7, § 254.2.

138. 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).

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

140. *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”).

- (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.¹⁴¹

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.¹⁴² 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.¹⁴³ In these situations, correction officers must perform the investigatory tasks that the prisoner would perform if he was able to do it himself.¹⁴⁴ However, note that assistants are only required to answer questions you specifically ask, and to perform tasks you specifically request.¹⁴⁵ Finally, if you are entitled to an assistant, New York law requires your hearing take place no sooner than twenty-four hours after your initial meeting with that assistant.¹⁴⁶

When you receive notice of the charges against you, you will be given a list of employees who serve as employee assistants.¹⁴⁷ 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 (or disagree with) the assignment. 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).¹⁴⁸

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.¹⁴⁹ However, do not expect the employee assistant to do anything that you do not specifically

ask him or her to do.¹⁵⁰ You must ask for assistance. If you do not make an affirmative request, you waive or lose 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.¹⁵¹ As a result, the prisoner was responsible for his own lack of representation.

The assistant does not need to act as your advocate the way a lawyer would, or even be present at your hearing.¹⁵² However, due process does require that your assigned assistant carry out basic, reasonable, and

141. N.Y. Comp. Codes R. & Regs. tit. 7, § 251-4.1(a).

142. *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 on other grounds 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 that a Spanish-speaking prisoner was not entitled to have employee assistant translate for him at disciplinary proceeding because translation assistance from a Spanish-speaking prisoner was enough).

143. *See Eng v. Coughlin*, 858 F.2d 889, 891 (2d Cir. 1988) (holding that a prisoner segregated from the general prison population has a due process right of assistance in preparing a defense).

144. *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).

145. *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 when he did not specify the documents he wanted produced).

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

147. N.Y. Comp. Codes R. & Regs. tit. 7, § 251-4.1(a); *see also Matter of 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).

148. *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).

149. N.Y. Comp. Codes R. & Regs. tit. 7, § 251-4.2.

150. *See Horne v. Coughlin*, 155 F.3d 26, 29, 31 (2d Cir. 1998), *amended by* 191 F.3d 244 (2d Cir. 1999). In *Horne*, 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.

151. *Matter of Newman v. Coughlin*, 110 A.D.2d 981, 983, 488 N.Y.S.2d 273, 274 (3d Dept. 1985).

152. *See Gunn v. Ward*, 71 A.D. 2d 856, 856, 419 N.Y.S. 2d 182, 183 (2d Dept. 1979), *affirmed*, 52 N.Y.2d 1017,

non-disruptive requests.¹⁵³ For example, one court held that an employee assistant's refusal to collect necessary and available evidence violated the prisoner's due process rights.¹⁵⁴ 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.¹⁵⁵

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 stated the limits of your constitutional right to call witnesses during disciplinary hearings.¹⁵⁶ The Court specified 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."¹⁵⁷ In other words, you can call witnesses unless prison officials decide that allowing you to do so would have a bad impact on the safety of the prison or the prison officials' ability to operate the prison. Prison officials do not have to call every witness you request to testify at your disciplinary hearing; they have the power to decide whether a potential witness can testify or not.¹⁵⁸ This has been interpreted to mean that the official can choose not to call witnesses whose testimony they believe would be not important (immaterial)¹⁵⁹ or repetitive and unnecessary (unduly redundant)¹⁶⁰.

A prisoner's constitutional right to call witnesses was expanded and clarified in *Powell v. Ward*, also known as *Powell II*.¹⁶¹ In *Powell II*, the court rejected a rule established at the prison against allowing witnesses to be present at the hearing.¹⁶² Instead, the court stated that "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."¹⁶³ If the court decides that witnesses may not be present at the disciplinary hearing, the witness may be interviewed and tape-recorded without you being present.¹⁶⁴ However, you must be given an explanation for why the witness is not allowed to appear.¹⁶⁵ The

420 N.E.2d 100 (N.Y. 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).

153. *See* *Silva v. Casey*, 992 F.2d 20, 22 (2d Cir. 1993) (discussing the duties of employee assistants and holding that assistant had no obligation to go beyond bounds of prisoner's specific instructions in interviewing prisoners and gathering evidence). *See also* *Matter of Kelemen 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).

154. *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).

155. *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).

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

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

158. *Wolff v. McDonnell*, 418 U.S. 539, 566, 94 S. Ct. 2963, 2980, 41 L. Ed. 2d 935, 956-57 (1974) (A prison official may exercise his "discretion to keep the hearing within reasonable limits.").

159. *See* *Dawkins v. Gonyea*, 646 F.Supp.2d 594, 611 (S.D.N.Y. 2009) (finding hearing officers are not required to call witnesses whose testimony is not necessary) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 566, 94 S. Ct. 2963, 2980, 41 L. Ed. 2d 935, 956-57 (1974)).

160. *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).

161. *Powell v. Ward*, 487 F. Supp. 917 (S.D.N.Y. 1980), *affirmed and modified*, 643 F.2d 924 (2d Cir. 1981).

162. *Powell v. Ward*, 487 F. Supp. 917, 928 (S.D.N.Y. 1980).

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

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

165. *Powell v. Ward*, 487 F. Supp. 917, 929 (S.D.N.Y. 1980); *but see* *Ponte v. Real*, 471 U.S. 491, 492, 105

tape or transcript of the interview must be made available to you before or at the hearing, unless the hearing officer decides that the tape or transcript also “jeopardize[s] institutional safety or correctional goals.”¹⁶⁶

Under New York regulations, the notice that you receive before the hearing must inform you of your right to call witnesses.¹⁶⁷ You may request a witness either by telling your employee assistant or hearing officer before the hearing, or by telling your hearing officer during the hearing.¹⁶⁸ You have a right to request that your employee assistant interview your witnesses during the investigation of your claim.¹⁶⁹ If your employee assistant interviews witnesses outside of your presence, you have a right to receive a tape or transcript of the interview or an explanation of their denial prior to the hearing.¹⁷⁰

In New York, if you are not permitted to call a witness, you should receive a written statement from the hearing officer that specifically states why you are not allowed, including the specific threat to institutional safety or correctional goals that would be harmed.¹⁷¹ Although the statute states you are required to receive a written explanation, Courts have interpreted this to be permitted but not required. Statements that do not include an explanation, like for example “[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.¹⁷² 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. On the one hand, there are limits on the prison officials’ option to decide when a witness’ testimony would be considered repetitive.¹⁷³ On the other hand, courts do not require these explanations to be detailed. Instead, the court “must accord due deference to the decision of the [prison] administrator.”¹⁷⁴ The court will uphold the prison official’s refusal to allow a witness even if the witness could have provided testimony beneficial to you.¹⁷⁵ When prison officials say the reason for their decision to deny witnesses is security concerns, courts will tend to uphold that determination.¹⁷⁶

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).

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

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

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

169. *See Matter of 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).

170. *See Matter of 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).

171. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.5(a), N.Y. Comp. Codes R. & Regs. tit. 7, § 254.5(a); *see Moyer 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).

172. *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).

173. *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, 273-74, 529 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); *Matter of 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). 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).

174. *Zamakshari v. Dvoskin*, 899 F. Supp. 1097, 1107 (S.D.N.Y. 1995) (“The Supreme Court and the Second Circuit have repeatedly concluded that in determining whether a prison disciplinary committee properly excluded a witness from a hearing, a reviewing court must accord due deference to the decision of the [prison] administrator.”).

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

176. *See, e.g., Matter of Laureano v. Kuhlmann*, 75 N.Y.2d 141, 146, 550 N.E.2d 437, 440, 551 N.Y.S.2d 184, 187 (1990) (upholding denial of right to call witness where hearing officer informed prisoner that victim of assault feared

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 constitutional 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."¹⁷⁷ One court interpreting *Wolff* described the security issues posed by confrontation and cross-examination as including the possibility of retaliation against adverse witnesses and informants (those testifying unfavorably or against you), in addition to the "potential for breakdown in authority."¹⁷⁸ Due to the prison's strong interest in keeping the prison safe, 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.¹⁷⁹ 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.¹⁸⁰

In New York, courts have held that prisoners do not have the right to be present when adverse witnesses testify if the witness is called by the Hearing Officer.¹⁸¹ Prison officials must, however, provide some objective evidence to support a decision to interview witnesses without you being there.¹⁸² They may also be required to give you a tape or transcript of the testimony, if doing so does not undermine the prison's interest in safety. For example, in *Martin v. Coughlin*, a disciplinary ruling was dismissed because the state refused to provide the prisoner with a tape or transcript of a witness' testimony without giving any reason for the denial.¹⁸³ Also, if a hearing officer is going to consider information that will be kept confidential (secret) from the prisoner, he must at least give the prisoner some reason for keeping the information confidential.¹⁸⁴ Despite these limits, you can always ask the hearing officer to question adverse witnesses for

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 (N.Y. 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).

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

178. *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).

179. *See Sanchez v. Roth*, 891 F. Supp. 452, 456–58 (N.D. Ill. 1995) (After affirming that the right to call witness is limited, subject to the discretion of prison officials, and considerations of safety, but that the discretion of officials is not unlimited and the decision cannot be arbitrary, the court held that where a prisoner did not follow proper procedure for requesting witnesses, prison officials' refusal to allow witnesses to testify at disciplinary proceeding was a valid excuse and did not violate prisoner's due process rights).

180. *See Ponte v. Real*, 471 U.S. 491, 496–97, 105 S. Ct. 2192, 2195–96, 85 L. Ed. 2d 553, 557 (1985) (establishing that prison officials can state the reason for denying a prisoner's witness request either in the administrative record or later in court testimony when there is a dispute over the refusal to call a witness). *But see Scarpa v. Ponte*, 638 F. Supp. 1019, 1023 n.4 (D. Mass. 1986) (distinguishing *Ponte v. Real* 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 v. Ponte*).

181. *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, 575 (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").

182. *See Burnell v. Smith*, 122 Misc. 2d 342, 347, 471 N.Y.S.2d 493, 497 (Sup. Ct. Wyoming County 1984) (removing disciplinary violation from prisoner's record where no substantive reason was given for refusal to allow prisoner to be present during witness' testimony).

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

184. *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, 825–26, 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

you. Prison officials, however, are not required to guarantee that informants are telling the absolute truth. 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.¹⁸⁵ If your version of the event is different 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 unbiased hearing officer conduct your disciplinary proceeding.¹⁸⁶ The hearing officer does not have to meet the very high standard of impartiality that applies to judges.¹⁸⁷ The officer, however, cannot be biased against you as to create a "hazard of arbitrary decisionmaking . . . violative of due process."¹⁸⁸ To prove that the hearing officer is biased against you, you must provide "evidence that the decisionmaker has actually prejudged the case or [had a] direct personal involvement in the underlying charge."¹⁸⁹ For example, one court found a hearing officer's refusal to consider evidence in support of the prisoner's claim was proof of possible bias.¹⁹⁰ 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."¹⁹¹ In another case, the court dismissed a disciplinary hearing decision given that what the hearing officer did (saying "Okay now. You have to convince me that you're not guilty") suggested bias against the prisoner.¹⁹²

The New York regulations touch on the issue of impartiality, but they do not guarantee you will have 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.¹⁹³ In a disciplinary hearing, the regulations do not allow the hearing officer to be someone who has (1) participated in the investigation; or (2) prepared or ordered the preparation of the misbehavior report.¹⁹⁴ Generally, a superintendent's hearing will be conducted by the superintendent, deputy superintendent, captain, or commissioner's hearing officer. In superintendent hearings, the regulations do not allow the use of a hearing officer who: (1) actually witnessed the event; (2) was directly involved in the incident; (3) is a review officer

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.")

185. *See* Gomez v. Kaplan, 964 F. Supp. 830, 835 (S.D.N.Y. 1997).

186. *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); *Sira v. Morton*, 380 F.3d 57, 69 (2d. Cir. 2004) (citing *Wolff*, 418 U.S. at 563-67).

187. *Moore v. Selsky*, 900 F. Supp. 670, 676 (S.D.N.Y. 1995) (finding that a hearing officer may be allowed to have a biased view that a scientific test for evidence is reliable, so long as the hearing officer would be willing to consider whether he may be mistaken in his view impartially); *Sloane v. Borawski*, 64 F. Supp.3d 473, 488 (W.D.N.Y. 2014) ("A hearing officer may satisfy the standard of impartiality if there is some evidence in the record to support the findings of the hearing.") (internal quotations omitted); *Allen v. Cuomo*, 100 F.3d 253, 259 (2d Cir. 1996) ("The degree of impartiality required of prison officials does not rise to the level of that required of judges generally. It is well recognized that prison disciplinary hearing officers are not held to the same standard of neutrality as adjudicators in other contexts.")

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

189. *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); *Washington v. Afify*, 968 F. Supp.2d 532, 542 (W.D.N.Y. 2013) (allegations that a hearing officer called the prisoner a "little monkey" and that there was "more retaliation on the way" is sufficient to support a finding of bias in a motion to dismiss).

190. *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"); cf. *Champion v. Artuz*, 76 F.3d 483, 486-87 (2d Cir. 1996).

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

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

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

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

who reviewed the misbehavior report; or (4) has investigated the incident.¹⁹⁵ Note that the superintendent has the choice to permit other correctional facility employees to act as hearing officers in a superintendent's or disciplinary hearing.¹⁹⁶

If you think your hearing officer might be biased, you should consider making an objection. You should also consider objecting if your hearing officer is closely connected to prison security or is 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 only through disciplinary proceedings within the prison. But, sometimes a violation of a prison rule will also be a violation of a criminal law. 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 want to testify at the disciplinary proceeding in order to avoid a potentially severe punishment. On the other hand, you may worry that something you say at your hearing could get you in trouble in a later criminal trial.

To avoid this problem, prisoners often seek "use" immunity in disciplinary hearings. "Use" immunity does not protect you from prosecution, but it prevents any statements you make at your disciplinary hearing from being used against you in the criminal case.¹⁹⁷ Immunity in criminal proceedings comes from the U.S. Constitution's Fifth Amendment privilege against self incrimination.¹⁹⁸ An individual accused of a crime has the right to remain silent.¹⁹⁹ When the state demands that you testify, the state must grant "use" immunity.²⁰⁰ 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.²⁰¹ If that was not the case, the state would be punishing you for exercising your Fifth Amendment right.

The Supreme Court faced this problem in *Baxter v. Palmigiano*,²⁰² which involved a prisoner facing disciplinary action for prison 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,²⁰³ silence alone is not enough. Other evidence must be produced in order to establish guilt.²⁰⁴

If a prisoner chooses to testify in cases where he is not required or compelled to testify, according to *Baxter*, anything he says at the disciplinary hearings can be used against him in criminal proceedings later.²⁰⁵ 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.²⁰⁶ In reality, it is unlikely that after *Baxter*, prison officials will make a prisoner testify since:

195. N.Y. Comp. Codes R. & Regs. tit. 7, § 254.1. 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.

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

197. See 18 U.S.C. § 6002 (2012) (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).

198. U.S. CONST. amend. V.

199. U.S. CONST. amend. V.

200. 18 U.S.C. § 6002 (2012).

201. See 18 U.S.C. § 6002 (2012).

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

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

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

205. *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; *Fantone v. Latini*, 780 F.3d 184, 192 (3d. Cir. 2015).

206. *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 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.

(1) unfavorable inferences, or conclusions, 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.²⁰⁷

New York state currently grants prisoners "use" immunity at all disciplinary proceedings.²⁰⁸ The City of New York requires that at the start of a disciplinary proceeding, prisoners be informed of their right to remain silent.²⁰⁹ You have the right to "use" immunity even if criminal charges have not been filed against you. You must be told 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."²¹⁰ This warning will appear in the notice of charges, which must be given to you at least twenty four hours before the proceeding. Because the legal interaction between disciplinary proceedings and criminal trials is so complicated, 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 end of the hearing the hearing officer may, at his discretion, do one of several things: he may affirm all the charges, he may dismiss all the charges, or he may affirm some charges and dismiss others.²¹¹ 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*,²¹² 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.²¹³

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.²¹⁴ 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.²¹⁵

With certain exceptions, *Wolff v. McDonnell* guarantees your constitutional right to receive, from the hearing officer, a written statement of the evidence being used against you and a statement of the reasons for the decision.²¹⁶ 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

207. *Baxter v. Palmigiano*, 425 U.S. 308, 318-20, 96 S. Ct. 1551, 1558-59, 47 L. Ed. 2d 810, 821 (1976).

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

209. City of New York Dep. of Cor. Directive, Inmate Disciplinary Due Process (2016).

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

211. 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).

212. *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).

213. *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).

214. *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 sufficient 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); *Tuitt v. Martuscello*, 106 A.D.3d 1355, 1356, 965 N.Y.S.2d 669, 670 (3d Dept. 2013) (holding that the "detailed misbehavior report provides substantial evidence supporting the determination of guilt."); *Walker v. Bezio*, 96 A.D.3d 1268, 1268, 946 N.Y.S.2d 905, 906 (3d Dept. 2012) (same).

215. *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).

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

interviews conducted.²¹⁷ 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.²¹⁸

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.²¹⁹ If evidence has been excluded, the written statement you receive informing you of the decision must disclose this fact.²²⁰

The written statement and the tape recording of the hearing will be important 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.²²¹

E. New York Disciplinary Proceedings and Appeal Procedures

1. Types of Disciplinary Proceedings

New York regulations create a three-tier (level) hearing system for disciplinary actions, based on how severe (bad) the offense is.²²² Violation hearings, which are used for minor offenses, make up the first tier.²²³ Disciplinary hearings, which are used for serious offenses, make up the second tier.²²⁴ Finally, superintendent’s hearings, which are for the most serious offenses, make up the third tier.²²⁵ 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.”²²⁶ In other words, if the court does not regard the punishment you are given as especially, or unusually, severe, there is no requirement to hold a hearing beforehand. Whether a punishment is severe is based on the specific facts of your case.²²⁷ 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 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*.²²⁸

Accordingly, New York is not constitutionally *required* to conduct violation and disciplinary hearings at all under *Sandin*. The regulations, however, still provide for all three types of hearings, and prison officials are required to follow their own rules.²²⁹ For example, if a prison official decided to revoke your visiting

217. *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); *Tolliver v. Fischer*, 125 A.D.3d 1023, 1023–24, 2 N.Y.S.3d 694, 695 (3d Dept. 2015) (granting prisoner’s petition due to an out of order transcript, portions of missing witness questionings, and a cut off petitioner statement).

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

219. *Laureano v. Kuhlmann*, 550 N.E.2d 437, 441, 75 N.Y.2d 141, 148, 551 N.Y.S.2d 184, 188 (1990); *see also*, *Moye v. Fischer*, 93 A.D.3d 1006, 1007, 940 N.Y.S.2d 356, 357 (3d. Dept. 2012).

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

221. *See, e.g.*, *Roseboro v. Gillespie*, 791 F. Supp.2d 353, 366 (S.D.N.Y. 2011).

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

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

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

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

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

227. *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.”); *Davis v. Barrett*, 576 F.3d 129, 134 (2d Cir. 2009); *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”).

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

229. *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

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 and significant” punishment.²³⁰ It is still unclear whether you could appeal your case successfully in a New York state court.²³¹ 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,” but otherwise does not have to even give prisoners violation or disciplinary hearings if the particular prison’s rules do not call for it.²³² 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 that violates a right protected by federal law.

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.²³³ 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.²³⁴ Disciplinary hearings may not result in loss of correspondence privileges and cannot lead to the loss of visiting privileges for more than thirty days.²³⁵ 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.²³⁶ Restitution (the payment of money) may be required for loss or intentional damage to property at both hearings.²³⁷ A superintendent’s hearing may result in a restricted diet²³⁸ and loss of a specific period of good time.²³⁹ Both types of hearings may allow for a delay before any penalty is imposed.²⁴⁰

error claims).

230. *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”); Kalican v. Dzurenda, 583 Fed. Appx. 21, 22 (2d Cir. 2014) (“Grievance procedures, which are creatures of state law, are not interests independently protected by the Constitution because the failure to investigate a grievance does not increase a prisoner’s sentence or impose an ‘atypical and significant hardship.’”).

231. *See, e.g.*, Edwards v. Mejia, No. No. 11 Civ. 9134(ALC), 2013 WL 1092978, at *2 (S.D.N.Y. March 15, 2013) (*unpublished*) (“Confiscation of property based on his guilty disposition does not constitute a constitutional violation or suffice to state a liberty interest.”).

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

233. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.7(a)(1)(ii) (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).

234. N.Y. Comp. Codes R. & Regs. tit. 7, § 254.7(a)(1)(ii) and (iii).

235. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.7(a)(1)(ii). 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).

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

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

238. N.Y. Comp. Codes R. & Regs. tit. 7, § 254.7(a)(1)(iii)(d)(vi). 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). 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. *See, e.g.*, Phelps v. Kapnolas, 308 F.3d 180, 186 (2d Cir. 2002) (“As suggested by our prior opinion, the alleged treatment—that prison officials deprived Phelps of a nutritionally adequate diet for fourteen straight days—is not as a matter of law insufficiently serious to meet the objective requirement. By alleging that prison officials knew that the diet was inadequate and likely to inflict pain and suffering, Phelps has also sufficiently pleaded the subjective element.”) (citation omitted). For a discussion of the 8th Amendment, see *JLM* Chapter 16, “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law.”

239. N.Y. Comp. Codes R. & Regs. tit. 7, § 254.7(a)(1)(iii)(d)(ix).

240. N.Y. Comp. Codes R. & Regs. tit. 7, § 254.7(a)(4); N.Y. Comp. Codes R. & Regs. tit. 7, § 253.7(a)(4). 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.

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:²⁴¹

- (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;²⁴²
- (2) Loss of at most two of the following privileges: one commissary buy purchase (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);²⁴³
- (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 including the regular work assignment); and²⁴⁴
- (4) Counsel and/or reprimand.²⁴⁵

The violation officer has discretion to suspend these punishments for thirteen days.²⁴⁶

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.²⁴⁷ 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 (commonly referred to by prisoners as a "ticket") "as soon as practicable" (possible) with the review officer.²⁴⁸ 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.²⁴⁹ Minor infractions or other violations "that do not involve danger to life, health, security, or property" do not need to be reported.²⁵⁰ 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 a SHU 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."²⁵¹ You cannot be confined to your cell or elsewhere for more than seven days without a hearing.²⁵² Such a hearing must be completed within fourteen days after the misbehavior report is written, unless a delay is authorized.²⁵³ If you are placed in keeplock or a SHU solely because of the charges against you, your hearing must begin within seven days of being confined, unless special circumstances exist.²⁵⁴ An officer may also confine you to your cell or room for your own protection, but can do so 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.²⁵⁵

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

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

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

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

245. N.Y. Comp. Codes R. & Regs. tit. 7, § 252.5(a)(4).

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

247. N.Y. Comp. Codes R. & Regs. tit. 7, § 251-2.2(b).

248. N.Y. Comp. Codes R. & Regs. tit. 7, § 251-3.1(a).

249. N.Y. Comp. Codes R. & Regs. tit. 7, § 251-3.1(b), (c).

250. N.Y. Comp. Codes R. & Regs. tit. 7, § 251-1.5.

251. N.Y. Comp. Codes R. & Regs. tit. 7, § 251-1.6(a).

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

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

254. *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).

255. N.Y. Comp. Codes R. & Regs. tit. 7, § 251-1.6(b).

The validity of the rules stated above is questionable in light of *Sandin v. Conner*.²⁵⁶ 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.²⁵⁷ 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 disciplinary 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.²⁵⁸ The regulations grant you the right to be present at your violation hearing.²⁵⁹ This right gives you a chance to defend yourself by 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.²⁶⁰ You do not, however, have the right to call witnesses at violation hearings,²⁶¹ 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. ²⁶²	Right to a copy of the misbehavior report at the hearing. ²⁶³
Right to a hearing that must be completed within fourteen days after report, unless authorized by the commissioner. ²⁶⁴	Right to a hearing that must be completed within seven days of the writing of the misbehavior report. ²⁶⁵
Limited right to substitute counsel. ²⁶⁶	No right to substitute counsel.
Limited right to appear before the hearing officer. ²⁶⁷	Limited right to appear before the violation officer. ²⁶⁸

256. *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.).

257. *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).

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

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

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

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

262. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.6(a) (rule governing disciplinary hearings); N.Y. Comp. Codes R. & Regs. tit. 7, § 254.6(a)(1) (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).

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

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

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

266. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.4 (rule governing disciplinary hearings); N.Y. Comp. Codes R. & Regs. tit. 7, § 254.4 (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").

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

Disciplinary/Superintendent's Hearing	Violation Hearing
Limited right to call witnesses. ²⁶⁹	No right to call witnesses. ²⁷⁰
Right to "use" immunity. (Statements you make in response to a charge of misbehavior cannot be used against you in criminal proceedings.) ²⁷¹	Right to "use" immunity. (Statements you make in response to a charge of misbehavior cannot be used against you in criminal proceedings.) ²⁷²
Right to an impartial hearing officer. ²⁷³	No declared right to an impartial violation officer.
Right to receive a copy of a written record of the disposition. ²⁷⁴	Right to receive a copy of a written record of the disposition. ²⁷⁵
Disposition of hearing may be made part of prisoner's institutional records.	Disposition of violation hearing not made part of prisoner's institutional records. ²⁷⁶
Right to an assistant. ²⁷⁷	No right to an assistant. But, you do have a right to a translator or accommodations if you are hard of hearing. ²⁷⁸

Figure I: Comparison of the Rights of Prisoners at Disciplinary or Superintendent's Hearings and Violation Hearings in New York²⁷⁹

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.²⁸⁰ If you are not confined, the hearing must be completed within fourteen days from the time the written charges were made against you.²⁸¹ The Commissioner of Correctional Services or a person designated to act for the Commissioner can, however, authorize a delay beyond these time limits.²⁸²

3. Appeal Procedures

In New York, prisoners have an absolute right to make an administrative appeal to another prison official.²⁸³ You must pursue this administrative appeal process in order to preserve your right to pursue

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

269. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.5 (rule governing disciplinary hearings); N.Y. Comp. Codes R. & Regs. tit. 7, § 254.5 (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").

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

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

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

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

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

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

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

277. N.Y. Comp. Codes R. & Regs. tit. 7 § 253.4.

278. N.Y. Comp. Codes R. & Regs. tit. 7 § 252.4.

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

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

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

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

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

further appeals in the courts (your right to judicial review).²⁸⁴ This means that in order to have a court hear your case at a later stage, you must make an administrative appeal first. 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).²⁸⁵ If your written request is submitted after the seventy-two hour deadline, you may lose your right to have your hearing reviewed.²⁸⁶ 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.²⁸⁷ New York state regulations do not specify whether an appeal can result in an increased sentence, but New York City does not allow for such an increase.²⁸⁸

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.²⁸⁹

(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 you have received the superintendent's decision following a superintendent's hearing, you have thirty days to submit your written appeal.²⁹⁰ You should submit your appeal in writing to the Commissioner of Correctional Services, not to the superintendent.²⁹¹ 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.²⁹² Under no circumstances can appealing a superintendent's hearing result in a harsher penalty.²⁹³

In addition to officially appealing a superintendent's hearing to the Commissioner, you should also consider writing to the superintendent. Writing to your superintendent may be particularly worthwhile if he or she did not preside over your hearing. Even where the superintendent did preside over your hearing,

284. To institute a New York Article 78 proceeding or a federal § 1983 claim, you must first exhaust your administrative appeal possibilities. *See, e.g.,* Julicher v. Town of Tonawanda, 61 A.D.3d 1384, 876 N.Y.S.2d 807 (N.Y. App. 2009). 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, "Using 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.

285. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.8.

286. *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); Lopez v. Matthews, No. 90-3174-R, 1990 WL 94312 (D. Kan. July 2, 1990) (*unpublished*).

287. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.8.

288. City of New York Dep. of Cor. Directive 6500R-D, Inmate Disciplinary Due Process, (III)(F)(4) (2015), available at http://www.nyc.gov/html/doc/downloads/pdf/6500R-D_New_Version.pdf (last visited Feb. 24, 2017).

289. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.9.

290. N.Y. Comp. Codes R. & Regs. tit. 7, § 254.8.

291. N.Y. Comp. Codes R. & Regs. tit. 7, § 254.8.

292. N.Y. Comp. Codes R. & Regs. tit. 7, § 254.8.

293. *See* N.Y. Comp. Codes R. & Regs. tit. 7, § 254.8.

there is always a chance that you can change his or her mind. A superintendent has the authority to reduce a penalty imposed at the superintendent's hearing at any time during which an imposed penalty is in effect.²⁹⁴ The superintendent can reduce your penalty even if the Commissioner decides not to reverse or modify the decision made at your superintendent's 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.²⁹⁵ The superintendent or the person designated to act for the superintendent must then issue a decision within seven days.²⁹⁶ The superintendent may reduce the penalty imposed at your hearing.²⁹⁷

Keep in mind that you can still appeal an unfavorable decision to a court of law, especially after a superintendent's hearing.²⁹⁸ However, after *Sandin v. Conner*,²⁹⁹ it is not likely that you would be able to successfully appeal an unfavorable decision from a violation hearing or disciplinary hearing. As discussed above, recall that an appeal in court can only be successful where the punishment is extreme and implicates a liberty interest.³⁰⁰ Furthermore, if the penalty imposed at your violation hearing is relatively minor, filing an appeal may not be worth the trouble. Moreover, violation hearings cannot be made part of a prisoner's institutional records.³⁰¹ In any event, the minor infraction dealt with through a violation hearing 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.³⁰² In other words, unless your state has a law or regulation that gives you the right to 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, which covers New York, have decided that some state and federal regulations regarding administrative segregation create such a protected liberty interest.³⁰³ This Part will first discuss the minimum administrative segregation procedures that all officials must follow before and during your administrative detention. Then it will cover the procedures that officials in New York must follow, then it will describe those that federal prisons within the Second Circuit must follow.

There are some minimum administrative segregation procedures that all prisons must follow before and during your administrative detention. The due process protections for disciplinary action discussed in the Sections above do not apply to administrative segregation. This means that the requirements of *Wolff v.*

294. N.Y. Comp. Codes R. & Regs. tit. 7, § 254.9.

295. N.Y. Comp. Codes R. & Regs. tit. 7, § 252.6.

296. N.Y. Comp. Codes R. & Regs. tit. 7, § 252.6.

297. N.Y. Comp. Codes R. & Regs. tit. 7, § 252.7.

298. 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.

299. *Sandin v. Conner*, 515 U.S. 472, 115 S. Ct. 2293, 123 L. Ed. 2d 418 (1995).

300. See Part E(1).

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

302. See *Sandin v. Conner*, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 430 (1995) (holding that a 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).

303. 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); *Brooks v. Chappius*, 450 F. Supp.2d 220, 223-24 (W.D.N.Y. 2006) (denial of food during containment gives rise to a liberty interest).

*McDonnell*³⁰⁴ do not apply to administrative segregation. The key case for understanding the basic requirements in the administrative segregation context is *Hewitt v. Helms*.³⁰⁵ The *Hewitt* case 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.³⁰⁶

The Supreme Court created a standard for hearings to determine whether a prisoner represents a security threat, or whether he should be confined to administrative segregation while awaiting the results of an investigation into misconduct charges.³⁰⁷ 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.³⁰⁸ Therefore, for administrative segregation hearings, the procedural safeguards you are entitled to in any prison 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 to transfer you to (or keep you in) 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.³⁰⁹

These are the minimum procedural requirements prison officials must follow. Other 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.³¹⁰ 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 a chance to respond to those findings.³¹¹ You are also entitled to have a committee review your status of confinement in administrative segregation every sixty days.³¹² A three-member committee consisting of a representative of the facility executive staff, a security supervisor, and a member of the guidance and counseling staff will examine your record and prepare and submit a report to the superintendent.³¹³ The report must state:

- (1) Reasons why you were initially placed in administrative segregation,
- (2) Information on your later behavior and attitude, and
- (3) Any other factors that favor keeping you in or releasing you from administrative segregation.³¹⁴

The law that applies to prisoners in federal prison is slightly different. If you are placed in administrative detention in SHU in a federal prison, you are entitled to a copy of the "Administrative

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

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

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

307. *Hewitt v. Helms*, 459 U.S. 460, 474-75, 103 S. Ct. 864, 873, 74 L. Ed.2d 675, 691 (1983).

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

309. *See Hewitt v. Helms*, 459 U.S. 460, 476-77, 103 S. Ct. 864, 874, 74 L. Ed. 2d 675, 691-92 (1983). *Hewitt* has been overturned in part on other grounds by *Sandin v. Conner*, 515 U.S. 472, 115 S.Ct. 2293, 132 L. Ed.2d 418 (1995), but remains good law on this matter. *See, e.g., Toevs v. Reid*, 685 F.3d 903, 912 (10th Cir. 2012).

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

311. *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 in some circumstances, prisons can constitute sufficient notice and opportunity to respond to charges by informing a prisoner of the dates and results of his reviews, of how long he can expect to be confined and what he might do to change his status, and give him a real opportunity to present information in his defense that he was no longer a threat to the facility).

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

313. N.Y. Comp. Codes R. & Regs. tit. 7, § 301.4(d)(1).

314. N.Y. Comp. Codes R. & Regs. tit. 7, § 301.4(d)(1).

Detention Order” which tells you the reasons for your detention, usually within twenty-four hours of your placement.³¹⁵ However, you will not receive an administrative detention order if you were placed in administrative detention while waiting for classification or while in holdover status.³¹⁶ A Segregation Review Official must conduct an initial review to evaluate the merits of the segregation within three days of your placement in SHU (not counting the day you were admitted, weekends, and holidays).³¹⁷ A Segregation Review Official must formally review your status at a hearing that you can attend within seven days of continuous placement in SHU.³¹⁸ After that, the Segregation Review Official will review your records without you there – once every seven calendar days of continuous placement.³¹⁹ After every thirty days of continuous placement in SHU, the Segregation Review Official will formally review your status at a hearing that you can attend.³²⁰

Unlike in state prisons in New York State, in federal prisons, federal laws do require some formal hearings. This means that if you are in a federal prison 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.³²¹ If the reasons for your confinement no longer exist, you must be released from administrative detention.³²² However, courts have ruled that the warden’s original decision to place you in administrative detention is in the warden’s discretion, and courts will generally respect and uphold the warden’s decision as long as certain procedural requirements are met.³²³

There are also rules that only apply to federal and state prisons that are in the area covered by the Second Circuit (which includes New York State). Other circuits might have different rules, so be sure to check for relevant case law if you are in a prison that is somewhere other than the Second Circuit. If you are in either a federal or state prison in the Second Circuit, there must be compelling reasons for placing you in confinement and continuing your confinement in administrative segregation upon periodic review.³²⁴ 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.³²⁵ If new, relevant information arises after your first hearing, the committee must consider the new evidence in deciding 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 conclusion that you pose a threat, prison officials cannot keep you in administrative segregation.³²⁶ If the reason for your confinement in administrative segregation changes, you have the right to know the new reason and to respond to it.³²⁷

315. 28 C.F.R. § 541.25(a) (2016).

316. 28 C.F.R. § 541.25(a) (2016).

317. 28 C.F.R. § 541.26(a) (2016).

318. 28 C.F.R. § 541.26(b) (2016).

319. 28 C.F.R. § 541.26(b) (2016).

320. 28 C.F.R. § 541.26(c) (2016).

321. 28 C.F.R. § 541.32(b) (2016).

322. 28 C.F.R. § 541.33(a) (2016).

323. *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”).

324. *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); *Ramsey v. Squires*, 879 F. Supp. 270, 296 (W.D.N.Y.), *aff’d*, 71 F.3d 405 (2d Cir. 1995)(noting periodic review requirement and holding that officials must demonstrate a compelling government interest in the restriction and the purpose of the measure is not solely punishment); *McClary McClary v. Coughlin*, 87 F. Supp. 2d 205, 212 (W.D.N.Y. 2000), *aff’d sub nom. McClary v. Kelly*, 237 F.3d 185 (2d Cir. 2001) (stating that the need to maintain the inmate in restricted housing must be subject to meaningful “periodic review” by prison officials.);

325. *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, 476, 103 S. Ct. 864, 874, 74 L. Ed. 2d 675, 691 (1983).

326. *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).

327. *See* *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*) (noting that prisons may not use a pretext to keep an inmate in segregated housing when he no longer presents a threat to the facility).

There must be a record of those meetings showing that there was actually “meaningful consideration” of the reasons for the segregation status.³²⁸ In *Giano v. Kelly*, a federal district court in New York found that 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.³²⁹ There were two main reasons for this conclusion. First, records of the committee meetings did not show that there was consideration on evidence available after he was first confined.³³⁰ 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.³³¹ 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.³³² The decision about what is and is not a threat to the security of the prison does not need to be based on any single decisive factor, and there does not need to be a finding that the prisoner committed some sort of misconduct.³³³ 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.³³⁴

In *Taylor v. Rodriguez*, the Second Circuit addressed what constitutes meaningful review for administrative segregation in the context of gang affiliation.³³⁵ In that case, a prisoner in a Connecticut prison was placed in administrative segregation because of “recent tension in B-Unit involving gang activity” and “statements by independent confidential informants.”³³⁶ The prisoner’s request for specific factual accusations was denied. The Second Circuit concluded that this notice was not enough to allow the prisoner to adequately prepare his defense.³³⁷ This means that if there are accusations that you are currently involved in a gang, prison officials have to tell you the specific facts supporting those accusations.³³⁸ Unclear statements or statements of fact without evidence are not enough. Prison officials cannot just accuse you of being affiliated with a gang – they must have a reason for making that accusation and they must tell you what it is.

In *Taylor*, the Second Circuit also ruled 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.”³³⁹ The report of the hearing provided no details to support the decision to segregate the prisoner in administrative housing.

328. 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 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, 334, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18, 33 (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).

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

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

331. *Giano v. Kelly*, No. 89-CV-727(C), 2000 U.S. Dist. LEXIS 9138, at *58-60 (W.D.N.Y. May 16, (2000) (*unpublished*).

332. *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).

334. See *Hewitt v. Helms*, 459 U.S. 460, 474, 103 S. Ct. 864, 872, 74 L. Ed. 2d 675, 689-90 (1983).

335. *Taylor v. Rodriguez*, 238 F.3d 188, 192–93 (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.

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

337. *Taylor v. Rodriguez*, 238 F.3d 188, 193. (2d Cir. 2011).

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

339. *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); *Edwards v. Balisok*, 520 U.S. 641, 648, 117 S. Ct. 1584, 1589, 137 L. Ed.2d 906, 915 (1997) (citing *Hill*); *McLean v. Holder*, 550 Fed. Appx. 49, 49 (2d Cir. 2014).

The report referred to attached statements of confidential informants, but they were not actually attached for the court to review.³⁴⁰ 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 confidential informants' credibility.³⁴¹ In *Taylor*, the record did not contain an assessment of 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."³⁴² 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.³⁴³ Prison officials must follow their own rules, and you can challenge the change in your confinement if these rules have not been followed.³⁴⁴ In all cases, your first step is to go through your prison's administrative process.³⁴⁵ 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.³⁴⁶ And remember, you only have so much time to file an appeal, whether it is within the prison's administrative process or in the courts. If you wait too long, you may lose your ability to do so.³⁴⁷

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

341. *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, 220 (2d Cir. 1993) (holding that the prisoner had not been deprived of a protected liberty interest because he was only subjected to administrative confinement pending his hearing and appeal and thus the question of whether he had a clearly established right to an independent examination of the confidential informants' credibility did not need to be decided).

342. *Sandin v. Conner*, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995). *See* Part E(1).

343. *See* Part C.

344. *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); *see* Part E(3).

345. *See* Part E.

346. *See* Part D(3).

347. *See* Part E(3).