# CHAPTER 18

# YOUR RIGHTS AT PRISON DISCIPLINARY PROCEEDINGS*

## A. Introduction

This Chapter is meant to help incarcerated people who are facing disciplinary action for breaking prison rules. It talks about what protections you are entitled to during a disciplinary hearing and what you can expect throughout the process. This chapter focuses on both your federal rights and your rights in New York disciplinary hearings. 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] The *JLM* also publishes supplements on Louisiana and Texas law with specific information about protections during disciplinary hearings under their respective state laws.[2]

Prison officials have the power to punish incarcerated people who break the law or who break prison rules and regulations. They also have the power to put incarcerated people in administrative segregation (separation or isolation from the general incarcerated population) 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 what they can do. To protect you from unfair abuses of power, federal and state laws require officials to follow procedural requirements (guidelines) when they punish you or put you in disciplinary or administrative segregation. If officials do not follow these guidelines, and you suffer "atypical and significant hardship," you can claim that your rights under the Due Process Clause of the U.S. Constitution have been violated. More information on what constitutes "atypical and significant hardship" can be found in Part E(2) of this chapter.

This Chapter describes rights related to how you are confined and your rights at disciplinary hearings. To protect these rights, you must first use your institution's administrative grievance procedure.[3] 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.[4] 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.[5] If you decide to bring a claim in federal court, it is extremely important for you to read Chapter 14 of the *JLM* on the Prison Litigation Reform Act (PLRA). If you do not 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.

This Chapter is divided into six parts. **Part B** explains "due process of law" in disciplinary proceedings. **Part C** describes the minimum federal protections at disciplinary hearings, including those about segregated and separate confinement. **Part D** explains the additional protections specific to New York State. **Part E** describes how courts evaluate these due process claims. **Part F** explains what due process requires in disciplinary hearings. Finally, **Part G** explains the types of disciplinary hearings in New York State and the appeals procedure.

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

[2] *See* Chapter 11 of the *JLM*, "Louisiana State Supplement"; Chapter 11 of the *JLM*, "Texas State Supplement."

[3] For information on incarcerated grievance procedures, see *JLM*, Chapter 15, "Incarcerated Grievance Procedures."

[4] For information on these types of cases, see *JLM*, Chapter 16, "Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law," and Chapter 17, "The State's Duty to Protect You and Your Property: Tort Actions."

[5] For information on Article 78, see *JLM*, Chapter 22 "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules."

This Chapter also includes information on HALT (the Humane Alternatives to Long-Term Solitary Confinement Act) which was passed in New York State in March 2021 and went into effect in March 2022. This law increases due process protections for incarcerated persons in disciplinary hearings where there is a possible punishment of solitary confinement. This new law and its impact on your rights during disciplinary hearings will be discussed throughout this chapter. However, note that this law only applies where solitary confinement is a potential punishment.

## B. Definition of "Due Process"

### 1. Due Process Generally

The U.S. Constitution's Fifth and Fourteenth Amendments include a Due Process Clause that prevents the government from taking your "life, liberty, or property" without "due process of law." This Chapter will often refer to "life, liberty, and property" as your protected interests. The Fifth Amendment limits the power of the federal government, which includes federal prison officials. The Fourteenth Amendment limits the power of state governments, which includes state prison officials. So, whether you want to cite the Fifth or Fourteenth Amendment when talking about your due process rights depends on if you are dealing with the federal or a state government.

There are two different types of due process rights: substantive and procedural. Procedural due process rights are what is most important to you in prison disciplinary hearings. Procedural due process means that the government must follow a strict set of rules and guidelines when it tries to restrict your substantive due process rights. The set of rules and guidelines the government must follow are the "procedures." What procedures the Due Process Clause requires vary widely based on the situation, but examples of procedures that may be required include:

- Notice (being told ahead of time about what the government is trying to do)
- The opportunity to be heard (having a chance to object to the government's intended action and explain why it should not happen)
- The right to present evidence, call witnesses, and cross-examine the government's witnesses
- The right to be represented by counsel
- The right to a neutral and unbiased decision-maker
- The right to a written explanation from the decision-maker that gives the reasons behind their decision

This is not a complete list, and each right will not apply in every situation. The government must follow different procedures in different cases, often based on what right they are seeking to restrict and the severity of the restriction. Courts decide which rules to follow by comparing your interests to the government's interests. If these procedures were not followed, you have a right to challenge the government action, typically through a federal Section 1983 claim.

### 2. Due Process in Prison

Due process means something different in prison than it does outside of prison. The Constitution only gives you a right to due process when the government tries to take away your "life, liberty, or property." When you are in prison or jail, a court has already decided that it is valid to restrict your liberty when it incarcerated you. So, your due process rights are more limited when you are incarcerated than when you are not incarcerated.

To have due process rights in a disciplinary hearing, a court must first decide whether the consequences you might face implicate (possibly affect) a protected interest (life, liberty, or property).[6] This determination will involve a comparison of your condition before the disciplinary hearing (not before you were incarcerated) and what restrictions the prison officials seek to enforce. In other words,

[6] 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. U.S. CONST. amends. V, XIV.

due process requirements only apply when prison officials try to take away a protected interest. The specific due process rights in disciplinary hearings vary by state, however, there is a set of federal minimal guidelines. A state can choose to give incarcerated persons more rights than the federal minimum, but they cannot give fewer.

## C. Federal Minimum Protections

### 1. When Disciplinary Hearings Involve Your Due Process Rights

*Sandin v. Conner* is the case known for setting the minimum standard for due process in disciplinary hearings that all other federal and state courts must follow. In that case, DeMont Conner, an incarcerated person in Hawaii, had a disciplinary proceeding after he was charged with using "abusive or obscene language" and "physical interference" when trying to stop prison employees from strip-searching him.[7] The prison disciplinary committee did not let Conner present witnesses at the hearing because, as they stated, all witnesses were unavailable.[8] They sentenced Conner to a thirty-day disciplinary segregation in the Special Holding Unit (SHU)[9] and he sought administrative review of the decision. Administrators later expunged the charge of physical interference, deciding there was no proof.[10] In the meantime, however, he filed a Section 1983 claim, arguing that his civil rights had been violated.

According to the Supreme Court, even if you have a major, negative change in your confinement, this does not necessarily hurt a liberty interest protected by due process rights.[11] If the new conditions are "within the normal limits or range of custody which the conviction has authorized the state to impose," a court will not view the new conditions as a restriction of your protected interests.[12] However, you could still use the Due Process Clause in certain circumstances. The Supreme Court has held that if states try to avoid a certain type of confinement, that can create a protected liberty interest. For example, in New York, HALT created a protected liberty interest for incarcerated people facing potential solitary confinement in New York State prisons. You should check to see if your state has made a law or regulation that makes prison officials follow more procedures in certain situations.[13] If your state has created greater protections when a specific punishment or restriction is involved, this typically means that it recognize a greater interest in this specific right.

However, even if your state has not recognized a protected interest, you are still entitled to some protections under *Conner*. In *Conner*, the Supreme Court held that new conditions cannot raise Due Process Clause concerns unless they impose "atypical [uncommon] and significant [major] hardship" compared to normal life in prison.[14] To determine this, a court will generally compare ordinary prison

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[7] Sandin v. Conner, 515 U.S. 472, 475, 115 S. Ct. 2293, 2295–2296, 132 L. Ed. 2d 418, 424 (1995).

[8] Sandin v. Conner, 515 U.S. 472, 475, 115 S. Ct. 2293, 2296, 132 L. Ed. 2d 418, 425 (1995).

[9] Please note that the SHU acronym is used throughout this chapter to describe different names for solitary confinement units.

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

[11] 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 an incarcerated person to another prison with harsher conditions does not necessarily violate a liberty interest protected by the Due Process Clause of the 14th Amendment).

[12] 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, 242–243, 96 S. Ct. 2543, 2547, 49 L. Ed. 2d 466, 471–472 (1976) (holding that no Due Process Clause liberty interest is infringed when an incarcerated person is transferred from one prison to another within the State without a hearing, unless there is some right or expectation that can be derived from state law that an incarcerated person will not be transferred except for misbehavior or upon the occurrence of other "specified events").

[13] *See* Sandin v. Conner, 515 U.S. 472, 483–484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 429–430 (1995) (citing Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974)) (holding that States may under certain circumstances create liberty interests that are protected by the Due Process Clause).

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

conditions with a fact-based analysis of your new disciplinary conditions. This analysis will include many factors, including the length and extent of the new conditions. Under the specific facts of *Conner*, the Supreme Court decided that placing the incarcerated person in thirty-day disciplinary segregation was not an undue hardship rising to the level of a deprivation of a protected interest. The Supreme Court made the decision "[b]ased on a comparison between inmates inside and outside disciplinary segregation."[15] The court concluded that his thirty-day disciplinary segregation was not the kind of "atypical, significant deprivation [(hardship)]" where a state may have created a liberty interest.[16] Because he 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. Remember that while the rule described in *Conner* is still good law, many states have greater protections for incarcerated persons facing disciplinary confinement, including New York. Furthermore, different courts have applied *Conner* in different ways. The next two paragraphs describe more recent applications of the *Conner* holding.

In *Ruggiero v. Fischer,* an incarcerated person brought a federal section 1983 claim against several prison employees. The incarcerated individual alleged that the prison's policy requiring certain incarcerated people to wear mechanical restraints, including handcuffs and a waist chain, during their allotted exercise period violated the incarcerated people's constitutional rights.[17] In *Ruggerio,* the court held that the use of mechanical restraints during exercise was not an uncommon and major hardship.[18]In their analysis, the court considered that the restraints were only used for a short period of time (one hour period during exercise) and were regularly used in the prison environment for all categories of incarcerated persons (such as during transportation). This case represents some of the factors modern courts take into account when applying *Conner.* For example, the condition at issue (in this case, the use of mechanical restraints during exercise) may be evaluated on its length, purpose, and relation to the general prison practices and general prison population.

*Mills v. Fischer* is another example of a court using *Conner* to analyze whether an incarcerated person's due process rights were violated.[19] In *Mills,* an incarcerated person was denied a single visit with his 16-year-old son because a prison official mistakenly applied a more stringent identification rule for the minor than prison policy required. The court held that this deprivation did not constitute an atypical and significant hardship. In the court's analysis, they considered the intent of the officer. The court said that "the intentional or malicious deprivation of visitation to a prisoner, even on one occasion, could rise to the level of a constitutional violation."[20] However, because in this case the denial was not intentional, the court held that the incarcerated person's due process rights were not violated. This case suggests that the court will also take the intent of the parties, including the prison officers, staff, and incarcerated persons, into account when applying *Conner.*

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

(1) Use internal prison grievance procedures[21]
(2) Seek state judicial review (review by state courts under state laws or state constitutional protections that have additional protections); or

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

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

[17] Ruggiero v. Fisher, 2020 U.S. App. LEXIS 10164, at *1 (2d Cir., Apr. 1, 2020) (*unpublished*).

[18] Ruggiero v. Fisher, 2020 U.S. App. LEXIS 10164, at *2 (2d Cir., Apr. 1, 2020) (*unpublished*).

[19] Mills v. Fischer, 2012 U.S. App. LEXIS 19842 (2d Cir., Sep. 21, 2012) (*unpublished*).

[20] Mills v. Fischer, 2012 U.S. App. LEXIS 19842, at *4 (2d Cir., Sep. 21, 2012) (*unpublished*).

[21] See Chapter 15 of the *JLM*, "Incarcerated Grievance Procedures," for more information.

(3) Make a claim under the Eighth Amendment of the Constitution, which protects against cruel and unusual punishment.[22]

### 2. Federal Protections in Cases Involving Segregated Confinement

There are some minimum administrative segregation (separation or isolation from the general incarcerated population) procedures that all prisons must follow before and during your segregated confinement. The key case for understanding the basic requirements for administrative segregation is *Hewitt v. Helms*.[23] In the *Helms* case, an incarcerated person was placed in administrative segregation after a riot in a state prison. The next day, the incarcerated person 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. The committee did not reach a decision about the incarcerated person's guilt but decided that he posed a threat to the safety of other incarcerated people and prison officials. The committee decided that his confinement in administrative segregation should be continued. The Supreme Court concluded that the prison officials' review process was acceptable and did not violate the incarcerated person's due process rights.[24]

The Supreme Court created a standard for hearings to determine if an incarcerated person represents a security threat, or if he should be confined to administrative segregation while awaiting the results of an investigation into misconduct charges.[25] The Court stated that an informal, non-adversarial (which here means not focused on the dispute or conflict) review of the evidence would satisfy the due process requirements of the Fourteenth Amendment.[26] Based on the previous decisions of the Supreme Court, 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.[27]

If you are placed in administrative detention in segregated confinement in a federal prison, you are entitled to a copy of the "Administrative Detention Order" which tells you the reasons for your detention. You will usually receive the Administrative Detention Order within twenty-four hours of your placement.[28] 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.[29] A Segregation Review Official must conduct an initial review to evaluate the merits of the segregation within three days of your placement in segregated confinement, not counting the day you were admitted, weekends, and holidays.[30] A Segregation Review Official must formally review your status at a hearing that you

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[22] See Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 to Obtain Relief From Violations of Federal Law," for more information.

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

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

[25] Hewitt v. Helms, 459 U.S. 460, 474–475, 103 S. Ct. 864, 873, 74 L. Ed. 2d 675, 690 (1983).

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

[27] *See* Hewitt v. Helms, 459 U.S. 460, 476–477 & nn.8–9, 103 S. Ct. 864, 874 & nn.8–9, 74 L. Ed. 2d 675, 691–692 & nn.8–9 (1983). Please note that *Helms* has been abrogated in part on other grounds by Sandin v. Conner, 515 U.S. 472, 482–483, 115 S. Ct. 2293, 2299, 132 L. Ed. 2d 418, 429 (1995), but it remains good law on this matter. *See, e.g.*, Toevs v. Reid, 685 F.3d 903, 912 (10th Cir. 2012).

[28] 28 C.F.R. § 541.25(a) (2023).

[29] 28 C.F.R. § 541.25(a) (2023).

[30] 28 C.F.R. § 541.26(a) (2023). You will not receive a review within three days if you are in disciplinary segregation status. 28 C.F.R. § 541.26(a) (2023).

can attend within seven days of continuous placement in segregated confinement.[31] After that, the Segregation Review Official will review your records without you there every seven calendar days for as long as you are continuously confined.[32] After every thirty calendar days of continuous placement in segregated confinement, the Segregation Review Official will formally review your status at a hearing that you can attend.[33]

In federal prisons, federal laws 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. This examination will include a personal interview.[34] If the reasons for your confinement no longer exist, you must be released from administrative detention.[35] However, courts have ruled that the warden's original decision to place you in administrative detention is in the warden's judgment, and courts will generally respect and uphold the warden's decision if certain procedural requirements are met.[36]

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.[37] 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.[38] 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 available evidence does not indicate that you pose a threat, prison officials cannot keep you in administrative segregation.[39] If the reason for your confinement in administrative segregation changes, you have the right to know the new reason and to respond to it.[40]

There must be a record of those meetings showing that there was actually "meaningful consideration" of the reasons for the segregation status.[41] In *Giano v. Kelly*, a federal district court in

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[31] 28 C.F.R. § 541.26(b) (2023).

[32] 28 C.F.R. § 541.26(b) (2023).

[33] 28 C.F.R. § 541.26(c) (2023).

[34] 28 C.F.R. § 541.32(b) (2023).

[35] 28 C.F.R. § 541.33(a) (2023).

[36] *See* Tellier v. Fields, 280 F.3d 69, 82 (2d Cir. 2000) (stating that although a warden's decision to place an incarcerated person in administrative detention is discretionary, this discretion is not "boundless and continuing").

[37] 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*, Ramsey v. Squires, 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 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).

[38] 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) (holding, in part, that one must be given at least some notice of the charges against them and an opportunity to present their views on the charges). Hewitt has been statutorily superseded in several states and one should look for the relevant state code in order to be sure of what administrative procedures are relevant.

[39] *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).

[40] *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 incarcerated person in segregated housing when he no longer presents a threat to the facility).

[41] *See* Taylor v. Rodriguez, 238 F.3d 188, 193 (2d Cir. 2001) (stating that a hearing for placement in

New York found that the committee did not conduct "meaningful" reviews of a New York State incarcerated person's segregation status. Therefore, this violated the incarcerated person's due process rights.[42] There were two main reasons for this conclusion. First, records of the committee meetings did not show that there was a consideration of the evidence available after he was first confined.[43] Second, the records of the reviews did not contain conclusions specifically about whether the incarcerated person continued to pose a threat to the safety or security of the prison.[44] Reviewing courts will generally defer to prison officials' reasons and decisions. However, the court in *Giano v. Kelly* concluded the reason for the plaintiff's initial confinement was no longer an adequate reason for his continued confinement.[45] The decision about what is 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 incarcerated person committed some sort of misconduct.[46] In making the decision, the committee may consider the character of the people confined in the particular facility. This analysis takes into account long-standing relations among incarcerated people and between those who are incarcerated and the guards.[47]

In *Taylor v. Rodriguez*, the Second Circuit addressed what constitutes meaningful review for administrative segregation in the context of gang affiliation.[48] In that case, an incarcerated person 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.'"[49] The incarcerated person's request for specific factual accusations was denied. The Second Circuit concluded that this notice was not enough to allow the incarcerated person to adequately prepare his defense.[50] This means that if there are accusations that you are currently involved in a gang, prison officials have to tell you the specific facts that support those accusations.[51] 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 incarcerated person'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

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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 incarcerated person's confinement in part because the incarcerated person 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).

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

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

[44] 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*).

[45] 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 incarcerated person could no longer pose a security risk).

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

[47] *See* Hewitt v. Helms, 459 U.S. 460, 474, 103 S. Ct. 864, 872, 74 L. Ed. 2d 675, 689–690 (1983); *see also* Steele v. Cicchi, 855 F.3d 494 (3d Cir. 2017) (identifying that the character of incarcerated people and guards are factors to consider in making a determination).

[48] Taylor v. Rodriguez, 238 F.3d 188, 192–193 (2d Cir. 2001) (holding notice given to an incarcerated person 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.

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

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

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

disciplinary board."[52] The report of the hearing provided no details to support the decision to segregate the incarcerated person in administrative housing. The report referred to the attached statements of confidential informants, but they were not actually attached for the court to review.[53] 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.[54] 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 an incarcerated person in administrative detention.

These are the minimum procedural requirements federal prison officials must follow. Other state regulations that govern your prison may set out additional, specific guidelines. Specific protections in New York State are discussed in the following Part.

## D. Additional Protections in New York State by Type of Confinement

HALT and other New York statutes affect what due process rights you are entitled to when facing various types of confinement, punishment, and segregation. This Part will outline your rights in (1) HALT and segregated confinement, (2) administrative confinement, and (3) Residential Rehabilitation Units.

### 1. HALT and Segregated Confinement

Many states have passed additional statutes and guidelines to protect incarcerated persons in prisons and during disciplinary hearings. In March 2021, New York State passed the Humane Alternatives to Long-Term ("HALT") Solitary Confinement Act.[55] HALT created a state law remedy when prison officials do not follow its procedural requirements. It can also be used to satisfy the second step of the *Conner* test and shows that the state has created a protected liberty interest where any form of solitary confinement could be used. HALT changes many things about how solitary confinement may be used in New York state. The rest of this Section will discuss the new procedural requirements created in HALT. Please note that HALT went into effect in March 2022. Therefore, there are not many cases where the HALT framework was applied.

First, HALT redefines "segregated confinement" as "any form of cell confinement for more than seventeen hours a day other than in a facility-wide emergency or for the purpose of providing medical or mental health treatment."[56] Therefore, any disciplinary action or punishment that meets these requirements falls into this category. HALT also defined a series of special populations, including those

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[52] Superintendent v. Hill, 472 U.S. 445, 455–456, 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 Superintendent v. Hill, 472 U.S. 445, 455–456, 105 S. Ct. 2768, 2774, 86 L. Ed. 2d 356, 365 (1985)); McLean v. Holder, 550 Fed. App'x 49, 49 (2d Cir. 2014) (*unpublished*).

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

[54] Taylor v. Rodriguez, 238 F.3d 188, 193–194 (2d Cir. 2001) (reasoning that confidential informant's identity in prison disciplinary hearing need not be disclosed because the "requirements of prison security are unique" (citing Giakoumelos v. Coughlin, 88 F.3d 56, 61–62 (2d Cir. 1996))); *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 incarcerated person 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).

[55] Humane Alternatives to Long-Term ("HALT") Solitary Confinement Act, S.B. S2836, 2021S., 2021–2022 Reg. Sess. (N.Y. 2021).

[56] Humane Alternatives to Long-Term ("HALT") Solitary Confinement Act, S.B. S2836, 2021S. § 4, 2021–2022 Reg. Sess. (N.Y. 2021) (codified at N.Y. CORRECT. LAW § 2(23)).

who are twenty-one or younger; those who are fifty-five or older; those with a disability; and those who are pregnant, in the first eight weeks of recovery after giving birth, or caring for a child in a correctional facility.[57] For incarcerated persons who fall into one or more of these special groups, segregated confinement is prohibited except during a brief holding before a hearing. This holding is not to exceed 48 hours.[58]

HALT also limits the use of segregated confinement in the general prison population. HALT allows for no more than 15 consecutive days of segregated confinement, or more than 20 days in a 60-day period.[59] This period can only be extended when there is a significant and unreasonable risk of harm to other incarcerated people or staff. Furthermore, for those in segregated confinement, HALT requires at least four hours of out-of-cell programming, one of which must be recreation.[60] HALT also says that no limitations on services, treatment, or basic needs (clothes, bedding, etc.) can be imposed as punishment while in segregated confinement. While the prison can restrict these things when there is a significant or unreasonable risk to other incarcerated people or staff, they still must offer at least four hours of out-of-cell time daily.

Finally, HALT creates additional procedural protections for those facing a disciplinary hearing where segregated confinement may be imposed. First, it establishes that incarcerated persons are entitled to an evidentiary hearing *before* being placed into solitary.[61] This protection goes beyond what is required under Federal law—under *Conner*, the court would review your confinement only during or after it has taken place. Additionally, an incarcerated person can be represented by counsel, a law student, or a paralegal at this hearing.[62] While exactly what constitutes an evidentiary hearing under HALT has not been fully explained, it likely means that you will be able to gather and present evidence, including witness testimony, to support your position.

HALT has greatly expanded your rights during disciplinary hearings where segregated confinement can be imposed. If you believe that any of these guidelines have been violated, you should first challenge them through the internal incarcerated grievance process. If you do not exhaust the internal grievance process, your ability to challenge any violations may be limited in the future. After exhausting the internal incarcerated grievance process, you can challenge any violations through a state court action or through a Federal Section 1983 claim under the *Conner* framework.

### 2. Administrative Confinement

HALT describes the rules for placing an incarcerated person in segregated confinement (also known as a Segregated Housing/Holding Unit (SHU))[63] for a set period of time if they find that the person broke a rule that created a risk to staff members.[64] Administrative segregation typically refers to segregation before a formal hearing. This segregation is based on a preliminary finding that an

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[57] Humane Alternatives to Long-Term ("HALT") Solitary Confinement Act, S.B. S2836, 2021S. § 4, 2021–2022 Reg. Sess. (N.Y. 2021) (codified at N.Y. CORRECT. LAW § 2(33)). For a full list of qualifying disabilities, see N.Y. EXEC. LAW § 292(21) (McKinney 2018).

[58] Humane Alternatives to Long-Term ("HALT") Solitary Confinement Act, S.B. S2836, 2021S. § 5, 2021–2022 Reg. Sess. (N.Y. 2021) (codified at N.Y. CORRECT. LAW § 137(6)(h)).

[59] Humane Alternatives to Long-Term ("HALT") Solitary Confinement Act, S2836, § 4, 55-56 (as passed by New York State Legislature, Jan. 25, 2021), https://www.nysenate.gov/legislation/bills/2021/s2836.

[60] Humane Alternatives to Long-Term ("HALT") Solitary Confinement Act, S.B. S2836, 2021S. § 5, 2021–2022 Reg. Sess. (N.Y. 2021) (codified at N.Y. CORRECT. LAW § 137(6)(j)(ii)).

[61] Humane Alternatives to Long-Term ("HALT") Solitary Confinement Act, S.B. S2836, 2021S. § 5, 2021–2022 Reg. Sess. (N.Y. 2021) (codified at N.Y. CORRECT. LAW §§ 137(6)(j)((i)–(ii), (k)).

[62] Humane Alternatives to Long-Term ("HALT") Solitary Confinement Act, S.B. S2836, 2021S. § 5, 2021–2022 Reg. Sess. (N.Y. 2021) (codified at N.Y. CORRECT. LAW § 137(6)(k)).

[63] HALT has replaced SHU with a general definition of segregated confinement. However, SHU will still be used throughout this chapter when referring to past cases in New York.

[64] *See* N.Y. COMP. CODES R. & REGS. tit. 7, §§ 254.7(a)(1)(v), 301.2(a) (2023).

incarcerated person's presence in the general prison population threatens prison safety and security.[65] HALT, however, places some limitations on the use of prolonged administrative segregation (usually any segregation over 48 hours).[66] The same rules for segregated confinement described in Section D(1) of this Chapter will apply. Administrative segregation can continue until the superintendent finds that the threat is over.[67]

New York State law requires that you receive a hearing within seven days of being placed in administrative segregation.[68] After the hearing, you have a right to receive a written determination within seven days of the decision.[69] Furthermore, for the first two months of administrative confinement, your status is required to be reviewed every seven days.[70] The bar placed on prison officials for this determination is quite high. The prison officials must show that "individual's release to general population would pose an unreasonable and demonstrable risk to the safety and security of staff, incarcerated individuals or the facility, or present an unreasonable risk of escape."[71] This decision is based on considerations including: "(i) reasons why the individual was initially determined to be appropriate for administrative segregation; (ii) information on the individual's subsequent behavior and attitude; and (iii) any other factors that they believe may favor retaining the individual in or releasing the individual from administrative segregation."[72] As mentioned, if these procedural requirements are not met, you will have a right to challenge your segregated confinement.

### 3. Residential Rehabilitation Units

HALT also provides for "residential rehabilitation units," a new type of holding aimed at getting rid of segregated confinement. HALT defines a residential rehabilitation unit as "a separate housing unit used for therapy, treatment, and rehabilitative programming of incarcerated people who have been determined to require more than fifteen days of segregated confinement pursuant to department proceedings. Such units shall be therapeutic and trauma-informed, and aim to address individual treatment and rehabilitation needs and underlying causes of problematic behaviors."[73]

While the exact ways these new units will function in practice are unclear, HALT lays out various requirements for these residential rehabilitation units. First, incarcerated persons in these units will be entitled to regular mental health care, including an incoming suicide screening, and a heightened level of care for those determined to have a serious mental health issue.[74] The "heightened level of care" includes a minimum of three hours daily of out-of-cell therapeutic treatment and programming.[75]

New York law and HALT also provide that these residential rehabilitation units must use the "least restrictive environment necessary for the safety of incarcerated persons, staff, and the security

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[65] *See* N.Y. COMP. CODES R. & REGS. tit. 7, § 301.4(a) (2023).

[66] *See* Humane Alternatives to Long-Term ("HALT") Solitary Confinement Act, S.B. S2836, 2021S. § 5, 2021–2022 Reg. Sess. (N.Y. 2021) (codified at N.Y. CORRECT. LAW § 137(6)(h)).

[67] *See* N.Y. COMP. CODES R. & REGS. tit. 7, § 301.4(e) (2023).

[68] *See* N.Y. COMP. CODES R. & REGS. tit. 7, § 301.4(b) (2023).

[69] *See* N.Y. COMP. CODES R. & REGS. tit. 7, § 301.4(b) (2023).

[70] *See* N.Y. COMP. CODES R. & REGS. tit. 7, § 301.4(c) (2023).

[71] *See* N.Y. COMP. CODES R. & REGS. tit. 7, § 301.4(c) (2023).

[72] *See* N.Y. COMP. CODES R. & REGS. tit. 7, § 301.4(c)(1) (2023).

[73] Humane Alternatives to Long-Term ("HALT") Solitary Confinement Act, S.B. S2836, 2021S. § 4, 2021–2022 Reg. Sess. (N.Y. 2021) (codified at N.Y. CORRECT. LAW § 2(33)).

[74] *See* Humane Alternatives to Long-Term ("HALT") Solitary Confinement Act, S.B. S2836, 2021S. § 5, 2021–2022 Reg. Sess. (N.Y. 2021) (codified at N.Y. CORRECT. LAW § 137(6)((d)(i)

[75] *See* Humane Alternatives to Long-Term ("HALT") Solitary Confinement Act, S.B. S2836, 2021S. § 5, 2021–2022 Reg. Sess. (N.Y. 2021) (codified at N.Y. CORRECT. LAW § 137(6)(d)(iii)

of the facility."[76] Therefore, many stringent units can be challenged, especially if they dramatically restrict your protected rights.

In a residential rehabilitation unit, you are also entitled to six hours of daily out-of-cell congregate programming, services, treatment, and/or meals, with an additional minimum of one hour for recreation. Recreation in all residential rehabilitation units shall take place in a group setting, unless exceptional circumstances mean doing so would create a significant and unreasonable risk to the safety and security of other incarcerated persons, staff, or the facility.[77]

Finally, in these specialized units you are entitled to personal property unless it involves an unreasonable risk to yourself or others. You are also entitled to access comparable programming and work assignments available to the general prison population.[78] Any violations of these rights should first be challenged through the internal incarcerated grievance process.

### E. How Courts Evaluate Due Process Claims for Disciplinary Actions

This Part will look at which prison practices make an "atypical and significant hardship" and how courts evaluate these claims. Remember that this analysis is specific to your state's laws and only applies if the state has a statute creating a protected liberty interest.

Courts in New York State and the Second Circuit will look at both disciplinary and administrative detention proceedings under the *Conner* test and HALT requirements. The court reviews complaints against both kinds of segregation to decide if:

(1) There are procedures explicitly required of prison officials, and
(2) Any "atypical and significant hardship" exists.[79]

This Part 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 an incarcerated person's confinement in segregated confinement under requirement (2). This Part focuses specifically on the law for courts in the Second Circuit (federal courts in New York, Vermont, and Connecticut). Court analysis 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.[80] If you live outside the area of the Second Circuit (the Second Circuit includes New York, Vermont, and Connecticut), you should look up how courts in your area interpret your prison's rules and if they

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[76] *See* Humane Alternatives to Long-Term ("HALT") Solitary Confinement Act, S.B. S2836, 2021S. § 5, 2021–2022 Reg. Sess. (N.Y. 2021) (codified at N.Y. CORRECT. LAW § 137(6)(h)(i)

[77] *See* Humane Alternatives to Long-Term ("HALT") Solitary Confinement Act, S.B. S2836, 2021S. § 5, 2021–2022 Reg. Sess. (N.Y. 2021) (codified at N.Y. CORRECT. LAW § 137(6)(h)(ii)

[78] *See* Humane Alternatives to Long-Term ("HALT") Solitary Confinement Act, S.B. S2836, 2021S. § 5, 2021–2022 Reg. Sess. (N.Y. 2021) (codified at N.Y. CORRECT. LAW § 137(6)(h)(v)

[79] *See, e.g.*, Wilkinson v. Austin, 545 U.S. 209, 210, 125 S. Ct. 2284, 2387 (2005) ("Such an interest may arise from state policies or regulations, subject to the important limitations set forth in [*Conner*], which requires a determination whether [Ohio State Penitentiary] assignment 'imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'" (quoting Sandin v. Conner, 515 U.S. 472, 486, 115 S. Ct. 2293, 2301, 132 L. Ed. 2d 418, 431 (1995))); Palmer v. Richards, 364 F.3d 60, 66 (2d Cir. 2004) (holding that the conditions of the incarcerated person's confinement in the SHU, coupled with the duration of time in the SHU, might constitute "atypical and significant hardship").

[80] *See* Crowder v. True, 74 F.3d 812, 815 (7th Cir. 1996) (holding administrative detention does not 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) (explaining 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, 701–702 (E.D. Pa. 1995) (holding regulations limiting prison officials' discretion in administrative detention decisions created a liberty interest).

consider administrative detention a protected liberty interest. See *JLM*, Chapter 2, "Introduction to Legal Research," for more information on how to look up your local law.

### 1. 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 confinement[81] and administrative segregation[82] give incarcerated people a liberty interest that protects them from certain prison conditions. The courts also hold that the Due Process Clause of the U.S. Constitution protects this liberty interest. The passage of HALT has further strengthened these state-created liberty interests. Where these interests have been created, the prison must also regularly uphold these protected interests.[83] It is important to remember that courts outside of New York State do not always find that state statutes and regulations create a liberty interest that protects incarcerated people from disciplinary and administrative segregation. In this case, you should look to your state law and see whether specific laws and guidelines protect specific interests and rights of incarcerated persons. If they do, you may have a strong argument that it is a state-protected interest.

### 2. The "Atypical and Significant Hardship" Requirement

After determining whether there is a state-created interest, the court will ask 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."[84] This analysis can apply to any segregated facility (administrative confinement, disciplinary confinement, etc.), and the analysis may vary based on state law. However, this analysis will always be mainly focused on the specific facts of your confinement.[85] There is no clear way to decide if a given SHU confinement is an "atypical and significant hardship."

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[81] *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 incarcerated people 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, 257–258 (S.D.N.Y. 1997) (holding state regulations on disciplinary segregation create a liberty interest in freedom from disciplinary confinement).

[82] *See, e.g.*, Wright v. Smith, 21 F. 3d 496, 500 (2d Cir. 1994) (holding that New York State regulation providing for mandatory reevaluation of administration segregation after an incarcerated person has been in the SHU for 14 days created a liberty interest); Gonzalez v. Coughlin, 969 F. Supp. 256, 257–258 (S.D.N.Y. 1997) (concluding that New York State rules regarding administrative confinement create a liberty interest).

[83] *See, e.g.*, 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, 583–584 (2d Cir. 1999) (explaining that "New York has established substantial factual predicates for many instances of administrative confinement" which create a protected liberty interest); Welch v. Bartlett, 196 F.3d 389, 392 (2d Cir. 1999) (stating that an incarcerated person 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), which held that because of Pennsylvania statutes setting forth procedures for placing incarcerated people in administrative confinement, incarcerated people had a liberty interest in remaining in the general prison population. Later, however, the Supreme Court explicitly rejected the *Helms* analysis as the primary means of determining the existence of a due process claim, finding that state regulations for administrative or disciplinary segregation did not themselves create a liberty interest—rather, incarcerated people needed to additionally show "atypical and significant hardship" arising from the segregation. Sandin v. Conner, 515 U.S. 472, 483–484, 115 S. Ct. 2293, 2299–2300, 132 L. Ed. 2d 418, 430 (1995). Despite the Supreme Court's ruling in *Connor*, the Second Circuit held that, in combination with *Connor*'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.

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

[85] *See* Miller v. Selsky, 111 F.3d 7, 9 (2d Cir. 1997) (holding that *Conner* 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").

Courts will look at two main things in their analysis: (i) the length of your confinement and (ii) the difference between your segregation conditions and normal prison conditions.[86] The court will look at both factors "since especially harsh conditions endured for a brief interval and somewhat harsh conditions endured for a prolonged interval might both be atypical."[87]

(a) 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 segregated confinement. A prison official may only be responsible for violating your due process rights during this period. Nevertheless, when you file your claim, you should state how long you actually spent in detention, as well as how long you could have spent.[88] You should count the total number of days that you spent in segregated confinement before, during, and after the disciplinary or administrative hearing.[89] If they move you from one type of segregated confinement to another, or to another facility, count the total number of days that you were detained in both facilities. Your transfer does not restart the duration of confinement for the court.[90]

HALT limits segregated confinement to no more than 15 consecutive days of segregated confinement, or more than 20 days in a 60-day period. HALT suggests that anything over this limit would be considered an "atypical and significant" hardship.[91] Courts outside of New York have not specifically 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 has suggested that SHU confinement of approximately 305 days or more probably involves a protected liberty interest.[92] Periods of less than 305 days but more than 101 days may involve a protected liberty interest.[93]

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[86] *See* Davis v. Barrett, 576 F.3d 129, 133 (2d Cir. 2009) ("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.'" (quoting Palmer v. Richards, 364 F.3d 60, 64 (2d Cir. 2004))); 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").

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

[88] *See, e.g.,* Walker v. Capra, No. 22 CV 7638 (VB), 2024 U.S. Dist. LEXIS 456, at *4 (S.D.N.Y. Jan. 2, 2024) (holding defendant's HALT Act violation claim, which included both the actual days spent in solitary confinement and the days originally sanctioned, could proceed). *But see* Paul v. Selsky, No. 02-CV-6347-CJS, 2012 U.S. Dist. LEXIS 90939, at *18 (W.D.N.Y. Jun. 29, 2012) (*unpublished*) ("In assessing atypicality under [*Conner*], a court must look to the 'actual punishment' imposed." (citing Scott v. Albury, 156 F.3d 283, 287 (2d Cir. 1998))). However, this will likely change with the application of HALT.

[89] *See* Nieves v. Prack, 172 F. Supp. 3d 647, 651–652 (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 SHU confinement).

[90] *See* Fludd v. Fischer, 568 F. App'x 70, 73 (2d Cir. 2014), No. 12-3641-pr, 2014 U.S. App. LEXIS 10812, at *4 (2d Cir. Jun. 6, 2014) (*unpublished*) (noting that, "[f]or the purpose of establishing a liberty interest, a district court should consider the entire 'sustained period of confinement'" (quoting 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 [*Conner*] inquiry" when they are imposed within a period of days or hours of each other and add up to a sustained period of confinement).

[91] *See* Humane Alternatives to Long-Term ("HALT") Solitary Confinement Act, S.B. S2836, 2021S. § 5, 2021–2022 Reg. Sess. (N.Y. 2021) (codified at N.Y. CORRECT. LAW § 137(6)((j)(vii)

[92] *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 *Conner*).

[93] 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 lasting between 101 and 305 days may trigger a protected liberty interest, depending on the specific

Confinement for less than 101 days probably does not involve a *Conner* liberty interest unless you experienced unusually severe conditions in segregated confinement.[94] Finally, confinement under typical conditions for less than thirty days will probably not result in a successful due process claim.[95]

This area of the law is rapidly changing, and more circuits are decreasing the amount of time one must spend in confinement before it becomes "atypical and significant." Therefore, it is incredibly important to include detailed information about the length of your confinement or potential confinement in your claim as well as stay up to date with recent cases on the issue.

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

In addition to weighing the length of your confinement and the extent of your deprivation, courts also look at how often the type and circumstances of confinement are used within the general prison population 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.[96]

Courts will compare how much hardship you suffered in disciplinary or administrative segregation to the "ordinary incidents of prison life."[97] The Supreme Court says that, under *Conner*, an incarcerated person in disciplinary or administrative segregation does not have a due process claim if

conditions of confinement"); *see also* Palmer v. Richards, 364 F.3d 60, 64–65 (2d Cir. 2004) ("Instead [of adopting a bright line rule], 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." (quoting Colon v. Howard, 215 F.3d 227, 232 (2d Cir. 2000))).

[94] *See* Ortiz v. McBride, 380 F.3d 649, 654 (2d Cir. 2009) ("[U]nder 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, 589–590 (2d Cir. 1999) (holding that 101 days of confinement under standard SHU conditions did not constitute an "atypical and significant" deprivation under *Conner*). *But see* Colon v. Howard, 215 F.3d 227, 232 n.5 (2d Cir. 2000) (noting that confinement for periods of 101 days or less "could be shown on a record more fully developed than the one in *Sealey* to constitute an atypical and severe hardship under [*Conner*]"); Welch v. Bartlett, 196 F.3d 389, 394 (2d Cir. 1999) (holding 90 days of confinement in a SHU may be "atypical and significant" if the deprivation that the incarcerated person suffered "was more serious than typically endured by prisoners as an ordinary incident of prison life"); Holmes v. Grant, 2006 U.S. Dist. LEXIS 15743, at *59 (S.D.N.Y. Mar. 31, 2006) (*unpublished*) (recognizing that the facility's 24-hour solitary confinement policy during a 13-day stay in SHU could be considered an atypical deprivation).

[95] *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—and there was no indication of unusual conditions."); Benton v. Keane, 921 F. Supp. 1078, 1079 (S.D.N.Y. 1996) (finding that thirty days of confinement in SHU does not implicate liberty interest); Hendricks v. Centanni, No. 92 Civ. 5353, 1996 U.S. Dist. LEXIS 1662, at *8–9 (S.D.N.Y. Feb. 16, 1996) (*unpublished*) (noting that thirty days of disciplinary confinement does not implicate liberty interest); Martin v. Mitchell, No. 92–CV–716, 1995 U.S. Dist. LEXIS 19006, at *9 (N.D.N.Y. Nov. 24, 1995) (*unpublished*) (holding that thirty days of confinement and loss of privileges does not implicate liberty interest).

[96] Scott v. Coughlin, 78 F. Supp. 2d 299, 306–307 (S.D.N.Y. 2000) (citing Welch v. Bartlett, 196 F.3d 389, 394 (2d Cir. 1999)) (noting that "Along 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 *Conner*, 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" (quoting Welch v. Bartlett, 196 F.3d 389, 394 (2d Cir. 1999))); 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 *Conner*, "a court must examine the specific circumstances of the punishment").

[97] *See* Wilkinson v. Austin, 545 U.S. 209, 223, 125 S. Ct. 2384, 2394, 162 L. Ed. 2d 174, 190 (2005) ("After [*Conner*], it is clear that the touchstone of the inquiry into the existence of a protected, state-created liberty interest in avoiding restrictive conditions of confinement is not the language of regulations regarding those conditions but the nature of those conditions themselves 'in relation to the ordinary incidents of prison life.'" (quoting Sandin v. Conner, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 430 (1995))).

other incarcerated people have about the same hardship under ordinary prison administration.[98] There is some dispute in the courts about the meaning of "ordinary incidents of prison life."[99] Courts will let you compare what you experienced in segregated confinement to what the general population experiences at your prison.[100] Thus, to be an "atypical and substantial deprivation," your hardships must be "substantially more grave" than what you would ordinarily experience in the general prison population.[101]

Like the length of your confinement, courts have no strict rule for what makes your deprivations in segregated confinement "substantially grave" enough to be "atypical and significant."[102] Rather, the court will look at many different factors to decide whether your deprivation violates the Due Process Clause. For example, in a case from the Western 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

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[98] Wilkinson v. Austin, 545 U.S. 209, 222–223, 125 S. Ct. 2384, 2394, 162 L. Ed. 2d 174, 190 (2005) (applying 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, 483–484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 430 (1995)).

[99] *See* Sealey v. Giltner, 197 F.3d 578, 588–589 (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).

[100] *See* Ortiz v. McBride, 380 F.3d 649, 655 (2d Cir. 2009) (recognizing that an incarcerated person could successfully prove a due process violation if he "could establish conditions in SHU 'far inferior' to those prevailing in the prison in general" (quoting Palmer v. Richards, 364 F.3d 60, 66 (2d Cir. 2004))); *see also, e.g.*, Sealey v. Giltner, 197 F.3d 578, 589 (2d Cir. 1999) (finding on appeal that the incarcerated person'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 an incarcerated person's SHU segregation to the deprivation that other incarcerated people 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 incarcerated person faced in administrative segregation to the typical conditions that the prison's general population endured).

[101] Welch v. Bartlett, 196 F.3d 389, 392 (2d Cir. 1999) (finding that, after *Conner*, an incarcerated person who experiences a deprivation under mandatory state regulations does not have a federal due process claim if other incarcerated people in the prison's general population typically experience approximately the same deprivation in the ordinary administration of the prison); *see also* Frazier v. Coughlin, 81 F.3d 313, 317–318 (2d Cir. 1996) (holding that when an incarcerated person 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 he was denied certain privileges, because the conditions of his confinement were not prohibited by law).

[102] *See* Davis v. Barrett, 576 F.3d 129, 133 (2d Cir. 2009) (explaining that when courts determine the extent of deprivation, they will look at "'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.'" (citing Palmer v. Richards, 364 F.3d 60, 64 (2d Cir. 2004))); *see also* Houston v. Cotter, 7 F. Supp. 3d 283, 296 (E.D.N.Y. 2014) (stating that "[w]hen 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 hose conditions for a significantly long time" (citing Earl v. Racine Cnty. Jail, 718 F.3d 689, 691 (7th Cir. 2013))); 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, even though it included restrictions on his diet and water and placement behind a cell shield); Jones v. Kelly, 937 F. Supp. 200, 202–203 (W.D.N.Y. 1996) (concluding that 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. Carriero, 905 F. Supp. 99, 104 (W.D.N.Y. 1995) (finding that 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").

(3) No social and recreational activity, such as drug and alcohol counseling, religious services, group meals, or group exercise. [103]

The *Giano* court also found more distinctions. Incarcerated people in segregated confinement 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, people in SHU only got two showers per week, one non-legal visit per week, and no telephone calls (except in an emergency or with permission).[104] Finally, the individual's cell was ten feet by ten feet, often dirty, and usually dark, with covered windows to prevent eye contact with other incarcerated people.[105] *Giano* demonstrates a series of conditions that were found to be "atypical and significant" hardships. If your situation is or was similar, you would likely have a successful claim.

However, even if incarcerated people in the general population sometimes experience similar deprivations, you may still have a due process claim.[106] The *Giano court* said that, although people incarcerated in the general population under "lock-down" had 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."[107] This analysis, which looks at the manner of your confinement and how long you spend in segregated confinement, seems typical of recent Second Circuit cases.[108]

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. Because this is a fact-based analysis, the court may also consider other factors that have contributed to the situation or hardship. Therefore, you should include as much information as possible on why your situation was "atypical or significant." You should present any and all available evidence of conditions in segregated confinement, any evidence of psychological effects of prolonged confinement

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[103] 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*).

[104] 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*).

[105] 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*).

[106] Giano v. Kelly, No. 89-CV-727(C), 2000 U.S. Dist. LEXIS 9138, at *24–25 (W.D.N.Y. May 16, 2000) (*unpublished*).

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

[108] *See, e.g.*, Gonzalez v. Hasty, 802 F.3d 212, 223 (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) (recognizing that "[i]n the absence of factual findings to the contrary, confinement of 188 days is a significant enough hardship to trigger *Sandin* [*v. Conner*]"); Palmer v. Richards, 364 F.3d 60, 64–66 (2d Cir. 2004) (articulating duration guidelines and noting that dismissal of a due process claim is appropriate only when an incarcerated person 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 incarcerated person'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 incarcerated person did not allege any adverse conditions of the confinement other than its duration); Sealey v. Giltner, 197 F.3d 578, 589–590 (2d Cir. 1999) (finding that plaintiff's 101-day confinement in the SHU did not impair a protected liberty interest since the duration and conditions of the confinement did not meet the *Conner* 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 similar deprivation typically endured by other incarcerated people in ordinary 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).

in isolated conditions, and the exact number of times you were placed in segregated confinement of different lengths of time.[109]

In addition to your own words, you should also get and submit other evidence about your detention conditions. This evidence should be independent. For example, if you complained of unsanitary conditions or other unmet medical needs, you should try to get records of these complaints.[110]

In conclusion, a court will generally consider first whether there was a state-created protected interest in life, liberty, or property. Next, the court will consider whether the deprivation was "atypical or significant." This analysis will include consideration of the extent of the confinement and how the confinement compares to the treatment of the general prison population. The next Section will consider specific situations, including transfers and good-time credits, and how courts generally analyze these claims.

### 3. How *Conner* Applies to Specific Situations

#### (a) Transfers

The Supreme Court says you do not have a protected liberty interest in staying at a certain prison, but some aspects of a transfer could involve your due process rights.[111] For example, you might have a claim if you were moved because you exercised a constitutional right, such as exercising your right to free speech.[112]

You do not have a protected liberty interest in staying in a certain prison even if the new prison has a different security level.[113] For example, an optional transfer from a minimum security prison to

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[109] *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 [an incarcerated person's] liberty claim"); Edwards v. Mejia, No. 11 Civ. 9134, 2013 U.S. Dist. LEXIS 37006, at *6–7 (S.D.N.Y. Mar. 15, 2013) (*unpublished*) (finding claim of difficulty breathing because of inadequate air ventilation and physical and psychological anguish was sufficient to plead atypical and significant hardship); Brown v. Doe, No. 13 CIV. 8409, 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).

[110] *See, e.g.,* Colon v. Howard, 215 F.3d 227, 232 (2d Cir. 2000) (finding that "evidence of the psychological effects of prolonged confinement in isolation" would be helpful on appellate review); *see also* Wheeler v. Butler, 209 F. App'x 14, 15 (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).

[111] *See* Meachum v. Fano, 427 U.S. 215, 224–225, 96 S. Ct. 2532, 2538–2539, 49 L. Ed. 2d 451, 459–460 (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); Olim v. Wakinekona, 461 U.S. 238, 247, 103 S. Ct. 1741, 1746, 75 L. Ed. 2d 813, 821 (1983) (finding that transfer for confinement in another state is within the normal range of custody). *But see* Vitek v. Jones, 445 U.S. 480, 493–494, 100 S. Ct. 1254, 1264, 63 L. Ed. 2d 552, 555–556 (1980) (finding that transfer to a mental hospital is not within the normal range of custody).

[112] *See* Meriwether v. Coughlin, 879 F.2d 1037, 1046 (2d Cir. 1989) (holding that a jury could reasonably conclude that incarcerated people were transferred solely because they exercised their 1st Amendment rights, and thus had a valid claim, where the incarcerated people were transferred after critiquing the prison administration); Hill v. Laird, No. 06-CV-0126, 2014 U.S. Dist. LEXIS 43994, at *22 (E.D.N.Y. Mar. 31, 2014) (*unpublished*) (dismissing 1st Amendment retaliation claim where, although incarcerated person had filed grievances against prison administration prior to transfer, prison official demonstrated he would have ordered transfer regardless).

[113] *See* Meachum v. Fano, 427 U.S. 215, 224–225, 96 S. Ct. 2532, 2538–2539, 49 L. Ed. 2d 451, 459–460 (1976) ("[T]he 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."); Moorman v. Thalacker, 83 F.3d 970, 973 (8th Cir. 1996) (holding that discretionary transfer of incarcerated person from minimum to medium security prison, as a result of disciplinary action, was not a disruption exceeding ordinary incidents of prison life and, thus, did not implicate a due process liberty interest); Keenan v. Hall, 83 F.3d 1083, 1089, 96 Cal. Daily Op. Service 3261, 96 Daily Journal DAR 5331 (9th Cir. 1996) (noting the standard for determining whether an incarcerated person had a

a medium-security prison is not considered worse than the "ordinary disruptions of prison life."[114] Also, moves from the general population to maximum security can be "within the normal limits or range of custody which the conviction" allows. This is true even when maximum security conditions are much worse.[115] The main case on this question is *Meachum v. Fano.* In *Meachum*, a group of incarcerated persons argued that transfers to a less favorable institution without an adequate fact-finding hearing deprived them of their due process rights.[116] However, the court found that transfers happen for a variety of reasons separate from the conduct of the incarcerated person. There was no state law that created a right to remain in the prison to which the incarcerated person was initially assigned. Therefore, a transfer could not be questioned upon due process grounds, unless accompanied by another event. Additionally, how often you move between prisons does not matter.[117]

In New York, *Meachum* was expanded upon. In *Rincon v. Annucci*, a New York court held that the holding in *Meachum* also applies to what knowledge an incarcerated person is entitled to regarding their assigned prison facility.[118] *Rincon* held that an incarcerated person was not entitled to know or dispute reasons for his place of confinement as a matter of due process.[119]

There has been only one case in the second circuit where a transfer was successfully challenged on due process grounds. In *Meriwether v. Coughlin,* a group of incarcerated people engaged in free speech activities to bring attention to various issues of corruption within the prison.[120] Afterward, many of the incarcerated persons were transferred to other facilities and alleged that they were severely beaten during the transfer process.[121] The court then held that a reasonable jury could find that the incarcerated persons were transferred solely because they exercised their First Amendment rights.[122] The court, however, held that this was only a violation of their First Amendment rights, not their due process rights.[123] *Meriwether* as a whole demonstrates that it is very difficult to argue that your rights were violated by a transfer. Lastly, 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. This is true even if conditions in the United States are worse than in your home country.[124]

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protected liberty interest in prison transfer depends on whether conditions at the facility to which the incarcerated person was transferred imposed significant and atypical hardship).

[114] *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.").

[115] Meachum v. Fano, 427 U.S. 215, 225, 96 S. Ct. 2532, 2538–2539, 49 L. Ed. 2d 451, 459 (1976).

[116] Meachum v. Fano, 427 U.S. 215, 215, 96 S. Ct. 2532, 2532, 49 L. Ed. 2d 451, 451 (1976).

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

[118] Rincon v. Annucci, 186 A.D.3d 1869, 1870, 130 N.Y.S.3d 567, 569 (2020).

[119] Rincon v. Annucci, 186 A.D.3d 1869, 1870, 130 N.Y.S.3d 567, 569 (2020).

[120] Meriwether v. Coughlin, 879 F.2d 1037, 1039 (2d Cir. 1989).

[121] Meriwether v. Coughlin, 879 F.2d 1037, 1040 (2d Cir. 1989).

[122] Meriwether v. Coughlin, 879 F.2d 1037, 1046 (2d Cir. 1989).

[123] Meriwether v. Coughlin, 879 F.2d 1037, 1046–1047 (2d Cir. 1989).

[124] *See* Wong v. Warden, FCI Raybrook, 999 F. Supp. 287, 289–290 (N.D.N.Y. 1998) (stating that an incarcerated noncitizen 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), *aff'd*, Wong v. Warden, FCI Raybrook, 171 F.3d 148 (2d Cir. 1999); 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, 431–432 (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).

### (b) Good-Time Credits

Good-time credits are another area where a court may find that you have a constitutionally protected liberty interest.[125] But, again, you can only claim a liberty interest if your state has created one.[126] For example, in one case, a Nevada law let incarcerated people get good-time credits "unless the inmate ha[d] committed serious misbehavior."[127] The court found that this law offered a "right of 'real substance'" and created a protected interest in good-time credits under the due process analysis.[128] Under the Nevada law, if an incarcerated person was found guilty of "serious misbehavior," that individual would lose good-time credits. However, before losing good-time credits, certain procedural guidelines must be met. For example, Nevada prisons must tell incarcerated people the charges against them. The prisons must also give them a chance to be heard. Both things must happen before they can find that an incarcerated person is guilty of "serious misbehavior."[129]

The chance to earn good-time credits is not a protected liberty interest by itself.[130] For example, in one case, the incarcerated person was put in administrative segregation.[131] This meant that the incarcerated person could not receive more good-time credits that would have helped him get parole. In that case, the court found no liberty interest. Instead, the court said that the "loss of opportunity to earn good-time credits . . . [is a] consequence[] of prison administrative decisions [that] do not create constitutionally protected liberty interests."[132] In another case, losing a prison job did not automatically involve a liberty interest. This was true even though the incarcerated person could no longer automatically get good-time credits through that job.[133]

One example of how a recent court has evaluated a good-time credit claim is *Burnett v. Department of Corrections and Community Supervision*.[134] In that case, an incarcerated person's good-time credits were revoked for refusing to participate in a mandatory sex offender treatment program.[135] The incarcerated person challenged the removal of his good-time credits, arguing that this was not a valid reason to remove his good-time credits. The court, however, held that there was a rational basis (meaning that the prison had a legitimate reason) for removing the credits and that the removal was valid. HALT also makes minor changes to good-time credits and likely creates a protected interest in good-time credits. HALT requires that good-time credits are restored to an incarcerated person if they

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[125] *See* Wolff v. McDonnell, 418 U.S. 539, 557–559, 94 S. Ct. 2963, 2975–2976, 41 L. Ed. 2d 935, 951–953 (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).

[126] *See* Wolff v. McDonnell, 418 U.S. 539, 557–559, 94 S. Ct. 2963, 2975–2976, 41 L. Ed. 2d 935, 951–953 (1974); Sandin v. Conner, 515 U.S. 472, 483–484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d. 418, 429 (1995) (stating that "we recognize that States may under certain circumstances create liberty interests which are protected by the Due Process Clause" in reference to *Wolff*); *see also* Leacock v. DuBois, 937 F. Supp. 81, 83–84 (D. Mass. 1996) (holding an incarcerated person 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).

[127] Reynolds v. Wolff, 916 F. Supp. 1018, 1023 (D. Nev. 1996).

[128] 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).

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

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

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

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

[133] Bulger v. U.S. Bureau of Prisons, 65 F.3d 48, 50 (5th Cir. 1995); *see also* Rivera v. Coughlin, No. 92 CIV 3404, 1996 U.S. Dist. LEXIS 560, at *17–19 (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 a possibility).

[134] Burnett v. Dept. of Corr. & Cmty. Supervision, 192 A.D.3d 1302, 143 N.Y.S.3d 728 (2021).

[135] Burnett v. Dept. of Corr. & Cmty. Supervision, 192 A.D.3d 1302, 1302, 143 N.Y.S.3d 728, 729 (2021).

complete their rehabilitation program in their residential rehabilitation unit.[136] Therefore, this law recognizes at least a protected interest in good-time credits for incarcerated persons in a residential rehabilitation unit.

The Supreme Court case of *Edwards v. Balisok* is also very important for claims about losing good-time credits.[137] According to that case, you must have a disciplinary hearing ruling about good-time credit issues reversed in state court before you can bring a Federal Section 1983 claim about the results (not the procedures) of the hearing.[138] This standard is applied in a variety of ways. The Second and D.C. Circuits have read it as barring only Federal Section 1983 challenges to good-time credit cases.[139] While the Seventh Circuit has read it as barring challenges to all prison disciplinary hearings.[140] See *JLM*, Chapter 35, "Getting Out Early: Conditional & Early Release," for more information about good-time credits.

### (c) Work Release Programs

The Supreme Court has held that an incarcerated person has a liberty interest in his pre-parole release program. This was because the program was very similar to parole.[141] The standard is similar for work release programs.[142] Courts consider whether your program gives you "substantial freedom." They also consider whether you have been "released from incarceration."[143] You have "substantial freedom" if your work release program is similar to release from prison. The court will probably not find that you have a liberty interest if your situation is still very similar to institutional life.[144]

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[136] Humane Alternatives to Long-Term ("HALT") Solitary Confinement Act, S.B. S2836, 2021S. § 5, 2021–2022 Reg. Sess. (N.Y. 2021) (codified at N.Y. CORRECT. LAW § 137(m)(iv)).

[137] Edwards v. Balisok, 520 U.S. 641, 117 S. Ct. 1584, 137 L. Ed. 2d 906 (1997).

[138] Edwards v. Balisok, 520 U.S. 641, 647–648, 117 S. Ct. 1584, 1588–1589, 137 L. Ed. 2d 906, 914–915 (1997).

[139] *See* Jackson v. Johnson, 15 F. Supp. 2d 341, 349 (S.D.N.Y. 1998) (holding that where an incarcerated person had not lost good-time credits and was not otherwise challenging the fact or duration of his confinement, he could use a Section 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, 167 (D.C. Cir. 1997) (finding that a formerly incarcerated person who brought a Section 1983 action seeking damages for being placed in administrative segregation without due process was not required to raise the claim through a writ of habeas corpus).

[140] *See* Stone-Bey v. Barnes, 120 F.3d 718, 722 (7th Cir. 1997), *overruled on other grounds by* DeWalt v. Carter, 224 F.3d 607, 618 (7th Cir. 2000), *abrogated on other grounds by* Savory v. Cannon, 947 F.3d 409 (7th Cir. 2020) (holding that incarcerated person's Section 1983 claim that disciplinary segregation violated due process was barred because the disciplinary judgment had not been overturned and recognizing this claim would imply that the disciplinary judgment was invalid).

[141] *See* Young v. Harper, 520 U.S. 143, 152–153, 137 L. Ed. 2d 270, 280, 117 S. Ct. 1148, 1154 (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 *22 (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").

[142] *See* 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*"); *see also* 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).

[143] 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 incarcerated person is given substantial freedom, and that the trigger is if the incarcerated person has been "release[d] from incarceration").

[144] *See* 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); *see also* 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, 463–464 (2d Cir. 2011) (*unpublished*) (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, 887–888, 890 (1st Cir. 2010) (finding conditional

The key factor for a court determining whether you have been "release[d] from institutional life altogether" is where you live.[145] In one case, the court found that a work release program participant had a protected liberty interest because he no longer lived in an institution.[146] However, in another case, the court found no inherent liberty interest in staying in a work release program.[147] In that case, the participant was on "5" and "2" status (spent five nights a week at home and two at the institution).[148] The court found that the incarcerated person did enjoy some liberty while in the program.[149] However, he had not been fully released from institutional life, so he did not have a liberty interest according to the court.[150] In a different case, the participant in the pre-parole program lived in his home at all times, and the Supreme Court found that this situation was enough to be considered "released from institutional life altogether."[151] Courts will also consider any other restrictions that the program puts on your life.[152]

You do not have a state-created right to be put in a work release program.[153] However, you might have a state-created interest once you are put in a work release program.[154] In some states, removal

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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).

[145] 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" (quoting Harper v. Young, 64 F.3d 563 (10th Cir. 1995))); *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").

[146] Edwards v. Lockhart, 908 F.2d 299, 302 (8th Cir. 1990); *see also* United States v. Stephenson, 928 F.2d 728, 732 (6th Cir. 1991) (finding an inherent liberty interest in continued placement in supervised release program allowing formerly incarcerated people to live in society); 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).

[147] Roucchio v. Coughlin, 923 F. Supp. 360, 370 (E.D.N.Y. 1996).

[148] 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).

[149] Roucchio v. Coughlin, 923 F. Supp. 360, 375 (E.D.N.Y. 1996).

[150] 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)).

[151] Young v. Harper, 520 U.S. 143, 148–149, 137 L. Ed. 2d 270, 278, 117 S. Ct. 1148, 1152 (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).

[152] 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, 887–888 (1st Cir. 2010) (considering restrictions placed on incarcerated people on conditional release, including wearing unremovable electronic tracking anklet and submitting list of restrictions on alcohol and substance abuse).

[153] *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 Neb. Penal and Corr. 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 incarcerated people 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 incarcerated person from such program, present different inquiries).

[154] *See* Roucchio v. Coughlin, 923 F. Supp. 360, 368–377 (E.D.N.Y. 1996) (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, 486, 115 S. Ct. 2293, 2301, 132 L. Ed. 2d 418, 431 (1995) (finding that

from a work release program is considered an "atypical and significant hardship" under the *Conner* analysis.[155] New York is one state that creates this liberty interest.[156] In New York, the following process must be followed before you can be removed from temporary work release:[157]

(1) You must be given written notice 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) The right to be heard by 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.[158]
(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."[159]

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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, 1172 (N.D. Ill. 1996) (stating that under *Conner*, courts should "look to the nature of the deprivation suffered by an incarcerated person, not to the language of prison regulations, to determine if a liberty interest exists").

[155] *See* Roucchio v. Coughlin, 923 F. Supp. 360, 374–375 (E.D.N.Y. 1996) (finding that where an incarcerated person 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 not atypical, because his confinement was an "ordinary incident of prison life"); Asquith v. Volunteers of Am., 1 F. Supp. 2d 405, 418 (D.N.J. 1998) (finding that there was no state-created liberty interest in a work release program under *Conner* because removal is not an atypical hardship, and because the New Jersey law isn't written in a way that gives an incarcerated person the right not to be removed); Hamilton v. Peters, 919 F. Supp. 1168, 1172 (N.D. Ill. 1996) (finding no liberty interest under *Conner* when incarcerated person was removed from work release in a disciplinary transfer).

[156] Quartararo v. Catterson, 917 F. Supp. 919, 940 (E.D.N.Y. 1996) (affirming the "continued vitality of *Tracy v. Salamack* in light of *Conner*"); Friedl v. City of New York, 210 F.3d 79, 84 (2d Cir. 2000) (stating that incarcerated people on work release have a liberty interest in continued participation in such programs, that under *Conner*, the Due Process Clause protects incarcerated people against "atypical and significant" deprivation of liberty, and that therefore incarcerated people 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, an incarcerated person 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 *Conner* implicitly affirmed Tracy v. Salamack, 572 F.2d 393 (2d Cir. 1978) 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).

[157] *See* Anderson v. Recore, 446 F.3d 324, 329 (2d Cir. 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*").

[158] Tracy v. Salamack, 572 F.2d 393, 396–397 (2d Cir. 1978) (defining the circumstances under which removal would be proper after a due process hearing).

[159] *See* Anderson v. Recore, 446 F.3d 324, 328–329 (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)).

HALT also made changes to work release programs. Under HALT, those in residential rehabilitation units are entitled to comparable work opportunities.[160] Although this likely does not include release, it means you are still entitled to some sort of similar program. HALT likely creates a protected interest in receiving comparable work opportunities when in confinement that cannot be limited without some due process. You should remember 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.[161]

(d) Parole

The mere opportunity to obtain parole does not necessarily grant you a liberty interest in obtaining parole.[162] However, 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.[163] This varies from state to state and depends on the language in the statute.[164] 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 an incarcerated person on parole "unless" certain conditions aren't met, the statute creates an expectation of parole. Therefore, the statute creates your liberty interest.[165]

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[160] *See* Humane Alternatives to Long-Term ("HALT") Solitary Confinement Act, S.B. S2836, 2021S. § 5, 2021–2022 Reg. Sess. (N.Y. 2021) (codified at N.Y. CORRECT. LAW § 137(6)(h)(v)

[161] 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)).

[162] *See* Bd. of Pardons v. Allen, 482 U.S. 369, 373, 107 S. Ct. 2415, 2418, 96 L. Ed. 2d 303, 309–310 (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, 677–678 (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).

[163] *See* Bd. of Pardons v. Allen, 482 U.S. 369, 376–378, 107 S. Ct. 2415, 2420–2421, 96 L. Ed. 2d 303, 311–313 (1987) (finding the Montana statute, which includes mandatory language, "creates a liberty interest in parole release"). This remains true even under *Conner*. *See* Wilson v. Kelkhoff, 86 F.3d 1438, 1446 n.9 (7th Cir. 1996) ("It appears that the Court [in *Conner*] 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, 1417–1418 (D.C. Cir. 1996) (noting that *Conner* did not overrule Greenholtz v. Prisoners of Neb. Penal and Corr. Complex or Board of Pardons v. Allen, and holding that liberty interest in parole stems from state parole statutes); Robles v. Dennison, 745 F. Supp. 2d 244, 261 (W.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.").

[164] *See, e.g.*, Robles v. Dennison, 745 F. Supp. 2d 244, 263–265, 271–274 (W.D.N.Y. 2010) (analyzing the language of New York's prior parole statute and New York's current parole statute to determine whether a protectable liberty interest remained); Watson v. DiSabato, 933 F. Supp. 390, 394 (D.N.J. 1996) (holding that New Jersey's 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, 401–404, (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 a "some evidence" standard); Thompson v. Veach, 501 F.3d 832, 836–837 (7th Cir. 2007) (stating that the District of Columbia's parole statute does not create a protectable liberty interest); Harper v. Young, 64 F.3d 563, 564–565 (10th Cir. 1995), *aff'd*, Young v. Harper, 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 *Conner*, but holding that "program participation is sufficiently similar to parole or probation to merit protection by the Due Process Clause itself.").

[165] *See* Bd. 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." (quoting Greenholtz v. Prisoners of Neb. Penal and Corr. Complex, 442 U.S. 1, 12, 99 S. Ct. 2100, 2106, 60 L. Ed. 2d 668, 678 (1979)); Wilson v. Kelkhoff, 86 F.3d 1438, 1447 n.9 (7th Cir. 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 there is mandatory language "that creates a presumption of release"

Once you obtain parole, you do have certain rights if your parole is being revoked.[166] In *Morrissey*, the Supreme Court outlined the procedural rights that you have before your parole can be revoked.[167] When you are first arrested or charged with a violation, you have a right to a preliminary hearing.[168] The purpose of the hearing is to make sure there are facts that support the alleged violation.[169] This hearing should be conducted near where you were arrested or where the violation took place, and as soon after your arrest or violation as possible.[170] The hearing should be held by someone who is not directly involved in your case.[171] You should receive notification of the preliminary hearing before it takes place, including information about why the hearing is happening and the allegations against you.[172] You can present information and question anyone testifying against you at the hearing. After the preliminary hearing, there will be a parole revocation hearing.[173] 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.[174]

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.

### F. Basic Rights in Disciplinary Procedures

This Part will discuss what to expect before, during, and after a disciplinary hearing. This Part will also discuss your basic rights during a disciplinary hearing, although please note that these protected rights can vary by state. If you have been placed in administrative segregation, this Part may not apply to you. Go to Parts C and D of this Chapter to learn more about your rights if you have

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in the statutes, regulations, or policy statements of prison or parole officials); Moor v. Palmer, 603 F.3d 658, 661–662 (9th Cir. 2010) (stating that a statute creates a protectable liberty interest as long as the statute has mandatory language and limits discretion of parole decision-makers, and that Nevada's statute does not: "Nevada's statutory parole scheme, however, expressly disclaims any intent to create a liberty interest. SEE NEV. REV. STAT. § 213.10705 (legislative declaration that "the release or continuation of a person on parole or probation is an act of grace of the State. . . . and it is not intended that the establishment of standards relating thereto create any such right or interest in liberty or property. . . ."). The statute does not use mandatory language; instead, it provides that "the Board may release on parole a prisoner who is otherwise eligible for parole" and lists factors to be considered in exercising that discretion. NEV. REV. STAT. § 213.1099(1), (2) (emphasis added). Moor v. Palmer, 603 F.3d 658, 661-662 (9th Cir. 2010)).

[166] *See* Green v. McCall, 822 F.2d 284, 289–290 (2d Cir. 1987) (stating that even parole grantees who have not yet been paroled have a protectable liberty interest).

[167] *See* Morrissey v. Brewer, 408 U.S. 471, 485–488, 92 S. Ct. 2593, 2602–2604, 33 L. Ed. 2d 484, 496–498 (1972) (holding that minimum due process requirements for parole revocation include a preliminary hearing to determine probable cause "as promptly as convenient after arrest," as well as revocation hearing).

[168] Morrissey v. Brewer, 408 U.S. 471, 484, 92 S. Ct. 2593, 2602, 33 L. Ed. 2d 484, 496 (1972).

[169] Morrissey v. Brewer, 408 U.S. 471, 484, 92 S. Ct. 2593, 2602, 33 L. Ed. 2d 484, 496 (1972).

[170] Morrissey v. Brewer, 408 U.S. 471, 485, 92 S. Ct. 2593, 2602, 33 L. Ed. 2d 484, 496 (1972) (noting the need for timeliness and proximity so that "information is fresh and sources are available.").

[171] Morrissey v. Brewer, 408 U.S. 471, 485–486, 92 S. Ct. 2593, 2602–2603, 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).

[172] Morrissey v. Brewer, 408 U.S. 471, 486–487, 92 S. Ct. 2593, 2603, 33 L. Ed. 2d 484, 497–498 (1972).

[173] Morrissey v. Brewer, 408 U.S. 471, 485–488, 92 S. Ct. 2593, 2602–2604, 33 L. Ed. 2d 484, 496–499 (1972).

[174] Morrissey v. Brewer, 408 U.S. 471, 488–489, 92 S. Ct. 2593, 2603–2604, 33 L. Ed. 2d 484, 498–499 (1972).

been placed in administrative segregation. Also, remember that this Part applies only if you have been deprived of a recognized liberty interest, such as a loss of good-time credits or something else very severe. Not all disciplinary hearings or deprivations will involve your due process rights. This Part explains the rule established in *Wolff v. McDonnell* about the due process rights that you can use to defend yourself at your disciplinary proceeding or to challenge your punishment on appeal in court.[175] In *Wolff*, the Supreme Court described how prison disciplinary procedures should be carried out in order to meet constitutional Due Process requirements.[176] First, you need to establish that a disciplinary action was an unusual and significant hardship affecting a protected liberty interest. In other words, the court needs to find that you have due process rights. Next, the court will ask whether you were deprived of that liberty interest without due process of law and whether the prison followed the required processes.[177]

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.[178] 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 through the internal incarcerated grievance process. Either way, you will have a better chance at success if you know what procedures the officials in your prison must follow.

### 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*, prison officials disciplined an incarcerated person for circulating a petition without permission.[179] The incarcerated person won the case because the prison rules didn't require incarcerated people to get permission before handing out petitions.[180] Therefore, it was unfair to punish the incarcerated person for an activity that he reasonably believed the prison allowed. The Supreme Court described this principle of fairness in *Grayned v. City of Rockford*,[181] stating that "because we assume that [a] 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

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[175] 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 incarcerated person's interest in good-time credits "has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated").

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

[177] Sealey v. Giltner, 116 F.3d 47, 51–52 (2d Cir. 1997) (finding that the 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 (citing Bedoya v. Coughlin, 91 F.3d 349, 351–352 (2d Cir. 1996))).

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

[179] Richardson v. Coughlin, 763 F. Supp. 1228 (S.D.N.Y. 1991) (holding that because an incarcerated person's punishment was based on the violation of a non-existent rule, prison officials deprived him of due process of law).

[180] Richardson v. Coughlin, 763 F. Supp. 1228, 1235 (S.D.N.Y. 1991). For more examples, see Wallace v. Nash, 311 F.3d 140, 143–145 (2d Cir. 2002) (finding that an incarcerated person had a 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, 1060–1061 (8th Cir. 1989) (finding an incarcerated person's due process rights were violated where he was punished for an unspecified prison rule); Hayes v. Fla. Dept. 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 holding that incarcerated people must have notice of prison rules before being punished for violating those rules).

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

what is prohibited, so that he may act accordingly."[182] In other words, you need to be told what the rules are to have a fair chance to follow them, 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.[183] For example, a federal court in Ohio struck down a regulation that prohibited "objectionable" conduct between an incarcerated person and his visitor because the regulation was unconstitutionally vague.[184] The word "objectionable" was considered vague because it can mean different things to different people. A regulation can also be found vague based on how it is applied in your specific case. In *Rios v. Lane*, the court found a regulation prohibiting "engaging or pressuring others to engage in gang activities" unconstitutionally vague when it was applied to an incarcerated person who allegedly shared information about Spanish-language political radio stations.[185] In other words, even if a regulation is clear when you read it, the regulation may still be considered vague in your specific situation if it is used to punish you for an activity that is usually considered lawful.

No matter what, you are presumed (assumed) to have knowledge of penal law (criminal statutes). This means you cannot claim that your rights have been violated just because you aren't given copies of your state's penal law.[186] As one court stated, "the law presumes that everyone knows the law, and ignorance of the law is not an excuse for its violation."[187] You are also presumed to know 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.[188]

Unlike the assumption that you know the penal law, you must be given an opportunity to learn the rules of your prison. Although you cannot be punished for violating a prison regulation that is

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[182] Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S. Ct. 2294, 2298–2299, 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; however, an anti-picketing ordinance was found unconstitutional on equal protection grounds).

[183] *See* Grayned v. City of Rockford, 408 U.S. 104, 108–109, 92 S. Ct. 2294, 2298–2299, 33 L. Ed. 2d 222, 227–228 (1972) (stating that a regulation is void for vagueness if it is not clear what it prohibits. That vagueness is a violation of due process).

[184] *See* Taylor v. Perini, 413 F. Supp. 189, 233–234 (N.D. Ohio 1976) (finding that a rule barring a visitor from further visits due to "objectionable" conduct between the incarcerated person and the visitor was too vague to justify such severe sanctions); *see also* Jenkins v. Werger, 564 F. Supp. 806, 807 (D. Wyo. 1983) (invalidating a rule against "unruly or disorderly" conduct for vagueness); Laaman v. Helgemoe, 437 F. Supp. 269, 321–322 (D.N.H. 1977) (invalidating a prison rule forbidding "poor conduct" for vagueness, because it didn't inform incarcerated people of what conduct was prohibited). *But see* El-Amin v. Tirey, 817 F. Supp. 694, 701–703 (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*, El-Amin v. Tirey, 35 F.3d 565 (6th Cir. 1994) (*unpublished*).

[185] Rios v. Lane, 812 F.2d 1032, 1037–1039 (7th Cir. 1987); *see also* Adams v. Gunnell, 729 F.2d 362, 368–370 (5th Cir. 1984) (finding a regulation that prohibited "conduct which disrupts the orderly running of the institution" was unconstitutionally vague when used to punish an incarcerated person for writing and circulating a petition).

[186] *See* McFadden v. United States, 576 U.S. 186, 192, 135 S. Ct. 2298, 2304, 192 L. Ed. 2d 260, 269 (2015) (holding that, in a drug prosecution, the "knowledge requirement may also be met by showing that the defendant knew the identity of the substance he possessed. Take, for example, a defendant who knows he is distributing heroin but does not know that heroin is listed on the schedules. Because ignorance of the law is typically no defense to criminal prosecution, this defendant would also be guilty of knowingly distributing 'a controlled substance'" (internal citations omitted)); *see also* Bryan v. United States, 524 U.S. 184, 196, 118 S. Ct. 1939, 1947 141, L. Ed. 2d 197, 208 (1998) (holding that except for a limited number of exceptionally complex statutes, a statute's willfulness requirement "does not carve out an exception to the traditional rule that ignorance of the law is no excuse; knowledge that the conduct is unlawful is all that is required").

[187] McRae v. State, 157 S.E.2d 646, 648, 116 Ga. App. 407, 410 (Ga. Ct. App. 1967).

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

temporarily posted on a bulletin board,[189] you can be punished if the regulation is posted permanently.[190] New York law requires that you be given a personal copy of the prison rules.[191] Some prisons also require you to state in writing that you received the prison disciplinary handbook.[192] All regulations must be printed in both English and Spanish,[193] and the possible punishments for each type of violation must be clearly noted.[194]

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.[195] 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

In *Wolff v. McDonnell*, the Supreme Court held that you have the right to receive notice of (be told about) the charges against you at least twenty-four hours before your disciplinary hearing is scheduled to begin.[196] An oral (spoken) explanation of the charges is not enough.[197] The charges must be in writing, and they must be clear enough to allow you to prepare your defense.[198] One court has found that an incarcerated person was denied due process, even though he was given notice of his charges twenty-four hours in advance, because he was only allowed to review the actual written charges five hours before his hearing.[199] With only five hours to study the twelve charges against him, the incarcerated person had to rely mainly on his memory to gather evidence and prepare his defense. This put him at a huge disadvantage.[200] 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 accusations against you.[201]

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[189] *See* Taylor v. Perini, 413 F. Supp. 189, 235 (N.D. Ohio 1976) (finding that an "inmate manual" did not adequately inform incarcerated people of prohibited conduct since the temporary posting of regulations on a bulletin board did not constitute fair notice).

[190] *See* Forbes v. Trigg, 976 F.2d 308, 314–315 (7th Cir. 1992) (finding that an incarcerated person had fair notice of a prison rule requiring urine tests since the posting of the rule was not temporary).

[191] N.Y. CORRECT. LAW § 138(2) (McKinney 2014).

[192] N.Y. COMP. CODES R. & REGS. tit. 9, § 7002.9(d) (2023).

[193] N.Y. CORRECT. LAW § 138(1) (McKinney 2014); *see also* Burgos v. Kuhlmann, 137 Misc. 2d 1039, 1040–1041, 523 N.Y.S.2d 367, 368 (Sup. Ct. Sullivan County 1987) (holding that disciplinary charges must be dismissed and the incarcerated person's record cleared on the ground that the Spanish-speaking incarcerated person did not have meaningful notice of prison rules where he was only provided with the English version of the rules).

[194] N.Y. CORRECT. LAW § 138(3) (McKinney 2014).

[195] 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*, "Introduction to Legal Research," for information on conducting legal research.

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

[197] Wolff v. McDonnell, 418 U.S. 539, 564, 94 S. Ct. 2963, 2979, 41 L. Ed. 2d 935, 955–956 (1974).

[198] Wolff v. McDonnell, 418 U.S. 539, 564, 94 S. Ct. 2963, 2979, 41 L. Ed. 2d 935, 955–956 (1974); *see also* Spellmon-Bey v. Lynaugh, 778 F. Supp. 338, 341–342 (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).

[199] *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.").

[200] Benitez v. Wolff, 985 F.2d 662, 665 (2d Cir. 1993).

[201] *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

New York law gives you even more rights than you have under *Wolff* and the federal law standard.[202] While *Wolff* does not require that the notice include any particular information,[203] New York law says that the notice must have the date, time, place, and nature of the charge, including information about what you did and what rule you violated.[204] If more than one incarcerated person was involved in the incident, the specific role played by each incarcerated person must also be included.[205] If you do not speak English, you have the right to translations of the notice of the charges and statements of evidence.[206] You also have the right to have a translator present at your disciplinary hearing.[207] If you are deaf or hard of hearing, you have the right to a sign language interpreter or any hearing device that you use.[208]

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)

The Supreme Court has held that incarcerated people do not have a right to counsel in disciplinary proceedings.[209] However, in *Wolff v. McDonnell*, the Supreme Court recognized two situations in which you are entitled to (have a right to) a "counsel-substitute." Your "counsel-substitute" can either be a prison employee ("employee assistant") or a fellow incarcerated person who helps you in preparing your case. You have the right to a counsel-substitute if you are illiterate (have difficulty reading and

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or details or required for notice to satisfy due process and that "[p]art 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 n.11 (2d Cir. 1977), *cert. denied,* Patterson v. McKinnon, 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 an incarcerated person prior to disciplinary hearing was sufficient, but acknowledging that "a notice lacking the required specifics which fail to apprise the accused party of the charges brought against him must be found to be unconstitutional because then, the accused party cannot adequately prepare a defense").

[202] N.Y. COMP. CODES R. & REGS. tit. 7, § 253.6(a) (2023).

[203] Wolff v. McDonnell, 418 U.S. 539, 563–565, 94 S. Ct. 2963, 2978–2979, 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 are required for said 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 incarcerated person's interests. Spellmon-Bey v. Lynaugh, 778 F. Supp. 338, 342–343 (E.D. Tex. 1991).

[204] N.Y. COMP. CODES R. & REGS. tit. 7, § 251–3.1(c) (2023).

[205] N.Y. COMP. CODES R. & REGS. tit. 7, § 251–3.1(c) (2023); *see also* Howard v. Coughlin, 190 A.D.2d 1090, 1090, 593 N.Y.S.2d 707, 708–709 (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, 843–844 (3d Dept. 1983) (finding notice was insufficient when it failed to inform incarcerated people of facts upon which charges were based). *But see* Vogelsang v. Coombe, 105 A.D.2d 913, 914, 482 N.Y.S.2d 348, 350 (3d Dept. 1984), *aff'd*, Vogelsang v. Coombe, 66 N.Y.2d 835, 489 N.E.2d 251, 489 N.Y.S.2d 364 (1985) (holding 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, rules violations, and incarcerated person's offensive conduct).

[206] N.Y. COMP. CODES R. & REGS. tit. 7, § 254.2 (2023); *see also* Reyes v. Henderson, 121 Misc. 2d 970, 971–972, 469 N.Y.S.2d 520, 521 (Sup. Ct. Albany County 1983) (holding that a Spanish-speaking incarcerated person was denied procedural due process where he was given notice of the charges against him in English only).

[207] N.Y. COMP. CODES R. & REGS. tit. 7, § 254.2 (2023).

[208] N.Y. COMP. CODES R. & REGS. tit. 7, § 254.2 (2023).

[209] *See* Baxter v. Palmigiano, 425 U.S. 308, 315, 96 S. Ct. 1551, 1556–1567, 47 L. Ed. 2d 810, 819–820 (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).

writing)[210] or if your case is really complicated, although the Court did not explain what "complicated" means.[211] Therefore, it is unclear how complicated the facts of your case must be before you can demand help from an employee assistant. If you face some clear personal barrier to preparing your defense (such as illiteracy, language difficulties, mental illness, or restrictive confinement), you should tell prison officials about it. These barriers will make your claim for assistance stronger. Under New York law, the HALT Act also recognizes a right to be represented by an attorney, law student, paralegal, or other incarcerated person at a hearing where the punishment will or could include segregated confinement.[212]

When you receive notice of the charges against you, you will be given a list of employees who serve as employee assistants.[213] You are entitled 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 the time of 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 (give up) the right to any assistance.[214] While HALT recognizes a right for you to have representation at segregated confinement hearings, you will need to get this representation yourself. If you do not, you will likely waive this right.

New York regulations specifically guarantee an employee assistant for certain incarcerated people, including:

(1) Non-English-speaking incarcerated people;
(2) Illiterate incarcerated people;
(3) Incarcerated people who are deaf or hard of hearing (who may be provided with sign language interpreters);
(4) Incarcerated people who are charged with drug use as a result of urinalysis tests; and
(5) Incarcerated people confined to a special housing unit (SHU) while waiting for a superintendent's hearing.[215]

In the case of non-English speaking incarcerated people, a court held that an incarcerated person who spoke only Spanish had the right to meet with a Spanish-speaking assistant at least twenty-four hours before his disciplinary hearing.[216] Similarly, incarcerated people in segregated confinement have a similar right to speak to their representation before their hearing. In situations where you are in segregated confinement before the hearing, correction officers must perform the investigatory tasks that you would perform if you were able to do it yourself.[217] However, be aware that assistants are only

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

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

[212] *See* Humane Alternatives to Long-Term ("HALT") Solitary Confinement Act, S.B. S2836, 2021S. § 5, 2021–2022 Reg. Sess. (N.Y. 2021) (codified at N.Y. CORRECT. LAW § 137(6)(l)

[213] N.Y. COMP. CODES R. & REGS. tit. 7, § 251-4.1(a) (2023); *see also* Jones v. Coughlin, 112 Misc. 2d 232, 234, 446 N.Y.S.2d 849, 850–851 (Sup. Ct. Albany County 1982) (finding that an incarcerated person's due process rights were violated when prison designated employee assistant other than one incarcerated person had selected, despite incarcerated person's oral and written objections).

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

[215] N.Y. COMP. CODES R. & REGS. tit. 7, § 251–4.1(a) (2023).

[216] Rivera v. Smith, 110 A.D.2d 1043, 1043–1044, 489 N.Y.S.2d 131, 131 (4th Dept. 1985). *But see* Valles v. Smith, 116 A.D.2d 1002, 1002–1003, 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 (1986) (finding that a Spanish-speaking incarcerated person was not entitled to have employee assistant translate for him at disciplinary proceeding because translation assistance from a Spanish-speaking incarcerated person was enough).

[217] *See* Eng v. Coughlin, 858 F.2d 889, 898 (2d Cir. 1988) (describing the role of the employee assistant as

required to answer questions that you specifically ask and are only required to perform tasks that you specifically request.[218] Finally, if you are entitled to an assistant, New York law says that your hearing cannot take place until twenty-four hours after your first meeting with that assistant.[219]

You can ask the assistant to help you prepare for your hearing by explaining the charges to you, interviewing witnesses, and helping you obtain documentary evidence or written statements.[220] However, do not expect the employee assistant to do anything that you do not specifically ask him or her to do.[221] You must ask for assistance. If you do not actively make a request, you waive or lose your right to that assistance. For example, in *Newman v. Coughlin*, the incarcerated person 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.[222] As a result, the court held that the incarcerated person was responsible for his own lack of representation.

In New York, the assistant does not need to defend you in the way a lawyer would or even be present at your hearing.[223] However, due process does require your assigned assistant to act and carry out basic and reasonable requests in good faith (meaning they acted honestly and sincerely).[224] For example, one court held that an employee assistant's refusal to collect necessary and available evidence violated the incarcerated person's due process rights, because his refusal was not in good faith.[225] In another case, an employee assistant did not report back to the incarcerated person with the results of his investigation and witness interviews. The court held that the employee deprived the incarcerated person of his right to defend himself and did not act in good faith.[226]

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

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corresponding to "those actions that an inmate facing disciplinary charges can undertake himself" when not separated from others).

[218] *See* Serrano v. Coughlin, 152 A.D.2d 790, 792–793, 543 N.Y.S.2d 571, 573 (3d Dept. 1989) (holding that incarcerated person was not denied meaningful employee assistance when he did not specify the documents he wanted produced).

[219] N.Y. COMP. CODES R. & REGS. tit. 7, § 253.6(a) (2023).

[220] N.Y. COMP. CODES R. & REGS. tit. 7, § 251–4.2 (2023).

[221] *See* Horne v. Coughlin, 155 F.3d 26, 29, 31 (2d Cir. 1998), *amended by* Horne v. Coughlin, 191 F.3d 244 (2d Cir. 1999). In Horne, an incarcerated person with an intellectual disability was sentenced to six months in the SHU and six months recommended loss of good time. The incarcerated person 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 incarcerated person, because a counsel substitute acts as a surrogate for the incarcerated person, not as an attorney.

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

[223] *See* Gunn v. Ward, 71 A.D.2d 856, 856, 419 N.Y.S.2d 182, 183 (2d Dept. 1979), *aff'd*, Gunn v. Ward, 52 N.Y.2d 1017, 420 N.E.2d 100, 438 N.Y.S.2d 302 (1981) (holding failure of employee assistant to appear at superintendent's proceeding violates neither New York law nor a incarcerated person's right to due process).

[224] *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 incarcerated person's specific instructions in interviewing incarcerated people and gathering evidence). *See also* Kelemen v. Coughlin, 100 A.D.2d 732, 732–733, 473 N.Y.S.2d 618, 619 (4th Dept. 1984) (finding that assistant's failure to investigate incarcerated person's reasonable factual claim violates due process); Hilton v. Dalsheim, 81 A.D.2d 887, 887–888, 439 N.Y.S.2d 157, 158 (2d. Dept. 1981) (finding that assistant's failure to interview witnesses as requested by incarcerated person violates the incarcerated person's rights under New York law).

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

[226] *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 incarcerated person of investigation results and interviews with witnesses deprived the incarcerated person of meaningful and effective assistance in preparation for a disciplinary hearing).

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.[227] The Court pointed out that an incarcerated person 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."[228] 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 their ability to operate the prison. Prison officials do not have to allow every witness you ask for to testify at your disciplinary hearing; they can decide whether a potential witness can testify or not.[229] If the officials believe that the witness's testimony would be immaterial (not important)[230] or unduly redundant (repetitive and unnecessary), they can choose not to let the witness testify.[231]

An incarcerated person's right to call witnesses (to have them testify) at disciplinary hearings was made clear in the 1980 court case *Powell v. Ward* (also known as *Powell II*).[232] Before that case, a prison rule had stated that witnesses could not be present to testify at a disciplinary hearing. In the *Powell* case, the court said that "witnesses must be allowed to be present at disciplinary proceedings, unless the appropriate officials determine that [their presence] would potentially harm institutional safety or correctional goals."[233] This means that witnesses have to be allowed at disciplinary hearings unless officials decide that there is a safety concern or that prison goals would be harmed because of a witness being present. If a witness is not going to be allowed at a disciplinary hearing, you have a right to be told the reason why they will not be allowed to appear.[234] If the court decides that a witness will not be allowed at your hearing, that witness may be interviewed and tape-recorded without you being there for the interview.[235] The tape or a transcript of the interview must be made available to you before the hearing or at the hearing, unless the hearing officer decides that the same concerns about safety and prison goals would exist if the witness were to appear.[236]

Under New York rules, when you receive a notice before your disciplinary hearing, the notice must tell you that you have the right to call witnesses.[237] If you want to ask for a witness you should tell your employee assistant or hearing officer before the hearing or during the hearing.[238] You have the

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[227] Wolff v. McDonnell, 418 U.S. 539, 566–567, 94 S. Ct. 2963, 2979–2980, 41 L. Ed. 2d 935, 956–957 (1974).

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

[229] Wolff v. McDonnell, 418 U.S. 539, 566, 94 S. Ct. 2963, 2980, 41 L. Ed. 2d 935, 956–957 (1974) (A prison official may exercise his "discretion to keep the hearing within reasonable limits").

[230] *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, 956–597 (1974)).

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

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

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

[234] Powell v. Ward, 487 F. Supp. 917, 929 (S.D.N.Y. 1980). *But see* Ponte v. Real, 471 U.S. 491, 492, 105 S. Ct. 2192, 2193–2194, 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).

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

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

[237] N.Y. COMP. CODES R. & REGS. tit. 7, § 251-3.1(d)(2) (2023).

[238] N.Y. COMP. CODES R. & REGS. tit. 7, § 253.5(c) (2023); N.Y. COMP. CODES R. & REGS. tit. 7, § 254.5(c) (2023).

right to ask your employee assistant to interview your witnesses while your claims about what happened are being investigated.[239] If you are not present during the interview, you have the right to get a tape or transcript of the interview.[240] If you are not given a tape or transcript, you have the right to be told before the hearing why it was denied.[241]

If you are an incarcerated person in New York State and you are not allowed to call a witness for a disciplinary hearing, you should receive a written statement from the hearing officer that explains why.[242] This statement should tell you the specific reason, which is either a safety concern or a concern that prison goals could be harmed.[243] Courts have said that simply telling you that, "[it] does not meet with Security Procedure or Correctional goals for you to be present during those interviews" is not a proper reason.[244] However, it is unclear exactly what counts as a proper explanation and courts do not require the explanations to be very detailed. You could be told that a witness's testimony is "redundant" (meaning it repeats evidence available from other sources).[245] On one hand, there are limits that stop a prison official from saying that all witness testimony is repetitive.[246] When considering these reasons, the court "must accord due deference to the decision of the [prison] administrator."[247] This means that the court must take the prison administrator's decision seriously. The court will still uphold the refusal to allow a witness even if the witness could have provided

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

[240] *See* Burke v. Coughlin, 97 A.D.2d 862, 863, 469 N.Y.S.2d 240, 242 (3d Dept. 1983).

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

[242] N.Y. COMP. CODES R. & REGS. tit. 7, § 253.5(a) (2023), N.Y. COMP. CODES R. & REGS. tit. 7, § 254.5(a) (2023); *see* Moye v. Selsky, 826 F. Supp. 712, 716–717 (S.D.N.Y. 1993) (explaining that prison officials may have to give incarcerated people an explanation for exclusion of witnesses from disciplinary hearing).

[243] N.Y. COMP. CODES R. & REGS. Tit. 7, § 253.5(a) (2023), N.Y. COMP. CODES R. & REGS. tit. 7, § 254.5(a) (2023); *see* Moye v. Selsky, 826 F. Supp. 712, 716–717 (S.D.N.Y. 1993) (explaining that prison officials may have to give incarcerated people an explanation for exclusion of witnesses from disciplinary hearing).

[244] *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 incarcerated person's presence would create any threat to prison security or correctional goals, incarcerated person's due process rights were violated when hearing officer did not allow incarcerated person to be present when officer interviewed witnesses).

[245] N.Y. COMP. CODES R. & REGS. tit. 7, § 253.5(a) (2023), N.Y. COMP. CODES R. & REGS. tit. 7, § 254.5(a) (2023).

[246] *See* Fox v. Coughlin, 893 F.2d 475, 477–478 (2d Cir. 1990) (holding that officials did not deprive an incarcerated person of clearly established statutory or constitutional rights where they called only some of the witnesses he requested, but emphasizing that, failing to provide an incarcerated person assistance in interviewing requested witnesses without a valid reason may in the future provide a sufficient basis for a viable Section 1983 action); Wong v. Coughlin, 137 A.D.2d 272, 273–274, 529 N.Y.S.2d 45, 46 (3d Dept. 1988) (removing disciplinary violation from incarcerated person's record where hearing officer's basis for refusing to allow officer who had prepared misbehavior report to testify was based only on guessing or predicting that his testimony would be redundant); Fox v. Dalsheim, 112 A.D.2d 368, 369, 491 N.Y.S.2d 820, 821 (2d Dept. 1985) (holding that hearing officer abused his discretion when he refused to call two witnesses requested by an incarcerated person 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 . . . 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").

[247] Zamakshari v. Dvoskin, 899 F. Supp. 1097, 1107 (S.D.N.Y. 1995) (internal quotations omitted) ("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.").

testimony that is helpful to you.[248] If the reason prison officials are denying your witness is for security concerns, courts usually find that acceptable.[249]

### 5. Confronting and Cross-Examining Witnesses

You generally have the right to call witnesses whose testimony is beneficial to you. However, the Supreme Court has stated that you do not have a constitutional right to confront and cross-examine the other side's witnesses during a disciplinary hearing. This means that you might not be able to ask those witnesses questions. The Supreme Court explained that the right to ask questions of the other side's witnesses would create "considerable potential for havoc [or problems] inside prison walls."[250] The Supreme Court was worried that confronting and cross-examining the other side's witnesses could lead to a security concern inside the prison. One court suggested that this security concern could be retaliation (trying to get revenge) against adverse witnesses (witnesses against you) and informants (people testifying unfavorably or against you).[251] The same court also suggested that confronting and cross-examining opposing witnesses could be a cause for "potential for breakdown in authority."[252] Because of the importance of keeping the prison safe, the courts tell us that your right to confront and cross-examine opposing witnesses is not as strong as your right to call your own witnesses. The decision of whether or not to allow you to confront and cross-examine witnesses is left up to the prison officials.[253] Prison officers are not required to explain to you why you are not allowed to confront your accusers or to cross-examine witnesses.[254]

In New York, courts have stated that incarcerated people do not have the right to be present when opposing witnesses testify (when the witness is called by the Hearing Officer).[255] However, prison officials do have to give you some objective evidence (evidence that is not biased) and a reason that

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

[249] *See, e.g.*, Laureano v. Kuhlmann, 75 N.Y.2d 141, 146, 550 N.E.2d 437, 439–440, 551 N.Y.S.2d 184, 186–187 (1990) (upholding denial of right to call witness where hearing officer informed incarcerated person that victim of assault feared retaliation and officer showed incarcerated person form where witness indicated desire not to testify); Cortez v. Coughlin, 67 N.Y.2d 907, 909, 492 N.E.2d 1225, 1225, 501 N.Y.S.2d 809, 809 (1986) (upholding exclusion of incarcerated person from his disciplinary hearing during witness testimony on basis of institutional safety and disciplinary reports documenting violent behavior when incarcerated person was allowed to listen to taped testimony instead).

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

[251] Smith v. Farley, 858 F. Supp. 806, 816–819, 822 (N.D. Ind. 1994) (finding violation of incarcerated person's due process rights where incarcerated person 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*, Wolff v. McDonnel, 418 U.S. 539, 562, 94 S. Ct. 2963, 2978, 41 L. Ed. 2d 935, 954 (1974).

[252] Smith v. Farley, 858 F. Supp. 806, 819 (N.D. Ind. 1994) (quoting Young v. Kann, 926 F.2d 1396, 1400 (3d Cir. 1991)).

[253] *See* Sanchez v. Roth, 891 F. Supp. 452, 456–458 (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 incarcerated person 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 incarcerated person's due process rights).

[254] *See* Ponte v. Real, 471 U.S. 491, 496–497, 105 S. Ct. 2192, 2195–2196, 85 L. Ed. 2d 553, 557 (1985) (establishing that prison officials can state the reason for denying an incarcerated person'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*).

[255] *See* Graham v. N.Y. State Dept. of Corr. Servs., 178 A.D.2d 870, 870, 577 N.Y.S.2d 728, 729 (3d Dept. 1991) (holding that an incarcerated person 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 incarcerated person'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").

supports their decision to prevent you from attending the witness interviews.[256] They may also be required to give you a tape or transcript of the testimony if doing so does not create a safety concern. In one New York case, a disciplinary ruling was dismissed because the state would not give the incarcerated person a tape or transcript of a witness's testimony, and the state also did not give a reason why.[257] When making a determination on a disciplinary matter, a hearing officer is also not allowed to consider information that is confidential (secret), and that the incarcerated person does not know, without giving some reason for keeping the information confidential.[258]

Although there are limits to your questioning of opposing witnesses, you can always ask the hearing officer to question those witnesses for you. You should be aware that prison officials are not required to guarantee that informants are telling the absolute truth. Prison officials are only required to judge the reliability of confidential informants (to try to tell if the person is being truthful) in situations where this right—to have the reliability of the informants examined—has been established.[259] If your version of what happened 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.[260] The hearing officer does not have to meet the high standard of impartiality that applies to judges.[261] However, the officer cannot be so biased against you that they create a "hazard of arbitrary decision-making . . . violative of due process."[262] To prove that the hearing officer is biased against you, you must provide "evidence that the [hearing officer] has actually prejudged the case or [had a] direct personal involvement in the underlying charge."[263] For example,

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[256] *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 incarcerated person's record where no substantive reason was given for refusal to allow incarcerated person to be present during witness' testimony).

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

[258] *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"); *see also* Freeman v. Coughlin, 138 A.D.2d 824, 825–826, 525 N.Y.S.2d 744, 745 (3d Dept. 1988) (applying the *Boyd* rule to find the hearing officer's decision to keep information confidential without informing the incarcerated person was not a harmless error, resulting in a new hearing for the incarcerated person). *But see* Laureano v. Kuhlman, 75 N.Y.2d 141, 147, 550 N.E.2d 437, 440, 551 N.Y.S.2d 184, 187 (N.Y. 1990) ("[A] disciplinary determination cannot stand when a denial of the inmate's request to call a witness, or to be present when his witness testifies, is wholly unexplained, but will not be set aside if the record discloses the basis for the denial.").

[259] *See* Gomez v. Kaplan, 964 F. Supp. 830, 835 (S.D.N.Y. 1997) (finding that because the informant did not have qualified immunity, the hearing officer violated the incarcerated person's rights by not judging the informant's reliability).

[260] 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 v. McDonnell, 418 U.S. 539, 563–567, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974)).

[261] 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, 487 (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.").

[262] Wolff v. McDonnell, 418 U.S. 539, 571, 94 S. Ct. 2963, 2982, 41 L. Ed. 2d 935, 959–960 (1974).

[263] Wade v. Farley, 869 F. Supp. 1365, 1376 (N.D. Ind. 1994) (holding that although hearing officer had been involved in incarcerated person's previous disciplinary proceeding, he was impartial with respect to the present proceeding (citing Underwood v. Chrans, No. 90 C 6713, 1992 U.S. Dist. LEXIS 12616, at *10 (N.D. Ill. Aug. 20,

one court found proof that a hearing officer was possibly biased when the hearing officer refused to look at the evidence in support of the incarcerated person's claim.[264] The court explained that "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."[265] In another case, the court dismissed a disciplinary hearing decision because the hearing officer said, "[o]kay now. You have to convince me that you're not guilty", which suggested that he was biased against the incarcerated person.[266]

New York regulations touch on the issue of impartiality, but they do not guarantee that 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 higher may preside over a disciplinary hearing.[267] 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.[268] 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 who reviewed the misbehavior report; or (4) has investigated the incident.[269] Note that the superintendent may permit other correctional facility employees to act as hearing officers in a superintendent's or disciplinary hearing.[270]

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 incarcerated people. 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 an incarcerated person 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, incarcerated people often seek "use" immunity in disciplinary hearings. "Use" immunity does not protect you from prosecution, but it prevents any statements you make at

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1992) (*unpublished*)); *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 an incarcerated person'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 incarcerated person 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).

[264] *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 incarcerated person did not have "a full and fair opportunity to litigate the issue").

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

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

[267] N.Y. COMP. CODES R. & REGS. tit. 7, § 253.1(A) (2023).

[268] N.Y. COMP. CODES R. & REGS. tit. 7, § 253.1(B) (2023).

[269] N.Y. COMP. CODES R. & REGS. tit. 7, § 254.1 (2023). See Part G(1) of this Chapter for an explanation of "superintendent's," "disciplinary," and "violation" hearings, which are the three types of hearings in New York.

[270] N.Y. COMP. CODES R. & REGS. tit. 7, § 253.1(A) (2023); N.Y. COMP. CODES R. & REGS. tit. 7, § 254.1 (2023).

your disciplinary hearing from being used against you in the criminal case.[271] Immunity in criminal proceedings comes from the U.S. Constitution's Fifth Amendment privilege against self-incrimination.[272] An individual accused of a crime has the right to remain silent.[273] When the state demands that you testify, the state must grant "use" immunity.[274] 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.[275] 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*[276] which involved an incarcerated person facing disciplinary action for violations of prison regulations which were also crimes under state law. The *Baxter* Court held that while an incarcerated person's silence can be considered evidence of guilt in a disciplinary proceeding,[277] silence alone is not enough to prove guilt. Other evidence must be produced in order to establish guilt.[278]

If an incarcerated person chooses to testify when he is not required to testify, according to *Baxter*, anything he says at the disciplinary hearings can be used against him in criminal proceedings later.[279] Therefore, an incarcerated person does not have a constitutional right to immunity in those cases. When the incarcerated person must testify, however, "use" immunity must be granted to protect his Fifth Amendment right to remain silent.[280] In reality, it is unlikely that after *Baxter*, prison officials will demand that an incarcerated person testify since: (1) unfavorable inferences, or conclusions, may be drawn from an incarcerated person's silence at a disciplinary hearing; and (2) the problem of whether to grant immunity can be avoided if the official does not compel testimony.[281]

New York currently grants incarcerated persons "use" immunity at all disciplinary proceedings.[282] The City of New York requires that at the start of a disciplinary proceeding, incarcerated people be informed of their right to remain silent.[283] 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

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[271] *See* 18 U.S.C. § 6002 (granting immunity from the use of compelled testimony and evidence derived from it); Kastigar v. U.S. 406 U.S. 441, 452–453, 92 S. Ct. 1653, 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).

[272] U.S. CONST. amend. V.

[273] U.S. CONST. amend. V.; *see also* Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 294 (1966) (holding that individuals being taken into custody must be informed of their right to remain silent or else their privilege against self-incrimination would be violated).

[274] 18 U.S.C. § 6002.

[275] *See* 18 U.S.C. § 6002.

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

[277] Baxter v. Palmigiano, 425 U.S. 308, 317–318, 96 S. Ct. 1551, 1557–1558, 47 L. Ed. 2d 810, 821 (1976).

[278] Baxter v. Palmigiano, 425 U.S. 308, 317–318, 96 S. Ct. 1551, 1557–1558, 47 L. Ed. 2d 810, 821 (1976).

[279] Baxter v. Palmigiano, 425 U.S. 308, 316, 96, S. Ct. 1551, 1557, 47 L. Ed. 2d 810, 820 (1976); *see* Fantone v. Latini, 780 F.3d 184, 192 (3d Cir. 2015) ("[A]n inmate does have [the right to remain silent] when the alleged prison misconduct include[s] criminal acts.").

[280] 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*, "Introduction to Legal Research," for more information on how to conduct legal research.

[281] Baxter v. Palmigiano, 425 U.S. 308, 318–20, 96 S. Ct. 1551, 1558–1559, 47 L. Ed. 2d 810, 821 (1976).

[282] N.Y. COMP. CODES R. & REGS. tit. 7, § 251-3.1(D)(1) (2023).

[283] City of New York, Department of Correction, Directive No. 6500R-G, Disciplinary Due Process for Individuals in Custody § (III)(D)(10)(b) (2019) (*as revised* July 9, 2021), *available at* https://www.nyc.gov/assets/doc/downloads/directives/Directive%206500R-G%20-%20Disciplinary%20Due%20Process%20for%20Individuals%20in%20Custody.pdf (last visited Jan. 19, 2024).

therefrom may be used against you in a criminal proceeding."[284] 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 or counsel before you make any formal or informal statements about the incident.

### 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.[285] The only requirement is that some evidence supports 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 hearing officer is not required to make a decision based only on the evidence presented at the hearing. In *Baxter v. Palmigiano*, 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 because they may help officials understand the incident.[286] The Court also clarified that the hearing officer must provide a written statement of the evidence that he relied on and of the reasons why the disciplinary action was taken.[287]

Often, the only evidence against an incarcerated person is the misbehavior report itself. New York's regulations require that misbehavior reports present a detailed written account of the alleged incident. Therefore, the report alone may provide enough evidence to support a disciplinary ruling.[288] However, in one case, the reports that were used as evidence only restated that all of the incarcerated people in the mess hall were part of a disturbance, without describing their specific misbehavior. There, the evidence was found to be insufficient to support a finding against them.[289]

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.[290] This requirement prevents the hearing officer from simply stating that you were found guilty of a particular offense without providing enough detail. The statement must include reasons for the decision, copies of any reports relied on, and summaries of any interviews conducted.[291]

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[284] N.Y. COMP. CODES R. & REGS. tit. 7, § 251-3.1(D)(1) (2023).

[285] Superintendent, Mass. Corr. Inst. v. Hill, 472 U.S. 445, 455–456, 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).

[286] 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).

[287] 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).

[288] *See* 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); 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 the incarcerated person violated rule prohibiting incarcerated people from making or possessing alcoholic beverages and that officials were not required to chemically test beverage for presence of alcohol).

[289] *See* Bryant v. Coughlin, 77 N.Y.2d 642, 649–650, 572 N.E.2d 23, 26–27, 569 N.Y.S.2d 582, 585–586 (1991) (concluding that misbehavior reports, which did not specify the particulars of the incarcerated person's misconduct and only alleged a mass incident, were insufficient).

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

[291] *See* McQueen v. Vincent, 53 A.D.2d 630, 631, 384 N.Y.S.2d 475, 476–477 (2d Dept. 1976) (remanding case to determine whether due process requirements were met in light of incomplete hearing record); *see also* Tolliver v. Fischer, 125 A.D.3d 1023, 1023–1024, 2 N.Y.S.3d 694, 695 (3d Dept. 2015) (granting incarcerated person's petition due to an out of order transcript, portions of missing witness questionings, and a cut off petitioner

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.[292]

Constitutional and New York standards allow the hearing officer to exclude (keep out) pieces 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 incarcerated person the details of a confidential informant's testimony or circumstances that might reveal the informant's identity.[293] Instead, the officer may provide a summary of essential points of the testimony.[294] If evidence has been excluded, the written statement you receive informing you of the decision must disclose this fact.[295]

The written statement and the tape recording of the hearing will be important parts of your disciplinary hearing "record." This record is very important because the court will examine it if you seek judicial review of an unfavorable disciplinary hearing decision in state or federal court.[296] The next Part covers the various types of disciplinary proceedings in New York State and the procedures for appealing a decision made at a disciplinary hearing.

## G. 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 that is based on how severe (bad) the offense is.[297] Violation hearings, which are used for minor offenses, make up the first tier.[298] Disciplinary hearings, which are used for serious offenses, make up the second tier.[299] Finally, superintendent's hearings, which are for the most serious offenses, make up the third tier.[300] The nature of the offense that you have been accused of determines both the type of hearing that you face and the type of punishment you can receive.

Under *Sandin v. Conner*, incarcerated people 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."[301] In other words, if the court does not think the punishment you are given is 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.[302] The regulations, however, still provide for all three

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statement); 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).

[292] N.Y. COMP. CODES R. & REGS. tit. 7, § 253.7(a)(5) (2023); N.Y. COMP. CODES R. & REGS. tit. 7, § 254.7(a)(5) (2023).

[293] Laureano v. Kuhlmann, 75 N.Y.2d 141, 148, 550 N.E.2d 437, 441, 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) (overturning an incarcerated person's disciplinary conviction because no reasons had been given for his witnesses' refusal to testify).

[294] Laureano v. Kuhlmann, 75 N.Y.2d 141, 148, 550 N.E.2d 437, 441, 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).

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

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

[297] N.Y. COMP. CODES R. & REGS. tit. 7, § 270.3(a) (2023).

[298] N.Y. COMP. CODES R. & REGS. tit. 7, § 270.3(a)(1) (2023); N.Y. COMP. CODES R. & REGS. tit. 7, § 252 (2023).

[299] N.Y. COMP. CODES R. & REGS. tit. 7, § 270.3(a)(2) (2023); N.Y. COMP. CODES R. & REGS. tit. 7, § 253 (2023).

[300] N.Y. COMP. CODES R. & REGS. tit. 7, § 270.3(a)(3) (2023); N.Y. COMP. CODES R. & REGS. tit. 7, § 254 (2023).

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

[302] Miller v. Selsky, 111 F.3d 7, 9 (2d Cir. 1997) ("*Conner* 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) ("[T]he decision in *Conner* entailed careful examination of the actual conditions of the challenged punishment compared with ordinary prison conditions. [The] court must examine the specific circumstances of the punishment.")

types of hearings, and prison officials are required to follow their own rules.[303] For example, if a prison official decided to revoke your visiting privileges or to place you in segregated confinement for no reason without giving you a hearing, you could file an appeal within the prison system. New York can choose to give incarcerated people more rights than federal law requires, but it cannot provide fewer rights. Therefore, when reviewing the rest of this Section, keep in mind that if prison officials violate these rules, the federal courts will not be able to remedy the situation unless your case involves a severe punishment that violates a right protected by federal law or your state law has created a protected interest.

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.[304] 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 incarcerated people as a "ticket") "as soon as practicable" (possible) with the review officer.[305] 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.[306] Minor infractions or other violations "that do not involve danger to life, health, security or property" do not need to be reported.[307] The misbehavior report becomes the basis for reviwing an officer's choice of the type of hearing to be held.

Under New York's regulations, both disciplinary and superintendent's hearings may result in a loss of certain privileges for a specific period of time.[308] Where the incarcerated person has been involved in improper conduct related to correspondence or visiting privileges with a particular person, a superintendent's hearing may result in the loss of those privileges with that person.[309] Disciplinary hearings may not result in the loss of correspondence privileges and cannot lead to the loss of visiting privileges for more than thirty days.[310] Restitution (the payment of money) may be required for loss or intentional damage to property at both hearings.[311] A superintendent's hearing may result in a restricted diet[312] and loss of a specific period of good time.[313] Both types of hearings may allow for a

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(quoting Brooks v. DiFasi, 112 F.3d 46, 49 (2d. Cir. 1997); Lee v. Coughlin, 26 F. Supp. 2d 615, 635 (S.D.N.Y. 1998) (arguing *Conner* "did not say that segregated confinement could never constitute an atypical and significant hardship").

[303] *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, incarcerated people may administratively challenge their keeplock confinement by raising procedural error claims).

[304] N.Y. COMP. CODES R. & REGS. tit. 7, § 251-2.2(b) (2023).

[305] N.Y. COMP. CODES R. & REGS. tit. 7, § 251-3.1(a) (2023).

[306] N.Y. COMP. CODES R. & REGS. tit. 7, § 251-3.1(b)–(c) (2023).

[307] N.Y. COMP. CODES R. & REGS. tit. 7, § 251-1.5(a) (2023).

[308] N.Y. COMP. CODES R. & REGS. tit. 7, § 253.7(a)(1)(ii) (2023) (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) (2023).

[309] N.Y. COMP. CODES R. & REGS. tit. 7, § 254.7(a)(1)(ii)–(iii) (2023).

[310] N.Y. COMP. CODES R. & REGS. tit. 7, § 253.7(a)(1)(ii) (2023). 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*, Kozlowski v. Coughlin, 871 F.2d 241 (2d Cir. 1989).

[311] N.Y. COMP. CODES R. & REGS. tit. 7, § 253.7(a)(1)(iv) (2023) (stating that, at disciplinary hearings, restitution is limited to $100) N.Y. COMP. CODES R. & REGS. tit. 7, § 254.7(a)(1)(iii)(d)(vii) (2023).

[312] N.Y. COMP. CODES R. & REGS. tit. 7, § 254.7(a)(1)(iii)(d)(vi) (2023). 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) (2023). 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 to Obtain Relief from Violations of Federal Law."

[313] N.Y. COMP. CODES R. & REGS. tit. 7, § 254.7(a)(1)(iii)(d)(ix) (2023).

delay before any penalty is imposed.[314] Remember that the HALT Act changes the requirements for hearings where segregated confinement could be imposed. If your hearing involves segregated confinement as a potential punishment, be sure to review Part D(1) on HALT.

### 2. Important Exceptions at Violation Hearings

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:[315]

(1) Loss of part of recreation (for example, game room, day room, television, movies, yard, gym, special events) for up to thirteen days;[316]
(2) Loss of at most two of the following privileges: one commissary 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);[317]
(3) Requiring 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); and[318]
(4) Counsel and/or reprimand.[319]

The violation officer may choose to suspend these punishments for thirteen days.[320]

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.[321] The regulations grant you the right to be present at your violation hearing.[322] 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.[323] You do not, however, have the right to call witnesses at violation hearings,[324] 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 the table below.[325]

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[314] N.Y. COMP. CODES R. & REGS. tit. 7, § 253.7(a)(4) (2023); N.Y. COMP. CODES R. & REGS. tit. 7, § 254.7(a)(4) (2023). 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.

[315] N.Y. COMP. CODES R. & REGS. tit. 7, § 252.5(a) (2023).

[316] N.Y. COMP. CODES R. & REGS. tit. 7, § 252.5(a)(1) (2023).

[317] N.Y. COMP. CODES R. & REGS. tit. 7, § 252.5(a)(2) (2023).

[318] N.Y. COMP. CODES R. & REGS. tit. 7, § 252.5(a)(3) (2023).

[319] N.Y. COMP. CODES R. & REGS. tit. 7, § 252.5(a)(4) (2023).

[320] N.Y. COMP. CODES R. & REGS. tit. 7, § 252.5(a) (2023).

[321] N.Y. COMP. CODES R. & REGS. tit. 7, § 251-5.1(c) (2023).

[322] N.Y. COMP. CODES R. & REGS. tit. 7, § 252.3(a)(2) (2023).

[323] N.Y. COMP. CODES R. & REGS. tit. 7, § 252.3(a)(3) (2023).

[324] N.Y. COMP. CODES R. & REGS. tit. 7, § 252.3(a)(3) (2023).

[325] See Part G(1) of this Chapter for more information on the different levels of disciplinary proceedings.

| Disciplinary/Superintendent's Hearing | Violation Hearing |
|---|---|
| Right to a written notice of proceeding at least twenty-four hours before the hearing.[326] | Right to a copy of the misbehavior report at the hearing.[327] |
| Right to a hearing that must be completed within fourteen days after report, unless authorized by the commissioner.[328] | Right to a hearing that must be completed within seven days of the writing of the misbehavior report.[329] |
| Limited right to substitute counsel.[330] | No right to substitute counsel. |
| Limited right to appear before the hearing officer.[331] | Limited right to appear before the violation officer.[332] |
| Limited right to call witnesses.[333] | No right to call witnesses.[334] |
| Right to "use" immunity. (Statements you make in response to a charge of misbehavior cannot be used against you in criminal proceedings.)[335] | Right to "use" immunity. (Statements you make in response to a charge of misbehavior cannot be used against you in criminal proceedings.)[336] |
| Right to an impartial hearing officer.[337] | No declared right to an impartial violation officer. |

[326] N.Y. COMP. CODES R. & REGS. tit. 7, § 253.6(a) (2023) (rule governing disciplinary hearings); N.Y. COMP. CODES R. & REGS. tit. 7, § 254.6(a)(1) (2023) (rule governing superintendent hearings); *see also* Wolff v. McDonnell, 418 U.S. 539, 564, 94 S. Ct. 2963, 2979, 41 L. Ed. 2d 935, 956 (1974) (holding that notice is required for hearings where rights are at stake such as a disciplinary-action hearings or superintendent hearings).

[327] N.Y. COMP. CODES R. & REGS. tit. 7, § 252.3(a)(1) (2023).

[328] N.Y. COMP. CODES R. & REGS. tit. 7, § 251-5.1(b) (2023).

[329] N.Y. COMP. CODES R. & REGS. tit. 7, § 251-5.1(c) (2023).

[330] N.Y. COMP. CODES R. & REGS. tit. 7, § 253.4 (2023) (rule governing disciplinary hearings); N.Y. COMP. CODES R. & REGS. tit. 7, § 254.4 (2023) (rule governing superintendent hearings); *see also* Wolff v. McDonnell, 418 U.S. 539, 566–570, 94 S. Ct. 2963, 2979–2982, 41 L. Ed. 2d 935, 956–959 (1974) (holding that incarcerated people do not have a right to an attorney but can collect documents and have a fellow incarcerated person 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").

[331] N.Y. COMP. CODES R. & REGS. tit. 7, § 253.6(b) (2023) (rule governing disciplinary hearings); N.Y. COMP. CODES R. & REGS. tit. 7, § 254.6(a)(2) (2023) (rule governing superintendent hearings).

[332] N.Y. COMP. CODES R. & REGS. tit. 7 § 252.3(a)(2) (2023).

[333] N.Y. COMP. CODES R. & REGS. tit. 7, § 253.5 (2023) (rule governing disciplinary hearings); N.Y. COMP. CODES R. & REGS. tit. 7, § 254.5 (2023) (rule governing superintendent hearings); *see also* Wolff v. McDonnell, 418 U.S. 539, 566, 94 S. Ct. 2963, 2979, 41 L. Ed. 2d 935, 956 (1974) (holding that an incarcerated person should be permitted to call witnesses "when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals").

[334] N.Y. COMP. CODES R. & REGS. tit. 7, § 252.3(a)(3) (2023).

[335] N.Y. COMP. CODES R. & REGS. tit. 7, § 251-3.1(d)(1) (2023).

[336] N.Y. COMP. CODES R. & REGS. tit. 7, § 251-3.1(d)(1) (2023).

[337] N.Y. COMP. CODES R. & REGS. tit. 7, § 253.1(b) (2023) (rule governing disciplinary hearings); N.Y. COMP. CODES R. & REGS. tit. 7, § 254.1 (2023) (rule governing superintendent hearings); *see also* Wolff v. McDonnell, 418 U.S. 539, 571, 94 S. Ct. 2963, 2982, 41 L. Ed. 2d 935, 959 (1974) (holding that a committee made up of wardens, superintendents, and facility directors that conducted disciplinary hearings was sufficiently impartial to satisfy due process).

| Disciplinary/Superintendent's Hearing | Violation Hearing |
|---|---|
| Right to receive a copy of a written record of the disposition.[338] | Right to receive a copy of a written record of the disposition.[339] |
| Outcome of hearing may be made part of incarcerated person's institutional records. | Outcome of violation hearing not made part of incarcerated person's institutional records.[340] |
| Right to an assistant.[341] | No right to an assistant. But, you do have a right to a translator or accommodations if you are hard of hearing.[342] |

Once you receive written charges, you know that a disciplinary proceeding will take place in the near future. The hearing must be completed within fourteen days from the time the written charges were made against you.[343] The Commissioner of Correctional Services or a person designated to act for the Commissioner can, however, authorize a delay beyond these time limits.[344]

### 3. Appeal Procedures

In New York, incarcerated people have an absolute right to make an administrative appeal to another prison official.[345] You must pursue this administrative appeal process in order to preserve your right to pursue further appeals in the courts (your right to judicial review).[346] 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).[347] If you submit your written request after the seventy-two-hour deadline, you may lose your right to have your

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[338] N.Y. COMP. CODES R. & REGS. tit. 7, § 253.7(a)(5) (2023) (rule governing disciplinary hearings); N.Y. COMP. CODES R. & REGS. tit. 7, § 254.7(a)(5) (2023) (detailing rules governing superintendent hearings); *see also* Wolff v. McDonnell, 418 U.S. 539, 564, 94 S. Ct. 2963, 2979, 41 L. Ed. 2d 935, 956 (1974).

[339] N.Y. COMP. CODES R. & REGS. tit. 7, § 252.5(b) (2023).

[340] N.Y. COMP. CODES R. & REGS. tit. 7, § 252.5(d) (2023).

[341] N.Y. COMP. CODES R. & REGS. tit. 7 § 253.4 (2023) (rule governing disciplinary hearings); N.Y. COMP. CODES R. & REGS. tit. 7 § 254.4 (2023) (rule governing superintendent hearings).

[342] N.Y. COMP. CODES R. & REGS. tit. 7 § 252.4 (2023).

[343] N.Y. COMP. CODES R. & REGS. tit. 7, § 251-5.1(b) (2023).

[344] N.Y. COMP. CODES R. & REGS. tit. 7, § 251-5.1(a)–(b) (2023).

[345] N.Y. COMP. CODES R. & REGS. tit. 7, § 253.8 (2023) (detailing rule governing disciplinary hearings); N.Y. COMP. CODES R. & REGS. tit. 7, § 254.8 (2023) (detailing rule governing superintendent hearings).

[346] To institute a New York Article 78 proceeding or a federal Section 1983 claim, you must first exhaust your administrative appeal possibilities. *See, e.g.*, Julicher v. Town of Tonawanda, 61 A.D.3d 1384, 1385, 876 N.Y.S.2d 807, 808 (4th Dept. 2009) (dismissing an employment termination petition for failing to exhaust the union's administrative process). 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 to Obtain Relief From Violations of Federal Law," and *JLM*, Chapter 14, "The Prison Litigation Reform Act."

[347] N.Y. COMP. CODES R. & REGS. tit. 7, § 253.8 (2023).

hearing reviewed.[348] 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.[349] New York State regulations do not specify whether an appeal can result in an increased sentence, but New York City does not allow for an increased sentence.[350]

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.[351]

(b) Superintendent's Hearings

The process for appealing a superintendent's decision is similar to the appeal procedure for disciplinary hearings discussed above. The significant 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.[352] You should submit your appeal to the Commissioner of Corrections and Community Supervision (not the superintendent) by writing:[353]

Commissioner _____[354]
Department of Corrections and Community Supervision
Harriman State Campus
1220 Washington Ave
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.[355] Under no circumstances can appealing a superintendent's hearing result in a harsher penalty.[356]

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, 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.[357] The superintendent can reduce your penalty even if the Commissioner decides not to reverse or modify the decision made at your superintendent's hearing.

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[348] *See* Lane v. Hanberry, 593 F.2d 648, 649 (5th Cir. 1979) (holding that when an incarcerated person 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*) (holding that an incarcerated person held in confinement who had failed to use the administrative remedy process was not allowed to challenge his confinement in a court of law).

[349] N.Y. COMP. CODES R. & REGS. tit. 7, § 253.8 (2023).

[350] City of New York, Department of Correction, Directive No. 6500R-G, Disciplinary Due Process for Individuals in Custody § (III)(G)(4) (2019) (*as revised* July 9, 2021), *available at* https://www.nyc.gov/assets/doc/downloads/directives/Directive%206500R-G%20-%20Disciplinary%20Due%20Process%20for%20Individuals%20in%20Custody.pdf (last visited Jan. 19, 2024).

[351] N.Y. COMP. CODES R. & REGS. tit. 7, § 253.9 (2023).

[352] N.Y. COMP. CODES R. & REGS. tit. 7, § 254.8 (2023).

[353] N.Y. COMP. CODES R. & REGS. tit. 7, § 254.8 (2023).

[354] As of May 2024, the Acting Commissioner of the Department of Corrections and Community Supervision is Daniel F. Martuscello III. You should double check who is currently sitting in this role. If you cannot find their name, you can simply put their title, "Commissioner of Corrections and Community Supervision."

[355] N.Y. COMP. CODES R. & REGS. tit. 7, § 254.8 (2023).

[356] N.Y. COMP. CODES R. & REGS. tit. 7, § 254.8(d) (2023).

[357] N.Y. COMP. CODES R. & REGS. tit. 7, § 254.9 (2023).

(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 or she review your case.[358] The superintendent or the person designated to act for the superintendent must then issue a decision within seven days.[359] The superintendent may reduce the penalty imposed at your hearing.[360]

Keep in mind that you can still appeal an unfavorable decision to a court of law, especially after a superintendent's hearing.[361] However, after *Sandin v. Conner*,[362] it is not likely that you would be able to successfully appeal an unfavorable decision from a violation hearing or disciplinary hearing. Remember, an appeal in court can only be successful where the punishment is extreme and implicates a liberty interest.[363] 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 an incarcerated person's institutional records.[364] The minor infraction dealt with through a violation hearing cannot be held against you at a later date.

## H. 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."[365] For example, New York has created a protected interest in avoiding segregated confinement in HALT. Regardless of what state you live in, you should pay attention to state laws and if they could potentially create a protected interest. 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.[366] Prison officials must follow their own rules, and you can challenge the change in your confinement if these rules have not been followed.[367] In all cases, your first step is to go through your prison's administrative process.[368] 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.[369] 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.[370]

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[358] N.Y. COMP. CODES R. & REGS. tit. 7, § 252.6 (2023).

[359] N.Y. COMP. CODES R. & REGS. tit. 7, § 252.6 (2023).

[360] N.Y. COMP. CODES R. & REGS. tit. 7, § 252.7 (2023).

[361] 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.

[362] Sandin v. Conner, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995).

[363] *See* Section E(1).

[364] N.Y. COMP. CODES R. & REGS. tit. 7, § 252.5(d) (2023).

[365] Sandin v. Conner, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995); *see* also Section E(1).

[366] *See* Part G.

[367] *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, incarcerated people may administratively challenge their keeplock confinement by raising procedural error claims); *see also* Part G.

[368] *See* Section G(3).

[369] *See* Section F(3).

[370] *See* Section G(3).