ALASKA PRISONERS’ RIGHTS GUIDE

ACLU of Alaska
1057 W. Fireweed Lane
Suite 207
Anchorage, AK 99503
907-646-8612
www.akclu.org
PREFACE

The purpose of this guide is to allow for a clear understanding of prisoners’ rights law in Alaska and to provide a comprehensive resource for advocates or prisoners seeking to challenge conditions of confinement or enforce constitutional rights.

This guide is divided into three parts. Part I examines the current state of prisoners’ rights law in Alaska, focusing on ten prominent constitutional rights. Part II summarizes the Federal Prison Litigation Reform Act and the Alaska Prison Litigation Reform Act. Part III provides an overview of some of the major Alaska Department of Corrections policies and procedures that implicate prisoners’ rights, such as the classification system, grievance process, and prisoner discipline system.

The Alaska Prisoners’ Rights Guide is an informational guide to the complicated field of prison law in Alaska. The guide was developed for educational purposes. This guide is only updated periodically and may not reflect recent changes in the law.

This guide does not cover every area of law that might be needed to prosecute a claim. Every legal claim is different, so no guide can substitute for the expertise of a knowledgeable attorney. If you believe you may have a claim, consult an attorney. It is important to understand that you may lose your right to pursue a claim if you do not file a lawsuit or administrative complaint before certain deadlines. Therefore, it is important that you seek advice from a lawyer licensed to practice in the State of Alaska if you have any questions about filing deadlines or about your legal circumstances generally. You may also wish to contact the following organizations to see if one of them may be able to assist you with your individual complaint: the Alaska Bar Association Lawyer Referral Service (800-770-9999); Alaska Pro Bono Program (907-529-1360); or Alaska State Ombudsman (907-269-5290).

Note: The ACLU of Alaska Foundation last updated The Alaska Prisoners’ Rights Guide in October 2010. Since then, the existing case law may have changed, and the Alaska Department of Corrections (DOC) may have revised some of its policies and procedures. You should review any revised policies/procedures and follow them to the extent they differ from what is included in this Guide. Links to these revisions are available in the document: “Alaska Prisoners’ Rights Guide Addendum – Miscellaneous Forms and Protocols of the Alaska Department of Corrections,” also available on the ACLU of Alaska website.
PART I: PRISONERS’ RIGHTS

A. Introduction

The term “prisoners’ rights” is a broad reference to the powers and protections that the law gives to prisoners. This term encompasses an array of privileges for inmates including substantial protections such as the right to necessary medical care and the right to access the courts. It also covers prison officials’ duties to maintain the health and safety of inmates and to provide certain basic amenities like personal hygiene items and exercise areas.

Both the United States Constitution and the Alaska Constitution provide protections for the rights of prisoners. Perhaps the most well known prisoners’ right is the protection against “cruel and unusual punishment” found in the Eighth Amendment to the U.S. Constitution. The Eighth Amendment states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” The “cruel and unusual” clause protects inmates from excessive force by prison officials, mandates safe conditions of confinement, and is the source of an inmate’s right to adequate medical care.

The First Amendment also provides significant safeguards for inmates, including the right of access to the courts and protection from retaliation from prison officials for reporting complaints and grievances. Additionally, the Fifth and Fourteenth Amendments both require government officials to provide due process of law before depriving any inmate of “life, liberty, or property.”

1 The word “prisoner” does not accurately describe all individuals who are imprisoned. For instance, it does not technically cover pretrial detainees (people who have been charged with crimes and are awaiting trial but have not yet been convicted), people who have been civilly committed, immigration detainees, and juvenile detainees. The term “inmate” is more often used to refer to all people imprisoned in jails, prisons, and other detention centers. The State of Alaska defines a “prisoner” as a “person held under authority of state law in official detention.” AS 33.30.901(12). “Official detention” means “custody, arrest, surrender in lieu of arrest, or actual or constructive restraint under an order of a court in a criminal or juvenile proceeding, other than an order of conditional bail release.” AS 11.81.900(40). Accordingly, the terms prisoner and inmate will be used interchangeably in this memorandum to refer to all people imprisoned in jails, prisons, and other detention centers. There are, however, some important differences between the rights of detainees and those of incarcerated persons serving criminal sentences. While the terms inmate and prisoner will be used to discuss the law as it applies to both detainees and convicted inmates, where relevant, important distinctions will be noted.

2 U.S. CONST. amend. VIII.

3 The Fifth Amendment applies to the Federal Government while the Fourteenth Amendment applies to state and local governments. The Fourteenth Amendment has “incorporated” the majority of the first ten amendments to the Constitution, meaning these amendments now apply to state and local governments as well as the federal government. See Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 847 (1992) (holding “the Due Process Clause of the Fourteenth Amendment incorporates most of the Bill of Rights against the states”). The portions of the Bill of Rights that have been incorporated against states and municipalities include the following: the First Amendment rights to free speech and freedom of the press, Gitlow v. New York, 268 U.S. 652, 666 (1925), the right to peaceably assemble, De Jonge v. Oregon, 299 U.S. 353, 364 (1937), the right of association, Shelton v. Tucker, 364 U.S. 479 (1960), the right to petition for the redress of grievances, Edwards v. South Carolina, 372 U.S. 229, 235 (1963), and the right to religious freedom, Cantwell v. Connecticut, 310 U.S. 296 (1940) (Free Exercise Clause), and Everson v. Bd. of Ed. of Ewing, 330 U.S. 1, 15 (1947) (Establishment Clause); the Second Amendment right to keep and bear arms, McDonald v. Chicago, 130 S.Ct. 3020, 3025 (2010); the Fourth Amendment right to be free from unreasonable searches and seizures, and to suppress illegally seized evidence from
The Alaska Constitution provides the same protections for prisoners as its federal counterpart, including a prohibition against cruel and unusual punishment and provisions for due process of law and the right to necessary medical care. It also provides that criminal administration in Alaska values the principle of rehabilitation so prisoners will make a crime-free return to society. Thus, inmates in Alaska are afforded an additional level of privileges, as the Alaska Supreme Court has repeatedly held that inmates in Alaska have a constitutional right to reformation and rehabilitation. This also signifies that the state views incarceration not merely as a means of punishment but also as a mechanism for effectively reintroducing an inmate to society.

Mentioning “prisoners’ rights” often stirs up debate. The public at large is generally uninformed with respect to prison issues. Many believe prisoners should have very few, very limited rights, and believe that the rights inmates do have extend too far. One common argument is that prison is not so bad: inmates are served food every day, they can earn a GED or receive other educational and vocational training, and, in some instances, they can watch television or listen to the radio. This view is completely without merit. Granted, for a very small percentage of convicted inmates, a prison term might represent a lifestyle improvement. What the public fails to consider, however, is that the United States Constitution does not get checked at the jailhouse door. When an inmate hands over his personal possessions before he begins serving time, he does not hand over the Bill of Rights also.

This is not to say that prisoners should have all of the rights afforded the rest of society. Prisoners found guilty of a crime should be punished and may be deprived of certain liberties. Prison is not meant to be pleasant, although unsentenced inmates, such as pretrial detainees, not found guilty of an offense cannot be subject to conditions intended as punishment. However, prisoners should still be able to observe religious practices, get exercise, send and receive letters, and have access to adequate medical care. Additionally, in a state with such a diverse cultural population, Native traditions and customs should not be stifled through incarceration. Most importantly, the guarantees afforded to the rest of society that prevent unfair treatment by the government—guarantees such as equal protection and due process—should unequivocally apply to individuals who live every moment of their lives under government watch.

4 ALASKA CONST. Art. I, §12.  
5 Id.  
As with other controversial issues within the ACLU’s scope, prisoners’ rights advocacy focuses on the constitutional principles at stake, not necessarily on the individuals asserting those rights. However, there are plenty of egregious cases on record where it is nearly impossible not to consider the affected individual. Again, the goal of prisoners’ rights advocacy is not to achieve cushy sentences for convicted criminals. Rather, the goal is to enforce the rights to which all prisoners are entitled under the laws of this country, and to ensure those rights are enforced equally, regardless of an inmate’s race, sex, religion, or any other classification.

The specific prisoners’ rights covered in this guide include:

1. the right to rehabilitation;
2. the right to receive adequate medical care;
3. the right of access to the courts;
4. the right to be free from retaliation from prison officials for the voicing of complaints or grievances;
5. the right to one’s traditional civil liberties;
6. the right to equal protection;
7. the right to due process;
8. the right to be free from excessive force by prison officials;
9. the right to be free from assault by other inmates; and
10. the right to humane conditions of confinement.

B. Prisoners’ Rights in Alaska

1. Right to Rehabilitation

Prisoners in Alaska have a fundamental right to rehabilitation under the Alaska state constitution. The Alaska Constitution states, in pertinent part, “Criminal administration shall be based upon the following: the need for protecting the public, community condemnation of the offender, the rights of victims of crimes, restitution of the offender, and the principle of reformation.” “Reformation” means doing something “to rehabilitate the offender into a non-criminal member of society.”

The Alaska Supreme Court has affirmed that rehabilitation is an enforceable constitutional interest designed to rehabilitate the inmate with the end-goal of that inmate’s crime-free return to society. Inmates, therefore, have a liberty interest in rehabilitation programs and any denial of

---

7 Brandon, 938 P.2d at 1032 (citing Abraham, 585 P.2d at 530-33).
8 ALASKA CONST. Art. I, §12.
9 Abraham, 585 P.2d at 531.
10 In Brandon, the plaintiff asserted the Department of Corrections erred in determining that his rehabilitation would not be substantially impaired by transferring him to a private prison in Arizona. 938 P.2d at 1032. The Alaska Statutes and the Alaska Administrative Code both reiterate that a prisoner may only be transferred out of state upon a determination that “rehabilitation of the prisoner will not be substantially impaired.” AS 33.30.061(b); 22 AAC 05.252(a). The Brandon court recognized that visitation is important to rehabilitation and, specifically, “[n]o single factor has been proven to be more directly correlated with the objective of a crime-free return to society than visiting.” 938 P.2d at 1032. While the court did acknowledge visitation privileges are a component of the constitutional right to rehabilitation, the Court did not define their required scope or the permissible limits on their
access to such programs must meet due process requirements.\textsuperscript{11} Note that the means of enforcing this right generally will be in the form of a civil rights suit against the Department of Corrections, rather than as a direct appeal of a sentencing order.\textsuperscript{12}

The Alaska Department of Corrections (DOC) has enacted a comprehensive policy governing the removal of a prisoner from a rehabilitation program.\textsuperscript{13} This policy includes guidelines that satisfy the requirements of due process before a prisoner is removed from a rehabilitative program. DOC will provide notice to a prisoner of its intent to remove the prisoner from a program covered by this policy and will give the prisoner an opportunity to present objections to the proposed removal before the removal occurs.\textsuperscript{14} However, not all programs and prisoner projects are clearly rehabilitative in such a way that the loss of the privilege invokes constitutional protection.\textsuperscript{15}

In accordance with its constitutional mandate, the Alaska legislature has instructed DOC to offer programs for prisoners that are designed to create or improve occupational skills, enhance educational qualifications, and otherwise provide for the rehabilitation and reformation of prisoners, thereby facilitating their reintegration into society.\textsuperscript{16}

- Prisoner Work Programs. Prisoner employment involves routine maintenance and support services for a facility’s operation; industrial and agricultural services; public service projects such as forest fire prevention and control, and forest and watershed exercise. \textsuperscript{Id} A subsequent decision indicated the Court would permit reasonable restrictions on visitations, including limits on contact visits for maximum security prisoners. Larson v. Cooper, 90 P.3d 125, 133-34 (Alaska 2004). However, in 2007, the Court reaffirmed the importance of visitation within the broader right to rehabilitation. Clark v. State, Dep’t of Corr., 156 P.3d 384, 387-88 (Alaska 2007). The Clark court held “prison officials and administrators must ensure that their operating policies and procedures and prison visitation rules take into account the unique challenges Alaska families regularly encounter when attempting to visit family members who are incarcerated” outside the state. \textsuperscript{Id} at 388 n.14.

\textsuperscript{11} See infra Part I.B.7.
\textsuperscript{13} DOC Policy # 808.04, Removal From Rehabilitation Programs.
\textsuperscript{14} The policy is based on the requirements of Ferguson v. State, 816 P.2d 134 (Alaska 1991) (holding an inmate employed by the prison industries program had a right to a due process hearing prior to dismissal from his position).
\textsuperscript{15} Moody v. Dep’t of Corr., No. S-12303, 2007 WL 3197938, at *2 (Alaska Oct. 31, 2007) (finding the loss of the right to keep crafts in one’s cell and to hold a prison laundry job involving no specialized training or rehabilitative aim did not violate the right to rehabilitation); Hays v. State, 830 P.2d 783 (Alaska 1992) (holding inmate did not have an enforceable constitutional interest in continued employment as a prison librarian because he merely moved jobs and was not denied the opportunity to work).
\textsuperscript{16} The full text AS 33.30.011(3) states: Under Alaska Statutory law, the Commissioner of the Department of Corrections (“Commissioner”) is required to establish programs for prisoners in state correctional facilities that are designed to:
A. protect the public and the victims of crimes committed by prisoners;
B. maintain health;
C. create or improve occupational skills;
D. enhance educational qualifications;
E. support court-ordered restitution; and
F. otherwise provide for the rehabilitation and reformation of prisoners, facilitating their reintegration into society.

AS 33.30.011(3)(A)-(F).
enhancement; recreational area development and cleanup, construction and maintenance of trails and campsites, fish and game enhancement projects, highway cleanup, and litter collection; renovation, repair, or alteration of existing correctional facilities; and other work within Alaska Correctional Industries.  

- Academic and Vocational Programs. These programs include Adult Basic Education (ABE); General Equivalency Degree (GED); and Post-Secondary Education.  

- Life Skills Programs including Health and Safety (programs such as anger and stress management, CPR/First Aid, personal hygiene, and decision making); Communications (programs in interpersonal relationships, parenting, assertiveness, and values clarification); Cultural Activities (programs in cross-cultural communications, Native languages, and cultural awareness events and activities); and Pre-Release/Pre-Employment Preparation (programs in career planning, budgeting and money management, consumer education, job-seeking skills, and resume writing).  

- Court-ordered treatment programs including sex offender treatment, substance abuse treatment, mental health treatment, anger management, and batterers’ treatment programs.

2. Medical Care

a. Introduction

The Eighth Amendment to the United States Constitution obligates prison officials to provide prisoners with adequate medical care. Many people wonder why this is so. Why do inmates have a constitutional right to medical care when others do not have the right to health care free of charge? The answer is that when an individual is imprisoned, that person cannot, on his or her own, go to a doctor, medical clinic, or hospital, buy medicine at a pharmacy, or do anything else needed to avoid getting sick in the first place, like eating well and exercising. Thus, because inmates lose the ability to obtain their own medical care, the Supreme Court has recognized that prison officials have a duty to provide medical care: “It is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself.”

---

17 DOC Policy # 812.01, Prisoner Employment.  
18 DOC Policy # 813.01, Academic and Vocational Education.  
19 Id.  
20 DOC Policy # 811.16, Court-Ordered Treatment.  
22 Toone, Robert E., PROTECTING YOUR HEALTH AND SAFETY: A LITIGATION GUIDE FOR INMATES at 72 (2002) [hereinafter Toone].  
23 Estelle at 104. The Court further wrote that the “denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose.” Id. at 97. Accordingly, medical care may not be denied as punishment or as a means of saving money.
Alaska adheres to this same principle. The Alaska Supreme Court has repeatedly recognized an inmate’s constitutional right to medical care. The state also owes inmates a duty to provide necessary medical care. Alaska’s legislature has determined that a prisoner has the right to receive necessary medical services, including psychiatric care, when confined. Pursuant to statutory provisions, the DOC must provide necessary medical services for prisoners in correctional facilities or those committed by a court to the custody of the commissioner. This duty includes examinations for communicable and infectious diseases, as well as psychological or psychiatric treatment. Treatment will be administered if a physician or other health care provider, exercising ordinary skill and care at the time of observation, concludes a prisoner exhibits symptoms of a serious disease or injury that is curable or may be substantially alleviated, and the potential for harm to the prisoner by reason of delay or denial of care is substantial.

b. When the Right to Medical Care Applies

The constitutional right to medical care does not mean that prisoners have unfettered, full-time access to medical care facilities or the ability to receive treatment for any and every ailment; inmates do not have a right of "unqualified access to health care." Rather, the U.S. Constitution guarantees inmates a right to treatment only for medical needs that are serious, and the Alaska Supreme Court has held that an inmate only has the right to receive necessary medical services while confined.

These terms are not mutually exclusive; they can be used interchangeably. It can be argued that the only difference is a matter of semantics—a serious medical need identifies the need on the part of the inmate while a medically necessary service is what the state would provide in response to a serious medical need.

c. Serious Medical Needs

Many medical conditions endanger a person’s life and are clearly serious. Examples include AIDS, hepatitis B, hepatitis C, tuberculosis, cancer, broken bones, and open, infected wounds. But, a medical condition does not have to be life threatening to be considered “serious.” The U.S. Supreme Court has not yet defined the term “serious medical need,” but several other courts have established definitions for the term:

27 AS 33.30.011.
30 Rust, 582 P.2d at 143.
31 Gutierrez v. Peters, 111 F.3d 1364, 1370 (7th Cir. 1997); Ellis v. Butler, 890 F.2d 1001, 1003 n.1 (8th Cir. 1989); Washington v. Dugger, 860 F.2d 1018, 1021 (11th Cir. 1988).
• “One that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity of a doctor’s attention.”\(^{32}\)

• “A ‘serious’ medical need exists if the failure to treat the need could result in further significant injury or unnecessary and wanton infliction of pain.”\(^{33}\)

• Medical conditions that fall well short of life-threatening can nevertheless constitute “serious medical needs,” if they result in pain or loss of function.\(^{34}\)

• The Eighth Amendment can be violated when failure to treat a prisoner results in pain, even if it does not result in a worsening of the patient’s condition.\(^{35}\)

• Factors that should guide the analysis include, but are not limited to, “(1) whether a reasonable doctor or patient would perceive the medical need in question as important and worthy of comment or treatment; (2) whether the medical condition significantly affects daily activities, and (3) the existence of chronic and substantial pain.”\(^{36}\)

**d. Necessary Medical Services**

The Alaska Supreme Court has held that an inmate has the right to receive necessary medical services, including psychiatric care, while confined.\(^{37}\) The court wrote that “[t]he essential test is one of medical necessity and not simply that which may be considered merely desirable.”\(^{38}\)

Pursuant to AS 33.30.011, a prisoner in DOC’s custody has the right to receive medical treatment if a health care provider, exercising ordinary skill and care at the time of observation, concludes with reasonable medical certainty (1) the prisoner's symptoms evidence a serious medical need, (2) the medical condition significantly affects daily activities, and (3) the existence of chronic and substantial pain.\(^{39}\)

\(^{32}\) *Hill v. DeKalb Reg’l Youth Det. Ctr.*, 40 F.3d 1176, 1187 (11th Cir. 1994) (internal quotation, citation omitted).

\(^{33}\) *Jett v. Penner*, 439 F.3d 1091 (9th Cir. 2006) (internal quotation omitted); *Carnell v. Grimm*, 872 F. Supp. 746, 755 (D. Hawai’i 1994), appeal dismissed in part, aff’d in part, 74 F.3d 977 (9th Cir. 1996).


\(^{35}\) *Boretti v. Wiscomb*, 930 F.2d 1150, 1154 (6th Cir. 1991) (denial of dressing and pain medication for wound); *Ellis*, 890 F.2d at 1003 (nurse’s failure to deliver pain medication); *Washington v. Dugger*, 860 F.2d 1018, 1021 (11th Cir. 1988) (denial of treatments that could “eliminate pain and suffering at least temporarily”); *H.C. v. Jarrard*, 786 F.2d 1080, 1083, 1086 (11th Cir. 1986) (denial of medical care for injured shoulder was unconstitutional, although no permanent injury resulted).

\(^{36}\) *Brock*, 315 F.3d at 162 (internal quotation omitted). The Ninth Circuit recently held that a prisoner who was scheduled for emergency dental surgery and was in undisputedly severe pain had raised a triable issue of fact as to whether the prison official who insisted on transferring the prisoner before surgery had acted with deliberate indifference to the prisoner’s serious medical needs. *See Fews v. Perez*, 219 F. App’x 676, 677 (9th Cir. 2007).

\(^{37}\) *Rust*, 582 P.2d at 143.

\(^{38}\) Id. at 142 (citing *Bowring v. Godwin*, 551 F.2d 44, 47-48 (4th Cir. 1977)).
disease or injury; (2) such disease or injury is curable or may be substantially alleviated; and (3) the potential for harm to the prisoner by reason of delay or denial of care would be substantial.\textsuperscript{39}

In its internal policies, the Alaska DOC does not use the term “serious medical need” but provides care for conditions deemed “medically necessary.” The DOC defines “medically necessary care” as care determined by a healthcare provider to be:

- consistent with the standards of care of the Department of Corrections,
- ordered by an authorized healthcare provider,
- required to prevent further deterioration in the inmate’s health resulting in permanent functional impairment if not rendered during the time of incarceration or necessary to relieve unmanageable pain,
- not considered experimental or adequately supported by medical evidence to demonstrate efficacy, and
- not administered solely for the convenience of the inmate or the health care practitioner.\textsuperscript{40}

### e. Legal Standard for Proving a Violation of the Right to Medical Care

Identifying a serious medical need or a medically necessary service is the first step. However, prison officials only violate the Constitution when they act with deliberate indifference to an inmate’s serious medical needs. “Deliberate indifference” is the intent or “state of mind” requirement that inmates must show any time they bring a claim for inadequate medical care.\textsuperscript{41}

“Deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain’ proscribed by the Eighth Amendment.”\textsuperscript{42}

In Farmer v. Brennan, the Supreme Court held an official acts with deliberate indifference when he or she “knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.”\textsuperscript{43} To be deliberately indifferent, an official must, therefore, both (1) know about a risk to an inmate and (2) fail to respond reasonably to that risk. If an official does not know about a risk, he has no constitutional duty to act. Alaska has adopted this same standard.\textsuperscript{44}

In Farmer, the Court emphasized the deliberate indifference standard is subjective rather than objective.\textsuperscript{45} Accordingly, it is not enough to show that an official “should have known” about a particular risk or that a “reasonable person” would have known about the risk. Instead, an

\textsuperscript{39} Id.
\textsuperscript{40} These guidelines are explained in the Prisoner Health Plan, DOC Policy # 807.02, Attachment A: Prisoner Health Plan, § VI, Definitions of Medical Terminology and Provided Services.
\textsuperscript{41} Deliberate indifference of prison officials is required for any Eighth Amendment health and safety claim. This includes failure-to-protect claims, claims challenging inhumane conditions of confinement, and claims challenging inadequate medical care.
\textsuperscript{44} Goodlatte, 698 P.2d at 1193.
\textsuperscript{45} Farmer, 511 U.S. at 838-39.
inmate must show that the official in question actually knew about the risk. However, the fact that the lack of care or conditions were “longstanding, pervasive, well-documented, or expressly noted” by officials in the past can prove, by inference, the official in question actually knew about the risk. Under the Farmer test, a prison official can argue that even though he knew about a particular problem at the facility, he still did not know that it had resulted in a substantial risk of serious harm to inmates. In other words, an official only acts with deliberate indifference if he makes the connection in his mind between a problematic condition and the resulting risk to inmates’ health or safety. This is what the Court meant when it wrote that an official “must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.”

Once an official has actual knowledge of a substantial risk of serious harm, he or she must respond reasonably to it. In deciding whether an official’s response was reasonable, a court will likely look to whether the official made a good-faith effort to investigate the problem and then fix it. In the medical care context, this means an inmate should be promptly examined by qualified medical personnel, prescribed or ordered the necessary treatment, administered the treatment properly, and then provided follow-up treatment as necessary.

It is important to note that deliberate indifference does not require a showing that an official intended to hurt an inmate or make an inmate suffer, yet it does require more than a showing of mere negligence. The deliberate indifference requirement “is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result.” An inmate “need not show that a prison official acted or failed to act believing that harm would actually befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm.” This is the difference between deliberate indifference and the malicious and sadistic intent requirement for excessive force claims.

Negligence is not enough to satisfy a showing of deliberate indifference. The Supreme Court has clearly stated that deliberate indifference “entails something more than mere negligence.” Moreover, in Estelle v. Gamble, the Court held that deliberate indifference to serious medical needs of prisoners does not result whenever a doctor negligently diagnoses or treats an inmate.

---

46 Toone, supra note 29, at 44.
47 Farmer, 511 U.S. at 842.
48 Id. at 837.
49 Id.
50 Vance v. Peters, 97 F.3d 987, 993 (7th Cir. 1996).
51 Toone, supra note 22, at 72. See Jett v. Penner, 439 F.3d 1091 (9th Cir. 2006) (finding deliberate indifference evidenced by staff recognition of the need to set inmate’s fractured thumb and failure to provide that treatment).
52 Id. at 44.
54 Id. at 842. See also Conn v. City of Reno, 572 F.3d 1047 (9th Cir. 2009), amended and superseded on denial of rehearing en banc, 591 F.3d 1081 (9th Cir. 2009) (holding knowledge of evidence of decedent’s suicidality, including verbal ideation and attempted hanging, showed deliberate indifference on behalf of police officers who witnessed the verbal and physical threats yet did not report them).
56 Farmer, 511 U.S. at 836.
57 Estelle, 429 U.S. at 106.
To summarize, “deliberate indifference” in the case of an inadequate medical care claim means prison officials knew of and disregarded a substantial risk of serious harm to the prisoner’s health. 58 This concept is the key to any medical care claim under the Eighth Amendment.

f. Special Medical Needs

Inmates also have certain rights with respect to post-release treatment and special medical needs. “Special medical needs” encompasses (1) care for disabled inmates, (2) mental health services, (3) pregnancy, childbirth and abortion services, and (4) drug and alcohol withdrawal programs.

1. Disabled Inmates

Inmates with physical disabilities are entitled to certain accommodations under both the Constitution and the Americans with Disabilities Act (ADA). 59 Living conditions that suffice for non-disabled inmates may be constitutionally inadequate for disabled inmates. The Eighth Amendment requires that inmates who cannot move around easily must be assisted and/or provided the means to use the toilet, take baths or showers, eat meals, and perform personal hygiene. 60 Similarly, inmates who are hearing-impaired (partly or wholly deaf) or vision-impaired (partly or wholly blind) have a right to aids or assistance for their disabilities. 61 The Eighth Amendment also prohibits prison officials from requiring an inmate to perform work that is beyond his strength, dangerous to his health, or unusually painful. 62

Disabled inmates also have significant rights under the ADA. The Supreme Court has held that the ADA applies to jails and prisons and therefore prohibits prison officials from discriminating against inmates with disabilities. 63 Officials must provide disabled inmates with an equal opportunity to benefit from all prison activities, programs, and services, and must make “reasonable modifications” where necessary to avoid such discrimination, unless doing so would fundamentally change the activity, program, or service being provided. 64

To state a prima facie claim under the ADA, a plaintiff must show: (1) that he is a person with a disability as defined by the statute; (2) he is otherwise qualified for the benefit in question; and

58 Farmer, 511 U.S. at 837.
60 See, e.g., Pierce v. County of Orange, 526 F.3d 1190, 1224 (9th Cir. 2008) (failing to provide paraplegic with adequate supply of catheters resulting in bed sores and bladder infections stated Eighth Amendment claim); Frost v. Agnos, 152 F.3d 1124, 1129 (9th Cir. 1998) (confining an inmate on crutches in unit with slippery floors and inadequate shower facilities would violate the Constitution); Parrish v. Johnson, 800 F.2d 600, 605 (6th Cir. 1986) (finding a prison guard who forced paraplegic inmates to sit in their own waste for extended periods of time violated the Eighth Amendment); Cummings v. Roberts, 628 F.2d 1065, 1068 (8th Cir. 1980) (holding alleged refusal of prison officials to clean inmate or provide wheelchair when bedridden with back injury, forcing him to crawl across floor, stated Eighth Amendment claim).
62 Sanchez v. Taggart, 144 F.3d 1154, 1156 (8th Cir. 1998).
64 Id.; Pierce, 526 F.3d at 1222 (affirming disabled prisoners must have substantially the same access to programs as all non-disabled prisoners within the system, and therefore, facilities with disabled access must offer similar programs as those without disabled access).
(3) he was excluded from the benefit due to discrimination.\textsuperscript{65} Inmates can also file complaints with the U.S. Department of Justice, which is responsible for investigating alleged ADA violations by state and local governments.\textsuperscript{66}

2. Drug and Alcohol Withdrawal

Some inmates are addicted to drugs or alcohol when they arrive at prison. And, despite the fact that drug abuse remains a major problem within the prison system, most drug-addicted inmates are immediately cut off and forced to go “cold turkey” when they begin their sentences. The resulting withdrawal can have serious, painful medical effects, such as \textit{delirium tremens} (DTs).\textsuperscript{67} Inmates have a constitutional right to be treated for the effects of drug and alcohol withdrawal as it amounts to a serious medical need.\textsuperscript{68}

While the U.S. Constitution does not require prisons to provide rehabilitation programs for inmates recovering from drug and alcohol dependency,\textsuperscript{69} the Alaska Supreme Court has held that “[p]risoners have an enforceable interest in continued participation in rehabilitation programs.”\textsuperscript{70}

3. Pregnancy, Childbirth, and Abortion\textsuperscript{71}

Pregnancy and childbirth are complicated matters and become even more so when a pregnant woman is incarcerated. As such, a number of serious medical needs arise when a female inmate is pregnant, including prenatal care, the need for an abortion, and the need for medical assistance during delivery.

Prenatal care should include regular visits to health care personnel trained in obstetrical care, and, because a woman typically gains anywhere from 25 to 40 pounds during pregnancy, jails and prisons should provide pregnant inmates with extra food and vitamins.\textsuperscript{72} An inmate who is in labor should be allowed to have the delivery take place in a quiet, private area, and the woman should not be shackled.\textsuperscript{73} Most jails and prisons, including those in Alaska, do not allow inmates to keep their babies with them after birth.

\textsuperscript{66} Complaints should be sent to Disability Rights Section, Civil Rights Division, U.S. Department of Justice, P.O. Box 66738, Washington, D.C. 20035-6738. Complaints must be filed within 180 days of the alleged discrimination.
\textsuperscript{67} Toone, supra note 22, at 90.
\textsuperscript{68} Lancaster v. Monroe County, 116 F.3d 1419, 1425-26 (11th Cir. 1997) (suffering acute alcohol withdrawal syndrome as a chronic alcoholic is a serious medical need).
\textsuperscript{69} Smith v. Schneckloth, 414 F.2d 680 (9th Cir. 1969).
\textsuperscript{70} Ferguson v. State, Dep’t of Corr., 816 P.2d 134, 139 (Alaska 1991).
\textsuperscript{71} This section uses information from the ACLU Reproductive Freedom Project. For more information on reproductive rights and freedoms, visit: http://www.aclu.org/reproductive-freedom/about-aclu-reproductive-freedom-project. To research this topic as it relates to female prisoners and detainees, visit: http://www.aclu.org/prisoners-rights_reproductive-freedom_womens-rights/women-and-criminal-justice-system.
\textsuperscript{72} Toone, supra note 22, at 98.
\textsuperscript{73} Id.; Nelson v. Corr. Med. Serv., 583 F.3d 522, 530-31 (9th Cir. 2009) (shackling a prisoner to her civilian hospital bed without any penological interest while she was giving birth gave rise to Eighth Amendment claim).
The Alaska DOC provides maternity care for pregnant inmates through access to comprehensive obstetrical care during incarceration. Such care will be arranged with an obstetrician upon confirming pregnancy by a urine or blood test. Prenatal visits are performed during the first 28 weeks of pregnancy, with more frequent visits between 28 weeks and delivery, as medically indicated. Prenatal counseling and education will also be offered to all pregnant inmates.

The DOC provides the following obstetrical care:

- pregnancy testing
- routine prenatal care
- high-risk prenatal care
- vaginal or cesarean delivery
- postpartum care and follow-up
- family planning and birth control counseling prior to parole or discharge.

The following services are not provided by DOC:

- procedures intended solely for the determination of the sex of the fetus
- hospital and medical expenses of the newborn
- autopsy or funeral/burial expenses resulting from death of the fetus
- non-therapeutic sterilizations, including hysterectomies for sterilization purposes
- non-therapeutic abortions.

While the inmate is hospitalized after delivery, physical contact with the newborn may be restricted, in whole or in part. Upon discharge from the hospital, inmates will not be permitted to bring their baby back to the correctional facility. Prior to delivery, each inmate is required, with staff assistance, to arrange for custody of the child.

Visitation with the newborn child will be in accordance with DOC Policy # 808.06, Requirements Relating to Female Prisoners:

A prisoner whose child is under 12 months of age may, at the Superintendent’s discretion and contingent upon the factors listed below, visit with her child for up to eight hours per day. This visitation is a privilege and the Superintendent or designee may terminate some or all of it. Visitation must comply with the following:

a. The prisoner’s sentence, classification, custody level and conduct must support visitation. Ordinarily, the visitation is limited to program facilities and does not apply to pretrial facilities.

---

74 DOC Policy # 807.02, Attachment A, § VII(I), Maternity Services.
75 Id.
76 Id.
77 Id.
78 Id.
79 Id.
80 DOC Policy # 807.02, Attachment A, § VII(I), Maternity Services.
b. An adult family member, foster parent, or guardian must bring the child to the facility.
c. The infant and accompanying child care paraphernalia must pass through an incoming and outgoing security screening approved by the Superintendent.
d. The facility’s visiting area must be able to accommodate parent-supervised child care.
e. The visit must take place in the contact visiting area, but an adult family member or guardian need not be present.
f. An adult family member, foster parent, or guardian must return the child to care outside the institution after the visit.\textsuperscript{81}

A woman has a constitutional right to terminate her pregnancy in its early stages. Being in prison or jail does not mean an inmate loses her right to obtain a safe and legal abortion. It is therefore unconstitutional for prison officials to deny an inmate appropriate abortion services.\textsuperscript{82}

An inmate’s constitutional rights are being violated if she is told that she must get a court order before getting an abortion, pay for the abortion out of her own pocket, or pay for the costs of the jail transporting her to a clinic or hospital to have an abortion, or if she is otherwise told she cannot obtain an abortion while incarcerated.

If an inmate is experiencing any of the above, she should:

1. determine if one particular nurse or guard is giving her a hard time. If this is so, then she should ask other medical staff or officials to help out;
2. document her requests, both by making them in writing and by keeping a list of the people she has spoken to when, what responses they’ve given, and when and to whom she has made written requests;
3. file an “administrative grievance” as well as a written request for medical assistance. If officials refuse to give her the forms she needs to do this, she should write letters making the requests (even if they don’t seem to get her anywhere) and again, keep track of them.

If an inmate is thinking of having an abortion, the prison or jail should help get her counselling so she understands all of her options. If a woman has already decided to have an abortion, it is important to act quickly. While abortions are extremely safe medical procedures, the costs and risks associated with the procedure increase with time. In addition, the longer a woman waits, the harder it may be to find a doctor in her area able to provide the service.

\textsuperscript{81} DOC Policy # 808.06(D)(1), Requirements Relating to Female Prisoners.
\textsuperscript{82} Roe v. Crawford, 514 F.3d 789, 795-98 (8th Cir. 2008) (holding policy against transporting inmates seeking elective abortions violated the Fourteenth Amendment by placing undue burden on plaintiff); Monmouth County Corr. Inst. v. Lanzaro, 834 F.2d 326, 346-49 (3rd Cir. 1987) (denying required care would likely result in tangible harm to inmate who wished to terminate her pregnancy, thus triggering an Eighth Amendment claim); see generally Planned Parenthood v. Casey, 505 U.S. 833 (1992) (indicating how and when the government may regulate abortion).
4. Mental Health

Alaska provides mental health and psychiatric services at any time during incarceration. Upon admission to the correctional system, each inmate will receive an initial mental health screening to determine the presence of any mental health condition. Placement at a facility may depend on the inmate’s need for further evaluation or treatment, the severity of the illness, and the level of care required. Mental health care may include group or individualized counseling, psychiatric consultation, prescribing of psychotropic medications, individualized behavior therapy, and case management and support services (i.e., job, housing, and discharge planning). Additionally, the Due Process Clause of the Fourteenth Amendment requires states to provide civilly committed persons with access to mental health treatment that provides them a realistic opportunity to be cured and released. Deliberate indifference to serious mental health needs also violates the Constitution. Courts use the same standards discussed above to determine whether a mental health need is “serious” or not.

5. Administration of Medication without Consent

The Due Process Clause protects the “right to bodily integrity,” that is, the general right not to have government officials interfere with your body without good reason. Officials therefore may not force an inmate to take a drug that is not medically appropriate (e.g., use an inmate to test an experimental drug without consent). However, the Supreme Court has held that a prison may forcibly treat a seriously mentally ill patient with anti-psychotropic drugs “if the inmate is dangerous to himself or others and the treatment is in the inmate’s medical interest.”

6. Post-Release Treatment

Prison officials have a limited duty to provide inmates with care after the inmate has been released from incarceration. The Constitution gives inmates a right to medical care because inmates have been stripped of their ability to care for themselves; inmates do not automatically regain this ability immediately upon release. “A parolee just having been released after a stay in prison is often in no position to immediately find the alternative medical attention that he needs.” For this reason, the Ninth Circuit has held that prison officials “must provide an outgoing prisoner who is receiving and continues to require medication with a supply sufficient to ensure that he has that medication available during the period of time reasonably necessary to permit him to consult a doctor and obtain a new supply.” This ruling is especially important for inmates who are receiving treatment for chronic conditions.

83 AS 33.30.011(4)(B); DOC Policy # 807.02: Attachment A, § VII(B), Mental Health & Psychiatric Services.
84 DOC Policy # 807.02: Attachment A, § VII(B).
85 Id.
86 Toone, supra note 22, at 100 (citing Sharp v. Weston, 233 F.3d 1166, 1172 (9th Cir. 2000)).
88 Id. (citing Washington v. Harper, 494 U.S. 210, 227 (1990)).
90 Wakefield v. Thompson, 177 F.3d 1160, 1164 (9th Cir. 1999).
g. Prison Medical Care Litigation

1. Introduction

Some medical problems are simply too minor to be the basis of a lawsuit. As one judge has explained,

A prison’s medical staff that refuses to dispense bromides for the snuffles or minor aches and pains or a tiny scratch or a mild headache or minor fatigue — the sorts of ailments for which many people who are not in prison do not seek medical attention — does not by its refusal violate the Constitution. 92

However, medical problems vary in seriousness from person to person. For instance, in most situations, the common cold does not cause significant injury. One court has ruled explicitly that the common cold does not normally present a “serious medical need.” 93 But, this ruling would not apply to someone who has limited resistance to infection because of an immunodeficiency disease. For such a person, a case of the common cold might severely affect her health and would likely amount to a serious medical need.

Additionally, courts have recognized that prisons must have health care systems in place that can address prison health issues as they arise and have established some elements of an adequate prison health care system:

The Eighth Amendment requires that prison officials provide a system of ready access to adequate medical care. Prison officials show deliberate indifference to serious medical needs if prisoners are unable to make their medical problems known to the medical staff. Access to the medical staff has no meaning if the medical staff is not competent to deal with the prisoners' problems. The medical staff must be competent to examine prisoners and diagnose illnesses. It must be able to treat medical problems or to refer prisoners to others who can. Such referrals may be to other physicians within the prison, or to physicians or facilities outside the prison if there is reasonably speedy access to these other physicians or facilities. In keeping with these requirements, the prison must provide an adequate system for responding to emergencies. If outside facilities are too remote or too inaccessible to handle emergencies promptly and adequately, then the prison must provide adequate facilities and staff to handle emergencies within the prison. These requirements apply to physical, dental and mental health. 94

The Alaska DOC has (on paper) established a comprehensive health care system for inmates that satisfies constitutional requirements. The DOC provides for initial medical screening of inmates, provides regular sick calls, has a medical records system in place, and employs infectious disease control parameters.

92 Toone, supra note 22, at 72 (citing Cooper v. Casey, 97 F.3d 914, 916 (7th Cir. 1996)).
93 Gibson v. Mckevers, 631 F.2d 95, 98 (7th Cir. 1980).
94 Hoptowit v. Ray, 682 F.2d 1237, 1252-53 (9th Cir. 1982) (citation omitted).
2. Establishing Deliberate Indifference

When considering whether or not to litigate a prison medical care issue, it is important to remember only “deliberate indifference to serious medical needs” violates the Eighth Amendment.\(^{95}\) This is a difficult standard to meet, and mere medical malpractice does not suffice.\(^{96}\) Additionally, the Supreme Court held that an official acts with deliberate indifference when he or she “knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.”\(^{97}\) To be deliberately indifferent, an official must therefore both (1) know about a risk to an inmate and (2) fail to respond reasonably to that risk. If an official does not know about a risk, he has no constitutional duty to act. Alaska has adopted this same standard.\(^{98}\)

There are four elements an inmate must show to prove deliberate indifference and succeed on an inadequate medical care claim:

1. existence of a serious medical need;
2. prison official’s knowledge of need;
3. prison official’s failure to provide treatment; and
4. causation and injury.

A. Serious Medical Need

What are “serious medical needs?” As explained above, the Supreme Court has not yet specifically defined the term “serious medical need,” but the Court has proclaimed that the Eighth Amendment prohibits the “unnecessary and wanton infliction of pain.”\(^{99}\) The definitions established by various lower courts can be grouped together in two differing definitions:

The first definition, embraced by the First, Third, Eighth, Tenth, and Eleventh Circuits, states that a medical need is serious when it “has been diagnosed by a physician as mandating treatment or…is so obvious that even a layperson would easily recognize the necessity for a doctor’s attention.”\(^{100}\)

The second definition, shared by the Second and Ninth Circuits, states that a serious medical need exists when “the failure to treat a prisoner’s condition could result in further significant injury or the unnecessary and wanton infliction of pain.”\(^{101}\) These courts consider the following factors, among others, in applying this test:

\(^{96}\) Id. at 106.
\(^{98}\) Goodlataw, 698 P.2d at 1193.
\(^{99}\) Estelle, 429 U.S. at 104.
\(^{100}\) Toone, supra note 22, at 72 (citing Mahan v. Plymouth County House of Corr., 64 F.3d 14, 18 (1st Cir. 1995); Monmouth County Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 347 (3rd Cir. 1987); Gutierrez v. Peters, 111 F.3d 1364, 1373 (7th Cir. 1997); Sheldon v. Pezley, 49 F.3d 1312, 1316 (8th Cir. 1995); Sealock v. Colorado, 218 F.3d 1205, 1209 (10th Cir 2000); Hill v. DeKalb Reg’l Youth Det. Ctr., 40 F.3d 1176, 1187 (11th Cir. 1994)).
\(^{101}\) Toone, supra note 22, at 73 (citing Harrison v. Blakely, 219 F.3d 132, 136 (2nd Cir. 2000) and McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992)).
• the existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment;
• the presence of a medical condition that significantly affects an individual’s daily activities; or
• the existence of a chronic and substantial pain.102

The following are examples of medical needs that courts have found to be “serious”:

• degenerative hip condition, which caused inmate great pain and difficulty walking103
• painfully swollen and obviously broken arm104
• stomach pain and abdominal distress caused by bleeding ulcer105
• appendix that is inflamed or on the verge of rupturing106
• dislocated shoulder107
• painful mouth and throat blisters caused by cancer treatment 108
• pain, purulent draining infection, and fever in excess of 100 degrees, caused by infected cyst109
• cuts, severe muscular pain, and burning sensation in eyes and skin, caused by being maced by guards110
• head injury from falling in the shower111
• painful fungal skin infection112
• severe chest pain which inmate (correctly) believed was caused by heart attack113

Medical needs deemed “not serious” by the courts include:

• sliver of glass in inmate’s palm that did not require stitches or painkiller114
• pain inmate experienced when doctor removed partially torn-off toenail without anesthetic115
• nausea, shakes, headache, and diminished appetite caused by family situational stress116
• pseudofolliculitis barbae or “shaving bumps”117

102 McGuckin, 974 F.2d at 1059-60.
103 Hathaway v. Coughlin, 37 F.3d 63, 67 (2nd Cir. 1994).
104 Loe v. Armistead, 582 F.2d 1291, 1296 (4th Cir. 1978).
106 Sherrod v. Lingle, 223 F.3d 605, 610-611 (7th Cir. 2000).
109 Gutierrez, 111 F.3d at 1373-74.
110 Cooper v. Casey, 97 F.3d 914, 916 (7th Cir. 1996)
111 Murphy v. Walker, 51 F.3d 714, 719 (7th Cir. 1995) (“Any injury to the head unless obviously superficial should ordinarily be considered serious and merits attention until properly diagnosed as to severity.”)
112 Logan v. Clarke, 119 F.3d 647, 649 (8th Cir. 1997).
113 Sealock v. Colorado, 218 F.3d 1205, 1210 (10th Cir. 2000).
115 Snipes v. DeTella, 95 F.3d 586, 591-92 (7th Cir. 1996).
116 Doty v. County of Lassen, 37 F.3d 540, 546 (9th Cir. 1994).
B. Prison Official’s Knowledge of Need

There is no right to medical treatment if prison officials are not aware of an inmate’s medical problem.\textsuperscript{118} Inmates therefore must do everything they can to inform officials about their medical conditions. There are a number of ways to do this. Inmates can fill out a medical request form, grievance form, or sick call slip or write a letter describing the problem to prison officials. Inmates can also inform prison staff and officials of the problem verbally. It is also important for inmates to communicate with the proper officials — the guards who can contact a doctor on a prisoner’s behalf and the medical staff who will provide treatment.\textsuperscript{119} It may not be enough to write only the Director of Institutions or the medical director of the prison system if that individual is not directly responsible for that particular inmate’s medical care.\textsuperscript{120} However, if an inmate believes there are system-wide problems that have prevented him from receiving adequate medical care, he should write to the appropriate higher-level officials in addition to the guards, nurses, and doctors who deal with the problem directly.

C. Prison Official’s Failure to Provide Treatment

Once officials are aware of an inmate’s serious medical need, they must respond reasonably. Ideally, an inmate should be promptly examined by qualified medical personnel, prescribed or ordered the necessary treatment, administered the treatment properly, and then provided follow-up treatment as necessary.\textsuperscript{121} But life in prison is often far from ideal. According to the Supreme Court, prison officials violate the Constitution only when they intentionally deny or delay access to medical care, provide grossly inadequate treatment, or intentionally interfere with prescribed treatment.\textsuperscript{122}

1. Denial of Medical Attention

The strongest type of medical care claim is when an inmate with a serious problem repeatedly asks for medical care, receives no care, and then suffers a serious injury.\textsuperscript{123} After learning about an inmate’s serious medical need, officials may not simply do nothing.\textsuperscript{124} Officials may not

\begin{itemize}
  \item \textsuperscript{117} Shabazz v. Barnauskas, 790 F.2d 1536, 1538 (11th Cir. 1986).
  \item \textsuperscript{118} See, e.g., Grayson v. Peed, 195 F.3d 692, 695 (4th Cir. 1999); Durham v. Nu’man, 97 F.3d 862, 869 (6th Cir. 1996).
  \item \textsuperscript{119} Toone, supra note 22, at 77.
  \item \textsuperscript{120} Farmer v. Moritsugu, 163 F.3d 610, 615-16 (D.C. Cir. 1998).
  \item \textsuperscript{121} Toone, supra note 22, at 77.
  \item \textsuperscript{122} Estelle v. Gamble, 429 U.S.97, 104-05 (1976).
  \item \textsuperscript{123} Hudson v. McHugh, 148 F.3d 859, 864 (7th Cir. 1998) (finding case in which officials knew inmate was not getting his medicine for epilepsy was a “prototypical case of deliberate indifference”).
  \item \textsuperscript{124} See, e.g., Kersh v. Derozier, 851 F.2d 1509, 1510 (5th Cir. 1988) (inmate went blind after officials refused to allow him to wash object out of his eye); Murphy v. Walker, 51 F.3d 714, 719 (7th Cir. 1995) (rather than having inmate with head injury treated by doctor, guards told him to “stop being a baby” and live with the pain); Hughes v. Joliet Corr. Ctr., 931 F.2d 425, 428 (7th Cir. 1991) (inmate with spinal injury told by medical staff he was “full of bullshit”); Estate of Rosenberg by Rosenberg v. Crandell, 56 F.3d 35, 37 (8th Cir. 1995) (rather than arranging visit to doctor, physician’s assistants required seriously ill inmate to work and walk to mess hall and refused to give him liquid food); Sealock v. Colorado, 218 F.3d 1205, 1207 (10th Cir. 2000) (after being informed that inmate might be having heart attack, sergeant refused to drive inmate to hospital and said, “Just don’t die on my shift. It’s too much
deny needed medical care because it is expensive or because the inmate cannot pay for it.\textsuperscript{125} But, courts have held that the Constitution allows jails and prisons to charge inmates co-payments, or small fees, for medical attention.\textsuperscript{126} As a general rule, jails and prisons should not charge inmates fees for treatment of chronic conditions (lifelong illnesses like cancer or AIDS), emergency conditions, or communicable diseases (because failure to treat a communicable disease like tuberculosis endangers the health of many others).\textsuperscript{127} Moreover, indigent inmates should not have to pay anything before receiving medical attention. Officials may not deny medical care as a form of punishment\textsuperscript{128} nor may they deny medical care by forcing an inmate to do something unreasonable first.\textsuperscript{129}

Guards and other “non-doctors” often play the role of “gatekeeper” in deciding which inmates receive medical attention and which do not. Untrained officials are not qualified to make medical decisions and thus should not make them.\textsuperscript{130} Because a nurse or doctor should be able to identify certain serious medical needs that a typical prison guard cannot, courts will consider whether the official in question had medical training when deciding whether an official was deliberately indifferent.\textsuperscript{131} Similarly, a medical official without specialized training should not make decisions about conditions that require a specialist’s training, as denial of access to appropriately qualified health care staff could constitute deliberate indifference on the part of an unspecialized medical official.\textsuperscript{132}
2. Delay in Providing Medical Attention

A prison official’s delay in providing needed medical care or access to medical personnel may also violate the Constitution. If the medical need is urgent, even a short delay can result in extreme pain or death and can therefore amount to deliberate indifference. As a general rule, a delay violates the Constitution if it is (1) medically unjustified and (2) clearly likely to make the inmate’s medical problem worse or result in a lifelong handicap or a permanent loss. Several circuits also require inmates to prove they suffered pain or their health worsened as a result of delay in treatment, though the Ninth Circuit has no such requirement.

3. Inadequate Medical Treatment

A prison official may also be deliberately indifferent if the medical care he or she provides is “so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness.” This is difficult to prove. Furthermore, inmates do not have the right to choose a specific course of medical treatment. Courts will rarely second-guess the choices
that doctors, nurses, and other medical officials make in treating inmates — even if the choices they make violate the standards of their professions. One court has held that “deliberate indifference may be inferred…only when the medical professional’s decision is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment.”

It is important to note deliberate indifference is not satisfied by a showing of negligence. In other words, medical malpractice in prison does not by itself violate the Constitution; something more must be shown. It is not enough to show a missed diagnosis or a bad result, although a doctor’s willful disregard for an obvious medical problem may be deliberately indifferent. It is also not enough to show that another doctor may have ordered a different course of treatment. Mere differences of medical judgment are not actionable. But, in certain instances, the decisions of prisoner doctors can be attacked. In these situations, the prisoner must show a legitimate medical judgment is not at issue.

However, if the care that a medical official provides is grossly inadequate, that is, glaringly or inexcusably bad, or if he or she intentionally decides to take an easier or cheaper, but much less effective, course of treatment, the official may be deliberately indifferent. Deliberate indifference may also exist if the official continues with a course of treatment “in the face of resultant pain and risk of permanent injury” if medical officials fail to inquire into facts necessary to make a professional judgment, or if they allow non-medical factors to interfere with medical judgment. Also, if judgment is so egregiously bad it isn’t really medical, or if treatment is “so cursory as to amount to no treatment at all,” it may violate the Constitution.

---

140 Taylor v. Adams, 221 F.3d 1254, 1259 (11th Cir. 2000).
141 Estate of Cole v. Fromm, 94 F.3d 254, 261-62 (7th Cir. 1996).
143 Lopez v. Smith, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc).
144 Hemmings v. Gorczyk, 134 F.3d 104, 109 (2nd Cir 1998); see also Steele v. Choi, 82 F.3d 175, 179 (7th Cir. 1996) (“if the symptoms plainly called for a particular medical treatment—the leg is broken, so it must be set; the person is not breathing, so CPR must be administered—a doctor’s deliberate decision not to furnish the treatment might be actionable . . .”).
145 Barron v. Keohane, 216 F.3d 692, 693 (8th Cir. 2000) (ruled officials did not act with deliberate indifference in treating inmate’s kidney disease with dialysis rather than providing him access to a kidney transplant).
146 Stewart v. Murphy, 174 F.3d 530, 535 (5th Cir. 1999).
147 See, e.g., Hunt v. Uphoff, 199 F.3d 1220, 1223-24 (10th Cir. 1999) (one doctor denied insulin prescribed by another doctor); Miller v. Schoenen, 75 F.3d 1305 (8th Cir. 1996) (recommendations from outside hospitals not followed).
148 Williams v. Vincent, 508 F.2d 541, 544 (2nd Cir. 1974) (finding alleged decision by prison doctors simply to close wound rather than reattach severed ear could constitute deliberate indifference).
151 See, e.g., Boswell v. Sherburne County, 849 F.2d 1117, 1123 (8th Cir. 1988) (budgetary restrictions); Jones v. Johnson, 781 F.2d 769, 771 (9th Cir. 1986) (budgetary restrictions); Ancata v. Prison Health Serv., Inc., 769 F.2d 700, 704-05 (11th Cir. 1985) (refusal to provide specialty consultations without a court order).
152 See, e.g., McElligott v. Foley, 182 F.3d 1248, 1257 (11th Cir 1999) (jury could find that treatment of Tylenol, Pepto-bismol, and anti-gas medication for inmate with severe stomach pains, later diagnosed as colon cancer, was
4. Interference with Prescribed Treatment

Prison officials may not interfere with or fail to carry out treatment that a doctor or other medical official has prescribed or ordered for an inmate. Officials also may not substitute their judgment for a medical professional’s prescription or order. Such conduct constitutes deliberate indifference.

d. Causation and Injury

Lastly, to win a medical care claim, an inmate must show that the officials’ deliberate indifference caused, or is likely to cause, an injury. If an inmate claims that he was denied medical care for a serious medical need, he must show how that denial caused an injury, i.e., that it caused pain, made a preexisting condition worse, or caused new medical problems. If the claim is that an official improperly delayed treatment, courts require that an inmate show that the delay caused pain or decreased health.

3. Mental Health Care Claims

The same Eighth Amendment principles apply to mental health care. In other words, “deliberate indifference to an inmate’s serious mental health needs violates the Eighth Amendment” and “[t]reatment of the mental disorders of mentally disturbed inmates is a serious medical need.”

A “severe” mental illness is one “that has caused significant disruption in an inmate’s everyday life and which prevents his functioning in the general population without disturbing or endangering others or himself.”

A prison must be equipped to provide mental health services. Elements of an adequate mental health system include:

“so cursory as to amount to no care at all”); Adams v. Poag, 61 F.3d 1537, 1543-44 (11th Cir. 1995) (medical treatment that is “so grossly incompetent, inadequate, or excessive as to shock the conscience” constitutes deliberate indifference); Hughes v. Joliet Corr. Ctr., 931 F.2d 425, 428 (7th Cir. 1991) (evidence that medical staff treated the plaintiff “not as a patient, but as a nuisance”).

See Estelle v. Gamble, 429 U.S. 97, 105 (1976) (intentionally interfering with treatment once prescribed); see also Lawson v. Dallas County, 286 F.3d 257 (5th Cir. 2002) (failure to follow medical orders for care of paraplegic prisoner); Walker v. Benjamin, 293 F.3d 1030 (7th Cir. 2002) (refusal to provide prescribed pain medication); Koehl v. Dalsheim, 85 F.3d 86, 88 (2nd Cir. 1996) (denial of prescription eyeglasses); Erickson v. Holloway, 77 F.3d 1078, 1080 (8th Cir. 1996) (officer’s refusal of emergency room doctor’s request to admit the prisoner and take x-rays); Boretti v. Wiscomb, 930 F.2d 1150, 1156 (6th Cir. 1991) (nurse’s failure to perform prescribed dressing changes).

See supra note 22, at 86.

Brown v. Zavaras, 63 F.3d 967, 970 (10th Cir. 1995).

Torraco v. Maloney, 923 F.2d 231, 234 (1st Cir. 1991)

Wilkerson v. Faulkner, 715 F.2d 269, 272 (7th Cir. 1983); see also Hoptowit, 682 F.2d at 1253; Bowring v. Godwin, 551 F.2d 44, 47 (4th Cir. 1977).

(a) a systematic program for screening and evaluating inmates in order to identify those who require mental health treatment;
(b) treatment must entail more than segregation and close supervision of the inmate patients;
(c) treatment requires the participation of trained mental health professionals, who must be employed in sufficient numbers to identify and treat in an individualized manner those treatable inmates suffering from serious mental disorders;
(d) accurate, complete, and confidential records of the mental health treatment process must be maintained;
(e) prescription and administration of behavior-altering medications in dangerous amounts, by dangerous methods, or without appropriate supervision and periodic evaluation is an unacceptable method of treatment;
(f) a basic program for the identification, treatment and supervision of inmates with suicidal tendencies is a necessary component of any mental health treatment program.  

Examples of deficiencies in prison mental health care programs that have been found to violate the Eighth Amendment include the following:

- lack of mental health screening on intake;\textsuperscript{161}
- failure to follow up on prisoners with known or suspected mental health disorders;\textsuperscript{162}
- failure to provide adequate numbers of qualified mental health staff;\textsuperscript{163}
- housing mentally ill prisoners in segregation or “supermax” units;\textsuperscript{164}


\textsuperscript{162} Comstock v. McCravy, 273 F.3d 693 (6th Cir. 2001); Sanville v. McCaughtry, 266 F.3d 724, 738 (7th Cir. 2001); Waldrop v. Evans, 871 F.2d 1030, 1036 (11th Cir. 1989); Arnold v. Lewis, 803 F. Supp. 246, 257-58 (D. Ariz. 1992).

\textsuperscript{163} Cabrales v. County of Los Angeles, 864 F.2d 1454, 1461 (9th Cir. 1988), vacated, 490 U.S. 1087 (1989), reinstated, 886 F.2d 235 (9th Cir. 1989); Waldrop v. Evans, 871 F.2d 1030, 1036 (11th Cir. 1989) (non-psychiatrist was not qualified to evaluate significance of prisoner’s suicidal gesture); Wellman v. Faulkner, 715 F.2d 269, 272-73 (7th Cir. 1983) (“a psychiatrist is needed to supervise long term maintenance” on psychotropic medication); see also Ramos v. Lamm, 639 F.2d 559, 577-78 (10th Cir. 1980).


Indeed, the U.S. Supreme Court has acknowledged the devastating effects of prolonged isolation even on “normal” prisoners. A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them. Others became violently insane, and others still committed suicide. Those who withstood the ordeal better were not generally reformed and, in most cases, did not recover sufficient mental activity to be of any subsequent service to the community. In re Medley, 134 U.S. 160, 168 (1890) (describing effects of solitary confinement as practiced in the early days of the United States). See also Chambers v. Florida, 309 U.S. 227, 237-38 (1940) (referring to “solitary confinement” as one of the techniques of
failure to transfer seriously mentally ill prisoners to more appropriate facilities; improper use of restraints; excessive use of force against mentally ill prisoners; lack of training of custody staff in mental health issues; failure to adequately supervise or report a prisoner who has demonstrated suicidal tendencies.

4. Dental Care

Inmates are entitled to necessary dental care. In fact, courts have recognized that dental care is one of the most important medical needs facing inmates. Similar to delays in medical care, delays in dental care can also violate the Eighth Amendment, particularly if the prisoner is suffering pain in the interim. There are, however, standards that apply specifically to dental care. For instance, “care” that consists of pulling teeth that can be saved is constitutionally inadequate and one court has held that some minimal level of prophylactic dental care is constitutionally required.

5. Conclusion

Providing medical care to inmates is a necessary task, though by no means an easy one. To begin with, many inmates come from poorer backgrounds. As a result, as a group they tend to have more medical problems than other Americans. For many inmates, the medical care they receive in prison is the first medical attention they have received in years. Moreover, staffing and budgetary concerns complicate a prison’s ability to provide medical care. Medical care can be very expensive, and few qualified doctors and nurses want to work in jails or prisons. Security issues also arise when violent or dangerous inmates require medical attention. Considering all of these factors, it is obvious why even the best-intentioned prison officials can get frustrated when it comes to taking care of inmates’ medical needs.
Despite the hardships that accompany providing medical care in prisons, lack of medical care can cause even greater problems. Denying prisoners medical care can endanger their lives, cause unnecessary pain, and make it difficult for them to perform basic functions like eating or sleeping. Additionally, if untreated, an inmate’s serious medical condition could endanger the health of other inmates, guards, and possibly the prison population as a whole.

For these reasons, it is important that prisoners be able to utilize the courts to enforce their right to receive needed medical attention. Most inmate medical care lawsuits involve claims against lower-level officials like guards, doctors, and nurses for failing to provide care, providing inadequate care, or interfering with prescribed treatment. These types of cases are resource- and fact-intensive: while they will address the concerns raised by an individual inmate, they will not spur system-wide change.

Supervising officials and municipal governments may also be held liable in civil rights lawsuits. To win a claim against a government agency like the Alaska DOC, an inmate must show the agency established or tolerated a deliberately indifferent policy or custom that resulted in a constitutional violation. Such a lawsuit is typically a class action, and represents the type of litigation that should be pursued in order to effect systemic change in prisoner medical care.

Whether an inmate has a constitutional right to medical care depends on the specifics of the problem the inmate has. It is therefore very important for inmates to describe their problems — to guards, nurses, doctors, and to a court if necessary — in as much detail as possible. Providing prison officials with specific information about a medical condition will increase the likelihood the inmate will receive the necessary care. Inmates should tell officials as much as they can about the following:

- symptoms: the signs or effects of the condition (e.g., vomiting, passing out, fever, blurred vision, dull or throbbing pain), regardless of whether the symptoms can be observed by others;
- how long the condition has lasted;
- how the condition has affected the inmate’s ability to perform basic functions (e.g., sleep, walk, sit, eat, work); and
- any previous medical advice or treatment received for this condition.

Prisoners should also be sure to keep a copy of their request forms or any other documents listing this information. Medical request forms often get “lost or misplaced,” so if it is not possible to keep a copy of the grievance form, it is important for the inmate to write this information down in a journal, together with the names of the people to whom he or she has complained and all relevant dates and times.

In order to show “deliberate indifference” in class action litigation, the plaintiff inmates must produce evidence showing “repeated examples of negligent acts which disclose a pattern of conduct by the prison medical staff,” or that “there are such systemic and gross deficiencies in staffing, facilities, equipment, or procedures that the inmate population is effectively denied access to adequate medical care.” Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir.1980) (internal citation omitted); see also Todaro v. Ward, 565 F.2d 48, 52 (2nd Cir.1977). Plaintiffs can also meet this burden by showing serious deficiencies in staffing, facilities or procedures.

Toone, supra note 22, at 75.

Id.
3. Access to the Courts

The First Amendment guarantees the right to “petition the government for a redress of grievances.”\(^{177}\) Prisoners have a specific constitutional right to file criminal appeals, including post-conviction appeals, habeas corpus petitions, and civil rights lawsuits.\(^{178}\) This is commonly referred to as the “right of access to the courts.”\(^{179}\) To further this right, prison officials must provide the tools prisoners need “to attack their sentences, directly or collaterally[ ] . . . in order to attack their conditions of confinement.”\(^{180}\) However, the Supreme Court has explained this is not a “freestanding right to a law library or legal assistance.”\(^{181}\) Thus, prison officials have some latitude in how they enable prisoners to file criminal petitions and civil rights lawsuits, and officials are not obligated to provide a law library per se.\(^{182}\)

To establish a violation of the right of access to the courts as a result of a sub-par law library, a prisoner must show that he/she has suffered an “actual injury” as a result of the denial:

> [T]he alleged shortcomings in the library or legal assistance program [must have] hindered his efforts to pursue a legal claim…for example, that a complaint he prepared was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison’s legal assistance facilities, he could not have known. Or that he had suffered arguably actionable harm that he wished to bring before the courts, but was so stymied by inadequacies of the law library that he was unable even to file a complaint.\(^{183}\)

“Actual injury” is difficult to prove, and most such claims fail.

A prisoner in Alaska has a right to reasonable access to the courts which cannot be limited unless the state's interests in security and rehabilitation of prisoners cannot be protected by less restrictive means.\(^{184}\) This appears to be a less onerous burden than the actual injury requirement under the U.S. Constitution. In fact, in Mathis v. Sauser, the Alaska Supreme Court declined to impose the “actual injury” requirement on an inmate who sued to challenge a Spring Creek Correctional Center policy that prohibited inmates from having computer printers in their cells.\(^{185}\) The court, in reversing summary judgment against Mathis, held Mathis only needed to show the alleged policy was motivated by intent to curtail access to the courts.\(^ {186}\) Mathis was not alleging that Spring Creek was providing inmates with insufficient tools to ensure meaningful access to the courts; rather, he alleged a claim of intentional administrative

\(^{177}\) U.S. CONST. amend. I.


\(^{179}\) Hudson v. Palmer, 468 U.S. 517, 523 (1984) (“Prisoners have the constitutional right to petition the Government for redress of their grievances, which includes a reasonable right of access to the courts.”).

\(^{180}\) Lewis, 518 U.S. at 355.

\(^{181}\) Id. at 352.

\(^{182}\) Id. at 350-53.

\(^{183}\) Id. at 351.

\(^{184}\) Midgett v. Cook Inlet Pre-Trial Facility, 53 P.3d 1105, 1112 (Alaska 2002).

\(^{185}\) 942 P.2d 1117, 1123 (Alaska 1997).

\(^{186}\) Id.
obstruction aimed at interfering with individual inmates’ presentation of claims to the courts. Additionally, the administration admitted the purpose of the policy was to reduce frivolous litigation and paperwork.

Under Alaska law, prisoners must have access to and use of legal reference materials or legal assistance “in order to gain meaningful access to a court for the purpose of challenging (A) the prisoner’s conviction or sentence; or (B) the conditions of the prisoner’s confinement.” In following this statutory mandate, the Alaska Department of Corrections requires that each institution provide every prisoner with access to a law library, library assistance, and supplies for preparing legal pleadings. Prisoners also must be given timely access to legal materials that the law library does not carry. This policy also states that each law library shall include at a minimum up-to-date constitutional, statutory, and case law materials, applicable court rules, and practice treatises and pleadings in Cleary v. Smith.

---

187 Id.
188 Id. at 1122.
189 AS 33.30.193
190 DOC Policy # 814.02, Law Library, provides:
    Superintendents shall provide prisoners access to typing paper, carbon paper, or a typing service, and at least one properly functioning typewriter for every 100 prisoners based on the maximum capacities of each institution. These shall be provided to indigent prisoners at no charge. If a Superintendent decides to limit a prisoner's access to a typewriter because of a safety or security risk, the Superintendent shall give the prisoner a pen with black ink or pencil and paper to prepare legal pleadings or correspondence.
191 Id.
192 This list, found in DOC Policy # 814.02, Law Library: Attachment A and in the Cleary Final Order, 3AN-81-5274 CIV, Sept. 1990, §V(G)(6), provides an extensive list of materials that the law library at each facility must contain. The list includes the following titles:

- Alaska Attorney Directory, Todd Communications
- Alaska Statues, Michie
- Alaska Reporter, West
- Advance Opinions of the Alaska Supreme Court and Court of Appeals
- Alaska Rules of Court
- Alaska Digest, West
- Alaska Administrative Code, Book Publishing Co.
- Alaska Case Notes, Pleiades Research Group
- Alaska Criminal Code Manual, Alaska Department of Law – Criminal Division
- Black’s Law Dictionary, Black, Henry C. West
- Current volumes of the Decennial Digest beginning with the Ninth Decennial Digest, Part II, regarding constitutional law, prisons and civil rules.
- Criminal Procedure, LaFave, Wayne R. (West 1984) or Wharten’s Criminal Procedure.
- A Layperson’s Legal Dictionary
- Legal Research in a Nutshell, West Publishing Co.
According to DOC policy, the superintendent at each facility will also provide an experienced or trained law librarian or assistant law librarian to help prisoners in using the library.\textsuperscript{193} The law librarian may be a prisoner. The librarian must:

\begin{itemize}
  \item a. know the resources available in the central and institutional law library;
  \item b. be able to perform basic legal research;
  \item c. understand the basic differences between the state and federal judicial systems; and
  \item d. be able to locate and reference the Court Rules of Procedure.
\end{itemize}

- (Applicable) Municipal Code or Ordinances
- Handbook on Criminal Law, LaFave & Scott, West Publishing Co.
- Shepard's Alaska Citations, Shepard's/McGraw-Hill
- How to File Bankruptcy
- Prisoner's Self-Help Litigation Manual, Manville & Borstein, Oceana Publication, Dobbs Ferry, N.Y.

Pleadings in Cleary v. Smith required to be held in each facility law library include:

\begin{itemize}
  \item Plaintiffs’ Complaint and Amended Complaints; Defendants’ Answers;
  \item Order Regarding Class Certification;
  \item Partial Settlement Agreement and Order Regarding Subclasses A and B;
  \item Settlement Agreement and Order Regarding Subclass C;
  \item Each Motion for Contempt (excluding exhibits), Opposition thereto, Reply and written Decision and Order by the Court or Master, a Transcript of Oral Decision by the Court or Master;
  \item The Memorandum Decision, Findings of Fact, Conclusions of Law and Order dated March 1, 1985;
  \item Order Regarding Post Trial Motions;
  \item Orders Regarding Classification Procedures;
  \item Order Regarding Urinalysis Testing; Orders Appointing and Continuing Appointment of Standing Compliance Monitor;
  \item 1998 Draft Status Report of Standing Compliance Monitor;
  \item Memorandum of Compliance Monitor regarding Disputed Issues;
  \item November 1988 Order Regarding Disputed Issues Presented by Compliance Monitor, and Order of Clarification January 31, 1989;
  \item Notices of Appeal and Cross-Appeal; and Final Settlement Agreement and Related Orders.
\end{itemize}

In addition, any facility holding more that 500 prisoners will have the following materials available in the law library: (a) Federal Supplement and Federal Supplement 2d; (b) Federal 2d Reporter and Federal 3d Reporter; (c) United States Supreme Court Reporter; and (d) Shepard's Citations for these reporters all beginning with the year 1960. The Department’s Central Law Library must also contain a manual on immigration law and procedure and applicable volumes of the Code of Federal Regulations (CFR) on immigration.\textsuperscript{193} DOC Policy #814.02, Law Library.
A prisoner may receive assistance from another prisoner (only within the same facility) when using the law library, conducting legal research, or preparing legal pleadings, but a prisoner has no right to assistance from a specific prisoner. Additionally, a prisoner must secure the superintendent or designee’s approval before receiving assistance from any person other than the law librarian. The superintendent may withhold approval only for legitimate reasons that relate to the security or orderly administration of the institution. The superintendent may also limit or deny assistance to or from a prisoner in segregation or maximum custody housing for security reasons, except for services provided by the law librarian.

Prisoners in administrative segregation or classified maximum custody must be provided the same access to the law library as the general population, unless the superintendent makes an individualized determination that the prisoner’s use of the law library presents a substantial threat to the facility’s security or order. If the superintendent makes such a finding, or the prisoner is in punitive segregation, the prisoner is not entitled to physical access to the law library but may have at least four law books in his or her cell at any one time. Staff shall arrange for secure visits between the prisoner and the librarian so that the prisoner may have the assistance of the law librarian in locating, researching, and obtaining legal materials.

A prisoner may obtain legal material that is not available in the institution’s law library from the Department's centralized law library. “Legal materials” include research materials that attorneys commonly rely on to prepare legal pleadings, documents, and briefs (excluding computers or computer assisted research). The Department will not honor requests for (1) an entire issue of a law review (prisoners may request particular law review articles) or (2) more than ten cases at one time (after the first ten are delivered, a prisoner may request up to ten additional cases).

4. Retaliation by Prison Officials

The First Amendment forbids jail and prison officials from retaliating against inmates who report complaints, file grievances, or file lawsuits. This is important because prison officials can retaliate against inmates in a number of different ways. Some are very subtle and, without knowledge of a prisoner’s prior complaints, would not seem like retaliation. These tactics include (1) refusing to provide hygiene materials; (2) reading or interfering with a prisoner’s legal papers; (3) placing an inmate in segregated or poor living conditions; (4) transferring an inmate to a different cell or prison; and (5) threatening or assaulting an inmate.

Toone, supra note 22, at 17 (citing Allah v. Seiverling, 229 F.3d 220, 224 (3rd Cir. 2000)); see also Crawford-El v. Britton, 523 U.S. 574, 588 n.10 (1998) (“[T]he reason why…retaliation offends the Constitution is that it threatens to inhibit exercise of the protected right”).

Toone, supra note 22, at 17.
5. Civil Liberties

Civil liberties are rights shared by all people in the United States that limit the government’s ability to interfere with what individuals say, think, and do. Constitutionally-protected civil liberties do extend to prisoners, but prison officials may limit civil liberties to advance such prison needs as maintaining security or promoting rehabilitation.

Restrictions on civil liberties and First Amendment rights are governed by the test set forth by the Supreme Court in Turner v. Safley. The Turner test requires that any restriction on civil liberties must be “reasonably related to legitimate penological interests.” Four factors are examined when the test is applied:

1. whether there is a “valid, rational connection” between the restriction and the government’s justification for it;
2. whether there are alternative means of exercising the civil liberty that remain open to inmates;
3. the effect that accommodating the asserted civil liberty will have on prison operations, the guards, and other inmates; and
4. whether there are ready alternatives to the restriction.

The Turner standard is deferential but “not toothless.” Prison officials may not “pile[con]jecture upon conjecture” to justify their policies; lower courts, though, have a tendency to apply the test in a way that favors prison officials. Therefore, the following points should be emphasized in any prisoner lawsuit challenging a limitation on civil liberties:

1. “Reasonableness” under Turner requires the court to balance the interests of the officials and the constitutional rights of inmates.
2. While it is appropriate for courts to defer to the well-supported judgments of jail and prison officials, “deference does not mean abdication”—a court should not defer to

---

201 Id. (citing Thaddeus-X v. Blatter, 175 F.3d 378, 386 (6th Cir. 1999) (en banc); Austin v. Terhune, 367 F.3d 1167, 1170-71 (9th Cir. 2004) (plaintiff sufficiently raised retaliation claim stemming from the First Amendment-protected grievance he had filed against the defendant); Hines v. Gomez, 108 F.3d 265, 269 (9th Cir. 1997) (alleged retaliatory punishment of 10-day confinement in segregation unit and loss of television privileges; “prisoners may still base retaliatory claims on harms that would not raise due process concerns”); Pratt v. Rowland, 65 F.3d 802, 806-07 (9th Cir. 1995) (“To succeed on his retaliation claim, [the inmate] need not establish an independent constitutional interest in either assignment to a given prison or placement in a single cell . . . ”)).
202 Toone, supra note 22, at 18.
203 Id. at 89-91.
204 Id. at 89-91.
205 Id. at 89-91.
206 Reed v. Faulkner, 842 F.2d 960, 963-64 (7th Cir. 1988); see also Miller-El v. Cockrell, 537 U.S. 322, 340 (2003) (“deference does not imply abandonment or abdication of judicial review.”); Armstrong v. Davis, 275 F.3d 849, 874 (9th Cir. 2001) (prison officials cannot avoid scrutiny under Turner “by reflexive, rote assertions”).
207 Toone, supra note 22, at 18.
the officials’ judgment in the absence of meaningful evidence in support of upholding the prison policies in question.

3. Officials must support their policies with facts, not conjecture or conclusory assertions.209

The remainder of Part I enumerates and discusses specific civil liberties as they apply to prisoners.

a. Freedom of Religion

All sincerely held religious beliefs are protected by the First Amendment, which prohibits the government from interfering with the “free exercise of religion.”210 The test is not whether the belief comprises a “central tenet” of the prisoner’s faith, but rather, whether the prisoner sincerely believes the practice in question to be a part of his faith.211 Accordingly, prison officials must abide by these guidelines, and inmates must be given a reasonable opportunity to exercise their religious beliefs without fear of penalty or retaliation.212 Alaska adheres to this constitutional requirement and provides prisoners with “access to clergymen, religious advisors, publications and related services which allow prisoners to adhere to legitimate religious practices.”213

Prison officials do, however, have wide discretion to limit religious freedom, so long as the limitations are “reasonably related to legitimate penological interests,”214 and do not favor certain religions over others.215 Under the Turner standard, the following restrictions on religious exercise have been found to violate the First Amendment: restricting an inmate’s ability to attend religious services;216 requiring an inmate to act in violation of the Sabbath;217 and failing to accommodate a religion’s dietary rules.218 Under Turner, challenges to grooming

209 Id. at 19 (citing Reed v. Faulkner, 842 F.2d 960, 962 (7th Cir. 1988) for point (1); Walker v. Sumner, 917 F.2d 382, 385 (9th Cir. 1990) for point (2); and Shimer v. Washington, 100 F.3d 506, 509-10 (7th Cir. 1996) for point (3)).
210 U.S. CONST. amend. I.
211 Shakur v. Schriro, 514 F.3d 878, 885 (9th Cir. 2008) (citing Employment Div., Dep’t of Human Res. v. Smith, 494 U.S. 872 (1990)).
213 DOC Policy # 808.05(A)(9), Environmental and Programmatic Rights of Prisoners.
214 Toone, supra note 22, at 19 (quoting O’Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987)).
215 Cruz, 405 U.S. at 322.
216 Mayweathers v. Newland, 258 F.3d 930, 938 (9th Cir. 2001) (upholding injunction against disciplining Muslim prisoners for missing work to attend Friday services); Youngbear v. Thalacker, 174 F. Supp. 2d 902 (N.D. Iowa 2001) (one year delay in providing sweat lodge for Native American religious activities violates First Amendment).
218 Shakur, 514 F.3d at 878 (additional cost of Kosher meal not adequate reason to deny meal to Muslim man who suffered from digestive problems as a result of the vegetarian diet with which he was being provided); Lomholt v. Holder, 287 F.3d 683 (8th Cir. 2002) (punishing plaintiff for religious fasting); Beerheide v. Suthers, 286 F.3d 1179, 1192 (10th Cir. 2002) (requiring co-pay from prisoners requesting Kosher meals); Makin v. Colorado Dep’t of Corr., 183 F.3d 1205 (10th Cir. 1999) (failure to accommodate Muslim prisoner’s fasting requirements during Ramadan); Ashelman v. Wawrzaszek, 111 F.3d 674, 478 (9th Cir. 1997) (failure to provide Kosher meals); see also Levitan v. Ashcroft, 281 F.3d 1313 (D.C. Cir. 2002) (reversing summary judgment for defendants in Catholic prisoners’ challenge to denial of communion wine).
requirements and bans on religious objects have generally been unsuccessful. But, such rules may be vulnerable if they are not enforced equally against all religions.\(^{219}\)

There are also two exceptions when applying Turner:

1. The Religious Freedom Restoration Act (RFRA),\(^{220}\) declared unconstitutional as to the states, still applies to the claims of federal prisoners and those imprisoned in the District of Columbia.\(^{221}\)

2. As to the states, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA),\(^{222}\) re-establishes the compelling state interest/least restrictive means test that existed under RFRA for the religious claims of prisoners.\(^{223}\)

Claims that may not be successful under the Eighth Amendment may be successful under RLUIPA.\(^{224}\) Under this Act, the state must present a compelling governmental interest for the restriction, rather than the legitimate penological interest dictated by Turner, and that interest must be furthered by the least restrictive means.\(^{225}\) The Supreme Court has not read RLUIPA to elevate accommodation of religion observances over an institution’s need to maintain order and safety, which is clearly a compelling interest.\(^{226}\) However, prison officials still must show that they “actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice.”\(^{227}\)

In Warsoldier v. Woodford, the Ninth Circuit found that the department of corrections grooming policy which required that all male prisoners maintain their hair no longer than three inches violated a Native American prisoner’s free exercise rights under RLUIPA.\(^{228}\) The prisoner held

\(^{219}\) Sasnett v. Litscher, 197 F.3d 290, 292 (7th Cir. 1999) (First Amendment violated where prison banned the wearing of Protestant crosses but allowed Catholic rosaries); Swift v. Lewis, 901 F.2d 730, 731-32 (9th Cir. 1990) (where prison permitted long hair and beards for some religions but not others, it must present evidence justifying this unequal treatment).


\(^{221}\) Gartrell v. Ashcroft, 191 F. Supp. 2d 23 (D.D.C. 2002) (prison grooming policies requiring Muslim and Rastafarian prisoners to shave their beards and cut their hair subject to scrutiny under RFRA).


\(^{224}\) See Henderson v. Terhune, 379 F.3d 709 (9th Cir. 2004)

In pertinent part, RLUIPA reads:

(a) General rule. No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 2 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997), even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—

1. is in furtherance of a compelling governmental interest; and

2. is the least restrictive means of furthering that compelling governmental interest.


\(^{226}\) Cutter, 544 U.S. at 722-23.

\(^{227}\) Greene v. Solano County Jail, 513 F.3d 982, 989 (9th Cir. 2008) (citation omitted).

\(^{228}\) Warsoldier v. Woodford, 418 F.3d 989, 991 (9th Cir. 2005)
a sincere religious belief that he could cut his hair only upon the death of a loved one.\textsuperscript{229} He was heavily sanctioned for refusing to cut his hair.\textsuperscript{230} Though the department argued the policy advanced interests in safety, easy identification of inmates and general health, the court found none of these compelling, nor was it convinced the department’s policy was the least restrictive one possible, especially given the prisoner’s confinement in a minimum security facility.\textsuperscript{231}

b. **Right to Peaceably Assemble and to Associate with Others for the Advancement of Beliefs and Ideas**

The First Amendment also provides the right to peaceably assemble and to associate with others for the advancement of beliefs and ideas.\textsuperscript{232} Freedom of association is “among the rights least compatible with incarceration,” and thus, “some curtailment of that freedom must be expected in the prison context.”\textsuperscript{233} Like the right to religious freedom under the First Amendment, this right is subject to the discretion of prison officials.\textsuperscript{234} Therefore, prison officials may, in accordance with Turner, ban any group activity they reasonably believe poses a threat to security. The Supreme Court has specifically ruled that a prison may prohibit inmates from taking part in a union organized for the purpose of criticizing prison policies.\textsuperscript{235}

c. **Family relationships**

Prisoners are without the freedoms “to be with family and friends and to form the other enduring attachments of normal life.”\textsuperscript{236} However, inmates have a constitutional right to get married, so limitations on that right must pass the Turner test. Alaska prisoners may be permitted to marry while incarcerated.\textsuperscript{237} An inmate must submit an application, and permission shall be granted on an individual basis.\textsuperscript{238} The DOC will consider the nature and requirements of incarceration and the institutional environment involved when reaching a decision.\textsuperscript{239}

Inmates do not have a constitutional right to conjugal visits.\textsuperscript{240} Women do not have a constitutional right to keep their children with them in prison.\textsuperscript{241} Pregnant inmates do have a right to proper prenatal care and medical assistance, and they have a right to an abortion early in their pregnancy.\textsuperscript{242}

Divorce, child custody, parental rights, spousal support, and inheritance are governed by applicable Alaska state laws.

\textsuperscript{229} Id. at 992.  
\textsuperscript{230} Id. at 996.  
\textsuperscript{231} Id. at 997, 999.  
\textsuperscript{232} U.S. CONST. amend. I.  
\textsuperscript{234} Toone, supra note 22, at 19.  
\textsuperscript{236} Morrissey v. Brewer, 408 U.S. 471, 482 (1972).  
\textsuperscript{237} DOC Policy # 808.10, Prisoner Marriages.  
\textsuperscript{238} Id.  
\textsuperscript{239} Id.  
\textsuperscript{241} See infra Part III.A.  
\textsuperscript{242} Id.
d. Searches and Seizures

The Fourth Amendment to the U.S. Constitution prohibits unreasonable searches and seizures. But, this amendment only applies where a person has a “reasonable expectation of privacy,” and inmates do not have a reasonable expectation of privacy in their living quarters. Officials may therefore conduct cell searches and “shakedowns” as they see fit. Such searches only violate the Constitution if they amount to “calculated harassment unrelated to prison needs.”

Prisoners have greater protections when it comes to bodily searches. Strip searches and body-cavity searches violate the Constitution when prison officials unreasonably expose an inmate’s genitals to people of the opposite sex. A body search may also be unconstitutional if the pain and humiliation caused by the search outweigh any penological need for it.

e. Communication with the Outside World

The First Amendment prohibits the government from “abridging the freedom of speech or of the press.” However, jail and prison officials may legitimately infringe upon the right of free speech by limiting an inmate’s ability to communicate with the outside world.

1. Mail

Alaska correctional institutions may not place limits on the volume of a prisoner’s incoming or outgoing mail, except that limits may be placed on mail used by a prisoner to conduct business activities. Restrictions on prisoners’ mail are governed by the Turner standard. Prison officials may read and censor non-privileged incoming mail as long as they are following policies or regulations that are reasonably related to legitimate penological interests. Such interests include inspecting it for contraband, censoring it to maintain security or discipline, preventing criminal activity, or promoting the goal of rehabilitation (e.g., denying violent pornography to sex offenders). Mail sent between inmates is also subject to the Turner standard. The Supreme Court recently held prisoners do not have a First Amendment right to provide legal assistance that enhances the protections otherwise available under Turner; in other words, correspondence between inmates which relates to a legal interest is not afforded more protection than correspondence regarding non-legal interests.

---

243 U.S. CONST. amend. IV.
245 Id.
246 Toone, supra note 22, at 21.
247 Id. (citing Lee v. Downs, 641 F.2d 1117, 1119 (4th Cir 1981); Cornwell v. Dahlberg, 963 F.2d 912, 916 (6th Cir. 1992); and Hayes v. Marriott, 70 F.3d 1144, 1146 (10th Cir. 1995)).
248 Id. (citing Bell v. Wolfish, 441 U.S. 520, 559 (1979); Tribble v. Gardner, 860 F.2d 321, 325-27 (9th Cir. 1988)).
249 U.S. CONST. amend. I.
250 DOC Policy # 810.03, Prisoner Mail, Publications and Packages.
252 Toone, supra note 22, at 22.
253 Shaw v. Murphy, 532 U.S. 223, 228 (2001).
Prison officials may not read privileged mail (mail to and from the courts, attorneys or paralegals), but they may open such mail, in the presence of the inmate, to see whether it contains contraband. All privileged mail must be clearly marked so prison officials will know not to read it or open it outside the inmate’s presence. Additionally, prisons may not ban mail simply because it contains material downloaded from the internet.

Restrictions on prisoners’ outgoing correspondence must meet a more demanding standard. Limitations must be “no greater than is necessary or essential” to protect an “important or substantial” government interest (e.g., to control mail that discusses escape plans, threats of blackmail, or other criminal activity).

Officials may not censor either incoming or outgoing mail because it is critical of the courts, jail or prison policies, or of the officials themselves, because it contains profane, disrespectful or inaccurate statements, or because it expresses “inflammatory political, racial, religious, or other views.” For example, in Barrett v. Belleque, the Ninth Circuit determined the plaintiff “unequivocally pleaded facts alleging that the prison censored his outgoing mail and punished him for its contents” in violation of his First Amendment rights. The plaintiff’s letters contained “vulgar and offensive racist language” aimed at prison officials, who reacted by punishing the plaintiff and taking away his accrued good time.

### 2. Publications

Restrictions on prisoners’ access to books, publications, and other reading material are governed by Turner, with several exceptions:

- Publications may be censored, subject to certain procedural safeguards, if they contain material harmful to prison security.
- The Ninth Circuit has upheld a ban on sexually explicit publications on the ground that they encourage sexual harassment of female staff.
- Both the sender and the intended recipient must receive notice of the censorship and an opportunity to appeal.

---

254 Wolf v. McDonnell, 418 U.S. 539, 575-77 (1974); DOC Policy # 810.03.
255 Clement v. California, Dep’t of Corr., 364 F.3d 1148 (9th Cir. 2004)
257 Toone, supra note 22, at 22 (citing Thornburgh, 490 U.S. at 416 n.14, and Procunier, 416 U.S. at 413, 415.)
258 Barrett v. Belleque, 544 F.3d 1060, 1062 (9th Cir. 2008).
259 Id. at 1061.
260 This rule was recently affirmed in Beard v. Banks, 548 U.S. 521 (2006), in which a plurality of Supreme Court justices found a Pennsylvania prison policy that denied publications and photographs to a group of “specially dangerous and recalcitrant inmates” fell within the standard articulated in Turner and thus did not violate of the inmates’ First Amendment rights. 548 U.S. at 524-25.
261 Thornburgh, 490 U.S. at 414-19.
262 Mauro v. Arpaio, 188 F.3d 1054 (9th Cir. 1999).
263 Montcalm Publ’g Corp. v. Beck, 80 F.3d 105, 109-10 (4th Cir. 1996); see also Krug v. Lutz, 329 F.3d 692, 697-98 (9th Cir. 2003) (censorship decision must be reviewed by someone other than the original decision maker).
• “Publisher only” rules, requiring that books and other reading materials be sent directly from the publisher or an approved vendor, have generally been upheld. Other restrictions on prisoners’ ability to receive books and publications have been struck down.264

3. Press/Media communications

Prison officials may not prevent communications with the press or media because of the subject matter of what inmates want to say. Officials may decide how those communications will take place, however.265 For instance, rather than allowing an in-person interview with a reporter, officials may require that the inmate write a letter.266 Also, prisoners may not be punished for posting material on the internet with the assistance of non-incarcerated third parties.267

4. Telephones

The Supreme Court has not ruled on whether inmates have a constitutional right to use the telephone. Some lower courts have ruled arrestees and pretrial detainees have a right to call their attorneys,268 and Alaska specifically provides the right to telephone or otherwise communicate with an attorney and any relative or friend immediately after arrest.269 In addition, an officer may be criminally liable in Alaska for refusing or neglecting to allow the prisoner to use the telephone after arrest.270

However, officials may limit a prisoner’s right to call her friends or family because of security reasons. Alaska law provides that each prisoner, except those in punitive segregation, shall have reasonable access to a telephone.271 Even prisoners in punitive segregation have the right to call their attorney, the Courts, or the Ombudsman’s Office, and in rare cases, the Superintendent may approve other calls “for compelling reasons.”272

5. Visitation

Inmates have a constitutional right to confidential contact visits with attorneys and their paralegals and law students.273 In Alaska, attorneys and legal representatives may visit a prisoner at the institution between 8 a.m. and 10 p.m. daily or at any time during the initial 24

264 See, e.g., Prison Legal News v. Lehman, 397 F.3d 692 (9th Cir. 2005) (finding a ban on non-subscription bulk mail and catalogues had no rational relation to a legitimate penological interest and thus was unconstitutional); Sorrels v. McKee, 290 F.3d 965 (9th Cir. 2002) (prison may not ban gift publications for which prisoner has not paid); Morrison v. Hall, 261 F.3d 896 (9th Cir. 2001) (prison may not ban receipt of subscription publications sent by bulk, third, or fourth class mail); Askher v. California, Dep’t of Corr., 224 F. Supp. 2d 1253 (N.D. Cal. 2002) (prison may not require that special shipping label be affixed to books ordered from approved vendors).
265 Pell v. Procunier, 417 US 817, 822-28 (1974); DOC Policy # 808.02, Prisoner/Media Contact.
266 Pell, 417 U.S. at 822.
268 Toone, supra note 22, at 23 (citing Tucker v. Randall, 948 F.2d 388, 390-91 (7th Cir. 1991)).
269 AS 12.25.150(b) (2009).
270 AS 12.25.150(c) (2009).
271 AS 33.30.231(a) (2009); see also DOC Policy # 810.01, Prisoner Access to Telephone.
272 DOC Policy # 810.01.
hours of a client’s incarceration, except during meal times or while the institution conducts a population count. Each institution will also provide private and secure attorney-client interview space with adequate seating and a writing table or desk.

The Supreme Court has not directly addressed whether inmates have a right to visit with family and friends, but it has said that inmates do not have a right to “unfettered visitation” or contact visits. The Alaska Supreme Court has not gone so far as to say that prisoners have an unabridged right to visitation. The court acknowledged that visitation is important to rehabilitation and that visitation privileges are a component of the constitutional right to rehabilitation. The court did not, however, define the required scope of visitation or the permissible limits on its exercise, though it has suggested that a pattern of denying visitation could constitute a violation of the right to rehabilitation. The Alaska DOC adopts this view of visitation and encourages visitation because “strong family and community ties increase the likelihood of a prisoner’s success after release.”

The U.S. Supreme Court has taken a much harder-line stance on visitation than the Alaska courts. The Court has not gone so far as to hold that prisoners have no rights of association, but it has upheld severe limitations on visits by children and ex-prisoners. The Court has also allowed an indefinite denial of all non-legal-related visiting for prisoners convicted of infractions relating to substance abuse.

6. Equal Protection

The Fourteenth Amendment prohibits the government from intentionally denying any person, whether incarcerated or not, “the equal protection of the laws.” Although this amendment refers to the states, the Equal Protection Clause applies against the federal government through the Fifth Amendment. As a general rule, the Equal Protection Clause requires government officials to treat “similarly situated” people alike. The intent to discriminate is a necessary component of any equal protection claim; thus, merely showing a “disparate impact” resulting from the discrimination is not enough.

274 DOC Policy # 808.01; 22 AAC 05.545(a).
275 DOC Policy # 808.01.
279 Id.; Adkins v. Stansel, 204 P.3d 1031, 1035 (Alaska 2009).
280 DOC Policy # 810.02, Visitation.
281 Id.
283 Id. at 137; see also Whitmire v. Arizona, 298 F.3d 1134 (9th Cir. 2002) (reversing dismissal of equal protection challenge to prison’s ban on same-sex kissing and hugging between prisoners and their visitors).
285 Toone, supra note 22, at 23.
Generally, government officials need only a “rational” reason to treat people differently. For instance, one is unlikely to succeed on an equal protection claim that challenges the differences in the way prison officials treat inmates in segregation and inmates in the general population, or the different ways in which inmates and non-inmates are treated, because there are rational reasons to treat these groups differently (e.g., security, punishment).287

A stronger, more difficult standard applies to racial discrimination or discrimination based on national origin.288 Such discrimination violates the Constitution unless it is necessary to serve a “compelling state interest by the least restrictive means available.” The Supreme Court has held that prison officials may not segregate inmates based on race unless it is necessary to maintain security and discipline.289

To meet the standard applied to gender discrimination, government officials must show that the discrimination “serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.”290 When male and female inmates in the same facility are treated differently, a court will require officials to meet this standard and show an important need for the discrimination. However, when inmates challenge differences at separate men’s and women’s facilities, courts will often reject the challenge on the ground that the groups are not similarly situated.291

 Discrimination based on sexual orientation receives only rational-basis review under the Equal Protection Clause. However, the Supreme Court has indicated that the government may not discriminate based solely on hostility to a person’s sexual orientation.292

7. Due Process

The Due Process Clause prohibits the government from depriving a person of liberty or property “without due process of law.”293 Inmates have limited rights when it comes to deprivations of their liberty and property.294

287 Toone, supra note 22, at 24.
288 Discrimination violates the prison employee code of ethical conduct. DOC Policy # 202.01a, Code of Ethical Professional Conduct. The DOC also states that “freedom from discrimination is a basic right extended to all prisoners.” DOC Policy # 808.05, Environmental and Programmatic Rights. Programs, activities, services or assignments shall not be denied or granted based on discrimination. Id. Discrimination is defined as: exercising a difference in action or process based upon a person’s race, religion, color, sex, age or national origin when such behavior may cause that person loss. Id.
291 Toone, supra note 22, at 24 (citing Keenan v. Smith, 100 F.3d 644, 648-50 (8th Cir. 1996) and Klinge v. Dep’t of Corr., 31 F.3d 727, 733 (8th Cir. 1994)).
292 Romer v. Evans, 517 US 630, 634-35 (1996); see also In re Levenson, 587 F.3d 925 (9th Cir. 2009) (finding no rational basis under Fifth Amendment for “denying [plaintiff]’s request that federal benefits be extended to his same-sex spouse”).
293 The Due Process Clause of the Fifth Amendment applies to federal inmates, while the Due Process Clause of the Fourteenth Amendment applies to state and local inmates.
294 Toone, supra note 22, at 25.
a. Loss of Property

Inmates have circumscribed rights regarding deprivations of their property. Generally, inmates must rely on state law remedies or administrative remedies, such as grievances and appeals, when property is lost. Federal civil rights law is often not the appropriate vehicle for challenging loss of property. For instance, if prison officials intentionally take or destroy an inmate’s property, a federal civil rights claim can only be filed if the inmate does not have a “meaningful post-deprivation remedy,” such as the opportunity to file a state-law tort action. If property is lost as a result of an official’s negligence, there is no due process claim at all, regardless of whether any meaningful remedies exist.

In order to maintain security, sanitation, fire safety, and good order, jail and prison officials have wide discretion over the types and amounts of property inmates can keep in their cells. Officials can even place reasonable limitations on the amount of legal papers and books an inmate can possess.

b. Disciplinary Sanctions, Segregation, and Other Losses of Liberty

“The touchstone of due process is protection of the individual against arbitrary action of the government.” The purpose of due process is not to keep the government from acting but to keep it from acting in an arbitrary and unfair manner. When an inmate has a liberty interest that is protected by the Due Process Clause, prison officials must provide “fair treatment.” In other words, they must comply with their own mandatory regulations, provide notice of a proposed deprivation of the liberty interest, and provide a reasonable opportunity for inmates to present their views on the matter.

In order to bring a due process claim, an inmate must have a protected liberty interest. Liberty interests arise from two sources. First, an inmate’s liberty interest may arise directly from the Due Process Clause “of its own course.” Some deprivations of liberty are “so severe in kind or degree (or so removed from the original terms of confinement) that they require due process regardless of state law.” For instance, the Supreme Court has held inmates have a liberty interest in avoiding unwanted administration of psychotropic drugs and in avoiding an involuntary transfer to a mental hospital. However, the existence of a liberty interest does not preclude prison officials from acting contrary to that interest; rather, if an official takes such an action, the official must treat the inmate in a fair, non-arbitrary manner.

295 Id.
298 Toone, supra note 22, at 25.
299 Id.
301 Id., supra note 22, at 25.
302 Id.
303 Id.
305 Id. at 497 (Breyer, J. dissenting).
Second, a liberty interest may also arise from a statute, rule, or regulation. It is important to note that under Sandin v. Conner, prison regulations do not give rise to protected due process liberty interests unless they place “atypical and significant hardships” on a prisoner. For example, take a prison regulation written using mandatory language (e.g., shall, will, must) that provides for certain procedures before inmates are placed in administrative or punitive segregation. An inmate would have a liberty interest only if the segregated confinement “imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.”

While there is no universal definition for “atypical and significant hardship,” it is clear that it is something significantly worse than “the most restrictive conditions that prison officials, exercising their administrative authority to ensure institutional safety and good order, routinely impose on inmates serving similar sentences.” Under this standard, if officials at a prison routinely place inmates in an administrative or punitive segregation unit for various reasons, an inmate must be subjected to conditions significantly worse than the conditions in that unit to have a liberty interest.

U.S. circuit courts are split on how to interpret “the ordinary incidents of prison life” standard articulated in Sandin. The Fourth and Ninth Circuits look at the conditions in the general prison population. The Second and Third Circuits look at typical conditions of administrative segregation. The Seventh Circuit looks at the conditions of non-disciplinary segregation in a state’s most restrictive prison. Alaska state courts have not addressed this issue, though the Alaska Supreme Court has concluded “temporarily suspending contact visitation, while continuing to allow secure visitation, is not so atypical and significant a hardship beyond ordinary prison life that it implicates a protected liberty interest.”

In Sandin, the Supreme Court held that, because the placement of a Hawaiian inmate in disciplinary segregation for 30 days did not amount to an “atypical and significant hardship,” he did not have a liberty interest under the Due Process Clause. Post-Sandin, “the right to litigate disciplinary confinements has become vanishingly small.” But, some courts have held that lengthy administrative or punitive segregation (i.e., six months or longer) can give rise to a liberty interest. Also, placing an inmate with a particular disability in administrative

308 This is sometimes called a “state-created liberty interest,” but such a liberty interest may arise under federal law as well.
309 515 U.S. at 484.
311 Sandin, 515 U.S. at 483-84 (emphais added).
312 Toone, supra note 22, at 26 (citing Hatch v. District of Columbia, 184 F.3d 846, 847 (D.C. Cir. 1999)).
313 Toone, supra note 22, at 26-27.
314 Beverati v. Smith, 120 F.3d 500, 504 (4th Cir. 1997); Keenan v. Hall, 83 F.3d 1083, 1089 (9th Cir. 1996).
315 Griffin v. Vaughn, 112 F.3d 703, 708 (3rd Cir. 1997); Brooks v. DiFasi, 112 F.3d 46, 49 (2nd Cir. 1997).
316 Wagner v. Hanks, 128 F.3d 1173, 1175 (7th Cir. 1997).
319 Wagner, 128 F.3d at 1175.
320 Colon v. Howard, 215 F.3d 227, 231 (2nd Cir. 2000); Williams v. Fountain, 77 F.3d 372, 374 n.3 (11th Cir. 1996) (full year in solitary confinement was “atypical and significant hardship” entitling inmate to due process).
segregation may give rise to an atypical and significant hardship in relation to other inmates in administrative segregation.321 Other forms of restraint, such as strapping an inmate down in four-point restraints, may also give rise to a liberty interest.322 However, transferring an inmate from one prison to another, even to a prison with more restrictive conditions of confinement, usually does not.323 In Alaska, because prisoners have a constitutional right to rehabilitation, an inmate does have an enforceable liberty interest when transfer is considered.324

It is important to note that despite Alaskan prisoners’ constitutional right to rehabilitation, their liberty interests regarding transfer are somewhat limited. Decisions of prison authorities relating to classification of prisoners are completely administrative matters.325 Therefore, an inmate has no due process rights beyond the expectation of fair and impartial allocation of the resources of the prison system to its charges.326

8. Right to Be Free from Excessive Force and Other Abuse by Prison Officials

The U.S. Constitution protects all Americans from the use of excessive force by government officials, but different provisions of the Constitution apply depending on when the use of excessive force occurs.

a. Excessive Force against Pretrial Detainees

The Due Process Clauses of the Fifth and Fourteenth Amendments prohibit excessive force against pretrial detainees, people who are held in jail awaiting trial on criminal charges.327 Different standards for the use of force against pretrial detainees apply in different circuits. The Second, Fourth, Fifth, Tenth, and Eleventh Circuits have adopted the malicious and sadistic standard.328 This is the same standard that applies to convicted inmates in all circuits, as described in Part I.B.8.b below.329 The Eighth and Ninth Circuits employ the objectively unreasonable standard for the use of force against pretrial detainees, the same standard used in

For Alaska prisoners in segregation, the classification committee shall hold review hearings within 30 days after the first hearing and every 30 days thereafter for as long as the prisoner remains in segregation. At this hearing, the institution must demonstrate that conditions still justify segregating the prisoner.

321 Serrano v. Francis, 345 F.3d 1071, 1078-79 (9th Cir. 2003) (wheelchair-bound inmate in non-wheelchair accessible administrative segregation suffered atypical and significant hardship in having to drag self around).
322 Williams v. Benjamin, 77 F.3d 756, 769 (4th Cir. 1996).
325 Rust, 582 P.2d at 134.
326 Id.
327 The Fifth Amendment applies to federal pretrial detainees, while the Fourteenth Amendment pertains to state and local detainees.
328 See Murray v. Johnson, No. 05-5338-pr, 2010 U.S. App. LEXIS 3499, at *3-5 (2nd Cir. Feb. 22, 2010); Fennell v. Gilstrap, 559 F.3d 1212,1217 (11th Cir. 2009) (force applied maliciously and sadistically to cause harm does “shock the conscience” and is excessive under the Fourteenth Amendment); Sawyer v. Green, 316 Fed. App’x 715, 717 (10th Cir. 2008); Iko v. Shreve, 535 F.3d 225, 239 (4th Cir. 2008); Valencia v. Wiggins, 981 F.2d 1440, 1446 (5th Cir. 1993).
329 See Wilkins v. Gaddy, 130 S.Ct. 1175 (9th Cir. 2003).
police brutality cases.\textsuperscript{330} The remaining circuits and the Alaska state courts have not yet enunciated the standard they employ.

b. Excessive Force against Convicted Inmates

The Eighth Amendment, not the Due Process Clause, applies to excessive force claims filed by convicted inmates. Prison staff violate the Eighth Amendment when they “maliciously and sadistically use force to cause harm,” even if the prisoner does not suffer serious injury.\textsuperscript{331} Prison officials are, however, permitted to use force “in a good-faith effort to maintain and restore discipline.”\textsuperscript{332} “Malicious and sadistic” means evil, mean, vicious, or wanting to hurt another. If an inmate fails to show that the official who used force against him acted maliciously and sadistically, the claim will not succeed.

To show malicious and sadistic intent, inmates can offer the words and actions of prison officials. An official may reveal malicious and sadistic intent by saying certain things while using force. For example, the official might taunt the inmate or say something to indicate that he is enjoying what he is doing\textsuperscript{333} or might say something that reveals an improper reason for the force (e.g., “This will teach you to file a grievance against me!”).\textsuperscript{334} But prison officials rarely make such revealing statements, at least in front of the inmates against whom they are using force. Therefore, an inmate must point to an official’s actions as evidence of what he or she was thinking.\textsuperscript{335}

An inmate must prove that the force used was not justified by any legitimate law enforcement or prison management need, or was completely out of proportion to that need.\textsuperscript{336} These factors are used to determine whether an official used excessive force:

1. the need for force;
2. the relationship between the need for force and the amount of force used;
3. the extent of the injury suffered by the inmate;
4. the extent of the threat to the safety of staff and inmates; and
5. any efforts made to temper the severity of a forceful response.\textsuperscript{337}

\textsuperscript{330} Lolli v. County of Orange, 351 F.3d 410, 415 (9th Cir. 2003); Andrews v. Neer, 253 F.3d 1052, 1060 (8th Cir. 2001) (citation omitted).
\textsuperscript{331} Wilkins, 130 S.Ct. at 1179 (quoting Hudson v. McMillan, 503 U.S. 1, 9 (1992)); see also Treats v. Morgan, 308 F.3d 868, 872 (8th Cir. 2002) (rejecting the legality of using of pepper spray on prisoner who “had not jeopardized any person’s safety or threatened prison security”).
\textsuperscript{332} Hudson, 503 U.S. at 7.
\textsuperscript{333} See, e.g., Estate of Davis v. Delo, 115 F.3d 1388, 1392, 1394 (8th Cir. 1997)
\textsuperscript{334} Toone, supra note 22, at 31.
\textsuperscript{335} Valencia v. Wiggins, 981 F.2d 1440, 1446 (5th Cir. 1993).
\textsuperscript{336} Whitley v. Albers, 475 U.S. 312, 320-21 (1986).
\textsuperscript{337} Although the Supreme Court adopted several of these factors in Whitley (See 475 U.S. at 321), different circuits have enunciated the factors in slightly different ways. See, e.g., Santiago v. Wells, 599 F.3d 749, 757 (7th Cir. 2010) (relying on all five factors in its determination of excessive force); Cardenas v. Lewis, 66 F. App’x 86, 89 (9th Cir. 2003) (enumerating all five factors with the exclusion of “any efforts made to temper the severity of a forceful response”). Also, since the Supreme Court’s decision in Wilkins, the factor regarding the extent of the plaintiff’s injury must be interpreted according to the Court’s ruling.
The following are examples where courts have ruled that prison officials used excessive force:

- After a shackled inmate went over the time limit on a phone call, officials beat, choked, threatened and slammed him against a wall.\textsuperscript{338}
- During a cell extraction, guards administered a severe beating to an inmate who had been incapacitated by the shock from an electric shield.\textsuperscript{339}
- After an inmate disrupted a disciplinary hearing, guards wrapped a towel around his neck and choked him until he was nearly unconscious.\textsuperscript{340}
- After an inmate made excessive noise, a guard entered the cell, grabbed the inmate’s hair, bashed his head repeatedly against the cell bars, and then applied a chokehold that left the inmate unconscious.\textsuperscript{341}

While the above examples are useful, it is important to note serious injury alone is not dispositive of an excessive force claim. The core judicial inquiry in an excessive force claim is not whether a certain quantum of injury was sustained, but rather whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.\textsuperscript{342} In other words, while the extent of injury may “provide some indication of the amount of force applied,” an inmate who is beaten handily does not lose his ability to pursue an excessive force claim merely because he was lucky enough to escape without serious injury.\textsuperscript{343}

c. Failure to Stop Other Officials’ Excessive Force

Officials who watch excessive force take place have a duty to intervene and stop the excessive force from continuing.\textsuperscript{344} If they fail to do this, they are liable for the injuries that result. The less strict \textit{deliberate indifference} standard applies to such claims.

Higher-ranking officials who supervise officials known to regularly use excessive force may also be held liable for the violations if the higher-ranking officials were personally involved in the violation, established a policy that led to the violation, or were deliberately indifferent to the risk that the officials they supervised would commit such a violation.\textsuperscript{345}

d. Corporal Punishment

Corporal punishment involves the intentional infliction of physical pain. Examples of corporal punishment include paddling, whipping, and spanking. The American Correctional Association

\textsuperscript{338}Toone, \textit{supra} note 22, at 33 (citing \textit{Brooks v. Kyler}, 204 F.3d 102, 104-106 (3rd Cir. 2000)).
\textsuperscript{339}Toone, \textit{supra} note 22, at 34 (citing \textit{Skrtich v. Thornton}, 267 F.3d 1251, 1257-58 (11th Cir. 2001), \textit{superseded by} 280 F.3d 1295 (11th Cir. 2002)).
\textsuperscript{340}Id. (citing \textit{Burgess v. Moore}, 39 F.3d 216, 217-18 (8th Cir. 1994)).
\textsuperscript{341}Id. (citing \textit{Valencia v. Wiggins}, 981 F.2d 1440, 1447 (5th Cir. 1993)).
\textsuperscript{342}\textit{Wilkins}, 130 S.Ct. at 1178.
\textsuperscript{343}Id. at 1178-79.
\textsuperscript{344}Toone, \textit{supra} note 22, at 34 (citing \textit{Durham v. Nu’Man}, 97 F.3d 862, 867 (6th Cir. 1996) and \textit{Robins v. Meecham}, 60 F.3d 1436, 1442 (9th Cir. 1995)).
\textsuperscript{345}Id. at 39 (citing \textit{Blyden v. Mancusi}, 186 F.3d 252, 264 (2nd Cir. 1999) and \textit{Vaughan v. Ricketts}, 859 F. 2d 736, 741 (9th Cir. 1988)).
states, “In no event is physical force justifiable as punishment” in any correctional facility. The Supreme Court has not condemned corporal punishment this roundly, but the Court has deemed many types of corporal punishment to “run afoul of the Eighth Amendment and offend contemporary concepts of decency, human dignity, and precepts of civilization which we profess to possess.” The Court enumerated “handcuffing inmates to the fence and to cells for long periods of time, ... and forcing inmates to stand, sit or lie on crates, stumps, or otherwise maintain awkward positions for prolonged periods” as examples of impermissible corporal punishment. Despite a lack of clarity from the courts on what does or does not constitute corporal punishment, prison officials may not use force against an inmate to punish them for earlier misconduct. Such after-the-fact force is considered troubling because often it is not “applied in a good faith effort to maintain or restore discipline.”

e. Restraints

Restraints are physical devices that keep inmates from moving part of their bodies. Limited use of restraints (i.e., handcuffs and/or leg and belly chains upon arrest or when being transferred) is constitutional. Constitutional use of more restrictive restraint devices (restraint chairs, four-point restraints) depends on the circumstances. Use of these restraints can have serious physical and psychological effects. Physical effects include loss of blood circulation, loss of oxygen, and cramping, while the inability to move around can injure the psyche over time, causing psychological effects. Because of these potential effects, officials may apply restrictive restraints only when an inmate is out of control and poses an immediate danger to himself or others. The restraints must be removed once the threat passes, and officials may not place inmates in restraints for the purpose of punishment or to inflict pain.

Inmates should rarely, if ever, be kept in restrictive restraints for more than a few hours. If they are, they should be constantly supervised by a doctor or other medical personnel. While restrained, inmates should receive necessary medical care and be allowed to use toilet facilities and perform basic hygiene. Pregnant inmates present a unique and complicated challenge for correctional institutions. This challenge is exacerbated when inmates go into labor. In a recent decision, the Eighth Circuit determined “an inmate in the final stages of labor cannot be shackled absent clear evidence that she is a security or flight risk.” While this holding is very fact-specific, the rationale that shackling a woman during labor violates the Eighth Amendment, the basic concept of which is

348 Id. (quoting Gates v. Collier, 501 F.2d 1291, 1306 (5th Cir. 1974)).
350 Toone, supra note 22, at 41.
351 Id.
352 Id.
353 Id.
354 Id.
the dignity of woman, is noteworthy. Alaska provides proper pre-natal and postnatal care for pregnant inmates and new mothers, but the state courts have not spoken on the issue of restraining inmates during labor.

f. Sexual Assault and Harassment

Forcible sexual assault by a jail or prison official is excessive force. Prison officials are allowed to use a certain amount of force in order to restore or maintain security or discipline, but there is no “good faith effort to restore or maintain discipline” involved in a sexual assault. An inmate “has a constitutional right to be secure in her bodily integrity and free from attack by prison guards,” especially when that attack is forcible sexual assault.

It is also improper for officials to sexually harass inmates – to touch them improperly or make vulgar or sexually explicit comments. However, courts generally do not treat verbal harassment by itself as a constitutional violation. The American Correctional Association, meanwhile, has implemented policies and procedures that “protect inmates from personal abuse, corporal punishment, personal injury, disease, property damage, and harassment”—a much more sweeping statement of protection than that endorsed by the courts.

9. Right to Be Protected from Assault by Other Inmates

The Eighth Amendment requires prison officials to protect prisoners from violence at the hands of other prisoners. The Court based this ruling on the notion that, “because inmates are placed into dangerous environments and stripped...of virtually every means of self-protection and...access to outside aid, the government and its officials are not free to let the state of nature take its course,” Additionally, according to the Supreme Court, “Being violently assaulted in prison is simply not part of the penalty that criminal offenders pay for their offenses against society.” Thus, prison officials have a duty to protect inmates from assault by other inmates. The Alaska Supreme Court has recognized that the state must exercise reasonable care for the

357 Id. (citing Hope, 536 U.S. at 738).
358 DOC Policy # 808.06(c), Requirement Relating to Female Prisoners, Pregnant Prisoners.
359 Toone, supra note 22, at 42.
360 Tafoya v. Salazar, 516 F.3d 912, 916 (10th Cir. 2008) (quoting Hovater v. Robinson, 1 F.3d 1063, 1068 (10th Cir. 1993)).
361 Toone, supra note 22, at 42; STANDARDS OF ADULT CORRECTIONAL INSTITUTIONS at 14 (written policy, procedure, and practice prohibit sexual harassment by employees or agents of correctional facility against inmates or other employees).
362 Austin v. Terhune, 367 F.3d 1167, 1171 (9th Cir. 2004) (citations omitted).
363 STANDARDS OF ADULT CORRECTIONAL INSTITUTIONS, at 77.
364 Nelson v. Shuffman, 603 F.3d 439, 446 (8th Cir. 2010) (quoting Farmer v. Brennan, 511 U.S. 825, 833 (1994)). For convicted inmates, this right is based on the Eighth Amendment “cruel and unusual punishments” clause. For pretrial detainees, this right is based on the Due Process Clause of the Fifth Amendment for federal pretrial detainees and the Due Process Clause of the Fourteenth Amendment for state and local pretrial detainees.
365 Toone, supra note 22, at 54 (quoting Farmer, 511 U.S. at 833) (internal quotations omitted).
366 Farmer, 511 U.S. at 834 (internal quotations omitted).
protection of a prisoner’s life and health and use the utmost care to protect a prisoner who is in
danger.367

Prison officials violate the Constitution if they act with “deliberate indifference” toward a
prisoner’s safety, that is, if the official had a reasonable opportunity to prevent the assault from
happening in the first place. 368 For example, prison officials may be liable if they knew that a
prisoner was at substantial risk of serious harm but ignored that risk and failed to take reasonable
steps in light of the risk.369 This is essentially the same standard that applies to prisoner claims
for inadequate medical care: all inmate cases based on the failure to provide for or protect health
and safety require a prison official to act with deliberate indifference in order to be held liable.370

Courts have recognized a distinction between a “substantial risk of serious harm” and the
everyday risk of harm that comes from being in prison.371 Another way to look at this distinction
is to consider the “strong likelihood of injury” stemming from a particular, identified danger
versus the mere possibility of injury that arises from being incarcerated. Even if a prisoner is
physically harmed by another inmate, prison officials will not be held liable if they knew there
was a risk of injury and responded reasonably to that risk.372 Courts have imposed liability on
line correctional officers who observed an assault or knew of a risk to a prisoner but did
nothing;373 on higher-level supervisors who made or failed to make policies or failed to act on
risks they knew about;374 and on city or county governments when an assault resulted from a
governmental policy.375

The rule concerning failure-to-protect from inmate on inmate assault is an inmate must prove
that the officials being sued actually knew about a substantial risk of serious harm, and yet failed
to respond reasonably.376 This breaks down into the four elements needed to show deliberate
indifference:

1. substantial risk of serious harm;
2. official’s knowledge of the risk;
3. official’s failure to respond reasonably; and

P.3d at 59-60)).
368 Farmer, 511 U.S. at 836-37.
369 Id. at 847.
370 See, e.g., Peate v. McCann, 294 F.3d 879 (7th Cir. 2002) (essentially rearming prisoner who attacked plaintiff,
leading to a second attack, showed deliberate indifference); Cantu v. Jones, 293 F.3d 839 (5th Cir. 2002) (guards
allowed prisoner out of his cell to attack another prisoner); Horton v. Cockrell, 70 F.3d 397 (5th Cir. 1995) (staff
failed to protect prisoner from attack despite his grievances requesting protection); Skinner v. Uphoff, 234
372 Farmer, 511 U.S. at 844-45.
373 See, e.g., Ayala Serrano v. Lebron Gonzales, 909 F.2d 8, 14 (1st Cir. 1990).
374 See, e.g., Redman v. County of San Diego, 942 F.2d 1435, 1447-48 (9th Cir. 1991); see also, Durrell v. Cook, 71
F. App’x 718, 719 (9th Cir. 2003) (Eighth Amendment violation is established if prison officials “know[ ] of and
disregard[ ] an excessive risk to inmate health or safety,” and incarcerate him under conditions posing such a risk,
such as rape by a cellmate).
375 See, e.g., Berry v. City of Muskogee, 900 F.2d 1489, 1497-99 (10th Cir. 1990).
376 Toone, supra note 22, at 55.
4. causation and injury.

Failure-to-protect claims usually arise in two contexts, which sometimes overlap. The first involves a prison official’s failure to respond or act reasonably in light of a particular threat to an individual prisoner, such as when an attacker clearly threatens a victim, when an official encourages an attack, or when an official witnesses an attack but fails to stop it. The second concerns prison conditions or practices that create a dangerous situation for prisoners, such as failure to control tools and weapons within the facility, overcrowding, and understaffing.

It is also important to realize sometimes a victim is unusually vulnerable or an attacker is unusually dangerous. Some inmates are obvious targets or “prey” for assault by others: known informants or “snitches,” the mentally ill, inmates with slight or youthful physical builds, or gay or transsexual inmates.\(^{377}\) Prison officials must take reasonable measures to protect such inmates, but courts may not find officials deliberately indifferent unless the inmate personally put them on notice of their particular vulnerability and asked for protection before the assault occurred.\(^{378}\)

Prison officials should respond to a legitimate request by placing the inmate in protective custody (administrative segregation). Additionally, as a general matter, prison officials have a duty to initially classify inmates based on, among other things, the likelihood that they will commit violence or be the victim of violence.

Just as some inmates are prey, others are “predators.”\(^{379}\) Prisons are full of dangerous, violent people, and prison officials do not have to isolate every inmate that has the capacity for violence. However, officials may not ignore an inmate’s history of violence behind bars. They may not place a known predator in a position where he can continue to prey on other inmates.\(^{380}\) Such action would constitute deliberate indifference if harm occurred. Also, as stated above, the prison’s classification system should separate violent or dangerous offenders who pose a risk to the safety of other inmates from the rest of the prison population.\(^{381}\)

10. Right to Humane Conditions of Confinement

Under the Constitution, prison conditions may be “restrictive and even harsh,” and they do not have to be “comfortable.”\(^{382}\) But, prisoners are constitutionally entitled to environmental conditions that do not pose serious risks to health and safety. Conditions, therefore, must meet a certain standard. Pretrial detainees and convicted inmates have a constitutional right to “humane conditions of confinement.”\(^{383}\)

\(^{377}\) Id. at 62-63.
\(^{378}\) Id. at 63.
\(^{379}\) Toone, supra note 22, at 62.
\(^{380}\) Id. (citing Frett v. Virgin Islands, 839 F.2d 968, 978-79 (3rd Cir. 1988) (other citations omitted)).
\(^{381}\) Jones v. Diamond, 636 F.2d 1364, 1374 (5th Cir. 1981).
\(^{382}\) Rhodes v. Chapman, U.S. 337, 347, 349 (1981); Farmer v. Brennan, 511 U.S. 825, 832 (1994); Isby v. Clark, 100 F.3d 502, 505 (7th Cir. 1996) (“Prisons, of course, are not Hilton hotels. And disciplinary segregation units within prisons are not like rooms at a Motel 6. But even nasty prisoners cannot be knowingly housed in ghastly conditions reminiscent of the Black Hole of Calcutta.”).
\(^{383}\) Farmer, 511 U.S. at 832.
For convicted inmates, the Eighth Amendment “cruel and unusual punishment” clause imposes a duty on prison officials to provide “humane conditions of confinement;” that is, officials must “ensure that inmates receive adequate food, clothing, shelter, and medical care, and must ‘take reasonable measures to guarantee the safety of the inmates.’”384 For pretrial detainees, the Due Process Clause provides at least as much protection as the Eighth Amendment.385 This means that, if a pretrial detainee can prove what it takes to win an Eighth Amendment conditions of confinement claim, (i.e., that prison officials were deliberately indifferent to a substantial risk of serious harm), the inmate should be able to prevail on a conditions claim under the Due Process Clause.386

a. Elements of a Right to Humane Conditions of Confinement Claim:

The elements of a claim alleging a violation of the right to humane conditions of confinement are: (1) deprivation of a basic human need; (2) official’s knowledge of the deprivation; (3) failure to respond reasonably; and (4) causation and injury.

Basic human needs include:

1. sanitation and hygiene;

   Basic elements of sanitation and hygiene involve many things.387 For example, inmates are entitled to:

   • adequate toilet facilities, including a working toilet in each cell in which an inmate is confined
   • regular access to working showers
   • basic hygiene items (toothbrush, toothpaste, shaving supplies, sanitary napkins, soap, towel, running water)388
   • sanitary food preparation and service389
   • working plumbing390
• protection from infestation by insects, rodents or other vermin.\(^{391}\)

2. clothing and bedding;
3. protection from extreme temperatures;\(^{392}\)
4. clean air;\(^{393}\)
5. clean water;\(^{394}\)

sufficiently described unsanitary and overcrowding conditions within the facility, including waste flooding into the showers); McCord v. Maggio, 927 F.2d 844, 847 (5th Cir. 1991) (forcing inmate to choose between standing, or lying or sitting down in foul water and refuse raised a viable Eighth Amendment claim); Gaston v. Coughlin, 249 F.3d 156, 166 (2nd Cir. 2001) (concluding Eighth Amendment claims of rodent infestations and unsanitary conditions right outside plaintiff’s cell should be reinstated); Jackson v. Duckworth, 955 F.2d 21, 22 (7th Cir. 1992) (allegedly forcing inmate to live with drinking water containing “little black worms which would eventually turn into little black flies” stated Eighth Amendment violation); Williams v. Griffin, 952 F.2d 820, 825 (4th Cir. 1991) (finding infestations of insects and vermin, allegedly known to prison officials, constituted Eighth Amendment violation); Foulds v. Corley, 833 F.2d 52, 54 (5th Cir. 1987) (dismissing plaintiff’s Eighth Amendment claim alleging he was forced to sleep on a cold ground while rats crawling over him was premature).\(^{392}\)


Excessive cold: Boulds v. Miles, 221 F. App’x 322, 323 (5th Cir. 2007) (allowing a prisoner to be exposed to extreme temperatures may violate the Eighth Amendment and thus complaint should not have been dismissed); Gaston v. Coughlin, 249 F.3d 156, 164-65 (2nd Cir. 2001) (exposing inmates to freezing and sub-zero temperatures stated an Eighth Amendment claim); Dixon v. Godinez, 114 F.3d 640, 642 (7th Cir. 1997) (holding prisoner could bring claim stating inhume conditions when indoor temperatures averaged about forty degrees).

Inadequate ventilation: Blay v. Reilly, 241 F. App’x 520, 525 (10th Cir. 2007) (knowing plaintiff worked in an enclosed, poorly ventilated prep room, which caused him serious respiratory distress, was sufficient to put defendants on notice about inadequate conditions); Keenan v. Hall, 83 F.3d 1083, 1090 (9th Cir. 1996) (holding that air “saturated with the fumes of feces, urine, and vomit” could undermine health and sanitation in violation of the Eighth Amendment).

Toxic or noxious fumes: Johnson-El v. Schoemehl, 878 F.2d 1043, 1054-55 (8th Cir. 1989) (spraying pesticides into housing units and refusing to admit which chemicals were being used raised questions about prison officials’ indifference); Cody v. Hillard, 599 F. Supp. 1025, 1032 (D.S.D. 1984) (inadequate ventilation of toxic fumes in inmate workplaces), aff’d in part and rev’d in part on other grounds, 830 F.2d 912 (8th Cir. 1987) (en banc). But see Givens v. Jones, 900 F.2d 1229, 1234 (8th Cir. 1990) (no Eighth Amendment violation where prisoner suffered migraine headaches as a result of noise and fumes during three week long housing unit renovation).

Exposure to second-hand smoke: Helling v. McKinney, 509 U.S. 25, 35 (1993) (recognizing an Eighth Amendment claim where inmate’s cellmate smoked five packs of cigarettes a day); Talal v. White, 493 F.3d 423, 427-28 (6th Cir. 2005) (permitting inmates and officials to smoke in non-smoking units, while ignoring plaintiff’s known smoke allergy, violated inmate’s Eighth Amendment rights); Atkinson v. Taylor, 316 F.3d 257, 265 (3rd Cir. 2003) (housing inmate for seven months with “constant” smokers stated analogous claim to that in Helling); Reilly v. Grayson, 310 F.3d 519, 521 (6th Cir. 2002) (finding inmates have a right to be removed from smoky environments).

Exposure to asbestos: U.S. v. Little, 308 F. App’x 256, 259-60 (10th Cir. 2009) (exposing inmates to asbestos created conditions which could be expected to cause the inmate serious injury or death); Powell v. Lennon, 914 F.2d 1459, 1463-64 (11th Cir. 1990) (ignoring inmate’s request to be transferred out of friable asbestos-ridden dorm showed deliberate indifference). But see McNeil v. Lane, 16 F.3d 123, 125 (7th Cir. 1994) (exposure to “moderate levels of asbestos” did not violate the Eighth Amendment). McNeil appears to be the first in a long line of Seventh Circuit cases affirming that “asbestos abounds in many public buildings” and exposure to it in moderate levels “is a common fact of contemporary life and cannot, under contemporary standards, be considered cruel and unusual punishment.” Christopher v. Buss, 384 F.3d 879, 882 (7th Cir. 2004) (quoting McNeil, 16 F.3d at 125). Other circuits have not yet imposed such stringent limitations on asbestos claims.

Jackson v. Duckworth, 955 F.2d 21, 22 (7th Cir. 1992) (alleging drinking water was full of small black worms that eventually turned into small black flies was sufficient to state a “subhuman conditions” claim under the Eighth
6. lighting; 395
7. protection from excessive noise; 396
8. accident prevention; 397
9. exercise; 398
10. food;
11. sleep; 399
12. adequate living space/no overcrowding.

Under Alaska Department of Corrections policy, as mandated by the Cleary Final Settlement Agreement, 400 prisoners have certain rights relative to the conditions of their confinement, including:

- single or double cell occupancy and/or supervised dormitories;
- clean and orderly surroundings;
- adequate toilet, bathing and laundry facilities;
- adequate lighting, heating, and ventilation;
- compliance with state, federal, and local fire and life safety laws and regulations;

Amendment); Jackson v. Arizona, 885 F.2d 639, 641 (9th Cir. 1989) (finding an allegation that drinking water was polluted was not a frivolous claim).

Keenan, 83 F.3d at 1090-91 (finding Eighth Amendment violation where fluorescent lights allegedly shone into prisoner’s cell 24 hour a day); Hoptowit v. Spellman, 753 F.2d 779, 783 (9th Cir. 1984) (“Adequate lighting is one of the most fundamental attributes of ‘adequate shelter’ required by the Eighth Amendment.”).

Keenan, 83 F.3d at 1090 (holding inmates, while not necessarily entitled to absolute quiet, must be housed in an environment “reasonably free from excessive noise”) (citation omitted).

This includes lack of fire safety, Hoptowit v. Spellman, 753 F.2d 779, 784 (9th Cir. 1985) and Gates v. Collier, 501 F.2d 1291, 1300, 1305 (5th Cir. 1974), and risk of injury or death in the event of an earthquake, Jones v. City and County of San Francisco, 976 F. Supp. 896, 909-10 (N.D. Cal. 1997).

Most courts have held that five hours of exercise per week is the constitutional minimum. See, e.g., Davenport v. DeRobertis, 844 F.2d 1310, 1315 (7th Cir. 1988) (recognizing a constitutional right to five hours’ minimum exercise per week); Spain v. Procunier, 600 F.2d 189, 199-200 (9th Cir. 1979) (same); Toussaint v. McCarthy, 597 F. Supp. 1388, 1402, 1412 (N.D. Cal. 1984) (acknowledging the right to eight hours’ minimum); af’d in part and rev’d in part on other grounds, 801 F.2d 1080 (9th Cir. 1986). Most courts have upheld curtailment, or even total elimination, of out-of-cell exercise for short periods under emergency circumstances. See, e.g., Davenport, 844 F.2d at 1315 (permitting exceptions to the five-hour minimum for “fractious inmates”).

Courts differ on whether prisoners are entitled to outdoor exercise. See Toussaint v. Yockey, 722 F.2d 1490, 1492-93 (9th Cir. 1984) (yes); Spain, 600 F.2d at 199-200 (yes); but see Martin v. Tyson, 845 F.2d 1451, 1456 (5th Cir. 1988) (no); Clay v. Miller, 626 F.2d 345, 347 (4th Cir. 1980) (no). The Ninth Circuit recently held restricting an inmate’s access to outdoor exercise due to safety concerns was lawful under the Eighth Amendment. Norwood v. Vance, 591 F.3d 1062, 1070 (9th Cir. 2010).

Harper v. Showers, 174 F.3d 716, 720 (5th Cir. 1999) (as “sleep undoubtedly counts as one of life’s basic needs[,]” sleep deprivation might violate the Eighth Amendment). But see Conlin v. Thaler, 347 F. App’x 983, 984 (5th Cir. 2009) (alleging unsupportive mattress does not shown an “egregious deprivation” of the basic human need for sleep).

See infra Part III.A.
a wholesome, properly prepared, nutritionally adequate diet;
health care services comparable in quality to those locally available to the general public;
access to both indoor and/or outdoor recreational opportunities and equipment;
safe environments;
personal choice regarding grooming and appearance limited only by institutional requirements for safety, identification, hygiene, and/or security;
the right of pre-trial detainees to wear their personal clothing, except when in punitive segregation or in administrative segregation pending investigation of a disciplinary infraction, or under circumstances where security considerations require a clothing restriction.

In light of the Cleary class action suit--filed largely in response to overcrowding and conditions of confinement--the DOC has established comprehensive policies relating to conditions of confinement that account for all of the constitutional concerns listed above.

To prevail on a claim regarding conditions of confinement, an inmate must establish that the deprivation he or she was exposed to was “sufficiently serious.” That is, the deprivation should be “extreme” or “something that would cause an outside observer to react with surprise or horror.” “Routine discomfort” does not meet this standard, as discomfort is considered “part of the penalty that criminal offenders pay for their offenses against society.” However, prison officials may not deprive an inmate of any constitutional right simply by calling their deprivation “reasonable.” There must be a greater nexus between the deprivation and some penological interest than merely what a correctional facility determines is “reasonable” or not.

In assessing the seriousness of a deprivation, the main factor courts will examine is the duration of the deprivation. Courts often conclude that conditions that would otherwise violate the Constitution are acceptable because they only lasted for a short while. According to the Supreme Court, “A filthy overcrowded cell and a diet of ‘gruel’ might be tolerable for a few days and intolerably cruel for weeks or months.” However, a serious deprivation of a basic human need would violate the Constitution even if it did not last very long, while a condition that might not normally violate the Constitution might become unconstitutional if it persists. Some examples of what may or may not classify as a serious deprivation of a basic need are listed below:

401 DOC Policy #808.05, Environmental and Programmatic Rights. For a complete list of rights, see http://www.correct.state.ak.us/corrections/pnp/pdf/808.05.pdf.
402 See infra Part III.G.
405 Toone, supra note 22, at 108. See also Bolden v. State, Dep’t of Corr., 2010 WL 2791983, at *3 (Alaska July 14, 2010) (reiterating that a serious deprivation strips an inmate of even the “minimal civilized measure of life’s decencies”) (citation omitted).
407 See Thomas v. Ponder, at *10 (“it is difficult to conceive of how a deprivation of a ‘basic human necessity’ . . . may be deemed reasonable” when that deprivation was completely unnecessary to maintaining order).
408 Toone, supra note 22, at 109.
410 Toone, supra note 22, at 109.
• Prison official violated the Eighth Amendment by keeping inmates outdoors in brutally cold weather without hats or gloves for one to two hours.\textsuperscript{411}
• Three-day confinement in a “crisis management cell” with blood on the walls and excrement on the floor was not a sufficiently “extreme” deprivation to give rise to an Eighth Amendment claim.\textsuperscript{412}
• Two nutritionally adequate meals per day did not violate the Eighth Amendment.\textsuperscript{413}
• Sleeping on the floor without mattresses for one night was not an impermissible punishment for detainees.\textsuperscript{414}
• Cell containing excrement and vomit did not violate the Constitution because the conditions lasted only 24 hours.\textsuperscript{415}
• Officials who limited an inmate to flushing only twice per hour did not give rise to a deprivation of the inmate’s right to basic sanitation and hygiene.\textsuperscript{416}
• Death row temperatures above ninety degrees, with little ventilation and high humidity, exposed inmates to high risk of heat-related illness in violation of Eighth Amendment;\textsuperscript{417} however, temperatures in the mid-eighties with a ventilation system, though uncomfortable, did not violate the Eighth Amendment.\textsuperscript{418}

The Ninth Circuit has taken the position that “modest” deprivations of basic human needs will violate the Constitution “only if such deprivations are lengthy or ongoing”; conversely, deprivations of “shelter, food, drinking water, and sanitation,” can violate the Constitution even if they only last for a short period of time.\textsuperscript{419} This follows the theory that, “[t]he more basic the particular need, the shorter the time it can be withheld.”\textsuperscript{420}

\textsuperscript{411} Gordon v. Faber, 973 F.2d 686, 687-88 (8th Cir. 1992).
\textsuperscript{412} Davis v. Scott, 157 F.3d 1003, 1006 (5th Cir. 1998).
\textsuperscript{413} Green v. Ferrell, 801 F.2d 765, 770-71 (5th Cir. 1986).
\textsuperscript{414} Antonelli v. Sheehan, 81 F.3d 1422, 1427, 1430 (7th Cir. 1996).
\textsuperscript{415} Whitnack v. Douglas County, 16 F.3d 954, 958 (8th Cir. 1994).
\textsuperscript{416} Barnes v. Wiley, 203 F. App’x 939, 941 (10th Cir. 2006).
\textsuperscript{417} Gates v. Cook, 376 F.3d 323, (5th Cir. 2004).
\textsuperscript{418} Chandler v. Crosby, 379 F.3d 1278, 1297-1298 (11th Cir. 2005).
\textsuperscript{419} Johnson v. Lewis, 217 F.3d 726, 732 (9th Cir. 2000).
PART II: PRISON LITIGATION

I. Introduction

Safeguards for the rights of Alaska prisoner are found in the U.S. Constitution and the Alaska Constitution. The constitutional provisions establishing these rights have their own tests and standards that must be employed to determine if a constitutional right has, in fact, been violated. The specific rights afforded to prisoners were discussed in detail in the previous section of this guide (Part I, supra). What follows is a brief recap of some important concepts pertaining to prisoners’ rights litigation, as well as a detailed explanation of the two major statutes affecting litigation of conditions of confinement claims by prisoners.

As noted earlier, perhaps the most well-known prisoners’ right is found in the Eighth Amendment, which prohibits the infliction of “cruel and unusual punishments” on convicted prisoners.421 The cruel and unusual clause protects inmates from excessive force from prison officials, mandates safe conditions of confinement, and is the source of an inmate’s right to adequate medical care. The Eighth Amendment also protects against conditions that pose an unreasonable risk of future harm, as well as those that are currently causing harm.422

To establish a violation of the Eighth Amendment, it is necessary to prove two elements – one objective, one subjective:

1. **Objective**: a deprivation of a basic human need (such as food, clothing, shelter, exercise, medical care, or reasonable safety). It is important to note that it is not enough for an inmate to allege that the “totality of conditions” is unconstitutional; rather, the plaintiff must allege deprivation of one or more identifiable human needs.424

2. **Subjective**: deliberate indifference on the part of one or more defendants. Although deliberate indifference is an actual-knowledge standard, the plaintiff need not show that defendants knew of a specific risk to her from a specific source.425 Instead, knowledge can be demonstrated by circumstantial evidence; thus, “a fact finder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.”426 It is important to note that there is no deliberate indifference if prison officials “responded reasonably to the risk, even if the harm ultimately was not averted.”427 But, this does not mean that any corrective action by prison officials necessarily forecloses a finding of deliberate indifference: “Patently ineffective gestures purportedly directed

---

421 U.S. CONST. amend. VIII.
422 Helling v. McKinney, 509 U.S. 25, 33 (1993). The Supreme Court has indicated a slight expansion of Eighth Amendment protections in recent jurisprudence. See Hope v. Pelzer, 536 U.S. 730 (2002) (intentional infliction of pain, discomfort, or risk of harm as punishment for past conduct violates Eighth Amendment; cuffing prisoner to “hitching post” as punishment was a *per se* Eighth Amendment violation, even without aggravating factors such as denial of proper clothing, water, and bathroom breaks).
423 Helling, 509 U.S. at 31-32.
426 Farmer, 511 U.S. at 842.
427 Id. at 844.
towards remedying objectively unconstitutional conditions do not prove a lack of deliberate indifference, they demonstrate it.”

The Eighth Amendment applies only to convicted prisoners. Pretrial detainees are protected by the Due Process Clause of the Fourteenth Amendment against any conditions that constitute “punishment.” Many courts have held these two standards are equivalent in the context of challenges to conditions of confinement.

The First Amendment also provides significant safeguards for inmates, including religious freedom, the right of access to the courts, freedom of association, and protection from retaliation against prison officials for reporting complaints and grievances. When inmates challenge an official’s abridgement of their First Amendment rights or civil liberties, courts will apply a “reasonable relationship” test to determine the validity of the limitation. This test, known as the Turner test, requires that any restriction on civil liberties must be “reasonably related to legitimate penological interests.”

Prisoners also enjoy important protections under the Fifth and Fourteenth Amendments, which require government officials to provide inmates with the equal protection of the laws and to ensure due process of law before depriving any inmate of life, liberty, or property. Between these protections, different standards apply depending on what class is being affected or what interest or right is being asserted. For instance, prison officials need only a rational reason for treating inmates in segregation differently from inmates in the general population, but a much stronger standard applies when prison officials segregate inmates based on racial classifications. Similarly, prison officials have wide discretion to make decisions with respect

---


430 See, e.g., Simmons v. Navajo County, Arizona, ---F.3d----, 2010 WL 2509181, at *4 (9th Cir. June 23, 2010); Minix v. Canarecci, 597 F.3d 824, 830-31 (7th Cir. 2010); Davis v. Oregon County, Missouri, 607 F.3d 543, 548 (8th Cir. 2010); Craig v. Eberly, 164 F.3d 490, 495 (10th Cir. 1998); Council v. Sutton, 306 F. App’x 31, 35-36 (11th Cir. 2010); see also Jacobs v. West Feliciana Sheriff’s Dep’t, 228 F.3d 388, 393 (5th Cir. 2000) (“A pretrial detainee’s due process rights are at least as great as the Eighth Amendment protections available to a convicted prisoner.”).

Not all courts have determined these two standards to be equivalent, however. See, e.g., Griffin v. Hardrick, 604 F.3d 949, 953 (6th Cir. 2010) (“The law is unsettled as to whether the analysis for a Fourteenth Amendment excessive-force claim and an Eighth Amendment excessive-force claim is the same.”)

Be sure to check whether your circuit applies a less demanding standard to the claims of pretrial detainees. See, e.g. Benjamin v. Fraser, 343 F.3d 35, 51 (2nd Cir. 2003) (stating pretrial detainees need not show Eighth Amendment deliberate indifference when challenging “a protracted failure” to provide safe living conditions).


432 Id.

433 See supra note 3 (providing a list of constitutional rights enforceable against federal, state, and local governments and government officials).

434 Toone, supra note 22, at 24.

435 See supra note 288.
to deprivation of an inmate’s property, but inmates have stronger due process rights when a liberty interest is at stake.

Whatever the origin of a prisoner’s specific right and whichever test will be applied to determine if that right was infringed upon, enforcing that right in a court must be done in accordance with the relevant statute: the Federal Prison Litigation Reform Act or the Alaska Prison Litigation Reform Act.

II. Federal Prison Litigation Reform Act

The Prison Litigation Reform Act (PLRA) of 1996 was intended to curtail frivolous lawsuits filed by inmates against government officials. In a sense it has achieved that goal: it has made it more difficult for prisoners to file any lawsuits in federal court. The PLRA has led to a significant reduction in new filings by prisoner plaintiffs in federal courts despite the continued growth of the prison population. Also, the number of prisons under court order has decreased significantly. While the federal courts remain open to many prisoners who seek to challenge conditions of confinement and actions that violate their constitutional rights (whether they seek injunctive relief or damages), the PLRA has seriously hindered their access to this forum.

This section outlines the major prisoners’ rights issues affected by the PLRA. There has been substantial litigation surrounding nearly every aspect of the PLRA, but this section does not

---

436 See supra Part I.B.7.a.
437 See generally, Part I.B.7.b.
438 Thanks to Elizabeth Alexander, the Director of the National Prison Project of the American Civil Liberties Union Foundation, for allowing the use of her PLRA materials. Any mistakes are the author’s.
439 Prison Litigation Reform Act of 1995, Pub. L. No. 104-134 (codified as amended in scattered titles and sections of the U.S.C.); see also H.R. 3019, 104th Cong. (1996). Although PLRA is generally described as containing restrictions on prisoner civil rights litigation, its scope is somewhat broader. In general, it has been interpreted to apply to litigation on behalf of committed and detained juveniles and pre-trial detainees, as well as sentenced prisoners.
441 Id.
442 Many inmates choose to file their lawsuits in federal courts. There are advantages and drawbacks to the federal court system, just as there are to the state court system. If you believe you would like your claims to be heard in federal court, you may file a complaint in federal court. If you would like to have your case heard in state court, you may file a complaint in state court. If you wish to keep your claim in state court, you may make claims only under the Alaska Constitution and not under the U.S. Constitution. If you bring any claims under the U.S. Constitution, even if you also have state constitutional claims, the State (or whichever government entity you are bringing suit against) may seek to have your claims moved to a federal court forum. This procedure is known as “removal.” Both the state and federal constitutions have similar provisions – e.g., both have a right to due process and a right against cruel and unusual punishment. Generally, any policies that violate the U.S. constitution will violate the state constitution, though the state constitution may offer more protections than the federal constitution. Further, some rights, like the right to rehabilitation, are found only in the Alaska Constitution. Each case is different, so the choice of filing in federal or state court will not be the same for all cases. Likewise, filing only state law claims or filing federal claims in addition to state law claims may help some prisoners and not others.
discuss the debates surrounding any particular aspect or allegation of unconstitutionality of the various PLRA provisions. Rather, it lays out the rules of law of the PLRA as it stands today.

PLRA restrictions generally fall into two categories: (1) restrictions on the ability of prisoner litigants to get into court, and (2) restrictions on the relief available in prisoner cases.

A. Restrictions on the Ability of Prisoner Litigants to Get Into Court

1. Filing Fees and Costs (28 U.S.C. § 1915(b) and (f)(2))

Before the PLRA, any indigent prisoner could proceed in forma pauperis (IFP) in federal court and be excused from prepayment of court filing fees. Under the PLRA, court filing fees will not be waived. Instead, the PLRA requires inmates to pay the filing fee in full. A complex formula requires the prisoner to pay an initial fee of 20% of the greater of the prisoner’s average balance or the average deposits to his or her prison account for the preceding six months. If an inmate does not have the money to pay the fees up front, the fee will be paid over a period of time by having monthly installments of 20% of the income credited to the account in the previous month withdrawn from the prisoner’s account until the fee has been paid.

Many sections of the PLRA have faced constitutional challenges. Courts have adjudicated the constitutionality of several provisions, including (1) the provision that permits courts to immediately terminate prison condition consent decrees, see Ruiz v. United States, 243 F.3d 941, 945-50 (5th Cir. 2001) (upholding provision against separation of powers and due process challenges); Tyler v. Murphy, 135 F.3d 594, 597 (8th Cir. 1998) (upholding provision against the argument it deprives courts of authority to remedy constitutional violations); Gavin v. Branstad, 122 F.3d 1081, 1085-92 (8th Cir. 1997) (upholding provision against separation of powers, due process, and equal protection challenges); (2) the provision that limits attorney’s fees, see Hadix v. Johnson, 230 F.3d 840, 842-47 (6th Cir. 2000) (upholding provision against equal protection challenge); Boivin v. Black, 225 F.3d 36, 41-46 (1st Cir. 2000) (same); Madrid v. Gomez, 190 F.3d 990, 996 (9th Cir. 1999) (same); (3) the provision requiring physical injury, see Searles v. Van Bebber, 251 F.3d 869, 876-77 (10th Cir. 2001) (upholding provision against due process challenge); Davis v. District of Columbia, 158 F.3d 1342, 1345-48 (D.C. Cir. 1998) (upholding provision against equal protection and access to courts challenges); Zehner v. Trigg, 133 F.3d 459, 463-64 (7th Cir. 1997) (upholding provision against equal protection and separation of powers challenges); but see Wilkins v. Gaddy, 130 S.Ct. 1175, 1178-79 (2010) (although force that causes no discernible injury will likely not be enough to mount a claim, it is the type of force, not the quantum of injury, that ultimately matters); and (4) the provision that requires prisoners proceeding in forma pauperis to pay the filing fee in installments, see Tucker v. Branker, 142 F.3d 1294, 1297-1301 (D.C. Cir. 1998) (upholding provision against due process, access to courts, and equal protection challenges); Norton v. Dimazana, 122 F.3d 286, 289-91 (5th Cir. 1997) (upholding provision against access to courts challenge); Nicholas v. Tucker, 114 F.3d 17, 19-21 (2nd Cir. 1997) (upholding provision against equal protection and access to courts challenges); Mitchell v. Farcass, 112 F.3d 1483, 1487-89 (11th Cir. 1997) (upholding provision against equal protection challenge); Roller v. Gunn, 107 F.3d 227, 231-34 (4th Cir. 1997) (upholding provision against access to courts and equal protection challenges); Hampton v. Hobbs, 106 F.3d 1281, 1284-89 (6th Cir. 1997) (upholding provision against access to courts, First Amendment, equal protection, due process, and double jeopardy challenges).

U.S.C. § 1915(b)(1) states:
The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of:
(A) the average monthly deposits to the prisoner’s account; or
(B) the average monthly balance in the prisoner’s account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

28 U.S.C. § 1915(b)(2) states:
After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month’s income credited to the prisoner’s account. The agency having custody

Alaska Prisoners’ Rights Guide – October 2010 62
Prisoners seeking IFP status must submit certified statements of their prison accounts for the preceding six months. Prisoners granted IFP status will pay the entire filing fee for complaints or appeals, currently $350 for filing a federal court civil complaint and $455 for filing an appeal. This procedure is complicated because it requires the prison or another like facility to cooperate administratively in the process by which the courts assess the statutory fee. However, the courts can require the prison administration to provide the necessary information.

An inmate’s case will not be dismissed if funds do not exist to pay the initial fee. The PLRA states that prisoners shall not be barred from bringing suit or appealing a judgment simply because they cannot pay; instead, the initial fee will be collected “when funds exist.” This provision applies only to civil actions. Habeas corpus petitions and other post-judgment proceedings challenging sentences or convictions are generally not considered civil actions under the PLRA. After a prisoner’s release, the majority rule is that the former prisoner may proceed IFP after satisfying the poverty conditions applicable for non-prisoners.

If the court assesses costs against a prisoner filing a civil suit, such costs are to be collected in the same manner that the initial filing fees are collected. A court can, however, exercise its discretion not to award costs against a prisoner plaintiff.


Under the PLRA, a federal court must screen all suits by prisoners against government officials and all IFP cases at the outset of litigation. Federal courts are required to dismiss sua sponte (of their own accord without a motion by either party) cases that are frivolous or malicious, that fail to state a claim on which relief may be granted, or that seek damages from a defendant who is

---

of the prisoner shall forward payments from the prisoner’s account to the clerk of the court each time the amount in the account exceeds $10 until the filing fees are paid.

---

28 U.S.C. § 1914(a). Note the filing fee for an application for a writ of habeas corpus is $5. Id.
28 U.S.C. § 1915(b)(1), (4). See, e.g., DeBlasio v. Gilmore, 315 F.3d 396 (4th Cir. 2003); In re Smith, 114 F.3d 1247 (D.C. Cir. 1997); In re Prison Litig. Reform Act, 105 F.3d 1131 (6th Cir. 1997); McGann v. Comm’r, Soc. Sec. Admin., 96 F.3d 28 (2nd Cir. 1996). But see Farley v. Simpson, 178 F. App’x 340, 341 n.1 (5th Cir. 2006) (citing Gay v. Texas Dep’t of Corr., 117 F.3d 240 (5th Cir. 1997)) (holding that, despite prisoner’s release after filing notice of appeal, he remained subject to PLRA filing fee requirements); Robbins v. Switzer, 104 F.3d 895 (7th Cir. 1997) (same). See, e.g., Feliciano v. Selsky, 205 F.3d 568 (2nd Cir. 2000); but see Skinner v. Govorchin, 463 F.3d 518, 522 (6th Cir. 2006) (“We are not prepared to follow Skinner, accompanied by Feliciano, down this road.”).
immune from damage claims. The circuits are split on whether this provision removes a court’s power to dismiss with leave to amend so plaintiffs may cure deficiencies in the initial complaints.

Federal prisoners can also lose their earned release or “good time” credits if the court decides that the prisoner filed a lawsuit solely for purposes of harassment or that the lawsuit presented false information:

In any civil action brought by an adult convicted of a crime and confined in a Federal correctional facility, the court may order the revocation of such earned good time credit, under section 3624(b) of title 18, United States Code, that has not yet vested, if on its own motion or the motion of any party, the court finds

(1) the claim was filed for a malicious purpose;
(2) the claim was filed solely to harass the party against which it was filed; or
(3) the claimant testifies falsely or otherwise knowingly presents false evidence or information to the court.


Under the PLRA, federal courts have the right to dismiss any prisoner lawsuit brought IFP if the prisoner has brought three or more claims that have been dismissed as “frivolous,” “malicious,” or stating an improper claim. This provision states:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

This means that if an inmate has had three complaints or appeals dismissed as frivolous, malicious, or failing to state a claim, the inmate must pay the entire filing fee up front, or the case will be dismissed. The only time the upfront fee would be waived and the prisoner allowed to proceed IFP is if the prisoner is at risk of immediate and serious physical injury.

---

455 28 U.S.C. § 1915(e)(2). Before the PLRA, a court’s ability to dismiss cases sua sponte was limited to frivolous and malicious cases. NPP Journal, Vol. 13, No. 3 & 4, Fall 1999/Winter 2000, at 10 [hereinafter NPP].
456 Alexander, supra note 396, at 12. See also Shane v. Fauver, 213 F.3d 113 (3rd Cir. 2000) (recognizing court’s power to allow leave to file amended non-IFP complaint); Lopez v. Smith, 203 F.3d 1122 (9th Cir. 2000) (en banc) (recognizing court’s power to allow leave to file amended IFP complaint). But see Christiansen v. Clarke, 147 F.3d 655 (8th Cir. 1998) (holding PLRA allowed court to dismiss without granting leave to amend); McGore v. Wrigglesworth, 114 F.3d 601 (6th Cir. 1997) (holding leave to amend was no longer allowed).
459 Id.
460 Id. Most circuits, including the Ninth Circuit, now agree “imminent danger” is assessed at the time the lawsuit is filed. See, e.g., Andrews v. Cervantes, 493 F.3d 1047, 1052-53 (9th Cir. 2007). To meet the “serious physical injury” requirement, the injury need not be so severe as to be an Eighth Amendment violation in and of itself. Gibbs
This provision, like the filing fees provision, applies to civil actions or appeals and does not include habeas corpus or other challenges to convictions or sentences.\(^{461}\)

### 4. Exhaustion of Administrative Remedies (42 U.S.C. § 1997e(a))

Prisoners must first exhaust their prison’s available administrative remedies (i.e., grievance procedures) before bringing an action with respect to prison conditions.\(^{462}\) The PLRA states:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.\(^{463}\)

This provision makes exhaustion of the prison’s internal grievance system mandatory; if a prisoner does not exhaust the available administrative remedies, the case will be dismissed.\(^{464}\) Such dismissal is “without prejudice;” thus, it will not implicate the “three strikes” provision described above. The prisoner will be able to return to court after pursuing the grievance process, but will likely have to pay another filing fee.

To file a claim alleging a violation of the Department’s regulations, a statute, or the prisoner handbook or to bring a health care claim, inmates in Alaska first must pursue all available avenues within the Department’s grievance process. This means filing a timely claim and pursuing all appeal opportunities. Similarly, to file suit over a classification or disciplinary decision or an administrative transfer, an inmate first must attempt to resolve the dispute internally through the hearing appeal process designed for classification, disciplinary and administrative transfer decisions.

#### a. Consequences of Non-Exhaustion

The exhaustion requirement is not jurisdictional.\(^{465}\) The Supreme Court held that failure to exhaust is an affirmative defense that must be raised by the defendants.\(^{466}\) If the court finds that

\(^{461}\) Carson v. Johnson, 112 F.3d 818 (5th Cir. 1997).


\(^{463}\) Id. Note that this exhaustion provision applies to private detention facilities as well as state-owned, public facilities. Roles v. Maddox, 439 F.3d 1016, 1017-18 (9th Cir. 2006).

\(^{464}\) Perez v. Wisconsin, Dep’t of Corr., 182 F.3d 532, 534-35 (7th Cir. 1999).


v. Cross, 160 F.3d 962, 966-67 (3rd Cir. 1998). The risk of future injury is enough to invoke this exception. Id. In Gibbs, the court held that the plaintiff had alleged imminent danger of serious physical injury by claiming that dust, lint and shower odor came from his cell vent, causing him to suffer “severe headaches, changes in voice, mucus that is full of dust and lint, and watery eyes.” Id.

In Abdul-Akbar v. McKelvie, the Third Circuit held that a court must evaluate the “imminent danger” exception at the time the prisoner attempts to file the new lawsuit, not at the time that the incident giving rise to the lawsuit occurred. 239 F.3d 307 (3rd Cir. 2001). See also Martin v. Shelton, 319 F.3d 1048 (8th Cir. 2003); Malik v. McGinnis, 293 F.3d 559 (2nd Cir. 2002); Ashley v. Dilworth, 147 F.3d 715 (8th Cir. 1998) (“an otherwise ineligible prisoner is only eligible to proceed IFP if he is in imminent danger at the time of filing.”). In addition, the Tenth Circuit has held that, because the “three strikes” provision is not jurisdictional, courts retain the jurisdiction to reach the merits of a claim by a prisoner who has “struck out.” Dubuc v. Johnson, 314 F.3d 1205 (10th Cir. 2003).
the prisoner has not exhausted his claims, the case will be dismissed without prejudice. Exhaustion must be completed prior to filing suit.

There is not a great deal of case law yet addressing whether a prisoner who is time-barred from an administrative remedy thereafter forever loses his constitutional or statutory claim. A prisoner in this situation would be well advised to appeal through all the levels of the grievance system and explain in the grievance the reasons for the failure to file on time.

b. Qualifying as Exhaustion

Exhaustion requires pursuing all available administrative appeals, and all claims raised in the lawsuit must be exhausted. Some courts have relied on the rules of the specific prison’s grievance policy to determine the level of specificity required in grievances. Also, “exhaustion is not per se inadequate simply because an individual later sued was not named in the grievances;” therefore, a claim may not be deemed unexhausted merely because not all defendants named in the suit were named in the relevant grievances.

A related issue is whether attempts at exhaustion qualify if they are technically deficient. If a prisoner does not file a grievance because he is unable to obtain grievance forms, the prisoner

---

468 McKinney v. Carey, 311 F.3d 1198, 1200-01 (9th Cir. 2002); Perez v. Wisconsin, Dep’t of Corr., 182 F.3d 532 (7th Cir. 1999); Wendell v. Asher, 162 F.3d 887 (5th Cir. 1998), overruled by implication on other grounds by Bock, 549 U.S. at 199.
469 Johnson v. Jones, 340 F.3d 624, 627 (8th Cir. 2003).
470 Johnson v. Meadows, 418 F.3d 1152, 1159 (11th Cir. 2005) (holding that failure to timely file a grievance without good cause was a procedural default under Georgia law).
471 In Woodford v. Ngo, the Supreme Court held “proper exhaustion of administrative remedies is necessary,” so under this standard, filing an untimely or otherwise procedurally defective grievance or appeal did not satisfy the PLRA’s exhaustion requirement. 548 U.S. at 81. However, the Supreme Court did not specify what constituted “proper” as opposed to “improper” exhaustion; it merely spoke to the facts in that particular case. Id. Meanwhile, the Tenth Circuit stated, “Where prison officials prevent, thwart, or hinder a prisoner's efforts to avail himself of an administrative remedy, they render that remedy unavailable and a court will excuse the prisoner's failure to exhaust.” Little v. Jones, 607 F.3d 1245, 1250 (10th Cir. 2010).
472 Similarly, the Fifth Circuit has held that, where a prisoner’s grievance was rejected as untimely but the prisoner had a broken hand and could not file, the court should not dismiss for failure to exhaust because “one’s personal inability to access the grievance system could render the system unavailable.” Days v. Johnson, 322 F.3d 863, 867-88 (5th Cir. 2003), overruled by implication on other grounds by Jones, 549 U.S. at 216. The court also emphasized that, in such circumstances, the prisoner needs to try to exhaust when he or she can, but that the court is not bound by the grievance system’s rejection of the grievance as untimely. Id.
473 In contrast (and prior to the Woodford decision), the prisoner in Pozo v. McCaughtry missed a deadline for one of the levels of appeal of the grievance system. 286 F.3d 1022 (7th Cir. 2002). The grievance was rejected on that basis. Id. After the grievance had been rejected, the prisoner filed his lawsuit. Id. The district court allowed the filing, but the Seventh Circuit reversed and found that the untimely appeal meant that the prisoner could never file a lawsuit. Id. This is an extraordinarily dangerous holding because it gives to those who operate prison grievance systems the power to bar a constitutional claim based on a minor procedural default. Significantly, the decision does not discuss the reasonableness of the grievance system’s failure to consider the grievance in light of the minor procedural error. Id.
475 Burton v. Jones, 321 F.3d 569 (6th Cir. 2003); Strong v. David, 297 F.3d 646 (7th Cir. 2002).
476 Bock, 549 U.S. at 219.
may file in court because no administrative remedy is “available.”

As the Eighth Circuit has stated, “a remedy that prison official prevent a prisoner from ‘utilizing’ is not an ‘available’ remedy under § 1997e(a).” In a multi-level grievance system, such as in Alaska’s prisons, if prison staff fail to respond within the time limits established by the grievance procedures, the prisoner must appeal to the next stage. If the prisoner does not receive a response at the final appeal level and the time for response has passed, the prisoner has exhausted.

If a prisoner cannot appeal without a decision from the lower level of the grievance system, and the lower level does not respond to the grievance, the prisoner may go ahead and file an appeal. Similarly, a prisoner who “wins” a grievance has exhausted if the grievance gives him everything that the grievance system can. Failure to sign and date the grievance or similar technicalities do not defeat exhaustion if the grievance procedures do not require these steps. Some courts have found that pursuit of a complaint through informal channels satisfies the exhaustion requirement; however, these cases are generally quite fact-specific. When navigating the grievance process in Alaska, it is crucial to understand and follow the Department of Corrections’ policies and procedures.

c. Exclusions from the Exhaustion Requirement

In Booth v. Churner, the Supreme Court resolved an inter-circuit conflict by holding that a prisoner seeking damages must exhaust available administrative remedies, even if the administrative remedy in question does not provide damages as a possible remedy. However, if the grievance system can provide no remedy at all to the prisoner, there still may be an argument against requiring exhaustion.

475 Miller v. Norris, 247 F.3d 736, 740 (8th Cir. 2001) (alterations in original). See also Brown v. Valoff, 422 F.3d 926, 935 (9th Cir. 2005) (“a prisoner need not press on to exhaust further levels of review once he has either received all ‘available’ remedies at an intermediate level of review or been reliably informed by an administrator that no remedies are available”).
476 White v. McGinnis, 131 F.3d 593 (6th Cir. 1997).
477 Lewis v. Washington, 300 F.3d 829 (7th Cir. 2002) (holding that when prison officials do not respond to prisoner’s initial grievance, administrative remedies are exhausted); Powe v. Ennis, 177 F.3d 393 (5th Cir. 1999).
480 Miller v. Tanner, 196 F.3d 1190 (11th Cir. 1999); see also Nyhuis v. Reno, 204 F.3d 65 (3rd Cir. 2000) (dictum that substantial compliance with grievance procedure will satisfy exhaustion requirement); Camp v. Brennan, 219 F.3d 279 (3rd Cir. 2000) (holding that investigation of complaint by Secretary of Corrections’ office rather than through regular grievance system satisfied exhaustion requirement). But see Freeman v. Francis, 196 F.3d 641 (6th Cir. 1999) (declining to find exhaustion for investigations by use of force committee and state police).
481 See, e.g., Marvin v. Goord, 255 F.3d 40, 43 n.3 (2nd Cir. 2001) (finding in dictum that resolution of the issue through informal channels satisfies exhaustion); Lewis v. Gagne, 265 F.Supp.2d 939 (N.D.N.Y. 2003) (finding informal efforts of juvenile detainee to notify facility of his grievances were sufficient to exhaust PLRA requirements).
482 See DOC Policy # 808.03, Prisoner Grievances.
484 Id. at 736.
• In Porter v. Nussle, the Supreme Court held that lawsuits raising claims about the use of force or retaliation are considered actions “with respect to prison conditions,” as the phrase is used in the exhaustion provision. Therefore, all such claims must be exhausted before a lawsuit can be filed.

• The leading decision addressing how exhaustion applies in the context of a class action is Jones-El v. Berge. The court held that only the named representatives of the class must exhaust for a class to be certified.

• The District of Columbia Circuit held the PLRA does not preclude courts from exercising their traditional equitable powers to issue injunctions while exhaustion is pending, if injunctive relief would prevent irreparable injury to a plaintiff.

• The exhaustion requirement does not apply to detainees in INS facilities.

• Finally, there is general agreement that the exhaustion requirement does not apply to cases filed before the effective date of PLRA.

5. Physical Injury Requirement (42 U.S.C. § 1997e(e))

Prisoners cannot file a lawsuit for mental or emotional injury unless they can also show that there has been physical injury. The PLRA provides:

No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

a. Action for Mental or Emotional Injury

This provision refers to an “action,” indicating that the entire action, not individual claims within one civil action, must conform to this requirement. However, courts that have examined this provision have analyzed conformity on a claim-by-claim basis. Despite this confusion and despite the fact that the statute does not distinguish between damages and other types of relief,
federal courts have agreed that this provision acts to bar only damages claims (and compensatory damages at that), leaving injunctive and declaratory relief claims unaffected.\footnote{Alexander, supra note 396, at 14 (citing Harper v. Showers, 174 F.3d 716 (5th Cir. 1999) and Perkins v. Kansas, Dep’t of Corr., 165 F.3d 803 (10th Cir. 1999)).}

\subsection*{b. Mental or Emotional Injury Defined}

The term “mental or emotional injury” refers to “such things as stress, fear, and depression, and other psychological impacts.”\footnote{Alexander, supra note 396, at 19 (citing Amaker v. Haponik, 1999 WL 76798, at *7 (S.D.N.Y. Feb. 17, 1999)).} Many courts have found claims of unconstitutional deprivation of liberty or property are not actions for mental or emotional injury.\footnote{Id.} But, the circuits are split on whether claims for other violations of constitutional rights, in the absence of a resulting physical injury, are intrinsically claims for mental or emotional injury. The Seventh and Ninth Circuits have held that First Amendment claims are not subject to the physical injury requirement.\footnote{Stewart v. Lyles, 66 F. App’x 18, 22 (7th Cir. 2003) (citing Rowe v. Shake, 196 F.3d 778 (7th Cir.1999)); Oliver v. Keller, 289 F.3d 623, 628 n.5 (9th Cir. 2002) (citing Cannell v. Lightner, 143 F.3d 1210 (9th Cir. 1998)).} In contrast, several other circuits treat First Amendment claims as claims for mental or emotional distress,\footnote{Royal v. Kautzky, 375 F.3d 720, 723 (8th Cir. 2004); cf. Allah v. Al-Hafeez, 226 F.3d 247 (3rd Cir. 2000) (determining First Amendment claims must be accompanied by physical injury to qualify for compensatory damages, although nominal damages could still be awarded absent physical injury).} and the D.C. Circuit has held privacy claims as claims for mental or emotional injuries.\footnote{Davis v. District of Columbia, 158 F.3d 1342 (D.C. Cir. 1998).}

\subsection*{c. Physical Injury Defined}

Courts differ on what constitutes sufficient harm to be a physical injury. Until recently, some courts held that in an Eighth Amendment excessive force case, physical injury “must be more than de minimis but need not be significant.”\footnote{Sigler v. Hightower, 112 F.3d 191, 193 (5th Cir. 1997); see also Gomez v. Chandler, 163 F.3d 921 (5th Cir. 1999).} However, Wilkins announced that injury and force are imperfectly correlated, and “it is the latter that ultimately counts.”\footnote{Id.} Thus, Wilkins essentially abrogated the de minimis injury requirement so long as the force applied was in violation of the Eighth Amendment.\footnote{Gomez, 163 F.3d at 921.} However, it is unclear how the Wilkins holding affects non-Eighth Amendment claims involving mental or emotional injury.

In practice, allegations of cuts and abrasions have been found to satisfy the physical injury requirement,\footnote{Liner v. Goord, 196 F.3d 132 (2nd Cir. 1999).} as have intrusive bodily searches.\footnote{Sigler, 112 F.3d at 191.} However, a bruised ear did not satisfy the requirement,\footnote{Id.} nor did confinement in a filthy cell with exposure to mentally ill patients.\footnote{Alexander, supra note 396, at 14.
The Seventh Circuit, in a case challenging the plaintiff’s exposure to excessive lead in the prison drinking water, left open the question of whether exposure to a currently non-injurious condition that is likely to lead to a future physical injury is barred by the provision. The court reversed and remanded for development of the record.\textsuperscript{507}

In \textit{Davis v. District of Columbia}, \textsuperscript{508} the court held that physical manifestations of emotional distress do not satisfy the statutory requirement. In contrast, the Tenth Circuit remanded on the same question.\textsuperscript{509}

Most courts hold that this provision does not bar a former prisoner who files suit for damages based on the conditions to which the plaintiff was subjected in prison.\textsuperscript{510} On the other hand, the provision has been applied to a lawsuit challenging a false arrest unrelated to the prisoner’s current incarceration, even though the arrest did not occur in a custodial facility.\textsuperscript{511}

The physical injury requirement does not apply to cases filed prior to the effective date of PLRA.\textsuperscript{512}

6. Attorney’s Fees

The PLRA attorney’s fees provision affects the ability of inmates to obtain legal counsel. The PLRA limits an attorney’s fees in any action filed by a prisoner under 42 U.S.C. § 1988, the Civil Rights Attorney’s Fees Act of 1976.\textsuperscript{513} Under this provision, fees are barred in “any action brought by a prisoner” except when fees are “directly and reasonably incurred in proving an actual violation of the plaintiff’s rights.”\textsuperscript{514} Fees can also be awarded if they are directly and reasonably incurred in enforcing the relief ordered for the violation.”\textsuperscript{515} The statute also requires fees to be “proportionately related to the court ordered relief for the violation” but does not state what proportion,\textsuperscript{516} although defendants may be required to pay fee awards up to 150% of any damages awarded.\textsuperscript{517}

\textsuperscript{507} Robinson v. Page, 170 F.3d 747 (7th Cir. 1999); see also Herman v. Holiday, 238 F.3d 660 (5th Cir. 2001) (holding claim of likelihood of developing a disease from asbestos exposure was not actionable as pled).
\textsuperscript{508} 158 F.3d 1342 (D.C. Cir. 1998).
\textsuperscript{509} Perkins v. Kansas, Dep’t of Corr., 165 F.3d 803 (10th Cir. 1999).
\textsuperscript{510} Kerr v. Puckett, 138 F.3d 321 (7th Cir. 1998); but see Harris v. Garner, 216 F.3d 970 (11th Cir. 2000) (en banc) (dismissing former prisoners claims without prejudice because they commenced their suit while incarcerated). But see Cox v. Malone, 199 F.Supp.2d 135 (S.D.N.Y. 2002) (applying provision to former prisoner).
\textsuperscript{511} Napier v. Preslicka, 314 F.3d 528 (11th Cir. 2002); see also Quinlan v. Pers. Transp. Servs. Co., LLC, 329 F. App’x 246, 248-49 (11th Cir. 2009) (applying § 1997e(e) to inmate who claimed to suffer injury while being transported between facilities).
\textsuperscript{512} Swan v. Banks, 160 F.3d 1258 (9th Cir. 1998); Craig v. Eberly, 164 F.3d 490 (10th Cir. 1998); Zehner v. Trigg, 133 F.3d 459 (7th Cir. 1997) (dismissing case based on physical injury provision when plaintiff had failed to raise non-retroactivity of PLRA in trial court).
\textsuperscript{513} 42 U.S.C. § 1997e(d).
\textsuperscript{517} 42 U.S.C. § 1997e(d)(2).
Hourly rates for attorneys are capped at 150% of the Criminal Justice Act (“CJA”) rates for criminal defense representation, as set forth in 18 U.S.C. §3006A. Currently, in almost all federal districts, the authorized CJA rate is $75, so the hourly PLRA rate is $112.50.

Prisoners are also affected by the provision that mandates “up to” 25% of a damage judgment to be applied to the fee award; if the fee award is not greater than 150% of the judgment, defendants must pay the rest. This means that in damages cases, a portion of the judgment awarded to the prisoner, not to exceed 25% of the award, is to be applied to satisfy the attorney’s fees. The remainder of the fees, up to 150% of the judgment, is to be covered by the defendants. For example, if damages were found to be $20,000, and requested fees were $50,000, then only $30,000 in fees could be awarded (up to 150% of the judgment). Of that amount, $5000 would come from the plaintiff’s damages award (up to 25% of the award).

B. Restrictions on Available Relief in Prisoner Cases

The PLRA contains several provisions that restrict a court’s ability to enter and to maintain prospective relief in prisoner litigation cases.

1. Injunctive Relief (18 U.S.C. § 3626)


In order to enter injunctive or prospective relief regarding conditions of confinement, the court must find that the relief is narrowly drawn, extends no further than necessary to correct the violation of a federal right, and is the least intrusive means necessary. These findings must be recited upon entering the relief. In addition, the court is to give substantial weight to any adverse impact on public safety and operation of the criminal justice system.

The PLRA does not change the standard for granting a preliminary injunction. Preliminary injunctive relief is limited to ninety days unless the court makes the relief final, and the court must make the same findings required for other kinds of injunctive relief. In Mayweathers v. Newland, the Ninth Circuit held that this provision does not bar a court from entering a series of preliminary injunctions; as long as relief is re-entered at the appropriate times, a preliminary injunction can continue indefinitely.

---

519 Alexander, supra note 396, at 15.
521 Alexander, supra note 396, at 15.
522 “Prospective relief” is all relief other than compensatory monetary damages. 18 U.S.C. § 3626(g)(7) (2010).
524 Id.
525 Id.
526 Id.
527 258 F.3d 930 (9th Cir. 2001).
b. Termination of Judgments (18 U.S.C. § 3626(b))

Under the PLRA, court orders in prison litigation, including consent decrees, may be terminated after two years unless the court finds that there is a “current and ongoing violation” of federal law. After this two-year period, orders may be challenged every year.\(^{530}\)

Violation of the court order itself is not enough to constitute a violation under § 3626(b)(3);\(^{531}\) there must also be a violation of the U.S. Constitution, a statute, or a regulation.\(^{532}\) There is still debate regarding what “current and ongoing” means — whether it means “right now” or whether it can include violations that a court might reasonably expect to recur soon if the injunction is dissolved. Several circuits have determined that an imminent constitutional violation does not satisfy the requirement of a "current and ongoing" violation.\(^{533}\)

Additionally, a court order may be challenged at any time if it was entered absent the required findings that the order was narrowly drawn, necessary, and the least intrusive means of correcting the violation of the federal right.\(^{534}\)

c. Important Cases Regarding Injunctive Relief

- All courts to address the issue have held that, with regard to litigated decrees, the PLRA does not change the standards for issuance of an injunction.\(^{535}\)

- Even under the PLRA restrictions, a court may enter a system-wide injunction if it is necessary to cure a “system-wide injury.”\(^{536}\)

- One court has held that the PLRA’s prospective relief provisions do not limit a court’s power to grant remedies for contempt.\(^{537}\)

- All circuits to consider the issue have upheld the PLRA’s termination provisions against constitutional challenges such as separation of powers, due process, and equal protection claims.\(^{538}\)

- Some courts interpret the findings for pre-PLRA litigated orders as sufficiently analogous to survive post-PLRA scrutiny.\(^{539}\)

---


\(^{531}\) Plyler v. Moore, 100 F.3d 365, 370 (4th Cir. 1996).

\(^{532}\) NPP, supra note 410, at 28. Note that PLRA has been read to limit federal courts’ ability to grant prospective relief to claims under federal law only. Handberry v. Thompson, 446 F.3d 335, 345-346 (2nd Cir. 2006).

\(^{533}\) Para-Prof’l Law Clinic v. Beard, 334 F.3d 301, 304 (3rd Cir. 2003); Gilmore v. California, 220 F.3d 987, 1009 n.27 (9th Cir. 2000) (noting in dictum that this requirement presents "a serious separation of powers claim"); Cason v. Seckinger, 231 F.3d 777, 784 (11th Cir. 2000).


\(^{535}\) Armstrong v. Davis, 275 F.3d 849, 872 (9th Cir. 2001); Smith v. Arkansas, Dep’t of Corr., 103 F.3d 637, 647 (8th Cir. 1996) (“The Act merely codifies existing law and does not change the standards for whether to grant an injunction.”); Williams v. Edwards, 87 F.3d 126, 133 n.21 (5th Cir. 1996) (same).

\(^{536}\) See Armstrong, 275 F.3d at 870 n.27.


\(^{538}\) See, e.g., Benjamin v. Jacobson, 172 F.3d 144 (2nd Cir. 1999)
Ordinarily, a plaintiff facing a termination motion is entitled to an evidentiary hearing upon request if there are disputed facts. The Ninth Circuit has held that defendants seeking termination of a decree have the burden of showing the absence of a current and ongoing violation. The Fifth Circuit, however, has held that those opposing termination have the burden of demonstrating a current and ongoing violation. The Tenth Circuit “reject[s] the general proposition that only defendants can seek equitable modification of unlitigated consent decrees.”

2. Automatic Stay

If a court does not decide a motion for termination within 30 days (or up to 90 days if good cause is shown), an automatic stay of relief goes into effect. This stay continues until the court decides on the motion to terminate. The Supreme Court rejected constitutional challenges to the automatic stay provision on separation of powers grounds based on the argument that the stay provision suspends a final judgment. The Court also rejected a construction of the automatic stay provision that would have allowed a court to enjoin the stay pending a ruling on a motion for termination. The Court left open the possibility that application of the automatic stay might violate the due process clause in cases so complex that no court could reach a decision on a termination motion within ninety days.

3. Settlements

In order to enter into a federal court settlement that includes prospective relief, the settlement must meet the same requirement that the PLRA establishes for other court orders. Parties may enter into “private settlement agreements” that do not meet the PLRA standards, but these settlements cannot be enforced in federal court.

539 See, e.g., Gilmore v. California, 220 F.3d 987, 1008 n.25 (9th Cir. 2000); Smith v. Arkansas Dep’t of Corr., 103 F.3d 637, 647 (8th Cir. 1996). But see Cagle v. Hutto, 177 F.3d 253, 257 (4th Cir. 1999) (holding that post hoc PLRA findings are not permitted).
540 Ruiz v. United States, 243 F.3d 941 (5th Cir. 2001); Hadix v. Johnson, 228 F.3d 662 (6th Cir. 2000); see also Laaman v. Warden, New Hampshire State Prison, 238 F.3d 14 (1st Cir. 2001) (“whether a full-fledged evidentiary hearing is required . . . is a matter for the discretion of the district court.”); Cason v. Seckinger, 231 F.3d 777 (11th Cir. 2000).
541 Gilmore, 220 F.3d at 1008-09.
542 Guajardo v. Tex. Dep’t of Criminal Justice, 363 F.3d 392, 396 (5th Cir. 2004)
543 David C. v. Leavitt, 242 F.3d 1206, 1211 (10th Cir. 2001).
545 Id.
547 Id. at 340-41.
548 Id. at 350.
4. Class Actions

The PLRA requires only the named plaintiffs to exhaust administrative remedies. Various holdings to that effect are consistent with general practice in class actions, which the PLRA does not purport to displace. A leading treatise on class actions states: “When exhaustion of administrative remedies is a precondition for suit, the satisfaction of this requirement by the class plaintiffs normally avoids the necessity for each class member to satisfy this requirement independently.”

5. Conclusion

The PLRA has succeeded in its mission of reducing the number of prisoner lawsuits challenging conditions of confinement. Most notably, the PLRA: (1) restricts "conditions of confinement" litigation brought by prisoners; (2) limits attorney's fees for successful cases; (3) requires a physical injury for a prisoner to recover damages for mental or emotional injury suffered while incarcerated; (4) requires indigent prisoners to pay the filing fees in civil cases in installments; (5) requires courts to screen prisoner civil actions for frivolousness, maliciousness, or failure to state a claim; and (6) authorizes the revocation of good time credits if a court finds that a prisoner has brought a claim maliciously or solely to harass a party, or has presented false testimony in pursuing a claim.

III. The Alaska Prison Litigation Reform Act

A. The Cleary Question

1. Historical Perspective

Cleary began in August 1981 as a class-action lawsuit filed by inmate Michael Cleary. Cleary v. Smith challenged the conditions of Alaska’s correctional facilities. In 1983, the superior court approved two partial settlement agreements between the parties. The next year, a trial took place to address substantive prisoners’ issues like overcrowding and rehabilitation. The trial lasted six weeks and judgment was rendered in 1985. Both sides appealed to the Alaska Supreme Court, which appointed a monitor to report to the court.

---


552 Shook v. El Paso County, 386 F.3d 963, 970 (10th Cir. 2004).


555 Id. at § 803(d) (adding 42 U.S.C. § 1997e(d)).

556 Id. (amending 42 U.S.C. § 1997e(e)).

557 Id. at § 804(a) (adding a new 28 U.S.C. §1915(b)).

558 Id. at § 805(a) (adding a new 28 U.S.C. §1915(a)).

559 Id. at § 809(a) (adding a new 28 U.S.C. § 1932)).
In 1990, the parties negotiated, and the court ordered, a Final Settlement Agreement and Order (“Cleary FSA” or “FSA”), which set standards for prison conditions and required judicial oversight to ensure compliance by the Department of Corrections.\textsuperscript{560}

In 1999, the Alaska Legislature enacted the Alaska Prison Litigation Reform Act (APLRA).\textsuperscript{561} The APLRA established, among other things, standards for terminating prospective relief in civil actions challenging conditions at prison facilities.\textsuperscript{562} The APLRA requires that a court terminate prospective relief previously ordered in a civil action absent findings of ongoing violations of a state or federal right.\textsuperscript{563}

On August 30, 2000, the State defendants filed a motion pursuant to the APLRA requesting to terminate the 1990 FSA. Plaintiffs opposed the motion, alleging the APLRA was unconstitutional.

The APLRA is substantially derived from the federal Prison Litigation Reform Act (PLRA).\textsuperscript{564} Like the PLRA, APLRA allows for the immediate termination of prospective relief if at any time the relief was found to be granted absent findings of a federal right violation.\textsuperscript{565} A majority of courts hold the PLRA termination provision mandates termination of the consent decree itself. The minority approach holds the PLRA does not terminate the underlying consent decree or order but rather restricts a court’s authority to order continued prospective relief under the order.\textsuperscript{566}

On May 4, 2001, the Superior Court held another hearing on this matter. The court-appointed compliance monitor reported that all matters referred to him were resolved in conformity with the standards established in the FSA, and that judicial oversight through the court-appointed monitor was no longer necessary. As a result, the court terminated active judicial supervision of the case and released the monitor and class counsel from their duties.

On July 3, 2001, the Superior Court ruled on the state’s motion to set aside the Cleary FSA.\textsuperscript{567} In rejecting the state’s arguments, the court adopted the Ninth Circuit (minority) approach to terminating a consent decree. The Court narrowly construed the APLRA to affect only the prospective relief due parties under the FSA, not the FSA itself. The court determined that the legislature intended the APLRA to limit a court’s ability to order prospective relief absent a showing of violations of state or federal law.\textsuperscript{568} Where there is no showing of an ongoing

\textsuperscript{560} This court-ordered settlement is considered a consent decree. A consent decree is defined as a “court order that is based on the agreement of the parties,” not including a private settlement agreement. AS 09.19.200(g)(2) (2009).

\textsuperscript{561} AS 09.19.200 (2010). Note: unless otherwise stated, all cited provisions of AS 09.19.200 are current as of 2009.

\textsuperscript{562} AS 09.19.200(c). Prospective relief is defined as “all relief other than compensatory monetary damages.” AS 09.19.200(g)(5). Relief is defined as “any legal or equitable remedy in any form that may be ordered by the court, and includes a consent decree but does not include a private settlement agreement.” AS 09.19.200(g)(6).

\textsuperscript{563} AS 09.19.200(c). “State or federal right” means “a right arising from the United States Constitution, the Constitution of the State of Alaska, or a federal or state statute.” AS 09.19.200(g)(7).


\textsuperscript{565} 18 U.S.C. § 3626(b)(2).

\textsuperscript{566} Gilmore v. California, 220 F.3d 987, 1000 (9th Cir. 2000).


\textsuperscript{568} Id.
violation of state or federal law, the APLRA requires a court to terminate prospective relief previously ordered in a civil action. The court also held that the APLRA must be construed consistently with the PLRA to the extent possible. The opinion clarified that the APLRA requires a court to terminate relief available under a consent decree absent a state or federal violation but does not require termination of the underlying consent decree or final order.

2. Status of the Cleary FSA

The APLRA was found to be a constitutional exercise of legislative authority, provided that it is interpreted only to terminate prospective relief—and not the underlying settlement agreement—in the absence of a showing of a violation of state or federal law. Thus, Cleary survives, but the prospective relief available under Cleary is limited to when an inmate can show a violation of a state or federal law. For instance there is no state or federal right relating to decoration of one’s prison cell; thus, an inmate who was ordered to take down a racy poster hanging in his cell could not file a compliance motion under Cleary. But if that same inmate were denied access to the prison law library, he could bring an action under Cleary to enforce his right of access to the courts, per the First Amendment to the U.S. Constitution and AS 33.30.193. Inmate classification issues also survived the State’s challenge of Cleary. Alaska inmates retain the constitutional right to rehabilitative programs and the statutory right to be held in the least restrictive housing available.

Nonetheless, the question still remains: If a court were to find a state or Federal statute violation, what remedy would be available to prisoners? Would the remedy be one that already exists in the Cleary FSA? Or would the court impose a remedy based on the APLRA or PLRA, both of which require the narrowest order necessary to correct the violation? Only time will tell. But some of the provisions in the FSA, like the due process requirements and the institutional population capacities, could be available remedies. Of course, the state would likely argue that the APLRA requires the narrowest remedy still considered to be constitutional, and that the remedies available under Cleary are not the narrowest possible. But, the state agreed to those remedies in the settlement agreement, so contesting them puts the state in the awkward position of arguing that it made a bad deal. The state was not obligated to provide the remedies it did in Cleary. For the most part, the remedies available under Cleary are probably the most minimal, as anything less would not likely alleviate the alleged violation.

B. APLRA Provisions

1. Required Findings

569 Id.
570 The court also held that the APLRA does not violate state or federal due process or equal protection and noted that inmates do not have a property interest in a consent decree.
572 Even though Cleary applies only to violations of state and federal rights, many claims can be couched in terms of a state or federal right, if pled carefully. And if the court determines that there was no violation of a state or federal right, the case would not have succeeded anyway.
573 See infra Part III.B.
574 AS 09.19.200(a)(2)-(3).
A court may not order prospective relief in a civil action with respect to correctional facility conditions unless the court finds:

1. the plaintiff has proven a violation of a state or federal right;
2. the prospective relief is narrowly drawn and extends no further than is necessary to correct the violation of the right;
3. the prospective relief is the least intrusive means necessary to correct the violation of the right; and
4. the prisoner has exhausted all administrative remedies available to the prisoner before filing the civil action.\(^{575}\)

In making these findings, the court must weigh any adverse effects on public safety or the criminal justice system caused by the prospective relief.\(^{576}\)

“When a court finds multiple violations of a state or federal right, when multiple remedies are ordered, or when the prospective relief applies to multiple facilities, the findings required above shall be made as to each violation, remedy, and facility,” respectively.\(^{577}\)

2. Preliminary Injunctive Relief

A court may enter preliminary injunctive relief only upon finding that the requested relief (1) is narrowly drawn and extends no further than is necessary to correct the harm, and (2) is the least intrusive means necessary to correct that harm.\(^{578}\) Preliminary injunctive relief shall automatically expire 90 days after it is ordered unless the court orders final relief within that period.\(^{579}\)

3. Class Actions

In class-action lawsuits challenging correctional facility conditions, prospective relief applicable to the class may only be ordered after the court makes the findings required under 09.10.200(c), and finds that the violation of a state or federal right is applicable to the entire class.\(^{580}\) A class action will be terminated upon the motion of the defendant if these requirements are not met.\(^{581}\)

4. Termination of Prospective Relief

Prospective relief ordered in a civil trial with respect to correctional facility conditions, including relief ordered under a consent decree, shall be terminated upon the motion of the defendant

\(^{575}\) AS 09.19.200(a). A court may order prospective relief as provided in a consent decree without complying with these requirements if the relief does not continue for more than two years. AS 09.19.200(e). Furthermore, parties may enter into private settlement agreements that do not comply with the limitations on relief imposed by AS 09.10.200(a), as long as the terms of the agreement are not subject to court enforcement. AS 09.19.200(e).

\(^{576}\) AS 09.19.200(a).

\(^{577}\) Id.

\(^{578}\) AS 09.19.200(b).

\(^{579}\) Id.

\(^{580}\) AS 09.19.200(c).

\(^{581}\) Id.
unless the court finds that there is a current violation of a state or federal right and makes the findings required under 09.10.200(a). Prospective relief must be modified by motion whenever the findings required above no longer apply to one or more provisions of the prospective relief then in effect.

5. **Automatic Stay**

The court must promptly rule on a motion to modify or terminate prospective relief. A motion to modify or terminate prospective relief stays the order for prospective relief beginning on the 90th day after the motion is filed, and the stay ends on the date the court enters a final order ruling on the motion. The court may postpone an automatic stay for not more than 30 days for good cause.

6. **Filing Fees**

A prisoner may not commence litigation against the state until the prisoner has paid full filing fees to the court. However, the court may exempt a prisoner from paying part of the fees if the court finds exceptional circumstances prevent the prisoner from paying the full fees. Imprisonment and indigence do not constitute exceptional circumstances if the prisoner has available income or resources that can be applied to the filing fee. The court will determine the amount of the exemption and set a fee to be paid by the prisoner. In setting this fee, the court shall require the prisoner to pay a filing fee equal to 20 percent of the larger of the average monthly deposits made to the prisoner’s account or the average balance of the account for the preceding six months.

**C. Conclusion**

The APLRA imposes several procedural hurdles on inmates attempting to file a civil action with respect to correctional facility conditions. The Act also limits the prospective relief available in such lawsuits. However, the APLRA is not as restrictive as the Federal Prison Litigation Reform Act. For instance, the APLRA does not have a “three strikes, you’re out” provision for prisoners whose claims are found to be frivolous, malicious, or without merit. The APLRA does mirror the PLRA with respect to payment of filing fees, and it too requires that a prisoner exhaust all administrative remedies prior to filing a lawsuit. The APLRA also established standards for terminating prospective relief in civil actions challenging conditions at prison facilities, including prospective relief ordered under a consent decree (i.e., it restricts a prisoner’s ability to sue for prospective relief under the *Cleary FSA*). The APLRA mandates that a court may not

---

582 AS 09.19.200(c).
583 Id.
584 AS 09.19.200(f).
585 Id.
586 Id.
587 AS 09.19.010(a) (2009). Note: unless otherwise stated, all provisions of AS 09.19.010 are current as of 2010.
588 AS 09.19.010(c).
589 Id.
590 AS 09.19.010(d).
591 Id.
order prospective relief in a civil action with respect to correctional facility conditions unless the court finds that (1) the plaintiff has proven a violation of a state or federal right, (2) the prospective relief is narrowly drawn and extends no further than is necessary to correct the violation of the right, and (3) the prospective relief is the least intrusive means necessary to correct the violation of the right.

The passage of the APLRA raised questions about the Cleary FSA. The APLRA severely limited the consent decree set out in Cleary. The APLRA sought to terminate prospective relief ordered under a consent decree, but the Alaska Superior Court ruled that the APLRA should be construed narrowly so as to only affect the prospective relief due parties under the consent decree and not to terminate the consent decree itself. In that respect, the Cleary FSA survives, but prospective relief is only available if an inmate can establish an ongoing violation of a state or federal right. Thus, there is still some utility to the Cleary FSA because an inmate can bring an enforcement action against the state under Cleary and avoid paying any statutorily required filing fees. Cleary, then, has a pragmatic value — the first step for inmate litigation should always be to file as a compliance motion under Cleary. In addition there are some remedies available under Cleary that could be construed as the most minimally intrusive ways to correct a violation and might, therefore, be enforceable.

IV. Class Action Litigation under the PLRA and APLRA

Generally speaking, a federal lawsuit filed to enforce any of the rights discussed in this guide would have to satisfy the requirements of the PLRA and a suit brought in state court would have to meet the requirements of the APLRA. The restrictions placed on individual litigation by these statutes, including exhaustion of administrative remedies, apply to class action litigation as well. However, under the PLRA, only the named plaintiffs must exhaust their administrative remedies. Various holdings to that effect are consistent with general practice in class actions, which the PLRA does not purport to displace. The PLRA does not impact the make-up of class certification in any way, leaving courts to apply “existing law governing class certification.”

Additionally, it should be sufficient for named prisoner plaintiffs to exhaust with respect to their individual complaints and/or experiences (e.g., “I was denied heart medication”) rather than to structural or systemic issues (inadequate or unlawful policies, deficient staff training or supervision) that are often raised in injunctive class litigation. In other words, the prisoner does not have to exhaust the grievance system with respect to a particular remedial request but is only obliged to put his or her complaint before prison authorities for resolution prior to filing a lawsuit. It is enough for prisoners to allege in their grievances what happened to them. It is then up to the authorities to determine what remedies are available, either generally or in a particular case.

---

592 See supra note 550.
594 Id.
595 Id. at 50.
Under the APLRA, in class action lawsuits challenging correctional facility conditions, prospective relief applicable to the class may only be ordered after the court makes the required findings under the statute. These findings include: the plaintiff has proven a violation of a state of federal right; the prospective relief is narrowly drawn and extends no further than is necessary to correct the violation of the right; the prospective relief is the least intrusive means necessary to correct the violation of the right; and, the prisoner has exhausted all administrative remedies available to the prisoner before filing the civil action. The court must then determine whether the alleged violation of a state or federal right is applicable to the entire class. This provision is not much different from that already required for class actions under the Alaska Rules of Civil Procedure. Therefore, it stands to reason that, like the PLRA class action requirements discussed above, only the named inmates would have to exhaust all administrative remedies and demonstrate that there was a violation of a state or federal right.

597 ALASKA R. CIV. P. 23(a) (2009).
PART III: ALASKA DEPARTMENT OF CORRECTIONS POLICIES AND PROCEDURES

The Department of Corrections’ policies and procedures are substantively derived from the provisions in the Cleary FSA. The Department of Corrections (DOC) has conceded that the Cleary FSA has become the Department’s standard operating procedure during the past decade. In that respect, the regulations established by the DOC pass constitutional muster by providing for protection of the health and safety of inmates and allowing for opportunities for prisoners to exercise their civil rights and civil liberties.

A. Medical and Health Care Services

1. Access to Health Care Services

All of the Alaska administered prisons are on the same health care system. According to DOC, all sentenced and unsentenced prisoners shall have access to medical, dental, and mental health care services comparable in quality to those available to the general public. This includes prisoners housed in both state and private facilities. Prisoners in punitive and administrative segregation must also receive the same access to health care as that provided to prisoner in the general population. DOC will also ensure that special health care services are made available to prisoners.

Providing health care comparable to that of the “general public” is noteworthy because it establishes a high baseline for the standard of care provided by DOC. However, DOC will still employ the most cost-effective health care treatment to meet the prisoner’s needs for essential and special health care services. While the same quality of care will be provided to both sentenced and unsentenced inmates, the level of health care delivered to a particular inmate will be based on a number of factors, including the “estimated date of release.” This distinction is important because there will be a number of situations where the Department makes a decision not to provide a specific service. The reason may be due to an inability to follow-up fully on a particular intervention or treatment or to the non-urgent nature of the request. Examples of such situations include nonessential dental care, orthopedic services, small hernia repairs, and certain therapies that require an extensive evaluation prior to starting treatment (i.e. treatment for Hepatitis C).

The Prisoner Health Plan states that, “[i]n instances where delay of several months has no significant effect on functioning or long-term health and discharge is imminent or

598 DOC Policy # 807.02, Access to Health Care Services.
599 Id. In some instances, this will require the Department to develop procedures for providing access to health care to high-risk inmates.
600 Id. “Special health care services” include services for the prisoner’s well being beyond those services received in everyday general practice. These services include: health education materials; hearing services (the Department will provide hearing aids and other hearing prosthetics for prisoners under DOC Policy # 807.15, Health Care Prosthetics); diagnostics (health care screening, testing, diagnoses, and tests); maternity care; (including pre-natal, natal, and post-natal care); treatment for contagious and communicable diseases; and detoxification and withdrawal programs.
601 DOC Policy # 807.02, Access to Health Care Services.
602 DOC Policy # 807.02 Attachment A: Prisoner Health Plan, § II, Sentenced and Unsentenced Status.
603 Id.
604 Id.
an inmate is unsentenced, care *may* not be approved.”  

However, what this really means is that care *will* not be approved in these circumstances. The reason for denying health care may be fiscal-related. While it is a violation of the Constitution to deny medical care for reasons of expense, if the care needed is not for a serious problem, does not cause harm, and is not the result of deliberate indifference, such a denial will not run afoul of the Eighth Amendment. DOC is cognizant of this and makes a point to state, “Regardless of status[,] all essential and medically necessary care will be approved and delivered in a timely manner.”

When a prisoner is admitted to an institution, he or she receives an orientation that must include instructions for medical, dental, and psychiatric health care. The Prisoner Health Plan also describes access to health care, while the Prisoner Handbook, which is to be given to all prisoners, addresses access to health care and counseling services. Upon admission, an inmate can fill out a form if he or she is in need of any kind of medication to be administered. Ongoing or chronic care medication is checked to ensure that it is legitimate. Prisoners are routinely given an exam within 14 days of admittance. But, they can be seen earlier than 14 days if the admitting nurse thinks it is necessary.

There is either a physician’s assistant or nurse practitioner in charge of each facility. The number of on-duty medical staff ranges from two to ten employees depending on the facility. One staff member is responsible for dispensing medication. Doctors visit on a routine or as-needed basis. If health care staff other than a physician, dentist, psychiatrist, psychologist, optometrist, osteopath, podiatrist, physician’s assistant, or advanced nurse practitioner shall perform health care treatment, it will be per written orders of licensed practitioners or per nursing protocols as approved by the Health Care Administrator and Medical Director of Inmate Health.

### 2. Medical and Surgical Services Provided

Medical and surgical services are provided to inmates when medically necessary as determined under DOC guidelines. These services include, but are not limited to:

- specialty consultations including diagnostics, treatment or second opinions, provided on-site in the clinic or in-patient infirmary or off-site at a community provider office, health care facility, or hospital
- emergency room services
- surgical and anesthesiology services
- vision examinations for prescribing corrective lenses

---

605 Id. (emphasis added).
606 Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 392-93 (1992) (“Financial constraints may not be used to justify the creation or perpetuation of constitutional violations”).
607 This is troubling because DOC basically implies that it will not provide medical care if the inmate will be released soon, unless there is something very wrong with the inmate and DOC absolutely has to provide care.
608 DOC Policy # 807.02 Attachment A: Prisoner Health Plan, § II, Sentenced and Unsentenced Status.
609 DOC Policy # 811.08, Prisoner Orientation
610 DOC Policy # 807.02. Attachment A.
611 DOC Policy # 809.01.
• dispensing and fitting eyeglasses
• eyeglass frames and lenses
• physical therapy
• radiology
• MRI services when prior authorization is obtained
• wound care, casts and related supplies
• audiology services and hearing aids
• speech-language pathology services
• blood products and related services
• radiation therapy and chemotherapy
• pharmacy services, including both prescriptive and over-the-counter medications
• mental health and psychiatric services
• oral health and dental care.

Covered inpatient hospital services include:

• routine daily hospital services
• drugs prescribed by the attending physician
• central service supplies
• operating room services and surgical supplies
• anesthesia and recovery room services
• normal and cesarean delivery services and supplies
• X-ray, laboratory, and physical therapy
• respiration therapy
• electroencephalography and electrocardiography.

3. Alaska Department of Corrections Medical Care Priority Levels

Medical care and treatment are prioritized into different levels. The level of health care services provided by DOC will be consistent with the standards for such services in the community. This means appropriately credentialed personnel in a professional setting will conduct health care procedures in a clinically appropriate manner.

DOC will provide care that is “medically mandatory,” “presently medically necessary,” and “medically acceptable, but not medically necessary.” DOC will not provide care for conditions deemed of “limited medical value.” The following guidelines are used by the DOC to determine whether treatment will be provided to an inmate:

a. Levels of Therapeutic Care

Level 1: Medically Mandatory

---

612 These guidelines are explained in the Prisoner Health Plan, DOC Policy # 807.02, Attachment A: Prisoner Health Plan, § III(A)-(B). The explanations of the guidelines in this section were copied directly from the Prisoner Health Plan, and are therefore not individually cited. Citations to any other sources will be noted.
“Medically mandatory care” is care that is essential to life and health without which rapid deterioration may occur and in which medical or surgical intervention makes a significant difference. Examples include:

- acute problems, potentially fatal, where treatment prevents death and allows full recovery, such as appendectomy for appendicitis or repair of a deep open wound in the neck
- acute problems, potentially fatal, where treatment prevents death, but does not necessarily allow for full recovery, such as burn treatment and treatment of severe head injuries
- maternity care, such as onset of labor and delivery, as well as treatment for obstetrical emergencies

**Level 2: Presently Medically Necessary**

“Presently medically necessary” treatment is care without which the inmate’s well-being could not be maintained without significant risk of either further serious deterioration of the condition or without significant pain or discomfort. Examples include:

- chronic, usually fatal conditions where treatment improves life span and quality of life, such as medical management of insulin dependent diabetes mellitus, surgical treatment for treatable cancer of the uterus, and medical management of disease processes equivalent to asthma and hypertension
- immunizations
- comfort care such as pain management and hospice-type care for the end stages of diseases such as cancer and AIDS
- proven effective preventative care for adults, such as preventative dental care, mammograms, and pap smear
- acute but non-fatal conditions where treatment causes a return to previous state of health, such as fillings for dental cavities and medical treatment of various infectious disorders
- acute non-fatal conditions where treatment allows the best approximation of return to previous health, such as reduction of dislocated elbow and repair of corneal laceration.

**Level 3: Medically Acceptable but not Medically Necessary**

“Medically acceptable but not medically necessary” refers to care for non-fatal conditions where treatment may improve quality of life for the patient. Examples include:

- routine hernia repair
- treatment of non-cancerous skin lesions
- corneal transplant for cataract
- hip replacement

---

613 Such treatments must have demonstrated “medical efficacy” reflecting a high degree of likelihood of a successful outcome.
Off-site procedures and therapies for Level 3 chronic diseases, when deemed appropriate for treatment by the institutional health practitioner, will be referred to the Medical Director for clinical review and approval.

**Level 4: Limited Medical Value**

“Limited medical value” refers to care that is available to certain individuals but significantly unlikely to be cost-effective or to produce long-term gain. This includes treatment of minor conditions where treatment merely speeds recovery, gives little improvement in quality of life, offers minimal reduction of symptoms, or is exclusively for the convenience of the individual. Examples include:

- tattoo removal
- elective circumcision
- minor nasal reconstruction (e.g., correction of a deviated septum)

Care and treatment for conditions of this sort will not be authorized.

**b. Exceptions**

There will always be occasions when the level of care of a certain disorder will be unclear or when it is not appropriate to apply the prescribed levels to an individual patient. For instance, there may be occasions when it is not appropriate to provide care for a Level 2 diagnosis, or it may seem appropriate to provide care for a Level 4 case. DOC is aware of this, and any individual case or proposed therapy can be reviewed for appropriateness, a second opinion, denial of coverage, etc., by submitting a request to the Medical Director.

**4. Non-emergency Health Care**

All prisoners, including those on furlough and in restitution centers, requiring non-emergency health care can attend “sick call” for medical attention or may complete a “Request for Medical Care” form for non-emergencies.\(^{614}\) “Sick call” is

> [a]n opportunity for the inmate to receive health care services by initiating a visit with a health care provider during a designated time of the day. Health care requests are evaluated and treated in a clinical setting. This is the system through which each inmate reports for and receives appropriate health care services for non-emergency illness or injury.\(^{615}\)

Sick call takes place at least one day per week in facilities of fewer than 50 prisoners, at least three days per week in facilities of 50 to 200 prisoners, and at least five days per week in

\(^{614}\) DOC Policy # 807.11, Sick Call.

\(^{615}\) DOC Policy # 807.2, Attachment A, § VI.
facilities of over 200 prisoners. In addition, a health care staff member will visit segregation units at least daily, during routine rounds or while dispensing medication.

5. Emergency Health Care

Prisoners who need emergency health care should immediately notify the staff. Staff will then call on-site medical staff and initiate first-aid. In the case of extreme emergency (i.e., threat to life or limb) that cannot wait for medical consultation, the shift supervisor will contact emergency medical services to arrange for transport of the prisoner. In an emergency situation requiring surgery or other urgent care, the staff on duty will call 911 and transport the prisoner to the hospital.

6. Essential Health Care

A prisoner has the right to receive essential health care services, including dental, psychological, psychiatric, or medical services, when a health care provider, with reasonable medical certainty and exercising ordinary skill and care at the time of observation concludes that:

a. the prisoner’s symptoms indicate a serious disease or injury;

b. treatment could cure or substantially alleviate the disease or injury; and

c. the potential for harm if treatment is delayed or denied could be substantial, or

d. services are needed to alleviate pain and suffering, including: procedures necessary to aid in increasing the level of functioning throughout the prisoner’s sentence, such as prosthetic devices; and health care needed to enable a prisoner to participate in, or benefit from, rehabilitative services.

7. Unusual or Costly Procedures

The commissioner must approve any unusual or costly health care or dental procedures that go beyond essential care. The commissioner has the discretion, after consulting with health care authorities, to disapprove health care or dental procedures for ailments that do not seriously threaten the prisoner’s health or well being while in prison.

8. Elective Health Care

DOC need not provide prisoners with elective health care. Elective procedures are those that are not necessary for the maintenance of basic medical, mental, and oral health.

9. Prisoner Transfer and Medical Care

DOC Policy # 807.11, Sick Call.
DOC Policy # 807.02(E), Medical and Health Care Services.
DOC Policy # 807.2, Attachment A.
When a prisoner is transferred from one facility to another, his medical record and medication theoretically goes with him. The transportation officer should administer medication during the transfer. This is how it should happen; but, it is possible that the process could break down, and it often does. The inmate should see the medical staff of the new institution the morning after arrival. The inmate is now a patient of the new medical staff, who can continue the prior care or make another recommendation.

10. Treatment Plan

A physician, dentist, or other health care practitioner shall develop a written treatment plan for each prisoner who needs special health care. The plan must include a statement of short and long-term goals, specific courses of therapy, referrals to supportive and rehabilitative services when needed, and recommended travel arrangements if the prisoner may need to be transferred in the future.

11. Health Care Expenses

a. No-Charge Treatment

There is no charge for access to sick call, unless the visit results in a specific health procedure for which there is a charge. All prisoners, including those on furlough and in restitution centers, may attend. No charge will be assessed for testing for pregnancy, HIV, AIDS, tuberculosis, sexually transmitted diseases, or other communicable diseases. Also, no charge will be assessed for injuries sustained from work performed for DOC or from an assault or violation of facility regulations or state law by another prisoner. Nor will any charge be assessed for services initiated by health care providers; for treatment for communicable diseases or pregnancy; or for treatment of chronic diseases or conditions where the potential for harm to the prisoner is substantial if treatment is delayed. Additionally, no prisoner is financially responsible for the following health care services: admission health appraisals and physical exams; education services provided by the health care staff; medication line visits; testing and treatment of staph infections (when symptoms exist); and requests for over-the-counter drugs from health care staff.

b. Co-Payment for Medical and Dental Services

1. Co-Payment Charges for Health Care Visits

Prisoners will be charged a co-payment fee of $4.00 for each health care visit, except as set out above. A prisoner with a chronic condition requiring ongoing treatment will be charged for the initial visit but not for follow-up visits for the same condition, even if the prisoner is transferred to another facility. However, if the prisoner is with the Department for more than one year,

---

620 DOC Policy #807.2, Access to Medical Care Services.
621 Id.
622 DOC Policy # 807.07, Prisoner Responsibility for Health Care.
623 Id.
624 Id.
year, the prisoner will be charged a co-payment fee of $4.00 once each year for ongoing treatment. If, during a routine follow-up treatment for a chronic condition, a new health problem is identified, a co-payment fee of $4.00 will be charged for the treatment of the new condition.

2. Co-Payment Charges for Other Services

Inmates will be billed $4.00 for any number of initial prescriptions ordered at the same time. Four dollars will be billed regardless of the number of changes to or renewals of prescriptions ordered at one time.

The use of medical equipment available in a facility, such as crutches or Neoprene braces, will result in a charge of $4.00 per use. The use of medical equipment not available in the facility will result in a charge of $20.00.

Health care services provided for injuries incurred in sports activities will result in a charge of $4.00 if a health care provider recommended against participation.

c. Inability to Pay

An inmate’s inability to pay will not be used to restrict his access to health care services or necessary procedures or prescriptions. An inmate who is unable to pay will be billed and his or her account will be accessed when funds become available. The Department may seek to have medical expenses provided or paid for by third-party coverage when practical and if the prisoner is eligible (e.g., Veteran’s Administration, Alaska Native Health Services Hospital, union health plan coverage, Medicare or Medicaid, major health care insurance coverage, or public assistance benefits).

625 Id.
626 Id.
627 DOC Policy # 807.07.
628 AS 33.30.028, Responsibility For Costs of Medical Care, provides:
(a) Notwithstanding any other provision of law, the liability for payment of the costs of medical, psychological, and psychiatric care provided or made available to a prisoner committed to the custody of the commissioner is, subject to (b) of this section, the responsibility of the prisoner and the:
(1) prisoner’s insurer if the prisoner is insured under existing individual health insurance, group health insurance, or any prepaid medical coverage;
(2) Department of Health and Social Services if the prisoner is eligible for assistance under AS 47.07 or AS 47.25.120 - 47.25.300;
(3) United States Department of Veterans Affairs if the prisoner is eligible for veterans’ benefits that entitle the prisoner to reimbursement for the medical care or medical services;
(4) United States Public Health Service, the Indian Health Service, or any affiliated group or agency if the prisoner is a Native American and is entitled to medical care from those agencies or groups; and
(5) parent or guardian of the prisoner if the prisoner is under the age of 18.
(b) The commissioner shall require prisoners who are without resources under (a) of this section to pay the costs of medical, psychological, and psychiatric care provided to them by the department. At a minimum, the prisoner shall be required to pay a portion of the costs based upon the prisoner’s ability to pay.
B. Classification

1. Overview

The Department of Corrections has established procedures in order to appropriately assign a prisoner to facility placement, custody status, and work and rehabilitative programs. Assignment to the appropriate security level facility and custody status is a balance between placing a prisoner in the least restrictive setting and maintaining the security and order of the facility, the special needs of the prisoner, and other available resources of the department.

The security level of a facility refers to the correctional institutions themselves. It is the degree of security assigned to an institution based on its constraint and security features and staffing ratio. The security level of a correctional facility will be maximum, medium, minimum, or multi-level, depending on the features available at each facility. A classification committee shall assign a custody level or custody status to a prisoner based on the degree of staff supervision necessary to monitor and control the prisoner's behavior.

The classification system subdivides a prisoner population into groups based on matrix scoring and individual prisoner program needs. Matrix scoring is a point system used by the DOC that assigns a numeric value to specific factors such as the type of offense the prisoner was convicted of and the inmate’s mental state and behavior while in custody. The total points assigned to an inmate will dictate the security and custody levels to which the inmate is assigned.

The higher an inmate’s security level score, the more of a security risk he or she is considered. For example, a prisoner detained on a Class B felony would receive 5 points, while a Class A felony scores 7 points. In determining custody status scoring, the higher an inmate’s score, the more likely custody level should be decreased. For instance, an inmate with current drug or alcohol use would get 2 points, an inmate with past usage history would get 3 points, and an inmate with no history of drug or alcohol use would receive 4 points. Similarly, a prisoner with

---

629 22 AAC 05.200.
630 Id. Classification includes:
   1. assigning prisoners to the proper security and custody levels;
   2. furthering the Department's goals for humane treatment, public safety and effective correctional administration;
   3. providing information for prisoner population management and planning;
   4. distributing correctional resources to meet the Department's and the prisoners needs; and
   5. identifying prisoner programs and services for budgetary purposes.

DOC Policy # 701.2, Classification Mission Statement.
631 22 AAC 05.271.
632 22 AAC 05.276.
633 22 AAC 05.271.
634 The factors the department considers for determining an inmate’s security score are: type of detainer (misdemeanor, Class A, B, C, or unclassified felony); the severity of the current offense (same); time left until release date; type of prior conviction; history of escapes or attempted escapes; and history of violent behavior. The factors the department considers for determining an inmate’s custody level score are: percent of time served; involvement with drugs and/or alcohol; mental/psychological stability; type of most serious disciplinary report; frequency of disciplinary reports; level of responsibility prisoner has demonstrated; and family/community ties.

DOC Form # 735.03a, Classification Form.
5 or more disciplinary reports filed against him would get no points, while an inmate with no reports receives 3 points.

Classification is one of the most important issues to examine within the DOC. An inmate’s classification status will determine in what facility and under what level of custody the inmate is to be guarded. This, in turn, determines whether the inmate will be in segregation or in the general population and what opportunities for employment and programming are available to that inmate.

The DOC has implemented several procedural safeguards with respect to classification decisions. First, within 30 days of the sentenced prisoner's arrival at the designated institution or within 60 days after sentencing and commitment (whichever occurs first), a sentenced prisoner will be given a hearing before a classification committee to determine or update the prisoner's security and custody status and program needs. This is called “Initial Classification.” The result of the initial classification, or any classification decision, is a designation. For instance, a prisoner could be designated “maximum custody” or “minimum custody.” The initial classification decision is not subject to appeal.

An unsentenced prisoner--that is, one who is awaiting trial, sentencing, or probation or parole revocation--must be classified by the superintendent within 15 working days after admission into a facility with regard to security and custody status and program involvement.

A pretrial detainee incarcerated for ten days who is not in punitive segregation is normally eligible to participate in educational programs, religious services, and counseling. The pretrial detainee’s custody level and housing assignment are relevant in determining the level of participation. Within 120 days after the superintendent’s decision, and every 120 days after...

---

635 22 AAC 05.216. At a hearing before a classification committee, the chairperson shall ensure that the prisoner understands the purpose of the hearing and all of the procedural opportunities afforded the prisoner. 22 AAC 05.230. A member of the committee, the prisoner's facility probation officer, or staff advocate (if the prisoner is being assisted by an advocate) may propose classification action and shall describe the aspects of the prisoner's record or other rationale that form the basis of the proposal. Id.

The prisoner has the following procedural opportunities: (a) a reasonable opportunity to challenge the factual basis or rationale advanced in support of the proposed classification action; and (b) the right to appear and the opportunity to present evidence and witnesses in the prisoner's own behalf and to confront and cross examine witnesses, subject to limitation by the chairperson based upon repetitiveness, relevancy, risk of reprisal, or security of the facility; if a witness is examined out of the presence of the prisoner, the chairperson shall inform the prisoner of the substance of the testimony and specify on the record the reasons for any exclusion. Id.

A prisoner is entitled to the active assistance of an advocate in investigating the facts and coordinating the prisoner's presentation at a classification hearing if the purpose of the hearing is consideration of continued assignment to administrative segregation, or termination of a furlough. Once selected, the advocate shall meet with the prisoner at least 36 hours before the scheduled hearing to assist the prisoner. 22 AAC 05.246. If requested by the prisoner, the advocate shall assist the prisoner in interviewing and preparing examination of witnesses for the hearing, and advise the prisoner how best to proceed on the possible classification actions for which the advocate was selected. Id. If necessary, the advocate must have the assistance of an interpreter. Id.

636 22 AAC 05.226.
637 Segregation is solitary confinement in the segregation housing unit. Segregation can be either administrative or punitive. See infra Part III.C.
638 22 AAC 05.226.
639 Id.
that, a prisoner awaiting trial, sentencing, or probation or parole revocation must be given a hearing before a classification committee to review the prisoner's security and custody status and program involvement.\textsuperscript{640}

After an initial classification hearing, a prisoner must be given a classification review hearing before a classification committee at (1) approximate one-year intervals, if the prisoner has two or more years remaining to a firm release date, or (2) approximate six-month intervals, if the prisoner has less than two years remaining to a firm release date or is classified community or minimum custody.\textsuperscript{641} The procedures for a classification review hearing are the same as those for a classification hearing.

In addition to initial classification and scheduled classification review hearings, a hearing before a classification committee, at which the prisoner has a right to be present, is required if the following classification actions are possible:

\begin{enumerate}
\item transfer to a facility outside of Alaska;
\item transfer to a mental health or psychiatric facility;
\item administrative transfer;
\item continued placement in administrative segregation;
\item termination of a furlough; and
\item an increase in custody status.\textsuperscript{642}
\end{enumerate}

Initial classification decisions may not be appealed, but prisoners can appeal subsequent classification hearings and classification reviews.\textsuperscript{643} A classification committee action that does not require review by the superintendent may be appealed only to the superintendent unless the superintendent has exercised discretionary authority to modify the classification action. A classification action by a superintendent may be appealed only to the regional director, except for a denial of or removal from a furlough, which may be appealed to the deputy commissioner if the regional director denies the appeal.

If the purpose of the classification hearing or review was the consideration of a transfer of a prisoner, the result may be appealed only to the deputy commissioner. The appeal must be made within five working days after the prisoner receives notice of the decision or after the transfer, whichever occurs first.

All other appeals must be submitted by a prisoner within five working days after receiving notice of the decision through a facility staff member designated by the superintendent for the purpose, or, if a valid reason for delay is stated by a prisoner, this time limit may be extended. With the exception of a transfer to a facility outside Alaska, action on a classification decision can occur pending an appeal.

Once an appeal has been filed and received, a response to the prisoner must be made as follows:

\begin{itemize}
\item \textsuperscript{640} Id.
\item \textsuperscript{641} 22 AAC 05.221.
\item \textsuperscript{642} 22 AAC 05.241.
\item \textsuperscript{643} 22 AAC 05.260.
\end{itemize}
appeal to superintendent: response within five working days;
(2) appeal to regional director: response within 15 working days; and
(3) appeal to deputy commissioner: response within 15 working days.

The appropriate official’s failure to respond within the time limits set out in this section must be considered a denial of the appeal. However, a late response granting an appeal is valid. Some prisoners are classified for transfer to a contract facility outside Alaska. Such transfer is permissible, so long as the out-of-state facility is not operated by the Federal Bureau of Prisons, the prisoner is provided a classification hearing, and a determination is made that the prisoner’s rehabilitation or treatment would not be substantially impaired by the transfer. In order to permit adequate communication with counsel, a prisoner with a pending criminal appeal will ordinarily not be transferred under this section to a contract facility outside of Alaska until at least 70 days after sentencing.

A prisoner housed in a facility outside Alaska is entitled to a hearing before a classification review team at approximate one-year intervals. The prisoner’s continued placement outside Alaska will be considered at the hearing. The prisoner must be provided a copy of the decision and may appeal the decision to the deputy commissioner within ten working days after receiving notice of the decision.

A prisoner incarcerated in a non-federal contract facility outside of Alaska may be returned to Alaska at the discretion of central classification, if central classification determines that out-of-state placement has substantially impaired the rehabilitation or treatment of the prisoner. A prisoner whose request to return to Alaska is denied may appeal the decision to the deputy commissioner within ten working days after receiving notice of the decision.

The classification system is described in more detail below.

2. Definitions

As used in this section, the following definitions shall apply:

a. Administrative Transfer: The transfer of a prisoner between facilities for any purpose related to an emergency or potentially hazardous situation or to facilitate an administrative action that can be more efficiently accomplished at another facility, such as:

1. parole hearing;
2. court action;
3. medical or mental health treatment;

---

644 22 AAC 05.252.
645 Id.
646 22 AAC 05.254.
647 22 AAC 05.256(c).
648 The definitions in this section were copied directly from DOC Policies and Procedures, Chapter 700, Classification. The sections are not cited individually here.
4. military tribunal;
5. family emergency; or
6. population management.

b. Appeal: A process by which a prisoner may have a classification action reviewed at an administrative level higher than that at which the original action was taken.

c. Category: Any of the numbered classes by which the particular reasons and needs for central monitoring of a case are specified.

d. Central Monitoring Case: A prisoner identified under provisions of this policy who presents special needs for management while incarcerated.

e. Central Monitoring System: The set of procedures by which prisoners with special management needs are identified and monitored.

f. Classification Committee/Hearing Officer: A group of individuals (or an individual) convened in order to review and assess a prisoner's security, custody, and program needs and make a classification recommendation as regards the prisoner.

g. Classification Packet: Prisoner case record documents and information forwarded to Central Classification for effecting a classification action, which contains, if applicable, the following:

final judgment and commitment, presentence investigation report, recent psychiatric/psychological reports; time accounting records, security designation and classification forms; health care record extract; the taped proceedings of a classification action recommending or resulting in a transfer to an institution or facility outside of Alaska; and related information.

h. Confirmation: Process by which information concerning proposed Central Monitoring Cases is reviewed at the institutional and Central Office levels and the prisoner entered into the Central Monitoring System.

i. Contract Misdemeanant Housing (CMH): A correctional facility provided through contract agreement for the confinement of prisoners convicted solely of misdemeanor crime(s); quasi-correctional facility providing a degree of security, custody, care, and discipline for misdemeanor prisoners similar to that required by the policies and regulations of this Department, consistent with the security and custody status of the prisoners who have been placed in the CMH facility.

j. Designation Custody Level: A prisoner's interim custody level determined at the initial designation on the basis of the prisoner's total security score on the Security Designation Form; the custody level in effect throughout the prisoner's residence in a Restitution Center or until the prisoner receives an initial classification at a receiving institution.
k. Exception Case: Prisoner whose offense or subsequent conduct involves: a notorious crime, such as one which has attracted substantial attention in the media, which is particularly violent, or which is a serious sex offense; substantial threats against a person or persons; an escape risk such as an escape attempt in the last 5 years or an actual escape in the last 10 years; or has been found guilty but mentally ill and is sentenced in accordance with AS 12.47.050.

l. Exigent Circumstances: Any set of circumstances that pose a threat to the security and/or order of an institution and require immediate action.

m. Firm Release Date: The date on which the prisoner is scheduled to be released, as established by one of the following methods:

1. good time calculations;
2. court order; or
3. Alaska State Board of Parole action.

n. Initial Classification: The first classification hearing a prisoner receives at a designated institution or following arrival at an institution when there has not been a previous classification hearing after designation.

o. Multiple Category Classification: The applicability of two or more categories as basis for a prisoner to be confirmed as a central monitoring case.

p. Out-of-State Transfer: The transfer of a prisoner outside the State of Alaska to a facility operated by the Federal Bureau of Prisons or a non-federal contract facility.

q. Over-ride: A classification changing security and/or custody level to a level different from that which would ordinarily be assigned on the basis of matrix scoring on the classification form, or which has been assigned by a lower level of authority; a decision which must be supported by a written factual basis that may be confirmed and/or verified as appropriate justification by a reviewing authority.

r. Reclassification: Classification committee review of a prisoner's custody level, security score and/or program needs on a scheduled basis or at the direction of the superintendent or designee.

s. Restitution Center: A residential center in the community which provides certain non-violent prisoners the opportunity for rehabilitation through community service and employment while protecting the community through supervision and partial incarceration, and creates a means to provide restitution to victims of crimes, payment of court ordered fines, dependent support, prisoner cost of care, and other prisoner expenses.

t. Short-Term Prisoner: A sentenced prisoner with 180 days or less remaining to a firm release date at the time of designation.
u. Special Medical Need: The serious and complex medical treatment and care needs of a prisoner that, because of the nature of the medical condition or the extraordinary costs involved in the treatment, cannot be provided within the State of Alaska.

v. Special Mental Health Need: The needs of a prisoner who, in the opinion of a physician, psychologist or psychiatrist, is suffering from a mental illness for which the prisoner cannot secure adequate treatment in prison and who cannot be given adequate mental or psychiatric treatment within any facility owned or operated by the Department.

w. Traditional or Rural Alaska Lifestyle: A way of life as reflected by a person who is not fluent in the English language and communicates predominantly in an Alaska Native dialect; or an individual whose entire life has been spent essentially in a village or rural setting with a population of 1,000 or less, which is not connected by roadways or ferries to a metropolitan community of greater than 1,000 population. A person from a setting with a population greater than 1,000, such as Bethel, Nome, Barrow or Kotzebue may fall within this category if the totality of the circumstances indicates a background that is extremely rural and/or traditional in character such as a rural Alaskan whose social experience is typified by in-village or remote residence with his or her conduct and means of livelihood being of a subsistence nature and lacking in exposure to non-rural life and having negligible commercial work experience for wages. Time spent for schooling at Mt. Edgecumbe in Sitka does not in and of itself exclude a person from being classified as having maintained a traditional, subsistence, or rural Alaskan lifestyle.

3. Custody Status and Security Level

The custody status assigned to a prisoner is based upon the matrix score attained on the classification form, which establishes the degree of security staff supervision required to appropriately monitor and control the prisoner's conduct and behavior within the context of correctional management.\(^{649}\)

a. Custody Levels

A classification committee shall assign a custody level to a prisoner based on the degree of staff supervision necessary to monitor and control the prisoner's behavior, in accordance with procedures established by the commissioner. Levels of custody and degree of staff supervision appropriate for each level are as follows:

(1) Community Custody: Assignment to community custody indicates that the prisoner must be considered for the least-restrictive housing, program, and supervision available in the Department, which may include furlough, contract facility placement in the community, outings with or without escort, work details outside the facility with minimal supervision and, if necessary, hospitalization without a guard.

(2) Minimum Custody: Assignment to minimum custody indicates that a prisoner must be considered for the least-restrictive housing, program, and supervision available within the

\(^{649}\) DOC Policy # 735.01, Designation Process for Long-Term Sentenced Prisoners.
facility's perimeter and activities outside the perimeter. These activities may include supervised contract facility placement, work details outside the facility with periodic staff supervision, trips outside the facility with a single staff escort, and if necessary, hospitalization under guard; a minimum custody prisoner is not eligible for furlough.

(3) Medium Custody: Assignment to medium custody indicates that a prisoner must be considered for regular housing, program, and supervision within the facility's perimeter. A medium-custody prisoner is not eligible for furlough. Work assignments or activities outside the facility's perimeter must be approved by the deputy commissioner. The prisoner must be placed in hand restraints and escorted by at least one officer when moved outside the facility's perimeter, and, if necessary, must be hospitalized under guard.

(4) Close Custody: Assignment to close custody indicates that a prisoner requires a substantial level of supervision due to being identified as assaultive, predatory, riotous, an escape risk, or seriously disruptive to the orderly administration of the facility. A prisoner is eligible for housing and program activities within the secure perimeter of the facility, which facilitate close staff supervision. Close-custody prisoners are not eligible for furlough, and movement outside the facility's perimeter requires the superintendent's approval, the presence of at least two officers, one of which must be armed, and the prisoner in hand and leg restraints. If hospitalization is necessary, the prisoner must be under guard.

(5) Maximum Custody: Assignment to maximum custody indicates that a prisoner requires the maximum level of supervision available within the facility due to being identified as an escape risk or the most assaultive, predatory, riotous, or seriously disruptive to the orderly administration of the facility. A maximum custody prisoner must be placed in secure housing with very limited program activities with maximum supervision within the secure perimeter of the facility. Maximum custody prisoners are not eligible for furlough, and movement within the facility requires two escorting officers using restraints as necessary and appropriate. Movement outside the facility's perimeter, other than for court appearances, requires the superintendent's written approval, the presence of at least two officers, one of which must be armed, and the prisoner in hand and leg restraints. If hospitalization is necessary, the prisoner must be under guard.

b. Security Levels

There are three categories of institutional security level based upon the rating of structural variables and staffing ratios, they are:

Level I (Minimum): The least secure institution, which is designed and staffed to house prisoners who require minimal supervision;

Level II (Medium): Moderately secure institution, which is designed and staffed to house prisoners who require intermediate security, regular quarters and a medium level of supervision; and

650 The explanations of Security Levels contained in this section were copied directly from DOC Policy # 803.19, Institution Security Classification, and are therefore not cited individually.
Level III (Maximum): The most secure institution, which is designed and staffed to house prisoners who require the closest confinement and the maximum level of supervision.

4. Unsentenced Prisoner Classification\textsuperscript{651}

An unsentenced prisoner is a prisoner who is awaiting trial, sentencing, or probation/parole revocation. An unsentenced prisoner must be classified with regard to security level, custody status, and program involvement. An unsentenced prisoner incarcerated for ten days who is not in punitive segregation, is eligible to participate in educational programs, religious services, and counseling programs available in the unsentenced holding area of the institution.

Each unsentenced prisoner must be classified with regard to custody level, security level and program involvement by the holding institution within 15 working days after admission into the facility. The Superintendent's classification decision is not subject to appeal.

Within 120 days after this classification by the Superintendent and every 120 days thereafter as long as the prisoner is an unsentenced prisoner, the unsentenced prisoner must be given a hearing before a Classification Committee to review his or her security and custody status and program involvement. The unsentenced prisoner classification decisions made by a Classification Committee may be appealed in accordance with DOC Policy #760.01, Appeal Procedures. Forms to facilitate an appeal will be provided to the prisoner by institutional staff upon request by the prisoner.

5. Classification Process for Short-Term Sentenced Prisoners\textsuperscript{652}

A sentenced prisoner with 180 days or less remaining to a firm release date at the time of designation is a “short-term” prisoner. A short-term prisoner will be designated to the least restrictive correctional facility consistent with the prisoner's classification matrix score in the context of sound correctional management.

Each short-term, sentenced felony prisoner will be designated by the holding institution within 15 working days after sentencing. Short-term prisoners sentenced for a misdemeanor will be designated within five working days after sentencing, except for prisoners sentenced to serve five days or less; these very short-term prisoners will be designated as soon as possible after arrival at the receiving institution. The designation decision is not subject to appeal.

6. Classification Process for Long-Term Sentenced Prisoners\textsuperscript{653}

\textsuperscript{651} The information contained in this section is taken directly from DOC Policy # 705.01, Unsentenced Prisoner Classification.

\textsuperscript{652} The information contained in this section is taken directly from DOC Policy # 735.02, Designation Process for Short-Term Sentenced Prisoners.

\textsuperscript{653} The information contained in this section is taken directly from DOC Policy # 735.01, Designation Process for Long-Term Sentenced Prisoners.
All newly sentenced prisoners with more than 180 days remaining to a firm release date will be designated within 15 working days after sentencing and commitment to the least restrictive security and custody levels appropriate for the prisoner. The designation decision is not subject to appeal except in the case of out-of-state designation. If designation is for an out-of-state facility, the prisoner must be provided a classification hearing in accordance with DOC Policy #750.02, Out-of-State Transfers. The designation decision based upon the classification hearing is appealable to the Deputy Commissioner for Operations in accordance with DOC Policy # 760.01, Appeal Procedures.

7. Central Monitoring Cases

DOC has established a system to monitor and control the status of specified prisoners who are classified as “special management cases” while in the custody of the Department. Certain categories of prisoners require case management coordination and supervision beyond that routinely afforded prisoners during their incarceration. These prisoners are known as Central Monitoring Cases. It is the policy of the Department to identify these prisoners and to provide special scrutiny over changes in their status for the duration of their imprisonment or until the need for such scrutiny is no longer necessary. The Central Monitoring System is established for this purpose.

Prisoners in the following categories are identified and processed for confirmation as Central Monitoring Cases:

<table>
<thead>
<tr>
<th>CODE</th>
<th>CATEGORY</th>
<th>DESCRIPTION</th>
</tr>
</thead>
<tbody>
<tr>
<td>01</td>
<td>Witness Security</td>
<td>Prisoners whose safety may be jeopardized due to their cooperation with criminal justice agencies.</td>
</tr>
<tr>
<td>02</td>
<td>Disruptive Group</td>
<td>Prisoners who belong to, or are closely associated with, prison gangs or other groups with a history of disrupting institutional operations and security.</td>
</tr>
<tr>
<td>03</td>
<td>Assaultive</td>
<td>Prisoners who have a history of violent behavior either in the community or while incarcerated or who, for specified reasons, are considered to present a substantial risk of future violent behavior.</td>
</tr>
<tr>
<td>04</td>
<td>Escape Risks</td>
<td>Prisoners who have a history of escape or who, for specified reasons, are considered to present a substantial risk of escape.</td>
</tr>
<tr>
<td>05</td>
<td>Protection</td>
<td>Prisoners who, for specified reasons, require protection from other known or unknown individuals and therefore require segregation from the general population.</td>
</tr>
<tr>
<td>06</td>
<td>Separation</td>
<td>Prisoners who may not be confined where they are accessible to other specified individuals.</td>
</tr>
<tr>
<td>07</td>
<td>Broad Publicity</td>
<td>Prisoners who have received widespread publicity as the result of their criminal activity or whose</td>
</tr>
</tbody>
</table>

654 The information contained in this section is taken directly from DOC Policy # 702.10, Central Monitoring Cases.
<table>
<thead>
<tr>
<th></th>
<th>Status Category</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>8</td>
<td>Interstate Federal Transfers</td>
<td>Prisoners who require special monitoring due to their status as transfers from other jurisdictions.</td>
</tr>
<tr>
<td>9</td>
<td>Threats to Others</td>
<td>Prisoners who have made threats toward specified individuals or groups of individuals.</td>
</tr>
<tr>
<td>10</td>
<td>Sophisticated Criminal Activity</td>
<td>Prisoners who are members of organized crime or who have been involved in large-scale sophisticated criminal activities.</td>
</tr>
<tr>
<td>11</td>
<td>Sex Offenders</td>
<td>Prisoners who have a history of sex offenses.</td>
</tr>
</tbody>
</table>

### 8. Initial Classification

The Department will classify prisoners for placement in the least restrictive level consistent with prisoners’ security and custody levels and sound correctional management.

**a. Prisoner Custody Level**

Subject to an override based upon a valid correctional interest, the Department will base a prisoner’s custody status on the matrix score attained on the classification form. The matrix score establishes the degree of security staff supervision required to appropriately monitor and control the prisoner’s conduct and behavior within the context of sound correctional management.

**b. Circumstances That Require a Hearing**

A prisoner has a right to a classification hearing under any of the following circumstances:

1. initial classification of a sentenced prisoner;
2. classification review and/or reclassification;
3. transfer to an institution or facility outside Alaska;
4. transfer to a mental health or psychiatric facility;
5. administrative transfer to another institution or facility;
6. placement in administrative segregation and every thirty days for as long as the prisoner is in administrative segregation;
7. termination of a furlough;
8. return from out-of-state placement, in-state restitution center, or other contract facility;
9. any increase in custody level;
10. every 120 days after the date of an unsentenced prisoner's initial classification, so long as the prisoner is unsentenced; and

---

655 The information in this section comes directly from DOC Policy # 735.03, Initial Classification.
656 The Department will provide facility designation and initial classification to sentenced and unsentenced prisoners under 22 AAC 05.206, 05.211, 05.216 and 05.226.
657 The information in this section comes directly from DOC Policy # 735.04, Required Classification Hearing.
658 22 AAC 05.241; DOC Policy # 735.04.
11. any classification action as may be determined by the Commissioner or designee to be the subject of a hearing.

c. **Time Frame for Classification Hearing**

1. **Prisoners in an Institution**

The institution must give a sentenced prisoner a hearing before a classification committee to determine or update the prisoner’s security and custody status and program needs (except for a prisoner in a community facility within 30 days of the sentenced prisoner's arrival at the designated institution or within 60 days after sentencing and commitment, whichever occurs first).

2. **Prisoners in a Community Facility**

A prisoner designated to a restitution center, contract misdemeanant housing, or other community placement is exempt from the initial classification time frames above. However, a prisoner admitted into an institution from anyone of these community facilities must be provided a classification hearing within 30 days of his or her arrival at the institution. Prisoners residing in a restitution center, contract misdemeanant housing, or other community placement must be reviewed by the furlough officer at least annually.

d. **Notice of Classification Hearing**

The institution shall give a prisoner at least 48 hours prior written notice on a Notice of Appearance form (Form # 735.03B) of a scheduled classification hearing. The notice must inform the prisoner:

1. of the time and place of the hearing;\(^{659}\)

2. of the purpose of the hearing, and in the case of a prisoner placed in administrative segregation, the facts that form the basis for segregation under 22 AAC 05.485;\(^{660}\)

3. that the prisoner is entitled to choose a hearing advocate from a pool if the classification decision could result in the prisoner's assignment or continued assignment to administrative segregation under 22 AAC 05.485 or in termination of a furlough under 22 AAC 05.335;\(^{661}\)

4. that, in all other cases, a staff member assigned by the Superintendent shall inform the prisoner before the hearing of the classification process and possible classification action;\(^{662}\)

\(^{659}\) 22 AAC 05.216(b)(1).

\(^{660}\) 22 AAC 05.216(b)(2).

\(^{661}\) 22 AAC 05.216(b)(3)(A).

\(^{662}\) 22 AAC 05.216(b)(3)(B).
5. that the committee/hearing officer shall tape record the hearing and keep it in transcribable form for the time periods and purposes set out in the Code if the purpose of the hearing is consideration of a prisoner's assignment or continued assignment to administrative segregation, termination of a furlough, placement in a psychiatric or mental health facility, or transfer to an institution or facility outside of Alaska; 663

6. of the right to counsel in the hearing if:

   a. the prisoner has been assigned to administrative segregation in connection with an infraction that, if established, would constitute a violation of a felony criminal statute and a decision by the district attorney to file felony charges is pending or charges have been filed; 664 or

   b. the Department is considering transferring the prisoner to a psychiatric or mental health facility; 665

7. that the prisoner may prepare testimony, solicit statements, or compile other evidence before the hearing, if such action would not create a substantial risk of reprisal or undermine the security of the institution; 666

8. that the classification committee/hearing officer shall make written factual findings and indicate the evidence relied upon in sufficient detail to provide an adequate basis for review of its decision; 667 and

9. that the prisoner may appeal the classification committee's decision under DOC Policy # 760.01, Appeal Procedures. 668

   e. Staff Assistance for Classification Hearing

   A prisoner is entitled to the active assistance of a hearing advisor or advocate to investigate the facts and coordinate the prisoner’s presentation at a classification hearing if the purpose of the hearing is to consider the prisoner’s assignment or continued assignment to administrative segregation or termination of a furlough.

1. Selecting a Hearing Advisor

   A prisoner may request a hearing advisor from a pool of three or more correctional officers or institutional probation officers designated by the Superintendent for that purpose.

   a. The prisoner has the right to select from at least two advisors in the pool.

663 22 AAC 05.216(b)(4).
664 22 AAC 05.216(b)(6).
665 22 AAC 05.216(b)(6).
666 22 AAC 05.216(b)(7).
667 22 AAC 05.216(b)(8)
668 22 AAC 05.216(b)(9); DOC Policy # 760.01, Appeal Procedures.
b. The Superintendent may deny a request for administrative reasons, e.g., the staff member is on vacation or sick leave, or would have to be paid overtime for appearing before the classification committee/hearing officer.

2. Hearing Advisor's Duties

The advisor shall meet with the prisoner at least 36 hours before the scheduled hearing to assist the prisoner. The advisor shall, at the prisoner’s request, help the prisoner interview and prepare for examination of witnesses for the hearing and advise the prisoner how best to proceed on the possible classification actions at the hearing. If necessary, the advisor shall arrange for the assistance of an interpreter.

3. No Advisor Assistance

The prisoner is not entitled to the assistance of a hearing advisor if the purpose of the classification hearing is to consider a classification action other than the prisoner’s assignment or continued assignment to administrative segregation or termination of a furlough. However, institutional staff must still inform prisoners before the hearing of the classification process and possible classification action.

f. Agenda and Procedural Rights at Classification Hearing

The classification hearing must proceed as follows:

1. The chair/hearing officer shall ensure that the prisoner understands the purpose of the hearing and his or her procedural rights.

2. A member of the committee/hearing officer, the institutional probation officer, prisoner, or hearing advisor if the prisoner is being assisted by an advisor, may propose classification action and shall describe the aspects of the prisoner's record or other rationale that form the basis of the proposal.

3. If, either before or at the hearing, additional time is needed to gather information, testimony or evidence relating to the proposed action, the chair/hearing officer may postpone the hearing for up to 20 working days except for a hearing regarding continued assignment to administrative segregation. In that case, the chair may only postpone the hearing for up to 24 hours.

4. The prisoner has the following procedural rights:

   a. a reasonable opportunity to challenge the factual basis or rationale advanced in support of the proposed classification action;

   b. the right to appear and present evidence and witnesses on his or her own behalf and to confront and cross-examine witnesses, subject to the limitation of evidence
or examination of witnesses based upon repetition, relevancy, risk of reprisal, or the facility’s security; if a witness is examined out of the prisoner's presence, the chair/hearing officer must inform the prisoner of the substance of the testimony and specify on the record the reasons for excluding the prisoner; and

c. the chair/hearing officer may require the prisoner to direct his or her questions through the hearing advisor, counsel, probation officer (if present), or through the chair/hearing officer.

5. The committee/hearing officer may only consider evidence presented at the hearing or contained in the prisoner’s case record. Prisoner conduct before and during the hearing and evidence that contains or constitutes hearsay if it appears to be reliable and relevant to the issues under consideration may also be considered. Findings and recommendations of prior disciplinary or classification committees/hearing officers, once all appeals have been exhausted, are conclusive and not subject to further review.

6. The prisoner has the right to appeal the classification decision. The prisoner must be provided a copy of the final decision that includes a description of the appeal process under DOC Policy # 760.01, Appeal Procedures. Staff shall give the prisoner appeal forms upon request.

g. Classification Decision

1. Classification Matrix Factors

The classification committee/hearing officer must complete the Classification Form for Sentenced Prisoners form (Form # 735.03A) using the Instructions form (Form # 735.01A) and issue its decision within three working days after the hearing. The committee/hearing officer must base the prisoner's custody and security status on the matrix scoring and factors including any recommendation to override the matrix score. The scored factors include:

a. Security Score:

(1) type of detainer
(2) severity of current offense
(3) additional felonies and/or misdemeanors
(4) time to firm release date
(5) type of prior convictions
(6) history of escape or attempted escapes
(7) history of violent behavior

b. Custody Score:

---

669 22 AAC 05.216.
670 Id.
(1) percent of time served
(2) involvement with drugs and/or alcohol
(3) mental/psychological stability
(4) type of most serious disciplinary report
(5) frequency of Disciplinary Reports
(6) responsibility prisoner has demonstrated
(7) family and community ties

2. Classification Hearing Decision Referred to Superintendent

a. The committee/hearing officer must forward for review to the Superintendent any decision that recommends transfer, change in security or custody status, grants or denies a furlough placement, continues a prisoner's placement in a restitution center contract facility, approves placement or continued placement in administrative segregation, or relates to an exception case. The Superintendent has five working days to approve, deny, or modify the committee’s decision, except for continued placement of a prisoner in administrative segregation, which pending disciplinary action is governed by the Alaska Administrative Code. The Superintendent must record his or her reasons for denying or modifying the decision on Form # 735.01A.

b. All other classification hearing decisions not required to be reviewed by the Superintendent are final unless modified by the Superintendent within three working days after the hearing.

c. If the Superintendent recommends transfer, he or she must forward the recommendation and the prisoner's classification packet to Central Classification. If Central Classification approves the transfer, the chief classification officer or designee shall select the receiving institution or facility, determine the prisoner's security and custody levels, and coordinate arrangements for the transfer. The classification packet must include:

(1) final judgment and commitment
(2) presentence investigation report
(3) recent psychiatric/psychological reports
(4) time accounting records
(5) security designation and classification forms
(6) needs assessment survey form and attached documents, as indicated
(7) health care record extract
(8) the taped proceedings if the classification action recommends or results in a transfer to an institution or facility outside of Alaska

671 22 AAC 05.216(d).
672 Id.
673 Id.
674 Id.
675 22 AAC 05.216(e).
676 Id.
(9) related information

d. Staff shall give the prisoner a copy of the Central Classification decision within two working days of its receipt at the holding institution. The decision must include a description of the appeal process. 677

h. Classification Appeal

A. The Department provides prisoners the right to appeal any classification action except initial designation, as provided in 22 AAC 05.260. All appeals of classification committee action must be prepared and processed under DOC Policy # 760.01, Appeal Procedures.

1. For an unsentenced prisoner:

a. The initial unsentenced prisoner Designation is without administrative appeal.

b. Subsequent classification committee action, except for transfer, may be appealed to the Regional Director; and Classification committee action regarding transfer may be appealed directly to the Deputy Commissioner.

2. For a sentenced prisoner:

a. The sentenced prisoner Designation is without administrative appeal.

b. Classification committee action not referred to or modified by the Superintendent may be appealed only to the Superintendent, and no higher.

c. Classification committee action referred to or modified by the Superintendent, except for transfer, may be appealed to the Regional Director.

d. Classification committee action regarding transfer may be appealed directly to the Deputy Commissioner for Operations.

B. Appeal of Classification Committee Decision

1. A Classification Committee action that does not require review by the Superintendent may be appealed only to the Superintendent unless the Superintendent has exercised discretionary authority to modify the classification action – in that case, the decision may be appealed to the Regional Director or to the Deputy Commissioner for Operations.

   NOTE: Unsentenced prisoner staff/superintendent classification and sentenced prisoner designation are not subject to administrative appeal.

677 22 AAC 05.216(f)
2. Except as provided below, a classification action by a Superintendent may be appealed only to the Regional Director, except for a denial of or removal from a furlough, which may be appealed to the Deputy Commissioner for Operations if the Regional Director denies the appeal.

3. Notwithstanding, the result of a classification hearing, the purpose of which was the consideration of a transfer of a prisoner, may be appealed only to the Deputy Commissioner for Operations.

4. The appeal of a classification action must be made within five working days after the prisoner receives notice of the decision or, in the case of transfer, within five working days after the prisoner arrives at the transfer destination, whichever occurs first. If a valid reason for delay is stated by the prisoner and verified by the institutional staff member designated to receive classification appeals at the holding institution, the five working day time limit for filing may be extended for an additional reasonable time period. However, an extension of time to file an appeal is an exception and must be accompanied by justification sufficient to support the exception to the prescribed time parameters.

5. Except as provided below for out-of-state and contract facility placement prisoners, an Appeal must be on the Appeal of Classification Action (Form # 20-760.01) and must be submitted through the institutional staff member designated by the Superintendent for the purpose of receiving, reviewing, and forwarding classification appeals, as follows:

   a. the designated staff member receiving the Appeal shall review the appeal for form and content appropriateness;

   b. the staff members shall prepare a cover memorandum, addressed to the appropriate official, summarizing the process to date; and

   c. shall prepare the packet of supporting documentation to accompany the appeal to include:

      1. the Classification Form(s) upon which the appeal is based;

      2. the prisoner's Appeal(s) of Classification Action which must be entered on Form # 20-760.01A;

         NOTE: A separate Appeal of Classification Action must be prepared for each level of appeal, i.e., the appeal statement/form prepared for the Regional Director and containing his or her response will not be appropriate for appeal of that decision to the Deputy Commissioner for Operations. However, the lower-level appeal response must accompany an appeal to the next higher level.

      3. the tape recording of the classification hearing; and
4. the cover memorandum of explanation certifying that the appeal has been routed through institutional staff;

6. A prisoner in out-of-state placement or in-state contract facility placement who is appealing a classification decision made in accordance with DOC Policy # 750.03, Classification Review Team, and/or DOC Policy # 750.04, Return of Prisoners From Out-of-State Placement, may appeal the decision, in writing, directly to the Deputy Commissioner for Operations within ten working days after receiving written notice of the decision.

7. For purposes of appeal, a prisoner may have access to the tape recording of a related disciplinary hearing or the classification hearing being appealed, except that the portion of the tape that contains the testimony of an informant must be summarized in as much detail as possible so as not to place the informant in danger; this summary must be made available to the prisoner. The tape remains the property of the Department. A tape containing informant testimony may have a summary transcript prepared, and the summary transcript made available to the prisoner in lieu of the actual recording.

8. With the exception of a transfer to an institution outside of Alaska, a classification action may be commenced pending an appeal.

j. Appeal Response:

1. Once an appeal has been filed and received, a response must be made as follows:

   a. Appeal to Superintendent: response within five working days;

   b. Appeal to Regional Director: response within 15 working days;

   c. Appeal to Deputy Commissioner for Operations: response within 15 working days

2. The appropriate official may grant the appeal, grant the appeal and modify the classification decision, deny the appeal, or refer the matter back to the committee for rehearing.

3. The official responding to the appeal shall enter his or her decision on the Appeal of Classification Action or, in the case of out-of-state or contract facility placed prisoner appeals, prepare a letter of response on official letterhead and sign the response in the appropriate space.

4. The appropriate official’s failure to respond within the time limits set out above must be considered a denial of the appeal. However, a late response granting an appeal is valid.

5. The prisoner must be informed of the official’s decision by receipt of the Appeal Response within the time frames set out above. A copy of the Response should be sent to the Superintendent, the prisoner’s case record and the prisoner's case manager/institutional probation officer at the holding facility. In the case of a transfer appeal, Central Classification should receive a copy of the Response as well.
8. Classification Review

Each prisoner’s custody status, security level, and program needs will be reviewed and reassessed on a scheduled basis.

a. Schedule of Classification Review

1. A prisoner with two or more years remaining to a firm release date will have a classification review at approximate one-year intervals (every 11-13 months).

2. A prisoner with less than two years remaining to a firm release date or who is classified community or minimum custody will have a classification review at approximate six month intervals (every 5-7 months).

3. A prisoner with one year or less remaining to a firm release date will have a classification review at approximate one year and six months before a firm release date.

4. A prisoner originally sentenced to serve a short sentence of one year or less will have a classification review approximately six months prior to release, as is appropriate to the length of sentence and firm release date.

5. A prisoner originally sentenced to serve a very short-term sentence of 90 days or less will not have a classification review other than classification action called for for designation or initial classification.

6. A prisoner returned to Alaska in accordance with DOC Policy # 750.04, Return of Prisoners From Out-of-State Placement, must have a classification review within ten days after return to the state.

7. A prisoner returned to Alaska for a reason other than that set out in DOC Policy # 750.04, Return of Prisoners From Out-of-State-Placement, must have a classification review within 30 days after the prisoner’s return to the State.

8. A prisoner may have a classification review hearing at any time at the discretion of the Regional Director or the Superintendent.

b. Classification Review for an In-State Contract Facility

1. A prisoner residing in a Restitution Center (RC) or Contract Misdemeanant Housing (CMH) will receive a formal review of designation in accordance with DOC Policy # 750.03, Classification Review Team, at least annually.

---

678 The information contained in this section comes directly from DOC Policy # 745.01, Prisoner Classification Review.
2. A prisoner received into an institution from a contract RC or CMH will receive an initial classification hearing in accordance with DOC Policy # 735.03, Initial Classification, within 30 days of the prisoners arrival at the institution.

3. A prisoner serving his or her entire sentence in a RC or CMH will not have a classification review other than the formal review of designation, initial classification as may be called if received into an institution from a contract RC or CMH, or other hearings in accordance with DOC Policy # 735.04, Required Classification Hearing.

c. Classification Review for Prisoners Incarcerated Outside Alaska

A prisoner housed in a facility outside Alaska in accordance with DOC Policy # 750.02, Out-of-State Transfers, will receive a hearing before a classification review team in accordance with DOC Policy # 750.03, Classification Review Team, at approximate one-year intervals (11-13 months).

d. Classification Review Hearing for Prisoners Incarcerated In Alaska

1. The Classification Review hearing will be a hearing conducted in conformance with procedures the same as those for initial classification in accordance with DOC Policy # 735.03, Initial Classification; and

2. The Designation Review hearing for in-state contract facilities and the classification review team hearing for prisoners incarcerated outside Alaska will be conducted in accordance with DOC Policy # 750.03, Classification Review Team.

e. Victim's Rights At Classification Review

A prisoner sentenced to incarceration for a felony crime against person on or after October 3, 1984, will have the victim(s) contacted by institutional staff for comment prior to a classification hearing at which community custody or placement is to be considered, for advance notification of the prisoner's furlough or other release, or both, in accordance with DOC Policy # 818.11, Victim Notification.

f. Appeal of Classification Review Decision

1. In-state classification review actions may be appealed by the prisoner in accordance with DOC Policy # 760.01, Appeal Procedures.

2. Out-of-state classification review actions may be appealed by the prisoner to the Deputy Commissioner for Operations within ten days after receiving notice of the decision.

9. Prisoner Transfer

a. Administrative Transfer

The information in this section comes from DOC Policy # 750.01, Administrative Transfer.
It is the policy of the Department to facilitate and expedite, when necessary or appropriate, the transfer of sentenced or unsentenced prisoners between institutions for any purpose related to an emergency or potentially hazardous situation or to facilitate an administrative action that can be more efficiently accomplished at another institution.

An administrative transfer is the transfer of a prisoner between facilities for any purpose related to an emergency or potentially hazardous situation or to facilitate an administrative action that can be more efficiently accomplished at another facility, such as:

1. parole hearing;
2. court action;
3. medical or mental health treatment;
4. military tribunal;
5. family emergency; or
6. population management.

A prisoner who is administratively transferred must be accompanied by a memorandum from the sending Superintendent to the receiving Superintendent. This Transfer Memorandum must include:

1. the reason(s) for the transfer;
2. what is expected to be accomplished or provided through the transfer;
3. any special expectations or steps required at the time of, or soon after, the prisoner's arrival at the receiving facility; and
4. specifics that the receiving Superintendent needs to know to properly process the prisoner.

If the transfer will result in the prisoner being assigned to administrative segregation, the prisoner must be granted a classification hearing as set out in DOC Policy # 735.03, Initial Classification, within no less than three working days in accordance with DOC Policy # 804.01, Administrative Segregation.

A prisoner may appeal an administrative transfer to the Deputy Commissioner for Operations in accordance with DOC Policy # 760.01, Appeal Procedures, within five working days after he or she receives notice of the transfer or after the transfer, whichever occurs first. The filing of an appeal will not delay a transfer, except when the transfer is to an out-of-state facility.

Except as provided above, a transferred prisoner must be provided a classification hearing as set out in DOC Policy # 735.03, Initial Classification, within ten working days after arrival at the receiving institution, except when the prisoner is being returned from out-of-state placement to facilitate an administrative action such as a court appearance when the prisoner must be provided a classification hearing within 30 days after returning.

b. Out-of-State Transfers

680 The information contained in this section is taken directly from DOC Policy # 750.02, Out-of-State Transfers.
Because of the lack of long-term correctional institutions and a shortage of needed rehabilitative services in the State, it is the policy of the Department to transfer some prisoners to institutions operated by the Federal Bureau of Prisons or contract facilities outside the State.

1. Out-of-State Transfer to a Federal Prison

A prisoner may be transferred outside Alaska to an institution operated by the Federal Bureau of Prisons (“FBP”) if the prisoner is provided a classification hearing, a determination is made that the prisoner's rehabilitation or treatment would not be substantially impaired by the transfer, and the prisoner meets one or more of the following criteria:

a. the prisoner requests out-of-state transfer;

b. the prisoner has a term of incarceration of seven and one half years or more remaining to be served;

c. the prisoner lacks significant family or community ties or lacks a significant time of residency in Alaska and has more than two years remaining to be served;

d. the prisoner requires protective custody because the prisoner would, in all likelihood, be subjected to a life-threatening situation if housed in an appropriate facility in Alaska;

e. the prisoner has been convicted of a violent offense, either as the present offense or as a prior conviction, and is an escape risk because of one or more documented escapes from a correctional facility or two or more documented escape attempts from a correctional facility and has more than two years remaining to be served; or

f. the prisoner has a special medical or mental health needs that cannot reasonably be met in Alaska.

2. Limitations on Transfers to a Federal Prison

Any of the following factors weigh heavily against a decision to transfer a prisoner to a facility operated by the FBP:

a. the prisoner has no prior criminal record or no prior incarcerations;

b. the prisoner is less than 20 years old; or

c. the prisoner has maintained a traditional or rural Alaska lifestyle; and

d. a prisoner with a pending criminal appeal that has not had the record on appeal certified for at least 30 days.
3. Limitation on Out-of-State Transfer to a Non-Federal Contract Facility

a. A prisoner may be transferred outside Alaska to a contract facility which is not operated by the FBP if the prisoner is provided a classification hearing and a determination is made that the prisoner's rehabilitation or treatment would not be substantially impaired by the transfer.

b. In order to permit adequate communication with counsel, a prisoner with a pending criminal appeal will ordinarily not be transferred to a contract facility outside of Alaska until at least 70 days after sentencing.

4. Transfer to an Out-of-State Psychiatric Facility

A prisoner being processed for transfer to a mental health or psychiatric facility outside Alaska for observation or treatment of a mental illness must be provided a classification hearing in accordance with DOC Policy # 745.02, Classification for Transfer to Psychiatric Facility.

c. Appeal of Decision to Transfer Out-of-State

A prisoner may appeal to the Deputy Commissioner a decision for transfer out-of-state in accordance with DOC Policy # 760.01, Appeal Procedures. The appeal must be submitted through the institutional staff member designated for that purpose within five working days of the time that the prisoner receives written notice of the Central Classification decision. A prisoner who has an appeal pending under this section may not be transferred out-of-state until the appeal process is completed.

d. Return of Prisoners from Out-of-State Placement

It is the policy of the Department to review the classification of prisoners placed out-of-state and to return prisoners incarcerated out-of-state as is appropriate on a case-by-case basis in response to established return eligibility criteria and the availability of space within institutions in-state as determined by the Central Classification Unit of the Department.

A. A prisoner incarcerated outside the state in a facility operated by the Federal Bureau of Prisons must be returned to Alaska within 60 days after Central Classification receives written notification from, or on behalf of, a prisoner meeting any of the following criteria:

*The prisoner's life is in danger, as evidenced by one or more of the following:

a. a recent verified attempt on the prisoner's life;

b. a recommendation for return by the out-of-state holding institution because the prisoner's life is in danger; or

681 The information in this section comes directly from DOC Policy # 750.04, Return of Prisoners from Out-of-State Placement.
c. other documentation sufficient to indicate that a prisoner's life is in danger;

*The prisoner has two years or less remaining to a firm release date and does not have an out-of-state sentence consecutive to his or her State sentence; or

*The prisoner is incarcerated outside Alaska solely for medical or mental health treatment and either that treatment is completed or facilities or resources have become available in Alaska for an equivalent level of treatment and security.

B. For every three prisoners transferred outside Alaska to a facility operated by the Federal Bureau of Prisons, at least one other prisoner who is already in Federal Bureau of Prisons placement must be returned to the state from the Federal Bureau of Prisons upon notification to Central Classification in writing and the Chief Classification Officer or designee's concurrence, that any of the following criteria have been met:

*The prisoner has a family crisis that could be demonstrably minimized by the prisoner's return;

*The prisoner has been incarcerated outside Alaska for five or more years and has maintained a disciplinary-free facility record, excluding minor infractions, for the entire period of time; or

*The prisoner has special needs that cannot be met by the Federal Bureau of Prisons.

C. A prisoner incarcerated in a non-federal contract facility out-of-state may be returned to Alaska, or transferred directly to a different non-federal contract facility, at the discretion of Central Classification, if the Chief Classification Officer or designee determines that the instant placement has substantially impaired the rehabilitation or treatment of the prisoner.

A prisoner returned to Alaska under one of the above scenarios must receive a classification hearing as set out in DOC Policy # 735.03, Initial Classification, within ten days of the prisoner's return unless the prisoner is being returned from out-of-state placement to facilitate an administrative action such as a court appearance, in which case the prisoner must be provided a classification hearing within 30 days after the prisoner's return.

The priority for prisoner return from out-of-state placement is established in accordance with the following guidelines:

a. Prisoners in the categories outlined under (A) above must be given first priority for return to Alaska.

b. Prisoners in the categories outlined under (B) above will be given the second priority for return to the State.
c. Prisoners in the category outlined under (C) above will be given third priority for return to the State; and may be transferred directly to a different non-federal contract facility in lieu of return to Alaska, at the discretion of Central Classification.

d. Prisoners not falling within one of the categories identified under (A) – (C). above will be assigned the lowest priority for return to Alaska.

e. During the annual prisoner classification review in accordance with DOC Policy # 750.03, Classification Review Team, every effort will be made to identify those prisoners who meet eligibility criteria for return to Alaska. Actual return will be dependent upon available space in an institution of appropriate security and custody level for the prisoner being returned.

A prisoner whose written request to return to Alaska under (A) – (C) above is denied may appeal the decision, in writing, directly to the Deputy Commissioner for Operations within ten working days after receiving notice of the decision in accordance with DOC Policy # 760.01, Appeal Procedures.

e. Transfer to Mental Health or Psychiatric Facility

1. When, in the opinion of institutional or contract mental health professional personnel, the local institutional mental health resources do not adequately meet a prisoner's current mental health treatment needs, the prisoner may be administratively transferred to a more appropriate institution in accordance with DOC Policy # 750.01, Administrative Transfer.

2. In the case of a prisoner requiring a level of mental health treatment beyond that available in an institution, the prisoner may be transferred to a mental health or psychiatric facility as follows:

a. In emergency cases that require a prisoner's immediate transfer into a psychiatric facility for mental health observation or stabilization, the transfer is an interim emergency medical placement and does not require a classification hearing unless:

i. the prisoner is not returned to the original institution within 20 days, in which case the prisoner must be provided a classification hearing within 30 days of the transfer; or

ii. a clinical diagnosis indicates the need for treatment in a psychiatric facility for more than ten days, in which case the prisoner must be provided a classification hearing within 15 days of the diagnosis.

3. A prisoner who has been transferred to a mental health facility and who requires a classification hearing or a prisoner being considered for long-term transfer to a

---

682 Information in this section is contained in DOC Policy # 745.02, Classification for Transfer to Mental Health or Psychiatric Facility.
psychiatric hospital inside or outside Alaska for observation or treatment of a mental illness must be provided a classification hearing as follows:

a. notice of all the following rights at least ten days before the classification hearing;

b. a tape recorded classification hearing in accordance with DOC Policy # 735.03, Initial Classification;

c. disclosure, at the time of notice of the hearing, of the evidence being relied upon as the basis for the transfer;

d. an opportunity to be heard in person, to present testimony of witnesses, and to confront and cross-examine witnesses, except upon findings of good cause for not permitting such presentation, confrontation, or cross-examination;

e. an independent decision maker not involved in the recommended transfer, who may be an impartial member of the institution's staff, shall preside over the hearing;

f. a written statement by the decision maker as to the evidence relied upon and reasons for transferring the prisoner;

g. availability of legal counsel, if the prisoner is financially unable to furnish counsel, in accordance with AS 18.85;

h. the right to appeal to the Deputy Commissioner for Operations a decision for transfer within five working days following receipt of notice of decision in accordance with DOC Policy # 760.01. Appeal Procedures; and

i. for out-of-state transfers, in accordance with DOC Policy # 750.02, Out-Of-State Transfers, a stay of transfer until a properly-filed appeal has been decided.

4. The physician, psychologist or psychiatrist who previously determined that the prisoner is suffering from a mental illness for which treatment in a mental health facility is appropriate must testify at the classification hearing. If the mental health professional who made the finding of mental illness is presently unavailable, another physician, psychologist or psychiatrist designated by the Commissioner may be substituted to testify at the classification hearing.

C. Segregation

Each institution has an administrative segregation unit that is used to securely house and protect prisoners. The Department may not use administrative segregation as punishment. Administrative segregation is intended to benefit the security of both the facility and the prisoner. Inmates in administrative segregation must receive a classification review hearing every 30 days.
Punitive segregation is a punishment. The Department may impose punitive segregation, confinement to quarters, or weekend or holiday lockups to alter a prisoner's inappropriate behavior and to affirm institutional standards for prisoner conduct. Confinement in punitive segregation, confinement to quarters, or weekend or holiday lock-ups may be for periods not to exceed 20 days for a low-moderate infraction, 40 days for a high-moderate infraction, or 60 days for a major infraction. Prisoners' privileges will be limited while in punitive segregation, consistent with the sanction of segregation as punishment. The Superintendent of each institution must ensure that staff supervise and monitor all segregated prisoners according to the security considerations inherent in punitive segregation status.683

1. Administrative Segregation

   a. Assignment to Administrative Segregation684

   The Department may assign a prisoner to administrative segregation if the prisoner:

   1. has not been classified since initial admission to the institution, or has not yet had a physical examination under DOC Policy # 807.14, Health Examinations;
   2. is incapacitated;
   3. is suffering or suspected of suffering from a communicable disease;
   4. is prescribed segregation by a physician, physician's assistant, or mental health professional based upon his or her mental or physical condition;
   5. requests the segregation in writing (the Department may deny a prisoner's request for administrative segregation if the prisoner does not have a valid security or medical reason – wanting a private room is not a sufficient reason);
   6. is detained as a non-criminal hold under AS. 47.30.705 or AS. 47.37.170;
   7. is being held as a material witness under a court order;
   8. presents a substantial and immediate threat to the security of the facility;
   9. requires protective custody; or
   10. presents a substantial and immediate threat to the public and no less restrictive alternative addresses the problem.685

   b. Placement in Administrative Segregation

      1. Emergency Placement

      A staff member may immediately segregate a prisoner if he or she reasonably believes that the prisoner presents a substantial and immediate threat to him or herself, others, or the security of the facility. The shift supervisor must approve the prisoner's placement in segregation either at the time that the prisoner is segregated or immediately following segregation. The institution shall hold a classification hearing within three working days of the emergency placement. In exceptional circumstances and for good cause, the institution may have a 24-hour extension.

583 22 AAC 05.505.
584 22 AAC 05.485(1)-(10).
585 DOC Policy # 804.01, Administrative Segregation.
2. Non-Emergency Placement

Except for prisoners segregated under reasons (a)(6) – (a)(10) above and except for the limited emergency placement described above, the institution may not segregate a prisoner without first notifying the prisoner in writing (on Form # 804.01A) of the reasons for the intended placement and holding a classification hearing to determine if circumstances exist that justify placement in administrative segregation.

The institution need not hold an initial classification hearing if a prisoner requests administrative segregation under section a(5) above. However, the institution must promptly release the prisoner upon request unless the prisoner meets the requirements for emergency placement.

c. Classification Hearing

1. Notice of Hearing

The Department shall give the prisoner 48 hours notice of the classification hearing and advise the prisoner of his or her right to assistance from a hearing advisor or counsel when segregation is in connection with an infraction that would constitute violation of a felony criminal statute or is related to transfer to a psychiatric facility. A prisoner is entitled to a hearing advisor to investigate the facts and coordinate the prisoner's presentation at the classification hearing.

2. Evidence/Witnesses

The prisoner must be given the opportunity to challenge the factual basis for the placement, to appear, to present evidence, and to examine witnesses, unless the hearing officer or classification committee makes a written factual finding that to do so would subject another person to a substantial risk of harm. In that case, the Department shall give the prisoner the substance of the witness' testimony. The prisoner must also be provided the opportunity to make a statement on his or her own behalf.

3. Department’s Burden

The institution must demonstrate that the prisoner meets the criteria in (a)(1) – (a)(10) above in order to place the prisoner in administrative segregation. Except as provided for below, within three working days after the hearing, the hearing officer or committee must prepare a Classification form (Form # 735.03A or Form # 705.01A) for the Superintendent's review and action. The form must include written factual findings and the evidence that the committee/hearing officer relied upon in sufficient detail to permit appellate review.

4. Superintendent’s Review

Except as provided below, the Superintendent has five working days to make a final decision on the hearing officer or committee's recommendation. The Superintendent may approve, disapprove, or modify the committee/hearing officer's decision. If disapproved or modified, the
Superintendent shall state the reasons on the Classification form. The prisoner shall receive a copy of the final decision. If the decision is for placement or continued placement in administrative segregation, it must include a description of the appeal process set out in DOC Policy # 760.01, Appeal Procedures.

5. Right to Appeal

The prisoner has the right to appeal the Superintendent's decision.

d. Appeal of Decision.

A prisoner may appeal the Superintendent's decision to the Director of Institutions (except when transferred to another institution). If the administrative segregation assignment involves transferring the prisoner to another institution, the prisoner may appeal the classification action directly to the Deputy Commissioner.

e. Review Hearings

The classification committee shall hold review hearings within 30 days after the first hearing and every 30 days thereafter for as long as the prisoner remains in segregation. At this hearing, the institution must demonstrate that conditions still justify segregating the prisoner.

f. Expedited Time Frames for Action after Hearing

A prisoner assigned to administrative segregation who has had a classification hearing and is either facing or appealing disciplinary action, is entitled to action within the following expedited time frames:

1. the committee/hearing officer shall prepare the Classification form and deliver it to the Superintendent within one working day after the classification hearing;

2. the Superintendent shall approve, disapprove, or refer the matter back to the committee/hearing officer for further consideration within two working days after receiving the Classification form;

3. if the matter is referred back to the committee/hearing officer, the committee/hearing officer has four working days to review the matter and resubmit it to the Superintendent for review; and

4. the institution shall release the prisoner immediately from segregation unless the Superintendent decides that the prisoner continues to meet the criteria for administrative segregation.

g. Conditions of Administrative Segregation
Except in an emergency, cell occupancy in the administrative segregation unit may not exceed operational capacity. When an emergency requires multiple occupancy beyond operational capacity, a report must be prepared immediately and given to the Superintendent for review and action. In addition, segregated prisoners must be provided the same food, bedding, linen, and personal hygiene opportunities as the general prison population except as provided below and segregation unit quarters must be adequately ventilated, lighted, heated, and cleaned.

**h. Rights and Privileges**

Segregated prisoners must be provided the same general rights and privileges as the general prisoner population unless the Department makes an individualized determination that a prisoner's participation in the specific right, privilege, or opportunity threatens the order and security of the facility. In such a case, the Superintendent or designee shall make written findings of fact showing that the prisoner is an escape, smuggling, or security risk and, therefore, not entitled to a certain right or privilege. The Superintendent or designee must notify the prisoner of this decision as soon as practicable either before or upon denying the right or privilege. The prisoner may appeal such a determination as provided above.

**i. Supervision of Segregation Unit**

The Superintendent or designee shall inspect the segregation unit(s) daily. The Superintendent shall inspect the unit in person at least once during each workweek. The segregation unit and the prisoners housed therein will be monitored on a regular basis to facilitate the observation and evaluation of the conditions of segregation, and to maintain the appropriate degree of staff contact with prisoners in segregation as follows:

1. the Assistant Superintendent shall visit the unit at least once each working day;
2. the Shift Supervisor shall visit the unit at least once during each shift;
3. health care personnel shall visit or otherwise be available to prisoners as needed, consistent with the Health Care Services policies and procedures;
4. probation officers, program representatives, and staff counselors shall visit the unit as appropriate for the prisoners' needs and requests;
5. mental health professionals shall visit the unit if requested by institutional staff or prisoners; and
6. religious faith representatives may visit the unit in response to prisoners' authorized requests.

**j. Release From Administrative Segregation**

The Superintendent shall release a prisoner from segregation under the following conditions:

1. after the Superintendent's review of placement and a determination that the prisoner does not meet the requirements for administrative segregation;
2. the prisoner has been appropriately classified after initial admission to the...
institution in accordance classification procedures;

3. after the prisoner completes the requisite health screening and physical examinations under DOC Policy # 807.14, Health Examinations; or

4. after reviewing the classification committee/hearing officers’ recommendations, the Superintendent determines that the prisoner no longer meets the criteria for administrative segregation.

2. Punitive Segregation

A. Assignment to Punitive Segregation

The institution may place a prisoner in punitive segregation after a disciplinary hearing in which the prisoner is found guilty of a violation that warrants this sanction.

B. Conditions of Punitive Segregation

A prisoner’s participation in the following activities [is] automatically suspended when the prisoner is in punitive segregation:

a. participation in education programs or group religious services;

b. contact visitation;

c. secure visitation other than with immediate family members (e.g., spouse, parents, children, or siblings);

d. telephone calls, except those to an attorney or the ombudsman's office;

e. use of radio, tape recorder, phonograph, television or games;

f. recreation, except the prisoner has the right to out-of-cell exercise at least one hour per day and must have access to fitness equipment sufficient to exercise the large muscle groups in an area large enough to reasonably accommodate the equipment and activity;

g. reading material, except for religious, legal matter, or educational materials if the prisoner is enrolled in a course;

h. eating in a community dining area;

i. use of the commissary;

---

686 The information contained in this section comes directly from DOC Policy # 804.02, Punitive Segregation.

687 22 AAC 05.470(b)(1)-(9).
j. right to wear personal clothing in living units; and

k. physical access to the law library and assistance in using the law library, except for law librarian's services, as individual security demands require; the prisoner may have at least four law books in his or her cell at any one time, and the law librarian's assistance locating, researching, and obtaining legal materials; if necessary, the Department may arrange secure visits between the prisoner and the law librarian.

The prisoners’ living conditions in punitive segregation must approximate but be more restrictive than those of the general prisoner population. The basic conditions below apply to punitive segregation:

a. Quarters must be sanitary and have adequate ventilation, light, and heat.

b. The cell or room must be single occupancy. Staff shall inform the superintendent when a situation arises that necessitates multiple occupancy. The superintendent or designee shall establish the criteria for exceeding single occupancy.

c. Prisoners must wear a prescribed uniform and have a bed, mattress, bedding, and linens. The institution may not segregate a prisoner without clothing or bedding unless health care personnel prescribe these extraordinary limitations for medical or psychiatric reasons and the superintendent approves the limitations.

d. Prisoners must normally be provided normal meals from the institution's daily menu, although the DOC may use disposable utensils. Prisoners on special diets must be provided meals that meet their special needs.

e. Prisoners must maintain standard personal hygiene. The institution shall provide personal hygiene items such as toothpaste, toothbrush, soap, and shaving items, etc. For safety or security, the institution may issue the prisoner a returnable kit of toilet articles. Each segregated prisoner must shower at least three times a week, unless these procedures present an undue security hazard. The Department shall provide laundry and barbering services on a regularly scheduled basis.

f. Segregated prisoner personal property is limited to personal hygiene items and the reading and writing materials necessary for religious purposes, legal matters, or educational programs if the prisoner is enrolled in a course.

g. incoming or outgoing mail for segregated prisoners is the same as for the general prisoner population.

D. Prisoner Grievances

The information in this section comes directly from DOC Policy # 808.03, Prisoner Grievances.
A prisoner may file a grievance over any matter within DOC’s control including a violation of the Department’s regulations, a statute, or a procedure set out in the prisoner handbook, or health care grievances. Prisoners may not file grievances concerning classification or disciplinary decisions, administrative transfers, prohibited conduct of prisoners, Alaska Parole Board procedures or decisions, or court procedures or decisions. Other avenues are available to contest these decisions.⁶⁸⁹

A. Grievance Process Summary

Step One. An inmate must first attempt to resolve the grievance informally by filling out a Request for Interview Form (Form # 808.11). If the inmate is not satisfied with the result of informal resolution, then:

Step Two. An inmate must fill out Form # 808.03C and give it to the facility’s Grievance Coordinator (GC) in order to file a formal grievance. This form must be filed within 30 days from the date the grieved action occurred or the date the inmate had knowledge of the action. The GC may screen the grievance, ask for permission to resolve it if it seems easy to resolve, or assign an investigator. If the grievance is screened, the inmate can attempt to correct any deficiencies in the grievance and re-submit it, or can appeal the screening decision. If the screening appeal is denied, there is no further action that the inmate can take. If the GC assigns an investigator:

Step Three. An inmate will receive a written decision from the Department concerning the grievance. This decision may be appealed by filling out Form # 808.03D within two days. If the inmate files an appeal:

Step Four. An inmate will receive another written decision from the Department. If the inmate does not agree with this decision, the inmate may seek review by the Department’s Grievance and Compliance Administrator (GCA). Prisoners must request review by writing a letter directly to the GCA within 30 days. This is the final step unless the grievance is an issue addressed in the Cleary FSA and involves a violation of a state or federal right. If it does, a compliance action may be filed with the court.

B. Preliminary Grievance Matters

1. Filing Period: A grievance must be filed within 30 days of the date the incident occurred or from the date the prisoner had knowledge of the incident. Filing a form for informal resolution does not satisfy this requirement.

2. Grievance Against the Superintendent: A grievance may be filed against a superintendent of a facility only for action taken directly by the superintendent.

3. Grievance Coordinator: The superintendent shall assign an appropriate staff member as the coordinator

⁶⁸⁹ These matters may only be raised through an appeal of a classification or disciplinary action, or court action.
4. **Where to File a Grievance:** Except for emergency grievances, all grievances and grievance appeals must be filed in the locked box located in the housing unit. The grievance coordinator will make and keep a copy of the grievance.

5. **Transferred or released prisoners:** If a prisoner is transferred while the grievance is being processed, the Grievance Coordinator shall continue the grievance process in coordination with the coordinator of the receiving institution, unless the transfer resolves the issue. If a prisoner has been released from custody, the prisoner must notify the coordinator in writing and leave a contact address if he or she wants the grievance process to continue.

6. **Retaliatory action:** The department shall promptly investigate any allegations of retaliation against prisoners who use the grievance process to ensure that the prisoner is not subjected to any form of retaliation for the pursuit of a grievance.

C. **General Grievance Procedures**

1. **Informal Resolution**

   A prisoner must first try to resolve the grievance informally before filing a grievance, except for an emergency grievance or a grievance alleging staff misconduct. The prisoner must complete a Request for Interview form (Form # 808.11) and give it to the appropriate staff member or place it in the locked box in the housing unit.

2. **Filing a Grievance (Level One)**

   If informal resolution fails, a prisoner may file a grievance. To do so, the prisoner must fill out the first page of the Prisoner Grievance Form (Form # 808.03C), attach the response to the informal resolution attempt, and place the form in the locked box. The Grievance Coordinator will record the grievance and its subject matter in the grievance log. The grievance process begins when the GC records and files the grievance.

   The GC shall promptly decide whether the grievance should be screened, resolved easily, sent to the GC of the facility where the incident occurred, sent directly to the Superintendent, or assigned to an investigator.

   **A. Screened Grievances**

   If screened, the GC will fill out a Grievance Screening Form (Form # 808.03A) and provide a copy to the prisoner. If a prisoner can correct the deficiency that caused the screening, the prisoner may resubmit the grievance. The grievance will be considered timely if resubmitted within two working days of receipt of the screening form.

   If the Prisoner believes that the grievance was screened improperly and this is part of a systemic problem, the prisoner can file a separate grievance concerning the screening process.
1. The GC shall screen out and return a grievance if:

a. The action or decision being grieved is not a grievable issue;
b. The grievance is not within the institution or department’s jurisdiction;
c. The issue was not first addressed informally;
d. The issue was already grieved by the prisoner or by another prisoner and resolved;
e. The grievance is submitted on behalf of another prisoner who is able to file his or her own grievance;
f. The form is not filled out completely;
g. The grievance is not filed within 30 days;
h. The grievance is grieving an action not yet taken;
i. The grievance contains inappropriate use of obscene or profane words;
j. The grievance is factually incredible or clearly devoid of merit;
k. The specific relief sought is unclear;
l. The grievance raises unrelated issues that should be presented in separate grievances; or
m. The grievance is against the superintendent but is not for action taken directly by the superintendent.

2. Appeal of a Screened Grievance

(a) The prisoner must state in writing why the screening decision is incorrect on the Request for Interview Form (Form # 808.11A), attach it to the grievance and the screening form, and return it to the GC within two working days after receiving the screening decision.

(b) The GC shall record the appeal and forward it to the superintendent or, if the grievance concerns an action taken by the superintendent, to the Deputy Director of Institutions.

(c) The superintendent/deputy director has ten working days after receipt of the appeal to complete the review and issue a written decision through the GC to the prisoner. If a response is not received within the ten working days, the appeal is considered denied. However, a late response granting an appeal is valid. This level of review is final.

B. Easily Resolved Filed Grievance

The GC has discretion to attempt to resolve the initially filed grievance if it can be easily resolved with the concurrence of the prisoner. If such a resolution is reached, the Resolved Filed Grievance form (Form # 808.03B) must be filled out completely and properly counter-signed by the prisoner and the GC.

C. Investigator Assigned
If the grievance is not screened out or resolved and withdrawn after its initial filing, the GC must either investigate or assign another staff member to investigate. The investigator shall forward a clear and concise written statement of findings (on the second page of Form # 808.03C) to the superintendent through the GC within ten working days from the date the grievance was filed.

**Grievance against Superintendent**

If Grievance is against the superintendent, the GC shall forward it to the Deputy Director of Institutions for assignment to an impartial investigator. The investigator shall forward the findings and recommendations to the Deputy Director of Institutions.

**Allegations of Staff Misconduct**

When the GC receive a grievance alleging staff violations of the ethical code or standards of conduct (defined in DOC Policy # 202.01), the GC shall record and forward the grievance directly to the superintendent. The superintendent shall then either:

1. investigate, resolve the grievance, and provide a written decision to the prisoner through the GC; or
2. return the grievance to the GC for informal resolution or assignment to an investigator

**3. Formal Review by the Superintendent/Deputy Director**

The superintendent or deputy director shall, through the GC, give the prisoner a written response on Form # 808.03C, within five working days after receiving the investigator’s findings. The decision must note any corrective action, include sufficient findings and conclusions to provide for further review, and include a copy of the investigator’s findings and recommendations.

**4. Appeal Process (Level Two)**

A prisoner may appeal a superintendent/deputy director decision. A prisoner must file a Prisoner Grievance Appeal Statement Form (Form # 808.03D) with the GC within two working days after receiving the superintendent/deputy director’s decision. The GC shall record the appeal and immediately send it to the deputy director, or, in the case of an appeal from the deputy director’s decision where the superintendent had been initially grieved, to the Director.

   a. The director/deputy director shall respond to the prisoner in writing through the GC within 15 working days after receiving the appeal. The director/deputy director shall either affirm or reverse the superintendent’s decision, note any corrective action, and set out findings and conclusions sufficient to permit further review. If a response is not received within 15 working days, the appeal is considered denied. However, a late response granting the appeal is valid.
b. The director/deputy director shall file a copy of the appeal and written response to the appeal with the Grievance and Compliance Administrator.

c. The Department may deny any prisoner’s appeal that does not allow for these procedures.

5. Review by the Grievance and Compliance Administrator

A prisoner who believes a grievance has not been handled consistent with this policy may seek review by the Department’s Grievance and Compliance Administrator (“GCA”) after the director/deputy director renders a decision. Prisoners must request review by writing a letter, and sending it in a sealed envelope directly to the GCA within 30 days. The GCA shall respond to the prisoner within 30 days.

D. Emergency Grievances

An emergency grievance may be made by notifying the GC, the superintendent, or the superintendent’s designee (e.g., shift supervisor during nights, weekends, holidays) orally or in writing. Emergency grievances involve issues that threaten life or the security of the facility or that may cause harm to any individual. The superintendent or designee (with immediate notification to superintendent) shall determine whether the issue grieved is an emergency. The GC, superintendent, or designee shall investigate and resolve the emergency grievance the same day or before the end of the shift. The GC, superintendent, or designee shall give the prisoner a written decision as soon as practicable.

E. Health Care Grievances

1. Scope

A prisoner may file a medical grievance regarding medical treatment, including:

a. the prisoner is refused treatment by medical, dental, psychiatric, or mental health staff, whether salaried or contract service personnel;

b. the Department refuses treatment recommended by a consulting health care professional (non-Department personnel); or

c. the prisoner is recommended for treatment by a consulting health care professional and the prisoner wants that recommendation reviewed

2. Procedures

Prisoners shall follow the sections on informal resolution and filing a grievance (level one) explained above. In addition, the following procedures apply:
a. The GC, in consultation with health care staff not the subject of the grievance, shall promptly decide whether the grievance should be screened or can be resolved easily. If it is not screened, the GC shall assign the grievance to the facility Health Care Officer (HCO) for investigation and response. The facility Health Care Officer shall send a written response (on Form # 808.03C) to the prisoner, through the GC, within ten working days from the date the grievance is filed.

b. If the grievance is against the facility HCO, the GC shall ask the Anchorage Central Office Health Care Administrator to assign an impartial investigator. If the investigation is to be conducted by a person from outside the facility, the investigator shall have ten working days from receipt of the assignment to send a written response to the prisoner through the GC.

c. The facility HCO shall investigate and resolve emergency grievances either within the same day or by the end of the officer’s shift. The officer shall send a written decision to the prisoner through the GC as soon as practicable.

3. Appeal

If a prisoner is not satisfied with the response to the grievance, the prisoner may appeal. The prisoner must complete Form # 808.03D and give it to the GC within two working days after receiving the decision. The GC shall direct the HCO to compile copies of all relevant medical records for placement in a sealed envelope. The GC shall record and forward the grievance appeal and the sealed records to the Health Care Administrator’s office for the assignment of an impartial investigator.

a. The assigned investigator shall investigate the matter and provide the Department’s Medical Director with a written statement of findings and recommendations within ten working days of receipt.

b. The medical director shall review the investigator’s written recommendations and, through the GC, give the prisoner a written decision within five working days of receipt of the investigators statement of findings and recommendations. The decision must contain findings of fact and conclusions as to the merits of the grievance. The medical director shall send copies of all appeal decisions to the Grievance and Compliance Administrator.

c. If the appeal involves a health care decision made by the medical director, the Medical Grievance Review Committee shall review the investigator’s written recommendations and, through the GC, give the prisoner a written decision within ten working days of receipt of the investigator’s statement of findings and recommendation. The decision must contain findings of fact and conclusions as to the merits of the grievance. The Medical Grievance Review Committee shall send copies of all appeal decisions to the Grievance and Compliance administrator.
d. If the prisoner believes that the health care grievance involves a malpractice issue, the prisoner may only appeal to the State Occupational Licensing Board.

F. Cleary Non-Compliance Grievances

If a prisoner files a grievance concerning an issue addressed in the Cleary FSA, the prisoner must: (1) exhaust the administrative grievance procedure set out in this policy and (2) allow the Grievance and Compliance Administrator 30 working days to review the Department’s decision and give the prisoner a written decision. If the prisoner does not agree with the GCA’s decision, the prisoner may file a compliance motion under Cleary. This motion must satisfy the requirements of the APLRA.  

Note: Legal counsel for the Cleary Plaintiff Class has been released. A prisoner must therefore proceed pro se or retain separate counsel to file an action with the Cleary Court.

E. Prisoner Disciplinary Proceedings

Disciplinary infractions committed by a prisoner will have a bearing on an inmate’s custody status and designation. As a result, the Department has developed a comprehensive hearing process to provide due process protections to inmates accused of committing a disciplinary infraction.

Minor infractions can be handled informally, but more serious infractions require a disciplinary hearing. At the hearing, prisoners have procedural rights such as the right to present evidence and witnesses, to confront witnesses, and to appeal the decision of the disciplinary tribunal.

1. Prohibited Conduct for Prisoners

Prohibited conduct for prisoners in state facilities is governed this section. A violation must be punished as either a major, high- or low-moderate, or minor infraction.

Major infractions include the following:

1. homicide;
2. assault upon a staff member or a visitor;
3. escape or evasion from custody;
4. setting a fire;
5. rioting;
6. assault by a prisoner upon another prisoner under circumstances that create a substantial risk of serious physical injury;
7. threatening or intimidating a witness in an official proceeding;
8. possession, use, or introduction of weapons or escape implements;
9. stealing, destroying, altering, or damaging government property, or the property of another, which results in damages of $1,000 or more; and

---

691 22 AAC 05.400.
10. commission of a class A or unclassified felony offense.

High-moderate infractions include the following:

1. fighting (i.e., mutual combat) with a person;
2. extortion, blackmail, or protection, such as the demanding or receiving of favors or anything of value in return for protection against bodily harm, property loss, or under threat of informing;
3. engaging in sexual acts with others or making sexual proposals or threats;
4. wearing a disguise or mask;
5. stealing, destroying, altering or damaging government property or the property of another, which results in damages of $100 or more, but less than $1,000;
6. tampering with or blocking a locking or security device;
7. possession, use, or introduction of contraband, except that described in Major Infractions, which directly threatens the security of the facility, such as excess money or unauthorized drugs;
8. intentional misuse of prescribed medication, such as hoarding medication or taking another person's medication;
9. adulteration of food or drink;
10. participation in an organized work stoppage;
11. possession of staff clothing or unauthorized civilian clothing;
12. counterfeiting, forging, or unauthorized reproduction of a document, article of identification, money, security, or official paper or the possession or use of such a document, which presents a threat to the security of the facility;
13. giving or offering an official or staff member a bribe;
14. threats to another of immediate bodily harm;
15. engaging in a group or individual demonstration or activity that involves throwing of objects, loud yelling, loud verbal confrontation, or pushing, shoving, or other physical contact that disrupts or interferes with the orderly administration of the facility;
16. refusal to provide a urine specimen when requested by a staff member;
17. spitting or throwing urine or fecal matter on or at a staff member;
18. intentionally providing a false statement before a classification or disciplinary committee or a hearing officer in a disciplinary matter or to an investigator in a grievance, classification, or disciplinary matter;
19. refusing to obey a direct order of a staff member;
20. misuse of the telephone, such as making intimidating, obscene, harassing, or threatening phone calls;
21. encouraging others to engage in a food strike;
22. refusal or failure to participate in a court-ordered treatment program, unless the conviction is being appealed and refusal is based upon advice of counsel;
23. intentionally interfering with a prisoner count; and
24. commission of a class C or B felony offense.

Low-moderate infractions include the following:

1. indecent exposure;
2. stealing, destroying, altering, or damaging government property, or the property of another, which results in damages of $50 or more, but less than $100;
3. unauthorized use of mail or telephone;
4. lying or providing a false statement to a staff member under circumstances other than those described in High Moderate Infractions;
5. giving or loaning property or anything of value for profit or favors if it threatens the security or orderly administration of the facility;
6. threats to another of future bodily harm;
7. possession of anything not authorized for retention or receipt by the prisoner and not issued through regular facility channels;
8. malingering or feigning an illness, injury, or suicide attempt;
9. missing a prisoner count, unexcused absence or tardiness from work or an assignment, failure to perform work as instructed by a staff member, or refusing to perform a work assignment for alleged medical reasons without being excused by medical staff;
10. failure to abide by posted sanitation rules or failure to keep one's person and quarters in accordance with posted rules;
11. being in an unauthorized area;
12. using equipment or machinery contrary to instructions or posted safety standards or use of equipment or machinery which is not specifically authorized;
13. using abusive or obscene language or gesture that is likely to provoke a fight or that clearly disrupts or interferes with the security or orderly administration of the facility;
14. tattooing or self-mutilation, other than attempts at suicide;
15. unauthorized communication or contact with the public or visitors;
16. giving to or exchanging anything of value with or accepting anything of value from any other person without prior approval of the superintendent, if it threatens the security or orderly administration of the facility;
17. threatening damage to or theft of another's personal property;
18. kicking, shouting, or banging, or engaging in any other persistent nuisance noise or activity;
19. willful failure or refusal to keep a medical or health care appointment scheduled with the prisoner's knowledge and consent; and
20. commission of a misdemeanor offense.

Minor infractions include the following:

1. gambling or possession of unauthorized gambling paraphernalia;
2. possession of unauthorized prisoner clothing;
3. failure to follow posted safety rules, except as described in Low Moderate Infractions;
4. smoking where prohibited;
5. stealing, destroying, altering, or damaging government property or the property of another, which results in damages of less than $50; and
6. failure to follow a written rule of the facility, of which the prisoner has been provided notice and which has been approved by the regional director.
Planning or attempting to commit, or aiding or encouraging a prisoner to plan or attempt to commit an infraction described in this section is considered the same as a commission of the infraction itself.

A list of the prohibited conduct described in this section must be provided in writing to each prisoner upon admission to a facility. If a prisoner is illiterate or cannot understand English, the list of prohibited conduct must be read and explained or interpreted, as necessary.

2. Informal Resolution

A facility staff member may informally handle prisoner conduct that constitutes a minor infraction by correcting, counseling, or advising the prisoner as to the proper or acceptable behavior. Upon approval of the assistant superintendent, a facility staff member may informally handle prisoner conduct that constitutes a low-moderate or high-moderate infraction by correcting, counseling, or advising the prisoner as to the proper or acceptable behavior. However, all prisoner misconduct that constitutes a low-moderate or higher infraction must be reported to the assistant superintendent by separate report for each infraction. If the matter is handled informally, the staff member shall file an information report unless the infraction is a minor infraction.

Staff members may not informally discuss the facts of an alleged infraction with other staff members other than the assistant superintendent, in order to ensure impartiality in the disciplinary process.

3. Advance Notice to Prisoner of Hearing before Disciplinary Tribunal

A prisoner scheduled to appear before a disciplinary tribunal must be provided written notice at least 48 hours in advance of the hearing. A prisoner may waive the 48-hour notice requirement by requesting an earlier appearance before the disciplinary tribunal. The notice referred to in this section must (1) include a brief description of the agenda followed at a disciplinary tribunal; (2) include the procedural opportunities afforded a prisoner; and (3) inform the prisoner that, no later than 24 hours before the hearing, the prisoner must inform the disciplinary tribunal in writing of witnesses that might be called or evidence that might be introduced.

If the prisoner is represented by a staff advocate, at the prisoner's request, the advocate shall inform the disciplinary tribunal in writing of witnesses the prisoner might call or evidence that might be introduced.

4. Agenda at Disciplinary Tribunal Hearing

A disciplinary tribunal hearing occurs in two phases, the adjudicative phase and the dispositive phase. The adjudicative phase must occur first and must be directed toward determining whether

---

692 22 AAC 05.405.
693 22 AAC 05.415.
694 22 AAC 05.420.
the prisoner committed the alleged infraction. If the prisoner is found to have committed the infraction, the dispositive phase must follow and must be directed toward determining what sanction is to be imposed. If the accused prisoner refuses to appear or participate in the hearing, adjudication and disposition may be made in the prisoner's absence.

The adjudicative phase of the hearing must proceed as follows:

1. The hearing officer or committee chairperson, as applicable, shall call the meeting to order and, unless the alleged violation is a minor infraction, ensure that the proceedings are tape-recorded.
2. The hearing officer or chairperson, as applicable, shall read the disciplinary report to the prisoner.
3. The hearing officer or chairperson, as applicable, shall request the prisoner to admit or deny each of the infractions alleged.
4. If an admission is entered, the dispositive phase may begin.
5. If a denial is entered, the following procedure applies:

   (a) If the prisoner or the disciplinary tribunal has requested the appearance of the staff member who wrote the disciplinary report, the staff member must be called into the room and questioned.
   (b) If the disciplinary report has noted the existence of witnesses or other evidence relevant to the alleged infraction, the hearing officer or chairperson, as applicable, may call the witnesses or otherwise introduce the evidence.
   (c) The accused prisoner or advocate may present the prisoner's version of events, call witnesses, and introduce evidence.
   (d) When the accused prisoner is finished presenting evidence, the prisoner must be excused from the room and the disciplinary tribunal shall, by a preponderance of the evidence, find whether the prisoner has committed the infraction. The tape recorder need not be operating during the deliberations of the disciplinary tribunal.
   (e) The prisoner must be called back into the room and informed, on the record, of the disciplinary tribunal's decision.

The dispositive phase of the hearing must proceed as follows:

1. If the prisoner admits the alleged infraction or is found by the disciplinary tribunal to have committed it, the disciplinary tribunal shall consider what sanction to impose.
2. The prisoner or advocate may present any evidence or information believed to mitigate punishment. The disciplinary tribunal must consider such evidence or information in imposing a penalty.
3. The prisoner may be excused from the room while the disciplinary tribunal determines what penalty to impose. The tape recorder need not be operating during the deliberations of the disciplinary tribunal. The prisoner must be called back into the room and informed on the record of the disciplinary tribunal's decision. The prisoner must be informed verbally, on the record, of the opportunity to appeal and the obligation to give notice of intention to appeal under 22 AAC 05.480 and must be provided a form, upon request, to facilitate an appeal.
5. Defense Witnesses and Evidence at Disciplinary Hearing

The accused prisoner may present witnesses and other evidence in the accused prisoner's defense, if written notice of the witnesses to be called or evidence to be admitted is given to the disciplinary tribunal no later than 24 hours before the hearing, unless good cause is shown why this time requirement cannot be met.

The superintendent shall allow the accused prisoner or advocate to have a reasonable opportunity to interview witnesses, collect statements, or compile other evidence, if that action would not create a risk of reprisal or undermine security. The accused prisoner must use a staff advocate to help in this task if either the prisoner or the witness is being held in segregation or the witness to be interviewed is a staff member.

The hearing officer or chairperson, as applicable, of the disciplinary tribunal may decline, for compelling reasons, to call a witness that the accused prisoner or advocate has requested to appear and may restrict the introduction of other evidence to avoid repetitious or irrelevant evidence or to avoid a risk of reprisal or undermining of security. The hearing officer's or chairperson's reason for declining to call a witness or admit evidence must be noted orally for the record. If the prisoner is found to have committed an infraction, the hearing officer or committee chairperson shall file a report, to be attached to the completed disciplinary tribunal report, listing all persons the prisoner requested to appear but were not called to testify or other evidence sought to be introduced, which was not admitted. This report must contain a brief statement of the reasons why the persons were not called or the evidence was not admitted.

6. Prisoner’s Opportunity to Confront Accusers in a Disciplinary Hearing

If the accused prisoner or advocate requests the disciplinary tribunal to call as a witness the member of the facility staff who wrote the disciplinary report, the staff member shall appear as a witness. If the staff member is temporarily unavailable, the hearing officer or chairperson shall postpone the proceedings until the staff member is available to appear. If any other staff member who is called as a witness is temporarily unavailable, the hearing officer or chairperson may postpone the hearing until the staff member is available to appear.

If the charge is based in whole, or in part, upon information supplied by another prisoner, an unidentified informant, or other witness, the hearing officer or chairperson of the disciplinary committee shall allow the accused prisoner to be present while the witness testifies, unless it would create a risk of reprisal or undermine security. The hearing officer or chairperson may exclude the accused prisoner from the hearing while the witness testifies, but the hearing officer's or chairperson's reason for denying confrontation must be noted orally for the record. If the accused is found to have committed an infraction, the chairperson shall file a report listing the persons the accused was not allowed to confront, the reasons for the action, the extent to which that testimony was relied upon, and facts upon which the disciplinary tribunal could have reasonably concluded that the person was credible and spoke with personal knowledge, or gave reliable information.

695 22 AAC 05.430.
696 22 AAC 05.435.
7. Examination of Witnesses in Disciplinary Hearings

The hearing officer or members of a disciplinary committee and the prisoner's advocate may direct questions to the accused prisoner and other witnesses. The accused prisoner may question any witness but must direct questions through the hearing officer or chairperson. The hearing officer or chairperson may, for compelling reasons, limit the prisoner's right to examine witnesses to avoid repetitious or irrelevant evidence or to preserve decorum, if those reasons are stated orally for the record. If the prisoner is found to have committed an infraction, the hearing officer or chairperson shall file a report, to be attached to the completed committee report, listing the reasons why the prisoner was prevented from examining a witness.

8. Punishment

A. Only a disciplinary tribunal may impose punishment for an infraction. The disciplinary tribunal shall impose at least one, and may impose all, of the following penalties if the prisoner is found guilty of an infraction:

1. reprimand;
2. suspension of participation in activities described, and except as limited below for a period up to 20 days for a minor infraction, up to 40 days for a low-moderate infraction, up to 60 days for a high-moderate infraction, and up to 90 days for a major infraction;
3. confinement in punitive segregation, confinement to quarters, or weekend or holiday lock-ups for periods not to exceed 20 days for a low-moderate, 40 days for a high-moderate, or 60 days for a major, infraction;
4. restitution for the amount of property damage, theft, or, in the case of an injury, for the amount of medical care and related costs, or for costs incurred from a violation of 22 AAC 05.400(d) (19), including the placement of a hold on the prisoner's work compensation payments, withdrawal of money from the prisoner's account, or requiring the prisoner to work without benefit of compensation; and
5. except as provided in 22 AAC 05.473, forfeiture of up to 90 days statutory good time for a low-moderate, up to 180 days statutory good time for a high-moderate and up to 365 days statutory good time for a major infraction.

B. Participation in the following activities is automatically suspended during the period the prisoner is placed in punitive segregation and may otherwise be suspended for the periods described above, except that participation in the activities described in (a) – (d) below for a prisoner who is not in punitive segregation may be suspended for no more than 15 days unless the infraction is directly related to the particular activity:

a. participation in education programs or group religious services;
b. contact visiting;
c. secure visitation other than with immediate family members (i.e., spouse, parents, children, or siblings);
d. telephone calls except those to an attorney;

697 22 AAC 05.445.
698 22 AAC 05.470.
e. use of radio, tape recorder, phonograph, television, or games;
f. recreation, except for one hour of exercise per day;
g. reading material, except for religious or legal matter, or educational materials if the prisoner is enrolled in a course;
h. eating in a community dining area; and
i. use of commissary.

C. If justice requires, the penalties imposed may be suspended for a period not to exceed one year contingent on the prisoner complying with reasonable conditions established by the disciplinary tribunal. If, during the period of suspension, the prisoner violates any of the conditions upon which the suspension was based, the disciplinary tribunal may, after a hearing, reimpose the penalties.

D. If the prisoner is found guilty of committing more than one infraction arising out of a single transaction or occurrence, penalties imposed must run concurrently unless the disciplinary tribunal finds that separate and distinct correctional interests exist which clearly justify penalties running consecutively.

F. Prison Food Standards

Except for Saturdays, Sundays, and holidays, each facility shall provide prisoners with three meals every 24 hours, of which at least two must be served hot. On Saturdays, Sundays, and holidays, the facility shall provide two hot meals no more than 14 hours apart. A registered nutritionist or dietician shall review all menus to ensure that prisoners’ diets comply with nationally recommended food allowances.

The Department will adopt procedures for the provision of special meals to accommodate cultural preference or religious, vegetarian, and medical diets. The contents of special, religious, and vegetarian meals must approximate the cost, quantity, quality, and nutritional adequacy of meals provided for the general population.

1. Definitions

Within this section, the following definitions apply:

Approved: Foods and/or food items under the surveillance of the State of Alaska, USDA, or FDA, which are certified as acceptable for preparation and consumption based upon conformance with appropriate standards and good public health practices.

Contamination: Contact by food and/or food items with dust, insects, rodents, unsanitary equipment or utensils, coughs or sneezes, flooding, drainage, leakage, or any substance, organism, or entity, which may threaten public health or the health of prisoners, visitors, or staff of an institution.

---

699 22 AAC 05.115
700 DOC Policy # 805.01, Food Service Standards.
701 DOC Policy # 805.03, Special and/or Religious Diets or Meals.
Potentially Hazardous Foods: Food that consists in whole or in part of wild mushrooms; bivalve shellfish such as clams and mussels (except from an approved source); the meat and/or organs of bear, fox, walrus or other wild marine or land animals (except fresh fish, whale, seal, beaver, moose, caribou, or reindeer from a lawful source); fermented vegetable, meat, seafood, or egg products; home canned foods or non-commercially vacuum packed foods; non-commercial smoked fish products; rendered oil; or other ingredients, including synthetic ingredients, in a form capable of supporting rapid and progressive growth of infectious or toxigenic micro-organisms.

Potlatch: A cultural theme special meal comprised of traditional foods, food items, or the like consumed in a group setting and in an atmosphere of celebration; Alaska Native festival meal sometimes associated with gift giving in conjunction with the meal.

Religious Coordinator: An employee of the institution designated by the Superintendent and assigned the responsibility of reporting, reviewing, and scheduling in co-operation with the Chaplaincy Coordinator, all religious programs in the institution.

Religious Diet: A prescribed allowance or selection of food for consumption with reference to a particular recognized religious belief.

Special Meals: Meals or food prepared for special occasions, e.g. holiday or potlatch meal, that may accommodate cultural preferences; "finger-foods" prescribed for a prisoner who requires especially prepared foods and/or extraordinary limits on access to utensils due to suicidal, assultive, or other conduct abusive to self, others, or items to which the prisoner has access.

Therapeutic Diet: Special meals or food prescribed by a physician, dentist, or other health care staff as part of a patient's treatment.

Vegetarian Diet: Meals prepared from vegetable sources or a combination of plant food and dairy products, exclusive of meat to sometimes include eggs.

2. Food Policy

A. Special meals and diets for prisoners will be accommodated to the extent reasonably possible within Department institutions.

B. Therapeutic diets will be provided when prescribed by health care staff. The diet will be prepared and served according to the instructions of the health care staff. The practitioner responsible shall:

1. explain the diet and its importance to the prisoner's condition or health;
2. explain other diet restrictions with regard to commissary or provisions of the special diet;

---

702 The information in this section comes directly from DOC Policy # 805.03, Special and/or Religious Diets or Meals.
3. establish the duration of the diet and the procedure for renewal, if necessary;
4. document all therapeutic diet orders in the medical record; and
5. write diet orders in duplicate with one copy to the Food Service Supervisor and the other copy to be placed in the medical file. The diet order shall contain the following information:
   a. name of prisoner;
   b. OBSCIS number;
   c. housing status;
   d. expiration date of order;
   e. title of special diet;
   f. known food allergies; and
   g. amount of nutrients, calories or other information necessary to clarify the order.

C. Religious diets will be made available subject to certification and instructions by the Religious Coordinator with the approval of the superintendent.

   1. A request for a religious diet must be channeled through the Religious Coordinator who will review the request and make recommendations to the superintendent.

   2. The superintendent will approve or disapprove the diet request. The verified needs of the requesting prisoner and the resources of the institution will be considered in the determination of a religious diet.

   3. If the diet is approved, the Food Service Supervisor must be notified in writing of the specifics for provision of the diet.

   4. Regular menu food items consistent with the religious diet (e.g., no pork) will be used unless otherwise approved by the Superintendent.

D. Vegetarian diets will be made available in accordance with a selected category of non-meat items identified by food service personnel. Requests for vegetarian diets must be approved by the superintendent or designee on a case-by-case basis.

E. Special meals and/or foods may be served at the discretion of the Superintendent or designee. The Superintendent must approve all such meals for consumption within the institution and ensure that potlatch special meals utilizing traditional wild and/or native foods are prepared and served in conformance with the following guidelines:

   1. Food service regulations, including the Department of Environmental Conservation (DEC) regulation 18 AAC 31.010, Supplies, require that food used in food service facilities such as correctional centers be obtained from approved sources.
2. Traditional wild and native foods and/or food items such as wild game or fish are not normally produced or obtained under inspected circumstances and therefore cannot be considered approved unless they are inspected and approved by a DEC agent on behalf of this Department.

NOTE: There is a DEC Sanitarian stationed in close proximity to every correctional facility except those in Bethel and Nome. The local state Sanitarian must be contacted at least one week in advance of receipt or utilization of wild or native foods to schedule a date and time for inspection of wild or native foods for approval prior to their being utilized by institutional food service personnel. For the Yukon-Kuskokwim Correctional Center in Bethel, the Chief Sanitarian for DEC in Juneau (465-2628) must be contacted at least two weeks in advance of the scheduled inspection in order to arrange for the Federal Sanitarian stationed in Bethel to assist state DEC and complete the inspection. For the Anvil Mountain Correctional Center in Nome, the Norton Sound Health Corporation Sanitarian (443-5411) is under contract with DEC and will complete the inspection on their behalf.

3. If there is reasonable assurance that the food item has been lawfully obtained by the donor, has been dressed, butchered, and stored without contamination or loss of quality as outlined below and the food item has been inspected and approved by a OEC agent, certain wild and native foods, exclusive of potentially hazardous foods, may be obtained, processed, prepared and served within an institution in connection with an authorized special meal.

4. At least once a year, when appropriate to the mission of the institution, the superintendent shall authorize a potlatch or other Alaska Native cultural theme special meal in accordance with DOC Policy # 805.01, Menu Planning and Meal Service, with the following guidelines:

   a. potentially hazardous foods as defined and applied in this policy are prohibited for institutional preparation and use;

   b. certain wild and native foods such as fresh fish, whale, seal, beaver, reindeer, caribou, and moose, which are approved by DEC or its designee or acquired from an approved source may be utilized for food service providing the following conditions are met:

      NOTE: Wild and native foods directly procured under the auspices of this Department such as the salmon obtained through the prisoner work program subsistence fishery in Bethel are exempt from the inspection but are subject to handling and service requirements.

G. Living Conditions for Prisoners

703 AS 33.30.015.
The Department of Corrections may not provide in a state correctional facility operated by the state:

a. living quarters for a prisoner into which the view is obstructed; however, the commissioner is not required to renovate a facility to comply with this subparagraph if the facility is being used as a correctional facility on August 27, 1997 or if the facility was already built before being acquired by the department;

b. equipment or facilities for publishing or broadcasting material, the content of which is not subject to prior approval by the department as consistent with keeping order in the institution and prisoner discipline;

c. cable television service other than a level of basic cable television service that is available as a substitute for services that are broadcast to the public in the community in which a correctional facility is located;

The Department of Corrections may not allow a prisoner held in a state correctional facility operated by the state to:

a. possess in the prisoner’s cell a cassette tape player or recorder, a video cassette recorder (VCR), or a computer or modem of any kind;

b. view movies rated "R," "X," or "NC-17";

c. possess printed or photographic material that (i) is obscene as defined by the commissioner in regulation; (ii) could reasonably be expected to incite racial, ethnic, or religious hatred that is detrimental to the security, good order, or discipline of the institution or violence; (iii) could reasonably be expected to aid in an escape or in the theft or destruction of property; (iv) describes procedures for brewing alcoholic beverages or for manufacturing controlled substances, weapons, or explosives; or (v) could reasonably be expected to facilitate criminal activity or a violation of institution rules;

d. receive instruction in person or by broadcast medium or engage in boxing, wrestling, judo, karate, or other martial art or in any activity that, in the commissioner's discretion, would facilitate violent behavior;

e. possess or have access to equipment for use in the activities listed in (d) of this paragraph;

f. possess or have access to free weights;

g. possess in the prisoner's cell a coffee pot, hot plate, appliance, or heating element for food preparation or more than three electrical appliances of any kind;

h. possess or appear in a state of dress, hygiene, grooming, or appearance other than as permitted as uniform or standard in the correctional facility;

i. use a computer other than those approved by the correctional facility; the use of a computer under this subparagraph may be approved only as part of the prisoner's employment, education, or vocational training and may not be used for any other purpose;

j. smoke or use tobacco products of any kind.

The commissioner may determine whether the provisions of this section shall apply to correctional facilities that are not operated by the state and may negotiate with a provider of services for the detention and confinement of persons held under authority of state law under contract or agreement whether the living conditions set out in of this section shall apply to persons held under authority of state law at a facility operated under contract or agreement.
The Department may not allow a prisoner to possess a television in the prisoner's cell if the prisoner is classified as maximum custody under AS 33.30.011(2). But, a prisoner who, under AS 33.30.011(2), has been classified as other than maximum custody may be allowed to possess a television in the prisoner's cell if the prisoner:

1. either is incapable of obtaining or has attained a high school diploma or general education development diploma or the equivalent;
2. is actively engaged in an educational, vocational training, or employment program;
3. has satisfied or is on a regular and current payment schedule for all restitution orders entered by the court as part of the prisoner's sentence and, if applicable, is actively engaged in a treatment plan or counseling, psychiatric, or rehabilitation program ordered by the court or the Department as part of the prisoner's sentence; and
4. pays for the expense of providing the television and, in addition to the utility service fee required by AS 33.30.017, pays for the expense of providing any cable television service.

H. Prisoner Housing

DOC shall provide separate female and male housing units. Requirements for individual cells, segregation units, and dormitory housing for new and existing units include:

A. General

1. Except as required by law, the Department will not admit anyone to a facility who is unconscious or in immediate need of medical attention until the person receives appropriate medical attention and the treating physician or other health care personnel approves the prisoner’s admission into the facility.

2. The Superintendent shall isolate those prisoners from the general population who:

   a. are under the influence of alcohol or drugs;
   b. are currently violent;
   c. request and have a valid reason for isolation; or
   d. are a substantial and immediate threat to themselves or others.

3. The Department shall provide separate female and male housing units.

B. Misdemeanor Housing

The Superintendent shall house sentenced misdemeanants and felons separately, as resources permit. The Department may provide separate cells in a modular living unit for misdemeanants and felons or separate the prisoners by modular living unit if facility resources or facility design permit.

The following prisoners are considered sentenced felons for the purposes of this policy:

704 DOC Policy # 808.09, Prisoner Housing.
a. a prisoner incarcerated for a combination of felony and misdemeanor offenses or for a probation or parole revocation where the underlying offense was a felony; and

b. a prisoner presently incarcerated for a misdemeanor who was incarcerated for a felony or was under probation or parole supervision following incarceration for a felony within three years preceding the present incarceration.

C. Pretrial Detainees

The Department shall house pretrial detainees and sentenced felons separately. The department may provide separate cells in a modular living unit or separate the prisoners by modular living unit if facility resources or design permit.

1. Once a pretrial detainee has been convicted of a felony offense, the Superintendent may house the convicted felon, pending sentencing, in any appropriate housing based upon available resources and sound correctional management.

2. Pretrial detainees may waive their right to be housed separately from sentenced felons.

D. Non-smoking Preference

The institution shall give a non-smoking prisoner preference to be housed in a cell with another non-smoking prisoner when resources permit.

E. Toilet, Bathing, and Laundry Facilities

1. Each cell, room, or housing unit must have a sink with hot and cold running water unless the cell is specifically designed for short-term housing of prisoners who are considered a danger to themselves or others. In such a case, the institution shall ensure that each prisoner in a locked cell is given reasonable access to running water and toilet facilities upon request.

2. Showers must be located near the housing units.

3. The institution shall maintain water temperatures at 100-120 degrees Fahrenheit.

4. Each cell or housing unit must have an adequate working toilet facility. The institution may design special toilets to minimize possible physical injury to prisoner living in specially designed housing units.

5. The institution shall use privacy screens to separate toilet facilities from the living area in all dormitories.

F. Bedding

Each prisoner shall be provided with:

1. a clean and intact mattress;
2. a pillow that conforms to applicable fire and safety codes;
3. two sheets;
4. a pillowcase;
5. a sufficient number of blankets to provide comfort under existing temperature conditions, unless documented individual health or safety concerns (e.g., suicide risk) dictate otherwise; and
6. a bed off the floor, unless documented individual health or safety concerns dictate otherwise.

I. Prisoner Hygiene, Grooming, And Sanitation

Prisoners have the freedom to groom and dress as they wish as long as their appearance does not conflict with an institution's requirements for safety, security, identification, and hygiene. Prisoners whose grooming and personal hygiene habits threaten their health or the health of others will be referred to medical staff.

A. Hair Care

1. Prisoners must have clean and properly groomed hair.

2. The superintendent shall ensure that prisoners wear hair nets or head coverings if they work in the kitchen, dining room, or near machinery. The superintendent also may designate other areas where prisoners must use a hair net or head covering.

3. Staff shall routinely search prisoners' hair for contraband.

4. If a prisoner greatly alters his or her outward appearance, e.g., changing hair length or color, shaving, or growing a beard or mustache, the individual shall be re-photographed for purposes of identification.

5. Superintendents of large institutions shall designate a specific room as a hair care facility. Prisoners may use a multipurpose room for hair care in smaller institutions.
   a. Prisoners shall cut hair under sanitary conditions and in an area where institutional staff may supervise.
   b. Staff shall store barber and beautician's equipment in a secure area when not in use.

6. Prisoners need not wear a particular hair style unless the superintendent requires a certain hair style for program, security, safety, or hygiene requirements in the institution.

---

705 The information contained in this section comes directly from DOC Policy # 806.02, Prisoner Hygiene, Grooming and Sanitation.
706 22 AAC 05.180(b).
707 22 AAC 05.180(d).
708 22 AAC 05.180(c).
B. Bathing

Showers and bathing facilities must be made available at least three times per week unless ordered otherwise by facility health care personnel. Prisoners assigned to special jobs such as food service, health care services, sanitation, or maintenance must shower daily.

C. Bedding and Linen

1. Each institution shall keep more linen and bedding in stock than necessary for the maximum prisoner capacity so that lost, destroyed, or worn out items can be replaced.

2. Correctional personnel shall record and issue to prisoners, at a minimum, the items below (except for prisoners who have a certain status or are assigned to a specific area because of extraordinary circumstances such as intoxication holds, suicide watch, medical isolation, etc.):

   a. one clean and intact mattress;
   b. two blankets; the Department shall provide additional blankets if necessary for comfort under cold temperature conditions, unless documented individual health or safety concerns (e.g., suicide risk) dictate otherwise;
   c. two sheets;
   d. one pillow which conforms to fire and safety codes;
   e. one pillow case;
   f. one towel; and
   g. one wash cloth.

3. Each facility shall maintain or have access to a means of cleaning mattresses and pillows.

4. Prisoners may exchange their linen on a one-for-one basis at least twice per week (towels at least three times per week) or more frequently as resources allow. Prisoners shall be held accountable for the linen they are issued.

D. Personal Hygiene Items

1. When admitted to the institution, the Department shall give each prisoner, at a minimum, a toothbrush, toothpaste or powder, a comb, and feminine hygiene items for women. The Department shall provide soap and toilet paper within the housing unit.\(^{709}\)

2. If a prisoner is transferred after admission and the Department does not transfer the items listed within twelve hours of the prisoner's arrival at the new facility, the Department immediately shall provide these items to the prisoner at the receiving facility's expense.

3. Each superintendent shall establish procedures for prisoners to purchase or, in the case of indigent prisoners, to obtain hygiene items through the commissary.

\(^{709}\)22 AAC 05.180(a). See also DOC Policy #811.05, Prisoner Personal Property.
4. The Department shall provide prisoners a daily opportunity to use an individual razor.

J. Institutional Design Standards

Work and living conditions for staff and prisoners must comply with all federal, state and local building and safety codes. All facilities constructed after January 1, 1991 must conform to all applicable codes and the policy below. Requirements include:

A. Housing.

1. Individual Cells.

Each assigned prisoner housing unit must include an above floor level bunk (unless documented individual health or safety concerns dictate otherwise), desk, clothing hooks or closet space, a stool or other seating, adequate lighting, and a personal grooming area with a toilet and sink with hot and cold water. The Department may design and provide special toilets to minimize possible physical injury for prisoners living in specially designed housing units. If a cell is specifically designated for short-term housing of persons who are considered a danger to themselves, water must be readily available to the prisoner.

2. Space Requirements

In all future facilities, general population cells or rooms must have a minimum of 60 square feet for one prisoner, 80 square feet for two prisoners, and 140 square feet for three prisoners. Cells for prisoners locked down more than 10 hours per day must have a minimum of 80 square feet for one prisoner, 90 square feet for two prisoners, and 150 square feet for three prisoners.

3. Segregation Units

Living conditions must approximate in size those provided to the general population. All future segregation cells shall comply with the space standards for prisoners locked down for more than ten hours per day.

4. Dormitory Housing

Dormitories may not provide for the housing of prisoners except for minimum custody level in facilities, minimum custody housing, or misdemeanant housing. Dormitories will have no more than 36 beds each, with a minimum of 40 square feet per prisoner in the sleeping area, not including bathroom and day room space, and a clear floor-to-ceiling height of at least eight feet. Each dormitory must include toilets, wash basins with hot and cold water, and closet space for each prisoner.

5. Showers

The information in this comes directly from DOC Policy # 801.01, Institutional Design Standards, Facility Modifications & New Construction.
Showers must be located near the housing units.

B. Day Rooms or Leisure Areas.

All facilities must have a minimum of 35 square feet of day room space or leisure area for each prisoner in the facility, in addition to cell or room space.

C. Exercise/Recreation Areas

Each housing facility must have an outside exercise/recreation area for prisoner use. In all future facilities, sufficient gymnasiums and recreation areas must be available for the number of inmates to be housed in the facility, given the location and security level of the facility. All activity areas will have lavatories easily accessible to prisoners using the area.

Adequate recreational opportunities include indoor and outdoor individual and team sports where appropriate (e.g., basketball, softball, etc.), fixed or movable indoor exercise equipment (e.g., exercise bicycles and weight training equipment), and space for calisthenics, jogging, track, or other similar individual activities.\textsuperscript{711}

D. Program Areas

In all future facilities, adequate space must be provided for health care and other rehabilitation programs. All activity areas will have lavatories easily accessible to prisoners using the area.

E. Visiting Areas.

In future facilities, adequate space must be provided for contact visitation by prisoners. Prisoners limited to non-contact visits must have a secure visiting area. Both types of visiting areas must have (1) an area for screening visitors; (2) an area for searching prisoners before and after visits; and (3) space for storing visitors' property not allowed in visiting area.

\textsuperscript{711} 22 AAC 05.165 provides:

(a) Each facility must develop and maintain programs of recreation and exercise compatible with security of the facility and the custody levels of prisoners.

(b) A prisoner must be offered outdoor recreation for a minimum of seven hours a week, weather permitting, unless security considerations require limitations.

(c) Indoor recreation and exercise may be substituted for outdoor activities if weather conditions make those activities inappropriate.

(d) A prisoner who is in administrative segregation for a period longer than three days has the right to recreation as set out in (b) of this section unless the prisoner is an escape, smuggling, or security risk, as determined by the superintendent. Such a prisoner may be restricted to indoor recreation in a gymnasium or exercise room. During the first three days in administrative segregation, a prisoner must be permitted at least one hour a day outside his or her cell for purposes of limited exercise.

(e) A prisoner in punitive segregation for a period longer than three days must be allowed the opportunity to exercise for at least one hour per day, and must be allowed access to large-muscle-group exercise equipment in an area sufficiently large enough to reasonably accommodate the equipment. During the first three days in punitive segregation a prisoner must be permitted at least one hour per day outside his or her cell for purposes of limited exercise.
F. Commissary

Department shall provide commissary space or services at each facility where prisoners can purchase personal items.

G. Food Service Areas

The Department shall provide food service areas, community dining space (except where safety or security concerns justify otherwise), food service equipment, and storage facilities. Food service personnel and prisoners must have access to toilets and sinks in the vicinity of the food preparation area.

H. Administrative Area

New facilities must incorporate administrative space needed for administrative, custodial, professional, and clerical staff. In each new facility, the Department shall, whenever possible, provide an area to accommodate staff briefing, training, and breaks, as well as lavatories.

I. Handicapped Access

Persons with disabilities must be provided reasonable access to the appropriate areas of each institution. Persons with disabilities must have housing and facilities that accommodate security, safety, and medical needs in each institution; reasonable accommodations should be made in lieu of such access. Public areas of each institution will comply with the Americans with Disabilities Act’s Architectural Barriers Act of 1968. In existing facilities, programmatic accommodations will be provided even if facility modifications have yet to be accomplished.

J. Housekeeping

Adequate space must be provided for janitorial closets accessible to living and activity areas. The closets must have a sink and cleaning implements.

K. Clothing and Supply Storage

Space must be provided in the institution to store and issue clothing, bedding, cleaning supplies, paper supplies and other items required for daily operations.

L. Prisoner Personal Property

Space must be provided for storing prisoner personal property.

M. Mechanical Equipment

Space shall be provided for the storage of mechanical and electrical equipment.
N. Law Library.

The law library must be large enough to accommodate two or more inmates at one time. In all future facilities, the Department shall ensure that the law library is large enough to meet the requirements in policy #814.01, General Library.

O. Attorney-Client Rooms.

The Departments shall ensure that all future facilities have enough rooms for private attorney-client meetings. Each room must have adequate seating and a table. The facility’s size, location, and type of prisoners shall help determine how many rooms the facility needs.