

115.78

Disciplinary sanctions for inmates**Standard in Focus****Disciplinary sanctions for inmates**

§115.78

- a) Inmates shall be subject to disciplinary sanctions pursuant to a formal disciplinary process following an administrative finding that the inmate engaged in inmate-on-inmate sexual abuse or following a criminal finding of guilt for inmate-on-inmate sexual abuse.
- b) Sanctions shall be commensurate with the nature and circumstances of the abuse committed, the inmate's disciplinary history, and the sanctions imposed for comparable offenses by other inmates with similar histories.
- c) The disciplinary process shall consider whether an inmate's mental disabilities or mental illness contributed to his or her behavior when determining what type of sanction, if any, should be imposed.
- d) If the facility offers therapy, counseling, or other interventions designed to address and correct underlying reasons or motivations for the abuse, the facility shall consider whether to require the offending inmate to participate in such interventions as a condition of access to programming or other benefits.
- e) The agency may discipline an inmate for sexual contact with staff only upon a finding that the staff member did not consent to such contact.
- f) For the purpose of disciplinary action, a report of sexual abuse made in good faith based upon a reasonable belief that the alleged conduct occurred shall not constitute falsely reporting an incident or lying, even if an investigation does not establish evidence sufficient to substantiate the allegation.
- g) An agency may, in its discretion, prohibit all sexual activity between inmates and may discipline inmates for such activity. An agency may not, however, deem such activity to constitute sexual abuse if it determines that the activity is not coerced.

Purpose

- To ensure that individuals who are confined are held accountable for any sexual abuse of other individuals who are confined.
- To ensure that accountability occurs through a formal disciplinary process that provides appropriate and measured sanctions commensurate with the nature and circumstances of the abuse, the disciplinary history of the person who is confined, and sanctions imposed for comparable offenses by individuals with similar histories.

- To ensure that the disciplinary process considers mental disabilities in determining whether and how to discipline an individual.
- To ensure that facilities consider whether to:
 - Require alleged abusers to participate in interventions to reduce the likelihood that they will perpetrate sexual abuse in the future.
 - Mandate such interventions as a condition of alleged abusers' access to other programming and benefits in the facility.
- To explain some circumstances under which discipline of a confined person for sexual abuse is not appropriate, such as when a person who is confined has sexual contact with a staff member, and the staff member consented to such contact.
- To clarify that consensual sexual activity between people who are incarcerated is not abuse.

Implementation

- Persons who are confined who are found, pursuant to an *administrative finding* or *criminal finding of guilt*, to have committed an act of sexual abuse against another individual who is confined must receive disciplinary sanctions pursuant to a formal disciplinary process.
 - Imposing consistent disciplinary sanctions demonstrates agency and facility commitment to sexual safety and helps deter sexual abuse.
- **“Inmate-on-inmate” sexual abuse**
 - A "*finding*" that the alleged perpetrator sexually abused another individual who is confined can be:
 - An **administrative finding** that the allegation is substantiated.¹
 - A **criminal finding** that the person who is confined is guilty. An individual who has been found guilty of sexual abuse in custody within a criminal court proceeding must receive a disciplinary sanction in addition to any criminal penalty that may be imposed.
 - Sexual activity between persons who are confined **is not necessarily sexual abuse**, as the activity may have been agreed-upon sexual contact. However, some sexual activity that appears consensual may be coerced, or a person may be unable to consent or refuse. Staff must make individualized determinations about each person's behavior and may not label an individual who is confined as an abuser for engaging in sexual activity with another person who is confined until this determination is complete.
 - Agencies may prohibit all sexual activity among people who are confined and may discipline them for engaging in consensual sexual activity. Sexual activity among people who are confined that is consensual may not be classified as sexual abuse unless it has been investigated and found to be a non-consensual or coerced act.

¹ *Substantiated allegation* means an allegation that was investigated and determined to have occurred.

Unfounded allegation means an allegation that was investigated and determined not to have occurred.

Unsubstantiated allegation means an allegation that was investigated, and the investigation produced insufficient evidence to make a final determination as to whether or not the event occurred.

- **“Inmate-on-staff” sexual abuse**
 - A person who is confined may never be disciplined for engaging in sexual contact with a staff member unless it has been determined, based on a full investigation, that the staff member did not consent to the sexual contact.
 - Lack of staff consent must be established by an administrative or criminal investigative finding supported by credible evidence. It is not enough to merely take the word of the staff member. See Standard 115.71(e) which states, "The credibility of an alleged victim, suspect, or witness shall be assessed on an individual basis and shall not be determined by the person’s status as inmate or staff."
 - Individuals who are confined may not be disciplined for engaging in sexual activity with a staff person who willingly participated, even if it appears that the person confined agreed to participate in that activity.
 - The imbalance of power between staff and those who are confined creates an inherently coercive situation. Therefore, individuals who are confined may not be disciplined for engaging in this sexual activity **unless it is determined that the staff member did not consent**. Staff members have a responsibility to avoid sexual contact with those who are confined.
- **Disciplinary sanctions for substantiated allegations**
 - Disciplinary sanctions for substantiated allegations of sexual abuse against a person who is confined must be imposed pursuant to a **formal disciplinary process**.
 - All sanctions must be fair and proportional; sanctions must be commensurate with the nature and circumstances of the abuse committed, the disciplinary history of the individual who is confined, and the sanctions imposed for comparable offenses by other individuals with similar histories.
 - When determining the type of sanction, if any, to be imposed, the disciplinary process must consider mitigating factors such as whether an individual's mental disabilities or mental illness contributed to his or her behavior.
 - Facilities may offer confined individuals therapy, counseling, or other interventions designed to address and correct underlying reasons or motivations for the sexual abuse. If such services are available, the facility must consider whether to require the individual who engaged in the sexual abuse to participate in such interventions as a condition of access to programming or other benefits that are available in the facility.
- **Good and bad faith allegations**
 - "Allegation" in this section means a verbal or written complaint of sexual abuse made by a person who is or has been confined, whether identified in the complaint or anonymous.
 - People who are confined may not be punished for making **good-faith allegations** of sexual abuse based upon a reasonable belief that the alleged conduct occurred, even if the allegation is not substantiated by the subsequent administrative or criminal investigation.
 - People who are confined may be disciplined upon a finding that the allegation was made in **bad faith**.
 - A determination of “*bad faith*” must be based upon an administrative or criminal investigation and supporting evidence that demonstrates a lack of any relevant mitigating circumstances related to the conduct. Please see below for

a discussion of reports that are made in bad faith.

- Agencies have the discretion to discipline those in custody who are not victims of sexual abuse but who attempt to circumvent agency rules by making “bad faith” allegations. These are allegations where investigation clearly shows that the person making the allegations knew that they were false and intended to accomplish something malicious, such as harming or causing trouble for another person.
 - If an investigation leads to a finding of “**unsubstantiated**,” there is insufficient evidence to find that a person acted in bad faith, and discipline is not permitted under this Standard.
 - If an investigation leads to a finding of “**unfounded**,” the agency must determine whether the report was in bad faith or had mitigating circumstances in order to determine whether discipline is appropriate.
- **Distinguishing unfounded bad faith reports from unfounded reports with mitigating circumstances**
 - If an allegation is made, a timely, thorough, and objective investigation is conducted, and the evidence proves the allegation did **NOT** occur, then the finding should be “**unfounded**.” There are two potential types of evidence regarding unfounded allegations that will inform whether discipline is appropriate:
 - ***Unfounded with mitigating circumstances***: While the allegation has been determined to be unfounded, the evidence shows mitigating circumstances surrounding the making of the allegation which may indicate the allegation was not made for malicious purposes. For example, the reporter of the false information may have a mental illness or cognitive disability with an inability to understand the ramifications of their actions, or the reporter may have made the allegation as a safety measure (e.g., the person in custody made an allegation to protect themselves and get out of a threatening situation). Disciplinary sanctions are not permitted in these situations with mitigating circumstances, but additional mental health consultations or services and/or safety measures may be necessary.
 - ***Unfounded with bad faith***: The allegation is unfounded based upon a thorough, timely, and objective investigation where credible and specific evidence proves the allegation was made in bad faith (e.g., the person knew it was false and it was done as a means to harm another, cause trouble for another, or create a negative outcome for another). Disciplinary sanctions may be appropriate in this situation per the facility’s discretion.
 - Additional guidance about the conduct of investigations may be found in Standard 115.72. Definitions of the various outcomes of investigations (i.e., substantiated, unsubstantiated, unfounded) may be found in Standard 115.5; and the definition of sexual abuse, for purposes of PREA, may be found in Standard 115.6.

Challenges

- Training staff, including investigative staff, to understand that unfounded allegations are not necessarily made in bad faith, and that a determination of bad faith requires investigation and credible evidence to support a conclusion of bad faith and the imposition of any discipline.

- Understanding the difference between an unfounded allegation made in bad faith and an unfounded allegation that has mitigating circumstances that may explain the conduct of the reporter and indicate the absence of bad faith.
- Ensuring that unfounded allegations and any determinations of “bad faith” are supported by thorough investigations and credible evidence.
- Ensuring that persons who are confined are not disciplined for bad faith reports if the problem is actually an insufficient investigation (e.g., an investigation that did not consider all relevant and available evidence or was conducted by someone without the necessary skills and experience). Every investigation must be prompt, thorough, and objective.
- Ensuring that investigations credit the testimony of confined persons in the balanced way that Standard 115.71 requires. The credibility of an alleged victim, suspect or witness must be assessed on an individual basis and may not be determined by the person’s status as staff or confined individual.
- Creating protocols and practices to ensure that disciplinary actions are always based on findings that have properly weighed all available evidence.
- Determining whether lack of consent or coercion was involved in sexual activity between persons who are confined, before deeming it to be sexual abuse.
- Ensuring that consideration is given to possible mental disabilities or mental illness of both the reporter and the alleged abuser:
 - Determining if the alleged abuser has a mental disability or mental illness and if so, determining if the mental disability or mental illness contributed to the sexual abuse.
 - Determining whether an abuser's mental disability or mental illness should affect the sanction imposed, if any.
 - Ensuring that the disciplinary process fully documents whether the investigations, including any evaluation, reveal that an individual’s mental disabilities or mental illness contributed to his or her behavior when determining the type of sanction to be imposed.

Best Practices

- Ensuring that investigative staff are trained thoroughly to analyze and evaluate whether there are indications of force or coercion. Evidence of lack of consent or coercion can be subtle and may be overlooked without regular and comprehensive training of investigators.
- Ensuring that investigative staff are trained to thoroughly weigh all statements and appropriately credit witnesses without giving preference to staff over incarcerated people; ensuring that investigations follow every possible lead and interview all witnesses and individuals who may have information regarding the case.
- Providing investigators with periodic training in the tools and methods to conduct unbiased and comprehensive credibility assessments.
- Providing training that helps investigators consider the ways in which societal factors such as implicit bias or language barriers may influence how they approach subjective tasks like weighing evidence and conducting meaningful credibility assessments.
- Implementing a standardized process for imposing sanctions following a substantiated allegation of sexual abuse, including documentation of all aggravating and mitigating factors that were considered.

- Including all requirements of Standard 115.78 in the facility's disciplinary policy.
- Considering whether a person with an intellectual disability or a mental illness was coerced or pressured by others to engage in the act.
- Including behavioral health staff, outside behavioral health providers, a disability support organization, and/or the attorney or other staff responsible for the agency's compliance with the Americans with Disabilities Act (ADA) in considering whether mental disabilities (such as intellectual disabilities) or mental illness contributed to or caused the conduct; whether particular options for discipline could exacerbate the incarcerated individual's symptoms or cause the person to decompensate; and whether therapy, counseling, or other interventions to address abusive behavior might be appropriate.
- For example, discipline decision makers may wish to consider, in consultation with a mental health professional or the other individuals mentioned above:
 - The possible effects of solitary confinement, lack of exercise, or lack of sunlight on certain mental health conditions.
 - How a confined person with a disability who is on disciplinary status would be able to access treatment services.
 - Whether any factors in the facility (such as staff behavior, housing issues, or communication challenges that weren't addressed) contributed to the incident, and what could be altered to avoid similar situations in the future.
 - Whether the purpose of the discipline under consideration, such as deterring future behavior or preventing another incident, is likely to be accomplished given the incarcerated person's disability.

Audit Issues

- Facilities must keep comprehensive records of the findings of administrative investigations of inmate-on-inmate sexual abuse and inmate-on-staff sexual abuse and any disciplinary actions that are taken against a confined person as a result of these findings.
 - Auditors will review the number of administrative findings of inmate-on-inmate sexual abuse and criminal findings of guilt for inmate-on-inmate sexual abuse that have occurred at the facility for the past 12 months.
 - Auditors will review investigative reports and all documentation of sanctions imposed and the facility's analysis supporting the sanctions. Auditors will confirm whether findings of sexual abuse meet PREA's definition of sexual abuse, and whether any incidents of consensual conduct between people in custody are inappropriately labeled as sexual abuse.
 - Auditors will review records of disciplinary actions for sexual conduct with staff against persons who are confined, to determine whether appropriate findings regarding lack of consent of staff are present.
 - Auditors will confirm whether the facility considered the impact of mental illness and other mental disabilities in determining whether and to what extent discipline was appropriate.

Standard Variations

The following variations in the standard are noted for **Lockups, Community Confinement Facilities, and Juvenile Facilities**. The variations are discussed in summary fashion below, but readers are encouraged to consult the full text of the specific set of standards to ensure a complete understanding of the differences.

- **Lockups:** Standard 115.178 is considerably shorter and reads as follows (with bulleted commentary below each provision):

§ 115.178 Referrals for prosecution for detainee-on-detainee sexual abuse

(a) When there is probable cause to believe that a detainee sexually abused another detainee in a lockup, the agency shall refer the matter to the appropriate prosecuting authority

- **Implementation differences:**
 - Since lockups do not generally hold individuals for a prolonged period of time and thus do not impose discipline, the agency is required to refer the allegation to the appropriate prosecuting authority when probable cause exists to believe that one person sexually abused another.

(b) To the extent that the agency itself is not responsible for investigating allegations of sexual abuse, the agency shall inform the investigating entity of this policy.

- **Implementation differences:**
 - This provision requires the agency to inform the investigative entity of the requirement to refer the allegation to the appropriate prosecuting authority when probable cause exists to believe that one person who is confined sexually abused another.

(c) Any state entity or Department of Justice component that is responsible for investigating allegations of sexual abuse in lockups shall be subject to this requirement.

- **Community Confinement:** No differences.
- **Juvenile:** Standard 115.378

§ 115.378 Interventions and disciplinary sanctions for residents.

(a) A resident may be subject to disciplinary sanctions only pursuant to a formal disciplinary process following an administrative finding that the resident engaged in resident-on-resident sexual abuse or following a criminal finding of guilt for resident-on-resident sexual abuse.

(b) Any disciplinary sanctions shall be commensurate with the nature and circumstances of the abuse committed, the resident's disciplinary history, and the sanctions imposed for comparable offenses by other residents with similar histories. In the event a disciplinary sanction results in the isolation of a resident, agencies shall not deny the resident daily large-muscle exercise or access to any legally required educational programming or special education services. Residents in isolation shall receive daily visits from a medical or mental health care clinician. Residents shall also have access to other programs and work opportunities to the extent possible.

(c) The disciplinary process shall consider whether a resident's mental disabilities or mental illness contributed to his or her behavior when determining what type of sanction, if any, should be imposed.

(d) If the facility offers therapy, counseling, or other interventions designed to address and correct underlying reasons or motivations for the abuse, the facility shall consider whether to offer the offending resident participation in such interventions. The agency may require participation in such interventions as a condition of access to any rewards-based behavior management system or other behavior-based incentives, but not as a condition to access to general programming or

education.

(e) The agency may discipline a resident for sexual contact with staff only upon a finding that the staff member did not consent to such contact.

(f) For the purpose of disciplinary action, a report of sexual abuse made in good faith based upon a reasonable belief that the alleged conduct occurred shall not constitute falsely reporting an incident or lying, even if an investigation does not establish evidence sufficient to substantiate the allegation.

(g) An agency may, in its discretion, prohibit all sexual activity between residents and may discipline residents for such activity. An agency may not, however, deem such activity to constitute sexual abuse if it determines that the activity is not coerced.

- **Implementation differences:**
 - Disciplinary sanctions against confined youth who engage in sexual abuse are discretionary (“resident may be subject to disciplinary sanctions”). Disciplinary sanctions are not mandatory as they are for confined adults in prisons and jails (“Inmates shall be subject to disciplinary sanctions”). Juvenile facilities can choose sanctions that focus on positive programming and treatment rather than punishment.
 - Unlike adults who are confined, youth placed in isolation retain access to large-muscle exercise; legally required education, programming, and special education services; daily visits from medical and mental health providers; and work opportunities under these standards.
 - Unlike adults who are confined, youth must retain access to general programming and education.
 - Facilities may require participation in certain interventions as a condition of access to rewards-based behavior management systems or other behavior-based incentives, but not as a condition to general programming or education, which are rights the resident retains irrespective of other requirements.

Resources

Frequently Asked Questions

→ www.prearesourcecenter.org/frequently-asked-questions

None available for this Standard as of 5/11/2023.

Additional Training Resources:

Always check the following sources for excellent training on PREA.

- National Institute of Corrections
 - nicic.gov/training/prea
- End Silence: The Project on Addressing Prison Rape
 - www.wcl.american.edu/endsilence

Notes and Federal Disclaimer

Note: Standards in Focus (SIFs) are not intended for use by the Department of Justice PREA auditors to evaluate PREA compliance. SIFs are a tool designed to help agencies and facilities implement, educate, and become familiar with the PREA standards and some related best practices, but are not a compliance checklist. They contain guidance about implementation best practices that may not be required and thus it would not be appropriate for auditors to audit against the SIF. SIFs also do not exhaust implementation guidance for every requirement in every standard.

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