



Section 5: Legal Issues Related to Discipline and Sanctions in Women's Correctional Facilities¹

STRATEGIES FOR PREVENTING POTENTIAL LEGAL CHALLENGES TO DISCIPLINE AND SANCTIONS IN WOMEN'S CORRECTIONAL FACILITIES

- ✓ Ensure that changes to discipline and sanctions policies and procedures for women inmates align with the state's broad correctional goals (e.g., safety and security, achieving successful outcomes).
- ✓ Document how such changes will enhance the agency's efforts to meet their goals.
- ✓ Document local data and national research studies that support changes in discipline and sanctions policies and practices.

Treating men and women inmates "differently" is equitable as long as correctional managers can show appropriate means to accomplish legitimate objectives.²

Correctional administrators should strive to achieve broad "parity" regarding critical issues that might impact both men and women offenders. Broad "parity" does not require that every aspect of correctional management be identical. Where there are differences, corrections administrators should be able to explain why these differences exist, and there must be more than just some general assumptions about the differences between men and women. The research or information that supports different approaches should be available to demonstrate the rationales for these variations in management.

"Because litigation is always a possibility, proactive administrators must be able to articulate a reasonable basis for their decisions based on specific circumstances. They need not fear that doing something new will have worse legal consequences than doing nothing... Doing nothing may ultimately pose more legal difficulties for officials."

Raeder, 2003, p. 108.

Courts tend to give "considerable deference to the professional judgment of corrections administrators, who bear a significant responsibility for defining legitimate goals of correctional systems and for determining the most appropriate means of accomplishing them."³ Goals often articulated by corrections officials include safety, security, and offender rehabilitation.⁴ It has

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² See also, Raeder, 2013 for a discussion on legal issues related to pregnancy, prenatal health care, visitation, and child-related issues among justice-involved women.

³ *Overton v. Bazzetta*, 539 U.S. 126, 2003.

⁴ See, e.g., *Beard v. Banks*, 548 U.S. 521, 2006.



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also been recognized that two of the essential tools used by corrections administrators to manage offenders are to punish violations and to offer inmates various incentives.⁵

In pursuing the legitimate correctional goals of safety, security, and rehabilitation, correctional administrators have the ability to develop rules and regulations. Again, the courts afford administrators wide latitude in determining the nature and language of these rules. Two acknowledged legal limitations on these rules are that they should be: (1) reasonably related to legitimate penological interests and not exaggerated responses to their objectives⁶ and; (2) officials should not act in ways that violate an inmate's constitutional protections. These protections include the right to be free from cruel and unusual punishment⁷; free from the deprivation of life, liberty, or property without due process of law⁸; free from the imposition of "ex post facto" laws⁹; and the right to equal protection of the law¹⁰.

Section 1 of the 14th Amendment indicates, in part, that "No State shall... deny to any person within its jurisdiction the equal protection of the laws." This might lead a corrections administrator to believe that—in order to be in compliance with the law—all offenders must be treated the same. While this might be laudable in some respects, it may also be true that treating men and women inmates differently, in certain respects, might actually increase the ability of administrators to achieve their legitimate objectives.

Corrections administrators should consider that while men and women inmates have some things in common, there are also significant differences. They were both convicted of crimes and sent to prison. They both forfeit certain freedoms (e.g., movement, property) consistent with their confinement. They must both abide by prison regulations. However, research indicates that they have different medical and mental health needs; are different in the number and/or types of crimes they have committed; pose different risks in terms of violence or escape; and may possess different attitudes, aptitudes, family responsibilities, and reentry needs. When corrections administrators treat men and women inmates "exactly the same," they are acting without regard to all of the differences that exist. From a legal perspective, courts

Key Questions to Consider

When corrections administrators choose to treat women and men inmates differently – in a facility disciplinary context or otherwise – there are two questions that they should be prepared to answer:

1. What is the important and legitimate correctional goal that the state seeks to achieve?
2. What is the evidence, research, or information that is being relied on to support their actions to achieve these important and legitimate goals?

⁵ See, e.g., *McKune v. Lile*, 536 U.S. 24, 2002.

⁶ See, e.g., *Turner v. Safely*, 482 U.S. 78, 1987.

⁷ U.S. Const. amend. VIII.

⁸ U.S. Const. amend. XIV.

⁹ U.S. Const. art. I, § 9; U.S. Const. art. I, § 10.

¹⁰ U.S. Const. amend. XIV.

generally do not expect men and women inmates to be treated “exactly the same.” What the courts do expect is that there will be some “parity” between the programs, services, and opportunities afforded to each group.¹¹

*West v. Virginia Department of Corrections*¹² provides an excellent example of how a court might examine a case under the equal protection clause when there is no “parity” of programs or services. The State of Virginia created a “boot camp” program that was limited to young male offenders. The State indicated that it planned for this to be a “pilot” and that it might create a boot camp for women in the future. If an inmate participated in a boot camp program it could substantially reduce the amount of time that an inmate would be incarcerated for their offense, and reduce the length of time before parole consideration might occur. Women were clearly “disadvantaged” because they could not participate in the program.

The court in *West* established the method by which such cases would be reviewed. Clearly, the State was acting in a way that treated men and women differently. Gender-based classifications are given “heightened” scrutiny by the courts. This is an intermediate level of scrutiny: State actions that might classify by race or national origin are given “strict scrutiny” (the highest level of scrutiny) while economic or non-suspect classifications are subjected to the lowest scrutiny, called the “rational basis” test. In order to meet this “heightened” or intermediate level of scrutiny, a State must be able to show that the classification they developed was substantially related to an important governmental objective.¹³ Under this test, a State may be able to justify a gender-based classification but it must be based on more than stereotypical or generalized concepts about men and women.¹⁴ In other words, the State must be able to identify its important objective, and demonstrate the evidence or information upon which it relied to create the different classification or treatment of men and women.

In the *West* case, the State could not meet this burden. The court was not persuaded by the fact that more men were in prison than women; that having a male boot camp would have a larger impact on reducing the prison population; that men might be more generally accustomed to a boot camp environment; or that, for fiscal reasons, the state wanted to have a “pilot” program that might later be expanded to include women. What the court concluded was that the State was offering a program to men that would allow for their release from custody much sooner than might otherwise be possible, and it was not offering this same alternative to women. That was the essence of the equal protection violation.

For the past twenty years, women inmates have brought a variety of equal protection clause cases to numerous federal courts, with mixed results. In cases like *West*, where the different

¹¹ See, e.g., Harvard Law Review Association, 1998.

¹² *West v. Virginia Department of Corrections*, 847 F. Supp. 402 (W.D. Va., 1994).

¹³ See *Reed v. Reed*, 404 U.S. 71 (1971); *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Bukhari v. Hutto*, 487 F. Supp. 1162, 1171 (E.D. VA. 1980).

¹⁴ See, e.g., *Craig v. Boren*, 429 U.S. 190, 1976.

treatment of men and women inmates had a substantial impact on issues such as the length of incarceration time, courts have been more sensitive to the equal protection arguments of the women offenders. A similar result occurred in *Walker v. Luther*¹⁵ where the issue of differences in parole eligibility triggered equal protection claims.

Further, where critical medical and mental health needs are apparently not being met for women—and where services for male offenders are superior to those of women—courts have also been more inclined to find an equal protection issue. For instance, in *Casey v. Lewis*¹⁶ a U.S. District Court in Arizona found that the medical and mental health needs of women prisoners were not “in parity” with the services provided for men—and that they should be. In *Flynn v. Doyle*¹⁷ the U.S. District Court in Wisconsin found that the absence of inpatient mental health services program for women at the Taycheedah facility (while such services existed for men at other prisons) constituted sufficient equal protection concerns to overcome the State’s motion for summary judgment. Similarly, in *Women Prisoners of D.C. v. District of Columbia*¹⁸ the lack of medical, mental health, and various program services in its women's facilities, when compared to men's facilities, gave rise to equal protection violations.

The standard that courts tend to apply in these equal protection cases does not appear to be “exact similarity” of programs or services, but instead substantial or at least sufficient “parity,” especially where significant ramifications are possible.¹⁹

However in other, perhaps somewhat less critical areas—particularly where they deal with issues that are deeply imbedded in common correctional operations—courts have been less likely to find equal protection violations. For instance, in the Nebraska case of *Klinger v. D.O.C.*²⁰, the court—while noting that programs and services in twelve different areas were not roughly equivalent to what was offered at men’s prisons—did not find an equal protection violation. In fact, the court in *Klinger* found what several other courts have concluded—that men and women inmates are not actually “similarly situated”—and therefore not required to be treated “equally” by the State.

The notion that men and women inmates are not “similarly situated” was also found in the Nebraska case of *Timm v. Gunter*²¹ and the Texas case of *Oliver v. Scott*²². These courts found the differences in such factors as the nature of the crimes committed, average age of the offenders, average length of sentence, frequency of escape, and having contraband or other

¹⁵ *Walker v. Luther*, 644 F. Supp 76; 830 F.2d 1208 (CT, 1986).

¹⁶ *Casey v. Lewis*, 834 F. Supp. 2479, 1993.

¹⁷ *Flynn v. Doyle*, 672 F. Supp. 2d 858, (D. Wis., 2009).

¹⁸ *Women Prisoners of D.C. v. District of Columbia*, 899 F. Supp. 659 (D.D.C.1995).

¹⁹ See, e.g., *Pargo v. Elliott*, 69 F.3d. 280 (8th Cir. C.A., Iowa, 1995; cert. den. 519 U.S. 831); *Glover v. Johnson*, 138 F.3d. 229 (6th Cir. C.A. Mich, 1998).

²⁰ *Klinger v. D.O.C.*, 31 F. 3d 727 (8th Cir. C.A., 1994).

²¹ *Timm v. Gunter*, 917 F. 2d 1093, cert. den. 501 U.S. 1209 (1990).

²² *Oliver v. Scott*, 276 F. 3d 736 (5th Cir. C.A., 2002).

facility disciplinary violations, to be significant. In finding that access to prison industry programs for men and women were quite different, a Missouri court in *Keevan v. Smith*²³ found no equal protection violation. The court's decision was based on the same rationale offered by the courts in *Klinger, Timm, and Oliver*²⁴—women and men inmates were not “similarly situated.”

While several of these courts made decisions in different jurisdictions (and therefore were not bound to follow each other's rulings), it does seem that some commonalities can be found among these decisions that may assist corrections administrators in developing and implementing gender responsive policies and practices. Where the “inequality” between male and female programs or services touches on issues such as the length of stay in prison, opportunities for parole consideration, or having critical medical or mental health needs met, courts may be more sensitive to the equal protection issues that are presented. However, when the equal protection claims involve access to other types of programs, facility jobs, or routine facility administration issues, courts may be more inclined to grant corrections administrators the broad leeway often afforded them in managing correctional systems.

A gender responsive, trauma-informed approach to discipline and sanctions in women's facilities is legally supportable.

The parameters for treating men and women inmates differently with respect to discipline and sanctions appear to be as follows:

- **Women and men inmates do not have to be treated exactly the same in all situations.** What is required is some level of substantial parity in terms of programs or services that can impact significantly their well-being or opportunities for release.
- **Women and men inmates may have different needs, present different risks, and pose different concerns from a programmatic, security, or custody perspective.** Informed corrections professionals may take these differences into account when developing or implementing systems designed to help achieve legitimate agency and facility goals.
- **Rules or programs that are different for women and men inmates should be supportable.** When rules or programs are created that intentionally treat men and women inmates differently, corrections administrators should be able to document the specific data, information, or research that led them to believe that these different rules or programs would help them to better achieve legitimate correctional objectives.
- **Defining legitimate correctional goals and the best way to accomplish them is important.** In determining the programs or services that are offered, or policies that are instituted or enforced, corrections administrators are afforded broad leeway to identify legitimate correctional goals and the best ways to accomplish those goals.

²³ *Keevan v. Smith*, 100 F.3d 644 (1996).

²⁴ *Supra*.

- **Not all rules—or responses to rules—have to be the same for men and women.** However, if these different rules or responses potentially impact sentence length or eligibility for parole consideration, then these differences should be eliminated or at least minimized.
- **Determining punishments or creating incentives are recognized by the courts as fundamental components of correctional management.** Courts give corrections officials broad latitude to determine the goals and methods used to achieve those goals.
- **Corrections administrators can design discipline and sanctions for women inmates consistent with legitimate correctional objectives.** Consistent with all appropriate due process considerations, 8th amendment requirements (i.e., no cruel and unusual punishment), and no *ex post facto* applications of the law, corrections administrators can identify the methods, goals, and procedures to be followed in their disciplinary systems to help achieve legitimate correctional objectives such as promoting institutional order, ensuring safety, and fostering rehabilitation.

To be legally supportable, a gender responsive, trauma-informed approach to discipline and sanctions in women's facilities should state the reasons for the difference in approach (from that in men's facilities), and the evidence that supports it.

The case law and discussions in this section are intended to highlight the fact that when known differences between women and men offenders are factored into approaches, programs, services, discipline, sanctions, and incentives used by corrections professionals—for the purpose of increasing facility safety, promoting rehabilitation, or other appropriate reasons—those decisions can be defended by corrections administrators. The information provided here can be used to help respond to any legal challenges brought regarding these differences. Since inmates can and do bring lawsuits for any number of reasons, correctional administrators need to be knowledgeable and sensitive to issues regarding the “equal” treatment of men and women offenders. While general “parity” is appropriate, exact duplication is not necessarily required (and in fact, could actually be a disservice to women inmates). What is important to consider is the reason for the differences, and the evidence that supports those reasons.

“Although the goal is to provide parity of treatment for all prisoners, regardless of gender, administrators may not be required to provide the same level of facilities and services to men and women if they can justify the differences. Penological goals may justify gender-specific treatment.”

Raeder, 2003, p. 110

Corrections administrators should not ignore pertinent and meaningful information about women offenders when designing or implementing disciplinary systems for fear that they might be accused of treating offenders “unequally.” Instead, they should pursue appropriate correctional goals armed with available information, evidence, and research, so that correctional goals can be better achieved.

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