

Aggravating Factors

Aggravating factors, where applicable, may enhance the value of a claim. Guidance regarding selected aggravating factors which may apply to a claim is as follows:

Unjustified Out-of-Community Confinement

For purposes of determining whether conduct constituting sexual abuse or physical abuse is aggravated by unjustified out-of-community confinement, such that a claim award should be enhanced, the following guidance is applicable:

“Out-of-Community Confinement,” (or “OOC”) also known as “room confinement,” and “solitary confinement,” means the placement of a resident in a locked room with minimal or no contact with persons other than correctional facility staff and attorneys.

OOC does not include protective or medical isolation.

OOC may take place in a resident’s assigned room, or it may take place in a separate room used specifically for that purpose.

OOC may involve practices such as removing most objects from the room, including the resident’s clothing, and even restraint of the resident, when necessary and appropriate to the purpose of the OOC.

OOC is justified in some circumstances. OOC may be used to calm a resident who is exhibiting seriously disruptive or dangerous behavior. It may also be used to protect residents from self-harm, hurting others or causing significant property damage. OOC used for these purposes should be terminated once it becomes reasonably certain that the necessitating circumstances have passed.

In some cases, OOC may also be justified as a sanction for rules violations.

Attitudes about the practice of utilizing OOC in juvenile detention facilities have varied over time. To determine whether OOC is justified in a given case, the then-applicable law and facility policies and procedures and whether they were substantially followed must be considered.

Use of Deadly Weapon

For purposes of determining whether conduct constituting sexual abuse is aggravated by use of a deadly weapon, such that a claim award should be enhanced, **“deadly weapon”** means any firearm, knife or other substance or thing which, in the manner it is used, intended to be used, or threatened to be used, is known to be capable of producing death or serious bodily injury.

Mitigating Factors

Mitigating factors may be taken into consideration by the AG Designee and the Administrator in arriving at an award, recommendation or position concerning a claim.

Mitigating factors do not need to be addressed by the Claimant.

The following guidance is provided regarding how mitigating factors should be considered.

Issues of Credibility

A Claimant's statements, made under oath, shall be presumed credible unless called into question as described below.

Additionally, it should be acknowledged that sexual abuse and physical abuse are traumatic events which can affect victims' ability to recall details clearly. It should also be acknowledged that memory of the details of traumatic events can sometimes be recalled over time. It should also be acknowledged that due to past trauma, and the potential for re-traumatization through recall, victims may only become able to discuss details of their abuse after the passage of time, and may not become comfortable sharing all details at a single time. Therefore, the fact that a victim has not previously disclosed or has only partially disclosed the details of incidents which now form the basis for a Claim shall not, standing alone, be considered as a reason for denial or reduction of a claim.

Understanding the foregoing, if the totality of the circumstances surrounding a Claimant's description of events (which may include how and when details were recalled and disclosed by Claimant, as well as statements made by persons other than Claimant, comparisons with information contained in records, and any other matters typically considered as bearing on credibility) indicates a Claim is predicated on statements lacking in credibility, a Claim may be denied or the amount reduced, on that basis.

Problems of Proof

The degree of proof needed to support a claim or element of a claim or defense will depend upon the nature of the claim and should generally comport with what proof might be reasonably expected to exist in each instance. A Claim may be denied or the amount reduced, or a defense rejected, where reasonably expected proof is lacking to such a degree that it calls into question the legitimacy or veracity of the claim, element or defense.

Legal Issues Including Defenses

The claims process is designed to be an alternative to litigation. The amounts which may be awarded from the Fund have been developed with consideration given to the fact that by participating, a claimant will largely avoid having to litigate issues of law that would otherwise be raised in a court case or controversy. Therefore, to the extent that issues of law exist and would be applicable to all Claimants equally, simply by virtue of the nature of the claims, generally, they shall not be considered as mitigating factors. To the extent that there are legal issues that are factually unique to a claim, they may be considered and may form the basis to deny or reduce a claim or to reject a defense. The more common legal issues which may be raised are discussed below.

Comment Regarding Law Applicable, Generally

Except where expressly contradicted by the Act or by the Guidelines, it shall be presumed that the law as it exists today is the same as the law that existed at the time of the incident which gave rise to claims of abuse. However, to the extent not expressly contradicted, the parties may raise, and the Administrator may consider, the law and standards applicable at the time of the incidents, if it can be demonstrated that the prior applicable law would require a different result than current law.

Limitations

This mitigating factor may apply to claims of sexual abuse only where it can be demonstrated that the Claimant had actual knowledge regarding the potential to file a claim during the applicable limitations period and failed to do so. This standard shall be applied to the exclusion of otherwise applicable law.

This mitigating factor may be applied to claims of physical abuse according to applicable law.

Laches

This mitigating factor may only apply to claims of physical abuse, and when applied, shall apply according to applicable law.

Justification/Privilege

Justification, as applicable to the definition of Physical Abuse, and as applicable to Out-of-Community Confinement as an Aggravating Factor, is already provided for in relation to each of those topics.

Conduct which would constitute Sexual Abuse should not generally be subject to a defense of justification or privilege, except as articulated in the definitions applicable to

Sexual Abuse Categories D and E, such as in the case of touching necessitated by medical treatment or use of surveillance cameras for security or law enforcement purposes.

To the extent a defense of justification or privilege might apply which is not already contemplated by these definitions, whether or not it constitutes a mitigating factor will be governed by applicable law.

Failure to Utilize Available Grievance Procedures or Other Means of Redress, Concealment

This mitigating factor may apply when the Claimant knew or reasonably should have known of the availability of legitimate procedures in place or other legitimate means by which abuse could have been addressed, and either (1) made a deliberate choice not to utilize those procedures or means, or (2) actively concealed the abuse, thwarting the effectiveness of such procedures.

Absence of Harm

The nature of this claim process is such that, in general, claims will be approved in a liquidated amount. Harm to a claimant from abuse is presumed, and a claimant need not offer proof of specific harm in order to receive compensation. However, to preserve the assets of the fund for other claimants, an extraordinary lack or the absence of any harm or suffering on the part of the Claimant may be considered as a mitigating factor.

Other Causes of Harm Suffered

To the extent that extraordinary harm or suffering, claimed as the basis for an enhancement, may be traced to another source, that circumstance may also be considered as a mitigating factor.

Waiver, Accord and Satisfaction, Release

This mitigating factor may apply where a claimant has previously relinquished the right to pursue a claim in exchange for consideration. This mitigating factor may be considered even if the consideration received is significantly less than the amount which would otherwise be awarded from the Fund.