In cases where we've uncovered evidence of sexual intimidation between youth, we typically find that age and size disparity between the youth is a significant risk factor. The older, bigger, more sophisticated youth obviously are preying on the younger, smaller, more vulnerable children. And, of course, as has already been stated, there is just simply not enough staff to supervise the youth adequately.

If we make a finding that a facility is violating the rights of the youth we make every effort to enter into an agreement with the facility to reform the conditions that we've discovered. Under both CRIPA and Section 14141 we may only seek prospective injunctive relief. In those types of cases we typically include provisions in our agreements that ensure improved investigative systems in a facility, improve staffing, not just in the number of staff, but also in their training, and improved classification of youth to ensure that youth who are younger and smaller are not housed in areas with older and stronger youth.

Thank you very much.

CHAIRMAN WALTON: Thank you very much.

Dr. Bidwell, do you believe that the circumstances that resulted in the testimony that we heard earlier this morning have been addressed by the State of Hawaii?

DR. BIDWELL: I would say at this -- no, they
haven't been addressed if that means have policies or procedures been developed that would protect the youth coming in now. I think I've said over the last number of years the proof is in the pudding. I'll believe it when I see it. And there are people working on it. Part of the settlement with the federal lawsuit was the requirement that the State hire an experienced consultant to come in and help the State develop policies and procedures around the area of sexual orientation and gender identity. I met with that person; they are very experienced, very credible. But even when we have policies and procedures on paper, I'll believe it when I see it because of that underlying culture of non-acceptance.

I agree strongly -- several people have mentioned here about having outside, the outside world looking in and seeing what's going on there, because I don't trust the system to monitor itself. There are some very good people in there, but they're often silenced by the people that are pretty toxic. And, so, things are happening, there are positive things, but at this moment if a transgender youth came into the facility, to be honest, be put in isolation because they don't have a clue what to do with a transgender youth. That's what happened for Cyryna. They were scared to death because they knew stuff was brewing legally, and, so, she was kept in isolation, not to the girls' unit, not
to the boys' unit, the last time she came in, and that, I
think, would happen again today.

COMMISSIONER SMITH: Dr. Bidwell, following up on
your comment, I'm going to push a little bit.

DR. BIDWELL: Sure.

COMMISSIONER SMITH: I know that's surprising.

All of you in some capacity represent
independents; you, because you're associated with an
academic institution, Mr. Gibson, you talked about the
importance of openness, the Special Litigation Division, the
attorney's office, you as a sort of special monitor. I
think that that's a fine recommendation and probably
certainly one that may surface and it's a good one, but how
do you build capacity within these agencies to continue sort
of that openness and those practices that you're trying to
put in place? And I say this as somebody who's been
involved in some of this litigation that lasts for ten
years. And the issue is, you go in, you have these outside
folk, but when those people leave, the systems can revert
back to that past conduct, so, what do you do to make sure
that it continues and how do you build that capacity?

DR. BIDWELL: I'll start out, if I can. I would
say I don't think -- I don't think they can ever leave. I
think that there has to be an ongoing presence there. I
don't know -- again, I'm a pediatrician so, I don't know
exactly how one does that, but I think there has to be some sort of a legal mandate or -- this may be wishful thinking -- but a real change of heart within the institutions that see that that's actually a good thing. For example, as Mr. Gibson said, you know, that welcome, that welcoming of the outside world into the facility, not having to be afraid, that actually that helps everyone. So, if that -- if a culture were built around that, that would be fine, but in the meantime, at least in Hawaii, it has to be mandated, and I can't see an ending date for that.

DR. KRISBERG: Can I comment on that, because in the middle of my investigation I remember going out to see Alan Breed who was the former head of NIC and when he headed the Capital Youth Authority it was viewed as the best system in the country. And I remember saying to him, how do you instill common sense in the staff? Because when we go away late at night, how do we ensure that people are going to do the right thing? And because to me that was the mountain I couldn't climb. And he talked about the issue which I think Ms. Chunn talked about, which is leadership, which I think is sorely lacking. When you have leaders who constantly reinforce publicly by their words and actions certain set of behaviors when they go out to the facilities, when they're seen talking to the young people, it makes a difference. It may not be -- it's not a substitute for the outside, but I
think, to the extent that -- I mean, we need to create a new generation of leaders of these systems that are kind of the Alan Breeds for our era.

MR. GIBSON: I don't know if it's fortunate or unfortunate, but I think sometimes you just have to put it into law, you have to put it into statute. I mean, people do leave, things do break down, and that's not to say anyone's better than anybody else, but, I mean, we've even looked at -- we have, whether it become misdemeanors being locked up or seriously mentally ill kids, I've learned that you just have to put it into law. Policies and procedures, I mean, I deal with the Supreme Court, and they do not have what's called administrative rule-making authority, which our state you have to develop administrative rules to go with a statute, so, they say we do policy. Well, I could change policy in a minute. I mean, I don't think you can put law into everything, but when it comes to outside mandatory reporting, investigations, things like that, I think you have to put it in law. You have to work with the local legislature and you have to put that in law. I really believe that. No matter what leadership is, some day it'll change. Department of Justice, I was fortunate because I was new in 1991, they came into our facility in Montana. We were one of the few states that didn't have to go to consent decree, other things, but I welcomed them because -- but,
again, I was fortunate because I wasn't the person before, 
but, I mean, they were right. We had to tear down 
buildings. As you said, it was mental health issues, it was 
locking kids up issues, it was special education issues, it 
was nothing really in relationship to this. But I think 
things, you just have to put them in law.

    Somebody talked earlier about national oversight. 
Other than these people, when it comes to our facility, 
there is no national oversight. It was mentioned about DMC 
and whatever. That doesn't impact our facilities. I'm on 
the state SAG as a representative which is run by a board. 
Not that they don't monitor things that were mentioned, but 
they have nothing to do with our state facilities.

    MR. BRIZZI: If I could jump in. This was a 
series of discussions that we had prior to making our 
charging decision because we had nine youth managers that 
were actually going out committing the child molests and 
sexual misconducts, and then there was the superintendent 
who didn't have any inappropriate contact with any of these 
female detainees but did sit on the tape, the evidence, and 
then, in our opinion, allowed that type of behavior to 
occur. And we had three choices. One was to not charge 
him, the middle ground was to charge him with what we 
charged him with which was the -- a pretty strong -- I think 
a very strong case in terms of the failure to report the
abuse. The third option, which was the one my deputy wanted to pursue because he was just so infuriated by what was going on, was to actually charge him with conspiracy to commit child molesting, which we chose the middle ground, we thought we could make our point effectively and, so, balance that with what was just. And I think that's exactly right, I think that's what you have to do.

COMMISSIONER KANEB: Mr. Gibson, towards the end of your testimony you alluded to this building in the small town in Montana where people imagined what might be going on and the solution you posited was, well, open the doors, let the public in. Now, I'd just like you -- I'd like to follow up on that and ask you to elaborate a little bit. I don't know much of anything about prison industry, but I can imagine people saying, come on, it's bad enough trying to handle legitimate visitors for the inmates, we can't have, say, just the general public who's curious walking around. What do you mean?

MR. GIBSON: Commissioner, what I mean, and, again, you do have, for example, we just had a new spiritual center, we took our old maximum unit, we closed it, we invited the public -- of course, we did security checks, of course, when they came into the facility we checked ID's. It's not that they just can wander around. I guess what I meant was is that the media, for example, I mean, these are
still minors. We have the media come in and do stories all the time. They don't photograph their face, they don't use their last names. But, again, you have to have a system in place, I think what you're getting at. We do background checks, if it's just the public at large, we have them do that at least a few minutes in advance, so, you do have security issues.

But I can guarantee you once we started to do that, our incidence of either staff abuse or kid-on-kid abuse, and I'm not talking sexual abuse, I'm talking just the fights and the assaults, especially in our school, because we have a separate school building, went down because both staff and kids did not know, unless it was scheduled, who was going to be coming through that facility. Now, when they go through that facility they are with staff, whether that would be the superintendent or a counselor or whatever, there was staff, they just -- they aren't given a key.

But we brought a person, and I can't think of his name, he's kind of famous, he was a probation officer, became a comedian, he did a lot of things for OJDP, brought him out to that facility, and I asked him the one question, I said, "Well, what did you think?" And he didn't get into like I think you're wonderful, you have the best mental health, whatever. He said, "Your kids feel safe. They know
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-- I talked to them -- they know that anybody can come in here. I mean, they thought I was like a legislator." We have legislators come to our facility. We pay for legislators to come to our facilities.

COMMISSIONER KANEB: You pay for...

MR. GIBSON: We have a DOC Advisory Council, and what I mean is that they're on that council from all different -- we have judges, we have county attorneys, and we have these meetings, not just in the capital, we have them in the facility, and we have meetings where we pay their per diem and we want -- and the first thing we do is a tour of that facility.

COMMISSIONER KANEB: I guess what I'm hearing is you have an active program to invite, say, invite scrutiny, or, at the very least, visitation, and you facilitate people coming rather than, let us say, making it more difficult for them to come. That -- that's back to having the right people administering whatever it is. And as you observed, the line on having the right people is something that cannot always do the trick because sometimes the wrong people succeed the right people, and codifying things in law is a help, but I'm afraid in the case that we're talking about here you really can't mandate by law the approach you're talking about. I think I'm answering my own question.

MR. GIBSON: What I meant, you can mandate that an
outside agency investigate every allegation.

COMMISSIONER KANE: Right.

MR. GIBSON: No, you can't mandate that you let
the media come in once a week.

COMMISSIONER KANE: Yeah. No, certainly, the
whole matter of the appeal processes, who reviews
complaints, who reviews appeals, is going to be something
that our standards are going to have to address very, very
thoughtfully, and we will be talking to people such as
yourself about that, because the integrity and effectiveness
of the appeal process is absolutely, as we know, at the
heart of any prevention strategy.

The other thing I would like to ask you is you
alluded to, and you used, again, an acronym or some
initials, and I'm wondering if you are -- as being people
that exist certainly in Montana but they were part of your
system. Were you referring to the monitors that Mr. Flores
talked about or some other type of ---

MR. GIBSON: Mr. Commissioner, what I was
referring to, in Montana we are under the State Department
of Corrections, but if we have an allegation of either
youth-on-youth, staff-on-youth, of any type of abuse, not
just sexual, we are mandated by law to report that to Public
Health & Human Services, which is a different agency. We
have internal investigations, and I think somebody referred
to that, and that's good, but I think it goes back to what
you were talking about earlier, it's good to have someone
outside with authority, and they have total authority. I
mean, if they came in and said this is substantiated, then
that goes on. So, I was referring to -- we're under
corrections now. We used to be under family services. We
used to be under institutions. But we're under the
Department of Corrections, but we have in law that if any of
our state facilities or even our juvenile detention
facilities, which are operated by the county but licensed by
us, it's mandatory reporting to Child Protective Services
for any allegation of abuse, whether it's kid-on-kid or
adult-on-kid.

CHAIRMAN WALTON: Ms. Becker, you said that your
investigations revealed a relatively small number of sexual
assaults or rapes, you said. What do you all characterize
as rape?

MS. BECKER: Well, at that point I was talking
about forced sex, it wasn't -- I wasn't -- I mean forced sex
as opposed to consensual sex. There are instances here
where you're talking about juveniles, obviously as a legal
matter it would constitute statutory rape.

CHAIRMAN WALTON: So, that fell within what you
were characterizing as rape?

MS. BECKER: I was characterizing -- when I used
the term "rape" I was talking about forced.

CHAIRMAN WALTON: Forced. Okay.

MS. BECKER: I should have been more concise, I apologize.

CHAIRMAN WALTON: You know what the numbers are if you incorporate into that also -- well, can't be consent ---

MS. BECKER: Right.

CHAIRMAN WALTON: --- but sex between an adult and a juvenile?

MS. BECKER: The numbers are obviously high. We have found incidences of that occurring but the numbers are not large, and I think the reason is because of the nature of our work. As I think it was Dr. Krisberg mentioned earlier, we need to develop a relationship with the juvenile in order -- or for any person really -- to have them confide in you about their sexual relationships. We typically do a site visit; we may do one or two site visits, we may be out there a few days. We -- typically we do interview juveniles as part of the site visit but we won't have repeated interviews with that particular person, so, that instant rapport is not developed. So, it could be -- there could be some under-reporting going on there as well that we are not detecting.

COMMISSIONER SMITH: Judge, one of the other things that -- and I will talk to Mr. Brizzi and Ms. Becker
after -- is about sort of the constant thing that we have come in about whether it's rape or whether it's consensual, when force or not, when force isn't involved, because, as you all are aware, in every state there are specific laws that deal with sexual abuse of people in custody that make it illegal. Then, of course, you have your statutory rape laws involving juveniles. And, so, this conversation about whether it's consensual or forced is kind of jarring because the fact is it is rape, it's statutory rape or it's rape under those other statutes.

MR. BRIZZI: Each state has its own set -- we all call it different things, but you're absolutely right. And of my six victims, one was what you would call a rape where ---

COMMISSIONER SMITH: Covered under sexual assault statute.

MR. BRIZZI: Exactly. And that would be -- and we actually filed for child molest on that instead of rape, because the child molest was a higher charge, exactly.

Now, then there were -- depending upon the ages of the victims, because they were 13, 14, 15, and the type of conduct that was going on, the type of sexual conduct that was going on, because then it depends, we charged sexual misconduct with a minor, there's 52 of them, 52 -- not all different, but an assortment of 52 charges, always looking
to see what the highest charge would be. But obviously, you're exactly right, they are not allowed to consent because of their age, and because of the fact that they are incarcerated.

CHAIRMAN WALTON: Some of you have made some comments that give me some concern about the ongoing efforts that are being conducted now to assess the prevalence of sexual assault in incarcerated settings. What you just said about people not being willing to open up and admit this occurring, and I think that was also mentioned otherwise. How likely are we to get accurate indications of prevalence from researchers who go into institutions and meet somebody for the first time and interview them to seek to try and get information of this nature?

DR. KRISBERG: Well, if I can answer that. I mean, it's still tough, because I think the relationship issue counts for a lot on an issue this sensitive, and to have an adolescent, you know, say publicly that they're involved in some of this behavior is quite difficult. But in 2000, OJJDP funded a national study that was -- took years to design, was implemented by Child Trends, probably one of the most outstanding research groups in the country, and they use this technology of Touch Screen so the youth didn't have to answer the question publicly, they could read the question or get help if they had reading issues, and
they could confidentially answer the question. So, I think techniques like that help a lot in terms of getting more honest answers about this. And I -- and, again, I go back to that 2000 survey. There was a bunch of us who worked for years trying to get the questions right, we had child psychologists, we had M.D.'s. It's a complicated issue. And I would hope in the current BJS survey that they don't throw all that work away and start from scratch.

COMMISSIONER SMITH: Is that study out, the 2000 survey that you're talking about?

DR. KRISBERG: Not that I'm aware of.

COMMISSIONER SMITH: So, that might be something helpful for us to look at.

MR. GIBSON: It's very complicated, and I think it goes the other way, too. There's been discussion about if you have kids that are open to victimization anyway and how they're going to do these interviews with kids with low IQ's in some states that you have kids, very low IQ's, mental health issues, that are probably more prone to victimization than many people, how are you going to put those questions to them?

On the flip side, and this isn't -- it can go the other way, too. If it's totally anonymous, whether it's in the adult system or the juvenile system, there might be a person that makes a false accusation, and I think what's
important there is the follow-up as far as not just asking the questions but where was that, what time was that, and somebody needs to follow that up, because, again, kids are afraid to report, but sometimes there will be false accusations, and how you follow up on that is very difficult.

MR. BRIZZI: Judge, one thing that was very, very troubling and I touched on this, now that I'm hearing some of the comments, I should have elaborated.

With the exception of the one girl whose mother came forward and reported this, none of the other five consider themselves to be victims, which is your point, which may be the reason why it's under-reported.

CHAIRMAN WALTON: When these alleged acts were taking place that you are prosecuting, did they take place during the reign of the same administrator of the facility, or have there been other individuals in that position?

MR. BRIZZI: No, it was the same, the superintendent, and he was the superintendent for 12 years.

CHAIRMAN WALTON: Do you attribute, if these allegations are accurate, this having occurred as a result of poor leadership?

MR. BRIZZI: Absolutely. Absolutely.

MS. BECKER: Let me just make one comment about -- I believe -- I'm a little bit outside my league here because
I'm not involved in the BJS study, but my understanding is that they have multiple -- they have taken that into account in terms of trying to preserve anonymity, trying to taking precautions with respect to ensuring that whatever the juvenile would be tell -- or inmates -- that the staff are not aware of the results of that survey or the type of survey that they're doing during that time period.

DR. KRISBERG: If I could add, I know, Judge Walton, you're very familiar with the surveys of drug use in this country and you know it's a tough issue to get accurate data, but the other thing, apart from -- it's interesting to have national-level survey data, but I really want to bring you back to some of the comments made earlier, the director in New Jersey, that is, the value of systems like performance-based standards that are focused on specific facilities that give quality assurance measures to administrators. Seems to me if you're ever going to get in front of this problem you've got to get every state to adopt something like that so they're getting some information, they're acting on the information, and they're starting to move this problem. I don't think we could ever know for sure that we've completely eliminated it, but you've got to start someplace and create a climate that we're watching, we're concerned. And I think the evidence, for example, in the performance-based standards area in other domains
suggest that it's really helpful.

COMMISSIONER KANE: I just had a short questions
of Ms. Becker. How does your office relate for purposes of
problems like we're trying to eliminate or ameliorate to the
Inspector General's office, if at all?

MS. BECKER: Thank you for the question. There is
a -- we have a Criminal Section within our Civil Rights
Division, and the Criminal Section prosecutes the criminal
civil rights laws which include color of law cases, so, that
would include excessive force by police officers, and in
some instances it includes rapes by prison officials. But
those numbers are relatively low because prison rape cases
can also be prosecuted by any U.S. Attorney's Office around
the country, and the Criminal Division really has the
primary lead on prison rape cases. We just handle the ones
that kind of have more civil rights flavor to it. So, there
is some relationship there with the IG but it's not the only
relationship within the department.

COMMISSIONER KANE: So, but even in the case
where you do find a civil rights aspect to a rape, it would
be confined or it would not really include
prisoner-on-prisoner rape.

MS. BECKER: No, that particular -- that would not
-- we would be focusing, under our statutes that we have
jurisdiction over, on basically police officer-on-detainee
or prison official-on-inmate, yes.

COMMISSIONER KANE: That was my question. All right. Thank you.

COMMISSIONER STRUCKMAN-JOHNSON: I just wanted to make a comment about our language of -- right now we're coming up with this artificial dichotomy of rape versus consensual, and I think we need to back away from that quickly, and we can talk about forced sex, and then I think we have a category of pressured sex. Pressured sex is not consensual but yet may describe the conditions of manipulation that make people think, maybe these young girls think it was consensual but really it's pressured, a pressure situation, and I think that's a useful terminology.

CHAIRMAN WALTON: Thank you again. It's an excellent panel. If, again, there's information that you didn't think about when you submitted your written testimony or that you testified about today that you think we should consider, we'd welcome receiving that information. So, thank you very much.

(Luncheon recess.)