

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

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

20 Thank you very much.

21 CHAIRMAN WALTON: Thank you very much.

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

25 DR. BIDWELL: I would say at this -- no, they

1 haven't been addressed if that means have policies or
2 procedures been developed that would protect the youth
3 coming in now. I think I've said over the last number of
4 years the proof is in the pudding. I'll believe it when I
5 see it. And there are people working on it. Part of the
6 settlement with the federal lawsuit was the requirement that
7 the State hire an experienced consultant to come in and help
8 the State develop policies and procedures around the area of
9 sexual orientation and gender identity. I met with that
10 person; they are very experienced, very credible. But even
11 when we have policies and procedures on paper, I'll believe
12 it when I see it because of that underlying culture of
13 non-acceptance.

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

1 to the boys' unit, the last time she came in, and that, I
2 think, would happen again today.

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

5 DR. BIDWELL: Sure.

6 COMMISSIONER SMITH: I know that's surprising.

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

22 DR. BIDWELL: I'll start out, if I can. I would
23 say I don't think -- I don't think they can ever leave. I
24 think that there has to be an ongoing presence there. I
25 don't know -- again, I'm a pediatrician so, I don't know

1 exactly how one does that, but I think there has to be some
2 sort of a legal mandate or -- this may be wishful thinking
3 -- but a real change of heart within the institutions that
4 see that that's actually a good thing. For example, as
5 Mr. Gibson said, you know, that welcome, that welcoming of
6 the outside world into the facility, not having to be
7 afraid, that actually that helps everyone. So, if that --
8 if a culture were built around that, that would be fine, but
9 in the meantime, at least in Hawaii, it has to be mandated,
10 and I can't see an ending date for that.

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

1 think, to the extent that -- I mean, we need to create a new
2 generation of leaders of these systems that are kind of the
3 Alan Breeds for our era.

4 MR. GIBSON: I don't know if it's fortunate or
5 unfortunate, but I think sometimes you just have to put it
6 into law, you have to put it into statute. I mean, people
7 do leave, things do break down, and that's not to say
8 anyone's better than anybody else, but, I mean, we've even
9 looked at -- we have, whether it become misdemeanors being
10 locked up or seriously mentally ill kids, I've learned that
11 you just have to put it into law. Policies and procedures,
12 I mean, I deal with the Supreme Court, and they do not have
13 what's called administrative rule-making authority, which
14 our state you have to develop administrative rules to go
15 with a statute, so, they say we do policy. Well, I could
16 change policy in a minute. I mean, I don't think you can
17 put law into everything, but when it comes to outside
18 mandatory reporting, investigations, things like that, I
19 think you have to put it in law. You have to work with the
20 local legislature and you have to put that in law. I really
21 believe that. No matter what leadership is, some day it'll
22 change. Department of Justice, I was fortunate because I
23 was new in 1991, they came into our facility in Montana. We
24 were one of the few states that didn't have to go to consent
25 decree, other things, but I welcomed them because -- but,

1 again, I was fortunate because I wasn't the person before,
2 but, I mean, they were right. We had to tear down
3 buildings. As you said, it was mental health issues, it was
4 locking kids up issues, it was special education issues, it
5 was nothing really in relationship to this. But I think
6 things, you just have to put them in law.

7 Somebody talked earlier about national oversight.

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

14 MR. BRIZZI: If I could jump in. This was a
15 series of discussions that we had prior to making our
16 charging decision because we had nine youth managers that
17 were actually going out committing the child molests and
18 sexual misconducts, and then there was the superintendent
19 who didn't have any inappropriate contact with any of these
20 female detainees but did sit on the tape, the evidence, and
21 then, in our opinion, allowed that type of behavior to
22 occur. And we had three choices. One was to not charge
23 him, the middle ground was to charge him with what we
24 charged him with which was the -- a pretty strong -- I think
25 a very strong case in terms of the failure to report the

1 abuse. The third option, which was the one my deputy wanted
2 to pursue because he was just so infuriated by what was
3 going on, was to actually charge him with conspiracy to
4 commit child molesting, which we chose the middle ground, we
5 thought we could make our point effectively and, so, balance
6 that with what was just. And I think that's exactly right,
7 I think that's what you have to do.

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

19 MR. GIBSON: Commissioner, what I mean, and,
20 again, you do have, for example, we just had a new spiritual
21 center, we took our old maximum unit, we closed it, we
22 invited the public -- of course, we did security checks, of
23 course, when they came into the facility we checked ID's.
24 It's not that they just can wander around. I guess what I
25 meant was is that the media, for example, I mean, these are

1 still minors. We have the media come in and do stories all
2 the time. They don't photograph their face, they don't use
3 their last names. But, again, you have to have a system in
4 place, I think what you're getting at. We do background
5 checks, if it's just the public at large, we have them do
6 that at least a few minutes in advance, so, you do have
7 security issues.

8 But I can guarantee you once we started to do
9 that, our incidence of either staff abuse or kid-on-kid
10 abuse, and I'm not talking sexual abuse, I'm talking just
11 the fights and the assaults, especially in our school,
12 because we have a separate school building, went down
13 because both staff and kids did not know, unless it was
14 scheduled, who was going to be coming through that facility.

15 Now, when they go through that facility they are with
16 staff, whether that would be the superintendent or a
17 counselor or whatever, there was staff, they just -- they
18 aren't given a key.

19 But we brought a person, and I can't think of his
20 name, he's kind of famous, he was a probation officer,
21 became a comedian, he did a lot of things for OJDP, brought
22 him out to that facility, and I asked him the one question,
23 I said, "Well, what did you think?" And he didn't get into
24 like I think you're wonderful, you have the best mental
25 health, whatever. He said, "Your kids feel safe. They know

1 -- I talked to them -- they know that anybody can come in
2 here. I mean, they thought I was like a legislator." We
3 have legislators come to our facility. We pay for
4 legislators to come to our facilities.

5 COMMISSIONER KANEB: You pay for...

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

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

25 MR. GIBSON: What I meant, you can mandate that an

1 outside agency investigate every allegation.

2 COMMISSIONER KANEB: Right.

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

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

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

19 MR. GIBSON: Mr. Commissioner, what I was
20 referring to, in Montana we are under the State Department
21 of Corrections, but if we have an allegation of either
22 youth-on-youth, staff-on-youth, of any type of abuse, not
23 just sexual, we are mandated by law to report that to Public
24 Health & Human Services, which is a different agency. We
25 have internal investigations, and I think somebody referred

1 to that, and that's good, but I think it goes back to what
2 you were talking about earlier, it's good to have someone
3 outside with authority, and they have total authority. I
4 mean, if they came in and said this is substantiated, then
5 that goes on. So, I was referring to -- we're under
6 corrections now. We used to be under family services. We
7 used to be under institutions. But we're under the
8 Department of Corrections, but we have in law that if any of
9 our state facilities or even our juvenile detention
10 facilities, which are operated by the county but licensed by
11 us, it's mandatory reporting to Child Protective Services
12 for any allegation of abuse, whether it's kid-on-kid or
13 adult-on-kid.

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

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

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

25 MS. BECKER: I was characterizing -- when I used

1 the term "rape" I was talking about forced.

2 CHAIRMAN WALTON: Forced. Okay.

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

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

7 MS. BECKER: Right.

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

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

24 COMMISSIONER SMITH: Judge, one of the other
25 things that -- and I will talk to Mr. Brizzi and Ms. Becker

1 after -- is about sort of the constant thing that we have
2 come in about whether it's rape or whether it's consensual,
3 when force or not, when force isn't involved, because, as
4 you all are aware, in every state there are specific laws
5 that deal with sexual abuse of people in custody that make
6 it illegal. Then, of course, you have your statutory rape
7 laws involving juveniles. And, so, this conversation about
8 whether it's consensual or forced is kind of jarring because
9 the fact is it is rape, it's statutory rape or it's rape
10 under those other statutes.

11 MR. BRIZZI: Each state has its own set -- we all
12 call it different things, but you're absolutely right. And
13 of my six victims, one was what you would call a rape where
14 ---

15 COMMISSIONER SMITH: Covered under sexual assault
16 statute.

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

20 Now, then there were -- depending upon the ages of
21 the victims, because they were 13, 14, 15, and the type of
22 conduct that was going on, the type of sexual conduct that
23 was going on, because then it depends, we charged sexual
24 misconduct with a minor, there's 52 of them, 52 -- not all
25 different, but an assortment of 52 charges, always looking

1 to see what the highest charge would be. But obviously,
2 you're exactly right, they are not allowed to consent
3 because of their age, and because of the fact that they are
4 incarcerated.

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

15 DR. KRISBERG: Well, if I can answer that. I
16 mean, it's still tough, because I think the relationship
17 issue counts for a lot on an issue this sensitive, and to
18 have an adolescent, you know, say publicly that they're
19 involved in some of this behavior is quite difficult. But
20 in 2000, OJJDP funded a national study that was -- took
21 years to design, was implemented by Child Trends, probably
22 one of the most outstanding research groups in the country,
23 and they use this technology of Touch Screen so the youth
24 didn't have to answer the question publicly, they could read
25 the question or get help if they had reading issues, and

1 they could confidentially answer the question. So, I think
2 techniques like that help a lot in terms of getting more
3 honest answers about this. And I -- and, again, I go back
4 to that 2000 survey. There was a bunch of us who worked for
5 years trying to get the questions right, we had child
6 psychologists, we had M.D.'s. It's a complicated issue.
7 And I would hope in the current BJS survey that they don't
8 throw all that work away and start from scratch.

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

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

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

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

22 On the flip side, and this isn't -- it can go the
23 other way, too. If it's totally anonymous, whether it's in
24 the adult system or the juvenile system, there might be a
25 person that makes a false accusation, and I think what's

1 important there is the follow-up as far as not just asking
2 the questions but where was that, what time was that, and
3 somebody needs to follow that up, because, again, kids are
4 afraid to report, but sometimes there will be false
5 accusations, and how you follow up on that is very
6 difficult.

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

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

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

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

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

23 MR. BRIZZI: Absolutely. Absolutely.

24 MS. BECKER: Let me just make one comment about --
25 I believe -- I'm a little bit outside my league here because

1 I'm not involved in the BJS study, but my understanding is
2 that they have multiple -- they have taken that into account
3 in terms of trying to preserve anonymity, trying to taking
4 precautions with respect to ensuring that whatever the
5 juvenile would be tell -- or inmates -- that the staff are
6 not aware of the results of that survey or the type of
7 survey that they're doing during that time period.

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

1 suggest that it's really helpful.

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

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

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

23 MS. BECKER: No, that particular -- that would not
24 -- we would be focusing, under our statutes that we have
25 jurisdiction over, on basically police officer-on-detainee

1 or prison official-on-inmate, yes.

2 COMMISSIONER KANEB: That was my question. All
3 right. Thank you.

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

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

20 (Luncheon recess.)