

ALASKA STATE LEGISLATURE
HOUSE HEALTH AND SOCIAL SERVICES STANDING COMMITTEE

April 3, 2012

3:10 p.m.

MEMBERS PRESENT

Representative Wes Keller, Chair
Representative Alan Dick, Vice Chair
Representative Bob Herron
Representative Paul Seaton
Representative Beth Kerttula
Representative Bob Miller
Representative Charisse Millett

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

HOUSE BILL NO. 367

"An Act relating to mitigation at sentencing in a criminal case for a defendant found by the court to have been affected by a fetal alcohol spectrum disorder."

- MOVED CSHB 367(HSS) OUT OF COMMITTEE

PRESENTATION: NORTH POLE SULFOLANE UPDATE

- SCHEDULED BUT NOT HEARD

PREVIOUS COMMITTEE ACTION

BILL: HB 367

SHORT TITLE: FETAL ALCOHOL SPEC. DISORDER AS MITIGATOR

SPONSOR(S): HEALTH & SOCIAL SERVICES

03/19/12	(H)	READ THE FIRST TIME - REFERRALS
03/19/12	(H)	HSS, JUD
04/03/12	(H)	HSS AT 3:00 PM CAPITOL 106

WITNESS REGISTER

JANET OGAN, Staff
Representative Wes Keller
Alaska State Legislature

Juneau, Alaska

POSITION STATEMENT: Introduced HB 367 on behalf of the House Health and Social Services Standing Committee, of which Representative Keller was chair.

CHRISTINE MARASIGAN, Staff
Senator Kevin Meyer
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Answered questions during discussion of HB 367.

NANCY MEADE, General Council
Administrative Staff
Office of the Administrative Director
Alaska Court System
Anchorage, Alaska

POSITION STATEMENT: Testified during discussion of HB 367.

KATE BURKHART, Executive Director
Advisory Board on Alcoholism & Drug Abuse;
Alaska Mental Health Board
Division of Behavioral Health
Department of Health and Social Services
Juneau, Alaska

POSITION STATEMENT: Testified in support of HB 367.

DIANE CASTO, Prevention & Early Intervention Manager
Prevention & Early Intervention Section
Division of Behavioral Health
Department of Health and Social Services
Juneau, Alaska

POSITION STATEMENT: Testified during discussion of HB 367.

SUSAN ASTLEY, Ph.D.
Professor of Pediatrics and Epidemiology
University of Washington;
Director
Washington State Fetal Alcohol Syndrome (FAS) Diagnostic &
Prevention Network
Seattle, Washington

POSITION STATEMENT: Testified during discussion of HB 367.

DEB EVENSON, Director
FAS Alaska
Homer, Alaska

POSITION STATEMENT: Testified during discussion of HB 367.

ACTION NARRATIVE

[3:10:27 PM](#)

CHAIR WES KELLER called the House Health and Social Services Standing Committee meeting to order at 3:10 p.m. Representatives Keller, Seaton, Millett, and Miller were present at the call to order. Representatives Herron, Kerttula, and Dick arrived as the meeting was in progress.

HB 367-FETAL ALCOHOL SPEC. DISORDER AS MITIGATOR

[3:11:03 PM](#)

CHAIR KELLER announced that the only order of business would be HOUSE BILL NO. 367, "An Act relating to mitigation at sentencing in a criminal case for a defendant found by the court to have been affected by a fetal alcohol spectrum disorder."

CHAIR KELLER moved to adopt the proposed committee substitute (CS) for HB 367, Version 27-LS1454\M, Gardner, 3/26/12, as the working document.

[3:11:36 PM](#)

REPRESENTATIVE SEATON objected for discussion.

[3:11:59 PM](#)

JANET OGAN, Staff, Representative Wes Keller, Alaska State Legislature, referring to the sponsor statement for HB 367 [Included in members' packets], read:

An Act relating to inclusion of fetal alcohol spectrum disorders, and intellectual disability in the definition of 'mental disease or defect'; and relating to mitigation at sentencing in a criminal case for a defendant affected by a mental disease or defect.

MS. OGAN explained that proposed HB 367 would add fetal alcohol spectrum disorder (FASD) as the definition for a mitigating factor in sentencing.

[3:13:11 PM](#)

REPRESENTATIVE SEATON withdrew his objection.

[Version M was adopted as the working document.]

CHAIR KELLER directed attention to the handout titled "CSSB 151/HB 367 FASD as a Mitigating Factor in Sentencing Explanation of Changes" [Included in members' packets] which listed the differences between the original bill and Version M. He clarified that Version M was presented to more closely align with CSSB 151 in the Senate.

MS. OGAN said that FASD was not currently included as a definition of mental disease for defining mitigating factors. She clarified that "this was not a get out free pass from jail," that the intent was for more appropriate sentencing for those with FASD. She reported that FAS treatment was necessary to reduce the level of recidivism. Referring to an earlier address to the Alaska State Legislature by Chief Justice Carpeneti during which he suggested that justices have more flexibility in sentencing, she stated that proposed HB 367 provided this flexibility in sentencing to those affected by FASD, as often there was not any cognitive understanding for their actions. She detailed that therapeutic court for treatment was another option. She reported that people with FASD were disproportionately represented in Alaska's criminal justice system.

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REPRESENTATIVE KERTTULA, referring to the aforementioned handout, asked to clarify whether the reference, "would prevent someone from claiming more than one mitigator," meant that only FASD could be claimed as a mitigator, and there could not be a claim for two mitigators.

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MS. OGAN deferred the response to another witness.

REPRESENTATIVE KERTTULA offered her belief that multiple mitigators could be claimed during criminal sentencing.

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CHRISTINE MARASIGAN, Staff, Senator Kevin Meyer, Alaska State Legislature, stated that Senator Meyer was the prime sponsor of the corresponding companion legislation, CSSB151, Version U, in

the Senate. In response to Representative Kerttula, she pointed to the language which had been removed on page 3, lines 13-14, and stated that the proposed legislation was not intended to create a mitigating factor to be used in addition to another mitigating factor, and further reduce the sentence. She stated that the intent was to add a mitigating factor for those with FASD and to target non-violent crimes.

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REPRESENTATIVE KERTTULA asked to clarify that the proposed bill did not intend to allow the use of the mental defect mitigator along with the FASD mitigator, but would still allow other mitigators.

MS. MARASIGAN expressed her agreement.

REPRESENTATIVE KERTTULA, directing attention to the exemption for arson and assault, asked what level of assault was exempted, as assault was included in many charges.

MS. MARASIGAN, in response, said that the intent of the proposed bill was directed toward non-violent offenses, and she stated that it was very difficult to parse out the levels of assault. She said that there had been extensive discussion with the Department of Law about this issue.

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REPRESENTATIVE KERTTULA, stating that mitigators applied across the board, asked if any other mitigator exempted from the crime of assault.

MS. MARASIGAN replied that there were other mitigators for assault, and that was the reason for it being exempted in the proposed bill.

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MS. MARASIGAN, in response to Representative Seaton, explained that the removal of lines 13-14, page 3, Version M, prevented the use of more than one mitigator.

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REPRESENTATIVE SEATON asked for further clarification.

CHAIR KELLER offered his belief that it was possible to "stack mitigators."

MS. MARASIGAN, clarifying that this was referenced in the proposed committee substitute, Version M, said that another testifier could describe this in more detail.

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REPRESENTATIVE SEATON cited that FASD often cognitively disassociated cause and effect, and he asked how a sentence reduction would alleviate the behavior and keep the public protected.

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MS. MARASIGAN agreed that this was a concern and that one idea was to extend probation instead of incarceration. She declared that a managed plan for sentencing was more cost effective, good for the prevention of recidivism, and good for public safety.

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MS. MARASIGAN, in response to Representative Seaton, directed attention to the chart, "Potential Savings by Diverting Alaskans with Fetal Alcohol Spectrum Disorder from Incarceration Based on 2011 Costs." [Included in members' packets] She stated that the chart clearly reflected the savings from probation and parole for FASD sufferers, instead of prison. She referred to the report, titled "SB 151/HB 367 - Inclusion of FASD as a Mitigating Factor" by the Alaska FASD Partnership, [Included in members' packets] which explained mitigating factors, defined FASD, and identified ways to diagnose FASD. She pointed out that it also reported on the Smart Justice program, which offered managed care as an alternative to incarceration.

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NANCY MEADE, General Council, Administrative Staff, Office of the Administrative Director, Alaska Court System, offered her belief that defendants could declare that more than one mitigator applied to their circumstances, although the burden of proof for clear and convincing evidence was on the defendant. She opined that a judge would be knowledgeable enough to not multiply similar mitigators, such as FASD and a mental disease. She pointed out that mitigators allowed a judge to offer a lesser sentence, up to 50 percent of the presumptive range.

REPRESENTATIVE SEATON asked where this was written in the proposed bill.

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MS. MEADE expressed her agreement that, although it was not written in the proposed bill, the judge could exercise experience and discretion for how much to mitigate. She declared that, although the proposed bill did not address the issue for double mitigation, most defendants would attempt to use any mitigators which fit their situation.

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CHAIR KELLER offered his belief that, although the original proposed bill, Version A, had prevented the use of multiple mitigators, the current working draft, Version M, had removed this prohibition.

REPRESENTATIVE SEATON offered his belief that, in Version A, the first exception was for arson or assault, and the second exception was for FASD.

CHAIR KELLER, directing attention to Version M, page 3, lines 20 - 21, stated that arson and crimes against a person did not apply.

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REPRESENTATIVE KERTTULA offered her belief that the language was the same in both versions and that Version M still allowed a defendant to claim both mitigators, but that the explanation of the proposed bill had stated that FASD and mental defect, as mitigators, could not both be claimed. She declared that judges only had a certain amount of latitude for sentencing.

[3:35:14 PM](#)

REPRESENTATIVE SEATON asked to clarify that the proposed bill, Version M, allowed for more than one mitigator to be claimed.

[3:35:45 PM](#)

REPRESENTATIVE MILLETT, directing attention to the aforementioned "Explanation of Changes," suggested that deleting

"This would prevent someone from claiming more than one mitigator" would clarify the confusion.

[3:36:15 PM](#)

CHAIR KELLER asked for a description as to how a judge would determine a sentence in lieu of prison.

MS. MEADE offered her belief that the proposed bill allowed the judge to lower the presumptive range for sentencing by 50 percent, when a mitigator was found, although it did not necessarily mean that a judge would sentence in lieu of prison time. She declared that the proposed bill put the burden on defendants to prove that a mitigator applied, and that the determination would be made at the sentencing hearing. She declared that the proposed bill did not require an alternative sentence.

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REPRESENTATIVE SEATON asked if, as there was not a requirement for an alternative sentence, those groups offering alternatives were "off on their own because there was no requirement that they cooperate or go through a half-way house or go through with other kinds of services."

[3:39:26 PM](#)

MS. MEADE said that treatment options were available, even if prison time was included in the sentencing. She stated that there were other treatment services available during probation, as well, and that judges could order that these services be used.

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REPRESENTATIVE MILLETT asked if the proposed bill would be a helpful tool for judges to lessen the sentences for people with mitigators.

MS. MEADE replied that all of the mitigators, if proven, gave more discretion to a judge for sentencing outside the presumptive ranges.

REPRESENTATIVE MILLETT asked if there had been any previous problem for the use of mental defect, instead of FASD, as a mitigator.

MS. MEADE, in response, said that a mitigating factor for mental disease or defect already existed. She stated that, as all people did not agree that FASD was a mental disease or defect, the proposed bill would ensure consistency for FASD as a mitigator.

REPRESENTATIVE MILLETT posed that the proposed bill was necessary to clarify that FASD was a mitigator to be taken into consideration during sentencing.

MS. MEADE expressed her agreement, and clarified that any crimes against the person, or arson, would be exceptions to the use of FASD as a mitigator.

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KATE BURKHART, Executive Director, Advisory Board on Alcoholism & Drug Abuse, Alaska Mental Health Board, Division of Behavioral Health, Department of Health and Social Services, stated that she was only speaking on behalf of the two boards. She noted that both boards were members of the Alaska FASD partnership, a volunteer coalition of advocates, and that the partnership had worked closely with the sponsor of the proposed bill. She declared her support for proposed HB 367, and stated that it had been a long, thoughtful, collaborative process with the Senate, the House, the community serving individuals with FASD, and the court system. She declared strong support for the need of FASD as a mitigator, as there was a disproportionate representation of individuals with FASD within the correctional system. She detailed that these individuals did not receive the diagnosis or the necessary services to successfully function in society. She declared, that by allowing judges the flexibility to reduce incarceration, extend probation, and make receipt of services part of probation, it would offer individuals with FASD an opportunity to successfully participate in the community, while balancing the concerns for public safety. She pointed out that this would save costs, and would achieve a better outcome for both the individual and the community. She noted that a judge could include treatment as a contingency for probation or parole, and that an FASD mitigator could allow for longer probation, electronic monitoring, residential services, and intensive case management. She declared that the proposed bill would balance the concerns for public safety with the concerns of disability advocates. She declared that this was smart justice, as it saved money and achieved better outcomes for communities and people with disabilities.

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CHAIR KELLER asked about the indeterminate fiscal note for approval of the FASD diagnosis. He questioned if there was a higher cost for those individuals on the margin of the FASD spectrum.

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MS. BURKHART, in response to Chair Keller, replied that the discussion for those qualified to diagnose FASD had been "taken up at length in the other body." She reported that, although a doctor could diagnose anyone with a medical condition, the most qualified, experienced people in Alaska were members of diagnostic teams which included, but were not limited to, a medical practitioner. She noted that eight communities had DHSS credentialed diagnostic teams, all of which followed a University of Washington model for diagnosing individuals. This model included a medical practitioner, a speech pathologist, a physical and/or occupational therapist, and a neuropsychologist and used an official diagnostic code. She reported that it was a long process for diagnosis. She declared that diagnosis by a single physician would result in a lower quality diagnosis.

CHAIR KELLER asked about the cost of the diagnosis by these teams. He asked how many diagnoses were performed annually.

MS. BURKHART, in response, said that she did not know the cost, and that some teams met more often, which allowed for more diagnoses.

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CHAIR KELLER asked if the courtroom judge had access to these teams during the decision making at sentencing.

MS. BURKHART replied that it would be possible in those communities with active teams, which included Juneau, Bethel, Fairbanks, Anchorage, and Sitka. She shared that there had been discussion for the formation of a traveling team.

CHAIR KELLER asked what percentage of the corrections population was FASD.

MS. BURKHART replied that the Department of Corrections anecdotal information was to a high percentage, above 75

percent, but that she could not validate it. She said that the Alaska Mental Health Trust Authority had estimated that 42 percent of the corrections population experienced a cognitive disability, including FASD. She said that this was consistent with the national statistics that there was a disproportionate representation in the correctional system by individuals with cognitive disability.

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MS. BURKHART, in response to Chair Keller, said that Canada was far ahead in addressing this issue.

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DIANE CASTO, Prevention & Early Intervention Manager, Prevention & Early Intervention Section, Division of Behavioral Health, Department of Health and Social Services, in response to Chair Keller, said that the cost for diagnosis was indeterminate. She explained that teams were certified with a provider agreement, which was similar to a grant for an individual or agency, and designated as a qualified provider of a specific service. She said that qualified teams had to include psychological testing, speech and language testing, motor skills testing, a medical doctor, and a parent navigator to work with the family. She stated that training and certifications were required, as well as training in the University of Washington diagnostic code process mentioned earlier. She explained that the fiscal arrangement was for \$3000 per diagnosis, paid at the completion of the diagnosis and the submission of the data. She said that the provider agreement amount was based on evaluation data from an earlier fund for FASD diagnosis, which had ranged from \$3000 to \$5000 per diagnosis. She noted that the larger metro areas had lower costs, as the cost at University of Washington was \$1200 to \$1500. She reported that this evaluation report had also ascertained an estimate for the billing of services to Medicaid to be \$1200 to \$1500. She clarified that DHSS would pay up to \$3000, with any additional cost to be billed to Medicaid by the diagnostic team. She reported that two communities, Dillingham and Kodiak, had recently approached her about renewing their diagnostic teams. She shared that each community would set up the diagnostic team process that worked best for the community.

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MS. CASTO noted that the diagnostic capacity for each team varied. She reported that there had been 1,683 diagnoses from 2000 to 2011, an average of 153 diagnoses per year, with 179 diagnoses in the prior year. She said that \$518,000 was designated for about 160 diagnoses per year.

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REPRESENTATIVE MILLETT asked if there would be an increase to caseloads if the proposed bill was passed.

MS. CASTO replied that it was hard to know, as it was not known how many afflicted people were in the correctional system. She declared that the majority of diagnoses had been for younger children, as some teams had determined that the critical age was for youth 12 years or younger, although some teams did provide diagnostic services for adults. She reported that the final cost element to review would be for the development of teams, as there was not any seed money to build more capacity. She surmised that, as there was a good foundation of teams, greater capacity could be built over time.

[4:10:40 PM](#)

REPRESENTATIVE MILLETT asked about a diagnosis of the prison population, in order to offer treatments which would lower the recidivism rates.

MS. CASTO, in response to Chair Keller, said that the majority of team members worked for agencies which volunteered the member's time to the team.

[4:12:29 PM](#)

REPRESENTATIVE MILLER asked at what age could there be a definitive diagnosis for FASD.

MS. CASTO clarified that FASD was an umbrella term, and not a diagnosis. She declared that some children could be diagnosed at birth, given the surrounding conditions prior to birth. However, the majority of children were diagnosed after three years of age, as it was necessary to have a certain amount of interaction. She said that the average age for diagnosis was between seven and twelve years of age, and that the majority were not even recognized to have a need for diagnosis until they started school and their behavior showed an inability to manage things.

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REPRESENTATIVE MILLER asked if there was any treatment, at a young age, to mitigate the behavior.

MS. CASTO replied that early diagnosis could accommodate a system for success, although the "disability related to pre-natal exposure to alcohol is a permanent lifelong disability."

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REPRESENTATIVE MILLER, offering an example of a young son diagnosed with FASD, asked if there were any identification card for diagnosis.

MS. CASTO replied that it was a good idea to keep a copy of the diagnosis, as this fully explained the range of the disability, and the strengths and challenges for the individual. She stated that most parents would keep this file to share with schools, camps, individual education planners, and activities. She declared that one challenge faced by parents was the need to educate the providers about the disability.

4:18:09 PM

REPRESENTATIVE MILLER, offering an example of a son involved in criminal behavior who appeared in front of a judge, asked how well disposed was the legal system to accept that this was a legitimate mitigating factor.

MS. CASTO opined that the DHSS trainings with judges, public defenders, and attorney generals had educated the majority of the legal community to better understand the disability, and that, as a result, the Alaska legal system was very receptive to FASD issues. She declared a challenge to be that it was a hidden disability; although a person could look normal, the damage was in the brain.

4:21:11 PM

SUSAN ASTLEY, Ph.D., Professor of Pediatrics and Epidemiology, University of Washington; Director, Washington State Fetal Alcohol Syndrome (FAS) Diagnostic & Prevention Network, stated that she was a founder of the FAS Diagnostic & Prevention Network in 1992, as well as the author of the aforementioned FASD 4 digit diagnostic code. She reported that Alaska was the

first state to adopt the Washington State interdisciplinary model of FASD diagnosis. She reported that diagnostic evaluation was very cost effective and the least expensive means for FAS diagnosis, as the diagnostic teams followed guidelines. She declared that, as a clinical researcher, she had discovered that a stable, supportive environment for the individual, not incarceration, was the most protective factor for mitigation of the disability. She stated that a stable environment could diminish the disability, while incarceration would exacerbate it. She declared this to be one reason for increased recidivism, noting that Canadian research also supported that intervention had resulted in a reduction in recidivism.

[4:25:33 PM](#)

DEB EVENSON, Director, FAS Alaska, reported that she had been working on fetal alcohol issues in Alaska and Canada for 25 years. She stated that her recent FAS work in the Yukon Territory recognized that the use of mitigating factors by the courts and structured support systems for a stable environment decreased the recidivism rate. She opined that this understanding would have "some really good outcomes."

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CHAIR KELLER closed public testimony.

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REPRESENTATIVE SEATON stated that mitigation factors and shortened sentences, combined with effective FAS services, reflected an expectation that the judicial system work to use these FAS services in order to improve lives and reduce recidivism.

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CHAIR KELLER declared his presumption that those who care will continue to work with the court system to look for options.

[4:29:41 PM](#)

REPRESENTATIVE DICK moved to report CSHB 367, Version 27-LS1454\M, Gardner, 3/26/12, out of committee with individual recommendations and the accompanying indeterminate fiscal notes. There being no objection, CSHB 367 (HSS) was reported from the House Health and Social Services Standing Committee.

4:30:38 PM

ADJOURNMENT

There being no further business before the committee, the House Health and Social Services Standing Committee meeting was adjourned at 4:30 p.m.