

**HB**

**367**

<TARGET><BILL>HB 367</BILL><SUBJECT>HB  
367</SUBJECT><COMM>HHSS27</COMM></TARGET>

# Alaska State Legislature

Rep. Alan Dick  
Rep. Beth Kerttula  
Rep. Bob Herron  
Rep. Bob Miller  
Rep. Charisse Millett  
Rep. Paul Seaton



State Capitol, Room 432  
Juneau, AK 99801-1182

Chair

Rep. Wes Keller  
Phone: (907) 465-2186  
Fax: 465-3818

## House Health and Social Service Committee

### Sponsor Statement for HB 367

*“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.”*

HB 367 would include Fetal Alcohol Spectrum Disorders (FASD) as *impaired brain function* under the state’s existing definition of *mental disease or defect*. If HB 367 passed, FASD could apply as a mitigating factor in sentencing. This would allow some flexibility in sentencing for those who are affected by FASD when there is clear and convincing evidence that the defendant has an *impaired brain function* as defined under *mental disease or defect*.

HB 367 does not require a judge to use the mitigating factor and it DOES NOT automatically adjust a presumptive sentence. The defense would have to prove that the defendant’s disability *significantly affected the defendant’s conduct and substantially impaired judgment, behavior, and capacity to recognize reality* in order to apply the mitigating factor.

Evidence shows that directing people with mental illness and other brain disorders to supported services, both inside and outside of Corrections, significantly reduces the high financial and social costs associated with re-incarceration and recidivism. Felons and repeat offenders with an FASD are more likely to stop committing crimes when they are given the same supports that benefit people with mental illness and other disabilities, which can include Therapeutic Court, housing and employment assistance, case management, counseling and rehabilitation.

27-LS1454M  
Gardner  
3/26/12

**CS FOR HOUSE BILL NO. 367( )**  
**IN THE LEGISLATURE OF THE STATE OF ALASKA**  
**TWENTY-SEVENTH LEGISLATURE - SECOND SESSION**

**BY**

**Offered:**  
**Referred:**

**Sponsor(s): HOUSE HEALTH AND SOCIAL SERVICES COMMITTEE**

**A BILL**  
**FOR AN ACT ENTITLED**

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

3 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

4 **\* Section 1.** AS 12.55.155(d) is amended to read:

5 (d) The following factors shall be considered by the sentencing court if proven  
6 in accordance with this section, and may allow imposition of a sentence below the  
7 presumptive range set out in AS 12.55.125:

8 (1) the offense was principally accomplished by another person, and  
9 the defendant manifested extreme caution or sincere concern for the safety or well-  
10 being of the victim;

11 (2) the defendant, although an accomplice, played only a minor role in  
12 the commission of the offense;

13 (3) the defendant committed the offense under some degree of duress,  
14 coercion, threat, or compulsion insufficient to constitute a complete defense, but that

1 significantly affected the defendant's conduct;

2 (4) the conduct of a youthful defendant was substantially influenced by  
3 another person more mature than the defendant;

4 (5) the conduct of an aged defendant was substantially a product of  
5 physical or mental infirmities resulting from the defendant's age;

6 (6) in a conviction for assault under AS 11.41.200 - 11.41.220, the  
7 defendant acted with serious provocation from the victim;

8 (7) except in the case of a crime defined by AS 11.41.410 - 11.41.470,  
9 the victim provoked the crime to a significant degree;

10 (8) before the defendant knew that the criminal conduct had been  
11 discovered, the defendant fully compensated or made a good faith effort to fully  
12 compensate the victim of the defendant's criminal conduct for any damage or injury  
13 sustained;

14 (9) the conduct constituting the offense was among the least serious  
15 conduct included in the definition of the offense;

16 (10) the defendant was motivated to commit the offense solely by an  
17 overwhelming compulsion to provide for emergency necessities for the defendant's  
18 immediate family;

19 (11) after commission of the offense for which the defendant is being  
20 sentenced, the defendant assisted authorities to detect, apprehend, or prosecute other  
21 persons who committed an offense;

22 (12) the facts surrounding the commission of the offense and any  
23 previous offenses by the defendant establish that the harm caused by the defendant's  
24 conduct is consistently minor and inconsistent with the imposition of a substantial  
25 period of imprisonment;

26 (13) the defendant is convicted of an offense specified in AS 11.71 and  
27 the offense involved small quantities of a controlled substance;

28 (14) the defendant is convicted of an offense specified in AS 11.71 and  
29 the offense involved the distribution of a controlled substance, other than a schedule  
30 IA controlled substance, to a personal acquaintance who is 19 years of age or older for  
31 no profit;

1 (15) the defendant is convicted of an offense specified in AS 11.71 and  
2 the offense involved the possession of a small amount of a controlled substance for  
3 personal use in the defendant's home;

4 (16) in a conviction for assault or attempted assault or for homicide or  
5 attempted homicide, the defendant acted in response to domestic violence perpetrated  
6 by the victim against the defendant and the domestic violence consisted of aggravated  
7 or repeated instances of assaultive behavior;

8 (17) except in the case of an offense defined by AS 11.41 or  
9 AS 11.46.400, the defendant has been convicted of a class B or C felony, and, at the  
10 time of sentencing, has successfully completed a court-ordered treatment program as  
11 defined in AS 28.35.028 that was begun after the offense was committed;

12 (18) except in the case of an offense defined under AS 11.41 or  
13 AS 11.46.400 or a defendant who has previously been convicted of a felony, the  
14 defendant committed the offense while suffering from a mental disease or defect as  
15 defined in AS 12.47.130 that was insufficient to constitute a complete defense but that  
16 significantly affected the defendant's conduct;

17 (19) the defendant is convicted of an offense under AS 11.71, and the  
18 defendant sought medical assistance for another person who was experiencing a drug  
19 overdose contemporaneously with the commission of the offense;

20 (20) except in the case of an offense defined under AS 11.41 or  
21 AS 11.46.400, the defendant committed the offense while suffering from a  
22 condition diagnosed as a fetal alcohol spectrum disorder, the fetal alcohol  
23 spectrum disorder substantially impaired the defendant's judgment, behavior,  
24 capacity to recognize reality, or ability to cope with the ordinary demands of life,  
25 and the fetal alcohol spectrum disorder, though insufficient to constitute a  
26 complete defense, significantly affected the defendant's conduct; in this  
27 paragraph, "fetal alcohol spectrum disorder" means a condition of impaired  
28 brain function in the range of permanent birth defects caused by maternal  
29 consumption of alcohol during pregnancy.

# CSSB 151/HB 367 FASD AS A MITIGATING FACTOR IN SENTENCING

## Explanation of Changes

### HHSS

Differences between HB 367 and the CS, which if adopted makes bill similar to CSSB 151 version U which just passed Senate Finance.

- Section (18), page 3, lines 13-14 has been deleted, which makes the FASD mitigating factor stand alone in Section (20). This would prevent someone from claiming more than one mitigator.
- Section (20), page 3, line 20 and 21 the language exempting arson and assault was added. The intent of this bill is to provide flexibility for non-violent offenders who are affected by FASD. If a rape or arson has occurred, this mitigator would not apply.
- Section (20), page 3, line 30 has been deleted. It is not outlined for other mitigating factors how mental disease or defect is determined. This can be done for FASD as it is with other mitigators; through clear and convincing evidence, the court can find someone to be suffering from a mental disease or defect.

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Chair

Rep. Wes Keller  
Phone: (907) 465-2186  
Fax: 465-3818

## House Health and Social Service Committee

### MEMO

To: Representative Carl Gatto, Chair  
Judiciary

Fm: Representative Wes Keller

Date: March 29, 2012

Re: Request for Hearing on HB367 pending referral

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Please consider this as a request for you to schedule HB367 "Fetal Alcohol Spectrum Disorder as Mitigator" before the House Judiciary Committee. Included with the formal request please find a packet of information and documents in pdf format.

HB367 would include Fetal Alcohol Spectrum Disorder (FASD) as *impaired brain function* under the state's existing definition of *mental disease or defect*. FASD could apply as a mitigating factor in sentencing. This would allow some flexibility in sentencing those who are affected by FASD when there is *clear* and *convincing* evidence that the defendant has an *impaired brain* as defined under *the mental disease or defect*.

Thank you for your consideration your consideration of this request.

# FISCAL NOTE

STATE OF ALASKA  
2012 LEGISLATIVE SESSION

Bill Version HB367  
Fiscal Note Number \_\_\_\_\_  
( ) Publish Date \_\_\_\_\_

Identifier (file name) HB367-DOA-OPA-3-30-12 Dept. Affected Administration  
Title Fetal Alcohol Spec. Disorder as Mitigator Appropriation Legal and Advocacy Services  
Allocation Office of Public Advocacy  
Sponsor Health & Social Services  
Requester House Health & Social Services OMB Component Number 43

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
			FY14	FY15	FY16	FY17	FY18
<b>OPERATING EXPENDITURES</b>	<b>FY13</b>	<b>FY13</b>	<b>FY14</b>	<b>FY15</b>	<b>FY16</b>	<b>FY17</b>	<b>FY18</b>
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>FUND SOURCE</b>		(Thousands of Dollars)					
1002	Federal Receipts						
1003	GF Match						
1004	GF						
1005	GF/Prgm (DGF)						
1037	GF/MH (UGF)						
1178	temp code (UGF)						
<b>TOTAL</b>		<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>POSITIONS</b>							
Full-time							
Part-time							
Temporary							

<b>CHANGE IN REVENUES</b>							
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Estimated **SUPPLEMENTAL (FY12) operating costs** \_\_\_\_\_ (separate supplemental appropriation required)  
(discuss reasons and fund source(s) in analysis section)

Estimated **CAPITAL (FY13) costs** \_\_\_\_\_ (separate capital appropriation required)  
(discuss reasons and fund source(s) in analysis section)

**Why this fiscal note differs from previous version (if initial version, please note as such)**

Not applicable, initial version

Prepared by Richard Allen  
Division Office of Public Advocacy  
Approved by John Cramer, Deputy Commissioner  
Department of Administration

Phone 907-269-3504  
Date/Time 3/30/12 3:00 PM  
Date 3/30/2012

**FISCAL NOTE**

**STATE OF ALASKA  
2012 LEGISLATIVE SESSION**

**BILL NO.** HB367

**Analysis**

AS 12.55.155(d) allows a sentencing court to impose a sentence less than the presumptive range where mitigating factors have been proven. This bill amends AS 12.55.155(d) by adding section 20, which allows the court to find a factor of mitigation where the defendant committed the offense while affected by fetal alcohol spectrum disorder.

The Office of Public Advocacy (OPA) does not anticipate a fiscal impact from this change. Accordingly, OPA submits a zero fiscal note.

# FISCAL NOTE

STATE OF ALASKA  
2012 LEGISLATIVE SESSION

Bill Version HB367  
Fiscal Note Number \_\_\_\_\_  
( ) Publish Date \_\_\_\_\_

Identifier (file name) HB367-DOA-PDA-3-30-12 Dept. Affected Administration  
Title Fetal Alcohol Spec. Disorder as Mitigator Appropriation Legal and Advocacy Services  
Allocation Public Defender Agency  
Sponsor Health & Social Services  
Requester House Health & Social Services OMB Component Number 1631

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
			FY14	FY15	FY16	FY17	FY18
<b>OPERATING EXPENDITURES</b>	<b>FY13</b>	<b>FY13</b>	<b>FY14</b>	<b>FY15</b>	<b>FY16</b>	<b>FY17</b>	<b>FY18</b>
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

**FUND SOURCE** (Thousands of Dollars)

1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
<b>TOTAL</b>		<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

**POSITIONS**

Full-time							
Part-time							
Temporary							

**CHANGE IN REVENUES**

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Estimated SUPPLEMENTAL (FY12) operating costs \_\_\_\_\_ (separate supplemental appropriation required)  
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs \_\_\_\_\_ (separate capital appropriation required)  
(discuss reasons and fund source(s) in analysis section)

**Why this fiscal note differs from previous version (if initial version, please note as such)**

Not applicable, initial version

Prepared by Quinlan Steiner  
Division Public Defender Agency  
Approved by John Cramer, Deputy Commissioner  
Department of Administration

Phone 907 334-4414  
Date/Time 3/30/12 2:15 PM  
Date 3/30/2012

FISCAL NOTE

STATE OF ALASKA  
2012 LEGISLATIVE SESSION

BILL NO. HB367

**Analysis**

AS 12.55.155(d) allows a sentencing court to impose a sentence less than the presumptive range where mitigating factors have been proven. This bill amends AS 12.55.155(d) by adding section 20, which allows the court to find a factor of mitigation where the defendant committed the offense while affected by fetal alcohol spectrum disorder.

The Public Defender Agency does not anticipate a fiscal impact from this change. Accordingly, the Agency submits a zero fiscal note.

# FISCAL NOTE

**STATE OF ALASKA**  
**2012 LEGISLATIVE SESSION**

Bill Version HB 367  
 Fiscal Note Number \_\_\_\_\_  
 () Publish Date \_\_\_\_\_

Identifier (file name) HB367-LAW-CRIM-03-30-12 Dept. Affected Law  
 Title An Act relating to mitigation at sentencing in a criminal Appropriation Criminal  
case for a defendant found by the court to have been... Allocation Criminal Justice Litigation  
 Sponsor Health & Social Services  
 Requester (H) Health & Social Services OMB Component Number 2202

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates					
			FY13	FY14	FY15	FY16	FY17	FY18
<b>OPERATING EXPENDITURES</b>								
Personal Services	***	***	***	***	***	***	***	***
Travel								
Services								
Commodities								
Capital Outlay								
Grants, Benefits								
Miscellaneous								
<b>TOTAL OPERATING</b>	***	***	***	***	***	***	***	***

<b>FUND SOURCE</b>		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
<b>TOTAL</b>		***	***	***	***	***	***	***

<b>POSITIONS</b>								
Full-time								
Part-time								
Temporary								

<b>CHANGE IN REVENUES</b>								
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Estimated **SUPPLEMENTAL (FY12) operating costs** \_\_\_\_\_ (separate supplemental appropriation required)  
 (discuss reasons and fund source(s) in analysis section)

Estimated **CAPITAL (FY13) costs** \_\_\_\_\_ (separate capital appropriation required)  
 (discuss reasons and fund source(s) in analysis section)

**Why this fiscal note differs from previous version (if initial version, please note as such)**

Not applicable, initial version.

Prepared by Sheila Bugbee, Administrative Officer  
 Division Administrative Services  
 Approved by Michael C. Geraghty, Attorney General  
Department of Law

Phone 465-3675  
 Date/Time 3/30/12 12:00 PM  
 Date 3/30/2012

FISCAL NOTE

STATE OF ALASKA  
2012 LEGISLATIVE SESSION

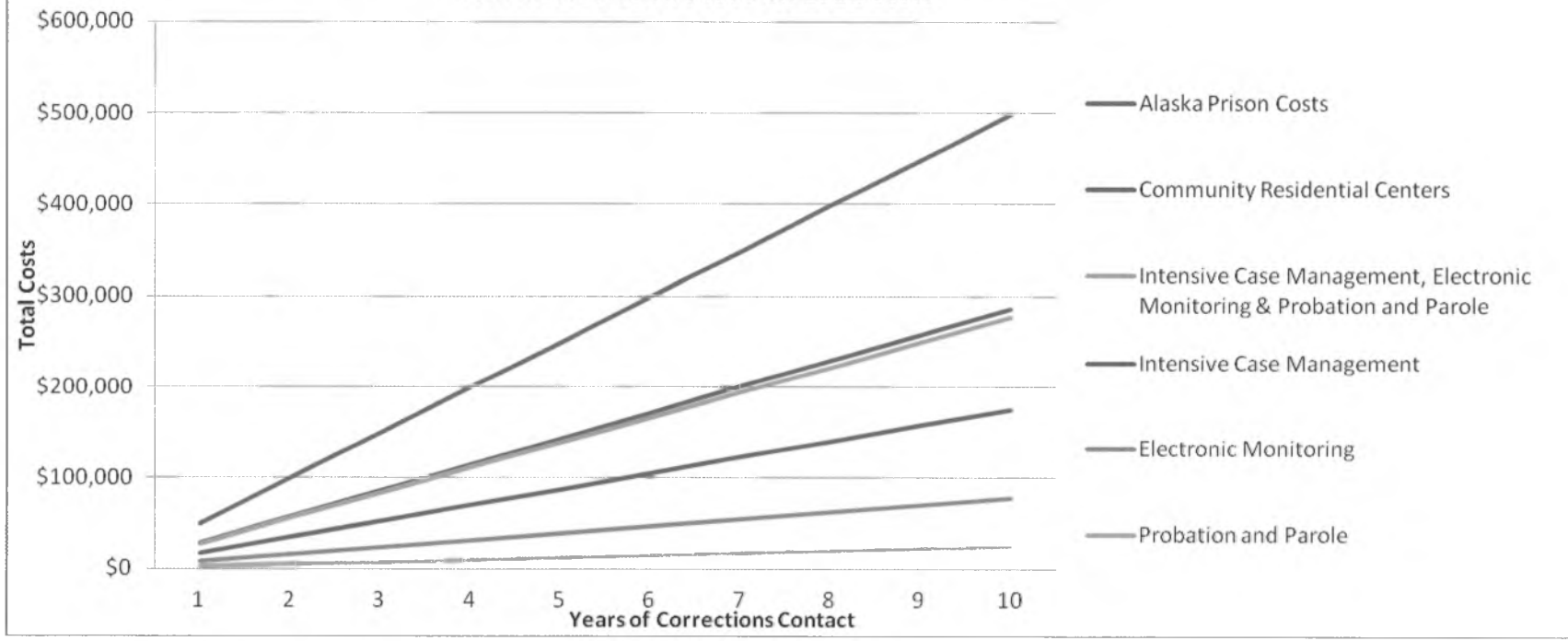
BILL NO. HB 367

**Analysis**

HB 367 would add a mitigating factor at sentencing. It would allow a new mitigator if the defendant was affected by a fetal alcohol spectrum disorder that significantly affected the defendant's behavior. If proven, the court would have discretion to reduce the term of imprisonment to below the presumptive range.

The fiscal impact for the Department of Law is indeterminate because it will require expert testimony on the issue of whether the person suffers from such a disorder and if so, did it significantly affect his or her behavior.

**Potential Savings by Diverting Alaskans with Fetal Alcohol Spectrum Disorder  
from Incarceration Based on 2011 Costs**



	Alaska Prison Costs	Community Residential Centers	Intensive Case Management, Electronic Monitoring & Probation and Parole	Intensive Case Management	Electronic Monitoring	Probation and Parole
Daily Costs	\$136.44	\$78.34	\$76.01	\$48.00	\$21.25	\$6.76
Yearly Costs	\$49,800.60	\$28,594.10	\$27,743.65	\$17,520.00	\$7,756.25	\$2,467.40



**Alaska Fetal Alcohol Spectrum Disorders (FASD) Partnership**  
431 N. Franklin St. Suite 203, Juneau, Alaska 99801 • (907) 465-8920  
Webpage: [www.hss.state.ak.us/fasd.htm](http://www.hss.state.ak.us/fasd.htm)  
Email: [akfasdpartnership@alaska.gov](mailto:akfasdpartnership@alaska.gov)

## **SB 151/HB 367 - Inclusion of FASD as a Mitigating Factor**

### **The Need for SB 151/HB 367**

Individuals diagnosed with a fetal alcohol spectrum disorder (FASD) are disproportionately represented within Alaska's criminal justice system. The intent underlying Alaska's sentencing structure – that people will modify their behaviors based on the criminal justice system's response to their crimes – is not met when applied to individuals with FASD. These disabilities manifest as deficits in executive function, resulting in impaired adaptive behavior, memory difficulties, an inability to plan, and a failure to recognize the consequences of actions. In the interest of justice, it is important to take these deficits into account during sentencing. Neither the offender nor society benefits from holding individuals with FASD to community standards that they cannot possibly attain given their impairments.

SB 151/HB 367 fulfills a recommendation adopted by the Alaska Criminal Justice Assessment Commission: "The legislature should create a statutory mitigating factor for use at criminal sentencing, recognizing when the wrongful conduct was substantially affected by an organic brain disorder."<sup>1</sup>

A draft resolution being proposed by the Commission on Youth At Risk of the American Bar Association for consideration at this year's annual ABA meeting states: "... the American Bar Association urges lawyers and judges, as well as bar associations and law school clinical programs, to support training that includes law school law enforcement, and legal/judicial education curricula on enhanced awareness of the child and adult disability of Fetal Alcohol Spectrum Disorders (FASD) and its impact on individuals in the child welfare, juvenile justice, and adult criminal justice systems, and that they work with medical, mental health, and FASD disability experts to promote: ... (d) applying FASD as a mitigating factor in the mitigation of juvenile justice and criminal sentencing ... and consideration of alternatives to incarceration that reduce recidivism."

### **Overview of the changes proposed in SB 151/HB 367**

SB 151/HB 367 proposes to allow FASD as a mitigating factor for sentencing in certain cases where there is *clear and convincing* evidence that a "defendant committed [an] offense while suffering from a condition diagnosed as a fetal alcohol spectrum disorder, the fetal alcohol spectrum disorder substantially impaired the defendant's judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life, and the fetal alcohol spectrum disorder, though insufficient to constitute a complete defense, significantly affected the defendant's conduct."

SB 151/HB 367 would, for the purposes of the subsection on mitigating factors, define fetal alcohol spectrum disorder as any "a condition of impaired brain function in the range of permanent birth defects caused by maternal consumption of alcohol during pregnancy."

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<sup>1</sup> Alaska Criminal Justice Assessment Commission (2000). *Final Report*. Retrieved October 12, 2010 from [www.hss.ak.gov/reports/CJAC\\_Final\\_2004.pdf](http://www.hss.ak.gov/reports/CJAC_Final_2004.pdf), at p.71.

The legislation *DOES NOT*:

- 1) *require* a judge to use the mitigating factor;
- 2) *automatically* adjust a presumptive sentence; the defendant would have to prove by *clear and convincing evidence* 1) that he or she has a fetal alcohol spectrum disorder and 2) that the condition “significantly affected the defendant’s conduct” before the judicial officer can consider the possibility of adjusting the presumptive sentence; or
- 3) the goal is not a “get out of jail free” card, but an attempt to be “smarter” within the justice system to better direct people who have impaired brain function to services both within and after release from the criminal justice system.

### **What are mitigating factors?**

The Legislature has decided in the presumptive sentencing law that judges should give jail time within certain ranges in all felonies (with the exception of “class C felonies” where the minimum presumptive term is 0 years). The amount of the presumptive term depends on the severity of the crime and whether or not a defendant has prior felonies. There are 34 statutory aggravating factors that could result in a sentence above the presumptive range, if proved by clear and convincing evidence. A judge must sentence a person to at least the minimum presumptive term unless a “mitigating factor” is shown by clear and convincing evidence. There are 19 statutory mitigating factors. With the current mental disease or defect mitigating factor, the defendant must *also* show by clear and convincing evidence that the condition “significantly affected the defendant’s conduct.” The proposed fetal alcohol spectrum disorder mitigating factor also requires proof by clear and convincing evidence that the condition “significantly affected the defendant’s conduct” before a judge could consider it. If the required showing has been made for any mitigating factor, it is legally possible for the judge to sentence below the minimum term (but if the minimum term is more than 4 years, the lower limit is half the minimum presumptive term).

There are special rules when there is a factor in a case that does not fit within the statutory list but which is so important in a case that it would be manifestly unjust to sentence a person without considering the factor. If the sentencing judge finds that such a “non statutory mitigating factor” exists, then the judge must refer the case to a three judge sentencing panel. If at least two judges on the panel agree, the panel can sentence with the same lower limits applicable to a statutory mitigating factor. If the panel does not agree, the case is referred back to the original judge to impose at least the minimum presumptive term. The “three judge panel” method is very cumbersome, time consuming and expensive. SB 151/HB 367 is a “statutory mitigating factor” and would not require any referral to a three judge sentencing panel.

### **What are Fetal Alcohol Spectrum Disorders?**

FASD is not a medical diagnosis, but an umbrella term for the range of diagnoses associated with damage caused by maternal alcohol consumption during pregnancy. These medical diagnoses can include Fetal Alcohol Syndrome (FAS), Partial Fetal Alcohol Syndrome (PFAS), Alcohol-Related Birth Defects (ARBD), and Alcohol-Related Neurodevelopmental Disorder (ARND). Note that the term, Fetal Alcohol Effects (FAE), is no longer commonly used, having been replaced by the PFAS, ARBD and ARND diagnoses.

Each diagnosis has its own symptoms and attributes, but common among all the diagnoses is permanent, life-long brain damage – often affecting decision-making, judgment and impulse control.

FASD is a brain-based disorder, similar to autism, traumatic and acquired brain injury, and other cognitive impairments.

FASDs appear in individuals differently. Some alcohol-exposed individuals may exhibit impulsivity, hyperactivity and risky behaviors. Some have difficulties with memory, while others have very good memories. Some have low IQs, while others have normal IQs.

Experts report that the different presentations are influenced by many variables, including when the mother drank, how much she drank, the genetic makeup (or genotype) of the baby, and the genotype of the mother.

Primary behavior characteristics of people with impaired brain function include: impulsiveness, memory difficulties, anger and frustration, difficulty pairing actions to consequences. Secondary behaviors that develop in reaction to or as a result of the primary disability, include substance abuse and mental health problems, anger and aggression, homelessness, involvement with the criminal justice system, and more.

Neurologist Dr. Susan Hunter-Joerns, a member of the Juneau FASD Diagnostic Team, wrote that structural brain damage “often significantly impair[s] cognitive behavior, common sense, the ability to understand right from wrong, cause-and-effect, consider consequences, ability to recognize social norm ... even though defendants may verbally seem able to talk about the issues. Making long term goals, planning appropriate actions, delaying gratification, and understanding the legal system, are often significant problems.”

#### **Who in Alaska is qualified to give a diagnosis of FAS/FASD?**

Though some physicians may be qualified to diagnose all the disorders on the FASD spectrum, the preferred method of diagnosis, according to Susan Astley, Professor of Epidemiology and Pediatrics at the University of Washington and director of the Washington State FASD Diagnostic and Prevention Network, is by an interdisciplinary diagnostic team using current, rigorous FASD diagnostic guidelines. This preferred method is also advocated for nationally by the Centers for Disease Control and Prevention.

Each diagnosis on the spectrum requires evaluation and testing related to the Central Nervous System (CNS) to detect damage that cannot be measured alone by physical attributes. Interdisciplinary diagnostic teams using the 4-Digit Diagnostic Code include evaluations by a medical professional, psychologist, occupational therapist, and speech-language pathologist. These evaluations can detect the nuances of the disability.

#### **How many diagnostic teams and/or physicians are available to give FASD diagnoses in Alaska?**

Currently, through the Division of Behavioral Health FASD Diagnostic Team Provider Agreement, Alaska has eight active FASD diagnostic teams – in Bethel, Fairbanks, Mat-Su, Kenai, Juneau, Sitka, and two in Anchorage (Southcentral Foundation and ASSETS). Alaska also has a trained diagnostic team at Alaska Psychiatric Institute (API) for children who enter the service system through that door. In the past there were teams in Dillingham and Kodiak — both locations that are interested in reviving their teams at some point, but do not have the resources to do it at this time. Alaska also has had team in Nome, Copper Center, and Ketchikan. The majority of FASD diagnoses in Alaska are determined by the diagnostic teams overseen by DHSS.

### **How many people are diagnosed with FAS/FASD in Alaska annually?**

In 2011, Alaska's FASD diagnostic teams diagnosed 179 individuals. The average per year number is around 153 per year, according to the Alaska Department of Health & Social Services.

### **What is Alaska's diagnostic standard based on?**

In 1999, the DHSS Office of FAS, in conjunction with the statewide FASD Steering Committee, agreed to use the 4-Digit Diagnostic Code as the standard diagnostic system for Alaska's developing Diagnostic Team Network. The 4-Digit Diagnostic Code was developed at the University of Washington's FASD Diagnostic and Prevention Network by Drs. Susan Astley and Sterling Clarren. The 4-Digit Diagnostic Code measures: 1) facial features, 2) growth deficiency, 3) central nervous system damage/dysfunction, and 4) prenatal alcohol exposure. The client's diagnosis is derived after a thorough evaluation by an interdisciplinary team of professionals, which generally includes a physician (or nurse practitioner), psychologist, occupational therapist, speech-language pathologist, social worker, and family advocate. For more information on the FASD 4-Digit Code, visit: <http://depts.washington.edu/fasdpn/htmls/4-digit-code.htm>.

The 4-Digit Diagnostic Code is considered the "gold standard" for FASD diagnosis and provides a reliable, evidence-based diagnostic process that gives detailed information about the individual client and how best to help that person work with their disability to reach their full potential. All team members are required to complete the University of Washington FASD 4-Digit Diagnostic Code Training Course.

### **The economic benefits of SB 151/HB 367**

The cost of incarceration in Alaska's prison is about \$136 per day. Over the course of five to ten years in an Alaskan prison, an inmate is expected to cost the state close to \$250,000-\$500,000 (not including medical, mental health or other specialized treatment while incarcerated).

The cost of intensive case management, including electronic monitoring and probation/parole, is about \$76 per day (\$48 for intensive case management, \$21 for electronic monitoring, \$7 for probation/parole) – for a savings of \$21,900 per person, per year.<sup>2</sup>

According to the 2009 ISER Study, *The Cost of Crime: Could the State Reduce Future Crime and Save Money by Expanding Education and Treatment Programs?*, the cost of providing services is less than the cost of incarceration. With appropriate supports, clients with FASD, T/ABI and other brain-based disabilities can live successfully in the community as contributing citizens, and provide jobs for Alaskan case workers, clinicians, assisted living providers, mental health and substance abuse counselors, psychologists and psychiatrists. Not only does SB 151/HB 367 further the cause of justice for a vulnerable population, it represents a better investment of our state's resources.

### **FASD in other jurisdictions**

Judges nationwide are experiencing repeat offenders diagnosed with these disorders who, as a direct result of their disabilities, are effectively unable to understand the charges against them, or comply with the conditions of their sentence. There is a growing body of research affirming that FASDs are

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<sup>2</sup> Source for Prison, Community Residential Centers, Electronic Monitoring & Probation and Parole: [http://www.ahfc.us/iceimages/homeless/102211\\_ach\\_doc\\_discharge\\_stats.pdf](http://www.ahfc.us/iceimages/homeless/102211_ach_doc_discharge_stats.pdf). Note: Intensive Case Management estimated costs are based on the most intensive case management with a high level of education and supervision for workers. Actual costs, depending on the case mix, may be lower.

brain disorders effectively impairing “judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life.”

Kate Burkhart, attorney and executive director of the Alaska Advisory Board on Alcoholism and Drug abuse, wrote that the language in SB 151/HB 367 “is commensurate with the federal sentencing guidelines and other western state laws that provide for such a mitigating factor. While none of the western states surveyed expressly include FASD in their definitions of mental defect, Utah includes a broad definition that would include FASD. The other states and federal guidelines would permit but do not mandate consideration of FASDs in sentencing unless they impair comprehension or ability to form intent.”

Burkhart noted that Utah defines “mental illness” as “a mental disease or defect that substantially impairs a person’s mental, emotional, or behavioral functioning. A mental defect may be a congenital condition, the result of an injury, or residual effect of a physical or mental disease that includes, but is not limited to, mental retardation” which is further defined to mean “significant sub-average general intellectual functioning, existing concurrently with deficits in adaptive behavior.”

Idaho permits consideration of mental condition creating an “inability to appreciate the wrongfulness” of conduct or to conform to legal requirements at sentencing.”

Washington permits the courts to consider “the defendant’s capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired.”

Nationally, advocates within the American Bar Association are proposing a resolution urging lawyers, judges, bar associations and law school clinical programs to promote “applying FASD as a factor in the mitigation of juvenile and criminal sentencing ... and consideration of alternatives to incarceration that reduce recidivism.” The resolution also asks, “that state and federal laws and policies reflect the serious effects of prenatal alcohol exposure by a) including persons diagnosed with FASD, or suffering from the affects of prenatal alcohol exposure, within the statutory definition of developmental disabilities ... and b) enhancing identification and diagnosis of ... persons with FASD.” Their intent is that this resolution would be approved by the ABA House of Delegates at the annual meeting in Chicago in August 2012.

Internationally, Alaska is among the forerunners in awareness, diagnosis, and prevention of fetal alcohol spectrum disorders, both nationally and internationally. However, Canada and parts of Australia are leading the world in establishing laws and practices that address FASD as a brain-based disability with specific interventions and solutions.

The Canadian Bar Association passed a resolution in 2010 acknowledging that FASDs involve a range of neurological and behavioral challenges that can include “impaired mental functioning, poor executive functioning, memory problems, impaired judgment, inability to control impulse behavior, inability to understand the consequences of their actions, and inability to internally modify behavior control.”

The resolution also acknowledged that “the criminal justice system is based on normative assumptions that a person acts in a voluntary manner, makes informed choices with respect to the decision to commit crimes, and learns from their own behavior and the behavior of others” and “ these normative assumptions and sentencing principals such as specific and general deterrence, are not valid for those with FASDs.

Following are other highlights addressed in the CBA’s resolution:

- sentencing options available to courts are often ineffective in changing the behavior of those with FASD and those with FASD are frequently repeat offenders

- some courts have ruled that absolutely no rehabilitative or deterrent purpose is served by incarceration of those with FASD;
- laws, programs or activities could ameliorate the disadvantages experienced by those with FASD whose behavior is judged on a standard that they are incapable of meeting because of their disability;
- the Canadian bar is resolved to urge the federal government to amend criminal sentencing laws to accommodate the disability of those with FASD.

In Heather Douglas' article, *The sentencing response to defendants with fetal alcohol spectrum disorder* (2010) published by Thomas Reuters in Australia, the author notes that "as a result of deficits in executive function resulting in memory difficulties, inability to plan and failure to recognize the consequences of actions, many of those with FASD are likely to fail to pay fines and to breach probation orders ... Suspended sentences will not be useful in a context where cause and effect is not understood. In prison, highly suggestible FASD sufferers are likely to be victimized. While FASD clients cannot be cured of all their symptoms, techniques and approaches have been identified that can be employed by professionals to help the person reach his or her potential."

### Conclusion

The state's movement toward "Smart Justice" aims to promote reduced public costs, fewer crimes, and a greater rehabilitative effect on offenders. While some offenders are clearly dangerous enough and need long-term incarceration, the research behind "Smart Justice" suggests that for certain non-violent offenders, treatment programs inside the prison, combined with adequate transition and case management services, will result in lower costs, less recidivism and a safer general public.

Chasnoff, M.D., an international expert on FASD, wrote in an article "Is Fetal Alcohol Spectrum Disorders a Mitigating Factor in Criminal Litigation and Sentencing?" in *Psychology Today* (2011), "We are in an ethical conundrum. Children, youth and young adults with FASD are more likely than not to end up before the court on criminal or civil charges, but the legal system has not come close to resolving how their cases should be treated. Most individuals with FASD have normal IQs, and most can relate a story as to how they ended up before the judge. Most can even state they understand the charges against them. But the truth is that neurocognitive damage that inhibits executive functioning, decision-making, and emotional and behavioral regulation has tremendous bearing on the capacity of these individuals to understand the ramifications of their actions. These people look normal, they speak normally, but they often have only a superficial understanding of the charges against them."

As noted by Canadian Judge Barry Stuart in *R. v. Sam* (1993), FASD takes away someone's "... ability to act within the norms expected by society." It is "manifestly unfair to make an individual pay for their disability with their freedom. Society is failed because a sentence calculated for a 'normal' offender cannot serve the same ends when imposed on an offender with FASD," he said. "Not only can traditionally calculated sentences be hopelessly ineffective when applied to FASD offenders, but the punishment itself, calibrated for a non-disabled individual, can have a substantially more severe effect on someone with the impairments associated with FASD," Judge Stuart concluded.

# Alaska FASD Partnership

*Over 75 organizations  
and individuals  
supporting:*

*Advocacy • Diagnosis*

- Case Management
  - Prevention
- Substance Abuse Treatment for Pregnant Women
- Parent Navigation
- Training for Parents
- Public Awareness
  - Alternatives to Incarceration
- Court Interpreters
  - Peer Support
- Training for Judges, Public Defenders, and Prosecutors
  - Training for Educators and Medical Professionals
- Traditional Healing
- Supported Housing and Employment
  - Family Support



March 30, 2012

Representative Wes Keller  
Alaska State Legislature  
Juneau, Alaska 99801

Dear Representative Keller,

It is with great pleasure that the Alaska FASD Partnership supports HB 367 to include FASD as a mitigating factor in sentencing.

The intent underlying Alaska's sentencing structure – that people will modify their behaviors based on the criminal justice system's response to their crimes – is not met when applied to individuals with FASD. These disabilities manifest as deficits in executive function, resulting in impaired adaptive behavior, memory difficulties, an inability to plan, and a failure to recognize the consequences of actions. In the interest of justice, it is important to take these deficits into account during sentencing. Neither the offender nor society benefits from holding individuals with FASD to community standards that they cannot possibly attain given their impairments.

The cost of incarceration in Alaska's prison is about \$136 per day. Over the course of five to ten years in an Alaskan prison, an inmate is expected to cost the state close to \$250,000-\$500,000 (not including medical, mental health or other specialized treatment while incarcerated).

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According to the 2009 ISER Study, *The Cost of Crime: Could the State Reduce Future Crime and Save Money by Expanding Education and Treatment Programs?* the cost of providing services is less than the cost of incarceration. With appropriate supports, clients with FASD and other brain-based disabilities can live successfully in the community as contributing citizens, and provide jobs for Alaskan case workers, clinicians, assisted living providers, mental health and substance abuse counselors, psychologists and psychiatrists. Not only does HB 367 further

<sup>1</sup> Source for Prison, Community Residential Centers, Electronic Monitoring & Probation and Parole: [http://www.ahfc.us/iceimages/homeless/102211\\_ach\\_doc\\_discharge\\_stats.pdf](http://www.ahfc.us/iceimages/homeless/102211_ach_doc_discharge_stats.pdf). Note: Intensive Case Management estimated costs are based on the most intensive case management with a high level of education and supervision for workers. Actual costs, depending on the case mix, may be lower.

the cause of justice for a vulnerable population, it represents a better investment of our state's resources.

Additionally, the state's movement toward "Smart Justice" aims to promote reduced public costs, fewer crimes, and a greater rehabilitative effect on offenders. While some offenders are clearly dangerous enough and need long-term incarceration, the research behind "Smart Justice" suggests that for certain non-violent offenders, treatment programs inside the prison, combined with adequate transition and case management services, will result in lower costs, less recidivism, and a safer general public.

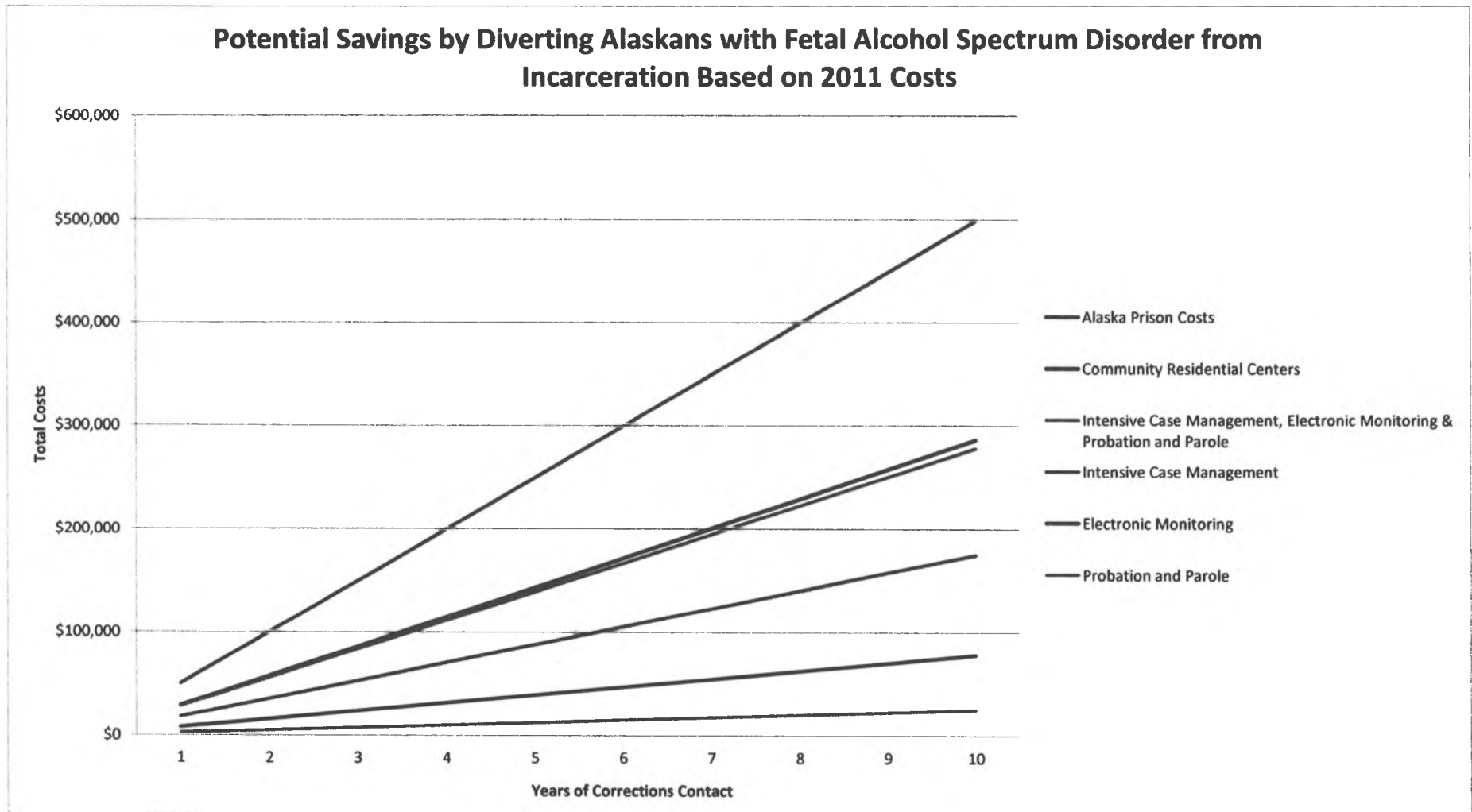
Thank you for the time and effort you have put into supporting this important effort.

Sincerely,



Monica Charles-Leinberger, Chair  
Alaska FASD Partnership

**Partnership members include:** *Abused Women's Aid in Crisis, Advisory Board on Alcoholism and Drug Abuse, Alaska Behavioral Health Association, Alaska Center for Children & Adults, Alaska Children's Services, Alaska Mental Health Board, Alaska Mental Health Trust Authority, Alaska Peer Support Consortium, Alaska Youth & Family Network, Aleutian Pribilof Islands Association, All-Alaska Pediatric Partnership, Anchorage Coordinated Resources Project, Anchorage School District (Anchorage), Anchorage Tlingit & Haida Indian Tribes of Alaska, Arctic FASD Regional Training Center, Assets Inc., Association for the Education of Young Children-SEAK, Big Brothers Big Sisters of Alaska, Boys & Girls Home of Alaska, Camp Fire USA Alaska Council, Central Council of the Tlingit & Haida Indian Tribes of Alaska, Christian Health Associates, Copper Basin Neurodevelopmental Center, Deltana Community Services Partnership, Dena A Coy/Southcentral Foundation, Diocese of Juneau, Fairbanks Community Behavioral Health Center, Family Centered Services of Alaska, Frontier Community Services, Gastineau Human Services, Governor's Council on Disabilities and Special Education, Hoonah Indian Association, Hope Community Resources, Independent Living Center, Kenai Peninsula FASD Program, Ketchikan Indian Community, Kineticions, Kobuk Valley Consulting, Kodiak Area Native Association, Juneau Family Health and Birth Center, Juneau FASD Diagnostic Clinic, Juneau Partnerships for Families and Children, Lower Kuskokwim School District, Lynn Canal Counseling Services, Nenana City School District, Ninilchik Traditional Council, Nome Youth Facility, Nondalton Tribe, Regional Wellness Forum, Set Free Alaska, Inc. (Wasilla), Southcentral Foundation FAS Diagnostic Team, Southeast Regional Health Consortium, Southeast Regional Resource Center, Southern Kenai Peninsula Communities Project, Sprout Family Services, Stone Soup Group, Tongass Substance Screening, UAA Department of Health Sciences, UAA Center for Human Development, Volunteers of America-Alaska ...and many individuals.*



Source of Corrections Costs: [http://www.ahfc.us/iceimages/homeless/102211\\_ach\\_doc\\_discharge\\_stats.pdf](http://www.ahfc.us/iceimages/homeless/102211_ach_doc_discharge_stats.pdf).  
Intensive Case Management costs based on a per person rate of \$48/day (highest estimate)

Advisory Board on Alcoholism  
and Drug Abuse



Alaska Mental Health Board

ALASKA MENTAL HEALTH BOARD  
ADVISORY BOARD ON ALCOHOLISM AND DRUG ABUSE  
431 NORTH FRANKLIN STREET, SUITE 200  
JUNEAU, ALASKA 99801  
(907) 465-8920

March 28, 2012

Representative Wes Keller  
Alaska State Capitol, Room 432  
Juneau, Alaska 99801

Re: Letter of Support for HB 367

Dear Representative Keller,

The Alaska Mental Health Board and Advisory Board on Alcoholism and Drug Abuse support HB 367 recognizing the special needs presented by Alaskans experiencing fetal alcohol spectrum disorders (FASD) in the justice system.

Alaska's judges, prosecutors, defenders, and court staff work to ensure that everyone who appears in court is treated fairly and with respect. However, Alaskans experiencing FASD often present with special needs and situations that impede the course of justice. Low cognitive functioning, inability to understand and stay within accepted social norms, limited short term memory, impulsivity, and impaired judgment can all result in a person experiencing FASD not being able to explain his or her actions, understand why they resulted in a criminal charge, or understand the criminal justice process. Usually, these impairments do not rise to the level of legal incompetence – but they often make it hard for judges and juries to make decisions that serve our notions of fairness and justice.

Based on research in other jurisdictions, an estimated 60% of inmates experience an FASD, brain injury, or similar organic cognitive impairment. The cost of incarceration is very high and usually does not result in restoration or rehabilitation. In fact, according to a 2009 ISER Study,<sup>1</sup> the cost of prison far exceeds the cost of services. CSSD 151 allows judges – **at their discretion** – to modify presumptive sentences to take into account the defendant's disabilities and to provide the sort of sentence needed to prevent recidivism and ensure a just outcome for victims, defendants, and our communities.

We thank you for your work on behalf of all Alaskans.

Sincerely,

J. Kate Burkhart  
Executive Director

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<sup>1</sup> *The Cost of Crime: Could The State Reduce Future Crime and Save Money by Expanding Education and Treatment Programs?* published by Institute of Social and Economic Research (ISER), University of Alaska (January 2009). Available online at [www.iser.uaa.alaska.edu](http://www.iser.uaa.alaska.edu).



March 29, 2012

Representative Wes Keller  
State Capitol Room 432  
Juneau AK, 99801

Re: Support for HB 367

Dear Representative Keller:

The Disability Law Center of Alaska supports the objective of HB 367, which is to allow the courts to take into consideration during sentencing whether the defendant was diagnosed with a fetal alcohol spectrum disorder. If these conditions cannot be considered as mitigating factors, then as one jurist observed, these individuals are paying for their disability with their freedom.

Thank you for your efforts in correcting this manifest injustice.

Sincerely,

DISABILITY LAW CENTER OF ALASKA

David C. Fleurant  
Executive Director

MEMBER OF THE  
NATIONAL  
DISABILITY  
RIGHTS  
NETWORK