

IV. Impact of FAS/ARND

Learning Objectives and Activities

- Identify the range of impacts of FAS/ARND on the individual suffering from FAS/ARND, family members and the tribal justice system
- Discuss common behavioral and cognitive disabilities associated with FAS/ARND
- Describe evidentiary and competency issues surrounding persons with FAS/ARND who are involved in the justice system

Presenters and Materials

- Overhead slides or Power Point slides containing statistical incidence of FAS/ARND
- Curriculum, chapter IV.
- Local Impacts Worksheet

Impact Upon the Individual Suffering from Fetal Alcohol Syndrome

A child born with FAS may suffer a range of cognitive and behavioral disabilities. The most commonly associated disabilities are characterized by the following acronym:

ALARM

- Adaptive behavior
- Language
- Attention
- Reasoning
- Memory³⁷

Disabilities in these areas will limit a child's capacity to develop basic math and reading skills. Without these basic skills, the child will begin to falter in school which may be reflected in repeated grades, special class placements or dropping out of school. As the child becomes an adolescent, they will lack the capacity to achieve daily activities required for independent living. Surprisingly, many children and adolescents with FAS will have an average or above average I.Q. score despite their inability to develop life skills.

37. Fetal Alcohol Syndrome and the Criminal Justice System, Conry and Fast, p. 16.

Adaptive Behavior refers to the effectiveness with which a person meets the standards of personal independence and social responsibility expected of an individual of the same age and cultural group.³⁸ Since this definition is dependent upon cultural standards, there is variance from community to community. *The life skills most affected by deficits in adaptive behavior include self-care, positive social relationships, independence, communication and appropriate judgment in work, school and community situations.*³⁹ For example, tribal communities are often characterized as having broad extended family networks. So, depending upon the community, several generations residing in a household where certain household duties (i.e., managing money, child care, income earners) are allocated among the adults may or may not be an indicator of a deficit in adaptive behavior. In some tribal communities, the cultural standard may dictate that persons with disabilities are fully accepted and not to be ostracized. Consequently, special treatment programs may be viewed as focusing unwanted attention on the disability rather than the individual. Sensitivity for this cultural standard must be balanced with the need to provide necessary services to persons with FAS/ARND.

As a consequence to the hindered development in life skills, many persons who suffer from FAS/ARND often experience problems with money management, employment and managing their non-structured leisure time. They may suffer from poor social judgment that leaves them vulnerable to persons who will exploit them or to their own dangerous or destructive behaviors.

Language deficits are also associated with persons with FAS/ARND. The primary deficit is a difficulty understanding language. To compensate, children with FAS/ARND will learn to respond to facial expressions, respond to tones of voice or respond only to words or phrases that they understand. If a complex question is posed using a friendly tone, the child or adult with FAS may not understand the scope of the question but may still respond to the tone positively. This poses an ethical issue for law enforcement officers when they interrogate a suspect who may be afflicted with FAS/ARND. Children or adults with FAS/ARND may provide responses

38. Id at p. 17.

39. Id.

*Dr. Truman Coggins, director of speech and language pathology for CHDD's University Center for Excellence in Developmental Disabilities reported that when children with FAS were asked to tell a story shown only by pictures, the group with FAS scored substantially lower than the control group on informativeness of descriptions and the number of episodes. In addition, the group with FAS had substantially higher scores on vagueness and irrelevance in their descriptions. "These results underscore how poorly youngsters with FAS understand connections," Coggins points out. *** "Inability to understand another's beliefs and desires leads to constant misunderstandings that cut off social exchange."*

(See <http://depts.washington.edu/chdd/OUTLOOK/OUTLOOK10.1/STY3FASlang.html> for more information about this study.)

to end a session of questioning out of a need to reduce stressors or to please the interrogator. A judge will need to exert extensive control over the line of questioning posed to a person with FAS/ARND to ensure that the questions involve single simple concepts that the person can understand.

Attention deficits may prove to be the most dangerous of the disabilities because it results in an inability to complete tasks, reason or problem-solve. Attention deficit/hyperactivity disorder is also prominent in persons with FAS/ARND resulting in impulsive actions that cause harm to themselves or other persons. Attention deficit disorders are often the root cause for suspension from school (positive structured environment) and engaging in delinquent or criminal behavior resulting in incarceration (negative structured environment).

Reasoning deficits in persons with FAS/ARND manifest as the inability to know right from wrong. Persons with FAS/ARND have difficulty understanding cause and effect or action and consequences, even where they have already experienced the same or similar situation. The adversarial justice system is based upon meting out punishments for illegal actions and resulting consequences. It will be unlikely that a person

Juveniles involved in the court system who also are afflicted by FAS/ARND are often viewed as problem children when in fact the community justice system is just not designed to respond to their behaviors.

with FAS/ARND will recognize the court process, decision or punishment as a consequence of their actions. Small tribal courts with meager probation programs may become a revolving door for the juvenile with FAS/ARND because they will not perceive the punishment as a deterrent for the original offensive behavior. *In one instance, a tribal court has continually punished an adolescent with FAS/ARND for driving without a license. While in court, he displayed many attention grabbing behaviors (jokes, laughter). By the time his case came before the judge, the judge was ready to have the person processed in order to get him out of the court room. The adolescent was ordered to pay a fine and then released as was done previously with the same individual.*

Memory deficits appear in a variety of contexts in persons with FAS/ARND. They may suffer from short term and/or long term memory problems, as well as sequencing of events. They may remember a detail one day but then forget it the next. Once forgotten they may attempt to fill in the gap of the memory loss with other information. This would be termed lying by any justice systems personnel. In fact, it is called “confabulation” because the person with FAS/ARND has no intent to deceive when they “fill in the gaps.”⁴⁰

REVIEW

	<u>Definition</u>	<u>Impact of Deficit</u>
<u>A</u>	<i>ADAPTIVE BEHAVIOR</i> refers to the effectiveness with which a person meets the standard of personal independence and social responsibility expected of an individual of the same age and cultural group.	Impacts life skills such as self-care, positive social relationships, independence, communication, judgment.
<u>L</u>	<i>LANGUAGE</i> refers to the individual’s difficulty in understanding language.	Impacts individual’s ability to understand and respond to complex language or sentences. Often people with FAS/ARND will learn to respond to emotional or physical cues instead of language.
<u>A</u>	<i>ATTENTION</i> refers to the individual’s inability to complete tasks, reason or problem-solve.	Impacts individual’s ability to limit or contain their impulses/impulsivity leading to problems such as suspension from school or illegal acts.
<u>R</u>	<i>REASONING</i> refers to the individual’s inability to know right from wrong, to understand cause and effect, or to understand action and consequences.	Impacts individual’s ability to learn lessons based upon previous experience or to alter behavior in response to punishments.
<u>M</u>	<i>MEMORY</i> refers to a range of memory deficits in an individual with FAS/ARND including an inability to access short or long term memory, or to sequence events.	Impacts individual’s ability to relay events accurately or repeatedly. Individuals with FAS/ARND may compensate with confabulation.

40. Id at p. 22.

Impact on Indian Families and Communities

Traditionally, various Indian tribes counted the number of relatives a person had to determine personal wealth. This practice provides evidence that many tribes viewed the Indian family as an extended network of kin relationships. Indian family networks helped tribal communities survive an extensive history of atrocities such as state and federally funded Indian extermination, forced relocation and boarding schools. In a variety of protective legislation such as the Indian Child Welfare Act of 1978, the federal government recognizes the Indian family as a source of strength. Extended Indian family networks remain the engine of tribal communities but must be strengthened to face contemporary challenges. If tribal communities are to overcome the challenges of FAS/ARND, tribal governments must implement child and family protection policies that strengthen the extended Indian family.

In Indian Country, the primary caregiver for an FAS/ARND individual is reflected in several profiles. The caregiver maybe a biological mother who has been in recovery for alcohol abuse but may be in denial about the present effect that her behavior has on her child. The caregiver may be a biological grandparent who is raising several grandchildren on a limited income. The caregiver might be a foster parent who was told by several people in the community about the child's birthmother and her reputation for alcohol abuse. All too often an FAS/ARND adolescent may have given birth because she just wanted a baby to love. Regardless of who the caregiver might be, tribal communities must identify and serve the needs of FAS/ARND children and their families. These needs can only be met through collaboration and commitment between the families and tribal communities.

Individual and community denial are major challenges in dealing with FAS/ARND. For individuals who are addicted, denial plays a big part in rationalizing their behavior. It is esti-

mated that 10-12% of addicted people do not even recognize their behavior is abusive, thus they make no efforts to change.⁴¹ Biological parents of children with FAS/ARND will often downplay their behavior to avoid taking responsibility for the disability of their child, or they may not even admit that their child has a problem. Community denial is another factor. Older parents and elders in the community may have raised their children in a time when little was known about the effects of alcohol on unborn children. Consequently, the extended family and the community may present a standard that minimizes the danger of consuming alcohol that results in an immense social and cultural pressure upon pregnant women susceptible to alcohol addiction.⁴² At the opposite end of the spectrum, the community standard may be the social condemnation of alcohol. This may cause pregnant women to conceal their drinking or other addictive behaviors. Thus, driving the practice of drinking underground and stigmatizing anyone who breaks the rules.⁴³ Many tribal governments also neglect to devote time and resources to the problem. Reasons are two fold, (1) to recognize the gravity of the problem brings feelings of shame, guilt and helplessness, and (2) many tribal leaders have added incentive to deny the problem because they or someone in their family may be alcohol-affected.⁴⁴

Aside from issues of professional and financial access to proper diagnostic services, Indian communities face an additional challenge to diagnosing and treating FAS/ARND. Many children in Indian communities are born into families of multi-generational drinkers and sufferers of FAS. A pregnant woman with FAS is unlikely to admit to or accurately describe her drinking pattern. In addition she is unlikely to get medical care or proper nutrition during her pregnancy.⁴⁵ If she or another family member attempts to care for her child after it is born the

41. FAS/E grossly under-diagnosed and under-reported, Bruce Ritchie, <http://www.acbr.com/fas/statbad.htm>

42. Id.

43. Id.

44. Id.

45. Id.

likelihood that the child will ever be diagnosed or get proper treatment is slim due to fear of losing the child to social services. If intervention does not occur the FAS cycle may continue into the next generation's offspring.

Impact of FAS on Tribal Systems

What is the Prevalence of FAS in Indian Country?

In 1990, Dr. Craig Vanderwagen, Acting Associate Director, for IHS Office of Health Programs addressed the U.S. Senate Committee on Finance. At that time, studies by the University of New Mexico were reporting incidence rates from 1.3 to 10.3 cases of FAS per 1,000 live births. These statistics referred to just FAS cases not ARND cases which were believed to have been 10 times more common than FAS.⁴⁶ At the same time, CDC's national Birth Defects Monitoring Program reported an FAS rate of 2.9 per 1,000 total births in American Indians. This rate (2.9 per 1,000) was 30 times the rate reported for Caucasian infants by CDC's Birth Defects Monitoring Program.⁴⁷

Since 1990, IHS, CDC and other federal, state and tribal agencies and organizations have made a concerted effort to increase awareness and reduce the incidence of FAS in the United States. Even with these efforts, FAS/ARND has impacted the U.S. criminal justice system. In 1996, Ann Streissguth reported upon a study that followed 415 individuals with FAS/ARND. The research demonstrated that 14% of subjects between the ages of 6 and 11, 61% of adolescents, and 58% of adults had run afoul of the law at least once. Overall, 60% of FAS/ARND subjects age 12 or over had been in trouble with the authorities, charged with a crime, or convicted of a crime.⁴⁸ "About one in three clients 12 years and older committed a first crime

46. Statement of Craig Vanderwagen, M.D., before the Subcommittee on Social Security and Family Policy, Committee on Finance, U.S. Senate (Dec. 10, 1990).

47. *Id.*

48. Understanding the Occurrence of Secondary Disabilities in Clients with Fetal Alcohol Syndrome (FAS) and Fetal Alcohol Effects (FAE)," Ann P. Streissguth, Helen M. Barr, Julia Kogan, and Fred L. Bookstein, report to the Centers for Disease Control and Prevention, August 1996.

between 9 and 14 years of age.”⁴⁹ Shoplifting and theft were the crimes most frequently committed by individuals with FAS/ARND, and subjects with ARND were somewhat more likely than those with FAS to commit crimes- possibly because more severely affected individuals receive more care and supervision.⁵⁰ Streissguth et al. also reported that about 50% of FAS/ARND subjects age 12 or over had exhibited inappropriate sexual behavior, with sexual misbehavior being most common among subjects who had themselves been abused. More than 60% of subjects age 12 or older had been suspended or expelled from school, or dropped out, and almost a third of subjects age 12 or older had abused drugs and/or alcohol (with female subjects as likely as males to abuse alcohol). Of the entire sample of 415 subjects, 94% exhibited mental health problems.⁵¹ Due to the higher incidence of FAS/ARND in tribal communities, tribal governments may be facing similar trends in the impact of FAS/ARND on tribal justice systems.

A recent report from the Bureau of Justice Statistics entitled “*Jails in Indian Country*” states that the Indian country jail population rose 8% from the year 2000 to 2001. This accounts only for the Indian country jail population which generally involve Indians who commit crimes in Indian country (within tribal jurisdiction). Indians who commit crimes within state jurisdiction or who commit crimes within federal jurisdiction would be held in other jail facilities. State prisons held 11,419, federal prisons held 1,955 and other local jails held 6,000 American Indians/Alaska Natives. The final total at mid-year 2001 was estimated to be 21,286 American Indians/Alaska Natives in incarceration. Estimates for American Indians/Alaska Natives under supervision is approximately 28,387. The rate of incarceration for American Indians was about 19% higher than the overall national rate. Juveniles account for 16% of the total in-custody population.

49. Alcohol's Legacy: High Crime Rate Seen in FAS/FAE, *Crime Times*, Vol. 3, No. 1 , 1997, Page 5.

50. *Id.*

51. *Id.*

The prevalence of FAS/ARND in Indian Country coupled with the associated disabilities and the higher incarceration rate have placed tribal justice systems under great pressure professionally and economically. If tribal communities fail to provide probation or other remedial programs that consider and serve the needs of individuals with FAS/ARND, the secondary disabilities will be further compounded. Confinement of individuals with FAS/ARND without special services related to their disabilities may cause a level of frustration that leads to self-destructive behavior.

What Role can Tribal Justice Systems Play in Addressing the Needs of Persons with FAS?

If FAS/FAE[/ARND] has gone undiagnosed by physicians and unrecognized by psychologists and teachers, then lawyers [/advocates] and judges will also surely miss it. A courtroom is not the place to discover that a person has special problems with memory, cognition, or communication. However, if the possibility of FAS/FAE[/ARND] is overlooked in court, there may be no more chances for diagnosis.⁵²

The person with FAS/ARND may appear in court as the plaintiff, defendant or the victim/witness. Their role in the court process may be effective if their disabilities are taken into consideration and steps are taken to ensure accuracy in their statements; however, the scope of the disabilities may require that the law enforcement officer, probation officer or judge recommend an assessment of the individual prior to subjecting them to judicial processes.

Assessment

If justice system personnel suspect that a child or adult involved in the justice system suffers from FAS/ARND, they should recommend that an FAS/ARND screening or assessment be performed. Resources for screening and assessment are not easy to find especially on or near

52. Fetal Alcohol Syndrome and the Criminal Justice System, Conry and Fast, p. 30.

Indian reservations. There may be controversy between medical and mental health professionals as to who may or should screen for FAS/ARND. The assessment should be performed by someone that has experience in diagnosing FAS/ARND. The assessment report should document evidence of maternal consumption of alcohol during pregnancy, medical issues at birth, history of academic problems and achievements. Any information concerning family or generational alcohol and drug abuse should be included in the report. The report should also contain physical measurements at birth and throughout developmental stages (i.e., weight, height, circumference of the head, palpebral fissure length, inner canthal distance, philtrum). Any physical anomalies should be reported. The report should also contain psychological assessment information focusing on the deficits noted previously: adaptive behavior, language, attention, reasoning and memory.

This information will result from personal interviews about the physical, social and psychological history of the individual with FAS/ARND. Some of this information may only be available from family members who fear disclosure or who may themselves be alcohol-affected. Regardless of the sources, the information will take time to gather. So, legal timelines may need to be delayed or ignored. In addition, the information contained in the assessment report is a tool informing the justice system on how to proceed with regard to the individual with FAS/ARND. It should not be used as a weapon for interrogating the individual with FAS/ARND.

Evidentiary Statements from Individuals with FAS/ARND

If an assessment report includes information about the degree of suggestibility for an individual with FAS/ARND, the advocate or judge may use that report to measure the reliability of their evidentiary statement. Without the assessment report, the advocate or judge may want

to refrain from admitting their statements into evidence until the suggestibility level is determined. Research has shown that people with learning disabilities agreed with leading questions more often. The adversarial process is based upon direct questioning in the direct examination of a witness and leading questions posed in the cross examination of a witness. It would be a simple exercise for an advocate to allow all direct examination questions, then upon cross examination pose leading questions that contradict all responses made during the direct examination. The witness would be found unreliable and would be impeached. The stress of such an exercise would only traumatize the individual with FAS/ARND.

The suggestibility dynamic has also been found to result in confessions from persons with disabilities who in fact did not commit the crime in question. If a person with FAS/ARND must provide a statement, it would be in the best interests of that person as well as the justice system to provide an expert witness in FAS/ARND to testify as to what the court may expect from the person with FAS/ARND. At a minimum, a person familiar with FAS/ARND or the afflicted person should be available for support throughout the process of providing the statement.

Competency

The competency of a defendant to stand trial is a legal concept that allows the courts to postpone criminal proceedings for those defendants who are considered unable to participate in their own defense due to a mental or physical disorder.⁵³ Competency is also related to the ability of a witness to offer testimony. In general a witness will be considered incompetent to testify in a court of law if the court finds that a mental condition or level of immaturity prevents the witness from accurately perceiving time, clearly expressing information either directly or

53. Patricia Zapf and Ronald Roesch, *Mental Competency Evaluations: Guidelines for Judges and Attorneys*, Court Review-Summer 2000.

through an interpreter, having cognizant memory, or sufficiently understanding their duty to tell the truth.

It is equally important to recognize the role competency plays in the judicial decision to transfer a child's case from the jurisdiction of juvenile to adult court. In these cases the court must assess both the child's ability to assist his/her counsel and the child's ability to rationally understand or weigh and select the available options. A child must be able to appreciate that the power of the court in regards to determining his or her guilt and punishment for the accused crime.

Thus lawyers and judges recognize and accommodate mental illness and physical disabilities when they are readily apparent. The research shows that individuals who are obviously handicapped are treated differently than those with invisible impairments such as FAS/ARND. Typically individuals with these disorders are presumed competent and never receive the accommodations to which they are entitled. Our courts hold them to a higher standard than they do individuals with highly visible developmental disorders. Presumptions of mental competence tell the afflicted individual that they can avoid "run ins" with the law. All they have to do is try a little harder. However, this is something that an individual with FAS/ARND cannot do. They will never overcome the inherent limitations with which they were born.⁵⁴

Failures of court and law enforcement personnel in recognizing these limitations increases the negative impact upon the individual with FAS/ARND. The individual's desire to please may make them prone to making a false confession. An inability to effectively communicate could result in an unintended guilty plea. Despite their lack of mental culpability, these individuals will often make guilty pleas based on factual knowledge of their own actions. Impulsive acts may be interpreted as willful or premeditated. Social dysfunction may appear to be a

54. *R. v. Gray*, 2002 BCPC 0058 at 4.

lack of remorse or boasting. The incapacity to learn from mistakes or anticipate consequences may invite harsher sentencing.⁵⁵

It may be difficult for the court system to accommodate individuals with FAS/ARND. They habitually violate court orders, fail to appear, miss appointments and have difficulty following instructions. They will often engage in self-defeating behavior. For example, FAS/ARND individuals have the capacity to sense anger. They will often agree with people who appear to be angry with them, because they know that things will get easier once the anger subsides.⁵⁶

55. Id at 4.
56. Id.

Factors to Consider For Adolescents and Adults In the Court System with Fetal Alcohol Syndrome Disorders

By Teresa Kellerman
FAS Community Resource Center—<http://www.fasstar.com>

Accountability

Aberrant behaviors have a basis in organic brain dysfunction, over which the individual has little control. Destructive and/or dangerous behaviors are reinforced in a maladaptive environment. It is unrealistic to expect a person with the functional abilities of a child to be accountable as an adult. The person with FAS/ARND is often not capable of understanding the system well enough to be found competent.

Arrested social development

Dr. Ed Riley's research (San Diego State University) shows that regardless of age, regardless of IQ, the person with FAS/ARND may have stunted social development, about that of a 4 to 6 year old child.

Delayed emotional development

Individuals with FAS disorders may be immature and emotionally volatile. They may go through normal childhood stages along a slower timeline. The emotional development might be at an age level of half the chronological age. Individuals with FAS disorders may not plateau emotionally until age 25 or 30.

Communication skill deficits

Although persons with FAS/ARND have good expressive language skills, their ability to comprehend may be lower than would be expected, and their inability to read social cues accurately may interfere with their ability to understand the expectations of others. Their writing skills may also be lacking, making it difficult to fill out forms or keep records.

Co-occurring conditions

Persons with FAS/ARND are at high risk of having psychiatric conditions, such as bi-polar disorder, clinical depression, Reactive Attachment Disorder (RAD), or Sensory Integration Disorder (SID). Many also have Attention Deficit Hyperactive Disorder (ADHD). Some persons with FAS/ARND are misdiagnosed as having Cerebral Palsy (CP) or Asperger's Syndrome (mild Autism). Symptoms of these disorders often mask the symptoms of FAS/ARND. About one-third of individuals with FAS have some degree of mental retardation, but this is often not recognized, even with court evaluations.

Attention deficits

Although not all persons with FAS/ARND have ADHD, they most likely have some attention deficits, which interfere with ability to listen, learn, remember, and apply information adequately.

Sensory integration disorder

Most individuals with FAS/ARND have some degree of sensory integration disorder (SID), due to overload of the senses, causing difficulty with processing incoming information. They may overreact to noises, lights, touch by becoming disruptive, anxious, or even aggressive.

Medications

Many persons with FAS/ARND benefit from medications to help balance brain chemicals that might be out of kilter. If medications are withheld (as they may be after arrest), or if they are not taken, this greatly diminishes the individual's ability to control impulses and behavior. The most beneficial combination of medications is a stimulant plus an anti-depressant SSRI. If the person has underlying psychiatric conditions, then other medications might be more helpful.

Pregnancy and paternity

The lack of good judgment and inability to control impulses means the person with FAS/ARND is at greater risk of pregnancy or paternity. The use of alcohol increases the risk. The individual with FAS/ARND lacks the ability to be responsible for daily use of contraceptives. The individual with FAS/ARND may also lack the ability to parent a child, unless there is continual support, as that of an extended family for instance.

Sexuality issues

The person with FAS/ARND may function emotionally at the level of a child. Physiological sexual development is usually normal. This is like putting a six-year-old child in the body of an adult. The poor judgment and lack of impulse control and difficulty understanding social cues results in increased vulnerability, putting the individual with FAS/ARND at higher risk of becoming a victim or a perpetrator of sexual assault, or both.

Money management

Persons with FAS/ARND usually have difficulty with abstract concepts like time and money. Ten dollars may have as much value as ten thousand dollars. They may not be able to pay bills or follow a budget. They may not even be able to figure change when paying for a \$2.99 bottle of milk with a five-dollar bill. They may appear to be intelligent enough to handle this, but can't.

Behavior issues

Individuals with FAS/ARND are generally immature, have a grandiose sense of themselves, but have an unrealistic view of the world. They have difficulty handling everyday stress, and when overwhelmed, they may react by withdrawing or by becoming aggressive. They may have trouble controlling their temper, and may be self-abusive. They may be unable to assess risk or danger, but may have unreasonable fears. They may have difficulty accepting the limitations of their disability.

Information processing deficits

Information is not filtered properly through the senses, information may not be organized mentally, and there is usually difficulty with memory. Information that can be retrieved at one time may not be there at another. The ability to process information is sporadic and unpredictable.

Independence

The person with FAS/ARND requires guidance, mentoring, structure, and supervision. Even in the best of circumstances, with good role modeling, effective medications, verbal and visual cues, and a supportive environment, when the person with FAS is left on his or her own, eventually there will be failure due to poor judgment and they will act on impulse without regard for the consequences. The high risk of making the same mistakes over and over require close monitoring 24 hours a day, 7 days a week. Independent living programs are rarely successful. It has been said that "Self-Determination" for the person with FAS becomes "Self-Termination."