

Ladies and gentlemen of the board, Mr. Chairman: Thank you for allowing me to speak in front of the board on this issue of such significance to me.

My name is Jeff Konrade-Helm. Until very recently, I was the programs director for the Autism Society of Colorado but today I come to you as a private disability advocate and a parent of a child who is so severely developmentally disabled that there would never be a question as to the extent of her disability. I mention this only so you know that I am not here because of any personal gain or ulterior motives.

And I have to tell you that I am very conflicted about my testimony today. I am conflicted because I know all-too-well the situation the Division faces and I know that it is untenable. Something has to change.

While something has to change; to-date, I have not heard any solution that I can agree with including the Division's proposal. I don't disagree with the Division's proposal because it will have the effect of restricting benefits to individuals with legitimate developmental disabilities. The Division is simply reacting to its situation. It would not be acting responsibly if it didn't respond.

Instead, I disagree with the manner in which it is reacting; and I have had a long-standing disagreement with the existing rule promulgated by this very board in 1995, to implement the statutory definition of developmental disability.

I am not going to read the statutory definition of developmental disability to you – at least, not all at once. Instead, I'm going to break it down and discuss its component parts.

“A disability that is manifested before the person reaches twenty-two years of age, which constitutes a substantial disability to the affected individual, and is attributable to mental retardation ...”

I think we're all pretty much in agreement upon what that means. It is the long-standing, somewhat out-dated term referring to a substantial impairment in general intellectual functioning as measured by two standard deviations from mean.

But then comes the word “OR” that doesn't seem to get much attention in the rule. There's a couple more “ORs” in the definition so I'll come back to them.

Then, squarely between two “ORs” is the following phrase: “... related conditions which include cerebral palsy, epilepsy, autism ...”

These are very specific but I agree with the Division's interpretation that an individual with a diagnosis of one of these conditions alone does not automatically make the individual developmentally disabled by this statutory definition.

Again, between two “ORs” is the phrase: “...other neurological conditions when such conditions result in impairment of general intellectual functioning ...”

Since our lawmakers chose to use the word “conditions here again, we can infer that they meant to include the specific conditions of cerebral palsy, epilepsy and autism mentioned earlier. That is why it is correct to require the definitional “test” of “general intellectual functioning” in the next part. In this sense it serves to connect this phrase with the previous one by reference to the term “conditions.” In fact, the definition of the word “or,” a conjunction as it is used here, means to link two or more alternatives.

By using the same term, they linked the two alternatives more closely and linked them to the concept of mental retardation from the earlier part by using the very words that define the term – general intellectual functioning.

All of this, so far, seems pretty straight-forward.

But then our lawmakers got “squishy” in their use of language by using the following phrase after yet another “or.” It reads: “... or adaptive behavior similar to that of a person with mental retardation.”

The current DHS rule 16.120 does an excellent job of defining adaptive behavior which is in line with the American Association of Intellectual and Developmental Disabilities definition.

But what were they thinking by using such a “soft” term as “similar to?”

Generally, such “fuzzy” language in statute serves two purposes: the first as compromise because not all parties agree upon more specific language; and secondly to specifically introduce the element of subjectivity. But in absence of clearly stated legislative intent, courts often use what they refer to as the “reasonable person test,” i.e., what would a reasonable person conclude when faced with such an issue?

Such ambiguity exists in statute so the hands of state departments are not tied so tightly by bureaucratic minutia that they can’t act properly in specific cases when such action is necessary. This works both ways. If an individual, by all reasonable standards, has a developmental disability and needs state services to function in society, then state agents on the front lines of the decision-making hierarchy should be able to deem the individual eligible in good conscience. Likewise, if another person comes forth and seemingly meets basic criteria but, by all reasonable standards, doesn’t require services to function in society, then the same agents could use the more subjective parts of the statute to deny such services.

So I can easily see why the Division, in its experience and witnessing the statute misapplied, would want to seek clarification of the statute. That is a reasonable request.

But it is not reasonable to interpret the statute in such a restrictive manner as to entirely change its meaning. That is NOT reasonable and it is NOT acceptable.

If you want to accomplish what the Division has stated is its intent for bringing this issue before you today, then it would be appropriate to use the same measurements for adaptive functioning as is used

for intellectual functioning, i.e., two standard deviations below the mean as is appropriate for whatever standardized instrument is being used.

No more, no less.

But tying adaptive functioning or behavior so closely to intellectual functioning is usurping otherwise clear legislative meaning and a blatant attempt to become the gatekeepers for access to the state purse – something reserved for the General Assembly who are directly elected by the citizens of Colorado.

If the department doesn't have the funds to carry out the law as it is written, it should inform the legislature of that state of affairs but it should not create meaning through rule where none exists in statute.

If the department cannot implement the statute as it is written, then it should inform the legislature of that fact and not promulgate rules whose only function is to restrict benefits to some of Colorado's most needy citizens where such a restriction is not authorized by statute.

I hope that in your deliberations you agree with my words and vote to NOT adopt the divisions rule as it is written, but rather, to address their stated need for clarification and adopt a similar measurement for adaptive behavior as is used in measuring intellectual functioning.

The only change necessary is to remove part "C" of the existing rule and to replace it with such a measurement.

But please don't further blur the meanings of these terms to serve some other purpose.

Thank you for the important work each of you does on this board. I do not envy the difficult decision you face.



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