

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
FROM THE COMMISSIONER OF HEALTH AND SOCIAL SERVICES**

In the Matter of:)
)
 TALKABOUT, INC.) OAH No. 11-0320-DHS
) Agency No. AN2010108901
_____)

DECISION

I. INTRODUCTION

The Division of Health Care Services (Division) audited Talkabout, Inc.’s Medicaid billings for the 2007 calendar year. The audit identified overpayments and the Division sought repayment of the overpayment amount. Talkabout appealed.

A hearing was held on September 29, 2011, in Fairbanks, Alaska. The Division’s witnesses were Allan Hansen, of the auditing firm Meyers and Stauffer, L.C., and Shauna Briggs, an employee of the Department of Health and Social Services. Talkabout’s witnesses were: its owner, Sandra Jamison; Speech Language Pathologist Jaina Hulbert-Billings;¹ and Office Administrator Amanda Hernandez.²

The Division has the burden of proving the existence of any overpayment.³ Based on the evidence in the record, the Division has failed to meet its burden of proving that overpayments were made to Talkabout, Inc. during 2007.

II. FACTS

Sandra Jamison is a speech language pathologist (SLP) with 37 years of experience. She has a Bachelor of Science degree in hearing and speech science, and a Master’s degree in speech pathology. Ms. Jamison is the owner of Talkabout, and she employed nine SLPs during 2007.

Ms. Jamison testified that all SLPs receive some training in addressing behavior issues. In addition, she has taken several classes from behavior specialists that addressed the use of behavior therapy in conjunction with speech therapy. The use of behavior therapy has become the cornerstone of her private practice as she believes behavior therapy and speech therapy go hand in hand. While not all SLPs incorporate behavior therapy into their practice to this extent, Ms. Jamison believes it is important to do so, and would not hire an SLP for Talkabout who was

¹ Talkabout employs several Speech Language Pathologists. Only Ms. Hulbert-Billings’ services were selected for this audit.

² Division Exhibits 1, 2, & 5 – 12 were admitted without objection. Talkabout Exhibits A, and I – K were admitted without objection.

³ Division’s Pre-Hearing Brief, page 2; AS 44.62.460(e)(1).

not interested in doing this. She was qualified as an expert in speech language pathology without objection.

Jaina Hulbert-Billings is the SPL whose records were examined during this audit. She has a Bachelor's of Science degree and a Master's degree in speech language pathology. She was qualified as an expert in speech language pathology without objection.

Meyers and Stauffer L.C. conducted an audit of Ms. Hulbert-Billings' Medicaid claims for 2007 and prepared its audit report, dated September 24, 2010.⁴ The audit identified overpayments based on claims submitted for social skill behavior intervention. For 44 of the audited claims, the auditors determined that the records did not sufficiently document that the behavior interventions actually occurred.⁵ For 41 of those same claims, the auditors also determined that there was insufficient documentation that the services were medically necessary.⁶ In other words, there were two independent reasons for finding an overpayment of the 41 claims, and only one reason for finding an overpayment on the remaining three claims.

The parties agreed that all of the 44 claims had similar issues and that the alleged deficiencies in the records were similar. For the 44 claims that the audit identified as not adequately describing the interventions used, the documentation describing the interventions was similar. For each of the 41 claims the audit identified as not documenting medical necessity, the content of the treatment plans relied on by Talkabout to establish medical necessity was similar. The parties agreed that testimony about one or two claims could be used as the basis for ruling on all of the claims.

III. DISCUSSION

A. Audit Requirements

The Division is required to contract for independent audits of a portion of all Medicaid providers.⁷ In order to facilitate these audits, Medicaid providers are required to keep records related to each patient for seven years from the date of service.⁸

A provider's record must identify patient information including

(1) recipient receiving treatment;

⁴ Exhibit A; Agency Record pages 3 – 47.

⁵ Record page 7.

⁶ *Id.*

⁷ AS 47.05.200; 7 AAC 160.110

⁸ 7 AAC 43.030(e). The regulations referred to in Section III of this decision have been repealed, but were in effect during 2007 and the parties agree they are applicable to this audit.

- (2) specific services provided;
- (3) extent of each service provided;
- (4) date on which each service is provided, and
- (5) individual who provided each service.^[9]

In addition,

A provider shall maintain a clinical record, including a record of therapeutic services, according to professional standards applicable to the provider, applicable state and federal law, the applicable Alaska Medicaid Provider Billing Manual as of May 9, 1997, and any pertinent contracts. The clinical record maintained by the provider must have clinical information to

* * *

- (2) identify the medical need for each service;

* * *

- (4) include annotated case notes, signed, dated, or initialed by the individual who provided the service, for each service delivered.^[10]

B. Behavioral Interventions During Speech Language Therapy

A central theme of the Division’s argument in this case is that behavior intervention is an inherent part of speech language therapy, at least when the patient is a young child.¹¹ The testimony from the two speech language pathology experts in this case, however, was that the behavior interventions at issue in this audit were distinct from treating the language disorder. The behavior interventions were necessary so that the patient would be amenable to speech therapy, but the interventions did not actually treat the underlying language disorder. According to Ms. Jamison, it is often impossible to provide speech therapy until after the behavior issues are addressed. She testified that some SLPs simply refuse to see a patient with poor behavior skills until the behavior issues are dealt with. That one medical condition must be treated before a second condition can be addressed does not mean that the first treatment is an inherent part of the second.

Ms. Jamison testified that while she has made the inclusion of behavior interventions a “cornerstone” of her private practice, there are other SLPs in Alaska who do not include this type of treatment in their speech therapy. She testified that Talkabout might be the only clinic in Alaska with the interest and background to do so. She also described a distinction between

⁹ 7 AAC 43.030(b).

¹⁰ 7 AAC 43.030(d).

¹¹ See Division’s Closing Argument, page 2.

speech therapy and behavior or social skill training. Behavior treatment does not ask the patient for language and does not work on the structure of language. Instead, behavior interventions focus on vocal tone, body position, eye contact, and attention.

Ms. Hulbert-Billings also testified that the behavior interventions she used were distinct from what she does during speech therapy. She would indicate that behavior interventions were given in addition to the speech therapy by checking the behavior therapy box on the chart note.

Ms. Jamison and Ms. Hulbert-Billings were both qualified as expert witnesses in speech language pathology. Their explanations made sense, and no other medical professional was called as a witness to dispute their testimony. The Division did present testimony from Shauna Briggs, who was qualified as an expert in Medicaid billing. She explained that she was unable to tell from the clinical records precisely what was performed during each therapy session. She could not determine from these records that behavioral intervention was actually performed.

Ms. Briggs did not, however, testify that SPLs could not separately bill for behavior intervention as part of a large speech therapy session. She and Mr. Hansen questioned whether the documentation was sufficient to show that this had occurred, but the evidence in this case does not establish that the behavior interventions used by Talkabout are an inherent part of speech language therapy.¹²

C. Description of Services Provided

As stated above, the audit asserts that Talkabout's records do not adequately describe the specific services provided. Nothing in the written record or the testimony of the witnesses provides guidance on the degree of specificity required to identify the "specific services provided[.]"¹³ The Division did not introduce any evidence of the record keeping standards applicable to SLPs, and has not cited any statute or regulation that sets standards for SLP records.

Talkabout uses a form for its chart notes that has basic information at the top, including a box containing the text "Health & Behavior Intervention/Individual."¹⁴ This box is checked when the patient receives behavior intervention, and the amount of time spent on the behavior

¹² It is important to remember that the audit findings form the basis for the Division's claims in this case. The audit report is the functional equivalent of the accusation required to initiate a claim against the provider. *See* AS 44.62.360. The relevant audit finding was that there was insufficient "documentation to verify that the reimbursed services were provided to the recipient." Record at 7. The audit did not assert that behavioral interventions could not be separately billed as a part of a speech language therapy session.

¹³ 7 AAC 43.030(b)(2).

¹⁴ *E.g.* Exhibit J, Record page 382.

intervention is then inserted.¹⁵ Below this top section are three columns. The first two columns are used to record notes concerning speech language therapy. The third column on the right hand side of the page has the heading “Social Skill Behavior Intervention.” This column is used to record notes concerning the behavior interventions.

The Division’s position is that checking the box on the top of the page and making a few notes in the intervention column is not sufficient to show what specific services were provided. Mr. Hansen testified that the auditors were looking for a narrative describing the intervention used and the patient’s response to that intervention.

Talkabout’s witnesses explained why the documentation is sufficient. Exhibit I contains a list by name of the different interventions used by Talkabout. Page 3 of Exhibit I contains a key to the coding marks used by Ms. Hulbert-Billings when using the different interventions. These marks indicate the patient’s response to the interventions, or whether the therapist had to prompt or repeat something. The third column of each chart note lists by name the specific interventions used by Ms. Hulbert-Billings on that day. Ms. Hulbert-Billings testified that the documentation used by Talkabout is similar to, but more detailed than, what she was taught to do when she was in graduate school.

Actually listing the services provided in a column titled “Social Skill Behavior Intervention” clearly identifies the “specific services provided.”¹⁶ The regulations do not specifically state that providers must include the patient’s response to each intervention, but even that is included for most of the audited records.¹⁷

It is true that the information is not provided as a narrative. The requirement to identify the services provided is one of four requirements listed in 7 AAC 43.030(b). The other three are the name of the recipient, the extent of each service, and the date of each service. None of the other three requirements are of a type that would necessarily be contained in a narrative as opposed to simply being listed somewhere in the providers records. When looked at in the context of these other three requirements, it is not reasonable to interpret 7 AAC 43.030(b) as requiring the information to be in narrative form.

¹⁵ Mr. Hansen testified that this was probably minimally sufficient to document the extent of the service provided as required by 7 AAC 43.030(b)(3). Neither the audit report nor the arguments made at the hearing asserted that the extent of the service provided was at issue.

¹⁶ 7 AAC 43.030(b)(2).

¹⁷ Ms. Hulbert-Billings testified that level one of some of the interventions did not require a response from the patient so there would be no marks for those records. It would not be reasonable to interpret this regulation to require recording a response to an intervention that is not designed to prompt a response.

The uncontradicted medical testimony was that the behavior interventions used for these patients were separate from the speech language therapy provided to these patients. There was no evidence that Talkabout's chart notes did not meet professional standards of record keeping for SLPs. Ms. Hulbert-Billings testified that she recorded behavioral interventions only when those interventions were actually provided. The chart notes list the specific interventions used for each patient. The Division has not met its burden of proving that these records do not adequately document the services provided to the recipients.

D. Medical Necessity

The second basis for denying 41 of these claims was a lack of documentation that the services were medically necessary. As part of its record keeping obligation, Talkabout is required to maintain records that "identify the medical need for each service."¹⁸ The claims for which an overpayment was identified for this reason are those claims for which there is no physician prescription ordering behavioral management services.

Talkabout has asserted that the treatment plans signed by a physician clearly identify the medical necessity of behavioral interventions. The plans contain goals that make specific statements such as "Improve behavior/social skills."¹⁹

Mr. Hansen testified that he was looking for distinct language from a doctor that behavior interventions or behavior therapy separate from speech therapy was required. Using Exhibit K as an example, the patient, O.B., was diagnosed with both a profound expressive and receptive language disorder as well as with "Severe Behavior and Social Skills Disorder."²⁰ The treatment plan included long term goals of improving expressive language skills, receptive language skills, and "behavior and social skills."²¹ This treatment plan was signed by O.B.'s physician.²² Based on the testimony of Ms. Jamison and Ms. Hulbert-Billings, the behavior and social skill interventions were distinct from the speech language therapy,²³ and the physician signed the treatment plan indicating that improving behavior and social skills was one of the goals for Talkabout to work on with this patient. Thus, there is distinct language signed by a doctor that behavior therapy separate from speech therapy was required. The Division has not met its

¹⁸ 7 AAC 43.030(d)(2).

¹⁹ *E.g.* Exhibit J, Agency Record at 372.

²⁰ Exhibit K, record at 534.

²¹ *Id.*

²² Exhibit K, record at 535.

²³ The Division did not present any evidence from a medical expert of its own to contradict the testimony from Talkabout.

burden of proving that the treatment plans failed to indicate that behavior interventions were medically necessary.

IV. CONCLUSION

Some speech therapy sessions may include aspects of behavior therapy that should not be separately billed. For the claims at issue in this case, however, behavioral interventions were identified as medically necessary by a physician and were provided to each patient as an intervention separate from the speech therapy that was also provided. The Division has not met its burden of proving that the audit properly identified overpayments in Ms. Hulbert-Billings' 2007 Medicaid billings.

DATED this 21st day of October, 2011.

By: Signed
Jeffrey A. Friedman
Administrative Law Judge

Adoption

The undersigned adopts this decision as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 1st day of December, 2011.

By: Signed
Signature
William J. Streur
Name
Commissioner
Title

[This document has been modified to conform to the technical standards for publication.]