



PHILIP D. MURPHY  
Governor

SARAH ADELMAN  
Commissioner

TAHESHA L. WAY  
Lt. Governor

**State of New Jersey**  
**DEPARTMENT OF HUMAN SERVICES**  
Division of Medical Assistance and Health Services  
P.O. Box 712  
Trenton, NJ 08625-0712

JENNIFER LANGER JACOBS  
Assistant Commissioner

**STATE OF NEW JERSEY**  
**DEPARTMENT OF HUMAN SERVICES**  
**DIVISION OF MEDICAL ASSISTANCE**  
**AND HEALTH SERVICES**

M.D.,	:	
	:	
PETITIONER,	:	<b>ADMINISTRATIVE ACTION</b>
	:	
v.	:	<b>FINAL AGENCY DECISION</b>
	:	
AMERIGROUP,	:	<b>OAL DKT. No. HMA 03253-2023</b>
	:	
RESPONDENT.	:	

As Assistant Commissioner for the Division of Medical Assistance and Health Services (DMAHS), I have reviewed the record in this case, including the Initial Decision and the Office of Administrative Law (OAL) case file. Petitioner filed exceptions in this matter. Procedurally, the time period for the Agency Head to render a Final Agency Decision is December 20, 2023 in accordance with an Order of Extension.

This matter arises from Amerigroup's February 22, 2023 decision to deny Petitioner's request for Private Duty Nursing (PDN) services. The matter was transferred to the Office of Administrative Law (OAL) and a hearing was held on August 29, 2023. The record closed on September 11, 2023 and the OAL issued an Initial Decision on September 21, 2023. Based upon my review of the record, I hereby ADOPT the Initial Decision affirming Amerigroup's decision to terminate Petitioner's PDN services.

Petitioner is a seven year old child whose principal diagnoses are heart failure, atrial septal defect, Hirschsprung's disease, gastrointestinal dysmotility, Down syndrome,

gastrostomy (g) tube and chronic respiratory disease. R-5. Petitioner had been receiving PDN services 8 hours per day, 7 days per week. R-8. In or about 2022, Amerigroup sought to reduce Petitioner's PDN hours to 4 hours per day, 7 days per week and the matter was appealed. Ibid. Ultimately, on October 11, 2022 the parties entered into a Stipulation of Withdrawal from that appeal, and mutually agreed upon implementing PDN services 8 hours per day, 5 days per week, Monday through Friday "until the next statutorily required reassessment determines the level of services for the next authorization period following this Stipulation". Ibid. As required, Petitioner was reassessed for PDN services on October 4, 2022, January 11, 2023, March 24, 2023 and August 15, 2023. Each assessment involved a review of the following categories: 1) Nutrition, 2) Integumentary, 3) Enteral and Specialty Care, 4) Airway management, 5) Communication, 6) Medication administration, 7) General assessment/VS neuro response and 8) Orientation/behaviors. R-1, R-2, R-6, R-7. The Acuity Scale assessments were completed by Amerigroup's Case Manager, J.D. In each assessment, Petitioner's acuity score totaled 14, which is lower than the score which would authorize PDN services under Medicaid rules in addition to all other criteria that must be met by regulation. N.J.A.C 10:60-5.4.

In reviewing the matter for authorization, Amerigroup determined that the clinical records showed that Petitioner did not meet the criteria for PDN services. Specifically, Amerigroup's Medical Director, Michael McNeill, M.D. noted that Petitioner takes food and medicine by mouth, has a feeding tube (gastrostomy tube) for additional feeding in the evening, does not require medicines be given as injections, does not need extra help with breathing by using aids such as oxygen, non-invasive ventilation, or breathing machine and does not need help moving around. R-3. As a result, Amerigroup denied Petitioner's request for PDN services from February 1, 2023 to April 30, 2023.

At the outset, I note that the Administrative Law Judge (ALJ) made credibility determinations related to the testimony of J.D. (M.D's Case Manager) and J.P., LPN, who was Petitioner's nurse from 2018 through 2023 and S.D., Petitioner's mother. The ALJ gave greater weight to J.D., who testified for Respondent and found her to be credible as she described Petitioner's needs as contained in the medical records and explained the PDN Acuity Scale assessment results. With regard to J.P.'s testimony, the ALJ determined that the comment she made that Petitioner was unable to indicate when he wanted to eat was not credible and cited "common sense tells you that would be one of the easiest things for the child to communicate with or without speech." The ALJ also determined that J.P. failed to provide any foundation or reasoning as to why Petitioner should continue to receive PDN services 8 hours a day, five days per week. Lastly, the ALJ found that S.D., was "naturally a somewhat biased witness" as she explained that her son was born premature at 37 weeks with lung and heart problems and has had PDN services since he left the hospital.

With regard to receipt of PDN services, the ALJ determined that Petitioner's Acuity scores remained 14 during each assessment described above, "which under Medicaid rules, means he should receive no PDN services." I agree. Petitioner's medical records concerning his PDN services do not demonstrate the need for skilled nursing. The evidence shows that Petitioner takes most food by mouth, does not need help with breathing such as oxygen, non-invasive ventilation or breathing machine, does not need help moving around, does not have a seizure disorder, does require assistance with grooming and does have a g-tube, but is also fed by mouth. R-3, R-4, R-8.

Private duty nursing services are defined as "individual and continuous nursing care, as different from part-time intermittent care, provided by licensed nurses in the home . . ." N.J.A.C. 10:60-1.2. To be considered for PDN services an individual must "exhibit a

severity of illness that requires complex skilled nursing interventions on an ongoing basis. N.J.A.C. 10:60-5.3(b). "Complex" means the degree of difficulty and/or intensity of treatment/procedures." N.J.A.C. 10:60-5.3(b)(2). "Ongoing" is defined "as the beneficiary needs skilled nursing intervention 24 hours per day/seven days per week." N.J.A.C. 10:60-5.3(b)(1). The regulations define "skilled nursing interventions" as procedures that require the knowledge and experience of licensed nursing personnel, or a trained primary caregiver." N.J.A.C. 10:60-5.3(b)(3).

Medical necessity for EPSDT/PDN services shall be based upon, but may not be limited to, the following criteria in (b) or (b)(2) below:

1. A requirement for all of the following medical interventions:

- i. Dependence on mechanical ventilation;
- ii. The presence of an active tracheostomy; and
- iii. The need for deep suctioning; or

2. A requirement for any of the following medical interventions:

- i. The need for around-the-clock nebulizer treatments, with chest physiotherapy;
- ii. Gastrostomy feeding when complicated by frequent regurgitation and/or aspiration; or
- iii. A seizure disorder manifested by frequent prolonged seizures, requiring emergency administration of anti-convulsants.

N.J.A.C 10:60-5.4(b)

In addition, the regulation goes on to exclude certain criteria that do not rise to the level of PDN services unless the criteria above is met:

(d) Services that shall not, in and of themselves, constitute a need for PDN services, in the absence of the skilled nursing interventions listed in (b) above, shall include, but shall not be limited to:

1. Patient observation, monitoring, recording or assessment;
2. Occasional suctioning;
3. Gastrostomy feedings, unless complicated as described in (b)1 above; and
4. Seizure disorders controlled with medication and/or seizure disorders manifested by frequent minor seizures not occurring in clusters or associated with status epilepticus.

N.J.A.C. 10:60-5.4(d).

In this case, the record does not contain any evidence that Petitioner's condition meets these requirements for PDN services. Specifically, Petitioner does not have a dependence on mechanical ventilation, an active tracheostomy, or the need for deep suctioning. There is also nothing in the record to support a finding that Petitioner suffers from a seizure disorder. While Petitioner does feed through g-tube, there is nothing in the record to show that Petitioner has experienced frequent regurgitation and/or aspiration.<sup>1</sup> The mere risk of aspiration does not rise to the level to qualify Petitioner for PDN services under N.J.A.C. 10:60-5.4(b), as PDN services cannot be used purely for monitoring in the absence of a qualifying medical need. See N.J.A.C 10:60-5.4(d)1. Petitioner does receive nebulizer treatments, but they are not performed "around the clock" and are provided on a routine basis. R-1, R-2, R-6, R-7. Accordingly, its administration does not rise to the level of a medical intervention to support a finding of medical necessity under N.J.A.C. 10:60-5.4(b). Petitioner, thus, does not require

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<sup>1</sup>. It should be noted, there is a discrepancy with regard to how many feedings Petitioner receives by g-tube. S.D. testified he is fed by the g-tube twice per day, and D.J. testified Petitioner is fed by g-tube once per day.

complex, ongoing interventions by a licensed nurse, and therefore, he does not meet the eligibility requirements for PDN services.

In addition, Petitioner's parental work schedule is only relevant when the PDN services have been found to be medically necessary. N.J.A.C. 10:60-5.4(c)(1) (stating that available primary care provider support, additional adult care support within the household, and alternative sources of nursing care shall be considered in determining the extent of the need for PDN services and authorized hours of service only after medical necessity, as set forth in N.J.A.C. 10:60-5.4(b), has first been established). Because Amerigroup found PDN services were not medically necessary in this matter, a consideration of Petitioner's family situation was not appropriate.

Based upon the record and the testimony in this matter, it appears that Petitioner is in need of observation, supervision, and monitoring. However, the regulations clearly state that PDN services are not available for observation, monitoring, or assessment. See N.J.A.C. 10:60-5.4(d). The IURO states that although Petitioner has a g-tube, he also takes food and medicine by mouth. R-5. Petitioner is ambulatory, but does require assistance with grooming. Ibid. The IURO notes that the daily activities Petitioner needs assistance with such as feeding and grooming can be met with a non-skilled level of care such as a health aide. Ibid. The IURO further notes that services that do not require a need for PDN services include g-tube feeding unless there are complications. Ibid. The IURO also indicates that PDN services do not include respite, supervision or routine parenting skills and the literature does not provide for PDN services for oral feeding, supervision or redirection for children such as Petitioner with Down Syndrome. In addition, Petitioner has received services for his feeding difficulties relating to food selectivity and difficulty advancing textures. Ibid. Petitioner participated in two feeding admissions with the latest occurring in November and December 2020. Petitioner was

able to make some gains in his feeding during the 2020 admission and it was determined that his oral motor skills for crunchy chewable foods had improved.

Petitioner asserts that they meet the skilled nursing standards necessary to maintain their PDN hours and argues in their exceptions that the Initial Decision was flawed. More specifically, Petitioner asserts the Initial Decision was not based on legally credible evidence and therefore violated the *residuum rule* because the ALJ failed “to address the fact that Amerigroup did not bring the medical director to the hearing,” or address the fact that the only witness Amerigroup produced was J.D., who relied on hearsay to complete the PDN Acuity Scale. The residuum rule requires “some legally competent evidence” to exist “to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness.” N.J.A.C. 1:1-15.5(b). To support his claim, Petitioner relies on A.B. v. United Healthcare, HMA 15133-2014, Final Decision, (July 17, 2015). However, A.B. is distinguishable from the matter at hand. In A.B., United Healthcare produced a witness that had no personal knowledge about the case, and whose primary role with United was to review narratives in the medical reports and provide testimony as to those reports at fair hearings. Unlike A.B., Amerigroup produced J.D., who was personally involved with Petitioner as his case manager for 4 years and regularly communicated with S.D. about Petitioner’s treatment plan. Here, the fact that J.D. served as Petitioner’s case manager and regularly communicated with S.D. contradicts Petitioner’s claim that Amerigroup failed to produce a witness with personal knowledge about Petitioner’s current medical condition. As such, Petitioner’s assertion that the *residuum rule* has been violated, is without merit.

Thus, for the reasons stated above, I FIND that Petitioner was properly reassessed through the documentation provided from Amerigroup. Petitioner’s reassessment and the supporting clinical records fail to demonstrate that Petitioner meets

the criteria for medical necessity to support continued PDN services. Petitioner's medical records do not demonstrate or document that he has a need for complex skilled nursing interventions on an ongoing basis; Petitioner may benefit from an assessment for other non-skilled or non-clinical services. As such, the termination of PDN hours was appropriate under N.J.A.C. 10:60-5.4.

THEREFORE, it is on this 20th day of DECEMBER 2023,

ORDERED:

That the Initial Decision is hereby ADOPTED.



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Jennifer Langer Jacobs, Assistant Commissioner  
Division of Medical Assistance and Health Services