



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION

BCS/170648

PRELIMINARY RECITALS

Pursuant to a petition filed December 07, 2015, under Wis. Stat. § 49.45(5)(a), to review a decision by the Brown County Human Services in regard to Medical Assistance, a hearing was held on January 04, 2016, at Green Bay, Wisconsin.

The issue for determination is whether the agency erred in its termination of BC+ for children AH, OH, and EH.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:



Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: [Redacted]
Brown County Human Services
Economic Support-2nd Floor
111 N. Jefferson St.
Green Bay, WI 54301

ADMINISTRATIVE LAW JUDGE:

John P. Tedesco
Division of Hearings and Appeals

FINDINGS OF FACT

- 1. Petitioner (CARES # [Redacted]) is a resident of Brown County.
2. Petitioner received MA for various children.

3. The agency conducted an investigation and determined that at least three of the children did not live with petitioner 50 percent of the time or more.
4. The agency determined that with a reduced household size the household income resulted in ineligibility for MA for AH, OH, and EH.
5. The agency sent notice terminating MA for the three children effective 1/1/16.
6. Petitioner appealed.
7. At hearing, petitioner disputed the findings of the agency regarding her children's living arrangements.

DISCUSSION

The agency terminated MA for three children in this case because it determined, following an investigation, that the household composition and household income do not result in current eligibility. The termination relies on the agency's conclusion that some of the children claimed on the FS case actually live with the father some or all of the time. Additionally, the facts at the time of hearing are possibly not the same as when the decision was made by the agency. Detective [REDACTED] conducted an investigation into the living arrangements of the family including the various five children. Detective [REDACTED] spoke with various individuals including petitioner, the father of the children ([REDACTED]), and one of the children (M.H.). The detective concluded that the parents have a lifestyle in which "the children are welcome in either of their homes and they have a lot going on in their lives. Based on conversations with [REDACTED] and [REDACTED], [REDACTED] and [REDACTED] are struggling to maintain their own residences which is resulting in sporadic living arrangements. I would recommend that any future living arrangements be verified from additional sources."

Notably, the petitioner explained that there is a valid court order for placement but neither the agency nor the petitioner provided the order as evidence. The detective had not reviewed the order prior to hearing and conceded that he had not known of a placement order until it was mentioned by petitioner.

Petitioner described a very fluid living arrangement confirming the detective's observation that the children feel free to live variously in both homes. She specifically denied the agency's conclusion that A.H., O.H., and E.H. live outside the home more than fifty percent of the time.

According to the BadgerCare Plus Eligibility Handbook:

2.2.1.2 Joint Placement

When the natural or adoptive parents of a child do not live together and have joint placement arrangements for the child (through a mutually agreed upon arrangement or court order), only one parent can be determined eligible at a time unless there is reasonably equivalent placement. Reasonably equivalent placement means that the child is residing with each parent at least 40 percent of the time during a month.

If the child is not residing with both parents at least 40 percent of the time, only the parent with the greater percentage of the placement time may apply on behalf of the child and/or for himself or herself as the caretaker relative of that child.

If only one parent of a child is applying for BadgerCare Plus and he or she is stating that he or she has placement of the child for at least 40 percent of the time, accept the declaration unless it is questionable.

If both parents are applying for BadgerCare Plus and claim the child is residing with them, act on their BadgerCare Plus cases as follows:

1. If both parents agree that they have a reasonably equivalent placement arrangement, ask under which parent's case they want the child to be receiving BadgerCare Plus benefits and determine eligibility for both parents' cases.
2. If either parent disputes that the placement arrangement is reasonably equivalent, the eligibility worker must determine the monthly percentage of the physical placement based on the court order. If the court order does not show reasonably equivalent placement, consider the child to be with the parent he or she is residing with during the month in question and deny the other parent's eligibility as a caretaker relative of this child.
3. If the parents cannot agree on which case the child will receive benefits, put the child on the case with the family whose income is at the lower [FPL](#) level.
4. Document your decision in the case record.

In determining eligibility for the parents with equivalent placement, the child is considered to be residing in both of their homes. That means the child will be included in the group size for both cases and the child's income will also be counted in both cases.

If reasonably equivalent placement exists (as described above) and both parents apply for BadgerCare Plus for the child and the child has access to health insurance where an employer pays 80 percent or more of the monthly premium in one home but not the other, the child shall remain eligible for BadgerCare Plus on the case with the parent who does not have access to health insurance for which the employer pays 80 percent or more.

This case ultimately must result in a hearsay analysis. ██████████ did not testify. M.H. did not testify. Both provided statements to the Detective which were relied upon at hearing. But, no cross-examination of these individuals was possible. In circumstances such as these, when the reliability and probative force of hearsay evidence is suspect and that hearsay evidence is to form the sole basis for a finding of fact, the Wisconsin Supreme Court has held that uncorroborated hearsay does not constitute substantial evidence upon which to base a finding of fact. *Gehin v. Wisconsin Group Ins. Bd.*, 2005 WI 16, ¶¶ 53-56 & 58, 278 Wis. 2d 111, 692 N.W.2d 572; See also, *Williams v. Housing Auth. of City of Milwaukee*, 2010 WI App 14, ¶¶ 14 & 19, 323 Wis. 2d 179, 187 & 189, 779 N.W.2d 185 ("[u]ncorroborated hearsay evidence, even if admissible, does not by itself constitute substantial evidence."). In these circumstances the Wisconsin Supreme Court has held that hearsay must be corroborated by nonhearsay evidence. *Gehin*, ¶¶ 82 & 92. Petitioner denies the agency's assertions and the agency only presents hearsay to support its claims.

In a case like this in which the agency seeks to change the status quo, the burden is on the agency to justify the change and prove the facts underlying the change. At this point, the facts of the actual living arrangements are not at all clear. The court order may indeed be the most reliable evidence, or might at least be the most reasonable way to divide benefits to be paid to the two parents. But, no one provided the court order.

At this point, the agency may wish to conduct further investigation as was recommended by the detective in his report. Or, the agency may wish to review the court order. Another alternative would be for the agency to simply accept the fluidity of the living situation in which the children appear to feel comfortable and welcome in both parents' homes without the need for a rigid schedule. Perhaps in the absence of ██████████ battling for benefits now being paid on petitioner's case then the agency could just leave the status quo in recognition of the rule from the Handbook: "[i]n determining eligibility for the parents with equivalent placement, the child is considered to be residing in

both of their homes. That means the child will be included in the group size for both cases and the child's income will also be counted in both cases.

CONCLUSIONS OF LAW

The agency did not establish that any change in MA status was appropriate.

THEREFORE, it is ORDERED

That the matter is remanded to the agency with instruction to restore and reinstate MA retroactive to January 1, 2016. These actions must be completed within 10 days of this decision.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 21st day of January, 2016

\sJohn P. Tedesco
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin \DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on January 21, 2016.

Brown County Human Services
Division of Health Care Access and Accountability