



FH  
[REDACTED]

**STATE OF WISCONSIN  
Division of Hearings and Appeals**

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In the Matter of

[REDACTED]

DECISION

CCO/144886

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**PRELIMINARY RECITALS**

Pursuant to a petition filed October 29, 2012, under Wis. Admin. Code § HA 3.03, to review a decision by the Rock County Dept. of Social Services to recover child care payments, a hearing was held on December 17, 2012, at Janesville, Wisconsin. A hearing set for November 20, 2012 was rescheduled at the petitioner's request. The record was held open 28 days for the parties to file written arguments.

The issue for determination is whether the father of petitioner's child lived with her after the child's birth. Note that individuals' initials are used for confidentiality purposes.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]

Petitioner's Representative:

Atty. Hal Menendez  
Legal Action of Wisconsin, Inc.  
31 South Mills Street  
Madison, WI 53715

Respondent:

Department of Children and Families  
201 East Washington Avenue  
Madison, Wisconsin 53703

By: Atty. Jerome A. Long, Sherry Quirk  
Rock County Dept. of Social Services  
P.O. Box 1649  
Janesville, WI 53546

**ADMINISTRATIVE LAW JUDGE:**

Brian C. Schneider  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (CARES # [REDACTED]) is a resident of Rock County.
2. In 2012 petitioner received child care assistance for her sons K.C. and M.E.J. M.E.J. was born in February, 2012, and his father is M.E.S.

3. In the summer, 2012, the agency received a referral from the county child support agency that M.E.S. was living with petitioner. An investigation commenced, and following the investigation the agency determined that M.E.S. lived with petitioner and the children as of July 1, 2012. The agency obtained M.E.S.'s income information. By a notice dated October 18, 2012, the county informed petitioner that she was overpaid \$776.86 in child care from April 29 through August 31, 2012, claim no. 690036496.
4. Petitioner lived with her mother prior to July 1, 2012. M.E.S. did not live there.
5. Although M.E.S. was at petitioner's residence daily, his official residence was with his mother. M.E.S. was ordered to pay child support despite the allegation he lived with petitioner. M.E.S. did stay with petitioner temporarily in July after she had surgery.

### DISCUSSION

Wis. Stat., §49.195(3), provides as follows:

A county, tribal governing body, Wisconsin works agency or the department shall determine whether an overpayment has been made under s. 49.19, 49.148, 49.155 or 49.157 and, if so, the amount of the overpayment.... Notwithstanding s. 49.96, the department shall promptly recover all overpayments made under s. 49.19, 49.148, 49.155 or 49.157 that have not already been received under s. 49.161 or 49.19(17) and shall promulgate rules establishing policies and procedures to administer this subsection.

Child care subsidies are authorized in Wis. Stat., §49.155, and thus they are within the parameters of §49.195(3). Recovery of child care overpayments also is mandated in the Wis. Admin. Code, §DCF 101.23. An overpayment is any payment received in an amount greater than the amount that the assistance group was eligible to receive, regardless of the reason for the overpayment. Wis. Admin. Code, §DCF 101.23(1)(g). Recovery must occur even if the error was made by the agency.

The Wisconsin Shares Child Care Assistance Manual, §1.3.8, provides:

Assistance Groups are defined as an individual who is a custodial parent or placement parent, and their dependent children, and all dependent children with respect to whom the individual's dependent child is a custodial parent.

The Assistance Group also includes any nonmarital coparent or any spouse of the individual who resides in the same household as the individual, and any dependent children with respect to whom the spouse or nonmarital coparent is a custodial parent.

The best evidence before me is that M.E.S. is present at petitioner's residence daily. In addition, petitioner admitted that he stayed there temporarily after she had surgery in July.

At the hearing M.E.S.'s mother testified that his regular residence is with her in [REDACTED]. She disputed the statement in the investigator's report alleging that he regularly sleeps at petitioner's residence. Petitioner and her mother also testified that although he is at petitioner's residence regularly he stays with his mother. I note that the Rock County child support agency obtained a child support order against M.E.S. despite the question of his residence. That supports petitioner's testimony that she told the court that they intended to live together, not that they were living together. In addition, M.E.S.'s employer shows the [REDACTED] address for him.

Based upon the evidence, I find that M.E.S. did not live with petitioner sufficiently to warrant him being a household member. At best he stayed with her temporarily in July, but they changed the arrangement after the investigation. They probably did so specifically for benefit purposes; not only does petitioner receive FoodShare, BadgerCare, and child care, her rental subsidy does not allow for M.E.S. to live there.

The question then is whether a person who is acknowledged to be present daily, but who does not sleep in a residence or keep his belongings there, is living in the residence. I have to conclude that the answer is no. It is really a close call, and petitioner should be aware that this finding does not mean that the agency will stop looking into her residential situation, but I am satisfied that petitioner and M.E.S. have separate residences based upon the evidence before me.

Under old AFDC rules, a father could be included in a household even if he did not technically live there, as long as his child was not deprived by his absence. Child care rules do not have a similar standard. To be included in a child care household, a person must live in the household. Petitioner and M.E.S. may have established a separation of convenience, but at this point they have done so successfully.

### **CONCLUSIONS OF LAW**

The county erroneously concluded that petitioner was overpaid child care because the evidence does not support a conclusion that she and her son's father were living together other than temporarily.

**THEREFORE, it is**

**ORDERED**

That the matter be remanded to the county with instructions to rescind child care overpayment claim no. [REDACTED] and to cease recovery of it. The county shall do so within 10 days of this decision.

### **REQUEST FOR A REHEARING**

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found 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 served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Children and Families. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 201 East

Washington Avenue, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Madison,  
Wisconsin, this 17th day of January, 2013

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\sBrian C. Schneider  
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 17, 2013.

Rock County Department of Social Services  
Public Assistance Collection Unit  
Child Care Fraud  
[ham@legalaction.org](mailto:ham@legalaction.org)