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[REDACTED]

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

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In the Matter of

[REDACTED]

DECISION

MOP/144889

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**PRELIMINARY RECITALS**

Pursuant to a petition filed October 29, 2012, under Wis. Stat., §49.45(5), to review a decision by the Rock County Dept. of Social Services to recover Medical Assistance (MA), 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 Health Services  
1 West Wilson Street  
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 BadgerCare Plus (BC+) for herself and 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 2, 2012, the county informed petitioner that she was overpaid \$392 in BC+ from July 1 through August 31, 2012, claim no. [REDACTED]
4. 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

MA overpayment recovery is authorized by Wis. Stat., §49.497(1):

(a) The department may recover any payment made incorrectly for benefits provided under this subchapter or s. 49.665 if the incorrect payment results from any of the following:

1. A misstatement or omission of fact by a person supplying information in an application for benefits under this subchapter or s. 49.665.
2. The failure of a Medical Assistance or Badger Care recipient or any other person responsible for giving information on the recipient's behalf to report the receipt of income or assets in an amount that would have affected the recipient's eligibility for benefits.
3. The failure of a Medical Assistance or Badger Care recipient or any other person responsible for giving information on the recipient's behalf to report any change in the recipient's financial or nonfinancial situation or eligibility characteristics that would have affected the recipient's eligibility for benefits or the recipient's cost-sharing requirements.

See also the department's BC+ Handbook, Appendix 28.2. The overpayment must be caused by the client's error. Overpayments caused by agency error are not recoverable.

To be eligible for BC+, a person must be under age 19, a custodial parent, or the spouse of a custodial parent. Wis. Admin. Code, §DHS 103.03(1)(f)1. A "fiscal test group" is "all members of the medical assistance group and all persons who are financially responsible for members of the medical assistance group who live in the same household as the person for whom they are legally responsible and who are not SSI or AFDC recipients." Admin. Code, §DHS 101.03(65). The BC+ Handbook, Appendix 2.2 also defines a household as the primary person plus others living in the household whose needs must be included.

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, BC+, 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. BC+ rules do not have a similar standard. To be included in a BC+ 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 BC+ 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 BC+ 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 Health Services. 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: 1 West Wilson Street, 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  
Division of Health Care Access and Accountability  
[ham@legalaction.org](mailto:ham@legalaction.org)