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[REDACTED]

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

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In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]

DECISION

CCB/146201

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**PRELIMINARY RECITALS**

Pursuant to a petition filed December 28, 2012, under Wis. Admin. Code §HA 3.03(4), to review a decision by the Milwaukee Early Care Administration - MECA in regard to Child Care, a hearing was held on March 12, 2013, at Milwaukee, Wisconsin.

The issue for determination is whether the Department erred in its denial of Child Care Program benefits to petitioner.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]  
[REDACTED]  
[REDACTED]

Respondent:

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

By: Theresa Miles

Milwaukee Early Care Administration - MECA  
Department of Children And Families  
1220 W. Vliet St. 2nd Floor, 200 East  
Milwaukee, WI 53205

**ADMINISTRATIVE LAW JUDGE:**

John P. Tedesco  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County.
2. Petitioner requested post-secondary child care benefits.

3. Petitioner holds the position of Research Assistant at the University of Wisconsin – Milwaukee’s Zilber School of Public Health. In that position, petitioner earns a stipend of \$20,778 for a one-year appointment from June 2012 to June 2013. As a research assistant, petitioner is also a graduate student at the University of Wisconsin – Milwaukee.
4. On December 28, 2012, the Department denied child care benefits (“CC”) on the basis that petitioner’s research assistantship was not qualified employment making him eligible for CC.
5. Petitioner filed a timely appeal.

### DISCUSSION

All childcare funding distribution falls under the aegis of the Wisconsin Works (W-2) program, regardless of whether or not the applicant is actually a participant in W-2 activities. See WI Stat § 49.155(1m). Prior to November 24, 2003, any parent desiring to contest child care assistance overpayments was required to request a fact-finding review from the issuing W-2 agency. Effective November 24, 2003, the Department of Workforce Development changed the process to provide recipients of such assistance a fair hearing from the Division of Hearings & Appeals. See, *DWD Operations Memo*, #03-66. See also, WI Stat §49.195(3), § 49.152(2), & § 227.42, *et. seq.*

Not every parent is eligible for W-2 child care services, even if they meet the financial criteria, as there are also nonfinancial eligibility criteria. A parent is eligible for child care services if she needs the care to attend W-2-approved school, to work, or to participate in W-2 activities. See Wis. Stat. §49.155(1m)(a).

Wisconsin Shares child care assistance is only available to individuals that are in Approved Activities. See *Child Care Policy Manual (Manual)*, §1.5.0, available online at <http://dcf.wisconsin.gov/childcare/wishares/pdf/chapter1.pdf>. Those Approved Activities include: Learnfare, High School, Unsubsidized Employment, Qualified Employers, Pre-Job Training, Apprenticeships, Sheltered Employment, Work Study, Youth Employment, Legitimate Self-Employment, Wisconsin Works or Tribal TANF Employment Position, FSET, Basic Education, Technical College or Course of Study Producing Employment.

The Department’s argument at hearing was that the Research Assistantship position is not “unsubsidized employment.” The first part of that argument made by the Department representative was based on a University human resource policy that states that RA’s are not considered employees (see ex. #3 at p.19). But, this document is a *University* policy. It does not provide a definition for the administration of benefits under a specific state program. The program provides the applicable definition for that (see below). It simply does not matter what the University designates a person if they meet the program definition. This document is irrelevant and the argument is off the mark.

The Department also argued that RA’s are not entitled to benefits and does not have a social security deduction from gross pay are, thus, not employees. At hearing, I repeatedly asked the Department representative where in the program rules it was stated that benefits or such a deduction were a requirement for qualifying employment. The representative never did reach that answer.

The representative also argued that the RA position was “subsidized employment.” The representative reached this conclusion based on the fact that petitioner receives a stipend for the RA position. The representative, without providing any actual evidence of this, asserted that a stipend indicates that the position is grant-funded. The representative then argued that because the position must be grant-funded, it is therefore subsidized employment which is not an approved activity.

Again, we must look at the actual program rules, none of which were argued or cited by the representative at the time of the hearing. According to the Wisconsin Child Care Assistance Manual at § 1.2.0

“Unsubsidized Employment” is defined as: “employment for which a W-2 agency provides no subsidy to the employer, including self-employment and entrepreneurship for purposes other than ‘holding a slot.’” I note that there is no reference to whether a position is grant-funded or paid by stipend. The Department made no argument that the University of Wisconsin – Milwaukee gets W-2 funding for this RA position, so I cannot find that it is a subsidized employment position for purposes of the CC program. Nor do I find that the position is anything but “employment

I asked the representative to provide a citation to a rule supporting her position following the hearing. The Department representative sent an e-mail to this ALJ following the hearing noting that according to Section 1.5.7 of the CC Manual, if petitioner is a student then he would be entitled to CC if the employment meets the definition of unsubsidized employment or if it is a teaching-assistant position or any other education related employment that has a measurable cash value equivalent to 5 hours per week. I note that in addition to the cash paid to petitioner, he is also entitled to a remission of tuition costs. For these reasons, this appears to fit within the allowable activities under this section as well. I am not sure if the Department representative sent this rule to me because she agrees with this interpretation and concedes the issue, or if she believes that this rule somehow supports her argument and excludes petitioner from eligibility.

In a Fair Hearing concerning the propriety of an overpayment determination, the agency has the burden of proof to establish that the action it has taken was correct given the facts of the case. If the agency meets its burden, the petitioner must then rebut the agency's case and establish facts sufficient to overcome its evidence of correct action.

Even after all this, I still do not understand the legal basis upon which the Department asserts that petitioner is ineligible. It has not met its burden.

### **CONCLUSIONS OF LAW**

The Department did not meet its burden to show that petitioner is not eligible for CC based on his position as a research assistant.

**THEREFORE, it is**

**ORDERED**

That this matter is remanded to the Department with instructions to reverse its determination, retroactive to December 28, 2012, that petitioner is ineligible for CC based on the nature of his position as a research assistant. The Department shall issue to petitioner any benefits from that point onward to which he is otherwise entitled. These actions must be completed within 10 days.

### **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 1st day of April, 2013

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\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 April 1, 2013.

Milwaukee Early Care Administration - MECA  
Child Care Benefits