



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

FOO/147728

PRELIMINARY RECITALS

Pursuant to a petition filed February 26, 2013, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Milwaukee Enrollment Services in regard to FoodShare benefits (FS), a hearing was held on April 3, 2013, by telephone. The hearing record was held open for seven days for a possible submission from the petitioner (post-2006 court order); nothing was received.

The issue for determination is whether the Department correctly reduced the petitioner's FS effective March 1, 2013, by removing his son from the FS case.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

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

By: Katherine May

Milwaukee Enrollment Services
1220 W Vliet St
Milwaukee, WI 53205

ADMINISTRATIVE LAW JUDGE:

Nancy J. Gagnon
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County.
2. The petitioner had an ongoing FS case for three persons prior to March 2013. In December 2012, the petitioner's ex-wife contacted the Department and advised that their child DD was not living

with the petitioner. On January 28, 2013, the Department issued written notice to the petitioner advising that his FS would be decreased from \$474 to \$331 effective March 1, 2013. The basis for reduction was removal of DD from the FS household.

3. The petitioner's Judgment of Divorce from █████ █████ in 2006 provided that both parents would have joint legal custody of their two sons, ND and DD. Primary physical placement and the actual majority of the placement time was awarded to █████ █████. As of 2013, ND is an adult.
4. On December 10, 2012, ██████████, administrator of ██████████, wrote a letter to the Department advising that the child DD was a full-time student at ██████████, which is an all-boys boarding school in ██████████, Wisconsin. He further advised that DD spent his school vacations and breaks with his mother.
5. DD was added to █████ █████'s FS case effective March 1, 2013, at her request.

DISCUSSION

The petitioner contends that the agency erred by removing his child from his FS group beginning March, 2013. The federal FS rule on household composition reads as follows:

(a) *General household definition. A household is composed of* one of the following individuals or groups of individuals, unless otherwise specified in paragraph (b) of this section:

- (1) An individual living alone;
- (2) An individual living with others, but customarily purchasing food and preparing meals for home consumption separate and apart from others; or
- (3) *A group of individuals who live together and customarily purchase food and prepare meals together* for home consumption.

(b) *Special household requirements.--*(1) Required household combinations. The following individuals who live with others must be considered as customarily purchasing food and preparing meals with the others, even if they do not do so, and thus must be included in the same household, unless otherwise specified:

- (i) Spouses;
- (ii) *A person under 22 years of age who is living with his or her natural or adoptive parent(s) or step-parent(s);* and
- (iii) A child (other than a foster child) under 18 years of age who lives with and is under the parental control of a household member other than his or her parent. A child must be considered to be under parental control for purposes of this provision if he or she is financially or otherwise dependent on a member of the household, unless State law defines such a person as an adult.

(emphasis added)

7 C.F.R. §273.1(a),(b). See also, *FS Wisconsin Handbook (FSWH)*,§ 3.3.1.2 - .3, viewable at www.emhandbooks.wisconsin.gov/fsh.

The petitioner testified that the child DD lives with and is under his "parental control" at all times with the exception of time away at school. The fact of joint legal custody is not in dispute.

The policy direction for placement reads as follows:

3.2.1.1 Joint or Shared Physical Custody of Children

Children are included in the household where they reside when they are under the care and control of a **parent** or other caretaker in that household. There may be situations when the residence of a **child** is not easily determined. There are many methods that can be used to determine the child's residence. If the residence of a child is questionable, court documents can be used to determine if there is a primary caretaker designated. It may be a situation of joint custody and a 50-50 custody split. If one parent is not designated as primary caretaker, the parents can be asked to decide. Individuals can only be included in one food unit.

... [omits criteria for deciding a 50-50 placement case]

Only one parent can receive **FS** for a child. If you still cannot determine which food unit the child should be in, the caretaker that first applies would be eligible. Use the best information available to make your decision, and document in case comments the basis of your determination. If you still cannot determine which food unit the child should be in, call the **CARES** call center.

Id., 3.2.1.1.

DD's mother has now added him to her FS case effective March 1, 2013. Thus, under the code and policy, DD could be on the petitioner's FS case if he had 51% placement. Per his testimony, DD spends the majority of his non-school time with the petitioner. However, the petitioner did not produce documentation to support a finding that the court has changed DD's primary placement from the mother to at least a 50/50 placement. The motion requesting a shift to 50/50 was presented, but no documentation of the court's decision on that motion was supplied. Thus, I cannot conclude that the placement has been changed by the court.

Unfortunately for the petitioner, FS rules and policy do not allow a person to be in more than one FS group at a time:

A person cannot be a member of more than 1 food unit and 1 **FS** group in the same month except residents of shelters for battered women and children.

FSWH, 3.4.1. Therefore, I cannot return DD to the petitioner's FS case as long as the mother has him on her case.

Second, even if the mother stopped claiming DD on her FS case, the allotment size for the petitioner cannot go up to three because DD is absent at a boarding school. (The same rule applies to his mother). The pertinent policy states:

3.2.1.2 Temporary Absence

Include in the household an individual temporarily absent from the household when the expected absence is no longer than 2 full consecutive calendar months past the month of departure. Some examples are absence due to illness or hospitalization, employment, and visits.

To be considered temporarily absent, one must meet ALL of the following conditions:

1. The individual must have resided with the food unit immediately before the absence,
2. The individual intends to return to the home, and the food unit must maintain the home for him/her,

3. If the absent person is a child, the caregiver of the absent child is responsible for the child's care and control when the child returns to the home, and
4. If the absent person is an **adult** , the adult must still be responsible for care and control of the child during their absence.

Attending school - Persons temporarily absent to attend a school is not a reason to remain included in the food unit.

FSWH, § 3.2.1.2. The upshot is that DD cannot be added to the head count of any FS household because he is in a boarding school, which is presumably supplying the majority of his meals.

CONCLUSIONS OF LAW

1. The agency correctly removed DD from the petitioner's FS case effective March 1, 2013, due to his absence from the household while attending boarding school.

THEREFORE, it is

ORDERED

That the petitioner is dismissed.

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 6th day of May, 2013

\sNancy J. Gagnon
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

David H. Schwarz
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on May 7, 2013.

Milwaukee Enrollment Services
Division of Health Care Access and Accountability