



FH
[REDACTED]

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

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

FOO/155392

PRELIMINARY RECITALS

Pursuant to a petition filed February 7, 2014, under Wis. Admin. Code, §HA 3.03(1), to review a decision by Milwaukee Enrollment Services in regard to FoodShare benefits (FS), a hearing was held on March 12, 2014, by telephone.

The issue for determination is whether the agency erred by putting petitioner's daughter on her mother's case because her case was open before petitioner's case.

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

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

By: Jose Silvestre
Milwaukee Enrollment Services
1220 W. Vliet St.
Milwaukee, WI 53205

ADMINISTRATIVE LAW JUDGE:

Brian C. Schneider
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County who receives FS.
2. Petitioner has one daughter, D.T., whose mother is A.L. A.L. has had an ongoing benefit case with child as part of her household.
3. On January 24, 2014, petitioner filed a change report showing that D.T. resides with him more than with A.L. He included a copy of a motion for change of custody to him. The agency took D.T. off A.L.'s case and put her on petitioner's case for February, 2014. At that point A.L.

complained, and the agency worker noticed that petitioner had provided a copy of a motion for change of custody but not the order that followed.

4. The order that followed petitioner's motion, dated December 30, 2011, provided for joint custody and joint placement. In addition, the Department's KIDS child support screen showed A.L. as the primary caretaker. Therefore the agency worker removed D.T. from petitioner's benefit case effective March 1, 2014 and added her back to A.L.'s case on the grounds that A.L. had D.T. on her case first. Petitioner then appealed.

DISCUSSION

The federal FS regulations define FS household composition 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.

7 C.F.R. §273.1(a). The generic household definition requires that household members "live together" and "purchase and prepare" meals together. This definition does not solve the problem posed by this case, because the children live with, and eat with, both of their divorced parents.

The only other relevant instruction offered by the federal regulation is in 7 C.F.R. §273.1(c) and is an authorization to the state agencies to create policies to answer questions pertinent to household composition issues:

(c) *Unregulated situations.* For situations that are not clearly addressed by the provisions of paragraphs (a) and (b) of this section, the State agency may apply its own policy for determining when an individual is a separate household or a member of another household if the policy is applied fairly, equitably and consistently throughout the State.

In Wisconsin, the state agency has developed policy standards to determine FS household composition in cases involving children in joint custody. The policy is clear in requiring that the child cannot be a member of more than one FS group in the same month. See the FoodShare Wisconsin Handbook, §3.4.1. State policy also determines the assignment of a joint custody child to a specific household:

Children are included in the household where they reside when they are under the care and control of a parent a person's biological, step, or adoptive mother or father regardless of age. Parenthood doesn't have to be verified or other caretaker in that household. There may be situations when the residence of a child a person's biological, step, or adopted son or daughter, regardless of age, 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.

If the parents can not or will not decide, compare the parents' activities and responsibilities against the following list and determine which one is exercising more control than the other:

1. If the parents reside in different school districts, where does the child attend school? Who selected the school?
2. Who assists the child with homework or school-related tasks?
3. Are there tuition costs for the child's education? If so, who pays those costs?
4. If the child is enrolled in day care, who arranges for and pays these costs?
5. Who is responsible for taking the child to and from school and/or day care?
6. Which parent is listed as the contact for emergencies at the child's school or day care provider?
7. Who arranges medical and dental care for the child? Who selects the physician and dentist?
8. Who maintains the child's medical records?
9. Who initiates decisions regarding the child's future?
10. Who responds to medical or law enforcement emergencies involving the child?
11. Who spends money on food or clothing for the child when the child visits the absent parent?
12. Who disciplines the child?
13. Who plays with the child and arranges for entertainment?
14. Are more of the child's toys, clothing, etc. kept at one parent's home than the other's?

Only one parent can receive FS for a child. If you still can not 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 can not determine which food unit the child should be in, call the CARES Client Assistance for Reemployment and Economic Support call center.

FS Handbook, §3.2.1.1, emphasis added in final paragraph.

I find that the agency handled this case incorrectly when it simply moved D.T. back to A.L.'s case. Petitioner alleged in his change report that he had D.T. more than A.L. Since the December, 2011 court order provides no specifics other than to say joint placement, the agency worker should have investigated the situation by asking both parents the questions listed above. The KIDS screen should have no bearing on the determination since there is no basis in the court order for one parent or the other to be named "primary." I note that there is no child support order for either parent as both are Supplemental Security Income (SSI) recipients.

Based on petitioner's testimony, he would likely be the primary parent. According to him he has D.T. with him four days per week every week, and he makes the decisions regarding school and medical care. I will not order D.T. back on his case, however, because I have not heard A.L.'s side of the placement dispute.

I will remand this case, and the two accompanying cases, to the agency to determine which parent should be the primary parent for D.T. for the issuance of benefits. If, after going through the current placement arrangement and the Handbook questions the agency still cannot decide, the child should stay on A.L.'s case.

CONCLUSIONS OF LAW

The agency erred by determining that petitioner's daughter should remain on her mother's case without first examining which parent should be listed as the primary parent following petitioner's request for a change.

THEREFORE, it is

ORDERED

That the matter be remanded to the agency with instructions to determine which parent should be the primary parent for D.T. for the issuance of benefits, going through the current placement arrangement and the FS Handbook questions. The agency shall take the action within 10 days of this decision and make the determination for the next possible benefit month.

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, Room 651, 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 13th day of March, 2014

\sBrian C. Schneider
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin \DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
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 March 13, 2014.

Milwaukee Enrollment Services
Division of Health Care Access and Accountability