FH
[redacted]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of:

[redacted]

DECISION

MOP/159671

PRELIMINARY RECITALS

Pursuant to a petition filed August 5, 2014, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Marathon County Department of Social Services ["County"] in regard to Medical Assistance ["MA"], a Hearing was held via telephone on September 16, 2014.

The issue for determination is whether it was correct to establish the following 2 Claims against petitioner for overpayments of MA for the time period February 1, 2013 to March 31, 2014 in the total amount of $8,021.79:

(I) Claim Number [redacted]; February 1, 2013 to December 31, 2013; $5,880.51; and,
(II) Claim Number [redacted]; January 1, 2014 to March 31, 2014; $2,141.28.

There appeared at that time via telephone the following persons:

PARTIES IN INTEREST:
Petitioner:

[redacted]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703
By: Kris Weden, ES Supervisor
Marathon County Department of Social Services
400 E. Thomas Street
Wausau, WI 54403

ADMINISTRATIVE LAW JUDGE:
Sean P. Maloney
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [redacted]) is a resident of Marathon County, Wisconsin.

2. The County established the following 2 Claims against petitioner for overpayments of MA for the time period February 1, 2013 to March 31, 2014 in the total amount of $8,021.79:

   (I) Claim Number [redacted]2; February 1, 2013 to December 31, 2013; $5,880.51; and,
   (II) Claim Number [redacted]; January 1, 2014 to March 31, 2014; $2,141.28.

3. Petitioner is divorced; he and his ex-wife had 2 children together: "BTF" [male; now 20 years old] and; "WF" [male; born 1999].

4. During the time period of the alleged MA overpayments listed in *Finding of Fact* #2, above, petitioner's younger child (son "WF" born in 1999) was counted as living with petitioner at least 40% of the time.

5. During the time period of the alleged MA overpayments listed in *Finding of Fact* #2, above, WF lived with petitioner at least 40% of the time for the time period September 2013 to January 2014.

DISCUSSION

An overpayment of MA benefits may be recovered only in the following 3 circumstances:

A. A misstatement or omission of fact by a person supplying information in an application for benefits;

B. The failure of an MA or BadgerCare 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; or,

C. The failure of an MA or BadgerCare 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.

Wis. Stat. § 49.497(1)(a) (2011-12); Wis. Admin. Code § DHS 108.03(3)(b) (May 2010); See also, *Badger Care + Eligibility Handbook* ["BC+EH"] 28.1.; *Medicaid Eligibility Handbook* ["MEH"] 22.2.1; BEM/DWS Operations Memo, No: 05-39, Date: 09/29/2005; and, BEM/DWS Operations Memo, No: 06-10, Date: 02/09/2006.

The alleged overpayments in this matter arose from the fact that WF counted was living with petitioner at least 40% of the time when the County maintains that he actually lived with petitioner less than 40% of the time. With certain exceptions not applicable here, during the time period of the overpayments in this matter in order to be eligible for MA an adult must be a parent or caretaker relative of a child who is living in the home with the parent or caretaker relative. Wis. Stat. § 49.471(4)a. (2011-12); BC+EH 2.1. There are special rules that apply when the parents of a child do not live together. BC+EH 2.2.1.2. Under these special rules it is possible that <u>both</u> parents are eligible for BC+ if there is "reasonably equivalent placement" of a child they have in common. BC+EH 2.2.1.2. The special rules are found in section 2.2.1.2 of the *Badger Care + Eligibility Handbook* and are as follows:

"2.2.1.2 Joint Placement

When the natural or adoptive parents of a child do not live together, and have joint placement arrangements for the child (through a mutually agreed upon arrangement or court order), only one parent can be determined eligible at a time unless there is reasonably equivalent placement. Reasonably equivalent placement means that the child is residing with each parent at least 40% of the time during a month.

If the child is not residing with both parents at least 40% of the time, only the parent with the greater percentage of the placement time may apply on behalf of the child and/or for him or herself as the caretaker relative of that child."

BC+EH 2.2.1.2.

This matter must be decided by a preponderance of the credible evidence in the record of this matter. Wis. Admin. Code §§ HA 3.09(1) & (4) (February 2014). The preponderance of the credible evidence concerning the time period of the overpayment (February 1, 2013 to March 31, 2014) is that:

- WF lived with his mother (petitioner's ex-wife) during the summer of 2013[1];
- during the school year (2012-2013; and, 2013-2014): WF lived with his mother during the week (because the school he attended was much closer to his mother's house than to petitioner's house); for the weekends petitioner would pick-up WF from school at about 3:00 P.M. on Friday afternoon, WF would spend the weekend at petitioner's house, petitioner would drop WF off at school at about 7:30 A.M. Monday morning, and WF's mother was out of town on Mondays but would pick WF up from school on Monday afternoon; petitioner was responsible for WF (and the school knew of this) until WF's mother picked him up on Monday afternoon;
- petitioner missed some days with WF in February 2014 and March 2014 due to a severe injury he sustained in February 2014.

Petitioner's ex-wife did not testify at the Hearing. However, she made statements to an investigator. She also provided a calendar marked with days that she states she cared for WF. This information from petitioner's ex-wife is to the effect that WF did not reside with petitioner at least 40% of the time during the time period of the overpayment (except for perhaps December 2013). All of this is hearsay. See, Wis. Stat. § 908.01(3) (2011-12). Further, it is inconsistent with the testimony of petitioner as well as with statements made by several other witnesses. Additionally, the credibility of petitioner's ex-wife is questionable based on a written statement provided by her older son (BTF) as well as the testimony of petitioner.

In circumstances where the reliability and probative force of hearsay evidence is suspect and that hearsay evidence is to form the sole basis for a finding of fact, the Wisconsin Supreme Court has held that uncorroborated hearsay does not constitute substantial evidence upon which to base a finding of fact. *Gehin v. Wisconsin Group Ins. Bd.,* 2005 WI 16, ¶¶ 53-56 & 58, 278 Wis. 2d 111, 692 N.W.2d 572; See also, *Williams v. Housing Auth. of City of Milwaukee*, 2010 WI App 14, ¶¶ 14 & 19, 323 Wis. 2d 179, 187 & 189, 779 N.W.2d 185 ["Uncorroborated hearsay evidence, even if admissible, does not by itself constitute substantial evidence."]. In these circumstances the Wisconsin Supreme Court has held that hearsay must be corroborated by nonhearsay evidence. *Gehin*, ¶¶ 82 & 92. There is little, if any, nonhearsay evidence in the record of this matter that corroborates the hearsay evidence of petitioner's ex-wife.

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[1] The evidence is that WF lived with petitioner during the summer of 2014. However, summer 2014 is not part of the overpayment time period.

Based on the above, it must be concluded that WF resided with petitioner at least 40% of the time during the months of September 2013, October 2013, November 2013, December 2013, and January 2014. Therefore, the overpayment cannot be sustained, and must be reserved, with respect to those 5 months. The County may attempt to reestablish an MA overpayment claim against petitioner for summer 2013 and for the months of February 2014 and March 2014. If the County does so it must provide petitioner with notice and an opportunity for a Hearing.

CONCLUSIONS OF LAW

For the reasons discussed above, it was not correct to establish the following 2 Claims against petitioner for alleged overpayments of MA for the time period February 1, 2013 to March 31, 2014 in the total amount of $8,021.79:

(I) Claim Number [redacted]; February 1, 2013 to December 31, 2013; $5,880.51; and,
(II) Claim Number [redacted]; January 1, 2014 to March 31, 2014; $2,141.28.

NOW, THEREFORE, it is

ORDERED

That this matter be REMANDED to the County, that the County not establish an MA overpayment Claim against petitioner for the 5 months of September 2013, October 2013, November 2013, December 2013, and January 2014 and that, within 10 days of the date of this *Decision*, the County send petitioner a letter stating that it has reversed the MA overpayment Claim for those 5 months. The County may attempt to reestablish an MA overpayment Claim against petitioner for summer 2013 and for the months of February 2014 and March 2014. If the County does so it must provide petitioner with notice and an opportunity for a Hearing.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision.** Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or 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 filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of

Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 3rd day of October, 2014

\sSean P. Maloney
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 October 3, 2014.

Marathon County Department of Social Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability