FH
[redacted]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION

CCO/165403

PRELIMINARY RECITALS

Pursuant to a petition filed April 13, 2015, under Wis. Admin. Code § HA 3.03, to review a decision by the Milwaukee Early Care Administration - MECA in regard to Child Care, a hearing was held on May 05, 2015, at Milwaukee, Wisconsin.

The issue for determination is whether the Milwaukee Early Care Administration (the agency) correctly determined that the Petitioner was overpaid childcare benefits in the amount of $1,547.46 for the period of September 7, 2014 through November 30, 2014.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:
Petitioner:

[redacted]

Respondent:

Department of Children and Families
201 East Washington Avenue, Room G200
Madison, Wisconsin 53703
By: Glennetta Rucker, DCF Program Supervisor
Milwaukee Early Care Administration - MECA
Department of Children And Families
1220 W. Vliet St. 2nd Floor, 200 East
Milwaukee, WI 53205

ADMINISTRATIVE LAW JUDGE:
Mayumi M. Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [redacted]) is a resident of Milwaukee County.

2. On September 3, 2014, the agency processed an application for child care benefits for the Petitioner. At that time, the Petitioner reported that she was self-employed and had provided her taxes showing self-employment income from a child care business. (Exhibit 2, pg. 17 and pgs. 46-52)

3. On September 4, 2014, the Petitioner contacted the agency to request a child care authorization, reporting self-employment. (Exhibit 2, pg. 17)

4. On September 4, 2015, the agency sent the Petitioner a notice of Child Care Eligibility, advising the Petitioner that her application for child care benefits was approved, effective September 1, 2014. (Exhibit 2, pgs. 53-56)

5. On September 8, 2015, the agency sent the Petitioner a notice, advising her that she was authorized to receive childcare for the period of September 7, 2014 through January 3, 2015. (Exhibit 2, pgs. 57-59)

6. On November 7, 2014, the agency determined that the Petitioner was not eligible for child care benefits, because she was self-employed as a childcare provider. So, the agency ended the Petitioner's authorization, effective November 8, 2014. (Exhibit 2, pg. 17)

7. On March 24, 2015, the agency issued to the Petitioner a manual Child Care Client Overpayment Notice, indicating that she was overpaid benefits in the amount of $1,547.46 for the period of September 7, 2014 through November 30, 2014, because of an agency / administrative error. (Exhibit 2, pgs. 1-2)

8. On March 25, 2015, the agency sent the Petitioner an automated Child Care Overpayment Notice, claim [redacted], again advising the Petitioner that she was overpaid benefits in the amount of $1,547.46 for the period of September 7, 2014 through November 30, 2014, due to NON-client error. (Exhibit 2, pgs. 3-4)

9. On April 2, 2015, the agency sent the Petitioner a repayment agreement. (Exhibit 5)

10. The Petitioner filed a request for fair hearing that was received by the Division of Hearings and appeals on April 10, 2015. (Exhibit 1)

DISCUSSION

Regardless of who caused the overpayment, the county agency is legally required to seek recovery of all overpayments of child care benefits. An overpayment occurs when a recipient is not eligible to receive child care benefits or receives more benefits than is entitled to receive. "All overpayments made to a client, whether due to client error, agency error or fraud, **must** be formally established to be repaid by the client." *Wisconsin Shares Child Care Assistance Manual (Child Care Manual) §2.1.5.2; See also §2.1.4.2*.

Wis. Stat. § 49.195(3) provides that the department shall determine whether an overpayment has occurred, shall notify the recipient, and shall give the recipient an opportunity for a review and hearing. See also *Child Care Manual* §2.1.5.1, which can be viewed on line at:

http://dcf.wisconsin.gov/childcare/wishares/manual.htm

It is a well-established principle that a moving party generally has the burden of proof, especially in administrative proceedings. State v. Hanson, 295 N.W.2d 209, 98 Wis. 2d 80 (Wis. App. 1980). In a case involving recovery of an alleged overpayment, the agency is the moving party, seeking to change the status quo. As such, the agency bears the burden to prove that it acted correctly.

There is no dispute that the Petitioner took her child to daycare between September 7, 2014, and November 30, 2014; nor is there any dispute that the Wisconsin Shares Program paid the daycare

provider $1,547.46 for the childcare services. The parties dispute the Petitioner's eligibility for those services.

The agency asserts that the Petitioner was not eligible for child care benefits, because she was self-employed as a daycare provider and was not engaged in any other approved activity. The Petitioner asserts that her child has health issues, requiring breathing apparatus, so an exception should be made in her case.

A parent/caregiver is eligible for child care services if he/she needs child care to participate in an "approved activity". *Child Care Manual,* §§ 1.5.0, et al., & 1.4.8. One type of approved activity is participation in legitimate self-employment. Wis. Stats. §49.155(1m)(a)(5); *Child Care Manual,* §1.5.3.7

However, Wis. Stats. §49.155(3m)(d) states that:

1. No funds distributed under par. (a) [Wisconsin Shares] may be used for child care services that are provided for a child by a child care provider who is the parent of the child or who resides with the child.
2. If a child's parent is a child care provider, no funds distributed under par. (a) may be used for child care services that are provided for the child by another child care provider who is not the child's parent.
3. Subdivision 1. Or 2. Does not apply if the child's parent has applied for, and been granted, a waiver of the prohibition under subd. 1. Or 2. By the county department or agency or by the department.
4. The department shall by rule specify the circumstances, or standards for determining circumstances, under which the department will grant a waiver under subd. 3.

The Department of Children and Families, exercised its authority under paragraph 4, above, and promulgated Wis. Admin. Code §DCF201.04(2j):

(2j) CHILDREN OF PROVIDERS.

(a) No funds distributed under s. 49.155 (3m) (a), Stats., may be used for any of the following:

1. Child care services provided for a child by a child care provider who is the parent of the child or who resides with the child.

2. If a child's parent is a child care provider, child care services provided for the child by another child care provider, unless the child's parent has applied for and been granted a waiver under pars. (b) and (c).

Note: Funds distributed under s. 49.155 (3m) (a), Stats., include funds used to reimburse child care providers; funds distributed to county departments and tribal governing bodies for child care services under s. 49.155, Stats.; funds distributed to private nonprofit agencies that provide child care for children of migrant workers; and funds used to reimburse W-2 agencies for child care that the agencies provide to the children of W-2 participants and applicants.

(b)

1. A parent who is a child care provider may apply to the agency for a waiver of the prohibition in par. (a) 2., requesting that funds distributed under s. 49.155 (3m) (a), Stats., be used for child care services provided for the provider's child by another child care provider. No waiver of the prohibition in par. (a) 1. is permitted.

2. If a parent who is a child care provider requests child care assistance to do an activity in s. 49.155 (1m) (a), Stats., other than an activity related to child care and the parent provides documentation of the need for child care services, the agency shall consider the documentation to be an application for a waiver of the prohibition in par. (a) 2.

(b) The department or agency may grant a waiver requested under par. (b) if any of the following apply:

(c)

1. The department or agency determines that assistance is appropriate because the child has a special need.

Note: See s. DCF 201.02 (20).

3. The parent is the child's foster parent.

4. The parent is the child's guardian or interim caretaker and is receiving subsidized guardianship payments under s. 48.623, Stats., or s. 48.62 (5), 2009 Stats., for the care and maintenance of the child.

5. The parent is the child's kinship care relative, the child has been placed with the relative under a court order, and the relative is receiving kinship care payments under s. 48.57 (3m) or (3n), Stats., for the care and maintenance of the child.

Note: Section DCF 58.04 (1) provides that if a relative applies for kinship care payments for a child who was placed in the relative's home under a court order, the relative shall apply for a license to operate a foster home under ch. DCF 56. Under s. DCF 58.065 (1) and (2), the relative may be eligible to receive kinship care payments pending the decision on the foster care application. If the relative's application to operate a foster home is denied or the relative is otherwise determined to be ineligible for licensure, the relative may be eligible to continue to receive kinship care payments if a court orders the child to remain in the kinship care relative's home under s. DCF 58.065 (3) or the court or panel approved continuation of the placement under s. DCF 58.066 (2). Many individuals who are ineligible for a foster care license would also be ineligible to be a child care provider, but the determination is made on a case-by-case basis.

6. Both of the following apply:

a. The child's biological parent is a dependent minor child under the age of 18 who attends high school or participates in a course of study meeting the standards established by the state superintendent of public instruction for the granting of a declaration of equivalency of high school graduation.

b. The dependent minor parent and the child reside with a person who is considered the child's parent for the purposes of this chapter and who may be the dependent minor parent's custodial parent, kinship care relative, foster parent, or guardian or interim caretaker receiving a payment under s. 48.623, Stats., or s. 48.62 (5), 2009 Stats., for the care and maintenance of the dependent minor parent.

7. The parent is requesting child care assistance to do an activity in s. 49.155 (1m) (a), Stats., other than an activity related to child care.

Based upon the statute and administrative code provision cited above, the agency is correct in its assertion that parents who are self-employed as child care providers are generally not eligible for childcare benefits. However, the statutory and code provision also indicate that a waiver may be granted under certain circumstances.

According to Ops Memo 12-60, a waiver application form, DCF-F-432-E, must be completed by the applicant. (Exhibit 2, pgs. 90-94) If the request for a waiver is denied, then the agency must deny the application for lack of an approved activity. (Id.) The agency must also send the applicant a Notice of Ineligibility that includes information advising applicant of his/her right to appeal the denial of the waiver. (Ops Memo 12-60 - Exhibit 2, pgs. 90-94)

Once the Petitioner reported her self-employment as a child care provider, the issue of whether she was engaged in an approved activity became questionable. Pursuant to *Child Care Manual §1.7.2*, the agency must verify approved activity participation. Further, an applicant "must be informed in writing of the verification items that are needed along with a due date." *Child Care Manual §1.7.4*

There is no indication in the record that the agency requested verification of the Petitioner's participation in an approved activity.

The Petitioner testified that her daughter is on some type of "breathing machine", but did not have any documentation to support the claim at the time of the hearing. As such, it is possible that the Petitioner might qualify for a waiver under the "special need" exception stated in Wis. Admin. Code §DCF201.04(2j)(c)1. Indeed," 'Special need' means an emotional, behavioral, physical, or personal need of a child requiring more than the usual amount of care and supervision for the child's age, as documented by a physician, psychologist, special educator, or other qualified professional. A 'special need' includes a developmental disability." Wis. Admin. Code §DCF201.02(20).

Consequently, the agency will have to rescind the overpayment, issue a request for verification and re-determine the Petitioner's eligibility for child care.

If the Petitioner disagrees with the new eligibility determination or if the request for a waiver is denied, the Petitioner will have to file a NEW appeal.

CONCLUSIONS OF LAW

The agency did not meet its burden to prove that it correctly determined the Petitioner was overpaid childcare benefits in the amount of $1,547.46 for the period of September 7, 2014 through November 30, 2014.

THEREFORE, it is **ORDERED**

That within 10 days of this decision, the agency shall:

1) Rescind claim #[redacted];
2) Issue to the Petitioner a Notice of Proof Needed or Notice of Action Needed, asking the Petitioner to complete the waiver application form, requesting verification of her child's special needs and/or requesting proof of participation in an approved activity.

Upon receipt of the requested verification, re-determine the Petitioner's eligibility for child care for the period of September 7, 2014 through November 30, 2014, within the time limits proscribed by the Child Care Manual.

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 Children and Families, 201 East Washington Avenue, Room G200, 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 Milwaukee,
Wisconsin, this 30th day of June, 2015.

\sMayumi M. Ishii
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 June 30, 2015.

Milwaukee Early Care Administration - MECA
Public Assistance Collection Unit
Child Care Fraud