

# Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



<b>Appeal Decision:</b>	Denied	<b>Appeal Number:</b>	2208788
<b>Decision Date:</b>	2/24/2023	<b>Hearing Date:</b>	01/11/2023
<b>Hearing Officer:</b>	Scott Bernard		

Appearance for Appellant:




**Appearance for Element Care/Program of  
All Inclusive Care for the Elderly (PACE)  
Organization:**

Carla Recinos, Participant Services  
Maureen Sturzo, Center Manager  
Elizabeth Katsohis, RN  
Dr. Jennifer Russo, Site Physician  
Karen Turnquist, Director of Quality  
Improvement and Risk Management



*The Commonwealth of Massachusetts  
Executive Office of Health and Human Services  
Office of Medicaid  
Board of Hearings  
100 Hancock Street, Quincy, Massachusetts 02171*

# APPEAL DECISION

<b>Appeal Decision:</b>	Denied	<b>Issue:</b>	PACE/Long Term Care (LTC)
<b>Decision Date:</b>	2/24/2023	<b>Hearing Date:</b>	01/11/2023
<b>PACE Rep.:</b>	Carla Recinos; Maureen Sturzo; Elizabeth Katsohis; Dr. Jennifer Russo; Karen Turnquist	<b>Appellant's Rep.:</b>	
<b>Hearing Location:</b>	Quincy Harbor South		

## Authority

This hearing was conducted pursuant to Massachusetts General Laws Chapter 118E, Chapter 30A, and the rules and regulations promulgated thereunder.

## Jurisdiction

Through a notice dated November 9, 2022, the PACE organization denied the appellant's request that the PACE organization perform in-home health care while being audio and/or video recorded. (See 130 CMR 519.007(C) and Exhibit (Ex.) 1). The appellant filed this appeal in a timely manner on November 28, 2022. (See 130 CMR 610.015(B) and Ex. 2). A denial of services by a PACE organization gives grounds for appeal. (See 130 CMR 610.032).

## Action Taken by the PACE Organization

The PACE organization denied the appellant's request that the PACE organization perform in-home health care while being audio and/or video recorded.

## Issue

The appeal issue is whether the PACE Organization was correct, pursuant to 130 CMR 519.007(C); and 42 CFR 460.122, in denying the request.

## Summary of Evidence

The PACE organization's representatives stated that on September 14, 2022, the appellant's representative requested that the PACE organization provide in-home health care at the appellant's assisted living facility (ALF) while under camera surveillance. The appellant's representative is the appellant's son. On September 15, 2022, the PACE interdisciplinary team denied this request. The appellant's representative appealed this determination internally. The result of this internal appeal was the November 9, 2022 notice denying the appellant's representative's request. The PACE organization's representatives stated that it was their understanding that under MGL c. 272, § 99, they need to consent to being recorded. The PACE organization's representatives emphasized that they have not denied care for the appellant. They are happy to provide care in the ALF in an alternate setting or if the camera is deactivated.

The appellant's representative stated that he set up a camera in his mother's (the appellant's) room at the ALF. He stated that he has found this has been a useful tool. The appellant has resided at the present ALF for about 11 months. The appellant's representative has set this camera up in all three of the appellant's ALFs. The camera is on the door and it is posted. The appellant's representative installed the camera to ensure her security and safety because at her first ALF, the staff had verbally abused the appellant.<sup>1</sup>

The appellant's representative was frustrated because of the way the PACE organization has handled this. The PACE organization called the appellant's representative on August 23, 2022 and told him that they would not provide care in the appellant's room while the camera was running. At that time, the appellant's representative capitulated because there were no other alternatives in the facility. The appellant's representative stated that the appellant had had an infection in her leg and the PACE organization would not visit her in her room to provide medical care. This was before the PACE organization presented any alternative or informed him of the right to grieve the decision.

The PACE organization's representatives disputed the appellant's representative's contention that they would cease providing care to the appellant if the camera remained. The PACE organization's representatives again stated that care could be provided in an alternate setting at the ALF or in the appellant's room if the camera was deactivated during care. The appellant's representative declined to do this. In response to the appellant's representative's contention regarding the care of the appellant's leg infection, the PACE organization's Site Physician stated that the PACE organization visited the appellant 29 times in October 2022. Daily care was provided by the ALF's medical personnel in the appellant's room. The PACE organization's nurse, also present at the hearing, stated that she did see the appellant on several occasions in alternate locations at the ALF.

The appellant's representative conceded that the appellant did receive care for her leg infection but that it was not in her room. The appellant's room is her home, and the provision of home care should occur in the appellant's home. The alternate location in the ALF is on the second floor and not in the appellant's home. The appellant does not live on the same floor and it is difficult for the appellant to move to that location. The appellant's representative stated that the PACE organization would not send

---

<sup>1</sup> The PACE organization's representatives interjected at this point that they had been aware of the presence in the camera in the room but did not know that it was recording both audio and video.

the PACE Site Physician or nurse to the appellant's room. The appellant's representative stated that eventually the Site Physician and nurse decided to see the appellant in her room, putting the appellant's care first.

## **Findings of Fact**

Based on a preponderance of the evidence, I find the following:

1. The appellant has resided at three ALFs, including the present ALF. (Testimony of the appellant's representative)
2. The appellant's representative, her son, has installed a video camera in the appellant's room in all three of the ALFs. (Testimony of the appellant's representative).
3. The appellant's representative installed the camera to monitor the behavior of ALF personnel. (Testimony of the appellant's representative).
4. The appellant has resided at the present ALF for about 11 months. (Testimony of the appellant's representative).
5. The PACE organization was aware of the presence of the camera in the appellant's room. (Testimony of the appellant's representative; Testimony of the PACE organization's representatives).
6. On August 23, 2022, the PACE organization's representatives contacted the appellant's representative and expressed their concern about the presence of the video camera. (Testimony of the appellant's representative; Testimony of the PACE organization's representatives).
7. On September 14, 2022, the appellant's representative requested that the PACE organization provide in-home health care at the appellant's ALF while under camera surveillance. (Testimony of the PACE organization's representatives).
8. On September 15, 2022, the PACE interdisciplinary team denied this request. (Testimony of the PACE organization's representatives).
9. The appellant's representative appealed this determination internally. (Testimony of the PACE organization's representatives).
10. The result of this internal appeal was the November 9, 2022 notice denying the appellant's representative's request. (Testimony of the PACE organization's representatives; Ex. 1).

## **Analysis and Conclusions of Law**

The PACE program is a comprehensive health program that is designed to keep frail, older individuals who are certified eligible for nursing-facility services living in the community. (130 CMR 519.007(C)(1)). Under PACE a complete range of health-care services is provided by one designated community-based

program with all medical and social services coordinated by a team of health professionals. (130 CMR 519.007(C)(1)(a)). MassHealth administers the program in Massachusetts as the Elder Service Plan (ESP). (130 CMR 519.007(C)(1)(b)). Persons enrolled in PACE have services delivered through managed care in day-health centers; at home; and in specialty or inpatient settings, if needed. (130 CMR 519.007(C)(1)(c)).

If a MassHealth member chooses to enroll in a PACE program, the following conditions apply: (a) Medicare and Medicaid benefit limitations and conditions relating to amount, duration, scope of services, deductibles, copayments, coinsurance, or other cost-sharing do not apply; and (b) the member, while enrolled in a PACE program, must receive Medicare and Medicaid benefits solely through the PACE organization. (42 CFR 460.94). The PACE benefit package for all participants, regardless of the source of payment, must include the following: (a) all Medicare-covered items and services; (b) all Medicaid-covered items and services, as specified in the State's approved Medicaid plan; and (c) other services determined necessary by the interdisciplinary team to improve and maintain the participant's overall health status. (42 CFR 460.92). Any service that is not authorized by the interdisciplinary team is an excluded service, even if it is a required service, unless it is an emergency service. (42 CFR 460.96).

Under the Federal PACE regulations an appeal is a participant's action taken with respect to the PACE organization's noncoverage of, or nonpayment for, a service including denials, reductions, or terminations of services. (42 CFR 460.122). The term "services" as used in this context, means all services that could be required under §460.92, including items and drugs. (42 CFR 460.6). These are all Medicare-covered services, all Medicaid-covered services, as specified in the State's approved Medicaid plan, and other services determined necessary by the interdisciplinary team to improve and maintain the participant's overall health status. (42 CFR 460.92).

The record shows that what has been requested, providing in-home healthcare while being audio and/or video recorded, is not a service as contemplated under these regulations. What was requested was not a Medicare-covered service, a Medicaid-covered service, or a service specified in Massachusetts' Medicaid plan. It also was not a service determined necessary by the interdisciplinary team to improve and maintain the appellant's overall health status.

For the above stated reasons, the appeal is DENIED.<sup>2</sup>

## Order for the PACE Organization

---

<sup>2</sup> At the same time, there does seem to be a middle ground that could be reached with regard to the operation of the camera (or at least its audio functions) while the PACE organization's representatives are meeting the appellant in her room perhaps by deactivating the camera during these times or disabling the audio functioning. As a means of perhaps easing the concerns of the PACE organization's representatives, a quick review of the Massachusetts wiretapping statute cited by the PACE organization's representatives reveals that the statute prohibits the use of secret recording devices by private individuals. (MGL c. 272, § 99(A)). The camera is clearly not a secret recording device, as the PACE organization's representatives seemed to be aware that it was present and at least recording video.

None.

## **Notification of Your Right to Appeal to Court**

If you disagree with this decision, you have the right to appeal to Court in accordance with Chapter 30A of the Massachusetts General Laws. To appeal, you must file a complaint with the Superior Court for the county where you reside, or Suffolk County Superior Court, within 30 days of your receipt of this decision.

---

Scott Bernard  
Hearing Officer  
Board of Hearings

cc:

Element Care, Attn: Carla Recinos, 37 Friend Street, Lynn, MA 01902