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# Department of Health

**ANDREW M. CUOMO**  
Governor

**HOWARD A. ZUCKER, M.D., J.D.**  
Commissioner

**LISA J. PINO, M.A., J.D.**  
Executive Deputy Commissioner

February 2, 2021

## CERTIFIED MAIL/RETURN RECEIPT

[REDACTED]  
c/o Terence Cardinal Cooke  
1249 Fifth Avenue  
New York, New York 10029

Vickey Johnson, Director of Finance  
Terence Cardinal Cooke  
1249 Fifth Avenue  
New York, New York 10029

Daniel Ross, Esq.  
Mobilization for Justice  
100 William Street, 6<sup>th</sup> Floor  
New York, New York 10038

**RE: In the Matter of [REDACTED] – Discharge Appeal**

Dear Parties:

Enclosed please find the Decision After Hearing in the above referenced matter. This Decision is final and binding.

The party who did not prevail in this hearing may appeal to the courts pursuant to the provisions of Article 78 of the Civil Practice Law and Rules. If the party wishes to appeal this decision it may seek advice from the legal resources available (e.g. their attorney, the County Bar Association, Legal Aid, etc.). Such an appeal must be commenced within four (4) months from the date of this Decision.

Sincerely,

James F. Horan  
Chief Administrative Law Judge  
Bureau of Adjudication

JFH: cmg  
Enclosure

**STATE OF NEW YORK: DEPARTMENT OF HEALTH**

**In the Matter of an Appeal, pursuant to  
10 NYCRR § 415.3, by**

██████████

**Appellant,**

**COPY**

**from a determination by**

**DECISION**

**TERENCE CARDINAL COOKE**

**Respondent,**

**to discharge her from a residential health care facility.**

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Hearing Before:

Jean T. Carney  
Administrative Law Judge

Held via:

Cisco WebEx videoconference

Hearing Date:

January 12, 2021

Parties:

Terence Cardinal Cooke, Respondent

By: Vickey Johnson  
Director of Finance  
vjohnson@archcare.org

██████████ Appellant

By: Daniel Ross, Esq.  
Mobilization for Justice  
dross@mfjlegal.org

**JURISDICTION**

By notice dated [REDACTED] 2020, Terence Cardinal Cooke (Facility), a residential care facility subject to Article 28 of the New York Public Health Law, determined to discharge [REDACTED] [REDACTED] (Appellant) from the Facility. The Appellant appealed the discharge determination to the New York State Department of Health (Department) pursuant to 10 New York Codes Rules, and Regulations (NYCRR) § 415.3(i).

**HEARING RECORD**

- ALJ Exhibits:                    I – Notice of Hearing  
    II – Physician’s Orders
- Facility Exhibits:                1 – Progress Notes dated [REDACTED]/20  
    2 – Progress Notes dated [REDACTED]/20 and [REDACTED]/20  
    3 – Social Services Progress Notes dated [REDACTED]/20  
    4 – Social Services Progress Notes dated [REDACTED]/20
- Facility Witnesses:                Monique King, Director of Clinical Operations  
    Lakiesha Bey, Director of Rehabilitation  
    [REDACTED] [REDACTED] Social Worker
- Appellant Exhibits:                A – Social Services Progress Notes dated [REDACTED]/20  
    B – Quarterly Assessment dated [REDACTED]/20  
    C – Progress Notes dated [REDACTED]/20 and [REDACTED]/20  
    D – Social Services Progress Notes dated [REDACTED]
- Appellant Witness:                [REDACTED] [REDACTED] Appellant

A transcript of the proceeding was made part of the record, and the ALJ took official notice of the New York City Department of Homeless Services Referral from Healthcare Policy.

## ISSUES

Has the Facility established that the determination to discharge the Appellant is correct and that its discharge plan is appropriate?

## FINDINGS OF FACT

An opportunity to be heard having been afforded the parties, and evidence having been duly considered, it is hereby found:

1. The Appellant is a [REDACTED]-year-old female who was admitted to the Facility on [REDACTED], 2018 from New York Public Hospital for continued wound care after having [REDACTED], and [REDACTED] being [REDACTED] due to [REDACTED] (Exhibit 1 and ALJ II).

2. On [REDACTED] 2020, the Facility served a Transfer/Discharge Notice on the Appellant, asserting that the Appellant's "health has improved sufficiently so that [she] no longer need the services provided by the facility," and that the "safety or health of individuals in the facility would be endangered, the risk to others is more than theoretical and all reasonable alternatives to transfer or discharge have been explored and have failed to address the problem..." (ALJ Exhibit I).

3. As of the date of the hearing, the Appellant requires some assistance with many activities of daily living (ADLs), including eating, dressing, and washing her hair.

She cannot open containers or bottles, so she depends on staff to administer her medications, including a bi-weekly [REDACTED]. The Appellant is able to transfer from bed and toilet without assistance; and she ambulates with a walker, but cannot climb stairs. (Exhibit 3, ALJ II, and Appellant's testimony @ pp. 52-54, 56, 63-64).

4. The Appellant was referred to Ms. Bey, the Director of Rehabilitation, for an evaluation on [REDACTED], 2020 to assess her ADLs and ability to live independently in the community. Ms. Bey suggested using adaptive devices to improve the Appellant's ADLs, and indicated she would follow up with the Appellant by the end of that week. (Exhibit 3).

5. In [REDACTED], the Appellant was approved for Social Security Income (SSI), and has been working with the Facility's Social Worker and the HIV/AIDS Services Administration (HASA) on obtaining appropriate housing. (Exhibit 4; testimony of [REDACTED] p.32 and p.40).

6. The Appellant has not fully complied with the Facility's COVID-19 protocols. She has refused to wear her mask on occasion, and she has refused to be tested for the virus. (Hearing testimony of Monique King @ p.14-15).

#### APPLICABLE LAW

A residential health care facility, also referred to as a nursing home, is a facility which provides regular nursing, medical, rehabilitative, and professional services to

residents who do not require hospitalization. (Public Health Law §§ 2801[2] and [3]; 10 NYCRR § 415.2[k]).

Pursuant to 10 NYCRR § 415.3(i)(1)(i)(a), a resident may only be discharged when the interdisciplinary care team determines that:

- (1) the transfer of discharge is necessary for the resident's welfare and the resident's needs cannot be met after reasonable attempts at accommodation in the facility;
- (2) the transfer or discharge is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility;
- (3) the safety of individuals in the facility is endangered; or
- (4) the health of individuals in the facility is endangered.

Additionally, 10 NYCRR § 415(i)(1)(ii) requires that the facility ensures complete documentation in the resident's clinical record when transferring or discharging a resident under the above circumstances. The documentation shall be made by:

- (a) the resident's physician and, as appropriate, interdisciplinary care team, when transfer or discharge is necessary under subclause (1) or (2) of clause (a) of subparagraph (i) of this paragraph; and
- (b) a physician when transfer or discharge is necessary due to the endangerment of the health of other individuals in the facility under subclause (3) of clause (a) of subparagraph (i) of this paragraph.

The burden is on the Facility to prove by substantial evidence that the discharge is necessary, and the plan is appropriate. (10 NYCRR § 415.3(i)(2)(ii); New York State Administrative Procedure Act [SAPA] § 306[1]). Substantial evidence means such relevant proof as a reasonable mind may accept as adequate to support conclusion or fact; less than preponderance of evidence, but more than mere surmise, conjecture or speculation and constituting a rational basis for decision. (*Stoker v. Tarantino*, 101 A.D.2d 651, 475 N.Y.S.2d 562 [3<sup>rd</sup> Dept. 1984], *appeal dismissed* 63 N.Y.2d 649[1984]).

#### DISCUSSION

The Facility alleges that the Appellant's health has improved sufficiently so that she no longer requires skilled nursing care; and that the safety or health of individuals in the facility would be endangered, thereby requiring that the Appellant be discharged to the HASA intake office. (ALJ I). The Facility failed to present sufficient evidence that the Appellant's discharge is necessary, and the discharge plan is appropriate.

In her opening statement on behalf of the Facility, Ms. Johnson stated that the Transfer/Discharge Notice was served on the Appellant in order to start discharge planning. Nearly one month after being served with the Transfer/Discharge Notice, the Appellant was referred to rehabilitation for an evaluation assessing her ability to live independently in the community. As a result of that evaluation, the Facility was going to follow up with the Appellant regarding assistive devices that could help the Appellant



with her ADLs. There was no evidence that the facility followed up with the Appellant, or that assistive devices were put in place. On the contrary, the evidence shows that the Appellant continues to depend on staff to complete ADLs and for medication management. In fact, when asked about whether the Appellant was able to administer her [REDACTED], Ms. King admitted that no training had been attempted to see if the Appellant could learn to self-administer that medication, considering her [REDACTED] [REDACTED] (Testimony of Monique King @ p. 21). The only other evidence presented by the Facility in support of its allegation that the Appellant's health had improved sufficiently to require discharge, was a physician's note in the Appellant's medical record from [REDACTED] 2020, that she "could potentially be discharged back to the community." (Exhibit 1). This record was made nearly one month after the Facility determined that discharge was required, and merely offers the potential for the Appellant's discharge.

The facility served the discharge notice prematurely, admitting that they initiated the proceeding so that the Appellant would start to think about discharge planning, rather than the Appellant actually being ready for discharge. The evidence presented at the hearing does not support the allegation that discharge is necessary because the Appellant's condition has improved sufficiently that she no longer needs the services of the facility.

The Facility also alleges that the Appellant's discharge is required because she endangers the health or safety of others in the facility. In support of this allegation, the Facility presented evidence that the Appellant fails to comply with COVID-19 protocols by refusing to wear a mask and refusing to be tested for the coronavirus. It is common knowledge that wearing a face covering or mask helps to prevent the spread of COVID-19. Therefore, it may be inferred that by failing to wear a mask, the Appellant is placing others at risk of infection. In addition, the Facility alleges that the Appellant smokes in her room, which also places others' safety at risk. However, there was no evidence regarding the efforts the Facility has made to explore all reasonable alternatives to transfer or discharge which have failed to address the problem.


The Appellant admits that she does not always wear a mask because it is very uncomfortable. In fact, when the hearing began, her mask did not cover her nose and mouth, but was on her chin. However, when this was pointed out, the Appellant did place the mask over her nose and mouth for the rest of the hearing. In addition, the record indicates that when spoken to about her behavior, the Appellant understands, and attempts to comply with COVID-19 protocols. (Exhibit D). Finally, the facility presented no evidence of a physician's note in the Appellant's clinical record documenting that the discharge is necessary due to the Appellant endangering the health of others in the facility, as required by 10 NYCRR § 415(i)(1)(ii)(b).

Because the facility has not proven that the Appellant's discharge is necessary, it is not necessary to address the issue of whether the proposed discharge plan is appropriate. However, I encourage the parties to continue working on an appropriate discharge plan.

**DECISION**

Terence Cardinal Cooke has not established that its determination to discharge the Appellant was correct, and that transfer to the shelter system is appropriate.

**DATED: Albany, New York**  
**February 2, 2021**

  
**JEAN T. CARNEY**  
**Administrative Law Judge**

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