

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MAINE**

VICKI FULKERSON,	)	
	)	
Plaintiff	)	
	)	
v.	)	Docket No. 01-CV-50-B-S
	)	
KEVIN CONCANNON, Commissioner	)	
of Maine Department of Human Services,	)	
	)	
Defendant	)	

**FINDINGS OF FACT AND CONCLUSIONS OF LAW  
ON PLAINTIFF’S MOTION FOR A TEMPORARY RESTRAINING ORDER**

SINGAL, District Judge

Before the Court is Plaintiff’s Motion for a Temporary Restraining Order/Preliminary Injunction (Docket #3). The Court held a phone conference on this matter on March 15, 2001. (See Report of Telephone Conference (Docket #4).) After considering the parties’ arguments during the conference and reviewing the Plaintiff’s submissions as well as the Commissioner’s final decision, the Court sets out its findings of fact and conclusions of law below.

**I. FINDINGS OF FACT**

1. Plaintiff Vicki Fulkerson is a 38-year old woman who suffers from severe muscular dystrophy. She resides at home with her mother, Angie Mitchell.
2. As a result of her condition, Ms. Fulkerson is bed-bound and extremely limited in her ability to make bodily movements. Additionally, she requires a tracheostomy tube to breathe, which, in turn, affects her ability to vocalize.

3. In order to receive a life-sustaining amount of oxygen twenty-four hours a day, Ms. Fulkerson must receive three and a half liters of concentrated oxygen per minute delivered via a ventilator.
4. Prior to November 2000, Ms. Fulkerson received her concentrated oxygen through “H-tanks.” “H-tanks” do not require electricity to operate.
5. Since November 2000, no medical equipment dealer operating in Maine supplies “H-tanks” for home use.
6. As a result, Ms. Fulkerson was left with two possible options to supply her necessary concentrated oxygen: a liquid oxygen system or an oxygen concentrator.
7. A liquid oxygen system does not require electricity and costs \$6916.00 per year.
8. By contrast, an oxygen concentrator, which runs on electricity, costs \$1197.00 and can be used for three years. In the event of a power outage, an oxygen concentrator will sound a mild alarm and continue to operate on a battery for approximately 18 minutes. In order to keep oxygen running to the ventilator after the battery runs out, someone must manually activate either a back-up generator to run the concentrator or an oxygen tank; either of which can continue to provide oxygen until power is restored.
9. Ms. Fulkerson lives in an area that has experienced numerous power outages.
10. Ms. Fulkerson requires 24-hour care. During the week, a skilled nursing staff cares for Ms. Fulkerson between the hours of 8 a.m. and 11 p.m. For the remaining nine hours of the day Ms. Fulkerson’s mother, Ms. Mitchell, is her primary caregiver. On the weekends, Ms. Mitchell tends to provide more daily hours of care due to difficulties obtaining skilled nurses to work on weekends.

11. Ms. Mitchell suffers from hearing loss and arthritis. As a result of her arthritis, Ms. Mitchell has lost significant strength in her right hand, which affects her ability to grip.

12. In the event of a power outage during the night, it is unlikely that Ms. Mitchell would hear the oxygen concentrator's alarm or be able to make the necessary conversion to an oxygen tank or a back-up generator in the allotted short period of time.

13. Moreover, Ms. Fulkerson would be unable to alert her mother that a power outage had occurred because she is bed bound and unable to vocalize.

14. In the event of a power outage and loss of her concentrated oxygen supply, Ms. Fulkerson would begin to show signs of debilitation, including sickness and decreased cognitive abilities, in approximately ten minutes.

15. At the administrative hearing, one of the nurses who cares for Ms. Fulkerson estimated that Ms. Fulkerson could die after an hour without an adequate concentrated oxygen supply.

16. A liquid oxygen system would provide Ms. Fulkerson with a constant supply of concentrated oxygen without relying on electrical power.<sup>1</sup> Ms. Fulkerson's treating physician has recommended that she use a liquid oxygen system.

17. Ms. Fulkerson is covered by Medicaid, which is administered by Maine's Department of Human Services ("DHS"). Defendant Kevin Concannon is the Commissioner of DHS.

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<sup>1</sup> The Court notes that Ms. Fulkerson does rely on a ventilator that requires electric power. However, the ventilator apparently will automatically switch over to battery operation in the event of a power outage. This battery can run Ms. Fulkerson's ventilator for up to 14 hours.

18. Medicaid is a federal program and once a state has agreed to participate it must administer its Medicaid program in accordance with federal law, including federal regulations.

19. DHS denied Ms. Fulkerson's request for coverage of a liquid oxygen system and instead determined that she was only eligible for an oxygen concentrator. This decision was apparently based upon the cost difference between the two systems.

20. On December 11, 2000, Ms. Fulkerson appealed this DHS determination by making a request for an administrative hearing.

21. A hearing was held at Ms. Fulkerson's home on January 26, 2001, at which a hearing officer, Steven Davis, presided.

22. Hearing Officer Davis issued his Recommended Decision on February 5, 2001.

23. This Recommended Decision concludes, "A liquid oxygen system . . . should be provided as soon as possible under the Medicaid program for Mrs. Fulkerson." (Recommended Decision at 6.)

24. Hearing Officer Davis based his decision on a finding that an oxygen concentrator was not medically appropriate for Ms. Fulkerson because it would not meet her needs in the event of a power outage. Thus, "the likely result of . . . an ill-timed power outage could be the death of Ms. Fulkerson." (Recommended Decision at 7-8.)

24. Commissioner Concannon decides whether to affirm or reverse a recommended decision. The Commissioner's decision with regard to a recommended decision represents the final administrative action of DHS.

25. Federal regulation requires the agency administering the Medicaid program to take final administrative action within ninety days of a request for a hearing. See 42 C.F.R. § 431.244(f).

26. In accordance with this regulation, Commissioner Concannon should have issued his decision on or before March 12, 2001.

27. On March 16, 2001, the Commissioner issued a decision in which he declined to adopt the Recommended Decision of Hearing Officer Davis. However, he did adopt the hearing officer's findings of fact.<sup>2</sup>

28. In order to address Ms. Fulkerson's safety concerns, the Commissioner approved an alternative plan to provide Ms. Fulkerson with a cell phone and an "automatic back-up generator system (including fuel tank, and all necessary hook-ups)" that would be installed and maintained by DHS.<sup>3</sup>

28. By letter dated March 16, 2001, Plaintiff's counsel objected to the Commissioner's proposal explaining that a home back-up generator system will not be fully automatic and, therefore, raises the same obstacles as an oxygen concentrator. Namely, Ms. Mitchell would have to be aware of the power outage and take affirmative action to turn on the generator.

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<sup>2</sup> The Court has similarly relied on the hearing officer's findings of fact, which the parties agreed was appropriate for purposes of the TRO. (See Report of Telephone Conference at 2 (Docket #4).)

<sup>3</sup> The Court notes that the Commissioner's proposed plan may, in fact, be a feasible alternative to a liquid oxygen system. However, based on the Commissioner's final decision, it is unclear how effectively a automatic back-up generator system will work or how long it would take to install such a system in Ms. Fulkerson's home. Similarly, the Commissioner's decision does not offer any information regarding the cost of implementing this proposal in lieu of a liquid oxygen system. The factual record is also silent as to the feasibility of attaching an automatic generator to the existing electrical system in Ms. Fulkerson's residence. Counsel for the Commissioner are free to develop the factual record regarding the Commissioner's proposed alternative plan before the Court issues a decision on Plaintiff's Motion for Preliminary Injunction.

29. A cell phone would be of little use to Ms. Fulkerson in case of emergency because she is unable to vocalize and it is not clear that her limited ability to make bodily movements would allow her to hold and dial a cell phone. Assuming the cell phone is for Ms. Mitchell to use to call for assistance, it is still of little value to the extent that Ms. Mitchell is not aware a power outage has occurred. Moreover, the factual record is unclear as to what assistance Ms. Mitchell would be able to receive within the allotted eighteen-minute window by placing a phone call.

### III. CONCLUSIONS OF LAW

1. Because this case challenges compliance with federal law, it presents a federal question and this Court has jurisdiction pursuant to 28 U.S.C. § 1331.
2. Based on the record as presently developed, Plaintiff has established a substantial likelihood of success on the merits.
3. Specifically, it appears that Commissioner Concannon's delay in taking final administrative action violates 42 C.F.R. § 431.244(f).
4. Additionally, it is substantially likely that Plaintiff can establish that DHS has denied her Medicaid coverage for a liquid oxygen system although such a system is medically necessary. Thus, Plaintiff can likely establish that DHS has failed to provide Ms. Fulkerson with durable medical equipment that is "sufficient in amount, duration and scope" to allow Ms. Fulkerson to live, in violation of Maine Medical Assistance Manual and 42 C.F.R. § 440.230(b).
5. There is significant risk of irreparable harm to Plaintiff absent an injunction.

6. Granting a preliminary injunction and thereby ordering Defendant to provide Plaintiff with a liquid oxygen system will not negatively affect the public interest.
7. The balance of hardships tilts in Plaintiff's favor.
8. Therefore, the Court finds that Plaintiff has established the necessary criteria for a temporary restraining order.

### III. CONCLUSION

For these reasons, the Court GRANTS Plaintiff's Motion for a Temporary Restraining Order. Therefore, the Court hereby ORDERS that the Commissioner provide Vicki Fulkerson with a liquid oxygen system as quickly as possible. Counsel for the Commissioner shall contact the Court if they encounter problems in promptly complying with this Order. This Order shall remain in effect until the Court issues a superceding order on Plaintiff's Motion for Preliminary Injunction.

With regard to the security mandated under Fed. R. Civ. P. 65(c), The Court will waive the security requirement in light of the fact that Plaintiff is proceeding in forma pauperis.

SO ORDERED.

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George Z. Singal  
United States District Judge

Dated on this 16<sup>th</sup> day of March 2001

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