

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

FEEDING OUR FUTURE, Plaintiff, v. MINNESOTA DEPARTMENT OF EDUCATION, Defendant.	Civil Case No. 62-CV-20-5492 NOTICE OF MOTION AND MOTION FOR AN EMERGENCY TEMPORARY RESTRAINING ORDER AND ORDER FOR CONTEMPT OF COURT
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Feeding Our Future, through its undersigned counsel, hereby brings a motion for an emergency temporary restraining order preventing the Minnesota Department of Education from continuing to withhold millions of dollars in valid reimbursements due to Feeding Our Future and the minority community it serves.

CONFERRAL

The parties have conferred by email about MDE's actions but have been unable to satisfactorily resolve their dispute.

MOTION

PLEASE TAKE NOTICE that as soon as it may be heard, Plaintiff Feeding Our Future will bring the following Motion for Temporary Restraining Order and for Contempt of Court before District Judge John Guthmann of the Ramsey County District 15 W Kellogg Blvd., St. Paul, MN 55102.

INTRODUCTION

In its latest tactic, MDE is refusing to release over \$17 million in federal reimbursements due and owing to Feeding Our Future and its community partners. As MDE knows, without the federal reimbursements they are entitled to, Feeding Our Future and its community partners face imminent bankruptcy and an end of their ability to feed tens of thousands of Minnesota's most vulnerable youth who have become dependent on the program during the pandemic and school closures.

On March 31, 2021, MDE sent Feeding Our Future a letter declaring that it was "seriously deficient" based on trivial allegations that do not even amount to a violation of federal policy. For example, MDE alleged that Feeding Our Future's applications to expand the food program had too many typos; that Feeding Our Future did not move quickly enough to follow MDE's non-binding recommendation that it hire an accountant; or that Feeding Our Future failed to proactively update its "budget worksheet," despite having no legal obligation to do so. Feeding Our Future is appealing these allegations through the administrative process and is not asking the Court to address the merits at this time.

Feeding Our Future brings this motion because MDE's March 31, 2021, letter declared that MDE had issued a "stop pay" notice withholding all federal funds due and owing to Feeding Our Future and its community partners "until the claim is validated by the state agency..." (March 31, 2021, letter, p. 3 attached as "**Exhibit 1**"). While it is troubling that MDE so brazenly declares its confidence that its claim will be "validated" before it even receives a response from Feeding Our Future, it is not surprising.

MDE's letter also declares: "No additional site ID requests will be created in CLiCS nor transferred to Feeding Our Future and all pending CACFP applications will be suspended effective as of March 31, 2021." (*Id.*).

MDE's decision to withhold federal funds due and owing to Feeding Our Future and its community partners is a violation of federal policy and amounts to civil theft. MDE's refusal to accept or process any of Feeding Our Future's applications is a violation of this Court's December 22, 2020 Order and USDA policy.

ARGUMENT

Feeding Our Future asks this Court to: (1) issue a temporary restraining order precluding MDE from withholding federal reimbursements that Feeding Our Future and its community partners are entitled to; and (2) issue an order finding that MDE's refusal to accept or process CACFP applications is a violation of the Court's December 22, 2020, Order.

I. MDE Cannot Withhold Federal Reimbursements Due and Owing to Feeding Our Future and its Community Partners.

The Court should enter a temporary restraining order preventing MDE from wrongfully withholding millions of dollars in federal reimbursements due and owing to Feeding Our Future and its community partners.

On April 8, 2021, MDE withheld \$2.5 million in federal funds due and owing to Feeding Our Future and its community partners. On April 15th, an additional \$14.9 million will become due and owing. MDE has indicated that it will also be withholding those funds and has put a "stop pay" notice in Feeding Our Future's CLiCS system. (Declaration of A. Bock, attached as "**Exhibit 2**" printout of CLiCS page, attached as "**Exhibit 3**"). Over 90% of the federal reimbursements belong to small, minority-owned businesses that purchased and provided food to socio-economically disadvantaged children. MDE has made not made any allegations of any kind

relating to the food services provided; the community's entitlement to the funds; or their full and complete compliance with all federal regulations and policies. The "allegations" that MDE has made have nothing to do with the food served or the money due.

Feeding Our Future and its community partners cannot survive MDE withholding over \$17 million of federal reimbursements. Without the federal reimbursements they are entitled to, Feeding Our Future and its community partners face inevitable bankruptcy and the end of the food program that has helped tens-of-thousands of children and their families survive the pandemic.

When considering whether to issue a temporary restraining order or an injunction, the Court considers the same five factors: "(1) the relationship between the parties before the dispute arose; (2) the harm plaintiff may suffer if the injunction is denied, compared to the harm inflicted on defendant if the injunction is granted; (3) the likelihood that the party will prevail on the merits; (4) public policy considerations; and (5) administrative burdens imposed on the court if the injunction issues." *M.G.M. Liquor Warehouse Int'l, Inc. v. Forsland*, 371 N.W.2d 75, 77 (Minn. App. 1985) (citing *Dahlberg Bros. v. Ford Motor Co.*, 137 N.W.2d 314, 321–22 (Minn. 1965)). Each of these five factors weighs heavily in Feeding Our Future's favor on both issues.

For nearly 20 years, federal policy has been consistent, plain, and explicit. State agencies can only withhold payments when the sponsor "engages in conduct that poses an imminent threat to the health or safety of participants or the public." (Federal Policy Memo, p. 2 attached as "**Exhibit 4**").¹ In March 2002, the USDA issued a memo explaining that an imminent risk of harm "is the only circumstance under which the law permits a 'stop payment' procedure without first offering the institution or home opportunity for corrective action and appeal." (*Id.*) (emphasis in original). The memo went on:

¹ Available on USDA's website at <https://www.fns.usda.gov/use-%E2%80%9Cstop-payments%E2%80%9D-child-and-adult-care-food-program-cacfp>

As mentioned in our April 12, 2001 guidance, the law only provides for the suspension of payments to providers when a provider has engaged in conduct that poses an imminent threat to the health or safety of participants or the public.

(Exhibit 4, p. 2). The memo goes on to explain that even when a state agency suspects intentional fraud and abuse, it can only stop payments “after the institution has been declared seriously deficient and provided an opportunity to take corrective action, and after a suspension review official has found the preponderance of the evidence suggests that the institution knowingly submitted a false or fraudulent claim.” (*Id.*). In this case, MDE is not making any allegations that there is a risk of harm to the public, or that Feeding Our Future or any of its community partners submitted a mistaken claim, much less a fraudulent one.

Allowing MDE to continue withholding millions of dollars in federal reimbursements due and owing to Feeding Our Future and its community partners would result in substantial and permanent harm. Again, over 90% of the funds are owed to community partners to reimburse their direct costs for buying, preparing, and serving food. The balance goes to support Feeding Our Future’s operating costs. As MDE is well-aware, neither Feeding Our Future nor its community partners can absorb \$17 million in operating costs.

Moreover, even a delay in payments creates substantial disruptions in program participation. Under CACFP, small businesses are asked to front the costs of buying, preparing, and serving food based on MDE’s promise that it will reimburse those costs. Once small businesses lose confidence in MDE’s promise to timely reimburse them, they will no longer participate. Small businesses cannot afford even delays in payments. Their obligation to pay food vendors, employees, and rent are not put on hold because MDE decides not to release federal funds. MDE’s refusal to release the federal funds also severely impacts Feeding Our Future’s relationship with its community partners and its ability to operate the food program. Because of

MDE's delays in payments, Feeding Our Future is spending substantial time working with its community partners to address their concerns.

MDE should not be allowed to violate federal policy, withhold over \$17 million in federal funds, and bankrupt Feeding Our Future and its community partners over allegations that do not even amount to a violation of federal law or policy.

WHEREFORE, Feeding Our Future asks the Court to enter an order requiring MDE to release all federal money due and owing to Feeding Our Future and its community partners and restraining MDE from withholding such payments in the future.

II. MDE's Refusal To Accept or Process Applications Violates this Court's Order.

On December 17, 2020, MDE and Feeding Our Future entered a stipulation to resolve Feeding Our Future's last motion for a restraining order. As agreed by the parties, the Court entered the stipulation as an order on December 22, 2020. Under the Order, MDE agreed: "MDE will approve or disapprove Feeding Our Future's CACFP and SFSP applications that are correct and complete in a reasonably prompt manner."

MDE's March 29, 2021, letter, however, explicitly stated that MDE will no longer allow Feeding Our Future to submit new applications and that it would not process Feeding Our Future's currently pending applications. Specifically, MDE explained: "No additional site ID requests will be created in CLiCS nor transferred to Feeding Our Future and all pending CACFP applications will be suspended effective as of March 31, 2021."

Notably, MDE's actions not only violate the Court's stipulated order, it also violates USDA policy. (USDA Handbook and Policy on Serious Deficiency, Suspension, and Appeals, p. 32 attached as "**Exhibit 5**"). Federal policy is clear that even when a state agency issues a notice of serious deficiency, it cannot stop accepting or processing applications:

31. Can the State agency refuse to allow an institution to apply to the Program (presumably because there are concerns of serious deficiency)?

No. The institution must be allowed to submit an application for participation. The State agency may deny the application if it can be documented that the institution does not meet the performance standards, has submitted false information on its application, or does not comply with any other action affecting the institution's ability to administer the Program in accordance with Program requirements.

(Exhibit 5).

There is no excuse or justification for MDE's decision to violate the Court's order and federal policy.

WHEREFORE, Feeding Our Future asks this Court to enter an order finding that MDE's decision to not accept or process Feeding Our Future's applications is a direct violation of the Court's December 22, 2020, order and federal policy.

CONCLUSION

MDE needs to stop withholding federal funds due and owing to Feeding Our Future and its community partners. MDE has no legal right to withhold the funds and its decision to do so is civil theft. MDE also has no legal basis to stop accepting or processing Feeding Our Future's applications.

Dated: April 13, 2020

MARTIN HILD, PA

s/ Rhyddid Watkins

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ATTORNEYS FOR FEEDING OUR FUTURE

ACKNOWLEDGEMENT REQUIRED BY MINN. STAT. § 549.211, SUBD.1

The undersigned hereby acknowledges that pursuant to Minn. Stat. § 549.211, subd. 3, sanctions may be imposed if, after notice and a reasonable opportunity to respond, the Court determines that the undersigned has violated the provisions of Minn. Stat. § 549.211, subd. 2.

s/Rhyddid Watkins

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