

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

<p>FEEDING OUR FUTURE,</p> <p style="text-align: center;">Plaintiff,</p> <p>v.</p> <p>MINNESOTA DEPARTMENT OF EDUCATION,</p> <p style="text-align: center;">Defendant.</p>	<p style="text-align: center;">Civil Case No. 62-CV-20-5492</p> <p style="text-align: center;">NOTICE OF MOTION AND RENEWED MOTION FOR AN EMERGENCY TEMPORARY RESTRAINING ORDER AND ORDER FOR CONTEMPT OF COURT</p>
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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

Since the hearing on April 21, 2021, counsel for Feeding Our Future called counsel for MDE numerous times. All calls were sent straight to voice message and no calls were returned. Feeding Our Future's counsel also sent an email to MDE's counsel noting their understanding that MDE's position remains unchanged. MDE's counsel responded that as far as she was aware, MDE's position remains unchanged.

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

Based on the briefing and April 21 hearing, a few things are clear: (1) MDE has not made any allegations that a single one of Feeding Our Future's claims is inaccurate, incomplete, or otherwise invalid; (2) MDE is legally required to process and pay Feeding Our Future's claims; and (3) MDE will not process and pay Feeding Our Future's invoices without an order from this Court.

To date, MDE has issued a "stop pay" notice and refused to process \$20,529,177.32 in claims due and owing to Feeding Our Future and its community partners. (Declaration of A. Bock, attached as "**Exhibit 1**"). As a result, as of the day of the hearing, three of Feeding Our Future's sites that were collectively serving 5,000 children a day had closed. Since the hearing, another 18 sites that were collectively serving 19,500 children per day have also closed. In total, there are now nearly 25,000 of Minnesota's most disadvantaged children going without desperately needed food every day. Those numbers will continue growing until MDE is forced to comply with the federal law.

Because Feeding Our Future and its community partners face imminent bankruptcy and the cessation of the food program, it is filing this renewed motion for a restraining order. To avoid duplicity, Feeding Our Future incorporates its prior briefing, exhibits, declaration, and arguments in support of this renewed motion.

ARGUMENT

I. MDE's Decision to Issue a "Stop Pay" Violates Federal law.

As has been exhaustively discussed and briefed, MDE's decision to issue a stop payment on all of Feeding Our Future's claims violates federal law. Feeding Our Future reiterates its prior arguments and points relating to the USDA's 2002 Policy memorandum and 2 C.F.R. § 200.339.

MDE's March 31, 2021, letter states: "As a result of this serious deficiency, Feeding Our Future Program Meal claims will be held on 'stop pay' in CLiCS until the claim is validated by the state agency, which will be determined by your submission of the corrective action plan and meal validation documentation." True to its word, MDE went into CLiCS and noted that all of Feeding Our Future's pending claims were on "stop pay." MDE also took Feeding Our Future's claims out of its normal claims processing procedures and refused to take any steps to progress their payment. MDE also issued a stop pay notice in CLiCS on all claims Feeding Our Future submitted after March 31, 2021, and similarly refused to process those claims for payment.

MDE's decision to stop all payments had nothing to do with any alleged issues or concerns with the claims themselves. This is evident from the fact that MDE has not identified a single claim that it believes was inaccurate, incomplete, or invalid in its correspondence with Feeding Our Future, in its briefing, or in response to the Court's direct questioning at the hearing. Making it more obvious, MDE's stop payment did not just apply to the \$2.5 million in claims Feeding Our Future had submitted by March 31, 2021. It also applied to every new claim Feeding Our Future would submit for the indefinite future. Since March 31, 2021, MDE has issued a stop pay for over \$18 million in new claims without any new or different basis. MDE's decision to proactively declare Feeding Our Future's future claims defective is a clear violation of federal law.

MDE's decision to issue a stop pay; its decision that the stop pay would remain in force and effect until Feeding Our Future "validated" its claims; its decision that the stop pay would apply to claims that had not even been submitted; and MDE's decision to actively take steps to delay the processing of Feeding Our Future's claims are clear violations of federal law.

II. MDE's Creation of a Claim Validation Process Violates Federal Law.

As noted above and discussed at the hearing, it is clear that MDE's decision to issue a stop payment violates federal law. It is equally clear, however, that MDE's creation and imposition of a new claims validation process for all claims submitted on behalf of the minority community also violates federal law. MDE relies on 2 C.F.R. 200.339 and 200.208 for the proposition that it can require Feeding Our Future to comply with a new claims validation process. MDE is wrong.

Regulation 200.339 allows MDE to impose additional conditions to grant recipients if the recipient has failed to comply with an applicable federal requirement. Before MDE can impose additional conditions, however, it must first find that there is a violation of federal law. It must then consider the factors described in 2 C.F.R. 200.208 (referenced in 200.339) to determine whether additional conditions are appropriate. Those factors include Feeding Our Future's history of compliance; its ability to meet expected performance goals; a responsibility determination; as well as the additional factors set forth in 2 C.F.R. § 200.206. 2 C.F.R. § 200.208(b). Before MDE can impose any additional conditions it must first notify Feeding Our Future of: (1) the nature of the additional requirements; (2) the reason why the additional requirements are being imposed; (3) the nature of the action needed to remove the additional requirements; (4) the time allowed for completing the actions; and (5) the method for requesting reconsideration of the additional requirements imposed. 2. C.F.R. § 200.208(d).

MDE's reliance on 2 C.F.R. 200.208 fails for a number of reasons. First, there is no rational relationship between MDE's allegation that Feeding Our Future failed to ensure its audit was filed with the Federal Audit Clearinghouse and MDE's requirement that Feeding Our Future submit to an onerous and time-consuming validation process. As part of its new claim validation process, MDE has required Feeding Our Future to provide menus, meal counts, attendance records, receipts, and proof of enrichment activities for each site's claims. To date, Feeding Our Future has had 10 people spend over 40 hours each collecting, scanning, labeling, and submitting thousands and thousands of the requested documents and it is only 80% complete. In total, Feeding Our Future estimates that it will take about 500 labor hours to provide the requested documents. Importantly, MDE has never alleged that any of Feeding Our Future's sites had any issues with their claims generally, much less their supporting documents. Again, at no point in Feeding Our Future's history has MDE alleged that any of its claims were inappropriate, unsupported, or in any way invalid. The federal regulations allow additional conditions to be applied to ensure compliance with federal requirements. They are not a punitive measure for unrelated violations. Any additional requirement MDE may impose must at least have some articulable connection to Feeding Our Future's alleged noncompliance. MDE cannot use any alleged noncompliance as a pretext to impose crippling additional conditions. Because there is not even a rational relationship between MDE's allegations and its additional conditions, MDE's new claim validation process is not an appropriate additional condition under 2 C.F.R. 200.339.

Second, MDE did not consider the requisite factors before imposing its "additional conditions." There is no indication that MDE was aware of 2 C.F.R. 200.208, much less that it considered the various required factors before issuing its decision. Feeding Our Future has no way of understanding if, much less how, MDE considered Feeding Our Future's long history of

compliance; its flawless record of submitting valid claims; and Feeding Our Future's outstanding record of exceeding all performance requirements. Before Feeding Our Future filed this lawsuit, MDE itself referred sites looking to participate in the food program to Feeding Our Future.

Third, MDE did not provide Feeding Our Future with the requisite notice. 2 C.F.R. § 200.208(d). MDE's March 31, 2021, letter said only that the stop pay would remain in effect until Feeding Our Future provided "meal validation documentation." MDE's letter, however, did not describe what documentation would be necessary as required by section 200.208(d)(1). It was not until April 15, two days after Feeding Our Future filed its motion for a restraining order, and two weeks after its stop pay notice, that MDE identified for the first time the documents it wanted. MDE also did not explain why it wants the additional documentation as required by section 200.208(d)(2). Again, MDE has never made any allegations about the completeness or accuracy of Feeding Our Future's claims much less explained what it wants such substantial documentation from each site. As the federal regulations make clear, Feeding Our Future is entitled to an explanation. Perhaps most importantly, MDE did not provide notice of "The method for requesting reconsideration of the additional requirements imposed." (2 C.F.R. § 200.208(d)(5)). In fact, MDE specifically said that Feeding Our Future had no right to appeal its decision. Because MDE did not provide the requisite notice and right to appeal, its decision requiring Feeding Our Future to comply with a new claim validation process violates 2 C.F.R. § 200.208.

MDE's decision to create and impose a new claim validation process also violates 7 C.F.R. § 226.7(k). Section 226.7(k) requires MDE to create a single, uniform process for submitting claims, and to inform Feeding Our Future of any issues with its claims within 15 days of receipt:

Each State agency shall establish procedures for institutions to properly submit claims for reimbursement. Such procedures must include State agency edit checks, including but not limited to ensuring that payments are made only for approved meal types and that the number of meals for which reimbursement is provided does

not exceed the product of the total enrollment times operating days times approved meal types. All valid claims shall be paid within 45 calendar days of receipt. Within 15 calendar days of receipt of any incomplete or incorrect claim which must be revised for payment, the State agency shall notify the institution as to why and how such claim must be revised. If the State agency disallows partial or full payment for a claim for reimbursement, it shall notify the institution which submitted the claim of its right to appeal under § 226.6(k). State agencies may permit disallowances to be appealed separately from claims for reimbursement.

(7 C.F.R. § 226.7(k)).

MDE has been operating the federal food program for decades. It has a claim submission process in place, and Feeding Our Future complied fully with those requirements. MDE cannot create a new claims submission process and apply it just to those sponsors that serve the minority community.

Moreover, section 226.7(k) explicitly requires that MDE must identify “any incomplete or incorrect claim which must be revised for payment” within 15 days of receiving the claim. MDE has no authority to extend that timeline, much less to do so indefinitely. Feeding Our Future has been submitting the claims at issue on a rolling basis since at least March 29, 2021. Feeding Our Future has about \$17 million in claims that have been pending for more than 15 calendar days. To date, MDE has not identified a single claim that it believes is incomplete, inaccurate, or needs to be revised before payment. In fact, each and every one of Feeding Our Future’s claims are noted in MDE’s CLiCS system as “Claim Status Approved.” They are not being processed for payment simply because of MDE’s stop payment notice.

MDE’s imposition of a new claim validation process violates USDA’s 2002 policy memo; 2 C.F.R. § 200.339; 2 C.F.R. § 200.208; and 7 C.F.R. § 226.7(k).

III. MDE's Threat to Deny All Claims Demonstrates the Necessity of a Court Order.

At the April 21 hearing, MDE all but admitted that its stop pay decision violated federal law, and that its decision was not based on any alleged deficiencies or issues with Feeding Our Future's claims. Nonetheless, MDE went on to explain that if the Court ruled its stop pay was illegal, it would simply deny all of Feeding Our Future's claims. MDE's threat to deny all of Feeding Our Future's current and future claims without any factual basis is clearly bad faith, arbitrary and capricious, and a violation of federal and state law. It also illustrates the importance of a court order. As MDE made plain, it will not comply with federal law on its own. Nothing shy of a court order will bring MDE into compliance with federal law.

IV. MDE Has Steadfastly Refused to Comply with the Court's December 22, 2019 Order.

Feeding Our Future asks the Court to reconsider its reluctance to find MDE in contempt of court for violating the Court's December 22, 2019, order. MDE's March 31, 2021, letter telling Feeding Our Future that it will not accept or process any applications is simply the latest in a long line of delays and refusal to comply with the Court order.

First, MDE's March 31, 2021, letter was an unequivocal violation of this Court's order. In that letter, MDE explained that it would neither accept nor process any applications. MDE wrote: "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." Without a site ID, it is not physically possible for Feeding Our Future to submit new applications. MDE requires that all applications be submitted through its CLiCS platform. Without a site ID, Feeding Our Future cannot upload applications. In April 2021, Minnesota State Senator Sandra L. Pappas reached out to Feeding Our Future to see if it could help the House of Refuge Outreach, a nonprofit

in St. Paul, participate in the food program. Feeding Our Future's Executive Director personally assured Senator Pappas that Feeding Our Future would do all it could to help. On April 13, 2021, Feeding Our Future submitted a request for a site ID for the House of Refuge Outreach. True to its word, MDE has refused to issue a site ID and thereby precluded Feeding Our Future from submitting an application for the House of Refuge Outreach.

Since the hearing, Feeding Our Future's counsel reached out to MDE's counsel to understand if MDE was reversing its March 31 position. In response, MDE explained that Feeding Our Future "is free to request site IDs and is free to submit meal plans on CLiCS." She went on to explain, "As for processing, my understanding is that it's MDE's position that the applications are not correct and complete because of the serious deficiencies..." MDE's assurances that Feeding Our Future can continue requesting site IDs is of no value. Without MDE's approval of those requests, Feeding Our Future cannot submit applications. Moreover, counsel's statement that MDE will consider all applications "not correct and complete" strongly suggests that MDE will continue in its refusal to issue final determinations. The Court's December order states: "MDE will approve or disapprove Feeding Our Future's CACFP and SFSP applications that are correct and complete in a reasonably prompt manner." By declaring all applications to be "not correct and complete," MDE is strongly implying that it will not approve or disapprove them. MDE is also implying that it will not consider any of the applications on their individual merits.

MDE's most recent action is simply the latest in a long history of obstructing Feeding Our Future's ability to submit applications. Feeding Our Future currently has 148 applications pending. Of those, 143 have been pending for 30 days or more; 103 have been pending for 60 days or more; 23 have been pending for 90 days or more; 8 have been pending for 120 days or more; and 5 have been pending for 144 days and counting. (Summary Chart of Feeding Our

Future's Pending Applications, attached as "**Exhibit 2**"). Again, federal regulations require MDE to process vastly more complex and onerous sponsor applications within 30 days. 7 C.F.R. § 225.6(b)(3). Although the parties dispute whether the same 30-day requirement applies to site applications, there is no dispute that site applications are substantially simpler and more straightforward. To resolve Feeding Our Future's first motion for a restraining order, the parties stipulated to an order requiring MDE to accept and process applications in a reasonably prompt manner. (December 22, Order, ¶ 1).

Most states process site applications within a couple of days. There is nothing reasonable or prompt about taking over five-and-a-half months and counting to process simple site applications. Sites are entitled to submit CACFP claims for reimbursement up to one month before they are approved. They are also required to submit claims within 60 days from the end of the month in which they incurred the costs. By refusing to approve or deny applications, MDE is perpetuating uncertainty about sites' ability to participate; delaying their ability to submit claims; and in the best cases requiring sites to use limited requests for a waiver to submit their claims late. Because of MDE's delays, numerous sites have decided they cannot participate while still more have delayed the start of their participation by months. MDE's refusal to process applications has caused Feeding Our Future and its community partners substantial and ongoing harm.

CONCLUSION

MDE will not comply with federal law without an order from this Court. Despite months of litigation, numerous hearings, and several motions, MDE continues to indefinitely delay its processing of Feeding Our Future's applications. Feeding Our Future respectfully requests:

1. An order from this Court restraining MDE from continuing to enforce its stop pay decision;

2. An order from this Court restraining MDE from continuing to enforce its claim validation process;
3. An order from this Court restraining MDE from continuing to enforce its decision refusing to accept or process Feeding Our Future's applications;
4. An order from this Court requiring MDE to approve or deny all Feeding Our Future's pending applications within 15 calendar days;
5. An order from this Court finding MDE in contempt of its December 22, 2020, order for refusing to accept or process Feeding Our Future's applications; and
6. An order from this Court requiring MDE to pay all of Feeding Our Future's attorneys' fees and costs associated with its motions.

Dated: April 23, 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