

# Montana Nurses Association



**To: Montana Citizens**  
**From: Montana Nurses Association**  
**Date: September 8, 2021**  
**Re: DPHHS Emergency Rule on Face Coverings**

The Montana Nurses Association (MNA) has reviewed the emergency rule issued by the Montana Department of Public Health and Human Services (DPHHS) related to face coverings in schools. Because of serious concerns with the legality and scientific inaccuracy of this rule, MNA has issued the following memorandum to members of the public.

In short, MNA's review concludes that the emergency rule violates Montana law and promotes junk science, but that a legal challenge would be futile because the rule does nothing.

**I. The emergency rule plainly violates Montana law, but is not worth challenging because it contains no regulatory content.**

Montana law has strict requirements when the government chooses to issue emergency rules. An emergency rule "constitutes the exercise of extraordinary power requiring extraordinary safeguards against abuse." Section 2-4-303(1)(a), MCA. This is because emergency rules skip the normal rulemaking process and "preclude" the people's constitutional right to prior notice and participation in the operations of their government." *Id.* Accordingly, under Montana law,

*An emergency rule may be adopted only in circumstances that truly and clearly constitute an existing imminent peril to the public health, safety, or welfare that cannot be averted or remedied by any other administrative act. The sufficiency of the reasons for a finding of imminent peril to the public health, safety, or welfare is subject to judicial review upon petition by any person. The matter must be set for hearing at the earliest possible time and takes precedence over all other matters except older matters of the same character. The sufficiency of the reasons justifying a*

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*finding of imminent peril and the necessity for emergency rulemaking must be compelling* and, as written in the rule adoption notice, must stand on their own merits for purposes of judicial review.

*Id.* (emphasis added).

The emergency rule issued by DPHHS fails to meet any of these requirements. As an initial matter, the emergency rule does not actually set forth any “rule.” Rather, it is a series of state suggestions about how local governments should balance policy considerations related to the spread of communicable disease. The rule contains no “shall” or “must” requirements, only suggestions that local governments “should” follow. Therefore, on its face the rule fails the requirement that an emergency rule may only be issued if the rule solves a problem that “cannot be averted or remedied by any other administrative act.” Here, an emergency rule is plainly not necessary if the rule itself has no actual requirements. DPHHS could just as easily have issued a press release stating the same suggestions, without abusing the rulemaking process.

Further, the emergency rule fails to make a “compelling” showing in the written rule adoption notice of “a finding of imminent peril and the necessity for emergency rulemaking.” The rule relies on a range of sources—some widely discredited, others that cut *against* the government’s reading, all of which are discussed *infra*—that argue against the scientific consensus in the United States around face coverings and disease. Nothing in the written rule notice makes a “compelling” showing that policies requiring face coverings in some Montana schools to prevent the spread of disease constitute “imminent peril.”

While the emergency rule plainly violates the requirements of Montana law, a legal challenge to the rule is not necessary because the rule has no regulatory content. A reviewing court would likely invalidate the rule for procedural reasons, but invalidation in court would have little real-world effect because the rule does nothing. Moreover, the rule expires in 120 days and cannot be re-issued. Section 2-4-303(1), MCA.

In sum, emergency rules are reserved for the most dire situation in which “imminent peril” requires the government to skip the safeguards of the ordinary rulemaking process. The “emergency rule” issued by DPHHS meets none of the demanding standards required of emergency rules in this state. Its utter lack of regulatory content demonstrates that the rule is an abuse of the Administrative Procedures Act, and that challenging such a rule would be futile because there is no regulatory content to set aside.

## **II. The emergency rule misrepresents science and evidence based data.**

In the emergency ruling on school mask mandates, Governor Gianforte and DPHHS director cite a number of studies to support their claim that “the scientific literature is not conclusive” to support mask mandates. As we review their “evidence,” here are four clear examples of misinformation that continues to confuse and divide our communities.

- 1) The first study they cite *is not peer reviewed* and comes with the disclaimer that the study is “new medical research that has yet to be evaluated and so should not be used to guide clinical practice.” The study looks only at state-level mask mandates (not actual rates of use and not mandates of masks in schools). This study is contradicted by a number of higher quality and peer-reviewed studies showing the effectiveness of mask mandates.

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- 2) The second study they cite (perhaps as a contrast, however it adds to the confusion) is CDC guidance that *clearly supports* masking and includes a handy table of 14 studies showing reduced incidence of transmission with mask use. Most of these studies are high quality and peer-reviewed. As the CDC notes, the weight of the evidence is clearly for masks.
- 3) The third “study” cited is a NY Magazine article, not a scientific journal, written by David Zweig who appears to just write a bunch of articles that contradict the scientific consensus on COVID and raise false alarms. His most recent articles include: “Is the Second Shot Giving Young Men a Dangerous Heart Condition?” and “Why Public Schools Shouldn’t Offer Remote Options this Fall.” So now an opinion writer for a magazine about New York City who doesn’t believe in public health is being cited to drive Montana school policies.  
<https://nymag.com/author/david-zweig/>
- 4) The fourth study cited is about the spread of *influenza* not COVID – which spreads mainly through droplets (cough, sneeze, talk). This study has little to no relevance to mask mandates during this pandemic. [https://wwwnc.cdc.gov/eid/article/26/5/19-0994\\_article](https://wwwnc.cdc.gov/eid/article/26/5/19-0994_article)

In conclusion, the evidence against mask mandates in schools cited in the rule is 1) one un-reviewed study about statewide (not school) mandates that is contradicted by other studies; 2) a CDC review that has 14 *positive* studies on mask use; 3) a NY Magazine article by a writer who only writes articles that contradict public health recommendations; and 4) a study on influenza.

MNA professional nurses are incensed that our state public health department would so misrepresent the scientific consensus and weight of the data to the public.

In contrast, there is a lot of good evidence supporting mask use that DPHHS seems to ignore.

- Like this review article: <https://www.pnas.org/content/118/4/e2014564118>. Or this peer-reviewed Morbidity and Mortality Weekly Report (MMWR): <https://www.cdc.gov/mmwr/volumes/70/wr/mm7010e3.htm>.
- Or this article showing mask mandates (are) associated with reduced transmission, hospitalization *and death*:  
<https://journals.plos.org/plosone/article?id=10.1371%2Fjournal.pone.0252315&fbclid=IwAR3rg8yo7YLVYLFxFfkMNjzdOW53amayws6Rdfg16Ie7J-FoGPNjDpOc4ng>.

MNA kindly asks, please get vaccinated if you can, wear a mask especially if you are unvaccinated, and please wear a mask, vaccinated or not in public places.

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