Big Sky Country

MONTANA STATE LEGISLATURE

May 26, 2022

Director Adam Meier
Department of Public Health and Human Services
111 North Sanders, Room 301
Helena, MT 59604

Dear Director Meier:

As members of the Interim Committee on Children, Families, and Health and Human Services (CFHHS) charged with oversight of the Department of Public Health and Human Services (DPHHS), we write to request that the Department immediately rescind its unlawful emergency rule concerning Montanans' ability to correct the gender markers on their birth certificates. The Department's adoption of this rule is unlawful because it violates several sections of Montana Code Annotated (MCA) section 2-4-303, as set out more specifically below.

1. Last year, the Legislature passed HB 47 sponsored by Rep. McKamey (R), by votes of 99-1 in the House and 50-0 in the Senate, and Governor Gianforte signed it into law on April 16, 2021. HB 47 amended Montana Code Annotated (MCA) section 2-4-303 to require special notice in the event of emergency rulemaking. According to this new law, "prior to adoption of an emergency rule, the agency shall make a good faith effort to provide special notice to each committee member and each member of the committee staff." The Department violated this requirement in its adoption of the so-called emergency rule by failing to make any effort – let alone a "good faith effort" – to notify members of our Committee in advance of adoption. As documented in paragraph 21 of the notice of adoption, the Department notified us of the proposed rule at the time it was adopted–not prior to its adoption.

2. In addition to its failure to properly notify CFHHS members, the Department is in violation of MCA 2-4-303(1)(a), which requires that emergency rules 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 same provision requires that the Department "state in writing its reasons" why there is "an existing imminent peril to the public health, safety, or welfare." The emergency rule fails to meet this basic requirement, rendering it plainly unlawful.

3. Not only is the emergency unlawful for failing to provide in writing the reasons that there is an imminent peril to the public safety, health, or welfare, but it is patently obvious that no such imminent peril could exist. Waiting until court action concludes can easily be done and would not result in any imminent danger to public health, safety, or welfare.

The above provisions are not merely hoops to be jumped through, but are meant to prohibit exactly what is happening here: the unlawful misuse of emergency rulemaking to circumvent the democratic means of adopting rules that require citizen input, the consideration of expert evidence, and a deliberative process within the agency. Indeed, the cited statute specifically says:

> "Because the exercise of emergency rulemaking power precludes the people's constitutional right to prior notice and participation in the operations of their government, it constitutes the exercise of extraordinary power requiring extraordinary safeguards against abuse. 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 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…"

Rulemaking has substantial impact on the lives of Montanans, and to ride roughshod over their constitutional right to know and cut them out of the process through an unsubstantiated claim of "emergency" is unlawful, anti-democratic and insulting to Montanans. It is particularly surprising coming from DPHHS, which, in other contexts, has consistently required extensive studies and lengthy deliberation before acting, even when a true emergency clearly existed.

It is our hope that the agency's failure to follow Montana law in the adoption of this emergency rule was an oversight and not meant as a direct challenge to the legislative branch's authority to enact laws which disallow the use of the emergency rule process as a means of circumventing the constitutional rights of Montanans to participate in governmental acts which impact them. Therefore, it is our hope that this action will be corrected by simply rescinding the rule.

Sincerely,

Rep. Ed Stafman
Chair, House District 62

Sen. Mary McNally
Senate District 24

Rep. Danny Tenenbaum
House District 95

Sen. Jen Gross
Senate District 25

Rep. Mary Caferro
House District 81