BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES OF THE
STATE OF MONTANA

In the matter of the adoption of Temporary Emergency Rule I to allow students and/or their parents or guardians the ability to opt-out of school health-related mandates for health, religious, moral, or other fundamental rights reasons	)))))))	NOTICE OF ADOPTION OF TEMPORARY EMERGENCY RULE

TO: All Concerned Persons

1. The Department of Public Health and Human Services (department) is adopting the following temporary emergency rule as part of the State's response to the current COVID-19 global pandemic. The current COVID-19 global pandemic has placed great burdens on the State, and some of the responses to the pandemic, including mask mandates, have also imposed additional burdens on citizens, including on their health and well-being. While the department encourages citizens to receive the COVID-19 vaccine in consultation with their health care provider, this choice, which could mitigate not only the need to wear a mask, but also, potentially, the need for school-based mask mandates, is not yet available to the majority of students because of their age. The rule directs that, if schools or school districts impose a health-related mandate on students, such as a mask mandate, they should consider, and be able to demonstrate they considered, parental concerns in adopting the mandate, and should provide the ability for students, and/or parents or guardians on behalf of their children, to choose to opt-out based on physical, mental, emotional, or psychosocial health concerns, as well as on the basis of religious belief, moral conviction, or other fundamental right, the impairment of which may negatively impact such students' physical, mental, emotional, or psychosocial health.

2. The Centers for Disease Control and Prevention (CDC) recognizes categories of people as exempt from the requirement to wear a mask, including children under age two; persons with disabilities who cannot wear a mask, or cannot safely wear a mask, for reasons related to the disability; and persons for whom wearing a mask would create a risk to workplace health, safety, or job duties (*see* "Guidance for Wearing Masks", "Who should or should not wear a mask" at https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html, last updated April 19, 2021). Similarly, mask wearing can interfere with the learning and general well-being of school-aged children, related to their age and development; their disabilities, and physical and mental health attributes; and classroom health, safety, and productivity. As those best suited and entitled to assess individual needs for the physical, mental, and developmental well-being of their minor children, parents or guardians, in consultation with their children's health care provider as appropriate, should be afforded the ability to opt-out of mask requirements on behalf of their children.

3. The department is charged with providing consultation on conditions and issues of public health importance for schools, to school and local public health personnel, and to the superintendent of public instruction (50-1-202(1)(l), MCA). The department is also charged with adopting and enforcing rules regarding public health requirements for schools, including any matters pertinent to the health and physical well-being of pupils, teachers, and others (50-1-202(1)(p)(v), 50-1-206, MCA). To this end, for example, the department recommends students be evaluated by a health care provider periodically and as necessary to identify health problems with the potential for interfering with learning, including assessment of students' health and developmental status, vision, hearing, and mental health (ARM 37.111.825(7)). In furtherance of this obligation, and for the reasons set forth herein, the department has determined that schools and school districts that impose such health-related mandates as mandatory mask wearing should provide the ability for students through their parents or guardians to choose to opt-out of mandated mask wear in school.

4. The scientific literature is not conclusive on the extent of the impact of masking on reducing the spread of viral infections. The department understands that randomized control trials have not clearly demonstrated mask efficacy against respiratory viruses, and observational studies are inconclusive on whether mask use predicts lower infection rates, especially with respect to children.[1] The department understands, however, that there is a body of literature, scientific as well as survey/anecdotal, on the negative health consequences that some individuals, especially some children, experience as a result of prolonged mask wearing.[2]

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[1] *See, e.g.,* Guerra, D. and Guerra, D., *Mask mandate and use efficacy for COVID-19 containment in US States*, MedRX, Aug. 7, 2021, https://www.medrxiv.org/content/10.1101/2021.05.18.21257385v2 ("Randomized control trials have not clearly demonstrated mask efficacy against respiratory viruses, and observational studies conflict on whether mask use predicts lower infection rates."). *Compare* CDC, *Science Brief: Community Use of Cloth Masks to Control the Spread of SARS-CoV-2,* last updated May 7, 2021, https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/masking-science-sars-cov2.html, last visited Aug. 30, 2021 (mask wearing reduces new infections, citing studies) *with* David Zweig, *The Science of Masking Kids at School Remains Uncertain*, New York Magazine, Aug. 20, 2021, https://nymag.com/intelligencer/2021/08/the-science-of-masking-kids-at-school-remains-uncertain.html (author reviewed the 17 studies cited in CDC's K-12 guidance of evidence that masks on students are effective, noting that none looked at student mask use in isolation from other mitigation measures or against a control, with some studies demonstrating that lack of masking correlated with low transmission and noting issue with presentation of one study published in CDC's MMWR). *See also* Xiao, J., Shiu, E., Gao, H., Wong, J. Y., Fong, M. W., Ryu, S., Cowling, B. J. (2020). *Nonpharmaceutical Measures for Pandemic Influenza in Nonhealthcare Settings—Personal Protective and Environmental Measures*. CDC, Emerging Infectious Diseases, 26(5), 967-975, https://doi.org/10.3201/eid2605.190994 (meta-analysis found that although mechanistic studies support potential effect of hand hygiene or face masks, evidence from 14 randomized controlled trials of such measures did not support a substantial effect on transmission of laboratory-confirmed influenza); Guerra, D. and Guerra, D. (not observing "association between mask mandates or use and reduced COVID-19 spread in US states").

[2] *See, e.g.,* Kisielinski, K. et al., *Is a Mask That Covers the Mouth and Nose Free From Undesirable Side Effects in Everyday Use and Free of Potential Hazards?*, Int. J. Environ. Res. Public Health 2021, 18, 4344, https://doi.org/10.3390/ijerph18084344 (scientific review of multiple studies revealed relevant adverse events over more than ten medical disciplines, including internal medicine, psychology, psychiatry, and pediatrics, finding statistically significant correlation in the quantitative

5. Similarly, there is also substantial literature that persons who are forced to act contrary to their religious beliefs or moral convictions may experience moral distress, and psychological and emotional harm.[3] This moral distress and the associated impact on an individual's psychological and emotional health could also arise when a person is forced to act contrary to his or her views of his or her fundamental rights.[4]

6. Mask wearing has been shown to cause some children to suffer mental and emotional distress and issues.[5] Mask wearing can also cause or aggravate physical conditions in some children, including interference with breathing related to asthma or other respiratory conditions or infections, or interference with the ability to see classroom boards, screens, papers and desk surfaces, and surrounding safety conditions, especially for students wearing glasses. The scientific literature has identified, with respect to pediatrics, diseases, or predispositions where masking may present significant risks, including respiratory diseases, cardiopulmonary diseases (asthma, bronchitis, cystic fibrosis, congenital heart disease, emphysema), neuromuscular diseases, and epilepsy.[6] In addition, mask wearing can cause

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analysis between the negative effects of blood-oxygen depletion and fatigue in mask wearers, and identifying what the authors called Mask-Induced Exhaustion Syndrome with symptoms including feeling of fatigue or exhaustion, decreased ability to concentrate, and decreased ability to think). *But see* CDC, Science Brief ("[r]esearch supports that mask wearing has no significant adverse health effects for wearers," citing studies mainly conducted with healthy research subjects).

[3] *See, e.g.,* Christy A. Rentmeester, *Moral Damage to Health Care Professionals and Trainees: Legalism and Other Consequences for Patients and Colleagues*, Journal of Medicine and Philosophy, 33: 27-43, 2008, p,37 ("moral distress is a sense of complicity in doing wrong. This sense of complicity does not come from uncertainty about what is right but from the experience that one's power to resist participation in doing wrong is severely restricted by one's work environment and from the experience that resisting participation in doing wrong is severely restricted by one's work environment and from the experience that resisting participation in doing wrong exposes one to harm."); Borhani et al., *The relationship between moral distress, professional stress, and intent to stay in the nursing profession*, J. Med. Ethics Hist. Med. 2014; 7:3.

[4] *Cf.* Kisielinski, K. et al. (masks impair the wearer's field of vision and inhibit other habitual actions, which can be perceived "as a permanent disturbance, obstruction, and restriction"; "[w]earing masks, thus, entails a feeling of deprivation of freedom and loss of autonomy and self-determination, which can lead to suppressed anger and subconscious constant distraction, especially as the wearing of masks is mostly dictated and ordered by others").

[5] *Id.* (noting a survey which showed masks can cause anxiety and stress reactions in children, an increase in psychosomatic and stress-related illnesses and depressive self-experience, reduced participation, social withdrawal, and lowered health-related selfcare); *see also* Carla Peeters, September 9, 2020, *Rapid response: Psychological, biological, and immunological risks for children and pupils makes long-term wearing of mouth masks difficult to maintain*, BMJ, https://www.bmj.com/content/370/bmj.m3021/rr-6.

[6] Kisielinski, K. et al. These conditions tend to be ones with respect to which individuals would be excluded from research studies. *See, e.g.,* Lubrano, R., Bloise, S., Testa, A., et al. *Assessment of Respiratory Function in Infants and Young Children Wearing Face Masks During the COVID-19 Pandemic*. JAMA Netw Open. Mar 2 2021;4(3):e210414. doi:10.1001/jamanetworkopen.2021.0414, (cited in CDC, Science Brief at note 64) (noting the exclusion from study of infants and young children with lung or cardiac disease, neuromuscular disorders and those with medications that could be associated with changes in the parameters examined).

decreased ability to think and to concentrate in some children, with potential implications for their cognitive development.[7]

7. Accordingly, personal choice in the form of an exemption from or exception to a mask mandate policy can serve to protect and further the physical, mental, and emotional health of students who may be negatively impacted by a masking requirement. Safety recommendations and choices in response to the COVID-19 global pandemic are invaluable, but mandates can place more detrimental stress or have other adverse health impacts on some students and families, unless they have the ability to opt-out as necessary. This is especially the case where the scientific evidence supporting the original public health intervention is inconclusive. With respect to the documentation necessary to support such exception or exemption from a mandatory health measure such as mandatory mask wearing, the department suggests that the type and quantum of documentation outlined in House Bill 334, with respect to exemptions from school vaccination requirements, may serve as an appropriate model.

8. For the foregoing reasons, the department adopts this emergency rule. Certain Montana schools and school districts have adopted and, with the beginning of the school year, will be enforcing mask mandates on the basis of public health, without considering the negative implications that such measures could have on the physical, mental, emotional, or psychosocial health of some students. Promulgation of this emergency rule is necessary because no other administrative act can be taken to avert this imminent peril to the public health, safety, and well-being of Montana youth, who are now returning or beginning to return to the classroom for the new school year. This rule will remain in effect no longer than 120 days after the date of adoption.

9. EMERGENCY RULE I is necessary to provide essential health, well-being, fundamental rights, and a safe and effective learning environment for Montana youth. Emergency Rule I protects Montana students returning to school who may experience adverse effects from mandatory mask wear by directing schools and school districts that they should consider, and be able to demonstrate consideration of, parental concerns when adopting a mask mandate, and should provide those students, or their parents or guardians, on their behalf, with the ability to opt-out of wearing a mask, as necessary.

10. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who need an alternative accessible format of this notice. If you require an accommodation, contact Heidi Clark at the Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; telephone (406) 444-4094; fax (406) 444-9744; or e-mail dphhslegal@mt.gov.

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[7] *See, e.g.,* Kisielinski, K. et al.; *see also* Guerra, D. and Guerra, D. (noting some risks of mask wearing, including that by obscuring nonverbal communication, masks interfere with social learning in children, and research that masks decrease cognitive precision).

11. The emergency rule is effective immediately, August 31, 2021.

12. The text of the emergency rule provides as follows:

EMERGENCY RULE I ABILITY TO OPT-OUT OF SCHOOL HEALTH-RELATED MANDATES (1) In order to provide for the health, well-being, rights, and educational needs of students, schools and school districts should consider, and be able to demonstrate consideration of, parental concerns when adopting a mask mandate, and should provide students and/or their parents or guardians, on their behalf, with the ability to opt-out of health-related mandates, to include wearing a mask or face covering, for reasons including:

(a) physical health;
(b) mental health;
(c) emotional health;
(d) psychosocial health;
(e) developmental needs; or
(f) religious belief, moral conviction, or other fundamental right the impairment of which could negatively impact the physical, mental, emotional, or psychosocial health of students.

AUTH: 2-4-303, 50-1-202, 50-1-206, MCA
IMP: 50-1-202, 50-1-206, MCA

13. The rationale for the temporary emergency rule is set forth in paragraphs 1 through 9.

14. It is presently unknown whether a standard rulemaking procedure will be undertaken prior to the expiration of this temporary emergency rule. The necessity and efficacy of this emergency rule will be continuously evaluated as the effort to combat the COVID-19 global pandemic in Montana continues and develops.

15. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices, and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in paragraph 10 or may be made by completing a request form at any rules hearing held by the department.

16. The bill sponsor contact requirements of 2-4-302, MCA, do not apply to this rulemaking. Special notice, pursuant to 2-4-303, MCA, was made to each member of the Children, Families, Health, and Human Services; and Education Interim Committees and to each member of the committees' staff, using electronic mail on August 31, 2021.

/s/ Robert Lishman
Robert Lishman
Rule Reviewer

/s/ Adam Meier
Adam Meier, Director
Public Health and Human Services

Certified to the Secretary of State August 31, 2021.