DENVER DISTRICT COURT Denver City and County Building 1437 Bannock St. Denver, CO 80202	DATE FILED: December 12, 2017 11:51 AM CASE NUMBER: 2017CV30629
Plaintiffs: ACUPUNCTURE ASSOCIATION OF COLORADO and the COLORADO SAFE ACUPUNCTURE ASSOCIATION, v. **Defendant:** COLORADO STATE PHYSICAL THERAPY BOARD.	**▲ COURT USE ONLY ▲**
	Case Number: 17CV30629 Courtroom: 424

OPINION AND ORDER

THIS MATTER is before the Court pursuant to Plaintiffs' Complaint for Declaratory and Injunctive Relief filed on February 16, 2017. Plaintiffs submitted their Opening Brief on October 6, 2017; Defendant filed its Answer Brief on November 10, to which Plaintiffs replied on December 1. Additionally, the American Physical Therapy Association's Colorado Chapter filed an amicus brief opposing Plaintiffs on November 14. The Court now issues the following opinion and order.

I. STATEMENT OF THE ISSUES

This case presents what appears to be a long-running turf war between acupuncturists and physical therapists over a process called dry needling. As a threshold matter, the Court must determine whether Plaintiffs Acupuncture Association of Colorado ("AAC") and Colorado Safe Acupuncture Association ("CSAA") (collectively, "Plaintiffs") have standing to seek judicial review under § 24-4-106, C.R.S., or, alternatively, a declaratory judgment under § 13-51-105. If so, the Court must then address whether the Colorado State Physical Therapy Board ("the Board") abused its discretion in denying Plaintiffs' petition to repeal Rule 211 (the administrative rule allowing dry needling by physical therapists) because the Rule is inconsistent with, or contrary to, Colorado's Physical Therapists Practice Act, § 12-41-101, C.R.S., *et seq.* (the "Act"). As part of the latter assessment, the Court revisits the timeliness of Plaintiffs' action.

II. PARTIES TO THIS APPEAL

A. Acupuncture Association of Colorado

AAC is a non-profit, professional organization of state-licensed acupuncturists/traditional East Asian medicine practitioners, students, and supporters of traditional and modern acupuncture throughout the state of Colorado. AAC's goals are to foster and promote the practice of acupuncture, including working to protect acupuncture's reputation as a safe and effective practice. AAC has more than 450 members in Colorado.

B. Colorado Safe Acupuncture Association

CSAA is a non-profit organization that works with newly licensed acupuncturists and acupuncture students to promote, encourage, and advocate for the safe and effective practice of acupuncture in Colorado. CSAA was formed to address the risks posed by individuals who use

acupuncture needles without having undergone the thousands of hours of training required for licensed acupuncturists. CSAA has more than fifteen members.

C. Colorado State Physical Therapy Board

The Board consists of seven members—five physical therapist members and two members from the public-at-large—and is authorized to "adopt all reasonable and necessary rules for the administration and enforcement of [the Act] . . . ." §§ 12-41-103.3, -103.6(2)(b). The Board may, at its discretion, decide whether to rule on petitions brought before it. 4 Colo. Code Regs. § 732-1:105(B). "If the Board determines that it will not rule upon such a petition, the Board shall promptly notify the petitioner of its action and state the reasons for such decision." *Id.*

III. STATEMENT OF THE CASE

On November 29, 2016, Plaintiffs filed a petition ("Petition") with the Board seeking repeal of Rule 211. The Petition asserts that the Rule exceeds the statutory scope of practice for physical therapy as adopted and defined in the Act. The Rule regulates 'dry needling,' which is the term used by the Board and physical therapists to describe the insertion of filiform needles to stimulate trigger points (taut bands of muscle) and diagnose and treat neuromuscular pain and functional movement deficits.

On January 17, 2017, the Board issued an order refusing to rule on Plaintiffs' Petition. Subsequently, the Board's director informed Plaintiffs that there were "no other decisions forthcoming regarding this matter," indicating the Board had made a final decision and effectively denied the Petition.

Plaintiffs now seek declaratory and injunctive relief against the Board pursuant to the Colorado Administrative Procedures Act ("APA"), § 24-4-101, *et seq.*, and alternatively the

Colorado Uniform Declaratory Judgment Act ("UDJ"), §§ 13-51-105, -106.

IV. ANALYSIS

A. Standing

"To establish standing under Colorado law, plaintiffs must satisfy a two-part test: (1) the plaintiffs must allege an 'injury in fact' and (2) the injury must be to a legally protected interest." *1405 Hotel, LLC v. Colo. Econ. Dev. Comm'n*, 370 P.3d 309, 316 (Colo. App. 2015). "[T]he test in Colorado has traditionally been relatively easy to satisfy." *Id.* (quoting *Ainscough v. Owens*, 90 P.3d 851, 856 (Colo. 2004)).

To satisfy the first prong—injury in fact—a plaintiff's alleged injury may be tangible, such as economic harm, or intangible, such as aesthetic harm. *Id.* (quoting *Barber v. Ritter*, 196 P.3d 238, 245 (Colo. 2008)). However, an injury that is overly speculative, indirect, or incidental is insufficient to confer standing. *See Hickenlooper v. Freedom from Religion Found., Inc.*, 338 P.3d 1002, 1006–07 (Colo. 2014); *see also Brotman v. East Lake Creek Ranch, LLP*, 31 P.3d 886, 891 (Colo. 2001) (finding that the respondent/cross-petitioner lacked standing because, among other things, the alleged injury in fact had not actually occurred). Government actions that have a direct and negative impact on the reputation of an association's members, methods of practice, and income are sufficient to meet the injury requirement. *Colorado Medical Society v. Hickenlooper*, 349 P.3d 1133, 1137 (Colo. 2015).

Here, Plaintiffs argue that they have suffered an injury in fact because Rule 211 allows physical therapists to engage in dry needling without sufficient training, leading to injuries and increased public fear of acupuncture needles; this, in turn, causes a reluctance to seek acupuncture treatment—a direct harm to the economic welfare of Plaintiffs' members. Plaintiffs also argue that Rule 211 diminishes the value of their members' professional licenses by giving

physical therapists the right to perform an almost identical procedure without adequate training. The Board responds that Plaintiffs' injuries are, at most, indirect or incidental to the existence of Rule 211. The Board further argues that Rule 211 does not regulate, and thus does not directly impact, the practice of acupuncture.

In *Colorado Medical Society*, the Colorado Supreme Court considered whether an anesthesiologists' association and a physicians' association had standing to challenge the governor's decision that Colorado opt-out of a federal regulation requiring nurses administering anesthesia to do so under a physician's supervision. 349 P.3d at 1135. Although the opt-out pertained to certified registered nurse anesthetists and the Nurse Practitioners Act, the court held that the plaintiffs—who represented members of different professions—had standing. *Id.* at 1136–37. The court considered the direct and negative impact on the reputations of the plaintiff's members, how they practice medicine, and their income, and concluded that these alleged injuries were not indirect or incidental. *Id.* Similarly here, while Rule 211 only regulates physical therapists, the alleged injuries to acupuncturists from allowing physical therapists to engage in dry needling are not indirect or incidental.

The holdings in *Wimberly v. Ettenberg*, 570 P.2d 535 (Colo. 1977) and *1405 Hotel, LLC v. Colo. Econ. Dev. Comm'n*, 370 P.3d 309 (Colo. App. 2015), are not to the contrary. In both cases, the courts considered solely the economic impact that resulted from an "increased number of alternatives" (*i.e.*, competition), and found that "injuries resulting only from the grant of an economic benefit to a competitor . . . are 'indirect' and therefore insufficient to establish standing." *1405 Hotel*, 370 P.3d at 318 (citing *Wimberly*, 570 P.2d at 539). Here, Plaintiffs' alleged injuries (to their members' professional reputations, the value of their licenses, as well as financial harm) are injuries in fact. *See Colorado Medical Society*, 349 P.3d at 1137.

To satisfy the second prong, a court must determine "whether the plaintiff has a claim for relief under the constitution, the common law, a statute, or a rule or regulation." *1405 Hotel*, 370 P.3d at 317 (citing *Ainscough*, 90 P.3d at 856). Neither the APA nor the UDJ create a legally protected right so as to confer standing to seek judicial review. *See Romer v. Bd. Of Cnty. Comm'rs of Pueblo Colo.*, 956 P.2d 566, 577 (Colo. 1998); *see also Farmers Ins. Exch. v. Dist. Court for Fourth Judicial Dist.*, 862 P.2d 944, 947 (Colo. 1993) ("To have standing to bring a declaratory judgment action, a . . . plaintiff must allege an injury in fact to a legally protected or cognizable interest."). The *Colorado Medical Society* court, however, found a legally protected interest in licenses obtained under the Medical Practice Act, § 12-36-101, C.R.S. *et seq.* This Court also finds a legally protected interest in licenses obtained under a similar statutory licensing act, the Acupuncture Act, § 12-29.5-102, *et seq.* Here, Plaintiffs allege injuries to their members' licenses and reputations from Rule 211. These injuries are tangible (economic harm suffered) and intangible (diminution of their reputations) and concern a legally protected interest (value of the licenses as established by the Acupuncture Act). *See Colorado Medical Society v. Hickenlooper*, 353 P.3d 396, 401 (Colo. App. 2012), *aff'd*, 349 P.3d at 1137 (Colo. 2015).

Finally, Plaintiffs have standing to bring this lawsuit on behalf of their members because the members would have standing to sue in their own right; the interests at stake are germane to the organizations' purposes; and neither the claims asserted nor the relief sought requires their members to participate directly in this lawsuit. *See Conestoga Pines Homeowners' Ass'n v. Black*, 689 P.2d 1176, 1177 (Colo. App. 1984) (quoting *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977) ("An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the

claim asserted, nor the relief requested, requires the participation of individual members . . . ."). As discussed above, Plaintiffs have alleged injuries in fact to their members' legally protected interests sufficient to establish standing. *Bd. of County Comm'rs of Adams v. Colo. Dep't of Pun. Health & Env't*, 218 P.3d 336, 338 (Colo. 2009). This challenge to Rule 211, and the Board's refusal to rule on Plaintiffs' Petition, are fundamental to both Plaintiffs' organizational purposes to promote the safe and effective practice and reputation of acupuncture. Thus, this Court finds that Plaintiffs have sufficiently established standing.

B. Plaintiffs' Administrative Appeal

While Plaintiffs' Briefs (primarily in arguing standing) refer to negative consequences of Rule 211, those events are not the basis of their administrative appeal. In other words, Plaintiffs do not contend that the Board abused its discretion in denying their Petition because Rule 211 is bad or harmful policy. Instead, Plaintiffs' sole argument is that Rule 211 should be declared void because it is not authorized by the statutory definition of "physical therapy." This argument is both stale and inconsistent with the APA provision through which Plaintiffs initiated this action.

1. *Untimeliness*

There is no dispute that acupuncturists, including by and through AAC, opposed Rule 211 from the outset. No timely request for judicial review, however, was sought upon enactment of the Rule or, for that matter, its 2007 predecessor. Nor (as will be discussed below) did Plaintiffs timely seek a declaratory judgment thereafter. Instead, over four years after Rule 211 was promulgated in June 2012, Plaintiffs sought its repeal by the Board in November 2016. Plaintiffs' appeal from the Board's denial was timely. But the argument it makes to this Court is not.

An appeal of the enactment of an agency rule must be filed within 35 days. § 24-4-106(4). Obviously, this did not occur here. The Court will not construe the APA so as to allow a party to "refresh" its appeal rights by filing a petition for repeal, and then raise an argument on appeal that was available to it when the rule being challenged was first enacted.

2. *Agency Discretion*

The APA grants an interested party the right to seek repeal of a rule. § 24-4-103(7). By its terms, based on the standard to be applied by the agency, this part of the APA appears to contemplate the possible repeal of a rule that is ineffective, obsolete, or having negative consequences. Whether to act on such a petition is within the relevant agency's discretion. *Id.* As a result of this discretionary standard, a request for repeal because a rule is beyond the scope of the agency's enabling statute—*i.e.*, void *ab initio*—is not appropriate under § 24-4-103(7). In other words, an agency lacks discretion if a rule is void, and therefore repeal would not be an exercise of discretion. Thus, this section of the APA is inconsistent with allowing the type of challenge made here by Plaintiffs.

C. Plaintiffs' Facial Challenge

In addition to their administrative appeal, Plaintiffs also seek declaratory relief. There is case law supporting this method of challenging an agency rule, even when a timely appeal was not taken after enactment. *Bonacci v. City of Aurora*, 642 P.2d 4, 7 (Colo. 1982) (holding that a constitutional challenge under C.R.C.P. 57 to a quasi-legislative action is not subject to § 24-4-106 time constraints); *see also Collopy v. Wildlife Comm'n, Dep't of Nat. Res.*, 625 P.2d 994, 1004 (Colo. 1981) (same). Here, however, Plaintiffs are not making a constitutional challenge. And even if they were, the Court concludes that the two-year limitations period in § 13-80-102(1)(i) would bar Plaintiffs' request for declaratory relief. *See Harrison v. Pinnacol*

Assurance, 107 P.3d 969, 972 (Colo. App. 2004) (applying § 13-80-102(1)(i) to declaratory judgment actions).

Even if the Court found Plaintiffs' challenge to be timely, it would deny relief. There is sufficient elasticity in the Act's definition of physical therapy to encompass dry needling. As noted by the Office of Legislative Legal Services in 2013, the definition in the Act of "physical measures, activities and devices" encompasses mechanical stimulation, "which can include the kind of stimulation of muscles that the technique of dry needling employs. The use of needles to palpate trigger points can be reasonably seen as the use of a 'device' to accomplish 'mechanical stimulation.'" Memorandum, Office of Legislative Legal Services, to Comm. on Legal Services (March 8, 2013) (submitted as Exhibit 5 to the Board's Answer Brief).

Plaintiffs argue that, when the legislature passed the Act in 1979, it would not have contemplated dry needling as a means of mechanical stimulation. But Plaintiffs cite no legislative history to support their argument, and it is as likely that the legislature used broad language so as to provide for new developments in physical therapy practice. Moreover, the legislature could have taken steps to restrict dry needling when considering Rule 211 via the Committee on Legal Services in 2013. Indeed, acupuncturists made the identical arguments about the Act to that committee, but the committee (albeit in a divided vote) declined to let Rule 211 expire.

Finally, to the extent the Act is ambiguous, this Court should give deference to the agency's interpretation. *Smith v. Farmers Ins. Exchange*, 9 P.3d 335, 340 (Colo. 2000). Here, Rule 211 is based on a permissible statutory construction.

For the forgoing reasons, Plaintiffs' administrative appeal and request for declaratory relief are denied.

DATED December 12, 2017.

BY THE COURT:

A. Bruce Jones
District Court Judge