SUMMARY
July 26, 2018

2018COA106

No. 16CA2011, Does # 1-9 v. Colo. Dep't of Public Health & Env't — Administrative Law — Colorado Sunshine Act — Open Meetings Law — Professions and Occupations — Colorado Medical Board — State Administrative Procedure Act — Judicial Review — Final Agency Action; Medical Marijuana

A division of the court of appeals considers whether the Colorado Department of Public Health and Environment (Department) and the Colorado Medical Board (Board) violated Colorado's Open Meetings Law (OML) when they created a policy establishing criteria for the Department to refer physicians to the Board for disciplinary investigations relating to physicians' certification of patients for medical marijuana. Because the Department is not a "state public body" under the OML and the Board did not have the authority to create such a policy, the

division concludes that they were not subject to the OML requirements.

The division next concludes that the Department's referrals of the John Does to the Board are not subject to judicial review under Colorado's Administrative Procedure Act because the referrals are not a final agency action. And because the policy was not a legislative rule, it was not required to follow rulemaking requirements.

The division lastly concludes that the district court properly denied attorney fees and costs under the Colorado Open Records Act because the records request related to pending litigation.

Accordingly, the division affirms the dismissal of the claims against the Board, reverses the judgment against the Department, and remands the case for the district court to enter summary judgment in favor of the Department.

COLORADO COURT OF APPEALS **2018COA106**

Court of Appeals No. 16CA2011
City and County of Denver District Court No. 15CV30902
Honorable Morris B. Hoffman, Judge
Honorable Jay S. Grant, Judge

John Doe 1, John Doe 2, John Doe 3, John Doe 4, John Doe 5, John Doe 6, John Doe 7, John Doe 8, and John Doe 9,

Petitioners-Appellees and Cross-Appellants,

v.

Colorado Department of Public Health and Environment; Larry Wolk, in his official capacity as Executive Director of the Department of Public Health and Environment; and Natalie Riggins, in her official capacity as State Registrar and Director of the Medical Marijuana Registry,

Respondents-Appellants,

and

Colorado Medical Board,

Cross-Appellee.

JUDGMENT AFFIRMED IN PART AND REVERSED
IN PART AND CASE REMANDED WITH DIRECTIONS

Division II
Opinion by JUDGE DUNN
Davidson* and Nieto*, JJ., concur

Announced July 26, 2018

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*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2017.

¶ 1 The Colorado Department of Public Health and Environment; Larry Wolk, the Executive Director of the Department of Public Health and Environment; and Natalie Riggins, the State Registrar and Director of the Medical Marijuana Registry (collectively, Department), referred John Does 1-9 (Doctors) to the Colorado Medical Board (Board) for investigation of unprofessional conduct involving the Doctors' certification of patients for the use of medical marijuana.[1] The Department based its referrals on its medical marijuana policy (Policy).[2]

¶ 2 Concerned that the Department and the Board had secretly consulted with one another to enact the Policy, the Doctors brought this action against the Department and the Board alleging, as relevant here, violations of Colorado's Open Meetings Law (OML), §§ 24-6-401 to -402, C.R.S. 2017, and the State Administrative Procedure Act (APA), §§ 24-4-101 to -204, C.R.S. 2017. The district court dismissed the claims against the Board. But it granted summary judgment on the Doctors' OML and APA claims against the Department and, as a result, declared the Policy void.

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[1] Ms. Riggins is the current program manager. Ronald Hyman was the program manager when the Department referred the Doctors.
[2] The complete Policy is attached as an Appendix.

¶ 3 Neither the Department nor the Doctors think the district court got it right. The Department asks us to reverse the summary judgment entered against it. And the Doctors challenge the dismissal of their claims against the Board along with the denial of their request for attorney fees and costs against the Department under the relevant provision of the Colorado Open Records Act (CORA), §§ 24-72-200.1 to -206, C.R.S. 2017. We affirm in part, reverse in part, and remand to the district court with directions to grant the Department's cross-motion for summary judgment and enter judgment in its favor.

I. Background

¶ 4 The Colorado Constitution authorizes physicians to recommend the medical use of marijuana for patients with debilitating medical conditions. Colo. Const. art. XVIII, § 14(2)(c). And it provides that the Governor shall designate "the state health agency" responsible for creating and maintaining "a confidential registry of patients authorized to" use medical marijuana and "enact rules to administer" the program. Colo. Const. art. XVIII, § 14(1)(h), (7), (9); *see also* § 25-1.5-106(2)(f), C.R.S. 2017.

A. The Department

¶ 5 Bill Owens, Colorado's then governor, designated the Department as "the state health agency" to administer Colorado's medical marijuana program. Exec. Order No. D 001 01 (Feb. 5, 2001), https://perma.cc/W9A9-6NZY; *see also* § 25-1.5-106(2)(f). In this capacity, the Department is required to promulgate rules governing certain aspects of the program. § 25-1.5-106(3)(a) (providing that the Department "shall . . . promulgate rules of administration"). In particular, it must promulgate rules to establish a confidential registry of patients who are entitled to receive medical marijuana cards. § 25-1.5-106(3)(a)(I). It must also promulgate rules concerning the conditions for issuing registry patients identification cards, which entails creating standards to ensure that patients have "a bona fide physician-patient relationship with a physician in good standing." § 25-1.5-106(3)(a)(V).

¶ 6 To develop and maintain a confidential patient registry, the Department created the medical marijuana program (also known as the medical marijuana registry). As described in the record, the program is headed by a manager and has staff members

responsible for "the day-to-day administration and operational maintenance" of the patient registry. The program is part of the Department's Center for Health and Environmental Data Division.

¶ 7 The Department has discretion to refer a physician to the Board for "an investigation" if the Department "has reasonable cause to believe" that a physician violated the constitution, specified provisions of the medical marijuana statute, or certain rules promulgated under the Department's rulemaking authority. § 25-1.5-106(6)(a). The "determination" of whether a physician violated any such provision is for the Board. *Id.*

B. The State Board of Health

¶ 8 Housed within the Department (and not a party to this case) is the state board of health. *See* § 25-1-108, C.R.S. 2017 (creating the state board of health); § 24-1-119(2), C.R.S 2017 (transferring the state board of health to the Department). Part of the state board of health's duties is to promulgate "rules and regulations . . . and to administer and enforce the public health laws of this state." § 25-1-108(1)(c)(I).

¶ 9 With this authority, the state board of health first promulgated rules related to the medical marijuana program in 2001. *See*

generally Dep't of Pub. Health & Env't Regs., 5 Code Colo. Regs. 1006-2 (2001).[3] In 2011, following its notice of proposed rulemaking and public hearings, it adopted a rule explaining, among other things, what qualifies as a "[b]ona fide physician-patient relationship." Dep't of Pub. Health & Env't Reg. 8(A)(2), 5 Code Colo. Regs. 1006-2; *see also* § 25-1.5-106(3)(a)(V). Specifically, the rule provides that physicians must complete full assessments of a patient's medical history, consult with patients about their debilitating or disabling medical condition before the patient applies for a medical marijuana card, and provide follow-up care and treatment to the patient. Dep't of Pub. Health & Env't Reg. 8(A)(2)(a), 5 Code Colo. Regs. 1006-2. The rule authorizes the Department to refer physicians who do not comply with these qualifications to the Board. Dep't of Pub. Health & Env't Reg. 8(B), 5 Code Colo. Regs. 1006-2.

C. The Board

¶ 10 The Board is entirely separate from the Department. It is housed under the Department of Regulatory Agencies. § 24-1-

[3] As far as we can tell, the state board of health has promulgated all the regulations related to the medical marijuana program.

122(2)(g), C.R.S. 2017. And its organic statute is the Colorado Medical Practice Act. § 12-36-103(1)(a)(I), C.R.S. 2017. The Board is authorized to investigate allegations of "unprofessional conduct" against physicians. *See* § 12-36-117, C.R.S. 2017; *see also* § 12-36-118, C.R.S. 2017 (describing the process for investigating complaints and formal hearings). This authorization allows the Board to issue subpoenas, "[m]ake investigations, hold hearings, and take evidence." § 12-36-104(1)(b)(I), C.R.S. 2017. If the Board's hearing panel "finds the charges proven," it may "determine the extent" of any "discipline [to] be imposed." § 12-36-118(5)(g)(III).

D. The Policy

¶ 11 In 2013, the Colorado State Auditor conducted a performance audit and issued "findings and recommendations related to Colorado's medical marijuana regulatory system." The audit raised concerns "over access to medical marijuana" by an increasing number of unqualified patients. The Auditor found evidence that some physicians "may be making inappropriate recommendations" for the medical use of marijuana and that the Department was "not sufficiently oversee[ing] physicians who make medical marijuana recommendations." Recognizing the Department's authority to refer

physicians to the Board, the Auditor recommended that the Department and the Board work together to determine risk factors and "establish guidelines for initiating investigation[s] of physicians or making physician referrals to the Board for further investigation."

¶ 12 Consistent with these recommendations, some Department employees and some Board employees exchanged a series of emails,[4] had a handful of private meetings, and participated in telephone calls to develop criteria for the Department to use to refer physicians to the Board for further investigation.[5] Though the record does not reflect exactly how or when it happened, these discussions apparently culminated in the Policy.[6]

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[4] Several employees from the Department of Regulatory Agencies are part of the email exchanges in the record, but the record does not explain who the employees are and their roles, if any, in developing the Policy.

[5] The summary judgment record is limited. With respect to the discussions about the Policy, it contains an affidavit, one deposition, and some emails.

[6] The Department notes that the initial Policy (dated May 15, 2014) was a draft and the final version was adopted and published in April 2015. The Department, however, does not dispute that it referred the Doctors under the 2014 Policy. As well, the district court used the 2014 Policy in its analysis. So any changes in the 2015 version are not relevant to our analysis.

¶ 13 The Policy provides for the medical marijuana program to identify physicians who exceed a specific (1) number of patients for whom medical marijuana is recommended; (2) amount of marijuana recommended; and (3) number of patients in a set age group for whom medical marijuana is recommended. If a physician exceeds one of the criteria, the Policy states that the physician "may be recommended for referral" to the Board. The Policy also provides that the Medical Marijuana Program Director "in consultation with the Chief Medical Officer or Deputy Chief Medical Officer" will review physician referral recommendations and will "issue a formal referral to the" Board if the evidence supports it.

¶ 14 The Department, through Mr. Wolk, referred the Doctors to the Board under the Policy. The Board began an investigation, notifying the Doctors that it had received information regarding "a possible violation of the Medical Practice Act," it had "received a complaint" from "the [Department] related to your medical marijuana recommendations," "no assumption [had] been made about the truth or validity of any information provided to the Board," and it was "required by law to investigate the complaint."

¶ 15 The Doctors then made CORA requests to the Department and the Board asking them to produce public records, including policies, rules, protocols, and guidelines related to standards for referring physicians to the Board.

E. The Lawsuit

¶ 16 After receiving some documents responsive to its CORA requests, the Doctors filed this action, seeking declaratory and injunctive relief.

¶ 17 The Board and the Department filed motions to dismiss for failure to state a claim. Agreeing with the Board that the Policy was the Department's — not the Board's — the district court dismissed the Doctors' claims against the Board. And it concluded that if the Policy was "ultimately declared void, any injunctive relief" would be directed to the Department.

¶ 18 But the court denied the Department's motion, questioning whether the Policy was a "rule of administration concerning implementation of the medical marijuana program." *See* § 25-1.5-106(3)(a). It ultimately determined that the answer "may well be a mixed question of law and fact," and declined to answer the question at that stage of the briefing.

¶ 19 The Department and the Doctors later filed cross-motions for summary judgment. The district court granted summary judgment for the Doctors on their APA and OML claims, determining that the Department was the "agency responsible for promulgating rules setting reasonable cause standards for referral of physicians to the . . . Board." The court concluded that the Department's referrals qualified as a "final agency action," and because the Department adopted the Policy without providing public notice of its meetings or opening the meetings to the public, the court determined that the "promulgation and implementation of [the] Policy . . . was in violation of the [OML] and that [the] Policy [was], therefore, invalid."

¶ 20 The court ordered the Department to "immediately cease and desist from enforcing [the] Policy," but it rejected the Doctors' request to "halt any investigations that were initiated as a result of those referrals." The court awarded the Doctors their reasonable attorney fees and costs under the OML. But it denied fees and costs related to the Department's response to the Doctors' CORA request.

II. OML

¶ 21 The Department argues the district court erred in granting summary judgment on the Doctors' OML claims against it. The Doctors disagree and additionally contend the court erred in dismissing their OML claim against the Board.

A. Standing

¶ 22 We do not agree with the Department's opening salvo that the Doctors lack standing to bring their OML claims.

¶ 23 Standing requires a showing of an injury in fact to a legally protected interest. *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004). The OML itself creates a "legally protected interest on behalf of Colorado citizens in having public bodies conduct public business openly in conformity with its provisions." *Weisfield v. City of Arvada*, 2015 COA 43, ¶ 22; *see also* § 24-6-402(9)(b), C.R.S. 2017 (Courts "have jurisdiction to issue injunctions to enforce [the OML] upon application by any citizen of this state.").

¶ 24 And the Doctors alleged an injury in fact under the OML. Namely, they alleged that the Department violated the OML by adopting the Policy in secret and without public input and that they were referred to the Board for further investigation under the secret

Policy. That is enough for standing under the OML. *See Weisfield*, ¶ 28 (concluding that a district resident had alleged an injury in fact under the OML by asserting that the district did not act in an open manner).[7]

¶ 25 We therefore conclude that the Doctors have standing.

B. Standard of Review

¶ 26 The district court granted the Doctors' motion for summary judgment, which we review de novo. *Gibbons v. Ludlow*, 2013 CO 49, ¶ 11. Summary judgment is appropriate when the pleadings and supporting documents show no genuine dispute of material fact and that the movant is entitled to judgment as a matter of law. *Id.*

¶ 27 But the court dismissed the claims against the Board for failure to state a claim. We review that dismissal de novo, taking the allegations in the complaint as true to determine whether the

[7] After the Policy was enacted, the General Assembly added section 24-6-402(9)(a), C.R.S. 2017, which states that "[a]ny person denied or threatened with denial of any of the rights that are conferred on the public by [the OML] has standing to challenge" the OML violation. Though it doesn't apply here, it confirms the General Assembly's intent to confer broad standing to bring OML claims. *See Weisfield v. City of Arvada*, 2015 COA 43, ¶ 16 n.1.

Doctors stated a plausible claim for relief. *Warne v. Hall*, 2016 CO 50, ¶ 24.

¶ 28 We construe the OML de novo. *Bd. of Cty. Comm'rs v. Costilla Cty. Conservancy Dist.*, 88 P.3d 1188, 1192 (Colo. 2004).

C. Claims Against the Department

¶ 29 Though not entirely clear from its order, the district court appears to have concluded that the Department is a "state public body" because it is "the state agency responsible for promulgating rules setting reasonable cause standards for referral of physicians to the [Board]." So, in its view, the entire Department is subject to the OML.

¶ 30 The Department contends that the entire agency cannot constitute a "state public body" under the OML. It therefore argues that the OML doesn't apply. We can't reconcile the district court's interpretation with the OML's plain language; thus, we agree that the district court's interpretation is too broad.

¶ 31 To be sure, "the formation of public policy is public business and may not be conducted in secret." § 24-6-401; *see also Cole v. State*, 673 P.2d 345, 347 (Colo. 1983) (noting that the OML was intended to give the "public access to a broad range of meetings at

which public business is considered"); *Benson v. McCormick*, 195 Colo. 381, 383, 578 P.2d 651, 652 (1978) (same). Still, the OML doesn't apply to every meeting involving any public employee. Rather, it applies to "meetings *of two or more members of any state public body* at which any public business is discussed or at which any formal action may be taken." § 24-6-402(2)(a) (emphasis added). Such meetings "are declared to be public meetings open to the public at all times." *Id.*

¶ 32 The OML defines a "state public body" as

> any board, committee, commission, or other advisory, policy-making, rule-making, decision-making, or formally constituted *body of any state agency*, state authority, . . . or the general assembly, and any public or private entity to which the state, or an official thereof, has delegated a governmental decision-making function but does not include persons on the administrative staff of the state public body.

§ 24-6-402(1)(d)(I) (emphasis added).

¶ 33 Our aim in construing a statute is to give effect to the General Assembly's intent. *Young v. Brighton Sch. Dist. 27J*, 2014 CO 32, ¶ 11. To do this, we look first at the language of the statute. *Id.* If that language is plain and unambiguous, we apply it as written. *Id.* And we avoid interpreting a statute in a way that renders any word

superfluous or leads to absurd results. *See Sooper Credit Union v. Sholar Grp. Architects, P.C.*, 113 P.3d 768, 771 (Colo. 2005).

¶ 34 The General Assembly did not include a "state agency" in the list of what qualifies as a "state public body." *See* § 24-6-402(1)(d)(I). Instead, it defined the term to include identifiable bodies "of any state agency," such as boards, commissions, committees, and formally constituted bodies. *Id.*; *see also Free Speech Def. Comm. v. Thomas*, 80 P.3d 935, 938 (Colo. App. 2003) (recognizing that the term "state agency" "generally refer[s] to state departments and other bodies of the state that . . . are governed by boards, commissions, or other multi-member bodies"). If the General Assembly had intended to include entire agencies in the definition of "state public body," it wouldn't have limited the definition to identifiable bodies "of any state agency." *See Sooper Credit Union*, 113 P.3d at 771. Indeed, if that had been the intent, it would have plainly included "any state agency" and "any board, committee, commission, or other advisory, policy-making, rule-making, decision-making, or formally constituted body" of a state agency. *See* § 24-6-402(1)(d)(I).

¶ 35 Other OML provisions support this conclusion. In particular, other subsections refer to "members" of a state public body. *See* § 24-6-402(2)(a) (The OML applies to meetings "of two or more members of any state public body" where public business is discussed.); § 24-6-402(3)(b)(I) ("All meetings held by members of a state public body" concerning employment or adverse employment actions of public officials or employees must be public.); *cf.* § 24-6-402(2)(b) (requiring meetings discussing public business in which "a quorum or three or more members of any local public body" are present to be public). And in discussing executive sessions, the OML requires, among other things, "the affirmative vote of two-thirds of the entire membership of the body" to "hold an executive session only at a regular or special meeting." § 24-6-402(3)(a); *see also* § 24-6-402(3)(c) (outlining requirements for the state board of parole executive sessions, including "affirmative vote of two-thirds of the membership of the board present"); § 24-6-402(3)(d) (providing that a governing board of an institution of higher education may hold an executive session "upon the affirmative vote of two-thirds of the members" authorized to vote). These references to "members" and "membership" peppered throughout the OML

reinforce our conclusion that the General Assembly intended to limit "state public body" to an established and defined body with an identifiable membership — not to an entire agency. *See Safe Air for Everyone v. Idaho State Dep't of Agric.*, 177 P.3d 378, 381 (Idaho 2008) (discussing Idaho's use of the word "member" in its open meetings law and noting that "[t]he legislature typically uses the word 'members' when referring to those who make up a statutorily created board, commission, or other governing group"); *see* Idaho Code Ann. § 74-202(5) (West 2018); Idaho Code Ann. § 74-203 (West 2018); *see also* § 24-1-135.1(1)(a)-(b), C.R.S. 2017 (describing those appointed to boards, commissions, or committees as "members"); § 25-1-103(1), C.R.S. 2017 (creating a state board of health with nine members); § 25-7-104(2), (5)-(8), C.R.S. 2017 (describing those appointed to the air quality control commission as "members").

¶ 36 As the Doctors correctly point out, the governor designated the Department as the "state health agency" to administer the medical marijuana program. Exec. Order No. D 001 01. But that gets them only so far. The Doctors did not allege — and do not argue — that

the Department itself is a "body of any state agency."[8] And it would be difficult to do so. After all, the Department can't be a body of itself. Instead, they simply assert "[t]he Department is a 'state public body.'" Under the OML's plain language, however, it isn't.[9]

¶ 37 Perhaps recognizing the problem with saying the whole Department is a state public body, the Doctors also assert (without explanation) that the Department is a "formally constituted body of the state [b]oard of [h]ealth." But it's the other way around. The Department is one of several principal departments created in the Administrative Organization Act of 1968 (Act), §§ 24-1-101 to -137, C.R.S. 2017. The Act transferred the state board of health to the Department through a type 1 transfer. § 24-1-119(2); *see also* § 24-

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[8] The complaint alleged only that the "[Department] . . . and the [Board] are state public bodies" under the OML.

[9] We consider only those "state public body" arguments the Doctors raised and developed in the district court that were based upon the portion of the statute defining state public body as "any board, committee, commission, or other advisory, policy-making, rule-making, decision-making, or formally constituted body of any state agency." *See* § 24-6-402(1)(d)(I). That is in fact the only part of the definition the Doctors refer to in their summary judgment pleadings. While the Doctors now set forth the entire definition of "state public body," to the extent they suggest the Department is a state public body because it is a "public entity," this is a new and undeveloped argument. So we don't consider it. *See Cikraji v. Snowberger*, 2015 COA 66, ¶ 21 n.3.

1-105(1), C.R.S. 2017 (explaining type 1 transfers). So the Department is not a "body of" the state board of health.

¶ 38 To the extent the Doctors also suggest that the OML applies to all Department employees who discussed the Policy, the General Assembly did not use the term "employees" in the OML. Instead, it used the term "members" and "membership." And "member" plainly means something different than "employee." *Compare Webster's Third New International Dictionary* 1408 (2002) (defining "member" as "one of the individuals composing a society, community, association, or other group"), *with id.* at 743 (defining employee as "one employed by another"). *See also Safe Air for Everyone*, 177 P.3d at 381 (noting that the distinction between "members" and "employees" is significant); *State ex rel. Krueger v. Appleton Area Sch. Dist. Bd. of Educ.*, 898 N.W. 2d 35, 45 (Wis. 2017) (The Wisconsin Supreme Court, construing Wisconsin's open meetings law, explained that "ad hoc gatherings of government employees, without more, do not constitute governmental bodies. Rather, an entity must exist that has the power to take collective action that the members could not take individually.") (citation omitted). Had the General Assembly intended the OML to apply to

every meeting of two or more agency employees, it would have said so. *See Clyncke v. Waneka*, 157 P.3d 1072, 1077 (Colo. 2007) ("[I]t is presumed that the General Assembly meant what it said.").

¶ 39 For these reasons, we don't agree with the district court that the Department is a "state public body" under the OML. And we therefore conclude that the court erred in granting summary judgment on the Doctors' OML claims against the Department.

D. The Claim Against the Board

¶ 40 We see no error, however, in the district court's dismissal of the Doctors' OML claim against the Board.

¶ 41 True, the eleven-member Board is a "state public body" under the OML. But the OML applies to only those meetings where "public business is discussed." § 24-6-402(2)(a). While "public business" is not defined in the statute, our supreme court has concluded that it is not enough that the meeting is of concern to the public. *Costilla Cty.*, 88 P.3d at 1193. Instead, the court concluded that "the OML applies to meetings that are convened for the purpose of policy-making" and that "there must be a demonstrated link between the meeting and the policy-making powers of the government entity holding or attending the meeting." *Id.* at 1193-

94; *see also Intermountain Rural Elec. Ass'n v. Colo. Pub. Util. Comm'n*, 2012 COA 123, ¶ 17. The Doctors alleged no such link here.

¶ 42 A review of the complaint shows that, as relevant, the Doctors alleged that the Board consulted with the Department about the Policy and later initiated investigations based on the Department's referrals. They did not allege that the Board enacted the Policy, had any constitutional or statutory authority to do so, or had any authority to implement the Policy. *Cf. Intermountain Rural Elec. Ass'n*, ¶¶ 23-24 (concluding the OML did not apply to the Public Utilities Commission's suggested edits and stated position on a proposed legislative bill that had "no demonstrable connection" to its policy-making functions because it "is not empowered to pass legislation"). So even accepting as true the Doctors' allegation that Board employees attended meetings to discuss and develop the Policy, the complaint doesn't allege facts showing any link between the meetings and the Board's "policy-making powers." *Costilla Cty.*, 88 P.3d at 1195. In this instance then, the Board is not subject to the OML.

¶ 43 We affirm the district court's dismissal of the Doctors' OML claim against the Board.

E. Attorney Fees and Costs

¶ 44 Given our disposition, we reject the Doctors' request for appellate attorney fees and costs under the OML. And because we reverse the district court's summary judgment in favor of the Doctors, we necessarily reverse the related award of attorney fees and costs to the Doctors under the OML. *See GMAC Mortg. Corp. v. PWI Grp.*, 155 P.3d 556, 558 (Colo. App. 2006).

III. APA

¶ 45 The Department argues the "district court erred in finding the APA applies to [the] Department referral[s] because they are not a 'final agency action' under the APA."[10] In contrast, the Doctors contend that the district court correctly "found the Department violated the APA," but generally object to the dismissal of the APA claims against the Board, contending that "[t]he Board [a]lso [v]iolated the . . . APA."

[10] Though not explicit, we interpret the district court's order as granting summary judgment in favor of the Doctors on their APA claims.

A. Standard of Review

¶ 46 We review de novo the district court's order granting summary judgment on the Doctors' APA claims against the Department as well as its dismissal of the Doctors' APA claims against the Board. *See BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66, 71 (Colo. 2004).

B. The Referrals

1. Finality

¶ 47 With one exception discussed later, only final agency action is subject to judicial review. § 24-4-106(2), C.R.S. 2017; *Chittenden v. Colo. Bd. of Soc. Work Exam'rs*, 2012 COA 150, ¶ 24. Under the APA, "action" is defined as "the whole or any part of any agency rule, order, interlocutory order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." § 24-4-102(1), C.R.S. 2017. For agency action to be final, it must "(1) mark the consummation of the agency's decision-making process and not be merely tentative or interlocutory in nature, and (2) constitute an action by which rights or obligations have been determined or from which legal consequences will flow." *Chittenden*, ¶ 26; *see also Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (discussing conditions for finality under federal Administrative Procedure Act).

¶ 48 To the extent the Doctors' APA claim is directed to the referrals (versus the Policy), the Doctors do not explain — and we do not see — how a referral to the Board fits within the definition of "action." § 24-4-102(1); *see also* § 24-4-102(7), (10), (14), (15), (17) (providing definitions for license, order, relief, rule, and sanction).

¶ 49 Even if it does, we still see finality problems. Namely, the referrals didn't determine anything, let alone any "rights or obligations." *Chittenden*, ¶ 26. Nor can we agree that "legal consequences will flow" from the referrals. *See id.* True, the referrals alert the Board to possible violations of the Medical Practice Act. But nothing concrete flows from the referrals themselves. The Board may investigate, but an investigation itself is not final. *See Dixon v. Riley*, 515 P.2d 1139, 1139-40 (Colo. App. 1973) (not published pursuant to C.A.R. 35(f)) (order requiring an optometrist to answer questions about his competence and to undergo medical examinations was not a final agency action). And it is not certain that an investigation will find a violation of the Medical Practice Act or result in any action. *See Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 15 (D.C. Cir. 2005) ("[I]f the practical effect of the agency action is not a certain change in the

legal obligations of a party, the action is non-final for the purposes of judicial review" under the federal Administrative Procedure Act.). In short, the referrals themselves did not determine "whether [the Doctors] will ultimately be subject to discipline." *Chittenden*, ¶ 29.[11]

¶ 50 Without finality, we do not have jurisdiction unless the exception applies.

2. Section 24-4-106(8) Exception

¶ 51 As pleaded in their complaint, the Doctors sought to enjoin the Department's referrals under section 24-4-106(8), which allows interlocutory review of agency actions in cases in which a party will suffer irreparable harm, thus allowing review when the agency's action is not final. *See Colo. Health Facilities Review Council v. Dist. Court*, 689 P.2d 617, 622 (Colo. 1984). In such a case, "any court of competent jurisdiction may enjoin at any time the conduct of any agency proceeding in which the proceeding itself or the action

[11] As the Department points out, because the referral is not a final agency action, it is not subject to judicial review. But if the Board ultimately disciplines the Doctors, they may challenge that final action. § 24-4-106(7), (11), C.R.S. 2017; § 12-36-119, C.R.S. 2017; *see also Colo. State Bd. of Med. Exam'rs v. Lopez-Samayoa*, 887 P.2d 8, 13 (Colo. 1994) (noting the scope of judicial review).

proposed to be taken therein is clearly beyond the constitutional or statutory jurisdiction or authority of the agency." § 24-4-106(8).

¶ 52 The Doctors get no further with this exception. To fit under this exception, the referrals must amount to a "proceeding" under the APA. A "proceeding" is defined as "any agency process for any rule or rule-making, order, or adjudication, or license or licensing." § 24-4-102(13). We do not see how a referral is any of these. Nor are we persuaded that a referral amounts to an "action" proposed to be taken in a proceeding. As discussed, the referral does nothing more than notify the Board of possible Medical Practice Act violations that the Board may then further investigate. *See* § 24-4-102(1) (defining "action"). Thus, there is no "proceeding" for the court to enjoin under section 24-4-106(8).

¶ 53 For these reasons, we conclude the district court erred in granting summary judgment on the Doctors' APA claims against the Department based on the referrals.

C. The Policy

¶ 54 The Doctors also argue that the Policy itself is a final agency action that did not comply with the APA's rulemaking

requirements.[12] *See* § 24-4-103(5), C.R.S. 2017 ("Once a rule becomes effective, the rule-making process shall be deemed to have become final agency action for judicial review purposes."). But even if we assume the Department had the authority to promulgate the Policy as a rule subject to APA review, we don't agree that the Policy violated the APA's rulemaking requirements.[13]

¶ 55 The APA establishes notice and hearing procedures an agency must follow when adopting a rule. § 24-4-103. But it also exempts from these procedures "interpretative rules or general statements of policy, which are not meant to be binding as rules, or rules of agency organization." § 24-4-103(1); *see Regular Route Common Carrier Conference v. Pub. Utils. Comm'n*, 761 P.2d 737, 743 (Colo. 1988).

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[12] The district court did not address this argument, instead finding "by referring the [Doctors] to the [Board], the department is making a final agency action."

[13] Because no party raised it, we don't consider the thirty-day limitation period within which to challenge a rule's noncompliance with the rulemaking procedures. *See* § 24-4-103(8.2)(b), C.R.S. 2017.

¶ 56 An interpretive rule, in contrast to a legislative rule, serves an advisory function.[14] *Regular Route Common Carrier Conference*, 761 P.2d at 748-49. It explains the meaning of a term in a statute or other rule, and "describes the type of factors which an agency will consider in future administrative proceedings without, however, binding the agency to a particular result." *Id.* at 748. Thus, we look to the rule's effect in determining whether the rule is legislative or interpretive. *Hammond v. Pub. Emps. Ret. Ass'n*, 219 P.3d 426, 428 (Colo. App. 2009). A rule "is legislative [and subject to the APA's rulemaking procedures] if it establishes a norm that *commands a particular result* in all applicable proceedings; it is interpretive if it establishes guidelines that do not bind the agency to a particular result." *Id.* (emphasis added).

¶ 57 Like an interpretive rule, "a general statement of policy does not establish a 'binding norm,' nor does it finally determine the issues or rights to which it is addressed." *Meyer v. Colo. Dep't of Soc. Servs.*, 758 P.2d 192, 195 (Colo. App. 1988); *see also Morgan v. Colo. Dep't of Health Care Policy & Fin.*, 56 P.3d 1136, 1141 (Colo.

[14] While the Doctors assert that the "Policy constituted an agency rule," they don't say why and they don't distinguish between interpretive and legislative rules.

App. 2002) (concluding that the scoring criteria to determine Medicaid home care benefits was exempt from publication requirement because physicians "remain[ed] free to make independent medical judgments about an applicant's qualifications").

¶ 58 The Policy doesn't "command[] a particular result" or require the Department, the Board, or any person or entity to do anything. Instead, it establishes "guidelines that do not bind" the Department, but rather assist the Department in exercising its statutory discretion to refer physicians to the Board.[15] *Meyer*, 758 P.2d at 195; *see also Wilson v. Lynch*, 835 F.3d 1083, 1089 (9th Cir. 2016) (concluding that an agency's letter instructing federal firearms sellers that possession of a medical marijuana card gives sellers "'reasonable cause to believe' that the [cardholder] is an unlawful user of a controlled substance" and thus cannot possess firearms, was an interpretative rule that merely explained, but did not add to, the substantive law that already existed); *Colo. Motor Vehicle Dealer Licensing Bd. v. Northglenn Dodge, Inc.*, 972 P.2d 707, 712 (Colo.

[15] The summary judgment record confirms that the Executive Director makes "the final determination in terms of who to refer."

App. 1998) (concluding that an agency's rule was interpretative because it explained the agency's interpretation of its statutory authority and provided minimum guidelines).

¶ 59 Given that it isn't binding and doesn't confer any power the Department did not already have, the Policy falls within the APA's exception to the notice and hearing rulemaking requirements. § 24-4-103(1). Thus the Doctors' argument that the Policy violated the APA fails.[16]

D. APA Claim Against the Board

¶ 60 Beyond the mere mention of the APA, the Doctors develop no argument in their opening brief as to how the APA applies to the Board. *See Taylor v. Taylor*, 2016 COA 100, ¶ 13 (recognizing that we generally decline to address arguments presented in a perfunctory or conclusory manner). And to the extent the Doctors discuss the APA in their reply, that's too late. *See Black v. Black*, 2018 COA 7, ¶ 80 (declining to address argument raised for the first time in the reply brief).

[16] The Doctors present no other argument regarding their claim under C.R.C.P. 106(a)(4).

¶ 61 We therefore affirm the district court's dismissal of the APA claim against the Board.[17]

IV. Attorney Fees and Costs under CORA

¶ 62 The Doctors next contend that the district court erred in denying an award for attorney fees and costs associated with their request to obtain access to public documents under CORA. We see no error.

A. CORA Request

¶ 63 Remember, the Doctors submitted a CORA request to the Department, seeking public records about, among other things, the Policy. The Department responded to the request, but withheld certain documents. After receiving the response, the Doctors filed this action.

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[17] Though not relied on by the Doctors, we recognize that another division of this court recently concluded — albeit in a different context — that the Policy violated the OML and the APA. *See Colo. Med. Bd. v. McLaughlin*, 2018 COA 41; *see also Colo. Med. Bd. v. Boland*, 2018 COA 39 (assuming without deciding that the Policy's adoption violated the OML). Respectfully, we don't agree with *McLaughlin* for the reasons already discussed. As well, the Department was not a party in *McLaughlin* (or *Boland*). In any event, we are not bound by *McLaughlin*. *See City of Steamboat Springs v. Johnson*, 252 P.3d 1142, 1147 (Colo. App. 2010).

¶ 64 During the course of the litigation, the Doctors moved the district court (under CORA) for an order "(1) directing [the Department] to show cause as to why the custodian of records did not permit inspection of the [identified] documents" and "(2) permitting [the Doctors] to inspect any and all responsive documents not properly [withheld]." The court conducted an in camera review of the documents and granted the Doctors' request in part, ordering the Department to produce some of the withheld documents. But it denied the Doctors' request for attorney fees and costs under CORA, finding that the Doctors' motion was made as a part of the ongoing litigation and they could have obtained these records "through ordinary discovery."

B. Governing Standards

¶ 65 CORA provides any person the ability to inspect public records. § 24-72-203, C.R.S. 2017; *Benefield v. Colo. Republican Party*, 2014 CO 57, ¶ 7. When the records custodian denies access, the requesting party "may apply to the district court of the district wherein the record is found for an order directing the custodian of such record to show cause why the custodian should not permit the inspection of such record." § 24-72-204(5)(a).

¶ 66 If the district court concludes that the custodian improperly withheld public records, it must order the custodian to disclose the records and "award court costs and reasonable attorney fees to the prevailing applicant." § 24-72-204(5)(b). But

> [t]he scheme makes clear that no costs or attorney fees shall be awarded to a person applying to the district court for access if the records being sought would be discoverable according to the civil rules in pending litigation filed by that person against a state or local public body.

Benefield, ¶ 9; *accord* § 24-72-204(5)(b).

¶ 67 The issue of whether the statutory fees and costs are available to the Doctors under CORA is a matter of statutory interpretation that we review de novo. See Reno v. Marks, 2015 CO 33, ¶ 20; Benefield, ¶ 11. When construing a statute, we aim to effectuate the General Assembly's intent as expressed in the statutory language. Reno, ¶ 20; Benefield, ¶ 11. "We give words and phrases their plain and ordinary meaning, and where statutory language is unambiguous, we do not resort to other rules of statutory interpretation but apply the language as written." *Reno*, ¶ 20.

C. Discussion

¶ 68 The Department preliminarily contends that the Doctors' request for attorney fees and costs is moot because the district court lacked subject matter jurisdiction to address the CORA claim filed in this litigation. We recognize that there is some difference of opinion as to whether the statutory procedure under CORA provides an exclusive jurisdictional basis to resolve a dispute over public records access. *Compare People in Interest of A.A.T.*, 759 P.2d 853, 855 (Colo. App. 1988) ("[A]ny action filed . . . by . . . the party requesting the [public] record [under CORA must] be a separate, independent action in the appropriate district court and . . . the action cannot be filed as part of any ongoing proceeding."), *with Citizens Progressive All. v. Sw. Water Conservation Dist.*, 97 P.3d 308, 311-12 (Colo. App. 2004) ("We do not read *A.A.T.* as precluding [the defendant] from seeking declaratory relief [in relation to a CORA request]."), *and Aviado v. Indus. Claim Appeals Office*, 228 P.3d 177, 183 (Colo. App. 2009) (We generally "construe a statute to limit jurisdiction only when that limitation is explicit."). But because we agree that the district court correctly denied attorney fees and costs under CORA and the

Department asserts the statutory procedure only as an alternative basis to affirm the order, we need not consider the merits of the competing positions.[18]

¶ 69 As set forth above, a party requesting an order to show cause for the disclosure of public records is not entitled to attorney fees and costs if the requesting party "has filed a lawsuit against a state public body" when the records relate to the "pending litigation" and are otherwise discoverable under the Colorado Rules of Civil Procedure. § 24-72-204(5)(b). That is the case here.

¶ 70 It is undisputed that the Doctors' CORA request related to the pending litigation against the Department and that the Doctors could have obtained these records through ordinary discovery. Nor is it disputed that this lawsuit was pending when the Doctors moved for a show cause order under CORA to permit their inspection of the records the Department had withheld. Thus, the Doctors' request for an order to show cause fits within the plain language of the statutory exception to attorney fees and costs under CORA. *See id.*

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[18] The Department does not appeal, or otherwise challenge, the portion of the district court's order requiring the production of documents to the Doctors.

¶ 71 The Doctors attempt to counter this plain reading of the statute by arguing that the triggering event for obtaining attorney fees and costs is the date the Doctors filed their initial request to inspect the documents. Because they had not yet filed the litigation against the Department when they made this initial CORA request, in their view, the exception to statutory fees and costs doesn't apply.

¶ 72 But the award of attorney fees and costs, as well as the exception to this provision, is not linked to the initial request to inspect documents. Rather, these provisions are triggered when the requesting party "applies to the court for an order [to show cause] for access to records." *Id.*; *see also Benefield*, ¶ 15 ("[Section 24-72-204(5)] premises a fee award in favor of an applicant on the court's failure to find that denial of 'the right of inspection' was proper."); *cf. Reno*, ¶ 37 ("[T]he relevant question is whether the Clerk's denial of the right of inspection was proper at the time she filed in district court."). Thus, the Doctors' motion for a show cause order — not the initial request to inspect documents — triggered section 24-72-

204(5) and, at that time, the litigation against the Department was pending.[19]

¶ 73 For these reasons, we conclude that the district court did not err in denying the Doctors an award of attorney fees and costs under CORA. We therefore also reject the Doctors' request for appellate attorney fees and costs under CORA.

V. Conclusion

¶ 74 We affirm the district court's judgment dismissing the Doctors' claims against the Board and its order denying the Doctors' request for attorney fees and costs under CORA. But we reverse the district court's judgment against the Department and necessarily reverse the associated attorney fees award. Because no issues of material fact exist, we remand to the district court with directions to grant the Department's cross-motion for summary judgment and enter

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[19] The Doctors generally contend that adopting this interpretation means "fees would never be awarded for violation of CORA, as upon the filing of any CORA show cause action in district court litigation will inherently be pending," but they don't explain this contention. And at any rate, the statute itself distinguishes between a "lawsuit" and an expedited show cause action, suggesting the two are different. *See* § 24-72-204(5)(b), C.R.S. 2017; *see also Colo. Ins. Guar. Ass'n v. Sunstate Equip. Co.*, 2016 COA 64 ¶ 93 (recognizing that a statute's use of different terms means that "these terms must have different meanings") (*cert. granted in part* Oct. 31, 2016).

judgment accordingly. *See Ball Aerospace & Techs. Corp. v. City of Boulder*, 2012 COA 153, ¶ 29.

JUDGE DAVIDSON and JUDGE NIETO concur.

Appendix

Colorado Department of Public Health and Environment

COLORADO MEDICAL MARIJUANA REGISTRY

Medical Marijuana Policy Number 2014-01

Policy Title: Physician Referrals to the Department of Regulatory Agencies / Medical Board

Issued Date: May 15, 2014

Enacted By: Ronald S. Hyman

Ronald S. Hyman
State Registrar and Director, Medical Marijuana Registry

Purpose
This policy establishes the criteria for referring physicians to the Department of Regulatory Agencies (DORA) Medical Board for investigation.

Authority
Colorado Revised Statute section § 25-1.5-106 (6)

Background
The Registry regularly performs statistical analyses of its data to identify outliers of concern for further review and action. An Office of the State Auditor report issued in July 2013 recommended that the Registry strengthen measures to ensure physician compliance with the state constitution, statutes and regulations involving physician recommendations for medical marijuana. This policy outlines the criteria that the Registry will use to refer recommending physicians to the Colorado Department of Regulatory Agencies (DORA) Medical Board, as the state entity with the investigative authority and expertise to evaluate physician conduct and take licensing actions as deemed appropriate.

Policy
The Registry will identify physicians for referral to the Colorado Department of Regulatory Agencies (DORA) Medical Board using the following procedure:

A. Physician Certifications

1. The Registry will conduct a statistical review of physician recommendations to determine if there is reasonable cause to refer a physician to the Colorado Medical Board based upon the following factors:
   a. Physician caseload as determined by the number of patients for whom medical marijuana is recommended. A high caseload is calculated as 3,521 or more patient recommendations in one year for a general practitioner. This reflects the recommendation of patients equal to or greater than the national average of patient visits per year for a generalist physician as reported by the Centers for Disease Control and Prevention (Hing & Schappert, 2012)[i]

b. The plant and ounce recommendations by the physician. Physician certification forms with a plant count recommendation above the constitutional standard six plants and two ounces will be reviewed for evidence of medical necessity in accordance with the Standing Order for Plants and Ounces for Patients signed by the CDPHE Chief Medical Officer on January 15, 2014. The review will include a focus on:
   i) Percent of caseload with increased plant count recommendations:
      (1) Physicians recommending increased plant counts for more than 30% of their caseload may be recommended for referral.
      (2) The physician's area of specialty will be taken into consideration when considering the appropriateness of a higher rate of increased plant/ounce count recommendations.
   ii) High individual plant count recommendations: Physicians who recommend a plant count above 24 plants/8 ounces for any one patient without substantiating medical necessity evidence may be recommended for referral.

c. Age demographics of the patient caseload. According to the CDC, older adults have a significantly higher prevalence of chronic conditions than younger adults. (Ward & Schiller, 2013) Physicians for whom more than one-third of the patient caseload is under the age of 30 may be recommended for referral.

2. The Medical Marijuana Program Director in consultation with the Chief Medical Officer or Deputy Chief Medical Officer will review recommendations for physician referral. If evidence supports referral, the Program Director will issue a formal referral to the Medical Board Program Director. This referral will contain:
   a. The physicians identifying information (name and DORA medical license number);
   b. The reason for the referral; and
   c. Any statistical data supporting the referral.
3. Absent the Medical Marijuana Registry taking action against the physician for any other potential violation of the program requirements, the Medical Marijuana Registry will continue to process physician certification forms signed by referring physicians until the Medical Board notifies the Department of corrective actions that may limit the physician's ability to recommend medical marijuana to their patients.

B. Other Circumstances

The Department will also refer physicians to the Medical Board for whom there is evidence of potential violation of the constitution, statutes or Board of Health regulations. These referrals may include, but are not limited to:

1. Patient safety concerns given the physician's training in a field which raises questions as to his/her ability to competently evaluate and treat minor patients and those who have clinical conditions not in the physician's prescribed area of specialty/expertise;
2. Reasonable belief that that a physician has financial ties to a medical marijuana caregiver, distributor, or any other provider of medical marijuana as outlined in CRS § 25-1.5-106(5)(d)
3. Potential substandard care of patients by physicians making patient recommendations for the use of medical marijuana;
4. Other information known or received by CDPHE that may constitute a violation of the Medical Practice Act, § 12-36-101 *et seq.*, C.R.S.

Hing, E. M., & Schappert, S. M. (2012, September). Generalist and Specialty Physicians: Supply and Access, 2008-2010. *National Center for Health Statistics Data Brief* .

Ward, B. W. (2013, April 25). *Prevalence of Multiple Chronic Conditions Among US Adults: Estimates from the National Health Interview Survey, 2010.* Retrieved May 1, 2014, from Centers for Disease Control and Prevention: www.cdc.gov/pcd/issues/2013/pdf/12_0203.pdf