

FILED BEFORE
FIRE PREVENTION AND BUILDING SAFETY COMMISSION

GRATEFUL CARE ABA,

Petitioner,

vs.

**WHITE RIVER TOWNSHIP FIRE
DEPARTMENT,**

Respondent.

**ADMINISTRATIVE CAUSE NO.:
DHS-2405-001267**

**RESPONDENT’S BRIEF IN SUPPORT OF OBJECTION
TO NON-FINAL ADMINISTRATIVE ORDER**

Pursuant to the March 4, 2025 Order Setting Oral Argument and Briefing Schedule issued by the Fire Prevention and Building Safety Commission (“FPBSC”), Respondent, White River Township Fire Department (“White River”), by the undersigned counsel, hereby files its Brief in Support of its Objection to the Non-Final Administrative Order (“Non-Final Order”) issued by Administrative Law Judge Vanessa Voigt Gould (“ALJ”) in favor of Petitioner Grateful Care, ABA (“Grateful Care”) and against White River.

This case is about whether therapy that teaches children and young adults with autism spectrum disorder (“ASD”) activities of daily living is “custodial care” to persons without their parents or guardians present for up to eight (8) hours per day, thereby satisfying the definition of an “I-4” occupancy day care facility. The ALJ found such therapy was not custodial care because it was medical care instead, thereby satisfying the definition of a “B” occupancy outpatient medical facility. But the ALJ’s

Non-Final Order rests on a false dichotomy between custodial care and medical care that does not exist in the plain meaning of the applicable building and fire codes. Therapy for children and young adults with ASD does not cease to be custodial care just because it is also medical care. The FPBSC should clearly say so.

The ALJ's Non-Final Order is also based upon erroneous factual conclusions that conflict with the weight of the evidence. Grateful Care offers services at its Greenwood clinic that are materially indistinguishable from day care services to clients who are incapable of self-preservation. It also cannot ensure that its clients can be evacuated safely in less than three (3) minutes. But the ALJ's Non-Final Order overlooks the evidence in support of these facts.

Therefore, the FPBSC should not adopt the Non-Final Order issued by the ALJ but should instead enter a Final Order concluding that Grateful Care's Greenwood Clinic is an "I-4" occupancy and not a "B" occupancy and Grateful Care does not comply with applicable requirements for said occupancy. In doing so, the FPBSC should 1) correct clearly erroneous legal conclusions which are not supported by the factual findings or plain meaning of the applicable building and fire codes, 2) correct the factual findings that are not supported by the weight of the evidence, and 3) consider additional evidence that was not considered by the ALJ to reach the correct findings and conclusions.

PROCEDURAL HISTORY

The procedural history discussed in the Non-Final Order is well-stated, and White River does not dispute or object to this history. [Final Order at 2-4]. In short, Petitioner Grateful Care filed a petition for administrative review on May 23, 2024,

from the Respondent White River's May 7, 2024, determination that Petitioner is in violation of the Indiana Fire Code. Respondent found that Petitioner was operating as an "I-4" occupancy day care facility without making certain fire safety improvements to the building, namely a fire alarm system and a sprinkler system. Petitioner disputed this finding and asserted that it is operating as a "B" occupancy business that requires no further improvements.

The issues addressed by the ALJ in Grateful Care's petition were:

1. Whether Grateful Care's occupancy of the Greenwood Clinic constitutes an "I-4" occupancy; and
2. If Grateful Care ABA's occupancy of the Greenwood Clinic does in fact constitute an "I-4" occupancy, does the building in its current state comply with the applicable requirements for said occupancy.

THE NON-FINAL ORDER'S FINDINGS AND CONCLUSIONS

A. Findings

The ALJ found, in relevant part, the following facts after an evidentiary hearing:

Grateful Care provides Applied Behavioral Analysis ("ABA") and/or behavioral therapy to treat children and young adults with Autism Spectrum Disorder ("ASD"). [Final Order, Finding ¶ 4]. ABA and behavioral therapy "are medical services that are complex, scientific, highly intensive, highly individualized, and therapeutic in nature" and are reimbursable by health insurance. [*Id.*, Findings ¶¶ 11, 20, 22]. These services are "very different from day care services." [*Id.*, Finding ¶¶ 18, 28]. "The treatment and/or services provided by Grateful care often focus on skill development

based on the individual needs of each patient.” [*Id.*, Finding ¶ 25]. Grateful Care’s clients spend between a few hours to up to eight hours per day under the supervision of Grateful Care staff at the facility. [*Id.*, Finding ¶ 21].

“Some of Grateful Care’s patients are capable of self-preservation and some are not – due to their age – and would require assistance evacuating in the event of an emergency.” [*Id.*, Finding ¶ 50]. “Those who would require assistance are not rendered incapable of self-preservation by the treatment and/or services provided by Grateful Care.” [*Id.*, Finding ¶ 51].

“Grateful Care could evacuate the Greenwood Clinic fully should there be an emergency in less than three minutes because there are three exits that are accessible to even the farther corners of the office within approximately thirty (30) seconds and each patient is always within three feet of their treatment and/or service provider who could assist them in evacuating if needed.” [*Id.*, Finding ¶ 52].

Multiple site visits and inspections were conducted by City of Greenwood Building Commissioner Kenneth Seal and White River Township Fire Department Fire Marshal Braden Prochnow. [*Id.*, Findings ¶¶ 31–41]. Commissioner Seal and Fire Marshal Prochnow “observed multiple children playing together and/or interacting with employees of Grateful Care.” [*Id.*, Findings ¶ 40]. “Building Commissioner Seal did not observe any emergency hardware on locking doors, occupant notification devices, fire alarm system, or sprinklers in the Greenwood Clinic.” [*Id.*, Findings ¶ 41].

B. Conclusions

The ALJ made, in relevant part, the following conclusions of law:

White River “failed to meet its burden to demonstrate by reliable and substantial evidence that Grateful Care ABA’s use of the Greenwood Clinic location constitutes an ‘I-4’ occupancy.” [*Id.*, Conclusion ¶ 19]. The 2014 IBC defines Institutional Group I-4, Day Care Facilities as follows: “buildings and structures occupied by more than five persons of any age who receive custodial care for fewer than 24 hours per day by persons other than parents or guardians, relatives by blood, marriage or adoption, and in a place other than the home of the person cared for” and includes but is not limited to “adult day care and child day care.” [*Id.*, Conclusions ¶¶ 10, 11]. The 2014 IBC defines “custodial care” as

[a]ssistance with day-to-day living tasks; such as assistance with cooking, taking medication, bathing, using toilet facilities and other tasks of daily living. Custodial care includes occupants who evacuate at a slower rate and/or who have mental and psychiatric complications.

[*Id.*, Conclusion ¶ 12]. “I-4” occupancies must have sprinkler systems, a manual fire alarm, and installation of a 1-hour fire rated assembly between occupancies. [*Id.*, Conclusion ¶ 13].

Instead, Grateful Care is a “B” occupancy that meets the definition of an outpatient clinic. [*Id.*, Conclusions ¶¶ 14–15, 21, 24]. An “outpatient clinic” is defined as “[b]uildings or portions thereof used to provide medical care on less than a 24-hour basis to persons who are not rendered incapable of self-preservation by the services provided” and is classified as a ‘B’ Occupancy.” [*Id.*, Conclusion ¶ 16]. Grateful care meets the definition of a “B” occupancy because it does not “render” its clients

“incapable of self-preservation” and does not “provide custodial care to more than five persons for less than 24 hours on any given day.” [*Id.*, Conclusions ¶¶ 20, 23]. And Grateful Care does not provide “day care services”; rather it “operates as an outpatient clinic and/or a facility that provides training and skill development outside of a school or academic program.” [*Id.*, Conclusion ¶ 21].

OBJECTIONS

A. Objections to Findings of Fact

The Non-Final Order’s findings of fact at paragraphs 18, 28, 48, 52, 56, and 59 are not supported by the weight of the evidence. The ALJ’s conclusion at paragraph 20 also contains a finding of fact that is not supported by the weight of the evidence. The evidence actually shows that Grateful Care offers services that are indistinguishable from day care services, that at least half of its clients are incapable of self-preservation, and that no substantial and reliable evidence shows that the facility could be evacuated in three minutes or less. When the Non-Final Order’s erroneous findings are eliminated, its conclusions of law lack factual support.

B. Objections to Conclusions of Law

The Non-Final Order’s conclusions of law at paragraphs 19 to 24 are clearly erroneous and not supported by the findings or applicable Indiana Building Code and Indiana Fire Code. Grateful Care is a “day care facility” that provides “custodial care” to clients already “incapable of self-preservation” without their parents or guardians present. Grateful Care is therefore a “I-4” occupancy and not a “B” occupancy.

C. Objection to Denial of White River’s Motion to Submit Exhibits 8 and 9

The ALJ clearly erred in denying Respondent White River’s request to admit supplemental exhibits 8 and 9 into evidence, which are publicly available and subject to judicial notice in any case.

ARGUMENT

A. Standard of Review

The FBPSC’s standard of review of the Non-Final Order is essentially de novo. It has the authority to affirm the Non-Final Order, modify the Non-Final Order, or enter “an order remanding the matter, with or without instructions, to an administrative law judge for further proceedings.” Ind. Code § 4-21.5-3-29(b). The FBPSC must simply identify the differences between its final order “and the nonfinal order issued by the administrative law judge,” enter findings of fact or incorporate the findings of the ALJ’s Non-Final Order, and explain the procedures for seeking further review of any final order. Ind. Code § 4-21.5-3-28(g).

B. The Findings of the Non-Final Order are Clearly Erroneous

1. Grateful Care ABA is Practically Indistinguishable From a Day Care Facility

No one disputes that Grateful Care resembles a day care facility. Petitioner’s witness, Derek Holman admitted that “[f]rom the outside, an ABA clinic may look similar, and have many of the same features to a typical day care facility.” [Petitioner’s Exhibit (“Pet Ex.”) J at 13]. He also stated that the “parent/guardians of the youth will not always be present in the building.” [Pet. Ex. J at 16].

No one disputes that Grateful Care does what a day care facility does. Petitioner’s witness and Grateful Care Clinical Director, Kimberly Chudzinski, testified that Grateful Care provides the tasks of daily living that one typically sees in a day care setting, including assisting with using toilet facilities. [Hearing Recording at 1:59:09 – 2:02:24 (describing activities of daily living); *id.* at 2:00:50 – 2:01:15 (“all of the daily living skills that you’re asking about, they do occur, a lot of them occur in the clinic”); *id.* at 2:02:25 – 2:02:44 (“it could be perceived that we are providing some type of day care services, however, with the one-on-one ratio that would be kind of odd for a day care. But with ... the lack of knowledge about the therapy and what is that we exactly do it could present that way if someone wasn’t asking additional questions.”); 2:28:39 – 2:29:06 (same); Pet. Ex. B at 3 (noting client “is toilet trained, but needs help wiping after a bowel movement. He also struggles with dressing and undressing and brushing his teeth”); Pet. Ex. B at 16 (noting progress with toilet needs)]. According to Ms. Chudzinski, the only difference between traditional day care activities and activities of Grateful Care is that the activities are provided pursuant to individualized treatment plans and schedules. [*Id.* at 2:29:45 – 2:30:30].

Further, as the ALJ expressly found, Grateful Care clients receive these services in a supervised setting for up to eight hours per day. [Non-Final Order, Finding ¶ 21]. Rendering services to children, without their parents present, for up to eight hours at a time is inherently supervisory in nature. This is essentially what one would expect from a day care facility.

No one disputes that the physical layout of Grateful Care is similar to a day care facility. For example, the interior doors of Grateful Care's office building are equipped with devices on the doors that prevent ADS Clients or children from easily opening the doors. Witnesses referred to these devices as "baby locks." [Hearing Recording at 2:06:10-2:06:36].

The ALJ found, however, that "[g]enerally, businesses that provide speech therapy, physical therapy, and other medical services are considered outpatient clinics and are classified as 'B' occupancies," citing to the testimony of Derek Holman.¹ [Non-Final Order, Finding ¶ 56]. But this finding overlooks the rest of Mr. Holman's testimony:

Q: ... your position is that based on your review of Grateful Care, not anyone else, they could be a B or could be an I classification, either would work.

A: That is correct.

[Hearing Recording at 55:47 - 56:03; *see also* Respondent's Exhibit ("Resp. Ex.") 5 (email of Craig E. Burgess, Plan Review Section Chief of Indiana Department of Homeland Security, classifying autism treatment facilities as I-4 day cares)]. Moreover, no evidence was offered by Grateful Care or noticed by the ALJ that any outpatient clinic offers services for up to eight hours per day of supervised care to children without their parents or guardians present.

¹ Throughout the Non-Final Order, the ALJ refers to Derek Pullman. This appears to have been an oversight. As the ALJ correctly noted elsewhere, Derek Holman testified on behalf of the Petitioner at the Evidentiary Hearing. [Non-Final Order, Procedural History ¶ 2]. No one named Derek Pullman testified. [*Id.*, ¶¶ 4-5].

At bottom, this is a case about building codes, which in turn is about the nature of the activities that take place at Grateful Care *in practice*, not in theory. While Respondents concede that ABA therapy is medical care and reimbursable by health insurance and Medicaid (and rendered by highly trained and skilled specialists), the activities that occur at Grateful Care fall within the code definitions applicable to traditional daycare.

Thus, the finding in the ALJ's Non-Final Order that Grateful Care does not provide day care services [Non-Final Order, Findings ¶¶ 18, 28] but provides outpatient clinic services instead [*id.*, Finding ¶ 56], is clearly erroneous.

2. Grateful Care ABA's Clients Are Incapable of Self-Preservation

No one disputes that many Grateful Care's clients are incapable of self-preservation. But the ALJ's Non-Final Order found that the only clients incapable of self-preservation are such "due to their age." [Final Order, Finding ¶ 50.] In fact, however, virtually all of Grateful Care's clients are incapable of self-preservation because of their underlying mental and psychiatric condition. The ALJ's limited finding otherwise is inconsistent with its other findings and it is contradicted by the clear weight of the evidence.

Despite finding that only age rendered some Grateful Care clients incapable of self-preservation, the ALJ also found that Grateful Care renders ABA and behavioral therapy to "help children and adults with [ASD] learn and develop skills to improve their behavior." [*Id.*, Finding ¶ 4]. This takes the form of getting kids ready for "traditional school, day care, or group home environment" suitable to their ages. [*Id.*, Finding ¶ 26]. These services are provided through supervised care of minors for up

to eight hours per day. [*Id.*, Finding ¶ 21]. The ALJ also recognized that “each patient is unique with differing strengths, *challenges and needs.*” [*Id.*, Findings ¶ 5 (emphasis added)].

Beyond these findings, the evidence presented by Grateful Care also shows that age is not the only reason many of its clients are incapable of self-preservation. Mr. Holman admitted that “the patients at Grateful Care would meet the definition of incapable of self-preservation” [Pet. Ex. J at 13]. Ms. Chudzinski also testified that half of Grateful Care’s clients are not independent with activities of daily living, [Hearing Recording at 1:59:09 – 2:02:24 (describing activities of daily living)], and only half of the clients are capable of self-preservation and responding independently to an emergency situation. [*Id.* at 2:25:32 – 2:26:03].

At any given time, many of Grateful Care’s ASD Clients are not capable of self-preservation. They are not independent with activities of daily living. They require supervision and vigilant attention from staff for day-to-day living tasks. [*E.g.*, Pet. Ex. C at 31 (noting 16 year-old ASD Client scored only 1 out of 10 on workplace safety goal of being able to “expressively and receptively identify at least 10 different hazard or danger signs” and “requires verbal prompts to avoid wet surfaces or unmarked wet floors”); Pet. Ex. D (describing plan for 3 year-old who “struggles with completing daily livings [sic] skills including toilet training, dressing, undressing, and brushing her teeth”).]

The weight of the evidence also shows that the clients are incapable of self-preservation because of their mental and psychiatric complications. ASD by its very

nature can cause affected persons to become overstimulated by loud noises and lose their ability to respond appropriately to stimulus. Grateful Care's ASD Clients come to Grateful Care with pre-existing "deficits" and "maladaptive behaviors" compared to typically developing same age peers related to communication, language, adaptive functioning skills, social interactions and skills, inflexibility, and fixated interests. [See, e.g., Petitioner's Exhibit C at 3 (describing "client medical necessity").] As the ALJ's Non-Final Order states, "Patients are referred to Grateful Care's Greenwood Clinic after being diagnosed with ASD by medical professionals such as developmental pediatricians, neurologists, psychiatrists, and/or psychologists." [Final Order, Findings ¶ 6 (citing Testimony of Kim Chudzinski and Testimony of Martin Myers)].

3. Grateful Care Cannot Be Evacuated in Three Minutes or Less

Further, the weight of the evidence does not support the ALJ's finding that Grateful Care could be evacuated safely in three minutes or less. Ms. Chudzinski testified that there is a history of some of Grateful Care's clients having crises or adverse reactions when multiple therapists are needed to assist them in such situations. [*Id.* at 2:37:00 - 2:38:30]. Such interventions could require up to four (4) staff for one client suffering from an adverse reaction. [*Id.*]. When Mr. Holman testified that he believed the facility could be evacuated in three minutes or less he presumed that there would always be a 1:1 ratio of caregiver and client – his response did not account for the adverse reactions of clients that would require up to four caregivers for one client. [*Id.* at 1:13:10 – 1:14:30]. Further, despite testifying that Grateful Care could evacuate its facility in less than three minutes, Ms. Chudzinski

testified that Grateful Care had never done any drills to practice an evacuation, [*id.* 2:26:47 – 2:27:02], and that she did not know how a client having an adverse reaction would react to an emergency evacuation situation. [*Id.* at 2:36:35 – 2:37:10 (“I have never observed, there hasn’t been a crisis, and I haven’t observed them in a crisis scenario. ... We haven’t had any emergency scenarios. So there hasn’t been a fire or tornado or anything like that. So I wouldn’t be able to speak to what the response would be for that child.”)].

* * *

Based on Petitioner’s witnesses alone, the FPBSC should conclude that the ALJ’s factual findings at paragraphs 18, 28, 48, 52, 56, and 59, and the findings reflected in in conclusion of law paragraph 20 are erroneous and not supported by the weight of the evidence.

C. The Conclusions of the Non-Final Order Are Clearly Erroneous

The ALJ’s Non-Final Order clearly errs in concluding that Grateful Care should be classified as a “B” occupancy “outpatient clinic” and not a “I-4” occupancy “day care facility.” This conclusion conflicts with the plain meaning of the Indiana Building and Fire Codes’ definitions of “day care facility,” “custodial care,” and “incapable of self-preservation.”

When applying the IFC and IBC, “[w]ords are to be given their plain, ordinary, and usual meaning” *Evansville Outdoor Advert., Inc. v. Bd. of Zoning Appeals of Evansville & Vanderburgh Cnty.*, 757 N.E.2d 151, 159 (Ind. Ct. App. 2001) (applying municipal building code). The text of the code should be read “as a whole, avoiding excessive reliance on a strict, literal meaning or the selective reading of individual

words.” *Consumer Att’y Servs., P.A. v. State*, 71 N.E.3d 362, 366 (Ind. 2017) (cleaned up). Terms not defined in the IBC are to be given their “ordinarily accepted meanings such as the context implies.” 2014 IBC, § 201.4.

1. Grateful Care Provides “Custodial Care”

The 2014 IBC defines Institutional Group I-4, Day Care Facilities as follows:

308.6 Institutional Group 1-4, day care facilities. This group shall include buildings and structures occupied by more than five persons of any age who receive *custodial care* for fewer than 24 hours per day by persons other than parents or guardians, relatives by blood, marriage or adoption, and in a place other than the home of the person cared for. This group shall include, but not be limited to, the following:

- Adult day care
- Child day care

2014 IBC § 308.6 (emphasis added). [*See also* Pet. Ex. L at 4; May 7, 2024 Letter.]

The 2014 IBC defines “custodial care” as

[a]ssistance with day-to-day living tasks; such as assistance with cooking, taking medication, bathing, using toilet facilities and other tasks of daily living. Custodial care includes occupants who evacuate at a slower rate and/or who have mental and psychiatric complications.

2014 IBC § 202, Definition of “Custodial Care” [*See also* May 7, 2014 Letter.] I-4

Occupancies must have the following fire safety measures installed on the premises:

an automatic sprinkler system, 2014 IFC § 903.2.6., a manual fire alarm system, 2014 IFC § 907.2.6., installation of a 1-hour fire rated assembly between occupancies, 2014 IBC § 508.4.4 and Table 508.4, and adjustments to exit doors that make them simple to operate and open. 2014 IFC § 1008.1.9.1.

Grateful Care falls squarely within the IBC definition of an Institutional Group I-4 Occupancy day care facility because it renders “custodial care” to “more than five persons of any age ... for fewer than 24 hours per day by persons other than parents, guardians or relatives, outside the home of the person cared for.” 2014 IBC § 308.6.

Grateful Care’s ASD Clients receive custodial care at Grateful Care because they receive “assistance with day-to-day living tasks” and have documented deficits and maladaptive behaviors that require constant assistance from Grateful Care staff while they are on-site at the Grateful Care facility. These deficits and maladaptive behaviors also fit within the plain meaning of “mental and psychiatric complications” referenced in the definition of “custodial care.” *See, e.g., Evansville Outdoor Advert., Inc.*, 757 N.E.2d at 159 (requiring plain meaning interpretation when the text is clear and unambiguous).

2. Grateful Care Provides “Custodial Care” Despite *Also* Providing Medical Care

Grateful Care’s position – and the position taken by the ALJ in the Non-Final Order – relies upon a false dichotomy between medical care and custodial care. Respondent White River does not dispute that Grateful Care provides medical care. But because of the unique nature of ABA therapy, this medical care is *also* custodial care for developmentally disabled children and adults, many of whom are not capable of self-preservation. This is confirmed by Petitioner’s Witness, Derek Holman, who has extensive experience interpreting the Indiana Building and Fire Codes. Mr.

Holman testified that Grateful Care satisfied the criteria for an I classification – that is, it provides “custodial care” – despite the fact that it also provides medical care:

Q: ... your position is that based on your review of Grateful Care, not anyone else, they could be a B or could be an I classification, either would work.

A: That is correct.

[Hearing Recording at 55:47 - 56:03; *see also* Resp. Ex. 5 (email of Craig E. Burgess, Plan Review Section Chief of Indiana Department of Homeland Security, classifying autism treatment facilities as I-4 day cares)].

The fact that this custodial care administered by Grateful Care is essentially identical to ABA therapy – which is medical care reimbursable by the Indiana Medicaid program – is not material to the I-4 Occupancy classification based on the plain meaning of the IBC’s definition of “day care facilities” and “custodial care.”

3. Grateful Care is Not an “Outpatient Clinic”

Grateful Care has argued that it is a B occupancy outpatient clinic. But it can only satisfy this definition by ignoring the plain meaning of “custodial care” of the I-4 Occupancy and ignoring the fact that it’s clients are already incapable of self-preservation the moment they step into the facility.

An “outpatient clinic” is defined as “[b]uildings or portions thereof used to provide medical care on less than a 24-hour basis to persons who are not *rendered incapable of self-preservation* by the services provide” and is classified as a B Occupancy. 2014 IBC § 202, Definitions (emphasis added). “Incapable of Self-Preservation,” which means “[p]ersons because of age, physical limitations, mental

limitations, chemical dependency, or medical treatment who cannot respond as an individual to an emergency situation.” 2014 IBC § 202, Definitions.

The ALJ’s Non-Final Order says that Grateful Care does not “*render*” any of its clients “incapable of self-preservation,” thereby satisfying the definition of “outpatient clinic.” [Final Order, Finding ¶ 51 & Conclusion ¶ 23]. But this ignores the ALJ’s own finding that many of its clients are *already* “incapable of self-preservation” due to their age. [Final Order, Finding ¶ 50.] It also overlooks the evidence discussed above that Grateful Care’s services are materially indistinguishable from “custodial care,” including “assistance with day-to-day living tasks.” And it ignores the clear evidence that that ABA therapy is designed to help clients with maladaptive behaviors and deficits for patients who fit the definition of persons with “physical limitations [and] mental limitations” that “cannot respond as an individual to an emergency situation.” Moreover, there is no evidence in the record demonstrating that Grateful Care’s clients are capable of responding as individuals to an emergency situation. In some circumstances, some ASD Clients may require up to four (4) staff members to assist if they have an adverse reaction to the emergency situation. [Hearing Recording at 2:37:00-2:38:30].

The ALJ’s conclusion violates both the letter of the definition of “custodial” care along with the spirit of the applicable codes, which are codified to ensure that vulnerable populations receive the fire protection they need.

Grateful Care would have the FPBSC conclude that the *pre-existing* incapacity for self-preservation of Grateful Care’s clients is irrelevant to the meaning of

“outpatient clinic” or “custodial care.” All that matters is that Grateful Care does not “render” them incapacitated. But this approach to the IBC makes sense only if Grateful Care ignores the plain meaning of “custodial care.” “Custodial care includes occupants who evacuate at a slower rate and/or who have mental and psychiatric complications” and includes “assistance with day-to-day living tasks.” This describes what occurs within Grateful Care’s facility regardless of whether medical care is *also* rendered.

In shorts, the Indiana Building Code must be considered as a whole. *Consumer Att’y Servs., P.A.*, 71 N.E.3d at 366. In doing so, it becomes clear that the plain meaning of “Group I-4 day care facilities” and “custodial care” more accurately capture the practical situation within Grateful Care than the plain meaning of “outpatient clinic.” When one reads the definition of “outpatient clinic” and “Group I-4 day care facilities” together, outpatient clinic refers to facilities rendering medical care that is not also “custodial care” rendered by non-relatives, and “Group I-4 day care facilities” refers to facilities that render both medical care and “custodial care.”

4. At Least One Other ABA Therapy Provider Was Designated an I-4 Occupancy

The Indiana Department of Homeland Security recently applied the I-4 designation to another ABA Therapy provider in Greenwood, Indiana, Circle City ABA. Circle City ABA previously sought an exemption from the fire safety measures required for I-4 Occupancies. Circle City ABA planned to convert “an existing office building (B Occupancy) into an Autism Clinic (I-4 Occupancy),” which was non-sprinkled. [See Resp. Ex. 8 at 4.] In October 2022, Circle City ABA sought a variance

from the Indiana Department of Homeland Security (IDHS), requesting an exception from the requirements that it (a) install a 2-hour fire wall between its building and an adjoining building, pursuant to 2014 IBC 706, and (b) install a sprinkler system, pursuant to 2014 IBC 903.2.6. [Resp. Ex. 8.] On November 1, 2022, the IDHS granted Circle City ABA’s variance request as to the 2-hour fire wall requirement, permitting a 2-hour fire barrier instead. [Resp. Ex. 8 at 3; Resp. Ex. 9.] But the IHDS denied the variance from the requirement to install a sprinkler system. [Resp. Ex. 9.]

Grateful Care and the ALJ’s Non-Final Order noted a single instance in which another Grateful Care facility in Terre Haute was classified as a “B” occupancy, despite providing the “same types of treatment and/or services ... provided.” [Non-Final Order, Finding ¶ 60; *see also* Pet. Ex. I]. But Exhibit I, unlike Exhibit 9, is merely an inspection report, not a decision on a variance request or any other document with any precedential value. Even if it did have precedential value, the FPBSC should give it little weight and decide Grateful Care’s classification on its own merit based on the evidence it has presented.

D. Objection to Denial of White River’s Motion to Submit Exhibits 8 and 9

The ALJ denied Respondent White River’s request to admit supplemental exhibits 8 and 9 into evidence. This Order was clearly erroneous.

Exhibits 8 and 9 are publicly available documents demonstrating that at least one (1) other ABA therapy provider in Greenwood, Indiana, Circle City ABA, has previously sought an exemption from the fire safety measures required for I-4 Occupancies, as discussed above.

The ALJ's decision to deny admission of Exhibits 8 and 9 was clearly erroneous and an abuse of discretion. The exhibits were timely filed, given the ALJ's August 19, 2024 Order, which kept the record open until close of business on September 23, 2024. Moreover, Exhibits 8 and 9 are publicly available at the website of the Indiana Department of Homeland Security / Fire Building and Safety Division. oas.dhs.in.gov/dfbs/variance/start.do. The public may access Exhibits 8 and 9 by selecting "Search, View & Print Variance Information," navigating to "Search for Applications," selecting "***Processed Applications," then typing in the Project Name field "Circle City" or typing in the Variance Number field "22-10-27." These exhibits are therefore appropriate for official notice by the ALJ even if they were not timely filed. Ind. Code § 4-21.5-3-26(f) ("Official notice may be taken of the following: (1) any fact that could be judicially noticed in the courts."); Ind. R. Evid. 201(a)(1) (judicial notice appropriate for facts "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned").

The ALJ's order also overlooks that the Indiana Administrative Orders and Procedures Act ("AOPA") contemplates the submission of supplemental evidence after an administrative hearing if the parties have sufficient notice and opportunity to contest and rebut the supplemental evidence. Indiana Code § 4-21.5-3-26 states:

(g) Parties must be:

(1) notified before or during the hearing, ***or before the issuance of any order*** that is based in whole or in part on ***facts or material noticed under subsection (f)***, of the specific facts or material noticed, and the source of the facts or material noticed ...; and

(2) afforded an opportunity to contest and rebut the facts or material noticed under subsection (f).

Ind. Code § 4-21.5-3-26(g) (emphasis added). Here, AOPA plainly contemplates an ALJ admitting facts submitted or noticed after the hearing but “before the issuance of any order.”

The ALJ’s order also overlooks the additional basis for judicial notice of the Exhibits under Evidence Rule 201(a)(1)(B): they “can be accurately and readily determined from sources whose accuracy cannot be questioned.” The Exhibits are essentially docket entries from the IDHS website. That source cannot be reasonably questioned. Submitting the Exhibits is no different than citing any other matter on a public court or administrative docket.

Even if the ALJ’s order was not clearly erroneous and an abuse of discretion, the FPBSC should still consider Exhibits 8 and 9 pursuant to its authority under Indiana Code § 4-21.5-3-28(e)(3) to “exercise the powers of an administrative law judge to hear additional evidence under” chapter 26 of AOPA. Respondent White River has made this request in its previously filed *Motion for Oral Argument and Admission of Additional Evidence*.

CONCLUSION

The FPBSC should not adopt the Non-Final Order issued by the ALJ but should 1) correct clearly erroneous legal conclusions which are not supported by the factual findings or plain meaning of the application building and fire codes, 2) correct factual findings that are not supported by the weight of the evidence, and 3) admit and consider Exhibits 8 and 9 in support of Respondent’s opposition to Grateful Care’s

Petition. The FPBSC should enter a Final Order concluding that Grateful Care's facility is an "I-4" occupancy and not a "B" occupancy and that the Greenwood Clinic does not comply with applicable requirements for an "I-4" occupancy.

Date: March 17, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *Respondent's Brief in Support of Objection to Non-Final Administrative Order* was served via service method indicated below on this 17th day of March 2025.

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Signature: /s/ Justin R. Olson
Served by: Justin R. Olson