STATE OF INDIANA
FIRE PREVENTION AND BUILDING SAFETY COMMISSION
ADMINISTRATIVE CASE NO.: DHS-2405-001267

GRATEFUL CARE ABA,	)
	)
Petitioner,	)
	)
v.	)
	)
WHITE RIVER TOWNSHIP FIRE DEPARTMENT,	)
	)
Respondent.	)

PETITIONER'S RESPONSE IN SUPPORT OF OFFICE OF ADMINSTRATIVE LAW PROCEEDINGS ORDER

COMES NOW, Petitioner Grateful Care ABA ("Grateful Care"), by counsel, and submits this response to White River Township Fire Department's appeal and Brief in Support of Objection to Non-Final Administrative Order of the Office of Administrative Law Proceedings ("OALP") Order issued on December 20, 2024, in favor of Grateful Care.

1. INTRODUCTION

Grateful Care provides applied behavior analysis ("ABA") for its patients that have been medically diagnosed with having Autism Spectrum Disorder ("ASD"). This is a type of behavioral therapy that helps people learn and develop skills to improve their behavior. *See* Grateful Care's Ex. D. ABA is often used to help children and adults with autism. *See id*. This case is about whether Grateful Care's occupancy and use of 1644 Fry Road, Greenwood, Indiana ("Premises") for providing ABA therapy constituted a "change of use" that requires the Premises to be retrofitted with

different fire safety devices; most notably interior sprinkler systems, manual fire alarms and fire barriers, as the City of Greenwood's Building Commissioner and Respondent contend. Respondent, here, is White River Township Fire Department ("White River"). Based on the evidence presented at the hearing and the applicable law, the Administrative Law Judge ("the ALJ") Order should be upheld as Respondent failed to meet its burden of proof, burden of production and produced no substantial evidence, despite having a full and fair opportunity to do so. Each of the findings in the ALJ's Order are supported by evidence and as the trier of fact, the ALJ is entitled to determine which Party and which witness were more credible and what evidence was most compelling.

2. PROCEDURAL HISTORY

The Procedural History in the OALP Order accurately summarizes the sequence of events, the evidence admitted by both Parties, how the proceedings were conducted, who participated for the respective Parties at hearing, and the record of filings before the OALP. Contrary to the Respondent's Objection that it had cited Grateful Care, Grateful Care did raise in its submission to the ALJ concerning Respondent White River Township Fire's involvement. Grateful Care noted White River Township Fire Department is identified as the Respondent, and White River's Fire Marshall participated in the proceedings, including the August 19, 2024 hearing. White River, though, did not designate any evidence or exhibits of violations found by White River, only the City of Greenwood's October 24, 2023 *Notice of Violation* was designated. Therefore, there is some question as to whether "Respondent found that

Petitioner as operating an "I-4" occupancy day care facility with making certain fire safety improvements to the building(.)" Respondent's Objection at 3.

The OALP Order addressed the following two questions as the "Issues" to be addressed:

1. (Whether) "Grateful Care ABA'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."

OALP Order at 1.

3. STANDARD OF REVIEW

On appeals of non-final orders from ALJ proceedings, the Commission may affirm the Non-Final Order, essentially leaving it without changes, may modify the Order, or may remand the matter back to the ALJ for further action with or with instructions. Ind. Code § 4-21.5-3-29(b). A final order may identify differences between the ALJ's non-final order and a final order to be issued by the Commission, include additional findings or include the ALJ's original findings and provide a brief explanation of any further review of the Order. Ind. Code § 4-21.5-3-28(g).

4. PRESUMPTION OF USE OF LAND FAVORS GRATEFUL CARE

While the Respondent's Brief does address a Standard of Review for the Commission, it omits any discussion of its burden of proof. Respondent's Objection at 7. An agency's burden of proof is substantial – Grateful Care is not required to

demonstrate that the Respondent was incorrect, though it has. Rather, the Respondent was required to prove its case through submission of substantial evidence. It did not. The overall strategy of the Respondent's brief demonstrates this – the Respondent's Objection goes through attempting to take incomplete or out-of-context evidence from Grateful Care to argue that the OALP Order was not supported. It must do this because the Respondent failed to submit any reliable evidence of its own addressing the bottom-line issue that needed to be addressed – Can an ABA treatment clinic be located in in "B" rated building? The entire focus of the Respondent's argument is the similarities, even overlap, that a day-care may have with an ABA clinic. This is done while avoiding that Grateful Care's use is primarily the medical and psychiatric treatment of autism. There is also zero evidence on what a day care does, either. That argument is mostly rhetorical and declarative statements unsupported by evidence. In doing so, Respondent invites the Commission through deduction that because of these similarities, rather than any substantial evidence it produced, that the ALJ's decision and the detailed lower record should be ignored.

The first hurdle the Respondent must overcome is Indiana's preference against interference with the use of land. No evidence was presented concerning this preference. The law requires that government interference with land rights must be viewed with great skepticism – that standard should not be overlooked here. Indeed, regulations which interfere with the use of real property are contrary to the common law and must be strictly construed. *See*, *e.g.*, *Hamby v. Board of Zoning Appeals of*

Area Plan Com'n of Warrick County, 932 N.E.2d 1251, 1256 (Ind. Ct. App. 2010) (landowners prevailed on their argument that their wind turbine is a permitted use in the R-2 zoning district), *reh'g denied*, *trans. denied*; *Saurer v. Board of Zoning Appeals*, 629 N.E.2d 893, 898 (Ind Ct. App. 1994) (finding that the ordinance's text controlled, not the agency's opinions); *see also Noblesville, Indiana Board of Zoning Appeals v. FMG Indianapolis, LLC*, 217 N.E.3d 510, 515-16 (Ind. 2023) (ambiguity in ordinance construed in favor of property owners – administrators are due no deference on questions of law). To simplify, doubt must be resolved in Grateful Care's favor and not the Respondent's favor.

5. RESPONDENT'S EVIDENTIARY BURDENS.

Respondent's Objection also omits discussion of its evidentiary burdens. Those burdens are substantial. Not only must White River eliminate any doubt about its interference with Grateful Care's free use of the subject premises, it also must carry its evidentiary burden that a code violation was committed. It did not. The ALJ was clear at multiple points of the hearing Respondent bore the burden of proof. *See* August 19, 2024 Hearing Transcript at 0:12, 0:13, 3:30. The burden of proof in matters before the Office of Administrative Law Proceedings ("OALP") are governed by Indiana Code § 4-21.5-3-14(c), which states:

> (c) At each stage of the proceeding, the agency or other person requesting that an agency take action or asserting an affirmative defense specified by law has the burden of persuasion and the burden of going forward with the proof of the request or affirmative defense. Before the hearing on which the party intends to assert it, a party shall, to the extent possible, disclose any affirmative defense specified by law on which the party intends to rely. If a prehearing

> conference is held in the proceeding, a party notified of the conference shall disclose the party's affirmative defense in the conference.

This section's meaning was definitively addressed in *Peabody Coal Co. v. Ralston*, 578 N.E.2d 751 (Ind. Ct. App. 1991). In analyzing the burden standards, the *Peabody* Court held:

> We first turn to basic tenets of burdens of proof in discerning the appropriate burden standards. In a criminal proceeding, the State carries the ultimate burden of proof, or burden of persuasion. *Denton v. State* (1979), 182 Ind. App. 464, 471, 398 N.E.2d 1288, 1289. The burden of going forward with the evidence, or burden of production, however, shifts to the defendant to revive a reasonable doubt in the jurors' minds after the State has presented a *prima facie* case showing the defendant's guilt. *Id.* Like defendants in a criminal proceeding, those charged with violations of DNR's regulations are often facing punitive sanctions such as fines. Similar to the rationale for affixing the ultimate burden of proof on the state in criminal matters, it would be a fundamentally unfair procedure to shift the burden of persuasion to one charged with a violation to prove his innocence. The burden of production may shift to the alleged violator when the agency pursuing sanctions for the violation has demonstrated a *prima facie* case of violation, but the ultimate burden of persuasion may never so shift.

Peabody, 578 N.E.2d at 754. Just because a matter is on review does not relieve an agency of its burden of persuasion in the proceedings being reviewed. *Id.*

An agency seeking enforcement must establish a violation by a preponderance of the evidence. *Id.* 754. "'Preponderance of the evidence,' when used with respect to determining whether one's burden of proof has been met, simply means the 'greater weight of the evidence." *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349, 361 (Ind. 1982). "Evidence is of greater weight if it convinces [the trier of fact] more strongly of

its truthfulness." Ind Model Civ. Jury Inst. 509. "It is evidence that convinces [the trier of fact] that something is more probably true than not true." *Id*. "Probative value" refers to evidence that carries "quality of proof and having fitness to induce conviction." *Vogelsang v. Shackelford*, 254 N.E.2d 205, 219 (Ind. Ct. App. 1970). Weight, as used here, though, does not mean a measure of volume or one party produces more evidence. Rather, again simplifying, that one party produces *better* evidence supports the greater weight. Applying this analysis, it is fair to paraphrase after viewing the evidence and hearing the testimony, the ALJ determined that there was a 'greater weight' of better evidence supporting Grateful Care.

As observed in *First Bank & Trust Co. of Clay County v. Bunch*:

> When a party with the burden of proof makes a prima facie case, the burden of going forward with the evidence to explain away the case shifts to his adversary. But, to overcome a prima facie case, the opponent need only meet it, he does not have to defeat it by a preponderance on the greater weight of the evidence. It is sufficient if the defendant's evidence equalizes the weight of the plaintiff's evidence, or in other words, put the case in equipoise. If the case is left in equipoise, the party with the burden of proof (the plaintiff here) must fail. The defendant is never required to negate the plaintiff's prima facie case by a preponderance of the evidence, and the party having the burden of proof cannot prevail if the evidence is evenly balanced.

460 N.E.2d 517 (Ind. Ct. App. 1984) (Ratliff, J., concurring) (internal citations omitted), *reh'g denied*. An agency that bears the burden of proof likewise bears a burden of production. *Southlake Indiana, LLC v. Lake County Assessor,* 174 N.E.3d 177, 180 (Ind. 2021). Simplifying again, presuming an agency meets their burden of providing a credible initial case, or a *prima facia* case, the responding Party need not

overwhelm that case, but only needs to draw even, so to speak, to win the matter. The ALJ's Order is not clear if it believed that Respondent had even met its initial burden, but certainly through the Findings and Conclusions, nearly all citing to testimony or evidence, believed that Grateful Care had 'pulled even' and therefore cancelled the Respondent's case.

What this means for these proceedings is that the Respondent carried both the "burden of proof" and the "burden of production" The Respondent, to be successful, needed to:

1) Carry its "burden of proof" which is its "duty to prove a disputed assertion or charge"; it includes both the burden of persuasion and the burden of production. Burden of Proof, BLACK'S LAW DICTIONARY (11th ed. 2019);
2) To meet the "burden of proof" the Respondent need to carry the "burden of production" which is "a duty to introduce enough evidence on an issue to have the issue decided by the fact-finder". Burden of Production, BLACK'S LAW DICTIONARY (11th ed. 2019). Thus, the *agency*, not the party cited, must present evidence in support of its decision. *See Peabody*, 578 N.E.2d at 754; *see also Elkhart County Assessor v. Lexington Square, LLC,* 219 N.E.3d 236, 241 (Ind. Tax Ct. 2023) (*emphasis* added).

This is analogous to the "presumption of innocence" standard applied in criminal matters, and carried in quasi-criminal ordinance enforcement matters. *See Gates v. City of Indianapolis*, 991 N.E.2d 592, 595 (Ind. Ct. App. 2013), *trans. denied*. Here, Grateful Care is due a presumption of lawful operation until White River

proves by a preponderance that it is not.

Respondent's Objection did not address any of these presumptions in Grateful Care's favor and the substantial burdens it needed to overcome, which paraphrased, are:

1. An initial presumption in Grateful Care's favor on the free use of land;
2. A requirement that the Respondent carried the "burden of proof" that Grateful Care was in violation; not that Grateful Care needed to prove the Respondent was incorrect;
3. That the Respondent was required to support its accusations with a preponderance of evidence – importantly noted as the greater weight of the evidence it needed to produce and that the trier of fact found more credible or truthful.
4. That there is a general implied presumption that Grateful Care acted lawfully, akin to a presumption of innocence.
5. That Grateful Care did not need to overwhelm the Respondent's evidence but only needed to "pull even" to overcome the accusations.

As to the Respondent's "preponderance of evidence" burden, that becomes more problematic for them. Testimony cannot be "conclusory" - there must be a path explaining why the conclusion was reached. *Blesich v. Lake County Assessor,* 46 N.E.3d 14, 17 (Ind. Tax Ct. 2015); *see also Southlake,* 174 N.E.2d at 179 (citing *Southlake Indiana, LLC v. Lake County Assessor*, 160 N.E.3d 1156 (Ind. Tax Ct. 2020) (holding that mathematical income analysis on certain rents and common area

maintenance fees were conclusory and unsupported). Similarly, speculation offers no helpful information to a trier of fact and is inadmissible. *See D.H. by A.M.J. v. Whipple*, 103 N.E.3d 1119, 1127 (Ind. Ct. App. 2018), *reh'g denied*, *trans. denied*; *see also Hunnicut v. Boughner*, 231 N.E.2d 231 N.E.2d 159, 160 (Ind. Ct. App. 1967) (a decision or finding based upon guesses, conjecture, surmise, possibility, or speculation does not meet the "probative value" standard), *trans. denied*.

The Respondent's repetition of "ABA treatment is day-care because they are alike" does not work from an evidentiary standpoint. Given the *several* burdens the Respondent must meet coupled with the preference against inhibiting use of land, the Respondent needed to do more than rely on unsupported conclusions. In fact, the maxim of "showing your work" that applies in the school classroom applies in the courtroom, too. *See Blesich,* 46 N.E.3d at 17. The Respondent, though, deploys an improper strategy – that Grateful Care's "shown work" was actually favorable to them. This is not the standard. They needed to prove their case initially. They did not and their arguments amount to attempting to shift their own heavy burden onto Grateful Care without having made an initial case. That burden, though, does not shift until they make that initial case, though.

As if these burdens were not enough, the repetitive "ABA treatment is day-care because they are alike" as a legal argument is eroded even further. The Respondent (whether it's White River or Greenwood) is due *zero deference* on interpretations of law. The Indiana Supreme Court held that an agency's interpretation of legal questions is due no weight. *FMG Indianapolis, LLC*, 217

N.E.3d at 515. *See also Saurer v. Board of Zoning Appeals*, 629 N.E.2d 893, 898 (Ind Ct. App. 1994) (agency interpretation of text was to be disregarded). In other words, in agency actions involving interpretation of statutes and ordinances, an agency's interpretation is due no deference and questions of law are to be solely decided by the courts. *Id.* at 513-14. Thus, what Respondent deemed a 'day care' or 'custodial' is irrelevant and due no weight.

When considered in total – the Respondent's burden of proof and production cannot be fulfilled with its own unqualified opinion on what the law means, but rather it must have supported its position with substantial evidence. The Respondent argues, though that some of Grateful Care's statements might be supportive of its position. That, however, does not accurately represent its burden – the decision is not made on the 'total weight of the evidence' or that there is 'some evidence' that supports its position, but that the following formula computes:

1.) That the Respondent provides *the greater weight of the evidence*;

2.) That its evidence must be supportable and Respondent's opinions are due zero deference;

3.) That the trier of fact is allowed to find its evidence lacking or less truthful that that of Grateful Care;

4.) That its evidence must not be unqualified conclusions.

That the ALJ disagreed with the Respondent or that some of Grateful Care's evidence and testimony can be presented in varying lights does not mean that the ALJ was wrong or that Grateful Care's evidence supported the repeated speculation

that "ABA treatment is day-care because they are alike" argument. The ALJ was the trier of fact and performed a duty in the matter similar to a sitting judge. *Indiana Dep't of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993). The near absence, though, of probative and non-conclusory evidence on the necessary legal issues from the Respondent is damning.

6. RESPONDENT MISREPRESENTS WHAT EVIDENCE WAS NEEDED TO SUPPORT THE ALJ'S FINDINGS

The Respondent repeatedly asserts that some of the ALJ's Findings and Conclusions are "clearly erroneous" or "unsupported by the weight of the evidence." The Respondent's attack on the ALJ's finding glides past the interpretation of what substantial evidence means in the AOPA realm to support an ALJ's findings. Here, Respondent challenges findings in the ALJ's Order based on a lack of "substantial" evidence, and not based on a lack "reliable" evidence. *See* Ind. Code § 4-21.5-3-27(d). But, the Indiana Supreme Court in *Ind. High Sch. Athletic Ass'n, Inc. v. Watson* explained that substantial evidence means "more than a scintilla; that is, reasonable minds might accept it as adequate to support the conclusion." 938 N.E.2d 672, 680-81 (Ind. 2010). Importantly, "[i]t need not reach the level of preponderance" to support the finding – a much lower burden to support the finding than the Respondent needed to prove and present its case. *Id*.

In 2020, Justice Slaughter, concurring in *Indiana Department of Natural Resources v. Prosser*, cited *Watson*, discussing the issue of what is enough evidence to support an ALJ's finding, writing "[t]o prevail on judicial review, Prosser had to show the agency's factual findings were "unsupported by substantial evidence."

Unfortunately for Prosser, what qualifies as "substantial" evidence is not substantial at all – requiring nothing more than a mere "scintilla" of evidence. And under Indiana's Administrative Orders and Procedures Act, if there is sufficient evidence in the record, a reviewing court must defer to an agency's factfinding." 139 N.E.3d 702, 702 (Ind. 2020). Here, the "agency" was OALP and the ALJ.

The difference between the above cases and this one is purely procedural. Here, the "ultimate authority" – *i.e.*, the Fire Prevention and Safety Commission – is evaluating the ALJ's nonfinal order which needed to meet the "substantial evidence" test of Indiana Code § 4-21.5-3-27(d) , whereas in *Watson* and *Prosser*, a final decision was subjected to judicial review under a different part of AOPA. However, the standard on appeal was the same – was there "substantial evidence" to support the findings? Here, the record contained more than a mere "scintilla" of evidence to support the ALJ's findings with most findings and conclusions having some reference to testimony or evidence. What is concerning though is the Respondent tries to churn up conjecture, picking selectively from the hours of testimony from Grateful Care explaining the medical and psychiatric nature of their practice, to declare "A-HA! Because they care for their patients, certainly they are a day care because day cares also care for children!" What this conjecture does though is distract from the reality that its entire argument is based on selections of Grateful Care's evidence and omits any discussion of it own lack of evidence on these relevant issues, its lack of any inquiry about any medical or psychiatric aspect of Grateful Care's practice, and never interviewing the clinicians or medical personnel. Justice Slaughter's concurrence is

instructive on how little a scintilla of evidence is, yet somehow the Respondent's evidence was below even that low mark – presenting nothing on these medical issues the ALJ and Code deemed relevant to the analysis. However, even if they had touched on these issues, the law is clear that the ALJ as trier of fact is allowed to determine Grateful Care's evidence was more credible, relevant and just better. *Vogelsang*, 254 N.E.2d at 219.

Respondent attacks the ALJ and ALJ Order on 7 Findings of Fact, out of 60 total findings, alleging that Findings 18, 28, 48, 52, 56 and 59 were not supported by the evidence. Respondent also argues Conclusion of Law 20 is actually a Finding of Fact, and likewise not supported. Respondent then argues Conclusions of Law 19 and 24 from the ALJ's Order are not supported by the Findings and are clearly erroneous. The proper analysis to determine if a Finding is supported, as stated above, is if the evidence is "reliable" (*See* Ind. Code § 4-21.5-3-27(d)) and that it before "more than a scintilla; that is, reasonable minds might accept it as adequate to support the conclusion." *Watson*, 938 N.E.2d at 680-81. Thus, rather than cherry pick selective portions of Grateful Care's evidence to support the Respondent's "ABA is Day Care" mantra, the Commission should look at each finding and determine if Justice Slaughter's 'mere scintilla' is present to support the ALJ's respective findings and conclusion.

As to Finding 18, it states:

> 18. The treatment and/or services provided at the Greenwood Clinic are very different from day care services. Testimony of Kim Chudzinski and Testimony of Mark Meyers.

As to Finding 28, it states:

28. Grateful Care does not provide day care services at its Greenwood Clinic. Testimony of Kim Chudzinski.

These Findings cite testimony of Grateful Care's Clinic Director Kim Chudzinski and Clinician Martin (*sic* Mark) Meyers, respectively, and are fairly similar. At varying points during the hearing they testified to the following which support Findings 18 and 28, respectively.

- Respondent never inquired or evaluated ABA therapy vs conventional day care. *See* August 19, 2024 Hearing at 1:43,

- Patient to Staff Ratios are between 1:1 or 1:2. *See* August 19, 2024 Hearing at 1:40. 1:50. Day care staffing for three-year-olds is a 7:1 ratio and for first graders a 20:1 ratio. *See* Grateful Care's Ex. K.

- BCBA (Board Certified Behavior Analyst) training is obtained by staff, unlike a day-care. *See* August 19, 2024 Hearing at 1:42.

- Grateful Care rejects patients for services that do not have a medical diagnosis or referral. *See* August 19, 2024 Hearing at 1:46.

- Providing for 'just day-care' would not qualify for medical reimbursement. *See* August 19, 2024 Hearing at 1:49.

- ABA insurance and medical diagnostic intake can take six to eight weeks. *See* August 19, 2024 Hearing at 1:46.

- All care in ABA is *individualized* and not group curriculum. Respondent provided no evidence as to what constitutes daycare curriculum, if there is any. *See* August 19, 2024 Hearing at 1:52.

- The treatment is designed to end when the patient improves and is dictated by patient progress, not limited to an arbitrary period picked by a parent or coinciding with a school year. *See* August 19, 2024 Hearing at 1:54, 1:57.

- Billing medical insurance for "daycare" rather than providing therapy would

be billing fraud. *See* August 19, 2024 Hearing at 1:55.

- Parents / Guardian must actively participate in ABA therapy. *See* August 19, 2024 Hearing at 2:15.

- Chudzinski specifically disagreed with Respondent's request to agree that ABA is 'day care like' - stating "it is not anywhere near what a standard daycare would provide." She noted individualized instruction, plans, and even separate rooms used as examples. Respondent, rather than disagree with her rejection, indicated "he appreciated [the] answer." *See* August 19, 2024 Hearing at 2:31.

- Clinical evaluation and treatment of the patients through impacts of ABA on the neurobiology of the patient and reference to the Diagnostic Statistical Manual, Fifth Version. *See* August 19, 2024 Hearing at 2:43.

- Collection of patient data responses 'at an intensive rate with over a 1000 teaching opportunities per day.' *See* August 19, 2024 Hearing at 2:45.

- Individual treatment plans do not have unstructured or 'purposeless' time included in the daily schedule, but all segments of time are geared toward the treatment of the patient. *See* August 19, 2024 Hearing at 3:10.

- Respondent never inquired of Grateful Care about the medical or psychiatric nature of ABA treatment. *See* August 19, 2024 Hearing at 3:17.

Respondent's argues though that "no one disputes that the physical layout of Grateful Care is similar to a day care facility." Respondent's Objection at 9. Kim Chudzinski literally refuted that assertion when Respondent asked her about this at the hearing. *See* August 19, 2024 Hearing at 2:31. So, yes, someone does dispute this – Grateful Care. Respondent put on no evidence to liken Grateful Care's layout to a daycare. Respondent misrepresents Chudzinski's testimony. She did not agree with the "ABA is daycare" argument, but actually asserted that a party that was ignorant about the medical nature of the therapy could make that incorrect assumption. *See* August 19,

2024 Hearing at 2:28.

Pursuant to the standard that the evidence is "reliable" (See Ind. Code § 4-21.5-3-27(d)) and that it is "more than a scintilla; that is, reasonable minds might accept it as adequate to support the conclusion" then the ALJ's Order meets the standard. *See* Watson, 938 N.E.2d at 680-81. The Respondent's objection does not cite any evidence it produced. Further, Respondent waived presentation of any evidence rebutting Grateful Care's presentation of evidence. *See August 19, 2024 Hearing at* 3:30. Given the burdens discussed above, the Respondent's Objection does nothing more than disagree with the ALJ's Order and does demonstrate that these findings lack support.

As to Finding 48, it states:

48. The building is not currently unsafe for Grateful Care's use. Testimony of Derek Pullman.

This finding cites to testimony of Derek Holman (*sic* Pullman), a building code and fire code expert with RTM Consultants. Pullman testified that the building was not an unsafe building for Grateful Care's use. *See* August 19, 2024 Hearing at 1:00, 1:04. He further testified there were no condemnation notices or notices to stop work issued for the Premises. *See* August 19, 2024 Hearing at 1:00. He testified that various the Premise could be used for various other uses, such as physical therapy among other things. *See* August 19, 2024 Hearing at 1:00.

Noting there was no other testimony demonstrating that Holman was wrong or that Respondent had condemned the building as unsafe, though it had inspected it more than once, then Finding 48 is supported with evidence. *See* Watson, 938 N.E.2d

at 680-81

Findings 56 and 59 state, respectively:

> 56. Generally, businesses that provide speech therapy, physical therapy, and other medical services are considered outpatient clinics and are classified as "B" occupancies. Testimony of Derek Pullman.
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> 59. Derek Pullman, a former Indianapolis Building Inspector and consultant, conducted his own evaluation and inspection of Grateful Care's Greenwood Clinic and based on his own observations believes that Grateful Care is most appropriately classified as a "B" occupancy as therapy and/or medical care and/or treatment is being provided, this treatment is the focus of business, and this treatment is occurring in a clinical environment on a one-on-one basis– not custodial care. Testimony of Derek Pullman.

Holman testified in support of these statements. *See* August 19, 2024 Hearing at 1:00, 1:17, 1:18, 1:21. There was no testimony or evidence provided that these findings were incorrect.

Finding 52 concerned being able to safely egress from the building. Both Kim Chudzinski and Derek Holman testified in support of the prompt evacuation of the building. *See* August 19, 2024 Hearing at 1:16, 2:05. The Respondent argues that the "weight of the evidence does not support the ALJ's finding that Grateful Care could be evacuated in three minutes or less." The Record reveals that Grateful Care's testimony is the only evidence in support of this result. Respondent had no standard to determine safe egress. Grateful Care and Holman both testified, in part due to three ground level doors and the 1 to 1 or better patient to staff ratio, that the Premises could be exited in three minutes or less. Respondent never testified or provided evidence demonstrating it could not. Grateful Care provided *Mooney v. City of East Cleveland,* Court of Appeals of Ohio, Eighth District, Cuyahoga County, May 17, 1984

WL 5565, where in that case, N.F.P.A. Life Safety Code for normally expected egress was three minutes. Further, Grateful Care noted in another case concerning sleep disorder studies, rather than autism spectrum disorder, that the 1 to 1 or better staff to patient ratios can negate self-preservation concerns. Grateful Care's testimony was it averages better than 1 to 1 patient to staff ratios, approach a 1 to 2 patient to staff ratio. *See* August 19, 2024 Hearing at 1:40. 1:50. Grateful Care noted the decision in *The Cleveland Clinic Foundation, Petitioner v. Centers for Medicare & Medicaid, Services, DAB No. 5903 (2021), 2021 WL 6502462,* (July 14, 2021) that the 1 to 1 staff to patient ratio in that case negated self-preservation concerns where a sleep study was conducted in a multi-story hotel with child-patients encumbered by diagnostic apparatus. Respondent provided no authority indicating these determinations were faulty. Thus, Grateful Care testimony provides support for this Finding.

The remaining conclusions the Respondent disagreed with were cumulative statements that the Respondent had not met its burden of proof and that Grateful Care was a permissible "B" occupancy. As an overall matter, the ALJ evaluated the evidence and testimony and determined that the Respondent had not met its burden. The Respondent presented less testimony and fewer exhibits than Grateful Care, it provided no qualification of its witnesses as having any medical background, let alone qualifications to evaluate psychiatric care, and the testimony revealed it had made no inquiries concerning what constituted ABA case. The determination that Grateful Care operated as an outpatient clinic pursuant to Indiana Building Code, Section 202, as its primary use is correct. The testimony was clear – ABA therapy is not a daycare.

There was no contradictory testimony or evidence provided by the Respondent on this point that the care provided is not linked to a medical purpose and provided for less than 24 consecutive hours. As a result, the Respondent's argument that the ALJ's findings are not supported by substantial evidence is incorrect. To say otherwise ignores what is actually in the record and elevates the Respondent's inferences above the actual record.

7. RESPONDENT'S TARDY EVIDENCE WAS PROPERLY EXCLUDED.

The ALJ correctly refused Respondent's tardy evidence. The ALJ required the parties to file witness and exhibits lists before the August 19, 2024 hearing. Respondent submitted a pre-hearing exhibit list that did not contain the Belated Exhibits. Grateful Care timely submitted its exhibits. The August 19, 2024 hearing was fully conducted and the Respondent did not ask for special leave to amend its filed exhibit list at the hearing. Respondent creatively contends that the ALJ's August 19, 2024 Order was actually an invitation, rather than an order requiring compliance, to submit new evidence post-hearing. However, even at hearing, the ALJ only referenced September 23, 2024 as a briefing deadline, and not an invitation for submitting new evidence. *See* August 19, 2024 Hearing at 3:45. The ALJ, though, in denying Respondent's request made clear it was not inviting the submission of new evidence post-hearing.

The Respondent goes on that because the new evidence is publicly available that excuses its violation of the accepted scheduling order agreed upon by the Parties and issued by the ALJ. The ALJ made clear it was not the ready availability of the

items that mattered, but rather that the Respondent did not bother to present them timely that was objectionable. In fact, the ready availability of the items was a factor in the denial – with the ALJ's Order stating "[t]he Respondent has not sufficiently demonstrated that Respondent's Proposed supplemental Exhibits 8 and 9 could not be located and produced prior to the evidentiary hearing in this matter." This stands as a rejection of Respondent's argument that Evidence Rule 201(a)(1)(B) concerning accurate determination of readily available sources where the accuracy cannot be questions – the Judicial Notice exception – should somehow excuses its tardiness. The issue is not the accuracy or relevance – the items are not before a trier of fact so that argument cannot be had. Rather, a clear order was entered and the Respondent did not, after the fact, like the case it put on and now wants to put on more evidence. That is what the ALJ rejected.

The Respondent attempts to save this issue citing to Ind. Code § 4-21.5-3-26 that if an ALJ's Order is going to be based on evidence outside the record, the Parties must be fairly warned of this fact and be permitted to contest and rebut it. The matter never reached this stage. Further, an administrative Order must be based on *evidence received during the administrative hearing*, or material presented by the agency under Ind. Code § 4-21.5-3-26. *Ind. Civil Rights Com'n v. Wellington Village Apartments*, 594 N.E.2d 518, 527-8 (Ind. Ct. App. 1992) (Admissions could be admitted at hearing or via Ind. Code 4-21.5-3-26 if the agency pursued this avenue.) Here, since the creation of OALP, it acts as the "agency" in this scenario and declined to hear this evidence and it is not in the record. It is not required to pursue all

possible new evidence a party would like to present, especially after it has seen all the other evidence presented.

Respondent argues that the ALJ's exclusion of its tardy items was "clearly erroneous." A decision is clearly erroneous when the record contains no facts to support the decision. *Morgan v. White*, 56 N.E.3d 109, 115 (Ind. Ct. App. 2016). The simplest and obvious problem is that there is a substantial fact supporting the ALJ's decision – the Respondent did not present its evidence on time and its attempt to do so violates the ALJ Scheduling Order. The Respondent revives it previously rejected attempt to include its late items, but as a base issue to be "clearly erroneous" there needs to be *nothing* supporting the decision. They were late, and that's enough to support the decision. *Id.*

10. CONCLUSION

Respondent claims that Grateful Care provides "custodial care" for its patients – *i.e.*, an institutional use akin to a day care. It provided no evidence about what a daycare is, but nevertheless, this was its argument. Because of this, Respondent asserts that the clinic must meet additional regulations – specifically, sprinkler, alarm and fire wall requirements – based on Grateful Care's use of the property. Respondent, though, wholly ignored the medical and psychiatric aspects of Grateful Care's practice in reaching its "autism behavioral care is just daycare" conclusion. Further, Respondent provided no evidence other than conclusory statements concerning Grateful Care's operations being a day care. It further ignores its substantial burden in this matter, which the ALJ noted to them more than once at

hearing. Because of this, if the Commission has any doubt about the Respondent's claim, that doubt must be resolved in favor of Grateful Care. Based on Respondent's failure to develop any meaningful evidence of its own, the superior volume and quality of Grateful Care's evidence, and the Respondent's failure to meet its required burden of proof, the Commission should reject Respondent's objection.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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