UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0527

SEPTEMBER TERM, 2016

GINA DREXEL

v.

MARYLAND STATE DEPARTMENT OF EDUCATION, OFFICE OF CHILD CARE

Graeff,
Berger,
Salmon, James P.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: May 19, 2017

Gina Drexel was granted a Certificate of Registration in 1998 that allowed her to provide daycare for up to eight children. Ms. Drexel, thereafter, provided daycare to children in Howard County until June 5, 2015, when her certificate was suspended, on an emergency basis, by the Maryland Department of Education, acting through its Office of Child Care ("OCC"). Ms. Drexel filed an appeal of her suspension with the Maryland Office of Administrative Hearings ("OAH"), where the matter was referred to Administrative Law Judge ("ALJ") Laurie Bennett. A hearing concerning the temporary suspension was held by ALJ Bennett on June 15, 2015 and, on June 24, 2015, the ALJ filed a 15 page opinion in which she affirmed the suspension of Ms. Drexel's certificate for a period not to exceed forty-five days.

On July 9, 2015, the OCC notified Ms. Drexel that it intended to revoke her child care certificate. Upon receipt of this notice, Ms. Drexel, on July 11, 2015, requested a hearing before the OAH to litigate the issue of whether revocation of her certificate was legally justified. A hearing was held before ALJ M. Teresa Garland on September 16, 2015. ALJ Garland, on October 22, 2015, filed a decision in which she affirmed the OCC's action in revoking Ms. Drexel's child care certificate.

Ms. Drexel filed a timely petition for judicial review in the Circuit Court for Howard County to contest ALJ Garland's decision. After considering legal memorandum and oral argument from counsel representing the OCC and Ms. Drexel, the circuit court affirmed ALJ Garland's decision. Ms. Drexel then filed this timely appeal in which she raises two issues that she phrases as follows: 1) [w]hether substantial evidence supported the decision of the Maryland State Department of Education, Office of Child Care[,] to revoke the

certificate of registration of Drexel; and 2) [w]hether the decision of the Maryland State Department of Education, Office of Child Care[,] was premised upon an erroneous conclusion of law. We shall answer "yes" to the first issue presented and "no" to the second and affirm the judgment of the Circuit Court for Howard County.

I.

BACKGROUND FACTS

A. Evidence Introduced at the Hearing Before ALJ Garland.

1. Undisputed Facts.

From 1998 to June 5, 2015, Gina Drexel operated a licensed day care center at her home located at 17540 Hardy Road, Mt. Airy, Maryland ("the Property"). The Property is divided into two parts. One part, referred to in the testimony as "the addition," was used for Ms. Drexel's day care business. The other part of the house was used by Ms. Drexel and her husband, Richard, as their residence ("the family portion"). Living with Mr. and Mrs. Drexel in the family portion was a friend, Paul Gagnon, along with the Drexel's son and the Drexel's three-year-old grandson, Richie. The family part of the house had two stories and, under pertinent Maryland regulations, no part of the family portion of the house could be used for child care purposes.

The certificate issued by the OCC to Ms. Drexel allowed her to care for a maximum of eight children at any one time.

On May 26, 2015, the OCC received an anonymous tip advising that Ms. Drexel "had between 10 and 14 children present and that Mr. Drexel helps by taking the children outside or upstairs."

On May 29, 2015, as a result of the anonymous tip, Tammy Guthland, an OCC Licensing Specialist, paid a visit to Ms. Drexel's day care facility. Five days later, on June 4, 2015, Ms. Guthland made a follow-up visit to that facility. During the follow-up visit, Ms. Guthland asked to inspect the family portion of the Property but Ms. Drexel refused her that permission to do so.

2. Testimony of Tammy Guthland.

Ms. Guthland testified that she had been a licensing specialist for the OCC, serving Howard and Carroll counties since 2007. Prior to May 29, 2015, she had visited Ms. Drexel's child care facility on three occasions. On one of those prior occasions, Ms. Guthland's inspection showed that Ms. Drexel had one extra child present that Ms. Drexel did not count toward the eight child capacity because, by Ms. Drexel's reasoning, the child was over the age of eight and could be sent home immediately. Believing that Ms. Drexel misunderstood the applicable OCC regulations, Ms. Guthland explained to Ms. Drexel that being able to be send a child home immediately required that the child be able to be sent home under "their parent's control [and] supervision[.]" It did not mean that a child would not be counted if the child could be removed from the premises by one of Ms. Drexel's relatives. Because Ms. Guthland believed that Ms. Drexel had simply misunderstood the pertinent regulation, she did not cite Ms. Drexel for a violation at that time.

On May 29, 2015, Ms. Guthland arrived to inspect the Property at approximately 4:00 p.m. When she approached the Property, she observed Ms. Drexel outside with 12 children, which was four more than were allowed. Ms. Drexel told Ms. Guthland that she did not count the four children in her eight children "population" because they did not come

every day and could leave immediately. She added that the four children were over age eight. The four children were Madison U., Mary Jo K.[1], Elizabeth K., and Kai P. Ms. Guthland asked each child to give their name and birthday. Twelve children were present, one of whom was Ms. Drexel's grandson, age three.[2]

Ms. Guthland asked Ms. Drexel where the parents of the four extra children were, and Ms. Drexel replied that "the parents were at work."

Ms. Drexel then phoned her husband who took the four extra children, plus Ms. Drexel's three-year-old grandson, and drove off with them. Ms. Guthland testified that she had "no idea" where Mr. Drexel took the children.

Ms. Guthland further testified that day care providers are required to keep on file an "emergency card" for each child who is under the provider's care. That card is to contain contact information in case a parent has to be notified that there is an emergency. Ms. Guthland asked for, but Ms. Drexel could not produce, an emergency card for three "visitors" i.e., Elizabeth K., Kai P., and Madison U. She could produce a card for Mary Jo K., one of the purported "visitors," but could not produce a card for Avery U., age 8, the sister of Madison U.

[1] According to Mary Jo K.'s mother, Samantha K., whose testimony is summarized *infra*, Mary Jo was seven as of September 16, 2015. An exhibit entered into evidence confirmed that fact because it shows that Mary Jo K. was born on August 22, 2008.

[2] According to an exhibit introduced into evidence that corroborated Ms. Guthland's testimony, the children, present on May 29, 2015, not counting Ms. Drexel's grandson, were: 1) Lilyana C. (age 4); 2) James W. (age 4); 3) Parker P. (age 18 months); 4) Parker Ann E. (age 21 months); 5) Madison U. (age 11); 6) Avery U. (age 8); 7) Elizabeth K. (age 9); 8) Mary Jo K. (age 6); 9) Lola S. (age 4); 10) Troy H. (age 4); and 11) Kai P. (age 11).

As a result of the May 29, 2015 inspection, Ms. Guthland cited Ms. Drexel for violating regulation No. 13A.15.04.03A – exceeding the child capacity number stated on the certificate of registration; and regulation 13A.15.03.04A – failure to maintain emergency information for each child "on a form supplied or approved by" OCC.

On June 4, 2015, Ms. Guthland made a follow-up inspection of the Property. When she arrived at Ms. Drexel's day care facility, seven children were present including Elizabeth K., one of the (purported) "visitors" who was also present on May 29, 2015. Even though Ms. Drexel produced no emergency card for Elizabeth K. at the time of the May 29th visit, this time she produced such a card which was, according to Ms. Guthland, "an older one. It was not a brand new emergency card."

During the June 4, 2015 inspection, Ms. Guthland talked to a four-year-old child who said her name was "Lily."[3] Lily told Ms. Guthland the names of all the children that were present. After she finished giving her those names, Lily pointed to the family portion of the house and said that "Maddie was over there." Ms. Guthland then asked to inspect the family portion of the Property. She made the request for two reasons. First, based on what Lily had said, and second, because the anonymous tipster had reported (on May 26, 2015) that Mr. Drexel was keeping some children "upstairs," which she believed referred to the two-story family portion of the house, because the "addition" only had one story.

When Ms. Guthland asked to inspect the family portion of the house, Ms. Drexel angrily refused, saying the house was "messy." Ms. Guthland warned Ms. Drexel that if

[3] In the transcript the child's name is spelled "Lilly" but in the day care facility's records, her first name is listed as "Lilyana."

she did not allow an inspection, there would be consequences that might include suspension of her license. After that warning, Ms. Drexel went into the family portion of the house and made a phone call. She then returned and demanded to know whether Ms. Guthland had a search warrant. Ms. Guthland replied that she had no warrant and did not need one to inspect all areas of the home during child care hours.

Because Ms. Drexel refused to permit inspection of all areas of the Property, Ms. Guthland felt that Ms. Drexel was obstructing her in the performance of her duties, and cited Ms. Drexel for a violation of Code of Maryland Regulations [COMAR] 13A.15.13.01B.

On June 5, 2015, Ms. Guthland, accompanied by Sharon Afework, an OCC licensing specialist, delivered to Ms. Drexel a notice which advised that her license to provide day care was suspended for 45 days.

After the June 5, 2015 suspension, according to Ms. Guthland's testimony, the OCC received a second anonymous call. The caller reported that on June 4, 2015, which was the date Ms. Guthland made her follow-up inspection, Ms. Drexel saw Ms. Guthland approaching the Property and instructed the children not to tell Ms. Guthland that Madison "was on the other side of the house" because this was a "secret." The anonymous caller also said, mysteriously, that "Ms. Drexel has a lot of secrets."

3. <u>Testimony of Sharon Afework</u>.

Sharon Afework accompanied Ms. Guthland on her visit to the Property on June 5, 2015. She testified that when the parents arrived to pick up their children after the notice of suspension of Ms. Drexel's license had been served, the excuse Ms. Drexel gave for not

allowing an inspection of the family portion of the Property was because that part of the house was "messy" and "she didn't want a woman in the house … because women talk to each other about housekeeping issues." Ms. Drexel was also quoted as saying that if a man had asked to inspect the house, she would have allowed him in to make an inspection.

4. Testimony of Louis Valenti.

Louis Valenti, a regional manager for the OCC, testified that he received a call from Mark U. on June 8, 2015, which was three days after Ms. Drexel's license was suspended. Mark U. told Mr. Valenti that he did not receive a copy of the letter from OCC that was sent to parents who had children under Ms. Drexel's care. The reason he was not notified, according to Mr. Valenti, was because the OCC did not have emergency cards for Mark U.'s children.

Mr. U. told Mr. Valenti that he had two children[4] that were cared for by Ms. Drexel and that he was going to have trouble getting after-school care for his children because of Ms. Drexel's suspension. Mark U. also said that Ms. Drexel was the only day care provider on the children's bus route. Parenthetically, we note that one of Mark U.'s children is Madison ("Maddie") U., a child who was, according to what Ms. Drexel told Ms. Guthland on May 29, 2015, merely a visitor**.** In a subsequent conversation with Mr. Valenti on September 11, 2015, Mark U. told Mr. Valenti that, although he would have to check with his wife, he believed he was paying Ms. Drexel $200 per week for the care provided to his

[4] His children are Avery U., age 8, and Madison U., age 11.

children. He added that his children had been under Ms. Drexel's care since they were six weeks old.

Mr. Valenti gave the following testimony, on direct-examination, concerning the way "visiting children" are counted for purposes of establishing whether a day care provider is over-capacity:

> Q. Were you made aware of Ms. Drexel's statement that four children were allegedly visiting that day?
>
> A. Yes.
>
> Q. Can you explain how the OCC counts visiting children as children in care if they're younger than 8 years old?
>
> A. All children under the age of 8 are counted in the number.
>
> Q. And what about if they're 8 years or older?
>
> A. If children are 8 or older, they must be able to be sent home immediately so that there is another person caring for those children. You can't just send them off into the wild and expect them to be cared for. So children are counted if you are providing the supervision, and Ms. Drexel, by her own admission, stated that the parents of those children [were] at work and there was no place to send those children.
>
> Q. Would simply taking the children off the premises be sufficient?
>
> A. No.
>
> Q. If a child is unable to be sent home immediately, are they considered a child in care?
>
> A. They are.
>
> Q. And if a child is in care, is the provider required to have emergency information on hand?
>
> A. Yes, they are.
>
> Q. What's the danger of missing emergency cards?

> A. Well, the emergency cards provide us with the names of people who are able to pick up the children that the children can be released to. It also gives the provider emergency contact information if there's a problem with their child and it gives them permission to take the child to the doctor if there's an emergency. So they're very important.

5. <u>Testimony of Appellant, Ms. Drexel</u>.

Ms. Drexel testified that on May 29, 2015, when Ms. Guthland did her inspection, she had seven children in her care. In addition, her grandson, Richie, was present along with four visitors. Initially she testified that the four visitors were Madison U., Mary Jo K., Ellie K., and Kai P. She said that she did not count those four children as being in her day care "population." She explained: "They were visiting. They don't come every day. They come occasionally to visit, and my reg[ulation] states that children 8 and older are not in population of children as long as they can leave immediately." According to Ms. Drexel, the four children could "leave immediately" because they lived in the area and "went to their parents." She added that she was very good friends with the parents of the four children and the reason they were present on the 29th of May was because she was going to have a graduation party for Kai P., one of the "visitors."

Ms. Drexel further testified that when Ms. Guthland told her that the four extra children "had to go," she told her husband to take the "visiting kids" home. Her husband did so and he also took along with him his grandson, Richie.

Ms. Drexel testified that on May 29, 2015, all of the parents of the "visiting children" were at home and therefore she did not need to notify them that her husband was

going to deliver them to their homes. Later in her testimony, Ms. Drexel added that of the "visiting children" one of their parents is retired and the others "work out of their homes."[5]

On cross-examination, Ms. Drexel changed her testimony, slightly. She said that Mary Jo K. was not a "visitor" because she was under the age of eight and was part of her day care "population." She added that Mary Jo was sent home on May 29 not because she was a "visitor" but because Mary Jo wanted to go home with her sister (Elizabeth K.).

Ms. Drexel testified that when Ms. Guthland made her June 4, 2015 visit, seven children were present. Upon arrival, Ms. Guthland "kept asking about Madison" whereupon four-year-old Lily said "Madison's here." Next, Ellie (Elizabeth K.), age 9, told Lily that "Madison's not here today." Ms. Guthland then accused Ms. Drexel of "hiding children." Ms. Drexel denied that accusation, whereupon Ms. Guthland said that she was there to perform the second-half of an inspection because there was a complaint "last week" that Ms. Drexel was hiding children in the family portion of the Property. Ms. Drexel did not believe Ms. Guthland because, in her opinion, if there had been such a complaint, Ms. Guthland wouldn't have waited until June 4, 2015 to make the inspection.

Ms. Drexel asked Ms. Guthland why she had not gone into the family portion of her house last week. Ms. Guthland replied that on the 29th of May all of the children were outside but presently, she needed to go into the house because "the children that were here last week aren't here [now] and you're probably hiding them in your house." At that point,

[5] That testimony was contradicted by the testimony, summarized *infra*, of Kai P.'s, mother and the testimony of the mother of Mary Jo K. and Elizabeth K.

Ms. Drexel asked Ms. Guthland for her OCC credentials,[6] but none were produced. After talking to her husband, Ms. Drexel told Ms. Guthland that she wasn't letting her into the family portion of the house unless she showed her some "paperwork." When Ms. Guthland threatened to call the police, Ms. Drexel replied that she would let the police in but she was not going to let Ms. Guthland into the family portion of her house. With that, Ms. Guthland said that she was going back to the office and was going to revoke Ms. Drexel's license.

In her testimony, Ms. Drexel denied ever having told the children to "keep secrets." She denied as well the part of Ms. Guthland's testimony where Ms. Guthland had said that on an occasion prior to May 29, 2015, Ms. Guthland warned her about her [Ms. Drexel's] misreading of the child capacity regulations.

6. <u>Testimony of Richard Carroll Drexel, Appellant's Husband</u>.

Mr. Drexel testified that on the afternoon of May 29, 2015, there were 11 children present – not counting his grandson. Four of those children, "Maddie, Mary Jo, Kai and Ellie," came to the Property after school finished for the day. He was upstairs in the family quarters when his wife called him and told him that he had to take the aforementioned four children home. She did not say why, and Mr. Drexel did not ask any questions. He then drove all four children to their homes. He dropped Mary Jo K. and Elizabeth K. off at their home where the children's grandparents were present; he dropped Kai off "with his

[6] In her testimony, Ms. Guthland denied that any such request was made.

mother"[7] and then dropped Maddie off at her father's residence. He recalled that Maddie's father, Mark U., had a broken foot at the time and that he "works out of the house most of the time anyway." When he returned home, Ms. Guthland was no longer there. Mr. Drexel denied ever letting children into the family part of the house.

7. Testimony of Julianne P.

Julianne P., mother of Kai P., testified that although she did not know the exact date, there came a time when Kai wanted to start coming home after school rather than going to day care at Ms. Drexel's house. By May of 2015, Kai was just at Ms. Drexel's house for "visiting" so that she (Julianne P.) could be assured that "he was okay if he was home long hours after school while I worked." She also testified that Kai was at Ms. Drexel's house for a party on May 29, 2015.

On cross-examination, Ms. P. said that sometimes Kai went to Ms. Drexel's after school when there wasn't a party. He did so "sort of more for my comfort level."

8. Testimony of Samantha K.

Samantha K. is the mother of Lucas K. and Mary Jo K. Both of these children were sent to Ms. Drexel's for day care. As of the date of the hearing, Lucas was five and Mary Jo was 7. A third child, Elizabeth K. ("Ellie"), age 9, also went to Ms. Drexel's after school where she waits until she is transported to the home of a tutor. Ms. K. testified that she works in the District of Columbia and lives, along with her children, with her parents. On

[7] According to ALJ Bennett's opinion, introduced at the hearing before ALG Garland as "OCC's Exhibit E." Ms. Drexel testified that "as [Mr. Drexel] was driving away from the day care [facility], [Mr. Drexel] saw Kai P.'s mother driving toward the day care [facility], and handed off the child to her."

June 4, 2015, Ms. K's father called her and told her that Ms. Drexel's husband, Richard, had dropped the children off "prematurely." Her father did not tell her why. This occurred on a Thursday, which is the day of the week that her ex-husband has overnight visitation with the children and, as a result, she usually works late. She recalled that on Thursdays, Elizabeth K. had a tutor and that was the night that Mr. Drexel took Elizabeth and the two other children home. She did not testify as to whom, if anyone, took the children home on May 29, 2015.

In her testimony, Ms. K. was highly complimentary about the way Ms. Drexel operated her day care facility, saying that it was the best such facility that had ever cared for her children.

9. Testimony of Appellant's Son.

Ms. Drexel's son, Richard C. Drexel, testified that he was present at his mother's child care facility on May 29, 2015. When Ms. Guthland arrived, he was outside building a fire pit. His son, three-year-old Richie, was with him. He was also present on June 4, 2015, when Ms. Guthland made her follow-up visit to the facility. He remembered that there was a discussion about a child being in the family portion of the Property and that Ms. Guthland wanted to go inside the family portion. His mother asked Ms. Guthland to produce some identification but Ms. Guthland produced none. He further testified that his mother told Ms. Guthland to "call the cops and get a warrant to come in[.]"

II.

COMAR REGULATIONS

As ALJ Garland noted in her decision, revocation of an OCC license is within OCC's authority and can be properly based on a violation of one or more of the regulations when the health, safety, or welfare of a child in the home is threatened and when evaluation of information provided to or acquired by the office indicates that the provider is unable to care for the welfare of children. *See* COMAR 13A.15.13.07A(1) and (3).

COMAR 13A.15.13.02 requires the OCC to investigate both "written and oral complaints" that relate "to a potential violation of a regulation under this subtitle, including anonymous complaints[.]"

COMAR 13A.15.13.01 reads:

> A. The office shall inspect each family child care home:
>
> (1) On an announced basis before issuing a certificate of initial registration or continuing registration; and
>
> (2) On an unannounced basis, at least once within each 12-month period after the date that a certificate of initial registration or continuing registration was issued to the provider.
>
> B. The provider or substitute shall permit inspection of all areas of the home by the agency representative during the provider's hours of operation.
>
> C. The agency representative may make inspections, in addition to the announced and unannounced inspections specified in § A of this regulation, without prior notice to the provider.
>
> D. Upon request, the provider or substitute shall make the records required by this subtitle available to the agency representative for inspection and copying.
>
> E. A provider or substitute may request satisfactory identification from the agency representative before admitting the person for an inspection.

F. A provider may appeal a finding of noncompliance with this subtitle by requesting a review of findings by the regional office or the central office of the Agency.

(Emphasis added.)

COMAR 13A.15.03.04 reads, in pertinent part:

A. The provider shall:

(1) Maintain emergency information for each child on a form supplied or approved by the office;

(2) Keep the emergency forms for the children who currently are in the provider's care in a readily accessible location, including taking the forms when taking the children away from the home; and

(3) Arrange to have the form for each child updated as needed, but at least annually, and signed and dated by the parent.

COMAR 13A.15.04.03 reads, in relevant part:

D. The maximum total capacity of a family child care home may not exceed eight children, of whom not more than four may be younger than 2 years old.
E. The office:

(1) Shall count as a child in care a resident who is younger than 6 years old; and

(2) May count as a child in care a child who is visiting the home if the child:

(a) Is younger than 8 years old and unaccompanied by an adult; or

(b) Cannot be sent home immediately.

III.

ALJ GARLAND'S DECISION AND ORDER

In her written decision, ALJ Garland made various findings of fact, including the following one, *viz*.:

- On May 29, 2015, Ms. Guthland initiated an investigation by inspecting the Appellant's family day care.
- The Appellant had several previous contacts with Ms. Guthland. She knew that Ms. Guthland was her licensing specialist and therefore did not question Ms. Guthland's identity.
- When Ms. Guthland arrived at the family day care home, the Appellant was the only adult outside with twelve children and the Grandson.
- The Appellant did not consider the Grandson enrolled "in care" because the Grandson's father (the Son [of Ms. Drexel]) was present.
- The Appellant did not consider the other four children as "part of her population" because they were on the premises for a graduation party.
- Shortly after Ms. Guthland arrived, the Appellant called the Husband on his cell phone. The Husband came outside and did not question Ms. Guthland's identity.
- Ms. Guthland and the Appellant went inside, to the Addition, where Ms. Guthland asked to see the children's emergency cards. The Appellant told Ms. Guthland that she did not have cards for four older children because they were just visiting for the day. The Appellant also did not have an emergency card for the Grandson. The Appellant produced emergency cards for eight children.
- Ms. Guthland asked the children their names and birth dates to verify their ages. The four allegedly visiting children were eight years old or older.
- Ms. Guthland asked the Appellant where the allegedly visiting children's parents were and the Appellant said they were at work. Ms. Guthland instructed the Appellant to remove four children from care in order to comply with the eight-child capacity established by her family day care Certificate.
- Removing the children from care means returning the children to their parents, guardian or other authorized caretaker.
- The Husband [Mr. Drexel] drove away from the family day care with the four school-age children and the Grandson.
- Ms. Guthland completed her inspection report at the Appellant's family day care and the Appellant refused to sign it.
- The OCC routinely conducts a follow-up inspection when an earlier inspection reveals a family day care is over capacity.
- On June 4, 2015, Ms. Guthland returned to the Appellant's family day care home to conduct the follow-up inspection. After Ms. Guthland knocked and waited several minutes, the Appellant answered the door.
- Ms. Guthland entered the Addition.
- The Appellant knew Ms. Guthland and did not question her identity.
- Ms. Guthland observed seven children in care.

- Ms. Guthland asked for the children's emergency cards. Among the cards the Appellant produced was one for a child [Elizabeth K.] whom the Appellant had identified as a visitor on May 29, 2015. The Appellant had not provided this child's card to Ms. Guthland on May 29, 2015.
- A child named Lily told Ms. Guthland the names of all of the children in care and told Ms. Guthland that Maddie (also known as Madison) was "over there," indicating the Main House, which was not approved for the Appellant's family day care.
- Because the initial anonymous complainant reported that the Appellant cared for children upstairs (and the Addition does not have an upstairs) and Lily had reported moments earlier that Maddie was in the Main House, Ms. Guthland needed to inspect the Main House.
- When Ms. Guthland told the Appellant that she wanted to inspect the Main House, the Appellant yelled and called Ms. Guthland "a liar," locked the door to the Main House with a key and refused to allow Ms. Guthland entry into the Main House.
- The Appellant told Ms. Guthland that she needed a search warrant to inspect the Main House.
- The Appellant was agitated and upset. At some point, the Appellant had the Son [Richard C. Drexel] come to the Addition so that she could call the Husband, who was at the library, to tell him what was happening.
- After the Appellant talked to the Husband, she locked the door between the Addition and the Main House, denied Ms. Guthland entry to the Main House and told Ms. Guthland that the Main House was too messy to inspect. The Appellant did not tell Ms. Guthland that she was denying inspection because Ms. Guthland did not produce her identification card/credentials.
- Because the Appellant was so agitated and confrontational, Ms. Guthland completed her inspection report at her office and not at the Appellant's family day care that same day. When presented with the inspection report, the Appellant refused to sign it.
- On June 5, 2015, the OCC suspended the Appellant's Certificate on an emergency basis.
- On June 5, 2015, Ms. Guthland and Sharon Afework, OCC Licensing Specialist, hand-delivered the OCC's emergency suspension notice to the Appellant. The Appellant referred to Ms. Afework as Ms. Guthland's "bodyguard" and stated that the emergency suspension was "revenge" by Ms. Guthland because the Appellant would not allow her entry into the Main House on June 4, 2015.

The ALJ, under the heading "Discussion," stated that "[w]ith respect to the overcapacity issue on May 29, 2015, I also find the Appellant's testimony to lack credibility."

The ALJ's conclusions of law were:

> Based on the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the OCC properly revoked the Appellant's Family Child Care certificate of registration. Md. Code Ann., Fam. Law § 5-524 (2012); COMAR 13A.15.13.07A(1) and (3); COMAR 13A.15.03.04; COMAR 13A.15.04.03; COMAR 13A.15.13.01(B).

IV.

STANDARD OF REVIEW

When reviewing the decision of an administrative agency, "this Court reviews the agency's decision, not the circuit court's decision." *Long Green Valley Ass'n v. Prigel Family Creamery*, 206 Md. App. 264, 273, 47 A.3d 1087 (2012) (citation omitted). In so doing, "we are limited to determining if there is substantial evidence in the record as a whole to support the agency's finding and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law." *Balt. Police Dep't v. Ellsworth*, 211 Md. App. 198, 207, 63 A.3d 1192 (citation omitted), *cert. granted*, 432 Md. 466, 69 A.3d 474 (2013). Stated differently, "[o]ur primary goal is to determine whether the agency's decision is in accordance with the law or whether it is arbitrary, illegal, and capricious." *Long Green Valley*, 206 Md. App. at 274, 47 A.3d 1087 (citation omitted). "In applying the substantial evidence test, we must decide whether a reasoning mind reasonably could have reached the factual conclusion the agency reached." *Rideout v. Dep't of Pub. Safety & Corr. Servs.*, 149 Md. App. 649, 656, 818 A.2d 250 (2003) (citation omitted). "When deciding issues of law, however, our review is expansive, and we may substitute our judgment for that of the agency if there are erroneous conclusions of law." *Maryland Dep't of the Env't v. Ives*, 136 Md. App. 581, 585, 766 A.2d 657 (2001) (citation omitted). As to error of law, this Court's review is *de novo*. *Taylor v. Harford Cnty. Dep't of Soc. Servs.*, 384 Md. 213, 223, 862 A.2d 1026 (2004) applying *de novo* review to determine whether an Administrative Law Judge "applied the correct legal standard in reaching his conclusion").

Matthews v. Housing Authority of Baltimore City, 216 Md. App. 572, 582 (2014).

V.

DISCUSSION

A. First Issue Presented.

Appellant contends that the appellee failed to produce substantial evidence that she violated any of the three regulations at issue. We shall discuss those regulations *seriatim*.

1. Violation of COMAR 13A.15.04.03E (The Number of Children Present in Care at Any One Time May Not Exceed the Child Capacity Number Stated on the Certificate of Registration).

Appellant contends that the OCC failed to produce substantial evidence that she violated COMAR 13A.15.04.03E and bases that contention on the following language set forth in COMAR 13A.15.04.03E, *viz.*:

> E. The office:
>
> (1) Shall count as a child in care a resident who is younger than 6 years old; and
> (2) May count as a child in care a child who is visiting the home if the child:
> (a) Is younger than 8 years old and unaccompanied by an adult; or
> (b) Cannot be sent home immediately.

Appellant argues:

> The OCC inspector concluded that Drexel had an impermissible number of children within the home based upon her assumption that the children over the age of eight were not able to be sent home. Under the applicable regulation, if a child over the age of eight is able to be sent home, then the child does not count toward the maximum number of children allowed within the family child care home. COMAR 13A.15.04.03(E)(2)(b). This regulation is otherwise consistent with Maryland family law, which does not prohibit children over the age of eight years old from being left unattended. Md. Code, Fam. Law § 5-801. However, Drexel testified at the hearing that Madison [U.], Mary Jo [K.], Ellie (Elizabeth) [K.], and Kai [P.]

> were not included within the population of children within the home because they were visiting and were able to be sent home to their parents, who lived nearby.
>
> During the OCC's first site visit, the OCC inspector testified that twelve children were present at Drexel's family child care home. However, as conceded by the OCC inspector in testimony at the OAH Hearing, if a child is over the age of eight and is capable of immediately being sent home to the care of a parent, then that child does not count toward the maximum number of children allowable in the family child care home. The OCC inspector testified that, upon her first site visit on May 29, 2015, five of the twelve children were driven away immediately by Drexel's husband. At the Hearing, Drexel testified that the children were taken to their parents and that she had personal knowledge that their parents were available to take custody of the children at that time. Conversely, the OCC inspector testified at the Hearing that she did not know where the children went. Therefore, without a basis in fact or evidence, the OCC inspector determined that the children were not able to be immediately sent home to their parents and were therefore required to be included in the OCC's count, which resulted in the identification of a violation by the OCC.

(Emphasis added.)

In regard to the part of the above argument that we have emphasized, two points are worth noting. First, ALJ Garland did not find Ms. Drexel's testimony in regard to the overcapacity issues credible. Ms. Guthland testified, and the ALJ found as a fact, that Ms. Drexel told Ms. Guthland, on May 29, 2015, that the parents of the four "visitors" were at work. In addition, it is important to note that the above argument assumes that the four children were all merely visiting, which Ms. Drexel defined as a child who comes only occasionally to visit. The regulation makes it clear that if a child is not visiting, it wouldn't matter if the child could be sent home immediately.

Taking the evidence in the light most favorable to the appellee, the four children were not all "visitors." While it is true that Ms. Drexel, at one point, called Mary Jo K. a

visitor, she later admitted that Mary Jo was part of her "population." i.e., a child for whom she regularly provided day care. Moreover, the evidence is uncontradicted that Mary Jo K. was, at all times here relevant, under eight years of age and unaccompanied by an adult. So even if she were "a visitor," and even if she could be sent home immediately, she still counted as part of the "population" of children in determining whether Ms. Drexel cared for more than eight children.

Also, based on what Mark U. told Mr. Valenti, Madison U., Mr. U.'s older daughter, was a child for whom Ms. Drexel had regularly provided day care for many years.

Another child, who Ms. Drexel claimed was a May 29, 2015 "visitor," was Elizabeth K. That part of Ms. Drexel's testimony was put in doubt because Elizabeth K. was again found at the facility on June 4, 2015. On that second date, Ms. Drexel produced an emergency card for Elizabeth K. The fact that Elizabeth K. was present both days plus the fact that Ms. Drexel produced an old looking emergency card for Elizabeth K., supported a rational inference that Elizabeth K. was a child for whom Ms. Drexel regularly provided care and supervision.[8]

[8] This is the inference drawn by ALJ Bennett whose decision was introduced as an exhibit at the hearing held by ALJ Garland. ALJ Bennett wrote:

> At the June 4 inspection, however, the Appellant gave Ms. Guthland an emergency card for one of the children [Elizabeth K.] she identified as a visitor on May 29. Ms. Guthland added that the card looked old, meaning the Appellant did not just create a new card because the child joined care after May 29. The Appellant did not refute Ms. Guthland's testimony about this child's emergency card. A preponderance of the evidence therefore shows that this child was not a visitor on May 29 and even assuming the other three children were, in fact, visitors, this child would have constituted the ninth child in care. The Appellant exceeded capacity on May 29, 2015.

We turn now to Kai P. We will assume that Kai P. was only an occasional visitor at Ms. Drexel's day care facility. The question then becomes whether he could be sent home immediately so that, in Mr. Valenti's words "there is another person caring" for that child. Ms. Guthland testified that Ms. Drexel told her that the parents of all four of the "visitors," which included Kai P., were presently at work. Kai P,'s mother, Julianne P., corroborated this by saying that Kai P. sometimes went to Ms. Drexel's home after school so that she could be assured that he was "okay" during after school hours while she worked. From the above, it could be inferred, legitimately, that when Kai P. arrived for his May 29, 2015 visit, no one was at home to supervise Kai P.

We reject appellant's argument that under the applicable regulation, a child does not count as part of the child care population merely because that child can be sent home immediately to the care of a parent. For that exception to apply, the child must be "visiting" the day care facility. The appellee presented strong proof that three of the children Ms. Drexel sent home on May 29, 2015 (Mary Jo K., Elizabeth K., and Madison U.) were not simply occasional visitors at the day care facility. As to the fourth child (Kai P.) the evidence supported the inference that his mother worked regularly and that if he were sent home, no parent or guardian would be there to supervise him.

Appellant next argues:

> [B]ased on this same erroneous assumption, the OCC inspector issued another violation to Drexel for failure to provide emergency contact cards for the visiting children. *Id.* However, because the children were visitors who were not properly included within the OCC's count, no emergency contact cards were required under the applicable OCC regulation. COMAR 13A.15.03.04(A)(2). Thus, both violations that OCC noted on May 29, 2015, were improperly noted and, indeed, unsupported by the evidence readily

> available to OCC. As the OCC's revocation of Drexel's Certificate of Registration arose from these wrongly noted violations, OCC's decision was not justified by substantial evidence and was erroneous.

The above argument overlooks the testimony of Ms. Guthland that Ms. Drexel did not have an emergency card for Avery U., Madison U.'s sister. Avery, age 8, was unquestionably not a "visitor." Aside from Avery U., for reasons already stated, there were at least two other children, Kai P. and Madison U., who, based on all the evidence, were either not visitors (Madison U.) or could not be sent home immediately (Kai P.) and were therefore children for whom Ms. Drexel should have had emergency cards.

Appellant's next argument, in regard to the (alleged) lack of substantial evidence is:

> Finally, as there were no proper violations noted in the initial site visit, in order for the OCC inspector to remain consistent with OCC's policies, no follow-up inspection should have occurred on June 4, 2015, and any violations noted during the follow-up inspection (i.e., the failure to permit the OCC inspector to inspect Drexel's family child care home in purported violation of COMAR 13A.15.13.01) should be disregarded. As conceded by the OCC in the Circuit Court, "[i]t is standard practice to conduct a follow up inspection after the substance of a complaint has been confirmed."

(Emphasis added.)

The above argument is based on two false premises. The first premise is that Ms. Guthland's May 29, 2015 visit uncovered no violations. For reasons already mentioned, the OCC produced substantial evidence that: 1) appellant was providing care for more than 8 children; and 2) that Ms. Drexel did not have emergency cards for all of the children in her care.

The second premise is that if the first inspection uncovered no violations, it would be "inequitable" to allow the OCC to conduct a second inspection. A plain reading of

COMAR 13A.15.13.01(A) and (B) (quoted on pages 14 and 15, *supra*) shows that the holder of a child care certificate must allow an inspection of the holder's Property at any time. There is nothing "inequitable" about such a regulation. As the ALJ pointed out, Maryland Public policy is to resolve doubts "in favor of the child when there is a conflict between the interests of a minor child and the interests of an adult" (quoting Md. Code (2012 Repl. Vol.), Family Law article § 5-502(b)). The regulations do not give a day care provider any equitable grace period in which the provider can be assured that no re-inspection will take place. Moreover, we can think of no public policy reasons that would justify such an implied grace period.

In regard to the June 4, 2015 requests to inspect the family portion of the Property, appellant argues that her refusal to allow Ms. Guthland to inspect should be forgiven because the OCC, when it asked permission to enter, improperly relied upon statements from a "[f]our-[y]ear-[o]ld [c]hild" and an "[a]nonymous [s]ource." This argument constitutes an attack, albeit an indirect one, on the following finding of fact by ALJ Garland:

> Because the initial anonymous complainant reported that the Appellant cared for children upstairs (and the Addition does not have an upstairs) and Lily had reported moments earlier that Maddie was in the Main House, Ms. Guthland needed to inspect the Main House.

In support of the aforementioned argument, appellant provides us with no reason whatsoever, why Ms. Guthland should not have relied on the anonymous tip provided to OCC on May 26, 2015. In any event, the argument is without merit. COMAR 13A.15.13.02 requires the OCC to investigate both written and oral complaints relating to

potential violations of the pertinent COMAR regulations, including anonymous complaints.

In support of the argument that Ms. Guthland "improperly" relied on what Lily said, appellant first points to the fact that a nine-year-old, Elizabeth K. ("Ellie") contemporaneously said (according to Ms. Drexel's testimony but not Ms. Guthland's) that Maddie was not present that day; 2) Ms. Drexel denied that any children were in the family portion of the Property; and 3) Madison's mother, Courtney U., wrote an undated letter to Ms. Guthland that was admitted into evidence, stating that Madison was "visiting her grandmother on June 4, 2015."

What Madison's mother said after June 4, 2015 has no bearing on whether, in the words of the ALJ, Ms. Guthland "needed to inspect" the family portion of the Property. And the fact that Ms. Drexel denied that anyone was in the family portion of the Property was not something a licensing inspector should be expected to believe. Lastly, the fact that Elizabeth K. contradicted Lily, certainly was not dispositive in light of what the anonymous tipster had said. For the above reasons, we conclude that there was substantial evidence to support the ALJ's finding that Ms. Guthland "needed to inspect" the Property on June 4, 2015 and that Ms. Drexel violated COMAR 13A.15.13.01 when she refused to allow Ms. Guthland permission to do so.

B.

Appellant next contends that the ALJ's decision should be reversed because she made an "error of law" by ruling that visiting children were to be counted under OCC regulations. The portion of the ALJ's decision relevant to this issue reads:

> With respect to the overcapacity issue on May 29, 2015, I also find the Appellant's testimony to lack credibility. "The number of children present in care at any one time may not exceed the child capacity number stated on the certificate of registration." COMAR 13A.15.04.03A. The Appellant is registered to provide care for a maximum of eight children. "The maximum total capacity of a family child care home may not exceed eight children, of whom not more than four may be younger than 2 years old." COMAR 13A.15.04.03D. "Whenever more than two children younger than 2 years old are present in care, an additional adult shall be present who has met the applicable requirements of COMAR 13A.15.06.04." COMAR 13A.15.04.03C. Ms. Guthland testified that she observed twelve children in care. The Appellant testified that Ms. Guthland improperly counted a child named Lucas who was not present,[9] the OCC should not count the Grandson because his father (the Son) was on the premises, and the OCC improperly counted the four visiting children.
>
> Whether there were eleven children in care on May 29, 2015 or twelve, as was Ms. Guthland's testimony, is irrelevant. The fact of the matter is that the Appellant's day care was overcapacity. The Husband took four children and the Grandson off of the premises when Ms. Guthland questioned the number of children in care that day. Moreover, I do not find that the Appellant's explanation that the additional four children were at her house for a graduation party mitigates, to any degree, the fact that she was overcapacity. Parents trust a provider to keep their child/ren safe and well supervised. The reason for capacity limits is to ensure that there is sufficient supervision of all children in care. In this case, the addition of four children to the Appellant's day care setting prevented her from adequately supervising those children legitimately in her care that day. Throughout this process, from May 29, 2015 until the date of the hearing in this matter, the Appellant has refused to acknowledge responsibility for her error in allowing children "not in her population" to exceed the capacity allowed by her certificate of registration.

(Emphasis added.)

Based on the portion of the above excerpt that we have emphasized, appellant argues:

[9] In her testimony, Ms. Guthland made it clear that she did not count Lucas as being present on May 29, 2015. The children who were present are as set forth in footnote 2, *supra*.

> Thus, the Administrative Law Judge not only dismissed the factual importance of the number of children that were in the care of Drexel and thus countable under OCC regulations toward the maximum, but the Administrative Law Judge committed plain legal error by ignoring OCC regulations entirely in making the decision. If the children were not in Drexel's countable child population, then it does not cause Drexel to exceed capacity under OCC regulations. COMAR 13A.15.04.03(E)(2)(b). The Administrative Law Judge determined that this regulation did not matter–in the Administrative Law Judge's view, if the children were there, they were to be counted no matter what—and in so doing committed reversible error.

Read in context, the ALJ did not "dismiss[ ] the factual importance of the number of children that were in the care of Drexel …." The ALJ, in her decision, page 9, stated:

The number of children present in care at any one time may not exceed the child capacity number stated on the certificate of registration. COMAR 13A.15.04.03.

> E. The office:
>
> (1) Shall count as a child in care a resident who is younger than 6 years old; and
>
> (2) May count as a child in care a child who is visiting the home if the child:
>
> (a) Is younger than 8 years old and unaccompanied by an adult; or
>
> (b) Cannot be sent home immediately.

It is clear that the ALJ was well aware of how children are to be counted when deciding if the child care capacity has been exceeded. Thus, it cannot be said that the ALJ held the view that COMAR 13A.15.04.03 did not matter.

The ALJ said, in effect, that whether the four children were at Ms. Drexel's house for a graduation party did not matter when counting the number of children in Ms. Drexel's care. This was true. Mary Jo K. was unaccompanied by an adult and under age 8, and would count toward Ms. Drexel's population no matter why she was at Ms. Drexel's facility. As to the other three (Madison U., Elizabeth K., and Kai P.), under the pertinent

regulations it would likewise not matter why the children were present on a particular day, if the child was either regularly at Ms. Drexel's day care facility and not merely an occasional visitor (Madison U. and Elizabeth K.), or could not be sent home immediately because there was no one at home to look after the child (Kai P.).

CONCLUSION

There was substantial evidence produced by the OCC that on May 29, 2015, Ms. Drexel had more than eight children under her care. Applying COMAR 13A.15.04.03, there were, not counting Ms. Drexel's grandson, eleven children present and under Ms. Drexel's care on that date. Ms. Drexel was required, under COMAR 13A.15.03.04A, to have an emergency card for each child under her care. The OCC's evidence showed that Ms. Drexel did not have an emergency card for three children that were in her care on May 29, 2015, i.e., Avery U., Madison U., and Kai P. Lastly, the undisputed evidence was that, contrary to COMAR 13A.15.13.01B, Ms. Drexel would not permit Ms. Guthland to inspect a part of Ms. Drexel's Property on June 4, 2015.

For the above reasons, we shall affirm the judgment entered by the Circuit Court for Howard County.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.