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LEAD POISONING PREVENTION,
ADVOCACY AND LITIGATION

Why Are So Many Children Poisoned Each Year?

Lead poisoning is one of the major environmental hazards to children in the U.S. and New York State - and has been so for more than 30 years. Nearly one million children in the United States have elevated blood lead levels. Thousands of children in New York State are affected each year by ingesting lead dust or lead in paint chips.

Lead poisoning affects children at all socioeconomic levels, but minority families and children in poor inner-city households are disproportionately injured. Almost 20 percent of inner-city children in older housing have elevated blood lead levels.

It is well documented and medically accepted that lead poisoning can cause permanent brain damage, loss of IQ, learning, developmental and behavioral disabilities, hyperactivity and numerous other health injuries. Lead is absorbed in the blood and transferred throughout the body. It is stored in bones for years and transfers back to the blood and continues to circulate to all the organs in the body. Often, this continues to re-poison a young child when the brain and nervous system is still developing.

Younger children are at greatest risk for lead poisoning. Ingestion and inhalation of lead dust is the primary cause of lead poisoning. Children also have hand-to-mouth

and pica behavior (eating non-food items). Lead has a sweet taste and even a few paint chips can poison a child.

The frequency of lead poisoning cases tends to increase in summer months. Children stand by open windows where chips and dust frequently accumulate, eat lead contaminated soil, and play on porches which tend to have peeling paint.

Adults are also unknowingly lead poisoned by inhaling lead dust when performing home remodeling or lead abatements. Workers, particularly painters, are commonly lead paint poisoned, because of the lack of adequate safety precautions during sanding or scraping of older layers of lead-based paint. Pregnant women pass lead through their blood to the developing child.

Although the use of lead-based paint was generally banned in New York State by 1970, two-thirds of the housing still has dangerous levels of lead-based paint. Almost all housing built before 1960 has lead-based paint. As the older layers peel, chip and create lead dust, they return to a hazardous condition. Lead-based paint on friction surfaces, such as doors and window sills, continually create hazardous conditions. Over the years, removal and scrapping of paint from the exterior of older housing causes the soil to be contaminated with lead chips and dust.

Why Hasn't the Problem Been Solved?

Lead paint literally surrounds us and a small amount of lead paint chips or dust poisons children. Some of the state and federal laws regarding lead hazards are flawed, ineffective or ignored. Many landlords don't perform necessary inspections and maintenance of their buildings. Government employees sometimes fail to enforce the

laws and may negligently supervise and certify lead abatements. Parents usually don't understand and appreciate the extent of the danger to their children. Even knowledgeable and caring parents cannot completely protect their children, when surrounded by lead hazards in their home. In addition, there are very few advocates and lawyers working to solve the problem.

Mandatory Blood Lead Screening and Reporting

Lead poisoning is measured as blood lead levels in micrograms per deciliter (mcg/dl or $\mu\text{g/dl}$). Blood is taken either by a pinprick (finger stick), which is often inaccurate or by the more accurate method of a venous draw (a "confirmed" lead level). In children a blood lead level of 10 mcg/dl is defined in New York State regulations as elevated, but any lead exposure may be injuring a child. In New York, at a confirmed level of 15 mcg/dl, an inspection for lead hazards by the Department of Health is required. Owners are required to temporarily correct any lead hazards. In New York City and Rochester, inspection is required at a confirmed level of 10 mcg/dl. In federally assisted housing more stringent federal regulations also apply.

The major New York Statute is the Lead Poisoning Prevention Act of 1971 (N.Y. Public Health Law §1370-1376), which was substantially amended and strengthened in 1993. The regulations require mandatory screening (blood tests for lead levels) for all young children by their primary care physician, pediatrician or clinic at about 12 months and 24 months. If a child is considered "at risk" (i.e. living or visiting in housing built before 1960, which has peeling or chipping paint), the child must be screened at least annually (10 N.Y.C.R.R. § 67-1.2) and at each well-child visit. All children must be screened before enrollment in preschool or child care.

Blood lead levels must be reported within five days to the New York State and local Department of Health. If the level is over 45 mcg/dl it must be reported within 24 hours. A severely lead-poisoned child is usually admitted to the hospital for several days of chelation therapy. Drugs are administered to assist the child's body in excreting some of the lead, but this does not reverse the permanent injuries.

Mandatory screening is required and is critical to identify lead poisoning, before it reaches higher levels. Tragically, mandatory screening is often not complied with. State records indicate that 30-40% of young children are not screened at ages 12 months and 24 months. Parents, advocates and health professionals must insure that the required blood level screenings are performed.

Department of Health Action

When a child has an elevated blood lead level of 10 mcg/dl or greater, either the New York State Department of Health or in most municipalities, the city or the county Department of Health ("DOH") is required to take certain action. In New York State, except in New York City and Rochester, at a blood lead level of 10 - 14 mcg/dl, only an informational contact is required, which usually consists of education about lead poisoning and prevention. This includes nutritional advice and good cleaning habits, such as frequent hand washing and wet mopping of the premises.

Some health departments may send a public health nurse to a home. Unfortunately, some parents or landlords perform interim controls, such as scraping and painting, without adequate precaution and clean-up. Parents and landlords, however, should not be doing "abatement" work without adequate training, experience, or

supervision. Often a child is further severely poisoned by being present during abatements, where adequate safety precautions are not taken.

At a blood lead level up to 14 mcg/dl, DOH will allow a child to remain in a dwelling, which probably is a lead hazard, and merely give parents advice about lead hazards. Even though an owner or landlord has legal obligations to maintain a safe premises, DOH does not require owners to abate hazards until a child's confirmed (venous drawn) lead level reaches 15 mcg/dl. In federally assisted housing more stringent federal regulations also apply.

Pursuant to New York State regulations, once a child's blood lead level is 15 mcg/dl and above, a diagnostic screening of the child is required. The local DOH or, in a few counties that don't have a lead poisoning prevention program, the State DOH is also required to inspect for lead hazards at confirmed levels of 15 mcg/dl and above (10 N.Y.C.R.R. § 67-1.2[9]). If hazards are found, the owner of the premises is required to perform "interim controls."

Although this is also typically referred to as an "abatement," interim controls are only temporary, and do not adequately prevent hazards from reoccurring. Owners are typically permitted to scrape the lead-based paint from the specific area where it is peeling, and paint over that area with non lead-based paint (10 N.Y.C.R.R. § 67 2.7[i]). This method of spot scrapping and repainting, known as paint film stabilization, is the cheapest and most commonly performed. In older housing, unless all the older layers of lead-based paint are removed, enclosed, or properly encapsulated, the paint will continue to chip and peel and cause hazards to recur. Interim controls are ineffective unless there is a program of regular inspection and maintenance.

Owners may also choose methods of abatement such as encapsulation of lead-based paint with an approved substance, enclosure (sheet rocking), or replacement of windows, woodwork or doors. Encapsulation, enclosure, and replacement are permanent methods of abatement, but are more costly than interim controls.

Landlord Obligations Under Other New York State Laws

In addition to the State and federal statutes and regulations specifically related to lead hazards, landlords in New York State have other general statutory duties to maintain their property. Pursuant to the New York State Real Property Law, §235-b(1), landlords must warrant that dwellings are fit for human habitation. The Statute also prohibits occupants from being subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety.

Landlords with dwellings of three or more families in cities with a population of more than 325,000, which fall under the New York State Multiple Dwelling Law §78(1) and §80, are required to keep multiple dwellings in good repair and clean and free from matters dangerous to life and health. In cities with populations of less than 325,000 and in all towns and villages, all multiple dwellings are required to be in good repair pursuant to the New York Multiple Residence Law (§ 174).

These New York State statutes and also various local municipal codes provide an independent basis for landlord liability for lead paint hazards. In addition, contractual obligations under written or oral leases may place obligations on landlords to maintain or repair the premises and to prevent lead hazards.

Federal Lead Based Poisoning Prevention Act

One of the major federal statutes regarding lead poisoning is the Federal Residential-Lead Based Hazard Reduction of 1992 (42 U.S.C. §§4801, 4822-4846). On September 15, 2000, HUD's new regulations implementing the requirements went into effect. The regulations apply to both federally assisted housing (including public housing, privately owned assisted housing and tenant-based Section 8), and to any housing being sold by the federal government that was built before 1978. These federal statutes and regulations do not apply to all housing in New York State.

The final regulation, known as the "Lead Safe Housing" Final Rule is available at HUD's Lead Paint Website: www.hud.gov/lea. The sixty page "Interpretive Guidance" for Part 35 explains the overall "Transition Plan" at HUD's Lead Paint Website. Landlords have affirmative obligations under the regulations. A common set of requirements is: risk assessment to identify lead-based paint hazards; interim control measures to eliminate any hazards that are identified; clearance; and ongoing maintenance and periodic reevaluation

On January 5, 2001, new regulations of the Environmental Protection Agency ("EPA") went into effect. These regulations add new requirements, including sampling for lead hazards in dust and soil. The clearance dust levels for floors are 40 µg/ft²; for windowsills are 250 µg/ft²; and for window troughs are 400 µg/ft². Soil in play areas is a hazard at 400 ppm and at 1200 ppm in the remainder of the yard.

Landlords, Sellers and Agents' Obligations Title X Disclosure

Federal law requires disclosure of known lead hazards to potential home purchasers or renters. These requirements apply to all housing, not just government funded housing. (42 U.S.C. § 4852(d)). Under the "Title X" disclosure requirements, sellers, lessors and agents must disclose known lead paint hazards in buildings constructed prior to 1978 and provide copies of all available reports and records regarding lead hazards. A lead warning information pamphlet must be provided to each tenant or prospective purchaser. The federal statute does not require the landlord or the seller to investigate for lead hazards, but merely to disclose known hazards, and provide the general lead warning information.

Although these requirements are usually met in purchase and sales of real property, the requirements are routinely ignored by landlords. The EPA can fine \$11,000 for each violation (per unit). Responsible parties are also subject to criminal proceedings. A knowing violation of this statute can result in treble damages for breach of contract, together with attorney's fees and expert witness costs (42 U.S.C. §4852(d)(b)(3), (4)).

Government Inspections

Government inspections and supervision regarding lead hazards may be incomplete. Department of Health inspectors may fail to test the entire dwelling (including all portions of buildings on a property) as required by New York State regulations (10 N.Y.C.R.R. § 67-2.3). Inspectors may fail to test soil around the home or test for lead dust. The "abatement" or "interim control" advice given to owners and parents may be inadequate. Inspectors may fail to test other premises where a child

spends a significant amount of time (10 NYCRR § 67-2.3), such as a babysitter or a grandma's house. Inspectors typically do not test other apartments in a multi-family dwelling even though other children are probably in a lead hazard. Inspectors may also fail to properly supervise abatements and improperly certify abatements as complete.

Although chipping paint is a building code violation, city code inspections usually do not inspect for lead hazards. Deteriorated paint is often just painted over without proper precautions or procedures for a lead abatement. Section 8 housing inspections also inspect for chipping paint, but not for lead hazards until after a child is lead poisoned. Tenants, usually, wrongly assume or are falsely told that a certificate of occupancy or a Section 8 inspection means an apartment is lead-safe.

Abatement and Clean-Up Procedures

There are specific New York State requirements regarding proper abatement and cleanup of lead hazards. Most importantly, children and pregnant women should not be present during abatement nor return without adequate cleanup. Most abatements and interim controls, however, are performed by untrained owners, workers, or tenants. Proper precautions and adequate cleanup are rarely performed. This frequently seriously poisons children.

New York Regulations Regarding "Abatement" and "Clean-Up" (10 NYCRR §67-2.7)

This applies to all housing in New York.

Important Note: Abatement in federally assisted housing has additional HUD and EPA requirements

1. Extensive regulatory requirements for abatement and clean up
 - a. Pre-abatement actions:

- i. furniture, rugs, carpets, bedding, drapes, dishware and food shall be either removed or covered with plastic sheets (six mils) and sealed;
 - ii. room openings must be sealed with plastic sheets (six mils); and
 - iii. floors or in place carpet must be covered with two sheets of plastic (six mil), secured to wall or baseboard with duct tape.
- b. Clean-up:
 - i. performed daily;
 - ii. misting debris with water
 - iii. carefully sweeping and placing it in double four mil or six mil plastic bags;
 - iv. followed by wet dusting or wet mopping of all surfaces in the work area;
 - v. final clean-up a minimum of two hours after completion of active abatement;
 - vi. include an HEPA filtered vacuuming of all interior surfaces, including window sills;
 - vii. followed by a wet mopping of all surfaces with a heavy duty household cleaning solution;
 - viii. followed by a second HEPA filtered vacuuming.
- c. Relocation of occupants, when necessary, to temporary housing until the abatement work specified has been completed.
- d. Placarding of the dwelling with the statement that human habitation is prohibited until the commissioner or his designated representative determines that the dwelling has been abated.
- e. Prohibition of the presence of children and pregnant woman in part or all of a dwelling during abatement activities.

**NY State approved "Abatement" methods (10
N.Y.C.R.R. §67-2.7)**

- f. Encapsulation of lead painted surfaces with approved materials:
 - i. after repair of water leaks caused by structures or plumbing deficiencies;
 - ii. in accordance with manufacturer's instructions; and
 - iii. after the removal of any chipping, peeling or flaking paint in accordance with subdivision (i) of this section.
- g. Enclosure of lead containing surfaces with durable materials:
 - i. After repair of water leaks;
 - ii. with materials that are fire resistance;
 - iii. after the proper removal of any chipping, peeling or flaking paint.
- h. Replacement of building components with lead-free materials.
- i. Removal of lead-containing surface coating materials by one or more of the following methods after which a lead-free surface coating materials shall be applied to the surface.

Important note: This actually is an "interim control" which is the least expensive and most commonly used method. Unless lead-based paint is completely removed to the bare wood surface, the area and adjacent areas will chip or peel and become lead hazards. This is the major problem with the New York regulation on "abatement" methods.

- i. wet wire brushing or hand scraping;
 - ii. machine sanding, using a sander equipped with a high efficiency particle air filter device;
 - iii. when used with appropriate respiratory protection, a heat gun, which produces a temperature not exceeding 1,100°F with hand scraping;
 - iv. off-site paint removal; and
 - v. other procedures acceptable to the commissioner.
- j. Abatement of exterior surfaces:
- i. any of the methods described in subdivisions (a)-(i) of this section or
 - ii. by confined abrasive blasting using a set misting technique or simultaneous vacuuming system;
 - iii. in addition, plastic sheets, (six mils), must be placed on the ground as close to the dwelling foundation as obstructions will allow a minimum of six feet for each story in height before blasting begins, and
 - iv. left in place until cleanup is complete;
 - v. all seams must be sealed with tape and outer edges raised to trap liquid waste.

Trained and Certified Workers

Federal law and regulations require that lead paint abatement workers, in every state, be trained and certified (15 U.S.C. § 2682). New York State, however, does not have its own worker certification requirements or program. The Federal Environmental Protection Agency (EPA) is providing training and certification. The need for trained workers is critical. Sanding and scrapping of lead-based paint causes chips and dust and is extremely hazardous. There are extensive OSHA requirements during lead abatements which are routinely ignored. Among the extensive requirements are the use of respirators and special clothing.

Landlord Liability

When a child has a blood lead level of 15 mcg/dl or higher the Department of Health will order a landlord to perform a lead abatement. Landlords, however, even without a DOH order may have statutory or contractual responsibility to provide safe housing including preventing and correcting lead hazards. Failure of a landlord, painter or Department of Health to act reasonably is negligence subjecting responsible parties to award for money damages.

In order to impose liability the landlord must have notice of the hazardous condition. Tenants should provide written notice to their landlord that:

- a. a child under 6 resides at or visits the property
- b. the building is old (prior to 1978)
- c. there is chipping or peeling paint
- d. and there probably is a lead hazard which is dangerous to the child.

The tenant should demand that the landlord repair the condition.

Take Action Regarding Hazards - This is an Emergency

Exercise extreme caution, but act immediately when a family is living in a premises with a lead hazard. This is an emergency situation. The family should leave the premises until the lead hazards are controlled and properly cleaned up. A few chips of paint or continued exposure to lead dust can severely poison a child. Do not sand, scrape or use a regular vacuum while children or pregnant women are present at the residence. Using a regular vacuum cleaner to pick up chips causes them to be turned into lead dust

and sent out through the vacuum exhaust system. This often poisons children. Obtain a special HEPA vacuum from your local health department.

Lead hazard abatement is an extremely dangerous activity. There are many circumstances where federal law or regulations require a certified abatement worker to perform abatement. Even where a certified abatement worker is not required, a landlord takes substantial risk of liability if an untrained person performs the abatement. Children are frequently poisoned during improper and incomplete abatements where proper precautions and proper clean up are not performed. Have resources available through contacts with your local social services department or Travelers Aid to find lead safe housing for families.

Owners Should Prevent Lead Poisoning

Owners should take affirmative action to prevent lead poisoning and to avoid liability. Most insurance companies have liability policies with a specific exclusion for lead paint hazards. In New York State an owner has liability if the owner knew or should have known of a lead hazard and failed to act reasonably to prevent or correct the hazard.

Owners should have inspections for lead hazards by a certified inspector (check telephone listings under lead inspectors). Unless permanent abatement is performed, a regular program of inspection and maintenance is necessary to prevent lead hazards. Owners should contact state and local health departments to access available grant and loan monies available for lead hazard abatements.

Owners should understand the laws which prohibit discriminating against renting to families with children. State law also prohibits retaliatory evictions, where for example, a family has complained to the government about lead hazards.

Time Limits for Claims

Where a child has been injured, property owners, managers, painters, inspectors and abatement contractors, health care providers, Health Departments and others may have liability for damages. In New York State, children have until age 18 plus three years to commence negligence actions, but parents have only three years to file actions for their derivative claims for injuries to their children. Claims against municipalities have very short time deadlines. Claims against the State of New York require the filing of a notice of intent to file a claim within 90 days. A notice of claim against municipalities is to be filed within 90 days. There are also deadlines for commencing an action. Courts have discretion to permit filing late notice of claims.

It is critical, however, in lead paint poisoning litigation to conduct a thorough fact investigation immediately, optimally before the condition of the hazard changes. A knowledgeable attorney will send a private lead inspector to do a lead inspection, including XRF examination (x-ray machine), paint chip samples, dust wipes, soil samples, water samples and extensive photographs. This fact investigation is necessary for proper advocacy.

Advocacy in New York State - What Can You Do?

Elimination of lead hazards on a statewide and national basis appears to be an overwhelming task with enormous social and economic costs. However, lead poisoning is

100 percent preventable. First, make a commitment to learn more about this silent epidemic, which has been the number one preventable environmental health hazard for children in New York State, for more than 30 years.

Families, owners, health care professionals and government employees need to learn more about the dangers of lead hazards and the methods to prevent lead poisoning. Contact the State and your local health department to obtain pamphlets with prevention, treatment, and abatement information. We need a State initiative to renovate housing and make all dwellings lead-safe.

Contacts

1. **New York State Childhood Lead Prevention Program** 518-473-4602
2. **Federal Complaint Hotline** 1-800-424-LEAD
3. **Department of Housing and Urban Development (HUD)**
Tel: 800-483-8929
<http://www.hud.gov/lea/leahome.html> or www.hud.gov/lea
4. **Environmental Protection Agency (EPA)**
Tel: 732-321-6671
<http://www.epa.gov/opptintr/lead/index.html>
www.epa.gov/lead
5. **National Lead Information Clearinghouse (NLIC)**
Tel: 1-800-424-LEAD
E-mail: ehc@cais.com
6. **Centers for Disease Control (CDC)**
Tel: (888)-232-6789
Website: <http://www.cdc.gov/nceh/ncehome.htm>

ADVOCACY ORGANIZATIONS

1. **Coalition to End Lead Poisoning in New York (CELP)**
c/o Greater Upstate Law Project, Inc. (GULP)
Tel: 518-462-6831
Website: <<*>>

E-mail: <<*>>

2. **New York City Coalition to End Lead Poisoning (NYCCELP)**
Tel: 718-519-1002
Website: www.nn-ic.org/nyccelp.htm
E-mail: NYCCELP2000@aol.com
3. **Alliance To End Childhood Lead Poisoning**
Tel: 202-543-1147
Website: www.aeclp.org
4. For a Directory of State and Local Lead Poisoning Advocacy Organizations, go to www.aeclp.org/7/ny.html

IMPORTANT PUBLICATIONS:

1. Physician's Handbook on Childhood Lead Poisoning Prevention (1997). Available from the New York State Department of Health at (518) 473-4602 or contact Peter Danziger (800) 950-5601.
2. Protecting Our Children From Lead. The Success of New York's Efforts to Prevent Childhood Lead Poisoning (May 25, 2001). Available from the New York State Department of Health at (518) 473-4602 or on the Internet at www.health.state.ny.us/nysdoh/lead/childlead.pdf
3. Screening Young Children For Lead Poisoning, Guidance for State and Local Public Health Officials, Centers for Disease Control and Prevention (November 1997). Available from the CDC Lead Poisoning Prevention Branch at (888)-232-6789.
4. Preventing Lead Poisoning in Young Children: A Statement by the Center for Disease Control, Report 99-2230 (1991). Available from the CDC Lead Poisoning Prevention Branch at (888)232-6789.
5. Eliminating Childhood Lead Poisoning: A Federal Strategy Targeting Lead Paint Hazards (2000). Available from the National Lead Information Center at (800)-424-LEAD and on the Internet at www.hud.gov/lea or www.epa.gov/children/whatwe/tf-proj.htm

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