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LEAD POISONING PREVENTION SEMINAR

I. SCOPE OF THE LEAD POISONING PROBLEM

A. Lead Poisoning Problem is Enormous and Overwhelming

1. Lead poisoning has been one of the major environmental hazards to children in New York
2. Problem recognized by NYS Legislature in 1971, 1992 and 2008
3. Almost 1,000,000 children in U.S. have elevated blood lead levels
4. More than 5,000 children are poisoned in NYS each year (10 mg/dl)
5. Almost 15% of minority children in older housing have elevated blood lead levels (10 mg/dl)
6. But not just inner city problem - every town
7. There is a higher percentage of lead-poisoned children in upstate New York than in New York City
8. 2/3 of housing in upstate New York has lead-based paint
9. Almost all housing in NYS built before 1960 has dangerous amounts of lead-based paint
10. A small amount of lead-based paint poisons a child (few chips or dust)
11. Highly toxic - neurotoxin - affects nervous system - brain

B. Adults Also Poisoned

1. Home remodeling
2. Workers - painters
3. Untrained abatement workers
4. Pregnant women

C. Children - More Susceptible to Lead Poisoning

1. A few paint chips can poison a child
2. Dust - even more dangerous
3. Ingested - absorbed in blood - transferred throughout body
4. Stored in bones for years - and back to blood

5. Hand-to-mouth behavior - Pica (eat non food items)
6. Lead has sweet taste
7. Age 1-2 crawling
8. Blood brain barrier
9. Systems developing - brain developing - Pb, Iron, Calcium

D. Extent of Injury is Function of

1. Lead level
 - a. measured as blood lead level - micrograms per deciliter (mcg/dl or $\mu\text{g}/\text{dl}$)
 - b. fingerstick (often inaccurate)
 - c. venous blood draw required to confirm blood lead level
 - d. 10 mcg/dl - in children -
 - i. defined as elevated by NYS regulation
 - ii. considered “poisoned” (Federal Task Force Report of 2000)
 - iii. some medical controversy over extent of injury at 10 mcg/dl
 - iv. new studies indicate injury even if under 10 mcg/dl
 - e. at 15 mcg/dl confirmed (venous)
 - i. medical agreement can cause brain damage and other injuries
 - ii. Department of Health at 15 mcg/dl (NYS regulations)- inspection required (applies to all housing in New York)
 - f. 45 mcg/dl - usually chelation therapy in hospital
2. Duration of exposure - often many months or years
3. Age of child - younger more susceptible to poisoning and injury

E. Injuries - Severe and Permanent

1. Brain damage
2. Loss of IQ
3. Learning disabilities
4. Developmental disabilities
5. Behavior disorders
6. Hyperactivity
7. Numerous other health injuries
8. May be no obvious symptoms, even though lead poisoned

F. Cost to Children, Families, Taxpayer and Municipalities

1. Special Education
2. Public Assistance
3. Criminal Justice System
4. Liability

G. Lead-Based Paint was Widely Used Prior to 1978

1. Almost all housing in NYS built before 1960 has dangerous amounts of

- lead-based paint
- 2. permanent abatement (replacing old windows - removal or encapsulation of lead paint)
 - a. estimated \$9,000 - \$15,000 per unit
- 3. interim control - paint stabilization
 - a. estimated \$2,500 per unit
 - b. then requires constant inspection and maintenance

H. Lead-Based Paint is Extremely Hazardous

- 1. Old layers peel, chip and create dust
- 2. Even intact paint - chalks
- 3. Friction surfaces - such as windows and doors - create chips and dust
- 4. Soil contains chips and dust (from exterior scraping)
- 5. Peeling lead paint and dust above drop ceilings
- 6. and behind paneling
- 7. More incidents in summer months
 - a. windows open
 - b. children play on porch
 - c. play in soil

I. Remodeling, Improper Abatement, and Improper Housekeeping Creates Lead Hazards

- 1. Don't use regular vacuum - chips exhausted as lead dust
- 2. Scraping without precautions produces chips and dust
- 3. Sanding - dust extremely hazardous - direct 100% absorption
- 4. Extensive State and federal regulations regarding proper abatement, precautions, worker safety and cleanup
 - a. all routinely ignored

J. Why Are So Many Children Poisoned Each Year?

- 1. Lead paint literally surrounds us
- 2. A small amount of lead paint or lead dust poisons children
- 3. Parents cannot effectively prevent lead poisoning

K. Why Hasn't the Problem Been Solved?

- 1. Majority of older New York housing has some lead-based paint
- 2. Cost of providing lead-safe housing
- 3. Difficulty of protecting children who live in lead hazards
- 4. Lack of awareness of the problems
- 5. Lack of enforcement of existing laws
- 6. Fundamental inadequacies of existing New York laws - which require action after a child is lead poisoned
- 7. Lack of advocacy for poor inner-city children
- 8. Legal and practical impediments to successful personal injury lawsuits on behalf of lead-poisoned children

II. STATE AND FEDERAL LAWS

A. New York State Lead Poisoning Prevention Law

1. Does not require intervention or abatement until after poisoning
2. “Abatement” when required is temporary
3. Trained workers are often not used
4. Precaution and clean-up requirements not followed
5. Government performs inspections and supervision
6. City and Town Code inspections and certificates of occupancy don’t test for lead (but tenants are told safe for occupancy)
7. Mandatory blood lead screenings are not always performed

B. Federal Disclosure and Warning Law (Title X)

1. Often ignored by landlords

C. Federal Lead Prevention Laws Requiring Risk Assessment, Interim Controls, and Clearance in Federally Funded Housing (Section 8)

1. Routinely violated
2. Negligent inspections and controls
3. Trained or certified abatement workers are not used

D. Required Blood Screening is not Always Performed

1. Federal government study indicates only 21% of Medicaid children are screened
2. NY State report 60-70% screened
3. Blood screen is only a snapshot and grossly underestimates the extent of lead poisoning

III. LANDLORDS

A. Landlords Either

1. Lack knowledge about
 - a. lead hazards
 - b. proper maintenance and abatement, or
2. Don’t have the financial resources to safely maintain property, or
3. Aren’t willing to commit the resources or
4. Just don’t care
5. Perform proper inspection and maintenance

B. Landlords Rely on County, City, or State Department of Health

1. Inspection
2. Supervision
3. Certification of abatement

IV. LANDLORD DUTIES

A. Duty

1. Common law, contractual (lease) and statutory
2. breach of duty
 - a. prior actual or constructive notice of lead hazard
 - b. failure to act reasonably
3. damages
4. causation
 - a. poisoning was probable substantial contributor to injury

B. Abnormally Dangerous Activity

1. Strict liability for abnormally dangerous activity
2. With sufficiently high risk of harm to others
3. Especially where there are reasonable even if more costly alternatives
4. Lead abatements are abnormally dangerous activities

C. Public Nuisance

1. Contamination on private property
 - a. injuring the public
 - b. extending beyond the boundaries of the property.
2. Liability does not require proof of negligence.
3. Defendant contributed to the nuisance.
4. Harm to public health is required.
5. Public authorities such as New York Attorney General, may bring a public nuisance claim on behalf of the public
6. A private plaintiff must show that it suffers an injury different in kind from the community at large.
7. A subsequent owner of contaminated property may sue the prior owner under a public nuisance theory, notwithstanding the general New York rule of caveat emptor

D. Private Nuisance

1. Private nuisance interferes with the use or enjoyment of land
2. Plaintiff must be the individual person whose property rights have been disturbed
3. Unlike the strict liability nature of public nuisance, private nuisance
 - a. intentional and unreasonable, or
 - b. negligent or reckless, or
 - c. actionable under the rules governing liability for abnormally dangerous conditions or activities
4. An owner may not sue a prior owner under a private nuisance theory

E. Statutory Duties of Landlords (evidence of negligence, statutory claims, fines)

1. All federal and state statutes and regulations, local county and city codes, and Department of Health protocols should be reviewed
2. Separately plead statutory causes of action
3. Include violations of statutes, regulations, codes, protocols and state

technical references in complaint and in discovery responses

F. New York State Real Property Law (RPL)

1. § 235-b(1) (Warranty of Habitability):
 - a. Landlord must warrant that dwellings "fit for human habitation" and "occupants .. shall not be subjected to any conditions
 - b. which would be dangerous, hazardous or detrimental to their life, health or safety."
 - c. breach of warranty of habitability creates contract damages not personal injury damages.
2. § 223-b (Retaliatory Eviction)
 - a. Landlord can't evict for good faith complaint of violation of any health or safety law, or actions taken in good faith, by or in behalf of the tenant, to secure compliance with law.
 - i. Landlord liable in civil actions for damages, injunctive relief. Presumption that its retaliation if Landlord seeks to evict w/in 6 months of complaint.
 - ii. Applied to all rentals except owner-occupied dwellings less than 4 units.
3. § 236 (Discrimination against children):
 - a. misdemeanor to refuse to rent to family with children
 - i. except federally subsidized senior housing, 1-2 family owner occupied homes, mobile home parks for persons over 55 years
 - b. also right to get civil damages, declaratory and injunctive relief, attorneys' fees. See also RPL § 237

G. New York State Multiple Dwelling Law (MDL) (3 or more families, cities over 325,000)

1. § 78(1) Multiple dwellings shall "be kept in good repair."
2. § 80 (Cleanliness): subd. (1) - owner must keep multiple dwelling "clean and free from ... matter dangerous to life or health."
3. § 309 (Nuisance): subd. (1)(a) make unlawful "nuisances", defined as "whatever is dangerous to human life or detrimental to health..."

H. NYS Multiple Residence Law (3 or more families, cities under 325,000 and all towns and villages)

1. (MRL) §174 (Good repair)

I. Federal Title X Disclosure - Residential Lead-Based Paint Hazard Reduction Act

1. Sellers and landlord required to disclose lead hazard and provide lead warning statement
2. Knowing failure - treble damages, costs and attorneys fees (this is limited to contract damages)
3. Government fines and criminal prosecution for noncompliance

J. Federal Hazardous Waste and Abatement Statutes

1. CERCLA
 - a. Comprehensive Environmental Response, Compensation, & Liability Act, 42 U.S.C. § 9601 *et seq.*
 - i. liability for the cleanup of sites contaminated by any “hazardous substance”.
 - ii. Any person who has incurred cleanup costs, including a liable party, may bring action
 - b. Statute also creates liability for “natural resource damages”
 - i. only certain governmental agencies, may bring such claims
 - c. CERCLA is applicable to lead hazards
 - i. State of New York v. Delmonte, No. 98-CV-0649E(M), 2000 U.S. Dist. Lexis 5149 (W.D.N.Y. March 31, 2000)
 - (1) Owner of vacant lot (gift) - 1992
 - (2) Children playing in soil
 - (3) Dept. Env. Conservation found lead hazard
 - (4) Owner did not remedy
 - (5) Owner liable \$161,000 clean up

K. Federal Resource Conservation and Recovery Act (RCRA)

1. Debris
 - a. Must be Handled Pursuant to 42 USC §6901, et seq., 40 CFR §§260-62
2. Contractor Certification
 - a. EPA Requirements of Title X - Subtitle B
 - b. extensive and detailed regulations
 - i. training and certification of programs and contractors in lead abatement industry
 - ii. guidelines for renovation and remodeling
 - iii. standards for lead in paint, dust and soil
 - c. Worker Protection - Title X - Subtitle C
 - i. OSHA extensive and detailed regulations require
 - (1) hazard determination
 - (2) exposure assessment
 - (3) work practices
 - (4) respiratory protection
 - (5) protective clothing and equipment
 - (6) hygiene facilities
 - (7) medical surveillance and removal
 - (8) training and notification
 - (9) record keeping

V. NEW YORK STATUTES, REGULATIONS AND CODES

A. The Major New York Statute - The Lead Poisoning Prevention Act of 1971

(LPPA), Amended in 1993

1. The statute and regulations apply to all housing and all children in New York State
2. Mandatory blood lead screening is not fully complied with
 - a. regulations require mandatory screening (blood test for lead level)
 - i. all young children (under 6 years) by their primary care physician, pediatrician or clinic
 - ii. at about 12 and 24 months
 - iii. and at each well-child visit or at least annually if at risk. 10 NYCRR § 67-1.2.
 - iv. also pregnant women. 10 NYCRR § 67-1.5
 - v. children must be screened before enrollment in preschool or child care. 10 NYCRR § 67-1.4
 - b. mandatory reporting blood lead levels within 5 days, to State and local DOH
 - i. If over 45 mcg/dl, within 24 hours. 10 NYCRR § 67-3.1
 - c. mandatory screening is required and is critical to identify poisoning before it reaches higher levels
 - d. unfortunately mandatory screening is not fully complied with
 - e. Federal GAO study in 1999 found
 - i. only 21% of 1 and 2 year olds in Medicaid are screened
 - f. NYS DOH study in 1998 found
 - i. approximately 58-70% of New York children age 2 are screened

B. The New York Regulations Have Major Flaws - Not Prevention Oriented

1. State regulations require action triggered by a child's blood lead level.

Important note: Federal law has different requirements at different blood lead levels.

 - a. under NYS regulations at 10 mcg/dl or greater (10 NYCRR § 67-1.2)
 - i. risk reduction education (brochures, etc.)
 - ii. nutritional counseling
 - iii. for example - nutritional advice and good cleaning habits (frequent hand washing)
 - iv. nurses sometimes advise parents to perform scraping and painting (interim control)
 - v. no one should perform abatement without adequate training or supervision
 - vi. using regular vacuum turns chips to dust
 - vii. often a child is further poisoned by improper abatement and inadequate clean-up
 - b. at fingerstick of 15 mcg/dl or greater
 - i. confirm using venous blood sample
 - ii. some local county DOH send public health nurse to perform home visit

- c. at confirmed (venous) 15 mcg/dl or greater
 - i. complete diagnostic evaluation
 - ii. environmental management (DOH inspection for lead hazards)
- 2. DOH has discretion to designate one or more dwellings as areas of high risk if a condition conducive to lead poisoning exists (10 NYCRR § 67-2.2 and § 67-2.3)
 - a. DOH can then perform an environmental investigation before a child has an elevated blood lead level (10 NYCRR § 67-2.3)
 - b. DOH has discretion to order abatements, but not mandated to **Important note:** DOH usually does not designate a dwelling as an area of high risk in order to perform a lead hazard inspection (with XRF machine), but only inspects after a child is poisoned at 15 mcg/dl.
 - i. For example, even if a child has a blood lead level of 10 mcg/dl - 14 mcg/dl and a public health nurse observes chipping paint and a child eating paint chips (pica behavior), some DOH believe they are not permitted to do a lead hazard inspection.

C. New York City and Rochester have special local laws

- 1. At confirmed 10 mcg/dl action is required
 - a. risk reduction education (brochures, etc.)
 - b. nutritional counseling
 - c. complete diagnostic evaluation
 - d. environmental management (DOH inspection for lead hazards)

D. No Required Inspection or Maintenance - Another Major Flaw of the New York Regulation

- 1. No required inspection or maintenance by landlord under New York Lead Poisoning Prevention Act
 - a. **Important note:** landlord has obligations to provide safe housing under other NY statutes, special local laws (NYC and Rochester), common law, and lease obligations, and under federal law if federally assisted housing
- 2. No fines or penalties to landlords under New York law for having lead hazard
 - a. fines are permitted after DOH hearing
 - b. for failure to comply with “abatement” order
 - c. although routine delays and non-compliance - rarely ever fines

E. Government Employee Inspections

- 1. Municipal DOH inspectors (in a lead poisoning prevention program)
 - a. required to test any dwelling where child spends a significant amount of time (10 NYCRR §67-2.3)
 - b. required to test any other area where the child spends a significant

- amount of time (10 NYCRR §67-2.3)
 - i. child care facility, babysitter, grandma's
- c. test other apartments in multifamily dwelling (under certain circumstances)
 - i. even though other children probably in lead hazard
- d. test soil around house (under certain circumstances)
 - i. frequent source of lead from exterior peeling paint and prior scraping
- e. test dust (under certain circumstances)
 - i. very high source of lead

F. Temporary Interim Controls Permitted - Another Major Flaw of the New York Regulations

1. At confirmed (venous) blood lead level of 15 mcg/dl or more or designation of area of high risk - state or local DOH required to inspect for lead hazards - state regulations
2. If "abatement" is ordered NY regulations allows temporary - interim control (10 NYCRR §67-2.7(i))
 - a. scrape - peeling area only
 - b. removal of lead based paint from friction surfaces
 - c. paint over with non-lead based paint
 - d. cheapest and most commonly done
 - e. For example:
 - i. 10 foot long baseboard in 100 year old apartment
 - ii. spot scrape and repaint - 1 foot section where chipping
 - iii. ineffective - next day or week another area chips

G. 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 New York 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 2 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 NYCRR § 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.

H. Federal Law Requires Trained and Certified Workers to Perform Permanent Abatement

1. It is anticipated that there will be widespread noncompliance
2. New York does not have a state program to train and certify workers
3. Untrained workers are a major problem
4. Workers don't follow existing protocols for abatement, precautions and cleanup
5. Lack of OSHA compliance during abatements
 - a. think of lead abatement like asbestos removal
 - b. must have trained workers

I. Government Inspectors Supervise and Certify Abatements

1. Advice and supervision of abatements by DOH
 - a. precautions
 - b. delays
 - c. clean up
2. Inspection for peeling paint
3. Dust wipes not always required under New York law
4. Soil tests not always required under New York law

J. Municipal Inspections for Certificates of Occupancy Do Not Check for Lead Hazards

1. Inspections usually inspect for peeling paint, but do not test for lead in paint (XRF machine)
2. Cites for chipping paint
3. Requires correction but not as remediation of lead hazard
4. Issues certificate of occupancy
5. Landlord assures tenant that apartment is safe
6. Potential liability of municipality for lead poisoning
7. Review local code for painting requirements and lead paint provisions

K. Housing Authority Inspections (i.e. Section 8)

1. Looking for chipping paint
2. No XRF
3. No dust wipes
4. No soil test
5. Don't require abatement
6. Certify inspected

L. Social Services Department Does Not Require Inspection for Lead Hazards, for Family Receiving Housing Assistance

M. NYS Public Health Law (PHL) § 206(1)(n) Mandates NYS Health Commissioner to Establish Criteria

1. For identifying areas and conditions of high Pb risk
2. For administering tests for poisoning and reporting data
3. For professional and public education
4. Counties routinely do not identify high risk areas

VI. FEDERAL LAWS DON'T PROVIDE ADEQUATE PROTECTION AND ROUTINELY ARE NOT COMPLIED WITH

- A. "Title X" Disclosure:** 1996 Requirements Added for Disclosing Known Lead Hazards to Potential Purchasers or Renters. **Title X § 1018. Regs are at 40 CFR §§ 745.100- 745.119; 24 CFR Part § 35.80-35.98; 61 Fed. Reg. 9064 (3/6/96)**
1. Title X Disclosure applies to all housing not just government funded.
 2. Sellers, lessors and agents must disclose known lead paint and/or lead paint hazards in pre-1978 buildings, provide copies of available reports.
 - a. Potential purchasers get 10 days to do own examination, and can rescind/renege contract of sale during this period.
 - b. Potential tenants do not get this grace period or right to inspect.
 - c. Must provide lead info pamphlet to tenant or purchaser. See 15 USC § 2686
 3. Exempts single room occupancy, studio apts., dorms, rental of individual rooms, leases less than 100 days, lease renewals where previous disclosure occurred, housing for elderly and disabled (w/o child under 6) (month to month lease is not exempt)
 4. **Important note:** Title X does not require landlord or seller to investigate for lead hazards.
 5. EPA can fine \$11,000 for each violation (per unit). 42 USC § 4852d(b)(5); 61 FR 69361
 6. Criminal prosecution for violations.
 7. Injured persons can obtain treble damages for injuries as result of knowing violation non-disclosure, attorneys fees, expert witness costs. 42 USC § 4852d(b)(3), (4) (damages provisions apply only regarding breach of contract damages).
 8. Complaint Hotline: 800-424-LEAD

9. Title X disclosure law is very important, however
 - a. usually not being complied with in leases
 - b. most landlords don't know about Title X or ignore the requirements
 - c. Title X does not require investigation for lead hazards
 - d. only punishes knowing violations

B. Major Federal Statute - Lead-Based Paint Poisoning Prevention Act: 42 U.S.C. §§ 4801, 4822-4846.

1. This does not apply to all housing.
2. On September 15, 2000, HUD's new regulations implementing the requirements of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. 4852d went into effect subject to certain phase-in or delay of full implementation.
3. 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.
4. **Important note:** The federal law has some provisions which are more stringent than State law requirements.
5. The final regulations, known as the "Lead Safe Housing" Final Rule. To obtain copies:
 - a. HUD website; www.hud.gov/lea;
 - b. see sixty page "Interpretive Guidance" for Part 35 which explains the overall "Transition Plan" at HUD's Lead Paint Website;
 - c. National Lead Information Center at 1-800-424-LEAD;
 - d. HUD published the regulation in the Federal Register, on September 15, 1999, starting on page 50410
 - i. correction January 21, 2000, page 3386;
 - ii. correction March 30, 2000, page 16818;
 - iii. Federal Register website; www.access.gpo.gov/nara;
 - iv. by mail, for a fee, from the Government Printing Office at 1-202-512-1800 (this is a toll call).
6. Scope of HUD's Lead Paint Regulations
 - a. the Lead Safe Housing regulations consolidate most of HUD's lead-based paint regulations into one part of the Code of Federal Regulations -- 24 C.F.R. Part 35.
 - b. issued under Sections 1012 and 1013 of the Residential Lead-Based Paint Hazard Reduction Act of 1992, which is Title X of the Housing and Community Development Act of 1992.
 - c. sections amend the Lead-Based Poisoning Prevention Act of 1971.
7. Generally, Part 35 sets hazard reduction requirements with greater emphasis on reducing lead in house dust.
 - a. requires dust testing whenever paint is disturbed;
 - b. specific requirements depend on:
 - i. whether the housing is being disposed of;

- ii. assisted by the federal government;
 - iii. the type and amount of financial assistance;
 - iv. the age of the structure; and
 - v. whether dwelling is rental or owner-occupied.
- 8. Housing covered
 - a. federally-owned housing being sold;
 - b. housing receiving a federal subsidy that is associated with the property, rather than with the occupants (project-based assistance);
 - c. public housing;
 - d. housing occupied by a family (with a child under 6) receiving a tenant-based subsidy
 - i. Section 8 voucher;
 - ii. Certificate
 - iii. Housing Choice Voucher
 - e. multi-family housing for which mortgage insurance is being sought; and
 - f. housing receiving federal assistance for rehabilitation.
- 9. Not covered by Part 35 are the following types of housing:
 - a. housing built since January 1, 1978, when lead paint was banned for residential use;
 - b. housing exclusively for the elderly or people with disabilities, unless a child under age 6 is expected to reside there;
 - c. zero-bedroom dwellings, including efficiency apartments, single-room occupancy housing, dormitories or military barracks;
 - d. property that has been found to be free of lead-based paint by a certified lead-based paint inspector;
 - e. property where all lead-based paint has been removed;
 - f. unoccupied housing that will remain vacant until it is demolished;
 - g. non-residential property; and
 - h. any rehabilitation or housing improvement that does not disturb a painted surface.

C. Summary of Requirements - Federal Lead-Based Paint Poisoning Prevention Act.

- 1. Requirements may differ for each type of housing assistance
 - a. you must review each subpart of the regulation
- 2. One common set of hazard control requirements that applies to several HUD programs is:
 - a. stabilization of any deteriorated paint, including correction of any moisture leaks
 - i. paint stabilization is not required if not lead-based paint;
 - b. clearance following paint stabilization
 - i. to ensure that the work has been completed;
 - ii. dust, paint chips and other debris have been satisfactorily

- cleaned up; and
 - iii. to ensure that settled dust has low levels of lead.
 - c. ongoing maintenance of the paint and periodic reevaluation.
- 3. Another common set of requirements found in the regulation is:
 - a. a risk assessment to identify lead-based paint hazards;
 - b. interim control measures to eliminate any hazards that are identified;
 - c. clearance; and
 - d. ongoing maintenance and periodic reevaluation.
- 4. Special obligations when a child has an “environmental intervention blood level”:
 - a. a child of less than 6 years of age
 - b. “environmental intervention blood level”
 - i. confirmed (venous) blood level of 20 mg/dl or greater; or
 - ii. confirmed blood lead level of 15 mg/dl or greater and another confirmed blood lead level of 15 mg/dl or greater when repeated in 3-4 months
 - c. housing providers are required to exchange information with the local county Health Department

Important note: The federal requirement for risk assessment and hazard, reduction is triggered by an “environmental intervention blood lead level which is different from State regulations.
 - d. heightened requirements
 - i. inspection (“risk assessment”),
 - ii. containment (“hazard reduction”)
 - iii. lead paint or possible lead paint hazards; and
 - iv. monitoring (notice and reporting) requirements
- 5. When a lead-poisoned child is identified
 - a. a risk assessment of the child’s dwelling must be completed within 15 days after the owner is notified of the presence of a lead-poisoned child by a health department or other medical health care provider;
 - b. lead-based paint hazards must be corrected within 30 days after the risk assessment.
- 6. Lead-based paint inspections
 - a. inspections determine whether or not lead-based paint is present, and
 - b. where it is located, and
 - c. whether or not it is currently a hazard.
- 7. Risk assessments
 - a. risk assessments determine whether or not lead-based paint hazards exist and
 - b. where they are located.
- 8. Lead-based paint hazards:
 - a. deteriorated lead-based paint;
 - b. lead-based paint on friction surfaces, impact surfaces and

- accessible (chewable) surfaces;
 - c. dust and soil that is contaminated with lead above specified standards;
 - d. friction, impact and chewable surfaces must show signs of paint abrasion, damage or teeth marks to be considered lead-based paint hazards;
 - e. lead-based paint that is intact and in good condition is usually not considered a hazard.
- 9. Abatement
 - a. permanent methods (at least 20 years) of intentionally eliminating lead hazards:
 - i. removal of paint;
 - ii. replacement of painted building components
 - iii. enclosure or encapsulation of painted surfaces
 - iv. application must have an expected life of at least 20 years
 - v. window replacement done to eliminate lead hazards
 - vi. covering a wall with new drywall.
 - b. not abatement unless intent of abatement:
 - i. many rehabilitation projects, are not considered to be abatement;
 - ii. window replacement done for other reasons is not an abatement;
 - iii. covering window troughs or other small surfaces with vinyl, aluminum or other material is not “permanent” and is not abatement.
- 10. Interim controls
 - a. maintain a property to ensure that hazards that have been identified are controlled.
 - b. interim controls correct lead-based paint hazards for a shorter period of time;
 - c. most common interim control is paint stabilization:
 - i. stabilizing paint is repairing any physical defect in the material beneath the painted surface that is causing paint deterioration;
 - ii. removing loose paint and other material from the surface to be treated using wet methods to reduce dust generation, and
 - iii. applying a new protective coating or paint.
 - d. ongoing maintenance of lead-based paint surfaces is necessary.
- 11. What size of an area before this rule requires action.
 - a. all deteriorated paint must be stabilized or abated:
 - i. except when the paint is found not to be lead-based paint or
 - ii. the deterioration is limited to hairline cracks or small nicks, scratches or nail holes.
 - b. “safe work practices” occupant protection, worksite preparation and specialized cleaning:
 - i. must be used during stabilization or abatement only when

the area of paint being disturbed is greater than:

- (1) 20 square feet on exterior surfaces; or
- (2) 2 square feet in an interior room; or
- (3) 10% of a building component with a small surface area (such as a painted window frame)

12. Clearance.
 - a. a visual assessment to assure deteriorated paint surfaces or visible amounts of dust or debris;
 - b. dust testing after visual assessment;
 - c. a report documenting that the housing passed clearance;
 - d. clearance is required except for single-family mortgage insurance and small jobs;
 - e. clearance examination must be done by a person who did not perform the hazard control work and who is certified (or licensed) to perform lead-based paint inspections, risk assessments or clearance examinations.
13. Soil testing:
 - a. lead hazard screens must be done in accordance with EPA standards at 40 CFR 745 and the HUD standards at 24 CFR
14. Certification for lead-based paint activities
 - a. clearance examination must be performed
 - i. by a person not involved in performing the hazards control work;
 - ii. certified (or licensed) as a lead-based paint inspector, risk assessor, or clearance technician;
 - iii. or by a person trained but not certified as a clearance technician, provided a certified lead-based paint inspector or risk assessor approves the work and signs the report;
 - b. paint testing and full lead-based paint inspections
 - i. must be performed by a certified lead-based paint inspector;
 - c. a risk assessment
 - i. must be performed by a certified risk assessor;
 - d. abatement
 - i. must be performed by a certified abatement worker;
 - ii. abatement work must be supervised by a certified lead-based paint abatement supervisor;
 - e. interim controls
 - i. must be performed by a person OSHA trained in accordance with the hazard communication standard (at 29 CFR 1926.59) of the U.S. Occupational Safety and Health Administration (OSHA
 - ii. and is either supervised by a certified abatement supervisor,
 - iii. or has completed one of several training courses that explain how to conduct such work safely.

15. Certified abatement personnel required
 - a. federally-assisted rehabilitation projects when the average federal assistance exceeds \$25,000 per unit;
 - b. when abatement is done in the context of modernization in the conventional public housing program;
 - c. properties receiving multifamily mortgage insurance where properties are being converted from non-residential to residential use or undergoing major rehabilitation.
16. Information on how to do lead hazard evaluation and control work safely.
 - a. HUD's "Lead Paint Safety: A Field Guide for Painting, Home Maintenance and Renovation Work":
 - i. National Lead Information Clearinghouse, at 1-800-424-LEAD, or
 - ii. www.hud.gov/lea
 - b. EPA's "Reducing Lead Hazards When Remodeling Your Home":
 - i. Clearinghouse or
 - ii. www.epa.gov/opptintr/lead.
 - c. HUD's comprehensive document, Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing:
 - i. www.hud.gov/lea or
 - ii. by mail from HUD USER at 1-800-245-2691.

D. Federal Regulations - Environmental Protection Agency: 40 CFR Part 745 - Lead; Identification of Dangerous Levels of Lead; Final Rule - January 5, 2001

1. Agency: Environmental Protection Agency (EPA)
2. Summary: EPA issued a final regulation under section 403 of the Toxic Substances Control Act (TSCA), as amended by the Residential Lead-Based Paint Hazard Reduction Act of 1992, also known as "Title X" (to establish standards for lead-based paint hazards in most pre-1978 housing and child-occupied facilities. This regulation supports the implementation of regulations already promulgated, and others under development, which deal with:
 - a. worker training and certification,
 - b. lead hazard disclosure in real estate transactions,
 - c. requirements for lead cleanup under State authorities,
 - d. lead hazard evaluation and control in Federally-owned housing prior to sale and housing receiving Federal assistance, and
 - e. U.S. Department of Housing and Urban Development (HUD) grants to local jurisdictions to perform lead hazard control.
3. In addition, under authority of TSCA section 402,
 - a. residential lead dust cleanup levels
 - b. and amendments to dust and soil sampling requirements.
4. Under authority of TSCA section 404,
 - a. amendments to State program authorization requirements.

ISSUE

FINAL REG. 40 CFR 745 SUBPART D

Walls, other surfaces (generally) - definition of hazard:	“Any...deteriorated lead-based paint in any residential building or child-occupied facility” §745.65(a)(4)
Friction Surfaces - definition of hazard:	All Pb paint on a friction surface, but only where if both 1) subject to abrasion <u>and</u> 2) dust levels exceed standards §745.65(a)(1)
Impact Surfaces - definition of hazard:	Only already damaged Pb-paint caused by impact from a related building component §745.65(a)(2)
Chewable Surfaces - definition of hazard:	Any chewable Pb painted surface, but only where evidence of teeth marks §745.65(a)(3)
Dust levels:	
floors	40 µg/ft bare and carpeted floors §745.65(b)
window sills	250 µg/ft §745.65(b)
window troughs	400 µg/ft §745.227(e)(viii)
Soil	soil-lead hazard is 400 ppm in play areas, 1,200 ppm remainder of yard §745.65(c)

E. Proposed Federal Regulations - Environmental Protection Agency: 40 CFR part 745, Lead; Notification Requirements for Lead-based Paint Abatement Activities and Training; Proposed Rule - January 22, 2001

1. Summary: Under the authority of Section 407 of the Toxic Substances Control Act (TSCA), as amended by the Residential Lead-Based Paint Hazard Reduction Act of 1992, also known as “Title X,” EPA **proposes** to establish notification procedures for:
 - a. certified lead abatement professionals conducting lead-based paint activities,
 - b. accredited training programs providing lead-based paint activities courses.
2. For General information contact: Environmental Assistance Division, Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20560; telephone number: (202) 554-1404; e-mail address: TSCA-Hotline@epa.gov

3. For technical information contact: Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

F. Worker Certification: Federal Law Requires That Workers Performing Permanent Paint Abatement Be Trained and Certified. 15 U.S.C. § 2682

1. States can administer worker certification programs, but if they don't do so, EPA must step in. § 2684
2. New York does not have worker certification yet, so EPA has been doing certification.
3. Regulations found at 40 CFR §§ 745.220-745.239, 745.320-745.339.

G. Screening under Medicaid: Early and Periodic Screening, Diagnosis and Treatment (EPSDT), 42 USC §§ 1396(a)(43) and 1396(a)(4)(B); 42 CFR § 441.56(b)(1)(v), requires lab tests for Medicaid eligible children < 21.

1. Also required periodic screening, per medically sound schedule § 441.58
2. States required to effectively inform all Medicaid eligible families of availability of free child screening, to affirmatively arrange for screening, to ID screening facilities, and to schedule and remind of appointments. 42 U.S.C. § 1396a(44); 42 CFR §§ 441.56, 441.60, 441.62
3. Federal GAO Study in 1999 found 79 % of 1 & 2 year old children in Medicaid not screened. (GAO/HEHS-99-18)

H. Lead-Based Paint Pre-Renovation Education

1. Lead-Based Paint Hazard Reduction Act § 406(b), rules at 40 CFR 745 subpart E (§§ 745.80 to 88), effective June 1, 1999.
 - a. applies where work is done that disturbs more than 2 ft² of painted surfaces
 - b. requires renovators, no more than 60 days prior to beginning work, to give owner of unit the EPA lead pamphlet on lead hazards, and the adult occupant of the unit.
 - c. if work will be in common areas, must ensure that each unit is notified, and make pamphlet available.

I. RESOURCES

A. HEALTH DEPARTMENTS

Contact your local Department of Health for the Lead Paint Poisoning Prevention Program **in** your region

B. MEDICAL - Regional Lead Poisoning Prevention Resource Centers

1. **Judge Joseph S Mattina Community Health Center**
300 Niagara Street
Buffalo, NY 14201
Dr. Melinda S. Cameron
Tel: (716)859-4199

2. **Montefiore Medical Center**
Environmental Sciences Lead Program
111 East 210th Street
Bronx, NY 10467-2490
Dr. John Rosen
Tel: (718)547-2789

3. **Albany Medical College**
Department of Pediatrics
43 New Scotland Avenue
Albany, NY 12208
Dr. Carrin Schottler-Thal
Tel: (518)262-7860

4. **SUNY Upstate Medical University**
Pediatric Medical Services Group
Department of Pediatrics
750 East Adams Street
Syracuse, NY 13210
Dr. Howard L. Weinberger
Tel: (315)464-5450

5. **University of Rochester Medical Center**
Department of Pediatrics
Division of General Pediatrics
601 Elmwood Avenue, Box 777
Rochester, NY 14642
Dr. Stanley Schaffer
Tel.: (585)275-0267
Dr. James R. Campbell, Co-Director
Tel: (585)922-3919

C. LEGAL

Empire Justice Center
Telesca Center for Justice
One West Main Street, Suite 200
Rochester, NY 14614
Tel.: 585-454-4060
Fax: 585-454-4019
web site: www.empirejustice.org

D. ADVOCACY ORGANIZATIONS

1. **Coalition to End Lead Poisoning in New York (CELP)**
c/o Empire Justice Center
119 Washington Avenue
Albany, NY 12210
Tel: 518-462-6831
Fax: 518-462-6687
2. **New York City Coalition to End Lead Poisoning (NYCCELP)**
P.O. Box 670818
Van Cott Station
Bronx NY 10467
Tel: 718-519-1002
Website: www.nmic.org/nycceelp.htm
E-mail: NYCCELP2000@aol.com
3. **Alliance To End Childhood Lead Poisoning**
227 Massachusetts Avenue NE
Washington, DC 20002
(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

E. NEW YORK STATE:

1. **Bureau of Child & Adolescent Health**
Childhood Lead Poisoning Prevention Program
(518)-473-4602
2. For Publications:

New York State Department of Health
Distribution Center
11 Fourth Avenue
Rensselaer, NY 12144-2415

F. FEDERAL:

1. **Department of Housing and Urban Development (HUD)**
Office of Lead Hazard Control
451 Seventh Street, SW, P-3206
Washington, DC 20410
(202)-755-1785

(800)-483-8929

HUD WebSites

<http://www.hud.gov/lea/leahome.html>

www.hud.gov/lea

2. **Environmental Protection Agency (EPA)**

EPA Region 2 Office (New York)

Regional Lead Contact

U..S. EPA Region 2

2890 Woodbridge Avenue

Building 209, Mail Stop 225

Edison, NJ 08837-3679

(732)-321-6671

EPA Websites

<http://www.epa.gov/opptintr/lead/index.html>

www.epa.gov/lead

3. **National Lead Information Clearinghouse (NLIC)**

1-800-424-LEAD / Hearing Impaired TDD (800)-526-5456

Fax 202-659-1192

E-mail: ehc@cais.com

For Publications of the National Lead Information Clearing House
Contact:

Superintendent of Documents

P.O. Box 371954

Pittsburgh, PA 15250-7954

(202)-512-1800

4. **Centers for Disease Control (CDC)**

Lead Poisoning Prevention Branch

Division of Environmental Hazards and Health Effects

National Center for Environmental Health

1600 Clifton Road, Mailstop E-25

Atlanta, GA 30333

(888)-232-6789

CDC Website

<http://www.cdc.gov/nceh/ncehhome.htm>

II. IMPORTANT PUBLICATIONS:

- A. *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.
- B. *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
- C. *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.
- D. *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.
- E. *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

III. NEW YORK STATUTES - REGULATIONS:

- A. **N.Y. Public Health Law** (PHL) § 1370 - 1376-a (Art. 13 Title X of the New York Lead Poisoning Prevention Act of 1971 (LPPA). Amended in 1993.)
 - 1. Regulations at 10 N.Y.C.R.R. § 67.
- B. **N.Y. Public Health Law** (PHL) § 206(1)(n).
- C. **N.Y. Real Property Law** (RPL)
 - 1. § 235-b(1) (Warranty of Habitability)
 - 2. § 223-b (Retaliatory Eviction)
 - 3. § 236 (Discrimination against children)
 - 4. § 237 (Civil damages, declaratory and injunctive relief, attorneys' fees)
- D. **N.Y. Multiple Dwelling Law** (MDL) (3 or more families, cities over 325,000)
 - 1. § 78(1) (Good repair)
 - 2. § 80 (Cleanliness)
 - 3. § 309 (Nuisance)
 - 4. § 304 (Penalties)
- E. **N.Y. Multiple Residence Law** (3 or more families, cities under 325,000 and all towns and villages)

1. § 174 (Good repair)

F. **N.Y. General Obligations Law (GOL)**

1. § 5-321 (Agreements exempting lessors from liability for negligence are void.)

IV. FEDERAL STATUTES - REGULATIONS

A. **Lead-Based Poisoning Prevention Act:** 42 U.S.C. §§ 4801, 4822-4846; 24 C.F.R. Part 35. (Applies to federally assisted housing, and housing sold by the federal government built before 1978.)

B. **Identification of Dangerous Levels of Lead:** 15 U.S.C. § 2683. Regulations at 40 CFR Part 745 (major new regulations).

C. **"Title X Disclosure":** 42 U.S.C. § 4852(d). Regulations at 40 C.F.R. §§ 745.100-745.119; 24 C.F.R. §§ 35.80-35.98; 61 Fed. Reg. 9064 (3/6/96). (Requirements for disclosing known lead hazards to potential purchasers or renters.)

D. **Worker Certification:** 15 U.S.C. § 2682. Regulations at 40 C.F.R. §§ 745.220-745.239, 745.320 - 745.339.

E. **Community Development Block Grant ("CDBG") Funds:** 42 U.S.C. § 5301. (Grantees obligations under 24 C.F.R. Part 570.)

F. **Section 8 Programs:** 42 U.S.C. §§ 4801, 4822-4846; 24 C.F.R. Parts 880-882.

G. **Screening under Medicaid: Early and Periodic Screening, Diagnosis and Treatment (EPSDT):** 42 U.S.C. §§ 1396(a)(43) and 1396(a)(4)(B); 42 C.F.R. § 441.56(b)(1)(v). (Requires lab tests for Medicaid eligible children under 21.)

H. **Comprehensive Environmental Response, Compensation, & Liability Act CERCLA:** 42 U.S.C. §9601. et seq. (Hazardous materials.)

I. **Federal Resource Conservation and Recovery Act (RCRA):** 42 U.S.C. §6901, 40 C.F.R. §§260-62. (Handling of debris.)