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Local and Federal Statutory and Regulatory Bases for Preventing Lead Poisoning

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by Lucy Billings

I. Introduction

Lead poisoning prevention and treatment are issues that have a broad impact on low-income clients' housing and health. Most paint on the interior of poor persons' homes is leaded. Stripping or covering painted surfaces impermeably, or replacing painted components, has a major impact on the housing unit. The reasons lead-paint violations are *not* cured in one of the permissible ways are likely the same reasons other housing code violations are not cured. Addressing the system for curing lead-paint violations has an impact on the system for curing other hazardous housing code violations.

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In addition, advocates can have a broad impact by securing detection and treatment of the poisoning even after some damage is done. Lead poisoning is easily contracted by young children in leaded housing and causes health, mental health, and developmental problems. The reasons children do not receive screening and treatment for lead poisoning, services required for low-income children eligible for Medicaid, are likely the same reasons children do not receive other services under the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) program. Addressing the system for delivering EPSDT services for lead-poisoned children has a positive impact on the system for delivering other EPSDT services and for diagnosing and treating all the impairments lead poisoning causes.

II. State or Local Statutory or Regulatory Bases for Claims

In most states, so-called lead poisoning prevention acts require lead-paint inspections and abatement only after children have been identified and reported as poisoned. These laws are *not* preventive. Most states, however, do impose a warranty of habitability upon landlords for the housing they rent to tenants. That warranty of habitability could well be interpreted to require landlords to correct hazardous conditions in housing. Moreover, many states, counties, or municipalities have state or local regulations or statutes that require correction of hazardous housing conditions.

For example, in New York City, a local law enacted in 1982 makes all lead paint inside multiple dwellings where children under age seven years reside a violation

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that must be immediately corrected.[1] Although it is the only law like it in the country, it is really not so radical; it merely requires what the federal law applicable to federally assisted housing[2] required when the local law was enacted.[3]

In 1985, Bronx Legal Services' clients initiated a lawsuit to require enforcement of and compliance with the local law, as well as applicable federal laws, by the local housing department, the New York City Department of Housing Preservation and Development.[4] The suit also sought to require enforcement of and compliance with the local law requiring lead-paint inspections and abatement for poisoned children by the local health department, the City Department of Health.[5] The third prong of the suit sought enforcement of and compliance with the EPSDT requirements[6] for the most common, preventable disease for children under age seven in an urban environment, by the agencies responsible for local administration of the federal Medicaid program, the New York State and City Departments of Social Services.

In that first prong of the suit, the court interpreted the local law requiring correction of the hazardous violation to mean (1) *proper correction*—removal or permanent, impermeable covering of all lead paint, which is what the statute defines as a violation—and (2) *safe correction.* In the first instance, the court did nothing but read the plain language of the law and interpret the "covering of lead paint" as the experts have. In the second instance, the court interpreted the law in the only way meaningful: if the purpose of the law was to correct a hazard, the correction process was required to be free of hazards.[7] A similar theory could apply to other hazardous violations prohibited under the city's housing code or housing codes in other jurisdictions.

Advocates seeking lead-paint inspections and correction procedures under state or local laws should emphasize five points that should guide implementation of any such laws:

(1) timely inspections, in time to correct an immediate hazard;

(2) adequate inspections, both accurate and complete;

(3) timely correction;

(4) complete correction; and

(5) safe correction.

III. Federal Statutory and Regulatory Bases for Claims

A. Federal Lead-Based Paint Poisoning Prevention Act

The federal Lead-Based Paint Poisoning Prevention Act (LPPPA) governs lead-paint conditions in all kinds of federally assisted housing.[8] Until 1992, the LPPPA required the Department of Housing and Urban Development (HUD) to establish procedures, through local public housing authorities (PHAs), to eliminate as far as practicable *all* lead paint, interior and exte-

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[1] N.Y.C. ADMIN. CODE § 27-2013(h).

[2] 42 U.S.C. § 4822 (1991).

[3] *See* Lucy Billings, *Tenants of Federally Financed Housing Lose Rights to Lead Paint Abatement*, 26 CLEARINGHOUSE REV. 1583 (Apr. 1993).

[4] New York City Coalition to End Lead Poisoning v. Koch, 138 Misc. 2d 188 (N.Y. Sup. Ct. New York County 1987), *aff'd*, 139 A.D.2d 404 (N.Y. App. Div. 1988), *on remand*, No. 42780/85 (N.Y. Sup. Ct. New York County July 6, 1989), *aff'd*, 170 A.D.2d 419 (N.Y. App. Div. 1991), *on remand*, No. 42780/85 (N.Y. Sup. Ct. New York County May 4, 1993) (Clearinghouse No. 39,406).

[5] 24 RULES OF THE CITY OF N.Y. § 173.13(d)(2).

[6] 42 U.S.C. §§ 1396a(a)(43), 1396d(a)(4)(B), 1396d(r)(1)(A), 1396d(r)(1)(B)(4); 42 C.F.R. §§ 441.56, 441.58.

[7] *New York City Coalition*, No. 42780/85 (July 6, 1989), *aff'd*, 170 A.D.2d 419 (1st Dep't 1991). *See* Lucy Billings, *Developing Regulations for the Safe Abatement of Lead Paint*, 1 N.Y.U. ENVTL. L.J. 7 (1992); *see also* 24 RULES OF THE CITY OF N.Y. § 173.14 (regulations promulgated pursuant to the court's decision in *New York City Coalition*).

[8] Lead-Based Paint Poisoning Prevention Act, 42 U.S.C. §§ 4822 *et seq.*

rior, in all pre-1978 federally assisted housing where children under age seven years resided or were expected to reside, regardless of whether they were lead poisoned.

This mandate was very broad. Its only qualifying language was "as far as practicable." The courts that had interpreted that language, however, had not found that the language limited HUD's mandate in any particular way and specifically found that the requirement *did*

Until 1992, the Lead-Based Paint Poisoning Prevention Act required the Department of Housing and Urban Development to eliminate as far as practicable all lead paint in certain federally assisted housing.

include surfaces *beyond* surfaces that are "defective" or deteriorated, as well as surfaces that are deteriorated.[9]

The statute was amended in 1992.[10] Under the current statute, not all lead paint is considered hazardous, nor must any be eliminated. Lead-paint "hazards" are defined as:

(1) deteriorated lead paint,

(2) chewable lead paint, and

(3) lead paint on friction and impact surfaces.[11]

In addition, the amended federal statute requires only a newly defined "risk assessment," distinguished from an inspection. While an inspection should assess risk factors, including (1) the presence of children and pregnant women; (2) the condition of the housing; and (3) the condition and nature of lead-painted surfaces (whether deteriorated, chewable, friction, or impact), a risk assessment, under the statute, does not necessarily include even a test for lead paint.[12] Without such a test, the assessment cannot accurately gauge the hazard, unless the assessment assumes all paint on pre-1978 housing is lead paint. Then risk assessments will categorize more housing in need of hazard correction than necessary.

In any event, these risk assessments need not occur until between 1996 and 2002, depending on the housing's age. Thus, over the ten years between 1992 and 2002, although these risk assessments will determine that housing units contain all sorts of hazards, nothing need be done about them.[13]

More significantly, under the new statute lead-paint hazards need not be eliminated. Historically, when lead paint was detected, it was supposed to be eliminated, by stripping or permanently, impermeably containing it. Ironically, now that lead poisoning has become such a serious problem, it is acceptable just to "control" it on an "interim" basis. The federal statutes do not even state (1) when, after a risk assessment, such "interim controls" must be implemented; (2) what interim controls are, except to list various alternative temporary measures, such as cleaning house, ordinary building maintenance that is otherwise required, and tenant education; or (3) who will perform these interim control measures (i.e., they could be the tenants' responsibility).[14]

Besides securing the best definitions of "when, what, and who," advocates must ensure that interim controls are implemented only as "interim" so as truly to "control" hazards. This will entail very frequent monitoring of lead-paint conditions and lead-dust accumulations, such that it may well become cost-effective just to do the job right the first time.

The only time, under the federal statutes, that actual abatement of lead-paint

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[9] *See, e.g.*, Ashton v. Pierce, 716 F.2d 56 (D.C. Cir. 1983).

[10] The Residential Lead-Based Paint Hazard Reduction Act, Pub. L. No. 102-550, 106 Stat. 3897 (1992) (Title X of the Housing and Community Development Act of 1992).

[11] 42 U.S.C. § 4851b(15).

[12] *Id.* § 4851b(25).

[13] *Id.* § 4822(a)(1).

[14] *Id.* §§ 4822(a)(1), 4851b(15).

hazards is required is when a housing unit receives a federally funded rehabilitation costing $25,000 or more.[15] Even in the event of such rehabilitation, however, the abatement is still only of lead-paint *hazards*.[16] Intact, nonchewable, nonfriction, and nonimpact surfaces can still contain high levels of lead paint. This lead paint will, next week, month, or year, and in poor housing likely sooner than later, only deteriorate and have to be patched up again and again.

When new HUD regulations are formulated under the amended statute, advocates, on their clients' behalf, should ask HUD to expand the definitions of lead-paint hazards to include as much hazardous lead paint as possible.[17] HUD should be urged to take the current regulations as the starting base, not to distinguish between poisoned and nonpoisoned children (e.g., to require the same inspection and abatement on deteriorated and chewable surfaces for all children under age seven years as now required for poisoned children), and also to address friction and impact surfaces.

B. Current HUD Regulations Under the Lead-Based Paint Poisoning Prevention Act

This section discusses the federal laws that still mandate local housing agencies to address lead contamination in housing where these authorities locally administer housing assistance payments under a program administered by the Secretary of HUD. These local agencies are PHAs that receive financial assistance from HUD under the United States Housing Act of 1937. That Act, as amended by Title II of the Housing and Community Development Act of 1974, was intended to remedy the shortage of decent, sanitary, and safe dwellings for low-income persons.[18] PHAs are responsible for compliance with federal housing quality standards intended to ensure that apartments where the assistance is used are maintained in a safe and sanitary condition, free of lead-paint hazards.

The LPPPA directs the Secretary of HUD to

> establish procedures to eliminate as far as practicable the hazards of lead based paint poisoning with respect to any existing housing which may present such hazards and which is covered by an application for mortgage insurance or housing assistance payments under a program administered by the Secretary or otherwise receives more than $5,000 in project-based assistance under a Federal housing program.[19]

The LPPPA also directs the Secretary of HUD to establish procedures to notify tenants of housing financially assisted by HUD (HUD-associated housing) of the hazards, symptoms, and treatment of lead-paint poisoning.

Pursuant to the authority granted under the LPPPA, the Secretary has promulgated regulations setting forth procedures for lead-paint notice, inspection, and elimination for HUD-associated housing constructed before 1978. As recipients of funds under a program administered by the Secretary, PHAs are responsible for compliance with the regulations governing HUD-associated housing.

Ironically, now that lead poisoning has become such a serious problem, it is acceptable just to "control" it on an "interim" basis.

HUD promulgated regulations under the original LPPPA as part of the housing quality standards that are similar for each of HUD's different federal housing pro-

[15] *Id.* § 4822(a)(1).
[16] *Id.* § 4851b(1), (15).
[17] A few suggestions in this regard can be found in the "Action Plan for HUD, EPA, and HHS on Lead Poisoning Prevention," Clearinghouse No. 49,375.
[18] Housing and Community Development Act of 1974, 42 U.S.C. § 1437.
[19] *Id.* § 4822.

Advocates Dissent from HUD-EPA Task Force Report on Lead-Based Paint Reduction

Four members of the HUD-EPA task force on lead-based paint reduction and financing have filed a dissenting view to the task force's recent report. The task force, created by the Housing and Community Development Act of 1992, Pub. L. No. 102-550, is responsible for making recommendations on expanding resources and efforts to evaluate and reduce lead-based paint hazards in private housing. In its final report, Clearinghouse No. 50,880A, the task force found that the key challenges to eliminating childhood lead poisoning include (1) the cost of hazard evaluation and control; (2) the need for safe, affordable housing; (3) the lack of accepted standards of lead-based paint hazard control; (4) the ineffective lead-based paint liability system; and (5) the lack of affordable lead-based paint liability insurance coverage.

Four members of the task force—two legal services attorneys, a tenant and mother of three lead-poisoned children, and an environmental health scientist—have filed a dissenting view to the final report. Dissenters disagree with the report's assertion that property owners do not comply with current lead-based paint abatement requirements because the requirements are unclear. In addition, dissenters challenge the task force's adoption of standards and strategies in the absence of any research that shows that they will in fact protect children. Dissenters assert that the report promotes partial, "interim controls" as the proper method to reduce lead-paint hazards and as a substitute for hazard abatement. Dissenters contend that, by leaving lead paint in children's homes, the report places substantial burden for lead poisoning prevention on tenant children and their families, the persons least able to control their situation.

Dissenters also disagree with the report's recommendations that would limit certain property owners' liability for lead poisoning. Dissenters assert that the most significant problem with the current tort system is that many lead-poisoned children do not have access to lawyers to seek redress. Although acknowledging that the current compensation system could be improved, dissenters maintain that the answer is not simply to "scrap" the system for new, untested procedures.

Finally, dissenters present examples of minimum recommendations for lead-based paint hazard reduction, including the mandatory inspection and abatement of lead-based paint hazards in very low-income housing. Copies of the ten-page dissent are also available from the Clearinghouse, No. 50,880B.

grams, for example, Section 8,[20] the Community Development Block Grant Program,[21] and public housing projects.[22] Although these HUD regulations probably could have been struck down as inadequate under the old federal statute, they now extend beyond the amended statutes' mandate. Nevertheless, the regulations are still in place and enforceable.[23]

Lead-paint-poisoning-prevention requirements are similar in the various federal housing programs. HUD regulations define lead paint as paint, whether or not defective, having a lead content greater than or equal to one milligram per square centimeter.[24] Applicable surfaces include "[a]ll intact and nonintact interior and exterior painted surfaces of a residential structure."[25] Defective paint surfaces are defined as "[p]aint on applicable surfaces that is cracking, scaling, chipping, peeling or loose."[26] Chewable surfaces are "protruding painted surfaces up to five feet from the floor or ground, which are read-

[20] 24 C.F.R. pts. 880–82.
[21] *Id.* § 570.608.
[22] *Id.* §§ 960.701 *et seq.*
[23] *See* Lucy Billings & Charles Delbaum, *Existing Regulations and the 1992 Residential Lead-Based Hazard Reduction Act*, 27 CLEARINGHOUSE REV. 674 (Oct. 1993).
[24] 24 C.F.R. §§ 570.608(c)(2), 882.109(i)(2); *see also id.* § 35.12.
[25] *Id.* §§ 570.608(c)(2), 882.109(i)(2); *see also id.* § 35.22.
[26] *See supra* note 25.

ily accessible to children under seven years of age."[27]

HUD procedures for notice, inspection, and elimination of lead paint generally are found at 24 C.F.R. part 35. HUD procedures require (1) tenant notification of (a) lead paint in housing where HUD assistance is used, (b) the symptoms and treatment of lead poisoning, and (c) the importance and availability of techniques to protect against lead poisoning;[28] (2) lead-paint inspection and correction;[29] (3) tenant protection during correction; and[30] (4) appropriate record keeping.[31]

Contrary to both the old and the new federal statutes, the HUD regulations distinguish between all children under age seven years and children identified as lead poisoned. For all children, the regulations generally require inspection for and treatment of defective or deteriorated surfaces—one of the more dangerous kinds of lead-painted surfaces, but not the only kind. For children identified as poisoned, and on whom the outdated blood lead level of 25 micrograms per deciliter is still being used to define poisoning,[32] the regulations generally require a test for lead paint and removal or permanent, impermeable containment of lead paint on defective and chewable surfaces—two of the more dangerous kinds of lead-painted surfaces, but not the only two.[33]

HUD regulations further make PHAs responsible for compliance, in HUD-associated housing, with (1) all applicable state and local laws, housing codes, and regulations and (2) all HUD regulations that materially affect tenants' health and safety, including any governing lead-paint inspections or abatement.[34] Therefore, clients may still have a federal claim, even if their advocates do find compliance under the federal law with the defective or deteriorated paint requirements and with the further requirements after a child is lead poisoned. If, as in New York City, the local jurisdiction requires more, tenants may make a claim on the basis of the federal regulations, which require compliance with local laws, as well as whatever claim the local law itself creates.

1. Community Development Block Grants

The Community Development Block Grant (CDBG) Program is an example of a program commonly administered locally by PHAs. Local housing agencies use CDBG funds in many different ways. In New York City, for example, the City Department of Housing Preservation and Development (HPD) uses CDBG funds to (1) repair and rehabilitate a revolving stock of 35,000–50,000 low-income housing units under city ownership and management and (2) enforce the laws governing the habitability of housing in the city, inspect housing, and ensure that the management and maintenance of privately owned housing comply with applicable laws. In particular, HPD uses CDBG funds for the repair and rehabilitation of housing in noncompliance.

The requirements to eliminate lead-paint hazards in housing assisted under the CDBG program are found at 24 C.F.R. § 570.608(c). Under the regulations, where a PHA uses CDBG funds it "shall inspect for defective paint surfaces in all units constructed prior to 1978 which are occupied by families with children under seven years of age."[35] In addition, PHAs "shall be required to test the lead content

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[27] *Id.* §§ 570.608(c)(2), 882.109(i)(2).
[28] *E.g., id.* § 35.5.
[29] *E.g., id.* § 35.24.
[30] *E.g., id.* §§ 570.608(c)(7), 882.109(i)(6).
[31] *E.g., id.* §§ 570.608(c)(8), 882.109(i)(7).
[32] The Centers for Disease Control (CDC) define lead poisoning as an elevated blood lead level equal to or greater than 10 micrograms per deciliter. *See* CENTERS FOR DISEASE CONTROL AND PREVENTION, PREVENTING LEAD POISONING IN YOUNG CHILDREN 11, n.51 *passim* (1991).
[33] The HUD regulations are discussed further in section III.B.1, .2, *infra.*
[34] 24 C.F.R. § 35.40(b); *see also id.* § 882.116(o).
[35] *Id.* § 570.608(c)(3)(i).

Recent Lead Paint Poisoning Litigation

California. The future of California's Childhood Lead Prevention Program Act (CLPPA) has been jeopardized by a recent decision in *Sinclair Paint Co. v. Board of Equalization,* No. 541310 (Cal. Super. Ct. Sacramento County Apr. 27, 1995) (Clearinghouse No. 50,702). CLPPA imposed up to $16 million in annual fees on paint and petroleum companies under the theory that those industries were the source of much of the lead now poisoning California's children. The assessment, which amounted to approximately 2.4 cents per gallon of paint sold and less than a penny a gallon for gasoline, funded the state's efforts to provide lead screening, environmental investigations, educational assistance, and other case management services to families exposed to lead paint. Challenging the assessment, Sinclair Paint Company argued that the fee was instead a tax prohibited by a California constitutional amendment that requires a two-thirds vote in the state legislature. (CLPPA had been passed by a majority vote.) The court agreed and granted Sinclair's motion for summary judgment. Intervenor low-income, lead-poisoned children were represented by pro bono counsel and by Alice Bussiere and Pat McElroy at the National Center for Youth Law.

Louisiana. The district court awarded plaintiffs attorney fees in *ACORN v. Edwards,* 1994 WL 634983 (E.D. La. Nov. 1994). ACORN had sued Louisiana state officials for failing to comply with the Lead Contamination Control Act of 1988 (LCCA), 42 U.S.C. § 300 j-24(c), (d), amending the Safe Drinking Water Act. LCCA required state officials to distribute to the Louisiana schools a list of water coolers that were not lead-free and to adopt and pursue a corresponding remediation program. Plaintiffs were represented by the Sierra Club Legal Defense Fund, Inc.

New York. In *General Accident Ins. Co. v. Idbar Realty Corp.,* 622 N.Y.S.2d 417 (Sup. Ct. 1995), the New York Supreme Court held that an insurer had a duty to defend an insured for the lead-paint poisoning of a child on insured premises and that a pollution exclusion was not so unambiguous as to bar coverage. The court ruled that the policy's pollution exclusion was reasonably interpreted to apply to injuries based upon industrial environmental pollution and not to lead-paint poisoning.

of chewable surfaces if the family residing in the unit, constructed prior to 1978 and receiving rehabilitation assistance, includes a child under seven years of age with an identified EBL [elevated blood lead level greater than or equal to 25 micrograms per deciliter]."[36] If the PHA forgoes testing chewable surfaces, however, it is to "abate all applicable surfaces."[37] These include pipes, radiators, common areas, fire escapes, and other exterior surfaces, as well as other interior surfaces.

Because lead paint can be present on any painted surface, the federal law merely reflects common sense in extending the abatement requirements to all such surfaces in or on a building. Local laws may include only specified surfaces (e.g., ceilings, walls, doors, moldings, and window sills and frames).[38] Simple logic, as well as the overwhelming bulk of scientific data and experience, supports the federal laws' inclusion of other lead-painted surfaces, such as window wells (a major repository of lead-paint scrapings and dust), baseboards, floors, radiators, pipes, hallways, and exterior surfaces. Even when the surfaces covered by local law have been abated, children can still be poisoned from these other sources.

The abatement methods are set out in 24 C.F.R. § 35.24(b)(2)(ii):

> Covering may be accomplished by such means as adding a layer of wallboard . . . Paint removal may be accomplished by such methods as scraping, heat treatment (infrared or coil type heat guns) or chemicals. Machine sanding and use of propane or gasoline torches (open flame

[36] *Id.* § 570.608(c)(3)(ii).
[37] *Id.* § 570.608(c)(3)(iii).
[38] *See, e.g.,* N.Y.C. ADMIN. CODE § 27-2013(h).

methods) are not permitted. *Washing and repainting without thorough removal or covering does not constitute adequate treatment.* [Emphasis added.]

The owner is also required to take necessary precautions to protect tenants from hazards associated with abatement procedures.[39]

Finally, the PHA is required to maintain records on which units have been inspected or tested pursuant to the procedures set forth in 24 C.F.R. § 570.608(c)(3).[40]

2. Section 8 Existing Housing

A local housing authority that makes housing assistance payments on behalf of eligible families leasing existing housing pursuant to Section 8 is responsible for compliance with the regulations for PHA-leased housing, found at 24 C.F.R. part 882.

New tenants who receive Section 8 housing assistance must be notified of PHA determinations that the housing unit the tenants are to lease with the Section 8 assistance is in decent, sanitary, and safe condition, based on the PHA's inspection before such leasing.[41] A unit to be covered by Section 8 cannot be leased until the PHA has concluded that the unit is "decent, safe and sanitary." For such a determination to be made, the PHA must inspect the unit for compliance with the established quality standards.[42]

Before a unit constructed pre-1978 is leased to a family that includes a child under age seven years, an initial inspection must include one for defective paint surfaces. If the initial inspection reveals a defect, the PHA is required to treat such surfaces in accordance with 24 C.F.R. §§ 35.24(b)(2)(ii), 882.209(h).[43] If a defect has to be corrected to make a unit "decent, safe, and sanitary," the PHA is required to inform the owner of the premises of the work required to bring the premises into compliance with the federal regulatory standards.[44]

The regulations further provide for periodic inspections of units to assure that the owner is maintaining the unit in a decent, sanitary, and safe condition. If a defect is identified, it is to be corrected within 30 days of PHA notification to the owner.[45]

When a current resident child under age seven years has been identified as having an EBL,[46] the PHA is required to inspect the unit and test for lead paint.[47]

Advocates should ensure maximum application of federal housing modernization funds in their communities, as these funds will also provide the opportunity for lead-paint abatement.

If lead paint is identified, lead-paint abatement must be completed within 30 days of PHA notification to the owner.[48]

The regulations require the PHA to select a safe treatment for surfaces containing lead paint, as set forth at 24 C.F.R. § 35.24(b)(2)(ii). As under the CDBG program, the owner is required to take necessary precautions to protect tenants from hazards associated with abatement procedures.[49]

Finally, the PHA is required to maintain records on which units have been tested and which units require treatment based on such testing.[50]

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[39] 24 C.F.R. § 570.608(c)(7).
[40] *Id.* § 570.608(c)(8).
[41] *Id.* § 882.116(o).
[42] *Id.* §§ 882.109, 882.209(h)(1).
[43] *Id.* § 882.109(i)(3).
[44] *Id.* § 882.209(h)(2).
[45] *Id.* §§ 882.109(i)(3), 882.211(b).
[46] *See id.* § 882.109(i)(2).
[47] *Id.* § 882.109(i)(4).
[48] *Id.*
[49] *Id.* § 882.109(i)(6).
[50] *Id.* § 882.109(i)(7).

3. HUD Modernization Funds

Advocates should ensure maximum application of federal housing modernization funds in their communities, as these funds will also provide the opportunity for lead-paint abatement. HUD's obligation to test for and abate "lead-based paint and lead-based paint hazards" in public housing receiving modernization assistance under 42 U.S.C. § 1437l is set forth at 42 U.S.C. § 4822(d)(1). To take advantage of this provision, as well as 42 U.S.C. § 4822(a)(1)(E) ("abatement of lead-based paint hazards in the course of substantial rehabilitation projects receiving more than $25,000 per unit in Federal funds"), advocates or clients may be interested in obtaining information relating to the Secretary's implementation of 42 U.S.C. § 4822(d)(1) from October 28, 1992, to the present in their communities. They may seek such information under the Freedom of Information Act[51] by requesting documents relating to the Secretary's responsibilities under 42 U.S.C. § 4822. The requested documents might include:

(1) a comprehensive listing of all public housing in the community that has received modernization assistance under 42 U.S.C. § 1437l from October 28, 1992, to the present;

(2) a comprehensive listing of all public housing in the community that has been inspected for lead paint pursuant to 42 U.S.C. § 4822(d)(1);

(3) a comprehensive listing of all public housing in the community where inspections pursuant to 42 U.S.C. § 4822(d)(1) produced test results greater than or equal to one milligram of lead per square centimeter or 0.5 percent by weight (or the local legal standard for lead paint if more stringent);

(4) a comprehensive listing of all public housing in the community where the Secretary is requiring the abatement of lead paint and lead-paint hazards pursuant to 42 U.S.C. § 4822(d)(1) and the current schedule for completion of those abatement activities where such a schedule is readily available; and

(5) all documents necessary to understand fully the Secretary's implementation of 42 U.S.C. § 4822(d)(1) in the community from October 28, 1992, to the present.

Under the Freedom of Information Act, fees associated with such requests may be waived. Waiver is more likely if the agency is persuaded that (1) a nonprofit community group that includes or serves persons at the poverty level seeks the information; (2) citizens seek to analyze the requested information in order to understand HUD's implementation of its responsibilities and to represent their interests, their group members, or their clients effectively on public housing and health issues; (3) the requested information is not in the public domain; and (4) no commercial benefit will accrue to those requesting the information or to their clients from the release of the information.

C. Federal Medicaid Act and Early and Periodic Screening, Diagnosis, and Treatment Regulations

Medicaid-participating states are required to provide minimum medical services. One set of mandated services is early and periodic screening, diagnosis, and treatment of health problems of eligible individuals under age 21.[52]

The EPSDT program imposes an obligation on local agencies that administer the Medicaid program in each state to ensure that medical screening, diagnosis, and treatment services, including services for lead poisoning, are actually available to Medicaid-eligible children. Federal law specifically requires early and periodic screening and diagnosis of Medicaid-eligible children to ascertain physical or mental defects and health care treatment and other measures to correct or ameliorate the defects and chronic conditions discovered.[53] State laws may reiterate and supplement the federal EPSDT requirements but not conflict with them.[54]

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[51] 5 U.S.C. § 552.

[52] 42 U.S.C. §§ 1396a(a)(43), 1396d(a)(4)(B).

[53] *Id.* §§ 1396a(a)(43), 1396d(a)(4)(B)

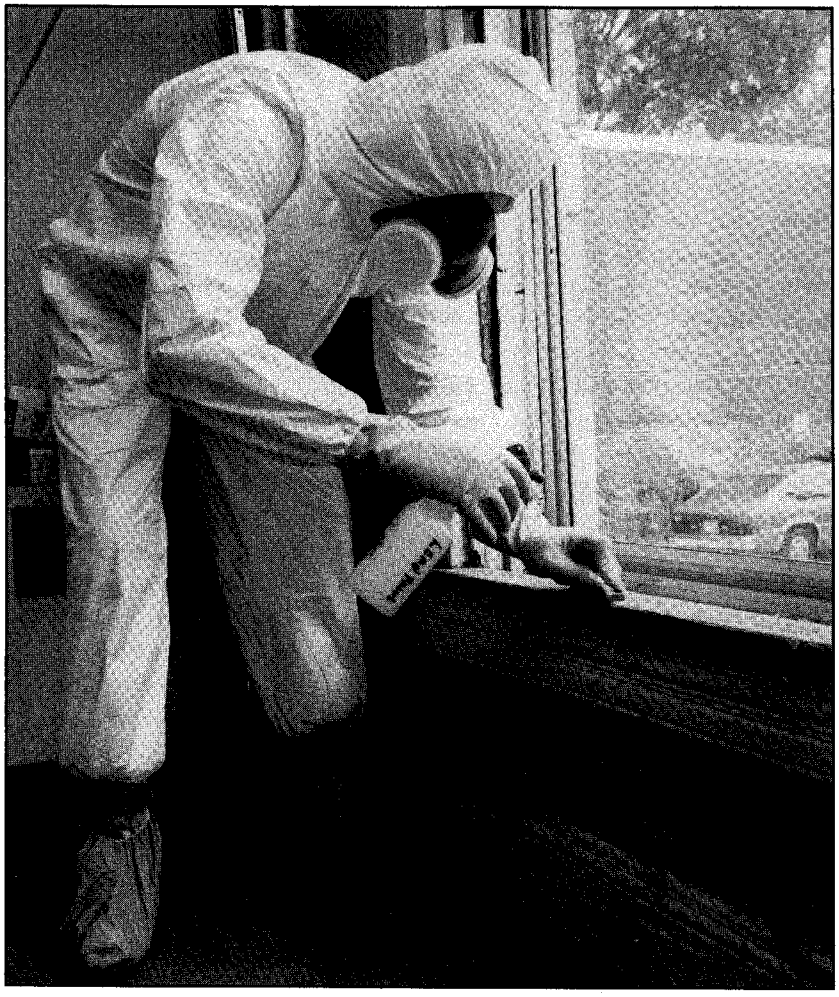
[54] *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 18, §§ 508.1(a)(1), 508.4.

District Court Certifies Class Action Against New York's Failure to Abate Lead Paint in Federally Assisted Housing

The district court has certified a class in a lawsuit challenging the New York City Housing Authority's failure to abate lead paint hazards in federally assisted housing. In *German v. Federal Home Loan Mortgage Corp.*, plaintiffs, children under the age of seven years, allege that they have been and continue to be at a heightened risk of lead poisoning as a result of living in dwellings owned, operated, and managed by defendant Federal Home Loan Mortgage Corporation. They claim that defendants' failure to ensure that the lead paint in their dwellings is immediately removed or permanently, durably, and impermeably covered violates the Lead-Based Paint Poisoning Prevention Act (LPPPA), 42 U.S.C. §§ 4822 *et seq.*, and New York City law. Plaintiffs also assert nuisance, breach of contract, warranty of habitability, negligence, product liability, strict liability, intentional infliction of emotional distress, and outrageous conduct claims. Plaintiffs seek an order requiring defendants (1) to notify tenants regarding the lead hazards in buildings that defendants own or where they administer federal funds; (2) to take the steps necessary to minimize lead's harmful effects on tenants; (3) to create a fund, paid for by defendants, for medical surveillance and monitoring of children in these buildings; (4) to refrain from evicting tenants and withholding security deposits; and (5) to abate the lead hazards in buildings. In certifying a class and denying in part defendants' motions to dismiss and for summary judgment, the court rejected defendants' argument that it should abstain. The court found that, even though city efforts to rectify lead paint problems are afoot, over decades these efforts have not eradicated the problem. In addition, the court rejected defendants' argument that abstention was appropriate because of some overlap between the instant case and *New York City Coalition to End Lead Poisoning v. Koch,* Clearinghouse No. 39,406, a state court proceeding against other defendants concerning lead paint. Although the court dismissed plaintiffs' negligence and strict product liability claims, the court denied defendants' motion to dismiss plaintiffs' other claims. In particular, the court held that plaintiffs do have a cause of action against the housing authority under the LPPPA. Plaintiffs are represented by Lucy Billings, Bronx Legal Services, Bronx, NY, and Brian Farrell and John E. Fitzgerald, Fitzgerald & Fitzgerald, Yonkers, NY.

The following documents are available from the Clearinghouse:

50,699A Reply Memo Supporting Plfs' Motion to Amend (18pp.)
50,699B Opinion (12pp.)
50,699C Plfs' First Interrogatories to Federal Home Loan Mortgage Co. (12pp.)
50,699D Plfs' First Interrogatories to Caisi Management Co. (6pp.)
50,699E Intervening Plfs' Memo (22pp.)
50,699F Plfs' First Interrogatories to City of New York (20pp.)
50,699G Intervening Plfs' Reply Memo (35pp.)
50,699H Intervening Plfs' Reply to City's Opp'n to Intervention & Prelim. Inj. (11pp.)
50,699-I Intervening Plfs' Reply to New York City Housing Authority (23pp.)
50,699J Second Amended Complaint (46pp.)
50,699K Memo Supporting Class Certification (32pp.)
50,699L Plfs' Memo Opposing Motion to Dismiss (38pp.)
50,699M Declaration Opposing Motions to Dismiss (22pp.)
50,699N Plfs' Memo Opposing Motion to Dismiss (65pp.)
50,699-O Plfs' Opp'n to City's Motion to Dismiss (79pp.)
50,699P Plfs' Reply to Housing Authority's Opp'n to Class Cert. (14pp.)
50,699Q Plfs' Reply in Support of Class Cert. (58pp.)
50,699R Opinion (111pp.)



MARTHA TABOR

1. Lead Poisoning Screening

Under the EPSDT program, Medicaid-eligible children must be regularly examined and evaluated for their physical and mental health, growth, development, and nutritional status. All examination, evaluation, and treatment services must be provided in accordance with reasonable standards of medical practice.[55]

In 1989, Congress amended the law to require that EPSDT screening services for children under age seven must include laboratory tests for lead poisoning.[56] The statute also requires blood lead screening at periodic intervals that meet reasonable standards of medical practice and at such other intervals indicated as medically necessary to determine illnesses or conditions.[57]

2. Necessity for Frequent Screening

Lead poisoning, if left undetected, becomes acute and causes irreversible damage. This damage decreases children's intelligence, attention span, and success in school and makes them more likely to require public support, including Medicaid services, as adults. Expending public funds to prevent lead contamination and poisoning costs but a fraction of what it costs to remedy the problem after injury.

In October 1991, the Centers for Disease Control (CDC) published a standard for blood lead levels. CDC stated that the definitive blood lead level at which injury occurs is 10 micrograms per deciliter. CDC indicated this standard might be reduced because "some studies have suggested harmful effects at even lower levels," and "*no* threshold has been identified for the harmful effects of lead."[58]

Federal Medicaid regulations establish general requirements for the amount, duration, and scope of each service to be provided. "Each service must be sufficient in amount, duration, and scope to reasonably achieve its purpose,"[59] and the "Medicaid agency may not arbitrarily deny or reduce the amount, duration, or scope of a required service . . . to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition."[60]

CDC and national experts on childhood lead poisoning prevention have determined minimum periodic screening intervals that meet reasonable standards

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[55] 42 U.S.C. § 1396d(r)(1)–(4).

[56] *Id.* § 1396d(r)(1)(B)(iv). *See also* 42 C.F.R. § 441.56(b)(1) and, e.g., N.Y. COMP. CODE R. & REGS. tit. 18, §§ 508.1(a), 508.8.

[57] 42 U.S.C. § 1396d(r)(1)(A)(i)-(ii). *See also* 42 C.F.R. §§ 441.56(b), 441.58, and, e.g., N.Y. COMP. CODE R. & REGS. tit. 18, § 508.8(a).

[58] CENTERS FOR DISEASE CONTROL, PREVENTING LEAD POISONING IN YOUNG CHILDREN 2 (1991) (emphasis added).

[59] 42 C.F.R. § 440.230(b).

[60] *Id.* § 440.230(c).

of medical practice and additional screening intervals medically necessary to determine lead poisoning. Blood lead tests are one of the minimum laboratory tests needed to comprise a medical examination appropriate for a child under age seven. To meet reasonable standards of medical practice for low-income Medicaid-eligible children, who live in or frequent older buildings with deteriorating surfaces that likely contain lead paint, lead blood assessments must be provided at least once every six months to every child from age six months to three years and at least once a year to every child age three to six years.[61]

Many environmental and medical conditions require shorter intervals between screenings. During and after lead poisoning medical treatment, during and after repairs or renovations that affect the paint in a child's home, and in other circumstances of potential exposure, it is medically necessary to test more frequently.

3. Diagnosis and Treatment of All Impairments Caused by Poisoning

Children who are lead poisoned are entitled to diagnostic and treatment measures to ameliorate that condition.[62]

Although lead poisoning is the most preventable children's disease, it now affects hundreds of thousands of children in New York City alone. Almost all affected children are poor and eligible for Medicaid. Lead poisoning causes a wide range of permanent, debilitating physical and mental conditions including adverse effects on the central nervous system, kidney, and hematopoietic system; decreased intelligence; impaired neurobehavioral development; decreased stature or growth; decreased hearing acuity; decreased ability to maintain a steady posture; reduced gestational age; and reduced weight at birth.[63] By Congress' mandate, these problems must be properly diagnosed and treated.

Case management could include parent education about lead poisoning or referral for lead abatement.

4. Environmental Investigations

Under the EPSDT program, states are required to provide "*necessary* health care, diagnostic services, treatment, and other *measures . . . to correct or ameliorate* defects and physical and mental illnesses and c*onditions discovered by the screening services, whether or not the services are covered under the State plan.*"[64] Case management is a Medicaid service that is mandatory if "necessary . . . to correct or ameliorate" a condition discovered in a child screened

[61] In October 1993, to comply with the court's order in Thompson v. Raiford, No. 3:92-C-V-1539-R (N.D. Tex. Sept. 24, 1993) (Clearinghouse No. 48,926), the Health Care Financing Administration (HCFA) issued a new manual provision on lead. HCFA, STATE MEDICAID MANUAL § 4123.2 (Oct. 1993). Under the new manual provision, children aged 6–72 months must receive verbal screening at each periodic visit and interperiodically as needed. Regardless of the verbal test results, all children must receive blood lead tests at 12 months and again at 24 months. Any child aged 24–72 months who has not been tested must be tested immediately. Children testing high (equal to or greater than 10 micrograms per deciliter) or responding "yes" to any part of the questionnaire are to be tested immediately and followed up consistent with the CDC guidelines. As set forth in the text, children verbally responding as high-risk but testing below 10 micrograms per deciliter must be retested at every periodic Early and Periodic Screening, Diagnosis, and Treatment visit. For children testing equal to or greater than 10 micrograms per deciliter, the guidelines call for environmental histories and investigations and for stepped up retesting at 3–4 month intervals until the lead problem is brought under control. *See also* Ellis v. Wetherbee, No. S92-0529 (S.D. Miss. May 1994) (Clearinghouse No. 48,639), and Matthews v. Coye, No. C-90-3620 EFL (N.D. Cal. Oct. 17, 1992) (Clearinghouse No. 46,283).

[62] 42 U.S.C. §§ 1396a(a)(43)(C), 1396d(a)(4)(B). *See also* N.Y. COMP. R. & REGS. tit. 18, §§ 508.1(a)(1), 508.4.

[63] *E.g.*, CENTERS FOR DISEASE CONTROL, supra note 58, at 7–10.

[64] 42 U.S.C. § 1396d(r)(5) (emphasis added).

under EPSDT. Case management services are defined as "services which will assist individuals eligible under the plan in gaining access to needed medical, social, educational, and other services."[65]

> [C]ase management may be used to reach out beyond the bounds of the Medicaid program to coordinate access to a broad range of services, regardless of the source of funding for the services to which access is gained. The services to which access is gained must be found by the Medicaid agency to be medically necessary for the child. However, the medically necessary services do not have to be medical in nature to be reimbursable under the Medicaid State Plan.[66]

Environmental case management includes (1) educating parents about the sources, effects, and prevention of lead poisoning; (2) investigating the environment to identify lead sources and effectively communicating the results of this investigation; (3) taking emergency measures; (4) implementing long-term interventions to reduce lead exposure; and (5) evaluating the efficacy of the interventions.[67] Under these provisions, case management could include parent education about lead poisoning, referral for an environmental investigation of a home, referral for lead abatement, and assistance in locating lead-abated, safe housing.

Specifically regarding environmental investigations, the State Medicaid Manual of the Health Care Financing Administration (HCFA) instructs:

> If a child is found to have blood lead levels equal to or greater than 10 μg/dl, providers are to use their professional judgment with reference to CDC guidelines covering patient management and treatment, including follow up blood tests and initiating investigations to determine the source of lead, where indicated. Determining the source of lead may be reimbursable by Medicaid.[68]

When HCFA first issued this guidance, HCFA's policy, based on the Medicaid statutes that are still current, stated: "Children with lead poisoning require diagnosis and treatment which includes periodic reevaluation and an environmental evaluation to identify the sources of lead."[69] In testimony, HCFA has also

> "made it clear that the cost incurred for epidemiological investigation necessary to identify the sources of lead contamination for individuals with undue lead absorption is a reimbursable service under the Medicaid program."[70]

In rules proposed on October 1, 1993, HCFA has limited its policy. It has taken the position that it will reimburse for environmental investigations as part of a Medicaid-eligible child's patient-specific case management services, when the investigation is (1) conducted by a "health professional" (2) investigating "a Medicaid-eligible child's home for the source of lead poisoning" (3) where the child has been "diagnosed with an elevated blood lead level."[71]

HCFA's position may be subject to challenge on two fronts. First, HCFA's requirement that environmental investigations be conducted by medical professionals is inconsistent with the State Medicaid Manual policy, which does not

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[65] *Id.* § 1396n(g)(2).
[66] Letter from Christine Nye, Director, Medicaid Bureau, Health Care Financing Administration, to Lourdes Rivera and Sara Rosenbaum, Children's Defense Fund (May 21, 1992).
[67] E.g., CENTERS FOR DISEASE CONTROL, *supra* note 58, at 65–66.
[68] STATE MEDICAID MANUAL § 5123.2(D)(1)(d).
[69] HCFA Transmittal 4 (July 1990),
[70] *Hearings Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce,* 102d Cong., 1st Sess. (Apr. 25, July 26, 1991) (testimony of William Hiscock, HCFA).
[71] 58 Fed. Reg. 51290 (Oct. 1, 1993).

contain any qualification as to who may conduct the evaluation. Consistent with this approach, HCFA policy previously covered inspections by public health inspectors, sanitarians, and local health department officials.[72]

Second, case management is mandatory under EPSDT if it is "necessary . . . to correct or ameliorate" a condition discovered in an EPSDT-screened child. Such a condition could be an elevated blood lead level or simply a *risk* of lead poisoning. HCFA's policy that covered inspections by public health inspectors, sanitarians, and local health department officials, without qualification as to a child's blood lead level, reflected this approach.[73]

5. Abatement

Under the EPSDT program, Medicaid-eligible children who are lead poisoned must be referred for abatement of lead-paint hazards. HCFA has taken the position, however, that the abatement itself is not covered under EPSDT. Federal financial participation is not available for nonmedical activities such as analysis of paint samples sent to laboratories, removal of lead sources, and provision of alternative housing. HCFA apparently believes these activities should be more appropriately funded by other federal, state, or local entities, rather than under the Medicaid program.[74] More often, however, these necessary treatments and services are not otherwise funded.

Again, HCFA's position is inconsistent with the EPSDT statute's requirement that Medicaid-eligible children be provided services "necessary . . . to correct or ameliorate" a problem detected in a screening—either a condition posing a risk of lead poisoning or an actual elevated blood lead level. While states may use prior authorization and other utilization controls to ensure that treatment services are medically necessary, these controls must be consistent with the preventive thrust of the EPSDT benefit.[75]

Requiring states to cover abatement will not "break the Medicaid bank." Without abatement, the costs of treating lead poisoning will break the Medicaid bank. In fact, the multiple *economic benefits* of reducing lead exposure, which comes predominantly from interior lead paint, are enormous. According to one study, if abatement of lead-painted housing were carried out so as to reduce the annual population of six year olds' blood lead levels by one microgram per deciliter, the savings in health care, special education, lost IQ points, lost productivity, and lost earnings would yield approximately $17.2 billion per year.[76] It is disappointing that this and other such studies have not been given greater attention.

In addition, the cost of abatement, by itself, is relatively minimal if housing is otherwise in compliance with codes. Units needing abatement may already need new, properly functioning windows and doors and nonleaking, noncollapsing walls and ceilings, which if repaired would (1) cure other violations, (2) prevent other tenant injuries and landlord liability, (3) decrease maintenance costs, and (4) increase property value.

In sum, abatement can accomplish other needed rehabilitation, and rehabilitation can accomplish abatement at virtually no additional cost.

6. Informing Eligible Families of Early and Periodic Screening, Diagnosis, and Treatment Services

Under the federal EPSDT regulations, eligible individuals and their families must be informed about services, provided clear and nontechnical information about the benefits of preventive health care and about where and how to obtain care, and assured that the services are actually available.[77] The regulations thus impose a mandatory obligation on par-

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[72] Region VII Medicaid State Bulletin 230 (Sept. 10, 1992).
[73] *Id.*
[74] 58 Fed. Reg. 51290, 51290 (Oct. 1, 1993).
[75] H. REP. NO. 239, 101st Cong., 1st Sess. 299 (1989), *reprinted in* 1990 U.S.C.C.A.N. 2125.
[76] Joel Schwartz, *Societal Benefits of Reducing Lead Exposure*, 66 ENVTL. RESEARCH 105 (1994).
[77] 42 C.F.R. §§ 441.56(a)(1), 441.56(a)(2)(i), 441.56(a)(2)(ii).

ticipating state and local agencies to notify, seek out, and screen persons under age 21 aggressively in order to detect health problems and to pursue those problems with needed treatment.

7. Enforcement

The Department of Health and Human Services (HHS) further obligates state agencies to "[d]esign and employ methods to assure that children receive those screening services initially or periodically requested or due under the periodicity schedule, and treatment for all conditions identified as a result of examination or diagnosis."[78] State agencies are required to "[m]aintain records, program manuals, rules and procedures describing the methods used to *assure that services are provided appropriately and timely* [and k]eep information needed to assess compliance with Federal Medicaid requirements for a minimum of 3 years."[79] This information must show that all applicable services were provided and must document any conditions found needing treatment.[80]

The Secretary of HHS is required to set annual goals for participation of eligible children in each state in EPSDT services.[81] By 1994, for example, New York State was expected to provide, through its Medicaid program, basic screening services including blood lead screening, when appropriate, to 67 percent of Medicaid-eligible children.[82]

IV. Conclusion

Advocates must be cautioned not to be persuaded that it is infeasible to abate lead paint from housing, particularly the housing of clients living at or below the poverty level, with young children. On cost-benefit grounds, complete abatement is demonstrably feasible: several analyses conducted for the Environmental Protection Agency and for CDC have found that the societal returns in preventing lead poisoning justify even large investments in abatement.[83]

The obstacles to abatement are not economic but political. While advocates may not be able to change the lack of political support for investing in abatement of this controllable danger to children's health, they can at least expose the reason for failing to make such an investment.[84]

This article was designed to help advocates find and use the statutory and regulatory duties imposed on landlords and governmental agencies that can be brought to bear. More lead poisoning cases abound than attorneys handling them. Once lead poisoning damage is done, it is irreversible. Furthermore, the poison continues to cause damage until its source is corrected. Although speedy correction through the law is particularly important to prevent additional damage or repoisoning, all damage can be prevented through application of and obedience to effective laws. Advocates must not wait for children to be lead poisoned before undertaking advocacy. Clients need help now.

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[78] STATE MEDICAID MANUAL pt. 5, § 5310(A) (Apr. 1, 1990); 42 C.F.R. § 441.56(d).
[79] *Id.* § 5320 (emphasis added).
[80] *Id.* § 5320.2(B).
[81] 42 U.S.C. § 1396d(r)(5).
[82] STATE MEDICAID MANUAL pt. 5, § 5360, exhibit A (Nov. 1993).
[83] E.g., Schwartz, *supra* note 76; HHS, STRATEGIC PLAN FOR THE ELIMINATION OF CHILDHOOD LEAD POISONING 10–12, app. 2 (1991).
[84] For further discussion of these points, readers are urged to consult the dissent to the Federal Lead Paint Hazard Reduction and Financing Task Force's final report, Clearinghouse No. 50,880, as well as materials from the Loose Association of Legal Services Housing Advocates and Clients working group on lead paint, Clearinghouse No. 50,600N.