



## LEAD POISONING PREVENTION Issue Brief


# Lead Safe Housing Rule: Overview and Opportunities for Public Health Advocates

## Introduction

The toxic effects of lead poisoning, especially among young children, are well known. Likewise, the prevalence of lead hazards in children’s environments—including the homes in which they live and visit, the water they drink, and the soil in which they play—are widely understood. Yet laws and programs designed to prevent lead poisoning are sorely lacking, as most rely on a child’s elevated blood lead level (EBLL)—indicating that a child has already been poisoned—to trigger lead hazard reduction and abatement activities. Federal lead poisoning prevention laws applicable to federally-owned and -assisted housing (hereinafter collectively referred to as federally-assisted housing) have long suffered from these common flaws. Although many of these inadequacies persist, 2017 amendments to the Lead Safe Housing Rule (LSHR), a key regulation governing lead inspection and hazard control activities in federally-assisted housing, constitute a step in the right direction, as they lower the Department of Housing and Urban Development’s (HUD) definition of EBLL to trigger action sooner in the timeline of exposure and require a more comprehensive response when a child with an EBLL is identified. This issue brief provides an overview of key federal lead-poisoning prevention laws applicable to federally-assisted housing, describes the recent LSHR amendments, and discusses opportunities for public health departments and advocates to contribute to effective implementation and private enforcement of the laws.

## Legacy of Lead Poisoning and the Permanent Health Consequences

Lead poisoning is a significant and longstanding public health concern. According to the Centers for Disease Control and Prevention (CDC), the American Academy of Pediatrics (AAP), and numerous research studies, there is no safe level of lead exposure for children.<sup>1</sup> Yet children continue to be exposed to lead through a variety of sources, including deteriorating lead paint in their homes, lead-contaminated house dust and soil, and water contaminated by lead pipes.<sup>2</sup> Although childhood lead exposure has declined significantly since the Consumer Product Safety Commission banned the use of lead in paint for household use in 1978, lead-based



paint hazards remain prevalent and continue to harm children living in homes built prior to 1978.<sup>3</sup> In fact, the U.S. Department of Housing and Urban Development (HUD) has estimated that 35% of all housing units in the U.S. have lead-based paint somewhere in the building.<sup>4</sup> With respect to federally-assisted housing, HUD estimated in 2016 that approximately 450,000 federally-assisted housing units were built prior to 1978 and have children under age six living in them and, of these, approximately 57,000 units contain lead hazards.<sup>5</sup> Applying the CDC's national lead poisoning rates to the under-five population of children in the Housing Choice Voucher (HCV) program (the largest tenant-based rental assistance program<sup>6</sup>), it is estimated that approximately 90,416 children in that program alone have lead poisoning.<sup>7</sup>

The health consequences of childhood lead poisoning are significant and well-documented. High blood lead concentrations are associated with severe consequences including encephalopathy (damage to the brain), protracted vomiting, and death.<sup>8</sup> But even low levels of exposure are associated with decreased cognitive functioning and neurobehavioral disorders.<sup>9</sup> Indeed, even blood lead concentrations below the CDC's reference value<sup>10</sup> of 5 micrograms per deciliter (µg/dL) are linked to detrimental effects on IQ, diminished academic achievement, and increased risk of developing behavioral problems such as inattention, impulsivity, aggression, and hyperactivity.<sup>11</sup> In addition, childhood lead exposure is associated with higher rates of delinquency and criminal behaviors among adolescents.<sup>12</sup> Lead exposure is also harmful to pregnant women, as it can cause spontaneous abortion or low birth weight in children.<sup>13</sup>

The long term consequences of low-level lead poisoning cannot be corrected.<sup>14</sup> For this reason, the CDC, AAP, and public health experts across the country have recognized that primary prevention—i.e., preventing exposure—is essential to assuring children's health and wellbeing. A primary prevention strategy requires removing sources of lead exposure before a child is poisoned rather than allowing a child's poisoning to trigger hazard reduction activities.

## **Overview of Federal Laws that Address Lead Poisoning in Federally-Owned or -Assisted Housing**

### **Lead-Based Paint Poisoning Prevention Act**

The first piece of national legislation addressing the health hazards associated with lead-based paint was the Lead-Based Paint Poisoning Prevention Act (LBPPPA), passed in 1971.<sup>15</sup> The act defined lead-based paint as having more than one percent lead by weight and required the Secretary of Health, Education, and Welfare<sup>16</sup> to take steps to prohibit use of lead-based paint in federally-assisted residential structures, among other things.<sup>17</sup> In 1973, Congress enacted amendments to the LBPPPA, including lowering the permissible lead content in paint and directing HUD to establish procedures for eliminating lead-based paint hazards from federally-assisted housing built before 1950, including prior to selling federally-owned properties for residential use.<sup>18</sup> In 1978, the Consumer Product Safety Commission banned lead-based paint in consumer products, including residential paint and on toys and furniture.<sup>19</sup> Subsequent amendments to the LBPPPA continued to expand lead abatement activities, including broadening HUD's focus to federally-owned or -assisted housing built before 1978 and imposing additional (albeit limited) inspection and abatement requirements for federally supported housing.<sup>20</sup> However, the amendments continually failed to effectuate a strategy of primary prevention.<sup>21</sup>



## Residential Lead-Based Paint Hazard Reduction Act

In 1992, Congress enacted the Residential Lead-Based Paint Hazard Reduction Act (Title X of the Housing and Community Development Act), which—among other things—amended the LBPPPA by requiring HUD to “establish procedures to eliminate as far as practicable the hazards of lead based paint poisoning” in federally-assisted housing.<sup>22</sup> The law directed the HUD Secretary to promulgate regulations applicable to federally-assisted target housing<sup>23</sup> establishing measures for conducting lead-based paint hazard risk assessments, inspections, and abatement measures; providing lead hazard information pamphlets to purchasers and tenants; performing periodic risk assessments and interim controls of lead hazards, as well as abatement in limited circumstances; and notifying occupants when lead-based paint activities have been performed.<sup>24</sup> Applicable beyond federal housing, the law also

required HUD and the Environmental Protection Agency (EPA) to promulgate regulations requiring sellers and lessors of target housing to disclose known lead-based paint hazards to a purchaser or lessee before that person is contractually obligated to purchase or lease the home.<sup>25</sup>

## Lead Safe Housing Rule of 1999

Seven years later, in 1999, HUD promulgated the “Requirements for Notification, Evaluation and Reduction of Lead-Based Paint Hazards in Federally Owned Residential Property and Housing Receiving Federal Assistance,” also known as the “Lead Safe Housing Rule” (LSHR).<sup>26</sup> The rule targeted federally-assisted housing built prior to 1978, requiring visual inspections and/or risk assessments according to the type and level of federal assistance received; use of hazard reduction methods to treat identified hazards, ranging in protectiveness from using safe work practices during rehabilitation to abating all lead paint hazards (depending on the type of housing assistance involved); and incorporation of lead paint reevaluation and maintenance into routine building operations.<sup>27</sup> The rule also established standards for lead-based paint hazard evaluation and reduction activities, including requiring that certain activities be performed by certified professionals.<sup>28</sup> Pursuant to the then-applicable definition of target housing, housing units excluded from the rule included zero-bedroom dwelling units (e.g., studio apartments) and housing designed for seniors or those with disabilities from its requirements unless a child under the age of six was residing or expected to reside in the home.<sup>29</sup>

The 1999 LSHR also outlined steps that the designated party (e.g., the federal agency, housing authority, or owner)<sup>30</sup> for covered properties<sup>31</sup> must take when notified that a child under 6 years old who is living in the federally-assisted property has an “environmental intervention blood lead level,” defined as a concentration of 20µg/dL for a single test or 15-19µg/dL for two tests taken at least 3 months apart.<sup>32</sup> The steps generally include conducting a risk assessment<sup>33</sup> of the child’s dwelling unit and common areas, treating any lead-based paint risks via interim controls or abatement, reporting the child’s name and address to the public health department, and providing notice to other occupants if an evaluation (including risk assessment) is completed and lead-based paint hazards are found and if hazard reduction activities are undertaken. In the case of tenant-based rental assistance (e.g., Section 8), the designated party must attempt at least quarterly to obtain a list of children with environmental intervention blood lead levels from a public health department with jurisdiction over the area and must provide a list of addresses receiving tenant-based rental assistance to the health department unless the department does not wish to receive the report.<sup>34</sup> The designated party must then match information received from the health department with the names and addresses of families receiving assistance and must respond as required by the rule to children with an environmental intervention blood lead level.<sup>35</sup>



## Summary of 2017 Amendments to the Lead Safe Housing Rule

In response to a 2016 petition for rulemaking led by Emily Benfer, then Director of Loyola University Health Justice Project, and Kate Walz, Vice President of Advocacy at the Shriver Center on Poverty Law,<sup>36</sup> HUD promulgated amendments to the LSHR in 2017.<sup>37</sup> An important change accomplished by the 2017 amendments is an update to the definition of an elevated blood lead level (EBLL) to match the CDC's reference value.<sup>38</sup> The 2017 amendments also expand on the steps which must be taken when an elevated blood lead level is discovered in a child under six years old who is living in:

- A residential property that receives project-based assistance from HUD,<sup>39</sup>
- Public housing receiving assistance under the U.S. Housing Act of 1937 (i.e., a public housing program),<sup>40</sup>
- A HUD-owned multifamily property or a multifamily residential property for which HUD is the mortgagee-in-possession,<sup>41</sup> or
- Housing in which families receive tenant-based rental assistance (also known as Section 8 housing).<sup>42</sup>


Many of the expanded EBLL response requirements also apply to properties that receive project-based assistance from a federal agency other than HUD.<sup>43</sup> The 2017 amendments also include new reporting requirements.<sup>44</sup> In sum, the 2017 rule change accomplishes the important changes described below:

### **1. Lowers HUD's definition of an elevated blood lead level (EBLL) to align with the CDC's blood lead reference value.**

An important change accomplished by the 2017 amendments is an update to the definition of an elevated blood lead level (EBLL) to align with the CDC's blood lead reference value.<sup>45</sup> The CDC's current reference value is 5 µg/dL,<sup>46</sup> which is substantially lower than HUD's previous "environmental intervention blood lead level" of 20 µg/dL for a single test. The effect of this change is that lead hazard reduction activities must occur in response to much lower levels of lead poisoning as compared to the 1999 rule. Although the amendments do not require a response until after a child has been poisoned (and thus still fail to accomplish primary prevention), the lowered EBLL definition should result in earlier identification of lead hazards and less long-term harm to the child. Because HUD's definition of EBLL is aligned with the CDC's reference value, HUD will publish a notice in the Federal Register each time the CDC reference value changes and will provide an opportunity for public comment before applying the new value to the LSHR.<sup>47</sup> This amendment is extremely important given the CDC's determination that there is no safe level of lead exposure and the agency's commitment to updating the blood lead reference value every four years.<sup>48</sup>

### **2. Requires the owner or designated party responsible for certain federally-assisted housing to report each child with a confirmed EBLL to the public health department with jurisdiction, the HUD Field Office, and the Office of Lead Hazard Control and Healthy Homes (OLHCHH), and to provide documentation to the HUD field office when required hazard reduction measures are completed.**

The 1999 LSHR required all owners or designated parties responsible for covered properties to report names and addresses of children with verified EBLLs<sup>49</sup> to the public health department with jurisdiction, and it required parties responsible for public housing programs to report children with EBLLs to the HUD field office. Under the 2017 amendments, all of the covered properties must not only report children with EBLLs to the applicable public health department, but must also report EBLLs to the HUD field office and to the Office of Lead Hazard Control and Healthy Homes (OLHCHH) within 5 days of receiving the report and must provide the HUD field office with documentation of completed hazard reduction activities.<sup>50</sup>



These reporting requirements have the potential to improve compliance with the rule, facilitate accountability among property owners and designated properties, and promote appropriate follow-up care for children. To achieve this end, HUD field offices must (a) actively monitor covered properties' initial reporting of children with EBLLs as well as their documentation of required hazard reduction measures and (b) be prepared and empowered to enforce the LSHR's requirements against owners or designated parties who fail to fulfill their responsibilities under the rule. However, historically HUD has provided insufficient oversight and has failed to adequately monitor compliance with the LSHR.<sup>51</sup> This presents significant risk, particularly when public housing agencies (PHAs) are allowed to self-certify compliance and there is evidence of false certification of compliance with the rule.<sup>52</sup>


**3. Increases the rigor of the required response to a child's EBLL by requiring an "Environmental Investigation" (which includes a Risk Assessment) of the child's home and associated common areas within 15 days of identifying a child with an EBLL.**

Previously, when notified<sup>53</sup> of a child with an environmental intervention blood lead level, the owner or designated party responsible for federally-assisted covered housing was required to complete a risk assessment of the affected child's home and associated common areas within 15 days of notification, as well as implement indicated hazard reduction measures within 30 days of completing the risk assessment.<sup>54</sup> A risk assessment is "[a]n on-site investigation to determine the existence, nature, severity, and location of lead-based paint hazards" along with a report explaining the results and lead hazard reduction options.<sup>55</sup>

In contrast, the 2017 amendments require the owner or designated party responsible for covered housing to conduct a more thorough "environmental investigation" within 15 days of being notified of a child under age 6 with an EBLL.<sup>56</sup> An environmental investigation is defined as "the process of determining the source of lead exposure ... consisting of administration of a questionnaire, comprehensive environmental sampling, case management, and other measures, in accordance with chapter 16 of the HUD Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing ("Guidelines")."<sup>57</sup> According to the Guidelines, there are three primary differences between a risk assessment and an environmental investigation: first, the purpose of an environmental investigation is to identify all lead hazards in a child's environment, while the purpose of a risk assessment is merely to identify lead-based paint hazards in the child's dwelling; second, an environmental investigator must "conduct a comprehensive investigation of all sources of lead in the child's environment, not just those lead exposures directly related to the child's residence" (meaning that the investigator must consider less common sources of lead (e.g., pottery) as well as lead hazards in other homes or areas where the child spends time); and third, the investigator must test deteriorated paint on potentially hazardous furniture, regardless of ownership.<sup>58</sup> Importantly, an environmental investigation also includes case management, which is described in the Guidelines as "ensuring prompt and effective environmental management, monitoring medical care, providing education to the family, and coordinating any needed services following an individual plan of care."<sup>59</sup>

If the environmental investigation indicates the presence of lead-based paint hazards in the home, the designated party must complete hazard reduction measures in the home within 30 days of receiving the investigation report.<sup>60</sup> The designated party must provide documentation of each completed activity to the HUD field office within 10 days of the activity's deadline.<sup>61</sup>

**4. If the environmental investigation conducted in response to a child's EBLL reveals lead-based paint hazards, the designated party must conduct a risk assessment for other dwelling units located in the same property and covered by the same type of assistance.**



Under the previous rule, a child's EBLL triggered a risk assessment of only the child's own home and associated common areas, but not of any neighboring dwellings.<sup>62</sup> As a result, despite the likelihood of lead-based paint throughout the building, a child had to be poisoned in each individual dwelling in order to trigger the risk assessment requirement. The 2017 amendment represents a positive step towards prevention, as it requires the owner or designated party to not only conduct an environmental investigation of the home of the child with an EBLL (the "index unit"<sup>63</sup>), but also to conduct a risk assessment for other dwelling units if a lead-based paint hazard was identified in the index unit. This requirement applies to homes that are located in the same property and supported by the same type of federal assistance if a child under 6 years old lives or is expected to live in the dwelling unit.<sup>64</sup>

When 20 or less additional units must be assessed, the owner has 30 days to complete the risk assessment; when there are more than 20 units, the owner has 60 days.<sup>65</sup> If lead-based paint hazards are identified in the other covered units, hazard control measures must be implemented within 30 calendar days if there are 20 or fewer affected units or within 90 calendar days if more than 20 units are involved and "the control work would disturb painted surfaces that total more than the de minimis threshold [set forth in 24 C.F.R.] § 35.1350(d)."<sup>66</sup> The designated party must provide documentation to the HUD field office of all required activities within 10 days of the applicable deadline.<sup>67</sup>

## Penalties under the Lead Safe Housing Rule


A designated party who fails to comply with LSHR requirements is subject to sanctions under the applicable federal housing program.<sup>68</sup> Importantly, a property owner who discloses information about possible lead-based paint hazards to a potential purchaser or occupant (as required by the rule) is still required to conduct applicable evaluation and hazard reduction requirements.<sup>69</sup>

## Opportunities for Public Health Departments to Support Implementation of the Lead Safe Housing Rule

The LSHR imposes requirements primarily on the owner or designated party responsible for federally-assisted housing. Nevertheless, there are several ways in which public health departments can support effective implementation and enforcement of the rule. In particular, many of the rule's investigation and hazard reduction requirements are triggered by an owner or designated party's knowledge of a child's EBLL. Thus, data sharing and coordination between health departments, health care providers, covered properties, and HUD are essential to the rule's efficacy. Below are three important roles that a health department may play to support effective implementation of the rule. Note that where a state or local government agency has received grant funding from the OLHCHH to support implementation of the LSHR, the agency is likely obligated by the terms of its grant to perform these or other functions to facilitate LSHR compliance.<sup>70</sup>

## Report and Verify EBLL Data

The LSHR's investigation and hazard reduction requirements are triggered when a public health department or other health care provider<sup>71</sup> notifies a covered property's designated party of a child with an EBLL who is under 6 years old and living in a covered housing unit. Moreover, when the designated party is notified of a child's EBLL by someone other than a health care provider (e.g., the child's parent), the designated party must "immediately verify" the child's EBLL with the health department or health care provider; if the information is



verified, the verification is treated as notification for purposes of triggering an environmental investigation.<sup>72</sup> Thus, it is crucial that health departments and health care providers make every effort to report a child's EBLL to the party responsible for a covered property and verify EBLL data when requested by covered properties (either with patient consent or through another pathway consistent with federal and state privacy laws).<sup>73</sup>

## Receive and Monitor EBLL Data


Within 5 business days of being notified of a child's EBLL of 5µg/dL or greater (by either a health care professional or a public health department), the designated party must report the case to the HUD field office and OLHCHH.<sup>74</sup> If the designated party is notified by a health care professional (rather than the health department) of a child's EBLL, the designated party must also report the child's name and address to the public health department within 5 business days.<sup>75</sup> Health departments can promote compliance with the LSHR's investigation and hazard reduction requirements by monitoring EBLL data reported by covered properties and following up with tenants or responsible parties to assure completion of required activities.

## Match EBLL Data with Addresses Receiving Tenant-Based Rental Assistance

On at least a quarterly basis, the designated party for a tenant-based rental assistance program must report the addresses of units receiving tenant-based rental assistance to the health department(s) with jurisdiction unless the health department has indicated that it does not wish to receive the report. In addition, the designated party must request from the health department(s) with jurisdiction a list of names and/or addresses of children under the age of 6 with an EBLL. The designated party must then match address data to EBLL data (unless the health department performs the required matching) and must use the information to carry out its responsibilities under the LSHR.<sup>76</sup> A health department can promote prompt identification of children with EBLs living in housing supported by tenant-based rental assistance by engaging with the designated party to perform this data matching function. A health department might also consider offering free blood lead testing to children identified by the designated party, recognizing that these children are at increased risk of lead poisoning and therefore would likely benefit from more proactive blood lead monitoring. Even if the state or local definition of EBLL is higher than the CDC's reference value, a health department should collect and monitor data on all EBLs, regardless of level.

## ***Frequently Asked Question: What pathways exist under the HIPAA Privacy Rule to enable data exchange between a county health department and a HUD-supported housing program?***<sup>77</sup>

There are several pathways through which health departments and public housing agencies (PHAs) may share EBLL data in compliance with the Health Insurance Portability and Accountability Act *Standards for Privacy of Individually Identifiable Health Information* (referred to as the "Privacy Rule").<sup>78</sup> Generally, public housing agencies are not "covered entities" under HIPAA and therefore are not subject to the HIPAA Privacy Rule's requirements, regardless of what information they are sharing. Although health departments may be covered entities under HIPAA, there are still a number of HIPAA-compliant pathways through which they may report and/or verify EBLL data for a PHA. The Alliance for Healthy Homes has developed a guide for state and local childhood lead poisoning prevention programs titled [Overcoming Barriers to Data-Sharing Related to the HIPAA Privacy Rule](#).<sup>79</sup> Though the guide was published in 2004 (shortly after HIPAA took effect), the pathways and guidance appear to remain viable today. The most salient points are summarized here, but readers may wish to also consult the guide's in-depth explanations for additional information.<sup>80</sup>



When defining a HIPAA-compliant pathway for sharing data between housing and public health agencies, two key questions that should begin the inquiry are whether the HIPAA Privacy Rule applies: (1) to the entity that holds the relevant data, and (2) to the relevant data. If the answer to either of these questions is no, the HIPAA Privacy Rule does not apply and the data may be shared in accordance with other applicable laws. Part c below discusses potential pathways for sharing data *if* the HIPAA Privacy Rule applies to *both* the entity and the relevant data.

**a. Is the entity that is holding relevant data a “covered entity” under the HIPAA Privacy Rule?**

The HIPAA Privacy Rule applies only to data shared by “covered entities,” defined to include health plans, health care clearinghouses, and most health care providers.<sup>81</sup> Generally, housing agencies are not covered entities and therefore are not subject to the Privacy Rule.<sup>82</sup> In contrast, the Privacy Rule is more likely to apply to a public health department because many health departments provide health care services. If the health department provides health care services, it may be fully covered by HIPAA or it may be a hybrid entity, meaning that certain components are covered by the Privacy Rule while other components are not.<sup>83</sup> If the health department is not a covered entity, or if it is a hybrid entity but the program that holds the relevant data is not part of the designated health care component, the HIPAA Privacy Rule does not apply.

**b. Is the relevant data considered “protected health information” under the HIPAA Privacy Rule?**

With regard to which data is covered, the Privacy Rule safeguards use and disclosure of “protected health information” (PHI), which is defined as individually identifiable health information that is transmitted or maintained in electronic media or in other forms.<sup>84</sup> Health information is defined fairly broadly:

Health information means any information, including genetic information, whether oral or recorded in any form or medium, that:


- (1) Is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and
- (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.<sup>85</sup>

Thus, individual blood lead level data would be considered PHI. A health department’s housing-related data alone (e.g., lead ordinance violation records) is less likely to contain PHI.

**c. Pathways for public health departments that are covered entities to share PHI with housing agencies or community partners to investigate and remediate lead hazards.**

If a health department is a covered entity, or it is a hybrid entity and the program that holds EBLL data is part of the designated health care component, the Privacy Rule applies to the agency’s use and disclosure of EBLL data. In general, disclosure of PHI is prohibited unless for purposes specified in the rule (e.g., treatment, payment, or health care operations) or in accordance with a valid authorization.<sup>86</sup> Obtaining individual consent is one relatively simple method for enabling exchange of information between public housing and public health agencies. However, it is not always possible to obtain consent, particularly where private health care providers





have reported EBLs to the health department and the health department has not had direct contact with the affected children or their families.

Nevertheless, health departments that are covered by the HIPAA Privacy Rule may be allowed to share individual EBL data with a public housing agency without obtaining individual authorization under the Privacy Rule's public health exception.<sup>87</sup> Among other public health uses and disclosures, this exception allows covered entities to use or disclose PHI to a public health authority that is authorized by law to collect the data for purposes of preventing or controlling disease, injury, or disability, including by conducting public health surveillance, investigations, and interventions.<sup>88</sup> For a covered entity that is also a public health authority (e.g., a local health department that provides health care services), the Privacy Rule allows the entity to use PHI "in all cases in which it is permitted to disclose such information for public health activities."<sup>89</sup>

The public health exception provides at least two potential pathways to allow a local health department to share data with a housing agency or community partner. First, the local health department could designate the housing agency or community partner as its agent for purposes of using the data to conduct an authorized public health activity, such as investigations and interventions related to lead exposure. This arrangement would align with 45 C.F.R. § 164.512(b)(2) because the local health department would be using the data, through its agent, to accomplish authorized public health activities. The CDC has provided sample language that may be used to accomplish a grant of public health authority.<sup>90</sup> A local health department would likely also develop an agreement or memorandum of understanding with the housing agency or community partner to further define the scope of the grant of public health authority, including limits on the partner's use and redisclosure of the data.

A second possible pathway involves the public health department recognizing a housing agency as a public health authority in its own right, based on the agency's specific responsibilities under the Lead Safe Housing Rule to evaluate and control lead hazards. The Privacy Rule defines a public health authority as follows:


Public health authority means an agency or authority of the United States, a State, a territory, a political subdivision of a State or territory, or an Indian tribe, or a person or entity acting under a grant of authority from or contract with such public agency, including the employees or agents of such public agency or its contractors or persons or entities to whom it has granted authority, that is responsible for public health matters as part of its official mandate.<sup>91</sup>

Encouraging use of this pathway, HUD in its response to public comments about the LSHR explained that the HUD Office of Lead Hazard Control and Healthy Homes (OLHCHH) and its grantees are considered public health authorities under HIPAA and thus may receive protected health information necessary to accomplish their public health responsibilities—i.e., lead hazard and control activities. HUD's question and answer published in the Federal Register are included here for reference:

c. Coordination With HIPAA and Local Data Privacy Laws

*Comment:* Several commenters (8) requested clarification of the protocols for reporting, including the interaction with other federal laws such as the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (Pub. L. 104–191), and state and local privacy laws.

*HUD Response:* For the purpose of preventing or controlling childhood lead poisoning, in regard to lead hazard evaluation and control activities, the OLHCHH and its lead hazard control grantees acting on its behalf, are considered public health authorities under HIPAA; thus, they may receive



related private health information that is minimally necessary to accomplish the intended purpose of the disclosure, including the addresses of housing units and vital information about the children and their families, and must protect that information.<sup>92</sup>

Likewise, the CDC and HUD have together recognized in a letter that this specific interpretation of “public health authority” is consistent with the OLHCHH’s legal mandate.<sup>93</sup> Their interpretation is also consistent with the following explanation from the U.S. Department of Health and Human Services Office for Civil Rights in response to a question about whether the National Institutes of Health is considered a public health authority under the HIPAA Privacy Rule:

The definition of a “public health authority” requires that an agency’s official mandate include the responsibility for public health matters. The mandate can be responsibility for public health matters, generally, or it can be for specific public health programs. Furthermore, an agency’s official mandate does not have to be exclusively or primarily for public health. Therefore, to the extent a government agency has public health matters as part of its official mandate, it qualifies as a public health authority.<sup>94</sup>

Upon recognizing a housing agency as a public health authority, the public health department is then permitted to disclose PHI to the agency pursuant to 45 C.F.R. § 164.512(b)(1)(i).


Note that in addition to presenting pathways for data exchange between public health and housing agencies, the public health exception may be used to involve community-based organizations (CBOs) that are authorized to act as agents of either entity. In all contexts, agencies will need to be cognizant of the Privacy Rule’s other requirements relating to use and disclosure of health information, such as the requirement to use and disclose only the minimum necessary information.<sup>95</sup>

## **Opportunities for Health Advocates to Eliminate Lead Poisoning in Federally-Assisted Housing**

Despite the LSHR’s requirements, many families and children continue to face challenges with accessing lead-safe federally-assisted housing, even after a child has been poisoned. Community-based efforts to address childhood lead exposure frequently involve non-governmental entities and advocates. Where there are local public housing and health agencies proactively working to prevent lead poisoning and improve compliance with federal laws, a community-based organization’s (CBO) resources are likely best directed towards supporting these existing efforts. However, when government agencies fail to prioritize lead poisoning prevention, health advocates may wish to seek judicial intervention to compel covered housing entities to comply with federal laws.

### **Requesting Lead Hazard Data**

Data about the names and addresses of children with EBLLs, the location of lead hazards, and the status of enforcement actions initiated against owners of noncompliant housing is crucial to taking targeted action. Yet this information may be difficult for a CBO to obtain absent a formal relationship with a health or housing agency or an individually signed authorization to disclose information. Although some organizations have successfully used their state’s Freedom of Information (FOI) Act to obtain data about the location of lead



hazards, FOI laws and their interpretation vary by state and can be difficult to generalize. Nevertheless, there are several considerations that may help to increase the likelihood of success when requesting lead hazard data.

- Consider framing your request in terms of the location and presence of known lead hazards rather than requesting information tied to a child's elevated blood lead levels.<sup>96</sup>
- Consider contacting the agency that holds the information needed to determine the types of information collected and the format in which it is stored. Then, frame the request to target the data needed.<sup>97</sup>
- To prevent a denial based on the agency's lack of responsive data, consider framing your request using the exact language of the statute or regulation that requires data collection.
- If you are unable to obtain data directly from a particular agency, consider other agencies that may hold relevant data.
- Consider partnering with academic researchers to use non-identifiable data to estimate the extent and location of lead hazards, lead poisoning, or at-risk populations in an area.

## Private Legal Actions Seeking to Eliminate Lead Poisoning in Federally-Assisted Housing

Although the viability of a claim brought under the LBPPPA is doubtful,<sup>98</sup> there are several other legal avenues which attorneys may use to address lead hazards on behalf of their clients. For example, given the disproportionate occurrence of lead poisoning in communities of color, an attorney might bring a claim challenging a federally-assisted housing program's failure to provide lead-safe housing under the Fair Housing Act,<sup>99</sup> which prohibits discrimination based on race, color, religion, sex, familial status, or national origin in the sale or rental of housing (including associated services) and thus arguably prohibits discriminatory maintenance practices.<sup>100</sup> Using the same reasoning, an attorney might file a claim under Title V of the Civil Rights Act,<sup>101</sup> which prohibits discrimination based on race, color, or national origin in programs receiving federal financial assistance.<sup>102</sup> Alternatively, an attorney might challenge a federally-assisted program's refusal to provide lead-free housing for a child who currently has or has had an EBLL or other impairment under section 504 of the Rehabilitation Act,<sup>103</sup> which prohibits federally-assisted programs from excluding from participation, denying benefits to, or otherwise discriminating against an individual on the basis of their disability<sup>104</sup>; this claim would be based on the argument that a child's previous or existing EBLL (or other disability) would be exacerbated by further lead exposure, thereby preventing the child's participation in the program.<sup>105</sup> In addition, an attorney might bring a due process claim under the Fifth and Fourteenth Amendments of the U.S. Constitution<sup>106</sup> if an individual residing in federally-assisted housing is effectively denied their housing benefit without due process of law by being denied habitable housing.<sup>107</sup> Attorneys are encouraged to consult Emily Benfer's extensive discussion of these litigation strategies in her article, *Contaminated Childhood: How the United States Failed to Prevent the Chronic Lead Poisoning of Low-Income Children and Communities of Color*.<sup>108</sup>



## State Law Actions Seeking Remediation of Lead Hazards and/or Compensation for Families of Children with Lead Poisoning

State law tort claims premised on a designated party's negligent failure to remediate lead hazards may provide a route for compensating families for harm caused by lead-based paint exposure.<sup>109</sup> However, plaintiffs may encounter challenges with establishing a particular home as the proximate cause of a child's lead poisoning<sup>110</sup> or may find that a government-run housing agency is protected (to varying degrees) by governmental immunity.<sup>111</sup> Depending on the facts of a given case, an attorney might also consider the viability of a claim based on relevant state statutes.<sup>112</sup>

## State and Federal Policy Proposals to Protect Children from Lead Poisoning in Federally-Assisted Housing

Despite the recent amendments to the LSHR, children in tenant-based rental assistance programs—and in the majority of private market rental units across the United States—must develop lead poisoning before an environmental investigation occurs.<sup>113</sup> In all other federally-assisted housing programs, the designated party must conduct a risk assessment or lead-based paint inspection and remediate or abate any lead-based paint hazards prior to occupancy by a child under age 6.<sup>114</sup> Members of the United States Congress introduced, but have yet to pass, the Lead Safe Housing for Kids Act over each of the past three sessions. If passed, the bill would (1) require risk assessments in all federally-assisted housing prior to occupancy by a child under age 6 (excluding housing covered under federal mortgage insurance); (2) allow families to move on an emergency basis from units with uncontrolled lead hazards; and (3) authorize appropriations necessary to carry out the amendments.<sup>115</sup>

Because tenant-based rental assistance relies on the local rental market, state and local laws can also protect children in federally-assisted housing from lead poisoning. Presently, at least eighteen U.S. cities and states have adopted ordinances and laws that require lead hazard inspections of private market rental units prior to and throughout tenancy.<sup>116</sup> With few exceptions, these more protective laws apply to federal tenant-based rental assistance programs. In all other cities and states, children must develop lead poisoning, often at very high EBLLs, before lead hazard inspections are triggered in private rental units.<sup>117</sup> In these areas, advocates can build interprofessional coalitions to develop primary prevention laws that require the inspection of rental units for environmental health hazards prior to occupancy. Where existing laws exempt federally-assisted housing, advocates can seek amendments to local policy to ensure that lead hazards are identified and remediated prior to occupancy regardless of a tenant's source of payment. In addition, advocates can work with their state to adopt the CDC reference value as the EBLL that triggers lead hazard inspections. This may result in identifying additional children with lead poisoning, triggering local and Lead Safe Housing Rule requirements earlier in the timeline of exposure. Although lead poisoning is a complex social problem, with robust federal and state legislation, resources, and investment, it is entirely solvable.

## Conclusion

To date, HUD's lead poisoning prevention approach emphasizes secondary and tertiary prevention rather than primary prevention, as most hazard reduction activities are triggered by a child's EBLL. On top of these inadequate laws, HUD's insufficient monitoring and enforcement activities allow the problem to persist

unchecked in many communities.<sup>118</sup> Accordingly, the long-term effects of lead poisoning continue to reverberate across generation after generation of children. A federal commitment to primary prevention—through improved laws and stronger enforcement—is crucial to making significant progress in protecting children living in federally -assisted housing from lead poisoning. But until this federal commitment is realized, the role of state and local public health departments, health advocates, and housing partners cannot be understated: these partners must work together to support implementation of the existing laws and to seek accountability for covered housing providers that fail to comply.

## Resources

**Flowchart Overview of the Elevated Blood Lead Level Protocol** (provided in HUD’s Federal Register publication of the 2017 amendments to the LSHR)<sup>119</sup>

<https://www.federalregister.gov/documents/2017/01/13/2017-00261/requirements-for-notification-evaluation-and-reduction-of-lead-based-paint-hazards-in-federally>

**Responding to EBLLs in Children under Age Six: Guidance for PHA Public Housing Staff**

<https://www.hud.gov/sites/dfiles/PIH/documents/PHPHAFactSheet4618.pdf>

**Responding to EBLLs in Children under Age Six: Guidance for PHA Housing Choice Voucher (HCV) Staff**

<https://www.hud.gov/sites/dfiles/PIH/documents/HCVPHAFactSheet4618.pdf>

**Responding to EBLLs in Children under Age Six: Guidance for PHA Project-Based Voucher Staff**

<https://www.hud.gov/sites/dfiles/PIH/documents/PBVPHAFactSheet4618.pdf>

**Working with Your Local Health Department: Information for PHA Staff on EBLL Preparation and Response**

<https://www.hud.gov/sites/dfiles/PIH/documents/HealthDeptFactSheet4518.pdf>

**Blood Lead Levels in Children: Update for Owners of Project-Based Voucher Units**

<https://www.hud.gov/sites/dfiles/PIH/documents/PBVOwnerFactSheet4618.pdf>

## SUPPORTERS



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Robert H. McKinney School of Law; and Jennifer Phillips, J.D., Indiana University Robert H. McKinney School of Law Class of 2019. The Network for Public Health Law provides information and technical assistance on issues related to public health. The legal information and assistance provided in this document does not constitute legal advice or legal representation. For legal advice, please consult specific legal counsel.

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<sup>1</sup> CENTERS FOR DISEASE CONTROL AND PREVENTION, CHILDHOOD LEAD POISONING PREVENTION – BLOOD LEAD LEVELS IN CHILDREN, [https://www.cdc.gov/nceh/lead/acclpp/blood\\_lead\\_levels.htm](https://www.cdc.gov/nceh/lead/acclpp/blood_lead_levels.htm) (last visited Jan. 24, 2020) [hereinafter CDC, Blood Lead Levels in Children]; Amer. Acad. of Pediatrics Council on Env'tl. Health, *Policy Statement: Prevention of Childhood Lead Toxicity*, 138 PEDIATRICS 1, 3 (2016), available at <http://pediatrics.aappublications.org/content/pediatrics/138/1/e20161493.full.pdf> [hereinafter AAP Policy Statement].

<sup>2</sup> CENTERS FOR DISEASE CONTROL AND PREVENTION, CHILDHOOD LEAD POISONING PREVENTION – SOURCES OF LEAD, <https://www.cdc.gov/nceh/lead/prevention/sources.htm> (last visited Jan. 24, 2020).

<sup>3</sup> Pamela A. Meyer et al., *Surveillance for Elevated Blood Lead Levels Among Children --- United States, 1997-2001*, 52(SS10) CENTERS FOR DISEASE CONTROL AND PREVENTION – MORBIDITY AND MORTALITY WEEKLY REPORT 1 (2003), available at <https://www.cdc.gov/mmwr/preview/mmwrhtml/ss5210a1.htm#tab4>.

<sup>4</sup> U.S. Dep't of Hous. & Urban Dev. Office of Healthy Homes and Lead Control, AMERICAN HEALTH HOMES SURVEY: LEAD AND ARSENIC FINDINGS ES-1 (2011), available at [https://www.hud.gov/sites/documents/AHHS\\_REPORT.PDF](https://www.hud.gov/sites/documents/AHHS_REPORT.PDF)

<sup>5</sup> Notice of Proposed Rulemaking, 81 Fed. Reg. 60304, 60305 (Sept. 1, 2016).

<sup>6</sup> Center on Budget and Policy Priorities, *United States Housing Choice Vouchers Fact Sheet* (2017), available at [https://www.cbpp.org/sites/default/files/atoms/files/3-10-14hou-factsheets\\_us.pdf](https://www.cbpp.org/sites/default/files/atoms/files/3-10-14hou-factsheets_us.pdf) (last visited Feb. 12, 2020).

<sup>7</sup> Columbia Law School Health Justice Advocacy Clinic, *The Cost of Childhood Lead Poisoning in the United States* (2019) available at <https://www.networkforphl.org/wp-content/uploads/2020/03/Cost-of-Childhood-Lead-Poisoning-in-US.pdf> (last visited Feb. 12, 2020).

<sup>8</sup> AAP Policy Statement, *supra* note 1, at 1.

<sup>9</sup> *Id.* at 3.

<sup>10</sup> The CDC, recognizing that no amount of lead poisoning is safe, has shifted from using the term “level of concern” to the term “reference value” to refer to children with blood lead content that is higher than most other children. The reference value will be updated every four years based on the blood lead concentration among the highest 2.5% of children tested. CENTERS FOR DISEASE CONTROL AND PREVENTION, CHILDHOOD LEAD POISONING PREVENTION – BLOOD LEAD LEVELS IN CHILDREN, [https://www.cdc.gov/nceh/lead/acclpp/blood\\_lead\\_levels.htm](https://www.cdc.gov/nceh/lead/acclpp/blood_lead_levels.htm) (last visited Jan. 24, 2020).

<sup>11</sup> AAP Policy Statement, *supra* note 1, at 3-4.

<sup>12</sup> *Id.* at 4.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 5.

<sup>15</sup> Lead-Based Paint Poisoning Prevention Act, Pub. L. No. 91-695, 84 Stat. 2078-2080 (1971), codified at 42 U.S.C. 4821-4846 (as amended).

<sup>16</sup> The Department of Health, Education, and Welfare was the predecessor agency to the current Department of Health and Human Services.

<sup>17</sup> Lead-Based Paint Poisoning Prevention Act, Pub. L. No. 91-695, §§ 401, 501, 84 Stat. 2078-2080 (1971).

<sup>18</sup> Pub. L. No. 93-151, §§ 4, 6, 87 Stat. 560 (1973).

<sup>19</sup> 42 Fed. Reg. 44199, codified at 16 C.F.R. Part 1303.

<sup>20</sup> See Pub. L. No. 100-242, § 566, 101 Stat 1815 (1987); Pub. L. No. 100-628, § 1088, 102 Stat 3224 (1988).

<sup>21</sup> For a comprehensive history, see Emily A Benfer, Contaminated Childhood: How the United States Failed to Prevent the Chronic Lead Poisoning of Low-Income Children and Communities of Color, 41 HARV. ENVIRON. LAW REV. 70 (2017).

<sup>22</sup> Pub. L. No. 102-550, 106 Stat. 3672 (1992).

<sup>23</sup> The law defined target housing as “any housing constructed prior to 1978, except housing for the elderly or persons with disabilities (unless any child who is less than 6 years of age resides or is expected to reside in such housing for the elderly or persons with disabilities) or any 0-bedroom dwelling...” Pub. L. No. 102-550, § 1004, 106 Stat. 3672 (1992). The law has since been updated to include 0-bedroom dwellings if a child under 6 years old resides or is expected to reside in the home. See Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, § 237, 131 Stat. 135 (2017).

<sup>24</sup> Pub. L. No. 102-550, § 1012, 106 Stat. 3672 (1992), codified at 42 U.S.C. § 4822 (as amended).

<sup>25</sup> Pub. L. No. 102-550, § 1018, 106 Stat. 3672 (1992), codified at 42 U.S.C. § 4852d. See 24 C.F.R. §§ 35.80-35.98.

<sup>26</sup> Requirements for Notification, Evaluation and Reduction of Lead-Based Paint Hazards in Federally Owned Residential Property and Housing Receiving Federal Assistance, 64 Fed. Reg. 50140 (Sept. 15, 1999), codified at 24 C.F.R. Part 35 (as amended).

<sup>27</sup> 64 Fed. Reg. 50209-50218 (Subparts D-M, §§ 35.300-35.1225).

<sup>28</sup> 64 Fed. Reg. 50218-50223 (Subpart R, §§ 35.1300-35.1355).

<sup>29</sup> 64 Fed. Reg., 50203 (§ 35.110 - Definitions). As noted above, the legislature changed the definition of target housing in 2017. See *supra* note 23.

<sup>30</sup> The party who is responsible for taking particular actions required by the LSHR depends on the action and the type of housing at issue. The rule defines “designated party” in § 35.110 as the “Federal agency, grantee, subrecipient, participating jurisdiction, housing agency, CILP recipient, Indian tribe, tribally designated housing entity (TDHE), sponsor or property owner responsible for complying with applicable requirements.” Readers should consult the LSHR Subpart that applies to the type of housing at issue to determine who is responsible for executing particular functions for that type of housing.

<sup>31</sup> 64 Fed. Reg. 50209-50218 (Subpart D (§ 35.325), Subpart H (§ 35.730), Subpart I (§ 35.830), Subpart L (§ 35.1130), Subpart M (§ 35.1225)).

<sup>32</sup> 64 Fed. Reg. 50204 (§ 35.110 - Definitions).

<sup>33</sup> As defined in 24 C.F.R. § 35.110, a risk assessment is “[a]n on-site investigation to determine the existence, nature, severity, and location of lead-based paint hazards” as well as a report explaining the assessment results and hazard reduction options. Risk assessments involve dust, soil, and paint sampling and may include water sampling. Office of Lead Hazard Control and Healthy Homes, U.S. Dept. of Hous. & Urban Dev., *Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing* 5-11, 16-6 (2012), available at

[https://www.hud.gov/program\\_offices/healthy\\_homes/lbp/hudguidelines](https://www.hud.gov/program_offices/healthy_homes/lbp/hudguidelines) (last visited Feb. 12, 2020) [hereinafter HUD Guidelines]. See also 40 C.F.R. § 745.227(d)(11).

<sup>34</sup> 64 Fed. Reg. 50218 (§ 35.1225(f)).

<sup>35</sup> 64 Fed. Reg. 50218 (§ 35.1225(f)).

<sup>36</sup> Petition for Rulemaking Under U.S. Dep't of Hous. & Urban Dev. "Lead Based Paint Poisoning Prevention in Certain Residential Structures" Regulations to Prevent Lead Poisoning Among Program Participant Children 5 (2016), available at <https://perma.cc/TZP2-DZ2N>.

<sup>37</sup> Requirements for Notification, Evaluation and Reduction of Lead-Based Paint Hazards in Federally Owned Residential Property and Housing Receiving Federal Assistance; Response to Elevated Blood Lead Levels, 82 Fed. Reg. 4151 (Jan. 13, 2017) (codified at 24 C.F.R. pt. 35).

<sup>38</sup> 82 Fed. Reg. 4167 (§ 35.110). Note that "elevated blood lead level" replaces the term "environmental intervention blood lead level."

<sup>39</sup> 24 C.F.R. § 35.730

<sup>40</sup> 24 C.F.R. § 35.1130.

<sup>41</sup> 24 C.F.R. § 35.830.

<sup>42</sup> 24 C.F.R. § 35.1225.

<sup>43</sup> See 24 C.F.R. § 35.325. The requirements are slightly different in many cases for properties receiving assistance from agencies other than HUD.

<sup>44</sup> 82 Fed. Reg. 4167-4172 (§§ 35.325, 35.730, 35.830, 35.1130, 35.1225). This reporting requirement does not apply to subpart D, pertaining to Project-Based Assistance Provided by a Federal Agency Other Than HUD. See 24 C.F.R. § 35.325.

<sup>45</sup> 82 Fed. Reg. 4167 (§ 35.110). Note that "elevated blood lead level" replaces the term "environmental intervention blood lead level."

<sup>46</sup> CDC, Blood Lead Levels in Children, *supra* note 1.

<sup>47</sup> 24 C.F.R. § 35.110.

<sup>48</sup> Centers for Disease Control & Prevention, CDC Response to Advisory Committee on Childhood Lead Poisoning Prevention Recommendations in "Low Level Lead Exposure Harms Children: A Renewed Call of Primary Prevention" 6-7 (May 13, 2012; updated June 7, 2012), available at [https://www.cdc.gov/nceh/lead/acclpp/cdc\\_response\\_lead\\_exposure\\_recs.pdf](https://www.cdc.gov/nceh/lead/acclpp/cdc_response_lead_exposure_recs.pdf).

<sup>49</sup> The designated party is also responsible for verifying an elevated blood lead level if it received the information from a source other than the public health department or a health care provider. 24 CFR §§ 35.730(b); 35.830(b); 35.1130(b); 35.1225(b).

<sup>50</sup> 24 C.F.R. §§ 35.730(e); 35.830(e); 35.1130(e); 35.1225(e).

<sup>51</sup> United States Government Accountability Office, GAO-18-394, *Lead Paint in Housing: HUD Should Strengthen Grant Processes, Compliance, Monitoring, and Performance Assessment* (June 2018), <https://www.gao.gov/assets/700/692603.pdf> [hereinafter GAO, *Lead Paint in Housing*]; United States Government Accountability Office, GAO-20-2777, *Rental Housing Assistance: HUD Should Strengthen Physical Inspection of Properties and Oversight of Lead Paint Hazards* (Nov. 2019), <https://www.gao.gov/assets/710/702760.pdf>.

<sup>52</sup> GAO, *Lead Paint in Housing*, *supra* note 51 at 28-29.

<sup>53</sup> If notified of an EBLL by someone other than a health department or health care provider, the designated party must "immediately verify" the information with a health department or health care provider. Verification constitutes notice and triggers responsive activities. 24 C.F.R. §§ 35.730(b), 35.830(b), 35.1130(b), 35.1225(b).

<sup>54</sup> 64 Fed. Reg. 50211-50218 (§§ 35.325, 35.730(e); 35.830(e); 35.1130(e); 35.1225(e)).

<sup>55</sup> 24 C.F.R. § 35.110. See also *supra* note 33.

<sup>56</sup> 24 C.F.R. §§ 35.325(a), 35.730(a); 35.830(a); 35.1130(a); 35.1225(a). This requirement applies even if the child identified as having an EBLL is no longer living in the dwelling, including for tenant-based rental assistance programs if another household receiving tenant-based assistance is living or planning to live in the same unit. The environmental investigation requirement does not apply if the designated party completed an environmental investigation between the date of the child's last blood test and the designated party's notification of the EBLL.

<sup>57</sup> 24 C.F.R. § 35.110.

<sup>58</sup> HUD Guidelines, *supra* note 33, at 16-6.

<sup>59</sup> *Id.* at 16-7.

<sup>60</sup> 24 C.F.R. §§ 35.730(c); 35.830(c); 35.1130(c); 35.1225(c) (Note that this requirement does not apply if the designated party completed an environmental investigation and lead-based paint hazard reduction measures between the date of the child's last blood test and the designated party's notification of the EBLL). For federally-assisted housing supported by an agency other than HUD, the Federal Agency is directed by the rule to establish its own timelines for completing required activities. 24 C.F.R. §§ 35.325(c).

<sup>61</sup> 24 C.F.R. §§ 35.730(e)(3); 35.830(e)(3); 35.1130(e)(3); 35.1225(e)(3). For federally-assisted housing supported by an agency other than HUD, the designated party must report the information in accordance with rules established by that agency. 24 C.F.R. §§ 35.325(d).

<sup>62</sup> See 64 Fed. Reg. 50211-50218 (§§ 35.325, 35.730(e); 35.830(e); 35.1130(e); 35.1225(e)).

<sup>63</sup> Index unit "refers to the housing unit in which the child who as an EBLL resides." 82 Fed. Reg. 4157.

<sup>64</sup> 24 C.F.R. §§ 35.325(b); 35.730(f); 35.830(f); 35.1130(f); 35.1225(f).

<sup>65</sup> 24 C.F.R. §§ 35.325(b); 35.730(f)(1); 35.830(f)(1); 35.1130(f)(1); 35.1225(f)(1). The designated party is exempt from the requirement to conduct risk assessments for covered dwelling units in two cases: (a) they completed risk assessments and lead-based paint hazard reduction measures in their covered dwelling units and common areas between the date of the child's last blood test and the designated party's notification of the EBLL, or (b) they are able to document "compliance with evaluation, notification, lead disclosure, ongoing lead-based paint maintenance, and lead-based paint management requirements under this part throughout the 12 months preceding the date the owner received the environmental investigation report." 24 C.F.R. §§ 35.325(b)(2); 35.730(f)(4); 35.830(f)(4); 35.1130(f)(4); 35.1225(f)(4).

<sup>66</sup> 24 C.F.R. §§ 35.325(b); 35.730(f)(2); 35.830(f)(2); 35.1130(f)(2); 35.1225(f)(2). The de minimis thresholds established in 24 C.F.R. § 35.1350(d) encompass "maintenance or hazard reduction activities that do not disturb painted surfaces that total more than: (1) 20 square feet (2 square meters) on exterior surfaces; (2) 2 square feet (0.2 square meters) in any one interior room or space; or (3) 10 percent of the total surface area on an interior or exterior type of component with a small surface area. Examples include window sills, baseboards, and trim."

<sup>67</sup> 24 C.F.R. §§ 35.730(f)(3); 35.830(f)(3); 35.1130(f)(3); 35.1225(f)(3). For housing supported by a federal agency other than HUD, the federal agency must establish a timetable for completing and providing documentation of required activities. 24 CFR § 35.325(d).

<sup>68</sup> 24 CFR § 35.175(a).

<sup>69</sup> 24 CFR § 35.175(b).

- 70 For additional information about OLHCHH grants, grant requirements, and a list of funded states and localities, visit [https://www.hud.gov/program\\_offices/healthy\\_homes](https://www.hud.gov/program_offices/healthy_homes).
- 71 Note that health care providers and/or laboratories who receive test results indicating EBLs generally have a responsibility under state law to report EBLs to a state or local health department. See e.g. Indiana law requires “[a] person that examines the blood of an individual for the presence of lead” to report test results to the state department of health within one week of examination, 410 Ind. Admin. Code § 29-3-1; Minnesota law requires that any health care facility, medical laboratory, or individual who performs a blood lead analysis must report blood lead levels greater than 15 µg/dL to the state health commissioner within two working days, Minn. Stat. § 144.9502(subdivision 3)).
- 72 24 C.F.R. §§ 35.730(b), 35.830(b), 35.1130(b), 35.1225(b). If the health department or health care provider denies the covered housing entity’s request to verify a child’s EBL, the owner or other appropriate party (as specified in the applicable provision) must provide documentation of the denial to the appropriate HUD representative (also specified in the applicable provision).
- 73 See below for further discussion of the HIPAA Privacy Rule.
- 74 24 C.F.R. §§ 35.730, 35.830, 35.1130, 35.1225.
- 75 24 C.F.R. §§ 35.730(e)(1), 35.830(e)(1), 35.1130(e)(1), 35.1225(e)(1).
- 76 24 C.F.R. § 35.1225(g).
- 77 This section is adapted from a legal technical assistance response prepared by Colleen Healy Boufides and reviewed by Denise Chrysler which was previously published on the Network for Public Health Law website. Network for Public Health Law, *Exchange of Blood Lead Data to Facilitate Responsive Action Under the Lead Safe Housing Rule* (June 4, 2019), <https://www.networkforphl.org/news-insights/exchange-of-blood-lead-data-to-facilitate-responsive-action-under-the-lead-safe-housing-rule/>.
- 78 45 C.F.R. Parts 160 and 164, subparts A and E.
- 79 Alliance for Healthy Homes, *Overcoming Barriers to Data-Sharing Related to the HIPAA Privacy Rule: A Guide for State and Local Childhood Lead Poisoning Prevention Programs* (June 2004), available at <https://www.cdc.gov/nceh/lead/docs/policy/HIPAADoc.pdf> (last visited Feb. 3, 2020).
- 80 Readers should consult their state privacy laws as well to determine any state-specific requirements or limitations on sharing EBL data.
- 81 45 C.F.R. § 160.103.
- 82 Some PHAs ask clients to sign a waiver allowing them to share data with the health department. However, this is not required by HIPAA unless the PHA is a covered entity under HIPAA.
- 83 45 C.F.R. § 164.105.
- 84 45 C.F.R. § 160.103.
- 85 45 C.F.R. § 160.103.
- 86 45 C.F.R. § 164.502(a)(1), 164.508.
- 87 45 C.F.R. § 164.512(b).
- 88 45 C.F.R. § 164.512(b)(1)(i).
- 89 45 C.F.R. § 164.512(b)(2).
- 90 Centers for Disease Control and Prevention, HIPAA Privacy Rule and Public Health: Guidance from CDC and the U.S. Department of Health and Human Services, 52(S-1) *Morbidity and Mortality Weekly Report* 19-20 (2003), at Appendix B, available at <https://www.cdc.gov/mmwr/preview/mmwrhtml/su5201a3.htm>.
- 91 45 C.F.R. § 164.501.
- 92 82 Fed. Reg. 4156.
- 93 Letter from the U.S. Department of Housing and Urban Development and the Centers for Disease Control and Prevention (CDC), *Subject: Confidentiality of Childhood Lead Poisoning Data*, (undated), at [http://www.cdc.gov/nceh/lead/partnership/HUD\\_letter.pdf](http://www.cdc.gov/nceh/lead/partnership/HUD_letter.pdf).
- 94 Department of Health and Human Services Office for Civil Rights, *Does the HIPAA Privacy Rule’s public health provision permit covered entities to disclose protected health information to authorities such as the National Institutes of Health (NIH)?* (created Dec. 20, 2002, last reviewed July 26, 2013), <https://www.hhs.gov/hipaa/for-professionals/faq/297/does-the-hipaa-public-health-provision-permit-covered-entities-to-disclose-information-to-authorities/index.html> (last visited May 17, 2019).
- 95 See 45 C.F.R. § 164.514.
- 96 See *State ex rel. Cincinnati Enquirer v. Daniels*, 108 Ohio St.3d 518 (2006) (finding that lead citations and lead risk assessment reports do not contain protected health information (PHI) as defined by HIPAA, but that even if the requested data were considered PHI, release of the records would still be permitted under HIPAA’s “required by law” exception since disclosure of public records is required by Ohio’s Public Records Law). *But see Cuyahoga Cty. Bd. of Health v. Lipson O’Shea Legal Group*, 145 Ohio St.3d 446 (2016) (denying a request for public records pertaining to homes in which “a minor child was found to have elevated blood lead levels...” because the request was “inextricably linked” to health information, in that it sought records tied to health status rather than the status of the home).
- 97 Nicholas Dias, Rashida Kamal, and Laurent Bastien, *What makes a good FOIA request? We studied 33,000 to find out*. Columbia Journalism Review (Jan. 30, 2017), <https://www.cjr.org/analysis/foia-request-how-to-study.php>.
- 98 See *Johnson v. City of Detroit*, 446 F.3d 614 (6th Cir. 2006) (holding that neither the LBPPPA nor federal regulations promulgated pursuant to the Act create an individual right enforceable under 42 U.S.C. § 1983). Although courts have previously held that the LBPPPA creates an individually enforceable right, this conclusion is called into doubt by the U.S. Supreme Court’s holding in *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002), in which the Court sought to clarify the factors for determining whether a statute confers a right enforceable under 42 U.S.C. § 1983, thereby “alter[ing] the landscape of § 1983 claims.” See *id.* at 618-21. For further discussion, see Anna Snook, *A Narrowing of Section 1983 Claims: How Gonzaga Has Limited Recovery for Victims of Lead Poisoning in Federal Court*, 44 B.C. ENVTL. AFF. L. REV. 207 (2017).
- 99 42 U.S.C. § 3604(b).
- 100 See Benfer, *supra* note 21, at 538-41 for discussion of this strategy.
- 101 42 U.S.C. § 2000d.
- 102 See Benfer, *supra* note 21, at 541-42 for discussion of this strategy.
- 103 29 U.S.C. § 794. See also 29 U.S.C. § 794a providing for remedies and attorney fees.
- 104 29 U.S.C. § 705(20)
- 105 See Benfer, *supra* note 21, at 543 for discussion of this strategy.
- 106 U.S. CONST. amend. V, XIV.



<sup>107</sup> See Benfer, *supra* note 21, at 544-46 for discussion of this strategy.

<sup>108</sup> *Id.* at 537-46.

<sup>109</sup> See, e.g., *Rogers v. Home Equity USA, Inc.*, 160 A.3d 1207 (Md. Ct. App. 2017), *Louisville Metro Housing Authority v. Burns*, 198 S.W.3d 147 (Ky. Ct. App. 2005); *Ford ex rel. Pringle v. Philadelphia Hous. Auth.*, 848 A.2d 1038 (Pa. Commw. Ct. 2004).

<sup>110</sup> See, e.g., *Rogers* 160 A.3d 1207.

<sup>111</sup> See, e.g., *Evans v. Housing Authority of the City of Raleigh*, 602 S.E.2d 668 (N.C. 2004). Note that this will vary depending on state law and some states may waive governmental immunity for public housing authorities.

<sup>112</sup> See e.g., *Williams-Ward v. Lorenzo Pitts, Inc.*, 908 F.Supp. 48 (D. Mass. 1995) (finding that federal law did not preempt the Massachusetts Lead Paint Act's strict liability provision).

<sup>113</sup> 24 C.F.R. 35.1215 (requiring only a visual inspection prior to occupancy; visual inspections are ineffective in identifying the majority of hazards). See also Benfer, *supra* note 21, at 526-27.

<sup>114</sup> 24 C.F.R. 35.100(c).

<sup>115</sup> S.2631 (114<sup>th</sup>) (2016) (This version of the bill also removed the zero-bedroom dwelling unit exemption and required EPA to update the lead hazard definitions. Both of these objectives were accomplished through alternative avenues.); S.1845 (115<sup>th</sup>) (2017); S.1583(116<sup>th</sup>) (2019).

<sup>116</sup> Emily Benfer, Jennifer Katz, Emily Tu, *Pre-Rental Lead Hazard Inspection Statutory Requirements in the United States* (2020).

<sup>117</sup> Emily Benfer, et. al, *The Elimination of Lead Poisoning: An Urgent Call to Action to Safeguard Future Generations*, 19 Yale J. Health Pol'y L. & Ethics (2020).

<sup>118</sup> Molly Parker, *HUD Is Failing to Protect Children From Lead Paint Poisoning, Audits Find*, ProPublica (June 22, 2018), <https://www.propublica.org/article/hud-is-failing-to-protect-children-from-lead-paint-poisoning-audits-find> (last visited Feb. 6, 2020).

<sup>119</sup> 82 Fed. Reg. 4153, Fig. 1. Flowchart overview of the elevated blood lead level protocol.