



SCHUBERT CENTER
FOR CHILD STUDIES

Office of the General Counsel (Rules- Rental Registry)
Ohio Department of Health (ODH)
246 N. High Street
Columbus, Ohio 43215

June 22, 2018

Sent by electronic mail to ODHrules@ODH.ohio.gov

RE: Lead Safe Rental Registry – Comments on Proposed Rules OAC Chapter 3701-81

To the Office of General Counsel:

Thank you for the opportunity to provide comment on the important issue of lead-safe rental housing registry rules. The Schubert Center for Child Studies at Case Western Reserve University (Schubert Center) bridges research, education, policy and practice for the well-being of children and adolescents. Our Center has an interest in reducing childhood exposure to lead and supporting public policies that advance best practices for children and families, because children are especially vulnerable to the effects of lead toxicity and can suffer serious immediate harm and profound life-long damage to their health and developing brain and nervous system. This damage can impact children's learning abilities, behavior and impulse control, social-emotional regulation, risk-taking and other consequences, that also result in significant costs to Ohio taxpayers. We write to raise concerns about the Chapter 3701-81 proposed rules.

The Ohio Department of Health's (ODH) accompanying memo states: "[t]hese rules are being proposed to increase the availability of lead-safe rental properties in the state..." (<https://www.odh.ohio.gov/-/media/ODH/ASSETS/Files/rules/drafts/3701-81/Memo-5-24-2018.pdf?la=en>). However, as currently drafted, these rules will not accomplish this stated purpose, because: (1) they do not require that the lead hazard assessment used for purposes of joining the "lead-safe" rental registry provides the most accurate measure of whether a property is in fact free of lead; and, (2) they do not ensure even minimal enforcement of the rules. Indeed, there is no reliable oversight mechanism in place to ensure compliance and no disincentives or penalties for unethical or even fraudulent behavior.

Given that the proposed registry is not mandatory, it is even more essential that the public can trust that the information provided within it reflects our best knowledge of the condition of a property in terms of lead hazards. This is especially important when it comes to parents and caregivers seeking a lead-safe home for their children. The following comments provide more specifics concerning these fundamental flaws in the proposed rules and offer recommendations for suggested revisions.

1A. "Post maintenance dust sampling" without actual dust wipe testing will not ensure a property is "lead-safe," as demonstrated by research.

On its face, the proposed rules appear to require the best practice of dust wipe sampling with testing to ensure that "no dust hazards" exist, but in fact, through a confusing use of similar-sounding language and references, the rule actually defines "dust sampling" to include a process ("cleaning verification") that

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only involves mere visual inspection of the dust wipes (OAC 3701-81-01(G)(1)). Because the proposed standards and procedures for joining the registry only require a visual examination (OAC 3701-81-02 (D)(2)) to identify potential lead hazards, the requirement to “conduct post-maintenance dust sampling” (OAC 3701-81-02 (D)(4)) that is effective is critical. The process of “post maintenance dust sampling” therefore, must accomplish its stated purpose: to ensure the property is lead-safe. The problem is that the definition of “post-maintenance dust sampling,” while including the more reliable “clearance examination,” also allows a visual check alone to qualify a property as lead-safe.

Studies addressing lead assessments offer compelling evidence for the need for dust wipe testing, the use of laboratory analysis of dust wipes to test for the presence of lead according to approved standards, and why cleaning verification alone is not adequate to assess whether lead hazards exist. Consider the following:

- Breyse and colleagues, in a study that examined Maryland’s implementation of its lead law, found that visual examinations alone, without dust wipe testing, were inadequate to ascertain whether a property is lead-safe.¹
- A 2017 examination of lead exposure to children in Chicago’s public housing choice voucher (HCV) program came to the same conclusion. The analysis found that the Chicago Housing Authority, which only required that paint in a dwelling be visually assessed for deterioration, had approved an HCV contract in 187 dwellings since 2010 where at least one child was subsequently diagnosed with lead poisoning: “*Young kids remain at risk in part because CHA inspectors only check visually for cracked and peeling paint, rather than confirming hazards with dust swabs or hand-held scanners.*”²
- Recent data collected by the city of Rochester, as part of its lead ordinance, is also instructive on this point. The city of Rochester requires inspections for potential lead violations; however, only a sub-set in designated high-risk areas are required to submit dust samples for analysis by a laboratory where the visual inspection has already passed (City of Rochester, Chapter 90: Property Code, Art. III, Sec. 90-55).³ As a result, in collecting data for several years, Rochester has documented thousands of units that had PASSED visual inspections but were later found with lead dust hazards; on average 10% of the units located in the high risk area failed the dust wipe test subsequent to passing the visual inspection for deteriorated paint.⁴ Note that these inspections were conducted on properties where the owners knew in advance that the unit had to pass a dust wipe analysis and so most of the units were likely cleaned prior to the inspection; had the dust wipe analysis not been required, it is reasonable to suspect that the lead dust hazards would have been even more common.

Ohio is in a position to learn from our sister states and cities and ensure that we have adequate processes in place to protect children from potential lead hazards. The proposed rule, while allowing for dust wipe testing, also permits visual clearance as adequate for inspection purposes. This allowance would further the likelihood of children being poisoned by lead in their homes. As proposed, the registry would include both units that passed only a “visual assessment” as well as those cleared by a dust wipe testing or even other more rigorous assessments. As parents and caretakers seek to identify residential spaces safe for their young children, the registry would not only be inadequate but misleading to the public.

¹ Breyse J, Anderson J, Dixon S, Galke W, Wilson J. *Immediate and one-year post-intervention effectiveness of Maryland’s lead law treatments.* Journal of Environmental Research (October 2007): 105(2):267-75.

² Hawthorne, M. and Smith Richards, J. “Kids poisoned by lead in CHA housing; landlords still got paid.” Chicago Tribune (April 8, 2017) Retrieved at: <http://www.chicagotribune.com/news/watchdog/lead/ct-cha-lead-poisoning-20170406-story.html>

³ “All inspections...shall include a visual assessment for deteriorated paint and bare soil violations. With respect to units in structures containing five or fewer units and located in the high-risk area identified by the Mayor or the Mayor’s designee, when the visual assessment identifies no interior deteriorated paint violation, the owner **shall cause dust samples to be taken and certified test results to be obtained** in accordance with the protocols established in § 90-57B [includes “submissions of samples for analysis for lead”] to determine whether a dust-lead hazard exists.” Retrieved at: <https://ecode360.com/8677786>

⁴ Lead Paint - Essential Links and Documents. Retrieved at: cityofrochester.gov/lead

1B. ODH not only has the authority but has a duty to ensure this registry is what it purports to be: “lead-safe”.

ODH must have the authority to carry out the expressed intent of Ohio law, which requires, among other things, that “the director of health shall establish and maintain a lead-safe residential rental unit registry...” (ORC 3742.41(A)) and to put in place appropriate “standards and procedures to be followed when registering a residential rental unit on the lead-safe residential rental unit registry...” (ORC 3742.45(A)(6)). While these standards and procedures must be “based on information from the United States environmental protection agency” (ORC 3742.45(A)(6)), federal law is only the minimum, a floor – not a ceiling – which bars states from going below a particular standard. Ohio should not rely solely on the federal government to protect our children, but should also be guided by what research and best practice suggest to ensure adequate protections are in place.

As more recent data and research demonstrate, a lead-safe registry can only be achieved with an adequate assessment requiring dust wipe testing. The ODH director has not only been vested with the authority by our legislature to implement this directive but in fact, has a duty to “require reports and make inspections and investigations that the director considers necessary” (underline added) in carrying out the responsibilities of the office (ORC 3701.04(A)(1). ODH’s knowledge that “deteriorating lead-based paint is the most probable cause of elevated blood lead levels in people in the vast majority of ODH’s environmental assessments,” coupled with the serious harm caused to children by lead-poisoning, makes “necessary” that the inspection “to ensure that no dust hazards” remain in a rental property is one based on good science, specifically laboratory testing of any dust wipe sampling.

RECOMMENDATION: *Lead inspections conducted for purposes of inclusion in the registry should unequivocally require dust sample testing, and define this term to require laboratory analysis of dust wipes, in its definition of “post maintenance dust sampling,” both as part of the inspection, (OAC 3701-81-01(G)) and for the required annual assessment for continued placement on the registry 3701-81-02(G). Specifically, remove “cleaning verification” as an approved method of post maintenance dust sampling (OAC 3701-81-01(G)(1)).*

2A. Quality assurance is an essential component of ODH meeting its duty of establishing and maintaining a lead-safe registry but the proposed rule has no enforcement mechanisms in place.

Quality control and enforcement are essential to maintaining the integrity of the registry. A 2016 review of regulatory policies aimed at reducing environmental hazards, including lead in residential units, found that regular monitoring to provide environmental and exposure data helped ensure compliance with the regulatory standards, and that educational and economic interventions alone were less successful.⁵ This 2016 review included an earlier study that compared strict enforcement of lead testing and remediation housing policies in one state to less-strict enforcement in a second state, and determined that “the stricter enforcement was associated with lower blood levels of lead as well as higher property values”.⁶

While the proposed rule does require that “the owner must retain documentation of compliance with the work practice standards set forth in this chapter for a period of no less than three years” (OAC 3701-81-02 (D)(5)), there is no process or procedure in place for monitoring compliance with this directive, including checking to determine if inspections are executed appropriately, or conducting audits to ensure documentation meets the standards. There is no provision, for example, for annual data collection and analysis to assess the effectiveness and reliability of the register. Without adequate, or even minimal quality assurance procedures in place, it is unclear how any “determination” may be made concerning

⁵ Apollonio, D.E., Wolfe, N. and Bero, LA. BMC Public Health. Realist review of policy intervention studies aimed at reducing exposures to environmental hazards in the United States. (August 2016). Retrieved at: <https://www.ncbi.nlm.nih.gov/pubmed/27539238>

⁶ Brown MJ, Gardner J, Sargent JD, Swartz K, Hu H, Timperi R. The effectiveness of housing policies in reducing children’s lead exposure. Am J Public Health. 2001 Retrieved at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1446655/>

whether an owner “falsified any required records, failed to comply with any requirement of this Chapter or failed to maintain required records” consistent with OAC 3701-81-02(F).

Moreover, where a determination has nevertheless, somehow, been made finding an owner has failed to comply, or even worse, falsified documents under these rules, the current rule does not require any penalties or consequences. The lack of disincentives for breaking the rules, especially where the actions are intentional and where potential lead poisoning can occur, is poor policy. At a minimum, where records have been falsified, the property should be removed from the registry.

RECOMMENDATION: *Revise 3701-81-02(F) to replace “may” with “shall” to ensure that any property where a determination has been made that records have been falsified or failed to comply with the requirements of this Chapter not remain on a “lead-safe” registry.*

2B. Quality control measures are needed specifically for addressing rental units on the lead-safe registry where a child who resides in that unit has been found to have elevated blood lead levels (between 5-9 micrograms per deciliter).

Since 2012, the CDC has declared that there is no safe level of lead exposure, changing its recommendation to BLL ≥ 5 $\mu\text{g/dL}$ as the “reference level” at which children should be monitored.⁷ Nevertheless, these proposed rules do not address what to do where a child residing in a rental unit on the registry is identified with elevated blood lead levels between 5-9 micrograms per deciliter. Instead, ODH should require appropriate action by removing – or suspending – the rental unit from the lead-safe registry until property owners can demonstrate through an adequate lead assessment that the property is lead-safe. This suspension from the registry should only be lifted once the unit is cleared through a full lead risk assessment or, at a minimum, an assessment that includes dust wipe testing. To do nothing is to ignore the reality that a lead poisoned child may continue to reside in a unit that is deemed “lead-safe” on the registry and that future children may also be at risk of lead poisoning.

RECOMMENDATION: *Add a new section (J) that includes language for the director of public health to conduct audits, collect and analyze data and otherwise investigate and monitor the implementation and maintenance of the registry for quality assurance purposes in order to effectively implement the standards and procedures under this rule. Include in this new section procedures for ODH identifying and removing, or suspending, rental units from the registry where a child residing therein is found to have elevated blood levels (between 5-9 micrograms per deciliter).*

For all these reasons, we urge ODH to revise its proposed rules as recommended in order to achieve the best results for Ohio’s children, families and all taxpayers. The creation of this voluntary, lead-safe registry is an important step toward protecting children from potential harm caused by lead hazards, but only if it will be a reliable and accurate public resource. Thank you for your consideration of these comments and suggestions. Please know we are available should there be any questions or need for further information or assistance.

Respectfully,



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⁷ Centers for Disease Control and Prevention. What do parents need to know to protect their children? Retrieved at: https://www.cdc.gov/nceh/lead/acclpp/blood_lead_levels.htm