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Re: Health Code § 173.13

Dear Members of the NYC Board of Health:

The undersigned write to bring to the Board's attention what appear to be gaps in the Health Code's provisions pertaining to the Department of Health and Mental Hygiene's response to situations where children have either been lead poisoned or are at risk of lead poisoning. We are concerned that Health Code § 173.13(d) – as presently written – apparently fails to explicitly grant DoHMH the clear authority to investigate day care, child care services, schools, and recreational facilities primarily used or occupied by children for hazards from lead in paint and dust. We are also concerned that the Health Code does not mandate these investigations in the event of a report of a child with an elevated blood lead level (“EBLL”), which we believe the City is required to do by the Administrative Code.

Our concern was sparked, in part, by a recent report that aired on WNYC* and published online in the Gothamist on June 5, 2020 (“NYC DOE Faces Potential \$10 Million Lawsuit Over Lead-Poisoned Child”)** detailing an instance where DoHMH, in response to a child with an EBLL, found lead paint in both the child's grandmother's home and the 3-K program run by the Department of Education, but failed to cite the hazards in the latter facility.

In its present form, § 173.13(d) (“Orders for abatement or remediation.”) reads as follows:

- (1) Generally. When the Department finds that there is lead-based paint, or dust with a lead content in excess of the clearance levels specified in §173.14(e) of this Code, on the interior of any dwelling, or concentrations of lead in the paint on the exterior of a dwelling, that may be creating a danger to health, it may in such cases as it deems essential, order the abatement or remediation of any such condition in a manner and under such safety conditions as it may specify. The

* archived at wnyc.org/story/doe-faces-potential-10-million-lawsuit-over-lead-poisoned-child

** gothamist.com/news/nyc-doe-faces-potential-10-million-lawsuit-over-lead-poisoned-child

Department may also order the removal or covering of soil appurtenant to any dwelling or other premises, including but not limited to, child care services, schools, and recreational facilities primarily used or occupied by children under the age of six years when it determines that there are concentrations of lead in such soil which exceed allowable limits of the U.S. Environmental Protection Agency found in 40 C.F.R. Part 745, or successor regulations, and further determines that such concentrations may be dangerous to health.

- (2) In a dwelling where a child with a blood lead level of five (5) micrograms per deciliter or greater resides. When the Department finds that there is a child under 18 years of age with a blood lead level of five (5) micrograms per deciliter or higher residing in any dwelling and further finds that the interior of such dwelling has a lead-based paint hazard because of its condition, location or accessibility to children, the Department shall order the abatement of any such condition in a manner and under such safety conditions as it may specify; in addition, until HPD adopts regulations described by paragraph (b) of subdivision (7) of section 27-2056.2 of the Administrative Code, the Department is authorized to order abatement when an unsafe lead paint hazard is present in such dwelling.

As we read it, § 173.13(d) thus provides in subdivision (1) a general grant of authority for DoHMH to investigate for certain conditions pertaining to paint or dust containing lead, regardless of whether a person has an EBLL, and in subdivision (2) a mandate to investigate when an EBLL of $\geq 5\mu\text{g}/\text{dL}$ is reported.

However, the wording of those provisions may be construed to constrain the scope of those investigations: § 173.13(d)(1) indicates that investigations for lead in paint and dust is limited to dwellings, the provisions pertaining to other locations such as “child care services, schools, and recreational facilities primarily used or occupied by children” only concern lead in soil. Likewise, § 173.13(d)(2) specifically limits the mandatory response to only dwellings.** Moreover, while Health Code Article 47 does appear to offer DoHMH a general power to order corrections of public health hazards in child care programs, there does not appear to be a mandate to investigate in response to a report of an EBLL child.

Notably, Administrative Code § 17-911(a) (added by Local Law 64 of 2019, effective August 12, 2019) mandates that when a report is made of a person under age 18 with an EBLL, DoHMH “shall conduct such investigation as may be necessary to identify potential sources of such elevated blood lead level, including, but not limited to, an inspection of any dwelling unit in which the department determines such person is routinely present for 10 or more hours per week” (emphasis added).

We see no reason why Health Code § 173.13(d) should not be amended accordingly to align with the mandates and intent of Local Law 64, and to explicitly grant DoHMH authority to investigate day care, child care services, schools, and recreational facilities primarily used or

** The term "Dwelling" for these purposes is defined in Health Code § 173.14(b) to mean “any building or structure or portion thereof, which is occupied in whole or in part as the home, residence or sleeping place of one or more human beings.”

occupied by children for hazards from lead in paint and dust, and the mandate to do so in the event of a report of an EBLL child. We would urge this matter be given the Board's consideration as soon as possible.

Yours truly,

Citizens Committee for Children

Cathy Curtis, Clean and Healthy New York

Cooper Square Committee

Claire L Barnett, Health Schools Network

Matthew Chachere, Northern Manhattan Improvement Corporation

Michael McKee, Tenants PAC

WE ACT for Environmental Justice

New York League of Conservation Voters

Dr. Morri Markowitz

CC: Katherine Garcia
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