

Lawyers and Doctors Partner for Healthy Housing

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Medical professionals are becoming more deeply aware that a child's environment as much as, or even more than, biological and genetic factors can affect her health. One such environmental determinant of health is the condition of the housing where a child lives. All states and most localities have laws governing the conditions of residential property. Lawyers, by advocating proper enforcement of these laws, ensure that housing is safe and sanitary—and thus help children grow up healthy.

An innovative collaboration between pediatricians and lawyers at the Boston Medical Center is developing creative strategies to hold landlords and government agencies accountable for meeting their obligations under housing-related laws and regulations. As New England's largest safety-net hospital, Boston Medical Center serves a predominantly low-income population. The Family Advocacy Program, a legal services office housed in the medical center's pediatrics department, employs lawyers to represent patients and their families in a wide array of civil matters, including housing problems. Lawyers from the program work closely with the medical center's pediatricians to help individual patient families attain the healthiest housing possible. Together with other public health specialists from groups such as the Asthma Regional Council, the lawyers and pediatricians advocate healthier housing on a systemic level.

After outlining the link between housing and child health and relevant law, we describe the strategies that the Family Advocacy Program and the Asthma Regional Council have employed to help low-income families achieve healthy conditions in their homes. Although these strategies utilize laws and regulations specific to Massachusetts, they have the potential to serve as models for child health interventions across the country.

I. Housing and Health

Over 5.3 million households, some 12.5 million people, pay over 50 percent of their available income on rent or live in substandard conditions or both.¹ Paying more than 50 percent of income on rent is linked to malnutrition and stunting of growth in children because not enough money is spent on food. Such housing problems often result in poor health, causing increased rates of asthma, lead poisoning, and injuries in children. Poor and minority children are often the most likely to face inadequate housing and to suffer the resulting health effects.

The most common chronic disease of children, asthma has seen an alarming rise in the past ten years; asthma affects an estimated 17.3 million children and adults in the

¹U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, WAITING IN VAIN: AN UPDATE ON AMERICA'S RENTAL HOUSING CRISIS (1999).

United States alone.² While triggers such as dust, rodents, and animal dander have long been associated with asthma attacks, cockroach allergens and molds have been identified as newer triggers in the past decade. Inadequate ventilation in many homes further subjects inhabitants to increased indoor allergen exposure and increased moisture, which leads to mold and dust mite growth. When children face these asthma triggers in their homes, medication and behavioral remedies often do not control their symptoms effectively.

Lead poisoning causes learning disabilities, developmental delays, reduced intelligence quotient and behavior problems in children. Nearly one million pre-school-age children have elevated levels of lead in their blood. Depending on the severity of their condition, children who suffer from lead poisoning may experience its debilitating effects throughout their lifetimes.

The most common source of exposure is paint and lead dust in older homes. Because lead's consequences are so severe, removing lead hazards (deteriorated paint, lead dust, and lead in soil around homes) in housing has significant health benefits for children.

Injuries are the leading cause of death among 1 to 14 year olds in the United States. Almost half of these injuries, such as those related to fires and falls, occur at home. Common hazards include lack of smoke detectors, exposed radiators, windows without screens or guards, and damaged stairways. When children leave substandard housing, they are less likely to suffer from serious accident-related injuries.

II. Legal Safeguards for Healthy Housing

The laws and regulations governing the construction and conditions of residential

housing vary by state and even locality. However, nearly all state and local codes include provisions to ensure correction of substandard housing conditions that can lead to health problems. This body of law can be grouped into four categories: sanitary codes, landlord-tenant laws, public nuisance laws, and other hazard-specific laws (such as those dealing with lead and pesticides). Massachusetts' jurisprudence allows attorneys to utilize all four sets of laws as tools for promoting child health.

A. Sanitary Code

Chapter 2 of Massachusetts' State Sanitary Code is the "Minimum Standards of Fitness for Human Habitation" and applies to residential owners and landlords.³ The regulations in this section have the force of law, and local boards of health are responsible for their enforcement. In Boston that board is the Inspectional Services Department, housed within the Department of Public Health.

The Sanitary Code covers multiple aspects of residential housing and often sets fairly high standards which, when followed, result in very healthy housing. The code sets requirements for owner maintenance of the structural elements, proper kitchen facilities, hot water, adequate heat, and adequate lighting.⁴

B. Landlord-Tenant Law

Laws governing the relationship between landlords and tenants set forth the responsibilities of both parties in maintaining the premises. In Massachusetts the warranty of habitability and the law of quiet enjoyment require landlords to keep rental housing in healthy condition and equipped with all the facilities needed to make it inhabitable.

Under the warranty of habitability, a landlord must maintain his property adequately as stipulation of receiving rental payments. If the landlord know-

²Forecasted State Specific Estimates of Self-Reported Asthma Prevalence—United States, 47 MORBIDITY AND MORTALITY WEEKLY REPORT 1022–25 (1998), available at www.cdc.gov/mmwr/PDF/wk/mm4747.pdf.

³See MASS. REGS. CODE, tit. 105, § 410.000 (2005).

⁴See, e.g., MASS. REGS. CODE, tit. 105, §§ 410.501 (owner maintenance of structural elements); 410.100 (kitchen); 410.190 (hot water); 410.200 (heat); 410.253(A) (electric light fixtures) (2005).

ingly fails to remedy a sanitary code violation that may “materially endanger” a tenant’s health or safety, the tenant has several options for recourse.⁵ She may hold rent in escrow until repairs are made up to an amount equal to the difference between the agreed-upon rent and the value of the home with all its code violations (its “fair rental value”). Alternatively she can order repairs herself and deduct their costs from her rent or move out of the apartment without giving several days’ notice as may have been agreed upon in the lease. Breach of the warranty of habitability is also grounds for tenant-originated court actions.

The law of quiet enjoyment mandates, among other conditions, that a landlord provide all utilities he has promised to provide in a lease and gives the tenant standing to sue for damages if he fails to do so.⁶ If an apartment’s rent includes heat and hot water, for example, and the landlord does not pay for these services or impedes their delivery, the tenant is entitled to collect either three months of rent or the value of actual damages (whichever is greater) along with any legal fees incurred. Courts may take additional punitive action against the landlord through fines or imprisonment. In very extreme cases, if the landlord does not uphold commitments to furnish utilities, a tenant may legally move out of an apartment prior to the expiration of a lease.⁷

C. Nuisance Law

Local governments typically have wide latitude and authority to deal with nuisances

under state or local laws. Although states define “nuisance” differently, most definitions are sufficiently broad to capture a variety of conditions that can be hazardous to the public health and safety. This breadth gives enforcement officials great flexibility to cite multiple housing violations as “nuisances”. In Massachusetts, for example, “[t]he board of health shall examine into all nuisances, sources of filth and causes of sickness within its town, or on board of vessels within the harbor of such town, which may, in its opinion, be injurious to the public health, shall destroy, remove or prevent the same as the case may require, and shall make regulations for the public health and safety relative thereto and to articles capable of containing or conveying infection or contagion or of creating sickness brought into or conveyed from the town or into or from any vessel.”⁸

D. Lead Law

Beyond the parameters of state sanitary codes, federal and state common law regulate lead hazards that plague many older homes.⁹

The Residential and Lead-Based Paint Hazard Reduction Act of 1992 requires most landlords to inform prospective tenants about the health effects of lead exposure and to alert them to the presence of lead-based paint in the home.¹⁰ This law explicitly recognizes the dangerous health effects of lead exposure on young children.¹¹ However, it offers little remedy for injured tenants because it allows them to sue only landlords who knew about the lead hazards on the property prior to the start of the lease. If a

⁵Sanitary code violations include lack of heat or running water. MASS. REGS. CODE, tit. 105, § 410 (2005).

⁶MASS. GEN. LAWS. ch. 186, § 14 (2005).

⁷Faye B. Rachlin, *Taking Your Landlord to Court*, in LEGAL TACTICS: TENANTS’ RIGHTS IN MASSACHUSETTS 239–57 (A.R. Duke ed., 6th ed. 2003).

⁸MASS. GEN. LAWS. ch. 111, § 122 (2005). Similarly, to further illustrate, Connecticut’s nuisance provision states that “[t]own, city and borough directors of health or their authorized agents shall, within their respective jurisdictions, examine all nuisances and sources of filth injurious to the public health, cause such nuisances to be abated and cause to be removed all filth which in their judgment may endanger the health of the inhabitants.” CONN. GEN. STAT. § 19a-206 (2004).

⁹Using lead paint in homes built after 1971 is illegal under the Lead-Based Paint Poisoning Prevention Act. See 42 U.S.C.S. § 4831 (Law. Co-op. 2005).

¹⁰See *id.* § 4851. The Residential and Lead-Based Paint Hazard Reduction Act of 1992 applies to lessors of “target housing,” which is all housing built before 1978, except housing for elderly and disabled persons and housing with zero bedroom units (unless a child younger than 6 years is expected to reside in the housing). See *id.* § 4851b(27).

¹¹See *id.* § 4851.

landlord neglects to test their rental property for lead, the landlord is not responsible for the consequences that a tenant may suffer.¹²

Most states have enacted their own laws about lead-hazard control to supplement the federal requirements.¹³ Massachusetts' statute "embodie[s] the principle of primary prevention" of lead poisoning in children.¹⁴ Under the law, if a tenant household with a child younger than 6 years learns of lead in its apartment, the household may demand that the landlord either remove the lead or make it inaccessible. The landlord must pay for the family to stay in a similar residence and reimburse any moving expenses that the family incurs. Financial hardship does not exempt a landlord from these requirements; financially needy landlords can obtain assistance for lead correction from the state. Noncompliant landlords may be subject not only to the penalties outlined in the landlord-tenant laws but also to personal injury complaints filed by injured tenants. A child who suffers lead poisoning as a result of a landlord's illegal behavior may sue for damages up until the child turns 21.¹⁵

III. Legal Advocacy for Healthy Housing

The laws and regulations discussed above protect tenants' rights only to the extent that landlords and public agencies uphold them. While many landlords take their legal obligations seriously and maintain their rental housing in adequate condition, just as many do not take necessary action until faced with the threat of liability. Likewise, public agencies—in this case the public office charged with inspecting residential property—do not always meet their obligations.

Low-income tenants often lack the knowledge and ability to defend their rights vis-à-vis their landlords and inspectional

services. Working with landlords and inspectional services to remedy substandard housing is often a long process that many tenants cannot navigate on their own, often because of conflicting demands on their time, such as TANF (Temporary Assistance for Needy Families) work requirements or language and cultural barriers. Moreover, many landlords and inspectional agencies are more diligent and compliant if an attorney is involved than when the tenant is unrepresented.

A. Representation of Tenants Who Report Substandard Housing

Recognizing the powerful role of lawyers in the inspection and remediation process, the Family Advocacy Program has prioritized representing tenants who report substandard housing. Program attorneys have found it effective to operate at times outside the adversary framework of litigation, using creative and nontraditional methods.

The first shift away from the traditional litigation paradigm involves a recognition that the presence of unsanitary housing conditions merits legal attention regardless of whether other legal disputes are going on between landlord and tenant. Many legal aid offices will not represent a client whose only concern is the unhealthy state of the client's home. If a client were being evicted, however, that legal aid office might represent her and would then evoke unsanitary conditions as a defense to the eviction claim. But for lawyers to view unhealthy housing as a legal issue that merits direct legal intervention is the exception, not the norm.

Second, lawyers representing tenants who live in substandard housing should be prepared to be involved in a very direct, hands-on way that can be lengthy and time-consuming. The lawyer's primary role is to mediate the relationship

¹²This applies to lessors or private housing. Lessors of federally subsidized housing are subject to much more stringent testing and abatement obligations.

¹³For summaries of state lead poisoning prevention statutes, see National Conference of State Legislatures, www.ncsl.org/programs/ESNR/pblaw99.htm#ma (current as of 1999).

¹⁴MASS. GEN. LAWS. ch. 111, § 190 (2005).

¹⁵Benjamin Hiller & Jeffrey Freuer, *Lead Poisoning*, in *LEGAL TACTICS*, *supra* note 7, at 129–36.

among client, landlord, and inspectional services. By being present throughout the entire process, the lawyer monitors compliance by the landlord and inspectional services and holds both parties accountable when they are not meeting their obligations. Paralegals and interns can be helpful with the logistics of this lengthy process.

Sample Protocol. The following is a sample protocol for tenant lawyers to follow; it outlines both action steps and likely obstacles. First, the lawyers should visit the tenant's unit. Rather than relying solely on the client's description, the lawyer must have firsthand knowledge of the conditions in the apartment before contacting the landlord. Some clients describe a problem as more severe than it actually is, while others do the opposite, often because they have grown so accustomed to the problem that they do not recognize it as unhealthy or illegal. During that first visit, the lawyer should assess the problem, and explore with the tenant whether the tenant can do anything to alleviate it. After inspecting the apartment, the lawyer can contact the landlord.

The next meeting with tenant, lawyer, and landlord present should occur at the apartment, so that tenant and lawyer can point out each problem to the landlord. The lawyer or tenant should submit to the landlord a written description of each problem, particularly if the tenant is withholding rent because of the substandard conditions. If the landlord agrees to take remedial action, then the lawyer, or someone on her staff, should coordinate the scheduling of all work appointments for the landlord to access the unit.

When a tenant attempts to navigate this process unrepresented, the lawyer may hear, after the fact, a number of finger-pointing accusations. Frequently the tenant claims that the landlord did not notify her that she should be home to grant him access at a certain time, while the landlord claims that he informed the

tenant but that she was not home, or the landlord claims that the tenant did not move furniture out of the way such that getting any work done in the unit was impossible. Having a third party—the lawyer—involved from the outset prevents all of these communication and logistical barriers and save weeks or months of failed attempts by the tenant to resolve the problems on her own.

If, despite the lawyer's participation in the process, the landlord does not adequately remedy the unit, then the tenant should contact the inspectional services office and request a residential inspection.¹⁶ The product of the inspection is a list, which is served on the landlord, of sanitary code violations. The list should describe each condition, cite the sanitary code provision that is being violated, and set forth the amount of time for the landlord to repair the violations. Once served with that report, the landlord is under legal duty to remedy the conditions of disrepair. Failure to remedy can result in civil and criminal penalties as described in the preceding section.

The thoroughness of an inspection report is critical; what is stated in the report is an objective finding that can help support a tenant's claim of housing problems in a civil or criminal case. Part of the lawyer's role during the inspection therefore is to ensure that inspecting agency records every single violation. *Pro se* tenants often fail to point out all violations (often out of fear or intimidation or due to language or cultural barriers), and inspectors do not always search the unit for violations that the tenant does not specifically mention. The lawyer's presence serves not only to place the tenant at ease but also to signal to the inspector that the inspector is being watched and must be thorough.

Ideally the landlord is also present during the initial inspection. If the landlord is not present during the inspection, the landlord may later say that he could not decipher the inspector's handwriting and therefore did not understand the viola-

¹⁶Trying to work with the landlord before contacting the inspectional services department is not necessary. However, doing so may increase the level of trust between landlord and tenant and help resolve the problems quickly without further intervention from other parties.

tion or may claim that the inspector's report did not give sufficient instructions on how to address a particular violation. The landlord may implement only superficial treatments such as painting over mold or putting out mousetraps instead of exterminating rodents and sealing holes completely. Having all parties present to discuss each violation and its appropriate remediation increases the likelihood that the landlord will do a better job at remediation and makes it easier to hold the landlord accountable.

As advocate for the tenant during the inspection, the lawyer can steer the inspector and landlord into discussing the actual causes of each problem. For example, inspectors commonly note the presence of rodents in their inspection reports. If the problem is actually caused by a neighboring unit, or a restaurant on the ground floor, then setting traps in the tenant's unit will not eliminate the root cause of the problem. The lawyer should be forceful in requesting that the inspector order the landlord to address the problem more globally, such as having the entire building exterminated.

After the inspection, the lawyer should ensure that the landlord schedules appointments to get the work done, and gives the tenant appropriate notice of work plans so that the tenant can plan to be home and to rearrange furniture or empty closets as needed. The lawyer should also hold the inspector accountable for returning to the unit and ensuring that all parties are notified of the reinspection and are present.

When this level of oversight does not occur, inspectors often do not return for reinspections either because of poor communication with the tenant or because of their own negligence. This can result in an inspection case being closed before the problem is actually resolved. The lawyer must ensure that neither landlord nor the inspectional services department is exonerated of its obligations toward the tenant until all violations are appropriately eliminated.

B. More Inspections for Families with Asthmatic Children

At Boston Medical Center's Pediatric Asthma Clinic, about fifty patient families per year report unhealthy conditions in their home.¹⁷ Suzanne Steinbach, a pediatrician at the clinic, finds that despite their housing concerns, most of these families have not had a recent inspection by the Boston Inspectional Services Department. Until last summer, most families who were told to arrange a visit by the department did not call for an inspection.

Families avoided inspections for a variety of reasons. Some families hoped to relocate soon or feared antagonizing a landlord. Other families reported that they did not know what the agency did and did not want inspectors in their house. Still other families had not found inspection to be effective. Notably Dr. Steinbach found that none of the families whose housing conditions had been inspected previously believed that their housing conditions improved as a result. Discussion among the medical center's health care providers and the department's inspectors revealed that several factors contributed to this breakdown in sanitary code enforcement: poor communication between tenants and the department, tenants' lack of knowledge about the code enforcement process, poor case tracking by the department, and tenants' own inadequate housekeeping in some cases.

Aiming to make inspections more accessible and effective for families with asthmatic children, a coalition of Boston pediatricians, public health educators, attorneys, department inspectors and the Boston Urban Asthma Coalition, with support from the Asthma Regional Council, launched the Breathe Easy Collaborative in summer 2004. Currently in its pilot phase, the Breathe Easy Collaborative serves families referred by the Boston Medical Center, the Bowdoin Street Health Center, the Boston Urban Asthma Coalition, and the Boston Public

¹⁷Interview with Suzanne Steinbach, Associate Professor of Pediatrics, Boston University School of Medicine, and Director of the Pediatric Asthma Clinic at Boston Medical Center (Feb. 22, 2005).

Health Commission. The neighborhoods that these agencies serve—Dorchester, Roxbury, Mattapan, and Jamaica Plain—are among those with the highest rate of asthma hospitalization in Boston.¹⁸

The Breathe Easy Collaborative comprises three parts described below: Web-based referral and case tracking for home inspections; asthma-trained home inspectors; and tenant education.

Web-Based Referral and Case Tracking for Home Inspections. Beginning in spring 2005, health care providers at referring sites of the Breathe Easy Collaborative were to request asthma-specialized inspections for their patients via a secure Web-based database. The database allows the referring individual to track case information for the families whom they have referred. The data include the name and contact information of the asthma-trained inspector assigned to the case, date and results of the initial inspection, date and results of the reinspection, and the date and results of any legal action by the Boston Inspectional Services Department. The referring individual can also update contact information for the patient and access inspection reports upon request.

Breathe Easy's database serves three purposes. First, it helps prevent families from falling through the cracks of the inspection process by empowering the health care provider to facilitate inspections and inspection follow-up. Second, it clarifies the guidelines under which the Boston Inspectional Services Department operates and makes the department accountable for adhering to those guidelines, such as legally mandated time limits for conducting inspections and filing court action.¹⁹ Third, the database can serve as a powerful tool for systemic change. It can generate reports about housing code violations and asthma incidence within specific residences and within neighborhoods. Such reports facilitate systemic improvement in housing conditions in two ways: by identifying repeat-offender

landlords for prosecution in class-action lawsuits and by highlighting risk patterns of asthma in order to target public health resources efficiently.

Asthma-Trained Home Inspectors. In several intensive training sessions in fall 2004, as part of the services of the Breathe Easy Collaborative, the Boston Public Health Commission) educated four department inspectors on household conditions that trigger asthma and effective ways to address these conditions. Armed with this knowledge, these inspectors conduct specialized inspections that focus on conditions such as mold, dust, and indoor moisture—notorious asthma triggers that are illegal but receive minimal attention in standard inspections. The department authorized the inspectors to inform landlords of how conditions on their properties affect their tenants' health and to recommend comprehensive remedies. For example, rather than requiring only that a landlord plaster a hole through which pests have entered a dwelling, an asthma-trained inspector may recommend that the landlord plug the hole with caulk and also recommend modifications in food storage and garbage containers to limit pest attractions. Inspectors may also inform landlords about available asthma-safe home materials and help coordinate interested landlords in bulk purchasing of such materials.

Tenant Education. Tenants themselves play a key role in maintaining healthy housing. Thus the founders of the Breathe Easy Collaborative incorporated tenant education into the program. In cases where tenants' housekeeping or smoking habits are a main source of asthma irritants in the home, the Boston Inspectional Services Department may conduct a joint visit with the Boston Public Health Commission educators. During these joint visits, the health educators walk through the home and inform tenants specifically of how they can improve their housing conditions. The

¹⁸BOSTON PUBLIC HEALTH COMMISSION, HEALTH OF BOSTON 2001 (2001), available at www.bphc.org/reports/pdfs/report_26.pdf.

¹⁹See MASS. REGS. CODE, tit. 105, § 410.820 (2005).

health educators also supply free home health literature and materials such as covered trash cans, sterile mattress covers, and sealed food containers. The commission may also conduct air quality tests and give advice and referral on smoking cessation.

If a tenant's housekeeping problems are egregious enough to warrant a citation by the Boston Inspectional Services Department (under Title 505, Section 410, of the Code of Massachusetts Regulations), an inspector may refer the tenant for an intensive intervention by visiting nurses or other health care staff. These referrals would be made through the Web-based database described above.

The goal of the Breathe Easy Collaborative is to translate an academic understanding of

the impact of housing conditions on child health into meaningful action. Its value is in its capacity to reduce logistical barriers to enforcement of the sanitary code. Already signs of success are emerging. Dr. Steinbach reports that, since the start of the program, a greater portion of patient families who report problems in housing conditions agree to call the Boston Inspectional Services Department. At least two families told her that, after a Breathe Easy inspection, their landlords corrected unhealthy conditions that the landlords had failed to address. In one case moldy carpeting was removed in an apartment unit, and in the other effective pest controls were put in place. Dr. Steinbach is confident that the children of these families will enjoy better health as a result of their housing improvements.