

The Joint Testimony of Ray Lopez, Director of Environmental Health & Family Asthma Program at LSA Family Health Service, Inc., a member institution of Manhattan Together, and Steven M. Edwards, Quinn, Emanuel Urquhart & Sullivan LLP

before the

New York City Council Committee on Environmental Protection

and the Committee on Public Housing

concerning

Oversight – Examining NYCHA’s Record in Removing Mold from Public Housing

and Pro Int. No. 978-A: In relation to requiring licensure for mold abatement, assessment and remediation work and setting minimum standards for such work

Tuesday, May 2, 2017

Miccio Community Center, 110 W 9th Street, Brooklyn, 10 a.m.

Mr. Lopez: Good morning Chairpersons Constantinides and Torres, and Members. I am Ray Lopez, the Director of the Environmental Health & Family Asthma Program at LSA Family Health Service. LSA Family Health Service is a member institution of Manhattan Together, a diverse, non-partisan, and multi-faith community power organization that is part of the Metro Industrial Areas Foundation. Manhattan Together has thousands of members living in public housing. I am joined by Steven Edwards, a pro bono attorney from the Quinn Emanuel law firm. Mr. Edwards represents Manhattan Together, South Bronx Churches, and a class of public housing tenants with respiratory disabilities in the *Baez* case, a lawsuit brought in New York federal district court against the New York City Housing Authority because of its failure to remediate mold and excessive moisture in an effective manner. We thank you for the opportunity to testify today.

Speaking on behalf of Manhattan Together, our position on the proposed local law requiring licensing for mold abatement, assessment, and remediation is that this law should not undermine any of NYCHA’s existing mold and moisture remediation obligations that a federal judge ordered in the *Baez* case. Mr. Edwards will now provide an overview of NYCHA’s obligations under the *Baez* court orders, and I will then share our views on several specific aspects of the proposed local law.

Mr. Edwards: In December 2013, several community organizations and public housing tenants filed a class action complaint in the United States District Court for the Southern District of New York against NYCHA on behalf of all NYCHA tenants who suffer from asthma that is exacerbated by the mold and moisture in their apartments. The tenants asserted that NYCHA’s failure to effectively abate the mold and moisture denied them the equal and meaningful

opportunity to use and enjoy their housing in violation of the Americans with Disabilities Act, the Fair Housing Law, and the New York State Human Rights Law. The tenants had suffered for years from mold that kept growing back again and again, even after NYCHA claimed to have fixed it, because NYCHA was merely cleaning the mold with bleach and painting over it rather than doing work that would correct the underlying cause of the mold, such as repairing the leaking or sweating pipes in the walls.

Concurrently with the filing of the complaint, NYCHA agreed to a consent decree, signed by Judge William Pauley, which set forth a number of important responsibilities that NYCHA is obligated to fulfill. First and foremost, the order requires NYCHA to identify the causes of mold growth within an apartment and to effectively abate the mold, excessive moisture, and their underlying causes. This is so important that the court order includes a mold and moisture maintenance policy that specifically requires NYCHA not only to promptly remove visible mold, but also to identify the root cause of the mold growth and to eliminate mold and moisture problems at their source. Secondly, with respect to 95% of the repairs, the order requires NYCHA to complete simple mold and excessive moisture-related repairs within an average of seven days, and to complete more complex repairs within an average of fifteen days.

In April 2015, more than a year after the court had ordered NYCHA to effectively remediate mold and moisture, the plaintiffs filed a motion to enforce the court's order because NYCHA had failed to comply with it. Significantly, NYCHA's own data had shown that mold was recurring in more than a third of the apartments in which NYCHA had allegedly repaired the mold, and NYCHA was taking far too long to make these critical repairs. NYCHA's only justification for its failure to comply was its misinterpretation of the order's requirements.

In December 2015, Judge Pauley rejected NYCHA's baseless interpretation of the order. He found that NYCHA had been out of compliance with the court's order from the day the order was entered, that NYCHA's officials had shown an attitude of indifference toward their mold and moisture remediation obligations, and that NYCHA's excuses for its failure to comply with the court's order were inadequate. Because NYCHA's failures jeopardized the health and public welfare of hundreds of thousands of New Yorkers, the court appointed Professor Francis McGovern as a Special Master to monitor and enforce compliance with the court's order.

Since February 2016, the Special Master has met many times with NYCHA officials and the *Baez* plaintiffs to better understand NYCHA's operations and the recurrent mold and moisture problems plaguing its tenants. The Special Master also engaged Microecologies, a commercial firm of industrial hygienists and indoor environmental consultants, to serve as neutral experts in investigating the mold and moisture issues in NYCHA apartments. With the help of Microecologies, the Special Master designed a new mold assessment and remediation protocol that guides NYCHA staff through the process of diagnosing mold problems, identifying the root cause, and developing a remediation plan. The new protocol was launched as a pilot program in 38 NYCHA developments this month. The Special Master has tasked Matthew Perzanowski, a

Columbia University public health researcher, with analyzing whether the new protocol is effective in reducing the reoccurrence of mold during a one-year study that will conclude in April 2018. Judge Pauley has extended the court's jurisdiction to enforce the *Baez* settlement order through the end of the study period. We have made it clear that when the pilot study has concluded, we are going to ask Judge Pauley to order permanent relief, including the performance and reporting standards that are set forth in the order.

We appreciate what the City Council Committees are doing here and are generally supportive of all efforts to improve the effective remediation of mold and excessive moisture in private and public housing, but we do not want the Council to do anything that NYCHA could use as an excuse to avoid its obligations under the order. I should add that we do not think the Council could do anything to diminish or negate any of NYCHA's obligations under Judge Pauley's order since it is an order of a federal court and would take precedence over any state or local regulation, but it is always a good idea to avoid any inconsistencies from the outset. Mr. Lopez will elaborate on some of the areas in which the order and the proposed new law may overlap.

Mr. Lopez: Manhattan Together is hopeful that the Microecologies mold assessment and remediation protocol will help bring NYCHA into compliance with Judge Pauley's order. On its face, the protocol is an improvement over NYCHA's prior mold remediation methods which, in being purely cosmetic and failing to address root causes, were wholly inadequate and not in keeping with NYCHA's obligations under the *Baez* order.

That said, we are deeply concerned because the Special Master's study only requires NYCHA to implement the new protocol in 38 developments that comprise less than 10% of all of NYCHA's apartments. Thousands of tenants are continuing to suffer from NYCHA's ineffective mold and moisture remediation work.

Moreover, NYCHA has not yet committed to implementing the new protocol NYCHA-wide. Even if the study proves that the new protocol is effective in reducing the reoccurrence of mold, as of now the federal court's oversight and the Special Master's tenure end in April 2018, and there is no guarantee from NYCHA that it will continue to follow the new mold remediation protocol thereafter.

We believe there are many aspects of the proposed licensing law that would be helpful if they applied to NYCHA, but we ask the Council not to do anything that would diminish or negate any of NYCHA's obligations under Judge Pauley's order and the Special Master's pilot program. I have attached a chart to the hard copies of my written testimony that compares and comments in more detail on the proposed local law in relation to the New York State mold licensing law and the *Baez* order. In that chart, we raise several questions and concerns for the Council's consideration, but for now I want to highlight three key points.

First, NYCHA is required under the *Baez* order to identify and remediate the underlying source of mold and excessive moisture. The proposed local law does not go far enough in this regard. It

encourages the mold assessor to specify the underlying sources of moisture that may be causing mold, but it does not mandate that these sources be diagnosed and abated. If the root cause of the mold is not effectively remediated, the mold will grow back. The law should require mold remediation plans and licensees to identify the underlying source of the mold problem and cause it to be corrected.

Second, NYCHA is required under the *Baez* order to effectively remediate mold and excessive moisture in an average of seven or fifteen days depending on whether the repair is deemed simple or complex. The proposed local law requires licensees to submit their remediation plans to the Department of Environmental Protection fourteen days prior to commencing the remediation work. It is not clear to us what the DEP is going to be doing during that fourteen day period, but under no circumstances would we accept such a long delay for NYCHA tenants.

Third, the *Baez* order requires NYCHA to effectively remediate not only mold, but also excessive moisture, which is defined in the order as uncontrolled dampness, wetness, or the presence of water due to leaks in or seepage from building infrastructure or systems. It is important to understand that excessive moisture alone – even in the absence of visible mold – can exacerbate asthma. The proposed law does not address that, which may be a shortcoming.

In conclusion, we support all efforts to improve the remediation of mold and excessive moisture in private and public housing, but we ask the Council not to do anything that would diminish any of NYCHA's pre-existing obligations under the *Baez* order to effectively and promptly remediate mold, excessive moisture, and its root causes. We note that there are a number of provisions in the proposed law that go beyond the requirements of the *Baez* order, and we would have no problem if those provisions applied to NYCHA as well because they have the potential to help protect the health and safety of the most vulnerable NYCHA tenants. Those provisions include mandating ongoing training of mold assessment and remediation licensees, requiring mold remediation plans to be made publicly available online, and empowering the Commissioner of the Department of Environmental Protection to investigate and redress injuries caused by violations of the law through fines and other civil penalties.

Thank you again for the opportunity to testify. We are happy to answer any questions.

Exhibit to Joint Testimony of Ray Lopez, Director of Environmental Health & Family Asthma Program at LSA Family Health Service, Inc., a member institution of Manhattan Together, and Steven M. Edwards, Counsel of Quinn Emanuel Urquhart & Sullivan LLP, before the New York City Council Committee on Environmental Protection and the Committee on Public Housing on May 2, 2017 at 10am

New York State Labor Law	Proposed New York City Law	<i>Baez</i> Order	Comments
Explicitly exempts public housing authorities and employees thereof from the mold licensing requirements.	Silent on this issue.	The Order only applies to NYCHA and requires that NYCHA “effectively abate mold and excessive moisture.”	The City law should not diminish any of NYCHA’s existing obligations under the <i>Baez</i> Order. Provisions in the City law that go beyond the requirements of the <i>Baez</i> Order have the potential to help protect NYCHA tenants, but many of the provisions need additional clarification regarding how they would be applied to NYCHA.

New York State Labor Law	Proposed New York City Law	<i>Baez Order</i>	Comments
<p>Requires the mold assessment licensee’s mold remediation plan to specify “<u>when possible</u>, the underlying sources of moisture that may be causing the mold and a recommendation as to the type of contractor who would remedy the source of such moisture.”</p>	<p>Requires the mold assessment licensee’s mold remediation plan to specify “<u>where practicable</u>, the underlying sources of moisture that may be causing the mold and a recommendation as to the type of contractor who could remedy the source of such moisture.”</p>	<p>The Order requires NYCHA to effectively address the underlying causes of mold and excessive moisture.</p>	<p>The City law should require licensees to identify the underlying sources of the mold and to include remediation of the underlying sources in the written plan. At the very least, the City law must not alter NYCHA’s obligation under the <i>Baez Order</i> to remediate the root causes of mold and excessive moisture.</p>
<p>Law applies to mold assessment/remediation, and defines “mold” as “any indoor multi-cellular fungi capable of creating toxins that can cause pulmonary, respiratory, neurological or other major illnesses after minimal exposure, as such exposure is defined by the environmental protection agency, centers for disease control and prevention, national institute of health, or other federal, state or local agency organized to study and/or protect human health.”</p>	<p>Same as the State law.</p>	<p>The Order applies not only to mold but also to excessive moisture. It defines “mold” as “one or more various type of fungi that grow in filaments and reproduce by forming spores.” It defines “excessive moisture” as “uncontrolled dampness, wetness, or the presence of water due to leaks in or seepage from building infrastructure or systems.”</p>	<p>The City law should not diminish NYCHA’s obligation to remediate not only mold, but also excessive moisture.</p>

New York State Labor Law	Proposed New York City Law	<i>Baez Order</i>	Comments
<p>Does not require that the work be completed in a specific time frame. However, the mold assessment licensee must estimate the time frame for completion.</p>	<p>Same as the State law.</p>	<p>The Order requires NYCHA to “maintain an average service level of no more than seven (7) days for completion of mold and excessive moisture-related work orders that require simple repairs that can be done by a maintenance worker in a single visit to the apartment and an average service level of no more than fifteen (15) days for completion of more complex repairs.”</p>	<p>The City law’s requirement that a mold remediation plan be submitted to the department of environmental protection 14 days before the remediation begins interferes with NYCHA’s obligation to complete mold repairs in no more than 15 days. The City law should not prolong the time that a tenant must wait for a mold problem to be remediated.</p>

New York State Labor Law	Proposed New York City Law	<i>Baez Order</i>	Comments
<p>Requires the mold assessment licensee to provide a mold remediation plan to the client before remediation begins.</p>	<p>Requires the mold assessment licensee to provide a mold remediation plan to the client and to the department of environmental protection 14 days before remediation begins. In addition, the department will publish the plan online in a searchable format.</p>	<p>The Order requires NYCHA to produce quarterly reports to the plaintiffs regarding its mold and moisture remediation service levels and reoccurrence rates, but does not require the public disclosure of NYCHA's remediation plans. The Order requires NYCHA to complete simple mold repairs in an average of 7 days, and complex repairs in an average of 15 days.</p>	<p>The City law must reduce the amount of time that elapses between the submission of the plan and the beginning of the mold remediation work because NYCHA is required to complete mold and moisture repairs in no more than 15 days on average. The City law should specify what role the department of environmental protection will play in reviewing and approving the mold remediation plans that are submitted.</p>

New York State Labor Law	Proposed New York City Law	<i>Baez</i> Order	Comments
<p>Requires a post-remediation assessment that determines whether 1) the work area is free of visible mold, 2) work was completed in compliance with the remediation plan and work plan and meets clearance criteria specified in the plan and, 3) to the extent feasible, determines that the underlying cause of the mold was remediated so that it is reasonably certain that mold will not return from the remediated area.</p>	<p>Same as the State law.</p>	<p>The Order requires NYCHA to attempt to contact residents who had at least 10 square feet mold and, each quarter, report to plaintiffs “the number of residents contacted and the percentage of work orders for which the resident reported that the problems were not effectively addressed.” Also, each quarter, NYCHA must report to plaintiffs the number of “work orders concerning mold or uncontrolled moisture or both requiring action within seven (7) days” and “fifteen (15) days,” as well as the percentage of work orders completed within the required time frame.</p>	<p>Post-remediation assessments should determine whether the underlying cause of the mold was effectively remediated. The City Council should consider requiring that the results of the post-remediation assessments be given to the department of environmental protection and made publicly available, particularly where the assessment shows that the remediation work was unsuccessful in meeting the clearance criteria.</p>

New York State Labor Law	Proposed New York City Law	<i>Baez</i> Order	Comments
<p>If the post-remediation assessment shows that remediation has not been successful, the licensee issues a final status report to the client and to the remediation licensee and recommends either 1) a new assessment, 2) that the original remediation plan be completed, or 3) that the underlying causes of mold be addressed, as appropriate.</p>	<p>Similar to the State law. If the post-remediation assessment shows that the project did not successfully address mold, the assessor issues a final status report to the client and the remediator, recommending 1) additional actions to ensure that the original plan was completed, or 2) a new plan, or 3) that the underlying causes of mold be addressed.</p>	<p>Under the <i>Baez</i> order, if NYCHA contacts a resident and the resident states that the mold or excessive moisture-related issue was not effectively addressed, NYCHA must create a new mold or moisture remediation work order. A resident can also contact NYCHA and request a new work order.</p>	<p>The City Council should consider requiring that the final status report showing unsuccessful remediation be given to the department of environmental protection and made public. The City Council should also consider implementing consequences to the remediation licensee if the final status report shows the work was unsuccessful, particularly if there have been multiple attempts at remediation and multiple failures to meet the clearance criteria within a particular apartment.</p>

New York State Labor Law	Proposed New York City Law	<i>Baez Order</i>	Comments
<p>The Commissioner may suspend or revoke a license or fine or impose probationary or other restrictions on a licensee for good cause shown, which includes (but is not limited to) <u>incompetence or gross negligence in relation to mold assessment or mold remediation.</u></p>	<p>The City law makes no reference to a penalty for incompetence or gross negligence.</p>	<p>The Order requires NYCHA to effectively remediate mold, excessive moisture, and its root causes. The Court found that NYCHA had failed to comply with the Order and appointed a Special Master to enforce compliance. At present, the Court retains jurisdiction to enforce the Order until April 17, 2018.</p>	<p>The City law should follow the State law in permitting license suspension/revocation and fines to be imposed on a licensee who is shown to be incompetent or grossly negligent in connection with his mold assessment or remediation.</p>
<p>Violators of any provision of the law can be fined in an amount not to exceed \$2,000 for the initial violation and up to \$10,000 for each subsequent violation.</p>	<p>If a court or the environmental control board finds that a person has violated any provision or rule promulgated under the law, the civil penalty is \$1,000 for the first violation, \$5,000 for the second violation, and \$10,000 for the third or subsequent violation. Additional penalties include revoking or suspending the license, rendering the licensee's tools inoperable, and ordering the licensee to discontinue the conduct constituting such violation.</p>	<p>The Order does not impose fines for violations, but the Court found that NYCHA failed to comply with its mold and moisture remediation obligations and, therefore, appointed a Special Master to monitor and enforce compliance at least until April 2018.</p>	<p>The City law should permit fines to be imposed when a mold remediator does an incompetent or grossly negligent job in performing the work or when the work fails to pass the post-remediation assessment on multiple occasions.</p>

New York State Labor Law	Proposed New York City Law	<i>Baez Order</i>	Comments
Applies to mold of more than 10 square feet.	Applies to mold of more than 4 square feet.	Applies to <u>all</u> mold and excessive moisture in NYCHA housing.	The City law should not reduce the heightened standard for NYCHA under the Order.
Prohibits the licensee from performing both the assessment and the remediation on the same property.	Same as State law.	Does not address this issue.	The City Council must give further consideration to how independence between the assessor and remediator would be accomplished if this provision were applied to NYCHA.
The Commissioner has established training courses required to obtain a license.	Courses approved by the State Labor Commissioner satisfy the training requirements for the City license.	The Special Master has engaged Microecologies to provide mold assessment and remediation training to selected NYCHA employees as part of a pilot program, the effectiveness of which will be studied during a one-year period from April 2017 through April 2018.	The training requirements contemplated by the City law could supplement, but should not supplant, the training requirements currently imposed on NYCHA as part of the Special Master's pilot program, which runs through April 2018.

New York State Labor Law	Proposed New York City Law	<i>Baez</i> Order	Comments
<p>Grants the Commissioner the authority to inspect ongoing or completed mold assessment and mold remediation projects and to conduct an investigation upon his own initiation or upon receipt of a complaint by any person or entity.</p>	<p>The City law grants the Commissioner powers with respect to licensing, and specifies that the Commissioner can, with respect to covered entities, conduct investigations, issue subpoenas, receive evidence, hear complaints, take depositions, serve interrogatories, take testimony, and hold hearings.</p>	<p>The Court retains jurisdiction to enforce the Order at least until April 17, 2018.</p>	<p>The City Council should clarify who can make a complaint that would trigger an investigation and should consider following the State law which permits the Commissioner to start an investigation of any ongoing or completed mold assessment/remediation project based on a complaint “by any person or entity.”</p>
<p>Empowers the Commissioner to adopt rules and regulations to oversee the practice of mold assessment, remediation, and abatement and to ensure the health, safety, and welfare of the public.</p>	<p>Empowers the Commissioner, with respect to licensing, to establish rules with respect to covered entities 1) to protect the health, safety, convenience, and welfare of the public, 2) to ensure that persons engaging in covered activities do not discriminate against any person in violation of federal, state, or city laws or rules, and 3) to arrange for the redress of injuries caused by violations of the law.</p>	<p>The Court retains jurisdiction to enforce the Order at least until April 17, 2018.</p>	<p>The City Council should clarify when the proposed City law would go into effect.</p>

New York State Labor Law	Proposed New York City Law	<i>Baez Order</i>	Comments
Requires the mold remediation licensee to provide a remediation work plan to the client.	Same as the State law.	The Order does not require NYCHA to provide a written remediation work plan to the client, but does require that NYCHA staff “discuss the possible causes of mold growth with an adult authorized occupant of the apartment.”	The City Council should consider requiring the remediator licensee’s plan to be provided to the department of environmental protection and made publicly available online as is required of the assessment licensee’s plan.