SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 25

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CAMPAIGN FOR FISCAL EQUITY, INC., *et al.*,

Plaintiffs,

v.

THE STATE OF NEW YORK, *et al.*,

Defendants.

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Hon. Leland DeGrasse

Index No.: 111070/93

PLAINTIFFS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO CONFIRM THE REPORT AND RECOMMENDATIONS OF THE JUDICIAL REFEREES

January 10, 2005

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Plaintiffs the Campaign for Fiscal Equity, Inc., *et al.* ("Plaintiffs") respectfully submit this reply memorandum of law in further support of their motion to confirm the Report and Recommendations of the Judicial Referees (the "Report").[1]

PRELIMINARY STATEMENT

The Judicial Referees appointed by this Court faithfully and thoroughly carried out their charge. They first properly accepted the State's admission that it had failed to comply with the Court of Appeals' directives, a failure that has perpetuated a serious constitutional harm on New York City's school children. They then properly developed a substantial record to determine the appropriate remedy for this harm and they made specific findings of fact and recommendations that are fully supported by the record. Their resulting Report, therefore, is entitled to substantial deference. None of the State's objections provides any basis to overturn any of the Referees findings or recommendations.

The State's objections fail even to acknowledge the extraordinary circumstances that bring the parties before this Court yet again. The parties are here because the State failed to follow the direct order of the Court of Appeals to determine the actual cost of providing a sound basic education in the New York City schools, to implement the reforms necessary to ensure that adequate resources are available in the New York City schools, and to modify the accountability system.

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[1] In this memorandum, we cite to the evidence presented to the Refrees by the parties, including the live testimony and written statements provided by the parties' witnesses. Citations to written witness statements are indicated by the surname of the witness followed by the paragraph number or page number of the written submission, *e.g.*, Berne Stmt. at ¶ 4, Palaich Stmt. at 35-40. Citations to live testimony are indicated by the surname of the witness followed by the transcript page and line numbers, *e.g.*, Finn 93:22-94:12, Palaich 430:11-18; Berne 1260:7-1261:2.

Incredibly, despite these circumstances, the State continues to insist that the courts must defer to the other branches. The State begins with a pointless discussion about declaratory judgment that seems to have been included only to serve as a platform for the State's deference theme. Then, the State bases its principal challenge to the Report on the premise that the Referees were required to defer to a purported remedial plan sponsored by the Governor ***that has already been rejected by the Legislature.*** And the State insists that this Court defer to a purported estimate of the cost of providing a sound basic education that was inserted in the Governor's plan. This estimate, however, was sponsored by the State to the Referees solely because it was the lowest number that Defendants could find among a range of numbers that were included in a methodologically flawed study whose authors refused to appear before the Referees. The State's cynical manipulation of that study was properly rejected by the Referees and the study is entitled to no deference by this Court.

Fundamentally, this case is no longer about deference to the other branches of government. Where the State has completely and admittedly failed to follow the direction of the Court of Appeals, there are neither State actions nor State judgments to which any deference is due.

ARGUMENT

I. THE COURT HAS THE AUTHORITY AND RESPONSIBILITY TO ISSUE A SPECIFIC ORDER REQUIRING THE STATE TO IMPLEMENT THE REFORMS RECOMMENDED BY THE JUDICIAL REFEREES

If the objective of the State's declaratory judgment argument is to show that this Court does not have the authority to issue the proposed remedial order submitted by Plaintiffs, the State is wrong. As the Referees found, the Court has the authority to issue detailed, specific mandates to the State. *See* Report at 50-54 (Section V) (citing *Klostermann v. Cuomo*, 61 N.Y.2d 525, 535 (1984); *New York Ass'n for Retarded Children, Inc. v. Rockerfeller*, 357 F. Supp. 752 , 769

(E.D.N.Y. 1973); *McCain v. Koch*, 70 N.Y.2d 109, 115, 119-21 (1987); *New York County Lawyers' Ass'n v. State*, 192 Misc. 2d 424, 436 (Sup. Ct. New York County 2002)).[2]

The State has no answer to the Referees' analysis and completely ignores the fact that the Court of Appeals gave the Governor and the Legislature ***more than a year*** to take the necessary action required to meet its requirements without judicial interference. The Court's decision makes clear that it was its concern for separation of powers and the prerogatives of the Legislature that resulted in this deference:

> We are, of course, mindful – as was the trial court – of the responsibility, underscored by the State, to defer to the Legislature in matters of policymaking, particularly in a matter so vital as education financing, which has as well a core element of local control.

Campaign for Fiscal Equity v. State of New York, 100 N.Y.2d 893, 925 (2003) ("*CFE II*"). But the Court also made it clear that the judiciary would not hesitate to step in if the State failed to take appropriate remedial action and allowed the constitutional violation to continue:

> By the same token, in plaintiffs' favor, it is the province of the Judicial branch to define, and safeguard, rights provided by the New York State Constitution, ***and order redress for violation of them.***

Id. (emphasis added). There is no doubt, therefore, that the Court has ample authority to issue an order directing the State to take specific action to remedy the constitutional violation.

To date, the State has taken no action in response to the Court of Appeals' decision in *CFE II*. A declaratory judgment would simply perpetuate the status quo and give the State no more incentive to act than it had during the year it ignored the Court of Appeals' mandate. As

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2 In contrast, all of the cases cited by the State at pages 11 to 14 of the State's brief involve questions of justiciability and separation of powers at the liability stage of those cases; none of them have any relevance to the unique, virtually unprecedented question before this Court of what actions the Court must take when the Governor and the Legislature have blatantly defied a direct constitutional mandate of the Court of Appeals.

the State's own inaction amply demonstrates, without a clear order that specific action be taken under penalty of meaningful consequences, there is no assurance at all that the State and the Governor will do anything to meet the requirements of *CFE II*. Accordingly, Plaintiffs respectfully urge the Court to adopt the Referees' recommendations and endorse the proposed order submitted by Plaintiffs.

II. THE REFEREES' FINDINGS AND CONCLUSIONS ARE ENTITLED TO GREAT WEIGHT AND SHOULD BE ADOPTED BY THE COURT

The Court's instructions to the Panel of Judicial Referees were clear. The Referees were to consider evidence submitted by the parties and make factual findings to support recommendations to the Court about the appropriate remedy for the constitutional deficiency in the New York City school system. *See* August 3, 2004 Order. The State, however, apparently believes that the Referees' findings and conclusions are entitled to no weight at all in these proceedings and, in essence, asks the Court to reject the Referees' findings out of hand. As the Court knows, at this stage of these proceedings the parties are not working on a blank slate. It has now been more than four years since this Court first found the State to have failed in its obligation to provide all New York City students with the opportunity for a sound basic education, and more than eighteen months since the Court of Appeals affirmed that decision. When this Court assumed authority over the final resolution of this case last July after the State's admitted failure to comply with the Court of Appeals' order, it appointed a panel of three distinguished jurists to hear and evaluate evidence submitted by the parties and to report to the Court with recommendations on how to "bring the State's school funding mechanism into constitutional compliance insofar as it affects the New York City School System." August 3, 2004 Order.

As a general matter, the findings and conclusions of referees appointed to hear and consider evidence are entitled to great weight under New York law because, as triers of fact, the referees had a direct opportunity to evaluate the credibility of witnesses and assess the evidence. *See, e.g., Poster v. Poster*, 4 A.D.3d 145, 145 (1st Dep't 2004) ("The recommendations of a special referee are entitled to great weight because, as the trier of fact, he has an opportunity to see and hear the witnesses and to observe their demeanor."); *Leinwand v. Leinwand*, 203 A.D.2d 210 (1st Dep't 1994). Accordingly, New York courts defer to the findings of referees appointed to hear and report on a pending matter. *See, e.g., Poster,* 4 A.D.3d at 145; *Matter of Holy Spirit Assn. v. Tax Comm'n*, 81 A.D.2d 64, 70-71 (1st Dep't 1981), *rev'd on other grounds*, 55 N.Y.2d (1982).

In this case, the Referees' conclusions and recommendations are entitled to particular deference. Over a period of three months, the Panel went to great lengths to make sure that it considered all the relevant evidence available. The Referees solicited and received multiple written submissions from the parties and from numerous *amici* concerning the appropriate remedy for the deficiencies in the City school system. They also permitted the City of New York and the Board of Regents to participate directly in the proceedings in recognition that the City and Board are intimately knowledgeable concerning the City school system and share responsibility both for running the current system and for actually implementing the remedy. The Panel also heard testimony from fifteen witnesses sponsored by Plaintiffs and the State as well as by the City of New York and the Regents. Given the breadth and scope of the evidence submitted to the Panel, there is no basis for the State to complain that the Referees' recommendations should be ignored because it was not given a fair hearing. And there is no

question that the Panel had more than an adequate basis upon which to make findings and conclusions for submission to this Court.

As the Referees properly found, the evidence submitted by the parties overwhelmingly established that:

- The State failed to comply with ***any*** of the requirements established by the Court of Appeals in *CFE II*, including the requirement that the State determine the actual cost of providing a sound basic education in New York City.
- The State's claim that a sound basic education can be provided in New York City with an additional expenditure of $1.93 billion was based on a cynical manipulation of a methodologically flawed study in order to produce a lowball figure and cannot be taken seriously.
- An additional expenditure of $5.6 billion in basic operation aid is necessary to provide a sound basic education in New York City.
- In order to provide New York City children with the opportunity for a sound basic education, significant capital projects must be completed, including the construction of new classrooms, laboratories and libraries, and the costs of these projects must be included in determining the actual costs of providing a sound basic education.
- The State's current accountability system must be enhanced by implementation of a comprehensive planning process.

The State, on the other hand, sponsored "expert" witnesses to endorse their proposal who had had no first hand knowledge of the Standard and Poor's ("S&P") study on which it was based (the "S&P Study"), and no recent or relevant experience in New York State education finance matters. Finn 80:14-81:3, 84:15-85:9, 87:11-14; Palaich 389:12-20. As discussed below, these witnesses confirmed many of the facts underlying Plaintiffs' proposal and admitted fatal flaws in the State's compliance plan. The testimony of the State's own witnesses, therefore, supports the Referee's findings and provides no basis to challenge them here.

A. The Referees' Factual Findings Concerning The Actual Cost of A Sound Basic Education Are Supported by Overwhelming Evidence

The State complains that the Panel "improperly substituted its own judgments" when it

found that the evidence did not support the State's position concerning the "actual cost" of a sound basic education. The implication of the State's argument is that the Referees were somehow precluded from using their "judgment" in determining which facts are supported by the evidence. This strange claim flows from the same rejected notion that the courts have no business adjudicating this case.

As the Referees found, the evidence overwhelming established that the State failed to "[a]scertain the actual cost of providing a sound basic education in New York City." *See* Report at ¶¶ 12-13. The evidence showed that the S&P Study upon which the State relies was not designed to determine the cost of a sound basic education in New York City and merely produced a highly-manipulable "range" of figures. In fact, S&P expressly stated that it "does not recommend any particular spending level." S&P Study at 2. Moreover, the Zarb Commission did not include any cost estimate for New York City in its March 2004 report and provided only a statewide estimate that simply adopted the lower ranges of the S&P Study. *See* New York State Commission on Education Reform, *Final Report* (March 29, 2004) at 8 ("Zarb Commission Report"). And the Governor himself put to rest any suggestion that the S&P Study identified the cost of a sound basic education when he proposed that the Referees order an additional $4.7 billion in aid for New York City, rather than the $1.93 billion the State claims is sufficient. As the Referees correctly concluded, these facts undermine any claim by the State that it has complied with the Court of Appeals' directive.

The State grossly distorts the Referees' Report by blatantly asserting that the Referees "recommend that this Court adopt defendants' overall methodology for ascertaining the cost of a sound basic education as set forth in the Standard and Poor's study." State's Br. at 7. The Referees did no such thing. They arrived at their conclusion that $5.63 billion in additional

operating aid is needed for New York City Schools by undertaking their own rigorous analysis of the successful schools data – correcting three major flaws of the State's approach – and accepting the resulting figure because of the "significant support [of the AIR/MAP Study] in confirming our conclusion that providing the New York City District an additional $5.63 billion in annual operations funding is both necessary and appropriate. . . ." Report at ¶ 50.

There was substantial evidence in the record to support each of the Referees' revisions of the major flaws in the State's use of the successful schools methodology.

1. The Panel Correctly Rejected the State's Misguided and Flawed Cost-Efficiency Factor

The State claims that the Referees "rejected a policy of requiring spending to be cost-effective" and "improperly substituted [their] own policy judgment" instead of endorsing the State's position that the cost of a sound basic education should be determined only by analyzing the bottom-spending 50% of successful school districts. This is a straw man argument and a complete distortion of the record in this case. No party disputed that cost-effectiveness is a worthy goal. The dispute was instead over whether the State's proposal was an appropriate and justifiable means of achieving that objective. Far from rejecting the notion that spending be cost-effective, the Referees explicitly recognized "the importance of running school districts efficiently." Report at ¶ 17. What the Referees did find, however, is that "the evidence in the record does not support the State's elimination from its costing-out analysis of the 50% highest-spending successful school districts." *Id.* This is not the substitution of one "policy judgment" for another; it is a factual conclusion based on the overwhelming evidence.

As the Referees explained in detail in their Report, the evidence showed that the State's proposed cost-effectiveness filter was an arbitrary measure that S&P used at the Zarb Commission's request that has no justification in the education finance literature or in practice.

Id. at ¶¶ 17-24. S&P made no attempt to determine whether the top-spending 50% of districts they identified were in fact spending inefficiently or to determine whether any of the excluded districts were demographically similar to New York City. In testimony before the Referees, Plaintiffs' expert and the State's expert both agreed that they would ***not*** use this filter in a successful schools study. Palaich 430:11-18; Berne 1260:7-1261:2; Berne Stmt. at ¶ 20; Parrish 1028:12-1029:11. No costing-out study in any state other than New York has ever used this procedure. In New Hampshire, the only example cited as precedent cited by the State to the Referees, it turned out that this procedure was devised by a legislative committee seeking to drive costs down to a predetermined amount, and not by any education finance experts.

2. The State's Proposed 1.35 Poverty Weighting Is Arbitrary

The S&P researchers themselves acknowledged that the 1.35 poverty weighting used in their Study and sponsored by the State was "drawn from a review of research literature," and they cautioned that "insufficient empirical evidence exists in New York to determine how much additional funding is actually needed for different categories of students with special needs to consistently perform at intended achievement levels." S&P Study at 8. Even the State's own expert testified that the State's proposed 1.35 weighting had no relationship to the cost of educating economically disadvantaged students in New York City. Palaich 433:3-434:7; *see also* Parrish 1027:4-1029:11.

Rather than rely on abstract national literature, the Referees utilized the lowest of the range of figures recommended by the Regents, who relied on SED analysis of the relevant literature and its relationship to New York students. The Regents had concluded that weightings of between 1.5 and 2.0 are appropriate depending on the concentration of economically

disadvantaged students in a district. Regents Study at 54. The Referees prudently used the 1.5 weighting figure, the lowest end of the Regents' range, in making their calculations.[3]

3. The Panel Adopted an Appropriate Regional Cost Index

The Referees recommended the use of the latest revision of the Geographic Cost of Education Index ("GCEI") prepared by Plaintiffs' expert Jay Chambers as part of the AIR/MAP Study. The State had used an outdated version of that index in its study and inexplicably urged the Referees to continue to use that outdated version. Report at ¶ 41. In its brief to the Court, the State has now acknowledged that the Referees' rejection of their flawed approach was correct, and has stated that it now has no objection to the use of the updated GCEI. State's Br. at 9.[4]

B. The Referees' Recommendation of $9.2 Billion in Capital Aid Is an Appropriate and Necessary Addition to the Current Building Aid System

The State has two objections to the Referees' recommendation that the Court order $9.2 billion in additional capital funding over five years to implement Plaintiffs' Building Requires Capital For Kids ("BRICKS") program. First, it claims that "nowhere in *CFE II* did the Court of Appeals invalidate the State's present system of reimbursing school districts for a portion of approved capital expenditures." State's Br. at 26. Second, the State argues that the Referees'

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3 The State also grossly mischaracterizes the testimony of Plaintiffs' expert Dr. Parrish on this point. State's Br. at 21. Dr. Parrish did not affirmatively state that AIR/MAP's implied weighting was lower than the State's proposed 1.35. Dr. Parrish testified that the AIR/MAP study "does not employ abstract weightings or other assumptions" in order to adjust for the cost of educating economically disadvantaged students. Parrish Stmt. at ¶ 28. Any attempt, therefore, to extrapolate corresponding weightings from the AIR/MAP Study is a comparison between apples and oranges. Parrish 1041:10-1044:25, 1045:17-1047:7.

4 The State reiterates its belief that the phase-in period for the increased funding should be five years rather than the four years recommended by the Referees. State's Br. at 25. The State had every opportunity to present evidence to justify this position to the Referees, but it presented none. Report at ¶ 92 & n.75. Now, after causing New York City's students to lose another year of constitutionally adequate funding by its failure to meet the July 31, 2004 deadline, the State should not be heard to argue for more delay.

capital funding recommendation should be rejected because it is "not tied to any specific projects and [does not require] review or approval by the State Education Department." *Id.* at 27. In regard to the first point, the State admits that, "in order to bring the City's schools into compliance with *CFE II*, certain capital expenditures may well be required to reduce overcrowding and recapture displaced library and science laboratory space." *Id.* at 26. It posits that these additional expenditures may be routinely provided through the present building aid system. As the Referees found, however, the evidence overwhelmingly established that the current capital funding system has ***not*** allowed the City to add desperately needed building capacity or to make necessary repairs and renovations to existing spaces. Report at ¶ 68. As a result, with each passing year, the City's schools sink further and further below a minimally adequate level.

The BRICKS program is designed to "bring[] New York City school facilities up to a constitutionally adequate level through an emergency infusion of funds specifically targeted to the deficiencies highlighted by the Court of Appeals." Zedalis Stmt. at ¶ 12. As such, it would remedy the historical inequity in capital funding by ***supplementing*** the existing building aid program, rather than replacing the current system. The BRICKS plan provided a detailed analysis of precisely how much of an emergency infusion of capital funding is necessary to bring the system to a constitutionally adequate level. Since, as the Referees found, the State essentially defaulted on this issue because they "completely failed to offer any plan to bring the City's school facilities into compliance with the Court of Appeals mandate" (Report at ¶ 66 & n.55), the Referees' finding that an additional $9.2 billion is required to bring City facilities up to a minimally adequate level is unchallenged and the State has no basis to object.

The State's second argument that "under the panel's recommendation . . . the City would receive 100% of these funds in lump-sum payments without any showing of how the funds would be expended" (State's Br. at 29) misreads the Referees' recommendation and is simply wrong. The Referees recommended that the Court order the Defendants "to take all steps necessary . . . to implement a capital funding plan [that will provide the City an additional $9.179 billion.]" Report at ¶ 3. The State, presumably acting through the Regents, certainly would be expected to include among the "steps necessary" specific procedures to ensure that the new capital funds will be effectively utilized for appropriate projects, as well as appropriate design and bidding procedures. Accordingly, there is no basis for the State's objection that the Referees recommendation amounts to a blank check.

C. The Referees' Recommendations Endorse Effective Comprehensive Planning, and Do Not Preclude the State From Enacting Further Enhanced Accountability Measures

Because New York State's current accountability system, which incorporates the extensive requirements of the federal No Child Left Behind Act, is already "comprehensive, rigorous and robust" (Report at ¶ 96), the Referees recommended that the Court endorse only the comprehensive planning process upon which the parties had agreed; they otherwise rejected the State's proposal for an Independent Office of Educational Accountability and its other specific accountability proposals. The foundation funding reform that all of the parties support[5] will provide most if not all of the increased state operating aid as a block grant. Accordingly, comprehensive planning that will identify, track and report on precisely how the money will be

[5] The Referees also support the foundation funding reform advocated by the parties. *See* Report at ¶¶ 88-89. They have not included foundation funding reform in their recommendations only because of its "statewide ramifications." *Id.* at ¶ 88.

spent and what results are achieved is a critical accountability enhancement that must be in place as soon as the additional funding is provided.

Extensive public engagement is a critical component of the comprehensive planning process. Both parties emphasized the importance of extensive involvement of parents, teachers and members of the general public in the comprehensive planning process because (a) meaningful public input provides important perspectives and information on the broad range of educational policy issues, and (b) new educational policies and initiatives, no matter how well-conceived, will not be effectively implemented in practice if they lack the understanding and enthusiastic support of the teachers and parents who need to carry them out. Sobol Stmt. at ¶¶ 20-21; *see also* Sobol 781-783. Both the Plaintiffs and the Defendants included specific provisions for enhanced public engagement in their submissions to the Referees. *See* Summary of Plaintiffs' Position on Accountability, p.2 ("The regents should issue regulations which ensure . . . that there is public engagement of parents, teachers, administrators and other individuals and groups in the planning process.); Defendants' Compliance Plan, Appendix E, Special Session Bill 1-A, at 3 ("The Plan shall be developed in cooperation with groups representing parents, teachers and administrators from the poorly performing schools."); Sound Basic Education Task Force Final Report at 113-15; Zarb Commission Report at 41; *see also* Kadamus 913-915.

The Referees, in specifying that they were recommending the comprehensive planning process which had been agreed upon by the parties (Report at ¶ 105), obviously meant to include these public engagement concepts. However, because the City has raised questions regarding the intent of the Referees to call for additional public engagement procedures (*see* Mem. of Law of *Amicus Curiae* the City of New York at 33), Plaintiffs have recommended in their Proposed

Order (page 5, ¶ 2) that any possible ambiguity in this area be eliminated by a specific reference to the need for the Commissioner of Education to issue specific regulations in this regard.

Ironically, the State's argument that the Court must order additional accountability mandates beyond procedures for comprehensive planning directly contradicts its other objections (discussed above) that the Referees have recommended ***too much*** and gone beyond the mandate of *CFE II*. On every other issue the State complains that the Referees exceeded their authority, but now it completely reverses course and argues that the Referees did not go far enough. Moreover, the State's objection to the Referees' accountability recommendations makes no sense because there is nothing at all preventing the State from enacting measures that expand upon what the Referees have recommended. This Court's ultimate remedial order in this case is a floor, not a ceiling, for the actions that the State must take to remedy the constitutional deficiency. If the State ultimately decides that more is required, nothing in the Court's order would prevent it from doing so.[6]

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6 The State's final complaint is that the Referees failed to consider the effect of "recent educational reforms [that] may increase the opportunity for New York City students to obtain a sound basic education, independent of school financing reforms." State's Br. at 36. The State's claim is undermined by the fact that the record is devoid of any evidence suggesting that New York City school children are today receiving an opportunity for a sound basic education. Moreover the costing-out studies conducted by the parties, and the Referees' analysis of this data, was based on current, post-trial needs and resource gaps.

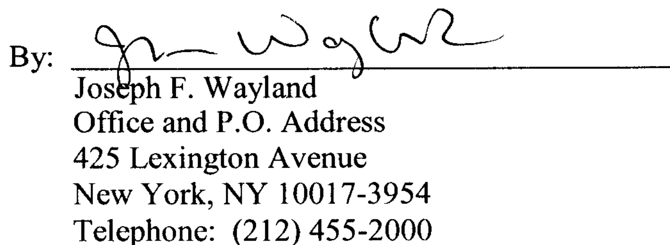
CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court (a) confirm the Referees' Report; and (b) enter an Order requiring Defendants to take all actions recommended by the Referees' Report.

Dated: New York, New York
January 10, 2005

Respectfully submitted,

SIMPSON THACHER & BARTLETT LLP



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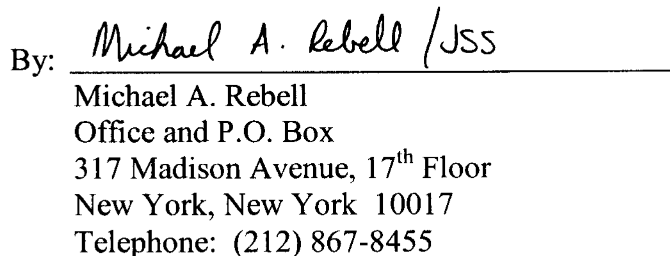

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