SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of

MONA DAVIDS, individually and on behalf of her minor children, Jane Doe I and John Doe I; KAREN SPROWAL, individually and on behalf of her minor child, John Doe II; DONALD NESBIT, individually and on behalf of his minor children, Jane Doe II, Jane Doe III, John Doe III; MARIA BRIGHT, individually and as legal guardian of minor children, John Doe IV, John Doe V, and Jane Doe IV; NOEMI MARTINEZ, individually and on behalf of her minor child, Jane Doe V; JENNY MORALES, individually and as legal guardian of a minor child, Jane Doe VI; LANETTE MURPHY, individually and on behalf of her minor child, John Doe VI; HELSON SANTIAGO, individually and on behalf of his minor children, John Doe VII, Jane Doe VII, Jane Doe VIII; KAREN SMITH, individually and on behalf of her minor child, Jane Doe IX; MARIA VALENCIA, individually and as legal guardian of a minor child, John Doe VIII; CRUZ VIDAL, individually and on behalf of his minor child, John Doe IX; and YVONNE WILLIAMS, individually and on behalf of her minor child, John Doe X,

Petitioners,

For a Judgment Under Article 78 of the Civil Practice Law and Rules

-against-

JOHN B. KING, JR., as Commissioner of Education of the New York State Department of Education, NEW YORK STATE DEPARTMENT OF EDUCATION, and BOARD OF REGENTS OF THE STATE UNIVERSITY OF NEW YORK,

Respondents.

Index No. _____

MEMORANDUM OF LAW IN SUPPORT OF ARTICLE 78 PETITION AND OF APPLICATION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

PRELIMINARY STATEMENT

Petitioners, parents and legal guardians of public and charter schoolchildren in New York State (collectively, "Petitioners"), submit this Memorandum of Law in support of its Verified Petition ("Petition"), pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR"), and CLPR Sections 6301, 6311, 6312, and 6313 for an Order and Judgment restraining and enjoining John B. King, Jr., as Commissioner of Education of the New York State Department of Education, the New York State Department of Education, and Board of Regents of the State University of New York (collectively, "Respondents" or "SED"), from disclosing the personally identifiable information of millions of New York State schoolchildren without the consent of their parents or guardians, in violation of the New York State Personal Privacy Protection Law, N.Y. Public Officers Law Section 96, and for other relief.

SUMMARY OF FACTS

The facts are set out in full in the Petition. A brief summary of facts follows herein.

Petitioners are the parents and legal guardians of minor children who attend public school in New York City. As schoolchildren, much personal information about them, including personally identifiable information ("PII"), is collected about the course of their progress through school—information that is key to ensuring that they receive a quality education.

On October 11, 2012, respondent New York State Education Department ("SED") entered into a Service Agreement with inBloom, Inc. ("inBloom"), a private corporation, (formerly known as the Shared Learning Collaborative), Pet. Ex. A, which committed SED to release to inBloom more than 400 pieces of student data from New York State local school districts, some of which are highly sensitive and qualify as PII, including test scores, grades, disciplinary and attendance data, economic and racial status, and "program participation,"

including whether or not a student is entitled to special education services, English language learner services, or other accommodations or modifications. Pet. Ex. A (Attachment F).

SED's agreement allows inBloom to load and store the PII and other student and teacher data on a cloud hosted and managed by inBloom or by vendors of inBloom, including Amazon. SED requires that data uploaded to inBloom be accessed by local school districts through one of three "data dashboards" offered by third-party vendors. Pet. Ex. B.

As a result of the Service Agreement, all local school districts receiving Race to the Top ("RTTT"), grant money will lose the right to control the storage and disclosure of their students' personal data. In recent weeks, in an effort to avoid the mass transfer of the student data storage to inBloom, a number of local school districts have announced that they will opt out of the RTTT grant program and return RTTT grant funds to the State. Pet. Ex. D. According to SED, even local school districts that do not accept RTTT grant money will lose control over the personal data of their students. SED is requiring all school districts to provide student data to the State for eventual upload to inBloom. Pet. Ex. B ("If your district does not participate in RTTT, the statewide data set will still be provided to inBloom for contract purposes . . . .").

SED's agreement with inBloom is a dramatic break from the current student data system, which is operated with in-house expertise in which local school districts, own and control their student data and are required to provide only limited personal data to SED for purposes of analysis and federal and state reporting requirements through a secure system in which data is transferred to State and locally-controlled Regional Information Centers ("RICs") (some of which are County Boards of Cooperative Education Services ("BOCES")), and then passed on to SED securely without the intervening involvement of private companies or outside vendors. Pet. Ex. E.

New York State now stands virtually alone among state education departments and local education agencies. New York State is the only inBloom client pledged to share PII for its entire state-wide public and charter school systems with inBloom. When SED entered into its relationship with inBloom, there were eight other participating states. Pet. ¶ 9. Seven of them—Colorado, Delaware, Georgia, Illinois, Kentucky, North Carolina, and Louisiana—have backed away from sharing any student data, and one, Massachusetts, has put its data-sharing plans on hold. Pet. Ex. F.

New York parents have expressed serious concerns about the potential harm to their children by the transfer of their personal data to cloud storage. Data storage on the cloud poses numerous risks. There have been countless examples of exposure and disclosure of sensitive personal data as the result of contractor inadvertence, negligence, or intentional and malicious acts of sabotage.

Parents are concerned about how their children's' personal information will be used in the hands of a private corporation. Pet. Ex. I; Ex. J. Schools with students that participate in individualized education plans ("IEPs"), are required to closely guard the contents of each student's IEP information, since such information can be highly sensitive in that it can reveal if a student suffers from any disabilities. As the Service Agreement provides, this data will be stored on a cloud-based system and provided to vendors, thereby greatly expanding the potential number of persons who may be able to view a child's IEP. Pet. Ex. I.

While inBloom will maintain millions of New York State students' PII, its agreement with SED is completely lacking in any enforceable date privacy and security policy. Indeed, while inBloom will hold the data, the Service Agreement puts the onus on SED and local school districts to protect it. Pet. ¶ 13. The Service Agreement does not include a Data Privacy and

Security Plan, but merely refers to inBloom's intention to implement a "comprehensive Data Privacy and Security Policy at some point after it has launched Release 1.0 of the SLI.. Pet. Ex. A (Attachment F, Ex. C). It is the local school districts and SED that remain responsible for all uses and disclosures of PII by any third parties. SLC/inBloom has no responsibility of liability for any "act or omission" of and use of the PII by third parties. Pet. Ex. A (§§ 3.2(b), 7.1).

Further, the Service Agreement permits inBloom to suspend SED's access to the data inBloom to find that SED or a local school district had failed to ensure that third parties complied with the as-yet undeveloped Data Privacy and Security Policy. Pet. Ex. A (Attachment A, § 2.3). Thus, where inBloom judges SED to be in default of the Service Agreement, SLC/inBloom would be the only party with any access to student PII. Pet. Ex. A (Attachment A, § 2.3).

The Service Agreement also does not require SLC/inBloom to ensure that third-party providers comply with data privacy and security laws. Pet. Ex. A (§ 7.1). Further, the Service Agreement explicitly provides that SLC/inBloom "does not warrant that its electronic files containing [the student data] are not susceptible to intrusion [or] attack . . . ." Under the Service Agreement, local school districts and SED are responsible for the loss of data through fraudulent or other means, while SLC/inBloom and its subcontractors are held harmless. Pet. Ex. A (§§ 11.5, 14.4). The Service Agreement also contains no protocol for management of a data breach. It simply requires that SED be notified of the breach. Pet. Ex. A (§ 11.2). It does not require notification to parents, and there is no provision for remedial action for students and families harmed or potentially harmed by the improper release of their student records, including what rights, if any, they would have; where they would present any such claims; and under what circumstances they would be able to recover from SED or the local school districts.

The Service Agreement, one-sided as it is, will dramatically alter the security and privacy of the student data system in New York State, moving it from local and regional control to inBloom's private cloud-based system, but leaving the burden of ensuring compliance with privacy laws and unspecified data security provisions in the hands of SED and local school districts. Thus, the inBloom Service Agreement makes it more likely, not less, that New York State student PII will be compromised, and creates a substantial and non-speculative risk that the PII of students will be disclosed.

ARGUMENT

I. Relevant Law

Both federal law and state law contain provisions that protect student PII from disclosure. The Family Educational Rights and Privacy Act ("FERPA"), provides parents with some degree of control over the disclosure of information from their children's educational records. 20 U.S.C. § 1232g (2013). The statute limits disclosure without consent to "directory information," which includes information such as names, addresses, degrees awarded, and the like. § 1232g(a)(5)(A). FERPA does not permit the release of education records or PII contained therein unless enumerated statutory exceptions are met. § 1232g(b). There is no private right of action to enforce FERPA.

However, Article 6-A of the Public Officers Law, also known as the Personal Privacy Protection Law ("PPPL"), governs this action. The PPPL was enacted to protect the privacy of individuals in their dealings with the government. N.Y. Pub. Off. Law, Art. 6-A, § 91 *et seq.* (2013). Section 96 of the PPPL specifically governs the disclosure of records and personal information. § 96. The PPPL defines a "record" as basically any item or group of "personal information about a data subject which is maintained . . . ." § 92(9). "Personal information"

means "any information concerning a data subject which, because of . . . [an] identifier, can be used to identify that data subject."[1] § 92(7). It is "personal information" that is at issue here. The PPPL states in relevant part that:

> (1) No agency may disclose any record or personal information unless such disclosure is:
>
> > (a) pursuant to. . . the voluntary written consent of the data subject . . . .
> > (b) to those officers and employees of, and to those who contract with, the agency that maintains the record if such disclosure is necessary to the performance of their official duties pursuant to a purpose of the agency required to be accomplished by statute or executive order or necessary to operate a program specifically authorized by law[.]

§ 96(1)(a), (b).[2]

The PPPL allows an aggrieved party to challenge an agency's action in an Article 78 proceeding pursuant to Section 97 of the PPPL. § 97(1). Further, the PPPL places the burden of proof on the party defending the action:

> (2) In any proceeding brought under subdivision one of this section, the party defending the action shall bear the burden of proof, and the court may, if the data subject substantially prevails against any agency and if the agency lacked a reasonable basis pursuant to this article for the challenged action, award to the data subject reasonable attorney's fees and disbursements reasonably incurred.

§ 97(2). For the reasons discussed below, SED has not abided by the PPPL because it failed to obtain consent for such extensive disclosure of PII to third parties; and fails to demonstrate how such disclosure is necessary to operate any educational program specifically authorized by law. This Court must enjoin SED from taking any steps to implement its disclosure of PII of New York State schoolchildren.

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[1] The PPPL uses the term "personal information," while the Service Agreement and standard industry practice use the term "personally identifiable information" ("PII"). These terms essentially are interchangeable, but Petitioners will use the latter herein.

[2] The PPPL lays out several other exceptions permitting disclosures, *see* § 96(c)-(n); however, these do not apply to the situation faced here.

II. SED's Disclosure of PII to inBloom and Other Contractors without Consent Violates State Law

A. Disclosure of Personal Information Generally is Not Permitted

Section 96 is broadly protective and generally prohibits disclosure of PII unless such disclosure meets specific conditions. § 96. The State Legislature recognized when enacting the PPPL that "[t]here is an inherent danger in permitting the unchecked use of . . . data systems which contain personal information about millions of New York State citizens." Comment to S. 6936, N.Y. State Senate, 652-53 (1983). For that reason, the PPPL requires that the relevant agency either obtain consent to disclose PII, or otherwise show that its disclosure meets one of several enumerated exceptions.

B. SED has Not Obtained Parental Consent for Disclosure

No agency may disclose any record or personal information unless the subject of the disclosure consents voluntarily. § 96(1)(a).

SED has decreed that parents of public and charter school children have no right to opt out of its disclosure of any of the information it has at its disposal about their children to inBloom or other vendors. Pet. ¶ 5; Ex. I (Davids Aff.), at ¶¶ 5-6. A SED spokesperson has stated that consent is unnecessary because private information is "give[n] up" when parents register children for school. Pet. Ex. Z. SED further justifies depriving parents of this right on the grounds that it would be "impossible—or extraordinarily more expensive—to conduct much of the day-to-day management work of schools." Pet. ¶ 5; Ex. C (EngageNY Fact Sheet).

However, SED ignores the fact that "day-to-day management work of schools," as well as collection and maintenance of student data, has on the whole been left to the individual school districts themselves. Pet. ¶¶ 49-52. Parents always have had the right to control the manner in which information about their children—and themselves—is utilized. Ex. I (Davids Aff.), at ¶¶

14, 16; Ex. J (Sprowal Aff.), at ¶ 6. Their privacy interests outweigh any justifications relating to school management.

The State Legislature recognized that the PPPL was enacted to "insure fairness in the collection, use and dissemination of personal information[.]" Comment to S. 6936, N.Y. State Senate, 652-53 (1983). While the Legislature noted that "increased governmental efficiency" was a benefit arising out of the statute's enactment, *id.*, it certainly was not enacted for this purpose. SED cannot credibly claim that "day-to-day management of schools" equates to increased governmental efficiency, which outweighs individuals' right to control disclosure of their own PII. *See id.*

Thus, at a minimum, under state law, parents should have the opportunity to decide how their children's PII is used. *See* Pet. ¶¶ 18-19. This Court must enjoin SED's intention to disclose New York State students' PII to a private third-party corporation such as inBloom.

III. SED's Disclosure of PII is Not within any Exceptions to the Consent Requirement of the PPPL

A. SED's Use of inBloom is Not "Necessary to Operate a Program Specifically Authorized by Law"

As stated above, disclosure under the PPPA without consent is permitted where it is "necessary to operate a program specifically authorized by law[.]" § 96(1)(b).[3] Based upon its

[3] The first part of Section 96(1) deals with public officials carrying out their official duties, which is not at issue here. The statute and case law demonstrates that the disclosure must be "necessary to the performance of their official duties[.]" § 96(1). This has taken the form of disclosure of employee personnel information that directly pertains to employees' execution of their duties as public officials. *See, e.g., Doe v. City of Schenectady,* 84 A.D.3d 1455, 1459 (3rd Dep't 2011) (publically-held police disciplinary hearings meant employee records would be disclosed anyway); *Matter of Levine v. Bd. of Educ. of the City of New York,* 186 A.D.2d 743, 745, 589 N.Y.S.2d 181 (2nd Dep't 1992), *appeal denied,* 81 N.Y.2d 710, 599 N.Y.S.2d 804, 616 N.E.2d 159 (1993) (disclosure of information regarding teacher who was determined unfit to teach was "necessary for the internal functioning" of the agency); *Kooi v. Chu,* 129 A.D.2d 393, 395-96, 517 N.Y.S.2d 601 (3rd Dep't 1987) (Department of Taxation disclosed information regarding its employees who failed to file timely personal tax returns).

public pronouncements, SED presumably seeks to implement transfer of PII to inBloom—and seeks to bypass obtaining parental consent for such use—on the grounds that the disclosure is "necessary to operate a program specifically authorized by law[.]" However, scrutiny of SED's reasoning demonstrates that nothing necessitates SED's use of inBloom for any purpose. SED has offered no reasoning or justification for why broad disclosure to inBloom is in any way necessary to the operation of any SED program. SED's intended disclosures thus run afoul of Section 96(1)(b).

SED also claims that use of inBloom is part and parcel of a data infrastructure requirement of the U.S. Department of Education's Race to the Top program ("RTTT"). *See* Pet. ¶¶ 21-22; Ex. P. However, there is nothing in RTTT regulations, in New York State's application for RTTT funding ("NYS RTTT"), or in any other federal law or regulation, that mandates either SED's use of inBloom to fulfill the program's requirements, or the mass transfer of PII to a third party such as inBloom, and its vendors. Pet. ¶ 60; Ex. P.

i. No Federal Statute or Program Requires SED to Use inBloom

Federal law requires that every state recipient of a grant establish a "statewide [] education longitudinal data system" (LDS). America COMPETES Act, 20 U.S.C. § 9871(e)(2) (2013) ("Competes Act"). LDS are programs that allow a given state to track student data as they progress through the school system, so that the state may monitor reforms and make program adjustments accordingly. Pet. ¶ 55; Ex. P. RTTT also provides grants supporting establishment of state LDS. RTTT merely requires that a state's LDS "include[]" the requirements set forth in the Competes Act, which requires collection of twelve data points from

schools.[4] § 9871; Pet. ¶ 55. Neither the Competes Act nor RTTT require SED to utilize inBloom—or any third-party data host. However, only a few data points relate to individualized, identifiable information about students. The Competes Act and RTTT basically set a forth a floor establishing the minimum amounts of data school districts must disclose to state education agencies. There is nothing in RTTT that requires disclosure beyond what the Competes Act requires. Notwithstanding that, SED has taken it upon itself to disclose data above and beyond such requirements. SED seeks to provide to inBloom—a third-party private vendor—with ***everything*** from disciplinary records to attendance records to economic status to whether students get free lunch, and much more. Pet. ¶¶ 4, 11. SED also has opted to utilize a third-party vendor to host its data and transfer it to other vendors for technological development, which also is not required and is not mentioned in NYS RTTT. Pet. ¶¶ 60, 65. Thus, SED reaches far beyond federal requirements in disclosing data to inBloom, and cannot justify doing so based on federal laws and programs.

It follows that because the NYS RTTT makes no mention of its use, inBloom is not necessary or required. Pet. ¶ 60; Ex. P. Section (C) of the NYS RTTT details the state's

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[4] The Competes Act data points are as follows:

> (1) use of a unique student identifier; (2) student level enrollment, demographic and program participation information; (3) student level exit, transfer, dropout, or continuation to postsecondary institution information; (4) ability to communicate with postsecondary data systems; (5) state data audit system assessing data quality, validity, and reliability; (6) yearly individual student test records; (7) information on students not tested by grade and by subject; (8) teacher identifier with ability to match teachers to students; (9) student level transcript information to include courses completed and grades earned; (10) student level college readiness test scores; (11) data on student transitions to secondary to postsecondary including information on remedial coursework; and (12) additional data necessary to address preparation/alignment for student success in postsecondary education.

§ 9871(e)(D)(i)-(iii).

implementation of "data systems to support instruction," and plan for meeting the requirements of the Competes Act. Pet. Ex. P, at 99.

The NYS RTTT describes its data systems goals as follows:

> building an Education Data Portal that provides customized ("dashboard") information so that diverse stakeholders can access and analyze materials and information, make decisions, and take actions to improve outcomes for New York's students.

Pet. Ex P, at 99. These "dashboards" will be the sites where school districts may access PII, whether from the inBloom cloud, from the school districts, or by the state. However, NYS RTTT makes no mention as to how dashboards are to be administered. Pet. Ex. P. To extrapolate from the general language of NYS RTTT that SED's disclosure of PII to inBloom is "specifically authorized by law," is unsupportable.

RTTT also requests a plan to ensure that data from the LDS are "accessible to, and used to inform and engage, as appropriate, key stakeholders . . . and that the data support decision-makers in the continuous improvement of efforts in such areas as policy, instruction, operations, management, resources allocation, and overall effectiveness." Pet. Ex. P, at 113. Again, this vague language does not set forth any specific directive from which SED could justify disclosure of PII. NYS RTTT's response states that:

> New York will have an Education Data Portal that provides a networking platform and information repository for dashboard reports and other customized resources so that diverse stakeholders—including educators, parents, students, policy leaders, researchers, and the media—can access and analyze educational data, make decisions, and take actions to improve outcomes for New York's students.

Id. NYS RTTT then lists the strategies through which it planned to execute this vision. Pet. ¶¶ 57-59; Ex. P, at 113-14. Finally, SED stated its intention to create a "statewide instructional reporting and improvement system." Pet. ¶ 59; Ex. P (NYS RTTT), at 132.

Conspicuously lacking from NYS RTTT is mention of SED's intent to upload all student PII into a private, third party database. Pet. ¶ 60. SED's delegation of such responsibility to a private third party simply is not necessary to meet the grant'S requirements. As SED well knows, many school districts already have their own student information management systems which they populate with data stored usually either on their premises or with BOCES. Pet. ¶¶ 8, 14. Many districts use locally controlled Regional Information Centers ("RICs") and other established governmental entities to upload data to SED for state reporting purposes. Pet. ¶ 8. Thus, many school districts already meet the stated RTTT requirement to ensure implementation of "data systems to support instruction." Pet. ¶¶ 8, 48-53; Ex. P, at 99. The practices of these districts demonstrate that upload of information to inBloom for subsequent download back down to data dashboards is completely superfluous and unnecessary.

Even a data dashboard manufacturer has stated that inBloom is not necessary to populate data into data dashboards. Jefferson County, Colorado—one of the last inBloom pilot school districts—is planning to invest in a data dashboard being built by LoudCloud Systems.[5] Pet. Ex Z. LoudCloud's CEO stated that inBloom is not necessary for the dashboard to work—and that LoudCloud "might be perfectly fine working with these school districts directly[,]" because the system could pull information directly from the existing data storage system. Pet. Ex Z. This demonstrates clearly that inBloom is not indispensable to the administration of data dashboards (either those being developed or those already in use), which exposes SED's attempt to use inBloom as unnecessary.

Indeed, SED represented to the federal government in its application that the State would "continue to develop the capacity and infrastructure of our regional data networks" and that SED

[5] On November 7, 2013, the Jefferson County school board voted to sever ties with inBloom due to parental concerns regarding safety and security of student PII. Pet. Ex. G.

would "pull relevant data from regional networks on a periodic and as-needed basis." Pet. ¶ 58. This clearly demonstrates that SED intended to keep its current infrastructure of data management in place, not outsource PII to inBloom.

B. Some of the PII to be Disclosed is Highly Sensitive and Guarded—And This Disclosure is Not Necessary

In addition to the simple fact that SED is not required to disclose PII generally to inBloom, some of the information SED looks to disclose is of a highly sensitive nature. While the State always has had the authority to collect certain information, never was such information accessible to any and everyone, even within a given school itself. Pet. ¶ 5; Ex. I (Davids Aff.), at ¶ 14; Ex. J (Sprowal Aff.), at ¶ 6. Providing such information to inBloom means sharing such information with vendors with whom inBloom contracts. Pet. ¶ 65. With use of inBloom, a student's entire history will be ripe for the viewing by any person with access to a data dashboard. Pet. ¶ 11. For example, a student with a disability oftentimes m have an "individualized education plan" ("IEP"). Ex. I (Davids Aff.), at ¶ 11; Ex. J (Sprowal Aff.), at ¶ 5. Currently, IEPs are closely held, and the only people with access are parents and essential staff and faculty. Pet. ¶ 12; Ex. I (Davids Aff.), at ¶ 14; Ex. J (Sprowal Aff.), at ¶ 6. Yet when SED begins using inBloom to populate data dashboards, all people with access to a student's record will be able to view and access information such as IEPs. Pet. ¶¶ 11-12; Ex. I (Davids Aff.), at ¶ 14; Ex. J (Sprowal Aff.), at ¶ 6. Disciplinary history is another example of information not normally widely disclosed. Pet. ¶ 3. With use of inBloom populating data dashboards, both these and other sensitive bits of information will now be one click away for any staff person at a school. Parents are concerned with the ramifications of such availability. Pet. ¶ 12; Ex. I (Davids Aff.), at ¶ 10; Ex. J (Sprowal Aff.), at ¶ 12. A student with an IEP may be stigmatized, or detrimental harm may come to a student's educational opportunities if a college

or program got ahold of certain disciplinary information. Pet. ¶ 12; Ex. I (Davids Aff.), at ¶¶ 10, 16; Ex. J (Sprowal Aff.), at ¶¶ 7, 10.

Further, since a given student's PII may contain patient or medical records, broad disclosure may also run afoul of Section 96(2)(b). § 96(2)(b). For example, students that participate in IEPs undergo an evaluation by a doctor either through the school or through a family physician. Pet. Ex. I (Davids Aff.), at ¶ 13. Presumably at least some of the results of such evaluation may be included in the student's educational file. Again, that sensitive, personal medical data could be available to anyone with access to the data dashboards.

Certain aspects of students' PII have always been closely guarded, and such information was disclosed only to personnel who actually needed it in order to execute their duties and functions. Pet. ¶ 5; Ex. I (Davids Aff.), at ¶ 14. However, this is a far cry from providing all information to every last staff member in a given school or district, not to mention third-party vendors. SED's decision to disclose this information to inBloom for the eventual downloading to the data dashboards—where anyone may see it—is completely unnecessary. SED never disclosed much of this information in the past, because of its sensitive nature and because of the harm that could come to students. SED now fails to explain how such disclosure is reasonably related to its goals of analyzing educational data, implementing actions to improve student education, and increasing efficiency. *See* Pet. Ex. P, at 113. Vague policy goals cannot justify such a radical intrusion into students' privacy.

C. Storage of PII in the Cloud is Not Secure and Exposes Millions to Harm

SED's trampling of privacy rights of millions of children and their parents through mass disclosure of students' PII to inBloom is made even worse because of the manner in which SED has agreed to allow inBloom to maintain data once it is transferred to inBloom—namely, through

use of cloud computing. The cloud has become an increasingly popular way for companies to store data and information. However, the cloud has many well-known susceptibilities that make it clear that the PII of millions of children should not be in such a vulnerable location. Pet. ¶¶ 10, 87-94.

There have been numerous instances in recent years of PII exposure, whether because of malicious attacks or through inadvertent exposure. Pet. ¶¶ 87-94. For example, in 2009, Google inadvertently shared user documents with user contacts that did not have access to them. Pet. ¶ 87. In 2011, over 100 million Sony customers had their accounts exposed when Amazon.com's cloud system, which Sony used to host its accounts, was hacked. Pet. ¶ 89. Most recently, Adobe Systems, Inc. had nearly 3 million credit card numbers exposed through a malicious attack. Pet. ¶ 92. These systems all have in common the use of cloud computing to store sensitive information. Google, Amazon, and Adobe, three web and software giants, certainly have stringent security policies in place to protect user accounts and private information. However, not even the technological savvy of these three market leaders could stop the disclosure of sensitive information to the world. Why parents should feel secure that inBloom has security measures on par with them is unclear. *See* Ex. I (Davids Aff.), at ¶¶ 17-18; Ex. J (Sprowal Aff.), at ¶¶ 9, 11. Industry experts also agree that organizations that utilize cloud storage have serious risks of data breaches. Pet. ¶¶ 93-94.

Additionally, SED has failed to promulgate a privacy policy detailing the requirements inBloom must meet to protect PII from disclosure of any kind. SED's Service Agreement does not commit inBloom to any liability for security breaches, other than requiring notification to SED that a breach has occurred. Pet. ¶ 83; Ex. A. InBloom is not even required to notify parents of a breach. Pet. ¶ 83; Ex. A. InBloom's Service Agreement places the onus of disclosure of PII

by a third party upon SED itself, Pet. ¶ 79; Ex. A, and does not require inBloom to ensure that third-party vendors comply with privacy and security laws. Pet. ¶ 84; Ex. A. Yet parents and guardians are supposed to accept that their children's PII will be secure simply because inBloom says it will be.

Cyberattacks and inadvertent disclosures are so malicious precisely because they cannot be predicted and cannot necessarily be avoided. Pet. ¶¶ 88-92. SED's claim that storing all students' PII in one central cloud location is secure is naïve at best. Yet it is telling that New York is the only remaining state centralizing all public and charter school student PII with inBloom. Pet. ¶ 9.

SED attempts to deflect attention from these issues by stating that Social Security numbers will not be provided to inBloom for storage on its cloud. Pet. Ex. B. However, SED does not address protection of the multitude of other identifiable information that will be provided to inBloom. *See* Pet. ¶¶ 3-4. The information collected by school districts and/or SED about children and their families is extensive—information that may be much more valuable to third parties, whatever their intent. It is possible to obtain another Social Security number, but it is impossible to remove private information about oneself from the Internet, from collective memory, or from the hands of a malicious party.

SED's willingness to trust the most highly-sensitive information about students to a still-unreliable technological form, when more secure methods exist, simply is not necessary. SED claims that the current "hodge podge of security measures from every school district across the State . . . weakens security." Pet. Ex. AA. However, SED ignores one glaring point, reinforced by the above-referenced data breaches: centralization of data makes a security breach that much

more serious. Because data will be centralized on inBloom's cloud, even the most minor breach—whether malicious or otherwise—has the potential to affect millions.

Finally, inBloom's status as a newly-formed organization raises some serious issues about their background and qualifications to handle such sensitive data. Wireless Generation was a News Corporation subsidiary initially tasked by SED to create a system similar to inBloom. Pet. ¶ 61. However, the State canceled its contract with Wireless Generation because of the News Corporation phone-hacking scandal. Pet. ¶ 61. The State explained the cancellation based on the scandal, and on the "incomplete record" of Wireless Generation's qualifications. Pet. ¶ 61. Here, there is even less information available about inBloom. Why the State is willing to trust inBloom's incomplete record in this instance is unclear.

Unifying the PII of millions of "data subjects" on inBloom's cloud also provides an incentive to hackers to hack inBloom. Because nothing requires cloud storage through inBloom, this creates unnecessary risk. This Court should enjoin SED from disclosing PII to inBloom pursuant to the PPPL.

IV. SED Violates Section 94(1)(i) of the PPPL Because It has No Data Retention and Destruction Policy for PII Hosted on inBloom's Cloud

Finally, SED violates Section 94 of the PPPL because it has not disclosed a data retention policy, which state law requires it to do. § 94(1)(i). The PPPL states that "[e]ach agency that maintains a system of records shall . . . (i) establish rules governing retention and timely disposal of records in accordance with law[.]" *Id.* To date, SED has not made public any data retention and destruction policies related to PII to be disclosed to inBloom. It is unclear what happens to a student's information if, say, he or she graduates, moves out of state, or transfers to private school. Alternatively, suppose a student is arrested for a crime, though his or her criminal record ultimately is expunged. Does the criminal activity remain in his or her educational file on

inBloom? Does SED modify the educational record and have inBloom's data updated? Perhaps SED will request that inBloom delete the PII of a student upon such events. However, at this time, parents have no way of knowing whether or not their children's PII is secure—meaning deleted—once they are no longer part of the SED educational regime. For all intents and purposes, a student's PII could live on the inBloom cloud forever, which could have lifelong ramifications for them. Pet. ¶ 12.

These issues are why a data retention and destruction policy is so essential. Where such sensitive information is in the hands of a non-governmental third party, these concerns become even more acute. The State, under the PPPL, is required by law to ensure that PII is protected and not subject to disclosure. Part of this requirement means controlling the use and subsequent destruction of PII that is not necessary to execution of the agency's duties. SED's lack of such a policy with regard to inBloom's manipulation of student PII places undue trust in inBloom—and also violates Section 94(1)(i).

V. Injunctive Relief Standard

This Court should grant a temporary restraining order pending a hearing for a preliminary injunction where it appears that "immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had." CPLR 6301. The purpose of the preliminary injunction is to prevent a respondent from taking an action concerning the subject matter of the dispute that would "render the judgment ineffectual" or would otherwise injure petitioner during the pendency of the action. *Id.* The courts will grant a preliminary injunction where a movant can demonstrate (1) a likelihood of success on the merits; (2) danger of irreparable harm; and (3) a balance of equities in favor of the movant. *See, e.g., AEP Res. Serv. Co. v. Long Island Power Auth.*, 179 Misc. 2d 639, 650, 686 N.Y.S.2d 664, 670 (Sup. Ct.

Nassau Co. 1999) (preliminary injunction with TRO granted against governmental authority); *Council of Trade Waste Assn's, Inc. v. City of New York*, 179 A.D.2d 413, 416, 579 N.Y.S.2d 330, 332 (1992) (reversing Supreme Court's refusal to grant injunction and Article 78 relief where City agency's determination was arbitrary and capricious). Petitioners have met their burden here.

A. Likelihood of Success on the Merits

Petitioners' likelihood of success has been set forth in the Verified Petition, Exhibits, and this Memorandum. As stated *supra*, SED is in clear violation of the PPPL, since disclosure of every last bit of student information to inBloom is simply not necessary for any legitimate purpose. Petitioner's burden of demonstrating likelihood of success has been met.

B. Petitioners Have Demonstrated Irreparable Harm

Petitioners will certainly suffer irreparable harm should a preliminary injunction not issue. Irreparable harm exists where calculation of future damages would be unreliable and risky. *See, e.g., Penstraw, Inc. v. Metro. Transp. Auth.*, 200 A.D.2d 442, 442, 608 N.Y.S.2d 807 (1st Dep't 1994).

Here, Petitioners have no remedy other than injunctive relief. Once SED has disclosed PII to inBloom, such disclosure cannot be undone, and that PII will be subject to security issues and vulnerabilities as a result of inBloom's involvement. The only way to ensure privacy protections and security of PII is to enjoin SED before it releases student data to inBloom.

C. The Balance of the Equities Favors Petitioners

Finally, the balance of the equities weighs in favor of Petitioners. The irreparable harm Petitioners may suffer in absence of equitable relief is greater than the harm SED will suffer if it is unable to provide student data to inBloom. *See, e.g., Destiny USA Holdings, LLC v. Citigroup*

Global Markets Realty Corp., 69 A.D.3d 212, 223, 889 N.Y.S.2d 793, 802 (4th Dep't 2009). As discussed *supra*, SED does not need to use inBloom in order to fulfill its requirements under federal laws. In the absence of equitable relief, millions of students are at risk of having the most intimate details of their lives released to the public. There is no economic remedy that can undo this harm. Alternatively, the worst harm faced by SED is that it will not be able to implement inBloom. SED claims that school districts will have "fewer choices and higher costs;" teachers will spend "more time integrating student data;" and there will not be standardization of security and privacy protections. Ex. C. These harms certainly are not irreparable. Several other states were in line to adopt inBloom, but did an about-face and renounced inBloom when they realized that providing sensitive and intimate student data to a third-party organization for storage in a highly insecure medium outweighed all other concerns. This Court should ensure that New York recognizes the same.

CONCLUSION

Therefore, for the foregoing reasons, Petitioners request that injunctive relief and Article 78 relief be granted.

Dated: New York, New York
November 12, 2013

Respectfully submitted,

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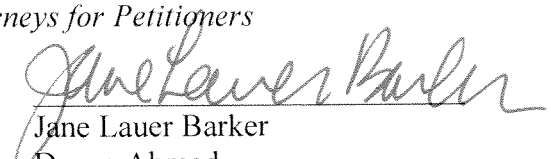
By: 
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