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. 6185-13

SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF ARTICLE 78 PETITION AND OF APPLICATION FOR PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

Petitioners, parents and legal guardians of public and charter schoolchildren in New York State ("Petitioners"), submit this Supplemental Memorandum of Law in support of their Amended 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 to inBloom, Inc. ("inBloom"), a private corporation, in violation of the New York State Personal Privacy Protection Law ("PPPL"), N.Y. Public Officers Law §§ 94 and 96, and for other relief.

This Supplemental Memorandum of Law addresses claims added to this proceeding in the Amended Verified Petition alleging that Respondents violated PPPL §§ 94(1)(f), (g), (h), (i), and (4)(b) by failing to comply with the obligations imposed on it and all State agencies that maintain any system of records containing personal information. SED maintains a system of student records which are provided to it by local educational agencies, such as local school districts, and are updated periodically in accordance with SED's requirements. (*See,* New York State Information Repository System (SIRS) Manual, http://www.p12.nysed.gov/irs/sirs/). The information maintained by the SED in that system of records includes personally identifiable information ("PII") of public and charter school children, including of the Petitioners' children. Respondents entered into a Service Agreement with inBloom, under which it has made, and will continue to make, mass disclosures of the PII of New York State public and charter school

children. In doing so, Respondents have violated and will continue to violate section 94 of the PPPL. The violations of section 94 at issue are egregious and blatant and create a substantial risk of irreparable injury to the schoolchildren of New York State. The Court's intervention is required to enjoin these violations and direct remedial action by Respondents.

SUMMARY OF FACTS

The Court is respectfully referred to the Amended Verified Petition and Petitioners' initial Memorandum of Law in Support of Article 78 Petition and Application for Temporary Restraining Order and Preliminary Injunction for a statement of the facts. We summarize for the Court's convenience here the factual issues relevant to Respondents' failure to comply with their obligations under PPPL § 94.[1] On October 11, 2012, SED entered into the Service Agreement with inBloom (formerly known as the Shared Learning Collaborative) (Pet. Ex. A)[2], which committed SED to disclose to inBloom hundreds of pieces of student data obtained from New York State local school districts, some of which are highly sensitive and qualify as PII, including financial status of family, family language, English proficiency, test scores, grades, disciplinary and attendance data, economic status of family 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, Service Agreement, Attachment E, p. 25 and F, p. 12; Pet. Ex. H, SED's Data Dictionary, pp. 4-5). According to the Service Agreement, inBloom is developing a web-based software which will include a "data store," where the student data transferred by SED to inBloom will reside on a cloud hosted by inBloom or vendors of inBloom, and programs that will allow access to the student data by SED

[1] Petitioners' initial supporting memorandum of law addresses Respondents' violation of PPPL § 96 which requires the consent of the parents or legal guardians of minor schoolchildren for the disclosure of their personal information.

[2] Exhibits to the Amended Verified Petition are cited herein as (Pet. Ex. "__").

and other users, including third party application providers. (Pet. Ex. A., Attachment B, p. 20). (*See also,* Pet. Ex. A, Attachment F, p. 10).

SED's agreement with inBloom breaks 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") and then passed on to SED securely without handling by private companies or outside vendors. Pet. Ex. E.

inBloom will maintain millions of New York State students' PII in its data store. While its Service Agreement with SED parrots the mantra that disclosures to it and other vendors are to be consistent with federal and state data privacy and security laws, in fact, its agreement with SED does not include provisions requiring inBloom to conform to the PPPL and is completely lacking in any enforceable date privacy and security policy. Indeed, while inBloom will hold the data, the Service Agreement, in large part, puts the onus on SED and local school districts to protect it. (Pet. Ex. A, p. 8, section 7).

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, and inBloom has no responsibility or liability for any "act or omission" of and use of the PII by third parties. (Pet. Ex. A, sections 3.2(b), 7.1).

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, section 2.3). Thus, where inBloom judges SED or a local school district to be in default of the Service Agreement, inBloom would be the only party with any access to student PII. (Pet. Ex. A, Attachment A, section 2.3).

The Service Agreement also does not require inBloom to ensure that third-party providers comply with data privacy and security laws. (Pet. Ex. A, section 7.1). Further, the Service Agreement explicitly provides that 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 inBloom and its subcontractors are held harmless. (Pet. Ex. A, sections 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, section 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 leaves the burden of ensuring compliance with privacy laws and unspecified data security provisions in the hands of SED and local school districts, while depriving the parents and local school districts of all control over the data storage and transfer. As shown below, these features of the inBloom Service Agreement are plainly and simply not in compliance with the requirements of PPPL § 96 and do not protect the personal privacy of the New York State schoolchildren whose PII is at risk.

ARGUMENT

In 1980, three years prior to the enactment of the PPPL, the New York State Legislature declared that "[t]he right to personal privacy is a fundamental right guaranteed by the Constitution of the United States," that "[t]he past decade has seen a massive increase in the number, size and complexity of data banks and information systems maintained by" state agencies, which contain information about individuals of the "most personal and sensitive nature." Laws 1980, ch. 677 § 1(a), (b), and (c), eff. June 26, 1980. The Legislature presciently pointed out in that legislative declaration that "data banks and information systems and the increasingly sophisticated technology that makes them possible pose a potential threat to the right to privacy." *Id.* § 1(d). Thus, the Legislature decreed its need for procedures by which it could assess the extent to which such privacy threats exist and to permit it to determine the necessity for regulation of the creation, maintenance and use of these record systems. *Id.* § 1(e) and (f).

Those legislative declarations formed the basis for the Legislature's first regulation of State agencies' maintenance of systems of records from which a person's personal information "may be retrieved by the use of the name or other identifying particular or combination of particulars of a person," *Id.* § 2(e). That chapter law required, *inter alia,* that on or before December 1, 1980, all State agencies prepare and submit to the Committee on Open Government, established by the N.Y. Public Officers Law § 89, a notice describing each of its systems of records by name, identifying the responsible official and the purposes and uses of such information, specifying the procedures that a person must follow to learn if the system contains information about that person and to correct or amend such information. The notice was also required to detail the disclosures regularly made or authorized to be made by the agency

of that information outside the agency, the statutory authority for maintenance of each category of information, the policies for retention and disposal of such information, and the contracts or agreements entered into for the funding of the system of records. *Id.* § 3(i) – (xiii).

Following that enactment requiring State agencies to provide detailed information about the collection and maintenance of personal information data systems in existence as of December, 1980, in 1983, the Legislature enacted the PPPL which continued and expanded upon those requirements. In section 94 of the PPPL, the Legislature codified the obligations of State agencies that maintain systems of records containing personal information. Those obligations, as indicated by the strong legislative declaration made in 1980, are intended to protect personal privacy. As shown herein, however, neither the strength of the New York State Legislature's declarations in 1980, nor the force of the codified provisions added through the PPPL in 1983, has constrained Respondents from outsourcing the New York State student information system to inBloom without ensuring that the PPPL's requirements are applied to inBloom. SED has modified its system of records so that it will reside in a "data store" on inBloom's virtual cloud accessible to third-party application providers, but it has utterly failed to comply with its obligations under section 94 of the PPPL. Therefore, because the Service Agreement and SED's arrangements with inBloom fail to meet the obligations of section 94 of the PPPL, a preliminary and permanent injunction must be granted to Petitioners invalidating the Service Agreement, enjoining the disclosure and transfer of student PII to inBloom, and requiring the destruction of student PII that was disclosed by SED to inBloom previously.

I. SED Did Not Make the Service Agreement with inBloom Subject to the Requirements of the PPPL.

Section 94(1)(f) of the PPPL requires that a State agency that maintains a system of records "cause the requirements of [the PPPL] to be applied to any contract it executes for the

operation of a system of records, ... by the agency or on its behalf." An examination of the Service Agreement shows that SED has not caused the PPPL requirements to be incorporated or applied to the inBloom agreement. As such, the Service Agreement violates section 94(1)(f).

Section 94(1)(f), by requiring that all contracts entered into for the operation of a system of records, ensures that contractors or vendors of State agencies will be bound by the very same personal privacy protections as are applicable to State agencies in the PPPL. The Service Agreement is a contract for the operation of a system of records. Under the PPPL, "record" includes "any item, collection or grouping of personal information about a data subject...irrespective of the physical form or technology to maintain such personal information." PPPL § 92(9). A "system of records" is defined as:

> [A]ny group of records under the actual or constructive control of any agency pertaining to one or more data subjects from which personal information is retrievable by use of the name or other identifier of the data subject.

PPPL § 92(11). "Data subject" means "any natural person about whom personal information has been collected by an agency." PPPL § 92(3). The Service Agreement contracts to inBloom the establishment of a "data store," which will "store and retrieve Customer Data," (Pet. Ex. 1, Attachment B, p. 20) and "Customer Data" includes "all information, records, files and data" stored by inBloom on behalf of the Customer, which is SED, in the inBloom Service Agreement. Indisputably, the Service Agreement is a contract for the operation of a system of records and, thus, SED was required to incorporate the requirement of the PPPL into that contract. It completely failed to do so. The Service Agreement does not either expressly or by adoption include the provisions of the PPPL. Indeed, the Service Agreement is utterly lacking in any reference to the PPPL or to its specific privacy protections.

While the Service Agreement contains a general definition of "data privacy and security laws" as "all applicable federal, state, regional, territorial and local laws ... governing the privacy and security of" PII, (Pet. Ex. A, § 1.9), nowhere in the Agreement is it or inBloom made subject to the PPPL. Indeed, section 10.6 of the Agreement provides that SED, the "Customer," is "independently responsible for ... processing and managing Customer data" in accordance with privacy laws and even in determining whether the Agreement and inBloom's data security and privacy policy is compliant with state privacy laws. (Pet. Ex. A, p. 13). Such vague language without an express incorporation of the PPPL into the Service Agreement does not meet the requirements of section 94(1)(f) of the PPPL since it does not ensure that inBloom is equally subject to the PPPL requirements. Those requirements include obligating it to establish appropriate administrative, technical and physical safeguards to ensure the security of the records, establish written policies for all persons involved in the design, development, operation, and maintenance of the system of records and instruct those persons in those policies, the requirements of the PPPL, and the penalties for non-compliance, file a supplemental privacy impact statement in conformance with the provisions of Laws 1980, ch. 677, establish rules for retention and timely disposal of records in accordance with law, and apply the other protective provisions of the PPPL, the access to records provision and the prohibition on disclosures of personal information. PPPL §§ 94(1)(f), (g), (h), (i); (4)(b); 95, 96. SED has not made inBloom or the Service Agreement subject to those provisions.

In addition, while SED has itself published a Data Security and Privacy Fact Sheet (updated November 3, 2013) (Pet. Ex. C), which also does not comply with the PPPL, that Fact Sheet is not made a part of the Service Agreement and does not contain a commitment by inBloom to be subject to the PPPL. With respect to its use of inBloom, SED simply notes that

inBloom "may not sell the New York student data or use the data" for purposes other than data storage and unspecified "platform services." (Pet. Ex. C, third unpaginated page). Unfortunately, although SED represents this in its Fact Sheet, the Service Agreement with inBloom does not limit inBloom to utilizing the data for only those purposes. SED, in its Fact Sheet, also notes that the data stored on inBloom will have intrusion protection (firewalls) and data encryption. The Service Agreement, however, does not include any provision that obligates inBloom to use any particular data prote ction or security methods, including firewalls and encryption. In any event, such items would in and of themselves be insufficient to meet the requirement of "appropriate administrative, technical, and physical safeguards" required by the PPPL. (*See,* Fordham Center on Law and Information Policy, "Children's Educational Records and Privacy: A Study of Elementary and Secondary School State Reporting Systems," pp. 53-57 Chapter IV.A. Recommendations for Best Practices (October 28, 2009)). SED also claims in its Fact Sheet that that no vendor may access or transmit data without authorization. Again, however, the Service Agreement completely lacks any enforceable prohibition against the further transfer of data and, in fact, its provides SED the right, notwithstanding the objections of local school districts and parents, to authorize disclosures of data to third parties and gives inBloom unrestricted right to outsource its duties and obligations to third parties. (Pet. Ex. A, section 14.3 (inBloom "may freely subcontract its duties and obligations under this Agreement"); Attachment E, section 2 (SED may disclose PII to third parties "to support evaluation or compliance activity," section 4 (PII may be disclosed to any third party designated by SED), section 6 (SED, as a third party application provider, may disclose PII to another third party application provider without the consent of local school districts)).

Finally, SED merely notes that in the event of a data breach, SED "will manage communication with affected constituents," and "[v]endors would be responsible for financial penalties." Neither of those commitments is binding on inBloom and, therefore, neither meets the requirements of the PPPL. Moreover, while SED refers to financial penalties for vendors, SED must know that it is not referring to inBloom because there are no financial penalties contained in the Service Agreement in the event that inBloom fails to maintain data privacy and security.

II. SED and inBloom Have Not Established Appropriate Safeguards to Ensure the Security of the Records and Data that it Has and Will Disclose to inBloom.

Section 94(1)(h) of the PPPL requires that SED (and, by extension, under section 94(1)(f), inBloom) establish "appropriate administrative, technical and physical safeguards to ensure the security of the records." The Service Agreement is lacking in the necessary appropriate safeguards and falls far short of being a comprehensive agreement to address the appropriate safeguards. Under the terms of the Service Agreement, the local school districts and SED *remain responsible* for all uses and disclosures of PII by any third parties. inBloom has no responsibility of liability for any "act or omission" of and use of the PII by third parties. (Pet. Ex. A, sections 3.2(b), 7.1). Once in the hands of inBloom and other third-party providers, and once it is no longer under the control of local school districts, there is virtually no way for any single entity to oversee the handling of student PII. Yet the Service Agreement puts the onus on SED and local school districts for doing so.

The Service Agreement also does not require inBloom to ensure that third-party providers comply with data privacy and security laws. (Pet. Ex. A, section 7.1). Further, the Service Agreement explicitly provides that *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 inBloom and its subcontractors are held harmless. (Pet. Ex. A, sections 11.5, 14.4).

The Service Agreement contains no protocol for management of a data breach. It simply requires that SED be notified of the breach. (Pet Ex. A, section 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. As noted, while SED claims that "[v]endors would be responsible for financial penalties[,]" (Pet. Ex. C), the Service Agreement makes no mention of any penalties—financial or otherwise—to inBloom in the event of a data breach. (Pet. Ex. A, sections 11.5, 14.4).

While SED also claims that there will be firewall protection and encryption protection, there is simply nothing in the Service Agreement that binds inBloom to utilize any particular security protection measures or, importantly, imposes any sanction on inBloom is it fails to ensure proper security of the student data. Furthermore, contrary to Best Practice Recommendations, the Service Agreement does not require utilization of dual database architecture, does not limit the data elements that are collected and transferred to inBloom to only those data elements that are necessary, and does not contain a specific data retention policy and procedure binding on inBloom and other vendors, does not require specific audit logs that track system use, and does not require meaningful and adequate notice to the parents and legal guardians of the students. These are not newly-invented practices and protocols, but the Service Agreement does not include any of them. *See, supra,* Fordham Center on Law and Information

Policy, "Children's Educational Records and Privacy: A Study of Elementary and Secondary School State Reporting Systems" (October 28, 2009).

III. SED and inBloom Have Not Established Written Policies in Accordance with Law Governing the Responsibilities of Persons who are Involved in the Design, Development, Operation or Maintenance of the System or Instructed Each Person in those Policies and the Requirements of the PPPL or Penalties for Noncompliance.

As demonstrated above, SED and inBloom have not set forth in the Service Agreement the required written policies in accordance with the PPPL's provisions that must govern the design, development, operation, and maintenance of the system. The Service Agreement is neither comprehensive nor adequate to address the issues covered by the PPPL. Further, as the Service Agreement does not contain such policies, neither SED nor inBloom can have instructed all persons involved in those areas regarding the required policies and the requirements of the PPPL. Moreover, as there are no penalties to inBloom for non-compliance, no one could have been instructed regarding that matter either. Therefore, the Service Agreement does not comply with PPPL § 94(1)(g).[3]

IV. SED and inBloom Have Not Filed with the Committee on Open Government a Supplemental Privacy Impact Statement.

Finally, because SED has broken away from its current data collection and storage system for student information by entering into the Service Agreement, it was required by section 94(4)(b) of the PPPL to file a supplemental privacy impact statement with the Committee on Open Government to identify the modifications it has made to its current system of records. In the absence of a demonstration that it has done so, SED's Service Agreement with inBloom is invalid and must be declared null and void.

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[3] Petitioners addressed Respondents' failure to comply with requirement to establish rules governing retention and timely disposal of records in accordance with law as provided in PPPL § 94(1)(i) is addressed in Petitioners' initial supporting memorandum of law.

CONCLUSION

Therefore, for the foregoing reasons and, based upon the Amended Verified Petition and the Memorandum of Law in Support, Petitioners request that the Court enjoin and restrain, preliminarily and permanently, Respondents from implementing the Service Agreement between SED and inBloom, including without limitation, by releasing, transferring or uploading the personal data of New York State public and charter school students, to inBloom or any private contractor or third party vendor; enjoin Respondents to direct the destruction of any personal data of New York State public and charter school students, including personally identifiable information, that has previously been disclosed, released, transferred, or uploaded to inBloom or any private contractor or third party vendor and confirm that such destruction has in fact occurred or that no such release, transfer or upload has occurred; declare the Service Agreement between SED and inBloom to be null and void as contrary to N.Y. Public Officers Law §§ 94(1)(f), (g), (h), (i) and (4)(b), and § 96; and award Petitioners their attorney's fees and costs.

Dated: New York, New York
December 3, 2013

Respectfully submitted,

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Index No. 6185-13

STATE OF NEW YORK)
) SS
COUNTY OF NEW YORK)

I, Lisa A. Uribe, being duly sworn, depose and say:

That deponent is not a party to this action, is over eighteen years of age, and resides in Queens, New York.

That on the 4th day of December 2013, deponent caused the Supplemental Memorandum of Law in Support of Article 78 Petition and of Application for Preliminary Injunction to be served via Federal Express overnight delivery to the person indicated below:

David L. Fruchter, Esq.
Assistant Attorney General,
Litigation Bureau
State of New York Office of the
Attorney General Eric T.
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The Capitol
Albany, NY 12224-0341

Lisa A. Uribe

Sworn to before me this
4th day of December, 2013

Notary Public

DEBORAH J. BOBB
NOTARY PUBLIC, State of New York
No. 02BO4955367
Qualified in Queens County
Commission Expires Aug. 28, 2017