At IAS Part ___ of the Supreme Court of the State of New York, County of Albany
_____ Eagle Street, Albany, New York,
on the _____ day of _____, 2013

BEFORE:
Hon: _____
Justice of the Supreme Court

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 on behalf of her 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 her 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 as legal guardian of a 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. _____

**ORDER TO SHOW CAUSE: ARTICLE 78 PROCEEDING WITH APPLICATION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

**(ORAL ARGUMENT REQUESTED)**

UPON THE ANNEXED COPY OF THE VERIFIED PETITION, sworn to on November 12, 2013, together with supporting affidavits and exhibits, and the accompanying memorandum of law, Respondent, John B. King, as Commission 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") are hereby:

ORDERED TO APPEAR AND SHOW CAUSE, on the _____ day of _____, 2013, at _____ o'clock in the _____ noon of that date, at the New York State Supreme Court Courthouse, 16 Eagle Street, Albany, New York, in Courtroom _____, why this Court should not enter an order, pursuant to CPLR §§ 6301, 6311, 6312, 6313 and Article 78, temporarily, preliminarily, and permanently, *pendente lite,* enjoining Respondents, their officers, officials, counsel, employees, agents and/or all other persons in active concert or participation with them, pending hearing and final disposition of this Petition, from and/or to:

a) Any release, transfer or upload of New York State public and charter school student and teacher personal data, including without limitation personally identifiable information, to inBloom, Inc. ("inBloom") or to any other private contractor or third party vendor without the prior written consent of the subject of the information or, in the case of minor schoolchildren, the prior written consent of the parent or legal guardian of the schoolchild; and

b) Any and all continued or further implementation of Respondents' Service Agreement with inBloom, Inc. ("inBloom"); and

c) Granting such other, further or different relief as the Court may deem just and proper.

FURTHER ORDERED, SUFFICIENT CAUSE appearing therefor, that service of this endorsed Order, together with the papers upon which it is based, by hand delivery to The New

York State Attorney General, 120 Broadway, New York, New York, on or before November _____, 2013, be deemed good and sufficient service and it is

FURTHER ORDERED, pursuant to CPLR §§ 7804 and so that the Court may enter a final disposition in this proceeding that

1. Respondents serve their answer and any opposing affidavits to the Verified Petition no later than November _____, 2013;
2. That Petitioners serve their Reply, if any, to said Answer and opposing affidavits no later than November _____, 2013.

ENTER:

_____

Justice of the Supreme Court

Dated: _____

**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,**

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**Respondents.**

**Index No. _____**

**VERIFIED PETITION WITH APPLICATION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Petitioners, the parents and legal guardians of New York State public and charter school students, by their attorneys, Pitta & Giblin LLP, as and for their Verified Petition pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR"), respectfully allege as follows:

## PRELIMINARY STATEMENT

1. This is a proceeding to halt the unnecessary and unprecedented mass disclosure of the records and personal information of millions of New York State school children by the New York State Department of Education ("SED"), without the consent of their parents or guardians in violation of the New York State Personal Privacy Protection Law ("PPPL"), N.Y. Public Officers Law § 96, which prohibits governmental agencies from disclosing any personal information without the voluntary written consent of the person who is the subject of that information. Oral argument is requested.

2. While other governmental entities are strengthening restrictions on the disclosure of personal information of children in recognition of the dangers to children's privacy rights in a digital world where commercial exploitation of children has become a scourge,[1] SED has undertaken a massive student data sharing program with a private company, inBloom, Inc. ("inBloom") (formerly the Shared Learning Collaborative, LLC), that exposes New York State students' personally identifiable information ("PII") to commercial use and identity theft and creates a grave risk of injury to students' future educational and career opportunities.

3. Under SED's Service Agreement with inBloom (Ex. A), that company is set to receive from New York State local school districts and other local educational agencies more than 400 pieces of student data, some of which are highly sensitive and qualify as PII, including student names, test scores, home addresses, grades, disciplinary and attendance data, economic and racial status, and "program participation," including whether or not a student is entitled to

[1] *See* Children's Online Privacy Protection Act, 15 U.S.C. §§ 6501-6508 (2013); Press Release, Fed. Trade Comm'n, FTC Strengthens Kids' Privacy, Gives Parents Greater Control Over Their Information By Amending Children's Online Privacy Protection Rule (Dec. 19, 2012), http://www.ftc.gov/opa/2012/12/coppa.shtm; Dave Heller, *Florida Moves to Restrict State Database on Public School Students*, 10 News Tampa Bay (Apr. 15, 2013 7:28pm), http://www..wtsp.com/news/education/article/311274/11/FL-moves-to-restrict-state-dadtabase-on-students.

special education services, English language learner services, or other accommodations or modifications. (Ex. A, Attachment F).

4. 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. Ex. B (EngageNY Portal FAQ (revised Oct. 30, 2013), http://www.engageny.org/resource/engageny-portal-faq#one).

5. The PII that SED intends to release to inBloom is universally considered to be subject to the strictest privacy protections under federal and state law, generally requiring the students' consent (or in the case of minor children, their parents' or legal guardians' consent) for disclosure to outside parties. SED, however, has expressly withheld from parents the right to consent on behalf of their minor children to the disclosure of PII to inBloom. It justifies this deprivation on the grounds that parental consent is not required by *federal law* and that, if SED allowed parents to make that choice, it would be "impossible—or extraordinarily more expensive—to conduct much of the day-to-day management work of schools." Ex. C (EngageNY Portal Fact Sheet, http://usny.nysed.gov/rttt/ data/enyp-parent-fact-sheet.pdf (updated Nov. 3, 2013)).

6. Furthermore, 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. Ex. D (Sarah Studley, *Pleasantville Schools Withdraw from Race to the Top*, Pleasantville

Patch (Oct. 25, 2013), http://pleasantville.patch.com/groups/schools/p/pleasantville-schools-withdraws-from-race-to-the-top; Gary Stern, *Several Area Districts to Forfeit Funding Over State Plans for Student Data Collection*, Lohud.com (Oct. 27, 2013), http://www.lohud.com/article/20131027/NEWS/310270027/; Denise Jewell Gee, *Some School Districts Cite Privacy Concerns Over State's Request for Student Data*, The Buffalo News (Nov. 2, 2013), http://www.buffalonews.com/city-region/schools/some-school-districts-cite-privacy-concerns-over-states-request-for-student-data-20131102; Danny LoPriore, *Elmsford School District Opts Out of 'Race to the Top*, Greenburgh Daily Voice (Nov. 7, 2013), http://greenburgh.dailyvoice. com/schools/elmsford-school-district-opts-out-race-top;

7. However, 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. Ex. B (EngageNY Portal FAQ) ("If your district does not participate in RTTT, the statewide data set will still be provided to inBloom for contract purposes . . . .").

8. Local school districts, superintendents, school board members, teachers, parents and students have all repeatedly expressed their deep concerns about SED's break from the current data system, which is operated with in-house expertise in which local education agencies ("LEAs"),[2] including 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

[2] "Local education agencies" include local public school districts, charter schools, non-public schools who participate in State assessments such as English Language Assessments and certain Regents exams, Boards of Cooperative Educational Services, the New York State Schools for the Deaf and the Blind and certain state agencies and private schools providing educational services under Article 81.

Cooperative Education Services ("BOCES")), and then passed on to SED securely without the intervening involvement of private companies or outside vendors. Ex. E (N.Y. State Dep't of Educ., Mem. of Ken Slentz to Board of Regents, at 2 (Apr. 11, 2013)).

9. Moreover, in its venture with inBloom, New York State stands virtually alone among state education departments and local education agencies. New York State is now 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. 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. Ex. F (Libby Nelson, *Morning Education*, Politico, (Aug. 1, 2013 5:58am), http://www.politico.com/morningeducation/0813/morning education11303.html; David Carr, *InBloom Education Data Warehouse Wilts Under Scrutiny*, InformationWeek.com (Aug. 8, 2013), http://www.informationweek.com/education/data-management/inbloom-educational-data-warehouse-wilts/ 240159670). Three local school districts remained in the program, but, on November 7, 2013, one of those, the Jefferson County, Colorado school board, after previously announcing that it would giv e parents a choice in whether to opt-out, voted unanimously to pull out of the inBloom's project. Ex. G (Daniel Laverty, *School board votes to scrap inBloom*, Columbine Courier (Nov. 7, 2013), http;//www.columbinecourier.com/content/school-board-votes-scrap-inbloom).

10. The concerns of New York parents about the potential harm to their children by the transfer of their personal data to cloud storage are real and substantial. Data storage on the cloud poses numerous risks. There have been countless examples, many of them recent—as

detailed below—of exposure and disclosure of sensitive personal data as the result of contractor inadvertence, negligence, or intentional and malicious acts of sabotage.

11. As important is the fact that the massive amount of data, including data regarding attendance, enrollment, demographic data, state assessment information, disability category, special education services, participation in English-language programs, eligibility for school food services, and other instructional services or modifications made at the local level to ensure that students are receiving an adequate education, will be available to be transferred to inBloom, creating a very real risk that this information may result in stigmatizing students. Ex. H (EngageNY Portal Data Dictionary, http://usny.nysed.gov/rttt/data/engageny-portal-data-dictionary.pdf (updated Nov. 3, 2013); Ex. B (EngageNY Portal FAQ); Ex. C (EngageNY Fact Sheet).

12. Parents are extremely concerned about how their children's' personal information will be used in the hands of a private corporation. Ex. I (Affidavit of Mona Davids); Ex. J (Affidavit of Karen Sprowal). Schools with students that participate in individualized education plans ("lEPs"), 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. Ex. I (Davids Aff., at ¶¶ 11-18).

13. Additionally, 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.

14. If the State's current data collection system is breached, it can be contained to the local district or regional center in which the breach occurred. If inBloom's security is breached through inadvertence, negligence, or sabotage, the PII of millions of students will be at risk. Ex. I (Davids Aff. ¶ 15).

15. Ignoring the cries of parents and the concerns local school districts, SED has pressed ahead and is now on the verge of beginning the transfer of student PII and other personal information to inBloom. According to SED, the date of implementation of the inBloom data system is now—fall 2013. Ex. K (N.Y. State Dep't of Educ., Mem. of Ken Wagner to BOCES District Superintendents, Superintendents of Public Schools, and Principals of Charter and Other Public Schools, at 6-7 (March 2013)).

16. According to SED, by October 31, 2013, local school districts were to choose a vendor to provide a "data dashboard" to the districts via which the districts will access SED's EngageNY portal and their students' data stored on the cloud. Ex. C (EngageNY Fact Sheet). (SED has given districts a 15-day grace period to November 15, 2013, after which point SED will assign a data dashboard vendor to each school district).

17. According to SED, for the next two years, RTTT funding will pay for the cost of this student information storage system, including the "data dashboards;" between 2015 and 2017, local school districts will have to pay to procure the "dashboards" to access the very student data they once controlled and kept secure. After 2017, no State funds and no statewide rates will be available to local school districts to pay for dashboards. Ex. B (EngageNY Portal FAQ). At that point, the local school districts, the teachers, parents, and students will be captives of inBloom or some other private contractor.

18. Unless this Court restrains and enjoins respondents from any further implementation of the Service Agreement with InBloom which would result in the loading or transfer of students' PII and other personal data to inBloom pending the hearing and disposition of this proceeding, the students in New York State's public and charter schools are at risk of the disclosure, re-disclosure, and misuse of their personal data. Given the timetable that SED has imposed on local school districts, the risk of irreparable harm to them is imminent. The seriousness of the privacy issues raised herein—the fact that state law expressly requires the voluntary consent for any disclosure of personal information, that SED refuses to honor the rights of parents to withhold consent to disclosure of their minor children's PII, and that the security that the student data currently enjoys under the control of local school districts will be lost because SED refuses to permit local school districts to opt-out of the inBloom data storage —make for a strong likelihood of Petitioners' ultimate success on the merits.

19. The balance of the equities favors Petitioners as well. Any disclosure of student PII and other personal data could have life-long ramifications for students. The irreparable harm that petitioners' minor schoolchildren 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. 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 that harm. The worst harm faced by SED is that it will not be able to implement inBloom. This certainly is not irreparable.

## PARTIES AND VENUE

20. Petitioner Mona Davids is the parent of two children who are students attending grade school and high school in the New York City Public School System. As students in schools governed by the New York City Department of Education ("DOE"), which is subject to

SED's data reporting requirements, her children and Ms. Davids, as their parent, are persons about whom personal information has been collected by the DOE and SED which has been or will be transferred by SED or DOE, under SED's directive, to inBloom.

21. Ms. Davids, individually, and her children are "data subjects" within the meaning of N.Y. Public Officers Law § 92(3) and they are aggrieved by the actions of SED as alleged herein. Petitioner has standing to bring this Article 78 proceeding pursuant to Public Officers Law § 97(1).

22. Petitioner Karen Sprowal is the parent of a child attending grade school in the New York City Public School System. She and her child are persons about whom personal information has been collected by the DOE and SED which has been or will be transferred by SED or DOE, under SED's directive, to inBloom.

23. Ms. Sprowal, individually, and her child are "data subjects" within the meaning of N.Y. Public Officers Law § 92(3) and they are aggrieved by the actions of SED as alleged herein. Petitioner has standing to bring this Article 78 proceeding pursuant to Public Officers Law § 97(1).

24. Petitioner Donald Nesbit is the parent of three children attending grade school in the New York City Public School System. He and his children are persons about whom personal information has been collected by the DOE and SED which has been or will be transferred by SED or DOE, under SED's directive, to inBloom.

25. Mr. Nesbit, individually, and his children are "data subjects" within the meaning of N.Y. Public Officers Law § 92(3), and they are aggrieved by the actions of SED as alleged herein. Petitioner has standing to bring this Article 78 proceeding pursuant to Public Officers Law § 97(1).

26. Petitioner Maria Bright is the legal guardian of three minor children attending grade school and high school in the New York City Public School System. She and her grandchildren are persons about whom personal information has been collected by the DOE and SED which has been or will be transferred by SED or DOE, under SED's directive, to inBloom.

27. Ms. Bright, individually, and her grandchildren, are "data subjects" within the meaning of N.Y. Public Officers Law § 92(3), and they are aggrieved by the actions of SED as alleged herein. Petitioner has standing to bring this Article 78 proceeding pursuant to Public Officers Law § 97(1).

28. Petitioner Noemi Martinez is the parent of a minor child attending grade school in the New York City Public School System. She and her child are persons about whom personal information has been collected by the DOE and SED which has been or will be transferred by SED or DOE, under SED's directive, to inBloom.

29. Ms. Martinez, individually, and her child, are "data subjects" within the meaning of N.Y. Public Officers Law § 92(3), and they are aggrieved by the actions of SED as alleged herein. Petitioner has standing to bring this Article 78 proceeding pursuant to Public Officers Law § 97(1).

30. Petitioner Jenny Morales is the legal guardian of a minor child attending high school in the New York City Public School System. She and her grandchild are persons about whom personal information has been collected by the DOE and SED which has been or will be transferred by SED or DOE, under SED's directive, to inBloom.

31. Ms. Morales, individually, and her grandchild, are "data subjects" within the meaning of N.Y. Public Officers Law § 92(3), and they are aggrieved by the actions of SED as

alleged herein. Petitioner has standing to bring this Article 78 proceeding pursuant to Public Officers Law § 97(1).

32. Petitioner Lanette Murphy is the parent of a minor child attending grade school in the New York City Public School System. She and her child are persons about whom personal information has been collected by the DOE and SED which has been or will be transferred by SED or DOE, under SED's directive, to inBloom.

33. Ms. Murphy, individually, and her child, are "data subjects" within the meaning of N.Y. Public Officers Law § 92(3), and they are aggrieved by the actions of SED as alleged herein. Petitioner has standing to bring this Article 78 proceeding pursuant to Public Officers Law § 97(1).

34. Petitioner Helson Santiago is the parent of minor children attending grade school in the New York City Charter School System. He and his children are persons about whom personal information has been collected by the DOE and SED which has been or will be transferred by SED or DOE, under SED's directive, to inBloom.

35. Mr. Santiago, individually, and his children, are "data subjects" within the meaning of N.Y. Public Officers Law § 92(3), and they are aggrieved by the actions of SED as alleged herein. Petitioner has standing to bring this Article 78 proceeding pursuant to Public Officers Law § 97(1).

36. Petitioner Karen Smith is the parent of a minor child attending high school in the New York City Public School System. She and her child are persons about whom personal information has been collected by the DOE and SED which has been or will be transferred by SED or DOE, under SED's directive, to inBloom.

37. Ms. Smith, individually, and her child, are "data subjects" within the meaning of N.Y. Public Officers Law § 92(3), and they are aggrieved by the actions of SED as alleged herein. Petitioner has standing to bring this Article 78 proceeding pursuant to Public Officers Law § 97(1).

38. Petitioner Maria Valencia is the parent of a minor child attending school in the New York City Public School System. She and her child are persons about whom personal information has been collected by the DOE and SED which has been or will be transferred by SED or DOE, under SED's directive, to inBloom.

39. Ms. Valencia, individually, and her child, are "data subjects" within the meaning of N.Y. Public Officers Law § 92(3), and they are aggrieved by the actions of SED as alleged herein. Petitioner has standing to bring this Article 78 proceeding pursuant to Public Officers Law § 97(1).

40. Petitioner Cruz Vidal is the parent of a minor child attending high school in the New York City Public School System. He and his child are persons about whom personal information has been collected by the DOE and SED which has been or will be transferred by SED or DOE, under SED's directive, to inBloom.

41. Mr. Vidal, individually, and his child, are "data subjects" within the meaning of N.Y. Public Officers Law § 92(3), and they are aggrieved by the actions of SED as alleged herein. Petitioner has standing to bring this Article 78 proceeding pursuant to Public Officers Law § 97(1).

42. Petitioner Yvonne Williams is the parent of a minor child attending high school in the New York City Public School System. She and her child are persons about whom personal

information has been collected by the DOE and SED which has been or will be transferred by SED or DOE, under SED's directive, to inBloom.

43. Ms. Williams, individually, and her child, are "data subjects" within the meaning of N.Y. Public Officers Law § 92(3), and they are aggrieved by the actions of SED as alleged herein. Petitioner has standing to bring this Article 78 proceeding pursuant to Public Officers Law § 97(1).

44. Respondent John B. King, Jr. is the Commissioner of the New York State Department of Education and is the chief administrative officer of NYSED pursuant to New York Education Law §§ 101 and 301 ("Educ. Law"). Respondent King maintains an official place of business at 89 Washington Avenue, Albany, New York 12234.

45. Respondent New York State Department of Education ("SED"), established by the State of New York and continued by Education Law § 101, is charged with the general management and supervision of all public schools and all education work in the State of New York and the exercise of all the functions of the education department, of the regents of the university and of the commissioner and education and the performance of all their powers and duties.

46. Respondent Board of Regents of the University of the State of New York ("Regents"), established by Education Law § 202, is empowered to exercise legislative functions concerning the educational system of the State of New York, determine educational policies, and establish rules for carrying into effect the laws and policies of the state relating to education and the functions, powers, duties, and trusts conferred upon SED. Educ. Law § 207.

47. Venue is proper in this Court pursuant to CPLR 506(b)(2).

## STATEMENT OF CLAIM FOR RELIEF

48. School administrators, teachers, and parents need information about their students and children to make appropriate informed decisions about children's educational requirements. In the past, this need was met by education systems with paper documents in filing cabinets, but, due to technological advances and the increased reliance on statistical measures for performance assessment, state and local educational agencies have moved from paper documents to automated student information systems.

49. Many local school districts throughout New York State have, for decades, maintained password-protected, secure student information management systems. These automated systems are purchased by the local school districts and are used to provide student information to parents, teachers and students, and the local school districts are the owners of their students' information and the student information system utilized by them.

50. In New York State, these local systems are the single source from which student data is extracted and transferred to SED through the Student Information Repository System ("SIRS"), for analysis and reporting purposes. SIRS is a source of all individual student records in New York State. SED provides templates that are required to be used by LEAs to report required student data to SED via SIRS. Ex. L (N.Y. State Educ. Dep't, SIRS Manual for Reporting Data for the 2013-2014 School Year, Version 9.0, at 6-8 (Sept. 30, 2013), http://www.p12.nysed.gov/irs/sirs/).

51. Under the current system and protocols, the extraction and transfer of student data from local school districts to SED for State reporting purposes is securely uploaded and transferred by and within governmental data storage systems. A local school district on Long Island, for example, will, in compliance with State reporting requirements, transfer student data

by electronically instructing its system to extract and load specified data elements to Nassau County BOCES, and Nassau County BOCES will then securely upload that data to SIRS. Ex. L (SIRS Manual).

52. In compliance with federal and state privacy laws, local school districts cannot and do not permit disclosure of the student information to any vendors. Even the providers of local school districts' student management systems only have access to local school districts' student information system when requested by the local school district—and then only for technical assistance or system repairs. Under no circumstances, even upon the promise of confidentiality or non-disclosure, does any vendor have the right to examine, review, or utilize the data in a local school district's student information system.

53. In August 2010, the U.S. Department of Education ("USDOE"), awarded New York State $696,646,000 in the second round of the federal Race to the Top ("RTTT"), competitive grant program. Ex. M (Press Release, N.Y. State Dep't of Educ., New York Wins Nearly $700 Million in Race to the Top Competition (Aug. 24, 2010), http://www.oms.nysed.gov/press/NewYorkWinsNearly700 MinRacetotheTopCompetition.html).

54. The USDOE set 19 selection criteria for RTTT program grants. Ex. N (U.S. Dep't of Educ., Race to the Top Program Exec. Summary, at 3 (Nov. 2009), http://www2.ed.gov/programs/racetothetop/executive-summary.pdf.) Of relevance to this proceeding, one of the selection criterion was "Data Systems to Support Instruction," with three sub-criteria of (1) fully implementing a statewide longitudinal data system; (2) accessing and using State data; and (3) using data to improve instruction. Ex. N (RTTT Exec. Summary).

55. 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). A longitudinal data system ("LDS") captures data on students as they move through the educational system from preschool to high school, college and the workforce. Under the America COMPETES Act, any statewide LDS was required to include 12 elements. Ex. O (U.S. Dep't of Educ., Statewide Longitudinal Data Systems, http://www2.ed.gov/programs/slds/factsheet.pdf).

56. New York State's RTTT Application addressed the longitudinal data system criterion and represented to the USDOE that it already had developed a P-16 student data system that meets all the requirements of the America COMPETES Act. Ex. P (New York Race to the Top Application, at 99-112 (May 28, 2010), http://www2.ed.gov/programs/racetothetop/phase2-applications/new-york.pdf) (hereinafter "NYS RTTT"). The State represented that its LDS was built on a collaboration of SED, local school districts and regional information centers, and it was built on a standardized data model and reporting tool. Ex. P (NYS RTTT), at 101-02.

57. The State reported that to meet the criterion of "access and use of data, it will have an "Education Data Portal[3] that provides a networking platform and information repository for dashboard reports and other customized resources . . . ." Ex. P (NYS RTTT), at 113, 121.

58. *With respect to the infrastructure*, the State certified that all schools in New York State will store data and receive data reports from one of the State's regional data centers, which ensures compatibility across all levels of the system. Its application to USDOE expressly represented that the "State would continue to develop the capacity and infrastructure of our regional data networks so that instructional data will be staged and refreshed regionally to ensure quick delivery of timely data to teachers." The State also represented that SED would "pull

[3] The Education Data Portal as referenced in the NYS RTTT was renamed by SED to the "EngageNY Portal." Ex. B (EngageNY FAQ).

relevant data from regional networks on a periodic and as-needed basis." Ex. P (NYS RTTT), at 122.

59. The State also stated that it would create a "statewide comprehensive instructional reporting and improvement system available to all stakeholders through the Education Data Portal." Ex. P (NYS RTTT), at 131. The application explains this system as providing "analysis of each assessment standard and item for every student and classroom . . . . [c]urriculum scope and sequence will also be included in the system to provide a dashboard showing in what content areas students are behind or ahead . . . ." Ex. P (NYS RTTT), at 132. Further, this statewide reporting system will have data loaded regionally from schools and districts to the RICs. Ex. P (NYS RTTT), at 134.

60. New York's application for an RTTT grant made no mention of its intention to contract with inBloom or any other private company for infrastructure, or that it would make mass disclosure of PII data to a third party as part of RTTT; nor did SED commit to storing all PII for all public and charter school students on the cloud, rather than under the control of the local school districts or SED itself. *See* Ex. P (NYS RTTT).

61. The first effort by SED to contract out a part of its data system was a failure. It had submitted a contract to the New York State Comptroller's Office for approval of a $27 million contract with Wireless Generation (a subsidiary of News Corporation) to build some of the data tools. That contract was canceled by the State Comptroller due to the News Corporation phone hacking scandal, and to the "incomplete record" about News Corporation's qualifications. Ex. Q (Kenneth Lovett, *Chalk it Up to the Hacks: New York Scraps $27 Million Education Contract with Murdoch Firm,* New York Daily News (Aug. 27, 2011), http://www.nydailynews.

com/news/chalk-hacks-new-york-scraps-27-million-education-contract-murdoch-firm-article-1.948688).

62. In December 2011, the Regents approved SED's participation in the Shared Learning Collaborative ("SLC"), a non-profit consortium funded by a multi-million dollar grant from the Bill & Melinda Gates Foundation and the Carnegie Corporation, ostensibly to increase the benefits of its Race to the Top data, curriculum and instructional improvement initiatives. Ex. R (N.Y. State Dep't of Educ., Mem. of Valerie Grey & Ken Slentz to P-12 Educ. Comm., dated Dec. 5, 2011).

63. SLC was formed in 2011 and, according to SED, was in the process of making plans for its long-term governance, including data privacy and security, but was at that time focused in the short-term on preparing and executing "non-binding memoranda of understanding with participating states . . . ," which was to be followed by data sharing agreements and data security and privacy protections. Ex. R (Grey & Slentz Mem.).

64. In or about February 2013, a non-profit private corporation, InBloom, Inc. was formed to "carry forward the mission of SLC." Ex. S (inBloom, About inBloom, https://www.inbloom.org/about-inbloom (last visited Oct. 26, 2013); inBloom Press Release, https:// www.inbloom.org/inbloom-launch (last visited Oct. 27, 2013)). (Hereinafter, SLC will be referred to as "SLC/inBloom.")

65. According to SED's memorandum of December 5, 2011, SLC/inBloom had engaged the services of numerous vendors, including Wireless Generation, Applied Minds, Double Line Partners and Intentional Futures, McKinsey, Alvarez and Marsal, and Connecting Education, Leadership, and Technology (CELT), and would be awarding additional contracts for

creation of software applications, ongoing hosting and operations, and development of search tools. Ex. R (Grey & Slentz Mem.).

66. According to SED, "[d]ata security will be protected through legally binding agreements that provide the strictest rules for authorized access . . . ." Ex. R (Grey & Slentz Mem.). There is no documentary evidence of the strict rules that apply to these vendors. These agreements do not exist.

67. The Regents approved SED's execution of a memorandum of understanding with the SLC, and, on or about April 13, 2012, SED entered into a Memorandum of Understanding ("MOU"), with SLC through which New York State agreed to be part of the SLC/inBloom's pilot phase for the design and development of the Shared Learning Infrastructure ("SLI"). Ex. A ((Service Agreement), at § A).

68. SLC/inBloom and SED intend that the SLI be a nationwide (multi-tenant), cloud-hosted, massive student data warehouse available to be used by teachers, parents, students, vendors and third party application providers, including for-profit and non-profit organizations, to, among other things, create products and distribute them to schools, teachers, parents, and children. Ex. A ((Service Agreement), at 12-13: "Scope of Technology Build"); *see* Ex. AA (EngageNY Portal Privacy Parent FAQ, http://usny.nysed.gov/rttt/data/edp-privacy-parent-faq.html (updated Oct. 24, 2013)).

69. In the MOU, SED adopts SLC/inBloom's vision for a system of shared technology services, common to all states, that is, *inter alia,* intended to "link content from many providers to student data from many source systems . . . allow large and small for-profit and non-profit organizations to distribute an array of choices of curriculum, digital content and tools . . . integrate with existing state and local education agency source data systems . . . [for] integration

of new instructional technology products." Ex. A ((Service Agreement), at MOU, §§ B.1.a., b., d.).

70. While the SLI—the infrastructure that will permit data integration and application interoperability—will be paid for by SLC/inBloom through 2015, and thus according to SED will be cost-free to those school districts who participate, all applications to use with the SLI will either need to be paid for by SED or purchased by the local school districts.

71. The SLI will include at least 29 data domains containing over 400 student and teacher data elements with more to be added. The data domains include attendance, discipline incidents, grades, parents, alternative supplemental services, as well as student demographics. Ex. A ((Service Agreement), at 12-13).

72. The MOU contemplates the participation of numerous vendors and is intended to create enormous opportunities for vendors and third-party providers who will access the data and use it to develop applications which can be purchased by local school districts to use with the SLI. Ex. U (Stephanie Simon, *K-12 student database jazzes tech startups, spooks parents*, Reuters.com, (Mar. 3, 2013), http://www.reuters.com/assets/print?aid=USBRE92204W201 30303 ("The sector is undeniably hot: technology startups aimed at K-12 schools attracted more than $425 million in venture capital last year.")).

73. The MOU identifies specific contractors, including Wireless Generation, which were engaged by SLI to design and develop the software to permit data integration and application interoperability, and provides that other vendors will be used for data hosting, including Rackspace Hosting, Microsoft Azure, and Amazon Web Services. Ex. A ((Service Agreement), at § 3.b.i, ii). Amazon's cloud has notably been victimized by hackers. Ex. V

(Heather Kelly, *Apple account hack raises concern about cloud storage*, CNN.com (Aug. 7, 2012), http://www.cnn.com/2012/08/06/tech/mobile/icloud-security-hack/.)[4]

74. Further, SLC/inBloom itself expressly reserves its right to engage its own vendors, including Intentional Futures, LLC and Double Line Partners, LLC, to develop applications "that are of interest to states participating in the SLI Pilot." Ex. A ((Service Agreement), at § 3.b.iii).

75. The MOU required SED and SLC/inBloom to enter into a separate agreement "related to the implementation of the SLI, including specific commitments regarding services, service levels, software licensing, and data sharing." There followed the Service Agreement, which incorporated the MOU, and was executed by SED on October 11, 2012. Ex. A ((Service Agreement), Attachment F).

76. In a memorandum from Ken Slentz of SED to the Regents, SED confirmed: *"All education data for the [Education Data Portal] will be provided through the SLI from either the State or by school districts adding supplemental data as desired."* Ex. E (Slentz Mem.).

77. The Service Agreement does not include a Data Privacy and Security Plan, but simply references a plan attached to the MOU that are the internal security policies applicable to Wireless Generation, LLC, not to inBloom or any other contractors. Ex. A ((Service Agreement), at Attachment F, Ex. C). The Service Agreement merely refers to SLC/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. Ex. A ((Service Agreement), Attachment A, § 1.10).

[4] In August 2012, the experience of one technology journalist exposed the shortcomings of security measures of cloud computing. Having acquired just the journalist's e-mail address and home address, hackers were able to obtain the last four digits of his credit card from Amazon.com. Armed with this information, the hackers then used this information to satisfy the security requirements needed to gain access to his Apple iCloud account and associated e-mail and social media accounts. Ex. V.

SLC/inBloom has up to this point not entered into an agreement with SED that includes a Data Privacy and Security Policy with respect to its own work for SED.

78. The Service Agreement specifically contemplates that third-party application providers will be involved to provide services to students. Ex. B ((Service Agreement), Attachment A, § 1.31). Those third-party providers can be granted access to the inBloom stored data either by SED or a local school district. *Id.*

79. However, under the terms of the Service Agreement, 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. Ex. A ((Service Agreement), § 3.2(b), 7.1).

80. 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 entire onus on SED and local school districts for doing so.

81. Further, the Service Agreement permits SLC/inBloom to suspend SED's access to the SLI Service were SLC/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 and with specified terms established by SLC/inBloom in Attachment E to the Service Agreement. Ex. A ((Service Agreement), Attachment A, § 2.3). Thus, where SLC/inBloom judges SED to be in default of the Service Agreement, SLC/inBloom would be the only party with any access to student PII. *Id.*

82. The Service Agreement also does not require SLC/inBloom to ensure that third-party providers comply with data privacy and security laws. Ex. A ((Service Agreement), § 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. Ex. A ((Service Agreement), §§ 11.5, 14.4).

83. In addition, the Service Agreement contains no protocol for management of a data breach. It simply requires that SED be notified of the breach. Ex. B ((Service Agreement), § 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.

84. SED claims that "[v]endors would be responsible for financial penalties[,]" Ex. C (EngageNY FactSheet), but the Service Agreement makes no mention of any penalties—financial or otherwise—to inBloom or any other vendor in the event of a data breach. Ex. A ((Service Agreement), §§ 11.5, 14.4).

85. 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.

86. 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.

87. Such disclosures are a matter of public record. For example, in March 2009, Google inadvertently shared its users' documents—which are permitted to be shared only with those individuals to whom users specifically grant access—with contacts who were never granted access to the documents.[5]

88. In May 2010, several websites maintained by the United States Treasury Department's Bureau of Engraving and Printing were hacked, rendering the websites inaccessible for more than a day. The cloud-based host site on which these Treasury websites were maintained was reprogrammed by hackers to redirect unsuspecting visitors to different, malicious websites.[6]

89. In April 2011, the second largest data breach in the history of the United States occurred, when hackers used a cloud-based computing service provided by Amazon.com to hack into Sony's online entertainment systems and to access the accounts of more than 100 million of Sony's customers.[7]

90. In July 2012, users of Dropbox, a cloud-based data storage service, were notified that the company's security was breached, after being victimized by a spam attack.[8]

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[5] Ex. W (Miguel Helft, *Privacy Group Asks F.T.C. to Investigate Google*, N.Y. Times (Mar. 17, 2009), http://bits.blogs.nytimes.com/2009/03/17/privacy-group-asks-ftc-to-investigate-google-cloud-computing/; *see* Jason Kincaid, *Google Privacy Blunder Shares Your Docs without Permission* (Mar. 7, 2009), http://techcrunch.com/2009/03/07/huge-google-privacy-blunder-shares-your-docs-without-permission/.

[6] Ex. W (Tony Romm, *Updated: Treasury Dept. site hacked, taken down*, The Hill (May 4, 2010), http://thehill.com/blogs/hillicon-valley/technology/95871-treasury-dept-sites-hacked-taken-down).

[7] Ex. W (Joseph Galante, *Sony Network Breach Shows Amazon Cloud's Appeal for Hackers*, Bloomberg News (May 16, 2011), http://www.bloomberg.com/news/2011-05-15/sony-attack-shows-amazon-s-cloud-service-lures-hackers-at-pennies-an-hour.html).

[8] Ex. W (Nicole Perlroth, *Dropbox Investigating After Spam Attack*, N.Y. Times (July 18, 2012), http://bits.blogs.nytimes. com/2012/07/18/dropbox-says-spam-messages-arent-a-sign-of-a-breach/.)

91. In April 2013, LivingSocial revealed that hackers breached and gained access to the data of more than 50 million users, including names, email addresses, birth dates, and passwords.[9]

92. In September 2013, the credit-card information of 2.9 million customers of Adobe Systems, Inc. was exposed. A cyberattack on the company's systems allowed hackers to access customer names, encrypted credit and debit card numbers, expiration dates, and customer online account username and password information.[10]

93. Organizations that utilize cloud storage for data also report problems with data security. A January 2013 survey conducted by Symantec, in which more than 3,000 organizations were polled, found that many organizations encountered problems with the use of cloud-storage for their data. More than 40% of the organizations that participated in the study indicated that they experienced the loss of data stored in the cloud. Ex. X (Symantec Corp., Avoiding Hidden Costs of the Cloud (Jan. 2013), at 6, http://www.symantec.com/content/en/us/about/media/pdfs/b-state-of-cloud-global-results-2013.en-us.pdf?om_ext_cid=biz_socmed_twitter_facebook_marketwire_linkedin_2013Jan_worldwide_StateofCloud2013).

94. Further, a report issued in August 2012 and revised in March 2013 by the Cloud Vulnerabilities Working Group of the Cloud Security Alliance, a not-for-profit organization that promotes best practices for providing security in the use of cloud computing technology, found a disturbing trend of increasing vulnerability incidents with cloud computing technologies. The report reviewed news accounts of cloud computing-related outages for the period January 2008 to February 2012, which period approximated the first five years of the use of cloud computing

[9] Ex. W (Robert Westervelt, *LivingSocial Data Breach Affects Millions*, CRN (Apr. 29, 2013), http://www.crn.com/news/security/240153803/livingsocial-data-breach-affects-millions.htm).
[10] Ex. W (Adam Gabbatt, *Adobe warns 2.9 million customers of data breach after cyber-attack*, The Guardian (Oct. 3, 2013), http://www.theguardian.com/technology/2013/oct/03/adobe-hacking-data-breach-cyber-attack).

technology. Ex. Y (Cloud Vulnerabilities Working Group, Cloud Security Alliance, Cloud Computing Vulnerability Incidents: A Statistical Overview (Aug. 23, 2012, rev. Mar. 13, 2013), https://cloudsecurityalliance.org/download/cloud-computing-vulnerability-incidents-a-statistical-overview/). The results of the study showed that over that period there were a total of 172 unique incidents. Forty-three such incidents (25% of all incidents reviewed) were characterized as "Data Loss & Leakage," which is one of the specific concerns that the petitioners in this case raise. While before 2008 there were less than ten cloud outage incidents, by 2011 there were more than 70. *Id.* More troublesome, during this same time period in which the number of incidents increased exponentially, the number of people utilizing cloud computing technology also significantly increased.

95. To summarize, in the absence of the voluntary written consent of the parents or legal guardians of their schoolchildren, SED's agreement with inBloom under which it will release massive amounts of student PII data to inBloom and other private contractors violates the New York State Personal Privacy Law, N.Y. Public Officers' Law § 96. Further, SED's agreement to share this information with inBloom and to allow inBloom to store this information on a cloud is not necessary for SED to meet its RTTT grant requirements or operate any program authorized by law. Therefore, SED's agreement with inBloom must be declared null and void and its further implementation of the inBloom project must be enjoined.

## CONCLUSION

WHEREFORE, petitioners respectfully seek an order and judgment pursuant to CPLR Article 78 and CPLR §§ 6301, 6311, 6312 and 6313:

A. Restraining and enjoining respondents, *pendente lite*, and permanently 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; and

B. Restraining and enjoining respondents, *pendente lite,* and permanently from disclosing, releasing, transferring, or uploading any personal data of New York State public and charter school students, including personally identifiable information, without the prior written consent of the parent or legal guardian of the schoolchild; and

C. Restraining and enjoining respondents to require 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;

D. Declaring the Service Agreement between SED and inBloom to be null and void as contrary to N.Y. Public Officers Law § 96; and

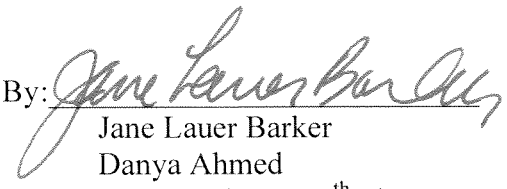
E. Awarding petitioners their attorney's fees and costs; and

F. Granting such other, further, or different relief as the Court may deem just and proper.

Dated: New York, New York
November 12, 2013

Respectfully submitted,

PITTA & GIBLIN LLP
*Attorneys for Petitioners*

By: 

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# VERIFICATION

STATE OF NEW YORK )
) ss:
COUNTY OF NEW YORK )

JANE LAUER BARKER, an attorney admitted to practice in the courts of this state, being duly sworn, deposes and says:

I am a member of the firm of PITTA & GIBLIN LLP, attorneys for the PETITIONERS in the within action. That deponent has read the foregoing Petition and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief and as to those matters, deponent believes them to be true. The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are the books and records of the Funds.

JANE LAUER BARKER

Sworn to before me this
12th day of November, 2013

Notary Public

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