STATE OF NEW YORK
SUPREME COURT CHAMBERS
ALBANY COUNTY COURTHOUSE
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THOMAS A. BRESLIN
JUSTICE

LAURA O. BEEBE
LAW CLERK

February 5, 2014

Eric T. Schneiderman, Esq.
Attorney General of the State of New York
David L. Fruchter, Esq.
Assistant Attorney General
The Capitol
Albany, New York 12224

Re: Mona Davids, et al v John B. King, Jr., as Commissioner
Albany County Index No. 6185-13

Dear Counselor:

Enclosed please find the original Decision and Order, with respect to the above referenced matter. The motion papers upon which it was decided are being filed by the Court with the Albany County Clerk's Office.

Sincerely,

Thomas A. Breslin
Supreme Court Justice

TAB:mew
Enclosure (w/Original of Decision and Order)
cc: Hon. Bruce A. Hidley
Albany County Clerk
Albany County Courthouse
Room 128
Albany, New York 12206-1324

Jane Lauer Barker, Esq.
Pitta & Giblin LLP
Attorney for Petitioners
120 Broadway, 28th floor
New York, New York 10271

STATE OF NEW YORK
SUPREME COURT 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 and 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,

DECISION and ORDER
INDEX NO. 6185-13
RJI No. 01-13-ST5189

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules and Civil Practice Law and Rules section 3001

-against-

JOHN B. KING, JR., as Commissioner 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.

Supreme Court Albany County Article 78 Term, January 3, 2014
Assigned to Justice Thomas A. Breslin

APPEARANCES:

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Assistant Attorney General

BRESLIN, J.:

Petitioners are twelve parents or guardians of children who attend schools in New York City. Petitioners commenced this CPLR article 78 proceeding to challenge what they allege to be unlawful disclosure of personally identifiable information about students in violation of the New York Personal Privacy Protection Law (Public Officers Law Article 6-A, § 91 *et seq.*). Petitioners assert six causes of action. One cause of action is asserted to be a violation of Public Officers Law § 96 and the other five causes of action assert violations of Public Officers Law § 94. Petitioners seek nullification of a service agreement between the New York State Education Department (hereinafter Education Department) and inBloom, Inc., a private non-profit corporation and the destruction of any data which has been transferred to inBloom. They seek to prohibit any disclosure of personal data without the consent of a parent or guardian. Petitioners also seek a

preliminary injunction which would bar respondents from implementing the service agreement with inBloom pending the outcome of this proceeding. The parties have informed the court that implementation of the data transfer has been delayed until April 1, 2014 so that this injunctive relief is not presently required. Petitioners also seek a preliminary injunction which would apply to all agency contracts with private third party contractors that include agreements for sharing of personally identifiable information from public school student records. Petitioners also seek attorney fees and costs.

Respondents filed an answer and affidavits in support of dismissing the petition for lack of standing and failure to state a cause of action. Respondents also oppose the requested injunctive relief.

The Education Department has a longitudinal data system (LDS) containing information relating to school students. This data is presently stored in a centralized data "warehouse" that is not accessible to various "stakeholders" in the educational system. These stakeholders include students, teachers, parents, school administrators, and educational agencies and policy makers. Thus these stakeholders cannot view this data. The federal funding recently obtained from the Race to the Top Competition grant

program (hereinafter Race) has affected the manner in which the Education Department plans to store and use data related to students and schools. In order to obtain Race funds in the second phase of the grant competition (New York did not receive a grant from the first phase), the state applicants were required to, inter alia, demonstrate that there existed a statewide LDS which included all the elements required under the federal America COMPETES Act. The application required that states develop plans to construct data "instructional improvement systems" to assist in decision-making and action by various education stakeholders to improve student learning outcomes. Implementation of an evaluation system was required as was a report on student achievement data. The data is intended to be used to improve educational outcomes. This meant that states had to develop plans to make the LDS accessible to educational stakeholders so that the information could be utilized. New York State's application was approved and thus the Education Department was required to develop "data portals" and to expand the existing LDS. The application had indicated that the State would contract with a vendor to develop a tool similar to that used by the New York City Department of Education's instructional improvement system.

The Education Department developed what is known as the EngageNY Portal. This system is intended to permit access to

educational records in a secure manner by educators, students, and parents by way of "data dashboards". In addition, the system would provide access to curriculum and instructional resources to the public through the EngageNY.org website. There would also be an online professional collaboration system for educators.

The Education Department plans to use data dashboards in order to permit access by authorized persons to the data relating to students and teachers that is already collected through the statewide LDS. It appears that additional data may be collected as well. The dashboards would use, among other things, encryption and passwords to keep the information secure. The data portal and the data dashboards permit the information concerning individual students to be accessed in a timely manner and in a useable format.

The Education Department signed a memorandum of understanding with Shared Learning Collaboration(hereinafter SLC), a company which later became a subsidiary of inBloom, to develop and test the shared learning infrastructure software in a pilot program. On October 11, 2012 the Education Department signed a service agreement with SLC, the service provider, so as to move ahead with development of the program. The Education Department sought bids from vendors to design and implement the dashboards and to provide overall management services for the data portal.

Requests for proposals were posted and four vendors were selected and awarded contracts. The contract for management was awarded to Public Consulting Group and three contracts were awarded to companies to develop different dashboards so that schools would have a choice in which dashboard to use. ConnectEDU, Inc., eScholar, LLC, and NCS Pearson, Inc. were awarded the dashboard contracts.

Petitioners contend that release and transfer of personal information of schoolchildren to inBloom, which is not a government entity, without the consent of parents or guardians, is a violation of Public Officers Law § 96. They challenge various decisions by respondents over a period of time which led up to the need for data transfer. The parents express concerns over what they describe as sensitive and confidential information being included, such as information relating to disability classifications and school suspensions. They have concerns that unauthorized persons will be able to access the private information. They note that some of the information is not needed for federal reporting purposes. Published reports of groups which involve students from different school districts but which express similar concerns are cited in support. The loss of local control over the data which is already provided to the State, or other vendors for the locality, is a concern for these other groups who have expressed opposition,

similar to that which is expressed by plaintiffs as relating to their school district. Among other things, petitioners have included a report of the New York City Comptroller's Audit dated January 12, 2012 which is critical of the New York City Department of Education's Achievement Reporting and Innovation System (hereinafter ARIS) that the Education Department is seeking to emulate by using inBloom. Plaintiffs' characterization of the report and its findings is that the system was described as ineffective and not useful to parents or teachers.

Respondents contend that the disclosures to inBloom are necessary for respondents to perform their duties which are required by statute and to operate programs authorized by law. It is stated that the Commissioner is authorized by statute to accept conditions of federal appropriations and that he did so with the Race funds in furtherance of his duties and that it is necessary for respondents to comply with both Federal and State law. Respondents note that substantial sums of money and time have been expended in furtherance of this plan.

It is contended that data transfers to inBloom are necessary to comply with statutory and legal obligations. Respondents cite to, inter alia, the State's obligation pursuant to the State Constitution to provide for free public schools and

statutory authority pursuant to Education Law § 101 which charges the Education Department with general management and supervision of all public schools. Education Law § 305(1) directs the Commissioner to enforce laws relating to education and execute all educational policies determined by the Board of Regents and Education Law § 305(2) grants the Commissioner general supervision of all schools. Education Law § 215 authorizes the Board of Regents or the Commissioner to require schools to submit reports containing information in the form as they prescribe. Respondents note that this statute provides the authority for all schools to make the required data reports. Education Law § 305(40) authorizes the Board of Regents and the Commissioner to establish a pre-kindergarten through post-secondary data system that tracks student performance and links students to teachers.

Respondents contend that the agreement is also necessary to carry out the existing data portal system that was envisioned by the Education Department and adopted by the Board of Regents in 2011. Although petitioners argue that there is no statutory provision which requires third party vendors to be used or for a transfer to inBloom and therefore such is not "necessary" within the meaning of Public Officers Law § 96, respondents argue that this ignores the discretion and authority vested in respondents to make determinations.

As to petitioners' concerns that inBloom's system will not be sufficiently secure and will risk having the personal information released to unauthorized persons or entities, respondents contend that a detailed privacy and security policy was developed and set up by inBloom, as was required by the service agreement. It is asserted that there are administrative controls including, inter alia, security training, a requirement that subcontracting firms follow the same privacy and security policies, a provision that the local school district determines which people have access to the information, deletion of information when the school district informs inBloom that it is no longer needed, and destruction of personal privacy information when the service contract expires. It is asserted that there are also technical controls, such as encryption which prevent access unless a user has the code to access the information, and regular security assessments and testing. Furthermore, it is asserted that currently individual school districts have their own data management systems with varying levels of security protections which allow third party access, and that the statewide centralized system such as inBloom's would decrease the risk of unauthorized release of personal privacy information.

Respondents also contend that petitioners are essentially making challenges to various administrative policy decisions and

the service agreement and memorandum of understanding with SLC and inBloom, but that the four month statute of limitations has expired on those determinations.

The affidavit of plaintiff Mona Davids submitted in reply asserts that respondents seek to justify the arrangement with inBloom by referring to the application made for the Race grant money, but that the application did not indicate that massive amounts of their children's personally identifiable data would be transferred to inBloom for storage on a "cloud" and available for use by third-parties. She contends that providing a data portal has nothing to do with permitting a third party to store and access the private data of a student.

This court must determine whether the actions of respondents in approving a service agreement with inBloom were in violation of Public Officers Law § 96 or § 94. The agreement would permit massive amounts of data relating to schoolchildren to be transferred to a private vendor in order to accomplish the goals of respondents, which is to improve the delivery and supervision of educational services. This court will not examine all the policy decisions which led to the service agreement with inBloom. Nor is the idea that substantial sums of money were expended to develop this agreement relevant to this determination. The issue is

whether the agreement violates the applicable provisions of the Personal Privacy Protection Law.

The Personal Privacy Protection Law (Public Officers Law article 6-A), which is modeled after the Federal Privacy Act (5 USC § 522a), "was enacted to protect against the increasing dangers to personal privacy posed by modern computerized data collection and retrieval systems" (Matter of Spargo v New York State Commn. on Govt. Integrity, 140 AD2d 26, 30 [1988], lv denied 72 NY2d 809 [1988]). The legislative history and the governor's memorandum indicate that it was recognized that in accepting the benefits of this new technology the government must also accept the responsibility for their intelligent use and protect personal information (id., [citations omitted]).

Public Officers Law § 96 subdivision (1) provides that no agency may disclose any record or personal information unless such disclosure is pursuant to one of the listed exceptions. As pertinent here, the exceptions to non-disclosure are:

(a) pursuant to a written request by or the voluntary written consent of the data subject... or

(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...(Public Officers Law § 96 [1]).

Public Officers Law § 96 prohibits a State agency's disclosure of records which constitute an unwarranted invasion of privacy (Doe v City of Schenectady, 84 AD3d 1455, 1459 [2011]). The law is designed to restrict access to personal information stored in computerized databases and information systems (Matter of O'Shaughnessy v New York State Div. of State Police, 202 AD2d 508, 510 [1994], lv denied 84 NY2d 807). Information can be released if the data transfer is permitted pursuant to Public Officers Law section 96 subsection (1)(b), that is, for a lawful and legitimate governmental purpose (Felicano v State, 175 Misc2d 671 [1997]). Inasmuch as the statute provides that an agency cannot disclose personal information unless the disclosure is to the agency or those who contract with the agency, then necessarily permission from the data subject, which is listed as an exception in subdivision (a), is not required.

In Reale v Kiepper (204 AD2d 72 [1994], lv denied 84 NY2d 813 [1995]), an agency determination to post disciplinary determinations against Transit Authority Police Officers was upheld. It was determined that the posting was necessary to the

duties and purpose of the agency and did not contravene Public Officers Law § 96 (1)(b). Two other cases determined that disclosures were authorized although there was no specific statutory directive and, instead, were based on discretionary decisions of the agency involved (Matter of Levine v Board of Educ. of City of New York, 186 AD2d 743 [1992], lv denied 81 NY2d 710 [1993] [medical bureau reports concerning unfitness of teacher necessary to functioning of board of education]; Kooi v Chu, 129 AD2d 393 [1987] [§ 96(1)(d) which permits disclosure to another governmental unit permitted Department of Taxation and Finance to disclose to State Tax Commission regarding employees who failed to file personal income tax returns]).

Although there is little caselaw on the subject, it is clear that the disclosure to an entity which contracts with the agency must be necessary to the performance of the agency's official duties. However, it is not required, as petitioners suggest, that the disclosure must be specifically authorized by statute. Disclosure of personal privacy information can be disclosed in the exercise of discretion of the agency if it is necessary to the performance of the duties and purpose of the agency.

As indicated previously, Education Law § 305(40)

authorizes the Board of Regents and the Commissioner to establish a pre-kindergarten through post-secondary data system which tracks student performance and links students to teachers. It requires that the data system be "maintained consistent with applicable confidentiality requirements, so as to prevent disclosures that would constitute an unwarranted invasion of personal privacy" (Education Law § 305[40]). Education Law § 305 (40) is thus consistent with Public Officers Law § 96 in requiring protection of confidentiality of personal privacy information.

It is important to note that the audit of ARIS, which was cited as support by plaintiffs, focused on use of the system by educators not parents. The objective of the audit was to determine if ARIS had affected student performance in a positive manner, was user-friendly, and had met its intended goals. In that the system at issue is said to be modeled on the New York City ARIS system, it is important to note that the report cited by plaintiffs was critical of the failure of educators to use the system to the extent that it was intended to be used, for lack of up to date information, and failure of the school system to be able to measure and use the system to improve student performance. It was stated that the internal controls were adequate to preclude unauthorized access and thus there was no criticism relating to unauthorized release of data.

As to petitioners' arguments that they prefer local control over who can access the information, it is noted that State agencies are bound by Public Officers Law article 6-A while local units of government are not (Public Officers Law § 92 [1]). State agencies are thus governed by both the Freedom of Information Law (Public Officers Law art 6)(hereinafter FOIL) as well as the Personal Privacy Protection Law. Local governments are bound by FOIL only which permits, but does not require, withholding of records when disclosure would constitute an unwarranted invasion of personal privacy (Public Officers Law § 87 [2][b], 89 [2]). In addition, the Education Department is further controlled by Education Law § 305 (40) concerning personal information in the data system exchange. It therefore appears that there are more statutory controls on the release of information by the Education Department than for local school districts.

The determination of respondents to utilize a third party vendor to design and effectuate the portal and the dashboard systems was not unlawful. The determination was made in order to carry out the duties of the agency which is promote and further the educational process and supervise all public schools. The exception contained in Public Officers Law § 96 subsection (1)(b) for those who contract with the agency that maintains the record permits disclosure in this case of personal information inasmuch as

the disclosure is necessary to the performance of respondents' official duties. The agreement with the vendor requires it to maintain confidentiality and to develop the system that will not disclose personal privacy protected information to unauthorized users. Inasmuch as disclosure is authorized by Public Officers Law § 96 subsection (1)(b), permission of the parents is not required.

As to petitioners' challenge that there was a failure to apply the requirements of Public Officers Law article 6-A to the memorandum of understanding and to the service agreement in violation of Public Officers Law section 94 (1)(f), respondents have shown that such requirements were in fact included. As to the contention that the Education Department, in violation of Public Officers Law section 94 (1)(g) and (1)(h), failed to establish written policies governing the responsibilities of inBloom and other vendors and to instruct persons regarding these responsibilities and to establish penalties and to establish appropriate safeguards, respondents have shown that an information security policy has been in place since 2002 and that the service agreement was in compliance with this policy. Petitioners allege that there was a violation of Public Officers Law section 94 (1)(i) in that there was a failure to establish rules governing retention and timely disposal of data but respondents have shown that this has now been accomplished and has been submitted for approval.

Finally, petitioners claim that there was a failure to file with the Committee on Open Government a supplemental statement to conform any previous privacy impact statement pursuant to Public Officers Law section 94 (4)(b). Respondents indicate that their oversight has now been corrected and the statement has been filed. Thus the last two claims are now moot. Accordingly, the alleged violations of Public Officers Law § 94 do not entitle petitioners to relief.

As with any electronic storage of personal information, concerns about hacking and unauthorized access are significant. Respondents, consistent with statutory requirements, have shown that steps have been taken to protect this information. The vendor, as well as any other contractors, are bound by restrictions on release of information. It is helpful to know that respondents have indicated, in an affidavit submitted by a person with knowledge, that the new system can support more security features than that which is currently available in the systems which are being used by local school districts.

Respondents have met their burden to show that there was a reasonable basis for the decision to enter into the agreement with inBloom and that the disclosure and transfer of data will be for a legitimate purpose. Accordingly, the relief requested in the

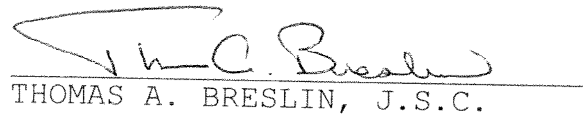
petition is denied in its entirety.

The petition is dismissed. This constitutes the decision and order of this court.

This decision and order is being returned to the attorneys for respondents. A copy of this decision and order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this decision and order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: February 5, 2014
Albany, New York



THOMAS A. BRESLIN, J.S.C.

PAPERS CONSIDERED:

1. Order to Show Cause dated November 13, 2013 and Stipulation and Order dated November 29, 2013.
2. Verified Petition with exhibits and memorandum of law.
3. Amended Verified Petition with exhibits and supplemental memorandum of law.
4. Respondents' Answer.
5. Affidavit of Kenneth Wagner, sworn to on December 23, 2013, with exhibits.
6. Affidavit of Donald E. Juron, sworn to on December 19, 2013.
7. Affidavit of Iwan Streichenberger, sworn to on December 27, 2013.
8. Affidavit of Benny Thottam, sworn to on December 27, 2013, with exhibit.

9. Respondents' memorandum of law.
10. Reply affirmation on Jane Lauer Barker, Esq., dated January 9, 2014, with exhibits.
11. Reply memorandum of law.