

**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; et al.,**

AFFIDAVIT

Petitioners,

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

**Index No. 6185-13
RJ 01-13-ST5189**

-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.

**STATE OF NEW YORK)
) SS:
COUNTY OF ALBANY)**

KENNETH WAGNER, being duly sworn, deposes and says :

Background in Public Education

- 1. I am currently employed as Deputy Commissioner for Curriculum, Assessment and Educational Technology for the New York State Education Department ("NYSED"). I make this affidavit in support of NYSED's response to the petition in the above-referenced matter.**

2. I have served as Deputy Commissioner since July 2013. In this role, I am primarily responsible for NYSED's implementation of curriculum standards, State assessments, and data and educational technology services.
3. Between July 2012 and July 2013, I was NYSED's Associate Commissioner for Curriculum, Assessment and Educational Technology. From October 2010 to July 2012, I served as NYSED's Assistant Commissioner for Data Systems. From March 2009 to October 2010, I was NYSED's Data Director.
4. In each of the roles I have held since I began employment with NYSED in March 2009, I have been responsible for developing and coordinating the State's data collection, data reporting and data usage efforts relating to student and teacher data.
5. In 2010, as NYSED's Data Director, I headed the team responsible for the development of Section C of New York's successful Race to the Top (RTTT) Phase 2 application relating to Data Systems to Support Instruction. A copy of Section C of the RTTT application is attached as Exhibit A. Subsequently, I helped develop the Service Agreement with the Shared Learning Collaborative, LLC (SLC), and its successor, inBloom, Inc. (inBloom), which is the subject of this proceeding (see Affidavit of Iwan Streichenberger, inBloom CEO, paragraphs 4-9). A copy of the Service Agreement entered into on October 11, 2012 is attached as Exhibit B. Attached as Exhibit C to my affidavit and also included as Exhibit F to the Service Agreement is a Memorandum of Understanding (MOU) between NYSED and SLC, relating to a pilot of the Shared Learning Infrastructure (SLI), a system of shared technology services among states that would assist NYSED in development of its Education Data Portal.

6. In the Memorandum of Understanding with SLC, I am identified as the Project Owner in charge of NYSED's project team. In Attachment G to the Service Agreement, I am designated as the "Super Administrator" for purposes of the Data Privacy and Security Policy required under the Service Agreement to be adopted by SLC/inBloom. A copy of the Data Privacy and Security Policy, which was published on inBloom's website in December 2012 (see Affidavit of Iwan Streichenberger, inBloom CEO, paragraphs 16 and 24), is attached as Exhibit D.
7. In 2012, in my capacity as "Super Administrator" I participated in NYSED's review and comment on inBloom's proposed Data Privacy and Security Policy (hereinafter "Policy") (see Affidavit of Iwan Streichenberger, inBloom CEO, paragraphs 16 and 24). Under paragraph B(3) of the Policy, the Super Administrator is responsible for all administrative decisions regarding access to data provided by NYSED to inBloom.
8. In addition to my experience as a NYSED employee in developing NYSED's current student data systems, including the Education Data Portal, I have extensive experience in serving in local public schools, including work on local data systems. For more than 15 years prior to my employment with NYSED, I was involved in public education in various capacities at the regional and local levels in the State of New York.
9. Immediately prior to joining NYSED, I served as the Program Administrator for Student Data Services for Eastern Suffolk Board of Cooperative Educational Services (BOCES) Regional Information Center (RIC) from August 2007 to February 2009.
10. I also have extensive experience working in various administrative and student service roles at the school district level. From July 2006 to July 2007, I was the Director of Administrative Services for the Shoreham-Wading River Central School District. In this

role, I was responsible for the district's technology, personnel, and policy services. From January 2004 to June 2006, I was a middle school principal at Shoreham-Wading River Central School District, and from August 2001 to December 2003, I was a middle school assistant principal at the Herricks Union Free School District. Between April 2001 and July 2001, I served as an interim elementary school assistant principal in the Roslyn Union Free School District. Finally, between March 1997 and March 2001, I was employed as a school psychologist at Atkinson Intermediate School in the Freeport Union Free School District, where I also served as the Committee on Special Education (CSE) sub-committee chairperson for students with disabilities.

11. Between 1986 and 1989, I served as a Trustee on the Board of Education of the Seaford Union Free School District.

Development of the "Data Systems to Support Instruction" Portion of New York State's Race to the Top Application

12. In the federal Race to the Top (RTTT) grant competition, each State, through its Governor, was afforded the opportunity to apply for substantial amounts of federal funding to be awarded through a competitive process, under which the State had to meet specific criteria in order to be awarded enough points to qualify for a grant. RTTT focused on four main components, which were reflected in four Sections of the application: Standards and Assessments (Section B), Data Systems to Support Instruction (Section C), Great Teachers and Leaders (Section D), and Turning Around the Lowest-Achieving Schools (Section E).
13. States applying for federal RTTT grant funds were required to meet specific criteria for each of the four sections. Section C required states to demonstrate that they have in place a statewide longitudinal student data system that includes all the data elements required

under the federal America COMPETES Act (see Exhibit A at page 99). At that time, New York had in place a P-16 longitudinal data system (LDS) with student data from pre-kindergarten through grade 12 (P-12) and data from public institutions of higher education (hence P-16), known as the Student Information Repository System (SIRS). States were also required to produce a high-quality plan to ensure that data from the State's longitudinal data system was accessible to and used to inform key stakeholders, including parents, students, teachers, principals, leaders of local educational agencies and policymakers (see Exhibit A, page 113). The Education Data Portal, now known as the "EngageNY Portal" (hereinafter referred to as the Data Portal) was the vehicle chosen by New York to make a subset of P-12 LDS data accessible to teachers, students, principals and other school administrators and school leaders to help them make better instructional decisions, improve teacher induction, evaluation and retention, guide educational program design and identify opportunities for effective professional development (see Exhibit A, page 115).

14. New York's initial application in Phase 1 of the RTTT competition was denied. However, in 2010 the United States Department of Education (USDE) subsequently opened up a second round of competition, Phase 2, and I participated in development of New York State's winning Phase 2 Application as NYSED's Data Director.
15. In the Phase 2 RTTT competition, Section C included a requirement that states develop plans to build data systems to support instructional improvement, or "instructional improvement systems"¹, to support decision-making and action by various education stakeholders to improve student learning outcomes.

¹ As defined in the RTTT application: "Instructional improvement systems means technology-based tools and other strategies that provide teachers, principals, and administrators with meaningful support and actionable data to

16. To meet RTTT's "instructional improvement systems" requirement, NYSED developed the Data Portal – a comprehensive system that includes secure access to educational records by educators, students, and their parents, through "data dashboards"; access to high quality curriculum and instructional resources by educators and the public through the EngageNY.org website; and access to a secure online professional collaboration system for educators.
17. NYSED incorporated data dashboards into its RTTT Section C application because of federal requirements; the need to provide secure access to educational records to educators, public school students, and their parents to inform decision-making and support actions that improve student learning outcomes; as well as to provide NYSED staff ready access to student data for compliance, evaluation, and program improvement purposes. Data dashboards will make a subset of the individual student and teacher data already collected by NYSED from school districts through its statewide LDS accessible to teachers, principals and other school administrators, and parents in a secure manner, with encryption, password protection and other safeguards. Without the Data Portal, the data stored in the LDS would not be available on an individual student basis in a timely and secure manner, in a useable format.
18. Because NYSED believed that the data dashboard model would most closely meet New York State's needs for a common set of tools to inform decision-making and actions that

systemically manage continuous instructional improvement, including such activities as: instructional planning; gathering information (e.g., through formative assessments (as defined in this notice), interim assessments (as defined in this notice), summative assessments, and looking at student work and other student data); analyzing information with the support of rapid-time (as defined in this notice) reporting; using this information to inform decisions on appropriate next instructional steps; and evaluating the effectiveness of the actions taken. Such systems promote collaborative problem-solving and action planning; they may also integrate instructional data with student-level data such as attendance, discipline, grades, credit accumulation, and student survey results to provide early warning indicators of a student's risk of educational failure" (See page 9 at <http://www2.ed.gov/programs/racetothetop/phase2-application.doc>).

improve student learning outcomes, my team and I, under the supervision of the Assistant Commissioner for Policy and Strategic Planning, designed the State's RTTT Section C application to include the three components described above: data dashboard tools, an instructional resources management system, and an online collaboration system.

19. In RTTT Section C, the State's application described a general structure or functions, rather than a full architectural design for the system. The proposed general structure was a centralized system that utilized the strengths of our existing statewide and regional data systems. For example, our application discussed our on-going work with the 12 Regional Information Centers (RICs), which are regional data systems generally operated by Boards of Cooperative Educational Services (BOCES), and the Big 5 City School Districts (New York City, Yonkers, Syracuse, Rochester and Buffalo) on the State's P-16 LDS. However, as noted above, the design for the LDS was that of a centralized system in which the State proposed to extend the current structure of our various regional data systems (see, e.g., Exhibit A, pages 133-136).
20. The BOCES and RICs have developed the State's regional data systems over time through extensive feedback from local teachers and administrators in the constituent schools, which are their clients. However, the regionalized nature of these systems has produced uneven quality. Some regional systems are strong, providing substantial information and analysis; others are more limited. To ensure that all students, teachers, and schools benefit from best practices, the Board of Regents decided that it would be most effective to build a uniform, comprehensive statewide system, fully accessible to authorized users through the Data Portal (see Exhibit A, pages 133-136). This integrated system would build on best practices being carried out in the RICs, all of which are linked and all of which report to

NYSED on behalf of the client districts. The New York City Department of Education (NYCDOE), which is its own RIC, has an instructional reporting and improvement system that is a national model; because it was the most advanced system in place at that time, NYSED decided that its greater technical capacity would be used as a guide in building the statewide system (see Exhibit A, pages 133-138).

21. The strength of the LDS at the time we designed our RTTT application was the existence of a centralized data warehouse, with data collected from all school districts and BOCES in the State, which allowed data to be reported to the State on an ongoing basis and stored in a common format for various state, regional, and local purposes.
22. However, a data warehouse – in and of itself – is simply a storage mechanism and is not an effective means by which data can be used by tens of thousands of people, which is what is needed in New York State, with its approximately 695 school districts, 37 BOCES, 140,000 teachers, and 2.6 million students. Much like machine parts in a conventional warehouse, the data in a data warehouse are only useful to the extent they are retrievable in a manner that permits them to be assembled into a meaningful data set for meaningful purposes. To meet the need for access to individual student data to support instruction and for compliance purposes, the data need to be organized through software that makes them accessible to individual users in a secure and timely manner. In other words, the software that manages the data needs to convert the data warehouse to a “data store” in which each individual user can obtain the data they need.
23. Based on our Statewide needs, size and complexity, NYSED was always aware that complete reliance on the State’s 12 RICs and Big 5 City School Districts was not a long-term or sustainable plan for expanding the use of data to improve instruction in NYS, as

required by the RTTT competition. Therefore, we realized that NYSED needed to transition from a statewide data warehouse to a statewide "data store." We needed a system that was designed for high-volume data use, and the State's RICs and Big 5 City School districts did not have the capacity to build such a statewide data system.

24. NYSED was aware of the need for a data store before my team and I began developing the RTTT Section C application. In 2009, my team and I, under the supervision of the Assistant Commissioner for Policy and Strategic Planning, were instrumental in writing a \$19.7M federal grant from the Institute of Education Sciences ("IES 2"). The purpose of the IES 2 grant was specifically targeted to finding a solution for the development of a common data store.
25. In developing our RTTT Section C application, NYSED staff and I consulted with experts in the field about what a data store would look like in NYS.
26. In August 2010, New York State was awarded approximately \$700 million to implement the commitments made our RTTT application. The grant award was time-limited – the instructional improvement system had to be launched by October 2012 and all funds had to be committed and the State's obligations met by September 30, 2014, the end of the 2013-2014 Federal fiscal year. Section C of the approved application committed NYSED and the State to developing the Data Portal and expanding the P-16 data system. The application did not specify in detail the means by which this would be accomplished. Contrary to petitioners' assertions (see e.g., Amended Petition paragraph 60), however, the RTTT application very clearly indicates that the State would contract with a Data Portal System vendor "to develop an instructional data presentation tool," similar to NYCDOE's instructional improvement system (see Exhibit A, page 121).

27. NYSED's initial attempt at implementation of Section C of our RTTT plan in late 2010 and early 2011 centered on the idea of establishing a common data store that would enable data to be used quickly by many users.
28. At that time, NYSED was also aware that other RTTT states were also grappling with the data store problem. To address this common problem, the Council of Chief State School Officers (CCSSO) came together to form the Shared Learning Collaborative (SLC), with initial funding from the Bill & Melinda Gates Foundation and the Carnegie Foundation, and began consulting with RTTT and other states.
29. Also at that time, various options for addressing the data store problem were becoming available in the field. NYSED was interested in partnering with Wireless Generation at this stage because of the efficiencies and other advantages of leveraging work that was already being carried out by the NYCDOE and our RICs. NYCDOE had contracted with Wireless Generation to develop and operate its ARIS (Achievement Reporting and Innovation System) student data system. NYCDOE was willing to transfer the ARIS software code to NYSED for expansion and improvement purposes. From NYSED's perspective, it made sense both economically and practically to build from the system NYCDOE already had in place by contracting with the vendor who had built the system, which would ensure that the statewide system would be compatible with the system being used by the largest school district in the State, which serves approximately 40% of the State's student population.
30. As a result, NYSED developed a single source contract with Wireless Generation for the development of data tools, content tools and collaboration systems as a single tool that would be owned by NYSED (see Affidavit of NYSED Chief Financial Officer Donald E. Juron, paragraph 6).

31. Upon information and belief, in or about August 2011, the Office of the State Comptroller (OSC) declined to grant NYSED's single source contract request to contract with Wireless Generation (see Affidavit of NYSED Chief Financial Officer Donald E. Juron, paragraph 7).
32. Upon information and belief, after OSC declined to grant NYSED's single source contract request to contract with Wireless Generation, NYSED staff (including staff members from both the fiscal and data/reporting offices) met with OSC staff to discuss next steps, including the option to use the services of SLC, later inBloom (see Affidavit of NYSED Chief Financial Officer Donald E. Juron, paragraph 7).
33. It was NYSED's understanding that the initial Memorandum of Agreement and the Service Agreement with SLC/inBloom did not require formal OSC approval pursuant to the State Finance Law, such as the contract with Wireless Generation had required (see Affidavit of NYSED Chief Financial Officer Donald E. Juron, paragraph 8).
34. NYSED's inability to contract with Wireless Generation set our RTTT implementation timeline back by approximately one year.
35. The loss of one year for our RTTT implementation and the fact that the grant was time-limited raised concerns about long-term sustainability. NYSED did not want to merely procure a cookie-cutter "off-the-shelf" solution that did not allow for choice and customization according to local district needs; rather, we wanted to provide a solution that met the State's specific needs while also making investments that would allow the RICs and Big 5 to continue the work when RTTT funding ended.
36. NYSED believed that long-term sustainability could be achieved if we provided school districts with choice of the data dashboard they would use to implement the Data Portal that

best met their local needs, and if we made strategic investments in an underlying secure system that could be maintained and expanded regionally and locally if it were successful in efficiently providing for district needs.

37. During this time, the idea of the SLC had begun to coalesce and the SLC further matured into a viable option for New York State because their work had advanced in the intervening time period.
38. In order to achieve our goals, NYSED continued its partnership with the SLC to provide a basis for the underlying secure system and contracted with three different data dashboard service providers to allow for local district choice of a preferred dashboard (see Affidavit of NYSED Chief Financial Officer Donald E. Juron).

NYSED's Agreement with SLC/inBloom

39. Upon information and belief, when SLC started, nine states were invited to participate. Not all of the nine states were RTTT states; rather, the invitees were a mixture of States that had some or all of the following attributes: they were either RTTT grant awardees or had other funding available for instructional improvement system purposes; they had the commitment and leadership readiness to build a data system for instructional improvement; and/or they had demographic balances (e.g., size, population).
40. The nine states participated in SLC in two phases: Phase 1 included New York, North Carolina, Massachusetts, Colorado and Illinois; Phase 2 included Delaware, Kentucky, Louisiana and Georgia.
41. Upon information and belief, SLC secured funding through the Bill and Melinda Gates Foundation and the Carnegie Foundation through December 2014.

42. The operational framework was that Phase 1 states would leverage SLC services before the end of the subsidized period in December 2014. Such active participation could be use of the data tools, content tools or both. While use of the data tools requires the use of student data, use of content tools alone does not. Upon information and belief, the only commitment made by Phase 2 states was to participate in discussions around the project and to assist in enhancing the project overall.
43. Upon information and belief, both New York State and Illinois remain committed to participating in both the data tool and content tool offerings; Massachusetts is undecided; North Carolina is continuing to work with the content tools, but not the data tools, and Colorado has removed itself as a Phase 1 state.
44. NYSED's efforts to improve its data system and its engagement with the SLC were discussed at several public meetings with stakeholders and those of the New York State Board of Regents (see Exhibit E for a list of Regents meetings at which the data system, SLC and related issues were discussed and/or presented).
45. On April 13, 2012, Valerie Grey, NYSED's then-Executive Deputy Commissioner, signed the memorandum of understanding (MOU) with the SLC. The MOU is attached hereto as Exhibit C.
46. The MOU outlined NYSED's participation in the SLC's Shared Learning Infrastructure (SLI) pilot, the purpose of which was to develop, test and implement the SLI. The SLI is the non-proprietary set of shared services provided by the SLC for the secure storage of data in a standard and non-proprietary format.

47. The MOU was to expire on December 31, 2012 “or upon the execution by the [SLC] and NYSED of a service level agreement governing implementation of the SLI, whichever is earlier” (see Exhibit C, page 7).
48. On October 11, 2012, NYSED entered into the Service Agreement with the SLC. The Service Agreement is attached hereto as Exhibit B.
49. Upon information and belief, the Service Agreement was posted publicly on NYSED’s website on or about October 18, 2012.
50. It is my understanding that, effective January 1, 2013, the Shared Learning Collaborative, LLC (SLC) became a wholly-owned subsidiary of inBloom, Inc., a nonprofit corporation recognized by the IRS as tax-exempt under §501(c)(3) of the Internal Revenue Code (see Affidavit of Iwan Streichenberger, inBloom CEO, paragraphs 7 and 8). Upon information and belief, this change was instituted as part of the SLC’s long-term plan to become a self-sustaining entity.
51. Petitioners question the need for the Service Agreement, arguing that the Data Portal and the transfer of student data to inBloom are unnecessary. However, the Data Portal was designed for the specific reasons described above – to require the transfer of personally identifiable information (PII) relating to both students and parents to whatever entities manage the secure data storage, access, and display of the data on behalf of NYSED. If NYSED were required adopt an alternate architecture to the Data Portal, this would have a significant and negative effect on project goals, timeline, cost, and benefits – including the likely scenario that NYSED will not be able to meet its federal RTTT requirements for this \$50 million project (see Affidavit of NYSED Chief Financial Officer Donald E. Juron, paragraphs 14, 18-22). Both student data needed for instructional purposes, and parent data

needed for security and privacy reasons to verify the identity of the person identifying themselves as the parent, must be transferred to those entities. Whether that entity is a private third party contractor such as inBloom or a RIC / Big 5 City School District, the problem is that NYSED does not have the capacity to store the data or operate the Data Portal itself, and must contract with multiple entities to carry out its commitments under the RTTT application.

52. Accordingly, the transfer of data, including personal information, to a third party is necessary for the State to meet its commitments to the United States Department of Education under its approved RTTT grant. Upon information and belief, failure to meet those commitments would place \$700 million in RTTT grant funds at risk, in whole or in part (see Affidavit of NYSED Chief Financial Officer Donald E. Juron, paragraphs 18-22).. Moreover, because the RTTT grant is time-limited and ends on September 30, 2014 -- or, if an extension is granted by USDE, on September 30, 2015 -- a shift to a contract with an entity other than inBloom at this late date creates a near certainty that the State would be unable to meet its obligations relating to implementation of the Data Portal by either of those dates while still providing school districts with a meaningful period of time during which to use the tools being provided through the Data Portal. That, too, would place \$700 million in RTTT funding at risk (see Affidavit of NYSED Chief Financial Officer Donald E. Juron, paragraphs 18-22).
53. In any case, SLC/inBloom cannot be fully replaced at this point in time if the State is to fully complete its work under the RTTT grant on the Data Portal by September 30, 2014 or September 30, 2015. SLC/inBloom has created open-source software to take in data securely, store data securely, and then to push it back out securely to users on the large

scale needed in NYS and in an open, non-proprietary format. It is my understanding that no other entity, including the RICs and Big 5, can do that to the same scale or with the same level of security as SLC/inBloom. While petitioners argue that it was not necessary for NYSED to select inBloom and imply that other vendors could take inBloom's place, at the time of the Service Agreement, inBloom committed to provide an open, non-proprietary set of standards for the storing and accessing data that other vendors were not willing to provide. inBloom offered the advantage that it would provide a standardized interface that could be paid for once and reused for multiple applications, while other vendors would provide proprietary systems that would generate fees every time a school district sought to add a new application. In any case, upon information and belief, petitioners have no right to dictate to NYSED which third party contractor to choose.

Data Collection

54. The student data available through the Data Portal, and therefore to be shared with inBloom, is a subset of the data collected by NYSED from school districts, charter schools and BOCES (hereinafter "local educational agencies") for purposes of the P-16 longitudinal data system. As I discuss more fully below, for the Data Portal to function as a tool for parents, that data had to be supplemented with parent contact and linkage information, but otherwise, there is no separate collection of student data for purposes of the Data Portal. It would not be practicable for NYSED to collect this student data directly from the parents of approximately 2.6 million public school students in the State. Therefore, upon information and belief, the collection of data from local educational

agencies, including personally identifiable information (PII) is necessary for NYSED to carry out its responsibilities under state and federal law.

55. The local educational agencies are responsible for updating their student data as changes occur, such as when students graduate, drop out or transfer to another school/district, or when the local educational agency learns that the data needs to be corrected, whether because of error or because the local educational agency is required by law to expunge or destroy data relating to a specific student. Upon information and belief, examples of the latter include when a Court or the Commissioner of Education orders that a student suspension be annulled or when personally identifiable information concerning a student with a disability is no longer needed to provide educational services to that student and by federal regulation must be destroyed at the request of the parent (see 34 CFR §300.624). In such circumstances, the local educational agency makes the necessary changes to its data and reports the updated data to NYSED through the P-16 data system. The individual student data available through the Data Portal is periodically refreshed or updated as frequently as once a week, so data regarding students whose records must be amended will be updated or corrected by the subsequent refreshing of data to the Data Portal. NYSED has a process for refreshing both current year data and data from prior years. Each refreshing of data to the Data Portal overwrites any previously held data, thus automatically deleting any obsolete data that NYSED has removed from the Data Portal transfer. For students who are no longer enrolled in the school district, the Data Portal will also be updated to delete such records at least twice annually after the end of each semester. Therefore, it is not true, as petitioners suggest, that once student data is transferred to the

Data Portal it remains accessible forever and never changes when the student is no longer enrolled or corrections must be made.

56. Generally, since approximately 2004 for most data; since 2007 for special education information; since 2012 for student-level attendance information; and since 2013 for student-level suspension and parent contact information, NYSED has collected data from school districts in at least 33 data categories (known as "entities"). Each entity is further broken down into "elements." For example, the entity "school" contains 18 elements, including school name and school zip code. The 33 data entities and their elements that are made available to the Data Portal are listed in the "data dictionary" attached hereto as Exhibit F. This information is a subset, relevant for classroom instructional purposes, of the broader data collection effort for purposes of the LDS that has been in place since 2004, as described in the New York State Student Information Repository System (SIRS) Manual (see Exhibit G). This broader statewide data collection has been securely stored by third parties since approximately 2004.
57. Attached hereto as Exhibit H is a June 1, 2010 memorandum issued by Alan Ray, NYSED's then-Assistant Commissioner for Policy and Strategic Planning, P-12. The memorandum was directed to BOCES District Superintendents, school district superintendents, and charter and other public school principals. The memorandum provided guidance on the collection and reporting of additional data in the State's LDS for Teachers and Courses during the 2009-2010, 2010-2011 and 2011-2012 school years.
58. Assistant Commissioner Ray's memorandum explained that the federal America COMPETES Act (20 USC §9871) requires that NYSED establish an LDS that includes a teacher identifier system with the ability to match teachers to students and student-level

transcript information, including information on courses completed and grades earned. The memorandum also explained that the federal American Recovery and Reinvestment Act of 2009 (ARRA) requires a State that receives State Fiscal Stabilization Fund (SFSF) funds (which includes but is not limited to the RTTT program) to provide assurances that the systems used to evaluate the performance of teachers include student achievement outcomes or student growth data as an evaluation criterion and that the system used to evaluate the performance of principals include student achievement outcomes or student growth data as an evaluation criterion.

59. The memorandum also explained that these additional student data elements are necessary for NYSED to provide the foundation for the comprehensive instructional reporting system and professional development network that was proposed in the State's RTTT application, as well as to inform policy decisions of the Board of Regents.
60. For the 2011-2012 school year, NYSED began collecting data on teacher-student linkages. NYSED was required to do this in part because it was awarded American Recovery and Reinvestment Act (ARRA) grants, which included, as a condition of funding, compliance with the federal America COMPETES Act requirement that States have "a teacher identifier system with the ability to match teachers to students" (20 USC §9871[e][2][D][ii][III]). It is not possible to accurately link a particular teacher with a particular student without having personally identifiable information about the student and the teacher, which means that the sharing of PII is required in order for NYSED to comply with federal law. In addition, RTTT required that States applying for a grant award develop data systems that contain all of the elements required by America COMPETES (see Exhibit A, pages 99, 104-112). NYSED also needed such data in order to implement

its Statewide Annual Professional Performance Review (APPR) system for evaluating teachers and principals (Education Law §3012-c; 8 NYCRR §30-2.3[b][1]).

61. For the 2012-2013 school year, NYSED began collecting attendance data. This was done for several reasons: (1) USDE has been supportive of innovative ways to flag early warning indicators for students who are at-risk of dropping out of school. Such indicators include attendance, suspension (behavior), and course grades (see Footnote 1 above); (2) As a policy matter, research indicates that early warning indicators can help to predict students who are at risk of dropping out as early as grade 6 for purposes of providing supports to such students. Research also indicates that chronically-absent students are particularly high-risk in terms of dropping out of school²; and (3) As compared to the collection of data at the aggregate level, the collection of data at the student level is more accurate.
62. For the 2013-2014 school year, NYSED began collecting data on student suspension as part of the attendance data entity. However, we did not begin to collect this data for purposes of the Data Portal work with inBloom. To the contrary, we planned to collect this

² Much research has been done regarding what indicators can help to predict if a student will dropout before completing high school. For example, the National High School Center found that the key indicators that researchers have identified as indicative of who is most likely to dropout are: poor grades in core subjects, low attendance, failure to be promoted to the next grade, and disengagement in the classroom, including behavioral problems (Kennelly, L., & Monrad, M. (2007). *Approaches to dropout prevention: Heeding early warning signs with appropriate interventions*. Washington, DC: National High School Center at the American Institutes for Research).

Absenteeism (truancy, attending school less frequently, etc.) has also been found to be an indicator for dropping out of high school by the National High School Center based on research they reviewed (Jerald, C. (2006). *Identifying potential dropouts: Key lessons for building an early warning data system*. Washington, DC: Achieve, Inc.; Neild, R. C. & Ballanz, R. (2006a). *Unfulfilled promise: The dimensions and characteristics of Philadelphia's dropout crisis, 2000-2005*. Baltimore: Center for the Social Organization of Schools, Johns Hopkins University; Allensworth, E., & Easton, J. Q. (2005). *The On-track indicator as a predictor of high school graduation*. Chicago: Consortium on Chicago School Research; Ballanz, R., & Herzog, L. (2005, March). *Keeping middle grades students on track to graduation: Initial analysis and implications*. Presentation given at the second Regional Middle Grades Symposium, Philadelphia, PA; Newmann, F. M., Wehlage, G. G., & Lamborn, S. D. (1992). The significance and sources of student engagement. In F. M. Newman (Ed.), *Student engagement and achievement in secondary schools* (pp.11-39). New York: Teachers College Press; Finn, J. D. (1989). Withdrawing from school. *Review of Educational Research* 59, 117-142; Wehlage, G. G., Rutter, R. A., Smith, G. A., Lasko, N., & Fernandez, R. R. (1989). *Reducing the risk: Schools as communities of support*. Philadelphia: Falmer Press.

data for the policy reasons described above, independent of the Data Portal work with inBloom. Specifically, within the attendance collection entity, the suspension element is being collected as an event (or code). The elements included in the attendance collection entity are: excused absence, unexcused absence, tardy, in-school suspension and out-of-school suspension (see Exhibit F, pages 74 and 90). These elements define a reason for an absence date. No other suspension information is collected at the student level other than the date of the suspension and whether or not that suspension was served in- or out-of-school. To the extent petitioners are concerned that inBloom may have access through the Data Portal to detailed information about the basis for a student suspension or information about a referral to law enforcement or criminal charges that may have been brought against a student, such concerns are unfounded.

63. If a student suspension is subsequently set aside through an appeal to the Commissioner of Education under Education Law §310 or by a court, the student's data is updated by the school district and re-submitted to the State to reflect that, and the attendance code is changed to reflect an excused absence. To the extent petitioners are concerned that a record that a student suspension occurred will be retained even if the suspension is annulled, such concern is also unfounded.
64. While we did not begin to collect the suspension data described above for purposes of the Data Portal project, one of the reasons that the parent portal aspect of this project is so critical is that it gives parents the ability to check that the State's data is complete and accurate. For example, with access to the data dashboard tools, parents can check their children's records electronically at any time to see whether the record was properly updated to reflect, for example, the expungement of a suspension. If the data is inaccurate, the

parent can then contact the school district to correct the data and can use the Data Portal to ensure that the corrected data gets updated in the State system.

65. With respect to students with disabilities, it is not true, as petitioners allege, that in Bloom through the Data Portal will have access to a student's individualized education program (IEP) in its entirety. Upon information and belief, the IEP is a written plan that describes in detail things like the student's academic achievement and functional performance, the special education programs and related services the student is provided and annual goals for the student and the student's progress in meeting those goals (see 34 CFR §300.320). A student's IEP is not uploaded into the Data Portal.
66. The data concerning students with disabilities which is uploaded to the Data Portal is the classification of the student's disability and any test accommodations recommended for the student, which upon information and belief are a part of a student's IEP. There are 13 classifications reported, which upon information and belief, correspond to the 13 classifications specified in the definition of a "student with a disability" in the Regulations of the Commissioner of Education (see 8 NYCRR §200.1[zz][1]-[13]). Upon information and belief, the 13 categories are autism, deafness, deaf blindness, emotional disturbance, hearing impairment, learning disability, intellectual disability, multiple disabilities, orthopedic impairment, other health impairment, speech and language impairment, traumatic brain injury and visual impairment including blindness.
67. Clearly, the data on the classification of students with disabilities in particular and the data on testing accommodations are sensitive and must remain confidential, but the reason such data is provided through the Data Portal is to afford the educators who provide services to the student with a disability the information they need to assist them in meeting the

student's educational needs. Upon information and belief, state law requires that every teacher or other service provider of a student with disability be afforded access to a student's IEP (see Education Law §4402[7][a]) and federal regulations contain a similar access requirement (see 34 CFR §300.323[d][1]). Consistent with those access requirements, only the educators who are reported to NYSED by the school district as currently providing educational services to the student and are linked to a particular class or program will have access to this personally identifiable information concerning the student. In fact, some teachers, like a library media specialist, who are not linked to a particular class or program may not be granted student level access to data, and would only receive aggregated or non-PII data. It is not true, as petitioners allege, that any staff member at a school district would have access to PII relating to a student with a disability. Only the student's current teachers and service providers may be granted such access.

68. With respect to students who have a disability, such as a physical disability, but do not have an educational disability, and receive services pursuant to section 504 of the federal Rehabilitation Act, no classification or description of the student's disability is uploaded to the Data Portal. The only information uploaded to the Data Portal is the identification of that student as a student with a section 504 plan.
69. Contrary to petitioners' allegations that inBloom may have access to information from a student's health records, NYSED does not collect student health records from school districts through the P-16 LDS and does not upload student health data, such as immunization data, to the Data Portal. Upon information and belief, petitioners' confusion in this regard may derive from a line in the data dictionary relating to students with section 504 plans that is intended as a definition to signify that a student who has health issues may

be eligible for services under section 504 (see Exhibit F, Tab 2, Row 79, in Column D ["Description"]). However, only the student's status as a student with a section 504 plan is uploaded to the Data Portal—no information on the student's health or the nature of his or her disability is reported.

70. Petitioners' concern that colleges and universities may gain access to information, such as a student's disciplinary history, through the Data Portal and inBloom, is also unfounded.

Colleges and universities do not have direct access to the Data Portal at all. A parent, or the student if over 18, may opt to provide the student's achievement scores on assessments to a State University of New York (SUNY) institution through the Data Portal. If the student or parent elects to do so, the only data provided to the SUNY institution are biographic data, enrollment data, and achievement scores — no other data, such as disciplinary records, are provided.

71. One new data element that NYSED is required to collect solely for purposes of the data portal is parent contact information and relationship information between parents and the children for whom they may access educational records. This is necessary for security and privacy reasons so that parents can verify their identity in order to create secure accounts to access their children's educational records. However, this data is only required if the parent chooses to create such an account.

72. Upon information and belief, under the regulations implementing the Family Educational Rights and Privacy Act (FERPA), 20 USC §1232g, where education records are disclosed to an authorized representative of a State educational authority or agency for an audit or evaluation of federal or state supported education programs or for the enforcement of or compliance with federal legal requirements that relate to those programs, the authorized

representative must destroy personally identifiable information from such education records when the information is no longer needed for the purpose specified (34 CFR §99.35[a][3][iii]). It is that overarching federal requirement for destruction of PII from student records that NYSED follows and embeds in its contracts with third party vendors that involve the sharing of PII, including the Service Agreement with inBloom (see Exhibit A, page 25 ["Personally Identifiable Information provided to the Service Provider and to its sub-contractors shall be destroyed when the Agreement is terminated or when the Personally Identifiable Information is no longer needed for services to the State Educational Agency."]). The purposes of the Data Portal are relevant only during the period that students are enrolled in a K-12 program, so data regarding students who are no longer enrolled will be deleted from the Data Portal at least twice annually.

73. Data will be maintained in the P-16 longitudinal data system at least for the period of a student's preschool through post-secondary education (P-16), per the requirements of the America COMPETES Act (see 20 USC §9871). Also, although the America COMPETES Act does not contain a defined retention period, the P-16 data must be used to:
- a. identify factors that correlate to students' ability to successfully engage in and complete postsecondary-level general education coursework without the need for prior developmental coursework;
 - b. identify factors to increase the percentage of low-income and minority students who are academically prepared to enter and successfully complete postsecondary-level general education coursework; and
 - c. use the data in the system to otherwise inform education policy and practice in order to better align State academic content standards, and curricula, with the

demands of postsecondary education, the 21st century workforce, and the Armed Forces.

74. Therefore, one of the implications of the America COMPETES Act is that outcome data must be collected at the postsecondary level, with links from PII from P-12 student data. As part of the State's RTTT application, NYSED proposed to eventually expand the P-16 longitudinal data system to link to workforce data, making it a P-20 data system. In 2008, the New York State Archives, which is authorized under Arts and Cultural Affairs Law §57.05 and 8 NYCRR Part 188 to review agency records management plans regarding records retention and disposition, conducted a technical appraisal of the statewide data warehouse (the data elements that are maintained in the statewide data warehouse comprise the LDS). In December 2013, the State Archives conducted a content appraisal. Based on these appraisals and in consultation with the State Archives, a proposed retention schedule has been developed that would require retention for at least eight 8 years following a student's graduation from high school. The proposed retention schedule has been submitted to the Office of the State Comptroller and the Office of the Attorney General for review and approval and will thereafter be submitted to the State Archivist for review and approval pursuant to 8 NYCRR §§188.7 and 188.8. A copy of the proposed retention schedule is annexed as Exhibit I.³

³ The proposed retention schedule submitted to the Office of the State Comptroller and the Office of the Attorney General for review and approval on December 16, 2013 contained a typographical error in which the proposed retention period was listed as six, rather than eight, years. A corrected copy of the proposed retention schedule reflecting the eight-year retention period was forwarded to those offices on December 20, 2013 and is contained in Exhibit I to my affidavit.

Privacy and Security Concerns

75. Petitioners raise several arguments in opposition to the Service Agreement that center around privacy and security concerns. First, in paragraph 84 of their Amended Petition, petitioners allege that section 1.10 of the Service Agreement makes reference to a Data Privacy and Security Policy (Policy), but that NYSED has not yet entered into an agreement with inBloom that includes such a Policy. Such allegation mischaracterizes the language of the Service Agreement. While it is true that the Service Agreement references a Policy and acknowledges that such Policy did not yet exist at the time the Service Agreement was executed, petitioners fail to reference the remaining language of section 1.10, which states as follows: “Service Provider intends to replace [the Data Privacy and Security Plan attached as Exhibit C to the MOU] no later than Release 1.0 launch with a more comprehensive Data Privacy and Security Policy, as approved by the independent advisory board following a notice and comment period as described in Section 10.6(b)(iv) and such policy will supersede and replace the Data Privacy and Security Plan and thereafter shall constitute the Data Privacy and Security Policy. Service Provider may thereafter modify the Data Privacy and Security Policy from time to time, as approved by the independent advisory board. Customer’s continued use of SLI services will indicate its acceptance of the Data Privacy and Security Policy” (emphasis added). Upon information and belief, the Release 1.0 launch referenced in section 1.10 of the Service Agreement occurred in December 2012.
76. The final Data Security and Privacy Policy (see Exhibit D) was adopted based on extensive input from SLC/inBloom states and districts, including New York, between the time the Service Agreement between NYSED and SLC was signed by NYSED’s then-executive

Deputy Commissioner Valerie Grey on October 11, 2012. and the Memorandum of Understanding between NYSED and SLC was signed by Valerie Grey on April 12, 2013 (see Affidavit of Iwan Streichenberger, inBloom CEO, paragraphs 16 and 24). At the time the current policy was approved, it superseded the plan attached to the MOU.

77. In paragraph 85 of their Amended Petition, petitioners point out that the Service Agreement contemplates that third-party application providers “will be involved to provide services to students” and can be granted access to the data stored by inBloom by NYSED or by a school district. However, section 1.31 of the Service Agreement specifically states that NYSED may not provide access to “the SLI Service and Customer Data ... for purposes of ... providing services to students in accordance with applicable Data Privacy and Security Laws and FERPA ... unless (i) specifically authorized to do so by a School District...” To make the Data Portal useful to school districts that already have, or wish to enter into, contracts with third party application providers to manage, for example, their special education data systems or their student management systems, the Data Portal is designed so other compatible applications can be added to it and access its data when specifically authorized for legitimate educational purposes consistent with FERPA and other State and federal laws and regulations by the State or school districts.
78. Petitioners go on to assert in paragraph 86 of their Amended Petition that it is school districts and NYSED that remain responsible for all uses and disclosures of personally identifiable information (PII) by any third parties. Petitioners misread the Service Agreement. Section 1.31 of the Service Agreement, to which petitioners cite, does reference third-party application providers, but specifically states that such providers include only those that “Customer has elected to grant access to the SLI Service and

Customer Data” for purposes of either providing services to students or services to the State.

79. For purposes of the Service Agreement, if the Customer, in this case NYSED, elects to approve the disclosure of PII to a third party application provider for a proper purpose and following the requirements in the Service Agreement, the Customer must therefore enter into an agreement with such provider that contains all required security and privacy protections for the PII, as described in Section 3.2(b) of the Service Agreement. Any such agreement with a third party application provider must also comply with the requirements contained in Attachment E to the Service Agreement, which include the destruction of PII when the agreement is terminated or when the PII is no longer needed for services to the State Educational Agency” (see Exhibit B, page 25). In that case, the Customer that authorized the use is also responsible for the authorized user’s compliance with the Policy and applicable Data Privacy and Security Laws and any act or omission by such authorized user will be deemed to be a breach of the Service Agreement by the Customer. As clarified in Section B of the Policy, “School Districts and State Educational Agencies that use inBloom to store PII have control of the data and are the ultimate arbiters of who is able to have access to the PII.”
80. Section 10.2 of the Service Agreement requires that the party receiving confidential information, defined to include PII, must maintain and protect the confidentiality of the information. Section 10.2(c) of the Service Agreement places responsibilities on inBloom, as the “receiving Party,” for any acts or omissions of its employees, the employees of its subsidiaries or affiliates, the employees of its contractors, suppliers or licensors, external attorneys and auditors that, if committed by inBloom, would constitute a violation of

inBloom's confidentiality obligations under the Service Agreement. Section 10.2(c) also specifically provides that nothing therein "shall be construed to authorize the disclosure of Personally Identifiable Information if such disclosure will violate any Data Privacy and Security Laws, FERPA, or any other federal or State law or regulation." The term "Data Privacy and Security Laws," used in several places in the Service Agreement, including Section 10.2(c) and Section 10.3 which sets forth limited exceptions to the Receiving Party's (inBloom's) liability for disclosing confidential information that do not apply where such disclosure would be in violation of any Data Security and Privacy Laws, is defined in Section 1.9 as "all applicable federal, state, regional, territorial and local laws, statutes, ordinances, regulations ...governing the privacy and security of Personally Identifiable Information...." (emphasis added).

81. While section 3.2(b), cited by petitioners, recognizes that NYSED or a local school district may authorize disclosures of PII to a third-party application provider under certain circumstances, it is simply untrue that inBloom bears no responsibility for any breaches of security with respect to PII. For example, section 10.6, Compliance with Laws, outlines the respective responsibilities of inBloom and NYSED. In this section, both parties agree to comply with federal data privacy and security laws, the Policy, and FERPA in connection with the agreement. Subsections (a) and (b) of section 10.6 outline each party's independent responsibilities. Section 10.6(b) specifies that, if PII is disclosed to inBloom or its subcontractors, inBloom is responsible for its own, and its subcontractors' adherence to all applicable laws and policies.
82. Section 10.6 (a) does make the Customer (the State or school district) , as the party that owns the data it releases to the Data Portal, independently responsible for assuring that the

data is processed and managed in accordance with all state and federal data privacy and security laws and with determining whether the Service Agreement and inBloom's Data Privacy and Security Policy are sufficient to enable the Customer to comply with its applicable state and local data privacy and security laws. NYSED accomplishes this by ensuring that appropriate data privacy and security procedures are in place. The Customer is in the best position to interpret and apply state or local data privacy and security laws and decide how its data can be managed consistent with those laws.

83. In any case, the clear requirement in both the Service Agreement and the Policy that all parties comply with FERPA, the comprehensive federal privacy statute and its extensive implementing regulations, 34 CFR Part 99, that govern the release of personally identifiable information from student records, protects the privacy of the student data released to inBloom. Attached as Exhibit J is an analysis dated April 20, 2012 by Steven Y. Winnick of EducationCounsel, LLC, a nationally known data privacy expert, analyzing the interplay between the Shared Learning Infrastructure and FERPA.
84. As Steven Winnick's analysis points out, FERPA includes a general prohibition against release of personally identifiable information from student records without written consent of the parents or the student if over 18 (see 34 CFR §99.30), and then carves out a series of exceptions where consent is not required (see 34 CFR §99.31). Upon information and belief, this approach is similar to what is done in Personal Privacy Protection Law §96. However, the FERPA statute and regulations are more extensive and comprehensive than the PPPL, though upon information and belief, they carry out the same underlying purpose — protecting the privacy of data collected by public agencies. Upon information and belief, FERPA provides greater privacy protection than the PPPL by, among other things,

- explicitly prohibiting the unauthorized redisclosure of personally identifiable information without parental consent by third parties who are authorized to receive data from a state or local educational agency (see 34 CFR §§99.33; 99.35).
85. The Service Agreement and Policy are based on the premise that both physical and technological data protections are required. In other words, access to data must be limited to the right people, data can only be used for authorized contract purposes (not for commercial marketing) and data must be destroyed at the end of the contract (see Exhibit B -- Service Agreement Sections 8.3[b] and 10.4 regarding destruction of data).
86. To ensure that inBloom strictly adheres to the terms of the Service Agreement and Policy, section 11.5 of the Security Agreement provides that inBloom may be liable for damages of up to \$1 million for any breach under section 10.6, which includes the requirement that inBloom, and its subcontractors, comply with federal Data Privacy and Security Laws, the Policy, and FERPA.
87. Section 8.2(c) of the Service Agreement provides that either party may terminate the Agreement immediately upon written notice to the other party "if the party reasonably believes such other party is intentionally violating its obligations ... with respect to Confidential Information or otherwise uses the SLI Service in violation of Data Privacy and Security Laws, the Data Privacy and Security Policy or FERPA."
88. In addition, as described above, both the Service Agreement and the Policy make reference to the fact that both parties to the Agreement are required to comply with all applicable state and federal laws, including FERPA. Under FERPA's implementing regulations, where USDE, as part of its investigation and enforcement responsibilities, finds that a third party has violated FERPA by not destroying such PII when no longer needed for the

specified purpose, for example, then the educational agency from which the PII originated may not allow such party access to PII from education records for at least five years (34 CFR §99.67(c)).

89. In paragraph 87 of their Amended Petition, petitioners claim that “[o]nce 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 districts for doing so.” Such argument can be refuted on several grounds. First, as described herein, the Agreement and Policy put more than sufficient “onus” on inBloom to comply with all applicable laws, regulations and policies regarding data security and PII, including a provision for up to \$1 million in damages for a breach and a possible FERPA prohibition against access to student data for a period of up to five years, which, upon information and belief, would effectively cause inBloom to cease its operations.
90. Moreover, as described herein, the vast majority of New York State’s approximately 700 school districts currently use a variety of data management systems – including those provided by third-party vendors who have access to student PII. The risks inherent in having 700 different systems Statewide, with differing levels of security protections in place and with each district typically providing access to more than one third-party vendor, far outweigh those of a secure, encrypted, centralized system such as that provided by inBloom. Indeed, in a December 12, 2013 report entitled “Privacy and Cloud Computing in Public Schools,” researchers at the Fordham Center on Law and Information Policy found that 19 of the 20 districts (95%) surveyed reported “outsourcing some type of school function involving student information” by transferring student data to third parties (see

Exhibit K, page 17). However, the study concluded that there are “substantial deficiencies in the privacy protections afforded to student data when public schools outsource functions to the cloud” (see Exhibit K, page 67).

91. Finally, NYSED has the authority to provide data to inBloom for its own evaluation needs, as described in the Service Agreement. The Service Agreement and Policy prohibit inBloom from redisclosing such data unless authorized by NYSED or a school district customer. NYSED, as Customer, gives permission to inBloom to make the data available for our purpose of developing dashboards for our own use to monitor and evaluate programs; if school districts want to use one of our three dashboards for their data purposes, and authorize such use through the data dashboard selection process, then inBloom will provide the district’s data to be displayed by the chosen dashboard to district users once the district provided proper authorization. As stated in section B of the Policy: **“School Districts and State Educational Agencies that use inBloom to store PII have control of the data and are the ultimate arbiters of who is able to have access to the PII”** (emphasis added). To illustrate the point, where a district designates a data dashboard, the district authorizes NYSED to tell inBloom to allow Dashboard A or Dashboard B or Dashboard C to display the district’s data back to that district’s parents, students, and educators for that district’s purposes. If a district did not select a dashboard, then NYSED would not allow inBloom to let Dashboard A or Dashboard B or Dashboard C display the district’s data to that district’s parents, students, and educators.
92. In the future, when RTTT ends, inBloom would be a potential service provider to school districts rather than to the State. In that scenario, a district interested in using inBloom’s

services would then directly authorize inBloom to securely store their data and to authorize Vendor X or Vendor Y access the district's data for legitimate educational purposes.

93. While it is true that, under the Service Agreement, inBloom is permitted to use subcontractors, it is equally true that inBloom can only do so for work that is included in the contract, and that if inBloom utilizes subcontractors, all of the protections, security and authorization provisions applicable to inBloom would apply to the subcontractor (see section 14.3 of the Service Agreement, Exhibit B). Under section 10.4 of the Service Agreement, the confidential information disclosed to inBloom remains the property of the Disclosing Party and inBloom is not granted or assigned any right to such data. Similarly, under section B(1) of the Policy, NYSED and school districts determine who has access to PII from their records. Section 10.5 of the Service Agreement provides for enforcement of inBloom's confidentiality obligations, providing that the Disclosing Party has the right to take all reasonable steps to protect its confidential information, including seeking injunctive and other relief. Moreover, sections 8.3(b) and 10.4(b) of the Service Agreement provide that upon request of the Customer (NYSED or the school district) when the Customer determines that the PII is no longer needed to obtain services under the Service Agreement or upon expiration or termination of the Agreement, inBloom must destroy the data it has received. Once its work under the Service Agreement is completed, inBloom must destroy the data it has received and it is not true, as petitioners suggest, that inBloom may retain the student data forever. What inBloom simply and unequivocally cannot do is use student data for its own purposes, including commercial purposes, or any other purposes that are outside the contract with NYSED (see Exhibit B, sections 10.2-10.6).

94. As an additional safeguard to ensure that NYSED meets its obligations with respect to data security and privacy and that our contractors meet theirs, NYSED has contracted with the New York State Technology Enterprise Corporation (NYSTEC), a not-for-profit organization based in Rome, New York (see Exhibit L). Pursuant to the contract, NYSTEC will conduct a rigorous independent review and validation of the data security plans of inBloom, the data dashboard vendors, and Public Consulting Group, the vendor that is coordinating the various systems necessary so the dashboards can plug in and work. NYSTEC's acceptance criteria address three deliverables under our contracts: a Site and System Security Plan; a Backup and Disaster Recovery Plan; and a Code Base Audit (a required independent security audit of the computer system used). NYSTEC will help ensure that our contract deliverables are being provided as agreed and that independent monitoring takes place to ensure that security requirements are being met.

inBloom v. Current System

95. Petitioners generally appear to allege that the inBloom system carries with it more risk to student PII than does the system currently in use in New York State. Right now, local school districts use a variety of data management systems, including student management systems, report card and transcript systems, special education systems, school lunch and transportation systems, emergency contact systems and email systems. They can operate these systems in one of two ways: (1) a district can install and maintain commercial off-the-shelf or district-developed software, in which case no other entity has access to its data; or (2) a district can engage a vendor to provide installation and support services or have their system hosted by a vendor or a BOCES, in which case the vendor or BOCES will

have continuous or periodic access to the district's data. Upon information and belief, the vast majority of districts use the second method, in which the vendor or BOCES has continuous or periodic access to the district's data.

96. There are security benefits to the system currently in use – for example, a breach to data contained in one district's system will not necessarily lead to a breach to data contained in another district's system. However, there are also drawbacks and risks. For instance, a school district's email system is most likely secure only if the email is internal to the system. In other words, as soon as plain text email (used in most existing email systems) is sent to an address external to the system, it is no longer secure: emails sent within a district from teacher to teacher would be secure, those sent between teacher and parent would not. Other security risks to the existing decentralized system include varying protocols for data security and privacy across school districts and across vendor systems used by those school districts (see Exhibit K, Fordham Center on Law and Policy's December 12, 2013 report entitled "Privacy and Cloud Computing in Public Schools"); school district systems with insufficient personnel capacity to maintain the systems and with equipment and software that do not contain the latest security updates; weak password policies and practices whereby users of the system use easy-to-guess passwords across multiple systems; confidential student data left in plain sight on unattended computer monitors or on print papers left in unattended work areas.
97. Contrary to petitioners' allegations, the inBloom system has the potential to be substantially more -- not less -- secure than those currently being used by school districts in that the inBloom system contains the latest security updates; adequate personnel resources to properly perform security functions; and standardized security protocols, including

physical security and the enforcement of strong password practices. While petitioners cite to media reports of “hackers” and “spam attacks” and other security breaches related to various cloud-based data storage services, they cite no such problems with inBloom’s services. Indeed, although inBloom does provide cloud-based data storage, the system uses encryption while the data is stored at inBloom and is certified to comply with the federal government’s stringent standards for cloud-based solutions (see www.fedramp.gov; Affidavit of Iwan Streichenberger, inBloom CEO, paragraphs 19-26). Upon information and belief, very few school districts that contract with third party vendors for either non-cloud or cloud-based data storage require that the system use encrypted data or have access to data encryption protections.

98. Petitioners correctly assert in paragraph 77 of their Amended Petition that NYSED has already transferred certain data to inBloom that included personally identifiable information. However, the data transferred to inBloom in or about December 2012 was not a Statewide student data set; rather, the data transferred for test purposes in or about December 2012 was a limited data set comprising student data, including names, only from school districts participating in RTTT. This limited data set was available to inBloom only (not the data dashboard vendors) and was purged when no longer needed for test purposes in or about Spring 2013 – months before the commencement of this proceeding. A Statewide student data set was transferred to inBloom in or about September 2013 that contained all of the available data in the data dictionary except student names, addresses and parent information. NYSED will not transfer student names to inBloom until on or after January 22, 2014. Therefore, inBloom does not have a data set including student names currently, nor have they had access to student names at any point during this

litigation. As petitioners allege in paragraph 83 of their Amended Petition, NYSED does not intend to transfer a Statewide data set, including student names, until January 2014. However, NYSED will not transfer student names to inBloom until on or after January 22, 2014.

99. Because inBloom does not currently have access to student names, inBloom is not able to link the data it has to specific students until the new Statewide data set is transferred in January. Pursuant to Education Law §305(22), NYSED has established a statewide system of assigning unique student identification numbers for all students in public and nonpublic schools within the state for purposes of student tracking and for state reporting purposes. The unique student identification numbers are randomly generated and kept secure throughout the data collection and storage process. While NYSED uses unique student identification numbers, they can only be linked to a specific student by persons or entities that have access to both the name and the unique student identifier of the student. Currently, only certain NYSED staff, school district staff and those with whom the school district has contracted for data services, and possibly the parent of the student have access to both the student's name and unique student identifier. Therefore, until student names are released to inBloom, together with parent contact information such as addresses, which is not scheduled to occur until on or after January 22, 2014, inBloom cannot use the unique student identifier to identify students.
100. In addition, the Data Portal, in coordination with inBloom's services, can also support more security features than are currently available through current technology used by most school districts, such as a single sign-on which compels use of a secure password. By doing this, we are providing secure identity management for teachers, students, and parents

who can now have single sign-on accounts. Using the current system, if a school district wants to provide parents and teachers with additional tools, those users would typically have to go through identity verification systems with the district's student management system vendors. Because of this, it is more difficult for school districts to offer more tools and options that are independent of this student management system vendor. With the Data Portal, in coordination with inBloom's services, parents can have a single secure sign-on and will be able to access all the tools that the district wants to provide to them.

101. In paragraph 82 of their Amended Petition, petitioners assert that NYSED has not filed a privacy impact statement or supplemental statement with the Committee on Open Government with respect to its systems of student records and data. NYSED has corrected that oversight by filing a privacy impact statement relating to the Data Portal and the P-16 longitudinal data system with the Committee on Open Government on December 16, 2013. A copy of the privacy impact statement is attached as Exhibit M.

Options for Districts

102. In paragraph 17 of their Amended Petition, petitioners also make claim that, after 2017, "local school districts, the teachers, parents and students will be captives of inBloom or some other private contractor." This is simply false.
103. The only Section C requirement for school districts that participate in RTTT is to select a dashboard from the three options and distribute secure PINs to teachers, students, and parents for secure account-creation purposes. NYSED has been consistently advising school districts that, if they have local tools that they favor and want to continue using (such as those provided by a RIC, for example), they should not stop using them. The only

thing NYSED has asked RTTT participating districts to do is try the state-provided data dashboard tools and then decide whether they prefer the old tool or the new tool and whether or not the state-system can provide efficient and secure advantages to school districts after RTTT ends (see Exhibit N, "EngageNY Portal: Data Security and Privacy Fact Sheet (updated November 3, 2013)," available at <http://usny.nysed.gov/rttt/data/enyp-parent-fact-sheet.pdf>). Our goal throughout this process has been to provide districts with choice and cost effective and secure long-term sustainability options. Districts are not being forced to use this system - if a district passes out its secure PINs to teachers and no one ever logs in, there will be no negative consequences.

104. In September 2014, the State's RTTT funding ends if we are unable to obtain an extension from USDE. At that point, NYSED's role as subsidizing and serving as a marketplace for offering increased options to school districts for dashboard services will end and inBloom must delete all the data that we have given them. inBloom can continue to market its services to school districts, and school districts may continue to use the services provided by inBloom. If school districts decide that they want to use inBloom services after the end of RTTT, they must contract and pay for those services. NYSED negotiated three years of data dashboard service, with five years of pricing at the State price, so that will result in a reduced cost for districts that wish to continue to use inBloom's services.

105. After the end of RTTT, it is also possible that our RICs could decide to do what inBloom is doing and to begin to provide that platform on their own. inBloom's service protocols are open and non-proprietary, which means that other parties, including RICs, could easily compete with inBloom to provide school districts with a better service at a better cost. The RICs could also provide services through a contract with inBloom.

106. Other companies are coming up and beginning to make these types of secure data integration services accessible, so the marketplace is growing as a result of this type of work, which is a benefit to school districts after the end of RTTT.

Consequences to the State of a Delay or Bar to the Data Portal Project

107. As described above, the State's RTTT grant is time-limited and requires that the State's obligations be met by September 30, 2014 (unless an extension is granted by USDE) (see paragraph 104 above; Affidavit of NYSED Chief Financial Officer Donald E. Juron, paragraph 18). NYSED's original RTTT commitment was to launch data dashboards in October 2012 (see Exhibit A, pages 131 and 137). Following the delay caused by NYSED's inability to contract with Wireless Generation (see paragraphs 32 and 34-35 above), NYSED extended the Data Portal launch date to March 2014. In order to meet the current March 2014 launch date, we need to send all data to inBloom approximately two months prior to launch (i.e., January 2014). Accordingly, NYSED's inability to send data in January 2014 due to the issuance of a preliminary injunction in this matter would preclude the currently-planned March 2014 launch, putting our timeline and federal RTTT funding at risk (see Affidavit of NYSED Chief Financial Officer Donald E. Juron, paragraphs 18 -- 22). In our monthly update conference calls regarding our Section C timelines and deliverables, USDE regularly asks about NYSED's Section C timelines and delays.

108. In addition, a launch delay beyond March 2014 would decrease the length of system availability for district use to possibly as little as five months if we are unable to obtain an extension from USDE.

109. If a preliminary injunction is issued, NYSED will have to immediately inform USDE that implementation will be delayed for an undetermined amount of time until this matter is resolved. Upon information and belief, a failure by NYSED to achieve the purposes and satisfy the requirements of Section C of the RTTT grant could result in a mandate to repay the grant funds to USDE (see Affidavit of NYSED Chief Financial Officer Donald E. Juron, paragraphs 21-22).

110. Moreover, for purposes of implementing the Data Portal project, NYSED has entered into five separate contracts: a contract with NYSTEC to conduct, among other things, a rigorous independent review and validation of the data security plans of inBloom (see paragraph 94 above); contracts with three data dashboard vendors; and a contract for content management and system services with Public Consulting Group (PCG) (see Affidavit of NYSED Chief Financial Officer Donald E. Juron, paragraphs 14 and 17). The issuance of a preliminary injunction in this matter would require a complete revision of the work plan for the contracts, and may even require terminating all or a portion of the contract scope (see Affidavit of NYSED Chief Financial Officer Donald E. Juron, paragraph 18). Upon information and belief, the delay may also cause NYSED to have to reimburse funds that will have been paid on existing contracts; to date, NYSED has paid almost \$15 million for the three data dashboard contracts and the PCG contract (see Affidavit of NYSED Chief Financial Officer Donald E. Juron, paragraph 17).

Sworn to before me this
20th day of December, 2013

~~NOTARY PUBLIC~~
NOTARY PUBLIC


KENNETH WAGNER

ALISON B. BIANCHI
NOTARY PUBLIC-STATE OF NEW YORK
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Qualified in Schenectady County
My Commission Expires March 10, 2016 