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8 CALIFORNIA

9  
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
11 COUNTY OF SAN FRANCISCO  
12

13 **THE PEOPLE OF THE STATE OF**  
14 **CALIFORNIA,**

15  
16 Plaintiff,

17 **v.**

18 **PRESENCELEARNING, INC.,**

19 Defendant.  
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Case No.

**STIPULATION FOR ENTRY OF FINAL  
JUDGMENT AND PERMANENT  
INJUNCTION**

1 Plaintiff, the People of the State of California, by and through its attorney, Xavier Becerra,  
2 Attorney General of the State of California (the Attorney General), and by Deputy Attorney  
3 General James F. Zahradka, and Defendant PresenceLearning, Inc. (PresenceLearning), appearing  
4 through its attorneys Latham & Watkins LLP, by Matthew Rawlinson, stipulate as follows:

5 1. This Court has jurisdiction of the subject matter hereof and the parties to this  
6 Stipulation for Entry of Final Judgment and Permanent Injunction (Stipulation).

7 2. The Proposed Final Judgment (Judgment), a true and correct copy of which is  
8 attached hereto as Exhibit 1, may be entered by any judge of the Superior Court.

9 3. The Attorney General may submit the Judgment to any judge of the Superior Court  
10 for approval and signature, based on this stipulation, during the Court's ex parte calendar or on  
11 any other ex parte basis, without notice to or any appearance by PresenceLearning, which notice  
12 and right to appear PresenceLearning hereby waives.

13 4. The parties hereby waive their right to move for a new trial or otherwise seek to  
14 set aside the Judgment through any collateral attack, and further waive their right to appeal from  
15 the Judgment, except the parties agree that this Court shall retain jurisdiction for the purposes  
16 specified in the Judgment.

17 5. The parties jointly represent that they have worked cooperatively to come to an  
18 agreement as set forth in the Judgment.

19 6. The parties have stipulated and consented to the entry of the Judgment without the  
20 taking of proof and without trial or adjudication of any fact or law herein, without the Judgment  
21 constituting evidence of or an admission by PresenceLearning regarding any issue of law or fact  
22 alleged in the complaint on file herein, and without PresenceLearning admitting any liability  
23 regarding allegations of violations that occurred prior to the entry of the Judgment.

24 7. PresenceLearning will accept service of any Notice of Entry of Judgment entered  
25 in this action by delivery of such notice to its counsel of record, and agrees that service of the  
26 Notice of Entry of Judgment will be deemed personal service upon it for all purposes.

27 8. The individuals signing below represent that they have been authorized by the  
28 parties they represent to sign this Stipulation.

1           9.       This Stipulation may be executed in counterparts, and the parties agree that a  
2 facsimile signature shall be deemed to be, and shall have the full force and effect as, an original  
3 signature.

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5                               [SIGNATURES ON FOLLOWING PAGE]  
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1 **PLAINTIFF THE PEOPLE OF THE STATE**  
2 **OF CALIFORNIA**

3 XAVIER BECERRA  
4 Attorney General of California

5 DATED: August 18, 2020

6 James F. Zahradka II  
7 James F. Zahradka II  
8 Deputy Attorney General  
9 *Attorneys for Plaintiff*

10 **DEFENDANT PRESENCELEARNING, INC.**

11 PRESENCELEARNING, INC.

12 DATED: August 14, 2020

13 Kate Eberle Walker  
14 Kate Eberle Walker  
15 Chief Executive Officer

16 Approved as to Form:

17 DATED: August 14, 2020

18 Matthew Rawlinson  
19 Matthew Rawlinson  
20 Latham & Watkins LLP  
21 *Attorneys for Defendant*

1 XAVIER BECERRA  
Attorney General of California  
2 MICHAEL L. NEWMAN  
Senior Assistant Attorney General  
3 SARAH E. BELTON  
Supervising Deputy Attorney General  
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Attorneys for THE PEOPLE OF THE STATE OF  
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14 **THE PEOPLE OF THE STATE OF**  
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18 **PRESENCELEARNING, INC.,**

19 Defendant.  
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Case No.

**[PROPOSED] FINAL JUDGMENT**

1 Plaintiff, the People of the State of California (“People” or “Plaintiff”), by and through its  
2 attorneys and Xavier Becerra, Attorney General of the State of California (the “Attorney  
3 General”), and Defendant PresenceLearning, Inc. (“PresenceLearning”), appearing through its  
4 attorneys, having stipulated to the entry of this judgment (“Judgment”) by the Court without the  
5 taking of proof and without trial or adjudication of any fact of law, without this Judgment  
6 constituting evidence of or admission by PresenceLearning regarding any issue of law or fact  
7 alleged in the People’s Complaint for Civil Penalties and Injunctive Relief (“Complaint”) on file  
8 or any of the allegations or conclusions set forth herein, and without PresenceLearning admitting  
9 any liability, and subject to the terms herein, with all parties having waived their right to appeal,  
10 and the Court having considered the matter and good cause appearing,

11 **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:**

12 **I. JURISDICTION AND VENUE**

13 This Court has jurisdiction over the allegations and subject matter of the People’s  
14 Complaint filed in this action, and the parties to this action; venue is proper in this County; and  
15 this Court has jurisdiction to enter this Judgment.

16 **II. INJUNCTION**

17 Applying only to PresenceLearning’s activities in the State of California,  
18 PresenceLearning is enjoined from engaging in any violations of law, including the causes of  
19 action set forth in the People’s Complaint, and shall engage in the following affirmative  
20 corrective actions:

21 **A. Expert Review**

- 22 1. PresenceLearning will retain an expert (the “Settlement Expert”) knowledgeable  
23 about: (a) the federal Individuals with Disabilities Education Act (“IDEA”) and  
24 California state law requirements pertaining to special education; (b) tele-health in the  
25 context of speech/language and occupational therapy for children and youth; and (c)  
26 California state laws and regulations, as well as ethics codes, regarding standards of  
27 practice for tele-health. The cost of the Settlement Expert and Selection Experts (as  
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hereinafter defined) shall be paid by PresenceLearning, and shall not exceed \$100,000 (the “Maximum Expert Fee Amount”), unless the Parties agree in writing to increase the Maximum Expert Fee Amount.

2. The Office of the Attorney General and PresenceLearning (“the Parties”) will meet and confer in good faith for a period not to exceed 14 days from the Effective Date (as defined in Section V), or earlier if practicable, to select a mutually-acceptable Settlement Expert (the “Initial Selection Process”).

3. In the event the Parties cannot agree on a mutually acceptable Settlement Expert through the Initial Selection Process, each Party will select one expert and those experts (the “Selection Experts”) will meet and shall have 30 days from the date of their selection to select a third expert, who will (subject to that expert’s agreement) be the Settlement Expert (the “Secondary Selection Process”). PresenceLearning shall reasonably compensate each Party’s Selection Expert for their work as part of the Secondary Selection Process. For avoidance of doubt, the aggregate amount paid to the Settlement Expert and Selection Experts shall not exceed the Maximum Expert Fee Amount. Each Party may give their chosen Selection Expert whatever information that Party believes will be helpful in guiding the selection process. Once the Selection Experts choose a Settlement Expert, both Parties are bound by that choice and must work with the chosen Settlement Expert, provided that such Settlement Expert’s and Selection Experts’ fees do not exceed the Maximum Expert Fee Amount. If the Selection Experts are unable to select a third expert, or if the terms of such expert’s engagement are unreasonable, the Parties shall repeat the Secondary Selection Process described in this paragraph one additional time, with each side choosing a new Selection Expert who will work together to choose a Settlement Expert. If the Parties are unable to select a Settlement Expert after two attempts at the Secondary Selection Process, the Office of the Attorney General shall provide

1 PresenceLearning with a list of three proposed experts from which PresenceLearning  
2 will select the Settlement Expert.

- 3 4. The Settlement Expert shall be given reasonable access throughout the Term of the  
4 Judgment—including the Expert Monitoring Term, as defined herein—to any and all  
5 information within PresenceLearning’s possession or control, and PresenceLearning  
6 will take reasonable steps to request access for the Settlement Expert to any and all  
7 information within the possession of therapists or other individuals under contract with  
8 PresenceLearning, to the extent such information is directly related to services  
9 provided by the therapists for PresenceLearning in California, and reasonably  
10 necessary to assist in conducting his or her review of PresenceLearning’s services in  
11 California, and the development of a report on, and recommended changes to,  
12 PresenceLearning’s policies, procedures, and practices in California.

13 PresenceLearning shall not be responsible for the refusal by, or failure of, any third  
14 parties to provide information requested by the Settlement Expert that is not within  
15 PresenceLearning’s possession or control. The Settlement Expert shall have access to  
16 relevant PresenceLearning personnel and documents in PresenceLearning’s possession  
17 or control relating to its services in California, including at least the following:

- 18 a. Access to PresenceLearning’s operations as they relate to students in California,  
19 including the ability to observe recorded therapy sessions and live access to  
20 trainings of staff members employed by, or others under contract with,  
21 PresenceLearning;
- 22 b. The ability to interview staff employed by PresenceLearning in California,  
23 including, but not limited to, supervisors and other support staff including  
24 substitute and/or temporary staff for any of these positions;
- 25 c. The ability to interview California-licensed therapists or other individuals under  
26 contract with PresenceLearning as third-party contractors for California schools  
27 who are directly involved in providing therapy services to students in California.  
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1 PresenceLearning will take reasonable steps to make California-licensed therapists  
2 or other individuals under contract with PresenceLearning available for interviews  
3 by the Settlement Expert, including by instructing such therapists or other third-  
4 party contractors to participate in interviews with the Settlement Expert and paying  
5 reasonable fees within the Maximum Expert Fee Amount to the therapists or other  
6 third-party contractors for the time they are being interviewed by the Settlement  
7 Expert;

- 8 d. To the extent that they exist, and subject to confidentiality requirements, access to  
9 all relevant PresenceLearning records relating to services provided to California  
10 students and schools, including, but not limited to, records relating to or  
11 comprising policies and procedures, employee performance assessments and  
12 reviews, employee professional development, and any grievances or other  
13 complaints received by PresenceLearning;
- 14 e. Following the conclusion of the initial review, PresenceLearning will discuss in  
15 good faith with the Settlement Expert and the Office of the Attorney General the  
16 scope and terms of any follow up communications with third parties—including  
17 with client schools, teachers, or parents and students—that the Expert deems in  
18 good faith are necessary to complete the Expert’s review.

- 19 5. PresenceLearning agrees that the Settlement Expert is a “consultant” under the Family  
20 Education Rights and Privacy Act (“FERPA”) regulations, 34 C.F.R. §  
21 99.31(a)(1)(i)(B), and thus may access personally identifiable information from the  
22 education records of students in PresenceLearning’s possession or control without  
23 consent. The person selected to serve as the Settlement Expert must enter into an  
24 agreement with PresenceLearning allowing the Settlement Expert to have such access  
25 under FERPA, 20 U.S.C. § 1232g, and California Education Code, § 49073 et seq.,  
26 and sign an agreement acknowledging that he or she will comply with relevant privacy  
27 and confidentiality laws.  
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- 1           6. In the event the Settlement Expert becomes unavailable for any reason, the Parties will  
2           meet and confer in good faith to select a mutually acceptable replacement expert. If  
3           the Parties are unable to select a replacement expert, the Parties shall repeat the  
4           process described in Section 3 above. The new Settlement Expert shall be paid only  
5           through funds remaining from the Maximum Expert Fee Amount defined in Section 1  
6           above.
- 7           7. The Settlement Expert will conduct a review of PresenceLearning’s policies,  
8           procedures, and practices in the following areas:
- 9           a. Compliance with California state laws and regulations regarding standards of  
10           practice for tele-health by PresenceLearning’s staff and California-licensed  
11           therapists under contract with PresenceLearning as third-party contractors for  
12           California schools; and
- 13           b. Compliance with relevant ethics codes—including, but not limited to, those  
14           promulgated by the American Speech-Language-Hearing Association and  
15           American Occupational Therapy Association—regarding standards of practice for  
16           tele-health by PresenceLearning’s staff and California-licensed therapists under  
17           contract with PresenceLearning as third-party contractors for California schools.
- 18           8. Based on his or her review, the Settlement Expert shall develop a report (the “Expert  
19           Report”), which shall include all proposed revisions to policies, procedures, and  
20           practices relating to services provided by PresenceLearning in California that the  
21           Settlement Expert recommends. The Expert Report will be completed and provided,  
22           along with a summary listing all underlying material relied upon by the Settlement  
23           Expert, to both Parties within 90 days of the commencement of the Settlement  
24           Expert’s work as described herein.
- 25           a. The Expert Report will include a recommended timeline and process for  
26           implementation and training of PresenceLearning’s California-based staff  
27           members and California-licensed therapists or other individuals under contract  
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1 with PresenceLearning as third-party contractors for California schools during the  
2 Expert Monitoring Term, as defined herein. The Expert Report's  
3 recommendations shall apply to such independent licensed therapists who work for  
4 PresenceLearning as independent contractors to the extent those recommendations  
5 are consistent with industry best practices, ethics codes, and California laws and  
6 regulations related to providing therapy services, including any best practices,  
7 laws, and regulations that grant independent licensed therapists the right to  
8 exercise individual professional judgment when providing therapy services.

- 9 b. Either Party may dispute a recommendation contained in the Expert Report on the  
10 basis that:
- 11 1. It is not required by and/or does not comply with federal and/or state law; or
  - 12 2. It, by itself, or in connection with other recommendations, would impose an  
13 unreasonable financial or operational burden on PresenceLearning; or
  - 14 3. It, by itself, or in connection with other recommendations, is deemed to have a  
15 negative or harmful effect on students' therapy sessions.
- 16 c. Such dispute shall be made in writing and delivered to the other Party within 45  
17 days of the issuance of the Expert Report. Unless otherwise agreed to by the  
18 Parties, the Parties agree to meet and confer in good faith, within 30 days, to  
19 discuss and try to resolve such dispute. Failing resolution of a dispute, any Party  
20 may, within 30 days of the unsuccessful meet and confer, submit the issue to the  
21 Court for decision. Any court order issuing as a result of such a submission may be  
22 subject to appeal in accordance with applicable law.
- 23 d. PresenceLearning will adopt undisputed or court-ordered recommendations from  
24 the Expert Report and adopt and disseminate the revised policies within a  
25 reasonable amount of time from the issuance of the Expert Report or resolution of  
26 all disputes under Section II.A.8.b, whichever is later. Once PresenceLearning has  
27 adopted the undisputed or court-ordered recommendations, a one-year period in  
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1 which the Settlement Expert shall monitor and assist in the implementation of his  
2 or her recommended revisions to PresenceLearning's policies, procedures, and  
3 practices (the "Expert Monitoring Term") will commence.

- 4 e. Time spent selecting the Settlement Expert, formulating the Expert Report,  
5 challenging any provision in the Expert Report, and adopting and disseminating  
6 the Expert Report shall not be counted towards the Expert Monitoring Term.
- 7 f. PresenceLearning will cooperate with the Settlement Expert throughout the Expert  
8 Monitoring Term regarding implementation of the Expert Report, including, but  
9 not limited to, by participating in the actions set forth above and by providing all  
10 information and access detailed above.

- 11 9. Training of California-licensed therapists under contract with PresenceLearning as  
12 third-party contractors for California schools and PresenceLearning staff or any other  
13 individuals under contract that serve or interact with students in California on any and  
14 all changes in policies, procedures, and/or practices shall be developed and conducted  
15 in consultation with the Settlement Expert during the Term of the Judgment. Such  
16 training shall be provided within 90 days after the adoption of such revised policies,  
17 procedures and/or practices. Any training of independently licensed therapists must  
18 be consistent with industry best practices and California laws and regulations  
19 regarding the provision of therapy services, including any best practices, laws, and  
20 regulations that grant independent licensed therapists the right to exercise individual  
21 professional judgment when providing therapy services.

22 **B. Advertising and Endorsements**

- 23 1. PresenceLearning will not make any representations unless they can be substantiated  
24 under the relevant Federal Trade Commission (FTC) standards.
- 25 2. For the purposes of this Agreement, the relevant FTC standards are defined as the  
26 following:
- 27 a. FTC Policy Statement Regarding Advertising Substantiation (March 11, 1983),  
28

1 [https://www.ftc.gov/public-statements/1983/03/ftc-policy-statement-regarding-](https://www.ftc.gov/public-statements/1983/03/ftc-policy-statement-regarding-advertising-substantiation)  
2 [advertising-substantiation.](https://www.ftc.gov/public-statements/1983/03/ftc-policy-statement-regarding-advertising-substantiation)

3 b. 16 C.F.R. Part 255 - Guides Concerning Use of Endorsements and Testimonials in  
4 Advertising, including specifically:

- 5 1. 16 C.F.R. § 255.2 (Consumer Endorsements Standard);  
6 2. 16 C.F.R. § 255.3 (Expert Endorsements Standard);  
7 3. 16 C.F.R. § 255.4 (Organizational Endorsements Standard).

8 c. PresenceLearning shall not make any representations regarding the benefits,  
9 efficacy or appropriateness of online therapy unless such representations are true,  
10 non-misleading, and, at the time such representation is made, PresenceLearning  
11 possesses and relies upon competent and reliable scientific evidence that is  
12 sufficient in quality and quantity based on standards generally accepted in the  
13 relevant field, when considered in light of the entire body of relevant and reliable  
14 scientific evidence, to substantiate that the representation is true and non-  
15 misleading. “Competent and reliable scientific evidence” means tests, analyses,  
16 research, or studies that (1) have been conducted and evaluated in an objective  
17 manner by persons qualified by training and experience to conduct such tests,  
18 analyses, research, or studies; and (2) are generally accepted in the profession to  
19 yield accurate and reliable results. If PresenceLearning and/or its agents conduct  
20 such tests, analyses, research, or studies, PresenceLearning must make all  
21 underlying or supporting data and documents generally accepted by experts in the  
22 relevant field as relevant to an assessment of such tests, analyses, research, or  
23 studies available for inspection and production to the Office of the Attorney  
24 General.

25 3. Specifically, PresenceLearning will not make representations:

- 26 a. Relating to the following topics unless they comply with the relevant FTC  
27 standards:  
28

1. The efficacy of online therapy versus traditional in-person therapy;
  2. That online therapy is appropriate for most, or all, students with special needs;
  3. That PresenceLearning’s services help students make progress faster, or meet their IEP goals faster, than students in traditional therapy;
  - b. That leading national medical associations and organizations or federal agencies have endorsed PresenceLearning’s services, unless such endorsements are actually obtained and these representations comply with the relevant FTC standards;
  - c. Regarding parental satisfaction with its services without disclosing the number of parents surveyed and the criteria used for choosing participants and complying with the relevant FTC standards;
  - d. That PresenceLearning’s therapists have “specialties in areas” including autism, writing, and phonology (or other areas) unless the therapists have “advanced knowledge, skills, and experience” in these areas, consistent with the American Speech-Language-Hearing Association (ASHA)’s requirements for therapists to be considered “specialists” in the speech/language field. See ASHA, “Clinical Specialty Certification” <https://www.asha.org/Certification/specialty/Clinical-Specialty-Certification/>.
4. PresenceLearning will clearly define what it considers to be a “successful” session of live, online therapy in any advertisements referencing the number of successful therapy sessions delivered by PresenceLearning and will calculate the number of therapy sessions delivered based solely on the number of live, online therapy sessions it has conducted.
  5. PresenceLearning may only use or quote statements made by parents, schools, school districts, providers, or other third parties regarding their experiences with PresenceLearning, including statements regarding satisfaction with PresenceLearning’s services, in its representations to the extent such representations comply with the relevant FTC standards.

- 1           6. To the extent the Office of the Attorney General believes that any promotional  
2           statement(s) made by PresenceLearning after the Effective Date do not comply with  
3           the relevant FTC standards, or the Office of the Attorney General believes that such  
4           promotional statement(s) are otherwise false or misleading, the Office of the Attorney  
5           General shall provide written notice to PresenceLearning identifying the specific  
6           promotional statement(s) it believes are objectionable and providing a brief  
7           description of the reason it believes the statements are objectionable (the “Notice of  
8           Noncompliance”). PresenceLearning shall have 14 business days after receiving a  
9           Notice of Noncompliance (the “Cure Period”) to remove or edit any promotional  
10          statement(s) identified in the Notice of Noncompliance. If PresenceLearning  
11          withdraws the statement(s) identified in the Notice of Noncompliance from its  
12          promotional materials, the Office of the Attorney General shall take no further action  
13          against PresenceLearning regarding those statements. If Presence Learning does not  
14          remove the statements during the Cure Period, the Office of the Attorney General shall  
15          be permitted to take any actions available to the Office of the Attorney General under  
16          the terms of the Settlement Agreement or under any other authority available to the  
17          Office of the Attorney General.
- 18          7. For avoidance of doubt, this Judgment shall not shift any burdens of proof between the  
19          parties as they currently exist under applicable law.

### 20       **III.    MONETARY SETTLEMENT REQUIREMENTS**

21           PresenceLearning shall pay, within 30 business days of the Effective Date of this  
22       Judgment (as defined in Section V) a total sum of \$600,000, allocated as \$250,000 to defray the  
23       costs of this action to the Attorney General’s Office and \$350,000 pursuant to Business and  
24       Professions Code sections 17206 and 17536. This amount is in addition to the Maximum Expert  
25       Fee Amount. The payment shall be effected by wire transfer to the California Attorney General’s  
26       Office pursuant to instructions provided by the Office of the Attorney General.

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1     **IV.     POTENTIAL DISRUPTIONS**

2             In light of recent issues related to the Novel Coronavirus Disease 2019 (COVID-19),  
3 including the fact that state and local governments have issued orders restricting the movement of  
4 individuals and requiring that individuals comply with certain social distancing guidelines, the  
5 Parties agree that, notwithstanding any other provisions to the contrary contained in this  
6 Judgment:

- 7             1. To the extent that, during the Term of the Judgment, any statewide or local orders or  
8 other legally enforceable restrictions are in effect, or come into effect, which restrict  
9 the movement of individuals anywhere in the state of California (including shelter-in-  
10 place orders), and impact a Party's abilities to fulfill the terms of the Judgment, such  
11 Party may request a reasonable extension of any deadline contained in the Judgment.  
12 Acquiescence to such a request shall not be unreasonably withheld. Such requests and  
13 responses thereto shall be in writing.
- 14             2. To the extent PresenceLearning is required pursuant to the terms of the Judgment to  
15 provide the CDOJ or the Settlement Expert with documents, information, records, or  
16 any other materials that are not in electronic form, PresenceLearning shall promptly  
17 inform the CDOJ and/or the Settlement Expert of any delay in providing those  
18 materials related to COVID-19. CDOJ shall take into account the fact that such delay  
19 is caused by COVID-19 when assessing whether to take any enforcement action.

20     **V.     CONTINUING JURISDICTION AND COMPLIANCE**

- 21             1. The Parties agree that the Court has continuing jurisdiction to interpret and enforce the  
22 provisions of this Judgment and to resolve any disputes that may arise under this  
23 Judgment.
- 24             2. This Judgment shall be submitted to the Court for entry by noticed motion or as  
25 otherwise may be required or permitted by law. The Judgment shall not be effective  
26 until it is entered by the Court. The Effective Date of this Judgment is the date that it  
27 is entered by the Court.



