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

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14 **THE PEOPLE OF THE STATE OF**
CALIFORNIA,
15
16 Plaintiff,
17 **v.**
18 **PRESENCELEARNING, INC.,**
19 Defendant.
20

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.

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

[SIGNATURES ON FOLLOWING PAGE]

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PLAINTIFF THE PEOPLE OF THE STATE OF CALIFORNIA

XAVIER BECERRA
Attorney General of California

DATED: August 18, 2020

James F. Zahradka II
James F. Zahradka II
Deputy Attorney General
Attorneys for Plaintiff

DEFENDANT PRESENCELEARNING, INC.

PRESENCELEARNING, INC.

DATED: August 14, 2020

Kate Eberle Walker
Kate Eberle Walker
Chief Executive Officer

Approved as to Form:

DATED: August 14, 2020

Matthew Rawlinson
Matthew Rawlinson
Latham & Watkins LLP
Attorneys for Defendant

1 XAVIER BECERRA
Attorney General of California
2 MICHAEL L. NEWMAN
Senior Assistant Attorney General
3 SARAH E. BELTON
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14 **THE PEOPLE OF THE STATE OF**
CALIFORNIA,

15
16 Plaintiff,

17 v.

18 **PRESENCELEARNING, INC.,**

19 Defendant.

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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1 hereinafter defined) shall be paid by PresenceLearning, and shall not exceed \$100,000
2 (the “Maximum Expert Fee Amount”), unless the Parties agree in writing to increase
3 the Maximum Expert Fee Amount.

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

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

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

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3. The Office of the Attorney General and PresenceLearning may jointly stipulate to make changes, modifications, and amendments to the Judgment for what the Parties deem to be material revisions, which shall be effective after a joint motion is filed by the Parties and is granted by the Court.
4. Any time limits for performance imposed by the Judgment may be extended by the mutual agreement, in writing, of the Office of the Attorney General and PresenceLearning, and/or by order of the Court for good cause shown.
5. Nothing in this Judgment alters or otherwise expands or contracts the requirements of federal or state law.
6. Nothing in this Judgment limits the powers vested in the Attorney General by the California Constitution and state statutory law, including Government Code section 11180 et seq., to oversee or enforce any California laws or regulations, which the Office of the Attorney General may use to monitor PresenceLearning’s compliance with the terms of the Judgment.
7. The injunctive provisions of this Judgment shall apply to PresenceLearning’s activities in the State of California as well as to its successors, assigns, directors, officers, employees, agents, independent contractors, partners, associates, and representatives of each of them with respect to their activities in the State of California.

IT IS SO ORDERED AND ADJUDGED.

Dated: August____, 2020

JUDGE OF THE SUPERIOR COURT