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BUSINESS ASSOCIATE AGREEMENT

This **BUSINESS ASSOCIATE AGREEMENT** ("Agreement") is a legal agreement by and between Covered Entity, as defined here, and PRO-ED Inc. ("Business Associate"), entered into on the date that Covered Entity entered the License Agreement ("Effective Date") this Agreement being incorporated by reference into the License Agreement, for the purposes of complying with the privacy and security regulations issued by the United States Department of Health and Human Services ("HHS") under the Health Insurance Portability and Accountability Act of 1996 and regulations promulgated thereunder at 45 CFR Parts 160 and 164 ("HIPAA"), as amended by The Health Information Technology or Economic and Clinical Health Act ("HITECH") and applicable state law. Covered Entity and Business Associate are collectively referred to as the "Parties."

RECITALS

WHEREAS, the Parties have entered into or are entering into agreements or other documented arrangements (the "License Agreement) pursuant to which Business Associate may provide products and/or services for Covered Entity that require Business Associate to access, create, use, maintain or transmit health information that is protected by state and/or federal law; and

WHEREAS, Covered Entity and Business Associate intend to protect the privacy and provide for the security of Protected Health Information ("PHI") disclosed to Business Associate in compliance with HIPAA, the "HITECH Act", and regulations promulgated thereunder, as may be amended from time to time (collectively, the "Privacy and Security Regulations"), and more stringent Texas law; and

WHEREAS, in accordance with the Privacy and Security Regulations, Covered Entity and Business Associate are required to enter into a legal agreement containing specific requirements as set forth in the Privacy and Security Regulations; and

NOW, THEREFORE, in consideration of the foregoing, and for other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, the Parties agree as follows:

1. DEFINITIONS.

Capitalized terms used but not otherwise defined in this Agreement shall have the meaning given to those terms in the Privacy and Security Regulations. The following terms, as used in this Agreement, are defined as follows:

1.1. “*Breach*” means the unauthorized acquisition, access, use, or disclosure of PHI not permitted by the Privacy and Security Regulations and which compromises the security or privacy of the PHI.

1.2. “*Breach of System Security*” means an unauthorized acquisition of computerized data that compromises the security, confidentiality, or integrity of sensitive personal information maintained by a person, including data that is encrypted if the person accessing the data has the key required to decrypt the data and includes any other definition promulgated by Texas law.

1.3. “*Covered Entity*” means such entity or person as defined as a “covered entity” by HIPAA, as may be amended from time to time, and furthermore in reference to this Agreement, shall mean the entity that has entered into a License Agreement with the Business Associate to the extent that such entity or person has provided the Business Associate with PHI.

1.4. “*Designated Record Set*” means a group of records maintained by or for a covered entity that is: (i) the medical records and billing records about individuals maintained by or for a covered health care provider; (ii) the enrollment, payment, claims adjudication, and case or medical management record systems maintained by or for a health plan; or (iii) Used (defined below), in whole or in part, by or for the covered entity to make decisions about individuals. For purposes of this definition, the term “record” means any item, collection, or grouping of information that includes PHI and is maintained, collected, used, or disseminated by or for a covered entity (as defined in the Privacy and Security Regulations).

1.4. “*Disclose*” and “*Disclosure*” mean, with respect to PHI, the release, transfer, provision of access to, or divulging in any other manner of PHI outside Business Associate’s internal operations.

1.5. “*Electronic PHI*” means PHI that is transmitted by Electronic Media or is maintained in Electronic Media. Examples of Electronic PHI include PHI that is electronically transmitted and maintained on devices such as cell phones, PDAs, text pagers, and USB static discs.

1.6. “*Individual*” shall have the meaning given to such term under the Privacy Rule, including but not limited to 45 C.F.R. Sections 164.501 and 160.103 and shall include a person who qualifies as a personal representative in accordance with 45 C.F.R. Section 164.502(g).

1.7. “*HIPAA*” shall have the meaning set forth in the introduction of this Agreement.

1.8. “*HITECH*” shall have the meaning set forth in the introduction of this Agreement.

1.10. “*Information*” shall mean any “health information” as defined in 45 C.F.R. Section 160.103.

1.11 “*License Agreement*” means the license agreement for the use of products or services provided by the Business Associate entered into by Covered Entity and to which this Agreement is incorporated by reference.

1.12. “*PHI*” or “*Protected Health Information*” means protected health information, as defined in the Privacy and Security Regulations, and shall include but not be limited to any information in any form or medium, including demographic information collected from an individual, that (i) identifies the individual (or for which there is a reasonable basis for believing that the information can be used to identify the individual); (ii) relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and (iii) is received by Business Associate from or on behalf of Covered Entity, is created, maintained or transmitted by Business Associate, or is made accessible to Business Associate by Covered Entity. PHI includes, without limitation, Electronic PHI.

1.13. “*Privacy and Security Regulations*” shall have the meaning set forth in the recitals of this Agreement.

1.14. “*Secretary*” means the Secretary of the U. S. Department of Health and Human Services or his or her designee.

1.15. “*Services*” means those activities, functions, or services that Business Associate provides for or on behalf of Covered Entity.

1.16. “*Subcontractor*” means a person to whom a business associate (as defined in the Privacy and Security Regulations) delegates a function, activity, or service, other than in the capacity of a member of the workforce of such business associate.

1.17. “*Unsecured PHI*” means PHI that is not rendered unusable, unreadable, or indecipherable to unauthorized persons through use of a technology or methodology specified by the Secretary in guidance issued under Section 13402(h)(2) the HITECH Act.

1.18. “*Use*” and “*Uses*” mean, with respect to PHI, the sharing, employment, application, utilization, examination, or analysis of such PHI within the internal operations of the entity that maintains such PHI.

1.19. “*Workforce*” means employees, volunteers, trainees, and other persons whose conduct, in the performance of work for Covered Entity or a business associate, is under the direct control of Covered Entity or business associate, whether or not they are paid by Covered Entity or business associate.

2. ASSURANCES BY BUSINESS ASSOCIATE REGARDING PHI.

Business Associate warrants that it shall comply with relevant portions of the Privacy and Security Regulations as those regulations apply to business associates and business associate Subcontractors. More specifically, and insofar as Business Associate has access to, has been provided with, maintains, transmits, or will be creating PHI regarding Covered Entity's patients, Business Associate warrants and agrees as follows:

2.1. ***Permitted Uses and Disclosures of PHI.*** Business Associate shall Use and Disclose PHI in the minimum amount necessary to perform the Services for or on behalf of Covered Entity, provided that such Use or Disclosure would not violate the Privacy and Security Regulations if done by Covered Entity. Further, Business Associate:

2.1.1. shall Disclose PHI to Covered Entity upon request; or

2.1.2. may Use or Disclose PHI as required by law; or

2.1.3. may Use PHI as necessary for the proper management and administration of its business or to carry out its legal responsibilities; or

2.1.4. may Disclose PHI as necessary for the proper management and administration of its business or to carry out its legal responsibilities, provided that:

2.1.4.1. the Disclosure is required by law; or

2.1.4.2. Business Associate obtains reasonable assurance from the person to whom the PHI is Disclosed that the PHI will be held confidentially and Used or further Disclosed only as required by law or for the purpose for which it was Disclosed to the person, and the person agrees to notify Business Associate of any instances of which the person is aware in which the confidentiality of the PHI has been breached.

2.2 ***Ownership of PHI and Additional Use.*** PHI and any related information created for or received from Covered Entity is, and will remain, the property of Covered Entity. Business Associate agrees that it acquires no ownership rights to or title in any PHI provided, however the Covered Entity, grants Business Associate a royalty free, perpetual, non-exclusive, transferrable, sublicensable, worldwide license to use the PHI for purposes contemplated under the terms of the license agreement related to the product or services being offered by the Business Associate.

2.3. ***Prohibition on the Sale of PHI.*** Except as otherwise permitted by the Privacy and Security Regulations, Business Associate shall not directly or indirectly receive remuneration in exchange for any of Covered Entity's PHI unless Covered Entity or Business Associate first obtains a valid, signed authorization from the individual whose PHI is at issue and such authorization specifies whether the PHI can be further exchanged for remuneration by the entity receiving the PHI. In addition, Business Associate shall comply with the prohibition on the sale of PHI and limitations of remuneration in the Texas Medical Records Privacy Act, Chapter 181.153 of the Texas Health & Safety Code.

2.4. ***Adequate Safeguards for PHI.***

2.4.1. Business Associate shall implement and maintain appropriate safeguards, which comply with the Privacy and Security Regulations, to prevent the Use or Disclosure of PHI in any manner other than as permitted by this Agreement.

2.4.2. Business Associate shall implement administrative, physical, and technical safeguards set forth in the Privacy and Security Regulations that reasonably and appropriately protect the confidentiality, integrity, and availability of Electronic PHI that it creates, receives, maintains, or transmits on behalf of Covered Entity. Business Associate shall comply with 45 C.F.R. Sections 164.306, 164.308, 164.310, 164.312, 164.314, and 164.316 as if Business Associate (and Subcontractors) were a Covered Entity, and Business Associate agrees that it, its agents and Subcontractors through written contract shall comply with the applicable provisions of the Privacy Standards and with these provisions of the Security Standards and all additional security provisions of the Security Rule.

2.4.3. Business Associate shall maintain policies and procedures, conduct ongoing risk assessment and risk management of its security program, identify a security official, and train and discipline its work force in compliance with the relevant portions of the Privacy and Security Regulations. Business Associate agrees to make its policies and procedures, risk assessments, and training and education documents available to Covered Entity upon Covered Entity's request.

2.5. ***Responsibility for Delegated Actions.*** To the extent that Covered Entity delegates any of its obligations under Subpart E of 45 C.F.R. Part 164 to Business Associate, then Business Associate shall, in the performance of such obligation(s), comply with the requirements of such Subpart E that apply to Covered Entity.

2.6. ***Availability of Internal Practices, Books and Records to Government Agencies.*** Business Associate shall make its internal practices, policies and procedures, books, and records relating to the security, Use and Disclosure of PHI available to the Secretary for purposes of determining Covered Entity's compliance with the Privacy and Security Regulations. Business Associate shall immediately notify Covered Entity of any requests made by the Secretary and provide Covered Entity with copies of any documents produced in response to such request.

2.7. ***Access to PHI.***

2.7.1. Business Associate shall, at the request and direction of Covered Entity, make PHI maintained by Business Associate in a Designated Record Set available to Covered Entity, or, as directed by Covered Entity, to the individual identified as being entitled to access and copy such PHI, within five (5) business days of receipt of such a request from Covered Entity.

2.7.2. If Business Associate uses or maintains Electronic PHI, Business Associate must provide access to such PHI in an electronic format, if so requested by Covered Entity or the applicable individual, if the PHI is readily producible in such form or format; or if

not, in a readable copy form or such other form and format as agreed by the individual, Covered Entity, and Business Associate.

2.8. ***Amendment of PHI.*** Business Associate shall, within five (5) business days of a request from Covered Entity, make PHI maintained by Business Associate in a Designated Record Set available to Covered Entity for the purpose of amendment and, as directed by Covered Entity, shall incorporate such amendments into such PHI within the time and in such a manner as specified by Covered Entity.

2.9. ***Accounting of Disclosures.*** Within five (5) business days of Covered Entity's request, Business Associate shall make available to Covered Entity the information necessary for Covered Entity to provide an individual with an accounting of each Disclosure of PHI made by Business Associate or its employees, agents, representatives, or Subcontractors.

2.9.1. Business Associate shall implement a process that allows for an accounting to be collected and maintained for any Disclosure of PHI for which Covered Entity is required to maintain such information. Business Associate shall include in the accounting: (a) the date of the Disclosure; (b) the name, and address if known, of the entity or person who received the PHI; (c) a brief description of the PHI disclosed; and (d) a brief statement of the purpose of the Disclosure or a copy of the written request for the Disclosure. For each Disclosure that requires an accounting under this Section, Business Associate shall document the information specified in (a) through (d) above and shall securely retain this documentation for six (6) years from the date of the Disclosure.

2.9.2. For repetitive Disclosures of Covered Entity's PHI that Business Associate makes for a single purpose to the same person or entity, the Disclosure information that Business Associate must record is either the Disclosure information specified above for each accountable Disclosure, or (a) the Disclosure information specified above for the first of the repetitive accountable Disclosures; (b) the frequency, periodicity, or number of the repetitive accountable Disclosures; and (c) the date of the last of the repetitive accountable Disclosures.

2.8.3. If any individual directly requests that Business Associate, its agents or Subcontractors provide an accounting of Disclosures of PHI, Business Associate shall notify Covered Entity within five (5) business days of such request.

2.10. ***Reporting Breaches, Unauthorized Use or Disclosure of PHI and Security Incidents.***

2.10.1. Business Associate shall report to Covered Entity:

2.10.1.1. A Breach of PHI;

2.10.1.2 Each access, acquisition, Use, or Disclosure of PHI that is made by Business Associate, its employees, representatives, agents, or Subcontractors that is not specifically permitted by this Agreement; and

2.10.1.3. Any Security Incident of which it becomes aware. A "Security Incident" means the attempted or successful unauthorized access, acquisition, Use,

Disclosure, modification, or destruction of information, or interference with the system operation of an information system.

2.10.2. Business Associate's Notice to Covered Entity

2.10.2.1. Business Associate shall notify Covered Entity's Privacy and Security Officer of the events listed in Section 2.9.1 above by telephone call without unreasonable delay but in any event no later than three (3) business days after the date that (a) Business Associate knows of such Breach, Unauthorized Use or Disclosure, or Security Incident, or (b) by exercising reasonable diligence, Business Associate would have known of such Breach, Unauthorized Use or Disclosure, or Security Incident.

2.10.2.2. Business Associate shall provide a full written report to Covered Entity's Compliance Officer within five (5) business days of verbal notice. Business Associate shall include the following in the written report:

(a) Description of the nature of the Breach, including a description of what occurred, the date of any Breach and the date of the discovery thereof, and whether the PHI was actually acquired or reviewed;

(b) Identification of Covered Entity's PHI that was subject to the non-permitted Use or Disclosure or Breach, including name, demographic information, social security number, and other information involved, including types of identifiers and likelihood of re-identification;

(c) Identification of who made the non-permitted Use or Disclosure and who received the non-permitted Use or Disclosure;

(d) Description of what corrective action the Business Associate took or will take to prevent further non-permitted Uses or Disclosures, to mitigate harmful effects, and to protect against any further Breaches; and

(e) Identification of what steps the individuals who are the subject of a Breach should take to protect themselves.

2.10.2.3 Business Associate shall, and shall require its agents and Subcontractors to, comply with the notice requirements of the Texas Business and Commerce Code, Chapter 521, Section 521.053 in the event of a Breach of Security System.

2.10.3. Business Associate, its agents and Subcontractors, shall provide adequate training to its employees and Subcontractors to ensure compliance with this Agreement, the Privacy Rule, Security Rule, HITECH requirements, the final Omnibus Rule, and Texas law.

2.11. Disclosure to Third Parties.

2.11.1. Subject to any limitations in this Agreement and the Service Agreement, Business Associate may disclose PHI to Subcontractors as necessary to perform its

obligations under the Service Agreement and as permitted or required by applicable federal or Texas law.

2.11.2. Business Associate shall not [and shall provide that its directors, officers, employees, Subcontractors, and agents, do not] disclose PHI to any other person (other than members of their respective Workforce) unless disclosure is required by law or authorized by the person whose PHI is to be disclosed. Business Associate shall enter into a signed written agreement with its Subcontractor(s) (as applicable) that:

(a). Establishes the permitted and required uses and disclosures of PHI by the Subcontractor. The written agreement shall not authorize the Subcontractor to use or further disclose PHI in a manner that would violate the Privacy Rule, if done by Covered Entity.

(b). Binds the Subcontractor and downstream Subcontractors to the same provisions, restrictions, and conditions of this Agreement pertaining to PHI, and Electronic PHI that apply to Business Associate for the express benefit of Covered Entity. Business Associate, Subcontractor, and downstream Subcontractors shall not use or further disclose PHI other than as permitted or required by this Agreement or as required by law.

(c). Requires the Subcontractor and downstream Subcontractors to comply with the applicable requirements of HIPAA (including but not limited to the Security and Privacy Rule as well as Texas Privacy provisions) including training of Workforce members, and the contractual obligations set forth in this Agreement by entering into a written contract.

(d). Contains reasonable assurances from Subcontractor that PHI will be held confidential as provided in this Agreement, and only disclosed as required by law for the purposes for which it was disclosed to Subcontractor.

(e). Obligates Subcontractor to immediately notify Business Associate of any breaches (including breaches of unsecured PHI as required by 45 C.F.R. Section 164.410 and Breaches of Security Systems as provided in Paragraph 6 of this Agreement) of the confidentiality of the PHI and Security Incidents of which it becomes aware.

(f). Obligates Business Associate and Subcontractor to comply with the principle of “minimum necessary use and disclosure,” i.e., only the minimum PHI that is necessary to accomplish the intended purpose may be disclosed; provided further, Business Associate and Subcontractor shall comply with Section 13405(b) of the HITECH Act, and any regulations or guidance issued by HHS concerning such provision, regarding the minimum necessary standard and the use and disclosure (if applicable) of Limited Data Sets.

(g). Requires that Subcontractor enter into a written agreement with its downstream Subcontractors that requires downstream Subcontractors to agree to the same responsibilities, restrictions, and conditions that apply to the Subcontractor and Business Associate.

(h). Obligates Subcontractor to mitigate and cooperate in accordance with Paragraph 4 of this Agreement.

- (i). Requires Subcontractor to comply with the destruction of PHI requirements of HIPAA as set forth in Paragraph 9 of this Agreement.

3. NOTICES.

Any notice required under this Agreement to be given to a party shall be made to:

If to Covered Entity:

Email address provided by Covered Entity at the time of activation of the software product covered by the License Agreement to which this Business Associate Agreement is incorporated by reference.

If to Business Associate:

Robert Lum, Vice President

PRO-ED, Inc.

8700 Shoal Creek Blvd.

Austin, Texas 78757

Email: blum@proedinc.com

4. MITIGATION AND COOPERATION.

Business Associate and its Subcontractors, through written agreement, shall use commercial best efforts to mitigate, at Business Associate's or Subcontractor's (as applicable) sole cost and expense and discretion, any harmful effect that is known to it for the Breach or Use or Disclosure of PHI in violation of this Agreement.

Covered Entity shall be solely responsible, based upon the facts of the Breach (as disclosed to Covered Entity by Business Associate), to conduct a risk assessment to determine whether PHI has been compromised and notification to individuals is required. Business Associate and Subcontractor, as applicable, shall cooperate with Covered Entity in the notification of individuals as required and in the manner as set forth in the Privacy and Security Regulations. Neither Business Associate or Subcontractor shall provide any notification directly to individuals regarding a Breach of PHI without Covered Entity's prior written consent, unless otherwise required by the Privacy and Security Regulations or law. All cost of notification shall be the sole responsibility of Covered Entity.

5. REMEDIES IN EVENT OF BREACH OF PHI.

5.1. **Specific Performance and Injunctive Relief.** Each Party acknowledges and agrees that any failure to comply with this Agreement in any respect could cause irreparable harm to other Party, its patients/customers and employees for which there may be no adequate legal remedy. Each Party therefor agrees that, in the event of a Breach of PHI, the non-breaching Party shall be

entitled to specific performance or injunctive or other equitable relief to prevent the breaching Party from commencing or continuing any action in violation of this Agreement, and the breaching Party further agrees to waive any requirement for the securing or posting of any bond in connection therewith.

5.2. **Indemnification.** Each party shall indemnify, defend, and hold harmless the other party, its directors, officers, employees, and agents from and against any and all claims, actions, demands, liabilities, judgments, losses, damages, penalties, fines, costs, fees, and reasonable attorney's fees and expenses (collectively, the "Losses") that are attributable or allegedly attributable to the acts or omissions of the indemnifying party or indemnifying party's material breach of this Agreement.

6. **BREACH OF SYSTEM SECURITY.**

6.1. To the extent Business Associate owns or licenses computerized data that includes sensitive personal information, Business Associate shall disclose any Breach of System Security, after discovering or receiving notification of the Breach, Business Associate shall provide notice of the Breach to Covered Entity immediately, but in no event more than two (2) days after discovery. Business Associate shall be liable for unreasonable delays in reporting to Covered Entity.

6.2. In the event of a Breach of System Security, Business Associate shall, in consultation with Covered Entity and at Covered Entity's direction, assist Covered Entity in conducting a risk assessment of the Breach of System Security, provide notice as required by Texas law and upon approval of Covered Entity, mitigate, to the extent practicable, any harmful effect of such Breach of System Security known to Business Associate. For purposes of this Agreement, a Breach of System Security shall be treated as discovered by Business Associate as of the first day on which such breach is known to Business Associate (including any person, other than the individual committing the breach, who is an employee, officer, or other agent of Business Associate, as determined in accordance with the federal common law of agency) or should reasonably have been known to Business Associate following the exercise of reasonable diligence. Business Associate shall solely incur all costs associated with mitigation and public or individual notice efforts.

7. **COVERED ENTITY OBLIGATIONS.**

7.1. Covered Entity shall notify Business Associate of:

7.1.1. Any limitations in Covered Entity's Notice of Privacy Practices to the extent that such limitation may affect Business Associate's Use or Disclosure of PHI;

7.1.2. Any changes in, or revocation of, permission by the individual to Use or Disclose PHI, to the extent that such changes may affect Business Associate's Use or Disclosure of PHI; and

7.1.3. Any restriction to the Use or Disclosure of PHI that Covered Entity has agreed to provide to the individual, to the extent that such restriction may affect the Business Associate's Use or Disclosure of PHI.

7.2. Covered Entity shall be responsible for all costs of breach notification, mitigation, call center costs, notices, identity theft insurance and other protections afforded to Individuals affected by a Breach.

8. TERM AND TERMINATION.

The term of this Agreement shall be the same as the term of the underlying License Agreement. In addition to and notwithstanding the termination provisions set forth in the underlying License Agreement, both this Agreement and the underlying License Agreement may be terminated by either party immediately and without penalty upon written notice by the terminating party to the non-terminating party if the terminating party, determines, in its sole discretion, that the non-terminating party has violated any material term of this Agreement. The terms and conditions under this Agreement shall survive the expiration or termination of the underlying License Agreement.

9. DISPOSITION OF PHI UPON TERMINATION OR EXPIRATION.

Upon termination or expiration of this Agreement, Business Associate shall either return or destroy, in Covered Entity's sole discretion and in accordance with any instructions by Covered Entity, all PHI in the possession or control of Business Associate or its agents and Subcontractors. However, if either return or destruction of PHI is not feasible, Business Associate may retain PHI provided that Business Associate (a) continues to comply with the provisions of this Agreement for as long as it retains PHI, and (b) limits further Uses and Disclosures of PHI to those purposes that make the return or destruction of PHI infeasible.

10. DE-IDENTIFICATION AND USE OF AGGREGATED PHI. Business Associate shall have the right to de-identify any PHI received from or on behalf of Covered Entity in accordance with the provisions of 45 C.F.R. §164.514 and use aggregated de-identified PHI in its sole discretion.

11. DOCUMENT RETENTION.

Business Associate shall maintain all documentation required by the Privacy and Security Regulations for a period of seven (7) years.

12. CONFLICT.

In the event there is a conflict between the language of this Agreement and the underlying License Agreement between the Parties (if any), the terms and conditions of this Agreement shall control.

13. NO THIRD-PARTY BENEFICIARIES.

There are no third-party beneficiaries to this Agreement.

14. INDEPENDENT CONTRACTOR.

Covered Entity and Business Associate expressly acknowledge and agree that Business Associate is an independent contractor and shall not for any purpose be deemed to be an agent, employee, servant or partner of Covered Entity.

15. INTERPRETATION.

Any ambiguity in this Agreement shall be resolved to permit the Parties to comply with the Privacy and Security Regulations and more stringent Texas law.

16. ENFORCEMENT.

Business Associate acknowledges that, in the event it, or its Subcontractors, violates any applicable provision of the Privacy and Security Regulations or any term of this Agreement that would constitute a violation of the Privacy and Security Regulations, Business Associate and its Subcontractors will be subject to the jurisdiction of the United States Office of Civil Rights and the imposition of civil and criminal penalties that may result from Business Associate or its Subcontractors' violation.