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VIA ELECTRONIC FILING

Mr. Donald S. Clark
Secretary
Federal Trade Commission
Room H-135 (Annex E)
600 Pennsylvania Avenue, NW
Washington, DC 20580

RE: Student Privacy and Ed Tech, P175412

Dear Secretary Clark:

Benetech appreciates the opportunity to provide these comments in advance of the Federal Trade Commission’s (“Commission”) workshop, co-hosted with the Department of Education (“Department”), exploring the intersection between education technology (“ed tech”) and federal laws such as the Family Educational Rights and Privacy Act (“FERPA”) and the Children’s Online Privacy Protection Act (“COPPA”). We commend the Commission and the Department for soliciting provider views on this area to ensure that the law keeps pace with the evolving education technology environment and maximizes the potential of educational technology for students, teachers, parents, and schools.

Benetech is a Silicon Valley-based 501(c)(3) nonprofit education technology company whose mission is to empower disadvantaged communities with software for social good. Benetech was founded in 1989 with a business model intended to keep costs low for users, and our organization quickly became the largest maker of affordable reading systems for the blind. More than two decades since our founding, our organization works with over 500,000 students with disabilities in over 25,000 schools, school districts, colleges, and universities in the United States and around the world. Benetech’s services include multiple software offerings to improve and transform the lives of students with disabilities, such as blindness, visual impairments, or dyslexia. These offerings include Bookshare, the world’s largest library of eBooks for students with disabilities. Bookshare provides more than 585,000 different accessible titles at no charge to students, who can listen to, see, and hear books in ways that work for them given their unique circumstances, whether audio, enlarged print, and/or braille.¹ To date, Bookshare has delivered over seven million books to U.S. students.

¹ In 2017, Benetech received a five-year award from the Department’s Office of Special Education Programs, which will ensure that Bookshare remains free for all school districts, educators, and their qualified students. *Benetech Secures U.S. Department of Education Award to Enable All Students to Read*, Benetech Blog, <https://benetech.org/funding-software-students-disability-read/> (Nov. 1, 2017).

Benetech also develops standards and open source software tools to make educational content more accessible, including the challenge of ensuring the accessibility of STEM (Science, Technology, Engineering, and Mathematics) content. Benetech has a five-year goal of driving systemic changes in the publishing industry through its Born Accessible initiative so that most new educational titles that are digitally created are, from the outset, designed to be accessible to all students with disabilities. With over two decades of experience as a leading nonprofit provider of education technology, Benetech has a unique perspective on the application of student data privacy laws to educational technology service providers. We have handled student data in compliance with FERPA's requirements since our inception by working with personally identifiable as well as de-identified information, in addition to securing consent from parents as well as utilizing the school official exception.

Based upon our longstanding experience, our comment focuses on the following three topics:

- I. FERPA is a Workable Law for Nonprofit Ed Tech Providers
- II. Use and Maintenance of Student Data over Time is Key for Personalized Learning Success
- III. Flexible Methods for Obtaining Consent Facilitate Availability of Ed Tech Solutions

We hope that the Commission and the Department will consider our experience with these three topics going forward in any future lawmaking or policy creation.

I. FERPA Is a Workable Law for Nonprofit Ed Tech Providers

For many nonprofit ed tech providers, a lack of awareness about FERPA requirements or a lack of resources as compared to larger for-profit entities can pose challenges to FERPA compliance efforts.² Despite this, Benetech's long-standing experience shows that nonprofit ed tech providers can work within FERPA in its current form to provide effective ed tech products and services.

Based on our experience in the nonprofit sector, we believe that many well-intentioned nonprofit organizations that provide useful educational products or services may be simply unaware of FERPA's requirements or applicability. Benetech is an example of how an organization can develop sufficient awareness of the applicable FERPA requirements and incorporate FERPA compliance mechanisms into the development of products or services: we have handled student data for the last 15 years and, accordingly, we have built in technology safeguards to our services, like Bookshare, and offered options to address student data privacy concerns throughout our products and services. Through our incubator, Benetech Labs, we attempt to do the same for both for-profit and nonprofit organizations by discussing accessibility for students with disabilities, as well as student

² Although Benetech is not subject to COPPA because of its nonprofit status, it is committed to maintaining strong privacy practices that protect the privacy of children's information.

data privacy issues. We also share much of our software and information under open licenses to increase awareness of best practices amongst ed tech organizations.³

In addition to varying levels of awareness of applicable FERPA requirements, nonprofit organizations also may have limited resources for FERPA compliance. To address this issue, nonprofits can collaborate with partners and supporters to facilitate FERPA compliance and maximize the impact of limited resources. Through the Code Alliance program, Benetech connects nonprofits with the necessary resources and experts to help them scale their cutting-edge technologies.⁴

We recommend that the Commission and the Department consider the impact of FERPA regulations and requirements on nonprofit organizations and other ed tech entities with limited resources when developing new FERPA regulations or revising existing requirements. New regulatory requirements also will impose additional compliance burdens on entities that have spent time and resources developing existing compliance programs.

II. Use and Maintenance of Student Data over Time is Key for Personalized Learning Success

Benetech, along with many other nonprofit and for-profit ed tech providers, seeks to help students, teachers, and parents through the power of personalized learning. Ed tech providers need to maintain and use student personally identifiable data to understand how their educational products and services are used over time in order to improve their products and services and truly be able to offer successful personalized learning endeavors. Without access to such data, students and families cannot take advantage of the full personalized impact of these products and services. In addition, increased availability of data will enable providers, educators, and researchers to better evaluate the effectiveness of these products and services in improving student learning outcomes. As a nonprofit ed tech provider with no commercial objectives for student data, Benetech offers a unique perspective and experience that highlights beneficial uses of student data for all parties involved.

A. Personalized Learning Requires Uses of Anonymized/Aggregated and Personally Identifiable Student Data

Benetech has protected students' privacy interests by utilizing aggregated or anonymized data sources for several of its analytic endeavors. As one example, Benetech uses aggregated and anonymized data to understand content preferences for certain sub-groups of students. Based on this understanding of preferences over time, Benetech can provide recommendation engines to guide sub-groups of students to certain types of content. This data allows Benetech to recommend content to students on the basis of their grade level, disability type, or other anonymized characteristics. For instance, Benetech

³ See *Unlocking Technology-for-Good Innovation*, Benetech Blog, <https://benetech.org/unlocking-technology-for-good-innovation/> (Aug. 6, 2014).

⁴ *Hacking for Social Good: What are You Hacking on?*, Benetech Blog, <https://benetech.org/hacking-for-social-good/> (Aug. 15, 2017); *Benetech's Code Alliance Helps Nonprofits Scale Cutting-Edge Technology Solutions at GoogleServe*, Benetech Blog, <https://benetech.org/benetechs-code-alliance-helps-nonprofits-scale-cutting-edge-technology-solutions-at-googleserve/> (July 27, 2016).

could utilize aggregated data to recommend content to a visually impaired fifth-grade student that other students with similar grade levels and disabilities had liked.

However, the use of aggregated, anonymized, or de-identified data alone can result in certain drawbacks. De-identification of student data strips significant quantities of information that would prove useful in research to understand, improve, and personalize ed tech products and services. Stripping data of key student characteristics and performance metrics that may render the data identifiable could eliminate the possibility of tracking student performance over time to see what functions, products, and services work best, and improve those that may not be working.

Benetech, like the vast majority of ed tech providers, cannot accomplish its goals and objectives through the use of de-identified data alone. Certain activities require, or are significantly enhanced by, the use of personally identifiable student information within the confines of FERPA's current requirements and safeguards. As one example, Benetech provides its products and services to students with varying disabilities that may impact how these students access and consume content. A student with low vision may need text presented in reverse contrast (white letters on a black background) of at least 48 point type size, whereas a student with dyslexia might need text presented in 12 point font that utilizes a yellow overlay and the ability to slow down the text being read back. To facilitate students' ability to use its products and services, Benetech tracks student activities using personally identifiable information on an individual student level to determine what features, content, or settings work best for that particular student.

This represents the power of personalized learning, and the overarching objective of special education, at its best — utilizing data to unlock the full potential of the educational experience for each student's unique needs. The use of personally identifiable student information should be subject to appropriate safeguards, such as those currently in effect under FERPA, in order to protect the security and privacy interests of students. But without the use of personalized data to understand and adapt to trends in each student's activities, preferences, and performance over time, Benetech and other ed tech providers cannot deliver the most useful products and services to students and teachers in the classroom.

B. Flexible Data Maintenance Requirements Optimize Benefits for Students

In order to use student data to unlock the full potential of personalized learning, an ed tech provider first must *have* student data to use and analyze. In this respect, flexible requirements for how long an ed tech provider can maintain properly secured student data can optimize the benefits of personalized learning for students, teachers, parents, and providers. Flexible maintenance requirements allow ed tech providers such as Benetech to analyze student data over longer periods of time to identify trends in usage through a student's educational experience. Some of the most meaningful trends, showing improvement and impact on student learning and performance over the course of a student's educational career, can only be identified through analysis of student data across multiple years. By allowing providers to retain data under proper security protections, these requirements balance the need to protect student privacy with the benefits that ed tech providers can offer if permitted to retain student data.

The adoption of stricter deletion requirements, including requirements with explicit timeframes for deletion, could not only inhibit providers' efforts to offer personalized learning solutions, but also may reduce the ability of students with disabilities to sustain their educational progress. Many students with disabilities must provide proof of their disability to receive appropriate accommodations from their educational institution, as well as to qualify for Bookshare's services. If an ed tech provider must delete student data after a student leaves an educational institution (e.g., high school), that data may no longer be available when the student needs it to receive accommodations at a subsequent educational institution (e.g., college). Adopting or maintaining flexible deletion requirements cannot only enhance the products and services ed tech providers offer, but can protect critical data relied upon by students throughout their educational careers.

III. Flexible Methods for Obtaining Consent Facilitate Availability of Ed Tech Solutions

Benetech also commends the Commission and the Department for seeking input from ed tech providers on appropriate methods for obtaining consent for the disclosure and use of student data. Based on its own experience, Benetech believes that the school official exception is an invaluable tool for ed tech providers and schools to improve students' educational experiences while protecting their privacy. The availability of the school official exception allows ed tech providers and schools to address consent and disclosure issues as part of the overall contracting process while avoiding the potential logistical challenges that can arise when seeking parental consent.

As an example, Benetech has integrated the school official exception into the contracting process for its Bookshare service. Due to the copyright protections applicable to the content Benetech offers through its Bookshare service, Benetech requires schools and organizations to agree to the Bookshare Organizational Agreement prior to granting students access to Bookshare. In addition, Benetech is required to provide content only to users with qualifying disabilities under the terms of the Section 121 copyright exception and Benetech's award from the Department, and incorporates this restriction through its Organizational Agreement as well. The school official exception fits naturally into this compliance model — used by many ed tech providers and schools — which focuses on documenting appropriate requirements and restrictions through contract.

In Benetech's experience, FERPA's school official exception offers a valuable option to facilitate providing its products and services in classrooms and protecting the privacy interests of students without necessitating consent. Benetech does utilize parental consent in limited instances, such as when a student seeks access to Benetech's products and services outside of a school or organization.⁵ However, in Benetech's experience, it can be difficult for ed tech providers to obtain timely responses from large numbers of parents to grant permission for the use of ed tech products and services. To avoid some of these issues, Benetech has utilized the school official exception to obtain student information for

⁵ Although approximately 80-90 percent of Bookshare users access Bookshare through a school or organization, some students and their parents or guardians sign up for Bookshare accounts independently from a school or organization. The reasons for independent sign-ups may vary — some students are homeschooled, while others may want to access a broader range of books than is assigned to them through their school account by an educator.

educational purposes under the direct control of the school. In Benetech's experience, school officials are often well positioned to facilitate the introduction of helpful ed tech products and services into the classroom without unnecessary delay, while simultaneously protecting the privacy interests of students, parents, and teachers.

A key benefit to the school official exception is its flexibility while maintaining appropriate guardrails to protect students' privacy interests. The exception's requirements promote the usage of the exception by providers that can improve and enhance students' educational experiences, while maintaining sufficient flexibility to encompass changes in educational functions that have accompanied the introduction of technology and personalized learning into the classroom. The exception's "direct control" requirement also promotes protection of important privacy interests while allowing schools and providers the flexibility to determine the most efficient method of operationalizing "direct control" within each contractual relationship. Benetech recommends maintaining the ability of schools to consent to certain disclosures and uses of student data through the flexibility offered by the school official exception.

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Once again, Benetech thanks the Commission and the Department for the opportunity to comment on these important topics. Through continued engagement with the ed tech provider community, Benetech believes that the Commission and the Department can facilitate beneficial educational outcomes for students, parents, teachers, and schools while protecting important student privacy interests.

Respectfully submitted,

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