

## **PAR Position Regarding the Release and/or Photocopying of Test Materials**

This document establishes PAR's position relative to the release and/or photocopying of any proprietary PAR test materials. This position paper is also intended to extend to situations where it is contemplated that test materials may be videotaped, audiotaped, or utilized or translated into any form of digital media. Topics covered include trade secrets and copyright (including "fair use"), the Family Education Rights and Privacy Act (FERPA), ethical considerations, and litigation.

PAR views the copying of its test materials without specific written permission from us as copyright infringement. Intentional or inadvertent disclosure of a test threatens the ongoing validity of the test results, the future utility of the test, and therefore, ultimately, the commercial value of the product. Measures to protect the validity of valuable testing instruments include establishing institutional policies for use of copyrighted materials, monitoring use of copyrighted materials in educational settings, having written guidelines for the process of parental access to test results, and corporately emphasizing the importance of adherence to copyright laws.

### **Trade Secrets**

PAR considers its tests and test materials to be trade secrets. Test questions and answers, profile forms, manuals, stimulus materials, and other items accompanying the test are confidential, and PAR takes steps to secure and ensure confidentiality of such material throughout the development process. For example, all PAR employees must sign a confidentiality agreement, and external consultants and examiners involved in pilot and standardization edition administrations must also sign confidentiality agreements.

PAR also works to maintain the secrecy of test materials after publication. Assessment instruments are only sold to qualified individuals who are obligated by professional ethical standards to protect the integrity of the materials by maintaining the confidentiality of the questions and answers. The PAR Customer Qualification Form must be completed by all purchasers prior to purchasing assessment products and related materials. The Qualification Form requires that each purchaser show that he/she is appropriately qualified to buy test materials and that ethical rules of test use and interpretation will be followed.

### **Copyright/Fair Use**

PAR believes that the copying of tests (including but not limited to audio- or videotaping during test administration or transmission of test information via another medium) is a copyright infringement. In our view, such copying does not fall under the "fair use" exception of copyright law, which is addressed in Section 107 of the copyright law. That section of copyright law identifies four principal

factors that should be considered in determining whether unauthorized copying of copyrighted material is a “fair use.” These factors are:

- (1) the nature of the use (e.g., commercial vs. non-profit educational use);
- (2) the nature of the copyrighted work (e.g., special considerations such as security issues);
- (3) the amount of the copyrighted work which is used; and
- (4) the effect of the use in a potential market for the copyrighted work.

Although the disclosure of copies of test materials might, in certain cases, fall on the “fair use” side of point (1), PAR believes that it almost certainly does not fall within the uses described in the other factors, particularly points (2) and (4).

### **FERPA**

The Family Education Rights and Privacy Act (FERPA) gives parents access to their children’s test results. Specifically, FERPA establishes the right of parents “to inspect and review the education records of their children” [20 U.S.C. § 1232G(a)(1)(A)]. However, there is nothing in the statute that requires the release of copies of test questions or protocols. Rather, the law simply requires that schools have policies and procedures that allow parents to review their children’s records within a reasonable time after a request is made. The regulations define “the right to inspect and review education records” as including:

“(1) the right to a response from the [school] to reasonable requests for explanations and interpretations of the records; and

(2) the right to obtain copies of the records from the [school] where failure of the [school] to provide the copies would effectively prevent a parent or eligible student from exercising the right to inspect and review the education records” [34 C.F.R. § 99.11(b)].

Even though the language does provide for copies of the *records*, there is nothing to suggest that copies of the test items and protocols are required. Rather, the school has an obligation to provide copies of *test results*, but only in circumstances where other arrangements cannot be made to provide parent access to the records. If a parent requests an inspection of a child’s record, and the school agrees to review the content of the child’s test record with the parent, it is unlikely that a court would find that the parent’s right to review educational records had been denied. As part of school practice related to discussion of a child’s test results, PAR also recommends that the school have specific guidelines about how to disclose the purpose of the test.

PAR encourages professionals to review test results with parents and, where necessary, to review responses to individual items. In some cases this may

involve showing a test protocol or answer contained in test booklets to parents to aid in the discussion. However, PAR strongly opposes the release of copies of protocols. The tests are valuable assessment instruments and are widely used throughout the educational and psychological testing arena. Breach of test security could threaten the validity of the tests and, therefore, their value as a measurement tool. However, school psychologists in California should be aware that a federal court ruling in 2005 [*Newport-Mesa Unified Sch. Dist. v. State of California Dept. of Educ.*, 43 IDELR 161 (C.D. Cal. 2005)] supported the right of parents to receive a copy of test items and protocols, and schools must comply with such requests when they occur. Schools (in California and elsewhere) can do much to ensure that a parent understands the assessment process, including the nature and the limitations of the test. Schools can also emphasize that disclosure of test items could compromise future test administration. At the very least, if school legal counsel recommends that the school release copies of any test materials, the school should obtain a confidentiality agreement signed by the parents.

### **Ethical Issues**

The original dissemination of PAR test materials is restricted to individuals with a professional background in psychology or a closely-related field, and only individuals with appropriate training in psychological assessment should interpret the tests. Under the *Standards for Educational and Psychological Testing* (American Psychological Association), psychologists have an ethical duty to protect the integrity of secure tests by maintaining the confidentiality of the questions and answers to the tests. PAR also believes that it is inappropriate for individuals to re-sell test materials on Web sites such as eBay or Amazon unless the seller assesses the educational and professional background of the party purchasing the material(s). Psychologists and test administrators must also consider the conditions under which tests are administered. It is the professional's responsibility to determine if testing conditions are appropriate for obtaining valid test scores. In summary, a significant investment has been made in developing and "norming" (compiling statistical data regarding results) the tests. Therefore, revealing test items to the public compromises the value of such tests and may interfere with PAR's business practices.

### **Litigation**

PAR values the swift progress of legal proceedings; however, we are unwilling to threaten the security and integrity of our test instruments by consenting to the release of copyrighted and confidential material to those not professionally qualified to obtain them. When litigation involving a psychologist reaches the point that a court is contemplating the release of proprietary test materials to non-professionals such as counsel, we ask that the court issue a protective order prohibiting parties from making copies of the materials; requiring that the materials be returned to the professional at the conclusion of the proceedings;

and requiring that the materials not be publicly available as part of the record of the case, whether this is done by sealing part of the record or by not including the materials in the record at all.

Additionally, if testimony reveals content of the items or confidential test data, PAR recommends that the court seal the disclosure, and not include the disclosures within the court record. Pleadings and other court filings should not, unless absolutely necessary, make specific reference to the content of or responses to any item, and any portion of any document that does so should be sealed. Finally, we request that the judge's opinion, including both findings of fact and conclusions of law, not include descriptions or quotations of the items or responses. PAR believes that this is the minimum requirement to protect our copyright, as well as the security, integrity, and validity of the test.

Please feel free to use this policy statement along with the company's name in your materials. We appreciate your concerns with regard to this issue. If you have other questions, please contact PAR at 800-331-8378 and ask for the Legal Department.