

Legal Policies

Effective: January 1, 2014

IMPORTANT NOTE:

These Legal Policies apply to the assessment products and services listed on this website (Site) for Pearson's Clinical Assessment and Talent Assessment (TalentLens) ("Pearson") products.

These Legal Policies are subject to change from time to time by updated postings, and changes will be effective upon posting of an update.

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General Policy For Reproduction And Dissemination Of Pearson's Test Materials

Pearson asserts that strong measures are necessary to protect the validity of its valuable testing instruments. Pearson believes that any reproduction of its tests without the prior written permission from Pearson may constitute copyright infringement and is a violation of the Terms and Conditions of Sale and Use of Pearson Products. Furthermore, disclosure of the assessments may threaten the ongoing security, reliability, and/or validity of the test and the test's results, and therefore, the value and usefulness of the test.

Trade Secrets

Outside of the protection granted by United States copyright law, Pearson considers its secured tests to be trade secrets. The test questions and answers, manuals and other materials constitute highly confidential, proprietary testing information that Pearson takes every precaution to protect from disclosure beyond what is absolutely necessary for the purpose of administering a test. Even in the development stage, the assessment materials are treated confidentially by Pearson employees, agents and consultants.

Pearson continues to guard the secrecy of its test materials once they become finished products. They are sold only to qualified individuals who are bound by the ethical standards of their profession to protect the integrity of the materials by maintaining the confidentiality of the test materials. Pearson has Qualification Policies that are strictly enforced and each purchaser of a Qualification Level B or C product is required to fill out a User Acceptance Form that verifies their qualifications. The User Acceptance Form contains a statement signed by the qualified purchaser indicating that the purchaser is so qualified, that the purchaser will abide by the Terms and Conditions of Sale and Use and that all ethical rules will be observed by the purchaser. Therefore, Pearson strongly opposes the release of any test materials to non-qualified individuals.

Copyright/Fair Use

It is the position of Pearson that any reproduction of its test or other published materials, whether reproduced on paper or electronically (this includes use intake forms, research, video or audio taping administrations, photos, or any image capturing system), constitutes an infringement of the copyright and other proprietary rights in the tests or other published materials. For your reference, the copyright law pertaining to our test materials can be found in Section 107 (Fair Use) of Public Law 94-553, Title 17 – Copyrights. With respect to the matter of copyright protection for Pearson's test materials, House Report 94-1476, (p. 69) states: "*(B) There shall be no copying of or from works intended to be 'consumable' in the course of study or of teaching. These include workbooks, exercises, standardized tests and test booklets and answer sheets and like consumable material.*"

In Pearson's view, reproduction of its test materials without prior written consent **DOES NOT** fall within the "fair use" exception of the copyright law. Section 107 of the copyright law states four factors as being among those that should be considered in determining whether unauthorized copying of copyrighted material is a "fair use." These factors are:

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

Although reproductions of test materials might, in very limited cases, fall on the "fair use" side of point 1), most reproductions almost certainly fall on the "non-fair use" side of the other three factors, particularly points 2) and 4). Therefore, please contact Pearson's Clinical Assessment group at pas.licensing@pearson.com for any permission request to make reproductions of any of the Pearson tests or other Pearson materials.

FERPA (Family Education Rights and Privacy Act)

In a school setting, some Pearson customers receive requests to release copies of test questions or protocols. It is our position that release of our tests or test protocols in any form is not required under federal law (except in very limited situations and in limited jurisdictions). If you are in California, please check with an attorney regarding your responsibilities. The applicable U.S. statute is the Family Education Rights and Privacy Act (FERPA), and it establishes the right of parents "to inspect and review the education records of their children" (20 U.S.C §1232G(a)(1)(A)). FERPA requires schools to establish procedures that will enable parents to review their children's records within a reasonable time after a request is made. The regulations implementing this section 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)).

The import of this section is that only where failure to provide copies would deny the exercise of this right will schools be obliged to provide copies. In all other cases, inspection alone would presumably suffice. If a parent requests an inspection of a child's record, once the school agrees to review the content of the child's test record with the parent, it is most unlikely that a court would find that exercise of the right to review educational records has been denied.

Pearson's Clinical Assessment group encourages professionals who conduct testing to review student's test results with their parents or guardians.

If the testing professional deems it appropriate, this review could include showing the parent or guardian the test materials and their child's responses in order to permit a more useful discussion of test results. Test scores may be summarized in writing. However, our Terms and Conditions of Sale and Use of Pearson Products do not permit the making and giving of copies of test materials to students or their parents or guardians.

Pearson's tests are sensitive copyrighted instruments and widely used throughout the world. In order to protect their validity and reliability for further use with the test taker and other students, Pearson **does not** waive its copyright and trade secret protection to permit copying of test protocols for the student's parent or guardian. Impairment of their security could threaten the validity and reliability of the tests and, therefore, their value as a measurement tool.

HIPAA (Health Insurance Portability and Accountability Act) Compliance

Pearson offers several platforms (together, the System) that collect Personal Health Information (PHI) as it is defined under the Health Insurance Portability and Accountability Act (HIPAA). Pursuant to HIPAA, Pearson may act as a Business Associate for those Covered Entities. PHI data on the System is protected using physical, security, and administrative safeguards including encryption during use, in transit and at rest. The PHI data is stored on secure servers located in a secured data center in a database that is encrypted with industry standard high-security encryption. When the data is transmitted, the data is encrypted using industry-standard Secure Socket Layer (SSL) technology. The System uses a secured database that separates and segregates a customer's records so that they cannot be seen by other customers. This separation and segregation is confirmed through testing and external auditing.

If you are a Covered Entity and require a Business Associates Agreement, the platform you are accessing should have a Business Associates Agreement accessible within the System and available for your use. Please note that the rules regarding disclosure of Test Record Forms are still applicable to the assessments accessed through these platforms.

HIPAA Disclosure of Test Record Forms

Many of our customers have inquired regarding Pearson's position on whether test record forms must be disclosed to patients in order to comply with the Privacy Rule of the Health Insurance Portability and Accountability Act (HIPAA). The HIPAA Privacy Rule provides that individuals have a qualified right of access to individually identifiable health information maintained by health care providers covered by HIPAA. However, Pearson's test materials are protected by copyright and trade secret law, and the widespread dissemination of test record forms (which may disclose test questions and answers) would violate restrictions on the use of Pearson's test materials and would cause great harm to Pearson, the test materials, the clinical community, and to the public at large.

The U.S. Department of Health and Human Services (HHS), which is responsible for HIPAA, provided clarification related to this matter as stated below:

"Any requirement for disclosure of protected health information pursuant to the Privacy Rule is subject to Section 1172(e) of HIPAA, 'protection of trade secrets'. As such, we confirm that it would not be a violation of the Privacy Rule for a covered entity to refrain from providing access to an individual's protected health information, to the extent that doing so would result in a disclosure of trade secrets."

Accordingly, we will continue to advise our customers that Pearson's test materials are trade secrets and their usefulness and value would be compromised if they were generally made available to the public. We have stated this position in correspondence, court cases, news articles and on our website for many years. This position is also consistent with our longstanding practice of ensuring, through our terms and conditions of use, that all purchasers have the appropriate qualifications to administer and interpret the test materials being purchased and that such purchasers agree to maintain the confidentiality of the test materials.

Given the above-quoted support from HHS, Pearson reiterates that customers may not disseminate copies of test record forms or protocols to persons who erroneously claim that they are entitled to copies under HIPAA. As the HHS has now confirmed, HIPAA does not require any person to disclose any trade secret materials, and all restrictions on the dissemination of test record forms and protocols remain in effect.

Second Opinions

Pearson recognizes that, in some cases, a parent or guardian may wish to consult a second professional regarding a minor's test scores. In these situations, we have no objection to a reproduction of the completed test protocol being provided to another qualified professional for the purpose of review; however, the materials should pass directly from professional to professional and not through the hands of a parent, guardian or their attorney.

Ethical Issues

The original dissemination of Pearson's test materials are carefully restricted to individuals with a professional background in psychology, and only individuals with appropriate training in psychological assessment should interpret the tests. Under the *Standards for Educational and Psychological Testing*, published by the American Educational Research Association (AERA), American Psychological Association, and the National Council on Measurement in Education (NCME), psychologists have an ethical duty to protect the integrity of secure tests by maintaining the confidentiality of the test materials and scores by releasing such test materials and scores only to professionals who have the same ethical duty.

The confidentiality of test questions, responses, and scores are paramount to maintaining the integrity, reliability, and validity of the tests. Unlike many other types of tests, our Qualification B and C level tests do not consist of a large collection of test items that are rotated. Rather, these tests have one expensive and highly researched version and should remain intact for 10 to 15 years. Millions of dollars have been spent on the research and "norming" (compiling of statistical data regarding results) of the tests. Any leakage of test items will severely compromise the value and usefulness of the tests.

Electronic Storage of Assessments

The question of electronic storage is a complicated one. The assessment materials being considered for electronic storage are copyright protected (and in some cases trade secret protected). Copying is not permitted without permission from the publisher. However, we understand that electronic storage is often replacing physical storage for record-keeping purposes. Recognizing that reality, please note that our concern is not so much the storage format, as access and disclosure to our assessments that is a problem.

First, please note that Section 8 of our Terms and Conditions of Sale and Use require purchasers of our assessment instruments to protect the security of the instruments they purchase.

Second, we have also developed the following guidelines to assist you with maintaining the security of the assessment instrument and to address the need to store the information electronically. When Pearson grants permission to make electronic file copies of the tests it publishes, we require those who would do electronic storage to comply with the following guidelines. If you are unable to comply with these guidelines, we cannot grant permission to make copies of our assessment materials.

Permission to make electronic file copies of the tests is predicated on the following conditions:

1. Ensure that the test items not be included whenever possible;
2. That the tests are kept separate from other file material so that they are not inadvertently disclosed in response to a general HIPAA request. Of course, there are situations that require disclosure of test material, but these are rare and are addressed with legal protective orders; and
3. That the file containing the tests be password protected and secure from unqualified (per the Pearson qualification policy) users.

When permission to scan has been received and the three safeguards above are in place, electronic storage can work fine for psychological tests. The responsibility for test security remains with the qualified purchaser.

Posting Reproductions or an Administration of a Test On-Line

Agreement to Pearson's Terms and Conditions of Sale and Use of Pearson Products are part of the purchase process for any of its assessments. For a variety of reasons, it is critical that all our customers (including students, as part of their graduate program) adhere to ethical and professional policies for the appropriate protection of secure assessment content. In contrast to the past where videotapes of assessments were relegated to the media lab at the graduate program, technology now makes it very easy for anyone to record themselves administering an assessment and post that recording to a mass media site. While recording an assessment administration remains an important part of the teaching and supervision process, students should be reminded that:

- Test materials (text, graphic images, or the oral reading of items) may not be displayed, reproduced, or performed (e.g., filming an administration) in any manner, electronically or otherwise, including posting on any mass media site, such as YouTube or any other similar site, without the prior written permission of Pearson.

This means that posting a video on a mass media site, such as YouTube or any other site, of an administration of a secure, copyrighted assessment should never occur without the prior written consent of Pearson. When a video of this nature becomes public on any forum, it is considered an unauthorized reproduction or performance of the copyrighted material (whether the materials are viewable or not). In addition to the legal concern, all clinicians should be aware that the availability of secure test content to unqualified users is damaging to the test's reliability and validity.

Variant Testing Conditions

Audio/Video Taping of Test Administration

It is Pearson's opinion that audio or videotaping or other non-standard conditions may invalidate the use of norm-referenced scores. As you may know, norms for standardized tests are developed under strict conditions. If such conditions are not met, the scaled scores obtained by application of the test norms are not statistically defensible. Although it is the position of Pearson that the validity of any scaled score that results from a non-standard administration should be interpreted with caution, it is the responsibility of the individual psychologist administering the test to ensure that the results of the assessment are an accurate reflection of the examinee's abilities. Additionally, an audio or video taping of an administration where any test materials are recorded is a reproduction under federal copyright law. If done without our written permission, such acts may be an infringement of the assessment's copyright.

Telepractice Test Delivery Administration

Telepractice is the use of telecommunications technology for the delivery of professional services at a distance. It is Pearson's opinion that delivery of an assessment through this method has not been conclusively proven to result in a score that is equivalent to an assessment conducted in a standardized manner. However, there is initial evidence supporting test validity when administering the test via a telepractice method for a selective group of assessments. Norms for standardized tests are developed under strict testing conditions. If such conditions are not met, the scaled scores obtained by application of the test norms may not result in statistically accurate scores. Although it is the position of Pearson that the validity of any scaled score obtained as a result from a non-standard administration should be interpreted with caution, it is the responsibility of the individual administering the test to ensure that the results of the assessment are an accurate reflection of the examinee's abilities. Please refer to the specific product pages for further information related to telepractice test administration. Delivering our assessments via a teleconference or other similar method is a reproduction of our assessments under federal copyright law that requires the written permission from the copyright owner. If done without our written permission, such acts may be an infringement of the assessment's copyright.

Litigation

Pearson understands that from time to time you may receive demands from third parties to reproduce, produce or disclose copyright-protected and/or trade secret protected psychological test materials in connection with litigation. If such demands were to be fully complied with, the material disclosed might include test booklets, answer sheets, record forms, manuals, user's guides, scoring software, computer-generated output reports, or other published and unpublished material protected by Pearson under intellectual property law.

Pearson does not wish to impede the progress of legal proceedings; however, we are equally unwilling to jeopardize 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. Should litigation in which a psychologist is involved reach the stage where a court considers ordering the release of proprietary test materials to non-professionals such as counsel, we request 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 proceeding; 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.

In addition, testimony regarding the items, particularly that which makes clear the content of the items, should be sealed and again not be included in the record. Pleadings and other documents filed by the parties 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 should be sealed. Finally, we ask that the judge's opinion, including both findings of fact and conclusions of law, not include descriptions or quotations of the items or responses. We think this is the minimum requirement to protect our copyright and other proprietary rights to the test, as well as the security and integrity of the test.

To the extent that you have not already done so, you may wish to consult with your local psychological association as well as the American Psychological Association on this particular issue. The Committee on Legal Issues for the American Psychological Association and/or the Office of General Counsel for the American Psychological Association in Washington, D.C., in particular, may have some additional thoughts on how to deal with this matter.

We very much appreciate your sensitivity to the issues surrounding appropriate use of and access to psychological testing materials. If you have other questions, please contact Pearson's Clinical Assessment group at 800-627-7271 and ask for the Legal Department.