

## California Decision Allows Parents to Receive Copies of Protocols

About a month after NASP received a copy of the above OSEP response, we were contacted by LRP Publications Editor Brian Caruso for comment following the release of a U.S. District Court (Central California) decision that appears to extend parents rights well beyond current OSEP policy. The following summary of that decision was provided to NASP by LRP Publications:

**Case name.** *Newport-Mesa Unified Sch. Dist. v. State of California Dept. of Educ.*, 43 IDELR 161 (C.D. Cal. 2005).

**Ruling.** In a case of first impression, and acknowledging its action was contrary to established law on competitive admission testing, the U.S. District Court, Central District of California ruled that a California statute requiring copies of test protocols to be provided to parents of special education students falls within acceptable "fair use" under federal copyright law. Nor does federal copyright law preempt the state statute, it said.

**What it means.** California school districts can distribute copies of test protocols to parents of special education students without violating federal copyright law, in accordance with *California Education Code section 56504*. Such distribution of copyrighted test protocols is a fair use under copyright law because it is noncommercial and broadens parents' understanding of their child's educational needs. FERPA similarly allows parents to inspect and review education records "directly related to a student," including test protocols. 20 USC 1232g(a)(1)(A), (a)(4)(A).

**Summary.** Allowing parents to view test protocols after a child has taken the test is a noncommercial use, consistent with California law, which will aid parents in ensuring that their children receive an appropriate education, a use that is a legislated public interest. California Education Code Section 56504 provides that parents of special education students may have *copies* of their child's test protocols. When the state department of education received a parent's complaint that a school district would not provide him with the copyrighted test protocol for the Woodcock-Johnson Test of Achievement III, the department ordered the district to provide it. On review, the court recognized that the existing body of law considered it a copyright violation to distribute copies of copyrighted standardized tests. However, it ruled that allowing parents to view test protocol *safter* a child has taken the test was a noncommercial use that will aid parents in ensuring that their children receive an appropriate education, a use which is a legislated public interest. The court determined that was a fair use under copyright law and copyright law did not preempt the education code provision.

The copyright holder for the test protocol intervened in the suit to assert its interest in protecting its copyright, claiming that widespread public access to the test protocols would diminish the test's market value. The court, however, found no evidence that the limited release of test protocols to parents of special education students, which has been the department's policy since 1983, resulted in any adverse market effect.