



# EDUCATION LAW NOTES

Federal and Virginia Developments in School Law

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## Student Growth Percentiles (SGPs) are *Confidential* Teacher Performance Indicators: A Lesson in Grammar

Probably since the inception of academic accountability standards, public school observers have sought information about individual teacher performance – and more specifically, how students perform on standardized tests within teachers' individual classrooms. With each administration of the Standards of Learning (SOL) tests in Virginia, parents, politicians, and educators anxiously await results for accreditation and other, sometimes less innocuous, reasons. That information often includes Student Growth Percentiles (SGPs). School principals sometimes are the object of Freedom of Information Act (VFOIA) requests for classroom-by-classroom results.

On August 31, 2017, the Virginia Supreme Court, in *Virginia Education Association et al., v. Brian C. Davison*, held as a matter of law that SGPs are teacher performance indicators. Importantly for school divisions, the Court ruled that the Richmond City Circuit Court erred in ordering the production of these documents, which contain teacher names and license numbers, to a requesting constituent: information that the Virginia Supreme Court determined is confidential pursuant to Virginia Code § 22.1-295.1. Interestingly, the Court's decision ultimately was based as much on a grammatical rule of construction as on a legal principle.

### *The Underlying Facts and Case*

Brian Davison requested SOL test results for students in Loudoun County Public Schools

(LCPS). LCPS advised Mr. Davison that the Virginia Department of Education (VDOE) was the custodian of the data and advised him to submit his request to VDOE. Mr. Davison asked VDOE for English and math assessment SGP aggregated score results for LCPS sorted by teacher and by school over the preceding five years, along with an explanation of the methodology used to calculate them. VDOE advised that score results do not include information for individual teachers; in response, Mr. Davison provided VDOE with a link to its own website where an exemplar "Annotated Division Report" showed that VDOE previously compiled SGP results by teacher and school.

VDOE responded that no such reports currently existed and any responsive records were exempt from disclosure as scholastic records under VFOIA. Mr. Davison again told VDOE

he believed VDOE could produce summary reports that did not include student identifying information. VDOE acknowledged that such reports did exist at one time, but were no longer produced – and reasserted the scholastic records exemption.

On October 2, 2014, Mr. Davison filed a petition for a *writ of mandamus* requesting that the Richmond City Circuit Court compel VDOE to produce the SGP data. In an opinion letter dated January 9, 2015, the Circuit Court found that the VFOIA scholastic records exemption (and the corresponding federal student privacy protections under the Family Educational Rights & Privacy Act (FERPA)) asserted by VDOE did

***“...the [Virginia Supreme] Court ruled that the Richmond City Circuit Court erred in ordering the production of [SGPs]...”***

not apply. Subsequently, the Circuit Court granted the Loudoun County School Board's motion to intervene for the limited purpose of asserting an exemption for *personnel records* pursuant to Virginia Code § 22.1-295.1(C). Specifically, the School Board argued that § 22.1-295.1(C) precludes disclosure of teacher identifying information as and under the term "teacher performance indicator." The Circuit Court rejected the School Board's argument, stating:

While the evidence revealed that student growth percentiles can be used for multiple purposes, including teacher evaluation, on balance considering the testimony and evidence the student growth percentiles have not been used as a teacher performance indicator by Loudoun County Public Schools.

The Circuit Court ordered VDOE to produce the records, and awarded Mr. Davison attorneys' fees and costs.

### ***The Virginia Supreme Court Reverses***

On appeal, the Virginia Supreme Court parsed subparagraph 22.1-295.1(C), which read at the time of the dispute:

Teacher performance indicators, or other data used by the local school board to judge the performance or quality of a teacher, maintained in a teacher's personnel file or otherwise shall be confidential but may be disclosed (i) pursuant to court order, (ii) for the purposes of a grievance procedure involving the teacher, or (iii) as otherwise required by state or federal law. Nothing in this subsection shall be construed to prohibit the release or to limit the availability of non-identifying, aggregate teacher performance indicators or other data.

The School Board and VDOE asserted that SGPs are confidential whether or not actually used in teacher evaluation; Davison argued SGPs were not teacher performance indicators at all.

The Court held as a matter of law that based on Standard of Quality 5 (addressing, in part, teacher evaluations) and Performance Standard 7 of the Guidelines for Uniform Performance Standards and Evaluation Criteria for Teachers (addressing student academic progress and recommending that at least 20 percent of the teacher evaluation be comprised of SGPs – recognized in LCPS's evaluation procedures handbook), SGPs are teacher performance indicators.

***“...we conclude that the phrase ‘used by the local school board’ refers solely to the phrase ‘other data’ and not to the phrase ‘teacher performance indicators’...”***

*Virginia Supreme Court decision*

### ***Making the Grammatical Case – Commas Are Important***

To settle the dispute regarding whether SGPs actually had to be used in teacher evaluations to be confidential, the Virginia Supreme Court relied on the grammatical "rule of the last antecedent." Under that rule, "referential and qualifying words and phrases, where no

contrary intention appears, refer solely to the last antecedent. The last antecedent is the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence." In other words, the Court's decision rested on the comma in the first sentence of subparagraph (C): "[a]pplying the rule of the last antecedent to Code § 22.1-295.1(C), we conclude that the phrase 'used by the local school board' refers solely to the phrase 'other data' and not to the phrase 'teacher performance indicators. . . . [i]t is only the 'other data' that must be used by the local school board in order for it to be held confidential. Actual use does not apply to teacher performance indicators." The lesson learned? Good grammar is important.