

Proposed Amendments to 19 TAC Chapter 66, State Adoption and Distribution of Instructional Materials
(First Reading and Filing Authorization)

February 10, 2006

COMMITTEE OF THE WHOLE: ACTION
STATE BOARD OF EDUCATION: ACTION

SUMMARY: This item presents for first reading and filing authorization proposed amendments to 19 TAC Chapter 66, State Adoption and Distribution of Instructional Materials. At the September 2004 State Board of Education (SBOE) meeting, the SBOE chair announced the formation of an ad hoc committee on textbooks. The committee was charged with recommending changes to 19 TAC Chapter 66. The committee met for the first time in November 2004 and discussed numerous proposed changes in 19 TAC Chapter 66, Subchapter A, General Provisions, Subchapter B, State Adoption of Instructional Materials, and Subchapter C, Local Operations. Proposed amendments have been presented to the ad hoc committee and the Committee of the Whole since the November 2004 meeting. At the November 2005 board meeting, the board directed that specific proposed rule changes be deleted. This item will provide members an opportunity to review, discuss, and approve needed amendments for first reading and filing authorization.

STATUTORY AUTHORITY: Texas Education Code (TEC), §§7.102(c)(23), 31.003, and 31.031(c).

EFFECTIVE DATE: The proposed effective date would be 20 days after filing as adopted with the *Texas Register*. Under TEC, §7.102(f), the SBOE must approve the rule action at second reading and final adoption by a vote of two-thirds of its members to specify an effective date earlier than September 1, 2006.

PREVIOUS BOARD ACTION: The SBOE adopted 19 TAC Chapter 66 to be effective in 1996. Several amendments to the rules have been made since then. The SBOE last adopted the review of 19 TAC Chapter 66 in July 2004. The SBOE also considered proposed amendments to the chapter at that time. Action on proposed amendments was postponed until the Ad Hoc Committee on Textbooks could review all proposed changes and provide an opportunity for textbook coordinators and textbook publishers to voice their opinions and concerns. In November 2004, the Ad Hoc Committee on Textbooks met to discuss needed changes to 19 TAC Chapter 66. Textbook publishers and textbook coordinators participated in the discussion. At the February 16, 2005, meeting of the ad hoc committee, additional changes were suggested to the rules. At the April 28, 2005, and July 15, 2005, meetings of the Committee of the Whole, further rule revisions were suggested. At the November 17, 2005, meeting of the Committee of the Whole, staff was directed to make specific changes to the proposed rule text and to bring the revised rules back to the Committee of the Whole in February 2006 for first reading and filing authorization.

BACKGROUND INFORMATION AND SIGNIFICANT ISSUES: Chapter 66, State Adoption and Distribution of Instructional Materials, includes five subchapters: Subchapter A, General Provisions; Subchapter B, State Adoption of Instructional Materials; Subchapter C, Local Operations; Subchapter D, Special Instructional Materials; and Subchapter E, Disposition of Instructional Materials. The rules were adopted in 1996 by the SBOE following 1995 legislation that modified the textbook adoption process.

In November 2004, staff presented an overview of changes in several sections of 19 TAC Chapter 66 to members of the Ad Hoc Committee on Textbooks. The amendments were proposed to address legislation resulting from the 78th Texas Legislature, 2003, and changes in the state adoption and distribution process. As part of the discussion, representatives of the Textbook Coordinators Association of Texas (TCAT) presented recommended changes and publishers had an opportunity to participate in the discussion. At the February 16, 2005, meeting, the ad hoc committee decided to bring the item forward to the Committee of the Whole at the April meeting. At the April 28, 2005, meeting, the Committee of the Whole decided to discuss the item further at its meeting on July 15, 2005, since the 79th Texas Legislature, 2005, was in regular session and revisions of the TEC, Chapter 31, Instructional Materials, were being considered. No changes were suggested in July as the Legislature was in special session.

At the November 17, 2005, meeting, the Committee of the Whole considered proposed amendments for first reading and filing authorization that had been presented to the SBOE at previous meetings as well as changes recommended by the TCAT and changes considered by the 79th Texas Legislature, Regular Session, 2005. At that November meeting, the Committee of the Whole directed staff to make changes to specific proposed rules and voted to postpone further discussions until the February 2006 meeting. Most of the requested changes to the proposed rules were to change the term "instructional materials" back to the term "textbooks." Another change made throughout the proposed rules was to change the term "average cost" back to the term "maximum cost." The SBOE also requested that agency legal counsel request an Attorney General's opinion about the deletion of language in §66.36(a)(4) and §66.66(c)(4), specifically, regarding the authority of the SBOE to adopt a rule requiring textbooks to meet general textbook content standards as a condition of SBOE approval. A copy of the AG opinion request is included as Attachment IV of this item.

Attachment II presents the current rule text for 19 TAC Chapter 66 and proposed amendments to 19 TAC Chapter 66 that have been presented to the SBOE at previous meetings as well as changes recommended by TCAT. The proposed amendments reflect the requested changes to revert to the terms "textbooks" and "maximum cost." The amendments also include a proposed new rule (19 TAC §66.110) to address enacted legislation from the 79th Texas Legislature, Regular Session, 2005, relating to the entitlement to a textbook for students enrolled, under a pilot project, in courses for concurrent high school and higher education academic credit as mandated by Senate Bill 151. Additionally, the proposed amendments now include a recommendation to address a Sunset Advisory Commission finding about maximizing the use of the State's textbook funds (19 TAC §66.51(a)(11)) and a recent request from the American Council of the Blind of Texas (19 TAC §66.121(h)). Attachment II reflects all rules in 19 TAC Chapter 66, including the proposed amendments with corresponding justifications. Attachment III includes only the rules proposed for amendment in the standard format for filing the proposals with the Texas Register. A summary of the proposed amendments follows.

Subchapter A. General Provisions

§66.10. Procedures Governing Violations of Statutes -- Administrative Penalties

The proposed amendment to this section would establish penalties for errors identified after instructional materials are distributed to schools that are comparable to the penalties assessed for errors identified prior to distribution and clarify that it is impossible to determine whether a publisher "knowingly" sold textbooks with factual errors. Another change, recommended by TCAT, would clarify that back-order penalties include penalties for failure to deliver adopted teacher components in a timely manner or in the quantities which the school district or open-enrollment charter school is eligible to receive.

In recent years, a number of Internet-based programs have been adopted. In most cases, the publisher manages web pages used for the Texas Essential Knowledge and Skills (TEKS) coverage. In the 2003 adoption, however, the board determined that publishers could cover TEKS by providing a link to another web page whether or not it was managed by the publisher. A proposed addition to the rules would require that the publisher be responsible for ensuring that the web page used for TEKS coverage is available throughout the contract period.

Subchapter B. State Adoption of Instructional Materials

§66.27. Proclamation, Public Notice, and Schedule for Adopting Instructional Materials

The current rule requires that a public meeting be held regarding the draft proclamation with representatives of the publishing industry 60-90 days prior to the scheduled adoption of the proclamation by the board. Staff recommends revising this section to enable staff to use the Internet for notification of proclamations and for soliciting input from the publishing industry related to the average costs using electronic mail distribution lists. The proposed amendment includes clarification that publishers are not required to register to receive notice of the proclamation.

§66.28. Adoption by Reference

Each year the SBOE adopts by reference the TEKS that are to be used for evaluating instructional materials submitted for review. The proposed amendment would remove the reference to the TEKS in Proclamations 2001 and 2002 since the products were reviewed and adopted in 2003 and 2004, respectively. The proposed amendment would add the reference to the TEKS in Proclamations 2004 and 2005 that will be used to evaluate new products submitted in 2006 and 2007.

§66.33. State Review Panels: Appointment

The proposed amendment to this section would require that the commissioner of education ensure that each state textbook review panel includes academic experts in the content area for which the new instructional materials have been submitted. This proposed amendment considers a recommendation made by the Sunset Advisory Commission in 2005 and subsequent clarification by the SBOE. Academic expert was defined so as to include not only university professors but also classroom teachers with strong academic backgrounds.

§66.36. State Review Panels: Duties and Conduct

Each year the SBOE approves a question and answer document which becomes a formal part of the review and adoption process. The proposed amendment to this section would include clarification that panel members must use the SBOE-approved definition of TEKS coverage.

Section 66.36(a)(4) may need to be deleted from rules to eliminate the requirement that instructional materials comply with TEC, §28.002(h), pending the opinion of the Attorney General.

§66.48. Statement of Intent to Bid Instructional Materials

The proposed amendment to this section would require publishers to provide preliminary price information at the time statements of intent to bid are submitted. This proposed amendment would provide publishers and staff additional time to review and compile pricing information and resolve issues on pricing and maximum costs that publishers might have.

§66.51. Instructional Materials Purchased by the State

The proposed amendment would delete language in subsection (a)(2) that prohibits a publisher from submitting a final bid price for the program that exceeds the preliminary price submitted with the sample.

Subsection (a)(5) would be modified to coincide with the proposal that publishers submit price information with the statement of intent to bid rather than with the official samples.

Subsection (a)(6) would be modified to clarify that individual component prices are replacement costs for school districts and are not bid prices that should be offered by the publishers.

Subsection (a)(8) would be modified to require publishers to mark their nonconsumable products to indicate that they are nonconsumable. In addition, the amendment would eliminate the requirement that the publisher's price for consumable material not exceed the state maximum cost. This rule is inconsistent with state law that allows publishers to exceed the maximum cost with school districts paying the difference.

Subsection (a)(9) would be added to provide clarification to publishers as to when the state would pay for consumable materials and when the consumable materials must be provided to school districts for the life of the contract. Currently, some publishers do not understand that consumable materials must be provided to districts each year for new students. If the state calls for consumables, the state budgets for this and pays for them each year. Some publishers provide consumables for one year, even though the state does not call for them and then expect the districts to pay for them in the following years. Publishers that desire year-to-year flexibility in offering any materials other than those specifically called for should offer these as ancillary or "free with order" materials.

Subsection (a)(11) would be added to include the Texas Sunset Commission finding that the current "textbook process does not maximize the use of the State's textbook funds." Currently the State pays up to the approved maximum cost for all adopted textbooks, including those that do not fully cover the TEKS. This proposed change would enable the State to save funds by reducing the maximum cost that could be paid for nonconforming textbooks.

§66.54. Samples

The current rule refers to publishers' submissions of instructional materials with "finished-format binding." The proposed amendment addresses Internet-based or electronic products and requires that programs of these types be submitted in final form and completely functional.

The proposed amendment would also eliminate the requirement that preliminary price information be submitted with the sample. This change would coincide with the proposal that price information be submitted with the statement of intent to bid.

The proposed amendment would also address delivery of samples for review by state review panels and would reduce the number of samples to be filed with the agency prior to and after state adoption. The proposed amendment also relates to specifications regarding correlations, supplementary materials, and the definition of instructional materials.

§66.60. Public Comment on Instructional Materials

In 2003, a number of requests to speak at public hearings were submitted by non-Texas residents. This item provides the board with the opportunity to consider whether to allow residents of other states to participate in public hearings or whether the current practice of allowing only residents of Texas to provide official testimony should be continued. Language is proposed that would provide for public hearing testimony by non-Texas residents with priority given to Texas residents.

§66.66. Consideration and Adoption of Instructional Materials by the State Board of Education

This proposed amendment would eliminate the need for publishers to provide proof of authority to do business in Texas. This document is no longer required for participation in the adoption process. Additionally, the proposed amendment would clarify that each student expectation in the TEKS must be addressed in order for a program to be considered conforming. Current rule refers to performance descriptions rather than student expectations. Section 66.66(c)(4) may need to be deleted from rules to eliminate the requirement that instructional materials comply with TEC, §28.002(h), pending the opinion of the Attorney General.

§66.69. Ancillary Materials

This proposed amendment would add a definition of ancillary materials to ensure that all publishers have a common understanding of what constitutes an ancillary. Currently, different publishers use the term in different ways. Also for clarification, language would be added to reference open-enrollment charter schools along with reference to school districts.

§66.75. Revisions, Updates, and Substitutions

With the advent of more state-adopted electronic programs, some delivered via the Internet, several changes in this section are warranted. The proposed amendment would update the section to address the applicability of provisions related to revised, updated, or later editions to electronic and online instructional materials. When school districts upgrade to a newer version of a computer operating system and the publisher has a corresponding software product available, it would be made available without regard to the one-year policy. The proposed amendment would include the provision that publishers must certify in writing that the new material meets the applicable TEKS. In addition, if a school district prefers a newer version of an instructional material or an alternative format for the same content, the product would be available without further SBOE review.

Subchapter C. Local Operations

§66.104. Selection of Instructional Materials by School Districts

Current rule refers to the state textbook depository and its role in receiving and redistributing surplus textbooks. The proposed amendment would delete references to the state textbook depository. It should be noted that the provision in subsection (c) addressing materials for subjects in the enrichment curriculum will become obsolete in September 2007 due to the passage of legislation in 2003 that specifies that the required curriculum includes foundation as well as enrichment curricula.

The Electronic Materials and Textbook ordering system, *EMAT Online*, will allow school districts to ship surplus instructional materials to other school districts.

§66.107. Local Accountability

The rule would be amended to reflect closure of the state textbook depository. The proposed amendment would require school districts to report their surplus instructional materials rather than return them to the state. New language is included that would define surplus. Language would also be added to emphasize the need to count students actually working at a particular grade level.

The proposed amendment would also implement House Bill (HB) 2072, enacted by the 78th Texas Legislature. HB 2072 stipulates that school districts shall not require teachers to pay for lost instructional materials.

§66.110. Pilot Project for Certain Students Enrolled in Courses for Concurrent High School and College Credit

This new section would be added to reflect the requirements of Senate Bill 151, 79th Texas Legislature, Regular Session, 2005. The bill, which became effective June 18, 2005, creates a pilot program of dual credit in several junior colleges and waives tuition and fees for educationally disadvantaged high school students. It also entitles the students to free textbooks for the dual credit courses. The bill makes implementation conditional upon sufficient general revenue appropriations in an amount corresponding with the waived tuition and fees.

If funds are appropriated in the future, the proposed new rule would establish provisions relating to student eligibility and entitlement; the SBOE role in setting aside money for textbooks; and school district responsibilities for making payments, maintaining inventory, and reporting enrollment.

Subchapter D. Special Instructional Materials

§66.121. Special Instructional Materials

The proposed amendment would reflect the closing of the state textbook depository and implementation of a new process for redistributing Braille and large type instructional materials.

The proposed amendment would also add language in new subsection (h) that would make educational materials available for blind or visually impaired parents in accessible formats such as braille and large type. In September 2005, the American Council of the Blind of Texas sent the commissioner of education a resolution emphasizing that "blind or visually impaired parents want to play an integral part in their sighted children's education" and requested that the agency make educational materials available for blind or visually impaired parents in accessible formats

such as braille and large type. Since the mid-1990's, the agency has provided braille versions of state adopted textbooks to blind or visually impaired parents of sighted public school students, when requested. The number of requests has been very small and there have been no problems associated with providing these materials to parents who are blind or visually impaired. Staff has determined that the requested materials can be made available without a need for additional resources.

FISCAL IMPACT: None.

PUBLIC AND STUDENT BENEFIT: The revision of textbook rules will result in more up-to-date rules with changes that can improve the textbook adoption and distribution process.

PROCEDURAL AND REPORTING IMPLICATIONS: Instead of reporting surplus inventory to the state textbook depository, one amendment proposes that school districts use the textbook ordering system, EMAT Online, to report surplus inventory. The proposed new rule regarding free textbooks for students participating in the pilot project provided under Senate Bill 151, 79th Texas Legislature, 2005, would require the collection of information necessary to report on the results of the pilot.

PUBLIC COMMENTS: During the preparation of the review of 19 TAC Chapter 66 and previous SBOE meetings, staff met with representatives of the publishing industry and TCAT. Publishers and textbook coordinators submitted comments and recommendations for amendments. An annotative copy of these comments and recommendations reflecting agency responses has been provided to the SBOE members at previous meetings.

ALTERNATIVES: No alternative actions are proposed regarding this item.

OTHER COMMENTS AND RELATED ISSUES: It has been suggested that future proclamations should include language requiring textbook publishers to provide all materials offered for adoption in a digital format. At the direction of the SBOE, staff will incorporate language in future proclamations.

COMMISSIONER'S RECOMMENDATION: I recommend that the State Board of Education:

Approve for first reading and filing authorization the proposed amendments to 19 TAC Chapter 66, State Adoption and Distribution of Instructional Materials.

Respectfully submitted,

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Commissioner of Education

Staff Members Responsible: Susan Barnes, Associate Commissioner
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- Attachments:**
- I. [Statutory Citations](#)
 - II. [Chart reflecting 19 TAC Chapter 66, State Adoption and Distribution of Instructional Materials, including proposed amendments and justifications](#)
 - III. [Text of Proposed Amendments to 19 TAC Chapter 66, State Adoption and Distribution of Instructional Materials](#)
 - IV. January 6, 2006, Request for Attorney General's Opinion