

The State Board of Education (SBOE) proposes an amendment to §66.15, concerning state adoption and distribution of instructional materials. The proposed amendment would address penalties for failure to comply with state law and rule governing review and adoption of instructional materials.

BACKGROUND INFORMATION AND JUSTIFICATION: Rules in 19 TAC Chapter 66, Subchapter A, address the requirement for registers, procedures governing violations of statutes, and administrative penalties.

At the April 2020 SBOE meeting, SBOE members expressed concern about publishers making changes to adopted products without obtaining SBOE approval and asked staff to provide options to address this concern. At the June-July 2020 SBOE meeting, the Committee on Instruction discussed possible amendments to rules in Chapter 66 related to administrative penalties to address this issue.

The proposed amendment would add new §66.15(f)(3) to impose stricter penalties for instructional materials containing factual errors if the errors occur due to updates to instructional materials if the publisher did not submit the proposed updates for review in accordance with requirements imposed by the SBOE.

The SBOE approved the proposed amendment for first reading and filing authorization at its September 2, 2020 meeting.

FISCAL IMPACT: Kristen Hole, associate commissioner for instructional strategy, has determined that for the first five years the proposal is in effect, there are no additional costs to state or local government required to comply with the proposal

LOCAL EMPLOYMENT IMPACT: The proposal has no effect on local economy; therefore, no local employment impact statement is required under Texas Government Code, §2001.022.

SMALL BUSINESS, MICROBUSINESS, AND RURAL COMMUNITY IMPACT: The proposal has no direct adverse economic impact for small businesses, microbusinesses, or rural communities; therefore, no regulatory flexibility analysis specified in Texas Government Code, §2006.002, is required.

COST INCREASE TO REGULATED PERSONS: The proposal does not impose a cost on regulated persons, another state agency, a special district, or a local government and, therefore, is not subject to Texas Government Code, §2001.0045.

TAKINGS IMPACT ASSESSMENT: The proposal does not impose a burden on private real property and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

GOVERNMENT GROWTH IMPACT: TEA staff prepared a Government Growth Impact Statement assessment for this proposed rulemaking. During the first five years the proposed rulemaking would be in effect, it would expand an existing regulation related to administrative penalties for failure to comply with state law and rule governing review and adoption of instructional materials.

The proposed rulemaking would not create or eliminate a government program; would not require the creation of new employee positions or elimination of existing employee positions; would not require an increase or decrease in future legislative appropriations to the agency; would not require an increase or decrease in fees paid to the agency; would not create a new regulation; would not limit or repeal an existing regulation; would not increase or decrease the number of individuals subject to its applicability; and would not positively or adversely affect the state's economy.

PUBLIC BENEFIT AND COST TO PERSONS: Ms. Hole has determined that for each year of the first five years the proposal is in effect, the public benefit anticipated as a result of enforcing the proposal would be ensuring adopted instructional materials continue to be appropriately aligned to the Texas Essential Knowledge and Skills prior to use by Texas teachers and students. There is no anticipated economic cost to persons who are required to comply with the proposal.

DATA AND REPORTING IMPACT: The proposal would have no new data and reporting impact.

PRINCIPAL AND CLASSROOM TEACHER PAPERWORK REQUIREMENTS: TEA has determined that the proposal would not require a written report or other paperwork to be completed by a principal or classroom teacher.

PUBLIC COMMENTS: The public comment period on the proposal begins October 9, 2020, and ends November 13, 2020. A form for submitting public comments is available on the TEA website at [https://tea.texas.gov/About_TEA/Laws_and_Rules/SBOE_Rules_\(TAC\)/Proposed_State_Board_of_Education_Rules/](https://tea.texas.gov/About_TEA/Laws_and_Rules/SBOE_Rules_(TAC)/Proposed_State_Board_of_Education_Rules/). The SBOE will take registered oral and written comments on the proposal at the appropriate committee meeting in November 2020 in accordance with the SBOE board operating policies and procedures. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on October 9, 2020.

STATUTORY AUTHORITY. The amendment is proposed under Texas Education Code (TEC), §31.002, which defines open education resource instructional material; TEC, §31.003, which authorizes the State Board of Education (SBOE) to adopt rules for the adoption, requisition, distribution, care, use, and disposal of instructional materials; TEC, §31.023, which requires the SBOE to adopt a list of instructional materials that meet applicable physical specifications, contain material covering at least half of the applicable Texas Essential Knowledge and Skills (TEKS) in the student version and in the teacher version, are suitable for the subject and grade level for which the instructional material was submitted, and have been reviewed by academic experts in the subject and grade level for which the instructional material was submitted; TEC, §31.035, which allows the SBOE to adopt supplemental instructional materials that are not on the adopted list if the material covers one or more primary focal points or topics of a subject in the required curriculum, is not designed to serve as the only instructional material for the course, meets applicable physical specifications, is free from factual errors, is suitable for the subject and grade level for which the instructional material was submitted, and has been reviewed by academic experts in the subject and grade level for which the instructional material was submitted. The statute requires the SBOE to identify the TEKS that are covered by the supplemental instructional material and requires the material to comply with the review and adoption cycle provisions; and TEC, §31.151(b), which authorizes the SBOE to impose a reasonable administrative penalty against a publisher who knowingly violates a requirement imposed on a publisher or manufacturer of instructional materials by TEC, §31.151(a), and ensure the penalty is of sufficient amount to deter a future violation.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code, §§31.002, 31.003, 31.023, 31.035, and 31.151(b).

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§66.15. Administrative Penalty.

- (a) Under the Texas Education Code (TEC), §31.151(b), the State Board of Education (SBOE) may assess a reasonable administrative penalty against a publisher or manufacturer found in violation of a provision of the TEC, §31.151(a). The SBOE shall assess an administrative penalty under this section only for a violation based upon an instructional material adopted by the SBOE. An administrative penalty shall be assessed only after the SBOE has granted the publisher or manufacturer a hearing in accordance with the TEC, §31.151; the Administrative Procedure Act; Chapter 157, Subchapter A, of this title (relating to General Provisions for Hearings Before the State Board of Education); and this chapter.
- (b) The SBOE may assess an administrative penalty against a publisher or manufacturer who violates the TEC, §31.151(a)(1), or a rule implementing that provision, including assessing an administrative penalty against a publisher or manufacturer who offers an instructional material in this state at a higher price than that offered to any other state, public school, or school district in the United States. A publisher or manufacturer does not violate this provision if within 60 days of the sale at a higher price, the publisher or manufacturer provides a refund in the incremental amount of the lower price compared to the purchase price to all Texas public schools that previously purchased the same instructional material at a higher price and enters into a written agreement with the Texas Education Agency (TEA) to offer the instructional material at the lower price to any Texas public school. An action under this subsection may only be taken for differential pricing

that occurs between the time when a public school may start entering orders for a particular school year until the time when a public school may start entering orders for the subsequent school year.

- (c) The SBOE may assess an administrative penalty against a publisher or manufacturer who violates the TEC, §31.151(a)(2), or a rule implementing that provision. A publisher or manufacturer does not violate this provision if within 60 days of the sale at a lower price, the publisher or manufacturer provides a refund in the incremental amount of the lower price compared to the original purchase price to all Texas public schools that previously purchased the same instructional material. An action under this subsection may only be taken for differential pricing that occurs between the time when a public school may start entering orders for a particular school year until the time when a public school may start entering orders for the subsequent school year.
- (d) The SBOE may assess an administrative penalty against a publisher or manufacturer who violates the TEC, §31.151(a)(3), or a rule implementing that provision. A publisher or manufacturer does not violate this provision if within 60 days of dissemination of instructional materials or ancillary items free of charge, the publisher or manufacturer provides a refund of the purchase to all Texas public schools that previously purchased the same instructional material and enters into a written agreement with the TEA that the ancillary items will be provided free of charge if any Texas public school buys the instructional material at issue.
- (e) The SBOE may assess an administrative penalty against a publisher or manufacturer who violates the TEC, §31.151(a)(4), or a rule implementing that provision. A publisher or manufacturer does not violate this provision if within 60 days of dissemination of instructional materials of higher quality, the publisher or manufacturer provides new copies of the higher quality instructional material at no charge or, with the public school consent, a refund equivalent to the price of the lower quality material to all Texas public schools that previously purchased the same instructional material.
- (f) The SBOE may assess an administrative penalty against a publisher or manufacturer who violates the TEC, §31.151(a)(4) or (9), or a rule implementing those provisions, including:
 - (1) an administrative penalty for selling instructional materials with factual errors. The SBOE may assess an administrative penalty against a publisher or manufacturer of instructional materials who sells instructional materials that have been adopted by the SBOE and contain factual errors unless, within 60 days of knowledge of the factual error, the publisher or manufacturer corrects the factual error, including revising web-based instructional materials, providing corrective materials to public schools that have received material containing the factual error, and ensuring no further distribution of materials occurs without correction of the error; or
 - (2) an administrative penalty for failure to correct factual errors. The SBOE may assess an administrative penalty against a publisher or manufacturer who fails to correct a factual error, including:
 - (A) failure to correct a factual error identified in the list of corrections submitted by a publisher under §66.28(c)(11) of this title (relating to Requirements for Publisher Participation);
 - (B) failure to correct a factual error identified in the report of the commissioner of education under §66.63(e) of this title (relating to Report of the Commissioner of Education) and required by the SBOE; or
 - (C) failure to correct a factual error identified and required by the SBOE prior to the adoption of the instructional material.
 - (3) an administrative penalty for a factual error in an instructional material that occurs through updates to the materials by the publisher when the updates did not comply with requirements for updating materials, including the requirements under §66.75 of this title (relating to Updates to Adopted Instructional Materials) and §66.76 of this title (relating to New Editions of Adopted Instructional Materials). Penalties imposed under this paragraph shall:
 - (A) not be subject to penalty limitations imposed by subsection (h) of this section or any other section of this title;

(B) be of a sufficient amount to deter future violations; and

(C) be based on a timeframe beginning at the time the factual error first appeared in instructional materials delivered to a public school, unless mitigating circumstances suggest otherwise.

- (g) For purposes of this section:
- (1) a factual error shall be defined as a verified error of fact or any error that would interfere with student learning. The context, including the intended student audience and grade level appropriateness, shall be considered;
 - (2) a factual error repeated in a single item or contained in both the student and teacher components of instructional material shall be counted once for the purpose of determining penalties. An identical error in materials with multiple components and formats shall be counted as one error; and
 - (3) a penalty may be assessed for failure to correct a factual error identified in the list of corrections submitted by a publisher under §66.28(c)(11) of this title or for failure to correct a factual error identified in the report of the commissioner of education under §66.63(a) of this title and required by the SBOE. The publisher shall identify errata in an appropriate manner.
- (h) For purposes of subsection (f)(2) of this section, a penalty of \$5,000 shall be assessed for each failure to correct a factual error:
- (1) after the deadline established in the proclamation by which publishers must have submitted corrected samples of adopted instructional materials for violations of subsection (f)(2)(A) of this section; or
 - (2) prior to distribution to public schools after the SBOE has identified the factual error for violations of subsection (f)(2)(B) and (C) of this section.
- (i) The SBOE may assess an administrative penalty against a publisher or manufacturer who violates the TEC, §31.151(a)(5), or a rule implementing those provisions.
- (j) The SBOE may assess an administrative penalty against a publisher or manufacturer who violates the TEC, §31.151(a)(6), (7), or (8), or a rule implementing those provisions, including:
- (1) a penalty for failure to deliver adopted instructional materials, including teacher components, in a timely manner or in the quantities the school district or open-enrollment charter school is eligible to receive as specified in the publisher's bid; and
 - (2) a penalty for failure to deliver adopted instructional materials, including teacher components, in accordance with provisions in the contracts if the failure extends beyond 45 days.
- (k) The SBOE may assess an administrative penalty against a publisher or manufacturer who fails to maintain a website or provide a suitable alternative for conveying the information in the website, or who otherwise fails to meet the requirements of §66.29 of this title (relating to Websites in State-Adopted Instructional Materials).
- (l) The SBOE may, if circumstances warrant, waive or vary penalties contained in this section for first or subsequent violations based on the seriousness of the violation, any history of a previous violation or violations, the amount necessary to deter a future violation, any effort to correct the violation, and any other matter justice requires.
- (m) Each affected publisher shall issue credit to the TEA in the amount of any penalty imposed under the provisions of this section. When circumstances warrant it, the TEA is authorized to require payment of penalties in cash within ten days. Each affected publisher who pays a fine for failure to deliver adopted instructional materials in a timely manner will not be subject to the liquidated damages provision in the publisher's contract for the same failure to deliver adopted instructional materials in a timely manner.
- (n) All administrative penalties shall be credited to the public schools instructional materials allotment funds under the TEC, §31.0212.