



Final Regulation Agency Background Document

Agency name	Virginia Department of Education
Virginia Administrative Code (VAC) citation	8 VAC 20-720-160 and 170 (new sections)
Regulation title	Regulations Governing Local School Boards and School Divisions
Action title	Add sections governing instructional materials and textbooks to the above named regulation
Date this document prepared	September 28, 2010

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 14 (2010) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

Please provide a brief summary (no more than 2 short paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation. Also, please include a brief description of changes to the regulation from publication of the proposed regulation to the final regulation.

The Board of Education currently has three sets of regulations governing textbooks and one set of regulations governing instructional materials. The regulations governing textbooks are: *Regulations Governing Textbook Adoption State Level* (8 VAC 20-220), *Regulations Governing Textbook Adoption Local Level* (8 VAC 20-230), and *Regulations Governing Textbook Fund Management and Handling on Local Level* (8 VAC 20-270). The regulations governing instructional materials are: *Regulations Governing Instructional Materials – Selection and Utilization by Local School Boards* (8 VAC 20-170).

All of these regulations were adopted on or before September 1, 1980, have not been amended since that time and are out of date. The NOIRA to repeal the three regulations governing textbooks and include provisions regarding textbooks into the proposed *Regulations Governing Local School Boards and School Divisions* was published on July 7, 2008. The proposal to repeal the *Regulations Governing Instructional Materials – Selection and Utilization by Local School Boards* (8 VAC 20-170), and include provisions regarding instructional materials into the proposed *Regulations Governing Local School Boards and School Divisions* was included in the NOIRA that was published proposing the *Regulations Governing Local School Boards and School Divisions*, 8VAC20-720 et seq.

The proposed regulation sections regarding textbooks and instructional materials were approved by the Virginia Board of Education at its July 23, 2009 meeting and were published in the Virginia Register of Regulations on May 24, 2010. A public comment period was held from May 24, 2010 through July 26, 2010. These final regulations were approved by the Board of Education at its September 23, 2010 meeting.

During the 2008 General Assembly, three bills were passed that impact the purchasing and provision of textbooks for Virginia's public school students. These bills were HB 137, patroned by Delegate Chris Peace, HB 354, patroned by Delegate Mark Cole, and SB 356, patroned by Senator John Watkins. HB 137 and SB 356 are identical and were proposed by the Department of Education. HB 354 is identical, with the addition of a provision making it possible for any private school within a school division to purchase textbooks from the local school board's contract with a publisher. These bills took effect on July 1, 2008.

During the 2010 General Assembly, there was one bill that passed that addressed textbooks. HB 709, patroned by Delegate Chris Peace, permits the purchase of hard-copy print textbooks, electronic textbooks, and hard-copy print textbooks with electronic files. The legislation clarifies that school divisions have the authority to purchase any of these three forms. This bill took effect on July 1, 2010.

The proposed regulation sections incorporate provisions from the three current Board of Education regulations as well as capturing the requirements of HB 137 (2008), HB 354 (2008), SB 356 (2008), and HB 709 (2010) regarding textbook purchasing. These provisions relate to the approval of textbooks, basal textbooks, contracts with textbook publishers, and the selection of instructional materials by local school divisions.

In addition, § 22.1-242 of the *Code of Virginia* requires the Board's regulations to include distribution of textbooks. The current regulations do not address this topic. The proposed regulations would take language from § 22.1-243 of the *Code*, to require local school boards to provide, free of charge, textbooks required for courses of instruction for each child attending public schools.

Finally, a number of provisions that are unnecessary, outdated, or are no longer required by the *Code of Virginia* are deleted.

Statement of final agency action

Please provide a statement of the final action taken by the agency including (1) the date the action was taken, (2) the name of the agency or board taking the action, and (3) the title of the regulation.

The Virginia Board of Education will consider for adoption final proposed regulation sections as additions to 8 VAC 20-720, *Regulations Governing Local School Boards and School Divisions*, at its meeting on September 23, 2010.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

Section 22.1-16 of the *Code of Virginia* provides that “The Board of Education may adopt bylaws for its own governance and promulgate such regulations as may be necessary to carry out its powers and duties and the provisions of this title.”

Section 22.1-242 of the *Code of Virginia*, effective July 1, 2008, requires the Board of Education to “adopt regulations governing (i) the purchase of textbooks approved by it for use in the public schools directly from the publishers by school boards and (ii) the distribution of such textbooks for the use by children attending public schools in Virginia.

Additionally, § 22.1-38 of the *Code* permits local school boards to use textbooks not approved by the Board of Education so long as the school board selects the books in accordance with regulations promulgated by the Board.

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Detail the specific reasons it is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

The purpose of this proposal is to repeal the four current regulations and add to the *Regulations Governing Local School Boards and School Divisions*, 8 VAC 20-720, by creating sections governing instructional materials and textbooks. The current regulations governing instructional materials and textbooks will be repealed simultaneously with the adoption of the addition to the new *Regulations Governing Local School Boards and School Divisions*. These new sections will not become effective until after the *Regulations Governing Local School Boards and School Divisions* become final.

As noted earlier, the proposed regulation sections will capture the requirements of HB 137 (2008), HB 354 (2008), SB 356 (2008), and HB 709 (2010) regarding textbook purchasing. These provisions relate to the approval of textbooks, basal textbooks, contacts with textbook publishers, and the selection of instructional materials by local school divisions. In addition, a number of provisions that are unnecessary, outdated, or are no longer required by the *Code of Virginia* are deleted. The goal of this proposal is to have regulations that comport with the *Code of Virginia* requirements governing textbooks and other statutes, such as the *Virginia Procurement Act*, while providing local school divisions and school boards more flexibility in the selection and purchasing of textbooks and instructional materials.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. A more detailed discussion is required under the “All changes made in this regulatory action” section.

The proposed sections include provisions related to the approval of textbooks, basal textbooks, contracts with textbook publishers, the distribution of textbooks and consumable materials, and the selection of instructional materials by local school divisions. In addition, a number of provisions that are unnecessary, outdated, or are no longer required by the *Code of Virginia* are deleted.

Issues

Please identify the issues associated with the proposed regulatory action, including:

- 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;
- 2) the primary advantages and disadvantages to the agency or the Commonwealth; and
- 3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, please indicate.

Section 22.1-242 of the *Code of Virginia*, effective July 1, 2008, requires the Board of Education to “adopt regulations governing (i) the purchase of textbooks approved by it for use in the public schools directly from the publishers by school boards and (ii) the distribution of such textbooks for the use by children attending public schools in Virginia. Additionally, § 22.1-38 of the *Code* permits local school boards to use textbooks not approved by the Board of Education so long as the school board selects the books in accordance with regulations promulgated by the Board. Therefore, the Board of Education must adopt these regulations in order to properly address the issue of textbooks and instructional materials.

This proposal is beneficial to the public as well as local school divisions in that the provisions will be up-to-date and will provide local school divisions with more flexibility without having a negative impact on the provision of educational services. The requirements regarding instructional materials and textbooks will be added to the *Regulations Governing Local School Boards and School Divisions* once they are final thus making them a part of one regulation with current regulatory requirements. This will eliminate the need to consult four separate regulations making it easier for school divisions to determine applicable requirements. Additionally, the regulations regarding textbooks that have been placed into the one section will provide the requirements for today’s educational programs and more directly reflect current business practices.

Changes made since the proposed stage

Please describe all changes made to the text of the proposed regulation since the publication of the proposed stage. For the Registrar’s office, please put an asterisk next to any substantive changes.

Section number	Requirement at proposed stage	What has changed	Rationale for change
160.A	Local school boards shall be responsible for the selection, approval, and utilization of instructional materials	Language is revised to delete the word “approval.”	Revised to comport with § 22.1-238 of the <i>Code of Virginia</i> , which authorizes the Board of Education to approve textbooks, and local school boards to select textbooks.
160.B	Local school boards shall adopt policies and criteria: 1. Instituting a policy regarding the rights of parents to inspect any instructional materials used as part of the educational curriculum... 20 U.S.C. § 123h...	The words “instituting a policy regarding” are deleted. The citation § 1232h is changed to read § 1232H.	Revised for clarity Revised to correct the citation

	<p>2. Establishing procedures for the reconsideration of challenged materials</p> <p>3. Placing special emphasis on materials related to sensitive or controversial topics</p> <p>4. Including in the curriculum and scheduling options for students whose parents choose to withdraw the student from class...</p>	<p>Items 2 and 3 are combined and revised to say that the basis upon which a person may seek reconsideration of the local school board's selection of instructional materials, including but not limited to materials that might be considered sensitive or controversial, and the procedures for doing so.</p> <p>The language is revised to reference language in the <i>Code of Virginia</i> specifying that the policies include procedures for handling challenged controversial materials.</p>	<p>Revised for clarity</p> <p>Revised to comport with § 22.1-253.13:7 of the <i>Code of Virginia</i></p>
<p>170 A</p>		<p>Language is added to clarify that textbooks approved by the Board of Education for use in grades 6-12 may be print textbooks, electronic textbooks, or print textbooks with electronic files. Local school boards are authorized to purchase these textbooks in any of these three forms.</p>	<p>Addresses the provisions of HB 709, passed by the 2010 General Assembly (§ 22.1-243 of the <i>Code of Virginia</i>).</p>
<p>170 B.</p>	<p>The procedures include: Appointment of an evaluation committee to review textbooks in one or more subject areas.</p> <p>Notice to parents that textbooks under consideration will be listed on the school division's Web site and made available for review.</p> <p>Provisions shall be made for those reviewing textbooks to present their comments to the school board through locally approved procedures.</p> <p>Actions necessary to assure appropriate consideration of citizen comments and observations. shall be taken and adequate time for such consideration shall be allowed.</p>	<p>Language is revised to provide for evaluation committees for each subject area.</p> <p>The item is divided into short paragraphs and reorganized.</p> <p>The term "opportunities" is used instead of provisions.</p> <p>The language is revised to say that procedures are required to ensure appropriate consideration of citizen comments and observations.</p>	<p>Revised for clarity.</p> <p>Revised for clarity.</p> <p>Revised for clarity.</p> <p>Revised for clarity.</p>

	Use of selection criteria that has been approved by the local school board.	The language is revised simply to require selection criteria.	Revised for clarity and elimination of redundancy.
170 C.	Provides that written contracts or purchase orders are exempt from the <i>Virginia Public Procurement Act</i> and from any locally adopted regulations or procedures.	The provision regarding locally adopted regulations or procedures is deleted.	Revised to clarify that textbooks approved by the Board of Education are exempt from the state procurement act, but not from locally adopted regulations or procedures.
170 D.	Requires local school divisions to purchase non-Board of Education approved textbooks by either entering into written contracts or issuing purchase orders in accordance with locally adopted procurement procedures or regulations or the <i>Virginia Public Procurement Act</i> .	Specifies that the purchase of non-Board of Education approved textbooks is not exempt from the <i>Virginia Public Procurement Act</i> .	The requirement that the purchase of non-Board of Education approved textbooks must be by written contract or purchase orders in accordance with local procedures or the <i>Procurement Act</i> was unnecessary.
170 E		Adds language addressing distribution of textbooks. This requires local school boards to provide, free of charge, textbooks required for courses of instruction for each child attending public schools.	§ 22.1-242 of the <i>Code</i> requires regulations governing the distribution of textbooks. The current regulations do not address this topic. The proposed language is consistent with language in § 22.1-243 of the <i>Code</i> , which addresses distribution of textbooks.
170 F.	Requires local school boards to certify that the price paid for each textbook was not in excess of that charged elsewhere in the United States in accordance with § 22.1-241 of the <i>Code of Virginia</i> .	Language is revised to state that the price did not exceed the lowest wholesale price at which the textbook involved in the contract was currently bid under contract in the United States, in accordance with § 22.1-241.	Revised to comport more closely with the language in the <i>Code of Virginia</i> .

Public comment

Please summarize all comments received during the public comment period following the publication of the proposed stage, and provide the agency response. If no comment was received, please so indicate.

The proposed regulation was published in the Virginia Register of Regulations on May 24, 2010. The public comment period was held from May 24, 2010 through July 26, 2010. Written comments could be provided to the Department of Education by mail, e-mail or fax. Public comments could also be provided

at public hearings held on June 3, 2010 in Marion, or on June 10, 2010 in Alexandria, Chesapeake or Richmond. Additionally, time was always set aside at the Virginia Board of Education’s regular meetings for public comment. However, in spite of these efforts, no public comments were received following the publication of the proposed regulation and notification of the public comment period.

Commenter	Comment	Agency response
N/A	N/A	N/A

All changes made in this regulatory action

Please list all changes that are being proposed and the consequences of the proposed changes. Describe new provisions and/or all changes to existing sections.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
8VAC 20-170-10	8VAC20-720-10	No definitions are provided.	A definition of “textbooks” has been added. A definition of “instructional materials” has been added. Rationale: Ensure clarity in the use of the terms and the responsibilities related to it.
8VAC 20-170-10	8VAC20-720-160	Provides that local school boards have the responsibility for the selection, approval and utilization of instructional materials. Also, states that in the selection of instructional materials, the local school board is responsible for: developing local criteria, approving materials, appointing a division evaluation committee, providing for the examination of materials by the committee, providing notice to parents that the books and materials under consideration will be available for review by interested citizens, requesting special assistance in the evaluation of proposed materials, if desired, from the Department of Education, establishing procedures for	Streamlines the requirements for local school boards to adopt in their policies and criteria for the selection of instructional materials. School divisions must include the following, at a minimum: <ul style="list-style-type: none"> • The rights of parents in accordance with the <i>Protection of Pupil Rights Amendment</i>, 20 U.S.C. § 1232H, and its implementing regulation, 34 CFR 98; • The basis upon which a person may seek reconsideration of the local school board’s selection of instructional materials, and the procedures for doing so Rationale: To ensure continued public participation in the process and compliance with the PPRA. Additionally, the language regarding the thorough evaluation of materials related to controversial or sensitive topics was removed as it was determined that school divisions did not need to be directed to do this via regulations. Finally, the language regarding options for parent withdrawal of students from class was not a proper requirement for regulations on

		the reconsideration of challenged materials; placing special emphasis on the thorough evaluation of sensitive materials; and including options for parents to withdraw students from class for the duration of the treatment of a sensitive or controversial topic.	textbooks and instructional materials.
8VAC20-220-10 through 30	8VAC20-720-170	Lists the subjects for which textbooks must be adopted for a six-year period according to a schedule adopted by the Department of Education and approved by the Board of Education; provided requirements for deletion of textbooks from the approved lists and the extension of contracts for adopted books; and, specified that only those materials designed to provide basic support for the instructional program will be adopted.	<p>The new regulatory requirements do not include the names of the subjects for which textbooks must be purchased. The regulations specify that the Board of Education has the authority to approve textbooks, and must report to local school boards those textbooks with a minimum decodability standard in accordance with § 22.1-239 of the <i>Code of Virginia</i>. It permits local school boards to use textbooks not approved by the Board provided the school board selects the textbooks in accordance with the proposed regulations.</p> <p>Rationale: To streamline the textbook selection process consistent with the legislation passed by the 2008 General Assembly. Additionally, to permit flexibility for local school divisions in the selection of textbooks on an as-needed basis.</p>
8VAC20-220-40 through 70	8VAC20-720-170	Provides requirements regarding wholesale prices, allowances for delivery costs, maximum retail prices and price adjustment requests.	<p>In accordance with § 22.1-241 of the <i>Code of Virginia</i>, local school divisions shall purchase textbooks approved by the Board of Education directly from publishers by either entering into written term contracts or issuing purchase orders. These written contracts or purchase orders are exempt from the <i>Virginia Public Procurement Act</i>. The purchase of textbooks other than those approved by the State Board is not exempt from the <i>Virginia Public Procurement Act</i>.</p> <p>The textbook price shall not exceed the lowest wholesale price at which the book or books covered by the contracts are currently bid anywhere in the United States. Local school divisions are required to certify annually that the textbooks have been selected and purchased in accordance with the <i>Code of Virginia</i> and these regulations to provide a list of all textbooks adopted by the local school board.</p> <p>Textbooks approved by the Board of</p>

			<p>Education for use in grades 6-12 shall allow for the purchase of printed textbooks, printed textbooks with electronic files, or electronic textbooks separate and apart from printed versions of the same textbook.</p> <p>Rationale: These provisions were written to comply with the newly revised sections of 22.1-241 of the <i>Code of Virginia</i> passed by the 2008 and 2010 General Assembly and to provide school divisions with needed flexibility to secure textbooks in accordance with their needs while still being protected by correct purchasing practices.</p>
8VAC20-230-10 through 40	8VAC20-720-170	<p>Provides for the local adoption of textbooks and materials; sets forth requirements for the local adoption of textbooks not on the state adopted list and for the local adoption of materials for subject areas not included in basal adoptions.</p>	<p>Section B. provides for selection of textbooks by local school boards. It requires local school boards to adopt procedures for the selection of the textbooks and prescribes what the procedures must include, at a minimum. These include the appointment of an evaluation committee, notice to parents that textbooks under consideration for approval are available for review and public comment and selection criteria.</p> <p>Section E. addresses distribution of textbooks, consistent with § 22.1-243 of the <i>Code</i>.</p> <p>Rationale: Provides local school boards and divisions with needed flexibility to select textbooks, while providing parents and other interested citizens with the opportunity for public participation in the process.</p> <p>Section E. was added because § 22.1-242 of the <i>Code</i> requires regulations governing the distribution of textbooks. This topic is not addressed in the current regulations. The language is taken from § 22.1-243 of the <i>Code</i>.</p>
8VAC20-270-10 through 130	8VAC20-720-170	<p>Provides general requirements for textbook fund management and handling on the local level. Also, sets requirements for: the establishment and designation of a special fund and bank account; textbook sales, receipts, and disbursements and bonds for clerk and other personnel handling the funds; accounting and records; verification of book</p>	<p>None of these requirements have been included in the proposed regulation section on textbooks.</p> <p>Rationale: The majority of the provisions applied to the sale of textbooks, a practice that no longer exists. Additionally, other provisions no longer apply because textbooks are purchased in accordance with the <i>Virginia Public Procurement Act</i> (§§ 2.2-4300 et seq. of the <i>Code of Virginia</i>) which was not in existence at the time the current regulation was promulgated, and locally adopted regulations or procedures.</p>

		<p>shipments received; the selling of textbooks to students; transfers between funds; reports and payments to publishers; unsold textbooks; books for resale; responsibility for the placement of books in specific schools; audits and preservation of records; fire insurance on textbooks; retail sales of textbooks; and the issuance of warrants between board meetings.</p>	<p>Therefore, these requirements were unnecessary, and in some cases, did not comply with the <i>Virginia Public Procurement Act</i>.</p>
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Regulatory flexibility analysis

Please describe the agency’s analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

This agency does not regulate small businesses. The only businesses that should be affected, in any way, by these regulatory amendments are book publishers and it is anticipated that the impact will be positive in that it will streamline the procurement process for Board-approved textbooks.

Family impact

Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one’s spouse, and one’s children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

The proposed regulatory action is not expected to have a negative impact on the institution of the family and family stability. Schools are important institutions in communities. The impact of the proposed regulatory action on the institution of the family will be continued improvement in the public school system. Students must be adequately prepared for the future in order to lead productive lives. Being productive and successful will increase the potential for strong stable families.