

California Department of Education

Executive Office

SBE-003 (REV. 11/2017)

imab-adad-nov22item04

# California State Board of EducationNovember 2022 AgendaItem #08

## Subject

Physical Fitness Test: Adopt the Final Statement of Reasons and the Proposed Amendments to the *California Code of Regulations*, Title 5, Sections 1040, 1043, 1043.4, 1043.6, 1043.8, and 1044.

## Type of Action

Action, Information, Consent

## Summary of the Issue(s)

As the California Department of Education (CDE) pursues changes needed to protect the mental health of and ensure equity for students taking California’s Physical Fitness Test (PFT), the CDE seeks approval of the proposed amendments to *California Code of Regulations*, Title 5 (5 *CCR*), Sections 1040, 1043, 1043.4, 1043.6, 1043.8, and 1044.

## Recommendation

The CDE recommends that the California State Board of Education (SBE) take the following actions:

* Approve the Final Statement of Reasons.
* Approve the regulations.
* Authorize the CDE to take any necessary action to respond to any direction or concern expressed by the Office of Administrative Law during its review of the Final Statement of Reasons.

## Brief History of Key Issues

California *Education Code* (*EC*)Section 60800 (<https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=60800&lawCode=EDC>) requires that local educational agencies (LEAs) administer the PFT during the months of February, March, April, or May to each student in grades five, seven, and nine. *EC* Section 51241(b)(1) allows LEAs to grant a high school student an exemption from participating in physical education courses for two years anytime during grades ten through twelve if the student has satisfactorily met at least five of the six standards of the PFT administered in grade nine.

The FITNESSGRAM®, a physical fitness assessment developed by the Cooper Institute, was designated by the SBE in February 1996 as the PFT for California schools. It includes six fitness areas: Aerobic Capacity; Body Composition; Abdominal Strength and Endurance; Trunk Extensor and Strength and Flexibility; Upper Body Strength and Endurance; and Flexibility. The desired performance standard (developed by the Cooper Institute) for each fitness-area test is the Healthy Fitness Zone®.

In 2020, the Legislature passed, and the Governor approved Senate Bill 820 (Statutes, 2020, Chapter 110, Section 68), which required the CDE to consult with experts and other interested stakeholders in order to provide recommendations regarding the purpose and administration of the PFT. Those stakeholders were to include, but not be limited to, individuals with expertise in fitness, adapted physical education, gender identity, body image, and pupils with disabilities. On or before November 1, 2022, the State Superintendent of Public Instruction must submit a report with recommendations to the appropriate fiscal and policy committees of the Legislature, the Department of Finance, and the SBE.

In the meantime, LEAs continued to administer the PFT to eligible students while the concerns that prompted the passage of SB 820, Chapter 110, Section 68 remained. One such concern relates to body image. Specifically, the Body Composition subtest of FITNESSGRAM® commonly involves calculating a student’s body mass index, which may negatively impact the student’s personal body perception. Accordingly, in the interest of students’ mental health, it is necessary to eliminate the Body Composition subtest and the related Body Composition Healthy Fitness Zone®, even pending the results of the study currently underway pursuant to SB 820.

It should be noted that eliminating the Body Composition subtest of the PFT will prevent students from qualifying for the *EC* 51241(b)(1) exemption. This exemption allows an LEA to grant a student an exemption from courses in physical education for two years anytime during grades 10 to 12, inclusive, if the student has met satisfactorily at least five of the six standards of the PFT administered in grade 9. While an LEA may offer the *EC* 51241(b)(1) exemption if the LEA chooses to collect the data and completes the calculations using the formulas for the Body Composition and Aerobic Capacity subtests, these additional efforts are not required by LEAs, nor are they supported by the CDE during the 2022–23 PFT administration and any PFT administrations thereafter, until legislative action is taken. LEAs may use the remaining exemptions in *EC* 51241(c) and *EC* 51242 for students seeking an exemption from high school physical education requirements. Because students did not take the PFT in 2019–20 and 2020–21 due to the pandemic-related suspension, students who are currently in high school do not have access to the *EC* 51241(b)(1) exemption.

A second concern relates to nonbinary students. Currently, LEAs report students’ Healthy Fitness Zone® scores on each FITNESSGRAM® subtest to students upon completion, and report aggregate results on the LEA’s School Accountability Report Card and to the CDE. However, the Healthy Fitness Zones® for the FITNESSGRAM® subtests correspond to a student’s recorded sex at birth. There are no Healthy Fitness Zones® for a nonbinary student. While a nonbinary student may receive raw scores, a nonbinary student will not receive Health Fitness Zone® scores. Therefore, the nonbinary student will not be included in the LEA’s aggregate scores and will not have the opportunity to satisfy the criteria for exemption from physical education (i.e., receiving a passing Healthy Fitness Zone® score on at least five of the six subtests) provided in *EC* Section 51241(b)(1). To ensure equity, a regulatory definition of “results” must be added to the proposed regulations to indicate that for all students, LEAs will report *raw scores only* to the student upon completion of the test and will report *participation rates only* on their School Accountability Report Card and to the CDE.

A third concern relates to students with physical disabilities. *EC* Section 60800 states that students with physical disabilities shall participate in the PFT to the extent they are able, and the regulations confirm in 5 *CCR* Section 1041(e) and 5 *CCR* Section 1047(a) that a student’s individualized education program or Section 504 plan may exempt the student from a subtest or subtests. However, the PFT does not offer students with physical disabilities an alternative way of satisfying the Health Fitness Zone® for any subtest in which they cannot participate. Thus, a student with a physical disability will not receive a Healthy Fitness Zone® score for any subtest from which the student is exempted (and will not be included in the LEA’s aggregate scores for that subtest) and will not have an alternative way of satisfying the criteria for exemption from physical education pursuant to *EC* Section 51241(b)(1).

To ensure equity in this regard, a regulatory definition of “results” must be added to indicate that LEAs will report individual students’ *raw scores only* to the student upon completion of the test, and LEAs will report *participation rates only* on their School Accountability Report Card and to the CDE. Alternatives remain for students to receive an exemption from physical education, including that provided in *EC* Section 51241(c) for students sixteen years of age or older who have been enrolled in grade ten for one academic year or longer and *EC* Section 51242 for any four-year or senior high school student who is engaged in a regular school-sponsored interscholastic athletic program carried on wholly or partially after regular school hours.

In order to address the concerns laid out in this item, some, or all of 5 *CCR* sections 1043, 1043.4, 1043.6, 1043.8, and 1044 must be repealed. These sections are no longer relevant due to the amendments in 5 *CCR* Section 1040.

## Summary of Previous State Board of Education Discussion and Action

In September 2022, the SBE approved the second readoption of the emergency regulations (<https://www.cde.ca.gov/be/ag/ag/yr22/documents/sep22item06.docx>) (<https://www.cde.ca.gov/be/ag/ag/yr22/sep22item06a4.asp>).

In May 2022, the SBE approved the first readoption of the emergency regulations (<https://www.cde.ca.gov/be/ag/ag/yr22/documents/may22item06.docx>) (<https://www.cde.ca.gov/be/ag/ag/yr22/may22item06a4.asp>).

In January 2022, the SBE approved the emergency PFT regulations while conducting the proposed rulemaking process and the commencement of the rulemaking process for the proposed amendments to the PFT regulations (<https://www.cde.ca.gov/be/ag/ag/yr22/documents/jan22item07.docx>) (<https://www.cde.ca.gov/be/ag/ag/yr22/jan22item07a5.asp>).

## Fiscal Analysis

An Economic and Fiscal Impact Statement is provided as Attachment 4.

## Attachment(s)

* Attachment 1: Final Statement of Reasons (4 Pages)
* Attachment 2: Final Permanent Regulations (5 Pages)
* Attachment 3: Copies of Public Comments Received During the Initial Emergency Rulemaking (2 pages)
* Attachment 3a: Copies of Public Comments Received During the 45-Day Public Comment Period (2 pages)
* Attachment 4: Economic and Fiscal Impact Statement (STD. 399) (5 Pages)

# FINAL STATEMENT OF REASONS

Physical Fitness Test

## UPDATE OF INITIAL STATEMENT OF REASONS

### Emergency Rulemaking

#### **Initial Adoption**

Pursuant to Government Code section 11346.1(a)(2), these proposed regulations were pre-noticed by the California Department of Education (CDE) on January 14, 2022 through January 24, 2022, inclusive. These regulations were filed with the Office of Administrative Law (OAL) as emergency regulations on January 25, 2022, and were approved on February 4, 2022, with an expiration date of August 4, 2022. One written public comment was received.

On February 3, 2022, the CDE provided to OAL an Addendum to the Finding of Emergency to further discuss the necessity for the emergency rulemaking and to make nonsubstantive changes to the regulations.

**SUMMARY AND RESPONSE TO COMMENTS RECEIVED BY OAL AND CDE DURING THE INITIAL EMERGENCY RULEMAKING COMMENT PERIOD:**

**David N. Daum, Ph.D., Assistant Professor, Department of Kinesiology, San Jose State University; Michael Wright, Ph.D., Professor and Chair, Department of Kinesiology, San Jose State University; Jingwen Liu, Ph.D., Assistant Professor, Department of Kinesiology, California State University, Fullerton; Christopher Gentry, Ph.D., Assistant Professor, Department of Kinesiology, California State University, San Bernardino; Melissa Bittner, Ph.D., CAPE, Assistant Professor, Department of Kinesiology, California State University – Long Beach; Denise Hoppal, MS, NBCT, Physical Educator, Los Angeles USD; and Patricia Suppe, Retired Physical Educator, Alvord USD**

**Comment:** Our first argument is that the proposed regulation does not constitute an emergency. According to the OAL’s definition of an emergency it must cause “serious harm to the public peace, health, safety, or general welfare” of students.

**Reject:**  The CDE provided reasons for the emergency rulemaking in the Finding of Emergency and the Addendum to the Finding of Emergency, which were presented and approved by the State Board of Education (SBE) and filed with the OAL. Subsequently, the OAL approved them and therefore the CDE rejects this comment.

**Comment:** Instead of eliminating portions of the Physical Fitness Test (PFT), we recommend the OAL, SBE and CDE consider implementing the ten safeguards recommended by the Centers for Disease Control and Prevention (CDC) before acting on a perceived emergency around the measurement of and reporting of body composition in California schools.

**Reject:** The current manual for the PFT directly addresses the ten safeguards to ensure the accuracy and privacy of a student’s Body Mass Index (BMI). However, due to the thousands of schools located within California and human error, these safeguards cannot be guaranteed by the CDE. It is impossible to oversee every administrator to ensure that the PFT is being properly administered. The CDE has been made aware of difficult circumstances by students and parents when privacy has been compromised. Therefore, the CDE rejects this comment.

**Comment:** Some of the referenced data and guides are out-of-date and/or inaccurate. It is important to note that the 3rd edition, which is available on the CDE webpage, was published in 2004 and the most updated version of the FITNESSGRAM is the 5th edition (2017).

**Reject:** The referenced data and guides posted on the CDE website are not out-of-date or inaccurate. The California Physical Fitness guides and reference materials have been updated by the CDE when necessary. Typically guides have been updated annually, but there is nothing that requires annual updates. Updates are completed and posted when changes in the test require an update. The FITNESSGRAM® Third Edition was the version when the regulations were last updated. Accordingly, the CDE rejects this comment.

**Comment:** The SBE identified that the PFT negatively affects students' mental and physical health, however, empirical data does not support this claim.

**Reject:** A study published in the Journal of the American Medical Association Pediatrics entitled “Effect of School-Based Body Mass Index Reporting in California Public Schools: A Randomized Clinical Trial” found that reporting BMI alone may decrease weight satisfaction. The CDE provided this information in the emergency rulemaking in the Finding of Emergency and the Addendum to the Finding of Emergency, which were presented and approved by the SBE and filed with the OAL. Subsequently, the OAL approved them and therefore the CDE rejects this comment.

#### **First Readoption**

On May 18, 2022, the SBE approved the readoption of these emergency regulations. Pursuant to Government Code section 11346.1(a)(2), these proposed regulations were pre-noticed by the CDE on July 11, 2022 through July 18, 2022, inclusive. These regulations were filed with the OAL as readopted emergency regulations on July 19, 2022, and were approved on August 2, 2022, with an expiration date of November 2, 2022. No written public comments were received.

#### **Second Readoption**

On September 14, 2022, the SBE approved the readoption of these emergency regulations. Pursuant to Government Code section 11346.1(a)(2), these proposed regulations were pre-noticed by the CDE on October 6, 2022, through October 13, 2022, inclusive. These regulations were filed with the OAL as readopted emergency regulations on October 14, 2022, with a request to approve on November 1, 2022, with an expiration date of January 31, 2023. No written public comments were received by OAL.

#### **Permanent Rulemaking**

The original proposed text was made available for public comment for at least 45 days from June 17, 2022 through August 2, 2022, inclusive. One individual provided written comments during the 45-day comment period.

A public hearing was held at 9:00 a.m. on August 2, 2022, via in-person meeting*.* No persons attended the in-person meeting and no persons provided oral comments.

**SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE INITIAL NOTICE PERIOD OF JUNE 17, 2022 THROUGH AUGUST 2, 2022, INCLUSIVE:**

**Carl Carpenter, PE teacher and Athletic Director, Mission Preparatory Charter**

**Comment:** “I support the elimination of the Body Composition subtest, and as it was not required this past year, we did not administer it at our school. I support the change to score reporting to provide equity to non-binary students. I support the third concern as it relates to students with physical disabilities and the way their scores are reported.”

No Action: No action needed because it is a letter of support.

## ALTERNATIVES DETERMINATION

The SBE has determined that no alternative would be more effective in carrying out the purpose for which the regulation is proposed or would be as effective and less burdensome to affected private persons than the proposed regulation, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provisions of law.

All alternatives were presented in the form of public comments, and those alternatives were accepted or rejected for the reasons stated above.

The nonadoption of these changes is not a suitable alternative because Local Educational Agencies would be required to administer the FITNESSGRAM® as currently prescribed pursuant to Education Code section 60800, without consideration of recent concerns regarding the equitability and accessibility of the PFT described herein.

## LOCAL MANDATE DETERMINATION

The proposed regulations do not impose any mandate on local agencies or school districts.

09-20-2022 [California Department of Education]

* The State Board of Education has illustrated changes to the original text in the following manner: text originally proposed to be added is underlined; text proposed to be deleted is displayed in ~~strikeout~~.

 **TITLE 5. Education
Division 1. California Department of Education**

**Chapter 2. Pupils
Subchapter 4. Statewide Testing of Pupils and Evaluation Procedures**

**Article 2. Physical Performance Testing Programs**

**§ 1040. Definitions.**

For the purpose of the physical performance test required by Education Code section 60800, and also referred to as the Physical Fitness Test (PFT), the following definitions shall apply:

(a) “Accommodations” means any variation in the assessment environment or process that does not fundamentally alter what the test measures or affect the comparability of scores.

(b) “Annual assessment window” begins on February 1 and ends on May 31 of each school year.

(c) “Block schedule” is a restructuring of the school day whereby pupils attend half as many classes, for twice as long.

(d) “District Physical Fitness Test Coordinator” is an employee of the school district designated by the superintendent of the district to oversee the administration of the PFT within the district.

(e) “FITNESSGRAM®,” November, 2005, excluding the Body Composition component, and all Healthy Fitness Zone® (HFZ) performance standards, is the California Physical Fitness Test designated by the State Board of Education (SBE), a document incorporated by reference.

(f) “Grade” for the purpose of the PFT means the grade assigned to the pupil by the school district at the time of testing.

(g) “Modification” means any variation in the assessment environment or process that fundamentally alters what the test measures or affects the comparability of scores.

(h) “Pupil” is a person in grades 5, 7 or 9, enrolled in a California public school or placed in a non-public school through the individualized education program (IEP) process pursuant to Education Code section ~~58365~~ 56365.

(i) “Results,” as used in Education Code section 60800, subdivisions (b) and (d), is the percent of students, by subtest component and grade level, who participated during the annual assessment window. “Results,” as used in Education Code section 60800, subdivision (c), is the raw score a student receives when participating in a specific FITNESSGRAM® component.

(~~i~~j) “School district” includes elementary, high school, and unified school districts, county offices ~~or~~ of education, any charter school that for assessment purposes does not elect to be part of the school district or county office of education that granted the charter, and any charter school chartered by the SBE.

(~~j~~k) “Test administration manual” is the Updated Third Edition FITNESSGRAM®/ACTIVITYGRAM®, a document incorporated by reference. A copy is available for review from CDE staff in the ~~Standards and Assessment Division~~ Assessment Development and Administration Division.

(~~k~~l) “Test examiner” is an employee of the school district who administers the PFT.

(~~l~~m) “Variation” is a change in the manner in which a test is presented or administered, or in how a test taker is allowed to respond, and includes, but is not limited to accommodations and modifications.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 60603, ~~and~~ 60608~~,~~ and 60800 Education Code.

**§ 1043. Methods of Administration.**

 (a) The tests shall be administered and scored by employees of the district or the employees of the county superintendent of schools. ~~The scoring thereof shall be in compliance with the instructions of the publisher or developer for scoring, and the scores shall be submitted to the governing board of the school district on the dates required by, and on forms prescribed or approved by, such governing board.~~

 (b) Districts may provide an alternative date for make-up based on absence or temporary physical restriction or limitations (e.g., recovering from illness or injury).

Note: Authority cited: Section 33031, Education Code. Reference: Section 60800, Education Code.

**§ 1043.4. District Physical Fitness Test Coordinator.**

 (a) On or before November 1 of each school year, the superintendent of each school district, county office of education, and independent charter school may designate from among its employees a District Physical Fitness Test Coordinator. If a District Physical Fitness Test Coordinator is designated, the superintendent shall notify the contractor for the PFT of the identity and contact information of the District Physical Fitness Test Coordinator. The District Physical Fitness Test Coordinator shall be available throughout the year and shall serve as the liaison between the school district and the CDE for all matters related to the PFT.

 (b) The District Physical Fitness Test Coordinator responsibilities include, but are not limited to, the following:

 (1) Responding to correspondence and inquiries from the contractor in a timely manner and as provided in the contractor's instructions.

 (2) Determining school district and individual school test and test material needs.

 (3) Overseeing the administration of the PFT to pupils.

 ~~(4) Overseeing the collection and return of all test data to the contractor.~~

 (~~5~~4) Ensuring that all participation test data are received from school test sites within the school district in sufficient time to satisfy the reporting requirements according to the School Accountability Report Card.

 ~~(6) Ensuring that all test data are sent to the test contractor by June 30 of each year.~~

NOTE: Authority cited: Section 33031, Education Code. Reference: Section 60800, Education Code.

**~~§ 1043.6. Data for Analysis of Pupil Proficiency.~~**

 ~~(a) Each school district shall provide the contractor of the PFT the California School Information Services (CSIS) student identification number and demographic information for each pupil tested for purposes of the analyses and reporting.~~

 ~~(b) The demographic information required by subdivision (a) is for the purpose of aggregate analyses and reporting only.~~

 ~~(c) School districts shall provide the same information for each pupil enrolled in an alternative or off-campus program, or for pupils placed in nonpublic schools, as provided for all other pupils.~~

~~NOTE: Authority cited: Section 33031, Education Code. Reference: Section 49061, 60605 and 60800, Education Code; and 20 USC Section 1232g.~~

**~~§ 1043.8. Reporting Test Scores.~~**

~~No aggregate or group scores or reports that are compiled pursuant to Education Code section 60800 shall be reported electronically, in hard copy, or in other media, to any audience other than the school or school district where the pupils were tested, if the aggregate of group scores or reports are composed of ten (10) or fewer individual pupil scores. In each instance in which no score is reported for this reason, the notation shall appear: “The number of pupils in this category is too small for statistical accuracy or privacy protection.” In no case shall any group score be reported that would deliberately or inadvertently make public the score or performance of any individual pupil.~~

~~NOTE: Authority cited: Section 33031 and 60605, Education Code. Reference: Section 49061, 60605 and 60800, Education Code; 20 USC Section 1232g; 34 CFR part 99; and 20 USC Section 6311(b)(3)(C)xiii.~~

**~~§ 1044. Recording Test Scores.~~**

~~The district superintendent or the county superintendent of schools, as the case may be, shall require that the pupil's scores on each of the tests given him or her in the physical performance testing program be included in the pupil's cumulative record. This requirement may be met by maintaining the regular physical performance testing program card with the cumulative record form.~~

~~NOTE: Authority cited: Section 33031, Education Code. Reference: Section 60800, Education Code.~~

08-10-2022 [California Department of Education]