

California Department of Education

Executive Office

SBE-003 (REV. 11/2017)

imab-adad-may22item03

# California State Board of EducationMay 2022 AgendaItem #07

## Subject

Physical Fitness Test: Approve Commencement of a 45-Day Public Comment Period for Proposed Amendments to *California Code of Regulations*, Title 5, Sections 1040, 1043, 1043.4, 1043.6, 1043.8 and 1044.

## Type of Action

Action, Information

## Summary of the Issue(s)

The California Department of Education (CDE) seeks approval of commencement of a 45-day public comment period for 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 Notice of Proposed Rulemaking (Notice).
* Approve the Initial Statement of Reasons (ISOR).
* Approve the proposed regulations.
* Direct the CDE to commence the rulemaking process.
* 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 Notice, ISOR, and proposed regulations.

## 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. The law also requires that LEAs provide individual results to students for their completed testing and annually report aggregate results in their annual school accountability report card and to the CDE at least every two years.

The FITNESSGRAM® was designated by the SBE in February 1996 as the PFT for California schools. The FITNESSGRAM® is a physical fitness assessment developed by the Cooper Institute. It includes six fitness areas: Aerobic Compacity, 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.

*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.

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 partners 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 interim, students are scheduled to take the PFT in spring 2022, but the concerns that prompted the passage of SB 820, Chapter 110, Section 68 remain. One such concern relates to body image. Specifically, the Body Composition subtest of FITNESSGRAM commonly involves calculating a student’s body mass index (BMI), based on the student’s height and weight. the reporting of which may negatively impact the student’s personal body perception. 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 underway pursuant to SB 820.

A second concern relates to nonbinary students. Currently, LEAs report students’ Healthy Fitness Zone scores on each FITNESSGRAM subtest to the student 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 scores only* on their School Accountability Report Card and to the CDE.

A local educational agency (LEA) may offer the “*EC* Section 51241(b)(1) exemption” if the LEA collects the data and completes the formulas necessary for the Body Composition and Aerobic Compacity components. These additional efforts are not required and there remain alternative exemptions in *EC* Section 51241 and *EC* Section 51242 for students seeking to be exempted from high school physical education requirements. Also, students did not take the PFT in 2018-2019 or 2019-2020 because of the [COVID] suspension of the PFT and thus did not have access to the “*EC* Section 51241(b)(1) exemption” in those years

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, it is necessary to add a regulatory definition of “results” to indicate that LEAs will report individual students’ *raw scores only* to the student upon completion of the test, and LEAs will report *participation scores 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.

## Addressing the above concerns requires the amendments or repeal of some or all of 5 *CCR* sections 1043, 1043.4, 1043.6, 1043.8, and 1044. These sections are no longer relevant due to the amendments in Section 1040.

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

In January 2022, the SBE approved the emergency PFT regulations so the regulations will be in effect for the 2021-22 assessment time window while conducting the rulemaking process for the permanent PFT regulations (<https://www.cde.ca.gov/be/ag/ag/yr22/documents/jan22item07.docx>).

## Fiscal Analysis

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

## Attachment(s)

* Attachment 1: Notice of Proposed Rulemaking (8 Pages)
* Attachment 2: Initial Statement of Reasons (7 Pages)
* Attachment 3: Proposed Regulations (5 Pages)
* Attachment 4: Economic and Fiscal Impact Statement (STD. 399) (5 Pages)

**CALIFORNIA DEPARTMENT OF EDUCATION**

TONY THURMOND

State Superintendent of Public Instruction

916-319-0800

 **CALIFORNIA STATE BOARD OF**

 **EDUCATION**

 LINDA DARLING-HAMMOND

 President

 916-319-0827

# NOTICE OF PROPOSED RULEMAKING

AMENDMENTS TO CALIFORNIA CODE OF REGULATIONS, TITLE 5, REGARDING
PHYSICAL FITNESS TEST

Notice published June 17, 2022

**NOTICE IS HEREBY GIVEN** that the State Board of Education (SBE) proposes to adopt the regulations described below after considering all comments, objections, or recommendations regarding the proposed action.

The SBE invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations at the scheduled hearing or during the written comment period.

***PUBLIC HEARING***

California Department of Education (CDE) staff, on behalf of the SBE, will hold a public hearing at 9:00 a.m. on August 2, 2022, at 1430 N Street, Room 1801, Sacramento, California. The room is wheelchair accessible.

At the hearing, any person may present statements or arguments, orally or in writing, relevant to the proposed action described in the Informative Digest. The SBE requests, but does not require, that persons who make oral comments at the public hearing also submit a written summary of their statements. No oral statements will be accepted subsequent to this public hearing.

***REASONABLE ACCOMMODATION FOR ANY INDIVIDUAL WITH A DISABILITY***

Pursuant to the *Rehabilitation Act of 1973,* the *Americans with Disabilities Act of 1990,* and the *Unruh Civil Rights Act,* any individual with a disability who requires reasonable accommodation to attend or participate in a public hearing on proposed regulations, may request assistance by contacting Stephanie Ireland, Assessment Development and Administration Division, 1430 N Street, Room 4409, Sacramento, CA, 95814; telephone, 916-445-2766 is recommended that assistance be requested at least two weeks prior to the hearing.

Pursuant to Government Code section 11346.6(a)(3) and (b), because some of these regulations pertain to special education, the following provisions also apply:

Upon request from a person with a visual disability or other disability for which effective communication is required under state or federal law, the CDE shall provide that person a narrative description of the additions to, and deletions from, the regulations. The description shall identify each addition to or deletion from the regulations by reference to the subdivision, paragraph, subparagraph, clause, or subclause within the proposed regulation containing the addition or deletion. The description shall provide the express language proposed to be added to or deleted from the regulations and any portion of the surrounding language necessary to understand the change in a manner that allows for accurate translation by reading software used by the visually impaired.

The CDE shall provide the information described above within 10 business days, unless the CDE determines that compliance with this requirement would be impractical and notifies the requester of the date on which the information will be provided.

Notwithstanding any other law, if information is provided to a requester as described above, the CDE shall provide that requester at least 45 days from the date upon which the information was provided to the requester to submit a public comment regarding the proposed regulation. The CDE shall not take final action to adopt the regulation until the requester has submitted a public comment or the extended 45-day comment period expires, whichever occurs first.

***WRITTEN COMMENT PERIOD***

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to:

Lorie Adame, Regulations Coordinator

Administrative Support and Regulations Adoption Unit

California Department of Education

1430 N Street, Room 5319

Sacramento, CA 95814

Comments may also be submitted by facsimile (FAX) at 916-322-2549 or by email to regcomments@cde.ca.gov.

Comments must be received by the Regulations Coordinator prior to or on August 2, 2022. All written comments received by CDE staff during the public comment period are subject to disclosure under the Public Records Act.

***AUTHORITY AND REFERENCE***

Authority: Section 33031, Education Code

References: Sections 60603, 60608 and 60800, Education Code

***INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW***

Education Code (EC) section 60800 requires that local educational agencies (LEAs) administer the PFT, designated by the California State Board of Education (SBE), during the month of February, March, April, or May to each student in grades five, seven, and nine. The law also requires that LEAs provide individual results to students for completed testing and report aggregate results in their annual School Accountability Report Card (SARC) and to the California Department of Education (CDE) at least every two years.

The FITNESSGRAM® was designated by the SBE in February 1996 as the PFT for California schools. The FITNESSGRAM® is a physical fitness assessment developed by the Cooper Institute and published by Human Kinetics and includes six fitness areas: Aerobic Compacity, 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 (HFZ).

Section 1040 of 5 CCRprovides the definitions for the physical performance test required by ECsection 60800. These proposed regulations address a concern related to body image. Specifically, the Body Composition subtest of FITNESSGRAM® commonly involves calculating Body Mass Index (BMI), which may negatively impact a student’s personal body perception. (A study published in 2021 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.)

In the interests of students’ mental and physical health, it is necessary to eliminate the Body Composition subtest and the related Body Composition HFZ now, even pending the results of the ongoing study pursuant to SB 820.

A second concern relates to nonbinary students. Based on Senate Bill No. 179, chapter 852 (Stats. 2017), relating to a nonbinary option for identification of persons, the CDE’s California Longitudinal Pupil Achievement Data System (CALPADS) addressed and then began to accommodate the option of a nonbinary gender student code for the 2019–20 academic year. On April 22, 2020, in response to the COVID-19 pandemic, Executive Order N-56-20, Section 13, waived the administration of the Physical Fitness Test (PFT) for the 2019–20 school year. Later that year, Senate Bill No. 820 (Stats. 2020) not only provided for the study and report about the PFT to be submitted to the Legislature in November 2022, it also suspended the PFT for the 2020–21 school year because of the ongoing COVID-19 pandemic (Sen. Bill No. 820, Stats. 2020, ch. 110, § 68(a)). On June 30, 2021, Senate Bill No. 98 (Stats. 2020) expired of its own terms, ending the authorization for distance learning and returning students to in-person instruction (EC, section 43511(b)). Thereafter, while continuing to participate in the ongoing Senate Bill No. 820 study about the PFT and to monitor the ongoing pandemic, the CDE pursued a legislative extension of the PFT suspension for the 2021–22 school year, pending submission of the Senate Bill No. 820 report on the PFT in November 2022. However, the CDE was ultimately unsuccessful in this request. Once it was clear that administration of the PFT for spring 2022 was expected to go forward (with a testing window beginning in February 2022), the CDE began developing a regulatory solution including both emergency regulations for the spring 2022 administration of the PFT and permanent regulations for the spring 2023 administration.

Currently, LEAs report students’ HFZ scores on each FITNESSGRAM® subtest to the student upon completion, and report aggregate results on the LEA’s School Accountability Report Card and to the CDE. However, the HFZs for the FITNESSGRAM® subtests correspond to a student’s sex at birth. There are no HFZs for a nonbinary student. While a nonbinary student may receive raw scores, the nonbinary student will not receive HFZ scores, and therefore 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 in EC section 51241(b)(1), i.e., receiving a passing HFZ score on at least five of the six subtests. To ensure equity, it is necessary to add a regulatory definition of “Results” to indicate that for all students, LEAs will report **raw scores** only to the student upon completion of the test, and LEAs will report **participation scores**only on their SARC and to the CDE.

A third concern relates to students with physical disabilities. While ECsection 60800 states that students with physical disabilities shall participate in the PFT to the extent they are able, and the regulations confirm in 5 CCRsections 1041(e) and1047(a) that a student’s Individualized Education Program or Section 504 plan may exempt the student from a subtest or subtests, the PFT does not offer a student with a physical disability an alternative way of satisfying the HFZ for any subtest in which the student cannot participate. Thus, a student with a physical disability will not receive a HFZ score for any subtest from which the student is exempted, and therefore 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 in ECsection 51241(b)(1).

Lastly, while “the lack of HFZ [Healthy Fitness Zone] performance standards will eliminate all students’ ability to satisfy the criteria for the exemption from physical education in ECsection 51241(b)(1),” it must be clarified that there remains the possibility that a LEA with the consent of a pupil could grant an exemption from physical education under that permissive section in a specific set of circumstances. That is, a student could volunteer (or a LEA could collect from a willing student) the student’s height and weight and, together with the raw scores from the aerobic capacity subtest, do the necessary computation to determine whether the student met the HFZ standard for that subtest. Then, if the student passed that subtest, and it was determined that the student’s raw scores also met the HFZ standard for the remaining four subtests, a student could apply for and be granted the exemption in ECsection 51241(b) if the LEA chose to exercise that option. Although this regulatory action thus does not completely eliminate the potential equity issues that have been identified, it is not expected that many LEAs will offer or many students will seek exemptions under ECsection 51241(b)(1) following the spring 2022 administration of the PFT. Therefore, this regulatory action takes a substantial step towards reducing inequities and maintaining students’ mental and physical health.

***Policy Statement Overview***

The proposed regulations are necessary for the state implementation of Education Code section 60800, while the required PFT study is in process and ensuring equitable results for all students.

***Anticipated Benefits of the Proposed Regulation***

The proposed regulations will provide LEAs flexibility in the administration of the PFT while the required PFT study is underway. The proposed regulations will allow for an equitable administration, while collecting and reporting only participation results.

***Evaluation of Inconsistency/Incompatibility with Existing State Regulations***

An evaluation of the proposed regulations has determined they are not inconsistent/incompatible with existing regulations, pursuant to Government Code section 11346.5(a)(3)(D). After conducting a review of any regulations that would relate to or affect this area of law, the SBE has concluded that these are the only regulations that concern the Physical Fitness Test regulations.

***DISCLOSURES REGARDING THE PROPOSED ACTION/ FISCAL IMPACT***

The SBE has made the following initial determinations:

*Other statutory requirements*: There are no other matters as are prescribed by statute applicable to the specific state agency or to any specific regulations or class of regulations.

*Mandate on local agencies and school districts*: No

*Costs to any local agencies or school districts for which reimbursement would be required pursuant to Part 7 (commencing with section 17500) of division 4 of the Government Code*: No

*Cost or savings to any state agency*: No

*Other non-discretionary costs or savings imposed on local agencies, including local educational agencies*: No

*Costs or savings in federal funding to the state*: No

*Effect on housing costs*: No

*Significant, statewide adverse economic impact directly affecting business including the ability of California businesses to compete with businesses in other states*: No

*Cost impacts on a representative private person or businesses*: The SBE is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

*Report required*: The proposed regulations do not require a report to be made.

*Effect on small businesses*: The proposed regulations would not have an effect on any small business *because* they are designed to address students’ body image perception and will not expand or eliminate small businesses currently doing business within the state of California.

***Results of the Economic Impact Analysis/ASSESSMENT***

***Benefits of the Regulations to the Health and Welfare of California Residents, Worker Safety, and the State’s Environment—Gov. Code Section 11346.5(a)(10):***

The SBE concludes that it is unlikely that these proposed regulations will: 1) create or eliminate jobs within California; 2) create new businesses or eliminate existing businesses within California; or 3) affect the expansion of businesses currently doing business within California.

Benefits of the Proposed Action: The proposed regulations will benefit the health of California’s students and will not adversely affect the welfare of California residents, worker safety and the State’s environment.

***CONSIDERATION OF ALTERNATIVES***

In accordance with Government Code section 11346.5(a)(13), the SBE must determine that no reasonable alternative it considered or that has otherwise been identified and brought to the attention of the SBE, would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

The SBE invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations during the written comment period.

***CONTACT PERSONS***

Inquiries concerning the content of these proposed regulations should be directed to:

Stephanie Ireland

Assessment Development and Administration Division

California Department of Education

1430 N Street, Room 4409

Sacramento, CA 95814

Telephone: 916-445-2766

Email: pft@cde.ca.gov@cde.ca.gov

Inquiries concerning the regulatory process may be directed to the Lorie Adame, Regulations Coordinator, or the backup contact person, Hillary Wirick, Regulations Analyst. The Regulations Coordinator and the Regulations Analyst may be reached by email at regulations@cde.ca.gov or by telephone at 916-319-0860.

***AVAILABILITY OF INITIAL STATEMENT OF REASONS, TEXT OF PROPOSED REGULATIONS AND INFORMATION***

As of the date this notice is published in the Notice Register, the rulemaking file consists of this Notice, the proposed text of the regulations, the Initial Statement of Reasons (ISOR), the agenda and a recording of the SBE meeting where the SBE approved commencement of this rulemaking activity, and Fiscal and Economic Impact Statement (STD. 399). These documents upon which the proposed action is based may be obtained upon request from the Regulations Coordinator. In addition, this Notice, the text of the proposed regulations and the ISOR may also be viewed on the CDE’s website at [*http://www.cde.ca.gov/re/lr/rr/*](http://www.cde.ca.gov/re/lr/rr/).

***AVAILABILITY OF CHANGED OR MODIFIED TEXT***

Following the public hearing and considering all timely and relevant comments received, the SBE may adopt the proposed regulations substantially as described in this Notice or may modify the proposed regulations if the modifications are sufficiently related to the original text. With the exception of technical or grammatical changes, the full text of any modified regulation will be available to the public for at least 15 days prior to its adoption from the Regulations Coordinator and will be mailed to those persons who submit written comments related to this regulation, or who provide oral testimony at the public hearing, or who have requested notification of any changes to the proposed regulations. The SBE will accept written comments on the modified regulations for 15 days after the date on which they are made available.

***AVAILABILITY AND LOCATION OF THE FINAL STATEMENT OF REASONS AND RULEMAKING FILE***

You may obtain a copy of the Final Statement of Reasons, once it has been finalized, by making a written request to the Regulations Coordinator.

All the information upon which the proposed regulations are based is contained in the rulemaking file which is available for public inspection by contacting the Regulations Coordinator.

***AVAILABILITY OF DOCUMENTS ON THE INTERNET***

Copies of the Notice of Proposed Action, the Initial Statement of Reasons, and the text of the regulations with modifications highlighted, as well as the Final Statement of Reasons, when completed, and modified text, if any, can be accessed via CDE’s website at [*http://www.cde.ca.gov/re/lr/rr/*](http://www.cde.ca.gov/re/lr/rr/).

04-25-2022 [California Department of Education]

# INITIAL STATEMENT OF REASONS

PHYSICAL FITNESS TEST

**INTRODUCTION**

The proposed amended regulations, California Code of Regulations, Title 5 (5 *CCR*), sections 1040, 1043, 1043.4, 1043.6, 1043.8, and 1044, must be adopted in order for California to continue to fairly and properly administer the California Physical Fitness Test (PFT) while awaiting recommendations from a study pursuant to Senate Bill (SB) No. 820, Statutes 2020, chapter 10, section 68, due on or before November 1, 2022. The study will address significant concerns about the PFT relating to body image, gender identity, and students with disabilities, among other issues.

**PROBLEM AGENCY INTENDS TO ADDRESS**

Education Code (EC) section 60800 requires that local educational agencies (LEAs) administer the PFT, designated by the California State Board of Education (SBE), during the month of February, March, April, or May to each student in grades five, seven, and nine. The law also requires that LEAs provide individual results to students for completed testing and report aggregate results in their annual School Accountability Report Card (SARC) and to the California Department of Education (CDE) at least every two years.

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Section 1040 of 5 CCRprovides the definitions for the physical performance test required by ECsection 60800. These proposed regulations address a concern related to body image. Specifically, the Body Composition subtest of FITNESSGRAM® commonly involves calculating Body Mass Index (BMI), which may negatively impact a student’s personal body perception. (A study published in 2021 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.) In the interests of students’ mental and physical health, it is necessary to eliminate the Body Composition subtest and the related Body Composition HFZ now, even pending the results of the ongoing study pursuant to SB 820.

A second concern relates to nonbinary students. Based on Senate Bill No. 179, chapter 852 (Stats. 2017), relating to a nonbinary option for identification of persons, the CDE’s California Longitudinal Pupil Achievement Data System (CALPADS) addressed and then began to accommodate the option of a nonbinary gender student code for the 2019–20 academic year. On April 22, 2020, in response to the COVID-19 pandemic, Executive Order N-56-20, Section 13, waived the administration of the Physical Fitness Test (PFT) for the 2019–20 school year. Later that year, Senate Bill No. 820 (Stats. 2020) not only provided for the study and report about the PFT to be submitted to the Legislature in November 2022, it also suspended the PFT for the 2020–21 school year because of the ongoing COVID-19 pandemic (Sen. Bill No. 820, Stats. 2020, ch. 110, § 68(a)). On June 30, 2021, Senate Bill No. 98 (Stats. 2020) expired of its own terms, ending the authorization for distance learning and returning students to in-person instruction (EC, section 43511(b)). Thereafter, while continuing to participate in the ongoing Senate Bill No. 820 study about the PFT and to monitor the ongoing pandemic, the CDE pursued a legislative extension of the PFT suspension for the 2021–22 school year, pending submission of the Senate Bill No. 820 report on the PFT in November 2022. However, the CDE was ultimately unsuccessful in this request. Once it was clear that administration of the PFT for spring 2022 was expected to go forward (with a testing window beginning in February 2022), the CDE began developing a regulatory solution including both emergency regulations for the spring 2022 administration of the PFT and permanent regulations for the spring 2023 administration.

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A third concern relates to students with physical disabilities. While ECsection 60800 states that students with physical disabilities shall participate in the PFT to the extent they are able, and the regulations confirm in 5 CCRsections 1041(e) and1047(a) that a student’s Individualized Education Program or Section 504 plan may exempt the student from a subtest or subtests, the PFT does not offer a student with a physical disability an alternative way of satisfying the HFZ for any subtest in which the student cannot participate. Thus, a student with a physical disability will not receive a HFZ score for any subtest from which the student is exempted, and therefore 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 in ECsection 51241(b)(1).

Lastly, while the lack of HFZ [Healthy Fitness Zone] performance standards will eliminate all students’ ability to satisfy the criteria for the exemption from physical education in ECsection 51241(b)(1), it must be clarified that there remains the possibility that a LEA with the consent of a pupil could grant an exemption from physical education under that permissive section in a specific set of circumstances. That is, a student could volunteer (or a LEA could collect from a willing student) the student’s height and weight and, together with the raw scores from the aerobic capacity subtest, do the necessary computation to determine whether the student met the HFZ standard for that subtest. Then, if the student passed that subtest, and it was determined that the student’s raw scores also met the HFZ standard for the remaining four subtests, a student could apply for and be granted the exemption in ECsection 51241(b) if the LEA chose to exercise that option. Although this regulatory action thus does not completely eliminate the potential equity issues that have been identified, it is not expected that many LEAs will offer or many students will seek exemptions under ECsection 51241(b)(1) following the spring 2022 administration of the PFT. Therefore, this regulatory action takes a substantial step towards reducing inequities and maintaining students’ mental and physical health.

Addressing the above concerns requires the amendments to amend or repeal some or all of 5 *CCR* sections 1043, 1043.4, 1043.6, 1043.8, and 1044. These sections are no longer relevant due to the amendments in Section 1040.

**BENEFITS ANTICIPATED FROM REGULATORY ACTION**

The benefits anticipated from regulatory action are various and will positively impact the mental and physical health of students. Removing the Body Composition fitness area prevents the embarrassment students endure when they are provided with a score that is based on their weight. Removing gender options creates a test that is equitable for all students, including those who identify as non-binary. The removal of gender does not allow for the use of the HFZs as the HFZs are based upon the student’s age and gender. Lastly, removing HFZs allows the test to be more accessible for all students, regardless of mental or physical restrictions.

The specific purpose of each adoption or amendment, and the rationale for the determination that each adoption or amendment is reasonably necessary to carry out the purpose of which it is proposed, together with a description of the public problem, administrative requirement, or other condition or circumstance that each adoption or amendment is intended to address, is as follows:

General changes were made to the proposed regulations to include grammatical edits, and renumbering and/or relettering to reflect deletions or additions.

**SECTION 1040. Definitions**

**Section 1040(e)** is amended to remove the Body Composition component and all HFZ performance standards from the “FITNESSGRAM®”so the PFT is more inclusive of today’s dynamic student population. Students will no longer have to answer questions concerning their biological sex at birth. Much has changed since the inception of the test and the PFT should reflect our evolving society. Removing the Body Composition fitness component of the test prevents student embarrassment and shame as they will no longer be required to publicly score their bodies based on height and weight.In addition, eliminating the HFZ performance standards creates a test that is more inclusive as HFZ scores are based on biological sex at birth.

**Section 1040(h)** is amended to provide the correct Education Code section.

**Proposed Section 1040(i)** Is added to include the definition of “Results” as student participation. This enables test coordinators to be less restrictive with disabled students. Students who are physically or mentally unable to perform a component of the test will not be penalized since the test will no longer be administered using HFZs as a passing or no passing standard. It also creates a test that is more inclusive as HFZ scores are based on biological sex at birth.

**Section 1040(k)** is amended to change "Standards and Assessment Division” to the current name, “Assessment Development Administrative Division.”

**SECTION 1040 NOTE** is amended to include EC section 60800 because the section specifically addresses the administration of the PFT.

**SECTION 1043. Methods of Administration**

**Section 1043(a)** is amended to delete “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.” This deletion is necessary because the proposed addition of section 1040(i) eliminates the collection of performance scores and requires only reporting participation data in the School Accountability Report Card (SARC).

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

**Renumbered Section 1043.4(b)(4), formerly Section 1043.4(b)(5),** is amended to read “Ensuring that all test participation 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.” This edit is necessary to clarify to LEAs the type of data that is to be reported according to the SARC.

**Section 1043.4(b)(4) and (6)** are deleted to be in alignment with Education Code 60800(b) that states the results of the PFT shall be reported to the department and not the contractor.

**SECTION 1043.6. Data for Analysis of Pupil Proficiency**

**Section 1043.6** is deleted to be in alignment to the proposed change in section 1040(i) because performance scores, i.e., pupil proficiency, are no longer required to be reported. Therefore, data analysis cannot be performed.

**SECTION 1043.8. Reporting Test Scores**

**Section 1043.8** is deleted to be in alignment to the proposed change in section 1040(i), as the California Department of Education is no longer collecting individual student results. The deletion of this section regulations will be aligned with the new definition of results as provided in section 1040(i).

**SECTION 1044. Recording Test Scores**

**Section 1044** is deleted to be in alignment to the proposed change in section 1040(i), LEAs are no longer required to store students’ PFT results in their cumulative file.

**ECONOMIC IMPACT ASSESSMENT PER GOV. CODE SECTION 11346.3(b)**

The proposed regulations will not result in any additional costs or savings to state agencies, or federal funding to the state. These proposed regulations will not result in any additional cost to any local agency or school district that is required to be reimbursed under GC section 17500 et seq. These regulations will not result in any additional non-discretionary costs or savings upon local agencies

***Purpose:***

The current guidelines to administer the PFT do not always provide alternative options for students with disabilities nor do they provide an option for non-binary students. Requesting teachers to calculate a student’s body composition can cause embarrassment and shame for a student who is struggling with their weight. The intended purpose of the proposed amendments is to ensure the accessibility and equitability of the PFT, and to avoid inflicting harm to a student’s mental and physical health.

***Creation or Elimination of Jobs within the State of California:***

The proposed regulations are designed to address students’ body image perception and mental and physical well-being and will not create or eliminate jobs within the state of California. These regulations only impact LEAs and how they administer the PFT and do not apply to or impact jobs within the state of California.

***Creation of New or Elimination of Existing Businesses within the State of California:***

The proposed regulations are designed to address students’ body image perception or gender identity and will not create or eliminate any new businesses within the state of California. These regulations only impact LEAs and how they administer the PFT and do not apply to or impact businesses.

***Expansion of Businesses or Elimination of Businesses Currently Doing Business within the State of California:***

The proposed regulations are designed to address students’ body image perception or gender identity and will not expand or eliminate businesses currently doing business within the state of California. These regulations only impact LEAs and how they administer the PFT and do not apply to or impact businesses.

***Benefits of the Regulations to the Health and Welfare of California Residents, Worker Safety, and the State’s Environment – Gov. Code Section 11346.1(b)(1):***

These proposed regulations are designed to address students’ body image perception or gender identity and will positively affect the mental health of California students. However, they do not apply to or impact worker safety or the State’s environment.

***Reasonable Alternatives that Would Lessen the Impact on Small Businesses – Gov. Code Section 11346.2(b)(4)(B):***

These proposed regulations only impact LEAs and how they administer the PFT and do not apply to or impact small businesses.

***Evidence Relied Upon to Support the Initial Determination that the Regulations Will Not Have a Significant Adverse Economic Impact on Business – Gov. Code Section 11346.2(b)(5):***

The proposed regulations would not have a significant adverse economic impact on any business because the proposed regulations are designed to address students’ body image perception or gender identity. These proposed regulations only impact LEAs and how they administer the PFT and do not apply to or impact businesses.

**OTHER REQUIRED SHOWINGS**

***Studies, Reports or Documents Relied Upon – Gov. Code. Section 11346.2(b)(3):***

The SBE did not rely upon any technical, theoretical, or empirical studies, reports, or documents in proposing the adoption, amendment, or repeal of these regulations.

***Reasonable Alternatives Considered or Agency’s Reasons for Rejecting Those Alternatives – Gov. Code Section 11346.2(b)(4)(A):***

No other alternatives were presented to or considered by the SBE.

***Analysis of Whether the Regulations are an Efficient and Effective Means of Implementing the Law in the Least Burdensome Manner – Gov. Code Section 11346.3(e):***

The proposed regulations have been determined to be the most efficient and effective means of implementing the law in the least burdensome manner.

***Determination of Inconsistent/Incompatible Existing Regulations – Gov. Code Section 11346.5(a)(3)(D):***

An evaluation of the proposed regulations has determined they are not inconsistent/incompatible with existing regulations, pursuant to Government Code section 11346.5(a)(3)(D).

04-03-2022 [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. EducationDivision 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 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.~~

05-02-2022 [California Department of Education]