

California Department of Education

Executive Office

SBE-003 (REV. 11/2017)

imab-adad-may22item02

# California State Board of EducationMay 2022 AgendaItem #06

## Subject

Physical Fitness Test: Approve the Finding of Emergency and Readopt the Proposed Emergency Regulations for Amendments to the *California Code of Regulations*, Title 5, Section 1040.

## Type of Action

Action, Information

## Summary of the Issue(s)

The California Department of Education (CDE) seeks approval of the Finding of Emergency and readoption of the proposed amended emergency regulations to the *California Code of Regulations*, Title 5 (5 *CCR*), Section 1040, related to the California Physical Fitness Test (PFT). The proposed regulations would amend the definition of “FITNESSGRAM®” and add a definition of “results.”

## Recommendation

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

* Approve the Finding of Emergency.
* Readopt the proposed emergency regulations.
* Direct the CDE to circulate the required Notice of Proposed Emergency Action, and then submit the emergency regulations to the Office of Administrative Law (OAL) for approval.
* Authorize the CDE to take any necessary action to respond to any direction or concern expressed by the OAL during its review of the Finding of Emergency and proposed emergency 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 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 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 (SB) 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 emergency 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 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 nor are they supported by the CDE during this physical fitness test (PFT) administration. The CDE encourages LEAs to use the remaining exemptions in EC 51241 and EC 51242 for students seeking to be exempted from high school physical education requirements. Also remember that students in 2018–19 and 2019–20 did not take the PFT because of the [COVID] suspension of the PFT and thus do not have access to the “EC 51241(b)(1) exemption”.

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.

In order for these emergency regulations to remain in effect while the SBE undertakes the regular rulemaking process to make the regulations permanent, these emergency regulations must be readopted to extend their effectiveness.

## 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: Finding of Emergency for Readoption (4 Pages)
* Attachment 2: Notice of Proposed Emergency Action (2 Pages)
* Attachment 3: Emergency Regulations (2 Pages)
* Attachment 4: Economic and Fiscal Impact Statement (STD. 399) (5 Pages)

**FINDING OF EMERGENCY
Readoption of Emergency Regulations**

Physical Fitness Test

The State Board of Education (SBE) finds that an emergency exists and that the emergency regulations adopted are necessary to avoid serious harm to the public peace, health, safety, or general welfare, especially the welfare of students attending California’s public schools.

**SPECIFIC FACTS DEMONSTRATING THE EXISTENCE OF AN EMERGENCY AND THE NEED FOR IMMEDIATE ACTION**

**Necessity for Readoption for Emergency regulations**

The proposed amendments to California Code of Regulations, title 5, section 1040 must be readopted on an emergency basis in order to maintain the consistency of reporting results of the 2021-2022 administration of the Physical Fitness Test (PFT).

Education Code (EC) section 60800 requires that local educational agencies (LEAs) administer the PFT, designated by the 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 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).

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.

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 2019-2020 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 PFT for the 2019-2020 school year.

Later that year, the Legislature passed and the Governor approved Senate Bill No. 820 (Stats. 2020, ch. 110, § 68), which required the CDE to consult with experts and other interested partners, including, but not limited to, individuals with expertise in fitness, adapted physical education, gender identity, body image, and pupils with disabilities in order to provide recommendations regarding the purpose and administration of the PFT. 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. Senate Bill No. 820 also suspended the PFT for the 2020-2021 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 (Ed. Code, § 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 2021-2022 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 potentially permanent regulations.

Also, while the lack of HFZ performance standards will eliminate all students’ ability to satisfy the criteria for the exemption from physical education in Education Code section 51241(b)(1), it must be clarified that there remains the possibility that a local educational agency 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 local educational agency 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 Education Code section 51241(b) if the local education agency 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 local education agencies will offer or many students will seek exemptions under Education Code section 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.

The proposed amendments to these emergency regulations include changes to 5 CCR sections 1040(e) and (i). Section 1040(e) is amended to replace “the relevant” with “all” to clarify that all HFZ performance standards are to be excluded from FITNESSGRAM®. This change is necessary because HFZ scores are based on a student’s biological sex at birth. Eliminating the HFZ performance standards creates a test that is more inclusive. Section 10404(i) is amended to include “by subtest component and grade level” to clarify how data is to be submitted.

**Showing of Substantial Progress**

The emergency regulations were approved by the SBE at its January 2022. The readoption of emergency regulations and the the regular rulemaking package for permanent regulations will be presented to the SBE at its May 2022 for approval. However, the emergency regulations are due to expire on August 4, 2022 and permanent regulations will not be operative until January 2023. By enacting the readoption of the emergency regulations, the CDE will avoid reverting back to the original regulations the SBE authorized to change upon the approval of the emergency regulations.

The following timeline illustrates the necessity of the readoption of the emergency regulations in order for the CDE to meet the requirements of the Education Code:

| **Action\*** | **Completion Date or Estimated Completion Date** |
| --- | --- |
| SBE approved the adoption of the emergency regulations and the commencement of the permanent rulemaking process | January 12, 2022 |
| 5-business day pre-notice of the proposed emergency regulations for readoption | January 14,2022 |
| 10-calendar day review by OAL | January 25-February 4 ,2022 |
| Emergency regulations effective | February 4, 2022 |
| SBE approves the commencement of permanent regulations and the first readoption of the emergency regulations. | May 18, 2022 |
| 45-day public comment period for permanent regulations | June 17, 2022–August 2, 2022 |
| Public hearing for permanent regulations | August 2, 2022 |
| Readopted regulations effective | August 3, 2022 |
| Emergency regulations expire | August 4, 2022 |
| SBE approves second readoption of the emergency regulations  | September 14, 2022 |
| Second readoption emergency regulations effective | October 31, 2022 |
| First readopted emergency regulations expire | November 1, 2022 |
| SBE approves the final statement of reasons or a 15-day comment period for permanent regulations  | November 2, 2022 |
| 15-day comment period for permanent regulations, if necessary  | November 7–22, 2022 |
| Submit rulemaking to OAL if a second 15-day comment period is not necessary | November 30, 2022 |
| OAL approval—Permanent Regulations effective  | January 13, 2023 |

\*These actions represent a small, but relevant, fraction of the details of the adoption process.

04-04-2022 [California Department of Education]

**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

July 11, 2022

**NOTICE OF PROPOSED EMERGENCY ACTION
Physical Fitness Test**

Readoption of Emergency Regulations, Title 5, Section 1040

Pursuant to the requirements of Government Code section 11346.1(a)(1), the State Board of Education (SBE) is providing notice of proposed emergency action with regards to the above-entitled emergency regulation.

**SUBMISSION OF COMMENTS**

Government Code section 11346.1(a)(2) requires that, at least five working days prior to submission of the proposed emergency action to the Office of Administrative Law (OAL), the adopting agency provide a Notice of the Proposed Emergency Action to every person who has filed a request for notice of regulatory action with the agency. After submission of the proposed emergency to the OAL, the OAL shall allow interested persons five calendar days to submit comments on the proposed emergency regulations as set forth in Government Code section 11349.6.

Any interested person may present statements, arguments or contentions, in writing, submitted via U.S. mail, email or fax, relevant to the proposed emergency regulatory action. Written comments must be received at the OAL and the California Department of Education within five days after the SBE submits the emergency regulations to the OAL for review.

Please reference submitted comments as regarding “Physical Fitness Test” addressed to:

 Reference Attorney

Lorie Adame, Regulations Coordinator

 Office of Administrative Law

 300 Capitol Mall, Suite 1250

 Sacramento, CA 95814

Email: staff@oal.ca.gov

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California Department of Education

1430 N Street, Suite 5319

Sacramento, CA 95814

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916-322-2549

For the status of the action submitted by the SBE to the OAL for review, and the end of the five-day written comment period, please consult the web site of the OAL at [www.oal.ca.gov](http://www.oal.ca.gov/) under the heading “Emergency Regulations.”

03-14-2022 [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. PupilsSubchapter 4. Statewide Testing of Pupils and Evaluation ProceduresArticle 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 ~~the related~~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 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.

(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.

(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 Assessment Development and Administration Division.

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

(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, 60608 and 60800, Education Code.

05-02-2022 [California Department of Education]