# 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]