**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, REGARDINGPHYSICAL 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 1101, 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]