

California Department of Education

Executive Office

SBE-003 (REV. 11/2017)

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# California State Board of EducationJanuary 2022 AgendaItem #07

## Subject

Physical Fitness Test – Approve the Finding of Emergency and 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 for the Finding of Emergency and Proposed Emergency Regulations/Amendments 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 the State Board of Education (SBE) take the following actions:

* Approve the Finding of Emergency
* Adopt 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, 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 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 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.

California *Education Code* (*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 (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, but the concerns that prompted 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 measuring Body Mass Index, which may negatively impact a student’s personal body perception. In the interests of students’ mental and physical health, it is necessary to eliminate the Body Composition subtest and the related Body Composition Healthy Fitness Zone, even pending the results of the ongoing study 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 sex at birth. There are no Healthy Fitness Zones for a nonbinary student. While a nonbinary student may receive raw scores, the nonbinary student will not receive Health Fitness Zone 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 Healthy Fitness Zone 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 School Accountability Report Card and to the CDE.

While the lack of Healthy Fitness Zone scores will eliminate all students’ ability to satisfy the criteria for the exemption from physical education in *EC* Section 51241(b)(1), there remain alternative options for students to receive an exemption from physical education. For example, *EC* Section 51241(c) permits an exemption from physical education for students who are age 16 or older and have been enrolled in grade 10 for one academic year or longer.

A third concern relates to students with physical disabilities. While *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, the PFT does not offer a student with a physical disability an alternative way of satisfying the Health Fitness Zone for any subtest in which the student 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 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 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. Alternative options remain for students to receive an exemption from physical education. For example, *EC* Section 51241(c) permits an exemption from physical education for students who are age 16 or older and have been enrolled in grade 10 for one academic year or longer.

## Fiscal Analysis

An Economic and Fiscal Impact Statement is provided as Attachment 5.

## Attachment(s)

* Attachment 1: Finding of Emergency (5 Pages)
* Attachment 2: Emergency Regulations (2 Pages)
* Attachment 3: Document Incorporated by Reference: FITNESSGRAM®
* Attachment 4: Notice of Proposed Emergency Action (1 Page)
* Attachment 5: Economic and Fiscal Impact Statement (STD. 399) (5 Pages)

## FINDING OF EMERGENCY

**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**

**Overview**

The proposed amended regulations, California Code of Regulations, title 5 (5 CCR), section 1040, must be adopted, on an emergency basis, in order for California to continue to fairly and properly administer the 2021-22 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, that will address significant concerns about the PFT relating to body image, gender identity and students with disabilities, among other issues. The intended purpose of the proposed amendments is to ensure the accessibility and equitability of the PFT, and to avoid inflicting harm to student’s mental and physical health, in the interim.

**Background**

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 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.

In 2020, the Legislature passed and the Governor approved SB 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.

**Specific Basis for the Finding of Emergency**

The concerns that prompted passage of SB 820, ch. 110, section 68 remain. One concern relates to body image. Specifically, the Body Composition subtest of FITNESSGRAM commonly involves measuring Body Mass Index (BMI), which may negatively impact a student’s personal body perception. (A study published in the Journal of the American Medical Association Pediatrics entitled “Effect of School-Based Body Mass Index Reporting in California Public Schools: A Randomized Clinical Trial” found that reporting BMI alone may decrease weight satisfaction.) In the interests of students’ mental and physical health, it is necessary to eliminate the Body Composition subtest and the related Body Composition Health Fitness Zone now, even pending the results of the ongoing study pursuant to SB 820.

A second concern relates to nonbinary students. 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 School Accountability Report Card (SARC) and to the CDE.

While the lack of HFZ scores will eliminate all students’ ability to satisfy the criteria for the exemption from physical education in EC section 51241(b)(1), there remain alternative options for students to receive an exemption from physical education. For example, EC section 51241(c) permits an exemption from physical education for students who are age 16 or older and have been enrolled in grade 10 for one academic year or longer.

A third concern relates to students with physical disabilities. While 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 sections 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 educaiton in 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 SARC and to the CDE. As noted above, while the lack of HFZ scores will eliminate all students’ ability to satisfy the criteria for the exemption from physical education in EC section 51241(b)(1). Alternative options remain for students to receive an exemption from physical education. For example, EC section 51241(c) permits an exemption from physical education for students who are age 16 or older and have been enrolled in grade 10 for one academic year or longer.

**These Issues Could Not Be Addressed Through Nonemergency Regulations**

The 2021-22 window for PFT testing would expire before formal rulemaking could be undertaken, and therefore LEAs would be required to administer the FITNESSGRAM® as currently prescribed pursuant to EC section 60800, without consideration for recent concerns regarding the equitability and accessibility of the PFT described herein.

**NON-DUPLICATION**

Government Code (GC) section 11349 prohibits unnecessary duplication of state or federal statutes in regulation. In this case, duplication of certain state statute in the proposed emergency regulations is necessary in order to provide additional specific detail not included in state statute.

**AUTHORITY AND REFERENCE**

Authority: Section 33031, Education Code.

Reference: Sections 60603 and 60800, Education Code.

**INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW**

Section 1040 of 5 CCR provides the definitions for the physical performance test required by EC section 60800, and also referred to as the PFT. The PFT is administered annually to public school students in grades five, seven, and nine. The SBE has designated the FITNESSGRAM® as the PFT. Current regulations require the LEA to report the student’s HFZ scores to the student upon completion of the PFT, and to report aggregate HFZ scores on the SARC and to the CDE.

The amendments to 5 CCR section 1040 are as follows. Section 1040(e) is amended to change the SBE’s designation of FINTESSGRAM as the PFT to eliminate the Body Composition subtest and related HFZ. Proposed Section 1040(i) is added to define “Results” to mean raw scores only when reporting to a student, and participation scores only when reporting on the SARC and to the CDE. Section 1040(k) is amended to change "Standards and Assessment Division” to the current name, “Assessment Development Administrative Division.”

**Policy Statement Overview**

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

**Determination 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 GC section 11346.5(a)(3)(D).

**Documents Incorporated by Reference**

FITNESSGRAM® is hereby incorporated by reference and may be found at <https://pftdata.org/files/hfz-standards.pdf>.

**SPECIFIC BENEFITS ANTICIPATED BY THE PROPOSED REGULATIONS**

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

**TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS RELIED UPON**

Effect of School-Based Body Mass Index Reporting in California Public Schools: A Randomized Clinical Trial <https://jamanetwork.com/journals/jamapediatrics/fullarticle/2773004>.

**MANDATE ON LOCAL AGENCIES OR SCHOOL DISTRICTS**

The proposed regulations do not impose a new mandate on LEAs because the amendments are made to the definitions of existing regulations and do not impose new or additional work on the LEAs.

**FISCAL IMPACT ESTIMATION**

These emergency regulations will not result in any additional costs or savings to state agencies, or federal funding to the state. These emergency 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. The emergency regulations will not result in any additional non-discretionary costs or savings upon local agencies.

12-17-2021 [California Department of Education]

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

TITLE 5. Education
**Division 1. California Department of Education
Chapter 2. Pupils
Subchapter 4. Statewide Testing of Pupils and Evaluation Procedures
Article 2. Physical Performance Testing Programs**

**§ 1040. Definitions.**

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

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

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

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

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

(e) “FITNESSGRAM®,” ~~November, 2005,~~excluding the Body Composition component and the related Healthy Fitness Zone (HFZ) performance standard, 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.

(i) “Results,” as used in Education Code section 60800, subdivisions (b) and (d), is the percent of students that 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, Education Code.

12-15-21 [California Department of Education]

**CA DEPARTMENT OF EDUCATION**

**TONY THURMOND**

State Superintendent of Public Instruction

**CA BOARD OF EDUCATION**

**LINDA DARLING-HAMMOND**

President

January 14, 2022

## NOTICE OF PROPOSED EMERGENCY ACTION

Physical Fitness Test

Adoption 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

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 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.”

11-01-21 [California Department of Education]