



1-1-2009

## Battling the Bulge: Chapter 32 Clarifies Requirements for P.E. Exemptions

Alex Harary

*Pacific McGeorge School of Law*

Follow this and additional works at: <http://digitalcommons.mcgeorge.edu/greensheet>

---

### Recommended Citation

40 McGeorge L. Rev. 339

This Article is brought to you for free and open access by the Law Review at Pacific McGeorge Scholarly Commons. It has been accepted for inclusion in Greensheets by an authorized administrator of Pacific McGeorge Scholarly Commons. For more information, please contact [msharum@pacific.edu](mailto:msharum@pacific.edu).

## **Battling the Bulge: Chapter 32 Clarifies Requirements for P.E. Exemptions**

*Alex Harary*

### *Code Section Affected*

Education Code § 51241 (amended).  
SB 602 (Torlakson); 2008 STAT. Ch. 32.

### I. INTRODUCTION

Increasingly, children in California and throughout the United States suffer from the effects of childhood obesity.<sup>1</sup> Nationwide data from 2003-2004 shows that “an estimated 17 percent of children and adolescents ages 2-19 years are overweight.”<sup>2</sup> Governor Schwarzenegger, with his extensive background in physical fitness,<sup>3</sup> has emphasized the importance of physical education in California schools, and, along with the Legislature, has devised a plan to combat childhood obesity.<sup>4</sup> It was therefore no surprise that early in his tenure, the Governor signed into law legislation requiring high school students to meet specific fitness criteria in order to waive the requirement of physical education as part of their curriculum.<sup>5</sup> The law was well intentioned, but lacked the clarity for schools to properly follow its procedures.<sup>6</sup> In response, the State Legislature enacted Chapter 32, which clarifies the specific standards students must meet to qualify for a physical education waiver.<sup>7</sup>

---

1. See, e.g., National Center for Health Statistics, Prevalence of Overweight Among Children and Adolescents: United States, 2003-2004, Jan. 30, 2007, [http://www.cdc.gov/nchs/products/pubs/pubd/hestats/overweight/overwght\\_child\\_03.htm](http://www.cdc.gov/nchs/products/pubs/pubd/hestats/overweight/overwght_child_03.htm) (on file with the *McGeorge Law Review*) (listing statistics that demonstrate increasing levels of childhood obesity across the United States).

2. *Id.*

3. See generally Office of the Governor, About Arnold, <http://gov.ca.gov/about/arnold> (last visited July 21, 2008) (on file with the *McGeorge Law Review*) (describing Governor Schwarzenegger's background in physical fitness).

4. See The Governor's Council on Physical Fitness, About the Council, [http://www.calgovcouncil.org/about\\_the\\_council/](http://www.calgovcouncil.org/about_the_council/) (last visited July 21, 2008) (on file with the *McGeorge Law Review*) (detailing Governor Schwarzenegger's plan to promote physical activity amongst California children).

5. ASSEMBLY COMMITTEE ON EDUCATION, COMMITTEE ANALYSIS OF SB 602, at 3 (June 4, 2008).

6. See *id.* (“While SB 601 was on the Governor's Desk pending action, the Administration discovered important technical clean-up that was necessary for the implementation of SB 601.”).

7. CAL. EDUC. CODE § 51241 (amended by Chapter 32).

## II. BACKGROUND

In 2003, the State Legislature amended the California Education Code to require students to pass a physical fitness test to be eligible for a waiver from physical education classes in high school.<sup>8</sup> The California State Board of Education<sup>9</sup> chose the Fitnessgram test to determine students' physical fitness.<sup>10</sup> This test measures physical fitness in six categories: the one-mile run, a twenty-meter Progressive Aerobic Cardiovascular Endurance Run (PACER), a one-mile walk, curl-ups, a skinfold measurement, and the body mass index.<sup>11</sup> The Fitnessgram's measurements are scientifically designed to measure physical health, not athletic ability.<sup>12</sup> In this manner, students who are natural athletes do not gain an unfair advantage over other students.<sup>13</sup> In 2003, the California Department of Education implemented testing in public schools.<sup>14</sup>

The law, however, was unclear regarding what a student must do to meet the passing requirement.<sup>15</sup> Therefore, in 2007, the Legislature further clarified the law by amending the Education Code to allow the Office of the County Superintendent of Schools (OCSS)<sup>16</sup> in each county to grant a temporary two-year waiver of physical education in grades 10-12 for students who satisfactorily complete "any" five of the six Fitnessgram test categories.<sup>17</sup>

8. ASSEMBLY COMMITTEE ON EDUCATION, COMMITTEE ANALYSIS OF SB 602, at 2 (June 4, 2008).

9. See CAL. EDUC. CODE § 60800 (West 2003 & Supp. 2008) (delegating authority to administer the testing to the Department of Education).

10. See Press Release, California Department of Education, State Schools Chief Jack O'Connell Releases Eighth Annual Physical Fitness Test Results (Dec. 6, 2007), available at <http://www.cde.ca.gov/ta/tg/pf/documents/pftnewsrelease.doc> (on file with the *McGeorge Law Review*) (stating that pursuant to state law, the State Board of Education chose the Fitnessgram test).

11. See California Department of Education, Fitnessgram Healthy Fitness Zones (2008-2009), <http://www.cde.ca.gov/ta/tg/pf/documents/healthfitzone08.pdf> (last visited Nov. 21, 2008) (on file with the *McGeorge Law Review*) ("[The] criterion-referenced standards established by The Cooper Institute of Dallas, Texas, represent minimum levels of fitness that offer protection against the diseases that result from sedentary living . . .").

12. The Cooper Institute, Frequently Asked Questions, <http://cooperinst.org/products/grams/questions.cfm> (last visited Oct. 10, 2008) (on file with the *McGeorge Law Review*).

13. See *id.* ("[The Fitnessgram] focus[es] on guidelines for health and personal improvement rather than attaining [an] unrealistic performance based standard.").

14. See ASSEMBLY COMMITTEE ON EDUCATION, COMMITTEE ANALYSIS OF SB 602, at 2 (June 4, 2008) ("[The 2003 Amendment] required students to 'pass' the Fitnessgram in order to be exempt from physical education for a period of two years in grades 10-12.").

15. See *id.* at 3 ("[The 2007 Amendments] clarified the law by removing the requirement that students 'pass' the Fitnessgram and instead required that students 'meet satisfactorily any five of the six standards' of the Fitnessgram . . .").

16. Each of California's 58 counties has an Office of the Superintendent, which provides a management role for the schools of each county's various school districts. See Sacramento County Office of Education, <http://www.scoe.net/> (last visited Oct. 6, 2008) (on file with the *McGeorge Law Review*) ("The Sacramento County Office of Education (SCOE) is one of 58 county offices of education in the State of California. SCOE plays a vital role in providing technical assistance, curriculum and instructional support, staff development, legal and financial advice, and oversight to Sacramento County school districts.").

17. CAL. EDUC. CODE § 51241 (West Supp. 2008).

Because the 2007 Amendment stated that students must pass “any” five of six categories, the law could have been interpreted as allowing students to skip the sixth category upon passing the first five.<sup>18</sup> As a result of this confusion, Governor Schwarzenegger issued a signing statement on the law,<sup>19</sup> which stated that further clarification by the Legislature was necessary.<sup>20</sup> Responding to the Governor’s concerns, the Legislature enacted Chapter 32, which aims to clarify portions of prior law.<sup>21</sup>

### III. CHAPTER 32

Chapter 32 allows the OCSS or the school district’s governing board to grant a two-year waiver of physical education classes for students who pass “at least” five of the six Fitnessgram categories.<sup>22</sup> By stating unequivocally that students must pass “at least” five of the six categories, the legislature clearly articulated that students must attempt to pass the *entire* test,<sup>23</sup> thus underscoring the importance of physical education in California schools.<sup>24</sup>

### IV. ANALYSIS

Because Chapter 32 further amends and clarifies the 2007 Amendment,<sup>25</sup> it is best understood in conjunction with that prior law. The 2007 Amendment established physical education incentives for public schools with the purpose of combating childhood obesity.<sup>26</sup> The Legislature initially passed the amendment with the intention that, absent extenuating circumstances, students excused from physical education had already exhibited an adequate level of health.<sup>27</sup> The school district’s governing board or the OCSS could still grant a waiver for other reasons, such as injury or illness.<sup>28</sup> Therefore, if a student could not pass the test and exhibit a satisfactory level of health, the school was, and is, statutorily prohibited from granting a waiver from physical education.<sup>29</sup> These standards

---

18. ASSEMBLY COMMITTEE ON EDUCATION, COMMITTEE ANALYSIS OF SB 602, at 3 (June 4, 2008); CAL. EDUC. CODE § 51241 (West 2003 & Supp. 2008).

19. Governor Schwarzenegger indicated when he signed the 2007 Amendment into law that while he did not want to veto it, he also was displeased with the specific language of the new law. ASSEMBLY COMMITTEE ON EDUCATION, COMMITTEE ANALYSIS OF SB 602, at 3 (June 4, 2008).

20. *Id.* at 3.

21. CAL. EDUC. CODE § 51241 (amended by Chapter 32).

22. *Id.*; ASSEMBLY COMMITTEE ON EDUCATION, COMMITTEE ANALYSIS OF SB 602, at 2 (June 4, 2008).

23. CAL. EDUC. CODE § 51241(e) (amended by Chapter 32).

24. *Id.* §51241 (amended by Chapter 32).

25. See ASSEMBLY COMMITTEE ON EDUCATION, COMMITTEE ANALYSIS OF SB 602, at 2 (June 4, 2008) (describing the problems with previous amendments and the need for clarification).

26. CAL. EDUC. CODE § 51241 (West 2003 & Supp. 2008).

27. ASSEMBLY COMMITTEE ON EDUCATION, COMMITTEE ANALYSIS OF SB 602, at 1 (June 4, 2008).

28. *Id.*

29. *Id.*

worked to counteract increasing childhood obesity trends by ensuring that each student either participated in a physical education program or otherwise maintained good health.<sup>30</sup>

Since Chapter 32 simply clarified existing law and had a negligible fiscal effect, there is no record of any opposition.<sup>31</sup> Various nonprofit organizations and unions voiced support for Chapter 32.<sup>32</sup> For example, the California Association for Health, Physical Education, Recreation, and Dance stated that Chapter 32 “provide[s] opportunities for evaluating physical education practices; and, establish[es] quality instructional programs.”<sup>33</sup>

Most schools probably already realized the intended meaning as pronounced in the 2007 Amendment—that passing “any” five of six Fitnessgram categories require that the student take the entire test.<sup>34</sup> However, in response to the Governor’s request for clarification, Chapter 32 removes all ambiguity and leaves no room for interpretation.

Regardless of how schools interpreted prior law, Chapter 32 continues the use of a Fitnessgram test, which has thus far proved effective.<sup>35</sup> As previously stated, there are six components to the Fitnessgram test,<sup>36</sup> and these separate tests are combined to measure aerobic capacity, body type, and strength, while taking into account the individual student’s physical traits.<sup>37</sup> In 2007, ninth grade students showed a 2.7 percent increase in Fitnessgram scores.<sup>38</sup> Nonetheless, the statistics also show that schools have a long way to go; a majority of students are still unable to pass the test at what is considered a healthy level.<sup>39</sup>

With school budgets strained across the nation, and many schools dependent on increased standardized test scores to receive funding, administrators are often forced to cut programs such as physical education as a cost-saving measure.<sup>40</sup> Federal laws, such as No Child Left Behind, mandate that a school meet certain testing criteria to

---

30. See *id.* (allowing for temporary and permanent waivers of physical education only under specific and limited circumstances).

31. See *id.* (listing no known opposition to SB 602).

32. See *id.* at 2 (listing the various supporters of SB 602).

33. *Id.*

34. See CAL. EDUC. CODE § 51241 (West Supp. 2008) (stating the requirements in a somewhat ambiguous way).

35. See Press Release, California Department of Education, *supra* note 10. (outlining improvements in physical fitness scores).

36. See *supra* Part II.

37. *Id.*

38. Press Release, California Department of Education, *supra* note 10.

39. See *id.* (“While I’m pleased these numbers are moving in the right direction,” O’Connell said, “this annual fitness test serves as an important reminder to all of us that the majority of our students are not in good physical shape.”).

40. See Helyn Trickey, *No Child Left Out of the Dodgeball Game?*, CNN, Aug. 24, 2006, <http://www.cnn.com/2006/HEALTH/08/20/PE.NCLB/index.html> (on file with the *McGeorge Law Review*) (describing how most states forego physical education due to a focus on increasing test scores in light of budget and time constraints).

continue to receive federal funding.<sup>41</sup> This requirement often forces schools to focus on in-classroom learning at the expense of physical education, thereby exacerbating the trend of increasing childhood obesity stemming from children's increasingly sedentary lifestyles.<sup>42</sup> This is reflected in national statistics showing that participation in high school physical education has declined over the past several years, coinciding with the percentage of overweight children tripling over the same time period.<sup>43</sup>

California remains one of the few states that mandates physical education in its schools.<sup>44</sup> While the effectiveness of the physical education program has been fairly modest to date,<sup>45</sup> the statistics do show measurable improvement.<sup>46</sup> Although there is still much work to be done in this arena, this incremental progress is a positive measure of California public schools' implementation of physical fitness programs.<sup>47</sup>

## V. CONCLUSION

Chapter 32 clarifies the California Education Code by eliminating any confusion regarding what requirements a student must meet to gain an exemption from physical education classes.<sup>48</sup> Chapter 32 aims to meet the Governor's and Legislature's goal of reducing childhood obesity by ensuring that students meet a minimum level of physical fitness before procuring a waiver from physical education.<sup>49</sup> Specifically, students requesting a waiver from physical education must attempt to pass the entire Fitnessgram test as well as successfully complete at least five of the six categories, thus guaranteeing that California's high school students have some measure of physical activity in their lives.<sup>50</sup>

---

41. *Id.*

42. *See id.* (finding various reasons for more children being considered overweight).

43. *See* Centers for Disease Control and Prevention, *Participation in High School Physical Education—United States, 1991-2003*, <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5336a5.htm> (last visited Jan. 6, 2009) (on file with the *McGeorge Law Review*) (finding that overall participation in physical education declined from 1981-2003, that the percentage of overweight children tripled over the same time frame, and recommending that students participate in physical education to increase health).

44. *Id.*; CAL. EDUC. CODE § 51241 (West Supp. 2008).

45. *See* Press Release, California Department of Education, *supra* note 10 (outlining improvements in physical fitness scores).

46. *Id.*

47. *Id.* (noting that there has been progress in the promotion of healthy lifestyles).

48. ASSEMBLY COMMITTEE ON EDUCATION, COMMITTEE ANALYSIS OF SB 602, at 2 (June 4, 2008).

49. *Id.*

50. *See id.* (stating the bill's intention to clarify the prior law).