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# 2024 Title IX Regulations: Training for Site Administrators and Supervisors

Presented by: Alyse Pacheco Nichols & Danielle Potestio

Oak Grove School District  
October 4, 2024



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Presenter

## Alyse Pacheco Nichols

Alyse Pacheco Nichols is a Partner in Lozano Smith's Walnut Creek Office. She represents clients in the facilities and business, litigation, and construction aspects of education law. Ms. Nichols frequently assists clients through Brown Act compliance, particularly related to agenda questions and issues; reviews vendor contracts; and helps conduct investigations into both employee and student Title IX complaints. Ms. Nichols prepares and assists clients in presenting expulsion cases, on behalf of school sites, before school boards and admin panels. She assists admin panels throughout the expulsion hearing process, and presents on student discipline, including expulsion appeals. She has also negotiated stipulated expulsion agreements for school sites. Additionally, Ms. Nichols supports clients in handling grade challenge appeals and requests for student records.



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Presenter

## Danielle Potestio

Danielle Potestio is an Associate in Lozano Smith's Walnut Creek Office. She represents clients in the labor & employment, litigation, student, and Title IX practice groups. Ms. Potestio has advised public agency clients on various legal matters, including the California Public Records Act, governance, gun violence restraining orders, workplace violence restraining orders, criminal and civil subpoenas, code enforcement, notices of dangerous conditions, and Pitchess Motions. She has extensive experience with the Public Records Act where she has advised public entity clients on daily requests, assisted in the review and redaction process of responsive records, evaluated applicable exemptions, and corresponded with requesters. Additionally, she has provided counseling in all stages of litigation including drafting and filing motions, discovery, contract review, settlement negotiations, mediation, trial preparation, dispute resolutions, and claims investigations.



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### Topics

- Overview of 2024 Title IX Regulations
- Definitions to Know
- Responding to Complaints
  - Initial Evaluation
  - Supportive Measures
  - Informal Resolution
  - Investigation Procedures
  - Appeals
- Pregnancy and Parenting


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## Overview of the 2024 Regulations

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### Scope of Sex Discrimination

- Title IX prohibits sex discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.
- The 2024 Regulations are **NOT** retroactive
  - Only applies to sex discrimination that **occurred on or after August 1, 2024.**
  - All incidents that take place on or before July 31, 2024, must be processed through the 2020 Title IX Regulations.

§ 106.10


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### Knowledge Check

- Before you came to this presentation, you were working on a Title IX investigation from a complaint that came in on June 6.
- Should you adjust your current investigation to comply with the 2024 regulations?



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### Definition of Sex-Based Harassment

- Quid Pro Quo**
  - person authorized by the District
- Hostile Environment Harassment [“HEH”]**
  - “Subjectively and objectively offensive and is so severe *or* pervasive that it limits or denies a person’s ability to participate in or benefit from the recipient’s education program or activity”
- Sexual Assault, Dating Violence, Domestic Violence, and Stalking**



34 C.F.R. § 106.2

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### Sex-Based Harassment - HEH

Factors to consider:

- Affect on the complainant’s ability to access the district’s education program or activity;
- The type, frequency, and duration of the conduct;
- The parties’ ages, roles, previous interactions, and other individual factors;
- The location of the conduct and the context in which the conduct occurred; and
- Other sex-based harassment.



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### Sexual Assault

- Rape
- Sodomy (meaning forcible oral or anal sexual intercourse with a complainant)
- Sexual Assault with an Object
- Fondling
- Incest
- Statutory Rape



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### Hypothetical

Principal Jones tells Claire, a student teacher at his site, "If you spend your lunch hour with me every day for the rest of the year, I will make sure you get a job here next year." When Claire doesn't join him for lunch, Principal Jones threatens that he will make sure she never has a job in this District.

Does this fall under Title IX?



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### Hypothetical

Michelle, a 7<sup>th</sup> grader, comes to you and complains that another 7<sup>th</sup> grader, Brady, keeps following her in the hallway and calling her names, such as "dyke," and "lesbian." Michelle is extremely upset and is requesting that she be transferred to a new school.

Does this fall under Title IX?



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Title IX Jurisdiction

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Title IX Jurisdiction

Must address all sex discrimination occurring under the district's education program or activity in the United States.

Includes, but not limited to:

- Conduct that occurs in any building owned or controlled by a student org. that is officially recognized by a postsecondary institution; and,
- Conduct that is subject to the recipient's **disciplinary authority**.



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§ 106.11

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Title IX Jurisdiction vs. Impact

Location and Impact	Is it Title IX?
Off campus conduct <b>with no impact on campus</b> and the District has no jurisdiction in policy	<b>No</b> Title IX Jurisdiction
Off campus conduct <b>with impact that is not a Title IX violation</b> (i.e., complainant is upset by seeing respondent)	<b>No</b> Title IX Jurisdiction, but District must remedy/provide supportive measures
Off campus conduct <b>with impact that is within Title IX</b> (i.e., hostile environment harassment from rumors, bullying, retaliation, etc.)	<b>Yes</b> , Title IX jurisdiction over HEH
Off campus conduct when District <b>has jurisdiction over off campus</b> conduct in policy	<b>Yes</b> , Title IX jurisdiction

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**Hypothetical: True or False**

The District must conduct a Title IX investigation into an incident:

- That occurred between two students over the weekend, at a student's home.
- In which an administrator allows an office manager to leave early and work from home in exchange for the office manager going on a date with the administrator.
- That occurred last year, and the complainant has graduated.



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**Sex-Based Distinctions or Separation**

- Recipients can impose sex-based distinctions or separation in their educational programs **if they do not impose more than a *de minimis* harm.**
- More than *de minimis* harm is any harm that **is genuine and objectively non-trivial**, from a reasonable person's perspective.
- Prohibiting a student from participating in an education program or activity consistent with their gender identity **violates this standard** and is thus prohibited.



§ 106.31(a)(2)



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**Sex-Based Distinctions or Separation**

- Religious exemption
- Military and merchant marine educational institutions
- Social fraternities and sororities
- Housing
- Athletics \*\*



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## Definitions

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### 2024 Title IX Definitions

#### Complainant:

- Includes person(s) other than student(s)/employee(s) who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX ***at a time when that individual was participating or attempting to participate*** in the district's education program or activity.

#### Respondent

- A person who is alleged to have violated the recipient's prohibition on sex discrimination.



34 C.F.R. § 106.2

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### 2024 Title IX Definitions

#### Knowledge

- Knowledge of conduct that reasonably may constitute sex discrimination requires **prompt and effective response**.  
(34 C.F.R. § 106.44)

#### Evaluation:

- The district's decision to dismiss or investigate a complaint.  
(34 C.F.R. § 106.45(b)(4))



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## 2024 Title IX Definitions

### Complaint:

- May be oral or written, as long as the complaint can be objectively understood as a request for the district to investigate.

(34 C.F.R. § 106.45(a)(2))

### Pregnancy or Related Conditions

- Pregnancy, childbirth, termination of pregnancy, or lactation; medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation; or Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions.

(34 C.F.R. §106.2)



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## 2024 Title IX Definitions

### Retaliation:

- Retaliation means intimidation, threats, coercion, or discrimination against any person by the District, a student, or an employee or other person authorized to provide aid, benefit, or service, for the purpose of interfering with any right or privilege secured by Title IX, or because the person has participated in any manner in a Title IX process.

### Peer Retaliation:

- Peer retaliation means retaliation by a student against another student.



34 C.F.R. § 106.2

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# Responding to Complaints Initial Evaluations

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### Responding to Sex Discrimination

- The District must respond **promptly and effectively** and **must prevent the recurrence** of any sex discrimination and remedy its effects.
- Title IX reporting is separate from mandated reporting requirements.



34 C.F.R. § 106.44 (c)(2)



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### Responding to Sex Discrimination

All non-confidential employees **must** notify the Title IX Coordinator of conduct that could reasonably be considered sex discrimination.

Supervisors must report up to the Title IX Coordinator.



34 C.F.R. § 106.44 (c)(2)



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### Confidential Employees



An employee whose communications are privileged or confidential under Federal or State law or an employee that has been designated as a confidential employee for the purpose of providing services to persons related to sex discrimination.

§ 106.2



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**Initial Evaluation**

Upon notice, Title IX Coordinator must:

- Treat parties equitably
- Supportive measures
- Inform Complainant of processes
- Initiate process

**Must consider and evaluate the parties' wishes**

34 C.F.R. §106.44(f)

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**Factors to Consider when Complaint is Initiated by Title IX Coordinator**

- Complainant request
- Complainant's reasonable safety concerns
- Risk of additional acts
- Severity
- Age and relationship
- Scope (i.e., pattern, ongoing acts, or impact on multiple individuals)
- Availability of evidence
- Whether the alleged sex discrimination can be stopped

34 C.F.R. § 106.44(f)

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**Complaint Initiated by Title IX Coordinator**

May initiate if alleged conduct:	If initiating, must:
<ul style="list-style-type: none"> <li>▪ Presents an imminent and serious health or safety threat</li> <li>▪ Prevents the district from ensuring equal access on the basis of sex to its education program or activity</li> </ul>	<ul style="list-style-type: none"> <li>▪ Notify complainant prior to initiation</li> <li>▪ Address safety concerns               <ul style="list-style-type: none"> <li>○ Complainant</li> <li>○ Others</li> </ul> </li> </ul>

34 C.F.R. § 106.44(f)

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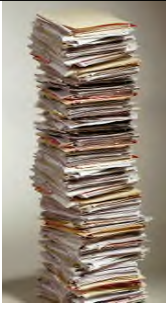
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### Discretionary Dismissals

- Title IX Coordinator may dismiss when:
  - District is unable to identify the respondent after taking reasonable steps to do so
  - The respondent is no longer enrolled or employed by the District
  - The complainant voluntarily withdraws any or all allegations
  - The alleged conduct would not constitute sex discrimination, if proven



34 C.F.R. § 106.45(d)



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### Discretionary Dismissals

- Must still offer supportive measures to complainant (and respondent as appropriate)
- Take prompt and effective steps to stop discrimination and prevent recurrence



34 C.F.R. § 106.45(d)

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### Dismissal Appeal

- Must offer appeal of dismissal
- Basis for appeal
  - Procedural irregularity
  - New evidence
  - Conflict of interest or bias



34 C.F.R. § 106.45(d)



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## Dismissal Appeal Procedures

If dismissal is appealed, the District must:

- Notify parties of the appeal
- Implement appeal procedures equally for all parties
- Ensure decisionmaker for appeal did not take part in the investigation
- Ensure decisionmaker for appeal is trained
- Provide parties a reasonable opportunity to make a statement in support of or challenging the outcome
- Notify the parties of the result of the appeal and rationale for result



34 C.F.R. § 106.45(d)

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## Hypothetical

The District receives an email alleging that Mr. Cromwell was making inappropriate sexual comments towards an 8<sup>th</sup> grade student during the summer school program at Hypo Middle School. You take the initial steps to evaluate the claim and decide to initiate Title IX. You provide a notice letter to Mr. Cromwell. The following day Mr. Cromwell resigns effective immediately.



Do you dismiss the complaint?

Do you take other steps?



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## Responding to Complaints

### Supportive Measures

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## Supportive Measures

Must offer supportive measures to both Complainants and Respondents



Parties have the right to challenge supportive measures

§ 106.44(g)



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## Supportive Measures

### Must be

- Must be designed to protect the safety of the parties or environment
- May be modified or terminated at the end of the resolution process
- May include emergency removal and administrative leave

### Must not be

- Must not unreasonably burden either party
- May not be imposed for punitive or disciplinary reasons

§106.44(g) and (k)



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## Supportive Measures

- Parties may challenge a decision regarding their supportive measures
- Challenge heard by an impartial employee with the ability to modify or reverse the original decision



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Hypothetical

Charlie, a 4<sup>th</sup> grade non-binary student, filed a Title IX complaint against two classmates for repeatedly misgendering them, and teasing them for not being “a boy or a girl.”

1. What supportive measures would you offer Charlie?

2. What supportive measures would you offer the two classmates?

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Supportive Measures

Examples:

No-Contact Orders

Change Of Class Or Work Schedules

Modified Lunch Schedules

Campus Escort Services

Change In Work Locations

Increased Security/Monitoring

Extensions Of Deadlines Or Other Course-Related Adjustments

Counseling

Independent Study (Must Be Nonpunitive/Nondisciplinary)

Emergency Removal & Administrative Leave

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Hypothetical

A Principal from one of your middle schools calls you after school and tells you that an 8<sup>th</sup> grade student, June, came to her and told her that a 7<sup>th</sup> grade student, Cheyenne, has been making her feel uncomfortable at school. June told her that Cheyenne has been staring at her in the locker room, and that one of her friends overheard Cheyenne call her “sexy” when she was changing in the locker room. The Principal is unsure what to do and is looking to you for assistance.

Is this Title IX?

What Supportive Measures Do You Offer?

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**Students with Disabilities**

K-12 district **MUST** consult with a student's IEP/Section 504 team to determine appropriate accommodations

§ 106.44(g)(6)

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**Responding to Complaints**

Informal Resolution

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**Informal Resolution**

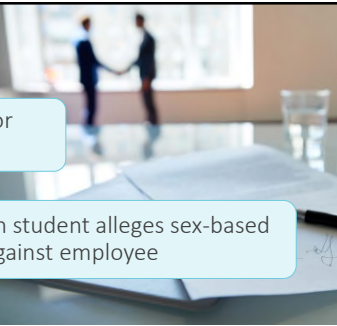
Expanded discretion for informal resolution

(K-12) Not available when student alleges sex-based harassment against employee

34 C.F.R. § 106.44(k)

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**Informal Resolution**

- Must be voluntary
- Informal resolution officer cannot be investigator or decision maker
- Cannot require a party to waive their right to an investigation & determination

LS 34 C.F.R. § 106.44(k)

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**Informal Resolution**

- Must provide notice to both parties including:
  - Allegations,
  - Requirements of informal resolution process,
  - Right to withdraw and initiate investigation,
  - Resolution would preclude an investigation,
  - Potential terms of resolution,
  - What information the District will maintain and how the District could disclose such information.

LS 34 C.F.R. § 106.44(k)

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**Hypothetical**

You are a Title IX Coordinator and you are investigating an allegation of sexual harassment between two employees. Both employees agree to informal resolution of the complaint.

Can you facilitate the informal resolution session?

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### Hypothetical

Jordan, a 8<sup>th</sup> grader, comes to you and says that Noah, an 7<sup>th</sup> grader, has been sexually harassing them for months in person and via text message. This has occurred both on campus during class and off campus after school. Jordan cannot deal with it anymore and wants it to stop. However, Jordan does not want this to be a big deal and just wants to do informal resolution quickly and get it over with.

Can you offer an informal resolution session?



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## Responding to Complaints

### Investigation Procedures

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### Title IX Grievance Procedures

Apply to all complaints of sex discrimination

No longer require written investigation reports or two separate ten-day periods

Exchange of evidence is still required but can be summary of evidence.

§ 106.45



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## Investigation Procedures

### Exchange of Evidence

- Method of exchange
  - Provide access to evidence, OR
  - Provide description of evidence
    - If use of description, must offer access if requested
- Investigation report
- What will the time-period be?

### Confidentiality

- District must take reasonable steps to prevent unauthorized disclosure of information obtained solely through investigation (§ 106.45(f)(4)(iii))
- Questioning the parties and witnesses to evaluate credibility by decision-maker



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## Relevant Evidence

- “Relevant” means related to the allegations of sex discrimination under investigation as part of the grievance procedures under § 106.45
- Questions are relevant when they seek evidence that may aid in showing whether the alleged conduct occurred.
- Evidence is relevant when it may aid a decisionmaker in determining whether the alleged conduct occurred.



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## Impermissible Evidence

Evidence privileged under Federal or State law.

Evidence provided to a confidential employee, unless the person to whom the privilege or confidentiality is owed has voluntarily waived the privilege or confidentiality.

Records that are made/maintained by a physician, psychologist, or other recognized professional or paraprofessional in connection to treatment, unless the recipient obtains voluntary, written consent for use in the recipient's grievance procedures.



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### Impermissible Evidence

A complainant's prior sexual behavior is irrelevant unless used:

To prove that someone other than the respondent committed the conduct alleged by the complainant, or

To prove consent, if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent



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## Responding to Complaints

### Written Determination

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### Written Determination

- Follows an evaluation of all relevant evidence
- Use the preponderance of evidence standard, unless the recipient uses the clear and convincing evidence standard in other comparable proceedings
- Notify the parties whether sex discrimination occurred to include:
  - The rationale for such determination; and
  - Procedure and bases to appeal, if applicable.



34 C.F.R. § 106.45(h)

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# Pregnancy and Parenting

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## Discrimination Based on Pregnancy or Related Conditions



- Discrimination based on a person's parental, family, or marital status or a person's current, potential or past pregnancy is prohibited.
- The District is required to make modifications to educational programs/schedules to ensure equal access for all students and employees.
- Employees must provide all students and/or persons with the legal right to act on behalf of a student with the Title IX coordinator's information.



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## Pregnancy and Related Conditions – Students



- Reasonable modifications according to policies, practices or procedures
  - Cannot fundamentally alter the education program or activity
  - Student can accept or decline
- Limitation on requiring supporting documentation



34 C.F.R. § 106.40

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### Pregnancy and Related Conditions – Students



- Voluntary access to a separate and comparable portion of the education program or activity
- Voluntary leaves of absence
- Lactation space
- Certification to participate



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### Pregnancy and Related Conditions - Employees

- Comparable treatment to other temporary medical conditions for all job-related purposes
- Voluntary leaves of absence
- Lactation time and space



34 C.F.R. § 106.57



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### Hypothetical

Josefina comes to you and complains that she is always having to pump in the bathroom at the District office because there is nowhere else for her go. You remind Josefina that there is a lactation space near the lobby but Josefina says that she cannot use it because the keypad is broken and her access code does not work.

Does this fall within Title IX?

Have you provided all necessary accommodations?



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Questions

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## Contact

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*Or any of the attorneys in one of our 8 offices.*



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