

# Changes to Title IX Regulations

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North Point Educational Service Center



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## New Title IX Rule

- U.S. Department of Education, Office of Civil Rights (OCR), released the final rule amending Title IX Regulations on May 6, 2020.
- New Final Rule went into effect on August 14, 2020.







## Title IX Coordinator

- Each school must designate and authorize at least one employee to coordinate its efforts to comply with its Title IX responsibilities.
  - Must be known as the “Title IX Coordinator”
  - Not “Compliance Officer” anymore
- Title IX Coordinator job title and stated job duties must reflect this (deadline to do so was August 14, 2020).
- Be sure those responsibilities give the Title IX Coordinator sufficient authority to perform the required tasks

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## **Title IX Coordinator Considerations**

- Title IX coordinator's role should be independent and should report directly to the senior leadership
- Designating a full-time Title IX coordinator will minimize risk of conflict of interest and ensure sufficient time is available to perform all the responsibilities
- Although not required by Title IX, multiple coordinators may be good practice for larger school districts
  - If there are multiple Title IX coordinators, one should be designated as the “lead” Title IX coordinator who will have ultimate oversight responsibility





## **Title IX Coordinator's Responsibilities and Authority**



- Coordinate the school's compliance with Title IX
  - This includes grievance procedures for resolving Title IX complaints
- Coordinate and oversee the school's responses to all complaints and reports involving possible sex discrimination
- Obtain knowledge of school policies and procedures on sex discrimination
  - Should be involved in the drafting and revision of such policies and procedures





## **Title IX Coordinator's Responsibilities**

- Provide or facilitate ongoing training, consultation, and technical assistance on Title IX for all students, faculty and staff
- Explain complaint procedures to complainants and respondents
- Oversee investigations of reports and complaints of sexual misconduct
  - Recommend whether report/complaint constitutes sexual misconduct
  - Appoint an investigative team
  - Ensure complaints are handled properly
  - Inform all parties of grievance process
  - Maintain information and documentation related to investigation in a secure manner
  - Monitor compliance with timeframes





## Title IX Coordinator's Responsibilities

- Recognize the Coordinator is *not* the Decision-maker
- Monitor and advise in ways such as:
  - Regularly reviewing all reports and complaints
  - Conducting an annual climate survey
  - Organize and maintain files
  - Regularly assess the school's compliance with Title IX
  - Regularly consult with the senior leadership to promote awareness and discussion







## **Title IX Coordinator's Responsibilities**

- Other Coordinator responsibilities:
  - Identify and address any patterns and/or systemic problems
  - Provide training on policies and procedures on sex discrimination & harassment
  - Conduct constituent surveys for analysis and consideration
  - Monitor students' participation in athletics & extra-curricular activities for disproportionate impact
  - Monitor students' participation in academic programs for disproportionate impact





## Visibility of Title IX Coordinator

- Must be visible in the school community
  - Notice of nondiscrimination posted
    - Note that questions should be directed to the Title IX coordinator
    - Via bulletins, announcements, application forms, etc.
  - Students and employees must be notified of the name, office address, telephone number, and email address of the current Title IX coordinator
    - Contact information must be widely distributed and easily found on the website or in various publications







## “Sexual Harassment”

- Title IX Regulations now define the term “sexual harassment”.
- Prior to the final rule, the term was loosely defined by interpretive case law and OCR Dear Colleague Letters.







## “Sexual Harassment”

Old Definition (from OCR guidance)	New Definition (Final Rule)
<ul style="list-style-type: none"><li>• Unwelcome conduct</li><li>• As determined by a reasonable person</li><li>• To be severe, pervasive, or persistent, and to interfere with or limit a student’s ability to participate in or benefit from school services, activities, or opportunities</li></ul>	<ul style="list-style-type: none"><li>• Unwelcome conduct</li><li>• As determined by a reasonable person</li><li>• To be so severe, pervasive, <b>and objectively offensive</b> that it <b>effectively denies</b> a person’s equal access to the recipient’s education program or activity</li></ul>





## When Must A School Respond To Sexual Harassment?

- A recipient with actual knowledge of sexual harassment in an education program or activity against a person in the United States must respond promptly and in a manner that is not deliberately indifferent.







## **Reporting Sexual Harassment: Who, How And When?**

- Any person may report sex discrimination, regardless of whether the person is the alleged victim of the reported conduct.
  - New Rule expressly recognizes the legal rights of parents and guardians to act on behalf of parties (including by filing formal complaints).
- Reports can be made by mail, by telephone, or by email, using the contact information listed for the Title IX Coordinator.
- Or by any means that results in the Title IX Coordinator receiving the person's report.
- Such a report may be made at any time, including during non-business hours, by using the telephone number or electronic mail address, or by mail to the office address listed for the Title IX Coordinator.





## Reporting Sexual Harassment: Formal Complaint

- “Formal complaint” is the document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment.
  - Third party reporter is not authorized to file a formal complaint.
  - Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party during a grievance process, and must comply with requirements for all Title IX personnel to be free from conflicts and bias.
    - Title IX Coordinator is authorized to sign a formal complaint which triggers investigation. This includes signing of formal complaints over a complainant’s objections.





## Reporting Sexual Harassment: Formal Complaint

- “Document filed by a complainant” means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the school) that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.
- At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the school with which the formal complaint is filed.







## Actual Knowledge

Old Rule (from OCR guidance)	New Rule (Final Rule)
<ul style="list-style-type: none"><li>A school has a responsibility to respond promptly and effectively if a school knows or should have known about sexual harassment</li></ul>	<ul style="list-style-type: none"><li>A school with <b>actual knowledge</b> of sexual harassment in a program or activity against a person in the United States must respond promptly and in a manner that is not deliberately indifferent</li></ul>





## New Rule & Case Law Definition

### Gebser v. Lago Vista Indep. Sch. Dist. 524 U.S. 274 (1998)

**Knowledge:** Notice of sexual harassment or allegations of sexual harassment to:

1. A recipient's Title IX coordinator
2. Any official of the recipient who has authority to institute corrective measures on behalf of the recipient
- 3. Any employee of an elementary and secondary school**



"Notice" includes, **but is not limited to**, a report of sexual harassment to the Title IX Coordinator as described in the Final Rule.





## Deliberate Indifference

- From the *Gebser* Court:
  - “[T]he response must amount to deliberate indifference to discrimination. The administrative enforcement scheme presupposes that an official who is advised of a Title IX violation refuses to take action to bring the recipient into compliance. The premise, in other words, is an official decision by the recipient not to remedy the violation.”







## Deliberate Indifference

Old Definition (from OCR guidance)	New Definition (Final Rule)
<ul style="list-style-type: none"><li>The school must take immediate action to eliminate the sexual harassment or sexual violence, prevent its recurrence, and address its effects.</li></ul>	<ul style="list-style-type: none"><li>Failure to respond reasonably in light of known circumstances.</li></ul>





## Student Rights - Generally

- **Complainant (victim)** has right to attend school without being subjected to unwelcome sexual conduct, especially conduct so severe, pervasive, and objectively offensive that it denies equal access to education.
- **Respondent (alleged perpetrator)** has right to due process before discipline is imposed and right not to be disciplined at all for activities protected by First Amendment.





## Respondent's Due Process Rights

Students accused of misconduct are entitled to **substantive** and **procedural** due process.

- **Substantive:** District cannot arbitrarily or unreasonably deprive students of education. Discipline must be supported by substantial, reliable, and probative evidence in the record. Typically “preponderance of the evidence” standard used for most disciplinary issues.
- **Procedural:** In deciding whether discipline is warranted, students are entitled to fair procedures. More procedures required for more significant discipline.





## Student Due Process Rights

Students are entitled to **substantive** and **procedural** due process.

- **Substantive:** Does the evidence prove that the alleged perpetrator (respondent) sexually harass / sexually assault the victim (complainant)?
- **Procedural:** In answering the above question, did the district provide a fair chance for the alleged perpetrator to prove his or her innocence and respond to the allegations?





## What Changed And Why?

- New regulations prompted by parent and student concerns that alleged perpetrators were not given fair chance to prove their innocence and that “preponderance of the evidence” standard was too low to expel a student from university or school.
- New regulations attempt to address both substantive and procedural issues.







## Changes To Procedural Due Process Rights

- Single investigator and decision-maker no longer allowed.
- Detailed grievance process with a focus on:
  - Notice of allegations
  - Cross examination
  - Opportunity to review and response to evidence
- Explicit prohibition on conflicted or biased coordinators, investigators, decision-makers.
- Emphasis on equal opportunities for both complainants and respondents to participate in the process.







## **New: Initial Response**

### **34 C.F.R. 106.44(a), .30(a)**

Must treat complainants and respondents equitably:

- Offer supportive measures to both
- Follow a grievance process before disciplining or sanctioning respondent







## **New: Initial Response**

### **34 C.F.R. 106.30(a), .44(a)**

Title IX Coordinator must promptly, even if no formal complaint is filed:

- Contact the complainant to discuss the availability of “supportive measures”
- Consider the complainant’s wishes with respect to supportive measures
- Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint
- Explain the process for filing a formal complaint







## Supportive Measures

Old Term (from OCR guidance)	New Term (Final Rule)
<ul style="list-style-type: none"><li>• Used terms such as “interim measures” or “interim steps” to describe measures to help a complainant maintain equal educational access.</li><li>• Implied only available during pendency of investigation, did not mandate offering them, not clear if could be punitive or disciplinary, and did not clarify if available to respondents.</li></ul>	<ul style="list-style-type: none"><li>• Non-punitive, individualized services, offered as appropriate and without charge to a complainant or a respondent before or after the filling of a formal complaint, or where no complaint has been filed (34. C.F.R.106.30(a)).</li><li>• Should be designed to restore or preserve equal access to the education program or activity without unreasonably” burdening the other party.</li></ul>





## Supportive Measures

- Examples:
  - Counseling
  - Course modifications
  - Schedule changes
  - Increased monitoring or supervision
- A supportive measure that completely removes a respondent from an activity would likely be considered punitive, except for “emergency removals” for students and “administrative leaves” for employees who pose an imminent threat.







## Supportive Measures

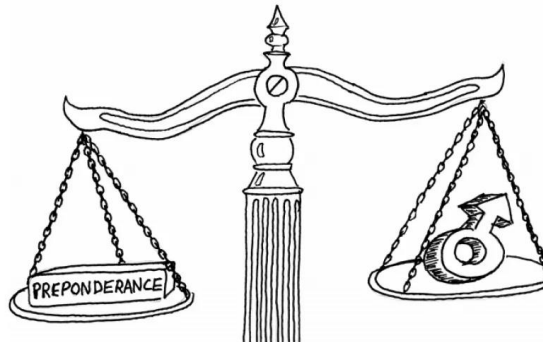
- Supportive measures give districts “wide discretion to quickly, effectively take steps to protect student safety, deter sexual harassment, and preserve a complainant’s equal educational access.” Actions such as changing a respondent’s class or activity schedule may fall under permissible supportive measures, and supportive measures must be offered without waiting to see if a grievance process is eventually initiated or not.





## Complainant Participation Refusal

- District must provide complainant (alleged victim) with access to supportive measures and must provide complainant with written notice of grievance procedure, even if complainant is unwilling to participate.







## **New: Formal Complaint Response 34 C.F.R. 106.45(b)**

- Requires a number of specific steps for investigating, dismissing, and determining responsibility in formal complaint.
- Major shift from previous more deferential stance toward specific policies and practices for complaint resolution.
- A complainant (alleged victim of sexual harassment) must be participating in or attempting to participate in the education program or activity of the district at time formal complaint is filed.





## Basic Required Elements 34 C.F.R.106.45(b)(1)

- Treat parties equitably
- Objective evaluation of all evidence
- No conflict of interest for Title IX Coordinator, Investigator or decision makers
- Presumption respondent not responsible
- Reasonably prompt time frames







## **Basic Required Elements**

### **34 C.F.R.106.45(b)(1)**

- Description or list of possible discipline/other remedies
- Statement of standard used (preponderance or clear/convincing)
- Appeal procedures and bases
- Range of supportive measures available
- No breach of privilege without waiver







## **More Steps: Written Notice**

### **34 C.F.R. 106.45(b)(2)**

- Written notice to known parties “upon receipt of written complaint”
- In sufficient time to allow respondent to prepare a response before any initial interview.
- Must include:
  - Notice of grievance process, including any informal resolution process
  - Notice of allegations, in sufficient detail to allow respondent to prepare a response (names of known parties, conduct alleged, date and location of conduct, if known)





## **More Steps: Written Notice**

### **34 C.F.R. 106.45(b)(2)**

- Notice must include:
  - Statement that respondent presumed not responsible and that responsibility determined at conclusion of grievance process.
  - Notice of parties' rights to have an attorney or non-attorney advisor and to inspect and review evidence.
  - Notice of any provision in the code of conduct that prohibits knowingly making false statements or providing false evidence during the grievance process.
- Must be supplemented if new allegations opened for investigation.





## Dismissals

### **Mandatory if conduct alleged:**

- Not sexual harassment if true.
- Did not occur in the school's program or activity (if there is dispute regarding this, the investigation may be required to determine whether there is jurisdiction).
- Did not occur in the United States.

**\*\*can still address under non-Title IX policy**







## Dismissals

### Permissive if:

- Complainant requests to withdraw.
- Respondent's enrollment or employment ends.
- Specific circumstances prevent recipient from gathering evidence sufficient to reach a determine (e.g., passage of time, lack of cooperation by complainant).







## Grievance Process

- General Emphasis
- Notice of Allegations
- Investigation
- Determination of Responsibility
- Appeals







## Investigation 34 C.F.R.106.45(b)(5)

- Burden of proof (to show discipline is warranted is on the school).
- Certain treatment records cannot be obtained without voluntary, written consent.
- There is no restriction of the rights of parties to discuss allegations or gather or present evidence.
- Same opportunities for others present (e.g., attorney or non-attorney advisor).
- Equal opportunity to present witnesses and evidence at interviews/meetings.





## **Investigation 34 C.F.R.106.45(b)(5)**

- Written notice to parties of date, time, participants, purpose, and location of each that gives sufficient time to prepare before investigative interview.
- All evidence provided to parties and their advisors at least 10 days before the investigator completes a written investigative report to allow time for each party to respond.
- Written investigative report “fairly summarizes the relevant evidence” provided to parties and advisors at least 10 days before hearing or other determination of responsibility – so each party may review and respond (i.e. ask written and relevant questions).





## Determinations of Responsibility

### 34 C.F.R.106.45(b)(6)

- **Live hearing with live cross by party advisors NOT required for K-12.**
  - May not be advisable – remember, it will involve many additional regulations.
- Hearings permitted for K-12 (include decision in grievance procedure), with each party allowed to submit written, relevant questions to be asked of another party or witness to the decision maker, who will provide each party with the answers and the opportunity for follow-up questions.
  - **Even if there is no hearing, districts must allow each side to question the other, in written form.**
- Questions about a complainant's prior sexual behavior or sexual predisposition only permitted to establish that another person committed the alleged conduct or that the conduct was consensual.





## Hearing

- If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility.
- But, the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.





## Hearing

- Live hearings may be conducted with all parties physically present in the same geographic location or, at the school's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other.
- Schools must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.





## Written Questions Required



- With or without a hearing, **after the school has sent the investigative report to the parties and before reaching a determination regarding responsibility**, the decision maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow up questions from each party.
- The decision-maker(s) must explain to the party proposing the questions any decision to exclude questions as not relevant.





## Decision

- The District's grievance process must state whether the standard of evidence to be used to determine responsibility is:
  - The preponderance of the evidence standard; or
    - It is “more likely than not” that the perpetrator committed the action. Used in civil context. Also known as 51% rule.
  - The clear and convincing evidence standard
    - It is “substantially more likely to be true that the perpetrator committed the act.”
- Must apply the same standard of evidence for formal complaints against students as for formal complaints against employees.





# **Determinations of Responsibility**

## **34 C.F.R. 106.45(b)(7)**

- Decision-maker cannot be the investigator or the Title IX Coordinator
- Must issue written determination addressing:
  - Allegations
  - Procedural steps taken
  - Findings of fact
  - Application of code of conduct to facts







## Determinations of Responsibility

- Statement of and rational for result as to each allegation including:
  - Determination of responsibility
  - Any disciplinary sanctions
  - Whether remedies to restore or preserve equal access to the educational program or activity will be provided
- Procedures and bases for appeals
- ❖ Provide to all parties simultaneously
- ❖ Becomes final after appeal time has passed or when appeal result is provided
- ❖ Title IX Coordinator is responsible for ensuring implementation of the remedies.





## Appeals: What Changed?

Old Requirements (from OCR guidance)	New Requirements (Final Rule)
<ul style="list-style-type: none"><li>■ Not required</li><li>■ Must be provided equally to both parties, if provided</li><li>■ No limitation on basis for appeals, if provided</li></ul>	<ul style="list-style-type: none"><li>■ Must offer to both parties for dismissals and final determinations in the following circumstances:<ul style="list-style-type: none"><li>– Procedural irregularity</li><li>– New evidence not reasonably available</li><li>– Conflict of interest against Title IX Coordinator, Investigator, Decision maker</li></ul></li><li>■ Can offer for other reasons on equal terms</li></ul>





## Appeals: What Changed?

Old Requirements (from OCR guidance)	New Requirements (Final Rule)
<ul style="list-style-type: none"><li>■ No requirement that the decision maker on appeal be different from investigators/decision makers in other phases of the process.</li></ul>	<ul style="list-style-type: none"><li>■ Different Decision-maker:<ul style="list-style-type: none"><li>■ May not be the Title IX Coordinator, investigator, or decision-maker</li><li>■ Must not have a conflict of interest or bias against complainants and respondents generally or individually.</li><li>■ Must receive training.</li></ul></li></ul>





# Investigation Dos and Don'ts







## Investigator Dos

- Presume innocence throughout the process.
- Be open and receptive to the complaint.
- Take the complaint seriously even if it sounds far-fetched or frivolous.
- Reserve judgment on whether you believe the complainant.
- Follow Board procedures for gathering evidence and conducting interviews.
- Respond promptly. Do not wait to undertake an investigation.
- Take steps to prevent threats or acts of violence even if the investigation is pending.





## Investigator Don'ts

- Make light of a complaint.
- Show bias when conducting witness interviews.
- Promise that all information will be kept confidential. It is appropriate to state that information will be kept as confidential as possible given the obligation to respond to the complaint.
- Discuss the investigation with individuals who do not have a “need to know”.





## Informal Resolutions

- District may not:
  - Require an informal resolution.
  - Offer an informal resolution until a formal complaint is filed.
  - Facilitate an informal resolution where allegations are made by a student against employee.





## Informal Resolutions

District may facilitate informal resolution after formal complaint filed, but must:

- Provide written notice to both parties with:
  - Allegations
  - Informal resolution process including any provisions that **after** agreeing to a resolution, party cannot withdraw and resume formal grievance process
  - Consequences of participating including records maintained or shared
- Obtain both parties' written and voluntary consent to informal resolution





## Emergency Removal

Districts may emergency remove student if individualized safety and risk analysis determines that sexual harassment allegations pose immediate threat to student physical health or safety such that removal is justified.

- Notice and opportunity to challenge the decision must be provided immediately after removal.
- Comply with all laws and regulations (federal and state) related to emergency removals and students with IEPs and 504 Plans.





## Emergency Removal: Example

- Susie tells a teacher that Robert sexually assaulted her in the bathroom.
- If the administrator's individualized safety and risk analysis shows that Robert's continued attendance creates immediate threat to student health or safety, administrator may:
  - Issue notice of intent to suspend and then provide opportunity to appear in informal hearing to challenge suspension or otherwise explain actions.
  - Issue notice of suspension with intent to expel, plus notice of opportunity to appear to challenge the reason for expulsion w time and place btw 3-5 days. Follow standard procedures for hearing, appeals etc.
  - Don't forget MDR for students with IEP or 504 plans before expulsion hearing or within 10 days of decision to suspend resulting in over 10 cumulative days out of school (change in placement)





## First Amendment

- Sometimes sexual harassment complaints are outside the disciplinary process because the alleged conduct is protected by the First Amendment.
  - Ex. Off-campus and using his own equipment, Robert creates a Tiktok page with disrespectful content about Susie. There is no substantial disruption to the school environment as a result, but Susie files a complaint.
- Disciplining Robert may be prohibited by the First Amendment, and the district would need to dismiss any formal complaints against him.





## First Amendment

- However, the district can and should take non-disciplinary action:
  - Offering both parties counseling, evaluation where appropriate
  - Implementing monitoring, additional supervision
  - Changing alleged perpetrator's class schedule, other separation approaches
  - Anti-harassment speakers, programming, education.
- Consulting with counsel is usually a good idea for any First Amendment issues because the decisions can be very fact-specific.





## Retaliation Prohibited

- No school or person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in a Title IX investigation, proceeding, or hearing.







## **Retaliation Prohibited**

- Charging an individual with code of conduct violations that do not involve sexual harassment, but arise out of the same facts or circumstances as a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX constitutes retaliation.
- The school must keep confidential the identity of complainants, respondents, and witnesses, except as may be permitted by FERPA, as required by law, or as necessary to carry out a Title IX proceeding.
- Complaints alleging retaliation may be filed according to a school's prompt and equitable grievance procedures.





## Not Retaliation

- The exercise of rights protected under the First Amendment does not constitute retaliation.
- Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a Title IX grievance proceeding does not constitute retaliation; however, a determination regarding responsibility, alone, is not sufficient to conclude that any party made a bad faith materially false statement.







## **Other Requirements: Recordkeeping**

### **34 C.F.R. 106.45(b)(10)**

- Records related to alleged sexual harassment must be maintained for a minimum of 7 years:
  - Investigation records
  - Disciplinary sanctions
  - Remedies
  - Appeals
  - Records of any actions taken, including supportive measures





## **Other Requirements: Recordkeeping**

### **34 C.F.R. 106.45(b)(10)**

- Must document for every instance:
  - Why response was not deliberately indifferent
  - That measures were taken to restore or preserve equal access to the educational program or activity.
  - If no supportive measures provided, why that was not deliberately indifferent.







## Other Requirements: Training

- Required for all staff (identify and report sexual harassment).
- Required for Title IX Coordinator, investigators, and decision makers (both decision and appeal).
  - Promoting impartial investigations and adjudication of formal complaints
  - Must not be based on sex stereotypes
- Maintain materials used for trainings for 7 years and post materials on website (or otherwise make available to public if the district does not have a website).





## Regulations Not Impacted by New Rule

- Current Title IX regulation provisions governing athletic participation, employment and single-sex education were not impacted by the final rule.







## **Title IX Policy Notice**



- District must provide notice of nondiscrimination policy and grievance procedures, including how to file or report sexual harassment and how the recipient will handle such reports.
- Notice must include the Title IX Coordinator's name, title, email address, office address and telephone number.
- Notice must be provided to: applicants for employment, students, parents/guardians, employee unions.
- Notice must be posted on: district website and in any handbook provided to employees, students, parents/guardians, and employee unions.





# Class Act: Updates in Education Law







# QUESTIONS



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