

From Adaptive Sports to Field Trips: Equal Access through Alternatives and Accommodations for Children with Disabilities

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A Word of Caution

No two cases are exactly alike. This material is designed to provide educators with a broad understanding of the obligations under Section 504 pertaining to access to extracurricular activities, including sports, and field trips. This material does not include every aspect of the law. You are strongly encouraged to seek a legal opinion from your school district's legal counsel regarding any specific case.

I. Overview

This material is designed to provide educators with a broad understanding of the obligations under Section 504 pertaining to access to extracurricular activities, including sports, and field trips. This material does not include every aspect of the law and you are strongly encouraged to seek an opinion from your school district's attorney regarding a specific case.

II. Brief Overview of Section 504

Section 504 applies to the recipients of grants from the federal government. Essentially, all public school districts are covered by Section 504 because they receive some form of federal financial assistance. See *Marshall v. Sisters of the Holy Family of Nazareth*, 44 IDELR 190 (E.D. Pa. 2005) (Section 504 does not apply to a private religious school that receives no federal funding).

Fundamentally, Section 504 is an anti-discrimination statute. In the educational system, it prohibits districts from discriminating against qualified students with disabilities on the basis of disability. Under Section 504, a person with a disability is one who: 1) has a physical or mental impairment that substantially limits one or more major life activities; 2) has a record of such an impairment; or 3) is regarded as having such an impairment. 29 USC 705(9)(B), (20)(B); 34 CFR 104.3(j). With respect to public schools, "qualified" means a person 1) of an age during which persons without disabilities are provided such services, 2) of any age during which it is mandatory under state law to provide such services to persons with disabilities, or 3) to whom a state is required to provide a free, appropriate public education under the Individuals with Disabilities Education Act. 34 CFR 104.3(i)(2).

Under Section 504, public schools are required to provide qualified students with disabilities with a free, appropriate education at public expense. 34 C.F.R. § 104.33(a). Schools are also required to provide such students with an "equal opportunity for participation" in "non-academic and extracurricular services and activities." 34 C.F.R. § 104.37(a).

The Office for Civil Rights (OCR) enforces several federal civil rights laws, including Section 504 of The Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990. The primary vehicle for OCR enforcement is through the process of complaint investigation and resolution.

The determinations of OCR, and to some extent case law, provide guidance to school districts on how to handle the two pronged legal requirements of Section 504 in the area of non-academic and extracurricular services and activities for students with disabilities. It is only through an awareness of OCR and court decisions that an educator can effectively discern the scope of their obligation to provide these opportunities "to the maximum extent appropriate," in a manner that affords "an equal opportunity."

III. Inclusion in Extracurricular Activities and Non-Academic Programs

Section 504 does not explicitly mention athletics, extracurricular programs or other school sponsored non-academic activities. However, the language of Section 504 is unquestionably broad, providing that “[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her/his disability, be excluded from participation in, be denied the benefits, or be subjected to discrimination under any program or activity receiving federal financial assistance.” 29 U.S.C. 794.

The Section 504 Regulations make it clear that Section 504 extends two legal principles to non-academic programming: participation: 1) “to the maximum extent appropriate” and 2) “an equal opportunity” for participation. The definition of these two terms has been left to the courts.

A. Participation to the “Maximum Extent Appropriate”

Pursuant to 34 CFR 104.34(b), when providing or arranging for the provision of non-academic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in 104.37(a)(2) (defined below), school districts must ensure that qualified students with disabilities participate with non-disabled students in such activities and services to the maximum extent appropriate to the needs of the student with the disability.

B. “Equal Opportunity for Participation”

34 CFR 104.37(a) articulates a general “equal opportunity,” standard. It states that a school “shall provide non-academic and extracurricular services and activities in such manner as is necessary to afford . . . students [with disabilities] an equal opportunity for participation in such services and activities.” 34 CFR 104.37(a) (emphasis added).

1. Defining “non-academic and extracurricular services and activities”

Nonacademic and extracurricular services and activities include:

- Counseling services
- Physical recreational athletics
- Transportation
- Health services
- Recreational activities
- Special interest groups or clubs sponsored by the recipients
- Referrals to agencies which provide assistance to persons with disabilities
- Employment of students, including employment by the school and assistance in making available outside employment.

34 CFR 104.37(a)(2).

2. Opportunity to access physical education and athletics

Pursuant to 34 CFR 104.37(c)(1), when providing physical education courses, athletics, and similar aids, benefits or services to any student, a school may not discriminate on the basis of disability. Schools that offer physical education courses or that operate or sponsor interscholastic clubs, or intramural athletics shall provide qualified students with disabilities with an equal opportunity for participation.

In Letter to Kelly, 62 IDELR 184 (OSEP Oct. 23, 2013), the Office of Special Education Programs clarified that when a student's IEP includes physical education as a service, the district must either provide the service or, if the district does not offer PE, it must make arrangements for the service to be provided by another public or private program.

Practice Pointer: Occupational or physical therapy services may come into play as compensatory services for missed access or to compensate for lack of equal opportunity. See Franklin City Public Schools (VA), 38 IDELR 46 (OCR Sept. 10, 2002).

a. Separate or different programs

A school may offer physical education and athletic activities to students with disabilities that are separate or different from those offered to non-disabled students only if separation or differentiation is consistent with the requirements of 34 CFR 104.34 (discussed above) and only if no qualified student with a disability is denied the opportunity to compete for a team, or to participate in courses that are not separate or different. 34 CFR 104.37(c)(2).

C. OCR's "Dear Colleague" Letter

In January 2013, the Office for Civil Rights (OCR), issued a "Dear Colleague" Letter, pertaining to participation in extracurricular activities by students with disabilities. Dear Colleague Letter, 60 IDELR 167 (OCR Jan. 25, 2013).

OCR began but stating that "extracurricular athletics – which include club, intramural, or interscholastic (e.g., freshman, junior varsity, varsity) athletics at all education levels – are an important component of an overall education program." Such programs provide valuable opportunities for socialization, improved teamwork leadership skills, and fitness. However, students with disabilities "are not being afforded an equal opportunity to participate in extracurricular athletics in public elementary and secondary schools." Id. (citing United States Government Accountability Office, Students with Disabilities: More Information and Guidance Could Improve Opportunities in Physical Education and Athletics, No. GAO-10-519, at 20-22, 25-26, available at: <http://www.gao.gov/assets/310/305770.pdf> (accessed March 3, 2014)).

OCR cautioned districts not to operate programs or activities on the basis of generalizations, assumptions, prejudices, or stereotypes about disability generally, or specific disabilities. OCR also noted that districts cannot provide substantial assistance to a private organization, association, club, league or other third party that discriminates on the basis of disability.

1. Equal Opportunity to Participate

Districts that offer extracurricular athletics must do so in a manner that provides qualified students with disabilities with an equal opportunity to participate. This includes making reasonable modifications and providing aids and services that are necessary to ensure that a student has an equal opportunity to participate, unless the district can show that doing such would result in a fundamental alteration to the program. School districts may, however, “require a level of skill or ability for participation in a competitive program or activity.”

When considering whether a reasonable modification is required, OCR recommends that districts consider the following:

- Is the modification necessary for the student to have an equal opportunity to participate?
- If the modification is necessary, does it result in a fundamental alteration of the nature of the extracurricular activity?
 - Does the modification alter an essential aspect of the game?
 - Does the modification give the student with a disability an unfair advantage over others?
- If the requested modification would result in a fundamental alteration of the activity, are there other reasonable modifications or other aids and services that would give the student an equal opportunity to participate?

Query: A student with a hearing impairment makes the track team. During tryouts, the coach signaled the start of each race by using a visual cue, and the student’s speed was fast enough to qualify. During meets, the start of the race is announced with a starter pistol, and the student requested that the district also use a visual cue to alert him to the start of the race. The district denied the request because it was concerned that the use of the cue may distract other runners. As a result, the student could not participate in track meets. Should this modification have been provided by the district?

Query: A student with diabetes has been determined to have a Section 504 disability. As part of his Section 504 plan, he receives assistance with glucose testing and insulin administration from trained school personnel. He wants to join a school-

sponsored gymnastics club that meets after school. Parents request glucose testing and insulin administration be provided when the club meets. Should this accommodation be provided by the district?

See Dear Colleague Letter, 60 IDELR 167 (OCR Jan. 25, 2013).

2. Separate or Different Athletic Opportunities

OCR believes that students with disabilities who cannot participate in an existing extracurricular athletics program, even with reasonable modifications or aids and services, should still have an equal opportunity to receive the benefits of extracurricular activities, and recommends that districts create opportunities for students with disabilities who are unable to participate in existing extracurricular athletic programs.

For example, OCR suggests offering opportunities for athletic activities such as wheelchair tennis or wheelchair basketball. OCR notes that these programs “should be supported equally, as with other athletic activities,” and “when the number of students in a district is insufficient to field a team, school districts can also: (1) develop district-wide or regional teams for students with disabilities as opposed to a school-based team in order to provide competitive experiences; (2) mix male and female students with disabilities on teams together; or (3) offer ‘allied’ or ‘unified’ sports teams on which students with disabilities participate with students without disabilities.” Id.

3. The Follow-Up Letter

In December 2013, OCR issued a follow-up letter. In re: Dear Colleague Letter of January, 62 IDELR 185 (OCR, Dec. 16, 2013). This letter clarified that:

- Section 504 requires that school districts provide students with disabilities with an equal opportunity to participate in and benefit from the districts’ nonacademic services, including their existing extracurricular athletic activities. Students with disabilities must be provided with equal access to those “existing extracurricular athletic activities. It does not mean every student with a disability has a right to be on an athletic team, and it does not mean that school districts must create separate or different activities just for students with disabilities.”
- School districts “must not exclude” students with disabilities “based on stereotypes and assumptions about the student or about students with disabilities.” Instead, students must be considered individually, and the Section 504 Team must consider whether “reasonable modifications could be made, or aids and services provided, that would allow those students an equal opportunity for participation.”
 - Examples of modifications and aids and services include using a light along with a starter pistol so that a deaf runner can compete and assisting with the administration of needed medicine like insulin

so a student with disabilities can participate in an after-school program.

- Equal opportunity does not mean:
 - Compromising student safety;
 - Changing the nature of selective teams: students with disabilities have to compete with everyone else and earn their place on the team;
 - Giving a student with a disability an unfair advantage over other competitors; or
 - Changing essential elements that affect the fundamental nature of the game.

- Districts are urged, but are not required, to create additional opportunities for students with disabilities, which could include separate or different activities from those already provided. When a district chooses to provide such activities, they must be supported equally as compared with the district's other athletic activities.

a. NHIAA By-Laws

The New Hampshire Interscholastic Athletic Association (NHIAA) has adopted a by-law and policies and procedures pertaining to unified sports. See NHIAA By-Law Article XXXIV, Unified Sports, available at: <http://www.nhiala.org/handbook.cfm> (accessed March 4, 2014); NHIAA Policies and Procedures for Unified Sports 2013-2014, available at: <http://www.nhiala.org/manuals.cfm> (accessed March 4, 2014).

The by-laws define a “Unified Student Athlete” as “[a] student with an intellectual disability who, based on his/her IEP is expected to be in school until he/she is 21.” The By-laws contain specific provisions pertaining to eligibility for participation in unified sports. Each NHIAA sanctioned unified sport (basketball, outdoor track, soccer, and volleyball) require the participation of a minimum number of unified student athletes and unified student partners (defined as “[a]ny student that meets the criteria outlined in NHIAA By-Law Article II: Eligibility”).

b. NHIAA Eligibility Rules

The NHIAA has also adopted specific eligibility rules. See NHIAA 2013-14 Handbook at By-law Article II, Eligibility, available at: <http://www.nhiala.org/handbook.cfm> (accessed March 4, 2014). These eligibility rules include, but are not limited to, requirements pertaining to age, academic standing, and residency. The residency requirement includes a provision that states: “[a] student who transfers enrollment without a corresponding move into a new school district by his/her parents or guardians shall be required to be in attendance in the new school for one (1) year from the date of enrollment in order to establish athletic eligibility. . .” Id. at Section 4, C.

Recently, the Fifth Circuit Court of Appeals held that a parent failed to provide sufficient evidence that a student's anxiety disorder substantially limited a major life activity and, therefore, found that the student did not qualify for services under Section 504. As a result, the district did not discriminate against the student when it required that the student sit out from football for one year after he transferred to a new school, as required by the athletic association's transfer rule. The parent argued that applying the rule was discriminatory because the transfer occurred due to a change in placement by the student's IEP Team. However, the court found that the rule, which rendered a student who transfers schools within a residence zone ineligible for athletics for one year from the date of the transfer, could be applied to the student because the parents' allegations failed to establish that the student's anxiety substantially limited a major life activity under Section 504. Mann v. Louisiana High Sch. Athletic Ass'n, 61 IDELR 186 (5th Cir. 2013).

IV. Extracurricular Activities: Case Studies

The following cases provide examples of the application of Section 504 to Extracurricular Activities and Nonacademic Programs. This is not an exhaustive list.

1. Tryouts

A mother filed a complaint with OCR alleging that the school district discriminated against her daughter on the basis of disability by failing to afford her an equal opportunity to participate in the tryouts for the cheerleading squad. The mother indicated that the school district had refused her request to videotape the cheerleading practice. Most likely the district's refusal had been based on the privacy interest of other students. Nevertheless, the district and the Office for Civil Rights (OCR) entered into a resolution agreement where the district agreed to take the following actions:

1. The district will develop a procedure to ensure that qualified students with disabilities are afforded an equal opportunity to participate in the district's extracurricular activities and interscholastic athletic programs. The procedure will specify that students with disabilities are entitled to necessary related aids and services and/or program modification in order to accomplish the objective of equal opportunity to participate in extracurricular and interscholastic programs. The procedure will also ensure that the necessary related aids and services and/or program modifications are determined on an individual basis.
2. The district will conduct training on the new procedure with the appropriate staff and district officials.
3. The district will ensure that if the student tries out for the cheerleading squad, the district will provide the student with effective accommodations, including but not limited to, the

opportunity to videotape the cheerleading sponsor's instructions and demonstrations.¹

Practice Pointer: 34 CFR 104.37(a)(1) does not require that districts adopt a written policy with regard to equal opportunity for participation in non-academic and extracurricular services and activities. However, the effective result of this resolution was that the district was required to adopt a procedure to ensure that equal opportunity was afforded to students with disabilities. The other lesson from this resolution agreement is that districts, when faced with competing interests, such as privacy interests and access issues should seek in the first instance to broach a balanced compromise. OCR frequently uses the complaint resolution process as an opportunity to see that district staff receive further training on Section 504. See Marion County School District (FL), 37 IDELR 13 (OCR Nov. 21, 2001). For a similar result see Moses Lake School District No. 161, 36 IDELR 218 (OCR Feb. 7, 2002).

2. Dismissal for unexcused absences.

In Shelby County (AL) School District, 37 IDELR 41 (OCR 2002), a parent filed a complaint with OCR alleging that the school district discriminated against her daughter on the basis of her disability (“Bipolar Rapid Recycler Depression” and ADHD) by not allowing her to participate on the high school volleyball team. The mother specifically alleged:

- That the district did not follow her daughter's IEP amendment which called for participation in athletics until after the district filed an eligibility form for the student;
- That the district dismissed the student from the team for unexcused absences that were due to her disability, and for unexcused absences that occurred during the time frame when she was ineligible for the team;
- That the varsity volleyball coach retaliated against the student because of a complaint that the parent had filed with the Alabama High School Athletic Association challenging its “no pass, no play” rule; and
- That the coach made embarrassing remarks about her daughter to the team and inquired about her attendance at school when she had an excused absence approved through the school office.

OCR found that the state code pertaining to athletics dictated the decision regarding a student with a disability's participation in extracurricular activities and that all students who compete on an interscholastic sports team in Alabama must file an eligibility form five days prior to the competition. As to the unexcused absences, the

¹Note the right to videotape did not extend beyond the cheerleading sponsor's instructions and demonstrations, perhaps addressing the district's concern as to privacy.

OCR pointed to the fact that the team rules state that three unexcused absences from practices or meetings will result in dismissal from the team. OCR found that the student was suspended for three days for fighting, and that she missed three days of practice because of her suspension. As a result, the student was dismissed from the team. OCR also found that the team rule in regards to unexcused absences was applied uniformly and therefore, the district did not fail to provide the student with an equal opportunity for participation on the district's volleyball team and did not treat the student in a different manner than any other student in regards to this allegation.

OCR found that the filing of the complaint with the Athletic Association was a protected activity and that the district was aware of the complaint and thus, aware of the protected activity. OCR concluded that the alleged adverse actions, to wit the remarks about the student, even if true, did not constitute adverse actions. The actions did not result in any denial of benefits to the student in that they did not result in the student being dismissed from the team.

Practice Pointer: The lesson from this case is that school districts remain free to uniformly exercise and impose team rules in the context of athletics. The key point the district needs to demonstrate is that the team rules are uniformly applied and that they do not result in disparate treatment of the disabled student.

Practice Pointer: Team rules, if applied uniformly, will generally not be deemed discriminatory. See Little Axe (OK) Public Schools, 37 IDELR 103 (OCR 2002).

3. Attitude and teamwork requirements.

In Kaneland Community Unit School District No. 302 (IL), 37 IDELR 287 (OCR Aug. 15, 2002), the high school baseball coach cut a student from the varsity baseball team on the final day of tryouts. The coach cited the student's attitude and teamwork skills as the reason for his decision to cut the student. The student's mother filed a complaint with OCR alleging that the district discriminated against her son on the basis of disability because her son was on the baseball team the previous year, was one of the best players on the team and his disciplinary record was no worse than some of the players who made the team. The district pointed to its extracurricular activities behavior code which governed student participation in any extracurricular activity. The code stated that "participation in these events at Kaneland is a privilege granted to students who can and do uphold the ideals of good citizenship, who abide by the rules and regulations of the school community and who commit themselves to academic success." Student participation in baseball was also governed by the baseball guidelines which established criteria necessary for participation in baseball. These criteria included attitude, ability, skills, teamwork and the ability to fit into the team's style and system. All students were provided a copy of those guidelines.

The district conceded that the student had the athletic ability and skills required to be a member of the team, but contended that he did not meet the other important criteria. For example, the student had a hot temper, a bad attitude and was not a team player. The coach denied the allegation that the student's disciplinary record was the factor in his decision to cut him from the team and further indicated that he was unaware at the time he made the decision to cut the student from the varsity team that the student had a disability or that he was a special education student. OCR specifically noted that the student's IEP did not preclude him from being subject to the same requirements for making the baseball team as other students. OCR observed that "He is subject to the district's established disciplinary policies and does not have a behavioral management plan that would preclude application of either the code or the guidelines." On that basis OCR determined the complaint to be unfounded.

Practice Pointer. The result might have been different if the student's IEP contained a behavioral intervention plan which was inconsistent with the district's athletic guidelines. This decision gives comfort to school districts that, absent IEP statements to the contrary, they may uniformly apply their team conduct codes to students and that this uniform application may include behavioral considerations.

4. Club sports

A disabled student was expelled from a school funded intramural hockey club. The student had a disability and a behavior management problem. The hockey club did not implement the behavior management program during his participation in the club sport. The Office for Civil Rights ruled that the district violated its obligation to ensure the ice hockey club to which it provided financial assistance complied with the requirements of Section 504 and the ADA. See Rosetree Media (PA) School District, 40 IDELR 188 (OCR Aug. 27, 2003).

5. Field Trips

Section 504 clearly indicates that a student should not be excluded from attending a field trip on the basis of their disability. 34 CFR 104.37(a)(1); but see Accomack County (VA) Pub. Schs., 49 IDELR 50 (OCR Jan. 22, 2007) (excluding a student from an assembly and a field trip did not violate Section 504 because the student was not eligible for participation in those activities – participation was limited to students in certain courses, which the complaining student did not participate in); Lucas Local Schools (OH), 37 IDELR 77 (OCR April 12, 2002) (no evidence that the student was prohibited from attending the field trip on the basis of his disability).

Under Section 504, districts are required to provide the related aids or services that a student requires to participate in a field trip. See 34 C.F.R. 104.34(b); Ventura (CA) Unified Sch. Dist. 17 IDELR 854 (OCR 1991). Students with disabilities must also receive equal notice of field trips. See Mt. Gilead (OH) Exempted Vil. Sch. Dist., 20 IDELR 765 (OCR 1993) (district should have provided parents of students in a self-contained class with the same written materials pertaining to field trips that were

provided to students in general education classrooms); Metro Nashville (TN) Sch. Dist., 53 IDELR 337 (OCR 2009) (District violated Section 504 by inviting non-disabled students on field trips and failing to provide invitations to students with disabilities).

Similarly, a district cannot make the parents' presence mandatory at a field trip when a similar obligation is not imposed upon the parents of non-disabled students. See 34 CFR 104.4(b)(iv). Doing such discriminates on the basis of disability in violation of Section 504. See Clovis (CA) Unified Sch. Dist., 52 IDELR 167 (OCR 2009) (conditioning a student's participation in a field trip on the parents providing medical services during the trip, or on authorizing other parents to provide the service, violated Section 504); compare id. with Stanwood-Camano (WA) Sch. Dist. No. 401, 48 IDELR 261 (OCR Nov. 15, 2006) (no violation of Section 504 where "the district's requirement that the student's grandmother attend [a] field trip were based on concerns with the student's health and safety during the trip in question [specifically, the inability of district staff to be able to adequately address the student's behavior in a public setting and their belief that the grandmother would be able to address the behavior], and the trip was the only one identified by OCR during the period investigated").

a. Limits on liability

A complaint to OCR alleged that a school district discriminated on the basis of disability by revoking permission for their son to go on a school sponsored European trip. OCR concluded that the district had revoked permission because of concerns the student would violate trip rules rather than because of his ADHD. See Maine School Administrative District No. 1, 35 IDELR 166 (OCR March 23, 2001).

Practice Pointer: The district's liability for excluding a Section 504 student from a field trip is contingent upon not only a demonstration by the plaintiff of his exclusion from participation in services and that such treatment was by reason of disability, but that also the school officials showed gross misjudgment or bad faith. For a similar result see Miamisburg City Schools (OH), 36 IDELR 217 (OCR Feb. 11, 2002). While a district may use the student's health or safety as a reason for not participating in a field trip, the district has the burden of demonstrating that the exclusion is essential to that child's health or safety. During the time period that the child does not participate in the field trip, the district has a duty to provide educational services.

Practice Pointer: A district can refute a charge of disability-based discrimination by demonstrating a legitimate non-discriminatory reason for its actions.

6. Transportation

Districts are required to provide transportation to extracurricular activities in a manner that affords students with disabilities an equal opportunity to participate. See Prince William County (VA) Pub. Schs., 57 IDELR 172 (OCR 2011). In that case, the student's IEP included transportation as a related service. The student participated in an after school chess club. Parent requested that the district transport the student

home after club meetings. A district administrator submitted the request to the transportation department. Almost a month after the request was submitted, the transportation coordinator informed the administrator that the request had to be submitted in the “same manner as a request for a general education activity bus.” The assistant principal then mistakenly submitted a request for special education transportation, which delayed the response further. As a result, a bus was not provided until the end of January, and the parent was required to provide transportation to the student while the request was pending. OCR found that the District violated Section 504 by failing to provide the student with transportation in a manner that was necessary to afford him an equal opportunity to participate in the club. The District entered into a voluntary resolution agreement with OCR.

7. Medical conditions

Districts cannot unilaterally determine that a student's medical condition precludes participation in physical education and extracurricular sports. See Enfield (CT) Pub. Schs., 51 IDELR 24 (OCR May 9, 2008). In the Enfield case, the parent filed a complaint with OCR, alleging that the district unilaterally determined that her son could not participate in physical education class or a Wiffle Ball club. The District submitted a corrective action plan, indicating that it would allow the student to participate in the Wiffle Ball club if he produced a note from his doctor stating that he could play without restrictions, and agreed to develop a Section 504 plan that included accommodations for participating in physical education. The District also agreed to provide staff with Section 504 training.

8. Playgrounds

Playgrounds must be fully accessible to students with disabilities. For example, the playground surfaces and access ways leading to the playground must be maneuverable by students in wheelchairs.

Practice Pointer: Districts need to be careful when confronted with volunteer playground construction efforts. These type of volunteer efforts can produce safety and access issues. A district should reference the Playground Standards promulgated by the United States Access Board. While these guidelines have not become law, they are considered advisory by OCR. See Shiloh Village School District (IL), 37 IDELR 188 (OCR July 3, 2002).

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