

THE INTERSECTION OF PENDING LEGISLATION AND SPECIAL EDUCATION

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A Word of Caution

No two cases are exactly alike. This material is designed to provide educators with an overview of certain bills that are pending before the New Hampshire Legislature and the United States Congress. This material focuses on pending legislation that may impact special education in school districts. This material does not contain a discussion of all pending bills and the bills that are discussed in this material are still pending, and are therefore subject to change. We recommend contacting your district's legal counsel regarding the final status of these bills.

I. Overview

The purpose of this material is to review a selection of bills that are currently pending before the New Hampshire Legislature and the United States Congress. If the bills selected for inclusion in this material become law, they may impact special education in New Hampshire. This material does not contain a discussion of all pending bills and the bills that are discussed in this material are still pending, and are therefore subject to change. We recommend contacting your district's legal counsel regarding the final status of these bills.

II. HB 1523 (2010), The Pupil Safety and Violence Prevention Act

HB 1523 would make substantial revisions to RSA 193-F, New Hampshire's Pupil Safety and Violence Prevention Act. The New Hampshire House of Representatives adopted this bill on March 11, 2010. It has been introduced in the Senate and referred to the Senate Education Committee. At the time of this writing the bill was scheduled for a hearing on April 6, 2010. In light of recent events, including the increase in cyberbullying, it is likely that this bill will become a law. Thus, the provisions of this bill, in the form passed by the House, are discussed in detail in the sections that follow.

A. The Purpose and Intent

HB 1523 expands on the purpose and intent of RSA 193-F:2. The stated purpose of HB 1523 is:

- I. All pupils have the right to attend public schools, including chartered public schools, that are safe, secure, and peaceful environments. One of the legislature's highest priorities must be to protect our children from physical, emotional, and psychological violence by dealing with bullying, harassment, intimidation, and cyberbullying in our public schools.
- II. Bullying, harassment, or intimidation in schools has historically included actions shown to be motivated by a pupil's actual or perceived race, color, religion, mental, emotional, or learning disability, gender, gender identity and expression, obesity, or other distinguishing personal characteristics, or based on association with any person identified in any of the above categories.
- III. It is the intent of the legislature to protect our children from physical, emotional, and psychological violence by dealing with bullying, harassment, intimidation, and cyberbullying of any kind in our public schools, for all of the historical reasons

set forth in this section, and to prevent the creation of a hostile educational environment.

- IV. The sole purpose of this chapter is to protect all children from bullying, harassment, intimidation, and cyberbullying, and no other legislative purpose is intended, nor should any other intent be construed from the enactment of this chapter.

B. Definitions

HB 1523 includes the following new definitions:

1. Bullying, harassment, or intimidation: a single incident or pattern of significant severity involving a written, verbal, or physical act, or any electronic communication which is intended to:
 - a. Physically harm a pupil or damage the pupil's property; or
 - b. Cause substantial emotional distress to a pupil; or
 - c. Substantially interfere with a pupil's educational opportunities; or
 - d. Be severe, persistent, or pervasive so as to create an intimidating or threatening educational environment; or
 - e. Substantially disrupt the orderly operation of the school.
2. The term "[b]ullying, harassment, or intimidation" also includes actions shown to be motivated by an imbalance of power, based on a pupil's actual or perceived characteristics, behaviors, or beliefs, or motivated by the pupil's association with another person and based on the other person's characteristics, behaviors, or beliefs.
3. Cyberbullying: bullying, harassment, or intimidation undertaken through the use of electronic devices.
4. Electronic devices, which include but are not limited to, telephones, cellular phones, computers, pagers, electronic mail, instant messaging, text messaging, and websites.

5. School property: all real property and all physical plant and equipment used for school purposes, including public or private school buses or vans.

C. Adoption of a Pupil Safety and Violence Prevention Policy

Under HB 1523, districts would still be required to adopt a written policy prohibiting bullying, harassment, intimidation, and cyberbullying. School boards would be required to “involve, to the greatest extent practicable, pupils, parents, administrators, school staff, school volunteers, community representatives, and local law enforcement agencies in the process of developing the policy.”

The bill contains specific requirements for the policies, including, but not limited to, the following:

1. The inclusion of the definitions set forth above;
2. Statements prohibiting bullying, retaliation or false accusations against a victim, witness, or anyone who in good faith provides information about an act of bullying, harassment, intimidation, or cyberbullying;
3. Disciplinary consequences and/or interventions for pupils who commit, or falsely accuse another of an act of bullying, harassment, intimidation, or cyberbullying;
4. A notice provision, with recommended methods of communication, including, but not limited to, handbooks, websites, newsletters, and workshops;
5. A procedure for reporting incidents of bullying, harassment, intimidation, or cyberbullying, that:
 - a. Identifies all persons to whom an act of bullying, harassment, intimidation, or cyberbullying may be reported;
 - b. Outlines the internal reporting requirements within the school or school district;
 - c. Provides for notification, within 48 hours of the report, to the parents or guardians of the victim and perpetrator;
 - d. Allows the superintendent or his/her designee to grant a written waiver from the notification requirement if he/she

deems the waiver to be in the best interest of the victim or perpetrator;

- e. Includes a procedure for investigation of the report, which must be initiated within 5 school days of the reported incident;
- f. Includes a written procedure for communication (within 10 school days of completion of the investigation) with parents/guardians of the victims and perpetrators regarding the remedies and assistance; and,
- g. Identification, by job title, of the officials responsible for ensuring that the policy is implemented.

HB 1523 authorizes the Department of Education to develop a model policy for use by school districts.

D. Notification and Reporting Requirements

As outlined above, school boards would be required to include the following provisions in their policies: notification procedures, procedures for reporting acts of bullying, harassment, intimidation, or cyberbullying, a procedure outlining the internal reporting requirements within the school or school district, and procedures for investigating acts of bullying, harassment, intimidation, or cyberbullying. However, HB 1523 removes many of the specific reporting and notice requirements, and instead leaves it up to the school boards, in conjunction with employees and community members, to outline the specific procedures in their policies.

HB 1523 would not impact RSA 193-D; thus, if applicable to a particular incident, the requirement to report acts of theft, destruction, or violence in a safe school zone would still apply.

E. Waiver of the Notification Requirement

HB 1523 retains the current provision in RSA 193-F:3(II)(b) that allows the Superintendent to grant the principal a waiver from the notification requirement if the Superintendent deems such waiver to be in the best interest of the child. Any waiver granted shall be in writing and must be given within 48 hours of the event.

F. The Local School Board's Duty to Remediate and Resolve Bullying

As with the current version of RSA 193-F, HB 1523 would require that schools develop a response to remediate any substantiated incident of bullying, harassment, intimidation, or cyberbullying, and that they include disciplinary consequences and/or interventions for pupils who commit an act of bullying, harassment, intimidation, or cyberbullying.

HB 1523 removes the right to appeal to the State Board of Education. However, districts would be obligated to report substantiated incidents of bullying, harassment, intimidation, or cyberbullying to the Department of Education; the Department would then be required to prepare an annual report, summarizing all substantiated incidents of bullying, harassment, intimidation, or cyberbullying.

G. Training

HB 1523 would require districts to “provide only evidence based educational programs in support of [their] efforts to reduce and prevent bullying, harassment, intimidation, or cyberbullying.” These programs would include:

- Training within 6 months of the effective date of the revisions to RSA 193-F, and annually thereafter, for district employees, regular school volunteers, parents, legal guardians, relative caretakers, or employees of a company under contract with the school, district or chartered public school who have significant contact with pupils in preventing, identifying, responding to, and reporting incidents of bullying, harassment, intimidation, or cyberbullying.
- An educational program for pupils and parents in preventing, identifying, responding to, and reporting incidents of bullying, harassment, intimidation, or cyberbullying.

As with the current version of the statute, HB 1523 states that there is no required curriculum or material with regard to the prevention of pupil harassment and that the failure to use a particular curriculum is not considered a violation of the Act.

H. Immunity and Liability Protection

HB 1523 would provide immunity for SAU employees, school employees, public academy employees, regular school volunteers, pupils, parents, legal guardians, relative caretakers, employees of a company under contract to a school, school districts, SAUs, public academies, and charter public schools, for “good faith conduct arising from, or pertaining to, the investigation, findings,

reporting, recommended response, or implementation of a recommended response under” RSA 193-F.

I. Impact on Special Education

The stated purpose of HB 1523 is to protect children from physical, emotional, and psychological violence by dealing with bullying, harassment, intimidation and cyberbullying occurring in the public school setting. Bullying, harassment, intimidation or cyberbullying on the basis of disability would constitute an actionable offense under HB 1523. Moreover, bullying, harassment, intimidation and cyberbullying on the basis of disability could also constitute discrimination. If based on a student’s disability, bullying that substantially interferes with a pupil’s educational opportunities or creates an intimidating or threatening educational environment may also lead to a claim that the victim was denied a free, appropriate public education.

III. H.R. 4247 and SB 396 – restraints and seclusion

A. H.R. 4247, the “Keeping All Students Safe Act”

This bill is currently pending before the United States Congress. It has passed in the House, and has been introduced in the Senate.

The purposes of this Act are to

1. Prevent and reduce the use of physical restraint and seclusion in schools;
2. Ensure the safety of all students and school personnel in schools and promote a positive school culture and climate
3. Protect students from –
 - a. Physical or mental abuse
 - b. Aversive behavioral interventions that compromise health and safety
 - c. Any physical restraint or seclusion imposed solely for purposes of discipline or convenience;
4. Ensure that physical restraint and seclusion are imposed in school only when a student’s behavior poses an imminent danger of physical injury to the student, school personnel, or others, and
5. Assist States, LEAs, and schools in

- a. Establishing policies and procedures to keep all students, including students with the most complex behavioral needs, and school personnel, safe;
- b. Providing school personnel with the necessary tools, training, and support to ensure the safety of all students and school personnel;
- c. Collecting and analyzing data on physical restraint and seclusion in schools; and
- d. Identifying and implementing effective evidence-based models to prevent and reduce physical restraint and seclusion in schools.

The bill contains several definitions, including the term “school.” By definition, the bill would apply to public schools and private day or residential elementary or secondary schools, early childhood, elementary school, or secondary school program that is under the jurisdiction of a school, LEA, educational service agency, or other educational institution or program that receives, or serves students who receive, support in any form from any program supported, in whole or in part, with funds appropriated to the Department of Education.

The bill would require the Secretary of the Department of Education to promulgate regulations that prohibit school personnel from imposing any mechanical restraints, chemical restraints, physical restraint or physical escort that restricts breathing, and aversive behavioral interventions that compromise health and safety.

In addition, school personnel would be prohibited from imposing physical restraint or seclusion on a student unless:

- A. The student’s behavior imposes an imminent danger of physical injury to the student, school personnel or others;
- B. Less restrictive interventions would be ineffective in stopping such imminent danger or physical injury;
- C. Such physical restraint or seclusion is imposed by school personnel who
 1. Continuously monitor the student face-to-face;
or

2. If school personnel safety is significantly compromised by such face-to-face monitoring, are in continuous direct visual contact with the student;
- D. Such physical restraint or seclusion is imposed by
1. Trained school personnel
 2. Other school personnel in rare and “clearly unavoidable emergency circumstances when” trained school personnel are not immediately available
- E. The physical restraint or seclusion ends immediately upon the cessation of the conditions described in paragraphs (A) and (B), above.

In addition, the bill would prohibit the use of physical restraint or seclusion as a planned intervention as part of an “education plan, individual safety plan, behavioral plan, or individualized education program.”

It would, however, allow LEAs or schools to establish policies and procedures for use of physical restraint or seclusion in school safety or crisis plans, provided that the plans are not specific to any individual students. Schools would also be required to develop a notice procedure, to report incidents of physical restraint or seclusion to the parent of the restrained student.

B. SB 396

This bill, which is currently pending before the New Hampshire House of Representatives, would create a new chapter, RSA 126-T, which would limit the use of restraints in schools and treatment facilities. The bill applies to all public schools, chartered public schools, public academies, nonpublic schools subject to the approval of the state board of education, and private or public providers of any component of a child’s individualized education program.

The bill requires all facilities and schools to have a written policy and procedure for managing the behavior of children. The policy must describe how and under what circumstances restraints are used. The policy must be provided to the parent, guardian, or legal representative of each child at the facility or school.

The bill prohibits schools and facilities from using or threatening to use any of the following restraint and behavior control techniques:

1. Any physical restraint or containment technique that:
 - a. Obstructs a child's respiratory airway or impairs the child's breathing or respiratory capacity or restricts the movement required for normal breathing;
 - b. Places pressure or weight on, or causes the compression of, the chest, lungs, sternum, diaphragm, back, or abdomen of a child;
 - c. Obstructs the circulation of blood;
 - d. Involves pushing on or into the child's mouth, nose, eyes, or any part of the face or involves covering the face or body with anything, including soft objects such as pillows, blankets, or washcloths, or
 - e. Endangers a child's life or significantly exacerbates a child's medical condition.
2. The intentional infliction of pain, including the use of pain inducement to obtain compliance.
3. The intentional release of noxious, toxic, or otherwise unpleasant substances near a child for the purpose of controlling or modifying the behavior or punishing the child.
4. Any technique that unnecessarily subjects the child to ridicule, humiliation, or emotional trauma.

SB 396 also limits the use of restraint "to ensure the immediate physical safety of persons when there is a substantial and imminent risk of serious bodily harm to the child or others." Trained personnel shall only use restraints "when all other interventions have failed or have been deemed inappropriate."

The bill also contains provisions requiring notice to parents, informing them when restraints have been utilized.

The Senate passed SB 396 on March 24, 2010. It has been introduced in the House and was referred to the House's "Children and Family Law" Committee. A public hearing was held on April 6, 2010. Subcommittee work sessions have been scheduled for April 8, 2010 and April 13, 2010, and an executive session has been scheduled on April 13, 2010.

IV. SB 520, Liability for Special Education Costs

SB 520 (2010) is intended to clarify which district is financially liable for special education and related services for a child who attends a public school in a district in which he/she does not reside. Under this bill, when a child attends a public school operated by a district in which the child does not reside, the district of residence bears financial responsibility for the child under RSA 186-C, unless the school district in which the child does not reside is liable under RSA 186-C:13, I, or it explicitly accepts financial responsibility through a written agreement.

RSA 186-C:13, I states that the district of residence is responsible for all expenses incurred in administering the law in relation to education for children with disabilities in need of special education and related services, except:

- a. When a child with a disability in need of special education and related services is placed in a home for children or health care facility, liability shall be determined in accordance with RSA 193:29; and
- b. When a child with a disability in need of special education and related services is placed in a state facility, the liability for expenses for the child shall be determined in accord with RSA 186-C:19.

SB 520 passed in the Senate on March 24, 2010. It has been introduced in the House and referred to the House Education Committee. A hearing has been scheduled for April 13, 2010. If this bill becomes a law, it will address the situations where districts, through their collective bargaining agreements, allow their non-resident teachers to enroll their students in their public schools.

V. Miscellaneous Bills

A. HB 1411

HB 1411 would create a new provision, RSA 189:14-h, which would require superintendents to notify, in writing, all education support personnel and non-certified school district employees who have completed their probationary employment period of the intent to continue or not continue that employment into the next school year.” (Emphasis added). However, the provision “shall [not] be construed to amend, replace, or otherwise modify a school district’s policy on dismissal, collective bargaining agreements, or any employee benefits package.”

This Bill has been introduced in the Senate, and a hearing before the Senate Education Committee is scheduled for April 13, 2010.

B. HB 154

This bill would amend provisions of RSA 189:34, RSA 189:35-a, and RSA 189:36, pertaining to truancy. In particular, the bill would require that school board policies on truancy include:

- A definition of “excused absence,” and a process for considering exceptions to absences not otherwise excused; and,
- A process for intervention designed to address individual cases of truancy as quickly as possible and to reduce the number of habitual truants in the school district. The board must provide for the participation of parents in the development of the policy, and the policy must include early parental involvement in the intervention process. The policy must also designate an individual employee in each school as the person responsible for truancy issues.

Truant officers would be prohibited from filing a petition alleging that a child is in need of services until all steps in the intervention process have been exhausted.

The bill would also amend the definition of truancy such that only ten (10) half days (rather than twenty (20)) of unexcused absence during a school year would constitute habitual truancy, and it would revise the definition of “unexcused absences” to mean “an absence which has not been excused” in accord with school board policy.

C. HB 1495

HB 1495 removes the prohibition on approval of new chartered public schools, and permits the State Board of Education to issue approval of chartered public schools (in accord with the provisions of RSA 194-B:3-a) between July 1, 2009 and June 30, 2011.

The House of Representatives has adopted this bill, and it is currently pending before the Senate. A hearing before the Senate Education Committee was held on March 30, 2010.

D. SB 311

This bill would amend RSA 186-C:3-1, VII, pertaining to services for persons incarcerated and attending Granite State High School. The bill would require Granite State High School to submit a plan for department approval to meet the special education needs of persons incarcerated in the state prison system. In addition, each county correctional facility would be required to

designate one person to serve as the contact person in all matters pertaining to special education. That person would be required to:

1. Provide, on a weekly basis, a list of incarcerated inmates up to the age of 21 who are eligible to receive special education;
2. Provide the school district with access to the incarcerated inmates with disabilities for the purpose of providing special education to ensure a free and appropriate public education and;
3. Provide time and space within the correctional facility to allow the school district to provide instruction and any special education and related services pursuant to the person's IEP.

SB 311 has been approved by the Senate and introduced in the House. A public hearing before the House Education Committee has been scheduled for April 13, 2010.

E. SB 373

SB 373 seeks to add a new provision, RSA 189:24-a, pertaining to alternative schools. The bill would allow school districts to establish alternative schools within the district, provided that the district already operates one or more standard schools¹ for the grade levels of the pupils seeking an alternative school.

The bill defines an alternative school as “a school that is operated by the school district in accordance with this section, approved by the state board of education, and maintained in a suitable and sanitary space, equipped with appropriate furnishings, equipment, and supplies.”

The bill contains a process for establishing an alternative school and requires the State Board to establish rules pertaining to the same.

Children with disabilities may attend alternative schools:

¹ A standard school is one approved by the state board of education, and maintained for at least 180 days in each year, or the equivalent number of hours if approved by the commissioner of the department of education, in a suitable and sanitary building, equipped with approved furniture, books, maps and other necessary appliances, taught by teachers, directed and supervised by a principal and a superintendent, each of whom shall hold valid educational credentials issued by the state board of education, with suitable provision for the care of the health and physical welfare of all pupils. A standard school shall provide instruction in all subjects prescribed by statute or by the state board of education for the grade level of pupils in attendance. RSA 189:24.

only if such attendance is the decision of the [IEP] team and the alternative school is approved by the special education bureau of the department of education. School districts that operate alternative schools shall retain all Child Find responsibilities required by state and federal law for all pupils in the alternative school. This section shall not affect any state or federal law that provides for a free and appropriate public education for a child with a disability.

This bill has passed in the Senate; the House Education Committee held a public hearing on the bill on April 6, 2010.

F. HB 1224 and HB 1286

HB 1224 and HB 1286 would amend RSA 189:13-a, relative to background investigations and criminal records checks.

HB 1224 would revise RSA 189:13-a, V by specifying that a person who has “been charged pending disposition for or” convicted of a violation or attempted violation of certain crimes, which are listed in RSA 189:13-a, V, shall not be hired by a SAU, school district, or chartered public school.

HB 1286 would extend the application of RSA 189:13-a to nonpublic schools and public academies that have been approved by the New Hampshire State Board of Education. It would also require that substitute teachers, student teachers, student interns, and other educational staff apply for a criminal history records check.

Both bills have passed in the House and are currently before the Senate.

G. HB 1265

This bill would require school boards to develop and implement a policy governing air quality issues in schools. The policy must address methods of minimizing or eliminating emissions from buses, cars, delivery vehicles, maintenance vehicles, and other motorized vehicles used for transportation on school property. On April 6, 2010, the Senate Education Committee held a hearing on this bill.

VI. A Blueprint for Reform, The Reauthorization of the Elementary and Secondary Education Act

President Obama has submitted a proposal to Congress entitled “A Blueprint for Reform, The Reauthorization of the Elementary and Secondary Education Act.” See U.S. Department of Education, Office of Planning, Evaluation and Policy Development, *ESEA Blueprint for Reform*, Washington,

D.C., 2010 (available at <http://dataserver.lrp.com/DATA/servlet/DataServlet?fname=03152010blueprint.pdf>, accessed April 5, 2010). This proposal has not yet been introduced as a bill, but it has been included in these materials because it provides an overview of the President's proposals regarding the upcoming reauthorization of the Elementary and Secondary Education Act (ESEA), commonly known as the No Child Left Behind Act (NCLB).

The proposal was submitted to Congress on March 15, 2010, and seeks to make reforms in four areas:

1. Improving teacher and principal effectiveness to ensure that every classroom has a great teacher and every school has a great leader;
2. Providing information to families to help them evaluate and improve their child's schools, and to educators to help them improve their student's learning;
3. Implementing college- and career-ready standards and developing improved assessments aligned with those standards; and
4. Improving student learning and achievement in America's lowest-performing schools by providing intensive support and effective interventions.

Id. at 3.

To achieve these goals, the proposal focuses on the following:

A. College- and Career-Ready Students.

The proposal seeks to "set a clear goal: Every student should graduate from high school ready for college and a career, regardless of their income, race, ethnic or language background, or disability status." Id. at 3. The proposal seeks to require that states develop and adopt standards in English language arts and mathematics that build toward college- and career-readiness by the time students graduate from high school, and aims to have all students graduating or on track to graduate by 2020. Id. States would be asked to develop high-quality assessments in line with those standards. Each statewide system of accountability would need to reward schools and districts for progress and success, require rigorous interventions in the lowest-performing schools and districts, and allow local flexibility to determine appropriate improvement and support strategies for most schools.

B. Great Teachers and Leaders in Every School

Under this proposal, states and school districts would be asked “to put in place conditions that allow for teachers, principals, and leaders at all levels of the school system to get meaningful information about their practice, and support them in using this information to ensure that all students are getting the effective teaching they deserve.” Id. at 13.

As such, this proposal would require: statewide definitions of “effective teacher,” “effective principal,” “highly effective teacher,” and “highly effective principal.” Id. at 14. These definitions would be “developed in collaboration with teachers, principals, and other stakeholders,” and would be “based in significant part on student growth,” as well as other measures, “such as classroom observations of practice.”

The proposal also requires state-level data systems linking information on teacher and principal preparation programs to the job placement, student growth, and retention outcomes of their graduates, as well as district-level evaluation systems that:

1. Meaningfully differentiate teachers and principals by effectiveness across at least three performance levels;
2. Are consistent with their state’s definition of “effective” and “highly effective” teacher and principal;
3. Provide meaningful feedback to teachers and principals and inform professional development; and
4. Are developed in collaboration with teachers, principals, and other education stakeholders.

Id.

C. Meeting the Needs of English Learners and Other Diverse Learners

The ESEA reauthorization proposal increases support for inclusion and improved outcomes of students with disabilities, and

help[s] ensure that teachers and leaders are better prepared to meet the needs of diverse learners, that assessments more accurately and appropriately measure the performance of students with disabilities, and that more districts and schools implement high-quality, state- and locally-determined curricula and

instructional supports that incorporate the principles of universal design for learning to meet all students' needs.

Id. at 20.

The proposal would also require states to:

1. Establish new criteria to ensure consistent statewide identification of students as English Learners, and to determine eligibility, placement, and duration of programs and services, based on the state's valid and reliable English language proficiency assessment.
2. Implement a system to evaluate the effectiveness of language instruction educational programs, and to provide information on the achievement of subgroups of English Learners, to drive better decisions by school districts for program improvement, and to support districts in selecting effective programs.

Id.

D. A Complete Education

The President has proposed to provide competitive grants to support the transition to higher standards by assisting states in strengthening their:

1. Literacy programs and by providing substantial support to high-need districts in implementing high-quality literacy instruction.
2. STEM [science, technology, engineering and math] programs and by providing substantial support to high-need districts in implementing high-quality instruction in at least mathematics or science and may also include technology or engineering.
3. Teaching and learning of arts, foreign languages, history and civics, financial literacy, environmental education, and other subjects.
4. Access to accelerated learning opportunities for students, through access to college-level work and gifted and talented educational programs.

Id. at 26-29.

E. Fostering Innovation and Excellence

Policymakers and educators will be asked “to carefully analyze the impact of their policies, practices, and systems on student outcomes.” The proposal continues to support school-choice, by providing competitive grants to states, charter school authorizers, charter management organizations, districts, and nonprofit organizations, to start or expand high-performing public charter schools and other high-performing autonomous public schools. In addition, competitive grants will be offered to districts and states to expand public school choice programs.

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