

APR 20 2009

Dispute Resolution & Administrative Services

VIRGINIA DEPARTMENT OF EDUCATION DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES OFFICE OF DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES

CASE CLOSURE SUMMARY REPORT

Public Schools

School Division Name of Parent

April 17, 2009

Date of Decision Name of Child

John Cafferky N/A

Counsel Representing LEA Counseling Representing Parents

Alan Dockterman parent

Hearing Officer Party Initiating Hearing

Hearing Officer's Determination of Issues: The parent was afforded all procedural and notice protections required by IDEA; PS offered a FAPE to for the 2008-2009 school year which was reasonably calculated to enable him to progress and receive the level of educational benefits required by IDEA; The MDR Committee correctly found that the misconduct of was not caused by or had a direct and substantial relationship to his disability under 20 U.S.C. §1415(k)(1)(E)(i); and the MDR Committee correctly found that the misconduct of was not direct result of the failure of PS to implement IEP under 20 U.S.C. §1415(k)(1)(E)(i) ( See written decision of 4/17/09); and no jurisdiction of appeal of disciplinary action per state law.

Hearing Officer's Order and Outcome of Hearing: Decision for PS.

This certifies that I have completed this hearing in accordance with regulations and have advised the parties of their appeal rights in writing.

4-17-09 Date

Alan Dockterman

COMMONWEALTH OF VIRGINIA:

DUE PROCESS EDUCATIONAL APPEAL

	)
	)
Appellant	)
	)
	) <u>In re:</u>
	)
PUBLIC SCHOOLS	)
Respondent	)

DECISION

I. INTRODUCTION AND PROCEDURAL HISTORY

Public Schools ( PS) received a request for an expedited due process hearing from , parent of on March 13, 2009. She appealed the "disciplinary decision involving [her] son, ," and the manifestation determination review (MDR) of March 9, 2009. (See March 13, 2009 letter of Ms. ).

She also appealed the decision of the hearing officer for the Superintendent of PS regarding the suspension of under the disciplinary procedures of the school district. (See March 13, 2009 letter of Ms. ).

I was appointed as the hearing officer from a list supplied by the Supreme Court of the Commonwealth of Virginia and certified by the Virginia Department of

Education. John F. Cafferky, Esq. and Donald Y. Yu, Esq. represented PS; Ms. represented herself.

The parties participated in a resolution meeting on March 20, 2009 but were unable to settle their differences. On March 23, 2009, a pre-hearing teleconference was conducted. The order of witnesses, issues in the appeal, exploration of settlement, and procedures for the conduct of the hearing were among the matters discussed. (See letter of March 24, 2009). At the request of Ms. , we rescheduled the date for the hearing to April 3, 2009 from April 2, 2009. Ms. stated that the hearing should be public.

The parties did not ask that I issue any subpoenas. The school district responded to Ms. ' appeal with written argument and legal authority in support of its legal position and provided additional case authority in the letter setting forth its list of witnesses. (See letters of March 23, 2009 and April 1, 2009). The parties timely filed their exhibits and list of witnesses.

Ms. ' motion for a continuance during two teleconferences on April 2, 2009 was denied.

The hearing took place on April 3, 2009 in the , located at , VA . At the beginning of the hearing, Ms. ' renewed her request for a continuance, which was supported by Dr. , who spoke by speakerphone. Her motion was denied again. Ms. did not withdraw her appeal and left the hearing room. She did not participate further in the proceedings.

PS decided to proceed with the hearing. The exhibits and list of witnesses were admitted into evidence without

objection. The school district offered the testimony of two witnesses.

References in this Decision refer to the transcript (TR). Ms. filed one exhibit of forty-three consecutively numbered pages which consisted of separate documents and PS filed fifty exhibits. References to the exhibits are identified as those from the parent ( ) and those from PS (F).

## II. DENIAL OF MOTION FOR CONTINUANCE

On April 1, 2009, Ms. submitted a list of three representatives: Dr. , Dr. and

. (See e-mail of April 1, 2009). On April 2, 2009 at approximately 1:00 P.M. she called and requested a continuance because she could not reach Ms. and her other representatives believed she needed local representation since they were unfamiliar with Virginia law.

I set up a teleconference with Mr. Cafferky and Ms which took place about 3:00 P.M. that afternoon. Mr. Cafferky objected to any continuance because many of his witnesses would be absent the following week due to the commencement of the spring break. Ms. stated she had contacted the offices of Beth Troutman, who told her that their staff member could not represent her on April 3, 2009 due to emergency dental surgery. The motion was denied for basically the same reasons set forth below in response to her renewal of the motion at the hearing on April 3, 2009. I stated that the motion was untimely, no local person had been identified as Ms. ' advocate, and the school district would not have had most of their

witnesses available the following week due to spring break. (TR-8-9).

At the hearing on April 3, 2009, Ms. [redacted] filed a written motion to reset the hearing. She noted that she had exhaustively attempted to obtain legal counsel, that the civil rights of [redacted] needed to be considered and that [redacted] needed to have an opportunity for his legal representative to clear his record. Ms. [redacted] argued that without counsel her civil and constitutional rights would not be defended and she would not be granted her full rights to due process. ( [redacted] Exh. 2).

Mr. Cafferky objected again based on the lateness of the motion and the absence of witnesses during spring break (TR-16-18). Ms. [redacted] stated that she had tried unsuccessfully since [redacted] was suspended to obtain representation. On April 1, 2009, Ms. Troutman had called her and said she had two potential representatives but one was leaving town on April 3, 2009 and the other had emergency oral surgery. She also objected to the fact that the three identified representatives, who were in New Orleans, LA, had not been served with documents. (TR-19-21).

I again denied the motion. I noted that Ms. [redacted] could have forwarded the documents to the representatives on April 2, 2009 who, in any event, Ms. [redacted] stated had withdrawn as her representatives. (Tr-20, 23-25). I pointed out that no local advocates had been identified, that a number of witnesses were ready to testify that day and would be understandably unavailable the week of April 13-17, 2009, and that I was statutorily prohibited from holding the hearing after April 17, 2009. (TR-21-25).

Ms. [redacted] continued to object to the ruling, identifying the potential local advocates as Lisa Fagan or another attorney associated with Beth Troutman and stating that she had contacted the NAACP who wished to attend and bring a legal representative but needed greater notice. Ms. [redacted] then requested that Dr. [redacted] be allowed to speak by speakerphone even though he would not be a representative or a witness. (TR-28-32).

Dr. [redacted] told us that he was her pastor and recommended that she obtain legal representation. He said he had known [redacted] since he was born, that his family had left New Orleans because of Hurricane Katrina, that many children had suffered great trauma from the hurricane, that children such as [redacted] were often mislabeled and misunderstood because of their nonverbal communications, and that he needed the best education possible. He said that from what he had learned, the reasons given were insufficient for expulsion. (TR-33-41).

I then explored at length with Ms. [redacted] and the school district her options. (Tr-41-46). She stated she did not understand the options and would neither withdraw her request for an expedited due process nor participate in it. (Tr-46-48). Ms. [redacted] then left the hearing room and, after a short recess, PS decided to continue with the hearing.

### III. FINDING OF FACT

The following represents findings of fact based upon a preponderance of evidence derived from the testimony of the witnesses and the documents admitted into evidence.

Additional findings will be found in other portions of this decision.

A. Factual Background Prior to Fifth Grade Experience

was born on September 3, . His family is originally from New Orleans, LA. They were left homeless as a result of Hurricane Katrina, which struck in 2005 and devastated the New Orleans area. The family was divided, with some staying in New Orleans and other members relocating to Northern Virginia. Ms. moved to Virginia with and later was joined by her mother and sister. After living with 's paternal uncle for one year, they moved to their present residence. (F. Exh. 30).

The separation from 's father, other relatives, and friends has been stressful for , and he has had difficulty adjusting to new surroundings. (F. Exh. 30).

attended preschool, kindergarten, and first grade in New Orleans and appeared to have done well in school. When he arrived in , he began second grade at Elementary School ( ). (F. Exh. 30).

During second grade, began displaying off task behavior and frequently acting disruptively. He seemed easily distracted. (F. Exh. 30). He received a diagnosis of Attention Deficit Hyperactivity Disorder (ADHD) by , M.D. ( . Exh. 1, p. 13). By the middle of third grade, 's behavior deteriorated substantially, subjecting him to a series of timeouts, class removals, and suspensions. (F. Exh. 1). Ms. referred to the Local Screening Committee who determined that a full psychological evaluation was justified. With regard to

intellectual functioning, \_\_\_\_\_ scored in the average to high average category. (F. Exhs. 29, 31; TR-97-99).

In her report, the school psychologist noted that \_\_\_\_\_ was experiencing major behavioral challenges which adversely affected his educational performance. The psychologist found that he demonstrated levels of depression and anxiety related to Hurricane Katrina and had behavioral characteristics typical of children with attention deficit problems. He had difficulty adapting to changing situations, had weak skills, was easily distracted, and had difficulty controlling his behavior and mood. (F. Exh. 29).

\_\_\_\_\_ received an Individualized Education Plan (IEP) on June 13, 2007, which provided for fifteen hours of services per week for his learning disabilities, five of which were to be provided in a special education setting. It established a number of goals related to his classroom behavior, organizational deficiency, task completion problem, and failure to focus. (F. Exh. 21).

On May 5, 2008, the IEP team modified the prior IEP, concentrating on \_\_\_\_\_'s impulsivity, lack of control, distractibility, and time management deficiencies. (F. Exh. 22). On October 21, 2008, the IEP team prepared an addendum, which provided for special education services for mathematics. (F. Exh. 24). For the period from September of 2007 until the end of the school year in June of 2008, twenty separate instances were identified in the Disciplinary Report prepared by \_\_\_\_\_ PS where \_\_\_\_\_ engaged in behavior resulting in timeouts, class removals, or alternate instructional arrangements. (F. Exhs. 1,2).

#### B. Suspension and MDR in Fifth Grade



, 's fifth grade teacher at , testified on behalf of PS. He had been teaching since 2001 and had considerable experience teaching children with special needs, including those diagnosed with ADHD. (TR-59-61). Mr. testified that was a very likeable and knowledgeable student, especially in one-to-one situations. However, in a general classroom, he often became disruptive and failed to keep on task. Mr. observed that he was intelligent and could perform at or above grade level. (TR-61-63).

He stated that received special education support for mathematics both within and outside the classroom. was on a behavioral plan which included visual reminders and cues to assist in correcting his behavior. (TR-63-65).

In December of 2008, received two timeouts and was removed from the classroom on one occasion. On December 16, 2008, he was suspended for five days because he pushed another student against a wall with such force that two of his teeth were knocked out. (F. Exhs. 1,8).

Ms. , 's special education instructor, and Mr. prepared Functional Behavioral Assessments on December 19 and 22, 2008, respectively. They noted that for at least three years, had engaged in the following behaviors: bullying and assaulting other students, inappropriate language, verbal harassment, disruption of other students, and performance of incomplete work. As a result, a Behavioral Intervention Plan (BIP) was developed on December 22, 2008. (F. Exh. 25).

The culmination of 's infractions took place on February 17, 2009, when began blurting out and

speaking loudly in the library and in Mr. 's classroom. Despite the warnings of Mr. , he continued to be disruptive and disrespectful. Mr. testified that later that day was defiant and disruptive to another teacher. 's actions disturbed the other students and impeded their ability to learn. (TR-65-77; F. Exhs. 11-13; LS. Exh.1, 14-17).

On February 18, 2009, , the principal at , told Ms. that he was recommending suspension and then expulsion and sent her a confirming letter the following day. The suspension was effective from February 19, 2009, through March 4, 2009, with the recommendation that it be extended until resolution of the disciplinary process. (F. Exh. 14). As noted by Mr. in the recommendation for expulsion letter to , the Superintendent's Hearing Officer, the school had attempted a number of behavior plans based on a positive support system with motivators selected by which had proven unsuccessful. During the 2007-2008 school year, Lane officials sought to obtain placement of in the Summitt Program (F. Exh. 44), but Ms. rejected the option. During the current school year, she likewise declined referral to the Alternative Learning Center. He concluded had "...exhausted all interventions and [felt they could] no longer allow [ ] to disrupt the education of students." (F. Exh. 15).

On March 3, 2009, an administrative hearing was held after which , the Hearing Officer for the Superintendent of PS, issued a decision on March 13, 2009. She observed that had accumulated a total of thirty-three infractions on his school discipline report. She found that although the recent offenses

warranted an expulsion, she would not forward that recommendation to the school board because of his age and promise to improve. Rather, she proposed that he be removed from [redacted] and permitted to receive most educational services in an alternative educational setting in accordance with the IEP process. In the new setting, he would be considered a probationary student and would have to meet enumerated stringent conditions. Ms. [redacted] was given four days after notification of the decision to seek review by the School Board. (F. Exh. 19). Under VA Code 22.1-277.05(A), Ms. [redacted] had the right to such an appeal, but there is no evidence that she did so.

On March 5, 2009, The MDR team convened and found that [redacted]'s conduct was not caused by or had a direct and substantial relationship to his disabilities and was not a direct result of [redacted]'s failure to implement the IEP. (F. Exh. 27).

Mr. [redacted] recounted what transpired during the MDR meeting. Also present were the parent, the school psychologist, the principal, the assistant principal, two Pyramid Resource teachers, [redacted]'s regular and special education teachers, and [redacted]'s past principal. The team discussed, *inter alia*, [redacted]'s disabilities, his progress in school, and [redacted]'s fulfillment of the requirements set forth in the IEP. Ms. [redacted] did not believe the BIP was appropriate but suggested no modifications. (F. Exh. 27; TR-77-81).

The committee also considered whether [redacted]'s disability was the cause of or had a substantial relationship to his misconduct on December 17, 2009. According to Mr. [redacted], they decided that his disability did not have a substantial relationship to his behavior and

did not cause it. Mr. [redacted] concurred in this decision, stating that [redacted], as he had in the past, admitted that he sought attention from his classmates by acting out and when Mr. [redacted] noticed his bad behavior, he corrected it. It was apparent to Mr. [redacted] that he acted intentionally, not impulsively, often shifting from one objectionable behavior, as he did on February 17, 2009, to a different disruptive behavior when confronted, rationalizing that Mr. [redacted] had only objected to the initial behavior. (TR-83-87).

Mr. [redacted] stated that the MDR team had reviewed the evaluations and eligibility documents as part of its MDR review. (TR-82).

PS also offered the testimony of [redacted], the school psychologist, who was qualified as an expert in the field of school psychology. She explained that there are different types of ADHD. [redacted] was diagnosed with combined type ADHD, which is characterized by inattentiveness and hyperactivity/impulsivity. (TR-96, 99-100). In her view, [redacted] had the capacity to learn at grade level and had the ability to understand the rules of proper behavior at school. She agreed with Mr. [redacted] that [redacted] was performing at an average or above average level. (TR-97-99).

Ms. [redacted] rendered her opinion that [redacted]'s misbehaviors were unrelated to his disabilities, pointing out that the initial infractions might have been impulsive but after redirection, his continuation was planned and willful considering his intellectual abilities. (TR-102-104). Various reports by other teachers and administrators supported the witnesses' conclusions that the actions of

were not caused by his disability. (F. Exhs. 11, 13, 16, and 44).

During IEP meetings on February 26, 2009 and March 9, 2009, the team changed the primary service from Other Health Impaired (OHI) to Non-Categorical Elementary (NCE) (F. Exh. 28). It also decided that [redacted] should receive ten hours per week of general educational services at home and one hour per month of special educational consulting services while the disciplinary process progressed. (F. Exh. 28). On March 11, 2009, [redacted], Coordinator of Social Work Services, sent a letter to Mr. [redacted], stating that [redacted] had been approved for home based instructional services for the period of March 19, 2009 until May 5, 2009. (F. Exh. 49).

### III. LEGAL ANALYSIS

The Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. §1400 *et seq.* (2005) amended the Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.* (1997) (IDEA). IDEA requires states, as a condition of acceptance of federal financial assistance, to ensure a "free appropriate public education" (FAPE) to all children with disabilities. 20 U.S.C. §1400(d), §1412(a)(1). Virginia has elected to participate in this program and has required its public schools, which include PS, to provide FAPE to all children with disabilities residing within its jurisdiction. Va. Code Ann., §22.1-214-215.

The Act imposes extensive substantive and procedural requirements on states to ensure that children receive a FAPE. 20 U.S.C. §1415. See also *Board of Education v.*

*Rowley*, 458 U.S. 176 (1982). The safeguards guarantee "...both parents an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decision they think inappropriate". *Honig v. Doe*, 484 U.S. 305, 311-312 (1987).

Hearing officers ordinarily engage in a two step inquiry to decide whether FAPE has been provided under IDEA. First, they determine whether school officials have complied with the procedures contained in the Act and, secondly, whether the IEP is reasonably calculated to enable the child to receive educational benefits. *Rowley, supra*, at 181.

The Act establishes significant procedural requirements to safeguard the rights of the student to receive a FAPE. 20 U.S.C. §1415. *Rowley, supra*, at 207. These safeguards "guarantee the parents an opportunity for meaningful input into all decision affecting their child's education." *Honig, supra*, at 311-312 (1988). "Congress placed every bit as much emphasis on compliance with procedures giving parents...a large measure of participation at every stage of the administrative process...as it did up the measurement of the resulting IEP against a substantive standard." *Rowley, supra*, at 205-206.

Parents are required to be members of the group that makes the decision on educational placement. 20 U.S.C. §1414(e). Under 34 C.F.R., §300.345, (2006), the school district is required to ensure that parents are present or have had an opportunity to participate at each IEP meeting. However, the right to participate does not give parents the power to dictate the outcome of the IEP team or veto educational decisions for their child without congressional

mandate. See, e.g., *A.W. v. Fairfax County School Board*, 372 F.3d 674, 683, n.10 (4<sup>th</sup> Cir. 2004).

Upon its decision to suspend for more than ten days or expel \_\_\_\_\_, PS was required to convene an MDR committee to determine whether the conduct was a manifestation of his disability. See 20 U.S.C. §1415(k). Under Virginia regulations, the committee must then determine the answers to three questions:

- (a) In relationship to the behavior subject to the disciplinary action, the student's IEP and placement were appropriate, and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the student's IEP and placement;
- (b) the student's disability did not impair the student's ability to understand the impact and consequences of the behavior subject to disciplinary action; and
- (c) the ability to control the behavior subject to the disciplinary action. 8 VAC 20-80-68 C.5.b.(2).

IDEA directs the team to determine whether the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability and whether the conduct was the direct result of the failure of PS to implement the IEP. 20 U.S.C. §1415(k)(1)(E)(i); 34 C.F.R. §300.530(e).

The MDR Committee is also required to review all pertinent information in the student's file, including any teacher observations and information provided by the parent. 20 U.S.C. §1415(k)(1)(E)(i); 34 C.F.R. §300.530(e). Should the team decide that the behavior is not a manifestation of the child's disability, the disciplinary procedures applicable to children without disabilities may be applied in the same manner as applied to children without disabilities. 20 U.S.C. §1415(k)(1)(C).

The testimony of the two PS witnesses and the school district's exhibits established that the MDR Committee correctly found that the IEP and BIP were appropriate, that the student had the ability to understand the impact and consequences of his misconduct, and that he had the ability to control his conduct. Further, the testimony adduced at the hearing and the exhibits demonstrated that the Committee considered relevant documentary evidence, observations of the child, and the IEP and his placement in making its decision. See 8 VAC 20-80-76 J.19.

As the uncontroverted testimony of the witnesses and the exhibits show, willfully decided to act in a disruptive manner on February 17, 2009 in defiance of the warnings given by his teachers. When told not to engage in a particular kind of misconduct he purposely shifted to another and then sought to rationalize it, thereby revealing forethought.

It was evident to 's teachers that his actions were voluntary and calculating rather than impulsive. Even if his disability had caused him to act on occasion impulsively during the past two and one-half year period replete with numerous infractions, the episodes on February 17, 2009 occurred over a sufficient time period that day to support the finding that he acted in a deliberate and premeditated manner, rather than in response to sudden stimulus typical of the reaction of ADHD children. See, generally, *Fitzgerald v. Fairfax County School Board*, 556 F. Supp. 2d 543 (E.D. 2008). Given his high level of functioning and his discussions with Mr , it is apparent he was cognizant of the impact and consequences of his behavior.



Ms. [redacted] produced no evidence that [redacted] 's actions were caused by his disability. Nor did she question whether he was receiving FAPE. In any event, based on the testimony of his teachers and the documentary evidence, there is ample evidence in the record that the IEP was reasonably calculated to provide educational benefits to [redacted] under the *Rowley* standard and that the school district had properly implemented both the BIP and the IEP.

Turning to the question of procedure, Ms. [redacted] has not raised any deficiencies in her expedited appeal. Regardless, I find that PS has shown that all required notices have been given to her. Even if there had been any technical violations, such failures would not have deprived [redacted] of any educational benefits or have infringed on Ms. [redacted] ' right to fully participate in the IEP process or to pursue her statutory rights under IDEA. *Burke County Board of Education V. Denton*, 895 F.2d 973, 982 (4th Cir. 1990). Procedural violation must *actually* interfere with the provision of FAPE. *DiBuo v. Board of Education of Worcester County*, 309 F.3d 184, 190 (4<sup>th</sup> Cir. 2002). (emphasis in original).

#### IV. ISSUES

1. Whether the misconduct of [redacted] was caused by his disability or had a direct and substantial relationship to his disability?

2. Whether the school district offered FAPE to [redacted] ?

3. Whether the notice and procedural requirements of IDEA were met by PS?

4. Whether the misconduct of was the direct result of PS' failure to implement the IEP?

5. Whether there is jurisdiction under IDEA to entertain appeals of disciplinary actions under Virginia law?

#### V. CONCLUSIONS OF LAW AND FINAL ORDER

1. is a student with Attention Deficit Hyperactivity Disorder, within the disability category of non-categorical elementary, who needs special education and related services and who qualifies for such services under IDEA.

2. The parent was afforded all procedural and notice protections required by IDEA.

3. Public Schools offered a FAPE to for the 2008-2009 school year which was reasonably calculated to enable him to progress and receive the level of educational benefits required by IDEA.

4. IDEA does not apply to appeals of suspensions for disciplinary infractions under Virginia law and thus Ms.

' appeal of the decision of the hearing officer for the Superintendent of PS is dismissed for lack of jurisdiction.

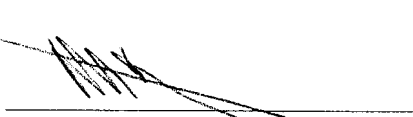
5. The MDR Committee correctly found that the misconduct of \_\_\_\_\_ was not caused by or had a direct and substantial relationship to his disability under 20 U.S.C. §1415(k)(1)(E)(i).

6. The MDR Committee correctly found that the misconduct of \_\_\_\_\_ was not the direct result of the failure of PS to implement the IEP under 20 U.S.C. §1415(k)(1)(E)(i).

7.. This decision is final and binding unless either party appeals to a federal District Court within ninety calendar days of the date of this decision, or to a state Circuit Court within one year of the date of this decision.

Date: \_\_\_\_\_

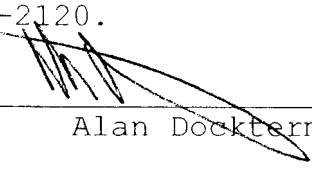
4/17/09

  
\_\_\_\_\_  
Alan Dockterman  
Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that I have, this 17<sup>th</sup> day of April, 2009, caused this Decision to be sent via first-class mail, postage prepaid, and by e-mail to appellant, \_\_\_\_\_, VA ; and to John F. Cafferky, Esq. and Donald Yu, Esq., counsel for \_\_\_\_\_, Public Schools, \_\_\_\_\_, Suite \_\_\_\_\_, VA ; and sent via first-class mail, postage prepaid, to \_\_\_\_\_, Coordinator, Monitoring and Compliance, \_\_\_\_\_, Public Schools, \_\_\_\_\_, Suite \_\_\_\_\_, VA and to

Judy Douglas, Director, Dispute Resolution/ Administrative  
Services Department of Education, Commonwealth of Virginia,  
P.O. Box 2120, Richmond, VA 23218-2120.



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Alan Dockerman

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