Accreditation & Innovation, State Authorization, and Title IX

2019 CASFAA Conference
Riverside, CA | November 4, 2019
Speaker Introduction

- Aaron D. Lacey
  - Partner and Practice Leader, Higher Education Practice, Thompson Coburn LLP
- Higher Education Practice
  - Provide regulatory counsel on federal, state, and accrediting agency laws and standards (e.g., Title IV, Title IX, Clery, consumer information).
  - Assist with postsecondary transactions, contract drafting and negotiation, policy creation, and compliance systems design.
  - Represent institutions in student and employee litigation, government investigations, administrative proceedings, audits, and reviews (e.g., borrower defense actions).
The Department’s Regulatory Agenda
ED’s Regulatory Agenda

- Accreditation & Innovation
- State Authorization
- Borrower Defense to Repayment
- Title IX
- Gainful Employment
- All Gender Restroom
Accreditation & Innovation Rulemaking
Scope of Rulemaking

- Recognition of accrediting agencies and accreditation procedures
- Definition of a credit hour
- Competency-based education and direct assessment programs
- Standards for distance education programs
- State authorization for DE programs
- Disclosures for DE and Licensure Programs
- Eligibility of faith-based entities to participate in grant and aid programs
- Rules for TEACH grants
## Rulemaking (2016-2018)

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>July 25, 2016</td>
<td>ED publishes its <a href="#">proposed 2016 State Authorization Rule</a>.</td>
</tr>
<tr>
<td>July 1, 2018</td>
<td>Original effective date of the 2016 State Authorization Rule.</td>
</tr>
<tr>
<td>July 3, 2018</td>
<td>ED publishes a <a href="#">final rule</a> delaying until July 1, 2020, parts of 2016 State Authorization Rule concerning state authorization of distance education. ED does <strong>not</strong> delay elements concerning foreign additional locations.</td>
</tr>
<tr>
<td>July 30, 2018</td>
<td>ED <a href="#">announces</a> a rulemaking to create a new Accreditation and Innovation Rule, and indicates that a new State Authorization Rule will be negotiated as part of the process.</td>
</tr>
<tr>
<td>Aug. 23, 2018</td>
<td>The National Education Association and the California Teachers Association <a href="#">sue</a> ED, asserting that the delay of the 2016 State Authorization Rule violated the APA.</td>
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</table>
# Rulemaking (2019)

<table>
<thead>
<tr>
<th><strong>Date</strong></th>
<th><strong>Event</strong></th>
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<tbody>
<tr>
<td><strong>Spring 2019</strong></td>
<td>ED carries out a negotiated rulemaking to create a new Accreditation and Innovation Rule, and a 2019 State Authorization Rule is formulated as part of that effort. On April 3, 2019, the Accreditation and Innovation Committee reaches consensus, obligating ED to use the <a href="#">draft consensus language</a> as the basis for its proposed rules.</td>
</tr>
<tr>
<td><strong>April 2019</strong></td>
<td>U.S. District Court for Northern CA rules that ED violated the APA when it delayed the 2016 State Authorization Rule, and vacates the delay effective May 26, 2019.</td>
</tr>
<tr>
<td><strong>June 12, 2019</strong></td>
<td>ED publishes <a href="#">proposed</a> 2019 A&amp;I Rule covering accreditation and state authorization in the Federal Register.</td>
</tr>
<tr>
<td><strong>July 12, 2019</strong></td>
<td>Comment period closes.</td>
</tr>
<tr>
<td><strong>Nov. 1, 2019</strong></td>
<td>ED publishes its <a href="#">final 2019 A&amp;I Rule</a> covering accreditation and state authorization in the Federal Register, with an effective date of July 1, 2020.</td>
</tr>
<tr>
<td>Date</td>
<td>Event</td>
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</tr>
<tr>
<td>Dec. 2019</td>
<td>ED publishes proposed rules relating to (1) credit hour, competency-based education, and distance education standards; (2) eligibility of faith-based entities; and (3) TEACH grants.</td>
</tr>
<tr>
<td>May 2020</td>
<td>ED publishes final rules relating to (1) credit hour, competency-based education, and distance education standards; (2) eligibility of faith-based entities; and (3) TEACH grants.</td>
</tr>
<tr>
<td>July 1, 2020</td>
<td>Effective date of final rule relating to accreditation and state authorization.</td>
</tr>
<tr>
<td>July 1, 2021</td>
<td>Effective date of final rule relating to (1) credit hour, competency-based education, and distance education standards; (2) eligibility of faith-based entities; and (3) TEACH grants.</td>
</tr>
</tbody>
</table>
Early Implementation

• The Secretary has designated the following new regulations for early implementation:
  – Definitions (600.2).
  – State Authorization (600.9).
  – Institutional Consumer Information (668.43).
  – DE Program Disclosures (668.50).
• Watch for guidance on appropriate process for early implementation.
Accreditation
Alternative Standards

• Permits accreditors to use alternative standards, policies, and procedures when “special circumstances exist, to include innovative program delivery approaches or, when an undue hardship on students occurs...”

• “The goals and metrics required by this provision under alternative standards must be equivalently rigorous to standards applied under normal circumstances.”

34 CFR § 602.18(c) (July 1, 2002); 84 FR 58861 (Nov. 1, 2019).
More Flexible Compliance Timeline

• Maximum time period for compliance extended from 2 years under current rule to the lesser of four years or 150 percent of the—
  – Length of the program in the case of a programmatic accrediting agency; or
  – Length of the longest program at the institution in the case of an institutional accrediting agency.

• Good cause extensions still permitted.
• Clarifies an accreditor may limit an adverse actions “to particular programs that are offered by the institution or to particular additional locations of an institution, without necessarily taking action against the entire institution…”

• Noncompliance must be limited to the particular program or location.

34 CFR § 602.20(d) (July 1, 2002).
Refines Scope of Oversight

- Explicitly states that accreditor’s are not responsible for enforcing:
  - Program Participation Agreements (668.14)
  - Financial Responsibility (668.15)
  - Administrative Capability (668.16)
  - Consumer Information (668.41)
  - Clery Act (668.46)

- However, places *affirmative obligation* on accreditors to notify ED if, in the course of their work, they identify instances or potential instances of noncompliance.

34 CFR § 602.20(f) (July 1, 2002).
The Residency Problem

- Under the 2016 Rule, schools must meet state authorization requirements in any state in which an enrolled student resides and be ready to document such authorization; and
- Similarly, for states where the institution is not physically located but has a student residing, schools must document that there is a state process for review and appropriate action on student complaints.

34 CFR § 600.9(c)(1)-(2).
Residency Problem Solved

• Recognizing the issue, ED removed the concept of a student's “residence” and replaced it with “location” in 600.9(c), as well as in the definition of “State authorization reciprocity agreement” at 600.2.

• Under the new rule, an institution that offers DE courses “to students located in a State in which the institution is not physically located or in which the institution is otherwise subject to that State's jurisdiction as determined by that State... must meet any of that State's requirements...”

34 CFR § 600.9(c)(1)(July 1, 2020).
Current Reciprocity

- Schools participating in state authorization agreements are considered authorized, subject to any limitations in the reciprocity agreement, as well as to any additional state requirements outside of the reciprocity framework.

- All institutions also must be prepared to document authorization to the Department upon request (such requests might be made during program reviews, recertification, or compliance investigations).

34 CFR § 600.9(c)(1)-(2).
Future Reciprocity

• ED generally left the reciprocity framework in place, including the definition of a “State authorization reciprocity agreement.”

• However, new rule clarifies that “such an agreement cannot prohibit any member State of the agreement from enforcing its own general-purpose State laws and regulations outside of the State authorization of distance education.”

34 CFR § 600.9(c)(1)-(2); 84 FR 58841 (Nov. 1, 2020).
Consumer Information
2016 DE Program Disclosures

• The **2016 State Authorization Rule** is now in effect and will remain in place until **July 1, 2020**, when the 2019 A&I Rule takes effect.

• **However, schools can exercise the early implementation option.**

• The 2016 Rule includes disclosure requirements that cover any Title IV program that is provided, or can be completed, solely through distance education or correspondence courses, excluding internships and practicums.

34 CFR § 668.50(a).
TC Extra Credit

• State Authorization Webinar
  – Free and on-demand here; reviews 2016 state authorization rule and disclosure requirements in detail.

• 2016 compliance chart
  – Sets out disclosure requirements.
• Pursuant to 668.41(d), institutions presently are required to “make available to any enrolled student or prospective student through appropriate publications, mailings or electronic media, information concerning” a wide range of topics, including financial aid (668.42) the institution (668.43).

• The 2019 A&I Rule revises and expands the listing of information that must be provided about the institution, as set forth in (668.43).
## Consumer Information

<table>
<thead>
<tr>
<th>Cost of attending</th>
<th>Refund policies</th>
<th>Withdrawal procedures</th>
<th>Summary of R2T4 requirements</th>
<th>Academic programs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Accreditation and licensing information</td>
<td>Disability services and policies</td>
<td>Consumer information POC</td>
<td>Title IV policy for study abroad</td>
<td>Copyright infringement policy</td>
</tr>
<tr>
<td>Transfer credit policies</td>
<td>Written arrangements with other institutions</td>
<td>Demographic data for student body</td>
<td>Placement rate information</td>
<td>Graduate and professional education outcomes</td>
</tr>
<tr>
<td>Fire safety report</td>
<td>Retention Rate</td>
<td>Vaccination Policy</td>
<td>Teach-out plans and enforcement action</td>
<td>Direct disclosures for licensure determinations</td>
</tr>
</tbody>
</table>

34 CFR 668.43 (July 1, 2020)
Disclosures for Licensure Programs

• The bulk of the DE program disclosures required under the 2016 State Authorization Rule will be jettisoned entirely (along with most of 668.50).

• However, disclosures relating to professional licensure not only will remain, they will be applied to all programs, without regard to whether they are offered online or on ground.
Disclosures for Licensure Programs

• “[T]he Department notes by moving disclosures from § 668.50, which only applied to distance education programs and correspondence courses, to § 668.43, which applies to all title IV eligible programs at institutions of higher education, the Department broadened the scope of these requirements so that more students can make informed enrollment decisions.”
Make Available Disclosures for Licensure Programs

• Under the new rule, a covered licensure program is one “designed to meet educational requirements for a specific professional license or certification that is required for employment in an occupation, or is advertised as meeting such requirements…”

• For each covered licensure program (online or on ground) an institution must make available “information regarding whether completion of that program would be sufficient to meet licensure requirements in a State for that occupation, including…”

34 CFR § 668.43(a)(5)(v) (July 1, 2020).
Make Available Disclosures for Licensure Programs

List of Positive Licensure Determinations
- A list of all States for which the institution has determined that its curriculum meets the State educational requirements for licensure or certification.

List of Negative Licensure Determinations
- A list of all States for which the institution has determined that its curriculum does not meet the State educational requirements for licensure or certification.

List of No Licensure Determinations
- A list of all States for which the institution has not made a determination that its curriculum meets the State educational requirements for licensure or certification.

34 CFR § 668.43(a)(5)(v) (July 1, 2020).
Direct Disclosures for Licensure Programs

• Prior to enrollment, an institution must directly notify a prospective student if:
  – the institution has made a determination that the program does not meet state licensure requirements in the state in which the prospective student is located; or
  – if the institution has not made a determination regarding whether the program meets state licensure requirements in the state in which the prospective student is located.
Direct Disclosures for Licensure Programs

- Within 14 calendar days, an institution must **directly** notify a **current student** if the institution has made a determination that the program does not meet state licensure requirements in the state in which the prospective student is located.

- Direct disclosures must be made directly to the student in writing, which may include through email or other electronic communication.

34 CFR § 668.43(c)(2), (3)(i) (July 1, 2020).
Determining a Student’s Location

- An institution must make a determination regarding the state in which a student is located at the time of the student's initial enrollment and, if applicable, upon formal notification that the student's location has changed to another State.
- Determinations regarding a student’s location must be made in accordance with written policies, which must be applied consistently.
- Upon request, institutions must be able to provide ED with written documentation of its determinations regarding student location.

34 CFR § 668.43(c)(3)(ii) (July 1, 2020).
Regular and Substantive Interaction
Regular and Substantive Interaction

- A distance education program must “support regular and substantive interaction between the students and the instructor, either synchronously or asynchronously.”
- Negotiators spent considerable time refining the meaning of the “regular and substantive interaction” standard, ultimately proposing revised, clarifying language.
Regular Interaction

Providing the opportunity for substantive interactions with the student on a predictable and regular basis commensurate with the length of time and the amount of content in the course or competency.

Monitoring the student’s **academic engagement** and success and ensuring that an instructor is responsible for promptly and proactively engaging in substantive interaction with the student when needed, on the basis of such monitoring, or upon request by the student.

Draft 34 CFR § 600.2.
Substantive interaction is engaging students in teaching, learning, and assessment, consistent with the content under discussion, and also includes at least two of the following:

<table>
<thead>
<tr>
<th>Providing direct instruction</th>
<th>Assessing or providing feedback on a student’s coursework</th>
<th>Providing information or responding to questions about the content of a course or competency</th>
<th>Facilitating a group discussion regarding the content of a course or competency</th>
<th>Other instructional activities approved by the institution’s or program’s accrediting agency</th>
</tr>
</thead>
</table>

Draft 34 CFR § 600.2.
Title IX Rulemaking
<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>June 23, 1972</td>
<td><strong>Title IX of the Education Amendments of 1972</strong></td>
</tr>
<tr>
<td>July 21, 1975</td>
<td>ED publishes <a href="https://www.colorado.edu/34cfrpart106">34 CFR Part 106</a>, which implements Title IX.</td>
</tr>
<tr>
<td>March 13, 1997</td>
<td>ED publishes <a href="https://www2.ed.gov/about/offices/list/ocr/guidance/sexualharassment.html">Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties.</a></td>
</tr>
<tr>
<td>May 24, 1999</td>
<td><a href="https://www.supremecourt.gov/opinions/98pdf/97-750pdf.pdf">Davis v. Monroe Cty. Bd. of Educ.</a>, 526 U.S. 629 (1999) (holding that a school can be liable under Title IX for student-on-student sexual harassment, but only if the school is deliberately indifferent to known sexual harassment, the respondent is under the school's disciplinary authority, and the behavior is so severe, pervasive, and objectively offensive that it denies access to the schools program and activities).</td>
</tr>
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## Title IX Timeline

<table>
<thead>
<tr>
<th>Date</th>
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<tbody>
<tr>
<td>Jan. 2001</td>
<td>Following significant judicial activity, ED publishes <a href="#">Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties</a>. ED draws distinction between standards for administrative enforcement and standards for private litigation for monetary damages.</td>
</tr>
<tr>
<td>April 2011</td>
<td>ED publishes <a href="#">DCL</a> with extensive guidance concerning school responsibilities for preventing and addressing sexual harassment and sexual violence.</td>
</tr>
<tr>
<td>April 2014</td>
<td>ED publishes <a href="#">Questions and Answers</a> on Title IX and Sexual Violence, further clarifying guidance articulated in 2001 Guidance and 2011 DCL.</td>
</tr>
<tr>
<td>Sept. 2017</td>
<td>ED publishes <a href="#">DCL</a> rescinding April 2011 DCL as well as new <a href="#">Q&amp;A</a> on Campus Sexual Misconduct.</td>
</tr>
</tbody>
</table>
On November 29, 2018, ED published the official version of its proposed Title IX rule in the Federal Register. The first concerning sexual misconduct since 1975.
# Title IX Proposed Rule Issue Areas

<table>
<thead>
<tr>
<th>Updates to Rights, Responsibilities, and the Faith-Based Exemption</th>
<th>New Definitions of Key Terms</th>
<th>Addresses When Schools Must Respond</th>
<th>Introduces “Deliberately Indifferent” Response Standard</th>
</tr>
</thead>
<tbody>
<tr>
<td>Addresses Emergency Removal and Admin. Leave</td>
<td>Describes Expectations for Supportive Measures</td>
<td>Details Elements of School Grievance Procedures</td>
<td>Requires Live Hearing, Cross-examination, and Advisors</td>
</tr>
<tr>
<td>Prohibits Single-Investigator Model</td>
<td>Provides Options for Evidentiary Standard</td>
<td>Encourages Informal Resolution</td>
<td>Establishes Record-Keeping Standards</td>
</tr>
</tbody>
</table>
Hearings

• Institutions of higher education would be required to provide a live hearing for formal complaints.
• The Title IX Coordinator cannot be the investigator.
• Reviewable evidence must be available at any hearing, including for purposes of cross-examination.
At the hearing, the adjudicator would be required to allow each party to cross-examine the other party and any witnesses.

Cross-examination would include relevant questions and follow-up questions, including those challenging credibility.

The rule proposes that cross-examination must be conducted by each party’s advisor. If a party does not have an advisor present, the school must provide an advisor aligned with that party to conduct cross-examination.

If a party or witness does not submit to cross-examination, the adjudicator is not permitted to rely on any statement of that party or witness in reaching a determination.
Cross-Examination

With regard to cross-x, ED also proposes:

- At the request of either party, the school must provide for cross-x to occur with the parties located in separate rooms with technology enabling the adjudicator and parties to simultaneously see and hear the party answering questions.

- The adjudicator must explain to the party’s advisor any decision to exclude cross-x questions as not relevant.

- Exclude evidence of the complainant’s sexual behavior or predisposition, unless...
  - the evidence is offered to prove that someone other than the respondent committed the alleged conduct, or the evidence “concerns specific incidents of the complainant’s sexual behavior with respect to the respondent and is offered to prove consent.”

Proposed 34 CFR 106.45(b)(3).
It is highly **uncertain** when the final rule will be promulgated or become effective. ED committed to a final rule in September 2019, but it has yet to arrive:

- ED is already managing an extremely ambitious regulatory agenda
- The agency is **understaffed** and **unhappy**
- ED has received over 100,000 comments and must review them all
- The Democrats in Congress have **vowed to fight** the proposal and want a Title IX overhaul wrapped into HEA reauthorization
- ED will want to make sure that it defends the final rule to the best of its ability

Note that a final Title IX Rule could become effective immediately.
TC Extra Credit

- **Title IX Proposed Rule Webinar**
  - Free and on-demand [here](#); reviews ED’s proposed Title IX Rule in detail.
TC Resources
## Higher Ed Webinar Series

### 2019 | 2020 Series Calendar

<table>
<thead>
<tr>
<th>Month</th>
<th>Topic</th>
</tr>
</thead>
<tbody>
<tr>
<td>August 2019</td>
<td>Examining the ED Approval Process for Higher Ed Mergers and Acquisitions</td>
</tr>
<tr>
<td>September 2019</td>
<td>Cybersecurity in Higher Education</td>
</tr>
<tr>
<td>October 2018</td>
<td>Merging Institutions of Higher Education: Corporate and Tax Considerations</td>
</tr>
<tr>
<td>November 2018</td>
<td>New Rules from the U.S. Department of Education</td>
</tr>
<tr>
<td>January 2019</td>
<td>Employee/ADA Considerations on Campus</td>
</tr>
<tr>
<td>February 2019</td>
<td>A Review of Noteworthy ED Administrative Decisions</td>
</tr>
<tr>
<td>March 2019</td>
<td>Immigration</td>
</tr>
<tr>
<td>April 2019</td>
<td>Intellectual Property</td>
</tr>
<tr>
<td>May 2019</td>
<td>Cannabis and Higher Education</td>
</tr>
</tbody>
</table>

If you would like to register for our webinars, email srichter@thompsoncoburn.com and we will send you a link as we open each webinar for registration.

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**AARON LACEY**
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alacey@thompsoncoburn.com

Aaron Lacey is the host of our higher education webinar series, as well as a frequent presenter. Aaron's practice is dedicated entirely to helping institutions of higher education navigate complex legal and regulatory matters. With time served both as outside and in-house counsel, Aaron has significant experience in the array of federal, state, and accrediting agency laws and standards that govern postsecondary institutions. He is a frequent writer and speaker on topics relating to higher education policy and the federal financial aid programs, and is also the editorial director of REGucation, the firm's higher education law and policy blog.
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<tr>
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<tbody>
<tr>
<td>An Examination of ED's New Borrower Defense Rule: Financial Responsibility and Related Reporting Requirements</td>
<td>September 23, 2019</td>
<td>Register</td>
</tr>
<tr>
<td>Colleges Held for Ransom: Responding to a Ransomware Attack</td>
<td>August 28, 2019</td>
<td>View Recording</td>
</tr>
<tr>
<td>Examining the USED Approval Process for Higher Ed Mergers and Acquisitions</td>
<td>August 27, 2019</td>
<td>View Recording</td>
</tr>
<tr>
<td>The State of Cannabis in the States: A Federal Overview</td>
<td>August 21, 2019</td>
<td>View Recording</td>
</tr>
<tr>
<td>Convinced Your Company Can't Possibly Be Benefiting From or Promoting Human Trafficking? Think Again</td>
<td>August 14, 2019</td>
<td>View Recording</td>
</tr>
<tr>
<td>Managing Contractors' Combating - Trafficking Compliance</td>
<td>July 29, 2019</td>
<td>View Recording</td>
</tr>
<tr>
<td>The Big Bang: When the Worlds of Energy Law and Bankruptcy Law Collide</td>
<td>July 23, 2019</td>
<td>View Recording</td>
</tr>
<tr>
<td>State Fiduciary Income Tax (Kaestner); S Corp. Ownership; Basis Step-Up Strategies</td>
<td></td>
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REGucation (our blog)
BORROWER DEFENSE RULE: Reporting Guide

Note: This sample is intended for information only and should not be considered legal advice.

[Model College Letterhead]

Internal Documentation of the Decision to Early Implement the Recission of the Gainful Employment Rule

Effective Date: [July 1, 2019]

On July 1, 2019, the U.S. Department of Education published a new gainful employment (GE) rule in the Federal Register (the “2019 GE Rule”). The 2019 GE Rule rescinds the existing GE regulation, which was promulgated on October 31, 2014, and is located at 34 C.F.R. Part 668, Subpart Q and Subpart R (the “2014 GE Rule”).

The 2014 GE Rule remains in effect until July 1, 2020, the date upon which the 2019 GE Rule becomes effective. However, as detailed in the preamble to the 2019 GE Rule, the Department designated the 2019 GE Rule for early implementation “beginning on July 1, 2019, at the discretion of each institution.”

Congress granted the Department the authority to designate a regulation for early implementation, and to specify under what conditions, if any, an institution may early implement. In its GE Electronic Announcement #122 – Early Implementation of the Recission of the Gainful Employment Rule, which was posted on Friday, June 28, 2019, the Department stated:

An institution that early implements the rescission must document its early implementation internally. It does not have to publish its decision to do so; however, it must make such documentation available upon request by the Department.

The Department placed no further conditions upon institutions desiring to early implement the 2019 GE Rule.

The purpose of this document is to formally record the decision of [Model College (OPE ID 12345600)] to early implement the rescission of the 2014 GE Rule, consistent with the 2019 GE Rule and GE Electronic Announcement #122. This decision is effective as of the date set forth above.

[printed name of president/chancellor/chief executive officer] (title)

1 See 84 FR 31392 (July 1, 2019); available online at https://www.federalregister.gov/documents/2019/07/01/2019-137703/program-integrity-gainful-employment.
2 See 84 FR 31396 (July 1, 2019).
3 See Section 442(q)(2) of the Higher Education Act of 1965, as amended (20 U.S.C. § 1098(c)(3)).
Questions & Answers
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