

GRAVENSTEIN UNION SCHOOL DISTRICT

ADMINISTRATIVE REGULATION

AR 5144.2

Now

Students

Suspension And Expulsion/Due Process (Students With Disabilities)

Note: Education Code 48915.5 mandates districts to develop procedures and timelines governing the expulsion of students with disabilities. The following sample regulation reflects amendments to the federal Individual with Disabilities Education Act (IDEA) (20 USC 1400-1487) and its implementing regulations (34 CFR 300.1-300.756) as amended in the Federal Register Vol. 64, No. 48, adopted March 12, 1999. Although these regulations took effect May 11, 1999, the U.S. Department of Education (USDE) is not mandating compliance until the state receives its 1999 federal funding, sometime between July 1 and October 1, 1999. Of course, a district may choose to adopt and implement the new regulations prior to the date mandated for compliance.

Note: Neither the IDEA nor the federal regulations require that these procedures apply to students identified under the federal Rehabilitation Act of 1973, Section 504 (29 USC 794). However, in some instances, the district may find it appropriate to apply portions of these procedures (e.g., the limitation that a student with a disability may not be suspended for more than 10 cumulative school days) to Section 504 students with an accommodation plan. Districts that wish to apply IDEA procedures to Section 504 students should modify the following regulation accordingly. Due to the complexity of the issue, CSBA advises districts to proceed carefully when suspending or expelling special education students and consult legal counsel as appropriate.

A student identified as an individual with disabilities pursuant to the Individuals with Disabilities Education Act (IDEA) is subject to the same grounds for suspension and expulsion, which apply to students without disabilities.

(cf. 5144.1 - *Suspension and Expulsion/Due Process*)

(cf. 6159.1 - *Procedural Safeguards and Complaints for Special Education*)

Procedures for Students Not Yet Eligible for Special Education Services

Note: Pursuant to 20 USC 1415(k)(8), a student who has not yet been determined to be eligible for special education services is subject to the same procedures as students without disabilities unless it is determined that the district "had knowledge," as defined below, that the student was disabled before the behavior occurred. As amended by FR 64, No. 48, 34 CFR 300.527 clarifies the circumstances under which a district will be deemed to "have knowledge" of the disability.

A student who has not been identified as an individual with disabilities pursuant to IDEA and who has violated the district's disciplinary procedures may assert the procedural safeguards granted under this administrative regulation only if the district had knowledge that the student was disabled before the behavior occurred. (20 USC 1415(k)(8))

The district shall be deemed to have knowledge that the student had a disability if one of the following conditions exists: (20 USC 1415)(k)(8); 34 CFR 300.527)

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Note: As amended by FR 64, No. 48, 34 CFR 300.527 states that the parent/guardian need not submit his/her concern in writing if he/she is illiterate or has a disability that prevents a written statement.

1. The parent/guardian has expressed concern in writing, or orally if the parent/guardian does not know how to write or has a disability that prevents a written statement, that the student is in need of special education or related services.
2. The behavior or performance of the student demonstrates the need for such services, in accordance with 34 CFR 300.7.
3. The parent/guardian has requested an evaluation of the student for special education pursuant to 34 CFR 300.530 - 300.536.
(*cf. 6164.4 - Identification of Individuals for Special Education*)
4. The teacher of the student or other district personnel has expressed concern about the behavior or performance of the student to the district's Director of Special Education or to other personnel in accordance with the district's established child find or special education referral system.

A district would not be deemed to "have knowledge" as specified in items #1-4 above, if, as a result of receiving such information, the district either (1) conducted an evaluation and determined that the student was not a student with a disability, or (2) determined that an evaluation was not necessary and provided notice to the parent/guardian of its determination. (34 CFR 300.527)

If it is determined that the district did not have knowledge that the student was disabled, then the student shall be disciplined in accordance with procedures established for students without disabilities. (20 USC 1415(k)(8))

If a request is made for an evaluation of a student during the time period in which the student is subject to disciplinary measures, the evaluation shall be conducted in an expedited manner. Until the evaluation is completed, the student shall remain in the educational placement determined by school authorities. (34 CFR 300.527)

Suspension

Note: A 1988 U.S. Supreme Court decision (*Honig v. Doe*) states that districts receiving funds under the IDEA may not unilaterally exclude a dangerous or disruptive special education student from the classroom if the dangerous or disruptive behavior is caused by the student's disabling condition or inappropriate placement. When traditional disciplinary measures such as counseling, detention or restriction of privileges fail to diffuse the threat posed by such a student, school officials can suspend the student for up to, but not more than, 10 consecutive school days to the extent such alternatives would be applied to students without disabilities. (20 USC 1415(k)(1); 34 CFR 300.520) The court held that suspending a special education student for more than 10 consecutive days constitutes a change in placement and is therefore prohibited unless done with parental consent or by court order.

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Note: Although Education Code 48903 permits a student to be suspended for up to 20 cumulative school days per year, districts should be cautious in suspending a student with disability for more than a cumulative total of 10 school days, unless the student is determined to be "dangerous" pursuant to Education Code 48912. The Analysis of Comments to the new federal regulations, FR 12619 (34 CFR 300. al), state that a student with disabilities may be suspended for more than 10 cumulative school days as long as the repeated suspensions do not constitute a change of placement and the suspension is consistent with the treatment of students without disabilities. The federal comments also state that portions of a school day in which a student has been removed would count towards the 10-day cumulative total. Whether a bus suspension would count as a day of suspension would depend on whether the bus transportation is part of the student's individualized education plan (IEP). Therefore, school personnel should carefully monitor the days and/or hours a disabled student is removed from class in order to determine if either the total amount of time or the pattern (proximity and length) of the removal constitutes a change of placement. As amended, 34 CFR 300.520 provides that once a student with a disability has been suspended for more than 10 cumulative school days, the district must convene an IEP team meeting, as specified below.

The Superintendent or designee may suspend a student with a disability for up to five school days for a single incident of misconduct, and for up to 20 school days in a school year. If the student is transferred to another school or alternative educational program, the student may be suspended for up to 30 school days in a school year, but still no more than five days for a single incident of misconduct, unless the student is suspended by the Governing Board pursuant to Education Code 48912. (Education Code 48903, 48911)

Note: The following paragraph is optional.

The principal or designee shall monitor the number of days, including portions of days, students with a valid individualized education program (IEP) have been suspended during the school year.

If the student poses an immediate threat to the safety of himself/herself or others, the Superintendent or designee may suspend the student for up to, but not more than, 10 consecutive school days if the student's parent/guardian agrees or a court order so provides. (Education Code 48911)

Note: It appears that supervised in-house suspension pursuant to Education Code 48911.1 is considered a part of a student's continuing instruction and, therefore, does not meet the definition of suspension in Education Code 48925. According to the Analysis of Comments to the federal regulations, FR 12619 (34 CFR 300. al), "in-house suspension" would not be counted towards the 20-day cumulative limit described above as long as the student is afforded the opportunity to continue to appropriately progress in the general curriculum, continue to receive the services specified in his/her IEP, and continue to participate with nondisabled students to the extent he/she would have in the current placement. However, the district should be careful that such action does not constitute a change of placement.

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Services During Suspension

Note: The IDEA, 20 USC 1412(a)(1)(A) and 34 CFR 300.520, requires that a "free and appropriate public education" (FAPE) be available to all children, including those students with disabilities who have been expelled or suspended for more than 10 school days in a year. The Analysis of Comments to the federal regulations, FR 12618 (34 CFR 300.al), clarify that it is the USDE's opinion that FAPE need not be provided when a student is removed for 10 school days or less, as long as no further removal beyond 10 days is contemplated.

Students suspended for more than 10 school days in a school year shall continue to receive a free and appropriate public education during the term of the suspension. (34 CFR 300.520)

Interim Alternative Placement Due to Dangerous Behavior

Note: The federal IDEA (20 USC 1415(k)(1)) permits an alternative placement for 45 days when a student with disabilities possesses a weapon or possesses, uses or sells drugs at school or at a school function. However, Education Code 48911(h) provides that a change of placement for a student who poses "an immediate threat" to safety may only be effected upon agreement of the parent/guardian or the provision of a court order. According to the CDE, state law requires either parent/guardian agreement or a court order before a district may place a student in a 45-day interim alternative placement. However, other attorneys have disagreed with the CDE's interpretation since, pursuant to Education Code 56000, the California Legislature did not intend to set a higher state standard than that provided under federal law. Until the Education Code is amended to conform with federal law, districts wishing to place a student in an interim placement should consult with legal counsel.

A student with a disability may be placed in an appropriate interim alternative educational setting when he/she commits one of the following acts: (20 USC 1415(k)(1))

Note: The term "weapon," as used below, refers to a "dangerous weapon" as defined in 18 USC 930 and includes any device which is capable of causing death or serious bodily injury. The term does not include a pocket knife with a blade of less than 2 1/2 inches in length.

1. Carries a weapon, as defined in 18 USC 930, to school or to a school function.

Note: According to the Analysis of Comments to the federal regulations, FR 12416 (34 CFR 300.al), it is the opinion of the USDE that "carries a weapon" also covers instances in which the student is found to have a weapon that he or she obtained while at school.

2. Knowingly possesses or uses illegal drugs while at school or a school function

3. Sells or solicits the sale of a controlled substance while at school or a school function

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Note: 20 USC 1415(k)(2) also allows an interim placement to be made upon determination by a hearing officer that the student's current placement is likely to result in injury to the student or others.

A hearing officer may order a change in placement of a student with a disability to an appropriate interim educational setting if the hearing officer: (20 USC 141 5(k)(2))

1. Determines that the district has established by substantial evidence that maintaining the current placement of the student is substantially likely to result in injury to the student or others
2. Considers the appropriateness of the student's current placement
3. Considers whether the district has made reasonable efforts to minimize the risk of harm in the student's current placement, including the use of supplementary aids and services
4. Determines that the interim alternative educational setting allows the student to participate in general curriculum, to continue to receive IEP services and to receive services designed to ensure that the behavior does not recur

The student may be placed in the interim alternative educational setting for up to 45 days, or until the conclusion of any due process hearing proceedings requested by the parent/guardian. (20 USC 1415(k)(2))

The student's alternative educational setting shall be determined by the student's IEP team. (20 USC 141 5(k)(2))

(cf. 6159 - Individualized Education Program)

Procedural Safeguards/Manifestation Determination

Note: The following section applies both to students who have been suspended for more than 10 school days and students who have been placed in an interim alternative setting, as described above.

Note: Pursuant to 34 CFR 300.520, the federal regulations clarify that the meeting described below must be convened within 10 business days. See AR 6159.4 - Behavioral Interventions for Special Education Students for content of the behavioral intervention plan.

Either before or not later than 10 business days after a student has been suspended for more than 10 school days or placed in an alternative educational setting, the district shall convene an IEP team meeting to conduct a functional behavior assessment and implement a behavioral intervention plan. If the student already has a behavioral intervention plan, the IEP team shall review the plan and modify it as necessary to address the behavior. (20 USC 1415(k)(1))

(cf. 6159.4 - Behavioral Interventions for Special Education Students)

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As soon as practicable after developing the behavioral intervention plan and completing the required assessments, the IEP team shall meet to develop appropriate behavioral interventions to address the behavior and shall implement those interventions. (34 CFR 300.520)

If a student with disabilities who has a functional behavioral plan is subject to a removal for more than 10 school days in a school year that does not constitute a change in placement, the IEP team members shall review the behavioral intervention plan and its implementation to determine if modifications are necessary. (34 CFR 300.520)

Note: The following "manifestation determination" is required when a district wishes to remove a student from his/her educational placement for more than 10 school days. According to the USDE, this manifestation determination is not required prior to a removal for 10 school days or less. However, the law is silent as to whether "10 school days" means consecutive or cumulative school days. Therefore, CSBA's attorneys recommend that districts proceed cautiously after a student has been suspended for more than 10 days in a school year and that a behavior intervention plan be developed as early as possible.

The following procedural safeguards shall apply when a student is suspended for more than 10 school days, when disciplinary action is contemplated for a dangerous behavior as described above, or when a change of placement of more than 10 school days is contemplated: (20 USC 141 5(k)(4); 34 CFR 300.523)

1. The parents/guardians of the student shall be immediately notified of the decision and provided all procedural safeguards on the day the decision to take action is made.
2. Immediately if possible, but in no case later than 10 school days after the date of the decision, a manifestation determination shall be made of the relationship between the student's disability and the behavior subject to the disciplinary action by the IEP team and other qualified personnel.

At this hearing, the IEP team and other qualified personnel shall consider, in terms of the behavior subject to the disciplinary action, all relevant information, including: (20 USC 141 5(k)(4); 34 CFR 300.523)

- a. Evaluation and diagnostic results, including the results or other relevant information supplied by the student's parents/ guardians
- b. Observations of the student
- c. The student's IEP and placement

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In relationship to the behavior subject to the disciplinary action, the team shall then determine whether the IEP and placement were appropriate and whether supplementary aids, services, and behavioral interventions were provided. The team shall also determine that the student's disability did not impair the ability of the student to understand the impact and consequences of the behavior, nor did it impair his/her ability to control the behavior subject to the disciplinary action.

(20 USC 141 5(k)(4); 34 CFR 300.523)

If the team determines that the student's behavior was not a manifestation of his/her disability, then the student may be disciplined in accordance with the procedures for students without disabilities.

(20 USC 141 5(k)(4))

Note: Pursuant to 34 CFR 300.524, the district must also ensure that the student's special education and disciplinary records are sent either to the Board, the hearing officer or the administrative panel for consideration at the expulsion hearing.

If the team determines that the student's behavior was a manifestation of his/her disability, then the student's placement may only be changed via the IEP team process. (20 USC 1415(k)(4))

Pre-Expulsion Assessment and Meeting

Note: Education Code 48915.5 requires districts to conduct a pre-expulsion assessment prior to the expulsion of a special education student. As of this printing, the California Legislature has not acted to amend state law to conform with federal law. As a result, there are a number of conflicts and inconsistencies between federal and state law. Therefore, although there appears to be some redundancies in the state and federal process, CSBA's legal counsel recommends that districts conduct both a "manifestation determination" hearing and a "pre-expulsion assessment" before expelling a special education student.

Pursuant to Education Code 48915.5, a student with disabilities may be expelled only if the IEP team determines that the student was appropriately placed when the misconduct occurred and that the misconduct was not caused by, or a direct manifestation of, the student's identified disability. Education Code 48915.5 requires a comprehensive pre-expulsion assessment and an IEP team evaluation before expulsion proceedings may be initiated. The pre-expulsion assessment must be conducted in accordance with federal law and must be done by a qualified "assessor," usually a school psychologist, program specialist or special education teacher.

Note: Education Code 48915.6 provides that the restrictions and special procedures of Education Code 48915.5 do not apply to students who (1) possess a firearm, knife or other dangerous object, or (2) commit or attempt to commit a sexual assault or battery, unless the special state procedures are mandated under federal law. Currently, federal law (20 USC 1415(k)(1)) allows that an interim alternative placement, as described above, may be made if the student brings a weapon to school, knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance while at school or a school function. Therefore, it could be argued that a "pre-expulsion assessment" need not be conducted for those students who qualify for an interim alternative placement under federal law. However, because of the complexity of expelling a special education student and the continuing confusion over this issue, legal counsel should be consulted whenever disciplinary action against a special education student is contemplated.

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Procedures and timelines governing the expulsion of students with disabilities shall be the same as those for all other students, except that a manifestation determination and a pre-expulsion assessment shall be made and an IEP team meeting held, under conditions and with possible consequences indicated below.

1. The parent/guardian shall receive written notice of the district's intent to conduct the pre-expulsion assessment and shall make the student available for the assessment without delay at a site designated by the district. The parent/guardian shall also have the right to an independent assessment as provided in Education Code 56329. (Education Code 48915.5)
2. The pre-expulsion assessment shall be conducted in accordance with the guidelines of 34 CFR 104.35, which shall include a review of the student's placement at the time of the alleged misconduct and a determination of the relationship, if any, between the student's behavior and his/her disability. (Education Code 48915.5)
3. The IEP team shall meet to determine if an expulsion hearing is appropriate. This meeting shall be held at a time and place mutually convenient to the parent/guardian and district within the period, if any, of the student's pre-expulsion suspension. The parent/guardian's participation may be made through actual participation, representation, or a telephone conference call. (Education Code 48915.5)
4. The parent/guardian shall be notified of his/her right to participate in the meeting at least 48 hours before the meeting. This notice shall specify:
(Education Code 48915.5)
 - a. That the meeting may be held without the parent/guardian's participation unless he/she requests a postponement for up to three additional school days
 - b. That the suspension will be continued during the postponement if the student continues to pose an immediate threat to the safety of himself/herself or others

Note: If the required notice has been given and the parent has not requested a postponement, the meeting may be conducted without the parent's participation. In order to hold the meeting without the parent/guardian, the district should keep a record of its attempts to arrange a mutually convenient meeting. Federal law specifies the following as examples of records that would satisfy this requirement.

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In order to make a record of its attempts to arrange the meeting at a mutually convenient time and place, the district shall keep documentation such as: (34 CFR 300.345)

- a. Detailed records of telephone calls made or attempted, and the results of those calls
 - b. Copies of correspondence sent to parents/guardians and any responses received
 - c. Detailed records of visits made to the parent/guardian's home or place of employment, and the results of those visits
5. The district shall grant a parent/guardian's request that the meeting be postponed for up to three additional school days and may extend a student's suspension for the period of postponement if he/she continues to pose an immediate threat to the safety of himself/herself or others. However, the suspension shall not be extended beyond 10 consecutive school days unless agreed to by the parent/guardian or required by court order. If the parent/guardian refuses to consent to an extension beyond 10 consecutive school days and chooses not to participate, the meeting may be conducted without the parent/guardian's participation. (Education Code 48915.5)
 6. The IEP team shall consider the pre-expulsion assessment results and shall also review and consider the student's health records and school discipline records. (Education Code 48915.5)
 7. If the IEP team determines that the alleged misconduct was caused by, or was a direct manifestation of, the student's disability or that the student was not appropriately placed, the expulsion shall not proceed. (Education Code 48915.5)
 8. If the IEP team determines that the alleged misconduct was not caused by, or a direct manifestation of, the student's disability, and if it is determined that the student was appropriately placed, the student shall be subject to expulsion in accordance with procedures that apply to all students. (Education Code 48915.5)

Note: Education Code 48916 requires districts to provide a rehabilitation plan at the time of the expulsion order.

9. When expulsion is ordered, the Board shall recommend a rehabilitation plan for the student. (Education Code 48916)

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Notification to Law Enforcement Authorities

***Note: Pursuant to 34 CFR 300.529, the district is authorized to report crimes by students with disabilities to law enforcement in accordance with state law. Education Code 48902 provides procedures for this notification.

Prior to the suspension or expulsion of any student, the principal or designee shall notify appropriate city or county law enforcement authorities of any student acts of assault which may have violated Penal Code 245. (Education Code 48902)

The principal or designee also shall notify appropriate city or county law enforcement authorities of any student acts, which may involve the possession or sale of narcotics or of a controlled substance, or possession of weapons or firearms in violation of Penal Code 626.9 and 626.10. (Education Code 48902)

Within one school day after a student's suspension or expulsion, the principal or designee shall notify appropriate city or county law enforcement authorities, by telephone or other appropriate means, of any student acts which may violate Education Code 48900(c) or (d), relating to the possession, use, offering or sale of controlled substances, alcohol or intoxicants of any kind. (Education Code 48902)

Due Process Appeals

If the parent/guardian disagrees with a decision that the behavior was not a manifestation of the student's disability or with any decision regarding placement, he/she has a right to appeal the decision. (20 USC 1415(k)(6))

Note: If the student's parent/guardian initiates a due process hearing in connection with a proposed disciplinary expulsion, the "stay-put" provision of the IDEA requires that the student remain in his/her current education placement until the completion of all proceedings. However, the district may seek an expedited hearing at any time to remove a student with a disability from school if the district believes that it is dangerous for the student to be kept in the current placement.

The expulsion hearing shall not be conducted, and the 30-day expulsion proceedings time limit shall not commence, until after completion of the:

1. Pre-expulsion assessments and the manifestation determination (Education Code 48915.5; 20 USC 1415(k))
2. IEP team meeting (Education Code 48915.5)
3. Due process hearings and appeals, if initiated (Education Code 48915.5)

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The Board may expel a student with disability only if an IEP team has determined that the misconduct was not caused by, or a direct manifestation of, the student's identified disability, and the student was appropriately placed at the time the misconduct occurred. (Education Code 48915.5)

Services During Expulsion

Note: As amended, 20 USC 1412(a)(1)(A) requires that FAPE be available to all children, including those students with disabilities who have been suspended or expelled. However, this amendment is not significant since state law, Education Code 48915, requires the Board to refer all expelled students to a program of study that is prepared to accommodate students with discipline problems.

During the term of the expulsion, a student with a disability shall continue to be offered a program of free and appropriate public education. Such services may include independent study, home instruction, or another appropriate alternative program.

(Cf. 6158 - Independent Study)

(Cf. 6185 - Community Day School)

Note: Pursuant to 34 CFR 300.121, the alternative placement must also meet the following requirements.

The alternative program must provide services to the extent necessary to enable the student to appropriately progress in the general curriculum and appropriately advance toward achieving the goals set out in the student's IEP. (34 CFR300.121)

Readmission

Note: Nothing in law addresses special education readmission differently from that of regular student readmission.

Readmission procedures for students with disabilities shall be the same as those used for all students. The Superintendent or designee may consider the input of the student's IEP team when developing recommendations to the Board regarding a request for readmission. Upon readmission, an IEP team meeting shall be convened to determine whether a new IEP needs to be established.

Suspension of Expulsion

The Board's criteria for suspending the enforcement of an expulsion order shall be applied to students with disabilities in the same manner as they are applied to all other students. (Education Code 48917)

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Note: The district should consult with its legal counsel when considering the suspension of a special education student's expulsion.

Legal Reference:

EDUCATION CODE

35146 Closed sessions (re suspensions)

35291 Rules (of governing board)

48900-48925 Suspension and expulsion

56000 Special education; legislative findings and declarations

56320 Educational needs; requirements

56321 Development or revision of individualized education program

56329 Independent educational assessment

56340-56347 Individual education program teams

56505 State hearing

PENAL CODE

245 Assault with deadly weapon

626.2 Entry upon campus after written notice of suspension or dismissal without permission

626.9 Gun-Free School Zone Act

626.10 Dirks, daggers, knives, razors or stun guns

UNITED STATES CODE, TITLE 18

930 Weapons

UNITED STATES CODE, TITLE 20

1412 State eligibility

1415 Procedural safeguards

UNITED STATES CODE, TITLE 29

706 Definitions

794 Rehabilitation Act of 1973, Section 504

CODE OF FEDERAL REGULATIONS, TITLE 34

104.35 Evaluation and placement

104.36 Procedural safeguards

300.1-300.756 Assistance to states for the education of students with disabilities

COURT DECISIONS

Parents of Student W. v. Puyallup School District, (1994 9th Cir.) 31 F.3d 1489

M.P. v. Governing Board of Grossmont Union High School District, (1994) U.S. Dist. Ct.,

S.D. Cal. 858 F.Supp. 1044

Honig v. Doe, (1988) 484 U.S. 305

Doe v. Maher, (1986) 793 F.2d 1470

Rock Island School District #41, IDELR 353:364

San Juan Unified School District, 20 IDELR 549

Management Resources:

FEDERAL REGISTER

34 CFR 300.a Appendix A to Part 300 - Questions and Answers

34 CFR 300.al Attachment 1: Analysis of Comments and Changes

WEB SITES

CDE: <http://www.cde.ca.gov>

USDE: <http://www.ed.gov>

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