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OSSE  
Office of Dispute Resolution  
March 11, 2024

**Confidential**

<p>Parent on Behalf of Student, <sup>1</sup></p> <p>Petitioners,</p> <p>v.</p> <p>District of Columbia Public Schools (Local Education Agency “LEA”)</p> <p>Respondent.</p> <p>Case # 2023-0231</p> <p>Date Issued: March 11, 2024</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Dates:</p> <p>February 28, 2024 February 29, 2024</p> <p>Counsel for Each Party listed in Appendix A</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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<sup>1</sup> Personally identifiable information is in the attached Appendices A & B.

## **JURISDICTION:**

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter 5-A30.

## **BACKGROUND AND PROCEDURAL HISTORY:**

The student who is the subject of this due process hearing ("Student") resides with Student's parents ("Petitioners") in the District of Columbia. The District of Columbia Public Schools ("DCPS") is Student's local education agency ("LEA"). Student has been determined eligible for special education and related services pursuant to IDEA with a disability classification of multiple disabilities ("MD"), including emotional disturbance (“ED”) and other health impairment (“OHI”).

On November 21, 2023, Petitioners filed the current due process complaint (“DPC”) against DCPS (“Respondent”) alleging that Respondent denied Student a free appropriate public education (“FAPE”) by allegedly failing to provide Student any educational placement for school year (“SY”) 2023-2024.

Petitioners seek as relief that Respondent be ordered to fund Student's placement for SY 2023-2024 at a residential facility ("School A") located outside of the District of Columbia where Petitioners unilaterally placed Student and where Student has been since October 2023.

### **LEA Response to the Complaint:**

Respondent filed its response to the DPC on December 4, 2023. In its response, Respondent stated, inter alia, the following:

Up to and through July 25, 2023, Petitioners informed DCPS that that Student was at Student’s previous residential facility (“School B”). Since that time, DCPS was informed Student would attend School A for the SY 2023-2024. DCPS began an inquiry and requested relevant student documents/files directly to School B on or before August 31, 2023. DCPS sent at least four follow up written requests to School B. DCPS was provided some documentation regarding Student at School B on or about October 9, 2023. An individualized education program (“IEP”) meeting was scheduled for October 17, 2023. DCPS agrees that Student requires a residential placement for FAPE. A change in placement has been sent to OSSE, the state education agency (“SEA”) as required by the SEA. Student has been offered FAPE and there has been no violation of IDEA by DCPS.

### **Resolution Meeting and Pre-Hearing Conference:**

The DPC was filed on November 21, 2023. The parties participated in a resolution meeting on December 1, 2023. The parties did not mutually agree to shorten the 30-day resolution period. The 45-day period began on December 21, 2023, and ended [and the Hearing Officer’s Determination (“HOD”) was originally due] on February 4, 2024. The parties were unavailable for the dates offered by the independent hearing officer ("IHO"). They requested and agreed on a

continuance and extension of the HOD due date to accommodate the agreed-upon hearing dates. The HOD is now due on March 11, 2024.

The IHO conducted a pre-hearing conference (“PHC”) on January 17, 2024, and issued a pre-hearing order (“PHO”) on January 25, 2024, outlining, inter alia, the issues to be adjudicated.

**ISSUES:**<sup>2</sup>

The issues adjudicated are:

1. Did DCPS deny Student a FAPE by failing to propose any educational placement for SY 2023-2024?
2. Is School A an appropriate placement?

**Petitioners’ Stay Put Motion:**

On January 8 2024, Petitioners filed a Motion for Enforcement of Stay Put Rights.

IDEA provides that "during the pendency of any proceeding conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child . . . until all such proceedings have been completed." 20 U.S.C. § 1415(j). This statutory injunction is commonly referred to as the “stay put” provision.

DCPS did not file an opposition to the motion and expressed during the PHC that DCPS holds no position on the motion. Consequently, the IHO granted Petitioners' motion and, as a part of the PHO, ordered that during the pendency of this proceeding, Student’s “stay-put” placement is the School A.

**DUE PROCESS HEARING:**

The Due Process Hearing was convened on February 28, 2024, and February 29, 2024. The hearing was conducted via video teleconference on the Microsoft Teams platform. The Parties submitted written summations of their respective cases on February 29, 2024.

**RELEVANT EVIDENCE CONSIDERED:**

The IHO considered the testimony of the witnesses and the documents submitted in each party’s disclosures (Petitioners’ Exhibits 1 through 27 and Respondent’s Exhibits 1 through 48) that were admitted into the record and are listed in Appendix 2.<sup>3</sup>

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<sup>2</sup> The IHO restated the issues from the PHO at the outset of the due process hearing, and the parties agreed that these were the issues to be adjudicated.

<sup>3</sup> Petitioner presented three witnesses who testified as experts: (1) Petitioners’ educational consultant, (2) School A’s principal, and (3) Student’s therapist at School A. Respondent presented one witness who testified as an expert: a DCPS LEA representative and special educator. The IHO found the witnesses credible unless otherwise noted in the conclusions of law. Any material inconsistencies in the testimony of witnesses that the IHO found are addressed in the conclusions of law.

## **SUMMARY OF DECISION:**

After Petitioners presented a prima facie case on issue #1, Respondent held the burden of persuasion on that issue. Petitioners held the burden of persuasion on issue #2. Based on the evidence adduced, the IHO concluded that Student was not provided a timely educational placement for SY 2023-2024, and Student was denied a FAPE. The IHO concluded that School A is an appropriate educational placement for Student and directed that DCPS place and fund Student at School A for SY 2023-2024.

## **FINDINGS OF FACT:<sup>4</sup>**

1. Student resides with Petitioners in the District of Columbia. DCPS is Student's LEA. Student has been determined eligible for special education and related services pursuant to IDEA with a disability classification of MD, including ED and OHI. (Petitioners' Exhibit 13, 15)
2. On August 23, 2021, an HOD, issued ordering DCPS to convene an IEP meeting within fifteen days, "to develop an IEP providing Student a placement in a residential facility, preferably one with experience in handling children suffering trauma due to adoption or abandonment." (Respondent's Exhibit 2-26)
3. On August 25, 2021, DCPS amended Student's IEP to reflect the change of Student's least restrictive environment ("LRE") to a residential facility. (Respondent's Exhibit 3 pg. 54)
4. Student previously attended another residential facility ("School B") also located outside the District of Columbia where Student was unilaterally placed by Petitioners for SY 2021-2022. (Respondent's Exhibit 3)
5. On December 20, 2021, an HOD ordered DCPS to reimburse the Petitioners for the tuition and related services already paid to School B and fund the Student's placement there for the remainder of SY 2021-2022. (Respondent's Exhibit 3)
6. On March 22, 2022, DCPS convened an IEP meeting to discuss Student's progress at School B and develop an IEP for SY 2022-2023.
7. On December 30 and 31, 2022, while Student was at School B, Student underwent a psychoeducational evaluation submitted to and reviewed by DCPS. (Petitioners' Exhibits 2, 3)

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<sup>4</sup> The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within parentheses following the finding. A document is noted by the exhibit number. If there is a second number following the exhibit number, that number denotes the page of the exhibit from which the fact was obtained or the PDF page number of the entire disclosure document. When citing an exhibit that has been submitted by more than one party separately, the Hearing Officer may only cite one party's exhibit.

8. On or about April 10, 2023, Petitioners received a prior written notice stating that funding for School B would be maintained until DCPS identified an appropriate residential treatment center. (Petitioners' Exhibit 4)
9. Student made progress at School B. When Student's progress plateaued, School B recommended Student's placement in a different residential setting. After, Student's discharge from School B, on July 25, 2023, Petitioners, through counsel, communicated their intent to enroll Student at School A and requested that DCPS place and fund Student at School A. (Witness 1's testimony, Petitioners' Exhibit 7)
10. On September 5, 2023, DCPS convened an eligibility meeting and continued to find Student eligible for services as a student with multiple disability ("MD") classification, including OHI and ED. The team agreed to meet again to continue the IEP process and consider a change in placement. (Respondent's Exhibit 24)
11. Although Petitioners informed DCPS of their intent to unilaterally place Student at School A on July 25, 2023, Student arrived and began attending School A on October 5, 2023. (Witness 1's testimony)
12. School A is an out-of-state residential therapeutic treatment facility for individuals with developmental trauma, 90% of whom are adopted. School A is made up of both residences and has an associated school. About half of the resident population, including Student, attends the school and receives specialized instruction in all classes, individual, family, and group therapy. School A has five clinical residences in the community surrounding its school, where most students who attend school reside. (Witness 1's testimony, Witness 2's testimony, Witness 3's testimony)
13. School A is licensed by the state in which it is located and accredited by an accreditation association to award credits toward high school graduation. Some students attend and reside at School A who have been referred, funded, and are monitored by their respective LEAs. Although School A implements students' IEPs, and School A staff participates in respective LEA IEP meetings, School A does not draft IEPs. School A does not hold an OSSE certificate of approval ("COA") (Witness 2's testimony)
14. There are 21 students on School A's school roster. School A is approved to instruct up to 40 students. Some individuals who reside in School A residences do not attend the school. There is one residence that houses adults. A resident's length of stay depends on the individual resident's treatment plan, but is typically 16 to 18 months. (Witness 1's testimony, Witness 2's testimony, Witness 3's testimony)
15. At School A, Student attends school for six hours per day for five days per week. School A has four classrooms, the smallest of which has two students and the largest has seven students. Student is doing well at School A and has strong grades. Student has earned mostly B- to A+ since attending School A. Student sometimes walks out of class to process an upset with school staff and then returns to class. Although Student had

disruptive behavior upon arrival at School A in October 2023, Student's behavior has markedly improved with Student's developed coping skills. Student is staying in class longer and completing 75% to 90% of assignments. School A staff have developed a treatment plan for Student that is updated monthly and is designed to prepare Student to eventually return home and to a non-residential school environment. (Witness 1's testimony, Witness 2's testimony, Petitioners' Exhibits 17 through 24)

16. There are eight other student in the Student's School A residence, with a student-to-staff ratio of three to one. Students leave the residences regularly for supervised activities, typically on the weekends. There is also a recreational activity every day at the residence. When Student first arrived at School A, Student was had escalated behaviors a couple of times per week mostly at the residence. Student would be set off/enraged easily, throwing chairs, and getting aggressive with staff. Student behavior in the residence has also improved significantly. (Witness 3's testimony)
17. On October 17, 2023, DCPS convened another meeting to discuss Student IEP revisions. (Respondent's Exhibit 25)
18. DCPS agrees that Student currently requires residential placement for FAPE. (Petitioner's Exhibit 15)
19. Pursuant to OSSE's change of placement process, once the LEA provides OSSE the referral for a residential placement, OSSE sends referrals to potential placements to obtain an acceptance for a student. (Witness 4's testimony)
20. After the October 23, 2023, IEP meeting, consistent with OSSE procedures, DCPS referred Student's placement to OSSE for a residential assignment for SY 2023-2024. As of the date of the due process hearing, an educational placement for Student for SY 2023-2024 had yet to be proposed by DCPS or OSSE. (Stipulation)

#### **CONCLUSIONS OF LAW:**

Pursuant to IDEA §1415 (f)(3)(E)(i), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii), in matters alleging a procedural violation, a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--  
(a) Are provided at public expense, under public supervision and direction, and without charge;

(b) Meet the standards of the SEA, including the requirements of this part; (c), Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5A DCMR 3053.6, the burden of proof is the responsibility of the party seeking relief. *Schaffer v. West*, 546 U.S. 49, 126 S.Ct. 528 (2005). The burden of persuasion shall be met by a preponderance of the evidence. See, e.g., *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii). DCPS held the burden of persuasion on issue #1 after Petitioner presented a prima facie case on that issue. 5 Petitioners held the burden of persuasion on issue #2.

**ISSUE 1:** Did DCPS deny Student a FAPE by failing to propose any educational placement for SY 2023-2024?

**Conclusion:** Respondent did not sustain the burden of persuasion by a preponderance of the evidence that it provided Student to any educational placement for SY 2023-2024.

The purpose of IDEA is to "ensure that all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." *M.G. v. District of Columbia*, 246 F. Supp. 3d 1,7 (D.D.C. 2017) (citing 20 U.S.C. § 1400(d)(1)(A)).

Pursuant to 34 C.F.R. § 300.323 at the beginning of each school year, each public agency must have an IEP effect for each child with a disability within its jurisdiction. The legal standard under the IDEA is that DCPS "must place the student in a setting that is capable of fulfilling the student's IEP." *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013). See also *O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (placement must be in a school

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<sup>5</sup> DC Code § 38-2571.03 (6) provides:

(A) In special education due process hearings occurring pursuant to IDEA (20 U.S.C. § 1415(f) and 20 U.S.C. § 1439(a)(1)), the party who filed for the due process hearing shall bear the burden of production and the burden of persuasion; except, that:

(i) Where there is a dispute about the appropriateness of the child's individual educational program or placement or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

(ii) Where a party seeks tuition reimbursement for unilateral placement, the party seeking reimbursement shall bear the burden of production and the burden of persuasion on the appropriateness of the unilateral placement, provided, that the hearing officer shall have the authority to bifurcate a hearing regarding a unilateral placement; provided further, that if the hearing officer determines that the program offered by the public agency is appropriate, it is not necessary to inquire into the appropriateness of the unilateral placement.

(B) This paragraph shall apply to special education due process hearings resulting from complaints filed after July 1, 2016.

that can fulfill the student’s IEP requirements).

Under the IDEA, parents who unilaterally decide to place their disabled child in a private school without obtaining the consent of local school officials, "do so at their own financial risk." *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993) (quoting *Sch. Comm. of the Town of Burlington v. Dep’t of Educ.*, 471 U.S. 359, 374, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985)). “As interpreted by the Supreme Court, IDEA requires school districts to reimburse parents for their private-school expenses if (1) school officials failed to offer the child a free appropriate public education in a public or private school; (2) the private-school placement chosen by the parents was otherwise “proper under the Act”; and (3) the equities weigh in favor of reimbursement—that is, the parents did not otherwise act “unreasonabl[y].” *Leggett v. District of Columbia*, 793 F.3d 59, 66–67 (D.C. Cir. 2015) (citing *Carter*, supra, 510 U.S. at 15–16, 114 S.Ct. 361; 20 U.S.C. § 1412(10)(C)(iii)(III)).

There is no dispute that Student was in a residential placement, School B, during SY 2022-2023, and that School B recommended Student’s continued placement in a residential setting upon Student’s discharge from School B. There is also no dispute that DCPS did not have an educational placement for Student at the beginning of SY 2023-2024. The evidence demonstrates that on July 25, 2023, Petitioner informed DCPS of their intent to place Student's in School A for SY 2023-2024 and seek DCPS funding. Student started at School A on October 5, 2023. DCPS convened an IEP meeting for Student on October 17, 2023, and determined that Student's LRE continued to be a residential placement. DCPS, thereafter, referred Student's placement to OSSE for OSSE to locate provide a residential placement pursuant to OSSE policy and practice. School A does not hold an OSSE COA. To date, no residential placement has been provided for Student by DCPS or OSSE.

DCPS asserts that it has fulfilled its obligation by referring the matter to the SEA, OSSE, for a residential placement and consequently there has been no denial of FAPE to Student by DCPS. However, DCPS cannot skirt its responsibility to Student despite the OSSE policy and practice of locating and assigning private and residential placements.

Although IDEA (20 U.S.C. 1413(g)(1)) allows for an SEA to use payments otherwise designed for an LEA and be deemed to be providing direct services to a student, the local educational agency (“LEA”), not the state educational agency (“SEA”), is charged with making a FAPE available to each child with a disability in the District of Columbia, from ages 3 to 22. (5-A DCMR § 3002.1.)

DCPS did not provide Student any educational placement for SY 2023-2024. There was no residential placement for Student at the start of DCPS' school year in August 2023 or thereafter other than School A. After Petitioners established a prima facie case of a denial of FAPE, there was insufficient evidence presented by DCPS to counter Petitioner’s case. Consequently, the IHO concludes that DCPS failed to sustain the burden of persuasion by a preponderance of the evidence, and denied Student a FAPE

**ISSUE 2:** Is School A an appropriate placement?

**Conclusion:** Petitioners sustained the burden of persuasion by a preponderance of the evidence on this issue.

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is made by a group of persons, including the parents and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and is made in conformity with the least restrictive environment provisions of the IDEA; and the public agency must ensure that the child's placement is determined at least annually, is based on the child's IEP, and is as close as possible to the child's home. See 34 C.F.R. § 300.116.

Removing a child with disabilities "from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily." 34 C.F.R. § 300.550; 34 C.F.R. §300.114 see also 20 U.S.C. § (a)(5)(A) (a disabled child is to participate in the same activities as non-disabled children to the "maximum extent appropriate"); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) ("The IDEA requires school districts to place disabled children in the least restrictive environment possible.")

"The IDEA requires that children with disabilities receive education in the regular classroom whenever possible" *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Endrew F.*, supra, 137 S. Ct. at 999 (quoting *Rowley*, 458 U.S. at 202)

Pursuant to D.C. Code § 38-2561.02(c) Special education placements shall be made in the following order of priority; provided, that the placement is appropriate for the student and made in accordance with the IDEA and this chapter: (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school; (2) Private or residential District of Columbia facilities; and (3) Facilities outside of the District of Columbia.

The legal standard under the IDEA is that DCPS "must place the student in a setting that is capable of fulfilling the student's IEP." *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013). See also *O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (placement must be in a school that can fulfill the student's IEP requirements).

Under the IDEA, parents who unilaterally decide to place their disabled child in a private school without obtaining the consent of local school officials "do so at their own financial risk." A school district may be required to pay for educational services obtained for a student by the student's parent, if the services offered by the school district are inadequate or inappropriate, the services selected by the parent are appropriate, and equitable considerations support the parents' claim, even if the private school in which the parents have placed the child is unapproved. *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993) (quoting *Sch. Comm. of the Town of Burlington v. Dep't of Educ.*, 471 U.S. 359, 374, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985)).

Courts must consider "all relevant factors" including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement

represents the least restrictive educational environment. *Branham v. District of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005).

“As interpreted by the Supreme Court, IDEA requires school districts to reimburse parents for their private-school expenses if (1) school officials failed to offer the child a free appropriate public education in a public or private school; (2) the private-school placement chosen by the parents was otherwise “proper under the Act”; and (3) the equities weigh in favor of reimbursement—that is, the parents did not otherwise act “unreasonabl[y].” *Leggett v. District of Columbia*, 793 F.3d 59, 66–67 (D.C. Cir. 2015) (citing *Carter*, supra, 510 U.S. at 15–16, 114 S.Ct. 361; 20 U.S.C. § 1412(10)(C)(iii)(III)).

The evidence demonstrates that Student requires a residential placement, that DCPS failed to offer Student a FAPE in a public or private school, and that the private placement Petitioners have chosen, School A, is consistent with Student’s LRE, can and has provided Student academic instruction and behavioral health services from which Student has made both academic and social-emotional progress and is thus, “proper under the Act.”

In this instance, Petitioners' unilateral placement does not include a request for reimbursement. Pursuant to the pre-hearing stay put placement granted by the IHO, the LEA is responsible for maintaining Student's placement at School A during the pendency of this proceeding. There is no evidence that Petitioners acted unreasonably. The IHO concludes that the equities weigh in favor of Student’s continued placement in School A.

Although School A does not have an OSSE certificate of approval (“COA”), there was no other placement proposed by either party during the hearing. The evidence demonstrates that School A is implementing Student's IEP, providing Student residential treatment, and Student is making academic, social/emotional, and behavioral progress at School A.

Consequently, the IHO directs in the order below that DCPS place and fund Student at School A for the remainder of the current school year.

**ORDER:**

1. DCPS shall place and fund Student at School A for the remainder of SY 2023-2024.
2. At least 60 days before the start of SY 2024-2025, DCPS shall convene a multidisciplinary team meeting to review Student's progress at School A and determine an appropriate placement for Student for SY 2024-2025.

**APPEAL PROCESS:**

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have ninety (90) days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

*/S/ Coles B. Ruff*

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**Coles B. Ruff, Esq.**  
**Hearing Officer**  
**Date: March 11, 2024**

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