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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

M.A., et al.,	)	
	)	
Plaintiffs,	)	Civil Action No. 01 CV 3389 (KSH)
v.	)	
	)	
NEWARK PUBLIC SCHOOLS, et al.,	)	**UNITED STATES' BRIEF**
	)	**IN OPPOSITION TO DEFENDANTS'**
Defendants.	)	**MOTION TO DISMISS ON ELEVENTH**
	)	**AMENDMENT IMMUNITY GROUNDS**

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PRELIMINARY STATEMENT

The United States seeks intervention in the above-captioned action to defend the constitutionality of the Individuals with Disabilities Education Act ("IDEA").[1/] Plaintiffs filed this class action complaint on behalf of students with disabilities in the Newark Public Schools alleging inter alia, that Defendants, State and local government entities and officials, have violated the IDEA by failing to (a) identify and evaluate children for special education services; (b) provide Plaintiffs with special education and related services; and (c) provide relief in the form of compensatory education for the deprivation of educational services to which Plaintiffs were entitled.

Defendants New Jersey Department of Education and State officials (collectively "State Defendants") have moved to dismiss Plaintiffs' IDEA claims on Eleventh Amendment grounds. Specifically, State Defendants contend that Congress did not validly abrogate New Jersey's sovereign immunity under the IDEA, and therefore Plaintiffs' IDEA claims are barred by the Eleventh Amendment of the United States Constitution. (State Defs.' Mot. at 11.) On November 14, 2001, the United States moved this Court to certify this constitutional issue to the Attorney General of the United States pursuant to 28 U.S.C. § 2403(a), which the Court did, granting the United States thirty (30) days from the date of certification in which to seek intervention for the presentation of evidence and for argument on the questions of the constitutionality of the IDEA.

The United States has moved in conjunction with the filing of this brief to intervene in this case for the purpose of defending the constitutionality of the abrogation of the State's

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[1/] 20 U.S.C. § 1400 et seq.

Eleventh Amendment immunity under the IDEA. The United States respectfully requests that this Court recognize that the IDEA conditions federal funding on States' waiver of sovereign immunity and that such condition is a valid exercise of Congress' power under the Spending Clause.[2/]

[2/] Alternatively, although the Court does not have to reach this question, the United States maintains that § 1403 of the IDEA unequivocally abrogates States' immunity under the IDEA, and that such abrogation constitutes a valid exercise of Congress' power under § 5 of the Fourteenth Amendment.

ARGUMENT

State Defendants contend that Plaintiffs' IDEA claims are barred by the Eleventh Amendment. Specifically, State Defendants argue that: (1) in enacting the IDEA, Congress exceeded its authority to legislate under the Fourteenth Amendment, and thus the IDEA's abrogation of State sovereign immunity is invalid under City of Boerne v. Flores, 521 U.S. 507 (1997); (2) State Defendants did not waive immunity by accepting federal funds; and (3) the Ex Parte Young doctrine does not apply to Plaintiffs' IDEA claims.[3/]

As demonstrated below, the Eleventh Amendment does not bar Plaintiffs' IDEA claims because State Defendants have waived their sovereign immunity under the IDEA by accepting federal funds.[4/] It is well-established that conditioning Federal financial assistance on States' waiver of sovereign immunity is a valid exercise of Congress's authority pursuant to the Spending Clause. By accepting federal funds after Congress made clear that it wished States to

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[3/]State Defendants concede that under Ex Parte Young, 209 U.S. 123 (1908), the Eleventh Amendment "does not bar a suit against a state official in federal court that seeks only prospective injunctive relief for violations of federal law." (State Defs.'s Brief at 13.) State Defendants argue that, in this case, claims for prospective injunctive relief are moot. Id. at 14. Plaintiffs refute this assertion in their response, stating that "Plaintiffs seek permanent injunctive relief for the entire Plaintiff class for violations by State officials of federal law" as well as ancillary fees and costs. Plaintiffs' Response at 30 (citing Missouri v. Jenkins, 491 U.S. 274, 279 (1989) (approving the award of fees and costs in suits for prospective injunctive relief against state officials)). Because the State Defendants' Ex Parte Young argument boils down to a factual dispute as to the relief requested, the United States does not take a position on that argument.

[4/] In their Reply brief, State Defendants argue that Plaintiffs' claims under both the IDEA and the Rehabilitation Act of 1973, 29 U.S.C. § 791 et seq. (hereinafter "Rehabilitation Act") are barred by the Eleventh Amendment. (State Defs.' Reply at 15.) Plaintiffs have not brought any claims under the Rehabilitation Act, and therefore the United States does not address State Defendants' challenges to the Rehabilitation Act at this time. However, the United States reserves the right to address these arguments, if, in the future, Plaintiffs amend their complaint to add a cause of action under the Rehabilitation Act and State Defendants challenge the constitutionality of the Rehabilitation Act.

be sued in federal court for violations of the IDEA, State Defendants waived their Eleventh Amendment immunity.[5/]

I. IDEA Contains an Unambiguous and Valid Waiver Provision

States can waive Eleventh Amendment immunity. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 65 (1996). It is well-settled that Congress may condition the receipt of federal funds on a waiver of Eleventh Amendment immunity. See College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 675 (1999); Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 276 (1959). Waiver can be effected by a clear expression of Congress's intent to condition participation in a federal grant program on the recipient States' waiver of Eleventh Amendment immunity either by "express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction."

[5/] In their Motion to Dismiss, State Defendants devote the majority of their argument to challenging the validity of the IDEA's abrogation of their Eleventh Amendment immunity, contending that Congress exceeded its Section 5 authority in enacting the IDEA. Because the State of New Jersey knowingly and voluntarily waived its immunity to suit in federal court by accepting federal IDEA funds, the Court need not reach the question of whether Congress has the constitutional authority to abrogate New Jersey's sovereign immunity pursuant to § 5 of the Fourteenth Amendment. See Litman v. George Mason Univ., 186 F.3d 544, 557 (4th Cir. 1999) (declining to address the question of whether Congress had constitutionally abrogated Eleventh Amendment immunity pursuant to Title IX because the State-operated university "through its acceptance of [federal] funding, waived its Eleventh Amendment immunity"); cf. Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944) (reciting rule that courts "should not pass on questions of constitutionality . . . unless such adjudication is unavoidable"). Nevertheless, the United States maintains in the alternative that abrogation of New Jersey's sovereign immunity under the IDEA is clear and unequivocal, and that such abrogation constitutes a valid exercise of Congress' power under Section 5 of the Fourteenth Amendment. See David D. v. Dartmouth Sch. Comm., 775 F.2d 411, 421-22 (1st Cir. 1985), cert. denied, 475 U.S. 1140 (1986); Crawford v. Pittman, 708 F.2d 1028, 1037-38 (5th Cir. 1983); Mitten v. Muscogee County Sch. Dist., 877 F.2d 932, 937 (11th Cir. 1989), cert. denied, 493 U.S. 1072 (1990); Counsel v. Dow, 849 F.2d 731, 737 (2d Cir.), cert. denied, 488 U.S. 955 (1988); Board of Educ. v. Illinois State Bd. of Educ., 979 F. Supp. 1203, 1208 (N.D. Ill. 1997); Emma C. v. Eastin, 985 F. Supp. 940, 947 (N.D. Cal. 1997).

Edelman v. Jordan, 415 U.S. 651, 673 (1974). When Congress acts under the Spending Clause, it does not abrogate Eleventh Amendment immunity. Instead, Congress conditions the receipt of federal funds on a waiver of that immunity by the States themselves.

A State can waive its immunity either by State statute or constitutional provision or "by otherwise waiving its immunity to suit in the context of a particular federal program." Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 n.1 (1985). Under this second method of waiver, a State may "by its participation in the program authorized by Congress . . . in effect consent[] to the abrogation of that immunity." Edelman v. Jordan, 415 U.S. 651, 672. The Supreme Court recently restated this maxim in Florida Prepaid:

> [W]e have held . . .that Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions. . . . Congress has no obligation to use its Spending Clause power to disburse funds to the States; such funds are gifts.

527 U.S. at 686. "For a federal statute to produce a waiver of a State's immunity through the State's participation in a federal spending program," however, "the statute must provide a clear expression of Congress's 'intent to condition participation in the program[] . . . on a State's consent to waive its constitutional immunity.'" Bradley v. Arkansas Dep't of Educ., 189 F.3d 745, 753 (8th Cir. 1999) (upholding State's waiver of Eleventh Amendment immunity under IDEA), rev'd in part on other grounds, Jim C. v. United States, 235 F.3d 1079 (8th Cir. 2000) (upholding waiver of State's Eleventh Amendment immunity under the Rehabilitation Act), cert. denied sub nom. Arkansas Dep't of Educ. v. Jim C., 121 S. Ct. 2591 (June 29, 2001).[6/]

[6/]Contrary to the State Defendants' assertion, Jim C. is not the subject of a pending petition for certiorari. The Supreme Court denied the petition for certiorari on June 29, 2001, refusing to review the Eighth Circuit's determination that acceptance of federal funds constituted a waiver of

The applicable IDEA waiver provision, 42 U.S.C. § 1403 (Section 1403), reads in part: "A State shall not be immune under the eleventh amendment to the Constitution of the United States from suit in Federal Court for a violation of this chapter." Id. Section 1403 unequivocally and unambiguously conditions receipt of Federal financial assistance under the IDEA on recipient States' waiver of Eleventh Amendment immunity from IDEA suits. By accepting federal IDEA funds, New Jersey has adopted this waiver of Eleventh Amendment immunity.

By enacting 20 U.S.C. § 1403, Congress has provided an unambiguous statement of its intent to condition IDEA funds on recipient States' waiver of Eleventh Amendment immunity. See Beth V. v. Carroll, 87 F.3d 80 (3d. Cir. 1996). In Muth v. Dellmuth, 491 U.S. 223 (1989), the Supreme Court concluded that the predecessor to the IDEA did not contain an adequately clear and unambiguous statement of Congress's intent to require a waiver of State sovereign immunity. Id. at 232. Congress responded by adopting 20 U.S.C. § 1403, "which makes express" its intent that State recipients of IDEA funding surrender their Eleventh Amendment immunity from suit. Beth V., 87 F.3d at 88.

The Supreme Court has interpreted nearly identical statutory language to represent "an unambiguous waiver of the States' Eleventh Amendment immunity" as a condition for the receipt of federal funds. See Lane v. Pena, 518 U.S. 187, 200 (1996) (interpreting almost identical statutory language that was added to the Rehabilitation Act pursuant to the Rehabilitation Act Amendments of 1986, codified at 42 U.S.C. § 2000d-7). In Lane, the Supreme Court was construing statutory language that Congress adopted "in response to

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sovereign immunity pursuant to the Rehabilitation Act. See Arkansas Dep't of Educ. v. Jim C., 121 S. Ct. 2591 (June 29, 2001).

Atascadero." Lane, 518 U.S. at 198. In Atascadero, the Supreme Court held that Congress had not expressed a "clear intent to condition participation in the programs funded under the [Rehabilitation] Act on a State's consent to waive its constitutional immunity." Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 247 (1985). Congress responded by making explicit that, as a condition of Federal financial assistance, State recipients were subject to suit in federal court in the same manner as other recipients. The Supreme Court stated that in amending the statute, "Congress sought to provide the sort of unequivocal waiver" that was required by Atascadero. Lane, 518 U.S. at 198 (citing the Rehabilitation Act Amendments of 1986, codified at 42 U.S.C. § 2000d-7).

State Defendants attempt to distinguish Lane v. Pena by reading the Supreme Court's waiver discussion out of the opinion. Although State Defendants point out that the Supreme Court has gone to great lengths to distinguish abrogation from waiver (State Defs.' Reply at 18), they nonetheless assert that the Supreme Court mistakenly conflated the two concepts in Lane. (Id. at fn.3 (claiming that despite the exclusive discussion of waiver without any mention of abrogation in Lane, "context and language" make clear that the Supreme Court intended to refer to abrogation)). There is no reason to discount the Supreme Court's interpretation of the Rehabilitation Act Amendments of 1986 as indicating Congress' intent to condition participation in the applicable federal grant programs on the recipient States' waiver of sovereign immunity. See Lane, 518 U.S. at 198, 200; see also Jim C. v. United States, 235 F.3d 1079, 1082 (8th Cir. 2000) (holding that Arkansas waived sovereign immunity "when it chose to participate in the federal spending program" created by the Rehabilitation Act), cert. denied sub nom Arkansas Dep't of Educ. v. Jim C., 121 S. Ct. 2591 (June 29, 2001); Bell Atlantic Maryland, Inc. v. MCI

Worldcom, Inc., 240 F.3d 279, 292 (4th Cir. 2001) ("[A]ny States reading [the Rehabilitation Act's explicit waiver of sovereign immunity] would clearly understand that, by accepting [federal] funding, it was consenting to resolve disputes . . . in federal court."); Bowers v. National Collegiate Athletic Ass'n, Act, Inc., No. Civ. A. 97-2600, 2001 WL 1359800, at *16 (D.N.J. Nov. 7, 2001)("The United States has clearly made the grant of any federal funds contingent on waiver of a recipient state's sovereign immunity from suit under Section 504 of the Rehab. Act."). This interpretation of the Rehabilitation Act's waiver provision applies with equal force to the IDEA's waiver provision, which the State Defendants describe as "virtually identical." (State Defs.' Reply at 21.)

Despite the clear and unambiguous waiver contained in the IDEA, State Defendants assert that the IDEA does not contain particular conditional words or phrases. (State Defs.' Reply at 22.) This semantic hair-splitting invoked by the State Defendants to avoid the clear waiver demanded under IDEA's grant program has been rejected by the Seventh Circuit. See Board of Educ. of Oak Park v. Kelly E., 207 F.3d 931, 935 (7th Cir. 1999) ("Although [IDEA] does not use words such as 'consent' or 'waiver,' it is hard to see why that should matter. Congress did what it could to ensure that States participating in the IDEA are amenable to suit in federal court."). Indeed, the circuit courts of appeal that have addressed this issue have held that States which accept funds pursuant to IDEA have waived their immunity to suit in federal court. See Kelly E., 207 F.3d at 935; Little Rock Sch. Dist. v. Mauney, 183 F.3d 816, 832 (8th Cir. 1999) (characterizing 20 U.S.C. § 1403 as "an unambiguous waiver of the States' Eleventh Amendment immunity"). The Third Circuit also has rejected the claim that waiver can be predicated only on Congressional invocation of particular "magic words." MCI Telecomm.

Corp. v. Bell Atlantic-Pennsylvania, 2001 WL 1381590 at *15-16 (3d Cir. Nov. 2, 2001) (rejecting argument that statutes must include "magic words" such as "waiver" or "immunity" in order to establish States' knowing and voluntary waiver).

In addition to § 1403, the IDEA includes a provision explicitly authorizing lawsuits to enforce its provisions in State and federal court, further evidencing "Congress' view that private suits are integral to enforcement of IDEA." Beth V., 87 F.3d at 88 (authorizing suit against Pennsylvania Department of Education and citing 20 U.S.C. § 1415).[7/] Read in conjunction with § 1403, this explicit reference to private rights of action in the federal courts provides additional, explicit notice that Congress intended to provide IDEA monies only to States that waived their sovereign immunity. See Bradley, 189 F.3d at 753 ("When it enacted [20 U.S.C.] §§ 1403 and 1415, Congress provided a clear, unambiguous warning of its intent to condition State's participation in the IDEA program and its receipt of federal IDEA funds on the State's waiver of its immunity from suit in federal court on claims made under the IDEA").

IDEA is effective only when the State elects to receive federal funds. See Beth V., 87 F.3d at 82 (noting that IDEA has "been described by several courts as a model of 'cooperative federalism'" and recognizing that IDEA funding "is contingent on State compliance with its array of substantive and procedural requirements"); see also Bernardsville Bd. of Educ. v. J.H., 42 F.3d 149, 151 (3d Cir. 1994) (recognizing that it is only when an education agency "receives an allocation of funds under" IDEA that it "incurs the responsibility" to comply with IDEA's terms).

[7/]The State Defendants read Section 1415 too narrowly when they describe the IDEA as limiting suits to "issues of identification, evaluation, or educational placement of the child." (State Defs.' Reply at 23.) The Third Circuit rejected such a limited construction of Section 1415 in Beth V., noting that the IDEA authorizes suits "*with respect to any matter relating to*" the provision of a free appropriate public education. Beth V., 87 F.3d at 86 (emphasis in original).

Thus, "the powers of the State are not invaded, since the statute imposes no obligation [to accept the funds] but simply extends an option which the State is free to accept or reject." Massachusetts v. Mellon, 262 U.S. 447, 480 (1923). As the State Defendants have accepted federal funds after the effective date of Section 1403, they have waived their Eleventh Amendment immunity to a suit under the IDEA. See Kelly E., 207 F.3d at 935 ("States that accept federal money [under the IDEA] . . . must respect the terms and conditions of the grant"). "Requiring States to honor the obligations voluntarily assumed as a condition of federal funding . . . simply does not intrude on their sovereignty." Bell v. New Jersey, 461 U.S. 773, 790 (1983).

The IDEA presented New Jersey with a clear choice: Either agree to waive Eleventh Amendment immunity for suits enforcing the IDEA's provisions, or forgo Federal financial assistance for educational programs for the disabled. Having accepted the federal funds, New Jersey is bound by the IDEA's valid waiver provisions. See 20 U.S.C. §§ 1403, 1415.

II. IDEA's Waiver Requirement is a Valid Exercise of Congress's Spending Clause Authority

In South Dakota v. Dole, the Supreme Court identified four limitations on Congress' spending power, none of which are exceeded under the IDEA. First, the Spending Clause by its terms requires that Congress legislate in pursuit of "the general welfare." 483 U.S. 203, 207 (1987). Federal programs that give money to States to assist in educating children as well as prohibiting discrimination against persons with disabilities clearly further the general welfare. See Board of Educ. of the Hendrick Hudson Sch. Dist. v. Rowley, 458 U.S. 176, 191 (1982) (noting Congress's goals). Second, if Congress conditions States' receipt of federal funds, it "must do so unambiguously . . ., enabl[ing] the States to exercise their choice knowingly,

cognizant of the consequence of their participation." Dole, 483 U.S. at 207 (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 1981))(internal quotation marks omitted). As discussed above, the language of the IDEA makes clear that the obligations it imposes are a condition of the receipt of federal financial assistance. Moreover, pursuant to the Department of Education's implementing regulation 34 C.F.R. § 80.11(c), New Jersey Department of Education, the financial assistance applicant, has assured the U.S. Department of Education that the State will comply with all of the requirements of the IDEA and its implementing regulations. See New Jersey's Statement of Assurance (filed with certification).

Third, the Supreme Court has "suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" Dole, 483 U.S. at 207 (citations omitted).

Although State Defendants do challenge the degree to which the conditions for receiving federal funds under the Rehabilitation Act are related to that statute's requirements, Plaintiffs have not brought a claim under the Rehabilitation Act, and therefore State Defendant's arguments on this point are irrelevant. However, even if State Defendants had challenged the IDEA on this point, federal funds received by the State pursuant to the IDEA are expressly tied to implementing the provisions of that statute, and therefore the condition of waiving Eleventh Amendment immunity is directly related to Congress' interest in implementing the IDEA. Finally, the obligations imposed by Congress may not violate any independent constitutional provisions. Id. at 208. The IDEA does not "induce the States to engage in activities that would themselves be unconstitutional." Id. at 210.

State Defendants do not dispute that the IDEA meets all four of the Dole requirements.

Instead, State Defendants challenge the Rehabilitation Act's waiver of immunity on the grounds of "coercion," citing a point reserved by the Court in Dole that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" 483 U.S. at 211 (quoting Chas. C. Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)); see also (Defs.' Reply at 16-17, 21). State Defendants do not repeat the coercion argument as to the IDEA, the statute at issue in this case, and even if they did, such an argument lacks merit.

First, the State is not faced with the choice of complying with the IDEA or having "to eschew all federal funding." (State Defs.' Reply at 21.) Rather, the only funds that the State would sacrifice by not accepting money pursuant to the IDEA are the federal funds provided under that particular program, which are targeted to providing special education services to students with disabilities. The State would continue to be eligible for numerous other federal educational funds under various other federal grant programs. Because of the IDEA's limited scope, the choice it offers States can hardly be characterized as coercive. See Kansas, 214 F.3d at 1202 (federal courts have found no coercion even in situations where large amounts of federal monies were at stake).

Second, State Defendants' coercion argument is inconsistent with Supreme Court decisions demonstrating that States may be put to "difficult" or even "unrealistic" choices about whether to take federal benefits without the conditions becoming unconstitutionally "coercive." Board of Educ. v. Mergens, 496 U.S. 226, 241 (1990); FERC v. Mississippi, 456 U.S. 742, 766 (1982); North Carolina ex rel. Morrow v. Califano, 445 F. Supp. 532, 535-36 (E.D.N.C. 1977)(three-judge court), aff'd mem., 435 U.S. 962 (1978). These cases demonstrate that the

federal government can demand that States comply with federal conditions or make the "difficult" choice of losing federal funds from many different longstanding programs (Califano), losing all federal funds (Mergens), or even losing the ability to regulate certain areas (FERC) without crossing the line into coercion.

Thus, the choice imposed by the IDEA is not "coercive." The "disbursement of federal monies are congressionally bestowed gifts or gratuities, which Congress is under no obligation to make, which a State is not otherwise entitled to receive, and to which Congress can attach whatever condition is chooses." MCI Telecomm., 2001 WL 1381590, at *8. The consequence of a State's refusal to waive Eleventh Amendment immunity is simply the withholding of the "gift" of federal funds, and not, for example, the "exclusion of the State from activities in which it otherwise was legally permitted to engage." Id. The Eighth Circuit acknowledged this distinction in Jim C, by upholding waiver under the Rehabilitation Act as a valid exercise of the Spending Clause in a case where the parents of a child with disabilities had sued their State department of education for failing to comply with Section 504. Jim C., 235 F.3d at 1082. The defendant had moved to dismiss the complaint on Eleventh Amendment grounds arguing, in particular, that the Rehabilitation Act is unconstitutionally coercive. In rejecting defendant's argument, the Eight Circuit Stated that the waiver condition placed on federal funds by the Rehabilitation Act is not unconstitutionally coercive, but rather, is "comparable to the ordinary *quid pro quo* that the Supreme Court has repeatedly approved." Id. at 1081.

While it may be unpalatable to decline federal monies, each State agency is free to decide whether it will accept Federal financial assistance in providing special education services to students with disabilities with the IDEA "string" attached, or simply decline the funds. Because

one of the critical purposes of the Eleventh Amendment is to protect the "financial integrity of the States," Alden v. Maine, 527 U.S. 706, 750 (1999), it is perfectly appropriate to permit each State to make its own cost-benefit analysis and determine whether it will, for any given federal program, accept federal money with the condition that the State waive its immunity to suit under the program, or forgo the federal assistance.

CONCLUSION

For the foregoing reasons, we respectfully request that this Court uphold as valid New Jersey's waiver of State sovereign immunity pursuant to the IDEA or, in the alternative, conclude that the IDEA validly abrogates sovereign immunity.

Dated: December 13, 2001

Respectfully submitted,

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