

# Identifying and Managing Underperformance

LSC Guidance on the Operation of Minimum Levels  
of Performance and Notices to Improve Applying  
to the 2007/08 Academic Year

## January 2007

Of interest to everyone involved in delivering  
LSC-funded provision

### **Further information**

For further information, please contact the appropriate Learning and Skills Council office. Contact details for each office can be found on the LSC's website ([www.lsc.gov.uk](http://www.lsc.gov.uk)).

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## **For action**

This document outlines the operation of minimum levels of performance and Notices to Improve in the FE system for the 2006/07 academic year, and the application to the 2007/08 year.

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Annexes referred to in this document providing more detailed technical information are available on the LSC website ([www.lsc.gov.uk](http://www.lsc.gov.uk)).

# Introduction

- 1 The Further Education (FE) Reform White Paper, *Further Education: Raising Skills, Improving Life Chances* (2006), signalled an ambition to develop a new relationship with the FE system based on trust, respect and autonomy within an increasingly self-regulating system. We will be working over the coming months to look at how our approach needs to be further streamlined following the recent publication of the Leitch Review of Skills: *Prosperity for all in the Global Economy: World class skills* (2006). We do however support and remain committed to a new light-touch relationship and the move towards a self-regulating FE system.
- 2 The White Paper also committed us to eliminating inadequate and unsatisfactory provision across the FE system by 2008, and to having a major impact on those organisations where performance was just satisfactory or not showing any improvement. In *Raising our game – Our Annual Statement of Priorities* (2006), we set out how these principles would be carried into our commissioning and funding dialogue with providers for 2007/08.
- 3 The LSC is committed to establishing a new relationship with providers that will enable us to invest in our funding priorities and to recognise and reward excellent provision with greater freedoms. These will include the introduction of a new light-touch planning approach focusing on specialisms and growth. The 'intervention' procedures outlined in this document will be applied proportionately to the scale of underperformance. The most serious actions will affect only a minority of LSC-funded providers. By way of illustration, we anticipate that for 2007/08 less than 25 colleges might be subject to measures explained here to tackle serious failure. However, the basis on which we propose to identify underperformance will be of wider interest.
- 4 Our starting point in developing these procedures is trust in the leaders and managers of colleges and providers as professionals committed to delivering the best experience and outcomes for learners, employers and their communities. Analysis of learner success rates and the judgements of Ofsted are an important feature of almost all colleges' and providers' assessments of their own performance. The annual self-assessment will, therefore, remain at the heart of our dialogue with LSC-funded providers.
- 5 The body of this document explains in greater detail how the minimum levels have been set and what consequences will follow for colleges and providers who are unable to meet them. We have developed these arrangements determined to ensure that they are fair and proportionate for those directly affected, and that they impose no additional burdens on providers more generally. The discussions about minimum levels of performance will be carried out at an appropriate level of detail within the annual provider dialogue. For the most successful providers, this will be on the basis of a high-level summary of activity rather than a detailed development plan.
- 6 For 2007/08 we have identified three aspects of provider performance that will inform judgements about action or intervention:
  - inspection outcomes
  - financial health monitoring
  - analysis of success rates against minimum levels of performance.

Arising from this, there are three broad categories of underperformance where intervention or action will be required.

  - Cases of whole-provider underperformance where immediate action must be taken to tackle outright failure or exceptional risk to the interests of learners. In these circumstances there will be an urgent and direct dialogue with the governors or directors and senior managers of the provider to determine the scope and nature of any necessary action. This will be confirmed in either a formal notification of the immediate action to be taken or in a Notice to Improve, as appropriate.
  - Cases of significant underperformance. In these cases, we will issue to the provider a Notice to Improve setting out the action that needs to be taken, the period in which improvement must be achieved and the action that will follow if

sufficient improvement is not achieved (this may mean moving to the 'whole-provider underperformance' category mentioned above).

- Cases of underperformance in specific areas of a provider's business. In these cases, improvement indicators will be determined to help the provider to monitor remedial action and to demonstrate that it is having an impact.
- 7 This document explains how we will define these categories, and the action we will take in each case. Beyond these categories it is, of course, important that we are securing improvements in quality and standards and delivering excellence for learners across the whole FE system. But we see colleges and providers themselves, both individually and collectively, as having the lead responsibility for assessing their own performance and for identifying what needs to be done to secure continuous improvement.
- 8 With our partners, we will be reviewing our approach during 2007/08 in the light of:
- experience of the operation of these arrangements
  - the development of the Framework for Excellence as a more comprehensive approach to assessing the performance of learning and skills providers.
  - the new powers proposed in the FE Reform Bill currently before Parliament, which would transfer to the LSC and extend the powers currently held by the Secretary of State for Education and Skills to intervene in the management of institutions. This may be expected to occur in the event of mismanagement, the failure to meet legal duties or to act in accordance with their powers and/or the failure to provide an acceptable standard of education and training.
- ### Identifying and managing underperformance – synopsis
- 9 This document concentrates on the definition and application of minimum performance levels in the 2007/08 commissioning round. Subject to passage of the FE Reform Bill, we will set out in greater detail our proposed approach to cases where there may be a need to consider the withdrawal of funding or radical structural options including the closure of a college. This section summarises the overall approach so as to set into context the material on defining and applying minimum levels of performance that follows.
- 10 Underperformance will be identified on the basis of inspection evidence, evidence of financial health and analysis of success rates against the minimum levels of performance.
- 11 Where underperformance is identified on the basis of any of these three factors the LSC will expect the leaders and managers of the providers in question to act to address the situation and will agree improvement indicators or, in more serious cases, conditions of a Notice to Improve.
- 12 Withdrawal of LSC funding, restructuring or intervention options will be considered in cases of outright failure, defined as those where:
- Ofsted has judged a provider as inadequate
  - 25 per cent or more of the provision on offer has failed to reach the minimum performance levels defined in this document
  - financial viability is seriously at risk
  - underperformance is identified and improvement does not occur within the specified period
  - Apprenticeship provision does not meet minimum performance levels.
- 13 In the case of outright failure in a college, a Notice to Improve will be issued. If the LSC judges that the risk to learners and/or to the public purse is immediate, or that the college is not able to demonstrate sufficient progress in making improvements, a review of strategic options will be effected immediately. The expectation is that governing bodies will themselves take action to tackle the causes of underperformance, including considering radical structural options such as merger or closure. Where this does not happen voluntarily and insufficient progress is made, the LSC will cease funding the college in its existing configuration. Depending on the specific circumstances this could mean:
- a request from the LSC to the Secretary of State for Education and Skills to exercise his powers to dissolve the college or provide for a merger with another college<sup>1</sup>
  - withdrawal of LSC funding and retendering to attract alternative and better quality providers
  - exercise of the LSC's power to appoint governors.

<sup>1</sup> Subject to passage of the FE Reform Bill currently before Parliament, these powers will in due course transfer to the LSC.

- 14 Where a Notice to Improve (a Notice) is issued, this will set out the conditions the provider needs to meet if it is to continue to receive LSC funding. In cases where an inspection finding of inadequate has triggered the Notice, the conditions will include, as a minimum, the requirement that the college should be judged at least satisfactory at its reinspection. In cases where the Notice has been triggered because of the proportion of provision that does not meet minimum performance levels, these conditions will include the requirement that at least 75 per cent of provision should meet those minimum levels at the end of the Notice period.
- 15 Beyond these minimum requirements, the LSC will base its decisions on progress on the full range of evidence available, including success rate data and inspection. During the period of a Notice to Improve, the LSC will stay closely in touch with the provider's action to recover the situation. If insufficient progress appears to be being made, action may be taken to ensure that additional learners are not put at risk, for example by closing programmes to recruitment prior to the beginning of the new academic year.
- 16 This process has been designed to avoid additional administrative burdens on the system and will be applied in line with our corporate values. As part of this process, the LSC has consulted the Bureaucracy Review Group (BRG), through its Chair, Caroline Lewis. The BRG has agreed to monitor the communication and implementation of this guidance.

# Quality Assurance through Annual Commissioning

- 17 Colleges and providers are responsible for the quality of service they offer to learners and employers. This is realised through rigorous self-assessment and continuous improvement. Governors, principals and directors are expected to have a clear vision of how they will deliver improved quality to meet the needs of learners and employers.
- 18 Managing underperformance needs to be seen in the context of wider quality assurance arrangements and as part of the commissioning process. Whilst serious concerns about performance are likely to be limited to a minority of providers, self-assessment and quality assurance are fundamental aspects of early discussions between the LSC and providers. We set out in *Planning for Success* (2005) the central role of self-assessment to the annual provider dialogue.
- 19 The discussion of underperformance will be differentiated and proportionate to the volume of provision concerned and take into account the extent to which a provider's self-assessment recognises and seeks to identify and address weak provision. The LSC must be assured that the provision it funds is at least meeting minimum levels of performance and is improving.
- 20 We still expect, as stated in *Planning for Success*, that for the year ending 31 July 2007, self-assessment reports should be brought forward and should be uploaded by **30 November 2007**. We recognise, however, that the timescales of awarding bodies will affect the earlier completion of self-assessment reports, and that we will need to work with them to understand fully and resolve issues associated with the timely publication of achievements.

# Identifying Underperformance

21 Until the Framework for Excellence becomes fully operational, underperformance and less than satisfactory provision will continue to be identified from:

- inspection outcomes
- financial health monitoring
- analysis of success rates against minimum levels of performance.

## Inspection outcomes – colleges

22 Underperformance in this context is defined as:

- where a college is awarded a grade 4 for overall effectiveness and is therefore deemed to be 'inadequate'
- where an area of provision is awarded grade 4 and is deemed to be 'unsatisfactory'.

23 We will issue a Notice to Improve where a college is judged as 'inadequate'. Where an area of provision is awarded grade 4 and is deemed to be 'unsatisfactory', improvement milestones will continue to be agreed as part of the post-inspection action plan. The stages in this process are already agreed with Ofsted and the Quality Improvement Agency (QIA) and are set out in Annex D.

## Inspection outcomes – Apprenticeship providers

24 Underperformance in this context is defined as:

- where a provider is awarded a grade 4 for overall effectiveness and is therefore deemed to be 'inadequate', the LSC will not contract for any new starts with that provider and will consider carefully the best interests of existing learners
- where a provider is awarded a grade 4 for a curriculum area, the LSC will not contract for any new starts in that curriculum area and will consider carefully how to ensure the best interests of existing learners in that curriculum area.

## Financial health

25 The LSC's arrangements for monitoring financial health and internal control of all providers have been in place for some time. Details of these assurance policies and arrangements are available from [www.lsc.gov.uk](http://www.lsc.gov.uk). Furthermore, we are currently examining our internal processes relating to providers in financial failure and internal control breakdown, which in the most serious cases will result in action, through issuing a Notice to Improve. It is the expectation that as part of this review process, and as far as it is appropriate, there will be a convergence of timings, terminology and actions in relation to provider financial health and control that mirror those used in relation to minimum levels of performance. This will be incorporated into the Framework for Excellence, which will be piloted in 2007/08 with implementation in 2008 and beyond.



# Minimum Levels of Performance

## The foundations

26 The following section sets out the LSC's approach, principles and actions in managing underperformance. It represents a more streamlined approach to secure high-quality provision, and to cease funding unsatisfactory provision. The principles applied in this approach build on the existing floor targets introduced through *Success for All* (2002) and *New Measures of Success* (2004). In developing this approach, it was important to address some underlying objectives that minimum levels should:

- allow for a proportionate response to underperformance that places accountability firmly in the hands of each college and provider
- not introduce any new or additional process or methodology
- be unambiguous; any levels set need to be clear and apply to both FE courses and Apprenticeship provision
- allow the new relationship with providers to flourish
- be both relevant to priorities for the sector and produce at least minimum levels of success rates
- encourage providers to exceed minimum levels, and to improve continually towards excellence; it will not be good enough that provision just meets the new minimum levels to guarantee future funding.

## In scope for the 2007/08 business cycle

27 The minimum levels of performance apply to:

- a general FE long-course qualifications<sup>2</sup> (by sector subject area and whole provider) offered by:
  - FE colleges
  - sixth form colleges

- external institutions
- colleges with dedicated, subject-based specialisms, such as colleges of agriculture and colleges of art and design

b Apprenticeship provision (full framework Apprenticeship and Advanced Apprenticeship) offered by:

- the colleges identified above
- training providers.

28 Over time, we plan to extend the standards to cover all qualifications. The minimum levels of performance will be reviewed annually to reflect the improvements made by the sector.

29 Train to Gain, Entry to Employment, key skills provision, provision for offenders, Ufl provision and provision for learners with learning difficulties and/or disabilities delivered by specialist providers are not in scope in 2007/08, but we expect they will be from 2008/09. We will continue to rely on other evidence, primarily from inspection, to determine underperformance in this provision.

30 Discrete provision for learners with learning difficulties and/or disabilities delivered by FE and work-based learning (WBL) providers, that utilises long-course qualifications, however, will be in scope. It is important we recognise that learners with learning difficulties and/or disabilities working at Level 1 or below across the FE system may take longer to achieve. Analysis and examination of minimum levels of performance will consider this issue. In *Learning for Living and Work* (2006), we committed to working with the Department for Education and Skills (DfES) and delivery partners to develop more sophisticated, robust and transparent performance measures with regard to this cohort. This work and the initial introduction of the minimum levels of performance will be used to inform further development of measuring performance.

2 For the purposes of minimum levels of performance, the definition of a long-course qualification is any qualification where the difference between the start date and end date, recorded against the Individualised Learner Record (ILR), is 24 weeks or greater.

31 We will monitor, and ensure that, the introduction of minimum levels of performance, and the actions taken by providers to improve provision falling under those levels do not disproportionately and/or adversely affect cohorts including, but not limited to:

- individuals with learning difficulties and/or disabilities
- individuals from a minority and/or ethnic minority backgrounds
- different genders.

### Minimum levels of performance for the 2006/07 planning round

32 For 2007/08, decisions for all providers will be based upon Apprenticeship and FE long-course qualifications, using the most recent available information for 2005/06.

**Table 1: Minimum levels of performance 2007/08 applied to success rates at sector subject area (tier 1) and for Levels 1, 2, 3, 4 and higher and at sector framework level for Apprenticeships.**

Qualification level	Long
Level 1	50%
Apprenticeships (full framework)	40%
Level 2	50%
Advanced Apprenticeships (full framework)	40%
Level 3	50%
Level 4 or higher	50%

### Apprenticeships

33 The calculation and analysis used for Apprenticeship provision is similar to that for FE qualifications (see Annex B). The level of 40 per cent has been set to provide opportunity for improvement, whilst maintaining adequate provision in key sectors. We do however expect this level to rise significantly in future years. Provision failing to meet the minimum level will be subject to competition.

### Further education

34 For FE qualifications, the minimum levels of performance for the 2007/08 academic year are set at 50 per cent for FE long-course provision success rates by subject sector area. The rationale for arriving at 50 per cent was to establish a base level success rate to allow performance to be assessed at a level that would reasonably allow funding for future provision to be sustained. In setting the minimum levels of performance, we are also seeking to ensure that the assessment of underperformance is consistent with the approach taken through inspection to assessing the adequacy of a curriculum area.

35 Assessment of underperformance will use 2005/06 data. The analysis of this data will be discussed with each college and provider, supported by their most recent self-assessment report.

36 Underperformance is calculated using aggregated guided learning hours (glh) for long-course qualifications and weighted success rates within qualification aims. By using this calculation, we can better reflect the public investment in learners. For more details on the calculations underpinning the minimum levels for FE courses, see the supplementary technical information at Annex A.

37 Long-course provision currently accounts for about 85 per cent of the provision in FE, and this will increase in line with funding and policy priorities. Shorter courses are not currently included in our calculations of underperformance, but it is intended that by publishing the minimum levels of performance for these qualifications, the LSC provides a clear signal about our expectations from 2008/09 onwards; the minimum levels for short courses can be found at Annex E. For 2007/08, however, the LSC expects provider self-assessment reports to highlight shorter courses that are underperforming and identify action to be taken.

# Applying Minimum Levels of Performance and Managing Underperformance

## Further education provision

- 38 The LSC will also consider the volume of an institution's underperforming provision as a total of long-course provision. This volume will determine the scale of the LSC's actions. These actions will occur in one of three ways.
- 39 First, and in the majority of cases, colleges and training providers will have relatively small amounts of provision or sector areas that are underperforming. In these cases (that is, where underperformance is less than 15 per cent of the total volume of an institution's long-course provision), the college will notify relevant improvement indicators to the LSC, as part of its quality improvement plan. We expect that as part their self-improvement plans, providers themselves will already be taking action.
- 40 In cases where there is a more significant concern and the level of provision underperforming is in the range of 15–24 per cent of the total volume of an institution's long-course provision, a formal Notice to Improve (a Notice) will be issued. We will issue the Notice in the form of a letter that sets out the conditions for continued funding and the timeframe by which we expect improvement to have occurred, usually within a maximum period of 12 months. We will expect providers to set out the actions to address the conditions in their development plan. In most circumstances, we will ask the QIA to source support. The QIA, working with us and the provider, will identify the appropriate level and type of support required.
- 41 Where there is a significant gap between success rates and the minimum level of performance and the provision in question is not likely to improve (or is not demonstrating progress towards improving) to at least the current minimum levels within the maximum Notice period of 12 months, then action will be taken to consider strategic options for the restructuring of that provision.
- 42 Where cases of serious concern arise and whole-provider underperformance (that is, underperformance at 25 per cent or more of an institution's total volume of long-course provision) is identified, the Notice will be issued to both the principal and the governing body. This level of underperformance can be equated to the application of inspectorate judgements of inadequacy. It is expected that in the 2007/08 commissioning round, less than 25 (less than 10 per cent) of general FE colleges should expect to fall within this classification.
- 43 This more serious level of underperformance presents significant risks to both learners and employers and in such cases we will initiate a strategic options review. This may result in immediate action to restructure provision through merger, closure or reallocation where there is little prospect of improvement under existing arrangements. The details are set out at paragraph 57. In most circumstances, we will ask the QIA to source support. The QIA, working with us and the provider, will identify the appropriate level and type of support required.

## Apprenticeship provision

- 44 The minimum level of performance of 40 per cent full framework completion will be applied to each provider by sector subject area and by Advanced Apprenticeship or Apprenticeship level.

- 45 The LSC signalled its intention to increase significantly the Apprenticeship framework achievement rate and drive up performance in Apprenticeships through the shift in funding arrangements in 2005/06. Where a provider has a framework achievement rate below the minimum level of performance for any sector subject area, that provision will be subject to competition. Meeting the new minimum levels of performance in Apprenticeship provision will therefore be a contractual requirement for all existing and new providers and Notices to Improve will not apply. We would not expect to recontract with providers that do not meet minimum levels of performance.
- 46 For national training providers holding contracts with the National Employers' Service (NES) that fall below minimum levels, data will be available at local, regional and national level. Regions will need to discuss the particular position of each contractor with NES staff. Clearly if an entire national contract is withdrawn, there could be significant implications for alternative supply.
- 47 For regional contracting arrangements where a single region holds the contract for multi-regional delivery of provision, the same principle will apply. That is to say, the lead region holding the contract will have local, national and regional data available to it enabling analysis to decide, in consultation with the regional colleagues affected, whether action is most appropriate at national or regional level. The performance of national employers that hold contracts to deliver to their own staff only will also be subject to these arrangements through discussions with the NES.

**Whole-provider underperformance**

- 48 Where whole-provider underperformance is identified, the LSC will discuss with the college possible options and the conditions that might be attached in the Notice to Improve. As part of this process, it is expected that the college will secure robust and final data earlier to inform the improvement discussion. The discussion will be with the principal and key staff in the first instance, and is likely to involve an application by the LSC to seek QIA advisor support. The discussion is intended to:
  - allow the college to accelerate its 2005/06 success rate data to factor in the discussion and make representations as to why the level of underperformance should be reviewed

- determine whether the college has the capacity to improve and within the maximum time period of 12 months
  - determine further options for the college and learners, taking into account the range of provision involved, the extent of underperformance and alternative providers available
  - enable the LSC to review the evidence to support its decision.
- 49 Following this discussion, where the college is unable to demonstrate that it has the capacity and capability to bring about improvement within a reasonable timescale of one year, the LSC, with the governing body, will agree appropriate action to safeguard learners, provision for employers and public funds. Failure to reach agreement will result in the LSC taking immediate action to utilise the necessary powers to intervene.
  - 50 Where a Notice is issued to a college due to whole-provider underperformance, an indicative timetable of possible actions is provided in Table 2 that sets out the key stages.

**Table 2: Timetable of actions for whole-provider underperformance**

Timeline	LSC action
December 2006	Extent of underperformance discussed with provider
January – February 2007	Improvement and strategic options discussion
February 2007	Issue of Notice applying to 2007/08 academic year based on 2005/06 success rate data
February – July 2007	Finalising development plans for 2007/08
July – December 2007	Mid-Notice review of improvement
February 2008	Validated success rate data for 2006/07
March – July 2008	Decision on funding for 2008/09 supported by inspection if necessary
If there is insufficient or no improvement, funding will normally be withdrawn from September 2008/09.	

## Complaints

- 51 Colleges will have the opportunity to make representations about the conditions proposed in the Notice to Improve during the commissioning discussions. If the governing body of the college intends to make representations about the LSC's decision, it should follow the published process for making complaints about the Council's administration. See the link below.

<http://readingroom.lsc.gov.uk/lsc/2005/externalrelations/complaintlsc/procedure-for-dealing-with-complaints-about-the-lsc.pdf>

# Support for Quality Improvement

52 Where a college is issued with a Notice to Improve, as identified through minimum levels of performance, we will ask the QIA to source support for providers. This will be subject to the outcomes of discussions as outlined in paragraph 48. The QIA, working with the LSC and the provider, will identify the appropriate level of support required, which may include the allocation of a quality improvement adviser or other appropriate support package that may draw on other improvement services such as Support for Success or the Skills for Life Improvement Programme. The link below directs LSC staff to the QIA application form.

[www.qia.org.uk/programmesandservices/uploads/QIA\\_Application\\_for\\_Quality\\_Improvement\\_Support\\_\(V3\).doc](http://www.qia.org.uk/programmesandservices/uploads/QIA_Application_for_Quality_Improvement_Support_(V3).doc)

# Fit with Inspection

- 53 Where a college has been issued with a Notice to Improve arising from an inspection judgement of inadequate, it will not receive a second Notice to Improve based on minimum levels of performance. We will, however, address success rate issues in the provider dialogue. It may be appropriate to set specific indicators about success rates and integrate these into the improvement plan.
- 54 Ofsted will receive copies, from the LSC, of all provider reports on minimum levels of performance through the Provider Gateway. This will enable it to use the reports to plan inspection and contribute to the pre-inspection, college performance report.
- 55 Ofsted will continue to undertake its own planned programme of inspections. If in the most serious cases, however, the LSC identifies a college that is not acting on the conditions attached to its Notice to Improve it will, at any point in the Notice period, invite Ofsted to undertake either an enhanced annual assessment visit (AAV) or full inspection at that college to better inform its decisions about the need for further action.

# Further Intervention – Strategic Options

56 The consideration of strategic options for restructuring provision may be driven by the college and its governing body or by the LSC. This will include taking into account the full spectrum of information and data available, including: Ofsted judgements, the reports of the QIA's adviser, the college's history of addressing improvement and the robustness of its approach to self-assessment. Clearly in these situations, there will not be a standard response; each scenario is likely to require quite different deliberations. Broadly, the options that may be considered could include:

- withdrawing funding and re-tendering provision to attract alternative and better quality providers
- varying the conditions of funding to meet specific requirements
- removing all or any of the members of the governing body
- appointing new members to the governing body if there are vacancies
- adding two members to the governing body
- directing changes to strengthen leadership and management, including the direction to dismiss the principal or senior postholders designated under the institution's articles of government
- directing the governing body in the exercise of its powers and performance of its duties
- directing changes to put merger and collaboration arrangements in place.

57 Should any case emerge where the risk to learners, employers and public funds is critical, the LSC will take immediate action and notify the provider of the action to be taken.

58 At present, for some of the above actions the necessary legal powers rest with the Secretary of State for Education and Skills and as such the LSC will request that they are exercised if required. Subject to successful passage of the FE Reform Bill, these powers will rest with the LSC in future.



# Further Education Reform Bill

59 The FE Reform Bill was published on 21 November 2006. Once the Bill has received Royal Assent, we will meet the requirement to prepare and publish a statement of our policy in respect of any intervention powers we have received. Any policy published will be developed in the context of this document and will be subject to consultation with the sector. In the meantime, this guidance provides an overview of the process that the LSC will use to address underperformance and inadequate provision.



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