



Consultation on the Draft Education (Non-maintained Special Schools) (England) (Amendment) Regulations

Launch Date:

1 September 2003

Respond by:

28 November 2003

Ref: DfES/0506/2003

This consultation will allow interested parties the opportunity to comment on the amendments the Secretary of State proposes to make to the Education (Non-Maintained Special Schools)(England) Regulations 1999 which all non-maintained special schools must comply with.

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Consultation on the Education (Non-maintained Special Schools) (England) Amendment Regulations

A Consultation

with Non-Maintained Special Schools approved under Section 342 of the Education Act 1996 and associated professional bodies, Local Education Authorities, SEN Regional Partnerships, the Local Government Association, OFSTED, The National Care Standards Commission, Charity Commission, lobby groups working in the special educational needs and disability fields, The National Assembly for Wales, those judged to have an interest in these regulations on the Department for Education And Skills' list of bodies normally consulted.

Issued 1 September 2003

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1 Executive Summary

- 1.1 The Education (Non-Maintained Special Schools) (England) Regulations 1999 comprise the current regulations with respect to Non-Maintained Special Schools (NMSS) approved as independent special schools under Section 342 of the Education Act 1996 and are referred to as the 'principal regulations' throughout this document. They require the charity controlling each school and the governing body to do certain things and manage the school in particular ways in order to meet its terms of approval. This consultation seeks consultees' views on draft regulations which would amend the principal regulations to reflect recent changes to legislation and policy.
- 1.2 The changes proposed are to:
- a. reassign responsibility for doing certain things from the school's governing body to the person or body of persons responsible for the management of the school;
 - b. give definitions of "boarding accommodation" and "National Minimum Standards" ;
 - c. alter the provisions regarding election of parent governors to ensure that such governors have experience of children with special educational needs;
 - d. broaden the range of pupils who are to be provided with free milk or school lunches;
 - e. require each school to have a written behaviour and exclusions policy; and
 - f. require the governing body to publish a statement of the values and ethos of the school and details of its arrangements for pupils who are transferring between phases of schooling or making the transition to further or higher education or the labour market.
- 1.3 The consultation will begin on 1 September 2003 and will finish on 28 November 2003. Key contributions will be posted on the Department's web site, www.dfes.gov.uk/consultations/sor/results_sor.htm by the end of December and it is anticipated that the new regulations will come into force before Easter 2004. We would welcome your views on any of the questions posed.
- 1.4 Non-Maintained Special Schools may exist in England only.

2 Background and Context

- 2.1 The roughly 70 Non-Maintained Special Schools are independent special schools approved by the Secretary of State for Education And Skills under Section 342 of the Education Act 1996. They provide for pupils with statements of special educational needs who are almost always placed there and funded by local education authorities, sometimes with part funding from Social Services Departments. In order to be approved under Section 342, each NMSS must be controlled by a charitable body and be non-profit making. The result is that they stand apart from most independent schools, which are run for profit. Like maintained schools, NMSS are inspected under Section 10 of the School Inspections Act 1996.
- 2.2 NMSS provide normally for pupils with severe and/or low incidence special educational needs. The principal regulations require each controlling charity and governing body to put procedures in place and manage their schools in ways very similar to those for maintained schools. There are some very good NMSS and the Government's policy is that they should

be encouraged to share their expertise across the education sector with those who would benefit from it most. To foster NMSS' development and to emphasise their place within the wider educational community, the Government provided nearly £8 million in grant payments to the sector in the financial year 2003-2004.

- 2.3 With the aim of cementing the similarities between the ways maintained and NMSS are conducted, they are subject to identical inspection procedures – under Section 10 of the School Inspection Act 1996 – and the principal regulations were framed to require the charity controlling each school and its governing body to do certain things and manage the school in particular ways akin to those applying to maintained schools. In order to continue to be approved under Section 342, schools must comply with the regulations.
- 2.4 As new legislation affecting maintained schools has come into force, some of the procedures described in the principal regulations have become out of date and need to be amended. Most of the provisions in the draft Amendment Regulations are included for this reason and are non-contentious in nature, for example, Regulation 10 on the provision of free school lunches and milk. The other provisions reflect a strengthening of policy in certain areas, for example, those with respect to residential schools have been broadened to require schools to have regard to the National Minimum Standards. For similar reasons, the Amendment Regulations require schools to have a Behaviour And Exclusions Policy.
- 2.5 We have addressed an important issue in the Amendment Regulations standing apart from the other textural amendments, namely to ensure that the charitable bodies controlling NMSS do not lose the ability to exercise control over their charity – and hence comply with charity law – because the principal regulations make certain functions and management decisions about the running of the school the responsibility of its governing body. The principal regulations were framed to give the governing body an important role in the management and conduct of the school. We believe now that the regulations required authority to be delegated slightly further than it would be reasonable to expect the controlling charity to comply with. The Amendment Regulations, therefore, move responsibility for most of the functions currently assigned to the governing body to the relevant person, defined as the person or persons responsible for the running of the school. The Government's policy aspiration remains that NMSS' governing bodies should play an important role in governing their schools. To ensure that this happens, the non-statutory guidance issued in conjunction with the Amended Regulations will stress the importance of the relevant person(s) consulting the governing body about the decisions they take.

3 The Proposals

- 3.1 These Regulations make amendments to the Education (Non-Maintained Special Schools) (England) Regulations 1999, the 'principal regulations', attached to this document.

Regulatory Impact

- 3.2 The Amendment Regulations do not place significant new demands on any of the parties they affect. Although the 'relevant person' (see 3.4 below) will assume some of the management responsibility for the school currently assigned to the governing body, in practice, work loads will remain largely unchanged because the relevant person will decide on proposals worked up by others. These are decisions the relevant person needs to have control over in order to comply with charity law in force currently.

- 3.3 The few requirements for the relevant person to have regard to the National Minimum Standards For Residential Special Schools make explicit the link between adhering to these standards and the conditions schools must satisfy to remain approved under Section 342 of the Education Act 1996. The relevant person does not have to take on additional responsibilities.

Proposals To Reassign Functions Currently The Responsibility Of The Governing Body To The Relevant Person

- 3.4 As discussed under Background and Context, to ensure that each charitable body responsible for a NMSS does not lose its ability to manage and control itself, to the extent that it ceases to comply with charity law, the Amendment Regulations move responsibility for most of the functions currently assigned to the governing body to the relevant person – defined as the person or persons responsible for the running of the school. However, as noted in Section 2, it remains policy to allow NMSS’ governing bodies to play an active part in the management of each school. It will be recommended strongly that each school’s relevant person will consult the governing body about important decisions. To help ensure that this happens, Regulation 5 of the Amendment Regulations inserts a new Regulation 2(1) into the principal regulations – “Schools will be governed and conducted by the governing body in conformity with their articles and instrument of government and also in accordance with these Regulations”.
- 3.5 It is proposed that functions currently the responsibility of each governing body will be reassigned to the relevant person as follows. The relevant person:
- a. may request the Secretary of State to delay withdrawing his approval of their school for a specified period (*Regulation 4 of the Amendment Regulations, Regulation 5 of the principal regulations*);
 - b. will be given responsibility to ensure the health, safety and welfare of pupils and to reach related decisions in consultation with the governing body (*Regulation 6 of the Amendment Regulations, paragraph 3 of the Schedule to the principal regulations*); and
 - c. will be responsible for providing school meals for certain groups of pupils (*Regulation 10 of the Amendment Regulations Para. 12 of the Schedule of the Amendment Regulations*).

(Responsibility for preparing the school’s prospectus remains with the governing body.)

- 3.6 It is proposed that the following amendments should be made to the substance of the text of the principal regulations.

Definitions for “boarding accommodation” and “National Minimum Standards” (which refer to the National Minimum Standards for Residential Special Schools (ISBN 011322544X) available at www.doh.gov.uk/ncsc) are inserted (regulation 3)

- 3.7 Boarding accommodation is not defined in the principal regulations. The Amendment Regulations, therefore, define boarding accommodation as meaning “overnight accommodation arranged or provided by the school at the school or elsewhere, but excluding accommodation for pupils being accommodated away from the premises during a brief school trip “ and National Minimum Standards as “the National Minimum Standards for Residential Special Schools”. The principal reason for including a definition was to remove any ambiguity about which aspects of a NMSS’s provision are counted as boarding

and, therefore, the National Minimum Standards apply to. The National Minimum Standards apply to all residential special schools including NMSS. It has, therefore, become necessary for regulations applying to NMSS to be drafted to make clear the applicability of these standards to the sector. The Minimum Standards are a key element of the Government's policy to raise the standards for children in residential care and it is vital that all bodies which should have regard to them do so. (The National Minimum Standards apply to NMSS because the sector is included within the over-all definition of special schools in Section 337 of the Education Act 1996 by virtue of them being "special schools which are neither maintained nor grant maintained".)

- 3.8 Schools which accommodate or arrange accommodation for children for more than 295 days per year, or intend to do so, are required to register as children's homes with the National Care Standards Commission. The residential elements of these schools are regulated by the Children's Homes Regulations 2001 and the linked National Minimum Standards for Children's Homes and are, therefore, outside the scope of the principal and Amendment Regulations.

Election of Parent Governors Amended To Ensure They Have Experience of Children with Special Educational Needs

- 3.9 Through Regulation 8 of the Amendment Regulations it is proposed that paragraph 2 (c) of the principal regulations should be amended to ensure that parent governors appointed by the relevant person have appropriate experience of children with special educational needs. It is proposed that where it is necessary to appoint a parent governor, in order of preference, that person should be:

- (a) a parent of a registered pupil at the school; or
- (b) a parent of a former pupil at the school; or
- (c) a parent of a child under or of compulsory school age with special educational needs for which the school is approved; or
- (d) a parent with experience of educating a child with special educational needs.

This text is identical to that used in the new School Governance Constitution (England) Regulations 2003, Statutory Instrument 2003/348. It differs from that used in the principal regulations inasmuch as these allowed for parents of children of any age with special educational needs or, as a last resort, a parent of any child to be appointed.

Proposal That Lunch And Milk Will Be Made Available Additionally To A Child Whose Parent Is In Receipt Of Certain Specified Benefits Or Allowances Or Who Is Himself In Receipt of Them

- 3.10 Regulation 10 of the Amendment Regulations makes various changes to paragraph 12 of the schedule of the principal regulations to enable a wider range of pupils to receive free school lunch – and, where provided, milk – than specified currently in the principal regulations. The amendments proposed mirror recent changes to the regulations with respect to the provision of school meals in maintained schools.
- 3.11 The general point should be made that the proposed amendments will allow the relevant person to recoup the money spent on providing free school milk or lunches through the school's fee income, just as the governing body can at present. Pupils falling within the

groups cited should receive school meals without any charge being made to their parents, carers or themselves.

3.12 The proposals are that

- a. pupils below compulsory school age who attend a session or session which straggles the school lunch period must be able to have a lunch provided for them;
- b. in addition to pupils whose parents receive income support or an income based jobseekers allowance, the children of those who fall within one of the following categories will be eligible for free lunches and, where it is provided, milk. They will be entitled to receive support if they are:
 - (i) in receipt of support provided under Part 6 of the Immigration and Asylum Act 1999;
 - (ii) in receipt of any other benefit or allowance or entitled to Child Tax Credit but not to Working Tax Credit (as defined in the Tax Credits Act 2002(1)) and where the parent is receiving Child Tax Credit by virtue of an award which is based on annual income not exceeding the amount determined for the purposes of section 7(1)(a) of the Tax Credits Act 2002 as the income threshold for Child Tax Credit.

Additionally, pupils who are eligible themselves for any of the benefits cited above will be entitled to free meals.

Punishment Books To Be Renamed Sanctions Books, NMSS To Be Required To Have Behaviour and Exclusions Policies

- 3.13 Regulation 11 of the Amendment Regulations changes paragraph 13 of the schedule to the Amendment Regulations to rename the Punishment Book a Sanctions Book. The function of this book remains unchanged i.e. to record disciplinary measures taken against pupils. Ministers believe that ‘sanctions’ better describe the sort of information that should be recorded because discipline enforced is not synonymous with punishment. Although not all types of school are required to keep sanctions books, we believe it sensible that this sort of record should continue to be kept by the NMSS sector given that they cater frequently for children with complex emotional and behavioural difficulties. Full and accurate records aid investigating authorities and protect staff and pupils, now and in the future.
- 3.14 Regulation 12 of the Amendment Regulations adds a new paragraph 13A to the schedule of the principal regulations requiring schools to “...draw up and implement a written policy to promote good behaviour amongst pupils and set out the sanctions to be adopted in the event of pupil misbehaviour, including a statement of the circumstances and manner in which a child may be excluded from school”.
- 3.15 Implementing this proposal would bring the requirements for NMSS in line with those for maintained schools. We appreciate that almost all NMSS will have formal behaviour and exclusions policies in place already and that this provision will, in large part, be formalising what exists currently. We appreciate too that most schools have separate behaviour and exclusions policy documents and we plan to make it clear in the non-statutory guidance to accompany these regulations that the Department’s preference would be for schools to continue to do this; it is all too easy for the exclusions element of a combined policy to swamp the behaviour element. However, separating the policies is not a regulatory requirement with respect to mainstream schools and we believe it would be inappropriate to regulate the NMSS sector more tightly than other types of schools.

- 3.16 For the same reason, the Amendment Regulations do not make it a regulatory requirement for schools to have policies on the use of physical force/physical intervention. Rather Regulation 13(3) requires the relevant person to “have regard to any guidance produced from time to time by the Secretary of State regarding the circumstances and manner in which physical force may be used to control or restrain pupils”. As normal practice with respect to the circumstances in which the use of physical force is permitted may differ slightly between school and residential settings, Regulation 13(4) of the Amendment Regulations requires that “in case of a residential school the relevant person shall have regard to the National Minimum Standards applicable to measures of control, discipline and the use of physical force”.

The Governing Body To Publish A Statement On The Values And Ethos Of The School

- 3.17 Regulation 14 of the Amendment Regulations adds a new provision paragraph 21 of the schedule to the principal regulations requiring the governing body to publish a statement of the values and ethos of the school and details of its arrangements for pupils who are transferring between phases of schooling or making the transition to further or higher education or the labour market.
- 3.18 Most NMSS’ governing bodies explain the values underlying what they do and their educational ethos in their school’s prospectus. This regulation merely formalises the process to ensure that practice in NMSS mirrors that in the maintained sector.
- 3.19 It has been reported widely to the Department, most recently through Baroness Ashton’s Special Schools Working Group, that the arrangements to ensure the effective transfer of pupils between one special school and other schools, further education and the labour market need strengthening frequently. Although there is much good practice in NMSS, the aim of requiring transition arrangements to be addressed is to make provision in this regard adequate in all schools in the sector. Ministers regard it as especially important that the pupils with very specialist or severe needs commonplace in NMSS should have their transfer from one phase of education to another and/or to the labour market managed with great care.

4 How to respond

- 4.1 As the Amendment Regulations comprise a ‘package’ of amendments which have either become necessary to ensure that the principal regulations remain tenable and reflect adequately changes in other educational legislation, the scope for changing their substance is limited. We would, however, be pleased to receive your comments on the proposed changes over all and on points of detail in the drafting that you feel we should reconsider.
- 4.2 The ‘response form’ attached asks questions about the key issues addressed by the Amendment Regulations. We should be grateful for your views on these and any other related issues you consider important.

You may e-mail us at NMSS.REGSCONSULTATION@dfes.gsi.gov.uk

If you require advice about the consultation generally, please telephone the Department’s Consultation Unit, 01928 794888

If you require advice about the underlying policy considerations, please telephone Richard McElheran or Georgina Carney on 01325 391203 and 01325 391209 respectively.

5 Additional Copies

- 5.1 You may obtain additional copies of this document from:

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6 Plans for Making Results Public

- 6.1 It is intended that a summary of the views expressed (subject to respondents' requests for confidentiality) will be available at [www.dfes.gov.uk/consultations/sor/results_sor.htm.] and the reasons for decisions finally taken by the end of December this year. It is planned that the Amendment Regulations will come into force by Easter 2004.

2003 No. []

EDUCATION, ENGLAND AND WALES

The Education (Non-Maintained Special Schools) (England) (Amendment) Regulations 2003

Made - - - - [] 2003

Laid before Parliament [] 2003

Coming into force - - [] 2003

In exercise of the powers conferred on the Secretary of State by sections 342(2), (4), and (5) and 569(4) of the Education Act 1996^(a), the Secretary of State for Education and Skills hereby makes the following regulations:

Citation, commencement and interpretation

1. —(1) These Regulations may be cited as the Education (Non-Maintained Special Schools) (England) (Amendment) Regulations 2003.

(1) These Regulations shall come into force on [date] 2003.

(2) In these Regulations “the Principal Regulations” means the Education (Non-Maintained Special Schools) (England) Regulations 1999^(b).

Amendment of Principal Regulations

2. The Principal Regulations shall be amended in accordance with regulations 3 to 14 below.

3. In regulation 2(1), at the appropriate place, there shall be inserted the following definitions—

““boarding accommodation” means overnight accommodation arranged or provided by the school at the school or elsewhere, but excluding accommodation for pupils being accommodated away from the premises during a brief school trip;”;

(a) ““National Minimum Standards” means the National Minimum Standards for Residential Special Schools (c);”.

4. In regulation 5(2) for the words “governing body” (where they appear) there shall be substituted the words “relevant person”.

5. Paragraph 2 of the Schedule shall be renumbered 2(1), and after paragraph 2(1) (as so renumbered) there shall be inserted the following paragraph—

“(2) Schools will be governed and conducted by the governing body in conformity with their articles and instrument of government and also in accordance with these Regulations.”.

^(a) 1996 c. 56. Section 342 was substituted by paragraphs 57 and 82 of Schedule 30 to the School Standards and Framework Act 1998 (c. 31). The powers conferred on the Secretary of State are exercisable only in relation to England as the functions in relation to Wales have been transferred to the National Assembly for Wales by the National Assembly for Wales (Transfer of Functions) Order 1999 (S.I. 1999/672).

^(b) S.I. 1999/2257.

^(c) ISBN 011322544X available at www.doh.gov.uk/ncsc. This document contains a statement of national minimum standards published by the Secretary of State under section 87C(1) of the Children Act 1989 (c. 41).

6. In paragraph 3 of the Schedule—
- (a) the words “The relevant person, in consultation with” shall be inserted at the beginning of existing paragraph 3 which shall be renumbered 3(1); and
 - (b) after paragraph 3(1) (as so renumbered) there shall be inserted the following paragraph—
“(2) For pupils for whom boarding accommodation is provided, the relevant person shall conform to the National Minimum Standards in order to safeguard and promote the welfare of those pupils.”.
7. At the end of paragraph 5(1) of the Schedule, there shall be inserted—
“and where boarding accommodation is provided, the premises shall conform to the standards relating to premises prescribed by the National Minimum Standards.”.
8. For paragraph 6(3) of the Schedule there shall be substituted the following paragraph—
“(3) The person who is elected or appointed under sub-paragraph (2)(c) shall be—
- (a) a parent of a registered pupil at the school; or
 - (b) a parent of a former pupil at the school; or
 - (c) a parent of a child under or of compulsory school age with special educational needs for which the school is approved; or
 - (d) a parent with experience of educating a child with special educational needs.”.
9. After paragraph 9(2) of the Schedule there shall be inserted the following paragraph—
“(3) Without prejudice to paragraphs (1) and (2), where boarding accommodation is provided, the relevant person shall have regard to the National Minimum Standards applicable to health and intimate care.”.
10. In paragraph 12 of the Schedule—
- (a) for the words “governing body” (wherever they appear) there shall be substituted the words “relevant person”;
 - (b) for sub-paragraph (1)(b)(ii) there shall be substituted the following sub-paragraph—
“(ii) where the pupil in question has not reached compulsory school age and does not attend a session which starts before and ends after the lunch period.”; and
 - (c) paragraph (3) shall be deleted and there shall be substituted the following paragraphs—
“(3) The relevant person shall, in relation to any pupil mentioned in paragraph (3A)—
- (a) secure that a school lunch is provided for the pupil which shall be provided free of charge; and
 - (b) secure that where milk is provided for the pupil, it shall be provided free of charge.
- (3A) Paragraph (3) shall apply to any pupil if—
- (a) his parent is—
 - (i) in receipt of income support,
 - (ii) in receipt of an income-based jobseeker’s allowance (payable under the Jobseekers Act 1995)(a),
 - (iii) in receipt of support provided under Part 6 of the Immigration and Asylum Act 1999(b),
 - (iv) in receipt of any other benefit or allowance or entitled to Child Tax Credit but not to Working Tax Credit (as defined in the Tax Credits Act 2002(c)) and where the parent is receiving Child Tax Credit by virtue of an award which is based on annual income not exceeding the amount determined for the purposes of section 7(1)(a) of the Tax Credits Act 2002 as the income threshold for Child Tax Credit, or
 - (b) he, himself, is—
 - (i) in receipt of income support,

(a) 1995 c.18.
(b) 1999 c.33.
(c) 2002 c.21.

- (ii) in receipt of an income-based jobseeker's allowance, or
- (iii) in receipt of any other benefit or allowance, or entitled to Child Tax Credit but not to Working Tax Credit (as defined in the Tax Credits Act 2002) and where the parent is receiving Child Tax Credit by virtue of an award which is based on annual income not exceeding the amount determined for the purposes of section 7(1)(a) of the Tax Credits Act 2002 as the income threshold for Child Tax Credit.”.

11. In paragraph 13 of the Schedule—

- (a) in the sub-heading, for the word “punishment” there shall be substituted the word “sanctions”;
- (b) in paragraph (2) for “punishment book” there shall be substituted “sanctions book”;

12. After paragraph 13 of the Schedule there shall be inserted the following paragraph—

“Behaviour policy

13A—(1) The relevant person shall draw up and implement a written policy to promote good behaviour amongst pupils and set out the sanctions to be adopted in the event of pupil misbehaviour, including a statement of the circumstances and manner in which a child may be excluded from school.

(2) In drawing up the behaviour policy, the relevant person shall have regard to any guidance given from time to time by the Secretary of State.

(3) The relevant person shall have regard to any guidance produced from time to time by the Secretary of State regarding the circumstances and manner in which physical force may be used to control or restrain pupils.

(4) In the case of a residential school the relevant person shall have regard to the National Minimum Standards applicable to measures of control, discipline and the use of physical force.”.

13. For paragraph 15 of the Schedule there shall be substituted the following paragraph—

“15. In the case of a residential school—

- (a) there shall be employed staff suitable and sufficient in number for the purposes of securing the proper care and supervision of the children accommodated thereat, including any children so accommodated during school holidays, and of attending to their welfare; and
- (b) the relevant person shall have regard to the National Minimum Standards applicable to staffing.”.

14. In paragraph 21 of the Schedule—

- (a) in paragraph (1) there shall be inserted after the words “of the school” the following words “and of the relevant person”;

- (b) after paragraph (4) there shall be inserted the following paragraph—

“ (4A) A statement on the ethos and values of the school.”;

- (c) for sub-paragraph (a) of paragraph (6) there shall be substituted the following sub-paragraph—

“ (a) a list of external qualifications (within the meaning of section 96(5) of the Learning and Skills Act 2000(a)) for which courses of study are provided for pupils of compulsory school age at the school and which are for the time being approved by the Secretary of State or by a designated body under section 98 of that Act;”;

- (d) after paragraph (10) there shall be inserted the following paragraph—

“ (10A) Where appropriate, particulars of the arrangements for transfer between phases of schooling and the arrangements for transition to further or higher education or employment.”.

(a) 2000 c. 21.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations make amendments to the Education (Non-Maintained Special Schools) (England) Regulations 1999.

The principal changes are:-

- (e) definitions for “boarding accommodation” and “National Minimum Standards” (which refer to the National Minimum Standards for Residential Special Schools (ISBN 011322544X) available at www.doh.gov.uk/ncsc) are inserted (regulation 3);
- (f) the provisions regarding election of parent governors have been amended to ensure that such governors have experience of children with special educational needs (regulation 8);
- (g) free school meals are made available additionally to a child whose parent is in receipt of certain specified benefits or allowances or who is himself in receipt of certain specified benefits or allowances (regulation 10);
- (h) new provision is made requiring non-maintained special schools to have a written behaviour policy and exclusions policy (regulation 12);
- (i) new provision is made requiring the governing body to publish a statement of the values and ethos of the school and details of its arrangements for pupils who are transferring between phases of schooling or making the transition to further or higher education or the labour market (regulation 14).

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